IV. PARTIES

RULE 17. PARTIES PLAINTIFF AND DEFENDANT; CAPACITY

(a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought; and when a statute so provides, an action for the use or benefit of another shall be brought in the name of the State of Maine. An insurer who has paid all or part of a loss may sue in the name of the assured to whose rights it is subrogated. 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 objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest. When in proceedings in the nature of quo warranto the title to office in a private corporation is involved, the action may be brought in the name of the interested party and the Attorney General need not be a party thereto.

(b) Guardians and Other Representatives. Whenever a minor or incompetent person has a representative, such as a general guardian, conservator, or other like fiduciary, the representative may sue or defend on behalf of the minor or incompetent person. A minor or incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for a minor or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the minor or incompetent person. In any action in which there are or may be defendants who have been served only by publication and who have not appeared, the court may appoint an agent, guardian ad litem, or next friend to represent them.

(c) Subrogated Insurance Claims. No claim or counterclaim shall be asserted on behalf of an insurer in the name of the assured for damages resulting from alleged acts of negligence, claimed by right of subrogation or assignment, unless at least 10 days prior to asserting such claim the insurer gives notice in writing to the assured of its intention to do so. Such notice shall be served in the manner provided for service of summons in Rule 4 or by registered or certified

mail, return receipt requested, with instructions to deliver to addressee only. There shall be attached to the pleading asserting such subrogation claim a copy of the notice together with either the return of the person making the service or the return receipt. An assured or any party suing in an assured's right who desires to assert a claim arising out of the same transaction or occurrence shall notify the insurer or its attorney in writing within 10 days after receipt of such notice.

Advisory Committee's Notes
May 1, 2000

Subdivision (b) is amended to substitute the term "minor" for the term "infant."

Advisory Committee's Note
December 31, 1967

In connection with the 1967 amendment of Rule 81(c) to abolish the extraordinary writs of certiorari, quo warranto and mandamus as procedural devices, the statutory provisions appearing in 14 M.R.S.A., Chaps. 603, 605 and 607 were repealed by the 1967 Pub. Laws, Chap. 441, § 7. Included among the repealed statutory provisions is one (14 M.R.S.A. § 5402) excusing the Attorney General from being a party in quo warranto proceedings involving the title to office in a private corporation. The substance of the repealed statute is incorporated into Rule 17(a).

A new subdivision (c) is added to Rule 17 for the purpose of protecting the assured from loss of what may be a substantial claim for personal injury by application of the doctrine prohibiting splitting of causes of action. Frequently the insurance company, having wholly or partially reimbursed the assured for loss in a motor vehicle accident under the coverage of its collision policy, will sue the third party on the subrogated or assigned claim. Under Rule 17(a) the insurance company has an option of bringing such subrogated or assigned claim either in its own name or in the name of the assured. If the company commences action in the name of the assured for only the subrogated or assigned property damage claim, the assured will thereby be barred from commencing a separate action for the personal injury. *Pillsbury v. Kesslen Shoe Co*., 136 Me. 235, 7 A.2d 898 (1939); *Sutcliffe Storage & Warehouse Co. v. United States*, 162 F.2d 849 (1st Cir. 1947). By the new Rule 17(c) the assured will be informed of the insurer's intention to commence suit on the subrogated or assigned claim and can take appropriate action to protect his personal injury claim. He can gain such protection either by beating

the insurer to the courthouse or by joining the insurer in pressing both the personal injury and the property claim in a single action.

The first sentence of Rule 17(c) prohibits the assertion of any claim or counterclaim by the insurance company until it has given the required 10-day notice to the assured. On the other hand, the language of the last sentence of Rule 17(c), while imposing upon the assured the obligation in hortatory language to notify the insurer of his intention to assert a claim arising out of the same transaction or occurrence as the subrogated or assigned claim, does not bar the subsequent assertion of such a claim. It is, however, of obviously great importance that the insurance company be given notice of the intention on the part of the assured to bring suit and the new Form 32, which is the insurer's notice under Rule 17(c), specifies in strong language that Rule 17(c) requires the assured within the set time to notify the insurance company of his intention to bring suit. If the insurance company proceeds with its suit even after receiving notice from the assured and he is thereby prevented from recovering on his personal injury claim, the insurance company may well be required to respond in damages to the assured. In order to avoid that danger, as well as to avoid the other difficulties of divided control of litigation on both the property damage and personal injury claims, an insurance company may be well advised to assert the subrogated or assigned claim in its own name as the real party in interest. That latter course, which is permitted by Rule 17(a), would also have the advantage to the insurance company of eliminating the need of complying with the notice requirements of Rule 17(c).

Rule 17(c) does not resolve the difficulty that at times arises as to whether the insurer or the insured is entitled to manage the litigation when the subrogated property damage claim and the insured's personal injury claim are brought in a single proceeding. It would appear that the insured should have a right to manage the case. *Cf. Buzynski v. Knox County*, 159 Me. 52, 188 A.2d 270 (1963).

Explanation of Amendments
March 22, 1965; November 1, 1966

The amendment to Rule 17(a) was taken from a 1966 amendment to F.R. 17(a). The principal change is 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 raising of the objection, for the real party in interest to ratify the commencement of the action or for him to be joined or substituted. The interests of justice dictate this result. In addition, there is a minor textual change to make it clear that the specific instances enumerated are

illustrations of the rule rather than exceptions to it. The word "bailee" is added to the illustrative list. A bailee suing on behalf of the bailor with respect to the property bailed is thus the real party in interest.

The last sentence of Rule 17(b), added by a 1965 amendment, was in general modeled on 14 M.R.S.A. § 6656 (applicable only to proceedings to quiet title). The rule as amended has, however, more general application than the statute. Appointment of a representative for absent parties, who indeed may be identified only by class description, may in the court's discretion be used to aid in fully airing the issues of the litigation. There would appear to be no due process requirement of such an appointment, assuming that the due process standards of notice have been complied with.

Reporter's Notes
December 1, 1959

This rule is like Federal Rule 17, but with some eliminations and modifications. Unlike most states, Maine has not had the conventional real party in interest statute upon which Rule 17(a) is based. The rule will forbid suit in the name of the assignor of a non-negotiable chose in action and to this extent change the Maine law, *Rogers v. Brown*, 103 Me. 478, 70 A. 206 (1908), but the defendant now has the right to compel disclosure of the identity of the assignee and to recover costs against him. R.S.1954, Chap. 113, Sec. 168 (repealed in 1959).

The last sentence of subdivision (a) allows a subrogated insurer to sue in the name of the assured. This is consistent with the view that the injection into a trial of the fact that the defendant has liability insurance is improper and may result in a mistrial. *Ritchie v. Perry,* 129 Me. 440, 152 A. 621 (1930); *Deschaine v. Deschaine*, 153 Me. 401, 140 A.2d 746 (1958). At present the action must be in the name of the assured. *Rockingham, etc. Ins. Co. v. Bosher*, 39 Me. 253 (1855). Most but not all of the real party in interest statutes have been construed to require the insurer to be named as plaintiff, and the rule has been written so as to preclude that construction. This sentence is not in the federal rule.