Federal Procedure—Manufactured Diversity of Citizenship—The Appointment of an Out-of-State Administrator for the Sole Purpose of Creating Diversity of Citizenship Between the Parties of a Lawsuit in Order To Invoke the Jurisdiction of the Federal Courts Is "Improper" and "Collusive" Under Title 28, Section 1359, United States Code.[1] *Bass v. Texas Power & Light Co.*, 432 F.2d 763 (5th Cir. 1970).

A wrongful death action was commenced in the Federal District Court for the Eastern District of Texas under the Texas Wrongful Death Statute.[2] The decendent, his statutory beneficiaries for whom the lawsuit was commenced, and the defendant were citizens of Texas; the administrator of the estate, Bass, was a citizen of Louisiana. It was candidly admitted that Bass was appointed administrator of the estate for the sole purpose of manufacturing or artificially creating diversity of citizenship so that the attorneys of the decedent's statutory beneficiaries could invoke the jurisdiction of the federal district court. Thus, for the first time, the Fifth Circuit Court of Appeals was presented with the issue of whether the appointment of an out-of-state administrator for the sole purpose of creating a diversity of citizenship in order to invoke the jurisdiction of the federal courts was "improper" or "collusive" under section 1359 of the United States Code.[3] The court held that it was and that the federal district court could have no jurisdiction over the action.

The manufacturing of diversity jurisdiction in the federal courts is not a new problem. Section 1359, derived from sections 41(1)[4] and 80[5] of the Judicial Code of 1940,[6] indicates that in a dispute between local parties, the appointment of an out-of-state citizen to represent one of the litigants, if made solely for for the purpose of creating diversity of citizenship, will not be sufficient to invoke federal jurisdiction. Until very recently, however, it was consistently recognized that if there were a valid state appointment of an out-of-state representative, the federal

1. 28 U.S.C. § 1359 (1965).

2. TEX. REV. CIV. STAT. ANN. art. 4671 (1952).

3. Section 1359 provides:

> A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court.

4. 28 U.S.C. § 41(1) (1940), provided that a federal court was to have no jurisdiction of a suit on a promissory note in favor of an assignee unless the suit could have been prosecuted in a federal court if no assignment had been made.

5. 28 U.S.C. § 80 (1940), required dismissal of an action when the suit did not involve a real and substantial dispute properly within the jurisdiction of the court or when the parties to the suit had been improperly or collusively made or joined to create diversity.

6. For a discussion of the development of the law prior to § 1359, see Note, *Manufacturing Diversity Jurisdiction In Federal Courts*, 20 SYRACUSE L. REV. 681 (1969).

courts would not inquire into the motive for the appointment and were, therefore, powerless to implement section 1359.

The first significant consideration of section 1359 was by the Court of Appeals for the Third Circuit in *Jaffe v. Philadelphia & Western Railroad*,[7] which upheld the manufacture of diversity in a wrongful death action where the plaintiff admitted that an out-of-state citizen was appointed administratrix of the decedent's estate solely to create diversity of citizenship.[8] The court placed heavy reliance on *Mecom v. Fitzsimmons Drilling Co.*,[9] where it was stated:

> 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.[10]

Using this rationale, the *Jaffe* court refused to inquire into the true motive for the appointment of the administratrix and held that the appointment was neither "improper" nor "collusive" under section 1359.

Following the line of reasoning begun in *Jaffe*, the Third Circuit again approved the manufacture of diversity in *Corabi v. Auto Racing, Inc.*[11] By giving the words "improper" and "collusive" their dictionary meaning and in effect "[b]y focusing on the literal meaning of the two words, the court virtually emasculated the statute . . . ."[12] Faced with almost identical facts, other courts have reached the same decision as did the Third Circuit in *Jaffe* and *Corabi*.[13] For instance, the Court of

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7. 180 F.2d 1010 (3d Cir. 1950).

8. The court found that the administratrix, who was a citizen of New Jersey, was the real party in interest and that her selection did not amount to collusion under section 1359, although the lawsuit was the only asset of the estate which was under her nominal management.

9. 284 U.S. 183 (1931). This case is distinguishable from the cases where the appointment of an administrator is done solely to create diversity jurisdiction because here, the resignation of the administratrix and the appointment of her successor were acts done not to create federal diversity jurisdiction but to prevent it from attaching.

10. *Id.* at 189.

11. 264 F.2d 784 (3d Cir. 1959). The mother of the decedent resigned as administratrix of the estate to permit the appointment of a non-resident as administrator so that the lawsuit could be brought in a federal court.

12. Caribbean Mills, Inc. v. Kramer, 392 F.2d 387, 393 (5th Cir.), *aff'd*, 394 U.S. 823 (1969), involved the assignment of all of the stock in a Panama corporation to a Texas resident so that he could bring suit in a federal court. Immediately after the transfer, the Texas resident reconveyed 95 per cent of the stock back to the Panama corporation, and under these circumstances, the court found that when an assignment is made solely to create federal diversity jurisdiction, it is "improper" and "collusive" within the meaning of section 1359.

13. *See, e.g.*, Lang v. Elm City Constr. Co., 324 F.2d 235 (2d Cir. 1963); County of Todd v. Loegering, 297 F.2d 470 (8th Cir. 1961).

Appeals for the Eighth Circuit found nothing "improper" or "collusive" in the appointment of an out-of-state trustee although it was done clearly to manufacture diversity of citizenship.[14] These courts steadfastly refused to inquire into the motive for the appointment of an out-of-state representative.

The present trend toward inquiring into the motive for appointing an out-of-state citizen to create diversity jurisdiction was begun by the Court of Appeals for the Fifth Circuit in *Caribbean Mills, Inc. v. Kramer.*[15] The Fifth Circuit rejected the limited construction of section 1359 which formed the basis of the Third Circuit's position in *Corabi* and held that an assignee solely for collection purposes cannot properly invoke federal diversity jurisdiction. In doing so, the court stated:

> 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. In the context of Section 1359 and its predecessor statutes, the phrase "improperly or collusively" means what the courts have said it means. Hence, an attempt to create federal jurisdiction by colorable assignment or other device without substance is "improper or collusive" within the meaning of the statute.[16]

Following this lead, the Court of Appeals for the Third Circuit in *McSparran v. Weist,*[17] overruled its prior decisions in *Jaffe* and *Corabi* and held that collusion is not limited to improper conduct between opposing parties, but includes actions by one side designed to manufacture diversity jurisdiction. The Third Circuit reasoned that the appointment of a representative for the purpose of creating diversity jurisdiction will not automatically violate section 1359. Instead, an

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

15. 392 F.2d 387 (5th Cir.), *aff'd*, 394 U.S. 823 (1969).

16. *Id.* at 393. In affirming, the United States Supreme Court in Kramer v. Caribbean Mills, Inc., 394 U.S. 823, 828 (1969), stated:

> The conclusion that this assignment was "improperly or collusively made" within the meaning of § 1359 is supported not only by precedent but also by consideration of the statute's purpose. If federal jurisdiction could be created by assignments of this kind, which are easy to arrange and involve few disadvantages for the assignor, than a vast quantity of ordinary contract and tort litigation could be channeled into the federal courts at the will of one of the parties. Such "manufacture of federal jurisdiction" was the very thing which Congress intended to prevent when it enacted § 1359 and its predecessors.

However, in a footnote, 394 U.S. at 828 n.9, the Supreme Court specifically reserved the question of whether the motive to create diversity jurisdiction renders the appointment of an out-of-state administrator "improper" or "collusive."

17. 402 F.2d 867 (3d Cir. 1968), involving the appointment of an out-of-state guardian solely to manufacture diversity jurisdiction.

appointment will only be "improper" or "collusive" in cases involving the appointment of an out-of-state citizen who has no function other than getting the lawsuit into the federal courts. The desire to create diversity is not in itself "improper" or "collusive," and normally the motives behind the appointment will not be considered. But in a case where diversity jurisdiction is dependent upon the citizenship of a representative whose citizenship is different from that of the beneficiaries, the Third Circuit stated that motive will be considered in order to determine if the appointment was made solely to create diversity jurisdiction. The federal district court must determine whether the normal considerations for selection of a representative are present[18] and if not, the appointment is "improper" or "collusive" under section 1359. This conclusion has also been reached in both the Second[19] and Fourth[20] Circuits.

After reviewing both sides of the problem, the Court of Appeals for the Fifth Circuit in *Bass* concluded that in view of the language of section 1359, the motive of the beneficiaries could not be disregarded in ascertaining the purpose for which the administrator was chosen. When the beneficiaries' only motive is the creation of diversity of citizenship without any of the considerations which normally lead to the selection of an administrator, the selection is "improper" or "collusive" within the meaning of section 1359. It is this lack of a stake in the outcome coupled with a colorable motive for bringing a local action into a federal court which makes an appointment "improper" or "collusive." The Fifth Circuit further found that since there is no mechanical test which can be applied to determine whether an appointment, while proper in form, is totally lacking in substance, the federal district courts must decide this question with a case-by-case analysis.

The fact that this problem exists at all is a clear indication that the

18. *E.g.*, a capacity to manage the property of the estate and an interest such that his involvement in the litigation is incidental to his general duty to protect the interests of those to whom he is responsible.

19. O'Brien v. Avco, 425 F.2d 1030 (2d Cir. 1969). The Second Circuit, in a case involving the resignation of an administratrix and the appointment of an out-of-state administrator for the sole purpose of creating diversity of citizenship, found that "[T]here can be no excuse for engulfing the already over-burdened federal courts with cases involving controversies between citizens of the same state, who seek to invoke federal jurisdiction through sham transactions." *Id.* at 1033. This case overruled Lang v. Elm City Constr. Co., 324 F.2d 235 (2d Cir. 1963). *See* note 12 *supra*.

20. Lester v. McFadden, 415 F.2d 1101 (4th Cir. 1969), involved the appointment of an out-of-state administrator for the purpose of bringing a wrongful death action in the federal district court. The court found that when an out-of-state administrator has no stake in the outcome of the lawsuit and he is appointed solely to create diversity jurisdiction, the apparent diversity is pretensive and "is improper within the meaning of § 1359." *Id.* at 1106.

Erie doctrine,[21] which requires federal courts to apply the same substantive law in diversity cases as would be applied in state courts, has not eliminated forum shopping. The differences in federal and state procedure, including more liberal discovery techniques, the reputation of certain judges, the fact that federal judges can comment on the evidence, the general reputation of juries for liberal damage awards, and the fact that appellate review of jury verdicts may be more restrictive in federal courts, are only a few of the reasons why one of the parties might prefer a federal court over a state court.[22] Primarily because of the failure of *Erie*, the federal courts have found themselves with an increasing load of cases which has caused a trend away from the earlier lenient construction of section 1359 to a much more restrictive construction.

There seems to be ample justification for this restrictive approach to section 1359 because "[t]he historical reason for diversity jurisdiction in the federal courts was primarily a fear of local prejudice in state forums when the rights of a diverse party were at issue. . . ."[23] However, in those cases where diversity is manufactured, the true parties are citizens of the same state and the claim itself is of a local nature. In such situations, the non-resident administrator cannot plead that his case will be influenced adversely by local prejudice because the jury will know that he represents a local beneficiary. Therefore, the basic reason for diversity jurisdiction, local prejudice, will not be present.[24]

This new interpretation of section 1359 has turned from the mechanical certainty of *Jaffe* and *Corabi* to a test based solely on subjective criteria, and as a result, several interesting problems have arisen. The most important problem is the fact that it will be extremely difficult for the federal district courts to determine what is a proper motive for the appointment of an administrator. The beneficiaries will learn to select a non-resident administrator with noted expertise in his field, and when they do so, it will be extremely difficult for the district court to find the "nominal" relationship which is necessary for the appointment to be "improper" or "collusive." Consequently, it is not unlikely that extremely lengthy trials on the diversity issue alone will develop, resulting in expense and lost time without a determination on

21. Erie v. Tompkins, 304 U.S. 64 (1938).

22. C. WRIGHT, LAW OF FEDERAL COURTS § 31, at 99 (2d ed. 1970); Comment, *Manufactured Federal Diversity Jurisdiction and Section 1359*, 69 COLUM. L. REV. 706 (1969).

23. Note, *Federal Courts—Jurisdiction—Creation of Diversity Jurisdiction Through the Appointment of Out-of-State Guardians*, 15 WAYNE L. REV. 1632, 1633 (1969); Frank, *Historical Basis* of Federal Judicial System, 13 LAW & CONTEMP. PROB. 3, 22-24 (1948).

24. Note, *Manufactured Diversity—Appointment of a Nonresident Fiduciary Representative In Order to Create Federal Diversity Jurisdiction*, 21 S. CAR. L. REV. 191, 204 (1969).

the merits of the case. Also, the non-resident administrator can never be absolutely certain whether or not he has the required diversity until there has been a final determination of the issue.[25]

The problems created by the new interpretation of section 1359 are greatly outweighed by the fact that it has the desirable effect of reducing the burden of diversity litigation on the federal courts. By eliminating many cases that are not really appropriate for federal determination, the new interpretation has accomplished the legislative purpose behind the enactment of section 1359. Thus, the fact that the administrator has the burden of proof on the issue of jurisdiction coupled with the courts' examination of the motive for the appointment makes section 1359 an effective limitation on federal diversity.[26]

Phillip A. Wylie

25. This in itself may present a difficult decision for the plaintiff where there is a danger that the statute of limitations may run.

26. Comment, *Manufacturing Diversity Jurisdiction*, 14 VILL. L. REV. 727, 741 (1969).