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Federal Rule 17(a): Will the Real Party in Interest Please Stand?

The author analyzes recent cases interpreting Rule 17(a). In attempting to arrange the cases into situational rather than doctrinal categories, he notes that the conceptual language of the Rule and the courts' treatment of it fail to make explicit the real interests, strategies, and policies at stake. After examining the recent amendment to the Rule and proposed jurisdictional changes, the author concludes that the present Rule is unnecessary and that it should be abolished.

John E. Kennedy*

INTRODUCTION

Recent amendments to the Federal Rules of Civil Procedure have clarified the real party in interest rule, Rule 17(a), while leaving it substantially unchanged. On a related front, the American Law Institute relentlessly pursues a goal of restricting diversity jurisdiction.¹ This article examines a number of federal diversity cases decided since 1948 in light of Rule 17(a), as recently amended, and the ALI's proposed amendments to the statutes defining diversity jurisdiction.

I. RULE 17(a) AS AN INTEGRAL PART OF THE RULES REGULATING CHOICE OF PLAINTIFF IN FEDERAL COURTS

A. HISTORY AND CONSTRUCTION OF THE RULE

While the words also appeared in other contexts, the phraseological ancestors of the real party in interest rule can be found most frequently in the decisions of equity courts early in the nineteenth century as a description and justification for allowing suits by assignees of choses in action.² In effecting the mer-

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1. See Farage, *Proposed Code Will Emascuate Diversity Jurisdiction—Affect 55% of These Cases in Federal Court*, *Trial*, April/May, 1966, p. 30.

2. Atkinson, *The Real Party in Interest: A Plea for Its Abolition*, 32 N.Y.U.L. REV. 926, 927 (1957).

ger of law and equity, the Field Code of 1848 established a rule applicable to both law and equity.³ The supposed objective of the Code rule was to allow suits by assignees at law as well as in equity. If this was the objective, the necessity for the rule is questionable, since in 1848 assignees could sue at law in the name of the assignor. In fact, assignees were then being denied the right to sue in equity because of the existence of an adequate remedy at law.⁴ Perhaps the real utility of the 1848 Code rule came to be the evasion of the common law rule which prohibited a party from testifying. By the use of an assignment, the assignee became the "real party plaintiff," and the assignor was able to testify as a nonparty. Once the rule disqualifying parties from testifying was abandoned, the real party rule became substantially meaningless, reducible to the truism that the person who has the right of action ought to be the plaintiff.⁵

Nevertheless the rule persisted and evolved into Federal Equity Rule 37, which was the forerunner of Rule 17(a).⁶

Although the federal rule drafters recognized the rule was "not a fortunate choice of expression," the authors felt that since the words were common in state procedure, federal equity practice, and numerous judicial decisions, they could serve as the model for a unified procedure.⁷ Even with the 1966 amendment, Rule 17(a) remains substantially identical to the corresponding provisions of the Field Code:

RULE 17. PARTIES PLAINTIFF AND DEFENDANT;
CAPACITY

1. (a) REAL PARTY IN INTEREST. Every action shall

3. FIRST REPORT OF NEW YORK COMMISSIONERS ON PRACTICE AND PLEADING 125 (1848). The relevant rules provided:

§ 91. Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section 93.

§ 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.

4. Atkinson, *supra* note 2, at 934-36. Apparently the Commissioners were simply wrong in their appraisal of contemporary practice. See LOUISELL & HAZARD, CASES AND MATERIALS ON PLEADING AND PROCEDURE 850 (1962). *But see* JAMES, CIVIL PROCEDURE § 9.2 (1965).

5. LOUISELL & HAZARD, *op. cit.* *supra* note 4, at 651-52.

6. The language of Rule 17(a), as adopted in 1938, was substantially identical to that of Equity Rule 37. 3 MOORE, FEDERAL PRACTICE § 17.02 (1948).

7. Clark & Moore, *A New Federal Civil Procedure*, 44 YALE L.J. 1291, 1311 (1935).

2 be prosecuted in the name of the real party in interest;
3 ~~but an~~ *An executor, administrator, guardian, bailee,*
4 trustee
5 of an express trust, a party with whom or in whose name
6 a contract has been made for the benefit of another, or
7 party authorized by statute may sue in his own name
8 without joining with him the party for whose benefit the
9 action is brought; and when a statute of the United
10 States so provides, an action for the use or benefit
11 of another shall be brought in the name of the United
12 States. *No action shall be dismissed on the ground*
13 *that it is not prosecuted in the name of the real party*
14 *in interest until a reasonable time has been allowed*
15 *after objection for ratification of commencement of the*
16 *action by, or joinder or substitution of, the real party*
17 *in interest; and such ratification, joinder, or substitution*
18 *shall have the same effect as if the action had been*
*commenced in the name of the real party in interest.*⁸

The Advisory Committee's note characterized the 1966 change in line 3, omitting "but," as affirming the view that "the specific instances enumerated are not exceptions to, but illustrations of the rule."⁹ The 1966 addition in lines 11 to 18 was originally developed by the Advisory Committee on Admiralty and, as first drafted, was limited to certain types of admiralty actions.¹⁰ Since the language fairly restated the ma-

8. The 1938 Rule is in regular type; 1966 omissions from the 1938 Rule are lined through; 1966 additions are in italics.

9. FED. R. CIV. P. 17(a), 28 U.S.C.A. (Supp. 1966). The Advisory Committee's note in summary states: (1) The specific enumeration does not preclude the finding of the existence of other real parties; (2) The term "bailee" is added primarily to preserve admiralty practice but need not be limited to it; (3) The provisions for amendment are added in the interest of justice on the basis that the rule was originally intended as a permissive rule to *allow* an assignee to sue, and that the only restrictive function that the rule now performs is to assure the defendant that he will be protected by *res judicata*; (4) Provisions for amendment back, however, are limited to good faith choices of plaintiff and are not meant to allow practices such as fictitious name suits with joinder of the real party after the statute of limitations has run.

10. *Preliminary Draft of Proposed Amendment to Rules of Civil Procedure for the United States District Courts*, reported in 34 F.R.D. 325, 341 (1964).

majority practice and the better results in both civil actions and admiralty,¹¹ it was made applicable to all cases.

The federal courts have traditionally defined the phrase "real party in interest" as meaning the person who, under the applicable substantive law, has the right sought to be enforced.¹² 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.¹³ In all cases not involving a federal cause of action, the doctrine is that the substantive law of the state in which the federal court is sitting must be applied to determine who has the right to enforce the cause of action.¹⁴

Using the technical concept of legal power to control the conduct of the lawsuit and to define the real party in interest would appear to permit artificial assignments and other arrangements to disguise the identity of an unattractive plaintiff or to create diversity jurisdiction.¹⁵ However, the official theory is that state policies invalidating champertous transfers and the statutory prohibition against collusive creation of diversity¹⁶ adequately cure these evils.¹⁷

The mechanical and legalistic nature of this definition of the real party has a certain advantage. It allows a quick and certain determination of the identity of the real party without lengthy factual inquiries into actual finance, control, and benefit. Perhaps, in this sense it performs the same function as the fictional theories about the citizenship of corporations.¹⁸ However, the definitional categories approach has several drawbacks. The rigidity of the categories makes them susceptible to manipulation to create or defeat diversity. Further, state legislative and judicial changes affecting the categories leave much room for uncertainty, especially in light of the wavy line between state

11. See text accompanying notes 41-44 *infra*.

12. 3 MOORE, FEDERAL PRACTICE ¶ 17.07 (1948).

13. See, e.g., 3 MOORE, FEDERAL PRACTICE ¶¶ 17.12-.14 (1948).

14. E.g., *McNeil Constr. Co. v. Livingston State Bank*, 300 F.2d 88 (9th Cir. 1962); *American Fid. & Cas. Co. v. All American Bus Lines, Inc.*, 179 F.2d 7 (10th Cir. 1949). State procedural rules defining the real party in interest must, of course, be ignored. *American Fid. & Cas. Co. v. All American Bus Lines, Inc.*, *supra*.

15. The citizenship of the real party in interest controls the determination of diversity. See notes 19-21 *infra* and accompanying text.

16. 28 U.S.C. § 1359 (1964).

17. Clark & Moore, *supra* note 7, at 1311-12.

18. Moore & Weckstein, *Corporations and Diversity of Citizenship Jurisdiction: A Supreme Court Fiction Revisited*, 77 HARV. L. REV. 1426, 1449-51 (1964).

substance and federal procedure.

B. RELATION TO DIVERSITY JURISDICTION

It has become generally recognized that the citizenship of the real party in interest controls the determination of the existence of diversity.¹⁹ Even before the adoption of Rule 17(a) in 1938, the Supreme Court had looked to the real party rules existing in federal equity practice and typical state procedural codes for the test to determine diversity. Thus the citizenship of trustees, subrogees, executors, administrators, guardians, and curators are usually controlling rather than that of beneficiaries, subrogors, heirs, and wards.²⁰ If, however, under the applicable state law a fiduciary has only a minimal degree of control over the lawsuit, he is to be regarded as a formal or nominal party and the citizenship of the beneficiary controls the determination of diversity.²¹

C. RELATION TO PERSONS NEEDED FOR JUST ADJUDICATION: RULE 19

As revised by the 1966 amendments, Rule 19 provides for the joinder, in certain cases, of persons having an interest in the subject matter of the litigation.²² Although the language and underlying policies of Rules 17 and 19 overlap to some extent, the relationship between the two rules has not been fully de-

19. 3 MOORE, FEDERAL PRACTICE ¶ 17.04, at 1312 (1948). Professor Atkinson cites *Wormley v. Wormley*, 21 U.S. (8 Wheat.) 421 (1823), as the first appearance of the real party terminology in diversity suits. Atkinson, *supra* note 2, at 927. Professors Hart and Wechsler assert that the division of parties into the categories, formal, proper, necessary and indispensable, controls the determination of diversity. HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 227, 907 (1953). However, the authors do not reconcile these categories with the real party concept.

20. 3 MOORE, FEDERAL PRACTICE ¶ 17.04, at 1313-14. An assignee is a real party in interest but the citizenship of the assignor controlled under the now repealed assignee clause. *Id.* ¶ 17.06, at 1324 (1948).

21. *E.g.*, *Martineau v. City of St. Paul*, 172 F.2d 777 (8th Cir. 1949).

22. The 1938 version of Rule 19 was doctrinally subdivided into three rules: First, suit could not go forward without the presence of "indispensable" parties, and if their presence could not be obtained or would defeat diversity, the suit had to be dismissed; Second, "necessary" parties would be added unless their presence was unobtainable or would defeat diversity—in which case the suit would be continued without them; Third, "proper" parties might be allowed in at the discretion of the court. The new Rule 19 abandons these rigid definitional categories and sets forth several factors to be considered by the court in determining whether the suit may proceed without an absent party.

veloped.²³

Rule 17(a) provides that certain persons "may sue in [their] own name[s] without joining with [them] the party for whose benefit the action is brought." Since the persons specified are examples of real parties, the rule implies that a real party in interest may sue without joining the party for whose benefit the action is brought.²⁴ However, even if the plaintiff is a real party in interest, Rule 17(a) has not been found to preclude the addition of another joint party plaintiff pursuant to Rule 19.²⁵ Conversely, if a nonparty can be categorized as a real party in interest, Rule 17(a) should not be construed to compel joinder without reference to Rule 19. In sum, Rule 17(a) should not be read as an absolute exception which allows exclusion or compels joinder apart from Rule 19. Perhaps the inconsistencies between Rules 17(a) and 19 could best be reconciled by restating Rule 17(a) as a permissive joinder rule.²⁶

D. RELATION TO CAPACITY TO SUE: RULES 17(B) AND 17(C)

Although it is said that there is a clear distinction between real party in interest and capacity to sue,²⁷ the underlying state

23. See *Dunham v. Robertson*, 198 F.2d 316, 319 (10th Cir. 1952); *Cobb v. National Lead Co.*, 215 F. Supp. 48, 50-51 (E.D. Ark. 1963); *Morelli v. Northwest Eng'r Corp.*, 30 F.R.D. 522 (E.D. Wis. 1962); cf. *Lumbermen's Mut. Gas Co. v. Elbert*, 348 U.S. 48, 51-52 (1954). In *Koepp v. Northwest Freight Lines*, 10 F.R.D. 524 (D. Minn. 1950), the court at page 527 stated:

Rule 19(a) necessarily assumes that the parties who may be joined under it as plaintiffs are real parties in interest. Otherwise, the rule would be inconsistent with the specific requirement of Rule 17. So the test for joinder set forth in Rule 19—joint interest—is whether the parties to be joined are the real parties in interest, and they are the real parties in interest when they are necessary parties.

The articles originating and debating the 1966 reform of Rule 19 do not reconcile its relation to Rule 17. Fink, *Indispensable Parties and the Proposed Amendment to Federal Rule 19*, 74 YALE L.J. 403 (1965); Hazard, *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 COLUM. L. REV. 1254 (1961); Reed, *Compulsory Joinder of Parties in Civil Actions (pts. 1-2)*, 55 MICH. L. REV. 327, 483 (1957).

24. E.g., *Imperial Appliance Corp. v. Hamilton Mfg. Co.*, 239 F. Supp. 175 (E.D. Wis. 1965) (patent licensee subcontracting for benefit of equitable owners of patent could sue without their joinder); *Jenkins v. Westinghouse Elec. Co.*, 18 F.R.D. 267 (W.D. Mo. 1955) (insured subrogator as trustee need not join insurer).

25. See, e.g., *Smith v. Sperling*, 117 F. Supp. 781 (S.D. Cal. 1953), *aff'd in part*, 237 F.2d 317 (9th Cir. 1956), *rev'd*, 354 U.S. 91 (1957); *Young v. Garrett*, 149 F.2d 223 (8th Cir. 1945).

26. ATKINSON, *supra* note 2, at 964. This solution has been adopted in New York. See note 182 *infra*.

27. WRIGHT, FEDERAL COURTS 258 n.16 (1963). Professor Wright

policies regulating capacity can be viewed as coalescing with the policies served by the real party in interest rule. Both the real party rule and the regulation of the legal representation of minors, wards, incompetents, partnerships, and associations, through the requirement of statutory qualifications, represent attempts to protect the interests of creditors, the public, and persons affected by the court's action. The real party and capacity requirements also protect the interest of the defendant by requiring a responsible party plaintiff against whom the rules of *res judicata* can operate.

This overlap in policy is symbolized by cases which have been criticized as confusing 17(a) and 17(b) by treating their concepts as interchangeable.²⁸ Judge Biggs of the Third Circuit has asserted that all the old Supreme Court learning about real parties in interest is really a simple question of capacity to sue under state law and that capacity determines diversity.²⁹ Rule 17(a), in this view, is apparently nothing more than a directive to be followed in entitling the complaint.

However, it is sometimes necessary to distinguish between the real party and capacity rules. The mechanics of raising objections under the two rules may not be identical.³⁰ Further, 17(b) makes an explicit total reference to state law, whereas only state substantive law is relevant to the application of 17(a).³¹

E. RELATION TO CLASS SUITS AND INTERVENTION: RULES 23 AND 24

The policies supporting Rule 17(a), as well as those underlying Rules 17(b), 17(c), and 19, would in theory have equal claim to regulating class actions.³² However, since the purpose of the class action is to accommodate situations in which all per-

cites *Catalano v. Higgins*, 182 A.2d 637 (Del. Super. Ct. 1962), as discriminatingly distinguishing the concepts.

28. *WRIGHT*, *op. cit. supra* note 27, at 258 n.15, citing *E. Brooke Matlack, Inc. v. Walrath*, 24 F.R.D. 263 (D. Md. 1959). See also *Robertson v. Malone*, 190 F.2d 756 (5th Cir. 1951); *Elliott v. Day*, 218 F. Supp. 90 (D. Ore. 1962).

29. *Fallat v. Govran*, 220 F.2d 325, 327 (3d Cir. 1955).

30. See notes 41-44 *infra* and accompanying text.

31. However, Rule 17(a) does allow a "party authorized by statute" to sue alone, thus conceivably referring to state procedural law as does Rule 17(b). Cf. *Vroon v. Templin*, 278 F.2d 345, 347 (4th Cir. 1960).

32. Rule 23 was extensively revised by the 1966 amendments. The former test based on abstract categories of rights was eliminated in favor of one emphasizing pragmatic factors to be considered in allowing and handling class suits. Advisory Committee's note, 28 U.S.C.A. (Supp. 1966).

sons interested in the action cannot, as a practical matter, be present before the court, the class action rule must strike a compromise between these policies and the needs of group litigation. Rule 23 thus is intended to provide a practical means to insure adequate representation of and notice to absent interested persons, to protect the defendant and promote court efficiency through application of *res judicata* policy, to fashion a workable effective remedy, and to distribute the costs and proceeds of the litigation.³³

Rule 17(a) commands that "every action" shall be brought in the name of the real party. Although no class action decision has made explicit reference to Rule 17(a), it should apply to class suits to test the status of the plaintiff as a true, legitimate representative of the class he purports to represent.³⁴ The real party rule can also be utilized in testing the status of an intervenor at the outset of a suit,³⁵ or after trial where the intervenor seeks to participate in the judgment.³⁶

F. RELATION TO SUBSTITUTION: RULE 25

Rule 25 has been relied on to avoid dismissal when, because of an assignment subsequent to the commencement of the action, the original plaintiff loses his status as real party in interest.³⁷ The same result has been extended to mistaken choices of the real party plaintiff at the outset of the suit³⁸ and is codified in the 1966 addition to Rule 17(a).³⁹ Consistent with the liberal amendment provisions of Rule 15, these rules reflect a policy that the choice of plaintiff should not have to be made at the risk of a procedural dismissal which may foreclose a new suit because of the statute of limitations.⁴⁰ While removal of the

33. Simeone, *Procedural Problems of Class Suits*, 60 MICH. L. REV. 905 (1962).

34. See *Matthies v. Seymour Mfg. Co.*, 23 F.R.D. 64, 83-84 (D. Conn. 1958), *rev'd*, 270 F.2d 365 (2d Cir.), *cert. denied*, 361 U.S. 962 (1959).

35. *National Radio School v. Marlin*, 83 F. Supp. 169 (N.D. Ohio 1949); cf. *Grieves v. Levy*, 238 F. Supp. 759 (N.D. Ill. 1965).

36. *Celanese Corp. v. John Clark Indus., Inc.*, 214 F.2d 551, 556 (5th Cir. 1954); *Strate v. Niagara Mach. & Tool Works*, 160 F. Supp. 296 (S.D. Ind. 1958).

37. *Unison Realty Corp. v. RKO Theatres, Inc.*, 35 F.R.D. 232 (S.D. N.Y. 1964).

38. See *Levinson v. Deupree*, 345 U.S. 648 (1953); *Link Aviation, Inc. v. Downs*, 325 F.2d 613 (D.C. Cir. 1963).

39. Lines 11-18 of Rule 17(a) as quoted in text of this article, at note 8 *supra*. Rule 15(c) was also amended in 1966 to establish more firmly the doctrine of relation back of amendments changing parties. MOORE, FEDERAL PRACTICE RULES PAMPHLET 460-66 (1966).

40. Cf. *De Franco v. United States*, 18 F.R.D. 156 (S.D. Cal. 1955);

dismissal sanction may encourage a strategic choice of plaintiff since an unsuccessful selection may be corrected, the Advisory Committee's note to Rule 17(a) indicates the court should not tolerate abuses such as bad faith fictitious name suits.

II. CLAIMS MADE TO THE AUTHORITY OF RULE 17(a)

A. OBJECTIVES OF THE DEFENDANT

In objecting that the plaintiff is not the real party in interest, the defendant may be motivated by a wide variety of strategic objectives. The defendant may be objecting legitimately to claim protection of the policies underlying rules of res judicata and indispensable parties, or rules as to capacity or champerty. More indirectly, the defendant may be attempting to recast the plaintiff to take advantage of statutes of limitations, service of process requirements, or other procedural restrictions which will end the suit. He may be attempting to limit the amount of damages by urging that they run to the nonparty. He may be seeking joinder of the absent person in order to make him a party known to the jury so that its prejudice can operate in his favor. And where the nonparty's citizenship will destroy diversity, the defendant may be asserting his constitutionally protected interest not to be sued in federal court. Finally, along with such objectives actually sought in greater or lesser degrees of good faith and hard fighting, he may be seeking strategic delay, harassment, preservation of the record, and the creation of an issue for appeal.

B. MECHANICS OF OBJECTION

In the past, the defendant has usually asked for dismissal first, and in the alternative, for joinder, on the grounds the plaintiff is not the real party in interest. The 1966 addition to Rule 17(a) precludes dismissal until a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted in the action. Any of these acts will have the same effect as if the action had been commenced in the name of the real party in interest.

Wallis v. United States, 102 F. Supp. 211 (E.D.N.C. 1952). Even without the new amendments to Rules 17 and 15, the Tenth Circuit held that substitution under Rules 25 and 15 related back for purposes of the statute of limitations. *American Fid. & Cas. Co. v. All American Bus Lines, Inc.*, 190 F.2d 234 (10th Cir.), *cert. denied*, 342 U.S. 851 (1951). A caveat to this generally liberal approach is the troublesome provisions of Rule 25(a)(1) covering the death of a party. See Note, *Federal Civil Procedure: Substitution Under Amended Rule 25(a)(1)*, 1963 DUKE L.J. 733.

The present rules do not expressly provide for the timing of a real party objection. However, Rule 9(a) requires that an objection to capacity be raised by specific negative averment. This requirement has been collaterally mentioned in finding a waiver of 17(a) objections.⁴¹ Conversely, although it may be raised on motion, an objection to lack of an indispensable party under Rule 19 is not waived and by Rule 12(h) (3) can be made at the trial on the merits.⁴²

Although some authority to the contrary exists, failure to raise a real party objection by pleading or motion is generally held to constitute a waiver.⁴³ Since the 1966 rule changes have not specifically treated the problem, the best solution may be to draw the closest analogy in each case to the waivable capacity objection or the nonwaivable indispensable party objection and to address the question of waiver and amendment to the sound discretion of the trial court. Of course, this procedure does not prevent the possibility that defendant's timely objection may be successful only on appeal, and require dismissal for lack of diversity after the verdict.⁴⁴

The use of discovery tools to explore the factual control of

41. *United States Fid. & Guar. Co. v. Slifkin*, 200 F. Supp. 563, 573-74 (N.D. Ala. 1961) (objection waived when raised after trial); *E. Brooke Matlack, Inc. v. Walrath*, 24 F.R.D. 263 (D. Md. 1959) (dictum).

42. A real party objection has been likened to an indispensable party objection in order to overcome the argument that under Rule 12 it could not be raised by motion prior to the answer. See *Kincaid v. City of Anchorage*, 15 FED. RULES SERV. 19a.1, Case 5 (D. Alaska 1951). Similarly, a real party objection can be raised by answer and is not waived by failure to raise in a pre-answer motion. See *Ohmer Corp. v. Duncan Meter Corp.*, 8 F.R.D. 582 (N.D. Ill. 1948).

43. See *Blau v. Lamb*, 314 F.2d 618 (2d Cir.), *cert. denied*, 375 U.S. 813 (1963) (dictum by Clark, J., calling it a matter of affirmative defense); *National Garment Co. v. New York, C. & St. L.R.R.*, 173 F.2d 32 (8th Cir. 1949) (dictum); *United States Fid. & Guar. Co. v. Slifkin*, 200 F. Supp. 563 (N.D. Ala. 1961); *McLouth Steel Corp. v. Mesta Mach. Co.*, 116 F. Supp. 689 (E.D. Pa. 1953), *aff'd*, 214 F.2d 608 (3d Cir.), *cert. denied*, 348 U.S. 873 (1954); CLARK, CODE PLEADING § 34 (2d ed. 1947); cf. *Sunray Oil Corp. v. Allbritton*, 187 F.2d 475 (5th Cir.), *cert. denied*, 342 U.S. 828 (1951), *modifying* 88 F. Supp. 54 (S.D. Tex. 1949). *But see Clark v. Hutchison*, 161 F. Supp. 35 (C.Z. 1957).

The timing of real party objections raises special difficulties because such moves are often linked to procedural problems of diversity jurisdiction. HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 719, 907-08 (1953); LOUISELL & HAZARD, *op. cit. supra* note 4, at 664-65 (1962).

44. *Thames v. Mississippi ex rel. Shoemaker*, 117 F.2d 949 (5th Cir.), *cert. denied*, 314 U.S. 630 (1941) (unclear whether statute of limitations had run).

the lawsuit has usually been freely yielded,⁴⁵ but now and then it is resisted.⁴⁶ Perhaps attorney-client privilege should yield in the face of the need for facts with which to apply policies of real party in interest rules.⁴⁷ However, wide discovery necessarily provides tools of delay for the defendant.⁴⁸ The importance of the question at the outset has occasioned the use of interlocutory appeals,⁴⁹ presenting another opportunity for delay to the defendant.

C. OBJECTIVES IN RETAINING THE CHOSEN PLAINTIFF

Plaintiff's attorney may resist a real party objection simply because he thinks the chosen plaintiff is entitled to an efficient remedy without the presence of the nonparty who may be unwilling or unavailable. The attorney may be seeking a remedy which substantive law denies to the nonparty but grants to his plaintiff or, on the other hand, may be seeking to create a short cut where formerly the remedy had run to the nonparty rather than his plaintiff. He may be trying to avoid statutory restrictions directed against certain parties, or to shield his nonparty from the jury. He may be deliberately trying to avoid the application of *res judicata*, thus keeping open the possibility of harassment through subsequent law suits by the nonparty against the defendant. Finally, the original choice of plaintiff may have been made to create or destroy diversity.

45. *Lang v. Elm City Constr. Co.*, 217 F. Supp. 873 (D. Conn. 1962), *aff'd*, 324 F.2d 235 (2d Cir. 1963) (admission of counsel); *Condor Inv. Co. v. Pacific Coca-Cola Bottling Co.*, 211 F. Supp. 671 (D. Ore. 1962) (preliminary hearing); *Northboro Apartments, Inc. v. Wheatland Tube Co.*, 198 F. Supp. 245 (E.D. Pa. 1961); *Williams v. Union Pac. R.R.*, 14 FED. RULES SERV. 17a.14, Case 3 (D. Neb. 1950) (interrogatories).

46. *E.g.*, *Doherty v. Mutual Warehouse Co.*, 245 F.2d 609, 610 (5th Cir. 1957) (inquiry into beneficial ownership of stock); *Rackley v. Board of Trustees of the Orangeburg Regional Hosp.*, 35 F.R.D. 516 (E.D.S.C. 1964) (resisted discovery into financing by NAACP); *Arlington Glass Co. v. Pittsburgh Plate Glass Co.*, 24 F.R.D. 50 (N.D. Ill. 1959) (resisted inquiry into financing of antitrust suit).

47. *Hartmann Coal Mining Co. v. Hoke*, 157 F. Supp. 313 (E.D. Pa. 1957).

48. *E.g.*, *Matthies v. Seymour Mfg. Co.*, 23 F.R.D. 64, 83-84 (D. Conn. 1958), *rev'd*, 270 F.2d 365, *cert. denied*, 361 U.S. 962 (1960).

49. *Link Aviation, Inc. v. Downs*, 325 F.2d 613 (D.C. Cir. 1963); *Corabi v. Auto Racing, Inc.*, 264 F.2d 784 (3d Cir. 1959).

III. COURT RESPONSES TO 17(a) CLAIMS

A. WHERE CREATION OR DEFEAT OF DIVERSITY JURISDICTION IS NOT AN OBJECT IN THE SELECTION OF THE PLAINTIFF

1. *Insurance in General: Subrogor and Subrogee*

When an insurance company pays a casualty claim to its insured, a combination of statutory, contractual, and equitable subrogation gives the insurance company the right to pursue the insured's right to compensation against third parties. If the insured has been totally compensated for his loss, he is factually disinterested in pursuing the claim further. If, however, he has been only partially compensated, he is still interested in advancing the claim. In either situation, the insurance company typically wishes to stay out of any litigation as plaintiff in order to avoid jury prejudice. The insured, if only partially compensated, may share this nondisclosure motivation.⁵⁰ Even if the insurance company is joined as plaintiff, the judge may keep its presence unknown to the jury.⁵¹ However, the courts and legal commentators indicate that, in practice, disclosure follows joinder. In addition, although modern juries may assume the *defendant* is covered by insurance, it is less likely that the jury will assume that an insurance company is behind the *plaintiff*.

In any event, when the suit is brought in the name of the insured alone, the defendant may either move to dismiss the action or to join the insurance company. As an appeal to a common sense principle that all interested parties ought to join, the argument has merit. The insurance company will benefit from any recovery, may bear the litigation expense, and may control the case by exerting at least a second chair influence on the conduct of the trial. However Rule 17(a) does not recognize such realities but depends more upon technical legal categorizations. Thus in anticipation of the objection by the defendant, the insurers have devised insurance contracts and settlement pro-

50. However, a field study of jury behavior indicates that in some situations it may be advantageous for the plaintiff to have his subrogated insurer joined. While the strategists are correct in assuming that the jury is generally prejudiced against the insurance company, the jury may reason that they must award liberally in order to benefit the individual plaintiff over and above the amount that will go to his subrogated insurer. Broeder, *The Pro and Con of Interjecting Plaintiff Insurance Companies in Jury Trial Cases: An Isolated Jury Project Case Study*, 6 NATURAL RESOURCES J. 269 (1966).

51. See interview with Judge Ford of the Eastern District of Kentucky, in Note, *Civil Procedure: Insurance Companies as Real Parties in Interest*, 46 KY. L.J. 252, 259 n.25 (1958).

cedures which attempt to preclude their being held real parties in interest.

Under the "loan receipt" arrangement, the insured is not "paid" but "loaned" the amount of his loss, with the loan being conditionally repayable out of any recovery against the third party. Many state court decisions have held such arrangements effective to keep the insurer out of the litigation.⁵² These decisions are often justified in terms of the state's real party in interest rule and its subrogation jurisprudence. In the federal courts this question has proved more complex.⁵³ The federal judge may, for example, find that state law allows or disallows the insurance company to avoid joinder and reach the same result under Rule 17(a). However, the court may find that Rule 17(a) requires a different result from that which would be arrived at in a state court. Where the citizenship of the insurance company will destroy diversity, the federal judge will have the additional alternative of refusing joinder of the insurance company as a merely necessary party or of forcing dismissal by calling it indispensable. In any event, federal judges must attempt to reconcile their decisions with *United States v. Aetna Cas. Co.*⁵⁴

a. The Supreme Court Gloss: *United States v. Aetna Casualty Co.*

In 1853 Congress passed a statute which, in substance, prohibited assignment of claims against the United States.⁵⁵ Incorporating the general common law policies against assignments, the purpose of the statute was to protect the federal government against splitting of claims and multiple litigation and liability, to preserve its defenses, counterclaims, and venue protection, and to allow simplicity of accounting.⁵⁶

In 1946 the Federal Tort Claims Act was enacted, waiving the sovereign immunity of the United States and making it liable for the torts of its employees.⁵⁷

Cases immediately arose where a person, who had been injured through the negligence of a government employee, was then partially or totally compensated by an insurance company.

52. See Note, *supra* note 51.

53. See Kessner, *Federal Court Interpretations of the Real Party in Interest Rule in Cases of Subrogation*, 39 NEB. L. REV. 452 (1960).

54. 338 U.S. 366 (1949).

55. 10 Stat. 170 (1853).

56. 338 U.S. at 371.

57. 28 U.S.C. § 1346(b) (1965).

In such cases insurance companies commonly brought suit against the United States in their own names as subrogees. In moving for dismissal, the United States generally raised two arguments: The Anti-Assignment Act prohibited the subrogation of the insurer to the insured's claim against the United States; and the insurer was not the real party in interest under Rule 17(a). The Supreme Court rejected both arguments holding that the Anti-Assignment Act did not prohibit "assignments by operation of law," which included subrogation, and that the insurer, as a subrogee, was a real party in interest. The four cases in issue before the Court—and the unappealed cases from seven circuits—involved various combinations of total or partial subrogation and one or two plaintiffs. Speaking to these situations, the Supreme Court, in *Aetna*, held:

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. * * * If it has paid only part of the loss, both the insured and the insurer have substantive rights against the tortfeasor which qualify them as real parties in interest.⁵⁸

With respect to the partial subrogation situation, the Court further pointed out that the United States could compel joinder of both parties because each is a "necessary" party.⁵⁹

Questions immediately arose as to the scope of the *Aetna* holding. Should the Supreme Court's statement be considered an invariable part of Rule 17(a), applicable to all diversity cases despite state law; or should it be narrowly limited to claims against the government or, at least, to claims not based on diversity?

The Fifth Circuit when faced with this problem ignored *Aetna* in holding that subrogated fire insurance companies conducting the litigation for the insured plaintiff were not joinable as either necessary or indispensable parties.⁶⁰ The court relied on the 1918 Supreme Court decision of *Luckenbach v. W. J. McCahan Sugar Ref. Co.*⁶¹ and Texas decisions upholding the validity of "loan receipt" insurance settlements. The Fifth Cir-

58. 338 U.S. at 380.

59. 338 U.S. at 380-82.

60. *Celanese Corp. v. John Clark Indus., Inc.*, 214 F.2d 551 (5th Cir. 1954). See also *Watsontown Brick Co. v. Hercules Powder Co.*, 201 F. Supp. 343 (M.D. Pa. 1962), following the same line.

61. 248 U.S. 139 (1918). The Fifth Circuit also cited three post-1938 federal cases reaching the same result: *Augusta Broadcasting Co. v. United States*, 170 F.2d 199 (5th Cir. 1948) (federal tort claim); *Dixey v. Federal Compress & Warehouse Co.*, 132 F.2d 275 (8th Cir. 1942); *Western Fire Ins. Co. v. Word*, 131 F.2d 541 (5th Cir. 1942).

cuit later distinguished *Aetna* by holding that it dealt only with the Anti-Assignment Act and did not involve loan receipt settlements.⁶² Thus the substantive right of the insurance company under a loan receipt as characterized by state law apparently determines that it is not a real party under Rule 17(a).

Another justification for refusing joinder of partial subrogee insurers is found in *Braniff Airways, Inc. v. Falkingham*.⁶³ While admitting the question was one of federal procedure under Rule 17(a), Judge Donovan distinguished *Aetna* on the ground that the Supreme Court there was speaking only of cases in which the insurer was a plaintiff and not of those in which the insured sued for the whole loss alone. In the latter case there was no good reason to join the insurer since all defenses were available to defendant and *res judicata* would protect him from another suit.

b. Workman's Compensation Subrogee as Nonparty: Employee as Plaintiff

(1) Joinder Refused

State workmen's compensation statutes provide various schemes for subrogation by the insurer to the rights of the injured employee. Typically they may provide a lien or judgment in favor of the insurer on any recovery by the employee against a third party to the extent of the compensation paid by the insurer and, in the event of inaction by the insured for a period of a year, an assignment of his claim against the third party to the insurance company. Several federal courts have relied on statutes of this type in denying joinder of the insurer, despite the language in *Aetna*. An oft-cited example is *Jenkins v. Westinghouse Elec. Co.*,⁶⁴ which held that the Supreme Court in *Aetna* had not defined "trustee of an express trust" in Rule 17(a)

62. *Peoples Loan & Fin. Corp. v. Lawson*, 271 F.2d 259 (5th Cir. 1959), *cert. denied*, 362 U.S. 903 (1960); cf. *United Servs. Auto. Ass'n v. Russom*, 241 F.2d 296 (5th Cir. 1957).

63. 20 F.R.D. 141 (D. Minn. 1957). By following Judge Donovan's theory, it has been concluded that the subrogee is a real party in interest, but need not be joined because he is neither indispensable, nor even necessary. *Wright v. Schebler Co.*, 37 F.R.D. 319 (S.D. Iowa 1965).

64. 18 F.R.D. 267 (W.D. Mo. 1955); see *Pyle v. Kansas Gas & Elec. Co.*, 23 F.R.D. 148 (D. Kan. 1959) (same result under Kansas statute); *Clark v. Hutchison*, 161 F. Supp. 35 (C.Z. 1957) (joinder refused under Harbor Worker's Comp. Act); *Shumate v. Wahlers*, 19 F.R.D. 173 (E.D. Mich. 1956) (same result under Michigan statute, *but see note 69 infra*); *Oliff v. Mount Vernon Seminary, Inc.*, 22 FED. RULES SERV. 17a.14, Case 2 (D.D.C. 1956) (loan receipt).

and that a compensated employee may qualify as such under Missouri law. Thus Rule 17(a) allowed the employee to sue without joining the insurer who is the beneficiary of the trust. The victory for the insurer may have been pyrrhic because the court went on to direct that at the trial defendant must be allowed to show the jury the interest of the insurance company in the plaintiff's claim, since the rules of evidence admit proof of the identity of beneficiaries in suits by the trustee.⁶⁵

*Strate v. Niagara Mach. Co.*⁶⁶ shows another, more effective, bypass of *Aetna*. Judge Stoeckler there denied joinder of the insurer, holding that an Indiana statute providing that the insurer "may at anytime intervene in the [employee's] action,"⁶⁷ gave the insurance carrier the total choice of entry, not compellable by the defendant. The court found that the insurer was not yet a real party in interest but only a "potential real party in interest" because the carrier would not have any vested rights until after a recovery by the employee.⁶⁸ After the jury's verdict the insurer was allowed to intervene so that its interests could be protected in all post-judgment proceedings. The result represents maximum success in jury avoidance.

(2) Conditional Joinder Ordered

Only by straining the distinctions of state law can the above cases refusing joinder be reconciled with those that order joinder. In *Smallwood v. Days Transfer, Inc.*,⁶⁹ for example, the court

65. 18 F.R.D. at 270; see *Wright v. Schebler Co.*, 37 F.R.D. 319, 322 (S.D. Iowa 1965), where the court classified the insurer as a real, non-necessary, nonjoinable party, but went on to say: "It would appear that the defendants, at the time of trial, would be entitled to indicate the interest of [the subrogee] in the plaintiff's claim"; *St. Paul Fire & Marine Ins. Co. v. Peoples Natural Gas Co.*, 166 F. Supp. 11 (W.D. Pa. 1958) (indicating disclosure despite nonjoinder).

66. 160 F. Supp. 296 (S.D. Ind. 1958).

67. IND. ANN. STAT. § 40-1213 (1929).

68. An Illinois statute has been similarly construed. *King v. Cairo Elks Home Ass'n*, 145 F. Supp. 681 (E.D. Ill. 1956); see *Wright v. Schebler Co.*, 37 F.R.D. 319 (S.D. Iowa 1965); *Race v. Hay*, 28 F.R.D. 354 (N.D. Ind. 1961); *Horwich v. Price*, 25 F.R.D. 500 (W.D. Mich. 1960).

69. 165 F. Supp. 929 (W.D. Mich. 1958). Compare *Dinardo v. Consumers Power Co.*, 181 F.2d 104 (6th Cir. 1950) (dismissing employee's suit on grounds contemporary Michigan statute required election between tort and compensation remedy), with *Shumate v. Wahlers*, 19 F.R.D. 173 (E.D. Mich. 1956) (refusing joinder under the Michigan statute as amended in 1952). See *Poleski v. Moore-McCormack Lines*, 21 F.R.D. 579 (D. Md. 1958) (joinder ordered); *Du Vaul v. Miller*, 13 F.R.D. 197 (W.D. Mo. 1952) (joinder ordered); *Koepp v. Northwest Freight Lines, Inc.*, 10 F.R.D. 524 (D. Minn. 1950) (joinder ordered under Wis-

concluded that under Michigan law the insurer is "manifestly a real party in interest" and that federal procedure requires its joinder as a necessary party if jurisdiction or venue will not be defeated. The decisions refusing joinder, it was said, misconstrue the old "but" clause of Rule 17(a) as an absolute exception to Rule 19.

In the cases analyzed above, the defendant raised the issue before trial. However, in *Sunray Oil Corp. v. Allbritton*,⁷⁰ the defendant apparently made no motion to join the insurer until a \$125,000 verdict had been returned in favor of the employee. On appeal the insurer was found to be a real party in interest. Since it had not been joined, the amount awarded by the jury was reduced by the amount of the subrogation claim of \$13,000. If, in fact, the defendant did not raise the real party objection prior to trial, it should have been held waived. On its apparent facts the *Sunray* result would require the insurer to join voluntarily at the outset. If it does not so join, the award may be reduced by the amount of its claim and it will be forced to other remedies, if available.⁷¹

*Braun v. Hassenstein Steel Co.*⁷² reached a hybrid result. The Minnesota workmen's compensation statute was found to allow the employee to sue for his personal injuries without joining the insurance company. However, the Minnesota statute, which places open-ended liability on the employer for medical expenses, was held to give the employer a "separate additional cause of action" for medical expenses. Thus the court required plaintiff to amend his complaint to state two separate causes of action. Joinder of the insurer was ordered as to the claim for medical expenses only.⁷³

An additional problem may arise from the provision, common to workmen's compensation statutes, causing an automatic

consin statute; disapproved in *Braniff Airways v. Falkingham*, 20 F.R.D. 141 (D. Minn. 1957)). Consistent with the above analysis categorizing the subrogee as a necessary party, its joinder was refused where its presence would destroy diversity. *Morelli v. Northwest Eng'r Corp.*, 30 F.R.D. 522 (E.D. Wis. 1962) (Michigan law applied).

70. 187 F.2d 475 (5th Cir.), *cert. denied*, 342 U.S. 828 (1951).

71. See parallel problem of strategy in *E. Brooke Matlack, Inc. v. Walrath*, 24 F.R.D. 263 (D. Md. 1959).

72. 21 F.R.D. 343 (D.S.D. 1958).

73. This result creates speculation as to whether the causes were in fact tried together or presented to the same jury. The plaintiff also argued that if joinder were to be ordered, the party joined should be only the employer and not his insurer because the statutory subrogation runs only to the "employer." This was summarily rejected on the basis that Minnesota had equated the carrier with the employer.

assignment to the employer if the employee fails to initiate suit within a designated period of time, usually one year. If suit is brought in the name of the employee more than one year after the claim accrues, it is subject to dismissal.⁷⁴ However, perhaps this defect may be cured by a reassignment of the claim back to the employee.⁷⁵

(3) Employee's Wrongful Death Administrator as Plaintiff

Where the employee has died as a result of the industrial accident, a new factor is added. Wrongful death and survivor statutes commonly designate the proper person to initiate suit on the cause of action created by the statute. In *Carlson v. Consumer Power Co.*,⁷⁶ an insurance carrier had paid compensation to family members who were claiming as beneficiaries in a wrongful death action. The court found that the right of the insurer, under Michigan law, to a lien on the judgment made it "manifestly a real party in interest" and ordered joinder. Cases not requiring joinder were again labeled misconstructions of the former "but" clause in Rule 17 as an exception to Rule 19.⁷⁷

74. *Hebia v. Select Lake Shore Operating Co.*, 14 FED. RULES SERV. 17a.11, Case 1 (N.D. Ill. 1950) (dismissing employee's suit because one year lapse had automatically assigned claim to employer).

75. Thus, a federal court concluded under New York Workmen's Compensation law: (a) the sole plaintiff employee had lost his right by automatic statutory assignment to the employer because of a one year lapse in bringing suit and the suit would be subject to dismissal, but (b) the employer had assigned the right back to the employee, thus reviving his status as real party, and (c) the employer could now intervene to protect its interest despite passage of a two year statute of limitations on torts. *Magee v. McNany*, 13 FED. RULES SERV. 15a.3, Case 1 (W.D. Pa. 1950). It has been asserted that workmen's compensation carriers, in order to avoid being plaintiff in employee suits, cannot use the "loan receipt" settlement device because they have an absolute statutory duty to pay. Kessner, *Federal Court Interpretations of the Real Party in Interest in Cases of Subrogation*, 39 NEB. L. REV. 452, 470 (1960). However, a loan receipt was successfully used in *Oliff v. Mount Vernon Seminary, Inc.*, 22 FED. RULES SERV. 17a.14, Case 2 (D.D.C. 1956) and *Horwich v. Price*, 25 F.R.D. 500 (W.D. Mich. 1960), *Tinker v. Northwest Airlines, Inc.*, 11 F.R.D. 540 (N.D. Ohio 1951), and *Magee v. McNany*, *supra*, indicate that an assignment back may accomplish the same purpose.

76. 164 F. Supp. 692 (W.D. Mich. 1957). See *Maryland ex rel. Carson v. Acme Poultry Corp.*, 9 F.R.D. 687 (D. Del. 1949); *Carlson v. Glenn L. Martin Co.*, 103 F. Supp. 153 (N.D. Ohio 1952).

77. The decisions granting conditional joinder were approved in an excellent analysis by Judge Winter who carefully examined whether in a state court on the same facts the insurer would have to be joined. *Maryland ex rel. Geils v. Baltimore Transit Co.*, 37 F.R.D. 34 (D. Md. 1965) (construing Maryland procedure and conflicts rule and New York compensation law).

However, in *Boeing Airplane Co. v. Perry*,⁷⁸ the Tenth Circuit, relying on the Kansas wrongful death statute allowing suits by an administrator, held that the subrogee (the United States) need not be joined. The case is perhaps distinguishable, however, because it involved a federal employee and federal compensation.

c. Casualty Insured as Plaintiff, Casualty Insurer Subrogee as Nonparty

Where a workmen's compensation statute is not involved, the insurance company typically relies on its method of settlement to argue that state decisions or statutes remove it from the real party in interest category. The majority of decisions, however, rely on *Aetna* to conclude that once state law gives the subrogee substantial rights, it is then a real party in interest under Rule 17(a) and will be conditionally joined as a necessary party under Rule 19.

(1) Joinder Ordered

*Hughey v. Aetna Cas. Co.*⁷⁹ is an excellent recent example which fully discusses the majority view. The plaintiff had been injured in an auto accident and had been fully compensated by his insurance company. The defendant third party moved for dismissal or joinder, asserting that the insurer was the real party in interest. The court recognized that Delaware common law practice required the suit to be brought in the state court only in the name of the insured, even in cases of total subrogation. Nevertheless, the court read *Aetna* and Rule 17(a) as requiring joinder in the interest of uniform federal procedure.⁸⁰

78. 322 F.2d 589 (10th Cir. 1963), *cert. denied*, 375 U.S. 984 (1964). Here the widow beneficiary assigned her claim to the United States after the action was initiated in return for compensation payments for loss of her Air Force husband. See also *Louisville & N.R.R. v. Rochelle*, 252 F.2d 730 (6th Cir. 1958) (court refused joinder of United States as subrogee to widow of a postman; *Aetna* and Rule 17(a) do not control direct provisions of the Federal Employee's Compensation Act); *Tinker v. Northwest Airlines, Inc.*, 11 F.R.D. 540 (N.D. Ohio 1951) (where subsequent to motion for joinder of employer, employer assigned subrogation claim back to personal representative).

79. 32 F.R.D. 340 (D. Del. 1963). Compare *Catalano v. Higgins*, 54 Del. 548, 188 A.2d 357 (1962), reversing dismissal of suit after verdict in favor of insured where trial judge reasoned that subrogee was sole real party in interest.

80. A leading case construing *Aetna* to require joinder of the partial subrogee despite state practice to the contrary is *Gas Serv. Co. v. Hunt*, 183 F.2d 417 (10th Cir. 1950). See *Tyler v. Dowell, Inc.*, 274 F.2d

The plaintiff in *McNeil Constr. Co. v. Livingston State Bank*,⁸¹ had been fully compensated by a surety company for bad check losses. The court found that the "loan receipt settlement" did not make the insured plaintiff a "trustee of an express trust" and labeled the settlement a "payment" rather than a "loan." Montana case law indicating a contrary result was held to be "procedural." The court went one step beyond the *Hughey* decision by granting defendant's motion to dismiss.⁸² In *Brown v. Fisher Skylights, Inc.*,⁸³ the insurer argued that its status as partial rather than total subrogee should distinguish *Aetna*. However, the New York federal court said *Aetna* and Rule 19 still required joinder as a necessary party.

An interesting judicial reaction to the "loan agreement" settlement is found in *Condor Inv. Co. v. Pacific Coca-Cola Bottling Co.*⁸⁴ Judge Kilkenny first stated that he was bound by Oregon decisions upholding the validity of loan agreements. However, he then commented that he had been counsel for insurance companies and felt the loan agreements were merely shams. He concluded from a lengthy factual examination of the settlement transaction that the parties intended "payment" rather than a loan and gave the plaintiff ten days to join the insurance company. Thus, despite his inclination to follow Oregon law, the judge reached the opposite result, requiring joinder, by turning to the facts.

890 (10th Cir.), *cert. denied*, 363 U.S. 812 (1960); *National Garment Co. v. New York, C. & St. L.R.R.*, 173 F.2d 32 (8th Cir. 1949) (*dictum*); *Eastman Kodak Co. v. United States Fid. & Guar. Co.*, 34 F.R.D. 490 (D. Md. 1964) (excess insurers had to be joined in suit brought in name of insured against prime insurer); *Continental Bus Sys., Inc. v. Rohwer*, 172 F. Supp. 487 (D. Colo. 1959) (where no loan receipt was mentioned, joinder of partial subrogee on property damage claim was ordered under Colorado law).

81. 185 F. Supp. 197 (D. Mont. 1960), *aff'd*, 300 F.2d 88 (9th Cir. 1962).

82. To the same effect, *American Fid. & Cas. Co. v. All American Bus Lines*, 179 F.2d 7 (10th Cir. 1949), but note that after reversal, the trial court successfully allowed substitution of the insurer and entered judgment for the new plaintiff. 190 F.2d 234 (10th Cir.), *cert. denied*, 342 U.S. 851 (1951).

83. 31 F.R.D. 532 (E.D.N.Y. 1962); see also *Northboro Apartments, Inc. v. Wheatland Tube Co.*, 198 F. Supp. 245 (E.D. Pa. 1961), where the court ordered joinder of the casualty insurer and rejected former § 210 of the New York Civil Practice Act expressly allowing suit by the insured alone as being "procedural."

84. 211 F. Supp. 671 (D. Ore. 1962).

(2) Joinder Refused

United States Fid. & Guar. Co. v. Slifkin,⁸⁵ recently restated the principle that *Aetna* requires joinder only if the insurer has paid the insured. The court found that *Luckenbach v. W. J. McCahan Sugar Ref. Co.*,⁸⁶ which prior to the federal rules upheld the validity of "loan receipt" settlements, is still applicable as a matter of federal law without reference to state substantive law.

Other courts follow a theory more in tune with the *Erie* doctrine by upholding loan agreements on the basis of state law. The insurance company successfully avoided joinder in *Petrikin v. Chicago, R.I. & P.R.R.*⁸⁷ by assigning back to the insured all its subrogation rights "for purposes of collection, suit and action" with the understanding the insured would pay back all sums recovered to the extent of payment. The court applied Missouri law recognizing assignments for collection and concluded that the insurance company was not a real party in interest. The "loan agreement" escape of *Aetna* is also used by casualty insurers.⁸⁸

d. Other Insurance Situations

In contrast to the foregoing discussion, there are situations where the defendants resist, rather than force, the entry of the

85. 200 F. Supp. 563 (N.D. Ala. 1961); see *Williams v. Union Pac. R.R.*, 14 FED. RULES SERV. 17a.14, Case 3 (D. Neb. 1950) (relying on *Luckenbach* and Nebraska law); *Capo v. C-O Two Fire Equip. Co.*, 93 F. Supp. 4 (D.N.J. 1950); cf. *Perrera v. Smolowitz*, 11 F.R.D. 377 (E.D.N.Y. 1951).

86. 248 U.S. 139 (1918).

87. 15 F.R.D. 346 (W.D. Mo. 1954). See also *Colorado Milling & Elevator Co. v. American Cyanamid Co.*, 11 F.R.D. 191 (W.D. Mo. 1951) (refusing joinder on ground Missouri law allows suit by assignee or representative without joinder of beneficiary); *Merriman v. Cities Serv. Gas Co.*, 11 F.R.D. 165 (S.D. Mo. 1951) (refusing joinder on grounds insured is "trustee of an express trust").

88. *Watson town Brick Co. v. Hercules Powder Co.*, 201 F. Supp. 343 (M.D. Pa. 1962); cf. *Johnston v. Timber Structures, Inc.*, 33 F.R.D. 25 (E.D. Pa. 1963), where the insurer had waived all subrogation rights, its joinder could not be forced; further, this did not reduce the plaintiff's damage claim despite defendant's theory that the plaintiff would be unjustly enriched if allowed both insurance compensation and full recovery. The nonjoinder theory of the Middle District in the *Watson town* case seems at odds with that of the Eastern District which refused to apply the New York State nonjoinder result in federal court because the New York rule was "procedural." *Northboro Apartments, Inc. v. Wheatland Tube Co.*, 198 F. Supp. 245 (E.D. Pa. 1961). For a theory of reconciliation, see *Rosenfeld v. Continental Bldg. Operating Co.*, 135 F. Supp. 465 (W.D. Mo. 1955) discussed in text accompanying note 95 *infra*.

insurance company. In *E. Brooke Matlack, Inc. v. Walrath*,⁸⁹ the plaintiff successfully moved for joinder of its own subrogees over the defendant's objection. The reverse strategy motivation apparently stemmed from the defendant's claim that he was entitled to coverage by the same insurance policies under which the plaintiff had been compensated. The court wisely conditioned the entry of the insurer on the preservation of all the defendant's claims to coverage by the insurer. However, in *Pure Oil Co. v. Geotechnical Corp.*⁹⁰ intervention of the plaintiff's subrogee was denied. Defendant, the indemnitor of the plaintiff, apparently hoped that by keeping the partial subrogee out of the action the amount of recoupage damages could be reduced.⁹¹ The court, although rejecting intervention, held that the plaintiff would be entitled to full recovery and would subsequently owe its insurer under equitable principles.

Another variation occurs where both plaintiff and defendant resist entry by the subrogee of the plaintiff. Faced with this problem, the Maryland federal court has decided that the settlement of an automobile suit between the insured and the defendant could not prejudice the rights of the subrogated collision insurer to intervene, even though the claim was less than the jurisdictional amount.⁹²

Other mutations occur.⁹³ For example, two insurance companies were potentially obligated to coverage of the same automobile accident. The first insurer settled under a loan receipt agreement with the injured party and then promoted suit in the injured party's name as plaintiff against the second insurer.⁹⁴

89. 24 F.R.D. 263 (D. Md. 1959). See also *Celanese Corp. v. John Clark Indus., Inc.*, 214 F.2d 551 (5th Cir. 1954), where the defendant first unsuccessfully moved for joinder of the subrogee, and then after verdict unsuccessfully resisted the subrogee's intervention. The appellate court termed the intervention "improper" but unprejudicial. *Kansas Elec. Power Co. v. Janis*, 194 F.2d 942 (10th Cir. 1952) (substitution of insurer subrogee after statute of limitations had run).

90. 129 F. Supp. 194 (E.D. La. 1955).

91. Similar motivation seems present in the defendant railroad's choice not to demand joinder of a shipper's subrogee in order to reduce damages by relying on a so-called "benefit of insurance" clause. *National Garment Co. v. New York, C. & St. L.R.R.*, 173 F.2d 32 (8th Cir. 1949).

92. *Maryland ex rel. Scott v. Taylor*, 140 F. Supp. 801 (D. Md. 1956).

93. *E.g.*, *Perrera v. Smolowitz*, 11 F.R.D. 377 (E.D.N.Y. 1951), where the plaintiff and defendant insureds remained the real parties in interest under loan receipts from three insurance companies on both sides of the litigation. Thus the objection to plaintiff's splitting of property claims into one for tractor and one for trailer was waived by defendant's two year delay in raising it.

94. *United Serv. Auto. Ass'n v. Russom*, 241 F.2d 296, 301 (5th Cir.

The Fifth Circuit, which respects loan receipt agreements, refused joinder of the first insurer. Another example occurred where a New York *bailor* of diamonds had been fully compensated by its insurer for a *bailee* loss occurring in a Missouri hotel. The insurer unsuccessfully attempted to sue in the *bailee's* name alone.⁹⁵ The strain put on the *Erie* doctrine by the court in this case became severe. Under Missouri law the *bailee* had the substantive right to sue as a trustee for the *bailor* but was subject to all defenses which could be raised against the *bailor*. Under Missouri conflicts law the effect of the loan receipt was governed by the law of the place of its execution, New York. The court found that New York substantive law recognized the validity of loan receipts only when the insurance policy provided for such a means of settlement. Since the insurance policy involved made no mention of loan receipt settlement, the insurer was found to be the real party in interest. Since suit could not be brought in the name of the *bailor*, it could not be brought by the *bailee*. The 1950 amendment to the New York real party rule, Section 210 of its Civil Practice Act, allowing insureds to sue without joining the insurer was held to be "adjective and procedural" and "cannot affect the matter of who owns the cause of action or can assert it in a Federal court in Missouri, as the real party in interest under Rule 17(a)."⁹⁶

2. *Nonresident Administrator as Plaintiff: Wrongful Death*

The various types of general and special administrators for decedents' estates and wrongful death actions are recognized by the specific language of Rule 17(a) and by most states as being real parties in interest who need not join the heirs, beneficiaries

1957). *Contra*, *Eastman Kodak Co. v. United States Fid. & Guar. Co.*, 34 F.R.D. 490 (D. Md. 1964); *Neighbours v. Harleysville Mut. Cas. Co.*, 169 F. Supp. 368 (D. Md. 1959), where the first insurer loaned money to the insured to settle the claim of a third party and then attempted to bring suit in the insured's name against the second insurer, joinder of the first insurer was ordered.

95. *Rosenfeld v. Continental Bldg. Operating Co.*, 135 F. Supp. 465 (W.D. Mo. 1955); see *McDaniel v. Durst Mfg. Co.*, 184 F. Supp. 430 (D.D.C. 1960).

96. *Rosenfeld v. Continental Bldg. Operating Co.*, *supra* note 95 at 467. In a converse strategy situation, the same New York Civil Practice Act was apparently treated as substantive where a totally subrogated company attempted to sue alone and was forced to join the insured because it had used a loan receipt settlement. *Hartford Fire Ins. Co. v. Commercial Union Assur. Co.*, 131 F. Supp. 751 (S.D.N.Y. 1955).

or subrogees as parties plaintiff.⁹⁷ Problems arise, however, in two situations: first, cases in which, because of the rule that the administrator's citizenship controls, diversity jurisdiction could be defeated by appointment or joinder or consideration of an administrator of different citizenship; and second, cases in which the objection is that the nonresident fiduciary lacks capacity under Rule 17(b) by the law of the forum state and is not qualified to maintain the suit. Rule 17(a) is on occasion irrelevantly interjected into what are primarily capacity cases.⁹⁸

3. *Transfer of Claims in General*

a. *Transferee as Plaintiff*

This section treats those cases where objection is raised by the defendant that the plaintiff's claim is defective because the nonparty who created in the plaintiff the right sought to be enforced—or transferred to the plaintiff the realty, personalty or chose in action involved in the suit—is actually the real party in interest. In the past the defendant has usually sought dismissal, rather than joinder. The reason for selection of the plaintiff without joinder of the nonparty may vary from unavailability or refusal of the nonparty to join, to the simple convenience or blunder of the attorney in choosing to bring the suit in the name of the plaintiff alone. The defendant's claims can usually be analyzed as an assertion that the plaintiff has no claim on the merits or that there are no damages, that the nonparty is an indispensable party, or that policies of *res judicata* require the nonparty's joinder.

The judicial responses commonly turn to the state substantive law to examine the nature of the transfer giving rise to the plaintiff's claim and generally indicate that both the plaintiff and the nonparty are real parties in interest. Thus, joinder, rather than dismissal, is the more frequent result. The 1966 addition to Rule 17(a) reflects this practice.

97. *McElroy v. Security Nat'l Bank*, 215 F. Supp. 775 (D. Kan. 1963). *But see* *Supine v. Compagnie Nationale Air France*, 100 F. Supp. 214 (E.D.N.Y. 1951), where a New York executor, alleging a Portuguese wrongful death action, was required to join the beneficiaries as plaintiffs despite the provision of Rule 17(a) that an executor may sue alone. On workmen's compensation subrogees in wrongful death actions, see text accompanying notes 76-78 *supra*.

98. Some of these cases are analyzed in the next major section, covering situations where diversity is at stake. See text accompanying notes 138-45 *infra*. All of these cases will be treated in a subsequent article concerning capacity and Rule 17(b).

The cases resulting in outright dismissal are rare and are based on the total invalidity of the transfer under state law. In one case a deed to the plaintiff was invalidated as being without consideration.⁹⁹ In another the assignment to the plaintiff of a tort claim for conversion was found ineffective,¹⁰⁰ and in yet another the assignment of warranty claims from injured third parties to the buyer plaintiff was held to be a nullity.¹⁰¹

The majority of cases have, however, refused to dismiss the complaint on an objection that the plaintiff is not the real party in interest. Since often both the plaintiff and the nonparty are factually interested and legally real parties, it is not surprising that the courts show impatience with the objection as a technical bar to a meritorious claim.¹⁰² Judge Clark recognized this policy in upholding the right of the purchaser to sue the carrier for damaged goods without joining the mesne brokers in concluding, "irrespective of niceties of 'title,' libelant was clearly the beneficial owner."¹⁰³ The many other cases refusing dismissal show

99. *Archie v. Shell Oil Co.*, 110 F. Supp. 542 (E.D. La. 1953). This was a suit to test title to oil property. The court stated that the transfer of title from the nonparty to the plaintiff, a casual laborer in the employ of the lawyer bringing the suit, was a mere "simulation for the convenience" of parties in bringing the law suit. In dismissing the suit, the court apparently was condemning the lawyer for maintenance.

100. *Farm Bureau Co-op Mill & Supply, Inc. v. Blue Star Foods, Inc.*, 238 F.2d 326 (8th Cir. 1956). The Arkansas Farm Bureau took a chattel mortgage and a note from Watson so he could purchase and raise chickens. Watson sold them for a worthless check to a confidence man who immediately resold to the defendant. In a suit by the assignee of the Farm Bureau's interest, the defendant won on the merits because any liens were waived by the Farm Bureau's act of giving Ottis possession of the chickens and power of sale. But in dicta the court stated that the assignment of the note and mortgage after the property had been taken did not operate to assign the tort cause of action for conversion, and that the plaintiff was thus not the real party in interest. The res judicata effect of this decision in a subsequent suit by the assignor is thus questionable. See *Ishmael v. City Elec. of Anchorage, Inc.*, 91 F. Supp. 688 (D. Alaska 1950) (personal injury action not assignable under Alaskan law; dismissed without prejudice).

101. *McDaniel v. Durst Mfg. Co.*, 184 F. Supp. 430 (D.D.C. 1960). The plaintiff plumber had purchased propane gas from the defendant. After an explosion causing damage to property owners, the plaintiff had agreed with the insurers of the owners to sue the defendant in his own name for breach of warranty and to hold the money in trust for their benefit. In dismissing the plumber's claim for damages to the premises, the court concluded that the law of privity gave the owners no action of warranty against the remote supplier and the attempted assignment to the plumber was of a nonexistent claim.

102. *Kilbourn v. Western Sur. Co.*, 187 F.2d 567 (10th Cir. 1951).

103. *Zack Metal Co. v. The S.S. Birmingham City*, 291 F.2d 451, 453 (2d Cir. 1961).

an amazing variety of reasons why the attorney for the plaintiff did not join the nonparty in the first place.¹⁰⁴

b. Transferor or Other Party to Multiple Party Transaction as Plaintiff

When a transferor sues without joining the transferee, the defendant will often demand dismissal on the ground that the plaintiff transferor is not the real party in interest, citing cases in which courts have categorized the transferee as the real party in interest. Though there have been dismissals in such cases,¹⁰⁵ both plaintiff and nonparty are usually considered real parties.¹⁰⁶

104. *Prudential Oil & Minerals Co. v. Hamlim*, 277 F.2d 384 (10th Cir. 1960) (assignments of claims by corporation to promoter-sole owner after suit initiated); *Doherty v. Mutual Warehouse Co.*, 245 F.2d 609 (5th Cir. 1957) (suit to compel corporate dividends permitted by "shareholder of record" who was attorney holding title for beneficial owner); *Robertson v. Malone*, 190 F.2d 756 (5th Cir. 1951) (statutory liquidator of insurance company was real party in interest on suit to recover premiums); *Harmon v. Martin Bros. Container & Timber Prods. Corp.*, 227 F. Supp. 9 (D. Ore. 1964) (individual assignee from five different employees of claims for breach of collective bargaining agreement); *United States v. Tyler*, 220 F. Supp. 386 (N.D. Iowa 1963) (assignments of grain warehouse receipts to plaintiff Commodity Credit Corp.); *State Sec. Co. v. Federated Mut. Implement & Hardware Ins. Co.*, 204 F. Supp. 207 (D. Neb. 1960), *aff'd per curiam*, 308 F.2d 452 (8th Cir. 1962) (mortgagee as assignee *pro tanto* of fire insurance policy of mortgagor who apparently was in jail for arson); *Campbell Soup Co. v. Diehm*, 111 F. Supp. 211 (E.D. Pa. 1952) (plaintiff allowed to sue as principal or third party beneficiary to gain advantage of equitable remedy); see *Boris v. Moore*, 152 F. Supp. 595, 602 (E.D. Wis. 1957), *aff'd*, 253 F.2d 523 (7th Cir. 1958).

In *Kincaid v. City of Anchorage*, decision on whether assignee was an indispensable party was withheld until it was determined whether the assignee would be joined. 15 FED. RULES SERV. 19a.1, Case 5 (D. Alaska 1951). And in *Automatic Dialing Corp. v. Maritime Quality Hardware*, 98 F. Supp. 650 (D. Me. 1951), an objection was made to a counterclaim on grounds it had been assigned to the R.F.C., and was overcome by voluntary appearance of the R.F.C. The abstract rule that an assignor is a real party in interest was held to exist only for the benefit of the obligor—assignee could not demand assignor be brought in.

105. In *Northwest Oil & Ref. Co. v. Honolulu Oil Corp.*, 195 F. Supp. 281 (D. Mont. 1961), the plaintiff originally had a contract to purchase oil from the defendant and the right to build a terminal for this activity. The plaintiff assigned the contract rights to another company and later brought suit to establish the right to build the terminal. The court concluded that the plaintiff had assigned all rights, had not reserved this one, accordingly was not the real party in interest, and dismissed the suit.

106. Where plaintiff, owner of an offshore oil rig, had made a total assignment of its contract with the defendant to a bank, the court held that an assignor for security retained sufficient interest to be a real party in interest. The court sensibly refused the defendant's motion to dismiss and ordered, *sua sponte*, joinder of the bank, which apparently did not

Of course, many cases do not fall easily into the transferor-transferee dichotomy, but are simply multiple party transactions, in which event the courts usually uphold the sole plaintiff as the real party, relying upon the phrase contained in 17(a) which best fits the situation.¹⁰⁷ The few cases resulting in dismissal rely on substantive law to conclude that plaintiff has no legitimate claim to relief.¹⁰⁸

B. WHERE CREATION OR DEFEAT OF DIVERSITY JURISDICTION IS AN OBJECT IN THE SELECTION OF THE PLAINTIFF

1. *Insurer Subrogor or Insured Subrogee as Plaintiff*

In some situations, the motivation for selecting a plaintiff to shield an insurance company from the jury may be absent or may coincide or conflict with the object of choosing a plaintiff whose citizenship will create diversity jurisdiction.¹⁰⁹ In any event, the defendant will object that the nonparty is the real party in interest or that the choice is collusive under 28 U.S.C. § 1359. In either instance dismissal for lack of diversity may be sought. *Aetna Cas. & Sur. Co. v. United States*¹¹⁰ stated that the partial subrogee and partial subrogor were both real parties,

want to come in. *Texas San Juan Oil Corp. v. An-Son Offshore Drilling Co.*, 194 F. Supp. 396 (S.D.N.Y. 1961). Where after commencement of the lawsuit, the plaintiff assigned the claim, Rule 17(a) could not be used to dismiss the claim, but rather Rule 25 would govern the court's discretion in substituting the new parties. *Unison Realty Co. v. RKO Theatres, Inc.*, 35 F.R.D. 232 (S.D.N.Y. 1964).

107. Where the defendant insurance company had issued a blanket fidelity bond against theft by employees to multiple members of a cotton exchange which provided that all actions on the bond should be by "the first named assured," the plaintiff, a member of the exchange, was permitted to sue alone even though it was not the first named. *New Amsterdam Cas. Co. v. W. D. Felder & Co.*, 214 F.2d 825, 826 (5th Cir. 1954). Also, the holder of a patent license can sue as a "real party in interest" without joining all the equitable beneficiaries. He is an "agent for collection" or the "maker of a contract" and the beneficiaries are not indispensable parties. *Imperial Appliance Corp. v. Hamilton Mfg. Co.*, 239 F. Supp. 175 (E.D. Wis. 1965). Finally, a mother was allowed to sue on behalf of herself and as guardian or trustee for her daughter on notes inherited from their husband-father under French law and thus avoid statute of limitations arguments potentially applicable to the daughter but not to the mother. *Chuchuru v. Chutchurru*, 185 F.2d 62 (10th Cir. 1950).

108. See *Walton v. Glen Falls Indem. Co.*, 192 F.2d 189 (5th Cir. 1951).

109. The same strategy and concept apply to the choices of the "real party-defendant in interest." *Lumbermen's Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 51 (1954). *But see* 28 U.S.C. § 1332(c) (1966).

110. 338 U.S. 366 (1949); see text accompanying notes 58-59 *supra*.

that suit could be brought by both, that both were necessary, *but* that neither was indispensable. Subsequent judicial applications thus have generally not forced joinder of a real party whose presence would destroy diversity.¹¹¹

*Allstate Ins. Co. v. Lumbermens Mut. Cas. Co.*¹¹² shows a manipulative application of these rules. After suit was commenced against the insured, National Cash Register, in state court, the insurer, Allstate Insurance Company of Illinois, joined with National Cash to sue as plaintiffs in federal court for a declaratory judgment against Lumbermen's Mutual Insurance Company, an Illinois corporation, seeking to establish coverage of the accident. At this point, Lumbermen's moved to dismiss because both plaintiff Allstate and defendant Lumbermen's were Illinois corporations. The plaintiffs thereupon successfully moved to withdraw Allstate as a party plaintiff in order to cure nondiversity. The court found that the declaratory action had been instituted by Allstate attorneys with authorization and consultation from the National Cash attorneys, and that National Cash was not a mere dummy but retained control of the suit. Despite further findings that National Cash had been solicited as plaintiff by Allstate, that Allstate had an interest and had promised National Cash indemnity for costs and attorney fees, the court decided National Cash had not been made a "party by collusion" within section 1359. Apparently, if Allstate was a real party in interest, it was only a necessary party, not compelled to join where jurisdiction would be defeated.

111. Thus, a Wisconsin federal court concluded that, though a workmen's compensation subrogee was the real party under Michigan law, it was only a "necessary" party under Rule 19, and need not be joined where its presence would defeat diversity. *Morelli v. Northwest Eng'r Corp.*, 30 F.R.D. 522 (E.D. Wis. 1962).

While continuing to maintain that *Aetna* has to do only with the Anti-Assignment and Tort Claims Acts and does not control results under loan settlements, the Fifth Circuit, in dictum, has given the subrogee mere necessary party status where its joinder would defeat diversity. *Peoples Loan & Fin. Corp. v. Lawson*, 271 F.2d 529 (5th Cir. 1959). In *Petrikin v. Chicago, R.I. & P.R.R.*, 15 F.R.D. 346 (W.D. Mo. 1954), although no facts were given, diversity was apparently in issue where the subrogee by a valid "assignment for collection" to the plaintiff insured removed itself from the status of real party in interest under Missouri law. A Pennsylvania federal court held that where the insurance company was a total subrogee, it could maintain suit as sole plaintiff where joinder of the insured would defeat diversity. *Security Mut. Cas. Co. v. Rich*, 16 F.R.D. 472 (W.D. Pa. 1954). *But see McLouth Steel Corp. v. Mesta Mach. Co.*, 116 F. Supp. 689 (E.D. Pa. 1953), *aff'd*, 214 F.2d 608 (3d Cir.), *cert. denied*, *Hartford Acc. & Indem. Co. v. Foster*, 348 U.S. 873 (1954).

112. 204 F. Supp. 83 (D. Conn. 1962).

In contrast, *Standard Acc. Ins. Co. v. Lohman*¹¹³ concluded that the subrogor and subrogee were both indispensable, and dismissed for lack of diversity. The insured, an Illinois citizen, never received service of process in an Illinois auto liability suit, which resulted in an uncontested \$18,500 judgment against him. His insurance company, a Michigan corporation, paid him \$17,500 and brought suit alone in federal court under an Illinois statute making the Illinois sheriff liable to the "party aggrieved." The insured brought suit in state court against the sheriff. Finding that the Illinois statute created a remedy in the insured only, the Seventh Circuit affirmed dismissal, relying upon United States Supreme Court decisions holding that a "surety liable for only part of a debt does not become subrogated to collateral remedies available to the creditor unless he pays the whole debt."¹¹⁴ Any assertion of rights as partial subrogee, the court held, would require joinder as a joint interest under Rule 19(a) and thus defeat diversity. No mention, however, was made of *Aetna*.

2. Choice of Plaintiff Who Must Qualify Under State Court Proceedings

a. Administrators: Wrongful Death Claims in Particular

Frequently an out-of-state citizen is chosen as administrator for a local estate in order to create diversity. Since Rule 17(a) provides that an administrator is a real party and the jurisdictional rule is that his citizenship controls, diversity will follow. The defendant is forced to object that the niceties of state law somehow do not recognize the administrator as a real party but only as a nominal party, or that his appointment has been collusive. Neither objection has proved successful. The courts have uniformly held that, since the administrator has total legal control of the suit, he is the real party, and, since the appointment takes place in open state court proceedings, it cannot be called collusive. Indeed, the typical George Washington admission of the lawyer, both to the state judge and later to the federal judge, that he seeks the appointment only to pick cherries from the diversity tree most often brings escape from reprimand because his truth hath made him free of collusion.

The pressure for this type of appointment apparently is greatest in the Eastern Megalopolis. The study by the Univer-

113. 295 F.2d 261 (7th Cir. 1961).

114. *Id.* at 264.

sity of Pennsylvania researchers concludes that twenty percent of federal court wrongful death actions are infected with the disease.¹¹⁵ The Third Circuit, the object of the Pennsylvania study, had recent occasion to restate its permissive view in *Borror v. Sharon Steel Co.*¹¹⁶ Bonita Curtician, a Pennsylvania resident, was killed in an explosion in Pennsylvania. A West Virginia citizen was appointed administrator of her estate by the Pennsylvania register of wills. As administrator, he brought a single complaint under the Pennsylvania survival statute and the wrongful death statute. The defendant exerted great energy to show that the plaintiff "is not a real party in interest but at best a kind of next friend or guardian *ad litem*, in short, a kind of very nominal plaintiff."¹¹⁷ Judge Biggs rejected this by tabulating the legal fiction factors that go into the making of a real party in interest: He is the master of the litigation, compelled to account for his conduct, removable only for good cause, may oppose removal and must be given notice of removal; he holds the proceeds of the suit for the beneficiaries and authorizes settlement. Judge Biggs also treated as irrelevant the defendant's argument that the beneficiaries under certain conditions might be able to sue on the wrongful death claim. The express words of Rule 17(a) allowing an administrator or person authorized by statute to sue alone, it was held, demanded the result. Further, since the defendant conceded that the plaintiff was the only person who could, under any conditions, bring the *survival* action, the administrator was the sole real party in interest on that claim. Jurisdiction of the *wrongful death* action would follow under the pendant jurisdiction doctrine of *Hurn v. Oursler*.¹¹⁸ Finally, Judge Biggs reiterated his position in *Fallat v. Gouran*¹¹⁹ that the question was really one of "capacity" to sue and not one of "real party-in-interest."¹²⁰

The Second Circuit, in *Lang v. Elm City Constr. Co.*,¹²¹ met the same problem by affirming *per curiam* a district judge who

115. ALLI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, App. B, 166, 171 (Proposed Final Draft No. 1, 1965). See Cohan and Tate, *Manufacturing Federal Diversity Jurisdiction by the Appointment of Representatives: Its Legality and Propriety*, 1 VILL. L. REV. 201 (1956).

116. 327 F.2d 165 (3d Cir. 1964); followed in *Curnow v. West View Park Co.*, 337 F.2d 241 (3d Cir. 1964).

117. *Borror v. Sharon Steel Co.*, 327 F.2d 165, 168 (3d Cir. 1964).

118. 289 U.S. 238 (1933).

119. 220 F.2d 325 (3d Cir. 1955).

120. *Id.* at 329-30.

121. 217 F. Supp. 873 (D. Conn.), *aff'd per curiam*, 324 F.2d 235 (2d Cir. 1963).

followed the Third Circuit position. Decedent had been domiciled in Connecticut. Decedent's mother, who had been appointed administrator by a Connecticut court, withdrew, and a citizen of Pennsylvania was appointed solely to create diversity.¹²² The court refused to dismiss, agreed that the appointment was not collusive under section 1359 and that the express words of Rule 17(a) authorized him to sue. Defendant argued that a Connecticut statute, which provided that in suits by non-resident fiduciaries the "same court shall have jurisdiction as would have if the plaintiff resided in the town where the court of probate which granted the administration is held,"¹²³ converted the plaintiff's residency (and apparently his citizenship) from Pennsylvania to Connecticut. The court rejected this argument, calling the statute a "local venue statute." Since all out-of-state fiduciaries, even those representing out-of-state estates, must qualify under Connecticut probate proceedings, to construe the statute as a substantive limitation on the right of a foreign fiduciary to sue would defeat diversity in any case in which such a fiduciary was a party and would unconstitutionally exclude it from federal court.¹²⁴

The Eighth Circuit has also considered the question recently. In *County of Todd v. Loegering*,¹²⁵ it followed the lead of the Third Circuit and held that the appointment of a Montanan as a Minnesota wrongful death administrator to litigate a Minnesota-based accident was not collusive. The court reasoned that under Minnesota statutes the administrator was the real party in interest, despite claims by the defendant that recent changes streamlining Minnesota probate practice had reduced his status to a formal party.

In a district court case involving the Texas death statute which provided that the action could be brought by surviving

122. 217 F. Supp. at 875.

123. CONN. GEN. STAT. ANN. § 52-21 (1958).

124. This argument may be questionable today since the states probably can constitutionally require a resident administrator to be appointed. See text accompanying note 190 *infra*. However, this same type of argument was used by Judge Murrah in sustaining diversity jurisdiction in a suit by a Californian who was appointed administrator by an Oklahoma court and who brought suit to cancel deeds to Oklahoma realty. Oklahoma statutes limiting actions to the "same courts" in which they "might have been maintained" by the intestate, and limiting actions for the recovery of real estate to the "county in which the subject of the action is situated" were held not intended to close the door to a federal diversity suit. *Erwin v. Barrow*, 217 F.2d 522 (10th Cir. 1954).

125. 297 F.2d 470 (8th Cir. 1961).

spouse, parents, children or "by either of them for the benefit of all," the Mexican widow was allowed to sue alone; her citizenship alone determined diversity, despite the fact that the recovery would also go to Texas children.¹²⁶ The words of Rule 17(a) were held to require the result.

The main variations on this theme are cases resulting in defeat of diversity jurisdiction by withdrawal of the initial plaintiff and the appointment of an administrator whose citizenship defeats diversity.¹²⁷ Although the majority of recent cases involve wrongful death claims, the same device has been used in a suit by a general administrator to cancel real estate deeds¹²⁸ and in a suit by a successor ancillary administrator with will annexed to recover oil royalties.¹²⁹

b. Guardians of Minors or Incompetents

Recent cases have not distinguished between a wrongful death administrator and guardians of minors or incompetents. In *Stephan v. Marlin Firearms Co.*,¹³¹ for example, a seventeen-year-old was injured by a rifle. He and all defendants were citizens of Connecticut. His paternal grandmother, a citizen of Florida, was appointed guardian of his estate by the Connecticut probate court, notwithstanding the admission of counsel before the probate judge that the purpose of the appointment was to obtain diversity. In federal court, Judge Timbers, upholding diversity, held the factual and legal differences between this situation and wrongful death actions irrelevant under the broad command of Rule 17(a).

126. *Rodriguez v. Wheeler*, 16 F.R.D. 103 (S.D. Tex. 1954); followed in *Rivera v. Chapa*, 233 F. Supp. 428 (S.D. Tex. 1964) (Texas adult sons disclaimed interest in New Mexico widow's action); cf. *Du Roure v. Alvord*, 120 F. Supp. 166 (S.D.N.Y. 1954) (French heir could sue without New York administrator, preserving diversity but not venue). *Contra*, *Campbell v. Pacific Fruit Express Co.*, 148 F. Supp. 209 (D. Idaho 1957), in which the Idaho Wrongful Death Act providing the decedent's "heirs or personal representatives may maintain an action" was held to require presence of a son as an indispensable party, thereby destroying diversity.

127. *Grady v. Irvine*, 254 F.2d 224 (4th Cir. 1958) (where Maryland plaintiff died during suit, substitution of Virginia administrator destroyed diversity); cf. *Simmons v. Atlantic Coast Line R.R.*, 235 F. Supp. 325 (E.D.S.C. 1964).

128. *Erwin v. Barrow*, 217 F.2d 522 (10th Cir. 1954).

129. *Falsetti v. Indiana Oil Purchasing Co.*, 215 F. Supp. 420 (N.D. Tex. 1963).

131. 217 F. Supp. 880 (D. Conn.), *aff'd per curiam*, 325 F.2d 238 (2d Cir. 1963); *Lang v. Elm City Constr. Co.*, 217 F. Supp. 873 (D. Conn.), *aff'd per curiam*, 324 F.2d 235 (2d Cir. 1963).

The Second Circuit affirmed Judge Timbers, following the result worked out by Judge Biggs in *Fallat v. Gouran*,¹³² a case in which Dixon, a Pennsylvania resident, became weak-minded as a result of an auto accident. His daughter, a New Jersey citizen, was appointed his general guardian by a Pennsylvania court. The district judge granted the defendant's motion to dismiss on the grounds that Dixon, the incompetent, was the real party in interest and his citizenship controlled diversity. On appeal, Judge Biggs, in a long analysis of the Supreme Court decisions, asserted his unique approach that the real party in interest rule was irrelevant, the question being solely one of capacity to sue under 17(b) and 17(c).¹³³

However, the Eighth Circuit has reached a contrary result. In *Martineau v. City of St. Paul*,¹³⁴ the attorneys for an injured Minnesota child had Martineau, an Illinois attorney, appointed general guardian by a Minnesota probate court. The Eighth Circuit, after dissecting the provisions of Minnesota statutes, concluded that the Illinois "guardian was a mere nominal party," and the boy was the real party in interest whose citizenship controlled.¹³⁵

One variation can occur where the ward attempts suit without his guardian. In *Hart v. Feely*,¹³⁶ the incompetent was a Pennsylvanian who, while competent, had issued a power of attorney to the New York plaintiff and the Pennsylvania defendant. Subsequent to the creation of the power of attorney a general guardian was appointed by a Pennsylvania court. Without mentioning the real party in interest, the court found that the court appointment of a guardian revoked the original power of attorney and, in any event, the guardian was now an indispensable party. The case was dismissed for lack of diversity.

Since there are different categories of guardianship available under state law, and if it is important to the attorneys that the

132. 220 F.2d 325 (3d Cir. 1955).

133. The same rule was applied to the general guardian of a minor after the court allowed correction of the jurisdictional defect by the re-appointment of the original guardian *ad litem* as the general guardian. *Berkowitz v. Philadelphia Chewing Gum Corp.*, 217 F. Supp. 80 (E.D. Pa. 1962), *aff'd per curiam*, 317 F.2d 192 (3d Cir. 1963); see *Morris v. Bradley*, 139 F. Supp. 519 (E.D. Pa. 1956) (mistakenly allowing citizenship of guardian *ad litem* to control).

134. 172 F.2d 777 (8th Cir. 1949).

135. Recall that this circuit subsequently refused to pierce the citizenship of the wrongful death administrator under Minnesota statutes in *County of Todd v. Loegering*, 297 F.2d 470 (8th Cir. 1961). The court nonetheless insisted it was being consistent with *Martineau*.

136. 109 F. Supp. 3 (M.D. Pa. 1953).

citizenship of the ward control, they may have appointed merely a "guardian *ad litem*." In such cases the ward remains the real party whose citizenship and residence control diversity and venue determinations.¹³⁷

c. Qualified Out-of-State Fiduciaries Failing To Qualify Locally

A different situation exists where an out-of-state fiduciary who has been appointed by an out-of-state court sues in federal court. As noted in *Van Dusen v. Barrack*¹³⁸ the vast majority of American jurisdictions allow suits by foreign fiduciaries, but require them to qualify or to perform some preliminary act to maintain suit.¹³⁹ The objections made by the defendant are thus usually made to the capacity of the plaintiff under Rule 17(b) and the forum law. The defendant's further objections that the plaintiff is not the real party in interest are reducible to assertions that either an existing local fiduciary should be the plaintiff or that local qualifications must be undertaken which might include the appointment of a resident fiduciary whose citizenship would destroy diversity. The plaintiff may resist local qualification in order to retain diversity, with the defendant urging the necessity of local qualifications to eliminate it.

In *Elliott v. Day*,¹⁴⁰ two citizens of Alaska died in attempting to rescue the Oregon defendant from Mount Everest. The Alaska-appointed administrators brought suit in the Oregon federal court making complaint under the Alaska Wrongful Death Act. The defendant pointed to Oregon statutes disqualifying nonresidents from acting in a representative capacity and argued that the Alaska administrators had no capacity to sue. If the remedy to this objection was that local fiduciaries must be appointed, it would destroy diversity. The court blocked this move, however, by holding that, as a matter of comity, the Oregon statute did not apply to preclude suits by out-of-state fiduciaries when there were neither estate nor creditors in Oregon and the proceeds of the suit would go to named nonresident beneficiaries. It therefore allowed the suit as brought.

137. *Horzepa v. Dauski*, 40 F. Supp. 476 (E.D.N.Y. 1941); see *Blackwell v. Vance Trucking Co.*, 139 F. Supp. 103 (E.D.S.C. 1956) (unsuccessful attempt to use guardian *ad litem*'s residence for venue purposes); cases cited note 133 *supra*.

138. 376 U.S. 612 (1964).

139. *Id.* at 623-24.

140. 218 F. Supp. 90 (D. Ore. 1962).

The court further theorized¹⁴¹ that the wrongful death administrator is merely a "nominal" party and the Alaskan widow and children are the real parties in interest. The court was perhaps referring to real parties in an economic sense. However, the Eighth Circuit, upholding a somewhat similar action in *McCoy v. Blakely*,¹⁴² categorized the administrator, rather than the surviving parents, as the real party in interest and therefore sustained an action by the Iowa administrator in the Nebraska federal court under the Nebraska wrongful death statute for the ultimate benefit of the Nebraska parents. Against arguments that the Nebraska statutory scheme would be defeated, the court presumed that the Iowa administrator would distribute according to the Nebraska statute.

In *Patterson v. Wynkoop*,¹⁴³ the out-of-state executor was forced to join the local administrator of an estate as an indispensable real party in interest defendant, thus defeating diversity. This result was also supported by a claim to lack of federal probate jurisdiction.

It is not necessary for courts, however, to inject Rule 17(a) into these situations. They can be decided solely on the basis of Rule 17(b) capacity. For example, *Jones v. Goodman*¹⁴⁴ concluded without mention of the real party rule that a suit by an Iowa administrator in a Kansas federal court under the Kansas wrongful death statute could not be brought as framed by the plaintiff. Apparently suit could be brought only by a Kansas administrator, in which event there would be no diversity.¹⁴⁵

3. Transfer of Claims

a. Transferee as Plaintiff

As discussed previously,¹⁴⁶ assignees are "real parties in in-

141. *Id.* at 93-94, citing *Wallan v. Rankin*, 173 F.2d 488, 493 (9th Cir. 1949). The many cases cited in *Elliot v. Day* treat the issue as a capacity problem.

142. 217 F.2d 227 (8th Cir. 1954).

143. 329 F.2d 59 (10th Cir. 1964). *But see* *Du Roure v. Alvord*, 120 F. Supp. 166 (S.D.N.Y. 1954) (allowing suit by French heir without joinder of New York administrator); *Redditt v. Hale*, 184 F.2d 443 (8th Cir. 1950) (guardian-administrator could sue on claims not within exclusive probate jurisdiction).

144. 114 F. Supp. 110 (D. Kan. 1953).

145. The court later said this case does "not stand for the proposition that a foreign fiduciary cannot sue in Kansas, but rather that there must be assets of the estate or a valid cause of action in existence in Kansas before such fiduciary may maintain a suit." *McElroy v. Security Nat'l Bank*, 215 F. Supp. 775, 778 (D. Kan. 1963).

146. See notes 98-104 *supra* and accompanying text.

terest under the substantive law of most states." Thus it becomes a tempting device for the lawyer to create diversity by transferring the claim to a person of diverse citizenship.¹⁴⁷ The defendant may attempt to prove the transfer invalid or incomplete under state law, assert that the transferor is indispensable, and assert the transaction to be a sham or collusive in terms of a state policy against maintenance or under the federal policy of section 1359. Usually the real party in interest rule is also invoked. The judicial response is similar to those where diversity is not in issue: So long as the lawyer is careful in following the legal form of transferring complete legal control over the claim, the additional factor that creation of diversity motivated the transfer generally is treated as irrelevant. Thus the "improper or collusive" description of section 1359 is given no additional federal meaning. Once the court decides the transfer is valid under state law, then it somehow cannot be "collusive" within section 1359. These general observations, however, must be taken with the caveat that in those cases where diversity is at stake and section 1359 is invoked, the transfer of control will be subjected to much closer scrutiny than when the object of the transfer is not diversity. In such a case the real facts as to finance, control, and benefit may influence the judge toward a finding of invalidity under state law.

(1) With Object To Defeat Diversity

Assignment has been successfully used to prevent diversity in suits on life insurance policies, both when the assignment was made before initiation of the lawsuit¹⁴⁸ and after removal.¹⁴⁹ It has been stated that even if the assignment was sham or collusive, section 1359 provides no objection because there appears to be no clear federal policy against the defeat of diversity jurisdiction.¹⁵⁰

147. A device that can be related to assignment is the filing of a disclaimer of interest by one originally considered indispensable in order to save diversity. Annot., 31 A.L.R.2d 910 (1953).

148. *Krenzien v. United Servs. Life Ins. Co.*, 121 F. Supp. 243 (D. Kan. 1954).

149. *Leshem v. Continental Am. Life Ins. Co.*, 219 F. Supp. 504 (S.D. N.Y. 1963).

150. *Ibid.* The absence of a federal policy against defeat of diversity jurisdiction did not deter the pro tem judge in *Lisenby v. Patz*, 130 F. Supp. 670 (E.D.S.C. 1955). There the plaintiff, in advance of initiating his suit in state court, had assigned an undivided 1/100 interest in his personal injury claim to the Georgia brother-in-law of his counsel. The federal court noted that the conceded purpose of this assignment was to

(2) With Object To Create Diversity

*Black and White Taxicab and Transfer Co. v. Brown and Yellow Taxicab and Transfer Co.*¹⁵¹ brought notoriety to the device of reincorporation in another state to gain access to the federal court and consequently a change of law. Perhaps because of the death of *Tyson* and rise of *Erie*, the wholesale abuses of this device are rarely observed in the recent cases.¹⁵² Only one recent case indicates anything approaching reincorporation and total transfer of assets to create diversity, and the result there was inconclusive.¹⁵³ More often, disputes center around simple transfers of claims between existing sister corporations or between a corporation and its principal shareholder. *Bradbury v. Dennis*¹⁵⁴ is typical and presents a recent survey of the area. The court's reasoning represents a common sense approach to diversity jurisdiction:

Certainly diversity jurisdiction should not be made to depend on whether someone can pick a legal flaw in the transaction by which jurisdiction is conferred. It should not be made to depend upon or await adjudication of the legality of the transaction under state law. All this means that the state of the law is left in the grey zone where we found it. Certainly no rule of thumb is suggested or stated. But, after all, it is the words of a

prevent removal by the Georgia defendant and pursued an extremely technical analysis of South Carolina law to conclude that it prohibited the assignment of personal injury claims prior to judgment. The court finally called the transaction "collusive" under South Carolina law, basing the invalidity of the assignment on public policy, and refused to remand. This result appears atypical; generally diversity has been successfully defeated through assignments. See Field, *Proposals on Federal Diversity Jurisdiction*, 17 S.C.L. Rev. 669, 671 (1965); Comment, 17 S.C.L. Rev. 790 (1965).

151. 276 U.S. 518 (1928).

152. See Frank, *For Maintaining Diversity Jurisdiction*, 73 YALE L.J. 7, 10 (1963).

153. *Tower Realty Co. v. City of East Detroit*, 185 F.2d 590 (6th Cir. 1950). Even though the plaintiff conceded the transfer of the assets of a Michigan corporation to a Delaware corporation was for the sole purpose of creating diversity, the trial court upheld the bona fide nature of the transaction and sustained diversity; the appellate court reversed for further examination of the transaction on the facts.

154. 310 F.2d 73 (10th Cir. 1962), *cert. denied*, 372 U.S. 928 (1963). A Colorado partnership contracted to purchase Colorado realty from the Colorado defendant. The partnership assigned all assets to the newly formed Colorado corporation. Bradbury, who was not a resident of Colorado, eventually became sole shareholder and the corporation became insolvent. To create diversity the claim was assigned to Bradbury. The defendant objected to jurisdiction and the court responded that though it was clear Bradbury was not the real party in interest as sole shareholder before the assignment, he was now. Section 1359 was no objection to an assignment valid under state law.

federal statute we construe in the context of an historical purpose to deny diversity jurisdiction when it would operate to serve a purpose which is unsuited to the good order of federal court administration.¹⁵⁵

There are cases, however, where, as part of his obligation to show federal jurisdiction, the plaintiff had the burden of proving the validity of the transfer at a preliminary hearing.¹⁵⁶

When real estate is involved a quit claim deed may be employed to effectuate the transfer. It has been seen that even where federal diversity is not in issue, the court may strike down a "sham" transaction as a "simulation for the convenience of parties" by going to the facts and dismissing because the plaintiff is not the real party in interest.¹⁵⁷ But even when section 1359 is involved, a quit claim deed may be given effect if valid under state law, notwithstanding that the admitted purpose is to create diversity.¹⁵⁸

Similar maneuvering seems present in *Cobb v. National Lead Co.*,¹⁵⁹ where choice of venue was made by an assignment of an oil lease claim by the father who was a resident of the Western District to the plaintiff son who was a resident of the Eastern District of Arkansas. The defendant's objection that the father was indispensable was oddly met with an answer that the son, as assignee, was now the real party in interest under Rule

155. *Id.* at 76. See generally *Dunham v. Robertson*, 198 F.2d 316 (10th Cir. 1952) (assignment to trustee in bankruptcy); *Rosenberg v. Platt*, 229 F. Supp. 8 (E.D. Wis. 1964) (assignment of negotiable note); *Paper Makers Importing Co. v. City of Milwaukee*, 165 F. Supp. 491 (E.D. Wis. 1958) (buyer's assignment to seller who brought action).

156. See *Hartmann Coal Mining Co. v. Hoke*, 157 F. Supp. 313 (E.D. Pa. 1957), which involved the assignment of an arbitration award from a Pennsylvania corporation to a New Jersey corporation, both owned by the same people. Plaintiff would have to show assignment relinquished all rights in the award and was not made for the sole purpose of bringing the action in the federal court, relying on *Steinberg v. Toro*, 95 F. Supp. 791 (D.P.R. 1951), which placed a burden of proof on plaintiff president to show assignment from his corporation was bona fide.

157. *Archie v. Shell Oil Co.*, 110 F. Supp. 542 (E.D. La. 1953).

158. In *City of Eufaula v. Pappas*, 213 F. Supp. 749 (M.D. Ala. 1963), three days before state condemnation proceedings were instituted, the Alabama owners of property made quitclaim deeds for \$1 to a New Jersey relative who agreed to divide the award among the grantors. The New Jersey defendant was successful in removing the subsequent state action to the federal court. The court flatly rejected the contention of the plaintiff based on section 1359, holding motive irrelevant so long as the transaction is valid under state law. Reformers call this a "particular egregious example." ALL, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, 101 n.40 (Proposed Final Draft No. 1, 1965).

159. 215 F. Supp. 48 (E.D. Ark. 1963).

17. The court did not mention Rule 19. Apparently section 1359 was considered irrelevant because it deals only with jurisdiction and not venue.¹⁶⁰

An additional problem is presented by those cases in which separate claims have been aggregated to sustain the jurisdictional amount.¹⁶¹ One court drew a fine distinction by allowing an "assignee for collection" to sue on bearer bonds as the real party in interest on assignments valued over \$3,000, but dismissed the part of his claim based on assignments under \$3,000 on the theory that section 1359 did not allow aggregation of claims by this device.¹⁶²

b. Transferor or Other Party to Multiple-Party Transaction as Plaintiff

Creation or defeat of diversity, as well as other motivations already discussed,¹⁶³ may lead the lawyer to choose a "transferor" or other person connected with the transaction as plaintiff. Again, despite claims that the control, financing, and benefits of the litigation in fact are attributable to a nonparty, the objection that the plaintiff is not the real party in interest or that the arrangement is collusive under section 1359 usually fails.¹⁶⁴

In stockholder derivative suits based on diversity jurisdiction, where the stockholder's corporation has the same citizenship as the defendant, diversity has been successfully created

160. *Accord*, *Commerce Mfg. Co. v. Blue Jeans Corp.*, 146 F. Supp. 15 (E.D.N.C. 1956) (counterclaim on assignment from corporate officer; § 1359 irrelevant, but assignment genuine regardless of motive).

161. See, e.g., *Hamon v. Martin Bros. Container & Timber Prods. Corp.*, 227 F. Supp. 9 (D. Ore. 1964); *Liberty Mut. Ins. Co. v. Tel-Mor Garage Corp.*, 92 F. Supp. 445 (S.D.N.Y. 1950); cf. *Continental Bus Sys., Inc. v. Rohwer*, 172 F. Supp. 487 (D. Colo. 1959) (partial subrogee's claim below jurisdictional amount).

162. *Birkins v. Seaboard Serv.*, 96 F. Supp. 245 (D.N.J. 1950).

163. See text accompanying notes 105-08 *supra*.

164. In *Bradley v. St. Louis Terminal Warehouse Co.*, 189 F.2d 818 (8th Cir. 1951), a field warehouseman could sue to recover its security interest without joinder of bankrupt bailor, relying on the principle that a bailee in possession may sue for conversion of the goods as real party in interest without joinder of the bailor. *Valentine v. Powers*, 85 F. Supp. 732 (D. Neb. 1948), held a promoter could sue in his own name without joinder of his corporation. In *J. W. Terteling & Sons v. Central Neb. Pub. Power & Irrigation Dist.*, 8 F.R.D. 210 (D. Neb. 1948), subcontractors with the same citizenship as defendant owner were allowed to finance diversity suit in name of prime contractor. See *Matthies v. Seymour Mfg. Co.*, 23 F.R.D. 64, 83-84 (D. Conn. 1958), *rev'd on other grounds*, 270 F.2d 365, *cert. denied*, 361 U.S. 962 (1960). *Contra*, *U.S. Epperson Underwriting Co. v. Jessup*, 22 F.R.D. 336 (M.D. Ga. 1958); *Photometric Prods. Corp. v. Radtke*, 17 F.R.D. 103 (S.D.N.Y. 1954).

by making the corporation a defendant. Arguments by the real defendant that the stockholder's corporation should be realigned as a real party plaintiff have been overcome by a transparent exception consisting of an allegation in the stockholder's complaint that the corporation is under "control antagonistic" to its own interests. The court will then accept jurisdiction and pursue the merits of the case, part of which will determine whether the control is in fact antagonistic.¹⁶⁵ A similar strain on the language of Rule 17(a) is presented where it is employed to sustain diversity in suits related to oil leases involving multistate parties.¹⁶⁶

IV. EVALUATION OF COURT RESPONSES

A. INSURANCE SUBROGATION

In the recent insurance subrogation cases the primary conflict between the parties is whether the insurer will be exposed to the jury. Although the issue is illusively framed in terms of real party and joinder or nonjoinder, the rules of *res judicata*, collateral estoppel, and privity are sufficient to prevent any real threat of a second suit by the subrogated insurer who is not made a party.¹⁶⁷ Less frequently real party objections are made to obtain outright dismissal or to reduce the amount of damages. Special situations arise where the strategic positions of the parties are reversed, as where there is a dispute as to the coverage of the insurance. Complicating these problems, diversity factors may create a struggle over jurisdictional dismissal.

The federal courts reach varied results generally rationalized in terms of the technical legal doctrines which have arisen under the real party rule. Few of these decisions clarify the objectives of the parties or define what practically is at stake. Of those that do mention jury strategy, some summarily reject as improper the motive of the defendant to force the insurer before the jury.¹⁶⁸ Others impugn the integrity of the insurance com-

165. *Smith v. Sperling*, 354 U.S. 91 (1957). It is interesting to speculate on the effect of a state statute requiring a derivative action to be brought by the corporation as plaintiff. See *Levitan v. Stout*, 97 F. Supp. 105 (W.D. Ky. 1951) (dismissing).

166. *Britton v. Green*, 325 F.2d 377 (10th Cir. 1963). The court's excursion into Rule 17(a) was probably unnecessary, since it had already found that absent defendants were not indispensable, thus disposing of the attack on diversity jurisdiction.

167. See *Capo v. C-O Two Fire Equip. Co.*, 93 F. Supp. 4 (D.N.J. 1950).

168. *Celanese Corp. of America v. John Clark Indus., Inc.*, 214 F.2d 551 (5th Cir. 1954).

panies in using sham loan receipt settlement procedures to avoid exposure to the jury.¹⁶⁹ Further, few decisions go beyond a mechanical definition of what is included in the state substantive right and what is controlled by federal procedure. For example, the former real party provision of the New York Civil Practice Act allowing subrogated insurers using loan receipts to stay out of actions is supposedly procedural,¹⁷⁰ while similar provisions in workmen's compensation statutes have been construed as part of the substantive right under state law.¹⁷¹ Finally, except in cases of total subrogation, the general reaction is to treat the absent party as merely necessary when diversity jurisdiction is at stake, even though the result might have been different if no diversity jurisdiction were involved.¹⁷²

It is submitted that the federal judge ought to strike to the heart of the problem. Regardless of his decision as to joinder, he ought to inform the jury fully as to any subrogation interests in the plaintiff's claim.¹⁷³ This approach is premised on the belief that frank disclosure to the jury of the real interests involved is the only way to elicit good verdicts.¹⁷⁴ This full disclosure to the jury could be reconciled with *Erie R.R. v. Tompkins* as being part of the independent and uniform federal procedural policy of the seventh amendment.¹⁷⁵

Full disclosure to the jury may be taking place in the cases

169. See *Condor Inv. Co. v. Pacific Coca-Cola Bottling Co.*, 211 F. Supp. 671 (D. Ore. 1962).

170. *Northboro Apartments, Inc. v. Wheatland Tube Co.*, 198 F. Supp. 245 (E.D. Pa. 1961); *Rosenfeld v. Continental Bldg. Operating Co.*, 135 F. Supp. 465, 469 (W.D. Mo. 1955).

171. *E.g.*, *Race v. Hay*, 28 F.R.D. 354 (N.D. Ind. 1961).

172. *E.g.*, *Morelli v. Northwest Eng'r Corp.*, 30 F.R.D. 522 (E.D. Wis. 1962).

173. Justice, then Judge, Whittaker reached this solution by concluding that even though the plaintiff as real party could sue alone, since he was the "trustee of an express trust," the jury should be informed as to the beneficiary of the trust, namely the subrogated workmen's compensation carrier. *Jenkins v. Westinghouse Elec. Co.*, 18 F.R.D. 267 (W.D. Mo. 1955).

174. This preference is further supported by the trend in the tort field to absolute liability, risk allocation, comprehensive insurance coverage, direct actions against insurers, disclosure of defendant insurers, and corresponding changes in the mentality of the modern jury. See *Hughey v. Aetna Cas. & Sur. Co.*, 32 F.R.D. 340 (D. Del. 1963); Broeder, *The Pro and Con of Interjecting Plaintiff Insurance Companies in Jury Trial Cases: An Isolated Jury Project Case Study*, 6 NATURAL RESOURCES J. 269 (1966).

175. *Byrd v. Blue Ridge Rural Elec. Co-op.*, 356 U.S. 525 (1958); see Clark, *Federal Procedural Reform and States' Rights; To a More Perfect Union*, 40 TEXAS L. REV. 211, 220 (1961); cf. *Kiernan v. Van Schaik*, 347 F.2d 775 (3d Cir. 1965).

in federal court which require joinder of the insurer.¹⁷⁶ In the cases where joinder is not required because it would destroy diversity, the suggested practice would eliminate potential windfalls to the nonparty insurer caused by nondisclosure of the interest of the insurer. The approach would give rise to some forum shopping to the extent that state practice would not inform the jury of the insurer's interest, whereas the federal practice would. However, the plaintiff would not be tempted to forum shop in the federal court since it would presumably not be to his advantage, and the rule could be rationalized as one of the prices a plaintiff must pay for litigating in federal court. On the other hand, some unfair discrimination might be posited in removal cases since the defendant could force disclosure of the insurance company by removal to the federal court.

If a policy of disclosure is followed, the problem is reduced to one of joinder under Rule 19 where diversity is at stake. By treating the subrogee as a merely necessary party, the federal judge can retain jurisdiction, disclose its interests to the jury, and, after verdict, attempt to bar double liability and litigation by appropriate orders of notice and joinder in the judgment. Finally, it is submitted that even if the federal courts do not adopt the above approach, at least their future decisions should explicitly explore the practice under state law¹⁷⁷ as to disclosure of the insurer's interest regardless of joinder, rather than pursue endless state-federal precedents defining the real party in interest.

B. REPRESENTATIVE ACTIONS

The primary objective of questioning the status of the representative in wrongful death and guardian suits when diversity is not at issue is to obtain dismissal on the ground that the

176. On the other hand, the federal judge may require joinder but order a separate trial or not inform the jury that the insurer is a party and will participate in the judgment. See interview with Judge Ford of the Eastern District of Kentucky, Note, *Civil Procedure: Insurance Companies as Real Parties in Interest*, 46 Ky. L.J. 252, 259 n.25 (1958). Contrary to Judge Ford's practice, a proper reading of the following language in *Aetna* might require jury disclosure in all events: "The pleadings should be made to reveal and assert the actual interest of the plaintiff, and to indicate the interest of any others in the claim." 338 U.S. at 382. See *Wright v. Schebler Co.*, 37 F.R.D. 319 (S.D. Iowa 1965); *St. Paul Fire & Marine Ins. Co. v. Peoples Natural Gas Co.*, 166 F. Supp. 11 (W.D. Pa. 1958).

177. For a good analysis see *Maryland v. Baltimore Transit Co.*, 37 F.R.D. 34 (D. Md. 1965).

representative lacks authority to bring the suit under the state statutes. The federal decisions overwhelmingly recognize the representative as the real party and thus have properly eliminated Rule 17(a) as any real barrier, though the defendants, with the court's indulgence, often like to skirmish with it. The real problem left, then, is Rule 17(b) capacity under state law, which, if it requires local representatives, may turn into a "door-closing" problem in the federal court.

It is submitted that the federal decisions which treat Rule 17(a) as substantially irrelevant and look to Rule 17(b) represent the better approach.

In the many cases where the representative is hand-picked to create or destroy diversity, Rule 17(a) generally protects this choice, since section 1359 on collusive creation of diversity is treated as a nullity generally, and especially in this area. At this stage it seems best for judges to treat section 1359 as dormant, since at the very least there is now certainty as to what the courts will do. To interpret life back into it would lead to much confusion. The appropriate solution here is new legislation of the sort proposed by the American Law Institute, which would specifically fix the citizenship of the decedent or ward as controlling diversity.¹⁷⁸ This solution would have certainty and would remove many of the manipulation strains from Rule 17(a).

C. TRANSFERS OF INTERESTS

Where diversity is not at stake, the majority of federal court decisions give full effect to the historical purpose of the real party in interest rule—removal of real or imagined procedural barriers restricting the transferability of interests. Only when some remaining restrictive state policy can be found, such as that against maintenance or the assignability of personal injury tort claims, does the federal court consider dismissal appropriate.¹⁷⁹ It is submitted that the same results can be reached by analysis in terms of failure-to-state-a-claim without reliance on Rule 17(a), and that, in effect, the federal courts already have adopted this approach.

Where creation of diversity is an object of the transfer, federal courts are not inclined to call it "collusive" so long as state

178. Discussed in text accompanying note 187 *infra*.

179. *E.g.*, *Tabben v. Ohio Cas. Ins. Co.*, 250 F. Supp. 853 (E.D. Ky. 1966), where it is stated in dictum that even if claims for wrongful refusal to settle were assignable under state law, assignor's bankruptcy would preclude valid assignment.

law would uphold the transfer. Section 1359 is pretty much a dead letter here, as in the case of hand-picking personal representatives. If new legislation is not adopted, it is submitted that federal courts should breathe new life into section 1359 as applied to transfers to create diversity. It is apparent that the original purpose of section 1359 was primarily directed toward such transfers.

As for the defeat of diversity, it appears that legislation is necessary to overcome the lack of power implicit in the notion that there is no federal policy against defeat of diversity. Even without legislation, federal courts should be less shy about using their injunctive powers in aid of their jurisdiction to prevent subsequent transfers of interests which take the suit to state court.¹⁸⁰ Such a trend would be consistent with the legislative history of 28 U.S.C. § 2283 which supposedly overturned the *Toucey* decision.¹⁸¹

D. MULTIPLE PARTY TRANSACTIONS

From the broad spectrum of substantive law giving rise to multiple party relations, a great variety of motivations are found in the selection of a single plaintiff and the objection of the defendant to that selection. The most typical reaction of the courts here is to view Rule 17(a) as a highly technical objection and to treat both the plaintiff and the nonparty as real parties who may maintain the action either alone or together. This is especially so where the court senses an otherwise meritorious claim. The problems are thus converted into Rule 19 joinder and Rule 17(b) capacity issues, and are given their only significant analysis under these concepts. Some courts, however, read Rule 17(a) literally and decide a wide variety of issues only in terms of its express words. The reader is left to wonder whether the result would be affected if these judges gave Rule 17(a) a non-exclusive *de minimis* reading as do the majority of other judges.

VI. PROPOSED CHANGES IN THE LAW

Professor Atkinson in 1957 made a successful plea for the abolition of the New York real party in interest rule, criticizing it as a useless, confusing appendage whose function is better

180. See *Leshem v. Continental Am. Life Ins. Co.*, 219 F. Supp. 504 (S.D.N.Y. 1963).

181. *Amalgamated Clothing Workers v. Richman Bros. Co.*, 348 U.S. 511, 521 (1955) (dissenting opinion).

performed by other rules.¹⁸² His research, however, was directed at the New York real party rule and did not undertake to say what would happen if Rule 17(a) were similarly eliminated from the Federal Rules. Although the recent amendment to Rule 17(a) attempts some minor clarification, there appears to be no recent major reevaluation of Federal Rule 17(a) or proposals to change it. On the other hand, since real party objections are often linked to joinder and jurisdictional concepts, the recently accomplished overhaul of Rule 19 and the federal jurisdiction changes proposed by the American Law Institute, taken separately or together, will undercut 17(a) doctrine to a great extent.¹⁸³ What they will do to the results is another question.

Analysis of the proposed ALI amendments to 28 U.S.C.¹⁸⁴ must begin with an examination of the trend toward restriction of diversity jurisdiction shown in recent amendments to Title 28. The amendment of 28 U.S.C. § 1332(c), effective August 14, 1964, provides that an insurer, sued under a direct action statute,

shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.¹⁸⁵

This amendment directly reverses *Lumbermen's Mut. Cas. Co. v. Elbert*,¹⁸⁶ where the Supreme Court termed the insurer the "real party in interest defendant" and employed the insurer's citizenship alone as the test for diversity. The amendment, however, reverses the *Lumbermen's* rule only as to defendant insurers and clearly does not affect the choice of the plaintiff in insurance subrogation situations. However, the statute may mark

182. Atkinson, *The Real Party in Interest Rule: A Plea for Its Abolition*, 32 N.Y.U.L. Rev. 926 (1957). His suggestion was honored posthumously by § 1004 of the New York Civil Practice Law and Rules which became effective in 1963.

183. E.g., Professor Reed would apparently dismiss a federal diversity action where joinder of a necessary party would defeat diversity and a state forum is available in which he can be joined. Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 MICH. L. REV. 327, 523-27 (1957). See also HAZARD & LOUISELL, *CASES ON PLEADING & PROCEDURE* 700 (1962).

184. ALI, *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS*, (Tent. Draft No. 3 April 15, 1965); *id.* (Proposed Final Draft No. 1 April 19, 1965).

185. 28 U.S.C. § 1332(c) (1965).

186. 348 U.S. 48 (1948). The amendment has been criticized as an overreaction to the peculiar problems in the Louisiana federal courts and as an unwise restriction of diversity in Wisconsin, the other state with a full-fledged direct action statute. Weckstein, *The 1964 Diversity Amendment: Congressional Indirect Action Against State "Direct Action" Laws*, 1965 WIS. L. REV. 268.

the beginning of a legislative trend which will eventually result in the application of the same rules and policy to plaintiffs.

Under section 1301(b)(4) of the ALI's proposed revision of diversity and federal question jurisdiction, the citizenship of the decedent or the ward would control diversity.¹⁸⁷

Proposed section 1307(b) is the other section primarily dealing with situations under 17(a). It would retain the present substance of section 1359 but would add:

(b) Whenever an object of a sale, assignment, or other transfer of the whole or any part of any interest in a claim or any other property has been to enable or to prevent the invoking of federal jurisdiction under this chapter or chapter 158 of this title, jurisdiction of a civil action shall be determined as if such sale, assignment or other transfer had not occurred. The word "transfer" as used in this section includes the appointment of a trustee, receiver, or other fiduciary, or of any other person to hold or receive interests of any kind, whether made by private persons or by a court or any other official body.¹⁸⁸

These two proposals probably would reverse that line of cases, sustaining diversity, which refused to impute collusiveness, under the present section 1359, to appointments and transfers valid under state law. On the other hand, the two sections, by ignoring appointments or transfers made to defeat diversity, would create diversity where past decisions denied it. No one should quarrel with this limited objective of frustrating the manipulation of citizenship to create or defeat diversity.

A question that should be raised is whether proposed section 1301(b)(4) eliminates more diversity than it ought. For example, where the decedent's beneficiaries are all out-of-state citizens and in fact are prosecuting the action, should diversity be denied in a wrongful death action merely because the decedent was a citizen of the forum jurisdiction? The same question may be raised in cases in which the executor or administrator is an out-of-state relative in non-wrongful death actions brought by or against the estate. The provisions of the section as applied to minors and incompetents would have the least objection, since the ward's interest is the one most directly at stake.

Another question that may be raised is whether federal legislation is the appropriate remedy to correct the abuses perceived in selection of nonresident fiduciaries. The new provision is supported by the study of diversity creation in Philadelphia.¹⁸⁹

187. ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 9 (Proposed Final Draft No. 1 April 19, 1965).

188. *Id.* at 23.

189. *Id.* at 62, 175.

It appears clear, however, that the states may constitutionally "close the door" to the federal courts in such actions by requiring appointment of a resident fiduciary.¹⁹⁰ If part of the reform thesis is that collusive extension of diversity jurisdiction is an invasion of state judicial power, the states, as the most interested parties, perhaps should be the ones to remedy it on an individual basis.

Apart from representative suits treated in section 1301(b) (4), the proposed section 1307(b) completes a total coverage of the remaining cases where Rule 17(a) can be manipulated. Section 1307(b) seems to be a fair compromise between the repealed assignee clause, which arbitrarily looked through many bona fide transfers, and current section 1359, which catches manipulation like a sieve. In compromise, however, the new section sets up a difficult factual inquiry into the "objects" of any transaction which creates or defeats diversity.¹⁹¹ Although this test appears simple enough, it may be difficult to administer. Innocent claims to diversity jurisdiction may be plagued by arguments directed to this provision based solely on the fact that the chain of title is traceable to a nondiverse citizen.

The word "transfer" appearing in the proposal will also create fruitful ground for argument. Limitations on imagination are probably the only boundaries here; witness the simple word "transfer" in defining preferences under section 60(a) of the Bankruptcy Act. Old learning and results under the assignee clause will be resurrected, such as the distinctions between ordinary assignments and assignments by operation of law. To the extent that "transfer" is broader than "assignments," the new section would open to challenge types of transactions not vulnerable under the repealed assignee clause. Insurance subrogation situations involving loan receipts, while often concerned with the object to avoid the jury, would be left in limbo by this provision.

The last sentence of proposed section 1307(b) will render vulnerable any diversity suit brought by a fiduciary on a cause of action arising before his appointment. As to causes arising

190. *Holt v. Middlebrook*, 214 F.2d 187 (4th Cir. 1954); *Barnes v. Union Pac. R.R.*, 139 F. Supp. 198 (D. Idaho 1956); *Jones v. Goodman*, 114 F. Supp. 110 (D. Kan. 1953); cf. *Cooper v. American Airlines, Inc.*, 149 F.2d 355 (2d Cir. 1945); *Goranson v. Capital Airlines, Inc.*, 221 F. Supp. 820 (E.D. Va. 1963); *Elliot v. Day*, 218 F. Supp. 90 (D. Ore. 1962); *Citizens Fid. Bank & Trust Co. v. Baese*, 136 F. Supp. 683 (M.D. Tenn. 1955).

191. ALI, *op. cit. supra* note 187, at 23.

after his appointment, he will of course be less vulnerable but subject to the argument that he was appointed in anticipation of the causes arising. Further, this last sentence does not designate whose citizenship controls when that of the appointed fiduciary is ignored. The broad sweep of the term "fiduciary" could bring into question many ordinary business arrangements and interstate fiduciary transactions. However, despite its deficiencies, the section could have a good effect by limiting egregious examples of manipulation. The courts, however, would have to temper its use with good sense to reduce harrassing, delaying arguments at the outset of every diversity suit. It would also be hoped that appellate courts would vest a great amount of discretion in the trial judges in deciding under the section, at least when the trial judge upholds diversity, so that cases that have gone to judgment would not be needlessly upset on appeal by finding of jurisdictional fault.

Other proposed changes will affect real party problems more remotely, but, it is believed, will be more universally welcomed than those discussed above. It may be recalled that, the majority view notwithstanding, a real party objection can be likened to a nonwaivable, indispensable party objection.¹⁹² Proposed section 1308(a) and the accompanying proposed change to Rule 12(h)¹⁹³ would provide for waiver of objections to subject matter jurisdiction except where relevant facts could not with reasonable diligence have been discovered earlier by a party raising the issue, or where collusion is established.¹⁹⁴ However, no change is proposed in Rule 12(h) (2) which allows "a defense of a failure to join a party indispensable under Rule 19" to be raised at trial. Thus by providing for waiver of jurisdictional challenge, but retaining nonwaiver of indispensable party objections, the proposal raises a possible loophole in its application where the defendant at trial moves to join a real, indispensable party whose presence would defeat diversity jurisdiction.

Real party objections are sometimes raised in the hope that a change in the parties may be equated to a recommencement of the action for the purpose of applying the statute of limitations.¹⁹⁵ The July 1, 1966, amendment to Rule 17(a) explicitly precludes this strategy by providing for relation back of the amendment to change parties. However, where the change in

192. See text accompanying notes 41-44 *supra*.

193. ALI, *op. cit. supra* note 187, at 29-30.

194. *Id.* at 24-25, 106-14.

195. See text accompanying note 40 *supra*.

parties would destroy diversity and thus result in dismissal, the plaintiff under present law could be barred by the statute of limitations from bringing his action in state court. Proposed section 1308(b) would presumably correct this situation by providing that the state statute of limitations would be tolled by commencement of an action in federal court and for at least 30 days following dismissal for lack of diversity jurisdiction.¹⁹⁶ Some problems could arise under this proposal where federal dismissal is based on a ground requiring that the action be recommenced in the name of a different party. The toll of the limitations statute applies to "a new action on the same claim." Defendants will no doubt argue that a change in parties makes the state court action a "different claim." But interpretation of the spirit of the new section and the overall purposes of statutes of limitation should overcome this legalism.

CONCLUSION

Four categories of problems are identifiable in the last fifteen years of federal cases involving Federal Rule 17(a): (1) Cases involving disputes over the mechanics of objection, waiver, and timing as to change of parties. This category is not exclusive and covers all the cases and other categories; (2) Cases where the basis of jurisdiction is diversity, but a change in the parties would not affect it. In such cases state substantive law under *Erie* is the main question; (3) Cases where the claimed basis of jurisdiction is diversity and a change in the parties would affect it. In these cases, though *Erie* controls, federal law has the independent task of choosing the relevant citizenship and of piercing collusive arrangements otherwise protected by state law; (4) Cases where the basis of jurisdiction is a federal question, or federal substantive law is properly applicable. In these cases *Erie* is not applicable and federal common law determines who has the substantive right.

As for category (1), the recent 1966 amendment to Rule 17(a) fairly well restates current practice. That is, valid real party objections do not result in dismissal, but rather in free amendment and substitution. As applied to category (2), the main part of Rule 17(a) remains unnecessary and misleading. Since in theory the holder of the state substantive right is the proper person to sue, his status can be tested simply by state substantive law principles. As for category (3), Rule 17(a) also

196. None of the constitutional objections to the validity of this proposal are substantial. ALI, *op. cit. supra* note 187, at 106-19.

appears unnecessary. Relevant citizenship is mechanically made to turn on the same rules and tests used in category (2) under the standard test that the citizenship of the real party in interest controls for diversity purposes. Collusiveness has developed no real independent federal standards. As for cases in category (4), which remain to be examined in detail in a later article, the hypothesis still appears to be valid that if a real party rule is unnecessary in a state system, as Professor Atkinson has shown, the rule is equally unnecessary for that part of a federal system which draws on federal common and statutory law to determine who has the substantive right to be enforced.

Rule 17(a) is a barnacle on the federal practice ship. It ought to be scraped away. If it were, some fear that lawyers would point to its absence and argue that the ship is somehow different without it. But Rules 19, 17(b) and substantive rules as to stating a claim for relief are adequate without interjecting the meaningless, logically inconsistent commands of the real party in interest rule. The solution is to abolish it with the explanation that it is a fascinating historical growth but it is no longer necessary.

Assuming total abandonment cannot be accomplished, in the alternative Professor Atkinson's next suggestion should be followed, as it was in New York. That is, abolish the first sentence, or main part of the rule, and taking the list of people who may bring suit without joining others, relocate it as part of Rule 19 under the flexible proviso "unless the court otherwise direct." Failing this suggestion, it would be helpful to add to Rule 17(a) that the rule is subject to the provisions of Rule 17(b) and Rule 19. And in any event, the word "the" in the first line of Rule 17(a) should be changed to "a" in order to eliminate arguments and decisions based on the assumption that there is necessarily only one real party in interest on any given side in any situation.

Aside from changing the rule itself, it would be good to develop a uniform federal procedural policy of full disclosure of all interests to the jury and to adopt specific statutory provisions as to determinative citizenship in diversity situations. Jury disclosure and diversity are the real problems. Rule 17(a) was never designed to solve them and now merely confuses their solution.