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Federal Rules of Civil Procedure-Rule 19 and Indispensable Parties

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NOTES

FEDERAL RULES OF CIVIL PROCEDURE—Rule 19 and Indispensable Parties

The reformulation of compulsory joinder rules, urged by commentators for a decade,[1] has been realized with the 1966 amendment to rule 19 of the Federal Rules of Civil Procedure. Prior to the amendment, courts consistently held that the absence from the lawsuit of persons who were "indispensable" deprived the court of power to adjudicate the action.[2] The amendment to rule 19 is an effort to establish a methodology which requires a practical consideration of the factual situation at hand when determining the propriety of permitting a case to continue even though certain parties are not joined. A brief look at the nature and source of the "indispensability of parties" doctrine is needed in order that the purposes of rule 19 and its supposed effects may be more easily understood.

At common law, parties who possessed joint rights or owed joint duties under substantive law had to be joined in a single action. Joinder requirements were considered to be annexed to the substantive rights of the parties and were thought not to be procedural devices.[3] Familiar examples of parties who possessed such rights were partners, joint tenants, and joint promisees under a contract.[4] In equity, on the other hand, another approach to compulsory joinder prevailed; in order to avoid multiplicity of actions, all parties that were "necessary to the complete settlement of the controversy" had to be joined.[5] The rules in equity were applied with a high degree of flexibility, and while all persons who were interested in a controversy were to be joined if feasible, such joinder was excused when it was impractical or impossible.[6] During the latter part of the eighteenth century, however, the equity courts began to follow the additional rule, not specifically related to their compulsory joinder practice, that a decree would not be entered unless it completely disposed of a controversy.[7] The result of superimposing this rule upon the necessary joinder rules applicable in equity actions, was that the equity courts would refuse to render *any* decree when-

1. See Hazard, *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 COLUM. L. REV. 1254 (1961); Reed, *Compulsory Joinder of Parties in Civil Actions* (pts. 1-2), 55 MICH. L. REV. 327, 483 (1957).

2. See, *e.g.*, Young v. Powell, 179 F.2d 147 (5th Cir. 1950); Caldwell Mfg. Co. v. Unique Balance Co., 18 F.R.D. 258 (S.D.N.Y. 1961).

3. CLARK, CODE PLEADING § 56 (2d ed. 1947).

4. *Ibid.*

5. *Ibid.* See also Bank of California Nat'l Ass'n v. Superior Court, 16 Cal. 2d 516, 106 P.2d 879 (1940).

6. See Hazard, *supra* note 1, at 1255-56.

7. Hazard, *supra* note 1, at 1273-82.

ever certain parties could not be joined and this nonjoinder might give rise to multiple suits.[8]

From this curious admixture of the joinder rules and equity's insistence upon the perfect decree grew the distinction between necessary and indispensable parties.[9] While necessary parties were classified as those "who ought to be present in order to have a complete and just determination,"[10] indispensable persons were defined as those who had an interest in the proceedings of such a nature that a final decree could not be made "without either affecting that interest or leaving the controversy in such a condition that its final termination . . . [is] wholly inconsistent with equity and good conscience."[11] In establishing a test whereby necessary and indispensable parties could be distinguished, the courts turned to the character of the parties' substantive rights and asked whether they were "severable."[12] If the absent party possessed a joint right which was not severable, he was "indispensable" and the action had to be dismissed unless he could be brought before the court. On the other hand, if the nature of the substantive right was "severable," the absentee was deemed to be merely a necessary party and the court, in its discretion, could proceed without him. Since the Federal Rules of Civil Procedure purported to adopt the flexible equity

8. In essence, Professor Hazard argues that the real equity joinder principle was the necessary party rule, which required that all parties with material interests be joined, but which was suspended whenever parties were without the court's jurisdiction. See Cockburn v. Thompson, 16 Ves. Jr. 321, 33 Eng. Rep. 1005 (Ch. 1809). In Professor Hazard's view, equity's general reluctance to render a decree which did not completely dispose of a controversy, when applied to the necessary joinder situation, gave rise to the indispensable party concept. See Hazard, *supra* note 1, at 1271-82.

9. See Hazard, *supra* note 1, at 1273-82.

10. The classic definitions of necessary and indispensable parties are set out in Shields v. Barrows, 58 U.S. (17 How.) 130 (1854).

11. *Id.* at 139.

12. *Ibid.* For application of the "severable rights" test, see Halpin v. Savannah River Elec. Co., 41 F.2d 329 (4th Cir.), *cert. denied*, 282 U.S. 848 (1930); Sechrist v. Palshook, 95 F. Supp. 746 (M.D. Pa. 1951); Wyoga Gas & Oil Corp. v. Schrack, 27 F. Supp. 35 (M.D. Pa. 1939). See generally Note, *Multiparty Litigation: Proposed Changes in the Federal Rules*, 50 IOWA L. REV. 1135, 1139-40 (1965).

The court in Washington v. United States, 87 F.2d 421 (9th Cir. 1936), in setting out what was to become the standard test for determining who was an indispensable, in contrast to a necessary, party, listed these four criteria: (1) whether the interest of the absent party was distinct and severable; (2) whether in the absence of the party the court could render justice between the parties; (3) whether the decree could have an injurious effect on the absent party's interest; and (4) whether the final determination in the absence of a party was "consistent with equity and good conscience." If any of the four questions were answered in the negative, the absentee was indispensable. Repeatedly, courts applied this test mechanically and unimaginatively, using it for the purpose of stating rather than reaching a result. See, *e.g.*, Lewis v. Lewis, 358 F.2d 495 (9th Cir. 1966); McCormick v. Tipton, 259 F.2d 913 (6th Cir. 1958); Sellers v. Bardill, 132 F. Supp. 386 (W.D. Ky. 1955). See generally Reed, *supra* note 1, at 355-56; Note, *Multiparty Litigation*, *supra* at 1141.

approach to joinder,[13] only the necessary party rule should have been embraced by rule 19.[14] Unfortunately, however, the concept of indispensable parties was introduced in part (b) of the original rule 19, which authorized the courts to order persons "who ought to be parties if complete relief is to be accorded" to be joined in the action *if those persons were not indispensable.* No effort was made to establish guidelines for determining who was an indispensable party; apparently that decision was left to be governed by prior case development.[15] Consequently, the courts continued to view indispensability in terms of the "severability" of the parties' substantive rights.[16]

Rule 19, as amended, sets out specific criteria on the basis of which the courts can determine whether a person—described by the rule as "contingently necessary"[17]—should be joined in the action. However, the cases cited in the Advisory Committee's Note to rule 19 illustrate that the rule is merely codifying the considerations that have always been crucial in determining whether a party should be joined[18] and thus is embracing the classes of persons heretofore designated as either "indispensable" or "necessary."[19]

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13. See Clark & Moore, *A New Federal Civil Procedure*, 44 YALE L.J. 1291, 1319-21 (1935).

14. See note 8 *supra.*

15. Judge Charles Clark, Reporter to the Advisory Committee on Civil Rules which drafted the original Federal Rules made the following observation:

> In a great number of different instances the only situation where the court will not go ahead under these provisions is in the case of what are called in equity indispensable parties, and we felt we could not redefine those terms or change that situation. I think the whole trend of federal decisions has been to cut down the number of parties that are considered indispensable, but that is a matter of judicial decision, rather than for procedural rules.

Quoted in Fink, *Indispensable Parties and the Proposed Amendment to Rule 19*, 74 YALE L.J. 403, 411 n.34 (1965).

16. See the cases collected in 2 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE §§ 513.1–.11 (Wright ed. 1961); and 3 MOORE, FEDERAL PRACTICE ¶¶ 19.07–.14 (2d ed. 1966).

17. FED. R. CIV. P. 19 provides:

> [A person is contingently necessary if]
> (1) in his absence complete relief cannot be accorded among those already parties, or
> (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may
> (i) as a practical matter impair or impede his 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 claimed interest.

For general literature on rule 19 as amended, see Cohn, *The New Federal Rules of Civil Procedure*, 54 GEO. L.J. 1204 (1966); Fink, *supra* note 15; Wright, *Proposed Changes in Federal Civil, Criminal, and Appellate Procedure*, 35 F.R.D. 317, 336-37 (1964); Note, *Multiparty Litigation*, *supra* note 12; Comment, *Federal Rules of Civil Procedure: Attacking the Party Problem*, 38 S. CAL. L. REV. 80 (1965).

18. See generally James, *Necessary and Indispensable Parties*, 18 U. MIAMI L. REV. 68 (1963); Reed, *supra* note 1; *Developments in the Law—Multiparty Litigation*, 71 HARV. L. REV. 877 (1958).

19. 2 BARRON & HOLTZOFF, *op. cit. supra* note 16, § 512 (Wright ed. Supp. 1966).

The innovation in the amended rule is that it no longer treats the absence of a "contingently necessary" person who cannot be made a party as grounds for automatic dismissal of the action. The rule as amended affirmatively states the factors which are relevant for evaluating the propriety of continuing an action in the absence of such a party: (1) the effect of a judgment on the interests of the present parties and the absentees; (2) the available methods of avoiding prejudice to the absentee's interests; (3) the adequacy of the judgment; and (4) the availability of alternative forums.[20] While some of these factors overlap with those to be considered in deciding whether a party is "contingently necessary," the others, namely, the court's ability to shape adequate relief and the availability of an alternative forum, focus on a separate dimension—the importance of the *plaintiff's* right to a forum for a total adjudication of his claim.[21] Thus, it is clear from the provisions of the new rule and the comments of the draftsmen that a court now has discretion to permit a case to continue even though a heretofore so-called "indispensable party" is not joined. The necessary-indispensable dichotomy seems to be abolished by the amended version of rule 19 and the term "indispensable" is now used only in a conclusive sense—to describe those parties in whose absence the court decides that proceeding with the action would result in an injustice.[22]

The first judicial challenge to amended rule 19 was made in

20. Pre-amendment cases also took cognizance of the relevance of such factors. See the cases cited in the Advisory Committee's Note to rule 19, H.R. Doc. No. 391, 89th Cong., 2d Sess. 33-36 (1966), reprinted in 39 F.R.D. 89-94 (1966), 1966 U.S. Code Cong. & Ad. News 779-84. The cases are listed in Fink, *supra* note 15, at 426-27 n.87.

21. See New England Mut. Life Ins. Co. v. Brandenburg, 8 F.R.D. 151, 153 (S.D.N.Y. 1948), where the court observed: "If the suit is dismissed, a wrong may be done to the plaintiff. . . . In such a situation, the equities of the parties is the basic consideration." See also, *e.g.*, Stumpf v. Fidelity Gas Co., 294 F.2d 886 (9th Cir. 1961); Zwack v. Kraus Bros., 237 F.2d 255, 259 (2d Cir. 1956). If some type of relief can be administered to the plaintiff individually, the court will render that type of decree. See Tardan v. California Oil Co., 323 F.2d 717 (5th Cir. 1963); Ward v. Deavers, 203 F.2d 72 (D.C. Cir. 1953); Kroese v. General Steel Castings Corp., 179 F.2d 760 (3d Cir.), *cert. denied*, 339 U.S. 983 (1950). See also Lewis v. Lewis, 358 F.2d 495 (9th Cir. 1966). The availability of another forum where all the parties can be brought in may be sufficient to authorize dismissal. See, *e.g.*, Fitzgerald v. Haynes, 241 F.2d 417 (3d Cir. 1957); Fouke v. Schenewerk, 197 F.2d 234, 236 (5th Cir. 1952); American Ins. Co. v. Bradley Mining Co., 57 F. Supp. 545 (N.D. Cal. 1944). A recent case, Pettengill v. United States, 253 F. Supp. 321 (N.D. Ill. 1966), decided prior to the date upon which the new rule took effect, but nevertheless applying the intent of the amendment, shows the type of analysis that is promoted by consideration of the plaintiff's right to an adjudication:

> If I find the Florida heir dispensable, the Government must defend three suits. The same defense should serve all three cases. If I find her indispensable, the taxpayers are completely deprived of any remedy. . . . [T]he practical considerations . . . weigh more heavily in favor of the dispensability of the Florida heir than in favor of her indispensability.

Id. at 324.

22. *But see* Cohn, *supra* note 17, at 1211. Professor Cohn fears that courts will continue to use the term "indispensable" as a link to the original rule and its anachronistic concepts.

Provident Tradesmens Bank & Trust Co. v. Lumberman's Mutual Casualty Co.,[23] wherein the Third Circuit held that the indispensable party doctrine is a rule of substantive law which cannot be altered by the Federal Rules of Civil Procedure.[24] That rule 19 cannot accomplish changes in the substantive law is clear from the Rules Enabling Act of 1934 which grants to the Supreme Court of the United States the "power to prescribe by general rules, the forms of process, writs, pleadings, and motions and the practice and procedure of the district courts of the United States in civil actions"[25] and which further provides that "such rules shall not abridge, enlarge, or modify any substantive right."[26] The perimeter of this limitation has been marked out by a number of Supreme Court decisions which suggest that a rule may regulate only the judicial processes for the enforcement of rights and duties recognized by the substantive law.[27] The test, easily articulated, becomes more difficult in application. In one sense, party-joinder may be thought to be strictly "procedural" in that it is concerned with the judicial administration and management of the litigation of a claim and thus falls within the sphere of federal rule-making power. The policies underlying all types of joinder—claims, remedies, and parties—are to avoid multiple litigation and to allow parties to have their disputes adjudicated more conveniently and inexpensively at a judicial forum. Moreover, the judge-made doctrines of "indispensability" are largely self-imposed by courts to effectuate fundamental ideas

23. 365 F.2d 802 (3d Cir. 1966), 80 HARV. L. REV. 678 (1967), discussed in text accompanying notes 30-44 *infra*.

24. See Fink, *supra* note 15, at 430-33. Professor Fink relies heavily on the statement of Judge Aldrich in Stevens v. Loomis, 334 F.2d 775, 778 n.7 (1st Cir. 1964), that "what are indispensable parties is a matter of substance, not procedure."

25. 62 Stat. 961 (1948), as amended, 28 U.S.C. § 2072 (1964). See generally Gavits, *State Rights and Federal Procedure*, 25 IND. L.J. 1, 24 (1949); Miller, *Federal Rule 44.1 and the "Fact" Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine*, 65 MICH. L. REV. 613, 738-46 (1967); Sunderland, *Character and Extent of the Rule-Making Power Granted U.S. Supreme Court and Methods of Effective Exercise*, 21 A.B.A.J. 404, 406-07 (1935); Tyler, *The Origin of the Rule-Making Power and Its Exercise by Legislatures*, 22 A.B.A.J. 772 (1936); Wickes, *The New Rule-Making Power of the United States Supreme Court*, 13 TEXAS L. REV. 1 (1934); Williams, *The Source of Authority for Rules of Court Affecting Procedure*, 22 WASH. U.L.Q. 459 (1937).

26. 62 Stat. 961 (1948), as amended, 28 U.S.C. § 2072 (1964).

27. In Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941), it was held that "the test must be whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." In Mississippi Publishing Corp. v. Murphree, 326 U.S. 438, 445 (1945), the Court said: "Congress' prohibition of any alteration of substantive rights of litigants was obviously not addressed to such incidental effects as necessarily attend the adoption of the prescribed new rules of procedure upon the rights of litigants." In discussing the applicability of federal rules in diversity of citizenship cases, the Supreme Court, in Hanna v. Plumer, 380 U.S. 460 (1965), indicated that the rule-making power was not invalid merely because it altered the enforcement of state-created rights. *Id.* at 473-74. See also Miller, *supra* note 25, at 744-46.

of fairness when settling disputes among litigants. However, despite these over-arching considerations, it cannot be denied that historically there was a close nexus between the substantive rights of the parties and compulsory joinder.[28] Nonetheless, this relationship does not necessarily lead to the conclusion that such joinder is a matter of "substance" for Enabling Act purposes. Closely analogous to the compulsory joinder situation is the impleader proceeding authorized by rule 14. Just as in the case of compulsory joinder, an understanding of the substantive rights of the parties under state law is preliminary to any application of rule 14 since impleader is contingent upon the existence of a right of indemnity under local law. Although the validity of the impleader rule has never been subjected to a direct challenge based upon the limitations on the rule-making power, there is dictum in one opinion that rule 14 is properly within the scope of that power.[29] Thus, the mere linkage of state-created substantive rights with procedural methods for enforcement of those rights does not automatically require a conclusion that such procedure is incorporated as part of the substantive law.

A second factor to be considered in attempting to circumscribe the domain of procedural rules is the impact of a particular practice on the rights of litigants; indeed, it was essentially this line of approach which was used by the Third Circuit in reaching its decision in *Provident Tradesmens.* The court relied on an earlier decision of the Fifth Circuit, *Perry v. Allen,*[30] in which the provision of rule 25(a)(1) requiring substitution within two years after the death of a party was held invalid as an attempt to impose a statute of limitations. The *Perry* court supported its decision on the ground that the rule attempted to abridge the appellant's *substantive right* to bring his civil action to trial on the merits. Whether such a right exists absolutely is open to question,[31] but the Third Circuit in *Provident Tradesmens* accepted the *Perry* court's statement at face value. *Provident Tradesmens* was an action for a declaratory judgment as to whether the coverage of an insurance policy issued by the defendant to one Dutcher, the owner of the automobile, extended to another person who had been driving the automobile at the time of the accident. In the earlier wrongful death action against the driver's estate, the defendant insurance company had refused

28. See notes 3-13 *supra* and accompanying text.

29. See D'Onofrio Constr. Co. v. Recon Co., 255 F.2d 904 (1st Cir. 1958), where the court said: "It must be recognized that the third-party impleader practice provisions promulgated by the Supreme Court in Rule 14 . . . may rationally be regarded as dealing with a procedural subject matter and therefore Rule 14 falls within the authority delegated to the Supreme Court." *Id.* at 910.

30. 239 F.2d 107 (5th Cir. 1956).

31. See Note, 45 CALIF. L. REV. 785 (1957); Note, 70 HARV. L. REV. 1471 (1957); Note, 105 U. PA. L. REV. 1098 (1957).

to defend the action, contending that the driver had not been acting within the scope of his permitted use of the automobile. After a default judgment was entered in the wrongful death action, this declaratory judgment proceeding was commenced, but Dutcher, the policyholder, was not joined.[32] The trial court's directed verdict in favor of the plaintiff driver's estate was reversed by the Third Circuit, which held, *sua sponte*,[33] that the action must be dismissed for failure to join Dutcher. Since the insurance policy was one which provided for a set amount of coverage, the Third Circuit viewed Dutcher's interest in the policy as adverse to that of the plaintiff and "affected" by any decree entered by the court. Therefore, the court concluded that Dutcher was indispensable and that it could not proceed to a final judgment in his absence. In evaluating the effect of amended rule 19 on the case, the court said:

> The indispensable party doctrine is not procedural. It declares *substantive* law and accords a *substantive right* to a person to be joined as a party to an action when his interest or rights may be affected by its outcome. The indispensable party doctrine is beyond the reach of, and not affected by, Rule 19 of the Federal Rules of Civil Procedure . . . .[34]

Obviously, the court has applied the suggestion made by one commentator that rule 19 should be interpreted in such a manner that the concept of indispensable parties is not affected.[35] However, the notes and memoranda from the Advisory Committee's proceedings make it abundantly clear that the rule was amended with the primary intention of mitigating the harsh results flowing from the application of the indispensable parties rule.[36] In effect, therefore,

32. The estate of the deceased driver of the second vehicle and an injured passenger sued the defendant insurance company and the insured Dutcher in separate state court actions.

33. FED. R. CIV. P. 12(h)(2) provides that a defense of failure to join an indispensable party may be made "In any pleading permitted or ordered under Rule 7a, or by motion for judgment on the pleadings, or at the trial on the merits." This would indicate that if the question is raised on appeal, after a trial and jury verdict, it is raised too late. See also Benger Labs., Ltd. v. R. K. Laros Co., 24 F.R.D. 450 (E.D. Pa. 1959).

34. 365 F.2d at 805. It is noteworthy that in *Erie* contexts the Third Circuit has consistently held that the rule of indispensability to be applied in a diversity case is that of the state. See Kroese v. General Steel Castings Corp., 179 F.2d 760 (3d Cir.), *cert. denied*, 339 U.S. 983 (1950); Valley Forge Golf Club v. L. G. De Felice & Son, 124 F. Supp. 873 (E.D. Pa. 1954). However, in Iovino v. Waterson, 274 F.2d 41 (2d Cir. 1959), *cert. denied sub nom.* Carlin v. Iovino, 362 U.C. 949 (1960), the Second Circuit made it clear that the substance-procedure analysis employed in diversity litigation under *Erie* does not apply in determining the scope of the Rules Enabling Act.

35. See Fink, *supra* note 15, at 425-28. In Stevens v. Loomis, 334 F.2d 775 (1st Cir. 1964), Judge Aldrich interpreted the omission of any reference to "indispensable parties" in the new rule as consistent with the view that indispensability is a matter of substance and not procedure; he therefore limited the proposed new rule to clarifying the grounds for proceeding where "necessary" parties could not be joined.

36. See Advisory Committe Note to Federal Rule 19, H.R. Doc. No. 391, 89th Cong.,

as the dissent in *Provident Tradesmens* points out, the majority in that case is striking down Federal Rule 19 as invalid and beyond the scope of the Enabling Act.[37]

The majority in *Provident Tradesmens* focused on the "substantive" right of an absent party to be joined when his interests may be "affected by the decree."[38] Professor Hazard, in his extensive analysis of the history of the indispensable party rule, points out that traditionally, at least in equity, joinder has been looked upon as a procedural matter.[39] In emphasizing that there is no party whose absence prevents the issuance of a decree, but rather that there may be a party whose absence prevents the rendering of a *complete* decree,[40] he should have dispelled all fears that a substantive right not to have one's interest affected might exist. Moreover, how can an absentee be said to have a substantive right not to have his interest "affected," when traditional notions of collateral estoppel and res judicata do not even permit his interest to be legally affected?[41] If the court is referring to the *factual* impact of a decree on the interests of an absentee, it does not make sense to talk in terms of a substantive right; for carried to its logical extreme, such a right would require a court to dismiss a creditor's suit because a judgment against the debtor would impair his ability to pay others who were not parties to the litigation.[42] Moreover, Federal Rule 19 does not attempt to obliterate any consideration of the absentee's rights; such a consideration is still a factor for evaluation. In any case, why should an absentee have a substantive right not to have his interest affected when he himself has the opportunity to protect that interest by intervention[43] or when the court may be able to

2d Sess. 33-36 (1966), reprinted in 39 F.R.D. 89-94 (1966), 1966 U.S. CODE CONG. & AD. NEWS 779-84. The dissenting opinion in *Provident Tradesmens*, 365 F.2d at 822, contains the following explanation of the change in rule 19:

> Rule 19 in effect, therefore, is an effort to restate the liberal view which requires a practical consideration of the circumstances and an effort to shape relief to avoid injustice rather than the automatic dismissal of the action by applying the label of "jurisdictional" defect because an interested person was not made a party. The difference between the old and the new Rule 19 is graphically illustrated in the change in title. It formerly was entitled "Necessary Joinder of Parties"; it is now entitled, "Joinder of Persons Needed for Just Adjudication." Thus, the Committee has endeavored to emphasize the importance of equitable, discretionary factors.

37. 365 F.2d at 822.

38. The circuit court relied on the district court's ruling that Dutcher was "incompetent" to testify because his interest in the policy was "adverse" to that of the plaintiffs in that "it appears clearly that the measure of Dutcher's protection under this policy of insurance is dependent upon the outcome of this suit."

39. See notes 5-8 *supra* and accompanying text. See also Hazard, *supra* note 1. *But see* Fink, *supra* note 15, who is not impressed with the law-equity distinction.

40. See Hazard, *supra* note 1, at 1282.

41. See Reed, *supra* note 1, at 483.

42. See Hazard, *supra* note 1, at 1288-89. See also the dissenting opinion in *Provident Tradesmens*, 365 F.2d at 816.

43. See, *e.g.*, Parker Rust-Proof Co. v. Western Union Tel. Co., 105 F.2d 976 (2d Cir.), *cert. denied*, 308 U.S. 597 (1939).

shape relief in such a manner that those rights are protected?[44]

The Third Circuit's concern for an individual's substantive rights might have been more correctly, or at least more profitably, focused on the interest of the defendant who was actually before the court and who might have been prejudiced by the possibility of inconsistent decisions and multiple liability.[45] Because of the particular facts of *Provident Tradesmens*, the defendant insurance company may have found itself liable to Dutcher for indemnification of judgments rendered in the state court actions, as well as to the deceased's estate in the present declaratory judgment action. Historically, however, protection against multiple liability has always been viewed as an equitable matter and one within the discretion of the court.[46] Furthermore, as the dissent in *Provident Tradesmens* perspicaciously notes, the evils involved in a race to collect against the fund can be readily guarded against by a provision in the decree to the effect that the insurer defendant is not required to make any payment under the policy until Dutcher has had an opportunity to present any claims that he may have as a result of the state court determinations.[47]

It must also be remembered that the distinction between "substance" and "procedure" rests on shifting grounds, since what may be classified as "substance" or "procedure" for Enabling Act purposes may not be so categorized for other purposes, notably the *Erie* and conflict-of-laws situations. Consequently, rather than attempting to uncover some objective line of demarcation between "substance" and "procedure," any judicial inquiry should concentrate on the purpose for which the distinction is being made.[48] In the case of the federal rule-making power, an insight into the purpose for the distinction may be gleaned from congressional history, which indicates a desire to leave the Supreme Court free to make rules "which would regulate all means and facilities which courts make available to enforce rights, and to limit only the making of those

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44. See, *e.g.*, Tardan v. California Oil Co., 323 F.2d 717 (5th Cir. 1963); Ward v. Deavers, 203 F.2d 72 (D.C. Cir. 1953); Kroese v. General Steel Castings Corp., 179 F.2d 760 (3d Cir.), *cert. denied*, 339 U.S. 983 (1950).

45. In Western Union Tel. Co. v. Pennsylvania, 368 U.S. 71 (1961), the Supreme Court intimated that the right to be immune from double liability may be a constitutional right. This idea is explored in Fink, *supra* note 15, at 421. While the *Western Union* case does show a concern for the threat of double liability, the due process issue may be limited to the situation in which a court's jurisdiction is based on property within the state.

46. *Compare* Mahr v. Union Fire Ins. Soc'y, 127 N.Y. 452, 28 N.E. 391 (1891), *with* Petrogradsky Bank v. National City Bank, 253 N.Y. 23, 170 N.E. 479 (1930).

47. 365 F.2d at 819.

48. *Cf.* Iovino v. Waterson, 274 F.2d 41 (2d Cir. 1959), *cert. denied sub nom.* Carlin v. Iovino, 362 U.S. 949 (1960). See also Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 YALE L.J. 333 (1933).

rules which would alter the character of rights to be determined by a final judgment on the merits."[49]

Assuming that Federal Rule 19 can be sustained as within the scope of the Enabling Act, the rule must still be approved as within the bounds of *Erie R.R. v. Tompkins*[50] in order to be applied in a

49. Sunderland, *supra* note 25, at 406. Not only must one recognize that the Advisory Committee which drafted rule 19 and the Supreme Court which approved the rule were confident of their power to effect changes in concepts of indispensability, but also that the New York and Michigan rule-making committees, both limited to "regulating procedure," had previously formulated liberal joinder provisions which impinged on anachronistic definitions of indispensable parties. N.Y. Civ. Prac. L. & R. § 1001 (McKinney 1963); Mich. Court Rule 205 (1961). The notion that the "indispensability rule is still preserved" as argued by Fink, *supra* note 15, at 428, is refuted in 2 WEINSTEIN, KORN, & MILLER, N.Y. ADVISORY COMMITTEE ON PRACTICE AND PROCEDURE § 1001.01 (1965):

> [Under the New York Civil Practice Law and Rules] the practice remains essentially unchanged and well-reasoned precedents holding parties "necessary" are still useful. This does not mean, however, that courts should dismiss in every case where previously a party might have been held *"indispensable."*

The commentary on the Michigan rule is even more explicit. As interpreted in 1 HONIGMAN & HAWKINS, MICHIGAN COURT RULES ANNOTATED 552 (1962), the rule alters previous notions of "indispensable parties":

> Prior to the adoption of the new rules, joint obligees were traditionally required to join in the prosecution of a claim on the obligation. . . . Since the presence of all joint obligees is essential to permit the court to render complete relief, this joinder requirement will be continued under Rule 205.1.
>
> If a joint obligee is beyond the jurisdiction of the court, his absence need not deter the court from proceeding under sub-rule 205.2. . . . Most frequently the lack of an alternative remedy if the suit is dismissed will outweigh the possibility of a multiplicity of suits and resulting harassment of the defendant and the court if the action proceeds.

As a postscript, it might be noted that FED. R. CIV. P. 19 may be vulnerable to a challenge that the indispensable parties rule is "jurisdictional" and that, as amended, rule 19 violates FED. R. CIV. P. 82 by altering jurisdiction. Today, however, that theory is generally regarded as fallacious. See, *e.g.*, Bry-Man's Inc. v. Stute, 312 F.2d 585, 587 (5th Cir. 1963); Washington v. United States, 87 F.2d 421, 431 (9th Cir. 1936). Much of the confusion underlying the theory of jurisdictional defect results from the consequences that may occur in diversity situations. See, *e.g.*, Kendig v. Dean, 97 U.S. 423 (1879); Calcote v. Texas Pac. Coal & Oil Co., 157 F.2d 216 (5th Cir. 1946).

50. 304 U.S. 64 (1938). *Erie* required a federal court in diversity cases to apply the substantive law of the state in which it was sitting, whether that law was statutory or decisional. A more restrictive requirement was authorized in Guaranty Trust Co. v. York, 326 U.S. 99 (1945), where federal courts were bound to look to state law if that law would significantly affect the outcome of the litigation. The retreat from the outcome-determinative test was begun with Byrd v. Blue Ridge Rural Elec. Co-op., Inc., 356 U.S. 525 (1958), where the court stressed the necessity of balancing state and federal interests in determining whether to apply state or federal law. Most recently in Hanna v. Plumer, 380 U.S. 460 (1965), the Supreme Court appears to have authorized the application of all federal rules of procedure in diversity cases. The relationship of the *Erie* doctrine and various federal "procedural" practices is analyzed in Miller, *supra* note 25, at 702-15. For the history of the *Erie* doctrine as it has evolved, see generally Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L.J. 267 (1946); Hill, *The Erie Doctrine and the Constitution*, 53 NW. U.L. REV. 427, 541 (1958); Horowitz, *Erie R.R. v. Tompkins—A Test To Determine Those Rules of State Laws To Which Its Doctrine Applies*, 23 S. CAL. L. REV. 204 (1950); Kurland, *Mr. Justice Frankfurter, the Supreme Court, and the Erie Doctrine in Diversity Cases*, 67 YALE L.J. 187 (1957); Meador, *State Power and the Federal Judicial Power*, 49 VA. L. REV. 1082 (1963); McCoid, *Hanna v. Plumer: The Erie Doctrine Changes Shape*, 51 VA. L. REV. 884 (1965); Merrigan, *Erie to York to Ragan—A Triple*

diversity case in a federal court.[51] Before the redrafting of rule 19, there was a split of authority as to whether federal or state decisions were the proper source of law governing the question of indispensability.[52] While the issue was never resolved by the Supreme Court, an illuminating discussion of the problem was presented by the Fifth Circuit in *Kuchenig v. California.*[53] In that case, the court opined that any resolution by it of a conflict between the federal rule and state practice would be premature since the federal rule did not specifically speak to the problem in that it did not delineate any standard of indispensability; the court therefore focused on the more limited question of whether to consult state or federal precedents in determining indispensability.[54] Now that rule 19 specifically articulates criteria for deciding whether an action may continue, the question concerning the source of governing law must be resolved, and the resolution should be made in light of the Supreme Court's most recent *Erie*-based decision, *Hanna v. Plumer.*[55] In *Hanna,* the Supreme Court appears to have held that whenever there is a clash between a federal rule and local practice, the federal rule applies unless it can be demonstrated that "the Advisory Committee, this Court and Congress erred in their *prima facie* judgment

Play on the Federal Rules, 3 VAND. L. REV. 711 (1950); Smith, *Blue Ridge and Beyond: A Byrd's-Eye View of Federalism in Diversity Litigation,* 36 TUL. L. REV. 443 (1962); Tunks, *Categorization and Federalism: "Substance" and "Procedure" After Erie Railroad v. Tompkins,* 34 ILL. L. REV. 271 (1939); Vestal, *Erie R.R. v. Tompkins: A Projection,* 48 IOWA L. REV. 248 (1963); Note, 54 CALIF. L. REV. 1382 (1966); Note, 51 CORNELL L.Q. 551 (1966); Note, 1966 DUKE L.J. 142; Note, 27 OHIO ST. L.J. 345 (1966).

51. See McCoid, *supra* note 50, at 908 n.114. See also ADVISORY COMMITTEE ON CIVIL RULES, TENTATIVE PROPOSAL TO CLARIFY NECESSARY JOINDER OF PARTIES—RULE 19, PRELIMINARY MEMO: THE RELEVANCE OF STATE LAW (1962).

52. Federal law governs: Resnik v. La Paz Guest Ranch, 289 F.2d 814 (9th Cir. 1961); Green v. Green, 218 F.2d 130 (7th Cir. 1954), *cert. denied,* 349 U.S. 917 (1955); Cowling v. Deep Vein Coal Co., 183 F.2d 652 (7th Cir. 1950); Lawrence v. Sun Oil Co., 166 F.2d 466 (5th Cir. 1948); De Korwin v. First Nat'l Bank, 156 F.2d 858 (7th Cir.), *cert. denied,* 329 U.S. 795 (1946); Grace v. Carroll, 219 F. Supp. 270 (S.D.N.Y. 1963); New England Mut. Life Ins. Co. v. Brandenburg, 8 F.R.D. 151 (S.D.N.Y. 1948). State law governs: Strachan v. Nisbet, 202 F.2d 216 (7th Cir. 1953); Dunham v. Robertson, 198 F.2d 316 (10th Cir. 1952); Kroese v. General Steel Castings Corp., 179 F.2d 760 (3d Cir. 1949), *cert. denied,* 339 U.S. 983 (1950); Richmond Lace Works, Inc. v. Epstein, 31 F.R.D. 150 (S.D.N.Y. 1962); Campbell v. Pacific Fruit Express Co., 148 F. Supp. 209 (D. Idaho 1957); Valley Forge Golf Club v. L. G. De Felice & Son, 124 F. Supp. 873 (E.D. Pa. 1954); Baker v. Dale, 123 F. Supp. 364 (W.D. Mo. 1954); Redfern v. Collins, 113 F. Supp. 892 (E.D. Tex. 1953); Platte County v. New Amsterdam Cas. Co., 6 F.R.D. 475 (D. Neb. 1946). See generally *Developments in the Law, supra* note 18, at 992.

53. 350 F.2d 551 (5th Cir. 1965), *cert. denied,* 382 U.S. 985 (1966).

54. In *Kuchenig,* the court noted that indispensability was a judicially self-imposed limitation and therefore was linked with matters of procedure. On the other hand, it recognized that indispensability controlled whether an action would be dismissed, and that disparities would directly affect the outcome of an action and therefore encourage forum-shopping.

55. 380 U.S. 460 (1965).

that the rule in question transgresses neither the terms on the Enabling Act nor constitutional restrictions."[56] This language, if read literally, would seem to authorize the application in diversity cases of every federal rule that is legitimately within the scope of the Enabling Act. However, the problems presented by contrary determinations of indispensability are of a different nature than those posed by state-federal divergence with respect to the manner of serving process involved in *Hanna*. *Hanna* forced the litigant merely to alter the way in which he serves process and to abide by the proper rules of the chosen forum. In the case of joinder of indispensable parties, however, the state standards for determining indispensability may be such that the litigant is completely deprived of any means by which he may avail himself of the state forum.[57] In effect, a state determination of indispensability is analogous to a "door-closing statute" which causes a difference in outcome at the very outset of the litigation since it concerns the right of the plaintiff to have his case heard in the first instance.[58] Consequently, unlike the effect of the differing practices regarding service of process, the ability to bring suit in a federal court and the inability to do so in a state court for reasons of indispensability may well have relevance to the choice of a forum and raise the sort of equal protection problems posed in *Erie*.[59] However, there is strong support for the proposition that administrative considerations have dictated the content of judge-made rules as to when a party is indispensable and that therefore a federal court should rely upon its own practices in evaluating the propriety of proceeding without a particular party.[60] In view of the doubt concerning the true source of the indispensability rule[61] and its apparent ability to be rationally classified as

56. *Id.* at 472.

57. See *Developments in the Law*, *supra* note 18, at 888.

58. *Cf.* Angel v. Bullington, 330 U.S. 183 (1947). *Compare* Arrowsmith v. United Press Int'l, 320 F.2d 219, 226-27 (2d Cir. 1963) (*en banc*), *with* Jaftex Corp. v. Randolph Mills, Inc., 282 F.2d 508, 512-16 (2d Cir. 1960).

59. The problem is noted in Kuchenig v. California, 350 F.2d 551 (5th Cir. 1965), *cert. denied*, 382 U.S. 985 (1966). See also Miller, *supra* note 25, at 712-15. At this point, it is appropriate to note that it is unlikely that sharp collisions with state law will often arise, since the tests incorporated in amended rule 19 reflect equitable principles common to the law of all American jurisdictions and embrace the strong discretionary element running through the entire law of party-joinder, both state and federal. See ADVISORY COMMITTEE ON CIVIL RULES, TENTATIVE PROPOSAL, *supra* note 51.

60. See 2 BARRON & HOLTZOFF, *op. cit. supra* note 16, § 512 n.21.14; *Developments in the Law*, *supra* note 18, at 888.

61. See Fink, *supra* note 15, at 431. Professor Fink himself admitted the confusion surrounding the historical origin of the indispensable party doctrine:

> Until we have an adequate theory of what the indispensable parties rule is, it is hardly possible to determine whether it is a rule of substantive law. It would seem that the indispensable parties rule is a rule of substantive law if failure to join an indispensable party goes to the court's "power to render a decree," is a "fatal error," or is, in itself, a violation of due process of law. On the other hand,

either "substance" or "procedure,"[62] the strong federal policy embraced in rule 19 should prevail.

There would still appear to be a narrow category of cases in which a federal court could run afoul of *Erie*. If a state were to pass a statute granting to the plaintiff a particular right of action only if he joins with him certain other persons,[63] a federal court might be precluded from allowing the action to proceed.[64] However, in light of Mr. Justice Harlan's concurring opinion in *Hanna*, in which he criticizes the majority for sanctifying any legitimately adopted federal rule of procedure regardless of its impact on a "State's substantive regulation of the primary conduct and affairs of its citizens,"[65] it is conceivable that even in the extreme situation posed in the hypothetical, the majority would insist upon preserving the integrity of the federal rules. In this context, it might be more appropriate to balance the state and federal interests. Thus, assuming a strong substantive state policy not based on mere judicial administration factors, the state rule should be effectuated. But, absent such direct and specific clarification by the state, *Hanna* and the philosophy it represents purports to teach that federal policies, and in particular, those bound up with the federal judicial system, are not to be categorically dismissed in favor of state practice, even to guarantee identity of result.[66] Rule 19 embodies a conclusive federal attitude toward compulsory joinder in a federal court and this significant federal policy should prevail.[67]

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if joinder requirements are merely means of adjudicating rights, and, within the confines of fairness which procedural due process always requires, are discretionary rules . . . then joinder requirements may be thought to be procedural.
Ibid.

62. Hanna v. Plumer, 380 U.S. 460 (1965), seemed to authorize congressional rulemaking power for those matters which, "though falling within the uncertain area between substance and procedure, are rationally capable of classification as either." *Id.* at 472.

63. That joinder is a matter of state substantive law might be inferred from the passage of such a statute.

64. See 2 BARRON & HOLTZOFF, *op. cit. supra* note 16, § 511. This theory is based on the unstated premise that the Supreme Court, despite the Rules Enabling Act, is impotent to promulgate a rule for diversity cases touching on a matter that a state has deemed a facet of substantive policy.

65. 380 U.S. at 475-76.

66. See Miller, *supra* note 25, at 721-22.

67. See Advisory Committee Note to Federal Rule 19, H.R. Doc. No. 391, 89th Cong., 2d Sess. 33-36 (1966), reprinted in 39 F.R.D. 89-94 (1966), 1966 U.S. CODE CONG. & AD. NEWS 779-84. See generally Rippey v. Denver United States Nat'l Bank, 260 F. Supp. 704 (D. Colo. 1966).