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Federal Courts - Diversity of Citizenship Jurisdiction - Limited Partnerships

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Recent Decisions

FEDERAL COURTS—DIVERSITY OF CITIZENSHIP JURISDICTION—LIMITED PARNERSHIPS— The United States Court of Appeals for the Third Circuit has held that in a limited partnership the citizenship of both the general and limited partners shall be counted for federal diversity jurisdiction, precluding such federal jurisdiction when complete diversity is absent between all members of the limited partnership and the opposing party.

Carlsberg Resources Corp. v. Cambria Savings and Loan Association, 554 F.2d 1254 (3d Cir. 1977).

Carlsberg Resources Corporation (Carlsberg), a general partner[1] in Carlsberg Mobile Home Properties, a limited partnership, instituted an action in the Federal District Court for the Western District of Pennsylvania[2] on behalf of the limited partnership.[3] Carlsberg alleged that the negligence of Cambria Savings and Loan Association (Cambria) in disbursing construction loans to the developers of the trailer park purchased by Carlsberg caused the loss of the property through a foreclosure sale. Carlsberg also contended that the developers and other defendants[4] attempted to defraud the limited partnership by requesting loan advances with certificates inaccurately indicating completed work.

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1. The general partner is the proper party to the proceedings by or against a limited partnership. UNIFORM LIMITED PARTNERSHIP ACT § 26.

2. Carlsberg Resources Corp. v. Cambria Sav. & Loan Ass'n, 413 F. Supp. 880 (W.D. Pa. 1976), *aff'd,* 554 F.2d 1254 (3d Cir. 1977). Carlsburg purchased a developing mobile home park from one of the defendants, Forest Park, a general partnership, and then leased it back to the partnership. At the time of the conveyance, the property was encumbered by a mortgage held by Cambria Savings and Loan Association, which Carlsberg did not assume. The mortgage arose from a construction loan agreement between Cambria and the seller, which stipulated that funds were to be disbursed as improvements were made and certified. When Forest Park, the seller/lessee, was unable to maintain its rental payments to Carlsberg, a foreclosure sale occurred and Cambria purchased the property. *Id.* at 884-85.

3. "A limited partnership is a partnership formed by two or more persons . . . having as members one or more general partners and one or more limited partners. The limited partners as such shall not be bound by the obligation of the partnership." UNIFORM LIMITED PARTNERSHIP ACT § 1; CAL. CORP. CODE § 15501 (West 1977); 59 PA. CONS. STAT. ANN. § 171 (Purdon Supp. 1977-1978).

4. Carlsberg also sued, Forest Park, the general partnership, Anne Henderson, a bookkeeper for Forest Park, Forest Enterprises, Inc., a corporation, and Deemer, the engineer in charge of certifying the mobile home park's improvements before additional funds from the construction loan were advanced.

Carlsberg asserted federal diversity jurisdiction was present;[5] Carlsberg, the only general partner of the limited partnership, was a corporate citizen of California, and all the defendants were citizens of Pennsylvania.[6] However, the district court judge questioned, sua sponte, the claimed diversity, noting that in the averments Carlsberg neither listed the citizenship of the limited partners nor alleged that none were citizens of Pennsylvania.[7] Upon finding that some of the limited partners were citizens of Pennsylvania,[8] the district court dismissed the case for lack of diversity.[9] The court concluded that the citizenship of a limited partnership, a type of unincorporated association, must derive from *all* of its members despite the statutory class distinctions between the general and limited partners within the association itself.[10] Both Carlsberg and Cambria contested the dismissal, maintaining on appeal that a limited partnership is a unique statutory business organization and that for purposes of diversity the citizenship of the general partners was dispositive.[11] Rejecting this rationale, the Third Circuit Court of Appeals affirmed the holding of the district court.[12]

The court of appeals[13] recognized the district court's duty to scrutinize its own subject matter jurisdiction in every case, sua sponte.[14]

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5. 28 U.S.C. § 1332 (1970) (congressional grant of jurisdiction to district courts in diversity cases).

6. 413 F. Supp. at 881.

7. *Id.*

8. *Id.* at 882. Thirty-eight of the more than 1500 limited partners were residents of Pennsylvania. *Id.* at 881, 884.

9. *Id.* at 881. The court, however, examined the merits of the case, and held in the alternative that Carlsberg's negligence action was insufficient as a matter of law. The court determined that it would have granted Cambria's motion for summary judgment and dismissed the case as to the remaining defendants for failure to state a claim. *Id.* at 884.

10. *Id.* at 881.

11. Counsel for Cambria did not answer the jurisdictional question in his brief but relied on Carlsberg's position. Brief for Appellee at 4, Carlsberg Resources Corp. v. Cambria Sav. & Loan Ass'n, 554 F.2d 1254 (3d Cir. 1977). Since the district judge indicated that he would have found for Cambria had he ruled on the merits, Cambria preferred to have jurisdiction granted to obtain a favorable disposition of the case. 413 F. Supp. at 884-86. The judgment could then have been used as a defense to pending litigation on the same issue in the state court. *See* Carlsberg Resources Corp. v. Cambria Sav. & Loan Ass'n, 554 F.2d 1254, 1255-56 n.3 (3d Cir. 1977).

12. 554 F.2d at 1262. The appellant does not plan to appeal this decision but will pursue its claim in the state courts. A lawsuit had been initiated there containing the same allegations present in the suit brought in federal court.

13. Judge Adams wrote the majority opinion in which Judge Biggs concurred. *Id.* at 1255. Judge Hunter dissented. *Id.* at 1262.

14. *Id.* at 1256. The court illustrated this point by alluding to past cases involving unincor-

In the court's view, the initial investigation into the jurisdictional basis of a case is essential both to contain the volume of court business and to preserve the constitutional and statutory structure of federalism.[15] The court expressed concern that in spite of the protection of state autonomy under the rule of *Erie Railroad v. Tompkins*,[16] the federal courts were trespassers in disputes traditionally resolved by states under the common law.[17] Thus, it was proper to frame diversity jurisdiction conservatively so as to grant a federal forum sparingly.[18]

The majority employed two tenets of diversity jurisdiction to support its decision: the courts' traditional denial of entity status to unincorporated associations (resulting in the citizenship of all members composing the organization being counted), coupled with the historical mandate of absolute diversity for diversity jurisdiction.[19] The court examined a trilogy of cases, *Chapman v. Barney*,[20] *Great*

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porated associations where the jurisdictional issue was raised independently by the appellate court to deter collusion or accidental waiver of a jurisdictional defect. *See, e.g.*, Thomas v. Board of Trustees, 195 U.S. 207 (1904) (individual members of the board of trustees of a college were citizens for diversity purposes even though the board itself could sue or be sued); Underwood v. Maloney, 256 F.2d 334 (3d Cir.) (president and members of local union, as plaintiffs, were held to be nondiverse from members of defendant international union and its executive board, and thus diversity jurisdiction was precluded), *cert. denied*, 358 U.S. 864 (1958).

15. 554 F.2d at 1256-57.

16. 304 U.S. 64 (1938). The basic controversy in *Erie* was which jurisdiction's duty of care standards should apply in a diversity case: the forum state's or the federal court's. The result was a determination that the federal courts were required to apply the substantive law of the forum state in which they sat in diversity cases, and not an undefined federal common law.

17. The court referred to cases in the nature of a "conflict resolution," which it stated constituted a "core public function of state government." 554 F.2d at 1257. The court cited to Parks v. "Mr. Ford," 556 F.2d 132, 146 (3d Cir. 1977) (Adams, J., concurring), in which a repairman exercised his common law right to retain and sell vehicles which he possessed because of unpaid bills. In *Parks*, Judge Adams reasoned that the power of the individual to unilaterally resolve a conflict flowed from the state. 556 F.2d at 146. In *Carlsberg*, he seems to have read this conflict resolution conclusion into diversity jurisdiction as a justification for framing diversity narrowly.

18. 554 F.2d 1257. Admittance to the federal courts on the basis of diversity of citizenship "should be granted only where clearly appropriate and only to the extent, if at all, that is justified." *Id.* at 1257.

19. *Id.* at 1258. The court cited to Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806), which held that the legislative predecessor to 28 U.S.C. § 1332 (1970) mandated absolute diversity. For a discussion of the implication of *Strawbridge*, see ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, Memorandum A (1969).

20. 129 U.S. 677 (1889). The Court in *Chapman* held that an express company could not be a citizen of a state for diversity purposes unless it was a corporation. The court in *Carlsberg* found *Chapman* analogous to the factual situation before it. In *Chapman*, even though the

Southern Fire Proof Hotel Co. v. Jones,[21] and *United Steelworkers v. R.H. Bouligny*,[22] all denying federal diversity jurisdiction to non-corporate entities unless their entire membership was nondiverse from the antipodal party. The *Carlsberg* majority postulated that the more recent decision in *Bouligny* bolstered the pre-twentieth century decisions in *Chapman* and *Great Southern*, maintaining that any reconsideration of that status came within the purview of Congress.[23]

In response to appellant's argument, the *Carlsberg* court then shifted to the Second Circuit Court of Appeals' divergent holding in *Colonial Realty Corp. v. Bache*,[24] that a limited partner's citizenship is not to be counted for diversity purposes in a cause of action against the limited partnership itself. The court criticized the Second Circuit Court of Appeals' reliance on the New York Limited Partnership Act, which restricted the proper parties to an action by or against a limited partnership to the general partner(s) alone.[25] The *Carlsberg* court rejected a jurisdictional analysis dependent

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president of the express company had the right to sue for the entity, all members of the express company were counted. Similarly, in *Carlsberg*, the general partner had the capacity to sue for the entity. Thus, if the entire membership of the express company in *Chapman* was to be counted, despite the president's status, it seemed logical that the entire membership of the limited partnership in *Carlsberg* should be counted despite class distinctions within the partnership. However, since the capacity issue does not appear to have been raised in *Chapman*, the analogy lacks persuasiveness.

21. 177 U.S. 449, 457 (1900). *Great Southern* involved *one* class of members, all of whom were limited partners of a limited partnership, a statutory arrangement approved by several states in the earliest limited partnership acts. The Court held that federal diversity jurisdiction required diversity of the entire membership; therefore, the citizenship of all individual members had to be alleged, not simply that of the entity.

22. 382 U.S. 145 (1965). The Court unanimously held that for federal diversity jurisdiction the citizenship of an unincorporated labor union is that of each of its members.

23. 554 F.2d at 1259.

24. 358 F.2d 178 (2d Cir. 1965), *cert. denied*, 385 U.S. 817 (1966). In *Colonial*, a corporate customer brought an action against a securities broker, a limited partnership. The issue was whether federal civil liability could be implied under the Securities Exchange Act of 1934 for a securities broker's breach of duty.

25. 554 F.2d at 1260-61. In *Colonial*, Judge Friendly, in adopting the viewpoint of the district court judge as to the existence of diversity jurisdiction, briefly alluded to the utilization of the state statute in the capacity inquiry:

> [W]here . . . diversity [existed] between the plaintiff and all the general partners of the [limited partnership], identity 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 . . . ." N.Y. Partnership Law § 115.

358 F.2d at 183-84.

upon state statutes defining capacity.[26] In its view, the jurisdictional inquiry was primary, both in right and in time; the issue of capacity was to be relegated to a secondary position.[27] The court pointed out that rule 17(b) of Federal Rules of Civil Procedure,[28] which requires federal courts to look to state law to determine capacity, is offset by rule 82,[29] which provides that the rules neither expand nor limit the jurisdiction of the district courts. The court reasoned that any inquiry into citizenship for diversity must be governed not by the Federal Rules of Civil Procedure or the vagaries of state statutes, but by the court itself, applying "principles of general application."[30]

Judge Hunter, dissenting, initially pointed out that the citizenship of a limited partnership was a question of first impression which had been addressed only cursorily in *Colonial* and which deserved a thorough examination.[31] The dissent emphasized, however, that Judge Friendly's opinion was not an aberration but had been cited with approval in one of his later decisions.[32] Judge Hunter disagreed sharply with the majority's unwillingness to resolve the question of whose citizenship was to be counted in a limited partnership terms of the parties who are given capacity to sue under the

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26. 554 F.2d at 1261.

27. *Id.* at 1260.

28. FED. R. CIV. P. 17(b). This section, in setting out the capacity to sue or be sued, directs the federal court to look to the law of domicile when the individual brings the action in a nonrepresentative status; if a corporation brings the action, the court should look to the law under which it was organized, and for all other entities, to "the law under which it was organized." The status of unincorporated associations has been held to be covered by this latter residuary clause. 3A MOORE'S FEDERAL PRACTICE ¶ 17.25 (2d ed. 1977).

29. FED. R. CIV. P. 82. "Jurisdiction and Venue Unaffected. These rules shall not be construed to extend or limit the jurisdiction of the United States district courts . . . ."

30. 554 F.2d at 1261. The court's reasoning appears to be based on the possible existence of variegated state limited partnership statutes rather than on the existing uniform limited partnership statute. If the capacity of the limited partners to sue or be sued involved a multitude of diversified statutes where a party's status changed from jurisdiction to jurisdiction, then the court's worry would appear to be justified for not only might forum shopping be the order of the day but states would in effect be determinators of the boundaries of federal jurisdiction.

31. *Id.* at 1262.

32. *Id.* The dissent cited to Woodward v. D.H. Overmyer Co., 428 F.2d 880 (2d Cir. 1970), *cert. denied*, 400 U.S. 993 (1971). The *Woodward* court, in determining the citizenship of a traditional partnership, looked to the citizenship of all the individual partners rather than to the partnership entity which had capacity to sue or be sued, distinguishing a partnership from a limited partnership. The implication from the distinction is that in the latter entity, the limited partners would not be counted because they are statutorily incapacitated from asserting individual rights against third parties.

Uniform Limited Partnership Act.[33] Relying on several cases where the Third Circuit Court of Appeals had utilized rule 17(b) to define its jurisdictional base,[34] Hunter reasoned that the capacity inquiry should be used to indentify the parties whose citizenship was relevant for diversity purposes.[35] Recognizing that manufactured diversity is possible in cases involving parties acting in a representative role, Hunter noted that courts have traditionally retained the right to examine the particular facts of a case, counting the real interested party instead of the nominal party in a manner consistent with the relevant state law.[36] Hunter maintained that the inability of a limited partner to assert an independent cause of action should eliminate the citizenship of that party from consideration in diversity cases.[37]

The dissenter found the cases of *Chapman* and *Great Southern,* relied on by the majority, clearly distinguishable from the facts of

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33. 554 F.2d at 1262-63. Hunter pointed out that since all the states and the Virgin Islands had adopted the act, a uniform disposition of this type of case was possible. (Louisiana has not adopted the uniform statute because of its civil law system).

34. *Id.* at 1263 n.6. Hunter cited the following cases: McSparran v. Weist, 402 F.2d 867 (3d Cir. 1968) (rule 17(b) disregarded as dispositive basis for citizenship inquiry when the diversity of the parties appeared to be manufactured), *cert. denied sub nom.* Fritzinger v. Weist, 395 U.S. 903 (1969); Underwood v. Maloney, 256 F.2d 334 (3d Cir. 1957) (rule 17(b) was used by the court to determine the entity status of an unincorporated labor union), *cert. denied,* 358 U.S. 864 (1958); Fallat v. Gouran, 220 F.2d 325 (3d Cir. 1955) (rule 17(b) governed the capacity of a guardian to sue for an incompetent and also the guardian's citizenship for diversity jurisdiction, the court reasoning that rule 17 was "the most effective way to state the diversity test").

35. 554 F.2d at 1263.

36. *Id.* at 1264, citing Miller v. Perry, 456 F.2d 63 (4th Cir. 1972) (Though relevant state law required a resident administrator to be appointed which would have effectively destroyed diversity jurisdiction, the court looked to the citizenship of the beneficiaries of the decedent who were out-of-state residents. The court followed the directives of the state law while counting only the actual parties in interest instead of the nominal parties, thus avoiding any abuse of its jurisdiction.); and Bishop v. Hendricks, 456 F.2d 289 (4th Cir.) (administrator deemed straw party since appointment was manifestly an artificial creation of federal diversity. The court, utilizing 28 U.S.C. § 1359 (1970) (congressional prohibition of manufactured diversity), barred federal jurisdiction where the party had been improperly or collusively joined to invoke jurisdiction), *cert. denied,* 419 U.S. 1056 (1974).

37. 554 F.2d at 1265. Because of the absence of relevant Pennsylvania cases, the dissent cited to other state cases to illustrate this point. *See* Bedolla v. Logan & Frazer, 52 Cal. App. 3d 118, 125 Cal. Rptr. 59 (1975) (limited partner assumed the liability of the partnership when suing on behalf of a limited partnership); Riviera Congress Assocs. v. Yassky, 25 App. Div. 2d 291, 268 N.Y.S.2d 854 (1965) (limited partners were barred from suing general partners in the partnership name but were allowed to maintain a class action derivative suit against general partners when fiduciary duty was breached), *aff'd,* 18 N.Y.2d 540, 223 N.E.2d 876 (1966).

Carlsberg.[38] First, the modern statutory limited partnership could not be equated with the single-classed limited partnership in *Great Southern*,[39] and second, the entity argument posited in *Chapman* could not be compared to the capacity issue in *Carlsberg*.[40] *Bouligny* was also differentiated from *Carlsberg;* in the former, the court possessed no easy guidelines to determine the citizenship of a labor union while in the latter there existed a uniform statute on which to base the citizenship inquiry.[41] Hunter also declared that the availability of a federal forum to a multistate limited partnership business organization was inherent in the original purpose of the congressional grant of diversity jurisdiction,[42] aimed at providing an impartial forum to out-of-state litigants. Finally, Hunter equated the status of general partners in a limited partnership with that of traditional partners in a partnership, maintaining that the rights of the former to a federal forum should be the same as the latter currently possess.[43]

Orthodox Case Law Versus Capacity Inquiry

The central issue confronting the court in *Carlsberg* revolved around how to determine the citizenship of a limited partnership for the purposes of diversity jurisdiction. The majority's approach was based on case law that precluded recognition of any noncorporate association as a citizen for diversity purposes while the dissent looked to the state laws that created the entity and applied the capacity test flowing therefrom.[44]

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38. 554 F.2d at 1264.

39. The partnership of *Great Southern* was one in which all the members had the same status, unlike *Carlsberg* where there were two distinct classes of members. *Id.*

40. Hunter asserted that the entity argument was the main issue of *Chapman* and that it was nowhere indicated that the capacity of the president to sue was considered by the court. *Id.* at n.7.

41. *Id.* at 1264.

42. *Id.* at 1266 n.14. Since limited partnerships are by their nature multistate and multiparty organizations, federal diversity jurisdiction would assure impartiality to out-of-state litigants.

43. *Id.* at 1266.

44. The appellant's argument could have been used by the court as a way to reconcile what became diametrically opposed positions on the bench. Counsel specifically rejected the entity approach argument, which had been denied judicial acceptance. Instead, appellant relied heavily on Judge Friendly's decision in *Colonial,* where limited partners were not counted for diversity purposes, and a corollary rule posited in *Great Southern*: the "members composing" test. Appellant attempted to carve out an exception for the modern limited

CASE LAW APPROACH

The case law analysis is fairly clearcut. Though *Chapman* and *Great Southern* concerned dissimilar business organizations, both clearly purported to exclude all business associations of the noncorporate variety from citizenship status in diversity questions. If the averments alleged the party to be a corporate citizen of a state, the entity alone was the citizen for diversity purposes to the exclusion of individual shareholders; if the averments alleged any other kind of organization, all members were citizens for diversity purposes.[45] The noncitizenship status of unincorporated associations remained settled until 1933 when the Supreme Court seemingly carved out an exception in *Puerto Rico v. Russell & Co.*[46] *Russell* held that the domicile of the civil law *sociedad en comandita,* an unincorporated association, was the same as the party plaintiff and destroyed diversity; thus, the case was remanded to the Insular Court of Puerto Rico. In focusing on the issue of domicile, the Court for the first time granted entity status to an unincorporated associa-

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partnership by demonstrating a path consistent with both the case law and the capacity of the parties. Appellant pointed to two district court cases in line with *Colonial* as support for the argument: Robinson Constr. Co. v. National Corp. for Housing Partnerships, 375 F. Supp. 446 (M.D.N.C. 1974) (where general partners sue limited partners, citizenship of the limited partnership is determined by the citizenship of individual general partners); Erving v. Virginia Squires Basketball Club, 349 F. Supp. 709 (E.D.N.Y. 1972) (for purposes of diversity jurisdiction, the citizenship of the general partners in a limited partnership is controlling). Brief for Appellant at 16, 19-22, Carlsberg Resources Corp. v. Cambria Sav. & Loan Ass'n, 554 F.2d 1254 (3d Cir. 1977). Both cases, however, were poor vehicles to convince a court of the viability of *Colonial.* The first case involved an intra-partnership controversy, not one in which a third party was involved. The second case is an example of a district court following the mandate of its circuit court of appeals, not necessarily an example of *Colonial's* popularity at the district level. It seemed that appellant, instead of aiming its argument directly at the capacity problem, distracted the court with its case law approach. As a result, the majority allied itself with orthodox case law.

45. The averments in *Chapman* stated that petitioner was a joint stock company organized under the law of New York. The Court held that the company could not be a citizen unless it was a corporation. 129 U.S. at 678. In *Great Southern,* the limited partnership asserted it was a quasi-corporation, but the Court refused to consider such a status as sufficient reason to treat the entity like a corporation. Utilizing the same reasoning it had used in *Chapman,* the *Great Southern* Court held that since a limited partnership, by its own admission, is not incorporated, all partners are to be counted for citizenship in diversity jurisdiction. 177 U.S. at 457.

46. 288 U.S. 476 (1933). An unincorporated association peculiar to Puerto Rico, known as a *sociedad en comandita,* was granted entity citizenship through the application of the U.S. CONST. art. IV, § 3, and the Organic Act of Puerto Rico, which formed the territorial unit. 288 U.S. at 478-79. It is worthy of note that the characteristics of the *sociedad,* as described in the case, appear strikingly similar to a modern limited partnership. *Id.* at 481.

tion, rejecting the "members composing" test under which the requisite diversity would have been attained.[47] In dicta, the Court differentiated the *sociedad* from the unincorporated association on the basis of corporate similarity; thus it appeared that the holdings of *Chapman* and *Great Southern* were weakening where the business entity had a corporate-type structure.[48] Precedent breaking cases appeared in the circuits.[49] In *Bouligny,* for example, the district court granted citizenship status to a labor union and declined to follow *Chapman.*[50] However, in affirming the reversal of this decision by the court of appeals, and by refusing to expand the concept of citizenship to a labor union, the Supreme Court reestablished the holding of the older line of decisions and deferred any jurisdictional change to Congress.[51] Admittedly, the *Bouligny* Court was concerned with the specifics of constructing a citizenship test for only a labor union; however, in alluding to the Congressional assistance eventually needed to cope with the simpler concept of corporate citizenship, the Court revealed its disinclination to renovate the

47. 288 U.S. at 480-81. Judge Hunter cited to *Russell,* pointing out that, as a *sociedad* was afforded entity treatment for citizenship purposes because it was an exotic creature of civil law, a like treatment could be given the limited partnership, a product of France, another civil law society. 554 F.2d at 1265 n.8. The essential distinction which might be made, however, is that in *Russell,* the *sociedad* remained unique to Puerto Rican commercial law, while the limited partnership in *Carlsberg* had become part of an American common law system.

48. 288 U.S. at 480-81. The *Russell* Court pointed out that the entity status of both the joint stock company of *Chapman* and the limited partnership of *Great Southern,* which established their capacity to sue on behalf of the membership, was not sufficient to confer on them the complete jural personality possessed by a corporation. The Court went on to demonstrate the similarity of the *sociedad* and a corporation. Thus, a departure from the rule of *Chapman-Great Southern* seemed available if one could convince a court that the entity in a particular case had not only capacity to sue but also operated as if it were a corporation, lacking only the formality of incorporation.

49. *See, e.g.,* Van Sant v. American Express Co., 169 F.2d 355 (3d Cir. 1948) (in an action against a joint stock company, the court looked to the entity's capacity to be sued as determinative of its citizenship treatment). In a footnote to the case, the court, citing *Russell,* concluded that *Chapman* was superseded. In Mason v. American Express Co., 334 F.2d 392 (2d Cir. 1964) (unincorporated joint stock association was deemed a citizen for diversity purposes), Judge Waterman, citing *Russell,* stated that in the court's opinion, *Chapman* should be abandoned in favor of a more flexible rule which utilized a corporate resemblance test. Ten years later, in Baer v. United Services Auto Ass'n, 503 F.2d 393 (2d Cir. 1974), Judge Waterman denied citizenship to an unincorporated reciprocal insurance association, distinguishing the insurance association from the joint stock association in *Mason,* and admitting that as a result of *Bouligny* the "precedential value of *Mason* was, at the least, seriously undermined." *Id.* at 396.

50. 382 U.S. at 146.

51. *Id.* at 152.

traditional rules of citizenship dealing with unincorporated associations.[52]

At first glance, the majority's strict application of the noncorporate-no entity test developed by the cases appears meritorious.[53] On closer analysis, however, it is a simplistic test that is difficult to defend as to all noncorporate organizations regardless of their internal structure. The shortcoming of the test is typified by the limited partnership in *Carlsberg,* where the limited partners lacked the capacity to bring a cause of action under the relevant state law, a uniform limited partnership statute adopted by forty-nine states.[54] The presence of a uniform statute is a guarantor of

52. *Id.* The dissent in *Carlsberg* asserted that the *Bouligny* Court retreated from the task of constructing a test for the citizenship of a labor union because of the complexity of the task. 554 F.2d at 1264. However, the thrust of the *Bouligny* opinion seemed to be that the Court will not devise a test for any unincorporated association. Having experienced problems in ascertaining the citizenship of an apparently simpler business structure, the corporation, the Court deferred the status of all unincorporated associations to a congressional solution. 382 U.S. at 153. However, that was twelve years ago. Perhaps, given the multitudinous development of the limited partnership as a business structure and its mandatory conformity to a uniform statutory pattern, the Court would now find no objection to recognizing its entity status for diversity purposes.

53. In fact, many jurisdictions use this one-dimensional approach. *See, e.g.,* Jim Walters Investors v. Empire-Madison, Inc., 401 F. Supp. 425 (N.D. Ga. 1975) (real estate investment trust was treated as an unincorporated association and citizenship of the entity was deemed to be that of each of its member shareholders, citing *Bouligny*). In Chase Manhattan Mortgage & Realty Trust v. Pendley, 405 F. Supp. 593 (N.D. Ga. 1975) (trust acting through trustees given status of an unincorporated trust), trustees attempted to amend averments asserting individual status but were denied the right, with the court holding that the capacity of the trustees to sue did not confer subject matter jurisdiction on the court. One year after *Bouligny,* the Court did liberalize venue rules concerning unincorporated associations in Denver & Rio Grande R.R. v. Brotherhood of R.R. Trainmen, 387 U.S. 485 (1967), holding that a venue statute, providing that corporations could be sued in any district in which they were incorporated or licensed to do business, included residences of unincorporated associations as proper places for litigation. However, the Court's liberal construction of a venue statute does not foretell diversity jurisdiction being expanded. Venue exists as a matter of convenience and court discretion for litigants, while the criteria of citizenship has a constitutional foundation.

54. 6 UNIFORM LAWS ANNOTATED 83. Unlike the uniform statutory base of *Carlsberg, Great Southern* involved a limited partnership formed under Pennsylvania law (177 U.S. at 450) at a time when few states had authorized the existence of this type of business entity, offering immunity from suit to limited partners. *See* Coleman & Weatherbie, *Special Problems in Limited Partnership Planning,* 30 S.W. L.J. 887-923 (1976). *Chapman* involved a joint stock company, specifically authorized by a New York statute, but not part of a nationally uniform statutory pattern. 129 U.S. at 677. The uniform code defines the parties to a cause of action, specifically denying to the limited partners any capacity to sue or be sued by a third party. UNIFORM LIMITED PARTNERSHIP ACT § 26; 59 PA. CONS. STAT. ANN. § 545 (Purdon Supp. 1977-1978).

proper federal jurisdiction because it identifies the proper parties to the cause of action while eliminating the possibility of forum shopping.

CAPACITY INQUIRY

The dissent maintained that the critical factor in determining the citizenship of the limited partners was the statutory incapacity of the limited partners to sue or be sued by third parties. Historically, the Court has required that *all* parties who possess the capacity to sue and who have an interest in the suit before a federal court must be counted in diversity cases.[55] It appears that the Supreme Court, in determining whose citizenship was to be counted, looked to state law[56] to determine the real parties in interest,[57] requiring that each possess capacity.[58] The Federal Rules of Civil Procedure, which became effective in 1938,[59] also linked parties in interest to capacity. Rule 17(a)[60] guides the federal court in determining the capacity of parties suing in a representative role, and rule 17(b)[61] is the guide as to all other parties except infants and incompetents, who were covered by rule 17(c). Both sections (a) and (b) are based on capacity to sue; neither suggests how to handle a party who lacks capacity because of the exclusionary effect of a positive command of a state statute.

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55. Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806). Chief Justice Marshall reasoned that distinct interests were to be represented by "all of whom are entitled to sue, or may be sued, in the federal courts . . . . [E]ach of the persons concerned in that interest must be competent to sue, or liable to be sued, in those courts."

56. In Rice v.Houston, 80 U.S. (13 Wall.) 67 (1871), the Court, in examining the capacity of an administrator to sue the debtor of the decedent's estate in federal court, looked both to the authority of the administrator, as granted by the state court, and to the state's statutes which imposed active duties on the administrator. *See also* note 63 *infra*.

57. The real party in interest for the purposes of an action in the federal courts is the person with the enforceable right. 3A MOORE'S FEDERAL PRACTICE ¶ 17.07 (2d ed. 1977).

58. Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806).

59. The Enabling Act was signed in 1934 and empowered the Supreme Court to prescribe general rules for the operation of the district courts. The act is codified at 28 U.S.C. § 2072 (1970).

60. FED. R. CIV. P. 17(a).

61. FED. R. CIV. P. 17(b). Rule 17(b) is the traditional association section for procedural purposes. The rule recognizes that state law is to be determinative of the entity status of the unincorporated association for suability while the accompanying notes reveal that this entity capacity exists merely for pleading purposes and does not affect the federal diversity jurisdiction of such associations.

A reasonable way of solving the dilemma of *Carlsberg* is to read 17(a) and 17(b) in pari materia. A federal court could count all the general partners who have capacity and who also assert a representative status in the limited partnership, following 17(a), and still adhere to the directives of rule 17(b) and the case law surrounding that rule by counting all the members of the limited partnership who possess capacity. After all, precedent does not suggest the counting of parties who have no capacity to sue or be sued unless the party suing is purely nominal.[62] Furthermore, when the federal court has asserted diversity jurisdiction, capacity is determined by looking at state law.[63] It seems logical that since the general partner is the real party in interest, only that class should count. The limited partner is not a real party in interest; his right to sue is either derivative[64] or representative,[65] but individual in very few instances.[66] Limited partners have the right to intervene where a general partner refuses to defend the partnership against a collusive suit,[67]

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62. 3A MOORE'S FEDERAL PRACTICE ¶ 17.04 (2d ed. 1977).

63. For example, capacity is determined by looking at state law to determine which party has an interest in cases involving wrongful death, suits by executors or administrators, and state workmen's compensation cases. 3A MOORE'S FEDERAL PRACTICE ¶ 17.14, at 17-169 to -171 (2d ed. 1977). "Except where a federal right is involved the substantive law to be looked to, of course, is the law of the state in which the federal district court is held." *Id.* ¶ 17.07, at 17-73. If the law of the forum makes the interest of the administrator nominal, then the courts look to the beneficiary for citizenship. *Id.* ¶ 17.04, at 17-30. Federal law determines capacity in cases which involve federal statutory rights, e.g., Federal Employees' Compensation Act or the Bankruptcy Act.

64. *See* N.Y. PARTNERSHIP LAW § 115-a (McKinney 1977). In Alpert v. Haimes, 64 Misc. 2d 608, 315 N.Y.S.2d 332 (Sup. Ct. 1970), the limited partners were compelled to bring a derivative suit by the New York law and were barred from proceeding individually to assert the partnership interest. *See also* Bedolla v. Logan & Frazer, 52 Cal. App. 3d 118, 128, 125 Cal. Rptr. 59, 66-67 (1975), where the court generally barred limited partners from bringing a lawsuit on behalf of a limited partnership while permitting them an individual cause of action against the general partner for breach of fiduciary duty. The courts in New York judicially created the derivative right of the limited partners, which the legislature then enacted into statute. *See* Riviera Congress Assocs. v. Yassky, 18 N.Y.2d 540, 223 N.E. 2d 876 (1966).

65. *See, e.g.*, Lerman v. Tenney, 425 F.2d 236 (2d Cir. 1970) (class action and not derivative suit is proper when the limited partner charges the general partner with a violation of federal security laws and state anti-fraud laws); Alpert v. Haimes, 64 Misc. 2d 608, 315 N.Y.S.2d 332 (Sup. Ct. 1970) (representative class suits occur when the limited partner alleges the general partner breached his common law duty).

66. UNIFORM LIMITED PARTNERSHIP ACT § 10. The limited and general partners can both inspect and copy partnership books, demand full and formal accounting of partnership funds, and sue for the dissolution of the partnership. All these rights are intrapartnership, however, and none give limited parties a cause of action outside the partnership.

67. Linder v. Vogue Invs., Inc., 239 Cal. App. 2d 338, 48 Cal. Rptr. 633 (1966).

the intervention being a matter of ancillary jurisdiction, where citizenship is not dispositive.[68]

The court of appeals, however, implicitly rejected this application of the federal rules of procedure as jurisdictional guidelines, basing its decision on rule 82 which declares that jurisdiction shall neither be extended nor limited by the rules of civil procedure.[69] But in bypassing rule 17, the *Carlsberg* court did, in effect, what it purported not to do: it expanded the reach of federal common law to define the perimeters of jurisdiction. Prior to the enactment of the rules of civil procedure, the court apparently had used state statutes to define capacity in diversity cases.[70] Thus, by eliminating this frame of reference, the command of rule 82 to maintain the status quo in jurisdictional determinations despite the rules is violated.

Perhaps the court was unwilling to develop a variant rule to the traditional treatment of unincorporated associations specifically adapted to limited partnerships because it conceptualized the relationship between the limited and general partners as that of principal and agent.[71] By looking at the parties who stood to benefit pecuniarily, the court must have forgotten the fact that the limited partners remained only nominal parties despite their apparent beneficial interest.[72] It is uncertain whether the court of appeals in

68. FED. R. CIV. P. 24(a)(2).

69. 554 F.2d at 1261.

70. In Susquehanna & Wyo. Valley R.R. & Coal Co. v. Blatchford, 78 U.S. (11 Wall.) 172 (1871), the Court distinguished the real parties in interest from the nominal parties by examining the intent of the relevant state statute and the rights and powers of the plaintiffs who were the real prosecutors of the suit. *See also* notes 56 & 63 *supra*. In Puerto Rico v. Russell & Co., 288 U.S. 476 (1933), the Court examined the status of the *sociedad*, i.e., the capacity to sue, within the ambit of the territorial statutes of Puerto Rico in determining the citizenship identity of the parties to the suit.

71. *See, e.g.*, Donroy, Ltd. v. United States, 301 F.2d 200 (9th Cir. 1962) (relationship between general and limited partners is not that of broker and principal or special agent and principal, but general partner-agent and principal); Bedolla v. Logan & Frazer, 52 Cal. App. 3d at 128, 125 Cal. Rptr. at 66 (the courts recognize no separate identities between general and limited partners as they do in the relationship between the shareholder and the corporation). In *Donroy*, the court considered the nature of the limited partnership comparable to that of a partnership, and thus regarded it as an association of individuals rather than as a legal entity. 301 F.2d at 206. The court then stated that

> each partner, whether general or limited has an interest as such in the assets and the profits of the partnership, including the physical plant or offices at which the partnership conducts its business, so that the office or permanent establishment of the partnership is in law, the office of each of the partners—whether general or limited.

Id. at 207. *Contra*, UNIFORM LIMITED PARTNERSHIP ACT § 18 ("A limited partners' interest in the partnership is personal property").

72. In *Carlsberg*, the limited partners contributed more than 99% of the capital, net

Carlsberg was swayed in its decision by a consideration of the disproportionately greater property interests of the limited partner as compared to the general partners; the district court seemed to have been.[73]

If the federal courts deem lack of capacity to sue irrelevant to the question of citizenship, they arguably have that right.[74] However, there are some compelling reasons why lack of capacity of the limited partners should be determinative for diversity citizenship purposes. The state's interest in enacting special provisions for the limited partners is to encourage individuals to invest.[75] By denying a federal forum, the *Carlsberg* decision will have a negative impact on the development of these multiparty-multistate business entities since the parties involved often desire the availability of a federal forum. The appeal of the limited partnership as an attractive business organization could be altered, and the substantive law of forty-nine forums could be thwarted, if the courts continue to analyze the diversity jurisdiction of a limited partnership in a vacuum. The result is a seemingly contradictory tilt for the post-*Erie* federal courts.

Moreover, the Third Circuit Court of Appeals has not previously adhered to the rigid position it now supports. In *Pavlovscak v. Lewis*,[76] where a miner brought an action against the trustees of the

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profits being allocated in a ratio 95% to limited partners and 5% to general partners. 413 F.Supp. at 882. Also, it is clear that the modern limited partnership was created in reponse to the peculiarities of the income tax law. The individual limited partner is a direct beneficiary of the tax idiosyncrasies which outline a fine line between corporate entities and partnerships for its taxing purposes. *See* Note, *Tax Classification of Limited Partnerships*, 90 HARV. L. REV. 745-62 (1977).

73. 413 F. Supp. at 884. The court pointed out that over 1500 limited partners stood to profit from this case. Thus, it can be inferred that the district court counted all the members of the limited partnership regardless of class distinction because of each partner's financial interest in a positive verdict.

74. "The district courts shall have original jurisdiction of all civil actions . . . between (1) citizens of different States . . . . " 28 U.S.C. § 1332 (1970). The federal courts thus have proprietary rights in the arena of federal jurisdiction and some contemporary courts may seek to detach their jurisdictional competence from state statutes which define capacity. In Ziady v. Curley, 396 F.2d 873 (4th Cir. 1968) (traditional guardian ad litem situation which involved nominal parties), the court held that the problem of citizenship (in that case domicile), is uniquely one of federal cognizance. The court implied that its jurisdictional prerogatives are within the perimeter of the *Erie* rationale, as the latter explicitly points federal courts at the states for substantive law in diversity cases but implicitly retains the residuary to the federal courts. The residuary could be enormous.

75. UNIFORM LIMITED PARTNERSHIP ACT § 1 & Comment.

76. 274 F.2d 523 (3d Cir. 1959), *cert. denied*, 362 U.S. 990 (1960). The court allowed

United Mine Workers' retirement fund, the court made subtle distinctions in its diversity of citizenship analysis between classes of individuals in which only one entity was looked to for diversity purposes while three classes existed. The court, considering the special and defined purposes for which the trust involved in the case was created, looked only to the trustees for citizenship, ignoring both the beneficiaries and the contributors to the trust. The court, in coming to this decision, considered the state's common law treatment of the fund as a guide to its own determination of the fund's status. Analogizing this to *Carlsberg,* the general partners could have been considered tantamount to trustees, and limited partners equivalent to beneficiary-contributors who had no management control, and who, in addition, lacked capacity by statutory enactment. Arguably the court of appeals could have used 17(b) as a guide and counted all the general partners in a fashion similar to *Pavlovscak,* or alternatively, it could have used 17(a) and counted the partners who had representative capacity—all the general partners—as it implicitly did in *Pavlovscak.* Either approach seems more logical than the one taken.

Conclusion

In a contradictory fashion, the Third Circuit Court of Appeals emphasized its support of federalism and its concern that federal courts not encroach on state issues,[77] but repudiated any reliance on a specific state statute to define citizenship in a diversity case where such reliance would seem logical.

Faced with the alternative of carving out an exception for the treatment of limited partnerships for diversity jurisdiction pur-

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jurisdiction to be exercised over a miners' retirement fund, considering it an unincorporated association, and counted only the trustees of the fund for citizenship purposes, not counting either the mine owners or the mine workers. The court distinguished *Underwood v. Maloney,* 256 F.2d 334 (3d Cir. 1958), where a labor union was denied entity status: first, union members did not pay into the fund or control it; second, union members had only an expectancy interest in the funds; and third, trustees were independent of workers and operators, agents of neither. *Bouligny* could have been distinguished in *Carlsberg* as *Underwood* was distinguished in *Pavlovscak.* Furthermore, the Third Circuit Court of Appeals in *Pavlovscak* looked to Stampolis v. Lewis, 186 Pa. Super. Ct. 285, 142 A.2d 348, *allocatur denied* (Pa. 1958), *cert. denied,* 359 U.S. 907 (1959), as Pennsylvania authority for its conclusion that a retirement fund should be treated as an entity. In *Carlsberg,* the court could have found similar authorization in the uniform state statute.

77. 554 F.2d at 1257.

poses, the court instead chose to rely on the case law rule of noncitizenship status for noncorporate associations. The court did not address the arguably viable option to sift out parties who should be counted for citizenship by a pari materia reading of rule 17(a) and (b). This type of a test for determining the citizenship of an unincorporated association where a uniform statute existed would then require a balancing of past decisions with the real party in interest or status analysis.

By refusing to consider the uniqueness of the limited partnership as an entity, the *Carlsberg* court has perhaps set the stage for some anomalous results. For example, where the court is faced with a limited partnership composed of a large class of general partners and few limited partners, one of whom happens to be a citizen of the state of the opposing party, it must deny jurisdiction based on *Carlsberg* or retreat from the corner in which it has placed itself. The court painted with a broad stroke where the situation demanded a fine line of distinction.

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