

1978

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Recommended Citation

Marian Burnbaum, *Limited Partnerships in Diversity: The Effect of Rule 17(b) on Federal Jurisdiction*, 6 Fordham Urb. L.J. 272 (1978).
Available at: <https://ir.lawnet.fordham.edu/ulj/vol6/iss2/4>

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LIMITED PARTNERSHIPS IN DIVERSITY: THE EFFECT OF RULE 17(b) ON FEDERAL JURISDICTION

I. Introduction

Limited partnerships are organizations classified under the general category of unincorporated associations.¹ Traditionally, citizenship of limited partnerships in diversity cases was determined under a common law rule developed for the entire class of unincorporated associations.² That rule deems unincorporated associations to be citizens of each state where one of its members resides.³ The federal courts differ upon the continuing validity and application of this common law rule regarding limited partnerships.⁴

Courts have distinguished the modern limited partnership from those partnerships prevailing at the inception of the traditional rule.⁵ Unlike most other forms of unincorporated associations, limited partnerships were altered significantly by the passage of uniform laws throughout the United States.⁶ The Uniform Limited Partnership Act (ULPA) removed the ability of limited partners to sue or be sued upon partnership rights.⁷ This limitation is considered by some federal courts as a reason to alter the method of deter-

1. A. BROMBERG, CRANE AND BROMBERG ON PARTNERSHIP §§ 4(b), 26 (1968) [hereinafter BROMBERG].

2. Great Southern Fire Proof Co. v. Jones, 177 U.S. 449 (1900); Chapman v. Barney, 129 U.S. 677 (1889).

3. Chapman v. Barney, 129 U.S. at 682.

4. 3A MOORE'S FEDERAL PRACTICE ¶ 17.25 nn.34-46 (rev. ed. 1977). For cases declaring citizenship of unincorporated associations to be that of each of its members, see Carlsberg Resources Corp. v. Cambria Sav. & Loan Ass'n, 554 F.2d 1254 (3d Cir. 1977) (limited partnership); Baer v. United Servs. Auto. Ass'n, 503 F.2d 393 (2d Cir. 1975) (reciprocal insurance association); Brocki v. American Express Co., 279 F.2d 785 (6th Cir.) (joint stock association), cert. denied, 364 U.S. 871 (1960). Contra, Colonial Realty Corp. v. Bache & Co., 358 F.2d 178, 183 (2d Cir.) (per Friendly, J.) (citizenship of limited partnership was that of each general partner), cert. denied, 385 U.S. 817 (1966); Mason v. American Express Co., 334 F.2d 392 (2d Cir. 1964) (joint stock association citizen of the state where formed); Van Sant v. American Express Co., 169 F.2d 355 (3d Cir. 1948) (joint stock association citizen of the state where formed); Erving v. Virginia Squires Basketball Club, 349 F. Supp. 709 (E.D.N.Y. 1972) (limited partnership possessed the citizenship of its sole general partner).

5. For a strong defense of this view, see Carlsberg Resources Corp. v. Cambria Sav. & Loan Ass'n, 554 F.2d 1254, 1262 (3d Cir. 1977) (Hunter, J. dissenting).

6. See BROMBERG, *supra* note 1, § 26.

7. UNIFORM LIMITED PARTNERSHIP ACT § 26 [hereinafter ULPA].

mining a limited partnership's citizenship for diversity purposes.⁸ Other courts have remained faithful to the common law rule.⁹

Disagreement among federal courts over the citizenship of limited partnerships centers around the interaction of Federal Rule of Civil Procedure 17(b),¹⁰ which guides the determination of proper parties to an action, and the rule of complete diversity,¹¹ which dictates that each opposing interest in a diversity action possesses citizenship of a different state. Two rules have arisen from this interaction. The first deems diversity primary and applies the common law citizenship rule for unincorporated associations. When followed literally, this rule makes the limited partnership a citizen of every state in which any general or limited partner resides.¹² This first rule effectively precludes limited partnerships from maintaining diversity actions in the federal courts.¹³ The number of limited partners is usually so great that complete diversity is readily destroyed when identity of citizenship between one limited partner and an opposing party is found.¹⁴

The alternative method for determining a limited partner's citizenship first utilizes Rule 17(b) which directs the court to state law in the location of proper parties to the action.¹⁵ Under state law, the court may find that general partners alone have standing to sue in

8. *Colonial Realty Corp. v. Bache & Co.*, 358 F.2d 178, 183-84 (2d Cir.), *cert. denied*, 385 U.S. 817 (1966); *Erving v. Virginia Squires Basketball Club*, 349 F. Supp. 709 (E.D.N.Y. 1972).

9. See note 4 *supra*.

10. FED. R. CIV. P. 17(b) entitled "Capacity to Sue or be Sued" states:

The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the *law of his domicile*. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. *In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held*, except (1) 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, 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).

Id. (emphasis added).

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

12. *Carlsberg Resources Corp. v. Cambria Sav. & Loan Ass'n*, 554 F.2d 1254 (3d Cir. 1977); *Grynberg v. B.B.L. Assoc.*, 436 F. Supp. 564 (D. Colo. 1977).

13. *Grynberg v. B.B.L. Assoc.*, 436 F. Supp. at 568.

14. *Id.*

15. See note 10 *supra*.

the name of the limited partnership because limited partners are generally not proper parties.¹⁶ It is after the determination as to proper parties that these courts evaluate diversity.¹⁷ The common law rule is modified by requiring complete diversity among only the general partners and opposing interests. This second approach permits limited partnerships greater access to the federal courts.

This Comment will describe the changes in the law which gave rise to the two methods currently used to derive the citizenship of limited partnerships. The discussion will include the major pronouncements of the United States Supreme Court and Courts of Appeals, emphasizing the effect of the Federal Rules of Civil Procedure on theories of diversity jurisdiction.

II. Modern Limited Partnerships

The modern limited partnership is composed of general partners and limited partners.¹⁸ Responsibilities of the two categories of partner vary greatly.¹⁹ General partners assume the management control of the organization much like officers of a corporation. General partners, however, are personally liable in suits against the partnership.²⁰ Limited partners are liable only to the extent of their individual investment in the partnership.²¹ Limited partners must exclude themselves from any exercise of management or control over the partnership.²² Their failure to remain detached from management results in personal liability for the debts of the organization and automatic classification as a general partner.²³

16. See, e.g., N. Y. PARTNERSHIP LAW § 115 (McKinney 1976), adopting ULPA § 26.

17. *Carlsberg Resources Corp. v. Cambria Sav. & Loan Ass'n*, 554 F.2d 1254, 1260 (3d Cir. 1977).

18. ULPA §§ 1, 9-10.

19. Professor Bromberg describes the limited partnership as follows:

A limited partnership is formed by compliance with statutory requirements. It consists of (a) general partners, who manage the business and have the same liability as in an ordinary partnership, and (b) limited partners, who take no part in management, share profits, and do not share losses beyond their capital contributions to the firm. A limited partner may forfeit his limited liability by taking part in control of the business. In most other respects, limited partnerships are like general partnerships.

BROMBERG, *supra* note 1, § 26, at 143.

20. ULPA § 9(1).

21. *Id.* § 17(1).

22. *Id.* § 7: "A limited partner shall not become liable as a general partner unless, in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business."

23. BROMBERG, *supra* note 1, § 26, at 147-50.

The ULPA adopted in all fifty states altered the rights of the two classes of partners to represent the partnership's claims in the courts.²⁴ Where the general partner is able to enforce partnership rights, the ULPA has denied the limited partner capacity to sue or be sued concerning those rights. Limited partners are thereby assured of a way to lessen the risk of personal liability for the firm's obligations.²⁵

III. The Common Law

Where questions of federal jurisdiction arise, lower federal courts must seek guidance from past decisions of the Supreme Court of the United States.²⁶ However, the Supreme Court has never considered the diversity status of a limited partnership created under the ULPA. Although there are two major cases²⁷ in which the Court established a diversity standard for unincorporated associations, these were decided before the existence of both the uniform laws²⁸ and the Federal Rules of Civil Procedure.²⁹ The Federal Rules direct the courts to utilize state law when classifying proper parties in diversity cases.³⁰ Formerly, such determinations were entirely within the domain of federal common law which declared all members of unincorporated associations to have equal status in the fed-

24. See *id.* at 143-45.

25. ULPA § 26, "Parties to Actions": "A contributor, unless he is a general partner, is not a proper party to proceedings by or against a partnership, except where the object is to enforce a limited partner's right against or liability to the partnership."

Professor Bromberg discusses the varied interpretations of the ULPA which reduce the degree of reliance reasonably to be placed upon the act's declaration of limited liability. BROMBERG, *supra* note 1, § 26, at 147-50.

26. See, e.g., *Carlsberg Resources Corp. v. Cambria Sav. & Loan Ass'n*, 554 F.2d 1254, 1257-59 (3d Cir. 1977).

27. *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449 (1900) (limited partnership association); *Chapman v. Barney*, 129 U.S. 677 (1889) (joint stock association).

28. The ULPA was first adopted by individual states in 1917.

29. The Federal Rules of Civil Procedure became the law of the United States in 1938. *FED. R. CIV. P.* 86(a).

30. Prior to 1938, the federal courts were free to interpret both procedural and substantive questions in diversity cases without regard to state case law. *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842). That is one reason why the early decisions such as *Chapman v. Barney*, 129 U.S. 677 (1889), and *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449 (1900), rejected state rules of capacity. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), established state substantive law as controlling in diversity cases where that law would affect the outcome of the litigation. See generally Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 *Cornell L.Q.* 499, 526-30 (1928).

eral courts.³¹ However, when the Court re-examines the capacity of limited partners to bring suit it will find that the ULPA as adopted by state law has deprived limited partners of their ability to sue.³² In addition, the Court must resolve the interaction of the rules of capacity with the common law diversity status of limited partnerships as unincorporated associations.

The major Supreme Court precedent involving the citizenship of unincorporated associations is *Chapman v. Barney*,³³ decided in 1889. Plaintiff, a joint stock company, was organized under New York law which authorized the company to sue as an entity in the name of its president.³⁴ The joint stock company alleged New York citizenship.³⁵ However, the Court held that only a corporation may sue as a citizen of the state under which it was organized.³⁶ All other business organizations were deemed partnerships. Thus, for diversity purposes, the unincorporated association was deemed a citizen of each state wherein its members resided.³⁷

The Court classified the joint stock company as a "mere partnership."³⁸ The phrase was meant to encompass all forms of unincorporated associations. The term partnership distinguished the joint stock company, whose members were of equal status and responsibility, from the corporation, whose stockholders were subsumed by the corporation to form a separate "personality" in the business community and before the courts.³⁹ The *Chapman* Court refused to expand federal jurisdiction to include entity status for business groups whose members functioned with equal rank and responsibilities within the organization.⁴⁰

The second notable decision establishing a standard for diversity was *Great Southern Fire Proof Hotel Co. v. Jones*⁴¹ which involved

31. For a detailed treatment of FED. R. CIV. P. 17(b) ("Capacity to sue or be sued") and its effect on diversity cases, see sections IV and V *infra*.

32. See, e.g., N.Y. PARTNERSHIP LAW § 115 (McKinney 1976).

33. 129 U.S. 677 (1889).

34. *Id.* at 679.

35. *Id.*

36. *Id.* at 682.

37. *Id.*

38. *Id.*

39. The Supreme Court had previously declared the existence of a "conclusive presumption" that stockholders were citizens of the state where their corporation was domiciled. *Marshall v. Baltimore & O.R.R.*, 57 U.S. (16 How.) 314, 328 (1853).

40. 129 U.S. at 682.

41. 177 U.S. 449 (1900).

an issue similar to that found in *Chapman*.⁴² The plaintiffs formed a limited partnership association, Jones & Laughlins, Ltd.,⁴³ wherein the status of each member was limited.⁴⁴ The Court interpreted the association's enabling statute as authorizing the association to sue or be sued as a citizen of Pennsylvania.⁴⁵ Again, the Court opposed treating the partnership association as an entity for jurisdictional purposes "although such associations may have some of the characteristics of a corporation."⁴⁶ *Southern Fire* held under *Chapman*⁴⁷ that a limited partnership, defined as containing only limited partners, was a citizen of every state where one of its partners resided.⁴⁸

Southern Fire may not be an apt precedent for determining diversity jurisdiction over the modern limited partnership formed under the ULPA.⁴⁹ The act eliminated variations among limited partnership organizations.⁵⁰ The limited partnership association is an example of a limited partnership form reduced to a rarity as a result of the uniform act's widespread acceptance.⁵¹

Limited partnership associations were first given a statutory framework in Pennsylvania.⁵² They served the function of surrogate corporations.⁵³ This partnership form, typified in *Southern Fire*, contained one class of associate.⁵⁴ No member could be held person-

42. 129 U.S. 677 (1889).

43. The limited partnership association was created by Pennsylvania statute, 1874 Pa. Laws 271 (current version at 59 PA. CONS. STAT. §§ 341-461 (1964)). In 1966, the statute was repealed in large part and replaced by a provision for professionals not permitted to incorporate. No. 519, § 50(g), 1965 Pa. Laws 1305, 1405.

44. The limited partnership association is a statutorily formed organization which allows its members to escape personal liability for firm debts. Limited partnership associations serve as a substitute for incorporation. However, the association resembles the corporation so closely that Professor Bromberg suggested its elimination from partnership classification. BROMBERG, *supra* note 1, § 26A, at 151-53.

45. 177 U.S. at 450, citing 1874 Pa. Laws 271.

46. *Id.* at 456.

47. *Id.* at 454.

48. *Id.* at 456-57.

49. *Carlsberg Resources Corp. v. Cambria Sav. & Loan Ass'n*, 554 F.2d 1254, 1258, 1264 (3d Cir. 1977). See also BROMBERG, *supra* note 1, § 26A, at 152 n.74.

50. See generally BROMBERG, *supra* note 1, § 26.

51. *Id.*, § 26A, at 151-52.

52. *Id.* at 151.

53. Schwartz, *The Limited Partnership Association—An Alternative to the Corporation for the Small Business with "Control" Problems?*, 20 Rutgers L. Rev. 29 (1965), cited in BROMBERG, *supra* note 1, § 26A, at 151 n.65.

54. BROMBERG, *supra* note 1, § 26A, at 151.

ally liable for the debts of the association.⁵⁵ Liabilities were paid solely from the fund of subscribed capital.⁵⁶

Though classified as an unincorporated organization, the limited partnership association, as described in *Southern Fire*, is extremely close in form to the corporation.⁵⁷ The organization may be taxed and regulated as a corporation.⁵⁸ In fact, scholars of partnership law have expressed doubt regarding the non-corporate status of the association.⁵⁹

Examining the entity status of a limited partnership association in 1900 necessarily entailed a perspective quite different from the contemporary consideration given the varied classes of partners defined by the ULPA.⁶⁰ The current problem in federal courts involves choosing the level of partner within a limited partnership whose domicile should control for diversity purposes. *Southern Fire's* association, composed of single status membership, presents a rather weak precedent upon which to rest a citizenship decision for the modern limited partnership.

The most recent case decided by the Supreme Court under the *Chapman* rule is *United Steelworkers v. Bouligny, Inc.*⁶¹ The United Steelworkers, an unincorporated labor union, claimed citizenship in Pennsylvania where the union maintained its principal place of business.⁶² The union was authorized to sue as an entity under Pennsylvania's common name statute.⁶³ The Court recognized the increasing similarity between certain forms of associations and corporate organizations;⁶⁴ nonetheless, its decision reaffirmed the *Chapman* rule, that for diversity purposes the union was a citizen of each state where one of its members resided.⁶⁵

55. 1874 Pa. Laws 271: "[A]n act authorizing the formation of partnership associations in which the capital subscribed shall alone be responsible for the debts of the association. . . ." (current version at 59 PA. CONS. STAT. §§ 341-461 (1964)).

56. *Id.*

57. See BROMBERG, *supra* note 1, § 26A, at 151.

58. *Id.*

59. *Id.* at 152 n.74. See also Note, *Tax Classification of Limited Partnerships*, 90 Harv. L. Rev. 745 (1977) (distinguishing the tax status of the limited partnership from that of the corporation).

60. See text accompanying notes 18-25 *supra*.

61. 382 U.S. 145 (1965).

62. *Id.* at 146.

63. *Id.*

64. 382 U.S. at 149-53.

65. *Id.* at 151.

The *United Steelworkers* Court distinguished its holding in *Puerto Rico v. Russell & Co.*⁶⁶ In *Russell*, the Supreme Court determined the citizenship of a business organization created under the laws of Puerto Rico.⁶⁷ The status of the so-called *sociedad en comandita*, according to the Court, was recognized within Puerto Rico as an entity similar to the American corporation,⁶⁸ although its organization closely resembled that of a limited partnership. The *Russell* decision described the characteristics of the *sociedad*.⁶⁹ Although the description of a *sociedad* met all the basic requirements of a limited partnership, the Court granted it entity status deeming it a citizen of Puerto Rico.⁷⁰

The Court in *United Steelworkers* recognized a need to explain the exceptional nature of the *Russell* holding.⁷¹ The decision noted a tendency among the courts to interpret *Russell* as the general rule rather than a rare exception. Mr. Justice Fortas writing for the majority in *United Steelworkers* refused to grant entity status to unincorporated associations because it would present the Court with unforeseeable complications.⁷² It was not within the Court's purview to assume the difficulty of establishing guidelines for determining citizenship of unincorporated associations or, more narrowly, unincorporated unions.⁷³ *United Steelworkers* stressed the common law view of unincorporated associations as a group of individuals. Any revision of this rule affecting the jurisdiction of federal courts must emanate from the legislative branch.⁷⁴

66. 288 U.S. 476 (1933).

67. *Id.* at 477.

68. *Id.* at 482.

69. *Id.* at 481.

70. *Id.* at 482.

71. The holding in *Russell* required clarification because it was construed by the United States Court of Appeals for the Second Circuit in *Mason v. American Express Co.*, 334 F.2d 392, 397 (2d Cir. 1964), to mean that the Supreme Court had declared limited partnerships to be juridical persons on a par with corporations. The court in *Mason* examined state statutes and prevailing attitudes supporting entity status. *Id.* at 399-403. The Second Circuit explained that the modern theory of unincorporated associations had departed from the *Chapman* view. The organization had developed into a functioning unit separate from its individual members. *Id.* at 398. The *Mason* interpretation was incorrect because the Supreme Court in *Russell* was merely applying civil law standards of Puerto Rico to the definition of a corporation as it existed under the Organic Act of Puerto Rico. 288 U.S. at 481.

72. 382 U.S. at 152.

73. *Id.* at 152-53.

74. *Id.* at 153.

The decision in *United Steelworkers* reflects the Court's predilection toward restricting diversity jurisdiction. Since the late 1800's there has been a desire to minimize the diversity jurisdiction of the federal courts.⁷⁵ This trend among scholars and jurists to limit the jurisdiction has continued as a result of the heavy case load burdening the federal courts.⁷⁶ However, many commentators have argued forcefully to maintain diversity in those cases for which the jurisdiction was created.⁷⁷ Premises upon which diversity was established have been described as:

1. The desire to avoid regional prejudice against commercial litigants, based in small part on experience and in large part on common-sense anticipation.
2. The desire to permit commercial, manufacturing, and speculative interests to litigate their controversies . . . with other classes, before judges who would be firmly tied to their own interests.
3. The desire to achieve more efficient administration of justice for the classes thus benefited.⁷⁸

Diversity jurisdiction exists as a principal means of access to the federal courts. The more liberal interpreters of the jurisdiction opine that diversity should be conferred in every case where interests are based in different states.⁷⁹

A similar philosophy surrounded the early decision in *Marshall v. Baltimore & Ohio Railroad Co.*,⁸⁰ where the Court created a fictional presumption that all stockholders of a corporation are citizens of the state of incorporation. The Court recognized corporations as artificial persons with identities separate from that of their shareholders.⁸¹

75. See Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 Cornell L.Q. 499 (1928); but cf. Moore and Weckstein, *Diversity Jurisdiction: Past, Present and Future*, 43 Tex. L. Rev. 1 (1964) (defending diversity jurisdiction) [hereinafter Moore and Weckstein].

76. See address by Warren E. Burger, *Annual Report on the State of the Judiciary* (Feb. 13, 1977), reprinted in 97 S.Ct. No. 13 (May 1, 1977); H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* (1973).

77. See, e.g., the proposals of the AMERICAN LAW INSTITUTE, *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* §§ 1301(b)(2), 1302(b) (1969) [hereinafter ALI STUDY]; Moore and Weckstein, *supra* note 75, at 32-34.

78. Frank, *Historical Bases of the Federal Judicial System*, 13 Law and Contemp. Prob. 3, 28 (1948) (footnote omitted).

79. See note 77 *supra*.

80. 57 U.S. (16 How.) 314 (1853).

81. *Id.* at 327.

Recognition of entity status for unincorporated associations might not be an unwarranted expansion of diversity jurisdiction.⁸² *Marshall v. Baltimore & Ohio Railroad Co.* stands as a precedent confirming the Supreme Court's power to grant unincorporated associations citizenship in the state of their organization and/or their principal place of business.⁸³

Professors Hart and Wechsler in their casebook, *The Federal Courts and the Federal System*, query whether the *United Steelworkers* Court could have ruled in favor of the labor union.⁸⁴ Congress did not consider the status of labor unions when adding citizenship of corporations provisions to the diversity statute⁸⁵ in 1958 or when reconsidering it in 1964. Neither Congress nor the Constitution has addressed the issue.⁸⁶ Therefore, the Court would be free to re-examine the function of unincorporated associations in light of modern business practice and locate the true interests involved for purposes of diversity jurisdiction.

Professors Moore and Weckstein have written: "[I]ndividual members are only indirectly affected and it is the organization itself, the aggregate of all the members bound together by their economic investment that is the true party in interest. Thus, the principal place of business is an appropriate criterion by which to govern an incorporated or unincorporated association's access to federal courts . . ."⁸⁷ To follow this approach would in effect alter the Court's view

82. See P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1092 (2d ed. 1973) [hereinafter HART & WECHSLER].

83. See text accompanying notes 157-71 *infra* for a discussion of the possible effects of Fed. R. Civ. P. 82 upon expansion of the fiction of juridical entities.

84. HART & WECHSLER, *supra* note 82, at 1092.

85. 28 U.S.C. § 1332(c) (1970).

86. HART & WECHSLER at 1092 poses some relevant questions regarding the consequences of a change in the rule of *United Steelworkers v. Bouligny*:

Did the Court in Bouligny make too much, or too little, of the addition of § 1332(c) in 1958 or of its amendment in 1964 . . . ? The legislative history shows no consideration of the Bouligny problem, or of the rule of *Chapman v. Barney*, at either time. Would it "amend diversity jurisdiction" for the Court to overrule its own prior decision in *Chapman*? Did the Court exaggerate the difficulties such overruling would bring in its wake? How would the overruling have affected an unincorporated association organized under the laws of state A and having its principal place of business in state B? Is the problem likely to arise? Aside from any practical difficulties, is there a rational basis for distinguishing between a corporation and a labor union?

Id. supra note 82 at 1092 (citation omitted).

87. Moore and Weckstein, *supra* note 75, at 34.

of unincorporated associations under *Chapman v. Barney*. A result similar to that in *Marshall v. Baltimore & Ohio Railroad Co.* would occur.

The American Law Institute's (ALI) study of federal jurisdiction also recommends separate citizenship for unincorporated associations.⁸⁸ The study favors this adjustment as consonant with the purposes for creating the jurisdiction: "General diversity jurisdiction should be retained unless it can be asserted with confidence that the shortcomings of state court justice which originally gave rise to it no longer exist to any significant degree."⁸⁹ The Institute suggests that unincorporated associations and partnerships be deemed citizens of the state in which they maintain their principal place of business.⁹⁰ In addition they would retain citizenship in any state where the organization has carried on a local establishment for a time longer than two years.⁹¹ The approach taken by the ALI study answers the Court's claim that a new standard for citizenship brings uncertainty and undue complications to diversity cases. Although the Court in *United Steelworkers* viewed the Institute's reasoning favorably, it directed such changes to Congress for consideration

88. ALI Study, *supra* note 77, §§ 1301(b)(2) and 1302(b).

89. *Id.* at 106.

90. *Id.*, proposed § 1301(b)(2) states:

A partnership or other unincorporated association capable of suing or being sued as an entity in the State in which an action is brought shall be deemed a citizen of the State or foreign State where it has its principal place of business, whether such action is brought by or against such partnership or other unincorporated association or by or against any person as an agent or representative thereof.

The commentary to proposed § 1301(b)(2) explains:

One practical effect is not to deprive an out-of-state plaintiff suing such an association in the state of its principal activity from access to the federal court because a member of the association is of the same citizenship as the plaintiff. Also, the association with its principal place of business in another state suing as a plaintiff will not be barred from a federal forum simply because one of its members is of the same citizenship as the defendant.

Id. at 115.

91. *Id.* § 1302(b) reads:

No corporation incorporated or having its principal place of business in the United States and no partnership, unincorporated association, or sole proprietorship having its principal place of business in the United States, that has and for a period of more than two years has maintained a local establishment in a State, can invoke that jurisdiction either originally or on removal in any district in that State in any action arising out of the activities of that establishment.

and delineation.⁹²

It is clear from this survey of Supreme Court decisions that the Court is unwilling to exercise its power to alter the traditional status of the unincorporated association from a group of individuals to that of a business "personality." However, it is yet unclear how the courts should treat associations, such as limited partnerships, whose limited members have been denied legal capacity to represent the interests of the partnership.

IV. *Erie* and The Federal Rules: The Circuits Diverge

Defining the citizenship of limited partnerships is distinguishable from resolving diversity issues confronted by the Supreme Court in *Chapman*, *Southern Fire*, and *United Steelworkers*. The associations discussed by the Court were composed of members holding equal status within the organization. State law in those cases did not deprive associates of the capacity to sue in the interests of their associations. Therefore, the Court was free to continue the common law rule setting the associations' citizenship as that of each member's domicile.⁹³

Limited partnerships, on the other hand, must contain two levels of partner to satisfy statutory requirements. The limited partner status is deprived of capacity to sue and be sued in the interests of the partnership under the ULPA as adopted by state law.⁹⁴

A determination of the citizenship of limited partnerships presents issues of great significance. In diversity cases, the access of all unincorporated associations to the federal courts would be greatly affected depending upon the outcome. If the Court concludes that capacity should always be determined before diversity is examined, the *Chapman* rule could fall by the wayside.⁹⁵ Even a narrow interpretation of such a holding would exclude limited partners from the

92. 382 U.S. at 153.

93. See text accompanying notes 26-92 *supra*.

94. See text accompanying notes 1-25 *supra*.

95. BROMBERG, *supra* note 1, § 58, at 337-38. Many states have adopted common-name statutes, granting unincorporated associations the right to sue and be sued as entities. These statutes thereby affect the capacity of such unincorporated associations. As will be explained in the discussion which follows, a judicial determination of capacity under Rule 17(b) prior to diversity might indicate that the common-name statutes apply. Such unincorporated associations would attain entity status in the federal courts as "citizens" of the states in which they were formed. FED. R. Civ. P. 17(b).

Court's diversity considerations.⁹⁶

The foundation for this result remains in the *Erie* doctrine⁹⁷ which requires that state law be followed in diversity cases where federal law has not spoken. The Federal Rules of Civil Procedure incorporate the *Erie* doctrine into Rule 17(b) governing capacity to sue.⁹⁸ Therefore, state rules which determine capacity to sue and proper party questions, would also determine which partners' residences must be examined to fulfill the diversity requirement.⁹⁹

The Second and Third Circuits have each approached the problem differently. Judge Friendly, writing for the Second Circuit, found in *Colonial Realty Corp. v. Bache & Co.*¹⁰⁰ that complete diversity between the limited partners of Bache & Co. and Colonial Realty Corp. was not necessary to satisfy the federal diversity requirement.¹⁰¹ The decision utilized Rule 17(b) by implication.¹⁰² Looking to the law of the forum state, Judge Friendly determined that the ULPA as adopted by New York¹⁰³ allowed consideration

96. Limited partners lack capacity to sue upon partnership rights in the forum state. *Colonial Realty Corp. v. Bache & Co.*, 358 F.2d 178, 183 (2d Cir.), *cert. denied*, 385 U.S. 817 (1966).

97. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

98. FED. R. CIV. P. 17(b) states, in part: "Capacity to sue or be sued shall be determined by the law of the state in which the district court is held. . . ."

99. Professor Wright in section 70 of his treatise, *FEDERAL COURTS*, discusses the relationship of FED. R. CIV. P. 17(b) to diversity jurisdiction in this way: "Since the rule [FED. R. CIV. P. 17(b)] does direct attention to the person with the substantive right sought to be enforced, state law must be looked to in diversity cases to see who this person is, although the federal rule then governs on the procedural question of joinder." C. WRIGHT, *FEDERAL COURTS* § 70, at 331 (3d ed. 1976) [hereinafter *FEDERAL COURTS*].

100. 358 F.2d 178 (2d. Cir.), *cert. denied*, 385 U.S. 817 (1966).

101. *Id.* at 183.

102. Although Judge Friendly never cited Rule 17(b) in the *Colonial Realty* decision, it is logically the only authority for his utilization of New York capacity rules. FED. R. CIV. P. 17(b).

103. N.Y. PARTNERSHIP LAW § 115 (McKinney Supp. 1977) entitled "Parties to Actions" states: "A contributor, unless he is a general partner, is not a proper party to proceedings by or against a partnership, except where the object is to enforce a limited partner's right against or liability to the partnership, and except in cases provided for in section one hundred fifteen—a of this article."

New York does allow limited partners capacity to sue upon partnership rights in one instance. That is, N.Y. PARTNERSHIP LAW § 115-a (McKinney Supp. 1977) allows a limited partners' derivative action brought in the right of a limited partnership to procure a judgment in its favor. *See, e.g., Alpert v. Haimes*, 64 Misc. 2d 608, 315 N.Y.S. 2d 332 (1970) where the court found that a representative action based upon section 115-a of the N.Y. PARTNERSHIP LAW would lie where there was an alleged breach of a general partner's fiduciary duty to the limited partners and where wrongful conduct was claimed. *See also* Comment, *Standing of Limited Partners to Sue Derivatively*, 65 Colum. L. Rev. 1463 (1965).

only of general partners for diversity purposes, since, under New York law, general partners alone could sue on behalf of the partnership.¹⁰⁴

The Second Circuit viewed the capacity requirement as primary, that is, to be evaluated before diversity is determined.¹⁰⁵ The reasoning underlying the decision, though not fully stated, appears to be that a plaintiff must have the capacity to assert his right under state law before a federal court can proceed to examine his citizenship for diversity purposes. Therefore, only proper parties fulfill the diversity requirement. Capacity under Rule 17(b) must be determined by the law of the forum state. It follows that those who lack capacity to appear in the state courts are also excluded as parties from federal suits involving a like interest.

The Third Circuit reached the opposite result in *Carlsberg Resource Corp. v. Cambria Savings and Loan Association*.¹⁰⁶ The plaintiff was the sole general partner of Carlsberg Mobil Home Properties, Ltd., a limited partnership. However, the Court chose to include all the limited partners of the plaintiff partnership in its diversity determination.¹⁰⁷ Some of the plaintiff limited partners and all of the defendants were Pennsylvania citizens. The court of appeals on its own motion dismissed the case for lack of diversity jurisdiction.¹⁰⁸ A restrictive approach to diversity jurisdiction colored the court's analysis of the case law.¹⁰⁹ The court concluded that

104. 358 F. 2d at 183-84. For a comparison of the New York statute with the ULPA § 26, see note 103 *supra*.

105. Judge Friendly stressed the importance of first defining the proper parties to the action after which diversity jurisdiction is examined:

[W]here, as here, there was diversity between the plaintiff and all the general partners of the defendant, identity of citizenship between the plaintiff and a limited partner was not fatal because under the applicable New York statute a limited partner "is not a proper party to proceedings by or against a partnership, except where the object is to enforce a limited partner's right against or liability to the partnership." N.Y. Partnership Law § 115. . . . [A] suit brought against a New York partnership must thus be considered to be against the general partners only and identity of citizenship between a limited partner and the plaintiff does not destroy diversity.

358 F.2d at 183-84 (citations omitted).

106. 554 F.2d 1254 (3d Cir. 1977).

107. *Id.* at 1255.

108. *Id.* at 1255, 1262.

109. Judge Adams, for the Third Circuit, stated the court's philosophy concerning diversity jurisdiction:

In view of the possibly deleterious consequences of a failure to adhere meticulously to the constitutional and statutory standards governing diversity jurisdiction, access to

granting jurisdiction where some limited partners were of the same citizenship as their adversaries would be an unwarranted expansion of diversity jurisdiction. The implication¹¹⁰ was that the result reached by the Second Circuit in *Colonial Realty*¹¹¹ permitted minimal diversity in violation of the Supreme Court's pronouncement of complete diversity¹¹² in *Strawbridge v. Curtiss*.¹¹³

The Third Circuit interpreted *Strawbridge* as a firm command from the United States Supreme Court instructing the federal courts to accept only cases where no opposing parties share like citizenship.¹¹⁴ However, the wording of the decision leaves a choice of proper parties to be examined when determining whether diversity is complete. Chief Justice Marshall, speaking for the Court in *Strawbridge*, stated "that where the interest is joint each of the persons concerned in that interest must be competent to sue, or liable to be sued, in those [federal] courts."¹¹⁵ The Third Circuit¹¹⁶

the federal courts, on the ground of the diverse citizenship of the parties, should be granted only where clearly appropriate and only to the extent, if at all, that is justified. *Id.* at 1257. For a more liberal approach to diversity jurisdiction, see Moore and Weckstein, *supra* note 75.

110. During its discussion of the *Colonial Realty* decision, the *Carlsberg* court explained its disagreement with Judge Friendly's approach to the problem:

Specifically, to ignore an identity of citizenship between limited partners and litigants with opposing interests, because of reliance on state statutes concerning the capacity to sue, does operate to liberalize access to the federal courts under diversity jurisdiction. It would seem to follow that Rule 82 bars the utilization of Rule 17 in this context.

554 F.2d at 1261. FED. R. CIV. P. 82 forbids the federal rules of civil procedure from being invoked to broaden or limit the jurisdiction of federal courts. For a more detailed discussion of FED. R. CIV. P. 82 and its effect on FED. R. CIV. P. 17, see the text accompanying notes 157-78 *infra*.

111. *Colonial Realty Corp. v. Bache & Co.*, 358 F.2d 178 (2d Cir.), *cert. denied*, 385 U.S. 817 (1966).

112. Minimal diversity occurs when any two opposing interests hold citizenship of different states. Congress has granted federal courts jurisdiction over certain interpleader actions meeting the requirements of minimal diversity. 28 U.S.C. § 1335 (1970).

113. 7 U.S. (3 Cranch) 267 (1806). *Strawbridge* described the rule of complete diversity in this way:

The words of the act of congress are, "where an alien is a party; or the suit is between a citizen of a state where the suit is brought, and a citizen of another state."

The court understands these expressions to mean, that each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued, in federal courts. That is, that where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued, in those courts.

Id.

114. *Id.* at 267.

115. *Id.*

read Chief Justice Marshall's words "competent to sue, or liable to be sued" to mean that mere citizenship of some state would grant the initial capacity to determine complete diversity.¹¹⁷ However, the phrase has been interpreted to require that each party being examined for diversity purposes must first have the capacity to sue or be sued concerning the subject matter of the litigation.¹¹⁸ Judge Friendly had given *Strawbridge* the latter interpretation in *Colonial Realty*.¹¹⁹

Judge Adams, for the *Carlsberg* majority, presented three arguments in defense of the court's conclusion. First, any expansion of diversity jurisdiction would be detrimental to the federal system of justice and federalism itself.¹²⁰ That is, time and funds spent on an increased caseload would ultimately delay the justice system for all federal litigants.¹²¹ Furthermore, broadening diversity jurisdiction would undermine federalism by permitting an unconstitutional encroachment on the rights of state courts to adjudicate their laws.

Second, Judge Adams was troubled by the possibility that diversity jurisdiction could be altered indirectly through state legislatures' amending their capacity laws.¹²² He found that the holdings of *Chapman*, *Southern Fire* and *United Steelworkers*¹²³ reaffirmed the standard of complete diversity in that all members of unincorporated associations must be counted for diversity purposes regardless of state law.¹²⁴ However, he also noted that "[I]n so stating, we recognize that the three leading Supreme Court cases in this area, . . . do not squarely address the exact question posed here—in effect, whether partners of divergent status may be treated differently for purposes of an evaluation regarding diversity of citizenship."¹²⁵

116. *Carlsberg Resources Corp. v. Cambria Sav. & Loan Ass'n*, 554 F.2d 1254 (3d Cir. 1977).

117. The *Carlsberg* court noted that "[w]hile the [*Strawbridge*] Court refers to 'entitlement' to sue, as we read the opinion, it appears to be speaking only to 'entitlement' based upon the requisite citizenship mandated by the diversity statute." *Id.* at 1258 n.14.

118. See *FEDERAL COURTS*, *supra* note 99, § 70.

119. 358 F. 2d 178, 183 (2d Cir. 1966).

120. *Carlsberg Resources Corp. v. Cambria Sav. & Loan Ass'n*, 554 F.2d 1254, 1256 (3d Cir. 1977).

121. *Id.*

122. *Id.* at 1261.

123. See text accompanying notes 33-92 *supra*.

124. 554 F.2d at 1258-59.

125. *Id.* at 1259.

Third, the court explained that capacity and diversity are distinguishable.¹²⁶ Diversity is the more fundamental concept in the federal courts and must be determined before competence to sue is established.¹²⁷ The majority illustrated the separation of capacity and diversity with two Third Circuit decisions, *McSparran v. Weist*¹²⁸ and *Underwood v. Maloney*.¹²⁹

In *McSparran*, the court refused to count the citizenship of a guardian for diversity purposes.¹³⁰ The court determined that the guardian was a "straw party" in "a naked arrangement for the selection of an out-of-state guardian in order to prosecute a diversity suit."¹³¹ The guardian was, therefore, collusively joined in violation of federal law.¹³² For diversity purposes the citizenship of the minor, the real party in interest, should have been counted.¹³³

As pointed out by Judge Hunter's dissent in *Carlsberg*, the *McSparran* holding is an exception to the rule that "capacity to sue—as dictated by state law—generally selects the proper parties, for diversity purposes."¹³⁴ *McSparran* turned upon an interpretation of a federal statute,¹³⁵ to which Rule 17(b) is subject in cases of parties collusively joined to obtain federal jurisdiction. In *Carlsberg*, the federal statute did not apply to alter the traditional selection of the proper parties through the use of the law of the forum state under Rule 17(b).

*Underwood v. Maloney*¹³⁶ involved a class action by members of

126. The court stated: "[C]onsiderations of varying membership status should not bear on the fundamental inquiry whether diversity exists." *Id.* at 1259.

127. *Id.* at 1260. However, the Third Circuit found that the Supreme Court had never addressed the problem directly. Judge Adams then postulated: "It may be for this reason that the Supreme Court has, in the leading cases concerning partnerships and other non-incorporated associations, declined to review problems involving diversity jurisdiction through the perspective of capacity to sue." *Id.* See the text accompanying notes 113-18 *supra* for a discussion of *Strawbridge v. Curtiss*.

128. 402 F.2d 867 (3d Cir. 1968), *cert. denied sub nom. Fritzinger v. Weist*, 395 U.S. 903 (1969).

129. 256 F.2d 334 (3d Cir.), *cert. denied*, 358 U.S. 864 (1958).

130. 402 F.2d at 875.

131. *Id.*

132. Under 28 U.S.C. § 1359 "[a] district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court." *Id.* (1970).

133. 402 F.2d at 876.

134. 554 F.2d at 1263 n.6 (dissenting opinion).

135. See note 132 *supra*. 28 U.S.C. § 1359 (1970).

136. 256 F.2d 334 (3d Cir.), *cert. denied*, 358 U.S. 864 (1958).

a union. The Third Circuit determined the capacity of the class using Rule 17(b) and the law of the forum state. The court found that the Pennsylvania rule requiring unions to litigate as entities deprived members of capacity to sue or be sued in class actions.¹³⁷ On rehearing, the court looked at the class representatives as individuals *and* members of the union. However, the Pennsylvania rule requiring the union to litigate as an entity disqualified union members from representing their fellow members in a class action.¹³⁸ This reasoning then permitted the Third Circuit to invoke the *Chapman* rule:¹³⁹ where a state has endowed an unincorporated association with the capacity to sue or be sued as an entity, "for jurisdictional purposes the citizenship of an unincorporated association is determined by the citizenship of its members."¹⁴⁰

The *Underwood* decision does not entirely support the majority's point in *Carlsberg* that capacity is a totally separate issue from diversity jurisdiction.¹⁴¹ The Third Circuit did in fact attempt to use state law in *Underwood* to determine capacity before it approached the issue of diversity jurisdiction.¹⁴² Commentators questioned the result reached in *Underwood* as a misinterpretation of Rule 17(b).¹⁴³

The validity of the *Underwood* decision was cast further into doubt by the passage of Rule 23.2¹⁴⁴ of the Federal Rules of Civil Procedure which provides class standing for unincorporated associations. Therefore, it no longer seems necessary to refer to state law under Rule 17(b) in a case such as *Underwood*. Rule 23.2 controls.¹⁴⁵

Judge Hunter, dissenting strongly from the *Carlsberg* majority, found that diversity had been satisfied.¹⁴⁶ His dissent took note of the changed form of the limited partnership under the ULPA,¹⁴⁷ in

137. 256 F.2d at 337-38.

138. *Id.* at 342.

139. 129 U.S. 677 (1889).

140. 256 F.2d at 338.

141. 554 F.2d at 1260. See text accompanying notes 126-133 *supra*.

142. 256 F.2d at 337-38.

143. See HART & WECHSLER, *supra* note 82, at 1093. For a fully developed criticism of *Underwood* based on Rule 17(b) in conjunction with the *Erie* doctrine, see Note, *The Problem of Capacity in Union Suits: A Potpourri of Erie, Diversity and the Federal Rules of Civil Procedure*, 68 Yale L.J. 1182 (1959).

144. FED. R. CIV. P. 23.2 is entitled, "Actions Relating to Unincorporated Associations."

145. See 3A MOORE'S FEDERAL PRACTICE ¶ 17.25, at 17-262 n.32. (rev. ed. 1977).

146. 554 F.2d. at 1266.

147. *Id.* The Pennsylvania statute governing the capacity of limited and general partners is based upon the uniform act, ULPA § 26. 59 PA. CONS. STAT. § 545 (1964) states, in part:

particular the section dealing with the capacity to sue.¹⁴⁸ Judge Hunter questioned the majority's logic in not using the act as adopted by all the states to determine those properly before the court.¹⁴⁹ "I fail to see, though, how a court knows whose citizenship to count without first determining who the parties are. By 'parties' I mean real parties, those who have the capacity to bring suit, and in some cases where the categories diverge, those who are the real parties in interest. No one can examine citizenship *in vacuo*."¹⁵⁰

Unlike the majority, Judge Hunter was not disturbed by state legislatures' control over capacity rules and the possible effect on diversity requirements.¹⁵¹ He likened the situation to that of out-of-state executors who are governed by state laws.¹⁵²

The dissent found it improbable that legislatures would alter partnership law with the goal of expanding or contracting diversity jurisdiction.¹⁵³ The legislators passed the ULPA in order to reflect the goals of the limited partnership form.¹⁵⁴ Thus, it would be impractical for a state legislature to amend its law for so singular a purpose as affecting diversity jurisdiction and ignore the value of the uniform act. Judge Hunter concluded that the customary treatment of limited partnerships in diversity cases is inappropriate for those partnerships created under the ULPA.¹⁵⁵ Their organization has altered radically. Therefore, the change requires a new evaluation of the diversity rules by the federal courts.¹⁵⁶

Following the *Carlsberg* decision a Colorado district court in *Grynberg v. B.B.L. Associates*¹⁵⁷ confronted a related problem. The

"A contributor, unless he is [a] general partner, is not a proper party to [a] proceeding by or against a partnership. . . ." For a comparison with the uniform act, see note 25 *supra*, citing ULPA § 26 in full.

148. 554 F.2d at 1265 (dissenting opinion).

149. *Id.* at 1264.

150. *Id.* at 1263.

151. *Id.* at 1265 (dissenting opinion).

152. *Id.* (dissenting opinion). The federal courts are protected against "straw parties" by 28 U.S.C. § 1359 (1970) eliminating federal jurisdiction over actions in which a party is involved in a case solely for the purpose of gaining federal jurisdiction for the case. See the text accompanying notes 130-35 *supra* for a discussion of the *McSparran* case presenting the problem more fully.

153. 554 F.2d at 1265 (dissenting opinion).

154. *Id.* at 1264-65 (dissenting opinion).

155. *Id.* at 1266 (dissenting opinion).

156. *Id.* (dissenting opinion).

157. 436 F. Supp. 564 (D. Colo. 1977).

plaintiff was the sole general partner of Jack Grynberg Associates, a limited partnership formed in Colorado.¹⁵⁸ He sued B.B.L. Associates, one of the limited partners, to recover the value of a quarter interest in the firm.¹⁵⁹ B.B.L. Associates was a general partnership composed of three Illinois citizens.¹⁶⁰ The defendant argued that the identity of citizenship among the defendants and one limited partner, not a party to the action, prevented the federal court from maintaining jurisdiction over the action.¹⁶¹

The United States District Court for the District of Colorado held that the citizenship of limited partnerships in diversity cases is that of each member, including the limited partners.¹⁶² Therefore, diversity was destroyed.¹⁶³ The decision further explained the point, mentioned briefly by the majority in *Carlsberg*,¹⁶⁴ that the Federal Rules of Civil Procedure are self-limiting. Under Rule 82, "[t]hese rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein."¹⁶⁵

The court explained that the *Colonial Realty* decision was an improper use of Rule 17(b) to expand diversity jurisdiction¹⁶⁶ in contravention of the established common law rule.¹⁶⁷ The vagaries of state law, the court continued, should never work to alter federal jurisdiction: "[w]ere the 'citizenship' of individuals in an association to depend on characteristics, such as capacity to sue, derived only from the existence of a state law, federal courts in some states would have jurisdiction over cases which other federal courts could not hear."¹⁶⁸

The opinion conceded that the ULPA was uniform in all the states;¹⁶⁹ however, to permit the ULPA to expand jurisdiction would

158. *Id.* at 566.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 568.

163. *Id.*

164. *Carlsberg Resources Corp. v. Cambria Sav. & Loan Ass'n*, 554 F.2d 1254, 1260-61 (3d Cir. 1977).

165. *FED. R. CIV. P.* 82.

166. 436 F. Supp. at 568.

167. For a discussion of the common law rule, see the text accompanying notes 26-92 *supra*.

168. 436 F. Supp. at 568.

169. *Id.* at 568 n.4.

create a dangerous precedent for courts interpreting laws which have not gained nationwide acceptance.¹⁷⁰ Finally, noting an inequitable result in the denial of access to federal courts, *Grynberg* called upon Congress to redefine the citizenship of limited partnerships. Rule 82 withheld this power from the courts.¹⁷¹

V. Conclusion

An issue of major significance will confront the Supreme Court when it chooses to resolve the disparity in the *Carlsberg* and *Colonial Realty* cases. Its discussion must clarify the relationship between capacity to sue through Rule 17(b) and the determination of diversity jurisdiction. That is, whether *Chapman v. Barney*, decided under the rule of *Swift v. Tyson*, should take precedence over the Federal Rules of Civil Procedure which refer the federal courts to state capacity rules. The *Chapman* rule which bears no relationship to state law, was promulgated under the now defunct federal common law of capacity. As noted in section IV,¹⁷² the *Chapman* decision and those that followed are distinguishable from recent cases involving limited partnerships governed by the ULPA.

The mandate of Rule 82 prohibiting the use of the Federal Rules of Civil Procedure to vary federal jurisdiction may affect the outcome in the same manner as the *Chapman* rule. It could be argued that Rule 82 prevents federal courts from creating a new "personality" fiction for all unincorporated associations as the Supreme Court did for corporations in *Marshall v. Baltimore & Ohio Railroad Co.*¹⁷³

As for the effect of Rule 17(b) on diversity jurisdiction, it would seem that diversity is dependent upon the prior determination of capacity. Since the proper parties before the court vary with each case, those counted for diversity purposes should reflect the true interests of the parties. A rule such as *Colonial Realty* may be viewed not as an expansion of jurisdiction but as a correct determination of diversity among proper parties.

In the same vein, the *Carlsberg* approach does not seem to be a balanced one. *Carlsberg* holds that the citizenship of the limited

170. *Id.* at 568.

171. *Id.*

172. See text accompanying notes 93-171 *supra*.

173. See text accompanying notes 75-85 *supra*.

partners shall be counted where the partnership sues through one of its general partners. The court in effect grants those limited partners "capacity" to appear before the federal courts.

However, the limited partner would lack competence to sue in federal court under Rule 17(b) because state law denies the limited partner capacity to participate in proceedings by or against the partnership.¹⁷⁴

The discussion of the *McSparran*¹⁷⁵ case indicates that there is only one proper departure from the usual result that parties who have the capacity to sue under state law are the identical parties counted for diversity purposes. A different party would be counted for diversity jurisdiction where federal statute would supercede state law. In the *McSparran* case a guardian, though having the capacity to sue, was collusively joined to gain diversity. The Third Circuit under 28 U.S.C. § 1359 disregarded the citizenship of the guardian in favor of the minor, who was the real party in interest. The court was thereby deprived of jurisdiction since diversity was destroyed. Allowance of suit by an "interested" guardian was not considered to be an unwarranted expansion of jurisdiction in violation of Rule 82.¹⁷⁶

Under the ULPA no limited partner may involve himself in the litigation of the rights of the partnership.¹⁷⁷ The federal standing of limited partnerships should parallel the capacity rules set out by the ULPA as adopted by the states. The existence of limited partners should not involve the courts unless the limited partner's rights or liabilities against the partnership are at stake.¹⁷⁸

Establishing the citizenship of limited partnerships as that of the general partners alone is consistent with the goals of diversity jurisdiction. Since the general partners are the sole management arms of the organization it would be rare if not impossible to find a limited partnership whose center of activities would be located in a state other than that of at least one of its general partners. It seems incongruous to allow the citizenship of a limited partner to destroy diversity where his only function in the firm is to contribute funds.

174. See ULPA § 26.

175. See text accompanying notes 130-35 *supra*.

176. FED. R. CIV. P. 82.

177. ULPA § 26.

178. See, e.g., N.Y. PARTNERSHIP LAW § 115-a (McKinney Supp. 1977).

Limited partnerships are among those business organizations for which the jurisdiction was created as a protection. These organizations are not inferior to corporations or partnerships; therefore, their access to the federal courts should be based upon similar standards.

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