THE PROBLEM OF CAPACITY IN UNION SUITS: A POTPOURRI OF ERIE, DIVERSITY AND THE FEDERAL RULES OF CIVIL PROCEDURE*

For purposes of suit, a union may be viewed either as an aggregate of individuals or as an entity distinct from its members. At common law, a union is an aggregation, not an entity capable of appearing as a party litigant; and the difficulty of joining all members in an action can serve to insulate unions from suit or to deny them access to the courts. Although many states continue to regard unions as aggregates of individuals, the problem of multiple joinder has been solved in most of these states through the class action, a

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2. See, e.g., Collins v. Barry, 11 Ill. App. 2d 119, 136 N.E.2d 597 (1956); Milam v. Settle, 127 W. Va. 271, 32 S.E.2d 269 (1944). See also United Mine Workers v. Coronado Coal Co., 259 U.S. 344, 389 (1922) (“To remand persons injured to a suit against each of the 400,000 members [of the union] to recover damages . . . would be to leave them remediless.”); Sturges, Unincorporated Associations As Parties to Actions, 33 Yale L.J. 383, 384-87 (1924); Kaplan, supra note 1, at 946; Comment, 37 Ill. L. Rev. 70, 71 (1942).


In West Virginia, a union is generally unable to sue or be sued as an entity, and a class action may not be brought on behalf of its members. See Milam v. Settle, supra note 2; Marion v. Chandler, 139 W. Va. 596, 81 S.E.2d 89 (1954). But the union's existence is recognized for some purposes. W. Va. Code Ann. § 4550 (1955) (permitting union suit for protection of trade mark); W. Va. Code Ann. § 3501 (1955) (permitting union trustees to accept gifts); Cook v. Collins, 131 W. Va. 475, 48 S.E.2d 161 (1948) (action by member against officers individually; rights under constitution and bylaws of union at issue); State ex rel. Ben Franklin Coal Co. v. Lewis, 113 W. Va. 529, 532, 169 S.E. 812, 813 (1933) (dictum) (union members having knowledge of injunction against officers are bound thereby); National Woolen Mills v. Journeymen Tailors' Union, 100 W. Va. 627, 131 S.E. 357 (1926) (union's capacity not considered in injunction suit for illegal picketing).

Courts have interpreted the Ohio provision for class actions, Ohio Rev. Code Ann. § 2307.21 (Page 1954), as permitting labor unions to be sued as entities. See Williams v. United Bhd. of Carpenters, 81 F. Supp. 150 (N.D. Ohio 1948); Hillenbrand v. Trades Council, 14 Ohio Dec. 628, 647 (Cincinnati Super. Ct. 1904).
form of suit which allows a few individuals to litigate on behalf of all union members. Other jurisdictions have abandoned the aggregate concept and have enabled unions and other unincorporated associations to sue or be sued as entities.

Class and entity actions may be functionally equivalent, but the distinction between them can effectively determine whether union litigants meet the requirements of federal jurisdiction based upon diversity of citizenship. If suit is brought under rule 23(a) of the Federal Rules of Civil Procedure—which permits a class action whenever “persons constituting a class” are too numerous for practicable joinder—federal courts look only to the citizenship of the class’s named representatives in deciding whether diversity exists. On the other hand, when a union litigates as an entity, the federal courts tradi-


In the District of Columbia, court decisions have endowed unions with capacity to litigate as entities. See Busby v. Electric Util. Employees Union, 147 F.2d 865 (D.C. Cir. 1945).

Statutes and cases concerning capacity of labor unions are compiled state by state in Forkosch, The Legal Status and Suability of Labor Unions, 28 Temple L.Q. 1, 8-27 (1954).

6. That is, an entity-action judgment in one state may have the same effect as a class-action judgment in another. See note 55 infra.

7. Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.


tionally equate its citizenship with that of all union members. Although a corporation can effectively achieve a single citizenship through the judicial fiction that all its shareholders are citizens of its chartering state, a similar presumption is not generally indulged with respect to unions. Since diversity jurisdiction does not exist if any plaintiff has the same citizenship as any defendant, a large labor organization litigating as an entity will often be excluded from federal court because at least one member has the same citizenship as an opposing party. In contrast, by selecting representatives with appropriate citizenship, union members litigating as a class can frequently secure federal jurisdiction—though the union itself could not.

9. See, e.g., Hettenbaugh v. Airline Pilots Ass'n, 189 F.2d 319 (5th Cir. 1951); Lloyd A. Fry Roofing Co. v. Textile Workers, 149 F. Supp. 695 (E.D. Pa. 1957); Douglas v. United Elec. Workers, 127 F. Supp. 795 (E.D. Mich. 1955); 3 Moore ¶ 23.08. But see American Fed'n of Musicians v. Stein, 213 F.2d 679, 685-88 (6th Cir.), cert. denied, 348 U.S. 873 (1954) ("[T]he rule that the citizenship of unincorporated associations generally is that of its members seems to be losing its vitality"; union could have single citizenship for diversity purposes if it were shown at trial to have characteristics similar to those of a corporation); Comment, 66 Yale L.J. 712, 724 n.174 (1957) (collecting cases).


11. Resort to this presumption in establishing a single corporate "citizenship" for diversity purposes was apparently thought to be constitutionally required. Article III of the Constitution gives federal courts jurisdiction over controversies between "citizens of different States," and only individuals were held to be citizens. Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 85, 91 (1809); Muller v. Dows, 94 U.S. 444, 445 (1876). See also Blake v. McClung, 172 U.S. 239, 259 (1898) (corporation not a "citizen" under article IV privileges and immunities clause); Hague v. CIO, 307 U.S. 496, 514 (1939) (corporation not a "citizen" under fourteenth amendment); McGovney, supra note 10, at 853, 861.

12. See cases cited note 9 infra.


15. See Tunstall v. Brotherhood of Locomotive Firemen, 148 F.2d 403, 405 (4th Cir. 1945) (dictum); Sperry Prods. Inc. v. Association of Am. Railroads, 132 F.2d
UNION CAPACITY TO LITIGATE

Whether or not a class or entity action is possible in federal court depends initially upon the capacity of the litigants. Rule 17(b) directs the federal judiciary to determine capacity by following state law, but varies the applicable law according to the type of litigant. The first sentence of rule 17(b) states that "the capacity of an individual, other than one acting in a representative capacity... shall be determined by the law of his domicile." The next sentence stipulates that a corporation's capacity "shall be determined by the law under which it was organized." Finally, the third sentence governs "all other cases": "capacity... shall be determined by the law of the state in which the district court is held, except... that," when jurisdiction is founded upon a federal question, an "unincorporated association, which has no such capacity by the law of such state," may litigate as an entity. Thus, in a diversity case, if a union lacks capacity to sue and be sued as an entity under the law of the forum state, only a class action by or against union members can be brought in federal court. Conversely, if state law allows only an entity suit, the class action—and readily achieved diversity jurisdiction—may be unavailable.

This second situation arose in the recent case of Underwood v. Maloney. There, a diversity suit was brought by and against union members as a class in a federal district court sitting in Pennsylvania, a state which permits a union to litigate only as an entity. Plaintiff Underwood was a Pennsylvania citizen and the ousted president of a local union affiliated with the International Union of Operating Engineers. He sought reinstatement by suing Maloney—the International president and an Illinois citizen—both individually and as representative of the defendant class. In a companion action, several members of the local (citizens of Pennsylvania and Delaware) brought a...
class action on behalf of the local membership against Maloney and another
union official (who was a citizen of the District of Columbia) as representa-
tives of the defendant international union members. The federal district court
entertained the suits and decided them on the merits. On appeal, the Third
Circuit ordered the second action dismissed. The appellate court reasoned
that the suit, though formally a class action, was in reality between the local
and international unions. Since a union is neither an individual nor a cor-
poration, the court determined capacity on the basis of the third sentence of
rule 17(b), that is, on the basis of the law of the forum state. Looking to
the Pennsylvania rule requiring unions to litigate as entities, the court con-

20. Both actions arose out of the same controversy. Underwood, suspended from
union office and membership, sued for reinstatement and for damages. One Dawson, on
behalf of the local's members, sued for an accounting, for an injunction against the
"Order of Supervision" whereby Maloney had placed the local in trusteeship, and for
reinstatement of the local's officers. 14 F.R.D. 222 (E.D. Pa. 1953) (determination of
(judgments for defendants in Underwood action, Underwood having had "procedural
due process" under International's constitution; in Dawson suit, court set aside trustee-
ship over local union, but held that a trustee might again be appointed if International's
constitution and court's opinion complied with), judgment stayed, 245 F.2d 797 (3d Cir.
1957) (injunction issued to maintain status quo pending disposition of appeals), rev'd in
part, aff'd in part, 256 F.2d 334 (3d Cir.) (since class action would have been unavailable
under Pennsylvania law, actions by Dawson and Underwood against Maloney as
representative must fail and cases be dismissed; insofar as Underwood was suing Maloney
as individual, judgment of lower court in favor of defendant affirmed), petition for re-
hearing denied, 256 F.2d 340 (3d Cir.), cert. denied, 358 U.S. 864 (1958). At present,
the same issues are again being litigated, this time in the United States District Court
for the District of Delaware. The parties plaintiff remain the same but the representa-
tive defendant is Maloney's successor, Delaney. Underwood v. Delaney, 6 CCH Lab. L.
21. Judgment in the first action was affirmed insofar as it related to Maloney individually.
22. Id. at 337-38.
23. See note 16 supra.
24. The Pennsylvania Rules of Civil Procedure make the entity action mandatory for
plaintiff and defendant unions.

Rule 2152. Actions by Associations.

An action prosecuted by an association shall be prosecuted in the name of a mem-
ber or members thereof as trustees ad litem for such association. An action so pros-
ecuted shall be entitled "X Association by A and B, Trustees ad Litem" against the
party defendant.

Rule 2153. Actions against Associations.

(a) In an action prosecuted against an association it shall be sufficient to name as
defendant either the association by its name . . . or any officer of the association as
trustee ad litem for such association in the manner prescribed by Rule 2152.

[Note of Procedural Rules Committee to Rule 2230, the class action provision:]

Suits by or against unincorporated associations are not to be brought as class
suits under this Rule. Such suits are now regulated by Pa. R.C.P. Nos. 2152 and 2153.
cluded that this rule deprives them of capacity to sue or be sued in class actions.\textsuperscript{25} The Third Circuit further said that the second suit, viewed as one between two entities, must be dismissed because some members of the plaintiff local had the same citizenship as some members of the defendant international.\textsuperscript{26}

In a subsequent opinion denying a petition for rehearing,\textsuperscript{27} the court adhered to its original decision but altered its rationale. This time, the court purported to treat the class action as a suit between groups of individuals, and regarded the capacity of the named representatives as critical. The exception to sentence one of rule 17(b) was deemed apposite on the ground that the individual litigants were "acting in a representative capacity."\textsuperscript{28} Turning, therefore, to sentence three (which governs "all other cases"), the court held that the litigants' capacity must be determined by examining the law of the forum state.\textsuperscript{29} The court then found that the individual litigants lacked capacity, but not on account of any personal disability. Rather, the Pennsylvania law requiring unions to litigate as entities was deemed to deprive union members of capacity to represent their fellow members in a class action.\textsuperscript{30} The court also answered the contention that its construction of rule 17(b) would deny effect to rule 23(a). Though 23(a) makes the class action generally available, the court ruled that such an action cannot be brought if the class representatives lack juridical capacity.\textsuperscript{31}

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\item 25. 256 F.2d at 338.
\item 26. Ibid. See note 13 supra.
\item 27. 256 F.2d at 340.
\item 28. For the text of rule 17(b), see note 16 supra.
\item 29. This aspect of the court's analysis was not clear. It stated: "Since under the law of Pennsylvania individuals lack the capacity to be sued as class representatives of an unincorporated association, they have no such capacity in the federal courts." 256 F.2d at 342. By clear implication, the court was concerned with representative capacity alone, since it looked to the law of the forum state. Had it been concerned with the individual capacity of the named representatives, it would have been referred by rule 17(b) to the law of the representatives' respective domiciles. Furthermore, the court cited as authority 3 Moore ¶¶ 17.18, which deals with "Capacity of Individual Acting in a Representative Capacity."
\item 30. 256 F.2d at 342.
\item 31. Ibid. Rule 23(a) is quoted in note 7 supra.
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The Third Circuit's original opinion postulates that, realistically viewed, the class action was between two unions rather than two groups of members. Accordingly, the opinion regards the capacity of the unions themselves as decisive. And, confusing a union with a class composed of its members, the opinion advances the theory that, under Pennsylvania law, a union lacks capacity to sue or be sued as a class. This analysis misconstrues the nature of the class action, which is a procedural device designed to obviate the joinder of numerous parties, and which is appropriately used only by or against a group of individuals, not a single entity. Although a union may, in effect, sue or be sued in a class action, the representative members and not the union will actually appear in the litigation. If the union were considered the only party litigant, the requirements of rule 23(a) could never be satisfied, for it does not authorize a class action except when "persons constituting a class are so numerous as to make it impracticable to bring them all before the court." The Underwood court evidently presupposed that an unincorporated association may possess both capacity to appear as an entity and capacity to appear as a class. The third sentence of rule 17(b) implies, however, that a union lacks capacity to litigate save as an entity. The sentence states that: "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 . . . [an] unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name [to enforce a federal right]." The phrasing of the "except" clause indicates that the "capacity" which state law may deny is the capacity to sue or be sued as an entity. Indeed, previous diversity cases have read rule 17(b) in this manner, for they have uniformly assumed that, if a state fails to accord unions entity capacity, unions have no capacity whatever in the federal courts of that state. Only their members

32. See Giordano v. Radio Corp. of America, 183 F.2d 558, 561 (3d Cir. 1950) ("[S]ince there are only fifteen other members of this class . . . it could hardly be held that they constitute a class 'so numerous as to make it impracticable to bring them all before the court.'"); Kainz v. Anheuser-Busch, Inc., 194 F.2d 737, 740 (7th Cir. 1952); System Fed'n No. 91, Ry. Employees' Dep't v. Reed, 180 F.2d 991 (6th Cir. 1950); Pacific Fire Ins. Co. v. Reiner, 45 F. Supp. 703 (E.D. La. 1942) (dictum); CHAFFEE, SOME PROBLEMS OF EQUITY 243 (1950); Wheaton, Representative Suits Involving Numerous Litigants, 19 CORNELL L.Q. 399 (1934); Note, 36 HARV. L. REV. 89 (1922).

33. See note 55 infra.

34. See Benz v. Compania Naviera Hidalgo, S.A., 233 F.2d 62, 68 (9th Cir.), cert. denied on this issue, 352 U.S. 890 (1956), aff'd on other grounds, 353 U.S. 138 (1957) (answering argument that difference between class and entity actions based on "semantics, not substance," court held that union was not a party to class action against members, and that its treasury could not be reached).

35. See note 7 supra.

36. Emphasis added.

37. "Provisions in Rule 24 [now rule 17(b)] . . . give . . . [an] unincorporated association the capacity to sue or be sued as an entity in the federal courts in those states which recognize the entity theory . . ." Moore, Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft, 25 Geor. L.J. 551, 566 (1937).

38. See cases cited note 17 supra.
can then sue or be sued, either by joining all of them or by means of a class action. Furthermore, if a union is viewed as possessing entity capacity and no other, "capacity" can be read throughout rule 17(b) to mean the right of a party to litigate in its own name regardless of the cause of action. For example, the individual who is of age and mentally competent in his domicile, and the corporation which is authorized to litigate by its charting state, have the capacity which rule 17(b) requires. Similarly, a union has capacity if, in the forum state, it is authorized to litigate as a single party and in its own name. The Third Circuit should have recognized, therefore, that the capacity to sue and be sued and the right to enforce a particular claim should be distinguished. De Franco v. United States, 18 F.R.D. 156, 159 (S.D. Cal. 1955) (dictum); Magee v. McNany, 10 F.R.D. 5, 11 (W.D. Pa. 1950) (dictum); see Angel v. Bullington, 330 U.S. 183 (1947); 3 Moore ¶ 17.16. But see McCollum v. Mayfield, 130 F. Supp. 112 (N.D. Cal. 1955) (though felon deprived of capacity by law of domicile, rule 17(b) held not to preclude suit in federal court on constitutional right). Compare David Lupton's Sons Co. v. Automobile Club of America, 225 U.S. 489 (1912) (holding that plaintiff corporation, assumed to have capacity under the law of its domicile, had capacity to litigate in a federal court sitting in New York), with Woods v. Interstate Realty Co., 337 U.S. 535 (1949) (overruling Lupton to the extent that the action there was not barred on the ground that the corporation, having failed to comply with New York's law governing foreign corporations, would have been unable to enforce its claim in the New York courts).

40. See De Franco v. United States, supra note 39, at 159 ("'Capacity' raises only the question of whether the plaintiff is free from general disability such as infancy, insanity or some other form of incompetency."); Magee v. McNany, supra note 39.

Corporations invariably have capacity to sue and be sued. See Hearings Before the House Committee on the Jurisdiction on the Rules of Civil Procedure for the District Courts of the United States, 75th Cong., 3d Sess., ser. 17, at 19 (1938):

Mr. Ramsay: You do not mean to state that you would approve any kind of a law of any State which would give immunity to any corporation organized under the laws of that State from being sued anywhere in the United States?

Mr. Mitchell (Chairman of Advisory Committee for Rules of Civil Procedure): Not at all. I do not approve any such thing as that. I do not know of any such case, a business corporation.

Mr. Ramsay: . . . If you take section (b) of rule 17 in its entirety . . . Delaware could practically exempt a corporation from being sued and then if it should not have that exemption clause in its charter, then the law that is applicable in the State where it might be sued shall apply, but if it is in there you cannot sue them at all.

Mr. Mitchell: I think we ought to deal with realities.

The issue of corporate capacity to litigate usually arises on dissolution, when, although defunct for most purposes, the corporation may still have capacity to litigate under the law of its domicile. See, e.g., Signal Gasoline Corp. v. United States, 46 F. Supp. 276 (S.D. Cal. 1942); Display Stage Lighting Co. v. Century Lighting, Inc., 41 F. Supp. 937 (S.D.N.Y. 1941).

a class action does not involve union capacity, and that the only question to be answered under rule 17(b) is whether the named representatives have capacity as individuals.

Had the court, on denying rehearing, consistently treated the class action as a suit by or against individuals, it would probably have found that the prerequisites of rule 17(b) were met. To be sure, the court correctly began its analysis by looking to 17(b)'s first sentence in order to establish the capacity of the individual litigants. But the court wrongly assumed that persons litigating as members of a class come within the exception to that sentence, which embraces "those acting in a representative capacity." 42 As used in this phrase, the term "representative" refers to fiduciaries like executors and guardians for minors and incompetents. 43 In the original draft, 17(b) simply ruled that an individual's capacity is governed by the law of his domicile. 44 The provision for "representatives" appeared in a later draft. 45 It serves to continue prior federal practice regarding personal fiduciaries, 46 and to complement the traditional rule that an executor or guardian, as a creature of state statute, may not litigate beyond the borders of the appointing state. 47

42. See note 16 supra.

Research has revealed only one case other than Underwood in which the "representative capacity" clause in rule 17(b) was held to refer to the capacity of a class representative. The Underwood holding had been foreshadowed the previous year by Lloyd A. Fry Roofing Co. v. Textile Workers, 152 F. Supp. 19 (E.D. Pa. 1957); both cases arose in the same district court. Fry Roofing held that the class representatives lacked capacity under rule 17(b) because "under Pennsylvania law individuals lack the capacity to be sued as class representatives of an unincorporated association." 152 F. Supp. at 20.

44. See U.S. SUPREME COURT ADVISORY COMM. ON RULES FOR CIVIL PROCEDURE, PRELIMINARY DRAFT OF RULES OF CIVIL PROCEDURE rule 24 (1936); U.S. SUPREME COURT ADVISORY COMM. ON RULES FOR CIVIL PROCEDURE, PROPOSED RULES OF CIVIL PROCEDURE rule 17(b) (1937).
45. See U.S. SUPREME COURT ADVISORY COMM. ON RULES FOR CIVIL PROCEDURE, FINAL REPORT rule 17(b) (1937).
47. On administrators and executors, see Lawrence v. Nelson, 143 U.S. 215, 222 (1892) ("[T]he general rule [is] that an administrator's power to act . . . is limited to the State from whose courts he derives his authority, and that therefore he cannot sue or be sued in another State in which he has not been appointed administrator."); The plaintiff certainly cannot maintain this bill as administrator . . . because he admits that he has never taken out letters of administration in New York; and the letters of administration granted to him in Michigan confer no power beyond the limits of that State, and cannot authorize him to maintain any suit in the courts, either State or national, held in any other State.

Johnson v. Powers, 139 U.S. 156, 157-58 (1891); Noonan v. Bradley, 76 U.S. (9 Wall.) 394, 400 (1869); Burrowes v. Goodman, 50 F.2d 92 (2d Cir. 1931); Derrick v. New
In contrast, a class representative is either self-appointed or chosen at random from among the eligible members of a class.\textsuperscript{48} Unlike a fiduciary, his interest in litigation is personal,\textsuperscript{49} and he cannot be held accountable for his conduct of a suit.\textsuperscript{50} Consequently, the exception to 17(b)’s first

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The technical ground for refusing a right of action dependent solely on foreign letters testamentary is that it would be giving extra territorial force to the judgment or decree of a foreign court or officer, and an interference with the jurisdiction of our own courts. But the more practical ground is that of public policy to prevent assets from being taken out of the state to the possible injury of our own citizens, creditors, who might thus be forced to go to a foreign tribunal to obtain satisfaction of their claims.
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For the same rule as applied to guardians, see Morgan v. Potter, 157 U.S. 195, 197 (1895); Pulver v. Leonard, 176 Fed. 596 (C. C. D. Minn. 1909); Ex parte Huffman, 167 Fed. 422 (C. C. W. D. Tex. 1909); Stumberg, Principles of Conflict of Laws 443-46 (2d ed. 1951).

48. The only prerequisite for representing members of a class is that laid down by rule 23(a). The representative must “fairly insure the adequate representation of all . . . .” Adequacy of representation is thus to be determined by the courts. See Hansberry v. Lee, 311 U.S. 32 (1940); Kentucky Home Mut. Life Ins. Co. v. Duling, 190 F.2d 797 (6th Cir. 1951); Fitzgerald v. Jandreau, 16 F.R.D. 578 (S.D. N.Y. 1954); 3 Moore \S\ 23.07.

49. In the “true” class action, a representative’s interests are held jointly or in common with all other members of the class. See Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921); Smith v. Swormstedt, 57 U.S. (16 How.) 288 (1853); System Fed’n No. 91, Ry. Employees’ Dep’t v. Reed, 180 F.2d 991 (6th Cir. 1950); Rank v. Krug, 142 F. Supp. 1 (S. D. Cal. 1956); 3 Moore \S\ 23.08.

When the class action is “spurious” or “hybrid,” the class representative is even more readily distinguishable from the fiduciary, since the right which the representative is enforcing is held individually and could therefore have been litigated without joining all other members of the class. See, e.g., Schatte v. International Alliance of Theatrical Stage Employees, 183 F.2d 685 (9th Cir.), cert. denied, 340 U.S. 827 (1950) (spurious class action lies where individuals each have damage claims arising out of loss of employment, and common questions of law or fact are involved); Pentland v. Dravo Corp., 152 F.2d 851 (3d Cir. 1945) (class was spurious since overtime wage claims against employer were held individually and it was unnecessary to join all others who might have similar claims); Lucy v. Adams, 134 F. Supp. 235 (N. D. Ala.), aff’d, 228 F.2d 619 (5th Cir. 1955), cert. denied, 351 U.S. 931 (1956) (Negroes may bring spurious class action to test their personal rights to gain admission to segregated university). For an example of the “hybrid” class action, see Dickinson v. Burnham, 197 F.2d 973, 980 (2d Cir.), cert. denied, 344 U.S. 875 (1952). See also Pennsylvania Co. for Ins. on Lives v. Deckert, 123 F.2d 979, 983 (3d Cir. 1941); 3 Moore \S\ 23.09-.10.

50. Absent members of a class whose interests are not adequately represented in a class action are not bound by the adjudication. Their protection against incompetent or collusive conduct of the litigation is therefore the right to relitigate the issues which, as to them, are not res judicata. See Hansberry v. Lee, 311 U.S. 32 (1940) (denial of due process to bind members of class not adequately represented). FED. R. CIV. P. 23(c) provides further protection to absent members of the class by requiring court approval
sentence should not be interpreted to encompass class representatives. And the capacity of a class representative, like that of an individual who is litigating his own cause of action, should be determined as the first sentence of rule 17(b) directs—by the law of his domicile. Since all the named parties in the Underwood action were apparently competent to appear in the courts of their home states, and since no overlap existed between the citizenship of plaintiff and defendant representatives, the class action ought not to have been dismissed for want of capacity or diversity.

If taken in its logical conclusion, the interpretation of rule 17(b) expounded in the later appellate opinion would seriously limit the availability of class actions under rule 23(a). According to Underwood, federal courts could not entertain class actions when sitting in states which restrict or do not permit them, since individual capacity to represent a class would exist only if the state allowed such representation in its own courts. But one policy behind rule 23(a) is to make suits involving unincorporated associations procedurally possible in federal courts. This policy, if not the mere existence of rule 23(a) itself, would appear to dictate that, given diversity of citizenship, federal courts should take jurisdiction over class actions irrespective of local law.

Had the Third Circuit found that all the Underwood litigants possessed capacity, that court would have had to face yet another question in passing on the trial court's jurisdiction: If a federal court entertains a class action when sitting in a state whose courts allow only entity actions, has the doctrine of Erie R.R. v. Tompkins been violated? The answer to this question turns on whether the state rule barring class actions is "substantive"—requiring the federal court to follow state practice—or "procedural"—permitting the federal court to entertain whatever form of suit its own rules allow. The measure of "substance" in diversity cases is not nominal classification but effect on the outcome of litigation. Consequently, should a federal court in Pennsylvania of any compromise. See Cohen v. Young, 127 F.2d 721 (6th Cir. 1942); Birnbaum v. Birrell, 17 F.R.D. 409 (S.D.N.Y. 1955); Cross v. Oneida Paper Products Co., 117 F. Supp. 919 (D.N.J. 1954). Fed. R. Civ. P. 24(a) also gives any member of a true class who may be inadequately represented a right to intervene. See 3 Moore ¶ 23.12.

In any case, members of a spurious class not before the court are not bound by the adjudication. See All Am. Airways, Inc. v. Elderd, 209 F.2d 247, 248 (2d Cir. 1954); York v. Guaranty Trust Co., 143 F.2d 503, 529 (2d Cir. 1944), rev'd on other grounds, 326 U.S. 99 (1945); Shipley v. Pittsburgh & L.E.R.R., 7 F.R.D. 744 (W.D. Pa. 1948). Thus, no reason would exist to bring an action against derelict representatives.


52. 304 U.S. 64 (1938).

53. State practice is regarded as "substantive" if the federal court's deviation from it in a diversity case would produce a result at variance with that obtainable in a court of the state where the federal court is sitting. For state rules that have been found
frame its judgment in a class action to secure the same outcome that a state court would reach in an entity suit, the "substance" test would be met.

Although an injunction is equally binding whether against a union as an entity or against its members as a class, the effect of a money judgment may vary when the members rather than the union itself are sued. In Pennsylvania injunction cases under the class and entity rules, compare Patterson v. Wyoming Valley District Council, 31 Pa. Super. 112, 119-20 (1906), and York Mfg. Co. v. Oberdick, 10 Pa. Dist. 463 (C.P. 1901), with Wortex Mills, Inc. v. Textile Workers, 380 Pa. 3, 7-8, 109 A.2d 815, 817-18 (1954).

The Court then held that "federal policy favoring jury decisions of disputed fact questions" is paramount. This case is noted in The Supreme Court, 1957 Term, 72 HARV. L. REV. 77, 147-50 (1958).


55. Statutes granting unions and other unincorporated associations capacity to sue and be sued in their own name generally provide for the recovery of judgments out of association assets. See, e.g., ALA. CODE ANN. tit. 7, § 145 (1941); VA. CODE ANN. § 8-66 (1957); RESTATEMENT, JUDGMENTS § 78, comment c (1942). Some of these statutes expressly limit recovery to the common assets when a union is the only named defendant. See, e.g., FLA. STAT. ANN. § 447.11 (1952); KAN. GEN. STAT. ANN. § 52-292 (1952); TEXAS REV. Civ. STAT. ANN. art. 6137 (1949). Other statutes allow recovery from the union members even when the union itself is the only named defendant. See, e.g., DEL. CODE ANN. tit. 10, § 3904 (1953); VERMONT STAT. § 1565 (1947).

When union members are sued as a class, some courts deny recovery from the common assets on the ground that all the members have not been joined. Although the class action would be res judicata as to the issues involved, individual members, if brought...
vania (as in many states where a union may litigate in its own name), a judgment against a union will support a recovery only against union assets. Since the class action may no longer be used in Pennsylvania by individuals representing union members, the state rule for recovery in class actions provides no guide for a federal court framing a judgment against such representatives. Some jurisdictions which authorize union-member class actions permit a money judgment to be satisfied out of the union treasury.

More important, this practice obtained in Pennsylvania prior to that state's adoption of its entity statute; the new law was designed to affect only procedure before the court in a suit on the judgment, might succeed in showing that they were not within the class, or that they had not participated in or ratified the conduct which gave rise to damages. Permitting a judgment to run against their proportionate share of the common assets would violate the common-law rule that a member of an association not before the court may not be subjected to a money judgment merely because of his membership. Recovery is therefore limited to the assets of those individuals shown in court to have been assenting members of the class. See Benz v. Compania Naviga Hidalgo, S.A., 233 F.2d 62, 67-68 (9th Cir.), cert. denied on this issue, 352 U.S. 890 (1956), aff'd on other grounds, 353 U.S. 138 (1957); Pascale v. Emery, 95 F. Supp. 147 (D. Mass. 1951); Malloy v. Carroll, 287 Mass. 376, 391-92, 191 N.E. 681, 667-68 (1934); Sweetman v. Barrows, 263 Mass. 349, 355, 161 N.E. 272, 275 (1928). Other jurisdictions, regarding the class action as a means of holding the union itself liable, will permit a judgment to be recovered from the union treasury. See United Packing House Workers v. Boynton, 240 Iowa 212, 221, 35 N.W.2d 881, 887 (1949); Bayel v. Rango, 304 Ill. App. 203, 25 N.E.2d 1015 (1940); Colt v. Hicks, 97 Ind. App. 177, 191-95, 179 N.E. 335, 340-42 (1933); Oster v. Brotherhood of Locomotive Firemen, 271 Pa. 419, 114 Atl. 377 (1921) (dictum); Chafee, Some Problems of Equity 221 (1950); Kaplan, Suits Against Unincorporated Associations Under the Federal Rules of Civil Procedure, 51 Yale L.J. 40, 43-46 (1941).

56. A judgment entered against an association sued in the name of the association or in the name of a trustee ad litem shall support execution upon the property of the association.

PA. R. Civ. P. 2158.

No trustee ad litem and no individual member of an association shall be liable for the payment of a money judgment entered against the association as such.

PA. R. Civ. P. 2155; 3 Goodrich-Amram §§ 2155-1, 2158-1 (citing cases).

An individual member may be held liable for association obligations if he is personally joined and shown to have engaged in or later ratified the transaction. PA. R. Civ. P. 2153(c); Kaplan v. Delaware County Republican Executive Comm., 7 Pa. D. & C.2d 554, 43 Del. County 229 (C.P. 1956) (dictum); Creighton v. Media Troop No. 1, B.S.A., 38 Del. County 410 (Pa. C.P. 1951); 3 Goodrich-Amram §§ 2153(c)-1, 2155-1.

57. See note 55 supra.

and not to alter the substantive liability of unions.\textsuperscript{59} In addition, the Third Circuit could have recognized that the class-action device was used only to obtain diversity jurisdiction, that, had the same controversy been litigated in state court, the unions would have appeared as entities, and that the entity-action damage remedy would therefore be appropriate. Thus, had the trial court in \textit{Underwood} found against the defendant union members, it could have satisfied \textit{Erie} requirements on either (or both) of two theories permitting a money judgment to be recovered from the union treasury.

Admittedly, had the \textit{Underwood} court heard the class action, the outcome would have been superficially different from that obtainable in local courts, inasmuch as Pennsylvania would not have entertained the class action at all. But the \textit{Erie} mandate could still have been observed. A federal court exercising diversity jurisdiction must attempt to rule as a court of the forum state only when a divergent result would defeat an ascertainable state policy.\textsuperscript{60} And, in \textit{Underwood}, federal jurisdiction was not inconsistent with local policy. Pennsylvania made the class action unavailable to members of unincorporated associations because it had enabled such associations to litigate as entities.\textsuperscript{61} Hence, that state sought to facilitate actions by and against unincorporated associations—not to limit the scope of federal diversity jurisdiction. Federal jurisdiction based on a class suit would therefore be anything but incompatible with the Pennsylvania statute permitting unincorporated


\textsuperscript{60} A state statutory provision may not be controlling if it appears to constitute a formal requirement or a rule of convenience rather than a reasoned state policy. See \textit{Byrd v. Blue Ridge Co-op.}, 356 U.S. 525, 536-38 (1958) (federal policy of having jury determine questions of fact unaffected by different allocation between judge and jury in state court); Note, 56 \textit{Yale L.J.} 1037, 1045-46 (1947) (discussing the applicability of \textit{Erie} to state forum non conveniens rules). \textit{But cf. Bernhardt v. Polygraphic Co.}, 350 U.S. 198 (1956); \textit{First Nat'l Bank v. United Air Lines, Inc.}, 342 U.S. 396, 401 (1952) (Frankfurter, J., dissenting).

\textsuperscript{61} See 3 \textit{Goodrich-Amram} §§ 2151-2 n.6, 2152-2, 2156(a)-1, 2158-1. For discussion of the desirability of entity status for unions, see \textit{United Mine Workers v. Coronado Coal Co.}, 259 U.S. 344, 383-92 (1922); \textit{Busby v. Electric Util. Employees Union}, 147 F.2d 865 (D.C. Cir. 1945); \textit{Warren, Corporate Advantages Without Incorporation} 22-24 (1929); \textit{Sturges, Unincorporated Associations as Parties to Actions}, 33 \textit{Yale L.J.} 383 (1924).
associations to enforce their rights, and making it possible to hold them accountable for their wrongs.\footnote{62}

Although the class action would have appropriately served to bring the Underwood litigation into federal court—and is frequently used to assure diverse citizenship\footnote{63}—it affords a tortuous if not irrational route to diversity jurisdiction. To litigate on behalf of a class, would-be litigants must establish adequacy of representation\footnote{64} and the impracticability of joining all members of the class.\footnote{65} In addition, the existence of diversity need bear no relation to the locus of union activity, for the pertinent citizenship is that of the persons fortuitously, or forehandedly, chosen as class representatives.\footnote{66} Diverse citizenship may thus arise or be created in cases which cannot subserve the purpose of diversity jurisdiction—enabling out-of-state litigants to gain entry into federal court.\footnote{67}

If a union’s members, like a corporation’s shareholders, were conclusively presumed to have a single citizenship, diversity jurisdiction could be achieved in union litigation by a more rational means than the class action. A single union “citizenship” recognized in all federal courts would presumably carry with it capacity to litigate as an entity in diversity cases wherever arising.

\footnote{62. See Spotz’s Estate, 51 Pa. D. & C. 427, 440-41 (Orphans’ Ct. 1944); \textit{3 Gronich-Amram} \S 2153(a)-2:

\textbf{(A)} Association activities may be conducted on so large and extended a scale that the plaintiff . . . may be unable to ascertain who are the members and officers of the association . . . . The rule therefore permits the plaintiff to sue the unincorporated association in its association name without naming any members or officers as parties defendant . . . .

An unincorporated association has just as much actual existence . . . as any corporation . . . . If it has sufficient existence to have a separate bank account or to borrow money it has sufficient existence to be sued . . . in its own name.

\footnote{63. See note 15 supra and accompanying text.}

\footnote{64. \textit{FED. R. Civ. P. 23(a)}, quoted note 7 supra. See note 48 supra.}

\footnote{65. \textit{FED. R. Civ. P. 23(a)}). See notes 7, 32 supra and accompanying text.

Also, the effect of money judgments is less certain when suit is brought against a class rather than an entity. See note 55 supra and accompanying text.

\footnote{66. See cases cited note 8 supra. If jurisdiction is based on a collusive naming of parties to create diversity, the federal court may dismiss. See 28 U.S.C. \S 1359 (1952); Mathies v. Seymour Mfg. Co., 23 F.R.D. 64, 83-85 (D. Conn. 1958) (since class representative had real interest in litigation and had not surrendered control over conduct of action to those without requisite citizenship, there was no collusion and district court had jurisdiction); Cashman v. Amador & Sacramento Canal Co., 118 U.S. 58, 61 (1886); Detroit v. Dean, 106 U.S. 537, 541 (1882); Farr v. Detroit Trust Co., 116 F.2d 807, 811-12 (6th Cir. 1941); Marvin v. Ellis, 9 Fed. 367 (C.C.E.D. La. 1881).

But a capacity of this scope would conflict with rule 17(b)'s directive that the capacity of an unincorporated association be determined by the law of the forum state. Similarly, such capacity, by allowing a union in a diversity action to secure or be subjected to judgments which the courts of the forum state might not grant, could violate the *Erie* doctrine. The precedent of a single citizenship for corporate shareholders would be of little assistance in solving the *Erie* problems which would arise were a union's members deemed to have a common citizenship. Unlike a union, a corporation is endowed with a capacity to litigate recognized by all jurisdictions. Nevertheless, a common citizenship for union members and a grant of union capacity to litigate as an entity could be reconciled with rule 17(b) and *Erie*. For example, those federal courts which hear diversity cases in states where unions may litigate as entities would presume that all a union's members are citizens of the state in which the union has its principal executive offices; and, in states where unions have no entity capacity, this presumption would not arise. Of course, whether or not union members are accorded a single citizenship in entity jurisdictions will depend in part on contemporary attitudes toward diversity jurisdiction. So long as diversity jurisdiction remains as readily in-

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68. See note 40 *supra*.

69. Not all organizations having capacity to sue and be sued as entities under state law need be treated by the federal courts as citizens for purposes of diversity jurisdiction. See Great So. Fire Proof Hotel Co. v. Jones, 177 U.S. 449 (1900) (even though partnership had entity status and was termed a “citizen” under Pennsylvania law, it was not a citizen for diversity purposes). The standard for determination might instead be whether the organization were sufficiently like a corporation. See American Fed'n of Musicians v. Stein, 213 F.2d 679, 686-88 (6th Cir.), *cert. denied*, 348 U.S. 873 (1954); Puerto Rico v. Russell & Co., 288 U.S. 476 (1933).

70. Advocates of single union citizenship generally propose locating it in the state where the union's principal place of business is maintained. See 3 MOORE ¶ 17.25, at 1413; Comment, 66 YALE L.J. 712, 749 (1957). This rule for unions would correspond to the treatment of corporations which are now deemed to be citizens of the state where their principal place of business is located, see note 71 *infra*, as well as of their chartering state. Although a corporation's principal place of business may be readily ascertained, see Comment, 58 COLUM. L. Rev. 1287, 1295-98 (1958), a union's “business” cannot be measured by such standards as the location of manufacturing facilities or the volume of sales. Compare Sperry Prods., Inc. v. Association of Am. Railroads, 132 F.2d 408, 412 (2d Cir. 1942) (concurring opinion). A more reasonable locus for union citizenship would be the state where its principal executive offices are maintained. This rule would assure uniformity by avoiding the question of whether the principal place of business is in the state from which authority is exercised or the state where the greatest proportion of the membership is concentrated. Moreover, the executive-offices rule would tie citizenship to the state where union policy is formed and the entire membership is best represented. Compare 2 RABEL, THE *CONFLICT OF LAWS: A COMPARATIVE STUDY* 115 (1947) (domicile of partnership located at central offices).

71. A synopsis of the arguments for and against diversity jurisdiction is given in Comment, 58 COLUM. L. REV. 1287, 1302 n.105 (1958).

Congress has recently limited the scope of diversity jurisdiction over corporations by deeming a corporation to be a “citizen” of both the state where its principal place of
vocable as it is today, however, union members should be able to sue or be sued in federal courts as easily as other litigants.

business is located and the state of incorporation. See Act of July 25, 1958, 72 Stat. 415, 28 U.S.C.A. § 1332 (Supp. 1958), amending 28 U.S.C. § 1332 (1952); S. Rep. No. 1830, 85th Cong., 2d Sess. (1958). Prior to this legislation, a corporation chartered in a state other than the one where it conducted its principal activities had ready access to the federal court in the latter state because of its foreign citizenship, even though the controversy was of a purely local nature. Thus, the policy upon which diversity jurisdiction is based—protecting out-of-state litigants from the supposed chauvinism of local courts, see authorities cited note 64 supra—was perverted. By considering a corporation to be a citizen both of the state of its principal place of business and of its incorporation, the new legislation limits the access to federal courts through this "artificial diversity."

Since a union's citizenship could be tied to the state where its principal offices are located, the foregoing problem of corporate citizenship need not arise.