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IX. Trusts and Estates

the Fourth Circuit in *Cavanaugh* properly allowed the railroads to assert a compulsory counterclaim for property damages against an FELA claimant.[112]

By allowing the railroads to maintain the counterclaim for property damages, the Fourth Circuit in *Cavanaugh v. Western Maryland Ry. Co.* protected the common-law right of an employer to sue his employee for damages resulting from the employee's negligence.[113] Since the plaintiff in *Cavanaugh* could still recover on his claim for personal injury damages under the FELA, the Fourth Circuit's protection of an employer's right to sue his employee for property damages did not negate the remedial purpose of the FELA.[114] The FELA does not hold railroads strictly liable for injuries to railroad employees, but only holds railroads liable for injuries to railroad employees that result from the railroad's negligence.[115] In the future, FELA claimants in the Fourth Circuit will continue to recover for their injuries at the hands of negligent railroads, but they may also be held liable for property damages resulting from their own negligence.

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IX. TRUSTS AND ESTATES

Citizenship of an Administrator Determinative for Diversity Jurisdiction in Personal Injury Action Against the Estate

A federal court may obtain jurisdiction over a law suit if the parties to that suit are of diverse citizenship and the suit involves a request for damages in excess of ten thousand dollars.[1] A federal court determines diversity of

112. *See supra* notes 50-111 and accompanying text (analysis of why FELA does not bar railroad's compulsory counterclaim for property damages against FELA claimant).

113. *See supra* note 42 and accompanying text (discussing common-law right of employer to sue his employee for damages resulting from employee's negligence).

114. *See* 45 U.S.C. § 51 (1982) (railroad liable for injury or death of employee resulting from negligence of railroad): *supra* notes 90-92 and accompanying text (railroad counterclaim for property damages will not exempt railroad from FELA liability).

115. *See* 45 U.S.C. § 51 (1982). The FELA only holds railroads liable for injuries to railroad employees that result from the railroads' negligence. *Id.*

1. 28 U.S.C. § 1332(a) (1982). Section 1332(a) of Title 28 of the United States Code provides:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—
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> (1) citizens of different States;

citizenship by examining the citizenship of each party to a suit to ensure that no plaintiff is a citizen of the same state as any defendant.[2] A court may encounter difficulty in determining whether the parties are of diverse citizenship, however, when one of the parties to a suit is the administrator of an estate.[3] When an administrator is a party to a suit, the court must decide

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(2) citizens of a State and citizens or subjects of a foreign state
(3) citizens of different states and in which citizens or subjects of a foreign state are additional parties; and
(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

Id. Federal diversity jurisdiction grew, in part, out of concerns of local bias by state courts directed at out-of-state parties. *See* Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 87-88 (1809); *see also* 13 C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3601, at 574 (1975) (diversity jurisdiction enacted to avoid prejudice to out-of-state litigants). Diversity jurisdiction also provides the parties with a choice of forum. *See* Rubin, *An Idea Whose Time Has Gone,* 70 A.B.A.J. 16, 16 (June 1984) (diversity jurisdiction allows litigant to choose forum based on procedure of jurisdiction, judicial quality and docket pace).

Today, many scholars advocate the abolition of diversity jurisdiction. *See* Rowe, *Abolishing Diversity Jurisdiction: The Silver Lining,* 66 A.B.A.J. 177, 177-80 (1980) (diversity jurisdiction should be abolished); McFarland, *Diversity Jurisdiction: Is Local Prejudice Feared?,* 7 LITIGATION 38, 38 (Fall 1980) (arguments favoring abolition of diversity jurisdiction have great weight); WRIGHT AND MILLER, *supra,* at 583 (arguments for abolishing diversity jurisdiction). One scholar has argued that diversity jurisdiction crowds federal dockets. *See* Rubin, *supra,* at 18. According to Rubin, the elimination of diversity jurisdiction would reduce the federal judiciary budget greatly. *Id. Contra* Frank, *An Idea Whose Time Is Still Here,* 70 A.B.A.J. 17, 18 (June 1984) (federal dockets are crowded but solution is to improve procedures, add judges and reduce number of questions decided). Other scholars argue that the historical basis of diversity jurisdiction of preventing bias to out-of-staters is no longer valid in modern society. *See* Phillips, *Diversity Jurisdiction: Problems And A Possible Solution,* 14 U. TOL. L. REV. 747, 752 (1983) (prejudice against out-of-state litigants no longer a factor in state courts). In general, those opposed to diversity jurisdiction state that interstate cooperation has abolished the need to protect out-of-state litigants from potential bias in state court. *See* Bratton, *Diversity Jurisdiction-An Idea Whose Time Has Passed,* 51 IND. L.J. 347, 347-49 (1976) (today's interstate society eliminates need for diversity jurisdiction).

2. Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267 (1806); *see* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 373-74 (1978) (Constitution and Congress grant jurisdictional power to federal courts). The Supreme Court opinion in *Owen Equipment & Erection Co. v. Kroger* states that federal courts are courts of limited jurisdiction. *Id.* at 374. As courts of limited jurisdiction, federal courts must follow the limits placed by the Constitution or Congress. *Id.* Complete diversity, however, is not a constitutional requirement. *See* State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 530-31 (1967) (complete diversity not constitutionally mandated). Congress has mandated, however, that diversity jurisdiction does not exist unless each plaintiff and defendant are citizens of different states. *See Owen,* 437 U.S. at 373-74 (federal diversity statute requires complete diversity of citizenship); 28 U.S.C. § 1332 (1982) (courts have jurisdiction over cases between citizens of different states); *supra* note 1 (discussion of § 1332).

3. *See* Miller v. Perry, 456 F.2d 63, 67 (4th Cir. 1972) (federal court must determine real party in interest to decide whether citizenship of administrator or citizenship of beneficiaries controls diversity of citizenship in wrongful death action); Comment, *Miller v. Perry: Further Complications in Determining Diversity Jurisdiction,* 30 WASH. & LEE L. REV. 282, 294-95 (1973) (discussion of *Miller* indicating that both the administrator and beneficiaries play role in determination of diversity jurisdiction).

who is the real party in interest to determine whether to use the citizenship of the administrator or the citizenship of the beneficiaries for purposes of diversity of citizenship.[4] In a wrongful death action, the general rule is that the administrator of the decedent's estate is the plaintiff real party in interest and the administrator's citizenship is determinative for the purpose of diversity of citizenship.[5] A personal injury action against an estate, however, involves the appointment of an administrator as a defendant in a lawsuit.[6]

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4. *See* C. WRIGHT, LAW OF FEDERAL COURTS § 70 (3d ed. 1976) (real party in interest is person possessing right to be enforced); *see also* Messer v. American Gems, Inc., 612 F.2d 1367, 1374 (4th Cir.) (beneficiaries had substantive interest in wrongful death action while administrator had no stake in litigation), *cert. denied*, 446 U.S. 956 (1980); Sadler v. New Hanover Memorial Hosp., 588 F.2d 914, 917 (4th Cir. 1978) (executrix was real party in interest because appointed in will and had substantial duties to perform for estate); Mullins v. Seals, 562 F.2d 326, 327 (4th Cir. 1977) (court looked to citizenship of beneficiaries for purposes of diversity of citizenship because beneficiaries were real parties in interest); Vaughan v. Southern Ry. Co., 542 F.2d 641, 644 (4th Cir. 1976) (administrator had no stake in outcome of wrongful death action so beneficiaries' citizenship determined diversity of citizenship); Bishop v. Hendricks, 495 F.2d 289, 295 (4th Cir.) (administrator had no stake in outcome of wrongful death litigation so not real party in interest), *cert. denied*, 419 U.S. 1056 (1974); Miller v. Perry, 456 F.2d 63, 67 (4th Cir. 1972) (where administrator's duties in wrongful death action limited by state, citizenship of beneficiaries' controls for diversity of citizenship); Lester v. McFaddon, 415 F.2d 1101, 1106 (4th Cir. 1969) (beneficiaries' citizenship controls for purposes of diversity of citizenship).

5. Mecom v. Fitzsimmons Drilling Co., 284 U.S. 183, 186 (1931). The *Mecom* court held the administrator is the real party in interest because the administrator is responsible for conducting or settling the suit, distributing proceeds of the suit and responsible to act with due diligence and fidelity. *Id.* While *Mecom* is the general rule concerning wrongful death administrators, an exception to the general rule exists for collusive appointment of the administrator in violation of § 1359 of Title 28 of the United States Code. *See* Bishop v. Hendricks, 495 F.2d 289, 297 (4th Cir.) (administrator collusively appointed so beneficiaries' citizenship determined diversity of citizenship), *cert. denied*, 419 U.S. 1056 (1974); *see also* Kramer v. Carribean Mills, Inc., 394 U.S. 823, 830 (1969) (banning collusive manufacture of diversity jurisdiction); 28 U.S.C. § 1359 (1982) (federal courts have no jurisdiction when diversity collusively manufactured); *infra* note 42 (discussion of § 1359 ban on manufactured diversity jurisdiction). Section 1359 provides that district courts have no jurisdiction over civil actions where the invocation of jurisdiction was improper or collusive. 28 U.S.C. § 1359 (1982); *see Kramer*, 394 U.S. at 830 (no diversity exists with collusive manufacture of diversity jurisdiction); Miller v. Perry, 456 F.2d 63, 67 (4th Cir. 1972) (*Mecom* tempered by 28 U.S.C. § 1359 bar on collusive joinder); *see also* Comment, *Manufacturing Diversity Jurisdiction*, 14 VILL. L. REV. 727, 741-43 (1969) (discussion of § 1359 ban against collusive manufacture of jurisdiction by assignment). Another exception to the *Mecom* general rule of looking to the administrator's citizenship for diversity exists when the administrator has no real stake in the outcome of the litigation and the beneficiaries, therefore, are the real parties in interest. *See* Messer v. American Gems, Inc., 612 F.2d 1367, 1374 (4th Cir.) (administrator appointed solely to satisfy statute and administrator had no stake in outcome of litigation), *cert. denied*, 446 U.S. 956 (1980); Mullins v. Seals, 562 F.2d 326, 327 (4th Cir. 1977) (beneficiaries are real parties in interest in wrongful death action where administrator appointed merely to institute action); Vaughan v. Southern Ry. Co., 542 F.2d 641, 644 (4th Cir. 1976) (administrator of wrongful death action appointed solely to bring suit is not real party in interest); Miller v. Perry, 456 F.2d 63, 67 (4th Cir. 1972) (courts look to citizenship of beneficiaries for diversity purposes when administrator has no real stake in outcome of litigation).

6. *See* VA. CODE § 64.1-75.1 (1980) (statute requires appointment of administrator to defend action against estate required in Virginia).

The law is less clear in defendant administrator cases about whether the citizenship of the beneficiaries or the citizenship of the administrator controls.[7] In *Krier-Hawthorne v. Beam,*[8] the United States Court of Appeals for the Fourth Circuit decided to use the citizenship of the defendant estate administrator rather than the citizenship of the estate beneficiaries to determine whether diversity of citizenship existed in a personal injury action against the estate.[9]

The controversy in *Krier-Hawthorne* originated with an automobile accident in York County, Virginia.[10] A car driven by Joseph Krier, a New York citizen, collided with a car driven by Thomas Beam, an Indiana citizen.[11] The accident resulted in the death of Joseph Krier and serious injury to Krier's wife, Margaret Krier-Hawthorne, a passenger in the Krier automobile.[12] Mrs. Krier-Hawthorne, a New York citizen, filed a diversity negligence action in the United States District Court for the Eastern District of Virginia against Beam and against the estate of her husband.[13] Pursuant to Virginia law, the Krier estate appointed a Virginia citizen, L. Wallace Sink, to be administrator.[14] The beneficiaries of the Krier estate consisted of Mrs. Krier-Hawthorne, a New York citizen, a son who was a New York citizen, and a daughter, who was a citizen of the State of Washington.[15] Sink promptly moved to dismiss the action for lack of diversity of citizenship, claiming that the citizenship of the beneficiaries controlled the determination of diversity and that diversity was absent because the plaintiff and a beneficiary of the decedent's estate were both New York citizens.[16] The plaintiff argued that the citizenship of the administrator and not the beneficiary controlled and, therefore, diversity of citizenship existed.[17] The district court agreed with the defendant administrator and looked to the citizenship of the beneficiaries for the purpose of determining diversity of citizenship.[18] On appeal, the

7. *Krier-Hawthorne v. Beam*, 728 F.2d 658, 661 (4th Cir. 1984).

8. 728 F.2d 658 (4th Cir. 1984).

9. *Id.* at 662.

10. *Id.* at 658.

11. *Id.*

12. *Id.* at 659.

13. *See* Hawthorne v. Beam, 558 F. Supp. 694, 695 (E.D. Va. 1983).

14. 728 F.2d at 659; *see* VA. CODE § 26-59 (Supp. 1984); id. § 64.1-75.1 (Supp. 1983) (requiring Virginia resident administrator to represent Virginia estate of nonresident). Section 26-59 of the Code of Virginia forbids the appointment of a nonresident administrator to represent an estate unless a Virginia resident administrator acts as cofiduciary. VA. CODE § 26-59 (Supp. 1984). Section 64.1-75.1 of the Code of Virginia requires the appointment of an administrator to represent the estate of any nonresident killed within or without the state when a cause of action arises in Virginia. VA. CODE § 64.1-75.1 (Supp. 1983); *see* Note, *Right of a Nonresident To Qualify and Serve in Fiduciary Capacities—An Analysis*, 37 VA. L. REV. 1119, 1121-24 (1951) (discussion of requirements of residency necessary to act as estate administrator throughout United States).

15. Brief for Appellant at 4, Krier-Hawthorne v. Beam, 728 F.2d 658 (4th Cir. 1984).

16. Hawthorne v. Beam, 558 F. Supp. 694, 695 (E.D. Va. 1983).

17. *Id.* at 695-96.

18. *Id.* at 697. The *Hawthorne* district court dismissed the action for lack of diversity of citizenship and for lack of an adversarial relationship between the estate heirs and the estate

Fourth Circuit vacated the district court ruling and remanded the case to the district court, stating that the citizenship of an administrator is determinative for the purpose of determining diversity of citizenship in a personal injury action against an estate when the estate administrator is a defendant.[19]

In deciding that the administrator's citizenship determines diversity of citizenship in a personal injury action against an estate, the *Krier-Hawthorne* court focused on the holding in *Mecom v. Fitzsimmons Drilling Co.*,[20] a United States Supreme Court benchmark case.[21] *Mecom* held that the citizenship of an estate administrator controls for the purpose of determining diversity of citizenship.[22] In *Mecom,* the plaintiff's decedent died of injuries sustained due to the alleged negligence of the defendant.[23] The decedent's widow, an Oklahoma citizen qualified as administratrix of her husband's estate and brought a wrongful death action in an Oklahoma state court against the Louisiana defendant.[24] The defendant promptly removed the case

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administrator. *Id.* In contrast, the *Krier-Hawthorne* court reasoned that an adversarial relationship existed between the widow and the administrator because Virginia had abolished interspousal immunity. 728 F.2d at 660. The Fourth Circuit also noted that Virginia law required the appointment of a Virginia administrator so the widow had no choice in the matter. *Id.*

19. 728 F.2d at 662. In determining that the citizenship of the administrator controls for diversity of citizenship in a personal injury action against the estate, the *Krier-Hawthorne* court noted that Virginia had abolished interspousal immunity in automobile accident litigation. *Id.* at 659; *see* Surratt v. Thompson, 212 Va. 191, 194, 183 S.E.2d 200, 202 (1971) (abolishing interspousal immunity in Virginia). Interspousal immunity was common law notion that a husband and wife are but "one flesh" and cannot sue each other. *See Surratt*, 212 Va. at 192, 183 S.E.2d at 201. In *Surratt*, Cornelia Surratt was a passenger in an automobile driven by her husband when the Surratt vehicle collided with an automobile driven by a third person. *Id.* at 192, 183 S.E.2d at 201. Mrs. Surratt died as a result of the collision and her administrator brought a wrongful death action against her husband and the driver of the other car. *Id.* at 192, 183 S.E.2d at 201. The husband filed a demurrer based on interspousal immunity. *Id.* at 192, 183 S.E.2d at 201. The *Surratt* court determined that the old common law notion of considering the husband and wife as "one flesh" was no longer tenable. *Id.* at 194, 183 S.E.2d at 202. The *Surratt* court then abolished interspousal immunity and emphasized that the ruling applied only to personal injuries resulting from automobile accidents. *Id.* The Virginia Supreme Court expanded the reach of *Surratt* in *Korman v. Carpenter. See* Korman v. Carpenter, 216 Va. 86, 92, 216 S.E.2d 195, 198 (1975). In *Korman* the court expanded the abolition of interspousal immunity to cover an action for wrongful death where the wrongful act of one spouse results in the death of the other spouse. *Id.* at 91-92, 216 S.E.2d at 198. The *Korman* abolition of interspousal immunity applies only when the deceased spouse dies without living children or grandchildren. *Id.* at 91-92, 216 S.E.2d at 198. The Virginia Supreme Court, however, has refused to extend the abolition of interspousal immunity to intentional torts committed by one spouse upon another spouse when the action is brought after divorce. *See* Courts v. Counts, 221 Va. 151, 266 S.E.2d 895, 897 (1980); *see also* Smith v. Kauffman, 212 Va. 181, 186, 183 S.E.2d 190, 194 (1971) (Virginia Supreme Court abrogated the rule of parental immunity in automobile accident litigation); Taylor, *A Re-examination of Sovereign Tort Immunity in Virginia*, 15 U. RICH. L. REV. 247, 252 (1981) (discussion of abolition of interspousal immunity in Virginia).

20. 284 U.S. 183 (1931).

21. 728 F.2d at 660-61.

22. *Mecom*, 284 U.S. at 190.

23. Mecom v. Fitzsimmons Drilling Co., 47 F.2d 28, 28 (10th Cir.), *rev'd*, 284 U.S. 183 (1931).

24. *Mecom*, 284 U.S. at 184-85.

to the United States District Court for the Western District of Oklahoma on the basis of diversity of citizenship between the parties.[25] To avoid diversity jurisdiction, the administratrix voluntarily dismissed the action without prejudice.[26] Subsequently, the administratrix brought identical wrongful death suits in an Oklahoma state court two additional times.[27] Each time, the defendant removed the suit to federal court based on the diversity and the administratrix voluntarily dismissed the actions.[28]

After three unsuccessful attempts to bring suit in state court, the widow in *Mecom* finally resigned from her administratrix position and induced the Oklahoma probate court to appoint a Louisiana citizen as administrator to avoid diversity jurisdiction.[29] The Louisiana administrator appointed the widow as co-administrator in Oklahoma whereupon the widow brought suit again in Oklahoma state court.[30] Again the defendant removed the suit to federal court based on diversity of citizenship.[31] The administrator moved to remand the case to Oklahoma state court on the ground of lack of diversity because both the plaintiff administrator and the defendant were Louisiana citizens.[32] The United States District Court for the Western District of Oklahoma denied the motion and held that the widow was the real party in interest so that her citizenship controlled diversity of citizenship.[33] The Tenth Circuit affirmed the district court ruling.[34]

Upon reviewing the Tenth Circuit's ruling in *Mecom,* the United States Supreme Court granted certiorari and reversed the Tenth Circuit.[35] The Supreme Court asserted that the motive for appointing an administrator to avoid diversity jurisdiction was immaterial[36] and that the administrator was the real party in interest.[37] The *Mecom* Court noted that the administrator was the real party in interest because Oklahoma law required the appointment of an administrator to prosecute the action and prescribed the administrator's duties.[38] The Supreme Court stated that because the administrator was the

25. *Id.* at 185.

26. *Id.* at 184-85. In *Mecom*, the plaintiff dismissed the case without prejudice. *Id.* Dismissal without prejudice leaves the case as if no action had been filed. *Id.; see* 9 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 1, § 2367, at 185-86 (dismissal without prejudice permits filing of second action).

27. *Mecom*, 284 U.S. at 184-85.

28. *Id.*

29. *Id.* at 185.

30. *Id.*

31. *Id.*

32. *Mecom v. Fitzsimmons Drilling Co.*, 47 F.2d 28, 29 (10th Cir.), *rev'd*, 284 U.S. 183 (1931).

33. *Id.*

34. *Id.* at 31. The Tenth Circuit in *Mecom* reasoned that the administrator was merely a nominal party and that the out-of-state administrator's appointment was purely to escape the jurisdiction of the court. *Id.* at 30.

35. *Mecom*, 284 U.S. at 183, 186, 190.

36. *Id.* at 189. The *Mecom* Court concluded that once a probate court officially appointed an administrator, no court should attack collaterally the appointment in examining diversity of citizenship. *Id.*

37. *See id.* at 190.

38. *Id.* at 186, 190.

real party in interest, the administrator's citizenship controlled the determination of diversity of citizenship.[39]

In discussing *Mecom,* the *Krier-Hawthorne* court noted that *Mecom* represents the settled proposition that federal courts have jurisdiction over suits by or against administrators as long as the administrator's citizenship is diverse from the opposing party's citizenship.[40] However, the Fourth Circuit observed that section 1359 of Title 28 of the United States Code[41] tempers *Mecom* by prohibiting "collusive or improper" manufacture of diversity.[42] The section 1359 prohibition against collusion prohibits a party from choosing his opponent based solely on a desire to establish diversity.[43] The *Krier-Hawthorne* court concluded that the appointment of Sink as resident administrator was not a collusive violation of section 1359 because Virginia law required appointment of a resident administrator.[44]

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39. *Id.*

40. 728 F.2d at 660.

41. 28 U.S.C. § 1359 (1982) (prohibition against collusive manufacture of diversity jurisdiction); *see supra* note 5 (discussion of § 1359).

42. 728 F.2d at 660.

43. *Id.; see* Kramer v. Carribbean Mills, Inc., 394 U.S. 823, 826 (1969) (§ 1359 ban on collusive manufacture of diversity limits diversity jurisdiction). In *Kramer,* Carribean Mills, a Haitian corporation, entered into a contract with a Panamanian corporation to purchase corporate stock of the Panamanian corporation. *Id.* at 824. The Haitian corporation defaulted and the Panamanian corporation assigned the contract to Kramer, a Texas lawyer. *Id.* Kramer brought a suit on the contract against Carribean Mills in the United States District Court for the Northern District of Texas claiming diversity of citizenship jurisdiction. *Id.* Carribean Mills moved to dismiss for lack of jurisdiction and the district court denied the motion. *See* Carribean Mills Inc. v. Kramer, 392 F.2d 387, 388 (5th Cir. 1968). On appeal, the Fifth Circuit Court of Appeals reversed, holding that the assignment was improper and collusive under 28 U.S.C. § 1359 and, therefore, the district court lacked jurisdiction. *Id.* at 394. The Supreme Court affirmed the Fifth Circuit and concluded that the assignment was improperly collusive. 394 U.S. at 830. The *Kramer* Court, however, asserted that several differences exist between the appointment of an administrator and the assignment of a cause of action. *Id.* at 828 n.9. First, the Court noted that statutes often require the appointment of an administrator for the prosecution of a suit and that administrators owe their appointment to a state probate court decree. *Id.* Second, the *Kramer* Court noted that administrators possess discrete powers. *Id.* A third distinction between assignment and appointment of an administrator is that the assignor can bring suit without the assignee and the act of assignment is a totally voluntary act between the parties. *Id.* After noting the differences between appointment of an administrator and assignment of a cause of action, the *Kramer* Court declined to decide whether the distinctions between appointment of an administrator and assignment of a cause of action are significant under 28 U.S.C. § 1359. *See id.; see also* Miller v. Perry, 456 F.2d 63, 65 (4th Cir. 1972) (*Kramer* holding requiring an examination of administrator's duties in examining diversity of citizenship undermined the *Mecom* assumption that administrator was real part in interest); Comment, *Manufacturing Diversity Jurisdiction,* 14 VILL. L. REV. 727, 742 (1969) (*Kramer* prohibition against manufacturing diversity jurisdiction serves to limit *Mecom* holding recognizing administrators as real parties in interest); Comment, *Miller v. Perry: Further Complications in Determining Diversity Jurisdiction,* 30 WASH. L. REV. 282, 286 (1973) (*Kramer* ban on collusive manufacture of jurisdiction limited *Mecom* rule indicating that administrator's citizenship determines diversity of citizenship).

44. 728 F.2d at 661.

In addition to the determination that the appointment of the administrator in *Krier-Hawthorne* was not collusive, the *Krier-Hawthorne* court noted that the Fourth Circuit had developed an exception to the *Mecom* rule recognizing the administrator as the real party in interest.[45] According to the *Krier-Hawthorne* court, the exception to *Mecom* states that the beneficiaries are the real parties in interest in wrongful death actions when there is a plaintiff administrator and two factors are present.[46] The first factor the Fourth Circuit noted was that state wrongful death statutes designate beneficiaries who are the real party plaintiffs in interest even though not formally named as plaintiffs.[47] Second, the Fourth Circuit stated that the plaintiff administrator of an estate in a wrongful death action has no assets to administer in connection with the litigation and no real stake in the outcome of the litigation.[48] The *Krier-Hawthorne* court acknowledged that in wrongful death actions, where the plaintiff administrator has no stake in the litigation and the beneficiaries are the real the real parties in interest, the beneficiaries' citizenship controls for diversity of citizenship.[49] The Fourth Circuit observed, however, that *Krier-Hawthorne* was a case of first impression for the Fourth Circuit because *Krier-Hawthorne* was the first Fourth Circuit case to involve a defendant administrator appointed in a personal injury action in accordance with state law.[50] Previous Fourth Circuit diversity cases involving adminis-

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45. *Id.* at 660.

46. *Id.* at 660. The *Krier-Hawthorne* court noted that the Fourth Circuit had considered wrongful death actions involving a determination of diversity of citizenship with a plaintiff administrator seven times since *Mecom*. *Id.* The Fourth Circuit observed that in six of the seven previous cases, the fourth Circuit determined that the beneficiaries' citizenship controlled diversity of citizenship. *Id.; see* Messer v. American Gems, Inc., 612 F.2d 1367, 1374 (4th Cir.) (beneficiaries' citizenship controls for diversity of citizenship in wrongful death action because administrator has no stake in litigation), *cert. denied*, 446 U.S. 956 (1980); Mullins v. Seals, 562 F.2d 326, 327 (4th Cir. 1977) (if administrator appointed merely to bring wrongful death suit then beneficiaries' citizenship controls for diversity of citizenship); Vaughan v. Southern Ry. Co., 542 F.2d 641, 643 (4th Cir. 1976) (administrator appointed to invoke diversity jurisdiction so beneficiaries are real parties in interest); Bishop v. Hendricks, 495 F.2d 289, 295-96 (4th Cir.) (beneficiaries' citizenship determinative for diversity of citizenship in wrongful death on behalf of estate because administrator's duties are merely nominal), *cert. denied*, 419 U.S. 1056 (1974); Miller v. Perry, 456 F.2d 63, 67 (4th Cir. 1972) (in wrongful death action against estate, administrator's duties are limited and beneficiaries are real parties in interest); Lester v. McFadden, 415 U.S. 1101, 1105 (4th Cir. 1969) (estate beneficiaries had real stake in outcome of wrongful death action on behalf of estate and citizenship of beneficiaries controlled for diversity of citizenship). *But see* Sadler v. New Hanover Memorial Hosp., 588 F.2d 914, 917 (4th Cir. 1978) (administrator's citizenship controls for diversity purposes where will appointed administrator and administrator had substantial duties).

47. 728 F.2d at 660; *see* VA. CODE § 8.01-53 (1984) (Virginia wrongful death statute designating beneficiaries). The Virginia wrongful death statute defines the wrongful death beneficiaries to be the surviving spouse, children and children of deceased children of the decedent. *Id.* If no spouse or children exist, the statute directs that the decedent's parents, brothers and sisters become the beneficiaries of the wrongful death action. *Id.*

48. 728 F.2d at 660.

49. *Id.* at 660.

50. *Id.* at 661.

trators concerned only plaintiff administrators prosecuting wrongful death actions.[51]

The Fourth Circuit declined, therefore, to follow the rule established in prior diversity cases involving plaintiff administrators, and turned instead to the *Mecom* holding that the administrator was the real party in interest.[52] The Fourth Circuit held that the administrator's citizenship controlled in a personal injury action against the estate for determining diversity of citizenship for several reasons.[53] First, the Fourth Circuit stated that the estate beneficiaries, in their role as such, had no stake in the outcome of the personal injury suit against the estate.[54] Although Mrs. Krier-Hawthorne was a beneficiary of the estate, her stake in the outcome of the litigation derived from her plaintiff status and not her beneficiary status. The *Krier-Hawthorne* court noted that a successful suit by the plaintiff would neither enrich nor impoverish the beneficiaries because an automobile liability insurance policy provided the proceeds to pay any damage award.[55] The *Krier-Hawthorne* court reasoned that the beneficiaries could not be the real parties in interest without having a stake in the outcome of the suit.[56] Second, the Fourth Circuit stated that the appointment of Sink as administrator was not collusive because state law required the appointment of a resident administrator.[57] The Fourth Circuit asserted that the plaintiff could file suit in Virginia since Virginia was the situs of the accident.[58] The fact that the plaintiff did not manufacture diversity jurisdiction, therefore, provided further support for not departing from the *Mecom* rule.[59] Finally, the *Krier-Hawthorne* court found the duties of the administrator to be substantial as opposed to the nominal duties of a wrongful death administrator.[60] Since the duties of the administrator were substantial, the Fourth Circuit observed that the administrator was the real party in interest.[61] The Fourth Circuit concluded by observing that the justifications for departing from *Mecom,* as enunciated

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 661. The *Krier-Hawthorne* court noted that the beneficiaries had no stake in the outcome of the litigation because the decedent's automobile insurance policy would pay any judgment against the estate. *Id.* at 661. The Krier estate had no assets other than the insurance policy and therefore the beneficiaries would neither be enriched nor impoverished by the outcome of the litigation. *Id.*

56. *Id.*

57. *Id.; see* VA. CODE § 26-59 (Supp. 1983); *id* § 64.1-75.1 (1980). (Virginia ancillary administrator required to defend action against estate prosecuted in Virginia); *supra* note 14 (discussion of §§ 26-59 and 64.1-75.1 of Virginia Code).

58. 728 F.2d at 661.

59. *See id.*

60. *Id.* The Fourth Circuit in *Krier-Hawthorne* determined that the decedent's automobile insurance policy was an asset of the Krier estate available to satisfy specific claims against the policy. *Id.* at 660. According to the *Krier-Hawthorne* court, the administrator's duties included administration of the insurance asset. *Id.* at 661. Additionally, the Fourth Circuit noted that the administrator's responsibilities included notifying the insurance company of the action, defending the litigation, and a general fiduciary duty to act with due diligence. *Id.* at 661-62.

61. *Id.*

in the previous Fourth Circuit wrongful death actions, were not present in *Krier-Hawthorne*.[62]

In contrast to the majority ruling that the administrator's citizenship controls diversity of citizenship in a personal injury action against the estate, the *Krier-Hawthorne* dissent asserted that the administrator was not the real party in interest.[63] The dissent, however, agreed with the majority's assertion that the estate beneficiaries were not the real parties in interest because the beneficiaries had no stake in the litigation.[64] Rather than considering the beneficiaries or the administrator to be the real parties in interest, the dissent instead suggested that the automobile liability insurance company was the real party in interest because the insurance company had a direct and substantial financial stake in the outcome of the litigation.[65] The dissent likened the insurance company's stake in the suit to a direct action[66] against the insurance company and concluded that the insurance company's citizenship should control diversity of citizenship.[67] Finally, the *Krier-Hawthorne* dissent advocated adoption of an American Law Institute (ALI) proposal which would impute the decedent's citizenship to the administrator of an estate for purposes of diversity of citizenship.[68] The dissent asserted that adoption of the ALI proposal would defeat diversity in *Krier-Hawthorne* because both the plaintiff and defendant decedent were New York citizens.[69]

The *Krier-Hawthorne* majority properly determined that the citizenship of an administrator controls in a personal injury diversity suit against an estate.[70] The circuits generally agree that the *Mecom* ruling, indicating that the administrator is the real party in interest in an action involving an estate, is still binding precedent.[71] A real party in interest is one who possesses the

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62. *Id.* at 662; *see supra* note 46 (explanation of the Fourth Circuit exceptions to *Mecom*).

63. *Id.* at 665 (Murnaghan, J., dissenting).

64. *Id.* at 664-65 (Murnaghan, J., dissenting).

65. *Id.* at 668 (Murnaghan, J., dissenting).

66. *Id.*; *see* 12A G. COUCH, CYCLOPEDIA OF INSURANCE LAW § 45:784 (2d ed. 1981). A "direct action" suit against an insurer is a suit by an injured person or representative of an injured person directly against the insurer. *Id.* At common law, as well as today, the absence of a statute expressly allowing direct actions bars the right of an individual to maintain a direct action. *Id.* § 45:785. Virginia has no direct action statute. Krier-Hawthorne v. Beam, 728 F.2d 658, 668 (4th Cir. 1984) (Murnaghan, J., dissenting). Section 38.1-380 of the Code of Virginia provides that the only time an individual may bring a direct action in Virginia is when a judgment obtained against the insured remains unsatisfied. VA. CODE § 38.1-380 (1950).

67. 728 F.2d at 668 (Murnaghan, J., dissenting).

68. *Id.* at 671 (Murnaghan, J., dissenting); *see* AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1301(b)(4) (1969) (proposal to use citizenship of decedent in diversity action); 728 F.2d at 661 n* (*Krier-Hawthorne* majority acknowledged that the use of decedent's citizenship was ideal proposal but Congress had not adopted proposal); *see also infra* notes 107-110 and accompanying text (discussion of ALI proposal to apply decedent's citizenship to estate in action by or against estate).

69. 728 F.2d at 672 (Murnaghan, J., dissenting).

70. *See* 728 F.2d at 662; *infra* text accompanying note 79 & 89 (indicating that Fourth Circuit properly determined *Krier-Hawthorne*).

71. *See* Gross v. Hougland, 712 F.2d 1034, 1037 (6th Cir. 1983) (general rule is that citizenship of representative determined diversity of citizenship), *cert denied*, 104 S. Ct. 1281 (1984); Field v. Volkswagenwerk AG., 626 F.2d 293, 302 (3d Cir. 1980) (generally administrator's

substantive right contested in the litigation.[72] *Mecom* considered an administrator the real party in interest because an administrator is required to bring suit under state statute, is charged for the conduct or settlement of the suit, and has a fiduciary duty to the estate.[73] Several exceptions to *Mecom,* however, exist.[74]

First, section 1359 of the United States Code prohibits the collusive manufacture of diversity jurisdiction.[75] The ban against collusively manufactured jurisdiction is grounded in the idea that federal courts are courts of limited jurisdiction.[76] For a federal court to have diversity jurisdiction, the parties must be properly before the court.[77] An example of improper diversity jurisdiction would be a case involving a defendant, a decedent and beneficiaries all of like citizenship and the appointment of an out-of-state administrator solely to create diversity of citizenship.[78] In *Krier-Hawthorne,* however,

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citizenship controls for diversity of citizenship); Betar v. DeHavilland Aircraft of Canada, Ltd., 603 F.2d 30, 33 (7th Cir. 1979) (rule that administrator's citizenship determines diversity of citizenship valid but tempered by § 1359 ban on collusive jurisdiction), *cert. denied,* 444 U.S. 1098 (1980); Sadler v. New Hanover Memorial Hosp., 588 F.2d 914, 915 (4th Cir. 1978) (*Mecom* rule recognizing administrator as real party in interest still valid precedent).

72. *See* Prevor-Mayorsohn Carribean v. Puerto Rico Marine Management, 620 F.2d 1, 4 (1st Cir. 1980) (real party in interest is one with substantive right); 6 C. WRIGHT AND A. MILLER, *supra* note 1 § 1541 (person with substantive right is real party in interest); FED. R. CIV. P. 17 (A) (all federal action shall be prosecuted in name of real party in interest); *see also* Comment, *Federal Courts-Diversity Jurisdiction—When State Law Requires Wrongful Death Action to Be Prosecuted By Resident Ancillary Administrator, Citizenship of Beneficiaries is Controlling For Diversity Purposes*—Miller v. Perry, 47 N.Y.U. L. REV. 801, 805-06 (1972) (discussion of real party in interest with administrator). *See generally* Kennedy, *Federal Rule 17(a): Will The Real Party in Interest Please Stand?,* 51 MINN. L. REV. 675, 678 (1967) (discussion of federal real party in interest rule).

73. *See* Mecom v. Fitzsimmons Drilling Co., 284 U.S. 183, 186 (1931).

74. *See* 728 F.2d at 660-661; *infra* notes 78 and 80-84 and accompanying text (discussion of Fourth Circuit exceptions to *Mecom*).

75. *Id.* at 660; *see* 28 U.S.C. § 1359 (1982) (ban against collusive manufacture of diversity jurisdiction).

76. *See* Owen Equip. & Erection Co., v. Kroger, 437 U.S. 365, 374 (1978) (federal courts are courts of limited jurisdiction); Kramer v. Carribbean Mills, Inc., 394 U.S. 823, 825 (1969) (discussion of § 1359 ban on collusively creating diversity jurisdiction); *supra* note 2 (federal courts entitled only to limited jurisdiction).

77. *See* 28 U.S.C. § 1332 (1982) (requirement for diversity jurisdiction in federal courts); 28 U.S.C. § 1359 (1982) (ban on collusively or improperly created diversity jurisdiction).

78. *See* Bishop v. Hendricks, 495 F.2d 289, 296-97 (4th Cir.) (administrator appointed collusively to manufacture diversity jurisdiction), *cert. denied,* 419 U.S. 1056 (1974). In *Bishop,* a South Carolina resident died when his automobile collided with another South Carolina resident in South Carolina. *Id.* at 290. The estate beneficiaries of the decedent obtained the appointment of a Georgia administrator from a South Carolina probate court. *Id.* The administrator brought a wrongful death action in the United States District Court for the District of South Carolina and the defendant moved to dismiss the action for lack of diversity. *Id.* The defendant alleged that the appointment of the Georgia administrator was solely to manufacture diversity jurisdiction. *Id.* The district court agreed that the appointment was collusive and dismissed the action. *Id.* at 291. The Fourth Circuit affirmed the district court decision by stating that the sole purpose of the appointment of an out-of-state administrator was to create diversity jurisdiction and that motive was collusive in violation of federal law. *Id.* at 296-97; *see also* 28 U.S.C. § 1359 (1982) (ban against collusive manufacture of diversity).

the Fourth Circuit correctly noted that appointment of Sink as administrator was not collusive as the appointment was made solely to comply with Virginia law.[79]

A second exception to *Mecom* that the *Krier-Hawthorne* court examined in determining diversity of citizenship was the "substantial stake" test developed by the Fourth Circuit.[80] The "substantial stake" test examines the extent of the duties performed by the administrator of the estate to see if the administrator's duties are substantial or nominal.[81] If the duties of the administrator are not substantial, the Fourth Circuit utilizes the citizenship of the beneficiaries for purposes of diversity of citizenship.[82] The "substantial stake" test stems from the idea that a party cannot be a real party in interest without a substantial stake in the outcome of the litigation.[83] In applying the "substantial stake" test to wrongful death cases with a plaintiff administra-

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79. 728 F.2d at 661.

80. *Id.*, *see infra* notes 80-90 and accompanying text (explaining "substantial stake" test); *see also* Messer v. American Gems, Inc., 612 F.2d 1367, 1374 (4th Cir.) (plaintiff administrator had not stake in the outcome of the litigation and was not real party in interest), *cert. denied*, 446 U.S. 956 (1980); Mullins v. Seals, 562 F.2d 326, 327 (4th Cir. 1977) (administrator appointed merely to prosecute wrongful death action was not real party in interest); Vaughan v. Southern Ry. Co., 542 F.2d 641, 644 (4th Cir. 1976) (administrator needs "substantial stake" in outcome of litigation to be real party in interest).

81. *See* 728 F.2d at 660-62 (explanation of "substantial stake" test); *see also* Bianca v. Parke-Davis Pharmaceutical Div., 723 F.2d 392, 396-98 (5th Cir. 1984) (Fifth Circuit interpretation of Fourth Circuit's "substantial stake" test); Miller v. Perry, 456 F.2d 63, 67 (4th Cir. 1972) (Court should examine administrator's duties in wrongful death action to see if substantial or nominal for purposes of diversity of citizenship); 14 C. WRIGHT, A. MILLER, & E. COOPER, *supra* note 1, § 3640 (discussion of Fourth Circuit's "substantial stake" test).

82. *See* 728 F.2d at 63; 14 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 1 § 3640 (beneficiaries are real parties in interest where administrator's duties are nominal); *see also* Miller v. Perry, 456 F.2d 63, 63 (4th Cir. 1972) (administrator must have substantial stake in litigation to be real party in interest). In *Miller*, a Florida infant died due to the alleged negligence of the North Carolina defendants. 456 F.2d at 63. North Carolina law required that a local administrator bring a wrongful death action. *Id.* at 64. The decedent's father, a Florida citizen, could not qualify as administrator so the decedent's grandfather, a North Carolina citizen, acted as administrator and filed suit in the United States District Court for the Eastern District of North Carolina. *Id.* at 63-64. The district court held that the administrator was the real party in interest and dismissed the action for the lack of diversity jurisdiction. Miller v. Perry, 307 F. Supp. 633, 637 (E.D.N.C. 1969). On appeal, the Fourth Circuit held that diversity existed because the Florida beneficiaries were the real parties in interest and the beneficiaries' citizenship determined diversity. *Miller*, 456 F.2d at 68. The *Miller* court determined that the *Mecom* Court's recognition of the administrator as the real party in interest was not an inflexible doctrine. *Id.* at 65. The Fourth Circuit asserted that the responsibilities of the *Miller* administrator were not important and because those duties were insubstantial the citizenship of the beneficiary controlled diversity. *Id.*; *see* Comment, *Federal Jurisdiction—Citizenship of the Beneficiaries Controls in Wrongful Death Actions Requiring A Resident Administrator*, 51 N.C.L. REV. 639, 646 (1973) (asserting that Fourth Circuit decided *Miller* properly); Comment, *supra* note 72, at 814 (indicating *Miller* decision contrary to Supreme Court precedent); Comment, Miller v. Perry: *Further Complications in Determining Diversity Jurisdiction*, 30 WASH. & LEE L. REV. 282, 295 (1973) (*Miller* only serves to complicate common diversity principles).

83. *See* 14 C. WRIGHT, A. MILLER, & E. COOPER, *supra* note 1, § 3640 (discussion of "substantial stake" test).

tor, the Fourth Circuit has ruled that the administrator of a wrongful death action was a nominal party in six of seven previous cases, and therefore utilized the beneficiaries' citizenship for diversity of citizenship rather than the administrator's citizenship.[84]

The United States Court of Appeals for the Fifth Circuit has criticized the Fourth Circuit's "substantial stake" test.[85] The Fifth Circuit stated that the "substantial stake" test was attractive because the test is easy to apply and effectuates the purposes of diversity jurisdiction, but the Fifth Circuit asserted that the "substantial stake" test cannot be justified under the language of section 1359.[86] The Fifth Circuit claimed that section 1359 only allows a motive test to see if the administrator's appointment was intended to manufacture diversity jurisdiction.[87] According to the Fifth Circuit, the "substantial stake" test moves into an area reserved for Congress in dictating the requirements for diversity jurisdiction.[88] Nevertheless, the *Krier-Hawthorne* court applied the Fourth Circuit's "substantial stake" test to find that the administrator had a substantial stake in the personal injury action against the estate and that the administrator's citizenship consequently should control diversity of citizenship.[89] The Sixth and Tenth Circuits also have held that an administrator who has a substantial stake can rely on his citizenship for diversity purposes.[90]

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84. *See supra* note 45 (discussion of seven previous Fourth Circuit administrator diversity cases).

85. *See* Bianca v. Parke-Davis Pharmaceutical Div., 723 F.2d 392, 398 (5th Cir. 1984). In *Bianca*, an eleven year old girl died of aplastic anemia from taking the Mississippi defendant's cold medication. *Id.* at 394. The beneficiaries of the Bianca estate also were citizens of Mississippi. *Id.* Because of the terrible trauma, the decedent's parents appointed the decedent's aunt, of Louisiana, administratrix. *Id.* The administratrix filed a wrongful death action in the United States District Court for the District of Mississippi. *Id.* The district court dismissed the suit because the administratrix had no stake in the litigation and because the appointment was collusive. *Id.* The Fifth Circuit reversed the Mississippi district court, holding that the motive for appointment was pure and that with a pure motive, the administratrix's stake in the litigation was relevant but not controlling. *Id.* at 398. The *Bianca* court ruled that the administratrix's citizenship controlled for diversity of citizenship. *Id.*

86. *Id.* at 397-98; *see* 28 U.S.C. § 1359 (1982) (prohibition against collusively manufacturing diversity jurisdiction); Frank, *supra* note 1, at 18 (discussion of positive aspects of diversity jurisdiction).

87. *Bianca*, 723 F.2d at 397-98 (discussion of Fifth Circuit's motive test).

88. *Id.*

89. *See* 728 F.2d at 661-62.

90. *See* Gross v. Hougland, 712 F.2d 1034, 1037 (6th Cir. 1983) (receiver's citizenship controlled for diversity of citizenship purposes where receiver had "substantial stake"), *cert. denied*, 104 S. Ct. 1281 (1984); Hackney v. Newman Memorial Hosp., Inc., 621 F.2d 1069, 1071 (10th Cir.) (citizenship of administrator with substantial stake controlled for diversity of citizenship), *cert. denied*, 449 U.S. 982 (1980). In *Gross v. Hougland*, the Delaware Court of Chancery appointed Gross, a Delaware resident, to act as receiver for Hougland Barge Line, Inc., a dissolved Delaware Corporation. *Gross*, 712 F.2d at 1035. Gross filed suit in the United States District Court for the Western District of Kentucky against four Kentucky citizens, who were former shareholders, accountants or lawyers for Hougland, alleging negligence in liquidating the corporation. *Id.* at 1036. The defendants moved to dismiss the action for lack of

In applying the "substantial stake" test in a personal injury action against an estate, a court must look to the duties performed by the defendant administrator.[91] In the case in which an automobile insurance policy exists to satisfy judgments, the insurance policy is an asset of the estate.[92] The administrator's stake includes responsibility for administration of the insurance policy to see that an action covered by the policy is properly defended.[93] The administrator also coordinates the conduct or settlement of the suit with the insurance company.[94] Another factor in a personal injury action against the estate is that, unlike a wrongful death action on behalf of the plaintiff estate where the beneficiaries stand to gain by a successful suit, the beneficiaries of a fully insured defendant estate have no stake in the outcome of the litigation.[95] In *Krier-Hawthorne,* therefore, the Fourth Circuit properly

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diversity jurisdiction, alleging that the plaintiff manufactured the diversity. *Id.* The Kentucky district court dismissed the action and the Sixth Circuit reversed the district court. *Id.* at 1036, 1041. The Sixth Circuit stated that policies limiting an administrator's or a guardian's ability to rely on the administrator's or guardian's own citizenship apply with equal force to receivers. *Id.* at 1038. The Sixth Circuit further stated that the appointment of the plaintiff in *Gross* was not collusive because Delaware law required appointment of a Delaware receiver to prosecute the action. *Id.* at 1039. The *Gross* court allowed use of the receiver's citizenship for diversity of citizenship. *Id.*; *see* DEL. CODE ANN. tit. 8, § 279 (1953) (requires appointment of receiver to manage corporate assets upon dissolution).

In *Hackney v. Newman Memorial Hospital, Inc.,* the Tenth Circuit examined whether to use the administrator's or beneficiaries' citizenship in a diversity action. *Hackney,* 621 F.2d at 1069-70. In *Hackney,* the plaintiff administratrix brought a wrongful death action on behalf of her mother's estate against the defendant. *Id.* at 1069. Originally, the decedent's daughter, Brenda Rea, an Oklahoma citizen, received appointment from an Oklahoma probate court to act as administratrix. *Id.* Brenda Rea resigned as administratrix after completing all duties except the prosecution of the wrongful death action. *Id.* The Oklahoma probate court then appointed the decedent's other daughter, the current plaintiff and a Colorado citizen, as administratrix for the wrongful death action. *Id.* The Oklahoma trial court dismissed the suit and ruled that the appointment of the administratrix was a collusive attempt to create diversity jurisdiction between the Colorado administratrix and the Oklahoma defendant. *Id.* at 1070. On appeal, the Tenth Circuit stated that Oklahoma law required that an administrator bring a wrongful death action and distribute the resulting proceeds. *Id.* at 1071; *see* OKLA. STAT. ANN. tit. 12, § 1053 (West 1961) (amended 1978 & 1979) (requiring appointment of administrator for wrongful death action in Oklahoma). The Tenth Circuit also determined that the administratrix received a portion of the proceeds of the wrongful death action so that the administratrix had a substantial stake. *Hackney,* 621 F.2d at 1071. The Tenth Circuit then held that the citizenship of the administratrix determined diversity of citizenship. *Id.*

91. *See* Sadler v. New Hanover Memorial Hosp., 588 F.2d 914, 917 (4th Cir. 1978) (Court should examine duties of administrator in determining diversity of citizenship).

92. *See* 728 F.2d at 660; Milmoe v. Toomey, 356 F.2d 793, 795 (D.C. Cir. 1966) (automobile liability insurance policy is asset of estate of deceased).

93. *See* VA. CODE § 64.1-139 (1980) (personal representative responsible for administering properly decedent's whole personal estate).

94. *See id.* (administrator has fiduciary duty to administer estate properly; *see also* Milmoe v. Toomey, 356 F.2d 793, 795 (D.C. Cir. 1966) (assets of estate include automobile liability insurance policy); 13A G. COUCH, *supra* note 66, § 49:99 (notice of accident is condition precedent to recovery).

95. *See* 728 F.2d at 661; *see supra* notes 54-55 and accompanying text (beneficiaries had no stake in litigation).

determined that the administrator was the real party in interest since the administrator performed substantial duties and the beneficiaries had no stake in the suit's outcome.[96]

The *Krier-Hawthorne* dissent offered an interesting alternative to considering the beneficiaries or the administrator as the real party in interest by suggesting that the automobile liability insurance company was the real party in interest.[97] According to the dissent, an insurance company has a direct financial stake in the outcome of a suit against an insured and a personal injury action against an estate is like a direct action against the insurer.[98] Several aspects of Virginia insurance law, however, point to a contrary holding.[99] First, Virginia has no direct action statute that would allow an individual to sue an insurance company directly on a policy claim.[100] Without a direct action statute, the insurance company would not be a named party to the suit and should not be considered the real party in interest.[101] Second, Virginia case law prohibits claimants from mentioning insurance on behalf of the defendant in court.[102] If the existence of the insurance policy, and therefore the insurer, cannot be mentioned in court, the insurer should not be considered to be the real party in interest.[103] Third, in a personal injury action against a living defendant, the insurance company's interest is not considered so the insurer's interest should not be considered in a suit involving an estate administrator.[104] Fourth, the probate court charges the estate administrator with administration of the insurance asset of the estate, thereby presenting the administrator with a substantial duty to perform.[105]

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96. *See id.* at 662; *supra* note 91-95 and accompanying text (discussion of stake of administrator and stake of beneficiaries in litigation).

97. *Id.* at 668 (Murnaghan, J., dissenting).

98. *Id.*; *see infra* notes 99-106 and accompanying text (discussion stake of insurance company); *supra* note 65 (examining direct actions against insurers).

99. *See infra* notes 100-106 and accompanying text (discussion of insurance company's stake).

100. 728 F.2d at 668 (Murnaghan, J., dissenting); *see* VA. CODE § 38.1-380 (1980) (direct action against insurer in Virginia available only after a judgment against insured remains unsatisfied); *see also supra* note 66 (discussion of direct action against insurers).

101. *See* 18 G. COUCH, *supra* note 66, § 74:542 (insurer not necessary party to litigation).

102. *See e.g.,* Willard v. Aetna Casualty and Surety Co., 213 Va. 481, 483, 193 S.E.2d 776, 778 (1973) (policy in Virginia is that plaintiffs must avoid mentioning the defendant's insurance coverage in court to avoid prejudice or bias in case); Travelers Ins. Co. v. Lobello, 212 Va. 534, 536, 186 S.E.2d 80, 82 (1972) (mentioning existence of defendant's insurance or absence thereof at trial is reversible error); Rinehart & Dennis Co. v. Brown, 137 Va. 670, 675, 120 S.E. 269, 272 (1923) (evidence of insurance is irrelevant and inadmissible in personal injury action).

103. *See supra* note 102 (cases addressing admissibility of insurance policy may support conclusion that insurer should not be considered real party in interest).

104. *See* Willard v. Aetna Casualty and Surety Co., 213 Va. 481, 483, 193 S.E.2d 776, 778 (1973) (plaintiff cannot mention auto insurance in suit between two individuals); 18 G. COUCH, *supra* note 66, § 74:542 (2d ed. 1983) (when insurer indemnifies insured, insurer is not necessary party to litigation).

105. *See* 728 F.2d at 661 (administration of insurance policy is substantial duty for administrator); *see also* Isbell v. Flippen, 185 Va. 977, 978, 41 S.E.2d 31, 33 (1947) (duty of

The combination of the four factors above presents a compelling reason to use the citizenship of the administrator instead of the citizenship of the insurer for diversity of citizenship, especially given the existing *Mecom* holding that the administrator's citizenship is dispositive for diversity of citizenship purposes.[106]

Perhaps the best alternative for determining the proper diversity party in suits involving administrators is the ALI Proposal to use the decedent's citizenship.[107] Both the *Krier-Hawthorne* majority and dissent, as well as other Fourth Circuit cases, cite the ALI proposal as ideal for resolution of the problem of determining diversity of citizenship with an estate administrator involved.[108] Congress, however, defines jurisdiction for the federal courts and Congress has not adopted the ALI proposal.[109] The ALI proposal, therefore, was not available for the *Krier-Hawthorne* court.[110]

The Fourth Circuit in *Krier-Hawthorne* properly concluded that the citizenship of an estate administrator controls for diversity of citizenship in a negligence action against the estate.[111] In determining that the administrator's citizenship controls, the Fourth Circuit correctly followed the existing Supreme Court precedent set out in *Mecom*.[112] The Fourth Circuit also

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administrator to collect and administer assets of estate was substantial; *supra* note 92 (automobile policy is asset of estate).

106. *See* 284 U.S. 183, 186 (1931); *see also supra* notes 99-105 and accompanying text (reasons for utilizing administrator's citizenship rather than insurer's in personal injury action against estate).

107. *See* AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1301(b)(4) (1969) (proposing that courts use citizenship of decedent for diversity of citizenship when personal representative brings action);*see also* Wright, *Restructuring Federal Jurisdiction: The American Law Institute Proposals*, 26 WASH. & LEE L. REV. 185, 196 (1969) (discussion of ALI proposals for substantive changes in diversity jurisdiction). *See generally* Field, *Jurisdiction of the Federal Courts—A Summary of American Law Institute Proposals*, 46 F.R.D. 141 (1969) (summary of ALI proposals on diversity jurisdiction).

108. *See* 728 F.2d at 661 n*, 671 (noting that ALI proposal of using decedent's citizenship in determining diversity of citizenship in action against estate may be ideal); Miller v. Perry, 456 F.2d 63, 68 (4th Cir. 1972) (ALI proposal to use decedent's citizenship in action involving estate is best solution for determining diversity of citizenship in action involving estate); Lester v. McFaddon, 415 F.2d 1101, 1106 (4th Cir. 1969) (ALI has best solution to problem of determining diversity jurisdiction when estate involved by deciding to use decedent's citizenship in determining diversity of citizenship).

109. *See* United Steelworkers of Am. v. R. H. Bouligny, Inc., 382 U.S. 145, 150-51 (1965) (Supreme Court recognized that while ALI proposals may be best change must come from Congress); *Krier-Hawthorne*, 728 F.2d 658, 661 n* (4th Cir. 1984) (Congress has not approved ALI proposal); Gross v. Hougland, 712 F.2d 1034, 1036 (6th Cir. 1983) (federal courts are of limited jurisdiction and only have jurisdiction defined by constitution and granted by Congress). *cert. denied*, 104 S. Ct. 1281 (1984); Miller v. Perry, 456 F.2d 63, 68 (4th Cir. 1972) (until Congress enacts ALI proposal to use decedent's citizenship Fourth Circuit is limited to existing law); *see also* U.S. CONST. art. III, § 2 (describing jurisdiction granted to federal courts).

110. *See supra* note 109 (discussion of federal court jurisdiction).

111. *See* 728 F.2d at 662; *supra* notes 80 & 89 and accompanying text (examining Fourth Circuit's determination in *Krier-Hawthorne*).

112. *See* 728 F.2d at 661 (administrator's citizenship controls for diversity of citizenship in personal injury action against estate); *see also Mecom*, 284 U.S. at 186 (administrator is real

properly noted that the existing exceptions to *Mecom* which prohibit collusive manufacture of diversity jurisdiction and require that an administrator have a substantial stake in the outcome of the litigation did not apply.[113] For future litigants, *Krier-Hawthorne* indicates that the Fourth Circuit requires an administrator to have a substantial stake in the litigation and that the administrator not violate the section 1359 ban against the collusively manufactured jurisdiction regardless of whether the administrator is a defendant or a plaintiff.[114] *Krier-Hawthorne* illustrates, however, that the stake of the administrator in a personal injury action against a fully insured estate is likely to outweigh the stake of the beneficiaries to the estate.[115] Once a court has determined that the administrator's citizenship controls diversity of citizenship, the court must examine the citizenship of all remaining parties to insure that complete diversity exists to obtain diversity jurisdiction over the lawsuit.[116]

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party in interest in action involving estate); *supra* note 71 (several federal circuits agree with Fourth Circuit that *Mecom* is valid precedent).

113. *See Mecom*, 284 U.S. at 186 (administrator's citizenship determined diversity of citizenship); 728 F.2d at 661-62 (exceptions to *Mecom* requiring substantial stake for administrator and prohibiting collusively manufactured jurisdiction did not apply in *Krier-Hawthorne*); *supra* notes 75 & 80-83 (exceptions to *Mecom* are for collusively manufactured jurisdiction and lack of stake by administrator in outcome of litigation).

114. *See* 728 F.2d at 660-62.

115. *See id.* at 661; *supra* notes 91-95 and accompanying text (discussion of administrator's stake in litigation).

116. *See* 28 U.S.C. § 1332 (1982) (federal courts have jurisdiction over suits between citizens of different states); *supra* note 1 (discussion of complete diversity requirement).