

Tulsa Law Review

Volume 13 | Issue 2

1977

Carlsberg Resources v. Cambria Savings and Loan Ass'n: Limited Partners and Diversity Jurisdiction

Scott C. Sublett

Follow this and additional works at: <https://digitalcommons.law.utulsa.edu/tlr>



Part of the [Law Commons](#)

Recommended Citation

Scott C. Sublett, *Carlsberg Resources v. Cambria Savings and Loan Ass'n: Limited Partners and Diversity Jurisdiction*, 13 Tulsa L. J. 304 (2013).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol13/iss2/6>

This Casenote/Comment is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact megan-donald@utulsa.edu.

**CARLSBERG RESOURCES V. CAMBRIA
SAVINGS AND LOAN ASS'N:
LIMITED PARTNERS AND
DIVERSITY JURISDICTION**

I. INTRODUCTION

Should the limited partners of a limited partnership be considered in determining whether there is diversity of citizenship for federal jurisdictional purposes?¹ This was the issue at bar in *Carlsberg Resources v. Cambria Savings and Loan Ass'n*.²

In this case, Carlsberg Resources Corporation, the general partner³ in a limited partnership, had brought suit against Cambria Savings and Loan for alleged negligence in the disbursement of construction development loans.⁴ The district court dismissed the suit for want of jurisdiction under 28 U.S.C. § 1332(a).⁵ While Carlsberg was a citizen of

1. For cases and additional information on diversity of citizenship jurisdiction as applied to other types of unincorporated associations see *Thomas v. Board of Trustees*, 195 U.S. 207 (1904) (governing board); *Lewis v. Odell*, 503 F.2d 445 (2d Cir. 1974) (partnership); *Bundy v. Penn Cent. Co.*, 455 F.2d 277 (6th Cir. 1972) (labor union); *Woodward v. D.H. Overmyer Co.*, 428 F.2d 880 (2d Cir. 1970) (partnership); *Mason v. American Express Co.*, 334 F.2d 392 (2d Cir. 1964) (unincorporated joint stock association). See also Kaplan, *Suits Against Unincorporated Associations Under the Federal Rules of Civil Procedure*, 53 MICH. L. REV. 945 (1955); Schwartz, *The Limited Partnership Association—An Alternative to the Corporation for the Small Business with "Control" Problems?*, 20 RUTGERS L. REV. 29 (1965); Note, *Federal Procedure: Diversity Jurisdiction: Unincorporated Associations: United Steelworkers v. R.H. Bouligny, Inc.*, 51 CORNELL L.Q. 827 (1966); Note, *Federal Procedure—Diversity Jurisdiction Over a Louisiana Partnership*, 27 LA. L. REV. 348 (1967); Comment, *Citizenship of Unincorporated Associations for Diversity Purposes*, 50 VA. L. REV. 1135 (1964); Note, *Diversity Jurisdiction for Unincorporated Associations*, 75 YALE L.J. 138 (1965); 65 COLUM. L. REV. 162 (1965) (discussing *Mason v. American Express Co.*, 334 F.2d 392 (2d Cir. 1964)); 34 GEO. WASH. L. REV. 793 (1965).

2. 554 F.2d 1254 (3d Cir. 1977).

3. A limited partnership is required to have at least one general partner and one limited partner. UNIFORM LIMITED PARTNERSHIP ACT § 1. This uniform act has been adopted in every state, except Louisiana, and in the District of Columbia and the Virgin Islands. The Oklahoma version of this section states, "A limited partnership is a partnership formed by two (2) or more persons under the provisions of Section [143 of this Title], and having as members one (1) or more general partners and one (1) or more limited partners." OKLA. STAT. tit. 54, § 142 (1971).

4. 413 F. Supp. 880 (W.D. Pa. 1976).

5. "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,

California, thirty-eight of the limited partners were citizens of Pennsylvania where the suit was brought. Cambria Savings and Loan was alleged to be a citizen of Pennsylvania, and the district court assumed, for the purposes of the case, that Cambria Savings and Loan was a Pennsylvania corporation with its principal place of business in Pennsylvania. The district court dismissed the action discussing the lack of an affirmative allegation of diversity of citizenship and the identity of citizenship between the defendant and thirty-eight limited partners of Carlsberg.⁶ The Court of Appeals for the Third Circuit, affirming the lower court's decision, held that the limited partners should be considered in determining whether diversity of citizenship existed.⁷

In discussing the *Carlsberg* case, this article will first review the bases of both the majority and dissenting opinions. Next, the real party in interest rule and the traditional treatment of unincorporated associations with respect to diversity jurisdiction will be considered. Finally, this article will present an analysis of the majority's opinion, and suggest two possible alternative approaches.

II. THE BASES OF THE MAJORITY'S HOLDING AND THE DISSENTING OPINION

In affirming the lower court's decision, the majority opinion stated:

When the rule of complete diversity is read in conjunction with the principle that the citizenship of a partnership depends

and is between—(1) citizens of different States” 28 U.S.C. § 1332(a) (1970). The citizenship of a corporate general partner would be determined by 28 U.S.C. § 1332(c) (1970), which states, “For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business”

It should be remembered that the judicial power of federal courts is a limited power. *Victory Carriers, Inc. v. Law*, 404 U.S. 202 (1971); *Gammons v. Domestic Loans, Inc.*, 423 F. Supp. 819 (M.D.N.C. 1976). Federal courts begin with the presumption that they lack jurisdiction. *Turner v. Bank of N. America*, 4 U.S. (4 Dall.) 8 (1799); *Clark v. Wright & Lopez, Inc.*, 423 F. Supp. 405 (E.D. Tenn. 1976). To obtain jurisdiction, the facts which disclose the existence of jurisdiction must be affirmatively alleged in the pleadings. *Bingham v. Cabot*, 3 U.S. (3 Dall.) 382 (1798); *Fifty Assocs. v. Prudential Ins. Co.*, 446 F.2d 1187 (9th Cir. 1970). If jurisdiction is challenged, the party claiming jurisdiction has the burden of showing that jurisdiction exists. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 (1936); *Mas v. Perry*, 489 F.2d 1396 (5th Cir. 1974).

6. 413 F. Supp. at 881-84. See *Weinfeld v. Paine, Webber, Jackson & Curtis*, 191 F. Supp. 750 (D. Mass. 1961) (plaintiffs were citizens of Massachusetts; nine general partners and seven limited partners were also citizens of Massachusetts). *But see Colonial Realty Corp. v. Bache & Co.*, 358 F.2d 178 (2d Cir. 1966) (identity of citizenship between limited partners and opposing party did not defeat diversity jurisdiction.); *C.P. Robinson Constr. Co. v. National Corp. for Housing Partnerships*, 375 F. Supp. 446 (M.D.N.C. 1974) (same); *Erving v. Virginia Squires Basketball Club*, 349 F. Supp. 709 (E.D.N.Y. 1972) (same).

7. 554 F.2d at 1259.

upon that of its members, it becomes clear that diversity jurisdiction may not obtain here, unless *all* of the members of the plaintiff partnership are of distinct citizenship from all of the defendants. Since such diversity in citizenship is lacking, the district court properly dismissed the complaint for want of jurisdiction.⁸

As indicated by the above statement, the court based its holding on two principles. First, for diversity jurisdiction to exist in the federal courts, there must be complete diversity between all plaintiffs and all defendants.⁹ Second, the citizenship of a partnership or unincorporated association depends upon the citizenship of its members.

The former principle was first enunciated in the landmark case of *Strawbridge v. Curtiss*.¹⁰ In *Strawbridge* several of the plaintiffs and all of the defendants, with the exception of Curtiss, were citizens of Massachusetts. The United States Supreme Court held that, in a case based upon diversity jurisdiction, all parties on one side of the action must be of diverse citizenship from all parties on the other side.

The latter principle is derived from the past treatment of unincorporated associations. The circuit court first examined *Great Southern Fire Proof Hotel Co. v. Jones*,¹¹ which involved a limited partnership association¹² suing in federal court under diversity of citizenship. The United States Supreme Court held that the citizenship of the association was "the citizenship of the several persons composing such association."¹³ The Third Circuit believed that *Great Southern* required the citizenship of each partner to be considered regardless of the nature of the association. *Chapman v. Barney*¹⁴ was considered next. *Chapman* involved a joint stock company¹⁵ authorized by the laws of New York to

8. *Id.*

9. See note 10 *infra* and accompanying text. Congress is empowered to make exceptions to the requirement of complete diversity, however. For example, only minimal diversity is required in interpleader actions brought under 28 U.S.C. § 1335 (1970). *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530-31 (1967).

10. 7 U.S. (3 Cranch.) 267 (1806). For a general discussion of *Strawbridge*, see WRIGHT, MILLER & COOPER, *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION*, § 3605 (1975).

11. 177 U.S. 449 (1900).

12. For further information on limited partnership associations, see Schwartz, *The Limited Partnership Association—An Alternative to the Corporation for the Small Business with "Control" Problems?* 20 RUTGERS L. REV. 29 (1965); 29 RUTGERS L. REV. 1155 (1976).

13. 177 U.S. at 456.

14. 129 U.S. 677 (1889).

15. A joint stock company is a form of business organization created by an agreement among its members. This agreement, much like a corporate charter, contains such items as the name, duration of existence, capitalization, and internal organization of the company. There are also freely transferable shares of ownership. However, unlike a corporation, the

sue in the name of its president. Here too, the Supreme Court required the citizenship of each member to be counted for diversity purposes. The Third Circuit perceived in *Chapman* a refusal by the Supreme Court to differentiate between classes of members of an association in determining diversity of citizenship. Finally, the court examined *United Steelworkers v. R.H. Bouligny, Inc.*¹⁶ and determined that *Bouligny* reaffirmed the *Great Southern* and *Chapman* holdings that each member of an unincorporated association must be considered for jurisdictional purposes. Also, the Third Circuit interpreted *Bouligny* as requiring Congress, not the courts, to make any alterations in the jurisdictional treatment of unincorporated associations.

In support of its position counting limited partners in determining diversity jurisdiction, the court enunciated two policy reasons: federalism and judicial economy. The court thought that the exercise of diversity jurisdiction interfered with the autonomy of the states, thus defeating the division of power between state governments and the federal government. It also feared the federal courts would become swamped with diversity cases and thus be prevented from exercising jurisdiction effectively in other areas.

Once the court had established these bases for its decision, it examined the position adopted by the Second Circuit Court of Appeals, as expressed in *Colonial Realty Corp. v. Bache & Co.*¹⁷ *Colonial Realty* had held that:

[I]dentity of citizenship between the plaintiff and a limited partner was not fatal because under the applicable New York statute a limited partner 'is not a proper party to proceedings by or against a partnership, except where the object is to enforce a limited partner's right against or liability to the partnership.'¹⁸

The court criticized *Colonial Realty* for determining diversity of citizenship by reference to the capacity of a limited partner to sue. Looking to past cases,¹⁹ the court concluded that diversity of citizenship should not be viewed in light of the capacity to sue rule. Also, the Third Circuit thought *Colonial Realty's* view created a conflict between Rule

members do not have limited liability to creditors, unless it is specifically contracted with the creditors that liability be limited to company property. J. CRANE & A. BROMBERG, LAW OF PARTNERSHIP § 34, at 178-81 (1968).

16. 382 U.S. 145 (1965).

17. 358 F.2d 178 (2d Cir. 1966). See generally cases cited in note 6 *supra*.

18. *Id.* at 183-84.

19. *Miller & Lux, Inc. v. East Side Canal Co.*, 211 U.S. 293 (1908); *Lehigh Mining & Mfg. Co. v. Kelly*, 160 U.S. 327 (1895); *McSparran v. Weist*, 402 F.2d 867 (3d Cir. 1968), *cert. denied sub. nom. Fritzing v. Weist*, 395 U.S. 903 (1969).

17(b)²⁰ and Rule 82²¹ of the Federal Rules of Civil Procedure. The court believed that using the capacity to sue, as provided for in Rule 17(b), resulted in expanding the jurisdiction of the United States district courts in violation of Rule 82.

The dissenting judge in *Carlsberg* disagreed with the majority's opinion in several areas. First, the dissent considered a limited partnership to be a unique form of business which should not be grouped with general partnerships. He also believed that the majority was putting the cart before the horse by determining the presence or absence of diversity before considering the capacity to sue. The dissent wondered how the majority "knows whose citizenship to count without first determining who the parties are."²² Finally, the dissent stated that the cases the majority relied on were inapposite to limited partnerships because those cases did not involve association with the unique qualities of a limited partnership.

III. THE REAL PARTY IN INTEREST RULE AND THE PAST TREATMENT OF UNINCORPORATED ASSOCIATIONS

The general rule is that only a real party in interest may bring a suit in federal court.²³ The real party in interest rule originated in *Wormely v. Wormely*²⁴ and it has been incorporated in the Federal Rules of Civil Procedure by Rule 17(a).²⁵ It has been said that "Federal Rule 17(a) states that every action shall be brought in the name of the real party in interest."²⁶

20. The relevant part of FED. R. CIV. P. 17(b) states:

The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held

21. FED. R. CIV. P. 82 states:

These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. An admiralty or maritime claim within the meaning of Rule 9(h) shall not be treated as a civil action for the purposes of Title 28, U.S.C. §§ 1391-93.

22. 554 F.2d at 1263 (Hunter, J., dissenting).

23. *Stewart v. Baltimore & O.R.R.*, 168 U.S. 445 (1897).

24. 21 U.S. (8 Wheat.) 421 (1823). In holding that it is the real party in interest who is to be considered, the Supreme Court stated:

This court will not suffer its jurisdiction to be ousted by the mere joinder or non-joinder of formal parties; but will rather proceed without them, and decide upon the merits of the case between the parties, who have the real interests before it, whenever it can be done without prejudice to the rights of others.

Id. at 451.

25. The relevant part of FED. R. CIV. P. 17(a) states: "Every action shall be prosecuted in the name of the real party in interest."

26. *Wright v. Schebler Co.*, 37 F.R.D. 319 (S.D. Iowa 1965).

The purpose of the real party in interest rule²⁷ is to enable the defendant to present his defenses against the proper persons, to avoid subsequent suits, and to proceed to finality of judgment.²⁸ To accomplish these purposes, the real party in interest is defined as the person who, by substantive law, has the right sought to be enforced.²⁹ As a result, the party in whose name the suit is brought is not necessarily the party who ultimately benefits from the litigation, because the beneficiary of the suit may not have the substantive right sought to be enforced.³⁰ Because it is the real party in interest who must bring the suit in federal court, it is that party's citizenship which is considered in determining whether there is diversity of citizenship for jurisdictional purposes.³¹ This rule has been held to include representatives,³² such as guardians,³³ administrators³⁴ and trustees.³⁵

The Third Circuit, however, has departed from the general real party in interest rule and has considered only the citizenship of the party who has the capacity to sue in determining diversity of citizenship.³⁶ This rule was limited to the extent that a person who was appointed or joined specifically to create diversity will not be considered for diversity purposes.³⁷ In this situation, 28 U.S.C. § 1359³⁸ mandates that the court look behind the form to the substance of the arrangement to prevent the manufacture of jurisdiction.³⁹

27. There has been much criticism of the real party in interest rule. *See, e.g.*, Atkinson, *The Real Party in Interest Rule: A Plea for Its Abolition*, 32 N.Y.U. L. Rev. 926 (1957); Kennedy, *Federal Rule 17(a): Will the Real Party in Interest Please Stand?*, 51 MINN. L. REV. 675 (1967).

28. *Rackley v. Board of Trustees*, 35 F.R.D. 516, 517 (E.D.S.C. 1964). *Accord*, *Virginia Elec. & Power Co. v. Westinghouse Elec. Corp.*, 485 F.2d 78 (4th Cir. 1973).

29. *See, e.g.*, *Boeing Airplane Co. v. Perry*, 322 F.2d 589 (10th Cir. 1963); *Gagliano v. Bernsen*, 243 F.2d 880 (5th Cir. 1957); *Rock Drilling Laborer's Local 17 v. Mason & Hanger Co.*, 217 F.2d 687 (2d Cir. 1954).

30. *See, e.g.*, *White Hall Bldg. Corp. v. Profexray Div. of Litton Indus., Inc.*, 387 F. Supp. 1202 (E.D. Pa. 1974); *Armour Pharmaceutical Co. v. Home Ins. Co.*, 60 F.R.D. 592 (N.D. Ill. 1973); *First Nat'l Bank v. Mottola*, 302 F. Supp. 785 (N.D. Ill. 1969).

31. *See, e.g.*, *Rice v. Houston*, 80 U.S. 66 (1871); *Hann v. City of Clinton*, 131 F.2d 978 (10th Cir. 1942); *Anderson v. Cecil*, 407 F. Supp. 1354 (E.D. Tenn. 1975); *Cole v. Continental Oil Co.*, 240 F. Supp. 642 (W.D. Okla. 1965).

32. *New Orleans v. Gaines' Adm'r*, 138 U.S. 595 (1891).

33. *Mexican Cent. Ry. v. Eckman*, 187 U.S. 429 (1903).

34. *Mecom v. Fitzsimmons Drilling Co.*, 284 U.S. 183 (1931).

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

36. *Fallat v. Gouran*, 220 F.2d 325 (3d Cir. 1955). The Third Circuit has disapproved *Fallat*, "to the extent that it indicates approval of 'manufacture' diversity." *McSparran v. Weist*, 402 F.2d 867, 876 (3d Cir. 1968).

37. *McSparran v. Weist*, 402 F.2d 867 (3d Cir. 1968); *Fahrner v. Gentzsch*, 355 F. Supp. 349 (E.D. Pa. 1972).

38. 28 U.S.C. § 1359 (1970) states: "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."

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

The capacity to sue rule used by the Third Circuit serves the same purpose as the real party in interest rule. Capacity to sue is a further requirement to bring an action in federal court.⁴⁰ Thus, although a party may have the substantive right to be enforced, he will be prevented from bringing suit in federal court unless he also has the capacity to sue. By these requirements, the defendant is protected from subsequent suits, is able to raise his defenses against the only party who can sue him, and receives a final judgment.

While the general rule has been to look to the citizenship of the real party in interest to determine diversity of citizenship, all the members of an unincorporated association traditionally have been considered in determining whether diversity of citizenship exists.⁴¹ This is well illustrated by *Chapman*, *Great Southern*, and *Bouligny*. The Supreme Court held in these cases that the citizenship of all of the members of an unincorporated association should be considered in determining diversity.⁴² These cases put forth several distinct reasons for considering the citizenship of the general membership of the unincorporated association for diversity purposes.

First, the Supreme Court has been reluctant to recognize unincorporated associations as entities. In *Chapman*, which involved a joint stock company, the Court stated, "[A]lthough it may be authorized by the laws of the State of New York to bring suit in the name of its president, that fact cannot give the *company* power, *by that name*, to sue in Federal Court."⁴³ Second, because the Supreme Court has been unwilling to consider unincorporated associations as entities, it has also been unwilling to extend the doctrine of corporate citizenship to unincorporated associations.⁴⁴ In *Great Southern* the Court stated:

That a limited partnership association created under the Pennsylvania statute may be described as a 'quasi-corporation,'

40. Rule 17(b), FED. R. CIV. P. See note 20 *supra* for the text thereof.

41. See, e.g., *Thomas v. Board of Trustees*, 195 U.S. 207 (1904); *Lewis v. Odell*, 503 F.2d 445 (2d Cir. 1974) (partnership); *Bundy v. Penn Cent. Co.*, 455 F.2d 277 (6th Cir. 1972) (labor union); *Brocki v. American Express Co.*, 279 F.2d 785 (6th Cir. 1960) (joint stock company). But see *Mason v. American Express Co.*, 334 F.2d 392 (2d Cir. 1964) (unincorporated joint stock association).

42. See notes 11, 14 and 16 *supra* and accompanying text.

43. 129 U.S. at 682 (emphasis added). See *United Steelworkers v. R.H. Bouligny, Inc.*, 382 U.S. 145, 153 (1965) (*Chapman v. Barney* followed).

44. In dealing with corporations, the United States Supreme Court first held that corporations were not citizens and that each of its members was to be considered for diversity purposes. *Bank of United States v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809). In *Deveaux*, the Court stated, "The court feels itself authorized by the case in 12 Mod., (on a question of jurisdiction), to look to the character of the individuals who compose the corporation. . . ." *Id.* at 91-92. Subsequently, however, the Court decided to allow

having some of the characteristics of a corporation, or as a 'new artificial person,' is not a sufficient reason for regarding it as a corporation within the jurisdictional rule heretofore adverted to. That rule must not be extended. We are unwilling to extend it so as to embrace partnership associations.⁴⁵

Third, in *Bouligny* the Supreme Court found a problem in determining the location of the citizenship of the association. The Court stated that it would be required to develop a new test in order to ascertain the citizenship of the labor union.⁴⁶ Finally the Court in *Bouligny* opined that it was the province of Congress, not the courts, to change the jurisdictional treatment of unincorporated associations.⁴⁷

IV. ANALYSIS OF THE MAJORITY'S HOLDING AND TWO POSSIBLE ALTERNATIVES

The traditional approach toward unincorporated associations was taken by the majority in *Carlsberg*. As stated previously,⁴⁸ the majority in *Carlsberg* relied on *Great Southern*, *Chapman*, and *Bouligny* to support its holding that limited partners should be counted in determining whether diversity of citizenship exists. However, the traditional treatment of unincorporated associations may not be appropriate for modern limited partnerships.

The *Carlsberg* court recognized one of the problems with using *Great Southern* as authority and applying the traditional treatment of unincorporated associations to limited partnerships. In discussing *Great Southern*, the *Carlsberg* majority stated, "That case did not involve a factual matrix in which there were partners of differing classes, since all of the partners were of a 'limited' status."⁴⁹ The association involved in

corporations to be considered citizens of the state in which they were incorporated. It stated:

We confess our inability to reconcile these qualities of a corporation—residence, habitancy, and individuality, with the doctrine that a corporation aggregate cannot be a citizen for the purposes of a suit in the courts of the United States, unless in consequence of a residence of all the corporators being of the State in which the suit is brought. When the corporation exercises its powers in the State which chartered it, that is its residence, and such an averment is sufficient to give the circuit courts jurisdiction.

Louisville R.R. v. Leston, 43 U.S. (2 How.) 497, 559 (1844). For discussion of the doctrine of corporate citizenship see *Steamship Co. v. Tugman*, 106 U.S. 118 (1882); *Ohio & M. R.R. v. Wheeler*, 66 U.S. (1 Black) 286 (1861).

45. 177 U.S. at 457. *Accord*, *United Steelworkers v. R.H. Bouligny, Inc.*, 382 U.S. 145 (1965).

46. 382 U.S. at 152.

47. *Id.* at 153.

48. See notes 11, 14, and 16 *supra* and accompanying text.

49. 554 F.2d at 1258.

Great Southern was a limited partnership association,⁵⁰ organized under the Pennsylvania Statutes of 1874.⁵¹ A limited partnership association differs in several respects from the modern limited partnership. As the court pointed out, there was only one class of partners involved in *Great Southern*, while in a modern limited partnership there are two classes—general partners and limited partners.⁵² Also, the management in *Great Southern* was elected from the general membership of the association, while in the modern limited partnership the limited partners may not participate in the management, except to a very minimal extent.⁵³ Finally, the members of the association in *Great Southern* all had liability limited to the amount they had contributed, while in the modern limited partnership the general partners have unlimited liability.⁵⁴

A second problem with the *Carlsberg* court's reliance upon *Great Southern* is that in *Great Southern* the parties contended that a limited partnership association was an entity. In *Carlsberg*, the dissent points out, there was no issue of entity involved.⁵⁵ The majority also recognized that there was no "entity" issue in *Carlsberg*.⁵⁶ However, the majority used *Chapman*⁵⁷ which rejected the entity argument, as support for the proposition that the Supreme Court has refused to recognize different classes in counting membership of unincorporated associations. The dissent in *Carlsberg* attacked the majority's interpretation of the *Chapman* case. After quoting from *Chapman*,⁵⁸ the dissent stated, "Thus, the Court did not consider an argument that because state law gave only the president the capacity to sue, only the president's citizenship should

50. See materials cited in note 12 *supra* for further information on limited partnership associations.

51. 1874 PA. LAWS No. 153, p. 271 (repealed).

52. Compare 1874 PA. LAWS No. 153, p. 271 (repealed) with 59 PA. CONS. STAT. § 511 (1975) and UNIFORM LIMITED PARTNERSHIP ACT § 1.

53. Compare 1874 PA. LAWS No. 153, p. 271 (repealed) with PA. CONS. STAT. §§ 521, 524 (1975) and UNIFORM LIMITED PARTNERSHIP ACT §§ 7, 10.

54. Compare 1874 PA. LAWS No. 153, p. 271 (repealed) with 59 PA. CONS. STAT. § 523 (1975) and UNIFORM LIMITED PARTNERSHIP ACT § 9.

55. 544 F.2d at 1263 n.5.

56. "[W]e recognize that the three leading Supreme Court cases in this area, which have been discussed above, do not squarely address the exact question posed here—in effect, whether partners of divergent status may be treated differently for purposes of an evaluation regarding diversity of citizenship." *Id.* at 1259.

57. 129 U.S. 677 (1889). There has been criticism of the rule in *Chapman*. See *Mason v. American Express Co.*, 334 F.2d 392 (3d Cir. 1964); *American Fed'n of Musicians v. Stein*, 213 F.2d 679 (6th Cir. 1954); *Van Sant v. American Express Co.*, 169 F.2d 355 (3d Cir. 1947). See generally *Unincorporated Associations: Diversity Jurisdiction and the ALI Proposals*, 1965 DUKE L.J. 329; *Unions as Judicial Persons*, 66 YALE L.J. 712 (1957).

58. The dissent quoted the following passage from *Chapman*:

On looking into the record we find no satisfactory showing as to the citizenship of the plaintiff. The allegation of the amended petition is, that the United States Express Company is a joint stock company organized under a law of the

matter. The rights and liabilities of the members were not an issue.’⁵⁹ The dissent thought the thrust of *Chapman* rejected any consideration of the joint stock company as an entity and required only that the general membership be counted for diversity purposes.

The Supreme Court reaffirmed *Chapman* in its decision in the *Boulogny* case. In *Boulogny* the Court refused to define a labor union as an entity.⁶⁰ The *Carlsberg* majority used this holding in support of its argument that limited partners should be counted for diversity purposes, although it recognized that the entity concept was not an issue. Also, the majority employed a second argument from *Boulogny*: that it is the province of Congress, not the courts, to change the jurisdictional treatment of unincorporated associations.⁶¹ This argument is not necessarily valid; it was the Supreme Court which originated the doctrine of corporate citizenship in *Louisville R.R. v. Leston*,⁶² decided the treatment of unincorporated associations in *Chapman*, and granted a jural personality to a *sociedad en comandita* in *Puerto Rico v. Russell*.⁶³ Although Congress has specifically mentioned corporations in 28 U.S.C. § 1332(c),⁶⁴ this was to eliminate the specific problem of local corporations incorporated in a foreign state, rather than to make corporations the only artificial persons capable of having citizenship, independent of membership, for purposes of diversity.⁶⁵

The court in *Carlsberg* also argued that limited partners should be

State of New York, and is a citizen of that State. But the express company cannot be a citizen of New York, within the meaning of the statutes regulating jurisdiction, unless it be a corporation. The allegation that the company was organized under the laws of New York is not an allegation that it is a corporation. In fact, the allegation is, that the company is *not* a corporation, but a joint-stock company—that is, a mere partnership. And, although it may be authorized by the laws of the State of New York to bring suit in the name of its president, that fact cannot give the company power, *by that name*, to sue in a Federal court.

554 F.2d at 1264 n.7 (quoting from *Chapman v. Barney*, 129 U.S. 677, 682 (1889)) (final emphasis added).

59. 554 F.2d at 1264 n.7.

60. 382 U.S. 150-51.

61. *Id.* at 153.

62. 43 U.S. (2 How.) 497 (1844). See note 44 *supra*.

63. 288 U.S. 476 (1933). See also *Luce & Co. v. Altementos Borinqueños, S.A.*, 276 F. Supp. 94 (D. Puerto Rico 1967) (*Puerto Rico v. Russell* followed).

64. The pertinent part of 28 U.S.C. § 1332(c) (1970) states: “For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business”

65. S. REP. NO. 1830, 85th Cong., 2d Sess. 3099, reprinted in [1958] U.S. CODE CONG. & AD. NEWS 3099, 3101 stated:

This fiction of stamping a corporation a citizen of the State of its incorporation has given rise to the evil whereby a local institution, engaged in a local business and in many cases locally owned, is enabled to bring its litigation into the Federal courts simply because it has obtained a corporate charter from another State.

counted on grounds of both federalism and judicial economy. The dissent agreed with the majority, that there were concerns for federalism and judicial economy, but went on to state, "Nonetheless, [the] federal courts still have jurisdiction in diversity cases, and whatever the effect on our docket, I see no responsible alternative but to apply diversity standards in this case."⁶⁶ Diversity jurisdiction was adopted in the Constitution⁶⁷ and, as such, it is a part of the federal system.

Although diversity jurisdiction is part of the Constitution, it has been and still is a very controversial part. At both the Constitutional Convention and in many of the state conventions debating the ratification of the Constitution, there was much opposition to including the section on diversity jurisdiction.⁶⁸ The argument over diversity jurisdiction continues at present.⁶⁹

66. 554 F.2d at 1263.

67. U.S. CONST. art. III, § 2.

68. See WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 3601 (1975); Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROB. 3, 23 (1948); Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928); Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 81 (1923).

69. There are generally three positions on the merits of the question. The first position is to maintain diversity jurisdiction as it presently exists, or even to expand it somewhat. The second position, propounded by the American Law Institute (ALI), is to retain diversity jurisdiction but to limit its scope. Finally, there are those who wish to eliminate diversity jurisdiction altogether.

Those who support the retention of diversity jurisdiction put forth several arguments. The first is that access to the federal courts via diversity jurisdiction is a federal right. State citizens in the United States are citizens of both the particular state and of the United States, so that the right to litigate in a federal court, when the suit is between citizens of different states, is an attribute of national citizenship. Also, when a citizen goes beyond the borders of his own state, diversity jurisdiction offers a feeling of security: if a cause of action should accrue while the person travels outside his home state, he knows that there will be an independent system of national courts to try his case.

Secondly, diversity jurisdiction may help to promote commerce among the states. Those desiring the retention of diversity jurisdiction argue that although a state court case may eventually reach the United States Supreme Court, this does not provide enough security for businessmen. Local bias may not be apparent on appellate review, and the knowledge that the case may reach the Supreme Court is not sufficiently comforting to investors.

The third argument propounded by the supporters of diversity jurisdiction deals with the courts. There is a belief that in many instances federal procedures and federal judges are better than state procedures and judges. Also, diversity serves an educational function. It allows for a greater exchange of ideas between the members of the bars of both the federal and the state courts. For further explication of these rationales, see Frank, *For Maintaining Diversity Jurisdiction*, 73 YALE L.J. 7 (1963); Marbury, *Why Should We Limit Federal Diversity Jurisdiction?*, 46 A.B.A.J. 379 (1960); Moore & Weckstein, *Diversity Jurisdiction: Past, Present and Future*, 43 TEX. L. REV. 1 (1964); Parker, *Dual Sovereignty and the Federal Courts*, 51 NW. U. L. REV. 407, 408-13 (1956); Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 WAYNE L. REV. 317 (1967).

The ALI also argues for the retention of diversity jurisdiction, but with a more limited scope. ALI STUDY ON THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, § 1302 (Official Draft 1965 and 1968). The main limitations on diversity juris-

Many of the arguments which support the retention of diversity jurisdiction for individuals and corporations apply as well to limited partnerships.⁷⁰ Some consider the right of citizens of different states to litigate in federal court to be an attribute of national citizenship. When an individual sues or is sued by a limited partnership, the individual may be denied his right to litigate in federal court simply because one of the limited partners is a citizen of the same state as is the individual.

A second argument for the retention of diversity jurisdiction, dealing with the promotion of commerce, is more directly connected with limited partnerships, because they are generally involved in some

diction would come under the ALI's proposed § 1302(a), (b), and (c). Section 1302(a) would prevent a plaintiff from invoking diversity jurisdiction if the plaintiff brings suit in his home state. The ALI believes that there is no need for a plaintiff suing in his home state to invoke diversity jurisdiction, because the plaintiff has some control over how the laws of his own state are administered.

Section 1302(b) deals with corporations and unincorporated associations which have maintained a local establishment within a state for two or more years. The ALI argues that these corporations and unincorporated associations should, in fairness, be subject to the state's jurisdiction if they have been competing in that state for two or more years and meet the definition of "local establishment" as set forth in § 1302(b).

The third limitation would come under § 1302(c), which deals with people living in one state but having their principal place of business or employment in another state. The ALI would deny this type of commuter the right to invoke diversity jurisdiction; first, because local prejudice is unlikely, and second, because the ALI does not believe that the mere choice of place of employment presents a strong enough case for federal interference with state autonomy. For a more detailed discussion of proposed § 1302(a), (b), and (c), see ALI STUDY ON THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, at 132-42 (Official Draft 1965 and 1968).

Those arguing for the abolition of diversity jurisdiction think that local bias does not present a serious problem anymore. The individual's ties with his state have been weakened by the mobility of our society, and business will expand beyond state borders without concern for the availability of a federal forum. Also, ideas will continue to flow between the state and federal courts through other means, such as periodicals and the ALI.

Those wishing to abolish diversity jurisdiction contend that the state courts were originally meant to handle the ordinary controversies which arise every day, while the federal courts were meant to spend most of their time concentrating on questions arising under the Constitution and federal statutes. Finally, those wishing to abolish diversity jurisdiction argue that the work load of the federal courts is too great to handle the cases arising under diversity jurisdiction. One commentator even feels that increasing the number of federal judges would not help, since this would just attract more cases. Bratton, *Diversity Jurisdiction—An Idea Whose Time Has Passed*, 51 IND. L.J. 347, 351 (1976). For further elaboration of the arguments against the retention of diversity jurisdiction, see Ball, *Revision of Federal Diversity Jurisdiction*, 28 ILL. L. REV. 356 (1933-1934); Bratton, *Diversity Jurisdiction—An Idea Whose Time Has Passed*, 51 IND. L.J. 347 (1976); Currie, *The Federal Courts and the American Law Institute*, 36 U. CHI. L. REV. 1, 4-49 (1968); Frankfurt, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 520-30 (1928); Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROB. 216, 234-40 (1948).

70. See Comment, *Unincorporated Associations: Diversity Jurisdiction and the ALI Proposal*, 1965 DUKE L.J. 329; Comment, *Federal Diversity Jurisdiction—Citizenship for Unincorporated Associations*, 19 VAND. L. REV. 984 (1966).

commercial activity. The knowledge that an independent system of courts exists may help to promote commerce. Whether or not local prejudice actually exists is not the question, according to Chief Justice Taft; rather, the critical question is "whether it is thought to be so by those who are considering the wisdom of investing their capital in states where that capital is needed for promotion of enterprises and industrial and commercial progress."⁷¹

Finally, as it stands now, limited partnerships are in many instances deprived of the advantage of the arguably superior federal judges and procedures. It happens, though, that through the manipulation of that same federal procedure, limited partnerships can create diversity of citizenship by the use of the class action device.⁷² It would seem preferable to extend to limited partnerships the right to avail themselves of diversity jurisdiction, rather than to allow the abuse of the "superior" procedures.

Although the controversy over diversity of citizenship jurisdiction is far from settled, that type of jurisdiction is, at the present time, part of the federal system. As a part of the federal system, diversity of citizenship jurisdiction should be exercised if it exists, and not avoided as was done in the *Carlsberg* case. It should be noted that neither the majority nor the dissent disagreed as to the merits of the diversity jurisdiction controversy; they only disagreed as to whether the merits of that controversy should resolve the question actually before the court.⁷³

V. CAPACITY TO SUE

In criticizing *Colonial Realty*, the majority in *Carlsberg* was troubled by the Second Circuit's use of the capacity to sue rule as the test for diversity of citizenship, even though this test has also been used by the Third Circuit.⁷⁴ The majority cited *McSparran v. Weist*⁷⁵ for the proposition that citizenship, for diversity purposes, is not to be viewed through capacity to sue. The court quoted from *McSparran*:

We are not here concerned . . . with the capacity to sue under Rule 17, nor with the question whether the fiduciary is the real party in interest. Our problem is whether for purposes of diversity jurisdiction we should look to the citizenship of the repre-

71. Taft, *Possible and Needed Reforms in the Administration of Justice in the Federal Courts*, 47 ABA REP. 250, 259 (1922).

72. See note 87 *infra*.

73. 554 F.2d at 1257, 1263.

74. See note 36 *supra* and accompanying text.

75. 402 F.2d 867 (3d Cir. 1968). See also note 19 *supra* and accompanying text.

sentative, here the guardian of the estate of a minor, or to the person on whose behalf he acts.⁷⁶

The reason the *McSparran* case did not use the capacity to sue rule was that it was concerned about an attempt to manufacture diversity jurisdiction. After citing several cases using the capacity to sue rule, the *McSparran* court went on to state that those cases did not “[d]ecide the problem now before us—the effect of the artificial creation or ‘manufacture’ of diversity.”⁷⁷ The *McSparran* case, rather than refusing to use capacity to sue for determining the existence of diversity of citizenship, limited the use of that test to cases where there is no attempt to manufacture diversity.

The court in *Carlsberg* believed *Colonial Realty’s* use of Rule 17(b)⁷⁸ created a conflict with Rule 82.⁷⁹ The majority stated: “Assuming that *Colonial Realty* was relying, at least in part, on Rule 17 for authority to look to state law to resolve the jurisdictional matter before the court, we believe that such reference may run afoul of the mandate of Rule 82.”⁸⁰ The court’s main concern was that state law⁸¹ would determine the presence or absence of federal jurisdiction. Rule 82 refers only to the subject matter jurisdiction of the federal courts,⁸² which in the *Carlsberg* case is derived from diversity of citizenship. Rule 17(b) does not expand or limit federal jurisdiction, but merely defines the test to be used in determining whether or not there is jurisdiction. Using Rule 17(b) only to define the test for jurisdictional purposes, “would not seem to be prohibited.”⁸³

In other situations, such as those involving guardians⁸⁴ and administrators,⁸⁵ it is state law which is used to determine whether diversity of citizenship exists. While these cases involving guardians and adminis-

76. 554 F.2d at 1260 n.24.

77. 402 F.2d at 870.

78. See note 20 *supra*.

79. See note 21 *supra*.

80. 554 F.2d at 1261.

81. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) stated: “Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State.” *Id.* at 78. This led to some confusion about what rules of procedure to follow in federal court when using state law. The Court clarified this confusion when it noted “the incorrect assumption that the rule of *Erie R.R. Co. v. Tompkins* constitutes the appropriate test of the validity and therefore the applicability of the Federal Rule[s] of Civil Procedure.” *Hanna v. Plumer*, 380 U.S. 460, 469-70 (1965). So, although state substantive law may be controlling in the case, the Federal Rules of Civil Procedure are followed with regard to all procedural aspects.

82. *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438 (1946).

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

84. *Mexican Cent. Ry. v. Eckman*, 187 U.S. 429 (1903).

85. *Mecon v. Fitzsimmons Drilling Co.*, 284 U.S. 183 (1931).

trators⁸⁶ were using the real party in interest test, it is still state substantive law which determines whether federal jurisdiction exists.

As can be seen, there is a strong tradition for counting all members of an unincorporated association in determining the existence of diversity of citizenship.⁸⁷ Because of the nature of limited partnerships,⁸⁸ however, it would seem that one of two alternative treatments would be more appropriate in determining the presence of diversity where limited partnerships are involved. The first alternative would be to grant limited partnerships a jural personality and treat them like corporations for diversity purposes.⁸⁹ The second alternative would be to consider only the general partners as real parties in interest when determining whether the parties are, in fact, diverse.

The United States Supreme Court has already laid the foundation for considering limited partnerships as jural persons in *Puerto Rico v. Russell*.⁹⁰ *Russell* involved a *sociedad en comandita*. The *sociedad en comandita* is a form of civil law partnership from which the modern limited partnership is derived.⁹¹ Thus, although the *sociedad en comandita* may have been an "exotic creation of the civil law,"⁹² its relative, the limited partnership, has become one of our modern business associations by statute.⁹³ Because of its heritage, the modern limited partnership has many traits in common with the *sociedad en comandita*.⁹⁴ It would seem

86. See notes 33 and 34 *supra* and accompanying text.

87. The class action is available to unincorporated association. See, *Calagaz v. Calhoun*, 309 F.2d 248, 251-53 (5th Cir. 1962). If a class action is used by a limited partnership not all limited partners need be counted. For further discussion of unincorporated associations and the class action device, see Comment, *Unincorporated Associations: Diversity Jurisdiction and the ALI Proposal*, 1965 DUKE L.J. 329, 331-32.

88. See note 94 *infra* and accompanying text.

89. *Id.*

90. 288 U.S. 476 (1933).

91. "This system of partnership was at an early day adopted in continental Europe, and became part of the modern civil law . . ." *Fifth Ave. Bank v. Colgate*, 120 N.Y. 381, 24 N.E. 799, 802 (1890).

92. *United Steelworkers v. R.H. Bouligny, Inc.*, 382 U.S. 145, 151 (1965).

93. See, e.g., OKLA. STAT. tit. 54, §§ 141-171 (1971).

94. In *Puerto Rico v. Russell*, 288 U.S. 476 (1933), the Supreme Court listed several traits which it thought gave the *sociedad en comandita* a jural personality. Several are offered for comparison with the Pennsylvania Statute and Uniform Limited Partnership Act. Compare "Its members are not thought to have sufficient personal interest in a suit brought against the entity to entitle them to intervene as parties defendant," 288 U.S. at 481, with 59 PA. CONS. STAT. § 545 (1975) and UNIFORM LIMITED PARTNERSHIP ACT § 26 (contributor not proper party to suit unless he is a general partner). Compare "It is created by articles of association filed as public records," 288 U.S. at 481, with 59 PA. CONS. STAT. § 512(1)(b) (1975) and UNIFORM LIMITED PARTNERSHIP ACT § 2(1)(b) (requiring certificate to be recorded). Compare "Where the articles so provide, the *sociedad* endures for a period prescribed by law, regardless of the death or withdrawal of individual members," 288 U.S. at 481 with 59 PA. CONS. STAT. §§ 512(1)(A) V, X, XIII (1975) and UNIFORM LIMITED PARTNERSHIP ACT §§ 2(1)(a) V, X, XIII; 20 (period of partnership's

therefore, if consistency is an object of our legal system, that the limited partnership should be treated in the same manner as the *sociedad en comandita*. But, in light of the Supreme Court's past treatment of unincorporated associations⁹⁵ and its reluctance⁹⁶ to extend the corporate citizenship doctrine, it is unlikely that the limited partnership will obtain a jural personality.

A more profitable argument might be made under the real party in interest rule.⁹⁷ As stated before, it is only the real party in interest whose citizenship is determinative of diversity,⁹⁸ and the real party in interest is the person with the substantive right to be enforced,⁹⁹ not necessarily the person who benefits from the litigation.¹⁰⁰ Taking these rules into consideration, there are several factors which militate against limited partners being considered as the real parties in interest.

The first factor is the purpose for which limited partnerships were developed. In *Vulcan Furniture Mfg. Corp. v. Vaughn*¹⁰¹ the purpose of limited partnerships was stated:

[I]t appears that this general purpose is not to assist creditors, but to enable persons to invest their money in partnerships and share in the profits without being liable for more than the amount they have contributed. The reason for this is to encourage investing by parties having capital but who will not participate in the detailed operation of the partnership.¹⁰²

duration). Compare "Powers of management may be vested in managers designated by the articles from among the members whose participation is unlimited, and they alone may perform acts legally binding on the *sociedad*," 288 U.S. at 481 with 59 PA. CONS. STAT. §§ 512(1)(a) IV, 523, 524 (1975) and UNIFORM LIMITED PARTNERSHIP ACT §§ 2(1)(a) IV (certificate must designate whether general or limited partner), 9, 10 (rights of general and limited partners). Compare "Its members are not primarily liable for its acts and debts . . ." 288 U.S. at 481, with 59 PA. CONS. STAT. §§ 521, 545 (1975) and UNIFORM LIMITED PARTNERSHIP ACT §§ 7, 26 (limited liability of limited partners). Compare "[I]ts creditors are preferred with respect to its assets and property over the creditors of the individual members, although the latter may reach the interests of the individual members in the common capital." 288 U.S. at 481, with 59 PA. CONS. STAT. § 536 (1975) and UNIFORM LIMITED PARTNERSHIP ACT §§ 22, 23(1)(a) (creditors of partnership preferred over individual creditors).

95. See note 41 *supra* and accompanying text.

96. See notes 46 and 47 *supra* and accompanying text.

97. In *Chase Manhattan Mortgage & Rlty. Trust v. Pendley*, 405 F. Supp. 593 (N.D. Ga. 1975), and *Jim Walters Investors v. Empire-Madison, Inc.*, 401 F. Supp. 425 (N.D. Ga. 1975), similar arguments were put forth. Both of these cases involved business trusts. It was argued in these cases that only the trustees, and not the beneficial holders of the shares of the trust, were the real parties in interest. Both *Chase Manhattan* and *Jim Walters* rejected this argument.

98. See note 31 *supra* and accompanying text.

99. See note 29 *supra* and accompanying text.

100. See note 30 *supra* and accompanying text.

101. 168 So. 2d 760 (Fla. 1964).

102. *Id.* at 764.

Thus the purpose of limited partnerships is to allow persons to invest, but to take only limited responsibility in connection with the investment.

A second factor to be considered is that limited partners have no rights in the partnership assets.¹⁰³ Since the limited partners have no such rights, there is very little on which to base a substantive cause of action. Having the right to enforce the substantive cause of action is one of the prime determinants of a real party in interest.¹⁰⁴

The third, and perhaps most important factor to be considered is that limited partners do not have the ability to sue on behalf of the partnership.¹⁰⁵ In connection with the limited partners' inability to sue, the dissent in *Carlsberg* stated, "Thus, the majority would have us take cognizance, for diversity purposes, of persons who, under state law, are clearly prohibited from taking part in a suit by or against the partnership. This, to me, appeals neither to logic nor to common sense."¹⁰⁶

The capacity to sue was one of the criteria used by the United States Supreme Court in *Mecom v. Fitzsimmons Drilling Co.*¹⁰⁷ in determining who was the real party in interest. In *Fitzsimmons* the Supreme Court adopted the view that, "[W]here an administrator is required to bring suit under statute, . . . he is the real party in interest and his citizenship rather than that of the beneficiary is determinative of federal jurisdiction."¹⁰⁸

Taking into consideration the purpose of the limited partnership, the lack of personal interest in the partnership assets by the limited partners, and the lack of ability by the limited partners to sue on behalf of the partnership, it would seem unreasonable to consider the limited partners as real parties in interest and to count them for purposes of diversity jurisdiction.

VI. CONCLUSION

The overall motivating force behind the decision in *Carlsberg* appears to be a concern about the nature of federal jurisdiction. The court was afraid it would be expanding the jurisdiction of the federal courts, interfering with state autonomy, and allowing state law to determine the

103. See, e.g., *Alley v. Clark*, 71 F. Supp. 521 (E.D.N.Y. 1947); *Lichtyger v. Franchard Corp.* 18 N.Y.2d 528, 223 N.E.2d 869, 277 N.Y.S.2d 377 (1966).

104. See note 29 *supra* and accompanying text.

105. See 59 PA. CONS. STAT. § 545 (1975); UNIFORM LIMITED PARTNERSHIP ACT § 26. See also *Bedolla v. Logan & Frazer*, 52 Cal. App. 3d 118, 125 Cal. Rptr. 59 (1975); *Lieberman v. Atlantic Mut. Ins. Co.* 385 P.2d 53 (Wash. 1963).

106. 554 F.2d at 1265.

107. 284 U.S. 183 (1931). *Accord*, *Mexican Cent. Ry. v. Eckman*, 187 U.S. 429 (1903).

108. 284 U.S. at 186.

extent of federal jurisdiction if it did not count limited partners. However, diversity jurisdiction was provided for in the Constitution. Many of the arguments which support the retention of diversity jurisdiction for individuals and corporations apply equally as well to limited partnerships. Since diversity jurisdiction is a part of the federal system, albeit a controversial part, it seems reasonable to count only general partners for diversity purposes. This could be accomplished either by using the foundation laid by the Supreme Court in *Puerto Rico v. Russell* or by using the real party in interest test, which is employed in other diversity situations.

Scott C. Sublett