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 Vermont. 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.

(b) Guardians and Other Representatives. Whenever an infant 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 infant or incompetent person. An infant 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 an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant 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 wrongful acts, 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. If the assured or any party suing in the assured's right desires to assert a claim arising out of the same transaction or occurrence, the assured or party shall notify the insurer or its attorney in writing within 10 days after receipt of such notice.

Editors' Notes

REPORTER'S NOTES--1983 AMENDMENT

Rule 17(c) is amended to broaden its coverage. The former language limited the rule to a claim “for damages resulting from alleged acts of negligence, claimed by right of subrogation.” Insurance coverage may, however, extend beyond damages caused by negligence, and the insurer may be subrogated for those other claims. There is no reason that the rule should not cover subrogated claims based on theories other than negligence. Thus, the rule was amended to substitute the term “wrongful acts” for “acts of negligence.” This amendment will be effective in the District Court by virtue of the incorporation of this rule into D.C.C.R. 17.

REPORTER'S NOTES

This rule is based on Federal Rule 17, as modified in Maine Rule 17.

Rule 17(a) changes prior practice by making mandatory for all action the permissive chancery rule that actions may be brought in the name of the real party in interest. See Barry v. Harris, 49 Vt. 392 (1876); Day v. Cummings, 19 Vt. 496 (1847). Previously, at law by virtue of 12 V.S.A. § 1073 (now superseded) the assignee of a nonnegotiable chose in action could sue in his own name, but in other actions the holder of the legal right sued upon was the only proper party in interest, even where his claim was merely nominal. See Murtey v. Allen, 71 Vt. 377, 45 A. 752 (1899); Moultroup v. Gorham, 113 Vt. 317, 34 A.2d 96 (1943). The rule does away with an unnecessary pleading technicality but makes no change in the substantive rights involved. As the second sentence makes clear, it is not necessarily the person who has the ultimate beneficial interest who must sue but rather the person who, as a matter of substantive law, has the right to be enforced. See 2 Barron & Holtzoff, Federal Practice and Procedure § 482 (Wright ed. 1961). Rule 17(a) incorporates one major exception to the real party in interest rule: A subrogated insurer may sue in the name of the assured. (Note that the provision is permissive only; the insurer may, if it wishes, sue in its own name as the real party in interest.) This provision is designed to avoid the possible prejudicial effect of letting the jury know of the insurance company's interest in the action. See Bliss v. Moore & Stoughton, 112 Vt. 185, 22 A.2d 315 (1941).

Rule 17(b) carries forward 12 V.S.A. § 974 (now superseded), which was taken from Federal Rule 17(c). While no specific provision is made for calling the facts of infancy or incompetence to the court's attention, counsel knowing such facts who fails to suggest them upon the record does so at his peril, because any judgment obtained may be set aside under Rule 60(b). See Pettengill v. Gilman, 126 Vt. 387, 232 A.2d 773 (1967). The last sentence of Rule 17(b) is added from the Maine rule. It broadens a procedure previously permitted in partition proceedings. See 12 V.S.A. § 5167.

Rule 17(c) is intended to cure a difficulty caused by the exception of subrogated insurers from the real party in interest rule. In the ordinary automobile case, personal injuries and property damage are held to be a single cause of action. Suit on one alone will bar a subsequent action by the same party on the other even when one of the actions is brought by the assured in his own behalf for personal injuries and in the other the subrogated property-damage insurer, suing in the name of the assured, is the real party in interest. See Moultroup v. Gorham, supra. The rule eliminates the danger that a subrogation action brought in the assured's name may preclude an assured's personal injury claim. The rule requires the insurance company to notify the assured of its intention to bring such a suit in order to give the assured the chance to commence his own action first or to join with the insurer in a single action. Similar protection is not required for the insurer, which may sue for property damage in its own name as real party in interest even after a judgment for the assured on the personal injury claim. See Travelers Indem. Co. v. Moore, 304 Ky. 456, 201 S.W.2d 7 (1947); United States v. Aetna Cas. & Sur. Co., 338 U.S. 366, 380-382 [70 S.Ct. 207, 215-216] (1949). By the same token, the insurer may avoid the burden of compliance with Rule 17(c) by suing in its own name initially. For the form of notification see Official Form 32, in the Appendix of Forms.

Rules Civ. Proc., Rule 17, VT R RCP Rule 17

Current with amendments received through December 1, 2015