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More Reasons for Abolishing Federal Rule of Civil Procedure 17(a): The Problem of the Proper Plaintiff and Insurance Subrogation

June F. Entman

MORE REASONS FOR ABOLISHING FEDERAL RULE OF CIVIL PROCEDURE 17(a): THE PROBLEM OF THE PROPER PLAINTIFF AND INSURANCE SUBROGATION

JUNE F. ENTMAN*

In this Article, Professor June Entman advocates the abolition of Federal Rule of Civil Procedure 17(a), the real party in interest rule, using the problem of the proper plaintiff in the insurance subrogation context to demonstrate that the rule has created more problems than it has solved. She points out that rule 17(a) is unnecessary because other procedural devices are available to resolve the proper plaintiff issue. Professor Entman stresses that deciding who may assert a claim in federal court is not merely an academic question. The correct answer is essential for a proper determination of federal diversity jurisdiction; even in a nondiversity case, the correct answer is important because parties have rights and obligations that nonparties do not have.

* Associate Professor, Cecil C. Humphreys School of Law, Memphis State University; B.A., 1967, Smith College; M.A.T., 1969, University of Chicago; J.D., 1981, Memphis State University. I am profoundly grateful to Professors Robert Banks, Richard Marcus, Michael Risinger, Carl Tobias, Ralph Whitten, and Dean Frederick Davis, who unselfishly and generously reviewed an earlier draft of this article and provided me with very sound advice. I also thank Memphis State University for a summer grant and for my student research assistant, Debra Minkler, who diligently pursued and collected state law of parties, joinder and subrogation. The errors and opinions, of course, are entirely mine.

I. INTRODUCTION

Nobody likes the real party in interest rule.[1] Scholars began as early as 1921 to call for the rule's abolition,[2] and it has attracted no defenders.[3] Inertia, however, can be a powerful force; the rule continues to exist in most states and in Federal Rule of Civil Procedure 17(a).[4] Critics of the real party in interest rule generally assert that it serves no useful purpose and only creates unnecessary confusion in identifying the proper party to assert a claim.[5] The confusion in turn is harmful not only because of the resulting waste of judicial resources,[6] but also because an incorrect decision under rule 17(a) may result in a procedural rule interfering with the correct application of substantive law or with policies of federal diversity jurisdiction.[7] The purpose of this Article is to demonstrate that this criticism of federal rule 17(a) not only continues to be valid, but also that the problems caused by that rule have multiplied in recent years.

One area in which rule 17(a) has been particularly troublesome is the question of the proper plaintiff when the injured party's casualty insurer has compen-

1. The most common form of the rule is that found in the first sentence of Federal Rule of Civil Procedure 17(a): "Every action shall be prosecuted in the name of the real party in interest."

2. *See* Atkinson, *The Real Party in Interest Rule: A Plea for Its Abolition*, 32 N.Y.U. L. REV. 926, 926 (1957); Kennedy, *Federal Rule 17(a): Will the Real Party in Interest Please Stand?*, 51 MINN. L. REV. 675, 724 (1967); Simes, *The Real Party in Interest*, 10 KY. L.J. 60, 72 (1921).

3. Even the Reporter who presided over the 1966 amendments to the Federal Rules of Civil Procedure, which attempted to cure some of rule 17(a)'s defects, could muster only the faintest praise: "[The rule] conveys a certain amount of correct information about naming plaintiffs, but to the average reader innocent of history it probably suggests as much or more that is quite incorrect." Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 412 (1967).

4. *See supra* note 1. Professor Atkinson's suggestion that the rule be abolished in New York, Atkinson, *supra* note 2, at 926, was honored posthumously by section 1004 of the New York Civil Practice Law and Rules, which became effective in 1963. N.Y. CIV. PRAC. L. & R. 1004 (McKinney Supp. 1990). Other states that have no "real party in interest" rule include New Hampshire, *see* Atkinson, *supra* note 2, at 932, and Illinois, *see* ILL. ANN. STAT. ch. 110, ¶ 2-403 (Smith-Hurd Supp. 1989); Brosam v. Employer's Mut. Casualty Co., 61 Ill. App. 2d 183, 187, 209 N.E.2d 350, 352 (1965).

5. *See* Atkinson, *supra* note 2, at 957-59; Kennedy, *supra* note 2, at 724; Simes, *supra* note 2, at 72; *see also* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 453 (4th ed. 1983) (noting the criticism).

6. *See* Virginia Elec. & Power Co. v. Westinghouse Elec. Corp., 485 F.2d 78, 83 (4th Cir. 1973) (real party in interest rule permits "[i]ngenious counsel . . . to present yet another 'decision point' resulting in extravagant expenditures of time and effort before ever reaching the merits") (citing J. FRANK, AMERICAN LAW, THE CASE FOR RADICAL REFORM 65 (1969)), *cert. denied*, 415 U.S. 935 (1974); Simes, *supra* note 2, at 72 ("[T]he mass of litigation on the real party in interest statute is but another illustration of the sort of 'much ado about nothing' which is all too frequent in legal discussion.").

7. Atkinson, *supra* note 2, at 938-39 (discussing cases in which "counsel and sometimes even the court have been misled into the belief that the real party in interest statute creates a substantive right"); Simes, *supra* note 2, at 62-63. *See generally* Kennedy, *supra* note 2 (discussing the relationship between the real party in interest rule and diversity).

sated him in whole or in part for the claimed loss.[8] If the insurer, by virtue of the compensation paid, has acquired rights in its insured's claim against third parties, the issue arises whether the proper party to assert the claim is the insured, the insurer, or both.

A considerable amount of rule 17(a) jurisprudence has been generated by this issue simply because parties are strongly motivated to litigate the proper plaintiff issue when one of the possible choices is an insurance company. Conventional wisdom that juries are prejudiced against insurance companies encourages plaintiffs to present claims in the name of the insured alone.[9] Conversely, when insurers have an interest in the claim asserted, defendants demand that the insurer be named as a party plaintiff.[10]

The defendant's demand that the insurer be named may take the form of a motion to dismiss for failure to name the real party in interest under rule 17(a),[11] a motion to dismiss under rule 12(b)(7) for failure to join an "indispen-

8. Professor Atkinson notes that the real party in interest rule is not often cited except in assignment, subrogation, and trust cases. Atkinson, *supra* note 2, at 958. *See generally* Annotation, *Proper Party Plaintiff, Under Real Party in Interest Statute, to Action Against Tortfeasor for Damage to Insured Property Where Insured [sic] Has Paid Part of Loss*, 13 A.L.R.3D 140 (1967) (partial subrogation cases); Annotation, *Proper Party Plaintiff, Under Real Party in Interest Statute, to Action Against Tortfeasor for Damage to Insured Property Where Loss is Entirely Covered by Insurance*, 13 A.L.R.3D 229 (1967 & Supp. 1989) (total subrogation cases).

9. *See, e.g.*, Celanese Corp. of Am. v. John Clark Indus., Inc., 214 F.2d 551, 556-57 (5th Cir. 1954) ("[Defendant's] real, its only concern was . . . the possible prejudice which plaintiff might suffer in the minds of the jury because of the knowledge that plaintiff was insured. Such a purpose is neither a proper nor a legal purpose."); Stouffer Corp. v. Dow Chem. Co., 88 F.R.D. 336, 338 (E.D. Pa. 1980) ("there is a substantial risk of prejudice to an insurer which is forced to join as a plaintiff, as the presence of an insurer may affect a jury's decision on the merits"); Public Serv. Co. v. Crane Co., 48 F.R.D. 424, 425 (N.D. Okla. 1969) ("strong possibility" that presence of an insurance company as a party "will generate prejudice or favoritism in the jury process"); Thrasher v. United States Liab. Ins. Co., 19 N.Y.2d 159, 167, 225 N.E.2d 503, 507 (1967) ("The law maintains the fiction that the insured is the real party in interest at the trial of the underlying negligence action in order to protect the insurance company against overly sympathetic juries."). *But see* Pace v. General Elec. Co., 55 F.R.D. 215, 218-19 (W.D. Pa. 1972) ("We feel compelled to say a good word for juries. . . . With the universality of insurance covering so many aspects of their lives, they show no prejudice against the organization providing this service . . . ."); Truckweld Equip. Co. v. Swenson Trucking & Excavating, Inc., 649 P.2d 234, 238 n.4 (Alaska 1982) ("We are not impressed by abstract claims of prejudice resulting from the jury's knowledge of partial coverage. Insurance is a widely accepted fact of life."); 2A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 74.41(c), at 14-559 (1988) (referring to the concern about jury prejudice as a "bugaboo"). *See generally* Kennedy, *supra* note 2, at 715 (concluding that regardless of joinder, the judge "ought to inform the jury fully as to any subrogation interests in the plaintiff's claim" because "frank disclosure to the jury of the real interests involved is the only way to elicit good verdicts").

10. There are other reasons for objecting to the party named as plaintiff. A successful objection may cause the dismissal of an action for lack of diversity jurisdiction. *See* Potomac Elec. Power Co. v. Babcock & Wilcox Co., 54 F.R.D. 486, 490-91 (D. Md. 1972). Defendants object to nonjoinder of a compensating insurer on the grounds that if the insurer is not named, the defendant will not be protected by doctrines of res judicata from a subsequent suit by the insurer to recover its portion of the claim. *See id.* at 492. The large number of rule 17(a) decisions dealing with compensating insurers, however, most likely is attributable solely to the fear of, or desire for, jury prejudice. *See supra* note 9 and accompanying text.

11. *See, e.g.*, Prudential Lines, Inc. v. General Tire Int'l Co., 74 F.R.D. 474, 474 (S.D.N.Y. 1977) (defendant moved to dismiss on the ground that the insurer had paid the claim and become subrogee, and was therefore the real party in interest). The motion under rule 17(a) also may be to reduce the damages claimed to only the amount due to the named plaintiff-insured. *See* Wadsworth v. United States Postal Serv., 511 F.2d 64, 66 (7th Cir. 1975) (district court granted motion to reduce the *ad damnum* from $1,000 to $60). The objection sometimes is phrased in terms of "standing," *see* Honey v. George Hyman Constr. Co., 63 F.R.D. 443, 446-47 (D.D.C. 1974) (because "plaintiff . . .

sable" party under rule 19,[12] or, if joinder is feasible, a motion to join a party "needed for just adjudication" under rule 19(a).[13] Even if the issue is presented as a joinder or dismissal question under rule 19, courts frequently begin their inquiry with rule 17(a).[14] Should a court find initially that the nonparty is not a "real party in interest" under rule 17(a), that is, not entitled to prosecute a claim against the defendant with regard to the subject matter of the suit, the court almost certainly will conclude that rule 19(a) does not require that party's joinder.[15] Because the nonparty has no claim that he may assert against the defendant (the nonparty is not a "real party in interest"), none of the criteria for compulsory joinder under rule 19 will be met.[16] When a court concludes, on the other hand, that the nonparty is entitled to assert a claim against the defendant with regard to the subject matter of the suit, the court then must determine whether the nonparty is one who must be joined, if joinder is feasible.[17]

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has demonstrated . . . sufficient injury in fact to give him a personal stake in the outcome of this litigation, it can safely be said that he has standing to bring this action"), or as a motion to dismiss for failure to state a claim under rule 12(b)(6), *see* DeWitt v. Quarterback Sports Fed'n, Inc., 45 F.R.D. 252, 252-53 (D. Minn. 1968) ("defendant has moved under Rule 12 to dismiss the complaint on the grounds that it fails to state a claim upon which relief can be granted because the plaintiff is not the real party in interest as required by Rule 17(a)").

12. Virginia Elec. & Power Co. v. Westinghouse Elec. Corp., 485 F.2d 78, 81 (4th Cir. 1983) (defendant moved to dismiss on ground that the real party in interest was indispensable and could not be made a party because diversity jurisdiction would be destroyed), *cert. denied*, 415 U.S. 985 (1974). For discussions of rule 19's application to compensating insurers and its relationship to rule 17(a), see *infra* notes 17, 262-319 and accompanying texts.

13. *See, e.g.*, Stouffer Corp. v. Dow Chem. Co., 88 F.R.D. 336, 337 (E.D. Pa. 1980); Braniff Airways, Inc. v. Falkingham, 20 F.R.D. 141, 142 (D. Minn. 1957). Defendants also often seek to compel joinder under rule 17(a). *See, e.g.*, Wattles v. Sears, Roebuck & Co., 82 F.R.D. 446, 447 (D. Neb. 1979).

14. *See, e.g.*, Childers v. Eastern Foam Prods., Inc., 94 F.R.D. 53, 55 (N.D. Ga. 1982) ("If [the nonparty insurer] is found to be the real party in interest under Rule 17, the focus shifts to Rule 19 to determine the remaining issue of joinder.") (citations omitted); Potomac Elec. Power Co. v. Babcock & Wilcox Co., 54 F.R.D. 486, 489 (D. Md. 1972) (stating that rule 17 presents the preliminary question whether the insurers are the real parties in interest).

15. *See, e.g.*, Strate v. Niagara Mach. & Tool Works, 160 F. Supp. 296, 297-300 (S.D. Ind. 1958).

16. The provision of rule 19(a) that is most typically cited as requiring joinder of compensating insurers compels joinder of a person who, when other conditions also are met, "claims an interest relating to the subject of the action." FED. R. CIV. P. 19(a)(2). This is not to say that a person necessarily cannot be a party "needed for just adjudication" under rule 19 unless he can state a claim for relief with regard to the subject matter of the suit. *See* Burger King Corp. v. American Nat'l Bank & Trust Co., 119 F.R.D. 672, 676 (N. D. Ill. 1988) (rule 19(a) "does *not* state that the absent party must have an interest *in* the *action*; instead, it requires only that he have an interest '*relating* to the *subject matter of* the action' ") (citing FED. R. CIV. P. 19(a)); Tobias, *Rule 19 and the Public Rights Exception to Party Joinder*, 65 N.C.L. REV. 745, 774-76 (1987). *But see* Kennedy, *supra* note 2, at 679-80 & n.23 (stating that the relationship between rules 17(a) and 19 "has not been fully developed," but quoting Koepp v. Northwest Freight Lines, 10 F.R.D. 524, 527 (D. Minn. 1950), for the proposition that "Rule 19(a) necessarily assumes that the parties who may be joined under it as plaintiffs are real parties in interest").

In the context of this Article, however, unless the compensating insurer has the right to bring a claim against the defendant, it is likely that none of the criteria requiring joinder under rule 19 will be met. The most common argument for compulsory joinder of a compensating insurer under rule 19 is that unless the court requires joinder, the defendant will be subjected to multiple litigation because of the nonparty's rights in the asserted claim. *See, e.g.*, *Childers*, 94 F.R.D. at 57; *Potomac Elec. Power Co.*, 54 F.R.D. at 492. If the compensating insurer has no right to bring suit against the defendant for the claim asserted in the action, this argument necessarily will fail.

17. Most commonly, but not always, courts resolve this issue under rule 19. *See infra* notes 262-319 and accompanying text. The rule 19 joinder question in cases contesting nonjoinder of a

In many states, the issue of who should be the party plaintiff when the claimant has been compensated by insurance is resolved by a specific rule or statute, sometimes as part of a state's real party in interest or compulsory joinder rule.[18] In federal litigation, however, there is no ready answer. Federal courts have sought guidance in both rules 17(a) and 19. Published opinions on the issue reveal that rule 17(a), in particular, has created many more problems than it has solved.

First, there is the problem of ascertaining the proper role of substantive law—often state law—under federal rule 17(a). This problem, discussed in Section IV of this Article, concerns the traditional criticism of the rule: Because the "real party in interest" is simply the person who is entitled by the substantive law to assert the claim,[19] should not the court proceed directly to the substantive law and ask whether the plaintiff has stated a claim upon which relief may be granted? If the plaintiff has no right under the substantive law, his claim should be dismissed under rule 12(b)(6) for failure to state a claim upon which relief may be granted. Does not the real party in interest rule merely distract one from the only really significant issue—the plaintiff's right to assert the claim?

A second problem is deciding the effect of the court's finding that a person not named as a plaintiff is a "real party in interest" within the meaning of the rule. In short, does rule 17(a) require joinder of all "real parties in interest"? Is it a rule of compulsory joinder? The discussion of this topic, found in Section V below, examines federal decisions that interpret rule 17(a) in a way that creates an overlap, and in some cases a conflict, between that rule and the federal compulsory joinder rule, rule 19.

Finally, an issue that has surfaced in recent years is whether a determination by the court that the party named as the plaintiff is not a "real party in interest" will preclude the named plaintiff from proceeding with the action. It once seemed clear that upon such a determination, the parties were required to name the proper plaintiff or the court would dismiss the claim. Section VI of

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partially subrogated insurer has deeply divided the federal courts, both before and after the 1966 amendment to rule 19. *Compare* Gas Serv. Co. v. Hunt, 183 F.2d 417, 420 (10th Cir. 1950) (joinder of partially subrogated insurer is required) and Carlson v. Consumers Power Co., 164 F. Supp. 692, 695 (W.D. Mich. 1957) (Potter Stewart, Circuit Judge) (rule 19 requires joinder of partially subrogated insurer) *with* Wright v. Schebler Co., 37 F.R.D. 319, 322 (S.D. Iowa 1965) (rule 19 does not require joinder) and Braniff Airways, Inc. v. Falkingham, 20 F.R.D. 141, 144 (D. Minn. 1957) (rule 19 does not require joinder); *compare Childers*, 94 F.R.D. at 57-58 (rule 19 requires joinder) and *Potomac Elec. Power Co.*, 54 F.R.D. at 486 (insurer "indispensable" under rule 19(b)) *with* Prudential Lines, Inc. v. General Tire Int'l Co., 74 F.R.D. 474, 475-76 (S.D.N.Y. 1977) (rule 19 does not require joinder) and White Hall Bldg. Corp. v. Profexray Div. of Litton Indus., Inc., 387 F. Supp. 1202, 1207 (E.D. Pa. 1974) (rule 19 does not require joinder), *aff'd mem.*, 578 F.2d 1377 (3d Cir. 1978) and *aff'd mem. sub nom.* Quaglia v. Profexray Div. of Litton Indus., Inc., 578 F.2d 1375 (3d Cir. 1978).

The issue of whether rule 19 requires joinder of a partially subrogated insurer is beyond the scope of this Article, but will be the topic of a future effort by this author.

18. *See* ALA. R. CIV. P. 17(a); ILL. ANN. STAT. ch. 110, ¶ 2-403(c) (Smith-Hurd Supp. 1989); IND. R. CIV. P. 19(e)(3); LA. CODE CIV. PROC. ANN. art. 697 (West 1981); ME. R. CIV. P. 17; MASS. R. CIV. P. 17(a); MISS. R. CIV. P. 17(b); N.Y. CIV. PRAC. L. & R. 1004 (McKinney Supp. 1990); OHIO R. CIV. P. 19(A)(3); PA. R. CIV. P. 2002(d); R.I. R. CIV. P. 17(a); TENN. R. CIV. P. 17.01; VA. CODE ANN. § 38.2-207 (1986); VT. R. CIV. P. 17(a); WIS. R. CIV. P. 803.03(2).

19. *See infra* note 42 and accompanying text.

this Article, however, describes how the 1966 amendment to rule 17(a) has led some federal courts to hold that a suit may proceed in the name of a party who is not a proper plaintiff so long as the proper plaintiff "ratifies" the action.

Rule 17(a)'s interference with the proper naming of plaintiffs is more than an academic concern. As discussed in Section VII below, naming the proper plaintiff is essential in order for courts to decide correctly questions of federal diversity jurisdiction. Even when federal jurisdiction is not at issue, the matter of who is named as a party plaintiff is important because the federal procedural system is premised upon the assumption that those named as parties have rights and duties in the conduct of the litigation. For example, the Federal Rules of Civil Procedure, as well as various federal statutes, provide for assessment of costs and sanctions against a "party."[20] Federal rule 16 authorizes the court to direct the "attorneys for the parties and any unrepresented parties" to appear at pretrial and settlement conferences.[21] Similarly, both the discovery provisions[22] and the scope of injunctions[23] under the Federal Rules of Civil Procedure accord different treatment to parties and nonparties. Thus, failure to name the proper party as plaintiff can circumvent, or at least unduly complicate, a procedural rule that by its terms applies only to a person with the status of a "party."

Some background is necessary before examining these problems. The next two sections of this Article set out, first, the origins of the real party in interest rule and its entry into the Federal Rules of Civil Procedure and, second, an overview of the substantive law of insurance subrogation, which determines the rights of the compensated insured and the compensating insurer.

II. THE ORIGINS AND EVOLUTION OF RULE 17(A)

A. Origins and Meaning of the Real Party in Interest Rule

From the time of its adoption in 1938 until it was amended in 1966, Federal Rule of Civil Procedure 17(a) provided:

> Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States.[24]

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20. FED. R. CIV. P. 11, 16(f), 37, 54(d), 68; *see also* Independent Fed. of Flight Attendants v. Zipes, 109 S. Ct. 2732, 2736 (1989) (district court may award Title VII attorney's fees against party intervenor not charged with Title VII violation, but only if intervenor's action is frivolous, unreasonable, or without foundation).

21. *See* G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648, 652 (7th Cir. 1989) (en banc) (federal rule 16 does not limit district court's inherent authority to require party represented by counsel to attend pretrial settlement conference).

22. *See* FED. R. CIV. P. 26-37.

23. *See* FED. R. CIV. P. 65(d).

24. FED. R. CIV. P. 17(a) (amended 1966), *reprinted in* 39 F.R.D. 84 (1966).

The evolution of the real party in interest rule was thoroughly documented in Professor Atkinson's 1957 law review article calling for the rule's abolition in New York.[25] Professor Atkinson located the rule's origins in early nineteenth-century differences between law and equity regarding whether the assignor or the assignee should appear as the plaintiff in a suit seeking to enforce an assigned claim.[26] Prior to the nineteenth century, common-law courts were hostile to assignments because they considered choses in action to be unassignable.[27] Only the assignor, who retained legal title to the claim, was permitted to sue at law.[28] By the middle of the nineteenth century, however, the law courts had begun to recognize the rights of an assignee and permitted an assignee to sue at law upon the assigned claim, but only in the name of the assignor.[29] The assignee controlled the suit and was liable for costs.[30] The practice at law of naming a merely nominal plaintiff was referred to as "use" or "name" practice; the plaintiff would be styled *X* (assignor) "for the use and benefit of *Y* (assignee)."[31] In the case of a partial assignment, however, the law courts did not permit the assignee to sue, even in the name of the assignor, because the courts wished to avoid subjecting debtors to more than one action on a single obligation.[32] Equity, on the other hand, recognized the equitable, beneficial interest of the assignee and permitted the assignee to sue in his own name.[33] Equity went so far as to find the interest of the assignor of a fully assigned debt so nebulous that only the assignee could appear to enforce the claim.[34] In cases of partial assignment, equity, having the advantage of liberal joinder of parties,[35] allowed the assignee to recover his share by suit in his own name if he joined the assignor in the suit.[36]

The term "real party in interest" first appeared in judicial decisions as a description of equity's preference for the assignee as the party who should sue

25. Atkinson, *supra* note 2.

26. *Id.* at 927.

27. *Id.* at 935 n.61.

28. *Id.* at 934.

29. C. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING § 21, at 157 (2d ed. 1947) (noting that the exception to the common-law rule that only one having the legal right can sue was not permitted in cases other than assignees, such as *cestuis que trustent* or those having an equitable interest in land).

30. Atkinson, *supra* note 2, at 935; *see* Aetna Life Ins. Co. v. Moses, 287 U.S. 530, 540 (1933).

31. "The suit, though for the use of the insurer, must be in the name of the person whose property was destroyed." Aetna Ins. Co. v. Hannibal & St. J.R.R., 1 F. Cas. 207 (C.C.E.D. Mo. 1874) (No. 96); *see* United States v. Aetna Casualty & Sur. Co., 338 U.S. 366, 381 (1949); J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE 319 n.5 (1985).

32. Clark & Hutchins, *The Real Party in Interest*, 34 YALE L.J. 259, 266 (1925).

33. C. CLARK, *supra* note 29, § 21, at 157.

34. Clark & Hutchins, *supra* note 32, at 260.

35. In equity, broad joinder of all interested parties was encouraged to prevent a multiplicity of suits whenever possible and convenient. C. CLARK, *supra* note 29, § 56, at 348-55. In the seventeenth and eighteenth centuries, equity's essentially permissive attitude toward joinder was combined with the idea that equity should do complete justice by requiring the joinder of all persons, known as "necessary parties," having an interest in the subject matter of the litigation. Hazard, *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 COLUM. L. REV. 1254, 1255 (1961); Kaplan, *supra* note 3, at 359; Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 MICH. L. REV. 327, 331-32 (1957).

36. Clark & Hutchins, *supra* note 32, at 266.

upon an assigned chose in action.[37] The Field Code of 1848 conformed the differing law and equity practices by creating the "real party in interest rule," mandating the equity practice of permitting an assignee to sue in his own name.[38] The Code eliminated the practice of the law courts in which the assignee brought suit in the name of the assignor.[39] The language of the Field Code, that "every action must be prosecuted in the name of the real party in interest," became substantially that of Federal Equity Rule 37[40] and, finally, Federal Rule of Civil Procedure 17(a).[41]

The plain language of the term "real party in interest" suggests that a suit must be prosecuted in the name of the one who will benefit from the suit. It is well settled, however, that a "real party in interest" is one who, under the substantive law, has the right to bring and control the action, and that this person is not necessarily the beneficially interested party.[42] Thus, for example, when the substantive law gives the exclusive right to assert and control a claim to an executor or a trustee who has no beneficial interest, the executor or trustee is the only "real party in interest."[43]

The real party in interest rule was never meant to determine who was enti-

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37. Atkinson, *supra* note 2, at 927.

38. The pertinent provisions of the Field Code are:

> § 91. Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section 93.
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> § 93. An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the persons for whose benefit the suit is prosecuted.

FIRST REPORT OF NEW YORK COMMISSIONERS ON PRACTICE AND PLEADINGS (1848). *See generally* Atkinson, *supra* note 2, at 928-32 (tracing the development of these provisions).

39. Atkinson, *supra* note 2, at 928; Clark & Hutchins, *supra* note 32, at 262. Professor Kennedy suggested that the real utility of the Code rule permitting an assignee to become the named plaintiff was to evade the common-law rule that prohibited a party from testifying. Kennedy, *supra* note 2, at 676. He concluded that once this common-law prohibition was abandoned, the real party rule became "substantially meaningless." *Id.*

40. Rules of Practice for the Courts of Equity of the United States, Rule 37 provided in pertinent part:

> Parties Generally—Intervention. Every action shall be prosecuted in the name of the real party in interest, but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute, may sue in his own name without joining with him the party for whose benefit the action is brought.

226 U.S. 627, 659 (1912); *compare supra* note 38 (text of the Field Code).

41. *See supra* text accompanying note 20.

42. C. CLARK, *supra* note 29, § 22, at 160; 6A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 1543, at 334 (2d ed. 1990) (the real party in interest is "the person who, according to the governing substantive law, is entitled to enforce the right"); Kennedy, *supra* note 2, at 678 ("Thus the real party is the one with legal power to control the lawsuit and may be different from the person who will ultimately be benefited if the suit is successful."); Simes, *supra* note 2, at 61 ("The real party in interest is the one to whom the substantive law of the case gives the right to bring and control the action."). *But see* Note, *Civil Procedure—Insurance Companies as Real Parties in Interest*, 46 KY. L.J. 252, 257 (1958) ("It would be difficult to argue . . . that the insurance company is not a real party in interest since it is the party 'who will be entitled to the benefits of the action upon successful termination thereof.' " (quoting Taylor v. Hurst, 186 Ky. 71, 74, 216 S.W. 95, 96 (1919))).

43. *See* 3A J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 17.12 (2d ed. 1989) [hereinafter MOORE'S FEDERAL PRACTICE].

tled to enforce the claim. The rule was intended to do nothing more than deter "use practice."[44] In its mandatory form,[45] the rule assures that one who has the right to assert and control the claim will be named as the party plaintiff.[46] But the rule does not tell us anything about who that person is.

To raise the issue of whether the plaintiff is entitled to assert the claim stated, other procedural devices are available. A rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief may be granted will test whether the named plaintiff is entitled to prosecute the claim stated in the complaint. Thus, for example, if the beneficiary of an estate brings suit to enforce a claim of the estate, and the substantive law gives an administrator the sole right to sue on behalf of the estate, a court will grant a motion to dismiss under rule 12(b)(6). Nothing more is needed.[47] Another rule declaring that the proper plaintiff is one who can state a claim for relief—which is all the real party in interest rule does—adds nothing.[48]

If the real party in interest rule were understood universally to mean no more than it does, there would be little harm in having an explicit rule that the

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44. Atkinson, *supra* note 2, at 935-36 (describing the assignor's purely formal connection with the action and concluding that all that remained to be done was to abolish use of the assignor's name, which "might easily have been accomplished without saying anything about the real party in interest"); Clark & Hutchins, *supra* note 32, at 262 ("Thus the change induced by this section is formal only: a plaintiff who had been able to sue at law in the name of another and in equity in his own name can now sue in his own name before a court administering both law and equity."). Professor Simes describes the real party in interest rule as having three parts: "(1) The real party in interest is the one to whom the substantive law of the case gives the right to bring and control the action. (2) The real party in interest must sue. (3) The real party in interest must sue in his own name." Simes, *supra* note 2, at 61. He then concludes that "only the third part of the rule represents any innovation," in that it "abolish[es] certain technical rules such as those providing for a 'use plaintiff' in case of suit by the assignee of a chose in action." *Id.* at 61-62.

45. The rule also has existed in some states in a permissive form. Atkinson, *supra* note 2, at 933; *see, e.g.*, FLA. R. CIV. P. 1.210 ("Every action may be prosecuted in the name of the real party in interest, . . ."); *see also* Holyoke Mut. Ins. Co. v. Concrete Equip., Inc., 394 So. 2d 193, 196 (Fla. Dist. Ct. App. 1981) ("Florida's 'real party in interest' rule is permissive only.").

46. In most cases, resolution of the issue of the plaintiff's right to assert the claim also will resolve the plaintiff's right to control the conduct of the lawsuit. The Federal Rules of Civil Procedure make this assumption in holding "parties" responsible for the conduct of litigation. *See supra* notes 20-23 and accompanying text. Under some procedural devices, however, most notably the class action and actions consolidated by the Judicial Panel on Multidistrict Litigation, a plaintiff who is entitled to assert a claim may not have complete control over the course of the suit. *See* FED. R. CIV. P. 23(d), (e); MANUAL FOR COMPLEX LITIGATION § 20.22 (2d ed. 1985).

47. J. FRIEDENTHAL, M. KANE & A. MILLER, *supra* note 31, at 320; Atkinson, *supra* note 2, at 960 ("If substantive principles of law are sufficient to indicate who should be sued, they are sufficient to ascertain who should sue. No formula is needed in either case."); Clark & Hutchins, *supra* note 32, at 262; Kennedy, *supra* note 2, at 723-24.

48. With one exception, it makes little difference procedurally whether a court considers a motion to dismiss as a motion under rule 17(a) or under rule 12(b)(6). The exception is the effect of a defendant's delay in asserting his objection to the right of the plaintiff to bring the action. Federal rule 12(h) provides specifically that a defense of failure to state a claim may be raised as late as "trial on the merits." Rule 17(a), on the other hand, provides no guidance as to the required timing of the objection, and there is no clear rule with regard to waiver of the objection. *See* Sun Ref. & Mktg. Co. v. Goldstein Oil Co., 801 F.2d 343, 344-45 (8th Cir. 1986) (real party in interest objection must be raised with "reasonable promptness"); Hefley v. Jones, 687 F.2d 1383, 1388 (10th Cir. 1982) (real party in interest objection waived when not asserted until 16 days prior to trial); Truckweld Equip. Co. v. Swenson Trucking & Excavating, Inc., 649 P.2d 234, 239 (Alaska 1982) ("The decision as to whether or not the motion has been made timely is committed to the discretion of the trial judge."); J. FRIEDENTHAL, M. KANE & A. MILLER, *supra* note 31, at 322; Kennedy, *supra* note 2, at 683-85.

proper plaintiff to be named is one who has the substantive right to assert and control the claim. Such a rule is consistent, in fact, with the federal procedural system's assumption that to be named a "party" to a lawsuit means something—that it is the "parties" who are accountable for and have rights in the litigation.[49] Unfortunately, however, the rule is as often misunderstood as it is understood. It has become, in some cases, a rule of compulsory joinder[50] and, in others, a rule that authorizes suit in the name of a party who is not the proper plaintiff under the substantive law.[51]

B. The "Exceptions" Clause and the 1966 Amendment

The proposition that nonbeneficially interested representatives such as executors and administrators may sue in their own names without joining the beneficially interested persons was expressed as an exception to the real party in interest rule in the Field Code,[52] in Federal Equity Rule 37,[53] and in the original version of rule 17(a).[54] Professor Atkinson criticized this syntax because it gave the erroneous impression that treating an authorized representative as a real party in interest was an exception not consistent with the rule.[55]

The "exceptions" clause actually did no more than reflect general substantive law. The purpose of the clause was to clarify that adoption of the equity practice that *permitted* suit by the holder of an equitable interest did not *prevent* suit by a legal title holder; nor did it require joinder of persons having only a beneficial interest, who were otherwise not entitled to sue at all.[56] Indeed, the beneficially interested persons associated with representatives listed in the clause were persons, such as the beneficiary of a trust or the legatee or distributee of a decedent, who typically had no right to sue under the substantive law and, for that reason, were not "real parties in interest."[57] Thus, the clause's purpose simply was to make clear that the rule worked no change in existing substantive law. Those representatives listed in the "exceptions" clause were entitled to sue not because they were listed in that clause; rather they could sue because the substantive law gave them that right.[58] They are, therefore, "real parties in in-

49. *See supra* notes 20-23 & 46 and accompanying texts.

50. *See infra* notes 262-319 and accompanying text.

51. *See infra* notes 141-261, 334-63 and accompanying texts.

52. *See supra* note 38.

53. The federal equity rule differed from the Field Code provisions in the conversion of Field Code § 93 into a clause following the main rule and the addition of "guardian" and "a party with whom or in whose name a contract is made for the benefit of another" in that clause. *See* Atkinson, *supra* note 2, at 930. *Compare supra* note 38 (text of Field Code § 93) *with supra* note 40 (text of Federal Equity Rule 37).

54. *See supra* text accompanying note 24 (text of original rule 17(a)).

55. Atkinson, *supra* note 2, at 937-38, 957. The drafters of the original rule 17(a) recognized this problem but did not attempt to correct it. *See* Clark & Moore, *A New Federal Civil Procedure—II. Pleadings and Parties*, 44 YALE L.J. 1291, 1311 n.88 (1935) (noting that the clause "tended to confuse the subject," but that "since the provision has received specific construction that is satisfactory it may be well to adopt Equity Rule 37 without substantial change").

56. Atkinson, *supra* note 2, at 960-61; Clark & Hutchins, *supra* note 32, at 274.

57. Atkinson, *supra* note 2, at 957 ("cestui que trust, the distributee and the legatee do not normally have a right of action against third persons"); Clark & Hutchins, *supra* note 32, at 274.

58. *See* Simes, *supra* note 2, at 71.

terest" and are not in any sense exceptions.

Professor Atkinson proposed that if New York retained the real party in interest rule, the state at least should change the connection between the main clause and the "exceptions" clause to remove the erroneous and confusing implication that the clause stated an exception to a supposed rule that the real party in interest is the beneficially interested person.[59] The 1966 amendment to federal rule 17(a) followed Atkinson's suggestion by eliminating the word "but" and converting the "exceptions" clause into an independent sentence.[60] The Advisory Committee did not cite Atkinson's article, but stated, "The minor change in the text of the rule is designed to make it clear that the specific instances enumerated are not exceptions to, but illustrations of, the rule."[61] Even the Reporter, Professor Kaplan, however, was not entirely confident that the change would correct the problem. Professor Kaplan wrote that the new first sentence was "still susceptible of the erroneous reading" that the real party in interest was the one beneficially concerned in the claim.[62]

C. Relation Back, Ratification, and the 1966 Amendment

Another feature of rule 17(a) that has contributed to the confusion about the rule's proper role is the provision added in 1966 to provide for relation back of an amendment correcting a defect in naming the real party in interest.[63] Because the question of who is a real party in interest is a matter of the substantive law, a federal court will apply state substantive law in making the real party in interest determination in regard to a claim arising under state law that is brought in federal court.[64] The effect, however, of a finding that the plaintiff is not a proper party to assert the claim remains a question of federal procedure in federal courts.[65] Thus, when there has been a defect in naming the plaintiff, federal law determines whether the complaint may be amended to correct the

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59. Atkinson, *supra* note 2, at 958; *see also* Clark & Hutchins, *supra* note 32, at 273-74 (referring to the exceptions clause as "the largest single cause" of confusion in real party in interest doctrine). For cases that have suffered from this confusion, see *infra* notes 320-33 and accompanying text.

60. Thus, the first two sentences of the rule, as amended in 1966, provided:

> Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States.

FED. R. CIV. P. 17(a) *Cf. supra* text accompanying note 24 (text of original rule 17(a)).

61. FED. R. CIV. P. 17(a) advisory committee's note (1966). The committee also added "bailees" to the list of real parties in interest who may sue alone for the benefit of another. *See id.*; *see also* Atkinson, *supra* note 2, at 949-50 (discussing the bailee's right to sue under substantive law).

62. Kaplan, *supra* note 3, at 412 n.213.

63. *See infra* note 68 and accompanying text.

64. *See, e.g.*, American Fidelity & Casualty Co. v. All Amer. Bus Lines, Inc., 179 F.2d 7, 10 (10th Cir. 1949); Braniff Airways, Inc. v. Falkingham, 20 F.R.D. 141, 143 (D. Minn. 1957); 3A MOORE'S FEDERAL PRACTICE, *supra* note 43, ¶ 17.07, at 17-49. State law also may be applied when the court is merely enforcing a federal remedy for a traditional state-created right. J. FRIEDENTHAL, M. KANE & A. MILLER, *supra* note 31, at 321.

65. *See* C. WRIGHT, *supra* note 5, at 453; Clark & Moore, *supra* note 55, at 1310.

defect and also controls the effect of that amendment.[66]

Prior to 1966, the Federal Rules did not specify whether an amendment of a complaint substituting the proper plaintiff to correct a failure to comply with rule 17(a) should be given relation back effect to avoid a statute of limitations defense.[67] The 1966 amendment to the rule clarified this matter of federal procedure by adding a new concluding sentence:

> No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.[68]

The 1966 amendment to rule 17(a) must be read in light of the parallel amendment of rule 15(c), which provided for relation back of an amendment changing the party "against whom a claim is asserted."[69] Although the 1966 amendment to rule 15(c) by its terms does not apply to a change in the named plaintiff, the advisory committee's note states that

> the attitude taken in revised Rule 15(c) toward change of defendants extends by analogy to amendments changing plaintiffs. Also relevant is the amendment of Rule 17(a) (real party in interest). To avoid forfeitures of just claims, revised Rule 17(a) would provide that no action

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66. Levinson v. Deupree, 345 U.S. 648, 652 (1953).

67. *See* Link Aviation, Inc. v. Downs, 325 F.2d 613, 615 (D.C. Cir. 1963) (relying upon rule 15(c) to permit relation back of an amendment to substitute fully subrogated insurers as the parties plaintiff).

68. 39 F.R.D. 84 (1966). The impetus for this amendment came from the Advisory Committee on Admiralty Rules. *See infra* notes 77-82 and accompanying text.

In addition to the amendments of rule 17(a) discussed above, the rule was amended in 1988 solely for the purpose of "gender-neutralizing." 108 S. Ct. ccxii (codified at FED. R. CIV. P. 17(a)). Thus, subsection (a) now reads in its entirety:

> Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

FED. R. CIV. P. 17(a).

69. Rule 15(c) as amended in 1966 provided in pertinent part:

> Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. *An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.*

FED. R. CIV. P. 15(c) (italicized language added in 1966).

> shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed for correction of the defect in the manner there stated.[70]

The advisory committee's mention of an extension of rule 15(c) "by analogy" to amendments changing plaintiffs could create some confusion, or at least an overlap with rule 17(a).[71] Nonetheless, at least the 1966 amendment to rule 17(a) moots the issue of whether rule 15(c) applies to a change of plaintiff.[72] Thus, the provision for relation back in rule 17(a) appears to be the only part of the rule that has any unique or useful function.

If rule 17(a) were deleted in its entirety, however, it would be a simple matter to preserve the relation back of amendments changing a named plaintiff. Federal courts generally have been very permissive in permitting plaintiffs to amend their complaints to avoid dismissal of the suit under rule 12(b)(6) for failure to state a claim.[73] All that would be needed would be some clarification that the first sentence of rule 15(c) applies to an amendment changing the named plaintiff, just as it does to any amendment other than a change of defendant.[74]

The difficulty created by the sentence added to rule 17(a) in 1966 is not the provision for relation back when a proper plaintiff is belatedly named. Rather, the problem is the suggestion found in the text of the amendment that one can cure a defect in naming the proper plaintiff by "ratification."[75] In recent years, a few courts have seized upon the word "ratification" to justify proceeding with a suit brought in the name of a person who is not a proper plaintiff, while the party who actually has the right to assert the claim and who controls the litigation remains unnamed.[76]

The idea of ratification came from admiralty, with its traditionally relaxed approach to plaintiffs. It has been said, for example, that even a simple volun-

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70. FED. R. CIV. P. 15 advisory committee's note (1966).

71. *See* Wadsworth v. United States Postal Serv., 511 F.2d 64, 66 (7th Cir. 1975) (relying upon both rules 15(c) and 17(a) in permitting relation back of an amendment to add insurer as a party plaintiff); Crowder v. Gordons Transp., Inc., 387 F.2d 413, 415-19 (8th Cir. 1967) (relying upon both rules to permit relation back of amendment changing the representative capacity of the plaintiff); Kaplan, *supra* note 3, at 410-12 (noting that in the 1966 amendments, "[p]art of the problem" of relation back of an amendment correcting the plaintiff "was being attacked by amendment of rule 17(a)").

72. *See* Raynor Bros. v. American Cyanimid Co., 695 F.2d 382, 384-85 (9th Cir. 1982); Note, *Amendments That Add Plaintiffs Under Federal Rule of Civil Procedure 15(c)*, 50 GEO. WASH. L. REV. 671, 676-80 (1982).

73. *See, e.g.*, Czeremcha v. International Ass'n of Machinists & Aerospace Workers, 724 F.2d 1552, 1556 (11th Cir. 1984) (even after a complaint is dismissed, leave to amend should be granted liberally).

74. The advisory committee's note to the 1966 amendment of rule 17(a) states that the relation back should be permitted only in a case in which "determination of the proper party to sue is difficult" or in a case of "understandable mistake." FED R. CIV. P. 17(a) advisory committee's note (1966); *see infra* note 87. Such a requirement may have seemed advisable under rule 17(a) because the 1966 amendment of that rule contains no limits upon the plaintiff's right to correct a defect in pleading and have relation back. If courts handle the problem under rule 15, however, the same limits that apply to any amendment will apply to an amendment changing the party plaintiff. *See* FED. R. CIV. P. 15(a) (leave of court or consent of adverse party required for amendments after a responsive pleading is served, "and leave shall be freely given when justice so requires").

75. *See supra* text accompanying note 68.

76. *See infra* notes 334-63 and accompanying text.

teer may institute suit against a carrier in admiralty to recover for loss or damage to cargo.[77] As long as the proper plaintiff or plaintiffs ratified the action before judgment, recovery could be obtained.[78] In other words, admiralty did not have a rule requiring that a real party in interest—one with a right under the substantive law to enforce the claim—bring the action. This nonchalance has been attributed to the numerous interests that may exist in a ship's cargo and to the difficulty in some cases of ascertaining the parties entitled to recover, at least prior to the expiration of applicable statutes of limitation.[79]

In 1964 the Advisory Committee on Admiralty Rules proposed the merger of civil and admiralty practice under the Federal Rules of Civil Procedure. The Committee, with the approval of the Advisory Committee on Civil Rules, recommended several amendments to the Federal Rules of Civil Procedure to preserve, after the merger, certain distinct admiralty practices.[80] The Committee proposed that the following concluding sentence be added to rule 17(a):

> No action for loss or misdelivery of, or damage to, maritime cargo, or for general average contribution to such cargo, or for salvage, and no action for personal injury or death governed by section 33 of the Longshoremen's and Harborworkers' Compensation Act, as amended . . . shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder or substitution shall have the same effect as if the action has been commenced in the name of the real party in interest.[81]

Then, as the Reporter to the Advisory Committee on Civil Rules later explained, "So sound did this proposed amendment of the rule seem that when it reached the Court it had been enlarged to cover all civil cases, not merely the particular maritime actions, and in that form it was approved."[82] The soundness perceived by Professor Kaplan was that the relation back effect of the rule would "prevent failure of action for reasons not going to the merits when the defendant had been informed through the institution of the action against him that rights were being asserted."[83]

What apparently passed unnoticed, however, was that the provision for ratification, as an alternative to joinder or substitution, introduced into the rule a practice that was fundamentally at odds with the rule's basic proposition that

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77. 2A A. JENNER & J. LOO, BENEDICT ON ADMIRALTY § 53, at 6-11 (7th ed. 1989) [hereinafter BENEDICT].

78. *Id.* § 53, at 6-11 to -13.

79. Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts, Part I— Amendments to Effect Unification of Civil and Admiralty Procedure, Rule 17(a) advisory committee's note, 34 F.R.D. 325, 341-42 (1964) [hereinafter Preliminary Draft]; *see* Saint Paul Marine Transp. Corp. v. Cerro Sales Corp., 505 F.2d 1115, 1118 (9th Cir. 1974).

80. Preliminary Draft, *supra* note 79, 34 F.R.D. at 331-36.

81. *Id.* at 341 (citation omitted).

82. Kaplan, *supra* note 3, at 411; *see supra* text accompanying note 68.

83. Kaplan, *supra* note 3, at 411. It is at least arguable that an amendment to rule 17(a) was not necessary to achieve this purpose. *See supra* notes 69-74 and accompanying text.

every action shall be prosecuted in the name of the real party in interest.[84] The practice of ratification reintroduces "use" practice—suit in the name of a nominal party for the use or benefit of the person who actually controls the litigation, and who even may be the only one to benefit from it.[85] This was the very practice, however, that the real party in interest rule was intended to abolish.[86]

The legislative history of the 1966 amendment strongly suggests that the drafters did not intend to revive "use" practice to sanction, at least outside admiralty, deliberate nonjoinder of a party who should be joined.[87] The Advisory Committee's Note states:

> This provision keeps pace with the law as it is actually developing. Modern decisions are inclined to be lenient when an honest mistake has been made in choosing the party in whose name the action is to be filed—in both maritime and nonmaritime cases . . . . The provision should not be misunderstood or distorted. It is intended to prevent forfeiture when determination of the proper party to sue is difficult or when an understandable mistake has been made.[88]

Recent decisions, however, allowing parties to use the ratification device deliberately to avoid naming an insurance company as a plaintiff are inconsistent

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84. The failure to appreciate the conflict between the real party in interest rule and admiralty's ratification practice is evident in Professor Kaplan's comment that "[a]pparently something on the order of a real party in interest doctrine applied in admiralty." Kaplan, *supra* note 3, at 411 n.209. A writer on admiralty, however, does seem to have appreciated the conflict, remarking:

> The admiralty principles discussed hereinabove in this chapter [with regard to proper parties and ratification in admiralty, see *supra* notes 77-79 and accompanying text] have been established by the decisions of the courts over many years. The application of Rule 17(a) of the Rules of Civil Procedure to admiralty cases is bound to affect the principles discussed but the extent of the impact remains for future decisions. Certainly, when possible, the plaintiff named in a complaint should be the party who has suffered the loss. However, it is sometimes impossible to ascertain what party has legally suffered loss of cargo until after the time for suit will have expired and, in such cases, suit in the name of the shipper from whom title has passed or in the name of a volunteer, may be the only practical course to follow.

BENEDICT, *supra* note 77, § 53, at 6-15. Ironically, admiralty appears to have had more of an impact on civil procedure than vice versa.

85. *See supra* note 31 and accompanying text; *see also* Note, *Compulsory Joinder of Partial Subrogees: Implications of the Alaska Rule*, 1 ALASKA L. REV. 171, 177-78 (1984) (the provision in rule 17(a) for ratification "actually encourages the device of use plaintiffs").

86. *See supra* notes 38-39, 44 and accompanying texts. Professor Atkinson stated that abolition of this practice was "the real party in interest statute's only real accomplishment." Atkinson, *supra* note 2, at 946; *see also* United States v. Aetna Casualty & Sur. Co., 338 U.S. 366, 381 (1949) ("Under the Federal Rules, the 'use' practice is obviously unnecessary, as has long been true in equity.").

87. *See supra* notes 77-83 and accompanying text; *see also* 6A C. WRIGHT, A. MILLER & M. KANE, *supra* note 42, § 1555, at 417-18. Wright, Miller, and Kane explain:

> The reference to "ratification" in Rule 17(a) seems to be a carryover from the original draft of the sentence added in 1966, which was to apply only to certain maritime proceedings, and probably was intended to adopt the procedure in salvage actions by which nonparties seek their share of the recovered property. Nonetheless, some federal courts have interpreted the word to validate an arrangement by which the real party in interest authorizes the continuation of an action brought by another and agrees to be bound by its result, thereby eliminating any risk of multiple liability.

88. FED. R. CIV. P. 17 advisory committee note (1966); *see also* J. FRIEDENTHAL, M. KANE & A. MILLER, *supra* note 31, at 322 n.28 (stating that the key factors to be considered in permitting the amendment are whether the delay will prejudice the defendant and whether the plaintiff has some reasonable excuse for the error as to the real party in interest).

with the expressed legislative intent that the 1966 amendment be available only in cases of mistake.[89] More importantly, the ratification device is inconsistent with federal policies of diversity jurisdiction[90] and with the assumption in the Federal Rules of Civil Procedure that the party plaintiff is the person in control of the action and the person entitled to state the claim for relief sought in the complaint.[91]

The several problems created by rule 17(a)—confusion in identifying the proper plaintiff, use of the rule to require joinder, and introduction of the ratification device—all can be illustrated by examining federal decisions concerning the proper party plaintiff when the claimant has been compensated in whole or in part by insurance. Before proceeding to this examination, one must understand the substantive law of subrogation that should be the starting point in identifying the proper plaintiff. In fact, a general failure to appreciate the considerable diversity in the law of subrogation has led federal courts to make many poor decisions about the proper plaintiff when insurance compensation has occurred.[92]

III. THE MEANING OF INSURANCE SUBROGATION

The rights of a compensating insurer may arise by actual assignment from the insured or by subrogation.[93] Subrogation is a remedial doctrine created by courts of equity to prevent unjust enrichment.[94] When a party (the subrogee) has discharged an obligation owed by another (the debtor) under such circumstances that the debtor would be unjustly enriched by retaining the benefit of the discharge, the subrogee is given the rights that the original obligee had against

89. *See supra* text accompanying note 88; *see also* Clarkson Co. v. Rockwell Int'l Corp., 441 F. Supp. 792, 797-98 (N.D. Ca. 1977) (ratification justified on grounds of difficulty of determining proper plaintiffs); Hobbs v. Police Jury of Morehouse Parish, 49 F.R.D. 176, 180 (W.D. La. 1970) (when determination of the proper party to bring the action was not difficult and when no excusable mistake had been made, then the last sentence of rule 17(a) is inapplicable and the action should be dismissed); 6A C. WRIGHT, A. MILLER & M. KANE, *supra* note 42, § 1555, at 415 ("A literal interpretation of the last sentence of Rule 17(a) would make it applicable to every case in which an inappropriate plaintiff has been named. However, the rule should be applied only to cases in which substitution of the real party in interest is necessary to avoid injustice.").

90. *See infra* notes 364-88 and accompanying texts.

91. *See supra* notes 20-23 & 46 and accompanying texts.

92. *See infra* notes 141-95 and accompanying texts.

93. Subrogation has been referred to as equitable assignment. Clark & Hutchins, *supra* note 32, at 270 n.79. At one time it was common for there to be an actual assignment to the insurer upon its payment to the insured, so that it made little difference whether the insured's rights were considered from the standpoint of assignment or subrogation. Atkinson, *supra* note 2, at 943. In some jurisdictions, on the other hand, subrogation is not permitted for life and accident insurance or for medical payments for a variety of reasons, including rules against assignment of personal injury claims. R. KEETON & A. WIDISS, INSURANCE LAW § 3.10(a) (Student ed. 1988). In such situations, insurers have used "loan receipts" to avoid the prohibition against assignment and subrogation. *Id.* § 3.10(a), at 230 & n.41; *see also* Kimball & Davis, *The Extension of Insurance Subrogation*, 60 MICH. L. REV. 841, 858, 866-68 (1962) (distinguishing assignment and subrogation); Comment, *The Loan Receipt and Insurers' Subrogation—How to Become the Real Party in Interest Without Really Lying*, 50 TUL. L. REV. 115, 133 (1975) (discussing insurer's use of loan receipt to achieve reimbursement otherwise prohibited); *infra* notes 211-61 and accompanying text (discussing other uses of loan receipts).

94. E. RE, CASES AND MATERIALS ON EQUITY AND EQUITABLE REMEDIES 312-13 (5th ed. 1975).

the debtor before the obligation was discharged. The procedure is called subrogation and the subrogee is said to be subrogated to the position of the original obligee (the subrogor).[95]

In the insurance context, a compensating insurer (the subrogee) is said to be subrogated to the rights of its insured (the subrogor) against a party who has caused the insured's loss.[96] An insurer's subrogation rights may be judicially created,[97] may derive from the insurance policy or a settlement agreement with the insured,[98] or may be provided by legislation.[99] At a minimum, a compensating insurer may be entitled to reimbursement from damages recovered from a third party liable for the compensated loss.[100] The term "subrogation," however, typically implies much more. It means that the insurer has acquired all of the rights of the insured—including the right to bring suit—with regard to that portion of the insured's claim that the insurer has compensated. When the insurer is subrogated in this sense, the insured typically will have a duty to permit the insurer to control enforcement of at least the insurer's portion of the claim, to cooperate in its enforcement, and to refrain from prejudicing the insurer's rights.[101] The insured, however, may retain control of his own uncompensated portion of the claim, while the insurer controls the subrogated portion.[102] In

95. RESTATEMENT OF RESTITUTION § 162 & comment a (1937).

96. R. KEETON & A. WIDISS, *supra* note 93, § 3.10(a), at 219. The collateral source rule, which prohibits reduction of a plaintiff's damages on account of benefits received from other sources, is essential to achieving the subrogation goal of shifting the loss from the insurer to the defendant. Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CAL. L. REV. 1478, 1498-99 (1966).

97. Judicially created insurance subrogation arises from the more general equitable doctrine and is sometimes referred to as "legal subrogation." R. KEETON & A. WIDISS, *supra* note 93, § 3.10(a), at 220.

98. This type of subrogation is sometimes referred to as "conventional subrogation." *Id.*

99. *Id.*

100. Depending upon the applicable subrogation rules, the allocation of recovery between insured and insurer will either give priority to the insured or the insurer, or require that they share pro rata. *Id.* § 3.10(b)(1), at 233-37.

101. 6A J. APPLEMAN, INSURANCE LAW AND PRACTICE § 4096.25 (1972); 6A C. WRIGHT, A. MILLER & M. KANE, *supra* note 42, § 1546, at 354 (Supp. 1989) ("As a practical matter, of course, the insurance company will control the prosecution of the lawsuit no matter in whose name it is brought."). The extent of an insured's duty to cooperate was not well established by the courts, *see, e.g.*, Central Nat'l Ins. Co. v. Horne, 45 Tenn. App. 711, 326 S.W.2d 141 (1959); Coniglio v. Wyoming Valley Fire Ins. Co., 337 Mich. 38, 59 N.W.2d 74 (1953), but more recent insurance policies have sought to specify the rights of the insurer and duties of the insured. For example, the "Business Auto Coverage Form (1985)" provides:

> 5. TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US. If any person or organization to or for whom we make payment under this Coverage Form has rights to recover damages from another, those rights are transferred to us. That person or organization must do everything necessary to secure our rights and must do nothing after "accident" or "loss" to impair them.

R. KEETON & A. WIDISS, *supra* note 93, app. G, at 1113; *see also id.* at 1119 ("Trust Agreement" clause in uninsured motorist part of "Family Combination Automobile Policy Form"); *id.* at 1129 ("Our Right to Recover Payment" clause in "Personal Auto Policy"); *id.* at 1147 ("Subrogation" clause in "Homeowners 4 Contents Broad Form").

102. *See, e.g.*, Providence Washington Ins. Co. v. Hogges, 67 N.J. Super. 475, 482, 171 A.2d 120, 124 (App. Div. 1961). Thus, an insured's release of a tortfeasor who has knowledge of the insurer's interest generally will not bar the insurer from asserting its subrogation claim against the tortfeasor. 6A J. APPLEMAN, *supra* note 101, §§ 4091-92; R. KEETON & A. WIDISS, *supra* note 93, § 3.10(c), at 244. If a tortfeasor accepts a release in good faith without knowledge of the insurer's

addition, there are also situations in which the insurer may have acquired the right to control the entire claim, with a duty to reimburse the insured for amounts recovered over the subrogated amount.[103]

The rights of the insurer, however, are not always so extensive. Under some schemes, most notably (but not exclusively) workers' compensation acts, the insured retains control of the entire original claim against the third party, although the insurer may be entitled to a lien on the recovery and the insured may be deemed a trustee to the extent of the insurer's interest.[104]

Finally, there are some situations in which both insured and insurer simul-

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interest, thus destroying the subrogation claim, the insurer may be entitled to recovery from the insured. 6A J. APPLEMAN, *supra* note 101, §§ 4093-94; R. KEETON & A. WIDISS, *supra* note 93, § 3.10(c), at 244-47; *see also id.* § 3.10(c), at 243 (discussing the possibility that a court "might allow the insured to settle with the alleged tortfeasor as to the insured's share of the cause of action without affecting the subrogated insurer's share of the cause of action").

Keeton and Widiss also discuss the situation of "reciprocal claims," in which the plaintiff's insurer settles the defendant's liability claim against the plaintiff. The authors suggest that it is fair to treat this settlement as a bar to the portion of the plaintiff-insured's claim against the defendant that is subrogated, but not as a bar to the plaintiff's portion. *Id.* § 7.5(a)(2), at 800-01. Similarly, a plaintiff-insured's settlement with the defendant should not bar the insurer subrogee's claim because the claims are "independent" and "severable." *Id.* § 7.5(a)(3), at 802-03.

103. In Virginia Elec. & Power Co. v. Westinghouse Elec. Corp., 485 F.2d 78, 82 n.1 (4th Cir. 1973), *cert. denied*, 415 U.S. 935 (1974), the insured, who retained a $150,000 pecuniary interest out of a $2,200,000 claim, executed an agreement providing that the conduct of the action would be under the "exclusive direction and control of the insurer." *See* 2A A. LARSON, *supra* note 9, §§ 74.14 & 74.15 (identifying workers' compensation acts that establish a sequence in which either the employee or the insurer first has the exclusive right to bring suit against a third party, and then, after a specified time, the other has the exclusive right); Jenner & Tone, *Pleading, Parties and Trial Practice*, 50 NW. U.L. REV. 612, 612 (1955) ("An insured under an automobile collision policy who has collected for property damage under the policy ordinarily has no control over a subrogation action brought subsequently in his name by the insurer under the subrogation provision of the policy."). When, however, because of a conflict of interest, the insurer is not likely to protect the insured's interest, a court may permit the insured to bring and control his own suit. *See* Czaplicki v. S.S. Hoegh Silvercloud, 351 U.S. 525 (1956). *But see* Rodriguez v. Compass Shipping Co., 451 U.S. 596 (1981) (injured longshoremen, who offered no excuse for their delay, could not prosecute personal injury action against third party after right to recover had been assigned to employer by terms of Longshoremen's Act, and it was not material that employers failed to pursue the assigned claims).

104. *See* 2A A. LARSON, *supra* note 9, § 74.14 (identifying workers' compensation schemes in which the employee has the exclusive right to bring suit for a specified period of time); *see also* Cleaves v. De Lauder, 302 F. Supp. 36, 38 (N.D. W. Va. 1969) (under West Virginia law the partially compensating automobile collision insurer's right is only a contingent interest in the litigation; the insurer could not maintain an action in its own name); United Sec. Ins. Co. v. Johnson, 278 N.W.2d 29, 30-31 (Iowa 1979) (when the insurance covers only part of the loss, the right of action remains in the insured for the entire loss, the insured becoming a trustee for the insurer to the extent of its payment and the insurer may not maintain an action against the tortfeasor); Krause v. State Farm Mut. Auto. Ins. Co., 184 Neb. 588, 593, 169 N.W.2d 601, 604 (in a case of partial compensation, the insured retains control of the entire cause of action and is deemed to hold as trustee the amount of the insurer's subrogation interest), *modified*, 184 Neb. 639, 170 N.W.2d 882 (1969).

When the insured otherwise has control of the claim, but fails to assert it, the insurer then may be permitted to sue. *See United Sec. Ins. Co.*, 278 N.W.2d at 31 (Iowa 1979); City of New York Ins. Co. v. Tice, 159 Kan. 176, 186, 152 P.2d 836, 842 (1944) (insured should sue for itself and as trustee for the insurer, but if the insured refuses to sue, "justice requires that the insurer be permitted to bring action"). *Cf.* Joyner v. F & B Enters., Inc., 448 F.2d 1185, 1187-88 (D.C. Cir. 1971) (under the Longshoremen's Act, a consequence of the employee's bringing suit is that the compensating insurer has no substantive right against the tortfeasor).

There do not appear to be any situations in which an insured who has received total compensation retains control of the claim. *See* Brinkerhoff v. Swearingen Aviation Corp., 663 P.2d 937, 941-42 (Alaska 1983) (When amounts owner received in insurance and salvage equalled the value of the lost aircraft, owner is not entitled to further recovery from defendant, even though defendant settled with owner's insurer for less than amount insurer paid owner. Owner did, however, retain valid

taneously are entitled to assert the entire claim, or the insured is entitled to assert the entire claim while the insurer is permitted to assert the subrogated portion. Generally in these situations joinder of both insured and insurer is required[105] or else the filing of suit by one will preclude suit by the other.[106]

IV. FINDING THE PROPER PLAINTIFF

Federal courts called upon to determine the proper plaintiff as between a compensated insured and his insurer unfortunately often have failed to appreciate the wide variety of applicable substantive law. Many courts merely consider an insurer "subrogated" whenever it may be entitled to reimbursement. Then, having so labeled the insurer, and without further examination of the insurer's rights under applicable law, the courts conclude that the insurer is a "real party in interest" under rule 17(a).[107] Similarly, when the insured retains any pecuniary interest in the claim, courts readily conclude that the insured is a "real party in interest."[108] The courts fail to address what ought to be the crucial question—who is entitled under the substantive law to maintain and control an action against the third party.[109]

The problem is most pronounced when, as is most often the case, the in-

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cause of action for prejudgment interest for period extending from date of accident to date of his recovery from his property insurer.).

105. *See* 2A A. LARSON, *supra* note 9, § 74.13, at 14-371 to -375. Larson discusses cases construing workers' compensation statutes to "give a right to the employer [or its insurer] without taking anything away from the employee, with the result that the subrogation or assignment has the effect of creating parallel rights of action which may be asserted by either employer or employee." *Id.* § 75.42, at 14-622 to -623. Many of these cases hold that although the employee may still sue after the insurer's rights arise, joinder of the insurer may be required in the employee's suit. *Id.* § 75.42, at 14-623 n.21. *See* Lucas v. Durabond Prod. Co., 510 F. Supp. 999, 1000-01 (W.D. Pa. 1981) (lamenting that "many justifiable and fair settlements of plaintiffs' claims" have been "wrecked by the counsel whose prime concern was the subrogation lien rather than the plaintiff's true interests").

106. Courts not requiring joinder although both insured and insurer have a right to sue explain that these parallel actions are not unfair to the defendant because, under the applicable statute only one judgment, which would bind both employee and insurer, was permitted. King v. Cairo Elks Home Ass'n, 145 F. Supp. 681, 683-86 (E.D. Ill. 1956) (describing rights of employee and insurer as "coextensive and independent" during the three months prior to expiration of the statute of limitations period, when either the employee or insurer could sue a third party under the workers' compensation act); Jenkins v. Westinghouse Elec. Co., 18 F.R.D. 267, 270 (W.D. Mo. 1957). In O'Hanlon Reports, Inc. v. Needles, 360 S.W.2d 382 (Mo. App. 1962), the court stated that

> either the employee or the employer (or both together) may sue the negligent third party for all elements of the employee's damages, and whichever brings the action becomes the trustee of an express trust for the benefit of the other . . . . Actually, while the word 'subrogated' is used . . . it is indemnity, and not true subrogation, for which the act provides.

Id. at 386.

Larson concludes that while this type of scheme avoids the problem of a subrogee-insurer with no incentive to protect its subrogor-insured's interests, it still gives "some advantage to the carrier in that, with its superior facilities and experience, it is apt to be the more alert and aggressive in launching the action." 2A A. LARSON, *supra* note 9, § 74.16(b), at 14-389. He further notes that "there may be some advantage of simplicity in having only one cause of action in existence at a given time, and in knowing exactly whose it is." *Id.*

107. *See infra* notes 141-69 and accompanying text.

108. *See infra* notes 170-95 and accompanying text.

109. Some federal courts, even after the adoption of rule 17(a), continued to authorize "use" practice. Grace v. United States, 76 F. Supp. 174, 178 (D. Md. 1948) (In general, "suit must be

surer has only partially compensated the insured for the loss. When the insurer has fully compensated the insured, federal courts generally hold correctly that the insurer is the only "real party in interest" under rule 17(a).[110] These decisions are correct because it is a virtually universal rule of subrogation that an insured who has received total compensation no longer has any rights in the claim.[111]

The case of partial subrogation under federal rule 17(a) has been more difficult than that of full compensation because of the variety in the substantive law of subrogation,[112] as well as the esoteric nature of the real party in interest rule. The erroneous approaches in federal decisions involving partial compensation by an insurer fall into three "problem" categories. First, many courts, failing to understand the real party in interest rule, have found that either the insured or the insurer is a real party in interest under rule 17(a) solely on the basis of that person's pecuniary interest in the claim.[113] Second, when applying state law to determine who is the real party in interest under rule 17(a), courts sometimes have failed to distinguish a state's procedural provisions from its substantive law of subrogation.[114] Third, federal courts' attempts to apply rule 17(a) to cases in which there is a loan receipt transaction between insured and insurer create a problem that contains both of the difficulties mentioned above, but also has its own unique features.[115]

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brought in the name of the person who has sustained the damage but with the notation that suit is also for the use and benefit of the insurer.").

110. United States v. Aetna Casualty & Sur. Co., 338 U.S. 366, 380-81 (1949). *See generally* Annotation, *Proper Party Plaintiff, Under Real Party in Interest Statute, to Action Against Tortfeasor for Damage to Insured Property Where Loss is Entirely Covered by Insurance*, 13 A.L.R.3D 229 (1967 & Supp. 1989) (collecting federal and state cases).

111. *See supra* note 104. Insurance companies, of course, are not pleased with the result that suit must be brought in their own names. Consequently, in many states there are specific procedural provisions for suit in the name of the insured even when there is total subrogation. *See* IND. R. CIV. P. 19(e)(3); ME. R. CIV. P. 17; MASS. R. CIV. P. 17(a); N.Y. CIV. PRAC. L. & R. 1004 (McKinney Supp. 1990); PA. R. CIV. P. 2002(d); R.I. R. CIV. P. 17(a); TENN. R. CIV. P. 17.01; VA. CODE ANN. § 38.2-207 (1986); VT. R. CIV. P. 17(a); Catalfano v. Higgins, 55 Del. 470, 473, 188 A.2d 357, 358 (1962); Holyoke Mut. Ins. Co. v. Concrete Equip., Inc., 394 So. 2d 193, 195-96 (Fla. App. 1981); Montello Shoe Co. v. Suncook Indus., Inc., 92 N.H. 161, 161-62, 26 A.2d 676, 676-77 (1942). Provisions permitting the insurer to control the action but to bring suit in the name of the insured also have appeared in some workers' compensation statutes. *See, e.g.*, King v. Cairo Elks Home Ass'n, 145 F. Supp. 681, 683 (E.D. Ill. 1956). Insurance companies also have developed the use of the loan receipt device to avoid being named as a plaintiff even when subrogation is total. *See infra* notes 211-61 and accompanying text.

112. *See supra* notes 93-106 and accompanying text. There also has been, from the time of Code pleading, a variety of procedural treatments among the states. Under the Codes, some states interpreted their real party in interest rule to mean that in a case of partial subrogation, either the insurer or the insured may sue, but joinder of both may be required. Clark & Hutchins, *supra* note 32, at 272. Other states held that when the insured was only partially compensated, the suit not only could, but must, be in the name of the insured alone. *Id.* at 272-73. The variety of interpretations of the real party in interest rule continues today, *see* Annotation, *Proper Party Plaintiff, Under Real Party in Interest Statute, to Action Against Tortfeasor for Damage to Insured Property Where Insured [sic] Has Paid Part of Loss*, 13 A.L.R.3D 140 (1967 & Supp. 1989), although some states have dealt with the issue specifically in a rule or statute. *See supra* note 18.

113. *See infra* notes 141-95 and accompanying text.

114. *See infra* notes 196-210 and accompanying text.

115. *See infra* notes 211-61 and accompanying text.

A. *Misunderstanding the Real Party in Interest Rule*

1. The *Aetna* Case and *Moore's Federal Practice*

A leading United States Supreme Court decision and an influential treatise relied upon in that opinion have contributed particularly to the first problem, the tendency to find real party in interest status solely on the basis of pecuniary interest in the claim. The case is *United States v. Aetna Casualty & Surety Co.*,[116] and the treatise is *Moore's Federal Practice*.[117] Professor Moore[118] discussed partial subrogation and the real party in interest rule in the 1948 second edition of his treatise, stating:

> For example, if the insurer satisfies his liability to the insured, but the insured sues and recovers his entire original loss, the recovery is impressed with a trust for the insurer up to the amount to which he was entitled by principles of subrogation. The insurer, therefore, owned that portion of the substantive right, and the insured owned the remainder. There are two real parties in interest and either or both may sue . . . .[119]

This passage fails to distinguish a right to reimbursement from a right to bring suit. It concludes that an insurer "owns" a substantive right, and therefore is a real party in interest, merely because the insurer has a right to reimbursement. But a right to sue and a right to reimbursement are not the same.[120] The weakness in the passage's reasoning is highlighted by the reference to the insurer's trust interest in the insured's recovery. The beneficiary of a trust generally is not entitled to sue and accordingly is *not* a real party in interest. If the insurer's interest under the substantive law is actually a trust interest, that fact alone demonstrates that the insurer properly would *not* be considered a real party in interest. Only if the insurer establishes its right to sue, not merely a beneficial interest, may a court correctly conclude that the insurer is a real party

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116. 338 U.S. 366 (1949).

117. There have been two editions of *Moore's Federal Practice*. The first edition was published in 1938 and rules 17(a) and 19 are discussed in volume 2 of that edition. 2 J. MOORE & J. FRIEDMAN, MOORE'S FEDERAL PRACTICE §§ 17.01-17.14, 19.01-19.05 (1938). The second edition was published originally in 1948 and the discussions of rules 17(a) and 19 appear in volume 3A of the current version of that edition. 3A MOORE'S FEDERAL PRACTICE, *supra* note 43, ¶¶ 17.01-17.15, 19.01-19.21. The second edition, however, is in a loose-leaf form and has been continuously revised since 1948. It is not possible, therefore, to locate with certainty the text of the treatise that is referred to in early citations to the second edition of *Moore's Federal Practice*. Thus, there is no way to identify the text referred to by the *Aetna* Court's citations to "3 Moore, Federal Practice (2d ed.) p. 1339" and "3 Moore, Federal Practice (2d ed.) p. 1348." *See Aetna*, 338 U.S. at 381-82.

118. Professor James William Moore served from 1935 to 1938 as Chief Research Assistant on the staff of Dean Charles E. Clark, Reporter to the Civil Advisory Committee. Moore became a member of the Committee in 1953. 2 MOORE'S FEDERAL PRACTICE, *supra* note 43, ¶ 1.02a[1], at 1-13 n.1. From 1944 to 1948, Professor Moore served as consultant to the revision of the Federal Judicial Code. 2 WHO'S WHO IN AMERICA 2357 (41st ed. 1980).

119. 3A MOORE'S FEDERAL PRACTICE, *supra* note 43, ¶ 17.09[2.-1] at 17-78. Although the treatise is continuously updated, *see supra* note 117, the section cited here begins with the following notation: "The discussion in this subhead was approved by the Supreme Court in United States v. Aetna Cas. & Sur. Co. . . ." *Id.* at 17-77 n.1. The passage also appears, with some differences in syntax, in the first edition of Moore's treatise. 2 J. MOORE & J. FRIEDMAN, *supra* note 117, § 17.08, at 2057.

120. *See supra* notes 93-106 and accompanying text.

in interest.[121]

Moore went on to state that "[i]t has been properly held that since the partial subrogee is a real party in interest, a suit by him alone states a cause of action, the only defect being that of parties . . . ."[122] Moore's approach here is identical to that decried by Professor Simes many years before: "Instead of going to the heart of the matter and deciding why the substantive law gives a litigant a right, courts have dodged behind [the real party in interest] statute and said, 'Oh, well, anyway he is the real party in interest, so, of course, he can sue.' "[123] Nonetheless, Moore's discussion was influential when the United States Supreme Court for the first time discussed rule 17(a) and the issue of insurance compensation.

United States v. Aetna Casualty & Surety Co.[124] has become the landmark decision for the problem of proper parties under the Federal Rules of Civil Procedure in cases involving compensating insurers. It is an unfortunate landmark. Although there is probably nothing wrong with the holding in the case, the decision's treatment of the rule 17(a) issue is dreadfully superficial and misleading.

In each of four cases consolidated for appeal in *Aetna*, an insured allegedly had been injured by the negligence of a federal government employee.[125] Each of the injured parties' insurers brought suit against the United States pursuant to the Federal Tort Claims Act[126] to recover the amounts each had paid to compensate the injured parties.[127] The predominant issue was whether each insurer's claim was prohibited by the Anti-Assignment Statute, which barred "transfers and assignments" of claims against the United States.[128] The Court framed the issue as whether an insurance company may "bring suit in its own name against the United States upon a claim to which it has become subrogated by payment to an insured who would have been able to bring such an action."[129]

In determining the right of subrogees to sue under the Tort Claims Act, the Court first held that the Anti-Assignment Statute did not bar assignments by operation of law, such as subrogation, and that Congress did not intend to exclude subrogation claims from the Tort Claims Act.[130] Thus, the Court concluded that "the Government must defend suits by subrogees as if it were a private person."[131]

The Court then turned to Federal Rule of Civil Procedure 17(a) and stated:

> [O]f course an insurer-subrogee, who has substantive equitable rights,

121. *See supra* notes 42-43 and accompanying text.

122. 3A MOORE'S FEDERAL PRACTICE, *supra* note 43, ¶ 17.09[2.-1] at 17-79.

123. Simes, *supra* note 2, at 72.

124. 338 U.S. 366 (1949).

125. *Id.* at 368-69.

126. 28 U.S.C. § 931 (current version at 28 U.S.C.A. § 2674 (West 1965 & Supp. 1989)).

127. In case number 36, both insured and insurer had sued to recover their respective interests. In case numbers 35, 37, and 38, the insurers alone had sued to recover the amounts paid to their insureds. *Aetna*, 338 U.S. at 368-69.

128. 31 U.S.C. § 203 (current version at 31 U.S.C. § 3727 (1982)).

129. *Aetna*, 338 U.S. at 368.

130. *Id.* at 373-80.

131. *Id.* at 380.

> qualifies as [a real party in interest]. If the subrogee has paid an entire loss suffered by the insured, it is the only real party in interest and must sue in its own name. 3 Moore, Federal Practice (2d ed.) p. 1339. *If it has paid only part of the loss, both the insured and insurer (and other insurers, if any, who have also paid portions of the loss) have substantive rights against the tortfeasor which qualify them as real parties in interest.*[132]

The difficulty with the Court's discussion is that it seems to say that subrogation—a right to sue—flows ineluctably from the fact of payment by the insurer. The Court makes no reference to the intermediate and necessary step of determining whether the underlying substantive law gives the compensating insurer (or retains for the partially compensated insured) such a right.

The Court's cursory discussion is understandable because the predominant issue in the case was the effect of the Anti-Assignment Act[133] and also because the defendant apparently did not dispute that the plaintiff insurers were subrogated.[134] The Court's statement in dictum, however, that a partially compensated insured would qualify as a real party in interest,[135] was plainly wrong in at least one of the cases before the Court. In stating the facts at the beginning of the opinion, Justice Vinson noted that in one of the consolidated cases, *Aetna Casualty & Surety Co. v. United States*, the plaintiff insurer was the workers' compensation carrier of the injured party's employer.[136] Justice Vinson observed that the insurer claimed to be entitled to sue under the New York Workmen's Compensation Law, which provided that when an injured employee who had been compensated by a workers' compensation insurer failed to commence an action within one year after the accident, "his inaction operated . . . as an assignment to the insurer of his cause of action."[137] In such a case the employee-insured, deemed to have assigned his claim, would not be entitled to sue and, therefore, would not properly be considered a real party in interest under rule 17(a).[138]

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132. *Id.* at 380-81 (emphasis added). As explained above, *supra* notes 117 & 119, the *Aetna* Court's citation to *Moore's Federal Practice* is to text that cannot be located certainly, but which apparently appears in the current version at 3A MOORE'S FEDERAL PRACTICE, *supra* note 43, ¶ 17.09[2.-1], at 17-78.

Regarding the compulsory joinder issue, the Court stated, "Under the Federal Rules, the 'use' practice is obviously unnecessary . . . . No reason appears why such a practice should now be required in cases of partial subrogation, since both insured and insurer 'own' portions of the substantive right and should appear in the litigation in their own names." *Aetna*, 338 U.S. at 381; *see also supra* note 17 and *infra* notes 262-319 and accompanying text (discussing compulsory joinder of partially subrogated insurers).

133. The resolution of this issue takes up 10 pages of Chief Justice Vinson's 16-page opinion. *See Aetna*, 338 U.S. at 369-80.

134. *Id.* at 368-69.

135. *Id.* at 381.

136. *Id.* at 368.

137. *Id.* The other three cases before the Court concerned property damage and the Supreme Court's opinion contains no discussion at all of the substantive law creating the insurer's right to sue in those cases. *See id.* at 367-69.

138. Aetna Casualty & Sur. Co. v. United States, 170 F.2d 469, 472 (2d Cir. 1948), *aff'd*, 338 U.S. 366 (1949) (Insurer is the only real party in interest because the "New York statute gives it alone the right to sue, even though it may have to account for part of the recovery to the injured employee.").

Thus, although on the facts of the case before it the proper plaintiff was before the Court, the Court's carelessly phrased dictum about the real party in interest rule unfortunately states a principle that would have produced an incorrect result if the action had been brought by the insured. Although the insured certainly had a pecuniary interest in the claim, proper application of the substantive law of New York under rule 17(a) would have denied the insured the right to sue, in spite of the Court's broad statement that partially compensated insureds have substantive rights that "qualify them as real parties in interest."[139]

More unfortunately, the *Aetna* dicta and the cited passage from *Moore's Federal Practice* did not go unnoticed. Many courts fell into assuming, without analyzing applicable substantive law, that in a case of partial compensation, the pecuniary interests of insured and insurer rendered them both "real parties in interest" under rule 17(a).[140]

2. Insurers as Real Parties in Interest

Under general casualty insurance, compensating insurers usually will qualify as real parties in interest because they have secured for themselves the right to subrogation, including the right to bring suit to enforce their reimbursement interest. Workers' compensation insurance, on the other hand, is regulated by statute and often does not permit the insurer, at least initially, to have control of the insured's claim against a third party.[141] For this reason, it is in the workers' compensation area that courts have had the most difficulty in applying rule 17(a) to compensating insurers. In each of the following three cases, the court addressed whether the action could proceed in the absence of an insurer that had partially compensated the plaintiff. In each case, the court's reliance on *Aetna* produced a flawed analysis. Unfortunately, the opinions are written so that one often cannot tell whether the courts were relying upon *Aetna* for purposes of applying rule 17(a), rule 19, or both rules.

For example, in *Wright v. Schebler Co.*[142] a federal district court decided that a workers' compensation insurer was a real party in interest because provisions of the Illinois Workmen's Compensation Act gave the insurer a lien on the employee's recovery and the right to join as a plaintiff in the employee's action.[143] The court did not discuss whether and to what extent the insurer otherwise was entitled to bring suit against the third party. Rather, the court based its decision that the insurer was a real party in interest under rule 17(a) upon its finding that the insurer had "a substantive right which is legally protected under Illinois law."[144]

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139. *Aetna*, 338 U.S. at 381; *see supra* text accompanying note 131.

140. *See infra* notes 142-58, 170-85 and accompanying texts.

141. *See supra* notes 93-106 and accompanying text.

142. 37 F.R.D. 319 (S.D. Iowa 1965).

143. *Id.* at 321. The court, nevertheless, denied the defendant's motion to join the insurer as a plaintiff. The court cited *Aetna* for the proposition that the defendants would be entitled "at the time of trial . . . to indicate the interest of [the insurer] in plaintiff's claim." *Id.* at 322 (citing *Aetna*, 338 U.S. at 382); *see infra* notes 308-10 and accompanying text.

144. *Wright*, 37 F.R.D. at 321. *Contra* Race v. Hay, 28 F.R.D. 354, 357 (N.D. Ind. 1961)

Similarly, in *Poleski v. Moore-McCormack Lines, Inc.*[145] another federal district court ordered joinder of an insurer as a party plaintiff because the insurer was "a party for whose benefit [the] action is brought."[146] This ruling was particularly curious because the insurer's obligation had arisen from the Longshoremen's and Harbor Workers' Compensation Act, and the court noted that by paying compensation without an award under the Act, the insurer had foregone its right to control the employee's right of action, although it retained a right to reimbursement.[147] The court even reserved judgment on whether and to what extent counsel for the insurer would be permitted to participate in the trial.[148] Even more curious, in light of the court's reliance on the *Aetna* decision, is the court's suggestion that it would be permissible to join the insurer as a "use" plaintiff.[149]

In *Maryland v. Baltimore Transit Co.*[150] the federal court considered the New York workers' compensation law under which the insurer had a right to reimbursement and a lien on the employee's recovery, but had no right to sue unless the employee failed to do so within a specified time, in which case the employee's failure would operate as an assignment of the employee's claim to the insurer.[151] The court noted that the statutory conditions for an assignment had not occurred.[152] Nonetheless, the court cited *Poleski*, stating, "It is the rule in this district that where such a right of reimbursement exists, a motion on the part of a defendant to make the person entitled to reimbursement appear as a party plaintiff should be granted."[153] Relying upon both *Aetna* and *Poleski*,[154] the *Baltimore Transit* court concluded that the insurer was a real party in interest who had to be joined because the insurer "has not only a right of reimbursement but, indeed, a lien on any proceeds of recovery, so that [the insurer] is manifestly a person for whose benefit the instant suit is brought."[155]

The *Wright*, *Baltimore Transit*, and *Poleski* courts all failed to appreciate that a beneficially interested person is not necessarily a real party in interest and that a real party in interest is one who has the right to enforce the claim, not merely to benefit from it. Just because a person has a "legally protected" right, or will benefit from recovery in a lawsuit, does not mean that this person is a real party in interest. Beneficiaries and legatees, for example, are persons who have

(insurer under Illinois workers' compensation act is not a real party in interest if employee has brought suit).

145. 21 F.R.D. 579 (D. Md. 1958).

146. *Id.* at 581. The court cited *Aetna*, 338 U.S. at 381, for the proposition that the insurer "is a necessary party, and may be brought in on motion of the defendant." *Id.*

147. *Id. Contra* Hawkins v. United Overseas Export Lines, Inc., 490 F. Supp. 138, 141 (D. Md. 1980) (employer or insurance carrier is not a real party in interest under the Longshoreman's Act during the six months that the longshoreman can bring a third-party action).

148. *Poleski*, 21 F.R.D. at 582.

149. *Id.*; *see supra* note 132.

150. 37 F.R.D. 34 (D. Md. 1965).

151. *Id.* at 35-36.

152. *Id.* at 36.

153. *Id.*

154. *Id.*

155. *Id.* at 37.

legally protected rights and who may benefit, but who, nonetheless, are not entitled to bring suit against third parties and are not real parties in interest.[156] Trustees and executors, on the other hand, are real parties in interest because they are entitled, even required, to pursue the claim.[157] The proper focus, not understood by these three courts, is on the person's entitlement to enforce his interest or right against the defendant.[158]

Other federal courts, however, have appreciated these distinctions. For example, in *Strate v. Niagara Machine & Tool Works*[159] the court noted that under the Indiana workers' compensation statutes the compensating insurer was permitted to bring suit against the tortfeasor only if the employee failed to bring an action within two years.[160] If the employee brought a timely action, as he had in this case, the insurer's rights were limited to protection of its lien on the recovery.[161] The insurer was permitted to intervene in the employee's action, but only for the purpose of protecting its interest postjudgment.[162]

The *Strate* court distinguished *Aetna* by noting that in those consolidated cases, "the applicable law operated to subrogate the insurer to the rights of the plaintiff."[163] Under the Indiana statute, on the other hand, the insurer was not subrogated because it had no right of action against the third party; it was "only a potential subrogee."[164] Consequently, the insurer was not a real party in interest under federal rule 17(a).[165]

The proper analysis under a different substantive law may lead, of course, to the opposite conclusion regarding the real party in interest status of the com-

156. *See supra* note 43 and accompanying text.

157. *Id.*

158. Another similarly poorly reasoned opinion is Blacks v. Mosley Mach. Co., 57 F.R.D. 503 (E.D. Pa. 1972), in which the court ordered joinder of a workers' compensation insurer without any reference to the real party in interest rule and without analyzing the insurer's rights with regard to the insured's claim. *Id.* at 505. The court even noted that the insurer was not in control of the litigation, but nevertheless ordered joinder on the basis of rule 19(a) solely because the plaintiff's and the insurer's interests were "identical, i.e. if the defendant is found liable, plaintiff will recover money damages and [the insurer] will recover its Workmen's Compensation lien." *Id.* at 506.

159. 160 F. Supp. 296 (S.D. Ind. 1958).

160. *Id.* at 299; *see* 2A A. LARSON, *supra* note 9, § 74.14 n.71.1 (identifying similar provisions in 22 states and under the Longshoreman's Act as amended in 1984).

161. *Strate*, 160 F. Supp. at 299.

162. *Id.* at 298-99; *see* 2A A. LARSON, *supra* note 9, § 74.41(c), at 14-559 ("The right of the carrier to intervene in the employee's suit does not necessarily carry with it the right to participate in the conduct of the suit without the consent of the employee."); *see, e.g.*, Gorrell v. Kansas Power & Light Co., 189 Kan. 374, 378, 369 P.2d 342, 345 (1962) (Workers' compensation carrier was permitted to intervene only to protect its lien, but not to participate in the lawsuit proceedings. The statutory right of the carrier to bring an action was contingent upon the employee's failure to do so within one year.).

163. *Strate*, 160 F. Supp. at 297.

164. *Id.* at 299.

165. *Id.* at 300; *accord* Hawkins v. United Overseas Export Lines, Inc., 490 F. Supp. 138, 141 (D. Md. 1980) (employer or insurance carrier is not a real party in interest under the Longshoreman's Act during the six months that the longshoreman can bring a third party action); McCoy v. Wean United, Inc., 67 F.R.D. 491, 493 (E.D. Tenn. 1973) (district court denied defendant's motion to require joinder of plaintiff's employer's compensation carrier because, under Tennessee law, the carrier had a subrogation lien, but no right of action); Race v. Hay, 28 F.R.D. 354, 357 (N.D. Ind. 1961) (under Illinois workers' compensation statute, insurer is not a real party in interest if the employee has brought suit).

pensating insurer. Thus, in *Chaplin v. Bruce*[166] the district court concluded that a workers' compensation carrier was a real party in interest under rule 17(a) after finding "direct statutory authority for . . . a substantive right under state law for a workmen's compensation insurer to proceed against and recover its interest in its insured's claim against the tortfeasor."[167]

If there were no rule 17(a), there would be more decisions like *Strate* and *Chaplin*, which look to the insurer's entitlement under the substantive law to assert the claim. There would be fewer cases like *Wright*, *Poleski*, and *Baltimore Transit*, which look only to the insurer's reimbursement or lien interest. Without a rule 17(a), the issue would arise, most likely, as a rule 12(b)(6) motion for failure to state a claim upon which relief may be granted,[168] directed toward the insured's assertion of a claim to which an insurer is subrogated. In such a posture, a court would be guided more clearly toward the question of whether the insured or the insurer is entitled under the substantive law to sue the third party. A court would be less likely to become distracted by entitlements and pecuniary interests that fall short of the right to sue. The distinctions in state subrogation law that ought to be preserved under rule 17(a) would be honored more consistently and correctly if there were no such rule.[169]

3. Insureds as Real Parties in Interest

The same analytical problems that appear when courts address whether a compensating insurer is a real party in interest under rule 17(a) arise when the question is whether a partially compensated insured is a real party in interest. This latter question arises because of the argument, generally asserted to avoid joinder of the insurer, that the insured is entitled to assert in his own name the entire original claim, regardless of the insurer's subrogation interest in the claim.

For example, in *Braniff Airways, Inc. v. Falkingham*[170] the insured brought suit for his entire loss, and the defendant moved for an order requiring joinder of the plaintiff's partially subrogated insurers on the grounds that they were real parties in interest and were, therefore, "necessary" parties.[171] To determine the

166. 57 F.R.D. 487 (W.D. Okla. 1972).

167. *Id.* at 488. The court considered both Oklahoma and Louisiana statutes, either of which arguably might have controlled. The Louisiana statute quoted by the court provided, "Any employer having paid or having become obligated to pay compensation under the provisions of this Chapter may bring suit against such third person to recover any amount which he has paid or become obligated to pay . . . ." *Id.* at 488 n.2.; *see also* Lucas v. Durabond Prod. Co., 510 F. Supp. 999, 1000-01 (W.D. Pa. 1981) (workers' compensation carrier is a real party in interest because carrier is entitled under Pennsylvania law to maintain an action against the wrongdoer); Cross v. Harrington, 294 F. Supp. 1340, 1341 (N.D. Miss. 1969) (same under Mississippi workers' compensation); Carlson v. Consumers Power Co., 164 F. Supp. 692, 694 (W.D. Mich. 1957) (same under Michigan workers' compensation). *See generally* 2A A. LARSON, *supra* note 9, §§ 74.12-74.13, 74.15 (identifying workers' compensation statutes that entitle subrogee to bring suit against the tortfeasor).

168. Because the motion might include material outside the pleadings presented to show the insurer's involvement, it may appear in the form of a motion for summary judgment. *See* FED. R. CIV. P. 12(b) & 56; *see also supra* notes 11-17 and accompanying text (discussing various formats for objecting to the party named as plaintiff).

169. *See supra* note 42 and accompanying text; *infra* note 196 and accompanying text.

170. 20 F.R.D. 141 (D. Minn. 1957).

171. *Id.* at 142; *see infra* note 272.

insurers' rights, the federal court first examined the applicable Minnesota substantive law and the parties' contract of insurance. The court concluded that "[s]ince by the state substantive law [the insurers] have an enforceable right, they are real parties in interest for the purposes of an action in the federal court if it is their wish to pursue it."[172] Turning to the question of compulsory joinder, however, the court held that the insurers' joinder was not required, based on its assumption that in spite of the insurers' interests, the insured was entitled to bring an action for the entire claim, including that portion to which the insurers were subrogated. The court reasoned that joinder was unnecessary to avoid multiple litigation because the entire claim would be resolved in this lawsuit.[173]

Although the court examined the substantive law to determine the insurers' rights, it did not do so to establish the insured's.[174] Apparently, the court merely assumed that because the insured had been compensated only partially, the insured remained "the party in legal interest" for the entire claim.[175] Because of the variations in substantive law from state to state with regard to the rights of a partially compensated insured,[176] however, the assumption was unwarranted. It was, nonetheless, an assumption that the court used to avoid joinder of the insurers.[177]

Somewhat more recently, in *Virginia Electric & Power Co. v. Westinghouse Electric Corp.*[178] the United States Court of Appeals for the Fourth Circuit also found that although an insurer was subrogated, a suit for the entire claim could proceed in the name of the insured alone. The plaintiff, Virginia Electric & Power Company (VEPCO), allegedly had suffered $2,200,000 in damages from the failure of a power generating station. All but $150,000 of the loss had been reimbursed by VEPCO's insurer, Insurance Company of North America (INA).[179] VEPCO and INA had agreed that INA would be subrogated to VEPCO's claim against others allegedly responsible for the loss and that INA would furnish counsel and have "exclusive direction and control" of the claim. INA and its counsel also agreed to prosecute VEPCO's uninsured $150,000 loss, but agreed that VEPCO would not be obligated for the costs and expenses of the suit.[180]

The parties brought suit in federal district court in VEPCO's name alone for the entire $2,200,000 loss.[181] The defendants moved to dismiss the action on the grounds that INA was the real party in interest under federal rule 17(a) and

172. *Braniff*, 20 F.R.D. at 143.

173. *Id.* at 144.

174. The court did note that a Minnesota rule that the insured can sue alone without joinder was procedural and, therefore, inapplicable. *Id.* at 143.

175. *Id.* at 143-44.

176. *See supra* notes 93-106 and accompanying text.

177. *Braniff*, 20 F.R.D. at 144-45. *But see supra* note 105 and accompanying text (when both insured and insurer have the right to sue, joinder generally required).

178. 485 F.2d 78 (4th Cir. 1973), *cert. denied*, 415 U.S. 935 (1974).

179. *Id.* at 81-82.

180. *Id.* at 81-82 nn.1 & 2.

181. At the time the suit was brought, VEPCO may have been in control of the action. Thereafter, however, as part of the settlement of a dispute between VEPCO and INA about the amount of coverage, VEPCO relinquished control to INA. *Id.* at 82.

that, because both INA and one defendant were citizens of Pennsylvania, the court lacked jurisdiction.[182]

Remarkably, the court did find that VEPCO was, under rule 17(a), a real party in interest entitled to enforce the whole claim. The court first distinguished the present case from that of full subrogation by noting that VEPCO retained "a significant pecuniary interest in the litigation."[183] But of course, as we have seen, a pecuniary interest does not a real party in interest make,[184] especially to the extent of someone else's pecuniary interest over which the putative real party in interest has no control. The court nevertheless stated that VEPCO was "entitled under the substantive law to bring suit for its entire loss."[185]

The *Virginia Electric* court's finding that under Virginia "substantive" law the insured was a real party in interest entitled to enforce the entire claim was based upon a misreading of a Virginia Supreme Court decision, *Miller v. Tomlinson*.[186] *Miller* was concerned only with the joinder question and did not address the rights of the insured and the insurer to bring the claim or to benefit from the recovery. The Virginia court held that, in light of the danger of jury prejudice, the trial court had erred in requiring joinder of the plaintiff's subrogated insurer.[187] It would seem more accurate, therefore, to characterize *Miller* as approving the procedural device of suit in the name of the insured, rather than as establishing an insured's substantive right in not only its own portion, but also in the subrogated portion of the claim. *Miller* does not stand for the proposition that the insured is entitled to pursue and control the insurer's claim regardless of the insurer's wishes. Furthermore, the substantive rights of the insured and insurer to assert the claim would not be affected if Virginia decided to reverse its position and require joinder of subrogated insurers when suit is brought for the entire claim.[188]

Even if one accepts the premise that the *Miller* case gives the insured such a substantive right, the insured in *Virginia Electric* arguably had relinquished this

182. *Id.* at 81. Alternatively, the defendants argued that INA was a party who must be joined under rule 19(a) and that, because INA could not be joined, the suit must be dismissed under rule 19(b). *Id.* The court concluded that although INA was "a party to be joined if feasible" under rule 19(a), the suit could proceed without joinder pursuant to rule 19(b). *Id.* at 85-86.

183. *Id.* at 83.

184. *See supra* notes 42-43 and accompanying text.

185. *Virginia Elec.*, 485 F.2d at 83.

186. 194 Va. 367, 73 S.E.2d 378 (1952).

187. *Id.* at 373, 73 S.E.2d at 382. The *Miller* court noted a Virginia statute permitting a subrogated insurer to enforce its claim against the third party, but asserted that this statute was for the plaintiff's benefit and did not require joinder at a defendant's request. *Id.* at 372, 73 S.E.2d at 381-82. The Virginia statute now provides specifically that a subrogated insurer may enforce its claim in either its own name or in the name of its insured. VA. CODE ANN. § 38.2-207 (1986); *see* Travelers Ins. Co. v. Riggs, 671 F.2d 810, 813-14 (4th Cir. 1982) (holding the Virginia statute procedural and, therefore, not determinative of the joinder issue).

188. This statement is borne out in part by the later decision in *Riggs*, in which the court held, applying federal procedure under rules 17(a) and 19 and Virginia substantive law, that a partially subrogated insurer is entitled to joinder of its insured as a co-plaintiff, but not to bring the claim in the name of the insured alone. *Riggs*, 671 F.2d at 814.

right when it gave the insurer "exclusive direction and control" of the suit.[189] Thus, the court in effect authorized "use" practice in the name of the very rule that was intended to abolish this device.[190] As in the courts of law before the time of the "real party in interest" rule, the *Virginia Electric* court permitted prosecution of the suit in the name of a party who had no right to control the action, while the person holding the right to control remained unnamed.[191] The insured was neither interested in the subrogated portion of the claim nor in control of the suit. Regarding the portion of the claim in which the insured did have a pecuniary interest, the insured actually was merely a person being represented, entitled to benefit from another's conduct of the litigation. In light of the parties' agreement, the court of appeals in *Virginia Electric* should have held that INA was the only "real party in interest" under rule 17(a).[192] Nevertheless, the court concluded that "[w]here there is partial subrogation, there are two real parties in interest under Rule 17. Either party may bring suit—the insurer-subrogee to the extent it has reimbursed the subrogor, or the subrogor for either the entire loss or only its unreimbursed loss."[193]

Were there no rule 17(a), the *Braniff* and *Virginia Electric* courts might not have been distracted by rubrics about partial subrogation and "real parties in interest." The defendants' objections in *Braniff* and *Virginia Electric* might have appeared as rule 12(b)(6) motions to dismiss for failure to state a claim upon which relief may be granted directed to the insured's right to assert, in spite of the insurer's interest, his entire original claim. In both cases, the courts, freed from rule 17(a)'s baggage, might have found that the insured was not entitled by the substantive law to assert and control the entire claim. In *Braniff* such a finding would have led to joinder of the insurer under rule 19,[194] while in *Virginia Electric* the finding would have required joinder or substitution of INA, followed by dismissal for lack of federal subject matter jurisdiction.[195] Rule 17(a) should not be permitted to undermine policies of compulsory joinder and federal jurisdiction. Its abolition would eliminate its potential to do so.

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189. *See supra* notes 180-81 and accompanying text.

190. *See supra* note 44 and accompanying text.

191. *See supra* notes 29-31 and accompanying text.

192. Another alternative, in light of VEPCO's role in the suit at the time it was filed, *see supra* note 181, might have been for the court to invoke its discretion under federal rule 25(c) to permit the suit to continue as styled. Rule 25, Substitution of Parties, provides that "[i]n case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party." FED. R. CIV. P. 25(c). The correctness of this approach, however, would seem to depend upon whether INA was a party whose joinder was required even before the execution of the subrogation agreement.

193. Virginia Elec. & Power Co. v. Westinghouse Elec. Corp., 485 F.2d 78, 84 (4th Cir. 1973) (citing United States v. Aetna Casualty & Sur. Co., 338 U.S. 366, 381-82 (1949)), *cert. denied*, 415 U.S. 935 (1974); *see supra* note 132 and accompanying text.

194. *See supra* notes 170-77 and accompanying text. *But see supra* note 17 (discussing disagreement among federal courts about whether rule 19 requires joinder of partially subrogated insurers).

195. *See infra* notes 364-88 and accompanying text.

B. *Distinguishing State Substance from State Procedure*

It is universally acknowledged that under federal rule 17(a), state law determines a person's substantive right to assert a claim that arises under state law,[196] but that federal procedure controls the naming of parties and joinder.[197] An equally acknowledged corollary is that state rules of procedure are irrelevant under federal rule 17(a).[198] The problem arises when federal courts fail to distinguish correctly between substance and procedure under state law.

The difficulty is created in part by the many state procedural provisions permitting suit in the name of the insured alone regardless of an insurer's interest.[199] The problem generally is not that federal courts construe these provisions as substantive. Rather, the problem is that because of these provisions, it may be difficult to find state law decisions addressing the substantive rights of the insured and insurer to sue a third party. Insurers permitted to sue in the name of their insureds will do so; thus, there may be no decisions analyzing whether an insurer may enforce its claim directly against the third party.[200] Similarly, unless some conflict between insured and insurer has been litigated, there might be no decisions discussing whether the insured may enforce the entire claim.[201]

Wattles v. Sears, Roebuck & Co.,[202] a case concerning a claim for property damage brought in the name of the insured alone, illustrates the difficulty that

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196. *See, e.g.*, American Fidelity & Casualty Co. v. All Amer. Bus Lines, Inc., 179 F.2d 7, 10 (10th Cir. 1949); Braniff Airways, Inc. v. Falkingham, 20 F.R.D. 141, 143 (D. Minn. 1957); 3A MOORE'S FEDERAL PRACTICE, *supra* note 43, ¶ 17.07, at 17-49. State law also may be applied when the court is merely enforcing a federal remedy for a traditional state-created right. J. FRIEDENTHAL, M. KANE & A. MILLER, *supra* note 31, at 321.

197. *See* C. WRIGHT, *supra* note 5, at 453; Clark & Moore, *supra* note 55, at 1310.

198. Travelers Ins. Co. v. Riggs, 671 F.2d 810, 813-14 (4th Cir. 1982); Gas Serv. Co. v. Hunt, 183 F.2d 417, 419-20 (10th Cir. 1950); 6A C. WRIGHT, A. MILLER & M. KANE, *supra* note 42, § 1544, at 342-43.

199. *See supra* note 111.

200. One unusual case is United Sec. Ins. Co. v. Johnson, 278 N.W.2d 29 (Iowa 1979), in which the partially compensating insurer, entitled under state law to bring suit in the name of the insured, brought suit in its own name, apparently because the insured was barred from suing by spousal immunity. The court held that the insurer was not a real party in interest entitled to maintain the action because the rule in Iowa was that

> the right of action remains in the insured for the entire loss, the insured becoming a trustee for the insurer (to the extent of the loss paid by the insurer) in the recovery secured by it; that the right of action for the entire loss is single and cannot be split and separately maintained by the owner and the various insurers who have paid parts of the loss.

Id. at 31 (quoting Fireman's Ins. Co. v. Bremmer, 25 F.2d 75, 76 (8th Cir. 1928)).

201. In White Hall Bldg. Corp. v. Profexray Div. of Litton Indus., Inc., 387 F. Supp. 1202, 1204 (E.D. Pa. 1974), *aff'd mem.*, 578 F.2d 1377 (3d Cir. 1978) and *aff'd mem. sub nom.* Quaglia v. Profexray Div. of Litton Indus., Inc., 578 F.2d 1375 (3d Cir. 1978), the court, attempting to identify the proper plaintiff under rule 17(a) when a loan receipt had been used, observed:

> Not surprisingly, this Court's research reveals no Pennsylvania case on point. Under the terms of the loan receipt method of transaction, the insured rather than the insurer initiates any court action brought against a third party and thus neither Pennsylvania's nor other courts would likely encounter the issue of whether the insurer itself could bring the action. It thus becomes necessary to attempt to ascertain what Pennsylvania's courts would do if such issue were in fact raised.

Id. at 1204. For a discussion of loan receipts, *see infra* notes 211-61 and accompanying text.

202. 82 F.R.D. 446 (D. Neb. 1979).

federal courts have had in ascertaining state law with regard to substantive subrogation rights. In *Wattles* the court concluded that a partially compensating insurer was a real party in interest and ordered its joinder, after rejecting as procedural Nebraska decisions holding that suit might be brought in the name of the insured for the entire loss.[203] The court then cited three Nebraska cases for the proposition that "it is clear that the insurer as subrogee by virtue of its payment of the loss sustained by the insured, has a substantive right to recover from the wrongdoer the amount it has been obliged to pay under its policy."[204]

The Nebraska cases cited by the *Wattles* court for this point, however, do not establish that under Nebraska law a partially compensating insurer is entitled to bring and control an action against a third party. One case did not even involve a partially compensating insurer, but held only that the insurer is the sole real party in interest when the insured has been fully compensated.[205] Neither of the other two cases, which did involve partially compensating insurers, called upon the courts to determine the insurers' right to bring suit. In one case the issue was whether the insured was entitled to sue,[206] and in the other the issue was whether the insured's attorney, who had settled the entire claim against the third party, was entitled to an attorney's fee from the insurer.[207] Moreover, to the extent that the latter two cases did discuss the issue, they seem to indicate that the insurer is *not* entitled to bring and control the action.[208]

As long as states permit parties to assert subrogated claims in the name of the insured alone regardless of actual control (as may have been the situation in

203. *Id.* at 449-51. The plaintiff in *Wattles* argued that the court should follow Schweitz v. Robatham, 194 Neb. 668, 670, 234 N.W.2d 834, 836 (1975), which stated that in the case of partial subrogation, the action may be brought in the name of the insured for the entire loss, and Krause v. State Farm Mut. Auto. Ins. Co., 184 Neb. 588, 593, 169 N.W.2d 601, 604 (1969), which stated that the insured is a trustee for the benefit of the insurer. The *Wattles* court responded that the plaintiff's argument failed to consider the distinction between substance and procedure. *Wattles*, 82 F.R.D. at 449. The court, apparently concluding that the cases cited by the plaintiff concerned only the naming of parties, insisted that this matter is procedural and therefore a question of federal, not state, law. *Id.* at 450.

204. *Wattles*, 82 F.R.D. at 449-50. The court's statement about what is "clear" brings to mind Gegan's law and its corollary: "Gegan's Law: The tendency for any conclusion to be called clear is in inverse ratio to the reasons available to support it. Corollary: Clarity tends to obscure and absolute clarity obscures absolutely." Gegan, *Constructive Trusts: A New Basis for Tracing Equities*, 53 ST. JOHN'S L. REV. 593, 602 n.34 (1979).

205. Jelinek v. Nebraska Natural Gas Co., 196 Neb. 488, 490, 243 N.W.2d 778, 779 (1976).

206. Shiman Bros. & Co. v. Nebraska Nat'l Hotel Co., 143 Neb. 404, 407-09, 9 N.W.2d 807, 811-12 (1943).

207. Krause v. State Farm Mut. Auto. Ins. Co., 184 Neb. 588, 590-91, 169 N.W.2d 601, 603-04 (1969).

208. The *Shiman* court stated that in a partial compensation situation, "the right of action against the wrong doer who caused the loss remains in the insured for the entire loss, and the action must be brought *by him* in his own name." *Shiman*, 143 Neb. at 409, 9 N.W.2d at 811 (emphasis added). The *Krause* court stated that the insured is a trustee for the insurer with regard to recoveries from third parties and that this approach "preserves the unity and *control of the insured* over his cause of action for personal injury and property damage against the tort-feasor, and yet fully protects the insurer's subrogation right." *Krause*, 184 Neb. at 593, 169 N.W.2d at 604 (emphasis added). The *Wattles* court, therefore, may have been much too quick in concluding that the statements in Nebraska decisions cited by the plaintiff were setting forth merely procedural rules. *See supra* note 196. There is irony in the *Wattles* court's criticism of the plaintiff's argument because of its "failure to consider the subtle, yet important, substantive-procedural distinction," *Wattles*, 82 F.R.D. at 449, followed by the court's own failure to carefully apply this distinction.

Nebraska at the time of *Wattles*[209]), insurers will do so, and federal courts will continue to have difficulty (as the *Wattles* court apparently had) locating state court decisions directly addressing the parties' substantive rights in the claim.[210] The task, nonetheless, is unavoidable. If there were no rule 17(a), federal courts would still have to ascertain whether the named plaintiff is entitled under the substantive law to assert the claim. Analytical clarity in cases such as *Wattles*, however, might be facilitated if the question were presented as a party's entitlement to assert the claim, and not whether the party is a "real party in interest."

C. Loan Receipts

In the Fifth Circuit during the 1950s, insurers successfully used the device of a loan receipt to avoid real party in interest status.[211] In a loan receipt device, the casualty insurer "lends" its insured an amount of money commensurate with the insured's claim against his insurance coverage. The insured promises to repay the loan only if, and to the extent that, the insured recovers from third parties for the loss.[212] At least in those jurisdictions in which the loan receipt is given its desired effect, the transfer of money is considered to be a loan, not a payment. Accordingly, the insurance company is not subrogated to the insured's claim against third parties, is not characterized as a real party in interest in spite of its control of the lawsuit, and is able to recoup from the tortfeasor through a suit brought in the name of the insured alone.[213]

In *Celanese Corp. of America v. John Clark Industries, Inc.*[214] the defendant challenged a jury verdict for the plaintiff on the grounds, *inter alia*, that the plaintiff's insurers were indispensable parties, or at least real parties in interest, and that the defendant should have had the benefit of making known to the jury the interests of the insurers.[215] The United States Court of Appeals for the Fifth Circuit rejected the defendant's arguments, stating that the suit "was properly prosecuted by plaintiff under loan receipts."[216]

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209. *See supra* notes 203 & 208.

210. *See supra* note 201. This difficulty was encountered in Virginia Elec. & Power Co. v. Westinghouse Elec. Corp., 485 F.2d 78 (4th Cir. 1973), *cert. denied*, 415 U.S. 935 (1974), in which the court, relying upon a Virginia Supreme Court decision that permitted suit in the name of the insured alone, found that an insured was a "real party in interest" with regard to a claim that was predominantly subrogated and completely controlled by the insurer. *See supra* notes 186-90 and accompanying text. The same difficulty in distinguishing state law substance from procedure for rule 17(a) purposes is found in cases involving loan receipts, *see infra* notes 211-61 and accompanying text, and cases involving rule 17(a)'s "exceptions" clause, *see infra* notes 320-33 and accompanying text.

211. *See infra* notes 214-27 and accompanying text.

212. R. KEETON & A. WIDISS, *supra* note 93, § 3.10(c), at 241-42.

213. *See* Annotation, *Insurance: Validity and Effect of Loan Receipt or Agreement Between Insured and Insurer for a Loan Repayable to Extent of Insured's Recovery from Another*, 13 A.L.R.3D 42 (1967 & Supp. 1989). Loan receipts used by first-party insurers to avoid subrogee status must be distinguished from loan receipts used by defendants and their liability insurers for the purpose of colluding with the plaintiff to the detriment of a codefendant. The latter type of loan receipt is often termed a "Mary Carter agreement." *See* Entman, *Mary Carter Agreements: An Assessment of Attempted Solutions*, 38 U. FLA. L. REV. 521, 522-23 (1986).

214. 214 F.2d 551 (5th Cir. 1954).

215. *Id.* at 553.

216. *Id.* at 556.

In support of the loan receipt device, Judge Hutcheson of the *Celanese* court cited both Texas and federal decisions,[217] including the United States Supreme Court's decision in *Luckenbach v. W.J. McCahan Sugar Refining Co.*,[218] a federal admiralty case. Without discussing the appropriate source of law—state or federal—for determining the legal effect of the loan agreement, Judge Hutcheson suggested that in a loan receipt case the insured is the only real party in interest and the insurance companies are not even proper parties.[219]

Discussing rule 17(a), Judge Hutcheson stated in *Celanese* that the purpose of the real party in interest rule is to enable a defendant to assert available defenses against the real party in interest and to protect the defendant from multiple litigation on the same matter.[220] None of these concerns, according to the court, was a legitimate problem for the defendant in this case because it "was understood by all that the counsel for the insurance companies were in active conduct of the suit and the judgment entered would have barred them whether or not they were actually in the cause."[221] The defendant's only purpose in seeking joinder of the insurers was a desire to benefit improperly from possible jury prejudice against an insurance company plaintiff.[222]

Five years later, in *Peoples Loan & Finance Corp. v. Lawson*,[223] Judge Hutcheson, again writing for the Fifth Circuit, specifically distinguished *Aetna* on the basis of the insurer's use of a loan receipt in compensating the insured.[224] The court cited a Georgia appellate court decision,[225] but relied primarily upon *Luckenbach*, which the court interpreted as settling that compensation through a loan receipt is not a payment giving rise to subrogation[226] and, therefore, the insurance company in a loan receipt case need not be joined.[227]

Judge Cameron, dissenting from Judge Hutcheson's opinion in the *Lawson* case, distinguished *Luckenbach*,[228] and ignored altogether the role of state law. Cameron argued that *Luckenbach* did not support a finding that the loan receipt

217. *Id.* at 556 n.9. For a discussion of the Texas decisions cited in *Celanese*, see *infra* text accompanying notes 233-37.

218. 248 U.S. 139 (1918). The Supreme Court determined the effect of the loan receipt agreement in *Luckenbach* according to the "general law of insurance," *id.* at 148-49, that is, under federal common law, and not under the law of any state. *See infra* note 237.

219. *Celanese*, 214 F.2d at 556.

220. *Id.* Professor Wright cites *Celanese* as the first enunciation that rule 17(a) has these purposes. C. WRIGHT, *supra* note 5, at 453 n.6.

221. *Celanese*, 214 F.2d at 556.

222. *Id.* at 556-57. In response to the *Celanese* court's criticism of the defendant's purpose in seeking joinder of the insurer, a later court argued that insurers resisting joinder "are tarred by the same brush; their motive in seeking anonymity is improper and perhaps illegal." City Stores Co. v. Lerner Shops of D.C., Inc., 410 F.2d 1010, 1013 n.3 (D.C. Cir. 1969). *See infra* note 261 for a dissenting view in *City Stores*.

223. 271 F.2d 529 (5th Cir. 1959), *cert. denied*, 362 U.S. 903 (1960).

224. *Id.* at 532.

225. *Id.* (citing Green v. Johns, 86 Ga. App. 646, 72 S.E.2d 78 (1952) (discussed *infra* notes 248-50 and accompanying text)).

226. *Lawson*, 271 F.2d at 532. Once again, Judge Hutcheson relied upon *Luckenbach* without discussing whether the insurer's subrogation rights were a matter of state or federal law. *See supra* notes 218-19 and accompanying text; *infra* note 237.

227. *Lawson*, 271 F.2d at 532.

228. *Id.* at 533-37 (Cameron, J., dissenting).

was a valid loan in the context of an insurance obligation that, unlike the one in *Luckenbach*,[229] required immediate payment and was not contingent.[230] He contended that in this context, the court should treat the loan receipt as an unconditional payment, with the result that the insurance company is subrogated to the insured's claim.[231]

The Fifth Circuit's approach to the real party in interest status of an insurer that has paid compensation through a loan receipt suffers from several analytical defects. First, like the courts that erroneously have focused upon pecuniary interest in determining the real party in interest,[232] Judge Hutcheson failed to appreciate that the real party in interest is simply the party entitled to control the action. In *Celanese* and *Lawson*, the courts ignored the purposes and meaning of the real party in interest rule and permitted suit to proceed in the name of a party who, through the loan receipt itself, had relinquished control of the claim. Moreover, the *Celanese* court treated rule 17(a) as a rule designed to avoid multiple litigation, and thus added a new element of confusion in rule 17(a) jurisprudence.[233] Further, as shown by the Fifth Circuit's reliance upon *Luckenbach*, the court failed to appreciate that the substantive law from which the rights of the parties arise is the proper source for determining whether the insured or the insurer is entitled to control the action and is, therefore, the real party in interest. Because the Supreme Court in *Luckenbach* determined the rights of the plaintiff shipper and its insurer under the loan receipt as a matter of federal common law,[234] that case should not have been treated as controlling precedent in *Celanese* or *Lawson*, in which the parties' rights derived from state law. Rather, the Fifth Circuit should have looked to the applicable state law to determine whether a loan receipt agreement would have left the insured with a right to enforce the claim.

In contrast to the Fifth Circuit, other federal courts have recognized that the effect of a loan receipt on the insurer's status as a real party in interest is a

229. Judge Cameron pointed out that in *Luckenbach* the plaintiff insured was a shipper of goods and the defendants were the carriers. The insurers had insured the goods for the shipper, but their liability for loss of the goods was contingent upon a finding of nonliability of the carriers to the insured. In this context, the purpose of the loan receipt was to lend the money to the shipper during the period that the liability of the carriers was being litigated and, in exchange for the loan, to give the insurer control of the litigation against the carriers and the right to payment by the insured of amounts recovered from the carriers. The defendant carriers in *Luckenbach* contended that the transaction was payment by the insurers, not a loan, and that the shipper, therefore, had been paid in full and should not be permitted to maintain the action. The Supreme Court found in *Luckenbach* that the loan receipt was a valid loan and that the shipper was entitled to bring the action in his own name. *Lawson*, 271 F.2d at 534 (Cameron, J., dissenting) (citing *Luckenbach*, 248 U.S. at 148-49).

230. *Lawson*, 271 F.2d at 535 (Cameron, J., dissenting). Judge Cameron, like Judge Hutcheson, apparently was unaware that the effect of the loan receipt, with regard to the insurer's substantive rights and its status as a "real party in interest," was properly a matter of state law, so that the *Luckenbach* decision, regardless of its holding, should not have been controlling. *See infra* note 237.

231. For cases so holding, see *supra* notes 254-61 and accompanying text. Judge Cameron also noted that the action had been initiated by the attorneys for the insurer, albeit in the name of the insured. *Lawson*, 271 F.2d at 535 (Cameron, J. dissenting).

232. *See supra* notes 141-95 and accompanying text.

233. *See supra* notes 220-22 and accompanying text. For further discussion of rule 17(a) and avoidance of multiple litigation see *supra* note 16; *infra* notes 262-319 and accompanying text.

234. *See supra* note 218; *infra* note 237.

matter of the law from which the insurer's rights arise.[235] That is, if under the applicable substantive law, the use of a loan receipt means that the insurer does not have a right to sue, a court should not consider the insurer a real party in interest for purposes of federal rule 17(a). On the other hand, if under the governing law an insurer is subrogated in spite of its use of a loan receipt, the insurer should be considered a real party in interest.

The latter point is well illustrated in *Rosenfeld v. Continental Building Operating Co.*,[236] in which a Missouri federal district court rejected the plaintiff's argument that the United States Supreme Court's federal common law decision in *Luckenbach* was controlling precedent with regard to the effect of the loan receipt payment in the case before the court.[237] Rather, the *Rosenfeld* court concluded that, under Missouri choice-of-law principles, the effect of the loan receipt should be determined by the substantive law of New York, where the loan receipt and payments were made.[238] The *Rosenfeld* court then applied a New York Court of Appeals decision holding that a loan receipt is payment unless the insurance policy contains a provision authorizing the insurer to discharge its liabilities by a loan.[239] Because there was no provision in the policy authorizing the insurer to settle its liabilities by a loan, the court held that the loan in the amount of the plaintiff's entire loss was a payment, and that the insurer was the real party in interest.[240] Therefore, the court sustained the de-

235. *See, e.g.*, White Hall Bldg. Corp. v. Profexray Div. of Litton Indus., Inc., 387 F. Supp. 1202, 1204-05 (E.D. Pa. 1974) (under Pennsylvania law, insurer who has paid by way of a loan receipt is not entitled to the benefits of outright payment, such as the right to bring suit as a subrogee and, therefore, is not a real party in interest under federal rule 17(a)), *aff'd mem.*, 578 F.2d 1377 (3d Cir. 1978) and *aff'd mem. sub nom.* Quaglia v. Profexray Div. of Litton Indus., Inc., 578 F.2d 1375 (3d Cir. 1978); 3A MOORE'S FEDERAL PRACTICE, *supra* note 43, ¶ 17.09[2.-4], at 17-89 n.5 (collecting cases); Annotation, *supra* note 213, at 115-16.

236. 135 F. Supp. 465 (W.D. Mo. 1955). The author of the *Rosenfeld* opinion was District Judge Charles E. Whittaker, who served on the United States Supreme Court from 1957 to 1962.

237. *Id.* at 469 (discussing Luckenbach v. W.J. McCahan Sugar Ref. Co., 248 U.S. 139 (1918)). Judge Whittaker explained that the plaintiff's reliance upon *Luckenbach* was mistaken because *Luckenbach*

> was decided by Justice Brandeis . . . at a time when it was thought there was Federal common law, but Justice Brandeis himself wiped out the authority of that case, and many others, by overruling Swift v. Tyson in his opinion in Erie R. Co. v. Tompkins, 304 U.S. 64, . . . [1938], holding that there is no Federal common law, and that, upon a non-Federal question, the controlling substantive law is the law of the state.

Id. Judge Whittaker overstated his case. The Court in *Erie* stated, "There is no federal *general* common law." *Erie*, 304 U.S. at 78 (emphasis added). Federal common law continues to operate, of course, in areas that are not properly matters of state law, and the *Luckenbach* case continues to be perfectly good federal common law on the effect of loan receipts in cases in which the rule of decision is properly federal. *See generally* Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405-22 (1964) (discussing the role of federal common law after *Erie*).

238. *Rosenfeld*, 135 F. Supp. at 468-69.

239. *Id.* at 469. The court noted that development in the loan receipt area was arrested in New York when the legislature amended the real party in interest statute to provide that " 'an insured person . . . which has executed to his insurer either a loan or subrogation receipt, trust agreement, or other similar instrument, . . . may sue without joining with him the person for whose benefit the action is prosecuted.' " *Id.* (citing New York Civil Practice Act § 210). Because this statute was "purely adjective and procedural," it did not affect the outcome under federal rule 17(a), however, and the court relied upon substantive New York law regarding subrogation rights resulting from a loan receipt payment. *Id.*

240. *Id.* at 470.

fendant's rule 17(a) objection to prosecution of the action in the name of the insured.[241]

In both the *Celanese* and *Lawson* decisions, the court did cite state law cases as well as *Luckenbach*, but the decisions cited did not support the proposition that the insurer was not a real party in interest under federal rule 17(a). In fact, the courts' reliance upon these state cases illustrates the problem of failing to distinguish between a procedural and a substantive decision under state law.[242]

Neither of the Texas cases cited in *Celanese*, *Hudson Underwriters Agency v. Ablon*[243] and *Houston Transit Co. v. Goldston*,[244] established that an insurer that has paid by loan receipt is not entitled to enforce its reimbursement interest against third parties. Quite to the contrary, in *Hudson*, the insurer had compensated the insured fully and was in complete control of the suit brought in the insured's name.[245] The two Texas cases cited by the *Celanese* court stand only for the proposition that under Texas law a compensating insurer who has paid by loan receipt, and possibly any compensating insurer,[246] is entitled to sue in the name of the insured.[247] Thus, contrary to the Fifth Circuit's interpretation, the cases actually support treating an insurer as a real party in interest under the federal rule because they show that the insurer has enforcement rights under Texas law.

Similarly, in *Lawson*, the court cited *Green v. Johns*,[248] a Georgia case holding that the insured may be the sole named plaintiff when the insurer has used a loan receipt, even though the insurer had the right under the terms of the loan

241. *Id.* The action was dismissed "but with leave to the insurer to come into the case as the plaintiff, . . . and to prosecute it in its own name." *Id.*

The converse of this situation was presented in Industrial Dev. Bd. v. Brown & Root, Inc., 99 F.R.D. 58 (M.D. Ala. 1983), *aff'd in part*, 795 F.2d 87 (11th Cir. 1986), in which the court, citing *Rosenfeld*, held that the insurer who had compensated the plaintiff through a loan receipt was not a real party in interest for purposes of federal rule 17(a). *Id.* at 60. The court noted the importance of following state substantive, not procedural, law and declined to give any effect to Alabama Rule of Civil Procedure 17(a), which required joinder of an insurer that has become subrogated through a loan receipt. *Id.* at 59-60. The court found that its decision was controlled by an Alabama decision, predating the procedural rule, holding that an insurer who otherwise has no subrogation rights does not acquire such rights through a loan receipt payment to its insured. *Id.* (citing McKenzie v. North River Ins. Co., 257 Ala. 265, 58 So. 2d 581 (1951)). Unfortunately, the *Industrial Development Board* court failed to consider whether the insurer in the case before the court did have, under Alabama substantive law, subrogation rights outside of the loan receipt agreement. If so, then the insurer would have been a real party in interest for purposes of rule 17(a)—not because of the Alabama procedural rule, but simply because of Alabama substantive law. *See* City of Birmingham v. Walker, 267 Ala. 150, 154-55, 101 So. 2d 250, 252-53 (1958) (discussing subrogation right of property insurer).

242. *See supra* notes 196-210 and accompanying text.

243. 203 S.W.2d 584 (Tex. Civ. App. 1947).

244. 217 S.W.2d 435 (Tex. Civ. App. 1949).

245. *Hudson*, 203 S.W.2d at 585.

246. In *Houston Transit Co.* the court stated, "We by no means hold that in the absence of a 'loan receipt' transaction, the appellant [defendant] would have been entitled to treat the insurance company here as the real party at interest . . . ." 217 S.W.2d at 438.

247. *Id.*; *Hudson*, 203 S.W.2d at 585.

248. 86 Ga. App. 646, 72 S.E.2d 78 (1952), *cited in* Peoples Loan & Fin. Corp. v. Lawson, 271 F.2d 529, 532 (5th Cir. 1959), *cert. denied*, 362 U.S. 903 (1960).

receipt to exclusive control of the lawsuit.[249] To the extent that the *Lawson* court was relying upon state law to determine the effect of a loan receipt, therefore, it failed to distinguish between state procedural joinder decisions and state law with regard to the right of the insurer to bring suit to enforce its subrogation interest.[250] Some federal courts, however, have appreciated this distinction and have declined to follow state law regarding loan receipts when the state rule merely permits an insurer to bring suit in the insured's name.[251]

Once again, a complicating factor for federal courts attempting to ascertain the effect of a loan receipt on the insurer's right to sue is that many states permit suit in the name of the insured alone regardless of an insurer's subrogation rights.[252] In these jurisdictions, there is no point in defendants attacking loan receipts, if they are used at all, because courts will not require joinder of the subrogated insurer in any case. Consequently, state court decisions about the effect of a loan receipt on an insurer's right to bring suit are unlikely to exist.[253]

Even when the effect of a loan receipt is properly a question of federal law, not all federal courts have agreed with the Fifth Circuit's approval of the device.[254] In *City Stores Co. v. Lerner Shops of District of Columbia, Inc.*[255] the United States Court of Appeals for the District of Columbia Circuit required joinder of a plaintiff's insurer that had settled its liability to the plaintiff through a loan receipt.[256] The court distinguished *Luckenbach*, as had Judge Cameron in *Lawson*, on the ground that the insurer's liability in *Luckenbach* was only contingent.[257] The court found that in an ordinary property damage case in which the insurer's liability is absolute, the use of a loan receipt results from "an

249. *Green*, 86 Ga. App. at 652, 72 S.E.2d at 82; *see also* Childers v. Eastern Foam Prod., Inc., 94 F.R.D. 53, 55-56 (N.D. Ga. 1982) (like *Lawson*, followed Georgia law approving of loan receipts as a device to avoid joinder of the insurer that nonetheless controls the litigation to the extent of its interest).

250. *See supra* notes 196-210 and accompanying text.

251. *See, e.g.*, McNeil Constr. Co. v. Livingston State Bank, 185 F. Supp. 197, 200-01 (D. Mont. 1960), *aff'd*, 300 F.2d 88 (9th Cir. 1962); Rosenfeld v. Continental Bldg. Operating Co., 135 F. Supp. 465, 469 (W.D. Mo. 1955) (discussed *supra* notes 236-41 and accompanying text); *see also* Industrial Dev. Bd. v. Brown & Root, Inc., 99 F.R.D. 58, 60 (M.D. Ala. 1983) (declining to follow Alabama procedural rule requiring joinder of insurer; discussed *supra* note 241).

252. *See supra* note 111.

253. *See supra* note 201. In Potomac Elec. Power Co. v. Babcock & Wilcox Co., 54 F.R.D. 486, 489 (D. Md. 1972), the court did not refer to state subrogation law, but noted that the loan receipt provided that the insurer "would pay for and have 'exclusive direction and control' of any suit such as the present one to recover for the loss." The court then stated,

> A payment conditioned on such control by an insurance company . . . hardly amounts to a bona fide loan so as to avoid the requirements of Rules 17 and 19. Under an agreement between an insured and its insurer such as the one here present, this Court concludes that the insurer is subrogated to the rights of the insured to the extent that it has paid portions of the loss in question.

Id.

254. *See* Executive Jet Aviation, Inc. v. United States, 507 F.2d 508 (6th Cir. 1974).

255. 410 F.2d 1010 (D.C. Cir. 1969).

256. *Id.* at 1015.

257. *Id.* at 1013. The court did not address the issue of what jurisdiction's substantive law controlled the rights of the insurer and the effect of the loan receipt agreement. The court referred to the case as one of first impression, *id.* at 1014, apparently assuming that federal common law controlled because the plaintiff's property damage claim arose from a fire in the District of Columbia. *Id.* at 1011.

unworthy motive, if not an improper and illegal purpose,"[258] and is "a transparent subterfuge to avoid subrogation and to evade" rule 17(a).[259]

The *City Stores* court fully appreciated the meaning of the real party in interest rule, keeping the focus of its analysis on the question of who controlled the claim. The court stated that by executing a loan receipt, "the insured simply sells to the insurance company the right to use his name as party plaintiff in a suit brought against a third party which is to be exclusively directed and controlled by the insurer at its expense and for its benefit."[260] The court held that in spite of an insurer's use of a loan receipt, the insurer "is subrogated to the rights of the insured and so is the real party in interest in a suit against a third party."[261]

Rule 17(a) has done nothing to solve the loan receipt problem. Once again, if federal courts asked whether the insured or insurer was entitled, in light of the loan receipt agreement, to state a claim for relief regarding the loss alleged in the complaint, they at least would be pointed in the right direction. In examining state loan receipt precedents, courts might consider more carefully whether the state decisions mean that the insurer using such an agreement is, in fact, not subrogated, or whether the decisions mean only that the insurer is entitled to assert the claim in the name of its insured.

V. RULE 17(A) AND COMPULSORY JOINDER

A. Rule 17(a) as a Rule Requiring Joinder

A particularly troubling aspect of rule 17(a) jurisprudence has been a judicial tendency to extend the rule beyond its borders to become a rule of compulsory joinder. A recent manifestation of this tendency is a 1985 federal district court decision, *Carpetland, U.S.A. v. J.L. Adler Roofing, Inc.*,[262] in which the court held that rule 17(a) is "an independent authority for compulsory joinder" separate from rule 19.[263] The rule's expansion into compulsory joinder was accepted, albeit reluctantly, by Judge Craven of the Fourth Circuit in *Virginia*

258. *Id.* at 1013.

259. *Id.* at 1015.

260. *Id.*

261. *Id.* Relying upon *Aetna* for the proposition that if the insurers are subrogated, they should be joined, *id.* at 1012, the court ordered "that the insurance companies be made parties plaintiff, as the real parties in interest." *Id.* at 1015. Judge Burger dissented, arguing that there is "nothing 'unworthy,' 'illegal,' or even undesirable in seeking to have the triers evaluate the case without regard to liability coverage." *Id.* at 1015-16 (Burger, J., dissenting).

Judge Burger's dissent was relied upon by the court in Acro Automation Sys., Inc. v. Iscont Shipping Ltd., 706 F. Supp. 413, 421 (D. Md. 1989), in which the court condoned use of a loan receipt agreement to avoid joinder of the insurer as a party plaintiff. Pursuant to the loan receipt agreement, the plaintiffs had received from their insurer all but $500 of their $252,110 loss and the insurer was in complete control of the litigation. *Id.* at 419. The court reasoned that as the insurer, because of its actual control, would be bound by the litigation, *id.* at 420, "the agreement, intended to circumvent the requirements of Rule 17(a), [did not] frustrate the policies of the rule." *Id.* at 422. The court relied upon *Celanese* for the proposition that the policy of the rule was the avoidance of multiple litigation. *Id.* at 420-21.

262. 107 F.R.D. 357 (N.D. Ill. 1985).

263. *Id.* at 360.

Electric & Power Co. v. Westinghouse Electric Corp.[264] Judge Craven referred to an "overlap" between rules 17(a) and 19 and analyzed the joinder issue under both rules.[265] He stated, however, that:

> Intended to expand the class of those who may sue to include persons having an equitable or beneficial interest, the [real party in interest] rule is unfortunately susceptible to efforts to prevent prosecution of claims as illustrated by this appeal. Ingenious counsel are enabled to present yet another "decision point" resulting in extravagant expenditures of time and effort before ever reaching the merits.[266]

The idea that rule 17(a) requires joinder is altogether ill-conceived,[267] but its emergence is not surprising. That the idea would arise in cases concerning motions to join subrogated insurers as parties plaintiff is especially predictable. To understand why the idea is wrong and to appreciate why it nevertheless has occurred in this setting, a brief look at history is necessary.

At common law, partial assignees and subrogees were not permitted to sue because the courts were reluctant to subject the debtor to more than one suit on a single obligation.[268] The problem could not be solved by joinder because joinder of parties at common law was very limited.[269] Equity, however, allowed liberal joinder of parties and had developed a doctrine of compulsory joinder—"necessary" and "indispensable" parties—broader than that of the common law.[270] Equity, then, and later the Field Code, permitted partial assignees and subrogees to sue in their own names (as "real parties in interest") because it was possible to protect the debtor through compulsory joinder.[271] Thus, the "real party in interest" rule did not in any sense require joinder. Rather, the rule itself was made possible by the evolution of a distinct doctrine of compulsory joinder;

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264. 485 F.2d 78 (4th Cir. 1973), *cert. denied*, 415 U.S. 935 (1974).

265. *Id.* at 84-85; *see also* Prudential Lines, Inc. v. General Tire Int'l Co., 74 F.R.D. 474, 475 (S.D.N.Y. 1977) (noting the "common purpose" of rules 17 and 19); White Hall Bldg. Corp. v. Profexray Div. of Litton Indus., Inc., 387 F. Supp. 1202, 1204 (E.D. Pa. 1974) (analyzing the joinder question under both rules), *aff'd mem.*, 578 F.2d 1377 (3rd Cir. 1978) and *aff'd mem. sub nom.* Quaglia v. Profexray Div. of Litton Indus., Inc., 578 F.2d 1375 (3rd Cir. 1978).

266. *Virginia Elec.*, 485 F.2d at 83 (citing J. FRANK, AMERICAN LAW, THE CASE FOR RADICAL REFORM 65 (1969)).

267. 6A C. WRIGHT, A. MILLER & M. KANE, *supra* note 42, § 1543 at 339 ("[T]he question of who should or may be joined in the action must be determined under Rule 19 and Rule 20 rather than Rule 17(a)."); Kennedy, *supra* note 2, at 680 ("Rule 17(a) should not be construed to compel joinder without reference to Rule 19"); *see also* U-Haul Int'l, Inc. v. Jartran, Inc., 793 F.2d 1034, 1038 (9th Cir. 1986) ("Although the parties have addressed this problem solely in the context of [federal rule] 17, we also must consider [federal rule] 19. . . . [rule] 17 governs only the right of [plaintiff] to bring the suit. It is [rule] 19 that tells us whether the appropriate parties are before the court."); Whitcomb v. Ford Motor Co., 79 F.R.D. 244 (M.D. Pa. 1978) (rule 19 analysis, not rule 17(a), should be used to decide joinder issue); Kint v. Terrain King Corp., 79 F.R.D. 10, 11 (M.D. Pa. 1977) (same).

268. *See* Clark & Hutchins, *supra* note 32, at 266.

269. At common law, plaintiffs were compelled to join when their rights were "joint"; no other joinder was permitted. C. CLARK, *supra* note 29, § 56, at 348-50.

270. *See supra* note 35.

271. Splitting was never an objection in equity, since the additional parties might be cited in, and with the freedom as to parties in equity incorporated in the codes, it cannot be an objection under present practice. The insured may be made plaintiff or defendant; all interests may be determined in one action.

Clark & Hutchins, *supra* note 32, at 273.

to think of the real party in interest rule as a joinder rule introduces a redundancy into the procedural system.[272]

Perhaps because of the causal relationship between the real party in interest rule and compulsory joinder, it is not surprising to find that discussions of partial subrogors and subrogees as "real parties in interest" invariably refer to compulsory joinder of these persons.[273] These discussions, however, have led to a blurring of the distinction between these two doctrines. Most notably, in *Moore's Federal Practice*, joinder of compensating insurers is discussed in the section of the treatise on rule 17(a). Regarding partial subrogation, Professor Moore stated, "There are two real parties in interest. Both may sue. But, as in the case of partial assignments, if the defendant makes a timely objection, the joinder of insurer and insured should be compelled."[274] Moore's treatment of the compulsory joinder issue in his discussion of the real party in interest rule,[275] without reference to rule 19 or the criteria and policies underlying com-

272. Doctrines of compulsory joinder from equity and code pleading were incorporated into federal rule 19. *See* Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987). In a recent article, Professor Bone discusses the decision by the 1938 rules drafters to eschew a pragmatic approach and to include in rule 19 the "conceptual baggage" of the late 19th century. *See* Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 110 (1989). Rule 19, as enacted in 1938, provided:

> Necessary Joinder of Parties. (a) Necessary Joinder. Subject to the provisions of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases, an involuntary plaintiff.
>
> (b) Effect of Failure to Join. When persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the court as to both service of process and venue and can be made parties without depriving the court of jurisdiction of the parties before it, the court shall order them summoned to appear in the action. The court in its discretion may proceed in the action without making such persons parties, if its jurisdiction over them as to either service of process or venue can be acquired only by their consent or voluntary appearance or if, though they are subject to its jurisdiction, their joinder would deprive the court of jurisdiction of the parties before it; but the judgment rendered therein does not affect the rights or liabilities of absent persons.
>
> (c) Same: Names of Omitted Persons and Reasons for Non Joinder to be Pleaded. In any pleading in which relief is asked, the pleader shall set forth the names, if known to him, or persons who ought to be parties if complete relief is to be accorded between those already parties, but who are not joined, and shall state why they are omitted.

FED. R. CIV. P. 19, *reprinted in* 39 F.R.D. 87, 87-88 (1966).

273. C. CLARK, *supra* note 29, § 24; Clark & Hutchins, *supra* note 32, at 271-72.

274. 2 J. MOORE & J. FRIEDMAN, *supra* note 117, § 17.08, at 2057. This passage appears without substantial change in the current edition of the treatise. *See* 3A MOORE'S FEDERAL PRACTICE, *supra* note 43, ¶ 17.09[2.-1], at 17-78 to 17-79.

275. In the rule 19 section of Moore's 1938 treatise, there is no discussion of partial subrogation, but only a citation to the rule 17(a) section in a footnote relative to partial assignment. 2 J. MOORE & J. FRIEDMAN, *supra* note 117, § 19.03, at 2154 n.78. Professor Moore's treatise now includes in the section on rule 19 a discussion of the overlap between rules 17(a) and 19, in which the writer suggests that the matter is best treated under rule 19 and that, applying the criteria of rule 19(a) as amended in 1966, joinder of the insurer should *not* be required. 3A MOORE'S FEDERAL PRACTICE, *supra* note 43, ¶ 19.07—1[2.-2], at 19-113 to 19-116. Moore's comments favoring compulsory joinder, however, continue to appear in his chapter on rule 17(a) and to be cited for that approach without reference to his discussion to the contrary in the section on rule 19. *See* Truckweld Equip. Co. v. Swenson Trucking & Excavating, Inc., 649 P.2d 234, 237 (Alaska 1982).

pulsory joinder,[276] unfortunately led to judicial decisions that followed suit.[277]

Once again, as discussed above with regard to the issue of identifying the "real party in interest," the Supreme Court decision in *United States v. Aetna Casualty & Surety Co.*[278] contributed to the problem. This time, the problem was the Court's treatment of the joinder issue. After stating that both partial subrogor and partial subrogee are real parties in interest under rule 17(a),[279] the Court noted tersely, "Although either party may sue, the United States, upon timely motion, may compel their joinder. 3 Moore, Federal Practice (2d ed.) p. 1348. Both are 'necessary' parties. Rule 19(b), Federal Rules of Civil Procedure."[280] Although the Court did cite rule 19(b) for the joinder proposition, it also cited Moore's discussion of rule 17(a).[281] More importantly, the Court offered no analysis of how the doctrine of compulsory joinder led to the conclusion that subrogor and subrogee were "necessary" under rule 19.[282] The cursory nature of this discussion in *Aetna* contributed to the blurring of "real party in interest" and compulsory joinder concepts. *Aetna* came to be widely cited, without any independent analysis of rule 19's application, for the proposition that a partially subrogated insurer is a "real party in interest" whose joinder is required.[283]

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276. Professor Bone refers to Professor Moore's treatment of compulsory joinder as "unusually superficial." Bone, *supra* note 272, at 112. Bone states, "The bulk of Moore's discussion of Rule 19 in his 1938 treatise consists of a lengthy summary of existing precedent defining necessary and indispensable parties in different types of cases without any clear account of the purpose the Rule was supposed to serve." *Id.* at 111.

277. One court, for instance, reasoned:

> [A] partial subrogee is a real party in interest, under Rule 17(a), and as such has standing to sue in his own name, subject only to the right of the defendant, by making timely objection, to insist upon the joinder of the other parties in interest in order to avoid a split-up of the cause of action.

State Farm Mut. Liab. Ins. Co. v. United States, 172 F.2d 737, 739 (1st Cir. 1949) (citing 2 J. MOORE & J. FRIEDMAN, *supra* note 117, § 17.08).

278. 338 U.S. 366 (1949). *See supra* notes 124-39 and accompanying text.

279. *See supra* note 132 and accompanying text.

280. *Aetna*, 338 U.S. at 381-82 (citation and footnote omitted).

281. *Id.* at 382; *see supra* text accompanying note 280. Because the 1948 second edition of *Moore's Federal Practice* is continuously updated, it is not possible to ascertain the exact language of the passage referred to in *Aetna* as "3 Moore, Federal Practice (2d ed.) p. 1348." *See supra* note 117. One can conclude, however, that the passage is Moore's discussion of rule 17(a), partial subrogation, and compulsory joinder, *see supra* note 274 and accompanying text, because the current version of Moore's treatise states that this discussion "was approved by the Supreme Court in United States v. Aetna Cas. & Sur. Co." 3A MOORE'S FEDERAL PRACTICE *supra* note 43, ¶ 17.09[2.-1], at 17-77 n.1. Moreover, Moore apparently did not discuss the relationship between rule 19 and compulsory joinder in his treatise until sometime after 1966. *See supra* note 275.

282. *See Aetna*, 338 U.S. at 382; *supra* note 272 (text of rule 19 at the time of the *Aetna* decision). With regard to the insurer-subrogee, the statement is entirely dictum, because the insurer was a named plaintiff in all four of the cases before the Court. *See supra* note 127 and accompanying text. A number of federal courts, therefore, have declined to order joinder of partially subrogated insurers, distinguishing *Aetna* on the ground that the only issue even arguably before the Court was compulsory joinder of the insured. *See, e.g.*, Prudential Lines, Inc. v. General Tire Int'l Co., 74 F.R.D. 474, 475-76 (S.D.N.Y. 1977); Braniff Airways, Inc. v. Falkingham, 20 F.R.D. 141, 144 (D. Minn. 1957).

283. *See, e.g.*, Gas Serv. Co. v. Hunt, 183 F.2d 417, 419 (10th Cir. 1950). Even after rule 19 was extensively revised in 1966, courts continued to rely upon *Aetna* for the proposition that partially subrogated insurers must be joined, rather than to apply Rule 19's stated criteria. *See, e.g.*, Virginia Elec. & Power Co. v. Westinghouse Elec. Corp., 485 F.2d 78, 85 (4th Cir. 1973) ("It is clear that a

The most serious blow to the distinction between rules 17(a) and 19 came in the 1954 Fifth Circuit opinion in *Celanese Corp. of America v. John Clark Industries, Inc.*,[284] discussed above in connection with loan receipts.[285] In *Celanese* Judge Hutcheson first postulated[286] that the modern function of the real party in interest rule is to prevent multiple litigation. Without citing any authority, Judge Hutcheson wrote:

> As appellant points out in its brief, the purpose of the practice long obtaining in the federal courts and now set forth in Rule 17 of the Federal Rules of Civil Procedure that every action shall be prosecuted in the name of the real party in interest, is to enable the defendant to avail himself of evidence and defenses that the defendant has against the real party in interest, and to assure him finality of the judgment, and that he will be protected against another suit brought by the real party at interest on the same matter.[287]

Judge Hutcheson, however, had it all backwards. The real party in interest rule would have *created* the problem of multiple litigation, had it not been for the doctrine of compulsory joinder. It was the real party in interest rule that permitted suit by both assignor and assignee on a partially assigned, or subrogated, claim. The protection that Judge Hutcheson found in the real party in interest rule had been provided in equity and in the codes, not by the real party in interest doctrine, but by the entirely separate doctrine of compulsory joinder, which had been incorporated into rule 19 of the Federal Rules of Civil Procedure.[288]

It is not surprising, however, that judges do see rule 17(a) as embracing compulsory joinder principles. Without being both knowledgeable and conscious of the rule's history, a judge, predictably, is unlikely to accept that the commanding language of the rule means so much less than what it seems to say.[289] Judge Hutcheson's idea, nevertheless, became part of the legislative his-

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partial subrogee is a person to be joined if feasible under Fed. R. Civ. P. 19(a).") (citing *Aetna*, 338 U.S. at 381-82), *cert. denied*, 415 U.S. 935 (1974)); Wadsworth v. United States Postal Serv., 511 F.2d 64, 66-67 (7th Cir. 1975); Public Serv. Co. v. Black & Veatch, 467 F.2d 1143, 1144 (10th Cir. 1972); City Stores Co. v. Lerner Shops of D.C., Inc., 410 F.2d 1010, 1012 (D.C. Cir. 1969); Wattles v. Sears, Roebuck & Co., 82 F.R.D. 446, 448-49 (D. Neb. 1979); Chaplin v. Bruce, 57 F.R.D. 487, 488 (W.D. Okla. 1972) (citing *Gas Serv. Co.* and *Public Serv. Co.*); Neal v. Trim-Master Corp., 48 F.R.D. 392, 393-94 (N.D. Miss. 1969). *But see* Edwards, Inc. v. Arlen Realty & Dev. Corp., 466 F. Supp. 505, 511-12 (D.S.C. 1978) (criticizing *Virginia Electric* for "bypass[ing] the analysis provided for in Rule 19(a)"); Bromac Elec. & Power Co. v. Babcock & Wilcox, 54 F.R.D. 486, 493 (D. Md. 1972) (rejecting reliance on *Aetna* because "that case was decided in 1949, long before Rule 19 was amended and put in its present form emphasizing that pragmatic considerations should be controlling"); *supra* note 17 (citing cases that apply rule 19 to decide whether partially subrogated insurers must be joined, but that do not agree upon the correct result).

284. 214 F.2d 551 (5th Cir. 1954).

285. *See supra* notes 211-61 and accompanying text.

286. C. WRIGHT, *supra* note 5, at 453 n.6.

287. *Celanese*, 214 F.2d at 556 (citation omitted).

288. *See supra* note 272.

289. *See* Kaplan, *supra* note 3, at 412 ("[The rule] conveys a certain amount of correct information about naming plaintiffs, but to the average reader innocent of history it probably suggests as much or more that is quite incorrect.").

tory of rule 17(a) in the Advisory Committee Note to the 1966 amendment, which states,

> In its origin the rule concerning the real party in interest was permissive in purpose: it was designed to *allow* an assignee to sue in his own name. That having been accomplished, the modern function of the rule in its negative aspect is simply to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata.[290]

It is not surprising that the advisory committee so willingly accepted the idea that rule 17(a) has this "modern function" of protecting a defendant from multiple litigation, because this is the advisory committee that extensively revised rule 19 with this same purpose in mind.[291]

Perhaps no one familiar with the manner in which precedent evolves in the

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290. FED. R. CIV. P. 17(a) advisory committee note (1966) (emphasis added).

291. Regarding subsection (a)(1), the advisory committee note to the 1966 amendment of Rule 19 states, "The interests that are being furthered here are not only those of the parties, but also that of the public in avoiding repeated lawsuits on the same essential subject matter." FED. R. CIV. P. 19 advisory committee note (1966). In Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968), the Court stated:

> [T]here remains the interest of the courts and the public in complete, consistent, and efficient settlement of controversies. We read the Rule's [19(b)'s] third criterion, whether the judgment issued in the absence of the nonjoined person will be 'adequate,' to refer to this public stake in settling disputes by wholes, whenever possible . . . ."

Id. at 111.

Rule 19 as amended in 1966 provides:

> Joinder of Persons Needed for Just Adjudication. (a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.
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> (b) Determination by Court Whenever Joinder Not Feasible. If a person as described in subdivision (a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.
>
> (c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a) (1)-(2) hereof who are not joined, and the reasons why they are not joined.
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> (d) Exception of Class Actions. This rule is subject to the provisions of Rule 23.

FED. R. CIV. P. 19, *reprinted in* 39 F.R.D. 87, 88-89 (1966) (In 1987, the rule was amended solely for the purpose of "gender-neutralization.").

hands of courts and writers should be surprised by the way in which Judge Hutcheson's unsupported dictum about the function of rule 17(a) has spread through the law of compulsory joinder like a fast-growing malignancy. In the *Virginia Electric* opinion, Judge Craven cited and relied upon both *Celanese* and the 1966 Advisory Committee Note to rule 17(a) to support his statement regarding the joinder function of rule 17(a).[292] In its turn, the *Carpetland* court cited *Virginia Electric* as a case regarding rule 17(a) "as requiring the joinder of real parties in interest independent of a Rule 19(a)(2) analysis."[293]

Once a court, such as the one in *Carpetland*, has committed itself to a proposition anchored to unstable moorings, it often will seek to support the proposition with other equally vulnerable premises. The *Carpetland* opinion is bloated with questionable reasoning in support of its conclusion regarding the joinder function of rule 17(a). Such reasoning is likely to broaden further the base of support for the application of rule 17(a) as a rule of compulsory joinder.

To the plaintiff's argument that its insurer's compulsory joinder should be determined solely by the requirements of rule 19(a),[294] the *Carpetland* court responded that it was bound by the United States Court of Appeals for the Seventh Circuit's decision in *Wadsworth v. United States Postal Service*.[295] The *Carpetland* court described *Wadsworth* as holding that rule 17(a) is "an independent authority for compulsory joinder."[296] That conclusion, however, vastly overstates the *Wadsworth* holding.

The *Wadsworth* case did hold that a partially subrogated insurer was subject to compulsory joinder, and, as pointed out by the *Carpetland* court, *Wadsworth* did not discuss or apply the prerequisites of rule 19(a). Rather, the *Wadsworth* court merely relied upon *Aetna*,[297] which, as further noted by the *Carpetland* court, relied upon both rules 17(a) and 19. The *Carpetland* court then took *Wadsworth*'s reliance upon *Aetna*, and its silence regarding amended rule 19, to reach the "natural conclusion" that *Wadsworth* does not require the prerequisites of rule 19(a) "to be satisfied before joinder is appropriate under Rule 17(a)."[298] But of course the *Aetna* Court had not applied the rule 19(a)(1) and (2) prerequisites that were added to the rule in 1966 because they were not, at least explicitly, a part of the rule at the time of the *Aetna* decision.[299]

The *Carpetland* court stated that *Wadsworth* was "[t]aking *Aetna*'s lead" by

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292. Virginia Elec. & Power Co. v. Westinghouse Elec. Corp., 485 F.2d 78, 84 nn.11 & 12 (4th Cir. 1973), *cert. denied*, 415 U.S. 935 (1974); *see supra* notes 264-66 and accompanying text.

293. Carpetland, U.S.A. v. J.L. Adler Roofing, Inc., 107 F.R.D. 357, 360 (N.D. Ill. 1985).

294. *Id.* at 359.

295. 511 F.2d 64 (7th Cir. 1975).

296. *Carpetland*, 107 F.R.D. at 359-60.

297. *Wadsworth*, 511 F.2d at 65-67. *Wadsworth* itself overstated *Aetna* as holding that joinder of the insurer is required. *Id.* at 66-67; *see supra* note 282; *see also* Bastian v. TPI Corp., 663 F. Supp. 474, 475-76 (N.D. Ill. 1987) (reluctantly following *Wadsworth*).

298. *Carpetland*, 107 F.R.D. at 360.

299. The advisory committee note to the 1966 amendment suggests that the criteria delineated in the amended rule were not new, but that the old rule merely "was defective in its phrasing and did not point clearly to the proper basis of decision." FED. R. CIV. P. 19 advisory committee's note (1966).

finding that rule 17(a) was a basis for joinder independent of rule 19(a).[300] In so doing, *Carpetland* construed the *Aetna* opinion as dispensing with prerequisites in rule 19(a) that were not specified in the rule until seventeen years after the opinion. Given that *Aetna* itself, in stating that joinder of the insurer was required, cited the version of rule 19 in effect at that time,[301] *Aetna* cannot reasonably be read to mean that rule 17(a) alone requires joinder.

The *Carpetland* court also cited several other decisions and *Moore's Federal Practice* for the proposition that rule 17(a) is regarded as an independent basis for joinder.[302] The cited cases were, however, like *Wadsworth*, cases in which the courts merely relied upon *Aetna*, or upon other cases that in turn had relied upon *Aetna*. The *Carpetland* court cited, for example, two opinions from the United States Court of Appeals for the Tenth Circuit, *Public Service Co. v. Black & Veatch*[303] and *Gas Service Co. v. Hunt*.[304] But *Public Service Co.* had relied upon *Aetna* and *Gas Service Co.*, which in turn was a pre-1966 case that had merely followed *Aetna*.[305] The many cases both pre- and post-1966 that, like *Wadsworth*, have found joinder required by reference to *Aetna* alone, without analyzing rule 19,[306] merely illustrate a judicial preference for precedent—even questionable precedent—over the strictures of reasoning and analysis.[307] They cannot fairly be taken to mean that rule 19 should be ignored in the context of subrogated insurers.

The *Carpetland* court, quoting *Aetna*, also argued that rule 17(a) provides an independent basis for compulsory joinder because

> Rule 17(a) has a purpose that is not covered by the scope of Rule 19(a): to reveal to the factfinder all the "owners" of the claim sought. "The pleadings should be made to reveal and assert the actual interest of the plaintiff, and to indicate the interests of any others in the claim."[308]

The sentence from *Aetna* quoted by the *Carpetland* court, however, immediately

300. *Carpetland*, 107 F.R.D. at 360.

301. United States v. Aetna Casualty & Sur. Co., 338 U.S. 366, 382 (1949).

302. *Carpetland*, 107 F.R.D. at 360 (citing Travelers Ins. Co. v. Riggs, 671 F.2d 810 (4th Cir. 1982); Virginia Elec. & Power Co. v. Westinghouse Elec. Corp., 485 F.2d 78 (4th Cir. 1973), *cert. denied*, 415 U.S. 935 (1974); Public Serv. Co. v. Black & Veatch, 467 F.2d 1143 (10th Cir. 1972); Gas Serv. Co. v. Hunt, 183 F.2d 417 (10th Cir. 1950)). The citation to *Moore's Federal Practice* is to the discussion of rule 17(a) in volume 3A, ¶ 17.09. As described *supra* notes 274-75 and accompanying text, Professor Moore's treatise contains a discussion of rule 17(a) that suggests that courts should require joinder of a subrogated insurer, but a subsequently-added discussion of rule 19 concludes that courts should not require joinder. *See* 3A MOORE'S FEDERAL PRACTICE, *supra* note 43, ¶ 17.09[2.-1], at 17-78 to 17-79; ¶ 19.07—1 [2.-2], at 19-113 to 19-116.

303. 467 F.2d 1143 (10th Cir. 1972).

304. 183 F.2d 417 (10th Cir. 1950).

305. *See Public Serv. Co.*, 467 F.2d at 1144; *Gas Serv. Co.*, 183 F.2d at 419-20. The *Carpetland* court also cited Travelers Insurance Co. v. Riggs, 671 F.2d 810 (4th Cir. 1982), which had followed *Virginia Electric*. *Carpetland*, 107 F.R.D. at 360.

306. *See supra* note 283.

307. *See* Smith, *A Primer of Opinion Writing, For Four New Judges*, 21 ARK. L. REV. 197, 198-200 (1967) (discussing the Grand Style and the Formal Style described in K. LLEWELLYN, THE COMMON LAW TRADITION—DECIDING APPEALS (1960)).

308. *Carpetland*, 107 F.R.D. at 360 (quoting *Aetna*, 338 U.S. at 382).

follows the *Aetna* Court's citation to rule 19.[309] *Aetna*'s statement about what the pleadings should reflect is not followed by any additional citation, much less a citation to rule 17(a). The *Aetna* Court most likely was referring only to the requirement in rule 19(c) that the pleadings set forth the names of persons who ought to be parties, but who are not joined, and account for their nonjoinder.[310]

Finally, the *Carpetland* court discussed the situation in which joinder of an insurer required by rule 17(a) might be impossible because the insurer is not "subject to service of process" or because its presence would destroy subject matter jurisdiction.[311] The court suggested that in the event of an inability to join the insurer, one should return to rule 19 and apply subsection (b) to determine whether the case should proceed without the insurer.[312] The *Carpetland* court thus is proposing a hybrid of rules 17(a) and 19 that is inconsistent with the language and design of rule 19. The scheme of rule 19 is that subdivision (a) provides the criteria for determining whether a nonparty is a person whose joinder should be required if feasible. Rule 19(b) then sets forth the criteria for the court's decision whether to proceed without the nonparty or to dismiss the suit "[i]f a person as described in subdivision (a)(1)-(2) hereof cannot be made a party."[313] Thus, the language of rule 19(b) limits its application to situations in which subdivision (a) first has been applied and does not anticipate application of subdivision (b) to deal with compulsory joinder arising from a source other than rule 19(a).[314]

This point illustrates a major problem with treating rule 17(a) as a rule of compulsory joinder. Rule 17(a) conceived of as a compulsory joinder rule not only overlaps and conflicts with rule 19, but it contains no criteria or guidance for its application in fulfilling the purposes that Judge Hutcheson, the advisory committee, and now *Carpetland* have grafted onto it.

What we see in *Carpetland* is the cumulative effect of less than explicit rule drafting, aggravated by and built upon less than fastidious judicial decisionmaking. The story begins with the cryptic texts of rules 17(a) and 19, themselves embodiments of earlier and, to the modern lawyer, equally cryptic rules and judicial decisions.[315] Added to that is Professor Moore's early treatment of compulsory joinder of subrogated insurers in his discussion of rule 17(a) that largely ignores the relationship of rule 19 to the problem.[316] His treatment was then followed by *Aetna*, which referred to both rules, but treated the matter of joinder very briefly, relying upon Moore and not engaging in any rule 19 analysis.[317] Then came those post-*Aetna* decisions, both before and after rule 19 was

309. *Aetna*, 338 U.S. at 382.

310. *See supra* notes 272 & 291.

311. *Carpetland*, 107 F.R.D. at 361.

312. *Id.*

313. FED. R. CIV. P. 19.

314. *See* FED. R. CIV. P. 19 advisory committee note (1966).

315. *See* Bone, *supra* note 272.

316. *See* 2 J. MOORE & J. FRIEDMAN, *supra* note 117, § 17.08, at 2057; *supra* notes 274-76 and accompanying text.

317. *See supra* notes 278-83 and accompanying text. State court decisions have also relied upon

amended, that followed *Aetna*'s dictum concerning absent insurers and eschewed any original rule 19 analysis for that problem.[318] Finally, in *Carpetland* all of this avoidance of the rule 19 analysis led to the abrogation of rule 19 altogether and the transformation of rule 17(a) into a rule of compulsory joinder.[319]

B. Rule 17(a)'s "Exceptions" Clause as a Rule Excusing Joinder

A few federal decisions have held that although joinder of a subrogated insurer otherwise might be required under rule 19 or the *Aetna* decision, the "exceptions" clause of rule 17(a) operates to permit the insured to sue alone. In *Shumate v. Wahlers*[320] a Michigan federal district court denied a defendant's motion to order joinder of a workers' compensation carrier. The court relied upon a Michigan statute permitting the employee to sue alone for itself and the insurer, and the language of rule 17(a) that "a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought."[321] In response to the defendant's argument that joinder was required by federal rule 19 because the employer and the insurer shared a "joint interest,"[322] the court stated that reliance on rule 19 was "not well placed . . . in view of the provisions of Rule 17(a) and of the state statute."[323]

Similarly, in *Jenkins v. Westinghouse Electric Co.*[324] a Missouri federal district court found that under Missouri law, the employee was a trustee of an express trust for the benefit of the workers' compensation carrier that had paid benefits to the employee.[325] The court thus distinguished *Aetna*'s apparent joinder requirement[326] by finding that the employee in this case was authorized by "substantive local state law" to bring suit alone for the entire claim under the provision of rule 17(a) that a " 'trustee of an express trust . . . may sue in his own name without joining with him the party for whose benefit the action is

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Aetna to convert rule 17(a) into a joinder rule. For example, in Louisville & N.R. Co. v. Mack Mfg. Corp., 269 S.W.2d 707 (Ky. 1954), the court stated,

> Where the assignor has brought suit for the entire claim . . . the defendant would have the right to insist upon application of the real party in interest rule, by moving that the assignee be made a party and assert his claim. . . . The view we here express is not materially in conflict with the view expressed by the Supreme Court of the United States concerning Section 17 (a) of the Federal Rules of Civil Procedure in United States v. Aetna Casualty & Surety Co. . . .

Id. at 709-10 (citation omitted).

318. *See supra* note 283.

319. Carpetland U.S.A. v. J.L. Adler Roofing, Inc., 107 F.R.D. 357, 359-60 (N.D. Ill. 1985).

320. 19 F.R.D. 173 (E.D. Mich. 1956).

321. *Id.* at 176; *see also* King v. Cairo Elks Home Ass'n, 145 F. Supp. 681, 683-86 (E.D. Ill. 1956) (following *Shumate*).

322. *See supra* note 272.

323. *Shumate*, 19 F.R.D. at 176.

324. 18 F.R.D. 267 (W.D. Mo. 1955). The author of the *Jenkins* opinion was District Judge Charles E. Whittaker, who served on the United States Supreme Court from 1957 to 1962. Judge Whittaker was also the author of Rosenfeld v. Continental Bldg. Operating Co., 135 F. Supp. 465 (W.D. Mo. 1955) (discussed *supra* notes 236-41 and accompanying text).

325. *Id.* at 270.

326. *See supra* notes 280-83 and accompanying text.

brought.' "[327]

Other federal courts correctly have rejected the analysis suggested by *Shumate* and *Jenkins*.[328] As discussed above,[329] the "exceptions" clause of rule 17(a) was included merely to clarify that "real party in interest" in the main part of the rule does not necessarily refer to the beneficially interested party. The purpose of the clause was to establish that although the rule might permit suit by the holder of an equitable interest, it did not alter existing law allowing a legal title holder to sue without joining beneficially interested persons who otherwise were not entitled to sue. The clause was not intended to excuse joinder of persons who were entitled to sue and whose joinder might be required under existing law. In the situations included in the original clause, the enumerated persons whose joinder was not required—beneficiaries, legatees and distributees—were persons who had no right to sue under the substantive law.

If the insurers in *Shumate* and *Jenkins* actually were subrogated under state law, it was incorrect for the courts to use the "exceptions" clause to treat them as mere beneficiaries. As Professor Atkinson pointed out some years ago, the idea of classifying an insured with an executor, administrator, and trustee as a person who may sue without joining the person for whose benefit the action is brought reveals an ignorance of the meaning of the real party in interest rule and may cause this rule to alter substantive law. Thus, Professor Atkinson was highly critical of New York's amendment of its real party in interest rule to include in the second clause a person who executed "a loan or subrogation receipt, trust agreement or other similar instrument."[330] He wrote that the insured does not fit into the group named in the clause because

> [i]t is the insurer who controls the action while in the other cases within the exception clause the designated fiduciaries do, or at least may, control the action. In other words the amendment authorizes a name action, abolition of which was the real party in interest statute's only real accomplishment. Furthermore, it is a use or name action which does not disclose the usee's name—a hearkening back to the ancient days before the assignee could sue in the assignor's name.[331]

Decisions such as *Shumate* and *Jenkins* dilute and circumvent federal rule 19 by permitting state procedural rules of joinder to govern. Each court used

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327. *Jenkins*, 18 F.R.D. at 270 (quoting rule 17(a)).

328. *See, e.g.*, Travelers Ins. Co. v. Riggs, 671 F.2d 810, 814 (4th Cir. 1982) (provision of rule 17(a) that party authorized by statute may sue in own name without joinder of beneficial party "is properly interpreted only as defining—either directly or by incorporation of state law—those persons who, as real parties in interest, have substantive rights of action, and not as enabling those parties then to avoid joinder of other parties in interest"); Neal v. Trim-Master Corp., 48 F.R.D. 392, 394 (N.D. Miss. 1969) (rejecting *Jenkins*); Maryland v. Baltimore Transit Co., 37 F.R.D. 34, 37 (D. Md. 1965) (rejecting *Shumate*: "Plaintiffs' argument in regard to the effect of Rule 17(a) proceeds on the erroneous basis that the enumeration of designated classes in the rule are exclusions from, rather than illustrations of, the 'real party in interest' concept and ignores the effect of Rule 19."); Carlson v. Consumers Power Co., 164 F. Supp. 692, 696 (W.D. Mich. 1957) (rejecting *Shumate* and *Jenkins*).

329. *See supra* notes 52-62 and accompanying text.

330. Atkinson, *supra* note 2, at 946.

331. *Id.*

the "exceptions" clause of rule 17(a) to excuse joinder of the insurer on the ground that under state law the insured would have been permitted to sue alone.[332] They, therefore, converted the "exceptions" clause, which was not intended to be an exception to anything,[333] into an exception to rule 19, and gave state procedure a role it never should have had in federal courts.

Presumably, the drafters of rule 19 made every effort to articulate in that rule every principle that is relevant to the issue of compulsory joinder. A court should proceed on the assumption that the principles included in the rule accommodate every conceivable policy that is relevant. To engraft upon rule 17(a) the *Celanese-Carpetland* treatment is, therefore, to threaten the integrity of rule 19's resolution of the competing policy considerations. Rule 17(a) is not a rule of compulsory joinder, nor does the rule's "exceptions" clause excuse compulsory joinder required by rule 19. Courts, however, have held to the contrary regarding both of these propositions. As long as rule 17(a) remains, such decisions may proliferate and, at the least, legal resources will be spent in debating the points. Abolishing rule 17(a) will eliminate its interference with rule 19 and compulsory joinder doctrine, and nothing will be lost.

VI. RATIFICATION UNDER RULE 17(a)

Several federal district court decisions have seized upon the idea of ratification, which was incorporated in the new sentence that was added to rule 17(a) in 1966, as a solution to the problem of compulsory joinder of subrogated insurers.[334] Since 1966, the final sentence of rule 17(a) has provided:

> No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.[335]

In *Stouffer Corp. v. Dow Chemical Co.*[336] a federal district court denied a defendant's motion for compulsory joinder on the basis of the insurer's execution of a ratification agreement.[337] The *Stouffer* court said that ratification

332. *See supra* text accompanying notes 320-27.

333. *See supra* notes 52-62 and accompanying text.

334. *See infra* notes 336-44 and accompanying text; Note, *supra* note 85 (discussing state court decision to same effect). Courts also have used ratification under rule 17(a) in cases dealing with absentees other than subrogated insurers. *See* ICON Group, Inc. v. Mahogany Run Dev. Corp., 829 F.2d 473, 477-78 (3d Cir. 1987); U-Haul Int'l, Inc. v. Jartran, Inc., 793 F.2d 1034, 1040 (9th Cir. 1986); Urrutia Aviation Enters., Inc. v. B.B. Burson & Assoc., 406 F.2d 769 (5th Cir. 1969); National Safe Corp. v. Texidor Sec. Equip., Inc., 101 F.R.D. 467 (D.P.R. 1984); Clarkson Co. Ltd. v. Rockwell Int'l Corp., 441 F. Supp. 792, 797-98 (N.D. Cal. 1977); Honey v. George Hyman Constr. Co., 63 F.R.D. 443, 447-48 (D.D.C. 1974) (suit by one subrogated insurer on behalf of others); Southern Nat'l Bank v. TRI Fin. Corp., 317 F. Supp. 1173, 1186-88 (S.D. Tex. 1970).

335. FED. R. CIV. P. 17(a), *reprinted in* 39 F.R.D. 84 (1966); *see generally supra* notes 63-91 and accompanying text (discussing the 1966 amendment to rule 17(a)).

336. 88 F.R.D. 336 (E.D. Pa. 1980).

337. *Id.* at 338. The *Stouffer* decision contains no description of the terms of the agreement.

under rule 17(a) "must be considered as an alternative to joinder in this context."[338] Regarding rule 19, the court first noted and approved the view that the rule does not require joinder of the insurer, even when the insurer controls the litigation.[339] Although it would appear that the court's disposition of the rule 19 problem made the ratification procedure superfluous, the court added that ratification assured that joinder under rule 19(a) would not be required because the defendant, by virtue of the agreement, was protected from multiple or inconsistent obligations.[340]

In *Hancotte v. Sears, Roebuck & Co.*[341] the same federal district court cited *Stouffer* and denied a defendant's motion for joinder of the plaintiffs' partially subrogated insurer because the insurer had executed a "ratification agreement" with the plaintiffs in which the insurer had agreed to be bound by the results of the action and to waive any right to pursue its subrogation rights outside that action.[342] The court held that the existence of the ratification agreement effectively disposed of the defendant's arguments for joinder under both rules 17(a) and 19(a). Regarding rule 17(a), the court stated that ratification "affords the defendant the same protection against subsequent actions that would be provided by Rule 17(a)."[343] Regarding rule 19(a), the court found that the ratification agreement eliminated "any danger of the defendant being subjected to multiple or inconsistent obligations."[344]

There are several problems, both historical and practical, with using the ratification language of rule 17(a) to solve the problem of compulsory joinder of subrogated insurers. First, when a court requires the insurer to ratify the insured's action in lieu of compulsory joinder,[345] it is proceeding on the assumption that the insurer is a person whose joinder is required for a just adjudication. It is far from settled, however, that the insurer would be subject to compulsory joinder under the present rule 19. If the insured is a "real party in interest" with regard to the entire claim, and if, as many cases hold, rule 19(a) does not require joinder of the subrogated insurer,[346] there is simply no basis in the Federal

338. *Id.* at 337; *see also* Whitcomb v. Ford Motor Co., 79 F.R.D. 244, 246 (M.D. Pa. 1978) (ratification is alternative to dismissal under rule 17(a)).

339. *Stouffer*, 88 F.R.D. at 337-38.

340. *Id.* at 338. The ratification solution was also suggested by Edwards, Inc. v. Arlen Realty and Dev. Corp., 466 F. Supp. 505, 512-13 (D.S.C. 1978), in which the court lamented that it was bound to require joinder by the Fourth Circuit decision in *Virginia Electric*.

341. 93 F.R.D. 845 (E.D. Pa. 1982).

342. *Id.* at 846; *see also* Acme Markets, Inc. v. Shaffer Trucking, Inc., 102 F.R.D. 216, 217-18 (E.D. Pa. 1984) (following *Hancotte* and denying defendant's motion for joinder when insurer had filed ratification affidavit with the court).

343. *Hancotte*, 93 F.R.D. at 846. *See generally* RESTATEMENT (SECOND) OF JUDGMENTS § 40 (1982).

344. *Hancotte*, 93 F.R.D. at 847; *see also* Kint v. Terrain King Corp., 79 F.R.D. 10, 11-12 (M.D. Pa. 1977) (subrogated insurer filed a "certificate authorizing plaintiff to prosecute the action 'for its benefit' and agreeing to be bound by the results of the litigation"; consequently, insurer is not subject to compulsory joinder under rule 19(a)).

345. Some federal courts have ordered that insurers file ratifications of the insureds' actions in order to avoid the defendants' objections to nonjoinder of the insurers. *See, e.g.*, James v. Nashville Bridge Co., 74 F.R.D. 595, 597 (N.D. Miss. 1977); Pace v. General Elec. Co., 55 F.R.D. 215, 219 (W.D. Pa. 1972); *In re* Wuttke, 2 Bankr. 362, 364 (Bankr. D.N.J. 1980).

346. *See supra* note 17.

Rules of Civil Procedure for objection to a suit by the insured alone. There would be, therefore, no basis for requiring ratification by the unnamed insurer.

Second, if rule 19 requires joinder of an insurer-subrogee, it is not clear that ratification is in all respects a satisfactory alternative, although ratification probably means that the insurer will be bound by the judgment in the insured's action.[347] Status as a named party is significant not only for purposes of res judicata, but also for the assessment of costs and sanctions,[348] application of rules of discovery,[349] and the existence of diversity jurisdiction.[350] While a ratifier is not a formally named party, the ratifier may be in actual control of the litigation.[351] The ratification then presents the court with a wide range of potential issues about the ratifier's duties and liabilities, as well as the effect of the ratifier's presence on subject matter jurisdiction.

The Federal Rules of Civil Procedure provide for the assessment of costs and sanctions only against a "party."[352] An insurer that is permitted to ratify to avoid joinder, therefore, is able to argue that, as a nonparty, it is not subject to sanctions and costs.[353] Similarly, the discovery provisions of the Federal Rules of Civil Procedure accord different treatment to parties and nonparties.[354] In both *Hancotte* and *Stouffer*, the defendants argued that to facilitate discovery the court should require joinder of the insurer.[355]

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347. This is particularly true when, as in the *Hancotte* case, the ratification agreement contains not only the insurer's agreement to be bound by the judgment, but also a waiver of subrogation rights outside that proceeding. *Hancotte*, 93 F.R.D. at 846. In Southern Nat'l Bank v. TRI Fin. Corp., 317 F. Supp. 1173 (S.D. Tex. 1970), after noting that the absentee had asserted its agreement to be bound by the judgment, the court observed, "A holding that this assertion will not suffice, but that instead [the ratifier] must go to the expense and inconvenience of engaging counsel and entering a formal appearance in this action, could not be reconciled with amended Rule 17(a), nor with the general mandate of [federal rule] 1." *Id.* at 1188.

348. *See infra* notes 352-53 and accompanying text.

349. *See infra* notes 354-55 and accompanying text.

350. *See infra* notes 364-88 and accompanying text.

351. In *Hancotte* the court described the ratification agreement as "authorizing plaintiffs to prosecute the action in [the insurers'] behalf." *Hancotte*, 93 F.R.D. at 846. Often, however, a subrogated insurer will be in control of the litigation through the terms of the policy. *See supra* notes 101 & 103-04.

352. In some instances courts may assess sanctions against attorneys as well. FED. R. CIV. P. 11, 16(f), 37.

353. *See* Truckweld Equip. Co. v. Swenson Trucking & Excavating, Inc., 649 P.2d 234, 238 (Alaska 1982) (joinder of insurer should be required because of Alaska's "broad costs and attorney's fees provisions . . . . Where a party's claim is directly litigated before the courts of this state, we believe that that party should bear the burdens as well as the benefits of the litigation.").

354. *See* FED. R. CIV. P. 26-37.

355. In *Stouffer* the defendant claimed that it was prejudiced because the plaintiff's insurer had investigated the fire that gave rise to the suit and had control of the results of that investigation. The court rejected this argument, noting that the plaintiff relied upon the same material, and that the defendant was able to obtain discovery of the material. Stouffer Corp. v. Dow Chem. Co., 88 F.R.D. 336, 338 (E.D. Pa. 1980). In *Hancotte* the defendant asserted that it would be prejudiced by the different treatments accorded parties and nonparties by the discovery provisions of the Federal Rules of Civil Procedure. The court responded that the defendant had articulated no specific instances of denial of its requests for documents and that the plaintiffs and their insurer had agreed to respond to all requests for discovery. *Hancotte*, 93 F.R.D. at 847; *see also* Blacks v. Mosley Mach. Co., 57 F.R.D. 503, 505 (E.D. Pa. 1972) (defendant asserts that nonjoinder of insurer will be prejudicial to defendant's ability to produce evidence). In Shepherd v. Castle, 20 F.R.D. 184 (W.D. Mo. 1957), the defendant sought to take the deposition of the nonparty compensating insurer's claims adjuster and the plaintiff asserted that the insurer "should be accorded all the rights and privileges which it

Courts could resolve the problems of sanctions, costs, and discovery by requiring that in ratifying the action, the insurer agree not only to be bound by the judgment, but also to respond to discovery as a party[356] and to be responsible for sanctions and costs assessed against the plaintiff.[357] This solution illustrates, however, that one of the problems with the ratification option is that it has no definition. The sole authority for ratification is the single word included in the 1966 addition to rule 17(a). Nothing in the rule itself or in its legislative history explains the scope of ratification. Neither the rule nor the advisory committee's note addresses questions such as who controls the action and has settlement authority; to what the ratifier must agree, when, and in what form; and to what liabilities such as expenses, costs, attorney's fees, and burdens of discovery the ratifier is subject.

These questions bring us to the historical reasons why ratification under rule 17(a) is not a proper substitute for compulsory joinder. The rules drafters had no particular definition of ratification in mind because the concept slipped into rule 17(a) inadvertently. As discussed above, the idea of ratification was borrowed from admiralty.[358] When the Advisory Committee on Admiralty Rules drafted the amendment to rule 17(a) providing for relation back, it referred to "ratification, joinder or substitution"[359] to cure a defect in naming the proper plaintiff. In admiralty, which did not have a "real party in interest" rule, litigants commonly used ratification to specify the parties to the suit at some point subsequent to the suit's commencement.[360] When, however, the provision for relation back was accepted for all civil suits, not just admiralty, the word "ratification" became part of the Federal Rules of Civil Procedure.[361]

Ratification, of course, is completely inconsistent with the philosophy behind the "real party in interest" rule, which commands that the party who has the claim for relief shall be the named party who brings the suit. Moreover, the use of ratification deliberately to avoid joinder is inconsistent with the advisory

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could claim if named as a party in this action, because as a Workmen's Compensation insurer it is financially interested in plaintiff's claim, as a *cestui que* trust, under Missouri law." *Id.* at 187.

356. *See* Clarkson Co. v. Rockwell Int'l Corp., 441 F. Supp. 792, 797 (N.D. Cal. 1977) (ratifying entities agreed "to be bound by the Federal Rules of Civil Procedure for purposes of discovery in the action"). *Cf.* United Coal Cos. v. Powell Constr. Co., 839 F.2d 958, 965 (3d Cir. 1988) (ratifying subrogated insurers were "co-plaintiffs" for purposes of attorney-client privilege, and apparently for all other purposes).

357. *See* ICON Group, Inc. v. Mahogany Run Dev. Corp., 829 F.2d 473, 478 (3d Cir. 1987), in which the court stated that a "proper ratification" requires that the ratifying party authorize the action and agree to be bound by its result, but that assumption of financial obligations was unnecessary in light of the interest and solvency of the named plaintiff.

Another problem is the proper role and responsibility of the ratifier under federal rule 16, which authorizes the court to direct the appearances of "attorneys for the parties and any unrepresented parties" at pretrial and settlement conferences. FED. R. CIV. P. 16. Again, because the ratifier is not a "party," but may be in control of the action, it is not clear whether the court has authority under rule 16 to order the ratifier's participation. *See* G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648, 652 (7th Cir. 1989) (en banc) (rule 16 does not limit district court's inherent authority to require party represented by counsel to attend pretrial settlement conference).

358. *See supra* notes 77-79 and accompanying text.

359. *See* Preliminary Draft, *supra* note 79, at 341.

360. *Id.*

361. *See supra* notes 80-83 and accompanying text.

committee note, which states that the relation back provision of rule 17(a) is to be used only in cases of "understandable mistake."[362] From the background of rule 17(a) and its 1966 amendment, it appears most unlikely that the rules drafters ever intended ratification to be used as it was in *Hancotte* and *Stouffer*.[363]

Abolition of rule 17(a) would expunge the ratification device from the civil rules. Short of abolition, however, the least that should be done is to delete the word "ratification," leaving joinder or substitution as the only appropriate devices to correct a defect in naming the proper plaintiff.

VII. DIVERSITY JURISDICTION AND RULE 17(A)

In *Navarro Savings Association v. Lee*[364] the United States Supreme Court alluded to "a 'rough symmetry' between the 'real party in interest' standard of Rule 17(a) and the rule that diversity jurisdiction depends upon the citizenship of real parties to the controversy."[365] Although the *Navarro* Court noted that there are circumstances in which the inquiry into diversity of citizenship goes beyond the parties named in the suit,[366] a general rule has been posited that citizenship of the "real party in interest" under rule 17(a) is determinative in deciding whether diversity jurisdiction exists.[367]

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362. *See supra* notes 87-88 and accompanying text.

363. *See supra* notes 336-44 and accompanying text. Nor does federal rule 25(c), governing substitution of parties, permit these results. *See supra* note 192. Although rule 25(c) gives the district court discretion to permit an action to continue in the name of the original plaintiff when his interest has been transferred to another, the rule appears to be limited to situations in which the transfer took place after the filing of the suit, which is not likely to be the case in most insurance subrogation situations. *See* FED. R. CIV. P. 25(c).

364. 446 U.S. 458 (1980).

365. *Id.* at 462 n.9. The Court in *Navarro* held that individual trustees of a Massachusetts business trust may invoke diversity jurisdiction on the basis of their own citizenship, regardless of the citizenship of the trust beneficiaries. *Id.* at 465-66.

366. The *Navarro* Court observed,

> But the two rules serve different purposes and need not produce identical outcomes in all cases. . . . In appropriate circumstances, for example, a labor union may file suit in its own name as a real party in interest under Rule 17(a). To establish diversity, however, the union must rely upon the citizenship of each of its members.

Id. at 462 n.9 (citing Note, *Diversity Jurisdiction over Unincorporated Business Entities: The Real Party in Interest as a Jurisdictional Rule*, 56 TEX. L. REV. 243, 247-50 (1978)). *See also* Carden v. Arkoma Associates, 110 S. Ct. 1015, 1021 (1990) (a federal court must look to the citizenship of a partnership's limited, as well as its general, partners to determine whether there is complete diversity). Other circumstances recently have been mandated by Congress. In 1988 Congress amended 28 U.S.C. § 1332(c) to provide that

> the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 202, 102 Stat. 4646 (1988) (amending 28 U.S.C. § 1332(c) (1982)). The idea for this legislation originated in the American Law Institute. *See* 6A C. WRIGHT, A. MILLER & M. KANE, *supra* note 42, § 1556, at 424 n.14. Similarly, section 1332(c)(1) provides that in a direct action against an insurer, the insurer shall be deemed a citizen of the state of which the insured is a citizen, as well as the insurer's state of incorporation and principal place of business. 28 U.S.C. § 1332(c)(1) (1982). The Court recently held, however, that when a liability insurer *brings* suit against a claimant, the "direct action" provision does not apply and the citizenship of the insurer, not the insured, determines the existence of diversity jurisdiction. Northbrook Nat'l Ins. Co. v. Brewer, 110 S. Ct. 297, 299 (1989).

367. 6A C. WRIGHT, A. MILLER & M. KANE, *supra* note 42, § 1556, at 419. The general rule, however, has become much less general in recent years. *See supra* note 366.

When rule 17(a) is applied properly, this general rule produces results that are consistent with principles of diversity jurisdiction, which in turn have developed from policies of federalism[368] and the complete diversity requirement.[369] These principles, like the real party in interest inquiry,[370] focus not upon the beneficially interested persons, but rather upon the person who is in actual control of the litigation.[371] Thus, whether diversity jurisdiction exists is generally determined by the citizenship of the representative party, not by the citizenship of those represented. Nominal or merely formal parties who have no interest are ignored for purposes of determining whether diversity jurisdiction exists.[372] A representative is considered more than nominal if he has "actual powers with regard to the matter in litigation"; without control over the litigation, the representative "is a mere conduit through whom the law affords a remedy to persons aggrieved, [and] the representative is treated as a nominal party."[373]

When rule 17(a) is not applied properly, however, the result can be that these principles of diversity jurisdiction are abrogated. *Virginia Electric & Power Co. v. Westinghouse Electric Corp.*[374] is a striking example of the manner in which the manipulation of rule 17(a)'s bag of tricks can operate to evade the policies reflected in the current congressional provision for federal jurisdiction premised upon the diverse citizenship of the parties. As discussed above, in *Virginia Electric* the insurer had become subrogated to all but $150,000 of the $2,200,000 claim and the insured had given the insurer "exclusive direction and control" of the suit.[375] The court found that the insurer was a "real party in interest,"[376] but the insurer's joinder would have defeated diversity jurisdiction.[377] Dismissal was avoided, however, because the court concluded that, in spite of the insurer's interest and control, the insured was a "real party in interest" under rule 17(a) with regard to the entire claim asserted.[378] The court,

368. 6A C. WRIGHT, A. MILLER & M. KANE, *supra* note 42, § 1556, at 711.

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

370. *See supra* note 42.

371. In *Navarro*, after noting that the beneficial shareholders "can neither control the disposition of this action nor intervene in the affairs of the trust except in the most extraordinary situations," Navarro Savings Ass'n v. Lee, 446 U.S. 458, 464-65 (1980), the Court stated, "We conclude that these respondents are active trustees whose control over the assets held in their names is real and substantial. . . . They have legal title; they manage the assets; *they control the litigation*. In short, they are real parties to the controversy." *Id.* at 465 (emphasis added). *Cf.* Broyles v. Bayless, 878 F.2d 1400, 1405 (11th Cir. 1989) (uninsured motorist carrier is not a "real party in interest" for purposes of diversity jurisdiction when it exercised no substantial control over the defense of the action).

In Carden v. Arkoma Associates, 110 S. Ct. 1015, 1020-21 (1990), the Court rejected control as the criteria for ascertaining diversity when a limited partnership is a party. The Court distinguished *Navarro* on the ground that *Navarro* concerned trustees as parties and it did not address the citizenship of an artificial entity. *Id.* at 1020.

372. 3A MOORE'S FEDERAL PRACTICE, *supra* note 43, ¶ 17.04, at 17-16 to 17-17; 13B C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3606 (1984).

373. 13B C. WRIGHT, A. MILLER & E. COOPER, *supra* note 372, § 3606, at 418 (citing Coal Co. v. Blatchford, 78 U.S. (11 Wall.) 172, 177 (1870)).

374. 485 F.2d 78 (4th Cir. 1973), *cert. denied*, 415 U.S. 935 (1974).

375. *Id.* at 81-82.

376. *Id.* at 83.

377. *Id.* at 85.

378. *Id.* at 84.

therefore, permitted the suit to proceed in the name of the insured alone, without joinder of the insurer.[379]

In light of the insurer's complete control of the *Virginia Electric* litigation, the plaintiff insured was, for the lion's share of the claim asserted, "a mere conduit through whom the law affords a remedy to persons aggrieved."[380] With regard to the portion of the claim in which the insured had a pecuniary interest, the insured was in the position of a party being represented, entitled to benefit from another's conduct of the litigation. The court, however, analyzed only rules 17(a) and 19 and never addressed the application of principles of diversity jurisdiction to the case before it.[381]

Thus, in the *Virginia Electric* case, a misapplication of rule 17(a) allowed the litigation in federal court of a two million dollar claim between nondiverse parties on the basis of the citizenship of a merely nominal representative. This was a complete abrogation of principles of diversity jurisdiction and the complete diversity requirement, which might not have occurred if there were no rule 17(a). Without the real party in interest rule, the court might have been forced to respond to the defendant's assertion that the insurer's interest defeated diversity by proceeding directly to the jurisdictional policies that ought to have governed. These principles then would have led the court to the correct result with regard to both the identity of the proper plaintiff and the diversity question.

Furthermore, as described above, there are numerous cases in which judicial misunderstanding of rule 17(a) has led to decisions in which the "real party in interest" has been determined by state procedural rules.[382] But as one treatise observes:

> If diversity jurisdiction could be destroyed as the result of state procedural rules, the primary objective of diversity jurisdiction—protecting out-of-state litigants from the possibility of local prejudice—would be frustrated. Conversely, if diversity jurisdiction were created as the result of state procedural rules, actions that properly belong in state courts would be tried in federal courts, thereby expanding the limited jurisdiction of the national courts and interfering with the proper allocation of judicial business in our federal system.[383]

When courts apply rule 17(a) correctly, of course, the rule does no violence to federal jurisdiction because the proper plaintiff under that rule will be, in most cases, the party whose citizenship should be controlling.[384]

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379. *See supra* notes 178-94 and accompanying text.

380. *See* 13B C. WRIGHT, A. MILLER & E. COOPER, *supra* note 372, § 3606, at 418 (citing Coal Co. v. Blatchford, 78 U.S. (11 Wall.) 172, 177 (1870)); *see supra* text accompanying note 373.

381. *Virginia Elec.*, 485 F.2d at 85-86.

382. *See supra* notes 196-261 and accompanying text.

383. 13B C. WRIGHT, A. MILLER & E. COOPER, *supra* note 372, § 3606, at 418-19.

384. With regard to unincorporated associations and representatives of infants, incompetents, and decedents' estates, however, the correct party plaintiff under rule 17(a) is *not* the party whose citizenship controls for diversity purposes. *See supra* note 366. In these situations, there is not even a "rough symmetry" between rule 17(a) and diversity determinations, *see supra* text accompanying note 365, and rule 17(a) simply is irrelevant in ascertaining jurisdiction.

The newly discovered device of ratification under rule 17(a),[385] however, presents a danger that more courts will determine diversity jurisdiction without examining the real interests at issue in the suit. If courts do not consider a ratifier's citizenship in determining diversity, insurers may be able to preserve or destroy diversity at will by choosing between ratification and joinder in the insured's action. This development would violate the admonition in Federal Rule of Civil Procedure 82 that "[the federal] rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein."[386]

A further evasion of congressional policy may occur if the diverse insured's pecuniary interest does not exceed the minimum jurisdictional amount,[387] but the suit proceeds in the name of the insured alone for an entire claim that exceeds the minimum, with the insurer as ratifier. In that event, federal jurisdiction would be created by considering the insurer's portion of the claim for purposes of meeting the jurisdictional amount, but ignoring the ratifying insurer for purposes of complete diversity.[388] Regarding federal jurisdiction and the insurer's role in the suit, the plaintiffs truly would have it both ways.

VIII. CONCLUSIONS

When the real party in interest rule was abolished in New York in 1963, a report to the legislature explained that the rule should be eliminated

> for the following reasons: (1) it is unnecessary since the law would be the same without any express rule, (2) it is an inept statement of an obvious principle of substantive law, (3) it misleadingly seems to say that the action must be brought by the party to be benefited, and (4) the second part of the section is not an exception to the first part as therein stated.[389]

All of these reasons also support abolition of federal rule 17(a).[390]

The federal rule, moreover, suffers from judicial interpretations converting

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385. *See supra* notes 334-63 and accompanying text.

386. FED. R. CIV. P. 82. One might assert that the court must consider the ratifier's citizenship to avoid a violation of 28 U.S.C. § 1359, which provides that, "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." 28 U.S.C. § 1359 (1982). Professor Moore notes, however, that "where either the subrogor or subrogee brings suit alone without joinder of the other, and the non-joined party's citizenship would destroy diversity, the arrangement by which the choice is made is rarely found to be collusive." 3A MOORE'S FEDERAL PRACTICE, *supra* note 43, ¶ 17.05[3.-1], at 17-34.

387. *See* 28 U.S.C.A. § 1332 (West Supp. 1989).

388. In Continental Bus Systems, Inc. v. Rohwer, 172 F. Supp. 487 (D. Col. 1959), the court ordered joinder of the subrogated insurer and held that the claims of insured and insurer would be aggregated to meet the jurisdictional amount. The court stated that " '[t]he several plaintiffs . . . have united "to enforce a single title or right, in which they have a common and undivided interest"; so "it is enough if their interest collectively equal the jurisdictional amount." ' " *Id.* at 490 (quoting Farren v. Gas Serv. Co., 122 F. Supp. 536, 537-38 (D. Kan. 1954)).

389. ADVISORY COMM. ON PRACTICE AND PROCEDURE, FIRST REPORT TO THE LEGISLATURE OF 1957, NO. 6(B), at 33 (1957), *quoted in* N.Y. CIV. PRAC. L. & R. 1004 (McKinney 1976), Legislative Studies and Reports.

390. *See supra* notes 107-261 and accompanying text.

it into a redundant and ambiguous rule of compulsory joinder.[391] It also is encumbered by the 1966 amendment that introduced the device of ratification, which is completely at odds with the original intent of the rule itself.[392]

The need to eliminate federal rule 17(a) becomes even more apparent when one considers the impact on federal diversity jurisdiction of erroneous determinations of the proper plaintiff.[393] Even when jurisdiction is not at issue, naming of the proper party plaintiff is important in federal courts because the person actually in control of the litigation should be subject to the responsibilities of a "party" under the Federal Rules of Civil Procedure.[394]

Concerns about juries' prejudicial reactions to insurance company plaintiffs should be addressed as problems of trial procedure and evidence, not as problems of the "real party in interest."[395] Such concerns should not be allowed to interfere with the policies that are enforced by requiring the naming of proper plaintiffs.

Nothing will be lost if rule 17(a) is eliminated. Rule 12(b)(6) is a clearer and more direct device for determining whether the named plaintiff should be allowed to proceed with the action.[396] Using rule 12(b)(6) for this purpose has the advantage of directing attention to the applicable substantive law, in many instances that of a particular state, which ought to be, but currently often is

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391. *See supra* notes 262-333 and accompanying text.

392. *See supra* notes 334-63 and accompanying text.

393. *See supra* notes 364-88 and accompanying text.

394. *See supra* notes 20-23 and accompanying text; *supra* text accompanying note 49; *see also* FED. R. CIV. P. 10(a) (requiring that "[i]n the complaint the title of the action shall include the names of all the parties"); National Commodity & Barter Ass'n v. Gibbs, 886 F.2d 1240, 1245 (10th Cir. 1989) (citing rule 10(a), the court sua sponte dismissed the claims of unnamed plaintiffs who had not sought permission to proceed anonymously, and stated that "the federal courts lack jurisdiction over the unnamed parties, as a case has not been commenced with respect to them").

395. *See supra* note 9. Joinder of an insurer as a party plaintiff does not necessarily mean that the jury must be informed of the presence of the insurer as a claimant. There is a difference between what must be in a pleading and what must be revealed to a jury. *See* Kessner, *Federal Court Interpretations of the Real Party in Interest Rule in Cases of Subrogation*, 39 NEB. L. REV. 452, 472 (1960). Even in those jurisdictions in which the jury may examine the pleadings, it is not necessary that all matters in the pleadings be revealed to the jury. *See, e.g.*, TENN. CODE ANN. § 20-9-302 (1980) (counsel may read "his entire declaration" to the jury); *id.* § 29-26-117 (notwithstanding the provisions of § 20-9-302, the plaintiff's demand for a specific sum "shall not be disclosed to the jury" in a medical malpractice action). *But see* Carchidi v. Rodenhiser, 209 Conn. 526, —, 551 A.2d 1249, 1253 n.7 (1989) (Connecticut bars requests for a specific amount of damages in complaints, which jurors are permitted to examine).

Professor Kennedy, favoring full disclosure of subrogation interests to the jury, suggested that the *Aetna* Court's statement that the pleadings should reveal and assert the actual interests of the plaintiff and others requires jury disclosure. Kennedy, *supra* note 2, at 715-16 & n.176. His suggestion probably reads too much into the Court's statement. *See supra* notes 308-310 and accompanying text.

Even if the jury is aware of the insurer's interest, federal courts commonly deal with such problems with cautionary instructions. *See, e.g.*, FED. R. EVID. 105. Professor Atkinson suggests that

> it may well be that the best solution of the problem, regardless of whether an insurer is a party or not, is that the court should caution the jurors that either party or both may be protected by insurance with which the jury has nothing to do, and that their job is to determine the defendant's liability upon the basis of fault.

Atkinson, *supra* note 2, at 944.

396. *See supra* notes 47-48 and accompanying text.

not,[397] the central inquiry in ascertaining the proper plaintiff. With regard to those persons not named as plaintiffs, it is the proper function of rule 19 to determine whether there are additional plaintiffs who should be joined if the action is to be allowed to proceed. Finally, the relation-back function of the 1966 amendment to rule 17(a) can be both preserved and clarified by using rule 15(c) to determine when courts should allow amendment and relation back.[398]

In 1967, Professor Kennedy wrote that rule 17(a) is a "barnacle on the federal practice ship."[399] Since that time, rule 17(a) has developed in such a way that it has become, in today's imagery, a computer virus in the systems of federal procedure and jurisdiction. The rule has expanded into areas in which it does not belong, interfering with the operation of other rules and policies, and contributing nothing itself to the successful operation of the program.

397. *See supra* notes 141-261 and accompanying text. Use of rule 12(b)(6) also eliminates any ambiguity about the timing of an objection to the proper plaintiff. *See supra* note 48.

398. *See supra* notes 68-74 and accompanying text.

399. Kennedy, *supra* note 2, at 724.