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MILLER v. PERRY: FURTHER COMPLICATIONS IN DETERMINING DIVERSITY JURISDICTION

In a small number of jurisdictions, statutes provide that only a resident administrator may bring a wrongful death action on behalf of his decedent.¹ Such statutes prevent an out-of-state administrator from bringing a wrongful death action in the state courts without the benefit of a resident ancillary administrator. Since an ancillary administrator would be necessary to sue resident defendants in state courts, federal diversity jurisdiction would be seemingly impossible to obtain.² With the exception of statutory interpleader cases,³ the rule of "complete diversity" has been followed by federal courts since it was first laid down by Chief Justice Marshall in *Strawbridge v. Curtiss*.⁴ After citing to the jurisdictional statute,⁵ Marshall explained: ". . . where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued in those courts."⁶ If complete diversity is to

¹ E.g., GA. CODE ANN. § 113-1203 (1959), § 105-1309 (1968), which in certain circumstances may operate to exclude foreign administrators from pursuing wrongful death actions in courts sitting in Georgia; N.C. GEN. STAT. §§ 28-8(2), 28-173 (Repl. vol. 1966); VA. CODE ANN. §§ 26-59, 8-634 (Repl. vol. 1969), construed in *Holt v. Middlebrook*, 214 F.2d 187 (4th Cir. 1954); W. VA. CODE ANN. §§ 44-5-3, 55-7-6 (1966), construed in *Rybolt v. Jarrett*, 112 F.2d 642 (4th Cir. 1940).

Kentucky law formerly provided that a foreign representative could not maintain a wrongful death action in Kentucky courts without securing the appointment of an ancillary administrator. *Vassill's Adm'r v. Scarsella*, 292 Ky. 153, 166 S.W.2d 64 (1942); see *Seymour v. Johnson*, 235 F.2d 181 (6th Cir. 1956). However, a Kentucky statute now allows a nonresident administrator to qualify in the state under most circumstances. KY. REV. STAT. ANN. § 395.005 (1972). As a consequence, a wrongful death action may now be maintained in a Kentucky court by a nonresident administrator who has qualified in Kentucky or in a federal district court in Kentucky, with diversity of citizenship as the jurisdictional basis. Nonresident administrators who have also qualified in the state of defendant's residence are not deemed to be a resident of that state for diversity purposes. See *Mason v. Helms*, 97 F. Supp. 312 (E.D.S.C. 1951) (applying a similar South Carolina Statute).

Statutes in Idaho and Oregon formerly excluded nonresident administrators from bringing wrongful death actions without securing ancillary administrators. Cf. *Elliott v. Day*, 218 F. Supp. 90, 93 (D. Ore. 1962).

² Since this action is based upon diversity of citizenship, a federal court, in dealing with a right of recovery created by a state, will follow the state law. *Guaranty Trust Co. v. York*, 326 U.S. 99, 108-109 (1945), *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938).

³ 28 U.S.C. § 1335 (1970), the statutory interpleader section, requires "two or more adverse claimants of diverse citizenship." This provision has been interpreted as demanding only minimal, as opposed to complete, diversity. *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 531 (1967).

⁴ 7 U.S. (3 Cranch) 267 (1806).

⁵ Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 78. This was the precursor of the modern diversity statute, 28 U.S.C. § 1332 (1970).

⁶ 7 U.S. (3 Cranch) at 267.

obtain, the statute, 28 U.S.C. § 1332,⁷ requires that no defendant be of the same citizenship as any of the plaintiffs. However, in *Miller v. Perry*,⁸ the Fourth Circuit held that diversity was present in a case involving North Carolina statutes which appeared to be destructive of diversity jurisdiction. The *Miller* court said that the citizenship of an ancillary administrator is of no consequence in the determination of diversity; it held that the beneficiaries should be looked to in making such a determination.⁹

Miller v. Perry originated with the death, in a North Carolina automobile accident, of a minor Florida citizen, allegedly through the fault of the Perrys, residents of North Carolina. The decedent's father, after qualifying as his administrator in Florida, instituted an action against the Perrys under the North Carolina wrongful death statute¹⁰ in the United States District Court for the Eastern District of North Carolina. This action was dismissed by the district court on its own motion, the court noting that the father was not qualified to bring the action since he was not a North Carolina citizen, as required by a statute which allows only a North Carolinian to qualify as an administrator of an intestate's estate.¹¹

⁷28 U.S.C. § 1332(a) (1970) provides:

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 interests and costs, and is between—

- (1) citizens of different States;
- (2) citizens of a State, and foreign states or citizens or subjects thereof; and
- (3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

⁸456 F.2d 63 (4th Cir. 1972).

⁹*Id.* at 67.

¹⁰N.C. GEN. STAT. § 28-173 (Repl. vol. 1966). This section requires the wrongful death action to be brought by the administrator or executor of the decedent's estate.

¹¹456 F.2d at 64. N.C. GEN. STAT. § 28-8 (Repl. vol. 1966) provides in part:

The clerk shall not issue letters of administration or letters testamentary to any person who, at the time of appearing to qualify—

• • • •

- (2) Is a non-resident of this state; but a non-resident may qualify as executor.

The residency requirement of § 28-8 extends to plaintiff administrators in wrongful death suits. See *Monfils v. Hazlewood*, 218 N.C. 215, 10 S.E.2d 673 (1940), *cert. denied*, 312 U.S. 684 (1941). It has been held that a local administrator is needed only when suit is filed in a court sitting in North Carolina. *General Steel Tank Co. v. Conner*, 387 F.2d 372 (5th Cir. 1967). In *Conner*, the Fifth Circuit held that the North Carolina law had no extra-territorial effect; therefore, when a district court in Georgia, following Georgia's conflict rule applied North Carolina's wrongful death statute, the resident administrator requirement [of § 28-8(2)] had no effect. *Id.* at 373.

Still within the statutory period, the decedent's grandfather, a resident of North Carolina, was qualified as ancillary administrator by a North Carolina court. A second action was brought, in the name of the grandfather, in which the father joined. This action was also dismissed for lack of complete diversity between the parties.¹² Since the ancillary administrator, as the only party vested with the statutory right to sue,¹³ was the real party in interest, the district court held that diversity did not exist.¹⁴ On appeal, the Fourth Circuit reversed, holding that for diversity purposes the beneficiaries¹⁵ were the real parties in interest in cases where a particular state law required the appointment of an ancillary administrator.¹⁶

The facts of *Miller* presented the Fourth Circuit with two obvious alternatives. It could have granted diversity jurisdiction by striking down N.C. GEN. STAT. § 28-8(2) as unconstitutional on the ground that a state statute exercising dominion over federal jurisdiction violates the Supremacy Clause.¹⁷ To have chosen this avenue of approach would have required an extension of prior Supreme Court decisions¹⁸ and would also have put the Fourth Circuit in conflict with another circuit;¹⁹ however, only a limited number of jurisdictions would be affected by such a prece-

¹²*Miller v. Perry*, 307 F. Supp. 633 (E.D.N.C. 1969).

¹³The right to sue for wrongful death is purely a creature of statute; the right did not exist at common law. See *Horney v. Meredith Swimming Pool Co.*, 267 N.C. 521, 148 S.E.2d 554 (1966).

¹⁴307 F. Supp. at 637.

¹⁵In this factual configuration, the decedent's father was at once the Florida principal administrator and the beneficiary of the estate. Under either Florida or North Carolina law, the parents would share equally, or the surviving parent would take the estate completely, in the absence of a spouse or lineal heirs of the decedent. FLA. STAT. ANN. § 731.23(4) (1964); N.C. GEN. STAT. § 29-15(3) (Repl. vol. 1966). The decedent was nineteen years old and unmarried.

¹⁶456 F.2d at 67.

¹⁷U.S. CONST. art. VI. The portion of article VI, known as the Supremacy Clause, provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

¹⁸See text accompanying notes 75-80 *infra*.

¹⁹See *Seymour v. Johnson*, 235 F.2d 181 (6th Cir. 1956); *Ockerman v. Wise*, 202 F.2d 144 (6th Cir. 1953). In both *Seymour* and *Ockerman*, the Sixth Circuit felt compelled to deny diversity jurisdiction in a wrongful death suit where the appointment of a resident ancillary administrator was required by Kentucky law. The Kentucky legislature has since changed its qualifications for administrators, allowing personal representatives of intestates to be non-residents in certain cases. KY. REV. STAT. ANN. § 395.005 (1972).

dent.²⁰ Alternatively, the court could have affirmed the district court by following existing case law as exemplified by *Mecom v. Fitzsimmons Drilling Co.*²¹ In *Mecom*, the Supreme Court decided that in cases involving executors and administrators, the citizenship of such representatives controls for diversity purposes when they have the power to bring suits or be sued.²² To have chosen this second alternative would not have resulted in any conflict with other circuits and would have followed precedent²³ which developed after *Mecom*.

However, neither alternative was apparently palatable to the *Miller* court; it was unwilling to deal with the constitutional issue, yet it was desirous of reaching an equitable result based on the congressional purpose underlying diversity jurisdiction.²⁴ Consequently, the Fourth Circuit decided to allow jurisdiction, distinguishing substantial precedent by obscure reasoning.²⁵

The *Miller* court initiated its analysis by acknowledging that there was a potential constitutional question involved.²⁶ The Supreme Court has held state statutes unconstitutional which explicitly limited the availability of wrongful death actions to their own courts²⁷ as violative of the Supremacy Clause of the Constitution.²⁸ However, the Fourth Circuit contended that the North Carolina statute presented no such problem, in spite of the Supreme Court's *Mecom* holding.²⁹ The court reasoned that unless *Mecom's* rule was "constitutionally required," and an "inflexible, essential ingredient,"³⁰ there would be no need to label the North Carolina statute unconstitutional, and it could be given "full force and recognition . . . without attribution . . . of impermissible dominion and control

²⁰*E.g.*, Georgia, North Carolina, Virginia, and West Virginia. See note 1 *supra*.

²¹284 U.S. 183 (1931).

²²*Id.* at 186-87.

²³See *Hot Oil Service, Inc. v. Hall*, 366 F.2d 295 (9th Cir. 1966); *Seymour v. Johnson*, 235 F.2d 181 (6th Cir. 1956); *Ockerman v. Wise*, 202 F.2d 144 (6th Cir. 1953). See also *Grady v. Irvine*, 254 F.2d 224 (4th Cir.), *cert. denied*, 358 U.S. 819 (1958).

²⁴456 F.2d at 67. The Fourth Circuit stated: "Diversity jurisdiction exists for the protection of the noncitizen who is obliged to sue or to be sued in the state of his adversary." That this was the purpose of the drafters of the Constitution in establishing diversity jurisdiction was first asserted by Chief Justice Marshall in *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809). Not all scholars accept this as the underlying purpose of diversity. See Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928).

²⁵456 F.2d at 68.

²⁶*Id.* at 64.

²⁷See *Railway Co. v. Whitton's Adm'r*, 80 U.S. (13 Wall.) 270, 286 (1871); *cf.* *First Nat'l Bank v. United Air Lines, Inc.*, 342 U.S. 396 (1952).

²⁸Note 17 *supra*.

²⁹456 F.2d at 65.

³⁰*Id.*

over federal jurisdiction."³¹ With this declaration of intent, the court proceeded to its decision by limiting the *Mecom* rule, using as its source the Supreme Court's decision in *Kramer v. Carribean Mills, Inc.*³²

The court was quick to point out that it considered *Mecom* to be a case of an "extraordinary"³³ nature; certainly the facts of the case were complex. An Oklahoma widow was the administratrix of her husband's estate. She commenced a wrongful death action against the defendant, a Louisiana corporation, in an Oklahoma state court. The defendant then removed to federal court, whereupon the plaintiff secured a voluntary dismissal. These same events occurred twice more, each subsequent action being cut short by a voluntary dismissal. Finally, the plaintiff administratrix resigned and upon her request the Oklahoma probate court appointed *Mecom*, a Louisiana attorney, in her place. He then filed another wrongful death action in the Oklahoma court, and again the defendant removed to federal court; a motion to remand to the state court was denied and a trial on the merits followed. On appeal, the district court's retention of jurisdiction was affirmed by the Tenth Circuit,³⁴ because the former administratrix was held to be the "real party in interest" and the Louisiana attorney but a "nominal" party.³⁵

The Supreme Court came to the opposite result, finding a relationship of trust on the part of the administrator: "The applicable statutes make the administrator the trustee of an express trust and require the suit to be brought and controlled by him."³⁶ Since the administrator had such responsibilities, his citizenship was determinative for jurisdictional purposes. Even though he did not sign his own bond, did not go to Oklahoma to be appointed, and upon appointment named the former administratrix his Oklahoma agent, he was not the nominal party the Tenth Circuit thought him to be.³⁷ Since his citizenship was the same as that of the defendant corporation, there was no right to removal, regardless of the motive behind his appointment.³⁸

³¹*Id.*

³²394 U.S. 823 (1969).

³³456 F.2d at 65.

³⁴*Mecom v. Fitzsimmons Drilling Co.*, 47 F.2d 28 (10th Cir. 1931).

³⁵*Id.* at 30. Since this decision was prior to the adoption of the Federal Rules of Civil Procedure, the notion of real party in interest was not as clearly defined as it is today under Rule 17(a). The Tenth Circuit based its holding on the *cestui que use* concept of parties, and consequently looked to the widow-beneficiary as the *cestui que use*. The Fourth Circuit in *Miller* did much the same without the use of the common law language. For a further discussion of nominal parties generally and in the *Miller* context, see note 66 and text accompanying notes 66-71 *infra*.

³⁶284 U.S. at 186-87.

³⁷*Id.* at 188.

³⁸*Id.* at 190.

This factual configuration hardly made *Mecom* an exceptional case; rather *Mecom* represented a continuance of earlier Supreme Court decisions.³⁹ Yet the *Miller* court felt that citizenship of the representative was not "constitutionally or inflexibly the criterion for ultimate determination of diversity,"⁴⁰ as *Mecom* has been previously read.⁴¹ This would seem to be a correct evaluation of *Mecom*; what made the citizenship of the Louisiana administrator important in that case was his power to bring suit and responsibility to the beneficiaries. In such a trustee capacity, he was deemed the real party in interest under federal standards.⁴²

However, the *Miller* court's use of *Kramer* to give flexibility to *Mecom* was not appropriate; *Kramer* did not go to the same issues as did *Mecom*. *Kramer* concerned a Panamanian corporation's assignment to a Texas attorney of its rights under a contract made with respondent Carribean Mills, a Haitian corporation.⁴³ Carribean Mills breached the contract, at which point the Panamanian corporation then assigned its interest in the contract to *Kramer* for the stated consideration of one dollar. Thereafter, *Kramer*, by separate agreement of the same day, agreed to give to the Panamanian corporation ninety-five percent of any amount recovered by an action on the contract. The Supreme Court saw *Kramer* as concerned with one issue: "whether *Kramer* was 'improperly or collusively made' a party 'to invoke the jurisdiction' of the District Court, within the meaning of 28 U.S.C. § 1359."⁴⁴ The Court found it

³⁹See *Rice v. Houston*, 80 U.S. (13 Wall.) 66 (1871); *Childress v. Emory*, 21 U.S. (8 Wheat.) 642 (1823); *Chappedelaine v. Dechenaux*, 8 U.S. (4 Cranch) 306 (1808). In *Childress* and *Chappedelaine*, the Supreme Court asserted that the citizenship of the person having the legal right to sue and to represent those having a beneficial interest in recovery, rather than the citizenship of those whom he represents, is controlling for diversity purposes, provided that the representative has actual power to control the suit. Chief Justice Marshall felt the rule of *Childress* and *Chappedelaine* to be "the universally received construction" that "jurisdiction is neither given nor ousted by the relative situation of the parties concerned in interest, but by the relative situation of the parties named on the record." *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 856 (1824).

⁴⁰456 F.2d at 65.

⁴¹*Bush v. Carpenter Brothers, Inc.*, 447 F.2d 707, 711 (5th Cir. 1971). See also *Missouri v. Homesteader Life Ass'n*, 90 F.2d 543, 549 (8th Cir. 1937); *Worcester County Trust v. Long*, 14 F. Supp. 754, 757 (D. Mass. 1936).

⁴²284 U.S. at 186-87.

⁴³394 U.S. 823 (1969).

⁴⁴*Id.* at 825. 28 U.S.C. § 1359 (1970) provides:

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.

This section has created, in effect, an exception to the principle that the citizenship of the real party in interest is controlling in diversity determinations. See 3A J. MOORE, FEDERAL PRACTICE ¶ 17.06[2], at 206-07 (2d ed. 1970).

unnecessary to consider whether motive in the creation of diversity in cases required to be brought by an administrator was improper or collusive under § 1359.⁴⁵ The Court also distinguished the positions of administrators from assignees to buttress its unwillingness to consider administrators and other personal representatives.⁴⁶

The Fourth Circuit, however, found that

[a]t the very least, *Kramer* authorizes attention to the substantive relation of the administrator, the beneficiaries and others to the controversy before an undiscriminating decision that the citizenship of a representative controls the determination of diversity jurisdiction.⁴⁷

Such a construction of *Kramer* seems at best questionable. The *Kramer* decision might indeed have been relevant if there was any inference of collusion to create diversity in *Miller*, but such was clearly not the case. *Miller's* ancillary administrator was appointed pursuant to statute, not to obtain federal jurisdiction, but in order that the action could be brought.⁴⁸ Additionally, the statutorily required appointment of the ancillary administrator in *Miller* had the effect of destroying diversity rather than creating it. The Fourth Circuit treated the distinction between creation and destruction as "insignificant."⁴⁹ However, an examination of situations involving § 1359 reveal that such distinction may indeed be significant.⁵⁰

Section 1359 is not applicable to situations involving the *destruction* of diversity, whether collusive or not;⁵¹ rather it controls only as to the

⁴⁵394 U.S. at 828 n.9.

⁴⁶*Id.*

⁴⁷456 F.2d at 66.

⁴⁸The first dismissal was sua sponte by Judge Larkins because the Florida administrator was unable to bring a wrongful death action. Motive was not at issue; while motive is important in § 1359 cases, it was not in *Miller*, since without the appointment of an ancillary administrator, no action was possible. It can be reasonably inferred that the "motive" behind the ancillary administrator's appointment was to allow suit to be brought.

⁴⁹456 F.2d at 66. *But see* *Lester v. McFaddon*, 415 F.2d 1101, 1104 (4th Cir. 1969), in which the Fourth Circuit gave greater significance to the distinction between the creation and the destruction of diversity. *See also* *McSparran v. Weist*, 402 F.2d 867, 875 (3d Cir. 1968), *cert. denied*, 395 U.S. 903 (1969).

⁵⁰*See* *Bass v. Texas Power & Light Co.*, 432 F.2d 763 (5th Cir. 1970), *cert. denied*, 401 U.S. 975 (1971); *O'Brien v. Avco Corp.*, 425 F.2d 1030 (2d Cir. 1969); *Lester v. McFaddon*, 415 F.2d 1101 (4th Cir. 1969); *McSparran v. Weist*, 402 F.2d 867 (3d Cir. 1968), *cert. denied*, 395 U.S. 903 (1969).

⁵¹*See* *Oakley v. Goodnow*, 118 U.S. 43 (1886). *Oakley* involved Ch. 137, § 5 of the Act of March 3, 1875, 18 Stat. 470, the predecessor of 28 U.S.C. § 1359. The Supreme Court stated:

While, therefore, the courts of the United States have under the act of

creation of diversity. Therefore *Kramer*, which involved the collusive creation of diversity and turned on an examination of the meaning of § 1359, could have little to do with *Mecom*, a case involving the destruction of diversity, with which § 1359 does not deal at all. Rather than view *Kramer* in this light however, the *Miller* court attributed to it substantially more import than an analysis of the application of § 1359. To the Fourth Circuit, the significance of *Kramer* lay in a grant of authority to examine duties and responsibilities of a representative before determining the existence of diversity jurisdiction. To be sure such an examination was necessary in *Kramer* because of the mandate of the statute,⁵² but § 1359 does not require any such determination when diversity destruction is involved. It is therefore difficult to imagine how *Kramer*, dealing as it did with § 1359, can be construed to give any sort of blanket authority to consider representative duties and responsibilities when the actions proscribed by § 1359 are not at all involved.

The Fourth Circuit subsequently supported its contention that *Kramer* modified *Mecom* by pointing to prior circuit court decisions.⁵³ Consequently, the court felt justified in examining the parties named on the record before it. It occurred to the court that this was really a case where federal diversity jurisdiction was present:

In every real sense, this is a diversity case. Had the young Floridian survived, he clearly could have held the North Carolina defendants accountable in a federal court. Since his beneficiaries are Floridians, the controversy is no less interstate after his death than before.⁵⁴

As a result, the *Miller* court felt that looking to the beneficiaries was justifiable where a resident ancillary administrator was required to repre-

1875 the power to dismiss or remand a case, if it appears that a colorable assignment has been made for the purpose of imposing on their jurisdiction, no authority has as yet been given them to take jurisdiction of a case by removal from a State court when a colorable assignment has been made to prevent such a removal.

Id. at 45. There is no statute similar to § 1359 requiring that diversity jurisdiction, which has been artificially defeated, be sustained, 3A J. MOORE, FEDERAL PRACTICE ¶ 17.05[2], at 152 (2d ed. 1970).

⁵²See text of 28 U.S.C. § 1359 at note 44 *supra*.

⁵³456 F.2d at 66. The Fourth Circuit drew support from *Green v. Hale*, 433 F.2d 324 (5th Cir. 1970); *Bass v. Texas Power & Light Co.*, 432 F.2d 763 (5th Cir. 1970), *cert. denied*, 401 U.S. 975 (1971); *O'Brien v. Avco Corp.*, 425 F.2d 1030 (2d Cir. 1969); and *McSparran v. Weist*, 402 F.2d 867 (3d Cir. 1968), *cert. denied*, 395 U.S. 903 (1969). Because all these cases dealt with § 1359 and the collusive creation of diversity, it is difficult to see how they can be used to support the proposition that *Kramer*, a § 1359 case, expanded the analysis required by *Mecom*, a destruction of diversity case.

⁵⁴456 F.2d at 67.

sent the interests of noncitizen beneficiaries as a consequence of the laws of the state in which the claim arose.⁵⁵ To do so, the court contended, would be in fact what the Supreme Court of North Carolina had done. To support its decision, the court looked to North Carolina decisions defining real party in interest.⁵⁶ Yet the notion of real party in interest is far from concrete in North Carolina, and it is questionable to what extent North Carolina's concept of the term has any relationship to that implicit in the Federal Rules of Civil Procedure.⁵⁷

Real party in interest is a procedural matter,⁵⁸ and therefore federal law controls, even in diversity cases.⁵⁹ If the Fourth Circuit was going to make a true real party in interest analysis, it should have looked first to federal law for the definition of the term,⁶⁰ because most authorities agree that the real party in interest under federal law is "the party who, by substantive law, possesses the right sought to be enforced, and not necessarily the person who might finally benefit from any action."⁶¹ Then the

⁵⁵*Id.*

⁵⁶*Id.*

⁵⁷FED. R. CIV. P. 17(a) provides:

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 his own name without joining with him the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

For an excellent explanation of real party in interest in federal courts, see *Allen v. Baker*, 327 F. Supp. 706, 710 (N.D. Miss. 1968).

⁵⁸*Montgomery Ward & Co. v. Callahan*, 127 F.2d 32, 36 (10th Cir. 1942); *Hughey v. Aetna Cas. & Sur. Co.*, 32 F.R.D. 340, 341 (D. Del. 1963); *DuVaul v. Miller*, 13 F.R.D. 197, 198 (W.D. Mo. 1952).

⁵⁹*Hanna v. Plumer*, 380 U.S. 460, 469-70 (1965); see *Erie R.R. v. Tompkins*, 304 U.S. 64, 78, 92 (1938). As Professor Wright observes, ". . . there is no longer an *Erie* problem on matters covered by the Civil Rules. If the rule is valid, and if it applies to the case it is controlling, and no regard need be paid to contrary state provisions." C. WRIGHT, *LAW OF FEDERAL COURTS* § 59, at 245 (2d ed. 1970) [hereinafter cited as WRIGHT].

⁶⁰*American Fidelity & Cas. Co. v. All American Bus Lines*, 179 F.2d 7, 10 (10th Cir. 1949); *Silvious v. Helmick*, 291 F. Supp. 716, 717 (N.D. W. Va. 1968); *McNeil Constr. Co. v. Livingston State Bank*, 185 F. Supp. 197, 200-01 (D. Mont. 1960), *aff'd*, 330 F.2d 88 (9th Cir. 1962); *cf. Horton v. Liberty Mut. Ins. Co.*, 367 U.S. 348, 352-53 (1961).

⁶¹WRIGHT § 70, at 293. See *Gagliano ex rel. Gagliano v. Bernsen*, 243 F.2d 880 (5th Cir. 1957); *Dixey v. Federal Compress & Warehouse Co.*, 132 F.2d 275 (8th Cir. 1942);

court should have looked to state law to determine the party who has such a right, which would have led in turn to the North Carolina wrongful death statute.⁶² As Professor Wright points out, the definition of real party in interest of the forum state is not applicable because it governs only a party's right to sue in state courts.⁶³ Since the federal courts, under Rule 17(a),⁶⁴ look only to that part of state law which grants the right to sue, the Fourth Circuit's consideration of North Carolina definitions of the real party in interest and illustrative cases such as *Broadfoot v. Everett*⁶⁵ for support of its position is an exercise in futility; it makes no difference whom North Carolina law defines as the real party in interest.

Likewise, it is difficult to see the ancillary administrator, required by the North Carolina statute, as a nominal party under the Federal Rules as the Fourth Circuit seems to have done.⁶⁶ The properly appointed administrator must exist for any action to be prosecuted.⁶⁷ He is the proper party plaintiff in a wrongful death action⁶⁸ and has authority and responsibility; he is not a mere figurehead.⁶⁹ Such an administrator must exist;

Clark & Moore *A New Federal Civil Procedure II. Pleadings and Parties*, 44 YALE L.J. 1291 (1935); F. JAMES, CIVIL PROCEDURE, § 9.2 (1965).

⁶²Cases cited at note 60 *supra*.

⁶³C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1544 at 647-48 (1971).

⁶⁴Text of Rule 17(a) appears at note 57 *supra*.

⁶⁵270 N.C. 429, 154 S.E.2d 522 (1967). The language in *Broadfoot* which the Fourth Circuit found "illustrative" was apparently: "His intestate's widow and two surviving children, not he [the administrator], are the real parties in interest." 154 S.E.2d at 525.

⁶⁶456 F.2d at 67. Since the *Miller* court did not consider the ancillary administrator the real party in interest, it could only have meant "nominal" party, since only nominal parties may be disregarded in the determination of diversity jurisdiction. *Salem Trust Co. v. Manufacturers' Fin. Co.*, 264 U.S. 182 (1924). In order to be disregarded as a nominal party, however, the party cannot possess actual powers with regard to the litigation. Only "[w]here the representative cannot prevent the institution or prosecution of actions, or exercise any control over them . . ." may he be treated as a nominal party. WRIGHT § 29, at 94. See *Susquehanna & Wyo. Valley Ry. & Coal Co. v. Blatchford*, 78 U.S. (11 Wall.) 172, 177 (1870). See also *Howard v. United States*, 184 U.S. 676 (1902) (formal obligee of a bond as a nominal party); *Boon's Heirs v. Chiles*, 33 U.S. (8 Pet.) 532 (1834) (dry passive trustee as nominal party).

⁶⁷*Young v. Marshburn*, 10 N.C. App. 729, 180 S.E.2d 43, 45 (1971).

⁶⁸*Brendle v. Gen. Tire and Rubber Co.*, 408 F.2d 116, 118 (4th Cir. 1969) (applying North Carolina law).

⁶⁹*First Union Nat'l Bank v. Hackney*, 266 N.C. 17, 145 S.E.2d 352 (1965). The *Miller* court distinguished the result of this case, saying that for the North Carolina Supreme Court to have done otherwise would have been irrational, and indicated that *Hackney* posed no problem to *Broadfoot*, 456 F.2d at 67. *Broadfoot*, however, was concerned with a conflicts problem, and the ancillary administrator in question was a Pennsylvania citizen. 154 S.E.2d at 523.

North Carolina cases vacillate considerably, holding that beneficiaries are the real parties in interest for purposes of North Carolina law, *but* the administrators have substan-

if no one has applied for or been issued letters of administration within six months, a North Carolina statute provides that a public administrator shall be issued letters,⁷⁰ even though only a right of action for wrongful death may exist.⁷¹ Therefore, even if an examination of North Carolina law was necessary, it would seem that an administrator would have been appointed whether or not the decedent's father, the Florida administrator, had wanted one appointed. This casts doubt upon any claim of "nominal" status for the ancillary administrator, regardless of whether or not he is considered the real party in interest. Describing the ancillary administrator as a nominal party would be equivalent to discarding the analysis required by Rule 17(a) in the event of a conflict with the policy behind diversity.

While the *Miller* court said that the North Carolina cases it cited were illustrative,⁷² the use of the word "illustrate" is misleading. The court confirmed its real objective in its closing remarks which made reference to the American Law Institute's *Study of the Division of Jurisdiction Between State and Federal Courts*.⁷³ The court's language indicates a desire to follow that proposal and that its *Miller* holding was the nearest thing possible, since the proposal is not yet law.⁷⁴

The Fourth Circuit had, however, another alternative,⁷⁵ striking down

tial powers and responsibilities. See, e.g., *In re Ives' Estate*, 248 N.C. 176, 102 S.E.2d 807 (1958); *McCoy v. Atlantic Coast Line R.R.*, 229 N.C. 57, 47 S.E.2d 532 (1948); *Davenport v. Patrick*, 227 N.C. 686, 44 S.E.2d 203 (1947).

⁷⁰N.C. GEN. STAT. § 28-20 (Repl. vol. 1966).

⁷¹See N.C. GEN. STAT. § 28-2.3 (Repl. vol. 1966). Even though no assets exist within the state except a right of action for wrongful death, an administrator can be appointed. The right of action is itself an asset. *In re Scarborough*, 261 N.C. 565, 135 S.E.2d 529, 531 (1964).

⁷²456 F.2d at 68.

⁷³ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1301 (1969 Official Draft).

⁷⁴456 F.2d at 68.

⁷⁵It might be suggested that the Fourth Circuit could have granted diversity jurisdiction without finding the North Carolina statute unconstitutional or torturing *Kramer*. If the first dismissal could be viewed as a result of a determination that the doctrine of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), required dismissal because of noncompliance with section 28-8(2), the Fourth Circuit might have analyzed *Miller* on the basis of *Byrd v. Blue Ridge Rural Elec. Cooperative, Inc.*, 356 U.S. 525 (1958). In *Byrd* the Supreme Court directed that federal policy as to how federal courts should be run be added as an affirmative countervailing consideration to the balance when testing the control of state law. Using the *Byrd* analysis, the Fourth Circuit might have viewed the policy underlying diversity as an affirmative countervailing consideration outweighing North Carolina's interest in statutorily requiring resident administrators when the statute works to destroy diversity. Such a result was approached in *Szantay v. Beech Aircraft Corp.*, 349 F.2d 60 (4th Cir. 1965), in which the Fourth Circuit held that the federal policy behind diversity, among other federal policy considerations, overrode a South Carolina door-closing statute.

the North Carolina statute requiring a resident administrator as unconstitutional. Such a result seems to arise from looking, at least initially, to *Railway Co. v. Whitton's Administrator*.⁷⁶ There the Supreme Court held:

Whenever a general rule as to property or personal rights, or injuries to either, is established by State legislation, its enforcement by a Federal court in a case between proper parties is a matter of course, and the jurisdiction of the court, in such case, is not subject to State limitation.⁷⁷

However, an analysis using *Whitton* may not be completely satisfactory because it can be distinguished from *Miller* in that *Whitton* involved a statute which *explicitly* limited a wrongful death action to the state courts, while the North Carolina statute is but an *implicit* limitation. *Mexican Central Railway v. Pinkney*⁷⁸ is more on point in a situation involving an implicit limitation. In *Pinkney* it was argued that a Texas statute which provided that jurisdictional immunity would be waived by a representative appearance was binding on the federal courts. The Supreme Court held to the contrary:

[T]he jurisdiction of the Circuit Courts of the United States has been defined and limited by the acts of Congress, and can be neither restricted nor enlarged by the statutes of a State.⁷⁹

Seemingly then, a permutation of federal jurisdiction by states, be it direct or indirect, has been rejected by the Supreme Court. Unless a state closes its judicial doors to a particular class of persons in other than a purely procedural matter, states cannot limit indirectly federal jurisdiction.⁸⁰

To have found the statute unconstitutional would have allowed the Millers a federal forum without complicating diversity determination

Such an analysis, however, is suspect because the first determination by the district court may be viewed not as an *Erie* decision, but as one arising from the command of Rule 17(a). Rule 17(a) required the district court to apply the federal real party in interest standard when determining whether the proper parties were before the court. Thus, the Fourth Circuit was entrapped by a conflict between the policy underlying diversity and a Federal Rule rather than by a state law-federal policy conflict.

⁷⁶80 U.S. (13 Wall.) 270 (1871).

⁷⁷*Id.* at 286.

⁷⁸149 U.S. 194 (1893).

⁷⁹*Id.* at 206.

⁸⁰The North Carolina statute does not "close the doors" of state courts to claims of nonresident administrators, since the claims can be prosecuted using the ancillary administrator device. See generally WRIGHT § 46, at 174-77. See also Stewart, *The Federal "Door Closing" Doctrine*, 11 WASH. & LEE L. REV. 154 (1954).

procedure. To have done so would also have eliminated potential equal protection objections to the North Carolina statute. While § 28-8(2) disqualifies anyone who is not a North Carolina resident from being an administrator of an intestate's estate, it does not disqualify a non-resident executor of a testate's estate,⁸¹ albeit the powers and responsibilities of executors and resident administrators are substantially the same insofar as powers to institute or defend actions are concerned.⁸² All a non-resident executor need do is appoint a resident process agent,⁸³ while an administrator must himself be a resident of the state.⁸⁴ This would seem to be not only an unnecessary complication but also an effective penalizing of the heirs of those who die intestate by virtue of allowing more limited representation than for those who die testate. The striking down of the North Carolina statute as unconstitutional would have admittedly put the Fourth Circuit in conflict with the Sixth Circuit.⁸⁵ However, to look to the beneficiaries still puts the Fourth Circuit in conflict with other circuits, as well as with the Supreme Court and "conventional wisdom."⁸⁶

Seemingly overlooked by the *Miller* court is another ramification of its decision. If followed, it will lead to extensive procedural complications, substantially delaying trial by necessitating an in depth party examination. The simplicity of *Mecom* and earlier holdings⁸⁷ allows an instant determination of diversity; only in § 1359 situations does more extensive examination become necessary, that is, only in cases involving allegedly collusively created diversity. However, the *Miller* decision will lead to mandatory, presumably pretrial, party exploration, perhaps even going substantially beyond the pleadings. This would be going further than the requirements of Rule 17(a), which limits its examination to that party who is entitled, under substantive law, to bring suit.⁸⁸ While this could perhaps be rectified by an inclusion in the pleadings of a reference to the existence of a beneficiary/administrator conflict, this too would be going beyond the Federal Rules which make no provision for such a complicated procedure. If in fact one of the primary purposes of the Federal Rules is to simplify pleading,⁸⁹ any complication going at cross-purposes to such aim would seem to be hard to justify.

The Fourth Circuit felt that the federal forum should be allowed the

⁸¹See note 11 *supra*.

⁸²N.C. GEN. STAT. §§ 28-8(2), 28-182 (Repl. vol. 1966).

⁸³N.C. GEN. STAT. § 28-186 (Repl. vol. 1966).

⁸⁴See note 11 *supra*.

⁸⁵See note 19 *supra*.

⁸⁶WRIGHT § 29 n.19 (Supp. 1972).

⁸⁷Note 41 *supra*.

⁸⁸See text accompanying note 57 *supra*.

⁸⁹Conley v. Gibson, 355 U.S. 41, 47-48 (1957).