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Federal Jurisdiction--Citizenship in a Class or Entity Action

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tax problems, and will be available for later conferences. However, if the attorney has little time for periodic reviews of his clients' estates, or if the occasion demands that a will be drawn up immediately and the client is vague on property values, then Sargent sees the formula as the appropriate solution.

Victor Alfred Barone

Federal Jurisdiction—Citizenship in a Class or Entity Action

D, United Mine Workers of America, entered into an agreement with *X*, Anthracite Mine Operators. *D* was to collect royalty payments on each ton of coal produced by *X* and place it in a health fund for anthracite coal miners. *P*, representing 23,000 of these miners, brought an action demanding judgment for all the delinquent royalty payments not collected. The class of persons *P* represented lived mostly in Pennsylvania. The principal office of *D* was in Washington, D.C. The action was based on diversity of citizenship. *D* moved to dismiss for lack of jurisdiction. *Held*, motion granted. For jurisdictional purposes the citizenship of an unincorporated association is determined by the citizenship of its members. Almost one-fourth of the members of the United Mine Workers lived in Pennsylvania. The representatives of the class lived in Pennsylvania. Because some of the parties plaintiff and defendant were citizens of the same state there was no diversity of citizenship. *Nedd v. UMW*, 225 F. Supp. 750 (E.D. Penn. 1963).

Some states allow union members to bring a class suit. West Virginia is one of these. *Milan v. Settle*, 127 W. Va. 271, 32 S.E.2d 269 (1944). Other states allow unions to bring a suit as an entity. This is the situation in the principal case. PA. R. Civ. P. 2153(a). The federal courts have apparently adopted the view that the citizenship status of the union is dependent on whether a class or entity action is brought. When a union is sued in a federal court the citizenship of the union is that of the individual members of the union if the union is sued as an entity. *Hettenbaugh v. Airline Pilots Ass'n*, 189 F.2d 319 (5th Cir. 1951). Thus if *X*, a citizen of Pennsylvania, sues *Z* union as an entity and *Z* union has 99 members that are citizens of West Virginia and one that is a citizen of Pennsylvania there is no diversity of citizenship because one of the parties plaintiff

has the same citizenship as one of the parties defendant. If the individual members of a union are sued in a class action then the citizenship of the class is determined by the citizenship of the representatives of the class. Thus, if X, a Pennsylvania citizen, sues all the members of Z union in a class action and chooses the representatives who live in West Virginia there is diversity of citizenship. This is true though some of the class are citizens of the same state as the plaintiff. *Montgomery Ward & Co. v. Langer*, 168 F.2d 182 (8th Cir. 1948); *Tunstall v. Brotherhood of Locomotive F. and E.*, 148 F.2d 403 (4th Cir. 1945); *Fitzgerald v. Dillon*, 92 F. Supp. 681 (E.D.N.Y. 1950).

The principal case was brought by Ps as a class against the defendant union as a entity. Applying the current citizenship-determining rules, jurisdiction was denied because the citizenship of the Ps as representatives of the class was identical to some of the members of the defendant association.

The question then arises, could the jurisdictional problem have been avoided by suing the defendant association as a class and choosing as representatives only those persons whose citizenship was diverse to the plaintiffs? The answer under present authorities appears to be that this may be done if the suit can be originated in a state where a union is not suable as an entity.

It has been held that if a state allows a union to be sued as an entity then a class action by union members cannot be maintained in that state under Rule 23. *Underwood v. Maloney*, 256 F.2d 333 (3rd Cir. 1958). In reaching this conclusion the federal court looked to Rule 17(b) of the Federal Rules of Civil Procedures to see in what capacity a union could sue. This rule directs the federal court to look to the state law in which the suit is brought to determine capacity. FED R. CIV. P. 17(b). Looking to the state law of Pennsylvania, the court said that because a union could sue as an entity the members of the union could not bring a class action. The court is saying that merely because state law provides that a union can sue as an entity, the members cannot sue as a class. Of course it is clear that under Rule 23 one person cannot sue as a class composed only of himself. FED R. CIV. P. 23. It would follow that a union, acting as such, with entity capacity could never bring a class action. However, Rule 17(b) does not indicate that a class action involves union capacity, and the only question to be answered under Rule 17(b) is whether the named representatives have capac-

ity as individuals. Note, 68 YALE L.J. 1182 (1959). There is nothing in Rule 17(b) that limits the right to bring a class action under Rule 23 in a proper case. *Tunstall v. Brotherhood of Locomotive F. and E.*, *supra*. In fact, one of the policies of Rule 23 was to make suits against unincorporated associations procedurally possible in federal courts. Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 GEO. L.J. 551 (1937).

Therefore, in a state that allows a union to be sued as an entity the right of the union members to sue as a class should not be limited by the capacity provision of Rule 17(b). However, if the state permits only a representative action, as in West Virginia, federal jurisdiction should not permit an entity action in the federal court. Unlike West Virginia, the union in Pennsylvania should have a choice of bringing suit as an entity or having members bring a class action in the federal courts. There seems little reason for denying the convenience of the federal class action because a state court in the forum state would permit the action to be brought by the union as an entity.

In rendering its judgment in such actions the court must obviously take cognizance of the state substantive law which may indeed be affected by the distinction between the class and entity action in the state courts. This seems a necessary implication of the "Erie Doctrine." *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). Nonetheless, the convenience and accessibility of the federal forum should not turn on state law in such situations.

Thus, in the principal case, assuming Pennsylvania law is procedural, the plaintiffs should be successful in their suit if rather than suing the union as an entity they would have sued the members of the union as a class and would have chosen the representatives of that class who have residency in West Virginia.

Boyd Lee Warner

Insurance—Insured's Breach of Cooperation Clause

P, an insurance company, sought a declaratory judgment to determine liability under an omnibus insured clause of an automobile liability policy. *P* insured the owner of the car. The owner and her daughter were injured in an accident at which time her husband,