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THE MYTH OF THE "LOAN RECEIPT" REVISITED UNDER RULE 17(a)

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The rather turbulent judicial and legislative history[1] which produced the Federal Rules of Civil Procedure has appropriately resulted in general approval from all levels of the legal profession. Although the rules are designed to regulate only practice and procedure and not to "abridge, enlarge or modify any substantive right,"[2] it is clear that the penumbra between procedure and substance shall continue to be a battleground for producing debate and court interpretations which will shape new contours in substantive law. The following discussion is oriented toward an area of substantive law which should be more of a gray area than has been presently established by the real party in interest controversy in construing the intent and purpose of Rule 17(a).[3] This rule, like others,[4] has not been free of conflicting interpretation, but the prevailing general rule is that the "real party in interest" is the party who by substantive law possessses the right to be enforced.[5] The purposes of this article are to analyze the

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1. FLEMING, CIVIL PROCEDURE (1965); BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE §§ 4-6 (Wright ed. 1960); Clark, *Two Decades of the Federal Civil Rules,* 58 COLUM. L. REV. 435 (1958); Holtzoff, *Origin and Sources of the Federal Rules of Civil Procedure,* 30 N.Y.U.L. REV. 1057 (1955).
2. 28 U.S.C. § 2072.
3. This rule states:

> Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, 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 his own name without joining with him the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States.

FED. R. CIV. P. 17(a).

4. *E.g.,* Cold Metal Process Co. v. United Eng'r & Foundry Co., 351 U.S. 445 (1956) (Rule 54(b) as amended); Mississippi Pub. Co. v. Murphee, 326 U.S. 438 (1946) (Rule 4(f)); Sibbach v. Wilson, 312 U.S. 1 (1941) (Rule 35(a)).
5. Boeing Airplane Co. v. Perry, 322 F.2d 589 (10th Cir. 1963), *cert. denied,* 375 U.S. 984 (1964); South Carolina Council of Milk Producers, Inc. v. Newton, 241 F. Supp. 259 (E.D.S.C. 1965); Eastman Kodak Co. v. United States Fid. & Guar. Co., 34 F.R.D. 490 (D. Md. 1964); Sigma Eng'r Ser. Inc. v. Halm Instrument Co., 33 F.R.D. 129 (E.D.N.Y. 1963). "Its meaning perhaps would be more accurately expressed if it read: An action shall be prosecuted in the name of the party who, by the substantive law, has the right to be enforced." Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft,* 25 GEO. L.J. 551, 564 (1937). *Cf.* Atkinson, *The Real Party In Interest Rule: A Plea for Its Abolition,* 32 N.Y.U.L. REV. 926 (1957).

narrow issue of the loan receipt method, whereby insurers settle claims with insureds, and to explore the resulting question of who is the real party in interest when suit is brought against the alleged wrongdoer.

This rule or a similar rule under state procedure would normally require an insurance company to be joined as a real party in interest to the extent of its payments to the insured for any loss under the policy.[6] However, a technique has been developed whereby an insurer makes a loan to the insured which is to be repaid in the event there is recovery from a third person. Insurers settle the claim for damages by advancing the claimed amount as a loan, evidenced by a printed "loan receipt" and signed by the person receiving the money. Customarily, the loan receipt states that the amount paid by the insurer is a loan on which the recipient does not pay interest and which is to be repaid only in the event and to the extent that recovery is had from the tort-feasor. Further, the receipt ordinarily provides that the recipient of the funds shall institute an action in his own name against the third person allegedly responsible for the loss but that such action shall be prosecuted under the exclusive direction, control and expense of the person "loaning" the money.

A major inquiry is whether such an arrangement under the name of "loan receipt" should be considered in law as a payment or as a loan. Under a "payment" theory the insurer would properly be regarded as a real party in interest under Federal Rule 17(a). Under a pure "loan" theory, however, courts have maintained that the insurer would not necessarily be considered a real party in interest and could successfully resist any attempt to be brought into an action.

There are several reasons why an insurer would prefer to make a loan rather than a payment. The primary purpose is to avoid subrogation and thus evade the procedural process of becoming a formal party to an action against a tort-feasor or other person liable for the loss or damage. Insurers and courts are reluctant to have a jury learn of the presence of an insurance company in the litigation because of supposed prejudice against

6. United States v. Aetna Cas. & Sur. Co., 338 U.S. 366 (1949); Link Aviation, Inc. v. Downs, 325 F.2d 613 (D.C. Cir. 1963); Virginia Elec. & Power Co. v. Carolina Peanut Co., 186 F.2d 816 (4th Cir. 1951); National Cordova Corp. v. City of Memphis, 214 Tenn. 371, 380 S.W.2d 793 (1964); Gardner v. Walker, 373 P.2d 598 (Wyo. 1962); *Cf.* Catalfano v. Higgens, 188 A.2d 357 (Del. 1962). (The court stated that the adoption of the equivalent of Rule 17(a) had not changed the prior state law permitting suit by an insured who had no interest.)

the insurers. However, the question in this discussion is whether the loan receipt method should be procedurally permitted, or in view of the real intent of the parties regarding the transaction, should be ignored thereby fully recognizing the procedural purposes embodied in the real party in interest provisions of Rule 17(a).

Leading legal authorities have summarily considered the question without discussion. According to Moore, the insurer is not a real party in interest when such a loan agreement exists. "An insurer which has merely made a 'loan' to an insured, to be repaid out of any recovery from a third party, is not a real party in interest in an action by the insured against a third party."[7] Similarly, Barron and Holtzoff state that "instead of paying the loss, the insurer makes a loan to the insured under an agreement whereby the loan is to be repaid only out of any recovery which may be obtained against a third person, the insured and not the insurer is the real party in interest and entitled to sue the third person."[8]

The development of the loan receipt and the case law testing its efficacy was due to an effort by carriers on one hand and insurers on the other to cast upon the other the burden of bearing the loss caused by the damage or destruction of goods. In order to escape the burden of bearing the loss, carriers inserted in their bills of lading a provision that in case of loss or damage to goods shipped, a carrier is to have the benefit of any insurance effected on them. Consequently, a payment by an insurer to the shipper would discharge, *pro tanto*, the latter's claim against the carrier. Such claim of the shipper would be discharged, and there would be no right of subrogation by the insurer upon payment of a loss of the shipper's right against the carrier. Insurers conceived an arrangement to relieve them, at least partially, of their liability for a loss of insured property brought about by the negligence of a carrier. The insurer would make a loan to the insured, pending settlement with the carrier, upon the contingency that the insured would be repaid only to the extent of any subsequent recovery obtained from the carrier.

The landmark case of *Luckenbach v. W. J. McCahan Sugar Ref. Co.*[9] permitted the "loan receipt method" of insurance to

7. 3 MOORE, FEDERAL PRACTICE § 17.09, at 1349 (2d ed. 1964).

8. 2 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 482, at 23 (Wright ed. 1961).

9. 248 U.S. 139 (1918).

be firmly established as being "creditable to the ingenuity of businessmen that an arrangement should have been devised which is consonant both with the needs of commerce and the demands of justice."[10] In this case a bill of lading contained a provision that the carrier should have the full benefit of insurance effected on the goods. However, the policy issued to the shipper contained a provision[11] excluding liability by the insurer for goods shipped under a bill of lading that gave the carrier the benefit of any insurance. After a loss, an agreement was made between the insured and the insurer to the effect that the insurer would make a loan to the shipper covering the loss, repayable only to the extent of any subsequent net recovery against the carrier. The insurer would have the control of the litigation against the carrier which the shipper agreed to institute. The Court held that such a transaction was a valid loan and did not constitute a payment which inured to the carrier's benefit. It lauded the purpose of such an agreement and speaking through Mr. Justice Brandeis, stated:

> Agreements of this nature have been a common practice in business for many years. [citations omitted] It is clear that if valid and enforced according to their terms, they accomplish the desired purpose. They supply the shipper promptly with money to the full extent of the indemnity or compensation to which he is entitled on account of the loss; and they preserve to the insurers the claim against the carrier to which by the general law of insurance, independently of special agreement, they would become subrogated upon payment by them of the loss. The carrier insists that the transaction, while in terms a loan, is in substance a payment of insurance; that to treat it as if it were a loan, is to follow the letter of the agreement and to disregard the actual facts; and that to give it effect as a loan is to sanction fiction and subterfuge. *But no good reason appears either for questioning its legality or for denying its effect.*[12]

The *Luckenbach* case has had an unfortunate influence and long-range effect on the courts and has been consistently cited not only to support the validity of loan receipts, but also to hold that the insurer is never the real party in interest when such a

10. Luckenbach v. W. J. McCahan Sugar Ref. Co., 248 U.S. 139, 149 (1918).
11. *Id.* at 146.
12. *Id.* at 148. (Emphasis added and citation omitted.)

method is employed by the parties. Since *Erie R.R. v. Tompkins*[13] it is a matter of state law whether the loan receipt is evidence of a true loan.[14] If it is determined under the state law that the loan receipt evidences a true loan transaction, then the insurer has not "paid" the insured's claim and is not a subrogee who, under the applicable federal procedural law, is required to prosecute an action for recovery of the claim in its own name as a real party in interest. The majority of states have followed the principle established in *Luckenbach* either as a matter of law or under a particular factual pattern.[15] Consequently, federal courts have consistently avoided the intent of Rule 17(a) and have blithely applied the controlling state law on the subject.[16]

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13. 304 U.S. 64 (1938).

14. Tyler v. Dowell, 274 F.2d 890 (10th Cir. 1960), *cert. denied*, 363 U.S. 812 (1960).

15. Martin v. McLeod, 241 S.C. 71, 127 S.E.2d 129 (1962); Waumbec Mills, Inc. v. Bahnson Ser. Co., 103 N.H. 461, 174 A.2d 839 (1961); Glancy v. Ragsdale, 25 Ia. 793, 102 N.W.2d 890 (1960); Sun Ins. Co. v. Aetna Ins. Co., 169 Neb. 94, 98 N.W.2d 692 (1959); Southeastern Fire Ins. Co. v. Moore, 250 N.C. 351, 108 S.E.2d 618 (1959); Ratcliff v. Smith, 298 S.W.2d 18 (Ky. 1957); Furrer v. Yew Creek Logging Co., 206 Ore. 251, 292 P.2d 499 (1956); Gould v. Weibel, 62 So. 2d 47 (Fla. 1952); Klukas v. Yount, 121 Ind. App. 160, 98 N.E.2d 227 (1951); Gillies v. Michigan Millers Mut. Fire Ins. Co., 98 Cal. App. 2d 743, 221 P.2d 272 (1950); Blair v. Espeland, 231 Minn. 444, 43 N.W.2d 274 (1950); Phillips v. Clifton Mfg. Co., 204 S.C. 496, 30 S.E.2d 146 (1944).

16. Peoples Loan & Fin. Corp. v. Lawson, 271 F.2d 529 (5th Cir. 1959), *cert. denied*, 362 U.S. 903 (1960); Celanese Corp. of Am. v. John Clark Indus., 214 F.2d 551 (5th Cir. 1954); Dixey v. Federal Compress & Warehouse Co., 132 F.2d 275 (8th Cir. 1942); Western Fire Ins. Co. v. Wood, 131 F.2d 541 (5th Cir. 1942); The Plow City, 122 F.2d 816 (3d Cir. 1941), *cert. denied*, 315 U.S. 798 (1942); First Nat'l Bank of Ottawa v. Lloyd's of London, 116 F.2d 221 (7th Cir. 1940); Automobile Ins. Co. v. Springfield Dyeing Co., 109 F.2d 533 (3d Cir. 1940); Watsontown Brick Co. v. Hercules Powder Co., 201 F. Supp. 343 (M.D. Pa. 1962); Luckenbach Steamship Co. v. Coast Mfg. & Sup. Co., 185 F. Supp. 910 (E.D.N.Y. 1960); Miller v. Pine Bluff Hotel Co., 170 F. Supp. 552 (E.D. Ark. 1959), *aff'd*, 286 F.2d 34 (8th Cir. 1961); Hartford Fire Ins. Co. v. Commercial Union Assur. Co., 131 F. Supp. 751 (S.D.N.Y. 1955); Capo v. C-O Two Fire Equip. Co., 93 F. Supp. 4 (D.N.J. 1950); Aetna Ins. Co. v. Henry DuBois Sons Co., 53 F. Supp. 516 (S.D.N.Y. 1943), *aff'd*, 144 F.2d 262 (2d Cir. 1944), *cert. denied*, 323 U.S. 797 (1945); Perrera v. Smolowitz, 11 F.R.D. 377 (E.D.N.Y. 1951); Merriman v. Cities Serv. Gas Co., 11 F.R.D. 165 (S.D. Mo. 1951); Yale Transp. Corp. v. Yellow Truck & Coach Mfg. Co., 3 F.R.D. 440 (S.D.N.Y. 1944); Kerna v. Trucking, Inc., 3 F.R.D. 365 (W.D. Pa. 1944); *cf.* Home Fire & Marine Ins. Co. v. Pan Am. Petroleum Corp., 72 N. Mex. 163, 381 P.2d 675 (1963), where the *insurer* filed suit when a loan receipt was present. The defendants moved to dismiss, stating the *insurer* was not the real party in interest. At the pretrial conference the insureds were joined as party plaintiffs, and after a directed verdict in favor of the defendants, the insurer appealed. The defendants moved to dismiss on the grounds that the insurers were not real parties in interest so they could not appeal and that since the insureds did not appeal, the judgment was final. Holding that the insurer was the "party aggrieved," the court did not reach the question whether they were real parties in interest and permitted the insureds to be added on appeal.

Insurers who become *subrogees* of the rights of their insureds by the payment of claims are real parties in interest, who under the intent of Rule 17(a) must prosecute actions to recover the amount of such claims in their own names. In *United States v. Aetna Cas. & Sur. Co.*,[17] the Federal Tort Claims Act[18] was construed as providing for the prosecution of tort claims against the United States for wrongful acts or wrongful death in connection with the federal statute which prohibited transfers and assignments of such claims, except assignments made as payment of the claim.[19] The Court held that an insurer-subrogee, such as an insurance company which had been subrogated wholly or in part by payment to an insured upon a claim arising under the Federal Tort Claims Act, qualifies as the real party in interest under the meaning and intent of Rule 17(a). Further, an insurer who has paid only part of the loss suffered by the insured may bring suit alone as the real party in interest and is not required to bring suit in the name of the insured for his own use and for the use of the insurance company. If the insurance company has paid the entire loss, it may bring suit alone as the real party in interest.

This case has been virtually ignored in applying the general principles of subrogation to loan receipt problems. Rather, courts still turn to *Luckenbach* to find support for sidestepping the real party in interest question. It is submitted that the *Luckenbach* case has been a legal crutch of questionable authority for supporting the doctrine that in every case of an advance under a loan receipt, the "advance" is a loan and not a payment. It should be emphasized initially that the case was decided on the principle of *Swift v. Tyson*[20] under the concept of a federal common law. Justice Brandeis himself wiped out the authority of that case and many others in *Erie R.R. v. Tompkins*,[21] which held that there is no federal common law and that on a non-federal question the controlling substantive law is the law of the state.

A second point of no light significance is the factual pattern of *Luckenbach*. The interconnected features of the *Luckenbach* case are readily apparent and clearly distinguish it from the typical loan receipt method. In *Luckenbach* the insurer's liability

17. 338 U.S. 366 (1949).
18. 28 U.S.C. §§ 1346, 2671.
19. 31 U.S.C. § 203.
20. 41 U.S. 1 (1842).
21. 304 U.S. 64 (1938).

was *contingent*. No liability was present without the non-liability of the carrier being first established. Therefore, the loan agreement was resorted to by the parties to insure prompt payment *because of the contingency clause*. Further, the purpose of the loan receipt in *Luckenbach* was to resolve the conflict between the carriers and insurers in their efforts to sidestep liability for a loss. This latter question is not an issue in the typical loan receipt transaction today. Most loan agreement methods concern arrangements where the insurer is *absolutely*, not *contingently*, liable for a loss, and the insured is promptly recompensed for the loss. Unfortunately, few courts have taken the steps necessary to view the *Luckenbach* case in its proper perspective:

(a) The facts of the case under consideration as compared to the *Luckenbach* case, and

(b) The intention of the parties in each case under consideration as compared to the *Luckenbach* case.

It is significant that many courts which cite or quote the *Luckenbach* case as authority for the validity of loan receipt transactions omit the following quotation which should be the keystone to the validity of the loan receipt. "Whether the transfer of money or other thing shall operate as payment is ordinarily a matter which is determined by the intention of the parties to the transaction."[22]

Some courts have taken steps to pierce the veil of the loan receipt when either the factual pattern patently reveals the true intent of the parties or the factual pattern cannot possibly be turned into a loan receipt scheme. In *McNeil Constr. Co. v. Livingston State Bank*[23] an action in debt was brought by a depositor against a bank for sums paid from the depositor's account to a former employee of the depositor on forged checks. The depositor had been reimbursed for the loss by a fidelity bondsman and had given a receipt for a "loan," repayable only on a condition of recovery by the depositor. In interpreting Montana law the district court[24] rendered summary judgment for the bank and held that when the depositor had been paid, he had no interest left in his claim against the bank and that the remittance was not a loan but a payment. The circuit court affirmed

22. Luckenbach v. W. J. McCahan Sugar Ref. Co., 248 U.S. 139, 149 (1918).
23. 300 F.2d 88 (9th Cir. 1962).
24. McNeil Constr. Co. v. Livingston State Bank, 185 F. Supp. 197 (D. Mont. 1960), *aff'd*, 300 F.2d 88 (9th Cir. 1962).

the decision noting that although the bank had made a motion to bring in the insurer as a party plaintiff, it apparently waived it by taking summary judgment. Further, the court stated that the district court might well have brought in the insurer instead of the insured on its own motion after it concluded the wrong party had brought suit. Since the appellant did not assign such failure as error, the court did not reach the point. The circuit court expressed reluctance in its holding by laconically stating that "while we may regret the result, it seems unavoidable. . . ."[25]

When New York substantive law was applied in *Rosenfeld v. Continental Bldg. Operating Co.*,[26] the court held that the payment of a loss even though evidenced by a loan receipt would not constitute payment *unless the policy so provided.*[27] Consequently, there could not be a subsequent loan agreement as in *Luckenbach.*

In *Condor Inv. Co. v. Pacific Coca-Cola Bottling Co.*[28] an action was brought by the insured for fire loss allegedly due to the defendant's negligence, and the defendant filed a plea in abatement. The law of Oregon supported the validity of loan agreements.[29] The defendant contended that where the insurance policy makes no provision for the loan of the amount of the claim in lieu of direct payment and subrogation, any loan agreement which might be signed by the insurer and the insured would be of no consequence. This would be particularly true where payment of the loss is required by the state statute. The defendant relied upon the *Rosenfeld* case as supporting this position. Stating that *if* the question had never been decided in Oregon, the *Rosenfeld* case would be followed, the court held that "these loan receipts negotiated and executed *after* the insured and insurers had agreed on settlements, constituted nothing more than shams and subterfuges which entirely misrepresented the real nature of the agreements."[30] As indicated, Oregon had previously held that the loan agreements are valid even though the policy makes

25. McNeil Constr. Co. v. Livingston State Bank, 300 F.2d 88, 91 (9th Cir. 1962).

26. 135 F. Supp. 465 (W.D. Mo. 1955).

27. New York now has a statute which provides that the insurer under a loan receipt method need not be joined. N.Y. CONSOL. LAWS ANN., *Civil Practice Law & Rules* § 1004 (1963). Since this applies only to actions instituted in the courts of New York, the Circuit Court applied the case law of New York.

28. 211 F. Supp. 671 (D. Ore. 1962).

29. See Lamb-Weston, Inc. v. Oregon Auto. Ins. Co., 219 Ore. 110, 341 P.2d 110 (1959), 346 P.2d 643 (1959).

30. Condor Inv. Co. v. Pacific Coca-Cola Bottling Co., 211 F. Supp. 671, 674 (D. Ore. 1962). (Emphasis added.)

no provision for the loan. Consequently, while recognizing the merit of the defendant's position, the court could not support it.

The court destroyed the validity of the loan receipt agreement in this case by disregarding the policy language and directly considering the real intention of the parties. In an enlightened opinion which probed the parties' real intent, the court concluded that the insurers were the real parties in interest in the suit since the checks, proofs of loss and loan receipts signed by the insured and issued to various insurers indicated the intention to consider the loan receipts as full payment of the claims. These facts also made it "quite clear that plaintiff and the insurance companies were engaged in the settlement of all claims as part and parcel of one transaction."[31] Although the printed language on the checks issued by one of the insurance companies, "Being in full settlement of," was obliterated and the language, "Adv. as loan," was substituted therefor, the drafts clearly showed that the money paid was on the particular policy under a particular policy number. The other drafts were unaltered, and "there is no doubt that these were given in full settlement of the fire claim, and not as a loan."[32] All of the drafts were delivered to the plaintiff at the same time, endorsed and accepted by the plaintiff, and deposited in its bank account. The money was shortly checked out in full payment of the contractor's charges for repair of the fire loss. No entry of debt was made on the plaintiff's books. Finally, although the loan receipts recite the actual receipt of a specific sum of money, no money was advanced until after the proofs of loss under the policies had been received. Since the amounts claimed in the proof of loss were exactly the same as the amount of the loss, "it is quite clear that the check was issued in connection with the proof of loss."[33]

In analyzing these facts, the court properly concluded that the insured did not treat the transaction as a loan, as evidenced by the fact that when the money was received, no entry of debt was on its books. The insurer did not consider it a loan, and in at least three instances drafts were issued which recited that they were in full and complete settlement of the loan and therefore were a payment under a particular proof of loss. The "loan" was correctly labeled as a payment since "the parties to these instruments never actually intended the transaction as loans

31. *Ibid.*
32. *Id.* at 675.
33. *Ibid.*

but . . . intended that the drafts should be accepted as full payment of their claims under the insurance policies."[34]

It would seem that this reasoning is extremely sound and evidences the true nature of most loan receipts. The insurer usually advances the *exact* amount of the loss, damage or injury. The insured regards the money as a *satisfaction of the loss* rather than a *loan* which he must repay. As a businessman he will undoubtedly make bookkeeping entries showing a payment and not a loan. This "loan" is usually contingent upon recovery from the third person, but the insurer is absolutely, not contingently, liable to *pay* the loss to the insured under the policy as opposed to making a *loan* for the loss. The most compelling argument is the fact that the insurer retains control of the cause of action, and the insured has little (in the case of partial coverage or payment) or no legal interest in what occurs after the money has been received from the insurer.[35]

If more than lip service were given to the controlling factor of true intention of the parties, the transfer of the money and the real purpose of the loan system, its legal efficacy in the eyes of the law, would obviously not be considered simply as a valid exercise of liberty to contract or to be "consonant both with the needs of commerce and the demands of justice."[36]

The substantive law is generally opposed to asserting the position that the insurer is the real party in interest when the loan receipt method is employed. Those cases that do overturn the general rule are compelled to use the intent factor to pierce the form. For example, in *Scarborough v. Bartholomew*[37] the court stated:

> The view adopted by this court is that to give effect to the literal words of such arrangements would amount to a distortion of the true intentions of the parties concerned. Viewed realistically and practically, there is no question but that the insured does not regard himself as a debtor in any sense of the word. Actually, he receives the money as compensation for the loss suffered by him in the collision. He

34. *Id.* at 675-76.

35. *Cf.* Lydick v. Napier, 105 Ga. 820, 125 S.E.2d 701 (1962). It was held that if the loan receipt does not purport to convey to the insurer authority to bring suit on behalf of the insured, the *insured* must bring the suit himself and can bar any attempt to bring it in his name without his authority.

36. Luckenbach v. W. J. McCahan Sugar Ref. Co., 248 U.S. 139, 148 (1918).

37. 22 N.Y.S.2d 635 (1940), *aff'd,* 263 App. Div. 765, 30 N.Y.S.2d 971 (1941), *appeal denied,* 263 App. Div. 905, 32 N.Y.S.2d 807 (1942).

> certainly regards the payment as a payment of the loss under the terms of the policy. That the insurance company does not regard the arrangement as a loan is evidenced by the inclusion of a provision in the loan receipt that the sum is a "loan without interest, repayable only in the event and to the extent of any net recovery the undersigned may make from any person . . . liable for the loss. . . ."[38]

New York has by statute permitted the insurer not to be joined as the real party in interest[39] so that decisions such as *Scarborough* are no longer evident. However, the language in the recent case of *Herbert Rosenthal Jewelry Corp. v. St. Paul Fire & Marine Ins. Co.*[40] is extremely helpful in illustrating who actually is the real party in interest in view of the party controlling the action. The insured brought an action against the insurer to determine whether the interest awarded on an amount the insurer had paid the insured under a loan receipt should be given to the insured or to the insurer. After reviewing the documents, the court noted that the critical words in this dispute were "borrowed" and "as a loan, without interest, repayable out of net recovery." The court observed that the purpose and effect of the loan receipt transaction was the typical insurance transaction: the insurer was to pay the loss, the insured was to receive prompt payment, and the insurer was to be subrogated to the third party claim to be prosecuted and controlled at his expense. The court noted that a reading of the loan receipt alone would not make this conclusion clear, but considering the insurance policy, the proof of claim, the draft endorsement *and* the loan receipt, it was clear that "the loan receipt transaction is not a banking or financial operation but a device for the payment absolute of an insurance loss, coupled with a fictional implementation to permit the insurer to sue in the name of the insured."[41] Without the above-noted statute the insurer, not the insured, would be the real party in interest as was held in the pre-statute cases.[42]

38. Scarborough v. Bartholomew, 22 N.Y.S.2d 635, 638 (1940).

39. "Except where otherwise prescribed by order of the court, . . . [an] insured person who has executed to his insurer either a loan receipt or subrogation receipt, . . . may sue or be sued without joining with him the person for or against whose interest the action is brought." N.Y. CONSOL. LAWS ANN., Civil Prac. Law & Rules § 1004 (1963).

40. 21 App. Div. 2d 160, 249 N.Y.S.2d 208 (1964).

41. *Id.* at 165, 249 N.Y.S.2d at 213.

42. See, *e.g.*, Slater Trucking Co. v. Maus, 273 App. Div. 139, 77 N.Y.S.2d 343 (1948).

In *Cleveland Paint & Color Co. v. Bauer Mfg. Co.*[43] the citadel of the loan receipt was again attacked successfully. The standard loan receipt method was employed, and the *Luckenbach* case was cited to support its validity. The court distinguished *Luckenbach* on the obvious ground that the insurer's liability was contingent rather than absolute. Destroying the fiction by the obvious intent of the transaction, the court held that the insurer and not the insured was the real party in interest.

This Ohio case was logically followed in a different factual circumstance in *Young v. Drive It Yourself, Inc.*,[44] where an action was brought by the driver of a rented automobile against the owner for breach of an insurance contract. This contract had indemnified the driver against loss as a result of an accident which occurred while he was driving the automobile. The driver's own insurance coverage was the excess over other valid and collectible insurance available to him, and he had "borrowed" money from his carrier to pay the judgments against him. The trial court sustained the defendant's motion to dismiss, saying that the insurer was the real party in interest under the authority of *Bauer*. The court of appeals reversed on the ground that this insurer's liability *was contingent* because it was an excess insurance carrier, and therefore, it was not absolutely liable to pay for a loss. Thus, the distinction made in *Bauer* was upheld, and the driver-insured *was* the proper party to bring the action.

This contingency distinction was also recognized where the loan receipt was considered for the first time by the Alabama Supreme Court.[45] The *Luckenbach* case had been cited, but the court quoted with approval the following language of a New York case which proposed an interesting hypothetical. "The plaintiff is required to repay 'the loan' only in the event that he recovers of this defendant. Suppose he fails to recover and sues the insurer on the policy for his damage, would the insurer still say he intended to make a loan, not a payment?"[46]

Regardless of the logic behind the policy, the loan receipt is entrenched in the substantive law. The only practical method to

43. 155 Ohio St. 17, 97 N.E.2d 545 (1951). In 25 TEMP. L.Q. 224 (1951) this case was criticized by emphasizing the policy reason for speedy payment as set forth in Luckenbach v. McCahan Sugar Ref. Co., 248 U.S. 139 (1918). The analysis overlooked the contingent versus absolute payment theory discussed in the *Bauer* case.

44. 115 Ohio App. 307, 20 Ohio Ops. 2d 380, 184 N.E.2d 912 (1961).

45. McKenzie v. North River Ins. Co., 257 Ala. 265, 58 So. 2d 581 (1951).

46. *Id.* at 583, quoting from Yezek v. Delaware, Lackawanna & Western R.R., 176 Misc. 553, 28 N.Y.S.2d 35, 38 (1941).

attack the validity of the insured's being the real party in interest seems to be through the "intent" factors. It is submitted that most of the executed loan receipts will follow the normal pattern of payment of the usual insurance coverage, and more importantly the parties will regard the transaction as payment of an insurance loss. By reviewing the records of the insurer and insured, the transaction will reflect the intent of the parties regardless of the form employed to settle the loss. The facts in the *Condor Inv.* case will undoubtedly parallel most loan receipt transactions. Hopefully, the reasoning applied to those facts will naturally follow when brought to the attention of an alert court.[47]

It would appear further that the purpose of Rule 17(a) and subrogation principles discussed in the *Aetna* case should be applicable in piercing the mantle of the loan receipt and discerning the true intent of the real party in interest. With such an interpretation there would be little difference in result evidenced by the loan receipt and by the normal principles of subrogation.

To attack this method properly, the records of the entire transaction must be reviewed. In order to avoid the automatic effect of stare decisis, the attack can be oriented to the particular facts of the case. It is submitted, however, that both approaches should be made: (1) attack the general principle of the loan receipt, and (2) attack the loan receipt in the particular factual pattern. Depending on the liberality of the court, the first argument can be used to enforce the validity of the second, *i.e.*, "even if loan receipts are valid and effective, in this particular case it is obvious that this was not the intent of the parties as evidenced by the records." The success of an attack on this method of settling the loss to the insured and thus evading the intent of Rule 17(a), depends upon a thorough presentation of the facts by the oppos-

47. Some courts have so blindly followed the loan receipt theory that no discussion was deemed warranted. For example, in a District of Columbia case, Oliff v. Mount Vernon Seminary, Inc., 22 Fed. Rules Ser. 17a, 14, Case 2 (1956), the plaintiff was an employee of Hessick, Inc., and was injured while delivering oil to the defendant's premises. The defendant moved to bring in the Aetna Casualty and Surety Co., the compensation carrier for Hessick, as an additional party plaintiff under Rule 17(a). The defendant stated that Aetna was a necessary party since it had by letter informed the defendant that it was claiming full reimbursement for all expenses which it, Aetna, had incurred as a result of the plaintiff's injuries. The plaintiff opposed the motion on the ground that the insurer was not a real party in interest since money given to the plaintiff was advanced voluntarily as a loan which this plaintiff had agreed to repay, and the insurer had no interest whatsoever in the claim of the plaintiff. Without any comment, the court sustained the plaintiff's position by simply citing MOORE, FEDERAL PRACTICE (2d ed. 1964) and the cases therein listed.

ing counsel. It must be clearly shown that slavish adherence to stare decisis is *not* consonant with reason and justice in view of the established subrogation policies and the purpose of the real party in interest rule.

The relative merits of whether an insurance company suffers undue prejudice before a jury is outside the scope of this discussion and, when analyzing loan receipts, should be outside any consideration of the real party in interest under Rule 17(a). New York has resolved this question by statute[48] providing that an insurance company is not the real party in interest under a loan receipt and thereby abrogating the substantive law which held that the insurance company was the real party in interest.[49] New York at least has recognized the subterfuge under the loan receipt and has applied the proper remedy to the problem complained of by the insurers. Justice Holmes once observed that "fiction always is a poor ground for changing substantial rights."[50] The fiction which has been perpetuated since *Luckenbach* is indeed a "poor ground" for avoiding the clear purpose of Rule 17(a) and should be so recognized by the courts. If the result of having the insurer before the jury as the named real party in interest invokes injustice, the remedy should be sought in the legislature and not in the courthouse.

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48. N.Y. CONSOL. LAWS ANN., Civil Prac. Law & Rules § 1004 (1963).

49. Scarborough v. Bartholomew, 22 N.Y.S.2d 635 (1940), *aff'd*, 263 App. Div. 765, 30 N.Y.S.2d 971 (1941).

50. Haddock v. Haddock, 201 U.S. 562, 630 (1906) (dissenting opinion).