COMPULSORY JOINDER OF PARTIAL SUBROGEES: IMPLICATIONS OF THE ALASKA RULE

I. INTRODUCTION

In *Truckweld Equipment Co. v. Swenson Trucking & Excavating, Inc.*,[1] the Alaska Supreme Court considered whether a defendant could compel the joinder of a partial subrogee.[2] The court followed the dictum in *United States v. Aetna Casualty & Surety Co.*[3] and created a rule for the compulsory joinder of partial subrogees under Alaska Rule of Civil Procedure 17(a).[4]

The purpose of this note is to scrutinize the *Truckweld* rule of compulsory joinder. The first section of the note summarizes the *Truckweld* case. The second section reviews the *Truckweld* opinion and concludes that the court's reasoning is unconvincing. The third section describes the dilemma presented by the *Truckweld* decision and considers two potential responses. The dilemma is created when lower courts are faced with an unenviable choice between certain express procedures in the Alaska rules and the compulsory joinder rule created by *Truckweld*. The final section suggests a third, more realistic response to this dilemma. The note concludes that while the

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1. 649 P.2d 234 (Alaska 1982).

2. *See generally* Recent Developments, *Federal Jurisdiction and Practice: Is Joinder of a Partial Subrogee Required?*, 33 OKLA. L. REV. 197 (1980); Annot., 13 A.L.R.3D 140 (1967).

3. 338 U.S. 366 (1949).

4. ALASKA R. CIV. P. 17.

(a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the state so provides, an action for the use or benefit of another shall be brought in the name of the state. No action shall be dismissed on the ground that it is not prosecuted in the name of 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.

Truckweld decision is an unfortunate reality, it can still be interpreted so that the explicit procedures of the rules are not rendered useless. Thus, despite the clear implication of *Truckweld* to the contrary, procedures expressly set forth in Alaska's rules, especially the procedure for ratification in Rule 17, should be retained.

II. A FACTUAL SUMMARY OF *TRUCKWELD EQUIPMENT CO. V. SWENSON TRUCKING & EXCAVATING, INC.*

The case originated with an action brought by Swenson Trucking & Excavating, Inc. (Swenson) against Truckweld Equipment Company (Truckweld) for negligently repairing a dump truck. Swenson sought to recover the entire amount of its damages although it had been reimbursed by its insurer, Insurance Company of America (INA), for $12,000 of the $89,000 claimed in the suit. Truckweld was granted summary judgment, but on appeal the case was remanded for further proceedings on a single count of negligence.[5]

Although INA initially considered representing its subrogated interest separately at trial, it eventually agreed to be represented by Swenson's attorney and to bear half of the attorney's fees and costs. A pretrial motion by Truckweld to name INA as a real party in interest under Alaska Rule of Civil Procedure 17(a)[6] was denied and the trial proceeded without INA as a named party.

At the second trial, Truckweld obtained a favorable verdict and moved for an award of costs and attorney's fees against both INA and Swenson. The trial court ruled that Swenson alone would be held liable for costs and attorney's fees;[7] INA was not liable because it was not a named party. Truckweld cross-appealed, arguing that INA was joinable under Rule 17(a) as a real party in interest and was therefore jointly and severally liable for attorney's fees and costs.[8] When Swenson failed to answer, INA was granted leave to file an amicus curiae brief.[9]

The Alaska Supreme Court unanimously held that the joinder of partial subrogees could be compelled under Rule 17(a).[10] However, at trial Truckweld's motion for joinder had been untimely; con-

5. Swenson Trucking & Excavating, Inc. v. Truckweld Equip. Co., 604 P.2d 1113, 1120 (Alaska 1980).

6. 649 P.2d at 235. The trial court's denial of a later motion under Rule 17(a) to dismiss for failure to name a real party in interest was not contested on appeal. *Id.* at 239.

7. *See id.* at 235.

8. *Id.* at 235-36.

9. *Id.* at 236.

10. *Id.* at 238.

sequently, the lower court's denial of joinder was affirmed.[11] Under these circumstances, the court's discussion of joinder was unnecessary because the issue of timeliness was dispositive of the entire case. Nevertheless, the court chose to announce a clear rule regarding the compulsory joinder of partial subrogees.

III. AN EXAMINATION OF THE REASONING IN *TRUCKWELD*

In order to examine the *Truckweld* decision, it is important first to determine whether the Alaska Supreme Court would have compelled joinder under Rule 17 or under Rule 19.[12] Joinder has previously been compelled under both rules. Although Rule 17 does not explicitly require it, some courts automatically join every party that qualifies as a real party in interest.[13] Under the more analytically correct approach,[14] however, even if a court decides that a party is a real party in interest under Rule 17(a), joinder is still determined under the procedures of Rule 19.[15] Courts following the latter approach treat motions for joinder of real parties in interest under Rule 17(a) as motions for joinder Rule 19.[15]

A number of factors indicate that, had it reached the issue, the court in *Truckweld* would have compelled joinder under Rule 17. First, the motion appealed was a motion to join the insurer as a real

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11. The motion was untimely because it was made 60 days after the deadline set in the pretrial order. *See id.* at 239.

12. Different inconsistencies arise depending upon which rule *Truckweld* used to compel joinder. *See infra* text accompanying notes 60-73. For a number of reasons, *see infra* text accompanying notes 17-20, this note takes the position that the *Truckweld* court contemplated joinder under Rule 17. Nevertheless, this note's ultimate conclusion — that ratification survives *Truckweld* as a procedure available to partial subrogees — applies regardless of whether joinder was contemplated under Rule 17 or Rule 19.

13. *See* City Stores Co. v. Lerner Shops, 410 F.2d 1010, 1015 (D.C. Cir. 1969); Wattles v. Sears, Roebuck & Co., 82 F.R.D. 446, 451 (D. Neb. 1979).

14. *See* White Hall Bldg. Corp. v. Profexray Div. of Litton Indus., 387 F. Supp. 1202, 1204 (E.D. Pa. 1974), *aff'd sub nom.* Quaglia v. Profexray Div. of Litton Indus., 578 F.2d 1375 (3d Cir. 1978).

15. *See, e.g.,* Jefferson v. Ametek, Inc., 86 F.R.D. 425, 429-30 (D. Md. 1980); Whitcomb v. Ford Motor Co., 79 F.R.D. 244, 245 (M.D. Pa. 1978); Kint v. Terrain King Corp., 79 F.R.D. 10, 11 (M.D. Pa. 1977); White Hall Bldg. Corp. v. Profexray Div. of Litton Indus., 387 F. Supp. 1202, 1204 (E.D. Pa. 1974), *aff'd sub nom.* Quaglia v. Profexray Div. of Litton Indus., 578 F.2d 1375 (3d Cir. 1978). *See also* 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1543, at 646 & n.59 (1971) ("[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).").

16. *See, e.g.,* Kint v. Terrain King Corp., 79 F.R.D. 10, 11 & n.2 (M.D. Pa. 1977); White Hall Bldg. Corp. v. Profexray Div. of Litton Indus., 387 F. Supp. 1202, 1204 (E.D. Pa. 1974), *aff'd sub nom.* Quaglia v. Profexray Div. of Litton Indus., 578 F.2d 1375 (3d Cir. 1978).

party in interest under Rule 17(a).[17] Nothing in the court's analysis indicated that this motion was treated as one for joinder under Rule 19.[18] Second, after stating that the policies behind Rule 19 did not require joinder, the court switched its analysis to the policies allegedly advanced by Rule 17.[19] Indeed, the court ignored the conditions for joinder set forth in Rule 19 and appeared to state that status as a real party in interest under Rule 17(a) would automatically trigger joinder.[20]

In creating a general rule for the compulsory joinder of partial subrogees under Rule 17, Justice Matthews relied primarily on the dictum in *United States v. Aetna Casualty & Surety Co.*[21] *Aetna,* however, contemplated joinder under Rule 19(b). The United States Supreme Court stated in *Aetna* that both an insured and its partially subrogated insurer were "necessary" parties under Rule 19 of the Federal Rules of Civil Procedure.[22] Rule 19 and other federal rules governing joinder were eventually revised in 1966. Despite these revisions, which were also incorporated into the Alaska rules, a significant number of federal courts still follow the *Aetna* dictum.[23]

The *Truckweld* court acknowledged that the federal circuits are split on whether to follow the *Aetna* dictum.[24] The circuits that reject *Aetna* reason that the elimination of the categories of "necessary" and "indispensable" parties by a 1966 amendment to Rule 19[25]

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17. For example, the court's discussion of timeliness referred only to motions under Rule 17. *See Truckweld,* 649 P.2d at 239.

18. *Cf.* cases cited *supra* note 16. The *Truckweld* opinion intimated that the trial court may have regarded the Rule 17(a) motion as a motion to amend the pleadings. 649 P.2d at 239. Nevertheless, whether the pleadings were to be amended to include the insurer still depends on the criteria in Rule 17. Furthermore, the rule that allows motions to amend sets forth no criteria for joinder.

19. *Truckweld,* 649 P.2d at 239. By considering joinder under Rule 17 instead of under Rule 19, the court hoped to avoid any inconsistency with the 1966 amendment to Rule 19. But *Aetna* is also inconsistent with the 1966 amendment to Rule 17. *See infra* text accompanying notes 57-59.

20. *See infra* text accompanying note 48.

21. 338 U.S. 366 (1949).

22. *Id.* at 381-82. *Aetna* considered whether an anti-assignment provision in the Federal Tort Claims Act (FTCA) prevented subrogated insurers from bringing actions of their own against the United States. *Id.* at 367-68. The Court held that the anti-assignment provision exempted subrogations by operation of law. *Id.* at 380. The Court discussed joinder only after noting that FTCA suits brought by subrogees would be subject to the Federal Rules of Civil Procedure.

23. *See* cases cited *infra* note 28.

24. 649 P.2d at 236.

25. The version of Rule 19 of the Federal Rules of Civil Procedure in effect at the time *Aetna* was decided provided that:

> (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

also eliminated the basis for the *Aetna* dictum.[26] Instead of automatically joining partial subrogees, these circuits look for one of three conditions that trigger joinder in the current version of Rule 19: threats of multiple litigation, threats to the nonparty's interests, or barriers to granting complete relief among the parties already before the court.[27] Under Rule 19, a court compels joinder only if one of the enumerated conditions exists. Other circuits, however, continue to follow *Aetna* without any meaningful discussion of the 1966

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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 required only by their 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, 28 U.S.C. § 6100 (1964) (amended 1966). The current version of the Rule, reflecting amendments adopted in 1966, provides:

Rule 19. *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 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. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

FED. R. CIV. P. 19(a). The language of Rule 19 in the Alaska Rules of Civil Procedure closely follows the language of the Federal Rule. *Truckweld,* 649 P.2d at 237 n.1.

26. *See* Glacier Gen. Assurance Co. v. G. Gordon Symons Co., 631 F.2d 131, 134 (9th Cir. 1980); Dudley v. Smith, 504 F.2d 979, 983 & nn.4-5 (5th Cir. 1974). In circuits where no appellate court has considered the issue, a number of the lower courts have rejected the *Aetna* dictum. *See, e.g.,* Kint v. Terrain King Corp., 79 F.R.D. 10, 11 n.3 (M.D. Pa. 1977); Prudential Lines, Inc. v. General Tire Int'l Co., 74 F.R.D. 474, 475 (S.D.N.Y. 1977).

27. *See* 3A J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 19.07-.1[2] (2d ed. 1982); 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1604, at 35 (1972). *See also infra* note 74.

amendment.[28]

The *Truckweld* court recognized that the 1966 amendment "arguably eliminated the basis for the [*Aetna*] dictum" and that the case before it presented no risk of multiple suits.[29] Nevertheless, the Alaska court adopted the *Aetna* dictum and created a rule requiring the joinder of partially subrogated insurers.[30]

Prior to *Truckweld,* courts following *Aetna* had usually ignored the 1966 amendment to Rule 19.[31] The *Truckweld* court, on the other hand, analyzed both sides of the compulsory joinder issue, adopted *Aetna,* and then attempted to justify its holding. The opinion appears to be well-reasoned. A close analysis, however, reveals that the *Truckweld* opinion is no more persuasive than the earlier cases that wholly disregarded the 1966 amendment.

The court noted three discernible reasons for the adoption of *Aetna.* First, the court stated that even when no threat of multiple litigation exists, "[t]he policy against use or sham plaintiffs reflected in Rule 17(a) remains unchanged."[32] Second, the court stated that Alaska's broad provisions for costs and attorney's fees made it desirable that all interested parties appear before the court formally.[33] Third, the court concluded that compulsory joinder was reasonable.[34]

A. Policy Against Use Plaintiffs

Contrary to the view stated in *Truckweld,* no policy against use plaintiffs exists in Rule 17.[35] The original purpose of Rule 17 was to create a method of pleading that allowed subrogees to sue directly.[36]

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28. *Truckweld,* 649 P.2d at 237. *See* Virginia Elec. & Power Co. v. Westinghouse Elec. Corp., 485 F.2d 78, 85 (4th Cir. 1973), *cert. denied,* 415 U.S. 935 (1974); Public Serv. Co. v. Black & Veatch, 467 F.2d 1143, 1144 (10th Cir. 1972).

29. *See* 649 P.2d at 238.

30. Moreover, the court was unimpressed "by abstract claims of prejudice resulting from the jury's knowledge of partial coverage. Insurance is a widely accepted fact of life." *Id.* at 238 n.4.

31. *See* Dudley v. Smith, 504 F.2d 979, 983 n.6 (5th Cir. 1974); *Truckweld,* 649 P.2d at 237.

32. 649 P.2d at 238. A "use plaintiff" is defined as "one for whose use (benefit) an action is brought in the name of another." BLACK'S LAW DICTIONARY 1383 (5th ed. 1979). Thus, Insurance Company of America (INA), at least to the extent it paid amounts due under the insurance policy, was the use plaintiff for whose benefit Swenson brought suit.

33. 649 P.2d at 238.

34. *Id.*

35. *See infra* text accompanying notes 39-43.

36. *Cf.* Virginia Elec. & Power Co. v. Westinghouse Elec. Corp., 485 F.2d 78, 84 (4th Cir. 1973), *cert. denied,* 415 U.S. 935 (1974); White Hall Bldg. Corp. v. Profexray Div. of Litton Indus., 387 F. Supp. 1202, 1206 (E.D. Pa. 1974), *aff'd sub*

Under the restrictive common law practice, subrogated rights were only enforceable in the name of the subrogor for the benefit of the subrogee.[37] The current purpose of Rule 17 is stated in the advisory committee notes to the 1966 amendment:

> In its origin the rule concerning the real party in interest was permissive in purpose: it was designed to *allow* an assignee to sue in his own name. That having been accomplished, the modern function of the rule in its negative aspect is simply to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata.[38]

The amended version of Rule 17 contains a provision for ratification that actually encourages the device of use plaintiffs.[39] A real party in interest ratifies an action by promising to be bound by the results of the litigation.[40] In exchange for this legally enforceable promise, Rule 17 allows the real party to forego participation in the suit. Unlike joinder, ratification does not make the real party in interest a named party to the suit.[41] Thus, after an insurer ratifies a suit, the suit continues with the insured essentially functioning as a use plaintiff.

Ratification is inconsistent with the policy against use plaintiffs which the court attributed to Rule 17(a).[42] Even if such a policy

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nom. Quaglia v. Profexray Div. of Litton Indus., 578 F.2d 1375 (3d Cir. 1978); Ward v. Franklin Equip. Co., 50 F.R.D. 93, 94 (E.D. Va. 1970).

37. *See Aetna,* 338 U.S. at 381; 3A J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 17.08, at 78 (2d ed. 1982); 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1541, at 633-34 (1971).

38. FED. R. CIV. P. 17 Advisory Committee notes to the 1966 amendment (emphasis added).

39. *See* ALASKA R. CIV. P. 17(a), set out at note 4 *supra*.

40. *See, e.g.,* Urrutia Aviation Enters., Inc. v. B.B. Burson & Assocs., Inc., 406 F.2d 769, 770 (5th Cir. 1969); Motta v. Resource Shipping & Enters. Co., 499 F. Supp. 1365, 1371 (S.D.N.Y. 1980); James v. Nashville Bridge Co., 74 F.R.D. 595, 597 (D. Miss. 1977); Pace v. General Elec. Co., 55 F.R.D. 215, 219 (W.D. Pa. 1972); Southern Nat'l Bank v. Tri Fin. Corp., 317 F. Supp. 1173, 1188 (S.D. Tex. 1970), *aff'd in part on other grounds and vacated in part on other grounds,* 458 F.2d 688 (5th Cir. 1972).

A party typically ratifies by filing an affidavit with the court, *see* Sowash v. Garrett, 630 P.2d 8, 12 n.3 (Alaska 1981), "explicit[ly] adopt[ing] the court proceedings in question." *Truckweld,* 649 P.2d at 240 n.5.

41. *See* Hancotte v. Sears, Roebuck & Co., 93 F.R.D. 845, 846 (E.D. Pa. 1982); Clarkson Co. v. Rockwell Int'l Corp., 441 F. Supp. 792, 797 (N.D. Cal. 1977); Southern Nat'l Bank v. Tri Fin. Corp., 317 F. Supp. 1173, 1188 (S.D. Tex. 1970), *aff'd in part on other grounds and vacated in part on other grounds,* 458 F.2d 688 (5th Cir. 1972).

42. *Cf.* Motta v. Resource Shipping & Enters. Co., 499 F. Supp. 1365, 1373 (S.D.N.Y. 1980). "Rule 17(a) ratification allows the parties freedom to determine who shall prosecute a suit in which they both rightfully claim an interest. In the

against use plaintiffs once existed,[43] Rule 17(a) now recognizes the legitimacy of use plaintiffs when the insurer ratifies the action. The provision for ratification confirms that Rule 17's primary purpose is to protect the defendant from further litigation, and not to abolish the use plaintiff device.

B. Alaska's Costs and Attorney's Fees Policy

The *Truckweld* court also asserted that compulsory joinder furthered Alaska's broad provisions for costs and attorney's fees.[44] Alaska, however, could promote these policies without imposing compulsory joinder by simply applying the procedures already provided for in Rule 17.[45] As the *Truckweld* decision revealed, any party ratifying under Rule 17 becomes jointly and severally responsible for attorney's fees and costs.[46] Therefore, compulsory joinder is not the sole means to assure that all parties "bear the burdens as well as the benefits of the litigation."[47] Alaska's attorney's fees policy will be protected whether the unnamed party ratifies or joins the action.

C. Reasonableness of Compulsory Joinder

The court's final rationale for adopting *Aetna* was simply that compulsory joinder was reasonable:

> If [the insured party] chooses to include the insurer's portion of the claim along with its own, then we think it only reasonable that the insurer also make an appearance. . . . Even if the insurer is not actively participating, it stands to gain from the litigation, since its share of any recovery will be impressed with a trust for its benefit. Since its claim is being directly litigated, there is no reason that it should not be made a named party.[48]

The court appeared to state that because the insurer was a real party in interest there was no reason why it should not have been named to the suit. The compulsory joinder of partially subrogated insurers,

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absence of any prejudice to the defendant, this result is consistent with the underlying rationale of the Rule . . . ." *Id.*

43. One commentator reports that an early predecessor of Rule 17 was based on a notion that use plaintiffs were undesirable. Atkinson, *The Real Party in Interest Rule: A Plea for its Abolition,* 32 N.Y.U. L. REV. 926, 936 (1957). References to the use plaintiff rationale, however, are infrequent. *See, e.g.,* 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1541, at 635-36 & nn.9-11 (1971).

44. *See* ALASKA R. CIV. P. 54(d), 79 & 82.

45. *Truckweld* disrupts the explicit procedures of Rule 17 because it is inconsistent with ratification under Rule 17(a). *See infra* notes 57-59 and accompanying text.

46. *See Truckweld,* 649 P.2d at 239.

47. *See id.* at 238.

48. *Id.*

however, is not reasonable because it subjects plaintiffs to the anti-insurer prejudice of juries and produces unnecessary inconsistencies within the Alaska rules.

1. *Jury Prejudice.* Compulsory joinder exposes both the insured and its insurer to the anti-insurer prejudice of juries. *Truckweld* asserts that insurance is a widely accepted fact of life and that juries, even when not expressly informed of coverage, are nevertheless aware that insurance exists.[49] Nevertheless, many courts still refuse to join insurance companies because of potential jury prejudice.[50] The possibility of juror prejudice, therefore, remains a cogent concern in many courts. Even some of the district courts that follow *Aetna* have criticized the joinder of insurers because of the possibility of prejudice.[51]

Little research has considered the prejudice of juries toward insurance companies.[52] The research that does exist is inconclusive. While one study evaluating the joinder of a plaintiff insurer concluded that joinder actually benefited the insured plaintiff,[53] most studies have indicated that juries disfavor insurance companies.[54]

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49. *See* Pace v. General Elec. Co., 55 F.R.D. 215, 218-19 (W.D. Pa. 1972). *See generally* Comment, *Evidence: Revealing the Existence of Defendant's Liability Insurance to the Jury,* 6 CUM. L. REV. 123, 137 (1975). At least one commentator, however, notes that while modern jurors are likely to assume the defendant is covered by insurance, they are less likely to assume that an insurance company stands behind the plaintiff. *See* Kennedy, *Federal Rule 17(a): Will the Real Party in Interest Please Stand?,* 51 MINN. L. REV. 675, 686 (1967).

50. *See, e.g.,* Stouffer Corp. v. Dow Chem. Co., 88 F.R.D. 336, 338 (E.D. Pa. 1980); White Hall Bldg. Corp. v. Profexray Div. of Litton Indus., 387 F. Supp. 1202, 1206 (E.D. Pa. 1974), *aff'd sub nom.* Quaglia v. Profexray Div. of Litton Indus., 578 F.2d 1375 (3d Cir. 1978).

51. *See* Edwards, Inc. v. Arlen Realty & Dev. Corp., 466 F. Supp. 505, 513-14 (D.S.C. 1978) (criticizing Fourth Circuit rule); Public Serv. Co. v. Crane Co., 48 F.R.D. 424, 425 (N.D. Okla. 1969) (criticizing Tenth Circuit rule), *aff'd sub nom.* Public Serv. Co. v. Black & Veatch, 467 F.2d 1143, 1144 (10th Cir. 1972).

> At its worst, this prejudice that might result from the insurers' joinder could result in complete denial of recovery to plaintiff and the insurers. On a lesser level, this prejudice could result in a reduction of damages, in which case the full effect of the prejudice would fall on the plaintiff alone, since the insurers have first lien on any recovery obtained.

White Hall Bldg. Corp. v. Profexray Div. of Litton Indus., 387 F. Supp. 1202, 1206, *aff'd sub nom.* Quaglia v. Profexray Div. of Litton Indus., 578 F.2d 1375 (3d Cir. 1978).

52. *See* Martinez, *Insurance: Discovery and Evidence,* 1971 INS. L.J. 471, 485.

53. *See* Broeder, *The Pro and Con of Interjecting Plaintiff Insurance Companies in Jury Trial Cases: An Isolated Jury Project Case Study,* 6 NAT. RESOURCES J. 269, 276-83 (1966).

54. *See, e.g.,* Broeder, *The University of Chicago Jury Project,* 38 NEB. L. REV. 744, 754 (1959); Comment, *Admissibility of Evidence of Insurance in Automobile Negligence Actions,* 19 WASH. & LEE L. REV. 146, 148-49 & n.20 (1962).

Jury prejudice may or may not exist. But if the threat of prejudice has been deemed sufficient to restrict the mention of insurance during trial,[55] it should also be enough to prevent insurance from being mentioned in the pleadings. Naming insurers to the action may unfairly prejudice the plaintiff. The rules should be construed so that juries are encouraged to focus on substantive issues rather than on their own irrational biases.[56]

2. *Inconsistency With the Alaska Rules.* The *Truckweld* decision, far from being a well-reasoned exercise in judicial rulemaking, unnecessarily created substantial inconsistencies with the 1966 amendments to Rules 17 and 19. As a result of the 1966 amendment, Rule 19 no longer contains language that can be interpreted as compelling the joinder of partial subrogees merely because they are real parties in interest.[57] The *Truckweld* court attempted to remain faithful to this amendment by shifting its analysis of joinder to Rule 17.[58] But the inconsistency with the 1966 amendments is not avoided by compelling joinder under Rule 17 instead of Rule 19. Since 1966, Rule 17 has contained a procedure for ratification. Compulsory joinder under Rule 17 is inconsistent with this procedure for ratification.[59] *Truckweld,* then, is unreasonable not only because it exposes insured plaintiffs to jury prejudice, but also because it creates inconsistencies within the Alaska rules.

This inconsistency with the 1966 amendments could have been avoided if the *Truckweld* court had proceeded directly to the case's dispositive issue of timeliness. Instead, the court unnecessarily endorsed the *Aetna* decision. The implications of *Truckweld* on Alaska's current rules of procedure were left to be sorted out by the lower courts. How the lower courts respond to the inconsistencies created by *Truckweld* will determine whether ratification remains available to partial subrogees.

IV. THE IMPLICATIONS OF *TRUCKWELD*

A dilemma arises when compulsory joinder is read into Rule 17(a), because that same rule also authorizes ratification. Lower courts may feel uneasy when faced with a choice between the *Truckweld* compulsory joinder requirement and the procedure for

55. *See* ALASKA R. EVID. 411.

56. In Edwards, Inc. v. Arlen Realty & Dev. Corp., 466 F. Supp. 505, 513 (D.S.C. 1978), the court noted that the forced joinder of an insurer has no objective effect on the substantive claim, but that it could "quite possibly result in a verdict not based on the substantive merits of the claim but rather on inherent prejudice against insurance companies." *Id.*

57. *See generally supra* note 25.

58. *See Truckweld,* 649 P.2d at 238.

59. *See infra* text accompanying notes 60-73.

ratification expressly authorized by Rule 17. If ratification is allowed, the rule in *Truckweld* is undermined because partial subrogees can avoid the compulsory joinder requirement by simply ratifying the suit. If the *Truckweld* compulsory joinder requirement is strictly enforced, the ratification procedure set forth explicitly in Rule 17 must be disregarded. Unfortunately, the *Truckweld* decision provides no guidance as to how this dilemma should be resolved. In light of the supreme court's silence, lower courts are free to choose among three possible responses to this dilemma.

A. Rejection of Ratification

The courts could choose to reject Rule 17's clearly expressed provision for ratification and allow the requirement of compulsory joinder created by the *Truckweld* dicta to prevail. Such a response is inappropriate because it leaves Rule 17 in disarray and denies partial subrogees the alternative of ratification.

There are a number of reasons why *Truckweld* should not be interpreted to preempt Rule 17's provision for ratification. First, ratification satisfies the policies that underlie the *Truckweld* decision. The procedure protects the Alaska attorney's fees policy because any party that ratifies becomes liable for fees. Furthermore, the court is informed of " 'the interest of the plaintiff, and . . . the interests of . . . others in the claim' "[60] because the ratifying party files with the court an affidavit indicating its interest.

In addition to advancing *Truckweld's* objectives, ratification is "logical, just and effectu[ates] . . . the purposes of [both] Rule 17 and Rule 19."[61] The procedure promotes the rules' policies regarding res judicata and the protection of defendants from subsequent suits by the unnamed real party in interest. By uniformly rejecting ratification, a court denies the parties their "freedom to determine who shall prosecute a suit in which they both rightfully claim an interest."[62] In short, neither *Truckweld* nor the Alaska rules suggests a compelling reason to deny partial subrogees the option of ratification.

Finally, ratification provides insurers and their insureds with the only viable means of avoiding jury prejudice. The only other techniques for avoiding jury prejudice, the "loan receipt" and the

60. *Truckweld,* 649 P.2d at 238 (quoting *Aetna,* 338 U.S. at 382). As a third reason for adopting *Aetna,* the court cited a policy in Rule 17 against use plaintiffs. No such policy exists. *See supra* notes 35-43 and accompanying text.

61. *See* Edwards, Inc. v. Arlen Realty & Dev. Corp., 466 F. Supp. 505, 514 (D.S.C. 1978).

62. Motta v. Resource Shipping & Enters. Co., 499 F. Supp. 1365, 1373 (S.D.N.Y. 1980).

outright waiver of subrogation rights, are not likely to be feasible. Although both of these methods allow the insurer to avoid all liability for fees and costs, they present serious disadvantages that make their utility doubtful.

The "loan receipt" is a common device for escaping joinder as a real party in interest.[63] Rather than pay for the loss, an insurer using a loan receipt lends money to the insured. The loan is repayable only to the extent the insured recovers against the parties who caused the loss.[64] Because the receipt provides for a loan rather than a payment, the insurer purportedly avoids subrogation to the insured's interest.[65] Most jurisdictions, however, treat the loan as a payment and deem the insurer to be a real party in interest.[66]

Alaska courts, which have not yet ruled on the validity of loan receipts, are unlikely to allow insurers this method to escape joinder. The supreme court in *Truckweld* stated that parties should bear the burdens as well as the benefits of having their claims litigated in Alaska's courts.[67] Because the purpose of loan receipts is to avoid liability for fees and costs, Alaska's courts will probably treat insurers using such receipts as real parties in interest.

Another, albeit extreme, method of avoiding joinder is the insurance company's complete waiver of subrogation rights. An insurer might prefer to waive its rights when faced with an unlikely recovery and potentially severe litigation expenses. At least one court has recognized waiver as a valid method of escaping status as a real party in interest.[68] However, when an insurer waives its subro-

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63. *See generally* Annot., 13 A.L.R.3D 42 (1967).

64. *See* Central Nat'l Ins. Co. v. Dixon, 93 Nev. 86, 87, 559 P.2d 1187, 1188 (1977); Atkinson, *supra* note 43, at 945.

65. *See, e.g.,* United States Fidelity & Guar. Co. v. Slifkin, 200 F. Supp. 563, 572-73 (N.D. Ala. 1961) (applying federal law); Miller v. Pine Bluff Hotel Co., 170 F. Supp. 552, 554 (E.D. Ark. 1959); American Chain & Cable Co. v. Brunson, 157 Ga. App. 833, 834, 278 S.E.2d 719, 721 (1981); Central Nat'l Ins. Co. v. Dixon, 93 Nev. 86, 88, 559 P.2d 1187, 1189 (1977).

66. Executive Jet Aviation, Inc. v. United States, 507 F.2d 508, 512-13 (6th Cir. 1974); City Stores Co. v. Lerner Shops, Inc., 410 F.2d 1010, 1014-15 (D.C. Cir. 1969); Condor Investment Co. v. Pacific Coca-Cola Bottling Co., 211 F. Supp. 671, 675-76 (D. Or. 1962).

67. 649 P.2d at 238.

68. In Johnston v. Timber Structures, Inc., 33 F.R.D. 25, 25-26 (E.D. Pa. 1963), the court held:

> It seems reasonable to conclude that an insurance company and its insured can make a contract whereby the insurance company can cease to have any interest in future legal action . . . . This claim belongs to the Home Insurance Company who [*sic*] has seen fit to waive the right rather than take the risk of a lawsuit with its attendant expense.
>
> Therefore, we determine that the Home Insurance Company . . . is not a real party in interest.

gation rights it entirely renounces its rights to share in the insured's recovery of damages. As a consequence, insurers will rarely seek waiver as a solution.

The importance of ratification is heightened by the fact that there exists no viable alternative method to avoid joinder. Neither "loan receipts" nor waiver fully protects insurers. The procedure of ratification, however, effectively avoids jury prejudice.[69] *Truckweld,* a decision which never expressly addressed the issue of whether *Aetna* precluded ratification, should not be interpreted to deny insureds and their insurers a procedure expressly authorized by the Alaska rules.

B. Avoidance of the Dilemma: Viewing *Truckweld* under Rule 19

A second response is that the courts could interpret *Truckweld* as a case contemplating joinder under Rule 19. Although *Truckweld* appeared to contemplate joinder under Rule 17, it may implicitly have intended to compel joinder under Rule 19. Most courts which adopt *Aetna* compel joinder under Rule 19, not Rule 17.[70] These courts hold that partial subrogees are "Persons to Be Joined if Feasible" under the current version of Rule 19(a).[71]

This interpretation of *Truckweld* as compelling joinder under Rule 19 avoids the internal inconsistency that results when joinder is required under Rule 17. Nevertheless, such a response presents an inconsistency of its own by ignoring the express conditions that trigger joinder under the substantive provisions of Rule 19(a).[72] Furthermore, compelled joinder under Rule 19 still renders the provision for ratification superfluous because ratification under Rule

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69. Before the 1966 amendment, some courts following *Aetna* handled the problem of prejudice by not informing the jury that an insurance company owned a portion of the plaintiff's claim. *See* Note, *Civil Procedure — Insurance Companies as Real Parties in Interest,* 46 KY. L.J. 252, 259 (1958). Ratification achieves essentially the same result.

70. *See* Garcia v. Hall, 624 F.2d 150, 152 (10th Cir. 1980); Virginia Elec. & Power Co. v. Westinghouse Elec. Corp., 485 F.2d 78, 85 (4th Cir. 1973), *cert. denied,* 415 U.S. 935 (1974).

71. *See* Virginia Elec. & Power Co. v. Westinghouse Elec. Corp., 485 F.2d 79, 85, *cert. denied,* 415 U.S. 935 (1974). The "Persons to Be Joined if Feasible" language appears in the heading to Rule 19(a). *See supra* note 25. The heading does not appear to have been intended as a substantive provision because Rule 19 contemplates joinder only if one of three conditions is triggered. *See id.*

72. The *Truckweld* court appeared to be willing to accept this degree of inconsistency. *See* 649 P.2d at 238.

17 would not prevent joinder from eventually being compelled under Rule 19.[73]

It should be evident, then, that the compulsory joinder of partial subrogees creates undesirable inconsistencies within the 1966 amendments. Compulsory joinder under either rule ignores the ratification procedure that was added to Rule 17 in 1966. In addition, compulsory joinder under Rule 19 ignores the express conditions for joinder which were also added by a 1966 amendment. *Truckweld,* however, can be interpreted so that the explicit procedures of the rules are not rendered useless.

V. THE SUGGESTED RESPONSE: A RATIFICATION EXCEPTION

A third response to the dilemma allows the explicit procedures of Rule 17 to take precedence over the *Truckweld* compulsory joinder rule. A court adopting this approach would give a partially subrogated real party the option of joining or ratifying the action. If within a reasonable time the real party took no action, the court would impose compulsory joinder pursuant to the *Truckweld* rule. This suggested approach essentially creates an exception to *Truckweld:* the court would not compel joinder when the real party ratifies the action.

While under this approach the ratifying party will avoid compulsory joinder under the *Truckweld* rule, it will not avoid joinder if one of the three conditions under Rule 19(a) is triggered.[74] This distinction between compulsory joinder under *Truckweld* and compulsory joinder under Rule 19 reflects the ultimate goal of the suggested approach: to preserve, as completely as possible, the procedures explicitly set forth in the Alaska rules. Thus, if one of the three conditions for joinder under Rule 19 is triggered, even a partial subrogee that ratified would be joined in the action. But if none of Rule 19's conditions is met, ratification would allow the action to proceed without the partial subrogee's participation as a named party.

Admittedly, this exception to *Truckweld* entails a certain level of inconsistency. For example, when a court imposes joinder under the *Truckweld* rule, it still ignores Rule 19's three conditions for join-

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73. *See* Edwards, Inc. v. Arlen Realty & Dev. Corp., 466 F. Supp. 505, 514 (D.S.C. 1978).

74. In Kint v. Terrain King Corp., 79 F.R.D. 10, 11 (M.D. Pa. 1977), the court observed:

> Rule 19(a) of the Federal Rules of Civil Procedure provides for the compulsory joinder of a nonparty in three circumstances: (1) when the absence of the nonparty precludes complete relief among the parties already present; (2) when the nonparty will be unable to protect an interest he has in the litigation; and (3) when the nonparty's interest in, but absence from, the litigation subjects parties already in the action to a substantial risk of multiple obligations.

der. The ratification exception also presents a less than consistent application of *Truckweld* itself. The rule that emerges from *Truckweld* apparently requires the compulsory joinder of partial subrogees in all cases.[75] The suggested approach, however, would forego compulsory joinder whenever the real party ratified the action.

Despite any inconsistency, this approach provides the most desirable interpretation of *Truckweld.* The suggested approach allows partial subrogees to avail themselves of the ratification procedure set forth in Rule 17.[76] Moreover, unlike the other approaches, the ratification exception applies regardless of whether the *Truckweld* court intended to compel joinder under Rule 17 or Rule 19. Thus, the question of whether partial subrogees can avail themselves of ratification will not depend upon a technical inquiry as to which rule the *Truckweld* court would have utilized to compel joinder. The suggested approach directly addresses the dilemma and resolves it in favor of prior Alaska case law and established rules of interpretation.

A ratification exception to *Truckweld* best complies with the prior Alaska case law. In *KOS v. Williams,*[77] the Alaska Supreme Court indicated that real parties in interest are to be given a choice between ratification and joinder under Rule 17.[78] The approach suggested above adopts the *KOS* rule: the partial subrogee, as a real party in interest, is allowed to choose between ratification and joinder. The other two approaches would have undercut *KOS* by imposing compulsory joinder whether or not the partial subrogee ratified the action. The *Truckweld* opinion cited *KOS* with approval.[79] Consequently, Alaska courts might prefer the inconsis-

75. There is language in *Truckweld* which may indicate that the Alaska court will be satisfied by ratification as much as by joinder. Concerning the assessment of attorney's fees and costs, the court indicated that ratification was the "functional equivalent" of joinder. 649 P.2d at 239. But this passage of the opinion cannot be taken to mean that ratification satisfied the requirements of compulsory joinder under *Aetna* because the court was dealing with the narrow issue of Alaska's costs and attorney's fees policy. Clearly, the court's adoption of the *Aetna* rule extends much further. The court intended joinder to be compelled even when the issue of costs and fees is absent.

76. The advantages of ratification have been discussed in the text accompanying notes 60-69.

77. 616 P.2d 868 (Alaska 1980).

78. *See id.* at 870; *accord* Montana *ex rel.* Bohrer v. District Court, 171 Mont. 116, 118, 556 P.2d 899, 900 (1976). *But see* Southern Nat'l Bank v. Tri Fin. Corp., 317 F. Supp. 1173, 1188 (S.D. Tex. 1970) (holding that the court, not the party, determines whether the party ratifies or joins), *aff'd in part on other grounds and vacated in part on other grounds,* 458 F.2d 688 (5th Cir. 1972).

79. *See* 649 P.2d at 239.

tency posed by a continued use of ratification to an undercutting of the *KOS* rationale.

Additionally, an analogy can be drawn to the well-recognized maxim of statutory interpretation that "repeals by implication are not favored."[80] Although the *Truckweld* compulsory joinder rule is a creation of judicial interpretation rather than statutory enactment, it should be interpreted to inflict the least possible damage to existing procedures. The *Truckweld* court did not indicate whether its adoption of *Aetna* precluded the use of ratification.[81] Consequently, lower courts should reject the implication that *Truckweld* repealed the use of ratification by partial subrogees. Such drastic revision should occur only upon an express ruling by the supreme court.

Despite the implications of *Truckweld* to the contrary, partial subrogees should be allowed the benefits of ratification. Such an approach advances the policies that concerned the court in *Truckweld,*[82] and provides a logical resolution of the *Truckweld* decision consistent with Alaska case law and procedural rules. At least one other court that has adopted *Aetna* has also allowed ratification. In *In re Wuttke,*[83] the court observed:

> In the instant case it would appear that there are two real parties — the plaintiffs and the insurance carrier. Pursuant to the *Aetna* decision, the defendant can compel the joinder of [the insurer] or its acquiescence in the lawsuit brought solely by the [insured] . . . .
>
> To settle this matter . . . the Court will direct [the insurer] to file with this Court . . . a letter ratifying the conduct of this litigation . . . .[84]

Although ratification may seem inconsistent with the rule in *Truckweld,* this recent decision indicates that the two procedures can meaningfully coexist. Under the ratification exception to *Truckweld,* the basic force of the supreme court's decision remains in effect while Alaska's procedure and prior case law suffer only minimal disruption. The suggested approach therefore constitutes the most reasonable and useful interpretation of *Truckweld.*

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80. Morton v. Mancari, 417 U.S. 535, 549 (1974); Posadas v. National City Bank, 296 U.S. 497, 503 (1936).

81. *Aetna* itself does not provide an answer to this question. When *Aetna* was decided in 1949, the use of ratification was restricted to maritime proceedings. *See* 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1555, at 709 (1971).

82. *See supra* text accompanying notes 60-61.

83. 2 Bankr. 362 (Bankr. D.N.J. 1980).

84. *Id.* at 364.

VI. CONCLUSION

In *Truckweld* the Alaska Supreme Court chose to engage in unnecessary rulemaking. As a result, the issue of how compulsory joinder affected the procedure for ratification never arose. Because the court never addressed this issue, *Truckweld* should be interpreted to enable partial subrogees to choose ratification as an alternative to joinder. Such a result advances the policies that concerned the court in *Truckweld,* permits insurers to escape the perceived threat of jury prejudice, and allows the express language of the rules to control Alaska procedure.

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