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# Federal Court Interpretations of the Real Party in Interest Rule in Cases of Subrogation

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Leading Articles

# FEDERAL COURT INTERPRETATIONS OF THE REAL PARTY IN INTEREST RULE IN CASES OF SUBROGATION

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## I. INTRODUCTION

The federal rules,[1] as well as the statutes of Nebraska[2] and the codes of civil procedure of three-fourths of the other jurisdictions,[3] require that an action be brought by, or in the name of, the *real party in interest.* In short, this requires that the action be prosecuted in the name of the party who, by the sub-

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1 FED. R. CIV. P. 17(a), 28 U.S.C.A. 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.

2 NEB. REV. STAT. § 25-301 (Reissue 1956). Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in Section 25-304.

NEB. REV. STAT. § 25-304 (Reissue 1956) An executor, administrator, guardian, trustee of an express trust, a person with whom or in whose name a contract is made for the benefit of another, or a person expressly authorized by statute, may bring an action without joining with him the person for whose benefit it is prosecuted. Officers may sue and be sued in such name as is authorized by law, and official bonds may be sued upon in the same way, and assignees of choses in action assigned for the purpose of collection, may sue on any claim assigned in writing, but such assignee shall be required to furnish security for costs as in case of nonresident plaintiffs.

3 3 MOORE, FEDERAL PRACTICE, 1306, n.5 (2d ed. 1953).

stantive law, has the right which is sought to be enforced. This is qualified to some degree by the permissive exceptions included in rule; for example, a person authorized by statute may sue in his own name, whether or not he is the real party in interest as defined above. Some of the stated exceptions are unnecessary if the definition is correctly applied. For instance, the rule allows the trustee to sue without joining the beneficiary. This is unnecessary, because the substantive law of trusts allows the trustee to prosecute the action in most instances, and the exception adds nothing.

The first codification of the real party in interest rule was in the Field Code of New York in 1848. One of the reasons for the inclusion of such a rule was to aid in the blending of law and equity jurisdictions. Prior to this, equity permitted a suit by an assignee to sue in the name of his assignor. Thus the adoption of the rule was an acceptance of the equity doctrine that he who has the right is the person to pursue the remedy. Some writers feel that the real party in interest rule was not needed to accomplish the combination of law and equity courts. They argue that all that was required was a rule abolishing the use of a nominal plaintiff as had been permitted in law courts.[4]

Another reason expressed in favor of the rule is that it protects the defendant from being subjected to more than one suit in cases of partial assignment. The feeling is that since there is a single claim or substantive right, the fact that part of it has been assigned should not require the defendant to defend two suits, because there still remains only one cause of action for a single wrong or debt, but it is now owned by two or more persons. The real party in interest rule is allowed to be used by the defendant to require the assignor and assignee in cases of partial assignment to sue in the same action, thereby preventing the splitting of the cause of action. On its face, the real party in interest rule does not appear to have any connection with such an application. In fact it could be said to lead to a contrary conclusion. After a partial assignment, both the assignor and assignee have substantive rights, and the rule requires each of them to enforce his own right. Certainly the defendant could not object that the assignee is not a real party in interest for the amount of the assignment.

If the result obtained by this application of the real party in interest rule is a desirable one, it could be obtained through

[4] Thomas E. Atkinson, *The Real Party In Interest Rule: A Plea For Its Abolition*, 32 N.Y.U.L. REV. 926, 959 (1957).

the use of the doctrine of res judicata. The United States Supreme Court in *Commissioner v. Sunnen*,[5] in speaking about res judicata stated:

> The general rule of res judicata applies to repetitious suits involving the same cause of action. It rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations. The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound, 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.' *Cromwell v. County of Sac*, 94 U.S. 351, 352. The judgment put an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor, invalidating the judgment. See Von Moschzisker, 'Res Judicata,' 38 Yale L.J. 299; Restatement of the Law of Judgments, §§ 47, 48.

If a partial assignee is treated as a privy of the assignor, each owning a portion of a single cause of action, an interpretation of this rule could be said to force the assignee to join with the assignor and sue for the whole dollar amount of the claim on which the cause of action is based or he will be forever barred. This reaches the same result as the application of the real party in interest rule above discussed, and is more sensible in light of the two rules. The same result could be reached through the adoption of joinder of parties statutes or rules.

Subrogation is quite similar to assignment. Most instances of subrogation occur where an insurer pays part or all of a loss suffered by one of its insureds, and then, by operation of law, the insurer becomes subrogated to part of the claim against the wrongdoer. Perhaps because subrogation, and the ensuing splitting of the substantive right, occurs by operation of law, and is not voluntary as are assignments, some distinction should be made. But most of the time the insurer takes a written assignment from the insured also. Thus it can be said within the terms of the statute that the insurer is a real party in interest and must prosecute the action against the wrongdoer in its own name, or jointly with the insured.

There is a general feeling that when an insurance company is a party to litigation, either as plaintiff or defendant, the jury will frequently be prejudiced against it. Many courts take great pains to prevent the element of insurance from being improperly

[5] 333 U.S. 591, 597 (1947).

injected into the proceedings. In Nebraska, for example, the improper mentioning of insurance is grounds for a mis-trial.[6] Even though the real party in interest rule would appear to require the insurer to participate in the prosecution of the action for the amount of the claim acquired by subrogation, many courts do not so require.

> . . . [I]t is generally held that if the insurance paid by the insurer covers only a portion of the loss, the insurer is not the real party in interest, but rather, the right of action against the wrongdoer who caused the loss remains in the insured for the entire loss, and the action must be brought by him in his own name.[7]

Why do some courts create this apparent exception to the real party in interest rule? Some say to prevent the splitting of the cause of action, but which is the greater evil, violat- a cause of action; probably the latter. But neither need be violated, if the wrongdoer is allowed to force the insurer to become a party, which will be seen is the rule of the federal courts. Other courts say the insured can sue alone because he is a trustee for the part of the claim subrogated to the insurer, but this is merely a fiction, possibly created to avoid the application of prejudice against the insurance company.

The federal courts have construed their real party in interest rule, Rule 17(a), in such a manner that in many instances an insurance company can be forced to be, or must be, a party to the litigation. Such cases are most prominent in the areas of collision and fire losses, and workmen's compensation cases. Thus if prejudices do exist, and are applied against insurance companies, the circumstance created is not a good one for a fair and impartial adjudication of the claim. It must be remembered that insurance companies are not babes in the woods, and if the subrogation causes them to prosecute the action against the wrongdoer in their own name, they can and have developed methods of payment to counter this, and thereby attempt to evade any prejudices that might be applied against them by the jury.

## II. COMPLETE PAYMENT BY THE INSURER

*Example A*

> P's $20,000 store building was totally destroyed by fire. Allegedly due to the negligence of the D Power Co. in the operation and maintenance of its electric power lines into

[6] Fielding v. Publix Cars, Inc., 130 Neb. 576, 265 N. W. 726 (1936).

[7] 29A Am. Jur. *Insurance* § 1746 (1960).

the building. P's fire insurer, the XYZ Ins. Co., paid P $20,000, the full amount of the loss.

Assuming diversity of citizenship for federal court jurisdiction, the real party in interest under Federal Rule 17(a) to litigate with the D Power Co. its alleged liability for the destruction of P's Store is the XYZ Ins. Co.

There appears to be no dispute among the federal courts that if the substantive law is such that an insurer is subrogated to the rights of the insured upon payment of a loss, and the insurer-subrogee has paid the *entire* loss suffered by the insured, the insurer is the *only* real party in interest and *must* sue in its own name. This was an unequivocal holding of the United States Supreme Court in *United States v. Aetna Casualty & Surety Company.*[8] This rule has never been questioned by any subsequent case. The bulk of the cases expounding this rule, aside from two of the cases involved in the Aetna appeal,[9] have been in the Tenth Circuit.[10]

Even though it is clear from these decisions that the insurer is the only real party in interest and the suit to recover from the wrongdoer must be maintained in the name of the insurer, the defendant in the case of *Kansas Electric Power v. Janis*[11] was denied a motion to dismiss where an action was brought within the time allowed by the statute of limitations by the insured, who had been fully paid by the insurer, in his own name for the benefit of the insurer. Defendant objected to this complaint, whereupon the insurer as plaintiff, filed a new complaint after the statute of limitation period had expired. Defendant's motion to dismiss was based on the ground that action was barred by the statute of limitations. The court, in denying the motion, stated that since the complaint was not changed in substance after the limitation period had expired, and the in-time complaint showed that the action was for the benefit of the insurer, the new complaint did not affect in any way the rights of the defendant, the cause of action being precisely the same.

[8] 338 U.S. 366 (1940).

[9] Aetna Casualty & Surety Co. v. U.S., 170 F. 2d 469 (2d Cir. 1948); United States v. Yorkshire Ins. Co., 171 F. 2d 374 (3d Cir. 1948).

[10] American Fidelity & Casualty Co., Inc. v. All American Bus Lines, 179 F. 2d 7 (10th Cir. 1949), Gas Service Co. v. Hunt, 183 F. 2d 417 (10th Cir. 1950), Kansas Electric Power Co. v. Janis, 194 F. 2d 942 (10th Cir. 1952). See also Continental Bus System, Inc. v. Rohwer, 172 F. Supp. 487 (D. Colo. 1959).

[11] *Supra,* note 10.

In *Liberty Mutual Ins. Co. v. Tel-Mor Garage Corp.*[12] the insurer had paid three of its insureds the full amount of their losses, none over $2,000, and then combined the three claims in a single suit for $4,300 against the defendant who was allegedly liable for the losses. Defendant moved to dismiss, alleging that the claims in fact belonged to the insured, who lacked diversity and none had the necessary dollar amount for the court's jurisdiction.[13] In denying the motion the court held that Rule 18(a)[14] allowed combining of claims by the plaintiff to acquire the necessary dollar amount for jurisdiction, and went on to say that under the rule of the *Aetna* case, the insurer-subrogee who had paid the full amount of the insured's loss is the only real party in interest and must bring the suit in its own name.

There is no problem in the application of the real party in interest rule in cases like these where the insurer has paid the total amount of the loss. There should be no question that the insurer has all of the substantive right and must prosecute the action the insured, after being paid in full, has no interest in the claim and should in no way be connected with the prosecution of the action. There is no problem of splitting the cause of action, because there remains a single right of action wholly owned by one litigant. Thus the application of the real party in interest rule creates no problems, except the fact that prejudices might be applied against the insurer as plaintiff.

## III. PARTIAL PAYMENT BY THE INSURER

*Example B*

> P's semi-truck was involved in a collision with a bus belonging to the D Bus Co. The truck was damaged to the to the extent of $12,000. P's collision insurer, the XYZ Ins. Co. paid P $11,000 under the terms of the policy. Now the XYZ Ins. Co. is only a partial subrogee, with P still retaining part of the substantive right against the D Bus Co.

The real party in interest problem in this situation was well stated by the court in the *Aetna* case, "In the case of a partial subrogee the question arises whether suit may be brought by the insurer alone, whether suit must be brought in the name of

[12] 92 F. Supp. 445 (S.D.N.Y. 1950).

[13] At the time of this litigation, the Judicial Code, 28 U.S.C.A. § 1332 (1949), required the amount in controversy in diversity cases to exceed $3,000.

[14] FED. R. CIV. P. 18(a), 28 U.S.C.A.

the insured for his own use and for the use of the insurance company, or whether all parties in interest must join in the action."[15] Common law would have required the insured to bring this action in his own name for the use of the insurer.[16] But the Supreme Court in *Aetna* said that since the adoption of the Federal Rules of Civil Procedure a reason no longer appears why such a practice should be required in cases of partial subrogation, since both the insured and the insurer "own" portions of the substantive right against the wrongdoer, they should appear in the litigation in their own names.

The Eighth Circuit said in *National Garment Co. v. N.Y.C. & St. L. R. Co.*:[17]

> The rule is that in absence of timely objection on the part of the defendant, the party suffering the loss [the insured] may maintain an action for recovery of the whole loss against the party primary liable, although the plaintiff has been indemnified for part of his loss, and the indemnifier, to the extent of the payment made, has been subrogated to the plaintiff's rights against the person primary liable.

In this situation there are two real parties in interest, the insurer to the extent of its payment to the insurer, and the insured to the extent of the difference between the payment received from the insurer and the whole loss. "In the absence of objection, either may maintain an action against the person primarily liable, the *insurer* to the *extent of its payment*, and the *insured* to the *extent of the whole loss*. The rule against splitting a cause of action is for the benefit of the defendant and may be waived."[18] (Emphasis supplied.) Apparently the insured is allowed to sue for the amount of the whole loss, in absence of objection from the defendant, on the theory that he does so for the benefit of the insurer for the amount it has paid, and the recovery is impressed with a trust for the insurer for the amount it has paid.

To enable the defendant to know if part of the claim has been subrogated, so that he can make a timely motion to bring in other real parties in interest, the Supreme Court in the *Aetna* case laid down the following rule, "The pleadings should be made to reveal and assert the actual interest of the plaintiff and

[15] *Supra,* note 8, at 381.

[16] Hall & Long v. Railroad Companies, 13 Wall. 368 (1872); Glenn v. Marbury, 145 U.S. 499 (1892).

[17] 173 F. 2d 32, 34 (8th Cir. 1949).

[18] *Id.* at 34. See also: United States v. Aetna Casualty & Surety Co., *supra,* note 8; St. Paul Fire & Marine Ins. Co. v. Peoples National Gas Co., 166 F. Supp. 11 (W.D. Penn. 1958).

to indicate the interests of any others in the claim."[19] Most cases[20] agree that upon the motion of the defendant, the absent real party in interest should be made a party plaintiff, having both the insured and insurer appear in the litigation in their own names.

Judge Donovan of the District of Minnesota, in the case of *Braniff Airways, Inc. v. Falkingham*[21] refused to make the subrogated insurers parties plaintiff on the motion of the defendant, even though the insurers had paid part of the plaintiff's loss and under the substantive law were partial subrogees of the claim against the defendant. He said, "Even though a partial subrogee is a real party in interest, he is only a proper party, not a necessary party, to a suit brought by the insured to recover the full loss.[22] He distinguished the present case from the *Aetna* case by saying that none of the three consolidated cases considered by the court in *Aetna* were brought by the insured alone, thus the defendant faced the possibility of a multiplicity of suits if joinder was not compelled, ". . . but where the insured brings the suit alone, to recover the whole loss, the controversy can be adjudicated completely and finally without the joinder of the insurer subrogees, and the defendant will have only one suit to defend."[23] The opinion went on to state, "In any event the recovery [by the insured] may be impressed with a trust in favor of the party claiming the right to subrogation."

Other decisions have stated that where the action is by the insured for the whole loss, *and the defendant does not object that not all real parties in interest were named as plaintiffs,* the recovery of the whole loss by the insured is impressed with a trust for the insurer to the extent to which it was subrogated. But it appears that the *Braniff* case is a minority of one in the federal system in holding that the defendant cannot object to the insured maintaining the action alone after being partially paid by his insurer.

A motion for dismissal by the defendant was denied in *St. Paul Fire & Marine Ins. Co. v. Peoples National Gas Co.*,[24] where

[19] *Supra,* note 8, at 382.

[20] See, Kansas Electric Power Co. v. Janis, *supra,* note 7; Gas Service Co. v. Hunt, *supra,* note 7; National Garment Co. v. N.Y., C. & St. L.R. Co., *supra,* note 17.

[21] 20 F.R.D. 141 (D. Minn. 1957).

[22] *Id.* at 144.

[23] *Ibid.*

[24] *Supra,* note 18.

the insurer as partial subrogee, brought an action against the wrongdoer for the amount it had paid the insured. The defendant's motion was based on the grounds that the insured was a real party in interest, and as such must be named as a party plaintiff on motion of the defendant, and in this instance the naming of the insured as a party plaintiff would defeat jurisdiction of the court since the insured lacked diversity with the defendant. The court held that insured, as "owner" of part of the claim against the defendant, was not an indispensible party, that must be joined, even if joinder would defeat jurisdiction, because the insurer is definitely a real party in interest for the amount it had paid, and had a right to assert this claim. It makes no difference that the defendant might have to defend several suits.[25]

In the case of *Virginia Electric & Power Co. v. Carolina Peanut Co.*,[26] the insured sued the defendant for the whole loss. Defendant moved that plaintiff's insurers, except the Virginia Fire & Marine Ins. Co., be made parties plaintiff because inclusion of Virginia Fire would allegedly defeat diversity jurisdiction, as its domicile was the same as that of the defendant. This motion was granted. After judgment was entered for the whole loss, Virginia Fire & Marine sought to intervene and get judgment for its pro rata share of the verdict against the defendant. The district court denied the motion to intervene. In reversing this ruling, the Fourth Circuit Court said, "Permitting intervention after federal jurisdiction has attached by an insurer which is a resident of the same state as the defendant, will not defeat the jurisdiction of the court."[27] The court went on to say;

> The suit had been instituted by the Peanut Co. to recover the damages which it had sustained as a result of the destruction of its property by fire, and it is elementary that in such a case an insurance company which had paid a part of the loss is entitled to a pro rata portion of any amount that may be recovered, and it is entitled to join in the suit for the recovery of damages. . . . This is a single wrong, the whole claim must be adjudicated in one action.[28]

The Fifth Circuit in *Ford v. United Gas Corp.*[29] held that it was not error to grant the defendant's motion to make the plaintiff's in-

[25] FED. R. CIV. P. 19(b), 28 U.S.C.A.

[26] 186 F. 2d 816 (4th Cir. 1951).

[27] *Id.* at 821.

[28] *Id.* at 820.

[29] 254 F. 2d 817 (5th Cir. 1958).

surers party-plaintiffs, even though the insurers had the same citizenship as the defendant. Both the *Virginia Electric & Power Co.* and *Ford* cases rely on the Supreme Court opinion in *Wichita R. & Light Co. v. P. U. Comm.*,[30] which held that jurisdiction is not defeated by intervention of a party of like citizenship with the plaintiff, by leave of the court, if the presence of the party is not essential to a decision of the controversy between the original parties. It is clear from the *Aetna* case that in cases of partial subrogation neither the insured nor insurer is an indispensible party to a suit brought by the other.[31]

If the insured and insurer sue as joint plaintiffs, it is sufficient if their claims collectively equal the jurisdictional amount for federal courts.[32] In *Farren et al v. Gas Service Co.*,[33] insured joined with two insurers (A—paid insured $3,800, B—$2,500) in a suit against the defendant for $23,000, defendant moved to dismiss on the grounds of no jurisdiction, because insurer B lacked a large enough dollar claim to give the federal court jurisdiction. In denying the motion the court said, "The several plaintiffs, so far as damage to the realty is concerned, have united to enforce a single title or right, in which they have a common and undivided interest, so it is enough if their interests collectively equal the jurisdictional amount."[34]

Since many people feel it is desirable to keep the insurer's name out of the litigation because of possible prejudice, the American Farmers Mutual Ins. Co., in the case of *Petrikin v. Chicago, R.I. & P.R. Co.*,[35] used a reassignment agreement to remove the possibility of being made a party plaintiff after having paid the insured and becoming partially subrogated to the claim against the wrongdoer. After the insurer had made payment to the insured for part of his loss, and by the terms of the policy became subrogated to part of claim, the insurer reassigned any claim it might have on account of the subrogation back to the insured. Then the insured brought suit in his own name. In denying the defendant's motion to have the insurer made a party

[30] 260 U.S. 48, 54 (1922).

[31] *Supra*, note 8, at 382.

[32] § 1332 of the Judicial Code, 28 U.S.C.A. § 1332 (Supp. 1959), presently requires the amount in controversy to exceed $10,000 in diversity cases.

[33] 122 F. Supp. 536 (D. Kan. 1957).

[34] *Id.* at 537.

[35] 15 F.R.D. 346 (W.D. Mo. 1954).

the court said, ". . . after the execution of said written assignment plaintiff became the only real party in interest in the instant action, and the . . . [insurer] . . . is established as not now being such a party in interest to the claim here asserted against defendant."[36]

As was said in the introduction, many state courts allow the insured to sue alone in cases of partial payment and subrogation. As these cases show, the federal courts follow the rule closer, and say that after partial payment and subrogation the insurer is a real party in interest and should prosecute the action in its name jointly with the insured. But even the federal courts do not look to the rule as a strict mandate, that is, they allow the insured to sue for the whole unless the defendant objects and then the insurer must be made a party. The rule makes no provision for such waiver, but this is the type of rule that can be waived, since it is for the benefit of the defendant.

In allowing the insured to sue for the whole loss, in the absence of an objection from the defendant, the federal courts appear to do so on the same theory some of the state courts use; the insured is suing as a trustee for the benefit of the insurer-subrogee.

The interpretation of the rule by the federal courts gives rise to the problem of splitting the cause of action. The problem of forcing the insured and insurer to sue jointly upon motion of the defendant is accentuated by the diversity problem. Supposedly if the insured prosecutes the action using diversity jurisdiction, and the defendant moves to make the insurer-subrogee a party plaintiff, the court loses jurisdiction of the insurer lacks diversity with the defendant, and thus the insured's action is thrown out also. This problem has been taken care of to some degree by treating the insurer as an intervenor, and as not being an indispensible party.[37] A proper application of the joinder of parties rules and res judicata could lead to the same result without the real party in interest rule.

The only problem then remaining is the idea that a jury might be prejudiced against the insurance company. This problem is not met by the courts, and correctly so. The problem is not to change the application of the law, but to defeat the prejudice, if one does exist. There are at least two possible ways to

[36] *Id.* at 348.

[37] See text at note 26, *supra.*

defeat this prejudice. One is a procedural method to be used to keep the jury from knowing an insurance company is involved in the litigation, the other is through education of public in the ideals of justice so they are not prejudiced when they sit as jurors.

## IV. PAYMENT IN THE FORM OF A LOAN

*Example C*

> P's $20,000 store building was totally destroyed by fire, allegedly caused by the negligence of the D Power Co. in the operation and maintenance of its electric power lines into the building. P's fire insurer, the XYZ Ins. Co. "paid" P $20,000, which P acknowledged and received, ". . . as a *loan* without interest, repayable only in the event and to the extent of any net recovery the undersigned may make from any person, persons, corporation or corporations, or other parties, causing or liable for the loss or damage to the property described below, or from any insurance effected on such property, and as security for such repayment the undersigned hereby pledges to the said Company, all his, its, or their claim or claims against said person, persons, corporation or corporations, or other parties, or from any insurance carrier or carriers, and any recovery thereon, and hereby delivers to said Company all documents necessary to show his, its, or their interest in said property."

The question arises whether the insurer after reimbursing the insured for his loss in the form of a loan agreement or receipt, becomes a real party in interest, which in the case of full reimbursement the insurer must sue in its own name, or if the insurer had reimbursed P for only part of the loss, whether the wrong doer can force the insurer to be made a party. The cases do not distinguish between cases of partial or complete reimbursement in the form of a loan agreement.

There seems to be no disagreement that a loan receipt is a mere fiction, but when courts look to the purpose of the fiction, i.e., to defeat prejudice frequently applied against insurance companies by juries, it is generally agree that the fact that the loan is a fiction is not alone sufficient to declare it a nullity, and its use will be allowed because of the purpose it serves. Courts generally will not say an agreement which is intended to avoid the operation of undue prejudice is against public policy.[38]

[38] See Generally, Luckenbach v. McCaban Sugar Co., 248 U.S. 139 (1918); Augusta Broadcasting Co. v. U.S., 170 F. 2d 199 (5th Cir.

Prior to the adoption of the Federal Rules of Civil Procedure, the United States Supreme Court had approved the use of a loan agreement by an insurer in the case of *Luckenbach v. McCahan Sugar Co.*[39] The court held that such an agreement was a valid business agreement, and should have no effect on the right of the recipient of the loan to bring an action against the wrongdoer.

In the case of *First Nat. Bank of Ottawa v. Lloyd's of London,*[40] the plaintiff bank had been reimbursed in the form of a loan from its excess insurer for the whole loss it had suffered from a robbery. In the suit against the primary insurer for the amount of the loss, the defendant's motion to make the excess insurer a party was denied. The court held that since the reimbursement was in the form of a loan, and such a loan was provided for in the policy, the loan was valid and the insured remained the real party in interest. The Federal District Court of Missouri in *Rosenfeld v. Continental Building Operation Co.,*[41] placed emphasis on the insurance policy providing for such a loan. In interpreting a loan agreement made in New York, it was held that under New York law if the policy does not provide for "payment" in the form of a loan, the loan is to be treated as payment,[42] with the substantive right being subrogated to the insurer. The *Rosenfeld* case and *Miller v. Pine Bluff Hotel Co.*[43] are the only federal decisions which place emphasis on the point that the policy must provide for a loan agreement before it is valid.[44] Other cases recognize the act of the insurer in extending a loan, rather than making payment for the loss, as a practice approved by the courts, and treat it as a loan.

1948); Perrera v. Smolouitz, 11 F.R.D. 377 (E.D.N.Y. 1951); Merriman v. Cities Service Gas Co. et al, 11 F.R.D. 165 (S.D. Mo. 1951); Capo v. C-O Two Fire Equipment Co., 93 F.Supp. 4 (D.N.J. 1950); Ratcliff v. Worthington, 298 S. W. 2d 18 (Ky. 1951).

[39] *Supra,* note 38.

[40] 116 F.2d 221 (7th Cir. 1940).

[41] 135 F.Supp. 465 (W.D. Mo. 1955).

[42] Sosnow, Kranz & Simcoe v. Storatii Corp., 269 App. Div. 122, 54 N.Y. S.2d 780, 295 N.Y. 675, N.E.2d 326 (1946); Maurice Slater Trucking Co., Inc. v. Maus, 273 App. Div. 139, 77 N.Y.S. 2d 343 (1948); Charles Miller Coat Co. v. Myron Herbert, Inc., 86 N.Y.S. 2d 736, 89 N.Y.S. 2d 703, 300 N.Y. 477, 88 N. E. 2d 659 (1949).

[43] 170 F.Supp. 552 (E.D. Ark. 1959).

[44] The opinion in First National Bank of Ottawa v. Lloyd's of Landon, *supra,* note 40, states that payment in the form of a loan was provided for in the policy, but does not state that this is a controlling factor.

The court in *Capo v. C-O Two Fire Equipment Co.*,[45] recognized a loan receipt as being valid, and said,

> The 'real party in interest' within the meaning of the rule [17a] is that party who, under the substantive law, has a legal right to enforce the claim. It is our opinion that the plaintiff [insured] in the instant case meets the test. The present plaintiffs retained the legal right to enforce their claims agains the defendant, . . . the insurer acquired nothing more than a beneficial interest in the recovery, if any. Any other construction would defeat the clear intention of the parties, the plaintiffs and the insurers, as expressed in the loan receipt.

Other courts have looked upon the loan agreement as giving the insurer a beneficial interest in the claim against the wrongdoer. In *Merriman v. Cities Service Gas Co. et al*,[46] the court held that after the execution of the loan agreement, the insured became a trustee, and pursuant to the provisions of Rule 17 (a) could sue in his own name without joining the beneficiary, in this instance, the insurer. Judge Delehant of the District of Nebraska applied the same theory in *Williams v. Union Pac. R. Co.*[47]

Although a loan agreement was approved in *Perrera v. Smolowity*,[48] the court added a caveat,

> However, while the parties have been correctly named in the legal sense [insurer after making loans to insured, conducted the litigation, but in the name of the insured], that which their respective insurers have contrived may be consulted in the effort to ascertain what each party may in truth be deemed to have done or omitted, insofar as their past conduct may affect their present legal rights . . . To reason otherwise . . . would ascribe too much substance to the distinction in form between the payment of the policy loss, and the delivery of a loan receipt in lieu thereof.

The Nebraska Supreme Court has dealt with the use of loan receipts in two different situations. In *Shiman Bros. & Co. v. Nebraska National Hotel Co.*,[49] the insurer had made a loan to the plaintiff-insured, but not for the full amount of the loss. The court relied on the *Luckenbach* case in recognizing the use of loan receipts. From the tenor of the opinion it could be said that the plaintiff-insured would have been the only real party in interest whether the loan agreement was treated as a loan or

[45] *Supra*, note 38, at 6.

[46] *Supra*, note 38.

[47] 194 F. Supp 174 (D. Neb. 1950).

[48] *Supra*, note 38, at 379.

[49] 143 Neb. 404, 9 N. W. 2d 807 (1943).

payment, since the court stated the rule that if the insurance paid by an insurer covers only a portion of the loss, the right of action against the wrongdoer who caused the loss remains in the insured for the entire loss, and the action must be brought by him in his own name. In a later opinion[50] the court cited the *Shiman* case and stated that where the insurer used a loan agreement to reimburse the insured for the *whole* loss, the loan agreement will be treated as a loan, and the action can be prosecuted by the insured in his own name.

The use of a loan agreement seems to do away with many problems. There is no longer a question of splitting the cause of action, or the application of prejudice against the insurer. This result is achieved through the use of a fiction, the loan agreement. There are other fictions in the law; should one more be created to escape the problems created by the real party in interest rule or should the rule be changed?

## V. WORKMEN'S COMPENSATION PAYMENTS

*Example D*

> P, an employee of the S Co. of Nebraska, went to Kansas to install a machine made by his employer in the M & N Co.'s plant. While so doing, and in the course of his employment, he was severely injured, allegedly due to the negligence of the M & N Co. P received workmen's compensation insurance benefits under the provisions of the Nebraska statutes from his employer's insurer, the XYZ Ins. Co. P now brings a tort action against the M & N Co. in Federal District Co.

Of course the question is, has the insurer been subrogated to any of P's substantive rights against the wrongdoer and if so, is the insurer a real party in interest. The decisions in cases with facts similar to the example are varied and somewhat conflicting. Each decision places particular and different emphasis on varying provisions of the statutes under which the compensation was paid.

In Nebraska there is no question that the employer or his insurer must be parties to an action against a third party wrongdoer. The statute specifically states that the employer shall be subrogated to the rights of the employee against a third person, and the recovery by the employer is not limited to the amount of compensation paid, and that suit can be for any amount the

[50] Bozell & Jacobs, Inc. v. Blackstone Terminal Garage, Inc., 162 Neb. 47, 75 N. W. 2d 366 (1956).

employee is entitled to recover. There is no requirement that the employee be made a party to the action. The statute has a proviso that allows the employee to sue, on the condition that the employer is made a party to the action or purposes of reimbursement.[51] In other jurisdictions the statutes are not as specific, thus the application of the real party in interest rule becomes a problem when suit is prosecuted in a federal court.

The Michigan statute[52] allows the employee to sue, if he does not bring suit within one year, the employer or the insurer can prosecute the action. In *Shumate v. Wahlers*[53] the employee brought suit against the third party wrongdoer three years after the injury occurred. The defendant's motion to make the insurer a party was denied. The court said that the statutes provided that any recovery first go to reimburse the insurer who had paid benefits, and this took care of the interest of the insurer. The opinion went on to state that Rule 17 (a) allows suit to be prosecuted in the name of the party authorized by statute, and interpreted the Michigan statute as allowing the employee to sue for the insurer's interest also. In a subsequent case, *Carlson v. Consumers Power Co.*[54] the Federal District Court of the Western District of Michigan granted the motion of the defendant requiring the workmen's compensation insurer, who had paid benefits under the Michigan statute, to be made a party plaintiff. The court in this case said that since pursuant to the statute any recovery first goes to reimburse the insurer, the insurer must be subrogated and thereby he becomes a real party in interest and may be made a party on motion of the plaintiff. The court mentioned the *Shumate* opinion, and said the provision of Rule 17 (a) relied on in that opinion does not in any way affect the rights granted by Rules 19 & 21 to have a real party in interest made a party. The reasoning and holding of the *Carlson* case was reiterated in *Smallwood v. Days Transfer, Inc.*[55]

The Missouri Workmen's Compensation Act[56] allows either the employee or the employer-insurer to sue. The court in *Jenkins*

[51] NEB. REV. STAT. § 48-118 (Reissue 1952).

[52] MICH. COMP. LAWS § 17.189 (1948), as amended, MICH. COMP. LAWS § 413.15 (Supp. 1954).

[53] 19 F.R.D. 173 (E.D. Mich. 1956).

[54] 164 F. Supp. 692 (W.D. Mich. 1957).

[55] 165 F. Supp. 929 (W.D. Mich. 1958).

[56] MO. REV. STAT. §§ 287.010-780 (1949).

*v. Westinghouse Electric Co.*[57] said, ". . . both the employee and the employer-insurer are vested with title to, and ownership of, the cause of action for the employee's bodily injuries against the negligent third party, 'as trustee of an express trust,' and either may sue as such trustee." In applying Rule 17 (a), the opinion stated, ". . . this procedural rule expressly provides that when, by the substantive local law of the state, the plaintiff is, and sues as, a trustee of an express trust need not, in suing in the federal court, join with him the beneficiaries of the trust."[58] The holding concluded by denying the defendant's motion to make the insurer a party plaintiff to the action brought by the injured employee. The language of the opinion indicates that the employer-insurer could have prosecuted the action, even for more than the amount of compensation paid, and the defendant could not force the bringing in of the employee.

In *Pyle v. Kansas Gas & Electric Co.*[59] an employer, who had received compensation under the Kansas statute,[60] brought suit against the defendant for injuries suffered allegedly due to the negligence of the defendant. In denying the defendant's motion to make the compensation insurer of the plaintiff's employer a party plaintiff, the court held that the statute gives the employee the right to sue and gives the insurer a lien on any recovery for the amount of compensation paid, thus the plaintiff-employee is a party authorized by statute to sue and falls within the proviso of Rule 17 (a) allowing him to sue in his own name. The Federal District Court of Illinois in *King v. Cairo Ellis Home Ass'n.*,[61] construed the Illinois workmen's compensation statute[62] in a like manner in regards to the real party in interest question, stating that when the employee brought suit the employer-insurer had a lien on any recovery for the amount of compensation paid.

In *Koepp v. Northwest Freight Lines*,[63] plaintiff-employee was injured in Minnesota, allegedly due to the negligence of the defendant. Plaintiff was a resident of Wisconsin and had received compensation benefits from his employer's insurer under the Wis-

[57] 18 F.R.D. 267, 270 (W.D. Mo. 1955).

[58] *Id.* at 270.

[59] 23 F.R.D. 148 (D. Kan. 1959).

[60] KAN. GEN. STAT. ANN. § 44-501 (Supp. 1959).

[61] 145 F. Supp. 681 (E.D. Ill. 1956).

[62] ILL. REV. STAT. ch. 48, § 138.5(b) (1953).

[63] 10 F.R.D. 524 (D. Minn. 1950).

consin statute.[64] The suit was prosecuted in the federal court, District of Minnesota. The court held that the Wisconsin statute allowed either the employee or the employer-insurer, or both, to sue the wrongdoer, thus both had a substantive right against the wrongdoer, were real parties in interest, and on timely motion of the defendant, must be made parties to the action. The Federal District Court of Ohio, in *Carlson v. Glenn L. Martin Co.*,[65] construed the Wisconsin statute[66] the same way, and granted the defendant's motion to make the employer's insurer a party to the action. The federal court in *State of Maryland to Nee of Carson v. Acme Poultry Corp.*,[67] reached the same conclusion in considering the Pennsylvania Workmen's Compensation Statute.[68]

The federal court, District of Indiana, in construing the Indiana Statute,[69] held that the employer-insurer is not subrogated to any substantive right of the employee against the liable third party, nor can he prosecute suit, until one of two events has occurred, (a) suit brought by the employee is dismissed, or (b) two years has elapsed since the suffering of the injury, and until one of these has happened the employer-insurer is not a real party in interest and cannot be compelled to join the action.[70]

Although the state workmen's compensation statutes construed by the federal courts in these cases are not too dissimilar, the bases of the holdings are different. Some of the courts held that, under the statute, no substantive right had been subrogated to the employer or his insurer, and thus under the basic definition of the real party in interest rule, the employee is the only party to maintain the actions. In some of the cases the different permissive exceptions to the real party in interest rule were applied to allow the injured employee to sue alone, even though the employer or his insurer had been subrogated to part of substantive right. Perhaps this was done to remove the problems of prejudice, jurisdiction, and splitting the cause of action that arise when there are two real parties in interest, and one of them is an insurance company. Yet other federal courts said there was subrogation,

64 WIS. STAT. § 102.01 (1940).

65 103 F. Supp. 153 (N.D. Ohio. 1952).

66 *Supra,* note 64.

67 9 F.R.D. 687 (D. Del. 1949).

68 PA. STAT. tit. 77, §§ 1-1065 (1936).

69 IND. ANN. STAT. §§ 40-1201-2507 (1954).

70 Strate v. Niagara Machine & Tool Co., 160 F. Supp. 296 (S.D. Ind. 1958).

the insurer was a real party in interest, and must, on objection of the defendant be made a party plaintiff. Such a determination leaves the court with the same problems as were discussed above in cases of partial subrogation in collision and fire losses.

The insurance companies cannot use loan agreements in paying workmen's compensation cases, because the liability is absolute by statute, thus one of the methods used to defeat the possibility of being named a party plaintiff is removed.

Perhaps another reason for the difference in the bases of the holdings in the workmen's compensation cases is that the federal court must determine if, under the state substantive law, here the workmen's compensation statute, any rights are subrogated to the insurer who has paid benefits to the injured employee. In so doing, the federal judge will look to what the state's own courts have said in this area. But due to the lack of a similar application of the real party in interest rule in many states, the problem has never been decided by the state court, thus the federal court must decide what the state court's decision would be if it were faced with the problem which as usual places the federal court in a somewhat uncomfortable guessing position.

After determining whether or not there is subrogation under the state substantive law, the federal court must then apply rule 17 (a). Since many states allow the employee to sue without joining the insurer, the federal court perhaps wants to hedge on, or protect its determination of the substantive law, and thus fits the employee into one of the permissive exceptions of Rule 17 (a), allowing him to sue in his own name, as a trustee, or as a party authorized by statute. Such a determination, regardless of the federal court's decision on the substantive law question has as its end result, the case being litigated in the names of the same parties as it would have been in the state court, thus leaving little room for criticism.

## VI. CONCLUSION

In light of the decisions discussed above, it is clear that in many instances insurance companies will of necessity, after making payment under their policies, be plaintiffs to recover damages from wrongdoers to property of their insureds, and often the claim will be required to be jointly prosecuted in the names of the insured and insurer. This is true unless the method of reimbursement used is such that it does not cause subrogation of any substantive rights to the insurer. If prejudices do exist against insurance companies, and are or would be frequently applied by

the jury, this does not represent a fair and impartial court for adjudication of the claim.

Since the real party in interest rule already has several permissive exceptions, another could be added to handle the problems of prejudices, diversity jurisdiction and splitting the cause of action in cases of partial subrogation to an insurer. This is apparently a workable method, because the courts of several states have in effect made such an exception and allow the insured to sue alone for the whole loss.

As was shown in the discussion of the cases in which loan agreements were used, the loan, which is a fiction, can be used as a method of reimbursement which will not create these problems. With the use of a loan there is no subrogation of substantive rights and the insured is the only real party in interest. The insurance companies themselves can use this method of reimbursement, and thereby prevent any problems, even in light of the present law.

In most cases no procedural statute or rule states who must be the defendant of an action; the substantive law sufficiently handles this. It would appear that the proper application of res judicata and the joinder of parties rules, to protect against the splitting of the cause of action, along with the substantive law, would be sufficient to dictate who can be a plaintiff, thus there is no need for a real party in interest rule such as Rule 17 (a). Possibly the permissive exceptions section of the rule should be retained because it makes some necessary exceptions to the substantive law.

In most of the insurance cases, even though the action is prosecuted in the name of the insured, the insurance company employs the counsel and directs the litigation, and the insured does not actively participate. As was discussed in the introduction, res judicata could be invoked against the insurer in this situation if it does not include in the same action the amount of the claim to which it was subrogated. Since the insurer is directing the litigation there is no question that it has notice that the suit is being prosecuted. If the claim against the wrongdoer is to be treated as a single cause of action the doctrine of res judicata could be used to bar a subsequent suit by the insured. This would then force the insurer to join with the insured or be barred from prosecuting the action. This is a more sensible rule to be applied to prevent the splitting of a cause of action then using the real party in interest rule. Thus one of the reasons expounded in favor of the rule has little merit. But, no matter which rule

is used to force the two to sue together, the problems of prejudice and diversity jurisdiction in federal courts still remain.

The problem of prejudice could be handled by not telling the jury that an insurance company is the owner of part of the claim being prosecuted. The application of prejudice can be overemphasized. Some states have compulsory insurance laws, and in metropolitan areas the jurors know that almost every driver has insurance. If the jury knows or believes that the defendant is protected by insurance, it should not create unfair prejudice to tell the jury that an insurer is one of the claimants in the action. In fact this type of disclosure might lead to a more impartial verdict.

It is interesting to note that the Nebraska real party in interest statutes, and those of many other states that have not adopted the federal rule, differ only slightly from Rule 17 (a). Thus without much difficulty, the Nebraska courts could require the insurer to be a party plaintiff in the same instances as does the federal rule.