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1. *USCS Fed Rules Civ Proc R 17*
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USCS Fed Rules Civ Proc R 17

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USCS Federal Rules Annotated > Federal Rules of Civil Procedure > Title IV. Parties

Rule 17. Plaintiff and Defendant; Capacity; Public Officers

(a) Real Party in Interest.

(1) *Designation in General.* An action must be prosecuted in the name of the real party in interest. The following may sue in their own names without joining the person for whose benefit the action is brought:

(A) an executor;

(B) an administrator;

(C) a guardian;

(D) a bailee;

(E) a trustee of an express trust;

(F) a party with whom or in whose name a contract has been made for another's benefit; and

(G) a party authorized by statute.

(2) *Action in the Name of the United States for Another's Use or Benefit.* When a federal statute so provides, an action for another's use or benefit must be brought in the name of the United States.

(3) *Joinder of the Real Party in Interest.* The court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action. After ratification, joinder, or substitution, the action proceeds as if it had been originally commenced by the real party in interest.

(b) Capacity to Sue or Be Sued. Capacity to sue or be sued is determined as follows:

(1) for an individual who is not acting in a representative capacity, by the law of the individual's domicile;

(2) for a corporation, by the law under which it was organized; and

(3) for all other parties, by the law of the state where the court is located, except that:

(A) a partnership or other unincorporated association with no such capacity under that state's law may sue or be sued in its common name to enforce a substantive right existing under the United States Constitution or laws; and

(B) *28 U.S.C. §§ 754* and *959(a)* govern the capacity of a receiver appointed by a United States court to sue or be sued in a United States court.

(c) Minor or Incompetent Person.

(1) *With a Representative.* The following representatives may sue or defend on behalf of a minor or an incompetent person:

(A) a general guardian;

(B) a committee;

(C) a conservator; or

(D) a like fiduciary.

(2) *Without a Representative.* A minor or an incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court must appoint a guardian ad litem—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action.

(d) Public Officer's Title and Name. A public officer who sues or is sued in an official capacity may be designated by official title rather than by name, but the court may order that the officer's name be added.

History

Amended March 19, Dec. 27, 1946, eff. March 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Feb. 28, 1966, eff. July 1, 1966; March 2, 1987, eff. Aug. 1, 1987; April 25, 1988, eff. Aug. 1, 1988; Nov. 18, 1988, *P. L. 100-690*, Title VII, Subtitle B, § 7049, *102 Stat. 4401*; April 30, 2007, eff. Dec. 1, 2007.

Annotations

Notes

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Other provisions:

Amendments:

1988.

Other provisions:

Notes of Advisory Committee. *Note to Subdivision (a).* The real party in interest provision, except for the last clause which is new, is taken verbatim from former Equity Rule 37 (Parties Generally—Intervention), except that the word "expressly" has been omitted. For similar provisions see N.Y.C.P.A. (1937) § 210; Wyo. Rev. Stat. Ann. (1931) §§ 89-501, 89-502, 89-503; English Rules Under the Judicature Act (The Annual Practice, 1937) O. 16, r 8. See also Equity Rule 41 (Suit to Execute Trusts of Will—Heir as Party). For examples of statutes of the United States providing particularly for an action for the use or benefit of another in the name of the United States, see U.S.C., Title 40, § 270b (Suit by persons furnishing labor and material for work on public building contracts . . . may sue on a payment bond, "in the name of the United States for the use of the person suing"); and *U.S.C., Title 25, § 201* (Penalties under laws relating to Indians—how recovered). Compare U.S.C., Title 26, § 3745(c) (Suits for penalties, fines, and forfeitures, under this title, where not otherwise provided for, to be in name of United States).

Note to Subdivision (b). For capacity see generally Clark and Moore, A New Federal Civil Procedure—II. Pleadings and Parties, 44 Yale L.J. 1291, 1312–1317 (1935) and specifically *Coppedge v. Clinton, 72 F.2d 531 (10th Cir. 1934)* (natural person); *David Lupton's Sons Co. v. Automobile Club of America, 225 U.S. 489, 32 S. Ct. 711, 56 L. Ed. 1177*, Ann. Cas. 1914A, 699 (1912) (corporation); *Puerto Rico v. Russell & Co., 288 U.S. 476, 53 S. Ct. 447, 77 L. Ed. 903 (1933)* (unincorporated assn.); *United Mine Workers of America v. Coronado Coal Co., 259 U.S. 344, 42 S. Ct. 570, 66 L. Ed. 975, 27 A.L.R. 762 (1922)* (federal substantive right enforced against unincorporated association by suit against the association in its common name without naming all its members as parties). This rule

follows the existing law as to such associations, as declared in the case last cited above. Compare *Moffat Tunnel League v. United States, 289 U.S. 113, 53 S. Ct. 543, 77 L. Ed. 1069 (1933)*. See note to Rule 23, clause (1).

Note to Subdivision (c). The provision for infants and incompetent persons is substantially former Equity Rule 70 (Suits by or Against Incompetents) with slight additions. Compare the more detailed English provisions, English Rules Under the Judicature Act (The Annual Practice, 1937) O. 16, rr 16–21.

Notes of Advisory Committee on 1946 amendments. The new matter [in subdivision (b)] makes clear the controlling character of Rule 66 regarding suits by or against a federal receiver in a federal court.

Notes of Advisory Committee on 1948 amendments. The amendment effective October 20, 1949, deleted the words "Rule 66" at the end of subdivision (b) and substituted the words "*Title 28, U.S.C., §§ 754* and *959 (a)*."

Notes of Advisory Committee on 1966 amendments. The minor change in the text of the rule is designed to make it clear that the specific instances enumerated are not exceptions to, but illustrations of, the rule. These illustrations, of course, carry no negative implication to the effect that there are not other instances of recognition as the real party in interest of one whose standing as such may be in doubt. The enumeration is simply of cases in which there might be substantial doubt as to the issue but for the specific enumeration. There are other potentially arguable cases that are not excluded by the enumeration. For example, the enumeration states that the promisee in a contract for the benefit of a third party may sue as real party in interest; it does not say, because it is obvious, that the third-party beneficiary may sue (when the applicable law gives him that right).

The rule adds to the illustrative list of real parties in interest a bailee—meaning, of course, a bailee suing on behalf of the bailor with respect to the property bailed. (When the possessor of property other than the owner sues for an invasion of the possessory interest he is the real party in interest.) The word "bailee" is added primarily to preserve the admiralty practice whereby the owner of a vessel as bailee of the cargo, or the master of the vessel as bailee of both vessel and cargo, sues for damage to either property interest or both. But there is no reason to limit such a provision to maritime situations. The owner of a warehouse in which household furniture is stored is equally entitled to sue on behalf of the numerous owners of the furniture stored. *Cf. Gulf Oil Corp. v. Gilbert, 330 U.S. 501 [91 L. Ed. 1055]* (1947).

The provision that no action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed, after the objection has been raised, for ratification, substitution, etc., is added simply in the interests of justice. In its origin the rule concerning the real party in interest was permissive in purpose: it was designed to allow an assignee to sue in his own name. That having been accomplished, the modern function of the rule in its negative aspect is simply to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata.

This provision keeps pace with the law as it is actually developing. Modern decisions are inclined to be lenient when an honest mistake has been made in choosing the party in whose name the action is to be filed—in both maritime and nonmaritime cases. See *Levinson v. Deupree, 345 U.S. 648 [97 L. Ed. 1319]* (1953); *Link Aviation, Inc. v. Downs, 325 F.2d 613 (D.C. Cir. 1963)*. The provision should not be misunderstood or distorted. It is intended to prevent forfeiture when determination of the proper party to sue is difficult or when an understandable mistake has been made. It does not mean, for example, that, following an airplane crash in which all aboard were killed, an action may be filed in the name of John Doe (a fictitious person), as personal representative of Richard Roe (another fictitious person), in the hope that at a later time the attorney filing the action may substitute the real name of the real personal representative of a real victim, and have the benefit of suspension of the limitation period. It does not even mean, when an action is filed by the personal representative of John Smith, of Buffalo, in the good faith belief that he was aboard the flight, that upon discovery that Smith is alive and well, having missed the fatal flight, the representative of James Brown, of San Francisco, an actual victim, can be substituted to take advantage of the suspension of the limitation period. It is, in cases of this sort, intended to insure against forfeiture and injustice—in short, to codify in broad terms the salutary principle of *Levinson v. Deupree, 345 U.S. 648 [97 L. Ed. 1319]* (1953), and *Link Aviation, Inc. v. Downs, 325 F.2d 613 (D.C. Cir. 1963)*.

Notes of Advisory Committee on 1988 amendments. The amendments are technical. No substantive change is intended.

Notes of Advisory Committee on 2007 amendments. The language of Rule 17 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 17(d) incorporates the provisions of former Rule 25(d)(2), which fit better with Rule 17.

Amendments:

1988. Act Nov. 18, 1988, in subsec. (a), purported to delete “with him”, but this amendment was not executed because “with him” did not appear in the existing text.

NOTES TO DECISIONS

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89.Receivers appointed by United States courts

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5.Other Particular Applications

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I. IN GENERAL

1. Generally

Rule 17 is simply rule of procedure—it did not and could not create rights where none exist under substantive law; accordingly, in action brought by automobile dealer for refund of federal excise tax on passenger automobiles, repealed by provision of Revenue Act of 1971, Rule 17 could not create additional right in dealer so as to enable it to sue under Rule 17 where it was clear that statute gave right only to manufacturer. *Delaware Valley Auto., Inc. v. United States, 376 F. Supp. 395, 34 A.F.T.R.2d (RIA) 6357, 1974-2 U.S. Tax Cas. (CCH) ¶ 16155, 74-2 U.S. Tax Cas. (CCH) ¶16155, 1974 U.S. Dist. LEXIS 8563 (E.D. Pa. 1974)*.

Because of their simultaneous adoption, Rules 15(c) and 17 should be read together. *Rose Hall, Ltd. v. Chase Manhattan Overseas Banking Corp., 93 F.R.D. 858, 1982 U.S. Dist. LEXIS 11574 (D. Del. 1982)*.

Federal district court has no power to appoint or substitute personal representatives for decedents in probate cases, since state statute granting that part of state courts is inherently suspect as putative source of power for federal court, and since power in USCS *F R Civ P, Rule 17* applies only to guardians ad litem for infants and incompetents. *Coleman v. McLaren, 590 F. Supp. 38, 40 Fed. R. Serv. 2d (Callaghan) 366, 1984 U.S. Dist. LEXIS 18144 (N.D. Ill. 1984)*.

Defamation plaintiff's argument for tolling statute of limitations must fail, where he argues for benefit of Maine's statutory provision tolling limitations periods for actions that accrue while potential plaintiff is imprisoned under *FRCivP 17(b)*, even though he is suing in Virginia, because Rule 17(b) is concerned with capacity to sue, not tolling of limitations periods. *Lewis v. Gupta, 54 F. Supp. 2d 611, 1999 U.S. Dist. LEXIS 8379 (E.D. Va. 1999)*.

Pursuant to *Fed. R. Civ. P. 17(a)(1)(G)*, even if real party in interest was Chapter 13 debtor's estate, debtor was not required to bring suit in its name because debtor was authorized by *Fed. R. Bankr. P. 6009* to sue on behalf of estate; accordingly, former employer's motion to dismiss debtor's age discrimination claim for lack of subject-matter jurisdiction under *Fed. R. Civ. P. 12(b)(1)* was denied. *Evinger v. Emery Winslow Scale Co., 115 Fair Empl. Prac. Cas. (BNA) 1660, 2012 U.S. Dist. LEXIS 105740 (S.D. Ind. July 30, 2012)*.

Fed. R. Civ. P. 17 does not provide remedy for very late filed claim; in this bankruptcy case, "mistake" in not naming copyright owner as claimant was not "understandable mistake."*In re Nortel Networks, Inc., 573 B.R. 522, 64 Bankr. Ct. Dec. (LRP) 88, 2017 Bankr. LEXIS 1805 (Bankr. D. Del. 2017)*.

Fed. R. Civ. P. 17 is administrative provision and cannot be used to cure standing when it is otherwise lacking. *Gavin/Solmonese LLC v. Citadel Energy Partners, LLC (In re Citadel Watford City Disposal Partners, L.P.), 603 B.R. 897, 2019 Bankr. LEXIS 1375 (Bankr. D. Del. 2019)*.

II. REAL PARTY IN INTEREST [RULE 17(a)]

A. In General

2. Generally

Requirement that every action shall be prosecuted in name of real party in interest does not necessarily preclude bringing of action by one party "to the use" of another, in cases in which actions were heretofore brought in that manner. *Lloyd Moore, Inc. v. Schwartz, 26 F. Supp. 188, 1938 U.S. Dist. LEXIS 1389 (D. Pa. 1938)*.

Defendant may require action be brought in name of real party in interest. *McWhirter v. Otis Elevator Co., 40 F. Supp. 11, 1941 U.S. Dist. LEXIS 2837 (D.S.C. 1941)*.

Thrust of Rule 17(a) is to provide defendant with protection against duplicate liability. *Independent School Dist. v. Statistical Tabulating Corp., 359 F. Supp. 1095, 17 Fed. R. Serv. 2d (Callaghan) 455, 1973 U.S. Dist. LEXIS 13414 (N.D. Ill. 1973)*.

While Rule 17(a) requires that every action shall be prosecuted in name of real party in interest, it is not necessary that action be brought in name of person who ultimately will benefit from any recovery. *Honey v. George Hyman*

Constr. Co., 63 F.R.D. 443, 18 Fed. R. Serv. 2d (Callaghan) 1347, 1974 U.S. Dist. LEXIS 8657 (D.D.C. 1974); *Mitsui & Co. v. Puerto Rico Water Resources Authority, 528 F. Supp. 768, 1981 U.S. Dist. LEXIS 9942 (D.P.R. 1981)*.

Rule 17 requires that action be brought by person who, according to governing substantive law, is entitled to enforce right. *Passman v. Companhia de Navegacao Maritima Netumar, 544 F. Supp. 451, 1983 A.M.C. 1065, 1982 U.S. Dist. LEXIS 9590 (E.D. Pa. 1982)*, aff'd, *725 F.2d 669, 1984 A.M.C. 1520, 1983 U.S. App. LEXIS 15061 (3d Cir. 1983)*.

Courts allow substitution under *FRCivP 17(a)* where to do so will prevent forfeiture and injustice. *Taylor v. Comcast Cablevision of Ark., Inc., 252 F. Supp. 2d 793, 14 Am. Disabilities Cas. (BNA) 277, 2003 U.S. Dist. LEXIS 4441 (E.D. Ark. 2003)*.

In exceptional cases or special circumstances, court may in its discretion permit party to proceed anonymously or by pseudonym; when evaluating request by party to proceed anonymously or by pseudonym, courts consider numerous factors, including whether identification would put affected party at risk of suffering physical or mental injury; courts should not permit parties to proceed pseudonymously just to protect parties' professional or economic life. *Guerrilla Girls, Inc. v. Kaz, 224 F.R.D. 571, 2004 U.S. Dist. LEXIS 21692 (S.D.N.Y. 2004)*.

Statutes may not be sued. *Fed. R. Civ. P. 17(a)* requires that suit to be brought against real party in interest. *569 F. Supp. 2d 91, 102 A.F.T.R.2d (RIA) 5583, ¶ 50486*.

Effect of federal rule requiring that action to be prosecuted in name of real party in interest is that action must be brought by person who, according to governing substantive law, is entitled to enforce right; however, it is not necessary that there always be only one real party in interest; identical provision of Vermont rule must be construed to same effect. *Smedberg v. Detlef's Custodial Serv., Inc., 2007 VT 99, 182 Vt. 349, 940 A.2d 674, 2007 Vt. LEXIS 260 (Vt. 2007)*.

Plain reading of rule (*Fed. R. Civ. P. 17(a)*) requires conclusion that challenges to real party in interest are held by party defending action. *Crymes v. Ocwen Loan Servicing, LLC (In re Crymes), 2018 Bankr. LEXIS 2479 (Bankr. N.D. Tex. Aug. 20, 2018)*.

Precedent of U.S. Court of Appeals for Tenth Circuit permits real party in interest to be substituted, ratify, or join under Rule 17(a)(3) only when commencement of case by wrong party was result of "honest mistake" and defendant will not be prejudiced by joinder. *In re Sandia Resorts, Inc., 62 Bankr. Ct. Dec. (LRP) 181, 75 Collier Bankr. Cas. 2d (MB) 1347, 2016 Bankr. LEXIS 2125 (Bankr. D.N.M. May 26, 2016)*.

3. Purpose

Purpose of rule requiring actions to be prosecuted in name of real party in interest is to enable defendant to avail himself of evidence and defenses he has against such real party in interest to assure finality of judgment, and protection against another suit by real party in interest on same matter. *Celanese Corp. of America v. John Clark Industries, Inc., 214 F.2d 551, 1954 U.S. App. LEXIS 2740 (5th Cir. 1954)*.

Purpose of Rule 17 is to enable defendant to present defenses he has against real party in interest, to protect defendant against subsequent action by party actually entitled to relief, and to ensure that judgment will have proper res judicata effect, in view of its current purpose, to protect defendants against subsequent suits, Rule 17 will not bar suit by real party in interest which will have effect of preventing multiplicity of suits. *Virginia Electric & Power Co. v. Westinghouse Electric Corp., 485 F.2d 78, 17 Fed. R. Serv. 2d (Callaghan) 1103, 1973 U.S. App. LEXIS 7663 (4th Cir. 1973)*, cert. denied, *415 U.S. 935, 94 S. Ct. 1450, 39 L. Ed. 2d 493, 1974 U.S. LEXIS 1371 (1974)*.

Purpose of rule requiring that every action be prosecuted by real party in interest is to protect defendant from subsequent similar actions by one not party to initial action. *Pacific Coast Agricultural Export Asso. v. Sunkist*

Growers, Inc., 526 F.2d 1196, 1975-2 Trade Cas. (CCH) ¶60617, 1975 U.S. App. LEXIS 11990 (9th Cir. 1975), cert. denied, *425 U.S. 959, 96 S. Ct. 1741, 48 L. Ed. 2d 204, 1976 U.S. LEXIS 1540 (1976)*.

Rule 17(a) was originally intended simply to allow assignee to sue in his own name, but it has come also to serve another equally, if not more important purpose, namely, to protect defendant against subsequent action by party actually entitled to recover, and to insure that judgment will have its proper final effect. *White Hall Bldg. Corp. v. Profexray Div. of Litton Industries, Inc., 387 F. Supp. 1202, 19 Fed. R. Serv. 2d (Callaghan) 790, 1974 U.S. Dist. LEXIS 11850 (E.D. Pa. 1974)*, aff'd, *578 F.2d 1375 (3d Cir. 1978)*, aff'd, *578 F.2d 1377 (3d Cir. 1978)*.

Purpose of Rule 17 is to insure that judgment will have proper res judicata effect by preventing party not joined in complaint from asserting "real party in interest" status in identical future suit. *Puerto Rico v. Cordeco Development Corp., 534 F. Supp. 612, 1982 U.S. Dist. LEXIS 11207 (D.P.R. 1982)*.

FRCivP 17(a) protects defendant from facing subsequent similar action brought by one not party to present proceeding and to ensure that any action taken to judgment will have its proper effect as res judicata. *Agri-Mark, Inc. v. Niro, Inc., 190 F.R.D. 293, 46 Fed. R. Serv. 3d (Callaghan) 341, 2000 U.S. Dist. LEXIS 728 (D. Mass. 2000)*.

4. Applicability

Both Rule 15(c) and Rule 17(a) apply to actions under Federal Tort Claims Act. *Wadsworth v. United States Postal Service, 511 F.2d 64, 19 Fed. R. Serv. 2d (Callaghan) 1271, 1975 U.S. App. LEXIS 16045 (7th Cir. 1975)*.

Rule 17 applies to civil proceedings in federal court despite fact that courts of forum state have rejected relation back doctrine; therefore, action for wrongful death of prison inmate arising out of alleged civil rights violations is not time barred where person other than real party in interest brings suit within statute of limitations, even though real party in interest does not join or ratify action until after limitation period has run. *Hess v. Eddy, 689 F.2d 977, 35 Fed. R. Serv. 2d (Callaghan) 78, 1982 U.S. App. LEXIS 24661 (11th Cir. 1982)*, cert. denied, *462 U.S. 1118, 103 S. Ct. 3085, 77 L. Ed. 2d 1347, 1983 U.S. LEXIS 510 (1983)*.

District court abused its discretion when it substituted Illinois underwriter for Texas insurer, dismissed non-diverse insurer, and then asserted diversity of citizenship removal jurisdiction over Texas insured's breach of contract and bad faith suit; district court improperly relied upon *Fed. R. Civ. P. 17(a)* as ground for substituting underwriter for insurer because, by its clear terms, "real party in interest" rule applied only to plaintiffs and not to defendants. *Salazar v. Allstate Tex. Lloyd's, Inc., 455 F.3d 571, 65 Fed. R. Serv. 3d (Callaghan) 991, 2006 U.S. App. LEXIS 17104 (5th Cir. 2006)*.

Investor's action under § 14(a) of the Securities Exchange Act of 1934, *15 U.S.C.S. § 78n(a)*, alleging that a proxy statement contained material misstatements regarding an offshore drilling service's dangerously lax safety protocols, was barred by the statute of repose; the investor's lead plaintiff motion did not relate back to the original plaintiff's filing under *Fed. R. Civ. P. 17(a)(3)*, because the original plaintiff's complaint was a nullity due to that plaintiff's lack of standing. *Dekalb Cnty. Pension Fund v. Transocean Ltd., 817 F.3d 393, Fed. Sec. L. Rep. (CCH) ¶ 99042, Fed. Sec. L. Rep. (CCH) ¶99042, 2016 U.S. App. LEXIS 4860 (2d Cir. 2016)*, cert. denied, *137 S. Ct. 2326, 198 L. Ed. 2d 755, 2017 U.S. LEXIS 4270 (2017)*.

District court properly rejected proposed joinder of plaintiff; this rule, which prevents courts from dismissing actions for failure to prosecute in name of real party in interest until reasonable time after objection, did not bar dismissal because no objection was raised until after dismissal. *Forest Creek Townhomes, LLC v. Carroll Prop. Mgmt., LLC, 695 Fed. Appx. 908, 2017 FED App. 0331N, 2017 U.S. App. LEXIS 10657 (6th Cir. 2017)*.

While Rule 17, with reference to the real party in interest, may apply to United States, if statutory authority exists to make United States a party, Rules themselves cannot be held to have been intended to broaden permission given by statute to sue United States. *Dierssen v. Woolever, 3 F.R.D. 342, 1944 U.S. Dist. LEXIS 1396 (D. Conn. 1944)*.

Rule 17(a), requiring action to be prosecuted by real party in interest, applies to commencement of an action; Rule 25(c), allowing action to be continued by original parties, applies where transfer of interest is made during pendency of action. *Unison Realty Corp. v RKO Theatres, Inc., 35 F.R.D. 232, 8 Fed. R. Serv. 2d (Callaghan) 25C.1, Case 1 (SD NY 1964)*.

Government's motion to dismiss party on ground that it is not real party in interest is not controlled by *Federal Rule of Civil Procedure 17*. *United States v. 29.16 Acres, etc., 496 F. Supp. 924, 30 Fed. R. Serv. 2d (Callaghan) 921, 1980 U.S. Dist. LEXIS 13495 (E.D. Pa. 1980)*.

Although Rule 17(a) has been interpreted by courts for protection of defendants, language of Rules does not make it exclusively applicable to them; term "prosecuted" does not cover only plaintiffs who are parties who prosecute action but also defendants who prosecute their defenses since word "prosecute" means to follow up. *BP Oil, Inc. v. Bethlehem Steel Corp., 536 F. Supp. 293, 1984 A.M.C. 2702, 1982 U.S. Dist. LEXIS 13040 (E.D. Pa. 1982)*.

Where trustee's original complaint was filed in trustee's individual capacity, fact that it took insurer approximately 17 months to notify trustee that it was challenging trustee's standing to bring suit in individual capacity demonstrated that trustee's apparent lack of standing was not plainly obvious; therefore, trustee's proposed amendment to add claim in trustee's capacity as trustee related back to original complaint, despite insurer's argument that trustee was not real party in interest in original complaint. *Farb v. Fed. Kemper Life Assur. Co., 213 F.R.D. 264, 2003 U.S. Dist. LEXIS 2924 (D. Md. 2003)*.

Where plaintiff in breach of contract suit admitted that it lacked standing to bring suit, as plaintiff was neither party to nor lawful assignee of contract, plaintiff also lacked standing to bring motion under *Fed. R. Civ. P. 17(a)* to substitute real party in interest as plaintiff; Rule 17(a) must be read with limitation that court must at minimum have subject matter jurisdiction over original claims. *Live Entm't, Inc. v. Digex, Inc., 300 F. Supp. 2d 1273, 17 Fla. L. Weekly Fed. D 245, 2003 U.S. Dist. LEXIS 24098 (S.D. Fla. 2003)*.

Corporation that was named as counter-defendant in lawsuit did not have authority to be named as plaintiff in action pursuant to *Fed. R. Civ. P. 17* because there was no allegation of mistake or difficulty in determining who was actual plaintiff in lawsuit and joinder was not needed to protect defendants from subsequent action. *Bradbury Co. v. Teissier-duCros, 231 F.R.D. 413, 2005 U.S. Dist. LEXIS 21004 (D. Kan. 2005)*.

Addition of defendants was time barred and *Fed. R. Civ. P. 15(c)* did not apply because, although inmate's original complaint adequately identified john doe defendants by describing their job titles and duties, that was not enough and his belated naming of three of defendants did not relate back to filing of original complaint; furthermore, *Fed. R. Civ. P. 17* did not apply because that rule was for benefit of defendants. *Gilmore v. Goord, 360 F. Supp. 2d 528, 2005 U.S. Dist. LEXIS 7731 (W.D.N.Y. 2005)*.

Negligence claim asserted against grocery store owner in amended complaint was barred by two-year statute of limitations set forth in *735 Ill. Comp. Stat. § 5/13-202* because it was filed over two years from date of purported injury; fact that customer had initially named wrong party did not require application of misnomer statute, *735 Ill. Comp. Stat. § 5/2-401(b)*, because incorrectly named party was actual entity and owner was not named or served until filing of amended complaint; further, *Fed. R. Civ. P. 17(a)* was of no assistance because parties agreed that state law applied to timeliness of claim and that rule applied to party prosecuting suit and not purported defendant. *Byrd-Tolson v. Supervalu, Inc., 500 F. Supp. 2d 962, 2007 U.S. Dist. LEXIS 43096 (N.D. Ill. 2007)*.

Cross-plaintiff, who did not have standing to sue, was permitted to amend his pleadings so that he would be substituted by real party in interest; to rule otherwise would defeat purpose behind *Fed. R. Civ. P. 17(a)*. *Blades v. Morgalo, 743 F. Supp. 2d 85, 2010 U.S. Dist. LEXIS 112534 (D.P.R. 2010)*.

In this breach of contract action, Rule could not be used to cure defect in standing where plaintiff was only plaintiff in this case and lacked standing to pursue all of its claims. *Tech-Sonic, Inc. v. Sonics & Materials, Inc., 2016 U.S. Dist. LEXIS 94979 (D. Conn. July 20, 2016)*.

Fed. R. Civ. P. 17(a) required that proper party in interest be substituted into action within "a reasonable time" after objection to existing plaintiff's status, and where on eve of Chapter 11 committees' complex fraudulent conveyance trial, appellate court had ruled in different case that committees lacked standing to pursue such action, bankruptcy court found that "reasonable" time requirement began to run from time of appellate court's decision, not from time defendant raised lack of standing as affirmative defense under Fed. R Civ. P. 12. Official Comm. of Asbestos Pers. Injury Claimants v. Sealed Air Corporation (In re W.R. Grace & Co.), 285 B.R. 148, 2002 Bankr. LEXIS 1241 (Bankr. D. Del. 2002).

Fed. R. Civ. P. 17, made applicable to adversary proceedings pursuant to Fed. R. Bankr. P. 7017, did not provide grounds for substituting one named defendant over other, because Fed. R. Civ. P. 17 applied only to party who was prosecuting claim. Brown v. Anselme (In re Polo Builders, Inc.), 374 B.R. 638, 48 Bankr. Ct. Dec. (LRP) 207, 2007 Bankr. LEXIS 2860 (Bankr. N.D. Ill. 2007).

Unpublished decision: Summary judgment in favor of insurer in diversity case involving underinsured motorist coverage was proper because Illinois law applied and action was barred by two-year statute of limitations in policy; applying Illinois law did not violate Oklahoma public policy and contrary to insureds' contention, insurer's application to intervene did not relate back to filing of original action against other driver; not only did Fed. R. Civ. P. 24 not contain such provision, but because insurer had denied coverage, it was not subrogated real party in interest, and there was no basis for applying relation back provision in Fed. R. Civ. P. 17(a). Myers v. Country Mut. Ins. Co., 117 Fed. Appx. 686, 2004 U.S. App. LEXIS 25204 (10th Cir. 2004).

5. Relation to other rules and laws

Rule 17(a) controls if interest was transferred prior to commencement of suit, but Rule 25(c) applies if transfer occurs during pendency of action; in tort action where plaintiff had elected to take workmen's compensation and District Court granted summary judgment against her as no longer being real party in interest under Rule 17(a), while granting leave to her employer as "assignee of her claim" to enter action in her stead, District Court erred—Rule 25(c) governed since transfer occurred when plaintiff received compensation award, which event occurred after suit had been commenced, so that plaintiff should have been permitted to continue action in light of fact that defendant never made motion for substitution, but only motion for summary judgment against plaintiff. Hilbrands v. Far East Trading Co., 509 F.2d 1321, 10 Fed. R. Serv. 2d (Callaghan) 1105, 19 Fed. R. Serv. 2d (Callaghan) 1105, 1975 U.S. App. LEXIS 16461 (9th Cir. 1975).

Order denying Supp. R. Certain Adm. & Mar. Cl. E(4)(f) motion to dismiss and to vacate warrant was denied because it was not final order, as whether standing of oil company under U.S. Const. art. III, Fed. R. Civ. P. 17(a), or both, were at issue and there was no reason to suspect that movant could not obtain effective review of its arguments on appeal from final judgment. Petroleos Mexicanos Refinacion v. M/T King A (EX-TBILISI), 377 F.3d 329, 2004 A.M.C. 2009, 2004 U.S. App. LEXIS 15614 (3d Cir. 2004).

District court properly ruled that management company did not have standing to sue majority shareholders and directors of bankrupt corporation on minority shareholder's breach of fiduciary duty claim because management company's settlement agreement with minority shareholder in another action, which transferred minority shareholder's shares to management company, was not finalized until after directors had decided to file bankruptcy petition to prevent management company from electing director to vacant seat on board of directors; pursuant to Cal. Corp. Code §§ 185, 701(d), management company did not own minority shareholder's shares at time of injury and thus did not have shareholder status at time of injury; further, management company could not cure its standing problem through invocation of Fed. R. Civ. P. 17(a). Davis v. Yageo Corp., 481 F.3d 661, 2007 U.S. App. LEXIS 4786 (9th Cir. 2007).

Exception in Fed. R. Civ. P. 17(b)(3)(A) did not apply because, under state law, defendant medical school only had capacity to be sued in action against board of regents, whether that action asserted federal claims against medical school as stand-alone entity, or as "partnership" with regional health-care system. Lundquist v. Univ. of S.D.

Sanford Sch. of Med., 705 F.3d 378, 84 Fed. R. Serv. 3d (Callaghan) 1005, 2013 U.S. App. LEXIS 2472 (8th Cir. 2013).

In lender's suit for declaration that borrower's purported rescission of mortgage pursuant to TILA was invalid, original lender properly substituted another lender as party plaintiff because original lender had constitutional standing, and thus, properly moved to substitute another lender as real party in interest because under loan servicing agreement, original lender was entitled to certain compensation for servicing borrower's loan, and thus, it necessarily would lose such compensation from borrower's purported recission. *GMAC Mortg., LLC v. McKeever, 651 Fed. Appx. 332, 2016 FED App. 0291N, 2016 U.S. App. LEXIS 10160 (6th Cir. 2016)*, cert. denied, *137 S. Ct. 655, 196 L. Ed. 2d 524, 2017 U.S. LEXIS 558 (2017)*.

There is no general rule in admiralty similar to Rule 17(a), but it has been very generally considered that proper pleading in admiralty requires observance of same principle. *New Hampshire Fire Ins. Co. v. The Perla, 84 F. Supp. 715, 1949 U.S. Dist. LEXIS 2735 (D. Md. 1949)*.

Rule 17(a), requiring action to be prosecuted by real party in interest, applies to commencement of an action; Rule 25(c), allowing action to be continued by original parties, applies where transfer of interest is made during pendency of action. *Unison Realty Corp. v RKO Theatres, Inc., 35 F.R.D. 232, 8 Fed. R. Serv. 2d (Callaghan) 25C.1, Case 1 (SD NY 1964)*.

Courts generally refer to Rule 19(b) to determine if party whose joinder is required under Rule 17(a) should nevertheless not be joined because of unfeasibility. *Carpetland, U.S.A. v. J.L. Adler Roofing, Inc., 107 F.R.D. 357, 1985 U.S. Dist. LEXIS 16081 (N.D. Ill. 1985)*.

Although insureds had constitutional standing in their suit against insurer, alleging breach of fiduciary duty, negligence, and breach of contract from failure to provide adequate insurance coverage, where insureds had assigned their cause of action against insurer as part of settlement of subrogation suit because they were injured parties, they did not have prudential standing as real party in interest under *Fed. R. Civ. P. 17(a)* because, under state law, only assignee of cause of action could bring suit as real party in interest. *Metal Forming Techs., Inc. v. Marsh & McLennan Co., 224 F.R.D. 431, 2004 U.S. Dist. LEXIS 21404 (S.D. Ind. 2004)*.

In securities fraud class action in which New Jersey corporation was removed as co-lead plaintiff, corporation's president did not meet *15 USCS § 78u-4(a)(3)(B)(iii)(I)(cc)*'s presumption of most adequate plaintiff because: (1) president's arguments regarding plaintiff substitution under *Fed. R. Civ. P. 15* and *17* were irrelevant to president's motion to be appointed co-lead plaintiff; and (2) even if president were real party in interest, president could not satisfy adequacy requirement of *Fed. R. Civ. P. 23(a)* where president had repeatedly submitted to court statements containing misrepresentations regarding corporation's securities transactions and corporation's ownership of claims asserted in action. *In re NYSE Specialists Sec. Litig., 240 F.R.D. 128, 2007 U.S. Dist. LEXIS 15418 (S.D.N.Y. 2007)*.

After 1991 amendments to *Fed. R. Civ. P. 15(c)*, federal law continued to govern relation back in federal question cases; thus, under *Fed. R. Civ. P. 17(a)*, both as it was worded in 1982, when Hess opinion was handed down, and today, plaintiffs' amended complaint related back to filing of their original complaint. Just as plaintiffs' amended complaint related back to filing of their original complaint under *Fed. R. Civ. P. 17(a)*, it also did so under Ala. R. Civ. P. 17(a). *Estate of Rowell v. Walker Baptist Med. Ctr., 290 F.R.D. 549, 84 Fed. R. Serv. 3d (Callaghan) 807, 2013 U.S. Dist. LEXIS 12189 (N.D. Ala. 2013)*.

In medical malpractice action, alleging negligent delivery of a child, parents were not compelled pursuant to *Fed. R. Civ. P. 35* to submit to genetic testing because neither parent was party, including mother who was serving representative role. *Young v. United States, 311 F.R.D. 117, 2015 U.S. Dist. LEXIS 132033 (D.N.J. 2015)*.

Fed. R. Civ. P. 17 applies to motions for relief from automatic stay of *11 USCS § 362* cases through application of *Fed. R. Bankr. P. 4001*, *Fed. R. Bankr. P. 9014*, and *Fed. R. Bankr. P. 7017*. *In re Kang Jin Hwang, 396 B.R. 757,*

67 U.C.C. Rep. Serv. 2d (CBC) 319, 2008 Bankr. LEXIS 2969 (Bankr. C.D. Cal. 2008), rev'd, remanded, *438 B.R. 661, 2010 U.S. Dist. LEXIS 96419 (C.D. Cal. 2010)*.

Motions brought under *11 USCS § 362* are subject to *Fed. R. Civ. P. 17*'s requirement that actions be prosecuted in name of real party in interest; *Fed. R. Bankr. P. 7017* incorporates *Fed. R. Civ. P. 17*, and Rule 17(a)(1) provides that action must be prosecuted in name of real party in interest. *In re Wilhelm, 407 B.R. 392, 69 U.C.C. Rep. Serv. 2d (CBC) 582, 2009 Bankr. LEXIS 1857 (Bankr. D. Idaho 2009)*.

Unpublished decision: *Fed. R. Civ. P. 17(a)*, which is made applicable to actions filed in bankruptcy courts by *Fed. R. Bankr. P. 7017*, applies in contested matters pursuant to *Fed. R. Bankr. P. 9014(c)*. Rule 17(a)(1) requires that an action be prosecuted in the name of the real party in interest, and the effect of this passage is that an action must be brought by a person who, according to the governing substantive law, is entitled to enforce the right. *In re Ray, 2009 Bankr. LEXIS 2319 (Bankr. W.D. Wash. July 28, 2009)*.

Fed. R. Civ. P. 17(c) bears some resemblance to *Fed. R. Bankr. P. 1004.1* in that both rules make threshold distinction between whether incompetent person is represented or not represented; general idea is similar: if there already is representative, that representative may act for incompetent person, but if there is no representative, then court may appoint representative. *In re Sniff, 2015 Bankr. LEXIS 3979 (Bankr. D. Colo. Oct. 6, 2015)*.

Fed. R. Civ. P. 25(c) was inapplicable because it applies only when action was commenced by real party in interest; if interest has been transferred prior to commencement of suit, *Fed. R. Civ. P. 17*, requiring that action be brought in name of real party in interest and defining capacity to sue and be sued, is controlling. *In re Sandia Resorts, Inc., 62 Bankr. Ct. Dec. (LRP) 181, 75 Collier Bankr. Cas. 2d (MB) 1347, 2016 Bankr. LEXIS 2125 (Bankr. D.N.M. May 26, 2016)*.

6. Jurisdiction based on diversity of citizenship

Although some similarity exists between real party in interest standard of *Federal Rule of Civil Procedure 17(a)* and principle that federal diversity jurisdiction is determined by citizenship of real parties to controversy, such rules serve different purposes and need not produce identical outcomes in all cases. *Navarro Sav. Ass'n v. Lee, 446 U.S. 458, 100 S. Ct. 1779, 64 L. Ed. 2d 425, 29 Fed. R. Serv. 2d (Callaghan) 500, 1980 U.S. LEXIS 35 (1980)*.

In diversity case, Federal District Court must look to substantive law of state in which it is located to determine whether complainant is real party in interest, and question is generally resolved by inquiring whether he or she has standing under state law. *Swanson v. Bixler, 750 F.2d 810, 1984 U.S. App. LEXIS 16226 (10th Cir. 1984)*.

Where stockholder breached engagement letter with investment banking firm by failing to deliver warrants and firm conveyed most of its interest in warrants to employees, including non-diverse employee, diversity jurisdiction existed in firm's suit against stockholder because firm was real and substantial party to controversy, and *Fed. R. Civ. P. 17(a)* did not determine real party in interest for diversity purposes. *Oscar Gruss & Son, Inc. v. Hollander, 337 F.3d 186, 56 Fed. R. Serv. 3d (Callaghan) 884, 2003 U.S. App. LEXIS 14664 (2d Cir. 2003)*.

Fed. R. Civ. P. 17 requires that every action be prosecuted in name of real party in interest, and insurer, as subrogee is real party in interest if it has paid all or part of claim; if insurer has only paid part of claim, then insured is also real party in interest that can be named in action, and if named in action, citizenship of insured must be considered in diversity of citizenship analysis under *28 USCS § 1332*. *St. Paul Fire & Marine Ins. Co. v. Universal Builders Supply, 409 F.3d 73, 2005 U.S. App. LEXIS 9446 (2d Cir. 2005)*.

In supplemental proceedings in aid of execution on its judgment against defendant judgment debtor, plaintiff judgment creditor was French corporation and its citizenship was unaffected by participation agreement with Illinois entity who assumed portion of creditor's risk; thus, complete diversity and subject matter jurisdiction existed, and further, real party in interest, whose citizenship was relevant for purposes of determining diversity, was party injured (judgment creditor) and not Illinois corporation who felt injury only through trickle down effect. *Dexia Crédit Local v. Rogan, 629 F.3d 612, 2010 U.S. App. LEXIS 24240 (7th Cir. 2010)*, reh'g denied, reh'g, en banc, denied, *2011 U.S.*

App. LEXIS 619 (7th Cir. Jan. 3, 2011), cert. denied, *565 U.S. 815, 132 S. Ct. 93, 181 L. Ed. 2d 22, 2011 U.S. LEXIS 6626 (2011)*.

Diversity of citizenship was not destroyed in action brought in Federal District Court for District of Columbia and was party to action filed under Little Miller Act, D. C. Code §§ 1-1104–1-1107 and arising from public-works contract since District of Columbia was nominal party only and not real party in interest within meaning of Rule 17(a). *District of Columbia ex rel. American Combustion, Inc. v. Transamerica Ins. Co., 797 F.2d 1041, 254 U.S. App. D.C. 374, 5 Fed. R. Serv. (Callaghan) 3d, 887, 1986 U.S. App. LEXIS 27725 (D.C. Cir. 1986)*.

Where insurance companies brought state antitrust claims on behalf of customers that had been found to be real parties in interest, customers had to be counted as parties under *28 USCS § 1332*, and presence of at least one nondiverse customer destroyed diversity jurisdiction; remand was warranted to consider dismissal of nondiverse parties under *Fed. R. Civ. P. 21*. *In re Lorazepam & Clorazepate Antitrust Litig. v. Mylan Labs., Inc., 631 F.3d 537, 394 U.S. App. D.C. 108, 78 Fed. R. Serv. 3d (Callaghan) 713, 2011-1 Trade Cas. (CCH) ¶77440, 2011 U.S. App. LEXIS 2571 (D.C. Cir.)*, cert. denied, *565 U.S. 930, 132 S. Ct. 368, 181 L. Ed. 2d 234, 2011 U.S. LEXIS 7064 (2011)*.

In a quiet-title dispute arising out of an HOA foreclosure action that involved a deceased homeowner and where neither the FHFA nor Fannie Mae ever consented to the HOA sale, the district court did not err in exercising diversity jurisdiction to find that the federal foreclosure bar applied because it diversity jurisdiction upon removal from state court where the deceased homeowner was not a proper person that could be joined as she had no legal existence and could not be a “citizen” of any state. *LN Mgmt., LLC v. JPMorgan Chase Bank, N.A., 957 F.3d 943, 2020 U.S. App. LEXIS 13216 (9th Cir. 2020)*.

In action in which there is nominal plaintiff and “use” plaintiff, residence of former is determinative of question whether requisite diversity of citizenship exists for jurisdictional purposes. *Lloyd Moore, Inc. v. Schwartz, 26 F. Supp. 188, 1938 U.S. Dist. LEXIS 1389 (D. Pa. 1938)*.

Test of diversity of citizenship under Rule 17(a), irrespective of powers of attorney, is whether there is diversity between real parties in interest and opposing party or parties. *International Allied Printing Trades Ass'n v. Master Printers Union, 34 F. Supp. 178, 46 U.S.P.Q. (BNA) 464, 1940 U.S. Dist. LEXIS 2760 (D.N.J. 1940)*.

In action brought for breach of employment contracts, plaintiffs were not allowed to substitute receiver with Georgia citizenship as real party in interest for defendant Pennsylvania corporation so as to create requisite diversity, where receiver was appointed nine months after commencement of action, since diversity of citizenship is determined as of date action is commenced. *Wolgin v. Atlas United Financial Corp., 397 F. Supp. 1003, 20 Fed. R. Serv. 2d (Callaghan) 835, 1975 U.S. Dist. LEXIS 11562 (E.D. Pa. 1975)*, aff'd, *530 F.2d 963 (3d Cir. 1976)*, aff'd, *530 F.2d 966 (3d Cir. 1976)*.

Ohio corporation, which formed part of limited liability corporation that operated plant where plaintiff was injured, was real party in interest, as contemplated by *Fed. R. Civ. P. 17(a)*, and jurisdiction based on diversity of citizenship was therefore defeated because corporation and plaintiff were both citizens of Ohio. *Barrientos v. Ut-Battelle, LLC, 284 F. Supp. 2d 908, 2003 U.S. Dist. LEXIS 17575 (S.D. Ohio 2003)*.

In U.S. corporation’s action against Japanese corporation for breach of asset purchase agreement, plaintiff pled sufficient facts to make itself real party in interest pursuant to letter of intent that it had signed, even though plaintiff’s subsidiary had signed asset purchase agreement; however, subsidiary, Japanese corporation, was indispensable party and its joinder would have destroyed diversity jurisdiction; therefore, action was dismissed. *Expeditors Int'l of Wash., Inc. v. Expeditors (Japan), Ltd., 224 F.R.D. 661, 2004 U.S. Dist. LEXIS 20633 (W.D. Wash. 2004)*.

In attorney one’s suit asserting claims against attorney two for quasi-contract, unjust enrichment, and money had and received in connection with attorney two’s use of parties’ money to fund appeal bond in attorney three’s suit

against attorney two, court had jurisdiction pursuant to 28 USCS § 1332 after disregarding citizenship of attorney one's law firm; attorney one, rather than his law firm, was real party in interest under Fed. R. Civ. P. 17(a) where he was party to underlying agreement with attorney two and funds came from account that was in attorney one's individual name. *Fay v. Perles, 484 F. Supp. 2d 6, 67 Fed. R. Serv. 3d (Callaghan) 967, 2007 U.S. Dist. LEXIS 20853 (D.D.C. 2007)*.

Fact that Brazilian company might be "real party in interest" under Fed. R. Civ. P. 17 was not determinative of whether district court could exercise diversity jurisdiction over civil suit filed by company against Delaware corporation; because company had filed suit both on its own behalf and on behalf of several of insurer-subrogees, citizenship of company and insurers was relevant for jurisdictional purposes, and complete diversity did not exist because one of insurers was Delaware citizen under 28 USCS § 1332(c)(1). *Pepsico do BRASIL, LTDA v. Oxy-Dry Corp., 534 F. Supp. 2d 846, 2008 U.S. Dist. LEXIS 11475 (N.D. Ill. 2008)*.

Plaintiff, trustee of pooling and servicing agreement (PSA), could bring suit in its own right as real party in interest under Fed. R. Civ. P. 17 despite role accorded to special servicer by PSA; PSA did not convey to special service exclusive power over claims such as one asserted in case; special servicer's stake in litigation was entirely due to its role as representative of trustee under PSA, it was not necessary party to action, and its citizenship was irrelevant in assessing diversity jurisdiction under 28 USCS § 1332. *United States Bank Nat'l Ass'n v. Nesbitt Bellevue Prop. LLC, 859 F. Supp. 2d 602, 82 Fed. R. Serv. 3d (Callaghan) 654, 2012 U.S. Dist. LEXIS 64044 (S.D.N.Y. 2012)*.

Unpublished decision: Complete diversity under 28 USCS § 1332(a)(2) was present when action was filed because central claim of initial complaint was that defendant, corporation organized under Cayman Island laws with its principal place of business in Brazil, breached its contract with plaintiff, Delaware citizen, by refusing to step aside as general partner of fund; defendant was not on both sides of action because real plaintiff in interest pursuant to Fed. R. Civ. P. 17(a) was not fund. *Int'l Equity Invs. v. Opportunity Equity Partners, Ltd., 246 Fed. Appx. 73, 2007 U.S. App. LEXIS 20939 (2d Cir. 2007)*.

7. —Action brought by representative

In action in his own name by trustee of express trust involving such trust, citizenship of trustee controls in determining whether there is federal diversity jurisdiction. *Curb & Gutter Dist. v. Parrish, 110 F.2d 902, 1940 U.S. App. LEXIS 4690 (8th Cir. 1940)*.

Parties acting in representative capacity, if jurisdictional requirements are otherwise satisfied, have right to maintain civil action in federal court, and citizenship of representative party controls irrespective of citizenship of persons for whose benefit action may be brought. *Minnehaha County v. Kelley, 150 F.2d 356, 1945 U.S. App. LEXIS 2780 (8th Cir. 1945)*.

In determining existence of diversity jurisdiction, court should look, not to citizenship of incompetent, but rather to citizenship of guardian, if he had capacity to sue. *Fallat v. Gouran, 220 F.2d 325, 1955 U.S. App. LEXIS 3346 (3d Cir. 1955)*.

Citizenship of infant or incompetent, rather than guardian ad litem or next friend, is controlling for purpose of determining whether there is federal diversity jurisdiction. *Appelt v. Whitty, 286 F.2d 135, 1961 U.S. App. LEXIS 5445 (7th Cir. 1961)*; *Ziady v. Curley, 396 F.2d 873, 1968 U.S. App. LEXIS 6560 (4th Cir. 1968)*; *Curry v. Maxson, 318 F. Supp. 842, 1970 U.S. Dist. LEXIS 10817 (W.D. Mo. 1970)*.

Under Rule 17(a), it is citizenship of fiduciary, where action is brought by him in his own name as such, which controls in determining whether diversity exists, rather than citizenship of beneficiary on whose behalf action is maintained. *Russell v. New Amsterdam Casualty Co., 325 F.2d 996, 1964 U.S. App. LEXIS 6848 (8th Cir. 1964)*; *Chenoweth v. Atchison, T. & S. F. R. Co., 229 F. Supp. 540, 1964 U.S. Dist. LEXIS 7065 (D. Colo. 1964)*.

Infant is real party in interest in action brought by its guardian ad litem and its citizenship governs jurisdiction. *Horzepa v. Dauski, 40 F. Supp. 476, 1941 U.S. Dist. LEXIS 2965 (D.N.Y. 1941)*.

Infant residing in one state cannot cause guardian ad litem or next friend to be appointed in another state for purpose of bringing suit in second state and thereby create venue in federal court in such second state based solely on residence of guardian ad litem or next friend. *Blackwell v. Vance Trucking Co., 139 F. Supp. 103, 1956 U.S. Dist. LEXIS 3579 (D.S.C. 1956)*.

Even if Rule 17(c) grants next friend capacity to sue, in action involving injured minor, citizenship of parents of minor as next friend was not determinative of question of diversity of citizenship, but citizenship of minor was controlling. *Fahrner v. Gentzsch, 355 F. Supp. 349, 17 Fed. R. Serv. 2d (Callaghan) 644, 1972 U.S. Dist. LEXIS 10850 (E.D. Pa. 1972)*.

8. — —Wrongful death

Where personal representative of decedent is authorized by statute to sue to recover for death of decedent, he is real party in interest within meaning of Rule 17(a) and his residence will be looked to in determining existence of federal diversity jurisdiction; fact that statutory beneficiaries are joined as plaintiffs will not defeat diversity jurisdiction where personal representative is in sole control of litigation and statutory beneficiaries do not participate in litigation in any manner other than to lend their names to complaint. *Bush v. Carpenter Bros., Inc., 447 F.2d 707, 1971 U.S. App. LEXIS 8424 (5th Cir. 1971)*.

For diversity purposes, where personal representative's role under state law is that of nominal party, citizenship of the beneficiaries controls; though one serving in representative capacity is real party in interest for purposes of Rule 17(a), representative is not necessarily real party in interest for purpose of determining diversity jurisdiction. *Wilsey v. Eddingfield, 780 F.2d 614, 1985 U.S. App. LEXIS 26228 (7th Cir. 1985)*, cert. denied, *475 U.S. 1130, 106 S. Ct. 1660, 90 L. Ed. 2d 202, 1986 U.S. LEXIS 1999 (1986)*.

Administratrix of decedent's estate had standing to object to discharge of wrongful death claims against Chapter 7 debtor so that it was not necessary to consider joinder provisions of Rule 17. *Fezler v. Davis (In re Davis), 194 F.3d 570, Bankr. L. Rep. (CCH) ¶78023, 45 Fed. R. Serv. 3d (Callaghan) 472, 1999 U.S. App. LEXIS 27004 (5th Cir. 1999)*.

Where district court found that counsel's mistake in naming decedent as plaintiff rather than his surviving wife in wrongful death action was honest, it abused its discretion by also requiring mistake to be understandable and denying motion to substitute wife for decedent. *Esposito v. United States, 368 F.3d 1271, 2004 U.S. App. LEXIS 10386 (10th Cir. 2004)*.

In wrongful death action filed on behalf of decedent by his attorney and against government, substitution was necessary as action could not be pursued by decedent, given numerous procedural difficulties: (1) under State law, decedent lacked capacity to sue or be sued; (2) under *28 USCS § 2674* and *Kan. Stat. Ann. § 60-1902*, only decedent's heirs were real parties in interest entitled to bring action; (3) decedent failed to file timely administrative claim as required by *28 USCS § 2675(a)*; and (4) his wife failed to file suit within six months and, therefore, district court lacked subject matter jurisdiction over action. *Esposito v. United States, 368 F.3d 1271, 2004 U.S. App. LEXIS 10386 (10th Cir. 2004)*.

North Carolina administrator of North Carolina decedent could sue in federal district court in Maryland on wrongful death statute of Virginia for death of his decedent occurring in automobile collision in Virginia. *Smith v. Bevins, 57 F. Supp. 760, 1944 U.S. Dist. LEXIS 1801 (D. Md. 1944)*.

Decedent's father/estate administrator shall have 30 days to add decedent's widow for purpose of prosecuting wrongful death action, where state law requires widow, as heir at law, to commence wrongful death action, because *FRCP 17(a)* requires court to allow reasonable time for joinder or substitution of correct real party in interest,

instead of dismissing case immediately upon proper assertion of real party-in-interest challenge. *Hembree v. Tinnin, 807 F. Supp. 109, 1992 U.S. Dist. LEXIS 18738 (D. Kan. 1992)*.

State probate proceedings are not enjoined pending federal court's disposition of declaratory judgment action brought by parents of decedent that they are proper parties to bring wrongful death action, where third party who is defendant in declaratory judgment action petitioned probate court for declaration that he is decedent's common-law husband, because court does not have authority to enjoin state probate proceedings but court will proceed to determine real party in interest since all parties are before court. *Stegman v. Horton Homes, 843 F. Supp. 707, 1994 U.S. Dist. LEXIS 971 (M.D. Ga. 1994)*.

Beneficiaries' motion to add two plaintiffs in their wrongful death action was denied where they were already represented in the action under *Fed. R. Civ. P. 7(a)*; they were not thereby prejudiced, and adding them would have defeated diversity jurisdiction. *Phillips v. Delta Air Lines, Inc., 192 F. Supp. 2d 727, 2001 U.S. Dist. LEXIS 23366 (E.D. Tex. 2001)*.

9. —Assignments

In action grounded solely on diversity of citizenship, where certain persons lacking diversity of citizenship were indispensable parties plaintiff, assignments of interest subsequently made by such persons to one of original plaintiffs, followed by filing of supplemental complaint alleging such assignments, was device to secure federal jurisdiction and violative of Rule 17(a). *Baird v. Peoples Bank & Trust Co., 1 F.R.D. 392, 1940 U.S. Dist. LEXIS 1970 (D.N.J. 1940)*, aff'd, *120 F.2d 1001, 1941 U.S. App. LEXIS 3602 (3d Cir. 1941)*.

Action on life insurance policy brought in Kansas state court by beneficiary, citizen of Missouri, her two assignees of all claims under policy, one a citizen of Kansas and other a citizen of District of Columbia, as plaintiffs, against insurer, District of Columbia corporation, as defendant, was remanded to state court, though defendant contended, and counsel for plaintiffs took no issue with facts, that sole purpose of assignment was to prevent removal. *Krenzien v. United Services Life Ins. Co., 121 F. Supp. 243, 1954 U.S. Dist. LEXIS 3403 (D. Kan. 1954)*.

If assignee bringing action is shown to be real party in interest as contemplated by Rule 17(a), there is diversity jurisdiction where assignee's citizenship is diverse to that of defendant, even though assignor has common citizenship with defendant. *Paper Makers Importing Co. v. Milwaukee, 165 F. Supp. 491, 43 L.R.R.M. (BNA) 2106, 36 Lab. Cas. (CCH) ¶65024, 1958 U.S. Dist. LEXIS 3717 (D. Wis. 1958)*.

In action on promissory note by plaintiff, a resident of Wisconsin and accommodation maker of the note, against defendant maker, resident of California, plaintiff and not bank was real party in interest for purposes of diversity of citizenship, where plaintiff had paid bank upon default of defendant, and note was assigned to plaintiff by bank without recourse, and there was no evidence that assignment was improperly or collusively made to invoke jurisdiction of court. *Rosenberg v Platt, 229 F. Supp. 8, 8 Fed. R. Serv. 2d (Callaghan) 17A.13, Case 2 (ED Wis 1964)*.

In diversity action seeking damages arising from allegedly improper construction of smokehouse for meat processing operations, dismissal pursuant to Rule 17(a) would be precluded where court was satisfied that plaintiff meat processor possessed substantive right to pursue property damage claim despite complex sale-leaseback agreement which plaintiff had entered into with other parties and independently of assignments secured by plaintiff from such parties of any rights they might have in action; plaintiff had paid all rents for use of smokehouse, had continuously operated plant exclusively since its construction, had paid for all repairs to smokehouse, had paid for all insurance on plant and equipment, had paid all real estate and property taxes on plant and equipment, had been treated as owner of plant and equipment, had received all revenues produced by smokehouse operation and had allegedly suffered losses because of defendants' conduct. *Armour-Dial, Inc. v. Alkar Engineering Corp., 469 F. Supp. 1193, 27 Fed. R. Serv. 2d (Callaghan) 525, 1979 U.S. Dist. LEXIS 12818 (E.D. Wis. 1979)*.

10. Meeting objection; ratification, joinder, or substitution

When it has been determined in prior suit between same parties that plaintiff is real party in interest, plaintiff need not plead res judicata to answer alleging that plaintiff is not real party in interest since no reply is required by Rules. *Gulf Refining Co. v. Fetschan, 130 F.2d 129, 1942 U.S. App. LEXIS 3046, 1942 U.S. App. LEXIS 3047 (6th Cir. 1942)*, cert. denied, *318 U.S. 764, 63 S. Ct. 666, 87 L. Ed. 1136, 1943 U.S. LEXIS 959 (1943)*.

When action is prosecuted in name of person who is not real party in interest, dismissal is not necessarily appropriate course. *Executive Jet Aviation v. United States, 507 F.2d 508, 19 Fed. R. Serv. 2d (Callaghan) 1274, 1974 U.S. App. LEXIS 5671 (6th Cir. 1974)*, limited, *Shelton v. United States, 615 F.2d 713, 1980 U.S. App. LEXIS 20355 (6th Cir. 1980)*.

Sentence of Rule 17(a) providing reasonable time for ratification, joinder, or substitution prior to dismissal for lack of real party in interest was added to prevent forfeiture when determination of proper party to sue is difficult or when understandable mistake has been made, and its main thrust is to allow correction in parties after statute of limitations has run, despite valid objection that original action was not brought by real party in interest. *Wadsworth v. United States Postal Service, 511 F.2d 64, 19 Fed. R. Serv. 2d (Callaghan) 1271, 1975 U.S. App. LEXIS 16045 (7th Cir. 1975)*.

Objection that action is not being prosecuted by real party in interest belongs to defendant and if not raised in timely fashion it may be deemed waived; and objection that manufacturer was not real party in interest where it had assigned accounts receivable to bank to secure collateral for loans should be rejected where trial court had followed Rule 17(a) guideline which permits such objection to be cured by ratification which was done at trial by bank's reassigning interest to accounts receivable to manufacturer. *Audio-Visual Marketing Corp. v. Omni Corp., 545 F.2d 715, 1976 U.S. App. LEXIS 6070 (10th Cir. 1976)*.

Rule 17(a) clearly provides that when action is brought by someone other than real party in interest within limitation period, and real party in interest joins or ratifies action after limitations period has run, amendment or ratification relates back to time suit was originally filed. *Ratner v. Sioux Natural Gas Corp., 770 F.2d 512, 3 Fed. R. Serv. 3d (Callaghan) 1275, Fed. Sec. L. Rep. (CCH) ¶ 92323, Fed. Sec. L. Rep. (CCH) ¶92323, 1985 U.S. App. LEXIS 22959 (5th Cir. 1985)*.

Joinder of father and brother in action brought by plaintiff against herbicide manufacturer was proper when evidence showed that father and brother were fully aware of plaintiff's actions and ratified them, and no unfair prejudice resulted to defendant from joinder, because defendant was aware long before trial of precise ownership interests of each family member in farm fields in question. *Hill v. BASF Wyandotte Corp., 782 F.2d 1212, 1986 U.S. App. LEXIS 22235 (4th Cir. 1986)*.

Proper ratification under Rule 17(a) requires that ratifying party both authorize continuation of action and agree to be bound by its result. *Icon Group, Inc. v. Mahogany Run Dev. Corp., 829 F.2d 473, 23 V.I. 450, 9 Fed. R. Serv. 3d (Callaghan) 99, 1987 U.S. App. LEXIS 12850 (3d Cir. 1987)*.

Chartered entity of foreign country did not have standing to bring trademark infringement action under *15 USCS § 1114* on basis country ratified lawsuit under this rule because entity could not deploy this rule to bypass standing requirement of § 1114, which permitted only registrants to brings actions for infringement of registered trademarks. *Fed. Treasury Enter. Sojuzplodoimport v. SPI Spirits Ltd., 726 F.3d 62, 107 U.S.P.Q.2d (BNA) 1839, 2013 U.S. App. LEXIS 16106 (7th Cir. 2013)*, cert. denied, *571 U.S. 1230, 134 S. Ct. 1291, 188 L. Ed. 2d 359, 2014 U.S. LEXIS 1049 (2014)*.

Action by insureds after their claim had been paid in full by their insurer was not nullity, and complaint could be amended to substitute insurer, though statute of limitations had run. *Link Aviation, Inc. v. Downs, 325 F.2d 613, 117 U.S. App. D.C. 40, 8 Av. Cas. (CCH) ¶17911, 7 Fed. R. Serv. 2d (Callaghan) 264, 1963 U.S. App. LEXIS 4119 (D.C. Cir. 1963)*.

Rule's provision that no action shall be dismissed on real-party-in-interest grounds until reasonable time has been allowed after objection for ratification or commencement of action by real party in interest implies that defense may not be raised at any time, for real party must have opportunity to step into the "unreal" party's shoes and should not be prejudiced by undue delay; in instant case "ratification" was impossible because real-party-in-interest issue was not raised until trial was underway. *Whelan v. Abell, 953 F.2d 663, 293 U.S. App. D.C. 267, 21 Fed. R. Serv. 3d (Callaghan) 1273, 1992 U.S. App. LEXIS 417 (D.C. Cir. 1992)*, amended, on reh'g, in part, reh'g denied, *1992 U.S. App. LEXIS 6180 (D.C. Cir. Mar. 30, 1992)*, cert. denied, *506 U.S. 906, 113 S. Ct. 300, 121 L. Ed. 2d 223, 1992 U.S. LEXIS 6329 (1992)*.

Real party in interest objection must be made with reasonable promptness; to wait until case reaches court of appeals is to waive objection. *Richardson v. Edwards, 127 F.3d 97, 326 U.S. App. D.C. 429, 9 4th Cir. & D.C. Bankr. Ct. Rep. 588, Bankr. L. Rep. (CCH) ¶77542, 38 Collier Bankr. Cas. 2d (MB) 1662, 1997 U.S. App. LEXIS 29779 (D.C. Cir. 1997)*, *9 Fourth Cir & Dist Col Bankr Ct Rep 588, 38 Collier Bankr. Cas. 2d (MB) 1662*.

Substitution of noteholders as plaintiffs would have cured standing defect, but simultaneously and necessarily would have created different, fatal jurisdictional defect, as plaintff conceded at oral argument that noteholders, foreign citizens, were not diverse from defendants, also foreign entities; because noteholders plaintiff sought to substitute would have lacked subject matter jurisdiction to bring claims, district court did not abuse its discretion by denying plaintiff's request to substitute those entities under *Fed. R. Civ. P. 17(a)(3)*. *Cortlandt St. Recovery Corp. v. Hellas Telecomms., 790 F.3d 411, 91 Fed. R. Serv. (Callaghan) 3d, 1657, 2015 U.S. App. LEXIS 10655 (2d Cir. 2015)* (criticized in *Digizip, Inc. v Verizon Servs. Corp. (2015, SD NY) 92 FR Serv 3d 1449*).

This rule did not authorize new relators to substitute themselves into false claims action by adding their names in amended complaint and omitting original relator's name because there was no contention that original relator was not real party in interest, nor was motion to dismiss made on that basis; thus, there was no attempt to avoid dismissal for failure to name real party in interest, and this rule was inapplicable. *United States ex rel. Little v. Triumph Gear Sys., 870 F.3d 1242, 98 Fed. R. Serv. 3d (Callaghan) 1162, 2017 U.S. App. LEXIS 17997 (10th Cir. 2017)*, cert. denied, *138 S. Ct. 1298, 200 L. Ed. 2d 473, 2018 U.S. LEXIS 1812 (2018)*.

District court abused its discretion by failing to give deceased detainee's estate and father reasonable opportunity to substitute administrator of estate as real party in interest with regard to Fourth Amendment excessive force claims; it was not unreasonable to have construed district court's approval of stipulation allowing estate to be named as plaintiff as determination that proper party had been named. *Jones v. Las Vegas Metro. Police Dep't, 873 F.3d 1123, 98 Fed. R. Serv. 3d (Callaghan) 1603, 2017 U.S. App. LEXIS 20669 (9th Cir. 2017)*.

In action by injured employee against alleged third-party tortfeasor where employer joined as party plaintiff by permission of court, and defendant alleged that suit was not prosecuted by real party in interest, the insurance carrier, plaintiff's recourse was not through motion to strike this defense but rather through steps to join or substitute real party in interest in action. *Haslam v. Trailways of New England, Inc., 59 F. Supp. 441, 1945 U.S. Dist. LEXIS 2564 (D. Conn. 1945)*.

Where insurer was known by government to be real party of interest in damage suit filed by insured against government, claim of insurer was not barred by statute of limitations where government had insurer substituted as plaintiff after running of statute. *Wallis v. United States, 102 F. Supp. 211, 1952 U.S. Dist. LEXIS 4722 (D.N.C. 1952)*.

Where bank, which agreed to furnish portion of funds to be advanced by plaintiff bank for construction of hotel and which was actual lender as to that portion, plaintiff bank being only conduit, filed letter agreeing that it would be bound by final determination made in case, this ratification was sufficient to protect defendant, which was being sued by plaintiff for alleged breach of agreement by defendant to purchase certain promissory note from plaintiff, and joinder would be useless formality and district court denied defendant's request for joinder. *Southern Nat'l Bank v. Tri Financial Corp., 317 F. Supp. 1173, 14 Fed. R. Serv. 2d (Callaghan) 949, 1970 U.S. Dist. LEXIS 10764 (S.D. Tex. 1970)*, aff'd in part, vacated in part, *458 F.2d 688, 1972 U.S. App. LEXIS 10411 (5th Cir. 1972)*.

In products liability action for damages resulting from fire, where substantial portion of damages had been covered by insurance and paid by carriers, but action was brought solely in name of insured, and when matter was practically ready for trial defendant raised point that action was not brought in name of real parties in interest, action would not be dismissed and insurance companies would be given reasonable time to ratify commencement of action, and agree to be bound by final determination in case. *Pace v. General Electric Co., 55 F.R.D. 215, 16 Fed. R. Serv. 2d (Callaghan) 529, 1972 U.S. Dist. LEXIS 13722 (W.D. Pa. 1972)*.

In action for breach of contract and negligence brought by underwriter subscribing policy on his own behalf and on behalf of other underwriters subscribing such policy, court would assume that plaintiff was not real party in interest, but would deny defendants' motion for summary judgment nonetheless since exhibit of plaintiff indicating that lead underwriters of each syndicate participating in policy had already consented to commencement of action served as ratification of commencement of action by real parties in interest. *Honey v. George Hyman Constr. Co., 63 F.R.D. 443, 18 Fed. R. Serv. 2d (Callaghan) 1347, 1974 U.S. Dist. LEXIS 8657 (D.D.C. 1974)*.

No objection concerning absence of real party in interest could be raised where motion was made after defect had been cured by filing of second amended complaint. *Unilever (Raw Materials), Ltd. v. M/T Stolt Boel, 77 F.R.D. 384, 25 Fed. R. Serv. 2d (Callaghan) 40, 1977 U.S. Dist. LEXIS 12527 (S.D.N.Y. 1977)*.

Two month period from time of objection is reasonable time for ratification, joinder, or substitution. *Western Colorado Fruit Growers Asso. v. Marshall, 473 F. Supp. 693, 27 Fed. R. Serv. 2d (Callaghan) 1187, 1979 U.S. Dist. LEXIS 11096 (D. Colo. 1979)*.

In action brought for alleged violations of federal securities laws and fraud, District Court will permit joinder of certain parties since, if substitution is not allowed, co-owners will lose right to assert claims, limitation period applicable to both claims has run, mistake made in denomination of plaintiff is excusable, none of original parties are fictitious and since request for substitution is timely. *Delta Coal Program v. Libman, 554 F. Supp. 684, 1982 U.S. Dist. LEXIS 9885 (N.D. Ga. 1982)*, aff'd, *743 F.2d 852, 40 Fed. R. Serv. 2d (Callaghan) 209, Fed. Sec. L. Rep. (CCH) ¶ 91683, 1984 U.S. App. LEXIS 18023 (11th Cir. 1984)*.

Where lawsuit was initially filed in name of partnership, partnership was allowed to add individual partners as alternate plaintiffs, and amendment would relate back to original filing of complaint. *Werner v. Illinois C. G. Railroad, 578 F. Supp. 384, 1984 U.S. Dist. LEXIS 19875 (E.D. La. 1984)*.

Rule 17(a) is intended to allow substitution when improper plaintiff has been inadvertently named; it is not intended to permit attorney to locate and substitute new plaintiff, suing upon new claim, simply to sustain pending action. *O'Donnell v. Kusper, 602 F. Supp. 619, 1985 U.S. Dist. LEXIS 23271 (N.D. Ill. 1985)*.

Determination of whether ratification is appropriate substitute to joinder of real party in interest lies within discretion of court. *Agri-Mark, Inc. v. Niro, Inc., 190 F.R.D. 293, 46 Fed. R. Serv. 3d (Callaghan) 341, 2000 U.S. Dist. LEXIS 728 (D. Mass. 2000)*.

Blood transfusion recipient who contracted hepatitis B was allowed to proceed under pseudonym in her action against public organization that had tested blood she had received where potential embarrassment and stigmatization were real. *EW v. N.Y. Blood Ctr., 213 F.R.D. 108, 54 Fed. R. Serv. 3d (Callaghan) 1149, 2003 U.S. Dist. LEXIS 2293 (E.D.N.Y. 2003)*.

To allow plaintiffs in certain other actions, or any of them individually, to join in receiver's amended complaint or to ratify commencement of instant action, *Fed. R. Civ. P. 17(a)*, by amended complaint would have been futile; claims as pleaded in amended complaint had to be dismissed. *Savino v. Lloyds TSB Bank, 499 F. Supp. 2d 306, 2007 U.S. Dist. LEXIS 43284 (W.D.N.Y. 2007)*.

Plaintiff had known for more than three years that defendants were contesting plaintiff's standing to bring this action before plaintiff first made suggestion in its opposition to defendants' motion to dismiss that substitution of certain individual for plaintiff under *Fed. R. Civ. P. 17(a)* might be appropriate alternative to dismissal; plaintiff had much

more than reasonable time to correct deficiency its complaint suffered by reason of plaintiff's lack of standing to bring this action, and it consciously chose not to do so notwithstanding repeated reminders over years since this action was instituted that defendants did not accept, and were questioning, plaintiff's standing to institute and pursue action; thus, relief under Rule 17(a) was not appropriate. *Triple Tee Golf, Inc. v. Nike, Inc., 511 F. Supp. 2d 676, 2007 U.S. Dist. LEXIS 58729 (N.D. Tex. 2007)*.

Ratification prior to final judgment was effective because it furthered *Fed. R. Civ. P. 17(a)*'s purpose of protecting defendants against subsequent litigation, ensured that the final judgment would have its proper res judicata effect, and worked no prejudice upon defendants. *Eli Lilly & Co. v. Air Express Int'l USA, Inc., 602 F. Supp. 2d 1260, 2009 U.S. Dist. LEXIS 18228 (S.D. Fla. 2009)*, aff'd in part and rev'd in part, vacated, remanded, *615 F.3d 1305, 22 Fla. L. Weekly Fed. C 1347, 2010 U.S. App. LEXIS 17590 (11th Cir. 2010)*.

In absence of prejudice and in exercise of its discretion, court was entitled to accept ratification by company's insurer under *Fed. R. Civ. P. 17(a)* of aircraft leasing and resale company's cause of action for damages insurer paid under its insurance contract. *Aquila, LLC v. City of Bangor, 640 F. Supp. 2d 92, 74 Fed. R. Serv. 3d (Callaghan) 101, 2009 U.S. Dist. LEXIS 68589 (D. Me. 2009)*.

Although document signed by plaintiff's insurer labeled "assignment" did not use term "ratify," assignment was accepted as effective ratification under *Fed. R. Civ. P. 17(a)*; assignment clarified that defendant city would not be held liable twice. *Aquila, LLC v. City of Bangor, 640 F. Supp. 2d 92, 74 Fed. R. Serv. 3d (Callaghan) 101, 2009 U.S. Dist. LEXIS 68589 (D. Me. 2009)*.

Loan servicer was allowed reasonable time for real party in interest to either ratify, join, or be substituted into *11 USCS § 362(d)* motion for relief from automatic stay where servicer was not holder of note and thus did not qualify as real party in interest. *In re Kang Jin Hwang, 393 B.R. 701, 2008 Bankr. LEXIS 2460 (Bankr. C.D. Cal.)*, reconsideration granted, *396 B.R. 757, 67 U.C.C. Rep. Serv. 2d (CBC) 319, 2008 Bankr. LEXIS 2969 (Bankr. C.D. Cal. 2008)*.

Unpublished decision: District court properly granted summary judgment in favor of appellee in appellant's suit seeking indemnity and contribution because appellant was not real party in interest under *Fed. R. Civ. P. 17(a)* as its insurers had covered all costs, so it was fully subrogated claim and appellant was not party to that claim, but after that determination was made, appellant should have been given reasonable opportunity to submit insurer's ratifications. *Durabla Mfg. Co. v. Durabla Can. LTD., 124 Fed. Appx. 732, 2005 U.S. App. LEXIS 3495 (3d Cir. 2005)*.

Unpublished decision: Proper ratification under *Fed. R. Civ. P. 17(a)* requires that ratifying party: (1) authorize continuation of action; and (2) agree to be bound by its result. *Durabla Mfg. Co. v. Durabla Can. LTD., 124 Fed. Appx. 732, 2005 U.S. App. LEXIS 3495 (3d Cir. 2005)*.

Unpublished decision: Declaratory action filed by company providing electronic data capture services was not subject to dismissal under *Fed. R. Civ. P. 17(a)* on ground that company was not real party in interest because plaintiff had merged with and into its parent company, purported real party in interest; to extent that Rule 17(a) was implicated, company was permitted opportunity for ratification, joinder, or substitution of real party in interest. *Pharmanet, Inc. v. DataSci, LLC, 2009 U.S. Dist. LEXIS 11661 (D.N.J. Feb. 17, 2009)*.

Statements suggested that loan purchaser intended for original lender to file Motion to Dismiss so that debtor might not know that loan purchaser had acquired Loan; under circumstances, filing of Motion to Dismiss by wrong party was not honest mistake, and loan purchaser was not entitled to substitute for original lender as real party in interest pursuant to *Fed. R. Civ. P. 17(a)(3)*. *In re Sandia Resorts, Inc., 62 Bankr. Ct. Dec. (LRP) 181, 75 Collier Bankr. Cas. 2d (MB) 1347, 2016 Bankr. LEXIS 2125 (Bankr. D.N.M. May 26, 2016)*.

11. Waiver

Objection that successor in interest was not real party in interest which was not raised at trial but was raised first time on appeal was deemed waived since it should have been raised with reasonable promptness. *Chicago & Northwestern Transp. Co. v. Negus-Sweenie, Inc., 549 F.2d 47, 22 Fed. R. Serv. 2d (Callaghan) 1112, 1977 U.S. App. LEXIS 10350 (8th Cir. 1977)*.

Defense based on Rule 17(a) is waived unless asserted by defendant in timely fashion; trial court is proper in refusing to permit amendment to assert defense of real party in interest 16 days prior to trial where defendant knew facts necessary to assert defense for one and one half year from time complaint was filed. *Hefley v. Jones, 687 F.2d 1383, 35 Fed. R. Serv. 2d (Callaghan) 298, 1982 U.S. App. LEXIS 25878 (10th Cir. 1982)*.

There was no abuse of discretion when court allowed oil corporation to assert claim for its insurer's contribution to personal injury settlement, and rejected liability insurer's argument that oil corporation was not real party in interest because it failed to prove that its insurer assigned oil corporation rights to recover sum contributed to settlement; argument was rejected because liability insurer waived defense under Rule 17(a) by failing to assert it until day before trial. *Rogers v. Samedan Oil Corp., 308 F.3d 477, 57 Fed. R. Serv. 3d (Callaghan) 593, 2002 U.S. App. LEXIS 21429 (5th Cir. 2002)*.

Where vessel owner sought to lessen its liability under *46 USCS § 30505* for damages caused to bridge after its barges broke free of their moorings and drifted 4.7 miles during hurricane, and where counter-claimant Mississippi Department of Transportation (MDOT) had repaired bridge and been reimbursed for repairs by time of trial, under *Fed. R. Civ. P. 17(a)*, owner's real party in interest defense against MDOT was deemed waived as untimely because it was first raised in pretrial order less than two weeks before trial. *Signal Int'l LLC v. Miss. DOT, 579 F.3d 478, 2009 A.M.C. 2177, 2009 U.S. App. LEXIS 18088 (5th Cir. 2009)*.

Defendant in securities fraud case waived defense that plaintiff was not "real party in interest" under *Fed. R. Civ. P. 17(a)* because he failed to raise defense during more than seven years between complaint and beginning of trial. *RK Co. v. See, 622 F.3d 846, 77 Fed. R. Serv. 3d (Callaghan) 747, 2010 U.S. App. LEXIS 19666 (7th Cir. 2010)*.

In plaintiff school board action seeking rite of passage to its enclosed Section 16 lands, because owners of parcels district court chose to burden failed to raise real-party-in-interest argument, it was waived. *Sch. Bd. of Avoyelles Parish v. United States DOI, 647 F.3d 570, 2011 U.S. App. LEXIS 15263 (5th Cir. 2011)*.

Paving company whose president sold the business to a buyer via an asset purchase agreement did not lose its Article III standing to pursue the company's claims against a stone supplier that had backed out of a joint venture; assuming the paving company was not the real party in interest, it did not lack standing because it had suffered economic injury, and it had waived the real party in interest objection by not raising it until after trial. *Cranpark, Inc. v. Rogers Group, Inc., 821 F.3d 723, 2016 FED App. 0101P, 94 Fed. R. Serv. 3d (Callaghan) 518, 2016 U.S. App. LEXIS 7290 (6th Cir. 2016)*, reh'g denied, reh'g, en banc, denied, *2016 U.S. App. LEXIS 9980 (6th Cir. May 31, 2016)*.

Request to substitute separate trustee, made more than one year after standing to appoint separate trustee had been challenged, was untimely; this did not qualify as reasonable time after standing objection. *NCUA Bd. v. U.S. Bank Nat'l Ass'n, 898 F.3d 243, 101 Fed. R. Serv. 3d (Callaghan) 831, 2018 U.S. App. LEXIS 21418 (2d Cir. 2018)*.

Corporation raised its real party in interest objection early enough to allow resolution of issue well before trial, and objection was not waived; however, manufacturer was real party in interest both by operation of asset purchase agreement and by other business's ratification of lawsuit. *Walker Mfg. v. Hoffmann, Inc., 220 F. Supp. 2d 1024, 2002 U.S. Dist. LEXIS 17400 (N.D. Iowa 2002)*.

By asserting "real party in interest" defense in proposed pre-trial order, defendant put plaintiffs on notice of defense eight months before they requested court to act on it by seeking dismissal of action pursuant to *Fed. R. Civ. P. 17(a)*; plaintiffs' argument that defendant waited until eleventh hour to assert defense and that defendant waived

defense was thus without merit. *Marine Office of Am. Corp. v. Lilac Marine Corp., 296 F. Supp. 2d 91, 2004 A.M.C. 670, 2003 U.S. Dist. LEXIS 21158 (D.P.R. 2003)*.

On timing grounds alone, motion to substitute had to be denied, as movants failed to explain or even acknowledge their years-long delay in bringing these objections to fore; moreover, it would have been patently unfair to bank to remove it from active participation in litigation and release them from obligation to participate, but then, to pull them back in as full and active participant seven years later—long after bulk of discovery had been completed and dispositive motions had been filed and determined. *New Bern Riverfront Dev., LLC v. Weaver Cooke Contr., LLC (In re New Bern Riverfront Dev., LLC), 66 Bankr. Ct. Dec. (LRP) 49, 2018 Bankr. LEXIS 2753 (Bankr. E.D.N.C. Sept. 12, 2018)*.

Even if debtor's statements in arguments on his motion in limine could be deemed appropriate challenge to whether creditor was real party in interest, such challenge, made on day of trial and only in circuitous manner, was neither reasonable nor prompt and thus, was waived. *Monty Titling Trust I v. Granrath (In re Granrath), 560 B.R. 515, 76 Collier Bankr. Cas. 2d (MB) 1601, 2016 Bankr. LEXIS 4173 (Bankr. N.D. Ill. 2016)*.

12. Miscellaneous

Where plaintiff insurance company had admittedly not suffered any injury by defendant insureds, it had no standing to bring negligence action against them, and no standing to make motion to substitute real party in interest. *Zurich Ins. Co. v. Logitrans, Inc., 297 F.3d 528, 2002 FED App. 0253P, 53 Fed. R. Serv. 3d (Callaghan) 365, 2002 U.S. App. LEXIS 15115 (6th Cir. 2002)*.

Instant diversity case was properly removed because real party defendant in interest that owned and operated non-juridical entity that was improperly sued in state court was entitled to remove case and was not required to have filed appearance in state court or been served with process prior to attempting removal; diversity jurisdiction was not destroyed by listing non-diverse, non-juridical entity as named defendant. *La Russo v. St. George's Univ. Sch. of Med., 747 F.3d 90, 2014 U.S. App. LEXIS 3991 (2d Cir. 2014)*.

Unlike substitution, pleading existence of new and substantively different assignment would require more than "merely formal" alteration of complaint, such attempt to employ *Fed. R. Civ. P. 17(a)(3)* to cure standing problem here would thus be fated to fail. *Cortlandt St. Recovery Corp. v. Hellas Telecomms., 790 F.3d 411, 91 Fed. R. Serv. (Callaghan) 3d, 1657, 2015 U.S. App. LEXIS 10655 (2d Cir. 2015)* (criticized in *Digizip, Inc. v Verizon Servs. Corp. (2015, SD NY) 92 FR Serv 3d 1449*).

In law firm's suit to collect unpaid attorney's fees, there was no abuse of discretion in permitting substitution of correct name of law firm as party plaintiff and in declining to dismiss suit for failure to sue in name of real party in interest because law firm's failure to name its correct name as plaintiff was not result of any bad faith, but rather looseness and sloppiness, which was insufficient for firm to forfeit lawsuit. *Marks Law Offices, LLC v. Mireskandari, 704 Fed. Appx. 171, 2017 U.S. App. LEXIS 15653 (3d Cir. 2017)*.

Jury's verdict need not be set aside on ground that beneficiary is not real party in interest with respect to damages it sought and recovered, where *FRCP 17(a)* rule is defense and is intended to protect party from subsequent litigation by another actually entitled to recover, because property manager failed to raise defense in timely manner, waiving it. *Dominium Mgmt. Servs. v. Nationwide Hous. Group, 3 F. Supp. 2d 1054, 1998 U.S. Dist. LEXIS 6686 (D. Minn. 1998)*, aff'd in part and rev'd in part, *195 F.3d 358, 1999 U.S. App. LEXIS 27894 (8th Cir. 1999)*.

In trademark and copyright action, request by defendants and proposed intervenors to proceed anonymously or by pseudonym was denied in absence of showing of any harm in revealing their identities, other than economic harm; identities of parties had substantial bearing on issues and were necessary in determining copyright and trademark ownership rights that were asserted by each side. *Guerrilla Girls, Inc. v. Kaz, 224 F.R.D. 571, 2004 U.S. Dist. LEXIS 21692 (S.D.N.Y. 2004)*.

In employment discrimination suit, where employer stipulated that it had contractual obligation to retain employee after it purchased business from predecessor, such stipulations superseded any contrary assertions made in previous pleadings, in accordance with *Fed. R. Civ. P. 17(a)*. *Clements v. Barden Miss. Gaming, L.L.C., 373 F. Supp. 2d 653, 2004 U.S. Dist. LEXIS 28784 (N.D. Miss. 2004)*, aff'd, *128 Fed. Appx. 351, 2005 U.S. App. LEXIS 5595 (5th Cir. 2005)*.

Three anonymous state university students, who were entitled to intervene as of right in lawsuit by students challenging state bill that made certain undocumented aliens eligible for favorable in-state college tuition rates, were not entitled to continue to proceed anonymously because *Fed. R. Civ. P. 17(a)* required suits to be prosecuted in name of real party in interest and students did not make showing that there were exceptional circumstances warranting anonymity. *Day v. Sebelius, 227 F.R.D. 668, 2005 U.S. Dist. LEXIS 7336 (D. Kan.)*, dismissed, *376 F. Supp. 2d 1022, 2005 U.S. Dist. LEXIS 15344 (D. Kan. 2005)*.

Lawsuit asserted by individual plaintiff was dismissed with prejudice, pursuant to *Fed. R. Civ. P. 17*, because evidence presented by defendant, which included sworn testimony from plaintiff in another lawsuit, established that at all relevant times plaintiff was not owner of domain name at issue; in fact, domain name was owned by corporation, and plaintiff could not assert claim on behalf of corporation. *Delor v. Intercosmos Media Group, Inc., 232 F.R.D. 562, 2005 U.S. Dist. LEXIS 36506 (E.D. La. 2005)*.

Party in interest behind claimant environmental group lacked standing to raise claims under National Environmental Policy Act because party in interest had no membership and was unable to show sufficient indicia of membership to have associational standing where party in interest made no showing that claimant group played any role in selecting party in interests' leadership, guided its activities, or financed activities of party at interest. *Basel Action Network v. Mar. Admin., 370 F. Supp. 2d 57, 60 Env't Rep. Cas. (BNA) 1626, 2005 U.S. Dist. LEXIS 3278 (D.D.C. 2005)*.

Where provider, incorporated and located in California, sought judicial review of Medicare decision under *42 USCS § 405(g)*, venue in New York was improper because, inter alia, if provider was bringing action on behalf of its parent, parent did not reside in New York for venue purposes. *Caremark Therapeutic Servs. v. Leavitt, 405 F. Supp. 2d 454, 2005 U.S. Dist. LEXIS 35006 (S.D.N.Y. 2005)*, corrected, *2006 U.S. Dist. LEXIS 1285 (S.D.N.Y. Jan. 12, 2006)*.

Where it was determined that a Nevada limited partnership was not a real party in interest, and it withdrew its informal *Fed. R. Civ. P. 17* request, demanding a mandatory opportunity to file a formal Rule 17 motion, because a summary judgment ruling then became inappropriate, its motion for reconsideration of rulings on cross-motions for summary judgment was granted; instead, it was directed to show cause in writing why the case should not be dismissed for failure to prosecute in the name of the real party in interest; Kansas limited partnership could, pursuant to *Kan. Stat. Ann. § 56-1a453*, sue in its own name as it was in its winding up phases, but that had not been done; instead, the Nevada partnership had argued that it and the Kansas limited partnership were the same entity. *Hjersted Family L.P. v. Hallauer, 71 Fed. R. Serv. 3d (Callaghan) 1574, 2008 U.S. Dist. LEXIS 90168 (D. Kan. Nov. 5, 2008)*.

Fact that mortgagor repeatedly failed to cure standing deficiency required that proposed class action be dismissed, rather than allow substitute representative to replace mortgagor. Wolferd v. Phelan, *Wolferd v Phelan (2013, ED Pa), 2013 U.S. Dist. LEXIS 163537 (November 14, 2013)*.

Former mortgagee of Chapter 13 debtor lacked standing to make motion to substitute existing mortgagee as real party in interest under *Fed. R. Civ. P. 17(a)*, in motion for sanctions due to repeat filings filed by former mortgagee, because former mortgagee lacked standing to file motion for sanctions. *In re Saffold, 373 B.R. 39, 2007 Bankr. LEXIS 2610 (Bankr. N.D. Ohio 2007)*.

Unpublished decision: Plaintiff had not demonstrated that need for his anonymity in his civil rights case outweighed public's interest in knowing his identity or why general rule of *Fed. R. Civ. P. 17(a)* of bringing action in name of real

party in interest should not be followed; possible history of mental illness or psychiatric care was not sufficient where he gave no particularized reasons why proceeding publicly would cause him real injury. *Raiser v. Brigham Young Univ., 127 Fed. Appx. 409, 2005 U.S. App. LEXIS 5138 (10th Cir. 2005)*.

Unpublished decision: Parents lacked standing to bring *42 USCS § 1983* action, challenging state proceeding in which Director of California Department of Developmental Services was appointed to act as permanent adult daughter's limited conservator, because daughter had previously been found incompetent and conservator had been appointed; *Fed. R. Civ. P. 17(b)* required that capacity of parents to bring action be determined by law of their domicile, and Cal. Code Civ. Proc. § 372(a) required that daughter be represented by conservator who was appointed for her. *Golin v. Allenby, 135 Fed. Appx. 978, 2005 U.S. App. LEXIS 12488 (9th Cir. 2005)*, cert. denied, *547 U.S. 1039, 126 S. Ct. 1618, 164 L. Ed. 2d 333, 2006 U.S. LEXIS 2513 (2006)*.

Unpublished decision: Where plaintiff sought to proceed under pseudonym after similar motion was denied in prior litigation, plaintiff's motion was denied because plaintiff did not demonstrate sufficient exceptional circumstances justifying use of pseudonym since (1) consequence of prior denial was that plaintiff's name remained in public domain in connection with litigation, and (2) court could not collaterally review previous decision. *Raiser v. Church of Jesus Christ of Latter-Day Saints, 182 Fed. Appx. 810, 2006 U.S. App. LEXIS 13657 (10th Cir. 2006)*, cert. denied, *549 U.S. 1252, 127 S. Ct. 1381, 167 L. Ed. 2d 160, 2007 U.S. LEXIS 2685 (2007)*.

Unpublished decision: District court properly denied winery's motion to amend its negligence complaint against consultants, which advised glassmaker about use of Freon 134a in winery's bottles, to include winery's majority and minority shareholders as plaintiffs because failure to include shareholders was not understandable mistake under *Fed. R. Civ. P. 15* and *17*; furthermore, adding shareholders' diminution of land value claim to negligence suit would have prejudiced consultants, and amending complaint would have been futile because any diminution of land value claim was time barred. *Twee Jonge Gezellen, Ltd. v. Owens-Illinois, Inc., 238 Fed. Appx. 159, 2007 FED App. 0531N, 2007 U.S. App. LEXIS 18257 (6th Cir. 2007)*.

Determination of correct party with respect to loan was as easy as reading check one time; ascertaining correct parties was not difficult and no mistake was made, and request to substitute or add plaintiff was denied in this bankruptcy case. *Houston v. Munoz (In re Munoz), 536 B.R. 879, 2015 Bankr. LEXIS 2856 (Bankr. D. Colo. 2015)*.

B. Persons Who Are Real Parties in Interest

1. In General

13. Generally

Once party is found to have standing to raise constitutional point, that ruling disposes of any real party in interest objections as well. *Apter v. Richardson, 510 F.2d 351, 1975 U.S. App. LEXIS 16311 (7th Cir. 1975)*.

Provision of Rule 17(a) requiring federal courts to look to state law for designation of those persons who, as real parties in interest, may properly sue in their own names on state claims in federal courts is properly interpreted only as defining, either directly or by incorporation of state law, those persons who have substantive rights of action and not as enabling those parties then to avoid joinder of other parties in interest. *Travelers Ins. Co. v. Riggs, 671 F.2d 810, 16 Av. Cas. (CCH) ¶18168, 33 Fed. R. Serv. 2d (Callaghan) 1070, 10 Fed. R. Evid. Serv. (CBC) 212, 1982 U.S. App. LEXIS 21964 (4th Cir. 1982)*.

Rule mandating that actions be prosecuted in name of real party in interest provides no exception that allows parties to proceed anonymously or under fictitious names such as initials; party wishing to do so must first petition district court for permission. *W.N.J. v. Yocom, 257 F.3d 1171, 2001 Colo. J. C.A.R. 3618, 51 Fed. R. Serv. 3d (Callaghan) 414, 2001 U.S. App. LEXIS 15532 (10th Cir. 2001)*.

This Court sees no basis for distinguishing personal stake required under *Fed. R. Civ. P. 17(a)* from interest required for standing. *APCC Servs. v. Sprint Communs. Co., 418 F.3d 1238, 368 U.S. App. D.C. 79, 2005 U.S.*

App. LEXIS 12759 (D.C. Cir. 2005), reh'g denied, 2005 U.S. App. LEXIS 24400 (D.C. Cir. Nov. 10, 2005), reh'g, en banc, denied, 2005 U.S. App. LEXIS 24402 (D.C. Cir. Nov. 10, 2005), vacated, remanded, *550 U.S. 901, 127 S. Ct. 2094, 167 L. Ed. 2d 811, 2007 U.S. LEXIS 4340 (2007)*.

Merely because one may benefit by result of litigation does not make him real party in interest. Armour Pharmaceutical Co. v. Home Ins. Co., 60 F.R.D. 592, 17 Fed. R. Serv. 2d (Callaghan) 1321, 1973 U.S. Dist. LEXIS 11448 (N.D. Ill. 1973).

It is proper to consider business customs and practices in determining whether plaintiff is real party in interest under Rule 17(a). Mitsui & Co. v. Puerto Rico Water Resources Authority, 528 F. Supp. 768, 1981 U.S. Dist. LEXIS 9942 (D.P.R. 1981).

Person who, according to governing substantive law, is entitled to enforce right is "real party in interest". Johnson v Secretary of/and U. S. Dep't of Housing & Urban Dev., 544 F. Supp. 925 (ED La 1981).

Unpublished decision: Delaware company failed to establish its real party status where it did not allege any harm flowing from fact that it was in breach of its client service agreements in complaint; company had not claimed that it would be able to satisfy contractual obligations and thereby avoid breach claims by clients if it secured judgments against insurer, nor did it claim that proceeds from any insurance payment would be used to help it defray costs. Payroll Mgmt. v. Lexington Ins. Co., 566 Fed. Appx. 796, 2014 U.S. App. LEXIS 9025 (11th Cir. 2014).

14. Substantive law as controlling

Where question involved is whether plaintiff is real party in interest under Rule 17(a), federal court will first look to state law to determine who has substantive right of action. American Fidelity & Casualty Co. v. All American Bus Lines, Inc., 179 F.2d 7, 1949 U.S. App. LEXIS 2607 (10th Cir. 1949).

Under mandatory real party in interest provisions, when it is once determined that given person is real party in interest as to chose in action under applicable rules of substantive law, action upon that chose must be brought by him in his own name, or by some one of excepted classes of persons. American Fidelity & Casualty Co. v. All American Bus Lines, Inc., 179 F.2d 7, 1949 U.S. App. LEXIS 2607 (10th Cir. 1949).

In cases based on diversity jurisdiction, question of who is "real party in interest" under Rule 17(a) is mixed question of state substantive law and federal procedural law, "real party in interest" being party who has substantive right sought to be enforced, which is determined by reference to substantive law of state wherein cause of action arose, and Rule 17(a) then governing on procedural question whether party having such right has instituted action or must be joined. Virginia Electric & Power Co. v. Carolina Peanut Co., 186 F.2d 816, 1951 U.S. App. LEXIS 3671 (4th Cir. 1951); Gas Service Co. v. Hunt, 183 F.2d 417, 1950 U.S. App. LEXIS 2956 (10th Cir. 1950); McNeil Constr. Co. v. Livingston State Bank, 300 F.2d 88, 5 Fed. R. Serv. 2d (Callaghan) 245, 1962 U.S. App. LEXIS 6005 (9th Cir. 1962).

Meaning and object of "real party in interest" principle embodied in Rule 17 is that action must be brought by person who possesses right to enforce claim and who has significant interest in litigation; whether plaintiff is entitled to enforce asserted right is determined according to substantive law; and, in diversity action, substantive law governing question of who is real party in interest is law of state; while question of in whose name action must be prosecuted is procedural, and thus governed by federal law, its resolution depends on underlying substantive law of state. Virginia Electric & Power Co. v. Westinghouse Electric Corp., 485 F.2d 78, 17 Fed. R. Serv. 2d (Callaghan) 1103, 1973 U.S. App. LEXIS 7663 (4th Cir. 1973), cert. denied, *415 U.S. 935, 94 S. Ct. 1450, 39 L. Ed. 2d 493, 1974 U.S. LEXIS 1371 (1974)*.

Forum state's procedural statute or rule defining real party in interest concept is not applicable in federal diversity suit because it only governs who may sue in state courts; under Rule 17(a), federal courts are concerned only with that portion of state law from which specific right being sued upon stems. K-B Trucking Co. v. Riss International Corp., 763 F.2d 1148, 18 Fed. R. Evid. Serv. (CBC) 682, 1985 U.S. App. LEXIS 20687 (10th Cir. 1985).

Although Federal Employers Liability Act [45 USCS §§ 51 et seq.] gives right of action for wrongful death to "personal representative" of deceased and permits action to be brought in any district in which defendant is doing business, law of the state in which action is brought determines whether action should be brought by domiciliary or ancillary representative. *Kleckner v. Lehigh Valley R. Co., 36 F. Supp. 600, 1940 U.S. Dist. LEXIS 2158 (D.N.Y. 1940)*.

"Real party in interest" is party who, by substantive law, possesses right sought to be enforced, and not necessarily person who will ultimately benefit from recovery. *Race v. Hay, 28 F.R.D. 354, 5 Fed. R. Serv. 2d (Callaghan) 255, 1961 U.S. Dist. LEXIS 5298 (N.D. Ind. 1961)*.

Real test of whether plaintiffs are real parties in interest is whether plaintiffs have right under substantive law to maintain action, and Negro child and her mother made to use separate facilities in a public hospital had such right under Fourteenth Amendment; real party in interest was not National Association for Advancement of Colored People. *Rackley v Board of Trustees, 35 F.R.D. 516, 8 Fed. R. Serv. 2d (Callaghan) 17A.11, Case 2 (DC SC 1964)*.

Rule 17 is simply a rule of procedure and does not create rights where none exist under substantive law; "real party in interest" are words of art which should be understood to mean that action shall be prosecuted in name of party who, by substantive law, has right sought to be enforced. *United States v. Thomas B. Bourne Associates, 367 F. Supp. 919, 18 Fed. R. Serv. 2d (Callaghan) 436, 1973 U.S. Dist. LEXIS 10748 (E.D. Pa. 1973)*.

Insurer is real party in interest if applicable substantive law confers on it substantive rights at issue in suit. *Stouffer Corp. v. Dow Chemical Co., 88 F.R.D. 336, 1980 U.S. Dist. LEXIS 9654 (E.D. Pa. 1980)*.

Although question of in whose name action may be prosecuted is procedural and governed by federal law, its resolution depends on underlying substantive law of state; principals of state substantive law determines whether beneficial owner has right sought to be enforced. *Beascoechea v. Sverdrup & Parcel & Associates, Inc., 486 F. Supp. 169, 1980 U.S. Dist. LEXIS 10514 (E.D. Pa. 1980)*.

Plaintiff's Federal Tort Claims Act claim against United States for property damage arising out of automobile collision between vehicle driven by plaintiff and postal mail truck was dismissed pursuant to *28 CFR § 14.3(a)*, *Fed. R. Civ. P. 17(a)*, and *28 USCS §§ 1346(b)(1)*, *2674*, because driver's father, not driver, was owner of vehicle; while plaintiff could produce evidence of damages in excess of his administrative claim, he could only recover maximum of his administrative claim unless he showed intervening facts or newly discovered evidence pursuant to *28 USCS § 2675(b)*, and amount of his administrative claim was reduced by dismissal of his property damage claim. *Carter v. United States, 667 F. Supp. 2d 1259, 2009 U.S. Dist. LEXIS 100536 (D. Kan. 2009)*.

15. Miscellaneous

Where action was maintained partly on behalf of another and partly on behalf of prosecutor of action, prosecutor of action was real party in interest. *Shumate v. Wahlers, 19 F.R.D. 173, 1956 U.S. Dist. LEXIS 4296 (D. Mich. 1956)*.

Motion to add county as third-party defendant in insurance coverage suit was granted because county had ultimate responsibility for any liabilities incurred by third-party defendant medical center, and county participated in settlement negotiations for underlying action, which was material to third-party complaint. *Nieto v. Kapoor, 210 F.R.D. 244, 2002 U.S. Dist. LEXIS 18735 (D.N.M. 2002)*.

Although defendant carrier alleged that plaintiffs did not have valid cause of action because they were not real party in interest (based on theory that since contract between insured and buyer was CIF (Cost, Insurance, and Freight), both risk and title to goods were transferred to buyer at port of loading), buyer accepted offer of deduction allowance for loss and insured assumed loss and became vested with right to sue defendant carrier; likewise, insurers, by reimbursing insured for its loss, became parties in interest to litigation. *Marine Office of Am. Corp. v. Lilac Marine Corp., 296 F. Supp. 2d 91, 2004 A.M.C. 670, 2003 U.S. Dist. LEXIS 21158 (D.P.R. 2003)*.

Even though it appeared that nominee of note holder would be real party in interest under *Fed. R. Civ. P. 17* based on its authority under Nevada law to conduct foreclosure sales, bankruptcy court properly concluded that nominee was not entitled to lift automatic stay under *11 USCS § 362(d)* because nominee could not comply with requirements of Nev. R. Dist. Ct. 4001 in meaningful way by producing either promissory note or written authority from note holder to conduct foreclosure sale. *Mortg. Elec. Registration Sys. v. Mitchell (In re Mitchell), 423 B.R. 914, 2009 U.S. Dist. LEXIS 125255 (D. Nev. 2009)*.

Bankruptcy court did not abuse its discretion when it granted creditor successor mortgagee relief from automatic stay for cause, pursuant to *11 USCS § 362(d)(1)*, where mortgagee had prudential standing based on its status as real party in interest under *Fed. R. Civ. P. 17*. *Edwards v. Wells Fargo Bank, N.A. (In re Edwards), 454 B.R. 100, 66 Collier Bankr. Cas. 2d (MB) 400, 2011 Bankr. LEXIS 2810 (9th Cir. 2011)*.

2. Particular Persons and Entities

16. Agents, generally

Where seller's agent assumed position of owner of coal sold under contract invalid under 15 USCS § 833, it could bring suit in its own name to recover under implied contract resulting from acceptance of coal by buyer difference between contract price and legal minimum price. *Costanzo Coal Min. Co. v. Weirton Steel Co., 150 F.2d 929, 1945 Trade Cas. (CCH) ¶57397, 1945 U.S. App. LEXIS 3566 (4th Cir.)*, cert. denied, *326 U.S. 765, 66 S. Ct. 147, 90 L. Ed. 460, 1945 U.S. LEXIS 2740 (1945)*.

In admiralty action, cargo owner's agent who is corporate subsidiary of owner and who, as consignee under bills of lading, takes possession of shipment of spoiled produce, has sufficient interest in damaged cargo to maintain action in its own name against shipper, even though agent and its parent company are part of single operation, where any further action by owner would be time barred, and shipper is thus amply protected against possibility of exposure to subsequent suit. *Prevor-Mayorsohn Caribbean, Inc. v. Puerto Rico Marine Management, Inc., 620 F.2d 1, 1982 A.M.C. 1359, 29 Fed. R. Serv. 2d (Callaghan) 767, 1980 U.S. App. LEXIS 18688 (1st Cir. 1980)*.

District court did not err in permitting foreign government as real party in interest to ratify judgment where plaintiff had acted as agent of foreign government and had justifiably relied on district court's denial of defendant's motion to dismiss in which defendant had raised real party in interest or issue. *Arabian American Oil Co. v. Scarfone, 939 F.2d 1472, 23 Fed. R. Serv. 3d (Callaghan) 659, 1991 U.S. App. LEXIS 20176 (11th Cir. 1991)*.

Agent of company doing business as marina was not real party in interest in action to collect money due for lease of boat slip where there was nothing in record to show that agent was authorized to prosecute instant lawsuit as required by operating agreement between company and agent. *Marina Mgmt. Servs. v. Vessel My Girls, 202 F.3d 315, 340 U.S. App. D.C. 92, 2000 A.M.C. 1740, 46 Fed. R. Serv. 3d (Callaghan) 227, 2000 U.S. App. LEXIS 1817 (D.C. Cir.)*, cert. denied, *531 U.S. 985, 121 S. Ct. 441, 148 L. Ed. 2d 446, 2001 A.M.C. 2999, 2000 U.S. LEXIS 7427 (2000)*.

In patent suit against county in which it was alleged that county park commission as agent of county, through installation and use of toll checking equipment on toll bridges, infringed plaintiff's patent, county was real party in interest, tolls collected from use of challenged devices being paid to county treasury. *Cooper v. Westchester County, 42 F. Supp. 1, 52 U.S.P.Q. (BNA) 18, 1941 U.S. Dist. LEXIS 2350 (D.N.Y. 1941)*.

Mere agent for collection is not real party in interest, but assignee for collection is real party in interest and may maintain action; amended complaint must set forth true status of plaintiff. *California League of Independent Ins. Producers v. Aetna Casualty & Surety Co., 175 F. Supp. 857, 2 Fed. R. Serv. 2d (Callaghan) 261, 1959 Trade Cas. (CCH) ¶69367, 1959 U.S. Dist. LEXIS 3245 (N.D. Cal. 1959)*, disapproved, *Royal Drug Co. v. Group Life & Health Ins. Co., 556 F.2d 1375, 1977-2 Trade Cas. (CCH) ¶61578, 1977 U.S. App. LEXIS 12109 (5th Cir. 1977)*.

Agent who was permitted to prosecute action in name of principal under state law was real party in interest to bring counterclaim on contract. *Hercules, Inc. v. Dynamic Export Corp., 71 F.R.D. 101, 1976 U.S. Dist. LEXIS 15664 (S.D.N.Y. 1976)*.

Corporation as undisclosed principal not served nor named in complaint could not have judgment entered against it. *Delaware Valley Equipment Co. v. Granahan, 409 F. Supp. 1011, 19 U.C.C. Rep. Serv. (CBC) 112, 1976 U.S. Dist. LEXIS 15816 (E.D. Pa. 1976)*.

Effect of executing form contract in trade name of plaintiff places plaintiff in position of undisclosed principal, and plaintiff, doing business as its trade name, is real party in interest. *Ashland-Warren, Inc. v. Sanford, 497 F. Supp. 374, 30 Fed. R. Serv. 2d (Callaghan) 1167, 1980 U.S. Dist. LEXIS 15536 (M.D. Ala. 1980)*.

Agent who has contracted in his own name for disclosed or undisclosed principal, or who acted as agent during course of transaction involved in litigation, may sue for damages suffered by principal. *Mitsui & Co. v. Puerto Rico Water Resources Authority, 528 F. Supp. 768, 1981 U.S. Dist. LEXIS 9942 (D.P.R. 1981)*.

As agent with ownership interest in subject matter of suit, plaintiff is real party in interest for purposes of Rule 17(a) where it is managing agent with substantial ownership share and where it has played active role in negotiating contract and assumed primary responsibility for monitoring and enforcing defendant's performance under contract. *Hanna Mining Co. v. Minnesota Power & Light Co., 573 F. Supp. 1395, 38 Fed. R. Serv. 2d (Callaghan) 464, 1983 U.S. Dist. LEXIS 12439 (D. Minn. 1983)*, aff'd, *739 F.2d 1368, 1984 U.S. App. LEXIS 19988 (8th Cir. 1984)*.

In securities fraud action against brokerage house in which plaintiff investor has filed amended complaint alleging existence of partnership between himself and his agent, who has been named defendant in indemnification action by brokerage house, there is no merit to contention of brokerage house that newly alleged partnership claims are barred by statute of limitations, where it is apparent from reading original and amended complaints that claims arise out of same transaction, although original complaint asserts agency relationship while amended complaint asserts partnership; whether amendment is viewed under Rule 15(c) as amendment of claim or viewed under Rule 17(a) as failure to name real party in interest, dismissal would not be appropriate. *Saul Stone & Co. v. Browning, 615 F. Supp. 20, 1985 U.S. Dist. LEXIS 19686 (N.D. Ill. 1985)*.

Plaintiff oil corporation is entitled to prosecute action in its own name pursuant to Rule 17(a) of federal and state rules of civil procedure where plaintiff established de facto agency relationship between it and 2 business entities not named as plaintiffs; fact that plaintiff was acting as authorized agent for business entities at time of contracting means it is entitled to prosecute action in its own name without joining its principals under state substantive law. *Forest Oil Corp. v. Tenneco, Inc., 626 F. Supp. 917, 89 Oil & Gas Rep. 291, 1986 U.S. Dist. LEXIS 30754 (S.D. Miss. 1986)*.

Servicer of mortgage failed to show that it was real party in interest to file proof of claim based on promissory note secured by mortgage against bankruptcy debtor's property since servicer provided no evidence that servicer had agency or other relationship with assignee of mortgage, or that either servicer or assignee was person entitled to enforce note. *Veal v Am. Home Mortg. Servicing, Inc. (In re Veal), 449 B.R. 542 (BAP9 2011)*.

Unpublished decision: Where insurers, in pooling agreement, had designated plaintiff managing agent to defend and settled claims against defendant airline with airline's knowledge and consent, agent had standing as real party in interest under *Fed. R. Civ. P. 17(a)* to sue airline for damages on insurers' behalf after learning airline's principals' criminal conduct impeded investigation. *Global Aero., Inc. v. Platinum Jet Mgmt., LLC, 488 Fed. Appx. 338, 2012 U.S. App. LEXIS 14605 (11th Cir. 2012)*.

On nondischargeability complaint arising out of creditor's purchase of weapons and collectibles from debtor, another plaintiff was dropped as party because complaint did not allege any interaction between debtor and that plaintiff regarding purchased items, and assertion that creditor made purchases as her agent was legal conclusion

that was not assumed to be true at motion to dismiss stage. *Gallo v. Palmiter (In re Palmiter), 591 B.R. 208, 66 Bankr. Ct. Dec. (LRP) 61, 2018 Bankr. LEXIS 2926 (Bankr. M.D. Pa. 2018)*.

17. Assignees and assignors

Person to whom claim has been assigned is real party in interest; assuming assignment to employer to be valid, right to sue is exclusively that of employer, and defense of assignment made against plaintiff assignor, is proper, where employer has not joined in action or ratified its commencement even though it has had reasonable time to do so. *Rodriguez v. Compass Shipping Co., 451 U.S. 596, 101 S. Ct. 1945, 68 L. Ed. 2d 472, 1981 U.S. LEXIS 25*, reh'g denied, *453 U.S. 923, 101 S. Ct. 3160, 69 L. Ed. 2d 1005, 1981 U.S. LEXIS 2771 (1981)*.

What assignees had promised to do with any recovery was irrelevant to their standing, as it would be to their status as real parties in interest. *APCC Servs. v. Sprint Communs. Co., 418 F.3d 1238, 368 U.S. App. D.C. 79, 2005 U.S. App. LEXIS 12759 (D.C. Cir. 2005)*, reh'g denied, *2005 U.S. App. LEXIS 24400 (D.C. Cir. Nov. 10, 2005)*, reh'g, en banc, denied, *2005 U.S. App. LEXIS 24402 (D.C. Cir. Nov. 10, 2005)*, vacated, remanded, *550 U.S. 901, 127 S. Ct. 2094, 167 L. Ed. 2d 811, 2007 U.S. LEXIS 4340 (2007)*.

In four copyright and trademark infringement cases, referred to chronologically based on filing date, district court's dismissal of third action for lack of statutory standing was error as claimant should have been allowed to join copyright and trademark owner as party since doing so in licensee's infringement suit was not ratification but joinder of real party in interest. *Doc's Dream, LLC v. Dolores Press, Inc., 766 Fed. Appx. 467, 2019 U.S. App. LEXIS 7813 (9th Cir. 2019)*.

Previous ruling that dismissed assignee for failure to prosecute was final judgment on merits with claim-preclusive effect, depriving assignor of any rights either on standing or on real-party-in-interest grounds; although there was some evidence assignor had not intended to assign all of his rights, he failed to identify which rights he retained. *Yeager v. Fort Knox Sec. Prods., 672 Fed. Appx. 826, 2016 U.S. App. LEXIS 21684 (10th Cir. 2016)*.

In four copyright and trademark infringement cases, referred to chronologically based on filing date, district court's dismissal of third action for lack of statutory standing was error as claimant should have been allowed to join copyright and trademark owner as party since doing so in licensee's infringement suit was not ratification but joinder of real party in interest. *Dolores Press, Inc. v. Jones, 766 Fed. Appx. 455, 2019 U.S. App. LEXIS 7822 (9th Cir. 2019)*.

Assignor and assignee are real parties in interest. *First Nat'l Bank v. Manufacturers Trust Co., 2 F.R.D. 125, 1941 U.S. Dist. LEXIS 2116 (D.N.J. 1941)*.

Person to whom complete and absolute assignment of rights arising ex contractu had been made is real party in interest and proper person to bring suit to enforce such rights, and fact that motive for assignment may have been to enable assignee, rather than assignor, to bring suit is immaterial. *Cobb v. National Lead Co., 215 F. Supp. 48, 7 Fed. R. Serv. 2d (Callaghan) 313, 1963 U.S. Dist. LEXIS 6332 (E.D. Ark. 1963)*.

Even when claim is not assigned until after action has been instituted, assignee is real party in interest and can maintain action. *Campus Sweater & Sportswear Co. v. M. B. Kahn Constr. Co., 515 F. Supp. 64, 33 U.C.C. Rep. Serv. (CBC) 547, 1979 U.S. Dist. LEXIS 9493 (D.S.C. 1979)*, aff'd, *644 F.2d 877 (4th Cir. 1981)*.

Municipal authority's motion to dismiss counterclaims of contractor was granted because contractor's surety stepped in contractor's shoes upon its default on project at issue under assignment agreement; thus, contractor had no standing to pursue counterclaims under Pennsylvania Prompt Pay Act, 62 Pa.C.S. §§ 3931 et seq., since it was not real party in interest. *Cecil Twp. Mun. Auth. v. N. Am. Specialty Sur. Co., 836 F. Supp. 2d 367, 2011 U.S. Dist. LEXIS 144427 (W.D. Pa. 2011)*.

Where alleged assignee of promissory note and deed of trust was unable to present evidence that it had possession of original promissory note, or any nonhearsay testimony that note had been assigned to it or assigned

to its alleged predecessor in interest, assignee lacked standing as real party in interest, under Fed. R. Civ. P. 17(a)(1), to obtain relief from automatic stay under 11 USCS § 362(d). In re Box, 63 Collier Bankr. Cas. 2d (MB) 1394, 2010 Bankr. LEXIS 1637 (Bankr. W.D. Mo. June 3, 2010).

Bankruptcy court did not err in finding that assignee had standing to bring 11 USCS § 523(a)(2) complaint against debtors as real party in interest under Fed. R. Bankr. P. 7017 and Fed. R. Civ. P. 17(a) because issue of assignee's standing was necessarily decided by state court in assignee's action for unpaid rent against debtors; state court could not have entered default judgment against debtor husband without finding that assignee had standing. Sung Ho Cha v. Rappaport (In re Sung Ho Cha), 483 B.R. 547, 2012 Bankr. LEXIS 5875 (9th Cir. 2012).

Unpublished decision: Plaintiff's bad faith and negligence claims were time-barred where (1) in actuality, it was plaintiff who commenced suit, not insured, and she was not yet real party in interest, because insured had not yet assigned his rights to her; and (2) instant court agreed with district court that April 2005 filing of writ of summons did not toll statute of limitations and, instead, statute continued to run until insured assigned his right to plaintiff in June of 2005; by that time, however, statute had expired. Gardner v. State Farm Fire & Cas. Co., 544 F.3d 553, 2008 U.S. App. LEXIS 15560 (3d Cir. 2008).

Unpublished decision: Bank was entitled, pursuant to Fed. R. Bankr. P. 7017, to substitute its successor in interest, finance company, as real party in interest in adversary proceeding against debtors to determine dischargeability of debt because finance company was real party in interest to prosecute adversary proceeding as bank contended that its claim against debtors was transferred to finance company before bankruptcy was filed; further, debtors did not show any prejudice from substitution of finance company. First Mut. Bank v. Briceno (In re Briceno), 2009 Bankr. LEXIS 5659 (Bankr. E.D. Cal. May 12, 2009).

Unpublished decision: Assignee was real party in interest because plain terms of assignment showed that assignor gave up his right to enforce judgment when he acknowledged that assignee held exclusive right to satisfy, settle, compromise and collect judgment at her sole discretion, such assignment of rights was valid under California law, and that assignee agreed to split with assignor any recovery she obtained did not undermine assignment's effect to vesting legal title of judgment in assignee. Caraway v. Klein (In re Klein), 2013 Bankr. LEXIS 4674 (9th Cir. Oct. 3, 2013).

Where debtor executed mortgage in favor of mortgagee and mortgage was later assigned, assignee was deemed substituted for mortgagee and deemed to be claimant, whether as real party in interest or as party by intervention. Fact that mortgagee filed proof of claim after bar date did not matter, as assignee's claim did not depend on that proof of claim but arose under Bankruptcy Code provision that deemed its claim filed timely because Chapter 11 debtor scheduled it as not disputed, contingent, or unliquidated. In re Batista-Sanechez, 2014 Bankr. LEXIS 403 (Bankr. N.D. Ill. Jan. 27, 2014).

18. —Consideration of substantive law

In diversity case or other case not involving federal right, question whether assignee is real party in interest, so as to enable and require him to maintain suit in his own name under Rule 17(a), is referable to substantive law of state in which federal district court is held. Dunham v. Robertson, 198 F.2d 316, 1952 U.S. App. LEXIS 3761 (10th Cir. 1952); Hoeppner Constr. Co. v. United States, 287 F.2d 108, 41 Lab. Cas. (CCH) ¶31062, 1960 U.S. App. LEXIS 3062 (10th Cir. 1960); Petrikin v. Chicago, R. I. & P. R. Co., 15 F.R.D. 346, 1954 U.S. Dist. LEXIS 4243 (D. Mo. 1954).

In diversity suit for wrongful death of decedent in Nebraska, brought by administrator of his estate in Kansas federal district court, which involved assignment of interest by widow and child to United States under provisions of § 26 of the Federal Employee's Compensation Act, no greater right of action was thereby created in the United States government than that accorded widow and since under Nebraska law, designated administrator of decedent is vested with exclusive right to bring and control litigation, appellant's motion for summary judgment on grounds that administrator was not real party in interest was properly denied. Boeing Airplane Co. v. Perry, 322 F.2d 589, 8 Av.

Cas. (CCH) ¶17909, 7 Fed. R. Serv. 2d (Callaghan) 337, 1963 U.S. App. LEXIS 4227 (10th Cir. 1963), cert. denied, *375 U.S. 984, 84 S. Ct. 516, 11 L. Ed. 2d 472, 1964 U.S. LEXIS 2001 (1964)*.

Following New Mexico law in accordance with Rule 17, assignment made by manufacturer to bank for security purposes within New Mexico permits assignor to be real party in interest. *Audio-Visual Marketing Corp. v. Omni Corp., 545 F.2d 715, 1976 U.S. App. LEXIS 6070 (10th Cir. 1976)*.

Assignor retained sufficient interest in chose in action to be real party in interest because, under controlling New York law, assignment as security for payment of debt is not complete assignment. *Diversa-Graphics, Inc. v. Management & Technical Services Co., 561 F.2d 725, 14 Collier Bankr. Cas. (MB) 106, 24 Fed. R. Serv. 2d (Callaghan) 40, 1977 U.S. App. LEXIS 11769 (8th Cir. 1977)*.

Applying New Jersey law, ratification could not cure defect that plaintiff, as assignee of corporation's right to sue, was not proper party in interest because procedural mechanisms that were set forth in *Fed. R. Civ. P. 17(a)* for ameliorating real party in interest problems could not, under Rules Enabling Act, *28 USCS § 2072(b)*, be employed to expand substantive rights because ratification under Rule 17(a) would allow plaintiff to accomplish, through operation of Federal Rules, precisely what it could not accomplish under applicable state law. *Stichting Ter Behartiging Van De Belangen Van Oudaandeelhouders in Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber, 407 F.3d 34, 2005 U.S. App. LEXIS 7606 (2d Cir. 2005)*.

Suit in Alaska by assignee of person alleged to have been injured by negligence of defendant could not be maintained, since action was not assignable under Alaska law; hence plaintiff was not real party in interest. *Ishmael v. City Elec., 91 F. Supp. 688, 1950 U.S. Dist. LEXIS 2799 (D. Alaska 1950)*.

If assignment of right to bring action was not good, transferee has not gained substantive right to bring action and it will be dismissed. *Kenrich Corp. v. Miller, 256 F. Supp. 15, 10 Fed. R. Serv. 2d (Callaghan) 333, 1966 U.S. Dist. LEXIS 6507 (E.D. Pa. 1966)*, aff'd, *377 F.2d 312, 1967 U.S. App. LEXIS 6243 (3d Cir. 1967)*.

19. —Partial assignee; assignee for suit or collection

Assignee for collection or suit only is real party in interest in action for accounting or for money fraudulently withheld. *Rosenblum v. Dingfelder, 111 F.2d 406, 43 Am. B.R. (n.s.) 40, 1940 U.S. App. LEXIS 3654 (2d Cir. 1940)*.

Assignment of note and chattel mortgage did not transfer to assignee the assignor's right of action for conversion of mortgaged property before assignment, and assignee was, therefore, not real party in interest and could not maintain action against tortfeasor. *Farm Bureau Co-operative Mill & Supply, Inc. v. Blue Star Foods, Inc., 238 F.2d 326, 1956 U.S. App. LEXIS 4034 (8th Cir. 1956)*.

Debtor-carrier had standing to join collection agent's action to recover from shippers under payments on freight charges since agreement between debtor and agent did not deny debtor right to enforce collection of undercharges should agent breach its duties. *Coliseum Cartage Co. v. Rubbermaid Statesville, Inc., 975 F.2d 1022, 5 4th Cir. & D.C. Bankr. Ct. Rep. 134, 23 Bankr. Ct. Dec. (LRP) 749, Bankr. L. Rep. (CCH) ¶74906, 23 Fed. R. Serv. 3d (Callaghan) 710, 1992 U.S. App. LEXIS 22187 (4th Cir. 1992)*, *5 Fourth Cir & Dist Col Bankr Ct Rep 134, 23 Bankr. Ct. Dec. (LRP) 749, 23 Fed. R. Serv. 3d (Callaghan) 710*.

Stockholder had standing to sue corporation that refused to honor stock certificate it issued because, even though stockholder held only 40 percent interest in certificate, it was real party in interest under *Fed. R. Civ. P. 17(a)*. *Tifford v. Tandem Energy Corp., 562 F.3d 699, 2009 U.S. App. LEXIS 10089 (5th Cir. 2009)*.

Assignment of chose in action constitutes assignee proper party in interest to sue even though instrument of assignment itself recites that transfer is merely for purposes of suit and obligates assignee to account for proceeds to another person. *Heitzmann v. Willys-Overland Motors, Inc., 68 F. Supp. 873, 1946 U.S. Dist. LEXIS 2041 (D.N.Y. 1946)*.

Motion to dismiss complaint on ground that plaintiff was not real party in interest in suit on corporate bonds was denied, where plaintiff testified that he had received letters from bondholders, which letters showed the bonds were assigned to plaintiff for purpose of collection. *Birkins v. Seaboard Service, 96 F. Supp. 245, 1950 U.S. Dist. LEXIS 1966 (D.N.J. 1950)*.

Motion to dismiss complaint as not brought by real party in interest in action by plaintiff for determination that he had not breached his contract with defendant by partial assignment of his profits was denied, as plaintiff, even if assignment was good, had not assigned all of his interest. *De Witt v. Quarterback Sports Federation, Inc., 45 F.R.D. 252, 1968 U.S. Dist. LEXIS 12776 (D. Minn. 1968)*.

Assignee for purposes of collection is real party in interest, even though he must account to his assignor for whatever is recovered in action. *Honey v. George Hyman Constr. Co., 63 F.R.D. 443, 18 Fed. R. Serv. 2d (Callaghan) 1347, 1974 U.S. Dist. LEXIS 8657 (D.D.C. 1974)*.

Plaintiff bank which irrevocably assigned note and mortgage to savings and loan association and had entered into loan servicing contract with it whereby bank agreed to represent association on matters pertaining to collection, repayment, and foreclosure could bring action for debt and foreclosure as real party in interest. *First Nat'l City Bank v. Burton M. Saks Constr. Corp., 70 F.R.D. 417, 12 V.I. 499, 1976 U.S. Dist. LEXIS 16780 (D.V.I. 1976)*.

Where assignment by shipbuilder represented only collateral assignment for purposes of creating security interest in government institution it was doing business with, rather than total assignment of all of shipbuilder's rights under surety bond, shipbuilder was real party in interest under *Fed. R. Civ. P. 17(a)* and had standing to bring suit. *MHI Shipbuilding, L.L.C. v. Nat'l Fire Ins. Co., 286 B.R. 16, 2002 U.S. Dist. LEXIS 19974 (D. Mass. 2002)*.

From terms of financing agreement, court found that parties intended to assign corporation's rights only to extent of corporation's debt to bonding company; thus, although immediate right to receive and enforce contract payments was assigned to bonding company, corporation retained interest in those payments to extent they exceeded its debt to bonding company, which was consistent with *La. Civil Code Ann. art. 3052*; therefore, because corporation retained residual interest in assigned contract rights, assignment was only partial and corporation remained real party in interest under *Fed. R. Civ. P. 17*. *Conerly Corp. v. Regions Bank, 668 F. Supp. 2d 816, 70 U.C.C. Rep. Serv. 2d (CBC) 104, 2009 U.S. Dist. LEXIS 97573 (E.D. La. 2009)*.

Assignee of mortgage against bankruptcy debtor's real property failed to show that it was real party in interest with standing to enforce mortgage note by seeking relief from automatic bankruptcy stay, since assignment of mortgage to assignee did not include assignment of note secured by mortgage, and assignee's failure to show actual possession of note precluded assignee from being holder of note, person entitled to enforce note, and thus real party in interest. *Veal v Am. Home Mortg. Servicing, Inc. (In re Veal), 449 B.R. 542 (BAP9 2011)*.

20. —Copyrights and patents

Assignee of renewed copyright, which was renewed by composer of music without joining author of words, may enjoin infringement and recover its share of the damages and defendant's profits without joining author's successors. *Edward B. Marks Music Corp. v. Jerry Vogel Music Co., 140 F.2d 268, 60 U.S.P.Q. (BNA) 256, 1944 U.S. App. LEXIS 3922 (2d Cir. 1944)*.

Plaintiff assignee of copyright is recognized as real party in interest capable of bringing claim, although summary judgment is granted because facts did not establish copying, where assignment was not made until after suit had been filed, since assignment occurred before trial, plaintiff is real party in interest in claim for misappropriation of trade secret, and defendant is not prejudiced and judicial economy is served by recognizing assignee rather than requiring assignee to bring claim after assignment. *Infodek, Inc. v. Meredith-Webb Printing Co., 830 F. Supp. 614, Copy. L. Rep. (CCH) ¶27175, 28 U.S.P.Q.2d (BNA) 1669, 1993 U.S. Dist. LEXIS 12145 (N.D. Ga. 1993)*.

Where patent assignee was misnamed in patent infringement case by use of word "Corporation" rather than "Inc.," and alleged infringer failed to show that it suffered any prejudice, there was no merit to alleged infringer's argument

that since named plaintiff did not legally exist it lacked standing and court was without jurisdiction to hear plaintiff's motion to amend; motion to amend complaint was granted pursuant to both *FRCP 17(a)* and *FRCP 15(a)*, and amended complaint related back to filing of original complaint. *Hilgraeve Corp. v. Symantec Corp., 212 F.R.D. 345, 2003 U.S. Dist. LEXIS 677 (E.D. Mich. 2003)*.

21. —Other particular circumstances

Plaintiff was entitled to sue automobile dealer and his bonding company in action based upon fraud as real party in interest, where amended complaint set forth written assignment of checks involved from payee, even though assignment was executed after suit was filed. *Kilbourn v. Western Surety Co., 187 F.2d 567, 1951 U.S. App. LEXIS 2286 (10th Cir. 1951)*.

In suit to recover on contract for salvage, salvor was real party in interest although it assigned interest in proceeds two days after suit filed; district court could have protected assignee by utilizing Rule 25(c) to order assignee's joinder or substitution. *Veverica v. Drill Barge Buccaneer No. 7, 488 F.2d 880, 18 Fed. R. Serv. 2d (Callaghan) 211, 1974 U.S. App. LEXIS 10373 (5th Cir. 1974)*.

In action seeking damages and injunctive relief under antitrust laws against agricultural cooperative and others, assignee exporter's association, at least where assignors were members of association bringing suit, would be permitted to seek whatever equitable relief was available to each assignor. *Pacific Coast Agricultural Export Asso. v. Sunkist Growers, Inc., 526 F.2d 1196, 1975-2 Trade Cas. (CCH) ¶60617, 1975 U.S. App. LEXIS 11990 (9th Cir. 1975)*, cert. denied, *425 U.S. 959, 96 S. Ct. 1741, 48 L. Ed. 2d 204, 1976 U.S. LEXIS 1540 (1976)*.

In suit by manufacturer for breach of contract, manufacturer, although it had assigned some of its accounts receivable to bank as collateral for outstanding loans, brought action against purchaser and was successful in contending that it was the real party in interest; defendant in its answer did not put in issue manufacturer's standing to maintain action nor had it done so by motion; furthermore, pretrial order did not list manufacturer's standing to maintain action in its own name as one of issues to be tried; therefore, in light of such circumstances especially where defense counsel only after trial had commenced had for the first time suggested that manufacturer was not the real party in interest and where after trial had begun bank had reassigned to manufacturer any interest it had in accounts receivable the trial court properly rejected the argument that manufacturer was not real party in interest. *Audio-Visual Marketing Corp. v. Omni Corp., 545 F.2d 715, 1976 U.S. App. LEXIS 6070 (10th Cir. 1976)*.

In action for breach of cattle sales contract allegedly assigned to plaintiffs, plaintiffs are proper parties to bring suit and defendant, who is in no danger of being liable for multiple damages, may not rely on real party in interest defense where plaintiffs, assignors of heifers and steers, fully settles with assignees in chain and receives assignment back of claims of final assignees. *Hefley v. Jones, 687 F.2d 1383, 35 Fed. R. Serv. 2d (Callaghan) 298, 1982 U.S. App. LEXIS 25878 (10th Cir. 1982)*.

Pharmaceutical association to which pharmacies assigned antitrust claims is real party in interest in action for violating antitrust laws against health care providers which offered prescription drug benefit that is available generally only at providers' pharmacy, even though pharmacies retained interest in outcome of antitrust action as evidenced by association's demand for treble damages for pharmacies since assignment of claims does not prevent assignors from receiving benefits of litigation. *Klamath-Lake Pharmaceutical Ass'n v Klamath Medical Serv. Bureau (1983, CA9 Or) 701 F2d 1276, 1983-1 CCH Trade Cases P 65254, 36 FR Serv 2d 472*, cert den *(1983) 464 US 822, 104 S Ct 88, 78 L Ed 2d 96* and (criticized in *Abraham v Intermountain Health Care, Inc. (2006, CA10 Utah) 461 F3d 1249, 2006-2 CCH Trade Cases P 75403*).

Assignee of loan and guaranty was real party in interest even though state insurance commissioner had been appointed conservator of assignee, since manager of conservator filed affidavit stating that commissioner had ratified assignee's counterclaim, had been prosecuting it on behalf of conservation estate, and agreed to be bound by court's determination. *Integon Life Ins. Corp. v. Browning, 989 F.2d 1143, 7 Fla. L. Weekly Fed. C 283, 1993 U.S. App. LEXIS 10167 (11th Cir. 1993)* (11th Cir. 1993) (criticized in *Highland Capital, Inc. v Franklin Nat'l Bank (2003, CA6 Tenn) 350 F3d 558, 2003-2 CCH Trade Cases P 74217, 2003 FED App 417P*).

Parent corporation, which assigned all its rights, title and interest in disputed account to subsidiary corporation, was not real party in interest and thus lacked standing to challenge district court's summary judgment in favor of lender. *Bob McLemore & Co. v. Maco Homes, Inc. (In re Maco Homes, Inc.), 180 F.3d 163, 11 4th Cir. & D.C. Bankr. Ct. Rep. 510, 1999 U.S. App. LEXIS 11752 (4th Cir. 1999)*.

Where plaintiff lacked standing because it had assigned its interests in litigation, and where its assignee possibly had standing as real party interest, assignee could not ratify, join, or be substituted into lawsuit because plaintiff lacked standing on all of its claims, and thus, its motion was nullity from beginning, so that there was no lawsuit pending for real party in interest to ratify, join, or be substituted into. *Valdin Invs. Corp. v. Oxbridge Capital Mgmt., LLC, 651 Fed. Appx. 5, 2016 U.S. App. LEXIS 9881 (2d Cir. 2016)*.

In suit for breach of contract by plaintiff in which defendant asserted counterclaim, Reconstruction Finance Corporation was real party in interest as far as counterclaim was concerned where defendant had assigned rights in contract to RFC; hence, court would join RFC as party where RFC had filed its consent. *Automatic Dialing Corp. v. Maritime Quality Hardware Co., 98 F. Supp. 650, 1951 U.S. Dist. LEXIS 2281 (D. Me. 1951)*.

Rule 17(a) permits assignment and prosecution of claims of union members for alleged breaches of collective bargaining contract. *Harmon v. Martin Bros. Container & Timber Products Corp., 227 F. Supp. 9, 8 Fed. R. Serv. 2d (Callaghan) 17a.13, 1, 56 L.R.R.M. (BNA) 2025, 48 Lab. Cas. (CCH) ¶18700, 1964 U.S. Dist. LEXIS 7664 (D. Or. 1964)*.

In action brought by assignee of contract for purchase and sale of cotton against cotton farmers and cotton merchant who contracted with each of other defendants and with each of third party defendants to purchase all or part of their respective cotton crops, contracts between defendant cotton merchant and plaintiff showed clearly that plaintiff acquired whatever property interest merchant had under his contracts with other defendants, and, accordingly, plaintiff assignee was real party in interest and proper plaintiff. *Mitchell--Huntley Cotton Co. v. Lawson, 377 F. Supp. 661, 15 U.C.C. Rep. Serv. (CBC) 20, 1973 U.S. Dist. LEXIS 10836 (M.D. Ga. 1973)*.

In action by assignee of insured against insurer for negligence in failing to settle assignee's claim against insured within policy limits, insured is not indispensable party under Rule 19, and assignee is real party in interest under Rule 17(a), where action is assignable under law of state. *Schneider v. Allstate Ins. Co., 487 F. Supp. 239, 1980 U.S. Dist. LEXIS 10841 (D.S.C. 1980)*.

Rule 17(a) is intended to protect defendants from subsequent suits by real party in interest and defendant will not be prejudiced by joinder of real parties in interest since original complaint alleged that plaintiff was prosecuting claim on behalf of himself and his parents and that he had been assigned rights of his parents, evidenced by power of attorney. *Verdi v. Philadelphia, 553 F. Supp. 334, 1982 U.S. Dist. LEXIS 16371 (E.D. Pa. 1982)*.

Lender of moneys to defendants is real party in interest under agreement between defendants and third-party defendant for third-party defendant to purchase rail cars from defendants upon 60 days' notice because purpose of defendants' assignment to lender of its rights in repurchase agreement was to give lender adequate security in form of liquidated proceeds in event of default by defendant. *Beneficial Commercial Corp. v. Railserv Management Corp., 563 F. Supp. 114, 36 Fed. R. Serv. 2d (Callaghan) 761, 1983 U.S. Dist. LEXIS 17580 (E.D. Pa. 1983)*, aff'd, *729 F.2d 1445, 1984 U.S. App. LEXIS 25394 (3d Cir. 1984)*, aff'd, *729 F.2d 1449 (3d Cir. 1984)*.

Competitor's motion to dismiss incumbent local exchange carrier's (ILEC's) collection action because it was not brought in name of assignee of accounts, subsidiary of ILEC, under *FRCP 17(a)*, was denied where ILEC owned accounts in one form or another, and since filing of motion to dismiss, subsidiary had ratified and reassigned collection claims to ILEC. *Verizon N.J., Inc. v. Ntegrity Telecontent Servs., 219 F. Supp. 2d 616, 2002-2 Trade Cas. (CCH) ¶73787, 2002 U.S. Dist. LEXIS 14741 (D.N.J. 2002)*.

Assignments of contractual claims by third-party beneficiaries to one of contracting parties after that party brought breach of contract action against second contracting party were allowed where no actual prejudice was shown by

second party. *Slidell, Inc. v. Millennium Inorganic Chem., Inc., 53 U.C.C. Rep. Serv. 2d (CBC) 829, 2004 U.S. Dist. LEXIS 11738 (D. Minn. June 28, 2004)*.

In breach of contract and unjust enrichment case in which defendant argued that plaintiff lacked standing, Advanced Magnetics decision and terms of *Fed. R. Civ. P. 17(a)(3)* governed whether plaintiff had standing; while plaintiff transferred claims to non-party prior to commencement of case, non-party assigned them back to plaintiff and ratified lawsuit after litigation had commenced as contemplated by Rule 17. *Digizip, Inc. v. Verizon Servs. Corp., 139 F. Supp. 3d 670, 92 Fed. R. Serv. 3d (Callaghan) 1449, 2015 U.S. Dist. LEXIS 140935 (S.D.N.Y. 2015)*.

Under Indiana law, assignee of cause of action is real party in interest and, after assignment, assignor is no longer proper party to sue and has no cause of action; therefore, in suit by insureds against insurer, alleging breach of fiduciary duty, negligence, and breach of contract from failure to provide adequate insurance coverage, insurer was granted summary judgment dismissing suit because (1) insureds were not real party in interest and (2) substitution of real party in interest was not appropriate as it was not honest mistake, but tactical decision, and insureds did not request substitution within reasonable time. *Metal Forming Techs., Inc. v. Marsh & McLennan Co., 224 F.R.D. 431, 2004 U.S. Dist. LEXIS 21404 (S.D. Ind. 2004)*.

In negligence action, if assignment of interests of certain individuals in certain property to plaintiff was not valid, plaintiff's claim could not be dismissed on summary judgment because *Fed. R. Civ. P. 17(a)* required that, when action was not prosecuted in name of real party in interest, action could not be dismissed on that ground until reasonable time was allowed for ratification of commencement of action by, or joinder or substitution of, real party in interest. *Cheswell, Inc. v. Premier Homes & Land Corp., 326 F. Supp. 2d 201, 2004 U.S. Dist. LEXIS 13830 (D. Mass. 2004)*.

Corporation's motion, construed under *Fed. R. Civ. P. 60(b)*, to revise order, which dismissed its Telephone Consumer Protection Act (TCPA) claims and common-law claim for invasion of privacy, was denied because (1) corporation did not demonstrate that any excusable litigation mistake was made, where it was given ample opportunity to raise arguments it made in its motion to reconsider; (2) corporation showed no error of substantive law where, to extent that corporation's attempt to bring TCPA claims as assignee might arguably have been characterized as real-party-in-interest question under *Fed. R. Civ. P. 17* rather than standing question, effect was same, since corporation was not valid assignee in that TCPA claims could not have been assigned, and thus corporation was not real party in interest. US Fax Law Ctr. v iHire, *Inc., 373 F. Supp. 2d 1208, 62 Fed. R. Serv. 3d (Callaghan) 237 (DC Colo 2005)*.

Former investors did not show that their noncompliance with *Fed. R. Civ. P. 17(a)* was result of difficulty or confusion in identifying real parties in interest; accordingly, claims brought on behalf of other persons who did not assign their claims to former investors were dismissed. *OSRecovery, Inc. v. One Groupe Int'l, Inc., 380 F. Supp. 2d 243, 2005 U.S. Dist. LEXIS 15403 (S.D.N.Y. 2005)*.

Tobacco manufacturer assigned its rights to any escrow refunds to wholesaler and because valid assignment had occurred, wholesaler had U.S. Const. art. III standing to assert claim regarding refund of 2003 escrowed funds under *Tenn. Code Ann. § 47-31-103* of Tennessee Tobacco Manufacturers' Escrow Fund Act of 1999, and in fact was only real party in interest under *Fed. R. Civ. P. 17(a)*. *S&M Brands, Inc. v. Summers, 420 F. Supp. 2d 840, 2006 U.S. Dist. LEXIS 11518 (M.D. Tenn. 2006)*.

District court ordered Florida corporation that operated dairy farm to submit evidence which showed it was real party in interest under *Fed. R. Civ. P. 17* in lawsuit it filed against silage company and brewing company, alleging that silage company sold contaminated silage that injured cattle corporation owned; silage company and brewing company claimed that Florida corporation did not have right to claim that silage company breached contract that was signed before corporation was incorporated, and that corporation was alter ego of two people who filed petition under Chapter 11 of Bankruptcy Code, and those claims had to be resolved. *Mecklenburg Farm, Inc. v. Anheuser-Busch, Inc., 250 F.R.D. 414, 2008 U.S. Dist. LEXIS 41742 (E.D. Mo. 2008)*.

Investment advisor's *Fed. R. Civ. P. 17(a)* motion for approval of assignment of claims by two funds it advised was denied because investment advisor did not have valid assignment of its clients' claims when action was filed, and thus, it did not have U.S. Const. art. III standing at time court appointed it lead plaintiff; assignment of legal rights which took place after commencement of litigation did not abdicate constitutional requirement that standing had to exist from commencement of litigation, and to extent courts allowed assignment of claim after litigation commenced, plaintiff generally had U.S. Const. art. III standing on at least one other claim at time action was filed. *In re SLM Corp. Sec. Litig., 258 F.R.D. 112, 2009 U.S. Dist. LEXIS 35401 (S.D.N.Y. 2009)*.

Successors-in-interest to initial debt securities purchasers had not made honest or understandable mistake under *Fed. R. Civ. P. 17* where for more than three years following securities issuer's bankruptcy alleged assignor had exercised all rights relating to notes and claims under them in bankruptcy proceedings, and thus, they knew they were not legal holders of such claims and they knew they had no right to bring action against financial institutions. *Enron Corp. Secs. v. Enron Corp., 279 F.R.D. 395, 2011 U.S. Dist. LEXIS 136989 (S.D. Tex. 2011)*.

Motion by institutional investor to reconsider district court's decision to dismiss fraud claims against rating agencies on basis that investor lacked standing to sue on behalf of wholly-owned subsidiary since there was no evidence that subsidiary assigned its right of action to investor was granted because district court overlooked *Fed. R. Civ. P. 17(a)*'s express allowance for ratification by real party in interest as long as it was done within reasonable time; subsidiary ratified that investor was authorized to pursue recovery on its behalf within weeks of first objection to investor's standing, and this declaration was sufficient to cure any real party in interest deficiency. *Abu Dhabi Commer. Bank v. Morgan Stanley & Co., 888 F. Supp. 2d 478, 2012 U.S. Dist. LEXIS 159838 (S.D.N.Y. 2012)*, dismissed, in part, *921 F. Supp. 2d 158, 2013 U.S. Dist. LEXIS 14461 (S.D.N.Y. 2013)*.

Rule and assignment authorized state court plaintiffs to prosecute federal action in their individual capacity because plaintiffs were party with whom, or in whose name, assignment was made for their own benefit and benefit of class, and this classification designated plaintiffs real parties in interest, allowing them to sue in their own names without joining class members. Mills, Potoczak & Co. v. Landmark Am. Ins. Co., *Mills, Potoczak & Co. v Landmark Am. Ins. Co. (2016, MD Fla), 2016 U.S. Dist. LEXIS 5334 (January 15, 2016)*.

In case where creditor initially made unilateral assignment of entire interest of his wife and of himself in judgment to assignee, subsequent assignment by wife could relate back to date on which initial assignment was filed in bankruptcy court because there was no evidence that initial assignment even if invalid was undertaken in bad faith and, there was neither prejudice to debtor nor any injustice that would result by permitting amended assignment. *In re Zavala, 505 B.R. 268, 2014 U.S. Dist. LEXIS 22120 (C.D. Cal. 2014)*.

Debtor, not insurer, was proper party to assert claims for buyer damages, where debtor stated sufficient facts to show that it did not assign claim for losses to its insurer, which losses arose out of unauthorized activity that caused assets of business division owned by defendant, which debtor purchased, to be depleted. *Handy & Harman Ref. Group, Inc. v. Handy & Harman, Inc. (In re Handy & Harman Ref. Group, Inc.), 287 B.R. 598, 2003 Bankr. LEXIS 53 (Bankr. D. Conn. 2003)*.

Trust was not real party in interest able to bring RICO claims in its own name as assignee of non-party's legal claims because prior court ruling found that trust was not assignee of non-party's legal claims. *Krasny v. Bagga (In re Jamuna Real Estate, LLC), 392 B.R. 149, 2008 Bankr. LEXIS 3571 (Bankr. E.D. Pa. 2008)*.

Where creditor claimed that he was assignee of debt owed by debtor, bankruptcy court acted within its discretion in ordering creditor to produce assignment agreement and any other documents reflecting assignment terms between parties so it could determine whether creditor was only real party in interest. *Carter v. Brooms (In re Brooms), 447 B.R. 258, 54 Bankr. Ct. Dec. (LRP) 124, 2011 Bankr. LEXIS 648 (9th Cir. 2011)*, aff'd, *520 Fed. Appx. 569, 2013 U.S. App. LEXIS 10442 (9th Cir. 2013)*.

Where creditor claimed that he was assignee of judgment debt owed by debtor, and submitted copy of acknowledgment of assignment, executed pursuant to state law, bankruptcy court erred in questioning creditor's

standing as assignee to pursue collection of judgment against debtor and when it conditioned creditor's adversary proceeding against debtor on whether and/or how much consideration he paid assignor for assignment. *Carter v. Brooms (In re Brooms), 447 B.R. 258, 54 Bankr. Ct. Dec. (LRP) 124, 2011 Bankr. LEXIS 648 (9th Cir. 2011)*, aff'd, *520 Fed. Appx. 569, 2013 U.S. App. LEXIS 10442 (9th Cir. 2013)*.

Unpublished decision: Assignment provided by parents of minor insureds of their rights for benefits under employee health plan to doctor was adequate because doctor was real party in interest under *Fed. R. Civ. P. 17(a)*, assignment was provided before trial, and there had been no showing of prejudice by defendants, plan and individual, and doctor had standing to bring claim under Employee Retirement Income Security Act (ERISA) to recover benefits due under *29 USCS § 1132(a)* because beneficiaries under plan assigned their rights to him, and such assignment was not expressly prohibited by ERISA statute. *Briglia v. Horizon Healthcare Servs., 43 Employee Benefits Cas. (BNA) 2534, 2008 U.S. Dist. LEXIS 25959 (D.N.J. Mar. 31, 2008)*.

Unpublished decision: Subsequent assignee of mortgage had standing and was real party in interest when it commenced foreclosure action as it provided note and mortgage, related assignment documents, and affidavit from servicer attesting to default, damages and costs. *VFC Partners 25 LLC v. Scranton Ctr. Holdings LP, 541 Fed. Appx. 206, 2013 U.S. App. LEXIS 22597 (3d Cir. 2013)*.

22. Bailees

In analyzing plaintiff's status as bailee vel non for purposes of *FRCP 17*, court looks to substantive law creating right being sued upon to ascertain whether plaintiff possesses substantive right to relief; where jurisdiction of federal court is founded upon diversity statute (*28 USCS § 1332*), court applies substantive law, including choice of law provisions, of state in which federal court sits. *Naghiu v. Inter-Continental Hotels Group, 165 F.R.D. 413, 1996 U.S. Dist. LEXIS 2263 (D. Del. 1996)*.

23. Corporations and stockholders

Shareholder of record is "real party in interest" to bring action to compel declaration of dividend, within meaning of Rule 17(a). *Doherty v. Mutual Warehouse Co., 245 F.2d 609, 1957 U.S. App. LEXIS 3266 (5th Cir. 1957)*.

Holders of membership shares in nonprofit co-operative membership corporation seeking to enforce rights of public did not come within purview of Rule 17(a) for purposes of bringing securities fraud action against transferee of corporate assets. *Kidwell ex rel. Penfold v. Meikle, 597 F.2d 1273, Fed. Sec. L. Rep. (CCH) ¶ 96912, Fed. Sec. L. Rep. (CCH) ¶96912, 1979 U.S. App. LEXIS 14317 (9th Cir. 1979)*, overruled in part, *Hollinger v. Titan Capital Corp., 914 F.2d 1564, Fed. Sec. L. Rep. (CCH) ¶ 95500, 1990 U.S. App. LEXIS 17054 (9th Cir. 1990)*.

Stockholder of bank is not proper party to bring Civil Rights Act (*42 USCS § 1983*) suit alleging injury to bank. *Gregory v. Mitchell, 634 F.2d 199, 1981 U.S. App. LEXIS 21093 (5th Cir. 1981)*.

Brokerage firm, as registered holder of debentures holding them in its own name on behalf of its customers, has standing to sue as signatory agent of holders. *Meckel v. Continental Resources Co., 758 F.2d 811, Fed. Sec. L. Rep. (CCH) ¶ 91980, Fed. Sec. L. Rep. (CCH) ¶91980, 1985 U.S. App. LEXIS 30280 (2d Cir. 1985)*.

Fifty-percent shareholder was not real party in interest since his injuries derived from fact that corporation suffered loss, and he therefore could not maintain action in his own name; when plaintiff failed to cure defect after being given reasonable time to do so, court properly dismissed action. *Weissman v. Weener, 12 F.3d 84, 27 Fed. R. Serv. 3d (Callaghan) 623, 1993 U.S. App. LEXIS 32015 (7th Cir. 1993)*.

Rule 17(a) should have been applied to allow amendment of complaint to name selling shareholders as plaintiffs, after court dismissed claims of corporation as assignee of shareholders' claims, since claims of shareholders were sufficiently identified in original complaint, which identified each individual selling shareholder by name, damage clause included recovery sought on selling shareholder's claims, and complaint's only pertinent flaw was identity of party pursuing claims. *Advanced Magnetics v. Bayfront Partners, 106 F.3d 11, 36 F. 1458, 36 Fed. R. Serv. 3d*

(Callaghan) 1458, Fed. Sec. L. Rep. (CCH) ¶ 99378, Fed. Sec. L. Rep. (CCH) ¶99378, 1997 U.S. App. LEXIS 651 (2d Cir. 1997).

Claim that stockholder lacked standing to prosecute compensation claim because corporation of which he and his wife were sole stockholders actually billed for his services was prudential standing issue and because it was actually objection to real party in interest governed by Rule 17, was waived. *Ensley v. Cody Resources, Inc., 171 F.3d 315, 1999 U.S. App. LEXIS 6954 (5th Cir.)*, reh'g, en banc, denied, *181 F.3d 98, 1999 U.S. App. LEXIS 11835 (5th Cir. 1999)*.

Substitution of principal of administratively dissolved corporation for corporation as real party in interest was proper since decision to sue for copyright infringement in name of corporation was due to principal's mistaken belief that corporation would be reinstated, and principal acquired copyrights as sole shareholder of corporation upon dissolution. *Gomba Music, Inc. v. Clarence Avant & Interior Music Corp., 62 F. Supp. 3d 632, Copy. L. Rep. (CCH) ¶30693, 113 U.S.P.Q.2d (BNA) 1551, 2014 U.S. Dist. LEXIS 163992 (E.D. Mich. 2014)*.

Conversion claim by 50% shareholder against the other 50% shareholder was dismissed because monies that were subject of the conversion claim were the property of the professional corporation, not the shareholder. Swart v. Pawar, *Swart v Pawar, 2015 U.S. Dist. LEXIS 156437 (ND W Va 2015)*.

Plaintiff, shareholder, officer, and employee of corporation lacked standing to sue under Telecommunications Act of 1996, *47 USCS § 207*, because plaintiff was not real party in interest under *Fed. R. Civ. P. 17(a)* and because all of his injuries were derivative of his corporation's injuries. *Walker v. GTE, 25 Fed. Appx. 332, 2002-1 Trade Cas. (CCH) ¶73534, 2001 U.S. App. LEXIS 27317 (6th Cir. 2001)*.

In interests of justice, broker of used printing equipment was properly substituted as real party in interest for his defunct corporation of which he was sole shareholder, officer and director; plaintiff did not identify any prejudice to it from substitution motion, and in fact its opposition to substitution motion was at odds with its summary judgment opposition argument that broker was corporation's alter ego. *Interstate Litho Corp. v. Brown, 255 F.3d 19, 2001 U.S. App. LEXIS 15094 (1st Cir.)*, cert. denied, *534 U.S. 1066, 122 S. Ct. 666, 151 L. Ed. 2d 580, 2001 U.S. LEXIS 10976 (2001)*.

Gas station owner was barred by shareholder-standing rule from pursuing Petroleum Marketing Practices Act, *15 USCS § 2805*, claim because he lacked direct, personal injury independent of derivative injury of shareholder generally, and had otherwise failed to bring himself within one of recognized exceptions to shareholder-standing rule; accordingly, district court properly dismissed owner's case for lack of prudential standing. *Rawoof v. Texor Petroleum Co., 521 F.3d 750, 2008 U.S. App. LEXIS 7359 (7th Cir. 2008)*.

Sole stockholder of corporation who acquired its assets and assumed its liabilities upon its discontinuing operation and, thereafter and prior to dissolution, filed claim for refund of tax as president of corporation was real party in interest in action to recover refund. *Roomberg v. United States, 40 F. Supp. 621, 28 A.F.T.R. (P-H) 120, 1941-2 U.S. Tax Cas. (CCH) ¶ 9664, 41-1 U.S. Tax Cas. (CCH) ¶9664, 41-2 U.S. Tax Cas. (CCH) ¶9664, 1941 U.S. Dist. LEXIS 2736 (E.D. Pa. 1941)*.

Subsequent to merger continuing corporation succeeds to rights of absorbed corporation and may itself sue on claims of absorbed corporation by reason of merger. *Akwell Corp. v. Eiger, 141 F. Supp. 19, 1956 U.S. Dist. LEXIS 3225 (D.N.Y. 1956)*.

Where plaintiffs were shareholders in corporation which operated business in question, use of d/b/a was inappropriate and misleading, and shareholders were not real parties in interest. *Iding v. Anaston, 266 F. Supp. 1015, 11 Fed. R. Serv. 2d (Callaghan) 320, 153 U.S.P.Q. (BNA) 846, 1967 U.S. Dist. LEXIS 11292 (N.D. Ill. 1967)*.

In action regarding certain sanitary facilities obligations where first count of complaint sought judgment declaring that purported sanitary facilities obligations, sought to be imposed upon lot owners and lots themselves, were null and void and invalid cloud upon plaintiff's title to land and upon title of lot owners who purchased lots from plaintiffs,

second count of complaint sought specific performance by two defendants of their alleged undertaking to remove sanitary facilities charges from lots, and third count sought compensatory and punitive damages from two defendants because of false and misleading representations allegedly made in course of transactions between parties, owners of lots were, under Rule 17, real parties in interest as to claim asserted in first count of complaint, and, under second and third counts, corporation which was wholly owned subsidiary of plaintiff corporation appeared to court to be party which had right to be enforced under substantive law. *Levitt & Sons, Inc. v. Swirnow, 58 F.R.D. 524, 17 Fed. R. Serv. 2d (Callaghan) 647, 1973 U.S. Dist. LEXIS 14401 (D. Md. 1973)*.

In civil rights action under *42 USCS §§ 1983*, *1985*, against city which established rates for ambulance service and also provided ambulance service, sole stockholder of ambulance corporation could not bring suit on behalf of corporation and was not proper plaintiff under Rule 17(a); nothing in Civil Rights Act permits individual to circumvent rule that stockholder or corporate officer may not maintain action for himself for alleged wrong committed by third party upon corporation, upon theory that such wrong devalued his capital stock or affected his livelihood as corporate officer. *Gentry v. Howard, 365 F. Supp. 567, 18 Fed. R. Serv. 2d (Callaghan) 211, 1973 U.S. Dist. LEXIS 11371 (W.D. La. 1973)*.

Corporations formed by black citizens of city to secure rights of its members was real party in interest to bring action challenging constitutional validity of at-large scheme of electing Commissioners under commission form of municipal government in City of Shreveport, Louisiana. *Blacks United for Lasting Leadership, Inc. v. Shreveport, 71 F.R.D. 623, 1976 U.S. Dist. LEXIS 14071 (W.D. La. 1976)*, remanded, *571 F.2d 248, 1978 U.S. App. LEXIS 11965 (5th Cir. 1978)*.

In action by shareholder in South Vietnam bank, claiming interest in funds owed by United States Government to bank, defendant's motion to dismiss for lack of capacity would be denied since plaintiff's claims made him real party in interest; neither ratification by bank nor its substitution or joinder as plaintiff would be feasible and defendant would suffer no prejudice since there was no reason why he could not assert against plaintiff any defenses which he could have asserted against bank and plaintiff could claim share only of assets to which bank had rightful claim. *Tran Qui Than v. Blumenthal, 469 F. Supp. 1202, 1979 U.S. Dist. LEXIS 12726 (N.D. Cal. 1979)*, aff'd in part, *658 F.2d 1296, 1981 U.S. App. LEXIS 16962 (9th Cir. 1981)*.

Parent corporation is real party in interest in suit by corporate division for refund of taxes where division assigns its interest in tax refund to parent on liquidation. *Standard Lime & Cement Co. v. United States, 503 F. Supp. 938, 48 A.F.T.R.2d (RIA) 5631, 1981-2 U.S. Tax Cas. (CCH) ¶ 9688, 81-2 U.S. Tax Cas. (CCH) ¶9688, 1980 U.S. Dist. LEXIS 9660 (W.D. Mich. 1980)*.

Minority stock shareholder, rather than father, is real party in interest in derivative action where counsel takes instructions solely from shareholder rather than father even though shareholder has little knowledge regarding investment. *Schupack v. Covelli, 512 F. Supp. 1310, 31 Fed. R. Serv. 2d (Callaghan) 1144, Fed. Sec. L. Rep. (CCH) ¶ 98018, 1981 U.S. Dist. LEXIS 11985 (W.D. Pa. 1981)*.

Motion to dismiss, filed by former officer of consulting corporation, was granted as to breach of fiduciary duty claim asserted by holding company, which was shareholder of consulting corporation, because alleged conduct, including misappropriation of consulting corporation's assets and usurping business opportunities from consulting corporation, were injuries to consulting corporation; therefore, redress for injuries should have been sought through derivative suit on behalf of consulting corporation and not through direct suit on behalf of holding company. *Elmhurst Consulting, LLC v. Gibson, 219 F.R.D. 125, 57 Fed. R. Serv. 3d (Callaghan) 487, 2003 U.S. Dist. LEXIS 18420 (N.D. Ill. 2003)*.

Shareholder's committee was required to join real party in interest, corporation, as party in malpractice action against attorneys that represented corporation, pursuant to *Fed. R. Civ. P. 17(a)*; mere ratification of action by corporation would expand causes of action available to committee, namely assignment of malpractice claim, in violation of *28 USCS § 2072(b)*, and addition of corporation as nominal defendant did not resolve problem. Stichting

ter behartiging van de belangen van oudaandeelhouders in het kapitaal van *Saybolt Int'l B.V. v Schreiber, 279 F. Supp. 2d 337 (SD NY 2003)*.

Pursuant to *Fed. R. Civ. P. 17(a)*, corporation was given leave to amend its breach of contract complaint against gas company so as to substitute corporation's sole shareholder, real party in interest, as party plaintiff where to do so would not prejudice company; substitution was necessary because shareholder had transferred to corporation its rights in contract with gas company without gas company's permission, which contract required. *Cibran Enters. v. BP Prods. N. Am., Inc., 365 F. Supp. 2d 1241, 18 Fla. L. Weekly Fed. D 599, 2005 U.S. Dist. LEXIS 10922 (S.D. Fla. 2005)*.

Shareholder's action against corporate officer and consulting company was dismissed because shareholder was not real party in interest under *Fed. R. Civ. P. 17(a)* as shareholder alleged that officer breached his fiduciary duty to other shareholders of corporations they had formed with officer, misappropriated corporations' assets, and usurped business opportunities from corporations, and those were classic injuries to corporations that had to be remedied in shareholder derivative action. *Ching v. Porada, 560 F. Supp. 2d 675, 2008 U.S. Dist. LEXIS 48276 (N.D. Ill. 2008)*.

Record established that civil liberties organization brought this action as not-for-profit, non-partisan, membership supported organization and not in its corporate capacity, and record also established that organization brought this action on behalf of its members; thus, organization's failure to make required corporate filings in timely manner did not warrant dismissal of its claims. *ACLU of Minn. v. Tarek Ibn Ziyad Acad., 788 F. Supp. 2d 950, 2011 U.S. Dist. LEXIS 43030 (D. Minn. 2011)*.

Dismissal of challenge to Forest Service denial of permit for failure to prosecute in name of real party in interest was not appropriate because plaintiffs did not engage in deliberate tactical maneuvering when they sued in their own names based on mistaken belief that special use application was requested by one of them in individual capacity instead of corporation, mistake was not in bad faith, and Forest Service would not be prejudiced. *Breaker v. United States, 977 F. Supp. 2d 921, 2013 U.S. Dist. LEXIS 140534 (D. Minn. 2013)*.

Even if corporate president were required to proceed against director for breaches of fiduciary duty in derivative action pursuant to *Fed. R. Bankr. P. 7023.1* and *Fed. R. Civ. P. 23.1*, he could easily file amended complaint to substitute himself for benefit of corporation as real party-in-interest under *Fed. R. Bankr. P. 7017* and *Fed. R. Civ. P. 17(a)*; requirements of rule would be satisfied by amending complaint to state derivative action under *Fed. R. Civ. P. 23.1*. *Automated Reporting Mgmt. Sys., Inc. v. Arcella-Coffman (In re Arcella-Coffman), 352 B.R. 677, 2006 Bankr. LEXIS 2707 (Bankr. N.D. Ind. 2006)*.

Unpublished decision: In administrative services business' breach of contract action against real estate brokerage company arising out of 1996 contract, business was real party in interest under *Fed. R. Civ. P. 17(a)* because 1997 memorandum did not substitute business owner for business and there was evidence that company had considered business to be contractually bound in December 2000. *WFM Assocs. v. Cushman & Wakefield, Inc., 197 Fed. Appx. 115, 2006 U.S. App. LEXIS 24277 (3d Cir. 2006)*.

Missouri LLC that leased real property to holding company ("debtor") that declared Chapter 11 bankruptcy was not precluded under Kan. Stat. Ann. § 17-76,126 from filing unsecured claim against debtor's bankruptcy estate, seeking payment of $1,340,614 because debtor allegedly breached parties' lease, because it did not register as foreign LLC with State of Kansas until after bar date for filing claims had passed; to extent LLC's claim was determined under state law, delay in registration did not provide defense under *11 USCS § § 502* or *558*, and LLC had capacity under *Fed. R. Bankr. P. 9014* and *7017* and *Fed. R. Civ. P. 17* to litigate its claim against debtor. *In re Flex Fin. Holding Co., 518 B.R. 891, 60 Bankr. Ct. Dec. (LRP) 73, 2014 Bankr. LEXIS 4548 (Bankr. D. Kan. 2014)*.

Where debtor sold his corporation to purchasers without disclosing income tax withholding liability and with representation that such taxes were paid, although corporation filed nondischargeability complaint and purchasers were added as parties to amended complaint, court treated purchasers as if they were named parties all along and

denied debtor's motion to dismiss complaint as untimely. *4000 N. Sheridan, Inc. v. Juliusson (In re Juliusson), 2015 Bankr. LEXIS 1090 (Bankr. N.D. Ill. Mar. 31, 2015)*.

24. Creditors and debtors

Court construed plaintiff's *Fed. R. Civ. P. 17(a)(3)* motion to join creditor as additional party plaintiff as motion to substitute creditor for plaintiff as sole plaintiff and granted motion as so construed because creditor, as real party in interest in its capacity as plaintiff's primary secured creditor pursuant to § 9-607 of Uniform Commercial Code, could pursue litigation against defendant, and because plaintiff was in Chapter 7 proceedings, it could not pursue case, which meant that substitution was appropriate course. *Agri-Best Holdings, LLC v. Atlanta Cattle Exch., Inc., 812 F. Supp. 2d 898, 75 U.C.C. Rep. Serv. 2d (CBC) 320, 2011 U.S. Dist. LEXIS 84910 (N.D. Ill. 2011)*.

Unpublished decision: Creditor had standing to file nondischargeability complaint under *11 USCS § 523(a)* even though it sold its right to receive payment from debtor's limited liability company and even though *Ind. Code §§ 26-1-3.1-301(1)* and 26-1-1-201(20) raised doubt as to whether creditor was in fact holder of underlying note such that it was real party in interest because under *Fed. R. Civ. P. 17(a)(3)*, even if it was not real party in interest, real party in interest authorized continuation of action and agreed to be bound by its result. *Auto. Fin. Corp. v. Leonard (In re Leonard), 2012 Bankr. LEXIS 1930 (Bankr. E.D. Tenn. May 2, 2012)*.

Unpublished decision: Although bankruptcy debtor lacked standing to bring adversary proceeding again creditor during pendency of debtor's chapter 7 bankruptcy case, since claim was property of estate which could only be brought by bankruptcy trustee, lack of standing was cured by trustee's intervention and subsequent sale of claim to debtor since debtor's error in filing complaint was understandable mistake after trustee issued report of no distribution rather than strategic decision. *Macklin v. Deutsche Bank Nat'l Trust Co. (In re Macklin), 2012 Bankr. LEXIS 6136 (Bankr. E.D. Cal. Feb. 16, 2012)*.

Bankruptcy court erred in denying Federal Deposit Insurance Corporation's (FDIC) motion for relief from automatic stay in Chapter 7 bankruptcy case; FDIC was real party in interest under *Fed. R. Civ. P. 17(a)(1)* because it was holder of debtor's note for purposes of Cal. Com. Code §§ 1201(b)(21) and 3301, and Freddie Mac, or some other supposed and unknown owner of note, was not necessary party under *Fed. R. Civ. P. 19(a)(1)(B)(i)* because difficulties perceived by bankruptcy court in protecting note owner's interests on motion did not result from owner's absence from motion but rather from owner not have right under California law to enforce note. *In re Hwang, 438 B.R. 661, 2010 U.S. Dist. LEXIS 96419 (C.D. Cal. 2010)*.

While *Rule 17(a) of Federal Rules of Civil Procedure* mandates that cause of action may not be prosecuted without joinder of real party in interest, it does not require that all other plaintiffs be dismissed; Rule's function is simply to protect defendant from subsequent action by party actually entitled to recover and to insure res judicata effect of judgment; both debtor in possession and its lender have sufficient interest to have standing in adversary proceeding seeking assumption of 2 contracts and damages relating to breach of contracts. *In re National Sugar Refining Co., 23 B.R. 726, 1982 Bankr. LEXIS 3099 (Bankr. S.D.N.Y. 1982)*.

When distributions from pre-petition trust that debtor founded began, plaintiffs failed to obtain temporary restraining order to enjoin any future distributions where bankruptcy court found that plaintiffs: (1) were not official bankruptcy committee; (2) did not hold claims against estate; or (3) were not group of creditors, but were instead group of 17 law firms that specialized in representing asbestos litigants who contracted cancers, allegedly from exposure to asbestos; standards for issuance of temporary restraining order were not met where court found that it was not likely that action would succeed on merits of litigation. *Pre-Petition Comm. of Select Asbestos Claimants v. Combustion Eng'g, Inc. (In re Combustion Eng'g, Inc.), 292 B.R. 515, 40 Bankr. Ct. Dec. (LRP) 275, 2003 Bankr. LEXIS 392 (Bankr. D. Del. 2003)*.

Creditor was not entitled to summary judgment on his complaint interpreted as attempt to block dischargeability of debt under *11 USCS § 523(a)(2)* and (a)(6); debt arose from state default judgment against debtor and her brother for unpaid rent and utilities, and even if debtor made false representations to her brother, it was he, not creditor,

who was proper party in interest under Fed. R. Civ. P. 17(a) and Ohio law. Coleman v. Lott (In re Lott), 363 B.R. 835, 2006 Bankr. LEXIS 3993 (Bankr. N.D. Ohio 2006).

Attempt by Chapter 11 trustee to grant standing to unsecured creditors committee to participate as plaintiff in fraudulent transfer suit filed pursuant to 11 USCS § 544 and 11 USCS § 548 was rejected and defense dismissal motion was granted; because committee was not real party in interest within meaning of Fed. R. Civ. P. 17(a), made applicable to bankruptcy case by Fed. R. Bankr. P. 7017, it lacked prudential standing, and trustee could not confer standing on committee by private agreement. Gecker v. Marathon Fin. Ins. Co. (In re Auto. Prof'ls, Inc.), 389 B.R. 630, 50 Bankr. Ct. Dec. (LRP) 53, 59 Collier Bankr. Cas. 2d (MB) 1611, 2008 Bankr. LEXIS 1796 (Bankr. N.D. Ill. 2008).

When Chapter 7 debtor pled actual damage from being unable to access her funds following placement of administrative hold on her accounts without notice from bank and debtor was person, court was satisfied that under Fed. R. Civ. P. 17(a), debtor had standing to bring Regulation CC claim under 12 CFR § 229.21 for civil liability; however, debtor did not state claim for which relief could be granted under Regulation CC. Jernigan v. Wells Fargo Bank, N.A. (In re Jernigan), 475 B.R. 535, 2012 Bankr. LEXIS 3663 (Bankr. W.D. Va. 2012).

Unpublished decision: When clear language of Chapter 11 debtor's reorganization plan that permitted debtor to bring suit in name of its trustee, trustee was granted leave to file amended complaint under Fed. R. Civ. P. 17(a)(3) name reorganized debtor as real plaintiff party in interest in action against financial advisor. Floyd v. CIBC World Mkts., Inc., 426 B.R. 622, 2009 U.S. Dist. LEXIS 75240 (S.D. Tex. 2009).

Unpublished decision: In bankruptcy matter, claimant investment fund had real interest because note on which debt was based was in name of fund and interests of various funds controlled by fund's principal shareholder were at best secondary; moreover, fund was sole defendant on counterclaims. In re MarketXT Holdings Corp., 2007 Bankr. LEXIS 740 (Bankr. S.D.N.Y. Mar. 1, 2007).

Unpublished decision: Creditor's complaint against debtor for non-dischargeability of obligation owed from debtor, pursuant to 11 USCS § 523(a)(6), could proceed under creditor's name even though there was evidence that obligation had been transferred to debtor's former husband, but any decision rendered would also be binding upon transferee. Conway Bank, N.A. v. Phillips (In re Phillips), 2007 Bankr. LEXIS 2447 (Bankr. D. Kan. July 17, 2007).

Unpublished decision: There was no error in bankruptcy court's determination that bank was holder of note signed by debtor and secured by deed of trust on debtor's property, and was real party in interest entitled to seek stay relief, because bank produced copy of note, which was endorsed in blank, and declaration of supervisor with knowledge of maintenance of bank's business and loan records, which stated that bank was holder of note. Arkison v. Griffin (In re Griffin), 2012 Bankr. LEXIS 1501 (9th Cir. Apr. 6, 2012), aff'd, 719 F.3d 1126, 58 Bankr. Ct. Dec. (LRP) 24, 2013 U.S. App. LEXIS 13097 (9th Cir. 2013).

25. Employers and employees

Under Chapter 13, Chapter 13 debtor remained in possession of estate's property, as defined by 11 USCS § 541(a), and cured his indebtedness through regular payments to creditors from earnings through approved plan, thus, plaintiff former employee, as Chapter 13 debtor, retained standing to file his Americans with Disabilities Act of 1990, 42 USCS §§ 12101– 12213, claim against defendant, his former employer. Wilson v. Dollar Gen. Corp., 717 F.3d 337, 27 Am. Disabilities Cas. (BNA) 1697, 2013 U.S. App. LEXIS 9929 (4th Cir. 2013).

Plaintiff had both constitutional and prudential standing and could pursue his tort, employment discrimination, and constitutional violation claims where (1) plaintiff filed his civil suit three days after he filed Chapter 7 bankruptcy petition; (2) plaintiff failed to list claims as asset of his bankruptcy estate as required by 11 USCS § 521(a)(1)(B); (3) after motion seeking to dismiss his civil suit was filed, plaintiff successfully petitioned to have his bankruptcy case reopened and converted to Chapter 13 proceeding; (4) although claims belonged to Chapter 7 trustee at time suit was filed, plaintiff had standing under U.S. Const. art. III to file suit because he alleged distinct and palpable

injury that was fairly traceable to defendants' purported conduct and for which he could obtain relief in courts; and (5) although plaintiff would have lacked prudential standing to pursue claims, if his bankruptcy case had remained Chapter 7 proceeding, as Chapter 13 debtor in possession, plaintiff was real party in interest for *Fed. R. Civ. P. 17(a)* purposes and could pursue claims on behalf of his bankruptcy estate. *Swearingen-El v. Cook County Sheriff's Dep't, 456 F. Supp. 2d 986, 56 Collier Bankr. Cas. 2d (MB) 1838, 2006 U.S. Dist. LEXIS 78535 (N.D. Ill. 2006)*.

In action challenging constitutionality of two city ordinances that regulated presence and employment of illegal aliens, *Fed. R. Civ. P. 17(a)* did not apply to issue of whether to allow anonymous plaintiffs to proceed using pseudonyms because (1) anonymous plaintiffs' claimed that they lived and worked in city and would be harmed by implementation of ordinances, (2) they had clearly participated in lawsuit, and they claimed that ordinances violated federal constitution and laws of U.S. and Pennsylvania; furthermore, anonymous plaintiffs were not trying to mislead court or city about who they were, and acknowledged that pseudonyms were not their real names. *Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 2007 U.S. Dist. LEXIS 54320 (M.D. Pa. 2007)*, vacated, in part, aff'd on other grounds, *620 F.3d 170, 31 I.E.R. Cas. (BNA) 129, 2010 U.S. App. LEXIS 18835 (3d Cir. 2010)*, aff'd in part and rev'd in part, *724 F.3d 297, 36 I.E.R. Cas. (BNA) 440, 2013 U.S. App. LEXIS 15256 (3d Cir. 2013)*.

In action in which plaintiff company filed suit against defendant company alleging that defendant violated Telephone Consumer Protection Act of 1991, *47 USCS § 227*, defendant's motion under *Fed. R. Civ. P. 37* to dismiss plaintiff's complaint or to strike plaintiff's answers to discovery and requests to admit, and deem those requests admitted was denied because although evidence showed that former employee was real party in interest, not plaintiff, former employee ultimately corrected his verifications, he appeared to have honestly answered questions during his deposition, and there was no evidence that discovery responses he provided were incorrect. *Eclipse Mfg. Co. v. M & M Rental Ctr., Inc., 496 F. Supp. 2d 937, 2007 U.S. Dist. LEXIS 9473 (N.D. Ill. 2007)*.

Although Chapter 13 debtor omitted pre-bankruptcy cause of action against his employer from his schedule of assets, he remained real party in interest under *Fed. R. Civ. P. 17* for purposes of suing employer for Title VII violation because, under *11 USCS § 1306(b)*, he and trustee had concurrent standing to pursue pre-bankruptcy claims on behalf of estate. *Hernandez v. Forest Pres. Dist., 108 Fair Empl. Prac. Cas. (BNA) 1622, 2010 U.S. Dist. LEXIS 29650 (N.D. Ill. Mar. 29, 2010)*.

Pursuant to *Fed. R. Civ. P. 17(a)(1)(G)*, even if real party in interest was Chapter 13 debtor's estate, debtor was not required to bring suit in its name because debtor was authorized by *Fed. R. Bankr. P. 6009* to sue on behalf of estate; accordingly, former employer's motion to dismiss debtor's age discrimination claim for lack of subject-matter jurisdiction under *Fed. R. Civ. P. 12(b)(1)* was denied. *Evinger v. Emery Winslow Scale Co., 115 Fair Empl. Prac. Cas. (BNA) 1660, 2012 U.S. Dist. LEXIS 105740 (S.D. Ind. July 30, 2012)*.

26. Executors and administrators

Under Rule 17(a) provision as to suit in own name by administrator, administrator may so bring action if by law of forum he may do so, where action is diversity suit to enforce state-created right of action in which federal court, sitting as another state forum, enforces such right in accordance with applicable state law. *Boeing Airplane Co. v. Perry, 322 F.2d 589, 8 Av. Cas. (CCH) ¶17909, 7 Fed. R. Serv. 2d (Callaghan) 337, 1963 U.S. App. LEXIS 4227 (10th Cir. 1963)*, cert. denied, *375 U.S. 984, 84 S. Ct. 516, 11 L. Ed. 2d 472, 1964 U.S. LEXIS 2001 (1964)*.

Administrator performing his duty of preserving assets of estate imposed by Texas law is real party in interest and prospective heirs need not be joined. *Lummis v. White, 629 F.2d 397, 1980 U.S. App. LEXIS 12814 (5th Cir.)*, reh'g denied, *634 F.2d 630 (5th Cir. 1980)*, rev'd, *457 U.S. 85, 102 S. Ct. 2325, 72 L. Ed. 2d 694, 1982 U.S. LEXIS 19 (1982)*.

In estate representative's suit against officer regarding high-speed pursuit that ended in driver's death, caption was reformed to eliminate estate as party because executor or administrator of estate was authorized suitor on estate's

behalf, not estate itself or its beneficiaries. *Wourms v. Fields, 742 F.3d 756, 2014 U.S. App. LEXIS 2221 (7th Cir. 2014)*.

In action under Death on High Seas Act, district court did not err in denying plaintiffs' motion for appointment as decedents' personal representatives because their two-year delay in seeking appointment was unreasonable and not understandable mistake; plaintiffs' counsel admitted that declaration that he signed explaining delay was not basis of delay or complete explanation. Nothing in *Fed. R. Civ. P. 17* permitted counsel to blatantly ignore district court's schedule and need for complete candor. *Hassanati v. Int'l Lease Fin. Corp., 643 Fed. Appx. 620, 2016 U.S. App. LEXIS 5300 (9th Cir. 2016)*.

Executor is real party in interest in action for accounting against decedent's committee. *Small v. Frick, 40 F. Supp. 778, 1941 U.S. Dist. LEXIS 2770 (D.S.C. 1941)*.

Although suit could not have been brought in name of deceased person, administrator could have maintained action in his own name. *Banks v. Employers' Liability Assurance Corp., 4 F.R.D. 179, 1944 U.S. Dist. LEXIS 1456 (D. Mo. 1944)*.

New York public administrator is "real party in interest" and has "capacity to sue" under Rule 17(a). *Petition of S.S. Co., 167 F. Supp. 189, 1958 U.S. Dist. LEXIS 3397 (D.N.Y. 1958)*.

Despite Rule 17(a) prohibition against dismissal of action solely on grounds that real party in interest is not party to action, plaintiffs would not be given leave to amend complaint to substitute decedent's personal representative as plaintiff where civil rights action was conclusively barred by statute of limitations. *Gee v. CBS, Inc., 471 F. Supp. 600, 202 U.S.P.Q. (BNA) 486, 1979 U.S. Dist. LEXIS 13962 (E.D. Pa.)*, aff'd, *612 F.2d 572, 1979 U.S. App. LEXIS 9705 (3d Cir. 1979)*.

Where plaintiff Nigerian nationals sued defendant former Nigerian head of state alleging violations of international and Nigerian law and human rights violations, head of state's motion for summary judgment was denied as to head of state's argument that one of nationals lacked standing to sue under *Fed. R. Civ. P. 17(a)* as party in interest on behalf of national's parents' estates for failure to show that national was estates' administrator, because issue did not implicate subject matter jurisdiction, which was issue that court had directed head of state to address, and head of state had not yet addressed issue. *Abiola v. Abubakar, 267 F. Supp. 2d 907, 2003 U.S. Dist. LEXIS 10540 (N.D. Ill. 2003)*, aff'd, remanded, *408 F.3d 877, 2005 U.S. App. LEXIS 9353 (7th Cir. 2005)*.

Estate could not be plaintiff under *Fed. R. Civ. P. 17(a)* and plaintiffs were granted leave to amend complaint in order to substitute estate's trustee, administrator, or executive as real party in interest; however, court did conclude that beneficiary had standing to sue because she was "interested person" under *Cal. Prob. Code § 48* and plaintiffs had established actual and threatened economic damages as result of surrendering their annuity to purchase defendants' annuity, which allegedly was caused by defendants' wrongful conduct. *Estate of Migliaccio v. Midland Nat'l Life Ins. Co., 436 F. Supp. 2d 1095, 2006 U.S. Dist. LEXIS 41195 (C.D. Cal. 2006)*.

Executor of decedent's estate had standing to sue decedent's former wife for unjust enrichment relating to decedent's employee welfare and pension plan benefits; executor was authorized by this rule to prosecute actions, executor stood in shoes of decedent with regard to entitlement to benefits, and actions affecting property rights survived death. Davis v. Drake, *Davis v Drake (2014, ND Ohio), 2014 U.S. Dist. LEXIS 175259 (December 18, 2014)*.

Under *Ind. Code § 29-1-13-3*, it was personal representative of estate, not estate itself, who had power to maintain adversary proceeding to determine dischargeability of debt under *11 USCS § 523(a)(4)*; however, pursuant to *Fed. R. Bankr. P. 7017* and *Fed. R. Civ. P. 17(a)*, fact that estate was named plaintiff did not necessarily mean that action had to be automatically dismissed, and representative of estate was given opportunity to join in action prior to dismissal. *Valich v. Trutko-Clayton (In re Trutko-Clayton), 384 B.R. 813, 2007 Bankr. LEXIS 4500 (Bankr. N.D. Ind. 2007)*.

Unpublished decision: Because defendant cross-claimant, personal representative (PR) of insured decedent's estate which was contingent beneficiary, in his capacity as PR of estate was joined and substituted into action in compliance with *Fed. R. Civ. P. 17(a)(1)*, 19(a)(1)(A), 25(a)(3), (c), defendant counter-claimant beneficiary mortgagee's argument that PR lacked standing and that interpleader action should have been dismissed failed. *Ohio Nat'l Life Assur. Corp. v. Langkau, 353 Fed. Appx. 244, 2009 U.S. App. LEXIS 25242 (11th Cir. 2009)*.

Estate administrator's timely amendment of original petition to name herself as plaintiff rather than decedent's estate avoided statute of limitations bar where, pursuant to *Fed. R. Civ. P. 17*, action was treated as if brought in administrator's name at time action was commenced. *Anderson v. Bristol, Inc., 847 F. Supp. 2d 1128, 2012 U.S. Dist. LEXIS 40261 (S.D. Iowa 2012)*.

Amendment of complaints against tobacco companies alleging personal injuries from smoking was not warranted to substitute hundreds of estates for decedents who were in fact dead before complaints were filed as real parties in interest, since no understandable mistake was shown in failing to establish status of decedents before filing suit other than sheer volume of thousands of parties, and there was undue delay of over four years in determining status of decedents and bringing matter to attention of court. *In re Engle Cases, 767 F.3d 1082, 25 Fla. L. Weekly Fed. C 393, 89 Fed. R. Serv. 3d (Callaghan) 1199, 2014 U.S. App. LEXIS 17450 (11th Cir. 2014)*.

27. —Actions for wrongful death

Where decedent, resident of Pennsylvania, met death in Kentucky, and under Kentucky wrongful death statute executrix was merely nominal party, beneficiaries being real parties in interest, Pennsylvania executrix could bring suit in federal district court in New York against defendant, a Delaware corporation, authorized to do business in New York, and which had designated secretary of state of New York as its agent upon whom process in any action against it might be served within that state. *Cooper v. American Airlines, Inc., 149 F.2d 355, 1945 U.S. App. LEXIS 2596 (2d Cir. 1945)*.

Personal representative, when so authorized or required by state law to bring action under statute governing actions for wrongful death, is real party in interest within purview of Rule 17(a). *McCoy v. Blakely, 217 F.2d 227, 1954 U.S. App. LEXIS 3104 (8th Cir. 1954)*; *Bush v. Carpenter Bros., Inc., 447 F.2d 707, 1971 U.S. App. LEXIS 8424 (5th Cir. 1971)*.

Montana resident who was appointed trustee of heirs of decedent pursuant to Minnesota wrongful death statute could maintain diversity action as real party in interest in Minnesota action against residents of that state. *County of Todd v. Loegering, 297 F.2d 470, 5 Fed. R. Serv. 2d (Callaghan) 257, 5 Fed. R. Serv. 2d (Callaghan) 787, 1961 U.S. App. LEXIS 2909 (8th Cir. 1961)*.

In diversity suit for wrongful death of decedent in Nebraska, brought by administrator of his estate in Kansas federal district court, which involved assignment of interest by widow and child to United States under provisions of § 26 of the Federal Employee's Compensation Act (5 USCS § 776), no greater right of action was thereby created in United States government than that accorded widow and since, under Nebraska law, designated administrator of decedent is vested with exclusive right to bring and control litigation, appellant's motion for summary judgment on grounds that administrator was not real party in interest was properly denied. *Boeing Airplane Co. v. Perry, 322 F.2d 589, 8 Av. Cas. (CCH) ¶17909, 7 Fed. R. Serv. 2d (Callaghan) 337, 1963 U.S. App. LEXIS 4227 (10th Cir. 1963)*, cert. denied, *375 U.S. 984, 84 S. Ct. 516, 11 L. Ed. 2d 472, 1964 U.S. LEXIS 2001 (1964)*.

Under Pennsylvania law, administrator of decedent's estate had capacity to sue for wrongful death, and, where he was citizen of West Virginia while defendant was Pennsylvania corporation, he could maintain suit under Rule 17(a), as real party in interest. *Borror v Sharon Steel Co., 327 F.2d 165, 8 Fed. R. Serv. 2d (Callaghan) 17A.21, Case 1 (CA3 Pa 1964)*.

Plaintiff, personal representative of decedent in wrongful death action, was properly defined as "real party in interest" in sense that action was properly maintained in his name, without need to join beneficiaries; Rule 17(a) is

merely procedural and does not extend or limit subject matter jurisdiction of District Court; thus, defendant in action seeking to invoke diversity jurisdiction of federal court could not base removal on citizenship of administrator. *Betar v. De Havilland Aircraft of Canada, Ltd., 603 F.2d 30, 15 Av. Cas. (CCH) ¶17872, 27 Fed. R. Serv. 2d (Callaghan) 1172, 1979 U.S. App. LEXIS 12723 (7th Cir. 1979)*, cert. denied, *444 U.S. 1098, 100 S. Ct. 1064, 62 L. Ed. 2d 785, 1980 U.S. LEXIS 925 (1980)*.

Although Rule 17(a) provides that administrator of estate is real party in interest for purposes of prosecuting action in federal court, court lacks jurisdiction over wrongful death action brought by resident administrator on behalf of estate of nonresident decedent, where state's long-arm statute operates only in favor of state residents and state statutes restrict person who prosecutes action to same rights as decedent would have had. *Estate of Portnoy v. Cessna Aircraft Co., 730 F.2d 286, 1984 U.S. App. LEXIS 23318 (5th Cir. 1984)*.

Action under Federal Employers Liability Act [*45 USCS §§ 51* et seq.] for wrongful death resulting from injuries sustained in New York where defendant was doing business may be brought in federal court in that state by domiciliary administrator of estate of deceased, resident of Pennsylvania, as New York law permits such suits by foreign administrators. *Kleckner v. Lehigh Valley R. Co., 36 F. Supp. 600, 1940 U.S. Dist. LEXIS 2158 (D.N.Y. 1940)*.

Jurisdiction in wrongful death action cannot be based on diversity of citizenship between personal representative appointed in New Jersey and Pennsylvania defendant where only reason parents of deceased, real parties in interest, were not appointed administrators ad prosequendum under New Jersey law was to create diversity of citizenship. *Swick v. Benscoter, 462 F. Supp. 24, 27 Fed. R. Serv. 2d (Callaghan) 70, 1978 U.S. Dist. LEXIS 17625 (E.D. Pa. 1978)*.

Although aunt of deceased college student remained without authority under *FRCP 17(b)* to maintain wrongful death suit on behalf of her nephew's estate where she had not qualified as administratrix of estate either at time she filed amended complaint or at time oral argument was held on defendants' motion to dismiss, she was granted leave to amend under *FRCP 15(a)* where justice required that she be allowed to assert her capacity as administratrix of estate and defendants would not suffer any hardship by addition as persons involved and facts remained same as originally pleaded. *Schieszler v. Ferrum College, 236 F. Supp. 2d 602, 2002 U.S. Dist. LEXIS 25852 (W.D. Va. 2002)*.

Where estate's personal representative filed timely wrongful death action just before he was appointed as replacement administrator for estate by probate court, representative's subsequent ratification of filing after statute of limitations period had expired had same effect as if action had been commenced in name of real party in interest because reasonable time for ratification by real party in interest elapsed where representative filed affidavit ratifying commencement of action approximately two and half months after *Fed. R. Civ. P. 17(a)* objections were asserted. *Estate of Butler v. Maharishi Univ. of Mgmt., 460 F. Supp. 2d 1030, 2006 U.S. Dist. LEXIS 80486 (S.D. Iowa 2006)*.

Pursuant to *Fed. R. Civ. P. 17*, capacity to represent estate of foreign decedent was governed by law of state in which district court was held, and District of Columbia Wrongful Death Statute provided that action pursuant to *D.C. Code § 16-2702* shall be brought by and in name of personal representative of deceased person, *D.C. Code § 16-2702* (2001); however, under Iraqi law, heirs of decedent could apply to responsible court and submit certain documents to obtain "Qassam Sharie", and upon receipt of court-issued Qassam Sharie, duly-appointed heir could act as decedent's personal representative in legal action; therefore, fact that estate obtained Qassam Sharie was sufficient to establish existence of personal representative, and if estate and father could provide Qassam Sharie documents within 14 days of issuance of order, court would recognize those documents to establish estate and father's right to proceed as personal representatives. *Estate of Manook v. Research Triangle Inst., Int'l, 693 F. Supp. 2d 4, 2010 U.S. Dist. LEXIS 17257 (D.D.C. 2010)*, transferred, *2010 U.S. Dist. LEXIS 63838 (E.D.N.C. June 28, 2010)*.

28. Foreign governments and officials

Consul General did not qualify as real party in interest in wrongful death action regarding foreign nationals at time of district court's grant of summary judgment, even though he had been substituted as special administrator in state probate court proceeding. *Consul Gen. of the Republic of Indon. v. Bill's Rentals, Inc., 330 F.3d 1041, 55 Fed. R. Serv. 3d (Callaghan) 672, 2003 U.S. App. LEXIS 11221 (8th Cir. 2003)*, reh'g denied, reh'g, en banc, denied, *2003 U.S. App. LEXIS 13893 (8th Cir. July 10, 2003)*.

29. Guardians

Plaintiff, who sued on notes executed by defendant to plaintiff's deceased husband, was entitled as real party in interest to sue in her own behalf and in behalf of daughter as guardian. *Chuchuru v. Chutchurru, 185 F.2d 62, 1950 U.S. App. LEXIS 3233 (10th Cir. 1950)*.

Guardian of minor children appointed pursuant to state law does not have power to sue as such guardian in federal courts of state if she lacks power to sue in such capacity in state court. *Slade v. Louisiana Power & Light Co., 418 F.2d 125, 13 Fed. R. Serv. 2d (Callaghan) 323, 1969 U.S. App. LEXIS 10309 (5th Cir. 1969)*, cert. denied, *397 U.S. 1007, 90 S. Ct. 1233, 25 L. Ed. 2d 419, 1970 U.S. LEXIS 2369 (1970)*.

Guardian who brought personal injury suit on behalf of minors who were her granddaughters should have been permitted reasonable time to join or substitute minors' father as real party in interest since Nebraska law provides that guardian may only bring action for medical expenses when there is no parent. *Jaramillo v. Burkhart, 999 F.2d 1241, 1993 U.S. App. LEXIS 18804 (8th Cir. 1993)*, app. after remand, remanded, *59 F.3d 78, 32 Fed. R. Serv. 3d (Callaghan) 1020, 1995 U.S. App. LEXIS 15790 (8th Cir. 1995)*.

General guardian had standing to appeal dismissal of former employee's discrimination suit based on settlement entered into by guardian ad litem, since guardian became real party in interest when appointed as general guardian and therefore replaced guardian ad litem as former employee's representative. *Neilson v. Colgate-Palmolive Co., 199 F.3d 642, 81 Fair Empl. Prac. Cas. (BNA) 683, 1999 U.S. App. LEXIS 31540 (2d Cir. 1999)*.

Parents did provide explanation for guardian's omission because they believed that they too could bring their son's claims, and refusal to allow ratification was abuse of discretion because parents offered reasonable explanation for their mistake in not naming guardian. *Rideau v. Keller Indep. Sch. Dist., 819 F.3d 155, 94 Fed. R. Serv. 3d (Callaghan) 847, 2016 U.S. App. LEXIS 6226 (5th Cir. 2016)*.

Mother's claims brought on behalf of herself and her adult child were improperly dismissed upon counting appointment of guardian ad litem (GAL) as commencement of action, as GAL was not new party and claims were brought within two years after tolling due to age had ended. *Hanson v. La Flamme, 2019 U.S. App. LEXIS 914 (9th Cir. Jan. 10, 2019)*, modified, remanded, *761 Fed. Appx. 685, 2019 U.S. App. LEXIS 3082 (9th Cir. 2019)*, modified, review or reh'g granted, *761 Fed. Appx. 685, 2019 U.S. App. LEXIS 3090 (9th Cir. 2019)*.

Plaintiff pro se court-appointed education advocates in action against defendant municipality were "parents" under Individuals with Disabilities Education Act for purposes of seeking attorneys' fees because they had been appointed by court as "Guardians, Limited for Educational Purposes," definition of "parent" in *20 USCS § 1401(23)* included guardians, and *Fed. R. Civ. P. 17(c)* acknowledged multiple eligible representatives. *Bowman v. District of Columbia, 496 F. Supp. 2d 160, 2007 U.S. Dist. LEXIS 55268 (D.D.C. 2007)*.

In putative class action in which consumer alleged that manufacturer of homeopathic common cold remedy violated California Unfair Competition Law, *Cal. Bus. & Prof. Code §§ 17200* et seq., and Consumers Legal Remedies Act, *Cal. Civ. Code §§ 1750* et seq., adults who bought product on behalf of their children could be considered in numerosity determination under *Fed. R. Civ. P. 23(a)(1)*; *Fed. R. Civ. P. 17(a)(1)(C)* permitted guardians to sue in their own names without joining person for whose benefit action was brought. *Delarosa v. Boiron, Inc., 275 F.R.D. 582, 2011 U.S. Dist. LEXIS 106248 (C.D. Cal. 2011)*.

30. Insured

Judgment creditor, not its insurer, was real party in interest in action against judgment debtors' insurer to collect on default judgment arising from motor carrier accident; under Missouri law, creditor's insurer had only equitable right to subrogation and could not sue debtors' insurer directly. *Tri-National, Inc. v. Yelder, 781 F.3d 408, 2015 U.S. App. LEXIS 4542 (8th Cir. 2015)*.

Where insurer denied coverage for underlying suit against Florida company to recover missed payments for healthcare contract, and Florida company, Delaware company, and acquiring company brought suit against insurer, dismissal of Delaware company was warranted because it was not real party in interest since Delaware company had not yet been named as defendant in underlying suit at time Florida company made its demand for coverage against insurer, and Delaware company did not make independent demand for coverage. *Payroll Mgmt. v. Lexington Ins. Co., 815 F.3d 1293, 26 Fla. L. Weekly Fed. C 92, 2016 U.S. App. LEXIS 3790 (11th Cir. 2016)*.

Although defendants argued that plaintiffs were not a real party in interest because their insurer paid their entire loss, the district court properly found that plaintiffs were a real party in interest as their loss exceeded their gross insurance recovery by $126,859.03 because the insurer paid only part of plaintiffs' loss. *Sawyer Bros., Inc. v. Island Transporter, LLC, 887 F.3d 23, 2018 A.M.C. 913, 2018 U.S. App. LEXIS 8464 (1st Cir. 2018)*.

Where insured arranges with his attorney to be relieved of all or part of his obligation to pay attorney's fees if jury does not award him amount claimed, insured is nevertheless real party in interest and may maintain action in his own name to recover unpaid fees. *Oliver B. Cannon & Son, Inc. v. Fid. & Cas. Co., 519 F. Supp. 668, 9 Fed. R. Evid. Serv. (CBC) 482, 1981 U.S. Dist. LEXIS 9724 (D. Del. 1981)*.

Rule 17(a) requires that action be brought by person who, according to governing substantive law is entitled to enforce right; it is not necessary that action be brought in name of person who ultimately will benefit from recovery; thus, plaintiff, asserting that it is insured under policy issued by defendant insurer to owner of vehicle involved in accident, is subject of underlying lawsuit in which claimant was defendant and is real party in interest. *Reichhold Chemicals, Inc. v. Travelers Ins. Co., 544 F. Supp. 645, 1982 U.S. Dist. LEXIS 14124 (E.D. Mich.)*, reh'g denied, *549 F. Supp. 197, 1982 U.S. Dist. LEXIS 14957 (E.D. Mich. 1982)*.

Potato farmer was granted leave to substitute his liability insurer as plaintiff in products liability-related negligence suit that he filed against broom manufacturer because (1) farmer filed his suit after processing plant rejected most of his potatoes after it found metal bristle, which purportedly came loose from one of manufacturer's brooms, embedded in potato; (2) manufacturer sought to dismiss suit for failure to prosecute in name of real party in interest after farmer admitted during his deposition that any damages that he recovered would be paid to insurer because it had made payment under his policy to plant in connection with incident; and (3) it was appropriate to allow farmer to substitute insurer as plaintiff in suit pursuant to *Fed. R. Civ. P. 17(a)* because farmer had not unreasonably delayed in seeking to make substitution, he had not acted in bad faith or engaged in deliberate tactical maneuvering, as he mistakenly believed when he filed suit that he had paid deductible under his policy, which would give him financial interest in suit, and manufacturer would not be prejudiced by substitution because legal claims asserted in suit remained same. *Suda v. Weiler Corp., 250 F.R.D. 437, 2008 U.S. Dist. LEXIS 11253 (D.N.D. 2008)*.

Where vessel owners received insurance proceeds for anti-pollution costs after vessel was damaged due to submerged obstruction, owners remained real parties in interest in action to recover full amount of expenses to repair vessel, including expenses related to anti-pollution efforts. *Am. S.S. Co. v. Hallett Dock Co., 862 F. Supp. 2d 919, 2012 U.S. Dist. LEXIS 39897 (D. Minn. 2012)*.

31. Insurer taking loan receipt from insured

In suit instituted by radio broadcasting company under Federal Tort Claims Act for damage to its radio tower resulting from being negligently struck by navy plane, plaintiff's giving of loan receipt to its insurer for amount of damage advanced by its insurer did not affect its right to sue, and it was real party in interest. *Augusta Broadcasting Co. v. United States, 170 F.2d 199, 1948 U.S. App. LEXIS 2605 (5th Cir. 1948)*.

Where insured, which had received from its insurer, under loan receipt, amount of its fire loss in its hydraulic die-casting plant resulting from use of hydraulic fluid, instituted action against defendant from whom it had purchased hydraulic fluid, suit was properly prosecuted by insured, it being, under undisputed facts, real party in interest in sense of rule governing suits filed under loan receipt procedure. *Celanese Corp. of America v. John Clark Industries, Inc., 214 F.2d 551, 1954 U.S. App. LEXIS 2740 (5th Cir. 1954)*.

In action by service station operator against customer's liability insurer, where service station operator had given his liability insurer loan receipt for sum advanced to pay judgments obtained against him for death of motorist resulting from collision with customer's automobile while being driven by service station operator at customer's request, service station operator was entitled to maintain suit as real party in interest. *Sanders v. Liberty Mut. Ins. Co., 354 F.2d 777, 1965 U.S. App. LEXIS 3661 (5th Cir. 1965)*.

Insured who was given loan receipt by insurers after loss of its aircraft remained real party in interest under Rule 17(a) for purposes of suit against manufacturer of aircraft, notwithstanding contention that loan receipt was payment in satisfaction for insured's loss so as to be subterfuge or sham to avoid subrogation. *R. J. Enstrom Corp. v. Interceptor Corp., 520 F.2d 1217, 13 Av. Cas. (CCH) ¶17981, 20 Fed. R. Serv. 2d (Callaghan) 832, 1975 U.S. App. LEXIS 13143 (10th Cir. 1975)*.

Although insurance company which has paid entire loss suffered by insured is real party in interest for purposes of Rule 17(a) and must sue in own name, insured who receives loan as payment from insurers retains sufficient interest so as not to be displaced by insurer. *Frank Briscoe Co. v. Georgia Sprinkler Co., 713 F.2d 1500, 1983 U.S. App. LEXIS 24248 (11th Cir. 1983)*.

Owner of goods stored in warehouse may maintain suit as real party in interest against warehouseman for their destruction by fire, even though goods had been insured and loan was made to owner by insurance company as against his claim for insurance. *Price & Pierce, Ltd. v. Jarka Great Lakes Corp., 37 F. Supp. 939, 1941 U.S. Dist. LEXIS 3614 (D. Mich. 1941)*.

Insurance company which loaned insured amount of his loss to be repaid out of any recoveries by insured from party responsible for loss was not "real party in interest" who must bring suit. *Kerna v. Trucking, Inc., 3 F.R.D. 365, 1944 U.S. Dist. LEXIS 1401 (D. Pa. 1944)*.

Although part of plaintiffs' claimed loss had been paid by their insurer under loan receipt authorizing plaintiffs to bring action and providing that part of any recovery would inure to benefit of the insurer, plaintiffs were empowered to maintain action against defendants in their own names under exception in Rule 17(a) permitting "a trustee of an express trust" to bring suit in his own name without joining beneficiary. *Merriman v. Cities Service Gas Co., 11 F.R.D. 165, 1951 U.S. Dist. LEXIS 3571 (D. Mo. 1951)*.

In action to recover damages to plaintiff's truck caused by collision with defendant's truck, fact that insurance companies had made advances to plaintiff under loan receipts did not render them real parties in interest within Rule 17(a). *Perrera v. Smolowitz, 11 F.R.D. 377, 1951 U.S. Dist. LEXIS 3640 (D.N.Y. 1951)*.

Insurer which had taken loan receipt from insured and had instituted action in its own name was granted leave to add its insured as party plaintiff, on ground that since insurer did have right, under loan agreement, to cause suit to be instituted in name of its insured, interests of justice required that plaintiff be allowed to prosecute claim in insured's name. *Hartford Fire Ins. Co. v. Commercial Union Assurance Co., 131 F. Supp. 751, 1955 U.S. Dist. LEXIS 3276 (D.N.Y. 1955)*.

In action by consignor of shipment of carpet-manufacturing machinery and equipment, consignor was lawful holder of bills of lading and had given its insurer loan receipt for sum covering portion of loss, insured could bring suit as the real party in interest. *McDowell Associates, Inc. v. Pennsylvania R. Co., 151 F. Supp. 894, 1957 U.S. Dist. LEXIS 4342 (D.N.Y. 1957)*.

In case of loan receipt from insured to insurer, interest of insurer as "pledgee" should be shown, and better practice is to make insurer additional party plaintiff. *Neighbours v. Harleysville Mut. Casualty Co., 169 F. Supp. 368, 1 Fed. R. Serv. 2d (Callaghan) 381, 1959 U.S. Dist. LEXIS 3832 (D. Md. 1959)*.

Where under loan arrangement insurer advances amount of loss to assured as loan repayable only out of proceeds of suit brought by assured in its own name to recover loss from those legally responsible therefor, assured is considered to be proper party plaintiff to bring suit under Rule 17(a). *American Dredging Co. v. Federal Ins. Co., 309 F. Supp. 425, 1970 U.S. Dist. LEXIS 12759 (S.D.N.Y. 1970)*.

In loan receipt cases, key determination as to who is real party in interest is nature of exchange of money between insured and insurer. *Armour Pharmaceutical Co. v. Home Ins. Co., 60 F.R.D. 592, 17 Fed. R. Serv. 2d (Callaghan) 1321, 1973 U.S. Dist. LEXIS 11448 (N.D. Ill. 1973)*.

In action for damages caused by breakdown of machinery, insurer which made loan to plaintiff in amount of loss with some deductions, such loan being repayable only from any recovery from one causing loss, is not real party in interest for purposes of Rule 17(a). *Industrial Dev. Bd. v. Brown & Root, Inc., 99 F.R.D. 58, 1983 U.S. Dist. LEXIS 14636 (M.D. Ala. 1983)*, aff'd, in part, *795 F.2d 87, 1986 U.S. App. LEXIS 26298 (11th Cir. 1986)*.

Even if insurer who took loan receipt from insured were real party in interest as one controlling litigation, Rule 17 cannot be used to compel insurer's joinder, and under Rule 19, complete relief was available without insurer since its rights were derived entirely from insured's and as nonparty in control of litigation would be precluded from relitigating insured's claims. *Tucson Elec. Power Co. v. Bailey Controls Co., 145 F.R.D. 102, 24 Fed. R. Serv. 3d (Callaghan) 1302, 1992 U.S. Dist. LEXIS 22458 (D. Ariz. 1992)*.

Debtor's former director's complaint, asserting that defendant insurer was obligated to pay director's defense costs in action filed by debtor for breach of fiduciary duties, was dismissed for lack of "related to" subject matter jurisdiction under *28 USCS § 157(b)(3)* because those costs had been paid by other co-defendants in debtor's action and by co-defendant's insurer, even if agreement between co-defendants and other insurer was considered to be loan receipt; director had no injury in fact to confer standing to satisfy "cases and controversies" requirement under U.S. Const. art. III, and director's argument that *Fed. R. Civ. P. 17* could be used to join or substitute co-defendants and/or other insured as real parties in interest was rejected because, under *28 USCS § 2072(b)*, Rules of Civil Procedure could not abridge, enlarge, or modify any substantive right. *Tesler v. Certain Underwriters at Lloyd's London (In re Spree.com Corp.), 295 B.R. 762, 41 Bankr. Ct. Dec. (LRP) 156, 2003 Bankr. LEXIS 788 (Bankr. E.D. Pa. 2003)*.

32. —Application of state substantive law

If, under substantive state law, loan receipt is deemed true loan, insured, being owner of legal title, is trustee of express trust and real party in interest under exception in Rule 17(a) providing that trustee of express trust may bring action without joining with him person for whose benefit it is prosecuted. *Dixey v. Federal Compress & Warehouse Co., 132 F.2d 275, 1942 U.S. App. LEXIS 2579 (8th Cir. 1942)*.

In determining who is real party in interest under Rule 17(a) in case of loan agreement between insured and insurer for loan repayable to extent of insured's recovery from another, resort must first be had to law of state in which action arose to ascertain who "owns" claim, and Federal Rule then governs on procedural question of whether person having substantive right of action has instituted action or must be joined as party plaintiff. *Tyler v. Dowell, Inc., 274 F.2d 890, 3 Fed. R. Serv. 2d (Callaghan) 293, 12 Oil & Gas Rep. 1034, 1960 U.S. App. LEXIS 5620 (10th Cir.)*, cert. denied, *363 U.S. 812, 80 S. Ct. 1248, 4 L. Ed. 2d 1153, 1960 U.S. LEXIS 1024 (1960)*; *Pennsylvania Lumbermens Mut. Ins. Co. v. Thomason, 178 F. Supp. 382, 1959 U.S. Dist. LEXIS 2525 (D.N.C. 1959)*; *Condor Inv. Co. v. Pacific Coca-Cola Bottling Co., 211 F. Supp. 671, 1962 U.S. Dist. LEXIS 3378 (D. Or. 1962)*.

Subrogation was aspect of issue relating to loan receipt, and it was question of substantive law whether loan receipt evidenced outright payment by carrier to insured on policy and accomplished subrogation or whether receipt was

valid as loan, with insured remaining real party in interest, so that where loan receipt in dispute was acknowledged in Massachusetts and would be performed in Oklahoma, and where those states followed precedent upholding validity of loan receipts as loans, insured remained real party in interest. *R. J. Enstrom Corp. v. Interceptor Corp., 520 F.2d 1217, 13 Av. Cas. (CCH) ¶17981, 20 Fed. R. Serv. 2d (Callaghan) 832, 1975 U.S. App. LEXIS 13143 (10th Cir. 1975)*.

General liability insurer, which entered into loan receipt with landlord/insured by which it funded insured's settlement costs in suit by tenant, was not real party in interest in landlord's subsequent suit against its landlord and tenant liability insurer since, under Georgia law, insurer giving loan receipt is not real party in interest and action against third party as tortfeasor may be brought in insured's name. *ECI Management Corp. v. Scottsdale Ins. Co., 23 F.3d 354, 8 Fla. L. Weekly Fed. C 295, 29 Fed. R. Serv. 3d (Callaghan) 671, 1994 U.S. App. LEXIS 15170 (11th Cir. 1994)*.

Where under substantive state law loan receipt, whether given for amount covering all or only portion of insured's loss, was deemed evidence of true loan, in which case there was no subrogation, insurer was not real party in interest required under Rule 17(a) to be joined as party plaintiff. *Williams v. Union P. R. Co., 94 F. Supp. 174, 1950 U.S. Dist. LEXIS 2088 (D. Neb. 1950)*; *Hartford Fire Ins. Co. v. Commercial Union Assurance Co., 131 F. Supp. 751, 1955 U.S. Dist. LEXIS 3276 (D.N.Y. 1955)*; *Watsontown Brick Co. v. Hercules Powder Co., 201 F. Supp. 343, 5 Fed. R. Serv. 2d (Callaghan) 240, 1962 U.S. Dist. LEXIS 3971 (M.D. Pa. 1962)*.

If, under substantive state law, loan receipt, whether given for amount covering all or only part of insured's loss, is deemed evidence of true loan so that there is no subrogation, substantive right of action remains in insured, and he is real party in interest under Rule 17(a) and proper party plaintiff. *Refined Syrups & Sugars, Inc. v. Travelers Ins. Co., 136 F. Supp. 907, 1954 U.S. Dist. LEXIS 2221 (D.N.Y. 1954)*, aff'd, *229 F.2d 439, 1956 U.S. App. LEXIS 3589 (2d Cir. 1956)*; *Neighbours v. Harleysville Mut. Casualty Co., 169 F. Supp. 368, 1 Fed. R. Serv. 2d (Callaghan) 381, 1959 U.S. Dist. LEXIS 3832 (D. Md. 1959)*; *Miller v. Pine Bluff Hotel Co., 170 F. Supp. 552, 1959 U.S. Dist. LEXIS 3754 (D. Ark. 1959)*.

Insured rather than plaintiff insurer was real party in interest where, under state law, loan receipt from insured to insurer was used instead of subrogation agreement. *Northern Assurance Co. v. Associated Independent Dealers, 313 F. Supp. 816, 14 Fed. R. Serv. 2d (Callaghan) 453, 1970 U.S. Dist. LEXIS 12131 (D. Minn. 1970)*.

In action brought to recover for fire-related damage caused by machine manufactured by defendant, court would deny defendant's motion to join, as real parties in interest, two insurers of plaintiff who entered into loan receipt agreement with plaintiff whereby sum of money was transferred and by which plaintiff was obligated to pay insurers if plaintiff recovered for fire damage, where (1) applicable substantive law was that of Pennsylvania, and while Pennsylvania had not ruled on whether insurer which pays insured by way of loan receipts may itself bring suit on insured's cause of action, consistency with existing Pennsylvania law on loan receipts indicated that Pennsylvania Courts would not allow such, (2) denial of motion would in no way violate purpose and reason for Rule 17(a) because it would not prejudice defendant's interest in finality of judgment, and (3) prejudice to insurers and plaintiff could arise if defendant's motion were granted. *White Hall Bldg. Corp. v. Profexray Div. of Litton Industries, Inc., 387 F. Supp. 1202, 19 Fed. R. Serv. 2d (Callaghan) 790, 1974 U.S. Dist. LEXIS 11850 (E.D. Pa. 1974)*, aff'd, *578 F.2d 1375 (3d Cir. 1978)*, aff'd, *578 F.2d 1377 (3d Cir. 1978)*.

33. —Excess insurer

Insured was real party in interest and proper party plaintiff in action on policy, even though excess insurer had furnished defense and paid settlement through loan receipt transaction. *Ketona Chemical Corp. v. Globe Indem. Co., 404 F.2d 181, 1968 U.S. App. LEXIS 4753 (5th Cir. 1968)*.

Excess insurers who had advanced money on loan receipts to take care of insured's liability in consequence of explosion, pursuant to agreement providing that they be reimbursed when money was received from primary insurance company, were real parties in interest in suit for declaratory judgment to establish liability of primary

company, and they should have been made parties. *Eastman Kodak Co. v United States Fidelity & Guaranty Co., 34 F.R.D. 490, 8 Fed. R. Serv. 2d (Callaghan) 17A.14, Case 1 (DC Md 1964)*.

In action for recovery on boiler and machinery policy, where it appeared that at time of loss there was also "all risk" policy by excess insurer, plaintiff was real party in interest where excess insurer had denied responsibility and had no absolute duty to pay, and there was no formal agreement or guarantee by excess insurer that it would pay if primary insurer was successful; mere agreement by excess insurer to pay cost of litigation and attorneys' fees, and recommendation of counsel to plaintiff, did not make this loan receipt transaction or make excess insurer real party in interest. *Armour Pharmaceutical Co. v. Home Ins. Co., 60 F.R.D. 592, 17 Fed. R. Serv. 2d (Callaghan) 1321, 1973 U.S. Dist. LEXIS 11448 (N.D. Ill. 1973)*.

34. —Where transaction deemed payment to insured

If amount paid, for which insurer takes loan receipt from insured, covers only portion of loss and insurer thereby acquires interest in claim, insurer, as well as insured, is real party in interest under Rule 17(a). *Tyler v. Dowell, Inc., 274 F.2d 890, 3 Fed. R. Serv. 2d (Callaghan) 293, 12 Oil & Gas Rep. 1034, 1960 U.S. App. LEXIS 5620 (10th Cir.)*, cert. denied, *363 U.S. 812, 80 S. Ct. 1248, 4 L. Ed. 2d 1153, 1960 U.S. LEXIS 1024 (1960)*; *Condor Inv. Co. v. Pacific Coca-Cola Bottling Co., 211 F. Supp. 671, 1962 U.S. Dist. LEXIS 3378 (D. Or. 1962)*.

If amount received by insured under loan receipt fully covers his loss and under substantive state law loan receipt transaction is regarded, not as true loan, but as absolute payment of insurer's liability to insured, thereby subrogating insurer to rights of insured against tortfeasor or other third person allegedly liable for loss, insured is not real party in interest under Rule 17(a). *McNeil Constr. Co. v. Livingston State Bank, 300 F.2d 88, 5 Fed. R. Serv. 2d (Callaghan) 245, 1962 U.S. App. LEXIS 6005 (9th Cir. 1962)*.

In action brought by corporation under Federal Tort Claims Act to recover for alleged negligence on part of Federal Aviation Administration air traffic controllers in connection with crash of corporation's airplane, where corporation had received $1,300,000 from its insurers pursuant to typical loan receipt agreement under which corporation was obligated to make repayment only out of any net recovery it might obtain from those liable for crash, with insurers to bear expense and assume direction and control of litigation, insurers were real parties in interest under Rule 17(a) to extent of payment and became subrogated to corporation's claims against government, since transfer of sum to corporation was loan in name only, and was, in fact, outright settlement of loss covered under insurance policy. *Executive Jet Aviation v. United States, 507 F.2d 508, 19 Fed. R. Serv. 2d (Callaghan) 1274, 1974 U.S. App. LEXIS 5671 (6th Cir. 1974)*, limited, *Shelton v. United States, 615 F.2d 713, 1980 U.S. App. LEXIS 20355 (6th Cir. 1980)*.

Use of loan receipt by insurer to settle claim of insured where insurer's liability was absolute amounted to subrogation making insurer real party in interest required by Rule 17(a) to sue in own name. *City Stores Co. v. Lerner Shops of District of Columbia, Inc., 410 F.2d 1010, 133 U.S. App. D.C. 311, 12 Fed. R. Serv. 2d (Callaghan) 254, 1969 U.S. App. LEXIS 13378 (D.C. Cir. 1969)*.

If, under substantive state law, loan receipt transaction is viewed as absolute payment, insurer is only real party in interest under Rule 17(a). *Rosenfeld v. Continental Bldg. Operating Co., 135 F. Supp. 465, 1955 U.S. Dist. LEXIS 2598 (D. Mo. 1955)*.

35. Insurer under other circumstances

Insurer issuing bond as security for loan following indemnity agreement was real party in interest entitled to the full amount of loss sustained after default of loan, despite reimbursement from reinsurance. *Interstate Fire Ins. Co. v. Sayers, 468 F.2d 1361, 16 Fed. R. Serv. 2d (Callaghan) 1111, 1972 U.S. App. LEXIS 6714 (5th Cir. 1972)*.

In action arising out of helicopter crash, which action was brought by surviving passenger, administratrix of deceased pilot's estate, and owner of helicopter, District Court would have exceeded discretion in requiring joinder of owner's insurer as real party in interest where there was no substantial showing that insurer was in fact involved in transaction between surviving passenger and owner whereby passenger released owner from any claims he

might have against it arising from crash and owner loaned passenger almost $75,000 for attorneys' fees and costs in passenger's anticipated action against manufacturer of helicopter. *Wyller v. Fairchild Hiller Corp., 503 F.2d 506, 19 Fed. R. Serv. 2d (Callaghan) 229, 1974 U.S. App. LEXIS 6882 (9th Cir. 1974)*.

Given that plaintiff victims had entered into post-judgment agreement with defendant insured that victims would delay executing on insured's property in exchange for assignment of insured's claims against his insurer, it was beyond peradventure that litigation over right of insurer to intervene was designed to have direct impact on insurer, and thus, insurer was party in interest under *Fed. R. Civ. P. 17 (a)*. *Ross v. Marshall, 426 F.3d 745, 2005 U.S. App. LEXIS 20281 (5th Cir. 2005)*, reh'g denied, *456 F.3d 442, 65 Fed. R. Serv. 3d (Callaghan) 797, 2006 U.S. App. LEXIS 17371 (5th Cir. 2006)*, cert. denied, *549 U.S. 1166, 127 S. Ct. 1125, 166 L. Ed. 2d 892, 2007 U.S. LEXIS 1032 (2007)*.

Manufacturer's motion to join insureds' insurer as proper party plaintiff was denied where mandatory joinder of insurer under *Fed. R. Civ. P. 17(a)*, 19(a) would have been unnecessary and inappropriate because (1) when action arose under state law, real party in interest was determined by state substantive law, (2) North Dakota Supreme Court had unequivocally recognized that right of action against wrongdoer who caused loss remained with insured as long as insurer had only covered portion of insured's losses, (3) it was clear and undisputed that insurer had only covered portion of insureds' loss, and (4) under state law, right of action remained with insureds and insureds would have been considered real parties in interest. *Torske v. Bunn-O-Matic Corp., 216 F.R.D. 475, CCH Prod. Liab. Rep. ¶16671, 2003 U.S. Dist. LEXIS 10888 (D.N.D. 2003)*.

In plaintiff insurers' declaratory judgment action regarding insurance coverage, London insurers were not required to be individually named where they were listed as certain London market insurance companies. *Certain London Mkt. Ins. Cos. v. Pa. Nat'l Mut. Cas. Ins. Co., 269 F. Supp. 2d 722, 2003 U.S. Dist. LEXIS 16863 (N.D. Miss. 2003)*, aff'd, *106 Fed. Appx. 884, 2004 U.S. App. LEXIS 14450 (5th Cir. 2004)*.

In contribution case, defendant was entitled to add plaintiff's insurer as plaintiff under *Fed. R. Civ. P. 19(a)* because complete relief did not preclude presentation of defenses, insurer was real party in interest, and joinder of insurer did not deprive court of subject matter jurisdiction; because insurer was real party in interest and there was no claim of mistake, circumstances permitting ratification under *Fed. R. Civ. P. 17(a)* as alternative to joinder were not present. *Arch Chems., Inc. v. Radiator Specialty Co., 653 F. Supp. 2d 1099, 2009 U.S. Dist. LEXIS 55698 (D. Or. 2009)*.

Because title insurance company was not asserting rights of certain creditor under title insurance policy, as assignee or otherwise, instant case did not run afoul of *Investors Title Insurance Co. v. Herzig, 330 N.C. 681, 413 S.E.2d 268 (1992)*, promote champerty, or wreak havoc on statutory intent of North Carolina Unfair and Deceptive Trade Practices Act; accordingly, it was real party in interest and could allege its forgery, fraud, and certain other claims for relief, all of which were personal in nature. *Old Republic Nat'l Title Ins. Co. v. Welch (In re Welch), 494 B.R. 654, 2013 Bankr. LEXIS 2679 (Bankr. E.D.N.C. 2013)*.

Unpublished decision: Insurer that issued relevant insurance policies and that began payments of workers' compensation benefits to injured employee was real party in interest under *Fed. R. Civ. P. 17(a)(1)* for purposes of its claims, alleging civil RICO acts and state claims, that arose from allegedly fraudulent scheme to have employee covered although he was not actually employee. *Virginia Sur. Co. v. Macedo, 2011 U.S. Dist. LEXIS 49077 (D.N.J. May 6, 2011)*.

36. Landlord and tenant

Where tenant agreed to indemnify landlord, they were not "equally responsible parties" in employee's personal injury action; consequently, landlord's insurer was subrogated to landlord's rights against tenant under lease indemnification clause. *TOPA Equities (V.I.), Ltd. v. Bared Jewelers of the V.I., Inc., 332 F. Supp. 2d 814, 46 V.I. 274, 2004 U.S. Dist. LEXIS 17121 (D.V.I. 2004)*.

37. Legal title holders; transferees

Under Rules 17(a) and 81(b), Reconstruction Finance Corporation to whom assets of Defense Supplies Corp. have been transferred may, as real party in interest, bring action on judgment recovered by Defense Supplies Corp. after termination of its corporate existence but within period during which continuance of litigation by it was authorized. *Defense Supplies Corp. v. Lawrence Warehouse Co., 336 U.S. 631, 69 S. Ct. 762, 93 L. Ed. 931, 1949 U.S. LEXIS 2533*, reh'g denied, *337 U.S. 921, 69 S. Ct. 1151, 93 L. Ed. 1730, 1949 U.S. LEXIS 2393 (1949)*.

Holder of legal title to copyright may sue without joining others who had equitable interest in copyright. *Edward B. Marks Music Corp. v. Jerry Vogel Music Co., 140 F.2d 268, 60 U.S.P.Q. (BNA) 256, 1944 U.S. App. LEXIS 3922 (2d Cir. 1944)*.

Where defendant in conversion action sold timber parcel to third party several years prior to mistaken issuance to defendant, by federal agency, of checks representing timber proceeds from parcel, and where agency also paid proceeds to third party upon his presentation of deed to property, third party owner of parcel is neither indispensable party under Rule 19 nor real party in interest under Rule 17(a) with respect to conversion suit. *United States v. McLeod, 721 F.2d 282, 1983 U.S. App. LEXIS 14832 (9th Cir. 1983)*.

Investment company did not and could not acquire interest in subject matter of law suit between landlord and tenant, notwithstanding agreement whereby tenant granted investment company option to acquire tenant's interest, where lease by its terms lapsed when tenant granted option without landlord's prior written authorization—or would have lapsed if investment company had attempted to exercise option. *American Nat'l Bank & Trust Co. v. Bailey, 750 F.2d 577, 40 Fed. R. Serv. 2d (Callaghan) 885, 1984 U.S. App. LEXIS 16096 (7th Cir. 1984)*, cert. denied, *471 U.S. 1100, 105 S. Ct. 2324, 85 L. Ed. 2d 842, 1985 U.S. LEXIS 1783 (1985)*.

Corporation which agreed to assume lessee's liability for rent in exchange for right to sublet or assign leases was not real party in interest in suit brought by lessee against lessor where lessor was relying upon its rights under substantive law, there was nothing to indicate that corporation had ever been substituted for lessee as party to lease, and lessee continued payment of rent to lessor, so that lessee rather than corporation remained real party in interest. *Checkers, Simon & Rosner v. Lurie Corp., 864 F.2d 1338, 12 Fed. R. Serv. 3d (Callaghan) 1162, 1988 U.S. App. LEXIS 17575 (7th Cir. 1988)*.

Resolution Trust Company was properly permitted to be substituted for lender who initially made loan to debtor which was assigned to parent bank which later failed; initial lender retained right to service and administer loan and its timely filing put debtor on notice that some creditor in daisy chain would contest discharge of over $3 million default judgment, thus serving purpose of Rule 4007(c) and 60-day rule. *FDIC v. Meyer (In re Meyer), 120 F.3d 66, 31 Bankr. Ct. Dec. (LRP) 144, Bankr. L. Rep. (CCH) ¶77456, 38 Collier Bankr. Cas. 2d (MB) 318, 38 Fed. R. Serv. 3d (Callaghan) 331, 1997 U.S. App. LEXIS 17929 (7th Cir. 1997)*.

District court did not abuse its discretion in patent infringement suit in denying motion to amend to substitute actual owner of patent for plaintiff, where plaintiff purported to own patent he did not actually own and did not disclose actual owner, company of which he was managing director and sole shareholder, until defendants discovered assignment; plaintiff's original allegations were not honest and understandable mistakes. *Lans v. Digital Equip. Corp., 252 F.3d 1320, 59 U.S.P.Q.2d (BNA) 1057, 2001 U.S. App. LEXIS 11584 (Fed. Cir. 2001)*, reh'g denied, reh'g, en banc, denied, *2001 U.S. App. LEXIS 17244 (Fed. Cir. July 11, 2001)*.

Contracting party who transfers all of his right, title, and interest in contract to another may not sue for breach thereof. *D. L. Stern Agency, Inc. v. Mutual Ben. Health &Acci. Asso., 43 F. Supp. 167, 1941 U.S. Dist. LEXIS 2278 (D.N.Y. 1941)*.

Transferee of property is real party in interest in action to establish title thereto and right to possession. *Daly Bros. Shoe Co. v. H. Jacob & Sons, Inc., 49 F. Supp. 118, 1943 U.S. Dist. LEXIS 2826 (D. Pa. 1943)*.

Where state court receiver had been appointed for plaintiff in action against United States for untenantable use of premises leased by defendant from plaintiff and conveyance of premises by receiver to new corporation approved, new corporation could be made party to action as real party in interest. *New Rawson Corp. v. United States, 55 F. Supp. 291, 1943 U.S. Dist. LEXIS 1723 (D. Mass. 1943)*.

Owner of interest in oil and gas lease was not real party in interest with regard to claim that oil companies fraudulently entered into operating agreement with owner and owner's company concerning another oil and gas lease which companies did not intend to perform, since interest in subject lease was owned by company rather than owner. Atkins v. Heavy Petroleum Partners, LLC, *Atkins v Heavy Petroleum Partners, LLC (2015, DC Kan), 86 F. Supp. 3d 1188 (February 4, 2015)*.

Holder of legal title to patent is real party in interest in patent infringement suit and can sue without joining others who may have equitable interests. *Sigma Engineering Service, Inc. v. Halm Instrument Co., 33 F.R.D. 129, 7 Fed. R. Serv. 2d (Callaghan) 311, 138 U.S.P.Q. (BNA) 297, 1963 U.S. Dist. LEXIS 7304 (E.D.N.Y. 1963)*.

Where plaintiffs sold their business and defendant made motion to dismiss action as moot, plaintiffs' motion to have purchasers of business joined as party plaintiffs was well taken and was granted. *Killebrew v. Moore, 41 F.R.D. 269, 10 Fed. R. Serv. 2d (Callaghan) 767, 1966 U.S. Dist. LEXIS 10696 (N.D. Miss. 1966)*.

Former owner of minor league baseball franchise, which upon sale of such franchise, had reserved only right to receive balance due under arbitration award and agreement from two major league clubs who had drafted territories of minor league, was not real party in interest in action seeking further compensation from two major leagues for loss of such territories. *Portland Baseball Club, Inc. v. Kuhn, 368 F. Supp. 1004, 1971 U.S. Dist. LEXIS 10218 (D. Or. 1971)*, aff'd, *491 F.2d 1101, 1974-1 Trade Cas. (CCH) ¶75092, 1974 U.S. App. LEXIS 10209 (9th Cir. 1974)*.

Transferees of dissolved corporation who had been defending action in name of dissolved corporation against judgment creditor without notice of dissolution to creditor for eight years where litigation had been directed to protecting transferees' interest in its assets, then to amend title of action to name them is not to add or substitute a new party but to recognize what has been the fact for last eight years. *American Renaissance Lines, Inc. v. Saxis S.S. Co., 71 F.R.D. 703, 23 Fed. R. Serv. 2d (Callaghan) 828, 1976 U.S. Dist. LEXIS 13992 (E.D.N.Y. 1976)*.

Permissive language of Rule 17(a) does not preclude beneficial owner from suing or joining with legal title holder if beneficial owner has right sought to be enforced; purpose of Rule is to guarantee that person who possesses right to enforce claim and has significant interest in litigation will prosecute matter. *Beascoechea v. Sverdrup & Parcel & Associates, Inc., 486 F. Supp. 169, 1980 U.S. Dist. LEXIS 10514 (E.D. Pa. 1980)*.

Common law right to tradename may be transferred so as to make transferee real party in interest in trademark action despite fact that tradename was not formally transferred in writing pursuant to Ohio Revised Code. *Discount Muffler Shop, Inc. v. Meineke Realty Corp., 535 F. Supp. 439, 217 U.S.P.Q. (BNA) 1154, 1982 U.S. Dist. LEXIS 11073 (N.D. Ohio 1982)*.

Partner to which other members of partnership have transferred their interests has right to bring action on behalf of partnership where, under state law, last surviving partner has right to wind up partnership's affairs. *Lartnec Inv. Co. v. Ft. Wayne-Allen Co. Convention & Tourism Authority, 603 F. Supp. 1210, 1985 U.S. Dist. LEXIS 21957 (N.D. Ind. 1985)*.

Record holder of securities is real party in interest who may sue in his own name for securities fraud whether he was acting for his own account or that of his clients. *Lemanik v. McKinley Allsopp, Inc., 125 F.R.D. 602, Fed. Sec. L. Rep. (CCH) ¶ 94496, Fed. Sec. L. Rep. (CCH) ¶94496, 1989 U.S. Dist. LEXIS 6742 (S.D.N.Y. 1989)*.

Patent holder who owned 95 percent of patent in question was real party in interest and if it was not joined or substituted for plaintiff who was 5 percent owner of patent in question simply for purpose of pursuing litigation on majority patent owner's behalf, case would be dismissed with prejudice. *Refac Int'l v. Lotus Dev. Corp., 131 F.R.D. 56, 15 U.S.P.Q.2d (BNA) 1747, 1990 U.S. Dist. LEXIS 6380 (S.D.N.Y. 1990)*.

Plaintiff is allowed reasonable time to join or substitute his wife, in action against securities corporation claiming fraud and negligence, where plaintiff has no ownership interest in shares of fund but is simply authorized to conduct transactions on behalf of his wife who opened account with corporation, because wife is real party in interest under *FRCP 17(a)*. *Price v. Crestar Sec. Corp., 44 F. Supp. 2d 351, 43 Fed. R. Serv. 3d (Callaghan) 1244, 1999 U.S. Dist. LEXIS 4727 (D.D.C. 1999)*.

Seller of cargo damaged in transit was not real party in interest under *Fed. R. Civ. P. 17(a)(1)* with respect to claim to recover costs incurred by buyer in transporting damaged cargo to repair facility and obtaining repairs, although seller had title to cargo at time it was damaged and was buyer's parent company. *Crompton Greaves, Ltd. v. Shippers Stevedoring Co., 776 F. Supp. 2d 375, 2011 A.M.C. 2650, 2011 U.S. Dist. LEXIS 23584 (S.D. Tex. 2011)*.

Condominium board's suit under Interstate Land Sales Full Disclosure Act, *15 USCS §§ 1701* et seq., against various sellers was dismissed for lack of subject matter jurisdiction because board lacked associational standing to bring claims asserting fraud as individual unit owners had never assigned their rights, participation of each individual purchaser was needed for board to prove its claims, and substitution of individual purchasers would not be mere formality as board conceded that it could not be certain how many of purchasers would join action and extent of relief that each would seek. *Bd. of Managers v. 72 Berry St., LLC, 801 F. Supp. 2d 30, 2011 U.S. Dist. LEXIS 67866 (E.D.N.Y. 2011)*.

Where holder of Chapter 7 debtor's note sold note, but had not yet delivered it to buyer, holder could enforce note under Cal. Com. Code § 3301(a), but could not obtain stay relief without first joining note's owner in motion for relief as real party in interest pursuant to *Fed. R. Civ. P. 17(a)(1)* and *Fed. R. Civ. P. 19*. *In re Kang Jin Hwang, 396 B.R. 757, 67 U.C.C. Rep. Serv. 2d (CBC) 319, 2008 Bankr. LEXIS 2969 (Bankr. C.D. Cal. 2008)*, rev'd, remanded, *438 B.R. 661, 2010 U.S. Dist. LEXIS 96419 (C.D. Cal. 2010)*.

Nominee of lender, and legal title holder of deed to secure debt, qualified as real party in interest because it had right to foreclose on debtor's property in event of default. *Mortg. Elec. Registration Sys. v. Freeman (In re Freeman), 446 B.R. 625, 2011 Bankr. LEXIS 1541 (Bankr. S.D. Ga. 2011)*.

Bankruptcy court did not abuse its discretion when it granted bank's motion under *11 USCS § 362(d)* for relief from automatic stay so it could proceed with eviction action against Chapter 13 debtor under Nebraska law; bank acquired title to home debtor owned in foreclosure sale before debtor declared bankruptcy, and it was party in interest in debtor's bankruptcy case under § 362(d) because its interest as owner of house was adversely affected by stay; there was no merit to debtor's claims that bank failed to establish that it was party in interest under *Fed. R. Civ. P. 17* and did not have standing to seek relief from automatic stay. *Bushnell v. Bank of the West (In re Bushnell), 469 B.R. 306, 2012 Bankr. LEXIS 2009 (8th Cir. 2012)*.

Unpublished decision: Substitute trustee's deed conveying property to defendant lender in foreclosure sale was sufficient evidence of ownership and basis for determining right to immediate possession in its *Tex. Prop. Code Ann. § 24.002* forcible detainer action, and original promissory note was not required; thus, lender was "real party in interest" under *Fed. R. Civ. P. 17(a)(1)* in forcible detainer action which had been removed to federal court and consolidated with plaintiff former homeowner's action. *McGillivray v. Countrywide Home Loans, Inc., 360 Fed. Appx. 533, 2010 U.S. App. LEXIS 540 (5th Cir. 2010)*.

Under *Fed. R. Civ. P. 17(a)(3)*, district court erred in dismissing mortgage servicer's suit against mortgagor on grounds it was not real party in interest, because trustee which held legal title to mortgage submitted timely affidavit, which was not contradicted, ratifying mortgage servicer's suit on its behalf. *CWCapital Asset Mgmt., LLC v. Chi. Props., LLC, 610 F.3d 497, 2010 U.S. App. LEXIS 13229 (7th Cir. 2010)*.

Plaintiff, although not fronting all of money for purchase of property, was intended legal purchaser of property and additional purchasers were intended third-party beneficiaries of agreement that plaintiff entered into with substitute trustees to purchase property; therefore plaintiff was real party in interest as party with whom or in whose name

contract was made for another's benefit. *Elbar Investements, Inc. v. Oluyemisi Omokafe Okedokun (In re Oluyemisi Omokafe Okedokun), 593 B.R. 469, 2018 Bankr. LEXIS 3430 (Bankr. S.D. Tex. 2018)*.

38. Legatees, devisees and heirs

Legatee of estate who sued to set aside gifts made by decedent to defendant prior to death was not real party in interest; action belonged to estate. *Young Powell, 179 F.2d 147, 1950 U.S. App. LEXIS 2199 (5th Cir.)*, cert. denied, *339 U.S. 948, 70 S. Ct. 804, 94 L. Ed. 1362, 1950 U.S. LEXIS 2056 (1950)*.

District Court is correct in dismissing diversity action for legal malpractice brought by heir to decedent's estate since unjoined heir is real party in interest who must be joined and since unjoined heir is joint obligee or beneficiary with plaintiff of any duty owed by defendants. *Jenkins v. Reneau, 697 F.2d 160, 1983 U.S. App. LEXIS 31385 (6th Cir. 1983)*.

Where plaintiff's father died domiciled in France and under laws of that country all his property vested in plaintiff, she was real party in interest and could maintain declaratory judgment action in New York to establish her title to certain stock. *Du Roure v. Alvord, 120 F. Supp. 166, 1954 U.S. Dist. LEXIS 3535 (D.N.Y. 1954)*.

Decedent's heirs lacked standing to bring suit against insurer for failure to defend and indemnify insured in their underlying wrongful death action because under substantive Colorado law, injured claimant could not maintain direct action on liability policy protecting insured unless specifically authorized by statute. *Pompa v. Am. Family Mut. Ins. Co., 506 F. Supp. 2d 412, 2007 U.S. Dist. LEXIS 15326 (D. Colo. 2007)*, aff'd, *520 F.3d 1139, 2008 U.S. App. LEXIS 7038 (10th Cir. 2008)*.

39. Loan servicer

Loan servicer, acting under interim agreement with lender whereby legal title to account of Chapter 13 debtors in bankruptcy was to be transferred to servicer, was party in interest in debtors' bankruptcy proceedings involving loan which it serviced, as servicer possessed rights sought to be enforced in bankruptcy claim and had economic interest in debt. *Greer v. O'Dell, 305 F.3d 1297, 15 Fla. L. Weekly Fed. C 1075, Bankr. L. Rep. (CCH) ¶78723, 53 Fed. R. Serv. 3d (Callaghan) 1285, 2002 U.S. App. LEXIS 19956 (11th Cir. 2002)*.

In action that bank's servicing affiliate commenced on behalf of bank to recover credit card balance from cardmember, bank was real party in interest, under *Fed. R. Civ. P. 17(a)*, with respect to counterclaims based on cardmember's allegation that certain fees and interest rates were charged in violation of state law; bank was real party in interest because bank extended credit to cardmember and set interest and fees of which cardmember complained and servicing agreement between bank and affiliate provided that bank was in charge of setting terms and conditions of lending money through its credit cards. *Discover Bank v. Vaden, 489 F.3d 594, 2007 U.S. App. LEXIS 13830 (4th Cir. 2007)*, cert. granted, *552 U.S. 1256, 128 S. Ct. 1651, 170 L. Ed. 2d 352, 2008 U.S. LEXIS 2465 (2008)*, rev'd, remanded, *556 U.S. 49, 129 S. Ct. 1262, 173 L. Ed. 2d 206, 21 Fla. L. Weekly Fed. S 693, 2009 U.S. LEXIS 1781 (2009)*.

Although loan servicer may have been party in interest to debtor's bankruptcy petition as contemplated by *11 USCS § 362(d)*, it was not real party in interest pursuant to *Fed. R. Civ. P. 17* where it did not hold note and it therefore lacked legal right to enforce obligation secured by mortgage. *In re Kang Jin Hwang, 393 B.R. 701, 2008 Bankr. LEXIS 2460 (Bankr. C.D. Cal.)*, reconsideration granted, *396 B.R. 757, 67 U.C.C. Rep. Serv. 2d (CBC) 319, 2008 Bankr. LEXIS 2969 (Bankr. C.D. Cal. 2008)*.

Loan servicer was not real party in interest, entitled to seek relief from automatic stay under *11 USCS § 362(d)* in order to prosecute foreclosure action against debtor's property, because it did not present sufficient evidence that it was either: (1) holder of mortgage, with concomitant right to enforce it under state law or (2) agent authorized by holder of mortgage to initiate court proceedings to enforce mortgage on holder's behalf. *In re Alcide, 450 B.R. 526, 65 Collier Bankr. Cas. 2d (MB) 1498, 2011 Bankr. LEXIS 1989 (Bankr. E.D. Pa. 2011)*.

Mortgage loan servicer had standing to seek relief from stay as "party in interest" under *11 USCS § 362(d)* and "real party in interest" under *Fed. R. Civ. P. 17* because under *S.C. Code Ann. § 36-3-301* servicer was nonholder in possession of note who had rights of holder, including right to enforce note, and servicer's interest in litigation was sufficiently significant to satisfy second prong of "real party in interest" standard. *In re Neals, 459 B.R. 612, 2011 Bankr. LEXIS 3746 (Bankr. D.S.C. 2011)*.

Unpublished decision: Loan servicing agent had standing to prosecute motion for relief from automatic stay to enforce note through non-judicial foreclosure procedures because agent had authority to enforce note under *Cal. Civ. Code § 2924(a)(1)* and was party interest under *Fed. R. Civ. P. 17(a)*, made applicable by *Fed. R. Bankr. P. 7017*. *Point Ctr. Fin., Inc. v. Pres. LLC (In re Pres., LLC), 2010 Bankr. LEXIS 5033 (9th Cir. Sept. 22, 2010)*.

Unpublished decision: Order granting relief from automatic stay pursuant to *11 USCS § 362(d)(1)* and (2) was reversed, as creditor failed to present evidence that it was either holder of note or transferee or assignee of note under Cal. Com. Code §§ 1201(b)(21)(A) and 3201, or servicer of note; therefore, creditor did not demonstrate that it had been injured by debtor's default and as result, it did not have constitutional standing to file stay relief motion; bankruptcy appellate panel did not reach prudential standing issues, as constitutional standing was threshold requirement. *Fawn Ridge Partners, LP v. BAC Home Loans Servicing, LP (In re Fawn Ridge Partners, LP), 2010 Bankr. LEXIS 5082 (9th Cir. Mar. 29, 2010)*.

Unpublished decision: Even if bank was servicer of note, and had constitutional standing to seek stay relief under *11 USCS § 362(d)*, it did not follow that it was holder of note under *Ariz. Rev. Stat. § 47-1201(B)(21)(a)*; bankruptcy court erred in granting stay relief, as bank did not establish that it had prudential standing under *Fed. R. Civ. P. 17* (as made applicable by *Fed. R. Bankr. P. 7017*) or that it had authority to act for any entity that did have standing. *Fontes v. HSBC Bank, USA, NA (In re Fontes), 2011 Bankr. LEXIS 1792 (9th Cir. Apr. 22, 2011)*.

Loan servicer demonstrated colorable claim to property of Chapter 13 debtor's estate where it obtained judgment of foreclosure, and fact that foreclosure judgment was on appeal did not affect its standing to pursue stay relief; further, as holder of note, creditor was entitled to enforce it under Wisconsin law (as state court concluded), and it was real party in interest. *In re Spencer, 531 B.R. 208, 2015 Bankr. LEXIS 1668 (Bankr. W.D. Wis. 2015)*, aff'd, *246 F. Supp. 3d 1241, 2017 U.S. Dist. LEXIS 47545 (W.D. Wis. 2017)*.

40 Partnership

Because claims asserted in original and first amended complaints actually belonged to partnership as real party in interest, court lacked subject matter jurisdiction over those claims absent proper showing of diversity based on citizenship of partnership; thus, because district court never had diversity jurisdiction over action against corporations, removal of that action was improper under *28 USCS § 1441*, and once district court determined it lacked jurisdiction over removed case, it should have vacated its previous substantive rulings and remanded case to state court in accordance with *28 USCS § 1447(c)*. *Cunningham v. BHP Petroleum Gr. Brit. PLC, 427 F.3d 1238, 2005 U.S. App. LEXIS 23074 (10th Cir. 2005)*.

Appellate court concluded that the partnership lacked standing to pursue the appeal of its claims as the real party in interest under *Fed. R. Civ. P. 17(a)* because there was nothing that precluded the execution sale of the partnership's chose in action against the company and the corporation, and Utah R. Civ. P. 69(f) (repealed 2004) provided that all choses in action may ordinarily be acquired by a creditor through attachment and execution; moreover, even if a sufficient ground existed for the appellate court to void the sale of the instant cause of action, the partnership waived any such argument by failing to appeal the district court's denial of the motion to stay or quash execution. *RMA Ventures Cal. v. SunAmerica Life Ins. Co., 576 F.3d 1070, 2009 U.S. App. LEXIS 17820 (10th Cir. 2009)*.

In partnership dispute that included claim against partnership itself, federal court lacked diversity jurisdiction because partnership was citizen of each state where each partner was citizen, but jurisdiction was preserved by dismissal of partnership, which was a dispensable nondiverse party, and joinder of partnership was not required

because although partnership could bring action as real party in interest, that did not make it necessary or indispensable party. *Moss v. Princip, 913 F.3d 508, 102 Fed. R. Serv. 3d (Callaghan) 985, 2019 U.S. App. LEXIS 1453 (5th Cir. 2019)*.

In securities fraud action against brokerage house in which plaintiff investor has filed amended complaint alleging existence of partnership between himself and his agent, who has been named defendant in indemnification action by brokerage house, there is no merit to contention of brokerage house that newly alleged partnership claims are barred by statute of limitations, where it is apparent from reading original and amended complaints that claims arise out of same transaction, although original complaint asserts agency relationship while amended complaint asserts partnership; whether amendment is viewed under Rule 15(c) as amendment of claim or viewed under Rule 17(a) as failure to name real party in interest, dismissal would not be appropriate. *Saul Stone & Co. v. Browning, 615 F. Supp. 20, 1985 U.S. Dist. LEXIS 19686 (N.D. Ill. 1985)*.

Unpublished decision: Bankruptcy court erred in dismissing partner's adversary proceeding on ground that only partnership had right to bring complaint where's court should have given partner time to obtain joinder or ratification by partnership, or leave to amend to assert claims for partnership dissolution or accounting. *Beverly Rodeo Dev. Corp. v. Liberty Mut. Ins. Co. (In re Rodeo Canon Dev. Corp.), 2005 Bankr. LEXIS 3394 (9th Cir. Aug. 5, 2005)*.

41. Subrogees and subrogors, generally

After property loss has been fully paid by insurer, insurer, being subrogated to insured's rights against tortfeasor causing loss, is the only real party in interest in action against such tortfeasor for loss. *Old Colony Ins. Co. v. United States, 168 F.2d 931, 1948 U.S. App. LEXIS 2159 (6th Cir. 1948)*; *Link Aviation, Inc. v. Downs, 325 F.2d 613, 117 U.S. App. D.C. 40, 8 Av. Cas. (CCH) ¶17911, 7 Fed. R. Serv. 2d (Callaghan) 264, 1963 U.S. App. LEXIS 4119 (D.C. Cir. 1963)*.

Where bus company was paid full amount of its loss by excess insurer it could not sue primary insurer for bad faith and negligence for failing to settle suit, since it was no longer real party in interest, as its rights had passed to excess insurer by subrogation. *American Fidelity & Casualty Co. v. All American Bus Lines, Inc., 179 F.2d 7, 1949 U.S. App. LEXIS 2607 (10th Cir. 1949)*.

When property loss caused by wrongful act of third person has been fully paid by insurance, insurer, being subrogated to insured's rights against tortfeasor, is real party in interest in action against tortfeasor to recover for loss and insurer rightfully sues in its own name. *Kansas Electric Power Co. v. Janis, 194 F.2d 942, 1952 U.S. App. LEXIS 2880 (10th Cir. 1952)*; *Continental Ins. Co. v. I. Bahcall, Inc., 39 F. Supp. 315, 1941 U.S. Dist. LEXIS 3203 (D. Wis. 1941)*; *Automobile Ins. Co. v. United States, 144 F. Supp. 454, 1956 U.S. Dist. LEXIS 2782 (D.N.C. 1956)*.

Insurer subrogee that has paid entire loss suffered by insured must sue in its own name, as it is only real party in interest. *Virginia Electric & Power Co. v. Westinghouse Electric Corp., 485 F.2d 78, 17 Fed. R. Serv. 2d (Callaghan) 1103, 1973 U.S. App. LEXIS 7663 (4th Cir. 1973)*, cert. denied, *415 U.S. 935, 94 S. Ct. 1450, 39 L. Ed. 2d 493, 1974 U.S. LEXIS 1371 (1974)*; *Hughey v. Aetna Casualty & Surety Co., 32 F.R.D. 340, 7 Fed. R. Serv. 2d (Callaghan) 316, 1963 U.S. Dist. LEXIS 10440 (D. Del. 1963)*.

Where insurers authorized insured's suit and subsequently executed and served on defendants agreements expressly ratifying insured's suit and undertaking to be bound by it, insurers were parties to suit. *United Coal Cos. v. Powell Constr. Co., 839 F.2d 958, 10 Fed. R. Serv. 3d (Callaghan) 947, 25 Fed. R. Evid. Serv. (CBC) 170, 1988 U.S. App. LEXIS 1857 (3d Cir. 1988)*.

Order awarding summary judgment to sellers of house in insurer's subrogation action for negligence and breach of contract was overturned because pursuant to *Fed. R. Civ. P. 17(a)*, insureds, not insurer, were real parties in interest, and consequently, diversity jurisdiction did not exist. *Allstate Ins. Co. v. Hughes, 346 F.3d 952, 2003 Cal. Daily Op. Service 8998, 2003 D.A.R. 11309, 56 Fed. R. Serv. 3d (Callaghan) 689, 2003 U.S. App. LEXIS 20442*

(9th Cir.), reprinted, *358 F.3d 1089, 2003 U.S. App. LEXIS 26897 (9th Cir. 2003)*, amended, *358 F.3d 1089, 2004 U.S. App. LEXIS 2566 (9th Cir. 2004)*.

Grant of summary judgment in favor of seller in insurer's negligence and breach of contract action was improper where insurer was not real party in interest and, thus, not allowed, under *Fed. R. Civ. P. 17(a)*, to bring claim in federal court; accordingly, diversity jurisdiction was lacking. *Allstate Ins. Co. v. Hughes, 358 F.3d 1089, 2003 U.S. App. LEXIS 26897 (9th Cir. 2003)*.

In action by plaintiffs for damages resulting from automobile collision wherein defendant counterclaimed for damages accruing to her automobile, and plaintiffs moved to dismiss defendant's counterclaim or to make defendant's insurer a party, on ground that defendant had been indemnified by her insurance carrier and had subrogated all her rights to such carrier, if it should appear that she had been paid and had assigned her claim, then under substantive law of Missouri defendant would not have capacity to maintain her action on her counterclaim. *Brush v. Harkins, 9 F.R.D. 604, 1949 U.S. Dist. LEXIS 3291 (D. Mo. 1949)*.

Where law of state wherein cause of action arose permits assignee, or one in representative capacity, to bring suit in lieu of real party in interest and beneficiary need not be made party, insured alone may maintain action against the tortfeasor and hold recovery as trustee for his insurer. *Colorado Milling & Elevator Co. v. American Cyanamid Co., 11 F.R.D. 191, 1951 U.S. Dist. LEXIS 4500 (D. Mo. 1951)*.

Insurer-subrogee qualifies as real party in interest whether he has paid whole loss or only part of it. *Ward v. Franklin Equipment Co., 50 F.R.D. 93, 14 Fed. R. Serv. 2d (Callaghan) 456, 1970 U.S. Dist. LEXIS 12628 (E.D. Va. 1970)*.

In absence of loan arrangement whereby insurer advances amount of loss to assured as loan repayable only out of proceeds of suit brought by assured, and where payment is made to assured by insurer, insurer is considered to be real party in interest under Rule 17(a), and, in action against party responsible for loss, is required to sue in its own name as subrogee. *American Dredging Co. v. Federal Ins. Co., 309 F. Supp. 425, 1970 U.S. Dist. LEXIS 12759 (S.D.N.Y. 1970)*.

Rule 17(a) requires every action to be prosecuted in name of real party in interest, and ordinarily subrogee is real party in interest. *Joint School Dist. v. Brodd Constr. Co., 58 F.R.D. 213, 17 Fed. R. Serv. 2d (Callaghan) 66, 1973 U.S. Dist. LEXIS 15359 (E.D. Wis. 1973)*.

Insurer-subrogee is "real party in interest" under Rule 17. *Reliance Ins. Co. v. Wisconsin Natural Gas Co., 60 F.R.D. 429, 17 Fed. R. Serv. 2d (Callaghan) 1110, 1973 U.S. Dist. LEXIS 12311 (E.D. Wis. 1973)*.

Insurer is real party in interest when completely subrogated to rights of insured. *Armour Pharmaceutical Co. v. Home Ins. Co., 60 F.R.D. 592, 17 Fed. R. Serv. 2d (Callaghan) 1321, 1973 U.S. Dist. LEXIS 11448 (N.D. Ill. 1973)*.

In interpleader action brought by insurer with respect to proceeds of automobile liability insurance policy covering vehicle involved in accident, insurance company named as defendant in action would not be considered real party in interest since any recovery by it would be by way of subrogation for medical benefits it might have paid to one of individual defendants who was injured in accident. *Empire Fire & Marine Ins. Co. v. Crisler, 405 F. Supp. 990, 1976 U.S. Dist. LEXIS 17346 (S.D. Miss. 1976)*.

Insurance company possessing substantive rights in litigation by way of subrogation should upon objection by defendant be joined as party plaintiff pursuant to Rule 17(a). *Wattles v. Sears, Roebuck & Co., 82 F.R.D. 446, 28 Fed. R. Serv. 2d (Callaghan) 221, 1979 U.S. Dist. LEXIS 12331 (D. Neb. 1979)*.

Insurer, whether it has paid all of loss or only part of loss, is real party in interest and must join action if it is to recover its subrogation interest. *Ledford v. Central Medical Pavilion, Inc., 90 F.R.D. 445, 32 Fed. R. Serv. 2d (Callaghan) 495, 1981 U.S. Dist. LEXIS 12753 (W.D. Pa. 1981)*.

Seller-shipper of tomatoes which were found to be spoiled on arrival at destination is not proper plaintiff in action against common carrier, where seller-shipper has been made whole by is insurance company; if any person has action against common carrier, it is seller-shipper's insurance company, which conceivably has subrogation claim. *William D. Branson, Ltd. v. Tropical Shipping & Constr. Co., 598 F. Supp. 680, 1987 A.M.C. 2703, 40 U.C.C. Rep. Serv. (CBC) 883, 1984 U.S. Dist. LEXIS 21795 (S.D. Fla. 1984)*.

Insurer which held subrogation interest in automobile because it paid policy proceeds to insured after automobile was destroyed by fire would be substituted for insured in action against manufacturer, wholesaler, and dealer; insurer was real party in interest, it mistakenly but reasonably assumed that policy holder also held title to automobile, and this assumption was not so careless, reckless, or misleading as to warrant dismissal for long delay in moving for substitution. *Green v. Daimler Benz, AG, 157 F.R.D. 340, 31 Fed. R. Serv. 3d (Callaghan) 491, 1994 U.S. Dist. LEXIS 12737 (E.D. Pa. 1994)*.

Wrongful death action against railroad was remanded because complete diversity was lacking; insurer, joined as involuntary plaintiff, who was citizen of same state as railroad, had subrogation interest and, thus, was real party in interest. *Estate of Pickard v. Wis. Cent., Ltd., 300 F. Supp. 2d 776, 2002 U.S. Dist. LEXIS 27216 (W.D. Wis. 2002)*.

Wisconsin Department of Justice, Crime Victim Compensation Program, which was named as subrogated party in personal injury suit, was real party in interest under *Fed. R. Civ. P. 17*; Program, which had paid plaintiff $280.89 in benefits for injuries sustained in assault, had subrogation rights under *Wis. Stat. § 949.15* and was therefore real party in interest regardless of dollar amount involved. *Bosse v. Pitts, 455 F. Supp. 2d 868, 2006 U.S. Dist. LEXIS 73885 (W.D. Wis. 2006)*.

If subrogee has paid entire loss it is only real party in interest and must sue in its own name; in cases of partial subrogation, however, there are two real parties in interest and each may prosecute action. *In re Wuttke, 2 B.R. 362, 5 Bankr. Ct. Dec. (LRP) 1304, 22 Collier Bankr. Cas. (MB) 919, 1980 Bankr. LEXIS 5629 (Bankr. D.N.J. 1980)*.

Unpublished decision: Where appellant admitted that its three insurance carriers covered all defense and settlement costs incurred to date, proper analytical framework therefore is that of fully-subrogated claim, where insurer who pays entire loss incurred is only real party in interest. *Durabla Mfg. Co. v. Durabla Can. LTD., 124 Fed. Appx. 732, 2005 U.S. App. LEXIS 3495 (3d Cir. 2005)*.

42. —In tort action against United States

Action under Federal Tort Claims Act by insurer which had fully reimbursed its insured for damage to insured's automobile sustained in collision with army truck was properly brought by real party in interest since, under law of the state wherein collision occurred insurer became subrogated to all rights of insured against defendant which grew out of collision. *Old Colony Ins. Co. v. United States, 168 F.2d 931, 1948 U.S. App. LEXIS 2159 (6th Cir. 1948)*.

Insurance company which paid loss of policyholder and is subrogated to rights of policyholder is real party in interest and may maintain action against government to recover loss due to negligence of driver of government vehicle. State Farm Mut. *State Farm Mut. Liability Ins. Co. v. United States, 172 F.2d 737, 1949 U.S. App. LEXIS 2767 (1st Cir. 1949)*.

43. —Worker's compensation cases

Where state compensation act provided that right to sue third party passed to employer upon payment of compensation, employee could not maintain action against third party after payment of compensation, since he was not real party in interest. *Dinardo v. Consumers Power Co., 181 F.2d 104, 1950 U.S. App. LEXIS 2569 (6th Cir. 1950)*.

Motion of defendant to cite in United States as party plaintiff, claiming that United States had paid compensation and medical expenses to plaintiff, employee of United States at time of injury, and was maintaining action in his

name, and that United States was, therefore, real party in interest, could not be granted, where there was no showing that United States had submitted to suit under the Workmen's Compensation Act [5 USCS §§ 751 et seq.]. *Dierssen v. Woolever, 3 F.R.D. 342, 1944 U.S. Dist. LEXIS 1396 (D. Conn. 1944)*.

Plaintiff, having accepted compensation under *33 USCS § 933*, is nevertheless real party in interest to sue for pain and suffering, and inclusion of claim for lost wages and medical expenses paid by compensation insurer is proper as such insurer is not indispensable party. *Clark v. Hutchison, 161 F. Supp. 35, 1957 U.S. Dist. LEXIS 2631 (D.C.Z. 1957)*.

In action for personal injuries against tortfeasors by plaintiff who received workmen's compensation from employer, workmen's compensation insurer who, pursuant to state law, could claim lien against any moneys paid by defendants was not real party in interest and thus could not be joined as party plaintiff under Rule 17(a), unless and until such joinder was sought by it, rather than sought by defendants. *Race v. Hay, 28 F.R.D. 354, 5 Fed. R. Serv. 2d (Callaghan) 255, 1961 U.S. Dist. LEXIS 5298 (N.D. Ind. 1961)*.

Compensation insurer who had paid award to plaintiff, and who under New York law was not only entitled to reimbursement from any judgment in plaintiff's favor but also had lien on proceeds of recovery, was real party in interest whom defendant could require be made involuntary plaintiff. *Maryland use of Geils v Baltimore Transit Co., 37 F.R.D. 34, 9 Fed. R. Serv. 2d (Callaghan) 17A.14, Case 1 (DC Md 1965)*.

Workmen's compensation carrier of respective plaintiff's employer was not required to be joined as real party in interest in actions brought by employees for personal injuries arising from their operation within Tennessee of allegedly defective punch-press manufactured and distributed by defendants, where Tennessee statute permitted employer to intervene in action such as one at hand to protect and enforce its subrogation lien in event of recovery against third person by its workman when such employer's maximum liability for workmen's compensation had been fully or partially paid and discharged, but did not give right of action thereunder to defendant in such action. *McCoy v. Wean United, Inc., 67 F.R.D. 491, 1973 U.S. Dist. LEXIS 10477 (D. Tenn. 1973)*.

In employee's personal injury action, workmen's compensation insurance carrier which had subrogated interest by virtue of payments to employee but which had assigned that interest to employee and waived right to participate in action, looking entirely to employee for reimbursement in event of successful termination of suit, was no longer real party in interest as contemplated by Rule 17(a). *Peyton v. Pascagoula Drayage Co., 69 F.R.D. 19, 20 Fed. R. Serv. 2d (Callaghan) 1325, 1975 U.S. Dist. LEXIS 15487 (N.D. Miss. 1975)*.

Since employee had been paid workmen's compensation benefits for his injuries and agreed with subrogor to proceed against third party for negligence promising reimbursement for recovery against third party then subrogor's proper ratification filed would relieve it of obligation to appear and would permit employee-plaintiff to proceed as real party in interest. *James v. Nashville Bridge Co., 74 F.R.D. 595, 23 Fed. R. Serv. 2d (Callaghan) 436, 1977 U.S. Dist. LEXIS 15708 (N.D. Miss. 1977)*.

In diversity action instituted by husband and wife seeking recovery of damages allegedly resulting from husband-plaintiff's employment-related injuries suffered as result of defective product manufactured and sold by defendant wherein defendant sought to join employer as third-party defendant for contribution and indemnity, employer is real party in interest under Rule 17(a) since employer may be entitled to be subrogated to rights of husband-plaintiff against third party joint or sole tortfeasor, but employer is not indispensable party within meaning of Rule 19 since under substantive law of Pennsylvania employer is absolutely and completely immune from suit as party for any purpose in action brought by injured employee against third party to recover damages arising out of employment-related injuries. *Shaner v. Caterpillar Tractor Co., 483 F. Supp. 705, 29 Fed. R. Serv. 2d (Callaghan) 1300, 1980 U.S. Dist. LEXIS 9889 (W.D. Pa. 1980)*.

In action by longshoreman under Longshoremen's and Harbor Workers' Compensation Act, *33 USCS §§ 901* et seq., against vessel owner for injuries sustained while working aboard vessel, longshoreman's employer and employer's insurance carrier are not real parties in interest and need not be joined, where longshoreman brings suit

during first 6 months following receipt of compensation award from his employer and carrier under § 904(b) of Act. *Hawkins v. United Overseas Export Lines, Inc., 490 F. Supp. 138, 1980 U.S. Dist. LEXIS 9072 (D. Md. 1980)*.

Longshoreman is real party in interest even though proceeds from suit must be used to reimburse his employer, or its insurance company, where longshoreman institutes suit within 6 months of accepting compensation of award. *Motta v. Resources Shipping & Enterprises Co., 499 F. Supp. 1365, 1981 A.M.C. 557, 31 Fed. R. Serv. 2d (Callaghan) 47, 1980 U.S. Dist. LEXIS 9446 (S.D.N.Y. 1980)*, disapproved, *Del Re v. Prudential Lines, Inc., 669 F.2d 93, 33 Fed. R. Serv. 2d (Callaghan) 583, 1982 U.S. App. LEXIS 22442 (2d Cir. 1982)*.

Plaintiff's employer's worker's compensation insurer need not be joined as real party in interest in negligence action arising out of motor vehicle accident since no subrogation rights exist under Ohio Worker's Compensation Law. *Knappenberger v. Bittner, 524 F. Supp. 777, 1981 U.S. Dist. LEXIS 15381 (W.D. Pa. 1981)*.

State workers' compensation fund which had waived right to proceed against defendant was no longer real party in interest and need not be joined as party plaintiff even though it had subrogation rights to plaintiff's recovery. *Lister v. Marangoni Meccanica S.P.A., 133 F.R.D. 177, 1990 U.S. Dist. LEXIS 16979 (D. Utah 1990)*.

44. Partial subrogees and subrogors

If insurer has paid only part of loss sustained by its insured, both insurer and insured qualify as real parties in interest under Rule 17(a) in action against tortfeasor responsible for loss. *United States v. South Carolina State Highway Dep't, 171 F.2d 893, 1948 U.S. App. LEXIS 3325 (4th Cir. 1948)*; *State Farm Mut. Liability Ins. Co. v. United States, 172 F.2d 737, 1949 U.S. App. LEXIS 2767 (1st Cir. 1949)*; *Kansas Electric Power Co. v. Janis, 194 F.2d 942, 1952 U.S. App. LEXIS 2880 (10th Cir. 1952)*.

After partial subrogation of insurer, action against alleged tortfeasor for whole loss may be prosecuted in names of insured and insurer jointly. *United States v. South Carolina State Highway Dep't, 171 F.2d 893, 1948 U.S. App. LEXIS 3325 (4th Cir. 1948)*; *State Farm Mut. Liability Ins. Co. v. United States, 172 F.2d 737, 1949 U.S. App. LEXIS 2767 (1st Cir. 1949)*; *J. P. (Bum) Gibbins, Inc. v. Utah Home Fire Ins. Co., 202 F.2d 469, 1953 U.S. App. LEXIS 3261 (10th Cir. 1953)*.

In action under Federal Tort Claims Act by insured and her insurer, which had partially reimbursed her for her loss, for damage to her automobile resulting from collision with army truck, although insurer was precluded by Federal Anti-Assignment Act from recovering in its own name amount paid to insured, trial court had properly refused to dismiss insurer from case, since original claimant was in court so that there was no splitting of causes of action for purpose of trial and case was tried as if there were no insurance, with all rights of United States preserved. *United States v. Hill, 174 F.2d 61, 1949 U.S. App. LEXIS 3355 (5th Cir. 1949)*.

After insurer has paid part of loss, question of who is "real party in interest" under Rule 17(a) in diversity action against tortfeasor is mixed question of state substantive law and federal procedural law—state substantive law governing as to substantive right sought to be enforced and Rule 17(a) then governing on procedural question whether party having such right has instituted action or must be joined. *Gas Service Co. v. Hunt, 183 F.2d 417, 1950 U.S. App. LEXIS 2956 (10th Cir. 1950)*; *Virginia Electric & Power Co. v. Carolina Peanut Co., 186 F.2d 816, 1951 U.S. App. LEXIS 3671 (4th Cir. 1951)*; *McIntire v Davis, 246 F. Supp. 872, 9 Ohio Misc. 250, 9 Fed. R. Serv. 2d (Callaghan) 20A.71, Case 5 (SD Ohio 1965)*.

In federal courts insurer must assert in its own name its claim for loss up to amount paid under its policy, and insured must assert in his own name his claim for loss in excess of amount paid by insurer. *Gas Service Co. v. Hunt, 183 F.2d 417, 1950 U.S. App. LEXIS 2956 (10th Cir. 1950)*.

Fire insurer, which is entitled to enforce entire claim, is partial subrogator and real party in interest as to entire claim against agency and its parent corporation for unauthorized issuance of policy. *Glacier General Assurance Co. v. G. Gordon Symons Co., 631 F.2d 131, 30 Fed. R. Serv. 2d (Callaghan) 687, 1980 U.S. App. LEXIS 12925 (9th Cir. 1980)*.

Client was real party in interest, and not its insurer who paid underlying judgment, in legal malpractice action because client's payment of deductible created sufficient independent interest. *Ocean Ships, Inc. v. Stiles, 315 F.3d 111, 54 Fed. R. Serv. 3d (Callaghan) 1236, 2002 U.S. App. LEXIS 26734 (2d Cir. 2002)*.

In action to recover damages for death of decedent and for damage to his automobile resulting from collision, decedent's personal representative, not decedent's insurer which had paid property damage in full, was real party in interest, on theory that wrongful act causing both personal injury, or death, and property damage gives rise to but single cause of action and insurer was only partial subrogee. *Van Wie v. United States, 77 F. Supp. 22, 1948 U.S. Dist. LEXIS 2612 (D. Iowa 1948)*.

Where fire insurer had paid portion of property loss of individual plaintiff's property occasioned by alleged negligence of defendant, it became, as insurer-subrogee, owner of portion of substantive right to recover against tortfeasor and is real party in interest. *Farren v. Gas Service Co., 122 F. Supp. 536, 1954 U.S. Dist. LEXIS 3239 (D. Kan. 1954)*.

Insurer, after it has paid part of property loss, is real party in interest, under Rule 17(a), in action against tortfeasor. *St. Paul Fire & Marine Ins. Co. v. Peoples Natural Gas Co., 166 F. Supp. 11, 1 Fed. R. Serv. 2d (Callaghan) 280, 1958 U.S. Dist. LEXIS 3486 (W.D. Pa. 1958)*; *McIntire v Davis, 246 F. Supp. 872, 9 Ohio Misc. 250, 9 Fed. R. Serv. 2d (Callaghan) 20A.71, Case 5 (SD Ohio 1965)*; *Federated Mut. Implement & Hardware Ins. Co. v. Zimmerman, 33 F.R.D. 8, 7 Fed. R. Serv. (Callaghan) 2d, 323, 1963 U.S. Dist. LEXIS 10354 (D. Kan. 1963)*.

Insurer-subrogee qualifies as real party in interest where he has paid only part of loss. *Ward v. Franklin Equipment Co., 50 F.R.D. 93, 14 Fed. R. Serv. 2d (Callaghan) 456, 1970 U.S. Dist. LEXIS 12628 (E.D. Va. 1970)*.

In case of partial subrogation, insurer may be found to be real party in interest. *Armour Pharmaceutical Co. v. Home Ins. Co., 60 F.R.D. 592, 17 Fed. R. Serv. 2d (Callaghan) 1321, 1973 U.S. Dist. LEXIS 11448 (N.D. Ill. 1973)*.

Where it appears from pleadings that individual plaintiff is claiming $106,000 in damages, of which $27,000 has been paid to him by his insurance company, individual retains significant stake in litigation which qualifies him as real party in interest. *Collins v. General Motors Corp., 101 F.R.D. 1, 37 Fed. R. Serv. 2d (Callaghan) 1035, 1982 U.S. Dist. LEXIS 17685 (W.D. Pa. 1982)*.

Action may involve 2 real parties in interest, as is case with partial subrogation of claims. *Carpetland, U.S.A. v. J.L. Adler Roofing, Inc., 107 F.R.D. 357, 1985 U.S. Dist. LEXIS 16081 (N.D. Ill. 1985)*.

Rule 17(a) is independent authority for compulsory joinder of insurer who has paid part of plaintiff insured's loss; joinder, if feasible, is required regardless of whether Rule 19(a)(2)(i) or (ii) prerequisites have been satisfied. *Carpetland, U.S.A. v. J.L. Adler Roofing, Inc., 107 F.R.D. 357, 1985 U.S. Dist. LEXIS 16081 (N.D. Ill. 1985)*.

Where plaintiff brought negligence action against defendant to recover damages for injuries to decedent, insurer that paid some of decedent's medical expenses was partial subrogee and, as such, was real party in interest under *Fed. R. Civ. P. 17*. *Balistreri v. Richard E. Jacobs Group, Inc., 221 F.R.D. 602, 2004 U.S. Dist. LEXIS 11314 (E.D. Wis. 2004)*.

In action brought by insurer, as subrogee for two insureds, against security system provider seeking damages arising from provider's failure to maintain fire detection system in townhome of insureds' neighbor, *Fed. R. Civ. P. 17(a)* required that insureds be added as additional plaintiffs because they suffered damages beyond amount they were reimbursed by insurer and, thus, they were real parties in interest for additional losses not reimbursed by insurer. *Fed. Ins. Co. v. ADT Sec. Sys., 222 F.R.D. 578, 2004 U.S. Dist. LEXIS 15454 (N.D. Ill. 2004)*.

If subrogee has paid entire loss it is only real party in interest and must sue in its own name; in cases of partial subrogation, however, there are two real parties in interest and each may prosecute action. *In re Wuttke, 2 B.R. 362, 5 Bankr. Ct. Dec. (LRP) 1304, 22 Collier Bankr. Cas. (MB) 919, 1980 Bankr. LEXIS 5629 (Bankr. D.N.J. 1980)*.

Where plaintiff sub-subcontractor alleged a nondischargeability claim under 11 U.S.C.S. § 523(a)(4) against debtor subcontractor, plaintiff was real party in interest, even though contractor paid plaintiff what was owed under the construction contract, to assert claims against debtor for recovery of the $12,141 in unpaid invoices, treble damages, attorney fees, and costs, on condition that any recovery by plaintiff of $12,141 from debtor would be subject to trust in favor of contractor. McGill v. McGill, 2020 Bankr. LEXIS 3481 (Bankr. D. Colo. Dec. 7, 2020).

45. —Suit by subrogee or subrogor only

Either insured or insurer may sue in his own name for his portion of loss. State Farm Mut. Liability Ins. Co. v. United States, 172 F.2d 737, 1949 U.S. App. LEXIS 2767 (1st Cir. 1949); National Garment Co. v. New York, C. & S. L. R. Co., 173 F.2d 32, 1949 U.S. App. LEXIS 3853 (8th Cir. 1949); Kansas Electric Power Co. v. Janis, 194 F.2d 942, 1952 U.S. App. LEXIS 2880 (10th Cir. 1952).

Where there are two real parties in interest, insurer to extent of its payment and insured to extent of difference between payment received from insurer and whole loss, either one, in absence of objection, may maintain action against person primarily liable, insurer to the extent of its payment, insured to extent of whole loss; rule against splitting cause of action is for benefit of defendant and may be waived. National Garment Co. v. New York, C. & S. L. R. Co., 173 F.2d 32, 1949 U.S. App. LEXIS 3853 (8th Cir. 1949).

Although he has been partially reimbursed for loss, insured may sue in his own name for entire loss. J. P. (Bum) Gibbins, Inc. v. Utah Home Fire Ins. Co., 202 F.2d 469, 1953 U.S. App. LEXIS 3261 (10th Cir. 1953); Ford v. United Gas Corp., 254 F.2d 817, 1958 U.S. App. LEXIS 4113 (5th Cir.), cert. denied, *358 U.S. 824, 79 S. Ct. 40, 3 L. Ed. 2d 64, 1958 U.S. LEXIS 443 (1958)*.

In case of partial subrogation, there are two real parties in interest under Rule 17(a), and either party may bring suit—insurer-subrogee to extent that it has reimbursed subrogor or subrogor for either entire loss or only its unreimbursed loss; joinder may be appropriate but is not required by Rule 17(a) if it will destroy diversity jurisdiction. Virginia Electric & Power Co. v. Westinghouse Electric Corp., 485 F.2d 78, 17 Fed. R. Serv. 2d (Callaghan) 1103, 1973 U.S. App. LEXIS 7663 (4th Cir. 1973), cert. denied, *415 U.S. 935, 94 S. Ct. 1450, 39 L. Ed. 2d 493, 1974 U.S. LEXIS 1371 (1974)*.

If insured sues alone for entire loss, insurer as partial subrogee is not necessary party since, when insured alone sues for whole loss, controversy can completely and finally be settled without joinder of insurer subrogees and defendant will have only one suit to defend. Braniff Airways, Inc. v. Falkingham, 20 F.R.D. 141, 1957 U.S. Dist. LEXIS 4452 (D. Minn. 1957).

Partial subrogee may maintain action in federal court alone without joining indemnitee and other subrogees; pleadings, however, should disclose names of all real parties in interest in order that defendant may compel their joinder. St. Paul Fire & Marine Ins. Co. v. Peoples Natural Gas Co., 166 F. Supp. 11, 1 Fed. R. Serv. 2d (Callaghan) 280, 1958 U.S. Dist. LEXIS 3486 (W.D. Pa. 1958).

Insurer may sue in its own name to recover its portion of loss without joining other real parties in interest. St. Paul Fire & Marine Ins. Co. v. Peoples Natural Gas Co., 166 F. Supp. 11, 1 Fed. R. Serv. 2d (Callaghan) 280, 1958 U.S. Dist. LEXIS 3486 (W.D. Pa. 1958).

In action by owner of building for damages caused by defendant's faulty construction and negligent installation of skylight, owner of building was real party in interest and could maintain action against defendant notwithstanding fact that owner was reimbursed for most of his damage by insurance and insurers were partially subrogated to owner's claim against defendant; defendant could, however, move to compel joinder of insurance companies subrogees. Brown v. Fisher Skylights, Inc., 31 F.R.D. 532, 1962 U.S. Dist. LEXIS 5960 (D.N.Y. 1962).

Insurer, as partial subrogee, may sue in its own name to extent of its payment to insured. McIntire v Davis, 246 F. Supp. 872, 9 Ohio Misc. 250, 9 Fed. R. Serv. 2d (Callaghan) 20A.71, Case 5 (SD Ohio 1965).

Because insurer which paid only part of loss was viewed under West Virginia law as partial subrogee with only contingent interest in litigation, and not one in whose name action could be prosecuted, insurer was not "real party in interest" under Rule 17(a), and joinder of insurer could not be compelled under Rule 19, since status of parties and their interests were not such that joinder of insurer was required for just adjudication. *Cleaves v. De Lauder, 302 F. Supp. 36, 13 Fed. R. Serv. 2d (Callaghan) 283, 1969 U.S. Dist. LEXIS 9822 (N.D. W. Va. 1969)*.

Although plaintiff insured may object to joinder of insurer as party plaintiff on ground that it will prejudice jury against insured, nonjoinder of insurer which is real party in interest under state law is unacceptable method for curing prejudice, especially when no basis for that prejudice has been presented to court and nonjoinder would be in direct contravention of Rule 17(a). *Carpetland, U.S.A. v. J.L. Adler Roofing, Inc., 107 F.R.D. 357, 1985 U.S. Dist. LEXIS 16081 (N.D. Ill. 1985)*.

Action dismissed for lack of subject matter jurisdiction without prejudice to its being refiled in state court where reinsurer, having subrogation rights in suit, is real party in interest under Rule 17(a) and joinder of reinsurer destroys complete diversity. *State Sec. Ins. Co. v. Frank B. Hall & Co., 109 F.R.D. 99, 3 Fed. R. Serv. 3d (Callaghan) 1462, 1986 U.S. Dist. LEXIS 29904 (N.D. Ill. 1986)*.

46. —Relinquishment of rights by subrogee

In insured's action for damage to his truck allegedly caused by defendant, since under Missouri substantive law assignment of insurer-partial subrogee's subrogated claim back to its insured for purpose of suit had effect of reinstating and restoring in insured entire title to his original claim against alleged tortfeasor and of dispossessing or disseising insurer of any legal right to prosecute such claim by subrogation, insurer which had executed such assignment after its insured had instituted his action against alleged tortfeasor but before defendant moved to have insurer joined as party plaintiff was not real party in interest. *Petrikin v. Chicago, R. I. & P. R. Co., 15 F.R.D. 346, 1954 U.S. Dist. LEXIS 4243 (D. Mo. 1954)*.

While partial subrogee is real party in interest such subrogee can divest itself of such substantive equitable rights by waiving its rights in order to effect compromise settlement with insured; thus, insurer which, pursuant to its insurance contract with insured, paid part of insured's loss resulting from collapse of roof of ice skating rink and as part of settlement with insured waived its subrogation rights was not real party in interest in action by insured against defendant whose alleged negligence caused collapse of roof. *Johnston v. Timber Structures, Inc., 33 F.R.D. 25, 7 Fed. R. Serv. 2d (Callaghan) 321, 1963 U.S. Dist. LEXIS 10360 (E.D. Pa. 1963)*.

Joinder of insurer under Rule 17(a) is not appropriate where only insureds are named as plaintiffs and partially subrogated insurers have executed ratification agreement authorizing plaintiffs to prosecute action in their behalf and have agreed to be bound by results in action between plaintiffs and defendants, forever waiving any rights to pursue their subrogation rights outside that proceeding. *Hancotte v. Sears, Roebuck & Co., 93 F.R.D. 845, 34 Fed. R. Serv. 2d (Callaghan) 85, 1982 U.S. Dist. LEXIS 11788 (E.D. Pa. 1982)*.

47. Parties under contract made for benefit of another

Where proceeds of fire insurance policy taken out by vendee were payable to vendor and vendee as their interests might appear, under state law vendor was party for whose benefit contract of insurance was made, and in this capacity had substantive right to prosecute action against insurer to recover his interest protected by contract. *Capital Fire Ins. Co. v. Langhorne, 146 F.2d 237, 1945 U.S. App. LEXIS 2049 (8th Cir. 1945)*.

Where loan was made by three lenders in consideration of trust deed and assignment as collateral security and where trust deed and assignment were taken in name of only one of lenders, for sake of convenience, named lender had right to sue as real party in interest on behalf of other two lenders under Rule 17(a). *Jackson Mfg. Co. v. United States, 434 F.2d 1027, 26 A.F.T.R.2d (RIA) 5086, 14 Fed. R. Serv. 2d (Callaghan) 185, 1970-2 U.S. Tax Cas. (CCH) ¶ 9557, 1970 U.S. App. LEXIS 8771 (5th Cir. 1970)*.

District Court did not err in allowing plaintiffs to pursue lawsuit in their own names rather than in name of limited partnership they formed to develop housing project which was subject of instant action where plaintiffs were pursuing claims for damages incurred by them personally and although profits from project may have been intended to go to limited partnership that was subsequently formed, party in whose name contract has been made for benefit of another may sue in that person's own name without joining with him party for whose benefit action is brought. *Zimmerman v. First Federal Sav. & Loan Asso., 848 F.2d 1047, 25 Fed. R. Evid. Serv. (CBC) 1324, 1988 U.S. App. LEXIS 7553 (10th Cir. 1988)*.

Although local union appeared to have authority to seek judicial review of arbitral award because it had participated in arbitration, complaints should be amended to name national union with whom employer had negotiated the bargaining agreement as party. *American Postal Workers Union v. United States Postal Service, 861 F.2d 211, 129 L.R.R.M. (BNA) 2944, 1988 U.S. App. LEXIS 14750 (9th Cir. 1988)*.

Where sales management contract was also of beneficial interest to other salesmen, sales manager could nevertheless enforce it in its entirety, and provision regarding payment to salesmen was one claim so far as he was concerned, even though he would hold recovery for number of beneficial owners. *Coxhead v. Winsted Hardware Mfg. Co., 4 F.R.D. 448, 1945 U.S. Dist. LEXIS 1404 (D. Conn. 1945)*.

It would be immaterial whether employer had insurable interest in its employees' lives, where group insurance policy, issued to employer and insuring its employees against loss of life from accidental injuries, was made for benefit of its employees. *Fomby v. World Ins. Co., 115 F. Supp. 913, 1950 U.S. Dist. LEXIS 1956 (D. Ark. 1950)*.

In action by brokerage firm against tender offeror for failure to accept plaintiff's tender of securities, where, of shares tendered, approximately 9,000 belonged to firm and 21,000 to its customers, firm was proper plaintiff for all shares as party in whose name contract was made, and it could properly bring suit on customers' behalf. *Bache & Co. v. International Controls Corp., 324 F. Supp. 998, 14 Fed. R. Serv. 2d (Callaghan) 1349, Fed. Sec. L. Rep. (CCH) ¶ 92981, Fed. Sec. L. Rep. (CCH) ¶92981, 1971 U.S. Dist. LEXIS 13978 (S.D.N.Y. 1971)*.

In action for rescission of allegedly fraudulent sale of stock to plaintiff, where plaintiff had contributed $30,000 toward purchase and $15,000 had been contributed by four other individuals who agreed that all shares be received in plaintiff's name, plaintiff was real party in interest under Rule 17(a) provision concerning contract made for benefit of another. *Gordon v. Burr, 366 F. Supp. 156, 18 Fed. R. Serv. 2d (Callaghan) 1112, Fed. Sec. L. Rep. (CCH) ¶ 94221, Fed. Sec. L. Rep. (CCH) ¶94221, 1973 U.S. Dist. LEXIS 11098 (S.D.N.Y. 1973)*, aff'd in part and rev'd in part, *506 F.2d 1080, Fed. Sec. L. Rep. (CCH) ¶ 94874, 1974 U.S. App. LEXIS 5976 (2d Cir. 1974)*.

Purpose of provision of Rule 17(a) allowing party in whose name contract is made for benefit of another to sue, without joining party for whose benefit action is brought, was to protect right of promisee to sue, where he had such right under substantive law; thus, in case in which, under substantive law, promisee under contract may recover only nominal damages but it is donee-beneficiary who has enforceable right to recover compensatory damages for breach of contract made for its benefit, promisee is real party in interest only for recovery of nominal damages and suit must be brought in name of donee-beneficiary, under Rule 17(a), to recover compensatory damages. *United States v. Thomas B. Bourne Associates, 367 F. Supp. 919, 18 Fed. R. Serv. 2d (Callaghan) 436, 1973 U.S. Dist. LEXIS 10748 (E.D. Pa. 1973)*.

Real estate broker who entered into agreement with defendants, and who also entered into agreements with co-brokers in connection with agreement with defendants, was real party in interest in action brought by broker to recover brokerage commissions from defendants, where contract sued upon was made in plaintiff's name alone, and co-brokers were, at best, third party beneficiaries thereto. *Weniger v. Union Center Plaza Associates, 387 F. Supp. 849, 20 Fed. R. Serv. 2d (Callaghan) 332, 1974 U.S. Dist. LEXIS 11577 (S.D.N.Y. 1974)*.

In action brought against defendants for alleged securities violations and fraud in inducing plaintiff bank to make loan, plaintiff bank was real party in interest, notwithstanding that plaintiff bank had sold participation rights in loan to other banks, where plaintiff bank alleged that it was party with whom or in whose name contract had been made

for benefit of another and therefore might sue in its own name without joining parties for whose benefit action was brought. *Midland Nat'l Bank v. Cousins Properties, Inc., 68 F.R.D. 427, 22 Fed. R. Serv. 2d (Callaghan) 1117, 1975 U.S. Dist. LEXIS 16481 (N.D. Ga. 1975)*.

Under Rule 17(a) provision allowing party with whom or in whose name contract has been made for benefit of another to sue, plaintiff savings and loan association could maintain action as to claims for which plaintiff alleged that it entered into contracts with defendants on behalf of association members for services since plaintiff was party to such contracts, notwithstanding claim of defendants that as to such claims borrowers who paid fees, rather than plaintiff association, were real parties in interest. *City Federal Sav. & Loan Asso. v. Crowley, 393 F. Supp. 644, 1975 U.S. Dist. LEXIS 12695 (E.D. Wis. 1975)*.

FRCP 17(a) challenge of provider of billing and collection services for telephone information provider must fail, although first information provider agreement was signed by another company, because clause added to end of agreement explains that company was acting as management company for new and yet unnamed corporation being formed, which is now real party in interest. *Audiotext Communs. Network v. US Telecom, 912 F. Supp. 469, 1995 U.S. Dist. LEXIS 19694 (D. Kan. 1995)*.

Breach-of-contract claim need not be dismissed under *FRCP 17(a)*, despite argument that development company through which individual plaintiff conducts business is real party in interest, because plaintiff has set forth sufficient allegations to support his claim that there is direct employment relationship between defendant contracting party and himself. *Tagare v. NYNEX Network Sys. Co., 921 F. Supp. 1146, 77 Fair Empl. Prac. Cas. (BNA) 919, 1996 U.S. Dist. LEXIS 4538 (S.D.N.Y. 1996)*.

In contract action, sign maker may, under *FRCP 17(a)*, proceed as plaintiff in this case, even though its only 2 board members signed letter contract indicating that maker, “on behalf of entity to be formed” is purchaser of sign manufacturer’s lighting division, where document was written on maker’s letterhead and no other entity was ever formed, because only maker can be considered other contracting party under these circumstances. *TecArt Indus. v. Nat'l Graphics, Inc., 181 F. Supp. 2d 451, 2002 U.S. Dist. LEXIS 800 (D. Md. 2002)*.

Loan servicer for trustee of investment trust, which was putative assignee of bankruptcy debtor’s mortgage, had standing as real party in interest under *Fed. R. Civ. P. 17(a)* to seek relief from bankruptcy stay, since mortgage note was endorsed in blank and thus servicer’s possession of note and mortgage instrument was sufficient to establish servicer’s right to enforce mortgage, even though such enforcement was on behalf of trust. *In re Woodberry, 383 B.R. 373, 65 U.C.C. Rep. Serv. 2d (CBC) 228, 2008 Bankr. LEXIS 240 (Bankr. D.S.C. 2008)*.

Unpublished decision: Creditors were real parties in interest entitled to pursue claims against bankruptcy debtor related to investment contracts between debtor and trust company which was custodian of creditors’ individual retirement accounts, since creditors were express and intended beneficiaries of contracts and thus had right to sue to enforce terms of contracts. *Gelber v. Jensen-Ames (In re Jensen-Ames), 2011 Bankr. LEXIS 1207 (Bankr. W.D. Wash. Mar. 29, 2011)*.

48. Receiver

FDIC as receiver was not real party in interest for purposes of seeking order barring nonsettling defendants from seeking contribution or indemnity from nonparty; such claims may involve consideration of many matters such as personal defenses, compulsory counterclaims, and so forth, which could not be asserted by or against FDIC. *Federal Deposit Ins. Corp. v. Geldermann, Inc., 975 F.2d 695, 23 Fed. R. Serv. 3d (Callaghan) 792, 1992 U.S. App. LEXIS 21247 (10th Cir. 1992)*.

Through equity receiver, investment fund is real party in interest in action against former legal representative based on alleged negligence, legal malpractice, and breach of fiduciary duty, whether fund is deemed unincorporated association which may sue to enforce substantive rights, or commodity pool cognizable as separate legal entity. *Johnson v. Miller, 596 F. Supp. 768, 1984 U.S. Dist. LEXIS 22780 (D. Colo. 1984)*.

49. RICO defendants

Claim of defendants found liable for violation of civil RICO statute (*18 USCS § 1962(c)*), raised during remedy phase of litigation, that government was improperly attempting to assert rights of third parties by bringing RICO action are dismissed, because, although certain victims of defendants' racketeering acts may receive partial restitution as result of government's prosecution of case, government brought action to vindicate its own interest in ensuring that RICO statute is enforced. *United States v. Local 1804-1, International Longshoremen's Ass'n, 831 F. Supp. 177, 1993 U.S. Dist. LEXIS 11584 (S.D.N.Y. 1993)*, modified, *United States v. Carson, 52 F.3d 1173, 149 L.R.R.M. (BNA) 2001, 130 Lab. Cas. (CCH) ¶11313, 1995 U.S. App. LEXIS 8457 (2d Cir. 1995)*.

Defendant sued for civil RICO violations waived real party in interest defense since he was on notice nearly two years before trial that plaintiff parent corporation might seek reimbursement for insurance premiums it paid to defendant on behalf of health maintenance organizations owned or managed by its subsidiary, but waited until pretrial conference one week before trial to object and did not convincingly demonstrate that he could face double liability from plaintiff's subsidiary or HMOs. *United HealthCare Corp. v. American Trade Ins. Co., 88 F.3d 563, 35 Fed. R. Serv. 3d (Callaghan) 269, RICO Bus. Disp. Guide ¶9062, 1996 U.S. App. LEXIS 15764 (8th Cir. 1996)*.

50. Spouse or ex-spouse

Motion of defendant to dismiss, for lack of diversity, action brought by plaintiff husband to recover damages for personal injuries to himself and wife, on ground that wife was real party in interest and consequently diversity was destroyed by failure to join her, was denied, since under law of Texas husband alone possessed substantive right of action for personal injuries to his wife and alone was real party in interest in whose name such action should be brought. *Galarza v. Union Bus Lines, Inc., 38 F.R.D. 401, 10 Fed. R. Serv. 2d (Callaghan) 326, 1965 U.S. Dist. LEXIS 10015 (S.D. Tex. 1965)*, aff'd, *369 F.2d 402, 1966 U.S. App. LEXIS 4228 (5th Cir. 1966)*.

Where after first wife filed claim with life insurer and second wife named as beneficiary of policy brought action for proceeds of policy on husband's life, insurer brought interpleader suit against both wives, and there was no proof that second marriage was bigamous and fact that second marriage took place was uncontested, second wife was clearly real party in interest under Rule 17(a). *Aetna Life Ins. Co. v. Harley, 365 F. Supp. 1210, 17 Fed. R. Serv. 2d (Callaghan) 1534, 1973 U.S. Dist. LEXIS 11329 (N.D. Ga. 1973)*.

Divorced wife is only proper party under Rule 17(a) to pursue claim for medical benefits under terms of employee welfare benefit plan, and ex-husband's claim is dismissed where ex-husband is neither participant nor beneficiary under both definitions of employer-sponsored plan and of Employee Retirement Income Security Act of 1975 (*29 USCS § 1132*). *Sublett v. Premier Bancorp Self Funded Medical Plan, 683 F. Supp. 153, 1988 U.S. Dist. LEXIS 3321 (M.D. La. 1988)*.

Where inmate allegedly fell from top bunk, dismissal of wife's claims was warranted because wife lacked standing to sue in her own name since (1) there were no allegations relating to any injury allegedly suffered by wife as result of inmate's fall from top bunk, and (2) although wife could bring suit on inmate's behalf through wife's power of attorney for inmate, wife could not maintain suit in wife's own name or seek relief for herself on this ground. *Nickens v. District of Columbia, 694 F. Supp. 2d 10, 2009 U.S. Dist. LEXIS 130958 (D.D.C. 2009)*.

Unpublished decision: In action under *11 USCS § 523(a)(5)* and (a)(15), court could not consider nondischargeability of Chapter 7 debtor's debts to third-party creditors given that they were not plaintiffs in action and did not ratify former spouse to represent their interests under *Fed. R. Civ. P. 17*, but former spouse was real party in interest to extent that she sought determination that his obligations to her were nondischargeable. *McFadden v. Putnam (In re Putnam), 2012 Bankr. LEXIS 6117 (Bankr. E.D. Cal. Aug. 30, 2012)*.

Cause of action for elder abuse that alleged that defendants directed against tenant's husband physical abuse, emotional abuse and neglect and endangerment failed as real party in interest was husband, who was non-party. Dang v. Oakland Police Dep't, *Dang v. Oakland Police Dep't, 2014 U.S. Dist. LEXIS 25461 (N.D. Cal. Feb. 26, 2014)*.

Even if mortgagor was uncertain about his legal claims, he had knowledge of facts essential to his claims against mortgagee when it allegedly failed to uphold its end of the loan modification agreement in 2009, and, at minimum, any doubt about these facts should have been dispelled when mortgagee sought and obtained foreclosure on his property prior to filing his second bankruptcy petition; he was not real party in interest to bring these claims, but before court could dismiss his claims for monetary relief, Trustee had to be notified and given opportunity to participate in case. Grillo v. JPMorgan Chase & Co., *Grillo v JPMorgan Chase & Co., 2014 U.S. Dist. LEXIS 73880 (DC Colo 2014)*.

51. State or local government, agency or official

School district which suffered loss when its underinsured property was destroyed was real party in interest in action against defendant corporation which processed statistical data regarding appraisal of school district's property for firm which had contracted with school district to appraise value of school district's destroyed property, where school district represented that defendant processor of data would be afforded protection against duplicate litigation by firm it had processed data for. *Independent School Dist. v. Statistical Tabulating Corp., 359 F. Supp. 1095, 17 Fed. R. Serv. 2d (Callaghan) 455, 1973 U.S. Dist. LEXIS 13414 (N.D. Ill. 1973)*.

For purposes of action brought by county employees under Fair Labor Standards Act alleging sex-based wage discrimination, County Clerk, Sheriff, and Circuit Clerk who made budgetary/compensation decisions complained of and who would be liable for any discrimination found to have occurred are real parties defendant. *Fury v. County Court of Wood County, 608 F. Supp. 198, 39 Empl. Prac. Dec. (CCH) ¶35913, 37 Fair Empl. Prac. Cas. (BNA) 1881, 104 Lab. Cas. (CCH) ¶34785, 27 Wage & Hour Cas. (BNA) 311, 1985 U.S. Dist. LEXIS 21891 (S.D. W. Va. 1985)*.

Declaratory judgment action brought by plaintiffs, state university and its athletic council, against defendants, former football coach and his company, that defendants removed pursuant to *28 USCS § 1441(a)* based on diversity of jurisdiction under *28 USCS § 1332* was remanded pursuant to *28 USCS § 1447(c)* because university's presence in case was as real party in interest under *Fed. R. Civ. P. 17(a)*, not as fraudulently joined party, so its citizenship could not be overlooked, and instead, its presence as non-citizen destroyed diversity of citizenship, precluded court from obtaining subject matter jurisdiction, and compelled remand; court denied plaintiffs' motion for costs and expenses under § 1447(c) because question of propriety of removal was justiciable. *Kan. State Univ. v. Prince, 673 F. Supp. 2d 1287, 2009 U.S. Dist. LEXIS 120543 (D. Kan. 2009)*.

Plaintiff could not bring civil rights action against New York State Office of District Attorney because office did not have legal existence separated from district attorney and office was not entity that could be sued. *Woodward v. Office of DA, 689 F. Supp. 2d 655, 2010 U.S. Dist. LEXIS 13933 (S.D.N.Y. 2010)*.

52. Trustee of express trust

Trial court erred in allowing employee in suit against third party to recover as trustee of compensation carrier amount paid by carrier to employee since employee was not trustee of express trust in sense of Rule 17(a). *Sunray Oil Corp. v. Allbritton, 187 F.2d 475, 1951 U.S. App. LEXIS 2265 (5th Cir.)*, reh'g denied, *188 F.2d 751, 1951 U.S. App. LEXIS 3102 (5th Cir. 1951)*, cert. denied, *342 U.S. 828, 72 S. Ct. 51, 96 L. Ed. 626, 1951 U.S. LEXIS 1624 (1951)*.

In interpleader and injunctive relief actions brought by trustees of express trust into which trustors had paid 10 percent federal tax on their telephone bills, trustees were real party in interest by virtue of Rule 17(a), but Rule 17(a) meant only that trustees had real interest in trust fund and it did not give them standing. *Kent v. Northern California Regional Office of American Friends Service Committee, 497 F.2d 1325, 34 A.F.T.R.2d (RIA) 5039, 1974-1 U.S. Tax Cas. (CCH) ¶ 16148, 74-1 U.S. Tax Cas. (CCH) ¶16148, 1974 U.S. App. LEXIS 8686 (9th Cir. 1974)*.

In suit by trustees of business trust against bank for breach of contract court would look only to terms of Declaration of Trust, provisions of promissory note making promissory note specifically payable to order of trustees, and

Federal Rules of Civil Procedure to determine identity of real parties in interest; citizenship of plaintiff trustees would be determinative for purposes of diversity jurisdiction. *Lee v. Navarro Sav. Asso., 597 F.2d 421, 27 Fed. R. Serv. 2d (Callaghan) 1178, 1979 U.S. App. LEXIS 13890 (5th Cir.)*, reh'g denied, *601 F.2d 586 (5th Cir. 1979)*, aff'd, *446 U.S. 458, 100 S. Ct. 1779, 64 L. Ed. 2d 425, 29 Fed. R. Serv. 2d (Callaghan) 500, 1980 U.S. LEXIS 35 (1980)*.

Compliance officer of restitution fund established by state court judgment to remedy violations of state law by corporation engaged in pyramid sales scheme is "trustee of an express trust" within meaning of Rule 17(a), and, as such, is real party in interest for purposes of class action litigation. *Piambino v. Bailey, 610 F.2d 1306, 29 Fed. R. Serv. 2d (Callaghan) 370, Fed. Sec. L. Rep. (CCH) ¶ 97275, Fed. Sec. L. Rep. (CCH) ¶97275, 1980 U.S. App. LEXIS 20757 (5th Cir.)*, reh'g denied, *618 F.2d 1390 (5th Cir. 1980)*, cert. denied, *449 U.S. 1011, 101 S. Ct. 568, 66 L. Ed. 2d 469, 1980 U.S. LEXIS 4109 (1980)*.

Leave to amend complaint and substitute separate trustee was appropriate in residential mortgage-backed securities case because National Credit Union Administration did not unduly delay request while pursuing derivative standing theory in good faith and substitution was merely formal after amendment. *NCUA Bd. v. Deutsche Bank Nat'l Trust Co., 410 F. Supp. 3d 662, 104 Fed. R. Serv. 3d (Callaghan) 1565, 2019 U.S. Dist. LEXIS 178263 (S.D.N.Y. 2019)*.

In action for breach of sales management contract brought against corporation by former sales manager, where it appeared that other salesmen were beneficially interested in performance of contract and in recovery of damages for its breach, plaintiff was real party in interest as to each salesman's claim whether or not he be considered trustee of express trust. *Coxhead v. Winsted Hardware Mfg. Co., 4 F.R.D. 448, 1945 U.S. Dist. LEXIS 1404 (D. Conn. 1945)*.

In action brought pursuant to § 301 of Labor Management Relations Act (*29 USCS § 185*) against employer for alleged violation of trust agreements, trustees, not trust funds, were entitled to bring action, where trusts themselves were not legal entities with capacity to sue, nor unincorporated associations with capacity to prosecute action under Rule 17(b), and where trust fund agreements themselves designated trustees as appropriate parties to sue to recover unpaid contributions. Carpenters & Millwrights Health Ben. *Carpenters & Millwrights Health Ben. Trust Fund v. Domestic Insulation Co., 387 F. Supp. 144, 19 Fed. R. Serv. 2d (Callaghan) 972, 88 L.R.R.M. (BNA) 2618, 76 Lab. Cas. (CCH) ¶10700, 1975 U.S. Dist. LEXIS 14485 (D. Colo. 1975)*.

Successor trustees were real parties in interest in action brought by prior trustee alleging breach of fiduciary duties by former trustees where trust instrument gave board of directors of corporation power to appoint successor trustees for profit sharing trust and court was satisfied that there had been no abuse of that power. *Blackmar v. Lichtenstein, 468 F. Supp. 370, 1979 U.S. Dist. LEXIS 13359 (E.D. Mo.)*, aff'd, *603 F.2d 1306, 1 Employee Benefits Cas. (BNA) 1679, 1979 U.S. App. LEXIS 12293 (8th Cir. 1979)*.

In action brought by union and employee benefit funds to enforce covenants of collective bargaining agreement under Labor Management Relations Act, there is no merit to defendant employers' assertion that neither funds nor union are real parties in interest and that only trustees of funds can be considered proper parties to such action. *International Union of Bricklayers & Allied Craftsmen, Local #1 v. Menard & Co. Masonry Bldg. Contractors, 619 F. Supp. 1457, 1985 U.S. Dist. LEXIS 14836 (D.R.I. 1985)*.

If it is determined that bond resolution gives bank power to assert claims as trustee of an express trust under Rule 17(a), it follows that bank has standing to bring tort claims on behalf of bondholders. *In re Washington Public Power Supply System Sec. Litigation, 623 F. Supp. 1466, Fed. Sec. L. Rep. (CCH) ¶ 92465, Fed. Sec. L. Rep. (CCH) ¶92465, 1985 U.S. Dist. LEXIS 13269 (W.D. Wash. 1985)*.

Bank, as trustee for purchasers of industrial revenue bonds, lacks standing to pursue negligence claims against director of bankrupt guarantor, where no language in bond indenture confers standing to assert bondholders' tort claims, because *FRCP 17(a)* does not support proposition that all trustees, regardless of terms of respective trust

indentures, may bring any type of suit on behalf of trust beneficiaries. *Premier Bank v. Tierney, 114 F. Supp. 2d 877, 2000 U.S. Dist. LEXIS 14446 (W.D. Mo. 2000)*.

National banking association as trustee for investors in pool of mortgages, rather than servicer of mortgage package, was real party in interest under *FRCP 17*, and, thus, dismissal of association's action against corporations that sold package to investors was not warranted, although service agreement gave servicer power and authority to take certain actions in servicing loans, where association simply contractually delegated some of its duties to servicer, it was holder of legal title to mortgage package, and it had power and obligation to sue on behalf of investors. *LaSalle Bank Nat'l Ass'n v. Nomura Asset Capital Corp., 180 F. Supp. 2d 465, 2001 U.S. Dist. LEXIS 15537 (S.D.N.Y. 2001)*.

Plaintiff investment advisor, which suggested that trustee could be substituted as plaintiff under *Fed. R. Civ. P. 17(a)(3)*, would not be permitted to amend its complaint pursuant to *Fed. R. Civ. P. 15(a)(2)* without formal motion to amend. *Braddock Fin. Corp. v. Wash. Mut. Bank, 637 F. Supp. 2d 924, 2009 U.S. Dist. LEXIS 29818 (D. Colo. 2009)*.

Plaintiff could bring claim on behalf of trust because he was trust representative, and trust owned shares in question; plaintiff could bring suit in his own name on behalf of trust. *Heine v. Streamline Foods, Inc., 805 F. Supp. 2d 383, 2011 U.S. Dist. LEXIS 83452 (N.D. Ohio 2011)*.

Unpublished decision: Corporation could not maintain claim as trustee on behalf of express business trust because purported business trust did not exist; Montana law dictated that express trusts depended for their creation upon clear and direct expression of intent by trustor established by evidence that was practically free from doubt, and corporation could not provide such evidence. *Olympic Coast Inv., Inc. v. Seipel, 208 Fed. Appx. 569, 2006 U.S. App. LEXIS 29598 (9th Cir. 2006)*, app. after remand, remanded, *337 Fed. Appx. 702, 2009 U.S. App. LEXIS 15340 (9th Cir. 2009)*.

As matter of law, bank, as REMIC trustee, was holder of debtor's mortgage and was proper plaintiff in foreclosure action even where litigation authority was delegated to special servicer. Thus, assuming that it obtained title to debtor's note and mortgage by assignment, its claim enjoyed secured status. *Stephens v. Nationstar Mortg. LLC (In re Stephens), 2016 Bankr. LEXIS 853 (Bankr. E.D. Pa. Mar. 14, 2016)*.

Diversity of citizenship existed in suit brought by individual trustees because their citizenship as real parties in interest controlled and their assertion of derivative claims on behalf of family-owned company, which was indispensable party, did not affect diversity because company would be realigned as plaintiff; removing defendant could enforce forum-selection agreement against trustees in representative capacity. *Rudd v. Branch Banking & Trust Co., 2014 U.S. Dist. LEXIS 190576 (N.D. Ala. Nov. 14, 2014)*.

53. Trustee in bankruptcy or reorganization; liquidator

Trustee of bank in liquidation to which life insurance policies had been assigned by insured is proper party to sue for benefits due under policies. *Lincoln Nat'l Life Ins. Co. v. Horwich, 115 F.2d 892, 1940 U.S. App. LEXIS 3020 (7th Cir. 1940)*.

Since corporate reorganization trustee, appointed pursuant to former Bankruptcy Act, §§ 101 et seq. (former 11 USCS §§ 501 et seq.), had no title to claims against trustee under trust indenture, created by corporate debtor, for failure to prevent debtor from violating negative pledge covenants of indenture, and thus damage debenture holders, though knowing that corporation was insolvent, it was not "real party in interest" by whom such claims should be asserted. *Clarke v. Chase Nat'l Bank, 137 F.2d 797, 53 Am. B.R. (n.s.) 722, 1943 U.S. App. LEXIS 2898 (2d Cir. 1943)*.

Foreign liquidator of insurance company is proper party to bring suit against agent for recovery of withheld premiums. *Robertson v. Malone, 190 F.2d 756, 1951 U.S. App. LEXIS 2495 (5th Cir. 1951)*.

Where plaintiff brought suit on his own behalf for antitrust violation alleged to have arisen prior to his filing for bankruptcy, he did not have standing to sue and cause of action belonged to trustee in bankruptcy. *Burkett v. Shell Oil Co., 448 F.2d 59, 1971 Trade Cas. (CCH) ¶73697, 1971 U.S. App. LEXIS 8116 (5th Cir. 1971)*.

Bank in receivership has no standing to bring claim, where state law designates receiver as "real party in interest." *Blask v. Sowl, 309 F. Supp. 909, 1967 U.S. Dist. LEXIS 11766 (D. Wis. 1967)*.

Bankruptcy trustee was real party in interest of debtor's employment discrimination claim since debtor filed for bankruptcy after evens giving rise to her discrimination claims occurred. *Wieburg v GTE Southwest, Inc. (2001, CA5 Tex) 272 F3d 302, 38 BCD 196, 87 BNA FEP Cas 445, 81 CCH EPD P 40839, 51 FR Serv 3d 405*, motion gr, dismd, motion den *(2002, ND Tex) 2002 US Dist LEXIS 18141*, affd *(2003, CA5 Tex) 71 Fed Appx 440* and (criticized in *Kirk v Pope (2007, Miss) 973 So 2d 981*).

Although taxpayer lacked prudential standing when he filed action to recover overpayment of federal income taxes because bankruptcy estate was real party in interest at that time, court could not conclude on record whether taxpayer may have had recourse pursuant to *Fed. R. Civ. P. 17(a)* to cure his prudential standing defect because of any understandable mistake; therefore, issue was remanded to district court for appropriate factual findings. *Dunmore v. United States, 358 F.3d 1107, 93 A.F.T.R.2d (RIA) 2004-649, Bankr. L. Rep. (CCH) ¶80042, 57 Fed. R. Serv. 3d (Callaghan) 1052, 2004 U.S. App. LEXIS 1328 (9th Cir. 2004)*.

Bankruptcy trustee had exclusive standing to prosecute False Claims Act (FCA) lawsuit because debtor failed to disclose during bankruptcy proceedings existence of his FCA qui tam action, such action was part of bankruptcy estate, and trustee was real party in interest. *United States ex rel. Spicer v. Westbrook, 751 F.3d 354, 59 Bankr. Ct. Dec. (LRP) 128, 71 Collier Bankr. Cas. 2d (MB) 840, 2014 U.S. App. LEXIS 8432 (5th Cir. 2014)*.

In action by trustee in bankruptcy for rents due plaintiff as mortgagee in possession of leased premises, trustee in bankruptcy was "real party in interest" although legal title to premises was in bank. *Malamut v. Haines, 51 F. Supp. 837, 1943 U.S. Dist. LEXIS 2271 (D. Pa. 1943)*.

Although trustee in bankruptcy authorized attorneys for debtor in pending suit to prosecute suit, such fact did not make trustee the party in interest. *American Foods, Inc. v. Dezauche, 74 F. Supp. 681, Bankr. L. Rep. (CCH) ¶56046, 1947 U.S. Dist. LEXIS 1921 (D.N.Y. 1947)*.

Defendant in securities fraud action is not entitled to dismissal of complaint on grounds that plaintiffs are not real parties in interest because real party in interest, permanent liquidator of estate appointed in Canada, had ratified action, and, therefore, defendant is protected from multiple liability. *Fund of Funds, Ltd. v. Vesco, 22 Fed. R. Serv. 2d (Callaghan) 201, Fed. Sec. L. Rep. (CCH) ¶ 95633, 1976 U.S. Dist. LEXIS 14392 (S.D.N.Y. June 28, 1976)*.

Ancillary liquidator of subcontractor's surety is sole real party in interest in counterclaim against contractor who sued subcontractor's surety for damages arising out of subcontractor's alleged failure to perform on contractor's project, and counterclaim must be prosecuted in liquidator's name. *Professional Constr. Consultants, Inc. v. Grimes, 552 F. Supp. 539, 1982 U.S. Dist. LEXIS 16291 (W.D. Okla. 1982)*.

Substitution of bankruptcy trustee in pending personal injury action for former bankruptcy debtor was warranted since trustee was real party in interest in action which was property of bankruptcy estate which only trustee could pursue, and substitution was merely formal and did not alter factual allegations. Copelan v. Techtronics Indus. Co.. Ltd., *Copelan v Techtronics Indus. Co.. Ltd. (2015, SD Cal), 95 F. Supp. 3d 1230 (March 27, 2015)*.

Substitution of bankruptcy trustee as plaintiff in breach of contract action against corporation for shareholders whose derivative action was dismissed is proper, where corporation is not prejudiced, trustee has standing, claims of trustee and shareholders are identical, reasonable amount of time has not yet elapsed, and shareholders have been found not to be real parties in interest. *Nagle v. Commercial Credit Business Loans, Inc., 102 F.R.D. 27, 38 Fed. R. Serv. 2d (Callaghan) 476, 1983 U.S. Dist. LEXIS 12609 (E.D. Pa. 1983)*.

Bankruptcy trustee may be substituted for subcontractor suing for value of his work performed, even though neither trustee nor subcontractor offers any explanation for waiting more than 16 months prior to filing motion to substitute, where defendants will not be prejudiced by substitution, because subcontractor's creditors will be left without remedy if substitution is denied. *Rousseau v. Diemer, 24 F. Supp. 2d 137, 1998 U.S. Dist. LEXIS 20934 (D. Mass. 1998)*.

Title VII case was dismissed for lack of standing because all of employee's Equal Employment Opportunity (EEO) complaints were raised prior to or during his bankruptcy proceeding and, therefore, were property of bankruptcy estate pursuant to *11 USCS § 541(a)(1)*, and employee's initial contacts with EEO counselor established his awareness of causes of action prior to or during bankruptcy proceeding; thus, trustee was real party in interest under *Fed. R. Civ. P. 17(a)*. *Byrd v. Potter, 306 B.R. 559, 2002 U.S. Dist. LEXIS 27330 (N.D. Miss. 2002)*.

Employer's motion to dismiss complaint for lack of standing and pursuant to *Fed. R. Civ. P. 12(b)(6)* was denied because bankruptcy trustee's ratification agreement was valid transfer to employee of right to prosecute this cause of action in her own name under *Fed. R. Civ. P. 17(a)*; therefore, ratification agreement should be enforced, and employee should be allowed to prosecute case in her name with requirement that proceeds of case, if any, would first inure to benefit of her bankruptcy estate. *Jenkins v. Wright & Ferguson Funeral Home, 215 F.R.D. 518, 92 Fair Empl. Prac. Cas. (BNA) 44, 2003 U.S. Dist. LEXIS 9046 (S.D. Miss. 2003)*.

Bank's motion to reinstate order substituting bankruptcy trustee as proper party plaintiff was granted where (1) debtor never alleged that debtor brought action in his own name as result of honest and understandable mistake because of difficulty in determining correct party to bring action, (2) because cause of action belonged to debtor at time of filing of bankruptcy petition, action was property of bankruptcy estate and could have only been prosecuted by trustee of bankruptcy estate, and (3) debtor had no right to proceed on his cause of action in any forum and instead, claim could have only been prosecuted by trustee of bankruptcy estate, real party in interest under *Fed. R. Civ. P. 17(a)*. *James v. Trustmark Nat'l Bank, 298 B.R. 270, 2003 U.S. Dist. LEXIS 16424 (N.D. Miss. 2003)*.

Former employer was entitled to summary judgment in former employee's employment discrimination action because employee was cognizant of her claims before she filed for bankruptcy, from which employee received discharge, and under *Fed. R. Civ. P. 17(a)* bankruptcy trustee, not employee, was real party in interest; employee had sufficient time to seek reopening of her bankruptcy case or joinder of trustee. *Bexley v. Dillon Cos., 17 Am. Disabilities Cas. (BNA) 1745, 2006 U.S. Dist. LEXIS 23544 (D. Colo. Mar. 23, 2006)*.

Summary judgment based on *Fed. R. Civ. P. 17(a)* was not warranted where trustee, not employee, was real party in interest to action because filing of bankruptcy petition created bankruptcy estate in which trustee gained control over all property of estate, including all legal or equitable interest of debtor in property as of commencement of bankruptcy case under *11 USCS § 541(a)*, and employee's claims against corporations accrued prior to her filing for bankruptcy. *EEOC v. Outback Steak House of Fla., Inc., 90 Empl. Prac. Dec. (CCH) ¶42998, 101 Fair Empl. Prac. Cas. (BNA) 1201, 2007 U.S. Dist. LEXIS 62996 (D. Colo. Aug. 27, 2007)*.

Under *Fed. R. Civ. P. 17(a)* and *21*, trustee was substituted for employee, where employee/debtor lacked standing and employee's actions in filing discrimination lawsuit against his employer and in failing to disclose it to bankruptcy trustee were his own post-petition actions and were not attributed to trustee as proper party in interest, because refusing to permit substitution of trustee as real party in interest would represent significant detriment to trustee and to employee's creditors, while at same time permitting employer to receive possible windfall by virtue of not being held accountable for its allegedly illegal actions. *Canterbury v. Federal-Mogul Ignition Co., 483 F. Supp. 2d 820, 2007 U.S. Dist. LEXIS 28437 (S.D. Iowa 2007)*.

In concluding that state Commissioner of Insurance, in his capacity as liquidator of state insurer, was not alter ego of state, and thus was not protected by Eleventh Amendment immunity, court determined that impact of judgment, whether obtained in state or federal court, would not have impacted state treasury, that case was primarily for benefit of insurer's policyholders and creditors, and that state law, specifically *N.C. Gen. Stat. § 58-30-71*, did not bar counterclaim against Commissioner if adverse parties contended that insurer owed them money; moreover,

Commissioner was not real party in interest under Fed. R. Civ. P. 17(a), because his limited capacity of liquidator merely allowed him to oversee liquidation and disposition of insurer's assets, which did not support conclusion that he was entitled to immunity as state's alter ego. North Carolina ex rel. Long v. Blackburn, 492 F. Supp. 2d 525, 2007 U.S. Dist. LEXIS 47588 (E.D.N.C. 2007), transferred, 2007 U.S. Dist. LEXIS 92131 (E.D.N.C. Dec. 14, 2007).

In plaintiff borrowers' putative class suit challenging adjustable rate mortgage under federal and state laws, although certain borrowers had transferred their interest in action to their estate by declaring bankruptcy, such assignment did not preclude trustee from ratifying borrowers' continued pursuit of their cause of action such that they were real party in interest. Jordan v. Paul Fin., LLC, 285 F.R.D. 435, 83 Fed. R. Serv. 3d (Callaghan) 520, 2012 U.S. Dist. LEXIS 119899 (N.D. Cal. 2012).

Fact that bankruptcy debtor admitted that portion of deposits that debtor alleged defendant bank had not credited to particular account belonged to debtor's liquidators did not alter fact that debtor was party in interest under Fed. R. Civ. P. 17(a) because debtor was party who allegedly made such deposits, as well as party who maintained account to which such deposits allegedly were never properly credited. Hechinger Inv. Co. of Del., Inc. v. Allfirst Bank (In re Hechinger Inv. Co. of Del., Inc.), 282 B.R. 149, 2002 Bankr. LEXIS 774 (Bankr. D. Del. 2002).

Where defendants in avoidance action under 11 USCS § 544(b) negotiated numerous extensions to answer bankruptcy trustee's complaint without raising issue of trustee's capacity to sue, defendants waived their right to assert, almost year in to proceeding, that trustee was not real party in interest under Fed. R. Civ. P. 17(a), made applicable to adversary proceeding under Fed. R. Bankr. P. 7017; further, even if trustee lacked capacity because complaint was filed after liquidating plan was confirmed but before "effective" date of plan, any lack of capacity was cured on effective date of plan and through trustee's late filing of amended complaint. Reynolds v. Feldman (In re Unger & Assocs.), 292 B.R. 545, 2003 Bankr. LEXIS 568 (Bankr. E.D. Tex. 2003).

In trustee's case that was brought pursuant to 11 USCS § 544 seeking to set aside fraudulent transfer, dismissal was entered in favor of several shareholders because action was time barred by 11 USCS § 546; because trustee was sole party in interest in case, substitution of creditor under Fed. R. Civ. P. 17 would not work to save action from dismissal. Barber v. Westbay (In re Integrated Agri, Inc.), 313 B.R. 419, 2004 Bankr. LEXIS 1109 (Bankr. C.D. Ill. 2004).

Chapter 13 debtor had no standing to assert avoidance powers under fraudulent transfer provisions of 11 USCS § 548(a); under Fed. R. Civ. P. 17 and Fed. R. Bankr. P. 7017, trustee could ratify, join, or seek substitution as plaintiff in adversary and, under 11 USCS § 327(e), could employ debtor's counsel as special counsel to prosecute case. Ryker v. Current (In re Ryker), 315 B.R. 664, 52 Collier Bankr. Cas. 2d (MB) 1793, 2004 Bankr. LEXIS 1546 (Bankr. D.N.J. 2004).

Unpublished decision: District court properly granted judgment on pleadings to credit union after finding that plaintiff was not real party in interest and, therefore, lacked standing to prosecute claims because (1) plaintiff filed for bankruptcy protection after her claims against credit union accrued; (2) pursuant to 11 USCS § 541(a), plaintiff's claims against credit union became part of her bankruptcy estate; and (3) pursuant to 11 USCS § 323, bankruptcy trustee was real party in interest with regard to claims, trustee had power and authority to sell claims, and trustee had sold claims to credit union, which now owned them. Riggs v. Aetna Life Ins. Co., 188 Fed. Appx. 659, 2006 U.S. App. LEXIS 14846 (10th Cir.), cert. denied, *549 U.S. 903, 127 S. Ct. 226, 166 L. Ed. 2d 180, 2006 U.S. LEXIS 5587 (2006)*.

Unpublished decision: Bankruptcy trustee's voluntarily dismissal under Fed. R. Civ. P. 41 of plaintiff debtor's Title VII lawsuit was self-executing, and trustee herself could not have invoked court's jurisdiction to review voluntary dismissal; and, once debtor was not real party in interest after bankruptcy trustee was substituted as plaintiff, debtor lacked valid basis for attacking subsequent orders, including dismissal. Kleven v. Walgreen Co., 373 Fed. Appx. 608, 2010 U.S. App. LEXIS 6772 (7th Cir. 2010), reh'g, en banc, denied, 2010 U.S. App. LEXIS 9338 (7th Cir. Apr. 28, 2010).

Unpublished decision: Plaintiff's request to modify his mortgage loan was part of his ongoing campaign to keep his home from foreclosure and to arrange suitable mortgage loan, and his cause of action, arising from refinancing was sufficiently rooted in pre-bankruptcy past and so little entangled with plaintiff's ability to make unencumbered fresh start that it was properly considered part of bankruptcy estate; district court properly held that plaintiff's failure to list his causes of action in his bankruptcy petition divested him of standing to pursue them in underlying litigation. *Clementson v. Countrywide Fin. Corp., 464 Fed. Appx. 706, 2012 U.S. App. LEXIS 2296 (10th Cir. 2012)*.

Unpublished decision: Plaintiff's request to modify his mortgage loan was part of his ongoing campaign to keep his home from foreclosure and to arrange suitable mortgage loan, and his cause of action, arising from refinancing was sufficiently rooted in pre-bankruptcy past and so little entangled with plaintiff's ability to make unencumbered fresh start that it was properly considered part of bankruptcy estate; district court properly held that plaintiff's failure to list his causes of action in his bankruptcy petition divested him of standing to pursue them in underlying litigation. *Clementson v. Countrywide Fin. Corp., 464 Fed. Appx. 706, 2012 U.S. App. LEXIS 2296 (10th Cir. 2012)*.

In avoidance action brought by creditor, purportedly on behalf of Chapter 11 bankruptcy estate, *Fed. R. Civ. P. 17(a)(3)* was inapplicable because debtor-in-possession failed to show that creditor's filing of complaint rather than debtor-in-possession was understandable mistake, despite being afforded opportunity to do so. *Better Hearing, LLC v. Hovis (In re Hearing Help Express, Inc.), 575 B.R. 175, 2017 Bankr. LEXIS 3344 (Bankr. N.D. Ill. 2017)*.

54. —Chapter 7 bankruptcy

Employment discrimination action need not be dismissed for lack of standing, where terminated nurse sued former employer and then separately filed for Chapter 7 bankruptcy, because substitution of trustee in bankruptcy is proper course of action pursuant to *FRCP 17(a)* and *25(c)*. *Bickford v. Ponce De Loen Care Ctr., 918 F. Supp. 377, 1996 U.S. Dist. LEXIS 6243 (M.D. Fla. 1996)*.

Action by Chapter 7 debtor against insurer seeking payment for earthquake damage to couple's home is dismissed, where cause of action against insurer accrued before debtor filed bankruptcy petition and became part of his bankruptcy estate, and where bankruptcy trustee did not abandon claim to debtor, because debtor is not real party in interest and has no standing to sue. *Griffin v. Allstate Ins. Co., 920 F. Supp. 127, 1996 U.S. Dist. LEXIS 2990 (C.D. Cal. 1996)*.

Bankruptcy trustee will not be substituted as real party in interest to continue action for personal injuries against employer, where plaintiff incurred more than $100,000 in debts in 1993 or earlier, was hurt at work in August 1995, filed Chapter 7 petition in bankruptcy in January 1997, closed bankruptcy case in May 1997, and filed suit against employer in July 1997, because claim should have been assigned to trustee during bankruptcy, and plaintiff cannot demonstrate that he filed action in his own name as result of honest mistake. *Feist v. Consolidated Freightways Corp., 100 F. Supp. 2d 273, 1999 U.S. Dist. LEXIS 3751 (E.D. Pa. 1999)*, aff'd, *216 F.3d 1075, 2000 U.S. App. LEXIS 12663 (3d Cir. 2000)*.

Insolvent investor's *Fed. R. Civ. P. 12(h)(3)* dismissal motion was denied because he had U.S. Const. art. III standing to assert fraud claims against defendants and he had waived his *Fed. R. Civ. P. 17(a)* objection where (1) investor contended that he lacked standing to prosecute fraud claims because he had filed for Chapter 7 bankruptcy protection, and bankruptcy estate was, therefore, real party in interest under R. 17(a); (2) investor's standing objection raised only prudential considerations because allegations in complaint clearly showed that investor met constitutional standing requirements; and (3) court would not dismiss investor's claims on jurisdictional grounds, based on prudential considerations, because investor had not raised his real party in interest objection in timely fashion and court could remedy situation by ordering bankruptcy trustee to be substituted as plaintiff in suit. *Lee v. Deloitte & Touche LLP, 428 F. Supp. 2d 825, 2006 U.S. Dist. LEXIS 26302 (N.D. Ill. 2006)*.

In franchisees' putative class suit alleging fraud based on franchisor's offering circular, regardless of bankrupt franchisee's ignorance of his claim, his interest in cause of action remained with bankruptcy estate, and bankruptcy trustee, rather than franchisee, was real party in interest and only bankruptcy trustee appointed to franchisor's case

was entitled to bring claims; dismissal for failure to name real party in interest was not warranted, but instead motion for substitution of trustee was appropriate. Putzier v. Ace Hardware Corp., *Putzier v Ace Hardware Corp. (2014, ND Ill), 50 F. Supp. 3d 964 (June 25, 2014)*.

In arrestee's § 1983 suit alleging that during course of his arrest, he was shot by police officer and seriously injured, where arrestee and his wife filed for Chapter 7 bankruptcy after commencement of suit, substitution of bankruptcy trustee as real party in interest was warranted. Gothberg v. Town of Plainville, *Gothberg v Town of Plainville (2015, DC Conn), 148 F. Supp. 3d 168 (September 3, 2015)*.

Borrower was no longer "real party in interest" for prosecution of her lawsuit where it was undisputed that transactions giving rise to her lawsuit occurred before she filed her petition for Chapter 7 bankruptcy protection, she did not otherwise allege that her claims were exempt from bankruptcy estate, and neither her alleged disclosure of Complaint to trustee, nor any oral assurances she allegedly received that trustee anticipated abandoning these claims, were apparent from bankruptcy court's docket. *Cobb v. Aurora Loan Servs., LLC, 408 B.R. 351, 2009 U.S. Dist. LEXIS 57937 (E.D. Cal. 2009)*.

Bank was entitled to dismissal of pro se borrower's action alleging violations of Truth in Lending Act, *15 USCS §§ 1601* et seq., and Home Ownership Equity Protection Act, *15 USCS § 1639*; because borrower had filed for Chapter 7 bankruptcy, causes of action were property of bankruptcy estate under *11 USCS § 541* and bankruptcy trustee was real party in interest under *Fed. R. Civ. P. 17*. *Runaj v. Wells Fargo Bank, 667 F. Supp. 2d 1199, 2009 U.S. Dist. LEXIS 91134 (S.D. Cal. 2009)*.

In case in which (1) employee's discrimination cause of action existed before she filed for bankruptcy; (2) she filed for Chapter 7 bankruptcy; (3) employee then sued her employer and two subcontractors, alleging claims for discrimination; and (4) employer and subcontractors filed motions to dismiss, asserting that employee lacked standing, bankruptcy trustee had assumed status of real party in interest in whose name *Fed. R. Civ. P. 17* required action to be brought, and debtor no longer had standing to pursue that cause of action. *Marshall v. Honeywell Tech. Solutions, Inc., 675 F. Supp. 2d 22, 2009 U.S. Dist. LEXIS 118303 (D.D.C. 2009)*.

District court granted bankruptcy trustee's motion for order appointing her as real party interest, pursuant to *Fed. R. Civ. P. 17(a)*, in action Chapter 7 debtor filed against United States Government, seeking refund of income taxes he paid for 2003 tax year, but denied trustee's request for order requiring clerk to pay any refund debtor was owed for 2003 tax year to debtor's bankruptcy estate; there was open case in U.S. Tax Court to resolve issue of whether debtor owed taxes for 2001 and 2002, *26 USCS § 6402* allowed IRS to setoff any outstanding tax liabilities debtor had, *11 USCS § 553(a)* preserved IRS's right of setoff under § 6402, and *11 USCS § 362(b)(26)* allowed IRS to retain refund until all pending determinations of tax liability were resolved. *Gordon v United States, 105 A.F.T.R.2d (RIA) 2987 (SD NY 2010)*.

Under *Fed. R. Civ. P. 17(a)*, bankruptcy trustee was substituted for debtors as real party in interest in putative class action that debtors filed before they filed their Chapter 7 bankruptcy petition; trustee was real party in interest because debtors' interest in putative class action was part of bankruptcy estate pursuant to *11 USCS § 541(a)(1)* and, under *11 USCS § 323*, trustee was representative of estate with capacity to sue and be sued. *Puello v. Citifinancial Servs., 76 Fed. R. Serv. 3d (Callaghan) 536, 2010 U.S. Dist. LEXIS 37877 (D. Mass. Apr. 16, 2010)*.

Company's motion to dismiss claims of 22 opt-ins for lack of subject matter jurisdiction was granted because they lacked standing to pursue their claims since they were not real parties in interest under *Fed. R. Civ. P. 17* as result of their Chapter 7 debtor status; generally speaking, pre-petition cause of action was property of Chapter 7 bankruptcy estate, under *11 USCS § 541(a)(1)*, and only trustee in bankruptcy had standing to pursue it; thus, trustee, as representative of bankruptcy estate, was proper party in interest, and was only party with standing to prosecute causes of action belonging to estate, under *11 USCS § 323*. *Burroughs v. Honda Mfg. of Ala., LLC, 2011 U.S. Dist. LEXIS 155628 (N.D. Ala. Nov. 1, 2011)*.

Debtor's employment discrimination suit had not been abandoned by his bankruptcy estate and bankruptcy trustee had indicated willingness to pursue plaintiff's discrimination claim; thus, court granted debtor's request to substitute bankruptcy trustee as plaintiff in action under *Fed. R. Civ. P. 17(a)*. *Kotbi v. Hilton Worldwide, Inc., 114 Fair Empl. Prac. Cas. (BNA) 1017, 2012 U.S. Dist. LEXIS 36933 (S.D.N.Y. Mar. 19, 2012)*.

In employment discrimination case in which employer moved for directed verdict and employee argued that she should be allowed time to amend complaint to substitute bankruptcy trustee as real party in interest, employee's Chapter 7 bankruptcy file has already been reopened, and motion to compromise claim against her employer had already been filed, with hearing date scheduled; therefore, amendment of complaint was unnecessary. *Brooks v. Cent. Irrigation Supply, Inc., 117 Fair Empl. Prac. Cas. (BNA) 101, 2012 U.S. Dist. LEXIS 178200 (E.D. Mich. Dec. 17, 2012)*.

Where bankruptcy trustee has ratified False Claims Act, *31 USCS §§ 3729*–*3732*, suit, and where trustee's interest in case will be extinguished in short time, trustee is not required to be added as party as real party in interest. *United States ex rel. Bibby v. Wells Fargo Bank, N.A., 906 F. Supp. 2d 1288, 2012 U.S. Dist. LEXIS 165179 (N.D. Ga. 2012)*, in part, *2014 U.S. Dist. LEXIS 196318 (N.D. Ga. Sept. 29, 2014)*.

Bankruptcy court found that it had authority under *11 USCS § 1123(b)(3)* to appoint creditor who filed claim against Chapter 11 debtor's bankruptcy estate to represent estate in filing malpractice action against law firm that represented debtor; once case was converted to one under Chapter 7 and trustee was appointed, however, trustee became estate's representative, pursuant to *11 USCS § 323*, and real party in interest, pursuant to *Fed. R. Civ. P. 17(a)* and *Fed. R. Bankr. P. 7017*, and court granted creditor and trustee's motion to substitute trustee as plaintiff, but only to extent trustee represented interests of bankruptcy estate. *Maxfield v. Quarles & Brady LLP (In re Jennings), 378 B.R. 678, 21 Fla. L. Weekly Fed. B 108, 2006 Bankr. LEXIS 4481 (Bankr. M.D. Fla. 2006)*.

Unpublished decision: Chapter 7 debtor's adversary complaint was properly dismissed for lack of standing, as causes of action arose pre-petition and thus, were property of his estate; as claims were not abandoned, only trustee could prosecute claims as real party in interest. *Meehan v. Ocwen Loan Servicing, LLC (In re Meehan), 2014 Bankr. LEXIS 4219 (9th Cir. Sept. 29, 2014)*, aff'd, *659 Fed. Appx. 437, 2016 U.S. App. LEXIS 18096 (9th Cir. 2016)*.

55. Unincorporated associations

State association of Negro teachers had standing, as real party in interest, to bring action to compel hiring of teachers on nonracial basis and to compel reassignment of teachers to various schools on nonracial basis. *Smith v. Board of Education, 365 F.2d 770, 1 Empl. Prac. Dec. (CCH) ¶9753, 9 Fair Empl. Prac. Cas. (BNA) 1081, 10 Fed. R. Serv. 2d (Callaghan) 342, 54 Lab. Cas. (CCH) ¶9027, 1966 U.S. App. LEXIS 4980 (8th Cir. 1966)*.

In action brought by environmental association to review Federal Energy Regulatory Commission order licensing hydroelectric project, association has capacity to sue as unincorporated association under *F R Civ P 17(b)(1)*, even though association was suspended California corporation, inasmuch as action arises under federal law, not state law. *Sierra Asso. for Environment v. Federal Energy Regulatory Com., 744 F.2d 661, 14 Envtl. L. Rep. 20531, 14 Envtl. L. Rep. 20830, 1984 U.S. App. LEXIS 22891 (9th Cir. 1984)*.

Trade association is not real party in interest with capacity to prosecute action to enforce separate property rights of its individual members. *Alabama Independent Service Station Ass'n v. Shell Petroleum Corp., 28 F. Supp. 386, 1939 U.S. Dist. LEXIS 2595 (D. Ala. 1939)*.

Restaurant association was not real party in interest to bring action against administrator of office of price administration and district director of district office of price administration to restrain them from requiring restaurant operators to file prices in accordance with amendment to price regulation. *Wisconsin Restaurant Ass'n v. Porter, 68 F. Supp. 239, 1946 U.S. Dist. LEXIS 2136 (D. Wis. 1946)*.

For organization to have standing in absence of special circumstances, there must be injury to organization distinct from that to membership; in civil rights action brought as class action, two organizational plaintiffs were not proper parties where neither had suffered any injury which was distinct from membership, there were no special circumstances such as lack of effective representation, gross adversarial inequality, or other obstacles to individual plaintiffs which required presence of organizational plaintiff, and dismissal would not adversely affect rights of individual plaintiff or defendants. *Bell v. Automobile Club of Michigan, 18 Fed. R. Serv. 2d (Callaghan) 1494 (E.D. Mich. 1974)*.

On defendants' motions to dismiss breach of contract action brought by business trust for lack of diversity jurisdiction, notwithstanding plaintiffs' contention that in diversity cases determination of who was real party in interest was controlled by state substantive law and that pursuant to Georgia law trustees of business trust were real parties in interest, court concluded that since business trust had status of unincorporated association, its citizenship controlled issue of diversity even though plaintiff was allowed to substitute individual trustees as named plaintiffs. *Chase Manhattan Mortg. & Realty Trust v. Pendley, 405 F. Supp. 593, 1975 U.S. Dist. LEXIS 14891 (N.D. Ga. 1975)*.

Since association can rely on injuries suffered by its members to establish standing to sue as representative of its members in furtherance of its organizational purposes, it can also invoke legal rights and interests of its members in suit; accordingly, plaintiff-intervenors in action challenging State's unemployment benefits to striking workers would be permitted to amend complaint eliminating all allegations of original complaint pertaining to injuries to associations' members generally and to premise standing to sue entirely on injury allegedly sustained by one of their members. *Grinnell Corp. v. Hackett, 22 Fed. R. Serv. 2d (Callaghan) 482 (D.R.I. 1976)*.

Where unincorporated association's action was filed in name of unincorporated association alone, and not through its president or treasurer, or officer who executes equivalent functions, it was defect pursuant to *Fed. R. Civ. P. 17*, but it could be corrected, and association was permitted to file amended order. *Arbor Hill Concerned Citizens Neighborhood Ass'n v. City of Albany, 250 F. Supp. 2d 48, 56 Env't Rep. Cas. (BNA) 1822, 2003 U.S. Dist. LEXIS 3977 (N.D.N.Y. 2003)*, dismissed, in part, *303 F. Supp. 2d 237, 2004 U.S. Dist. LEXIS 884 (N.D.N.Y. 2004)*.

56. —Labor unions

Complaint by president of national union as representative of members of national and of the members of all its locals to enjoin representatives of local union of rival national union did not violate real party in interest rule, since action involved rights of national and not rights of local. *Fitzgerald v. Abramson, 89 F. Supp. 504, 25 L.R.R.M. (BNA) 2520, 18 Lab. Cas. (CCH) ¶65665, 1950 U.S. Dist. LEXIS 4005 (D.N.Y. 1950)*.

Union could not maintain suit in behalf of its union members, who were employees of defendant, for damages sustained by these members as result of bribery of union agent, since union was not real party in interest. *Rock Drilling, etc., Local Union v. Mason & Hangar Co., 90 F. Supp. 539, 26 L.R.R.M. (BNA) 2218, 18 Lab. Cas. (CCH) ¶65795, 1950 U.S. Dist. LEXIS 3820 (D.N.Y. 1950)*, aff'd, *217 F.2d 687, 35 L.R.R.M. (BNA) 2232, 27 Lab. Cas. (CCH) ¶68855, 1954 U.S. App. LEXIS 4036 (2d Cir. 1954)*.

Union could maintain action against employer seeking to compel payment of sum of money to trustees of trust fund designed to provide life, health, and accident insurance for employees pursuant to collective bargaining agreement between parties, and trustees of fund did not have to be joined as indispensable parties to action where employer and employees, as represented by union, were only parties whose interests were in controversy, and action was based upon agreement entered into before welfare fund was set up and trustees designated. *Amalgamated Butcher Workmen v. Capitol Packing Co., 32 F.R.D. 4, 6 Fed. R. Serv. 2d (Callaghan) 327, 52 L.R.R.M. (BNA) 2374, 47 Lab. Cas. (CCH) ¶18163, 1963 U.S. Dist. LEXIS 7068 (D. Colo. 1963)*.

Union member need not be joined as party plaintiff in action by labor union to enforce seniority rights because Labor-Management Relations Act provides that labor union "may sue in behalf of employees whom it represents" and Rule 17 permits "party with whom or in whose name contract has been made for benefit of another to sue in

own name without joining with him party for whose benefit action is brought". *Air Line Pilots Asso. International v. Capitol International Airways, Inc., 17 Fed. R. Serv. 2d (Callaghan) 247 (S.D.N.Y. 1973)*.

In action brought by union and employee benefit funds to enforce covenants of collective bargaining agreement under Labor Management Relations Act, there is no merit to defendant employers' assertion that neither funds nor union are real parties in interest and that only trustees of funds can be considered proper parties to such action. *International Union of Bricklayers & Allied Craftsmen, Local #1 v. Menard & Co. Masonry Bldg. Contractors, 619 F. Supp. 1457, 1985 U.S. Dist. LEXIS 14836 (D.R.I. 1985)*.

Essential purpose of Rule 23.2 was to abrogate common law rule whereby, in order for unincorporated association to sue or be sued, all of its members had to be named parties to action; in this sense, Rule 23.2 supplements Rule 17 by allowing unincorporated associations same legal status as person or corporation; Rule 23 therefore remains unsullied by Rule 23.2, and labor union or those representing union's membership must comply with its provisions when bringing class action suit. *Stolz v. United Brotherhood of Carpenters & Joiners, Local Union No. 971, 620 F. Supp. 396, 121 L.R.R.M. (BNA) 3053, 1985 U.S. Dist. LEXIS 14912 (D. Nev. 1985)*.

57. United States

In petitioner employee's False Claims Act (FCA) qui tam action against respondent city, because U.S. declined to intervene, it was not "party" for purposes of extending employee's time to appeal dismissal of action under *Fed. R. App. P. 4(a)(1)(B)* and appeal, filed over 30 days after dismissal, was untimely under Rule 4(a)(1)(A); although U.S. was minimally involved in every FCA action and "real party in interest" under *Fed. R. Civ. P. 17(a)*, it was not "party" to FCA action for purposes of Rule 4 unless it had intervened. *United States ex rel. Eisenstein v. City of New York, 556 U.S. 928, 129 S. Ct. 2230, 173 L. Ed. 2d 1255, 21 Fla. L. Weekly Fed. S 916, 73 Fed. R. Serv. 3d (Callaghan) 1132, 2009 U.S. LEXIS 4316 (2009)*.

Where action was brought in name of United States for veteran under Selective Service Act (former 50 USCS Appx. §§ 301 et seq.), United States can by amendment be stricken out, so that complaint will stand in name of real party in interest, if under Rule 17(a) proceeding should properly be in name of veteran. *United States ex rel. Deavers v. Missouri, K. & T. R. Co., 171 F.2d 961, 23 L.R.R.M. (BNA) 2250, 16 Lab. Cas. (CCH) ¶64918, 1949 U.S. App. LEXIS 3546 (5th Cir.)*, cert. denied, *337 U.S. 958, 69 S. Ct. 1533, 93 L. Ed. 1757, 24 L.R.R.M. (BNA) 2227, 1949 U.S. LEXIS 2118 (1949)*, app. after remand, *183 F.2d 65, 26 L.R.R.M. (BNA) 2292, 18 Lab. Cas. (CCH) ¶65847, 1950 U.S. App. LEXIS 3677 (5th Cir. 1950)*.

United States is real party in interest in actions against Medicare carriers because recovery would come from federal treasury. *Anderson v. Occidental Life Ins. Co., 727 F.2d 855, 1984 U.S. App. LEXIS 24799 (9th Cir. 1984)*.

United States and not collector of internal revenue is real party in interest in action upon abatement bond given by defendant to collector, to stay collection of additional income and excess profit taxes. *United States v. Morrisdale Coal Co., 46 F. Supp. 356, 29 A.F.T.R. (P-H) 1230, 1942-2 U.S. Tax Cas. (CCH) ¶ 9564, 42-2 U.S. Tax Cas. (CCH) ¶9564, 1942 U.S. Dist. LEXIS 2525 (E.D. Pa. 1942)*, aff'd, *135 F.2d 921, 31 A.F.T.R. (P-H) 85, 1943-1 U.S. Tax Cas. (CCH) ¶ 9445, 1943 U.S. App. LEXIS 3454 (3d Cir. 1943)*.

United States was proper party to bring action against lessees of Indian lands where lessees failed to pay tax assessment in accordance with provision of the leases, because United States occupies position of trustee. *United States v. Allbaugh, 83 F. Supp. 109, 1949 U.S. Dist. LEXIS 2816 (D. Neb. 1949)*, modified, *184 F.2d 109, 1950 U.S. App. LEXIS 3046 (8th Cir. 1950)*.

United States was real party in interest in suit filed by it in behalf of United States Commercial Company, government corporation engaged in purchase of strategic material, to recover for damages paid to customers of corporation, as result of damage to leather goods during transportation. *United States v. New York Dock Co., 100 F. Supp. 303, 1951 U.S. Dist. LEXIS 3923 (D.N.Y. 1951)*.

United States is proper party to bring treble damage and injunction suit for violation of Defense Production Act (former 50 USCS Appx §§ 2061 et seq.). *United States v. St. Regis Paper Co., 106 F. Supp. 286, 1952 U.S. Dist. LEXIS 3987 (D.N.Y. 1952)*.

Swine Flu Act (42 USCS § 47b(k)(2)(a)) substituted United States as defendant for any personal injury or wrongful death sustained as result of swine flu inoculation and abolished cause of action against manufacturer program participant and controlled over *Federal Rules Civil Procedure 19* and *17*; there will not be any infringement of plaintiff's discovery rights since manufacturers are obligated to cooperate with United States relative to discovery and plaintiff could move to decertify them if they impede discovery. *Sparks v. Wyeth Laboratories, Inc., 431 F. Supp. 411, 1977 U.S. Dist. LEXIS 15897 (W.D. Okla. 1977)*.

In case in which federal taxpayer sued United States and Commissioner of IRS, seeking writ of mandamus against Commissioner to prohibit and prevent improper and fraudulent seizure of his property as such seizure was being made for alleged unpaid income taxes, for which he denied any liability and United States filed *Fed. R. Civ. P. 12(b)(1)* motion to dismiss for lack of subject-matter jurisdiction, only proper party was United States; *28 USCS § 1346(b)* conferred jurisdiction on federal district court to hear claims sounding in tort against United States, not against its agencies, and that point was amplified in *28 USCS § 2679(a)*. 106 A.F.T.R.2d (RIA) 5232, ¶ 50525.

58. Other

Operator of bridge which charged tolls to passenger trains using bridge was real party in interest with respect to claims for tolls of passenger trains using bridge which association lost when bridge was closed for repair of damages caused by collision from tugboat where bridge operator had continuing legal obligation to reimburse railroad's difference between tolls and bridge operator was party entitled to enforce right to recovery. *Petition of M/V Elaine Jones, 480 F.2d 11, 1973 U.S. App. LEXIS 10783 (5th Cir. 1973)*, amended, *513 F.2d 911, 1975 U.S. App. LEXIS 14647 (5th Cir. 1975)*.

In suit brought by residents, taxpayers, and electors of towns in two school districts, claiming that apportionment of their regional boards of education diluted their voting power and deprived them of equal protection of law, voters of towns were real parties in interest for Rule 17(a) purposes, and jurisdiction had not been improperly invoked through "collusive joinder." *Baker v. Regional High School Dist., 520 F.2d 799, 1975 U.S. App. LEXIS 13534 (2d Cir.)*, cert. denied, *423 U.S. 995, 96 S. Ct. 422, 46 L. Ed. 2d 369, 1975 U.S. LEXIS 3493 (1975)*.

In action for attorney's fees for successful prosecution of claim of employment discrimination during administrative proceedings, it is proper for client to be made real party in interest because recovery will go to client in first instance, although attorney will ultimately benefit. *Richards v. Reed, 611 F.2d 545, 24 Empl. Prac. Dec. (CCH) ¶31388, 24 Fair Empl. Prac. Cas. (BNA) 32, 29 Fed. R. Serv. 2d (Callaghan) 59, 1980 U.S. App. LEXIS 20714 (5th Cir. 1980)*.

Nondiverse subcontractor was not real party in interest in suit between general contractor and parish since state law did not provide sub with enforceable substantive contractual rights against parish, nor did prelitigation agreement between sub and general contractor transform sub into real party in interest. *Farrell Constr. Co. v. Jefferson Parish, 896 F.2d 136, 16 Fed. R. Serv. 3d (Callaghan) 545, 1990 U.S. App. LEXIS 3705 (5th Cir. 1990)*.

When successor fiduciary steps into shoes of predecessor who, acting in fiduciary capacity, has brought lawsuit in court vested with jurisdiction over subject matter of suit, "stepping in" relates back to time when original party had standing to sue; no other conclusion is possible given Rule 17(a)'s statement that substitution shall have same effect as if action had been commenced in name of real party in interest. *Corbin v. Blankenburg, 39 F.3d 650, 1994 FED App. 0372P, 18 Employee Benefits Cas. (BNA) 2537, 30 Fed. R. Serv. 3d (Callaghan) 1068, 1994 U.S. App. LEXIS 30637 (6th Cir. 1994)*, cert. denied, *513 U.S. 1192, 115 S. Ct. 1256, 131 L. Ed. 2d 136, 18 Employee Benefits Cas. (BNA) 2872, 1995 U.S. LEXIS 1705 (1995)*, app. after remand, *33 Fed. Appx. 722, 27 Employee Benefits Cas. (BNA) 1776, 2002 U.S. App. LEXIS 2963 (6th Cir. 2002)*.

Complaint, reasonably construed, alleged that note holder, not his attorney in fact, was not only named plaintiff but also real party in interest; although complaint contained one reference to attorney in fact, rather than note holder, as plaintiff, remainder of complaint clearly identified note holder, not attorney in fact, as named plaintiff. *In Sik Choi v. Hyung Soo Kim, 50 F.3d 244, 31 Fed. R. Serv. 3d (Callaghan) 1253, 1995 U.S. App. LEXIS 4808 (3d Cir. 1995)*.

Property owner whose claim against trucking company for damages when driver lost control and truck damaged building was dismissed as filed outside statute of limitations could not join insurer's suit against trucking company under Rule 17 since it was not real party in interest; nothing in rule provides non-party with right to join case on grounds that it is not prosecuted in name of real party in interest. *Intown Props. Mgmt., Inc. v. Wheaton Van Lines, Inc., 271 F.3d 164, 51 Fed. R. Serv. 3d (Callaghan) 1302, 2001 U.S. App. LEXIS 23620 (4th Cir. 2001)*.

Where plaintiff retailer sued defendant supplier on claims of fraud, deceptive trade practices, and promissory estoppel in connection with supplier's refusal to honor its rebate program for retailer's customers, retailer was real party in interest under *Fed. R. Civ. P. 17(a)* because it alleged injuries that customers could not allege—e.g., lost profits on cancelled sales and costs associated with unsold inventory, and while conceivably, rebate applicants could have asserted breach of contract claim against supplier after it refused to pay rebates, it was undisputed that none of those applicants suffered injury (since retailer issued its own rebates to its customers so as to not lose business from those customers), and therefore, there was no risk of duplicative litigation. *Curtis Lumber Co. v. La. Pac. Corp., 618 F.3d 762, 2010 U.S. App. LEXIS 17665 (8th Cir. 2010)*.

Subpoena served on appellant witness was not ineffective for being addressed to witness's sole proprietorship c/o witness rather than witness personally, since proprietorship was just name that real person used when doing business, not juridical entity, and witness/proprietor was only entity and real party in interest under *Fed. R. Civ. P. 17*. *York Group, Inc. v. Wuxi Taihu Tractor Co., 632 F.3d 399, 78 Fed. R. Serv. 3d (Callaghan) 999, 2011 U.S. App. LEXIS 2171 (7th Cir. 2011)*, reh'g denied, *2011 U.S. App. LEXIS 4511 (7th Cir. Feb. 22, 2011)*.

Prisoners who claimed that city officials violated their constitutional rights by terminating one drug treatment program and awarding contract for another program to new contractor alleged constitutionally protected liberty interest sufficient to make them real parties in interest; therefore, their complaint should not have been dismissed on grounds that wrong party was prosecuting action. *Best v. Kelly, 39 F.3d 328, 309 U.S. App. D.C. 51, 30 Fed. R. Serv. 3d (Callaghan) 986, 1994 U.S. App. LEXIS 28423 (D.C. Cir. 1994)*.

District court correctly dismissed first plaintiff's complaint because first plaintiff was not signatory to lease, which was signed by second plaintiff and was intended for benefit of corporation, first plaintiff's only alleged connections to lease were that he gave corporation some of purchase money and that he served as president of corporation, and these connections were not sufficient to make him real party in interest to case. *Symonette v. V.A. Leasing Corp., 648 Fed. Appx. 787, 2016 U.S. App. LEXIS 6843 (11th Cir. 2016)*.

Claim of railroad passenger who alleged sexual assault by railroad employee was properly found to be untimely since passenger filed action under pseudonym without leave of court, and substitution of passenger as real party in interest for pseudonymous party after limitations period expired did not apply to render complaint timely since pseudonymous party was not separate person from passenger, and thus pseudonymous party could not be deemed nominal party. *Capers v. Amtrak, 673 Fed. Appx. 591, 2016 U.S. App. LEXIS 23182 (8th Cir. 2016)*, reh'g denied, *2017 U.S. App. LEXIS 1757 (8th Cir. Jan. 31, 2017)*.

District court lacked jurisdiction to review plaintiff's claims that a decision to permanently withdraw a retail merchant from the Supplemental Nutrition Assistance Program (SNAP) program was arbitrary and capricious where public documents showed that the true owner was a corporation, and the fact that he was a party to a settlement agreement noted in the agency decision did not permit him to seek judicial review of an agency decision that did not name him as an appellant and did not withdraw SNAP authorization from him to any entity that he personally owned. Ettayem v. United States, *Ettayem v United States (2017, CA6 Ohio), 2017 U.S. App. LEXIS 23408 (November 17, 2017)*.

Where, prior to bankruptcy, debtor entered into settlement releasing certain tort claims, and where after bankruptcy closed, she sued to rescind settlement agreement, and where after she reopened bankruptcy case, trustee abandoned any interest in claim, debtor became real party in interest thereafter because debtor then had right to sue. *Martineau v. Wier, 934 F.3d 385, 2019 U.S. App. LEXIS 23969 (4th Cir. 2019)*.

Plaintiff, who owned only few of machines placed on war project and used by prime contractors, could assert claims of his associates who owned other machines and enforce rights created by his lease agreement and acts of government in relation to it in action against United States. *Corum v. United States, 81 F. Supp. 728, 112 Ct. Cl. 479, 1949 U.S. Ct. Cl. LEXIS 18 (Ct. Cl. 1949)*.

Injured third parties who possess substantive right under Iowa law to enforce negligence claims when appropriate circumstances exist against accountants are real parties in interest; whether or not parties can pursue negligence claims under law and undisputed facts is matter entirely distinct from threshold question of their possession of cause of action sought to be prosecuted. *Briggs v. Sterner, 529 F. Supp. 1155, Fed. Sec. L. Rep. (CCH) ¶ 98444, Fed. Sec. L. Rep. (CCH) ¶98444, 1981 U.S. Dist. LEXIS 18578 (S.D. Iowa 1981)*.

Seller-shipper of tomatoes which were found to be spoiled on arrival at destination is not proper plaintiff in action against common carrier, where seller-shipper has been made whole by is insurance company; if any person has action against common carrier, it is seller-shipper's insurance company, which conceivably has subrogation claim. *William D. Branson, Ltd. v. Tropical Shipping & Constr. Co., 598 F. Supp. 680, 1987 A.M.C. 2703, 40 U.C.C. Rep. Serv. (CBC) 883, 1984 U.S. Dist. LEXIS 21795 (S.D. Fla. 1984)*.

Claim by owner of grain storage facility against manufacturer of aeration fans for damages arising from spoilage of grain due to water in storage unit is not summarily denied, where owner purchased grain from Commodity Credit Corporation while it was stored but after damage was done and where owner incurred costs in removing undamaged grain to prevent further spoilage, because since owner was bailee of grain and owner of storage facility and party to contract with fan manufacturer, facility owner owed any cause of action as for damages incurred and was therefore real party in interest. *King Grain Co. v. Caldwell Mfg. Co., Div. of Chief Indus., Inc., 820 F. Supp. 569, 1993 U.S. Dist. LEXIS 6296 (D. Kan. 1993)*.

Corporation raised its real party in interest objection early enough to allow resolution of issue well before trial, and objection was not waived; however, manufacturer was real party in interest both by operation of asset purchase agreement and by other business's ratification of lawsuit. *Walker Mfg. v. Hoffmann, Inc., 220 F. Supp. 2d 1024, 2002 U.S. Dist. LEXIS 17400 (N.D. Iowa 2002)*.

Where plaintiff was in privity with its clients as it had "complete investment authority" and was "attorney-in-fact with full power and authority to bring suit to recover for investment losses," plaintiff had standing to prosecute clients' Securities Exchange Act of 1934 claims, and real party in interest requirement of *Fed. R. Civ. P. 17* was met. *Weinberg v. Atlas Air Worldwide Holdings, Inc., 216 F.R.D. 248, 2003 U.S. Dist. LEXIS 9103 (S.D.N.Y. 2003)*.

Where plaintiff, sitting state court judge who had provided information to FBI in criminal investigation of state district court judge and another county official regarding drug use and impropriety, had not presented compelling reasons that would have justified sealing case from public or that would have outweighed public interest in open court proceedings, including real names of parties in interest, court denied plaintiff's request to seal proceedings and ordered that complaint comply with *Fed. R. Civ. P. 10(a)* by including names of all parties. *Doe v. FBI, 218 F.R.D. 256, 57 Fed. R. Serv. 3d (Callaghan) 480, 2003 U.S. Dist. LEXIS 18586 (D. Colo. 2003)*.

Although defendants argued ERISA plan itself held defendant company's stock in plan and owned legal interest in those assets, that plan record holder was real party in interest, and that plan participants and beneficiaries, who held only equitable interest, could bring securities law claims, court disagreed. *Tittle v. Enron Corp. (In re Enron Corp. Sec. Derivative & ERISA Litig.), 284 F. Supp. 2d 511, 31 Employee Benefits Cas. (BNA) 2281, 2003 U.S. Dist. LEXIS 17492 (S.D. Tex. 2003)*.

Court had authority to order entities, that were mistakenly or inadvertently opted-out of class action antitrust litigation without authority, to ratify requests for exclusion that were filed on their behalf pursuant to its broad equitable powers to manage multidistrict litigation, and under *Fed. R. Civ. P. 17(a)*'s real party in interest requirement, which both protected defendants from threat of double recovery by plaintiffs and allowed plaintiffs reasonable amount of time to cure. *In re Linerboard Antitrust Litig., 223 F.R.D. 357, 2004 U.S. Dist. LEXIS 17160 (E.D. Pa. 2004)*.

Charterer and recipient were proper parties in interest under *Fed. R. Civ. P. 17(a)* to bring negligence action against owner of vessel that was destroyed while taking charterer's cargo to recipient because charterer and recipient were entitled to enforce their rights under charter and bill of lading. *Energy Transp., LTD. v. M.V. San Sebastian, 348 F. Supp. 2d 186, 2004 U.S. Dist. LEXIS 25047 (S.D.N.Y. 2004)*.

In declaratory judgment action brought by insurer, its agent, and its reinsurer seeking declaration that indemnity agreement and amendment did not require review of amount of security provided by insured for two years and to recover unpaid premiums, agent and reinsurer were not proper parties in interest under *Fed. R. Civ. P. 17(a)* because they had no privity of contract with insured and, thus, they had no standing to sue or be sued and they; moreover, court had no subject matter jurisdiction over counterclaims that were dismissed under *Fed. R. Civ. P. 12(h)*, 41(b). *United States Fid. & Guar. Co. v. S.B. Phillips Co., 359 F. Supp. 2d 189, 2005 U.S. Dist. LEXIS 3701 (D. Conn. 2005)*.

Court denied corporation's motion under *Fed. R. Civ. P. 17(a)* to "cure" defects of its complaint because corporation was keenly aware of facts at issue; corporation specifically averred facts in its complaint, and so court found that there was no honest mistake. *Metal Working Lubricants Co. v. United States Fire Ins. Co., 460 F. Supp. 2d 897, 2006 U.S. Dist. LEXIS 9308 (S.D. Ind. 2006)*.

Where a legal malpractice claim was brought by the wrong party, and joinder of the real party in interest, under *Fed. R. Civ. P. 17*, would destroy diversity jurisdiction, dismissal of the action with prejudice but not as a judgment on the merits, so the proper party could file in state court under the protection of *Kan. Stat. Ann. § 60-518*. *Hjersted Family Ltd. P'ship v. Hallauer, 2008 U.S. Dist. LEXIS 82020 (D. Kan. Oct. 15, 2008)*, reconsideration granted, vacated, *71 Fed. R. Serv. 3d (Callaghan) 1574, 2008 U.S. Dist. LEXIS 90168 (D. Kan. Nov. 5, 2008)*.

Where defendants, manufacturers/sellers/distributors of generic drug or chemicals used therein, argued ratification process was inadequate because it did not meet notice requirements in class action context, that argument was misplaced, because plaintiff insurers' ratification process was governed by *Fed. R. Civ. P. 17(a)* and not *Fed. R. Civ. P. 23*, and, as stated by court when it addressed issue previously, application of remedial provision of *Fed. R. Civ. P. 17(a)* was appropriate as requirements of rule were otherwise met, thus, remittitur of amounts awarded plaintiff health insurers on their antitrust claims was not proper regarding self-funded plans that opted to stay in litigation. *In re Lorazepam & Clorazepate Antitrust Litig., 531 F. Supp. 2d 82, 2008-1 Trade Cas. (CCH) ¶76222, 2008 U.S. Dist. LEXIS 4615 (D.D.C. 2008)*, remanded, *631 F.3d 537, 394 U.S. App. D.C. 108, 78 Fed. R. Serv. 3d (Callaghan) 713, 2011-1 Trade Cas. (CCH) ¶77440, 2011 U.S. App. LEXIS 2571 (D.C. Cir. 2011)*.

In accordance with *Fed. R. Civ. P. 17(a)*, before summary judgment was entered in favor of corporation and its senior officers for lack of standing, investment and management companies that did not have standing to bring suit on behalf of various foreign investment funds were granted 30 days to amend their complaint and submit proof of assignment, ratification, or substitution for each of funds on whose behalf they brought suit. *In re Vivendi Universal, S.A., 605 F. Supp. 2d 570, 2009 U.S. Dist. LEXIS 52629 (S.D.N.Y. 2009)*.

In suit alleging violations of Title IX of Education Amendments of 1972, *20 USCS §§ 1681* et seq., and other laws based on sexual relationship between student and teacher, student was substituted as real party interest because, since initiation of suit, she had attained legal age to be real party in interest. *Romero v. City of New York, 839 F. Supp. 2d 588, 2012 U.S. Dist. LEXIS 36049 (E.D.N.Y. 2012)*.

Where mother asserted that District of Columbia violated Individuals with Disabilities Education Improvement Act of 2004, *20 USCS §§ 1400* et seq., by failing to timely review daughter's vocational evaluation, District's claim that mother lacked standing was moot following daughter's motion to substitute. *Brooks v. District of Columbia, 841 F. Supp. 2d 253, 2012 U.S. Dist. LEXIS 10165 (D.D.C. 2012)*.

Because appellants were not disclosed principals in limited guaranty, they were also not real parties in interest. DVI Receivables, XIV, LLC v. Rosenberg, *DVI Receivables, XIV, LLC v Rosenberg, 2011 U.S. Dist. LEXIS 158828 (SD Fla 2011)*.

Plaintiff was not entitled to reasonable time to amend complaint to substitute another plaintiff with standing because the procedural rule allowing a reasonable time to substitute a party addresses party joinder, not federal-court subject-matter jurisdiction. *Middleton, Inc. v. 3M, 2012 U.S. Dist. LEXIS 195434 (S.D. Iowa Mar. 6, 2012)*.

In dispute concerning five commercial loans made to LLCs that owned gas stations, cross-plaintiff guarantor had right to assert claim for breach of fiduciary duty against cross-defendant guarantor as cross-plaintiff was twenty-five percent member of LLCs; claim did not need to be asserted by LLCs or bankruptcy trustee because cross-plaintiff was real party in interest. United Cent. Bank v. Desai, *United Cent. Bank v Desai (2014, ND Ill), 2014 U.S. Dist. LEXIS 7815 (January 21, 2014)*.

Purported trustee lacked standing to pursue action on behalf of corporation as purported owner of corporation's note because trustee was unable to appear or file pleadings on behalf of corporation, and trustee was not and could not have become real party in interest to proceed on behalf of corporate entity; trustee's attempt to proceed with complaint in his individual capacity also failed because bankruptcy court found that trustee was not holder of note and could never have acquired rights of holder. Chien v. Freer, *Chien v Freer (2014, ED Va), 2014 U.S. Dist. LEXIS 113730 (August 14, 2014)*.

Bank was real party in interest under *Fed. R. Civ. P. 17(a)(1)* to file proof of claim because it possessed Lost Note Affidavit, which, with copy of original note endorsed in blank, constituted adequate proof of terms of note under *Wash. Rev. Code § 62A.3-309*; as bearer instrument under *Wash. Rev. Code § 62A.3-305*, note was negotiable by transfer of possession alone under *Wash. Rev. Code § 62A.3-201(a)*. *Allen v. US Bank, NA (In re Allen), 472 B.R. 559, 2012 Bankr. LEXIS 2634 (9th Cir. 2012)*.

Unpublished decision: Since decedent did not strike deal with borrower in his individual capacity, decedent's estate was not indispensable party to, nor real party in interest in, lender's action to recover demand. *Feriozzi Co. v. Ashworks, Inc., 130 Fed. Appx. 535, 2005 U.S. App. LEXIS 8176 (3d Cir. 2005)*.

Unpublished decision: CEO lacked standing to seek injunctive relief in action arising from conduct relating to enforcement of federal tax lien because company for which he served as CEO was real party in interest by operation of *Fed. R. Civ. P. 17(a)*. *Carey v. Andrews, 207 Fed. Appx. 863, 2007-1 U.S. Tax Cas. (CCH) ¶50124, 2006 U.S. App. LEXIS 29061 (9th Cir. 2006)*.

Unpublished decision: Bank customer, corporation's president and sole shareholder, was not *Fed. R. Civ. P. 17* real party in interest to enforce cashier's check, and he was not entitled to enforce check under Mich. Comp. Laws Serv. § 440.3301 because he was no longer holder under Mich. Comp. Laws Serv. § 440.3310 after he negotiated check under Mich. Comp. Laws Serv. § 440.3201(2) by endorsing and depositing it into corporation's account. *White v. JPMorgan Chase Bank, NA, 521 Fed. Appx. 425, 2013 FED App. 0332N, 80 U.C.C. Rep. Serv. 2d (CBC) 466, 2013 U.S. App. LEXIS 6972 (6th Cir. 2013)*.

Unpublished decision: Pursuant to *Fed. R. Civ. P. 17(a)*, where plaintiff used false identity in his complaint, without leave of court, complaint was subject to dismissal; plaintiff's false identity was apparently used to disguise fact that he was illegal alien. *Marcano v. Lombardi, 2005 U.S. Dist. LEXIS 35548 (D.N.J. Dec. 20, 2005)*.

Unpublished decision: Mortgagor was not real party in interest and lacked prudential standing for damages claims as: (1) claims were pre-petition claims since amendments to *Colo. Rev. Stat. § 38-38-101* were effective and Colo.

R. Civ. P. 120 proceeding was filed before bankruptcy filing; (2) claims needed to be scheduled and were part of bankruptcy estate; and (3) since claims were not disclosed, they were not administered nor abandoned in bankruptcy case, and they remained property of estate. *Brumfiel v. United States Bank, 618 Fed. Appx. 933, 2015 U.S. App. LEXIS 12812 (10th Cir. 2015)*, cert. denied, *577 U.S. 1078, 136 S. Ct. 830, 193 L. Ed. 2d 739, 2016 U.S. LEXIS 606 (2016)*.

That plaintiff may have been asserting claims for benefit of his parents, as third party beneficiaries of Agreement, did not disqualify him from pursuing that claim; however, party seeking third-party standing in federal court on behalf of real party in interest must also satisfy prudential prerequisites of standing by demonstrating close relation to injured third party and hindrance to that party's ability to protect its own interests, and plaintiff failed to satisfy that requirement because Complaint was devoid of allegations establishing his right to act on behalf of his parents. *Salim v. Nisselson (In re Big Apple Volkswagen, LLC), 2016 Bankr. LEXIS 2057 (Bankr. S.D.N.Y. May 19, 2016)*, aff'd, *571 B.R. 43, 2017 U.S. Dist. LEXIS 117980 (S.D.N.Y. 2017)*.

III. CAPACITY TO SUE OR BE SUED [RULE 17(b)]

A. In General

59. Generally

Since Court of Claims has no jurisdiction over suit by judgment creditor for damages for breach by United States of contract made by it with judgment debtor, though such suit has been authorized by order of state court in which judgment is recovered in accordance with state practice, Federal District Court in which such suit is brought, under § 2 of the Tucker Act [*28 USCS § 41(20)*] giving district courts jurisdiction "concurrent with the Court of Claims" over certain claims against government founded upon contract, is likewise without jurisdiction; and no jurisdiction in such case is conferred on it by Rule 17(b). *United States v. Sherwood, 312 U.S. 584, 61 S. Ct. 767, 85 L. Ed. 1058, 1941 U.S. LEXIS 1095 (1941)*.

There is nothing in Rule 17(b) which limits right to bring class suit under Rule 23(a) in proper cases. *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 148 F.2d 403, 16 L.R.R.M. (BNA) 597, 1945 U.S. App. LEXIS 3362 (4th Cir. 1945)*.

A name may not be sued unless someone is doing business under that name, in which case party or parties so doing business may be sued individually as trading under said name or by trade name. *In re Midwest Athletic Club, 161 F.2d 1005, Bankr. L. Rep. (CCH) ¶55918, 1947 U.S. App. LEXIS 3874 (7th Cir. 1947)*.

Plaintiff's capacity to sue must first be resolved before court may enter judgment in his favor. *Winbourne v. Eastern Air Lines, Inc., 632 F.2d 219, 15 Av. Cas. (CCH) ¶ 18471, 30 Fed. R. Serv. 2d (Callaghan) 604, 1980 U.S. App. LEXIS 13361 (2d Cir. 1980)*.

Rule 17(b)(1) exception is not applicable when action is based upon state common law rather than state statute, constitutional rights, or laws of United States. *Oyler v. National Guard Asso., 743 F.2d 545, 39 Fed. R. Serv. 2d (Callaghan) 1372, 1984 U.S. App. LEXIS 18769 (7th Cir. 1984)*.

Fed. R. Civ. P. 17(b) is itself choice of law provision, and does not require that court take additional step of determining if New York choice of law requires application of foreign law as to issue of capacity. Sokolow v. PLO, *Sokolow v PLO (2014, SD NY), 60 F. Supp. 3d 509 (November 19, 2014)*.

Issue of capacity of plaintiff raises only question of whether plaintiff is free from general disability such as infancy, insanity, or some other form of incompetency, or if he sues in representative capacity, whether he actually possesses character in which he sues and does not go to question of whether or not he has cause of action. *De Franco v. United States, 18 F.R.D. 156, 1955 U.S. Dist. LEXIS 4075 (D. Cal. 1955)*.

Rule 17(b) deals with capacity to bring action and does not affect survivability of private antitrust suit. *Cinnamon v. Abner A. Wolf, Inc., 215 F. Supp. 833, 7 Fed. R. Serv. 2d (Callaghan) 356, 1963 Trade Cas. (CCH) ¶70731, 1963 U.S. Dist. LEXIS 9889 (E.D. Mich. 1963)*.

Causes of action by plaintiffs suing for damages for fraud and misrepresentation of distributor-dealer contracts were severed and plaintiffs ordered to serve amended complaints alleging capacity to sue in conformity with Rule 17(b), and to state with particularity as required by Rule 9(b) where or when alleged fraudulent misrepresentations by defendant took place. *Sun-X Glass Tinting, Inc. v Sun-X International, Inc., 227 F. Supp. 365, 8 Fed. R. Serv. 2d (Callaghan) 20A.2, Case 2 (WD Wis 1964)*.

"Capacity to sue or be sued" as used in Rule 17 refers to general capacity. *Poole v. Wolke, 58 F.R.D. 110, 1973 U.S. Dist. LEXIS 15238 (D. Wis. 1973)*.

Capacity is ability of particular individual or entity to use, or to be brought into, courts of forum; it has no direct correlation to conducting of business, existence of enforceable right, interest, cause of action, claim or defense, or whether party is real party in interest. *Johnson v. Helicopter & Airplane Services Corp., 404 F. Supp. 726, 22 Fed. R. Serv. 2d (Callaghan) 610, 1975 U.S. Dist. LEXIS 15295 (D. Md. 1975)*.

Although manufacturers directly raised issue of capacity and legal existence in their motions to dismiss and that complied with *Fed. R. Civ. P. 9(a)*'s requirement for specific negative averment, manufacturers' argument that dismissal was appropriate because consultants failed to allege that manufacturers had legal existence or capacity to be sued was meritless as it was unnecessary to include allegations in pleading of parties' capacity or legal existence except when required to show jurisdiction. *Bradbury Co. v. Teissier-duCros, 387 F. Supp. 2d 1167, 62 Fed. R. Serv. 3d (Callaghan) 1256, 2005-2 Trade Cas. (CCH) ¶74947, 2005 U.S. Dist. LEXIS 21001 (D. Kan. 2005)*.

U.S. Bankruptcy Court for Northern District of Indiana, Hammond Division, agrees with concept that capacity issues under *Fed. R. Civ. P. 17(b)* may be raised by motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*. *Valich v. Trutko-Clayton (In re Trutko-Clayton), 384 B.R. 813, 2007 Bankr. LEXIS 4500 (Bankr. N.D. Ind. 2007)*.

60. Capacity of individuals

Capacity of party to maintain action under Federal Employers' Liability Act (*45 USCS §§ 51* et seq.) is governed by provisions of that Act and not by Federal Rules. *Kreiger v. Lehigh Valley R. Co., 1 F.R.D. 601, 1939 U.S. Dist. LEXIS 1680 (D.N.Y. 1939)*.

Under common law, father would be entitled to maintain action for all claims provided by Fair Labor Standards Act (*29 USCS §§ 201* et seq.) for his minor sons as employees of defendant, and at common law father would be real party in interest in such action, and under South Carolina statute mother also would be necessary party to action. *Constance v. Gosnell, 62 F. Supp. 253, 10 Lab. Cas. (CCH) ¶62771, 5 Wage & Hour Cas. (BNA) 602, 1945 U.S. Dist. LEXIS 1952 (D.S.C. 1945)*.

Felon imprisoned in California state prison was empowered to sue in federal court under *42 USCS § 1983* (deprivation of civil rights statute), though state statute provides that all civil rights of such person are suspended during term of sentence. *McCollum v. Mayfield, 130 F. Supp. 112, 1955 U.S. Dist. LEXIS 3336 (D. Cal. 1955)*.

In action by state prisoners under *42 USCS § 1983*, Missouri "civil death" statute rendering prisoners incapable of suing did not bar suit, despite Rule 17(b) making law of domicile determinant as to capacity of individuals to sue, since federal statute (*42 USCS § 1983*) allows suit by any citizen of United States or any other person in jurisdiction thereof. *Beishir v. Swenson, 331 F. Supp. 1224, 1970 U.S. Dist. LEXIS 12498 (W.D. Mo. 1970)*.

Substantive law of state where fee agreement which is asserted as basis for entitlement to finder's fee was executed and where sale with ready, willing, and able buyers occurred governs plaintiff's capacity to sue. *Baron & Co. v. Bank of New Jersey, 504 F. Supp. 1199, 1981 U.S. Dist. LEXIS 10237 (D.N.J. 1981)*.

Revival of creditor's corporate status during pendency of adversary proceeding and before trial retroactively validated filing of complaint and cured any timeliness issues, as Bankruptcy Rules pertaining to deadlines for filing complaints to determine denial of discharge or denial of discharge of particular debt were procedural, and not statutes of limitation. *Westland Architecture & Dev. Corp. v. Matthews (In re Matthews), 2016 Bankr. LEXIS 3609 (Bankr. C.D. Cal. Oct. 3, 2016)*.

61. —As depending on law of domicile

Even if prisoner, alleged domiciliary of Massachusetts serving life sentence in New Jersey, who was suing for libel in federal court in New York, lacked capacity to sue under New York statute providing that person sentenced to life imprisonment is to be deemed civilly dead, it was error to apply New York law since Rule 17(b) required application of law of plaintiff's domicile; since there was no showing that under law of his domicile plaintiff was incapable of suing, his action should not have been dismissed. *Urbano v. News Syndicate Co., 358 F.2d 145, 10 Fed. R. Serv. 2d (Callaghan) 345, 1966 U.S. App. LEXIS 6893 (2d Cir.)*, cert. denied, *385 U.S. 831, 87 S. Ct. 68, 17 L. Ed. 2d 66, 1966 U.S. LEXIS 699 (1966)*.

Civil rights statute (*42 USCS § 1983*), which affords right to sue to any citizen of United States who has been deprived of any right, privilege, or immunity, prevails over conflicting policy purportedly expressed in Rule 17(b) when applied in light of rationale of Virginia statutes which provide for appointment of committee which may sue and be sued in respect to all claims in favor of or against person convicted of felony. *Almond v. Kent, 459 F.2d 200, 15 Fed. R. Serv. 2d (Callaghan) 1531, 1972 U.S. App. LEXIS 10178 (4th Cir. 1972)*.

Under Federal Tort Claims Act (FTCA), *28 USCS § 1346(b)(1)*, applicable law was whole law of State where act or omission occurred, and not law of plaintiff Florida family members' domicile under *Fed. R. Civ. P. 17*, thus, Rule 17 did not apply to FTCA case filed by family members against defendant United States on claims that air traffic controllers caused plane crash in Texas, and did not, thorough Florida law as to survivorship actions, preclude family members from bringing FTCA claim against United States. *Schippers v. United States, 715 F.3d 879, 24 Fla. L. Weekly Fed. C 246, 85 Fed. R. Serv. 3d (Callaghan) 806, 2013 U.S. App. LEXIS 9068 (11th Cir. 2013)*.

Capacity of individual, not acting in representative character, to sue or be sued in federal court is ordinarily to be determined by law of his domicile, and if, by law of person's domicile, that person can sue irrespective of actual mental incompetence, he may do so in federal court. *Donnelly v. Parker, 486 F.2d 402, 158 U.S. App. D.C. 335, 17 Fed. R. Serv. 2d (Callaghan) 959, 1973 U.S. App. LEXIS 8266 (D.C. Cir. 1973)*.

Capacity to sue of assignee of claim for damages for violation of Antitrust Laws (*15 USCS §§ 1* et seq.) is governed by law of plaintiff's domicile. *Momand v. Twentieth-Century Fox Film Corp., 37 F. Supp. 649, 1941 U.S. Dist. LEXIS 3535 (D. Okla. 1941)*.

Employer's right to sue tortfeasor as subrogee of employee's beneficiary under workmen's compensation act was matter of substance, and rule of Erie Railroad Co. v Tompkins was equally as pertinent as Rule 17(b). *Melella v. Savage, 59 F. Supp. 258, 1945 U.S. Dist. LEXIS 2526 (D. Del. 1945)*.

In action against auto manufacturer by corporate auto dealer and its major stockholder, where defendant manufacturer argued that stockholder was not real party in interest as to damages claim for breach of contract for conveyance of real estate, capacity of major stockholder to sue was determined by law of his domicile (Pennsylvania) which was clear that plaintiff may sue in his own name without joining as plaintiff any person beneficially interested, when such plaintiff is acting in fiduciary or representative capacity, or is person with whom or in whose name contract has been made for benefit of another. *Rea v Ford Motor Co. (1972, WD Pa) 355 F Supp 842, 1973-1 CCH Trade Cases P 74332*, vacated on other grounds *(1974, CA3 Pa) 497 F2d 577, 1974-1 CCH Trade Cases P 75029*, cert den *(1974) 419 US 868, 95 S Ct 126, 42 L Ed 2d 106* and (criticized in *Salem Mall Lincoln Mercury, Inc. v Hyundai Motor Am. (1998, SD Ohio) 1998 US Dist LEXIS 22898*) and (criticized in *Bronx Chrysler Plymouth, Inc. v Chrysler Corp. (2002, SD NY) 212 F Supp 2d 233*) and (criticized in *Jackson v Volvo Trucks N. Am. (2006, CA10 Utah) 462 F3d 1234*).

In civil rights action for deprivation of rights of plaintiffs' decedent allegedly resulting in his death, capacity of plaintiffs to sue would be determined by law of plaintiffs' domicile, and where it was inferable from affidavit that plaintiffs' decedent was domiciled in Tennessee at time of his death, his personal representatives would likewise be domiciled there. *Troutman v. Johnson City, 392 F. Supp. 556, 1973 U.S. Dist. LEXIS 13855 (E.D. Tenn. 1973)*.

Under Rule 17(b), capacity of Attorney General of Alabama to institute and to prosecute challenge to constitutionality of state statute must be determined by state of Alabama. *Baxley v. Rutland, 409 F. Supp. 1249, 1976 U.S. Dist. LEXIS 16204 (M.D. Ala. 1976)*.

Where defendants were served with summons and copy of civil complaint after their convictions but before they began serving their sentences, defendants had capacity to be sued under Virginia law, under *Va. Code Ann. § 53.1-223*. *Buchanan County v. Blankenship, 406 F. Supp. 2d 642, 63 Fed. R. Serv. 3d (Callaghan) 881, 2005 U.S. Dist. LEXIS 35012 (W.D. Va. 2005)*.

Because defendant Maryland contractor company's charter had been forfeited under *Md. Code Ann., Corp. & Ass'ns § 3-503*, defendant principal of company, who was still operating company, was necessary party under *Fed. R. Civ. P. 19(a)*, as determined under Maryland law according to *Fed. R. Civ. P. 17(b)*, to plaintiff homeowners' suit for breach of construction contract. *Djourabchi v. Self, 240 F.R.D. 5, 67 Fed. R. Serv. 3d (Callaghan) 136, 2006 U.S. Dist. LEXIS 90136 (D.D.C. 2006)*.

Father, acting as "next friend" of his minor child, had standing to sue to redress infringement of his child's First Amendment and due process rights resulting from removal of series of books from school libraries within school district because, under state law, made applicable to instant case under *Fed. R. Civ. P. 17(b)*, child could not bring suit himself due to disability of nonage minors. *ACLU of Fla., Inc. v. Miami-Dade County Sch. Bd., 439 F. Supp. 2d 1242, 19 Fla. L. Weekly Fed. D 877, 2006 U.S. Dist. LEXIS 50502 (S.D. Fla. 2006)*, remanded, *557 F.3d 1177, 21 Fla. L. Weekly Fed. C 1467, 2009 U.S. App. LEXIS 2253 (11th Cir. 2009)*.

In museums' declaratory judgment suit against claimant to two paintings, seeking declaration that claimant had no valid claim of ownership in two disputed paintings, claimant had capacity to be sued under *Fed. R. Civ. P. 17(b)(1)* because under laws of Germany, which was his domicile, declaratory judgment suit could proceed against claimant in his individual capacity. *Museum of Modern Art v. Schoeps, 549 F. Supp. 2d 543, 2008 U.S. Dist. LEXIS 30717 (S.D.N.Y. 2008)*.

Unpublished decision: While *Fed. R. Civ. P. 17(c)* does not provide standard for determining competency, *Fed. R. Civ. P. 17(b)* provides that capacity of party to sue or be sued shall be determined by law of party's domicile; thus, in context of someone seeking to pursue litigation in federal court on his own behalf, term incompetent person in Rule 17(c) refers to person without capacity to litigate under law of his state of domicile. *Richards v. Duke Univ., 166 Fed. Appx. 595, 2006 U.S. App. LEXIS 1719 (3d Cir. 2006)*.

Unpublished decision: Where plaintiff inmate alleged defendants, seller of house inmate bought, seller's attorney, judge, unnamed county sheriff, and sheriff's department, conspired to unlawfully use temporary restraining order to retrieve wine collection left in house by seller, under *Fed. R. Civ. P. 17(b)*, capacity of sheriff's department to be sued was governed by state law, and because under state law sheriff's departments were not usually considered legal entities subject to suit, there was no error in district court's decision that inmate failed to state claim against sheriff's department. *Lawal v. Fowler, 196 Fed. Appx. 765, 2006 U.S. App. LEXIS 20565 (11th Cir. 2006)*.

62. Capacity of corporations

Cooperative corporation, not being real party in interest, may not maintain action for damages sustained by its members individually if state of incorporation does not grant such organizations right to sue in their corporate name upon causes of action owned by members. Farmers Co-op. *Farmers Co-op. Oil Co. v. Socony-Vacuum Oil Co., 133 F.2d 101, 1942 U.S. App. LEXIS 2460 (8th Cir. 1942)*.

Rule 17(b) simply codifies well established principle that issue of corporation's capacity to sue is question of substantive law. *Chrysler Credit Corp. v. Superior Dodge, Inc., 538 F.2d 616, 22 Fed. R. Serv. 2d (Callaghan) 19, 1976-2 Trade Cas. (CCH) ¶61011, 1976 U.S. App. LEXIS 7841 (4th Cir. 1976)*, cert. denied, *429 U.S. 1042, 97 S. Ct. 743, 50 L. Ed. 2d 754, 1977 U.S. LEXIS 247 (1977)*.

Corporation originally organized under law of Missouri, having forfeited its corporate charter, lacked capacity to maintain antitrust action in District Court. *Moore v. Matthew's Book Co., 597 F.2d 645, 1979-1 Trade Cas. (CCH) ¶62614, 1979 U.S. App. LEXIS 14921 (8th Cir. 1979)*.

Rule 17 prevails over antitrust law and requires application law of state where corporation is incorporated to determine whether it has capacity to sue. *Community Electric Service, Inc. v National Electrical Contractors Ass'n (1989, CA9 Cal) 869 F2d 1235, 131 BNA LRRM 2408, 111 CCH LC P 11110, 1989-1 CCH Trade Cases P 68475, 13 FR Serv 3d 743*, cert den *(1989) 493 US 891, 110 S Ct 236, 107 L Ed 2d 187* and (ovrld in part on other grounds by *Townsend v Holman Consulting Corp. (1990, CA9 Cal) 914 F2d 1136, 91 Daily Journal DAR 4058, 17 FR Serv 3d 801*) and (ovrld in part on other grounds by *Townsend v Holman Consulting Corp. (1991, CA9 Cal) 929 F2d 1358*).

Since county sheriff's department lacks capacity to be sued under Alabama law, District Court correctly dismissed pretrial detainee's case against it. *Dean v. Barber, 951 F.2d 1210, 22 Fed. R. Serv. 3d (Callaghan) 18, 1992 U.S. App. LEXIS 910 (11th Cir. 1992)*, app. after remand sub. nom., *Dean v. Bailey, 12 F.3d 219, 1993 U.S. App. LEXIS 33506 (11th Cir. 1993)*.

Rule 17(b) is declaratory of existing law that right of suit by or against corporation depends upon laws of state in which incorporated. *Sedgwick v. Beasley, 173 F.2d 918, 84 U.S. App. D.C. 325, 1949 U.S. App. LEXIS 2948 (D.C. Cir. 1949)*.

In antitrust action, plaintiff corporation has capacity to sue, even though it has been assigned antitrust damage claim, because state law providing that action for penalty is not assignable has no application. *Isidor Weinstein Inv. Co. v. Hearst Corp., 303 F. Supp. 646, 13 Fed. R. Serv. 2d (Callaghan) 276, 1969 Trade Cas. (CCH) ¶72953, 1969 U.S. Dist. LEXIS 13084 (N.D. Cal. 1969)*.

Capacity of corporation to bring suit in District Court is determined by law of state of its incorporation, and in action brought by South Carolina corporation seeking to have certain contracts for purchase of cotton declared valid and specifically in force, plaintiff had capacity to bring suit in District Court in Georgia, where plaintiff was incorporated under laws of South Carolina, and where none of parties contended that corporate law of South Carolina did not allow corporation power to sue. *R. N. Kelly Cotton Merchant, Inc. v. York, 379 F. Supp. 1075, 1973 U.S. Dist. LEXIS 11445 (M.D. Ga. 1973)*, aff'd, *494 F.2d 41, 14 U.C.C. Rep. Serv. (CBC) 890, 1974 U.S. App. LEXIS 8552 (5th Cir. 1974)*.

It has long been held that capacity of corporation to sue or be sued in federal court is determined by law under which it is organized, and Rule 17(b) applies only to capacity of corporation to sue or be sued in those actions coming to federal courts in exercise of their jurisdiction in cases excluding diversity jurisdiction. *Weinstock v. Sinatra, 379 F. Supp. 274, 1974 U.S. Dist. LEXIS 7939 (C.D. Cal. 1974)*.

In action brought under Miller Act, capacity of plaintiff corporation to be sued would be governed by Illinois law where plaintiff corporation was one organized under laws of Illinois. *United States use of Triangle Landscaping Corp. v. Home Ins. Co., 403 F. Supp. 320, 1975 U.S. Dist. LEXIS 15814 (N.D. Ill. 1975)*.

Capacity of city, a municipal corporation, to sue state must be determined by reference to state law. *426 F. Supp. 919, 10 Env't Rep. Cas. (BNA) 1564*.

Rule 17(b) does not require that corporation itself be sued in private antitrust action but only comes into play when injured party in such action choose to sue such corporation directly. *Tondas v. Amateur Hockey Asso., 438 F. Supp. 310, 1978-1 Trade Cas. (CCH) ¶61849, 1977 U.S. Dist. LEXIS 13601 (W.D.N.Y. 1977)*.

Foreign corporation's capacity to sue in federal court in diversity action is determined by state law. *Farris v. Sambo's Restaurants, Inc., 498 F. Supp. 143, 1980 U.S. Dist. LEXIS 14062 (N.D. Tex. 1980)*.

Pursuant to Rule 17(b), newspapers which are wholly owned subsidiaries of defendant corporation are properly dismissed from action, where newspapers are not separate corporations but are simply "d.b.a.s" of corporation, and their inclusion constitutes mere surplusage. *Laxalt v. McClatchy, 622 F. Supp. 737, 12 Media L. Rep. (BNA) 1377, 1985 U.S. Dist. LEXIS 13813 (D. Nev. 1985)*.

Foundation organized as trust under laws of Liechtenstein has capacity under Rule 17(b) to sue securities firm for alleged violations of *7 USCS §§ 6b* and *6*odespite firm's assertion that Illinois law indicating that trust cannot sue on its own behalf should be applied, where Foundation is actually corporate form of association under Liechtenstein law. *Khalid Bin Alwaleed Foundation v. E.F. Hutton & Co., 709 F. Supp. 815, 1989 U.S. Dist. LEXIS 2628 (N.D. Ill. 1989)*.

Claim that plaintiff, Canadian corporation, lacked capacity to sue was denied absent Canadian authority that corporation lacked capacity to sue in federal court under *Fed. R. Civ. P. 17(b)*. *Healthtrac, Inc. v. Sinclair, 302 F. Supp. 2d 1125, Fed. Sec. L. Rep. (CCH) ¶ 92686, Fed. Sec. L. Rep. (CCH) ¶92686, 2004 U.S. Dist. LEXIS 1751 (N.D. Cal. 2004)*.

District court had jurisdiction and plaintiffs' motion to remand was denied where one defendant (unincorporated division of its parent company) was found, under state law, not to have been proper party to suit because it was not legal entity or "person" and, after it was dismissed from suit, there was complete diversity between parties. *Doe v. Bayer Corp., 344 F. Supp. 2d 466, 2004 U.S. Dist. LEXIS 22893 (M.D.N.C. 2004)*.

Lanham Act action brought by company and licensee for trademark infringement was dismissed because pursuant to *Fed. R. Civ. P. 17(b)* and *805 Ill. Comp. Stat. 5/13.70* company did not have capacity to maintain claim as it had not registered with state to do business as foreign corporation, and fact that it was doing business as corporation registered with state was immaterial because corporation was not party to action, and licensee lacked standing under *15 USCS §§ 1114(1)*, *1127* as it did not own any rights to mark at issue. *Cent. Mfg. Co. v. Pure Fishing, Inc., 392 F. Supp. 2d 1046, 2005 U.S. Dist. LEXIS 22136 (N.D. Ill. 2005)*.

Two alleged conspirators could not be sued in direct purchasers' antitrust case against alleged conspirators since they merged into one alleged conspirator that existed as surviving entity; as result, two alleged conspirators lacked *Fed. R. Civ. P. 17(b)* capacity to be sued, as law of state where forum court was located guided inquiry, and applicable Illinois law, 805 ILCS 180/37-30(a)(1), dictated that separate existence of limited liability company ceased to exist when merger takes effect. *In re: Dairy Farmers of Am., Inc., 767 F. Supp. 2d 880, 2011 U.S. Dist. LEXIS 13307 (N.D. Ill. 2011)*.

Unpublished decision: Granting debtor's motion to set aside default judgment, under *Fed. R. Civ. P. 55(c)* and *60(b)*, would have been futile because other corporations lacked capacity to file answers to bankruptcy trustee's second amended complaint because trustee provided evidence that none of other corporations were in good standing with California Secretary of State, no evidence was provided to contrary, and, under California law, corporation that was not in good standing could have neither prosecuted lawsuit nor defended one; no default judgment was entered against debtor. *Kendall v. State (In re Northgate Ctr., Inc.), 2009 Bankr. LEXIS 2475 (Bankr. N.D. Cal. May 1, 2009)*.

Debtor waived his right to claim that LLC that joined two other creditors in filing involuntary bankruptcy petition under Chapter 7 of Bankruptcy Code was ineligible to act as petitioning creditor because Oklahoma Secretary of State terminated its right to conduct business before petition was filed; capacity to sue was not same thing as standing to sue, capacity could be waived under *Fed. R. Civ. P. 17* and *Fed. R. Bankr. P. 7017*, debtor waived LLC's lack of capacity because he did not raise that defense for thirteen months after case was filed, and both LLC that was terminated before petition was filed and LLC that was terminated after petition was filed met qualifications

under *11 U.S.C.S. § 303* for acting as petitioning creditors. *In re Agrawal, 2017 Bankr. LEXIS 3771 (Bankr. W.D. Okla. Oct. 30, 2017)*.

Defendant, alleged in complaint to be division of company, was dismissed from suit because, under District of Columbia law, unincorporated divisions of corporation lacked legal capacity to be sued. Smartdoor Holdings, Inc. v. Edmit Indus., *Smartdoor Holdings, Inc. v Edmit Indus. (2015, DC Dist Col), 78 F. Supp. 3d 275 (January 23, 2015)*.

63. —Dissolved or merged corporation

In action brought by Pennsylvania corporation to recover for damages to pipeline owned at time of damage by corporation which was later merged into plaintiff corporation, law of Pennsylvania would determine whether plaintiff could sue to recover pre-merger damages. *Sun Pipe Line Co. v. Altes, 511 F.2d 280, 51 Oil & Gas Rep. 21, 1975 U.S. App. LEXIS 16050 (8th Cir. 1975)*.

Under Rule 17(b) corporation which has forfeited its charter but has not been completely dissolved, has capacity to be sued even though government's initial complaint was not filed until more than 3 years after forfeiture of its charter, since under Delaware law corporation with forfeited charter is not completely dead for all purposes, but is merely in "state of coma," during which it is still subject to suit, even if suit is brought more than three years after charter forfeiture. *United States v. Northeastern Pharm. & Chem. Co., 810 F.2d 726, 25 Env't Rep. Cas. (BNA) 1385, 17 Envtl. L. Rep. 20603, 1986 U.S. App. LEXIS 36423 (8th Cir. 1986)*, cert. denied, *484 U.S. 848, 108 S. Ct. 146, 98 L. Ed. 2d 102, 26 Env't Rep. Cas. (BNA) 1856, 1987 U.S. LEXIS 4136 (1987)*.

Illinois statute permitting lawsuit against dissolved corporation to be commenced within five years of dissolution, rather than federal law, applied to suit under CERCLA for cleanup costs; CERCLA is federal law and Rule 17(b) expressly states that corporation's capacity to sue and be sued shall be determined by law under which it was organized. *Citizens Elec. Corp. v. Bituminous Fire & Marine Ins. Co., 68 F.3d 1016, 26 Envtl. L. Rep. 20055, 1995 U.S. App. LEXIS 29771 (7th Cir. 1995)*.

In suit challenging denial of loan assistance applications for energy-efficient vehicles, defunct corporation lacked capacity to sue to obtain reconsideration and granting of its loan application because under applicable California law, dissolved corporation continued to exist only for purpose of winding up its affairs, and prosecuting and defending actions by or against it but not for purpose of continuing business except so far as necessary for winding up thereof, and relief sought would effectively revitalizing its business operations, rather than winding them up. *XP Vehicles, Inc. v. DOE, 118 F. Supp. 3d 38, 2015 U.S. Dist. LEXIS 90998 (D.D.C. 2015)*.

Dismissal of appeal was required because only remaining appellant, Cayman Islands corporation, had been stricken from Cayman Register of Companies before notice of appeal was filed and therefore lacked capacity to sue or be sued. *FBME Ltd. v. Mnuchin, 709 Fed. Appx. 4, 2017 U.S. App. LEXIS 21046 (D.C. Cir. 2017)*, reh'g denied, *2017 U.S. App. LEXIS 21678 (D.C. Cir. Oct. 31, 2017)*.

Subsidiary that initiated tender offer and subsequently merged into acquired corporation was properly dismissed from suit alleging nondisclosures in tender offer recommendation statement; under Delaware law, subsidiary ceased to exist after merger was consummated, and its rights and liabilities belonged to surviving corporation. *Varjabedian v. Emulex Corp., 888 F.3d 399, Fed. Sec. L. Rep. (CCH) ¶ 100086, Fed. Sec. L. Rep. (CCH) ¶100086, 2018 U.S. App. LEXIS 10000 (9th Cir. 2018)*, reh'g denied, reh'g, en banc, denied, *2018 U.S. App. LEXIS 25363 (9th Cir. Sept. 6, 2018)*, cert. granted, *139 S. Ct. 782, 202 L. Ed. 2d 511, 2019 U.S. LEXIS 8 (2019)*, cert. dismissed, *139 S. Ct. 1407, 203 L. Ed. 2d 635, 2019 U.S. LEXIS 2942 (2019)*.

As under New York law, dissolved corporation may maintain suit to collect its assets, New York corporation has capacity to sue in federal courts even after dissolution. *Display Stage Lighting Co. v. Century Lighting, Inc., 41 F. Supp. 937, 52 U.S.P.Q. (BNA) 163, 1941 U.S. Dist. LEXIS 2572 (D.N.Y. 1941)*.

Under Rule 17(b), question whether maintenance of civil suit against Illinois corporation may be instituted three and one half years after formal dissolution of such corporation must be determined by law of Illinois. *Stone v. Gibson Refrigerator Sales Corp., 366 F. Supp. 733, 1973 U.S. Dist. LEXIS 10859 (E.D. Pa. 1973)*.

In tort action brought against defendant corporations, one of which was dissolved Georgia corporation, Georgia law would be applicable with respect to question of whether dissolved corporation might be impleaded as third-party defendant after 2-year period of extension under Georgia statute had expired. *Litts v. Refrigerated Transport Co., 375 F. Supp. 675, 19 Fed. R. Serv. 2d (Callaghan) 22, 1973 U.S. Dist. LEXIS 11009 (M.D. Pa. 1973)*.

Rule 17(b), providing that capacity of corporation to sue or be sued is to be determined by law under which it was organized, applies to dissolved as well as active corporations; Rule 17(b) was meant to be adoption of local rules on capacity to sue and be sued, not an equation of capacity with "doing business" concept; corporation organized under laws of Delaware which had voluntarily dissolved did not have capacity to be sued in products liability action instituted after three-year period for winding up affairs of corporation had expired since, notwithstanding corporation's failure to surrender certificate of authority to do business in New York, its capacity to be sued was governed only by state of its organization, and once corporation was dissolved in Delaware and statutory period for winding up its affairs had expired, corporation ceased to exist for purposes of suit in any federal court. *Johnson v. Helicopter & Airplane Services Corp., 404 F. Supp. 726, 22 Fed. R. Serv. 2d (Callaghan) 610, 1975 U.S. Dist. LEXIS 15295 (D. Md. 1975)*.

Dissolved corporation that has tangible assets that can be reached is liable for response costs, and state corporate capacity statutes that would hold to contrary, as well as *FRCP 17(b)*, are preempted. *22 Envtl. L. Rep. 21352*.

Capacity of dissolved corporation to sue or be sued is controlled by law of state in which it was incorporated. *Old Republic Ins. Co. v. Hansa World Cargo Serv., Inc., 170 F.R.D. 361, RICO Bus. Disp. Guide ¶9245, 1997 U.S. Dist. LEXIS 2050 (S.D.N.Y. 1997)*.

Where dissolved race systems company brought action for patent infringement against competitor, court found that *Fed. R. Civ. P. 17(b)* did not prevent race systems company, as dissolved corporation, from bringing lawsuit. *Race Safe Sys. v. Indy Racing League, 251 F. Supp. 2d 1106, 66 U.S.P.Q.2d (BNA) 1536, 2003 U.S. Dist. LEXIS 4136 (N.D.N.Y. 2003)*.

U.S.' motion to dismiss refund suit under *26 USCS § 7422(a)* by dissolved corporation, its subsidiaries, and two other corporations was denied as to corporation because corporation had capacity under *Fed. R. Civ. P. 9(a)*, 17(b) to maintain refund suit since suit was sufficiently related to earlier refund claim filed with IRS so as to constitute one proceeding for purposes of *Kan. Stat. Ann. § 17-6807*, but was granted as to other corporations because they were not common parent and could not maintain refund suit on behalf of consolidated return group. *96 A.F.T.R.2d (RIA) 7465, 2005 U.S. Dist. LEXIS 32783*.

Motion to remand was granted because dissolved oil company was properly named as defendant and its consent to removal was necessary, company was not fraudulently joined because there was "glimmer of hope" of success against it and claims were not misjoined because they fell squarely within four corners of *Fed. R. Civ. P. 20(a)*. *Ryan Envtl., Inc. v. Hess Oil Co., 718 F. Supp. 2d 719, 2010 U.S. Dist. LEXIS 53876 (N.D. W. Va. 2010)*.

In case in which employer was dissolved District of Columbia corporation, pursuant to D.C. Code § 29-221.18, employee could serve *Fed. R. Civ. P. 30(b)(6)* notice of deposition on employer in same way that she could serve Rule 30(b)(6) notice on existing corporation. *Simms v. Ctr. for Corr. Health & Policy Studies, 272 F.R.D. 36, 78 Fed. R. Serv. 3d (Callaghan) 733, 2011 U.S. Dist. LEXIS 4991 (D.D.C. 2011)*.

Unpublished decision: Texas law resulted in brief split of legal and beneficial titles to mark when cross-appellee's corporate privileges were forfeited but that split was only temporary; when company subsequently forfeited its charter, Texas law deemed company to have been dissolved under *Tex. Bus. Corp. Act art. 7.12*; one of effects of dissolution was to rejoin legal and beneficial titles, and as cross-appellee regained full right to sue or defend on

mark by company sold mark to another party, other party likewise had full power when he licensed mark and joined lawsuit. *Guar. Residential Lending, Inc. v. Homestead Mortg. Co., L.L.C., 291 Fed. Appx. 734, 2008 FED App. 0541N, 2008 U.S. App. LEXIS 19025 (6th Cir. 2008)*.

Diversity action had to be dismissed for lack of subject matter jurisdiction because signatory to contract and real party in interest had forfeited corporate privileges for failure to pay franchise taxes, thus could not sue in Texas, and was outside three-year survival period; moreover, alleged parent company could not be joined as real party in interest because it was not party to contract, had separate corporate existence, and was not identified as parent company on franchise tax report. Construtodo, S.A. de C.V. v. Conficasa Holdings, Inc., *Construtodo, S.A. de C.V. v Conficasa Holdings, Inc. (2014, SD Tex), 2014 U.S. Dist. LEXIS 13782 (January 31, 2014)*.

Revival of creditor's corporate status during pendency of adversary proceeding and before trial retroactively validated filing of complaint and cured any timeliness issues, as Bankruptcy Rules pertaining to deadlines for filing complaints to determine denial of discharge or denial of discharge of particular debt were procedural, and not statutes of limitation. *Westland Architecture & Dev. Corp. v. Matthews (In re Matthews), 2016 Bankr. LEXIS 3609 (Bankr. C.D. Cal. Oct. 3, 2016)*.

B. Capacity "In All Other Cases"

1. In General

64. Generally

Capacity to sue is to be judged by law of state in which federal district court sits, but this is only true when right to object thereto has not been waived; defendant waived issue of plaintiff's capacity when he waited for more than seven months after second amended complaint and more than three months after answer on merits were filed, and after statute of limitations of state other than forum state had run, before making his motion to dismiss because of lack of capacity to sue. *Young v. Pattridge, 40 F.R.D. 376, 10 Fed. R. Serv. 2d (Callaghan) 69, 1966 U.S. Dist. LEXIS 10691 (N.D. Miss. 1966)*.

Unpublished decision: Under *Fed. R. Civ. P. 17(b)*, capacity to sue or be sued was be determined by law of state in which district court was held and sheriff's departments and police departments were not usually considered legal entities subject to suit. *Robinson v. Hogansville Police Dep't, 159 Fed. Appx. 137, 2005 U.S. App. LEXIS 28040 (11th Cir. 2005)*.

65. Controlling effect of state law

Federal district court which has jurisdiction by virtue of diversity must give effect to conflict of law rule of state in which action is brought. *Natale v. Upjohn Co., 356 F.2d 590, 3 U.C.C. Rep. Serv. (CBC) 133, 1966 U.S. App. LEXIS 7148 (3d Cir. 1966)*.

Congress clearly mandated that courts follow Federal Rules of Civil Procedure when adjudicating CERCLA claims; therefore, state capacity statutes, as opposed to liability statutes, are not preempted by CERCLA. *Witco Corp. v. Beekhuis, 38 F.3d 682, 39 Env't Rep. Cas. (BNA) 1545, 25 Envtl. L. Rep. 20007, 1994 U.S. App. LEXIS 29352 (3d Cir. 1994)*.

That defendant, alleged in complaint to be division of company, was allegedly Canadian entity did not change capacity analysis because capacity to be sued was based on law of state where court was located. Smartdoor Holdings, Inc. v. Edmit Indus., *Smartdoor Holdings, Inc. v Edmit Indus. (2015, DC Dist Col), 78 F. Supp. 3d 275 (January 23, 2015)*.

Even though corporation has capacity to sue if it is entitled to sue according to the law under which it was organized, it still may be deprived of federal forum for noncompliance with corporate registration or other door-

closing statute of forum state. *Flour Mills of America, Inc. v. Pace, 75 F.R.D. 676, 1977 U.S. Dist. LEXIS 15812 (E.D. Okla. 1977)*.

State "door-closing" statute prohibiting corporation which transacts business in state from suing in state court unless it has obtained authority to transact business there is clearly substantive legal rule, and as such, must be given precedence over Rule 17(b). *McCollum Aviation, Inc. v. Cim Associates, Inc., 438 F. Supp. 245, 1977 U.S. Dist. LEXIS 13829 (S.D. Fla. 1977)*.

On state law claims, capacity to sue is determined by state law. *Comstock v. Pfizer Retirement Annuity Plan, 524 F. Supp. 999, 2 Employee Benefits Cas. (BNA) 2050, 1981 U.S. Dist. LEXIS 14965 (D. Mass. 1981)*.

Because court could not proceed in civil forfeiture proceedings until one of parties filed suggestion of death concerning claimant and since under state law, which was made applicable to federal proceedings by *Fed. R. Civ. P. 17(b)*, all claims survived death, court ordered parties to address claimant's death so that substitution could be made under *Fed. R. Civ. P. 25*. *United States v. Currency $ 11,331, 482 F. Supp. 2d 873, 2007 U.S. Dist. LEXIS 28503 (E.D. Mich. 2007)*.

Unpublished decision: Under *Fed. R. Civ. P. 17(b)*, state law controlled issue, in *42 USCS § 1983* action, of whether county police department was entity that was subject to suit. *Lovelace v. Dekalb Cent. Prob., 144 Fed. Appx. 793, 2005 U.S. App. LEXIS 16090 (11th Cir. 2005)*.

Unpublished decision: County board of education was properly dismissed as party under *Fed. R. Civ. P. 12(b)(6)* and *17* in former employee's action under *42 USCS § 1983* because under Georgia law, county board of education was not body corporate and did not have capacity to sue or to be sued. *Mason v. Clayton County Bd. of Educ., 334 Fed. Appx. 191, 2009 U.S. App. LEXIS 10491 (11th Cir. 2009)*.

Unpublished decision: Fire victim's claims against N.Y.C. Fire Department (NYFD), Police Department (NYPD), and Emergency Medical Services (EMS) unit failed as matter of law because pursuant to *Fed. R. Civ. P. 17(b)*, capacity of government agency to sue or be sued must be determined by law of State in which district court is held and State had neither expressly given nor necessarily implied that NYPD, FDNY or EMS could sue or be sued in their individual capacities. *Petway v. City of New York, 2005 U.S. Dist. LEXIS 37783 (E.D.N.Y. Sept. 2, 2005)*.

66. —What constitutes "law of the state"

In context of a *28 USCS § 1404(a)* transfer between district courts, language of Rule 17(b) refers to law of transferor state rather than to law of transferee state. *Van Dusen v. Barrack, 376 U.S. 612, 84 S. Ct. 805, 11 L. Ed. 2d 945, 1964 U.S. LEXIS 1537 (1964)*.

In ascertaining state law under Rule 17(b) as in cases arising under doctrine of *Erie R. Co. v Tompkins, 304 US 65, 82 L Ed 1188, 58 S Ct 817, 114 ALR 1487*, intermediate state court decisions must be heeded by federal court, absent ruling by highest state court, unless federal court is convinced by other persuasive data that highest court of state would decide otherwise. *Cooper v. American Airlines, Inc., 149 F.2d 355, 1945 U.S. App. LEXIS 2596 (2d Cir. 1945)*.

"State law" required to be applied by federal courts includes common law of state as well as state statutory law; whenever Federal Rules require application in District of Columbia of state law as distinguished from federal law, law intended is law which is locally applicable within district and not that which is applicable generally there and elsewhere as federal law. *Fennell v. Bache, 123 F.2d 905, 74 App. D.C. 247, 1941 U.S. App. LEXIS 2845 (D.C. Cir.)*, cert. denied, *314 U.S. 689, 62 S. Ct. 359, 86 L. Ed. 551, 1941 U.S. LEXIS 46 (1941)*.

Under *28 USCS § 1404(a)* transferee district court must apply laws of state of transferor district court and Rule 17(b) must be interpreted so that capacity to sue would be governed by laws of transferor state. *Glazer v. Colonial Village Corp., 232 F. Supp. 892, 1964 U.S. Dist. LEXIS 8347 (E.D. Tenn. 1964)*.

67. Miscellaneous

Where Indian nation sued Director of Arizona Department of Gaming on basis of federal common law, in disregard of his lack of capacity to be sued under Arizona law, but argued that he had no capacity to counterclaim under Arizona law, as this would be inequitable, district court held he could participate as normal litigant, including by asserting counterclaims. *Tohono O'odham Nation v. Ducey, 174 F. Supp. 3d 1194, 2016 U.S. Dist. LEXIS 42410 (D. Ariz. 2016)*.

Capacity to sue is to be judged by law of state in which federal district court sits, but this is only true when right to object thereto has not been waived; defendant waived issue of plaintiff's capacity when he waited for more than seven months after second amended complaint and more than three months after answer on merits were filed, and after statute of limitations of state other than forum state had run, before making his motion to dismiss because of lack of capacity to sue. *Young v. Pattridge, 40 F.R.D. 376, 10 Fed. R. Serv. 2d (Callaghan) 69, 1966 U.S. Dist. LEXIS 10691 (N.D. Miss. 1966)*.

2. Partnerships and Unincorporated Associations

68. Generally

While alternative methods of suit are provided by Rule 17(b) and Rule 23(a), diversity of citizenship for federal jurisdiction must still exist between all parties on one side and all parties on other; if association is sued or sues as entity under Rule 17(b), citizenship is determined by individual members; if association is class party under Rule 23(a), representatives named must have complete diversity from other side; if association in capacity of entity is joined with persons fairly representing association as class, then association itself is party and citizenship is determined accordingly. *Lowry v. International Brotherhood of Boilermakers, etc., 259 F.2d 568, 1 Fed. R. Serv. 2d (Callaghan) 302, 42 L.R.R.M. (BNA) 2748, 42 L.R.R.M. (BNA) 2749, 35 Lab. Cas. (CCH) ¶71819, 1958 U.S. App. LEXIS 5071 (5th Cir. 1958)*.

69. Capacity under state law, generally

Under Rule 17(b), capacity of unincorporated association to sue is determined by law of forum state. *In re Vento Dev.Corp., 560 F.2d 2, 3 Bankr. Ct. Dec. (LRP) 687, 13 Collier Bankr. Cas. (MB) 412, 1977 U.S. App. LEXIS 12837 (1st Cir. 1977)*.

Judgment entered in favor of limited partnership on its breach of contract claim against property manager that wrongfully disbursed its escrow funds was affirmed, as partnership and limited partners had standing to sue on their own behalf and on behalf of partnership. *Eastland Partners Ltd. Partners v. Village Green Mgmt. Co. (In re Brown), 342 F.3d 620, 2003 FED App. 0315P, 2003 U.S. App. LEXIS 18155 (6th Cir. 2003)*, reh'g denied, *2003 U.S. App. LEXIS 20330 (6th Cir. Sept. 29, 2003)*.

Although Civilian Board of Contract Appeals initially dismissed contractor's case because it was not in good standing under Delaware LLC law, because court vacated that dismissal in its entirety and contractor was restored to good standing at time of remand, Board erred by not considering merits of its claim; further, because contractor had capacity to maintain action under Delaware law, court did not have to decide whether Board erred in its determination that it was not unincorporated association under *Fed. R. Civ. P. 17*. *W. States Fed. Contr., LLC v. VA, 667 Fed. Appx. 775, 2016 U.S. App. LEXIS 12976 (Fed. Cir. 2016)*.

Unincorporated association cannot sue unless such right to sue is granted by state law or suit is for the enforcement of substantive right under Constitution or laws of United States. *American Newspaper Guild v. Mackinnon, 108 F. Supp. 312, 1952 U.S. Dist. LEXIS 2262 (D. Utah 1952)*.

Where plaintiff arrestee sued defendant police department alleging he was arrested in different city by police officers who were operating outside of their jurisdiction, police department was not legal entity subject to suit under Florida law, which was applied for purposes of determining capacity under *Fed. R. Civ. P. 17(b)*. *Ball v. City of Coral*

Gables, 548 F. Supp. 2d 1364, 2008 U.S. Dist. LEXIS 37016 (S.D. Fla.), aff'd, *301 Fed. Appx. 865, 2008 U.S. App. LEXIS 24695 (11th Cir. 2008)*.

Where former police captain brought civil rights action alleging wrongful termination, city police department was not suable entity and therefore had be dismissed from suit. Louisiana law determined suability of police department and parties cited to no law that conferred upon police department authority to sue or be sued. Winn v. New Orleans City, 919 F. Supp. 2d 743, 2013 U.S. Dist. LEXIS 10570 (E.D. La. 2013), dismissed, in part, 2014 U.S. Dist. LEXIS 24365 (E.D. La. Feb. 25, 2014).

70. Enforcement of substantive federal rights, generally

Rule 17(b) allowing unincorporated association to sue or be sued in its common name for purpose of enforcing federal substantive right merely embodies law as previously declared in United Mine Workers v. Coronado Coal Co., 259 U.S. 344, 42 S. Ct. 570, 66 L. Ed. 975, 1922 U.S. LEXIS 2490 (1922), app. after remand, 268 U.S. 295, 45 S. Ct. 551, 69 L. Ed. 963, 1925 U.S. LEXIS 741 (1925).Denver & R. G. W. R. Co. v. Brotherhood of Railroad Trainmen, 387 U.S. 556, 87 S. Ct. 1746, 18 L. Ed. 2d 954, 11 Fed. R. Serv. 2d (Callaghan) 361, 65 L.R.R.M. (BNA) 2385, 55 Lab. Cas. (CCH) ¶11954, 1967 U.S. LEXIS 2841 (1967).Williams v. United Mine Workers, 294 Ky. 520, 172 S.W.2d 202, 7 Lab. Cas. (CCH) ¶61642, 1943 Ky. LEXIS 487 (Ky. 1943).

Under Fair Labor Standards Act (29 USCS §§ 201 et seq.), voluntary, cooperative, mutual association may be subject to suit in federal district court although it could not be sued or summoned as entity in state court. Schmidt v. Peoples Tel. Union, 138 F.2d 13, 7 Lab. Cas. (CCH) ¶61782, 3 Wage & Hour Cas. (BNA) 648, 1943 U.S. App. LEXIS 2414 (8th Cir. 1943).

Rule 17(b), permitting unincorporated associations to sue or be sued in their common name to enforce federal substantive right, thus recognizes them as jural entities. *Underwood v. Maloney, 256 F.2d 334, 41 L.R.R.M. (BNA) 2795, 42 L.R.R.M. (BNA) 2407, 34 Lab. Cas. (CCH) ¶71402, 34 Lab. Cas. (CCH) ¶71529, 1958 U.S. App. LEXIS 5010, 1958 U.S. App. LEXIS 5030 (3d Cir.)*, cert. denied, *358 U.S. 864, 79 S. Ct. 93, 3 L. Ed. 2d 97, 42 L.R.R.M. (BNA) 2830, 1958 U.S. LEXIS 1834 (1958)*; Philadelphia Local, A. F. T. v. American Federation of Teachers, 44 F. Supp. 345, 1942 U.S. Dist. LEXIS 2983 (D. Pa. 1942).

Right to arbitrate is substantive right existing under laws of United States within exception to Rule 17(b). *Laundry, Dry Cleaning & Dye House Workers International Union v. Mahoney, 491 F.2d 1029, 84 L.R.R.M. (BNA) 2084, 85 L.R.R.M. (BNA) 2280, 73 Lab. Cas. (CCH) ¶14242, 1973 U.S. App. LEXIS 12392, 1974 U.S. App. LEXIS 10460 (8th Cir.)*, cert. denied, *419 U.S. 825, 95 S. Ct. 42, 42 L. Ed. 2d 49, 87 L.R.R.M. (BNA) 2397, 75 Lab. Cas. (CCH) ¶10364, 1974 U.S. LEXIS 4103 (1974)*.

When party seeks to take advantage of exception in Rule 17(b) which permits unincorporated association to sue or be sued in its common name for purpose of enforcing for or against it substantive right under laws of United States, and laws under which alleged right originates do not specifically limit right to "person," but rather say nothing one way or the other, court is free to decide applicability of Rule 17(b) substantive right exception on merits of particular case before it. National Asso. for Community Development v. Hodgson, 356 F. Supp. 1399, 17 Fed. R. Serv. 2d (Callaghan) 251, 1973 U.S. Dist. LEXIS 14228 (D.D.C. 1973), overruled, National Treasury Employees' Union v. Campbell, 482 F. Supp. 1122, 1980 U.S. Dist. LEXIS 9875 (D.D.C. 1980).

Where putative class action asserted by debtors involved a political subdivision's alleged violation of the stay, violation of the discharge injunction, and unjust enrichment, while the state of South Carolina could certainly place limitations on litigants' abilities to bring certain actions in state court, those limitations did not extend to causes of action brought under federal bankruptcy law, in the bankruptcy court. Jones v. Lexington Health Servs. Dist., Inc. (In re Jones), 618 B.R. 757, 2020 Bankr. LEXIS 1806 (Bankr. D.S.C. 2020).

71. —Patent and antitrust cases

In patent case, unincorporated association must be sued in district in which it maintains its principal place of business, or at any of its regular or established places of business where it may have infringed, and it may be sued in its common name. *Sperry Products, Inc. v. Association of American Railroads, 132 F.2d 408, 56 U.S.P.Q. (BNA) 1, 1942 U.S. App. LEXIS 2610 (2d Cir. 1942)*, cert. denied, *319 U.S. 744, 63 S. Ct. 1031, 87 L. Ed. 1700, 57 U.S.P.Q. (BNA) 568 (1943)*, cert. denied, *319 U.S. 744, 63 S. Ct. 1031, 87 L. Ed. 1700, 57 U.S.P.Q. (BNA) 569, 1943 U.S. LEXIS 1256 (1943)*.

Question of who may bring action under federal antitrust laws on behalf of limited partnership is governed by Federal Rules of Civil Procedure, and especially Rule 17(b). *Klebanow v. New York Produce Exchange, 344 F.2d 294, Bankr. L. Rep. (CCH) ¶61362, 1965 Trade Cas. (CCH) ¶71413, 1965 U.S. App. LEXIS 6039 (2d Cir. 1965)*, *1965 U.S. App. LEXIS 6039 (2d Cir. 1965)* (superseded by statute on other grounds as stated in *Koppel v 4987 Corp. (1999, SD NY) CCH Fed Secur L Rep P 90640*).

State rule that suit by partnership must be brought in names of individual partners is superseded in patent suits by provision of Rule 17(b) that partnership may sue in its common name for purpose of enforcing substantive right existing under Constitution or laws of United States. *Gregory v. Royal Typewriter Co., 27 F. Supp. 160, 41 U.S.P.Q. (BNA) 85, 1939 U.S. Dist. LEXIS 2840 (D.N.Y. 1939)*.

When action for injunction and treble damages under federal Antitrust Acts (*15 USCS §§ 1* et seq.), common law, and general business law of New York was properly brought against unincorporated association in its common name, charging violation of federal statutes, it would be needless formalism to require officer of association to be named as such in accordance with New York law, particularly when association's president had been served both individually and as president, and individual members of association were also named as defendants. *Braddick v. Federation of Shorthand Reporters, 115 F. Supp. 550, 32 L.R.R.M. (BNA) 2580, 24 Lab. Cas. (CCH) ¶67762, 1953 U.S. Dist. LEXIS 2445 (D.N.Y. 1953)*.

Action brought by one of two partners in dissolved California partnership in process of liquidation, for treble damages for claimed violation of Antitrust Laws (*15 USCS §§ 1* et seq.) was an "act appropriate for winding up partnership affairs," and action could be brought by one partner in partnership name. *Leh v. General Petroleum Corp., 165 F. Supp. 933, 1 Fed. R. Serv. 2d (Callaghan) 297, 1958 Trade Cas. (CCH) ¶69138, 1958 U.S. Dist. LEXIS 3761 (S.D. Cal. 1958)*.

72. Unincorporated association, generally

Non-profit organization had capacity to sue as unincorporated association in federal court, regardless of its capacity to sue under state law, because it forfeited its corporate charter by failing to file annual report in one year. *Committee for Idaho's High Desert v. Yost, 92 F.3d 814, 96 Cal. Daily Op. Service 5814, 35 Fed. R. Serv. 3d (Callaghan) 897, 39 U.S.P.Q.2d (BNA) 1705, 1996 U.S. App. LEXIS 19488 (9th Cir. 1996)*.

Although plaintiff's corporate powers were suspended and, under California law, it could not bring suit or defend legal action, district court properly held that it had capacity to sue under Lanham Act, as Federal Rules of Civil Procedure allowed unincorporated association that lacked capacity to sue under state law to sue to enforce substantive right existing under federal law. *S. Cal. Darts Ass'n v. Zaffina, 762 F.3d 921, 112 U.S.P.Q.2d (BNA) 1326, 2014 U.S. App. LEXIS 15391 (9th Cir. 2014)*.

Rule 17(b), which appears to contemplate suits against unincorporated associations for purpose of enforcing constitutional rights is entirely understandable in terms of providing forum for equitable relief, and does not presuppose existence of Bivens remedies against entities such as schools who enjoy Eleventh Amendment immunity. *Kauffman v. Anglo-American Sch. of Sofia, 28 F.3d 1223, 307 U.S. App. D.C. 356, 1994 U.S. App. LEXIS 17008 (D.C. Cir. 1994)*.

Although Civilian Board of Contract Appeals initially dismissed contractor's case because it was not in good standing under Delaware LLC law, because court vacated that dismissal in its entirety and contractor was restored

to good standing at time of remand, Board erred by not considering merits of its claim. Further, because contractor had capacity to maintain action under Delaware law, court did not have to decide whether Board erred in its determination that it was not unincorporated association under Fed. R. Civ. P. 17. *W. States Fed. Contr., LLC v. VA, 667 Fed. Appx. 775, 2016 U.S. App. LEXIS 12976 (Fed. Cir. 2016)*.

Unincorporated association which has brought suit in its common name but is unable to establish necessary diversity of citizenship as to all of its individual members may be given opportunity to proceed with case as class action if there is diversity of citizenship as to its representatives. *International Allied Printing Trades Ass'n v. Master Printers Union, 34 F. Supp. 178, 46 U.S.P.Q. (BNA) 464, 1940 U.S. Dist. LEXIS 2760 (D.N.J. 1940)*.

Rule 17(b) permits unincorporated association of seven or more members to sue in its common name, if it has such capacity by law of state in which district court is held. *International Allied Printing Trades Ass'n v. Master Printers Union, 34 F. Supp. 178, 46 U.S.P.Q. (BNA) 464, 1940 U.S. Dist. LEXIS 2760 (D.N.J. 1940)*.

Federal court in Pennsylvania applied Pennsylvania rule that unincorporated association may be sued in equity by naming several of its members as representatives of entire body. *Philadelphia Local, A. F. T. v. American Federation of Teachers, 44 F. Supp. 345, 1942 U.S. Dist. LEXIS 2983 (D. Pa. 1942)*.

Where defendant is an unincorporated association with its principal office in Cleveland it could not be sued in Illinois, since it is inhabitant or resident of place where it has its principal office only. *Griffin v. Illinois C. R. Co., 88 F. Supp. 552, 25 L.R.R.M. (BNA) 2288, 17 Lab. Cas. (CCH) ¶65516, 1949 U.S. Dist. LEXIS 1902 (D. Ill. 1949)*.

In civil suit brought by 4 unincorporated associations against Labor Department and an unincorporated association, Interstate Conference of Employment Security Agencies (ICESA), based on alleged violation of federal criminal statutory provision (*18 USCS § 1913*) making governmental subsidy of lobbying illegal, plaintiffs were attempting to enforce right existing under laws of United States and, pursuant to Rule 17(b), plaintiffs, as unincorporated associations, might sue, and defendant, ICESA, as unincorporated association, might be sued in their common names. *National Asso. for Community Development v. Hodgson, 356 F. Supp. 1399, 17 Fed. R. Serv. 2d (Callaghan) 251, 1973 U.S. Dist. LEXIS 14228 (D.D.C. 1973)*, overruled, *National Treasury Employees' Union v. Campbell, 482 F. Supp. 1122, 1980 U.S. Dist. LEXIS 9875 (D.D.C. 1980)*.

In civil rights action brought in United States District Court in Virginia, unincorporated association of black police officers had capacity to sue in light of provision of Virginia law specifically conferring upon unincorporated corporation capacity to sue or be sued. *Richmond Black Police Officers Ass'n v. City of Richmond, 386 F. Supp. 151, 10 Empl. Prac. Dec. (CCH) ¶10268, 12 Fair Empl. Prac. Cas. (BNA) 435, 19 Fed. R. Serv. 2d (Callaghan) 1296, 1974 U.S. Dist. LEXIS 5751 (E.D. Va. 1974)*.

For purposes of Rule 17(b)(1), capacity is not conferred only in those instances where substantive right asserted belongs to unincorporated association as entity and not to its individual members; in action brought by unincorporated association having as their members renters who were ineligible for benefits under state statute because of their receipt of public assistance, associations had capacity under Rule 17(b)(1), where plaintiffs contended that provisions of state statute offended both equal protection and due process clauses of Fourteenth Amendment by impermissibly excluding from benefits renters who receive public assistance from state Department of Public Welfare. *Action Alliance for Senior Citizens v. Shapp, 400 F. Supp. 1208, 20 Fed. R. Serv. 2d (Callaghan) 985, 1975 U.S. Dist. LEXIS 11221 (E.D. Pa. 1975)*.

Although unincorporated association lacks capacity to sue under Missouri law, action on behalf of association may be maintained by one or more of its members and where each of reciprocal interinsurance exchanges subscribers have granted to its attorney-in-fact power of attorney then attorney-in-fact could bring action and reciprocal interinsurance exchange had capacity to sue under Rule 17(b). *Lumberman's Underwriting Alliance v. Hills, 413 F. Supp. 1193, 1976 U.S. Dist. LEXIS 15280 (W.D. Mo. 1976)*.

Joint labor-management committee which supervises and controls apprenticeship program in several states is unincorporated association and, as such, is suable entity under method authorized by Rule 17(b). *Bailey v. Boilermakers Local 677 etc., 480 F. Supp. 274, 22 Empl. Prac. Dec. (CCH) ¶30811, 21 Fair Empl. Prac. Cas. (BNA) 874, 1979 U.S. Dist. LEXIS 8302 (N.D. W. Va. 1979)*.

In copyright infringement action, motion of organization to dismiss complaint for want of capacity in that it is not entity capable of being sued is granted where Wes Farrell Organization is merely title used by defendant to conveniently identify numerous companies over which he has control and, is not distinct entity; since company encompassed within Wes Farrell Organization is defendant in action, there is no reason to extend definition of "unincorporated associations" to include fictitious entities. *Testa v. Janssen, 482 F. Supp. 1195, 29 Fed. R. Serv. 2d (Callaghan) 1304, 209 U.S.P.Q. (BNA) 534, 1980 U.S. Dist. LEXIS 9868 (W.D. Pa. 1980)*.

Committee of unincorporated chiropractic association has capacity to sue as assignee of treble damage claims of members of unincorporated association. *Health Care Equalization Committee of Iowa Chiropractic Soc. v Iowa Medical Soc. (1980, SD Iowa) 501 F Supp 970, 1980-81 CCH Trade Cases P 63718*, affd *(1988, CA8 Iowa) 851 F2d 1020, 1988-1 CCH Trade Cases P 68107, 11 FR Serv 3d 647* and (criticized in *EEOC v St. Francis Xavier Parochial Sch. (1999, DC Dist Col) 77 F Supp 2d 71*).

Tenants' union has capacity as an "unincorporated association" under Rule 17(b) to bring action under Fair Housing Act, Civil Rights Act of 1964, *42 USCS §§ 1981* and *1982*, Thirteenth and Fourteenth Amendments, and United States Housing Act against Department of Housing and Urban Development, State of Rhode Island, various other municipal and State agencies, corporate developer, and various individuals associated with defendant organizations for allegedly racially discriminatory housing practices where union has membership and distinct purpose, performs specific functions toward its purpose, has office and full-time staff person, and presumably does business on its own behalf, because union is clearly actual assemblage of people and is far from amorphous or transitory group. *Project Basic Tenants Union v. Rhode Island Housing & Mortg. Finance Corp., 636 F. Supp. 1453, 1986 U.S. Dist. LEXIS 24584 (D.R.I. 1986)*.

English insurance syndicates may not be sued by investors for violating federal securities laws and RICO, where investors claimed that syndicates have capacity to be sued under *FRCP 17(b)* since investors seek only to enforce federal substantive rights, because syndicates are not unincorporated associations under any applicable law and legal existence is substantive proposition that cannot be controlled by procedural rule. *Roby v. Corporation of Lloyd's, 796 F. Supp. 103, Fed. Sec. L. Rep. (CCH) ¶ 96825, Fed. Sec. L. Rep. (CCH) ¶96825, 1992 U.S. Dist. LEXIS 8210 (S.D.N.Y. 1992)*.

In action by employees alleging age discrimination, investment firm's Board of Partners, which acted under charter of investment firm, was not subject to federal claims under *Fed. R. Civ. P. 17(b)(1)*; moreover, with regard to claims under state or local laws, Board's capacity to be sued would be governed by D.C. law, under which Board, as unincorporated association, could not be sued in its own name. *Murphy v. PriceWaterhouseCoopers, LLP, 357 F. Supp. 2d 230, 2004 U.S. Dist. LEXIS 27148 (D.D.C. 2004)*, aff'd in part and rev'd in part, remanded, *595 F.3d 370, 389 U.S. App. D.C. 213, 93 Empl. Prac. Dec. (CCH) ¶43823, 108 Fair Empl. Prac. Cas. (BNA) 795, 2010 U.S. App. LEXIS 2998 (D.C. Cir. 2010)*.

Under *Fed. R. Civ. P. 17(b)* capacity of entity other than individual or corporation to sue or to be sued was determined by state law, and in state, unincorporated entity could not be sued; consequently, because plaintiff was unable to provide evidence that two entities named as defendants could be sued, and because evidence indicated one of entities was merely trade name, entities were dismissed from case. *Dodora Unified Communs., Inc. v. Direct Info. Pvt. Ltd., 379 F. Supp. 2d 10, 2005 U.S. Dist. LEXIS 11756 (D. Mass. 2005)*.

Defendant, alleged in complaint to be division of company, was not "unincorporated association" because division of corporation did not operate with charter—charter of larger corporation. Smartdoor Holdings, Inc. v. Edmit Indus., *Smartdoor Holdings, Inc. v Edmit Indus. (2015, DC Dist Col), 78 F. Supp. 3d 275 (January 23, 2015)*.

Special tactics unit that was involved in night-time raid on residents of home who allegedly were involved in theft ring was unincorporated association of area law enforcement officials and, thus, was "person" pursuant to *42 USCS § 1983* who had capacity to be sued as recognized by *Fed. R. Civ. P. 17* for allegedly using excessive force in violation of victims' *Fourth Amendment, U.S. Const.* amend. IV, rights; victims could sue special tactics unit based on their claims that special tactics unit shot and killed homeowner and terrorized other residents during raid. *Rush v. City of Mansfield, 2009 U.S. Dist. LEXIS 130648 (N.D. Ohio May 20, 2009)*, accepted, in part, rejected, *771 F. Supp. 2d 827, 2011 U.S. Dist. LEXIS 13689 (N.D. Ohio 2011)*.

Complaint alleging group of companies' breach of contract was dismissed, under *Fed. R. Civ. P. 4(m)* and *12(b)(5)*, because (1) group was not registered corporation, (2) nothing showed group was statutorily authorized to participate in litigation, and (3) nothing suggested group was independent legal entity capable of being sued. *K & S Servs. v. Schulz Elec. Group of Cos., 670 F. Supp. 2d 91, 2009 U.S. Dist. LEXIS 109545 (D. Me. 2009)*.

Pension plan participants sufficiently alleged that entity was unincorporated association that could be sued as fiduciary under Employee Retirement Income Security Act, *29 USCS §§ 1001*–*1461* and *Fed. R. Civ. P. 17(b)*; entity was alleged to operate as branch office of provider of investment management services. *Goldenberg v. Indel, Inc., 741 F. Supp. 2d 618, 50 Employee Benefits Cas. (BNA) 1718, Fed. Sec. L. Rep. (CCH) ¶ 95901, Fed. Sec. L. Rep. (CCH) ¶95901, 2010 U.S. Dist. LEXIS 97599 (D.N.J. 2010)*.

Plaintiff was unincorporated association capable of suing or being sued; it had website, chairman, treasurer, and board of directors; board of directors selected and voted on issues undertaken by plaintiff; it had adopted formal bylaws; and it maintained two Ohio political action committees with treasurer. *Miller v. City of Cincinnati, 870 F. Supp. 2d 534, 2012 U.S. Dist. LEXIS 64885 (S.D. Ohio 2012)*.

Plaintiff was not unincorporated association capable of suing or being sued, but group of people who acted together in common cause to effect political change; it was amorphous, ever-changing combination of other advocacy groups and associations; it had no charter, minutes, bylaws, or board of directors. *Miller v. City of Cincinnati, 870 F. Supp. 2d 534, 2012 U.S. Dist. LEXIS 64885 (S.D. Ohio 2012)*.

73. Foreign political or terrorist organization

Palestine Liberation Organization (PLO) may not be sued under its common name pursuant to *FRCP 17(b)(1)*, where ship passengers brought action against PLO stemming from its hijacking of Italian vessel on international waters, because right to be enforced is not one existing under Constitution or laws of U.S. since case is governed by Italian law. *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione etc., 795 F. Supp. 112, 1993 A.M.C. 1387, 1992 U.S. Dist. LEXIS 10883 (S.D.N.Y. 1992)*.

Plaintiffs, surviving family of Israeli victim of terrorist bomb, filed suit against defendant jihadist Palestinian militia (Hamas) under Israeli law, but Hamas had no capacity to be sued by family under Israeli law because Hamas was unincorporated association under *Fed. R. Civ. P. 17(b)* and suit against unincorporated association to enforce right under foreign laws was not cognizable under District of Columbia law and *Fed. R. Civ. P. 4(k)(2)* applied only to claims arising under federal law; thus, default could not enter on that claim. *Sisso v. Islamic Republic of Iran, 448 F. Supp. 2d 76, 2006 U.S. Dist. LEXIS 59137 (D.D.C. 2006)*.

74. Joint venture

In suit by court-appointed receiver for business entity, whose founder caused it to illegally distribute funds as part of Ponzi scheme, entity was independent entity under Utah law and thus there was no impediment for receiver to assert standing on behalf of entity to pursue Uniform Fraudulent Transfer Act claim because entity was association of investors who pooled resources together and transacted business under common name, it had joint venture contracts with investors, and over course of its existence, it made payments to some investors and even had its own website. *Klein v. Cornelius, 786 F.3d 1310, 2015 U.S. App. LEXIS 8781 (10th Cir. 2015)*.

District Court would deny motion of defendant to dismiss action brought by joint venture composed of 2 corporations, on ground that joint venturers were real parties in interest and that they were required to bring suit in their own names, since under law of Utah where District Court was located, joint ventures were subject to same rules as partnerships, and partnership was entity distinct from partners which could sue in its own name. *Gary Energy Corp. v. Metro Oil Products, 114 F.R.D. 69, 1987 U.S. Dist. LEXIS 921 (D. Utah 1987)*.

75. Labor union

United States Supreme Court will not decide whether unincorporated labor union may be sued in federal district court in its common name unless it is first decided that under local law such union is without capacity to be sued in its own name. *Busby v. Electric Utilities Employees Union, 323 U.S. 72, 65 S. Ct. 142, 89 L. Ed. 78, 15 L.R.R.M. (BNA) 666, 1944 U.S. LEXIS 1250 (1944)*.

Citizenship of unincorporated labor union, for purposes of federal diversity jurisdiction, is that of each of its members. *United Steelworkers of America v. R. H. Bouligny, Inc., 382 U.S. 145, 86 S. Ct. 272, 15 L. Ed. 2d 217, 60 L.R.R.M. (BNA) 2393, 52 Lab. Cas. (CCH) ¶51415, 1965 U.S. LEXIS 2253 (1965)*.

In action to recover damages occasioned by publication of alleged libel concerning plaintiff in labor union newspaper, question of suability of unincorporated labor union was governed by state law. *Pullman Standard Car Mfg. Co. v. United Steelworkers, 152 F.2d 493, 17 L.R.R.M. (BNA) 624, 1945 U.S. App. LEXIS 3162 (7th Cir. 1945)*.

In case not involving federal substantive right, suit cannot be brought against unions in their common names where under state law they can neither sue nor be sued, but Rule 23(a) provides alternative method of bringing into court unincorporated associations which cannot be sued as such. *Montgomery Ward & Co. v. Langer, 168 F.2d 182, 1948 U.S. App. LEXIS 3000 (8th Cir. 1948)*.

In cases by or against unincorporated associations such as labor unions, where jurisdiction is bottomed on diversity of citizenship, as contrasted with jurisdiction based on federal question, courts must determine capacity of unincorporated association to sue or be sued by reference to law of state in which federal court is sitting. *Underwood v. Maloney, 256 F.2d 334, 41 L.R.R.M. (BNA) 2795, 42 L.R.R.M. (BNA) 2407, 34 Lab. Cas. (CCH) ¶71402, 34 Lab. Cas. (CCH) ¶71529, 1958 U.S. App. LEXIS 5010, 1958 U.S. App. LEXIS 5030 (3d Cir.)*, cert. denied, *358 U.S. 864, 79 S. Ct. 93, 3 L. Ed. 2d 97, 42 L.R.R.M. (BNA) 2830, 1958 U.S. LEXIS 1834 (1958)*.

Former members of independent union could maintain in federal district court in Rhode Island action sounding in tort against thirteen individual members and representatives of unincorporated international union, though statutes of that state required that in class action against such defendant certain designated officers thereof be made defendants. *Oskoian v. Canuel, 269 F.2d 311, 2 Fed. R. Serv. 2d (Callaghan) 279, 44 L.R.R.M. (BNA) 2610, 37 Lab. Cas. (CCH) ¶65689, 1959 U.S. App. LEXIS 4753 (1st Cir. 1959)*.

Rule 17(b) allows union to sue, despite fact that state law precluded suit by unincorporated association, where union alleged that enforcement of state rules and regulations, which required various union members to file financial disclosure statements, violated employee's right to privacy and due process of law. *American Federation of State, County & Municipal Employees v. Ogilvie, 465 F.2d 221, 16 Fed. R. Serv. 2d (Callaghan) 407, 1972 U.S. App. LEXIS 8521 (7th Cir. 1972)*.

Unincorporated labor organization is subject to suit in its common name. *National Asso. of Industrial Ins. Agents v. CIO, 25 F. Supp. 540, 3 L.R.R.M. (BNA) 747, 1938 U.S. Dist. LEXIS 1687 (D.D.C. 1938)*; *Williams v. United Mine Workers, 294 Ky. 520, 172 S.W.2d 202, 7 Lab. Cas. (CCH) ¶61642, 1943 Ky. LEXIS 487 (Ky. 1943)*.

Action by unincorporated labor union may be brought in name of unincorporated association and such actions may be brought also against such association in its unincorporated name; actual citizenship of individual members of unincorporated labor association is determinative. *Green v. Gravatt, 34 F. Supp. 832, 7 L.R.R.M. (BNA) 659, 1940 U.S. Dist. LEXIS 2673 (D. Pa. 1940)*.

Labor union may maintain suit in its common name as unincorporated association against employer to enforce rights of group which it represents and officers of union should not be joined as parties plaintiff. *Railway Employees' Dep't v. Virginian R. Co., 39 F. Supp. 354, 4 Lab. Cas. (CCH) ¶60657, 1941 U.S. Dist. LEXIS 3211 (D. Va. 1941)*.

Where plaintiffs, an international union, a local union, and individual members thereof, on strike over a wage dispute, sought a temporary injunction to restrain acts of defendants, state and municipal officials, claimed to violate plaintiffs' rights under federal Constitution, National Labor Relations Act (*29 USCS §§ 151* et seq.) and Federal Civil Rights Act (*42 USCS §§ 1981*–*1994*), individual plaintiffs as citizens of the United States were proper parties, and plaintiff unions, voluntary associations of individuals, were also proper parties to conduct suit in their representative capacity in interest of their members. *United Electrical, Radio & Machine Workers v. Baldwin, 67 F. Supp. 235, 18 L.R.R.M. (BNA) 2329, 11 Lab. Cas. (CCH) ¶63314, 1946 U.S. Dist. LEXIS 2323 (D. Conn. 1946)*.

In action wherein members of union sued union to invalidate dues increase voted upon at union convention, and second count of third amended complaint sought to invoke pendent jurisdiction of Federal District Court in Illinois to determine, according to Illinois law, whether union's constitutional standard requiring two-thirds weighted vote of delegates for dues increase was fulfilled, capacity of association to sue or be sued was to be determined by law of state in which District Court was sitting, since second count encompassed state law claim. *Rota v. Bhd. of Ry., Airline & S.S. Clerks, 64 F.R.D. 699, 19 Fed. R. Serv. 2d (Callaghan) 278, 88 L.R.R.M. (BNA) 2288, 76 Lab. Cas. (CCH) ¶10775, 1974 U.S. Dist. LEXIS 6419 (N.D. Ill. 1974)*.

Although plaintiff unions, in action brought for alleged deprivation of civil rights, were unincorporated, capacity to sue would be premised under Rule 17(b) since suit sought to enforce substantive constitutional right. *Elk Grove Firefighters Local v. Willis, 391 F. Supp. 487, 88 L.R.R.M. (BNA) 3067, 76 Lab. Cas. (CCH) ¶10725, 1975 U.S. Dist. LEXIS 14103 (N.D. Ill. 1975)*, aff'd, *79 Lab. Cas. (CCH) ¶11675*.

76. Partnership

Allowance under New York law for action for legal services to be brought in firm's name, although services were rendered by senior partner, is within spirit of Rule 17. *Riggs, Ferris & Geer v. Lillibridge, 316 F.2d 60, 7 Fed. R. Serv. 2d (Callaghan) 1005, 1963 U.S. App. LEXIS 5612 (2d Cir. 1963)*.

Federal District Court in California erred in finding that plaintiff lacked capacity to sue on theory that plaintiff and his carriers were in partnership and only partnership could bring suit where such issue had been raised after commencement of trial, since theory of limited capacity to sue for partners was based on California law as incorporated by reference in Rule 17(b), and failure to raise objection to plaintiff's capacity to sue at outset of case was waiver under California law. *Blankenship v. Hearst Corp., 519 F.2d 418, 20 Fed. R. Serv. 2d (Callaghan) 707, 1975-2 Trade Cas. (CCH) ¶60384, 1975 U.S. App. LEXIS 14001 (9th Cir. 1975)*.

Limited partners had capacity under Missouri law to bring their federal and Missouri securities law claims derivatively since they were like corporate shareholders and trust beneficiaries who have capacity to sue derivatively and remedies of dissolution and accounting are incapable of providing effective relief for many of wrongs that can occur to limited partners' interests. *Allright Mo., Inc. v. Billeter, 829 F.2d 631, 9 Fed. R. Serv. 3d (Callaghan) 27, 1987 U.S. App. LEXIS 12358 (8th Cir. 1987)*.

In federal court in Massachusetts, action on behalf of limited partnership must be brought in name of its general partner. *Trafalgar Capital Assocs. v. Cuomo, 159 F.3d 21, 1998 U.S. App. LEXIS 27960 (1st Cir. 1998)*, cert. denied, *527 U.S. 1035, 119 S. Ct. 2393, 144 L. Ed. 2d 794, 1999 U.S. LEXIS 4442 (1999)*.

In District of Columbia, partnership may not be sued in its common name, except to enforce federal substantive right. *Fennell v. Bache, 123 F.2d 905, 74 App. D.C. 247, 1941 U.S. App. LEXIS 2845 (D.C. Cir.)*, cert. denied, *314 U.S. 689, 62 S. Ct. 359, 86 L. Ed. 551, 1941 U.S. LEXIS 46 (1941)*.

District of Columbia's long arm statute was not a substantive right within meaning of Rule 17(b) giving capacity to sue partnership within District of Columbia. *Day v. Avery, 548 F.2d 1018, 179 U.S. App. D.C. 63, 1976 U.S. App.*

LEXIS 6316 (D.C. Cir. 1976), cert. denied, *431 U.S. 908, 97 S. Ct. 1706, 52 L. Ed. 2d 394, 1977 U.S. LEXIS 1736 (1977)*.

Where plaintiff was authorized by Rule 17(b) to sue partnership in its partnership name, without naming partners individually, describing defendant as corporation instead of designating it as partnership was technical misnomer which in no way affected character of claim or in substance changed defendant; hence, complaint, process, and return could be amended to correct error after statute of limitations against cause of action had expired. *Bowles v. Marx Hide & Tallow Co., 4 F.R.D. 297, 1945 U.S. Dist. LEXIS 1365 (D. Ky. 1945)*.

In action brought in United States District Court in California by minority partners who owned and operated restaurants and who claimed that joint venture agreement that each of them signed with defendant majority partner violated antitrust acts by constituting unlawful tying agreement, plaintiffs were clothed with capacity to sue both majority partner and others, but since alleged damages belonged to partnership, plaintiffs had to sue in names of partnership joint ventures as well as on their behalf, and since parties were confused as to whether they could sue in partnership name under California law and such was uncertain, plaintiffs might resort to Rule 17(b) to sue in partnership name; court would grant plaintiffs leave to amend their complaint to include names of various partnership joint ventures. *Serpa v. Jolly King Restaurants, Inc., 62 F.R.D. 626, 1974-2 Trade Cas. (CCH) ¶75302, 1974 U.S. Dist. LEXIS 9083 (S.D. Cal. 1974)*.

In action brought in United States District Court in Wisconsin, court was required to look to Wisconsin law to determine whether plaintiff had capacity to assert derivative claim on behalf of partnership, and where there was no Wisconsin provision permitting partner to sue derivatively on behalf of partnership, and no Wisconsin Supreme Court decision which permitted partner to defy will of majority of managing partners by bringing derivative suit, plaintiff lacked capacity to assert claims on behalf of partnership. *Hauer v. Bankers Trust New York Corp., 65 F.R.D. 1, 20 Fed. R. Serv. 2d (Callaghan) 58, 1975-1 Trade Cas. (CCH) ¶60142, 1974 U.S. Dist. LEXIS 11656 (E.D. Wis. 1974)*.

Federal court in Pennsylvania in railroad reorganization proceeding applied Pennsylvania law that partnership must proceed as individual partners trading as partnership. *In re Penn Cent. Transp. Co., 419 F. Supp. 1376, 2 Bankr. Ct. Dec. (LRP) 825, 10 Collier Bankr. Cas. (MB) 226, 1976 U.S. Dist. LEXIS 14083 (E.D. Pa. 1976)*.

Since partnership is not entity which is capable of being sued under Missouri law, action must be brought against individual partners. *Tiffany Industries, Inc. v. Harbor Ins. Co., 536 F. Supp. 432, 1982 U.S. Dist. LEXIS 11956 (W.D. Mo. 1982)*.

Rule 17(b)(1) allows partnership to sue in its common name. *West Zion Highlands v. Zion, 549 F. Supp. 673, 1982 U.S. Dist. LEXIS 15434 (N.D. Ill. 1982)*.

District Court would deny motion of defendant to dismiss action brought by joint venture composed of 2 corporations, on ground that joint venturers were real parties in interest and that they were required to bring suit in their own names, since under law of Utah where District Court was located, joint ventures were subject to same rules as partnerships, and partnership was entity distinct from partners which could sue in its own name. *Gary Energy Corp. v. Metro Oil Products, 114 F.R.D. 69, 1987 U.S. Dist. LEXIS 921 (D. Utah 1987)*.

Unpublished decision: Summary judgment was inappropriate as to whether entity existed as partnership because four of five factors indicated that entity was partnership, one factor that did not so indicate was that there was no apparent agreement that employee would share business losses or liability claims against entity, and *Tex. Bus. Orgs. Code Ann. § 152.052(c)* provided that such agreement was not necessary to creation of partnership. *Advanced Nano Coatings, Inc. v. Hanafin, 478 Fed. Appx. 838, 2012 U.S. App. LEXIS 10935 (5th Cir. 2012)*.

General partners of partnership had capacity to be held liable for partnership's breaches of contract with bankruptcy debtor since partnership was foreign partnership organized under laws of another state, was thus not recognized as partnership under forum state's laws, and was subject to laws of foreign state which permitted partners to be sued.

Residential Liquidating Trust v. Mortg. Investors Grp., Inc. (In re Residential Capital, LLC), 527 B.R. 590, 60 Bankr. Ct. Dec. (LRP) 234, 2015 Bankr. LEXIS 1062 (Bankr. S.D.N.Y. 2015).

Any insolvency of partnership did not warrant dismissal of general partners from bankruptcy adversary proceeding alleging breach of contract by partnership since partnership was named defendant in proceeding. *Residential Liquidating Trust v. Mortg. Investors Grp., Inc. (In re Residential Capital, LLC), 527 B.R. 590, 60 Bankr. Ct. Dec. (LRP) 234, 2015 Bankr. LEXIS 1062 (Bankr. S.D.N.Y. 2015)*.

77. Political party or committee

In suit challenging constitutionality of delegate allocation formula adopted by Republican Party for its 1976 convention, Republican Party had capacity to be sued in its common name where plaintiff's purpose was to enforce substantive constitutional right, Party's existence as unincorporated association was found as fact by Federal District Court, and finding was not clearly erroneous. *Ripon Soc. v. National Republican Party, 525 F.2d 567, 173 U.S. App. D.C. 350, 1975 U.S. App. LEXIS 12558 (D.C. Cir. 1975)*, cert. denied, *424 U.S. 933, 96 S. Ct. 1148, 47 L. Ed. 2d 341, 1976 U.S. LEXIS 678 (1976)*.

Trustees of Republican Committee to Reelect President had no better standing under District of Columbia law to sue than did the committees themselves since District of Columbia does not permit unincorporated associations to sue. *Democratic Nat'l Committee v. McCord, 416 F. Supp. 505, 1976 U.S. Dist. LEXIS 14546 (D.D.C. 1976)*.

When committees to reelect President settled federal claims out of court their trustees were also bound by settlement of federal claims under Rule 17(b)(1) since trustees could assert no better legal standing than committees themselves. *Democratic Nat'l Committee v. McCord, 416 F. Supp. 505, 1976 U.S. Dist. LEXIS 14546 (D.D.C. 1976)*.

78. Real estate investment trust

For diversity jurisdiction purposes, unincorporated real estate investment trust may not be treated as corporation and court must look to citizenship of investors and not to that of trustees. *Riverside Memorial Mausoleum, Inc. v. UMET Trust, 581 F.2d 62, 25 Fed. R. Serv. 2d (Callaghan) 943, 1978 U.S. App. LEXIS 10728 (3d Cir. 1978)*.

Trustees of real estate investment trust in action against savings association for damages resulting from breach of loan commitment agreement could not maintain class action since *Federal Rule Civil Procedure 23.2* must be read in conjunction with Rule 17(b) which orders that capacity of unincorporated association to sue be determined by law of state in which district court is held and that state law of Texas permitted real estate investment trusts to sue as entities. *Lee v. Navarro Sav. Asso., 416 F. Supp. 1186, 1976 U.S. Dist. LEXIS 13905 (N.D. Tex. 1976)*, rev'd, *597 F.2d 421, 27 Fed. R. Serv. 2d (Callaghan) 1178, 1979 U.S. App. LEXIS 13890 (5th Cir. 1979)*.

In securities fraud action based upon federal statute and New York statutory and common law, BT Mortgage Investors, an unincorporated association, moved to dismiss non-federal claims against it on basis that pursuant to Rule 17(b), New York General Associations law § 13 permitted unincorporated association only to be sued in name of president or treasurer; basis of dismissal of non-federal claims was ground upon fact that chairman and treasurer of unincorporated association were served in their individual capacities and not in their representative capacities; however, BT Mortgage Investors was admittedly a proper party to the federal claim and chairman and treasurer and BT Mortgage Investors itself had been represented by their counsels since beginning of action plus neither individuals or BT Mortgage Investors had suffered any prejudice; therefore, court would not see a need for serving chairman or treasurer twice in order to confer personal jurisdiction over BT Mortgage Investors on non-federal claims. *Markewich v. Adikes, 422 F. Supp. 1144, Fed. Sec. L. Rep. (CCH) ¶ 95851, Fed. Sec. L. Rep. (CCH) ¶95851, 1976 U.S. Dist. LEXIS 12100 (E.D.N.Y. 1976)*.

Creditor bank eventually established that it was holder of debtors' note in securitization trust enforceable under *Ohio Rev. Code § 1303.31(A)(1)*, and thus real party in interest under *Fed. R. Civ. P. 17*; holder's claim was

accordingly allowable under 11 USCS § 502(b)(1); modified payment schedule was governed by 11 USCS § 1322(c)(2). In re Smoak, 461 B.R. 510, 2011 Bankr. LEXIS 3621 (Bankr. S.D. Ohio 2011).

79. Religious denomination

Plaintiff, religious denomination, has no capacity to sue under Rule 17(b). International Soc. for Krishna Consciousness v. Enz, 495 F. Supp. 373, 1979 U.S. Dist. LEXIS 8480 (D. Ariz. 1979), disapproved, *In re Adair, 965 F.2d 777, 92 Cal. Daily Op. Service 4654, 92 D.A.R. 7443, 22 Fed. R. Serv. 3d (Callaghan) 947, 35 Fed. R. Evid. Serv. (CBC) 966, 1992 U.S. App. LEXIS 12235 (9th Cir. 1992)*.

Where students and parents alleged that private Catholic school's English-only rule violated 42 USCS § 1981 and Title VI of Civil Rights Act of 1964, 42 USCS § 2000d et seq., parish and school were dismissed from action because they were not separate legal entities from diocese. Silva v. St. Anne Catholic Sch., 595 F. Supp. 2d 1171, 2009 U.S. Dist. LEXIS 2228 (D. Kan. 2009).

80. Student organization

Plaintiff's suit to enjoin enforcement of Media Act which eliminated funding for all print media for registered student organizations (RSO) was not rendered moot due to plaintiff's lapsed RSO status, because plaintiff was unincorporated association under Rule 17(b)(3) which existed separate from its registration status. As process of re-registering as student organization was ministerial, plaintiff could successfully complete process and become eligible for funding. The Koala v. Khosla, 2020 U.S. App. LEXIS 4818 (9th Cir. Feb. 14, 2020).

Federal courts must apply federal and not state law in determining what constitutes unincorporated association for capacity purposes where federal substantive right is claimed; thus, in action brought by official student government organization on one of university's campuses, where organization asserted substantive right founded on First Amendment, organization was found to be "unincorporated association" within meaning of Rule 17(b) as term had been interpreted by federal courts. Associated Students of University of California v. Kleindienst, 60 F.R.D. 65, 17 Fed. R. Serv. 2d (Callaghan) 461, 1973 U.S. Dist. LEXIS 13661 (C.D. Cal. 1973).

Gay Lib student organization had own capacity to sue under Civil Rights Act and First Amendment for rejection of its status as campus organization. Gay Lib v. University of Missouri, 416 F. Supp. 1350, 1976 U.S. Dist. LEXIS 14369 (W.D. Mo. 1976), rev'd, *558 F.2d 848, 1977 U.S. App. LEXIS 12120 (8th Cir. 1977)*.

81. Miscellaneous

Multi-governmental unit drug task force was not unincorporated association which could be sued in its own name under Rule 17(b) for violation of Fair Labor Standards Act in absence of evidence that governmental units in fact established separate legal entity. Brown v. Fifth Judicial Dist. Drug Task Force, 255 F.3d 475, 49 Fed. R. Serv. 3d (Callaghan) 1110, 143 Lab. Cas. (CCH) ¶34288, 7 Wage & Hour Cas. 2d (BNA) 65, 2001 U.S. App. LEXIS 14799 (8th Cir. 2001).

District court did not err in concluding that complaint failed plausibly to allege that group was entity capable of being sued; plaintiff had not shown in his complaint plausible inference that group was unincorporated association—complaint lacked any indication that group possessed traits that Louisiana courts have regarded as indicative of intent to establish juridical entity. Doe v. McKesson, 945 F.3d 818, 2019 U.S. App. LEXIS 37128 (5th Cir. 2019), reh'g denied, *947 F.3d 874, 2020 U.S. App. LEXIS 2696 (5th Cir. 2020)*, vacated, remanded, 208 L. Ed. 2d 158, 28 Fla. L. Weekly Fed. S. 597, 2020 U.S. LEXIS 5192 (U.S. 2020).

Suit for damages based on alleged libel of unincorporated association was not suit to enforce substantive right under laws and Constitution of United States under Rule 17(b). American Newspaper Guild v. Mackinnon, 108 F. Supp. 312, 1952 U.S. Dist. LEXIS 2262 (D. Utah 1952).

Insurance company organized as a cooperative under laws of Puerto Rico was distinct judicial entity apart from its members and had standing to sue in its own name as if it were corporation. *Cooperativa de Seguros Multiples v. San Juan, 294 F. Supp. 638, 1969 Trade Cas. (CCH) ¶72764, 1968 U.S. Dist. LEXIS 12150 (D.P.R. 1968)*.

Trademark infringement claim is dismissed without prejudice for 30 days as to weekly newspaper, pending proffer of evidence it is suable entity, where state law did not allow suit against partnerships and unincorporated associations at time suit was filed but now does, while *FRCP 17(b)(1)* allows federal claims to be brought against partnership or unincorporated association, regardless of state law on subject, because author of trademarked and copyrighted advice column has produced no evidence to support existence of newspaper as partnership or unincorporated association, aside from its corporate publisher. *Ludden v. Metro Weekly, 8 F. Supp. 2d 7, 26 Media L. Rep. (BNA) 2153, 47 U.S.P.Q.2d (BNA) 1087, 1998 U.S. Dist. LEXIS 8827 (D.D.C. 1998)*.

Citizens planning committee lacked capacity to sue under *Fed. R. Civ. P. 17(b)*, either under *Alaska Stat. §§ 09.65.070(a)* and 29.35.010(14) or federal law exception embodied in Rule 17(b)(1) and lacked standing under U.S. Const. art. III because bringing lawsuit was not within parameters of committee's stated and undisputed function, which was to act as citizens' advisory committee concerning relocation of village. *Kivalina Relocation Planning Comm. v. Teck Cominco Alaska, Inc., 227 F.R.D. 523, 2004 U.S. Dist. LEXIS 28123 (D. Alaska 2004)*.

Contrary to arguments of plaintiff employee, defendant county sheriff's department was not "unincorporated association" under *Fed. R. Civ. P. 17(b)* and was not capable of being sued under Alabama law. *Frith v. Baldwin County Sheriff's Office, 70 Fed. R. Serv. 3d (Callaghan) 1348, 2008 U.S. Dist. LEXIS 46635 (S.D. Ala. June 16, 2008)*.

In action brought against town and its zoning board of appeals, planning board, and building department, town was only proper municipal party defendant under *Fed. R. Civ. P. 17(b)* and New York law because other municipal entities had no separate legal identity apart from town. *Omnipoint Communs., Inc. v. Town of Lagrange, 658 F. Supp. 2d 539, 2009 U.S. Dist. LEXIS 81941 (S.D.N.Y. 2009)*.

Entity that provided strategic weapons and tactics (SWAT) teams to police departments was subject to suit as "unincorporated association" under *Fed. R. Civ. P. 17(b)(3)(A)* because it was governed by private entity, and it appeared that no municipality exercised any control over entity or its activities. *Cline v. City of Mansfield, 745 F. Supp. 2d 773, 2010 U.S. Dist. LEXIS 103520 (N.D. Ohio 2010)*, amended, *745 F. Supp. 2d 773, 2011 U.S. Dist. LEXIS 7876 (N.D. Ohio 2011)*, aff'd, *495 Fed. Appx. 578, 2012 FED App. 913N, 2012 U.S. App. LEXIS 17626 (6th Cir. 2012)*.

Entity that provided strategic weapons and tactics (SWAT) teams to police departments and was determined to be "unincorporated association" was either subject to suit under *Fed. R. Civ. P. 17(b)(3)* because it was subject to suit under Ohio law or was subject to suit under Rule 17(b)(3)(A) because it was not. *Cline v. City of Mansfield, 745 F. Supp. 2d 773, 2010 U.S. Dist. LEXIS 103520 (N.D. Ohio 2010)*, amended, *745 F. Supp. 2d 773, 2011 U.S. Dist. LEXIS 7876 (N.D. Ohio 2011)*, aff'd, *495 Fed. Appx. 578, 2012 FED App. 913N, 2012 U.S. App. LEXIS 17626 (6th Cir. 2012)*.

Police SWAT team composed of officers from various municipalities was subject to suit as unincorporated association, pursuant to *Fed. R. Civ. P. 17(b)(3)(A)*. *Rush v. City of Mansfield, 771 F. Supp. 2d 827, 2011 U.S. Dist. LEXIS 13689 (N.D. Ohio 2011)*.

3. Individual in Representative Capacity

82. Generally

Purpose of Rule 17(b), which, dealing with persons acting in representative capacity, provides that capacity to sue shall be determined by law of state "in which district court is held," is to achieve basic uniformity between state and federal courts, and to work accommodation of interests within federal system; in interpreting provision in new contexts, court should look to its guiding policy and keep it free from entanglements with analytical or terminological

niceties; although Rule 17(b), under which capacity of one acting in representative capacity to bring suit shall be determined by law of state in which district court is held, is irrelevant to determination of where action "might have been brought," within meaning of *28 USCS § 1404(a)* authorizing, on grounds of convenience and in interest of justice, transfer of civil action to another district where it might have been brought, effect of Rule 17(b) may necessarily render change of venue against "interest of justice." *Van Dusen v. Barrack, 376 U.S. 612, 84 S. Ct. 805, 11 L. Ed. 2d 945, 1964 U.S. LEXIS 1537 (1964)*.

Potential lack of capacity of estate to bring adversary action pursuant to *Fed. R. Civ. P. 17* and *Fed. R. Bankr. P. 7017* did not negate subject matter jurisdiction of court to hear matter brought pursuant to *11 USCS § 523(a)(4)* because capacity and subject matter jurisdiction were two mutually exclusive concepts. *Valich v. Trutko-Clayton (In re Trutko-Clayton), 384 B.R. 813, 2007 Bankr. LEXIS 4500 (Bankr. N.D. Ind. 2007)*.

83. State law as controlling

Capacity to sue by one acting in representative capacity shall be determined by law of state in which district court is held. *Brimhall v Simmons, 338 F.2d 702, 9 Fed. R. Serv. 2d (Callaghan) 17B.11, Case 1 (CA6 Tenn 1964)*.

District court found that husband who sued corporation gave his wife valid durable power of attorney that was effective under *Ala. Code § 26-1-2*, and because *Fed. R. Civ. P. 17(b)* did not prohibit wife from serving as her husband's representative even though there was no evidence he suffered from legal disability, it granted husband's motion for leave to amend his complaint to allow his wife to serve as his representative. *Grace v. Palm Harbor Homes, Inc., 401 F. Supp. 2d 1230, 2005 U.S. Dist. LEXIS 29002 (N.D. Ala. 2005)*.

County sheriff's office and county attorney's office were dismissed as defendants pursuant to *Fed. R. Civ. P. 17(b)* where they could not be sued in their own name under *Neb. Rev. Stat. § 23-101*. *Winslow v. Smith, 672 F. Supp. 2d 949, 2009 U.S. Dist. LEXIS 110444 (D. Neb. 2009)*.

Unpublished decision: *Fed. R. Civ. P. 17(b)* required application of Washington law where brother was asserting claims against his sister on behalf of his deceased mother and thus, he was asserting claim in some type of representative capacity. *Masood v. Saleemi, 309 Fed. Appx. 150, 2009 U.S. App. LEXIS 2170 (9th Cir. 2009)*.

84. Executor, administrator, etc.

Executor of Connecticut estate residing in New York was not barred from suing United States, for refund of estate taxes in New York, since suit was not primarily as foreign executor but as individual who had paid tax under compulsion of the United States. *Kruskal v. United States, 178 F.2d 738, 38 A.F.T.R. (P-H) 1215, 1950-1 U.S. Tax Cas. (CCH) ¶ 10748, 50-1 U.S. Tax Cas. (CCH) ¶10748, 1950 U.S. App. LEXIS 4086 (2d Cir. 1950)*.

Rule 17 does not apply to substitution of parties, but only as to right to sue; hence, where foreign administrator filed suit for accounting from defendants, local administrator appointed thereafter could not be substituted as plaintiff, since original plaintiff had right to file suit. *Jones v. Schellenberger, 196 F.2d 852, 1952 U.S. App. LEXIS 2532 (7th Cir.)*, cert. denied, *344 U.S. 876, 73 S. Ct. 171, 97 L. Ed. 679, 1952 U.S. LEXIS 1578 (1952)*.

Capacity of representative to bring suit for others is determined by state law, and Louisiana courts hold that when succession owes no debts administrator alone lacks capacity to enforce judicially real rights on behalf of succession; heirs are necessary parties, with administrator, to bring suit. *Danos v. Waterford Oil Co., 266 F.2d 76, 1959 U.S. App. LEXIS 3940 (5th Cir. 1959)*.

District Court erroneously dismissed derivative suit brought by executors of estate in Federal District Court in Florida; while Florida law would determine executors' capacity to sue, New York law would determine appropriate scope of New York executors' power or right to bring particular suit. *Jacobs v. Adams, 601 F.2d 176, 28 Fed. R. Serv. 2d (Callaghan) 47, 1979 U.S. App. LEXIS 12531 (5th Cir. 1979)*.

Right to sue as representative of estate depended on state law, and district court properly recognized that state court's decision to retain certain individual as estate's representative was not subject to collateral attack. *Owsley v. Gorbett, 960 F.3d 969, 2020 U.S. App. LEXIS 17195 (7th Cir. 2020)*.

Capacity of executor to be sued is determined by law of state in which court is situated. *Buttson v. Arnold, 4 F.R.D. 492, 1945 U.S. Dist. LEXIS 1413 (D. Pa. 1945)*.

Action brought in federal district court in California by executors appointed by California state court against noncitizen of that state was not transferable to federal district court in Texas for the reason that it could not have been brought there originally in that foreign executors have no standing in Texas courts to bring suits therein. *Felchlin v. American Smelting & Refining Co., 136 F. Supp. 577, 1955 U.S. Dist. LEXIS 2460 (D. Cal. 1955)*.

Administratrix, appointed in Missouri, was not entitled to bring suit in federal court where decedent resided in Illinois and suit commenced in Illinois on grounds of diversity of citizenship, as Illinois law permitting suits by foreign administrators applies only when decedent is a nonresident. *Lowrance v. Central Illinois Public Service Co., 161 F. Supp. 656, 1958 U.S. Dist. LEXIS 2410 (D. Ill. 1958)*.

New York public administrator is "real party in interest" and has "capacity to sue" under Rule 17. *Petition of S.S. Co., 167 F. Supp. 189, 1958 U.S. Dist. LEXIS 3397 (D.N.Y. 1958)*.

Although Vermont courts had not decided point, federal district court would assume that state court would apply generally recognized rule that personal representative of decedent cannot be sued in his representative capacity in action at law in state other than that of his appointment. *Palmer v. L. E. Leach Co., 60 F.R.D. 602, 1973 U.S. Dist. LEXIS 11619 (D. Vt. 1973)*.

District court held that there would be no prejudice to defendant employees' ability to defend against excessive force claims if former special administrator, now administrator of decedent's simplified estate, was substituted as proper party to bring action. *Unzueta v. Steele, 291 F. Supp. 2d 1230, 2003 U.S. Dist. LEXIS 20721 (D. Kan. 2003)*.

Plaintiff's claim that defendants violated FDCPA by sending two letters to her father's estate, of which she was executrix, despite knowing that plaintiff was represented by counsel, was dismissed without prejudice because plaintiff, suing as individual, was not consumer for purposes of FDCPA and had no standing to bring claim. Hall v. Nationstar Mortgage, LLC, *Hall v Nationstar Mortgage, LLC (2015, ED Pa), 2015 U.S. Dist. LEXIS 87616 (July 6, 2015)*.

On defendant's motion to dismiss adversary proceeding in bankruptcy, executors of decedent's estate were not "unincorporated association" for purposes of *Fed. R. Civ. P. 17(b)(1)*. *Michaelesco v. Estate of Richard (In re Michaelesco), 276 B.R. 39, 2002 Bankr. LEXIS 365 (Bankr. D. Conn. 2002)*, rev'd, remanded, *288 B.R. 646, 2003 U.S. Dist. LEXIS 1876 (D. Conn. 2003)*.

Unpublished decision: District court properly held that brother lacked capacity to bring claims on his deceased mother's behalf where it applied Washington law as required by *Fed. R. Civ. P. 17(b)* in determining whether he had authority to pursue claims on behalf of decedent, under Washington law, heirs were not allowed to bring claims on behalf of deceased without first obtaining appointment as personal representative, and brother admitted that he had not been appointed as personal representative of his mother's estate. *Masood v. Saleemi, 309 Fed. Appx. 150, 2009 U.S. App. LEXIS 2170 (9th Cir. 2009)*.

85. —Action for wrongful death

Rule 17(b) requires that capacity of personal representative to maintain in federal court action based upon diversity of citizenship, under death statute, be determined by law of forum. *Cooper v. American Airlines, Inc., 149 F.2d 355, 1945 U.S. App. LEXIS 2596 (2d Cir. 1945)*; *Borror v Sharon Steel Co., 327 F.2d 165, 8 Fed. R. Serv. 2d (Callaghan) 17A.21, Case 1 (CA3 Pa 1964)*; *Fennell v Monongahela Power Co., 350 F.2d 867, 9 Fed. R. Serv. 2d (Callaghan) 17B.11, Case 2 (CA4 W Va 1965)*.

Special administrator of decedent's estate in Nebraska, not qualified as personal representative in Oregon, was not entitled to bring wrongful death action in Oregon against Oregon corporation because Oregon law applied and failure to qualify as personal representative destroyed capacity to sue. *Pantano v. United Medical Laboratories, Inc., 456 F.2d 1248, 15 Fed. R. Serv. 2d (Callaghan) 1374, 1972 U.S. App. LEXIS 10684 (9th Cir. 1972)*.

Iowa administrator, as such, may not maintain action in Kansas under its wrongful death statute, as under Kansas law damages awarded must inure to exclusive benefit of surviving spouse and children or next of kin. *Jones v. Goodman, 114 F. Supp. 110, 1953 U.S. Dist. LEXIS 3924 (D. Kan. 1953)*.

Where diversity of citizenship and requisite jurisdictional amount are present, foreign administrator may maintain in federal district court in Tennessee action for wrongful death occurring in state of his appointment under wrongful death statute of that state and for use and benefit of named beneficiary. *Citizens Fidelity Bank & Trust Co. v. Baese, 136 F. Supp. 683, 1955 U.S. Dist. LEXIS 2475 (D. Tenn. 1955)*.

Since, under Idaho statute, person not bona fide resident of state was not competent to serve as administrator, administratrix domiciled and appointed in Oregon could not maintain action in district court, for death of her husband in Oregon, under Oregon statute authorizing action to be brought by decedent's personal representative. *Barnes v. Union P. R. Co., 139 F. Supp. 198, 1956 U.S. Dist. LEXIS 3597 (D. Idaho 1956)*.

Where Idaho resident was killed in automobile-truck collision in Nevada, personal representative appointed by Idaho court had capacity to prosecute action in federal district court of Nevada for benefit of decedent's heirs under wrongful death statute of Nevada. *Sonner v. Cordano, 228 F. Supp. 435, 1963 U.S. Dist. LEXIS 6587 (D. Nev. 1963)*.

Since plaintiff, citizen and resident of New York, instituted action for wrongful death of her son in federal district court in Vermont as administratrix of estate of son, her capacity to maintain action would be determined according to law of Vermont; plaintiff, however, did not have capacity to maintain action for wrongful death of son in Federal District Court in Vermont under law of Vermont until she had authority to proceed by way of ancillary letters of administration. *Weinstein v. Medical Center Hospital, Inc., 358 F. Supp. 297, 1972 U.S. Dist. LEXIS 11242 (D. Vt. 1972)*.

In action under Death on the High Seas Act, because plaintiffs did not act within reasonable time to secure appointment as personal representatives of decedents once advised by court of need to do so, and because defendant had filed dispositive motion asserting lack of standing that court decided, any subsequent appointment of plaintiffs as decedents' personal representatives would not relate back. Hassanati v. Int'l Lease Fin. Corp., *Hassanati v. Int'l Lease Fin. Corp., 51 F. Supp. 3d 887, 2014 A.M.C. 2755, 2014 U.S. Dist. LEXIS 145961 (C.D. Cal. 2014)*, aff'd, *643 Fed. Appx. 620, 2016 U.S. App. LEXIS 5300 (9th Cir. 2016)*.

In action brought in United States District Court in New York by citizens of Florida to recover damages from New York corporations for wrongful death of their sons resulting from auto accident in Georgia, where plaintiffs were duly qualified as administrators in Florida County, motion of plaintiffs to amend complaint to conform expressly to requirements of Georgia wrongful death statute was not barred by fact that none of named plaintiffs or individuals whom plaintiffs sought to join were qualified as ancillary administrators in New York. *Bujtas v. Henningsen Foods, Inc., 63 F.R.D. 660, 18 Fed. R. Serv. 2d (Callaghan) 1460, 1974 U.S. Dist. LEXIS 9623 (S.D.N.Y. 1974)*.

86. Guardian or guardian at litem

Foreign guardian appointed by Tennessee court could sue administrator appointed by Arkansas state court in federal district court for fraud, where law of Arkansas provided that foreign guardians could sue in any of courts of state. *Redditt v. Hale, 184 F.2d 443, 1950 U.S. App. LEXIS 3110 (8th Cir. 1950)*.

Resident of New Jersey, who was guardian of Pennsylvania incompetent, had capacity to bring diversity action in Pennsylvania against citizen of that state to recover for injuries to his incompetent resulting from automobile accident in Pennsylvania. *Fallat v. Gouran, 220 F.2d 325, 1955 U.S. App. LEXIS 3346 (3d Cir. 1955)*.

Prior decision remanded to district court for determination whether guardian ad litem was appropriate person to represent minor under state law did not decide any jurisdictional issues either explicitly or implicitly; resolution of guardian ad litem status was regarded as predicate to any further consideration of case. *Chrissy F. v. Mississippi Dep't of Pub. Welfare, 995 F.2d 595, 1993 U.S. App. LEXIS 16843 (5th Cir.)*, reh'g, en banc, denied, *3 F.3d 441, 1993 U.S. App. LEXIS 23571 (5th Cir. 1993)*, cert. denied, *510 U.S. 1214, 114 S. Ct. 1336, 127 L. Ed. 2d 684, 1994 U.S. LEXIS 2474 (1994)*.

It was unnecessary to appoint guardian ad litem for 6-year-old Cuban boy since his great uncle was ably representing him as next friend in his asylum claim. *Gonzalez v. Reno, 212 F.3d 1338, 13 Fla. L. Weekly Fed. C 713, 2000 D.A.R. 5737, 2000 U.S. App. LEXIS 11994 (11th Cir.)*, reh'g denied, reh'g, en banc, denied, *215 F.3d 1243, 13 Fla. L. Weekly Fed. C 863, 2000 U.S. App. LEXIS 14481 (11th Cir. 2000)*, cert. denied, *530 U.S. 1270, 120 S. Ct. 2737, 147 L. Ed. 2d 1001, 2000 Cal. Daily Op. Service 5309, 2000 U.S. LEXIS 4490 (2000)*.

Ohio guardian of Ohio minor could not maintain suit in federal district court in Michigan against Michigan corporation for injuries sustained by minor, without prosecuting ancillary probate proceedings in Michigan. *Buchele v. Trucking, Inc., 57 F. Supp. 954, 1944 U.S. Dist. LEXIS 1839 (D. Mich. 1944)*.

Unpublished decision: Plaintiffs' fraud and negligence action was properly dismissed because while they had right to proceed pro se under *28 USCS § 1654*, they had no right as non-lawyers under *Fed. R. Civ. P. 17* to represent their child in action in child's name, they failed to plead their individual fraud claims with particularity required under *Fed. R. Civ. P. 9(b)*, and emotional distress damages could not be recovered without showing of physical injury. *Whitehurst v. Wal-Mart, 306 Fed. Appx. 446, 2008 U.S. App. LEXIS 25259 (11th Cir. 2008)*.

As decedent died intestate without surviving spouse or domestic partner, his children were his successors in interest and because they were minors, their claims arising out of his death while in jail had to be prosecuted by guardian ad litem. Although decedent's mother, who was appointed guardian ad litem, neglected to attach certified copy of decedent's death certificate to her affidavit seeking to commence action as decedent's successor in interest, law of the case indicated that she had been excused from that requirement because she was unable to obtain certified copy despite numerous requests and because no party disputed that decedent died on certain date. Cotta v. County of Kings, *Cotta v. County of Kings, 79 F. Supp. 3d 1148, 2015 U.S. Dist. LEXIS 1637 (E.D. Cal. 2015)*.

87. Trustee

Where plaintiff, who had been appointed trustee by state court, brought suit to recover benefits for estate under life insurance policy, federal district court lacked capacity to examine whether state court erred in appointing plaintiff as trustee and Rule 17(b) only permitted inquiry as to whether state court had in fact appointed plaintiff and whether plaintiff was authorized by state law to bring action, and Rule did not authorize collateral attack on appointment. *Rives v. Franklin Life Ins. Co., 792 F.2d 1324, 1986 U.S. App. LEXIS 26580 (5th Cir. 1986)*.

Unpublished decision: In debtor's reopened chapter 7 proceeding, trustee had right to reinstate previously dismissed state court action and transfer it to bankruptcy court because case or controversy existed; adversary action was timely filed by correct party in interest; substitution of parties was appropriate, since trustee was real party in interest. *Kartzman (In re Zapata) v. Arcola Sales & Serv. Corp., 2014 Bankr. LEXIS 3785 (Bankr. D.N.J. Sept. 3, 2014)*.

Co-trustee brother lacked the capacity to sue his co-trustee sister's financial advisors because, under the rule, Illinois law applied and 760 ILCS 5/10 barred his suit because he lacked the consent of at least one of his co-trustees, the sister. *Doermer v. Oxford Fin. Grp., Ltd., 884 F.3d 643, 2018 U.S. App. LEXIS 5721 (7th Cir. 2018)*.

88. Miscellaneous

Illinois injuries act does not relate to capacity to sue; therefore, federal district court in Illinois had jurisdiction of action for wrongful death alleged to have resulted in South Carolina from negligent operation of one of defendant's

aircraft, notwithstanding provision of Illinois statute that no action shall be brought or prosecuted in an Illinois court for a wrongful death occurring outside Illinois where right of action exists under laws of place where death occurred and service of process may be had upon defendant in such place. *Martineau v. Eastern Air Lines, Inc., 64 F. Supp. 235, 1946 U.S. Dist. LEXIS 2908 (D. Ill. 1946)*.

Whether Maine probate judge in his representative capacity may sue in United States district court for district of Massachusetts is to be determined by law of state in which district court is held. *Wilbur v. Ford, 81 F. Supp. 641, 1949 U.S. Dist. LEXIS 1737 (D. Mass. 1949)*.

In suit brought by 2 individuals and tenants' association seeking injunctive relief and damages, alleging that utility charges and rent increases had been collected illegally at federally subsidized apartment project and alleging that 24 CFR § 215.25(a) violated National Housing Act, tenants' association would not be permitted to sue pursuant to Rule 17(b) since suit was primarily one for damages, and, accordingly, representation by association would not be appropriate. *East Tennessee Tenants' Asso. Fairview Chapter v. Harris, 82 F.R.D. 204, 28 Fed. R. Serv. 2d (Callaghan) 693, 1979 U.S. Dist. LEXIS 12280 (E.D. Tenn. 1979)*.

Rule 17(b) provides that capacity of entity to be sued is determined by state law under which it is organized and state statute providing for creation of public defenders office and for appointment of person to serve as public defender does not create governmental entity or agency having existence separate from person who fills such position; therefore, plaintiff cannot maintain suit against "Office of Public Defender". *Clay v. Friedman, 541 F. Supp. 500, 11 Fed. R. Evid. Serv. (CBC) 85, 1982 U.S. Dist. LEXIS 12967 (N.D. Ill. 1982)*.

Husband had no standing to sue for breach of fiduciary duty to his deceased wife or their children; accordingly, court granted 45-day period to join or substitute real parties in interest. *Siegemund v. Shapland, 324 F. Supp. 2d 176, 2004 U.S. Dist. LEXIS 10808 (D. Me. 2004)*.

Unpublished decision: Court would not by implication import terms from promissory note upon creditor's word, where his credibility was badly compromised; as his claim was barred by statute of frauds, *N.Y. Gen. Oblig. Law § 5-703*, he did not have standing to object to debtor's discharge, as he was not creditor of debtor. *Catanzaro v. Alvaro (In re Alvaro), 2005 Bankr. LEXIS 3483 (Bankr. S.D.N.Y. Apr. 5, 2005)*.

4. Receivers

89. Receivers appointed by United States courts

While actions against receivers may brought in state courts, they may also be brought in federal court in which receiver was appointed, and, notwithstanding that no federal question is involved and there is no diversity of citizenship, federal courts have jurisdiction upon ground that actions are ancillary to original suit. *Horvath v. Pitney, 51 F. Supp. 886, Bankr. L. Rep. (CCH) ¶54561, 1943 U.S. Dist. LEXIS 2277 (D.N.J. 1943)*.

90. Receivers appointed by state courts

Receiver of Michigan bank appointed by state banking department commissioner had capacity to maintain action in Federal District Court in New York against defendant upon defendant's guaranty of some bonds purchased by bank, although he had not procured ancillary appointment in New York. *Bicknell v. Lloyd-Smith, 109 F.2d 527, 1940 U.S. App. LEXIS 3941 (2d Cir.)*, cert. denied, *311 U.S. 650, 61 S. Ct. 15, 85 L. Ed. 416, 1940 U.S. LEXIS 1123 (1940)*.

Corporate receiver appointed in supplementary proceedings could maintain action to recover from officers and directors of corporation value of property wrongfully conveyed and dividends improperly declared and paid, as authorized by state statute, but could not recover moneys illegally loaned to such officers and directors where such recovery was not authorized by state statute. *Klages v. Cohen, 146 F.2d 641, 1945 U.S. App. LEXIS 3101 (2d Cir. 1945)*.

Receiver appointed by Alabama state court has standing to bring action in federal court in Texas against director-majority shareholder of insolvent insurer for alleged violation of federal security laws and fiduciary duties in management of insurer's affairs since capacity of receiver to sue in federal court is governed by law of forum state and under Texas law receiver has standing to sue on behalf of insured's shareholders, policy holders and creditors. *Meyers v. Moody, 693 F.2d 1196, Fed. Sec. L. Rep. (CCH) ¶ 99028, Fed. Sec. L. Rep. (CCH) ¶99028, 1982 U.S. App. LEXIS 23073 (5th Cir. 1982)*, reh'g denied, *701 F.2d 173 (5th Cir. 1983)*, reh'g denied, *701 F.2d 173 (5th Cir. 1983)*, reh'g denied, *701 F.2d 173 (5th Cir. 1983)*, cert. denied, *464 U.S. 920, 104 S. Ct. 287, 78 L. Ed. 2d 264, 1983 U.S. LEXIS 2026 (1983)*.

91. Receivers appointed by foreign courts

It is consistent with amended Rule 17 that receiver duly appointed by foreign court has power to bring and maintain action in District Court; rationale of amended Rule 17 allows for such extraterritorial exercise of authority, whether foreign receiver hails from another jurisdiction in United States or another country, and to hold otherwise would resurrect an anachronism inconsistent with international business reality. *Mentink v. World Time Corp of Am., 131 F.R.D. 210, 17 Fed. R. Serv. 3d (Callaghan) 152, 1990 U.S. Dist. LEXIS 7263 (S.D. Fla. 1990)*.

5. Other Particular Applications

92. College or university

Employee's age discrimination claim against the Louisiana Small Business Development Center (LSBDC) on a state university campus was dismissed because the LSBDC was not an independent juridical unit capable of being sued, and the University System's Board of Supervisors was an arm of the state entitled to state sovereign immunity. *Edmiston v. La. Small Bus. Dev. Ctr., 931 F.3d 403, 2019 U.S. App. LEXIS 22085 (5th Cir. 2019)*.

In action brought in Federal District Court in Florida against University of Florida and others for alleged sex discrimination in employment, capacity of university to be sued would be determined by law of Florida, and where under Florida law university was not endowed with separate corporate existence, nor with authority to be sued in its own name, university lacked capacity to be sued and had to be dismissed. *Byron v. University of Florida, 403 F. Supp. 49, 11 Empl. Prac. Dec. (CCH) ¶10642, 11 Fair Empl. Prac. Cas. (BNA) 1001, 1975 U.S. Dist. LEXIS 15414 (N.D. Fla. 1975)*.

Medical school was properly granted summary judgment on former employee's ADA action because school lacked capacity to be sued under state law and *Fed. R. Civ. P. 17(b)*; it was board of regents, not university or its medical school, that had personal capacity to sue and be sued under South Dakota law. *Lundquist v. Univ. of S.D. Sanford Sch. of Med., 705 F.3d 378, 84 Fed. R. Serv. 3d (Callaghan) 1005, 2013 U.S. App. LEXIS 2472 (8th Cir. 2013)*.

93. Heir of estate

Heirs lacked capacity under Ohio law to bring suit against, inter alia, executor/trustee of their grandmother's estate since they did not fall within any exceptions to general rule granting executors rather than heirs right to bring suit: they never made demand upon executor to bring suit. *Firestone v. Galbreath, 976 F.2d 279, RICO Bus. Disp. Guide ¶8097, 1992 U.S. App. LEXIS 23133 (6th Cir. 1992)*, reh'g denied, *1992 U.S. App. LEXIS 26890 (6th Cir. Oct. 21, 1992)*.

French law, not New York law, must be used to determine whether or not heir may be sued by alleged licensor of reproduction rights in works of art, even though licensor argues that "capacity to be sued" is determined by law of forum under *FRCP 17(b)*, because *FRCP 17(b)* does not apply since heir does not have authority to represent Picasso estate in litigation. *Museum Boutique Intercontinental v. Picasso, 886 F. Supp. 1155, 1995 U.S. Dist. LEXIS 7751 (S.D.N.Y. 1995)*.

Unpublished decision: Daughter lacked capacity to bring lawsuit against music publishers on behalf of her father's estate because she was not real party in interest, under *Fed. R. Civ. P. 17(a)*, because daughter conceded that she

was not personal representative of her father's estate, and under Florida law, only party who had capacity to sue on behalf of estate was duly appointed legal representative of estate. *Tennyson v. ASCAP, 477 Fed. Appx. 608, 2012 U.S. App. LEXIS 10034 (11th Cir. 2012)*.

94. Government corporation

In suit alleging gender discrimination and other matters, claim against city Board of Parks and Recreation failed because Board did not have capacity to be sued as under Charter of Metropolitan Government of Nashville and Davidson County, Tennessee, §§ 1.01, 11.1001, Metro Nashville, Tennessee has capacity to sue or be sued, but charter does not provide for Board of Parks and Recreation to sue or be sued. Desoto v. Bd. of Parks & Rec., *Desoto v Bd. of Parks & Rec. (2014, MD Tenn), 64 F. Supp. 3d 1070 (November 25, 2014)*.

Capacity of governmental corporation to be sued in federal courts is governed by law of state in which District Court is held. *United States v. Two Lots of Ground, 30 F.R.D. 5, 5 Fed. R. Serv. 2d (Callaghan) 178, 1962 U.S. Dist. LEXIS 5969 (E.D. Pa. 1962)*.

Juvenile bureaus created by Oklahoma law have capacity to sue and be sued for purposes of *Fed. R. Civ. P. 17(b)(3)*. Oklahoma law, including *Okla. Stat. Ann. tit. 10A, § 2-4-107(D)(4)*, provides that juvenile bureau is department of county in which it sits for legal representation purposes. *McClellan v. Bd. of County Comm'Rs, 261 F.R.D. 595, 2009 U.S. Dist. LEXIS 92761 (N.D. Okla. 2009)*.

95. Law enforcement departments

Capacity of sheriff's department to be sued in federal court is determined by state law. *Garcia v. County of Los Angeles, 588 F. Supp. 700, 1984 U.S. Dist. LEXIS 17102 (C.D. Cal. 1984)*, disapproved, *Shaw v. California Dep't of Alcoholic Beverage Control, 788 F.2d 600, 1986 U.S. App. LEXIS 24652 (9th Cir. 1986)*.

Under *Fed. R. Civ. P. 17(b)(3)*, even if arrestee was successful on false arrest claims filed against police officers, New York City Police Department was not amenable to suit because New York City, N.Y., Charter ch. 17, § 396 provided that claims against New York City Police Department had to be addressed in lawsuit against City of New York. *Brewton v. City of New York, 550 F. Supp. 2d 355, 2008 U.S. Dist. LEXIS 36455 (E.D.N.Y. 2008)*.

Law enforcement department was entitled to dismissal as matter of law because, in North Carolina, there was no statute authorizing suit against department. *Ostwalt v. Charlotte-Mecklenburg Bd. of Educ., 614 F. Supp. 2d 603, 2008 U.S. Dist. LEXIS 104102 (W.D.N.C. 2008)*.

Unpublished decision: Because *Fed. R. Civ. P. 17(b)(3)* required court to look at Iowa law when deciding whether to dismiss police department from plaintiff's *42 USCS § 1983* case, and Iowa Supreme Court had signaled that subdivisions of municipalities were not suable as such, police department was dismissed. *Iowa Code § 364.1* also supported proposition that municipal police departments were subdivisions of home rule municipalities creating them and this rule applied to city and city police department. *Shannon v. Koehler, 2008 U.S. Dist. LEXIS 90953 (N.D. Iowa Oct. 13, 2008)*.

96. Pension board

Capacity of pension board to sue is determined by law of state in which District Court is sitting. Williamsport Firemen Pension Bds. *Williamsport Firemen Pension Bds. I & II v. E.F. Hutton & Co., 567 F. Supp. 140, Fed. Sec. L. Rep. (CCH) ¶ 99268, Fed. Sec. L. Rep. (CCH) ¶99268, 1983 U.S. Dist. LEXIS 16304 (M.D. Pa. 1983)*.

97. Public official

In case of public official, such as governor of state, capacity to sue is determined by law of state. *Finch v. Mississippi State Medical Asso., 585 F.2d 765, 1978 U.S. App. LEXIS 7229 (5th Cir. 1978)*.

Acting director of Federal Housing Finance Agency (FHFA) had standing to prosecute action contesting application of Chicago, Ill., Mun. Code § 13-12-126(a)(1), imposing requirements on mortgagees of vacant properties, on FHFA, because acting director's predecessor was legally director of FHFA, as predecessor was properly appointed as director of Office of Federal Housing Enterprise Oversight, out of which FHFA was created. *Fed. Hous. Fin. Agency v. City of Chicago, 962 F. Supp. 2d 1044, 2013 U.S. Dist. LEXIS 119987 (N.D. Ill. 2013)*.

98. Trust

Trust created for operation of maritime training, education, and safety program was not proper party defendant in action brought in Federal District Court in Maryland by former director of program for breach of employment contract, where pursuant to Rule 17(b), trust as entity lacked capacity to be sued under Maryland law. *Limouze v. M. M. & P. Maritime Advancement, Training, Education & Safety Program, 397 F. Supp. 784, 1975 U.S. Dist. LEXIS 11960 (D. Md. 1975)*.

While defendant trust was not entity that could be sued under state law and thus capacity to be sued by plaintiff borrowers was lacking under *Fed. R. Civ. P. 17(b)*, but it was not disputed that trust was nonetheless necessary party under *Fed. R. Civ. P. 19(a)(1)(A)* because it was holder of loan on which borrowers' claims for rescission were based, trust could be granted summary judgment as to its liability but was not dismissed as party from lawsuit. *Jordan v. Paul Fin., LLC, 644 F. Supp. 2d 1156, 2009 U.S. Dist. LEXIS 56701 (N.D. Cal. 2009)*.

99. Miscellaneous

Plaintiff's civil rights claims against Brown County Court of Common Pleas failed as it was not entity capable of being sued under Ohio law. Fields v. Doe, *Fields v Doe (2008, CA6 Ohio), 2008 U.S. App. LEXIS 28481 (December 11, 2008)*.

Arrestee's claims against police department were properly dismissed because police departments could not be sued as entities under North Carolina law. *Smith v. Munday, 848 F.3d 248, 2017 U.S. App. LEXIS 1975 (4th Cir. 2017)*.

State tort law claims against city police department based on alleged use of excessive force in effectuating arrest failed because department did not have capacity to be sued. Bombard v. Volp, *Bombard v Volp (2014, DC Vt), 44 F. Supp. 3d 514 (September 8, 2014)*.

In this breach of contract action, court declined to find that plaintiff lacked capacity to bring instant motion where plaintiff timely commenced this suit and entered into Stipulation Orders prior to its dissolution. Valdin Invs. Corp. v. Oxbridge Capital Mgmt., LLC, *Valdin Invs. Corp. v Oxbridge Capital Mgmt., LLC, 106 F. Supp. 3d 316 (ED NY 2015)*.

In bankruptcy debtor's adversary proceeding against estate for payment for services, estate lacked capacity to be sued, but debtor could have cured capacity issue by joining executors of estate and adversary proceeding could not have been dismissed. *Michaelesco v. Estate of Richard (In re Michaelesco), 288 B.R. 646, 2003 U.S. Dist. LEXIS 1876 (D. Conn. 2003)*.

Court denied state department of transportation's motion to dismiss employee's sexual harassment and retaliation claims against it because department was capable of being sued under *Fed. R. Civ. P. 17(b)* as it was agency of state. *Parks v. Miss. DOT, 380 F. Supp. 2d 776, 2005 U.S. Dist. LEXIS 20875 (N.D. Miss. 2005)*.

Delaware county land use office was not suable entity and, thus, was improperly named as defendant by property owner in his pro se civil rights suit: (1) pursuant to *Fed. R. Civ. P. 17(b)*, state law was determinative with regard to office's capacity to sue or be sued; (2) to be suable entity under state law, office had to be separate corporate entity; and (3) office was not suable entity under Delaware law because 9 Del. C. § 1301 made clear that it was merely division within county governmental department and was not separate corporate entity. *Shipley v. Orndoff, 491 F. Supp. 2d 498, 2007 U.S. Dist. LEXIS 41926 (D. Del. 2007)*.

City of New York had capacity to maintain its suit against defendant wholesalers alleging that wholesalers violated Contraband Cigarette Trafficking Act, *18 USCS §§ 2341* et seq., by shipping in excess of 10,000 unstamped cigarettes to reservation retailers who re-sold cigarettes to public, and violation of Cigarette Marketing Standards Act, *N.Y. Tax Law § 484*. *City of New York v. Milhelm Attea & Bros., Inc., 550 F. Supp. 2d 332, 2008 U.S. Dist. LEXIS 35465 (E.D.N.Y. 2008)*.

In city adult entertainment ordinance challenge by Internet-based business, city failed to sufficiently assert that code enforcement board was improperly named as defendant in suit under *Fed. R. Civ. P. 17(b)* because under Florida law, determination as to whether board was properly named party required far more searching inquiry that provided by city and business alleged that board was agency of city, rendering it subject to suit under Florida law. *Flava Works, Inc. v. City of Miami, 559 F. Supp. 2d 1318, 2008 U.S. Dist. LEXIS 43545 (S.D. Fla. 2008)*.

Where terminated public employee asserted discrimination and tort claims, claims against Orleans Parish Juvenile Court (OPJC) were dismissed because OPJC was not juridical person capable of being sued. *Griffith v. Louisiana, 808 F. Supp. 2d 926, 2011 U.S. Dist. LEXIS 88755 (E.D. La. 2011)*, dismissed, in part, *2013 U.S. Dist. LEXIS 10994 (E.D. La. Jan. 28, 2013)*.

Unpublished decision: In *42 USCS § 1983* case arising in State of Texas in which truck driver sued city police department, district court properly dismissed claim against police department because it lacked capacity to be sued; police department was not separate legal entity apart from city. *Crull v. City of New Braunfels, 267 Fed. Appx. 338, 2008 U.S. App. LEXIS 4061 (5th Cir. 2008)*.

Unpublished decision: Where former member of parent-teacher student association asserted false arrest, defamation, and other claims, claims against education board and superintendent in superintendent's official capacity were properly dismissed because, inter alia, board lacked capacity to sue or be sued under Georgia law. *Reeves v. Wilbanks, 542 Fed. Appx. 742, 2013 U.S. App. LEXIS 20204 (11th Cir. 2013)*.

IV. INFANTS OR INCOMPETENT PERSONS [RULE 17(c)]

A. In General

100. Generally

Whether or not Rule 17(c) applies to party as an incompetent depends entirely on whether or not party had been found insane, and it was primary question for decision by court in original action. *Zaro v. Strauss, 167 F.2d 218, 1948 U.S. App. LEXIS 2424 (5th Cir. 1948)*.

Under *Rule 17(c) of Federal Rules of Civil Procedure* and *28 USCS § 1654*, minor child cannot bring suit through parent acting as next friend if parent is not represented by attorney. *Meeker v. Kercher, 782 F.2d 153, 1986 U.S. App. LEXIS 21851 (10th Cir. 1986)*.

Court-appointed guardian ad litem is fiduciary and parent therefore has no standing to raise claims on appeal on behalf of her children. *Garrick v. Weaver, 888 F.2d 687, 15 Fed. R. Serv. 3d (Callaghan) 324, 1989 U.S. App. LEXIS 16281 (10th Cir. 1989)*.

Fed. R. Civ. P. 17(c) applies to habeas petitioners as it does to other civil litigants. *Allen v. Calderon, 408 F.3d 1150, 2005 U.S. App. LEXIS 7595 (9th Cir. 2005)*.

Non-attorney parents generally may not litigate claims of their minor children in federal court. *Myers v. Loudoun County Pub. Schs, 418 F.3d 395, 2005 U.S. App. LEXIS 16722 (4th Cir. 2005)*.

Although district court has special duty to safeguard interests of minor plaintiffs, that duty requires only that district court determine whether net amount distributed to each minor plaintiff in proposed settlement is fair and reasonable, without regard to proportion of total settlement value designated for adult co-plaintiffs and contracted by

them with plaintiffs' counsel; if net recovery of each minor plaintiff under proposed settlement is fair and reasonable, district court should approve settlement as proposed. *Robidoux v. Rosengren, 638 F.3d 1177, 79 Fed. R. Serv. 3d (Callaghan) 95, 2011 U.S. App. LEXIS 6485 (9th Cir. 2011)*.

Power to appoint guardian ad litem under Rule 17(c) is confined to cases where infant or incompetent is "not otherwise represented" in action. *Southern Ohio Sav. Bank & Trust Co. v. Guaranty Trust Co., 27 F. Supp. 485, 1939 U.S. Dist. LEXIS 2942 (D.N.Y. 1939)*; *Russick v. Hicks, 85 F. Supp. 281, 1949 U.S. Dist. LEXIS 2437 (D. Mich. 1949)*.

Federal court may not appoint guardian ad litem if incompetent is represented by committee or guardian appointed by court of state in which federal court is held. *Southern Ohio Sav. Bank & Trust Co. v. Guaranty Trust Co., 27 F. Supp. 485, 1939 U.S. Dist. LEXIS 2942 (D.N.Y. 1939)*.

Rule 17(c) deals only with protection of incompetents in their status as parties and gives no general powers over their persons or property. *In re Ryan, 47 F. Supp. 10, 1942 U.S. Dist. LEXIS 2215 (D. Pa.)*, reh'g denied, *47 F. Supp. 1023, 1942 U.S. Dist. LEXIS 2210 (D. Pa. 1942)*.

Under Rule 17(c) guardian ad litem may be appointed not only for incompetent defendant but also for incompetent plaintiff. *Blackwell v. Vance Trucking Co., 139 F. Supp. 103, 1956 U.S. Dist. LEXIS 3579 (D.S.C. 1956)*.

If it is obvious that incompetent plaintiff has no cause of action, action may be dismissed without appointment of guardian ad litem pursuant to Rule 17(c). *Gale v. Wagg, 140 F. Supp. 6, 1956 U.S. Dist. LEXIS 3405 (D. Mich. 1956)*.

Under *FRCP 17(c)*, duties of lawyer for party and guardian ad litem for party are different, and it is not function of guardian ad litem to serve as lawyer. *McCaslin by McCaslin v. Radcliff, 168 F.R.D. 249, 1996 U.S. Dist. LEXIS 10726 (D. Neb. 1996)*, aff'd sub. nom., *McCaslin by McCaslin v. County of York, 141 F.3d 1169, 1998 U.S. App. LEXIS 14431 (8th Cir. 1998)*.

District court is authorized to appoint next friend or to allow self-appointed individual to serve as next friend in order to protect interests of incompetent party. *Ingram by & Through Ingram v. Ainsworth, 184 F.R.D. 90, 43 Fed. R. Serv. 3d (Callaghan) 540, 1999 U.S. Dist. LEXIS 555 (S.D. Miss. 1999)*.

There are no special requirements for serving as next friend; at its discretion, court may consider whether there is significant relationship between next friend and incompetent party, whether there is legitimate reason why actual party cannot bring suit, and evidence as to whether incompetent party approves of suit in question. *Ingram by & Through Ingram v. Ainsworth, 184 F.R.D. 90, 43 Fed. R. Serv. 3d (Callaghan) 540, 1999 U.S. Dist. LEXIS 555 (S.D. Miss. 1999)*.

Parents who were named as defendants in adversary proceeding that was filed by Chapter 7 trustee were not proper persons to serve as guardians ad litem for their minor children who were also named as defendants in trustee's adversary proceeding because they had potential conflict of interest in defending themselves and their children and because trustee's complaint raised issues that required knowledge of Bankruptcy Code to properly protect children's interests; possibility that parents might be witnesses to claims trustee filed against their children enhanced potential for conflict of interest to develop. *Petersen v. Hoffman (In re G & R Feed & Grain Co.), 2014 Bankr. LEXIS 5309 (Bankr. S.D. Iowa July 3, 2014)*.

101. Unborn children and human fetuses and embryos

Statutory authority is not required for appointment of guardian, under Rule 17(c), for unborn beneficiaries. *Hatch v. Riggs Nat'l Bank, 284 F. Supp. 396, 12 Fed. R. Serv. 2d (Callaghan) 294, 1968 U.S. Dist. LEXIS 7752 (D.D.C. 1968)*.

Unborn children, fetuses, and embryos are not persons with legally protectable interest within meaning of Rule 17(c) so as to warrant appointment of guardian ad litem. *Roe v. Casey, 464 F. Supp. 483, 27 Fed. R. Serv. 2d (Callaghan) 384, 1978 U.S. Dist. LEXIS 13915 (E.D. Pa. 1978)*, aff'd, *623 F.2d 829, 29 Fed. R. Serv. 2d (Callaghan) 772, 1980 U.S. App. LEXIS 18493 (3d Cir. 1980)*.

Claim on behalf of ex utero human embryo, seeking to enjoin human embryo research panel from making recommendations to National Institutes of Health with regard to issue of human research, is denied summarily, where embryo sought to represent herself and 20,000 other human embryos currently in storage throughout country, through appointment of nonprofit genetic research organization as guardian ad litem, because (1) embryos are not persons with legally protectable interests within meaning of Rule 17(c), and (2) given organization's position in opposition to federal funding for fetal research, it is unclear whether organization could fairly represent interests of would-be plaintiff embryo and 20,000 others. *Doe v. Shalala, 862 F. Supp. 1421, 31 Fed. R. Serv. 3d (Callaghan) 187, 1994 U.S. Dist. LEXIS 13684 (D. Md. 1994)*.

102. Federal or local law as controlling

If minor or incompetent person has no representative, questions relating to appointment of such representative are controlled by Rule 17(c) and not by state law; thus, Louisiana statute providing that suit for minor, where parent's marriage is dissolved, must be brought by tutor is procedural and not jurisdictional, so that in suit in federal district court in Louisiana such minor, if guardian has not been appointed, may sue by his next friend or by guardian ad litem since federal rule is unconditional and is in no way dependent upon law of domicile of minor or of law of state of forum. *Travelers Indem. Co. v. Bengtson, 231 F.2d 263, 1956 U.S. App. LEXIS 3383 (5th Cir. 1956)*.

In determining whether person is competent to sue in federal court, federal judge is not required to use state's procedures for determining competency or capacity, but may apply any procedure that meets due process requirements. *Thomas v. Humfield, 916 F.2d 1032, 18 Fed. R. Serv. 3d (Callaghan) 293, 1990 U.S. App. LEXIS 19621 (5th Cir. 1990)*.

Capacity of individual, not acting in representative character, to sue or be sued in federal court is ordinarily to be determined by law of his domicile, and if, by law of person's domicile, that person can sue irrespective of actual mental incompetence, he may do so in federal court; even if domiciliary law withholds that attribute because of mental disability, litigation of his rights in federal court is still to be governed by Rule 17(c); state law may confer but cannot deny capacity to sue or defend federally, and only effect of party's mental incompetence upon maintenance of action is possible need for appointment of guardian ad litem or entry of protective order; in no event is federal jurisdiction to entertain cause diminished. *Donnelly v. Parker, 486 F.2d 402, 158 U.S. App. D.C. 335, 17 Fed. R. Serv. 2d (Callaghan) 959, 1973 U.S. App. LEXIS 8266 (D.C. Cir. 1973)*.

In action in which three of the plaintiffs were minors represented by their next friend, provision of Rule 17(c) that where infant or incompetent person does not have duly appointed representative he may sue by his next friend or guardian ad litem could not be abridged by state statute. *Constantine v. Southwestern Louisiana Institute, 120 F. Supp. 417, 1954 U.S. Dist. LEXIS 3571 (D. La. 1954)*.

Puerto Rico Civil Code Articles relating to procedure required in dealing with representation of incompetents are inapplicable in federal court to extent they are in conflict with Federal Rule 17(c). *First Nat'l City Bank v. Gonzalez & Co., 308 F. Supp. 596, 1970 U.S. Dist. LEXIS 13008 (D.P.R. 1970)*.

Since New York State statute does not bar members of Board of Visitors of Manhattan Children's Psychiatric Center from representing children who are patients at psychiatric center, they may do so under Rule 17(c). *Seide v. Prevost, 536 F. Supp. 1121, 1982 U.S. Dist. LEXIS 9406 (S.D.N.Y. 1982)*.

Settlement of employment discrimination case, negotiated by court-appointed federal guardian ad litem, is approved, even though incompetent plaintiff's son opposes approval pending review by general guardian for plaintiff whose appointment is now pending in state court, where delay caused would be extended and prejudicial,

because adherence to procedures and rules prescribed by state law would in many cases render *FRCP 17* nullity. *Neilson v. Colgate-Palmolive Co., 993 F. Supp. 225, 1998 U.S. Dist. LEXIS 1896 (S.D.N.Y. 1998)*, aff'd, *199 F.3d 642, 81 Fair Empl. Prac. Cas. (BNA) 683, 1999 U.S. App. LEXIS 31540 (2d Cir. 1999)*.

Where protective services agency petitioned in state court pursuant to Mass. Gen. Laws ch. 19A, § 14 et seq., for protective services for elderly man, remand to state court was warranted because subject matter jurisdiction was lacking; regarding diversity jurisdiction, probate exception applied because, inter alia, to provide requested remedy would require federal court to assume powers of state court. *Southwest Boston Senior Services, Inc. v. Whatley (In re Whatley), 396 F. Supp. 2d 50, 2005 U.S. Dist. LEXIS 24848 (D. Mass. 2005)*.

Where one-year statute of limitations prescribed in P.R. Laws Ann. tit. 31, § 5298 might have been tolled as to two brothers who were disabled with schizophrenia because such might have made them legally incompetent to sue, they were ordered to appear by certain date with appropriate representation as was required pursuant to *Fed. R. Civ. P. 17(c)*. *Cintron-Rivera v. Borders Group, Inc., 555 F. Supp. 2d 273, 2006 U.S. Dist. LEXIS 97516 (D.P.R. 2006)*.

Although *Fla. Stat. § 744.3215* provided that right to sue and defend could be removed from person by order determining incapacity, where there was no clear test for determining party's incapacity or incompetence under Florida law, court was entitled to follow procedures of *Fed. R. Civ. P. 17* to preserve integrity and interests of court; where unrebutted expert testimony showed that plaintiff lacked rational and factual understanding of her civil action and was unable to consult with attorney, plaintiff was found to be mentally incompetent by clear and convincing evidence under *Fed. R. Civ. P. 17* and guardian ad litem was appointed to protect her interests in litigation. *Scannavino v. Fla. Dep't of Corr., 242 F.R.D. 662, 20 Fla. L. Weekly Fed. D 863, 2007 U.S. Dist. LEXIS 41579 (M.D. Fla. 2007)*.

103. —Where infant or incompetent has representative

Action by insane person was properly instituted under Rule 17(c) by her husband, as her guardian ad litem, law of the forum determining how plaintiff was required to proceed and in whose name action must be filed, since these questions are procedural; and when husband was appointed as plaintiff's legal guardian, he was rightly substituted in place of guardian ad litem. *Montgomery Ward & Co. v. Callahan, 127 F.2d 32, 1942 U.S. App. LEXIS 3797 (10th Cir. 1942)*.

In litigation in federal court in which minor or incompetent party has representative appointed by some other authority than federal court acting under Rule 17(c), representative's capacity is governed by state law under Rule 17(b). *Travelers Indem. Co. v. Bengtson, 231 F.2d 263, 1956 U.S. App. LEXIS 3383 (5th Cir. 1956)*.

Tennessee statute requiring appointment of co-guardian residing in Tennessee when resident of another state is appointed to act as guardian for incompetent ward in Tennessee did not require qualification of co-guardian to serve and act with plaintiff and did not operate to deprive district court of jurisdiction where there was no estate to be administered in Tennessee. *Brimhall v Simmons, 338 F.2d 702, 9 Fed. R. Serv. 2d (Callaghan) 17B.11, Case 1 (CA6 Tenn 1964)*.

Where general guardian of minor children, appointed by statute court in Mississippi, lacked power to sue as guardian in state courts of Louisiana, she had no power under Rule 17(b) or 17(c) to sue as such guardian in federal district court in Louisiana. *Slade v. Louisiana Power & Light Co., 418 F.2d 125, 13 Fed. R. Serv. 2d (Callaghan) 323, 1969 U.S. App. LEXIS 10309 (5th Cir. 1969)*, cert. denied, *397 U.S. 1007, 90 S. Ct. 1233, 25 L. Ed. 2d 419, 1970 U.S. LEXIS 2369 (1970)*.

In action by wife and child for wrongful death of man killed in airplane crash, trial court did not err in failing to appoint guardian ad litem for child pursuant to *Federal Rule of Civil Procedure 17(c)*, which authorizes district court to appoint guardian ad litem "for an infant. . . not otherwise represented in an action," since child's legal guardian, his mother, brought action on his behalf and, thus, child was "otherwise represented." *Croce v. Bromley Corp., 623*

F.2d 1084, 15 Av. Cas. (CCH) ¶18382, 30 Fed. R. Serv. 2d (Callaghan) 78, 6 Fed. R. Evid. Serv. (CBC) 1154, 1980 U.S. App. LEXIS 14860 (5th Cir. 1980), cert. denied, *450 U.S. 981, 101 S. Ct. 1516, 67 L. Ed. 2d 816, 1981 U.S. LEXIS 1215 (1981)*.

Parent of former minor resident of state institution for mentally retarded may not bring suit as "next friend" to such minor whose mother, as his natural guardian, expresses disapproval of action by parent challenging visitation rules of institution. *Developmental Disabilities Advocacy Center, Inc. v. Melton, 689 F.2d 281, 1982 U.S. App. LEXIS 25400 (1st Cir. 1982)*.

When proposed next friends of foster children sought to bring suit in federal court on behalf of children, alleging deficiencies in state's foster care system violated children's federal constitutional and statutory rights, it was error to find that appointment of guardians ad litem and/or court appointed special advocates (CASAs) for children precluded appointment of next friends, under *Fed. R. Civ. P. 17(c)*, because Rhode Island law in *R.I. Gen. Laws §§ 40-11-7.1(b)(3)* and 40-11-14 limited authority of guardians ad litem and CASAs to family court proceedings in which guardians ad litem or CASAs were appointed. *Sam M. v. Carcieri, 608 F.3d 77, 2010 U.S. App. LEXIS 12552 (1st Cir. 2010)*.

Guardian or administrator appointed in one state may not bring suit in federal court in another state, if by laws of latter state such guardian does not have capacity to sue. *Southern Ohio Sav. Bank & Trust Co. v. Guaranty Trust Co., 27 F. Supp. 485, 1939 U.S. Dist. LEXIS 2942 (D.N.Y. 1939)*; *Ballard v. United Distillers Co., 28 F. Supp. 633, 1939 U.S. Dist. LEXIS 2380 (D. Ky. 1939)*.

Federal court cannot appoint guardian ad litem in action in which infant or incompetent is already represented by someone considered appropriate under law of forum state; court will not circumvent unchallenged procedure of state for determining who may represent incompetent. *Wolfe v. Bias, 601 F. Supp. 426, 1984 U.S. Dist. LEXIS 21087 (S.D. W. Va. 1984)*.

Son and daughter of incompetent bringing claims against defendant as "next friends" of their mother do not have to prove conflict of interest between committee and incompetent in order to serve as "next friends" where committee has declined to sue but endorses action and agrees to be bound by judgment. *Von Bulow v. Von Bulow, 634 F. Supp. 1284, 1986 U.S. Dist. LEXIS 25904 (S.D.N.Y. 1986)*.

Where plaintiff, Detainee found incompetent to stand trial, bought suit through his mother and next friend, sued defendants, Louisiana Department of Health and Hospitals and state officials, asking that defendants be required to transfer such Detainees from jails to required facility, mother had standing because complaint clearly pled that she was Detainee's mother, Detainee had been determined incompetent to stand trial, and *Fed. R. Civ. P. 17(c)(1)* provided that minor or incompetent person could be represented by general guardian, committee, conservator, or like fiduciary. *Advocacy Ctr. for the Elderly & Disabled v. La. Dep't of Health & Hosps., 731 F. Supp. 2d 583, 2010 U.S. Dist. LEXIS 79868 (E.D. La.)*, injunction granted, in part, *731 F. Supp. 2d 603, 2010 U.S. Dist. LEXIS 141602 (E.D. La. 2010)*.

104. Appointment of guardian ad litem as mandatory or permissive

If court feels that infant's interests are otherwise adequately represented and protected, such as by next friend or attorney, guardian ad litem need not be appointed. *Till v. Hartford Acci. & Indem. Co., 124 F.2d 405, 1941 U.S. App. LEXIS 2517 (10th Cir. 1941)*; *Westcott v. United States Fidelity & Guaranty Co., 158 F.2d 20, 1946 U.S. App. LEXIS 2322 (4th Cir. 1946)*; *Roberts v. Ohio Casualty Ins. Co., 256 F.2d 35, 1958 U.S. App. LEXIS 4289 (5th Cir. 1958)*.

Contention that word "or" in last sentence of Rule 17(c) really means "and," thus making appointment of guardian ad litem mandatory, was rejected. *Westcott v. United States Fidelity & Guaranty Co., 158 F.2d 20, 1946 U.S. App. LEXIS 2322 (4th Cir. 1946)*.

Rule 17(c) does not make appointment of guardian ad litem mandatory. *C. J. Peck Oil Co. v. Diamond, 204 F.2d 179, 1953 U.S. App. LEXIS 2412 (5th Cir. 1953)*; *Roberts v. Ohio Casualty Ins. Co., 256 F.2d 35, 1958 U.S. App. LEXIS 4289 (5th Cir. 1958)*.

Rule 17(c) does not mean that trial judge may ignore or overlook fundamental requirement of Rule for protection of infants. *Roberts v. Ohio Casualty Ins. Co., 256 F.2d 35, 1958 U.S. App. LEXIS 4289 (5th Cir. 1958)*.

By its terms, Rule 17(c) permits infant who lacks general guardian to bring suit by next friend, and no special appointment process for next friend is required; Federal District Court may, in its discretion, appoint guardian ad litem and it must do so or take other equivalent protective action when it appears that next friend will not adequately protect infant's interests. *Genesco, Inc. v. Cone Mills Corp., 604 F.2d 281, 1979 U.S. App. LEXIS 12849 (4th Cir. 1979)*.

Court need not appoint guardian ad litem for minor son of decedent where mother is also plaintiff in lawsuit. *Croce v. Bromley Corp., 623 F.2d 1084, 15 Av. Cas. (CCH) ¶18382, 30 Fed. R. Serv. 2d (Callaghan) 78, 6 Fed. R. Evid. Serv. (CBC) 1154, 1980 U.S. App. LEXIS 14860 (5th Cir. 1980)*, cert. denied, *450 U.S. 981, 101 S. Ct. 1516, 67 L. Ed. 2d 816, 1981 U.S. LEXIS 1215 (1981)*.

Court is not required to appoint guardian ad litem to represent potential litigant who was never party to bankruptcy reorganization if representation is adequate; Rule 17(c) does not impose on federal courts duty to appoint guardians for all potential litigants who may be incompetent by reason of youth or mental condition to represent themselves, and Rule 17(c) is limited in operation to cases in which incompetent persons are actually parties to federal litigation. *In re Chicago, Rock Island & Pac. Ry., 788 F.2d 1280, Bankr. L. Rep. (CCH) ¶71105, 5 Fed. R. Serv. 3d (Callaghan) 911, 1986 U.S. App. LEXIS 24607 (7th Cir. 1986)*, , *In re Chicago, Rock Island & Pac. Ry., 788 F.2d 1280, 5 Fed. R. Serv. (Callaghan) 3d, 911, 1986 U.S. App. LEXIS 24607 (7th Cir. 1986)*.

In action by United States against defendant to establish just compensation for defendant's land taken by government, where defendant presented evidence that he was totally mentally disabled, District Court erred in failing to exercise legally required discretion under Rule 17(c) in that court failed to make any inquiry as to whether defendant was competent and could adequately protect himself and court was directed to make determination on remand as to whether guardian ad litem should be appointed for defendant. *United States v. 30.64 Acres of Land, 795 F.2d 796, 5 Fed. R. Serv. 3d (Callaghan) 415, 1986 U.S. App. LEXIS 27590 (9th Cir. 1986)*.

When substantial question exists regarding competence of unrepresented party court may not dismiss with prejudice for failure to comply with order of court; court has discretion to dismiss case without prejudice, appoint lawyer to represent party, or proceed with competency determination. *Krain v. Smallwood, 880 F.2d 1119, 14 Fed. R. Serv. 3d (Callaghan) 884, 1989 U.S. App. LEXIS 10767 (9th Cir. 1989)*, app. after remand, *931 F.2d 60, 1991 U.S. App. LEXIS 14723 (9th Cir. 1991)*, app. after remand, *931 F.2d 60 (9th Cir. 1991)*, app. after remand, *931 F.2d 60 (9th Cir. 1991)*, app. after remand, *931 F.2d 60 (9th Cir. 1991)*, app. after remand, *1991 U.S. App. LEXIS 8226 (9th Cir. Apr. 18, 1991)*.

Unless court finds child's general representative to be inadequate, it should not allow general representative to by bypassed by appointment special representative to litigate on behalf of ward; although Rule 17(c) does not say this in so many words, it is implicit in usual formulations of court's powers under rule. *T.W. by Enk v. Brophy, 124 F.3d 893, 38 Fed. R. Serv. 3d (Callaghan) 1468, 1997 U.S. App. LEXIS 23835 (7th Cir. 1997)*.

District court did not abuse its discretion by failing to sua sponte appoint guardian at litem to pro se plaintiff under *Fed. R. Civ. P. 17(c)* because neither rule nor court precedent required district court to conduct inquiry into employee's competency. *Ferrelli v. River Manor Health Care Ctr., 323 F.3d 196, 91 Fair Empl. Prac. Cas. (BNA) 688, 55 Fed. R. Serv. 3d (Callaghan) 93, 2003 U.S. App. LEXIS 5516 (2d Cir. 2003)*, cert. denied, *540 U.S. 1195, 124 S. Ct. 1448, 158 L. Ed. 2d 107, 2004 U.S. LEXIS 1285 (2004)*.

Suggestion in Rule 17(c) that guardian be appointed to represent infant or incompetent in court is not mandatory; necessity of any procedure to protect rights of minors in court is discretionary with court. *Foe v. Vanderhoof, 389 F. Supp. 947, 1975 U.S. Dist. LEXIS 13974 (D. Colo. 1975)*.

Neither appointment of guardian ad litem nor protective order in lieu of such appointment is mandatory so long as court determines that plaintiff is adequately protected in litigation without guardian. *T H v. Jones, 425 F. Supp. 873, 1975 U.S. Dist. LEXIS 11337 (D. Utah 1975)*, aff'd, in part, *425 U.S. 986, 96 S. Ct. 2195, 48 L. Ed. 2d 811, 1976 U.S. LEXIS 1729 (1976)*.

Guardian ad litem is appointed for incompetent defendant in government's action seeking writ of ne exeat republica, despite government's request that court appoint conservator or general guardian, because *FRCP 17(c)* only authorizes courts to appoint guardian ad litem for incompetent litigants, and expansion of that authority would interfere unduly with state probate and guardianship laws. *United States v. Maryans, 803 F. Supp. 1378, 1992 U.S. Dist. LEXIS 15551 (N.D. Ind. 1992)*.

Provisions of *FRCP 17(c)* permit, but do not compel, court to appoint guardian ad litem for unrepresented minor; however, once matter has been brought to court's attention, it is required to consider and decide issue. *Seibels, Bruce & Co. v. Nicke, 168 F.R.D. 542, 1996 U.S. Dist. LEXIS 13893 (M.D.N.C. 1996)*.

Although child's next best friend may represent child pursuant to *FRCP 17(c)*, court has inherent authority thereunder to appoint guardian ad litem to represent child when it perceives that child's interest may conflict with next best friend's. *Scott v. District of Columbia, 197 F.R.D. 10, 2000 U.S. Dist. LEXIS 15746 (D.D.C. 2000)*.

Under Fla. R. Civ. P. 1.210, minor is incapable of bringing action on his or her own behalf, but can only sue by and through guardian ad litem, next friend, or other duly appointed representative; because children lacked legal capacity to sue under Florida law, when suit was filed, plaintiffs' counsel moved to appoint guardian ad litem for matter; no party contended that guardian was not authorized to maintain lawsuit on behalf of plaintiffs pursuant to *Fed. R. Civ. P. 17(c)(2)*. *Smith v. Rainey, 747 F. Supp. 2d 1327, 2010 U.S. Dist. LEXIS 104830 (M.D. Fla. 2010)*.

105. Effect of statute of limitations

Under guardian ad litem appointment process envisioned by *FRCP 17*, no legal representative had been appointed for minor until his parents commenced lawsuit before district court, which was within three year time period under former46 USCS Appx § 183b(c) to appoint legal representative; accordingly, minor's claim was not time-barred under passenger ticket contract and § 183b(c). *Gibbs v. Carnival Cruise Lines, 314 F.3d 125, 2003 A.M.C. 179, 54 Fed. R. Serv. 3d (Callaghan) 507, 2002 U.S. App. LEXIS 26425 (3d Cir. 2002)*.

Summary judgment was properly granted against mother on her medical malpractice claim against U.S.; where mother could have filed administrative action and had 15 months after she reached 18 years of age to file civil suit on behalf of her child, mother's infancy during beginning of limitations period did not toll statute of limitations in *28 USCS § 2401(b)*, part of Federal Tort Claims Act, even though *Mo. Rev. Stat. § 507.115* and *Fed. R. Civ. P. 17(b)* barred mother from filing suit until she reached 18 years of age. *Wilson v. Gunn, 403 F.3d 524, 2005 U.S. App. LEXIS 5423 (8th Cir.)*, cert. denied, *546 U.S. 827, 126 S. Ct. 367, 163 L. Ed. 2d 74, 2005 U.S. LEXIS 6112 (2005)*.

106. Attorneys fees, costs and expenses

Even if guardian ad litem's fees and expenses may be taxed as costs under Rule 54(d), they may not include services guardian ad litem performs as attorney to incompetent. *Kollsman v Cohen (1993, CA4 Va) 996 F2d 702, 25 FR Serv 3d 1208*, amd (1993, CA4 Va) slip op.

District court properly awarded guardian ad litem fees against U.S. under *Fed. R. Civ. P. 54(d)(1)* in action under Federal Tort Claims Act, *28 USCS §§ 2671–2680*, that was filed by minor and his parents as result of automobile accident involving postal vehicle; because U.S. Supreme Court's decision in Crawford Fitting did not consider subject of guardian ad litem fees, district court was not obligated to extend language of Crawford Fitting to overrule

widely accepted practice of awarding such costs; further, Fed. R. Civ. P. 17(c) constituted alternative express statutory authorization as was required by Crawford Fitting to tax guardian ad litem fees as costs, and, phrase "court appointed experts" in *28 USCS § 1920(6)* could be interpreted to encompass guardians ad litem. *Gaddis v. United States, 381 F.3d 444, 59 Fed. R. Serv. 3d (Callaghan) 457, 64 Fed. R. Serv. (Callaghan) 1238, 2004 U.S. App. LEXIS 16652 (5th Cir. 2004)*.

Under Fed. R. Civ. P. 17(c), district courts have inherent authority and discretion to determine: (a) whether guardian ad litem needs to be appointed to protect interests of minor or incompetent person and, if so, who will be appointed to best serve in that capacity; (b) whether guardian ad litem will be compensated for his services and, if so, basis upon which value of such services shall be determined, so long as guardian ad litem is acting in his guardian ad litem capacity and not in any attorney ad litem capacity; and (c) whether compensation payable to guardian ad litem will be treated (1) as court cost to be taxable against nonprevailing party or (2) as expense to be payable out of any funds that were recovered by or payable to minor or incompetent person, on whose behalf guardian ad litem was appointed. *Gaddis v. United States, 381 F.3d 444, 59 Fed. R. Serv. 3d (Callaghan) 457, 64 Fed. R. Serv. (Callaghan) 1238, 2004 U.S. App. LEXIS 16652 (5th Cir. 2004)*.

Authority of court to award reasonable fee to guardian ad litem is implied from power to appoint him under Rule 17(c) and such fee may properly be taxed as costs since it is expenditure necessary to perform its own judicial function. Friends for all *Friends for all Children, Inc. v. Lockheed Aircraft Corp., 533 F. Supp. 895, 17 Av. Cas. (CCH) ¶18019, 1982 U.S. Dist. LEXIS 11138 (D.D.C. 1982)*.

Mortgagor to United States is not entitled to award of attorney fees and expenses pursuant to Rule 17(c) in connection with appointment pursuant to 50 USCS App § 520 of attorney who unsuccessfully pursued stay of foreclosure proceeding brought by United States since Rule 17(c) is silent on issue of compensation and taxation of cost in connection with appointment of guardians ad litem and under law of state in which action is brought cost of attorney appointed pursuant to 50 USCS App § 520 should be taxed as part of cost of cause of action and parties have stipulated that each is to bear its own cost. *United States v. Henagan, 552 F. Supp. 350, 1982 U.S. Dist. LEXIS 17003 (M.D. Ala. 1982)*.

Rule 17(c) gives court special responsibility to safeguard interests of infant litigants and thus supports determination to reduce contingent attorneys' fees, set by contract with infant or guardian to amount considered appropriate under circumstances. *Friends for All Children, Inc. v. Lockheed Aircraft Corp., 567 F. Supp. 790, 1983 U.S. Dist. LEXIS 16277 (D.D.C. 1983)*.

107. Miscellaneous

Rule 17(c) does not provide for suit by next friend when incompetent already has duly appointed representative; therefore, daughter could not maintain bankruptcy petition on her mother's behalf where guardian of mother's estate had already been appointed. *Wieczorek v. Woldt (In re Kjellsen), 53 F.3d 944, Bankr. L. Rep. (CCH) ¶76500, 32 Fed. R. Serv. 3d (Callaghan) 187, 1995 U.S. App. LEXIS 10518 (8th Cir. 1995)*, reh'g denied, *1995 U.S. App. LEXIS 15122 (8th Cir. June 16, 1995)*.

Court was justified in rendering summary judgment before naming guardian ad litem for defendant since district court gave defendant opportunity to obtain guardian ad litem but she delayed selection. *Salomon Smith Barney, Inc. v. Harvey, 260 F.3d 1302, 14 Fla. L. Weekly Fed. C 1067, 50 Fed. R. Serv. 3d (Callaghan) 1273, 2001 U.S. App. LEXIS 17962 (11th Cir. 2001)*, vacated, remanded, *537 U.S. 1085, 123 S. Ct. 718, 154 L. Ed. 2d 629, 2002 Cal. Daily Op. Service 11986, 2002 D.A.R. 14114, 2002 U.S. LEXIS 9248 (2002)*.

As to claim on behalf of unrepresented minor or incompetent person, court is not to reach merits without appointing suitable representative; fact that minor or incompetent person must be represented by next friend, guardian ad litem, or other fiduciary does not alter principle embodied in *28 USCS § 1654* that non-attorney is not allowed to represent another individual in federal court litigation without assistance of counsel; if representative of minor or incompetent person is not himself attorney, he must be represented by attorney in order to conduct litigation;

without counsel, case will not go forward at all. *Berrios v. N.Y. City Hous. Auth., 564 F.3d 130, 2009 U.S. App. LEXIS 8406 (2d Cir. 2009)*.

Because plaintiff individual was not proper party to pursue tort claims against defendants due to her incompetency, and she did not move to substitute proper party after being put on notice of need for substitution, district court did not err in dismissing claims. *Kuelbs v. Hill, 615 F.3d 1037, 2010 U.S. App. LEXIS 15757 (8th Cir. 2010)*, cert. denied, *562 U.S. 1287, 131 S. Ct. 1679, 179 L. Ed. 2d 616, 2011 U.S. LEXIS 2250 (2011)*.

While exercising its special duty, derived from *Fed. R. Civ. P. 17(c)*, to protect interests of litigants who were minors, district court erred when it focused on large proportion of total settlement value going to plaintiffs' counsel, instead of reviewing fairness of each minor's net recovery in isolation, because (1) if net recovery of each minor plaintiff under proposed settlement was fair and reasonable, district court should approve settlement as proposed; and (2) district court performed overly broad review of proposed settlement and considered factors and state court rules outside narrow scope of district court's review. *Robidoux v. Rosengren, 638 F.3d 1177, 79 Fed. R. Serv. 3d (Callaghan) 95, 2011 U.S. App. LEXIS 6485 (9th Cir. 2011)*.

Because district court's order denying prisoner's request to appoint guardian ad litem and staying prisoner's civil rights case until prisoner was found "restored to competency" and capable of protecting his own interest through self-representation failed to adequately protect prisoner's interests and, instead, amounted to dismissal with prejudice of prisoner's actions, it did not constitute appropriate order under this Rule. *Davis v. Walker, 745 F.3d 1303, 88 Fed. R. Serv. 3d (Callaghan) 106, 2014 U.S. App. LEXIS 5427 (9th Cir. 2014)*.

Where social workers took two-day-old child into protective custody and father filed suit against county and social workers, complaint provided adequate notice of cause of action on behalf of child because, inter alia, complaint was not inadequate merely because assertion that child's constitutional right to be with child's parents was violated was not coupled with reference of Fourth Amendment. *Kirkpatrick v. County of Washoe, 792 F.3d 1184, 2015 U.S. App. LEXIS 11918 (9th Cir. 2015)*, vacated, reh'g, en banc, granted, *813 F.3d 1258, 2016 U.S. App. LEXIS 2661 (9th Cir. 2016)*, superseded, *843 F.3d 784, 2016 U.S. App. LEXIS 21925 (9th Cir. 2016)*.

None of petitioners, alleged conservators and minor's relatives, demonstrated how under federal law he or she would have qualified as general guardian, conservator, or like fiduciary because minor was properly designated as unaccompanied alien child, conservators lacked any legal or biological relationship to minor, conservators could not have qualified "conservators" because state court lacked jurisdiction to grant their conservatorship of minor, and fact relatives were minor's closest living relatives did not automatically entitle them to file claims on her behalf in federal court. *United States ex rel. K.E.R.G. v. Sec'y of HHS, 638 Fed. Appx. 154, 2016 U.S. App. LEXIS 2032 (3d Cir. 2016)*.

Fact that parents represented their minor child in settlement of lawsuit based on injuries suffered at birth did not warrant *Fed. R. Civ. P. 60(b)* relief because district court was not required to appoint guardian for child since parents represented child and failure to appoint a guardian did not render settlement void. *Kile v. United States, 915 F.3d 682, 102 Fed. R. Serv. 3d (Callaghan) 1250, 2019 U.S. App. LEXIS 4040 (10th Cir. 2019)*.

Although plaintiffs captioned their complaint as [Parents' names] as parent-guardians and next friend to their minor children, complaint provided adequate notice to defendants that parents were asserting their own rights in addition to those of their children and thus, plaintiffs' claims involving rights of parents were properly before court. *Kanuszewski v. Mich. HHS, 927 F.3d 396, 2019 FED App. 122P, 2019 U.S. App. LEXIS 17287 (6th Cir. 2019)*.

Federal court could not appoint representative under *Fed. R. Civ. P. 17(c)* in civil rights lawsuit involving state's child welfare system when child was already represented by guardian ad litem in state juvenile proceedings; therefore, because minor children were within jurisdiction of family court, where guardians had been appointed to represent their interests, State's Child Advocate and next friends who brought lawsuit had no authority or standing to proceed in case, and case had to be dismissed. *Sam M. v. Carcieri, 610 F. Supp. 2d 171, 2009 U.S. Dist. LEXIS 38981 (D.R.I. 2009)*, rev'd, remanded, *608 F.3d 77, 2010 U.S. App. LEXIS 12552 (1st Cir. 2010)*.

In case brought under 5 USCS § 552 in which father sued U.S. Department of Justice (DOJ) on behalf of his minor daughter and DOJ filed Fed. R. Civ. P. 12(b)(1) motion to dismiss claims on behalf of daughter, father, who was not attorney, lacked standing, and father had not established that he was his daughter's general guardian or like fiduciary; given unsettled nature of custody dispute over daughter, it was wholly inappropriate to recognize either parent as appropriate guardian for purpose of resolving present case; therefore, district court lacked subject matter jurisdiction over his FOIA claims on behalf of his daughter against DOJ. Lazaridis v. United States DOJ, 713 F. Supp. 2d 64, 2010 U.S. Dist. LEXIS 51919 (D.D.C. 2010).

Because plaintiff made bald allegations of mental illness, but had not submitted any verifiable evidence of incompetence to court, court had no duty to conduct sua sponte determination of competency under Fed. R. Civ. P. 17(c)(2). Johnson v. Crocker, 881 F. Supp. 2d 615, 2012 U.S. Dist. LEXIS 111374 (D. Del. 2012).

Unpublished decision: District court abused its discretion—by not applying correct standard or making any factual findings to support such decision—where: (1) 15 V.I. Code Ann. § 842 provided that guardian may be appointed if it appeared to court that person in question was incapable of taking care of himself; (2) magistrate judge referred to Fed. R. Civ. P. 17 and Cyntje decision in ordering that guardian be appointed, but he never cited standard he was using to determine whether attorney was competent; and (3) district court affirmed magistrate judge's appointment of guardian without further explanation; decision was vacated, and matter was remanded to district court—it was clear that attorney was competent to proceed pro se. Richards v. Duke Univ., 166 Fed. Appx. 595, 2006 U.S. App. LEXIS 1719 (3d Cir. 2006).

Unpublished decision: District court was not required to sua sponte appoint guardian ad litem under Fed. R. Civ. P. 17(c) for borrower bringing action under RESPA against loan servicer because there was insufficient evidence in record that should have alerted district court to any issue regarding competence of one of two borrowers in that psychological and mental stress was not equivalent of incompetence to proceed in court and second borrower was also party to action. McLean v. GMAC Mortg. Corp., 398 Fed. Appx. 467, 2010 U.S. App. LEXIS 20234 (11th Cir. 2010).

Unpublished decision: Guardian for minor ward was properly dismissed as named plaintiff when ward turned 18, as age of majority in Virgin Islands was 18 and guardianship terminated under Virgin Islands law when minor attained his majority. Exxon Mobil Savings Plan v. Williams, 567 Fed. Appx. 97, 2014 U.S. App. LEXIS 9616 (3d Cir. 2014).

Unpublished decision: District court did not abuse its discretion in finding prisoner competent and declining to appoint guardian ad litem and counsel for his 42 USCS § 1983 proceedings because court contemplating appointment of representative or counsel in civil case was required to find that claim had arguable merit in fact and law; prisoner's claims were devoid of factual or legal basis. Hartmann v. Carroll, 582 Fed. Appx. 111, 2014 U.S. App. LEXIS 21656 (3d Cir. 2014).

Parents could have sued as their child's next friend because it did not appear that child had any duly appointed representative, and parents qualified as persons with interest in child's welfare. Roth v. Islamic Republic of Iran, Roth v Islamic Republic of Iran (2015, DC Dist Col), 78 F. Supp. 3d 379 (January 27, 2015).

B. Necessity of Appointment in Particular Situations

108. Abortion rights

District Court erred in failing to consider and rule upon question of guardian ad litem for 14-year-old pregnant female child committed to custody of state's Department of Human Resources in her action which challenged state statute prohibiting defendant Secretary of State's Department of Human Resources from consenting to or providing payment for female's desired abortion, where issue was particularly critical in light of (1) controversial nature of legal issues, (2) status of plaintiff as minor, pregnant out of wedlock, without benefit of natural parent or guardian, and (3) defendant's being female's legal guardian; although it would not be improper for court, upon consideration, to appoint child's attorney as her guardian ad litem, mere presence of attorney representing her in action was

insufficient of itself to protect her personal interests in action. *Noe v. True, 507 F.2d 9, 19 Fed. R. Serv. 2d (Callaghan) 646, 1974 U.S. App. LEXIS 5783 (6th Cir. 1974)*.

Appointed guardian ad litem does not replace general guardian for all purposes, but is appointed as representative of court to act for minor in case, with authority to engage counsel, file suit, and to prosecute, control, and direct litigation; as officer of court, guardian ad litem has full responsibility to assist court to secure just, speedy, and inexpensive determination of action; thus, in action brought by 14-year-old pregnant female child committed to custody of state's Department of Human Resources, in which action challenge was made to state statute which prohibited defendant Secretary of State's Department of Human Resources from consenting to or providing for payment of female's desired abortion, plaintiff was not "otherwise represented" in action as provided in Rule 17(c), where respective legal position of child and her legal guardian (the defendant in law suit) were adverse. *Noe v. True, 507 F.2d 9, 19 Fed. R. Serv. 2d (Callaghan) 646, 1974 U.S. App. LEXIS 5783 (6th Cir. 1974)*.

In action brought by unmarried pregnant woman under age of 18 to challenge validity of Colorado statute requiring parental consent for abortion for female under age of 18, court would decline to appoint guardian ad litem to represent plaintiff, in light of facts that plaintiff's interests were sufficiently protected by her attorneys and social worker in matter and that plaintiff had evidenced understanding of legal and personal implications of action and was capable of bringing action on her own behalf. *Foe v. Vanderhoof, 389 F. Supp. 947, 1975 U.S. Dist. LEXIS 13974 (D. Colo. 1975)*.

In action brought to enjoin enforcement of state statute making it criminal offense to perform abortion upon minor without consent of both parents as well as that of minor, court would not appoint guardian ad litem for unmarried minor plaintiff where minor was of ample intelligence to fully understand nature of action, where minor voluntarily participated in action, where interests of minor in interpretation and effect of statute were fully represented by competent counsel, and to extent of any conflicting interest, by action of competent counsel for intervening parent, and where statute in question, which offered minor superior court hearing if parents refused consent to abortion, provided that court need not appoint guardian although no one at all might be representing her. *Baird v. Bellotti, 393 F. Supp. 847, 1975 U.S. Dist. LEXIS 12633 (D. Mass. 1975)*, vacated, *428 U.S. 132, 96 S. Ct. 2857, 49 L. Ed. 2d 844, 1976 U.S. LEXIS 81 (1976)*.

109. Adoption

Rule 17(c) is not applicable in proceedings instituted in federal district court for District of Columbia under Adoption Act of District, but nevertheless Rule 17(c) serves to indicate that one acceptable method for protecting interests of adoptees would be appointment of guardian ad litem. *Barnes v. Paanakker, 111 F.2d 193, 72 App. D.C. 39, 1940 U.S. App. LEXIS 3608 (D.C. Cir. 1940)*.

Term next friend is broad enough to include law school dean enlisted by civil liberties union who was interested in establishing constitutional basis for children's claim for permanent home from adoption agencies and lawsuit was grounded on that claim and since children expressed it as their desire and in addition where defendants did not present anything in record to impugn good faith of next friend nor of the attorneys nor evidence indicating children did not authorize alleged next friend to proceed to vindicate their claim. *Child v. Beame, 412 F. Supp. 593, 22 Fed. R. Serv. 2d (Callaghan) 802, 1976 U.S. Dist. LEXIS 16546 (S.D.N.Y. 1976)*.

110. Family planning

Relevant to determining that plaintiff in challenging state regulations by declaratory judgment dealing with state prohibition of Utah Planned Parenthood Association providing minors with family planning assistance absent parental consent court found that plaintiff did not need guardian ad litem or protective order since first, plaintiff in action asserted her own statutory and constitutional rights independent of her parents who were her guardians under Utah law; secondly, plaintiff did not seek monetary relief, but raised statutory and constitutional claims aimed at declaratory and injunctive relief; and thirdly, plaintiff was represented by able and experienced counsel. *T H v.*

Jones, 425 F. Supp. 873, 1975 U.S. Dist. LEXIS 11337 (D. Utah 1975), aff'd, in part, *425 U.S. 986, 96 S. Ct. 2195, 48 L. Ed. 2d 811, 1976 U.S. LEXIS 1729 (1976)*.

111. Forfeiture

Appointment of guardian in forfeiture proceeding is not necessary, where government seized property owned by husband and wife, husband committed suicide after seizure but before adjudication, husband had one minor child, wife had two minor children, wife and paternal grandfather of husband's child received notice of forfeiture hearing on behalf of children, and grandfather appeared on behalf of husband's child, because *FRCP 17(c)* only requires that court consider appointment of guardian, and since children had no interest in property to protect, decision not to appoint guardian was correct. *United States v. 42.5 Acres, More or Less, of Land & Personal Property, Located in First Property Judicial Dist., 834 F. Supp. 912, 1992 U.S. Dist. LEXIS 21789 (S.D. Miss. 1992)*.

112. Prisoners

District court abused its discretion in dismissing *28 USCS § 2254* habeas corpus petition for failure to prosecute without first holding competency hearing or otherwise considering prisoner's claim where there was sufficient evidence of prisoner's incompetence at least to require district court to make competency determination because (1) as evidence of prisoner's incompetence, prisoner submitted prisoner's sworn declaration and that of another inmate, (2) each declaration explained that prisoner was mentally ill and did not understand district court's instructions, (3) as further support, prisoner included letter from prison psychiatrist, which stated that prisoner was under psychiatrist's care, diagnosed with chronic undifferentiated schizophrenia, and was taking two psychotropic medications, (4) because allegations were unrebutted, district court was required to take them as true in deciding whether to dismiss petition, and (5) where party's incompetence in fact caused party to fail to prosecute or meet filing deadline, action should not have been dismissed on such grounds. *Allen v. Calderon, 408 F.3d 1150, 2005 U.S. App. LEXIS 7595 (9th Cir. 2005)*.

Although district court properly concluded that death row inmate's *42 USCS § 1983* action challenging method of execution could not be brought by next friend under *Fed. R. Civ. P. 17* where there was no showing that inmate was incapable for caring for own litigation interests despite his mental illness, dismissal of case was abuse of discretion in that substitution, joinder, or ratification should have been permitted. *Magallon v. Livingston, 453 F.3d 268, 65 Fed. R. Serv. 3d (Callaghan) 712, 2006 U.S. App. LEXIS 14854 (5th Cir.)*, cert. denied, *548 U.S. 921, 126 S. Ct. 2974, 165 L. Ed. 2d 981, 2006 U.S. LEXIS 5167 (2006)*.

When confronted with verifiable evidence from mental health professional of unrepresented litigant's incompetence, district courts had obligation, under *Fed. R. Civ. P. 17*, to inquire into litigant's competency; under this rule, psychiatric report in one case was so thorough as to plaintiff prison litigant's incapacity in his criminal case that it was abuse of discretion not to appoint representative; psychiatrist's letter put court on notice that other plaintiff also was possibly incompetent, but evidence was not so strong that appellate court could conclude that he should have been found so; instead, court held only that district court abused its discretion in failing to at least consider possible application of Rule 17(c) and remanded for reconsideration. *Powell v. Symons, 680 F.3d 301, 82 Fed. R. Serv. 3d (Callaghan) 266, 2012 U.S. App. LEXIS 6467 (3d Cir. 2012)*.

Federal courts encounter issue of appointment of counsel more frequently in civil cases under *28 USCS § 1915(e)*, but only rarely consider issue of appointment of guardian ad litem under *Fed. R. Civ. P. 17(c)*. *Powell v. Symons, 680 F.3d 301, 82 Fed. R. Serv. 3d (Callaghan) 266, 2012 U.S. App. LEXIS 6467 (3d Cir. 2012)*.

District court had not been required to sua sponte appoint guardian ad litem for plaintiff inmate because despite his treatment for mental health issues, he was able to adequately litigate his *42 U.S.C.S. § 1983* claims and had never been adjudicated incompetent. *Williams v. Rickman, 759 Fed. Appx. 849, 2019 U.S. App. LEXIS 9 (11th Cir. 2019)*.

Father could sue in capacity as next friend of his incompetent son who was inmate without having been appointed general guardian. *Bradley v. Harrelson, 151 F.R.D. 422, 1993 U.S. Dist. LEXIS 14667 (M.D. Ala. 1993)*.

"Next friend" requirements, under *Fed. R. Civ. P. 17(c)(2)*, were satisfied on basis of detainee's inaccessibility, due to his detention in Belarus, and his brother's clear dedication to best interests of detainee. *Gudavadze v. Kay, 556 F. Supp. 2d 299, 2008 U.S. Dist. LEXIS 44620 (S.D.N.Y. 2008)*.

Even if plaintiff inmate's mother had filled role of guardian ad litem or "next friend" pursuant to *Fed. R. Civ. P. 17(c)*, she had to obtain legal counsel to bring her son's civil rights claims before court; thus, she was properly dismissed from his case. *Mills v. Greenville County, 586 F. Supp. 2d 480, 2008 U.S. Dist. LEXIS 107292 (D.S.C.)*, dismissed without prejudice, *586 F. Supp. 2d 480, 2008 U.S. Dist. LEXIS 30724 (D.S.C. 2008)*.

113. Students

In action by minor high school students against officials of school system challenging rules governing students' distribution of written communicative material in or on grounds of public school buildings, district court did not abuse its discretion in denying defendants' petition for appointment of guardian ad litem where nothing in the record indicated that minors, who were represented by counsel, were represented inadequately or that any party was prejudiced by absence of guardian ad litem. *Jacobs v. Board of School Comm'rs, 490 F.2d 601, 18 Fed. R. Serv. 2d (Callaghan) 715, 1973 U.S. App. LEXIS 6471 (7th Cir. 1973)*, vacated, *420 U.S. 128, 95 S. Ct. 848, 43 L. Ed. 2d 74, 19 Fed. R. Serv. 2d (Callaghan) 934, 1975 U.S. LEXIS 30 (1975)*.

In action by father of handicapped child against school district claiming that district was required to place his child in hospital with in house education program, where father subsequently allowed state agency to become managing conservator of child in order to facilitate her placement at public psychiatric hospital, District Court correctly determined that father no longer had standing to pursue action, and court stated that nothing in Rule 17(c) authorized parent of child for whom legal representative had been appointed to file action without obtaining court authority to do so. *Susan R.M. v. Northeast Independent School Dist., 818 F.2d 455, 1987 U.S. App. LEXIS 7222 (5th Cir. 1987)*.

Since Rules 17(c) is permissive and not mandatory, court would allow appointment of committee of teachers to represent children as next friend since they were only group of adults likely to seek vindication of children's constitutional rights to learning environment free of any racially discriminatory practices. *Ad Hoc Committee of Concerned Teachers on behalf of Minor & Under-Age Students etc. v. Greenburgh #11 Union Free School Dist., 873 F.2d 25, 50 Empl. Prac. Dec. (CCH) ¶39022, 49 Fair Empl. Prac. Cas. (BNA) 1081, 13 Fed. R. Serv. 3d (Callaghan) 482, 1989 U.S. App. LEXIS 5159 (2d Cir. 1989)*.

For purposes of Individuals with Disabilities in Education Act (IDEA), *20 USCS §§ 1401* et seq., parents are not "parties aggrieved" who have right to bring civil action under *20 USCS § 1415(i)(2)(A)*; pursuant to *28 USCS § 1654* and *FRCP 17(c)*, parents of minor, disabled student have right to sue or defend, on their child's behalf, civil actions that are brought under *20 USCS § 1415(i)(2)(A)*, and they may also act as their own counsel in such suit, but nothing in IDEA permits parents to serve as legal counsel for their minor disabled student's cause of action. *Cavanaugh v. Cardinal Local Sch. Dist., 409 F.3d 753, 2005 FED App. 0222P, 2005 U.S. App. LEXIS 8867 (6th Cir. 2005)*, reh'g denied, *2005 U.S. App. LEXIS 12384 (6th Cir. June 15, 2005)*, overruled in part, *Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 127 S. Ct. 1994, 167 L. Ed. 2d 904, 20 Fla. L. Weekly Fed. S. 287, 2007 U.S. LEXIS 5902 (2007)*.

In action by mother and father, on behalf of themselves and their son, against high school district, union, and state department of education, following mother's appeal, appellate decision was deferred for limited purpose of permitting counsel to be retained to represent son; although mother had right to act as her own counsel under *28 USCS § 1654*, neither *Fed. R. Civ. P. 17(c)* nor *Fed. R. App. P. 3(c)(2)* implied that non-lawyer mother could represent her minor son in federal court. *Tindall v. Poultney High Sch. Dist., 414 F.3d 281, 2005 U.S. App. LEXIS 13319 (2d Cir. 2005)*.

Father, non-attorney, was not authorized to litigate pro se claim of his minor children that *Va. Code Ann. § 22.1-202(C)*, which provided for daily, voluntary recitation of Pledge of Allegiance in state's public schools, violated

Establishment Clause. *Myers v. Loudoun County Pub. Schs, 418 F.3d 395, 2005 U.S. App. LEXIS 16722 (4th Cir. 2005)*.

Child's father lacked standing to challenge school redistricting on child's behalf because judgment and letters of tutorship produced by father did not establish that he was child's tutor at time suit was filed; however, because capacity to sue could be cured, it was necessary for district court to consider whether to permit father to remedy his defective allegations of capacity. *Lewis v. Ascension Parish Sch. Bd., 662 F.3d 343, 2011 U.S. App. LEXIS 22222 (5th Cir. 2011)*.

Pursuant to *Fed. R. Civ. P. 17(c)*, student's stepfather was proper party to case challenging constitutionality of search of student while at school even though student had not been adopted by stepfather, where there was relationship between student and stepfather and there was no evidence of opposition to representation or of conflict between interests of student and stepfather. *Rudolph v. Lowndes County Bd. of Educ., 242 F. Supp. 2d 1107, 2003 U.S. Dist. LEXIS 658 (M.D. Ala. 2003)*.

Unpublished decision: District court magistrate did not commit any error under *Fed. R. Civ. P. 17(c)* in appointing guardian ad litem to represent autistic child with regard to implementation of consent decree that had been entered in suit filed by child's mother pursuant to Individuals with Disabilities Education Act (IDEA), *20 USCS §§ 1401* et seq., since (1) although U.S. Supreme Court subsequently held in Winkelman that parents could represent themselves in IDEA suits, it expressly declined to decide whether they could represent their children in such suits; (2) mother was bound by consent decree because she had knowingly and voluntarily agreed to it; and (3) magistrate had appointed guardian ad litem after concluding that mother's conduct had harmed child, as irrational and inconsistent positions that she had taken in dealing with her own counsel, child's school district, and district court had made it impossible to implement consent decree. *Muse B. v. Upper Darby Sch. Dist., 282 Fed. Appx. 986, 2008 U.S. App. LEXIS 13620 (3d Cir. 2008)*.

114. Wrongful death action

Even if it was assumed that appellant children whose claims were dismissed on res judicata grounds were same individuals identified as children of deceased in prior action, that did not necessarily resolve question of whether they were parties in prior suit for purposes of imposing res judicata bar on claims against appellee corporation under Alien Tort Statute, *28 USCS § 1350*, and Torture Victim Protection Act of 1991, *28 USCS § 1350* note, because at time of filing of prior suit, current children were minors (and still were), and they did not have capacity to sue in their own right under *Fed. R. Civ. P. 17(c)(2)* which required that they sue through duly appointed representative, "next friend," or guardian, and prior complaint did not indicate that children were present in that suit "by and through their mother and next friend." *Baloco v. Drummond Co., 640 F.3d 1338, 22 Fla. L. Weekly Fed. C 2087, 2011 U.S. App. LEXIS 10178 (11th Cir.)*, reh'g, en banc, denied, *437 Fed. Appx. 885, 2011 U.S. App. LEXIS 23469 (11th Cir. 2011)*.

Appointment of guardian ad litem is necessary following crash of plane carrying orphaned children since infants, who were about one year old at time of crash, require continuing monitoring of their physical condition and protection of their legal interests in ensuing litigation. Friends for all *Friends for all Children, Inc. v. Lockheed Aircraft Corp., 533 F. Supp. 895, 17 Av. Cas. (CCH) ¶18019, 1982 U.S. Dist. LEXIS 11138 (D.D.C. 1982)*.

Guardian ad litem is appointed to protect interests of children of decedent in connection with distribution of settlement proceeds in wrongful death action between children and decedent's surviving spouse, where under proposed settlement spouse would receive substantially greater share of proceeds, because interests of spouse and children are conflicting. *Geddes v. Cessna Aircraft Co., 881 F. Supp. 94, 1995 U.S. Dist. LEXIS 4644 (E.D.N.Y. 1995)*.

Unpublished decision: In wrongful death suit, it was not abuse of discretion to appoint minors' paternal grandfather as their next friend or guardian ad litem to prosecute suit on behalf of minors, notwithstanding mother's tutorship, because their mother's inability or unwillingness to pursue claims on minors' behalf, as reflected by mother's

silence, essentially left minors unrepresented; rather than usurping any interests of mother, district court's action merely preserved potential claims possessed by minors. *Rice v. Cornerstone Hosp. of W. Monroe, L.L.C., 589 Fed. Appx. 688, 2014 U.S. App. LEXIS 20862 (5th Cir. 2014)*.

115. Other settlements

District court was not required to consider whether appointment of guardian ad litem was necessary where minor was represented by parent who had similar interests; even though minor alleged that mother never gave her share of settlement proceeds, record did not reveal that actual conflict of interest existed at time case was before district court. *Burke v. Smith, 252 F.3d 1260, 14 Fla. L. Weekly Fed. C 769, 50 Fed. R. Serv. 3d (Callaghan) 72, 2001 U.S. App. LEXIS 11281 (11th Cir. 2001)*.

Pursuant to *FRCP 17(c)*, court will neither consider merits of settlement agreement nor appoint guardian ad litem, because (1) source of court's authority to approve settlement is not rule but, rather, state law and inherent duty to protect interests of incompetents before court, and (2) although incompetent's guardian's role as referring attorney created undisclosed conflict of interest, customary course of appointment of guardian ad litem will not be followed in light of court's ability to objectively assess fairness of settlement and in interests of time and cost savings. *Eagan by Keith v. Jackson, 855 F. Supp. 765, 1994 U.S. Dist. LEXIS 7962 (E.D. Pa. 1994)*.

116. Other mentally impaired persons

Upon determining that mother of incompetent adult son lacks standing to bring action against son's temporary guardian, alleging that involuntary commitment of son constitutes false imprisonment, District Court should appoint guardian ad litem or next friend to protect son's interest, rather than dismiss case with prejudice without first determining whether son's interests are adequately protected, where complaint, taken at face value, shows conflict of interest between son and temporary guardian. *Adelman on behalf of Adelman v. Graves, 747 F.2d 986, 40 Fed. R. Serv. 2d (Callaghan) 631, 1984 U.S. App. LEXIS 16256 (5th Cir. 1984)*.

Guardian ad litem appointed for retarded teenager for purposes of state family court proceedings was not proper representative in federal civil rights suit initiated on teenager's behalf since she was named as defendant in federal suit and thus had conflict of interest. *Gardner v. Parson, 874 F.2d 131, 13 Fed. R. Serv. 3d (Callaghan) 834, 1989 U.S. App. LEXIS 5875 (3d Cir. 1989)*.

Action under *42 USCS § 1983* by inmate at mental institution did not have to be dismissed because it was brought by inmate and not his court-appointed guardian, since there is no absolute rule that ward may never prosecute case in his own name; better approach to controlling litigation by inmate, who filed frequently, would be to forbid further filing without leave of court. *Kolocotronis v. Morgan, 247 F.3d 726, 49 Fed. R. Serv. 3d (Callaghan) 3, 2001 U.S. App. LEXIS 6207 (8th Cir. 2001)*.

It was entirely appropriate that district court, recognizing plaintiff suffered from some degree of mental retardation, appointed guardian ad litem to assist court in determining propriety of his continued participation in litigation. *Fonner v. Fairfax County, 415 F.3d 325, 12 Accom. Disabilities Dec. (CCH) ¶12-013, 2 Accom. Disabilities Dec. (CCH) ¶ 2-013, 16 Am. Disabilities Cas. (BNA) 1718, 2005 U.S. App. LEXIS 14222 (4th Cir. 2005)*.

In opinion of guardian ad litem appointed to assist court in determining propriety of mentally retarded man's continued participation as named plaintiff, man had not knowingly authorized his counsel to represent him; district court's dismissing man from case was not abuse of discretion. *Fonner v. Fairfax County, 415 F.3d 325, 12 Accom. Disabilities Dec. (CCH) ¶12-013, 2 Accom. Disabilities Dec. (CCH) ¶ 2-013, 16 Am. Disabilities Cas. (BNA) 1718, 2005 U.S. App. LEXIS 14222 (4th Cir. 2005)*.

In action alleging that physical conditions, care, treatment, and training provided at state home for mentally retarded did not meet constitutional standards, where action was brought by parents of certain children confined in state institution on behalf of such children and others similarly situated, court, in light of possibility that interests of parents might conflict with those of children residing in institution, would order, under Rule 17(c), appointment of

guardian ad litem, who would not displace parents as representatives but would be alert to recognize potential and actual differences in positions asserted by parents and positions that need to be asserted on behalf of plaintiffs. *Horacek v. Exon, 357 F. Supp. 71, 1973 U.S. Dist. LEXIS 14376 (D. Neb. 1973)*.

In civil rights action, in which damages and declaratory relief were sought to end alleged "forced labor" of mental hospital patients in Pennsylvania, where defendant moved to dismiss on ground that capacity of plaintiffs to sue was questionable on allegations of complaint, if evidence is adduced which raises substantial issue as to plaintiffs' capacity, court may enter appropriate order under Rule 17(c). *Downs v. Department of Public Welfare, 368 F. Supp. 454, 1973 U.S. Dist. LEXIS 10450 (E.D. Pa. 1973)*.

Where district court had to approve class action settlement, it decided not to appoint guardian ad litem because of Alabama Disabilities Advocacy Program's (ADAP) participation in litigation; ADAP was plaintiff and also served as counsel to individual named plaintiffs, and court grants final approval of settlement agreement, ADAP would be tasked with monitoring its implementation. *Dunn v. Dunn, 197 F. Supp. 3d 1331, 95 Fed. R. Serv. 3d (Callaghan) 85, 2016 U.S. Dist. LEXIS 89072 (M.D. Ala. 2016)*.

In civil rights action brought by inpatients at state mental health facilities against various state officials, where plaintiffs sought appointment of next friend for class of potential plaintiffs, court denied motion for appointment without prejudice because class had not yet been certified and request was premature; but court ordered that plaintiffs' counsel attempt to discover if individual plaintiffs would assent to appointment of next friend pursuant to Rule 17(c) to represent their individual interests, and counsel was also required to submit evidence as to mental capacity of each plaintiff so that court could evaluate individual's need for next friend. *N.O. v. Callahan, 110 F.R.D. 637, 1986 U.S. Dist. LEXIS 23961 (D. Mass. 1986)*.

Guardian ad litem was appointed for architect who sued United Arab Emirates and rival architectural firm for copyright infringement, i.e., stealing her contest-winning plans for building embassy in Washington D.C., because her irrationality about merits of her case and her refusal to submit to court-ordered psychiatric exam rendered her incompetent person under *Fed. R. Civ. P. 17(c)* and client with diminished capacity under D.C. R. Prof. Conduct 1.14(1). *Sturdza v. U.A.E., 644 F. Supp. 2d 50, 2009 U.S. Dist. LEXIS 63497 (D.D.C. 2009)*.

117. Miscellaneous

In bankruptcy proceedings involving reorganization of railroad company, district court was not required under Rule 17(c) to appoint guardian ad litem to represent minor who had personal injury claim against railroad, where trustee in bankruptcy mailed proof-of-claim form to minor's mother, but no proof of claim was ever filed, and minor was never party to reorganization proceedings, and where district court had no reason to think that minor's mother would not represent his interest adequately. *In re Chicago, Rock Island & Pac. Ry., 788 F.2d 1280, Bankr. L. Rep. (CCH) ¶71105, 5 Fed. R. Serv. 3d (Callaghan) 911, 1986 U.S. App. LEXIS 24607 (7th Cir. 1986)*, , *In re Chicago, Rock Island & Pac. Ry., 788 F.2d 1280, 5 Fed. R. Serv. (Callaghan) 3d, 911, 1986 U.S. App. LEXIS 24607 (7th Cir. 1986)*.

Nonresident foster mother is not necessarily proper person to bring civil rights action on behalf of infant given facts that she was nonresident, not related to infant, and only provided foster care for about 2 weeks, absent evidence that she would necessarily protect infant's interests; District Court must either appoint guardian ad litem or find that infant's interests are adequately protected without appointment. *Chrissy F. v. Mississippi Dep't of Public Welfare, 883 F.2d 25, 1989 U.S. App. LEXIS 13638 (5th Cir. 1989)*, app. after remand, *925 F.2d 844, 1991 U.S. App. LEXIS 3557 (5th Cir. 1991)*.

District court erred in granting summary judgment for employer with respect to retaliation claim of teenage restaurant employee because, when employee's mother complained about restaurant manager's ongoing sexual harassment of employee to shift supervisor, she acted as agent of employee, who was minor and did not have capacity to sue; in firing employee because of her mother's intervention, manager retaliated against employee in

violation of *42 USCS § 2000e-3(a)*. *EEOC v. V & J Foods, Inc., 507 F.3d 575, 90 Empl. Prac. Dec. (CCH) ¶43006, 101 Fair Empl. Prac. Cas. (BNA) 1676, 2007 U.S. App. LEXIS 25856 (7th Cir. 2007)*.

Where owner of claim is minor or incompetent person, unless that claimant is properly represented by guardian ad litem, next friend, or other suitable fiduciary, and that representative either is, or is represented by, attorney, court should not issue ruling as to whether complaint states claim on which relief may be granted. *Berrios v. N.Y. City Hous. Auth., 564 F.3d 130, 2009 U.S. App. LEXIS 8406 (2d Cir. 2009)*.

District court sua sponte dismissed claims asserted on behalf of incompetent nephew on ground that complaint failed to state claim on which relief might be granted without determining whether nonattorney was proper guardian ad litem and without nephew having benefit of counsel; judgment thus entered would—even if pertinent allegations could be amended to state viable claim—bar nephew from asserting such claims should he ever obtain proper, counseled, representation; thus, nonattorney's motion for in forma pauperis status was granted to vacate district court's judgment and case was remanded for proceedings that conformed to bar against nonattorneys' representation of other entities in federal courts. *Berrios v. N.Y. City Hous. Auth., 564 F.3d 130, 2009 U.S. App. LEXIS 8406 (2d Cir. 2009)*.

When proposed next friends of foster children sought to bring suit in federal court on behalf of children, alleging deficiencies in state's foster care system violated children's federal constitutional and statutory rights, children did not have to show children's relatives approved filing of federal suit or did not oppose it because nothing showed relatives could act as children's general guardians, as (1) relatives did not move to represent children, (2) nothing showed relatives were willing or able to represent children, and (3) relatives allegedly refused or were unable to sue on children's behalf. *Sam M. v. Carcieri, 608 F.3d 77, 2010 U.S. App. LEXIS 12552 (1st Cir. 2010)*.

When proposed next friends of foster children sought to bring suit in federal court on behalf of children, alleging deficiencies in state's foster care system violated children's federal constitutional and statutory rights, proposed next friends did not have to have significant relationships with children because (1) children lacked significant ties with children's parents, and (2) giving children access to judicial forum through next friend advanced important social interests, particularly where children alleged violations of state's duty to protect them. *Sam M. v. Carcieri, 608 F.3d 77, 2010 U.S. App. LEXIS 12552 (1st Cir. 2010)*.

While asylum ruling did not supersede enforceability of order that children be returned to their mother in Mexico, because asylum grant was relevant to whether Hague Convention exceptions to return should apply, matter was remanded for consideration of asylum evidence and participation by children through appointed guardian ad litem. *Sanchez v. R. G. L., 743 F.3d 945, 2014 U.S. App. LEXIS 3319 (5th Cir.)*, op. withdrawn, on reh'g, remanded, *755 F.3d 765, 88 Fed. R. Serv. 3d (Callaghan) 1164, 2014 U.S. App. LEXIS 10510 (5th Cir. 2014)*.

Children would be appointed formal legal representation because their fundamental interests were at stake in mother's action seeking their return under Hague Convention on Civil Aspects of International Child Abduction and International Child Abduction Remedies Act, and no respondent was making effort to represent those interests. *Sanchez v. R. G. L. ex rel. Hernandez, 755 F.3d 765, 88 Fed. R. Serv. 3d (Callaghan) 1164, 2014 U.S. App. LEXIS 10510 (5th Cir.)*, vacated, remanded, *761 F.3d 495, 89 Fed. R. Serv. 3d (Callaghan) 449, 2014 U.S. App. LEXIS 14849 (5th Cir. 2014)*.

District court did not clearly err under under Hague Convention on Civil Aspects of International Child Abduction and International Child Abduction Remedies Act in ordering children's return to their based on its finding that children would not be returned to same threatening situation as they were in when they left Mexico, but because children had been granted asylum in interim, all available evidence from asylum proceedings should be considered by district court before determining whether to enforce return order, and on remand, joinder of Government, children's temporary legal custodian, was required, and guardian ad litem should be appointed. *Sanchez v. R. G. L., 761 F.3d 495, 89 Fed. R. Serv. 3d (Callaghan) 449, 2014 U.S. App. LEXIS 14849 (5th Cir. 2014)*.

District court did not err in denying request for it to appoint next friend or guardian ad litem because minor was never properly before court as no petitioner had any authority to represent her interests or raise claims on her behalf. *United States ex rel. K.E.R.G. v. Sec'y of HHS, 638 Fed. Appx. 154, 2016 U.S. App. LEXIS 2032 (3d Cir. 2016)*.

Judicial appointment of next friend is not necessary in suit by infants against defendant for enticing mother away where children live with father and father acts as next friend. *Russick v. Hicks, 85 F. Supp. 281, 1949 U.S. Dist. LEXIS 2437 (D. Mich. 1949)*.

In action against minor defendant involving automobile collision, in which action summons was served upon Missouri secretary of state pursuant to statute, and minor defendant before answer removed action to federal district court, failure of minor defendant to procure appointment of guardian ad litem until after removal was but technical irregularity not requiring remand. *Rock v. Manthei, 129 F. Supp. 769, 1955 U.S. Dist. LEXIS 3596 (D. Mo. 1955)*.

Judgment was not void though one of defendants was minor and no guardian ad litem was appointed for him, where everything was done for minor defendant by his father and his able and experienced lawyers that could have been done if guardian ad litem had been formally appointed. *Rutland v. Sikes, 203 F. Supp. 276, 1962 U.S. Dist. LEXIS 3195 (D.S.C.)*, aff'd, *311 F.2d 538, 1962 U.S. App. LEXIS 3200 (4th Cir. 1962)*.

In action to recover certain sums from estate of deceased husband and wife for professional services rendered on behalf of deceased couple and succession of deceased wife, court granted motion to join as indispensable party incompetent daughter of deceased couple, and appointed individual as guardian ad litem for incompetent daughter for protection of her rights as codefendant in action. *Baker v. Estate of Rosenbaum, 58 F.R.D. 496, 1972 U.S. Dist. LEXIS 11240 (D.P.R. 1972)*.

In action to contest validity of Pennsylvania welfare regulation, person with whom minor (who had been abandoned by natural mother and whose father was unknown) lived, and who had assumed responsibility for him at early age, had standing to sue on behalf of minor under Rule 17(c). *Williams v. Wohlgemuth, 366 F. Supp. 541, 17 Fed. R. Serv. 2d (Callaghan) 1346, 1973 U.S. Dist. LEXIS 11381 (W.D. Pa. 1973)*, aff'd, *416 U.S. 901, 94 S. Ct. 1604, 40 L. Ed. 2d 106, 1974 U.S. LEXIS 661 (1974)*.

In action brought by plaintiffs who were listed as 17 years of age in complaint, appointment of guardian was not required where only constitutional issues were presented and no monetary recovery was sought, where there was no showing of inadequate representation by counsel, and where there was no allegation that any party was currently prejudiced by absence of guardian ad litem. *Rotzenburg v. Neenah Joint School Dist., 62 F.R.D. 340, 18 Fed. R. Serv. 2d (Callaghan) 716, 1974 U.S. Dist. LEXIS 9214 (E.D. Wis. 1974)*.

Request of plaintiff who had been ordered to submit to mental examination to determine his competency to maintain action, that order be based on Rule 17(c), relating to appointment of representative for infant or incompetent person, rather than on Rule 35, relating to orders for mental or physical examination of party or other person, was not important since same protective provisions were possible in either case. *Swift v. Swift, 64 F.R.D. 440, 18 Fed. R. Serv. 2d (Callaghan) 581, 1974 U.S. Dist. LEXIS 9598 (E.D.N.Y. 1974)*.

Appointment of guardians ad litem for infant or incompetent persons in action to determine plaintiffs' entitlement to SSI or state supplementary assistance benefits was unnecessary where attorney had for number of years vigorously pursued legal remedies available to plaintiffs and it could not reasonably be said that representation by attorney was insufficient protection of plaintiffs' interests. *Ruppert v. Secretary of United States Dep't of Health & Human Services, 671 F. Supp. 151, 1987 U.S. Dist. LEXIS 9188 (E.D.N.Y. 1987)*, aff'd in part and rev'd in part, *871 F.2d 1172, 1989 U.S. App. LEXIS 4797 (2d Cir. 1989)*.

In case where complaint or claim has been served on parent of minor, and there is no indication that parent would not or could not represent minor's interest, courts are not required to appoint guardian ad litem to represent minor

even if claim might be lost by default. *Seibels, Bruce & Co. v. Nicke, 168 F.R.D. 542, 1996 U.S. Dist. LEXIS 13893 (M.D.N.C. 1996)*.

Plaintiffs' claims to extent that they were brought on behalf of their children were dismissed under *Fed. R. Civ. P. 17 (c)* because plaintiffs, who were proceeding pro se and who were not attorneys, could not maintain action on behalf of their children without appointment of counsel for children. *Burrell v. State Farm & Cas. Co., 226 F. Supp. 2d 427, RICO Bus. Disp. Guide ¶10335, 2002 U.S. Dist. LEXIS 16827 (S.D.N.Y. 2002)*.

Pursuant to *Fed. R. Civ. P. 17(c)*, husband and wife had authority to sue neighbor on their children's behalf as "next friends" where neighbor allegedly detonated bomb when wife passed by his house; knowledge that someone had physically attacked one's spouse or parent due to their race, in effort to drive them of neighborhood, quite plainly gave other family members standing to sue under *42 USCS § 1982* and Fair Housing Act; reasonable person would have construed such acts as having been designed to drive out entire family, not just one member. *Whisby-Myers v. Kiekenapp, 293 F. Supp. 2d 845, 2003 U.S. Dist. LEXIS 21523 (N.D. Ill. 2003)*.

Where employer, on behalf of its employee profit-sharing plan, brought action against plan trustee and plan advisor, and defendants brought counterclaim against officers of employer and plan, due to conflict of interest, court ordered that guardian ad litem be appointed to replace officers and serve as administrator of plan for limited purpose of lawsuit. *Pressman-Gutman Co. v. First Union Nat'l Bank, 34 Employee Benefits Cas. (BNA) 1915, 2004 U.S. Dist. LEXIS 23991 (E.D. Pa. Nov. 30, 2004)*.

Mother of handicapped minor child had standing to bring claim, which challenged handicap accessibility in City, in both independent and representational capacity under Title II of Americans with Disabilities Act, *42 USCS § 12131* to *42 USCS § 12134*; had representational standing under § 504 of Rehabilitation Act, *29 USCS § 794* and Virginians with Disabilities Act of 1985, Va. Code Ann. §§ 51.5 et seq., in that she was suing as her minor child's next friend; and alleged injury in fact in that she sought prospective relief, which would enable her and her son to attend events at schools City-wide in addition to those listed in complaint. *Bacon v. City of Richmond, 386 F. Supp. 2d 700, 2005 U.S. Dist. LEXIS 21376 (E.D. Va. 2005)*.

Unpublished decision: District court properly deferred to debtor's guardian ad litem (GAL), who was duly appointed pursuant to *Fed. R. Civ. P. 17(c)* and *Fed. R. Bankr. P. 7017*, in dismissing debtor's appeals from bankruptcy court decisions; law of case established that debtor could not act in bankruptcy proceedings except through GAL; further, district court's denial of second competency hearing was not abuse of discretion as debtor did not submit any new evidence tending to indicate that he should be considered competent. *Kloian v. Simon (In re Kloian), 179 Fed. Appx. 262, 2006 FED App. 0294N, 2006 U.S. App. LEXIS 11043 (6th Cir. 2006)*.

Unpublished decision: The bankruptcy court did not commit error by, sua sponte, substituting bankruptcy trustee as real party in interest pursuant to *Fed. R. Civ. P. 17(c)(3)* and *Fed. R. Bankr. P. 7017(a)*, for unsecured creditor that sought to avoid, under *11 USCS § 544*, transfers of business interests by debtor to associate to which creditor held claim. *Walia v. Singh, 2008 U.S. Dist. LEXIS 50047 (D.N.J. July 1, 2008)*.

Unpublished decision: Bankruptcy court was not in position to declare debtor incompetent because materials supplied showed more physical disability; it suggested possibility of lessened cognitive function. Record did not leave court with firm conviction that debtor met definition of incompetency, thereby warranting appointment of next friend. *In re Burchell, 2014 Bankr. LEXIS 1336 (Bankr. N.D. Ohio Mar. 31, 2014)*.

V. PUBLIC OFFICER'S TITLE AND NAME [RULE 17(d)]

118. Generally

In habeas corpus petition identification of petitioner's immediate custodian by official title, rather than name, was sufficient under former Rule 25(d)(2). *West v. Louisiana, 478 F.2d 1026, 1973 U.S. App. LEXIS 10178 (5th Cir.)*, reh'g, en banc, granted, *478 F.2d 1026, 1973 U.S. App. LEXIS 8034 (5th Cir. 1973)*, vacated, *510 F.2d 363, 1975 U.S. App. LEXIS 15507 (5th Cir. 1975)*.

Although normally when public official is sued either in his individual or official capacity, he is sued by name rather than merely by title, former Rule 25(d)(2) specifically allowed public officer, who is sued in his official capacity, to be described as party by his official title rather than by name. *Allah v. Commissioner of Dep't of Correctional Services, 448 F. Supp. 1123, 1978 U.S. Dist. LEXIS 18785 (N.D.N.Y. 1978)*.

Committee on Admissions to Bar of District of Columbia Court of Appeals will be substituted as defendant in place of individual committee members pursuant to former Rule 25(d)(2) with respect to claims by unsuccessful bar applicant seeking declaratory judgment that committee members violated her constitutional rights, injunction against use of grading techniques which continue to violate her constitutional rights, admission to Bar, and grant of license to practice law in District of Columbia, since it is clear from nature of relief requested that plaintiff is suing defendants in their official capacities. *Powell v. Nigro, 601 F. Supp. 144, 1985 U.S. Dist. LEXIS 23358 (D.D.C. 1985)*.

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Research References and Practice Aids

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