Cornell Law Review

Volume 70
Issue 6 *August 1985*

Article 1

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CREATIVE MANIPULATION OF FEDERAL JURISDICTION: IS THERE DIVERSITY AFTER DEATH?

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INTRODUCTION

One of the major purposes of the Supreme Court's decision in *Erie Railroad Co. v. Tompkins*[1] was to eliminate or drastically curtail the evil of forum shopping.[2] Forum shopping continues, however, notwithstanding the well-known strictures of *Erie*. Indeed, in recent years, federal courts have been bedeviled by a series of cases involving creative manipulation of diversity jurisdiction in estate-related litigation. Lacking clear guidance from the Supreme Court,[3] district and circuit courts have articulated a confusing array of principles and tests to govern jurisdictional questions in estate-related litigation.[4]

As a consequence, a litigant can manipulate federal diversity requirements effectively in some jurisdictions, but not in others.[5]

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1 304 U.S. 64 (1938).

2 The twin aims of the *Erie* rule were characterized by the Court as "discouragement of forum-shopping and avoidance of inequitable administration of the laws." Hanna v. Plumer, 380 U.S. 460, 468 (1965) (footnote omitted). The *Hanna* Court viewed *Erie* as a reaction to the practice of forum shopping that had developed in the wake of Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842). *Hanna,* 380 U.S. at 467. *See* Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518 (1928) (diversity jurisdiction existed although plaintiff reincorporated solely to create diversity); *see also* O'Brien v. Avco Corp., 425 F.2d 1030, 1036 (2d Cir. 1969) (forum shopping in estate litigation viewed as an evil *Erie* doctrine was designed to prevent).

3 Only two Supreme Court decisions address jurisdictional issues in estate-related litigation. Kramer v. Caribbean Mills, 394 U.S. 823 (1969); Mecom v. Fitzsimmons Drilling Co., 284 U.S. 183 (1931).

4 *See infra* notes 107-49 and accompanying text. For an excellent summary of the development of these different approaches see Bianca v. Parke-Davis Pharmaceutical Div. of Warner-Lambert Co., 723 F.2d 392 (5th Cir. 1984).

5 In *Bianca v. Parke-Davis* the Fifth Circuit adopted the "motive/function" test, *see infra* notes 123-35 and accompanying text, to ascertain whether a nonresident administratrix's citizenship should determine jurisdiction. 723 F.2d at 397-98. Had the plaintiff filed in a circuit applying the "substantial stake" test, however, she would not have been able to maintain her suit in federal court.

> [I]t is apparent that [the administratrix] has no substantial stake in the outcome of the wrongful death action. Though [she] asserts that Mississippi's Wrongful Death Statute vests in her substantive powers and duties

Thus, some litigants may successfuly establish diversity jurisdiction while their counterparts in other states fail to get into federal court on similar facts.[6] These inconsistent results produce a discriminatory effect among litigants of different states. The jurisdictional tests are also difficult to apply, easy to manipulate, and not consonant with the purposes underlying diversity jurisdiction.[7]

The use of manipulative tactics to secure a federal forum in estate-related litigation will continue to be a problem.[8] Because of the confusion among the lower federal courts, the rules for determining proper diversity jurisdiction are ripe for reconsideration. Until clearly formulated rules are articulated, the lower federal courts will issue ad hoc, fact-bound decisions amounting to little more than jurisdictional babble. Thus, the Supreme Court and Congress must reconsider the rules for determining jurisdiction in estate-related cases in light of the purposes underlying diversity jurisdiction.[9] To this end, Congress should amend or repeal the collusive joinder statute; this action would alleviate the necessity of engaging in problematic inquiries into parties' motivations in seeking a federal fo-

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> which belie any claim that she is a "straw fiduciary," she does not lay claim to any portion of any recovery in the wrongful death action, and she does not credibly claim that her function as administratrix was to do more than prosecute this lawsuit.

Id. at 398. For a discussion of the substantial stake test, see *infra* notes 129-49 and accompanying text.

6 It is ironic that this discrimination is precisely what *Erie* intended to eliminate. *See supra* note 2.

7 The often articulated rationale for diversity jurisdiction is to prevent state court prejudice against out-of-state litigants. *See* American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts §§ 101-03 (1969) [hereinafter cited as Division of Jurisdiction Study]; *see also* Betar v. De Havilland Aircraft of Can., 603 F.2d 30 (7th Cir. 1979) ("the purpose of diversity jurisdiction [is] to prevent local prejudice"), *cert. denied*, 444 U.S. 1098 (1980); Bishop v. Hendricks, 495 F.2d 289 (4th Cir.) (federal jurisdiction is to prevent prejudice in state courts), *cert. denied*, 419 U.S. 1056 (1974); O'Brien v. Avco Corp., 425 F.2d 1033 (2d Cir. 1969) (same); McSparran v. Weist, 402 F.2d 867 (3d Cir. 1968) (same), *cert. denied sub nom.* Fritzinger v. Weist, 395 U.S. 903 (1969); and Esposito v. Emery, 402 F.2d 880 (3d Cir. 1968) (same).

8 In McSparran v. Weist, 402 F.2d 867, 871 (3d Cir. 1968), *cert. denied sub nom.* Fritzinger v. Weist, 395 U.S. 903 (1969), the Third Circuit noted that the "rivulet of 'manufactured' diversity cases [had] swollen to a stream of wide dimensions." In *McSparran* a Pennsylvania Orphans' Court appointed an out-of-state guardian to prosecute a personal injury claim in federal court because larger verdicts were usually obtained there. The *McSparran* court acknowledged that in a two year period, 20.5% of the diversity cases in the Pennsylvania district court were brought by out-of-state personal representatives of Pennsylvania citizens against Pennsylvania defendants. *Id.* One out-of-state resident was a guardian in 61 pending diversity suits in the Eastern District of Pennsylvania. *Id.*

9 *See supra* note 7.

The desirability of retaining federal diversity jurisdiction is much debated. For a summary of the competing arguments, see Division of Jurisdiction Study, *supra* note 7, §§ 99-110. This Article supports and assumes retention of federal diversity jurisdiction. *See infra* notes 171-75 and accompanying text.

rum. Further, Congress should promulgate a per se rule that the citizenship of the beneficiaries should govern jurisdiction in estate-related litigation. This rule not only is consonant with the purposes of diversity jurisdiction, but also avoids most of the problems that attend other approaches. Lastly, the Court should reject the tests currently utilized by the federal appellate courts and affirm a per se citizenship rule as a prerequisite to access to federal court.

This Article examines the treatment the Supreme Court and Congress have given diversity jurisdiction in estate litigation. Next, it examines different approaches taken by the circuits and discusses the American Law Institute's proposal on this subject. Finally, the Article argues that the citizenship of the beneficiaries should govern jurisdiction in estate-related litigation because such a rule would best effectuate the purposes of diversity jurisdiction.

I
FEDERAL DIVERSITY JURISDICTION IN ESTATE-RELATED LITIGATION

Consider the following situations:

(1) An Indian national dies in an airplane crash in Zambia, Africa. He leaves a wife and children who are all Indian nationals. As beneficiaries to his estate, they appoint an Illinois citizen to administer the estate, which contains no assets other than the wrongful death action arising out of the airplane crash. The administrator files suit against the airplane's Canadian manufacturer in Illinois state court. The Canadian defendant removes the action to a federal district court in Illinois. The administrator then petitions for a remand to the state court, arguing that the federal court lacks jurisdiction. The district court denies this petition. The court of appeals reverses, holding that even though the nominal plaintiff is an Illinois citizen, the action is essentially a suit by Indian nationals against a Canadian corporation. The court reasons that a defendant who attempts to remove to federal court cannot base diversity jurisdiction on the administrator's citizenship. The court concludes that this suit is between aliens, and thus is outside the original jurisdiction of the federal courts.[10]

(2) An eleven-year-old child contracts aplastic anemia and dies after taking a cold medication prescribed by the family doctor. The child's parents wish to sue the physician, as well as the supplier and manufacturer of the medication, but because the parents are alleg-

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10 *See* Betar v. De Havilland Aircraft of Can., 603 F.2d 30 (7th Cir. 1979), *cert. denied*, 444 U.S. 1098 (1980). The court utilized a "substantial stake in the outcome of the litigation" test to reach this result. *Id.* at 35; *see infra* notes 129-49 and accompanying text.

edly despondent and traumatized by the daughter's death, they feel incapable of prosecuting the lawsuit. The Mississippi Chancery Court names the child's aunt, a Louisiana citizen, administratrix of the child's estate. The Louisiana administratrix then files a wrongful death action against the physician, supplier, and manufacturer, all from Mississippi, in federal district court in Mississippi. The court dismisses the suit for lack of federal jurisdiction. On appeal, the court of appeals reverses, holding that the administratrix's citizenship may be used to establish diversity unless she was appointed with a motive to create diversity where it would not otherwise exist.[11]

(3) An Oklahoma citizen dies of medical complications, leaving her severely disabled husband and two grown daughters as heirs. One of the daughters, also an Oklahoma citizen, is appointed administratrix. She completes her duties as the estate fiduciary but does not bring a wrongful death action against the hospital and physicians who treated her mother. The daughter then resigns as administratrix and appoints her sister, a Colorado citizen, as successor administratrix. The new administratrix immediately commences a wrongful death action in federal district court in Oklahoma. A month after filing suit in federal court, she moves to Oklahoma, making that her permanent residence. The defendants move to dismiss for lack of diversity and, alternatively, for collusive appointment of a fiduciary. The trial court grants this motion, but the court of appeals reverses, holding that diversity exists because the successor administratrix had a real and substantial stake in the outcome of the litigation, sufficient to support proper diversity jurisdiction in federal court.[12]

These cases all raise the troublesome issue of whose citizenship may be used for establishing diversity jurisdiction in estate litigation: the decedent's, the beneficiaries', or the estate representative's? Behind this relatively simple question lie a myriad of complex issues. For example, if the estate representative's citizenship governs jurisdiction, are there significant distinctions among estate representatives—executors, administrators, guardians, and trustees—to warrant different treatment?[13] Does it matter whether

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11 *See* Bianca v. Parke-Davis Pharmaceutical Div. of Warner-Lambert Co., 723 F.2d 392 (5th Cir. 1984). The court adopted the "motive/function" analysis in arriving at its conclusion. *Id.* at 398; *see infra* notes 115-27 and accompanying text.

12 *See* Hackney v. Newman Memorial Hosp., 621 F.2d 1069 (10th Cir.), *cert. denied,* 449 U.S. 982 (1980). The court endorsed the "substantial stake" approach in determining whether the administratrix was more than a straw party. *Id.* at 1071.

13 A number of courts and commentators have suggested that the legal status of the fiduciary determines jurisdiction.

> The substantive status of the various kinds of representatives is not, of

the administrator is appointed by a court, designated in advance by the decedent, or nominated by the estate beneficiaries?[14] How does the federal proscription against improper and collusive joinder of parties apply to an administrator's appointment?[15] If an appointment is valid under state law, can it be invalid for federal jurisdic-

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> course, uniform, and their authority and duties differ widely. In general, executors, although acting by virtue of court appointment, owe their position to their designation by the testator, and administrators to their relationship to the deceased intestate. While an executor or administrator takes title to the property of the decedent, a gnardian of the person of a minor or other incompetent has no interest in his ward's property and a gnardian of his estate does not take legal title to the property, which remains in the ward, but merely acts as its custodian or manager. A trustee, on the other hand, is of course vested with the legal title to the property of the trust.

McSparran v. Weist, 402 F.2d 867, 870 (3d Cir. 1968) (citations omitted), *cert. denied,* 395 U.S. 903 (1969). The Supreme Court also has noted that estate representatives may differ as to their status and power under state law, but the Court has refused to speculate whether these distinctions should be determinative of federal diversity jurisdiction. *See* Kramer v. Caribbean Mills, 394 U.S. 823, 828 n.9 (1969). In a number of cases, lower courts chose not to distingnish among representatives. *E.g.,* Messer v. American Gems, Inc., 612 F.2d 1367, 1369 (4th Cir.), *cert. denied,* 446 U.S. 956 (1980); Betar v. De Havilland Aircraft of Can., 603 F.2d 30, 34 (7th Cir. 1969), *cert. denied,* 444 U.S. 1098 (1980); County of Todd v. Loegering, 297 F.2d 470, 472 (8th Cir. 1961). In other cases, courts distinguished among representatives. Sadler v. New Hanover Memorial Hosp., 588 F.2d 914, 917 (4th Cir. 1978); Rogers v. Bates, 431 F.2d 16, 19-20 (8th Cir. 1970); Lester v. McFaddon, 415 F.2d 1101, 1103-04 (4th Cir. 1969). *See also* C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE § 3640 (1976) [hereinafter cited as FEDERAL PRACTICE AND PROCEDURE]; Atkinson, *The Real Party in Interest Rule: A Plea for its Abolition,* 32 N.Y.U. L. REV. 926, 962-63 (1957) (argning for different treatment for different guardians); Kennedy, *Federal Rule 17(a): Will the Real Party in Interest Please Stand?,* 51 MINN. L. REV. 675, 706-08 (1967) (discussing courts' distinction between guardian and administrator); Note, *Manufactured Federal Diversity Jurisdiction and Section 1359,* 69 COLUM. L. REV. 706, 715 n.36 (1969) (noting different treatment of guardians and administrators) [hereinafter cited as Note, *Manufactured Federal Diversity*]; Note, *Federal Courts—Appointment of Administrator to Defeat Diversity Jurisdiction*—Miller v. Perry, 22 J. PUB. L. 293, 398 (1973) (recoguizing distinction between ancillary and general administrator) [hereinafter cited as Note, *Appointment of Administrator*]; Comment, *Federal Courts—Diversity Jurisdiction—When State Law Requires Wrongful Death Action to be Prosecuted by Resident Ancillary Administrator, Citizenship of Beneficiaries is Controlling For Diversity Purposes*—Miller v. Perry, 47 N.Y.U. L. REV. 801, 807-08 (1972) (discussing different treatment of administrators and other representatives).

14 There is an opportunity for improper or collusive behavior where the beneficiaries of an estate nominate or appoint the estate representative. A decedent naming an executor in his will is less likely to do so in contemplation of litigation in federal court. Finally, if the court appoints an estate administrator, any suggestion of collusiveness would imply that the state behaved improperly. *See* Messer v. American Gems, Inc., 612 F.2d 1367, 1373 n.8 (4th Cir.) ("The decedent, divorced from his wife, in taking the altogether reasonable step of naming his sister as executrix could not be charged with prescient plotting to achieve diversity jurisdiction should he die in circumstances giving rise to a wrongful death claim."), *cert. denied,* 446 U.S. 956 (1980); Sadler v. New Hanover Memorial Hosp., 588 F.2d 914 (4th Cir. 1978) (designation of executrix in a will found not collusive).

15 *See infra* notes 74-89 and accompanying text.

tional purposes?[16] Of what significance are federal and state real party in interest rules to the proper resolution of jurisdictional questions?[17] If the federal court looks to the beneficiaries' citizenship, should diversity be destroyed when one of the beneficiaries lives in the same jurisdiction as the defendant?[18] May a beneficiary create or destroy diversity jurisdiction by changing domicile or appointing a nonresident administrator?[19] When state law requires that an administrator be a resident, will a nonresident beneficiary be able to bring a wrongful death action in a federal forum?[20]

At first blush, federal jurisdiction in estate cases appears relatively simple to establish. The basic diversity statute[21] authorizes federal jurisdiction where the parties to the action are citizens of different states. Federal Rule of Civil Procedure 17[22] and the federal anti-collusion statute,[23] however, limit that rule. The real party in interest under rule 17 must bring the suit, and the rule specifies that executors, administrators, and guardians may litigate an action in their own name without joining the person on whose behalf they are acting.[24] The federal anti-collusion statute denies federal jurisdiction to any civil action when a party has been improperly or collusively joined in order to invoke the jurisdiction of a federal court.[25]

Despite the apparent clarity of these rules, the federal courts have not done well in resolving jurisdictional disputes in estate-re-

16 *See* Miller v. Perry, 456 F.2d 63 (4th Cir. 1972) (upholding validity of North Carolina statute requiring resident ancillary administrator to prosecute wrongful death actions). *Miller* raised the issue whether statutes such as North Carolina's violate the supremacy clause when they defeat federal jurisdiction. *Id.* at 64, 67-68. The North Carolina statute was subsequently repealed. For other cases examining the relationship between state law and the supremacy clause, see Sadler v. New Hanover Memorial Hosp., 588 F.2d 914, 916 n.2 (4th Cir. 1978); Vaughan v. Southern Ry., 542 F.2d 641, 646 (4th Cir. 1976) (Butzner, J., dissenting).

17 *See infra* notes 90-106 and accompanying text. *See generally* Atkinson, *supra* note 13; Kennedy, *supra* note 13.

18 In Vaughan v. Southern Ry., 542 F.2d 641 (4th Cir. 1976), the court held that the citizenship of the beneficiaries was controlling on the jurisdictional question. In his dissent, Judge Butzner articulated several problems raised by this rule. *Id.* at 646-47 (Butzner, J., dissenting).

19 *See* Hackney v. Newman Memorial Hosp., 621 F.2d 1069, 1070 (10th Cir.) (administratrix's change of domicile after institution of wrongful death action does not destroy diversity), *cert. denied*, 449 U.S. 982 (1980).

20 The Supreme Court seems to have laid this issue to rest in Kramer v. Caribbean Mills, 394 U.S. 823 (1969). "The existence of federal jurisdiction is a matter of federal, not state, law." *Id.* at 829. Nevertheless, litigants still argue that state laws governing estate administration affect federal diversity. *See, e.g.*, Bianca v. Parke-Davis Pharmaceutical Div. of Warner-Lambert Co., 723 F.2d 392, 398 n.6 (5th Cir. 1984); O'Brien v. Avco Corp., 425 F.2d 1030, 1034 (2d Cir. 1969).

21 28 U.S.C. § 1332 (1982).

22 FED. R. CIV. P. 17.

23 28 U.S.C. § 1359 (1982).

24 FED. R. CIV. P. 17.

25 28 U.S.C. § 1359 (1982).

lated cases. Lower court difficulties stem, in part, from a lack of clear Supreme Court guidance. The two Supreme Court cases most commonly cited in this context do not focus squarely on the question of whose citizenship should be used to establish diversity in estate-related cases.[26] Nonetheless, the lower federal courts have taken their analytical cues from these two decisions to develop complex principles and rules.

The circuit courts have articulated two distinct tests for determining the validity of federal jurisdiction in estate-related litigation: the "motive/function" test and the "substantial stake in the outcome of the litigation" test.[27] The motive/function approach requires the court to make a factual inquiry into the motives for the fiduciary's appointment as well as an examination of his duties as estate representative. The substantial stake test considers whether the estate fiduciary has a significant interest in any estate-related litigation that he prosecutes on behalf of the decedent's estate. The American Law Institute, mindful of this legal problem and its current judicial treatment, has proposed a third alternative. The A.L.I. rejects any jurisdictional test requiring evidentiary hearings into motives or functions and has recommended a per se rule that the decedent's citizenship controls all jurisdictional issues.[28]

A. The Supreme Court's Treatment

Traditionally, probate matters, like most domestic relations litigation, have not been within the purview of the federal courts and therefore jurisdictional contests have been rare.[29] Although the Court has suggested that proper diversity jurisdiction can exist between an estate administrator as plaintiff and an opposing defendant,[30] it has never squarely addressed the issue of whose citizenship courts count when a plaintiff seeks a federal forum in an estate ad-

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26 Mecom v. Fitzsimmons Drilling Co., 284 U.S. 183 (1931), concerned a litigant attempting to destroy, rather than create, diversity jurisdiction. This tactic does not come within the statutory prohibition of 28 U.S.C. § 1359 (1982). *See infra* notes 35-52 and accompanying text. Kramer v. Caribbean Mills, 394 U.S. 823 (1969), involved a collusive assignment of a contract claim and did not involve estate-related litigation; *see infra* notes 53-70 and accompanying text.

27 The motive/function test was first articulated by the Third Circuit in McSparran v. Weist, 402 F.2d 867 (3d Cir. 1968) (en banc), *cert. denied,* 395 U.S. 903 (1969). The "substantial stake in the outcome" test was first articulated by the Fourth Circuit in Bishop v. Hendricks, 495 F.2d 289 (4th Cir.), *cert. denied,* 419 U.S. 1056 (1974).

28 Division of Jurisdiction Study, *supra* note 7, § 1301(b)(4), at 117-19.

29 *See* C. WRIGHT, LAW OF THE FEDERAL COURTS 143-46 (4th ed. 1983); Note, *Federal Jurisdiction in Matters Relating to Probate and Administration,* 43 HARV. L. REV. 462 (1930); Comment, *Federal Court Probate Proceedings,* 45 IND. L.J. 387 (1970); Note, *Federal Jurisdiction and Practice: Probate Matters,* 15 OKLA. L. REV. 462 (1962).

30 *Mecom,* 284 U.S. at 186 (citing Childress v. Emory, 21 U.S. (8 Wheat.) 642 (1823)).

ministration matter, most commonly the prosecution of a wrongful death action.[31] In spite of this, lower federal courts analyze jurisdictional questions in the mistaken belief that the Court has spoken on the subject, a misapprehension that has encouraged a proliferation of inconsistent rules among the circuits.

Lower federal courts have relied on two Supreme Court decisions: *Mecom v. Fitzsimmons Drilling Co.*[32] and *Kramer v. Caribbean Mills, Inc.*[33] Although they are treated as precedent on the issue of federal jurisdiction in estate-related litigation, both cases are factually inapposite to the situations typically before the lower courts. As a result, they are virtually useless to courts that must decide whose citizenship may be used to establish diversity. At its worst, these two Supreme Court cases are utilized to justify inconsistent principles.[34] And ironically, although the Court has never spoken to the jurisdictional problem in estate-related litigation, lower federal courts adjudicate this issue as though the Court has so spoken.

1. Mecom v. Fitzsimmons Drilling Co. *and the Rule that Motive Is Irrelevant*

In *Mecom*,[35] an Oklahoma widow who was the administratrix of her husband's estate twice instituted wrongful death actions in Oklahoma state court against a Louisiana corporate defendant. On both occasions, the defendant removed the lawsuits to federal district court, and, in each instance, the widow dismissed her suit. After the second dismissal, the widow resigned as administratrix and asked the Oklahoma probate court to appoint Mecom, a Louisiana resident, estate administrator. Mecom filed a third wrongful death action in state court, and the defendant again attempted to remove the action to federal court. This time, however, removal was improper because the plaintiff and defendant were citizens of the same

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31 *Mecom* involved a suit by an administratrix for recovery of damages under the Oklahoma wrongful death statute for the loss of her husband. *Id.* at 184.

32 284 U.S. 183 (1931).

33 394 U.S. 823 (1969).

34 The *Mecom* decision has been consistently cited for the principle that the motives of a litigant in seeking a federal forum are immaterial to the federal court's jurisdictional analysis. *See* Lang v. Elm City Constr. Co., 324 F.2d 235, 236 (2d Cir. 1963) (relying on Corabi v. Auto Racing, Inc., 264 F.2d 784 (3d Cir. 1959)); Janzen v. Goos, 302 F.2d 421, 425 (8th Cir. 1962); County of Todd, Minn. v. Loegering, 297 F.2d 470, 473 (8th Cir. 1961); Corabi v. Auto Racing, Inc., 264 F.2d 784, 786 (3d Cir. 1959); McCoy v. Blakely, 217 F.2d 227, 230 (8th Cir. 1955); and Jaffe v. Philadelphia & W.R.R., 180 F.2d 1010, 1012 (3d Cir. 1950), *rev'd*, 402 F.2d 867 (3d Cir. 1968). The *Kramer* decision has been construed as endorsing the proposition that motives are material to a court's jurisdictional analysis, particularly where § 1359 is implicated. *See, e.g.*, Bianca v. Parke-Davis, 723 F.2d at 395.

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

state.[36] The Tenth Circuit determined that the motive for Mecom's appointment was to eliminate the diversity of citizenship that had justified removal in the earlier lawsuits.[37]

Nevertheless, the Supreme Court held that the motive behind the administrator's appointment was immaterial. Under Oklahoma law, a nonresident can be appointed administrator. The Court reasoned that it was "*immaterial that the motive for obtaining [Mecom's] appointment and qualification was that he might thus be clothed with a right to institute an action which could not be so removed on the ground of diversity of citizenship.*"[38] Therefore, *Mecom* can be read to stand for the proposition that when a party validly appoints an estate representative, inquiries into motive are immaterial to diversity and constitute an impermissible collateral attack on a state court's decree validating the appointment.[39]

This rule governed circuit court decisions for almost twenty years.[40] In 1968, the Third Circuit revisited this problem and decided that motive was indeed a relevant concern in determining federal jurisdiction in estate-related litigation.[41] The Third Circuit was the first court to notice that *Mecom*'s facts were sufficiently different from the typical estate cases to render the *Mecom* rule inapplicable in most estate-related cases.[42]

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36 *Id.* at 184-85.

37 *Id.* at 185.

38 *Id.* at 190.

39 [I]t is clear that the motive or purpose that actuated any or all of these parties in procuring a lawful and valid appointment is immaterial upon the question of identity or diversity of citizenship. To go behind the decree of the probate court would be collaterally to attack it, not for lack of jurisdiction of the subject-matter or absence of jurisdictional facts, but to inquire into purposes and motives of the parties before that court when, confessedly, they practiced no fraud upon it.

Id. at 189. For a discussion of the *Mecom* decision, see Note, *Manufactured Federal Diversity, supra* note 13, at 717; Case Comment, *Federal Courts—Jurisdiction: Diversity of Citizenship—Appointment of Administrator From Defendant's State To Defeat Diversity Jurisdiction,* 45 HARV. L. REV. 743 (1932); Recent Decision, *Federal Jurisdiction—Diversity of Citizenship—Suit Under Death Act,* 30 MICH. L.REV. 1341 (1932); Comment, *supra* note 13, at 803; Note, *The Manufacture of State or Federal Jurisdiction,* 41 YALE L.J. 639 (1932).

40 Janzen v. Goos, 302 F.2d 421, 425 (8th Cir. 1962); County of Todd v. Loegering, 297 F.2d 470, 472-75 (8th Cir. 1961); Corabi v. Auto Racing, Inc., 264 F.2d 784, 786, 788 n.10 (3d Cir. 1955); Jaffe v. Philadelphia & W. R.R., 180 F.2d 1010, 1010-12 (3d Cir. 1950), *rev'd* 402 F.2d 867 (3d Cir. 1968).

41 McSparran v. Weist, 402 F.2d 867 (3d Cir. 1968), *cert. denied,* 395 U.S. 903 (1969). *See infra* notes 107-10 and accompanying text. For commentary on the *McSparran* decision, see 3A J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 17.05 [2.2] (2d ed. 1984); FEDERAL PRACTICE AND PROCEDURE, *supra* note 13, § 3640 [103-04]; Note, *Manufactured Federal Diversity, supra* note 13, at 719.

42 The fundamental distinction between *Mecom* and the present case is that there the collusion statute was not involved because the resignation of the administratrix and the appointment of her successor were acts done not to create federal jurisdiction but to prevent it from attaching. Section

Three factors render *Mecom* unique. First, *Mecom* involved a litigant who manipulated parties to destroy diversity jurisdiction, rather than to create it.[43] This tactic does not implicate the anti-collusion statute which prohibits the joinder of parties in order to create federal jurisdiction.[44] Thus, the Court's decision that motive was immaterial was logical in this factual context. The Court has not yet spoken on the validity of jurisdiction when an estate fiduciary is appointed specifically to create diversity, an act directly implicating the anti-collusion statute.

The second unusual feature of *Mecom* is that the jurisdiction issue was raised in a removal action. The original administratrix prevented removal by appointing a nondiverse administrator.[45] She clearly did not wish to avail herself of the benefits of a federal court; rather, the corporate defendant sought a federal forum. In evaluating these maneuvers, the Court analogized to cases where the plaintiff sued in state court and brought in nondiverse defendants.[46] In those situations, a plaintiff's motives in joining defendants are immaterial provided there is a good faith action against the joined parties. That rule embodies the federal policy of according considerable deference to the plaintiff's choice of forum and denying jurisdiction even when the plaintiff has deliberately joined nondiverse parties to avoid removal. Unlike the administratrix in *Mecom*, most estate fiduciaries choose to sue in federal court. Therefore, in those cases, original jurisdiction rules, not removal principles, apply.[47]

1359, as its language clearly shows, expresses a policy against the creation of federal jurisdiction and not against its avoidance. It proscribes improper or collusive conduct "to invoke" diversity jurisdiction and hence was inapplicable in the *Mecom* case.

McSparran, 402 F.2d at 875 (footnote omitted).

43 For years lower courts iguored this and cited *Mecom* to support jurisdiction when litigants tried to create diversity. *See supra* note 34 (citing cases).

In Janzen v. Goos, 302 F.2d 421 (8th Cir. 1962), a husband died of injuries he received in an automobile accident in Nebraska. A Nebraska court appointed his widow as administratrix of his estate. Two months after this appointment, the administratrix moved to Kansas and filed a wrongful death action against the defendants in federal district court in Nebraska. The Eighth Circuit held that the Nebraska district court had jurisdiction of the action against Nebraska residents. *Id.* at 427. The court relied on *Mecom* in concluding that the representative's citizenship controlled. The court failed, however, to note that in *Mecom* the administrator's appointment destroyed diversity, while here the plaintiff was attempting to create diversity.

44 *See* 28 U.S.C. § 1359 (1982). *See also* J. MOORE & J. LUCAS, *supra* note 41, ¶ 17.05; FEDERAL PRACTICE AND PROCEDURE, *supra* note 13, § 3637.

45 *Mecom*, 284 U.S. at 185.

46 *Id.* at 189.

47 Removal is governed by 28 U.S.C. § 1441 (1982). The principles governing removal jurisdiction are somewhat different than those governing original jurisdiction. *See* C. WRIGHT, *supra* note 29, at 209-34. For example, resident defendants are denied access to federal courts by the removal statute. 28 U.S.C. § 1441(b) (1982). The same resi-

Finally, *Mecom* is limited in its precedential value by the Court's focus on the real party in interest. The Oklahoma probate court appointed a Louisiana citizen as estate administrator.[48] He thus became a trustee of an express trust under Oklahoma law. As administrator, he was required to prosecute any wrongful death action, distribute the recovery to the beneficiaries, and act with diligence in order to avoid liability for breach of his fiduciary duties.[49] The Court concluded that because of these requirements, the administrator was the real party in interest and *his* citizenship, rather than that of the beneficiaries or the decedent, should govern federal jurisdiction.[50]

However, not all estate representatives are court-appointed. Furthermore, the duties of fiduciaries vary greatly from state to state,[51] and a fiduciary's designation as the real party in interest depends on the representative's legal duties. Therefore, *Mecom* is not applicable where the administrator's duties are not sufficient to make him a real party in interest.[52]

Mecom avoided the issue of whether joinder in order to create federal jurisdiction in estate-related litigation is proper. Although the decision allowed a litigant who chose a state forum to avoid removal by designating a nondiverse plaintiff, the Court failed to decide whether a litigant could choose to bring the initial action in a federal forum by employing the same tactic. Furthermore, *Mecom* did not distinguish among administrators, executors, trustees and guardians as possible plaintiffs; nor did the opinion examine how a fiduciary's duties might affect his status as a real party in interest. Finally, *Mecom* said nothing about the materiality of a plaintiff's motives in seeking a federal forum for litigation of an estate matter.

The *Mecom* decision innocently engendered more than fifty years of judicial confusion concerning whether a litigant's motives are relevant to a court's jurisdictional inquiry. After years of consistent application, most courts have now rejected the *Mecom* rule that

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dents, however, are not precluded from invoking the original jurisdiction of the federal court as a plaintiff. *See* C. WRIGHT, *supra* note 29, at 170-71, 214-15.

48 *Mecom*, 284 U.S. at 185.

49 *Id.* at 186-87.

50 *Id.* at 189-90.

51 The crucial distinction among estate fiduciaries is whether they have other duties in addition to prosecuting the wrongful death action. Where this is the only asset in the estate, courts carefully scrutinize the appointment of a non-resident fiduciary. O'Brien v. Avco Corp., 425 F.2d 1030, 1034 (2d Cir. 1969). ("The appointment of an administrator *ad litem*, whose sole function is to collect the proceeds of a lawsuit and turn them over to the beneficiary, is far more akin to the 'collection' than the 'actual transfer' line of cases.").

52 The *Kramer* Court noted this problem but failed to resolve it. Kramer v. Caribbean Mills, 394 U.S. 823, 828 n.9 (1969).

motive is irrelevant to jurisdictional analysis, but unfortunately this repudiation has resulted in a split among the circuits concerning the principles applicable in jurisdictional disputes. Although some courts believe that *Mecom* is still a vital precedent, numerous decisions have significantly eroded its continuing authority. *Mecom* remains a problematic precedent that offers unclear guidance for jurisdictional analysis.

2. Kramer v. Caribbean Mills *and the Principle of Collusive Joinder*

Nearly forty years after *Mecom,* the Supreme Court announced in *Kramer v. Caribbean Mills*[53] that joinder of a party for the purpose of invoking diversity jurisdiction is improper.[54] *Kramer* represents the Supreme Court's only interpretation of the anti-collusion statute since its revision in 1948.[55] However, the opinion offers little guidance to lower federal courts attempting to determine jurisdiction in estate-related litigation.

In *Kramer* the real party in interest assigned a contract claim to a nominal plaintiff for the purpose of litigating in a federal forum. The underlying dispute arose from a breach of contract between Caribbean Mills, a Haitian corporation, and the Panama and Venezuela Finance Company, a Panamanian corporation. According to their agreement, Caribbean agreed to purchase corporate stock from Panama on an installment basis. When Caribbean failed to make payment, Panama assigned its entire interest in the agreement to Kramer, a Texas attorney, for $1.00. In a second contract, executed the same day, Kramer agreed to pay Panama 95% of any recovery he received from Caribbean.[56] Kramer sued Caribbean in federal district court in Texas basing jurisdiction on the diversity between himself and Caribbean.[57] The Fifth Circuit[58] and the Supreme Court[59] both held that the district court lacked jurisdiction because the assigument was made to create diversity. *Kramer* is consistent with assignment cases decided under the statutes that preceded the anti-collusion statute.[60] It reaffirmed the principles

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53 394 U.S. 823 (1969).

54 *Id.* at 825, 827-28.

55 *See* C. WRIGHT, *supra* note 29, at 168.

56 This agreement denoted the pay-back as a "Bonus." *Kramer,* 394 U.S. at 824.

57 *Id.*

58 Caribbean Mills v. Kramer, 392 F.2d 387 (5th Cir. 1968).

59 394 U.S. 823 (1969).

60 The Fifth Circuit reached this conclusion after considering the Third Circuit's decision in Corabi v. Auto Racing, Inc., 264 F.2d 784 (3d Cir. 1959). In *Corabi,* the court relied on the dictionary definitions of "collusive" and "improper" to interpret the mandate of § 1359. *Corabi,* 264 F.2d at 788. Rejecting this approach, the *Caribbean Mills* court noted that "[b]y focusing on the literal meanings of the two words, the [*Corabi*]

formulated under the assignee clause of the Judiciary Act of 1789,[61] by declaring that these rules applied to the revised statute.[62] The Court applied these rules and concluded that Panama's assignment was transparently collusive because it was made for jurisdictional purposes only.[63]

The Court qualified its holding by stating: "[W]e have no occasion to re-examine the cases in which this Court has held that where the transfer of a claim is absolute, with the transferor retaining no interest in the subject matter, then the transfer is not 'improperly or collusively made,' *regardless of the transferor's motive*."[64] This careful caveat obviated the need to overturn decisions where jurisdiction was based upon a complete assignment of a contract claim to a diverse party.[65] However, the Court avoided the question of whether the motive for a fiduciary appointment is a relevant consideration in other situations. By not re-examining the contract assignment cases,[66] the Court implicitly endorsed the principle that if there has

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court virtually emasculated the statute . . . . If the statute is to have any utility, its meaning must be derived from the pre-revision statutes and cases, not from dictionary definitions of the individual words." *Caribbean Mills*, 392 F.2d at 393.

61 The original assignee clause provided that federal courts could not have jurisdiction over a suit based on a promissory note in favor of an assignee unless the suit could have been prosecuted in federal court had no assignment been made. Judiciary Act of 1789, ch. 20, 1 Stat. 73. The assignee clause was revised in 1875 to incorporate langnage prohibiting the collusive creation of diversity. Act of Mar. 3, 1875, ch. 137, § 5, 18 Stat. 470, 472. This provision, revised in 1911, Act of Mar. 3, 1911, ch. 231, § 37, 36 Stat. 1087, 1098, was the immediate statutory predecessor to the current anti-collusion statute at 28 U.S.C. § 1359 (1982), enacted in 1948.

Tracing this legislative history, Wright, Miller, and Cooper noted that "[t]he statute, even with—or perhaps because of—successive amendments, was not well drafted, however. One commentator referred to its 'obscure phraseology' as a 'jumble of legislative jargon.' As a result, its difficult language gave rise to a vast, and highly technical body of decisions." FEDERAL PRACTICE AND PROCEDURE, *supra* note 13, § 3639, at 90.

62 Although the statute was revised in 1948, the new code section "[did] not reflect any change of policy with respect to the Act of 1875 and its successor statutes." *Caribbean Mills*, 392 F.2d at 391.

> Thus, as was true prior to 1948, an action based on an assigued claim will be barred under Section 1359 if the court determines that the assignee possesses no real personal interest in the outcome of the litigation so that the transfer is a sham or that the transaction otherwise should be ignored since no consideration was given, or the assignment agreement requires that the assignee pay a certain percentage of anything recovered on the claim to the assignor, or that the assiguor actually retains control over the litigation. The fact that plaintiff was solicited to bring the suit has been held not to be sufficient to demonstrate collusion . . . .

FEDERAL PRACTICE AND PROCEDURE, *supra* note 13, § 3639, at 95-97. *See* 3A J. MOORE & J. LUCAS, *supra* note 41, ¶ 1705[1].

63 *Kramer*, 394 U.S. at 827-28.

64 *Id.* at 828 n.9 (emphasis added).

65 *Id.* (citing Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518 (1928); South Dakota v. North Carolina, 192 U.S. 286 (1904); Cross v. Allen, 141 U.S. 528 (1891)).

66 *Kramer*, 394 U.S. at 828 n.9.

been a complete transfer of interest from one litigant to another, the assignee's citizenship governs jurisdiction.[67] *Kramer,* like *Mecom,* left unresolved the question of whether motive is relevant in deciding whether federal jurisdiction exists when a litigant manipulates parties solely to create diversity. Notwithstanding this silence, lower courts interpreted *Kramer* as holding that examination of motive is proper in resolving jurisdictional disputes.[68]

The import of *Kramer* is additionally questionable because it did not involve estate litigation. The Court noted that it was not "necessary to consider whether, in cases in which suit is required to be brought by an administrator or guardian, a motive to create diversity jurisdiction renders the appointment of an out-of-state representative 'improper or collusive.' "[69] The Court thereby left open the motive question in estate-related cases.[70] Like *Mecom, Kramer* is most siguificant for the issues it chose to ignore. The Court has not yet articulated principles governing improper or collusive joinder of parties to create or destroy federal jurisdiction in estate litigation. The Court has not indicated how different fiduciaries affect jurisdictional analysis. Finally, the Court has not resolved the issue whether a litigant's motives in seeking a federal forum in estate matters are material for establishing diversity jurisdiction. Nonetheless, lower federal courts have proceeded as if the Supreme Court has articulated rules governing these questions.

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67 *See* Ferrara v. Philadelphia Labs, Inc., 272 F. Supp. 1000, 1012 (D. Vt. 1967), *aff'd per curiam,* 393 F.2d 934 (2d Cir. 1968): "[M]otive is but one of several considerations to be taken into account and where, upon consideration of all other pertinent factors, the transfer to the plaintiff is established as a 'real' transaction, the motive of the transferor, standing alone, will not defeat jurisdiction." *See also* FEDERAL PRACTICE & PROCEDURE, *supra* note 13, § 3639, at 99: "One question concerning assignments that remains somewhat undecided under section 1359 is whether the court should consider the assignor's motive."

68 The Third Circuit decided that inquiry into motive was appropriate to jurisdictional analysis a year before the Supreme Court opinion in *Kramer. McSparran,* 402 F.2d 867. Nevertheless, lower courts have interpreted *Kramer* as holding that examination of motive is proper. *See, e.g.,* Bianca v. Parke-Davis Pharmaceutical Div. of Warner-Lambert Co., 723 F.2d 392, 395 (5th Cir. 1984).

69 *Kramer,* 394 U.S. at 828 n.9.

70 However, the Court acknowledged that differences exist between personal representatives and assignees:

> Cases involving representatives vary in several respects from those in which jurisdiction is based on assignments: (1) in the former situation, some representative must be appointed before suit can be brought, while in the latter the assignor normally is himself capable of suing in state court; (2) under state law, different kinds of guardians and administrators may possess discrete sorts of powers; and (3) all such representatives owe their appointment to the decree of a state court, rather than solely to an action of the parties.

Id.

B. The Statutory Framework

Confusion over federal jurisdiction in estate litigation arises from the Supreme Court's indefinite construction of applicable statutes. In addition, the lower federal courts have provided little assistance in construing these provisions properly. For example, the *Mecom* Court analyzed the jurisdictional question in terms of a real party in interest.[71] Lower federal courts applying *Mecom* have disagreed as to whether the validity of an appointment under state law is dispositive of the federal real party in interest question.[72] Furthermore, because *Kramer* involved a contract assignment, the Court's interpretation of the federal anti-collusion statute in that case may not apply to estate jurisdiction issues.[73] Nevertheless, many lower courts focus on the anti-collusion statute and real party in interest rules in determining whether federal jurisdiction exists.

1. *The Federal Anti-Collusion Statute*

A plain reading of the anti-collusion statute would seem to bar federal jurisdiction when a litigant in any civil action creates diversity solely to obtain a federal forum.[74] However, the Supreme Court has never so ruled, leaving open the question of what constitutes

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71 *Mecom*, 284 U.S. at 186-87.

72 *See, e.g., Bianca*, 723 F.2d at 394-96 (administratrix's citizenship controls for diversity purposes absent finding of motive to create diversity); Betar v. De Havilland Aircraft of Can., 603 F.2d 30, 32, 35 (7th Cir. 1979) (motive underlying personal representative's appointment and representative's stake in outcome of litigation are relevant inquiries even where appointment valid under state law), *cert. denied*, 444 U.S. 1098 (1980); Sadler v. New Hanover Memorial Hosp., 588 F.2d 914, 915-16 (4th Cir. 1978) (despite *Mecom*, court may look to substantive relationship between administrator and the controversy); Lester v. McFaddon, 415 F.2d 1101, 1105 (4th Cir. 1969) (administrator's stake in litigation is relevant even where appointment assumed valid under state law); McSparran v. Weist, 402 F.2d 867, 874-75 (3d Cir. 1968) (valid appointment of guardian does not preclude inquiry into motives behind appointment), *cert. denied*, 395 U.S. 903 (1969).

73 *See* Note, *Appointment of Administrator*, *supra* note 13, at 296: "Although *Kramer* did indicate that motive is not irrelevant in determining diversity, it did not override the *Mecom* holding that the citizenship of the administrator controls diversity, and *Mecom* represents the majority view today." For an even narrower interpretation of the *Kramer* decision, see *also* Comment, *supra* note 13, at 808-09.

74 The federal anti-collusion statute states: "A district court shall not have jurisdiction of a civil action in which any party, by assigument or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court." 28 U.S.C. § 1359 (1982). *See generally* 3A J. MOORE & J. LUCAS, *supra* note 41, ¶¶ 17.04, 17.05; FEDERAL PRACTICE AND PROCEDURE, *supra* note 13, §§ 3637-42; Note, *Manufactured Federal Diversity*, *supra* note 13; Note, *Appointment of Administrator*, *supra* note 13; Comment, *supra* note 13; Note, Miller v. Perry: *Further Complications in Determining Diversity Jurisdiction*, 30 WASH. & LEE L. REV. 282 (1973) [hereinafter cited as Note, *Further Complications in Diversity*]; Note, *Appointment of Non-Resident Administrators to Create Federal Diversity Jurisdiction*, 73 YALE L.J. 873 (1964).

improper or collusive manufacture of diversity in estate matters.[75] The appellate courts therefore rely on the Court's interpretation of the anti-collusion statute in assignment-of-claim cases and in cases involving reincorporation in diverse jurisdictions.[76]

Traditionally, if an assignment or reincorporation is not a sham, the motives behind the transaction are immaterial to questions of jurisdiction. Diversity jurisdiction is proper provided that transfer of interest is complete, real, and valid under state law and the transferee has some independent, legitimate interest in the underlying legal dispute.[77] Applying the rule to the estate context, some appellate courts have concluded that if the appointed representative has an independent, legitimate interest in the litigation, the motive behind the appointment is irrelevant to a jurisdictional determination.[78]

This construction of the anti-collusion statute has "render[ed] the statute virtually ineffective,"[79] and encouraged peculiar conclusions. In some cases, litigants have candidly admitted that the only reason for an assignment, reincorporation, or fiduciary appointment was to obtain a federal forum.[80] Notwithstanding such honesty,

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75 *See Kramer,* 394 U.S. at 828 n.9 (finding it unnecessary "to consider whether . . . a motive to create diversity jurisdiction renders the appointment of an out-of-state administrator 'improper' or 'collusive' ").

76 *See* Hackney v. Newman Memorial Hosp., 621 F.2d 1069, 1072 (10th Cir. 1980) (Seth, C.J., concurring) (assignment of claim); McSparran v. Weist, 402 F.2d 867, 873-74 (3d Cir. 1968) (assignment of claim); Corabi v. Auto Racing, Inc., 264 F.2d 784, 787-88 (3d Cir. 1959) (reincorporation).

77 *See* Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 524 (1928) (no inquiry into motive where reincorporation in another state was actual, not feigned, or merely colorable); *see also* National Sur. Corp. v. Inland Properties, 286 F. Supp. 173, 183 (E.D. Ark. 1968), *aff'd on other grounds,* 416 F.2d 457 (8th Cir. 1969). There the court stated:

> When section 1359 is invoked against an assignee who has brought suit in a federal court, the question for determination is the genuineness of the assignment rather than its motivation. If the assignment or transfer is . . . bona fide, . . . section 1359 is not applicable even though the transfer or assignment may have been motivated in whole or in part by a desire to create diversity of citienship [sic] for the purposes of litigation.

See generally 3A J. MOORE & J. LUCAS, *supra* note 41, ¶ 17.05 [3.1].

78 *See* County of Todd, Minn. v. Loegering, 297 F.2d 470, 472-73 (8th Cir. 1961); Corabi v. Auto Racing Inc., 264 F.2d 784, 787-88 (3d Cir. 1959).

79 3A J. MOORE & J. LUCAS, *supra* note 41, ¶ 171.05 [3.1].

80 "It is candidly admitted by the plaintiff-appellee that Bass was appointed administrator of Morris' estate for the sole purpose of manufacturing or artificially creating diversity of citizenship so that the attorneys of Morris' statutory beneficiaries could invoke the jurisdiction of the District Court." Bass v. Texas Power & Light Co., 432 F.2d 763, 764 (5th Cir. 1970). *See* Rogers v. Bates, 431 F.2d 16, 20 (8th Cir. 1970); O'Brien v. Avco Corp., 425 F.2d 1030, 1036 (2d Cir. 1969); McSparran v. Weist, 402 F.2d 867, 869 (3d Cir. 1968), *cert. denied,* 395 U.S. 903 (1969); Esposito v. Emery, 402 F.2d 878, 879 (3d Cir. 1968); Lang v. Elm City Constr. Co., 324 F.2d 235, 236 (2d Cir. 1963); and Corabi v. Auto Racing, Inc., 264 F.2d 784, 785 (3d Cir. 1959).

courts have found diversity jurisdiction to exist where the transfer was valid under substantive state law.[81] One court even found a party's open admission that a fiduciary was purposefully appointed to obtain federal jurisdiction indicated that the action was not collusive.[82]

Kramer is consistent with other assignment-of-claim precedents construing the anti-collusion statute, but the opinion does not offer any guidelines for identifying improper or collusive tactics.[83] The assignment in *Kramer* was patently a mere contrivance.[84] The Court therefore had no difficulty in concluding that the assignment was collusive because sham transfers have traditionally been regarded as violative of the anti-collusion statute.[85] The Court's failure to delineate any standards for determining collusive or improper joinder beyond the traditional analysis limits *Kramer*'s precedential value in applying the anti-collusion statute to estate litigation.

Kramer, however, did articulate two important principles to govern analysis of improper or collusive joinder. First, transfers which are valid under state law may violate the anti-collusion statute.[86] Second, the Court reaffirmed that "[t]he existence of federal jurisdiction is a matter of federal, not state law."[87] Some lower federal

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81 *See, e.g., Corabi,* 264 F.2d at 788 (using a state law to create diversity is not collusive); *Lang,* 324 F.2d at 236 (relying on *Corabi*).

82 *Corabi,* 264 F.2d at 788. The court used WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed.) to illuminate § 1359's prohibition against "improper or collusive" joinder of parties to manufacture jurisdiction. The court noted that the word collusive generally connoted an illegal, secret, deceitful agreement between opposing sides of a litigation. 264 F.2d at 788. Because the plaintiff openly admitted his purpose, it could not be collusive. Furthermore, the dictionary defined improper as "[i]ndecent, unseemly, indecorous, unbecoming, indelicate." Looking at the plaintiff's assertion of jurisdiction, the court could discern no impropriety according to the definition of the term.

83 *See supra* notes 60-63 and accompanying text.

84 *See* 394 U.S. at 827-28 (Kramer had no previous connections with parties and reassigned a 95% interest in outcome of litigation).

85 *Id.*

86 *Id.* at 829 (noting that binding effect of assignment under state law gives no assurance that jurisdiction was not manufactured). To decide otherwise, the Court acknowledged, "would render [the anti-collusion statute] largely incapable of accomplishing its purpose; this very case demonstrates the ease with which a party may 'manufacture' federal jurisdiction by an assignment which meets the requirements of state law." *Id.*

87 *Id.* The plaintiff-appellant argued that because the contract assigument was valid under Texas law, the assigument was unchallengeable for federal jurisdictional purposes. The Court rejected this contention, citing to Missouri Pac. Ry. v. Fitzgerald, 160 U.S. 556, 582 (1896). The circuit courts have rejected the analogous argument in the estate context, namely, that the valid appointment of an estate fiduciary pursuant to state law immunizes that appointment from scrutiny for federal jurisdictional purposes. *See, e.g.,* O'Brien v. Avco Corp., 425 F.2d 1030 (2d Cir. 1969):

> While a state may of course define and encourage certain fiduciary relationships, the characterization and effect of those relationships for the

courts have interpreted these principles as authorizing an inquiry into the motives of the parties seeking a federal forum.[88] Other courts analogizing to non-estate cases have regarded motive as irrelevant and required that an estate representative have a substantial stake in the outcome of the litigation.[89]

2. *The Real Party In Interest Rule*

The relationship of the real party in interest rule to jurisdictional requirements in estate litigation has caused much confusion.[90] Federal rule 17[91] requires that every suit be prosecuted in the name of the real party in interest, and that executors, administrators, or guardians may sue in their own names without having to join the party for whom they are acting.[92] Lower federal courts disagree as to whether rule 17 simply states procedure or requires reference to substantive state law.

The circuit courts have taken three different approaches to the real party in interest problem. The majority view is that the fiduciary's citizenship governs jurisdiction because the fiduciary is the real party in interest. The Supreme Court agreed with this view in *Mecom*:

> purposes of federal diversity jurisdiction is a federal question . . . . Accordingly, the legality of a relationship for state law purposes does not control its effect on federal jurisdiction. That effect is determined by the policies behind the general grant of diversity jurisdiction, and its limitation in section 1359.

Id. at 1034.

88 This is the motive/function test. *See infra* notes 115-27 and accompanying text.

89 This is the substantial stake test. *See infra* notes 129-49 and accompanying text.

90 *See* Atkinson, *supra* note 13, at 926, 934-38 (arguing that language of New York equivalent of federal real party in interest rule is confusing and misleading); Kennedy, *supra* note 13, at 714-18 (arguing that language and construction of rule fails to identify real interests at stake).

91 FED. R. CIV. P. 17.

> (a) *Real Party In Interest.* Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought. . . .
>
> (b) *Capacity to Sue or be Sued.* 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. . . . In . . . other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held. . . .
>
> (c) *Infants or Incompetent Persons.* Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. . . .

92 FED. R. CIV. P. 17(a). In addition, rule 17 specifies that a representative's capacity to sue is determined by state law. FED. R. CIV. P. 17(b).

> [W]here an administrator is required to bring the suit under a statute giving a right to recover for death by wrongful act, and is . . . charged with the responsibility for the conduct or settlement of such suit and the distribution of its proceeds to the persons entitled under the statute, and is liable upon his official bond for failure to act with diligence and fidelity, he is the real party in interest and his citizenship, rather than that of the beneficiaries, is determinative of federal jurisdiction.[93]

Some lower courts, relying on this language, have concluded that since the fiduciary is the real party in interest and his citizenship controls, the anti-collusion statute is irrelevant unless a party fraudulently misrepresents facts relating to the fiduciary's appointment.[94]

Under a second approach, the fiduciary is not automatically the real party in interest, but is merely a substitute for the estate beneficiaries.[95] Therefore, a factual determination of the fiduciary's duties is necessary before the fiduciary is accorded the status of the real party in interest for diversity purposes.[96] The factfinder must determine whether the fiduciary has a stake in the litigation.[97] Courts adopting this approach argue that the real party determination is a question of substantive state law.[98] Thus, "[t]hese courts have concluded that the appointment of an administrator with diverse citizenship is not dispositive of the jurisdictional question, even if the representative has the power to sue in his own name."[99]

A third approach rejects rule 17's applicability to jurisdictional determinations in estate litigation. This approach emphasizes capacity to sue as the determinative jurisdictional factor.[100] Moreover,

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93 *Mecom*, 284 U.S. at 186.

94 *See, e.g.*, Field v. Volkswagonwerk AG, 626 F.2d 295, 309 (3d Cir. 1980); Bush v. Carpenter Bros., 447 F.2d 707, 710-11 (5th Cir. 1971); Deposit Guar. Bank & Trust Co. v. Burton, 380 F.2d 346, 348 (6th Cir. 1967).

95 This is essentially the argument of jurisdictions that require the estate representative to have a substantial stake in the outcome of the litigation in order for his citizenship to be determinative. *See infra* notes 129-49 and accompanying text.

96 *See, e.g.*, Sadler v. New Hanover Memorial Hosp., 588 F.2d 914, 917 (4th Cir. 1978) (executrix's management of decedent's estate, including prosecution of wrongful death action, sufficient to support finding that representative is real party in interest whose citizenship should be used to establish diversity jurisdiction).

97 FEDERAL PRACTICE AND PROCEDURE, *supra* note 13, § 1536.

98 *See, e.g.*, Betar v. De Havilland Aircraft of Can., 603 F.2d 30, 35 (7th Cir. 1979), *cert. denied*, 444 U.S. 1098 (1980); Bishop v. Hendricks, 495 F.2d 289, 291 (4th Cir.), *cert. denied*, 419 U.S. 1056 (1974); Lester v. McFaddon, 415 F.2d 1101, 1105 (4th Cir. 1969). Such courts view the anti-collusion statute as a limitation on *Mecom*'s inflexible rule that the properly appointed fiduciary is the real party in interest. *See also* Gross v. Hougland, 712 F.2d 1034, 1037 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 1281 (1984).

99 *Gross*, 712 F.2d at 1037.

100 Corabi v. Auto Racing, Inc., 264 F.2d 784, 785-86 (3d Cir. 1959); Fallat v. Gouran, 220 F.2d 325, 327 (3d Cir. 1955); *see also* FEDERAL PRACTICE AND PROCEDURE, *supra* note 13, § 1556 (capacity to sue test may be sharp break with real party in interest test and is consistent with general policy of federalism under rule 17).

federal rule 82 expressly provides that the rules of procedure cannot affect jurisdiction.[101] Thus, rule 17 "is merely procedural and does not extend or limit the subject matter jurisdiction of the district court."[102] Furthermore, state real party requirements do not control a district court's determination of diversity because federal courts determine their own jurisdiction.[103]

Most federal courts now completely disregard real party considerations when they analyze the citizenship question. The few courts that have analyzed the real party factor have not articulated a compelling theory of the rule. Instead, real party terminology is hopelessly confused and "a number of courts have openly admitted that certain cases are irreconcilable."[104] Some courts have concluded that real party rules are not relevant to their determinations while other courts have chosen to avoid complex rule 17 interpretation.[105] Nonetheless, real party concerns will continue to perplex lower courts until intelligible principles are formulated concerning controlling citizenship in estate litigation.[106]

C. Tests for Determining Whether Diversity Exists in Estate Litigation: The Muddle in the Circuit Courts

For nearly forty years, lower federal courts looked to the fiduciary's citizenship to establish diversity without examining the motive behind the representative's appointment. Then, in *McSparran v. Weist,*[107] the Third Circuit recognized that cases involving allegedly manufactured jurisdiction implicated the anti-collusion statute and that "the rivulet of 'manufactured' diversity cases [had] swollen to a stream of wide dimensions."[108] The *McSparran* court noted that the cases "in which a straw or nominal fiduciary is apointed to create diversity stand on totally different ground than those in which the courts are simply concerned with the general question whether the citizenship of the personal representative or his ward or beneficiary

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101 FED. R. CIV. P. 82 provides that: "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein."

102 Betar v. De Havilland Aircraft of Can., 603 F.2d 30, 32 (7th Cir. 1979), *cert. denied,* 444 U.S. 1098 (1980).

103 *See Kramer,* 394 U.S. at 829.

104 Note, *Manufactured Diversity Jurisdiction, supra* note 13, at 715-16.

105 *Id.* at 715. The author notes that "most courts have held the real-party status of the representative to be irrelevant, so that his citizenship controls in all cases where the situs state recognizes his capacity to sue." *Id.* However, a minority of courts do not disregard real party in interest considerations, viewing the fiduciary as a substitute for the beneficiaries of the lawsuit. In these cases, the fiduciary is not automatically granted status as the real party in interest. *Id.* at n.36.

106 *See generally* Atkinson, *supra* note 13; Kennedy, *supra* note 13.

107 402 F.2d 867 (3d Cir. 1968), *cert. denied,* 395 U.S. 903 (1969).

108 *Id.* at 871.

should be the test of diversity jurisdiction."[109] After examining both the legislative history of the anti-collusion statute and the purposes underlying diversity jurisdiction, the Third Circuit concluded that courts could no longer continue to disregard motive in their jurisdictional inquiries.[110]

McSparran is significant for two reasons. First, it rejected the long-standing principle established in *Mecom,* that motive is irrelevant for jurisdictional purposes. More importantly, it fostered a split among the circuits concerning the proper test for establishing diversity jurisdiction when considered in relationship with the anti-collusion statute. Some circuits developed a "motive/function" test for detecting collusive manufacturing of diversity.[111] Under this test, if a nonresident fiduciary has not been selected with a purpose of manufacturing diversity, then the fiduciary's lack of stake in the litigation's outcome cannot itself defeat jurisdiction. The motive/function approach requires the court to make a factual inquiry into the motives for the fiduciary's appointment as well as an examination of his duties as estate representative. Other circuits concluded that a fiduciary must have a substantial stake in the outcome of the underlying litigation in order to avoid violating the anti-collusion statute.[112] Proponents of the substantial stake test argue that if the fiduciary has no other function than prosecuting a wrongful death action and no stake in the outcome of that litigation, then the anti-collusion statute prohibits the representative's citizenship from counting for diversity purposes, even though he was appointed for legitimate reasons.[113]

These tests differ substantially in both theory and practice. A plaintiff might meet diversity requirements under one test but fail under the other.[114] Two different anti-collusion tests complicate jurisdictional determination, encourage forum shopping, and foster inconsistent results.

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109 *Id.* The Third Circuit judicially noticed an American Law Institute study of the diversity docket for the Eastern District of Pennsylvania during 1958-1959 in which 20.5% of diversity suits were brought by out-of-state personal representatives of Pennsylvania citizens against Pennsylvania defendants. The court also noted that one out-of-state citizen had been appointed as guardian in 61 pending lawsuits in the district. Concluding that many of these cases probably involved improperly invoked jurisdiction in violation of § 1359, the court commented: "The multiplication of 'manufactured' diversity cases is a reflection on the federal judicial system and brings it into disrepute." *Id.* at 873.

110 *Id.* at 874. The following year, the *Kramer* Court ratified this conclusion. Kramer v. Caribbean Mills, 394 U.S. 823 (1969).

111 *See infra* notes 115-27 and accompanying text.

112 *See infra* notes 129-49 and accompanying text.

113 *See, e.g.,* Bishop v. Hendricks, 495 F.2d 289, 293-95 (4th Cir. 1974).

114 *See supra* note 5.

1. *The Motive/Function Test for Collusive Joinder of Parties*

Under the "motive/function" test, a representative's citizenship is used to establish diversity jurisdiction, unless that representative was appointed with a motive of creating diversity where it would not otherwise exist.[115] The *McSparran*[116] court was the first to suggest that the motivation for an appointment affects jurisdiction:

> While, of course, the desire to obtain diversity jurisdiction is not itself improper, nevertheless it is not irrelevant in the determination of the question whether the fiduciary is in fact a straw fiduciary whose citizenship is to be disregarded. Moreover, it is difficult to see how motive can be entirely ignored in ascertaining the purpose for which the representative is selected in view of the langnage of [the anti-collusion statute] . . . . [T]he artificial selection of a straw representative who has no duty or function except to offer the use of his citizenship to create diversity in contemplated litigation is a violation of [the anti-collusion] provisions.[117]

Whether a device is so lacking in substance as to be improper and collusive under the anti-collusion statute is a question of fact.[118] In making this inquiry, courts examine several factors, including: (1) the relationship of the representative to the parties represented; (2) the nature and scope of the fiduciary's powers and duties; (3) any special capacity or experience the fiduciary possesses with respect to his appointment; (4) the existence of another nondiverse representative who might normally be considered the logical choice to represent the interests of the parties; (5) specific reasons for the appointment of a nonresident fiduciary; and (6) whether the lawsuit, apart from the appointment of a diverse fiduciary, is essentially a local dispute.[119]

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115 For background on the appointment of representatives to create diversity, see generally Note, *Manufactured Federal Diversity, supra* note 13, at 719; 3A J. MOORE & J. LUCAS, *supra* note 41, ¶ 17.05; FEDERAL PRACTICE AND PROCEDURE, *supra* note 13, § 3640.

116 McSparran v. Weist, 403 F.2d 867 (3d Cir. 1968), *cert. denied,* 395 U.S. 903 (1969).

117 *Id.* at 874-75 (footnote omitted). This decision found support in the Supreme Court decision in Kramer v. Caribbean Mills, Inc., 394 U.S. 823 (1969). In addition to the Third Circuit, the Second, Fourth, Fifth, and Sixth Circuits have adopted the motive/function approach. *See* Gross v. Hougland, 712 F.2d 1034, 1038 (6th Cir. 1983), *cert. denied,* 104 S. Ct. 1281 (1984); Bass v. Texas Power & Light Co., 432 F.2d 763, 765-67 (5th Cir. 1970), *cert. denied,* 401 U.S. 975 (1971); O'Brien v. Avco Corp., 425 F.2d 1030, 1034-35 (2d Cir. 1969); Lester v. McFaddon, 415 F.2d 1101 (4th Cir. 1969). The Fourth Circuit, however, eventually abandoned this test. *See* Bishop v. Hendricks, 495 F.2d 289 (4th Cir. 1974), *cert. denied,* 419 U.S. 1056 (1975).

118 *See McSparran,* 402 F.2d at 876.

119 Groh v. Brooks, 421 F.2d 589, 595 (3d Cir. 1970). *See also* Gross v. Hougland, 712 F.2d 1034, 1038-39 (6th Cir. 1983), *cert. denied,* 104 S. Ct. 1281 (1984) (enumerating factors to consider in analyzing motive for appointment).

Application of this test is easy when a party concedes that the representative is a straw party, chosen solely to create diversity jurisdiction. Courts have denied federal court jurisdiction where litigants have candidly admitted that securing diversity jurisdiction was the sole reason for the nonresident's appointment.[120] If a number of factors contributed to an appointment, however, the factfinder must weigh all the elements to determine whether creation of diversity jurisdiction was the primary reason for the appointment. Thus, one court sustained diversity jurisdiction when it was alleged that the out-of-state administrator was chosen to avoid close involvement in personal family problems and was experienced in financial affairs. Although the administrator's nonresident citizenship was also a reason for his selection, other legitimate considerations distinguished this situation from a deliberate effort to artificially create diversity.[121] By contrast, where an administrator was appointed to secure a federal forum because of alleged prejudice in state court, the federal court viewed the appointment "as a blatant example of precisely the type of forum-shopping that [the anti-collusion statute] and cases like *Erie R.R. Co. v. Tompkins* . . . were designed to prevent."[122]

Courts and commentators have criticized the motive/function test on practical and theoretical grounds. As a practical matter, courts have interpreted the test to require some proof of motive, requiring time-consuming fact-finding. Furthermore, the test is subjective rather than objective.[123] Critics object that the motive/function test "open[s] a fertile field for perjurious testimony"[124] and elevates manufactured diversity "to an art difficult to define and even more difficult to combat."[125]

A more serious criticism is that the motive/function test fails to promote the purposes underlying diversity jurisdiction. In order for a motive to support diversity jurisdiction, "it must be more than an expression of sentiment or personal preference or mere kinship

120 Bass v. Texas Power & Light Co., 432 F.2d 763, 764 (5th Cir. 1970), *cert. denied*, 401 U.S. 975 (1971); O'Brien v. Avco Corp., 425 F.2d 1030, 1036 (2d Cir. 1969); McSparran v. Weist, 402 F.2d 867, 876 (3d Cir. 1968), *cert. denied*, 395 U.S. 903 (1969); Esposito v. Emery, 402 F.2d 878, 880 (3d Cir. 1968).

121 *See* Joyce v. Seigel, 429 F.2d 130 (3d Cir. 1970) (diversity found to exist where out-of-state administrator was experienced in financial affairs and was not closely connected to family's personal problems because these reasons were "quite different from an effort to create artificial diversity").

122 O'Brien v. Avco Corp., 425 F.2d 1030, 1036 (2d Cir. 1969).

123 *See* Esposito v. Emery, 402 F.2d 878, 882 (Biggs, J., dissenting in part and concurring in part) ("[W]hat was in the mind of the person or persons who moved . . . to appoint an out-of-state executor or administrator?").

124 *Id.* at 883.

125 *Id.* at 882.

with either the beneficiaries or the decedent. Nor can it be established by some self-serving profession of good faith in the appointment."[126] The underlying purpose of diversity jurisdiction is to provide a federal forum for real, substantial controversies between citizens of different states. The proper test should therefore be whether the fiduciary has more than a nominal relationship to the litigation.[127]

The harshest criticism of the motive/function test has come from those courts that reject it.[128] Those courts have adopted the "substantial stake" test, which is derived from a different interpretation of the anti-collusion statute.

2. *The Substantial Stake In the Outcome Test For Collusive Joinder of Parties*

According to the "substantial stake" test, if a representative has more than a nominal interest in the litigation, his appointment is not proscribed by the anti-collusion statute.[129] The test requires that the plaintiff's interest in the litigation be somewhat substantive, rather than only procedural. This approach rejects the real party principle that a nominal plaintiff is entitled to maintain an action in his own name even though the proceeds of any recovery will go to the estate beneficiaries. If the representative has no stake in the outcome of the litigation, was appointed solely for the purpose of creating jurisdiction, and "is a real party in interest only in the narrow procedural sense of those words,"[130] he is barred from proceeding in federal court.

Courts that apply the substantial stake test, like those that apply the motive/function test, evaluate the reasons for the appointment

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126 Bishop v. Hendricks, 495 F.2d 289, 293 (4th Cir. 1974) (footnotes omitted). *Cf.* Bianca v. Parke-Davis, 723 F.2d at 394 (nonresident administratrix chosen because decedent's parents were grief-stricken and psychologically incapable of prosecuting wrongful death action).

127 "[O]nly if the Court can conclude that the out-of-state administrator has something more than a nominal relationship to the litigation will the citizenship of an out-of-state administrator sustain diversity." Bishop v. Hendricks, 495 F.2d at 295.

128 *See infra* note 129 (citing cases).

129 The substantial stake test was articulated by the Fourth Circuit in Bishop v. Hendricks, 495 F.2d 289, 293-95 (4th Cir.), *cert. denied,* 419 U.S. 1056 (1974), and endorsed in a series of subsequent decisions. Messer v. American Gems, Inc., 612 F.2d 1367, 1370-71 (4th Cir. 1980); Sadler v. New Hanover Memorial Hosp., 588 F.2d 914, 916 (4th Cir. 1978). In addition, this approach has been adopted by the Seventh, Eighth, and Tenth Circuits. *See* Bettin v. Nelson, 744 F.2d 53, 56 (8th Cir. 1984), Hackney v. Newman Memorial Hosp., 621 F.2d 1069, 1071 (10th Cir.), *cert. denied,* 449 U.S. 982 (1980); Betar v. De Havilland Aircraft of Can., 603 F.2d 30, 35-36 (7th Cir. 1979), *cert. denied,* 444 U.S. 1098 (1980). *See generally* FEDERAL PRACTICE AND PROCEDURE, *supra* note 13, § 3640, at 108-10.

130 Lester v. McFaddon, 415 F.2d 1101, 1106 (4th Cir. 1969).

of the nonresident administrator. The substantial stake courts determine, however, whether the representative has more than a nominal relationship to the litigation as the estate fiduciary.[131] It is significant that reasons that might permit diversity jurisdiction under the motive/function test may be insufficient to satisfy the substantial stake test. For example, the party's appointment of the representative because of personal preference or kinship, grief-stricken sentiment, or reliance on the appointee's superior business judgment does not satisfy the substantial stake test.[132] "[A]ny reason or motive for the appointment which does not elevate his relationship to the litigation above the level of a nominal party is irrelevant to the issues of diversity."[133]

Factors affecting the substance of a representative's appointment include: whether the fiduciary has other assets to administer in addition to the wrongful death suit; whether he has other duties as the estate administrator; whether the beneficiaries may settle the lawsuit without consulting the administrator; whether the administrator knows the facts that gave rise to the litigation; and whether the administrator selects the attorney to prosecute the litigation.[134] When it can be shown that the estate representative was not appointed predominantly for the purpose of prosecuting the lawsuit and "if there [was] a valid reason for the appointment of an out-of-state administrator that gives to his representation greater substantiality than mere administrator *ad litem,* the citizenship of the administrator may be determinative of diversity."[135] When a representative's appointment lacks such substance, the court ignores his citizenship and uses that of the beneficiaries to determine whether diversity exists.[136]

Lower federal courts derive the substantial stake test from the legislative history of the anti-collusion statute and the Supreme Court's decision in *Kramer.*[137] These courts interpret the anti-collu-

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131 Bishop v. Hendricks, 495 F.2d 289, 293-96 (4th Cir.), *cert. denied,* 419 U.S. 1056 (1974).

132 *Id.* at 294-95.

133 *Id.* at 295.

134 *See* Messer v. American Gems, Inc., 612 F.2d 1367, 1374 (4th Cir. 1980); Bishop v. Hendricks, 495 F.2d 289, 294 (4th Cir.), *cert. denied,* 419 U.S. 1056 (1974); Kenebrew v. Columbia Land & Timber Co., 454 F.2d 1146, 1146-47 (5th Cir. 1972); White v. Lee Marine Corp., 434 F.2d 1096, 1098-99 (5th Cir. 1970); Lester v. McFaddon, 415 F.2d 1101, 1103 (4th Cir. 1969).

135 Bishop v. Hendricks, 495 F.2d at 293.

136 *See* Messer v. American Gems, Inc., 612 F.2d 1367 (4th Cir. 1980); Betar v. De Havilland Aircraft of Can., 603 F.2d 30 (7th Cir. 1969); Mullins v. Seals, 562 F.2d 326 (4th Cir. 1977); Vaughan v. Southern Ry., 542 F.2d 641 (4th Cir. 1976); Bishop v. Hendricks, 495 F.2d 298 (4th Cir.), *cert. denied,* 419 U.S. 1056 (1974).

137 Hackney v. Newman Memorial Hosp., 621 F.2d at 1070; Betar v. De Havilland Aircraft of Can., Ltd., 603 F.2d at 33; Sadler v. New Hanover Memorial Hosp., 588 F.2d

sion statute as denying a federal forum to lawsuits which do not " 'really and substantially involve a dispute or controversy properly within the jurisdiction' of the federal courts."[138] *Kramer* is construed to prohibit jurisdiction based on joinder of a party on " 'colorable assignment or other device without substance.' "[139] Proper federal jurisdiction, therefore, requires substantive as well as formal validity of a representative's appointment.[140] "It is the lack of stake in the outcome coupled with the motive to bring into a federal court a local action normally triable only in a state court which is the common thread of the cases holding actions collusively or improperly brought."[141]

Upholding federal jurisdiction when an administrator has little stake in the litigation and insubstantial ties to the beneficiaries "would not advance any of the functions diversity jurisdiction was designed to serve."[142] The substantial stake test best effectuates the purpose of diversity jurisdiction because it denies a federal forum to cases which are essentially local controversies.[143] Furthermore, the substantial stake test is easier to apply and avoids the "difficult and perhaps needless litigation of disputed facts [which] might well encourage perjury or manipulation of factual evidence."[144]

Critics of the substantial stake test argne that it is philosophically unsound and inconsistent with the anti-collusion statute. Under this approach, a court may sustain diversity jurisdiction when an administrator has a substantial stake in the litigation, even if the

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at 916; Vaughan v. Southern Ry., 542 F.2d at 644; Bishop v. Hendricks, 495 F.2d at 291; Miller v. Perry, 456 F.2d at 65; White v. Lee Marine Corp., 434 F.2d at 1098; Rogers v. Bates, 431 F.2d at 21; Lester v. McFaddon, 415 F.2d at 1104. The Fourth Circuit, in *Miller v. Perry,* noted that:

> At the very least, *Kramer* authorizes attention to the substantive relation of the administrator, the beneficiaries and others to the controversy before an undiscriminating decision that the citizenship of a representative controls the determination of diversity jurisdiction.
>
> . . .
>
> We are obliged to read *Kramer* as interjecting a new note of realism into the determination of diversity jurisdiction.

456 F.2d at 66-67.

138 Bishop v. Hendricks, 495 F.2d at 294 (quoting 28 U.S.C. § 1359 (1982)); *see* McSparran v. Weist, 402 F.2d at 872-73.

139 Bishop v. Hendricks, 495 F.2d at 294 (quoting *Kramer,* 392 F.2d at 393).

140 *See, e.g., id.*; *supra* note 137 (citing cases).

141 Lester v. McFaddon, 415 F.2d at 1106 n.11.

142 White v. Lee Marine Corp., 434 F.2d 1096, 1100 (5th Cir. 1970).

143 Betar v. De Havilland Aircraft of Can., Ltd., 603 F.2d at 35; Vaughan v. Southern Ry., 542 F.2d at 644; Bishop v. Hendricks, 495 F.2d at 294; Miller v. Perry, 456 F.2d at 67.

144 Bianca v. Parke-Davis Pharmaceutical Div. of Warner-Lambert Co., 723 F.2d 392, 398 (5th Cir. 1984) (quoting White v. Lee Marine Corp., 434 F.2d at 1099 n.8); Esposito v. Emery, 402 F.2d 878 (3d Cir. 1968) (Biggs, J., dissenting).

court finds that he was chosen in order to create diversity.[145] Conversely, jurisdiction can be denied when a fiduciary was not appointed to manufacture diversity, if the administrator lacks the requisite substantial stake required to prosecute the wrongful death action.[146] These critics characterize the substantial stake test as judicially-created control over diversity jurisdiction that intrudes on the congressional prerogative to determine the scope of diversity jurisdiction. Thus, they argue, a court cannot prohibit an administrator's access to a federal court just because he lacks a certain interest, that is, whether or not he has a substantial stake in the outcome of the litigation.[147]

In addition, the critics argue that the substantial stake jurisdictions incorrectly emphasize the substantive validity of an appointment, ignoring inquiries into motive.[148] The plain language of the anti-collusion statute suggests that the motives underlying a representative's appointment must govern the jurisdictional inquiry. If the representative is not appointed solely to manufacture diversity, then his lack of stake in the litigation alone cannot trigger the prohibition against manipulatively-created jurisdiction. The substantial stake test therefore improperly engrafts a jurisdictional requirement on parties that is not mandated by statute or the Constitution. As such, the test is an impermissible exercise of judicial power.[149]

D. The American Law Institute Proposed Rule Changes

The American Law Institute has proposed a variety of statutory

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145 *See, e.g.*, Hackney v. Newman Memorial Hosp., 621 F.2d 1069 (10th Cir. 1980) (diversity jurisdiction sustained where decedent's daughter appointed administratrix in order to obtain diversity jurisdiction because she had real and substantial stake in outcome of wrongful death action).

146 *See, e.g.*, Messer v. American Gems, Inc., 612 F.2d 1367 (4th Cir. 1980) (beneficiaries' citizenship controls diversity issue where administratrix had no substantive interest in wrongful death action even though there was no collusion in appointment).

147 *See, e.g.*, Bianca v. Parke-Davis, 723 F.2d at 396 & n.4.

148 Whether the administrator has a substantial stake in the litigation, whether he has duties above and beyond prosecution of the lawsuit, and whether the estate contains assets other than the wrongful death claim may all inform our judgment as to the motive for the appointment, but none of these elements are independently necessary to sustain jurisdiction if no improper motive underlies the appointment.

Id. at 397.

149 Professors Wright, Miller, and Cooper note that this approach "may involve the expenditure of a great deal of judicial time and effort, in both the district court and the court of appeals." FEDERAL PRACTICE AND PROCEDURE, *supra* note 13, § 3640, at 110. Judge Haynsworth has characterized such judicial inquiries as "a dreadful waste of time." Bianca v. Parke-Davis, 723 F.2d at 397 (quoting *The Division of Jurisdiction Between State and Federal Courts: Hearings on S. 1876 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 163 (1971) (statement of Chief Judge Clement F. Haynsworth)).

changes to better effectuate the purposes underlying federal question and diversity jurisdiction.[150] Significant proposals involving estate litigation combine an anti-collusion provision with a per se citizenship rule for appointed fiduciaries. The proposed anti-collusion statute states that:

> (a) A district court shall not have jurisdiction of a civil action in which any party has been made or joined improperly, or collusively, or pursuant to agreement or understanding between opposing parties, in order to invoke the jurisdiction of such court.
>
> (b) Whenever an object of a sale, assignment, or other transfer of the whole or any part of any interest in a claim or other property has been to enable or to prevent the invoking of federal jurisdiction . . . jurisdiction of a civil action shall be determined as if such sale, assignment or other transfer had not occurred. The word "transfer" as used in this section includes the appointment of a trustee, receiver, or other fiduciary, or of any other person to hold or receive interests of any kind, whether made by private persons or by a court or other official body.[151]

To prevent manufactured diversity and avoid inquiries into the motives or substance of a fiduciary's appointment, the American Law Institute proposes that the decedent's citizenship be used to determine diversity jurisdiction in estate litigation.

> An executor, or an administrator, or any person representing the estate of a decedent or appointed pursuant to statute with authority to bring an action because of the death of a decedent shall be deemed to be a citizen only of the same State as the decedent; and a guardian, committee, or other like representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the person represented.[152]

This proposal is designed to prevent manipulation of diversity jurisdiction by the appointment of a nonresident fiduciary.[153] The drafters argue that federal courts are inappropriate fora for essentially local disputes between local citizens.[154] This per se rule elimi-

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150 Division of Jurisdiction Study, *supra* note 7.

151 *Id.* at 22-23 (proposed language for § 1307(a), (b)).

152 *Id.* at 11 (proposed language for § 1301(b)(4)).

153 *Id.* at 117 (commentary on proposed new § 1301(b)(4)).

Although the section was drafted with reference to wrongful death actions, it applies to any action by an estate representative. *Id.* at 118. Also, the phrasing does not include a person who has a statutory right to bring an action in his own name, by reason of his relationship to the decedent, such as a widow or child of the decedent. "The imposition upon diversity jurisdiction has been the appointment of out-of-staters to create diversity, and there seems no sufficient reason to cover a person whose right to sue is because of his relationship rather than by appointment." *Id.*

154 There is no proper place in federal courts for cases in which diversity has thus been deliberately created in order to obtain a federal forum for what would otherwise be a purely local lawsuit between co-citizens. This abuse

nates the need for inquiring into either the motives behind a fiduciary's appointment or his stake in the litigation.[155] In addition, this rule eliminates the need for complex analysis of real party considerations.

Numerous federal courts have endorsed the proposed rule as a sensible one because it substantially eliminates most jurisdictional disputes.[156] Commentators have approved the revisions because the per se rule "cure[s] [the] erroneous doctrine . . . evolved by the federal courts"[157] that jurisdiction is proper given that a representative's appointment satisfies state law requirements irrespective of the motive behind that appointment.[158]

Despite these endorsements, the American Law Institute proposals are flawed. Some commentators have charged that the rules are overly broad in their attempt to prevent improper manipulation of diversity jurisdiction.[159] The per se citizenship rule "eliminates more diversity than it ought."[160] For example, it fails to allow jurisdiction where a decedent's beneficiaries are out-of-state residents, but the decedent resided in the forum state. Moreover, the revised anti-collusion statute does not eliminate the existing interpretation problems because it fails to define improper and collusive joinder of parties. There are no federal standards for collusiveness, and the American Law Institute proposals merely perpetuate existing problems of interpretation. Indeed, the new language will require difficult factual inquiries and "create fruitful ground for argument."[161] Under the revised statutory language, diversity jurisdic-

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has apparently not yet become pervasive, but if corrective action is not taken, the practice is likely to spread.

Id.

155 *Id.* at 119.

156 *See, e.g.,* Messer v. American Gems, Inc., 612 F.2d 1367, 1375-76 n.11 (4th Cir. 1980); White v. Lee Marine Corp., 434 F.2d 1096, 1099 n.8 (5th Cir. 1970); O'Brien v. AVCO Corp., 425 F.2d 1030, 1035 (2d Cir. 1969).

157 3A J. MOORE & J. LUCAS, *supra* note 41, ¶ 17.05[2] (footnote omitted).

158 *Id.* Furthermore, the authors suggest that federal courts not wait for legislative action to correct the erroneous doctrine. *Id. But see* White v. Lee Marine Corp., 434 F.2d at 1099 n.8 ("However convenient [the ALI proposed] rule might seem, we agree with the Second, Third, and Fourth Circuits that it can only be adopted by legislative action.").

159 *E.g.,* 3A J. MOORE & J. LUCAS, *supra* note 41, ¶ 17.05[3.-2] n.10 (criticizing ALI proposal as denying diversity when there is no motive to create diversity and, consequently, principles underlying anti-collusion statute are not implicated); Note, *Manufactured Federal Diversity, supra* note 13, at 726 ("It is not necessary . . . to go as far as the ALI in order to ensure against improper attempts to create or destroy jurisdiction.").

160 Kennedy, *supra* note 13, at 720.

161 *Id.* at 721. The author points out that although § 1307(b) may be a fair compromise, it

> sets up a difficult factual inquiry into the "objects" of any transaction which creates or defeats diversity. Although this test appears simple enough, it may be difficult to administer. Innocent claims to diversity

tion will be suspect in all suits brought by a representative on a cause of action arising before his appointment. For suits arising after appointment, there remains the argument that he was designated in anticipation of the action.[162] Finally, the proposed rules do not suggest whose citizenship will govern when the designated fiduciary is found to have been improperly or collusively joined.[163] The per se citizenship rule, while an attractive palliative for federal judges, is nevertheless unprincipled, because its arbitrary designation of the decedent's citizenship as determinative of federal jurisdiction lacks any relationship with the purposes underlying diversity jurisdiction.

II
PROPOSAL FOR A PRINCIPLED RULE

Rules governing jurisdiction over estate litigation should be consistent with the purposes underlying diversity jurisdiction. Thus, the federal real party in interest rule, long referred to as a "barnacle on the federal practice ship,"[164] should be abolished. Rather than assisting in the determination of citizenship in diversity cases, this rule merely confuses their solution.[165] Other federal rules relating to capacity and joinder of parties properly address the question of whether a representative should be regarded as a real party to an action.[166]

> jurisdiction may be plagued by arguments directed to this provision based solely on the fact that the chain of title is traceable to a nondiverse citizen.

Id. (footnote omitted).

162 *See id.* at 721-22.

163 *See id.* at 722. By not designating a party whose citizenship should control in such a case, the ALI failed to remedy the very problem it sought to alleviate with a per se rule. As of 1980, the Fourth Circuit served notice to prospective litigants that it expects the ALI proposed rules to factor into the Court's jurisdictional determination:

> Without intimating that we should or can effect the change simply by judicial pronouncement, we, nevertheless, want it known that, if a case arises which presents the question in a way that its answer will affect the outcome, we sball expect the issue of the applicability of the A.L.I. proposal to be raised and fully presented.

Messer v. American Gems, Inc., 612 F.2d at 1375 n.11.

164 Kennedy, *supra* note 13, at 724.

165 *Id. See supra* notes 90-92 and accompanying text.

Professor Atkinson recommended abolition of New York's real party in interest rule. Atkinson, *supra* note 13, at 958-60. He argued that "[t]he real party in interest concept may have had some small degree of usefulness in the middle of the nineteenth century. It bas none at the present day." *Id.* at 964. The New York State Legislature eventually adopted his suggested modifications. *See* N.Y. CIV. PRAC. LAW § 1004 (McKinney 1976 & Supp. 1984).

166 *See* Kennedy, *supra* note 13, at 724 ("Rule 19, 17(b) and substantive rules as to stating a claim for relief are adequate without interjecting the meaningless, logically inconsistent commands of the real party in interest rule.").

The anti-collusion statute also ought to be abolished. The concept of collusiveness "has developed no real independent federal standards,"[167] and the federal court interpretation of the anti-collusion statute "catches manipulation like a sieve."[168] It is ironic that in many instances "the typical George Washington admission of the lawyer . . . that he seeks the appointment only to pick cherries from the diversity tree, most often brings escape from reprimand because his truth hath made him free of collusion."[169] Moreover, judicial notions of improper plaintiff conduct vary from circuit to circuit, engendering inconsistent results on similar facts.[170] A positive expression of jurisdictional principles best serves the purpose of the anti-collusion statute, namely to prohibit cases not properly adjudicated in a federal forum.

Diversity jurisdiction rests on the notion that federal courts should protect out-of-state litigants from state court prejudice.[171] Although commentators have severely criticized this rationale,[172] the American Law Institute argues that prejudice against out-of-state litigants remains a viable rationale for diversity jurisdiction.[173] Thus, diversity jurisdiction is the proper device for alleviating "the possible shortcomings of state justice,"[174] such as the provincialism of local judges and juries, the tendency of local courts to favor their own over outsiders, infirmities in local practice that might jeopardize fairness, and congested state dockets which cause delays.[175]

Assuming the utility of diversity jurisdiction, a per se rule governing citizenship in estate litigation is the best mechanism to resolve jurisdictional disputes. Adopting the per se rule would obviate the problems that courts applying the anti-collusion statute and the real party in interest rule have unsuccessfully attempted to solve. An examination of the possible per se rules, evaluated in light of the purposes underlying diversity jurisdiction, suggests that the beneficiaries' citizenship should control the jurisdictional inquiry.

A. Using the Fiduciary's Citizenship to Establish Diversity

Although a number of federal courts have held otherwise,[176]

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167 *Id.*
168 *Id.* at 721.
169 *Id.* at 703.
170 *See supra* note 5 and accompanying text.
171 *See* Division of Jurisdiction Study, *supra* note 7, at 105-10.
172 *See generally* C. WRIGHT, *supra* note 29, at 131-34.
173 *See* Division of Jurisdiction Study, *supra* note 7, at 106-09.
174 *Id.* at 107.
175 *Id.* at 107-08.
176 *See, e.g.*, Sadler v. New Hanover Memorial Hosp., 588 F.2d 914 (4th Cir. 1978)

the fiduciary's citizenship should not govern jurisdiction. As a practical matter, choice of a nonresident representative is easy to manipulate while the choice of beneficiaries is more difficult and the decedent's citizenship is virtually impossible. As a theoretical matter, protection of the fiduciary is not consonant with the purposes underlying diversity jurisdiction. The estate representative usually prosecutes estate-related litigation to collect and distribute any recovery to the estate beneficiaries.[177] Therefore, jurisdictional rules should focus on potential prejudice to estate beneficiaries. Consider the following examples:

(1) Where all parties (decedent, defendant, beneficiaries and fiduciary) are in-state residents, the controversy is purely local and unlikely to result in prejudice to any party. A state forum is obviously appropriate.

(2) Where the fiduciary is the only out-of-state party, prejudice against the nominal nonresident plaintiff is possible. However, an in-state judge or jury should recognize this as a purely local controversy. Therefore, a foreign estate representative should not encounter prejudice. A federal forum should not be made available for this essentially local controversy.

(3) The greatest possibility of prejudice against the nonresident representative occurs where the defendant is the only in-state party. A local forum will likely protect its citizen involved in litigation brought by an out-of-state victim, estate representative, and beneficiaries. This action belongs in a less biased forum, but not because of possible prejudice against the estate fiduciary; rather, because of potential bias against the out-of-state decedent or beneficiaries.

(4) Where there is an in-state decedent, an in-state defendant, out-of-state beneficiaries, and an out-of-state fiduciary, there may be prejudice against the nonresident representative. However, it is uncertain whether a local forum would discriminate in favor of an in-state defendant, when the decedent was also a local citizen. The court may view this dispute as brought by one of its own citizens and therefore deserving of favorable review, notwithstanding the fact that the beneficiaries and the representative are foreigners. If prejudice occurs, it is possible that it will favor the decedent. Therefore, it is questionable whether a controversy of this type should have ac-

(executrix's citizenship controls diversity determination); Janzen v. Goos, 302 F.2d 421 (8th Cir. 1962) (citizenship of administratrix governs diversity determination).

177 *See generally* T. ATKINSON, HANDBOOK OF THE LAW OF WILLS 643, 645 (2d ed. 1953).

cess to a federal forum.[178]

The likelihood of local prejudice in any case[179] does not result from the presence of a nonresident fiduciary. Therefore, jurisdictional rules should refer to the parties ultimately affected by the litigation: the decedent and the beneficiaries.

B. Using the Decedent's Citizenship to Establish Diversity

The American Law Institute has proposed that the decedent's citizenship be used to establish diversity jurisdiction in estate-related litigation.[180] However, the American Law Institute provides no reasons for choosing the decedent's citizenship over the beneficiaries' or the representative's, and as such, has supplied no principled basis for choosing one party's citizenship in preference to any other's.[181]

There are many reasons why the decedent's citizenship should govern jurisdiction. As a practical matter, the rule would minimize manipulation because the decedent's citizenship cannot be manipulated for jurisdictional purposes in the ways that the administrator's or beneficiaries' citizenship are susceptible to manipulation. As a theoretical matter, the decedent more closely resembles a real party in interest because his estate recovers the proceeds of any estate-related litigation. Furthermore, the decedent's desires concerning the ultimate disposition of his property are central to estate administration, and a state court's primary interest is to effectuate that intent. Thus, the decedent, rather than the beneficiaries or the estate fiduciary, is the center of gravity in estate cases.[182]

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178 Nevertheless, because a per se rule is desirable, *see infra* notes 185-201 and accompanying text, this type of controversy should not be heard in a federal forum.

179 Additional combinations of parties are conceivable where an in-state administrator sues an out-of-state defendant.

180 *See supra* notes 150-63 and accompanying text.

181 The only stated rationale for this rule is that a per se citizenship rule would obviate the need for an inquiry into the motives behind the fiduciary's appointment. Division of Jurisdiction Study, *supra* note 7, at 119. The ALI gives no indication, however, why it chose the decedent's citizenship as the basis for its per se rule. One commentator objected to the ALI formulation, stating that: "the decedent is the only one in the whole world who literally has no interest in the proceedings . . . ." Farage, *Proposed Code Will Emasculate Federal Jurisdiction,* 2 TRIAL, Apr./May 1966, at 30-32. *But cf.* Currie, *The Federal Courts and the American Law Institute,* 36 U. CHI. L. REV. 1, 16 (1968) (approving ALI rule because other possible rules too difficult to administer).

182 *See generally* T. ATKINSON, *supra* note 177. On the construction of wills in general, Atkinson states the general rule for probate:

> If possible, a will should be interpreted according to its terms viewed in the light of the general circumstances surrounding the testator in order to effectuate his intention. . . .
>
> The rules of construction should be flexibly applied so as not to defeat such intention as may be manifested in the will. . . .

Id. at 807.

On balance, however, using the decedent's citizenship to determine jurisdiction is not consonant with the purposes underlying federal diversity jurisdiction. This is clearest in litigation where the beneficiaries are the only out-of-state residents. If the decedent's citizenship governed jurisdiction in these cases, the nonresident beneficiaries would be denied a federal forum. However, in these situations a state court may be prejudiced against the nonresident beneficiaries, even though the decedent and his administrator are local residents. The court might be reluctant to award substantial damages to remote, unknown beneficiaries, especially when the defendant is a local resident.[183] Indeed, commentators have criticized the American Law Institute proposal that the decedent's citizenship control as overly restrictive because it would deny nonresident beneficiaries the benefits of a federal forum.[184]

C. Using the Beneficiaries' Citizenship to Establish Diversity

Most cases suggest that the estate beneficiaries are the true locus of concern in estate litigation because they are the parties who will benefit from any estate-related recovery.[185] Consequently, a per se rule in estate litigation should provide that the beneficiaries' citizenship control jurisdiction. It obviates factual problems conceruing the motive behind or substantial stake in the outcome of the litigation. Testators are likely to name the natural objects of their bounty as beneficiaries, rather than selecting them with creating diversity jurisdiction in mind. Beneficiaries are designated well in advance of any anticipated litigation or are designated by law if the decedent dies intestate. Therefore, collusion or improper joinder of parties to manipulate diversity jurisdiction is unlikely.[186]

This rule best effectuates the purposes of diversity jurisdiction. It protects litigants from the potential inadequacies of local justice. Where estate beneficiaries are all in-state residents and the defend-

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183 Several empirical studies have attempted to determine whether state courts and juries are biased against nonresident litigants. *See* Goldman & Marks, *Diversity Jurisdiction and Local Bias: A Preliminary Empirical Inquiry*, 9 J. LEGAL STUD. 93 (1980) (local bias is relevant but not highly important factor in attorneys' choice of federal or state forum); Summers, *Analysis of Factors that Influence Choice of Forum in Diversity Cases*, 47 IOWA L. REV. 933 (1962) (local bias is insignificant factor in forum choice); Note, *The Choice Between State and Federal Court in Diversity Cases in Virginia*, 51 VA. L. REV. 178 (1965) (local bias is somewhat important factor in choice of forum but never the most important factor).

184 *E.g.*, 3A J. MOORE & J. LUCAS, *supra* note 41, ¶ 17.05[3.-2] n.10; Kennedy, *supra* note 13, at 720.

185 *E.g.*, Mullins v. Seals, 562 F.2d 326, 327-38 (4th Cir. 1977); Miller v. Perry, 456 F.2d 63, 67-68 (4th Cir. 1972).

186 The Fourth Circuit, in Sadler v. New Hanover Memorial Hosp., Inc., 588 F.2d 914, 917 (4th Cir. 1978), pointed out that "the designation of a nonresident executor in one's will, before a wrongful death suit is even imagined, cannot be so tainted."

ant is also an in-state resident, the controversy is purely local and should be adjudicated in state court. However, where the beneficiaries are nonresidents, local prejudice is likely, especially if the defendant is a local citizen. Such a case belongs in federal court.

The major problem with this rule arises when there are some beneficiaries in-state and others out-of-state. In these situations, the presence of one in-state beneficiary will destroy diversity jurisdiction under the "complete diversity rule."[187] Certainly, if in-state beneficiaries predominate, then the litigation is best characterized as a local controversy that should be adjudicated by state courts. But where out-of-state beneficiaries predominate, the case is not a local controversy, and the nonresident beneficiaries should not forfeit their right to a less biased federal forum because an in-state party destroys diversity. In these situations an out-of-state beneficiary should be designated as a "class representative" to allow his citizenship to control for federal jurisdictional purposes.[188] This formulation would conform to the principle underlying diversity jurisdiction, that federal courts should be available to resolve real, substantial controversies between citizens of different states.

Applying this rule to the three cases described earlier[189] would lead to proper jurisdictional conclusions. In the first case, which involved a lawsuit by an Illinois estate administrator representing Indian beneficiaries against a Canadian corporation, the court applied the substantial stake test and concluded that the administrator lacked an interest in the litigation sufficient to justify removal to a federal forum.[190] The court reached the right result for the wrong reasons. The court reasoned that use of the administrator's citizenship would bring within the court's diversity jurisdiction an action between aliens and that diversity jurisdiction was not intended to achieve this result.[191] Although the court applied the substantial stake test to the estate administrator, it actually relied on the beneficiaries' citizenship when it concluded that the underlying litigation was a conflict between aliens of two foreign nations and therefore

187 This is a consequence of the complete diversity rule which was first articulated in Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806). *See generally* C. WRIGHT, *supra* note 29, at 140-42.

188 *See* Snyder v. Harris, 394 U.S. 332, 340 (1968) (class action allowed in federal court even though no complete diversity); Supreme Tribe of Ben Hur v. Cauble, 255 U.S. 356 (1921) (same). This principle permits a shareholder to bring a derivative suit in federal court even when there is no complete diversity. *See* C. WRIGHT, *supra* note 29, at 170.

189 *See supra* notes 10-12 and accompanying text.

190 *See* Betar v. De Havilland Aircraft of Can., 603 F.2d 30, 35-36 (7th Cir. 1979) *cert. denied*, 444 U.S. 1098 (1980).

191 *Id.* at 35.

not justiciable in federal court.[192] Had the court used the beneficiaries' citizenship per se rule, it would have reached the same result more directly.

In the second case,[193] use of the beneficiaries' citizenship rule would have produced a different result. There, an out-of-state administratrix brought a wrongful death action on behalf of parents who were allegedly prostrate with grief over their child's death.[194] The court concluded that the administratrix's citizenship would govern jurisdiction unless she had been named in order to create diversity.[195] If the court had applied the per se rule based on the beneficiaries' citizenship, it would not have granted jurisdiction because the beneficiaries and the defendants were citizens of Mississippi.[196] This was essentially a local dispute and therefore not the kind of controversy appropriate for federal court.

In the third case,[197] all beneficiaries were citizens of Oklahoma, except one, who was a citizen of Colorado.[198] She was appointed administratrix and instituted a wrongful death action in federal court. Shortly thereafter she moved to Oklahoma and made that her permanent residence.[199] The court applied the substantial stake test and held that there was diversity jurisdiction.[200] However, application of the per se rule focusing on the beneficiaries' citizenship would bar this suit from federal court. Because the defendants and most of the beneficiaries were residents of Oklahoma,[201] this case presented a local controversy which a state court could fairly adjudicate. The court's use of the substantial stake test thus resulted in an outcome at odds with the purposes of diversity jurisdiction.

CONCLUSION

Diversity jurisdiction in estate-related litigation has been problematic. Because the Supreme Court has not provided clear guidance, the lower federal courts have articulated a variety of rules, principles, and tests to govern the jurisdictional analysis. As a result, the federal courts disagree as to whose citizenship should be used to determine diversity. Some courts look to the estate fiduci-

192 *Id.*

193 Bianca v. Parke-Davis Pharmaceutical Div. of Warner-Lambert Co., 723 F.2d 392 (5th Cir. 1984).

194 *Id.* at 394.

195 *Id.* at 398-99. The Fifth Circuit remanded the case to the district court for further inquiry into the motive behind the administratrix's appointment. *Id.*

196 *Id.* at 394.

197 Hackney v. Newman Memorial Hosp., 621 F.2d 1069 (10th Cir. 1980).

198 *Id.* at 1069, 1071.

199 *Id.* at 1070.

200 *Id.* at 1071.

201 *Id.* at 1070.

ary, others look to the beneficiaries, and the American Law Institute advocates that courts look to the decedent. In addition, opinions are muddled by abstruse discussions of real party in interest rules and by imprecise analyses of improper and collusive joinder. The motive/function and substantial stake tests require evidentiary hearings which invite perjurious and self-serving testimony, and the courts have failed to develop any standards for collusiveness. Furthermore, the use of different tests by different jurisdictions has produced inconsistency. In short, rules relating to diversity jurisdiction in estate litigation fail to assure principled, just results.

The major inadequacy of current jurisdictional rules is their failure to effectuate the purposes of federal diversity jurisdiction. Those purposes would best be served by a per se rule that in estate-related litigation the beneficiaries' citizenship is used to determine whether diversity exists. To this end, Congress should promulgate a per se rule to this effect. The anti-collusion statute should be amended or, in the alternative, abandoned as the lodestar of jurisdictional analysis in these cases. The Supreme Court should also reject the tests currently utilized by the circuits in resolving jurisdictional disputes, and definitively hold that the beneficiaries' citizenship is the only just, appropriate determinant of federal jurisdiction. This rule would be easy to apply, and would obviate the difficulties of the motive/function and substantial stake tests. More important, this rule would ensure that federal courts hear only those lawsuits involving real, substantial controversies between citizens of different states.