UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

EATON CORPORATION,
Plaintiff,

v.

WESTPORT INSURANCE COMPANY, et al.
Defendants,

Case No. 15-C-1157

AIU INSURANCE COMPANY, et al.,
Third-Party Plaintiffs

v.

ALLSTATE INSURANCE CO., et al.
Third-Party Defendants.

DECISION AND ORDER

In this suit, plaintiff Eaton Corporation seeks a declaratory judgment against its insurers establishing their duty to provide it with coverage for personal-injury claims involving allegations of exposure to asbestos in certain products. The defendant insurers have filed third-party complaints against other insurers, and many insurers have filed crossclaims and counterclaims against other insurers. Each insurer alleges that if it must provide Eaton with coverage for asbestos claims, then the other insurers that issued policies covering the same risks must each pay their fair share of the claims. In this opinion, I will describe the insurers' claims against each other as claims for contribution, although I note that other labels, such as indemnification, might also apply.

One of the third-party defendants alleged to be liable for contribution is First State Insurance Company. According to Eaton, in December 2016, Eaton and First

State entered into a settlement agreement that resolved Eaton's claims against First State for coverage of the asbestos claims at issue in this case. Under the settlement agreement, Eaton agreed to defend and indemnify First State in connection with contribution claims brought by Eaton's other insurers, including the third-party claims and crossclaims alleged against First State in this case. In addition, Eaton agreed to reduce the amount of any judgment it obtained against another insurer by the same amount as any judgment that that insurer obtained against First State. As part of the settlement, First State granted Eaton the right to control First State's defense. First State also agreed to cooperate and provide information relevant to the defense, including by responding to requests for documents and depositions.

Before me now is Eaton's motion to substitute itself for First State as the defendant to each contribution claim. Eaton contends that, because it has agreed to defend and indemnify First State with respect to the contribution claims, it is the real party in interest with respect to those claims and should be substituted as the defendant under Federal Rule of Civil Procedure 17(a). Several of the insurers that have sued First State for contribution oppose Eaton's motion.

Rule 17(a)(1) provides that "[a]n action must be prosecuted in the name of the real party in interest." "This is a procedural rule requiring that the complaint be brought in the name of the party to whom that claim 'belongs' or the party who 'according to the governing substantive law, is entitled to enforce the right.'" *Rawoof v. Texor Petroleum Co.*, 521 F.3d 750, 756 (7th Cir. 2008). Another way to say this is that "[t]he 'real party in interest' is the person who possesses the right or interest to be enforced through litigation." *RK Co. v. See*, 622 F.3d 846, 850 (7th Cir. 2010). The purpose of Rule 17(a)

is to protect a defendant from multiple suits by parties who would not be bound by claim preclusion. *See id.*; 4 James Wm. Moore, *Moore's Federal Practice* § 17.10[2] (3d ed. Lexis 2019); 6A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice & Procedure* § 1541 (3d ed. Westlaw 2019). For example, assume that a lawsuit is brought by someone other than the real party in interest, and the defendant obtains a judgment in its favor. In a second suit by the real party in interest, the judgment in the first case would not have preclusive effect, because the real party in interest was not a party to the first suit and thus is not bound by the judgment. *See, e.g., Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981) (claim preclusion bars "the parties or their privies" from relitigating claims). By requiring the first suit to have been prosecuted in the name of the real party in interest, Rule 17(a) avoids this result and ensures that the first judgment will have its proper preclusive effect.

The text of Rule 17(a) and its purpose—to protect the defendant from duplicative suits—suggest that the rule is not concerned with whether a defendant is a real party in interest. *See Lincoln Property Co. v. Roche*, 546 U.S. 81, 90 (2005) ("[Rule 17], as its text displays, speaks to joinder of *plaintiffs*, not defendants."); 4 Moore, *supra*, § 17.10[1] ("By its terms, Rule 17 applies only to claimants."); 6A Wright, Miller & Kane, *supra*, § 1543 ("By its very nature, Rule 17(a) applies only to those who are asserting a claim and thus is of most importance with regard to plaintiffs."). A plaintiff has no need for protection from duplicative suits, since the plaintiff is the one who chooses to bring the suit in the first place. Moreover, if the plaintiff learns during the suit that the defendant is not the person responsible for his or her injury, the plaintiff will have an incentive to amend the complaint to name the correct defendant.

From the premise that Rule 17(a) is not concerned with defendants, it does not follow that the concept of real party in interest does not apply to defendants. To the contrary, it is often important to identify the real party defendant in interest for purposes of ascertaining whether the parties are diverse and jurisdiction under 28 U.S.C. § 1332 is secure. *See Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 462–63 (1980); *Lumbermen's Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 50–51 (1954). However, although "[t]here is a 'rough symmetry' between the 'real party in interest' standard of Rule 17(a) and the rule that diversity jurisdiction depends upon the citizenship of real parties to the controversy . . . the two rules serve different purposes and need not produce identical outcomes in all cases." *Navarro Sav. Ass'n*, 446 U.S. at 462 n.9. (quoting Note, *Diversity Jurisdiction over Unincorporated Business Entities: The Real Party in Interest as a Jurisdictional Rule*, 56 Texas L.Rev. 243, 247–250 (1978)). Moreover, courts will sometimes use Rule 17(a) in connection with defendants to clean up the docket, such as when the plaintiff mistakenly names an unsuable entity as the defendant and all parties agree on who the correct, suable entity is. *See Teamsters Local Union No. 727 Health & Welfare Fund v. L&R Group of Companies*, 844 F.3d 649, 651–52 (7th Cir. 2016).

In the present case, neither of the reasons for applying the concept of real party in interest to defendants applies. I do not need to identify whether Eaton or First State is the real party defendant in interest to determine whether diversity jurisdiction is proper. Although the initial claim by Eaton against its insurers depends on diversity, the third-party claims and crossclaims among the insurers do not. Regardless of whether First State is a real party in interest to the third-party claims and crossclaims, those claims cannot proceed under § 1332, for other insurers on both sides of the dispute are

citizens of the same state. Instead, I have supplemental jurisdiction over those claims because they are part of the same case or controversy as Eaton's suit, namely, the controversy over which of Eaton's insurers are responsible, and to what extent, for providing it with coverage for the asbestos claims at issue. *See* 28 U.S.C. § 1367(a). Likewise, because First State is undoubtedly a suable entity, I do not have to apply Rule 17(a) in the manner it was applied in cases such as *Teamsters*.

In any event, to the extent that Rule 17(a) requires me to determine whether First State is the real party in interest with respect to the third-party claims and crossclaims, I determine that it is. As discussed above, the real party in interest is the party who "possesses the right or interest to be enforced through litigation." *RK Co.*, 622 F.3d at 850. Although this language was written with plaintiffs in mind, it can be changed slightly to accommodate defendants: the real party defendant in interest is the party who is liable to the real party plaintiff with respect to the right the plaintiff has asserted. That party could be said to "possess" the alleged liability. Here, that party is undoubtedly First State. First State is an insurer alleged to have issued policies covering the asbestos claims at issue. Because of its status as one of Eaton's liability insurers, First State is potentially liable for contribution to one or more of Eaton's other liability insurers. Such liability will arise if one or more of the other insurers pay First State's share of the collective coverage obligation. *See* ECF No. 118 at 9–10. Thus, First State "possesses" the liability at issue.

Eaton contends that it is the real party defendant in interest because, as part of its settlement with First State, it agreed to defend and indemnify First State from contribution claims. However, the parties' contractual arrangement did not extinguish

First State's liability for contribution and transfer it to Eaton. First State still "possesses" the liability; the agreement only granted First State a contractual right to be indemnified for that liability. Although unlikely, it is possible for Eaton to breach its contract with First State by refusing to defend or indemnify First State or by refusing to reduce its judgment against the other insurers to the extent of First State's liability for contribution. In that event, the other insurers would be entitled to look to First State for payment, and it would be up to First State to sue Eaton for breach of contract. This possibility shows that the liability for contribution still belongs to First State.

Essentially, the settlement agreement put Eaton into the position of First State's insurer with respect to the contribution claims. Like an ordinary liability insurer, Eaton agreed to assume First State's defense and indemnify it against an adverse judgment. But of course, an ordinary liability insurer is not substituted as the real party in interest to a suit against its insured. That is because the insured still possesses the liability. Indeed, unless the suit is subject to a "direct action" statute, *see, e.g.,* Wis. Stat. § 632.24, the injured third party cannot bring the suit against the insurer directly and must instead sue the insured. Similarly, in the present case, the other liability insurers could not have filed their contribution suits against Eaton directly, and thus Eaton cannot be substituted for First State as the real party in interest.

Moreover, it is not necessary to substitute Eaton for First State to ensure that any judgment for contribution has the appropriate preclusive effect. The contribution obligation at issue is First State's, and thus any judgment should be in the name of First State. There is no danger that entering judgment in First State's name will lead to duplicative litigation. Once First State's liability for contribution is established in this suit,

that will be the end of the matter. The other insurers could not file subsequent suits against Eaton, for, as just explained, Eaton has no direct liability to the other insurers. Likewise, Eaton could not file a subsequent suit against the other insurers to relitigate First State's liability.

Eaton contends that it is the real party defendant in interest because it "bears financial responsibility" for First State's contribution obligation and "will select counsel and control" First State's defense. *See* ECF No. 211 at p. 5 of 12. But the real party in interest is not necessarily the party with an economic interest in the suit. *See* 4 Moore, *supra*, § 17.10[1] ("One who merely stands to benefit from the action, economically or otherwise, is not necessarily a real party."); 6A Wright, Miller & Kane, § 1543 ("the action will not necessarily be brought in the name of the person who ultimately will benefit from the recovery"). If it were, then every liability insurer would always be substituted for its insured as the real party defendant in interest. Likewise, when the plaintiff is a corporation, the plaintiff's shareholders would have to be substituted as the real parties in interest, for they are the ones who would ultimately benefit from the corporation's recovery. Further, the person having a right to control the defense is not necessarily the real party in interest, since the person having the right to control the defense is not necessarily the person who possesses the liability. *See Appvion, Inc. v. P.H. Glatfelter Co.*, No. 08-C-16, 2015 WL 2374514, at *2 (E.D. Wis. May 15, 2015) ("The right to control litigation is not the right to institute litigation in one's own name.").

In short, Rule 17(a) does not require that Eaton be substituted for First State as the real party in interest. Accordingly, **IT IS ORDERED** that Eaton's motion to substitute

itself for First State (ECF No. 210) is **DENIED**. First State shall file a responsive pleading to the claims asserted against it within 21 days of the date of this order.

Dated at Milwaukee, Wisconsin, this 13th day of September, 2019.

s/Lynn Adelman
LYNN ADELMAN
District Judge