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Compulsory Joinder of Compensating Insurers: *Federal Rule of Civil Procedure 19* and the Role of Substantive Law

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ARTICLES

COMPULSORY JOINDER OF
COMPENSATING INSURERS: *FEDERAL
RULE OF CIVIL PROCEDURE 19* AND
THE ROLE OF SUBSTANTIVE LAW

June F. Entman[†]

I. INTRODUCTION	2
II. THE RELATIONSHIP BETWEEN INSURANCE SUBROGATION AND THE FEDERAL RULES OF CIVIL PROCEDURE	7
III. COMPULSORY JOINDER OF COMPENSATING INSURERS: PRE- <i>AETNA</i>	12
A. <i>Use Practice and the Rule That Only the Insured May Sue</i>	12
B. <i>Necessary Parties</i>	18
IV. THE <i>AETNA</i> DECISION AND ITS LEGACY	24
A. <i>United States v. Aetna Casualty & Surety Co.</i>	24

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- B. *Aetna's Legacy* 30
 - 1. Finding the Real Party in Interest Without Understanding the Substantive Law 30
 - 2. The Jurisprudence of Labels 33
- V. THE IMPACT OF AMENDED RULE 19 35
 - A. *The 1966 Amendment* 35
 - B. *Aetna's Continuing Legacy: Ignoring Rule 19(a)* . . . 38
 - C. *Misapplying Rule 19(a)(1)* 44
 - D. *Misapplying Rule 19(a)(2)(ii)* 50
- VI. REASONS FOR REQUIRING JOINDER OF SUBROGATED INSURERS 56
 - A. *The Problem of Multiple Litigation* 56
 - 1. Res Judicata as a Remedy 57
 - 2. Ratification as a Remedy 60
 - B. *The Problem of Non-Parties in Control of Litigation* . 66
 - C. *The Non-Problem of Jury Prejudice* 69
- VII. HOW TO REQUIRE JOINDER WHEN IT OUGHT TO BE REQUIRED: THE PROPER APPLICATION OF SUBSTANTIVE LAW 71

I. INTRODUCTION

The question seems to be a simple one: The plaintiff claims to have suffered a loss through the fault of the defendant. The plaintiff's insurance company has partially compensated the plaintiff for that loss and, consequently, the insurer has acquired a right to reimbursement from damages recoverable from the defendant. If the plaintiff sues the defendant for the loss, may the defendant successfully require joinder of the plaintiff's insurer as a party plaintiff?

Since adoption of the *Federal Rules of Civil Procedure* in 1938, federal courts have looked for the answer to this question in Rule 17(a), the real party in interest rule,¹ in Rule 19, the compulsory joinder rule,² and sometimes in both rules.³ State courts with

1. See generally June F. Entman, *More Reasons for Abolishing Federal Rule of Civil Procedure 17(a): The Problem of the Proper Plaintiff and Insurance Subrogation*, 68 N.C. L. REV. 893 (1990); V. Woerner, Annotation, *Proper Party Plaintiff, Under Real Party in Interest Statute, to Action Against Tortfeasor for Damage to Insured Property Where Insured Has Paid Part of Loss*, 13 A.L.R.3d 140 (1967).

2. See Jean F. Rydstrom, Annotation, *Who Must Be Joined in Action as Person "Needed for Just Adjudication" Under Rule 19(a), Federal Rules of Civil Procedure*, 22

similar or identical rules of civil procedure have engaged in the same inquiry.⁴

The search for an answer in the rules of civil procedure has not led to uniformity of either result or analysis. Even among the courts that have found an answer in the rules, there is remarkable diversity in their reasons for either requiring joinder or declining to do so. Some have held that Rule 17(a) requires the insurer's joinder. Others have held that Rule 17(a) does not require joinder, but that Rule 19 does. Still others have held that neither rule requires joinder of the insurer. Why has a seemingly simple issue generated not only opposite results, but also divergent and complex analyses? Why have so many spent so much effort litigating and legislating the issue?

The answer to the latter question is perceived jury prejudice: parties are eager to exploit or to avoid the prejudice that many believe will result when a jury is aware that part of the recovery it awards will go to reimburse an insurance company for payments made to the plaintiff under an insurance policy. A few judicial opinions have cited jury prejudice in holding that a compensated insured may appear as the sole plaintiff,⁵ but in most decisions this consideration remains unarticulated.

A rationale more frequently expressed by courts and defendants to support requiring a compensating insurer to appear as a party plaintiff is the prevention of multiple litigation. Defendants

A.L.R. FED. 765, 809-11 (1975) (listing decisions requiring joinder of insurer under Rule 19); *see infra* parts IV.B.2, V.C-D.

3. *See, e.g.*, *Virginia Elec. & Power Co. v. Westinghouse Elec. Corp.*, 485 F.2d 78, 84-85 (4th Cir. 1973) (finding an "overlap" between Rules 17(a) and 19), *cert. denied*, 415 U.S. 935 (1974); *Carpetland, U.S.A. v. J.L. Adler Roofing, Inc.*, 107 F.R.D. 357, 359-60 (N.D. Ill. 1985) (holding that Rule 17(a) is "an independent authority for compulsory joinder" in addition to Rule 19(a)). The issue is presented in several ways: a defendant's motion either to dismiss for failure to name the real party in interest under Rule 17(a), or for failure to join an indispensable party under Rule 19, or a motion to compel joinder under Rule 19.

4. *See, e.g.*, *Capitol Fuels, Inc. v. Clark Equip. Co.*, 342 S.E.2d 245, 251 (W. Va. 1986) (holding that joinder of a partially subrogated insurer as a real party in interest under Rule 17(a) in a suit brought by the insured for the total loss may not be compelled under Rule 19(a) of the *West Virginia Rules of Civil Procedure*). In many states, however, the issue has been resolved by specific provisions in statutes or rules of civil procedure. *See* ALA. R. CIV. P. 17(a); IND. R. TRIAL P. 19(e)(3); LA. CODE CIV. PROC. ANN. art. 697 (West 1960); ME. R. CIV. P. 17; MASS. R. CIV. P. 17(a); MISS. R. CIV. P. 17(b); N.Y. CIV. PRAC. L. & R. 1004 (McKinney 1976); OHIO R. CIV. P. 19(A)(3); PA. R. CIV. P. 2002(d); R.I. R. CIV. P. 17(a); TENN. R. CIV. P. 17.01; VT. R. CIV. P. 17(A); VA. CODE ANN. § 38.2-207 (Michie 1994); WIS. R. CIV. P. 803.03(2).

5. *See infra* note 308.

often assert that a lawsuit prosecuted in the name of the insured alone will leave them subject to a subsequent action by the compensating insurer.⁶ Sensitive to growing judicial workloads, courts have shown an increasing willingness to read Rules 17(a) and 19 as requiring broad joinder for the purpose of preventing multiple litigation.⁷

The primary reason that there is such variety in judicial applications of Rules 17(a) and 19 is that these two rules simply are not well understood. Both rules embody doctrines that evolved long before the merger of law and equity and have not adapted well to modern litigation. Poor drafting of the rules themselves, along with inadequate judicial understanding of them, has given us results that are chaotic at best. In particular, federal courts have failed to appreciate the role that the substantive law of insurance should play in applying Rules 17(a) and 19. Federal courts frequently declare that joinder issues are governed by federal rules of procedure and have proceeded to apply those rules without careful analysis of the substantive rights of the parties, sometimes brushing aside applicable state law as merely procedural.⁸

Complicating matters is the fact that the substantive law governing the rights of a compensating insurer varies considerably from state to state. All situations in which an insurer has acquired an interest in its insured's claim are not the same in terms of whether the substantive law entitles the insured or the insurer, or both, to bring and control an action against the third party.⁹ If properly applied, Rule 17(a), the real party in interest rule, should direct the court to ascertain and enforce the substantive law's choice as to whether the insured or the insurer has the right to control the asserted claim. Similarly, in determining whether an insurer's joinder is required under Rule 19, the court should consider, along with the policies of Rule 19, what rights the insured

6. See, e.g., *Potomac Elec. Power Co. v. Babcock & Wilcox Co.*, 54 F.R.D. 486, 492 (D. Md. 1972) (defendants argued that only through joinder of the insurer could defendants be assured that principles of *res judicata* would operate to protect them from a subsequent suit by the insurer on the same claim).

7. See, e.g., *Prestenback v. Employers' Ins. Co.*, 47 F.R.D. 163, 165 (E.D. La. 1969) ("In these days of exploding dockets, we welcome the opportunity to explore the pragmatic aspects of joinder problems as dictated by amended F.R.C.P. 19."); *infra* parts V.C-D.

8. See, e.g., *Gas Serv. Co. v. Hunt*, 183 F.2d 417, 419 (10th Cir. 1950) (finding joinder a procedural issue governed by the *Federal Rules of Civil Procedure*); see *infra* part VII.

9. See *infra* part II.

and the insurer have, or do not have, under the substantive law.¹⁰ All too often, however, courts assume without inquiry that both the insured and the compensating insurer are entitled to control actions against third parties who have caused the loss.¹¹

Procedure ought to be the servant of substance, enabling rights to be articulated in litigation. The procedural doctrines of real party in interest and compulsory party joinder have not been very good servants. In an earlier article, I used the compensating insurer problem to illustrate how Rule 17(a) has been widely misunderstood and misapplied, and why that rule should be abolished.¹² Part II of this article summarizes the variety found in the substantive law of subrogation and how Rule 17(a) has failed as a mechanism for enforcing that law. Similarly, from its very beginnings compulsory party joinder doctrine has been ill-conceived and frequently has obscured and frustrated, rather than supported, the substantive law.¹³ The problems are well-illustrated by examining the forms that compulsory joinder rules have taken over time and how each of these forms has been applied to the issue of the proper party plaintiff in cases involving compensating insurers.

Part III describes the two different practices governing the naming of subrogated insurers as parties that applied in law and equity prior to merger, and the difficulties with the assimilation of these doctrines into the *Federal Rules of Civil Procedure*. The law courts adopted "use practice," the naming of only the insured as the plaintiff in all cases. "Use practice" was an acknowledged fiction that served little purpose except to provide an easy answer and to protect insurance companies, in every case, from having their presence disclosed to the trier of fact. Pre-merger equity, on the other hand, applied its compulsory joinder doctrines of "necessary" and "indispensable" parties, which formed the basis for the original version of Federal Rule of Civil Procedure 19, to determine whether compensating insurers must be named as plaintiffs.

Part IV describes how the labelling of insurers as "necessary" parties became fixed in federal practice in the United States Supreme Court's 1949 opinion in *United States v. Aetna Casualty &*

10. See *infra* part VII.

11. See *infra* part IV.B.1.

12. Entman, *supra* note 1.

13. See Geoffrey C. Hazard, Jr., *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 COLUM. L. REV. 1254, 1289 (1961) (arguing that the indefensible result of the indispensable party rule is to deprive plaintiff of a perfectly valid remedy).

Surety Co.,¹⁴ and how the legacy of *Aetna* has been a widespread failure of federal courts to give proper effect to the substantive law of subrogation. Part V describes the 1966 amendment of Rule 19, which was intended to free compulsory joinder doctrine from the jurisprudence of labels and to redirect judicial attention to basing compulsory joinder upon the substantive rights of the parties. The amended rule, however, has also failed in this endeavor. While some federal courts have continued to follow the *Aetna* opinion after the 1966 amendment, others have misconstrued amended Rule 19 in a variety of ways and continue to treat all compensating insurers alike without regard to their actual relation to the lawsuit.

When Rule 19 is properly understood, it does not mandate joinder of compensating insurers, even those that are partially subrogated to the plaintiff's claim. Whether Rule 19 or some other rule should require joinder, is the subject of Part VI, which examines the problem of multiple litigation, the more significant problem of non-parties in control of lawsuits, and whether the problem of jury prejudice nonetheless militates against joinder.

Several commentators have identified weaknesses in Rule 19 and modern compulsory party joinder doctrine and have proposed improvements in drafting and interpretation designed to broaden the rule's effect.¹⁵ Part VII concludes, however, that there is no need in many cases to involve federal compulsory party joinder doctrines to achieve joinder of compensating insurers when that joinder should be required. The problems that federal courts have sought to solve through Rule 19 have been, for the most part, adequately addressed in the substantive law of insurance. If the courts would simply give that law its proper application, fair results would be achieved and the debate over the meaning of Rule 19 could be

14. 338 U.S. 366 (1949).

15. See Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 114 (1989) (concluding that the historic function of compulsory joinder has been lost); Richard D. Freer, *Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court's Role in Defining the Litigative Unit*, 50 U. PITT. L. REV. 809, 813 (1989) [hereinafter Freer, *Avoiding Duplicative Litigation*] (advocating expanding the federal courts' power to order joinder for the express purpose of avoiding duplicative litigation); Richard D. Freer, *Rethinking Compulsory Joinder: A Proposal to Restructure Federal Rule 19*, 60 N.Y.U. L. REV. 1061, 1064 (1985) [hereinafter Freer, *Rethinking Compulsory Joinder*] (proposing statutory authorization of minimal diversity, nationwide service of process and relaxed venue restrictions for compulsory joinder of some absentees); Carl Tobias, *Rule 19 and the Public Rights Exception to Party Joinder*, 65 N.C. L. REV. 745, 747 (1987) (arguing that there should be no absolute "public rights" exception to compulsory joinder).

ended, at least in the context of compensating insurers.

II. THE RELATIONSHIP BETWEEN INSURANCE SUBROGATION AND THE *FEDERAL RULES OF CIVIL PROCEDURE*

When an insurer has the right to bring and control a claim against a third party who has caused some payment by the insurer to the insured, the insurer is said to be subrogated to the insured's claim. Compensating insurers may be entitled, however, only to reimbursement from proceeds the insured recovers from third parties. When the insurer has only a claim against its insured for reimbursement, and not a claim directly against the third party, the insurer is not considered to be subrogated.¹⁶

The rights of a compensating insurer depend upon the applicable law of insurance subrogation, the type of insurance involved, and the terms of the particular insurance contract.¹⁷ In some circumstances, the exclusive right to control any claim against a third party remains in the insured.¹⁸ Although the compensating insurer is entitled to reimbursement from the insured's recovery, the insurer does not have an enforceable claim against the third party.¹⁹ In

16. See *Strate v. Niagara Mach. & Tool Works*, 160 F. Supp. 296, 299 (S.D. Ind. 1958) (holding that because insurer has no right of action against third party, it is not subrogated, although it has a lien on insured's recovery).

17. ROBERT E. KEETON & ALAN I. WIDISS, *INSURANCE LAW* § 3.10(a) (1988); see Entman, *supra* note 1, at 908-11 ("An insurer's subrogation rights may be judicially created, may derive from the insurance policy or a settlement with the insured, or may be provided by legislation."); Spencer L. Kimball & Don A. Davis, *The Extension of Insurance Subrogation*, 60 MICH. L. REV. 841, 844 (1962) (discussing "where the law draws the line between policies to which legal subrogation applies and those to which it does not").

18. See, e.g., *Cleaves v. DeLauder*, 302 F. Supp. 36, 38 (N.D. W. Va. 1969) (finding that under West Virginia law, partially compensating automobile collision insurer's right is only a contingent interest in the litigation; insurer could not maintain an action in its own name); *Farmers Ins. Co. v. Effertz*, 795 S.W.2d 424, 426 (Mo. Ct. App. 1990) (if insurer's rights arise by operation of law, without assignment from the insured, "legal title remains in the insured and he retains the exclusive right to bring the suit" (quoting *State Farm Mut. Ins. Co. v. Jessee*, 523 S.W.2d 832, 834 (Mo. Ct. App. 1975))); 2A ARTHUR LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 74.14 (1993) (identifying workers' compensation schemes in which the employee has the exclusive right to bring suit for a specified period of time).

When the insured otherwise has control of the claim, but fails or refuses to assert it, some jurisdictions then permit the insurer to bring the claim. See, e.g., *City of New York Ins. Co. v. Tice*, 152 P.2d 836, 842 (Kan. 1944) (insured should sue for itself and as trustee for the insurer, but if the insured refuses to sue, "justice requires that the insurer be permitted to bring action"). There do not appear to be any situations in which an insured who has received total compensation retains control of the claim.

19. The insurer may be entitled to a lien on the insured's recovery or to intervene in

other circumstances, the insurer entitled to reimbursement is further entitled to assert and control the claim against the third party.²⁰ Finally, the insured and insurer sometimes each have separate claims against the third party.²¹ In the latter situation, however, the law of subrogation usually further provides that either joinder of both insured and insurer is required²² or the filing of suit by

the action to protect its interest in any judgment awarded. *See, e.g., Wright v. Schebler Co.*, 37 F.R.D. 319, 321 (S.D. Iowa 1965) (stating that employer becomes statutory lienholder to the extent of its claim in employee's recovery); *see also infra* note 249 (discussing subject matter jurisdiction limitations upon insurer's intervention).

20. *See* 2A LARSON, *supra* note 18, §§ 74.14-74.15 (identifying workers' compensation acts that establish a sequence in which either the employee or the insurer first has the exclusive right to bring suit against a third party, and then, after a specified time, the other has the exclusive right). Subrogation clauses in insurance policies typically confer upon the insurer the right to control the claim. For example, the "Business Auto Coverage Form (1985)" provides:

5. TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US

If any person or organization to or for whom we make payment under this Coverage Form has rights to recover damages from another, those rights are transferred to us. That person or organization must do everything necessary to secure our rights and must do nothing after "accident" or "loss" to impair them.

KEETON & WIDISS, *supra* note 17, app. G at 1113. *See also* Tucson Elec. Power Co. v. Bailey Controls Co., 145 F.R.D. 102, 103 (D. Ariz. 1992) (loan receipt agreement provided that litigation against third party was to be brought in insured's name and maintained "at the expense of and under the exclusive direction and control of" the insurance company).

When the insurer, however, because of a conflict of interest, is not likely to protect the insured's interest, a court may permit the insured to bring and control his own suit. *See, e.g., Czaplicki v. The Hoegh Silvercloud*, 351 U.S. 525, 532 (1956) (subrogated insurer was also defendant's liability insurer). *But see* Rodriguez v. Compass Shipping Co., 451 U.S. 596, 603 (1981) (holding that injured longshoremen, who offered no excuse for their delay, could not prosecute personal injury action against third party after right to recover had been assigned to employer by terms of Longshore Act, and it was not material that employers failed to pursue the assigned claims).

21. *See, e.g., Arkwright-Boston Mfrs. Mut. Ins. Co. v. City of New York*, 762 F.2d 205, 209 (2d Cir. 1985) (determining that claim by insured for its deductible amount and claim by insurer for amount paid to insured are "separate and distinct, and do not constitute unlawful splitting under New York law"); 2A LARSON, *supra* note 18, § 74.13 (discussing cases where insurer's action against tortfeasor was determined independent of insured's action). Larson discusses cases construing workers' compensation statutes to "give a right to the employer [or its insurer] without taking anything away from the employee, with the result that the subrogation or assignment has the effect of creating parallel rights of action which may be asserted by either employer or employee." 2B ARTHUR LARSON, THE LAW OF WORKMEN'S COMPENSATION § 75.42, at 14-699 (1994).

22. *See, e.g., MISS. R. CIV. P. 17(b)* ("If the subrogor still has a pecuniary interest in the claim the action shall be brought in the names of the subrogor and the subrogee."); *Lindsey v. Samoluk*, 219 S.E.2d 464, 466 (Ga. Ct. App. 1975) (insured and partially compensating insurer each "has a cause of action and may sue by joining the other part

one precludes enforcement of the claim by the other.²³

Either state or federal law may govern the insurance relationship and, therefore, determine the insurer's right to reimbursement or subrogation and the consequences to the insured of accepting compensation from its insurer. In some cases, the source of the applicable insurance law may differ from the source of law that governs the underlying claim against the third party. For example, the subrogation rights of one who pays workers' compensation benefits to a longshoreman are governed by the federal Longshore and Harbor Workers' Compensation Act,²⁴ although the tort claim against the third party may arise under either federal or state law.²⁵ Similarly, the law of one state may determine the injured party's right to recover against the tortfeasor, while the law of another state may determine whether an insurer is subrogated to the injured party's claim.²⁶

The function of Federal Rule of Civil Procedure 17(a),²⁷ the

owner"), *rev'd on other grounds*, 223 S.E.2d 147 (Ga. 1976); 2B LARSON, *supra* note 21, § 75.42, at 14-699 n.21.

23. *See, e.g.*, Joyner v. F & B Enters., Inc., 448 F.2d 1185, 1187-88 (D.C. Cir. 1971) (noting that under the Longshore Act, a consequence of the employee's bringing suit is that the compensating insurer has no substantive right against the tortfeasor); Klick v. American Mut. Ins. Co., 80 F.R.D. 711, 712 (E.D. Wis. 1978) (describing Wisconsin workers' compensation act, which provided that when either the employee or the insurer brings suit alone, the other is bound by the judgment if given notice of the action).

24. 33 U.S.C. § 933(h) (1988).

25. *See* Holland v. Sea-Land Serv. Inc., 655 F.2d 556, 558-59 (4th Cir. 1981) (concluding that although worker was engaged in maritime employment for purposes of compensation under the Longshore Act, his claim against third party arose under state law), *cert. denied*, 455 U.S. 919 (1982); Ward v. Norfolk Shipbuilding & Drydock Corp., 770 F. Supp. 1118, 1121 (E.D. Va. 1991) (finding that when employee covered by Longshore Act was injured on navigable waters, his claim against third party arose from federal maritime law, not from either state law or the Longshore Act). *See also* Cook v. Stuples, 74 F.R.D. 370, 371-72 (W.D. Okla. 1976) (noting that in plaintiff's diversity action for negligence of defendant in automobile accident, the Medical Care Recovery Act, 42 U.S.C. § 2651, governed recovery by the United States for medical care it furnished the plaintiff).

26. *See, e.g.*, Koepf v. Northwest Freight Lines, 10 F.R.D. 524, 526 (D. Minn. 1950) (holding that the Wisconsin employee, injured in Minnesota, has the right to recover against the tortfeasor under Minnesota law, but that the Wisconsin insurer's right to be joined as party plaintiff was determined by Wisconsin law).

27. FED. R. CIV. P. 17(a) provides:

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 of the United States so provides, an action for the use or benefit of another shall

real party in interest rule, is to require that the plaintiff be the person who, under the substantive law, has the right to bring and control the action.²⁸ When an injured party has been compensated by his insurer, therefore, Rule 17(a) means that the court should require the naming of the party plaintiff to conform to the answer found in the law of subrogation to the question of who has the right to sue.²⁹

If Rule 17(a) were properly understood and applied, it alone (or better yet, Rule 12(b)(6)³⁰ alone) would be sufficient in many cases to resolve the question of whether an insurer must be joined as a plaintiff when its compensated insured brings an action against a third party.³¹ If, for example, the applicable subrogation law denies the insured's right to assert the claim that once was his, the insured should not be permitted to proceed as the party plaintiff.

be brought in the name of the United States. 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.

28. See CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING § 22, at 160 (2d ed. 1947) (defining the real party in interest as he who by substantive law has the right of action); 6A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1543, at 334 (2d ed. 1990) (defining real party in interest as the "person who, according to the governing substantive law, is entitled to enforce the right"); John E. Kennedy, *Federal Rule 17(a): Will the Real Party in Interest Please Stand?*, 51 MINN. L. REV. 675, 678 (1967) ("Thus the real party is the one with legal power to control the lawsuit and may be different from the person who will ultimately be benefited if the suit is successful."); Lewis M. Simes, *The Real Party in Interest*, 10 KY. L.J. 60, 61 (1921) ("The real party in interest is the one to whom the substantive law of the case gives the right to bring and control the action."). See also Entman, *supra* note 1, at 898-902 (discussing origins of real party in interest rule).

29. See Entman, *supra* note 1, at 900-01 & n.41 (defining the real party in interest as determined by who has the right to assert and control the claim).

30. FED. R. CIV. P. 12(b)(6) provides in pertinent part:

Every defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . .
(6) failure to state a claim upon which relief can be granted.

31. The function of Rule 17(a) is virtually identical to the function of a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief may be granted. Both rules require that the federal court apply state law when, as is often the case, state law governs the right of the compensated insured and the compensating insurer to bring and control an action against a third party. See Entman, *supra* note 1, at 901 (comparing Rule 12(b)(6) with Rule 17(a)).

The insurer that has acquired through subrogation the right to assert the claim, and who is in actual control of the lawsuit that has been brought, is the only proper plaintiff.³² There is no joinder issue, only a real party in interest, or Rule 12(b)(6), issue.

Unfortunately, Rule 17(a) rarely has been construed in the subrogation context to resolve party plaintiff issues in so straightforward a fashion. Rule 17(a) has been misapplied in a number of ways that have resulted in decisions either to require or not to require joinder of insurers without careful reference to the underlying substantive law. The frequent result is that federal courts fail to enforce the substantive law of subrogation, often the law of a state, that ought to control whether the insured or the insurer is named as the plaintiff.³³ In addition, by concluding erroneously that both the insured and the insurer are entitled to assert a claim against the third party, the federal courts create an unnecessary issue of compulsory joinder.³⁴

The problem is only compounded when federal courts apply Rule 19 in response to a defendant's motion to require naming of a compensating insurer as a party plaintiff.³⁵ Rule 19 requires joinder on the basis of the nonparty's relationship to the claims

32. This result has widely, but not universally, been obtained in cases of full subrogation, in which the insured does not retain even a pecuniary interest in the claim. See *United States v. Aetna Casualty & Sur. Co.*, 338 U.S. 366, 380-81 (1949) (stating that subrogee who has paid entire loss suffered is the only real party in interest); V. Woerner, Annotation, *Proper Party Plaintiff, Under Real Party in Interest Statute, to Action Against Tortfeasor for Damage to Insured Property Where Loss is Entirely Covered by Insurance*, 13 A.L.R.3d 229 (1967).

33. See Entman, *supra* note 1, at 913-22 (discussing misapplication of real party in interest rule).

34. See, e.g., *Public Serv. Co. of Okla. v. Black & Veatch*, 467 F.2d 1143 (10th Cir. 1972) (discussed *infra* part V.B.); *Blacks v. Mosley Mach. Co.*, 57 F.R.D. 503, 506 (E.D. Pa. 1972) (discussed *infra* note 208).

35. See *U-Haul Int'l, Inc. v. Jartran, Inc.*, 793 F.2d 1034, 1038 (9th Cir. 1986) ("Although the parties have addressed this problem solely in the context of Fed. R. Civ. P. 17, we also must consider Fed. R. Civ. P. 19 Fed. R. Civ. P. 17 governs only the right of [plaintiff] to bring the suit. It is Fed. R. Civ. P. 19 that tells us whether the appropriate parties are before the court."); *Tucson Elec. Power Co. v. Bailey Controls Co.*, 145 F.R.D. 102, 104 (D. Ariz. 1992) (following *U-Haul*); *Whitcomb v. Ford Motor Co.*, 79 F.R.D. 244, 245 (M.D. Pa. 1978) (holding that Rule 19 analysis, not Rule 17(a), should be used to decide joinder issue); *Kint v. Terrain King Corp.*, 79 F.R.D. 10, 11 n.2 (M.D. Pa. 1977) (construing motion as one under Rule 19 notwithstanding defendant's ostensible reliance upon Rule 17, and declining to reach any Rule 17 issues). See also 6A WRIGHT ET AL., *supra* note 28, § 1543, at 339-40 ("[T]he question of who should or may be joined in the action must be determined under Rule 19 and Rule 20 rather than Rule 17(a)."); Kennedy, *supra* note 28, at 680 ("Rule 17(a) should not be construed to compel joinder without reference to Rule 19.").

asserted in the lawsuit.³⁶ If the court fails to determine correctly the nonparty insurer's rights with regard to the insured's claim, its application of Rule 19's criteria may yield a result that is inconsistent with the substantive law.³⁷

The practice of ignoring substantive law in designating the proper plaintiff to a claim did not originate, however, with the *Federal Rules of Civil Procedure*. Even prior to the enactment of the federal rules, federal courts encountered considerable difficulty in determining the proper party plaintiff in a suit to enforce a claim that had been compensated by insurance. The decision has been a difficult one to make because it implicates a number of important substantive and procedural policies.³⁸

III. COMPULSORY JOINDER OF COMPENSATING INSURERS: PRE-AETNA

Prior to the 1949 United States Supreme Court decision in *United States v. Aetna Casualty & Surety Co.*,³⁹ federal and state courts followed one of two different doctrines for identifying the proper party plaintiff in a case involving insurance subrogation. One approach, which originated in the law courts prior to merger and adoption of the real party in interest rule, was "use practice," under which the suit would be brought in the name of the insured alone "for the use" of the insurer to the extent of its subrogation interest.⁴⁰ The other approach was to apply the compulsory joinder doctrines of "necessary" and "indispensable" parties, which had originated in courts of equity.⁴¹

A. *Use Practice and the Rule That Only the Insured May Sue*

Common-law courts initially were hostile to assignments and considered choses in action to be unassignable.⁴² Nor were they receptive to subrogation, which was a creation of equity⁴³ some-

36. See *infra* text accompanying note 149.

37. See, e.g., *Public Serv. Co.*, 467 F.2d at 1143 (discussed *infra* text accompanying notes 159-70).

38. See discussion *infra* parts VI.B & VII.

39. 338 U.S. 366 (1949) (discussed *infra* part IV.A).

40. See *infra* part III.A.

41. See *infra* part III.B.

42. Walter W. Cook, *Alienability of Choses in Action*, 29 HARV. L. REV. 816, 830 (1916).

43. Subrogation originated in equity from principles of unjust enrichment, I GEORGE E. PALMER, *THE LAW OF RESTITUTION* § 1.5(b) (1978); see also 2 JOHN N. POMEROY, JR.,

times described as an equitable assignment.⁴⁴ In the nineteenth century, however, the law courts began to recognize the right of an assignee or subrogee to reimbursement, at least when the assignee or subrogee had acquired the entire claim.⁴⁵ Law courts accepted the substance of subrogation to the extent of refusing to permit a defendant to defeat an insured's claim on the grounds that the insured, having been compensated by insurance, had suffered no loss.⁴⁶

The law courts were never fully comfortable, however, with the idea that a subrogee, having only an equitable interest, could directly enforce its claim against a third party.⁴⁷ Many courts also expressed the view that the insured's cause of action was "indivisible"⁴⁸ and that permitting a subrogee to prosecute its claim would

EQUITABLE REMEDIES §§ 921-22 (1905) (discussing parties entitled to subrogation and stating that "subrogation is purely an equitable right") (citation omitted).

44. *Mobile & Montgomery Ry. v. Jurey*, 111 U.S. 584, 594 (1884) (holding that insurer's payment for a total loss works as an equitable assignment); Charles E. Clark & Robert M. Hutchins, *The Real Party in Interest*, 34 YALE L.J. 259, 270 n.79 (1925) (stating that subrogation may be called an equitable assignment). At one time it was common for there to be an actual assignment to the insurer upon its payment to the insured, so that it made little difference whether the insured's rights were considered from the standpoint of assignment or subrogation. Thomas E. Atkinson, *The Real Party in Interest Rule: A Plea for Its Abolition*, 32 N.Y.U. L. REV. 926, 943 (1957).

45. *See Mandeville v. Welch*, 18 U.S. (5 Wheat.) 277, 283 (1820) (discussing assignment); *Hart v. Western R.R.*, 54 Mass. (13 Met.) 99, 107 (1847) (discussing subrogation).

46. *Hart*, 54 Mass. (13 Met.) at 108 ("[A] recovery against the underwriter is no bar to a suit by the assured against the party primarily liable[.]"). The principle that a personal injury claimant's recovery is not reduced by the amount of compensation received from sources independent of the tortfeasor came to be known as the "collateral source rule." *See Rixmann v. Somerset Pub. Sch.*, 266 N.W.2d 326, 329-32 (Wis. 1978) (discussing the relationship between subrogation and the collateral source rule).

47. *See, e.g., Peoria Marine & Fire Ins. Co. v. Frost*, 37 Ill. 333, 336 (1865). The court stated:

[W]hen an injury is done to property, the remedy must be sought in the courts of common law, by some person who has an estate in the property, legal or equitable, which the law recognizes. But the insurance company had no estate or ownership in this property of any kind whatever.

See also Pittsburgh, C.C. & St. L. Ry. v. Home Ins. Co., 108 N.E. 525, 529 (1915). This court stated:

[C]ommon-law pleading looked to the entire legal interest, and did not directly recognize the beneficial interest or equitable right In the view of common-law procedure, he who was clothed with this legal title had the exclusive right of action, although the entire beneficial interest, with the equitable title, was in someone else.

See generally Bone, supra note 15, at 25 (discussing how common law procedure was an obstacle to common law courts' attempts to enforce rights formerly recognized only in equity).

48. *Aetna Ins. Co. v. Hannibal & St. J.R.*, 1 F. Cas. 207, 208 (C.C.E.D. Mo. 1874)

result in multiple lawsuits when there was more than one subrogee or when subrogation was partial.⁴⁹ An assignee or subrogee, therefore, was allowed to sue only in the name of the assignor or subrogor.⁵⁰

Use practice was a typical common-law fiction.⁵¹ When the claim was fully subrogated, the subrogee controlled the suit and was liable for costs.⁵² Many decisions described the insured-subrogor as a trustee,⁵³ an analogy that perhaps helped to explain how the equitable right of subrogation could be enforced in a law court.⁵⁴ But it was an odd trusteeship indeed when, in a case of full subrogation, the insured-trustee was only a nominal plaintiff

(No. 96) ("The wrongful act was single and indivisible, and gives rise to but one liability.").

49. *Mandeville*, 18 U.S. (5 Wheat.) at 288-89 (discussing partial assignments). In *Peoria Marine*, 37 Ill. at 337, the court stated:

It very often happens that valuable property is insured in several companies at the same time. If the property is burned through the carelessness of some third person, can such person be liable to as many suits as there are insurances? Is there more than one cause of action against him? And can that be indefinitely divided? . . . [I]t is still [the defendant's] right to have that loss adjusted in a single suit.

50. *Hall & Long v. Railroad Cos.*, 80 U.S. (13 Wall.) 367, 370 (1871) ("[I]t has often been ruled that an insurer, who has paid a loss, may use the name of the assured in an action to obtain redress from the carrier whose failure of duty caused the loss."); *Mandeville*, 18 U.S. (5 Wheat.) at 285 (determining that assignee can sue only in the name of assignor); *Hannibal & St. J.R.*, 1 F. Cas. at 208 ("The suit, though for the use of the insurer, must be in the name of the person whose property was destroyed."); *Hart*, 54 Mass. (13 Met.) at 108 (stating that insurer can sue in the name of the insured); CLARK, *supra* note 28, § 21, at 157 (stating that one having an equitable interest could sue only in the name of the person having legal title).

51. Bone, *supra* note 15, at 20 n.41 (describing how common law judges adopted fictions to assimilate new disputes into the existing, seemingly inflexible, forms of action).

52. *See, e.g., Peoria Marine*, 37 Ill. at 338 ("The insurance company will, however, be at liberty to bring a suit in the name of [the insured], to its use, indemnifying them, if they require it, against the costs, and this suit will be under the control of the company."); BENJAMIN J. SHIPMAN, HANDBOOK OF COMMON LAW PLEADING, §§ 27-29 (2d ed. 1895) (stating that use plaintiff must give indemnity for costs to holder of legal interest in whose name action must be brought).

53. *See, e.g., Rockingham Mut. Fire Ins. Co. v. Bosher*, 39 Me. 253, 255 (1855) (finding that the owner, having recovered payment from the underwriter, stands as trustee); *Hart*, 54 Mass. (13 Met.) at 108 ("[A]fter a payment by the insurer . . . the assured becomes trustee for the insurer[.]"); *Gales v. Hailman*, 11 Pa. 515, 521 (1849) ("The shipper has sued on the contract of bailment, not only in his own right for the unpaid balance due to himself, but as a trustee for what has been paid by the insurer in ease of the carrier[.]").

54. In *Hart*, 54 Mass. (13 Met.) at 107, the court said that "[i]f the trust consists in an equitable liability to pay money, it will be recognized and enforced in a suit at law."

and the insurer-beneficiary had actual control of the action.⁵⁵

Eventually, common-law courts adopted use practice to allow actions to be brought in the name of the insured in cases of partial, as well as complete, subrogation.⁵⁶ Use practice, or at least a simple rule that suits must be in the name of the insured alone, continued to be followed in many code states with merged systems of law and equity,⁵⁷ and in a number of federal courts following

55. RESTATEMENT (SECOND) OF TRUSTS §§ 82, 192 (1959) (trustee has sole responsibility for determining whether to sue, to settle, etc.); 4 AUSTIN W. SCOTT, LAW OF TRUSTS § 282, at 25-29 (4th ed. 1989) (commenting that in most cases trustee has exclusive authority to sue third parties who injure the beneficiary's interest in the trust). Nonetheless, the notion of insured-subrogator as trustee—and, therefore, that the insured is the only proper plaintiff in a suit to recover a subrogated claim—has continued to reverberate in judicial and legislative treatment of the problem. See Atkinson, *supra* note 44, at 946 (criticizing New York legislative treatment of a subrogator in same category as a trustee). For a description and criticism of modern decisions that use the trustee analogy to hold that joinder of a subrogated insurer, otherwise required, is excused by Rule 17(a)'s provision that trustees may sue in their own names without joining beneficial parties, see Entman, *supra* note 1, at 940-42.

56. See *Gales*, 11 Pa. at 520-22. The court held:

[T]he insurer, who in this case bore a part of [the loss] for [the carrier], has a right to be reimbursed, [and] there must be a remedy of some sort to enforce it In this case, the insurer and [the] shipper could not sever; and the action was well brought, respectively for the use of each, in the name of him who had the legal title.

See also *Mobile & Montgomery Ry. v. Jurey*, 111 U.S. 584, 594-95 (1884) (holding that the use of only the insured's name in the complaint was sufficient) (citing *Gales*, 11 Pa. 515 and *Hall & Long v. Railroad Cos.*, 80 U.S. (13 Wall.) 367 (1871)); *Hall & Long*, 80 U.S. (13 Wall.) at 371, 373 (holding that an insurer may file suit in the name of the insured against a carrier who was responsible for the loss) (citing *Gales*, 11 Pa. at 515). See generally, G.J. Couch, Annotation, *Proper Party Plaintiff to Action Against Tort-Feasor for Damage to Insured Property Where Insurer is Entitled to Subrogation to Extent of Loss Paid by It*, 96 A.L.R. 864, 865-73 (1935) (noting both federal and state cases).

57. See CLARK, *supra* note 28, § 24, at 174-79 (criticizing the continuation of use practice as inconsistent with the codes' real party in interest rule). Under code pleading, courts continued to use the trustee analogy as a rationale for suit in the name of the insured alone, noting that the real party in interest rule permitted the trustee of an express trust to sue alone without joining the beneficiaries. The analogy, however, was often inconsistent with the reality of the relationship between the insured and the insurer. For example, in *Peoples Oil & Fertilizer Co. v. Charleston & W.C. Ry.*, 83 S.C. 530 (1909), the partially compensated insured gave each of three compensating insurers a subrogation receipt that assigned its right of action, to the extent of payment received, to the insurer and authorized the insurer "to sue, compromise or settle in our names, or otherwise" *Id.* at 535. The court held that "[n]otwithstanding the words of assignment . . . plaintiff [the insured] still has legal title to the cause of action, subject to the equitable right of subrogation" and can sue alone as trustee of an express trust. *Id.* at 536. *But see Pratt v. Radford*, 8 N.W. 606, 607 (Wis. 1881) (arguing that the trust created by subrogation arises by implication of law and is, therefore, not an express trust within the meaning of the real party in interest rule).

adoption of the *Federal Rules of Civil Procedure*.⁵⁸

While use practice or suit in the name of the insured alone may have appeared to be a workable solution to the problem of the proper plaintiff when there had been partial subrogation, it really did no more than mask the underlying problem, which was how to recognize the rights of both insured and insurer without creating a risk of multiple litigation. If the rule were to have achieved its goal, it would have required that the insurer be bound by the judgment in any action brought in the name of the insured to recover the subrogated claim. But in a case of partial subrogation, if the rule really meant that only the insured, like a trustee, was entitled to control an action against the third party, then the rule effectively reduced the insurer's subrogation right to a claim for reimbursement.⁵⁹

Some courts, therefore, while generally following the rule that

58. See, e.g., *Van Wie v. United States*, 77 F. Supp. 22, 33 (N.D. Iowa 1948) ("[I]n cases of partial subrogation the action could be maintained by the insured in his own name for the entire loss."); *Grace v. United States*, 76 F. Supp. 174, 178 (D. Md. 1948) ("In general . . . where the insurer has paid less than the whole loss the suit must be brought in the name of the person who has sustained the damage but with the notation that suit is also for the use and benefit of the insurer."); *Gray v. United States*, 77 F. Supp. 869, 871 (D. Mass. 1948) (holding that insurer-subrogee may not sue tortfeasor in its own name but that insured is entitled to sue for entire loss and holds sum paid to him by the insurer as trustee), *rev'd sub nom.* *State Farm Mut. Liab. Ins. Co. v. United States*, 172 F.2d 737 (1st Cir. 1949); *Dayton Veneer & Lumber Mills v. Cincinnati, N.O. & T.P. Ry.*, 1 F.R.D. 444, 445 (E.D. Tenn. 1940) (denying motion to dismiss suit by property owner although he had collected insurance for the damage). See generally, M.L.C., Annotation, *Proper Party Plaintiff to Action Against Tort-Feasor for Damage to Insured Property Where Insurer is Entitled to Subrogation to Extent of Loss Paid by It*, 157 A.L.R. 1242 (1945) [hereinafter Annotation, *Proper Party Plaintiffs*] (noting both federal and state cases).

59. In *Firemen's Ins. Co. v. Bremner*, 25 F.2d 75 (8th Cir. 1928), separate suits were filed, one by the insured for his personal injuries and unreimbursed property damages, the other by the insurer for its subrogation interest. Holding that a judgment against the defendant in the insured's action barred the suit by the insurer, the court stated that "the right of action remains in the insured for the entire loss, the insured becoming a trustee for the insurer" *Id.* at 76. In *Subscribers at Casualty Reciprocal Exch. v. Kansas City Pub. Serv. Co.*, 91 S.W.2d 227 (Mo. Ct. App. 1936), *overruled by Farm Bureau Mut. Ins. Co. v. Anderson*, 360 S.W.2d 314, 321 (Mo. Ct. App. 1962), an insurer, pursuant to an insurance policy with a \$50 deductible, paid its insured \$567.55 for damage to the insured's automobile and notified the defendant of its claim for subrogation. The insured, however, gave the tortfeasor a release of all claims in exchange for \$50. The court affirmed dismissal of the insurer's suit against the tortfeasor, citing the rule that where subrogation is partial, only the insured may sue. *Subscribers at Casualty Reciprocal Exch.*, 91 S.W.2d at 231. *But see Hart v. Western R.R.*, 54 Mass. (13 Met.) 99, 108 (1847) (refusing to permit the insured's release of the defendant to defeat the insurer's right to reimbursement).

the insured alone is the only proper plaintiff, carved out exceptions to protect the interests of the partially subrogated insurer. For example, some courts permitted the insurer to prosecute an action in the name of the insured when the insured declined to bring the claim.⁶⁰ Carving out exceptions, however, did not adequately deal with the problems caused by the rule that the insured was the only proper named plaintiff in a subrogation action. Such a rule is simply not a satisfactory way of dealing with the complexity that subrogation introduces into litigation.⁶¹ It merely simplifies the question of whom to name as the plaintiff by rendering the name meaningless, and defers resolution of problems to other stages in the litigation.

The United States Supreme Court appeared to announce the demise of use practice when it stated in 1949 that the practice was "obviously unnecessary" under modern rules of civil procedure.⁶² Use practice, nevertheless, has not disappeared. It has found a new incarnation in the device of ratification under the 1966 amendment to Rule 17(a).⁶³ As of 1992, moreover, twelve states explicitly permitted suit in the name of the insured alone even with total subrogation.⁶⁴

60. In *Kennebec Coal & Ice Co. v. Wilmington & N.R.R.*, 2 Chester County Rep. 29 (Pa. C.P. 1883), for example, an insured ice company, whose premises had been destroyed by fire, refused to sue or to authorize its compensating insurers to sue in its name, apparently because the company was dependent upon the defendant railroad company for its supplies of ice. The court held that under such circumstances the insurers have a right to institute suit in the name of the insured without its consent. *Id.* at 31-32. *See also* *Fire Ass'n of Philadelphia v. Wells*, 94 A. 619, 620 (N.J. 1915) (holding that partially subrogated insurer may sue in insured's name even without insured's consent when insured has given release to defendant; insured's release to defendant is no defense to insurer's claim); *Hart*, 54 Mass. (13 Met.) at 108 (holding same as *Wells*, 94 A. at 620).

61. *See* *Bone*, *supra* note 15, at 22 ("The common law's restrictive party and cause of action joinder rules, for example, stood as obstacles to the adjudication of all pieces of a complex dispute in one proceeding when consolidated adjudication was necessary in order to fashion the best remedy.").

62. *United States v. Aetna Casualty & Sur. Co.*, 338 U.S. 366, 371-72 & n.8, 381 (1949) (noting, in particular, Rule 17(a)); *see infra* part IV.

63. *See infra* part VI.A.2. *See also* Entman, *supra* note 1, at 905-08, 942-46 (discussing judicial use of ratification in Rule 17(a) analysis); Steven D. Plissey, Note, *Compulsory Joinder of Partial Subrogees: Implications of the Alaska Rule*, 1 ALASKA L. REV. 171, 177 (1984) ("The amended version of Rule 17 contains a provision for ratification that actually encourages the device of use plaintiffs.").

64. *See* IND. R. TRIAL P. 19(e)(3); ME. R. CIV. P. 17(c); MASS. R. CIV. P. 17(a); N.Y. CIV. PRAC. L. & R. 1004 (McKinney 1976); PA. R. CIV. P. 2002(d); R.I. R. CIV. P. 17(a); TENN. R. CIV. P. 17.01; VT. R. CIV. P. 17(a); VA. CODE ANN. § 38.2-207 (Michie 1994); *Catalfano v. Higgins*, 188 A.2d 357 (Del. 1962); *Holyoke Mut. Ins. Co. v. Concrete Equip.*, 394 So.2d 193 (Fla. Dist. Ct. App. 1981); *Montello Shoe Co. v.*

B. *Necessary Parties*

The other pre-merger approach to resolving questions of proper parties and insurance subrogation was to apply doctrines of compulsory joinder that originated in equity and were ultimately incorporated into the *Federal Rules of Civil Procedure*.⁶⁵ Courts of equity, of course, had no difficulty in accepting a subrogee as a party plaintiff on the basis of its equitable and beneficial right to recovery.⁶⁶ With both subrogor and subrogee permitted to enforce a claim, however, the issue then arose whether both must appear as plaintiffs when one chose to bring suit.

Joinder of parties in law courts had been quite limited: plaintiffs were compelled to join when their rights were "joint," and no other joinder was permitted.⁶⁷ In equity, on the other hand, joinder of all interested parties was encouraged to prevent a multiplicity of suits.⁶⁸ In the seventeenth and eighteenth centuries, equity's per-

Suncook Indus., 26 A.2d 676 (N.H. 1942). Provisions permitting the insurer to control the action but to sue in the name of the insured also appear in some workers' compensation statutes. See, e.g., ILL. ANN. STAT. ch. 820, para. 305/5(b) (Smith-Hurd 1993). Some states permit suit in the name of the insured alone when there has been partial, but not total, subrogation. See, e.g., Scheibel v. Groeteka, 538 N.E.2d 1236, 1253 (Ill. App. Ct. 1989) ("If an insured plaintiff has even a *de minimis* pecuniary interest in the lawsuit, that interest is sufficient to allow a subrogation action to be maintained in plaintiff's name.") (citation omitted). In addition, other states permit insurers to use loan receipt agreements to avoid suing in their own names while in fact controlling the litigation. See Entman, *supra* note 1, at 925-31 (discussing the use of loan receipts by insurers to control litigation); E. Michael Johnson, Note, *The Real Party Under Rule 17(a): The Loan Receipt and Insurers' Subrogation Revisited*, 74 MINN. L. REV. 1107 (1990); V. Woerner, Annotation, *Insurance: Validity and Effect of Loan Receipt or Agreement Between Insured and Insurer for a Loan Repayable to Extent of Insured's Recovery from Another*, 13 A.L.R.3d 42 (1967).

65. See generally Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 922 (1987) ("The underlying philosophy of, and procedural choices embodied in, the Federal Rules were almost universally drawn from equity rather than common law.").

66. Equity courts permitted assignees and subrogees, even those not entitled to the entire claim, to sue in their own names. *Saint Louis Ry. v. Commercial Union Ins. Co.*, 139 U.S. 223, 235 (1891). This equity practice came to be known as the "real party in interest rule," in contrast to the law courts' essentially fictitious "use" or "name" practice. Atkinson, *supra* note 44, at 927; Entman, *supra* note 1, at 899-901. Equity went so far as to find the interest of the assignor or subrogor of a fully assigned claim so nebulous that only the assignee or subrogee could enforce the claim. Clark & Hutchins, *supra* note 44, at 260.

67. CLARK, *supra* note 28, § 56, at 348-50 (discussing the limits the common law placed on joinder of parties, as in contract and property damage cases); Bone, *supra* note 15, at 7 (describing common-law procedure as "rights-centered," assuming that a lawsuit involved only one right or obligation).

68. CLARK, *supra* note 28, § 56, at 353-57 (discussing compulsory joinder, permissive

missive attitude toward joinder was combined with the idea that equity should do complete justice by requiring the joinder of all persons, known as "necessary parties," having an interest in the subject matter of the litigation, thus leading to a rule of compulsory joinder.⁶⁹ Authorities generally agree that compulsory joinder of "necessary" parties was motivated by three purposes: 1) to protect absentees whose out-of-court situations might be adversely affected by the litigation; 2) to protect the defendant from subsequent litigation reaching inconsistent results; 3) to protect both the parties and society from unnecessary multiplicity of litigation.⁷⁰

At first, courts excused joinder of necessary parties when joinder was impossible, impractical or unduly complicated.⁷¹ Later, however, the doctrine of indispensability emerged. According to this doctrine, there are "indispensable" parties whose relationship to the controversy is so substantial that not only should they be joined, but in their absence the court cannot proceed and the action must be dismissed altogether.⁷²

joinder, nonjoinder and misjoinder in equity); Bone, *supra* note 15, at 34 (discussing Pomeroy's justification of equity jurisdiction to "render a decree ideally suited to the dispute as a whole").

69. Hazard, *supra* note 13, at 1255; Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 359 (1967) (emphasizing, however, that complete joinder was not an absolute rule; courts would proceed with a case if it were impossible or impractical to join an "interested party"); John W. Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 MICH. L. REV. 327, 331-32 (1957).

70. DAVID W. LOUISELL ET AL., *CASES AND MATERIALS ON PLEADING AND PROCEDURE* 737 (6th ed. 1989); CHARLES A. WRIGHT, *THE LAW OF FEDERAL COURTS* § 70 (4th ed. 1983); Bone, *supra* note 15, at 62-66 (discussing the desire to protect absent parties); Kaplan, *supra* note 69, at 365 (discussing possibility of prejudice to absent parties as well as the exposure of defendants to "double" liability); Reed, *supra* note 69, at 330; Note, *Indispensable Parties in the Federal Courts*, 65 HARV. L. REV. 1050 (1952).

71. Bone, *supra* note 15, at 63; Hazard, *supra* note 13, at 1254-55; Kaplan, *supra* note 69, at 358-59.

72. Hazard, *supra* note 13, at 1254-56 (discussing development of indispensable party concept). See generally Bone, *supra* note 15, at 62-66 (outlining development of equity joinder rules).

The nomenclature used to describe the two classes of parties—those who should be joined but whose joinder can be excused, and those without whom the court cannot proceed—has not been uniform and, consequently, has generated considerable confusion. See Bone, *supra* note 15, at 62 ("[S]emantic confusion contributed to the opacity of equity party doctrine."); Reed, *supra* note 69, at 328-30 (discussing the role of semantics in "diversity of results in factually similar cases"). Sometimes the terms "conditionally necessary" and "contingently necessary" are used. Howard P. Fink, *Indispensable Parties and the Proposed Amendment to Federal Rule 19*, 74 YALE L.J. 403, 422-25 (1965) (describing the evolution of the terms and their usage); Note, *Developments in the Law—Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874, 879 n.16 (1958) [herein-

In the second half of the nineteenth century, equity's flexible principles of compulsory joinder calcified into what came to be known as a "jurisprudence of labels."⁷³ In the much-quoted and highly influential case of *Shields v. Barrow*,⁷⁴ the Supreme Court described equity's compulsory joinder doctrines in terms of classifications of parties in which "necessary" parties are those "having an interest" in the controversy, but whose "interests are separable from those of the parties before the court," while "indispensable" parties are those whose interests are not separable.⁷⁵ Rules of procedure provided similar disembodied abstractions for identifying necessary and indispensable parties. The *Field Code*⁷⁶ provided that "[o]f the parties to the action, those who are united in interest must be joined as plaintiffs or defendants."⁷⁷ Federal Equity Rule

after Note, *Multiparty Litigation*] (stating that "necessary" has been used to refer to both the "indispensable" and the "conditionally necessary" classifications).

73. WRIGHT, *supra* note 70, § 70 at 458. See also JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 6.5, at 335-36 (1985) (describing the difficulty of the distinction between "indispensable" and "necessary" parties).

74. 58 U.S. (17 How.) 130 (1854).

75. *Id.* at 139. There are three classes of parties to a bill in equity:

1. Formal parties.
2. Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties.
3. Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.

Id.

76. The *Code of Civil Procedure* in New York, passed in 1848, is commonly "referred to as the 'Field Code' for David Dudley Field (1805-94), the renowned New York practitioner who spearheaded the reform effort [to] abolish[] the existing forms of action and mandate[] that there be 'but one form of action'." RICHARD L. MARCUS ET AL., CIVIL PROCEDURE: A MODERN APPROACH 113 (1989). Field was the principal drafter of the *First Report of New York Commissioners on Practice and Pleading*, from which the 1848 *New York Code of Civil Procedure* was derived. More than half of the states eventually adopted codes of civil procedure based on the *Field Code*. Clark, *supra* note 28, at 22, 24.

77. FIRST REPORT OF NEW YORK COMMISSIONERS ON PRACTICE AND PLEADINGS § 99 (1848). According to Clark, from this provision, "[i]t is evident that the codes thus adopt the equity rule that all whose interests would be directly affected by the decree are necessary parties, and such is the result of the decisions." CLARK, *supra* note 28, at 358-59. *Field Code* § 99 provided in full:

37 spoke in terms of "persons having a united interest."⁷⁸ Federal Rule of Civil Procedure 19, as adopted in 1938,⁷⁹ retained the

Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one, who should have been joined as plaintiff, cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint.

FIRST REPORT OF NEW YORK COMMISSIONERS ON PRACTICE AND PLEADINGS, *supra*. See Hazard, *supra* note 13, at 1279 (tracing the use of the term "united in interest" to describe parties whose joinder is required back to *Joy v. Wirtz*, 13 F. Cas. 1172 (C.C.D. Pa. 1806) (No. 7553)).

As amended in 1849, § 122 (formerly § 102) of the *Field Code* also provided:

The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court may order them to be brought in.

AN ACT TO AMEND THE CODE OF PROCEDURE, 1849 N.Y. LAWS 613, 640. In the amended code, the text of former § 99 appears in § 119. *Id.* at 639.

78. RULES OF PRACTICE FOR THE COURTS OF EQUITY OF THE UNITED STATES, Rule 37, *reprinted in* 226 U.S. 627, 659 (1912):

Parties Generally—Intervention. 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 expressly authorized by statute, may sue in his own name without joining with him the party for whose benefit the action is brought. All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs, and any person may be made a defendant who has or claims an interest adverse to the plaintiff. Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause. Persons having a united interest must be joined on the same side as plaintiffs or defendants, but when anyone refuses to join, he may for such reason be made a defendant.

Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding.

79. Rule 19, entitled "Necessary Joinder of Parties," provided:

(a) Necessary Joinder. Subject to the provisions of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases, an involuntary plaintiff.

(b) Effect of Failure to Join. When persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the court as to both service of process and venue and can be made parties without depriving the court of jurisdiction of the parties before it, the court shall order them summoned to appear in the action. The court in its discretion may proceed in the action without making such persons parties, if its jurisdiction over them as to either service of process or venue can be acquired only by their

labels "necessary" and "indispensable"⁸⁰ and mandated joinder of persons having "a joint interest."⁸¹

Compulsory joinder decisions under these rules, including the *Shields* decision itself, have been widely criticized for employing abstractions and labels rather than applying the underlying purposes of compulsory joinder to the facts of the case at hand.⁸² As Professor Reed described the problem, "Judges, with human preference for the simplicity and apparent certainty of pat concepts and rules of thumb, tend to lapse into the terminology of joint rights, inseparable rights, and the like, instead of striving (through factual analysis) for a balance of equity and convenience."⁸³ Similarly, the

consent or voluntary appearance or if, though they are subject to its jurisdiction, their joinder would deprive the court of jurisdiction of the parties before it, but the judgment rendered therein does not affect the rights or liabilities of absent persons.

FED. R. CIV. P. 19, reprinted in 39 F.R.D. 69, 87-88 (1966). With regard to the "involuntary plaintiff doctrine," reflected in the second sentence of subsection (a), and also included in the rule as amended in 1966, see *infra* note 108 and accompanying text.

80. Professor Wright concludes that the rule was unsatisfactory, "not because it necessarily led to bad results but because it did not point to the factors properly relevant to decision." WRIGHT, *supra* note 70, § 70, at 459. In a recent article, Professor Bone discusses the decision by the 1938 rules drafters to eschew a pragmatic approach and to include in Rule 19 the "conceptual baggage" of the late 19th century. Bone, *supra* note 15, at 110.

81. The syntax of Rule 19 led to additional confusion. See FED. R. CIV. P. 19 advisory committee's notes (1966) (discussing the textual defects in the original version of Rule 19). Subdivision (a) appeared to define necessary parties as those with joint interests; however, subdivision (b) stated that the court shall summon persons who are not indispensable, but "who ought to be parties if complete relief is to be accorded between those already parties." See *supra* note 79 (text of 1938 version of Rule 19). The two criteria apparently were derived from separate sections of the *Field Code*. See *supra* note 77. The rule thus appeared to give two different criteria of "necessary" and it provided no basis for distinguishing the "necessary" from the "indispensable," placing this distinction in the court's discretion. WRIGHT, *supra* note 70, § 70, at 459-61 (discussing the judiciary's discretionary application of Rule 19); Kaplan, *supra* note 69, at 363-64 (evaluating the ambiguous language of the original Rule 19). Professor Bone has concluded that the rules drafters composed a confusing rule because they were confused themselves. Bone, *supra* note 15, at 113. Even a defender of the rule noted that the rule was not well understood and that it could be construed properly only if its derivations were considered. See Fink, *supra* note 72, at 410-11 (arguing that Rule 19 has been misunderstood by those who have failed to appreciate how the rule encompasses its derivations). Professor Wright, commenting on the original Rule 19, said, "[a]nd so you had to read into it a very heavy gloss of court decisions and of the writings of the commentators to understand when parties fell under the time-honored labels of indispensable, necessary, or proper." Charles A. Wright, *Proceedings of the Twenty-Ninth Annual Judicial Conference, Third Judicial Circuit of the United States*, 42 F.R.D. 437, 561 (1966).

82. Reed, *supra* note 69, at 345-46.

83. *Id.* at 346. Kaplan describes this phenomenon as "naive self-delusion in the reli-

Shields formulation has been accused of resulting in "classification of cases by a kind of sloganeering process in which important factual detail was overlooked."⁸⁴

One such slogan widely, though not unanimously, adopted by both state and federal courts⁸⁵ was that partially compensated insureds and their compensating insurers were necessary parties when either brought suit.⁸⁶ Many courts, on the other hand, held that the insurer was not a necessary party and continued the older practice of suit in the name of the insured alone, at least when subrogation was only partial.⁸⁷ Still other courts simply were con-

ance on disembodied categories." Kaplan, *supra* note 69, at 359. Professor Chafee, discussing classifications of class action lawsuits, wrote, "I often have as much perplexity in telling a 'common' right from a 'several' right as in deciding whether some ties and dresses are green or blue." ZECHARIAH CHAFEE, JR., *SOME PROBLEMS OF EQUITY* 257 (1950).

84. Kaplan, *supra* note 69, at 362 & n.24 (citing as an example the proposition derived from *Shields* "that in actions to rescind a transaction or cancel an instrument all original parties are indispensable."). For other slogans, or "rubrics," see, e.g., 2 JAMES W. MOORE & JOSEPH FRIEDMAN, *MOORE'S FEDERAL PRACTICE* § 19.03 (1st ed. 1938); Note, *Multiparty Litigation*, *supra* note 72, at 880 (describing the development of the rules as a response to deeper policies, but then acquiring "a force of their own").

85. Under the Conformity Act that governed procedure in federal courts prior to adoption of the federal rules in 1938, joinder in actions at law was determined by the law of the state in which the federal court sat. In many cases, this meant code pleading. Joinder in suits in equity was governed by the federal equity rules. WRIGHT, *supra* note 70, at § 61.

86. See, e.g., *National Garment Co. v. New York, C. & St. L. R.R.*, 173 F.2d 32, 35 (8th Cir. 1949) (finding both insured and insurer real parties in interest even though insured was satisfied with payment from insurer because such payment may not have satisfied all claims with the tortfeasor); *State Farm Mut. Liab. Ins. Co. v. United States*, 172 F.2d 737, 739 (1st Cir. 1949) (stating that insured, as a partial subrogee, is a necessary party); *Simpson v. Hartranft*, 283 N.Y.S. 754, 757 (App. Div. 1935) (recognizing insurer as a necessary party and granting plaintiff's request to join insurer as party defendant); *Verdier v. Marshallville Equity Co.*, 46 N.E.2d 636, 638-39 (Ohio Ct. App. 1940) ("[Insurer] was united in interest with the plaintiff in a single and indivisible claim against the defendant" and therefore the trial court erred in refusing "to accord to the defendant the right to have the insurance company made a participating party in the litigation before verdict."); *Pratt v. Radford*, 8 N.W. 606, 607 (Wis. 1881) (stating that the insured and insurers "have a united interest in the cause of action" and insurers must be joined as plaintiffs with insured); CLARK, *supra* note 28, at 177 & n.89 (citing cases and adding that "[m]any of these cases describe insurer and insured as 'joint owners of the cause of action.'"); 2 MOORE & FRIEDMAN, *supra* note 84, § 17.08, at 2057 (stating that partial subrogee retains part of his substantive right as a real party in interest); Annotation, *Proper Party Plaintiffs*, *supra* note 58, at 1253-55 (detailing both state and federal cases).

87. See, e.g., *Van Wie v. United States*, 77 F. Supp. 22, 33 (N.D. Iowa 1948) (stating that despite partial subrogation, right of action for the entire loss remains with insured). Judge Clark was critical of courts that continued to permit or require suit in the name of the insured alone, attributing the practice to a failure to appreciate the real party in interest rule and the advantages of compulsory joinder. CLARK, *supra* note 28, at 177-79. Suit

fused by the whole business.⁸⁸ In this sloganeering process, however, the courts overlooked the substantive law of insurance subrogation and the underlying purposes of compulsory joinder. And there was no more guilty party than the United States Supreme Court, which in 1949 put its stamp of approval on one of the slogans in a case that vividly illustrates how the jurisprudence of labels diverts attention from the underlying substantive law.

IV. THE AETNA DECISION AND ITS LEGACY

A. United States v. Aetna Casualty & Surety Co.

In the four cases consolidated for appeal in *United States v. Aetna Casualty & Surety Co.*,⁸⁹ an insured allegedly had been injured by the negligence of a federal government employee.⁹⁰ The injured parties' insurers had brought suit against the United States pursuant to the Federal Tort Claims Act⁹¹ to recover the amounts they had paid in compensating the injured parties.⁹² The issue before the Court was whether an insurer's subrogation claim against the United States was prohibited by the Anti-Assignment Statute, which barred "transfers and assignments" of claims against the United States.⁹³

Without discussing whether the compensating insurers were, in

by the insured alone often was rationalized on the theory that the insured was a trustee for the insurer and that the real party in interest rule, Rule 17(a), authorized the insurer's nonjoinder regardless of the requirements of compulsory joinder. *Gray v. United States*, 77 F. Supp. 869, 871 (D. Mass. 1948) (entitling insurer to sue for entire loss and holding sum paid to him by the insurer as trustee), *rev'd sub nom.* *State Farm Mut. Liab. Ins. Co. v. United States*, 172 F.2d 737 (1st Cir. 1949); *see supra* note 53 (insured as trustee). A procedural rule that treats an insured as a trustee and an insurer as a beneficiary in all cases, however, is as guilty as the necessary parties slogan of ignoring the substantive law of subrogation, which is not uniform with regard to the relative rights of the insured and insurer. *See Entman, supra* note 1, at 940-42 (discussing the use of the trustee/beneficiary concept in the misapplication of the real party in interest rule).

88. For example, the holding in *Insurance Co. of N. Am. v. United States*, 76 F. Supp. 951, 954 (E.D. Va. 1948), appeared to approve both use practice and joinder simultaneously: "[T]he pleadings should be made to reveal and assert the actual interest of the claimant. The insured and insurer can be compelled to join, and the action brought in the name of the insured for the use of himself and of his insurer . . . to meet the requirements of Rule 17(a)."

89. 338 U.S. 366 (1949).

90. *Id.* at 368-69.

91. 28 U.S.C. § 931 (1940) (current version at 28 U.S.C. § 2674 (1988)).

92. *Aetna*, 338 U.S. at 368-69.

93. 31 U.S.C. § 203 (1951) (current version at 31 U.S.C. § 3727 (1988)).

fact, subrogated under the substantive law of insurance that applied to each claim,⁹⁴ the Court framed the issue before it as whether an insurance company may “bring suit in its own name against the United States upon a claim to which it has become subrogated by payment to an insured who would have been able to bring such an action[.]”⁹⁵ The Court concluded that the Anti-Assignment Statute did not bar assignments by operation of law, such as subrogation.⁹⁶ Consequently, the right of a subrogee to bring suit against the government under the Tort Claims Act was the same as the subrogee’s right to bring suit against a private person.⁹⁷

In concluding its decision, the *Aetna* Court briefly discussed the proper parties to a suit seeking to recover damages that have been compensated by insurance. Having already assumed that the compensating insurers were subrogees, the Court announced that, under Rule 17(a), a subrogee that has paid an entire loss must sue in its own name alone, while in a case of partial compensation, “both the insured and insurer (and other insurers, if any, who have also paid portions of the loss) have substantive rights against the tortfeasor which qualify them as real parties in interest.”⁹⁸ Like the Court’s facile assumption that a compensating insurer is necessarily subrogated and entitled to enforce a claim, the Court erroneously assumed that the insured’s remaining pecuniary interest rendered it a “real party in interest” also entitled to sue.⁹⁹

The Court next discussed the joinder issue.¹⁰⁰ Addressing

94. In one of the cases, the plaintiff insurance company was the workers’ compensation carrier of the injured party’s employer. Having paid the injured person’s claim under the New York Workmen’s Compensation Law, the insurance company’s rights were created by the New York law, which provided that if the injured person failed to commence an action within one year after the accident, his inaction operated as an assignment to the insurer of his cause of action. *Aetna*, 338 U.S. at 368. In the other three cases, the insureds had suffered property damages and the Court’s opinion did not discuss what substantive law, if any, gave the insurance companies rights of subrogation. *Id.* at 369.

95. *Id.* at 368.

96. *Id.* at 373-80.

97. *Id.* at 380.

98. *Id.* at 381.

99. In one of the cases before the Court, the Second Circuit specifically had found that, under the New York workers’ compensation statute, the plaintiff insurer, which had paid only partial compensation, was the only real party in interest. The employee’s failure to sue within a year operated as an assignment of the claim to the carrier, who then had to share with the employee any recovery in excess of the amount of compensation paid. *Aetna*, 338 U.S. at 368 n.3.

For a more detailed criticism of the *Aetna* court’s misunderstanding of the real party in interest rule, see Entman, *supra* note 1, at 913-16.

100. Even if the court had concluded correctly that the insured was not entitled to sue

whether the insurer might sue alone,¹⁰¹ or whether the suit must be in the name of the insured for the use of the insurer, or whether all parties in interest must join in the action, the Court first rejected the notion of "use" practice as "obviously unnecessary" under Federal Rule 17(a).¹⁰² The Court added that "[n]o reason appears why such a practice should now be required in cases of partial subrogation, since both insured and insurer 'own' portions of the substantive right and should appear in the litigation in their own names."¹⁰³

The Court then turned to compulsory joinder under Rule 19. In a classic example of labelling, the Court stated that:

Although either party may sue, the United States, upon timely motion, may compel their joinder 3 Moore, Federal Practice (2d ed.) p. 1348. Both are "necessary" parties. Rule 19 (b), Federal Rules of Civil Procedure. The pleadings should be made to reveal and assert the actual interest of the plaintiff, and to indicate the interests of any others in the claim.¹⁰⁴

and was not, therefore, a real party in interest, the joinder issue would not be entirely foreclosed. There was nothing in the text of Rule 19 at the time, or even now, requiring that a party joined under that rule necessarily qualify as a real party in interest. See *Farrell Constr. Co. v. Jefferson Parish, La.*, 896 F.2d 136, 140 (5th Cir. 1990) ("Even if a party is not the real party in interest, Rule 19 requires that party's joinder if it is 'necessary for a just adjudication' of the action."); *Burger King Corp. v. American Nat'l Bank & Trust Co.*, 119 F.R.D. 672, 676 (N.D. Ill. 1988) ("[Rule 19(a)] does *not* state that the absent party must have an interest *in the action*; instead, it requires only that he have an interest '*relating to the subject matter of the action*'."); Tobias, *supra* note 15, at 774-76 (discussing how courts should evaluate the absentee's "interest" under Rule 19(a)(2)(i)). *But see Kennedy, supra* note 28, 679-80 & n.23 (stating that the relationship between Rules 17(a) and 19 "has not been fully developed," but quoting *Koepp v. Northwest Freight Lines*, 10 F.R.D. 524, 527 (D. Minn. 1950), for the proposition that "Rule 19(a) necessarily assumes that the parties who may be joined under it as plaintiffs are real parties in interest."). On the other hand, determining whether a party qualifies for compulsory joinder under Rule 19 does require accurate understanding of that party's legal relationship to the dispute.

101. In case no. 36, both insured and insurer had sued to recover their respective interests. In case nos. 35, 37 and 38, the insurers alone had sued to recover the amounts paid to their insureds. *Aetna*, 338 U.S. at 368-69.

102. *Id.* at 371-72, 381.

103. *Id.* at 381. The Court's quotation marks around the word "own" signal, at least to this reader, the Court's tentativeness about its own understanding of the substantive rights of the parties and the real party in interest doctrine.

104. *Id.* at 381-82. The Court also cited *Delaware County v. Diebold Safe & Lock Co.*, 133 U.S. 473, 488 (1890), but noted that this was a case applying a state code under the Conformity Act. *Aetna*, 338 U.S. at 381-82. The *Delaware County* case, moreover, involved suit by an assignee of a construction contract, and did not involve subrogation.

The *Aetna* Court gave no further explanation of why the insured and the insurer were necessary parties. The Court did not even cite Rule 19(a), which defined "necessary" parties as those with joint interests. Perhaps the Court considered the insured and the insurer to be "necessary" simply because of their "joint" interests, but this reasoning was not in the opinion. Rather, the Court cited subdivision (b), which provided for compulsory joinder of persons who are not "indispensable," but "who ought to be parties if complete relief is to be accorded between those already parties."¹⁰⁵ The Court did not explain why the presence of either the insured or the insurer would be needed to provide complete relief between those already parties. In fact, it would seem that the opposite is true—that a court could resolve the dispute between either insured or insurer and the alleged tortfeasor without the presence of the other party interested in the claim.¹⁰⁶

The *Aetna* Court also noted that although it considered both the insured and the insurer to be "necessary" parties, they "clearly" would not be "indispensable" under Rule 19.¹⁰⁷ Thus, the Court suggested that if the party who is not joined is beyond the jurisdiction of the court, the suit may nevertheless proceed without him under Rule 19(b) and the defendant may have to defend two or more actions on the same tort.¹⁰⁸ Again, the Court did not ex-

Delaware County, 133 U.S. at 473.

105. *Aetna*, 338 U.S. at 382.

106. See *infra* part V.C.

107. *Aetna*, 338 U.S. at 382 n.19. The Court's statement brings to mind Gegan's law and its corollary: "Gegan's Law: The tendency for any conclusion to be called clear is in inverse ratio to the reasons available to support it. Corollary: Clarity tends to obscure and absolute clarity obscures absolutely." Bernard E. Gegan, *Constructive Trusts: A New Basis for Tracing Equities*, 53 ST. JOHN'S L. REV. 593, 602 n.34 (1979).

108. *Aetna*, 338 U.S. at 382. Insofar as this statement by the Court refers to a lack of personal jurisdiction over the absentee, it assumes that the doctrine of the involuntary plaintiff would not apply to permit joinder of the absentee. The doctrine is expressed in the provision of Rule 19(a) that, "[i]f the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff." FED. R. CIV. P. 19(a). It is generally agreed that this provision, derived from *Independent Wireless Tel. Co. v. Radio Corp. of Am.*, 269 U.S. 459 (1926), permits involuntary joinder as a plaintiff of a party over whom there otherwise is no personal jurisdiction, and further means that the party so joined will be bound by *res judicata*. For the most part, the doctrine has been applied only in cases, such as patent claims brought by a licensee, in which the absentee (owner of the patent) has a duty to join in the suit or to permit use of his name. 3A JAMES W. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* ¶ 19.06 (2d ed. 1994); Jean F. Rydstrom, Annotation, *What Constitutes "Proper Case" Within Meaning of Provision of Rule 19(a) of Federal Rules of Civil Procedure That When Person Who Should Join as Plaintiff Refuses to Do So, He May Be Made Involun-*

plain its conclusion. The Court stated simply that neither absent party would meet the *Shields v. Barrow*¹⁰⁹ test that indispensable parties are those with "an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience."¹¹⁰

The *Aetna* decision created an unfortunate, although highly influential, precedent for compelling joinder of a compensating insurer under Rule 19 without regard to either the substantive law or any policies of compulsory joinder. Moreover, the Court's broad statement that the defendant may compel joinder of either insurer or insured was dicta with regard to joinder of the insurer. In each of the cases before the Court, the insurer had brought suit. The Court's failure to analyze the application of Rule 19 or its underlying policies make it difficult to assess the proper precedential value of its dicta. Had the Court at least explained why the insureds were necessary, but not indispensable, it might be possible to determine whether the same reasoning should apply to the insurer, or whether there is any distinction between insured and insurer in this situation that would call for a different result.

The Court's failure to justify its joinder pronouncements in the *Aetna* opinion is probably attributable to its heavy reliance on *Moore's Federal Practice*, which had recently been published in second edition.¹¹¹ In the 1948 version of the second edition, Pro-

itary Plaintiff "In a Proper Case," 20 A.L.R. FED. 193 (1974).

The involuntary plaintiff doctrine is not often implicated in the issue of compulsory joinder of subrogated insurers because lack of personal jurisdiction over the insurer generally is not a problem. If there is any jurisdictional problem, it is that the insurer's joinder would defeat diversity jurisdiction. If the absentee insurer is subject to personal jurisdiction, therefore, the involuntary plaintiff doctrine does not apply. The correct procedure is to bring the insurer into the lawsuit by service as a defendant and then to realign the insurer to reflect its position as a plaintiff and to ascertain diversity. See 3A MOORE, ET AL., *supra* note 84, ¶ 19.06, at 19-86 to 19-87 (explaining applicability of "involuntary plaintiff" doctrine); 7 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §§ 1605-1606 (2d ed. 1986) (discussing joinder of absentees as defendants and involuntary plaintiffs). In most judicial decisions and, consequently, in this article, however, the procedure is simply referred to as joining the insurer as a party plaintiff. *But see* Blacks v. Mosley Mach. Co., 57 F.R.D. 503, 505-06 (E.D. Pa. 1972) (stating, incorrectly, that ordering joinder of the compensating insurer was an extension of the involuntary plaintiff doctrine).

109. 58 U.S. (17 How.) 130 (1854).

110. *Aetna*, 338 U.S. at 382 n.19 (quoting *Shields*, 58 U.S. at 139).

111. *Id.* at 381-82 (citing "3 Moore, Federal Practice (2d ed.)").

fessor Moore described principles for joinder of compensating insurers in his discussion of Rule 17(a).¹¹² He echoed Clark's preference¹¹³ for the analogy to partial assignment—that in a case of partial subrogation, either subrogor or subrogee may sue, but that upon defendant's objection, joinder of the other should be compelled.¹¹⁴ The Moore treatise and the *Aetna* decision both imply that the role of the substantive law ends with the conclusion that the insurer is entitled to reimbursement. Whether the insured or the insurer each may assert and control a claim against the third party, and whether joinder of the other is required or may be dispensed with, are all treated as matters of federal procedure.¹¹⁵ And even as to matters of federal procedure, both Moore and *Aetna* reinforce a jurisprudence of labels, oblivious to underlying policies of compulsory joinder.¹¹⁶ This approach, in turn, was reflected for many years in lower court decisions, even after the

112. 3A MOORE, ET AL., *supra* note 108, ¶ 17.09 [2.-1]. Although the 1948 edition is continuously updated, the section cited here, [2.-1], begins with the following notation: "The discussion in this subhead was approved by the Supreme Court in *United States v. Aetna Casualty & Surety Co.* . . . discussed in subhead [2.-2], *infra*." *Id.* at 17-77 n.1.

113. CLARK, *supra* note 28, § 24, at 177-79.

114. 3A MOORE ET AL., *supra* note 108, ¶ 17.09 [2.-1], at 17-78 to 17-79.

115. Moore's treatise states:

[I]f the insurer satisfies his liability to the insured, but the insured sues and recovers his entire original loss, the recovery is impressed with a trust for the insurer up to the amount to which he was entitled by principles of subrogation. The insurer, therefore, owned that portion of the substantive right, and the insured owned the remainder. There are two real parties in interest and either or both may sue, although as in the case of partial assignments, if the defendant makes a timely objection, the joinder of insurer and insured should be compelled.

Id.

116. Professor Bone refers to Professor Moore's treatment of compulsory joinder as "unusually superficial." Bone, *supra* note 15, at 112. Bone states that "[t]he bulk of Moore's discussion of Rule 19 in his 1938 treatise consists of a lengthy summary of existing precedent defining necessary and indispensable parties in different types of cases without any clear account of the purpose the Rule was supposed to serve." *Id.* at 111.

Professor Moore's treatise now includes in the section on Rule 19 a discussion of the overlap between Rules 17(a) and 19, in which the writer suggests that the matter is best treated under Rule 19 and that, applying the criteria of Rule 19(a), joinder of the insurer should *not* be required. 3A MOORE ET AL., *supra* note 108, ¶ 19.07—1 [2.-2], at 19-113 to 19-116. As this discussion is based upon the requirements of Rule 19 as amended in 1966, however, it would not have been part of the 1948 treatise. Moreover, Moore's comments favoring joinder continue to appear in his chapter on Rule 17(a) and to be cited for that approach, without reference to his discussion to the contrary in the section on Rule 19. *See Truckweld Equip. Co. v. Swenson Trucking & Excavating, Inc.*, 649 P.2d 234, 237 (Alaska 1982) (citing Moore's treatise discussion on Rule 17(a) favoring joinder).

1966 amendment to Rule 19 should have settled that the scope of federal compulsory joinder is much narrower and depends upon careful analysis of the substantive rights of the parties.¹¹⁷

B. *Aetna's Legacy*

1. Finding the Real Party in Interest Without Understanding the Substantive Law

One legacy of the *Aetna* opinion, explored in some detail elsewhere,¹¹⁸ was a large number of lower court decisions finding that insurers and insureds were both real parties in interest in spite of substantive law to the contrary. The importance of this legacy for present purposes is that an incorrect determination that both insured and insurer are entitled to state a claim for relief against the third party creates an unnecessary joinder issue and, in some cases, an erroneous decision to require joinder.

An illustrative case is *Gas Service Co. v. Hunt*,¹¹⁹ decided by the Tenth Circuit one year after the *Aetna* decision. In *Hunt*, the circuit court assigned error to the trial court's denial of a defendant's motion to require joinder of subrogated insurers as plaintiffs in an action brought by the insured. The Tenth Circuit reversed and required joinder.¹²⁰ The *Hunt* court first stated that under Kansas law both the insured and the partially compensating insurer were real parties in interest with the substantive right to sue the wrongdoer for their respective shares of the claim.¹²¹ Acknowledging that Kansas permitted the insured to sue alone for the entire claim, the Tenth Circuit concluded that this rule was "procedural rather than substantive," and therefore not applicable in a federal court.¹²²

The *Hunt* court's conclusion that the Kansas rule was merely procedural is not borne out by an examination of the Kansas authorities. The Kansas rule had been announced in *City of New York Insurance Co. v. Tice*,¹²³ a case cited but badly misunderstood by the Tenth Circuit in *Hunt*. In *Tice*, the Kansas Supreme Court

117. See *infra* parts IV.B.2, V.B.

118. Entman, *supra* note 1, at 916-31.

119. 183 F.2d 417 (10th Cir. 1950).

120. *Id.* at 419.

121. *Id.*

122. *Id.*

123. 152 P.2d 836 (Kan. 1944).

stated that in a case of partial compensation,

[The] action should be brought by the property owner, who will hold as trustee for the insurer in respect to such part of the amount recovered as the insurer has been compelled to pay under the policy. If, in such a situation, the property owner refuses to bring action, justice requires that the insurer be permitted to bring action.¹²⁴

On its face, the Kansas rule limited the right of the insurer to bring an action to enforce its interest. When the insured sued for the entire claim, the insurer was limited to the role of beneficiary; it was entitled to bring an action to enforce its claim against the wrongdoer only if the insured did not.

Moreover, the *Tice* court's rationale for this rule was that "[t]he wrongdoer should not be compelled to defend two actions for the same wrong."¹²⁵ The rule concerned more than "the person in whose name the action may be prosecuted," as the Tenth Circuit characterized it.¹²⁶ The rule was a substantive limitation on the insurer's right to sue, designed for the protection of the accused tortfeasor.¹²⁷ Nonetheless, the *Hunt* court decided that the Kansas rule was procedural and that the insurer was a real party in interest.

In contrast to the *Hunt* case, a number of lower federal court decisions have followed state law in deciding that compensating insurers were not real parties in interest with regard to claims asserted by insureds. For example, denying the defendant's motion to join a workers' compensation insurer as a party plaintiff in *Pyle v. Kansas Gas & Electric Co.*,¹²⁸ the court first stated that the insurer's right to recover from the defendant was controlled by

124. *Id.* at 842. The second sentence describes the actual holding in *Tice*. The insurer had brought suit in its own name after the insured settled with the tortfeasor for her \$50 deductible and indicated her reluctance to participate in the action. *Id.* at 837-38.

125. *Id.* at 840.

126. *Gas Serv. Co. v. Hunt*, 183 F.2d 417, 419 (10th Cir. 1950).

127. In fairness, the Tenth Circuit may have been misled by the *Tice* court's statement that both insured and insurer were real parties in interest, 152 P.2d at 842, a statement that is incorrect with regard to an insurer who is not entitled to sue. On the other hand, the *Hunt* case may illustrate how federal circuit courts of appeals are less capable of appreciating and applying state law than are the federal district judges in those states. *But see* *Salve Regina College v. Russell*, 499 U.S. 225, 238 (1991) (rejecting argument that "a district judge is better positioned to determine an issue of state law than are the judges on the court of appeals").

128. 23 F.R.D. 148 (D. Kan. 1959).

Kansas law.¹²⁹ Then, after examining the Kansas workers' compensation statute, the court concluded that because the employee had brought suit, the insurer was only entitled to a lien on the employee's recovery and therefore was not subrogated.¹³⁰ Several other post-*Aetna* decisions involving workers' compensation carriers have carefully examined the underlying substantive law and have concluded correctly that the insurers were not real parties in interest when the applicable statutes gave the insurers only a right to reimbursement and not a right to sue the third party.¹³¹

It is really not surprising to find more accurate assessments of insurers' substantive rights in the workers' compensation cases. Federal courts in those cases often have the benefit of statutes that explicitly address the insurer's right to bring an action against the third party. When a statute creates the right of the insurer to compensation, it is not difficult for the court to ascertain that right and also to appreciate that the state rule is substantive. In cases such as *Hunt*, on the other hand, the federal court is faced with deciphering state court decisions to determine the right of a compensating insurer to state a claim against a third party. In many instances, it may be considerably more difficult than it was in *Hunt* to determine the correct answer.¹³² Outside of the workers' compensation area, therefore, one more frequently finds federal courts simply concluding that a state rule is procedural, or ignoring state law altogether, and applying the *Aetna* assumption that insurers are subrogated.¹³³

129. *Id.* at 149.

130. *Id.* at 150-51.

131. See Entman, *supra* note 1, at 918-19 (discussing other federal decisions correctly construing workers' compensation acts that did not give insurers subrogation rights). A number of other federal decisions, however, have concluded erroneously that insurers were subrogated when the workers' compensation statutes gave the insurer a pecuniary interest in the employee's recovery, but not a claim against the third party. See, e.g., *Wright v. Schebler Co.*, 37 F.R.D. 319, 321 (S.D. Iowa 1965) (stating that workers' compensation insurer was a real party in interest because, under the applicable Illinois compensation act, the insurer was a statutory lienholder); Entman, *supra* note 1, at 916-18 (discussing *Wright* and other similar cases). Federal courts have also misunderstood applicable substantive law and found that insureds were real parties in interest even though the insurer had the exclusive right to assert any claim against the third party. See *id.* at 919-22 (discussing cases in which substantive law was misapplied).

132. See Entman, *supra* note 1, at 923-25 (discussing the difficulty of distinguishing between substantive and procedural state law and the difficulty of finding state law addressing insurers' right to sue).

133. Both sides of the coin are illustrated in *Cook v. Stuples*, 74 F.R.D. 370 (W.D. Okla. 1976), in which the court correctly analyzed the substantive subrogation rights of

2. The Jurisprudence of Labels

Aetna's other legacy is the use of labels to determine compulsory joinder, in particular the label that partially compensating insurers are necessary parties. For example, in *Gas Service Co. v. Hunt*,¹³⁴ after mischaracterizing Kansas law as procedural and deciding that the insurer was a subrogee and a real party in interest,¹³⁵ the court quickly resolved the joinder issue. Relying solely upon the *Aetna* dicta, and without citing Rule 19, the court stated that when either the insured or the subrogated insurer brings suit, the other should be joined upon timely motion of the alleged wrongdoer.¹³⁶ Thus, the *Hunt* court required joinder of an insurer that did not even have a claim for relief against the third party.

In *Wright v. Schebler Co.*,¹³⁷ on the other hand, the district

the United States for medical expense compensation under a federal statute. *Id.* at 371-72. With regard to the plaintiff's partially compensated property damage, however, the court engaged in no such analysis. The court simply stated that the insurer "by virtue of its payment . . . possesses substantive rights in this litigation . . . in accordance with *Gas Service Co. v. Hunt*." *Id.* at 372.

Courts sometimes pay lip service to the role of the substantive law, but then reveal that they do not really understand the concept. In *Brocklesby Transp. v. Eastern States Escort Serv.*, 904 F.2d 131, 133 (2d Cir. 1990), the court stated that "federal law governs the issue of in whose name a lawsuit must be brought, even though state law controls the underlying substantive right of an insured to recovery." Then, however, with no inquiry into the state law of subrogation, the court stated that "[u]nder federal law . . . if the insured is only partially compensated by the insurer, both the insurer and the insured are real parties-in-interest." *Id.* (citing *United States v. Aetna Casualty & Sur. Co.*, 338 U.S. 366, 380-82 (1949) and 3A JAMES W. MOORE ET AL., *MOORE'S FEDERAL PRACTICE*, ¶ 17.09 [2.-04] (2d ed. 1989)).

134. 183 F.2d 417 (10th Cir. 1950).

135. See *supra* text accompanying notes 119-27.

136. *Hunt*, 183 F.2d at 419-20. Also requiring joinder of purported insurer-subrogees on the basis of *Aetna*: *Maryland v. Baltimore Transit Co.*, 37 F.R.D. 34, 36 (D. Md. 1965); *Brown v. Fisher Skylights, Inc.*, 31 F.R.D. 532, 532-33 (E.D.N.Y. 1962); *Poleski v. Moore-McCormack Lines*, 21 F.R.D. 579, 581 (D. Md. 1958) (citing *Aetna*, 338 U.S. at 381, for the proposition that the insurer "is a necessary party, and may be brought in on motion of the defendant"); *Carlson v. Consumers Power Co.*, 164 F. Supp. 692, 695 (W.D. Mich. 1957) (Stewart, Potter, Cir. J.) (noting that *Aetna* was not "controlling on the facts," but finding it to be "strong support" for compulsory joinder). See also *Continental Bus Sys., Inc. v. Rohwer*, 172 F. Supp. 487, 490 (D. Colo. 1959) (following *Hunt*, 183 F.2d 417, and further holding that although the share of the partial subrogee insurer in the total claim was less than the jurisdictional amount, joinder did not defeat jurisdiction because the plaintiffs are enforcing "a single title or right, in which they have a common and undivided interest") (citation omitted); Kennedy, *supra* note 28, at 693-94 (discussing other cases construing *Aetna* to require joinder of the insurer). For later decisions requiring joinder on the basis of *Aetna*, even after the 1966 amendment of Rule 19, see *infra* part V.B.

137. 37 F.R.D. 319 (S.D. Iowa 1965).

court had also decided incorrectly that the insurer was subrogated,¹³⁸ but it nonetheless declined to order the insurer's joinder. Unlike the *Hunt* court, the court in *Wright* distinguished *Aetna* and relied upon the text of Rule 19.¹³⁹ Reading the criterion of subparts (a) and (b) of Rule 19 to be cumulative, the *Wright* court first found that the insurer had a "joint interest" with the plaintiff, as specified in subpart (a).¹⁴⁰ In light of the insurer's limited interest under the Illinois workers' compensation act, that conclusion was debatable. The court found, however, that the criterion of subpart (b) was not met.¹⁴¹ Subpart (b) provided that joinder was necessary "if complete relief is to be accorded between those already parties."¹⁴² The court found that complete relief could be granted between those already parties, the insured and the tortfeasor, without joinder of the insurer.¹⁴³

Apparently attempting to cover all bases, the *Wright* court further stated that an "underlying objective" of Rule 19 is to "avoid multiple suits, and generally promote the economy and efficiency of judicial action."¹⁴⁴ In the situation before it, the court explained, there was no possibility of multiple suits because "there can be but one recovery under Illinois law."¹⁴⁵ Although the court cited no authority for this statement about Illinois law, it was undoubtedly correct. Under the express language of the act, the insurer had no right to sue once the insured had sued.¹⁴⁶

In *Wright*, the court escaped an erroneous decision requiring joinder as a plaintiff of an insurer that was not subrogated. The court, moreover, eschewed the jurisprudence of labels and attempt-

138. The insurer in *Wright* was a workers' compensation carrier that had a lien interest in the employee's recovery, but no right to assert a claim against the third party. See *supra* note 131.

139. For the full text of Rule 19 as it read at the time of *Wright*, see *supra* note 79.

140. *Wright*, 37 F.R.D. at 322.

141. *Id.*

142. See *supra* note 79 (text of Rule 19(b)).

143. *Wright*, 37 F.R.D. at 322. See *infra* part V.C for a discussion of this same criteria in Rule 19(a) as amended in 1966.

144. *Wright*, 37 F.R.D. at 322.

145. *Id.* The *Wright* court also distinguished *Aetna* on the ground that the defendants in *Aetna* were faced with the "possibility of multiple suits or 'split causes of action.'" *Id.* See also *Braniff Airways v. Falkingham*, 20 F.R.D. 141, 144 (D. Minn. 1957) (also distinguishing *Aetna* on the grounds that there is no risk of multiple litigation when the insured sues to recover the entire claim), cited by *Wright*, 37 F.R.D. at 322.

146. See *Pyle v. Kansas Gas & Elec. Co.*, 23 F.R.D. 148, 150-51 (D. Kan. 1959) (reading the language of the Kansas workmen's compensation statute to expressly preclude insurer from bringing suit once the insured had initiated suit against tortfeasor).

ed to apply the text of Rule 19. Its statement, however, of a broad purpose in Rule 19 to avoid multiple litigation typifies an unfortunate judicial tendency that has continued even after the 1966 revision of Rule 19. Had the *Aetna* court provided more accurate guidance in the application of Rule 19, perhaps this trend would not have begun and future courts would have had a clearer idea of federal compulsory joinder doctrine.

V. THE IMPACT OF AMENDED RULE 19

A. *The 1966 Amendment*

In 1966, Rule 19 was completely rewritten and the labels discarded. The Advisory Committee's aim was to replace "abstract classifications" with "pragmatic considerations" as the correct basis of decision with regard to compulsory joinder.¹⁴⁷ The new rule entirely eliminated the terms "necessary" and "joint" and "united" interests; "indispensable" was retained, but not as a classification. "Indispensable" was instead used as a conclusion to describe the consequence of analysis.¹⁴⁸ The rule spelled out the factors to be considered both in requiring joinder and in deciding whether to proceed in the absence of a party who should be joined. The rule adopted in 1966 provided:¹⁴⁹

JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION.

(a) *Persons to be Joined if Feasible.* A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his [the person's] absence complete relief cannot be accorded among those already parties, or (2) he [the person] claims an interest relating to the subject of the action and

147. FED. R. CIV. P. 19 advisory committee's note (1966).

148. *Id.* Old terminology and its confusion refuses to die, however. See, e.g., *Glacier Gen. Assurance Co. v. G. Gordon Symons Co.*, 631 F.2d 131, 134 (9th Cir. 1980) (after quoting amended Rule 19(a), the court held "that the reinsurers are not necessary parties under this standard"); *Landon v. Lief Hoegh & Co.*, 521 F.2d 756, 761 (2d Cir. 1975) (referring to "an indispensable party under Rule 19(a)" and "a necessary party under 19(b)"), *cert. denied*, 96 S. Ct. 783 (1976).

149. FED. R. CIV. P. 19, *reprinted in* 39 F.R.D. 88-89 (1966) (parts 19(c) & (d) omitted). In 1987, the rule was amended for the purpose of "gender-neutralization." The words deleted in 1987 are underlined and the words added are in brackets. See FED. R. CIV. P. 19.

is so situated that the disposition of the action in his [the person's] absence may (i) as a practical matter impair or impede his [the person's] ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his [the] claimed interest. If he [the person] has not been so joined, the court shall order that he [the person] be made a party. If he [the person] should join as a plaintiff but refuses to do so, he [the person] may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder [of that party] would render the venue of the action improper, he [that party] shall be dismissed from the action.

(b) *Determination by Court Whenever Joinder Not Feasible.*

If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him [the person] or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

In *Provident Tradesmens Bank & Trust Co. v. Patterson*,¹⁵⁰ the United States Supreme Court addressed the significance of the 1966 amendment. The court of appeals reversed plaintiffs' verdicts in a declaratory judgment action brought to determine whether the driver of a vehicle involved in a fatal accident had been using the car with the permission of the owner, Dutcher, who was not a defendant in the suit.¹⁵¹ The defendants were Dutcher's liability insurer and the estate of the driver, against which one of the plaintiffs had an unsatisfied consent judgment. The court of appeals re-

150. 390 U.S. 102 (1968).

151. *Id.* at 106.

versed on the grounds that Dutcher was an indispensable party.¹⁵² Reversing, the Supreme Court criticized the court of appeals for its failure to base its decision on the new rule's "stated pragmatic considerations."¹⁵³ The Court admonished that the inflexible approach adopted by the court of appeals "exemplifies the kind of reasoning that the Rule was designed to avoid."¹⁵⁴ Focusing primarily upon the "equity and good conscience" test of Rule 19(b), the Court concluded that the trial court's judgment should have been permitted to stand in spite of Dutcher's absence.¹⁵⁵

The 1966 amendment of Rule 19 has not significantly improved the quality of federal decisions with regard to joinder of compensating insurers. As the Supreme Court discovered in the *Provident Tradesmens* case, improving the text of Rule 19 does not automatically improve judicial understanding of compulsory joinder doctrine. The *Aetna* legacies have continued to influence analysis, or a lack thereof, in federal decisions concerning compensating insurers. The first *Aetna* legacy—assuming without sufficient attention to the substantive law that both insured and insurer are real parties in interest entitled to sue—has not been avoided by Rule 19's clearer articulation of compulsory joinder doctrine. As the decisions discussed below illustrate, federal courts have continued to give insufficient attention to the substantive rights of insured and insurer under the applicable law of subrogation.

The second *Aetna* legacy—failing to understand and to apply compulsory joinder doctrine properly—has also continued unabated, although it has taken various forms. First, some federal courts, despite the admonitions of *Provident Tradesmens*,¹⁵⁶ have ignored the criteria of Rule 19 altogether and have relied upon *Aetna dicta*¹⁵⁷ and other outdated precedent. Second, many courts, applying either the "complete relief" language of Rule 19(a)(1) or the "multiple or otherwise inconsistent obligations" language of Rule

152. *Id.*

153. *Id.* at 106-07.

154. *Id.* at 107. The Court also rejected the court of appeals' conclusion that "the 19th century joinder cases in this Court created a federal, common-law, substantive right in a certain class of persons to be joined in the corresponding lawsuits." *Id.* at 119. Rather, the Court explained, joinder was a federal procedural question, although state law questions might arise in determining what interest the outsider actually had. *Id.* at 116-25, 119 n.22.

155. *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 109 (1968).

156. *Id.* at 102.

157. See *supra* part IV.A.

19(a)(2)(ii), have read Rule 19 incorrectly as a broad prohibition against multiple lawsuits from one transaction.¹⁵⁸

B. Aetna's Continuing Legacy: Ignoring Rule 19(a)

Illustrative of unquestioning reliance on pre-1966 precedent in requiring joinder of a compensating insurer is the Tenth Circuit opinion in *Public Service Co. v. Black & Veatch*.¹⁵⁹ In *Public Service Co.*, the court declined to overrule its 1950 holding in *Gas Service Co. v. Hunt*¹⁶⁰ that a compensating insurer should be joined as a party plaintiff upon motion of a defendant tortfeasor.¹⁶¹ In calling for the overruling of *Hunt*, both the plaintiff¹⁶² and the district court¹⁶³ focused their concern on jury prejudice, a concern that failed to move the Tenth Circuit.¹⁶⁴ The district court reasoned also that *Hunt* should not be followed when "the insured brings the action for the entire loss and a rule prohibits another suit by anyone having an interest in the Plaintiff's cause of action."¹⁶⁵ Unfortunately, the lower court failed to explain fully the significance of the Oklahoma rule: because the insurer had no right to enforce its claim, there was no reason for requiring its joinder.¹⁶⁶

The Tenth Circuit in *Public Service Co.* merely reaffirmed the rule in *Aetna* and *Hunt* that "where the owner has been reimbursed for only a part of his loss, both the insured and the insurer own

158. See generally Rydstrom, *supra* note 2. Professor Bone observes that amended Rule 19, like its predecessor, is not a rule requiring broad joinder of parties and is largely redundant of impleader, interpleader, and intervention. He explains that while the original rules drafters generally favored broad permissive joinder for purposes of trial convenience, they took a very narrow approach to compulsory joinder, giving the plaintiff wide latitude in structuring his lawsuit. He concludes that, "[t]he historic function of compulsory joinder has been lost to modern procedural law and with it much of the sense of Rule 19." Bone, *supra* note 15, at 108-14.

159. 467 F.2d 1143 (10th Cir. 1972).

160. 183 F.2d 417 (10th Cir. 1950) (discussed *supra* text accompanying notes 119-27, 134-36).

161. *Public Serv. Co.*, 467 F.2d at 1143.

162. *Id.* at 1144.

163. *Public Serv. Co. v. Crane Co.*, 48 F.R.D. 424, 425 (N.D. Okla. 1969).

164. *Public Serv. Co.*, 467 F.2d at 1144.

165. *Public Serv. Co. v. Crane Co.*, 48 F.R.D. at 425.

166. See *Cleaves v. DeLauder*, 302 F. Supp. 36, 37-38 (N.D. W. Va. 1969) (finding that under West Virginia law insurer has no right to sue third party and, therefore, joinder of insurer not required by Rule 19). See also *Farrell Constr. Co. v. Jefferson Parish*, 896 F.2d 136, 141-43 (5th Cir. 1990) (holding that subcontractor, who had no right to sue owner under Louisiana law, was not a person whose joinder was required by Rule 19 in contractor's suit against owner).

portions of the substantive right against the wrongdoer and should appear in litigation in their own names."¹⁶⁷ The court again failed to recognize the need to refer first to the substantive law to determine the rights of insured and insurer before proceeding to the joinder issue. Furthermore, it appears that neither the plaintiff nor either of the courts in *Public Service Co.* took note of the 1966 amendment of Rule 19. Had they done so, they might have seen the necessity for re-evaluating both *Hunt* and *Aetna*, and the new rule may have helped to focus the inquiry on the rights of the parties.¹⁶⁸ Instead, the Tenth Circuit merely reiterated that *Hunt* was consistent with *Aetna* and other authorities,¹⁶⁹ most of which predated the 1966 amendment.¹⁷⁰

One year later, another circuit court of appeals took up the issue, this time taking note of the 1966 amendment. The result, however, fell far short of the careful analysis that the Supreme Court called for in *Provident Tradesmens*.¹⁷¹ In *Virginia Electric & Power Co. v. Westinghouse Electric Corp.*,¹⁷² the Fourth Circuit granted an interlocutory appeal from the denial of a motion to

167. *Public Serv. Co.*, at 467 F.2d at 1144. The Tenth Circuit quoted a passage from 6 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1546, at 659-60 (1971), which stated in part that "[t]he insurer who pays a part of the loss is only partially subrogated to the rights of the insured Either the insured or the insurer may sue in his own name." 467 F.2d at 1145. The passage, currently found at 6A WRIGHT ET AL., *supra* note 28, § 1546, at 360, certainly gives the unfortunate impression that the rights of the insured and insurer to sue in a case of partial compensation are procedural issues that do not require reference to the substantive law.

168. See *Landon v. Lief Hoegh & Co.*, 521 F.2d 756, 761 (2d Cir. 1975) (compensating employer under Longshore and Harbor Workers' Compensation Act is not a party whose joinder is required by Rule 19 because the employer has no claim until the plaintiff has recovered against the ship), *cert. denied*, 96 S. Ct. 783 (1976).

169. *Public Serv. Co. v. Black & Veatch*, 467 F.2d 1143, 1144-45 (10th Cir. 1972).

170. Also relying upon *Aetna* without reference to the 1966 amendment of Rule 19: *Wright v. Albuquerque Auto-Truck Stop Plaza*, 591 F.2d 585, 586-87 (10th Cir. 1979) (ordering insurer's joinder on the basis of *Public Service Co.* and *Aetna*); *Wadsworth v. United States Postal Serv.*, 511 F.2d 64, 66-67 (7th Cir. 1975) (stating, erroneously, that the holding in *Aetna* was that a partially subrogated insurer should be joined); *City Stores Co. v. Lerner Shops*, 410 F.2d 1010, 1012 (D.C. Cir. 1969); *Wattles v. Sears, Roebuck & Co.*, 82 F.R.D. 446, 448-49 (D. Neb. 1979); *Cook v. Stuples*, 74 F.R.D. 370 (W.D. Okla. 1976) (discussed *supra* note 133); *Chaplin v. Bruce*, 57 F.R.D. 487, 488 (W.D. Okla. 1972) (relying on *Hunt*); *Ward v. Franklin Equip. Co.*, 50 F.R.D. 93, 94-95 (E.D. Va. 1970); *Neal v. Trim Master Corp.*, 48 F.R.D. 390, 394 (N.D. Miss. 1969); *Cross v. Harrington*, 294 F. Supp. 1340, 1341-42 (N.D. Miss. 1969). For pre-1966 cases that relied upon *Aetna* in requiring joinder of insurers, see *supra* note 136.

171. *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968) (discussed *supra* text accompanying notes 150-53).

172. 485 F.2d 78 (4th Cir. 1973), *cert. denied*, 415 U.S. 935 (1974).

dismiss on the grounds that the plaintiff's insurer was a real party in interest and an indispensable party.¹⁷³ The insurer in *Virginia Electric*, unlike the plaintiff insured, shared the citizenship of the defendant, and thus its joinder would have defeated federal diversity jurisdiction.¹⁷⁴ In *Virginia Electric*, Circuit Judge Craven first determined that under Rule 17(a) and applicable Virginia law, both the insured and the partially subrogated insurer were real parties in interest.¹⁷⁵ In this case, however, the conclusion that the insured was a real party in interest entitled to sue was in conflict with a cooperation agreement between the insured and the insurer in which the insured agreed "that the conduct of the continuing action to recover . . . for such claims shall be under the exclusive direction and control of the Insurer," and a subrogation instrument providing that the insured "subrogates the Insurer to all of its remaining rights of recovery."¹⁷⁶ Pursuant to this agreement, the insured apparently had conveyed to the insurer all rights to enforce the claim against the defendant.¹⁷⁷ The insured, therefore, had no claim to enforce against the defendant.

Because the insured in *Virginia Electric* was not, therefore, a proper plaintiff, the suit simply should have been dismissed for lack of diversity jurisdiction, or on proper motion, via summary judgment. Believing that both insured and insurer were proper plaintiffs, however, Judge Craven then turned to Rule 19. His entire analysis under subdivision (a) consisted of only a citation to *Aetna* and the conclusion that "[i]t is clear that a partial subrogee is a person to be joined if feasible under Fed.R.Civ.P. 19(a)."¹⁷⁸ Thus, once again, the pre-amendment dicta of *Aetna*, and not the specific criteria of Rule 19(a), prevailed.¹⁷⁹

It may be that Judge Craven devoted so little attention to applying Rule 19(a) because he had determined that in any case this was a suit that, under Rule 19(b), should be permitted to proceed in spite of the insurer's absence as a party.¹⁸⁰ In other words,

173. *Id.* at 81.

174. *Id.*

175. *Id.* at 83-84.

176. *Id.* at 82 nn.1-2. For criticism of the interpretation and application of Rule 17(a) in *Virginia Electric*, see Entman, *supra* note 1, at 920-22, 931-32, 947-48.

177. *Virginia Elec.*, 485 F.2d at 82, 86.

178. *Id.* at 85.

179. See *supra* note 170.

180. See *Virginia Elec.*, 485 F.2d at 86 (discussing why insurer's presence as party was not necessary).

Judge Craven may have reasoned in a somewhat backwards fashion: The insurer cannot be joined because its presence would defeat jurisdiction. The ultimate question, therefore, is whether the suit may proceed without the insurer. Applying the criteria specified in Rule 19(b), the suit may so proceed. Thus, it matters little whether joinder of the insurer would be required if it were feasible.

Deciding that the insurer was not indispensable under Rule 19(b) led to the same result in *Virginia Electric* as the court would have reached had it determined that joinder of the insurer was not required by Rule 19(a). The insured was permitted to sue alone for the entire loss. It is unfortunate, however, for a court, especially a court of appeals, to treat the subdivision (a) analysis as merely academic. This methodology creates a body of precedent that, when applied in a case in which joinder is feasible, supports much broader joinder than may be warranted by a careful application of subdivision (a). In *Virginia Electric*, the court's simple reliance on *Aetna* and its apparently backwards application of Rule 19 created an influential precedent that leads to misapplication of Rule 19.¹⁸¹

Several federal courts have adopted the approach, in cases in which joinder of the absentee is not feasible, of analyzing whether to proceed or dismiss under subdivision (b) without analyzing whether joinder would be required under subdivision (a).¹⁸² Other

181. See, e.g., *Travelers Ins. Co. v. Riggs*, 671 F.2d 810, 813 (4th Cir. 1982) (relying upon *Virginia Electric* in requiring insurer's joinder); *Lightner v. Duke Power Co.*, 719 F. Supp. 1310, 1317 (E.D. Va. 1989) (following *Virginia Electric* and ordering joinder of workers' compensation insurer with no discussion of insurer's rights under substantive law); *Edwards, Inc. v. Arlen Realty & Dev. Corp.*, 466 F. Supp. 505, 514 (D.S.C. 1978) (reluctantly following *Virginia Electric* and ordering joinder).

See also *Jefferson v. Ametek, Inc.*, 86 F.R.D. 425, 429-30 (D. Md. 1980), in which the court followed *Virginia Electric* and stated that "the question remains whether it [the insurer] must be joined as a named plaintiff because it is an indispensable party." This statement is nonsense, of course, because by definition an indispensable party may never be joined. The statement illustrates, however, the confusion caused by failing to carefully separate the issues resolved under each of the subdivisions of Rule 19.

182. See, e.g., *Gonzalez v. Cruz*, 926 F.2d 1, 5-7 (1st Cir. 1991) (analyzing dismissal under subdivision (b) and altogether ignoring subdivision (a)); *Dayton Indep. Sch. Dist. v. U.S. Mineral Prod.*, 906 F.2d 1059, 1067-68 (5th Cir. 1990) (using subdivision (b) analysis without considering subdivision (a)); *Schutten v. Shell Oil Co.*, 421 F.2d 869, 874 (5th Cir. 1970) ("Under subdivision (a) the Levee Board is clearly a party 'to be joined if feasible.'"). This trend may have begun with *Provident Tradesmens*. Stating that "[w]e may assume, at the outset, that Dutcher falls within the category of persons who, under § (a), should be 'joined if feasible,'" the Court gave a very cursory, three-sentence analysis in support of this assumption before proceeding to its much more thorough subdivision (b) analysis. *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 108 (1968).

federal courts have criticized this approach.¹⁸³ Under some circumstances it may be justifiable for a trial court, presented with a motion to dismiss because joinder of an absentee is not feasible, to engage in only the subdivision (b) inquiry. If the court decides to proceed without the absentee as a result of a subdivision (b) analysis, there is no harm done by the court's making the assumption that the absentee is "a person as described in subdivision (a)."¹⁸⁴ If the court is clear that it is operating only upon an assumption, and not a finding, with regard to subdivision (a), the approach will have saved the court unnecessary effort and will not create careless precedent. When the trial court's conclusion, however, is that under subdivision (b) it should not proceed without the absentee, the subdivision (a) application is unavoidable because a suit should be dismissed only if the absentee is "a person as described in subdivision (a)."¹⁸⁵

The reasons given by Judge Craven for concluding that the insurer was not indispensable under subdivision (b) highlight the inadequacy of his conclusion that the insurer was a person whose joinder was required under subdivision (a). Judge Craven explained that the insurer was not indispensable because a judgment in the

183. See, e.g., *Field v. Volkswagenwerk AG*, 626 F.2d 293, 300 (3d Cir. 1980). In *Volkswagenwerk AG*, the court stated:

Rule 19(b) itself is applicable only if a person who should be joined under the provisions of Rule 19(a) cannot be made a party for some reason. 'By proceeding in this orderly fashion the court will be able to avoid grappling with the difficult question of indispensability whenever it initially decides that the absentee's interest is not sufficient to warrant compelling his joinder.'

(quoting 7 WRIGHT ET AL., *supra* note 108, § 1604, at 39-40). See also *Bates v. Cekada*, 130 F.R.D. 52, 57 (E.D. Va. 1990) ("Rule 19 requires the Court to make a two-part inquiry. The first part of the inquiry is governed by Rule 19(a)"); *Burger King Corp. v. American Nat'l Bank & Trust Co.*, 119 F.R.D. 672, 676 (N.D. Ill. 1988) (criticizing courts for avoiding the Rule 19(a)(2) problem by "assuming arguendo that the absent person is necessary and moving directly to the 'indispensability' test."); *Edwards*, 466 F. Supp. at 512 (criticizing *Virginia Electric* for "bypass[ing] the analysis provided for in Rule 19(a)"). See generally Tobias, *supra* note 15, at 773-74 (explaining the relationship between subdivision (a) analysis and subdivision (b) analysis).

184. FED. R. CIV. P. 19(b).

185. *Id.* See *Sindia Expedition, Inc. v. Wrecked & Abandoned Vessel*, 895 F.2d 116, 121 (3d Cir. 1990) ("If a district court failed to make an explicit 19(a) determination but dismissed an action on 19(b) grounds, the appellate court must independently analyze whether an absent party was required to be joined under 19(a)."). Especially in light of a judicial tendency to readily dismiss under subdivision (b) whenever an alternative forum is available, see *infra* note 205, a mere assumption that an absentee is a person whose joinder is required under subdivision (a) would lead to unjustified loss of a federal forum for many plaintiffs.

insurer's absence would be "fully adequate to protect both INA [the insurer] and the parties and the public interest in the termination of disputes."¹⁸⁶ Specifically, because of INA's control of the litigation, it would have been bound by any judgment in favor of the defendants.¹⁸⁷ An examination, however, of the subdivision (a) criteria for determining if a person must be joined if feasible reveals that the very reasons Judge Craven cited for finding the insurer not indispensable under subdivision (b) indicate that INA's joinder would not be required under subdivision (a). If INA controlled the litigation and would be bound by a judgment, the factors listed in subdivision (a) did not require joinder. Complete relief could be afforded; INA's interests were protected; and there was no risk of multiple or inconsistent obligations. INA was not, therefore, a "person to be joined if feasible" within the meaning of Rule 19(a).

Had Judge Craven more carefully considered subdivision (a) of Rule 19, rather than relying exclusively upon the *Aetna dicta*,¹⁸⁸ he may well have reached the same result without ever having had to consider the problem of indispensability under subdivision (b). Of course, had Judge Craven first reached the conclusion, as he should have, that under the circumstances of this case the insured had no claim and only the insurer was entitled to sue, he would have reached an entirely different result, dismissing the case for lack of diversity of citizenship between the insurer and the defendant.¹⁸⁹ As it was, however, *Virginia Electric* authorized a fiction in the naming of the plaintiff that not only permitted the exercise of federal jurisdiction where none in fact existed,¹⁹⁰ but that also permitted the insurer to escape the responsibilities it should have borne as the party in control of the litigation.¹⁹¹ *Virginia Electric*, therefore, in effect, allowed a type of "use plaintiff."¹⁹²

186. *Virginia Elec. & Power Co. v. Westinghouse Elec. Corp.*, 485 F.2d 78, 86 (4th Cir. 1973), *cert. denied*, 415 U.S. 935 (1974).

187. *Id.*

188. *See supra* text accompanying note 178.

189. *Compare Virginia Elec.*, 485 F.2d 78 *with State Sec. Ins. Co. v. Frank B. Hall & Co.*, 109 F.R.D. 99, 101 (N.D. Ill. 1986) (finding that Illinois law did not permit the partially compensated insured to sue for the entire claim and, therefore, dismissing suit because of insurer's non-diverse citizenship).

190. *See infra* part VI.B. *Cf. Potomac Elec. Power Co. v. Babcock & Wilcox Co.*, 54 F.R.D. 486, 492 (D. Md. 1972) ("If indispensability is a benefit which can be waived by a party for the purpose of securing diversity jurisdiction, federal courts would lose control over their jurisdictional boundaries.").

191. *See infra* part VI.B.

192. *See also Garcia v. Hall*, 624 F.2d 150, 152 (10th Cir. 1980) (holding that suit

C. *Misapplying Rule 19(a)(1)*

Other courts have concluded that compensating insurers whose joinder is feasible must be joined under Rule 19(a), but, in contrast to the reliance on outdated precedent found in *Public Service Co.* and *Virginia Electric*, have done so by applying the post-1966 language of the rule. These courts have generally found that Rule 19 is designed to prevent multiple litigation and that such a danger exists if an insured is permitted to sue alone to recover a claim that is partially subrogated.

In *Potomac Electric Power Co. v. Babcock & Wilcox Co.*¹⁹³ defendants moved to dismiss the suit on the grounds that the plaintiff's insurers were real parties in interest under Rule 17(a) and indispensable parties under Rule 19(b).¹⁹⁴ The court first determined that the insurers were real parties in interest.¹⁹⁵ One of the insurers, Royal Indemnity Company, had paid part of the insured's loss under a loan receipt agreement.¹⁹⁶ The agreement provided that Royal would have "exclusive direction and control" of any suit to recover for the loss. In addition, officers of Royal were appointed as agents and attorneys in fact "with irrevocable power" to collect any claim resulting from the loss.¹⁹⁷ The court found that the arrangement was not a bona fide loan and did not avoid the conclusion that the insurer was subrogated and was, therefore, a real party in interest in the suit.¹⁹⁸

In light of the insurer's exclusive control of the claim, the court might have concluded that Royal *alone* was the real party in interest, thus obviating any issue of Rule 19 in the case. The suit could have been dismissed on the ground that the plaintiff insured had no claim to enforce and that substitution of the insurer, Royal, would defeat subject matter jurisdiction because of loss of diverse

may proceed in the name of the insured alone where the partially subrogated insurer is non-diverse and "has instituted this suit in the name of the insured for the entire loss and will be bound by the judgment").

193. 54 F.R.D. 486 (D. Md. 1972).

194. *Id.* at 487. The plaintiff insured had originally brought the suit in its own name "to its own use and to the use of" its two compensating insurers. Upon the defendants' motion to dismiss for lack of diversity jurisdiction between the defendants and the insurers, the plaintiff moved to drop the nondiverse "use plaintiffs." The defendants opposed the motion on the grounds that the insurers were indispensable under Rule 19. *Id.*

195. *Id.* at 489.

196. See Entman, *supra* note 1, at 925-31 (discussing loan receipt agreements).

197. *Potomac Elec.*, 54 F.R.D. at 489.

198. *Id.*

citizenship. Moreover, the court noted in passing that a Maryland rule of procedure required that the insurers be named as parties plaintiff.¹⁹⁹ Had the court examined the Maryland rule and found it to reflect a substantive state policy, the court might have found it controlling.²⁰⁰ Under either rationale, there was sufficient basis in the substantive law for the court's ultimate decision to dismiss the case for lack of diversity, without applying Rule 19. Not appreciating these potential solutions to its case, however, the *Potomac Electric* court turned to compulsory joinder under Federal Rule 19.

The court first noted the plaintiff's heavy reliance on the *Aetna* dicta that neither the insured nor the insurer would be indispensable.²⁰¹ The court rejected that authority both because the statement was dicta and because "that case was decided in 1949, long before Rule 19 was amended and put in its present form emphasizing that pragmatic considerations should be controlling."²⁰² The court then applied amended Rule 19 by finding initially that the insurer was a party whose joinder was required if feasible under subdivision (a)(1). Reasoning that the insurer might be entitled to bring a subsequent action against the defendant if the insurer were dissatisfied with the outcome of the suit brought by its insured, the court found that complete relief would not be "accorded the other parties" in the insurer's absence.²⁰³ The court quoted the Advisory Committee Note to Rule 19, which stated that "the interests that are being furthered [by subdivision (a)(1)] are not only those of the parties, but also that of the public in avoiding repeated lawsuits on the same essential subject matter."²⁰⁴ Next applying subdivision (b), the court decided that the insurers were indispensable, and, therefore, it dismissed the suit.²⁰⁵

199. *Id.* at 492 n.8.

200. *See infra* part VII.

201. *United States v. Aetna Casualty & Sur. Co.*, 338 U.S. 366, 382 n.19 (1949).

202. *Potomac Elec.*, 54 F.R.D. at 493. A number of other courts have declined to rely upon *Aetna* for the same reasons. *See, e.g.*, *Dudley v. Smith*, 504 F.2d 979, 983 (5th Cir. 1974) (distinguishing *Aetna* on the facts); *Kint v. Terrain King Corp.*, 79 F.R.D. 10, 11 n.3 (M.D. Pa. 1977) (stating that "detailed step-by-step analysis is necessary notwithstanding the dicta in . . . *Aetna* . . . where . . . the Court stated that partially subrogated insurers are necessary parties under Rule 19").

203. *Potomac Elec.*, 54 F.R.D. at 490.

204. *Id.*

205. *Id.* at 491. The court explained that the subdivision (b) factor that it considered most determinative was that an alternative forum—a state court—was available in which all parties could be joined. *Id.* The court also noted its concern with the possibility that the nonjoined insurers would be entitled to relitigate the case, or at least to force the de-

The *Potomac Electric* court's interpretation of Rule 19(a)(1) is one that has been rejected by most authorities, including a number of well-reasoned federal court opinions. In finding that Rule 19(a)(1) identified the insurer as a person to be joined if feasible, the court ignored the plain and specific language of Rule 19(a)(1), which is that absence of the non-party will prevent "complete relief among those *already* parties." The *Potomac Electric* court's concern about a subsequent lawsuit prosecuted by the non-party insurer against the defendant is not relevant to the question of complete relief between those *already* parties—the insured and the defendant. The specific language of subdivision (a)(1) does not encompass consideration of all claims of all persons, parties and non-parties, that may have arisen from the events being litigated. The word "already" in the rule excludes consideration of affording complete relief among parties and those not "already" parties. The Advisory Committee's comment, cited by the *Potomac Electric* court, about the public interest "in avoiding repeated lawsuits on the same essential subject matter," was made solely in the context of clause (1), which is concerned only with those already parties.²⁰⁶ The comment, therefore, should only be taken to mean that Rule 19(a)(1)'s purpose is to avoid repeated lawsuits on the same transaction among those who are already parties to the action.

To construe Rule 19(a)(1) as did the court in *Potomac Electric* would be, in effect, to swallow up a major portion of Rule 20, which provides for permissive joinder of parties plaintiff and defendant. Rule 20 provides for permissive joinder of parties if the claims asserted by or against them arise out of the same transaction or occurrence and if any common question of law or fact will arise in the action.²⁰⁷ To read Rule 19, as did the *Potomac Elec-*

fendants to prove in another court that principles of res judicata or collateral estoppel would bar such relitigation. Nonetheless, the court stated that if no alternative forum were available, it would have no hesitation in concluding that the suit should proceed without the insurers. *Id.* at 492. See also *Reliance Ins. Co. v. Wisconsin Natural Gas Co.*, 60 F.R.D. 429, 431 (E.D. Wis. 1973) (holding that the insured was an indispensable party under Rule 19(b)); Freer, *Rethinking Compulsory Joinder*, *supra* note 15, at 1077-78 (noting that federal courts have elevated the alternative forum question to primary importance in Rule 19(b) analysis).

206. FED. R. CIV. P. 19 advisory committee's note to 1966 amendment.

207. FED. R. CIV. P. 20 provides in pertinent part:

- (a) Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons

tric court, to require joinder of a nonparty merely because that person has a claim arising from the same "essential subject matter"²⁰⁸ is to make Rule 19 compulsory joinder coterminous with Rule 20 permissive joinder.

Prior to 1990, a similar failure to appreciate the interrelationship between Rules 19 and 20 had arisen in the context of defendants' Rule 19 motions to require plaintiffs to join potential joint tortfeasors as defendants. Although the well-established rule has long been that joinder of all joint tortfeasors is not required,²⁰⁹ some recent decisions, in flagrant opposition to the Advisory Committee's Note to amended Rule 19,²¹⁰ had held that Rule 19(a)(1) should be construed to require the joinder of potential joint tortfeasors.²¹¹ In *Temple v. Synthes Corp.*,²¹² however,

will arise in the action. All persons . . . may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action.

208. *Potomac Elec. Power Co. v. Babcock & Wilcox Co.*, 54 F.R.D. 486, 490 (D. Md. 1972). See also *Blacks v. Mosley Mach. Co.*, 57 F.R.D. 503, 506 (E.D. Pa. 1972) (ordering an insurance carrier with a workers' compensation lien joined as a plaintiff under Rule 19(a), even though the insurer did not institute the proceedings or control the litigation, because "its interests are the same as plaintiff's"). Two years later, the author of the *Blacks* opinion, Judge Newcomer, held that joinder of a subrogated insurer was not required by Rule 19, in part because any judgment in the insured's action would be binding on the insurer because of the insurer's control of the action. *White Hall Bldg. Corp. v. Profexray Div. of Litton Indus.*, 387 F. Supp. 1202, 1207 (E.D. Pa. 1974), *aff'd mem.*, 578 F.2d 1377 (3d Cir. 1978) and *aff'd mem. sub nom. Quaglia v. Profexray Div. of Litton Indus.*, 578 F.2d 1375 (3d Cir. 1978). Judge Newcomer got it exactly backwards. The insurer in *Blacks* should not have been joined because it had no right to sue, while the insurer in *White Hall* should have been the sole plaintiff.

209. *Temple v. Synthes Corp.*, 498 U.S. 5, 7 (1990).

210. The Advisory Committee's Note to 1966 amendment reads:

[T]he description [of persons to be joined if feasible under rule 19(a)] is not at variance with the settled authorities holding that a tortfeasor with the usual 'joint-and-several' liability is merely a permissive party to an action against another with like liability Joinder of these tortfeasors continues to be regulated by Rule 20; compare Rule 14 on third-party practice.

211. See, e.g., *Whyham v. Piper Aircraft Corp.*, 96 F.R.D. 557, 560 (M.D. Pa. 1982) (finding that joint tortfeasors were "necessary" parties because all three criteria of subdivision (a) were satisfied and stating that "[t]he goal of Rule 19(a)(1) is to protect the interests of the parties by affording complete adjudication of the dispute"); see also *Wisconsin Creek Watershed v. Kocher Coal Co.*, 641 F. Supp. 712, 715-16 (M.D. Pa. 1986) (following *Whyham*).

212. 498 U.S. 5 (1990).

the Supreme Court firmly established that Rule 19 embodies the traditional rule against compulsory joinder of all joint tortfeasors. The Court acknowledged that the *Provident Tradesmens*²¹³ opinion had identified the public interest in limiting multiple litigation as a focus of Rule 19, but it further noted that the Court's recognition of that interest in *Provident Tradesmens* arose in the context of a subdivision (b) analysis.²¹⁴ Regarding the joint tortfeasor situation, the Court in *Temple* explained that, "[h]ere, no inquiry under Rule 19(b) is necessary, because the threshold requirements of Rule 19(a) have not been satisfied."²¹⁵ The Court then reached a correct conclusion under subdivision (a), but did so unfortunately in the old language of labels, without explaining the result in terms of the rule itself. The Court simply stated that "[a]s potential joint tortfeasors with Synthes, Dr. LaRocca and the hospital were merely permissive parties."²¹⁶ Other courts reaching the same result have been more fastidious in pointing out that Rule 19(a)(1) refers only to complete relief among those who are already parties, and that it does not protect defendants from the necessity of pursuing their contribution or indemnity claims in a separate lawsuit.²¹⁷

Because it was concerned with compulsory joinder of plaintiffs, the Third Circuit opinion in *Field v. Volkswagenwerk AG*,²¹⁸ is even more to the point. Ivana Field was injured in a single car accident while driving a Volkswagen van. Ivana's husband, Arthur, was killed, and her stepson, Michael, injured. Ivana filed suit against Volkswagenwerk AG (VWAG) individually for her own injuries and also in her capacity as administratrix of her husband's estate. In addition, Michael Field's guardian, his mother, asserted a claim as a co-plaintiff seeking to recover for Michael's injuries. After the suit was filed, it was learned that diversity jurisdiction was lacking because of Ivana's Czechoslovakian citizenship. In response to the defendant VWAG's motion to dismiss, Ivana

213. *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968).

214. *Temple*, 498 U.S. at 7-8.

215. *Id.* at 8.

216. *Id.*

217. See, e.g., *Field v. Volkswagenwerk AG*, 626 F.2d 293, 298 (3d Cir. 1980) (pointing out that Rule 19(a) does not protect defendant from having to pursue independent indemnity claim); *Bedel v. Thompson*, 103 F.R.D. 78, 80-81 (S.D. Ohio 1984) ("The 'complete relief' provision of Rule 19 relates to those persons already parties and does not concern any subsequent relief via contribution or indemnification for which the absent party might later be responsible.").

218. 626 F.2d 293 (3d Cir. 1980).

sought a voluntary dismissal of her individual claim. She also took the necessary steps under New York law to have Michael's mother substituted as administratrix of Arthur Field's estate.²¹⁹

Defendant VWAG took the position, and the district court agreed, that the entire suit must be dismissed because Ivana Field was an indispensable party to the suit by her stepson and the estate of her husband.²²⁰ The district court apparently based its decision on the assumption that Ivana's negligence was an issue in the case and that without Ivana as a party, VWAG would "be unable to assert Ivana's negligence against the claims of the remaining parties."²²¹

In a carefully reasoned opinion, the Third Circuit held that Ivana was not a party whose joinder was required under the criteria of Rule 19(a).²²² With regard to Ivana's role as a co-plaintiff, the court explained that Ivana's absence as a party did not preclude the court from according "complete relief among the parties," as contemplated by subdivision (a)(1), simply because VWAG might later have to defend against a separate action brought by Ivana in her individual capacity. The court explained that if Ivana's joinder were required, "the distinction between Rules 20 and 19 would be rendered practically meaningless. For in just about every case of permissive joinder under Rule 20 the proper party in question, if not joined, would be able to assert rights against the defendant in a separate action."²²³ Because Ivana was not even a party to be

219. *Id.* at 295.

220. *Id.* at 296.

221. *Id.* at 297-98.

222. *Id.* at 302. In contrast to some courts' backwards approach to subdivisions (a) and (b) of Rule 19, see *supra* notes 181-85 and accompanying text, the court in *Field* noted the importance of analyzing subdivision (a) first. *Field*, 626 F.2d at 300.

Discussing the argument that Ivana's negligence rendered her a joint tortfeasor who must be joined as a defendant, the court noted that VWAG would suffer no prejudice from the dismissal of Ivana as a party. If VWAG wished to assert a right of contribution or indemnity against Ivana, it would be able to do so by bringing a third-party claim against Ivana pursuant to Fed. R. Civ. P. 14. *Id.* at 298.

223. *Field*, 626 F.2d at 301. The court also quoted *Moore's Federal Practice* for the proposition that "mere theoretical considerations of disposing of the whole controversy should not be employed to dismiss an action where it appears unlikely that absent persons could be adversely affected." *Id.* (quoting 3A MOORE ET AL., *supra* note 108, ¶ 19.07-1[1], at 19-93 to 19-97). See also *Arkwright-Boston Mfrs. Mut. Ins. Co. v. City of New York*, 762 F.2d 205 (2d Cir. 1985), in which the subrogated insurers alone brought suit and the defendant moved to dismiss on the ground that the non-diverse insured, which retained a \$100,000 deductible interest, was an indispensable party. The Second Circuit affirmed the district court's denial of the motion, explaining that Rule 19(a)(1) refers only to complete relief among those already parties. Citing *Aetna*, the court further noted: "The

joined if feasible, the lawsuit could proceed in her absence and there was no reason to deny her motion to dismiss her claim.

Rule 19(a)(1) is not a broad prohibition against multiple litigation. Even if both insured and insurer have separate claims under the substantive law, Rule 19(a)(1), properly understood, does not provide the defendant a remedy for nonjoinder of the absent insurer.²²⁴ Although the remedy, if there is to be one,²²⁵ may be found in other rules,²²⁶ some federal courts have sought a basis for requiring joinder of compensating insurers in another subdivision of Rule 19.

D. Misapplying Rule 19(a)(2)(ii)

Other courts have required joinder of subrogated insurers out of a concern for preventing multiple litigation, but have relied upon subdivision (a)(2)(ii) of Rule 19(a). This subdivision requires joinder, if feasible, of a person who "claims an interest relating to the subject of the action, and is so situated that the disposition of the action in the person's absence may . . . leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest."²²⁷

In *Childers v. Eastern Foam Products, Inc.*,²²⁸ the court required joinder of a partially subrogated insurer on the basis of subdivision (a)(2)(ii). The court in *Childers* began by examining the substantive rights of the compensating insurer to determine

fact that the defendants may be required to defend more than one action arising from the same tort is not grounds for finding the insured an indispensable party to its insurer's partial subrogation action." *Id.* at 209.

224. It may seem curious that the rules drafters created a rule with so unambitious a reach. Professor Bone suggests that the rules drafters have never had a clear idea of what "complete relief" means. Bone, *supra* note 15, at 112. Professor Bone further noted, however, that modern concern with efficiency may "breathe new life" into subdivision (a)(1). *Id.* at 77 n.249. Cases such as *Potomac Electric* would seem to prove his point. Professor Freer at one time suggested elimination of subdivision (a)(1), reasoning that, "[b]ecause most courts do interpret Rule 19(a)(1) correctly, very few invoke it Thus, Rule 19(a)(1) has had minimal impact on the compulsory joinder doctrine." Freer, *Rethinking Compulsory Joinder*, *supra* note 15, at 1081-82. Later, however, Professor Freer proposed that subdivision (a)(1) be "redrafted and invigorated to allow the court to consider whether failing to join the absentee creates a manifest risk of multiplicity." Freer, *Avoiding Duplicative Litigation*, *supra* note 15, at 844.

225. See *infra* part VII.

226. See *infra* part VI.A.

227. FED. R. CIV. P. 19(a)(2)(ii).

228. 94 F.R.D. 53 (N.D. Ga. 1982).

whether it was a real party in interest.²²⁹ The court found that the absentee insurer was a subrogee and real party in interest on the basis of a Georgia appellate court holding that insured and partially compensating insurer each own part of the claim and “[e]ach owner of a part of the claim has a cause of action and may sue by joining the other part owner.”²³⁰

Without further mention of the Georgia rule mandating joinder, the court then turned to Federal Rule 19(a)(2)(ii). The court expressed its concern that because the insurer was not a party, the defendant would be faced with the “substantial risk” of defending against the insurer should the defendant prevail or the plaintiff insureds recover only part of their claim.²³¹

The *Childers* court acknowledged that many cases had held joinder of the insurer-subrogee not required under Rule 19(a), some relying upon the assumption that a non-party who controls litigation is bound by the outcome.²³² Nonetheless, the court concluded that, as joinder was feasible, it was “desirable,” because joinder would eliminate any uncertainty about the insurer’s subsequent rights against the defendant.²³³

Childers illustrates, once again, a court reading Rule 19(a) so broadly that it is indistinguishable from permissive joinder under Rule 20. “Desirable” joinder should not be equated with compulsory joinder.²³⁴ Rule 19(a)(2)(ii) speaks of protecting the parties from “multiple, or otherwise inconsistent obligations.” The rule does not speak of preventing multiple litigation or even of preventing inconsistent judgments, although some courts have read the rule in such a fashion. For example, in *Whyham v. Piper Aircraft*

229. *Id.* at 55-57. This inquiry was particularly complicated in *Childers* by the fact that the insurer had made part of its payments to the insured through a loan receipt agreement. With regard to loan receipts and subrogation, see Entman, *supra* note 1, at 925-31.

230. 94 F.R.D. at 57 (citing *Lindsey v. Samoluk*, 219 S.E.2d 464, 464 (1975), *rev'd on other grounds*, 223 S.E.2d 147 (1976)).

231. *Id.*

232. *Id.* See *infra* part VI.A.1.

233. *Childers*, 94 F.R.D. at 58. See also *Reliance Ins. Co. v. Wisconsin Natural Gas Corp.*, 60 F.R.D. 429, 431 (E.D. Wis. 1973) (holding the insured indispensable in a suit by the subrogated insurer, the court stated without explanation that the defendant “may be subject to inconsistent obligations”).

234. The *Childers* court’s use of this term may be attributable to the Advisory Committee’s statement that, “[n]ew subdivision (a) defines the persons whose joinder in the action is desirable.” FED. R. CIV. P. 19 advisory committee’s note to the 1966 amendment.

Corp.,²³⁵ a Pennsylvania federal district court found that joint tortfeasors were parties who must be joined under subdivision (a)(2)(ii) because the defendant had a right of contribution that would have to be adjudicated "in an unnecessary second suit."²³⁶ The *Whyham* court also reasoned that two trials might result in different or contradictory findings of the tortfeasors' proportion of liability, which would result in "inconsistent obligations."²³⁷

This misreading of Rule 19(a)(2)(ii) was rejected by an Ohio federal district court in *Bedel v. Thompson*,²³⁸ in which the defendant Jones & Co. argued that a bankrupt corporation, D.H. Baldwin Co., was an indispensable party because of Jones's right of contribution or indemnification against Baldwin. The court explained that the defendant Jones was not subject to inconsistent obligations within the meaning of subdivision (a)(2)(ii) merely because of the possible inconsistent results that would occur if Jones were found liable to the plaintiff and, in another action, Baldwin found not liable to Jones.²³⁹ The *Childers* court was concerned with a risk of multiple litigation if the defendant prevailed or the insured recovered only a part of his claim.²⁴⁰ But as the *Bedel* court pointed out, Rule 19(a)(2)(ii) is designed to prevent multiple or inconsistent obligations, not to prevent multiple or inconsistent litigation or results.²⁴¹

235. 96 F.R.D. 557 (M.D. Pa. 1982).

236. *Id.* at 561.

237. *Id.* See also *Wisconisco Creek Watershed v. Kocher Coal Co.*, 641 F. Supp. 712, 715-16 (M.D. Pa. 1986) (following *Whyham*).

238. 103 F.R.D. 78 (S.D. Ohio 1984).

239. *Id.* at 81 (citing 3A MOORE ET AL., *supra* note 108, ¶ 19.07-1[2-2]). See also *Boone v. General Motors Acceptance Corp.*, 682 F.2d 552, 554 (5th Cir. 1982) (holding that the threat of inconsistent obligations, not the possibility of multiple litigation, determines Rule 19 considerations); *Field v. Volkswagenwerk AG*, 626 F.2d 293, 298 (3d Cir. 1980) (holding that failure to join all possible defendants does not necessarily lead to inconsistent results, although it may lead to subsequent litigation). For situations that present an actual threat of inconsistent obligations, not merely inconsistent results, see *Shimkus v. Gersten Co.*, 816 F.2d 1318 (9th Cir. 1987) (holding in housing discrimination suit by class of black persons against property management business that non-black minorities must be joined as plaintiffs because obligations to give preferential treatment will at some point become inconsistent); *Helzberg's Diamond Shops v. Valley W. Des Moines Shopping Ctr.*, 564 F.2d 816 (8th Cir. 1977) (finding absentee a party to be joined if feasible because of risk of subjecting defendant to inconsistent contractual obligations, but concluding that the absentee was not indispensable); Freer, *Rethinking Compulsory Joinder*, *supra* note 15, at 1090-96 (discussing protecting the defendant in compulsory joinder cases).

240. *Childers v. Eastern Foam Prod.*, 94 F.R.D. 53, 57 (N.D. Ga. 1982).

241. This is not to say that avoidance of multiple litigation is not at all a concern of

What the *Childers* court failed to appreciate was that its concern with preventing multiple litigation had been addressed, not by federal Rule 19, but by the Georgia law of subrogation that should have been followed by the federal court. In defining the rights of insured and insurer in the circumstance of partial compensation, the Georgia court had held that the right of each to sue was conditioned upon joinder of the other as plaintiff.²⁴² The *Childers* court might have found, as part of its initial inquiry into whether the plaintiff insured was a real party in interest, that the insured was entitled to sue only upon joinder of the insurer. Requiring joinder on that basis would have generated the same result without an expansive and incorrect reading of Rule 19.

A few cases have noted, however, a more genuine danger of multiple obligations when the insured alone sues to recover a claim that is partially subrogated. If a successful plaintiff-insured fails to reimburse his insurer, and the insurer is then permitted to assert its subrogation claim against the defendant, the defendant may be obliged to pay twice for the same injury.

In some of the decisions holding that Rule 19(a) does not require joinder of the subrogated insurer, courts have recognized this problem, but have concluded that it can be remedied by means short of requiring joinder. For example, in *O'Brien v. Tri-State Oil*

Rule 19. The societal interest in the efficient administration of justice has been, from the beginning, a concern underlying the development of rules of compulsory joinder. *See supra* part III.B. Rule 19(a), however, is not broad enough to incorporate that interest as a reason for requiring joinder, except with regard to subsequent litigation between those already parties. *See Bone, supra* note 15, at 110-14 (stating that compulsory joinder does not reach as far as permissive joinder because the 1938 rules drafters did not believe that concerns for efficiency ought to limit the autonomy of the litigants); *supra* text accompanying note 206.

On the other hand, the Supreme Court has found that avoidance of multiple litigation is to be taken into account in determining, under Rule 19(b), whether the suit should be dismissed or allowed to proceed without the absentee who cannot be joined. In *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 111 (1968), the Court stated:

Fourth, there remains the interest of the courts and the public in complete, consistent, and efficient settlement of controversies. We read the Rule's [19(b)'s] third criterion, whether the judgment issued in the absence of the nonjoined person will be 'adequate,' to refer to this public stake in settling disputes by wholes, whenever possible

See Temple v. Synthes Corp., 498 U.S. 5, 7-8 (1990) (noting that *Provident Tradesmens'* discussion of the public interest in limiting multiple litigation is in the context of subdivision (b), not subdivision (a)); Tobias, *supra* note 15, at 777.

242. *See supra* note 230 and accompanying text.

Tool Industries,²⁴³ the defendant moved the court to join as a party plaintiff a workers' compensation insurer that had a statutory subrogation lien on the plaintiff's recovery. The defendant contended that without joinder, it would be subject to multiple or inconsistent obligations as described in Rule 19(a)(2)(ii).²⁴⁴ The defendant's argument in *O'Brien* presupposed that the insurer would be entitled to bring an action against the defendant to enforce its right to reimbursement. This supposition was not acknowledged or examined by the court in *O'Brien*, but in most workers' compensation schemes, the insurer would not have such a right, particularly after the employee had filed suit.²⁴⁵ Both by contract and under the general law of subrogation, an insurer's exclusive remedy when its insured recovers from a third party but neglects to reimburse the insurer is directly against the insured.²⁴⁶ In any event, the court in *O'Brien* did not find joinder of the insurer under Rule 19(a) necessary in order to protect the defendant from the plaintiff's failure to reimburse the insurer. Rather, the court suggested that it would entertain a motion that if the plaintiff obtained a verdict, the judgment order would require the parties to satisfy the judgment in a fashion consistent with the insurer's lien interest under the workers' compensation law.²⁴⁷ The court explained that such a procedure would provide the protection Rule 19(a) was designed to afford while avoiding the addition of another party at a late stage in the litigation.²⁴⁸ Like the *O'Brien* court, other courts have concluded that the risk of multiple obligations can be prevented without joinder simply by protecting the insurer's

243. 566 F. Supp. 1119 (S.D. W. Va. 1983).

244. *Id.* at 1124.

245. *See supra* part II.

246. The defendant is also protected from multiple obligations in the event of a settlement with the insured because the substantive law of subrogation generally provides that an insured's release of a tortfeasor bars the insurer from asserting its subrogation claim, unless the tortfeasor had knowledge of the insurer's interest. The insurer's remedy for a release that impairs its subrogation interest is against the insured, not against the defendant who accepted the release in good faith. *See Entman, supra* note 1, at 909 n.102.

These protections also explain why reference to subdivision (a)(2)(i) is largely absent from judicial decisions about joinder of compensating insurers. Subdivision (a)(2)(i) is designed to protect the absentee when disposition of the action without him may impair his ability to protect his interest. *See generally* Tobias, *supra* note 15. When suit is brought by the insured, however, the absentee insurer is protected by its agreement with its insured. The insurer, moreover, may be in actual control of the litigation, and generally is resisting the joinder.

247. *O'Brien*, 566 F. Supp. at 1124.

248. *Id.*

pecuniary interest in any judgment obtained by the insured.²⁴⁹

249. See *Dudley v. Smith*, 504 F.2d 979, 983 (5th Cir. 1974) ("Any multiplicity of suit risk can be obviated by final judgment of the district court at the request of appellant."); *Clark v. Hutchison*, 161 F. Supp. 35, 39 (D.C.Z. 1957) (denying compulsory joinder of insurers, but responding to the defendant's concern about further litigation should the plaintiff fail to reimburse the subrogees, the court stated that it would "entertain a motion to make them parties for the purpose of precluding double recovery and directing that they receive their proportionate share of the judgment rendered"); *Braniff Airways v. Falkingham*, 20 F.R.D. 141, 144-45 (D. Minn. 1957) (stating that insured's "recovery may be impressed with a trust in favor of the party claiming the right to subrogation").

Occasionally an insurer that is not entitled to assert a claim directly against the defendant will seek to intervene for the limited purpose of protecting its lien or interest in the plaintiff's judgment. In *Strate v. Niagara Mach. & Tool Works*, 160 F. Supp. 296 (S.D. Ind. 1958), the federal court granted a workers' compensation insurer's motion for limited intervention, enforcing an Indiana statute granting the insurer a right to intervene to protect its statutory lien. A federal court will not be able to permit the insurer's intervention, however, if joinder of the insurer will defeat complete diversity of citizenship upon which the court's subject matter jurisdiction depends. The subject matter jurisdiction limitation is more likely to bar intervention since the 1990 enactment of the supplemental jurisdiction statute, 28 U.S.C. § 1367. The statute provides that federal courts shall not have supplemental jurisdiction over "claims by plaintiffs against persons made parties under Rule . . . 24 of the Federal Rules of Civil Procedure, or over claims by persons . . . seeking to intervene as plaintiffs under Rule 24 . . . when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332." 28 U.S.C. § 1367(b) (1990); see LARRY L. TEPLY & RALPH U. WHITTEN, *CIVIL PROCEDURE* 670-79 (1994) (discussing interpretations and effect of 28 U.S.C. § 1367(b) with regard to intervention).

Illustrative of the problem is *Krueger v. Cartwright*, 996 F.2d 928 (7th Cir. 1993), in which an insurer that had paid \$19,268.25 in economic losses to its insured sought to participate in the insured's diversity action against a tortfeasor. The insurer sought either to assert its statutory lien on a proposed \$75,000 settlement or, in the alternative, to assert its subrogation claim against the defendant. The trial court adjudicated the issue of the insurer's lien, determining that the settlement did not include economic losses, and then dismissed the insurer's claim against the defendant for want of jurisdiction, apparently because the insurer and the defendant were not of diverse citizenship. Although the court of appeals did state at one point that the trial court had granted the insurer's "motion to intervene," *id.* at 930, the insurer had moved to "be joined as a party plaintiff under Rule 19(a)." *Id.* at 932. The court of appeals analyzed the issue as one of whether the insurer was a party that could be joined without defeating the court's jurisdiction within the meaning of Rule 19(a). Having concluded that the district court lacked supplemental jurisdiction and that joinder would in fact defeat diversity, the court of appeals then concluded that the insurer was not a party whose presence was indispensable under the 19(b) criteria and that the insurer was thus improperly joined as a party-plaintiff. *Id.* at 934.

If the question in *Krueger* is viewed solely as one of compulsory joinder, the court of appeals' analysis may have been correct. Had the court of appeals, however, analyzed the issue simply as one of intervention under Rule 24(a), as the trial court apparently did, it might have affirmed the trial court's holding and result. With regard to its asserted lien, the insurer was not seeking to intervene as a plaintiff. Rather the insurer was asserting a claim adverse to the plaintiff, which was not excluded by the provisions of § 1367(b). Consequently, the insurer's claim of a lien on the plaintiff's settlement was within the court's supplemental jurisdiction, although there was no independent or supple-

VI. REASONS FOR REQUIRING JOINDER OF SUBROGATED INSURERS

A. *The Problem of Multiple Litigation*

Although Rule 19 properly applied does not provide a solution, preventing multiple litigation is a particularly compelling goal in the context of insurance subrogation. Regardless of whether broad joinder of plaintiffs should be generally required for the purpose of efficiency in litigation,²⁵⁰ insurance subrogation presents particular reasons for requiring joinder. Ordinarily, when several claimants are injured in the same transaction and their claims thus depend largely upon common questions of law or fact, the claimants nonetheless possess distinct claims, which may be subject to distinct defenses. A compensating insurer's subrogation claim, on the other hand, is entirely derivative of the insured's claim. The only issue unique to the insurer's claim is its right to subrogation.²⁵¹

More importantly, subrogation may give more than one person the right to assert the identical claim. Multiple claimants injured by the same transaction are not entitled to assert each other's claims and, therefore, the defendant in such a case does not face the possibility of defending the identical claim twice—only the prospect of defending two suits arising from the same transaction. If the substantive law of subrogation, on the other hand, permits an insurer to state a claim for relief for its portion of the loss after the insured has unsuccessfully prosecuted the entire claim, a defendant is faced with twice defending the identical claim. Even if the insured is entitled to assert only its own portion of the claim, while the insurer is entitled to assert the subrogated portion, the defendant is still placed in the position of twice defending against what was, at

mental basis for jurisdiction over the insurer's claim against the defendant.

250. See Freer, *Avoiding Duplicative Litigation*, *supra* note 15, at 844 (advocating broadening compulsory joinder to avoid the risk of multiple litigation, especially to force joinder of plaintiffs in "transactionally related tort cases").

251. See *Edwards, Inc. v. Arlen Realty & Dev. Corp.*, 466 F. Supp. 505, 513 (D.S.C. 1978):

[T]he insurance company's claim is by way of contractual or common-law subrogation and is therefore purely derivative of the insured's claim. The insurance company's claim rises and falls on the same facts, is subject to the same prima facie burdens of proof, and same defenses as if the claim had never been assigned and the insured never indemnified.

the time it originally occurred, a single claim.

Some federal courts have suggested that doctrines other than compulsory joinder—*res judicata* and ratification—provide defendants with sufficient protection from multiple litigation. Neither of these other doctrines, however, offers a sufficient remedy to problems of multiple litigation left by Rule 19. For reasons set forth below,²⁵² *res judicata* does not provide a fully adequate remedy. Ratification, on the other hand, would seem to cure the problem of multiple litigation, but its use as a device for preventing further litigation brought by a previously unnamed insurer may not be authorized by the federal rules and may also interfere with other important policies that depend upon the proper naming of parties.²⁵³

1. Res Judicata as a Remedy

A few federal courts that have assumed, as did the courts in *Potomac Electric*²⁵⁴ and *Childers*,²⁵⁵ that Rule 19 is designed to prevent multiple litigation, have concluded, nonetheless, that compulsory joinder of the subrogated insurer is unnecessary and not required by the rule. These decisions have reasoned that the nonjoined insurer will, under principles of *res judicata*, be bound by a judgment in the insured's suit. Thus, these courts have concluded, none of the Rule 19(a) criteria, including the perceived goal of obviating multiple litigation, requires joinder.²⁵⁶

252. See *infra* part VI.A.1.

253. See *infra* part VI.A.2.

254. *Potomac Elec. Power Co. v. Babcock & Wilcox Co.*, 54 F.R.D. 486 (D. Md. 1972) (discussed *supra* part V.C).

255. *Childers v. Eastern Foam Prods., Inc.*, 94 F.R.D. 53 (N.D. Ga. 1982) (discussed *supra* part V.D).

256. See *Glacier Gen. Assurance Co. v. G. Gordon Symons Co.*, 631 F.2d 131, 134 (9th Cir. 1980) (stating that joinder of reinsurers is not required under Rule 19(a) because defendants "are protected from future actions by the reinsurers"); *Dudley v. Smith*, 504 F.2d 979, 983 (5th Cir. 1974) (finding Rule 19(a) requires joinder when there is a substantial risk of "multiplicity of suits," but requirement of 19(a) not met when insured sues for the full amount of the loss); *Tucson Elec. Power Co. v. Bailey Controls Co.*, 145 F.R.D. 102, 105 (D. Ariz. 1992) (finding criteria of Rule 19(a) do not reach insurer); *Prudential Lines v. General Tire Int'l Co.*, 74 F.R.D. 474, 475 (S.D.N.Y. 1977) ("*res judicata* would protect the defendant from another suit"); *White Hall Bldg. Corp. v. Profexray Div. of Litton Indus.*, 387 F. Supp. 1202, 1206 (E.D. Pa. 1974) (finding non-party is bound by a judgment "if he had a sufficient interest in the suit and participated in and controlled the litigation;" therefore, Rule 19 does not require joinder of insurers), *aff'd mem.*, 578 F.2d 1377 (3d Cir. 1978) and *aff'd mem. sub nom. Quaglia v. Profexray Div. of Litton Indus.*, 578 F.2d 1375 (3d Cir. 1978). These cases also are notable for their rejection of pre-1966 precedent, including *Aetna*, in favor of performing the flexible

The reasons given by these courts, however, for finding that the nonjoined insurer will be bound by the insured's judgment are not entirely satisfactory. It may be true that a judgment for the insured for the entire claim with a trust in favor of the insurer would provide a quick and sufficient basis for disposing of a second lawsuit simply because the insurer's claim is subject to the defense of accord and satisfaction. But what if the judgment is for the defendant, or if the judgment is in an amount that is not satisfactory to the insurer? Courts citing the *res judicata* solution typically do not fully examine the adequacy of that doctrine as a protection for the defendant. For example, in *Prudential Lines, Inc. v. General Tire International Co.*,²⁵⁷ the court reached the conclusion that the non-party insurer would be bound because the insurer was "in privity with [the] plaintiff since it authorized plaintiff to prosecute this action."²⁵⁸ The court did not explain, however, what acts by the insurer had authorized the plaintiff to bring the action. In *Tucson Electric Power Co. v. Bailey Controls Co.*,²⁵⁹ the court stated that the insurer "as a nonparty in control of the litigation, will be precluded from relitigating [its insured's] claims."²⁶⁰

analysis under amended Rule 19 that the Supreme Court called for in *Provident Tradesmens*. In *Dudley v. Smith*, the Fifth Circuit distinguished *Aetna* and other contrary authority by pointing out that these cases had not been reasoned in terms of the Rule 19 criteria. 504 F.2d at 983. Courts also have distinguished *Aetna* on the ground that *Aetna* did not involve a question of compulsory joinder of an insurer and, thus, its pronouncement that the insurers were "necessary" parties was dicta. *White Hall Bldg. Corp.*, 387 F. Supp. at 1207; *Prudential Lines*, 74 F.R.D. at 475.

257. 74 F.R.D. 474 (S.D.N.Y. 1977).

258. *Id.* at 476.

259. 145 F.R.D. 102 (D. Ariz. 1992).

260. *Id.* at 105. See *Glacier General*, 631 F.2d at 134 (stating that the defendants "are protected from future actions by the [insurers]") (citing *Virginia Elec. & Power Co. v. Westinghouse Elec. Corp.*, 485 F.2d 78, 84 & n.15. (4th Cir. 1973), *cert. denied*, 415 U.S. 935 (1974)). The citation to *Virginia Electric* is apparently to that court's assertion that, "[e]ven without joinder the partial subrogee is generally precluded from bringing a subsequent action . . . where a judgment has been rendered in a suit by the subrogor for the entire loss." 485 F.2d at 84. The Ninth Circuit gave no reason, other than the Fourth Circuit's statement about what is "generally" true, in support of its conclusion that the non-party insurers would be bound by its decision in the case before it. In *Virginia Electric*, moreover, the insurer had agreed to be bound by any judgment, *id.* at 83 n.3, but there is no indication of such an agreement in *Glacier General*.

See also the court's observation in *Celanese Corp. v. John Clark Indus.*, 214 F.2d 551, 556 (5th Cir. 1954):

It was understood by all that the counsel for the insurance companies were in active conduct of the suit and the judgment entered would have barred them

These courts may indeed be correct in their predictions that the insurer will be bound, either because of the insurer's control of the insured's action,²⁶¹ or because the insurer is deemed to have been represented in the litigation by the plaintiff insured.²⁶² What these courts fail to appreciate, however, is that without joinder of the insurer, the defendant may be required to litigate the res judicata issue in a subsequent suit brought by the insurer under circumstances that pose considerable risk. As at least one court has observed, a court rendering judgment in a suit brought only in the name of the insured cannot conclusively determine the res judicata effect of that judgment in a subsequent action brought by the insurer in its own name, and it may be unfair to require the defendant to rely upon a future determination of the res judicata effect of the judgment.²⁶³ To prevail in establishing the res judicata de-

whether or not they were actually in the cause, so that defendant was at no time concerned with the question of lack of finality of the judgment or the possibility of its being again sued.

See also Acro Automation Sys. v. Iscont Shipping Ltd., 706 F. Supp. 413, 422 (D. Md. 1989) (stating that the insurer's "complete control over the present litigation will preclude it from relitigating any of the issues which will be litigated in this action"); *White Hall Bldg. Corp.*, 387 F. Supp. at 1207 (stating that insurers will be bound "even though they are not parties of record, because of their interest in and control of plaintiff's case") (discussed *supra* note 208).

261. *See* *Montana v. United States*, 440 U.S. 147, 155-58 (1979) (holding that although United States was not a party to prior litigation, it had exercised sufficient control to be bound by principles of res judicata); RESTATEMENT (FIRST) OF THE LAW OF JUDGMENTS § 84 (1942):

A person who is not a party but who controls an action, individually or in cooperation with others, is bound by the adjudications of litigated matters as if he were a party if he has a proprietary or financial interest in the judgment or in the determination of a question of fact or of a question of law with reference to the same subject matter or transaction; if the other party has notice of his participation, the other party is equally bound.

See also RESTATEMENT (SECOND) OF THE LAW OF JUDGMENTS § 39 (1982) ("A person who is not a party to an action but who controls or substantially participates in the control of the presentation on behalf of a party is bound by the determination of issues decided as though he were a party."). As comment b to § 39 states: "The rule stated in the Section applies to issue preclusion, and not to claim preclusion, because the person controlling the litigation, as a non-party, is by definition asserting or defending a claim other than one he himself may have." *Id.*

262. *See* RESTATEMENT (SECOND) OF THE LAW OF JUDGMENTS § 41 (1982). There is also no risk of multiple litigation, of course, if the insurer has no right of subrogation following an action by the insured. *See* *Cleaves v. DeLauder*, 302 F. Supp. 36, 38 (N.D. W. Va. 1969) (finding no risk of multiple litigation because partially compensating insurer under West Virginia law has no claim against tortfeasor); Entman, *supra* note 1, at 911 & n.106 (discussing when suit instigated by either employee or insurer precludes other from also filing suit).

263. *Potomac Elec. Power Co. v. Babcock & Wilcox Co.*, 54 F.R.D. 486, 492 (D. Md.

fense, the defendant may be required to carry the burden of proving in subsequent litigation what role the insurer actually played in the prior suit.²⁶⁴ That may be an unreasonable burden, considering that most of the relevant evidence will be under the control of the insured and the insurer. In light of the defendant's legitimate interest in being protected from having to defend against the insured and the subrogated insurer in separate actions, decisions such as *Prudential Lines* and *Tucson Electric* appear to be too cavalier in concluding that the defendant will have such protection without joinder of the insurer as a party plaintiff.²⁶⁵

2. Ratification as a Remedy

Other federal courts have approved of the device of ratification pursuant to Rule 17(a)²⁶⁶ as an alternative to what they perceive to be Rule 19's mandate that compensating insurers must be joined as party plaintiffs to prevent multiple litigation.²⁶⁷ For example, in

1972) (discussed *supra* part V.C). Cf. *Klick v. American Mut. Ins. Co.*, 80 F.R.D. 711, 713 (E.D. Wis. 1978) (holding that joinder of insurer not required by Rule 19 because Wisconsin workers' compensation statute provided that insurer is bound by the judgment if it has notice of the insured's action against third party).

264. FED. R. CIV. P. 8(c) places upon the defendant the burden of pleading *res judicata*.

265. See *supra* notes 257-60 and accompanying text.

266. FED. R. CIV. P. 17(a) provides, in pertinent part:

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.

267. *United Coal Cos. v. Powell Constr. Co.*, 839 F.2d 958, 960 (3d Cir. 1988) (trial court took no action on defendant's motion to add subrogated insurers because the insurers executed ratification agreements); *Sovereign Chem. & Petroleum Prods. Inc. v. Ameropan Oil Corp.*, 148 F.R.D. 208, 210 (N.D. Ill. 1992) (holding partially subrogated insurer not indispensable because it had ratified action brought in name of insured, which had assigned to insurer right to sue in insured's name); *Prosperity Realty v. Haco-Canon*, 724 F. Supp. 254, 258 (S.D.N.Y. 1989) (finding that insurer's substitution as plaintiff is not required where insurer has filed affidavit ratifying suit and agreeing to be bound by decision); *Acme Mkts. v. Shaffer Trucking*, 102 F.R.D. 216, 218 (E.D. Pa. 1984) (explaining ratification as an alternative to joinder); *Stouffer Corp. v. Dow Chem. Co.*, 88 F.R.D. 336, 338 (E.D. Pa. 1980) (finding ratification agreement protected party against multiple litigation); *Whitcomb v. Ford Motor Co.*, 79 F.R.D. 244, 245 (M.D. Pa. 1978) ("Compulsory joinder is not appropriate where, as here, the partially subrogated insurers have authorized plaintiffs [insureds] to prosecute the action for them and have agreed to be bound by the results of the action."); *Kint v. Terrain King Corp.*, 79 F.R.D. 10, 11 (M.D. Pa. 1977) (describing situation where subrogated insurer filed a "certificate authoriz-

Hancotte v. Sears, Roebuck & Co.,²⁶⁸ the court denied the defendant's motion for compulsory joinder of the plaintiff's insurer, reasoning that the insurer's execution of a "ratification agreement," in which it had agreed to be bound by the results of the insured's action and to waive any right to pursue its subrogation rights outside of that action,²⁶⁹ eliminated "any danger of the defendant being subjected to multiple or inconsistent obligations."²⁷⁰

There are several problems, both historical and practical, with using the ratification language of Rule 17(a) to solve the problem of multiple litigation. First, ratification can be a solution only if the court has some authority to order dismissal of an action brought in the name of the insured alone. The sole authorization for ratification in the federal rules is the provision in Rule 17(a) for ratification as an alternative to dismissal for failure to name the real party in interest.²⁷¹ If the court has no authority to dismiss, it has no authority to require the insurer's ratification as an alternative. When the substantive law permits the insured to sue in his own name, the court has no basis for requiring the insurer to ratify, even if the insurer is also entitled to prosecute an action as subrogee. When the court does have authority to dismiss,²⁷² however, ratification still is not an appropriate alternative to the naming of the

ing plaintiff [insured] to prosecute the action 'for its benefit' and agreeing to be bound by the results of the litigation;" consequently, insurer is not a party to be joined under Rule 19(a).

Some federal courts have ordered that insurers file ratifications of the insureds' actions in order to avoid the defendants' objections to nonjoinder of the insurers. *See, e.g., In re Wuttke*, 2 B.R. 362, 364 (Bankr. D.N.J. 1980); *Lister v. Plunk*, 77 F.R.D. 359, 360 (N.D. Miss. 1977); *James v. Nashville Bridge Co.*, 74 F.R.D. 595, 597 (N.D. Miss. 1977); *Pace v. General Elec. Co.*, 55 F.R.D. 215, 219 (W.D. Pa. 1972). The ratification solution was also suggested by *Edwards, Inc. v. Arlen Realty & Dev. Corp.*, 466 F. Supp. 505, 512-13 (D.S.C. 1978), in which the court lamented that it was bound to require joinder by the Fourth Circuit decision in *Virginia Electric*.

268. 93 F.R.D. 845 (E.D. Pa. 1982).

269. *Id.* at 846. Ratification should be distinguished from waiver. If the insurer has actually waived all its rights against the third party and is not in control of the insured's action, there is no substantive basis for the insurer's presence as a party plaintiff, *Lister v. Marangoni Meccanica S.P.A.*, 133 F.R.D. 177, 179 (C.D. Utah 1990), and ratification of the insured's action is simply irrelevant.

270. *Hancotte*, 93 F.R.D. at 847.

271. *See supra* note 266.

272. *See* FED. R. CIV. P. 12(b)(6), 17(a). When the plaintiff-insured is not a proper party under the substantive law, the court has authority to dismiss the action for failure to state a claim upon which relief may be granted or to order substitution of the insurer. In addition, as argued below, *infra* part VII, federal courts sometimes have authority to find the insurer's joinder required on the basis of state substantive law.

insurer as a party plaintiff because Rule 17(a) does not authorize ratification in cases of deliberate nonjoinder of the proper plaintiff.

Ratification is an anomaly that slipped into Rule 17(a) in 1966 when admiralty actions were brought under the *Federal Rules of Civil Procedure*.²⁷³ Prior to the 1966 amendments, courts exercising admiralty jurisdiction had taken a lax approach to the naming of parties plaintiff because of the difficulty of identifying, at least prior to the expiration of applicable statutes of limitation, the numerous parties who may have enforceable claims arising from the loss of a ship's cargo.²⁷⁴ According to a leading treatise, even a simple volunteer might institute suit in admiralty against a carrier to recover for loss or damage to cargo.²⁷⁵ So long as the proper plaintiff or plaintiffs ratified the action before judgment, the action could be saved and judgment entered in the name of the plaintiff on the basis of the unnamed parties' claims.²⁷⁶ In effect, admiralty had no real party in interest rule.

In 1964 the Advisory Committee on Admiralty Rules proposed the merger of civil and admiralty practice under the *Federal Rules of Civil Procedure*. The Committee, with the approval of the Advisory Committee on Civil Rules, recommended several amendments to the *Federal Rules of Civil Procedure* to preserve, after the merger, certain distinct admiralty practices.²⁷⁷ Among the recommendations by the committee was an amendment to Rule 17(a) that would have preserved the practice of relation-back of claims through the formerly unnamed parties' "ratification, joinder or substitution."²⁷⁸ The Committee on Civil Rules then embraced the

273. See Entman, *supra* note 1, at 906-08 (discussing the provision for ratification and the resulting reintroduction of "use" practice).

274. Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts, Part I - Amendments to Effect Unification of Civil and Admiralty Procedure, Rule 17(a) Advisory Committee's Note, *reprinted in*, 34 F.R.D. 325, 341-42 (1964) [hereinafter Preliminary Draft]; see *Saint Paul Marine Transp. Corp. v. Cerro Sales Corp.*, 505 F.2d 1115, 1118 (9th Cir. 1974) (noting admiralty practice to allow owners to sue on behalf of master and crew).

275. 2A ELLEN FLYNN & GINA A. RADUZZO, *BENEDICT ON ADMIRALTY* § 53, at 6-10 (7th ed. 1992).

276. *Id.* § 53, at 6-11 to 6-13.

277. Preliminary Draft, *supra* note 274, 34 F.R.D. at 331-36.

278. The Committee proposed that the following concluding sentence be added to rule 17(a):

No action for loss or misdelivery of, or damage to, maritime cargo, or for general average contribution to such cargo, or for salvage, and no action for personal injury or death governed by section 33 of the Longshoremen's and Harborworkers' Compensation Act, as amended . . . shall be dismissed on the

idea and modified the proposed amendment so as to make it applicable to all civil actions.²⁷⁹

What apparently passed unnoticed, however, was that the provision for ratification, as an alternative to joinder or substitution, introduced into Rule 17(a) a practice that was fundamentally at odds with the rule's basic proposition that every action shall be prosecuted in the name of the real party in interest.²⁸⁰ The device of ratification reintroduces "use" practice—suit in the name of a nominal party for the use or benefit of the person who actually controls the litigation, and who even may be the only one to bene-

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 has been commenced in the name of the real party in interest.

Id. at 341.

279. The Reporter later explained that the relation-back effect of the amendment would: prevent failure of actions for reasons not going to the merits when the defendant had been informed through the institution of the action against him that rights were being asserted So sound did this proposed amendment of the rule seem that when it reached the Court it had been enlarged to cover all civil cases, not merely the particular maritime actions, and in that form it was approved.

Kaplan, *supra* note 69, at 411.

It is at least arguable that an amendment to Rule 17(a) was not necessary to achieve this purpose because a 1966 amendment of FED. R. CIV. P. 15(c) provided for relation back under the same circumstances, although the latter rule did not explicitly apply to parties plaintiff. Entman, *supra* note 1, at 904-05.

280. The failure to realize the conflict between the real party in interest rule and admiralty's ratification practice is evident in the Reporter's comment that, "Apparently something on the order of a real party in interest doctrine applied in admiralty." Kaplan, *supra* note 69, at 411 n.209. An admiralty authority, however, does seem to have appreciated the conflict, remarking:

The admiralty principles discussed hereinabove in this chapter [*see supra* notes 273-76 and accompanying text (regarding proper parties and ratification in admiralty)] have been established by the decisions of the courts over many years. The application of Rule 17(a) of the Rules of Civil Procedure to admiralty cases is bound to affect the principles discussed but the extent of the impact remains for future decisions. Certainly, when possible, the plaintiff named in a complaint should be the party who has suffered the loss. However, it is sometimes impossible to ascertain what party has legally suffered loss of cargo until after the time for suit will have expired and, in such cases, suit in the name of the shipper from whom title has passed or in the name of a volunteer, may be the only practical course to follow.

FLYNN & RADUAZZO, *supra* note 275, § 54, at 6-14. It appears, ironically, that admiralty has had more of an impact on civil procedure than vice versa.

fit from it.²⁸¹ This was the very practice, however, that the real party in interest rule was intended to abolish.²⁸²

Even though the provision for ratification appears on its face to authorize a form of use practice,²⁸³ the legislative history of the 1966 amendment strongly suggests that the drafters did not intend to sanction deliberate nonjoinder of a person who should be named as a party plaintiff.²⁸⁴ The Advisory Committee's Note states that 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."²⁸⁵ Recent decisions, however, allowing parties to use the ratification device deliberately to avoid naming an insurance company as a plaintiff²⁸⁶ are inconsistent with the expressed legisla-

281. With regard to use practice, see *supra* part III.A.

282. See Entman, *supra* note 1, at 899-900. Professor Atkinson stated that abolition of use practice was "the real party in interest statute's only real accomplishment." Atkinson, *supra* note 44, at 946; see also *United States v. Aetna Casualty & Sur. Co.*, 338 U.S. 366, 381 (1949) ("Under the Federal Rules, the 'use' practice is obviously unnecessary, as has long been true in equity . . .").

283. See Plissey, *supra* note 63, at 177-78 (stating that the provision in Rule 17(a) for ratification "actually encourages the device of use plaintiffs").

284. See 6A WRIGHT ET AL., *supra* note 28, § 1555, at 417-18. Wright, Miller, and Kane explain:

The reference to "ratification" in Rule 17(a) seems to be a carryover from the original draft of the sentence added in 1966, which was to apply only to certain maritime proceedings, and probably was intended to adopt the procedure in salvage actions by which nonparties seek their share of the recovered property. Nonetheless, some federal courts have interpreted the word to validate an arrangement by which the real party in interest authorizes the continuation of an action brought by another and agrees to be bound by its result, thereby eliminating any risk of multiple liability.

285. FED. R. CIV. P. 17 Advisory Committee's Note (1966); see also *Clarkson Co. v. Rockwell Int'l Corp.*, 441 F. Supp. 792, 797-98 (N.D. Cal. 1977) (finding ratification justified on grounds of difficulty of determining proper plaintiffs); *Hobbs v. Police Jury of Morehouse Parish*, 49 F.R.D. 176, 180 (W.D. La. 1970) (explaining that when determination of the proper party to bring the action was not difficult and when no excusable mistake had been made, the last sentence of Rule 17(a) is inapplicable and the action should be dismissed); FRIEDENTHAL ET AL., *supra* note 73, at 322 n.28 (stating that the key factors to be considered in permitting the amendment are whether the delay will prejudice the defendant and whether the plaintiff has some reasonable excuse for the error as to the real party in interest); 6A WRIGHT ET AL., *supra* note 28, § 1555, at 415 ("A literal interpretation of the last sentence of Rule 17(a) would make it applicable to every case in which an inappropriate plaintiff has been named. However, the rule should be applied only to cases in which substitution of the real party in interest is necessary to avoid injustice.").

286. See *supra* note 267.

tive intent that the 1966 amendment be available only in cases of mistake.

Use of ratification outside the intended scope of Rule 17(a), as an alternative to otherwise-required joinder or substitution, is ill-advised. The ratification device is inconsistent with federal policies of diversity jurisdiction, which depend upon meaningful naming of parties,²⁸⁷ and with the assumption in the *Federal Rules of Civil Procedure* that the party plaintiff is the person in control of the action and thus has certain rights and responsibilities in the litigation.²⁸⁸ Nowhere do the federal rules define the status of a ratifier in such a way that ratification can be considered the functional equivalent of party status. Nothing in Rule 17(a) itself or its legislative history explains the relationship between ratification and diversity jurisdiction or between ratification and other provisions of the rules, most likely because the rules drafters did not contemplate general use of the device to permit a person to avoid party status.²⁸⁹

Some courts have dealt with ratification's lack of definition by requiring that in order to avoid joinder or dismissal, the ratifier must agree to accept various burdens, but there is no consistency in what the courts have required.²⁹⁰ Ratification may indeed solve the problem of multiple litigation when a subrogated insurer does not appear as a party plaintiff in a lawsuit brought in the name of the insured. Without a satisfactory definition, however, ratification may mean a return to use practice and the undermining of important policies that depend upon the proper naming of parties in

287. See *infra* part VI.B.

288. See *infra* part VI.B.

289. Cf. *Mansfield v. Paxon*, 899 F.2d 649, 651 (7th Cir. 1990) (denying compensation insurer's motion to intervene as a "silent party plaintiff" because no such status is sanctioned by federal rules).

290. Compare *ICON Group, Inc. v. Mahogany Run Dev. Corp.*, 829 F.2d 473, 478 (3d Cir. 1987) (stating that "proper ratification" requires that the ratifying party authorize the action and agree to be bound by its result, but assumption of financial obligations was unnecessary in light of the interest and solvency of the named plaintiff) with *Clarkson Co. Ltd. v. Rockwell Int'l Corp.*, 441 F. Supp. 792, 797 (N.D. Cal. 1977) (ratifying entities agreed "to be bound by the Federal Rules of Civil Procedure for purposes of discovery in the action") and with *Municipality of Anchorage v. Baugh Constr. & Eng'g Co.*, 722 P.2d 919, 924-26 (Alaska 1986) ("[U]nder Alaska Civil Rule 17(a) . . . [t]he ratifying party is subject to any orders the court may make concerning discovery or attorney's fees [R]atification assures that all interested parties bear the burdens of claims litigated on their behalf."). Cf. *United Coal Cos. v. Powell Constr. Co.*, 839 F.2d 958, 965 (3d Cir. 1988) (ratifying subrogated insurers were "co-plaintiffs" for purposes of attorney-client privilege, and apparently all other purposes).

federal litigation.

B. *The Problem of Non-Parties in Control of Litigation*

The primary reason for requiring joinder or substitution of subrogated insurers, rather than merely ratification by them, is that one in control of litigation, as subrogated insurers so often are, should bear the responsibilities of party status.²⁹¹ The matter of who is named as a party plaintiff is important because the federal procedural system is premised upon the assumption that those named as parties have rights and duties in the conduct of the litigation. For example, the *Federal Rules of Civil Procedure*,²⁹² as well as various federal statutes,²⁹³ provide for assessment of costs and sanctions against a "party." Federal Rule 16 authorizes the court to direct the "attorneys for the parties and any unrepresented parties" to appear at pretrial and settlement conferences.²⁹⁴ Simi-

291. Others have been much more sanguine about nonparty insurers controlling litigation. In *Prosperity Realty v. Haco-Canon*, 724 F. Supp. 254 (S.D.N.Y. 1989), the court declined, because of a ratification agreement, to order joinder of the subrogated insurer. The defendant argued that the insurer should be named because it was controlling the litigation. The court responded: "[That] argument is not persuasive. 'As a practical matter, . . . the insurance company will control the prosecution no matter in whose name it is brought.'" *Id.* at 258 (quoting 6 WRIGHT & MILLER, *supra* note 167, § 1546, at 656). The substance of the quotation is currently found at 6A WRIGHT ET AL., *supra* note 28, § 1546, at 354. See also Albert E. Jenner, Jr. & Philip W. Tone, *Pleading, Parties and Trial Practice*, 50 NW. U. L. REV. 612, 612 (1955) ("An insured under an automobile collision policy who has collected for property damage under the policy ordinarily has no control over a subrogation action brought subsequently in his name by the insurer under the subrogation provision of the policy.").

292. FED. R. CIV. P. 11 (authorizing sanctions against represented parties for violations of the rule's requirements for pleadings, motions, and papers), 16(f) (authorizing sanctions against parties for violations of the rule's requirements for scheduling and pretrial orders and conferences), 37 (applying sanctions for failure to comply with court order), 54(d) (allowing prevailing party to recover costs) & 68 (requiring offeree to pay costs if judgment is not more favorable than offer).

293. See *Independent Fed. of Flight Attendants v. Zipes*, 491 U.S. 754, 761 (1989) (holding that district court may award Title VII attorney's fees against party intervenor not charged with Title VII violation, but only if intervenor's action is frivolous, unreasonable, or without foundation); *Truckweld Equip. Co. v. Swenson Trucking & Excavating Co.*, 649 P.2d 234, 238 (Alaska 1982) (stating that joinder of insurer should be required because of Alaska's "broad costs and attorney's fees provisions Where a party's claim is directly litigated before the courts of this state, we believe that party should bear the burdens as well as the benefits of the litigation."). See also *New York News, Inc. v. Kheel*, 972 F.2d 482 (2d Cir. 1992) (holding aggrieved non-party who is target of baseless allegations in a complaint does not have standing to move for Rule 11 sanctions).

294. See *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648, 650 n.1 (7th Cir. 1989) (en banc) (stating that Fed. R. Civ. P. Rule 16 does not limit district court's inherent authority to require party represented by counsel to attend pretrial settlement

larly, some of the discovery procedures of the *Federal Rules of Civil Procedure* may be used only against parties to the litigation²⁹⁵ and the scope of an injunction may depend upon party status.²⁹⁶ Thus, failure to name the proper party plaintiff can circumvent, or at least unduly complicate, a procedural rule that by its terms applies only to a person with the status of a "party."²⁹⁷

In addition, federal subject matter jurisdiction based upon diversity of citizenship, including the right of a defendant to remove a case from state court, will often depend upon a proper identification of parties to the lawsuit.²⁹⁸ The jurisprudence of diversity jurisdiction does not tolerate manipulative naming of parties for the purpose of either creating or defeating diversity of citizenship.²⁹⁹ Diversity generally is determined by the citizenship of the person who is in actual control of the litigation, not by the citizenship of those who are only beneficially interested in the lawsuit.³⁰⁰

conference). In a case that illustrates the problem of nonparties in control of litigation, the Eleventh Circuit held that district courts have no authority, either inherent or under Rule 16, to order the appearance at a settlement conference of an employee of the defendant's liability insurer, even though only the employee, and not the defendant or his attorney, had settlement authority. *In re Novak*, 932 F.2d 1397, 1403-08 (11th Cir. 1991).

295. See, e.g., FED. R. CIV. P. 30 (duty to appear at deposition); 33 (interrogatories to a party); 35 (physical or mental examination of a party or person under control of a party); 36 (requests for admissions).

296. See FED. R. CIV. P. 65(d) (binding only parties to the action and certain others to court orders granting injunction or restraining order).

297. See also *United States v. City of Oakland*, 958 F.2d 300, 301 (9th Cir. 1992) ("Federal Rules of Appellate Procedure 3 and 4 clearly contemplate that only parties may file a notice of appeal.").

298. See *Entman*, *supra* note 1, at 946-49 (discussing the relationship between diversity jurisdiction and the real party in interest rule).

299. See generally 14 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3637 (devices to create diversity jurisdiction), § 3638 (change of state citizenship), § 3639 (assignments), § 3640 (appointments), § 3641 (devices to defeat diversity jurisdiction), § 3642 (utilization of John Doe defendants) (1985).

300. See *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 464-66 (1980) (holding that individual trustees of a Massachusetts business trust may invoke diversity jurisdiction on the basis of their own citizenship, regardless of the citizenships of the trust beneficiaries because the trustees, and not the beneficiaries, exercised control of the litigation); 3A MOORE ET AL., *supra* note 108, ¶ 17.04, at 17-14; 13B CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3606, at 418-19 (1984).

There are exceptions to the general rule. 28 U.S.C.A. § 1332(c)(2) (West Supp. 1993) states:

[T]he legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

Similarly, in a direct action against an insurer, the insurer is deemed a citizen of the state

If a subrogated insurer is in actual control of a lawsuit, but not named as a party, and consequently, its citizenship is ignored for diversity purposes, the requirements for diversity jurisdiction are circumvented.³⁰¹ The subrogator-insured who is named as the sole party plaintiff may have some beneficial interest in the suit and may be denominated a "trustee" for the insurer's reimbursement interest, but if the insurer has exclusive actual control of the suit, the insured is in reality merely a nominal or formal party whose citizenship should be ignored for diversity purposes.³⁰² Cases such as *Virginia Electric & Power Co. v. Westinghouse Electric Corp.*,³⁰³ in which the non-diverse subrogated insurer in complete control of the litigation effectively was permitted to sue in the name of its diverse insured, allow the parties to evade the requirement of complete diversity and thus contravene the principle that the federal courts are courts of limited jurisdiction.³⁰⁴

In addition, it would seem that the naming of the insured as the sole plaintiff in such a case constitutes a violation of 28 U.S.C. § 1359, which provides that "[a] district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."³⁰⁵ Section 1359 admittedly has not traditionally been given a vigorous interpretation.³⁰⁶ Nonetheless, when a subrogation agreement gives a non-diverse insurer complete control of an action and the right to bring suit in the diverse insured's name, and the court finds that the motivation for the agreement is to create diversity jurisdiction, the court should find that the agreement violates section 1359.³⁰⁷

of which the insured is a citizen, as well as the insurer's state of incorporation and principal place of business. *Id.* § 1332(c)(1).

301. See Entman, *supra* note 1, at 946-49 (discussing misapplication of Rule 17(a) and analyzing the adverse effect on the principles of diversity jurisdiction).

302. See 13B WRIGHT ET AL., *supra* note 300, § 3606, at 418 (discussing the principle that diversity jurisdiction should be based on the citizenship of the parties in actual control of the litigation, not on that of a nominal representative).

303. 485 F.2d 78 (4th Cir. 1973), *cert. denied*, 415 U.S. 935 (1974).

304. See Entman, *supra* note 1, at 920-22, 947-48; *supra* notes 172-92 and accompanying text (discussing *Virginia Electric*); see also *Garcia v. Hall*, 624 F.2d 150, 152 (10th Cir. 1980) (holding that suit may proceed in the name of the insured alone where the partially subrogated insurer is non-diverse and "has instituted this suit in the name of the insured for the entire loss and will be bound by the judgment").

305. 28 U.S.C. § 1359 (1988).

306. See 14 WRIGHT ET AL., *supra* note 299, §§ 3637-42 (showing that section 1359 has not been aggressively applied by federal courts until recently).

307. See *Pratt v. First Hays Bانشares, Inc.*, 682 F. Supp. 1177, 1180-82 (D. Kan.

C. *The Non-Problem of Jury Prejudice*

Courts sometimes acknowledge that their decisions about compulsory joinder of compensating insurers are influenced by their belief that a jury's objectivity is adversely affected when an insurance company appears as a party plaintiff.³⁰⁸ In so doing, they are simply invoking a widely accepted assumption about juries.³⁰⁹

1988) (dismissing suit pursuant to 28 U.S.C. § 1359; diverse party had shown no reason unrelated to diversity jurisdiction for turning over all rights except his name in settlement agreement, when full assignment would have destroyed diversity). In *Unigard Sec. Ins. Co. v. M.W. Carlson Assocs.*, 657 F. Supp. 1146 (N.D. Ill. 1987), the court held that an insured's assignment to its insurer of its entire interest in the lawsuit against the defendant for \$100, the amount of its deductible, violated 28 U.S.C. § 1359. *Id.* at 1147-48. Prior to the assignment, the court had held that because of the insured's pecuniary interest, the insured was an indispensable party plaintiff. *Unigard Sec. Ins. Co. v. M.W. Carlson Assocs.*, No. 86 C 6898, 1987 WL 6623, at *1 - *2 (N.D. Ill. Feb. 9, 1987). Unfortunately, *Unigard* may be a case in which the section 1359 ruling was both unfortunate and ultimately unfair. Had the court appreciated that the insured was not an indispensable, or even proper, plaintiff merely because it had a pecuniary interest, the court might have found that there was complete diversity and it would not have been faced with the insurer's attempt to reach that result through the assignment.

308. *See, e.g.*, *Celanese Corp. of Am. v. John Clark Indus., Inc.*, 214 F.2d 551, 556-57 (5th Cir. 1954) (suggesting that the defendant's reason for attempting to join the plaintiff's insurance companies was to inform the jury that the plaintiff was insured, and thereby potentially prejudice the plaintiff's case); *Acro Automation Sys. v. Iscont Shipping, Ltd.*, 706 F. Supp. 413, 421 (D. Md. 1989) ("[The defendants] would consider it a strategic advantage to have the jury know that a plaintiff has another source of recovery other than from them."); *Stouffer Corp. v. Dow Chem. Co.*, 88 F.R.D. 336, 338 (E.D. Pa. 1980) ("[T]here is a substantial risk of prejudice to an insurer which is forced to join as a plaintiff, as the presence of an insurer may affect a jury's decision on the merits."); *Kint v. Terrain King Corp.*, 79 F.R.D. 10, 12 n.4 (M.D. Pa. 1977) (citing prejudice to the plaintiff as one factor supporting a decision denying a motion under Rule 19 to join the plaintiff's insurance companies); *Public Serv. Co. v. Crane Co.*, 48 F.R.D. 424, 425 (N.D. Okla. 1969) (indicating a "strong possibility" that presence of an insurance company as a party "will generate prejudice or favoritism in the jury process"), *aff'd*, 467 F.2d 1143 (10th Cir. 1972); *Thrasher v. United States Liab. Ins. Co.*, 225 N.E.2d 503, 507 (N.Y. 1967) ("The law maintains the fiction that the insured is the real party in interest at the trial of the underlying negligence action in order to protect the insurance company against overly sympathetic juries."). *But see* *Tucson Elec. Power Co. v. Bailey Controls Co.*, 145 F.R.D. 102, 104 (D. Ariz. 1992) (asserting that concern about jury prejudice is irrelevant to Rule 19 motion).

309. *See, e.g.*, *Rozark Farms, Inc. v. Ozark Border Elec. Coop.*, 849 F.2d 306, 308-09 (8th Cir. 1988) (holding that it is prejudicial error to admit irrelevant evidence of insurance coverage); *Adams Lab., Inc. v. Jacobs Eng'g Co.*, 761 F.2d 1218, 1226 (7th Cir. 1985) (stating that references to opposing party's insurance coverage may be prejudicial error if made intentionally and designed to prejudice the jury); *City of Cleveland v. Peter Kiewit Sons' Co.*, 624 F.2d 749, 758 (6th Cir. 1980) (indicating that an attorney runs the risk of a mistrial by raising the issue of insurance improperly); *Dow Chem. Corp. v. Weevil-Cide Co.*, 630 F. Supp. 125, 128-29 (D. Kan. 1986) (holding that application of Wisconsin direct action statute would violate Kansas public policy of avoiding the poten-

Many courts and writers, however, have either questioned or rejected the assumption that juries are less likely to render a fair verdict when they have direct knowledge of an insurer's interest in the litigation.³¹⁰ At least one writer has questioned in particular the relevance of the assumption when the insurer's interest is that of a plaintiff.³¹¹

Whether the concern with jury prejudice is or is not well-founded, the concern should not be a factor in implementing the federal rule of compulsory joinder. In cases in which the insured has fully subrogated his claim to his insurers, federal courts have not found concern with jury prejudice sufficient to override the rule that the insurer is the sole proper plaintiff.³¹² A case of partial subrogation, in which the insured may properly be named as a co-plaintiff along with the insurance company, should present even less cause for concern because it is not necessary for the jury to know of the insurer's presence merely because the insurer is named in the pleadings. In addition, federal courts commonly deal with such problems with cautionary instructions.³¹³ The problem of ju-

tial prejudice caused by a jury's knowledge of a defendant's liability insurance); *Larsen v. Powell*, 16 F.R.D. 322, 324 (D. Colo. 1954) (stating that knowledge of insurance might prejudice the jury).

310. See, e.g., *Pace v. General Elec. Co.*, 55 F.R.D. 215, 218 (W.D. Pa. 1972) ("We feel compelled to say a good word for juries With the universality of insurance covering so many aspects of their lives, they show no prejudice against the organization providing this service"); *Truckweld Equip. Co. v. Swenson Trucking & Excavating, Inc.*, 649 P.2d 234, 238 n.4 (Alaska 1982) ("We are not impressed by abstract claims of prejudice resulting from the jury's knowledge of partial coverage. Insurance is a widely accepted fact of life."); 2A LARSON, *supra* note 18, § 74.41(c), at 14-627 (referring to the concern about jury prejudice as a "bugaboo"). See also *Atkinson*, *supra* note 44, at 944 ("[I]t may well be that the best solution of the problem, regardless of whether an insurer is a party or not is that the court should caution the jurors that either party or both may be protected by insurance with which the jury has nothing to do, and that their job is to determine the defendant's liability upon the basis of fault."); *Kennedy*, *supra* note 28, at 715 (concluding that regardless of joinder, the judge "ought to inform the jury fully as to any subrogation interests in the plaintiff's claim" because "frank disclosure to the jury of the real interests involved is the only way to elicit good verdicts").

311. *Johnson*, *supra* note 64, at 1133-35 (observing that jury prejudice may be more relevant when the insurance company is a defendant because a jury may assess damages on a deep-pocket theory). *Contra Alan Calnan, The Insurance Exclusionary Rule Revisited: Are Reports of Its Demise Exaggerated?*, 52 OHIO ST. L.J. 1177, 1203 (1991) (describing empirical evidence that jurors are affected by knowledge of plaintiff's insurance coverage).

312. See, e.g., *United States v. Aetna Casualty & Sur. Co.*, 338 U.S. 366, 380-81 (1949) ("If the subrogee has paid an entire loss suffered by the insured, it is the only real party in interest and must sue in its own name.").

313. See FED. R. EVID. 105 ("When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted,

ry prejudice, if there is one, should be dealt with as a matter of trial practice and evidence, and should not be permitted to eclipse the important policies implicated by the naming of parties to a lawsuit.³¹⁴

VII. HOW TO REQUIRE JOINDER WHEN IT OUGHT TO BE REQUIRED: THE PROPER APPLICATION OF SUBSTANTIVE LAW

To prevent multiple litigation, joinder of subrogated insurers—those entitled by the substantive law to assert a claim against the third party—ought to be required.³¹⁵ Joinder or substitution of subrogated insurers in actual control of litigation should also be required to assure that the party in control is subject to the responsibilities of a party and is properly considered for purposes of diversity jurisdiction in federal court.³¹⁶

Some federal decisions are contrary to these conclusions.³¹⁷ Other decisions have achieved these results, but only through erroneous interpretations of Rules 17(a) and 19.³¹⁸ Still other federal courts have reached the wrong result in the opposite direction. In some federal decisions, compensating insurers that are neither sub-

the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly."); see generally Jeanean Kirk, Comment, *Instructing the Jury on the Irrelevance of Insurance Coverage*, 20 ARIZ. ST. L.J. 1069 (1988) (discussing cautionary jury instructions on disclosure of insurance coverage).

314. See *Travelers Ins. Co. v. Riggs*, 671 F.2d 810, 814 (4th Cir. 1982) (noting that federal policy "abjures concealed or fictional issues and parties in interest and attempts to avoid unfair prejudice by jury *voir dire*, cautionary instructions, and other corrective measures rather than by a concealment of interests that is likely to be ineffectual in any event").

315. See *supra* part VI.A.

316. See *supra* part VI.B.

317. See, e.g., *Glacier Gen. Assurance Co. v. G. Gordon Symons Co.*, 631 F.2d 131 (9th Cir. 1980) (discussed *supra* note 260 and *infra* text accompanying notes 321-23); *Virginia Elec. & Power Co. v. Westinghouse Elec. Corp.*, 485 F.2d 78 (4th Cir. 1973) (discussed *supra* part V.B), *cert. denied*, 415 U.S. 935 (1974); *Tucson Elec. Power Co. v. Bailey Controls Co.*, 145 F.R.D. 102 (D. Ariz. 1992) (denying defendant's motion to join compensating insurer who was in exclusive control of litigation); *White Hall Bldg. Corp. v. Profexray Div. of Litton Indus.*, 387 F. Supp. 1202 (E.D. Pa. 1974) (discussed *supra* notes 208, 260 and accompanying text), *aff'd mem.*, 578 F.2d 1377 (3d Cir. 1978) and *aff'd mem. sub nom. Quaglia v. Profexray Div. of Litton Indus.*, 578 F.2d 1375 (3d Cir. 1978).

318. See, e.g., *Potomac Elec. Power Co. v. Babcock & Wilcox Co.*, 54 F.R.D. 486 (D. Md. 1972) (discussed *supra* text accompanying notes 193-208); *Ward v. Franklin Equip. Co.*, 50 F.R.D. 93, 95 (E.D. Va. 1970) ("Although this action is instituted in the name of the insured, it is clear the insurer is in control of the litigation and caused it to be filed . . . Pursuant to the provisions of Rule 19(a) . . . it is ordered that the [insurer] be joined as a party plaintiff . . .").

rogated nor in control of the litigation have been required to join as plaintiffs.³¹⁹

This unsatisfactory situation arises in large part because federal courts do not permit the substantive law of subrogation, often that of a state, to play its rightful role in determining the parties to the suit. Federal courts have largely ignored or refused to apply various provisions in the law of subrogation that are designed specifically to prevent multiple litigation. State law frequently is brushed aside with the shibboleth that matters of joinder are procedural and, therefore, governed by federal law.³²⁰ Careful analysis reveals, however, that the issue is not that simple and that there are some situations in which federal courts are required to give effect to state law joinder provisions. Doing so, moreover, will solve the problems of multiple litigation that are not remedied by Federal Rule 19 and will facilitate federal policies regarding the naming of parties.

For example, some state law provides that an insured may not sue without joinder of its subrogated insurer. Such a state rule may reflect a policy of protecting the defendant from multiple litigation by conferring a right of action upon two parties that is not enforceable by one alone. In *Glacier General Assurance Co. v. G. Gordon Symons Co.*,³²¹ the applicable Montana law provided that if an action were instituted by either the insured or the insurer alone, the defendant could compel joinder of the other.³²² The

319. See, e.g., *Public Serv. Co. of Okla. v. Black & Veatch*, 467 F.2d 1143 (10th Cir. 1972) (discussed *supra* notes 159-70 and accompanying text).

320. See, e.g., *Gas Serv. Co. v. Hunt*, 183 F.2d 417, 419 (10th Cir. 1950) (discussed *supra* notes 119-27, 134-36 and accompanying text); *Jefferson v. Ametek, Inc.*, 86 F.R.D. 425, 427 n.2 (D. Md. 1980) (noting that federal, not state, rules control determination of the proper parties in a federal court); *Cross v. Harrington*, 294 F. Supp. 1340, 1341 (N.D. Miss. 1969) (holding that compulsory joinder is governed by federal law because it is a procedural aspect of a case); *Wright v. Schebler Co.*, 37 F.R.D. 319, 321 (S.D. Iowa 1965) ("Whether or not a defendant can compel a compensation carrier to be joined as a party is a procedural problem. The Illinois rule thereon is not binding upon this Court; the federal rule governs.") (discussed *supra* notes 137-43 and accompanying text); *Braniff Airways v. Falkingham*, 20 F.R.D. 141, 143 (D. Minn. 1957) (holding that while state law is used to determine substantive rights, the issue of whether a party is "necessary" is procedural, governed by federal rules). See also *Wadsworth v. United States Postal Serv.*, 511 F.2d 64, 66 (7th Cir. 1975) (stating that plaintiff's attorney was incorrect in following Illinois practice rather than *Aetna*, which requires insurer's joinder); *Childers v. Eastern Foam Prods., Inc.*, 94 F.R.D. 53, 57-58 (N.D. Ga. 1982) (noting a Georgia appellate decision requiring joinder, but ordering joinder pursuant to Federal Rule 19) (discussed *supra* part V.D); *Potomac Elec.*, 54 F.R.D. at 492 (noting, but otherwise ignoring, a Maryland rule requiring joinder) (discussed *supra* notes 193-208 and accompanying text).

321. 631 F.2d 131 (9th Cir. 1980).

322. *Id.* at 134 (citing *State ex rel. Slovak v. District Court*, 534 P.2d 850, 852 (Mont.

Ninth Circuit found, however, that "this aspect of Montana law does not bind us. The ability to force joinder of a nonparty in a diversity action is a matter of federal law governed by Fed. R. Civ. P. 19."³²³ Then, in a brief Rule 19 application, the court concluded that joinder of the plaintiff's compensating insurers was not required.³²⁴ Unfortunately, the court did not examine underlying state policies to determine the basis for the Montana rule.

When, however, state law provides that a partially compensated insured may sue only if he joins the insurer as a party plaintiff, a finding that the purpose of that rule is to protect a defendant from multiple litigation would justify the conclusion that the state rule is substantive and should be applied by the federal court without reference to Rule 19. As Judge Wyzanski explained in *Stevens v. Loomis*:³²⁵

[I]f, as a matter of substantive law, a state does not recognize that a plaintiff has a particular right of action unless he joins with him certain others, then, under *Erie R.R. v. Tompkins*, the federal diversity court is precluded from giving a plaintiff who fails to join those others an opportunity to proceed as though alone he had a substantive right.³²⁶

1975)).

323. *Id.*

324. *Id.*; see also *supra* note 260. But see *Travelers Indem. Co. v. Westinghouse Elec. Corp.*, 429 F.2d 77, 79-80 (5th Cir. 1970) (dismissing suit by partially subrogated insurer because of absence of nondiverse insured and other nondiverse insurer, relying upon both Louisiana statute and Rule 19).

325. 223 F. Supp. 534 (D. Mass. 1963), *aff'd*, 334 F.2d 775 (1st Cir. 1964).

326. *Id.* at 536 (citation omitted). See also *Kroese v. General Steel Castings Corp.*, 179 F.2d 760, 761 n.1 (3d Cir. 1950) ("3 Moore's Federal Practice 2153, under Par. 19.07 (2d ed. 1948), states flatly that whether parties are indispensable should be determined in federal court by federal rather than state rules. We think this statement cannot apply where the question of the indispensability of a party depends upon substantive law which in the diversity case, is a matter of the law of the state."); John W. Reed, *Compulsory Joinder of Parties in Civil Actions (continuation)*, 55 MICH. L. REV. 483, 517 (1983):

[I]n diversity cases the question of indispensability well may be decided upon the basis of state rules. To the extent that required joinder is determined by reference to the character of the parties' rights or interests the problem is essentially substantive and must be settled by reference to the governing law—usually state, under *Erie R.R. v. Tompkins*, but sometimes federal, as, for example, where copyrights and patents are involved.

(footnotes omitted).

The mandate of *Erie* applies, of course, not only to the "federal diversity court," but any time a federal court adjudicates a claim for which state law provides the

This principle was applied by the Sixth Circuit Court of Appeals in *Jamison v. Memphis Transit Management Co.*,³²⁷ an action brought by a father to recover for the death of a child. The court dismissed the action because the child's mother could not be joined as a plaintiff without destroying complete diversity.³²⁸ The court explained that the Tennessee wrongful death act vested the right of action in both parents and the defendant "could not obtain complete exoneration from its liability except by payment to both parents or the execution of a release by both the father and mother."³²⁹

In the subrogation context, Federal Rule 19 should not be permitted to undermine a state's decision to give both the insured and the compensating insurer the right to sue the third party directly, but then to balance that right with the third party's right to insist that only one lawsuit be prosecuted.³³⁰ Courts can not properly apply the rule simply by declaring the preeminence of federal procedure. They must address the substance of the state rule and the policies it is intended to effectuate.

When state law permits the insured to sue alone, it is more difficult to resolve whether a federal court should follow the state rule. The state rule may reflect its policy that in order to protect

rule of decision, regardless of the basis for federal subject matter jurisdiction. See Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 408 n.122 (1964).

Although Judge Wyzanski relied upon the *Erie* doctrine, the reasoning and result in *Stevens* would also be called for by Rules 12(b)(6) and 17(a), each of which requires that the plaintiff be entitled under the substantive law to enforce the claim asserted. See *supra* notes 27-31 and accompanying text.

327. 381 F.2d 670 (6th Cir. 1967).

328. *Id.* at 677.

329. *Id.* at 676. Similarly, in *Kuchenig v. California Co.*, 350 F.2d 551, 557 (5th Cir. 1965), *cert. denied*, 382 U.S. 985 (1966), the court held that the plaintiff's demand for a declaration of ownership of certain land must be dismissed because Louisiana law required the presence as a defendant of the adverse claimant's lessor, who could not be joined.

330. In *Kuchenig*, 350 F.2d 551, Judge Wisdom discussed the effect of the then-recent decision in *Hanna v. Plumer*, 380 U.S. 460, 472 (1965), in which the Court announced that federal courts should follow federal rules of civil procedure, rather than state law, on "matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either." *Kuchenig*, 350 F.2d at 553-55. Judge Wisdom concluded that notwithstanding *Hanna*, the issue of indispensability should be treated as "a run-of-the-mine *Erie* problem, requiring the usual balancing of substantive and procedural elements." *Id.* at 555. See also *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 119 (1968) ("Rule 19 does not prevent the assertion of compelling substantive interests; it merely commands the courts to examine each controversy to make certain that the interests really exist.").

the defendant from multiple litigation, only the insured has a claim for relief.³³¹ It is often the case, however, that such a state rule reflects only the policy of preventing juries from knowledge of an insurer's interest, and the state law in fact gives the insurer control of the litigation in the insured's name.³³²

When the state non-joinder rule is designed to protect the defendant from multiple litigation, the federal court should not compel the insurer's joinder. In *Gas Service Co. v. Hunt*,³³³ the Tenth Circuit required joinder of a compensating insurer in spite of the Kansas rule that only the insured was entitled to sue.³³⁴ The Kansas rule was designed to implement an articulated state policy that the wrongdoer "not be compelled to defend two actions for the same wrong."³³⁵ The *Hunt* court's joinder order did nothing to undermine, or to enhance, the state's goal of protecting the defendant from more than one lawsuit, but it was an unnecessary order because the defendant was protected by the state's determination that the insurer was not entitled to bring its own action. The federal court's order did, however, unnecessarily subject the insurer to the burdens of party status in spite of the fact that the insurer was not even a proper party.³³⁶

331. See, e.g., *Cleaves v. DeLauder*, 302 F. Supp. 36, 38 (N.D. W. Va. 1969) (stating that West Virginia follows "what is said to be the majority rule" that only the insured may sue because of "the right of the wrongdoer not to have the cause of action against him split up so that he is compelled to defend two actions for the same wrong" (citation omitted)).

332. Cf. *Kuchenig*, 350 F.2d at 556-57:

[T]he mere fact that state law labels a missing person "indispensable" may not always be controlling in federal court. If, for instance, a state indispensability rule were based purely on some administrative or procedural consideration, conceivably that rule might not conclude a federal diversity action. The nature and purpose of the state rule must be determined in each case.

333. 183 F.2d 417 (10th Cir. 1950).

334. *Id.* at 419.

335. *City of New York Ins. Co. v. Tice*, 152 P.2d 836, 840 (Kan. 1944); see discussion of *Hunt*, 183 F.2d 417, and *Tice*, *supra* notes 119-27 and accompanying text. See also *Public Serv. Co. v. Black & Veatch*, 467 F.2d 1143 (10th Cir. 1972) (discussed *supra* notes 159-70 and accompanying text).

336. Cf. *Cleaves v. DeLauder*, 302 F. Supp. 36, 38 (N.D. W. Va. 1969) (the insurer "could not maintain an action in its own name in a state court and under the dictates of *Erie R.R.*, this Court may not elevate the partial subrogee's interest above that given by state law") (citation omitted). In *Lister v. Marangoni Meccanica S.P.A.*, 133 F.R.D. 177, 179 (D. Utah 1990), the court distinguished *Hunt*, 183 F.2d 417, reasoning that the subrogated Workers Compensation Fund was not a real party in interest, and need not be joined, because of its ratification of the employee's action and waiver of its right under

A state rule permitting the suit to be brought by the insured alone may not reflect any substantive state policies. The latter conclusion should be reached when state law gives the insurer the actual right to control the litigation but permits the insurer to sue in the name of the insured as the party plaintiff. The apparent state policy for such a rule would be nothing more than a judgment on an evidentiary question—that the jury could not be trusted to decide the case on the merits if it were aware that an insurance company was the actual beneficiary of the suit. The question is simply one of how to achieve accurate adjudication.

In *Traveler's Insurance Co. v. Riggs*³³⁷ the Fourth Circuit was faced with such a rule in Virginia code provisions that allowed an insurer to sue its in own name or its insured's and prohibited involuntary joinder of the insurer.³³⁸ In opposition to the Virginia rule was the position of the Fourth Circuit in the earlier case of *Virginia Electric & Power Co. v. Westinghouse Electric Corp.*,³³⁹ that a partially subrogated insurer may be involuntarily joined as a party plaintiff upon motion of the defendant.

Analyzing the conflict as a "relatively unguided *Erie* choice',"³⁴⁰ the *Riggs* court found that it was not bound to follow the Virginia statutes. First evaluating the policy behind the state rule, the court explained: "The policy concern that undoubtedly underlies the Virginia rule—to avoid the prejudice that in conventional wisdom is assumed to afflict all insurance companies in jury trials—is clearly a legitimate one. But it has only to do with the conduct of litigation."³⁴¹ With regard to the countervailing federal policies,³⁴² the court found "an approach which abjures concealed

Utah law to sue the third party. *Lister's* analysis is sound, so long as the Fund was not, in spite of its waiver, in actual control of the litigation.

337. 671 F.2d 810 (4th Cir. 1982).

338. *Id.* at 813.

339. 485 F.2d 78 (4th Cir. 1973), *cert. denied*, 415 U.S. 935 (1974) (discussed *supra* notes 172-92 and accompanying text).

340. *Riggs*, 671 F.2d at 813 (quoting *Hanna v. Plumer*, 380 U.S. 460, 471 (1965)). Apparently, it was not clear to the *Riggs* court whether the *Virginia Electric* rule was derived from Rule 19 and, therefore, required to be applied under the *Hanna* decision. The *Riggs* court avoided having to decide that issue by finding the federal rule applicable in any event under *Erie*.

341. *Id.* The court also found that choice of a contrary federal rule would not be outcome-determinative in the sense of *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), because "any encouragement it lends to the limited forum shopping that is possible for defendants is simply of the kind that attends any federal rule of procedure thought by litigants to provide tactical advantage." *Riggs*, 671 F.2d at 814.

342. *Riggs*, 671 F.2d at 814 (citing *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S.

or fictional issues and parties in interest.”³⁴³ As discussed above, there are very strong federal policy reasons for insisting that a lawsuit be brought in the name of the person who is in control of the action,³⁴⁴ and the *Riggs* court was correct in declining to follow the Virginia rule that permitted the insurer to sue in the name of the insured.

Once the federal court determines that a state law provision permitting enforcement of a subrogated claim in the name of the insured alone is procedural, as many are,³⁴⁵ the next step should not be to proceed directly to Federal Rule 19. Rather, the court should determine who—insured, insurer, or both—is entitled by the applicable substantive law to assert and control the claim. Making this determination often will be difficult. So long as states permit parties to assert subrogated claims in the name of the insured alone regardless of actual control, insurers will do so, and federal courts will have difficulty locating state court decisions directly addressing the parties’ substantive rights in the claim.³⁴⁶ When insurers invariably bring suit in the name of the insured, there may be no

525 (1958)).

343. *Id.* In support of this proposition, the court quoted the following passage from *United States v. Aetna Casualty & Sur. Co.*, 338 U.S. 366, 382 (1949): “The pleadings should be made to reveal and assert the actual interest of the plaintiff, and to indicate the interests of any others in the claim.” The *Riggs* court may have been reading a bit too much into that particular passage, which may have referred only to the Rule 19 requirement that the pleadings set forth the names of persons who ought to be parties, but who are not joined, and account for their nonjoinder. FED. R. CIV. P. 19(c).

There are other bases for the *Riggs* court’s assertion that are not cited in the opinion. *See, e.g.*, FED. R. CIV. P. 10(a) (requiring that “[i]n the complaint the title of the action shall include the names of all the parties); *Doe v. Frank*, 951 F.2d 320, 322-24 (11th Cir. 1992) (indicating that only in exceptional cases may a plaintiff proceed under a fictitious name); *National Commodity & Barter Ass’n v. Gibbs*, 886 F.2d 1240, 1244-45 (10th Cir. 1989) (citing Rule 10(a), the court *sua sponte* dismissed the claims of unnamed plaintiffs who had not sought permission to proceed anonymously, and stated that “the federal courts lack jurisdiction over the unnamed parties, as a case has not been commenced with respect to them”).

344. *See supra* part VI.B. Requiring the insurer to be a party plaintiff in *Riggs* was correct, not because its joinder was required under Rule 19(a) as the *Virginia Electric* court suggested, but because it was undisputed that the insurer had commenced the action, as it was entitled to do by Virginia law. *Riggs*, 671 F.2d at 812-13.

345. *See, e.g.*, TENN. R. CIV. P. 17.01 (“[A] party to whose rights another is subrogated . . . may sue in his own name without joining with him the party for whose benefit the action is brought . . .”). Similarly, some states permit insurers to use loan receipt agreements to avoid appearing as the party plaintiff in lawsuits that they in fact control. *See Entman, supra* note 1, at 925-31 (discussing loan receipt agreements, where the insurer makes a loan to the insured equal to the amount of the claim, with an agreement that the insured repay the insurer only if the insured recovers from a third party).

346. *See Entman, supra* note 1, at 923-25.

judicial decisions analyzing whether an insurer may enforce its claim directly against a third party.³⁴⁷ Similarly, unless some conflict between insured and insurer has been litigated, there might be no decisions discussing whether the insured may enforce the entire claim.³⁴⁸

In many situations, however, the answer will be more accessible. A workers' compensation act, for example, may expressly provide that the insurer has exclusive control of the claim although it is permitted to sue in the name of the insured.³⁴⁹ The right to control also may be vested in the insurer by a subrogation clause in the policy³⁵⁰ or by a subrogation agreement between the insured and the insurer.³⁵¹ When the federal court finds that an in-

347. One unusual case is *United Sec. Ins. Co. v. Johnson*, 278 N.W.2d 29 (Iowa 1979), in which the partially compensating insurer, entitled under state law to bring suit in the name of the insured, brought suit in its own name, apparently because the insured was barred from suing by spousal immunity. The court held that the insurer was not a real party in interest entitled to maintain the action because of the Iowa rule that stated:

[T]he right of action remains in the insured for the entire loss, the insured becoming a trustee for the insurer (to the extent of the loss paid by the insurer) in the recovery secured by it; that the right of action for the entire loss is single and cannot be split and separately maintained by the owner and the various insurers who have paid parts of the loss.

Id. at 31 (quoting *Firemen's Ins. Co. v. Bremmer*, 25 F.2d 75, 76 (8th Cir. 1928)).

348. In *White Hall Bldg. Corp. v. Profexray Div. of Litton Indus.*, 387 F. Supp. 1202 (E.D. Pa. 1974), *aff'd mem.*, 578 F.2d 1377 (3d Cir. 1978) and *aff'd mem. sub nom. Quaglia v. Profexray Div. of Litton Indus.*, 578 F.2d 1375 (3d Cir. 1978), the court, attempting to identify the proper plaintiff under Rule 17(a) when a loan receipt had been used, observed:

Not surprisingly, this Court's research reveals no Pennsylvania case on point. Under the terms of the loan receipt method of transaction, the insured rather than the insurer initiates any court action brought against a third party and thus neither Pennsylvania's nor other courts would likely encounter the issue of whether the insurer itself could bring the action. It thus becomes necessary to attempt to ascertain what Pennsylvania's courts would do if such issue were in fact raised.

Id. at 1204.

349. *See, e.g.*, ILL. ANN. STAT. 820, para. 305/5 (Smith-Hurd 1993):

In the event the employee or his personal representative fails to institute a proceeding against such third person at any time prior to 3 months before such action would be barred, the employer may in his own name or in the name of the employee, or his personal representative, commence a proceeding against such other person for the recovery of damages on account of such injury or death to the employee

350. *See supra* note 20.

351. *See, e.g.*, *Virginia Elec. & Power Co. v. Westinghouse Elec. Corp.*, 485 F.2d 78,

surer, pursuant to its right under the substantive law, is in actual control of a suit brought in the name of the insured, the court should require substitution of the insurer as the named plaintiff pursuant to Rule 12(b)(6) or Rule 17(a), the real party in interest rule.³⁵²

In some situations, the federal court may find that the substantive law in fact permits splitting—that it gives the insured and the insurer the right to control their own portions of the claim and that joinder is not required.³⁵³ In such a situation, a suit brought only in the name of the insured for the entire claim still should not be permitted, not on the basis of federal compulsory joinder, but on the basis that the insured has failed to state a claim for relief with regard to that portion of the ad damnum clause in excess of the insured's interest.³⁵⁴ The insured and the insurer then, of course,

82 (4th Cir. 1973) (discussed *supra* notes 172-92 and accompanying text), *cert. denied*, 415 U.S. 935 (1974); *Tucson Elec. Power Co. v. Bailey Controls Co.*, 145 F.R.D. 102, 103 (D. Ariz. 1992) (noting that the loan receipt agreement provided that litigation against third party was to be brought in insured's name and maintained "at the expense of and under the exclusive direction and control of" the insurance company).

352. In *K-B Trucking Co. v. Riss Int'l Corp.*, 763 F.2d 1148 (10th Cir. 1985), the court explained:

The forum state's procedural statute or rule defining the real party in interest concept is not applicable, however, because it only governs who may sue in the state courts; under Rule 17(a), the federal courts are concerned only with that portion of state law from which the specific right being sued upon stems.

Id. at 1153 (footnote omitted) (quoting 6 WRIGHT & MILLER, *supra* note 167, at 647-48).

353. See *Arkwright-Boston Mfrs. Mut. Ins. Co. v. City of New York*, 762 F.2d 205, 209 (2d Cir. 1985) (stating that claim by insured for its deductible amount and claim by insurer for amount paid to insured are "separate and distinct, and do not constitute unlawful splitting under New York law"); *Blatz v. City of Rock Falls*, 434 N.E.2d 807, 808 (Ill. App. Ct. 1982) (holding that, under Illinois statute, insured and insurer each may prosecute an action to enforce their beneficial interest). See also ILL. ANN. STAT. ch. 735, para. 5/2-403 (Smith-Hurd 1993) ("A judgment in an action brought and conducted by a subrogee . . . whether in the name of the subrogor or otherwise, is not a bar or a determination on the merits of the case or any aspect thereof in an action by the subrogor to recover upon any other cause of action arising out of the same transaction or series of transactions."); *Jenner & Tone*, *supra* note 291, at 613 (explaining that the drafters of the original version of ILL. ANN. STAT. ch 735, para. 5/2-403 recognized the "undesirable effect" of requiring the defendant to litigate the same issues twice, but concluded "that this factor was overbalanced by considerations of fairness to the subrogor who had not had his day in court" in the subrogee's action).

354. See *Wadsworth v. United States Postal Serv.*, 511 F.2d 64, 66 (7th Cir. 1975), in which the district court had granted the defendant's Rule 17(a) motion to reduce the plaintiff insured's ad damnum to \$60, the amount of the insured's uncompensated loss. The court of appeals, however, held that under *United States v. Aetna Casualty & Sur. Co.*, 338 U.S. 366 (1949), the district court should have required joinder of the insurer upon a proper motion by the defendant. *Wadsworth*, 511 F.2d at 67. In *Executive Jet*

may choose to join as plaintiffs to pursue the claim in one lawsuit.

They may, however, choose to pursue separate actions. If only one of the actions is brought in a federal court, and it is brought prior to a judgment in the other party's action,³⁵⁵ the question becomes whether the federal court is required to give effect to the state policy permitting separate lawsuits. It would seem that the state's decision to permit each party to control its own portion of the claim would not be impeded by a decision that the parties must do so in one action. If there were some federal rule that required compulsory joinder in this situation, the federal goal of avoiding multiple litigation would permit application of that rule despite a state procedural rule eschewing compulsory joinder. Because of Rule 19's limited scope, however, there is no such federal rule.

Happily, state law rarely creates this situation. In almost all cases, state law of subrogation permits only one lawsuit, either by requiring joinder or by vesting the right to control the entire claim in only one of the parties. If federal courts give effect to that state law, they will enforce the substantive law's policy intended to prevent multiple litigation and, at the same time, will further the important federal policies that require the party in control to appear as the named plaintiff.

In most instances, therefore, it is not necessary to broaden Rule 19 in order to achieve the goal of preventing multiple litigation in the insurance subrogation context.³⁵⁶ State law designed for this

Aviation, Inc. v. United States, 507 F.2d 508, 514 (6th Cir. 1974), the defendant argued for a "pro tanto dismissal" of the plaintiff insured's action to the extent of the insurers' claims. The court held that the insurers, who had used a loan receipt agreement to avoid having to sue in their own names, should be given an opportunity to join in the action as plaintiffs. *Id.* at 515. Because the insurers, under the loan receipt agreement, were to bear the expense and to assume direction and control of the litigation, *id.* at 510, the court probably should have required substitution of the insurer as the sole party plaintiff. Regarding loan receipts, see Entman, *supra* note 1, at 925-31.

355. If both actions are brought in federal court, the court may be able to consolidate them. FED. R. CIV. P. 42(a). If the first action is resolved in a state court prior to the filing of the federal action, the federal court will not be able to bar the second action because 28 U.S.C. § 1738 requires the federal court to give the state court judgment the same effect that it would be given by the state's courts. 28 U.S.C. § 1738 (1988). In that circumstance, however, the federal court will not be subjected to trying more than one lawsuit.

356. Cf. Freer, *Avoiding Duplicative Litigation*, *supra* note 15, at 844 (advocating broadening compulsory joinder to avoid the risk of multiple litigation, especially to force joinder of plaintiffs in "transactionally related tort cases").

purpose should be given effect in federal courts. Applying these principles to joinder of compensating insurers is not necessarily an easy task, but it achieves better results and is probably no more difficult than the task that federal courts have been performing of applying Rule 19 without regard to state law.

