

THE REAL PARTY IN INTEREST RULE REVITALIZED:
RECOGNIZING DEFENDANT'S INTEREST IN THE
DETERMINATION OF PROPER PARTIES PLAINTIFF

Every action must be prosecuted in the name of the real party in interest.—Section 91 of the New York Code of Civil Procedure of 1848.

The real party in interest rule was originally designed to help courts determine proper parties plaintiff in civil suits.¹ From the beginning, however, the language of the rule has been so vague that courts have never shown consistency in applying it.² In cases where the rule has been invoked courts have disagreed on its functions. As presently interpreted the rule serves no purpose not already provided for by other procedural rules.³ Because of their ambiguous phraseology and the prevailing uncertainty as to their purpose, the real party in interest statutes as interpreted fail to provide adequate guidelines for the selection of proper parties plaintiff in civil suits. Although real party in interest statutes may incorporate procedural rules developed to safeguard the interest of potential plaintiffs and the courts in the selection of proper plaintiffs, they are wholly inadequate to protect the interests of defendants in proper plaintiff selection. Specifically, these statutes do not: (1) ensure defendants an opportunity to assert counterclaims in full; (2) guarantee to defendants the utility of their pretrial discovery rights; or (3) provide defendants some control over the selection of the party plaintiff.

These gaps in the procedural law place defendants at an unfair disadvantage. First, in cases in which plaintiff has been chosen for his non-liability, defendants may be unable to assert legitimate counterclaims. Thus a hospital successfully prevented defendant's assertion of a counterclaim for malpractice by assigning for collection only its claim for unpaid hospital bills.⁴ Secondly, where plaintiff has been selected for his ignorance defendants may be denied effective use of their discovery rights. For example, by arranging for an insurer to become fully subrogated to a personal injury claim, an injured person might prevent a defendant from utilizing discovery provisions for physical and mental examinations⁵ to discover the nature and extent of his injury.⁶ Finally, a plaintiff chosen

¹ COMMISSIONERS ON PRACTICE AND PLEADINGS, STATE OF NEW YORK, FIRST REPORT, CODE OF PROCEDURE 123-25 (1848) [hereinafter cited as COMMISSIONERS' REPORT].

² D. LOUISELL & G. HAZARD, CASES AND MATERIALS ON PLEADING AND PROCEDURE 648-53, 662-65 (1962); Atkinson, *The Real Party in Interest Rule: A Plea for its Abolition*, 32 N.Y.U.L. REV. 926 (1957).

³ See text accompanying notes 18-34 *infra*.

⁴ *Macri v. Carson Tahoe Hospital, Inc.*, 247 A.C.A. 23, 55 Cal. Rptr. 276 (1966).

⁵ *E.g.*, FED. R. CIV. P. 35.

⁶ See *United States v. Aetna Cas. & Sur. Co.*, 338 U.S. 366 (1949) (subrogee may sue

for his jury appeal may put a defendant at an unfair psychological disadvantage. In a jurisdiction permitting plaintiff to sue defendant's insurer directly,⁷ plaintiff's insurer, after compensating plaintiff and becoming subrogated to his claim, might put defendant's insurer at an unfair disadvantage in the mind of the trier of fact by not joining with plaintiff in a suit to recover directly from defendant's insurer.⁸

By reinterpreting or, preferably, amending⁹ existing real party in interest statutes to reflect defendants' interest in the selection of proper plaintiffs such abuses could be eliminated. To illustrate how this result might be achieved, this Comment will systematically develop a "revitalized" real party in interest rule based upon a consolidation of existing procedural rules concerning the selection of parties plaintiff. It will then explore the relationship of this rule to existing real party in interest statutes and examine its impact upon cases, normally involving assignments and subrogations, in which real party in interest questions most frequently arise.

I

CURRENT INTERPRETATIONS OF THE REAL PARTY IN INTEREST RULE

While the history of the real party in interest rule cannot be traced with any certainty before 1848, the rule probably originated in the practices of the English and American courts of equity.¹⁰ Those courts required actions to be brought in the name of the "party really interested" in the suit.¹¹ Courts of law, however, refused to adopt this practice.¹² Even though law courts recognized the concept of a real party in interest,¹³ they

alone on subrogated claim). By permitting someone other than the injured party to sue, without joinder of the injured party, *Aetna* opens the door to subversion of defendant's discovery rights. This possibility follows from the fact that most discovery statutes are limited in scope to use against "parties" to the action. See note 43 *infra*.

⁷ See, e.g., *Jones v. Thunderbird Transp. Co.*, 178 F. Supp. 9 (D. Kan. 1959); *James v. Young*, 77 N.D. 451, 43 N.W.2d 692 (1950); *Enders v. Longmire*, 179 Okla. 633, 67 P.2d 12 (1937).

⁸ See, e.g., *Gas Serv. Co. v. Hunt*, 183 F.2d 417 (10th Cir. 1950); *Farmers Ins. Exch. v. Arlt*, 61 N.W.2d 429 (N.D. 1953); *Harrington v. Central States Fire Ins. Co.*, 169 Okla. 255, 36 P.2d 738 (1934). See also *Tober v. Hampton*, 178 Neb. 858, 136 N.W.2d 194 (1965).

⁹ See the draft real party in interest statute, text accompanying notes 209-13 *infra*.

¹⁰ See, e.g., *Field v. Maghee*, 5 Paige 539 (N.Y. Ch. 1836).

¹¹ See *Morgan v. King*, 312 Ky. 792, 229 S.W.2d 976 (1950); *Clark & Hutchins, The Real Party in Interest*, 34 YALE L.J. 259 (1925). But see D. LOUISELL & G. HAZARD, *supra* note 2, at 649-50; *Cook, The Alienability of Choses in Action*, 29 HARV. L. REV. 816 (1916) (questioning the view that real party in interest is an equitable concept). The owner of the legal title, however, was often required to be joined in order that the legal title would be bound by the decree. But cf. *Currier v. Howard*, 80 Mass. (14 Gray) 511 (1860).

¹² E.g., *Randoll v. Bell*, 1 M. & S. 714, 105 Eng. Rep. 266, 269 (K.B. 1813); *Anderson v. Martindale*, 1 East 497, 102 Eng. Rep. 191 (K.B. 1801).

¹³ *Legh v. Legh*, 1 Bos. & Pul. 447, 126 Eng. Rep. 1002 (C.P. 1799). This case is quoted

insisted, for example, that all suits on a chose in action be commenced in the name of the legal owner of the chose.¹⁴

In 1848 the New York Commissioners on Practice and Pleadings published their pioneering *First Report*.¹⁵ The report contained a draft Code of Procedure which included the following sections:

§ 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.

These sections are the first known legislative statement of the real party in interest rule. They were intended to constitute a just and easily administerable rule respecting the selection of plaintiffs in civil actions.¹⁶ The statutes are so broadly drafted, however, that courts have not agreed on their general scope, meaning, or purpose.¹⁷ Despite this confusion, two

in its pertinent parts in *Cook*, *supra* note 11, at 825. *See also* *Dawson v. Coles*, 16 Johnson 50 (N.Y. Sup. Ct. 1819) (debtor not permitted to plead judgment for assignor as bar to suit by assignee where debtor has notice of assignment on grounds assignor is not real party in interest).

¹⁴ *Randall v. Bell*, 1 M. & S. 714, 105 Eng. Rep. 266, 269 (K.B. 1813); *Anderson v. Martindale*, 1 East 497, 102 Eng. Rep. 191 (K.B. 1801).

¹⁵ COMMISSIONERS' REPORT, *supra* note 1. The commission claimed the rule it had adopted derived from the earlier equity practice. *Id.* at 124. The commissioners cited *Mills v. Hoag*, 7 Paige 18, 21 (N.Y. Ch. 1837), *Rogers v. Traders' Ins. Co.*, 6 Paige 583, 598 (N.Y. Ch. 1837), and *Field v. Magbee*, 5 Paige 539 (N.Y. Ch. 1836), as illustrative. All these cases dealt with suits by assignees. For the purposes of this Comment the commissioners' view regarding the origins of the rule will be accepted. *See Shyvers v. City of Bremerton*, 15 Wash. 2d 497, 131 P.2d 187, 189 (1942); J. POMEROY, CODE REMEDIES 83 (5th ed. W. Carrington 1929). *But see* D. LOUISELL & G. HAZARD, *supra* note 2, at 648-53; *Cook*, *supra* note 11.

¹⁶ "Civil action" was the name given by the commissioners to actions brought under their merged system of law and equity. COMMISSIONERS' REPORT, *supra* note 1, at 2-3. The typical real party in interest statute provides that, "Every action must be prosecuted by the real party in interest." CAL. CODE CIV. PRO. § 367 (West 1964) (emphasis added). *See also* statutes cited in 3 J. MOORE, FEDERAL PRACTICE, ¶ 17.02, at n.5 (2d ed. 1967). This language implies that the rule pertains only to parties plaintiff. A majority of courts have so held. *E.g.*, *Woodley v. Lancaster*, 307 Mich. 473, 12 N.W.2d 428 (1943). A few courts, and at least one commentator, however, have mistakenly applied the rule to defendants. *See Lumberman's Mut. Ins. Co. v. Elhert*, 348 U.S. 48, 51 (1954), criticized on this point in 53 Mich. L. Rev. 1000 (1955); *Wolf v. Gross*, 38 Pa. D. & C. 413 (C.P. Lancaster County 1940); Note, 41 Minn. L. Rev. 748 (1957). Most of these misapplications involve attempts to bring defendant's liability insurer into the litigation as a party.

No matter how desirable it may seem to have a similar rule applicable to defendants, the rule seems clearly inapplicable to them. The revitalized rule proposed by this Comment does not apply to defendants.

¹⁷ Compare *Kirpatrick v. Parker*, 136 Fla. 689, 187 So. 620 (1939) (a woman seeking damages for her own seduction is not a real party in interest), with *Hood v. Sudderth*, 111 N.C. 215, 16 S.E. 397 (1892) (a woman seeking damages for her own seduction is a real party in interest). Compare *Dafoe v. Dafoe*, 160 Neb. 145, 69 N.W.2d 700 (1955) (a real party in interest is one who is entitled to proceeds of suit), with *Archer v. Musick*, 147

interpretations of the rule can be discerned in those cases in which the rule has been applied. These interpretations may be referred to as the "plaintiff-oriented" and the "defendant-oriented" approaches to the rule. An examination of these two approaches suggests that neither can be used to justify the rule as an independent procedural device.¹⁸

A. The Plaintiff-Oriented Approach

In the traditional, plaintiff-oriented, view the primary purpose of the rule is to allow anyone who previously had a right to sue in the name of another to sue in his own name instead.¹⁹ A variation of this view limits the scope of the rule even more by holding that its purpose is "to allow the assignee of a chose in action to sue upon it in his own name instead of the name of the assignor."²⁰ Under both conceptions the rule acts merely as a procedural device to allow certain plaintiffs to sue in their own names.

Most courts believe the rule has no effect on underlying causes of action.²¹ Nor do they read the rule as expressing a policy judgment as to

Neb. 1018, 25 N.W.2d 908 (1947) (a real party in interest is one who can protect defendant against future liability).

¹⁸ See, D. LOUISELL & G. HAZARD, *supra* note 2, at 652; Atkinson, *supra* note 2.

¹⁹ Simes, *The Real Party in Interest*, 10 KY. L.J. 60, 72 (1922). See also *Aetna Freight Lines v. R.C. Tway Co.*, 298 S.W.2d 293, 296 (Ky. 1956); C. CLARK, CODE PLEADING § 22, at 160-61 (2d ed. 1964); 3 J. MOORE, FEDERAL PRACTICE ¶ 17.02, at 1341 (2d ed. 1967); Kennedy, *Federal Rule 17(a): Will the Real Party in Interest Please Stand?* 51 MINN. L. REV. 75 (1967).

²⁰ 3 J. MOORE, FEDERAL PRACTICE ¶ 17.09, at 1334 (2d ed. 1967); Atkinson, *supra* note 2, at 936. *Accord*, 2 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 482, at 14-15 (C. Wright ed. 1961); F. JAMES, CIVIL PROCEDURE § 9.3 (1965); Cook, *supra* note 11, at 836. This narrower view of the rule's intended purpose is supported by the following facts. First, the only illustration of the workings of the real party in interest rule given by the New York Commissioners noted that suits on assigned choses should henceforth be brought in the name of the assignee. COMMISSIONERS' REPORT, *supra* note 1, at 124. Second, soon after the real party in interest provisions were adopted, New York passed another law requiring suits by transferees of estate of disseised landowners to bring actions for ejectment in the name of their transferors. This statute was passed for the express purpose of resolving doubt as to the applicability of the real party in interest rule to a person other than an assignee. Cook, *supra* note 11, at 835.

On the history of assignment at common law and the respective rights of the assignor, the assignee, and the obligor in the assigned chose see Bailey, *Assignments of Debts in England from the Twelfth to the Twentieth Century* (pts. 1-3), 47 L.Q. REV. 516 (1931), 48 L.Q. REV. 248 (1932); *id.* at 547; Cook, *supra* note 11; Williston, *Is the Right of an Assignee of a Chose in Action Legal or Equitable?* 30 HARV. L. REV. 97 (1916); Cook, *The Alienability of Choses in Action: A Reply to Professor Williston*, 30 HARV. L. REV. 449 (1917).

²¹ *E.g.*, Goldstein v. Commonwealth Trust Co., 19 N.J. Super. 39, 46, 87 A.2d 555, 558 (Hudson County Ct. Law Div. 1952); *Spires v. Hanover Fire Ins. Co.*, 364 Pa. 52, 57, 70 A.2d 828, 831 (1950). See F. JAMES, CIVIL PROCEDURE § 9.7 (1965); text accompanying note 171 *infra*.

which of many possible persons should sue in any given case. Concisely stated, the plaintiff-oriented view of the rule merely says that, "An action shall be prosecuted in the name of the party who, by the substantive law, has the right sought to be enforced."²²

This interpretation of the rule seems circular because it leaves unanswered the initial question: Who should be able to pursue the remedy for a particular right sought to be enforced?²³ By narrowing the definition of the phrase "real party in interest" a revitalized rule can establish guidelines for answering this question.

B. The Defendant-Oriented Approach²⁴

A minority of courts has taken a somewhat broader view of the purpose of the real party in interest statutes. These courts recognize that the rule embodied in these statutes should benefit defendants²⁵ and courts²⁶ as well as certain classes of plaintiffs.²⁷ The rule benefits courts by checking circuitous actions, thereby reducing the volume of litigation. The rule benefits defendants in two ways. First, it ensures that a defendant may avail himself of all defenses which he has against the real party in in-

²² 3 J. MOORE, *FEDERAL PRACTICE* § 17.02, at 1305 (2d ed. 1967); *accord*, 2 W. BARRON & A. HOLTZOFF, *supra* note 20, at 7-8; Clark & Hutchins, *supra* note 11, at 261; Simes, *supra* note 19, at 61. *See* Boeing Airplane Co. v. Perry, 322 F.2d 589, 591 (10th Cir. 1963); Sigma Eng'r Serv., Inc. v. Halm Instrument Co., 33 F.R.D. 129, 130 (E.D.N.Y. 1963); Northboro Apartments, Inc. v. Wheatland Tube Co., 198 F. Supp. 245, 247 (E.D. Pa. 1961).

²³ D. LOUISELL & G. HAZARD, *supra* note 2, at 652.

²⁴ The commentators have virtually ignored the defendant-oriented approach to the rule. Very few references to the phenomenon can be found. *See* Advisory Committee's Note to the 1966 Amendments of FED. R. CIV. P. 17(a), reproduced in J. MOORE, *RULES PAMPHLET* 503 (1966); 67 C.J.S. *Parties* § 10, at n.97 (1950). Moreover, although at least thirteen courts have recognized the view in one form or another, none has approached the rule with any consistent theory. *See* cases cited note 25 *infra*. Yet if any independent meaning is to be discovered in the real party in interest rule, it will be found as an outgrowth of this approach.

²⁵ *Anheuser-Busch v. Starley*, 28 Cal. 2d 347, 170 P.2d 448 (1946); *Cammie v. Sander-son*, 48 Del. 225, 101 A.2d 316 (1953); *Powers v. Ellis*, 231 Ind. 273, 108 N.E.2d 132 (1952); *Hunt v. Wright*, 256 Iowa 1378, 131 N.W.2d 268 (1964); *First Nat'l Bank v. United Tel. Ass'n*, 187 Kan. 29, 353 P.2d 963 (1960); *Kearns v. Michigan Iron & Coke Co.*, 340 Mich. 577, 66 N.W.2d 230 (1954); *Anderson v. Connecticut Fire Ins. Co.*, 231 Minn. 469, 43 N.W.2d 807 (1950); *Noble v. Farmers Union Trading Co.*, 123 Mont. 518, 216 P.2d 925 (1950); *Goldstein v. Commonwealth Trust Co.*, 19 N.J. Super. 39, 87 A.2d 555 (Hudson County Ct., Law Div. 1952); *Reagan v. Dougherty*, 40 N.M. 439, 62 P.2d 810 (1936); *Newby v. Johnston's Fuel Liners, Inc.*, 122 N.W.2d 156 (N.D. 1963); *Shaw v. Jeppson*, 121 Utah 155, 239 P.2d 745 (1952); *Larsen v. Sjogren*, 67 Wyo. 447, 226 P.2d 177 (1951).

²⁶ *Wyoming Wool Marketing Ass'n v. Urruty*, 394 P.2d 905 (Wyo. 1964). *See also* *Home Ins. Co. v. Lack*, 196 Ark. 888, 120 S.W.2d 355 (1938); *Streetbeck v. Benson*, 107 Mont. 110, 80 P.2d 861 (1938).

²⁷ *See* cases cited notes 19, 21-22 *supra*.

terest.²⁸ Second, the rule saves defendants from future liability, litigation, and vexation at the hands of others interested in the same transaction.²⁹ This latter function of the rule is hereinafter referred to as the "claim-preclusion" aspect of the defendant-oriented view. Most courts adopting a defendant-oriented view of the rule recognize both of these benefits.³⁰

In its current forms the defendant-oriented approach to the rule is no more helpful in suggesting an independently meaningful role for the rule than is the plaintiff-oriented approach. The "protection of defendant's defenses" aspect of this approach adds nothing to existing law. Most jurisdictions ensure such protection by statute.³¹ Even in the absence of statutory safeguards, in cases involving choses in action, defendants are usually protected by the common law rule that transferees take non-negotiable choses subject to outstanding defenses.³²

Nor does the claim preclusion aspect of the defendant-oriented approach add to existing law. This aspect reflects a desire to protect defendants and courts from redundant litigation. Most jurisdictions, however, have already accomplished this end by adopting liberal statutes respecting joinder of parties.³³ If maintenance of defenses and avoidance of multiple liability, litigation, and vexation are the only justifications for the rule, it should be abandoned.³⁴

²⁸ *E.g.*, *Giselman v. Starr*, 106 Cal. 651, 40 P. 8 (1895); *Cammile v. Sanderson*, 48 Del. 225, 101 A.2d 316 (1953).

²⁹ *E.g.*, *First Nat'l Bank v. United Tel. Ass'n*, 187 Kan. 29, 353 P.2d 963 (1960); *Kearns v. Michigan Iron & Coke Co.*, 340 Mich. 577, 66 N.W.2d 230 (1954).

³⁰ *E.g.*, *Anheuser-Busch v. Starley*, 28 Cal. 2d 347, 170 P.2d 448 (1946); *Cammile v. Sanderson*, 48 Del. 225, 101 A.2d 316 (1953).

The defendant-oriented conception of the rule seems more consistent with the general aim of the New York commissioners than does the narrower plaintiff-oriented view. In codifying the rules respecting parties the commissioners noted that they had a three-fold purpose in view:

[F]irst to do away with the artificial distinctions existing in the courts of law, and to require the real party in interest to appear in the court as such; second, to require the presence of such parties as are necessary to make an end of the controversy; and third to allow otherwise great latitude in respect to the number of parties who may be brought in.

COMMISSIONERS' REPORT, *supra* note 1, at 123. The second of these objectives is not recognized in the plaintiff-oriented conception of the rule. The claim-preclusion aspect of the defendant-oriented approach, however, does take account of this goal.

³¹ *See, e.g.*, CAL. CODE CIV. PRO. § 368 (West 1954).

³² *Cf.* *Detroit Postage Stamp Serv. Co. v. Schermack*, 179 Mich. 266, 276, 146 N.W. 144, 147 (1914); *Marquette Appliances, Inc. v. Economy Food Plan Inc.*, 256 Minn. 169, 173, 97 N.W.2d 652, 655 (1959).

³³ *E.g.*, CAL. CODE CIV. PRO., § 389 (West 1954); FED. R. CIV. P. 19(a). *See also* *Atkinson*, *supra* note 2, at 941.

³⁴ In fact, in the jurisdictions adopting a defendant-oriented approach courts often hold that when all defenses are protected and when a defendant is not threatened by mul-

II

A PROPOSAL FOR REVITALIZING THE REAL PARTY IN INTEREST RULE

Merely because the real party in interest rule has little significance in its current conceptions does not mean that it cannot be a meaningful tool of procedural law. Revitalization of the rule, however, requires education of new functions for the rule, and redefinition of the phrase "real party in interest."

*A. Functions of a Revitalized Rule**1. Protecting Defendants' Counterclaims*

Statutes exist in most jurisdictions providing that, in cases involving assignments of choses in action, actions by assignees are without prejudice to any defense existing at the time of the assignment.⁸⁵

As interpreted, these statutes limit defenses to actions on assigned choses in two ways. First, the defenses must have been available against the assignor before notice of the assignment.⁸⁶ Second, relief granted on counterclaims and cross-claims cannot exceed the amount found owing on the assigned chose.⁸⁷ Thus, defendants may not assert against an assignee claims for affirmative relief which they might have sought against the assignor.⁸⁸ This state of affairs is inequitable.⁸⁹ It allows a person beneficially interested in an action to seek, through techniques such as assignment for collection only, the benefits of that action without assuming the risks normally entailed in its prosecution.⁴⁰ To illustrate: Assume that *M*, a resident of California, has to undergo an emergency operation while traveling in Nevada. After *M*'s return home complications develop and *M*, claiming that the complications resulted from malpractice by the hospital, refuses to pay his hospital bill. By assigning its claim to a California agent for collection only, the hospital could collect its fee with little risk to itself of a successful counterclaim by *M* for malpractice. Because the hospital would not be a party to the action, it would avoid

multiple liability, litigation, and vexation, suit need not be prosecuted by the real party, or parties, in interest. *Ex parte* Randall, 149 Ala. 640; 42 So. 870 (1906); *Williamson v. Purity Bakeries, Inc.*, 101 Ind. App. 441, 447-48, 193 N.E. 717, 720 (1935); *Home Indem. Co. v. State Bank*, 233 Iowa 103, 8 N.W.2d 757 (1943); *First Nat'l Bank v. United Tel. Ass'n*, 187 Kan. 29, 353 P.2d 963 (1960).

⁸⁵ *E.g.*, CAL. CODE CIV. PRO. § 368 (West 1954).

⁸⁶ *Luders v. Pummer*, 152 Cal. App. 2d 276, 313 P.2d 38 (1957).

⁸⁷ *See Bank of America v. Pacific Ready-Cut Homes*, 122 Cal. App. 554, 10 P.2d 478 (1932).

⁸⁸ *See Macri v. Carson Tahoe Hosp., Inc.*, 247 A.C.A. 23, 55 Cal. Rptr. 276 (1966), for an illustration of the type of factual setting in which a defendant might be so stymied.

⁸⁹ If one applies directly or indirectly to a forum to seek its advantages he should also have to submit to its disadvantages. *Cf. Adam v. Saenger*, 303 U.S. 59 (1938).

⁴⁰ *See Macri v. Carson Tahoe Hosp., Inc.*, 247 A.C.A. 23, 55 Cal. Rptr. 276 (1966).

all discovery provisions limited in applicability to "parties" to the action. As a consequence, *M* could be prevented from obtaining information necessary to the preparation of a successful defense.⁴¹ Even in the unlikely event that *M* could prove his counterclaim, he would be entitled to assert it only as a set-off to the extent of the assignee's claim against him.⁴²

If *M* wished to seek affirmative relief against the hospital he would have to travel to Nevada and start a second suit there. In that event *M* would be at the strategic disadvantage of having given the hospital a preview of his case while defending the California suit by the assignee. *M* and the courts would also be forced to the expense of conducting two suits under circumstances that rationally require only one.

A revitalized rule could avoid such abuses by defining real party in interest to include persons actually injured in a transaction giving rise to litigation. By requiring such persons to be plaintiffs the rule could prevent injured persons from evading legitimate counterclaims through such techniques as assignment for collection only.

2. *Guaranteeing Discovery Rights*

Four of the five most common discovery techniques are by their terms available for use only against "parties" to a suit.⁴³ None of the four, however, defines the term "party." Nor is the term defined in any other generally recognized procedural statute. Unfortunately, this omission has

⁴¹ See text accompanying notes 43-46 *infra*.

⁴² *Bank of America v. Pacific Ready Cut Homes*, 122 Cal. App. 554, 10 P.2d 478 (1932). In most jurisdictions, following a victory on the counterclaim, *M* could institute a second suit against the hospital for the balance of his claim. *M*'s recovery in the second suit would, of course, be reduced by the amount already allowed as a set-off in the initial suit. 30 AM. JUR., *Judgments* § 390, at n.13 (1958); Annot. 147 A.L.R. 196, 210-13 (1943). In some jurisdictions, however, *M* would not be allowed to institute the second suit. Such jurisdictions hold that the doctrines of merger and bar operate to extinguish completely a counterclaim once such claim is litigated, even though the counterclaimant may receive no more than partial satisfaction if successful, *e.g.*, as in a situation in which the counterclaimant may receive no more than a set-off if victorious on the counterclaim. *Riddle v. McLester-VanHoose Co.*, 145 Ala. 307, 40 So. 101, 102 (1905); *South & N.A.R.R. v. Henlein & Barr*, 56 Ala. 368 (1876); 30 AM. JUR., *Judgments* § 390, at n.14 (1958). Thus at best, in the situation supposed, *M* would have to undergo at least one extra, and unnecessary suit to fully gain satisfaction. At worst, *M* could lose the California suit to the hospital's assignee and then find himself barred from even commencing a second action.

⁴³ Illustrative of the four discovery techniques limited by their terms to use against "parties" are: FED. R. CIV. P. 33 (interrogatories to parties); *id.* 34 (production of documents); *id.* 35 (mental and physical examinations); *id.* 36 (admissions). Oral depositions alone may be taken of nonparties. See FED. R. CIV. P. 26. But even as to oral depositions defendants have valuable advantages regarding the discovery of parties not available as to nonparties. For example, a defendant may insist that a party plaintiff appear and give an oral deposition in the forum in which suit has been commenced. *Novel v. Garrison*, 42 F.R.D. 234, 235 (D.C. La. 1967); *Irwin Co. v. Tide Publishing Co., Inc.*, 13 F.R.D. 18 (S.D.N.Y. 1952); 4 J. MOORE, *FEDERAL PRACTICE* ¶ 30.03, at 2018 n.11 (2d ed. 1967).

led to glaring inconsistencies in the interpretation of existing discovery provisions.⁴⁴ Moreover, the omission provides an opportunity for persons or entities beneficially interested in an action to evade discovery entirely. By reading existing definitions of the term "parties" into the discovery statutes, courts have narrowed such statutes beyond their intended scope.⁴⁵ As a result, clever adversaries can deprive defendants of valuable discovery rights. For example, an individual who suffers personal injuries can arrange with his insurer for the latter to become fully subrogated to the injury claim. In some jurisdictions this procedure avoids the necessity of joining the injured person in litigation respecting the claim and, therefore, avoids the risks of discovery under provisions such as Rule 35 of the Federal Rules of Civil Procedure.⁴⁶

By defining real party in interest to include interested persons possessing information that a reasonable defendant would wish to discover, the revitalized rule could provide a standard for determining when one should be considered a party plaintiff for purposes of the discovery statutes. This approach would substantially reduce the opportunities now available for evading discovery.

3. *Ensuring Mutuality: Control of Parties Plaintiff*

In an adversary system, plaintiffs initiate litigation, pick the time and place for commencement of suit, and have wide discretion in selecting the defendant, or combination of defendants, when they wish to sue.⁴⁷ For example, a plaintiff injured through the negligence of a worker may sue the worker,⁴⁸ his employer,⁴⁹ or both the worker and employer together.⁵⁰ Defendants, however, do not have similar latitude in selecting which of all possible plaintiffs will prosecute an action against them.

⁴⁴ Compare *Wadlow v. Humberd*, 27 F. Supp. 210, 212 (W.D. Mo. 1939) (construing FED. R. CIV. P. 35 narrowly to apply only to situations "in which the mental or physical condition of a party shall be immediately and directly in controversy and not merely in controversy incidentally and collaterally"), with *Beach v. Beach*, 114 F.2d 479 (D.C. Cir. 1940) (construing FED. R. CIV. P. 35 broadly to extend discovery to a child, not a formal party, in an action respecting the child's paternity).

⁴⁵ See *Beach v. Beach*, 114 F.2d 479 n.20 (D.C. Cir. 1940), commenting unfavorably on *Wadlow v. Humberd*, 27 F. Supp. 210 (W.D. Mo. 1939). See also D. LOUISELL & G. HAZARD, *supra* note 2, at 777.

⁴⁶ See *United States v. Aetna Cas. & Sur. Co.*, 338 U.S. 366 (1949); note 43 *supra*. See also *Griffin v. Londrigan*, 107 N.J. Eq. 76, 151 A. 611 (Ch. 1930) (lunatic not discoverable by reason of incompetency; guardian of lunatic not discoverable because not a party); *Boynton*, *supra* note 6.

⁴⁷ See FED. R. CIV. P. 20(a); CAL. CODE CIV. PRO. §§ 379, 379(a) (West 1954); *Kraft v. Smith*, 24 Cal. 2d 124, 148 P.2d 23 (1944).

⁴⁸ *James*, *Vicarious Liability*, 28 TUL. L. REV. 161, 162-63 (1954).

⁴⁹ *E.g.*, *Hobbs v. Hurley*, 117 Me. 449, 104 A. 815, 818 (1918).

⁵⁰ *E.g.*, *Skala v. Lehon*, 343 Ill. 602, 175 N.E. 832 (1931). See also C. CLARK, CODE PLEADING § 60, at 385 (2d ed. 1947).

Because defendants have little control over the designation of parties plaintiff, a defendant may be disadvantaged by clever selection of the party commencing an action against him. For example, a plaintiff could take unfair advantage of a defendant through use of a "litigating costume," that is, a formal plaintiff having special appeal to the trier of fact.⁵¹ When combined with a plaintiff's power to select unattractive defendants, use of a litigating costume gives plaintiffs an unjustifiable advantage over their adversaries.⁵²

The revitalized rule should help eliminate such handicaps by defining real party in interest to include the person actually injured in the transaction sued upon and by permitting defendants to insist upon the substitution or joinder as plaintiffs of interested persons who initially decline to participate in the litigation against defendants.⁵³

4. *Ensuring Mutuality: Equalizing the Burdens of Litigation*

Traditionally, courts have required that actions be prosecuted by persons beneficially interested in their outcome.⁵⁴ Reflected in the revitalized real party in interest rule, this requirement could serve three

⁵¹ See cases cited notes 7-8 *supra*.

⁵² A desirable plaintiff may be recruited through use of devices such as assignments for collection only, loan receipts, novation, and even subrogation. *E.g.*, *Furrer v. Yew Creek Logging Co.*, 206 Or. 382, 292 P.2d 499 (1956).

⁵³ Plaintiffs need no similar protection against defendants. Because plaintiffs exercise broad discretion in an adversary system regarding the selection of the persons they wish to sue, they are able to secure for themselves their discovery and other trial rights.

⁵⁴ 39 AM. JUR., *Parties* § 10, at 860 n.15 (1942). See also COMMISSIONERS' REPORT, *supra* note 1, at 124.

This rule was the guiding principle in determining proper parties plaintiff in courts of equity. 1 J. POMEROY, *EQUITY JURISPRUDENCE* § 114 (5th ed. W. Symons 1941). No single explanation for this principle appears. Perhaps it emerged as a result of the desire to mitigate the harshness of the common law rules regarding parties plaintiff. See, *e.g.*, *Randoll v. Bell*, 1 M. & S. 714, 720-23, 105 Eng. Rep. 266, 269 (K.B. 1813); *Anderson v. Martindale*, 1 East 497, 102 Eng. Rep. 191 (K.B. 1801). On the other hand, the principle might have emerged as an outgrowth of the doctrines respecting champerty and maintenance. See, *e.g.*, *Ravenel v. Ingram*, 131 N.C. 396, 42 S.E. 967 (1902); *Brown v. Ginn*, 66 Ohio 316, 64 N.E. 123 (1902). The doctrines of champerty and maintenance, however, are no longer major sources of judicial concern. The evils to which these doctrines responded are now controlled by other institutions, such as tort actions for malicious prosecution, W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 114, at 872 (3d ed. 1964), and statutes prohibiting assignments to attorneys, see *Radin, Maintenance By Champerty*, 24 CALIF. L. REV. 48 (1935).

Perhaps the requirement of suit by beneficially interested persons can be explained as the embodiment of a conception of fairness, *i.e.*, the feeling that if one stands to reap the rewards of litigation he must also accept its burdens. Or, perhaps it is the embodiment of a desire to circumscribe in some rational manner the number of persons who can sue on any given cause of action. In any event, the rule persists, see 39 AM. JUR., *Parties* § 10, at 860 n.15 (1942), and since it performs a useful function it is reflected in the revitalized rule.

functions. First, beneficially interested persons would be assured control over the prosecution of litigation in which they are interested.⁵⁵ Second, the volume of litigation would be reduced by forcing all beneficiaries of an action to submit to adjudication of their rights in a single suit.⁵⁶ Third, defendants as a class would benefit because fewer persons would instigate litigation on insignificant or questionable claims if they knew that they must personally bear the inconvenience and expense of suit.

5. *Recognition of More Than One Real Party in Interest*

Statutes, courts, and commentators occasionally assert that only one real party in interest can exist in any suit.⁵⁷ Reference to *the* real party in interest, however, is misleading because often two or more persons appear who should be considered real parties in interest.⁵⁸ By referring to the real *parties* in interest, the revitalized rule would remind both courts and practitioners that more than one person should be joined as a plaintiff in some litigation.

6. *Ensuring that Beneficially Interested Parties May Prosecute Litigation in Which They are Interested*

Finally, although courts almost universally hold that persons beneficially interested in the outcome of an action may prosecute that action,⁵⁹ no explicit statutory authority supports this position.⁶⁰ A revitalized real party in interest rule could provide such authority by expressly defining the phrase "real party in interest" to include persons beneficially interested in the outcome of litigation.⁶¹

No existing interpretation of the real party in interest rule explicitly reflects these functions. Nor does any body of existing substantive law adequately fulfill them. Incorporated in a revitalized real party in interest

⁵⁵ Cf. COMMISSIONERS' REPORT, *supra* note 1, at 124.

⁵⁶ See text accompanying notes 137-48 *infra*.

⁵⁷ Cf. Atkinson, *The Real Party in Interest Rule: A Plea for its Abolition*, 32 N.Y.U.L. REV. 926, 957 (1957). But see *Woodbury v. Tampa Water Works Co.*, 57 Fla. 243, 49 So. 556, *aff'd on rehearing*, 57 Fla. 249, 49 So. 559 (1909); *Turner v. New Brunswick Fire Ins. Co.*, 45 N.M. 126, 131, 112 P.2d 511, 514 (1941).

⁵⁸ See, e.g., text accompanying note 117 *infra*.

⁵⁹ See, e.g., *Maryland Cas. Co. v. King*, 381 P.2d 153 (Okla. 1963).

⁶⁰ Support for the position may, however, be inferred from the "exception statutes" that accompany most real party in interest statutes. These exception statutes usually read as follows:

An executor or administrator, or trustee of an express trust, or a person expressly authorized by statute, may sue *without joining with him the persons for whose benefit the action is prosecuted*.

CAL. CODE CIV. PRO. § 369 (West 1954) (emphasis added). See text accompanying notes 80-85 *infra* for a discussion of the exception statutes.

⁶¹ See text preceding note 62 *infra*.

rule, these functions could give the rule an important role as a procedural device.

B. Formulation and Application of a Revitalized Rule

Reformulation of the real party in interest rule must begin by defining the phrase "real party in interest" so that it reflects the functions assigned to the revitalized rule. Reformulation also requires that the scope of the Rule is sufficiently extensive to reflect the fact that more than one real party in interest may exist with reference to any given cause of action. The following draft of a revitalized real party in interest rule deals with both of these aspects of reformulation.

§ 000 (a) Every action should be prosecuted by the real parties in interest.

(b) A real party in interest is one who:

(1) has a substantial and beneficial interest in the outcome of the litigation, or

(2) was a primary participant in the transaction giving rise to the litigation and probably possesses information that is both relative to the transaction and of such a nature that a reasonable defendant would wish to make discovery of him.⁶²

These sections constitute the basic statement of the revitalized rule and may therefore be referred to as the "main rule."⁶³

The main rule is drawn in broad terms. Such inclusive formulation is consistent with the current trend toward drafting general policy-oriented procedural statutes.⁶⁴ Certain limitations, however, need to be incorporated into the rule lest it be read so broadly as to include persons with only a remote interest in, or relationship to, a cause of action. While the text of the main rule includes some such limitations, it has not incorporated all possible limitations. Those not included should be expressed independently, perhaps in a subsection of the rule.

1. Textual Limitations on the Scope of the Main Rule: "Substantial and Beneficial"

The first part of the main rule's definition of "real party in interest" focuses on a party's interest in the outcome of the litigation. To qualify as a real party in interest, one's interest in the outcome of the litigation must be both substantial and beneficial. "Substantial and beneficial" are terms of art; they are flexible concepts which do not yield to precise

⁶² Section (a) of this rule is specifically designed to reflect function 6 of the rule enumerated above. Section (b)(1) is designed to reflect functions 1 and 5. Section (b)(2) reflects function 3, and section (b) as a whole reflects functions 2 and 4.

⁶³ See Atkinson, *supra* note 57, at 926.

⁶⁴ Cf. FED. R. CIV. P. 19, 23. E.g., 4 KAN. STATS. ANN. arts. 60-219, 60-223 (1964).

definition. When deciding whether a person's interest in the outcome of given litigation is "substantial and beneficial" within the meaning of the revitalized rule, courts should consider: (1) the extent and nature of the control which a person can exercise over the possible proceeds of the litigation; (2) the absolute monetary value of the person's interest in the claim; and (3) the value of the person's interest in the claim relative to the interest of others—what percentage of the recovery he can ultimately claim as compared with the percentage share of others.

If a person's interest in any of these aspects is great, a court should find that he has a substantial and beneficial interest in the outcome of the given litigation and that he is, therefore, a real party in interest.

Courts should also consider the individual's relationship to the claim sued upon and the extent to which the individual will bear the cost and share the control of the litigation.⁶⁵ Attention to these factors may help make clear whether the person's interest in the litigation is real, or merely a pretense to permit him to prosecute an action in which he could not otherwise participate. If the individual suing was actually injured in the transaction sued upon, a court should be inclined to find him a real party in interest. A court should be similarly inclined if it finds that the individual is bearing the costs or controlling the litigation. Such involvement usually indicates a substantial and beneficial stake in the outcome of the litigation.

2. *Textual Limitations on the Scope of the Main Rule: The Discoverability Aspect*

The second part of the main rule's definition of real party in interest focuses on discoverability. To qualify as a real party in interest under this aspect of the definition, an individual must have been: (1) a primary participant in the transaction giving rise to the litigation; (2) a person who probably possesses information relative to the claim sued upon; and (3) a person whom a reasonable defendant would wish to discover for the information he probably possesses.

The "primary participant" qualification limits the scope of this part of the revitalized rule's definition of real party in interest. It prevents a defendant from trying to compel joinder of such persons as witnesses, or persons who participate to some minor degree in the transaction giving rise to the litigation—for example, persons who administer first aid to victims of an accident. The rule is not meant to extend defendant's existing discovery rights; it is only intended to define more precisely the scope of those rights to which defendant should already be entitled.⁶⁶

⁶⁵ Cf. *State ex rel. Love v. Jones*, 98 Ohio App. 45, 128 N.E.2d 228 (1953).

⁶⁶ Two of the major discovery devices under the Federal Rules—inspections and mental

The "probably possess[ing] information relative to the claim sued upon" qualification is intended to make the rule administratively convenient. A requirement that the participant *must* possess information relative to the claim would necessitate excessively detailed pretrial investigation by the court into the participant's knowledge.

The "reasonable defendant" qualification is inserted to establish a standard by which the rule can be fairly administered. For purposes of the revitalized rule, one may assume that a reasonable defendant would not utilize discovery devices solely to harass a plaintiff or to delay an action.

In determining the real party, or parties, in interest under the discoverability aspect of the revitalized rule, courts should consider the following kinds of factors.

First, what is the individual's relationship to the claim being sued upon: Was he a party to the contract in controversy? Was he the person personally injured in the transaction giving rise to the controversy? If the individual was personally involved in the transaction giving rise to the litigation, the court should be inclined to find him a real party in interest on the assumption that he probably possesses information which a reasonable defendant would wish to discover.

Second, what is the amount, quality, and relevance of information persons similarly situated usually have regarding the type of claim in controversy. If the quality and quantity of such information is usually significant, courts should be inclined to find the individual a real party in interest.

Finally, courts should consider the availability of alternative sources of the information desired and the proximity and cost of those alternative sources. If the court finds that reasonable alternative sources of information are readily available to the complaining defendant, it should be less inclined to find a given individual a real party in interest.

3. *Statutory Limitations of the Scope of the Main Rule*

The main rule should be applied whenever possible. In some cases, however, the real parties in interest will be so widely scattered that no court can acquire jurisdiction over all of them. In other cases, the cost of joining all real parties in interest will outweigh the advantage of such a procedure. In still other cases—those involving bailees, for example⁶⁷—

and physical examinations—cannot be used without first obtaining a court order. Such orders are predicated upon a showing of good cause. FED. R. CIV. P. 34, 35(a). A determination that one is a real party in interest under the discoverability aspect of the revitalized rule's definition of real party does not alter this good cause requirement.

⁶⁷ See text accompanying notes 87-92 *infra*.

insistence upon joinder of all real parties in interest would defeat supervening policy considerations. As a result of these practical limitations on the automatic application of the main rule, standards must be formulated by which various real parties in interest can be selectively excused from joinder.

If the initial plaintiff in a suit both (1) adequately ensures the efficacy of defendant's discovery rights and (2) protects defendant from the risk of multiple liability, litigation, and vexation, then, under the revitalized rule, courts need not require joinder of other real parties in interest in cases in which: (1) their presence in the suit would deprive the court of jurisdiction over the action;⁶⁸ (2) the real party in interest lacks capacity to sue; (3) it could make little or no difference to defendant whether any or all of the real parties in interest were joined; (4) insistence that suit be prosecuted by all real parties in interest would cause undue hardship to unjoined real parties in interest; (5) insistence that suit be prosecuted by all real parties in interest would place unjustifiable burdens on the administration of justice;⁶⁹ or (6) defendants should be found estopped to compel a person's joinder as plaintiff.⁷⁰

If a choice becomes necessary between suit by a beneficially interested real party in interest and a discoverable real party in interest, courts should insist upon suit by the discoverable real party in interest.⁷¹ Presumably, privity will ensure that the beneficially interested party will be bound by any judgment in the case.

These limitations on the main rule should give courts wide discretion in determining proper plaintiffs in particular suits. In conjunction with the indispensable party statutes found in most jurisdictions,⁷² the revitalized rule can serve as a catalog of the major considerations relevant to the determination of proper plaintiffs in civil suits.

⁶⁸ Cf. *Peoples Loan & Fin. Corp. v. Lawson*, 271 F.2d 529 (5th Cir. 1959); *Federated Mut. Implement & Hardware Ins. Co. v. Zimmerman*, 33 F.R.D. 8 (D. Kan. 1963); *Morrell v. Northwest Eng'r Corp.*, 30 F.R.D. 522 (E.D. Wis. 1962).

⁶⁹ For an illustration of such a situation, see *Roseburg Disaster Pleading*, reproduced in D. LOISELL & G. HAZARD, *CASES ON PLEADING AND PROCEDURE* 538-48 (1962). See also *Yuba Consol. Gold Fields v. Kilkeary*, 206 F.2d 884 (9th Cir. 1953).

⁷⁰ See note 101 *infra*.

Even in cases in which the original parties plaintiff cannot assure the efficacy of defendant's discovery rights, courts might, under the circumstances enumerated above, decide not to require joinder of one or more of the real parties in interest. Courts should be much more hesitant, however, to permit suit to proceed without joinder of at least one discoverable plaintiff than they should be to permit suit to proceed without a beneficially interested plaintiff.

⁷¹ This should not be required, however, in cases in which consideration of judicial economy or hardship to the discoverable real party in interest clearly outweigh the benefits to defendant of following this preference.

⁷² E.g., FED. R. CIV. P. 19; CAL. CODE CIV. PRO. § 389 (West 1954).

C. *Alternatives to Revitalization of the Rule*

Piecemeal enactment, amendment, and judicial reassessment of other procedural rules could be combined to obviate the need for revitalizing the real party in interest rule. The propriety of various litigating costumes could be determined by legislative fiat rather than by balancing interests as is required under the revitalized rule.⁷³ Defendants' discovery rights might be safeguarded by extending existing discovery rules,⁷⁴ or by amending such rules to define the term "party." Finally, guidelines for ascertaining proper parties plaintiff in new and unusual situations might be developed by the courts over time. If all these alternatives were adopted simultaneously, there would be little need for continued existence of the real party in interest rule, or for its revitalization.⁷⁵

Revitalization of the rule, however, offers a more economical method of achieving desired ends than adoption of the available alternatives. The revitalized rule articulates in a single statement the several changes which would otherwise be required.

Further, revitalization requires little,⁷⁶ or no, legislation. If legislatures procrastinate in amending existing real party in interest statutes, courts need only interpolate a new definition of "real party in interest" into them. Implementing the alternatives, although a sufficient means of achieving the desired ends, would require extensive legislation.

Finally, revitalization allows greater procedural flexibility. Because it states broadly a set of procedural policies, the revitalized rule can be molded to meet the specific demands of new and unusual situations.⁷⁷ Alternatives to the rule might not allow such flexibility.

III

CORRECTING OMISSIONS FROM THE REVITALIZED RULE:

APPLICABILITY OF THE TRADITIONAL EXCEPTIONS

Although the main rule⁷⁸ appears overinclusive in some respects,⁷⁹ it is underinclusive in others. If strictly applied, the main rule could be read as prohibiting suits by such persons as executors, administrators, guardians, and trustees.

⁷³ See, e.g., the following direct action statutes: LA. REV. STAT. ANN. § 22.655 (1958); WIS. STAT. ANN. § 260.11 (1951).

⁷⁴ California has done this. CAL. CODE CIV. PRO. § 2032 (West 1954).

⁷⁵ Discussion of the details of these alternatives is beyond the scope of this Comment.

⁷⁶ See the draft real party in interest statute at the end of this Comment.

⁷⁷ See Roseburg Disaster Pleading, reproduced in D. LOUISELL & G. HAZARD, *supra* note 69, at 538-48.

⁷⁸ See text accompanying note 62 *supra*.

⁷⁹ See text accompanying note 64 *supra*.

Such persons generally have neither a substantial and beneficial interest in the outcome of the litigation nor such information regarding the claims sued upon as a reasonable defendant would wish to discover.

This problem of underinclusiveness also exists in current real party in interest statutes. It has been solved in the past through adoption of a clause⁸⁰ or another statute⁸¹ listing exceptions⁸² permitting suit by certain persons not considered real parties in interest under the main rule. The clause or statute usually applies to some, or all, of the following: executors, administrators, guardians, bailees, trustees of express trusts, parties with whom or in whose name a contract has been made for the benefit of another, parties authorized by statute to sue, and various governmental bodies under certain conditions specified by statute. The clause-statute approach to the problem of underinclusiveness seems eminently reasonable. This approach permits suit by a group of persons who should, as a matter of policy, be able to sue even though not technically real parties in interest.

Although courts universally allow those listed in the exception clause to prosecute suits,⁸³ they almost never discuss policy reasons for doing so. An examination of policies underlying the traditional exceptions to the rule suggests the desirability of including such exceptions in the revitalized rule. At the outset it should be noted that these exceptions merely give enumerated persons the option of suing. The exceptions do not require these persons to prosecute actions in which they are involved,⁸⁴ nor do they demand that if such persons sue they must sue alone.⁸⁵

⁸⁰ E.g., FED. R. CIV. P. 17(a).

⁸¹ E.g., CAL. CODE CIV. PRO. § 369 (West 1954).

⁸² Although most courts sensibly treat these provisions as codifications of exceptions to the rule, Atkinson, *supra* note 57, at 937, some treat them instead as codifications of illustrations of the rule. *Smallwood v. Days Transfer, Inc.*, 165 F. Supp. 929, 932 (W.D. Mich. 1958); *Carlson v. Consumers Power Co.*, 164 F. Supp. 692, 696 (W.D. Mich. 1957). See also 2 W. BARRON & A. HOLTZOFF, *FEDERAL PRACTICE AND PROCEDURE* 9 (C. Wright ed. 1961); F. JAMES, *CIVIL PROCEDURE* § 9.8, at 397 (1965); J. MOORE, *RULES PAMPHLET* 503 (1966). Courts in the latter category invariably adhere to the plaintiff-oriented conception of the rule. These courts hold that each of the listed persons or institutions can prosecute actions to which they are related. Since a real party in interest in the plaintiff-oriented view is one "who by the substantive law has the right sought to be enforced," 3 J. MOORE, *FEDERAL PRACTICE* ¶ 17.02, at 1305 (2d ed. 1967), it follows that the exception clause in this view must illustrate, rather than define, the rule. To read the enumerated persons and institutions as illustrative of those qualifying as real parties in interest, however, implies a definition of "real party in interest" so broad as to be useless as a procedural concept. See text accompanying notes 19-23 *supra*.

⁸³ See generally 3 J. MOORE, *FEDERAL PRACTICE* ¶¶ 17.12-17.15 (2d ed. 1967).

⁸⁴ Atkinson, *supra* note 57, at 933. But see *Robinson v. Adams*, 81 App. Div. 20, 80 N.Y.S. 1098 (1903), *aff'd* 179 N.Y. 558, 71 N.E. 1139 (1904). See also *Landis v. First Nat'l Bank*, 20 Cal. App. 2d 198, 66 P.2d 730 (1937).

⁸⁵ When the policies underlying an exception are not applicable in a particular case

A. *Executors and Administrators*

The most widely expressed exception to the real party in interest rule relates to executors and administrators. The explanation for this exception is that the person possessing the cause of action, *i.e.*, the decedent, cannot sue. Someone must have the power to prosecute actions which accrued to a decedent before his death. The logical persons to prosecute such actions are the decedent's beneficiaries, his executor, or administrator. Under most definitions of "real party in interest," a decedent's beneficiaries are qualified to sue—they have a substantial and beneficial interest in the outcome of litigation relative to the estate. Executors and administrators possess no such qualification. Time and expense are saved, however, if a single executor or administrator, instead of numerous heirs, can prosecute suits on behalf of the estate.⁸⁶ For reasons of judicial economy, then, executors and administrators should be permitted to sue under an exception to the revitalized rule.⁸⁷

B. *Bailees*

The exception permitting bailees to sue may also be justified in terms of judicial economy. A typical case in which judicial economy requires that a bailee sue might involve negligent destruction of all the goods in a warehouse.⁸⁸ Absent contributory negligence on the part of the bailee, each separate bailor has an uncontestable claim against the tortfeasor. If all bailors bring suit independently, the tortfeasor's resources might be exhausted in defending litigation.⁸⁹ This undesirable result can be avoided by allowing the bailee to prosecute a single action for the value of the bailed goods.

The above analysis justifies the bailee exception to current real party in interest rules. Under the revitalized rule, however, a bailee might qualify as a real party in interest under the discoverability provision of

of the type usually involving that exception, courts should not allow the suit to proceed without joinder of the real parties in interest. *Cf.* CAL. CIV. CODE § 3510 (West 1954).

⁸⁶ *Cf.* 31 AM. JUR. 2d *Executors and Administrators* § 715 (1967).

⁸⁷ Note, the same end could be accomplished through prosecution of a class action by one beneficiary on behalf of all under such rules as FED. R. CIV. P. 23. In most cases, however, suit by the executor or administrator under the real party in interest rule would seem preferable, both as a means of avoiding the cumbersome notice requirements of class actions, *see* *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), and because the beneficiaries might not be so numerous or united in interest as to form a class. *Cf.* FED. R. CIV. P. 23.

⁸⁸ *See, e.g., Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). Other cases requiring suit by a bailee frequently arise in admiralty. If a ship or its cargo is injured in a foreign port, the owner of the vessel as bailee of the cargo, or the master of the vessel as bailee of both ship and cargo, should be permitted to sue for damages occurring to either the ship, the cargo, or both. J. MOORE, RULES PAMPHLET 503 (1966).

⁸⁹ *Cf.* *Roseburg Disaster Pleading*, reproduced in D. LOUISELL & G. HAZARD, *supra* note 69, at 538-48.

the main rule's definition of real party in interest.⁹⁰ If so, no exception would be needed to allow such bailee to sue. The problem under the revitalized rule is more one of rationalizing the bailee's right to sue alone than of rationalizing his right to sue at all. Considerations of judicial economy and protection of defendants from harassment—the same considerations which require that a nonreal party in interest bailee be given a right to sue under the exceptions to the traditional rule⁹¹—require that a real party in interest bailee have an exclusive right to sue under the revitalized rule.⁹²

C. Trustees of Express Trusts

The exception relating to trustees of express trusts is the most misunderstood and ill-used exception to the real party in interest rule.⁹³ Only twelve years after adoption of New York's 1848 Code of Procedure, a New York case dealing with this exception held that an "express trust" within the meaning of the exception could only be created by a direct and positive act of the parties, "by some writing, deed, or will."⁹⁴ The cases which have followed, however, have virtually ignored this technical requirement. Thus, it has been held that the express trust referred to in the exception need not be formal, or even in writing.⁹⁵ Such loose readings have resulted in the extension of the exception into so many areas that it has become meaningless.⁹⁶ These distortions of the exception

⁹⁰ See text preceding note 62 *supra*.

⁹¹ See text accompanying notes 88-89 *supra*.

⁹² When no considerations of judicial economy exist, however, courts should insist that the bailor join in prosecution of the suit. See note 85 *supra*.

⁹³ See, e.g., Atkinson, *supra* note 57, at 951-53. See also J. POMEROY, CODE REMEDIES §§ 101-06 (5th ed. W. Carrington 1929). The provision in many statutes to the effect that, "[a] person with whom, or in whose name, a contract is made for the benefit of another, is a trustee of an express trust, within the meaning of this section," CAL. CODE CIV. PRO. § 369 (West 1954), does not help to reduce the confusion. Far from helping to clarify the concept of express trust, this provision focuses on persons having little or nothing to do with express trusts as they are commonly understood.

⁹⁴ Considerant v. Brisbane, 22 N.Y. 389, 395 (1860).

⁹⁵ Fidelity & Cas. Co. v. Ballard & Ballard, 105 Ky. 253, 48 S.W. 1074 (1899). *Contra*, Wiehtuechter v. Miller, 276 Mo. 322, 208 S.W. 39 (1918).

⁹⁶ As has been observed by Clark & Hutchins, *The Real Party in Interest*, 34 YALE L.J. 259, 275-76 (1925) (footnotes omitted):

A foreign executor, or a trustee under foreign law, has been allowed to sue alone under the . . . provision. Agents for disclosed or undisclosed principals have made great use of the theory that they are trustees of express trusts, so that the fact that an agent for a disclosed principal is not generally considered the real party in interest does not debar him from suing if the contract is considered to be made in his name. An assignee for collection or suit is sometimes held the trustee of an express trust; and the pledgee of a note after default of the pledgor has been put in the same class. The clause has been extended also to include a partner holding funds for the firm or contracting for it.

probably occurred when courts attempted to justify suits by certain plaintiffs who, under literal readings of the rule, would not otherwise have been able to sue.⁹⁷

Under the revitalized rule the express trust exception should be limited to trustees of express trusts created in writing. While this limitation may appear somewhat arbitrary, it is necessary to narrow the exception sufficiently to allow it once again to be easily and meaningfully administered. Admittedly, such narrowing limits the classes of persons able to sue under the express trust exception. Under the main rule, however, persons with a substantial interest in a chose can still sue.

The express trust exception reflects a policy judgment that trustors should be able to designate anyone they wish to guard and manage trust assets. A primary purpose of such trusts as spendthrift trusts would be defeated if the trustee were denied the right to prosecute actions relative to the trust without interference from the beneficiaries. In the absence of prejudice to defendants' discovery rights, a trustor's selection of one to shepherd trust assets should not be disregarded; trustees of express trusts should be able to sue on matters involving their trusts. For express trusts created in favor of multiple beneficiaries, the trustee exception may be further justified on the same grounds of judicial economy used to justify suits by bailees.⁹⁸

D. Parties with Whom or in Whose Name a Contract Has Been Made for the Benefit of Another

This exception is designed primarily to allow makers of third party beneficiary contracts and agents to sue upon contracts made in their names.⁹⁹ Presumably the maker of a third party beneficiary contract is permitted to sue on the contract to enable him to protect his *bénéfice*. The agent is permitted to sue on a contract made in his own name probably because it is felt that this privilege is one of the bargained for incidents of such contracts.

⁹⁷ Cf. *Barrett v. Chicago, M. & St. P. Ry.*, 190 Iowa 509, 175 N.W. 950 (1920); *Citizens Trust Co. v. Tindle*, 272 Mo. 681, 199 S.W. 1025 (1917).

⁹⁸ The analogy between the two exceptions is limited, however, to suits by executors and administrators on post mortem claims. The justification for suits by executors and administrators on causes of action accruing prior to decedent's death is that the decedent can no longer bring such suits himself. A similar rationale cannot be applied to justify suits by a trustee of an express trust regarding causes of action accruing to the trustor prior to establishment of the trust. The settlor in most cases is still alive and capable of submitting to discovery. Thus, under the revitalized rule, a defendant should be able to insist upon joinder of the settlor of an express trust in cases in which the trustor's absence from the suit would prejudice defendant's discovery rights.

⁹⁹ Note that this exception refers to the maker of the third party beneficiary contract and not to the beneficiary. At least one prominent commentator seems to have become confused on this point. See *Atkinson*, *supra* note 57, at 947.

Under the revitalized rule this exception seems unnecessary. Makers of third party beneficiary contracts and agents would probably be considered real parties in interest under the discoverability provision¹⁰⁰ of the main rule's definition of real party in interest. Thus, under the revitalized rule this exception should be eliminated.¹⁰¹

E. Guardians

The exception to the real party in interest rule permitting guardians to sue¹⁰² is not universal. The typical real party in interest statute requires only that actions be prosecuted "in the name of" the real party in interest.¹⁰³ Nothing in these statutes prevents suits by a guardian in the name of his ward. In fact, many jurisdictions require guardians to sue in this manner.¹⁰⁴

On the one hand the ends accomplished by such name suits are sound. Parties otherwise legally incapable of prosecuting actions are assured a means of receiving justice. At the same time defendants are assured due process. Since wards are parties, albeit formal parties, to suits prosecuted

¹⁰⁰ See text preceding note 62, *supra*.

¹⁰¹ See also Gavitt, *The New Federal Rules and State Procedure*, 25 A.B.A.J. 367, 372-73 (1939).

The revitalized rule's broad applicability to agents has one major drawback. The discoverability aspect of the main rule's definition of real party in interest encompasses all agents and not just those classes of agents permitted to sue under existing interpretations of the rule. Thus, under the revitalized rule even an agent who was working for a disclosed principal and who did not sign a disputed document in his own name could prosecute an action or be joined to it at defendant's insistence. This latter effect of the rule is probably undesirable. *Cf.* Howard v. Boyce, 266 N.C. 572, 146 S.E.2d 828 (1966). Persons dealing with an agent who signs a document solely in the name of his disclosed principal do not intend nor expect that they may be sued by anyone other than the disclosed principal or his successor. Similarly, an agent signing a document solely for a fully disclosed principal does not intend nor expect that he thereby opens himself to the risk of being joined as a party plaintiff in any litigation commenced by his principal arising out of the transaction. These undesirable results may be avoided by findings that agents are estopped to assert that they are real parties in interest, and defendants are estopped to move for the agent's joinder in cases in which the agent has both been dealing for a disclosed principal and signed any documents solely in the principal's name.

In cases involving undisclosed principals, the agent should always be considered a real party in interest, and his joinder required upon defendant's motion. CAL. CIV. CODE § 2343 (West 1954).

¹⁰² *E.g.*, CAL. CODE CIV. PRO. § 369 (West 1954).

¹⁰³ *Id.* § 367.

Atkinson suggests that the New York Commissioners on Practice and Pleadings required only that actions be prosecuted "in the name of the real party in interest" because had they required that actions be prosecuted "by" the real party in interest, their rule would have prevented suits by guardians on behalf of their wards. Atkinson, *supra* note 57, at 937.

¹⁰⁴ *E.g.*, CAL. CODE CIV. PRO. § 372 (West 1954) as construed by Fox v. Minor, 32 Cal. 111 (1867) (suit in name of guardian dismissed on ground suit should have been brought in name of ward).

in their names, defendants have all rights against them which they would usually possess against a party plaintiff.¹⁰⁵ On the other hand, the name suit technique is undesirable as a general practice. If real party in interest statutes were read generally as permitting nonreal parties in interest to prosecute suits "in the name of" the real party in interest, an original goal of the rule—cessation of suits by one individual in the name of another—would be defeated. A better approach would begin with modifying the general rule to require that suits be prosecuted by the real party in interest himself.¹⁰⁶ Because this modification precludes suits by guardians on behalf of their wards, and because such suits are desirable, the revitalized rule should adopt an exception permitting guardians to sue. By adopting this approach courts could insure the conceptual integrity of the revitalized rule without sacrificing the guardian's right to sue.

That guardians may sue under an exception to the revitalized rule, however, does not mean that they may sue without joining their wards. Even though a ward usually lacks capacity to sue, he can still be a real party in interest.¹⁰⁷ In many cases a ward will be in exclusive possession of information regarding the transaction giving rise to the suit. In such cases the defendant's ability to present an adequate defense may require that the defendant make discovery of the ward. To protect defendants, courts should, in the absence of strong public policy to the contrary,¹⁰⁸ require the joinder of wards in suits prosecuted on their behalf.¹⁰⁹

*F. Persons Authorized by Statute*¹¹⁰

The most easily explained exception to the rule relates to persons authorized to sue by statute. If the legislature feels that a given class of nonreal parties in interest should be able to sue on a given cause of action, courts should not interfere with that determination. The exception

¹⁰⁵ Colvert v. Colvert, 95 Ind. App. 325 (1932); Fotopoulos v. Gas Serv. Co., 150 Kan. 738, 96 P.2d 666 (1939); Chenault v. State Bank & Trust Co., 278 Ky. 453, 128 S.W.2d 715 (1939). *But see* Griffin v. Londrigan, 107 N.J. Eq. 76, 151 A. 611 (Ch. 1930) (lunatic not discoverable by reason of incompetency; guardian of lunatic not discoverable because not a party); Alsante v. Roberts, 118 N.Y.S.2d 683 (Sup. Ct. 1953) (examination of infant before trial not allowed as violative of public policy).

¹⁰⁶ This modification protects all policies underlying the requirement that beneficially interested persons prosecute an action. See note 54 *supra*.

¹⁰⁷ See text accompanying notes 179-84 *infra*.

¹⁰⁸ *Cf.* Griffin v. Londrigan, 107 N.J. Eq. 76, 151 A. 611 (Ch. 1930); Alsante v. Roberts, 118 N.Y.S.2d 683 (Sup. Ct. 1953).

¹⁰⁹ This problem might also be solved by amending rules like FED. R. CIV. P. 35 to permit discovery of a ward as California has done. CAL. CODE CIV. PRO. § 2032(a) (West Supp. 1966).

¹¹⁰ For examples of actions in which parties are authorized by statute to sue, see 2 W. BARRON & A. HOLTZOFF, *supra* note 82, at § 482 nn.54-55.

has the additional advantage of acting as a reminder to practitioners that not all code provisions relevant to parties plaintiff are embodied in the real party in interest statute. This exception should be retained in the revitalized rule.

IV

USES OF A REVITALIZED RULE: ASSIGNMENT AND SUBROGATION

A complete understanding of the revitalized rule requires an examination of the application of the rule in specific types of cases. The greatest controversy concerning the rule in its traditional forms occurs in cases involving assignments or subrogations. Accordingly, the next two sections of this Comment will deal with the major real party in interest problems arising in these contexts and with the effect the revitalized rule might have on such problems.¹¹¹

A. Assignment¹¹²

1. Assignment in General

The real party in interest rule is not intended to affect the substantive law of assignment.¹¹³ The rule was designed solely to determine who

¹¹¹ Other areas in which real party in interest difficulties arise are: patent disputes, see generally 2 W. BARRON & A. HOLTZOFF, *supra* note 82, § 482, at 18-19; labor disputes, see generally *id.*, at 10-12; bankruptcy actions, see generally 3 J. MOORE, *FEDERAL PRACTICE* ¶ 17.04 (2d ed. 1967); ejectment actions, see generally Simes, *The Real Party in Interest*, 10 K.Y. L.J. 60, 71-72 (1922), see also *City of Newark v. Eastern Airlines*, 159 F. Supp. 750 (D.N.J. 1958); workmen's compensation actions, see generally 2 W. BARRON & A. HOLTZOFF, *supra* note 82, § 482, at 24-26; wrongful death actions, see generally F. JAMES, *CIVIL PROCEDURE* § 98, at 398-401 (1965); antitrust actions, see generally *Arlington Glass Co. v. Pittsburgh Plate Glass*, 24 F.R.D. 50 (N.D. Ill. 1959); *Northern Cal. Monument Dealers Ass'n v. Interment Ass'n*, 120 F. Supp. 93 (S.D. Cal. 1954); actions involving negotiable instruments, see generally 39 AM. JUR. *Parties* § 16 (1942); stockholders derivative actions, see generally cases cited in WEST'S SEVENTH DECENNIAL DIGEST, *Corporations*, Key No. 210 (1956-66); class actions, see generally *National Radio School v. Marlin*, 83 F. Supp. 169 (N.D. Ohio 1949); *Clark v. Chase Nat'l Bank*, 45 F. Supp. 820 (S.D.N.Y. 1942); actions on conditional sales contracts, see generally *Zack Metal v. The S.S. Birmingham City*, 291 F.2d 451 (2d Cir. 1961).

¹¹² The question of the validity of an assignment often arises in federal courts in the context of challenges to the jurisdiction of the court under 28 U.S.C. § 1359 (1964). Section 1359 reads: "A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court." No satisfactory test has yet been developed for application of § 1359. Perhaps the factors relevant to determining an assignee's status as a real party in interest might also be relevant to determining whether an assignment has been improperly or collusively made within the meaning of § 1359. For more detailed consideration of this possibility see F. JAMES, *CIVIL PROCEDURE* § 9.13, at 412-13 (1965); 3 J. MOORE, *FEDERAL PRACTICE* ¶¶ 17.03, 17.05-.06 (2d ed. 1967); Comment, *Diversity of Citizenship and the Real Party in Interest*, 4 U.C.L.A.L. REV. 619 (1957).

For a discussion of the history of assignment in the common law see note 20, *supra*.

¹¹³ For a discussion of what constitutes a valid assignment see 4 A. CORBIN, *CONTRACTS* §§ 865-73 (1951).

should sue once a valid assignment has been made. Under the revitalized rule there can be little question of an assignee's status to sue on a validly assigned claim.¹¹⁴ The assignee in such a case will almost certainly have a substantial and beneficial interest in the outcome of litigation relative to the claim. The more difficult question in such cases is whether the assignor should also be required to join in prosecution of the action. Courts have universally answered this question in the negative.¹¹⁵ For the most part these decisions appear correct—the assignor has lost whatever beneficial interest he had in the claim. However, in cases in which the assignor exclusively possesses information relative to the chose such that a reasonable defendant would wish to utilize discovery devices against him, courts should require his joinder.¹¹⁶

2. *Partial Assignment*

Partial assignment cases are the only class of cases in which the courts have rationally applied the real party in interest rule. In such cases both the assignor and the assignee are real parties in interest. Both possess a substantial beneficial interest in the outcome of litigation relative to their joint claim. Both may have information regarding the claim such that a reasonable defendant would wish to discover them. Accordingly, both should be joined under the revitalized rule as parties plaintiff in suits on their joint claim.¹¹⁷

3. *Assignment for Collection Only*

Nowhere is the question of the purpose and meaning of the real party in interest rule raised as squarely as with regard to the status of an assignee for collection only. Nowhere do the courts manifest more confusion than in deciding whether an assignee for collection only is a real party in interest. A majority of courts has held that an assignee for collection only is a real party in interest.¹¹⁸ They do not, however, agree

¹¹⁴ Atkinson, *The Real Party In Interest Rule: A Plea for its Abolition*, 32 N.Y.U.L. REV. 926, 934-36, 939-42 (1957).

¹¹⁵ E.g., *Burlison v. Carl*, 83 Ind. App. 514, 149 N.E. 89 (1925); *Foster v. Central Nat'l Bank*, 183 N.Y. 379, 76 N.E. 338 (1906).

¹¹⁶ See text accompanying notes 43-46, *supra*. Factors relevant to determinations of this nature are considered in the text accompanying notes 65-66, *supra*.

¹¹⁷ *Schilling v. Mullen*, 55 Minn. 122, 56 N.W. 586 (1893); F. JAMES, *CIVIL PROCEDURE* § 9.5, at 389 (1965); see *Delaware County Comm'rs v. Diebold Safe & Lock Co.*, 133 U.S. 473 (1890); *Martin v. Howe*, 190 Cal. 187, 211 P. 453 (1922).

¹¹⁸ E.g., *Sroufe v. Soto*, 5 Ariz. 10, 43 P. 221 (1896); *Hammel v. Superior Court*, 217 Cal. 5, 17 P.2d 101 (1932); *Bankers Trust Co. v. International Trust Co.*, 108 Colo. 15, 113 P.2d 656 (1941); *Carson Pirie Scott & Co. v. Long*, 268 N.W. 518, 222 Iowa 506 (1936); *Lucky v. Rush*, 121 Kan. 279, 246 P. 1004 (1926); *Young v. Hudson*, 99 Mo. 102, 12 S.W. 632 (1889); *Castleman v. Redford*, 61 Nev. 259, 124 P.2d 293 (1942); *In re Estate of Bajkic*, 36 Misc. 2d 398, 233 N.Y.S.2d 116 (1962); *Joplin v. Ely*, 365 P.2d 735 (Okla. 1961);

on their reasons for so concluding.¹¹⁹ A minority of courts has steadfastly refused to recognize an assignee for collection only as a real party in interest.¹²⁰ No court has ever convincingly justified either position in terms of public policy.

An assignee for collection only is not a real party in interest according to the discoverability aspect of the revitalized rule's definition of that term. By definition he cannot possess information such that a reasonable defendant would wish to make discovery of him. Nor can an assignee for collection only sue under any of the currently recognized exceptions to the rule.¹²¹ If an assignee for collection only is permitted to sue under the revitalized rule, he must be able to do so under either the beneficial interest aspect of the rule's definition of real party in interest or the authority of an exception to the rule. Assuming the interest of an assignee for collection only is insufficient to qualify him as a beneficially interested real party in interest,¹²² the question arises whether another exception should be added to the rule authorizing suits by assignees for collection only.

Commercial necessity is the primary justification for allowing suits

Hibernia Sec. Co. v. United Mfg. Co., 154 Or. 369, 59 P.2d 384 (1936); *J. F. Anderson Lumber Co. v. National Sur. Co.*, 49 S.D. 235, 207 N.W. 53 (1926); *Chesney v. District Court*, 99 Utah 513, 108 P.2d 514 (1941); *Olsen v. Hagan*, 102 Wash. 321, 172 P. 1173 (1918); *Hankwitz v. Barrett*, 143 Wis. 639, 128 N.W. 430 (1910). See also F. JAMES, *CIVIL PROCEDURE* § 9.3, at 386 (1965); 3 J. MOORE, *FEDERAL PRACTICE* ¶ 17.09, at 1341-43 (2d ed. 1967).

The few courts that have waived on the question have always ended up in the camp of the majority. Kansas first decided that assignees for collection only were real parties in interest, *Krapp v. Eldridge*, 33 Kan. 106, 5 P. 372 (1885), then decided that they were not, *Stewart v. Price*, 64 Kan. 191, 67 P. 553 (1902), and finally ended up holding that they were real parties in interest, *Manley v. Park*, 68 Kan. 400, 75 P. 557 (1904). See also *State ex rel. Freebourn v. Merchant's Credit Serv., Inc.*, 104 Mont. 76, 66 P.2d 337 (1937), overruled by *Rae v. Cameron*, 112 Mont. 159, 114 P.2d 1060 (1941).

¹¹⁹ Compare *Rosenblum v. Dingfelder*, 111 F.2d 406 (2d Cir. 1940) (assignee for collection only can sue as holder of legal title) with *James v. Lederer-Strauss & Co.*, 32 Wyo. 377, 233 P. 137 (1925) (assignee for collection only can sue as trustee of an express trust).

¹²⁰ *Coombs v. Harford*, 99 Me. 426, 59 A. 529 (1904); *Martin & Garrett v. Mask*, 158 N.C. 436, 74 S.E. 343 (1912); *Brown v. Ginn*, 66 Ohio St. 316, 64 N.E. 123 (1902); 1 J. KERR, *LAW OF PLEADING AND PRACTICE* § 586 (1919).

¹²¹ See text accompanying notes 78-110 *supra*. Some courts, however, have permitted an assignee for collection only to sue under the theory that he is a trustee of an express trust. E.g., *James v. Lederer-Strauss & Co.*, 32 Wyo. 377, 233 P. 137 (1925). However, as that exception is interpreted for purposes of the revitalized rule, an assignee for collection only is not a trustee of an express trust.

¹²² If the assignee has a large contingent fee interest in the assigned chose this assumption would obviously be incorrect. In that case the assignee for collection only would be considered a real party in interest and could sue as such. Under the revitalized rule, however, the desirability of assigning a claim for collection only would be greatly reduced because the assignor would in most cases still have to join in prosecution of the action on the assigned chose. See text accompanying notes 114-18 *supra*.

by assignees for collection only.¹²³ Refusal to permit such parties to sue results in unnecessary economic waste. If assignees for collection only were not permitted to sue, merchants might be forced to decide between abandoning their enterprises while suing on delinquent accounts, or abandoning their delinquent accounts. Neither choice produces socially desirable results.¹²⁴

The arguments against allowing suit by an assignee for collection only repeat those considered earlier in justifying the revitalized rule itself.¹²⁵ The arguments most relevant to the present problem involve: (1) the traditional feeling that suits should be prosecuted by persons beneficially interested in their outcome, (2) the desire to protect defendants' discovery rights, and (3) the desire to protect defendants' counterclaims.¹²⁶

The above considerations do not seem very compelling with regard to suits in which the amount in controversy is relatively small. The policy reasons for requiring that suits be prosecuted by beneficially interested parties are highly abstract. They reflect value judgments regarding fairness.¹²⁷ Against such intangible judgments must be weighed the probability that tangible economic waste will follow from refusal to allow assignees for collection only status to sue. In small cases the threat of tangible harm seems far more compelling than the intangible feeling that suits should be prosecuted by the beneficially interested party.

In addition, the expense of discovery in small cases usually outweighs its utility. A reasonable defendant in an action seeking only five dollars or even five hundred dollars is unlikely to exercise those discovery rights that the revitalized rule is designed to protect. Little risk of prejudice to defendants would result from permitting suits in such cases by assignees for collection only.

Attempted assignment for collection only of large claims presents an entirely different situation. The probability that defendant will wish to make discovery of the real party in interest increases substantially with the amount in controversy.¹²⁸ For this reason, courts should be hesitant to permit assignees for collection only to sue alone on large claims.

¹²³ Note, 2 MONT. L. REV. 120, 124 (1941); cf. F. JAMES, CIVIL PROCEDURE § 9.5, at 389 (1965).

¹²⁴ If a merchant chose the former alternative, his business would suffer. If a merchant chose the latter alternative, two undesirable consequences would follow. First, his costs would increase. Second, his customers would be encouraged to default on their accounts.

¹²⁵ See text accompanying notes 35-61 *supra*.

¹²⁶ Cf. *Macri v. Carson Tahoe Hosp., Inc.*, 247 A.C.A. 23, 55 Cal. Rptr. 276 (1966).

¹²⁷ See note 54 *supra*.

¹²⁸ Further, in such cases the intangible feeling that suits should be prosecuted by the beneficially interested party weighs more heavily against the threat of economic waste. Some-

Administrative inconvenience and judicial inconsistency would undoubtedly plague the courts if judges were required to weigh all the above factors before deciding whether to allow suit by an assignee for collection only in every given case. Fortunately, the problem lends itself to legislative solution. By drafting an exception to the real party in interest statute permitting the designee of a real party in interest to prosecute an action for, perhaps, five hundred dollars or less without joining the real party in interest, all major problems are solved. Economic waste is avoided in those cases in which it would most likely occur, defendants are protected in those cases in which they most need protection, and courts are supplied with an easily administered test for determining the propriety of suits by nonreal parties in interest. Such an exception has the further advantage of applying to all manner of cases, and not just to those involving assignments for collection only. For example, this exception would also apply to cases involving the propriety of suits by persons having powers of attorney.¹²⁹

Finally, this exception would permit courts to avoid the necessity of making fine distinctions between transfers deemed "partial assignments" and transfers deemed "assignments for collection only." If an action were commenced seeking more than the statutory amount, the court would, in proper cases, be able to join the assignor regardless of the assignee's interest in the claim. It would not matter whether the assignee was a full assignee, a partial assignee, or an assignee for collection only. As a practical consequence, since the assignor could always be joined, the appeal of the assignment for collection only technique would be greatly reduced.

4. *Assignment for Collateral Security*

Most courts treat an assignee for collateral security in the same manner as they treat assignees for collection only.¹³⁰ Such treatment is improper because the status of the two classes of assignees differs qualitatively. The assignee for collateral security has, *prima facie*, a substantial beneficial interest in the outcome of litigation on the assigned chose.

how it seems less wasteful to require that one prosecute personally a claim for \$5,000 than to require that same person to prosecute a claim for only \$5.

¹²⁹ Strangely enough some jurisdictions refuse to allow persons with mere powers of attorney to prosecute suits, *Archie v. Shell*, 110 F. Supp. 242 (E.D. La. 1953), *aff'd* 210 F.2d 653 (5th Cir.), *cert. denied*, 348 U.S. 843 (1954), including at least one jurisdiction that permits assignees for collection only to sue. *Spencer v. Standard Chemical & Metals Corp.*, 237 N.Y. 479, 143 N.E. 651 (1924). No major distinctions exist between a suit by one having powers of attorney and a suit by one who receives an assignment for collection only. Accordingly both situations should be treated in the same manner.

¹³⁰ *E.g.*, *Wetmore v. City of San Francisco*, 44 Cal. 294 (1872); *Marker v. Gillam*, 54 Okla. 766, 154 P. 351 (1916); *Barak v. Detroit Apartments Corp.*, 232 Mich. 59, 204 N.W. 745 (1925).

Should there be a failure of recovery the assignee for collateral security could lose his loan. The assignee for collection only, however, has no such *prima facie*, substantial beneficial interest in the outcome of litigation relative to the assigned chose.¹⁸¹ At best his interest in the litigation is an expectancy. Since he risks nothing in exchange for his interest in the chose, he is deprived of nothing upon a failure to recover. The situation of an assignee for collateral security is more analogous to that of a partial assignee¹⁸² than to that of an assignee for collection only. Courts should therefore consider assignees for collateral security as real parties in interest.

B. Subrogation

1. Subrogation and Assignment

In theory, few differences exist between subrogation and assignment.¹⁸³ In practice, the two almost always occur in completely different contexts.¹⁸⁴ Assignments generally involve contract claims. Subrogations usually involve tort claims. Preparation of an effective tort defense always requires information relative to the alleged cause, nature, and extent of injuries suffered by a tort claimant. Preparation of an effective contract defense, however, may not require information relative to the circumstances surrounding the making of a contract. Consequently, reasonable defendants are more likely to feel the need to make discovery of a subrogor than of an assignor. Under the discoverability aspect of the revitalized rule's definition of real party in interest, courts would therefore be more apt to find subrogors to be real parties in interest than assignors.¹⁸⁵

2. Subrogation in General¹⁸⁶

The real party in interest rule has not been applied to cases involving subrogation with any consistency. Some courts have read the rule as requiring that actions on subrogated claims must be prosecuted by the

¹⁸¹ Although if his fee for suing upon the claim takes the form of a large contingent interest in the claim, his interest in the litigation will certainly be substantial.

¹⁸² See text accompanying note 117 *supra*.

¹⁸³ Atkinson, *supra* note 114, at 943. Cf. F. JAMES, CIVIL PROCEDURE § 9.4, at 387 (1965); 3 J. MOORE, FEDERAL PRACTICE ¶ 17.09, at 1346, 1348 n.30 (2d ed. 1967).

¹⁸⁴ Cf. *Memphis & Little Rock R.R. v. Dow*, 120 U.S. 287, 301 (1887).

¹⁸⁵ The courts have, in fact, more often found subrogors to be real parties in interest than they have found assignors to be real parties in interest. Compare *Alaska Pac. S.S. Co. v. Sperry Flour Co.*, 94 Wash. 227, 162 P. 26 (1917) with *Paper Makers Importing Co. v. Milwaukee*, 165 F. Supp. 491 (E.D. Wis. 1958).

¹⁸⁶ See also Annot., 96 A.L.R. 864 (1935). For cases and comment relevant to the history of subrogation at equity and common law, see F. JAMES, CIVIL PROCEDURE § 9.4, at 387 (1965); Note, 10 IND. L.J. 528 (1935). See also *Aetna Ins. Co. v. Hannibal & St. J.R.R. Co.*, 1 F. Cas. 207 (No. 96) (C.C.E.D. Mo. 1874); *Peoria Marine & Fire Ins. Co. v. Frost*, 37 Ill. 333 (1865).

subrogee alone.¹³⁷ Other courts have read the rule as requiring that such actions be prosecuted by the subrogor alone.¹³⁸ Still others have held that the rule permits either the subrogor or the subrogee to prosecute such actions.¹³⁹ And at least one court has held that the rule compels joinder of both the subrogor and subrogee in prosecution of a claim.¹⁴⁰ Under the revitalized rule this last approach seems most desirable.

Those courts which hold that the subrogee must sue alone limit the effective discovery rights of defendants. If the subrogor is not a party to the suit, defendant may not be able to make effective discovery against him.¹⁴¹ This is particularly true in suits on subrogated personal injury claims.¹⁴² The discovery provision in most jurisdictions relating to physical and mental examinations applies only to parties to the suit.¹⁴³

If the subrogor of a personal injury claim is not a party to the suit, defendant cannot compel him to submit to physical or mental examination.¹⁴⁴ Defendant might thus be prevented from obtaining information vital to the presentation of a good defense.¹⁴⁵ Such injustice can be avoided by compelling the subrogor to join in the suit.

¹³⁷ *Travelers' Ins. Co. v. Great Lakes Works Co.*, 184 F. 426 (6th Cir. 1911); *Marine Ins. Co. v. St. Louis, I.M. & S. Ry. Co.*, 41 F. 643 (E.D. Ark. 1890); *Cunningham & Hinshaw v. Seaboard Air Line Ry.*, 139 N.C. 427, 51 S.E. 1029 (1905).

¹³⁸ *Alaska Pac. S.S. Co. v. Sperry Flour Co.*, 94 Wash. 227, 162 P. 26 (1917); *Illinois Cent. R.R. Co. v. Hicklin*, 131 Ky. 624, 115 S.W. 752 (1909).

¹³⁹ *Foster v. Missouri Pac. Ry. Co.*, 143 Mo. App. 547, 128 S.W. 36 (1910).

¹⁴⁰ *Pratt v. Radford*, 52 Wis. 114, 8 N.W. 606 (1881).

¹⁴¹ Four of the five most common discovery devices may be used only against parties to the suit. See note 43 *supra*.

¹⁴² The courts have held personal injury claims to be subrogable under certain circumstances. If there is a clause in an insurance policy providing that the insurance company shall have a lien for all sums expended by it in accordance with the policy against any judgment that may be rendered in favor of insured, the insurance company may become subrogated to the policy-holder's claim. *Davidson v. Louisville & N.R.R.*, 294 S.W.2d 519 (Ky. 1956); *Reutenik v. Gibson Packing Co.*, 132 Wash. 108, 231 P. 773 (1924). In the absence of such a clause no subrogation is possible. *Crab Orchard Improvement Co. v. Chesapeake & O. Ry.*, 115 F.2d 277 (4th Cir. 1940).

The possibility of subrogation in personal injury cases is surprising because of the strong stance courts have traditionally taken against assignment of the same type of claim. *E.g.*, *Comegys v. Vasse*, 26 U.S. (1 Pet.) 193 (1828); *Washington v. Washington*, 47 Cal. 2d 249, 302 P.2d 569 (1956); *Catalano v. Higgins*, 54 Del. 548, 182 A.2d 637 (1962); *Clar v. Dade County*, 116 So. 2d 34 (Fla. 1959); *Remsen v. Midway Liquors, Inc.*, 30 Ill. App. 2d 132, 174 N.E.2d 7 (1961); *cf. Juba v. General Builders Supply Corp.*, 7 N.Y.2d 48, 163 N.E.2d 328, 194 N.Y.S.2d 503 (1959).

¹⁴³ *E.g.*, Fed. R. Civ. P. 35, as interpreted in *Wadlow v. Humbred*, 27 F. Supp. 210 (W.D. Mo. 1939). See also CAL. CODE CIV. PRO. § 2032 (West 1954) which allows physical and mental examinations not only of a party but also of "an agent or a person in the custody or under the legal control of a party." Note that the phrase "a person . . . under the legal control of a party" might, arguably, include a subrogor.

¹⁴⁴ *Wadlow v. Humbred*, 27 F. Supp. 210 (W.D. Mo. 1939). But see *Beach v. Beach*, 114 F.2d 479 (D.C. Cir. 1940).

¹⁴⁵ For an example, see *United States v. Aetna Cas. & Sur. Co.*, 338 U.S. 366 (1949).

Those courts which require the subrogor to sue alone are encouraging unnecessary litigation and perhaps fraud. Frequently subrogors when given control over the action abuse their power. They settle when they should sue. Unauthorized settlement by subrogors presents courts with two unacceptable alternatives. First, courts can find the settlement invalid as to the subrogee and can allow him to proceed against either the subrogor¹⁴⁶ or the obligor.¹⁴⁷ If courts allow suit against the subrogor, they will have entertained one action more than would have been necessary had the subrogee been joined in the original action. If courts allow suit against the obligor, they will not only have to entertain an additional action but will also have exposed the obligor to the necessity of defending two suits on a single claim. Second, courts can find the settlement valid as to the subrogee.¹⁴⁸ Such a finding, however, amounts to judicial approval of fraud on the subrogee. The necessity of choosing between these alternatives may be avoided by joining the subrogee in the initial suit.

3. Partial Subrogation

No logical basis exists for distinguishing partial subrogation from partial assignment. In both cases all persons with an interest in the assigned or subrogated claim have a substantial beneficial interest in the outcome of the litigation.¹⁴⁹ Accordingly, both situations should be treated in the same manner.¹⁵⁰

The courts, however, have not dealt with partial subrogation in the rational manner with which they have treated partial assignment. A majority of courts holds the subrogor to be the real party in interest in such cases.¹⁵¹ Of these courts, some hold the subrogor to be the only real party in interest.¹⁵² Most of the courts following the majority rule, how-

¹⁴⁶ *E.g.*, *Atchison, T. & S.F.R.R. Co. v. Home Ins. Co.*, 59 Kan. 432, 53 P. 459 (1898); *Shawnee Fire Ins. Co. v. Cosgrove*, 85 Kan. 296, 116 P. 819 (1911); *Newcomb v. Cincinnati Ins. Co.*, 22 Ohio St. 382 (1872).

¹⁴⁷ *E.g.*, *Monson v. Payne*, 199 Ky. 105, 250 S.W. 799 (1923); *Hartford Fire Ins. Co. v. Wabash Ry.*, 74 Mo. App. 106 (1898); *Connecticut Fire Ins. Co. v. Erie Ry.*, 73 N.Y. 399 (1878); *General Exch. Ins. Corp. v. Young*, 357 Mo. 1099, 212 S.W.2d 396 (1948).

¹⁴⁸ *Dodson v. Kansas City Pub. Serv. Co.*, 230 Mo. App. 468, 91 S.W.2d 227 (1936). See also *F. JAMES, CIVIL PROCEDURE* § 9.5, at 390-92 (1965).

¹⁴⁹ This fact is even more obvious in cases of subrogation than in cases of assignment. Subrogation is essentially equitable in nature. Note, 10 *IND. L.J.* 528 (1935). Equity permitted only those having a substantial beneficial interest in the litigation to sue. See note 55 *supra*. Hence it necessarily follows that a subrogee of a properly subrogated claim must have a substantial beneficial interest in the claim. The interest of a partial assignee in a partially assigned claim is not necessarily substantially beneficial. Courts will be hard put in marginal cases to distinguish between partial assignment and assignment for collection only. See text following note 129 *supra*.

¹⁵⁰ See, *e.g.*, 3 *J. MOORE, FEDERAL PRACTICE* ¶ 17.09, at 1348 n.30 (2d ed. 1967).

¹⁵¹ *E.g.*, *Harrington v. Central States Fire Ins. Co.*, 169 Okla. 255, 36 P.2d 738 (1934).

¹⁵² *E.g.*, *Hayward v. State Farm Mutual Auto. Ins. Co.*, 212 Minn. 500, 4 N.W.2d 316, 318 (1942).

ever, permit the subrogee to join if he desires.¹⁵³ Other courts require joinder of the subrogee upon motion of defendant.¹⁵⁴ The approach taken by this latter group of courts, and by the revitalized rule, seems more desirable because it reduces both the probability of redundant litigation and the risks to defendants of multiple liability.

4. *The Subrogated Insurer*¹⁵⁵

Problems of applying the real party in interest rule to subrogees most frequently arise in suits on fully subrogated insurance claims. In these cases, many courts hold the subrogated insurer to be the real party in interest.¹⁵⁶ Insurance companies, fearing jury prejudice, vigorously resist these holdings. They assert that suits on their subrogated claims are jeopardized by the requirement that they join in the formal prosecution of the action.¹⁵⁷ To avoid this alleged prejudice the companies have developed a number of devices to prevent subrogation, thus circumventing the effect of rulings that a full subrogee is a real party in interest.

(a) *The Loan Receipt Technique*.¹⁵⁸—The device most frequently invoked to avoid subrogation is the loan receipt.¹⁵⁹ Upon being injured, the insured is paid by his own insurer. In return for the payment the insured executes to insurer a loan receipt whereby he acknowledges the compensation as a loan repayable to the extent, and only to the extent, of any net recovery he obtains from the obligor or tortfeasor. The insured also covenants in the agreement to prosecute an action for the recovery of his loss at the expense and under the control of the insurance company.¹⁶⁰

¹⁵³ *Shawnee Fire Ins. Co. v. Cosgrove*, 85 Kan. 296, 116 P. 819 (1911); *Pittsburg, C.C. & St. L. Ry. v. Home Ins. Co.*, 183 Ind. 355, 108 N.E. 525 (1915). *But see* *Southern Bell Tel. & Tel. Co. v. Watts*, 66 F. 460 (4th Cir. 1895).

¹⁵⁴ *E.g.*, *Turk v. Illinois Cent. R.R.*, 218 F. 315 (6th Cir. 1914); *Louisville & N.R.R. v. Mack Mfg. Corp.*, 269 S.W.2d 707, 709 (Ky. 1954).

¹⁵⁵ *See generally* Annot., 13 A.L.R.3d 229 (1967).

¹⁵⁶ *E.g.*, *Werkley v. Koninklijke Luchtvaart Maatschappij, N.V.* (Royal Dutch Airlines, Holland), 110 F. Supp. 746 (S.D.N.Y. 1952); *Lord & Taylor, Inc. v. Yale & Towne Mfg. Co.*, 230 N.Y. 132, 129 N.E. 346 (1920); *Allen v. Chicago & N.W. Ry.*, 94 Wis. 93, 68 N.W. 873 (1896). *Contra*, *Cunningham v. Evansville & T.H.R.R.*, 102 Ind. 478, 1 N.E. 800 (1885); *Simes, The Real Party in Interest*, 10 Ky. L.J. 60, 68-69 (1922). On court responses under Fed. R. Civ. R. 17(a) to insurance cases *see generally* Kennedy, *Federal Rule 17(a): Will the Real Party in Interest Please Stand?*, 51 MINN. L. REV. 675, 686-97 (1967).

¹⁵⁷ *E.g.*, *Merrimack Mfg. Co. v. Lowell Trucking Corp.*, 182 Misc. 947, 46 N.Y.S.2d 736 (Sup. Ct. 1944); Note, 46 Ky. L.J. 252, 257-58 (1958). The existence of such prejudice has been much doubted. Note, 74 HARV. L. REV. 357, 358 n.12 (1960); 41 MINN. L. REV. 784, 788-91 (1957). *See also* Atkinson, *supra* note 114, at 944.

¹⁵⁸ *See generally* Boynton, *The Myth of the "Loan Receipt" Revisited Under Rule 17(a)*, 18 S.C.L. REV. 624 (1966). *See also* Annot., 13 A.L.R.3d 42 (1967).

¹⁵⁹ Annot., 13 A.L.R.3d 42, 94-97 (1967).

¹⁶⁰ *Cf. Newco Land Co. v. Martin*, 358 Mo. 99, 213 S.W.2d 504 (1948), *noted in* 17 U. KAN. CITY L. REV. 72.

The loan receipt technique was initially developed to circumvent provisions in most public carriers' freight contracts providing that the carrier's liability for loss or damage to goods in transit be reduced by the amount of any compensation received by the shipper from the shipper's own insurance.¹⁶¹ More recently, insurance companies have been using loan receipts to avoid alleged jury prejudice.¹⁶² In both contexts courts have focused exclusively upon the legitimacy of the loan receipt as a procedural device. As a result, they have failed to examine the substantive problems underlying the use of such techniques.¹⁶³

By acquiescing in loan receipts intended to avoid undesirable clauses in shipping contracts, courts fail to examine the validity of the clauses themselves. If provisions for giving carriers the benefit of shipper's insurance are unconscionable, they should be declared null and void.¹⁶⁴ If, however, such provisions are acceptable, courts should not allow them to be subverted through such fictitious devices as the loan receipt. Similarly, by acquiescing in loan receipts intended to avoid jury prejudice, courts fail to decide whether such prejudice exists in fact, and, if so, what steps may appropriately be taken to minimize or avoid the prejudice. Under the revitalized rule, courts should always ignore the loan receipt device and hold lenders to be real parties in interest. If such holdings result in prejudice to insurers, other devices, such as the Eastern District of Kentucky approach,¹⁶⁵ may be used.

(b) *The Partial Payment Technique.*—A method frequently employed

¹⁶¹ *E.g.*, *Luckenbach v. McCahan Sugar Ref. Co.*, 248 U.S. 139 (1918); *Kalle & Co. v. Morton*, 156 App. Div. 522, 141 N.Y.S. 374 (1913); *Gulf. C. & S.F. Ry. v. Zimmerman*, 81 Tex. 605, 17 S.W. 239 (1891). *See also* Annot., 13 A.L.R.3d 42, 48-52 (1967).

¹⁶² Annot., 13 A.L.R.3d 42 (1967). *See also* Atkinson, *supra* note 114, at 945.

¹⁶³ Some courts have inquired into the substantive problems. *McNeil Constr. Co. v. Livingston State Bank*, 300 F.2d 88 (9th Cir. 1962); *Cocoa Trading Corp. v. Bayway Terminal Corp.*, 290 N.Y. 865, 50 N.E.2d 247 (1943). *See also* Annot., 13 A.L.R.3d 42, 87-94 (1967). Most courts, however, do not. As a result, courts in the latter category sometimes find themselves faced with blatant attempts to subvert the ends of justice in the guise of loan receipts. *E.g.*, *Tober v. Hampton*, 178 Neb. 858, 136 N.W.2d 194 (1965), where one of several joint tortfeasors, in a jurisdiction not requiring contribution in such cases, compensated the injured party and received from him a loan receipt and a promise that he would sue another joint tortfeasor for the benefit of the compensating tortfeasor. Fortunately, most such attempts are rejected. Nonetheless, they will continue to occur so long as loan receipts are recognized.

¹⁶⁴ *Cf.* *Boston & M.R.R. v. Piper*, 246 U.S. 439 (1918); *Oceanic Steam Navigation Co. v. Corcoran*, 9 F.2d 724 (2d Cir. 1925); *Franklin v. Southern Pac. Co.*, 203 Cal. 680, 265 P. 936 (1928) (all cases holding contract clauses limiting a public carrier's liability for negligence void as against public policy). *See also* W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 67, at 457 (3d ed. 1964); *UNIFORM COMMERCIAL CODE* § 2-302.

¹⁶⁵ *See* text accompanying notes 168-170 *infra*. Alternatively, legislatures could add a qualification to the rule specifically exempting subrogated insurers from the operation of the real party in interest statute. *See* text preceding note 211 *infra*.

to avoid full subrogation is the partial payment technique. This technique has gained popularity in those jurisdictions that permit the subrogor of a partially subrogated claim to sue alone for the entire claim. The mechanics of this technique work as follows: The insurer compensates insured for less than his full loss, thus becoming subrogated to only a part of the total claim. The insured, as a partial subrogor, then files an action for the full amount of his damages without the insurance company's having to join the action.¹⁶⁶ Under the revitalized rule this complicated set of transactions would net the insurer nothing, since both the partial subrogor and the partial subrogee are real parties in interest.¹⁶⁷ Insurers adopting the partial payment technique would still have to participate in the suit.

(c) *The Eastern District of Kentucky Approach.*—The last technique does not involve circumvention of the real party in interest rule. It recognizes that a subrogee is a real party in interest and focuses instead on the problem of avoiding jury prejudice in actions involving subrogated insurers. The approach is denominated the "Eastern District of Kentucky approach" after the place of its origin.¹⁶⁸ The mechanics of this technique are as follows: The subrogated insurer, as a real party in interest, is joined on motion of defendant. The court then proceeds on insured's claim without disclosing to the jury the insurance company's presence. This technique has the dual advantage of protecting the insurer from the risk of jury prejudice and ensuring defendant against the risk of multiple liability. The insurance company's formal presence in the suit ensures that the company is bound by any judgment rendered in the action.

If, under the revitalized rule, protection of insurance companies from the risk of prejudice appears necessary, a provision specifically excluding them should be adopted.¹⁶⁹ Absent legislation, the Eastern District of Kentucky approach should be used. This approach accomplishes the desired ends in a manner conceptually consistent with the revitalized rule and without resort to fictitious devices such as loan receipts.¹⁷⁰

¹⁶⁶ See generally Annot., 13 A.L.R.3d 140 (1967).

¹⁶⁷ If the insurer wishes to be particularly cautious, and if the jurisdiction in which the action is brought permits assignment for collection only, the insurer will then assign its share of the claim to insured for collection only. *Petrikov v. Chicago, R.I. & P.R.R.*, 15 F.R.D. 346 (W.D. Mo. 1954). But see *Louisville & N. Ry. v. Mack Mfg. Co.*, 269 S.W.2d 707, 709 (Ky. 1954).

¹⁶⁸ The technique is described in Note, 46 Ky. L.J. 252, 259 (1958).

¹⁶⁹ See text accompanying note 211 *infra*.

¹⁷⁰ Many state statutes permit an injured party to sue the tortfeasor's insurance company directly. Cf. Note, 74 HARV. L. REV. 357 (1960). Presumably such statutes may be read as a legislative determination that an insurance company's presence in an action is not prejudicial to the insurance company's case. To assure uniform treatment of insurers in such states this policy should be applied to plaintiffs' insurers as well as to defendants' insurers. Thus, in states having direct action statutes, insurers fully subrogated to actionable claims should not be given the benefit of the Eastern District of Kentucky technique.

V

THE REVITALIZED RULE AND EXISTING LAW

The preceding section examined the operation of the revitalized rule in the specific contexts of assignment and subrogation. Complete understanding of the revitalized rule, however, requires more. Examination must also be made of the relationship of the revitalized rule to substantive and procedural law in general.

A. The Relationship of the Revitalized Rule to Substantive Law

The real party in interest rule does not affect substantive law. The rule does not apply to ascertaining when, or under what circumstances, a cause of action has arisen. It acts only as a procedural device for determining necessary and proper parties in actions already recognized by substantive law. As an illustration, suppose that *X* intentionally frightens *Y*, but does so without having touched *Y*. Whether there exists a cause of action for intentional infliction of mental distress is a question of substantive law upon which the real party in interest rule has no bearing. Suppose further that *Y* has become incapacitated as a result of his fright and that he attempts to have *Z*, his best friend, sue *X*. Assuming that a cause of action will be recognized, is *Z* a proper party to bring the action, and if so, may *Z* sue alone without joining *Y*? Such questions fall within procedural law and can be dealt with effectively by applying the revitalized rule.¹⁷¹

B. The Revitalized Rule and the Erie Case

Under the plaintiff-oriented interpretations, the real party in interest rule is considered substantive within the meaning of *Erie Railroad Company v. Tompkins*¹⁷² and therefore Rule 17(a) of the Federal Rules of Civil Procedure (the federal real party in interest rule) does not apply in diversity cases.¹⁷³ This position follows naturally from the plaintiff-oriented definition of "real party in interest."¹⁷⁴ Under the revitalized rule, however, this characterization is incorrect. As noted above, the revitalized

¹⁷¹ Unfortunately, most commentators have failed to distinguish between substance and procedure in this manner. As a result their treatment of the subject tends to be confused. See, e.g., C. CLARK, CODE PLEADING § 22, at 160-61 (2d ed. 1947); F. JAMES, CIVIL PROCEDURE § 9.7, at 395 (1965); 3 J. MOORE, FEDERAL PRACTICE (2d ed. 1967), claiming on the one hand that the rule is merely procedural, *id.* ¶ 17.09, at 1341, and implying on the other hand that it is substantive for *Erie R.R. v. Tompkins* purposes, *id.* ¶ 17.07. Perhaps this confusion can be excused in light of the imprecise meaning of the terms "substance" and "procedure." See *Guaranty Trust Co. v. York*, 326 U.S. 99, 108 (1945).

¹⁷² 304 U.S. 64 (1938).

¹⁷³ E.g., D. LOUISELL & G. HAZARD, CASES ON PLEADING AND PROCEDURE 653 (1962).

¹⁷⁴ See text accompanying notes 19-23 *supra*.

rule serves only to determine which person, or persons, may prosecute an action already recognized by the substantive law.¹⁷⁵ Accordingly, Rule 17(a) of the Federal Rules of Civil Procedure, if revitalized, should not be considered outcome-determinative for *Erie* purposes.¹⁷⁶

C. The Relationship of the Revitalized Rule to Procedural Law

1. The Rule and the Law of Parties

The real party in interest statutes tend to be read as isolated procedural rules. The procedural law of parties, however, would be greatly enriched through assimilation of the rule reflected in such statutes.

(a) *Emphasizing Defendants' Discovery Rights.*—Existing procedural rules respecting parties plaintiff, such as Rule 19 of the Federal Rules of Civil Procedure, place primary emphasis on the problem of protecting defendants against the possibility of multiple liability. Little emphasis is placed on the problem of ensuring that defendants are confronted by adversaries against whom they may effectively use their discovery rights. By including discoverability in its definition of real party in interest, the revitalized rule adds such emphasis.

(b) *Testing Existing Procedural Law.*—Some leading procedural law scholars assert that the real party in interest rule should not be used to determine which persons should bring a specific cause of action.¹⁷⁷ This view, however, does not accurately reflect the function of the revitalized rule. The revitalized rule articulates a set of policies, regarding protection of defendants, against which procedural rules respecting parties may be measured. In utilizing the revitalized rule courts should not mechanically apply existing dogma as a means of determining whether a given plaintiff is a real party in interest. Instead, courts should examine the procedural law arising in this process and reject so much of it as does not accord with the policy judgments expressed by the revitalized rule.¹⁷⁸

¹⁷⁵ See text accompanying note 171 *supra*.

¹⁷⁶ This conclusion is consistent with the recent trend toward classification of the Federal Rules as procedural for *Erie* purposes. See *Hanna v. Plummer*, 380 U.S. 460 (1965). For holdings to the effect that Fed. R. Civ. P. 17(a) is procedural for *Erie* purposes see *American Fidelity & Cas. Co. v. All Am. Bus Lines*, 179 F.2d 7 (10th Cir. 1950); *Hughey v. Aetna Cas. & Sur. Co.*, 32 F.R.D. 340 (D. Del. 1963); *DuVaul v. Miller*, 13 F.R.D. 197 (W.D. Mo. 1952). Such holdings are consistent with the general command of the Rules Enabling Act, 28 U.S.C. § 2072 (1964), that the Federal Rules "shall not abridge, enlarge, or modify any substantive right of any litigant."

¹⁷⁷ In so doing they mistakenly assume that this kind of determination is substantive rather than procedural. See authorities cited in note 22 *supra*.

¹⁷⁸ For example, instead of acquiescing in the proliferation of devices like loan receipts, see text accompanying notes 158-65 *supra*, courts should examine the problems to which such fictitious devices respond. No judicial system should tolerate such fictions, for they are used to mask serious substantive problems. If the ends sought by these techniques are found

2. *The Rule and Questions of Capacity*

Whether one is a real party in interest with regard to a given cause of action and whether he has the legal capacity to sue on that cause of action are entirely separate problems.¹⁷⁹ Challenges to a plaintiff's capacity refer directly to his power to sue. Challenges to a plaintiff's status as a real party in interest, however, refer only to the question of his right to sue in a specific case. A finding that one is, or is not, a real party in interest does not affect his legal capacity to sue. One may lack capacity to sue and still be a real party in interest.¹⁸⁰ Or, one may have capacity to sue and not be a real party in interest.¹⁸¹

Theoretically, a plaintiff must have both capacity and interest to maintain an action.¹⁸² Practically, however, one without interest is far more apt to succeed in maintaining an action than one who lacks capacity. Objections to plaintiff's status as a real party in interest are not considered jurisdictional, and therefore are deemed waived unless timely made.¹⁸³ Objections to plaintiffs' capacity to sue, however, are considered jurisdictional and may be raised at any time.¹⁸⁴

VI

ADMINISTRATION OF THE RULE

A. Presentation of the Objection

1. *Objection by whom*

Since the revitalized rule is designed primarily to aid defendants, the burden of going forward with the objection that plaintiffs are not real parties in interest or are not all the real parties in interest should be upon defendants. Most courts do, in fact, place the burden on defen-

desirable, then the substantive law should be changed to allow their attainment directly. If the ends sought by such devices are found unacceptable, then judicial disapproval should be clearly recorded.

¹⁷⁹ E.g., *American Home Benefit Ass'n v. United Am. Beneficial Ass'n*, 63 Idaho 754, 767, 125 P.2d 1010, 1016 (1942); *Harrington v. Central States Fire Ins. Co. of Wichita, Kan.*, 169 Okla. 255, 36 P.2d 738 (1934). See also Kennedy, *Federal Rule 17(a): Will the Real Party in Interest Please Stand?*, 51 MINN. L. REV. 675, 680 (1967).

¹⁸⁰ See text accompanying notes 102-09 *supra*.

¹⁸¹ *Payette Lakes Protective Ass'n v. Lake Reservoir Co.*, 68 Idaho 111, 189 P.2d 1009 (1948).

¹⁸² There are exceptions to this rule. For example, an interested minor lacking capacity to sue alone, may frequently sue through a guardian ad litem. Cf. *Fox v. Minor*, 32 Cal. 111 (1867).

¹⁸³ *Fox v. McGrath*, 152 F.2d 616 (2d Cir. 1945), *cert. denied*, 327 U.S. 806 (1946). But see *Shambley v. Jobe-Blackley Plumbing & Heating Co.*, 264 N.C. 456, 142 S.E.2d 18 (1965). See also text accompanying note 202 *infra*.

¹⁸⁴ E.g., *Fox v. Minor*, 32 Cal. 111 (1867).

dant.¹⁸⁵ In addition to defendants' power to raise these objections, courts, on their own motion, occasionally challenge plaintiffs' status as real parties in interest.¹⁸⁶ To the extent that such court-sponsored motions avoid redundant litigation by bringing in interested parties who would not otherwise be bound by the judgment, they are desirable. They are not desirable, however, in cases in which such motions do not foreclose future controversy. Joinder of additional parties is a time-consuming and expensive process; if defendant feels no need to request joinder of an individual as plaintiff, there is no reason why a court should require such joinder.¹⁸⁷ The better rule would be that courts should not raise these objections on their own motion.

In cases in which suit is knowingly initiated by one other than a real party in interest, or by fewer than all known real parties in interest, the revitalized rule should require the person or persons commencing the action to set forth in the initial pleading the existence of any unjoined real parties in interest and the reasons for the nonjoinder of each.¹⁸⁸ This practice would expedite determination of whether the original formal parties should be permitted to sue alone if defendant raises an objection.

2. *Timing of the Objection*

Objections that a plaintiff is not a real party in interest or that not all real parties in interest have joined in the action should be deemed waived unless made in or before defendant's answer. Such practice is consistent with the procedure established under Rules 12(b) and 12(h) of the Federal Rules of Civil Procedure for handling objections to a court's jurisdiction over persons. By requiring timely challenges to the number or status of plaintiffs courts can avoid useless litigation.¹⁸⁹ For

¹⁸⁵ E.g., *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).

¹⁸⁶ *Schroeder v. Gerlach*, 366 Ill. 596, 10 N.E.2d 332 (1937). *Contra*, *Kardo Co. v. Adams*, 231 F. 950 (6th Cir. 1916) (reversible error for court to raise real party in interest objection on its own motion).

¹⁸⁷ If defendant does object to plaintiff's status, however, the court should always investigate the merits of his objection. Prior contract agreements by defendants conferring a right to sue on one who is not normally entitled to sue should be disregarded as unconscionable. *Langer v. State*, 69 N.D. 129, 284 N.W. 238 (1939); *New Amsterdam Cas. Co. v. A. Wirtz Transfer Co.*, 20 Ohio L. Abs. 309, 34 N.E.2d 258 (Ct. of App., Butler County 1935). Given the recent trend toward liberal interpretation of res judicata doctrines it would seem that a court which initiated objections to plaintiff's status would, in general, do more harm than good. See *Bernhard v. Bank of America*, 19 Cal. 2d 807, 122 P.2d 892 (1942); Note, *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818 (1952).

¹⁸⁸ *St. Paul Fire & Marine Ins. Co. v. Peoples Natural Gas Co.*, 166 F. Supp. 11 (W.D. Pa. 1958); *FED. R. CIV. P.* 19(c).

¹⁸⁹ If defendants were permitted to save objections to plaintiff's status as a real party in interest, defendants would always await the outcome of the initial trial and, if the result

this reason, most courts hold that objections to plaintiffs' status are waived if not made at the proper time.¹⁹⁰

3. Method of Objection

If on the face of the complaint it appears that the plaintiff is not a real party in interest, or that less than all the real parties in interest have joined in the action, objection may be raised by motion or answer.¹⁹¹ The objection may be raised on demurrer in states where such devices are recognized.¹⁹² Where the facts indicating that plaintiff is not a real party in interest or that fewer than all real parties in interest have joined in the action do not appear on the face of the complaint, the objection to plaintiff's status should be specially pleaded.¹⁹³ In some jurisdictions, defendants are also permitted to raise objections at the pretrial conference to the number or status of plaintiffs.¹⁹⁴

B. Mechanics of Decision

1. Scope of Inquiry

In passing on real party in interest objections, courts should not be restricted to an examination of the pleadings. When necessary, courts should not hesitate to pierce the pleadings and make a cursory examination of the facts of the case.¹⁹⁵ Some courts might even wish to admit testimony relative to such objections before passing on defendant's motion.¹⁹⁶ To a limited extent, such practices might be useful, but courts which engage in them should be careful not to turn preliminary inquiries into full trials.

2. Burden of Proof

Once the defendant has established a prima facie case in support of his objection to the number or status of plaintiffs, he has met his burden

were unfavorable, only then raise the objection to obtain a second trial. *See Kennedy, supra* note 179, at 683-84.

¹⁹⁰ *E.g.*, *Sun-Maid Raisin Growers v. California Packing Corp.*, 273 F.2d 282 (9th Cir. 1959); *City of Skagway v. Home Power Co.*, 8 Alaska 333 (1932); *Grain v. Aldrich*, 38 Cal. 514 (1869); *Caley v. Flegenheimer*, 8 Wis. 2d 72, 98 N.W.2d 473, *cert. denied*, 362 U.S. 961 (1960). *But see Cox v. Detroit United Ry.*, 234 Mich. 597, 208 N.W. 745 (1926).

¹⁹¹ J. MOORE, RULES PAMPHLET 534 (1966).

¹⁹² *E.g.*, *Hoxie v. Americus Auto. Co.*, 73 Ga. App. 686, 37 S.E.2d 808 (1946); *Baker v. Ackerman*, 123 Ind. App. 543, 111 N.E.2d 80 (1953).

¹⁹³ *E.g.*, *Griffith v. Thrall*, 109 Ind. App. 141, 29 N.E.2d 345 (1940); *Elam v. Bruenger*, 165 Kan. 31, 193 P.2d 225 (1948).

¹⁹⁴ *Tober v. Hampton*, 178 Neb. 858, 136 N.W.2d 194 (1965).

¹⁹⁵ *E.g.*, *Fairclough v. St. Amand*, 217 Ala. 19, 114 So. 472 (1927); *Colstad v. Levine*, 243 Minn. 279, 67 N.W.2d 648 (1954); *Texas & Pac. Ry. v. Leatherman*, 351 S.W.2d 633 (Tex. Civ. App. 1961); *Weber v. City of Cheyenne*, 55 Wyo. 202, 97 P.2d 667 (1940).

¹⁹⁶ *Pantzer v. Rogers*, 180 F. Supp. 659 (E.D.N.Y. 1959).

of going forward.¹⁹⁷ The burden of proof rests on plaintiffs to establish the propriety of their number or status with respect to a given cause of action, or a given defendant. This allocation of the burden of proof corresponds with the general rule that plaintiffs have the burden of establishing their jurisdictional allegations when such allegations are challenged.¹⁹⁸

3. *Trier of Fact*

One court has held that the question of whether one is a real party in interest should be decided by the jury.¹⁹⁹ This holding is clearly wrong. Judicial economy requires that questions regarding joinder of parties be settled at the outset of litigation.²⁰⁰ Justice requires that such questions be answered uniformly. If such questions are left to the jury, neither economy nor uniformity is likely. For these reasons, questions regarding the number or status of plaintiffs should be resolved by the judge rather than the jury.²⁰¹

C. Consequences of a Finding That Plaintiff is Not a Real Party in Interest

A number of jurisdictions have held that if a real party in interest does not initiate an action, the court lacks jurisdiction over the suit.²⁰² This result is too harsh. The real party in interest rule requires only that an action be prosecuted²⁰³ by a real party in interest. The rule says nothing about an action being commenced by a real party in interest.

Frequently it is difficult to tell in advance which of many parties will be considered real parties in interest. In those cases in which a good faith effort has been made to comply with the rule, courts should permit the

¹⁹⁷ This burden may be met through allegation of facts sufficient, if true, to justify a finding either (1) that plaintiff is not qualified to sue under the real party in interest rule or one of the exceptions thereto, or (2) that plaintiff is not the only real party in interest with regard to the given action. Note, however, that some courts hold that the defendant also has the burden of proof with regard to such allegations. *Wyoming Wool Marketing Ass'n v. Urruty*, 394 P.2d 905 (Wyo. 1964).

¹⁹⁸ *E.g.*, *Thomson v. Gaskill*, 315 U.S. 422 (1942). *See also* J. MOORE, RULES PAMPHLET 532 (1966). *Contra*, *Wyoming Wool Marketing Ass'n v. Urruty*, 394 P.2d 905 (Wyo. 1964) (real party in interest objection is an affirmative matter to be sustained by the party making it).

¹⁹⁹ *Colstad v. Levine*, 243 Minn. 279, 67 N.W.2d 648 (1954).

²⁰⁰ *See* note 191 *supra*.

²⁰¹ *Williams v. Whitlock*, 14 Mo. 387 (1851); *Tober v. Hampton*, 178 Neb. 858, 136 N.W.2d 194 (1965).

²⁰² *E.g.*, *Shambley v. Jobe-Blackley Plumbing & Heating Co.*, 264 N.C. 456, 142 S.E.2d 18 (1965); *Wilson v. Gibbes Mach. Co.*, 189 S.C. 426, 1 S.E.2d 490 (1939); *Marshfield Clinic v. Doege*, 269 Wis. 519, 69 N.W.2d 558 (1955); *Gardner v. Walker*, 373 P.2d 598 (Wyo. 1962).

²⁰³ *Cf. Spires v. Hanover Fire Ins. Co.*, 364 Pa. 52, 70 A.2d 828 (1950). *But see* *Thelin v. Intermountain Lumber & Builders Supply, Inc.*, 80 Nev. 285, 392 P.2d 626 (1964) ("prosecute" as used in real party in interest statutes includes commencement).

subsequent joinder²⁰⁴ or substitution²⁰⁵ of previously omitted real parties in interest.²⁰⁶ Particularly in cases in which the statute of limitations has run against the unjoined parties, such joinder or substitution should be permitted; otherwise, the innocently omitted parties will be unduly punished for a relatively minor mistake.²⁰⁷ If a person found by the courts to be a real party in interest refuses to join when his joinder appears feasible and desirable, he may be brought into the action as a party defendant.²⁰⁸

CONCLUSION

Because existing procedural statutes do not adequately reflect the interests of defendants in the establishment of standards for selecting proper plaintiffs in private civil suits seeking monetary damages, a revitalization of the real party in interest rule appears necessary. Implementation of a revitalized rule may occur in two ways. The easier of these is judicial reinterpretation of existing real party in interest statutes. This approach, however, has the disadvantage of being slow and uncertain. The more efficient means of implementing the revitalized rule would be legislative reenactment of an amended real party in interest statute. The following draft statute could serve as a model for amendment of existing statutes:

§ 000 (A) Except as provided in subsection (C), every action should be prosecuted by the real parties in interest.

(B) A real party in interest is one who:

(1) has a substantial and beneficial interest in the outcome of the litigation, or

(2) was a primary participant in the transaction giving rise to the litigation and probably possesses information that is both relative to that transaction and of such a nature that a reasonable defendant would wish to make discovery of him.

²⁰⁴ Cf. FED. R. CIV. P. 21.

²⁰⁵ Cf. FED. R. CIV. P. 25.

²⁰⁶ Cf. *Levinson v. Deupree*, 345 U.S. 648 (1953); *Link Aviation Inc. v. Downs*, 325 F.2d 613 (D.C. Cir. 1963).

²⁰⁷ The policies underlying such statutes are not violated by subsequent joinder of a real party in interest. Defendants in such cases have had notice (and thus an opportunity to preserve needed evidence) within the statutory period. Defendants therefore would not be prejudiced by such procedures. See J. MOORE, RULES PAMPHLET 503-04 (1966) for a discussion of the limits of a policy permitting liberal joinder in such situations.

²⁰⁸ Cf. FED. R. CIV. P. 19(a); CAL. CODE CIV. PRO. § 382 (West 1954). Other interesting problems faced in administration of the rule relate to: (1) the impact of an assignment pendente lite on a suit, see generally 4 J. MOORE, FEDERAL PRACTICE ¶ 25.08 (2d ed. 1967); (2) conflict of laws problems, see generally Annot., 62 A.L.R.2d 486 (1958); (3) forum non conveniens problems, see generally Annot., 90 A.L.R.2d 1109, 1116-27 (1963); and (4) in forma pauperis problems, see generally Annot., 11 A.L.R.2d 607 (1950).

- (C) (1) An executor or administrator, or the designee of the real party or parties in interest, on a claim for \$500 or less, may prosecute an action without joining with him the real party, or parties, in interest.
- (2) A guardian, bailee, trustee of an express trust created in writing, or a party authorized by statute may prosecute an action.²⁰⁹
- (3) The court, in its discretion, need not require joinder of a particular real party in interest in cases in which:
- (a) his presence in the suit would deprive the court of jurisdiction over the action;
 - (b) the real party in interest lacks capacity to sue;²¹⁰
 - (c) it makes little difference to defendant who prosecutes suit against him;
 - (d) insistence that the real party in interest be joined would work undue hardship upon such party;
 - (e) defendant is deemed estopped to compel a real party in interest's joinder; or
 - (f) insistence that the real party in interest join in the suit would cause undue diseconomies in the administration of justice.
- (4) An insurance company need not join in the prosecution of actions upon claims to which the company has become subrogated.²¹¹
- (D) A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons described in subsection (B) hereof who are not joined, and the reasons why such persons are not joined.²¹²
- (E) No action shall be dismissed on the ground that it is not prosecuted by the real parties in interest until a reasonable time has been allowed after objection for ratification of the action by, or joinder or substitution of, the real parties in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced by the real parties in interest.²¹³

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²⁰⁹ Such parties are not necessarily authorized to prosecute actions alone. Whether or not the real parties in interest should be joined in suits prosecuted by such persons is a matter to be decided by the court in accordance with subsection (c)(3) of the draft rule. In most cases a guardian should be required to join his ward in any action prosecuted on behalf of the ward. See text accompanying notes 102-09 *supra*.

²¹⁰ To the extent that such parties possess information that a reasonable defendant would wish to discover, they should be required to join in the action.

²¹¹ Cf. N.Y. CIV. PRAC. LAW § 1004 (McKinney 1963). This section is optional. Failure on the part of a legislature adopting this draft real party in interest statute to enact this provision would be indicative of a legislative policy decision that insurers should join in the prosecution of such actions.

²¹² Cf. FED. R. CIV. P. 19(c).

²¹³ Cf. FED. R. CIV. P. 17(a).