

In re LORAZEPAM & CLORAZEPATE ANTITRUST LITIGATION.

**Blue Cross & Blue Shield
of Massachusetts, et
al., Appellees**

v.

**Mylan Laboratories, Inc. and
Mylan Pharmaceuticals,
Inc., Appellants.**

Nos. 08–5044, 08–5045.

United States Court of Appeals,
District of Columbia Circuit.

Argued Oct. 8, 2010.

Decided Jan. 18, 2011.

Background: Health insurance companies, on behalf of themselves and as claims administrators for their self-funded customers, sued manufacturer of generic drugs and two companies engaged in selling chemicals for pharmaceuticals, alleging violations of state antitrust laws. The United States District Court for the District of Columbia, 531 F.Supp.2d 82, entered judgment, following jury trial, awarding insurance companies \$76,823,943. Defendants appealed, and moved to dismiss for lack of jurisdiction.

Holdings: The Court of Appeals, Randolph, Senior Circuit Judge, held that:

- (1) self-funded customers had to be counted as parties in determining whether diversity of citizenship existed;
- (2) defendants could challenge existence of diversity jurisdiction for first time on appeal; and
- (3) remand to permit district court to proceed under rule permitting district court to add or drop a party on just terms was warranted.

Remanded.

1. Federal Courts ⇨289

Self-funded customers of insurance companies, which served as customers' claims administrators, were the real and substantial parties with respect to state antitrust claims asserted on their behalf by insurance companies, and thus had to be counted as parties in determining whether diversity of citizenship required for diversity jurisdiction existed in insurance companies' action against manufacturer of generic drugs and companies that sold chemicals for pharmaceuticals, where claims of customers were asserted at the outset of action, customers were the ones who felt effect of defendants' alleged antitrust violations with regard to claims asserted on their behalf and had right to sue under substantive law, and, at most, insurance companies' authority extended to acting as agents for customers in recovering damages on their claims. 28 U.S.C.A. § 1332; M.G.L.A. c. 93A, § 9.

2. Federal Courts ⇨622

Defendants in antitrust action could challenge existence of diversity jurisdiction for first time on appeal, even if counsel should have identified issue earlier. 28 U.S.C.A. § 1332.

3. Federal Courts ⇨95

Parties cannot confer jurisdiction on federal court by consent.

4. Federal Courts ⇨622

Party does not waive a jurisdictional objection by failing to raise it, at least so long as the jurisdictional defect appears on the face of the record.

5. Federal Courts ⇨286.1

Diversity jurisdiction does not exist unless each defendant is a citizen of a different state from each plaintiff; thus, the presence of just one nondiverse plain-

tiff destroys diversity jurisdiction. 28 U.S.C.A. § 1332.

6. Federal Courts ⇌23

Presence of a nondiverse party deprives the district court of diversity jurisdiction over any of parties' claims, leaving nothing to which supplemental jurisdiction may attach. 28 U.S.C.A. §§ 1332, 1367.

7. Federal Courts ⇌289

District court's order finding self-funded customers on behalf of which insurance companies had asserted state antitrust claims to be real parties in interest as to claims asserted on their behalf did not bring customers into case, for purposes of determining whether diversity jurisdiction existed at case commencement; insurance companies brought customers into case when they started lawsuit, and order simply allowed them to continue asserting customers' claims so long as customers acquiesced. 28 U.S.C.A. § 1332; Fed. Rules Civ.Proc.Rule 17, 28 U.S.C.A.

8. Federal Courts ⇌947

Determination on appeal that diversity jurisdiction did not exist in antitrust action in which insurance companies asserted claims on behalf of their self-funded customers, due to need to treat customers as parties for jurisdictional purposes, warranted remand of case by Court of Appeals so that district court could proceed under rule permitting district court to add or drop a party on just terms, and determine whether any of customers could be dismissed to restore complete diversity. 28 U.S.C.A. § 1332; Fed.Rules Civ.Proc.Rules 19, 21, 28 U.S.C.A.

9. Federal Courts ⇌306

Rule permitting district court to add or drop a party on just terms allows court to dismiss so-called "jurisdictional spoilers," parties whose presence in the litigation destroys jurisdiction, if those parties

are not indispensable and if there would be no prejudice to the parties. Fed.Rules Civ.Proc.Rule 21, 28 U.S.C.A.

See publication Words and Phrases for other judicial constructions and definitions.

10. Federal Courts ⇌545.1, 947

Courts of Appeals, though not technically governed by rule permitting district court to add or drop a party on just terms, may exercise the same power or may remand to the district court for it to make the inquiry under the rule in the first instance. Fed.Rules Civ.Proc.Rule 21, 28 U.S.C.A.

11. Federal Courts ⇌307

Through legal fiction, rule permitting district court to add or drop a party on just terms relates back to the date of the complaint, thereby allowing court to proceed as if nondiverse parties were never part of the case; with those parties effectively scrubbed from the complaint, they are not present to contaminate other claims, and district court may save its prior rulings, and the jury's findings, which otherwise were entered without jurisdiction. 28 U.S.C.A. § 1332; Fed.Rules Civ.Proc.Rule 21, 28 U.S.C.A.

Appeals from the United States District Court for the District of Columbia, (No. 1:99-mc-00276).

Jonathan M. Jacobson argued the cause for appellants. With him on the briefs were Seth C. Silber, D. Bruce Hoffman, and Ryan A. Shores. Neil K. Gilman entered an appearance.

Martin R. Lueck argued the cause for appellees. With him on the brief were Sara A. Poulos, James R. Safley, Sarah E. Hudleston, Robert T. Rhoad, and Ryan C. Tisch. Jeffrey Downey and Bethany M. Wimsatt entered appearances.

Before: SENTELLE, Chief Judge, WILLIAMS and RANDOLPH, Senior Circuit Judges.

Opinion for the Court filed by Senior Circuit Judge RANDOLPH.

RANDOLPH, Senior Circuit Judge:

This is an appeal from the judgment of the district court, entered after a jury trial, awarding plaintiffs \$76,823,943. The plaintiffs invoked diversity jurisdiction and alleged violations of state antitrust laws. Our opinion deals only with defendants' motion on appeal to dismiss for lack of jurisdiction.

Plaintiffs are four health insurance companies. They sued Mylan, a manufacturer of generic drugs, and two other companies engaged in the business of selling chemicals for pharmaceuticals. In support of diversity jurisdiction, plaintiffs alleged that they were citizens of Minnesota, Massachusetts and Illinois, and that defendants were citizens of Delaware, Pennsylvania, New York, New Jersey and West Virginia. Their principal claim, sounding exclusively in state law, was that defendants entered into exclusive licensing agreements enabling Mylan to raise the prices the insurance companies paid for two prescription anti-anxiety medications.

The insurance companies sued, in their words, "on behalf of themselves and as claims administrators for their self-funded customers." In the insurance industry, "self-funded customers" are entities—typically large corporations—providing health benefits directly to their employees using their own funds. *See generally* Allison K. Hoffman, *Oil and Water: Mixing Individual Mandates, Fragmented Markets, and Health Reform*, 36 AM. J.L. & MED. 7, 17–18 (2010). These entities contract with insurance companies such as plaintiffs, who provide claims-processing and other services to them in plaintiffs' role as

"third-party administrators." It is the self-funded customers who bear the financial risks associated with providing insurance coverage.

On the eve of trial, Mylan and its co-defendants filed a motion challenging the insurance companies' authority to bring damages claims on behalf of their self-funded customers. The district court first granted the motion but later allowed the claims to proceed under Rule 17 of the Federal Rules of Civil Procedure. Rule 17(a)(1) requires every action to "be prosecuted in the name of the real party in interest." The court, however, "may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action." Fed.R.Civ.P. 17(a)(3).

The district court found that the insurance companies were not the real parties in interest "with respect to the claims for damages suffered by their self-funded customers." But it allowed the insurance companies to seek ratification of the claims. To do so, the insurance companies sent letters to their self-funded customers, giving them about a week to respond. The letters stated that if the customer did not opt out, it will be deemed to have consented to the insurance companies' representing it and would be bound by the result of the litigation. (We express no opinion on the validity of this ratification procedure.)

The suit proceeded to trial. The jury found Mylan and its co-defendants liable and determined that their violations were willful. Judgment was entered, and this appeal followed.

After the parties had filed their briefs, and a few days before oral argument, defendants filed a motion to dismiss, arguing for the first time that the district court

lacked jurisdiction because at least one (Minnesota Mining and Manufacturing Corporation (3M))—and potentially more—of plaintiffs’ self-funded customers were from the same state as at least one of the defendants. The existence of these customers, defendants argued, destroyed “complete diversity” and stripped the court of power to hear the case.

[1] The first question this argument raises is whether plaintiffs’ self-funded customers must be counted as parties for diversity of citizenship purposes. We think they must. The claims of the self-funded customers were asserted at the outset. Those customers, not the named plaintiffs, were the ones who felt the effect of defendants’ alleged violations with regard to the claims asserted on their behalf. And they were the ones who had the right to sue under the substantive law. *See, e.g.,* Mass. Gen. Laws ch. 93A § 9. The plaintiff insurance companies no longer contend that the contracts with their self-funded customers validly assigned the asserted claims to them. At most, plaintiffs’ authority extended to acting as agent for the self-funded customers in recovering damages on their claims. *See Advanced Magnetics, Inc. v. Bayfront Partners, Inc.*, 106 F.3d 11, 17–18 (2d Cir.1997). The self-funded customers are therefore the “real and substantial” parties with respect to the claims asserted on their behalf. *See Associated Ins. Mgmt. Corp. v. Ark. Gen. Agency*, 149 F.3d 794, 796 (8th Cir.1998); *Airlines Reporting Corp. v. S & N Travel, Inc.*, 58 F.3d 857, 862 (2d Cir.1995). As such, they must be treated as parties for diversity purposes. *Navarro Sav. Ass’n v. Lee*, 446 U.S. 458, 460–61, 100 S.Ct. 1779, 64 L.Ed.2d 425 (1980); *Associated Ins. Mgmt. Corp.*, 149 F.3d at 796.

[2] The effect of the self-funded customers on the district court’s diversity jurisdiction turns on principles established in

three Supreme Court decisions dating from the early 1800’s. The first, *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126, 2 L.Ed. 229 (1804), was a diversity action for trespass. The complaint alleged that the defendant was a citizen of North Carolina, but it did not allege that the plaintiff was a citizen of a different state. After verdict for the defendant, the plaintiff appealed on the ground that his complaint was jurisdictionally defective. The Supreme Court agreed and set aside the judgment. The absence of jurisdiction, the Court held, could be raised for the first time on appeal even by the party who invoked federal jurisdiction. That a party may raise jurisdictional issues for the first time on appeal has been repeatedly reaffirmed. *See, e.g., Mansfield, Coldwater & L.M. Ry. v. Swan*, 111 U.S. 379, 382–83, 4 S.Ct. 510, 28 L.Ed. 462 (1884); *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 93–96, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998); *Grupo Dataflux v. Atlas Global Grp., L.P.*, 541 U.S. 567, 570–71, 124 S.Ct. 1920, 158 L.Ed.2d 866 (2004).

[3,4] The plaintiffs here complain that defendants were derelict in not raising their jurisdictional objection at an earlier stage. The defendants all but admit this. There are approximately 1,400 of these self-funded customers. Counsel for the defendants explains that only when he began preparing for oral argument did he realize their significance for diversity purposes. As far as jurisdiction is concerned, it does not matter if he should have recognized this sooner. *Capron* holds that the parties cannot confer jurisdiction by consent. A corollary, long established, is that a party does not waive a jurisdictional objection by failing to raise it, at least so long as the jurisdictional defect appears on the face of the record. *See Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702, 102 S.Ct. 2099, 72

L.Ed.2d 492 (1982); Dan B. Dobbs, *Beyond Bootstrap: Foreclosing the Issue of Subject-Matter Jurisdiction Before Final Judgment*, 51 MINN. L.REV. 491, 507–24 (1967).

[5] The second case is *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 2 L.Ed. 435 (1806). Although the Court’s opinion was short and obscure, it has come to mean that, under the diversity statute (now 28 U.S.C. § 1332), “diversity jurisdiction does not exist unless *each* defendant is a citizen of a different state from *each* plaintiff.” *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373, 98 S.Ct. 2396, 57 L.Ed.2d 274 (1978). Thus the presence of just one nondiverse plaintiff—here 3M—destroys diversity jurisdiction under § 1332.

Plaintiffs do not dispute this point, but they invoke the supplemental jurisdiction statute, codified at 28 U.S.C. § 1367,¹ to avoid its consequences. Their argument is that once the district court had jurisdiction (under § 1332) over claims between the named plaintiffs and the defendants, the district court could exercise supplemental jurisdiction over claims of the self-funded customers. In support, plaintiffs cite *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 125 S.Ct. 2611, 162 L.Ed.2d 502 (2005). The Court there held that § 1367 authorized jurisdiction over

claims of plaintiffs who did not meet § 1332’s amount-in-controversy requirement as long as those claims were part of the same Article III “case or controversy” as the claims of plaintiffs who met all of the requirements of § 1332(a). *Id.* at 549, 125 S.Ct. 2611. In doing so, the Court determined that Congress, in enacting § 1367, implicitly overruled Supreme Court precedent that had denied jurisdiction over such claims. *Id.* at 569–71, 125 S.Ct. 2611.

[6] Plaintiffs’ reading of *Allapattah* would, in effect, abolish the complete diversity requirement of *Strawbridge v. Curtiss*. Whenever a claim is brought by one diverse party against another, § 1367 would authorize the court to hear, as part of the same case, claims brought by nondiverse parties. The Supreme Court might have given this reading to § 1367, essentially treating citizenship like the amount-in-controversy requirement at issue in *Allapattah*. But the Court made it clear that it was *not* overruling *Strawbridge*: a “failure of complete diversity, unlike the failure of some claims to meet the requisite amount in controversy, contaminates every claim in the action.” *Id.* at 564, 125 S.Ct. 2611. The presence of a nondiverse party, in other words, deprives the district court of jurisdiction over any of the claims; it follows that there is nothing to which sup-

1. 28 U.S.C. § 1367 provides, in part:

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332....

plemental jurisdiction may attach. *Id.* at 554, 125 S.Ct. 2611.

[7] The third case is *Mollan v. Torrance*, 22 U.S. (9 Wheat.) 537, 539, 6 L.Ed. 154 (1824), which holds that the court's jurisdiction "depends upon the state of things at the time of the action brought..." Plaintiffs argue—or more accurately, assert—that not until the district court entered its Rule 17 order did the self-funded customers become real and substantial parties for diversity purposes. Therefore, they say, there was diversity jurisdiction at the time they commenced the action. But it was not the district court's ruling that brought the self-funded customers into the case. Plaintiffs did that when they started the lawsuit. The district court's Rule 17 order simply allowed plaintiffs to continue asserting their customers' claims so long as the customers acquiesced. See *Associated Ins. Mgmt. Corp.*, 149 F.3d at 797.

[8–10] Ordinarily a finding that the district court lacked jurisdiction would lead us to vacate the court's judgment and remand for dismissal. See, e.g., *LoBue v. Christopher*, 82 F.3d 1081, 1082 (D.C.Cir. 1996). But the posture of this case suggests a different disposition. Rule 21 of the Federal Rules of Civil Procedure provides that "[o]n motion or on its own, the court may at any time, on just terms, add or drop a party." Fed.R.Civ.P. 21. This Rule allows the district court to dismiss so-called "jurisdictional spoilers"—parties whose presence in the litigation destroys jurisdiction—if those parties are not indispensable and if there would be no prejudice to the parties. *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830–32, 109 S.Ct. 2218, 104 L.Ed.2d 893 (1989). The courts of appeals, though not technically governed by Rule 21, may exercise the same power or may remand to the district court for it to make the Rule 21

inquiry in the first instance. *Id.* at 837–38, 109 S.Ct. 2218; *Long v. Dist. of Columbia*, 820 F.2d 409, 416–17 (D.C.Cir.1987).

[11] It might be thought that the ability to dismiss nondiverse parties and retain jurisdiction over the rest of the case is in tension with *Mollan*, as well as *Allapattah's* holding that the presence of a nondiverse party "contaminates" the entire action, therefore stripping the district court of jurisdiction *in toto*. This tension is resolved through the fiction that Rule 21 relates back to the date of the complaint. See *LeBlanc v. Cleveland*, 248 F.3d 95, 99 (2d Cir.2001). This way, the court may proceed as if the nondiverse parties were never part of the case. With those parties effectively scrubbed from the complaint, they are not present to contaminate the other claims. The fiction also allows the district court to save its prior rulings, and the jury's findings, which otherwise were entered without jurisdiction. *C.L. Ritter Lumber Co. v. Consol. Coal Co.*, 283 F.3d 226, 229–30 (4th Cir.2002).

The prudent course here is to remand to the district court to proceed under Rule 21. It is open to the district court to decide that plaintiffs' self-funded customers are not indispensable parties to the case. See Fed.R.Civ.P. 19. For the most part, the identity and citizenship of the self-funded customers are not in the record. Evidentiary issues may arise, and the district court may need to determine which, if any, of the self-funded customers may be dismissed in order to restore complete diversity. Since this may also affect damages, the district court may have to conduct a partial retrial on that issue.

We decline to issue any opinion on the merits of defendants' objections to the jury award until such time as jurisdiction is secured.

The case is remanded to the district court for further proceedings consistent with this opinion.

So ordered.



FLINT HILLS RESOURCES ALASKA,
LLC, Petitioner

v.

FEDERAL ENERGY REGULATORY
COMMISSION and United States
of America, Respondents

ConocoPhillips Alaska, Inc.,
et al., Intervenor.

Nos. 09–1236, 09–1251.

United States Court of Appeals,
District of Columbia Circuit.

Argued Nov. 8, 2010.

Decided Jan. 18, 2011.

Background: Energy corporation brought Petition for Review from final order of Federal Energy Regulatory Commission (FERC), changing quality bank adjustments paid to oil shippers on Trans Alaska Pipeline System (TAPS).

Holding: The Court of Appeals, Williams, Senior Circuit Judge, held that agency's interpretation of Motor Carrier Safety Reauthorization Act allowing carrier-filed adjustment to take effect and setting matter for hearing as "first order" was not entitled to deference.

Vacated and remanded.

Randolph, Senior Circuit Judge, filed dissenting opinion.

Carriers ⇌ 26

Interpretation of Motor Carrier Safety Reauthorization Act retroactivity provision by Federal Energy Regulatory Commission (FERC), allowing carrier-filed "quality bank adjustment" paid to oil shipper on Trans Alaska Pipeline System (TAPS) to take effect and setting matter for hearing as "first order," was not entitled to deference; interpretation did not match ordinary usage of terms employed by Congress in drafting provision, and fulfilled congressional objectives only with respect to specialized set of delays not singled out for special treatment. 49 U.S.C.A. § 31109 et seq.

On Petitions for Review of Orders of the Federal Energy Regulatory Commission.

James M. Armstrong argued the cause for petitioner. With him on the briefs were David D'Alessandro, Richard A. Curtin, Patricia F. Godley, Howard E. Shapiro, and Jonathan D. Simon. Dennis Lane and Marie D. Zosa entered appearances.

Kathrine L. Henry, Attorney, Federal Energy Regulatory Commission, argued the cause for respondents. With her on the brief were John J. Powers III and Robert J. Wiggers, Attorneys, U.S. Department of Justice, Thomas R. Sheets, General Counsel, Federal Energy Regulatory Commission, and Robert H. Solomon, Solicitor.

Matthew W.S. Estes argued the cause for intervenors ConocoPhillips Alaska, Inc., et al. in support of respondents. With him on the brief were John A. Donovan and John Wyeth Griggs.

Before: TATEL, Circuit Judge, and WILLIAMS and RANDOLPH, Senior Circuit Judges.