

FEDERAL CIVIL PROCEDURE: THIRD CIRCUIT REJECTS  
FLEXIBLE APPROACH TO THE DOCTRINE OF  
INDISPENSABLE PARTIES EMBODIED IN AMENDED  
FEDERAL RULE OF CIVIL PROCEDURE 19

THE Third Circuit has impugned the premise and frustrated the goal of the new Federal Rule 19 by holding that the indispensable party doctrine is substantive law and therefore unaffected by a rule of procedure.<sup>1</sup> Following a fatal automobile accident, the executor of a deceased passenger brought a declaratory judgment action to establish the liability of the insurer, which had denied that the policy covered the person driving the car at the time of the accident. The insurer joined the estate of another victim and a surviving passenger but did not join the insured owner. The determinative factual issue was whether the driver was acting within the scope of the owner's permission at the time of the accident. At the trial on the merits, the district court judge found that because the policy was for a stated sum, any amount recovered by the estates would reduce the funds available to the insured on any claim arising from the accident. Thus, since the interests of the estates and the insured were adverse, the court invoked Pennsylvania's Dead Man's Act<sup>2</sup> to prevent the insured from testifying as to the driver's permission in the suits brought by the estates. However, the owner was allowed to testify against the surviving passenger, who did not come under the act's restrictions. The jury found that the driver was within the scope of the owner's permission and rendered a verdict for the injured party. Similarly, the district court directed verdicts for the plaintiff estates,<sup>3</sup> whereupon the insurer, protesting the application of the dead man's statute and the propriety of the directed verdicts, appealed. The court of appeals, however, did not reach these questions since it sua sponte determined the insured owner to be an indispensable party, thus necessitating dismissal of the action.<sup>4</sup>

Indispensable parties have been defined as

---

<sup>1</sup> *Provident Trademens Bank & Trust Co. v. Lumbermens Mut. Cas. Co.*, 365 F.2d 802 (3d Cir. 1966).

<sup>2</sup> PA. STAT. ANN. tit. 28, § 322 (1958).

<sup>3</sup> *Provident Trademens Bank & Trust Co. v. Lumbermens Mut. Cas. Co.*, 218 F. Supp. 802 (E.D. Pa. 1963).

<sup>4</sup> 365 F.2d at 804, 816.

Persons who . . . have [such] an interest in the controversy . . . 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.<sup>5</sup>

Thus, in an action to quiet title, the dispossessed claimant must join the adverse claimant.<sup>6</sup> Similarly, joint obligees must be joined when one of them is suing an obligor.<sup>7</sup> However, where the absent parties have separable interests, such as those of joint tort-feasors<sup>8</sup> or joint obligors,<sup>9</sup> they are not usually termed indispensable. Yet when a party is found to be indispensable, the court will dismiss the action<sup>10</sup> on the theory that "no court can adjudicate directly upon a person's right without the party being . . . before the court."<sup>11</sup> Such a procedure, however, conflicts with those policies which favor "economy and effectiveness in litigation" and the assurance of a remedy for the plaintiff.<sup>12</sup> The extent to which a court will balance the absent party's interest with these latter considerations depends essentially upon whether the court considers the indispensability doctrine to be a substantive right or a procedural guide. If the doctrine is substantive, the court's consideration of the problem must end with a technical determination of the absent party's interest; on the other hand, if it is procedural, the court can determine in the light of equitable and pragmatic considerations whether or not it should proceed.<sup>13</sup> The correct choice between these alternatives is a matter

---

<sup>5</sup> *Shields v. Barrow*, 58 U.S. (17 How.) 130, 139 (1854). See generally JAMES, CIVIL PROCEDURE §§ 9.14-27 (1965); 3 MOORE, FEDERAL PRACTICE ¶ 19 (2d ed. 1964); WRIGHT, FEDERAL COURTS § 70, at 260 (1963); Fink, *Indispensable Parties and the Proposed Amendment to Federal Rule 19*, 74 YALE L.J. 403 (1965); Hazard, *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 COLUM. L. REV. 1254 (1961); Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 MICH. L. REV. 327 (1957).

<sup>6</sup> *E.g.*, *Kuchenig v. California Co.*, 350 F.2d 551, 557 (5th Cir. 1965), *cert. denied*, 382 U.S. 985 (1966); *Washington v. United States*, 87 F.2d 421 (9th Cir. 1936).

<sup>7</sup> *E.g.*, *Gregory v. Stetson*, 133 U.S. 579 (1890); *Bryman's, Inc. v. Stute*, 312 F.2d 585 (5th Cir. 1963); see MOORE, *op. cit. supra* note 5, ¶ 19.11.

<sup>8</sup> *E.g.*, *McRanie v. Palmer*, 2 F.R.D. 479 (D. Mass. 1942); see 3 MOORE, *op. cit. supra* note 5, ¶ 19.07, at 2153 and cases cited n.13.

<sup>9</sup> *E.g.*, *Capital Fire Ins. Co. v. Langhorn*, 146 F.2d 237 (8th Cir. 1945); see 3 MOORE, *op. cit. supra* note 5, ¶ 19.11.

<sup>10</sup> *E.g.*, *Washington v. United States*, 87 F.2d 421 (9th Cir. 1936); see 3 MOORE, *op. cit. supra* note 5, ¶ 19.06, at 2152. See generally Comment, 29 CALIF. L. REV. 731 (1941).

<sup>11</sup> *Mallow v. Hinde*, 25 U.S. (12 Wheat.) 193, 198 (1827); see Reed, *supra* note 5, at 331-32.

<sup>12</sup> JAMES, *op. cit. supra* note 5, at §§ 9.17-19.

<sup>13</sup> Compare *Washington v. United States*, 87 F.2d 421, 428 (9th Cir. 1936), with *Mallow v. Hinde*, 25 U.S. (12 Wheat.) 193, 197-98 (1827).

of current dispute, which has its roots in the historical development of the doctrine.

The indispensability rule arose in equity where the court, in order to dispose of all contested issues, required that every person having an interest in the action be present.<sup>14</sup> In the earliest enunciations of the rule in this country, the determination of indispensability was commonly held to be subject to the judge's discretion.<sup>15</sup> However, after *Shields v. Barrow*<sup>16</sup> in 1854, there was a noticeable shift in the application of the doctrine. Holding the absent party to be indispensable, the Court in *Shields* emphasized his technically inseparable interest in the subject matter of the suit.<sup>17</sup> This concentration upon a technical jointness<sup>18</sup> tended to formularize the doctrine.<sup>19</sup> Concomitantly, the courts began to repeat more frequently earlier dicta to the effect that indispensability was a matter of substantive law which circumscribed judicial power to hear a case.<sup>20</sup> Even in these enunciations, however, there has been confusion as to the underlying basis of this "substantive law." Some courts have held that the failure to join an indispensable party was a jurisdictional defect;<sup>21</sup> others have suggested that the failure could constitute a denial of due process to the absent party;<sup>22</sup> and a few have merely stated without explanation that to proceed without an indispensable party is "fatal error."<sup>23</sup> Yet even as this trend toward a substantive view of the rule developed,<sup>24</sup> there remained a counter-

<sup>14</sup> See Fink, *supra* note 5, at 403; Hazard, *supra* note 5, at 1255-56; Reed, *supra* note 5, at 331, 347; Comment, *Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874, 879 (1958); cf. LOUISELL & HAZARD, PLEADING AND PROCEDURE 694-95 (1962).

<sup>15</sup> Mallow v. Hinde, 25 U.S. (12 Wheat.) 193, 197 (1827); Elmendorf v. Taylor, 23 U.S. (10 Wheat.) 152, 166-67 (1825); West v. Randall, 29 Fed. Cas. 718, 721-23 (No. 17424) (C.C.R.I. 1820).

<sup>16</sup> 58 U.S. (17 How.) 130 (1854).

<sup>17</sup> *Id.* at 140.

<sup>18</sup> See *Advisory Committee's Note*, FED. R. CIV. P. 19, reported in 86 Sup. Ct. (No. 11) 22 (1966).

<sup>19</sup> See JAMES, *op. cit. supra* note 5, § 9.21; WRIGHT, *op. cit. supra* note 5, § 70, at 260-61; Reed, *supra* note 5, at 340-46. *But see* Fink, *supra* note 5, at 413-16.

<sup>20</sup> See, e.g., Commonwealth Trust Co. v. Smith, 266 U.S. 152 (1924); Washington v. United States, 87 F.2d 421 (9th Cir. 1936); United States v. Fried, 183 F. Supp. 371 (E.D.N.Y. 1960), *aff'd on other grounds*, 309 F.2d 851 (2d Cir. 1962).

<sup>21</sup> E.g., Caldwell Mfg. Co. v. Unique Balance Co., 18 F.R.D. 258 (S.D.N.Y. 1955); Petroleum Anchor Equip., Inc., 406 S.W.2d 891, 892 (Tex. 1966) (dictum); see Fink, *supra* note 5, at 416-17 n.53; Reed, *supra* note 5, at 348 nn.69-70.

<sup>22</sup> E.g., Western Union Tel. Co. v. Pennsylvania, 368 U.S. 71 (1961). See generally LOUISELL & HAZARD, *op. cit. supra* note 14, at 429-30; Fink, *supra* note 5, at 421.

<sup>23</sup> E.g., Washington v. United States, 87 F.2d 421, 428 (9th Cir. 1936).

<sup>24</sup> See Fink, *supra* note 5, at 410-11. See generally *Advisory Committee's Note*, *supra* note 18, at 22-23.

vailing influence which, while not as widespread, has seemed to view the rule as one of procedure.<sup>25</sup> One reason for this latter tendency has been the nature of the strict federal diversity requirements, which have encouraged particular courts to "strain" to render some form of relief to those before them, either by finding the absent party to be only necessary or by shaping the final decree so as to protect his interest.<sup>26</sup> Accordingly, two courts, faced with the prospect of an inequitable dismissal, have proceeded to judgment in the knowledgeable absence of a clearly "indispensable" party.<sup>27</sup> Consequently, it is difficult to discern from the cases any definitive answer to the question of whether the rule is substantive or procedural.<sup>28</sup> At least one commentator has suggested that the courts have employed these terms as labels to denote conclusions reached after an unannounced weighing of equitable considerations.<sup>29</sup> The commentators are not, however, in agreement, although the greater number of recent articles seems to favor the procedural view.<sup>30</sup>

Nevertheless, in formulating the new Federal Rule of Civil Procedure 19, the Advisory Committee clearly adopted the procedural view of the indispensable party doctrine. The old rule, entitled "Necessary Joinder of Parties," was essentially a restatement of the contemporary understanding of indispensability and did not question the nature of the doctrine.<sup>31</sup> Thus, rule 19 (a) stated simply that "persons having a joint interest shall be made parties,"<sup>32</sup> and rule 12 (b) provided for dismissal of an action for failure to join an indispensable party.<sup>33</sup> As a result of the wording of those rules, the link between a party's technical interest and his indispensability became

---

<sup>25</sup> *E.g.*, *Gauss v. Kirk*, 198 F.2d 83, 85 n.2 (D.C. Cir. 1952); *Parker Rust-Proof Co. v. Western Union Tel. Co.*, 105 F.2d 976, 979 (2d Cir. 1939).

<sup>26</sup> *E.g.*, *Kroese v. General Steel Casings Corp.*, 179 F.2d 760, 764-65 (3d Cir.), *cert. denied*, 339 U.S. 983 (1950). See generally *Reed*, *supra* note 5, at 351-54; *Committee Comment*, MICH. CT. R. ANN. 205 (1963).

<sup>27</sup> *Parker Rust-Proof Co. v. Western Union Tel. Co.*, 105 F.2d 976 (2d Cir. 1939); *Benger Labs., Ltd. v. R. K. Laros Co.*, 24 F.R.D. 450 (E.D. Pa. 1959).

<sup>28</sup> *E.g.*, *Stevens v. Loomis*, 334 F.2d 775, 778 n.7 (1st Cir. 1964); *Gauss v. Kirk*, 198 F.2d 83, 85 n.2 (D.C. Cir. 1952).

<sup>29</sup> *WRIGHT*, *op. cit. supra* note 5, § 70, at 263.

<sup>30</sup> *JAMES*, *op. cit. supra* note 5, § 9.20, at 425; *Hazard*, *supra* note 5, at 1255; *Reed*, *supra* note 5, at 436. *Contra*, *Fink*, *supra* note 5, at 448.

<sup>31</sup> Fed. R. Civ. P. 19, 1 F.R.D. xci (1941). See *Fink*, *supra* note 5, at 408-11; *Comment*, 71 HARV. L. REV. 874, 879 (1958); *Note*, 56 YALE L.J. 1088 (1947). *But see* *Fink*, *supra* note 5, at 411-12 n.34.

<sup>32</sup> Fed. R. Civ. P. 19, 1 F.R.D. xci (1941).

<sup>33</sup> FED. R. CIV. P. 12 (b) (7). See FED. R. CIV. P. 12 (h).

even stronger,<sup>34</sup> for the bare command of the rules was not conducive to judicial analysis of the character of the doctrine. The basic change attempted by the Committee in the new rule is clearly indicated by the title: "Joinder of Persons Needed for Just Adjudication." In the revised rule 19 the emphasis is shifted from the party's technical interest to whether "in the light of pragmatic considerations"<sup>35</sup> the court should proceed with the parties before it or dismiss the action. The word indispensable is thus used only in a "conclusory" sense.<sup>36</sup> "Equity and good conscience" are the goals, and new functional guides have replaced the technical criteria of the old rule;<sup>37</sup> the courts are specifically instructed to consider the following inclusive factors:

[F]irst, to what extent a judgment rendered in the person's absence might be prejudicial to him 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.<sup>38</sup>

Thus the new rule's emphasis upon the pragmatic considerations of the original equity concept of indispensability<sup>39</sup> indicates its flexible, procedural orientation.<sup>40</sup>

The majority of the Third Circuit, however, rejected this position. Finding a joint interest between the insured and the insurer which might be adversely affected by the final decree, the majority reasoned that the insured owner was an indispensable party.<sup>41</sup> Consequently, the court, basing its decision primarily on those cases which have stated that the indispensability rule is substantive, concluded that

<sup>34</sup> *Advisory Committee's Note, supra* note 18, at 22; see *Fink, supra* note 5, at 408-11; cf. *Reed, supra* note 5, at 355-56.

<sup>35</sup> *Advisory Committee's Note, supra* note 18, at 24; accord, *Gram v. May*, 41 F.R.D. 52 (E.D. Pa. 1966).

<sup>36</sup> *Advisory Committee's Note, supra* note 18, at 25.

<sup>37</sup> Compare *Washington v. United States*, 87 F.2d 421, 427-28 (9th Cir. 1936), with *Advisory Committee's Note, supra* note 18, at 24-25.

<sup>38</sup> FED. R. Civ. P. 19 (b). See *LaVale Plaza, Inc. v. R. S. Noonan, Inc.*, 41 F.R.D. 4 (M.D. Pa. 1966); *B. L. Schrader, Inc. v. Anderson Lumber Co.*, 257 F. Supp. 794 (D. Md. 1966); *Advisory Committee's Note, supra* note 18, at 24-25.

<sup>39</sup> *Id.* at 22.

<sup>40</sup> Compare Proposed Amendments to Rules of Civil Procedure, 34 F.R.D. 371, 379 (1964) and *Stevens v. Loomis*, 334 F.2d 775, 778 n.7 (1st Cir. 1964), with *Advisory Committee's Note, supra* note 18.

<sup>41</sup> 365 F.2d at 809.

it must dismiss since the rule restricted its power to adjudicate the matter.<sup>42</sup> Furthermore, the court reasoned that rule 19 is merely procedural and therefore could not affect this substantive law. The dissent, on the other hand, rejected the majority's conclusions as historically ill-founded and relied instead on recent writings, the Advisory Committee's Note, and those cases which have treated indispensability as a procedural issue.<sup>43</sup> The dissent argued that, irrespective of whether the district court should have proceeded, the jury verdict should be preserved by fashioning an effective decree which would protect the absent party.<sup>44</sup> Thus, the minority members of the court were free to consider those factors which they felt were equitably relevant. They stressed that it had been eight years since the accident, that the insured had testified, and that he could have tried to intervene if he had felt his interests were jeopardized by the proceedings.<sup>45</sup> Furthermore, the dissent argued that the insured's interest could have been protected by shaping the decree so that any recovery on the policy by the estates or the injured party would have been conditional upon prior satisfaction of any claims against the insured.<sup>46</sup> A comparison of both the reasoning and the result of these two divergent approaches suggests the wisdom of the discretionary application of the procedural view of the indispensability rule. The flexibility of the minority's approach, when contrasted with the rigid stance taken by the majority, is demonstrably preferable. Although the majority may support its result by a perfunctory recitation of rule 12 (b), it can proffer no equitable justification for dismissal in the instant case. The dismissal is contrary not only to the modern philosophy of procedure, which stresses equity and convenience, but also to the historical basis of the indispensability doctrine, which emphasizes its discretionary character. An *ad hoc* determination of the absent party's interest according to the criteria of the new rule 19 is clearly superior to a ritualistic application of the joint interest formula, which is blind to the equities of the case.

---

<sup>42</sup> *Id.* at 809, 813.

<sup>43</sup> *Id.* at 817-18, 821-22 (dissenting opinion); *accord*, *Rippey v. Denver U.S. Nat'l Bank*, 10 FED. RULES SERV. 2d 19a.1-61, case 15 (D. Colo. Oct. 21, 1966).

<sup>44</sup> 365 F.2d at 820.

<sup>45</sup> *Id.* at 819-20.

<sup>46</sup> *Id.* at 819.