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Federal Civil Rule 17 (b) and (c): Qualifying to Litigate in Federal Court

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FEDERAL CIVIL RULE 17(b) and (c): QUALIFYING TO LITIGATE IN FEDERAL COURT*

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I. The Process of Qualifying to Litigate

A. In General

When an attorney admitted to the local bar[1] brings an action for a client who is an *adult, sane, human citizen of the forum state* to protect the client's *own personal interest,* the defendant's attorney cannot validly object to the plaintiff's qualification to litigate.[2] However, problems arise as (1) the description of the plaintiff shifts to *minor, incompetent* or *artificial entity,* (2) the plaintiff's citizenship shifts from *forum* to *foreign,* (3) the interest shifts from *personal* to *derivative* or *representative.* As these factors vary, a host of state regulatory policies arise upon which the defendant may base an objection to the qualifications of the plaintiff to sue. Most of these regulatory policies are aimed at protecting multiple interests and are not meant to protect the defendant exclusively. He becomes beneficiary of these policies, however, to the extent that the court will sustain his objections. If the defendant successfully presses his claims based upon these policies, the attorney for the plaintiff may be forced to requalify his plaintiff or seek a remedy through another theory, plaintiff or court.[3] While some of the policies of capacity regulation may be difficult to discern because of their ancient origin,[4] it may be helpful, nevertheless, to outline some of the more obvious policies that are thought to be involved.

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1 The qualification of the attorney to act as such in the particular court has practical implications for the realistic appraisal of capacity to bring certain type suits: *e.g.*, Rule No. 1 of the United States District Court for the Middle District of Alabama (March 7, 1961) provides generally that in civil rights cases, parties must be represented by at least one attorney who permanently resides in the district and who is regularly admitted to practice before the court. FED. LOCAL COURT RULES, Alabama, Rule No. 1 (1964).

2 Louisell and Hazard pose as the archetype of our litigating model "the adult male who is a citizen of the jurisdiction in which the court sits and who suffers from no mental or legally imposed disability." D. LOUISELL & G. HAZARD, JR., CASES ON PLEADING AND PROCEDURE 642 (1962).

3 This very brief description of the plaintiff in the model process becomes highly complicated as the following factors are added: (1) The distinction is drawn between "active" capacity to sue and "passive" capacity to be sued. Though the American legal system tends to lump these together, the policy considerations evoked can be quite different in the two situations. *See* A. EHRENZWEIG, CONFLICT OF LAWS §§ 11-24 (1962). (Ehrenzweig also reports the unfollowed civilian distinction between capacity to be a party to a proceeding and capacity to act validly therein); (2) the objection is made by the defendant or by the plaintiff and it goes either to their opponent's or their own capacity; (3) considerations as to pleading, timing of objections, waiver, post-trial and appellate review are injected; (4) the question arises in a second proceeding under the context of collateral attack.

4 See brief exploration of policy factors in F. JAMES, CIVIL PROCEDURE § 9.9 n.3 (1965).

B. State Policies in Regulating Qualification to Litigate

1. In General

A moment's speculation will indicate how the attorney's choice of a real party in interest plaintiff is indirectly controlled by a state's policies embodied in rules governing service of process, statutes of limitations, jury trial, jurisdiction, venue, and dismissals for failure to state a claim for which relief can be granted. It can be observed also that a more direct impact on the attorney's choice of a plaintiff is made by a state's rules concerning maintenance, res judicata and fiduciary duties.[5] These same policies also underlie the rules establishing qualifications to litigate as explored in the sections below.[6]

2. Disqualification to Represent Self-Interest: Total and Partial

Total legal disqualification to litigate may be the result of pervasive jurisprudential assumptions dictating who are the proper subjects of legal rights. The Roman system of law gives us the classic historical example in that it generally denied legal status and personality to noncitizens.[7] The policy in England during the Middle Ages, of placing a married woman under the protective coverture of her husband is reflected in her common-law disability to enforce her own rights without him.[8] The infamous *Dred Scott* decision,[9] denying citizenship to a freed slave, shows the impotence of a timid judiciary to pierce the assumption that a Negro was not the proper subject of legal rights.[10] Recent Supreme Court cases have been less timid in construing who are the proper subjects of legal rights by injecting cruel and unusual punishment theories into expatriation cases.[11] Nevertheless, legally imposed disabilities still remain in the United States against imprisoned felons who "forfeit" their civil status[12] or, in

5 *See generally* Kennedy, *Federal Rule 71(a): Will the Real Party in Interest Please Stand?* 51 MINN. L. REV. 675 (1967).

6 Related to procedural regulations of capacity are the wide range of quasi-substantive doctrines such as those in constitutional law where refusal of remedy is based on lack of standing to raise a claim. *See* Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court,* 71 YALE L.J. 599 (1962).

7 The Roman system recognized a series of partial capacities and resulting legal relations as a human person descended from categories of "citizen," "freeman" and "father" to their polar statuses of "noncitizen," "slave" and "son." A reduction in capacity was called "capitis diminutio." J. MUIRHEAD, LAW OF ROME § 29 at 121-26 (2d ed. 1899).

8 This pattern was first changed by equity and later by statutes. J. MADDEN, LAW OF PERSONS AND DOMESTIC RELATIONS § 54 (1931); A. CASNER AND W. LEACH, CASES AND TEXT ON PROPERTY 283-84 (1951); 15 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 194-95 (1965); W. PROSSER, LAW OF TORTS § 116, at 879-82 (3d ed. 1964). Blackstone gives the policy, which now appears strangely inverted by our modern, nonfeudal standards: "[E]ven the disabilities which the wife lies under are for the most part intended for her protection and benefit: so great a favorite is the female sex of the laws of England." 1 BLACKSTONE, COMMENTARIES * 444.

9 Scott v. Sanford, 60 U.S. (11 How.) 393 (1857).

10 *See* Corwin, *The Dred Scott Decision in the Light of Contemporary Legal Doctrines,* 17 AM. HIST. REV. 52 (1911).

11 See Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) (draft evasion statute held unconstitutional for not providing trial).

12 *See, e.g.,* Urbano v. News Syndicate Co., 232 F. Supp. 237 (S.D.N.Y. 1964), *rev'd,* 358 F.2d 145 (2d Cir.), *cert. denied,* 385 U.S. 831 (1966). The policy justification for retention of disability is apparently based on the necessity of maintaining prison discipline and

some instances, against aliens.[13] In international law, the doctrine persists that nation-states, and not human persons, are technically the only proper subjects of international rights.[14] The trend toward disappearance of such total disabilities is represented in part by enlightened judicial decisions and in part to dramatic social and legislative upheaval. The modern American emphasis has now shifted far beyond the legal doctrines of incapacity to the real-life problems of providing lawyers for the poor.[15]

Today we attempt to disqualify individuals where it serves an identifiable policy. For example, the law attempts to protect minors and incompetents by imposing various restrictions on their substantive rights and duties[16] and by disqualifying them from litigating except through representatives regulated by fiduciary obligations. The opposing litigant, by raising objections to qualification of a minor or incompetent, represents society's interest in demanding proper representation of the ward's interest. The defendant also has standing to object in his own right in order to be protected by a binding, enforceable judgment or settlement that will prevent future harassment on the same claim.[17]

3. Qualification to Represent Another's Interest

The guardian of a minor or incompetent is regulated by the laws which have various policy objectives aimed at protecting the ward. But other legitimate interests are also evident. One is that the public be able to rely on business transactions conducted through duly-constituted representatives. Some other interests, however, reveal a mixture of surface idealism and underground economic lobbying. For example, statutory requirements that a guardian must be a resident reflect a legitimate policy that he be subject to continuing court supervision and service of process. Such statutes, though, also insure that the "guardianship business" remains available to local people.[18] The economics of bonding interests are also involved in the legal regulation of fiduciaries. Similarly, requirements that a guardian *ad litem* be an attorney[19] reflect high idealism that the ward be given the best representation. Yet, to the extent that there may be additional fees for such a guardian, the requirements serve to further the economic interests of attorneys, or at least to keep the business out of institutional hands.

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morale in the face of endless law suits which might be brought by prisoners with nothing else to do. *Cf.* Dunway, J., concurring in Weller v. Dickson, 314 F.2d 598, 601-04 (9th Cir.), *cert. denied,* 375 U.S. 845 (1963). *See also* Note, *The Rights of Prisoners While Incarcerated,* 15 BUFFALO L. REV. 397 (1965).

13 3 J. MOORE, FEDERAL PRACTICE ¶ 17.17, at 1381 (2d ed. 1967).

14 W. BISHOP, INTERNATIONAL LAW 265 (2d ed. 1962).

15 *See, e.g., Symposium: Justice and the Poor,* 41 NOTRE DAME LAWYER 843 (1966); *Symposium: Law of the Poor,* 54 CALIF. L. REV. 319 (1966).

16 *E.g.,* Bowling v. Sperry, 133 Ind. App. 692, 184 N.W. 2d 901 (1962) (right of minor to avoid a contract).

17 The absence of a properly qualified plaintiff may subsequently be viewed either as a quasi-jurisdictional defect, EHRENZWEIG, *supra* note 3, § 15, at 52, or a suit by a different party, and thus not give res judicata protection to the defendant.

18 *Cf.* economic analyses in Hover & Cannon, *Increased Fees for Fiduciaries,* 13 N.Y. COUNTY B. BULL. 187 (1956); Comment, *Institutionalized Trusteeship: Avenues of Compensation Reform,* 58 YALE L.J. 924 (1949).

19 *E.g.,* WIS. STAT. ANN. § 48.02 (8) (1957).

The representatives of decedents' estates are similarly regulated in order to protect the multiple interests of beneficiaries, creditors and government tax officials. These policies often provide for the disability of representatives appointed in foreign courts, presumably for the purpose of insuring local control, protection of local creditors, effectuation of the state's distribution scheme, and prevention of multiple fiduciaries.[20] It seems, though, that this objective could be accomplished without the requirement of a local representative who will be entitled to an additional fee.[21]

Apart from court-appointed representatives, personal representatives can also be created by voluntary transactions giving rise to such status relationships as trusteeship, agency and power of attorney to represent another's interest. Each status relationship is regulated by rules establishing fiduciary duties and qualifying the authority of the representative to sue on behalf of the other. For example, an individual could be clothed with many capacities such as "stockholder in a derivative suit," "representative of a class," "trustee," "agent," "director of the board," "parent of the child," and each would call forth a series of policies regulating who may sue and what "accounting" or "housekeeping" steps he must take to record and authenticate his representation of another's interest.

In all these situations — guardianship, administration or derivative representation — the opponent may object to lack of qualification and authority to sue and thus act in the dual role of enforcer of the relevant community policies and also as private litigant entitled to protection from a second suit on the same basic claim.

In more subtle contexts, behind the record of a court dispute, there may be either a feigned controversy or a struggle for power in which the defendant himself may be engaged to determine who will control the representative of the plaintiff and, hence, the course of the litigation.[22]

4. Qualification of Artificial Persons

A supposed reason for allowing the institution of corporations is to encourage through limited liability the accumulation and organization of capital on a large-scale basis continuing through time despite individual changes in ownership.[23] The historical mechanism provides for the creation of corporations under statutory schemes with authority to own property and to be the subjects of rights and liabilities, including that of suing and being sued as entities.[24] Unincorporated associations and partnerships, while often operating on a larger economic scale than many corporations, need not comply with these statutory regulations which, in theory, assure a known, comprehensive mechanism capable of protecting all the multiple interests in the economic enterprise.[25] Consequently,

20 Van Dusen v. Barrack, 376 U.S. 612, 641 (1964).
21 *Cf.* Bradshaw v. Moyers, 152 F. Supp. 249 (S.D. Ind. 1957).
22 *See, e.g.,* Hansberry v. Lee, 311 U.S. 32 (1940).
23 R. STEVENS, PRIVATE CORPORATIONS 3-5 (2d ed. 1949).
24 D. LOUISELL & G. HAZARD JR., CASES ON PLEADING AND PROCEDURE 644-48 (1962).
25 The Uniform Partnership Act is silent as to whether or not a partnership may sue or be sued as an entity and consequently the states take varying positions on the issue, UNIFORM PARTNERSHIP ACT, 7 U.L.A. § 6, nn. 8 & 9 (Supp. 1966). The pattern also varies as to statutes allowing unincorporated associations status as entities, LOUISELL AND HAZARD, *supra* note 24, at 724-25.

the opponent may theoretically rise as a private objector and as a community objector to an association or partnership's lack of qualification to litigate as an entity apart from the individuals who compose it.[26]

Finally, the class action, as an equitable procedure, allows the ad hoc creation of an artificial entity where the rigidity of noncapacity rules would leave a vacuum for practical litigation concerning group interests and properties.[27]

5. Limitations on State Policies

All are familiar with the attempts of lobbyists to reshape the law against the interest of their opponents. Included in this process is the not too subtle art of stacking the procedural deck by attempting to shift venue requirements,[28] shorten statutes of limitations,[29] shift the burden of proof[30] or require bonds.[31] Within the range of possibility are statutory devices which limit or condition the capacity to litigate, or extend judicial power to adjudicate interests not represented. At what point do these limitations and extensions become so unreasonable and discriminatory against one group in favor of another group that they can be subjected to successful constitutional attack? A few examples will outline the more frequent patterns in which these basic constitutional limitations of fairness and reasonableness are raised against state regulations of capacity to litigate.

Generally, a state can deny foreign corporations access to its courts for not registering to do business in the state on the theory that such registration is a reasonable qualification for doing business within the state. These required registrations are usually upheld despite vigorous dissents that since such statutes are coercive attempts to make the foreign corporation pay taxes to a state, they bear no reasonable relation to denying the corporation access to the state's courts in private law suits.[32] At the other extreme, where a state attempts to extend

26 It may be doubtful, however, whether there is any modern policy against treating associations as legal entities. Some time ago Sturges argued that courts originally denied status because they thought it was an attempt to usurp corporate franchises from the sovereign. He concluded that courts on their own motion, without legislation, may provide for suit against associations, by service of process on their officers, execution on the associations assets and supplemental proceedings against the members. Sturges, *Unincorporated Associations as Parties to Actions,* 33 Yale L.J. 383, 404-05. (1924).

There may be interesting comparative law questions to pursue here concerning the attitudes of other countries toward recognition of unincorporated associations. Russian law would probably be very negative. For example, Russia did not formally recognize the existence of even a state enterprise as a juridical person until 1961. Maggs, *Soviet Corporation Law: The New Statute on the Socialist State Production Enterprise,* 14 Am. J. Comp. L. 478, 482. (1965). Yugoslav attitudes on the other hand might be more liberal. *Cf.* XIII Collection of Yugoslav Laws 1-14 (Inst. Comp. L. 1966).

27 *See* Simeone, *Procedural Problems of Class Suits,* 60 Mich. L. Rev. 905 (1962). *See also* Kalven & Rosenfield, *The Contemporary Function of the Class Suit,* 8 U. Chi. L. Rev. 684 (1941).

28 *E.g.,* the apparent struggle between the railroads and the unions over the venue requirements in personal injury litigation in FELA actions, as reflected in the history and cases concerning relevant venue requirements. 1A J. Moore, Federal Practice ¶ 0.228, at 2627-33 (1965).

29 *See Developments in the Law: Statutes of Limitations,* 63 Harv. L. Rev. 1177 (1950).

30 *See, e.g.,* Mooney, *Functional Analysis of Exceptions in Accident Insurance,* 1964 U. Ill. L. F. 495, 545 (judges' use of evidentiary presumptions to reach desired results).

31 *See, e.g.,* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 551-53 (1949).

32 *See, e.g.,* Eli Lilly & Co. v. Sav-on-Drugs, Inc. 366 U.S. 276 (1961); Woods v. Interstate Realty Co., 337 U.S. 535 (1949); David Lupton's Sons Co. v. Automobile Club, 225 U.S. 489 (1912).

its judicial power over nonrepresented interests, the interests of known parties cannot be cut off by devices which purport to represent those interests, such as fictional consent or appointment of attorneys.[33] In conflicts between the states, there are competitive limitations where one state's power to regulate capacity must yield to another's in something approaching a constitutional arbitration under the full faith and credit clause.[34] Thus, for example, while fiduciaries without ancillary qualification may be barred from capacity outside their state of appointment, under the full faith and credit clause a state may not close its doors to death actions arising outside the state.[35] On another constitutional level, a state may not discriminate against federal court diversity actions by attempting to close the federal court doors while keeping its own open.[36]

C. Federal Policies Regulating Qualifications to Litigate in Federal Court

Federal jurisdictional policies concerning diversity of citizenship, and thus the rules for determining relevant citizenship, have depended in their application upon the plaintiff who has title to the real interest.[37] He must also be properly qualified to sue. In diversity cases, the federal courts apply state rules establishing the qualification to sue, so long as the rules are constitutional. Subject to this deferral to state policy, however, the federal court system retains its inherent judicial power to regulate representatives appearing before it, *e.g.*, attorneys, guardians *ad litem,* and representatives in class actions. Under *Erie*[38] it also retains the power to apply the policy of one, uniform federal procedure, which may be at odds with a state on such matters as waiver and amendment.[39] The federal court system also retains the power to grant parties independent status for the protection of rights under federal law, where state policy might deny them qualification to sue.[40]

33 Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 318-20 (1950). The same policy requires a state to insure that a class representative is bona fide before res judicata may be imposed against class members. Hansberry v. Lee, 311 U.S. 32 (1940).

34 *Cf.* Coppedge v. Clinton, 72 F.2d 531, 533-34 (10th Cir. 1934) (Oklahoma law could not prohibit incompetent from changing his domicile to Arkansas).

35 First Nat'l Bank v. United Airlines, Inc., 342 U.S. 396 (1952); Hughes v. Fetter, 341 U.S. 609, 612-14 (1951).

36 Hellrung v. LaFayette Loan & Trust Co., 102 F. Supp. 822 (N.D. Ind. 1951) (statute restricting claims against estate to probate court could not bar claim in federal court); *cf.* Brimhall v. Simmons, 338 F.2d 702 (6th Cir. 1964) (relying on Memphis Street Ry. v. Moore, 243 U.S. 299 (1917) for policy construing state statutes in favor of, rather than in derogation of, federal diversity jurisdiction). *But see,* Holt v. Middlebrook, 214 F.2d 187 (4th Cir. 1954) (statute requiring appointment of resident administrator can close door).

37 Kennedy, *supra* note 5, at 679.

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

39 Some spiritual renewal has recently been given to the policy of one uniform federal procedure in Hanna v. Plumer, 380 U.S. 460 (1965), where Justice Brennan quoted from Lumberman's Mut. Cas. Co. v. Wright, 322 F.2d 759, 764 (5th Cir. 1963):

> One of the shaping purposes of the Federal Rules is to bring about uniformity in the federal courts by getting away from local rules. This is especially true of matters which relate to the administration of legal proceedings, an area in which federal courts have traditionally exerted strong, inherent power, completely aside from the powers Congress expressly conferred in the Rules. The purpose of the Erie doctrine, even as extended in York and Ragan, was never to bottle up federal courts with "outcome-determinative" and "integral-relations" stoppers. . . . Hanna v. Plumer, *supra* at 472-73.

40 Nevertheless, the federal policy in many areas governed by federal substantive law may be to defer to state policy in determining qualification to sue. *E.g.,* The Federal Employer's

D. State and Federal Policies in a Nutshell

The various policies of the states can best be summed up as providing for (1) total disqualification and denial of legal status for substantive reasons; (2) partial disqualification to represent self-interest but, for protective purposes, the interest can be presented through a representative; (3) qualification of people who purport to act as representatives for specified interests where the purpose of the qualification is to protect multiple interests; (4) qualification of artificial entities as part of a comprehensive scheme of institutional regulation; and (5) qualification of representatives in class actions. The federal policy is to defer to state policy determinations with the following exceptions: Federal policy will make an independent choice where the issue involves relevant citizenship, the necessity of a uniform federal procedure, the judicial regulation of representatives who appear in court, or finally, the hearing of claims based on a substantive federal right. Yet, in all of the above, a federal court may choose to defer to state policy on the strength of the state's claim to substantive policy and the weakness of any specified federal policy providing otherwise.

II. Rule 17(b) and (c) as the Basic Regulation in the Federal Court

A. Origin

The Field Code of 1848 recognized the concept of lack of "legal capacity to sue" as a basis for a demurrer,[41] but apparently did not otherwise utilize the concept nor treat the related problems in one place or in a unified manner.[42] Rather, as the Code evolved with amendments, provisions found in different chapters and articles treated the litigation powers of various persons as parts of other subject matter. For example, in later editions of the New York Code there are provisions relating to real parties,[43] married women,[44] infants,[45] poor persons,[46] committees for incompetents,[47] executors,[48] temporary administrators,[49] trustees,[50] and foreign corporations[51] in different sections. This proliferated

Liability Act allows suit by the "personal representative" of the deceased and may thus cause referral to state law to determine that status. *See* Briggs v. Pennsylvania R.R., 153 F.2d 841 (2d Cir. 1946). *Cf.* De Sylva v. Ballentine, 351 U.S. 570 (1956) (reference made to state probate law to decide whether illegitimate child was entitled to renew a copyright as one of the "children of the author" under section 24 of the Copyright Act).

41 First Report of the Commissioners on Practice and Pleadings § 122, at 148 (New York 1848).

42 Title III of the Report, *supra* note 41, entitled "Of Parties to Civil Actions," pp. 123-128, concerns mainly the real party in interest and joinder of necessary and permissible parties. In later years, however, the concept "capacity to sue and defend" appears as a major subsection in the index under the heading "Parties" in Parson's N.Y. Pocket Code of Civ. Pro. 1234 (1901), though it does not appear in the index in the 1900 edition.

43 § 91, Code of 1848, PARSON'S N.Y. POCKET CODE OF CIV. PRO. (hereinafter PARSON'S) § 449 (1900).

44 § 94, Code of 1848, PARSON'S § 450 (1900).

45 §§ 95, 96, Code of 1848, PARSON'S §§ 468, 469 (1900).

46 PARSON'S § 448 (1900).

47 *Id.* § 2340.

48 *Id.* § 1817.

49 *Id.* § 2675.

50 *Id.* § 449.

51 *Id.* § 1779.

approach was presumably duplicated in the states adopting the Field Code. In the federal courts, under the combination of the Rules of Decisions Act[52] and the Conformity Act,[53] these state provisions generally controlled in actions both at law and in equity.[54] However, the Federal Equity Rules of 1912 independently provided the traditional real party in interest provision in Rule 37, and the provision for appointing guardians *ad litem* for infants and incompetents in Rule 70.[55] The Equity Rules of 1912 served as part of the model for merging law and equity in the Federal Rules of 1938. It was thus natural for the United States Supreme Court to adopt Equity Rule 37 on real parties as the present Rule 17(a) and Equity Rule 70 on guardians *ad litem* as the present rule 17(c).[56] For the uncovered area, the Supreme Court drafted Rule 17(b) to reflect the overall existing federal policy of deferring to state law.

In drafting this provision concerning federal deferral to state law, a departure from the existing rule was proposed. Generally, the existing rule was that the law of the state in which the federal court sat should determine capacity in both legal and equitable matters.[57] Clark and Moore, however, made the proposal that for the sake of nationwide uniformity, capacity of a person should be determined by the law of his domicile so that regardless of the federal court in which a person sued, his capacity would be the same.[58] This theory of uniformity was also to be used to test the capacity of corporations by the law under which they were organized and to test the capacity of those acting as representatives by the law under which they were appointed. A compromise resulted. The Clark-Moore proposal was to be applied only to individuals acting for their own interest and to corporations. For those acting in a representative capacity and all other cases, the law of the forum state was to be applied to determine capacity, thus following the old pattern.[59]

To these basic policies, the drafters appended the obvious policy underlying the rule from the *Coronado Coal*[60] case. This decision had allowed a union to be sued in federal court to enforce a federal substantive right against it, even though the state law would have denied it capacity to be sued as an entity.[61]

Thus the drafters, after reciting the traditional state and federal real party in interest provision in Rule 17(a), molded paragraphs (b) and (c) to read:

> (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. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized.

52 28 U.S.C. 1652 (1964).
53 28 U.S.C. 1962 (1964).
54 MOORE, *supra* note 13, ¶ 17.16, at 1379-80; *See also* 2 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 484 (Wright ed. 1961); Clark & Moore, *A New Federal Civil Procedure-II. Pleadings and Parties*, YALE L.J. 1291, 1312-13 (1935).
55 HOPKINS, NEW FEDERAL EQUITY RULES ANN. (6th ed. 1929).
56 MOORE, *supra* note 13, ¶ 17.02, at 1305, ¶ 17.26, at 421 & n. 11.
57 *See* note 54 *supra*.
58 Clark & Moore, *supra* note 54, at 1313.
59 MOORE, *supra* note 13, ¶ 17.22 at 1399.
60 United Mine Workers v. Coronado Coal Co., 259 U.S. 344 (1922).
61 *Id.* at 385-92.

> In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States.
> (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. If an infant or incompetent person does not have a duly appointed representative he may sue by his next friend or by a guardian *ad litem*. The court shall appoint a guardian *ad litem* for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

In 1946, because of problems created by applying the rule to receivers, and in order to make matters clear, an additional line was attached to 17(b), which now reads:

> . . . and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Title 28, U.S.C., §§ 754 and 959(a).[62]

B. Inconsistency

1. Between 17(b) and 17(c)

Three conflicting themes of federal policy run through Rule 17(b) and (c) on its face: first, there is a deferral to the state law of the forum; second, there is a deferral to the law of a party's domicile; and third, there is a grant of independent federal capacity based upon federal judicial power to control representatives or upon a federal substantive right. In any situation where simultaneous claims to any two of these three can be made to conflict, the words of Rule 17(b) and (c) will require interpretation. Consider the following problems: 1) If the law of a person's domicile would allow him to sue, but the law of the forum state would require a representative, should the question be considered a problem of an "individual" or of a "representative," thus determining whether it will be governed by the law of the forum or the domicile? 2) One part of Rule 17(c) defers to state law in determining capacity of guardians, but another allows the federal court to appoint them; how far can this permissive federal power override state regulations? 3) In the case of guardians, can it be argued that the first part of 17(c) refers to state domicile law and thus is in conflict with 17(b)'s referral to forum law? 4) Assume there is a defective corporation, and the second sentence of 17(b) defers to the state law under which it was organized. Could the corporation, nevertheless, be given capacity by finding a federal substantive right and treating it under the exception as an unincorporated association?

62 The 1946 version originally referred to Rule 66, but in 1948 the reference was changed to "Title 28, U.S.C. §§ 754 and 959 (a)," to which Rule 66 had referred. MOORE, *supra* note 13, ¶ 17.20, at 1393-94; BARRON & HOLTZOFF, *supra* note 54, § 486 at 48-49.

2. Between *Angel v. Bullington*[63] and 17(b)

The *Erie* doctrine adds another implicit rule that gives an additional reason for making the law of the forum determinative. This is not spelled out in Rule 17(b). Whenever a forum state could constitutionally close its courts, the result supposedly should be applied as "substantive" in the federal court, thereby circumventing Rule 17 altogether. This would mean that the law of a litigant's domicile and the concept of independent federal capacity are irrelevant.[64] As a specific example, a recent dissent[65] raised the possibility that Rule 17(b)'s order to apply the law of domicile might be inconsistent with *Erie,* or at least with the mandate of *Klaxon Company v. Stentor Manufacturing Company*[66] to apply the forum state's conflict rules.

3. Between Rule 17(a) and 17(b)

Confounding the problems described above, Rule 17(a), by interpretation, refers a federal court in diversity cases to state law to determine who has the substantive right in the action. Expressly specified in the rule are examples of representatives authorized to sue without joinder of their beneficiaries, such as parties to a third party beneficiary contract, trustees, administrators, executors and parties authorized by statute. No attempt, however, is made in Rule 17(a) to distinguish between forum or domicile state law. Moreover, Rule 17(a) is not understood to cure a representative's capacity defects under state forum law and Rule 17(b), even though 17(a) could be interpreted to do so.[67]

C. Relation to Other Federal Rules of Civil Procedure

Typical situations arise in which the parties invoke Rule 17(b) and (c) with other Federal Rules. Accompanying the internal conflicts that must be reconciled among the Federal Rules themselves, in diversity cases claims also are made under *Erie* that state practice should dictate the result, rather than independent federal procedural policy. The following discussion presents some typical procedural problems related to Rule 17.

63 330 U.S. 183 (1947).

64 On the other side of the coin, the claim is made that the federal rule, by deferring to state capacity law, wrongfully restricts federal diversity jurisdiction. Fennell v. Monogahela Power Co., 350 F.2d 867 (4th Cir. 1965) (claim made to Rule 82, rejected); Lang v. Elm City Construction Co., 217 F. Supp. 873 (D. Conn.), *aff'd,* 324 F.2d 235 (2d Cir. 1963) (statute restricting administrator to suit in state county could not control).

65 Urbano v. News Syndicate Co., 358 F.2d 145, 148 (2d Cir.) (dissenting opinion), *cert. denied,* 385 U.S. 831 (1966). *Cf.* Nolan v. Transocean Air Lines, Inc., 276 F.2d 280 (2d Cir. 1960), *set aside and remanded,* 365 U.S. 293 (1961) (New York conflict rule applied to refer to California law to determine whether South Carolina plaintiff's minority ended at 18 or 21 thus ending toll of statute of limitations); Gandall v. Fidelity & Cas. Co., 158 F. Supp. 879 (E.D. Wis. 1958) (Wisconsin federal court applied Wisconsin statute awarding costs to guardian *ad litem* in Illinois accident case after determining Rule 54(d) was silent and Wisconsin conflict rule would apply it).

66 313 U.S. 487 (1941).

67 *Compare* Elliott v. Day, 218 F. Supp. 90 (D. Ore. 1962) (Alaska wrongful death statute allowing plaintiff to sue under Rule 17(a) yields to "capacity of representative" regulations of Oregon forum law under Rule 17(b), but law allowed suit) *with* Suders v. Campbell, 73 F. Supp. 112 (M.D. Pa. 1947) (objections to foreign ancillary administrator under Rule 17(b) overcome by referring to Rule 17(a)).

In the event Rule 17 authorizes a suit against a partnership or unincorporated association, Rule 4, regulating service of process on parties and their agents, must be satisfied. Rule 9 establishes the basis for claims to waiver of capacity objections by providing that capacity or authority to sue does not have to be specially pleaded, but that objections to capacity must be raised by specific negative averment. Rule 13(a), providing for compulsory counterclaims which the defendant might have against the opposing party, has raised questions when the counterclaim is logically related to the original claim, but is technically between parties of different capacities, *e.g.*, a claim against a partner and a counterclaim by his partnership.[68]

Rule 15(c) bears an important relation to 17(b) and (c) by providing that amendments relate back to the filing of the original pleading. Since many valid capacity objections under Rule 17(b) and (c) can theoretically be corrected by amendment and substitution of the proper party, the only real obstacle is the intervention of a state statute of limitations before the amendment, and a claim that the state law does not allow the relation back. The permissiveness of Rule 21, in providing that misjoinder is not grounds for dismissal and that dropping or adding parties may be accomplished on just terms, also supports the liberal policy of amendment in Rule 15(c). Rule 25 is functionally related to this same type of question but specifically covers substitution of parties in the event of death or transfer of interest during the law suit.[69]

In conjunction with Rule 17(b), Rules 17(a) and 19 are often used indiscriminately to attack the status of the plaintiff in a wide variety of situations in which it is claimed simultaneously that the plaintiff is not the real party in interest, lacks capacity to sue under state law and that an indispensable party to the action is absent.[70] Parallel problems not necessarily involving Rule 17(b) are to be seen where class actions under Rule 23 may raise questions concerning standing of the class representative to represent the class. The status of intervenors under Rule 24 also may be attacked on the ground of lack of standing to enter a claim in a law suit, both of which raise a broad generic form of "capacity."

III. Mechanics of Resolving Qualification Issues

A. Strategic Objectives of the Parties

An attorney's method of qualifying his plaintiff may be directed toward no particular strategic objective. On the other hand, it may be aimed at a variety of strategic objectives involving service of process, statutes of limitations, venue,

68 3 J. MOORE, FEDERAL PRACTICE ¶ 13.06, at 15 (2d ed. 1962).

69 This problem has proved unusually complicated. Note, *Federal Civil Procedure: Substitution Under Amended Rule 25(a)(1)*, 1963 DUKE L.J. 733; Annot., 79 A.L.R.2d 532 (1961); *Cf.* Cinnamon v. Abner A. Wolf, Inc., 215 F. Supp. 833 (E.D. Mich. 1963) (rule 17(b) does not govern survivability where plaintiff dies pendente lite).

70 *See, e.g.*, De Franco v. United States, 18 F.R.D. 156, 158 (S.D. Cal. 1955) (question whether partner could sue to recover for tax refund owing partnership was not "real party" question, nor "capacity" question, but "indispensable" party question); Hershel California Fruit Prods. Co. v. Hunt Foods Inc., 119 F. Supp. 603, 607 (N.D. Cal. 1954) (a trust had no capacity as party under rule 17(a)).

jurisdiction, pleading, remedies, and jury trial considerations. In federal courts, the strategic objectives may include an attempt to create or defeat diversity jurisdiction and proper venue. The defendant in turn, by utilizing the concept of capacity, may attempt to cause dismissal of the case, delay, reversible error, or expense.

These strategic patterns emerge in an infinite number of situations, depending on the chronology and nature of the objection.[71] The ultimate questions that are generated by these situations are certainly less crucial when improper qualification can be corrected by amendment and substitution, thus avoiding the statute of limitations or some other bar to the underlying claim.

B. Raising the Objection

The theory of the Rules is that capacity to sue or be sued will generally be presumed. Thus, Rule 9 throws the burden on the objector to "raise objections to capacity by specific negative averment." No rule, however, expressly states when this averment must be made or if it may be made by motion. In providing for waiver of objections, Rule 12 does not mention capacity. It may be recalled that Rule 12 establishes waiver of all objections not raised by motion or in the answer, other than indispensable party, jurisdiction of the subject matter or failure-to-state-a-claim objections. Thus, a routine capacity objection may be waived under Rule 12. On the other hand, if the objection is likened to an indispensable party or jurisdictional objection, it cannot be waived. Furthermore, if Rules 9 and 12 are construed against the objector in favor of a waiver, then the question arises whether the discretion of the court under Rule 15 should relieve the objector of his waiver by allowing amendment.

The Rules are silent about the question as to whether the objection may be made by motion or must await the answer, and the manner will depend on the potency of the defect and the degree to which the facts are disputed. Consistent with the great amount of discretion available in the Rules, the courts have been fairly adept at making pragmatic, common-sense dispositions of claims relating to the mechanics of pleading and objections to qualification. Some of these resolutions are summarized below.

1. Proper Raising of the Objection

It appears clear that the objection may be made either in a motion to dismiss before answer[72] or in the answer under Rule 12.[73] The objection has also been successfully raised in a motion for a more definite statement[74] and in motions for summary judgment.[75] And where the defendant had no previous

71 *See* note 3 *supra*.

72 Klebanow v. New York Produce Exchange, 344 F.2d 294, 296 n. 1 (2d Cir. 1965) (though there is no express provision, "the practice has grown"); Coburn v. Colemen, 75 F. Supp. 107 (W.D.S.C. 1947) (citing rule 7 (b)). *But see* Krijn En Zoon v. Schrijver, 151 F. Supp. 955 (S.D.N.Y. 1957) (deferring question to answer).

73 Brown v. Keller, 274 F.2d 779 (6th Cir.), *cert. denied*, 363 U.S. 828 (1960).

74 Sun-X Glass Tinting of Mid-Wisconsin, Inc. v. Sun-X Int'l, Inc., 227 F. Supp. 365 (W.D. Wis. 1964).

75 Klebanow v. New York Produce Exchange, 344 F.2d 294 (2d Cir. 1965); *cf.* Barnes v. A. Sind & Associates, 32 F.R.D. 39 (D. Md. 1963).

knowledge of the facts upon which a lack of capacity depended, one court entertained a motion to dismiss after the answer had been made.[76] Where the objection is raised in a pleading, such as the answer, under Rule 9(a) it must be raised by "specific negative averment." However, where the capacity defect appears on the face of the complaint and is challenged by a motion to dismiss, technically the requirement of a specific negative averment is not applicable; rather the applicable standard is found in Rule 7(b) that the motion "state with particularity the grounds therefor."[77] Under these standards, a defendant corporation properly objected to its own capacity to be sued on a motion to dismiss with the simple averment that there was no such corporation.[78] In a suit brought in November by the trustees of an employee fund, the issue was properly raised by an answer containing a negative averment that plaintiffs were not trustees when the suit was brought and the affirmative allegation that they ceased to be trustees in the following August.[79] Similar motions were mechanically sound in raising the issue of the limited capacity of partnership[80] and of limited partners.[81] Even though the rule technically requires a "negative" averment, the rules have been liberally construed to translate affirmatives to negatives, *e.g.*, to convert defendant's averment that the "plaintiff died before the suit" to one asserting that the "plaintiff was not living and had no legal existence."[82]

2. Objection Improperly Raised

Rulings at the pleading stage that the objection to capacity has been improperly raised are not as harsh as they might seem because they most often coexist with other cumulative reasons for denying the objection, even if it had been properly raised. For example, a New York administratrix brought suit under the Massachusetts Wrongful Death Act, alleging jurisdiction, authorization, and the right to bring the action. The defendant's answer, which merely denied knowledge sufficient to form a belief in the truth or falsity of the allegation and further pleaded that the plaintiff's allegation raised a question of law to be submitted to the court, was held not to comply with the specific negative averment requirement of Rule 9(a).[83] But the court in dictum ruled on the merits of the point in favor of the plaintiff and also indicated that the pretrial order had

76 Pasos v. Eastern S.S. Co., 9 F.R.D. 279 (D. Del. 1949). *See also* Chorney v. Callahan, 135 F. Supp. 35 (D. Mass. 1955) where after the defendant administrator had answered and the statute of limitations had run, he was allowed to amend his answer to show that the action had been brought prematurely and thus gain dismissal. In the special situation where a wrongful death plaintiff unsuccessfully resisted a change of venue all the way through a mandamus proceeding, without raising a capacity objection, he was later allowed in the transferee forum, to raise the objection that he had no capacity there and thus to obtain a retransfer back to the original forum. Goranson v. Capital Airlines, Inc., 221 F. Supp. 820 (E.D. Va. 1963).

77 Coburn v. Colemen, 75 F. Supp. 107, 109 (W.D.S.C. 1947). *See also* Suders v. Campbell, 73 F. Supp. 112, 115-16 (M.D. Pa. 1947) (objection proper but unsuccessful).

78 Barnes v. A. Sind & Associates, 32 F.R.D. 39 (D. Md. 1963) (supporting affidavits to be contested after plaintiff completed discovery).

79 Brown v. Keller, 274 F.2d 779 (6th Cir. 1960).

80 Krijn En Zoon v. Schrijver, 151 F. Supp. 955 (S.D.N.Y. 1957).

81 Klebanow v. New York Produce Exchange, 344 F.2d 294 (2d Cir. 1965).

82 Pasos v. Eastern S.S. Co., 9 F.R.D. 279, 281 (D. Del. 1949).

83 Montellier v. United States, 202 F. Supp. 384, 389-90 (E.D.N.Y. 1962), *aff'd*, 315 F.2d 180 (2d Cir. 1963).

stipulated her qualification and authority to sue. An answer which says "upon information and belief, plaintiff has no capacity to sue" is similarly insufficient to test plaintiff's capacity to sue as a corporation because supporting particulars are required.[84] And one case may carry the implication that the objection may not be raised on a motion to dismiss when the defect is not apparent on the face of the complaint and thus must be presented like an affirmative defense in the answer.[85]

However, as the time of attack shifts from pretrial to trial and post-trial, the objection to capacity will often be deemed not only improperly raised, but also waived. Thus, where on the fourth day of trial the defendant raised the question whether the plaintiff corporation's president was authorized to initiate the action, the court replied ". . . the issue was not raised by the pleadings or any amendment thereto. Rule 9(a) . . . precludes the raising of this issue during the course of trial."[86] The same ruling was made on a motion for judgment n.o.v. based on lack of capacity.[87] And in *Ivey v. Daus*[88] where the plaintiff, Ivey, sued in his capacity as executor, and the defendant counterclaimed, alleging that Ivey had converted the estate to his own use, the counterclaim led to a personal judgment against Ivey since he failed to raise the question of capacity in his reply to the counterclaim.[89]

C. Pleading Qualifications

The attorney bringing the claim is faced with fairly simple federal regulations concerning capacity. Rule 8 provides that the complaint shall set forth a short and plain statement of a claim upon which relief can be granted. Rule 9 provides generally that it is not necessary to aver capacity, active or passive, of an individual, or the authority of a person acting in a representative capacity, or the legal existence of a corporation. Rule 9 further throws the burden on the opponent to raise any of these issues by specific negative averment. And Rule 10 places no special burden on the plaintiff by providing that the pleading shall have a caption including the names of the parties.

Nevertheless, despite these very liberal requirements, it appears that the plaintiff must comply with other rules of law that may require the caption of a complaint to indicate the capacity of a representative, such as a trustee, executor or administrator, as an essential part of indentification of the party and as an ingredient of the claim.[90] And, of course, Rule 10 itself creates an exception for

84 Porto Transp. v. Consolidated Diesel Elec. Corp., 19 F.R.D. 256, 260-61 (S.D.N.Y. 1956). The defendant in *Porto,* however, was granted leave to amend.

85 Aberdeen Hills Second Corp. v. Biafore, 24 F.R.D. 502 (E.D. Pa. 1960). The plaintiff corporation here was suing its officers and managers for conversion of funds. The objection technically went to the "authority" of the corporation to bring suit. The trial judge relegated it to a matter in avoidance to be raised as an affirmative defense under Rule 8(c) and did not mention Rule 9(a).

86 Mardel Sec., Inc. v. Alexandria Gazette Corp., 183 F. Supp. 7,18 (E.D. Va. 1960), *aff'd* 320 F.2d 890 (4th Cir. 1963).

87 Waldrip v. Liberty Mut. Ins. Co., 11 F.R.D. 426, 429-30 (W.D. La. 1951).

88 181 F. Supp. 793 (S.D.N.Y. 1960).

89 *Id.* at 797.

90 *Cf.* Vroon v. Templin, 278 F.2d 345 (4th Cir. 1960). Applicable state law, for example, may require suit against fiduciaries to be brought in their personal capacities. *But*

jurisdictional allegations. In the case of corporations, this would take the form of stating that the corporation is incorporated under laws of a certain state and a statement indicating where it does or does not have its principal place of business.[91] Other cases where capacity and diversity jurisdiction are in dispute also may evoke a dispute over the captioning of the complaint and present special problems for partnerships and unincorporated associations.[92]

Although there are cases where defective allegations of jurisdiction result in dismissal,[93] they are not inclined to foreclose a claim where the underlying facts show the parties are properly in federal court.[94] Thus, a simple allegation that the "plaintiff was and still is a limited partnership . . . organized and existing under the laws of . . . the Netherlands" was held to be a sufficient allegation to sustain alienage diversity jurisdiction.[95] In a parallel situation, limited partners were ultimately successful by tailoring their complaint along the lines of a stockholder derivative suit to allege that the partnership was under "control antagonistic" to them, thus giving them capacity to sue, even though limited partners ordinarily have no capacity to sue for the partnership.[96]

One may also observe unsuccessful attempts to turn state pleading requirements into rules of state substantive law.[97]

Only one case seems to be out of line with the plain direction of Rule 9(a). In that case the court granted a motion for a more definite statement against a corporate plaintiff, stating "From the summons and complaint, the capacity [of the plaintiff] to sue does not appear. Rule 17 . . . sets forth the requirements for capacity to sue."[98] The court then ordered the plaintiff to "allege" its capacity

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see Crowe v. Di Manno, 225 F.2d 652 (1st Cir. 1955) (allegation of fiduciary capacity under Massachusetts law could be treated as surplusage when objection was raised for first time after judgment).

91 Official Form 2(a), FED. R. CIV. P.

92 See text accompanying notes 208-34 *infra*.

93 *E.g.*, Riess v. Murchison, 34 U.S.L.W. 3274 (9th Cir. July 7, 1965), *cert. denied*, 383 U.S. 946 (1966) (trial judge did not abuse discretion in refusing plaintiff leave to amend complaint to allege principal place of corporate business and citizenship rather than residence).

94 Suders v. Campbell, 73 F. Supp. 112 (M.D. Pa. 1947) is a case in point. In order to bring a Pennsylvania Wrongful Death Action, the New Jersey administrator took out ancillary letters of administration from a Pennsylvania court. In bringing suit her caption merely stated "Mae Suders, Administratrix of the Estate of Allen J. Suders, Deceased." *Id.* at 114. The complaint did not specify whether she was suing under the authority of the New Jersey or the Pennsylvania letters. To defendant's motion to dismiss for failure to state a claim and because of lack of capacity under Pennsylvania law, the court responded: "in determining a question of jurisdiction the court is not bound by the pleadings but may of its own motion inquire into the facts as they really exist." *Id* at 115. The facts were that she was suing as Pennsylvania ancillary administrator; further, the caption complied with Rule 10(a) and under Rule 9(a) it was unnecessary for her to aver capacity or authority under which she was acting. *Id.* at 114-15. *See also* 28 U.S.C. § 1653 (1964).

95 Krijn En Zoon v. Schrijver, 151 F. Supp. 955, 956 (S.D.N.Y. 1957). It may be that all the partners were Netherland citizens in any event. The implicit ruling that the limited partnership has a citizenship is probably overruled by United Steelworkers Union v. R. H. Bouligny, Inc., 382 U.S. 145 (1965), discussed at notes 233-37 *infra*.

96 Klebanow v. New York Produce Exchange, 344 F.2d 294 (2nd Cir. 1965).

97 The defendant in Waldrip v. Liberty Mut. Ins. Co., 11 F.R.D. 426 (W.D. La. 1951), tried to turn a capacity pleading defect into a point of Louisiana substantive law on a motion for judgment n.o.v. The defendant claimed that in a suit by a parent for the wrongful death of two sons, the parent had to allege and prove that the son was not survived by wives or children. The court disagreed that Louisiana law required it, but also found the point was not substantive and had been waived under Rule 9(a). *Id.* at 428-30.

98 Sun-X Glass Tinting of Mid-Wisconsin, Inc. v. Sun-X Int'l, Inc., 227 F. Supp. 365, 375 (W.D. Wis. 1964).

to sue in conformity with the Rules.[99] It is submitted that the court overlooked Rule 9(a) and assumed that under Rule 17 the state substantive law governed the necessary allegations of capacity and that the plaintiff would have to comply with them. Thus, while federal pleading requirements are minimal, the attorney must beware of state requirements that might be raised under an *Erie* claim or Rule 17(b).

D. Amendment and Substitution of Properly Qualified Parties

In the past, some courts have been handicapped by the notion that an amendment changing the party plaintiff or defendant in any way constitutes a "new action" and thus cannot be made after the statute of limitations has run.[100] The results were harsh where innocent and technical defects were present in describing the plaintiff or defendant.[101] Rule 15(c) of the Rules of 1938 gave federal judges authority to rectify this situation by allowing amendments that would relate back. Most courts caught the spirit of this policy,[102] but some did not.[103] It thus became necessary in 1966 to amend Rule 15(c) and Rule 17(a) to specify the policy in detail.[104] As to defendants, Rule 15(c) now provides:

> . . . An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

As to plaintiffs, Rule 17(a) now provides:

> . . . No action shall be dismissed on the grounds it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

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99 *Id.*

100 3 J. MOORE, FEDERAL PRACTICE ¶ 15.15 [4.-1], at 1041 (2d ed. 1967).

101 Although the trend has been toward leniency in this area, the 1966 amendments discussed below were not meant to authorize fictitious name suits. *See* 1966 Advisory Committee Note, Rule 17(a), Federal Rules of Civil Procedure, 28 U.S.C.A. (Supp. 1966). Concerning state fictitious name practice in federal court, see Note, *Designation of Defendents by Fictitious Names — Use of John Doe Complaints*, 46 IOWA L. REV. 773 (1961).

102 *E.g.*, Levinson v. Duepree, 345 U.S. 648 (1953); Taormina Corp. v. Escobedo, 254 F. 2d 171 (5th Cir.), *cert. denied*, 358 U.S. 827 (1958) (change from individuals and corporation to partnership); Anglo Canadian Shipping Co. v. United States, 238 F.2d 18 (9th Cir. 1956) (petition by 23 members amended to add their unincorporated association to satisfy venue defect). *See also* Brough v. Strathmann Supply Co., 358 F.2d 374 (3d Cir. 1966); Brown v. Keller, 274 F.2d 779 (6th Cir.), *cert. denied*, 363 U.S. 828 (1960); Montgomery Ward v. Callahan, 127 F.2d 32 (10th Cir. 1942); Pikor v. Cinerama Prods. Corp. 25 F.R.D. 92 (S.D.N.Y. 1960).

103 *E.g.*, Seymour v. Johnson, 235 F.2d 181 (6th Cir. 1956); Paris v. Braden, 234 F.2d 40 (D.C. Cir. 1956); Chorney v. Callahan, 135 F. Supp. 35 (D. Mass. 1955); Straub v. Jaeger, 9 F.R.D. 672 (E.D. Pa. 1950).

104 J. MOORE & H. FINK, FEDERAL PRACTICE RULES PAMPHLET 463-66 (1966).

There are numerous cases decided before the 1966 amendments to 15(c) and 17(a). Suffice it to say that those cases not permitting the relation back to the original complaint are subject to suspicion.[105]

One other possibility remains for the subversion of the liberal policy concerning relation back. Prior to the amendments, Professor Moore took pains to point out that such an amendment of parties was constitutionally permissible despite an *Erie* and *Woods v. Interstate Realty*[106] argument that contrary state practice under its statute of limitations would govern in diversity actions.[107] His common sense arguments are persuasive, and the new theme of *Hanna v. Plumer*[108] seems to fortify his view. It remains to be seen, however, whether some federal judges will be caught in the *Erie* neutrality net and favor state provincialism over the maintenance of a uniform federal system.

IV. Court Responses to Rule 17(b) Claims[109]

A. Qualification of Individuals to Represent Self-Interest

Rule 17(b), on its face, makes no distinction between claims brought by individuals based on federal law and diversity claims brought by individuals based on state law. The first sentence of Rule 17(b), rather, states that the capacity of an individual shall be determined by the law of his *domicile* and, by a later exception, provides that the capacity of individuals acting in a representative capacity is to be determined by the law of the *forum* in which the district court sits. The purpose of the general clause testing individual capacity by domicile law is to give one uniform test for individuals, regardless of the particular federal court in which they might litigate.[110] Even though this was a change from previous practice, the new test of domicile has had little impact in litigated cases since 1938.[111] The test has sometimes been ignored by defining the problem at hand as substantive, the resolution thus being dependent upon the application of the law of the forum.[112] A New York federal district court in *Urbano v. News Syndicate Company*[113] unsuccessfully utilized this substantive theory in attempting to bar a libel action against a New York newspaper brought by a felon imprisoned in a New Jersey state penitentiary. Judge Bonsal found that New York law controlled and that the law of Massachusetts, where the

105 See cases cited at note 103 *supra*.
106 337 U.S. 535 (1949).
107 MOORE, *supra* note 100, ¶ 15.
108 380 U.S. 460 (1965).
109 This section deals only with diversity claims and thus does not extensively treat cases where capacity is based on federal law, *e.g.*, federal receivers and federal corporations. Neither does it explore capacity in diversity suits involving class actions and stockholder derivative suits.
110 MOORE, *supra* note 100, ¶ 17.16, at 1379-81.
111 *E.g.*, a Michigan federal court did use it in relying on Michigan law to test the competency of a former mental patient in his suit against his former doctors. Gale v. Wagg, 140 F. Supp. 6 (E.D. Mich. 1956) (dismissed for failure to state a claim), but Michigan law would also be applicable under the law-of-the-forum test.
112 *E.g.*, Momand v. Twentieth-Century Fox Film Corp., 37 F. Supp. 649 (W.D. Okla. 1941). The court upheld the assignability of antitrust treble damages claims by referral to substantive law of Oklahoma and rejected Rule 17(b) as procedural. *Id.* at 656. Capacity, however, was probably irrelevant, the problem being more identifiable as a real party in interest question.
113 232 F. Supp. 237 (S.D.N.Y. 1964).

felon claimed to be a citizen, and the law of New Jersey, where he was incarcerated, were irrelevant, despite Rule 17(b)'s direction to apply the law of the felon's domicile. The court said: "it is doubtful whether the framers of Rule 17(b) considered the case of individuals sentenced to life imprisonment."[114] Rather, the New York statute imposing civil death[115] would bar a felon who was not a New York resident from suing in New York state courts. Thus, to Judge Bonsal the statute

> embodies a declared public policy of New York and hence is a rule of New York substantive law binding on this Court under the doctrine of *Erie R.R. v. Tompkins* . . . and acts as a complete bar to this Court taking jurisdiction of this action notwithstanding Rule 17(b). . . .[116]

The Second Circuit overruled the decision stating:

> it was error to apply the law of New York rather than the law of plaintiff's domicile as required by Federal Rules of Civil Procedure, Rule 17(b). There was no showing that under the law of his domicile plaintiff was incapable of suing.[117]

As noted earlier, Rule 17(b) remains silent about the capacity of individuals asserting claims based on federal law. Nevertheless, when a state-incarcerated felon bases his claim on the federal Civil Rights Act, he has capacity to sue, even though the forum state's civil death statute would deny him that capacity.[118] It also appears that a claim by a federal prisoner, based on state law, would not be barred by a state civil death statute.[119] Federal law does not have a civil death statute, but an analogous policy is contained in the Trading With the Enemy Act, which limits the capacity of alien enemies to sue in the courts during time of war.[120]

B. Qualification to Litigate for Minors or Incompetents

1. In General: Management of the Guardian

A lawyer representing a person who, under the law of his domicile, has no

114 *Id.* at 239.

115 "A person sentenced to imprisonment for life is thereafter deemed civilly dead . . . " N.Y. PENAL LAW § 511(1) (McKinney 1967).

116 Urbana v. News Syndicate Co., 232 F. Supp. 237, 240 (S.D.N.Y. 1964), *rev'd*, 358 F.2d 145 (2d Cir. 1965), *cert. denied*, 358 U.S. 831 (1966). The Court here had to disapprove of an early case allowing a negligence action by a Florida felon sentenced to life imprisonment, Panko v. Endicott Johnson Corp., 24 F. Supp. 678 (N.D.N.Y. 1938).

117 Urbana v. News Syndicate Co., 358 F.2d 145, 146 (2d Cir.), *cert. denied*, 385 U.S. 831 (1966). Lumbard, C. J., in dissent, termed the treatment "cavalier" and raised the issue that perhaps "Rule 16(b) as applied here *runs contrary to the decision* in Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 . . . (1941) . . . ." *Id.* at 148 (dissenting opinion).

118 McCollum v. Mayfield, 130 F. Supp. 112, 116-17 (N.D. Cal. 1955). *See also* Weller v. Dickson, 314 F.2d 598 (9th Cir.), *cert. denied*, 375 U.S. 845 (1963), agreeing with *McCollum* but affirming a denial of leave to proceed in forma pauperis. The concurring opinion of Duniway, J., surveys the remedies available to prisoners against their warden. 314 F.2d at 601-04.

119 Hill v. Gentry, 280 F.2d 88 (8th Cir. 1960).

120 MOORE, *supra* note 100, ¶ 17.17, at 1381. The bar can be extended to others under certain conditions. *See, e.g.*, Oerlikon Mach. Tool Works Buehrle & Co. v. United States, 151 F. Supp. 332 (Ct. Cl. 1957), *vacating* 102 F. Supp. 417 (Ct. Cl. 1952). It should be noted that other procedural restrictions, such as venue, may also plague the alien's claim.

personal capacity to litigate because he is under legal age or is mentally incompetent, has two alternatives available in preparing for litigation: (1) A separate state court proceeding, usually under the probate jurisdiction, is initiated, and a person with capacity is appointed the general legal representative of the minor or the incompetent. This "general" guardian then sues in his own name as plaintiff, or is substituted as defendant, and the pleadings designate his capacity as general guardian of the ward. (2) Without a separate probate proceeding, a complaint is filed identifying the ward as plaintiff and designating that the suit is brought by his named next friend or named guardian *ad litem*. In some cases there may be applications to the court to make this designation.[121] Generally, state courts conduct the general guardian appointment exclusively under their probate jurisdiction, whereas the designation of a guardian *ad litem* may be handled by any state or federal court having jurisdiction of the complaint.

Federal Rule 17(b) and (c) clearly reflects this practice by recognizing that where a general representative has been appointed, his capacity is to be determined by state law, but where no general representative has been appointed, the federal court has power to designate a guardian *ad litem* to protect a ward's interest involved in litigation before the court.[122] Thus, where diversity jurisdiction is not ultimately in issue, the problems faced by the federal court are similar to those of managing guardians in the state courts of general jurisdiction.

Objections have resulted in some fairly obvious rulings in light of the wording of Rule 17(c). For example, a federal complaint for minors by a next friend does not have to allege or show the judicial appointment of the next friend. The complaint simply initiates the suit and thus comes under the supervision of the court.[123] And where minors have brought personal injury actions by next friends in state courts, the minors and next friends can in turn be sued in the same capacities as proper defendants in federal court.[124]

The requirement of a guardian *ad litem* or a next friend is clearly not mandatory, and the rule may be satisfied if the minor's interest is adequately represented by counsel.[125] On the other hand, the usual practice should be to appoint a guardian or next friend, and, at minimum, the trial court must make

121 *But see* Blackwell v. Vance Trucking Co., 139 F. Supp. 103 (E.D.S.C. 1956) in which the trial judge said that he was "not familiar with any proceeding whereby a guardian ad litem may be appointed before a suit is instituted . . . ." *Id.* at 105. In Bengston v. Travelers Indem. Co., 132 F. Supp. 512 (W.D. La. 1955), *aff'd*, 231 F.2d 263 (5th Cir. 1956), a guardian *ad litem* was appointed by an ex parte application to the court under Rule 17(c).

122 Bengston v. Travelers Indem. Co., 132 F. Supp. 512, 515-17 (W.D. La. 1955), *aff'd*, 231 F.2d 263 (5th Cir. 1956).

123 Constantine v. Southwestern La. Inst., 120 F. Supp. 417 (W.D. La. 1954) (class action for admission of Negro children to school); Russick v. Hicks, 85 F. Supp. 281 (W.D. Mich. 1949) (children's suit for causing their mother to abandon them).

124 Till v. Hartford Accident & Indem. Co., 124 F.2d 405, 408-09 (10th Cir. 1941). *But cf.* Roberts v. Ohio Cas. Ins. Co., 256 F.2d 35 (5th Cir. 1958).

125 Westcott v. United States Fidelity & Guar. Co., 158 F.2d 20 (4th Cir. 1946). (One lawyer represented a car owner and a minor defendant, who was the driver, against a declaratory judgment claim of noncoverage and agreed to waive jury trial. The minor hired his own attorney who the day before trial asked that a guardian *ad litem* be appointed in order to demand a jury trial. The jury trial was denied. After the minor lost, he appealed and the court said: "We cannot hold . . . that the failure to grant this last-minute motion for a guardian *ad litem* was reversible error." *Id.* at 22.) *See also* Rutland v. Sikes, 203 F. Supp. 276 (E.D.S.C.), *aff'd on other grounds*, 311 F.2d 538 (4th Cir. 1962), *cert. denied*, 374 U.S. 830 (1963). Judgment against minor defendant not rendered void where court found his interests adequately represented by father and attorneys.)

some judicial determination as to the adequacy of the representation, or the judgment against the minor can be reversed.[126] Thus, a default judgment was invalid when entered against an incompetent whose attorney had first submitted an answer informing the court of her declared incompetency, but then failed to answer an amended complaint. The mere fact she appeared by an attorney did not establish that she was "otherwise represented" and thus excuse the court from protecting her interests under Rule 17(c).[127]

A federal court has no general power of guardianship over the person or property of incompetents. This power is exclusively within the province of state courts as *parens patriae* of the mentally ill.[128] But a federal court can, as we have seen, appoint a guardian *ad litem* for an incompetent.[129] If a court does appoint a guardian *ad litem*, it should take care to avoid conflicts of interests by not naming a relative who has a potential adverse interest.[130] A lawyer not only can be named a guardian *ad litem*, but ought to be named.[131] Where the guardian *ad litem* is an attorney suing for minors, the court, under Rule 17(c) and equity practice, may allow him reasonable attorney's fees out of the fund recovered on the basis that it is a good policy to protect minors' interests by seeing to it that lawyers are paid for representing them.[132] And where the state statutes go further and require guardian *ad litem* fees to be taxed as costs, the federal court can construe Federal Rule 54(d) as being neutral on the subject of costs, and choose in its discretion to follow the expressed policy of the state statute.[133] This incorporation of the state practice to particularize the provision of 17(c) that the court may make "orders to protect the interest of the minor or incompetent" is reflected in a local rule of the New York district court which directs that the practice "conform, as nearly as may be, to the practice in the New York state courts."[134] Once the guardian *ad litem* has been appointed, he can be required to answer requests for admissions, but since he usually has little knowledge of the case, the process is subject to special supervision by the court.[135]

126 Roberts v. Ohio Cas. Ins. Co., 256 F.2d 35 (5th Cir. 1958). It was not clear from the reversal whether the minor was entitled to a new trial or whether the trial judge could salvage the judgment by making a post trial finding as to adequacy of representation.

127 Zaro v. Strauss, 167 F.2d 218, 220 (5th Cir. 1948).

128 *In re* Ryan, 47 F. Supp. 10, 13 (E.D. Pa. 1942) (mental hospital inmate, represented by attorney, unsuccessfully sought writ of habeas corpus, and also requested court to make an order for care of person and property).

129 Smith v. United States, 174 F. Supp. 828 (S.D. Cal. 1959), *appeal dismissed*, 272 F.2d 228 (9th Cir. 1959), *cert. denied*, 362 U.S. 954 (1960) (court granted motion for mental examination of habeas corpus petitioner under Rule 35, and as a result appointed his mother guardian *ad litem*); Gandall v. Fidelity & Cas. Co., 158 F. Supp. 879 (E.D. Wis. 1958) (court appointed guardian *ad litem* when plaintiff became incompetent); Gale v. Wagg, 140 F. Supp. 6 (E.D. Mich. 1956) (dictum).

130 United States v. E. I. Du Pont De Nemours & Co., 13 F.R.D. 98, 105 (N.D. Ill. 1952).

131 *Id.* Some states have statutes requiring that a guardian *ad litem* be an attorney of the state. *See, e.g.*, WIS. STAT. ANN. § 48.02(8) (1955).

132 Folsum v. McDonald, 237 F.2d 380 (4th Cir. 1956) (suit for social security); Mutual Life Ins. Co. v. Ginsberg, 228 F.2d 881 (3d Cir. 1956), *cert. denied*, 350 U.S. 979 (1956) (insurance interpleader; court held that appointment and allowance of fees for guardian *ad litem* lawyer to protect minor's interests was proper).

133 *See* Gandall v. Fidelity & Cas. Co., 158 F. Supp. 879 (E.D. Wis. 1958).

134 Rhodes v. United States, 15 F.R.D. 500 (S.D.N.Y. 1954) (court refused to dispense with a bond required upon turnover of recovered funds to the guardian *ad litem*).

135 Metropolitan Life Ins. Co. v. Carr, 169 F. Supp. 377 (D. Md. 1959) (guardian *ad litem*

2. Situations Where Claim Is Made That State Law Bars Suit

More serious problems have arisen because of a conflict between Rule 17(b) and Rule 17(c) and the mandate of *Erie v. Tompkins*. Rule 17(b) directs that the capacity of a representative be tested by the law of the forum state, but Rule 17(c) implies that if no representative has been appointed, the federal court can appoint one. At the same time, *Erie* and *Angel v. Bullington*[136] hold that if a claim is completely barred in state court, it is also barred in federal court. If a representative has been defectively appointed and has no capacity under state law, can the federal court nevertheless rely on its power under 17(c) to cure the defective capacity for the purpose of the litigation? Would allowing the suit violate the language of Rule 17 or the theory of *Angel v. Bullington?*

Some cases take the position that 17(c) operates independently to allow access to federal courts in any event.[137] For example, a wife was defectively appointed guardian for her husband by a New Mexico state court.[138] Her state suit on a personal injury claim for her husband was removed to the federal court, tried, and settled. When a validly, subsequently appointed guardian brought suit against the same defendant, the suit was barred by res judicata. The theory was that despite the new guardian's claim that the wife as former guardian had no capacity, errors in appointment did not go to the jurisdiction of the court, and any defect in appointment under state law could have been correctable by the federal courts' power to appoint guardians under Rule 17(c). The general test again was whether the incompetent husband's interest had been adequately represented.[139]

Similarly, the Louisiana statutory requirement that all actions by a minor be brought through court-appointed tutors did not bar the suit of Louisiana minors by next friend or guardian *ad litem* in a Louisiana federal court under 17(c).[140] The reconciliation here with *Angel v. Bullington* was that the underlying claim was not totally barred in the state court, since it might be brought through a tutor, and thus the capacity statutes of Louisiana were procedural and not a substantive bar to allowing suit under 17(c) in the federal court.

The problem gets murkier when a guardian is litigating outside his state of appointment. The general test expressed by Rule 17(c) is to refer to the law

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and the minor should not be put to special expense and admissions should be subject to scrutiny by judge at trial).

136 330 U.S. 183 (1947).

137 In dictum, Chief Judge Biggs suggests that Rule 17(c) may make Rule 17(b) unnecessary where guardians are concerned, since there would be capacity regardless of state law. Fallat v. Gouran, 220 F.2d 325, 328 (3d Cir. 1955).

138 New Mexico Veterans' Service Comm'n v. United Van Lines Inc., 325 F.2d 548 (10th Cir. 1963). No notice was given nor was a waiting period satisfied. *Id.* at 550.

139 *Id.* at 550. The court also pointed out that New Mexico has adopted Federal Rule 17(c). *See also* Montgomery Ward & Co. v. Callahan, 127 F.2d 32 (10th Cir. 1942) (relying on 17(c) to allow substitution of mandatory guardian for guardian *ad litem* after statute of limitations had run. *Id.* at 36-37).

140 Constantine v. Southwestern La. Inst., 120 F. Supp. 417 (W.D. La. 1954). *See also* Bengston v. Travelers Indem. Co., 132 F. Supp. 512 (W.D. La. 1955), *aff'd,* 231 F.2d 263 (5th Cir. 1956).

of the forum,[141] and that law on its face may prohibit a foreign fiduciary from bringing suit within the state unless a fiduciary is appointed under local laws.[142] In some cases the federal suit has been allowed by interpreting the state statute as not intending to apply to out-of-state fiduciaries who represent no property interests within the state.[143] These cases thus did not have to reach the question which would arise if the state statute was intended to apply: could the suit be brought by a next friend or guardian *ad litem* under 17(c), thereby avoiding the restriction of the state statute?[144]

It seems clear, however, that if a committee or guardian for an incompetent has already been appointed by the state court in which the federal court is sitting, the federal court cannot appoint a different guardian *ad litem*.[145]

Another variation involves the forum state appointment of a nonresident guardian. It has been noted that a *general guardian* may be selected for his out-of-state citizenship in order to create diversity since he will be considered the real party in interest whose citizenship is controlling.[146] As long as a state does not restrict this practice by limiting the appointments in its courts to residents, diversity jurisdiction can be created and will not be considered collusive by the federal court.[147] On the other hand, where it is advantageous, the attorney, under Rule 17(c), may have a mere *guardian ad litem* appointed by the federal court. The ward will then be the real party in interest and his citizenship and residence will determine diversity and venue.[148]

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141 C. J. Peck Oil Co. v. Diamond, 204 F.2d 179 (5th Cir. 1953) (argument that Rule 17(c) referred to the domicile law rejected).

142 Buchele v. Trucking, Inc., 57 F. Supp. 954 (E.D. Mich. 1944) (Ohio guardian must qualify in Michigan court, dismissed without prejudice). This is the same problem faced by foreign wrongful death administrators. See text accompanying notes 149-88 *infra*.

143 Brimhall v. Simmons, 338 F.2d 702, 707 (6th Cir. 1964) (allowing suit by Florida guardian despite Tennessee statute); Vroon v. Templin, 278 F.2d 345, 349 (4th Cir. 1960) (suit by Michigan guardian not barred by Virginia statute).

144 *Compare* the permissive theory in Fallat v. Gouran, 220 F.2d 325 (3d Cir. 1955), *with* the restrictive view of trial court in Vroon v. Templin, 278 F.2d 345 (4th Cir. 1960).

145 Southern Ohio Sav. Bank & Trust Co. v. Guaranty Trust Co., 27 F. Supp. 485 (S.D.N.Y. 1939) (Ohio guardian had no capacity in New York and could not be appointed under 17(c) because there existed an ancillary New York guardian). *See also* C. J. Peck Oil Co. v. Diamond, 204 F.2d 179 (5th Cir. 1953) (mother, appointed Louisiana tutrix of daughter could nevertheless sue as "next friend" in Mississippi federal court under Mississippi wrongful death act); Jones v. Schellenberger, 196 F.2d 852 (7th Cir.), *cert. denied*, 344 U.S. 876 (1952) (unsuccessful attempt by defendant to force substitution of friendly Illinois administrator *de bonis non* for Texas administratrix plaintiff).

146 Kennedy, *Federal Rule 17(a): Will the Real Party in Interest Please Stand?*, 51 MINN. L. REV. 675, 706-08. See text accompanying notes 167-68 *infra*.

147 Stephan v. Marlin Firearms Co., 217 F. Supp. 880 (D. Conn.), *aff'd per curiam*, 325 F.2d 238 (2d Cir. 1963); Morris v. Bradley, 139 F. Supp. 519 (E.D. Pa. 1956). This device, however, does not work where state law views the general guardian as the nominal party and the ward as the real party in interest. Martineau v. City of St. Paul, 172 F.2d 777, 780 (8th Cir. 1949).

148 Horzepa v. Dauski, 40 F. Supp. 476 (E.D.N.Y. 1941) (guardian *ad litem* appointed by federal court not be a real party under New York law; ward's residence made venue proper). *See also* Blackwell v. Vance Trucking Co., 139 F. Supp. 103 (E.D.S.C. 1956) (unsuccessful attempt by New York minor against North Carolina defendant in an automobile suit to place venue in South Carolina by labeling South Carolina guardian *ad litem* as plaintiff). It should be noted that venue would now be proper in South Carolina under 28 U.S.C. § 1391(d) (1964).

C. Qualification in Cases Involving Death: Executors, Administrators, Wrongful Death Representatives

1. Where Plaintiff Has Been Appointed by Foreign Jurisdiction

In state courts, the general rule at common law has been that a representative has no litigating capacity outside the state of his appointment.[149] This barrier is generally lowered by state statutes in varying degrees.[150] Some abrogate the rule entirely with perhaps a minimal requirement that the out-of-state fiduciary file a bond; other states remove the barrier only in certain specified cases; and some require that the out-of-state fiduciary take out ancillary letters of administration from its courts. Still other states maintain an all purpose statute that forbids the appointment of nonresident fiduciaries. The pattern of these state statutes is anything but simple; the frequent amendments do not necessarily show a consistent trend, with some states first liberalizing the common-law rule and then later returning to a restrictive policy. Although a state cannot constitutionally exclude foreign death actions as such,[151] these state restrictions against out-of-state fiduciaries are still accepted as constitutional.

Rule 17(b) directs the judge to turn to the law of the state in which he sits to determine the litigating capacity of an executor, administrator or wrongful death representative appointed out of state.[152] Should it make any difference to the federal judge in applying state law: a) that the state qualifications require the appointment of a resident fiduciary, thus destroying diversity of citizenship in the federal court while leaving the case open to the state court? b) that after the filing of a federal suit by a plaintiff of defective state capacity, corrective steps are taken to appoint a person properly qualified under state law by amendment and substitution permitted under the federal rules, but state practice disallows the correction? c) that the claim in the action is based on federal law, and jurisdiction is not based on diversity? It is submitted that these factors should make a difference, and that in all three situations the federal court should open its doors where state law would close them. The cases do not necessarily reflect this viewpoint, however, and are analyzed in their most convenient groupings below.

(a) *Suits Dismissed*

Some cases dismiss the suit on the cryptic ground that the plaintiff has not taken out ancillary letters of administration required by state law and, therefore,

149 F. JAMES, CIVIL PROCEDURE § 9.8 (1965); A. EHRENZWEIG, CONFLICT OF LAWS §§ 14, 15 (2d ed. 1962) (criticizing rule); Currie, *The Multiple Personality of the Dead: Executors, Administrators, and the Conflicts of Laws*, 33 U. CHI. L. REV. 429 (1966).

150 17 RUTGERS L. REV. 664, 668 & n.24 (1963); Annot., 52 A.L.R.2d 1048 (1957).

151 First Nat'l Bank v. United Air Lines, Inc., 342 U.S. 396 (1952); Hughes v. Fetter, 341 U.S. 609 (1951).

152 The special problem of capacity in venue transfer cases has been temporarily handled by applying the law of the transferor forum. Van Dusen v. Barrack, 376 U.S. 612 (1964).

153 Noel v. St. Johnsbury Trucking Co., 147 F. Supp. 432 (D. Conn. 1956); Orloff v. Hayes, 7 F.R.D. 75 (S.D.N.Y. 1946); Reynolds v. Cincinnati, N.O. & P. Ry., 7 F.R.D. 165 (E.D. Ky. 1945).

has no capacity to sue.[153] The reason is cryptic in the sense that we do not know whether the plaintiff, if he attempted, could have qualified at all because of state restrictions against the specific type of action.[154] If the plaintiff was permitted to take corrective action by obtaining ancillary letters or otherwise qualifying, he still might have been barred by the state statute of limitations and the federal court's refusal to allow the substitution to relate back.[155] In those cases where the state's qualification requirement is interpreted as an absolute prohibition against nonresident fiduciaries, the literal application of the state statute will result in a dismissal of the suit from federal court for lack of the required forum state capacity unless amendment and substitution are allowed.[156] These holdings also may prevent the case from ever being brought in the federal court since to gain capacity, a resident fiduciary must be appointed, and his citizenship will often destroy diversity.[157] Needless to say, these cases refuse to read exceptions into the statutory prohibitions.[158] Rarely is the argument raised that the requirement of a resident fiduciary unconstitutionally closes the door of the federal court.[159]

(b) *Dismissals Refused*

Since many states do not put insurmountable barriers in the way of the nonresident fiduciary, there are federal cases routinely overcoming the objection to capacity. Thus, some states simply allow suit by a foreign administrator if he could bring suit under the law of the state in which he was appointed,[160] or they might allow suits by merely requiring the foreign administrator to undergo

154 *Cf.* Cooper v. American Airlines, Inc., 149 F.2d 355 (2d Cir. 1945) (where plaintiff alleged that his application for ancillary letters was rejected by a New York court because wrongful death suit was against a New York "resident"). *See also* Briggs v. Pennsylvania R.R., 153 F.2d 841 (2d Cir. 1946), *cert. denied,* 333 U.S. 836 (1948).

155 Seymour v. Johnson, 235 F.2d 181 (6th Cir. 1956); *cf.* Straub v. Jaeger, 9 F.R.D. 672 (E.D. Pa. 1950).

156 *Cf.* Carlson v. United States, 14 F.R.D. 21, 23 (W.D. Ky. 1953) (since statute of limitations had not run, court declined dismissal and allowed substitution).

157 Fennell v. Monongahela Power Co., 350 F.2d 867 (4th Cir. 1965); Grady v. Irvine, 254 F.2d 224 (4th Cir.), *cert. denied,* 358 U.S. 819 (1958) (plaintiff's death during trial required appointment of local administrator, thus destroying diversity), noted, 24 MARQ. L. REV. 551 (1959); Holt v. Middlebrook, 214 F.2d 187 (4th Cir. 1954); Goranson v. Capital Airlines, Inc., 221 F. Supp. 820 (E.D. Va. 1963); Lowrance v. Central Illinois Public Service Co., 161 F. Supp. 656 (E.D. Ill. 1958) (prohibition applies to estates of residents but not to estates of nonresidents); Barnes v. Union Pacific R.R., 139 F. Supp. 198 (D. Idaho 1956); Jones v. Goodman, 114 F. Supp. 110 (D. Kan. 1953) (Iowa administrator could not sue under Kansas wrongful death statute); Coburn v. Colemen, 75 F. Supp. 107, (W.D.S.C. 1947). *But cf.*, Carlson v. United States, 14 F.R.D. 21 (W.D. Ky. 1953).

158 In direct conflict, other federal courts imply exceptions. *See* text accompanying notes 160-66 *infra.*

159 *Cf.* Lang v. Elm City Constr. Co., 217 F. Supp. 873 (D. Conn.), *aff'd,* 324 F.2d 235 (2d Cir. 1963) (state statute restricting administrator to state court could not constitutionally be applied and therefore construed as local venue provision). *See* First Nat'l Bank v. United Airlines, Inc., 342 U.S. 396, 400-01 (1952) (concurring opinions of Justices Jackson and Minton); Fennell v. Monongahela Power Co., 350 F.2d 867 (4th Cir. 1965) (argument raised and rejected).

160 Boeing Airplane Co. v. Perry, 322 F.2d 589 (10th Cir.), *cert. denied,* 375 U.S. 984 (1963) (foreign wrongful death action in Kansas); McElroy v. Security Nat'l Bank, 215 F. Supp. 775 (D. Kan. 1963) (suit to recover stocks). *See also* Bradshaw v. Moyers, 152 F. Supp. 249 (S.D. Ind. 1957) (foreign administrator can bring action under Indiana wrongful death statute; it must be presumed other state's supervision will comply with distribution scheme).

local ancillary appointment.[161] The permissiveness may not extend, however, to allowing him to sue under the forum wrongful death statute.[162]

Where there are restrictive capacity statutes, a distinction has grown up between suits on behalf of the general estate and wrongful death suits for the benefit of specific statutory beneficiaries. Where recovery goes to the general estate, the forum state theoretically has a greater interest in regulating the fiduciary for the benefit of resident creditors. On the other hand, where recovery clearly goes to specific beneficiaries who are out-of-state residents, the courts do not perceive significant policy reasons for imposing restrictive statutes on the nonresident fiduciary. A leading case making this distinction is *Cooper v. American Airlines*[163] where Judge Frank "divined" the future of New York decisions as allowing this exception to the general rule of incapacity. Subsequent cases have followed this distinction in the face of statutes prohibiting nonresident fiduciaries by reasoning that such statutes were not intended to apply to this situation.[164] Another transparent distinction, now unnecessary, was that the Illinois Injuries Act,[165] precluding suits for wrongful deaths occurring outside the state if the defendant was subject to service of process, was merely a restriction on the jurisdiction of state courts and did not deny capacity of a foreign wrongful death administrator to sue in federal court.[166]

2. Where Plaintiff Has Been Appointed by Forum Court

If a state has no restriction against appointing nonresident fiduciaries in its own courts, then an attorney can create diversity by selection of an administrator of appropriate citizenship. The effectiveness of this technique is supported by a long line of precedent that the administrator or executor is the real party in interest and thus his citizenship alone, and not that of the represented party, is determinative of diversity.[167] The technique is also supported by a shorter line of precedent that such an appointment, even accompanied by the candid admission that it was made solely for the purpose of creating diversity, is not a "collusive" creation of jurisdiction within the meaning of section 1359 of the Federal Judicial Code.[168]

Of the many variable forms in which wrongful death suits may arise, one is the situation where suit is brought by a domiciliary administrator in his own

161 Suders v. Campbell, 73 F. Supp. 112 (M.D. Pa. 1947). *See* Redditt v. Hale, 184 F.2d 443 (8th Cir. 1950) (Arkansas law allowed suit upon filing of bond).

162 Jones v. Goodman, 114 F. Supp. 110 (D. Kan. 1953) (Iowa administrator could not sue under Kansas wrongful death act).

163 149 F.2d 355 (2d Cir. 1945).

164 Wallin v. Rankin, 173 F.2d 488 (9th Cir. 1949); Sonner v. Cordano, 228 F. Supp. 435 (D. Nev. 1963); Elliott v. Day, 218 F. Supp. 90 (D. Ore. 1962); Citizens Fidelity Bank & Trust Co. v. Baese, 136 F. Supp. 683 (M.D. Tenn. 1955).

165 ILL. ANN. STAT. ch. 70, § 2 (Smith-Hurd 1959).

166 O'Donnel v. Elgin, Joliet & Eastern Ry., 193 F.2d 348 (7th Cir. 1951); Martineau v. Eastern Airlines, Inc., 64 F. Supp. 235 (N.D. Ill. 1946). The statute was declared unconstitutional in First Nat'l Bank v. United Air Lines, Inc., 342 U.S. 396 (1952) under the full faith and credit clause. Thus the issue was not reached whether it unconstitutionally discriminated against diversity jurisdiction. The original decision in *Martineau* was probably suspect under Angel v. Bullington, 330 U.S. 183 (1947).

167 Kennedy, *supra* note 146, at 679.

168 28 U.S.C. § 1359 (1964). Kennedy, *supra* note 146, at 703-06.

forum on a wrongful death statute of a foreign state. This situation may provide some potential problems, as reflected in a case where the New York administratrix brought suit in New York under the Massachusetts wrongful death act.[169] In dictum, the court indicated that New York law would control, thus allowing her to bring the suit in New York, even though the Massachusetts statute limited actions to its own courts.[170]

3. Where Representative of Deceased is Defendant

A number of factors change and new ones are added when a case involves a suit against, rather than by, a representative of a decedent's estate. There are different policies at stake in regulating passive, as opposed to active, capacity.[171] First, sensible administration of the estate calls for the equitable distribution of the assets according to a regulated scheme in which the representative should be allowed a unified, consistent approach, not disrupted by widespread claims in diverse courts. Second, federal policy traditionally has been to abstain from exercising jurisdiction over matters within the province of state probate courts,[172] a policy which may be more applicable in suits against, rather than by, decedents' representatives.

The state regulation of passive capacity of decedents' representatives exists in various forms, such as the nonrecognition of foreign decedents' representatives, or the barring of claims for a certain statutory period after a representative is appointed, or the limiting of claims to the jurisdiction of the probate court or to appointed commissioners. There are many other peculiarly local state restrictions that may be invoked in the federal court. Thus, in deciding the capacity of a defendant representative of a decedent, Rule 17(b)'s command to apply the law of the forum may shut the door of the federal court.

As a derivative of the general rule that a foreign fiduciary has no capacity outside his state of appointment, some federal suits have been dismissed on the basis that the defendant had no capacity to be sued under the law of the forum."[173] Where the state law prohibits suits against executors or administrators during

169 MASS. ANN. LAWS ch. 229 § 2C (1955).

170 Montellier v. United States, 202 F. Supp. 384 (E.D.N.Y. 1962), *aff'd*, 315 F.2d 180 (2d Cir. 1963).

171 EHRENZWEIG, *supra* note 149 §§ 11-24.

172 C. WRIGHT, FEDERAL COURTS § 25, at 74 (1963).

173 Goldlawr, Inc. v. Shubert, 169 F. Supp. 677 (E.D. Pa. 1958), *aff'd*, 276 F.2d 614 (3d Cir. 1960), *quoting from* Callwood v. Virgin Islands Nat'l Bank, 121 F.2d 770, 780 (3d Cir. 1955): "[W]here it affirmatively appears that no assets of a foreign estate are present in the forum, no jurisdiction is acquired over the foreign representatives of the estate." Buttson v. Arnold, 4 F.R.D. 492 (E.D. Pa. 1945) (Pennsylvania law denied capacity to defendant Vermont administrator served under nonresident motorist statute); Knoop v. Anderson, 71 F. Supp. 832 (N.D. Ia. 1947) (similar). But there are state law exceptions to these no capacity rules which may be similarly employed in the federal court to sustain capacity. *See, e.g.*, Crowe v. Di Manno, 225 F.2d 652 (1st Cir. 1955) (Massachusetts law is that executors must be sued personally and not in fiduciary capacity, but naming a person in fiduciary capacity is mere surplusage and may be disregarded); see description of trend away from immunity for foreign fiduciary defendants, Currie, *supra* note 149, at 439-62. Plaintiffs' attorneys have also discussed the strategy of having a resident administrator appointed for the estate of a nonresident decedent-defendant, then declaring his auto-liability policy an asset of the estate, attaching it, and then serving process on a *quasi-in-rem* theory against the nonresident administrator or executor.

a period six months after their appointment, the restriction has been recognized under Rule 17(b) and the action dismissed as premature.[174] In two other cases, however, the state restrictions were viewed as restrictions only on local courts and not meant to apply to the federal courts. Thus, neither an Indiana statute limiting complaints to the probate proceedings,[175] nor a Vermont statute, limiting claims to commissioners,[176] could bar wrongful death actions in the federal court. And in cases involving death of the original defendant and substitution of his representative, Rule 25 will override state practice to the contrary.[177]

4. Where Death Claim is Based on Federal Law

Unlike the treatment accorded partnerships and unincorporated associations, which are expressly given independent federal capacity when they are suing to enforce a federal substantive right, Rule 17(b) remains silent as to other representatives seeking to enforce federal claims. Nevertheless, arguments based upon a pertinent federal statute can overcome state forum capacity restrictions. For example, Congress under the Federal Employer's Liability Act has created a right that can be sued upon by the "personal representative" in favor of beneficiaries. When a Pennsylvania domiciliary administratrix of the deceased brought an FELA death action in New York, Judge Learned Hand found "there is no good reason to impose the restrictions of the states that a domiciliary administrator cannot sue without taking out ancillary letters . . . in fact it may be unjust where state law does not allow taking out the ancillary letters."[178]

The same theory presumably should apply to the other federal statutes. However, the Federal Tort Claims Act covers only cases "wherein the United States would be liable under the law of the place where the act occurred." Thus, in *Carlson v. United States,*[179] a Tennessee executrix was faced with an objection in the Kentucky court that she needed ancillary Kentucky letters. However, the question was resolved without the necessity of extending Judge Learned Hand's FELA theory by allowing her to qualify in Kentucky and to amend her complaint.[180]

5. Attempts to Cure Defects; Death During Suit: Amendment and Substitution

Federal cases that have required plaintiffs to meet local qualifications of capacity have shown liberality in allowing plaintiffs sufficient time to qualify,[181]

174 Chorney v. Callahan, 135 F. Supp. 35 (D. Mass. 1955).
175 Hellrung v. LaFayette Loan & Trust Co., 102 F. Supp. 822 (N.D. Ind. 1951).
176 Hurlburt v. Eno, 17 F.R.D. 230 (D. Vt. 1955); *But see,* Redditt v. Hale, 184 F.2d 443 (8th Cir. 1950) (suit by heirs concerning land against curator appointed by probate court was dismissed on the ground the probate court had already taken *in rem* exclusive jurisdiction).
177 Iovino v. Waterson, 274 F.2d 41 (2d Cir. 1959), *cert. denied,* 362 U.S. 949 (1960); *see* text accompanying notes 181-88 *infra.*
178 Briggs v. Pennsylvania R.R., 153 F.2d 841 (2d Cir. 1946). *Contra,* Reynolds v. Cincinnati, N.O. & T.P. Ry., 7 F.R.D. 165 (E.D. Ky. 1945).
179 14 F.R.D. 21 (W.D. Ky. 1953).
180 *Id. See also* Levinson v. Duepree, 345 U.S. 648 (1953) (allowing similar disposition in admiralty). A potential conflict arises between the Federal Tort Claims Act and Rule 17(b) where the death occurs outside the forum state. The Act would call for the law of the place of death, while 17(b) would call for the law of the forum. *Cf.* Briggs v. Pennsylvania R.R., 153 F.2d 841 (2d Cir. 1946).
181 Boyle v. Curtis Publishing Co., 11 F.R.D. 92 (E.D. Pa. 1950).

in permitting amendment and substitution of a plaintiff with proper capacity, and in allowing the amendment and substitution to relate back in order to avoid arguments that the statute of limitations has run.[182]

However, in *Straub v. Jaeger*,[183] a New Jersey father was appointed administrator *ad prosequendum* in New Jersey for the wrongful death of his daughter. He brought suit under the New Jersey act in a Pennsylvania federal court within two years after the daughter's death. When he found himself barred by a Pennsylvania one year statute of limitations, he took out Pennsylvania ancillary letters as general administrator in order to cure objections to his capacity to sue on the Pennsylvania survival action, which had a two-year statute of limitations. When he moved for amendment and substitution, the court refused on the ground that the two-year period had now run, and Pennsylvania law did not allow relation back in these circumstances. Despite this case and dictum in another,[184] the pattern has been, and should be, to allow the amendment as a matter of federal procedure under Rules 15, 21, and 17(a), even where state practice would be contrary.[185]

When either the original plaintiff or defendant dies during the pendency of an action, Rule 25 governs the procedure for accomplishing the substitution. There has been a history of problems under Rule 25, but hopefully, its amendment in 1963 has obviated them.[186] For purposes of general treatment here, however, it is important to note two cases holding that despite contrary state law which might otherwise be controlling under Rule 17(b) and *Erie*, Rule 25 nevertheless operates independently as a matter of federal procedure to govern substitution of both defendants[187] and plaintiffs.[188]

D. Qualification of Public Officials, Receivers, and Miscellaneous Private Representatives

1. Public Officials

Like executors and administrators, state public officials originally had no capacity to litigate outside their state of appointment.[189] The main thrust of this doctrine was to prevent tax collection suits by foreign state officials.[190] Yet, as with executors and administrators, the evolution is toward greater recognition of the capacity of state public officials to sue in other states.[191] Under Rule 17(b),

182 Levinson v. Duepree, 345 U.S. 648 (1953) (admiralty); Briggs v. Pennsylvania R.R., 153 F.2d 841 (2d Cir. 1946); Frankel v. Styer, 209 F. Supp. 509 (E.D. Pa. 1962); Carlson v. United States, 14 F.R.D. 21 (W.D. Ky. 1953); Bolitho v. Buch Express, Inc., 12 F.R.D. 189 (E.D. Pa. 1951) (relying on state law in allowing change to save diversity).

183 9 F.R.D. 672 (E.D. Pa. 1950). *See also* Paris v. Braden, 234 F.2d 40 (D.C. Cir. 1956).

184 Seymour v. Johnson, 235 F.2d 181 (6th Cir. 1956) (ancillary administrator had to be resident, thus destroying diversity).

185 The 1966 amendments to Rule 15(c) and 17(a) should make clear the intent of the federal rules to provide relation back, independent of state law. *See* note 102 *supra*.

186 *See* note 69 *supra*.

187 Iovino v. Waterson, 274 F.2d 41 (2d Cir. 1959), *cert. denied*, 362 U.S. 949 (1960).

188 Messner v. Wyte, 33 F.R.D. 288 (S.D.N.Y. 1963); *cf.* Boyle v. Curtis Publishing Co., 11 F.R.D. 92 (E.D. Pa. 1950).

189 3 J. MOORE, FEDERAL PRACTICE ¶ 17.19, at 1385.

190 Moore v. Mitchell, 30 F.2d 600 (2d Cir. 1929), *aff'd*, 281 U.S. 18 (1930).

191 The first step was to give full faith and credit to foreign tax claims which had been reduced to judgment. Milwaukee County v. M. E. White Co., 296 U.S. 268 (1935). The other major step was the enactment of reciprocity legislation, EHRENZWEIG, *supra* note 149 § 49, at

the federal court will have to ascertain whether the forum state will recognize such an evolution in granting capacity to the foreign official and allowing him to prosecute a cause of action.[192]

2. Receivers Appointed in State Proceedings

Where a receiver has been appointed under state law,[193] by either a court or a statutory proceeding, his capacity to sue or be sued in the federal court will be determined by the state law of the state in which the federal court sits.[194] This result is directed by the general clause of Rule 17(b) under either the concept of an "individual acting in a representative capacity" or the concept of "all other cases." Where a corporation is appointed receiver, even though Rule 17(b) says the capacity of a corporation is to be determined by the law of its domicile, presumably the forum state's capacity qualifications would be applicable as they are in the case of a corporation not qualifying to do business in a state or a foreign corporation acting as a fiduciary.[195]

3. Miscellaneous Private Representatives

A wide variety of federal cases may involve a basic challenge to the authority of the plaintiff to bring the suit in some representative capacity. As with other capacity problems, the challenge may be based upon the real party in interest rule.[196] The question is sometimes raised in a situation where there are two groups claiming the right to represent the interest. Examples include disputes between guardians,[197] attorneys in fact[198] and decedents' representatives.[199] Another extensive area of dispute involves the numerous problems in testing capacity of representatives in stockholder derivative suits and in class suits.[200]

175. In 1948, the American Law Institute also changed its 1934 position from negative to neutral. *See* RESTATEMENT OF CONFLICT OF LAWS § 610 comment C (Supp. 1948). *See also* City of Philadelphia v. Cohen, 11 N.Y.2d 401, 184 N.E.2d 167, 230 N.Y.S.2d 188 (1962) (denying full faith and credit to tax claim not reduced to judgment); Comment, 25 U. CHI. L. REV. 187 (1957).

192 The capacity of federal officials in federal courts, however, should be controlled by federal jurisdictional statutes, *e.g.*, 28 U.S.C. § 1345 (1964), and not by state law.

193 As to receivers appointed by a federal court, Rules 17(b), and 66 and 28 U.S.C. §§ 754 and 959(a) generally provide that he may sue in any federal court without ancillary appointment, though he must petition the court that appointed him. MOORE, *supra* note 189, ¶ 17.20, at 1392-94.

194 Cohen v. La Vin, 210 F.2d 550 (2d Cir. 1954); MOORE, *supra* note 189, ¶ 17.20, at 1392-94.

195 U.S. Epperson Underwriting Co. v. Jessup, 22 F.R.D. 336 (M.D. Ga.), *aff'd per curiam*, 260 F.2d 355 (5th Cir. 1958) (corporation as attorney-in-fact); Citizens Fidelity Bank & Trust Co. v. Baese, 136 F. Supp. 683 (M.D. Tenn. 1955) (corporation as executor); Southern Ohio Savings Bank & Trust Co. v. Guaranty Trust Co., 27 F. Supp. 485 (S.D.N.Y. 1939) (corporation as guardian).

196 Kennedy, *supra* note 146, at 680-81, 718.

197 Southern Ohio Savings Bank & Trust Co. v. Guaranty Trust Co., 27 F. Supp. 485 (S.D.N.Y. 1939).

198 Hart v. Feely, 109 F. Supp. 3 (M.D. Pa. 1953) (attorney *v.* guardian).

199 Jones v. Schellenberger, 196 F.2d 852 (7th Cir.), *cert. denied*, 344 U.S. 876 (1952); *cf.* Redditt v. Hale, 184 F.2d 443 (8th Cir. 1950) (guardian-administrator *v.* curator).

200 *See, e.g.*, Mardell Sec. Inc. v. Alexandria Gazette Corp., 183 F. Supp. 7 (E.D. Va. 1960), *aff'd*, 320 F.2d 890 (4th Cir. 1963); Pikor v. Cinerama Prods. Corp., 25 F.R.D. 92 (S.D.N.Y. 1960) (capacity of stockholders in derivative suit); Aberdeen Hills Second Corp. v. Biafore, 24 F.R.D. 503 (E.D. Pa. 1960) (challenge that corporation was "not duly authorized" to sue).

E. Qualification to Sue or Be Sued as a Private Corporation

Unlike the treatment accorded by the Rules to representatives, whose capacity is to be determined by the law of the forum, Rule 17(b) provides that the capacity of a corporation shall be determined by the law of the state under which it was organized.[201] This directive is somewhat misleading because it is not exclusive, and in diversity cases, under *Erie v. Tompkins,* there may be applicable substantive state forum law denying capacity to a foreign corporation, thus barring the federal suit even though the corporation has capacity by the law under which it was organized.[202] This result was reached by the Supreme Court in *Woods v. Interstate Realty Corporation.*[203] A Tennessee brokerage corporation had not qualified to do business in Mississippi, but nevertheless engaged in a Mississippi land transaction. A Mississippi statute provided that contracts made by foreign, unqualified corporations would not be enforceable. The Tennessee corporation's suit for its commission in Mississippi federal court was upheld by the Fifth Circuit on the theory that Mississippi did not, and could not, constitutionally close the doors of a federal court in a suit by a foreign corporation. The Supreme Court reversed by relying on the overall theme of *York v. Guaranty Trust*[204] and *Angel v. Bullington*[205] that the federal court while exercising its diversity jurisdiction is only another state court, and if a suit is legitimately barred in the latter, it must be barred in the former.[206]

Since the decision in *Woods,* there have been few cases applying the rule it announced. In a Texas case, on all fours, Judge Atwell avoided *Woods* and refused to dismiss the suit with the candid comment, "I am strongly opposed to the doctrine therein announced."[207] He creatively avoided an impact with *Woods* by using the theory that where the plaintiff is a corporation engaged in interstate commerce, the state cannot constitutionally exclude it from its own courts, unless the corporation is also engaged in intrastate business and is thus subject to the regulation of the state.

The power of the state to bar a federal court diversity suit, sanctioned by *Woods,* apparently does not exist when the claim is based upon federal law. In one case a contractor corporation had not qualified to do business in Utah and thus lacked capacity to sue there. When it was sued in Utah federal court under the Miller Act, the corporation was allowed, nevertheless, to assert a counter-

201 The treatment thus resembles that accorded individuals whose capacity is tested by the law of their domicile. In the case of federally chartered corporations, the appropriate law is, of course, federal law. MOORE, *supra* note 189, ¶¶ 17.23, 17.24, at 1399-406.

202 In a parallel situation, "national policy" may override the capacity law under which an alien corporation is organized. Compania Ron Bacardi, S.A. v. Bank of Nova Scotia, 193 F. Supp. 814 (S.D.N.Y. 1961).

203 337 U.S. 535 (1949).

204 326 U.S. 99 (1945).

205 330 U.S. 183 (1947).

206 The opinion of Justice Douglas in *Woods* specifically states that *Angel v. Bullington* overruled David Lupton's Sons v. Automobile Club, 225 U.S. 489 (1912), which for years did not constitutionally allow states to close the federal court door to a foreign corporation on the basis that it had not qualified to do business in the state. Both the majority and the dissent, it should be noted, viewed the issue as one of "access to the courts" and not as a substantive rule of contract law making the contract void.

207 Emulsol v. Rubenstein & Son Produce Inc., 111 F. Supp. 410 (N.D. Tex. 1953); Judge Atwell further commented that he thought the correct rule was stated in *David Lupton's Sons.*

claim, at least to the extent of a setoff.[208] Similarly, *Woods* does not seem to control when a federal corporation is given capacity under federal law, but an opposite result may be reached when a federal corporation plaintiff is an *assignee* of a private corporation.[209]

The passive capacity of a corporation to be sued is a different problem than its capacity to sue. Rule 17(b) makes no distinction, however, between active and passive capacity in making the law of the state of organization determinative of the capacity to litigate. This mandate was used to overcome a dissolved New Jersey corporation's claim that it had no capacity to be sued in New York. The federal district court turned to New Jersey law, which provided that all dissolved corporations continue as "bodies corporate for the purpose of prosecuting and defending suits against them."[210] It is probable that New York law would also recognize such capacity.[211] The dissolution of the corporation by the organizing state should lead, however, to the denial of capacity in the forum state.[212]

F. Qualification of Artificial Entities

1. Nonrecognized Entities

The model for a qualified litigating party is the natural person.[213] In general, *groups* of natural persons cannot be litigating parties unless they bring themselves within some statutory scheme of regulation that recognizes an artificial litigating party, such as corporation and unincorporated association statutes, partnership statutes, and miscellaneous statutes giving groups entity status to litigate.[214] There are exceptions to this general rule of requiring statutory authority, such as the class action device[215] and also the special rules regulating governmental units.[216]

Occasionally, there are creative attempts by attorneys to name as parties entities which are not only unrecognized by statutory law, but which have no describable, tangible existence. Absent some statutory scheme or class action justification, the federal courts, like the state courts, deny capacity to litigate in such a situation.[217] In cases involving more identifiable entities, such as

208 United States *ex rel.* Bernadot v. Golden West Constr. Co., 194 F. Supp. 371 (D. Utah 1961), *modified*, 304 F.2d 753 (10th Cir. 1962).

209 *Contra*, Reconstruction Finance Corp. v. Barnett, 118 F. 2d 190 (7th Cir.), *cert. denied*, 314 U.S. 641 (1941). This case, however, was decided eight years before *Woods v. Interstate Realty* and now is questionable authority.

210 Newmark v. Abeel, 102 F. Supp. 993 (S.D.N.Y. 1952).

211 Display State Lighting Co. v. Century Lighting, Inc., 41 F. Supp. 937 (S.D.N.Y. 1941) (New York corporation in dissolution could obtain declaratory judgment for nonpatent infringement).

212 Sedgwick v. Beasley, 173 F.2d 918 (D.C. Cir. 1949) (Pennsylvania-dissolved insurance company not subject to creditor's attachment in the District of Columbia).

213 D. LOUISELL & G. HAZARD, CASES AND MATERIALS ON PLEADING AND PROCEDURE 642 (1962).

214 F. JAMES, CIVIL PROCEDURE § 9.9, at 404 (1965). Some grants of entity status, however, have come from judicial decision.

215 *Id.*

216 MOORE, *supra* note 189, ¶¶ 17.23, 17.24, at 1399-406.

217 Coverdell v. Mid-South Farm Equip. Ass'n, 335 F.2d 9 (6th Cir. 1964) (trust could not be sued as entity); Gillespie v. Shomaker, 191 F. Supp. 8 (E.D. Ky. 1961) (defendant "The

partnerships, unions, associations, or boards, a federal court must ascertain the state law, which may[218] or may not[219] be held to grant capacity to sue or be sued as an entity. Frequently, cases also present the opposite dilemma of having to decide whether individuals can litigate when the objection is raised that the suit must be brought by or against the entity they represent.[220]

2. Claims Based on Federal Law

If state law does not grant capacity to a partnership or an association to sue as an entity, then the suit must be brought by or against the partners or association members as individuals. Rule 17(b), though generally adopting this state law, makes an exception and allows suit by or against a partnership or association in its common name for the purpose of enforcing a federal substantive right. If the federal right can be shown, Rule 17(b) and capacity are no barrier.[221] Under this rule, there is a long line of cases sustaining capacity where state law would otherwise deny it.[222]

Similarly, there is another line of cases where the party has not been able to make out a successful claim to federal substantive law. Thus, lack of capacity under state law becomes one basis for the dismissal of the suit.[223] Often this latter type of case involves an action by or against a union. Thus, claims against unions have been dismissed where they have been based on mere common-law assault,[224] or wrongful interference with business relations.[225] Central to this

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Belmont," described as unincorporated association of persons unknown to plaintiff, not proper party); Hershel California Fruit Prods. Co. v. Hunt Foods, Inc., 119 F. Supp. 603 (N.D. Cal. 1954), *appeal dismissed,* 221 F.2d 797 (9th Cir. 1955) (trust could not be sued as entity); Virgin Islands v. W. A. Taylor & Co., 97 F. Supp. 737 (S.D.N.Y. 1951), *rev'd on other grounds,* 202 F.2d 61 (2d Cir. 1953). The functional problem parallels that of suing unknown individual defendants by John Doe process. That situation, however, contemplates ultimate amendment and substitution of the real party's name into the pleadings. Note, 46 IOWA L. REV. 773 (1961).

218 Pavlovscak v. Lewis, 274 F.2d 523 (3d Cir. 1959), *cert. denied,* 362 U.S. 990 (1960) (union welfare fund and three man board of trustees); American Fed'n of Musicians v. Stein, 213 F.2d 679 (6th Cir.) *cert. denied,* 348 U.S. 873 (1954); Van Sant v. American Express Co., 169 F.2d 355 (3d Cir. 1948) (joint stock association); Rosen v. Allegheny Corp., 133 F. Supp. 858 (S.D.N.Y. 1955) (stockholders' protective committee); Remington's Dairy v. Rutland Ry., 15 F.R.D. 488 (D. Vt. 1954) (partnership).

219 Local 13-566, Oil, Chemical and Atomic Workers Int'l Union v. Heyden Newport Chem. Co., 172 F. Supp. 230 (D. N.J. 1959) (union); Elizabeth Hosp. Inc. v. Richardson, 167 F. Supp. 155 (W.D. Ark. 1958), *aff'd,* 269 F.2d 167 (8th Cir.), *cert. denied,* 361 U.S. 884 (1959) (county medical society); Yonce v. Miners Memorial Hosp. Ass'n, 161 F. Supp. 178 (W.D. Va. 1958) (welfare trust fund). *See also* cases cited at note 217 *supra.*

220 Klebanow v. New York Produce Exchange, 344 F.2d 294 (2d Cir. 1965) (limited partners can sue on behalf of partnership under antagonistic control); Zion v. Sentry Safety Control Corp., 258 F.2d 31 (3d Cir. 1958) (claim by partnership not compulsory counterclaim in suit against partner); Taormina Corp. v. Escobedo, 254 F.2d 171 (5th Cir.), *cert. denied,* 358 U.S. 827 (1958) (amendment allowed after statute of limitations had run to add partnership entity); DeFranco v. United States, 18 F.R.D. 156 (S.D. Cal. 1955) (individual partner can sue for tax refund due partnership).

221 But related objections, such as service of process and venue, may still bar the suit.

222 Moore lists the situations where the entity is either a plaintiff or a defendant in federal litigation such as patent, antitrust, racial discrimination, FLSA, LMRA, maritime, government contract, SEC, or OPA suits. *See* MOORE, *supra* note 189, ¶ 17.25, at 1407-16.

223 *E.g.,* Elizabeth Hosp. Inc. v. Richardson, 167 F. Supp. 155 (W.D. Ark. 1958), *aff'd,* 269 F.2d 167 (8th Cir.), *cert. denied,* 366 U.S. 884 (1959).

224 McNutt v. United Gas, Coke & Chem. Workers, 108 F. Supp. 871 (W.D. Ark. 1952).

225 Marydale Prods. Co. v. United Packinghouse Workers, 322 F.2d 224 (5th Cir. 1963); Upper Lakes Shipping Ass'n v. International Longshoremen's Ass'n, 33 F.R.D. 348 (S.D.N.Y.

problem has been the torturous history of Section 301 of the Labor Management Relations Act, which grants federal jurisdiction to suits for breach of labor contracts and allows unions to sue or be sued as entities.[226]

3. Claims Based on Diversity of Citizenship

If it cannot be established that a federal substantive right is in issue, then under Rule 17(b) the issue of capacity is relegated to state law. If the forum state denies capacity, then it would seem that the only method of bringing suit would be complete joinder and service of process on every individual member or partner, or else a class action. On the other hand, the state may grant capacity to sue, and Rule 17(b) is no longer a capacity barrier. However, the rule that the citizenship of an unincorporated association is to be determined by the citizenship of its members may destroy diversity. Despite indications of a trend toward overturning the rule,[227] the Supreme Court has recently reaffirmed it,[228] at least as to unions, with the observation that such action is appropriate for legislative, not judicial, action. Considered below are first, the cases where this rule operated to destroy diversity, and second, cases where an exception was found or the rule operated to allow diversity.

(a) No Diversity: Chapman v. Barney

In 1889, *Chapman v. Barney*[229] held that a joint stock company, in order to sustain diversity jurisdiction, must allege citizenship of its members, even though state law gave it power to sue in its own name. This rule became the norm for suits by and against labor unions and other unincorporated associations. The only wholesale evasion of the rule came through the class suit device where the citizenship of the representatives controlled, rather than that of the members of the class.[230]

Chapman was criticized for its unrealistic and unfair treatment of citizenship and consequent denial of federal diversity jurisdiction to large, active entities.[231] The critics pointed to the Supreme Court decision in *Puerto Rico v. Russell & Company*[232] as the lever on which the prevailing rule could be overturned. In *Russell,* the Court had found that a *sociedad en comandita* organized under the Puerto Rico civil code was so much like a corporation that it had

1963). *See also* American Newspaper Guild v. Mackinnon, 108 F. Supp. 312 (D. Utah 1952) (libel suit); UAW v. Delta Air Lines, 83 F. Supp. 63 (N.D. Ga. 1949) (claim for damages for breach of contract).

226 29 U.S.C. § 185 (1964). The constitutional validity of this section was finally sustained in Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957). The difficulty of determining what are legitimate federal claims under this section has been partially alleviated by giving the trial judge a wider discretion in retaining state claims under the concept of "pendent jurisdiction." United Mineworkers v. Gibbs, 383 U.S. 715 (1966).

227 Comment, 53 GEO. L.J. 513 (1965); Comment, 65 COLUM. L. REV. 162 (1965); Comment, 78 HARV. L. REV. 1661 (1965).

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

229 129 U.S. 677 (1889).

230 *See* text accompanying note 248 *infra.*

231 *See* note 227 *supra.*

232 288 U.S. 476 (1933).

Puerto Rican citizenship. Thus, the non-Puerto Ricans who had organized it could not rely on their citizenship to remove an action brought in the Puerto Rico domestic court.

(b) No Diversity Continued: United Steelworkers v. Bouligny

In the early 1960's, heeding the arguments of the critics and relying on *Puerto Rico v. Russell,* Judge Craven of the Western District of North Carolina thought the time for revolution had come. He boldly decided that a state court defamation action against the United States Steelworkers could be removed to his court because the union could be considered to possess the citizenship of its principal place of business, Pennsylvania.[233] The Fourth Circuit's reversal of this decision[234] was affirmed by the Supreme Court.[235] Speaking for the court, Justice Fortas acknowledged dissatisfaction with the *Chapman v. Barney* rule,[236] but noted that it had become fixed through long use and *Puerto Rico v. Russell* could not be extended to overturn it; the solution was now up to Congress rather than the Court.[237]

Bouligny upheld a line of precedent denying federal jurisdiction in a wide variety of union fights,[238] some involving routine disputes with employers,[239] some involving organizational activities,[240] and many involving intramural union squabbling over the control of locals,[241] reinstatement[242] and pension funds.[243] Typically these cases contained a wealth of collateral issues as to whether the suit could be continued as a class suit, whether service of process had been sufficient,[244] and whether, in the alternative, a federal substantive right could be made out to sustain jurisdiction.

The interplay of rules as to entity-capacity, class actions, and diversity leads

233 R. H. Bouligny, Inc. v. United Steelworkers, 336 F.2d 160 (4th Cir. 1964).
234 *Id.*
235 United Steelworkers v. R. H. Bouligny, Inc., 382 U.S. 145 (1965).
236 See text accompanying note 239 *infra.* The union also argued that the purpose of diversity should be to protect it from economic-racial prejudice in the state court.
237 Justice Fortas supported this argument by noting: (1) If the Court overturned *Chapman,* unlike the case of corporations, there would be difficulty setting the rules of citizenship for international and local unions; (2) Congress had been active in the field, in 1958 making a corporation a citizen of its principal place of business, and (3) the American Law Institute offered a proposal to make unincorporated associations citizens of their principal place of business.
238 *E.g.,* Stein v. American Fed'n of Musicians, 183 F. Supp. 99 (M.D. Tenn. 1960).
239 Hettenbaugh v. Airline Pilots Ass'n, 189 F.2d 319 (5th Cir. 1951); Douglas v. United Elec., Radio & Machine Workers, 127 F. Supp. 795 (E.D. Mich. 1955) (libel action); Air Line Dispatchers Ass'n v. California Eastern Airways, Inc., 127 F. Supp. 521 (N.D. Cal. 1954) (breach of contract by discharge of employees and subcontracting for their work).
240 Marydale Prods. Co. v. United Packinghouse Workers, 322 F.2d 224 (5th Cir. 1963); Upper Lakes Shipping v. International Longshoremen's Ass'n, 33 F.R.D. 348 (S.D.N.Y. (1963).
241 Rizzo v. Ammond, 182 F. Supp. 456 (D.N.J. 1960); Murphy v. Hotel & Restaurant Emp. & Bar. Int'l Union, 102 F. Supp. 488 (E.D. Mich. 1952).
242 Lowry v. International Bhd. of Boilermakers, 259 F.2d 568 (5th Cir. 1958); Williams v. United Bhd. of Carpenters, 81 F. Supp. 150 (N.D. Ohio 1948), *aff'd,* 191 F.2d 860 (6th Cir. 1951), *cert. denied,* 343 U.S. 935 (1952).
243 Nedd v. UMW, 225 F. Supp. 750 (E.D. Pa. 1963), *aff'd,* 332 F.2d 373 (3d Cir. 1964). *But see* Pavlovscak v. Lewis, 274 F.2d 523 (3d Cir. 1959), *cert. denied,* 362 U.S. 990 (1960) (allowing suit against trust fund and trustees).
244 Webster v. Wilke, 186 F. Supp. (S.D. Ill. 1960). Here, after the court held that there was no diversity jurisdiction because of the defendant union, the plaintiff could have converted it to a class suit, but was unable to sustain service of process on a nonresident class representative by service on in-state agents.

to interesting strategic battles to locate the lawsuit in state or federal court. For example, where the state law allows entity-capacity, the plaintiff, whether union or nonunion, who wishes to maintain the action only in state court, can bar removal of the action by designating the union as an entity and not as a class,[245] but if the plaintiff wishes to keep litigation in federal court, he has the option of amending to convert the suit from an entity suit to a class suit.[246]

This strategy, however, is somewhat unpredictable. An ousted union official, suing in a state court against the international union and its officials, attempted to resist removal of his case by pointing to the nondiversity of the union's members. The federal court responded that the union had no capacity under state law, its joinder was a nullity and thus sustained removal on the basis of the diversity of the union officials.[247] Disputes over whether the class suit device remains available in federal court when not available under state law have opened a new dimension to the problem.[248]

(c) Diversity in Non-Union Cases: Some Exceptions

Miscellaneous types of cases not involving labor unions support the same rule reaffirmed in *United Steelworkers v. Bouligny;*[249] *i.e.,* for purposes of diversity jurisdiction, the court will look to the citizenship of individual members of an association or a partnership, even though the association or partnership has capacity to be sued as an entity by the state law.[250] Since the defect is jurisdictional, it leads to the absurd result that a judge may dismiss a case on his own motion after trial and it cannot be salvaged by dropping a party.[251]

The first deliberate departure[252] came in a suit against the American Ex-

245 Lowry v. International Bhd. of Boilermakers, 259 F.2d 568 (5th Cir. 1958); Murphy v. Hotel & Restaurant Emp. & Bar. Int'l Union, 102 F. Supp. 488 (E.D. Mich. 1952).

246 McNutt v. United Gas, Coke & Chem. Workers, 108 F. Supp. 871 (W.D. Ark. 1952).

247 Sanders v. International Ass'n of Bridge Workers, 120 F. Supp. 390 (W.D. Ky. 1954). But in a companion case arising out of the same facts, the international union was able to sue as a class. Lyons v. Sanders, 120 F. Supp. 392 (W.D. Ky. 1954).

248 Oskoian v. Canuel, 269 F.2d 311 (1st Cir. 1959) (diversity action may be maintained in federal court as class suit if state law does not exclusively require entity suit); Underwood v. Maloney, 256 F.2d 334 (3d Cir.), *cert. denied,* 358 U.S. 864 (1958) (diversity action against union may not be maintained as class suit if state law exclusively requires entity suit, which in turn destroys diversity), noted, 107 U. PA. L. REV. 559 (1959), criticized, 68 YALE L.J. 1182 (1959). *Cf.* Benz v. Compania Naviera Hidalgo, S.A., 233 F.2d 62 (9th Cir. 1956), *aff'd on other grounds,* 353 U.S. 138 (1957) (where state law recognizes class suit, but not entity suit, execution on union member's assets will be denied). *See also* 1966 amendment to Rule 23, adding Rule 23.2.

249 *See text* accompanying notes 233-37 *supra.*

250 Arbuthnot v. State Auto. Ins. Ass'n, 264 F.2d 260 (10th Cir. 1959); Fine v. Philip Morris, Inc., 239 F. Supp. 361 (S.D.N.Y. 1964); Morrison-Knudson Co. v. Rocky Mountain Chapter, Nat'l Elec. Contractors Ass'n, 236 F. Supp. 436 (D. Colo. 1964) (diversity jurisdiction sustained against association of foreign corporations, argument rejected that Colorado grant of capacity converted it to a Colorado citizen); Stuart v. Al Johnson Constr. Co., 236 F. Supp. 126 (W.D. Pa. 1964) (joint venture). See cases cited in 3 J. MOORE, FEDERAL PRACTICE ¶ 17.25, at 1407-16 (1965).

251 Eastern Metals Corp. v. Martin, 191 F. Supp. 245 (S.D.N.Y. 1960). *But see* Grant County Deposit Bank v. McCampbell, 194 F.2d 469, 471 (6th Cir. 1952) (successful disclaimer made by nondiverse partner whose interest was remote, nominal and worth $75 at most).

252 There has been some departure by way of dictum where the courts, inadvertently it is believed, equated citizenship for diversity purposes to residence for venue purposes. Krijn En Zoon v. Schrijver, 151 F. Supp. 955 (S.D.N.Y. 1957); Remington's Dairy v. Rutland Ry., 15 F.R.D. 488 (D. Vt. 1954) (allowing plaintiff partnership to amend to show partners' citizenship).

press Company in which the company did not raise the jurisdictional defect until after a reversal of its victory.[253] The judge summarily stated that *Chapman v. Barney* was not controlling, that the defendant joint stock association had capacity to be sued as an entity under 17(b) and Pennsylvania law, and, therefore, sustained the allegation that the American Express Company was a citizen of New York. This decision was later criticized by the Ninth Circuit for overlooking the distinction between suability and citizenship. Nevertheless, the Ninth Circuit, while paying lip service to the *Chapman* rule, found that a Massachusetts statute giving religious societies status as "bodies corporate" for the limited purpose of receiving gifts had thereby constituted them corporations for the purpose of diversity rules. Thus, the First Church of Christ was a citizen of Massachusetts subject to diversity suit in a California federal court despite the California citizenship of some of its members.[254]

Another departure from *Chapman* was taken in *Mason v. American Express Company.*[255] Building on the early *Puerto Rico v. Russell* case, and on a perceived trend away from *Chapman v. Barney,* the Second Circuit concluded, as the Third Circuit had done earlier,[256] that realistically the American Express Company ought to be treated like a corporation for diversity purposes. The status of these three decisions, however, is somewhat uncertain. The *Mason* case was specifically disapproved in the Third Circuit's opinion in *Bouligny,* which in turn was affirmed by the Supreme Court in an opinion which seems sweeping enough to prohibit joint stock associations from being considered citizens for jurisdictional purposes.

4. Venue for Artificial Entities

Assuming that a plaintiff's attorney has overcome initial capacity hurdles and has been able to cast his suit either as (1) an action involving a substantive federal claim, in which case 17(b) supplies federal capacity, or as (2) a diversity suit where state law grants capacity and the individual members are not citizens of the same state as the opponent, an additional barrier of venue restrictions may then remain. The 1966 amendment to federal venue requirements should, however, relieve many of the problems formerly faced. The new provision allows suit, where jurisdiction is based upon either a federal question or diversity, in the federal court of the judicial district "in which the claim arose."[257] This provision is in addition to the old provisions, and thus suit may also still be brought under the former provisions: in federal question cases, in districts "where all defendants reside"[258] and in diversity cases, "where all plaintiffs or all defendants reside."[259]

253 Van Sant v. American Express Co., 169 F.2d 355 (3d Cir. 1948).
254 Swan v. First Church of Christ, Scientist, 225 F.2d 745 (9th Cir. 1955) (issue was raised on appeal by defendants even though they had won on merits below and ultimately won on appeal).
255 334 F.2d 392 (2d Cir. 1964).
256 Van Sant v. American Express Co., 169 F.2d 355 (3d Cir. 1948).
257 80 Stat. 1111 (1966).
258 28 U.S.C.A. § 1391(b) (Supp. 1966).
259 28 U.S.C.A. § 1391 (a) (Supp. 1966).

Until just recently, a dispute persisted under the old provisions concerning the residence of an unincorporated association for venue purposes. Since there was no express answer in the statute or in its legislative history, respectable arguments could be made for two different positions. One view, a more restrictive one, was that an association should only be considered a resident of its principal place of business. The other, more liberal view was that it should be considered a resident wherever it was doing business.

It is now unnecessary to dissect the history of the two views or to weigh their respective merits, for in 1967 the Supreme Court laid the dispute to rest by expressly adopting the liberal interpretation in *Denver & Rio Grande Western Railroad v. Brotherhood of Railroad Trainmen.*[260] Thus, unincorporated associations, for venue purposes, are to be considered, by analogy to corporations, residents of the places where they are doing business.[261] The majority opinion by Justice White thoroughly recapped the history of the problem and restated the theory of the lower court decisions that had adopted the liberal view. This view was based on the early theory of Judge Learned Hand that once unincorporated associations were given capacity as entities in the federal courts, for many different procedural purposes the courts would have to assimilate them to corporations.[262] The dissent, voiced by Justice Black,[263] agreed with the theory, but felt that Congress in the 1948 revision of the Judicial Code intentionally froze the assimilation process as of 1948 when associations were residing at their principal places of business only, and that the Court was powerless to expand it.[264]

260 387 U.S. 556 (1967). The action was brought in the federal district court in Colorado by the railroad against the union for damages caused by an illegal strike in breach of the union's duties under the Railway Labor Act, 45 U.S.C. § 151-64 (1964). The district court overruled the union's motion to dismiss for improper venue. The appellate court reversed holding venue to be proper only at the union's principal place of business, Cleveland, Ohio. The Supreme Court reversed on the theory that venue would be proper if the union were found to be doing business in Colorado.

261 An alternative ground for the decision was that the 1966 amendment to the venue statute, allowing venue "where the claim arose," was applicable to pending suits and thus might permit suit in Colorado.

262 Sperry Prods., Inc. v. Association of American R.Rs., 132 F.2d 408 (2d Cir. 1942), *cert. denied,* 319 U.S. 744 (1943). *See* note 264 *infra.*

263 Justice Black said he would not have dissented if the Court had rested its decision solely on the ground that the 1966 amendment applied to pending cases. He was joined by Justices Fortas and Douglas.

264 A brief chronology of the dispute may be helpful: 1942: The general venue statute required that defendants be sued in districts where they resided. By case law, corporations resided at their state of incorporation and the state in which they had their principal place of business. However, under Neirbo v. Bethlehem Shipbuilding Corp., 308 U.S. 165 (1939), they could "waive" venue objections by registering to do business in a particular state.

1942-48: Sperry Products, Inc. v. Association of American R.Rs., 132 F.2d 408 (2d Cir. 1942), *cert. denied,* 319 U.S. 744 (1943). Judge Learned Hand, in construing the venue requirements for patent suits, found that an unincorporated association should be assimilated to a corporation and thus could be found to be an "inhabitant" of its principal place of business. *See also* Darby v. Philadelphia Transp. Co., 73 F. Supp. 522 (E.D. Pa. 1947) and Thermoid Co. v. United Rubber Workers, 70 F. Supp. 228 (D.N.J. 1947). These cases followed *Sperry Products* prior to the revision of the Judicial Code in 1948. Since the *Neirbo* rule was based on the theory of waiver by registering to do business, it was not applicable to associations.

1948: The revisers of the Judicial Code claimed that they had no intention of changing the venue law. In the process of simplifying and restating it, they generally equated "resident" with "inhabitant" and attempted to codify the result of the *Neirbo* case by providing in 28 U.S.C. § 1391(c) (1964) that a corporation was to be regarded for venue purposes as a

There will no doubt be problems in applying the assimilation theory. For example, section 1391(c) itself presents the issue whether it should be interpreted to apply only to defendants or also to plaintiffs.[265] And the concept of "doing business" may be easier to manage in the case of commercial activities of specific corporations, than it is to apply the case of noncommercial activities of complexly structured national associations and their various subgroups and local affiliates.[266] Nevertheless, the Supreme Court's decision in *Denver & Rio Grande*, coupled with the 1966 amendment and the provisions for venue transfer,[267] should alleviate venue requirements as absolute bars to obtaining effective remedies where unincorporated associations are concerned.

V. Appraisal and Suggested Changes

A. Mechanics

There are no serious problems in handling the mechanical aspects of pleading, objections, waiver and amendment. The results as worked out by the courts have generally been good and in accord with the language of Rules 9(a), 10, and 15(c).[268] However, some codification of these cases might now be attempted by explicitly including lack of capacity as an affirmative defense within Rule

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resident of the place at which it was doing business. The revisers said nothing about unincorporated associations.

1948-67: The issue clearly emerged. Did the revisers, in 1948, intend to adopt only the result of the *Sperry Products* case as it existed in 1948, *i.e.*, that unincorporated associations were inhabitants of their principal place of business? Or did the revisers intend to adopt the full theory of Learned Hand and continue the judicial assimilation process by treating associations like corporations under the new provision of § 1391(c)? The case law, as can be seen below, was split rather badly and thus was inconclusive.

The Restrictive View: Brotherhood of Locomotive Firemen v. Graham, 175 F.2d 802 (D.C. Cir. 1948), *rev'd on other grounds*, 338 U.S. 232 (1949); Cherico v. Brotherhood of R.R. Trainmen, 167 F. Supp. 635 (S.D.N.Y. 1958); McNutt v. United Gas, Coke & Chem. Workers, 108 F. Supp. 871 (W.D. Ark. 1952); Westinghouse Elec. Corp. v. Radio & Mach. Workers, 92 F. Supp. 841 (W.D. Pa.), *aff'd*, 94 F.2d 770 (3d Cir. 1950), *cert. denied*, 343 U.S. 966 (1952); Griffin v. Illinois Cent. R.R., 88 F. Supp. 552 (N.D. Ill. 1949); Salvant v. Louisville & N. R.R., 83 F. Supp. 634 (W.D. Ky. 1949). *Cf.* Joscar Co. v. Consolidated Sun Ray, Inc., 212 F. Supp. 634 (E.D.N.Y. 1963) (limited partnership plaintiff); Hadden v. Small, 145 F. Supp. 387 (N.D. Ohio 1951) (partnership).

The Liberal View: Rutland Ry. v. Brotherhood of Locomotive Engineers, 307 F.2d 21 (2d Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); American Football League v. National Football League, 27 F.R.D. 264 (D. Md. 1961); R & E Dental Supply Co. v. Ritter Co., 185 F. Supp. 812 (S.D.N.Y. 1960); American Airlines, Inc. v. Air Line Pilots Ass'n, 169 F. Supp. 777 (S.D.N.Y. 1958); Eastern Motor Express, Inc. v. Espenshade, 138 F. Supp. 426 (E.D. Pa. 1956) (turnpike comm'n); Portsmouth Baseball Corp. v. Frick, 132 F. Supp. 922 (S.D.N.Y.), *aff'd*, 278 F.2d 395 (2d Cir. 1955), *cert. denied*, 364 U.S. 831 (1960). (National and American baseball leagues).

265 See Robert E. Lee & Co. v. Veatch, 301 F.2d 434 (4th Cir.), *cert. denied*, 371 U.S. 813 (1961); FORRESTER & CURRIER, FEDERAL JURISDICTION & PROCEDURE 448 (1962).

266 These types of problems were one of the considerations causing the Court in *Bouligny* to refuse to give citizenship to unincorporated associations and to turn the question back to Congress for specific legislative treatment. *See* note 237 *supra*. Another example of the problems in the assimilation theory is that of distinguishing between the residence of partners and that of the partnership. *See, e.g.*, Joscar v. Consolidated Sun Ray, Inc., 212 F. Supp. 634 (E.D.N.Y. 1963); Goldberg v. Wharf Constructors, 209 F. Supp. 499 (N.D. Ala. 1962).

267 80 Stat. 1111 (1966).

268 *See* text accompanying notes 72-106 *supra*. Only one case, Sun-X Glass Tinting of Mid-Wisconsin, Inc. v. Sun-X Int'l, Inc., 227 F. Supp. 365 (W.D. Wis. 1964), discussed at notes 74 and 98 *supra*, seems questionable.

8(c),[269] or by providing that the objection may be raised by motion under Rule 12(b) and, consequently, may be waived under Rule 12(g).[270] Another implicit rule might also be made explicit, *i.e.*, that the caption of the complaint should specify the special capacity of the plaintiff or the defendant.[271] In the only major problem area, the better reasoned cases have allowed amendments correcting capacity defects to relate back despite contrary practice under state statutes of limitations.[272] This result is now supported by Rule 15(c) and Rule 17(a), but Rule 17(b) should be similarly amended. However, most of the above clarifications are so well understood or implied that attempts at making them explicit might cause needless trouble.

B. Individuals

Rule 17(b) tests the capacity of an individual by the law of his domicile. In so doing, the Rule may conflict with an *Erie* mandate to apply the capacity law of the forum state.[273] There are few cases that have been called upon to resolve this possible conflict. In such cases, where the domicile law allows access to a federal court, but forum law does not, the provision of Rule 17(b) and the determination that there is capacity[274] are to be commended on the theory that capacity and access are better than noncapacity and nonaccess. On the other hand, this result and Rule 17(b) thus set up an exception to the general norm of applying forum law when there appears to be no special reason for the exception. Assuming that a change in Rule 17(b) would be appropriate, one alternative would obviously be to test the capacity of the individual by the law of the forum. However, it is believed there are better alternatives, discussed below in connection with changes in other parts of the Rule.

C. Guardians

The general language of Rule 17(c) is relied upon to decide many routine cases concerning court management of legal guardians. Although there are practices here that could be made explicit, *e.g.*, procedure and qualifications for appointment, bonding and allocation of costs, it seems that the general language of Rule 17(c) and the courts' disposition of cases under it are adequate.[275] As noted, however, a conflict with Rule 17(c) is presented by Rule 17(b)'s direction that state forum law should govern the capacity of representatives. It has

269 *Cf.* Aberdeen Hills Second Corp. v. Biafore, 24 F.R.D. 502 (E.D. Pa. 1960).
270 *See* text accompanying notes 72-82 *supra.*
271 C. CLARK, CODE PLEADING § 50, at 322-26 (2d ed. 1947).
272 *See* text accompanying notes 101-11, 122-88 *supra.*
273 *Cf.* Angel v. Bullington, 330 U.S. 183 (1947).
274 Urbano v. News Syndicate Co., 232 F. Supp. 237 (S.D.N.Y. 1964). *Cf.* Nolan v. Transocean Airlines, Inc., 276 F.2d 280 (2d Cir. 1960), *vacated, per curiam,* 365 U.S. 293 (1961) (change in applicable California law).
275 *See* text accompanying notes 121-48 *supra.* This does not exclude the possibility of amending Rule 17(c) to improve guardian *ad litem* practices. *See* AMERICAN LAW INSTITUTE, UNIFORM PROBATE CODE, Art. V. (Summer 1967 draft, July, 1967), which, for the sake of greater precision, introduces some new concepts and types of proceedings such as "disabled person," "protected person," "conservator-trustee," "protective proceeding," and "conservator-trusteeship proceeding."

been suggested that the conflict should be resolved by reading 17(b) and (c) to mean that where there has been no appointment made under state law, a federal court can appoint a guardian at law.[276] This is a sensible reading which should resolve most of the conflicts. Yet, in some cases, there may be either a defective state appointment of a general guardian, or a situation where there ought to be a guardian at law despite the existence of a general guardian. Here, it is submitted, the cases are correct that extend the independence of the federal court by finding capacity under Rule 17(c).[277] Once there has been a trial, the only question should become whether the underlying interest of the ward was adequately represented.[278] In sum, it appears that Rule 17(c) adequately and appropriately expresses the principle that a federal court will generally defer to a state's system of regulating representatives, but when that system unduly restricts access to the federal court, or attempts to upset its judgments through jurisdictional defects, there is residual federal power to confer capacity.

D. Foreign Representatives

The common-law rule is that a representative has no capacity outside the state of his appointment. This rule has been criticized on the grounds that its historical development was incorrect, that it has no support in comparative law, and that it has no justification in policy.[279] The main objection to change in the rule is based on the policy of giving protection to local creditors' claims. This, however, can be overcome by bonding.[280] It is further asserted that the trend of judicial decision and legislation is, and ought to be, toward giving the representative litigating capacity outside his state of appointment.[281] In this context, Rule 17(b) requires a federal court to apply the law of the forum state to determine the capacity of a representative. As a result, a federal court must follow restrictive state law denying capacity. Such restriction, in some cases,

276 C. WRIGHT, FEDERAL COURTS § 70, at 259 (1963).

277 *Cf.* New Mexico Veteran's Serv. Comm'n v. United Van Lines, Inc., 325 F.2d 548 (10th Cir. 1963); Fallat v. Gouran, 220 F.2d 325 (3d Cir. 1955).

278 *See* note 220 *supra.* Compare the unjustifiable state practice which may make the absence of a guardian *ad litem* a jurisdictional defect. Such a theory produced the absurd result that a plaintiff who sued a 17 year old and lost, could on appeal upset the judgment in the defendant's favor because the defendant was not represented by a guardian at law. Blincoe v. Miller, 11 Ill. App. 2d 247, 136 N.E.2d 539 (1956).

279 A. EHRENZWEIG, CONFLICT OF LAWS §§ 14-16, at 44-45, 49-54 (2d ed. 1962). Professor Ehrenzweig relies in part on Cheatham, *The Statutory Successor, the Receiver, the Executor, in Conflicts of Law, in Administration of Decedent's Intangibles,* 44 COLUM. L.REV. 549 (1944). *See also* Currie, *The Multiple Personality of the Dead; Executors, Administrators, and the Conflict of Laws,* 33 U. CHI. L.REV. 429 (1966) (favoring universal succession).

280 EHRENZWEIG, *supra* note 279, § 14 at 47; Currie, *supra* note 279, at 432. Professor Ehrenzweig asserts that the defendant is already protected by res judicata from claims by multiple representatives. *Id* at 52, n. 27. Professor Currie points out that local forum creditors cannot constitutionally be discriminated against by the foreign appointing state. *Id.* at 432.

281 *The Uniform Powers of Foreign Representatives Act* was drafted in 1944, but as of 1965 had not been enacted in any state. This act establishes the capacity of foreign representatives to litigate in the absence of application for local ancillary administration. *See also* Currie, *supra* note 279, at 433, describing the current status of state law. AMERICAN LAW INSTITUTE, UNIFORM PROBATE CODE, Art. IV (Summer 1967 draft, July, 1967) pursues the goal of unitary representation of the estate by generally providing for registration of the foreign personal representative and allowance of service of process against him if the decedent would have been subject to process.

may effectively preclude any remedy at all.[282] In keeping with the present trend, it might be that Rule 17(b) should be used as the vehicle for reform and thus should be rewritten to allow foreign representatives capacity to sue or be sued[283] in federal court if there is capacity to litigate under the law of the state of the representative's appointment.[284] Such a change would raise *Erie* challenges,[285] but these challenges could be overcome. One theory would base the change on the power of a federal court to administer uniform rules of conflicts of laws. In other words, the federal court, under the changed rules, would still be applying state capacity law but it would be choosing nonforum law over forum law.[286]

Absent this formal change in Rule 17(b), the federal decisions that, through one device or another, allow capacity for foreign representatives are to be approved. These devices are: 1) to follow and expand recognized exceptions to the rule of no capacity, *e.g.*, that the restrictions do not apply to wrongful death actions because local creditors are not affected;[287] 2) to allow capacity when the action is based on federal law,[288] and 3) to allow steps to be taken that correct defective capacity without dismissal under the state statute of limitations.[289] No federal court has yet taken the further step of refusing to apply a state statute requiring a resident fiduciary. This step might be justified on the theory that such a statute unconstitutionally discriminates against the diversity jurisdiction of the federal court. Such a step, in conjunction with the three just mentioned, might substantially result in the same effect as a formal change in Rule 17(b).

E. Foreign Corporations

Rule 17(b) commands the federal court to apply the law of the state under

282 F. JAMES, CIVIL PROCEDURE 400-01 (1965).

283 Although different policies are involved concerning foreign representative defendants, capacity should be extended to them also, subject to "minimum contacts" limitations on service of process. EHRENZWEIG, *supra* note 279, 63-70. *See also* Currie, *supra* note 279. Note the plaintiff's device of opening an estate for a nonresident decedent by declaring the decedent's automobile liability policy an asset of the estate. Estate of Lawson, 18 Ill. App. 586, 153 N.E.2d 87 (1958).

284 Such a proposal was indirectly rejected in the drafting of the 1938 rules. 3 J. MOORE, FEDERAL PRACTICE ¶ 17.18, at 1381-82. Such an amendment should carry a proviso that a federal court require the foreign representative to comply with forum requirements where possible.

285 *E.g.*, dissent of Chief Judge Lumbard in Urbano v. News Syndicate Co., 358 F.2d 145, 146-48 (2d Cir.), *cert. denied*, 385 U.S. 331 (1966).

286 *See* AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, Part I, "Supporting Memorandum C," at 196-200, "Supporting Memorandum D," at 200-03 (Prop. Final Draft No. 1, 1965). The memorandum takes the view that it would be within congressional power to amend the Rules Enabling Act to provide for uniform conflict of laws rules, but does not discuss whether the court could do it, either judicially or by amendment to the rules under the present Enabling Act. The federal power to regulate capacity by choosing foreign state law over forum state law is foreshadowed by the present power to decide appropriate state law in venue transfer cases. *See* Van Dusen v. Barrack, 376 U.S. 612 (1964).

287 *E.g.*, Wallin v. Rankin, 173 F.2d 488 (9th Cir. 1949); Cooper v. American Airlines, Inc., 149 F.2d 355 (2d Cir. 1945); Sonner v. Cordano, 228 F. Supp. 435 (D.Nev. 1963); Elliott v. Day, 218 F. Supp. 90 (D.Ore. 1962); Citizens Fidelity Bank & Trust Co. v. Baese, 136 F. Supp. 683 (M.D. Tenn. 1955).

288 *E.g.*, Levinson v. Duepree, 345 U.S. 648 (1953); Briggs v. Pennsylvania R.R., 153 F.2d 841 (2d Cir. 1946); Carlson v. United States, 14 F.R.D. 21 (W.D. Ky. 1953). *Contra*, Reynolds v. Cincinnati, N.O. & T.P. Ry., 7 F.R.D. 165 (E.D. Ky. 1945).

289 *E.g.*, Levinson v. Duepree, 345 U.S. 648 (1953) (admiralty); Iovino v. Waterson, 274 F.2d 41 (2d Cir. 1959), *cert. denied*, 362 U.S. 949 (1960); Seymour v. Johnson, 235 F.2d

which a corporation is organized. This presents no problem in the case of corporations organized under federal law. But in the case of corporations organized under state law, *Wood v. Interstate Realty Company*[290] forces a federal court to apply forum capacity law, which may bar suit by a foreign, unregistered corporation. Apart from previous compliance with state forum law, few routes are thus left for independent access to a federal court. One route is by way of exception for corporations exclusively engaged in interstate business.[291] Another route is where the claim is based on federal law.[292] Rule 17(b) is thus incomplete, if not directly misleading, and might appropriately be rewritten to acknowledge forum law. However, real reform in this area may come only by constitutional invalidation of state statutes restricting the capacity of foreign corporations. Short of this, Rule 17(b) might be rewritten to allow access to foreign corporations, regardless of state forum law. Such a course might be sustained against *Erie* objections by theories similar to those outlined previously in relation to federal capacity for foreign death representatives, *i.e.*, the federal system would be regulating procedure, or else would merely be making an independent choice between forum and nonforum state law.

F. Unincorporated Associations

The common law did not give partnerships or unincorporated associations capacity to sue or be sued, but this restrictive attitude has been attacked in modern times.[293] The trend of state legislation and judicial opinion is to recognize the capacity of partnerships and unincorporated associations to sue or be sued as entities. In 1922, the United States Supreme Court recognized the power of the judiciary to establish the capacity of a union to be sued.[294] Then Rule 17(b) codified this result and extended it to active capacity situations. This has resulted in many cases where capacity is sustained on the basis of a federal substantive right despite contrary state law.[295] Even where no federal right is involved, however, and where state law denies capacity, the federal class suit remains available as a means of overcoming the group's lack of capacity to sue or be sued.[296]

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181 (6th Cir. 1956); Briggs v. Pennsylvania R.R., 153 F.2d 841 (2d Cir. 1946); Messner v. Wyte, 33 F.R.D. 288 (S.D.N.Y. 1963); Carlson v. United States, 14 F.R.D. 21 (W.D. Ky. 1963); Bolitho v. Buch Express, Inc., 12 F.R.D. 189 (E.D. Pa. 1951) (relying on state law allowing change to save diversity); Straub v. Jaeger, 9 F.R.D. 672 (E.D. Pa. 1950). *See also* Paris v. Braden, 234 F.2d 40 (D.C. Cir. 1956); Boyle v. Curtis Publishing Co., 11 F.R.D. 92 (E.D. Pa. 1950).

290 337 U.S. 535 (1949).

291 Emulsol v. Rubenstein & Son Produce, Inc., 111 F. Supp. 410 (N.D. Tex. 1953).

292 *Cf.* United States *ex rel.* Bernadot v. Golden West Constr. Co., 194 F. Supp. 371 (D. Utah 1961).

293 EHRENZWEIG, *supra* note 279, § 12, at 39-40; § 24, at 68-69.

294 UMW v. Coronado Coal Co., 259 U.S. 344 (1922).

295 *See* notes 221-22 *supra.*

296 Ironically, if state law grants capacity to an association or partnership, diversity jurisdiction may be denied under the rule that relevant citizenship is that of each of the association's members. *See* UMW v. R.H. Bouligny, Inc. 382 U.S. 145 (1965) and text accompanying note 237 *supra.* Since Congress has alleviated venue problems by allowing suit "where the claim arose," and since the Supreme Court has assimilated associations to corporations for other venue purposes, Congress ought to complete the process by adopting the American Law Institute's proposal to treat associations as citizens of their principal place of

An appropriate reform here would be to amend Rule 17(b) to provide simply that partnerships and unincorporated associations may sue or be sued in their common names. This amendment would thus extend the rule in federal question cases to diversity cases. The constitutional power to do this, it is submitted, is found in the power to regulate procedure in the federal courts, and once the state-federal debate is put aside, practical considerations of policy should sustain it.[297]

G. Federal Claims and State Claims

Thus far, this appraisal and the suggestions for change have been based on categories of legal persons, *i.e.*, individuals, representatives, corporations and associations. A different category, based on the distinction between state substantive rights and federal substantive rights, could also be used. Although Rule 17(b) uses this distinction in granting capacity to an unincorporated association where federal substantive rights are in issue, the Rule is silent about applying the distinction to other legal persons. Nevertheless, it appears that the distinction is, and should be, recognized in other situations. Thus, when a federal substantive right is involved, individuals,[298] representatives,[299] and corporations[300] have been granted capacity to litigate in federal court, despite contrary state law.

In the other situation, where the action is brought to enforce rights existing under state law, in light of *Erie* and *Klaxon*, it might be much more accurate for Rule 17(b) simply to provide that capacity is governed by the law of the state in which the district court sits. A simplified Rule 17(b) would thus emerge, referring capacity questions to either federal law or state forum law, depending on the nature of the right involved.

VI. Conclusion

The preferred goal should be capacity to litigate for individuals, representatives, artificial entities and corporations, unless there is some good reason for absolute nonrecognition. It is submitted that the policies of res judicata, claims for costs, and the enforceability of judgments can ordinarily be satisfied by regulating the party before the court through bonds, joinder, stipulations, transfers of venue, and other creative court orders short of outright dismissal. The over-

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business for jurisdictional purposes. *See* text accompanying notes 260-64 *supra*. *See also* AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, Part I, § 1301(b)(2) and commentary at 59-61 (Prop. Final Draft No. 1, 1965).

297 *Cf.* Arguments supporting judicial powers to create capacity and enforceable judgments against associations in Sturges, *Unincorporated Associations as Parties to Actions*, 33 YALE L.J. 382 (1924); on the constitutional power, *cf.* Hanna v. Plummer 380 U.S. 460 (1965).

298 *E.g.*, Weller v. Dickson, 314 F.2d 598 (9th Cir.), *cert. denied*, 375 U.S. 845 (1963); Hill v. Gentry, 182 F. Supp. 500 (W.D. Mo.), *vacated and remanded*, 280 F.2d 88 (8th Cir.), *appeal dismissed per curiam*, 283 F.2d 517 (8th Cir.), *cert. denied*, 364 U.S. 875 (1960); McCollum v. Mayfield, 130 F. Supp. 112, 116-17 (N.D. Cal. 1955).

299 *E.g.*, Levinson v. Duepree, 345 U.S. 648 (1953); Briggs v. Pennsylvania R.R., 153 F.2d 841 (2d Cir. 1946); Carlson v. United States, 14 F.R.D. 21 (W.D. Ky. 1953). *Contra*, Reynolds v. Cincinnati, N.O. & T.P. Ry., 7 F.R.D. 165 (E.D. Ky. 1945).

300 United States *ex rel.* Barnadot v. Golden West Constr. Co., 195 F. Supp. 371 (D. Utah 1961).

riding justification for diversity jurisdiction that is currently emerging is that it provides a forum where a remedy is procedurally impossible in state courts.[301] Since constitutional law has not fully developed in many areas to eliminate unreasonable state restrictions on the capacity to litigate, federal courts ought to provide a remedy through their procedural power to regulate capacity under Rule 17(b).

Whether Rule 17(b) in its present form can be modified to bring about these objectives is another question. Perhaps the rule is innately defective in its Austinian attempt to regulate by categorical imperative. While the present rule has the appearance of simplicity and certainty, in practice these values are deceptively elusive. The 1966 amendments of Rules 19 and 23, show that a realistic approach might be to state the factors which should govern the federal court in regulating capacity to litigate. Implicit in such a list of factors would be the principle that the federal court should attempt to require compliance with the law and practice of the state in which it sits. However, wherever compliance would not be reasonably possible, would destroy the jurisdiction of the federal court, or would effectively deny a forum for a remedy, then the federal court should allow capacity to litigate under such terms and conditions as are just.

301 AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, Part I, § 1301(e) and commentary at 66-68 (Prop. Final Draft No. 1 1965).