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Manufactured Diversity--Appointment of a Nonresident Fiduciary Representative in Order to Create Federal Diversity Jurisdiction

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NOTES

MANUFACTURED DIVERSITY—APPOINTMENT OF A NONRESIDENT FIDUCIARY REPRESENTATIVE IN ORDER TO CREATE FEDERAL DIVERSITY JURISDICTION

I. Introduction

A great portion of the cases heard in federal district courts today arrive there by way of diversity of citizenship jurisdiction pursuant to section 1332[1] of the Federal Judiciary Act. The abuses of diversity jurisdiction have been many, but no one abuse has been so flagrant as manufactured diversity.[2] Manufactured diversity, sometimes called artificial diversity, exists when a representative is appointed to provide the requisite diversity lacked by the party he represents, necessary to have the action brought in federal district court. Courts have almost consistently sustained jurisdiction when the appointed party has been a fiduciary representative, as a general guardian, executor or administrator, or a trustee. In *McSparran v. Weist*,[3] however, the Court of Appeals for the Third Circuit denied jurisdiction in a situation involving manufactured diversity by appointment of a nonresident guardian, stating that section 1359 of the Judiciary Act denied jurisdiction in cases in which diversity had been "improperly or collusively" made.[4] In so doing, the court overruled its own landmark decision of *Corabi v. Auto Racing, Inc.*[5]

It is the purpose of this article to consider both the practice of manufacturing diversity jurisdiction by appointing a nonresident fiduciary to represent a resident beneficiary, and the effect of section 1359 on this practice. It is felt that the proper interpretation of section 1359 will apply equally to administrators and executors, general guardians, and trustees even

1. 28 U.S.C. § 1332 (1964).
2. For a general discussion of the history of manufactured diversity and a criticism, see Cohan & Tate, *Manufacturing Federal Diversity Jurisdiction by the Appointment of Representatives: Its Legality and Propriety*, 1 Vill. L. Rev. 201 (1956).
3. 402 F.2d 867 (3d Cir. 1968).
4. 28 U.S.C. § 1359 (1964).
5. 264 F.2d 784 (3d Cir. 1959); Annot., 75 A.L.R.2d 711 (1961).

though their functions and modes of appointment differ. Situations involving assignments of claims made to create diversity, however, are outside the scope of this article and will not be considered because different criteria are used to determine when an assignment comes within section 1359.[6]

II. THE HISTORY OF DIVERSITY JURISDICTION

The Constitution of the United States provides that "[t]he judicial Power shall extend to all . . . Controversies . . . between citizens of different States . . . ."[7] The first Congress exercised this grant of power by including a provision for diversity jurisdiction in the Judiciary Act of 1789.[8] Congress thereby gave federal courts of original jurisdiction the power to hear cases in which diversity of citizenship existed, although, of course, the states had concurrent jurisdiction. "[N]either the debates of the Constitutional Convention nor the records of the First Congress shed any substantial light on why such jurisdiction was granted by the Constitution or why the First Congress exercised its option to vest such jurisdiction."[9] To this day, there is no agreement as to why diversity jurisdiction was created or what justifies its present existence.[10]

While the reasons for the existence of diversity jurisdiction are obscure and disputed, the most frequently heard and most widely accepted explanation is that diversity jurisdiction was created to protect nonresident litigants from local prejudice in state courts. Support for this explanation can be found in *Bank*

6. This difference is due to the fact that assignments are commercial in nature, and the only result of an assignment could be to achieve diversity status, thus requiring the courts to consider whether the transfer was real and complete. In the case of a fiduciary representative, the appointment is accompanied by certain duties imposed by state law, irrespective of the motives for appointment. Traditionally, courts have dealt more harshly with attempts to gain access to federal courts by assignment than with similar attempts involving appointment of fiduciary representatives. *See* Caribbean Mills, Inc. v. Kramer, 392 F.2d 387 (5th Cir. 1968).

7. U.S. CONST. art. III, § 2.

8. Act of September 24, 1789, ch. 20, § 11, 1 Stat. 73.

9. C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 23, at 64 (West 1963).

10. For a general discussion of the history of diversity jurisdiction and the propriety of its current existence, see Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928); Yntema & Jaffin, *Preliminary Analysis of Concurrent Jurisdiction*, 79 U. PA. L. REV. 869 (1931); 1 J. MOORE, FEDERAL PRACTICE ¶ 0.71 at 701.10—.80 (2d ed. 1964); 1 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 26, at 131-56 (Wright ed. 1960); C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 23, at 64-69 (West 1963).

of the United States v. Deveaux,[11] an opinion by Chief Justice Marshall. However, some writers argue that there is no evidence that such prejudice was present in state courts at the time the Constitution was written.[12]

From a very early date, it was recognized that the citizenship of a fiduciary representative, rather than the citizenship of the beneficiary, was controlling for purposes of determining the existence of diversity citizenship. In *Chappedelaine v. Dechenaux*,[13] decided in 1808, Chief Justice Marshall upheld jurisdiction in a case in which the plaintiffs were nonresident (alien) trustees even though the citizenship of the plaintiff's beneficiary was the same as that of the defendant.[14] Since that date it has been consistently held that the citizenship of the representative is determinative of the presence of diversity—whether the representative be a trustee,[15] or executor or administrator,[16] or a general guardian.[17] (It should be noted that only a general guardian's citizenship is determinative. In cases of lesser guardians, such as guardians ad litem, the citizenship of the beneficiary is looked to for diversity purposes.)[18] The problem under consideration arises when a fiduciary representative is appointed solely for the purpose of manufacturing diversity, which his beneficiary lacks, in reliance on the above principles. The question to be determined is whether such an appointment comes within the meaning of section 1359 which denies jurisdiction in cases in which a party has been improperly or collusively made in order to obtain jurisdiction.[19]

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11. 9 U.S. (5 Cranch) 61, 87 (1809).
12. *E.g.*, Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 497 (1928).
13. 8 U.S. (4 Cranch) 306 (1808).
14. *Id.* at 308.
15. Dodge v. Tulleys, 144 U.S. 451 (1892); Coal Co. v. Blatchford, 78 U.S. (11 Wall.) 172 (1871).
16. Rice v. Houston, 80 U.S. (13 Wall.) 66 (1871); Childress v. Emory, 21 U.S. (8 Wheat.) 642 (1823).
17. Mexican Central Ry. v. Eckman, 187 U.S. 429 (1903).
18. *E.g.*, Appelt v. Whitty, 286 F.2d 135 (7th Cir. 1961).
19. Why do litigants often prefer to have their cases decided in federal courts? The chief reason is that verdicts are frequently larger in federal courts than in state courts. Additionally, the rules of evidence and discovery are more liberal, and federal judges may comment on the evidence and have more freedom to direct verdicts. The method of selection of federal judges makes them less susceptible to local influences and prejudices. There are three less worthy reasons for preferring federal tribunals. First, because the Federal Rules of Civil Procedure allow a more complete presentation of the evidence, a party may prolong a trial with an accompanying increase in court costs. Second, the greater distances to federal courts can work an inconvenience on the

III. DIVERSITY JURISDICTION STATUTES

The pertinent portions of the present diversity statute, section 1332, read:

> (a) The district court 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 cost, and is between—(1) citizens of different states; . . .[20]

One of the major judicially imposed limits on this statute is the requirement of "complete" diversity, first enunciated in *Strawbridge v. Curtis*[21] in 1806. Complete diversity means that *all* parties on one side must have citizenship diverse from *all* of the parties on the opposing side. Also, the burden of proving diversity falls on the party seeking to take advantage of federal jurisdiction.

Rule 17(a) of the Federal Rules of Civil Procedure provides that "[e]very action shall be prosecuted in the name of the real party in interest." Rule 17(a) also permits a personal representative to sue in his own name without joining the beneficiary. Rule 17(b) states that the representative's capacity to sue or be sued is to be determined by the law of the state in which the district court is held. Rule 17(c) says that an infant or incompetent can be represented by his guardian, committee, or conservator. If the infant or incompetent has no such representative, he may be represented by his next friend or guardian ad litem. Several cases can be found discussing problems of section 1359 in terms of whether or not the nominal plaintiff (the representative) is the "real party in interest."[22] This approach ignores the fact that the Federal Rules deal with procedure—not jurisdiction. "A rule of procedure . . . is without

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opposing party. Third, appeals in federal courts generally involve greater expenses than a similar appeal in a state court.

For a general discussion of why litigants might prefer to have their cases heard in federal court, see Cohen & Tate, *Manufacturing Federal Diversity Jurisdiction by the Appointment of Representatives: Its Legality and Propriety*, 1 VILL. L. REV. 201, 239-40 (1956) and C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 31, at 84 (West 1963).

20. 28 U.S.C. § 1332 (1964). This section also grants jurisdiction in cases in which a citizen of a state is involved in an action with a foreign state or citizen.

21. 7 U.S. (3 Cranch) 267 (1806).

22. *E.g.*, Ferrara v. Philadelphia Laboratories, Inc., 272 F. Supp. 1000, 1004 n.1 (D. Vt. 1967).

efficacy to extend the jurisdiction of a court."[23] "It is elementary that the jurisdiction of the federal courts is neither enlarged nor restrained by [Rule 17] . . . ."[24] Instead "[t]he focus of . . . [Rule 17] is on the capacity to sue, and it does not purport to establish standards for the determination of diversity of citizenship . . . . Rule 82 expressly states [that the Federal Rules of Civil Procedure] do not affect the jurisdiction of district courts."[25] Therefore, whatever the effect of section 1359 may be on the problem of manufactured diversity in cases involving personal representatives, it is not influenced by Rule 17. The fact that the personal representative who brings the action is the "real party in interest" will not prevent the action from being "collusive" within the meaning of section 1359.[26]

Section 1359 currently provides that "[a] district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."[27] This section was adopted as part of the 1948 revision of the Judicial Code and serves as a restriction on the use of section 1332. Section 1359 "and its progenitors [have] led a long and troubled life."[28] It was derived from section 41(1) and 80 of 28 United States Code (1941 edition). Section 41(1) was an anti-assignment statute which had its origins in the first Judiciary Act of 1789.[29] Section 80 was first enacted in 1875.[30] In addition to the language of the present statute which speaks in terms of parties "improperly or collusively" made, section 80 contained a phrase providing for dismissal of an action when the court found "that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court."[31] This phrase was omitted from the 1948 revision as

23. Dery v. Wyer, 265 F.2d 804, 808 (2d Cir. 1959).
24. Rock Drilling, Blasting, Etc. v. Mason & Hanger Co., 217 F.2d 687, 693 (2d Cir. 1954).
25. McSparran v. Weist, 402 F.2d 867, 870 (3d Cir. 1968).
26. Birkins v. Seaboard Service, 96 F. Supp. 245 (D.N.J. 1950); 3 J. MOORE, FEDERAL PRACTICE ¶ 17.03, at 1320 (2d ed. 1953).
27. 28 U.S.C. § 1359 (1964).
28. Ferrara v. Philadelphia Laboratories, Inc., 272 F. Supp. 1000, 1006 (D. Vt. 1967), *aff'd on opinion below*, 393 F.2d 934 (2d Cir. 1968).
29. Act of September 24, 1789 ch. 20, § 11, 1 Stat. 73.
30. Act of March 3, 1875 ch. 137, § 5, 18 Stat. 472.
31. The predecessor of section 1359, the former 28 U.S.C. § 80, read:
> If in any suit commenced in district court, or removed from a State court to a district court of the United States, it shall appear to the satisfaction of the said district court, at any time after such suit has been brought or removed thereto, that such suit does not

unnecessary because it was felt that a court would always dismiss an action not within its jurisdiction—either on counsel's motion or even on its own motion.[32] This omitted phrase is not unimportant in the interpretation of the present statute, as will be seen.

IV. MANUFACTURED DIVERSITY

The amended version of the anti-collusion statute, section 1359, "would seem an effective barrier against the manufacturer of diversity, whether by assignment or by any other device but the decisions of case law have rendered section 1359 largely ineffective."[33]

The Court of Appeals for the Third Circuit first had occasion to deal with the problem of manufactured diversity, as affected by section 1359, in *Jaffe v. Philadelphia & Western Railroad Co.*[34] In that case an administratrix, a New Jersey citizen, brought in federal court a wrongful death action on behalf of her deceased against a Pennsylvania citizen. The administratrix was a stenographer in the office of the attorney of the deceased's widow. On appeal, the Third Circuit held that so long as the administratrix was properly appointed and had a right to bring the action under state law, the motive of her appointment was immaterial. The administratrix's citizenship was determinative of the existence of diversity jurisdiction, and such an appointment was not collusive within the meaning of section 1359. In *Fallat v. Gouran*[35] the Third Circuit again seemingly approved of manufactured diversity.

The most detailed examination given to section 1359 and the problem of manufactured diversity was in *Corabi v. Auto Racing, Inc.*,[36] a landmark decision by the Court of Appeals for

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really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, or that parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said district court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just.

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

32. *See* 28 U.S.C. § 1359 (1964) (revisor's notes).

33. C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 31, at 86 (West 1963).

34. 180 F.2d 1010 (3d Cir. 1950).

35. 220 F.2d 325 (3d Cir. 1955).

36. 264 F.2d 784 (3d Cir. 1959); Annot., 75 A.L.R.2d 711 (1961).

Third Circuit which has been extensively relied on in other jurisdictions. There, a minor who was a Pennsylvania resident was killed when a wheel detached from a race car and struck him as he sat in a grandstand. The Register of Wills granted letters of administration to the deceased minor's mother, also a Pennsylvania resident. Later the Orphan's Court permitted the mother to resign expressly for the purpose of enabling the court to appoint a nonresident as administrator d.b.n. in order that a wrongful death action could be brought in federal district court. When the nonresident administrator d.b.n. brought the action in federal district court, the defendant moved to dismiss on the ground that diversity jurisdiction had been "simulated" by the parties because the administrator d.b.n. had been appointed solely to create federal diversity jurisdiction. The defendant maintained that this appointment was collusive within the meaning of section 1359. The district court denied the motion and certified the matter to the Court of Appeals for the Third Circuit.[37] On appeal, the court, sitting en banc, held that the appointment of a nonresident administrator d.b.n. for the sole and expressed purpose of creating jurisdiction was not "collusive" or "improper" within the meaning of these terms as used in section 1359.

Corabi examined the meanings of the words "improperly" and "collusively" and determined that

> [t]he word "collusive" is a strong one. The term "collusion" indicated "A secret agreement and cooperation for a fraudulent or deceitful purpose; deceit; fraud." Webster's New International Dictionary, 2 ed. . . . "An agreement between two or more persons to defraud a person of his rights by the forms of law, or to obtain an object forbidden by law." [Also from Webster's Dictionary].[38]

The court reasoned that it could not be within the meaning of the term "collusive" to use openly a state law in an attempt to obtain a higher verdict in federal court. It considered "collusive" to be understood generally to consist of an illegal agreement between opposing counsel. The court decided the word "improperly" meant not well suited for the circumstances or having a connotation of impropriety. Guided by this logic,

37. 28 U.S.C. § 1292(b) (1964).
38. Corabi v. Auto Racing, Inc., 264 F.2d 784, 788 (3d Cir. 1959).

Corabi concluded that, had Congress meant to achieve a contrary result, it would have simply omitted the two words "improperly" and "collusively" from the statute.

The effect of *Corabi* on section 1359 has been nothing less than catastrophic:

> By focusing on the literal meanings of the two words the court virtually emasculated the statute, for it is doubtful that any of the cases reflect collusion in the sense of fraud or deceit, collusion with the other opposing party or impropriety in the sense of indecorum or indecency.[39]

The rationale of *Jaffe* and *Corabi*, moreover, led to great abuses of diversity jurisdiction. For example, in one case, it developed that the plaintiff had also appeared as the administrator in thirty-three other civil actions in federal court.[40]

Following *Corabi*, however, other circuit courts "uniformly ruled that a party's actions were not 'improper' or 'collusive' within the meaning of [section 1359], even though the sole motive [of the appointment] was to gain access to federal court, if the actions were lawful in themselves."[41] So, even where a fiduciary representative was appointed solely and admittedly to manufacture diversity, jurisdiction was uniformly sustained by the circuit courts—whether the representative be a general guardian,[42] an executor or administrator,[43] or a trustee.[44]

The only major case to the contrary was the 1949 decision of *Martineau* v. *City of St. Paul*,[45] decided by the Court of Appeals for the Eighth Circuit. In *Martineau* the appointment of a general guardian for purposes of creating diversity was said

39. Caribbean Mills, Inc. v. Kramer, 392 F.2d 387, 393 (5th Cir. 1968). The court in McSparran v. Weist, 402 F.2d 867 (3d Cir. 1968), however, admitted that "*Corabi* [had] become a leading case and [was] the authoritative foundation for the maintenance of manufactured diversity jurisdiction." *Id.* at 872.

40. Jamison v. Kammerer, 264 F.2d 789 (3d Cir. 1959).

41. C. WRIGHT, HANDBOOK OF THE LAW OF THE FEDERAL COURTS § 31, at 86 (West 1963).

42. Stephen v. Marlin Firearms Co., 325 F.2d 238 (2d Cir. 1963), *aff'g on opinion below*, 217 F. Supp. 880 (D. Conn. 1963); Fallat v. Gouran, 220 F.2d 325 (3d Cir. 1954).

43. Lang v. Elm City Constr. Co., 217 F. Supp. 873 (D. Conn.), *aff'd* 324 F.2d 235 (2d Cir. 1963); Corabi v. Auto Racing, Inc., 264 F.2d 784 (3d Cir. 1959); Jamison v. Kammerer, 264 F.2d 789 (3d Cir.), *cert. denied*, 361 U.S. 813 (1959); McCoy v. Blakely, 217 F.2d 227 (8th Cir. 1954); Jaffe v. Philadelphia & Western R.R., 180 F.2d 1010 (3d Cir. 1950).

44. County of Todd v. Loegering, 297 F.2d 470 (8th Cir. 1961).

45. 172 F.2d 777 (8th Cir. 1949).

to be within the prohibition of section 1359. Its remarks about section 1359, however, appear in an alternative holding and were made without a detailed consideration of the statute. *Martineau* was not subsequently followed by that circuit[46] and has been distinguished on the ground that the guardian was a mere agent of the probate court under Minnesota law.[47]

Finally, in *McSparran*, the Third Circuit reconsidered its prior decisions of *Jaffe* and *Corabi*.

Richard Riegner, a minor and resident of Pennsylvania, was injured in a collision while riding in an automobile driven by the defendant, Jeffery Weist, also a Pennsylvania resident. Stella McSparran, a resident of New Jersey, was appointed guardian for Richard Riegner by the Orphan's Court of Berks County, Pennsylvania. The guardian was a straw party and was chosen solely for the purpose of creating diversity jurisdiction as was later conceded on appeal. Under the decisions of the Third Circuit and, indeed, the other circuits, such an appointment was an accepted method for obtaining federal jurisdiction. The injuries sued upon, moreover, were well within the statutory jurisdictional amount of $10,000.[48] At trial, however, the district judge dismissed the action so that the judgment would be final, as required for an appeal,[49] in order that the court of appeals could rule on the question of whether Richard's mother could bring a suit for out-of-pocket medical expenses "pendent" to Richard's action.[50]

On appeal, the Court of Appeals for the Third Circuit, en banc, dismissed the entire action—on jurisdictional grounds! The court side-stepped the question of pendent jurisdiction and held that the appointment of a nonresident guardian *solely* for the purpose of creating diversity jurisdiction was improper and collusive within the meaning of section 1359, requiring dismissal of the action for want of jurisdiction. The court, moreover, expressly overruled *Jaffe v. Philadelphia & Western Railroad Co.*[51] and *Corabi v. Auto Racing, Inc.*[52] which had pre-

46. *See, e.g.*, McCoy v. Blakely, 217 F.2d 227 (8th Cir. 1954). This case was decided without mentioning the contrary decision in *Martineau*, decided five years earlier.
47. County of Todd v. Loegering, 297 F.2d 470 (8th Cir. 1961).
48. 28 U.S.C. § 1332(a) (1964).
49. 28 U.S.C. § 1291 (1964).
50. 270 F. Supp. 421 (E.D. Pa. 1967).
51. 180 F.2d 1010 (3d Cir. 1950).
52. 264 F.2d 784 (3d Cir. 1959).

viously held such manufactured diversity not to be within the scope of section 1359. These prior decisions had been extensively relied on in similar decisions in other circuits.[53]

Two judges dissented from the *McSparran* decision. Senior Judge Biggs, author of the opinion in *Corabi*, who was disqualified[54] from participating in the rehearing of *McSparran* because he had not participated in the first arguments of that case, expressed his disapproval of the majority opinion in a companion case decided that same day.[55]

The court placed great weight on the preliminary words of section 80 of 28 United States Code (1941 edition) which were omitted from section 1359.[56] The court cited the revisor's notes which stated that no alteration in the meaning of the section was intended by the omission and that the omitted words were felt to be unnecessary. Relying on this, the court concluded that these omitted, preliminary words gave meaning to

> otherwise indefinite and ambiguous words "improperly" or "collusively". They say in effect that a nominal party designated simply for the purpose of creating diversity of citizenship, who has no real or substantial interest in the dispute or controversy, is improperly or collusively named.[57]

Corabi and the other "restrictive" views of section 1359 felt that to look at the motives of an appointment would contravene the dictates of the Supreme Court of the United States in *Mecom v. Fitzsimmons*,[58] which provided that a state probate decree could not be collaterally attacked by questioning the motive behind the decree of appointment. *McSparran* distinguished *Mecom* on the ground it did not deal with the anti-collusion statute because the appointment was made to avoid diversity, while the statute only applied to situations aimed at creating diversity.[59]

53. *See, e.g.*, Lang v. Elm City Constr. Co., 324 F.2d 235 (2d Cir. 1963), *aff'g per curiam*, 217 F. Supp. 873 (D. Conn. 1963); Stephen v. Marlin Firearms Co., 325 F.2d 238 (2d Cir. 1963), *aff'g on opinion below*, 217 F. Supp. 880 (D. Conn. 1963); Janzen v. Goos, 302 F.2d 421 (8th Cir. 1962); County of Todd v. Loegering, 297 F.2d 470 (8th Cir. 1961).
54. 28 U.S.C. § 371(b) (1964).
55. Esposito v. Emery, 402 F.2d 878, 880 (3d Cir. 1968).
56. For full text of the revised section see *supra* note 31.
57. McSparran v. Weist, 402 F.2d 867, 873 (3d Cir. 1968).
58. 284 U.S. 183 (1931).
59. McSparran v. Weist, 402 F.2d 867, 885 (3d Cir. 1968). Moreover, it is hard to see why refusing to recognize the citizenship of a straw party for diversity purposes is in any way collaterally impugning the decree of a state

Two important Supreme Court decisions have dealt with sections 41(1) and 80 of the United States Code (1941 edition), the predecessors of section 1359: *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*[60] and *Lehigh Mining & Manufacturing Co. v. Kelley.*[61] These two cases seem, upon initial consideration, to come to conflicting results. *Black & White Taxicab* was cited in *Corabi* and subsequent cases as permitting manufactured diversity while *Lehigh* would seem to support an argument against manufactured diversity.

In *Lehigh*, officers and shareholders of a Virginia corporation formed a Pennsylvania corporation which had identical shareholders with the Virginia corporation. All interests of the Virginia corporation were transferred to the new corporation without consideration, leaving the old corporation in existence. This transfer of assets was made to create a case cognizable in federal court under diversity jurisdiction. The shareholders of the Virginia (plaintiff) corporation could have required the Pennsylvania corporation to convey to the Virginia corporation any recovery which might be had in court. The Court held this to be a fraud on the Court in violation of the predecessor of section 1359. A similar result was reached in *Miller & Lux v. East Side Canal & Irrigation Co.*[62]

The *Corabi* court said it "would consider the decisions in *Lehigh Mining* . . . and *Miller & Lux* as persuasive were it not for the later decision of the Supreme Court in [*Black & White Taxicab*] . . . ."[63] In *Black & White Taxicab*, a suit was brought in federal court by a Tennessee corporation against two Kentucky corporations to enjoin interference with contract rights. A similar dispute had existed between one of the defendants and the plaintiff's predecessor, also a Kentucky corporation, which had formed the Tennessee corporation and transferred its interest to the Tennessee corporation so that the action could be brought in federal court. The major factual distinction between *Black & White Taxicab* and *Lehigh* was that the parent cor-

court. This in no way questions the representative's right to bring the suit by virtue of his nominal status, any more than does looking to the citizenship of the beneficiary in the case of a guardian ad litem who has traditionally been considered only a nominal party.

60. 276 U.S. 518 (1928).
61. 64 F. 401, *aff'd* 160 U.S. 327 (1894).
62. 211 U.S. 293 (1908).
63. Corabi v. Auto Racing, Inc., 264 F.2d 784, 787 (3d Cir. 1959).

poration of *Black & White* had been dissolved, whereas in *Lehigh* the predecessor corporation remained in existence. The Supreme Court refused to dismiss *Black & White Taxicab* for want of jurisdiction upon finding that "[t]he succession and transfer were actual, not feigned or merely colorable. In these circumstances, courts will not inquire into motives when deciding their jurisdiction."[64] In *Corabi*, the circuit court decided it was prevented from inquiring into the motives of the appointment because it believed the facts of *Corabi* fell within the ambit of *Black & White Taxicab*. The court felt that the appointment of the representative was "actual, not feigned or merely colorable," presumably because under state law the appointment was bona fide and because the representative had actual duties imposed on him by state law. This logic was followed by other circuits to avoid coming within *Lehigh's* interpretation of section 1359's predecessor.

McSparran distinguished *Black & White Taxicab* on its facts by saying that in *Black & White Taxicab* the new corporation, which was created to make diversity jurisdiction possible, was not a mere "straw"—instead the transaction was a real one which had significance beyond the existence of diversity jurisdiction. The court then pointed out that in *McSparran* the record on its face showed a "naked arrangement" and nothing more. Therefore, the court reasoned, the situation in *McSparran* came within *Lehigh* in which the Supreme Court permitted motive to be considered when deciding if an appointment came within the purview of the forerunner of section 1359 (which *McSparran* had decided was not substantially changed by the 1948 revision).

The factual distinctions between *Lehigh* and *Black & White Taxicab* are apparent, but the court's distinction between *Black & White Taxicab* and the facts of *McSparran* are less than convincing. As Senior Circuit Judge Biggs points out in his dissent from *Esposito v. Emery*,[65] a companion case to *McSparran*:

> What palpable difference is there between having a single asset transferred by operation of law to the guardian of the estate of a minor and having all assets

64. Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 524 (1928).
65. 402 F.2d 878 (3d Cir. 1968).

> of one corporation transferred to another corporation by action of a board of directors and, probably, stockholders?[66]

Under the *McSparran* decision, collusion is not limited to improper conduct between opposing parties, but will include actions by only one side designed to create diversity jurisdiction. *McSparran* does not say, however, that any appointment of a representative for the purpose of creating diversity jurisdiction will be violative of section 1359. Instead, the decision seems to be limited to cases involving a straw party—a naked arrangement aimed solely at creating diversity jurisdiction. The desire to create diversity is not in itself improper and ordinarily the motives behind the appointment of a representative will not be considered. But, in a case in which diversity jurisdiction is dependent on the citizenship of a representative whose citizenship is different from that of his beneficiary, *McSparran* says motive will be considered in order to determine if the representative is a mere straw party. The district court will look to determine whether the considerations which normally lead to the selection of such a representative by the local court are present. Factors important in such a determination would include: Did the representative have the capacity to manage the property of the beneficiary? What were his past experiences in such matters? Does he have any real duty or function to offer, other than the use of his citizenship in a diversity action? Would the appointing court normally appoint someone who would be absent from its jurisdictional control? The burden of proof will be on the party asserting diversity jurisdiction to show that the nonresident fiduciary is more than a straw party. If this burden is not met, the representative will not be treated as a true fiduciary and the citizenship of the beneficiary will be determinative.

Because of reliance on its earlier decisions by parties to many pending cases, the court provided that the *McSparran* decision would only be applied prospectively. The court provided further that in cases pending before district courts, the new criteria for interpreting section 1359 would not be applied where it would be too late to bring that action in a state tribunal or where dismissal would place an unreasonable burden on the plaintiff. The majority opinion in *McSparran* speaks of "re-

66. *Id.* at 882.

lieving the federal courts of the overwhelming burden" of cases that more properly belong in state courts in order that the federal courts will be free to handle truly federal cases. This will likely prove an illusory work saving device, however, because in each case involving diversity based on the citizenship of a representative, the district court will be required to examine the facts and take evidence in order to determine if the fiduciary is a straw party. The court's task will be made difficult by efforts of the parties to make a fiduciary look "real." In the past, counsel's briefs have openly admitted the purpose behind an appointment. This was done in reliance on the prior decisions which indicated that an appointment could not be improper or collusive if it was done openly.

> While purporting to abolish the "manufacturer" of diversity jurisdiction, the majority rule would elevate such manufacturing to an art difficult to define and even more difficult to combat.[67]

V. CONCLUSION

Weighing the relative merits of the *Corabi* approach as compared with that of *McSparran*, one is faced with an agonizing dilemma. The rationale of *Corabi* and other related decisions had the inherent advantage of certainty. At the same time these decisions made possible, abuses of diversity jurisdiction. In theory, *McSparran* will end these abuses, but it will create a lack of certainty and will surely prove difficult to enforce. While *McSparran's* distinction of *Black & White Taxicab* from the instant case is somewhat falacious, the end *McSparran* seeks to accomplish is admirable. There appears no logical reason why such a case as was presented in *McSparran* should be heard in federal court. The nonresident representative can hardly say that his case will be influenced adversely by local prejudice because the jury will be well aware that he represents a local beneficiary or a local deceased. Thus, the basic explanation for the justification of diversity jurisdiction, local prejudice, is lacking. Furthermore, under the doctrine of *Erie Railroad Co. v. Tompkins*[68] the federal judges are required to apply state law, a body of law with which state judges may be more qualified to deal.

67. *Id.*
68. 304 U.S. 64 (1938).

A solution compatible with the principles underlying diversity jurisdiction has been offered by the American Law Institute. It proposes that the Judicial Code be amended to attribute the same citizenship to a fiduciary representative as the decedent or beneficiary he represents.[69] As pointed out, a local jury will hardly be prejudiced against a nonresident representative who represents a local decedent or beneficiary. And, even if such prejudice does exist, it is hardly important when compared with all the other prejudices with which litigants contend today such as social, racial, and political—not to mention the prejudice which exists against large corporations. Furthermore, the fourteenth amendment is often available to grant federal relief whenever such prejudice can be shown.

The decision in *McSparran* is indicative of a developing trend toward abolishing manufactured diversity.[70] There now exists a split of authority in the opinions in the circuit courts on this matter which will most certainly be resolved by the Supreme Court.

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69. ALI, *Study of the Division of Jurisdiction Between the State and Federal Courts*, pt. 1 § 1301(6)(4) (1965).

70. See dictum in Caribbean Mills, Inc. v. Kramer, 392 F.2d 387 (5th Cir. 1958) indicating disapproval of the *Corabi* interpretation of section 1359.