Chapter 18

Parties

*by Samuel Adams and Ryan M. Tosi**

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I. INTRODUCTION

§ 18:1 Scope

This chapter discusses the rules, statutes, and procedures governing which individuals or entities may bring suit in their own name; the capacity of an individual or entity to sue or be sued; the right of a disinterested stakeholder to resolve, in one proceeding, multiple, competing claims to a single liability; the ability of a nonparty to intervene and participate in pending litigation; and the substitution of parties in the event of death, incompetency or the transfer of interest occurring during the course of pending litigation. Of primary concern are Rule 17 of the Federal Rules of Civil Procedure, establishing the real party in interest[1] and capacity[2] requirements; Rule 22 and the Federal Interpleader Act, 28 U.S.C.A. § 1335, establishing the requirements for interpleader;[3] Rule 24, establishing the requirements for intervention;[4] and Rule 25, establishing the requirements for substitution of parties.[5] Similar to the rules of joinder, which are addressed in Chapter 13 "Joinder, Severance, and Consolidation" (§§ 13:1 et seq.), the purpose of the rules, statutes, and procedures discussed in this chapter is to avoid multiplicity of suits by facilitating the resolution of all pending controversies among interested parties in one proceeding. As such, the rules, statutes, and procedures discussed in this chapter are of critical importance not only to the individual parties interested in the resolution of a particular lawsuit but also to the efficient administration of the entire litigation process.

II. PRACTICAL CONSIDERATIONS

§ 18:2 Real party in interest

Rule 17(a) of the Federal Rules of Civil Procedure requires that every action be brought in the name of the party possessing the

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[Section 18:1]

[1]See §§ 18:7 to 18:23.

[2]See §§ 18:24 to 18:33.

[3]See §§ 18:34 to 18:45.

[4]See §§ 18:46 to 18:61.

[5]See §§ 18:62 to 18:76.

substantive right to relief.[1] Rule 17(a) expressly authorizes executors, administrators, and other named representatives to sue in their own name without joinder of the party for whose benefit the action is brought. The rule serves as an important, albeit perhaps unnecessary, reminder that no party can bring suit unless the suit is brought in the name of the person possessing the right to relief under the substantive law at issue. Strategically, this means that a defendant may insist upon having an action maintained by a plaintiff against which it can assert the res judicata principles of finality of judgment when the litigation is carried through to a judgment on the merits.[2]

In practice, Fed. R. Civ. P. 17(a) is most commonly invoked in the context of assignments and subrogation. It is settled that the assignee of a right of action is a real party in interest, and that an assignor who has assigned its entire claim is not. Where, however, there is a partial assignment, both the assignor and assignee are real parties in interest. In such a situation, a defendant is faced with the threat of a split judgment and should move to compel the joinder of both the assignor and assignee as plaintiffs.

A similar situation is presented when an insurer pays its insured's loss and thus is subrogated to the insured's right against some third party. Where the insurer has paid the entire loss, it is the real party in interest and must sue in its own name. The insured, which no longer has any interest in any potential recovery, cannot bring suit in its own name. If the insurer has paid only part of the loss, both the insured and insurer remain real parties in interest and a defendant faced with such a scenario should move to join both parties as plaintiffs in order to avoid multiplicity of suits.

Procedurally, a defendant seeking to challenge the plaintiff's standing as a real party in interest should file a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) (lack of subject matter jurisdiction), Fed. R. Civ. P. 12(b)(6) (failure to state a claim), or Fed. R. Civ. P. 12(b)(7) (failure to name an indispensable party). While such a motion may be filed during trial or, in the case of a motion asserting lack of subject matter jurisdiction, on appeal, it is advisable to file the motion as early in the litigation as possible to avoid any potential waiver of the defense. A plaintiff faced with such a motion must show that it possesses the legal right under the applicable law or that the defendant waived its objection to the plaintiff's real party in interest status. Since one of the

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[Section 18:2]

[1]See § 18:7.

[2]See Chapter 16 "Claim and Issue Preclusion" (§§ 16:1 et seq.).

purposes of Fed. R. Civ. P. 17 is to avoid the forfeiture of meritorious claims, courts are particularly wary of allowing dismissal where the defendant's delay in raising the real party in interest challenge would prejudice the real party in interest, *e.g.*, where, as a result of a mistake as to real party status, the applicable limitations period has expired. Moreover, the plaintiff is entitled to a "reasonable time" within which to cure any defect by joining, substituting, or obtaining ratification from the real party in interest before the action may be dismissed.

§ 18:3 Capacity to sue and be sued

Rule 17(b) sets forth the procedure to determine the legal capacity of individuals and business entities, such as partnerships and corporations, to sue and be sued.[1] An important procedural distinction exists between the concept of a "real party in interest" under Fed. R. Civ. P.17(a)[2] and the "capacity to sue and be sued," which is governed by Fed. R. Civ. P. 17(b). While a party may be the real party in interest, it may nevertheless lack capacity to sue, as for example when a party becomes mentally incompetent.[3] The converse is also true. A party may possess the capacity to sue, but it may not be the real party in interest, as for example when a corporation has assigned all of its interest in a claim to another party. The distinction is significant because Fed. R. Civ. P. 9(a)(2) generally requires a specific denial if a defendant seeks to challenge a plaintiff's capacity to sue. A plaintiff, by contrast, generally has the burden of establishing its substantive right to recovery when its real party in interest status is challenged.

Where an individual is deemed to lack the capacity to sue or be sued due to infancy or incompetency, Fed. R. Civ. P. 17(c)(1) provides that a representative, such as a guardian, conservator, or other fiduciary, may sue and defend on the individual's behalf.[4] Fed. R. Civ. P. 17(c)(2) also permits a "next friend" to sue on behalf of an infant or incompetent person without being appointed by the court. In practice, such "next friends" are typically parents or relatives, who will not usually have interests adverse to those of the infant or incompetent person and who can pursue the action without the necessity of the appointment of a guardian ad litem. Nevertheless, when a case pursued by a next friend is settled, it is advisable for the defendant to request that the court approve the settlement. Although court approval is not required

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[Section 18:3]

[1]See §§ 18:24 to 18:33.

[2]See §§ 18:2 and 18:7 to 18:23.

[3]See § 18:24.

[4]See § 18:26.

by Rule 17, it may help deter any later challenge to the settlement claiming that it was not in the best interests of the infant or incompetent person. In those situations, where parents or relatives have interests that may conflict with those of the infant or incompetent person, the opposing party is well advised to seek appointment of a guardian ad litem by the court.

When defending an infant or incompetent person who does not have a representative, the appointment of a guardian ad litem should be sought as soon as possible after service of the complaint and summons. In contrast to actions brought by a "next friend," prior court approval generally is required before a "next friend" may defend an action on behalf of an infant or incompetent person. In all instances, court approval of a proposed settlement with a minor or incompetent person is advisable to avoid later challenge.

§ 18:4 Interpleader

Interpleader allows a party facing conflicting claims to the same liability to avoid satisfying the wrong claim, and incurring multiple adverse judgments in different courts, by providing a mechanism by which all of the claims may be resolved in a single proceeding.[1] In practice, interpleader commonly arises when two or more persons have adverse interests in the proceeds of a life insurance policy. Rather than paying any one claimant, the insurance company may require all the claimants to litigate the merits of their claims in a single proceeding. Interpleader also arises where, for instance, a defendant is exposed to double liability on claims asserted by a plaintiff and a codefendant. Under those circumstances, interpleader allows the defendant to interplead the plaintiff by counterclaim and the codefendant by crossclaim, thereby avoiding the threat of double liability and affording the defendant important strategic options. For instance, a secondary beneficiary may bring suit against an insurer and the principal beneficiary, alleging that the insurer's payment to the principal beneficiary was or would be improper, *e.g.*, because the principal beneficiary was suspected of murdering the insured. The insurer may defend by bringing claims for interpleader against the multiple claimants to the fund.

Where the party seeking interpleader is truly an innocent stakeholder with respect to the disputed fund (such as where the interpleader acknowledges that the fund is due and owing to at least one of the claimants), it is entitled to be discharged of full responsibility regarding the disputed fund once those funds are

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[Section 18:4]

[1]See §§ 18:34 to 18:45.

paid into the court's registry.[2] In addition, the court, in its discretion, may award an innocent stakeholder its reasonable attorney's fees and costs incurred in connection with the interpleader action. Increasingly, however, courts have declined to award attorney's fees and costs to insurance companies that are in the business of distributing proceeds from insurance policies. In the absence of such an award, there may be less of an impetus for insurance companies to initiate an interpleader action in smaller cases (smaller, that is, in terms of the number of potential claimants and relative value of the claims) since, as a practical matter, it may be more cost efficient for the insurer to simply wait to defend an action brought by one of the claimants. Where, however, there is a large class of potential claimants seeking recovery from a single fund (*e.g.*, the proceeds of an insurance policy), as for instance in the product liability or environmental tort arena, interpleader continues to provide an orderly and efficient mechanism for resolving competing claims in one proceeding.

§ 18:5 Intervention

Intervention is the mechanism by which persons claiming an interest in a pending action, who were not originally included in the action, may seek to participate in the action.[1] Fed. R. Civ. P. 24(a) provides for intervention as of right.[2] To intervene as of right, the person must qualify as a real party in interest within the meaning of Fed. R. Civ. P. 17,[3] or as a person required for just adjudication within the meaning of Fed. R. Civ. P. 19.[4] Fed. R. Civ. P. 24(b) also provides for permissive intervention where a person otherwise eligible for permissive joinder under Fed. R. Civ. P. 20(a) may seek to join in an action after it has commenced.[5]

Prior to moving for intervention, careful consideration must be given to determining whether the movant's interest in the pending litigation is compelling enough to risk being bound by an adverse judgment. Once a motion to intervene is allowed, the intervenor generally has the right to fully participate in the litigation in the same manner and to the same extent as the original parties. As a participant in the litigation, the intervenor may be bound by the res judicata effect of a potentially adverse judgment

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[2]See §§ 18:38, 18:40.

[Section 18:5]

[1]See §§ 18:46 to 18:61.

[2]See § 18:47.

[3]See § 18:7.

[4]See Chapter 13 "Joinder, Severance, and Consolidation" (§§ 13:1 et seq.) (discussing Fed. R. Civ. P. 19).

[5]See § 18:52.

that it otherwise might have avoided by remaining on the sidelines.

Further, as a practical matter, careful consideration must also be given to the posture of the pending litigation, the goals and interests of the existing parties to the litigation and their counsel, and the likelihood of bringing successful claims independent of the pending litigation. Indeed, while the cost of a second action could be higher than intervention in the pending litigation, the question is, will that cost outweigh any possible loss of control that might affect your party's interest in the pending litigation?

The intervenor also generally should be prepared to assume an active role in the conduct of the litigation by staking out its position on the issues that are of interest to it. If the risk of being bound by res judicata or collateral estoppel is likely or even a possibility, a very serious analysis should be made of the party with which you would be aligned and of its counsel's competency.

An application to intervene should be timely made and accompanied by a copy of the proposed pleading in intervention (*e.g.*, complaint or answer). When a motion to intervene is filed long after the action was commenced, it may be opposed as being untimely and the party seeking intervention should be prepared to demonstrate that no unreasonable prejudice or delay will result from allowance of intervention.

§ 18:6 Substitution of parties

Substitution most often occurs where a party (either a plaintiff or a defendant) dies after commencement of an action and the action survives in favor of (or against) a decedent's estate. In these instances, Fed. R. Civ. P. 25(a)(1) controls the process by which the real party in interest is substituted for the decedent.[1] Although the rule does not set any time limit as to when a suggestion of death must be made, it allows any party, not just the decedent's representative, to enter a suggestion of death on the record. Once the suggestion of death is properly entered, a motion to substitute the decedent's representative must be made within 90 days or the cause of action will be dismissed as to the deceased party.[2] The 90-day time limit may present difficulties to the decedent's representative because appointment procedures for qualified representatives often take substantially longer to complete. However, the decedent's representative may obtain additional time for substitution by filing a motion pursuant to Fed.

[Section 18:6]

[1]See §§ 18:62 to 18:76.

[2]See §§ 18:64, 18:66.

R. Civ. P. 6(b).

Even assuming that additional time remains, substitution may be denied where it would be otherwise unfair or inequitable to allow substitution. Substitution may be denied, for example, where the settlement and distribution of the decedent's estate was near completion at the time that the motion for substitution was made and substitution would postpone final settlement and distribution or require the process to start anew. Ultimately, the safest course for a decedent's representative is not to wait for a suggestion of death to be filed but to move for substitution as soon as the fact of death becomes known.

III. REAL PARTY IN INTEREST

§ 18:7 Requirements of Fed. R. Civ. P. 17(a)

Fed. R. Civ. P. 17(a) provides that "[a]n action must be prosecuted in the name of the real party in interest." The Rule does not purport to identify the "real party in interest" in any particular case; instead, that issue is resolved by reference to substantive statutory and common law. The provisions of Fed. R. Civ. P. 17(a) are, therefore, purely procedural. Unlike capacity to sue or be sued, which is discussed at Sections 18:24 to 18:33, the requirement of bringing suit in the name of the real party in interest applies only to plaintiffs, not to defendants.[1]

§ 18:8 Protection from multiple suits

The purpose of Fed. R. Civ. P. 17 is to ensure that the person who brings a claim is entitled to enforce the claim.[1] Thus, the rule protects a defendant which is subject to liability in a pending action from being called upon to defend a subsequent suit ini-

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[Section 18:7]

[1]See Rawoof v. Texor Petroleum Co., Inc., 521 F.3d 750, 756 (7th Cir. 2008) (Fed. R. Civ. P. 17(a) is "concerned only with whether an action can be maintained in the plaintiff's name"); Salazar v. Allstate Texas Lloyd's, Inc., 455 F.3d 571, 573, 65 Fed. R. Serv. 3d 991 (5th Cir. 2006) ("[b]y its terms, . . . rule 17(a) applies only to plaintiffs").

[Section 18:8]

[1]See Cortlandt Street Recovery Corp. v. Hellas Telecommunications, S.à.r.l, 790 F.3d 411, 420, 91 Fed. R. Serv. 3d 1657 (2d Cir. 2015) ("The real party in interest principle embodied in Rule 17 ensures that only 'a person who possesses the right to enforce [a] claim and who has a significant interest in the litigation' can bring the claim." (quoting Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt International B.V. v. Schreiber, 407 F.3d 34, 48 n.7 (2d Cir. 2005), certified question accepted, 5 N.Y.3d 730, 799 N.Y.S.2d 769, 832 N.E.2d 1185 (2005), certified question withdrawn, 421 F.3d 124 (2d Cir. 2005))). See also §§ 18:9 to 18:12.

tiated by the true claimant.[2] Accordingly, the rule ensures that a defendant will be called upon to defend only once and that any action taken to judgment will have its proper effect as res judicata.[3]

§ 18:9 Party must possess legal right or interest

Courts uniformly identify the real party in interest as the person holding the substantive right or interest that is sought to be enforced in the subject litigation.[1] Thus, to determine the plaintiff's status as the real party in interest, courts will review the substantive state or federal statutory or common law creating the right or interest being sued upon to ascertain whether the plaintiff possesses a substantive right to relief.[2] A party not possessing a right or interest under the substantive law is not

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[2]See RK Co. v. See, 622 F.3d 846, 850, 77 Fed. R. Serv. 3d 747 (7th Cir. 2010) ("the purpose of this procedural rule is to protect the defendant against a subsequent action by the party actually entitled to recover"); F.D.I.C. v. Graham, 2010 WL 5157108, at *3 (S.D. Ohio 2010) ("Rule 17(a) is designed 'to protect individuals from harassment of suits by persons who do not have the power to make final and binding decisions concerning prosecution, compromise and settlement' ").

[3]See In re Signal Intern., LLC, 579 F.3d 478, 487, 2009 A.M.C. 2177 (5th Cir. 2009) ("The purpose of this requirement 'is to assure a defendant that a judgment will be final and that res judicata will protect it from having to twice defend an action, once against an ultimate beneficiary of a right and then against the actual holder of the substantive right.' " (quoting Farrell Const. Co. v. Jefferson Parish, La., 896 F.2d 136, 142, 16 Fed. R. Serv. 3d 545 (5th Cir. 1990))); Suda v. Weiler Corp., 250 F.R.D. 437, 440 (D.N.D. 2008) (Rule 17(a) "serves 'to protect the defendant against a subsequent action by the party actually entitled to relief, and to ensure that the judgment will have a proper res judicata effect' " (quoting Intown Properties Management, Inc. v. Wheaton Van Lines, Inc., 271 F.3d 164, 170, 51 Fed. R. Serv. 3d 1302 (4th Cir. 2001))).

[Section 18:9]

[1]U.S. ex rel. Eisenstein v. City of New York, New York, 556 U.S. 928, 934-35, 129 S. Ct. 2230, 173 L. Ed. 2d 1255, 73 Fed. R. Serv. 3d 1132 (2009) ("[t]he phrase, 'real party in interest,' is a term of art utilized in federal law to refer to an actor with a substantive right whose interests may be represented in litigation by another"); Greer v. O'Dell, 305 F.3d 1297, 1303, Bankr. L. Rep. (CCH) P 78723, 53 Fed. R. Serv. 3d 1285 (11th Cir. 2002) ("real party interest principle is a means to identify the person who possesses the rights sought to be enforced").

[2]See Pompa v. American Family Mut. Ins. Co., 506 F. Supp. 2d 412, 415 (D. Colo. 2007), judgment aff'd, 520 F.3d 1139 (10th Cir. 2008) (where parties seek to enforce a substantive right arising under state law, real party in interest is determined by state law); Torske v. Bunn-O-Matic Corp., 216 F.R.D. 475, 478, Prod. Liab. Rep. (CCH) P 16671 (D.N.D. 2003) (as a procedural matter, federal rules require suit in name of party with substantive right; however, when action arises under state law, real party in interest is determined by state substantive law); see also Federal Treasury Enterprise Sojuzplodoimport v. SPI Spirits Ltd., 726 F.3d 62, 83, 107 U.S.P.Q.2d 1839 (2d Cir. 2013), cert. denied,

considered the real party in interest with respect to that right and may not enforce it.[3]

The real party in interest, however, need not be the party who ultimately will benefit from the recovery.[4] For instance, a shareholder may be the real party in interest in a shareholder derivative action, although any recovery will inure to the corporation's benefit.[5]

Similarly, an executor or administrator may be the real party in interest to maintain a wrongful death action under the applicable state law, even though any recovery would pass through the decedent's estate and go directly to the statutory beneficiaries.[6] Indeed, the second sentence of Fed. R. Civ. P. 17(a)(1), including subparagraphs (A) through (G), expressly envisions just this situation by providing that "an executor; an administrator; a guardian; a bailee; a trustee of an express trust; a party with whom or in whose name a contract has been made for another's benefit; and a party authorized by statute" may sue in that person's own name without joining the party for whose

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134 S. Ct. 1291, 188 L. Ed. 2d 359 (2014) (examining substantive federal law to determine real party in interest action brought pursuant to Latham Act).

[3]Old Ben Coal Co. v. Office of Workers' Compensation Programs, 476 F.3d 418, 419 (7th Cir. 2007); Walker Mfg., Inc. v. Hoffmann, Inc., 220 F. Supp. 2d 1024, 1030 (N.D. Iowa 2002) (citing Farrell Const. Co. v. Jefferson Parish, La., 896 F.2d 136, 140, 16 Fed. R. Serv. 3d 545 (5th Cir. 1990)).

[4]See U.S. ex rel. Spicer v. Westbrook, 751 F.3d 354, 362, 59 Bankr. Ct. Dec. (CRR) 128, 71 Collier Bankr. Cas. 2d (MB) 840 (5th Cir. 2014) (" 'The real party in interest is the person holding the substantive right sought to be enforced, and not necessarily the person who will ultimately benefit from the recovery.' " (quoting Wieburg v. GTE Southwest Inc., 272 F.3d 302, 306, 38 Bankr. Ct. Dec. (CRR) 196, 87 Fair Empl. Prac. Cas. (BNA) 445, 81 Empl. Prac. Dec. (CCH) P 40839, 51 Fed. R. Serv. 3d 405 (5th Cir. 2001))).

[5]See, e.g., Ross v. Bernhard, 396 U.S. 531, 538, 90 S. Ct. 733, 24 L. Ed. 2d 729, Fed. Sec. L. Rep. (CCH) P 92566, 13 Fed. R. Serv. 2d 1042 (1970) (corporation is the real party in interest in a shareholder derivative action). See generally Chapter 20 "Derivative Actions by Stockholders" (§§ 20:1 et seq.) (discussing Fed. R. Civ. P. 23.1 and derivative actions).

[6]See, e.g., Guinn v. Great West Cas. Co., 2010 WL 4363784, at *2-3 (W.D. Okla. 2010) (administrator is the "real party in interest who may assert claims and seek damages on behalf of the individual survivors without naming those survivors as additional plaintiffs"); In re Medvedev, 2010 WL 537637, at *5 (W.D. Wash. 2010) (administrator of decedent's estate is real party in interest in wrongful death action brought for benefit of "the spouse, children or other statutory beneficiar[ies]"); In re Bryant, 260 B.R. 839, 845 (Bankr. W.D. Ky. 2001) (an executor or administrator may bring a nondischargeability action "without joining the party to whose benefit the action is brought. Thus, a personal representative is the real party in interest when it is statutorily authorized to bring suit on behalf of a decedent.").

benefit the action is brought.[7]

In the bankruptcy context, the bankruptcy trustee becomes the real party in interest as to those rights or interests falling within the bankruptcy estate.[8] Under the Bankruptcy Code, the bankruptcy trustee possesses all substantive rights in connection with the bankruptcy estate, not the debtor whose assets became property of the estate upon filing of a bankruptcy action.[9] Thus, once a cause of action becomes the property of the bankruptcy estate, the bankruptcy trustee assumes the status of the real party in interest in whose name the action must be brought.[10]

Ultimately, there may be multiple real parties in interest for a given claim, and if the plaintiff is a real party in interest under the substantive law, Fed. R. Civ. P. 17(a) does not require the addition of other parties also fitting that description.[11] For example, in the insurance context, if a subrogor/assignor only partially as-

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[7]Fed. R. Civ. P. 17(a)(1).

[8]U.S. ex rel. Spicer v. Westbrook, 751 F.3d 354, 362, 59 Bankr. Ct. Dec. (CRR) 128, 71 Collier Bankr. Cas. 2d (MB) 840 (5th Cir. 2014); In re Banks, 223 Fed. Appx. 149, 151 (3d Cir. 2007); Parker v. Wendy's Intern., Inc., 365 F.3d 1268, 1272, 51 Collier Bankr. Cas. 2d (MB) 1742, 105 Fair Empl. Prac. Cas. (BNA) 716 (11th Cir. 2004); Marshall v. Honeywell Technology Solutions, Inc., 675 F. Supp. 2d 22, 25 (D.D.C. 2009).

[9]See 11 U.S.C.A. § 541.

[10]See Marshall v. Honeywell Technology Solutions, Inc., 675 F. Supp. 2d 22, 25 (D.D.C. 2009) ("Once a cause of action becomes the property of the bankruptcy estate, the bankruptcy trustee assumes the status of the real party in interest in whose name Federal Rule of Civil Procedure 17 requires an action to be brought, and the debtor no longer has standing to pursue that cause of action."); see, e.g., Macauley v. Estate of Nicholas, 7 F. Supp. 3d 468, 477 (E.D. Pa. 2014) ("The Chapter 7 trustee is the only person that has the authority to bring these claims, and he or she must be substituted as the real party in interest under Federal Rule of Civil Procedure 17 if this case is to continue."); Runaj v. Wells Fargo Bank, 667 F. Supp. 2d 1199, 1207 (S.D. Cal. 2009) (finding debtor was not a real party in interest and ordering debtor to: (1) substitute or join the bankruptcy trustee; (2) show the trustee's ratification of this action, pursuant to Fed. R. Civ. P. 17(a)(3); or (3) amend the complaint to allege lawsuit is exempt from the bankruptcy estate or has been abandoned by the bankruptcy trustee); Cobb v. Aurora Loan Services, LLC, 408 B.R. 351, 354 (E.D. Cal. 2009) ("After filing a petition for Chapter 7 bankruptcy protection, a debtor 'may not prosecute a cause of action belonging to the bankruptcy estate' because the bankruptcy trustee is the 'real party in interest' with respect to such claims . . .. In order to circumvent this proscription, a debtor must either show that his or her claims are exempt from the bankruptcy estate or were abandoned by the bankruptcy trustee."). See also In re Banks, 223 Fed. Appx. 149, 151 (3d Cir. 2007) ("Chapter 7 trustee was the only person with authority to bring . . . a cause of action" after the appointment of the trustee).

[11]HB General Corp. v. Manchester Partners, L.P., 95 F.3d 1185, 1196, 35 Fed. R. Serv. 3d 377 (3d Cir. 1996) ("There may be multiple real parties in interest for a given claim, and if the plaintiffs are real parties in interest, Rule 17(a) does not require the addition of other parties also fitting that description.").

signs his rights, the assignor and assignee are each real parties in interest but Fed. R. Civ. P. 17(a) does not require them to both be part of the lawsuit.[12] However, additional parties may need to be joined to the lawsuit pursuant to the requirements of Fed. R. Civ. P. 19(a).[13]

§ 18:10 Party must possess legal right or interest—Executors, administrators, guardians, bailees, or trustees of an express trust

As noted in Section 18:9, Fed. R. Civ. P. 17(a) expressly allows an executor, administrator, guardian, bailee, or trustee of an express trust to sue in its own name without joining as a plaintiff the party for whose benefit the action is brought.[1] This is not, however, an exception to the real party in interest requirement. Rather, these parties are deemed by the rule to possess the substantive right to sue in their own names, without the need for joinder of the person for whose benefit the action has been brought.[2] Moreover, the list of parties set forth in Fed. R. Civ. P. 17(a)(1) who are regarded as real parties in interest is meant to be illustrative, and not exhaustive.[3] Any party possessing a substantive right under the applicable law may bring suit, without regard to the particular factual context in which the case may arise.[4]

For example, nothing in Fed. R. Civ. P. 17 explicitly prevents suit by the ultimate beneficiary in its own name.[5] Indeed, although Fed. R. Civ. P. 17(a)(1) provides that a trustee of an express trust may sue in its own name on behalf of the trust, the rule may also allow for suit to be brought in the name of the

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[12]See, e.g., Tallman v. HL Corp., 2015 WL 306964, at *5-6 (D.N.J. 2015).

[13]See generally Chapter 13 "Joinder, Severance, and Consolidation" (§§ 13:1 et seq.) (discussing the rules and procedures of joinder).

[Section 18:10]

[1]Fed. R. Civ. P. 17(a).

[2]See Kawa v. U.S., 77 Fed. Cl. 294, 301 (2007) ("The real parties in interest enumerated by [Fed. R. Civ. P.] 17(a) 'are not exceptions to, but illustrations of, the rule.' " (quoting Advisory Committee Notes to 1966 amendment to Fed. R. Civ. P. 17)).

[3]Advisory Committee Notes to 1966 amendment to Fed. R. Civ. P. 17 ("[t]hese illustrations, of course, carry no negative implication to the effect that there are not other instances of recognition as the real party in interest of one whose standing as such may be in doubt").

[4]See, e.g., Kawa v. U.S., 77 Fed. Cl. 294, 301 (2007) ("the absence of 'escrow agent' from the list of enumerated parties in [Fed. R. Civ. P.] 17(a) does not preclude an escrow agent from being a real party in interest").

[5]See, e.g., In re Narciso, 149 B.R. 917, 918 (E.D. Ark. 1993) (recognizing both administrator and heir as real party in interest).

trust itself.[6] Similarly, although a promisee in a contract for the benefit of a third party may bring suit as a real party in interest, it is clear that the third-party beneficiary may also maintain an action when the applicable substantive law recognizes that right.[7]

§ 18:11 Party must possess legal right or interest—Attorneys in fact/agents

A person who is an attorney in fact or an agent solely for the purpose of bringing suit is generally not considered a real party in interest and cannot maintain suit in his own name.[1] An agent may acquire the real party in interest status of its principal if the rights or interests that are the subject of the litigation are validly assigned or subrogated to the agent.[2] Absent a valid assignment or subrogation of a principal's rights or interests, an agent may be entitled to proceed in its own name under certain circumstances. An agent, for example, may, pursuant to the agreement (or power of attorney) giving rise to the agency, sue in its own name on behalf of the principal and thereby bind the principal.[3] An agent may also sue in its own name where the agent has rights or interests, independent of the principal, under

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[6]See, e.g., Emerald Investors Trust v. Gaunt Parsippany Partners, 492 F.3d 192, 199 n.10 (3d Cir. 2007) (although Rule 17(a) states that a "trustee of an express trust 'may' sue in its own name without joining the trust as a plaintiff," where a trust has the capacity to hold notes and mortgages, the rule does not prohibit the trust bringing suit in its own name); San Juan Basin Royalty Trust v. Burlington Resources Oil & Gas Co., L.P., 588 F. Supp. 2d 1274, 1280 (D.N.M. 2008) (although Rule 17(a) provides that a trustee of an express trust may sue in her own name, the rule also allows for suit to be brought in the name of the trust itself).

[7]Advisory Committee Notes to 1966 amendment to Fed. R. Civ. P. 17 ("[Fed. R. Civ. P. 17(a)] states that the promisee in a contract for the benefit of a third party may sue as real party in interest; it does not say, because it is obvious, that the third-party beneficiary may sue (when the applicable law gives him that right.)"). See, e.g., Munnings v. Fedex Ground Package Systems, Inc., 2008 WL 1744779, at *4 (M.D. Fla. 2008) (stating that "the third party beneficiary of a contract is the real party in interest and may prosecute an action on it in his own name").

[Section 18:11]

[1]See, e.g., In re Jacobson, 402 B.R. 359, 366 (Bankr. W.D. Wash. 2009), as modified, (Mar. 10, 2009).

[2]See §§ 18:13 to 18:15.

[3]See, e.g., F.D.I.C. v. Graham, 2010 WL 5157108, at *4 (S.D. Ohio 2010) (the "pooling and servicing agreement" governing the agency relationship "contained such 'comprehensive' delegation of authority that the [agent-servicer] 'effectively [held] equitable ownership of the claim' and the trust merely held 'the bare legal title' "; thus, the agent-servicer was the real party in interest in a foreclosure action (citing CWCapital Asset Management, LLC v. Chicago Properties, LLC, 610 F.3d 497 (7th Cir. 2010))); In re Rent-Way Securities Litigation, 218 F.R.D. 101, 111 (W.D. Pa. 2003) (investment advisor was real party in inter-

the substantive law.[4]

§ 18:12 Party must possess legal right or interest—Fictitious names

While a court has discretion to permit a real party in interest to proceed in litigation under a fictitious name, this practice is unusual and has been allowed only in "exceptional circumstances" where the party has a privacy right so substantial as to outweigh the customary and constitutionally embedded presumption of openness in judicial proceedings.[1]

This concern for openness in judicial proceedings reflects another important policy underlying the real party in interest rule. By requiring that all civil actions be prosecuted in the name of the real party in interest, Fed. R. Civ. P. 17(a) protects the public's legitimate interest in knowing what disputes involving what parties are pending in the judicial system.[2] Because the use of fictitious names undermines this legitimate policy interest, the court must balance the need for anonymity against the presumption that parties' identities are public information.[3] Generally, courts have been willing to allow real parties to maintain suits

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est in securities fraud action on behalf of its clients, where, by agreement, advisor was authorized to sue for recovery of investment losses on behalf of its clients, advisor was in privity with its clients, and clients were bound by outcome of the action); Weinberg v. Atlas Air Worldwide Holdings, Inc., 216 F.R.D. 248, 255 (S.D. N.Y. 2003) (same).

[4]See, e.g., Marnatha Volunteers Intern., Inc. v. Golden Giant, Inc., 181 F.3d 102 (6th Cir. 1999) ("under Ohio law an agent may bring suit in his own name on the contract if the agent contracts in his own name, or in such manner as to become personally bound upon the contract" (internal quotation marks and citations omitted)); In re Woodberry, 383 B.R. 373, 379, 65 U.C.C. Rep. Serv. 2d 228 (Bankr. D. S.C. 2008) (agent may be real party in interest "by virtue of its pecuniary interest in collecting payments under the terms of the note and mortgage").

[Section 18:12]

[1]See Doe v. Delta Airlines, Inc., 310 F.R.D. 222, 224 (S.D. N.Y. 2015) ("The use of pseudonyms runs afoul of the public's common law right of access to judicial proceedings, a right that is supported by the First Amendment."); Doe v. Pittsylvania County, Va., 844 F. Supp. 2d 724, 727-728 (W.D. Va. 2012) ("it is the exceptional case in which a court allows a party to proceed anonymously") (collecting cases).

[2]See Doe v. Delta Airlines, Inc., 310 F.R.D. 222, 224 (S.D. N.Y. 2015) ("The use of pseudonyms runs afoul of the public's common law right of access to judicial proceedings, a right that is supported by the First Amendment."); Freedom From Religion Foundation, Inc. v. Cherry Creek School Dist. # 5, 2009 WL 2176624, at *5 (D. Colo. 2009) (the requirements of Fed. R. Civ. P. 17(a) "protect the public's legitimate interest in knowing which disputes involving which parties are before the federal courts that are supported with tax payments and that exist ultimately to serve the American public").

[3]See Doe v. Megless, 654 F.3d 404, 408, 80 Fed. R. Serv. 3d 71 (3d Cir.

under fictitious names only if there are substantial privacy interests at stake; for example, where the interests of children are involved or where the claims involve highly sensitive personal issues such as abortion, mental illness, personal safety, illegal aliens, or intimacy.[4] Moreover, issues reflecting societal and judicial changes, such as attitudes toward sexual harassment, sexual offenders, and public registries of sexual offenders, are often reflected in the balancing of the competing interests.[5]

2011) ("When a litigant sufficiently alleges that he or she has a reasonable fear of severe harm from litigating without a pseudonym, courts of appeals are in agreement that district courts should balance a plaintiff's interest and fear against the public's strong interest in an open litigation process."); see also Does I thru XXIII v. Advanced Textile Corp., 214 F.3d 1058, 1068, 6 Wage & Hour Cas. 2d (BNA) 97, 140 Lab. Cas. (CCH) P 34069, 46 Fed. R. Serv. 3d 1105 (9th Cir. 2000) (outlining factors courts must consider to determine whether a "party's need for anonymity outweighs prejudice to the opposing party and the public's interest in knowing the party's identity"); Doe v. Cox, 2015 WL 6962857, at *4 (D. Nev. 2015) (applying a balancing test to determine if the need for anonymity outweighs public's right to access).

[4]See Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 504 n.27 (M.D. Pa. 2007), aff'd in part, vacated in part on other grounds, 620 F.3d 170, 31 I.E.R. Cas. (BNA) 129 (3d Cir. 2010), cert. granted, judgment vacated, 563 U.S. 1030, 131 S. Ct. 2958, 180 L. Ed. 2d 243, 32 I.E.R. Cas. (BNA) 480 (2011) and aff'd in part, rev'd in part on other grounds, 724 F.3d 297, 36 I.E.R. Cas. (BNA) 440 (3d Cir. 2013) (plaintiffs, all of whom had uncertain immigration status, were entitled to proceed anonymously); Doe v. Hartford Life and Acc. Ins. Co., 237 F.R.D. 545, 549-51 (D.N.J. 2006) (plaintiff permitted to proceed under pseudonym in ERISA litigation seeking long-term disability benefits for severe bipolar disease; plaintiff's interests in proceeding anonymously outweighed public's interest in knowing identity, plaintiff kept his illness confidential from colleagues, disclosure of name would risk stigmatization in plaintiff's professional life as lawyer, and there was substantial public interest in ensuring that rights of mental illness sufferers were adjudicated without risk of stigmatization). See also Doe v. Indiana Black Expo, Inc., 923 F. Supp. 137, 139-40, 16 A.D.D. 724, 5 A.D. Cas. (BNA) 944 (S.D. Ind. 1996) (collecting cases where the use of fictitious names has been allowed). But see Raiser v. Brigham Young University, 127 Fed. Appx. 409, 410-11 (10th Cir. 2005) (where plaintiff did not provide any particularized reasons why proceeding publicly would cause him real psychological or physical injury, plaintiff not entitled to proceed under pseudonym in civil rights complaint, despite contention that harmful and prejudicial information might be made public and might harm reputation); Doe v. Merck & Co., Inc., 2012 WL 555520, at *4 (D. Colo. 2012) (denying plaintiff's motion to proceed anonymously despite the fact that his alleged injuries were of a "sexual nature").

[5]See Doe v. City of Chicago, 360 F.3d 667, 669-70, 58 Fed. R. Serv. 3d 103 (7th Cir. 2004) (although suit alleged sexual harassment, plaintiff was "not a minor, a rape or torture victim . . ., a closeted homosexual, or—so far as appears—a likely target of retaliation by people who would learn her identity only from a judicial opinion or other court filing" and no other basis existed for allowing plaintiff to proceed anonymously); Femedeer v. Haun, 227 F.3d 1244, 1246, 47 Fed. R. Serv. 3d 574 (10th Cir. 2000) (rejecting sex offender's request to file suit under pseudonym to protect his identity on basis that "those using the courts must be prepared to accept the public scrutiny that is an inherent part of

Generally, a real party in interest wishing to file suit anonymously or under a pseudonym must first seek the court's permission to do so.[6] However, failure to seek permission prior to commencement of suit does not deprive the court of jurisdiction or require immediate or automatic dismissal.[7]

§ 18:13 Effect of assignment or subrogation of claim

As set forth in detail in Sections 18:14 to 18:15, a valid assignment or subrogation of a claim shifts real party in interest status to the assignee or subrogee.

§ 18:14 Effect of assignment or subrogation of claim—Valid assignment shifts real party in interest status

Fed. R. Civ. P. 17(a) makes the assignee of a valid assignment, written or oral, a real party in interest.[1] The rule applies only to transfers of interest that occur prior to the commencement of an action; transfers that take place during the action are governed by Fed. R. Civ. P. 25(c).[2] Where the assignment is total, the assignee is the only real party in interest and suit must be brought in its name.[3] Where, however, the assignment is partial and the assignor still retains a portion of the substantive right being sued

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public trials").

[6]Citizens for a Strong Ohio v. Marsh, 123 Fed. Appx. 630, 637, 2005 FED App. 0004N (6th Cir. 2005) (stating that "[f]ailure to seek permission to proceed under a pseudonym is fatal to an anonymous plaintiff's case"); W.N.J. v. Yocom, 257 F.3d 1171, 1172, 51 Fed. R. Serv. 3d 414 (10th Cir. 2001) ("[w]hen a party wishes to file a case anonymously or under a pseudonym, it must first petition the district court for permission to do so"); Does v. Shalushi, 38 Media L. Rep. (BNA) 2335, 2010 WL 3037789, at *1 (E.D. Mich. 2010) (refusing to allow a complaint filed pseudonymously to proceed without a protective order).

[7]See A.G. v. American Credit Bureau, Inc., 2011 WL 6140903, at *1 (D. Conn. 2011); Doe v. Barrow County, Ga., 219 F.R.D. 189, 192, 57 Fed. R. Serv. 3d 805 (N.D. Ga. 2003); EW v. New York Blood Center, 213 F.R.D. 108, 109-10, 54 Fed. R. Serv. 3d 1149 (E.D. N.Y. 2003).

[Section 18:14]

[1]See Sprint Communications Co., L.P. v. APCC Services, Inc., 554 U.S. 269, 285, 128 S. Ct. 2531, 171 L. Ed. 2d 424 (2008) (an assignee for collection may properly sue on the assigned claim in federal court); American Soc. for Testing & Materials v. Corrpro Companies, Inc., 292 F. Supp. 2d 713, 718 (E.D. Pa. 2003) (if assignment is effective, assignee is the real party in interest and "an action on the assignment must be prosecuted in his name").

[2]Wheeler v. Florida Dept. of Corrections, 2006 WL 2321114, at *5 (M.D. Fla. 2006); Metlife Capital Corp. v. Water Quality Ins. Syndicate, 198 F. Supp. 2d 97, 103 (D.P.R. 2002). See also §§ 18:72 to 18:75.

[3]Wade v. EMCASCO Ins. Co., 483 F.3d 657, 675 (10th Cir. 2007) (where injured party assigns rights to a third party, the assignee becomes the real party in interest and the assignor can no longer pursue a claim); Emerald

upon, both the assignee and assignor remain as real parties in interest and each must sue in its own name, with judgment to be entered proportionally.[4] If the assignor and assignee sue separately, the defendant may move for joinder under Fed. R. Civ. P. 19 and 21, to litigate the validity of the underlying claim in one proceeding.[5]

The fact that the assignor may be the ultimate beneficiary of any recovery does not usually prevent the assignee from becoming the real party in interest.[6] For example, a partnership may not wish to have all partners made named plaintiffs in the action and may prefer to assign the claim to a single partner or to an individual who is not a partner.[7] As such, that valid assignment will create a real party in interest under Fed. R. Civ. P. 17(a).

The principle that a real party in interest does not need to be the ultimate beneficiary of a recovery extends beyond the

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Investors Trust v. Gaunt Parsippany Partners, 492 F.3d 192, 199 n.10 (3d Cir. 2007) (as party made assignments of notes and mortgages to prospective real party in interest, such party "would be regarded as the real party in interest as it holds the notes and mortgages that it seeks to enforce . . .. In short, we cannot understand why if [the prospective real party in interest] has the capacity to hold the notes and mortgages it should not have the capacity to enforce them"); Isbell v. DM Records, Inc., 2009 WL 792415, at *1 (E.D. Tex. 2009) (music publisher, which had assigned the entirety of its present and future causes of action for infringement, was not the real party in interest and was not entitled to substitute his assignee as plaintiff); CGU Life Ins. Co. of America v. Metropolitan Mortg. & Securities Co., Inc., 131 F. Supp. 2d 670, 676, 43 U.C.C. Rep. Serv. 2d 1241 (E.D. Pa. 2001) (where an assignment is effective "the assignee stands in the shoes of the assignor and assumes all of his rights . . .[t]herefore, the assignee is the real party in interest and an action on the assignment must be prosecuted in his name" (internal citations omitted)).

[4]See U.S. ex rel. Eisenstein v. City of New York, New York, 556 U.S. 928, 934, 129 S. Ct. 2230, 173 L. Ed. 2d 1255, 73 Fed. R. Serv. 3d 1132 (2009); Silver v. Klehr, Harrison, Harvey, Branzburg & Ellers, LLP, 2004 WL 1699269, at *2 (E.D. Pa. 2004).

[5]See Chapter 13 "Joinder, Severance, and Consolidation" (§§ 13:1 et seq.).

[6]See Sprint Communications Co., L.P. v. APCC Services, Inc., 554 U.S. 269, 279-86, 128 S. Ct. 2531, 171 L. Ed. 2d 424 (2008) (an assignee of a legal claim for money owed has standing to bring suit even if the assignee has promised to remit the litigation proceeds to the assignor); Klamath-Lake Pharmaceutical Ass'n v. Klamath Medical Service Bureau, 701 F.2d 1276, 1282, 1983-1 Trade Cas. (CCH) ¶ 65254, 36 Fed. R. Serv. 2d 472 (9th Cir. 1983) ("[a]n assignment of claims does not prevent the assignors from receiving the benefits of the litigation"); South Ferry LP No. 2 v. Killinger, 271 F.R.D. 653, 658, 78 Fed. R. Serv. 3d 484 (W.D. Wash. 2011) (noting that "the Supreme Court [has] held that a valid assignment gives a plaintiff standing to pursue the assignor's claims, even if the assignee would not receive any pecuniary gain from pursuing the action and would not otherwise have standing"). But see In re Stevens, 184 B.R. 584, 586 (Bankr. W.D. Wash. 1995) ("[w]hen there has been an assignment for collection purposes, the assignor remains the real party in interest").

[7]See Chapter 114 "Partnerships" (§§ 114:1 et seq.).

assignor-assignee context.[8] One such example occurs when the assets of a trust are depleted by fraud. There, the trustee may sue to redress the injury, even though the trust will distribute the proceeds to the trust's beneficial owners.[9]

While Fed. R. Civ. P. 17(a) in no way attempts to determine the underlying validity of the assignment, which is a matter governed by the applicable substantive law,[10] the general rule that an assignee may sue in its own name is subject to two important limitations: an assignment may not be used merely as a vehicle to circumvent the applicable limitations period, nor to confer federal jurisdiction where none otherwise would exist.[11]

§ 18:15 Effect of assignment or subrogation of claim—Valid subrogation shifts real party in interest status

Like assignments, a valid subrogation shifts real party status to the subrogee.[1] Subrogation typically arises when an insurance company pays its insured pursuant to a policy, and the company is then subrogated to the cause of action of its insured.[2] The general rule is that if an insurer has paid the entire loss suffered by the insured, it is the only real party in interest and must sue in

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[8]Sprint Communications Co., L.P. v. APCC Services, Inc., 554 U.S. 269, 287, 128 S. Ct. 2531, 2543, 171 L. Ed. 2d 424 (2008) (stating that "[t]rustees bring suits to benefit their trusts; guardians ad litem bring suits to benefit their wards; receivers bring suit to benefit their receiverships; assignees in bankruptcy bring suit to benefit bankrupt estates; executors bring suit to benefit testator estates; and so forth").

[9]Grede v. Bank of New York Mellon, 598 F.3d 899, 900 (7th Cir. 2010).

[10]In re Brooms, 447 B.R. 258, 265, 54 Bankr. Ct. Dec. (CRR) 124 (B.A.P. 9th Cir. 2011), aff'd, 520 Fed. Appx. 569 (9th Cir. 2013), cert. denied, 135 S. Ct. 98, 190 L. Ed. 2d 40 (2014) ("In order to determine whether a valid assignment has been made, a court must turn to the substantive state law governing the assignability of the action at issue."); Abu Dhabi Commercial Bank v. Morgan Stanley & Co. Inc., 888 F. Supp. 2d 478, 489 (S.D. N.Y. 2012) (examining New York state law to determine validity of assignment of fraud claims).

[11]See §§ 18:21 to 18:23.

[Section 18:15]

[1]16 Couch on Ins. § 222:68 (3d ed. 2012) ("An express assignment of the right of an insured to an insurer who has paid under an indemnity policy has the effect of enabling the insurer to institute an action in its own name against a third person causing the loss when there is a statute or rule of court which permits or requires that an action be brought by a subrogee in its own name, as the real party in interest.").

[2]16 Couch on Ins. § 222:2 (3d ed. 2012) (defining subrogation as "the insurer's right to proceed against a third party responsible for a loss which the insurer has compensated pursuant to its contractual obligation under a policy, and which depends, inter alia, on the existence of the insured's right to proceed against that entity").