CHAPTERS

EXPLORING THE INDISPENSABLE PARTY: A SURVEY OF COMMON CONTEXTS FOR RULE 19 CLAIMS

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Although Rule 19 claims can arise in virtually any category of case, they have a particularly prominent expression in natural resource disputes. Cases involving natural resources commonly involve a great number of interests, represented by many parties. A recent Ninth Circuit case that is currently pending certiorari by the Supreme Court is an excellent example. In Dine Citizens Against Ruining Our Environment v. Bureau of Indian Affairs*, an environmental group brought suit against the federal government for its issuance of various permits to the Navajo Nation for coal mining activities. The Ninth Circuit held that the case must be dismissed under Rule 19 because Navajo Nation was an indispensable party that could not be joined due to sovereign immunity. This case involved matters regarding real property, contracts, corporations, and prompted my research into common contexts for Rule 19 cases. Exploration of five common categories of cases in which Rule 19 claims arise provides insight into not only environmental cases but help elucidate a seemingly unpredictable area of law.*

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I. INTRODUCTION

In the American legal system, the plaintiff has considerable control over who will be a party to litigation. Rule 19 of the Federal Rules of Civil Procedure, however, limits this power by providing a framework with which courts determine if joinder of absent parties is required for just adjudication.[1] Because of the Rule's potential to sweep a broad range of absent parties into the "necessary" or "required" classification, whether a particular lawsuit must be dismissed in the absence of a certain person must be determined in the context of particular litigation.[2] Thus, careful consideration of factual similarities between Rule 19 cases, and the ways in which courts approach them, are particularly instructive.

Rule 19 can arise in virtually any circumstance. However, five broad categories of cases contain a wealth of Rule 19 jurisprudence that provide insight into when a party will be deemed indispensable. Cases in which sovereign bodies are implicated, or disputes wherein contracts, real property, insurance, or corporate law are at issue, are common contexts for illustrative Rule 19 analysis of indispensable parties. Within these categories, the reasoning that most prominently guides courts' analysis differs based on the nature of the action and can be extrapolated to a wide range of Rule 19 cases.[3]

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[1] FED. R. CIV. P. 19(b).

[2] *See* Provident Tradesmens Bank & Tr. Co. v. Patterson, 390 U.S. 102, 118 (1968).

[3] Other common contexts exist as well for Rule 19 claims. Examples are those cases arising from patent, copyright, and trademark suits. *See* A123 Sys. v. Hydro-Quebec, 626 F.3d 1213, 1222 (Fed. Cir. 2010) (patent owner was an indispensable party in an action seeking a declaration of noninfringement of two of owner's patents); Cable Vision, Inc. v. KUTV, Inc., 335 F.2d 348, 353–54 (9th Cir. 1964) (holding copyright proprietor is an indispensable party to a suit to enforce a copyright claim); May Apparel Grp. v. Ava Import-Export, Inc., 902 F. Supp. 93, 96 (M.D.N.C. 1995) (holding that the chief executive of a corporation was an indispensable party in an action to cancel the trademark when that officer held the trademark used by the corporation). Disputes involving labor and management, or collective bargaining is another area of the law where Rule 19 claims may arise. Local No. 92, Int'l Ass'n of Bridge v. Norris, 383 F.2d 735, 744 (5th Cir. 1967) (holding union was not an indispensable party in a derivative suit brought under § 501(b) of the Labor Management and Disclosure Act due to concerns of conflict of interests). Additionally, Rule 19 claims also have expression in cases regarding estates and trusts, such as in *First Nat'l Bank & Tr. Co. of Okla. City, Okla. v. McKeel*, 387 F.2d 741, 743 (10th Cir. 1967) (holding that the executor of a disputed fund of a decedent's estate is indispensable in actions asserting claims against the assets of the estate). The decision to focus on sover-

II. RULE 19 OVERVIEW

As an initial matter, it is important to understand that Rule 19 is a flexible test, capable of bending to address the wide range of factual circumstances to which it must be applied. Rule 19 prescribes no specific weight to be given to any individual factor and leaves it to the courts' discretion to determine what "in equity and good conscious" is the appropriate balance.[4] Courts even note that the factors enumerated in the Rule are not an exhaustive list of potential considerations.[5] Given the considerable latitude courts have in analyzing an issue under Rule 19, it is helpful to first establish how the factors are generally applied and interpreted, regardless of the context.

A. 19(a): Persons Required to Be Joined if Feasible

In order for a court to reach the "indispensable" analysis under 19(b), it must first establish the threshold requirements of a "necessary" party under 19(a)(1) and that the absent party is infeasible to join.[6] Many of the 19(a) factors involve similar considerations as those under 19(b). Thus, while similar concerns will arise in both 19(a) and 19(b), the "necessary" analysis often demands a less certain showing of prejudicial effect.[7]

The first factor of 19(a)(1) asks whether, in the absence of the party, the court can accord complete relief among existing parties.[8] This factor requires the court to look only to the present parties and consider the quality of relief it would be able to provide. "Complete" relief is generally interpreted to be that which is not "hollow," but instead achieves the objective of the lawsuit.[9] In conducting the Rule 19(a)(1) analysis, the court determines if the absence of the party would preclude the district court from fashioning meaningful relief between the parties.[10] If meaningful relief would force an absent party to take some particular action or to refrain from action to achieve the desired result, that person may qualify as required under (a)(1).[11]

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eign immunity, real property, contracts, insurance, and corporate disputes was based on the opinion that these categories are both representative of other categories, but also sufficiently distinct so as to highlight differences in courts' approach to Rule 19 cases.

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

5 Gardiner v. V.I. Water & Power Auth., 145 F.3d 635, 640 (3d Cir. 1998).

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

7 *See* Walsh v. Centeio, 692 F.2d 1239, 1243–44 (9th Cir. 1982).

8 FED. R. CIV. P. 19(a)(1)(A).

9 Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1043 (9th Cir. 1983); Watchtower Bible & Tract Soc'y of N.Y. v. Municipality of San Juan, 773 F.3d 1, 13 (1st Cir. 2014).

10 Disabled Rights Action Comm. v. Las Vegas Events, Inc., 375 F.3d 861, 879 (9th Cir. 2004).

11 *See* Focus on the Family v. Pinellas Suncoast Transit Auth., 344 F.3d 1263, 1280 (11th Cir. 2003) (holding that a court could not require absent party to run a particular advertisement on a local bus shelter).

The second factor of 19(a) requires the court to identify the absent party's interest in the action,[12] the scope of which informs the prejudice analysis in 19(b). Under this factor, the court is directed to consider whether the absent party is so situated that disposing of the action in the party's absence may as a practical matter impair or impede the person's ability to protect the identified interest.[13] It is at this point of the analysis that courts may inquire into the ability of any of the existing parties to adequately represent the absent party's interests.[14] Although often analyzed during the "necessary" portion of the Rule 19 process, some courts address the ability of existing parties to represent the absent party's interest at the "indispensable" phase, or at times in both 19(a) and 19(b).[15]

The final factor asks whether disposing of the action in the person's absence may leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.[16] Properly considered, a court must entertain any non-frivolous claimed interest without inquiring into the merits of the case since the purpose of Rule 19 is to give the absent party the ability to be heard before the court makes a finding on the merits.[17] It is important to note that this factor is primarily concerned with inconsistent obligations, not *outcomes*.[18] The First Circuit provided a helpful explanation of the distinction:

> "Inconsistent obligations" are not . . . the same as inconsistent adjudications or results. Inconsistent obligations occur when a party is unable to comply with one court's order without breaching another court's order concerning the same incident. Inconsistent adjudications or results, by contrast, occur when a defendant successfully defends a claim in one forum, yet loses on another claim arising from the same incident in another forum.[19]

After conducting the 19(a) analysis, if the court determines that the absent party is one that is necessary for adjudication, it then considers if the party can feasibility be joined.[20] If it can, the party is joined, and

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12 *Id.* at 1279–80.

13 FED. R. CIV. P. 19(a)(1)(B)(i).

14 Am. Trucking Ass'n. v. N.Y. State Thruway Auth., 795 F.3d 351, 360 (2d Cir. 2015).

15 Glancy v. Taubman Ctrs., Inc., 373 F.3d 656, 669 (6th Cir. 2004).

16 FED. R. CIV. P. 19(a)(1)(B)(ii).

17 White v. Univ. of Cal., 765 F.3d 1010, 1026–27 (9th Cir. 2014).

18 Delgado v. Plaza Las Ams., Inc., 139 F.3d 1, 3 (1st Cir. 1998); Sch. Dist. of City of Pontiac v. Sec'y of U.S. Dep't of Educ., 584 F.3d 253, 282 (6th Cir. 2009) (en banc) ("Inconsistent obligations arise only when a party cannot simultaneously comply with the orders of different courts."); Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. California, 547 F.3d 962, 976 (9th Cir. 2008) ("We adopt the approach endorsed by the First Circuit [in Delgado]."); Winn-Dixie Stores, Inc. v. Dolgencorp, LLC, 746 F.3d 1008, 1040 (11th Cir. 2014).

19 *Winn-Dixie Stores*, 746 F.3d at 1040.

20 *Id.* at 1039 (citing FED. R. CIV. P. 19(a)).

the case may proceed. However, if the absent party cannot feasibly be joined, the court will continue to the "indispensability" analysis under 19(b).[21]

B. 19(b): Indispensable Parties

If after the court makes the determination that an absent party is necessary and cannot feasibly be joined, the next inquiry is whether "in equity and good conscience" the action should proceed among the existing parties or whether it should be dismissed.[22] In assessing the Rule 19(b) factors, courts adopt a flexible, case-specific approach.[23] District courts are afforded substantial discretion in weighing the Rule 19(b) factors and in determining how heavily to emphasize certain considerations in deciding whether the action should go forward in the absence of a necessary party.[24] Accordingly, the decision whether to dismiss an action for failure to join an indispensable party is often described as "more in the arena of a factual determination than a legal one."[25]

The first Rule 19(b) factor requires the court to determine the "extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties."[26] This factor often overlaps with the Rule 19(a) analysis, since both require the court to determine the potential for prejudice to existing and absent parties.[27] Because of the importance of identifying the interests at issue for indispensability, courts commonly dedicate the bulk of their interest analysis to 19(b).[28]

The second Rule 19(b) factor calls for the court to examine "the extent to which any prejudice could be lessened or avoided by" protective measures in the court's judgment or other measures appropriately shaping the relief.[29] This factor directs the court's attention to the possibility of remedies other than those requested by the plaintiff that would minimize the prejudicial effect of proceeding without the necessary party. The most common of these alternative remedies, as suggested by the Advisory Committee's note, is money damages rather than equitable remedies.[30] In specific circumstances, courts may also

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21 *Id.* (citing FED. R. CIV. P. 19(b)).

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

23 Republic of Philippines. v. Pimentel, 553 U.S. 851, 864 (2008).

24 Walker v. City of Waterbury, 253 F. App'x 58, 62 (2d Cir. 2007).

25 *Id.* (quoting Envirotech Corp. v. Bethlehem Steel Corp., 729 F.2d 70, 75 (2d Cir. 1984)).

26 FED. R. CIV. P. 19(b)(1).

27 *See* 7 WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1608 (3d ed. 2001, rev. 2010); *see also Gardiner*, 145 F.3d 635, 641 n.4 (3d Cir. 1998).

28 *See, e.g.*, Kickapoo Tribe of Indians v. Babbitt, 43 F.3d 1491, 1494–99 (D.C. Cir. 1995).

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

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

shape relief by delaying enforcement of the judgment[31] or requiring security.[32]

The third factor under Rule 19(b) requires the Court to consider "whether a judgment rendered in the person's absence would be adequate."[33] Adequacy refers to the "public stake in settling disputes by wholes, whenever possible."[34] This factor also closely relates to the other factors considered under the Rule 19 analysis, particularly the "shaping of relief" clause of (b)(2)(B) and the test for compulsory joinder set out in (a)(1)(A).[35]

It is under this factor that courts often considered whether a judgment rendered without an absent party would bind that party under res judicata or collateral estoppel in any subsequent litigation.[36] Generally, res judicata is not a concern in matters of joinder because it applies only to those party to the initial proceeding that later attempt to litigate the same claim and in no way implicates unjoined parties.[37] However, res judicata and collateral estoppel bind those parties that are in privity with joined parties, which after the 2008 Supreme Court case, *Taylor v. Sturgell*,[38] also extends to those unjoined parties whose interests are "adequately represented" by parties to the suit.[39] Thus, courts often struggle in their approach to the adequate representation analy-sis. Adequate representation and privity historically cut in opposite directions in Rule 19 analysis but, following Taylor, they seem to be combined. For instance, in the contracts context, courts generally leave it up to the obligee to join the obligors it deems fit.[40] An exception to this, however, is when the absent obligor is in privity with a joined obligor.[41] When this is the case, courts traditionally considered it a factor that weighed in favor of indispensability.[42] In contrast, generally the ability of a joined party to adequately represent an absent party indicated the absent party was not indispensable.[43] The muddling of

31 Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92, 104 (C.D. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir. 1972).

32 Nat. Res. Def. Council, Inc. v. Tenn. Val. Auth., 340 F. Supp. 400, 408 (S.D.N.Y. 1971), *rev'd on other grounds*, 459 F.2d 255 (2d Cir. 1972).

33 FED. R. CIV. P. 19(b)(3).

34 *Provident Tradesmens Bank*, 390 U.S. 102, 111 (1968).

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

36 *See, e.g.*, *Republic of Philippines*, 553 U.S. 851, 870–71 (2008).

37 *See* Taylor v. Sturgell, 553 U.S. 880, 892 (2008).

38 *Id.*

39 *Id.* at 898.

40 Janney Montgomery Scott, Inc. v. Shepard Niles, Inc., 11 F.3d 399, 408 (3d Cir. 1993).

41 Challenge Homes, Inc., v. Greater Naples Care Ctr., Inc., 669 F.2d 667, 670 (11th Cir. 1982).

42 *Id.* at 669.

43 Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Rite Aid of S.C., Inc., 210 F.3d 246, 250–51 (4th Cir. 2000) ("If [a present party] is able adequately to represent [the absent party's] interest, we would be inclined to conclude that [the absent party's] ability to protect its interest is not impaired or impeded by its absence from this suit.").

these two considerations makes this factor of the Rule 19 analysis confusing and hard to predict, though subject matter-specific exploration elucidates the analysis to some extent.

Under the fourth factor, the court must consider "whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder."[44] In evaluating this, the court must assess the damage to judicial economy resulting from dismissal, because the fact that a state court forum is available does not, without more, make it appropriate to dismiss the federal action.[45] As discussed in greater detail below, in some circumstances, courts rely on similar public and private interest factors as invoked in determining whether to transfer a case, in deciding whether to dismiss.[46]

Courts also often discuss alternative forums as either "superior" or "convenient."[47] A superior forum is generally one where the matter at issue in the case is primarily a matter of state law, and therefore, the state courts are in the best position to adjudicate the claim.[48] This rationale has a particularly prominent expression in real property cases, as discussed in more detail below. "Convenient" forums are those where many of the parties are located.[49] The availability of either a "superior" or "convenient" forum weighs in favor of dismissal.

As explored below, depending on the context, courts consider the factors described above to varying degrees to determine if an absent party is necessary, and if so, if it is indispensable. The following categories of cases are those that are particularly instructive in understanding how courts approach the indispensability analysis.

III. COMMON CATEGORIES FOR INDISPENSABLE PARTIES

A. Sovereign Immunity

The Rule 19 process may best be characterized in the sovereign immunity context as not a balancing test containing multiple factors, but instead as a two-part test. The first inquiry is whether the absent sovereign has a legally protected interest in the matter.[50] If this is answered in the affirmative, the seemingly dispositive question becomes whether another party to the suit adequately represents the identified interests of the sovereign. If this too is answered positively, then courts will almost invariably allow the case to proceed.[51] Thus, the many cases

44 FED. R. CIV. P. 19(b)(4).

45 CP Solutions PTE, Ltd. v. Gen. Elec. Co., 553 F.3d 156, 161 (2d Cir. 2009).

46 *See, e.g.*, Doty v. St. Mary Par. Land Co., 598 F.2d 885, 888 (5th Cir. 1979).

47 *See* Kapoor v. Nat'l Rifle Ass'n of Am., 343 F. Supp. 3d 745, 752 (N.D. Ill. 2018).

48 *See, e.g.*, Broussard v. Columbia Gulf Transmission Co., 398 F.2d 885, 889 (5th Cir. 1968).

49 *See, e.g.*, *Nat'l Union Fire Ins. Co.*, 210 F.3d 246, 253 (4th Cir. 2000).

50 FED. R. CIV. P. 19(a).

51 *See Republic of Philippines*, 553 U.S. 851, 867 (2008).

dealing with Rule 19 claims in the sovereign immunity context devote a great deal of their discussion to discerning the respective interests at issue.[52]

Though a legally cognizable interest is universally required,[53] the way in which courts define "interest" varies between courts. For instance, in some cases, broad notions of a sovereign's interest in self-governance and controlling its own resources are strong indications that the sovereign has an interest in the case,[54] while in others courts take a more exacting approach to the issue.[55] On one side of the spectrum are courts that acknowledge the presence of a legal interest in cases where the sovereign's administrative decisions are indirectly attacked. For example, the plaintiffs of *Boles v. Greeneville Housing Authority*[56] challenged an urban renewal plan approved by the Department of Housing and Urban Development (HUD) in an action against a local governmental entity.[57] The Sixth Circuit concluded that HUD had an interest in the action and was indispensable, explaining it was "most hesitant to set the precedent of allowing the policies and practices of HUD or any other federal agency to be overhauled by the judiciary without at least affording the agency the opportunity to be heard in support of its present operation."[58] The Eighth Circuit found "this reasoning . . . helpful" in a 2015 case brought by two tribal members regarding the U.S.'s decision to approve leases for oil and gas mining.[59]

At other times, courts require careful identification of the absent parties' interest at stake and demand more than a mere "but-for" causation before recognizing a legally protected interest.[60] For example, in a case regarding Idaho, Oregon, and Washington's equitable apportionment of anadromous fish, the Supreme Court overturned the lower court's finding that the federal government's control over the ocean fishery, its management of the Columbia and Snake River dams, and its role as trustee for Indian tribes with fishing rights did not rise to a legal interest.[61]

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[52] *See Cachil Dehe*, 547 F.3d 962, 970 (9th Cir. 2008); *see also* Sac & Fox Nation of Mo. v. Norton, 240 F.3d 1250, 1259–60 (10th Cir. 2001); *see also* Washington v. Daley, 173 F.3d 1158, 1168 (9th Cir. 1999); *see also* Davis *ex rel.* Davis v. United States, 343 F.3d 1282, 1294 (10th Cir. 2003); *see also* Citizen Potawatomi Nation v. Norton, 248 F.3d 993, 998 (10th Cir. 2001).

[53] Already, LLC v. Nike, Inc., 568 U.S. 85, 91 (2013).

[54] *See* Dine Citizens Against Ruining Our Env't v. Bureau of Indian Affairs, 932 F.3d 843, 852–53 (9th Cir. 2019); *see also Citizen Potawatomi Nation*, 248 F.3d at 997.

[55] *See* Idaho *ex rel.* Evans v. Oregon & Washington 444 U.S. 380, 388 (1980); *see also Cachil Dehe*, 547 F.3d at 970; *see also Daley*, 173 F.3d at 1168.

[56] 468 F.2d 476 (6th Cir. 1972).

[57] *Id.* at 477.

[58] *Id.* at 479.

[59] Two Shields v. Wilkinson, 790 F.3d 791, 796 (8th Cir. 2015).

[60] *Cachil Dehe*, 547 F.3d at 973; *see also* Makah Indian Tribe v. Verity, 910 F.2d 555, 558 (9th Cir. 1990).

[61] *Evans*, 444 U.S. 380, 387 (1980).

Also important in determining the existence of a legal interest is how the sovereign itself characterizes its interests. For instance, in a line of cases that deal with state-run corporations, courts gave considerable deference to how the state contractually involves itself with the matters of the corporation.[62] In two cases from the Second Circuit, the court held the contracts demonstrated a concerted effort on the part of the state to keep interests of the state and of the state-run corporation separate and deemed the interest too remote and indirect to rise to the level of a legal interest.[63]

Another aspect of adequate representation that seems to guide courts is not just the nature of the interests at issue, but also the character of the party representing those interests. In virtually all Rule 19 cases where an absent sovereign is deemed not to be necessary or required, there is another sovereign party deemed to adequately represent the unjoined party's interests.[64] This seems to especially be the case between the federal government and Indian tribes.[65] In cases wherein a tribe is deemed to adequately represent the federal government, or the federal government adequately represents the tribe, there is generally some discussion of the trustee relationship between tribes and the government agency at issue.[66] Thus, in Rule 19 cases, it is important to not only consider the nature of the interests at issue, but what joined party may be reasonably understood to adequately represent them.

In addressing sovereign immunity, courts often provide a cursory application of the other factors in both subsections (a) and (b) of Rule 19.[67] However, the last factor of 19(b), "whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder,"[68] often receives little to no weight, and is sometimes omitted from discussion altogether, despite its seemingly considerable importance.[69] In *Republic*

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[62] *See* Conntech Dev. Co. v. Univ. of Conn. Educ. Props., Inc., 102 F.3d 677, 679 (2d Cir. 1996); *Am. Trucking*, 795 F.3d 351, 362 (2d Cir. 2015).

[63] *Conntech*, 102 F.3d at 682–83; *Am. Trucking*., 795 F.3d at 358.

[64] *See Am. Trucking*, 795 F.3d at 360; *Sac & Fox Nation*, 240 F.3d 1250, 1260 (10th Cir. 2001); *Daley*, 173 F.3d 1158, 1168 (9th Cir. 1999); Sw. Ctr. for Biological Diversity v. Babbitt, 150 F.3d 1152, 1153 (9th Cir. 1998); *Makah Indian Tribe*, 910 F.2d at 558–59.

[65] *Daley*, 173 F.3d at 1167 (concluding Indian tribes were not necessary parties to actions filed by State of Washington against Secretary of Commerce because the Secretary and the tribes had virtually identical interests and the United States could therefore adequately represent the tribes); Lyon v. Gila River Indian Cmty., 626 F.3d 1059, 1071 (9th Cir. 2010) (holding the federal government's interests were shared and adequately represented by the tribe and therefore the government was not indispensable).

[66] *Sac & Fox Nation*, 240 F.3d at 1261 (noting the "Secretary remained obligated to satisfy the requirements of the trust statute . . . and regulation . . . and to exercise his discretion as required by law in processing any trust application filed by Wyandotte Tribe") (internal quotations omitted).

[67] *Id.* at 1257–58.

[68] FED. R. CIV. P. 19(b)(4).

[69] *See White*, 765 F.3d 1010, 1028 (9th Cir. 2014); *see also* Yashenko v. Harrah's NC Casino Co., LLC, 446 F.3d 541, 552–53 (4th Cir. 2006).

of Philippines,[70] the Supreme Court determined the Republic could not be joined in a case brought by a class of human rights victims against former president of the Republic, noting "[d]ismissal under Rule 19(b) will mean, in some instances, that plaintiffs will be left without a forum for definitive resolution of their claims. But that result is contemplated under the doctrine of foreign sovereign immunity."[71]

Though unusual, some courts seem to acknowledge the importance of an alternative forum for plaintiffs in the sovereign immunity context but will nevertheless only allow the case to proceed without the absent sovereign if its interests are sufficiently represented. Multiple courts have acknowledged, in weighing the Rule 19 factors, that if no alternative forum is available to the plaintiff, the court should be "extra cautious" before dismissing the suit.[72] Interestingly, however, in a case where the Tenth Circuit determined the interests of an absent tribe to be adequately represented by the Secretary of the Interior, the court characterized the fourth factor of 19(b) as "perhaps the most important,"[73] though it actually based its decision not to dismiss on adequate representation by the federal government, as evidenced by the quantity of discussion that went into the respective factors.[74] Despite differing value courts place on (b)(4), it appears that the lack of an alternative forum will only actually weigh in favor of proceeding without the absent sovereign once the threshold question of whether its interests are adequately represented is answered in the affirmative.

Thus, in Rule 19 cases where sovereign immunity is an issue, courts are presented with two countervailing policy concerns. On one hand, there is the interest that those suffering legal wrong have a forum in which to adjudicate their grievances, and on the other, the principle "[a]n axiom of [the Court's] jurisprudence,"[75] inherited from English common law—that the government cannot be compelled by the courts because it is the power of the government that creates the courts in the first place.[76] Presented with the opportunity to weigh these two interests, courts seem to have definitively placed sovereign immunity above the dictate of Rule 19.[77]

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[70] 553 U.S. 851 (2008).

[71] *Id.* at 872.

[72] Kescoli v. Babbitt, 101 F.3d 1304, 1311 (9th Cir. 1996); *Makah Indian Tribe*, 910 F.2d 555, 560 (9th Cir. 1990); *Sac & Fox Nation*, 240 F.3d at 1260.

[73] *Sac & Fox Nation*, 240 F.3d at 1260.

[74] The Tenth Circuit's analysis of every other Rule 19 factor made reference to the Secretary of the Interior's ability to adequately represent the unjoined Tribe's interests. *See id.* at 1258–60.

[75] Price v. United States, 174 U.S. 373, 375–76 (1899).

[76] John Lobato & Jeffrey Theodore, *Briefing Paper No. 21: Federal Sovereign Immunity*, HARVARD LAW SCHOOL FEDERAL BUDGET POLICY SEMINAR, http://www.law.harvard.edu/faculty/hjackson/FedSovereign_21.pdf (2006).

[77] *Davis*, 343 F.3d 1282, 1294 (10th Cir. 2003) ("[W]e do not believe that the absence of an alternative forum weighs so heavily against dismissal that the district court abused its discretion in deciding not to retain Plaintiffs' case."); United States *ex rel.* Hall v. Tribal Dev. Corp., 100 F.3d 476, 480 (7th Cir. 1996) ("A plaintiff's inability to seek relief, howev-

B. Real Property

Disputes over real property often present issues under Rule 19 due to the potential for multiple parties to stake a claim in a particular piece of land or the associated natural resources.[78] Because real property law is the province of the state, cases generally reach federal court though diversity jurisdiction, and thus, motions for the joinder of nondiverse absent parties with alleged interests in the property at issue serves as a powerful tool for litigants.[79] The unique characteristics of real property disputes, such as the ability for courts to relatively easily define potential interests, the inability of joined parties to adequately represent those interests, and the availability of a state forum often lead courts to find an absent party to be indispensable and order the dismissal or remand of the case.

Although matters of state law are common in Rule 19 cases, the real property context is perhaps one of the clearest areas of Rule 19 jurisprudence in which courts consistently rely on the availability of a state forum as a compelling factor favoring dismissal.[80] Whereas with other subject matter the availability of another forum is frequently either mentioned merely to support a holding reached through application of other Rule 19 factors, or omitted entirely, in real property cases, courts dedicate considerable attention to the matter, at times declaring it the most "persuasive"[81] or "superior"[82] factor.

The importance placed by courts upon the availability of a state forum in the context of real property in early Rule 19 cases—particularly in circuits that stressed most heavily their preference for adjudication of property claims in state court—appears to have discouraged parties from filing property suits in federal court. The Fifth Circuit is illustrative. In 1968, the Fifth Circuit decided *Broussard v. Columbia Gulf Transmission Co.*, an action brought by landowners for an injunction to compel a gas company to remove a pipeline from plaintiffs' property.[83] The court dismissed the suit, reasoning that the case involved real property in which the state, rather than the federal

er, does not automatically preclude dismissal, particularly where that inability results from a tribe's exercise of its right to sovereign immunity."); *Makah Indian Tribe*, 910 F.2d at 560 ("[L]ack of an alternative forum does not automatically prevent dismissal of a suit. . . . Sovereign immunity may leave a party with no forum for its claims.").

78 *See* 7 WRIGHT ET AL., *supra* note 27 § 1621 (3d ed. 2001).

79 *See* Schutten v. Shell Oil Co., 421 F.2d 869, 870–71, 874 (5th Cir. 1970) (holding absent lessor, which also claimed title to land in question, was an indispensable party which could not be joined, since joinder would destroy diversity jurisdiction).

80 Marra v. Burgdorf Realtors, Inc., 726 F. Supp. 1000, 1006 (E.D. Pa. 1989) ("State court adjudication is especially appropriate when a question of the law of real property is before the court, as such questions are fundamental concerns of state courts, not federal courts.").

81 Tick v. Cohen, 787 F.2d 1490, 1495 (11th Cir. 1986).

82 *Walsh*, 692 F.2d 1239, 1244 n. 5 (9th Cir. 1982); *Tick*, 787 F.2d at 1495; Fortuin v. Milhorat, 683 F. Supp. 1, 4 (D.D.C. 1988).

83 *Broussard*, 398 F.2d 885, 887 (5th Cir.1968).

judiciary, had a paramount concern.[84] Over the next decade, two other cases decided by the Fifth Circuit emphasized this point in no uncertain terms and similarly found the unjoined parties indispensable.[85] These early cases likely indicate that federal courts considered the federal forum inapt for resolution of matters of state law, and in circumstances where a necessary party could not be feasibly joined, the clear answer was dismissal. In the last three decades, district courts in the Fifth Circuit published only five cases addressing Rule 19 in an action regarding real property. Of those five, all of them emphasize their preference of the state forum,[86] and three of them quote directly from *Broussard*.[87]

Many other circuits take a similar approach to the Fifth Circuit in their analysis of the fourth factor of 19(b) in the context of real property cases. Research revealed that either appellate or district courts in at least the Second,[88] Third,[89] Fourth,[90] Seventh,[91] Eleventh,[92] and District

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[84] *Id.* at 889.

[85] *See Schutten*, 421 F.2d 869, 875 (5th Cir. 1970):

> [A]ppellants will by no means be prejudiced themselves if forced to pursue their remedy in the courts of the State of Louisiana. Both the Levee Board and Shell are amenable to process in Louisiana. This litigation concerns land situated in Louisiana, is governed by Louisiana law and involves a claim of ownership asserted by an agency of the State of Louisiana. Appellants cannot be heard to complain about the competence of the courts of Louisiana in such matters.

See Doty, 598 F.2d 885, 888 (5th Cir. 1979) ("The final factor is one which, in the end, we find to be most persuasive—the presence of an adequate forum if the action is dismissed.").

[86] Manning v. Manning, 304 F.R.D. 227, 231 (S.D. Miss. 2015); JPMorgan Chase Bank, N.A. v. Sharon Peters Real Estate, Inc., No. 5:12-CV-1172-XR, 2013 WL 3754621, at *6 (W.D. Tex. July 15, 2013); El Paso E&P Co., LP v. Crabapple Properties, Ltd., No. CIV.A. 07-0428, 2008 WL 2051109, at *10 (W.D. La. Mar. 6, 2008); Fagan Enterprises, Inc. v. Constantin Land Tr., No. CIV. A. 98-333, 1998 WL 352171, at *4 (E.D. La. June 30, 1998); Shell W. E & P Inc. v. Dupont, 152 F.R.D. 82, 87 (M.D. La. 1993).

[87] Giambelluca v. Dravo Basic Materials Co., 131 F.R.D. 475, 479 (E.D. La. 1990); *Fagan Enterprises*, 1998 WL 352171, at *4; *Shell W. E & P Inc.*, 152 F.R.D. at 87.

[88] LoCurto v. LoCurto, No. 07 CIV. 8238 (NRB), 2008 WL 4410091, at *8 (S.D.N.Y. Sept. 25, 2008) ("[T]he available state forum may actually be more appropriate than the federal forum because of the state court's expertise with substantive real property law.").

[89] Republic Realty Mortg. Corp. v. Eagson Corp., 68 F.R.D. 218, 222 (E.D. Pa. 1975) ("Not only can the case easily be brought in the state court, but as a foreclosure action it should be, as it involves real property with which the state, and not the federal judiciary, has a fundamental concern."); Steel Valley Auth. v. Union Switch & Signal Div., 809 F.2d 1006, 1015 (3d Cir. 1987) ("Not only is the state court available for resolution of this controversy, but it also may be the most appropriate forum for consideration of Steel Valley's particular cause of action.").

[90] Levitt & Sons, Inc. v. Swirnow, 58 F.R.D. 524, 531 (D. Md. 1973):

> Were indispensability a benefit which might be easily disregarded by a party in order to secure diversity jurisdiction, federal courts would lose control over their jurisdictional boundaries and would be compelled to hear matters traditionally reserved for state courts. Under circumstances such as those present here, parties should present their claims in a state court.

of Columbia[93] Circuits have all suggested the propriety of the state forum for the adjudication of real property disputes. The Eighth Circuit, however, does not seem to weigh the availability of a state forum as heavily as other circuits. In a dispute involving a lease, the Eighth Circuit affirmed the district court's finding that a leasing company was not an indispensable party, noting that "a judgment rendered in [the leasing company's] absence would be adequate and that there [was] no controlling significance to the fact that [the leasee] would have an adequate remedy in the Iowa courts were not erroneous."[94]

Beyond the recognition that real property disputes are particularly suited to resolution by state courts due to the implication of state law, federal courts occasionally rationalize dismissal or remand based on factors akin to those considered during a motion for a transfer under 28 U.S.C. § 1404(a).[95] Judicial recognition of an alternative forum as appropriate for the transfer of a case due to a transferee court's familiarity with the state law to be applied is an oft-mentioned factor in the § 1404(a) transfer analysis.[96]

Section 1404(a) itself provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented."[97] Courts often, in conducting an indispensability analysis in real property cases, echo the importance of convenience when contemplating an alternative forum by reasoning that the plaintiff would not be inconvenienced by remand of the case to state court.[98] For

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[91] Burger King Corp. v. Am. Nat. Bank & Tr. Co. of Chi., 119 F.R.D. 672, 680 (N.D. Ill. 1988) ("When the case involves a dispute over real property, and all the parties could be joined in state court, this factor actually mitigates in favor of *dismissal*.").

[92] *Tick*, 787 F.2d 1490, 1495 (11th Cir. 1986) ("The fourth factor, the existence of an alternative forum if the action is dismissed, is the most persuasive factor in this case.").

[93] *Fortuin*, 683 F. Supp. 1, 4 (D.D.C. 1988):

> [W]hen, as here, an action features a dispute over real property, the state court is not only an "adequate" forum, Fed. R. Civ. P. 19(b), but perhaps a superior forum for the litigation of the parties' rights and obligations. . . . It is the state court, after all, which is most familiar with the nuances of District of Columbia property law, and which manifests a 'special concern . . . for the ownership and utilization of its land.

See also 7 WRIGHT, ET AL., *supra* note 27 (3d ed. 2001).

[94] Helzberg's Diamond Shops, Inc. v. Valley W. Des Moines Shopping Ctr., Inc., 564 F.2d 816, 820 (8th Cir. 1977).

[95] *See Doty*, 598 F.2d 885, 888 (5th Cir. 1979) (holding that the case should proceed in the state court of Louisiana, in part because it could).

[96] *See* Van Dusen v. Barrack, 376 U.S. 612, 643 (1964) (stating that judicial familiarity with governing laws and the relative ease and practicality of trying cases in an alternative forum are factors in assessing convenience and fairness of a venue).

[97] 28 U.S.C. § 1404(a) (2012).

[98] *Broussard*, 398 F.2d 885, 889 (5th Cir. 1968); Amoco Production Co. v. U.S. Dep't of Energy, 469 F. Supp. 236, 244 (D. Del. 1979) (holding the "possibility of prejudice to the plaintiffs flowing from that transfer" is part of the 1404(a) analysis).

example, the Fifth Circuit highlighted convenience in its decision to dismiss the suit, stating "Mrs. Hebert, who had willingly traveled from Texas to Louisiana to enter the federal court action, could hardly claim inconvenience by being required to walk a few blocks from the federal to the state courthouse."[99]

In weighing the fourth factor of the 19(b) test, courts additionally have considered other § 1404(a) public and private interest factors, such as administrative difficulties flowing from court congestion[100] and convenience of witnesses.[101] These examples of courts' reliance upon common § 1404(a) interest factors in connection with indispensability analysis suggests that in certain categories of Rule 19 cases, invocation of transfer of venue reasoning may be compelling to some judges.

Another characteristic of Rule 19 cases in the real property context is courts' general willingness to find a legally cognizable interest in the land or resource at issue. Unlike other areas of Rule 19 jurisprudence, where courts will scrutinize the specific interests involved before acknowledging a party as necessary, courts in real property cases seem more willing to accept absent parties' claimed interest in the property at issue. This is likely in part because of the clear and widely understood interests commonly associated with real property. For instance, consider the classic idiom that describes property as a "bundle of sticks"—a collection of individual rights which, in certain combinations, constitute property.[102] These "sticks," which generally include the rights to exclude,[103] transfer,[104] possess,[105] and enjoy,[106] create many distinct interests in a single parcel of land.[107] Thus, often a party's right to utilize real property is adverse to another party's right to exercise the same right. These long-recognized interests, unlike other, more

99 *Broussard*, 398 F.2d at 889.

100 *Shell W. E & P Inc.*, 152 F.R.D. 82, 87 (M.D.La. 1993) ("The Court believes the dismissal of this action is an efficient use of judicial resources of both the federal and state judiciaries, particularly where only state law questions are at issue.").

101 *Manning*, 304 F.R.D. 227, 231 (S.D.Miss. 2015) ("[T]he plaintiffs' interest in the federal forum is weak. Relief is available to them in the state court, where they originally filed suit, and which is as convenient to the parties and witnesses as is the federal court.").

102 United States v. Craft, 535 U.S. 274, 278 (2002).

103 Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979).

104 Bd. of Cty. Comm'rs of Kay Cty., Okla. v. Fed. Hous. Fin. Agency, 754 F.3d 1025, 1030 (D.C. Cir. 2014).

105 Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982).

106 *See* Vulcan Materials Co. v. City of Tehuacana, 369 F.3d 882, 888 (5th Cir. 2004).

107 James L. Huffman et al., *Constitutional Protections of Property Interests in Western Water*, 41 PUB. LAND & RESOURCES L. REV. 27, 32 (2019).

amorphous interests that arise in Rule 19 cases,[108] likely help explain courts', at times cursory, analysis of absent parties' interests.[109]

The Fifth Circuit's analysis of the parties' interests in *Schutten*[110] illustrates this point. In *Schutten*, the plaintiff, who claimed title to the land at issue, filed suit in district court seeking to evict the defendant, Shell Oil Company, and sought an accounting for the removal of oil, gas, and other minerals from the land.[111] Shell filed a motion to dismiss, asserting its lessor, the Board of Commissioners of the Orleans Levee District, who also claimed title to the land in question, was an indispensable party that cannot be joined.[112] While the Fifth Circuit dedicated a considerable portion of its analysis to a discussion of "interests" in general, it summarily concluded that because both the unjoined party and the appellants claimed ownership in the land, "[t]here [was] no doubt that the Levee Board ha[d] an interest in this litigation and [was] a 'party to be joined if feasible.'"[113] *Schutten* demonstrates that, insofar as the absent party can tether its stake in the case to one of the broadly accepted property interests, a court will likely become more hesitant to allow the case to proceed.

To this point, in conducting the indispensability analysis in real property cases, research has uncovered no situation in which a court found the interests of unjoined parties adequately represented by parties to the suit.[114] The nature of real property interests themselves likely explain this characteristic of Rule 19 analysis. As noted above, individual interests in real property are usually adverse to others.[115] Thus, because one party's interest in real property is often distinct or in conflict with another's, the real property context is often an inapt area for invoking the adequate representation argument.

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108 Amorphous interests discussed in Rule 19 cases may be notions of a tribe's sovereign interest in self-governance as expressed in *Dine Citizens*, 932 F.3d 843, 851 n.5 (9th Cir. 2019) and *Citizen Potawatomi Nation*, 248 F.3d 993, 997 (10th Cir. 2001) or a corporation's "reputational interest" in an action, as considered in Ward v. Apple Inc., 791 F.3d 1041, 1053 (9th Cir. 2015).

109 *See Schutten*, 421 F.2d 869, 870, 875 (5th Cir. 1970) (court did not inquire into the adequacy of absent party's interest in case when absent party asserted title to land at issue); *see also Doty*, 598 F.2d 885, 887 (5th Cir. 1979) (noting it is "apparent that the mineral lessee will be prejudiced" based on its interest in the real property).

110 *Schutten*, 421 F.2d 869 (5th Cir. 1970).

111 *Id.* at 870.

112 *Id.* at 870–71.

113 *Id.* at 874 (internal citation omitted).

114 Of the fifteen Rule 19 real property cases cited in this section, not one addresses the ability of an existing party to represent the interests of the unjoined party.

115 *See* Huffman et al., *supra* note 107 at 32 (discussing individual rights in relation to the "bundle of sticks" that make up interests in property law).

C. Insurance

In many, ways Rule 19 jurisprudence defies generalization in the context of insurance cases.[116] This is likely due to the highly factual nature of insurance cases which vary greatly depending upon the number of insurers and insureds, and the nature of the policy. Despite the seemingly unpredictable outcomes Rule 19 insurance actions, there nevertheless are specific factors courts seem to find most persuasive in conducting its analysis. Most notably, courts demonstrate a particularly strong reliance on whether the absent party will be subject to multiple, inconsistent judgments[117] and whether full relief will be granted in the absence of the unjoined party.[118]

Many Rule 19 cases in the insurance context dedicate lengthy analysis to ways in which the parties may be subject to multiple, inconsistent judgements.[119] This is likely due to the potential for multiple parties involved in an event precipitating an insurance claim to seek some type of relief. Unlike other categories of Rule 19 cases, where the potential parties and claims may be more readily ascertained—for instance, in a contract action where the only possible parties are usually parties to the contract—insurance cases often require courts to analyze possible future involvement of third parties, subrogors, beneficiaries, or other insurers.[120]

Even in instances where a court determines that nonjoinder of the absent party may subject a party to multiple inconsistent obligations, certain factual and procedural circumstances may weigh against dismissal. Some courts seem particularly willing to consider the terms of the insurance policies at issue to determine if prejudice from

116 *See* Rhone-Poulenc Inc. v. Int'l Ins. Co., 71 F.3d 1299, 1301 (7th Cir. 1995) (acknowledging that Rule 19 is not a rigid rule).

117 *See* Travelers Indem. Co. v. Westinghouse Elec. Co., 429 F.2d 77, 79 (5th Cir. 1970) (discussing the need for total subrogation); Arkwright-Boston Mfrs. Mut. Ins. Co. v. City of N.Y., 762 F.2d 205, 209 (2d Cir. 1985) (recognizing that insurers are necessary parties but 'not indispensable parties).

118 *See* Hartford Cas. Ins. Co. v. Cardenas, 292 F.R.D. 235, 242 (E.D. Pa. 2013) (quoting Fed. Kemper Ins. Co. v. Rauscher, 807 F.2d 345, 354 n.5 (3d Cir. 1986) ("A brief analysis of the facts of this case under Rule 19 leads to the conclusion that *the most relevant inquiry in the Rule 19 analysis is whether full relief can be accorded [to the insurer] without joining the . . . injured part[ies].* Such an inquiry leads to the conclusion that the [injured parties] are indispensable parties to the action.") (alterations in original)).

119 *See*, *e.g.*, U.S. Fire Ins. Co. v. HC-Rockrimmon, L.L.C., 190 F.R.D. 575, 577 (D. Colo. 1999) (finding that the conceded risk of inconsistent judgments regarding a complex issue provided a basis for finding an absent third party necessary to the action); W Holding Co., Inc. v. Chartis Ins. Co. of P.R., 300 F.R.D. 63, 67 (P.R. 2014) (denying plaintiff's motion to join additional defendant in part because of low risk of inconsistent judgments); Wilson v. Everbank, N.A., 77 F. Supp. 3d 1202, 1228 (S.D. Fla. 2015) ("[B]ecause [the parties'] interests are aligned and their legal claims are the same, the current composition of the parties to this case does not risk any inconsistent judgment . . . .").

120 *See* 7 WRIGHT ET AL., *supra* note 27 § 1619 (Supp. 2020) (discussing a court's analysis for possible future involvements in insurance cases).

inconsistent obligations may be contractually limited.[121] For instance, the D.C. Circuit distinguished *Western Maryland Railway Co. v. Harbor Insurance Co.* from a factually similar case that the court dismissed under Rule 19 because the policy at issue in *Western Maryland Railway Co.* imposed "occurrence limits" for personal injury and property damage claims, as well as "aggregate limits" for claims based on the types of diseases at issue in the case.[122] The D.C. Circuit found the presence of occurrence and aggregate limits made insurers' risk of inconsistent obligations less than substantial because there was a cap on the total amount the insurers would possibly be compelled to pay, regardless of the number of subsequent claims.[123] *Western Maryland Railway Co.* illustrates that, although a party may be subject to a risk of inconsistent obligations, courts look to the likelihood that those inconsistent obligations will manifest prejudice or whether they may be contractually limited.

Similarly, some courts analyze the policy to determine if the insurer exposed itself to the prejudice of which a party alleges. A common example of this is when the insurer opens itself up to multiple or inconsistent obligations by the nature of its policy, covering multiple parties under the same policy.[124] This type of policy presents issues of inconsistent obligations under the Rule 19 analysis because it creates a situation wherein additional insureds have the same rights and obligations as the named insured.[125] Thus, in circumstances where a party raises concerns over the potential for an absentee to create multiple or inconsistent obligations, a court will likely not be persuaded when that insurer knowingly entered into an agreement that subjected it to this type of situation.

Procedural circumstances also appear to play a role in the amount of weight courts give to the multiple inconsistent judgments factor of the Rule 19 analysis. The existence of a parallel proceeding tends to weigh in favor of dismissal because, as one court noted, "the possibility of inconsistent judgments is not speculative, but real."[126] When another

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121 *See* W. Md. Ry. Co. v. Harbor Ins. Co., 910 F.2d 960, 962 (D.C. Cir. 1990) (recognizing that both policies at issue imposed occupational limits, aggregate limits, and occupational diseases); *In re* Chinese Manufactured Drywall Prod. Liab. Litig., 273 F.R.D. 380, 389 (E.D. La. 2011) (analyzing that certain obligations for the insurers was a result of bargaining and agreement).

122 *W. Md. Ry. Co.*, 910 F.2d at 962.

123 *Id.* at 963.

124 *See*, *e.g.*, *In re Chinese Manufactured Drywall Prod. Liab. Litig.*, 273 F.R.D. at 388–89 (holding that the insurer assumed the risk of multiple litigation because it incurred separate obligations when it insured multiple parties under the same policy); Pflumm v. W. World Ins. Co., No. 1:19-CV-254, 2019 WL 5860693, at *6 (M.D. Pa. Aug. 1, 2019).

125 *See* Travelers Prop. Cas. Co. v. Liberty Mut. Ins. Co., 444 F.3d 217, 219 (4th Cir. 2006) (stating the insurer has an independent coverage obligation to an additional insured); W. Am. Ins. Co. v. Lindepuu, 128 F. Supp. 2d 220, 232 (E.D. Pa. 2000) (stating that under policy, additional insureds have the same rights and obligations as named insured).

126 Ins. Co. of State of Pa. v. LNC Communities II, LLC, (No. 11-CV-00649-MSK-KMT), 2011 WL 5548955, at *9 (D. Colo. Aug. 23, 2011).

suit is actually ongoing, as opposed to merely possible, the concern that the two courts reach different obligations becomes higher.[127] When such proceedings are before the same judge, however, courts will generally find parallel proceedings in this situation to cut in the opposite direction under the Rule 19 analysis. While parallel proceedings present a greater opportunity for inconsistent obligations—when the same judge oversees both cases—the court is in a position to try to fashion relief in one suit so as not to unduly prejudice the parties in the other.[128]

A body of cases also suggest that, in the insurance context, courts will look to the actions of both joined and unjoined parties as an indication of perceived prejudice.[129] For instance, a number of cases consider whether the absent party attempted to intervene in the action, finding that intervention suggests the absent party believes its interests are at stake if it is not joined in the suit, and therefore is an indication of prejudice.[130] If a party to the suit argues under Rule 19 that the unjoined party will experience prejudice if not made party to the suit, courts may consider failure to join under Rule 24(a) as evidence to the contrary. For instance, in a case where insureds brought suit following an insurer's refusal to pay on a policy, the Fifth Circuit found insured's argument that its unjoined trustee would be unable to protect its interests undermined because the trustee did not attempt to intervene in the suit, despite being aware of the litigation.[131] Several circuits, in considering the interplay between possibility of intervention under Rule 24(a) and the prejudice determination under Rule 19(b), treat the possibility of intervention as a permissive, rather than mandatory, consideration.[132]

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127 *See id.* (discussing how another court could reach a different conclusion and leaving some parties to conflicting orders).

128 *See* Chesapeake & Ohio Ry. Co. v. Certain Underwriters at Lloyd's, London, 716 F. Supp. 27, 33 (D.D.C. 1989) ("[T]he Court recognizes that both actions are in front of the same court, and that the Court is thus in a position to try and fashion relief in one suit so as not to unduly prejudice the parties in another").

129 This consideration is not exclusive to insurance cases. Rather, it seems to have prominent expression in insurance cases.

130 *See*, *e.g.*, Smith v. State Farm Fire & Cas. Co., 633 F.2d 401, 405 (5th Cir. 1980) (noting that an absent trustee's ability to protect his interest was not significantly impaired where "[i]t is clear from the record that the trustee was aware of [the] litigation yet did not attempt to be made a party"); Am. Safety Cas. Ins. Co. v. Condor Assocs., Ltd., 129 F. App'x 540, 542 (11th Cir. 2005) (discussing the relationship between party indispensability and the possibility of intervention); Fed. Ins. Co. v. Singing River Health Sys., 850 F.3d 187, 201 (5th Cir. 2017) (finding that a third party's interests were sufficiently protected without required joinder because they had the ability to intervene in the proceeding).

131 *Smith*, 633 F.2d at 405.

132 *See* Dainippon Screen Mfg. Co. v. CFMT, Inc., 142 F.3d 1266, 1272 (Fed.Cir. 1998) (holding that a potential prejudice to a party if it is not joined to the matter does not automatically make them indispensable); Travelers Indem. Co. v. Dingwell, 884 F.2d 629, 636 (1st Cir. 1989) (holding that an ability to intervene does not control the indispensability determination); *In re* Allustiarte, 786 F.2d 910, 919 n.2 (9th Cir. 1986) (recognizing that an absent parties' failure to intervene when they were not joined to the lawsuit may

Similarly, courts may consider whether the insurer opposed a motion to join even though they were allegedly going to face multiple, inconsistent judgments if additional insureds were joined. For example, in a Fifth Circuit insurance case, the fact that the insurer that was party to the case did not oppose a motion to join additional insureds weighed against dismissal because it indicated the insurers lack of concern regarding multiple, inconsistent judgments.[133]

It is worth noting that many of the proffered examples where courts considered the actions and specific policies of parties involved sophisticated insurance companies.[134] This is consistent with the widely accepted judicial approach that holds sophisticated parties to a higher standard across many areas of law, particularly contract disputes.[135] In the context of Rule 19, courts are usually comfortable speculating about potential prejudice that may result if an absent party is not joined. When one of the parties asserting a disadvantage is a sophisticated entity, however, the court may be more likely to allow the specific actions of parties to inform its analysis.

Although Rule 19 insurance cases are difficult to generalize, there are a few circumstances in which courts usually find an unjoined insurer to be an indispensable party to the suit. The first of these is where the insured that is party to the suit has both primary and excess coverage.[136] Courts will generally find the primary insurer an indispensable party, reasoning that duplicative litigation could ensue and incomplete relief may be rendered.[137] In these cases, the court must determine which policies provide coverage in which circumstances, and establish which insurers are subject to liability in relation to other insurers, a complicated inquiry that presents a high possibility for different conclusions in subsequent litigation.[138] As the Seventh Circuit explained, when policies are excess, the joined insurer's liability is

be considered to determine whether a party has been prejudiced); *Am. Safety Cas. Ins. Co.*, 129 F. App'x at 542 (affirming that consideration of the possibility of intervention is not a "hard and fast" requirement when looking at the interplay between Rule 24(a) and Rule 19(b)).

133 *Fed. Ins. Co.*, 850 F.3d at 201 ("As to the risk of multiple or inconsistent obligations, this risk is borne by [Defendant], who opposed the motion to join the additional insureds.").

134 *Smith*, 633 F.2d at 405 (corporate insurer); *Fed. Ins. Co.*, 850 F.3d at 201 (corporate insurer); *Travelers Prop. Cas. Co.*, 444 F.3d 217, 219 (4th Cir. 2006) (corporate insurer).

135 *See* Sidney Hillman Health Ctr. of Rochester v. Abbott Labs., Inc., 782 F.3d 922, 929 (7th Cir. 2015) (noting "we have been willing to hold sophisticated entities to a higher standard."); Bank of Am., N.A. v. JB Hanna, LLC, 866 F.3d 929, 932 (8th Cir. 2017) (holding that a corporation's high level of sophistication weighed against a finding that it reasonably relied upon a fraudulent misrepresentation); Pinto v. Reliance Standard Life Ins. Co., 214 F.3d 377, 392 (3d Cir. 2000), *as amended* (July 19, 2000) (noting that the court will apply a heightened level of scrutiny when the party is sophisticated).

136 *See* Sta-Rite Indus., Inc. v. Allstate Ins. Co., 96 F.3d 281, 285–86 (7th Cir. 1996) (discussing the policies at issue where primary coverage was exhausted before any excess coverage was implicated).

137 *Id.*

138 *Id.*

"contingent on the liability of the [plaintiff's comprehensive general-liability insurers—]a liability that cannot be determined in the absence of those insurers."[139] This is generally sufficient to trigger dismissal because without the primary insurer, the court cannot determine the obligations of the excess insurers and therefore would subject the parties to a high potential for inconsistent judgments.[140]

The second circumstance in which courts will typically find an unjoined insurer to be indispensable is when the potential for "whipsaw" arises.[141] "Whipsaw" describes the situation wherein there are different periods of coverage under various policies, which creates the potential for inconsistent verdicts in separate actions based on different legal and factual findings, leaving the insured without full coverage.[142] When an insured is covered by different policies at different times, the potential for inconsistent judgments becomes particularly acute.[143] Multiple circuit courts have explained the potential for "whipsaw" may manifest itself in three ways, based upon the three steps that a court presiding over some aspect of the controversy at hand would foreseeably undertake.[144] As an initial matter, a court must determine, as a matter of law, whether the policies issued provide any coverage to the insured.[145] Second, assuming the first inquiry is answered in the affirmative, a court must next determine, also as a matter of law, what constitutes the "trigger of coverage" under the terms of the policies.[146] Third, a court would have to determine, as a matter of fact, at what point in time the "trigger of coverage" occurred.[147] These three questions of law and fact present the opportunity for courts to rule differently, thus exposing parties to inconsistent judgments. Due to the high potential for "whipsaw" in these situations, courts often find the unjoined insurer to be indispensable and order dismissal.

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139 *Rhone-Poulenc Inc.*, 71 F.3d 1299, 1302 (7th Cir. 1995).

140 *Id.*

141 *See, e.g.*, Schlumberger Indus., Inc. v. Nat'l Sur. Corp., 36 F.3d 1274, 1286 (4th Cir. 1994) (discussing the circumstances that cause "whipsaw" and the three steps a court must consider).

142 *Id.*

143 *Id.*

144 *See id.*; Lumbermens Mut. Casualty Co. v. Conn. Bank & Trust Co., N.A., 806 F.2d 411, 412–14 (2d Cir. 1986) (where resolution of question of law would determine trigger of coverage, so that different resolutions by different courts with different insurers as parties before them could result in insured receiving less than full coverage, court of appeals affirmed district court's grant of stay pending resolution of issue in concurrent state court action); Liberty Mut. Ins. Co. v. Foremost-McKesson, Inc., 751 F.2d 475, 477 (1st Cir. 1985) (holding that the "piecemeal litigation" could severely prejudice the rights of the parties).

145 *Schlumberger Indus., Inc.*, 36 F.3d at 1286.

146 *Id.*

147 *Id.*

D. Contracts

In many circumstances, "a contracting party is the paradigm of an indispensable party."[148] The reason for this is simple: any alteration of the rights or obligations of the parties under a contract necessarily affects the rights and obligations of the other parties to the contract.[149] Therefore, courts consistently determine that an absent party is indispensable if the action would change or rescind a contract.[150] These types of actions, however, are not the only way in which contract disputes arise, so this rigid indispensability rule must be qualified in certain situations. Varying dynamics between obligors and obligees, as well as the indefinite interests of third parties often cause courts to undertake a more searching Rule 19 analysis.[151]

As an initial matter, it is instructive to consider how courts address the "paradigmatic" contract case in the Rule 19 context. [152] These cases involve contract rescission, reformation, cancellation, or in some way question the validity of a contract. In such cases, the general rule is that all parties to the contract have such a substantial interest in the outcome of the litigation that the cases, "in equity and good conscience," cannot proceed without them.[153] Unlike other areas of Rule 19 contract jurisprudence where courts may consider whether the unjoined party is the obligor or obligee,[154] when the action involves the validity or

148 *U.S. ex rel. Hall*, 100 F.3d 476, 479 (7th Cir. 1996) (quoting Travelers Indem. Co. v. Household Int'l, Inc., 775 F. Supp. 518, 527 (D. Conn. 1991)).

149 *See, e.g.*, Lomayaktewa v. Hathaway, 520 F.2d 1324, 1325 (9th Cir. 1975) ("No procedural principle is more deeply imbedded in the common law than that, in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable."); Dawavendewa v. Salt River Project Agric. Improvement & Power Dist., 276 F.3d 1150, 1157 (9th Cir. 2002) ("A party to a contract is necessary, and if not susceptible to joinder, indispensable to litigation seeking to decimate that contract.").

150 *Lomayaktewa*, 520 F.2d at 1325.

151 *See, e.g.*, *Janney Montgomery Scott, Inc.*, 11 F.3d 399, 406 (3d Cir. 1993) (holding that joinder was compulsory under Rule 19(a)(2)(i) and Rule 19(a)(2)(ii)); *Challenge Homes*, *Inc.*, 669 F.2d 667, 670 (11th Cir. 1982) (holding that even though a judgment would have no legally preclusive effect, does not otherwise end the Rule 19 analysis); MasterCard Int'l Inc. v. Visa Int'l Serv. Ass'n, Inc., 471 F.3d 377, 386 (2d Cir. 2006) (recognizing that a party may be necessary when their rights would be prejudiced by another party's awarded relief).

152 *U.S. ex rel. Hall*, 100 F.3d at 479.

153 Delta Fin. Corp. v. Paul D. Comanduras & Assocs., 973 F.2d 301, 305 (4th Cir. 1992) ("The cases are virtually unanimous in holding that in suits between parties to a contract seeking rescission of that contract, all parties to the contract, and others having a substantial interest in it, are necessary parties."); Enter. Mgmt. Consultants, Inc. v. U.S. ex rel. Hodel, 883 F.2d 890, 894 (10th Cir. 1989) (quoting Lomayaktewa, 520 F.2d at 1325: "[n]o procedural principle is more deeply imbedded in the common law than that, in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable.").

154 *Janney Montgomery Scott, Inc.*, 11 F.3d at 406.

existence of a contract, such considerations are usually not relevant.[155] Additionally, courts rarely accept the potential for another party to the suit to adequately represent the absent party's interests in these circumstances.[156]

Disputes concerned with the fulfillment of contract obligations are often more complex under Rule 19. This is likely because the relief sought is often the performance of the contract, which in the case of multiple obligees or obligors, can generally be performed or received by one of the parties with the possibility for a subsequent contribution or indemnity suit.[157] While this scenario presents efficiency concerns, the Rule 19 test is designed to account for such considerations of judicial economy, balanced against the rights of litigants.[158] A few generalizations can be made regarding cases involving both unjoined obligors and obligees.

Cases addressing the indispensability of obligors are perhaps the area of Rule 19 jurisprudence in the contract context where courts are least likely to find an absent party indispensable.[159] The general rule appears to be that the plaintiff is entitled to choose which obligors it wishes to have involved in the litigation.[160] Almost universally, if obligors are jointly and severally liable, only one obligor is required, and all others are not indispensable.[161] The Third Circuit, in considering whether a court can grant complete relief in a breach of contract action to the parties before it when only one of two co-obligors has been joined as a defendant, concluded that if the contract can be construed or interpreted as a contract imposing joint and several liability on its co-obligors, complete relief may be granted in a suit against only one of them.[162] This is because a judgment against one joint obligor provides the plaintiff the relief it is entitled to, while not implicating the interests

155 *See, e.g.*, Jicarilla Apache Tribe v. Hodel, 821 F.2d 537, 540 (10th Cir. 1987) (affirming that in an action to set aside a contract, all parties who may be affected by the decision are an indispensable party).

156 *See, e.g.*, *Delta Fin. Corp.*, 973 F.2d at 305 (holding unjoined partner in contract rescission case was an indispensable party even though other partners presumably sought the same outcome).

157 Bank of Am. Nat. Tr. & Sav. Ass'n v. Hotel Rittenhouse Assocs., 844 F.2d 1050, 1054 (3d Cir. 1988) ("A defendant's right to contribution or indemnity from an absent non-diverse party does not render that absentee indispensable pursuant to Rule 19.").

158 *Boles*, 468 F.2d 476, 479 (6th Cir. 1972) (noting the Rule 19 test requires weighing many interests against that of judicial economy).

159 *See, e.g.*, *Janney Montgomery Scott, Inc.*, 11 F.3d at 406 (holding that a court must take into consideration the effect that resolution of the litigation would have on all the parties before considering the effect it may have on an absent party).

160 *See* 7 WRIGHT ET AL. *supra* note 27, § 1613 (3d ed. 2020) (explaining the deference given to plaintiffs when initiating a litigation).

161 *Id.*

162 *Janney Montgomery Scott, Inc.*, 11 F.3d at 405–06.

and rights of the absent joint obligors, who then remain liable to contribution to the co-obligor.[163]

This analysis becomes more complex when the obligors are in privity. Courts often consider preclusion in their Rule 19 analysis to determine potential prejudice to the parties.[164] If co-obligors are in privity with each other, this presents preclusion issues since preclusion applies where the party against whom it is asserted was a party or in privity with a party to the prior adjudication.[165] Therefore, in circumstances where obligors are in privity, some courts are likely more inclined to find absent obligors indispensable.[166] Courts confronted with privity arguments, however, have been hesitant to find indispensability based purely on preclusion given the highly factual nature of the privity analysis.[167] Thus, courts have suggested that while privity, and therefore potential for preclusion, weighs in favor of a finding of indispensability, to engage in the privity analysis would be premature.[168] This indicates that successful preclusion arguments are best made with accompanying evidence clearly demonstrating privity since courts are hesitant to undertake the analysis.

Unlike with obligors, joint obligees are usually held to be indispensable parties, the nonjoinder of whom leads to dismissal of the action.[169] In these cases, courts rely heavily on the desire to prevent multiplicity of suits, and seek a complete and final decree between all parties interested.[170] Without the obligee, the court cannot determine the rights of all parties because the promise made by obligors to obligees was made jointly, not separately.[171] Therefore, a decision without the

163 *See* 7 WRIGHT ET AL., *supra* note 27, § 1608 (3d ed. 2001) (discussing liability between co-obligors).

164 *See Challenge Homes, Inc.*, 669 F.2d 667, 670 (11th Cir. 1982) ("Because [the absent party] is not a party to this suit and will not have an opportunity to litigate his involvement in the questioned transaction, he will not be legally bound by the judgment under principles of res judicata or collateral estoppel.").

165 *See Taylor*, 553 U.S. 880, 893–94 (2008) (discussing preclusion based on pre-existing substantive legal relationships).

166 *See, e.g.*, *Janney Montgomery Scott, Inc.*, 11 F.3d at 410 (recognizing that if the court was to find that preclusion applies, two of the parties must have been in privity with each other).

167 *See* Johnson & Johnson v. Coopervision, Inc., 720 F. Supp. 1116, 1124 (D. Del. 1989) (holding it would be premature for the court in Rule 19(b) indispensable party analysis to decide whether the absent party is in privity for purpose of determining preclusive effect of lawsuit given the factual nature of privity analysis).

168 *Janney Montgomery Scott, Inc.*, 11 F.3d at 410 ("We will not theorize in determining necessary party status about the potential preclusive effect of this action on a later lawsuit as this would be premature.") (internal citations omitted).

169 Bry-Man's, Inc. v. Stute, 312 F.2d 585, 587 (5th Cir. 1963) ("It has often been held that joint obligees are indispensable parties when suing an obligor.") (citing Gregory v. Stetson, 133 U.S. 579, 586 (1890); Himes v. Schmehl, 257 F. 69, 70–71 (3d Cir. 1919)).

170 *Bry-Man's*, 312 F.2d at 587.

171 *See id.* at 586–87 (holding "that interest was so entire and indivisible, that without their presence, no decree could be made"); 7 WRIGHT ET AL., *supra* note 27, § 1608 (3d ed.

joint obligees may represent an incomplete adjudication of the rights and obligations of the contract.[172]

Joinder issues often arise in complex agreements among multiple parties that are all associated through separate contracts.[173] Because of the critical "interests" and the potential impact litigation will have on them, courts pay careful attention to precisely who is a party to the contract at issue and who is a third party.[174] In cases involving absent third parties, the success of a Rule 19 claim generally turns on whether the case actually involves a contract to which the absentee is a party.[175] It is not enough under Rule 19 for a third party to have an interest in the litigation, nor is it enough for a third party to be adversely affected by the outcome of the litigation.[176] Rather, necessary parties are only those parties whose ability to protect their interests would be impaired because of that party's absence from the litigation.[177] Thus, when an absentee is not a party to the contract at issue in the litigation, and has no direct involvement in that contract, even though the absent party's rights and obligations under another contract may be implicated, the absentee is not an indispensable party in a suit to determine obligations under the disputed contract.[178]

E. Corporate Disputes

Yet another common context for Rule 19 claims is in corporate disputes. These cases introduce complex associations between joined and unjoined parties and force the court to analyze the relationships within and between corporations and stockholders. Perhaps not surprisingly given the corporate nature of many insurers, as in the insurance context, courts often seem to treat whether parties would be exposed to double, multiple, or otherwise inconsistent obligations as one of the most important factors in conducting its Rule 19 analysis.

2001) (discussing the relationship between obligors and obliges and the effect on court determinations).

172 *Bry-Man's, Inc.*, 312 F.2d at 587 ("It was and is a rule based on equity, and the cardinal rule in equity was that all persons materially interested in a suit ought to be made parties to a suit in order to prevent multiplicity of suits, and that there might be a complete and final decree between all parties interested.").

173 *See, e.g.*, *MasterCard Int'l Inc.*, 471 F.3d 377, 386 (2d Cir. 2006) (discussing the need to enjoin a third party who would benefit from the contract at issue).

174 *Id.*

175 *Compare* Crouse-Hinds Co. v. InterNorth, Inc., 634 F.2d 690, 700–01 (2d Cir.1980) (holding that the third party was necessary where the counterclaim specifically challenged the validity of the merger agreement and sought to set aside that agreement, so the actual contract involving the absent third party was the basis of the claim), *with MasterCard Int'l Inc.*, 471 F.3d at 386 (holding that absent party's ability to protect its interest in its contract with joined party will not be impaired if not joined because the contract is not at issue in the suit).

176 *MasterCard Int'l Inc.*, 471 F.3d at 387.

177 *Id.*

178 Davis Companies v. Emerald Casino, Inc., 268 F.3d 477, 484 (7th Cir. 2001).

A frequent Rule 19 issue in the corporate law context is whether an absent parent or subsidiary is indispensable to the action.[179] These cases often raise considerations of privity and adequate representation.[180] Although there is privity between parent and subsidiary corporations, the weight courts give this fact in the indispensability analysis is far from uniform, and is only further muddled by the 2008 Supreme Court case, *Taylor v. Sturgell*, which extended privity to those unjoined parties whose interests are adequately represented by parties to the suit.[181] Yet again, the corporate context presents an area of Rule 19 jurisprudence wherein some circuits rely on privity to weigh in favor of dismissal,[182] others equate privity with adequate representation and weigh it against dismissal,[183] while others believe "[a]dequate representation should be considered as a part of the Rule 19(b) analysis, and not the threshold Rule 19(a) analysis."[184] There is indication in the last decades, however, that courts recognize this inconsistency and appear to favor the view that privity should indicate adequate representation and weigh against dismissal.[185] Despite this trend, a privity and its potential preclusive effect is likely still a circuit-dependent consideration that is appropriately argued based on precedent, although identifying the inconsistencies and contradictions within this area of Rule 19 jurisprudence may be compelling to some courts.[186]

In the parent/subsidiary context, courts often look to impact on the absent corporation to determine if the adverse impact on the absent

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179 B. Fernandez & Hnos., Inc. v. Kellogg USA, Inc., 440 F.3d 541, 542–43 (1st Cir. 2006).

180 *Id.* at 547.

181 *Taylor*, 553 U.S. 880, 888 (2008).

182 *Janney Montgomery Scott, Inc.*, 11 F.3d 399, 409 (3d Cir. 1993) ("If issue preclusion or collateral estoppel could be invoked against [the absent party] in other litigation, continuation of the federal action could 'as a practical matter impair or impede' [the absent party's] interests and so Rule 19(a)[(1)(B)(i)] would require its joinder if joinder were feasible.") (internal citation omitted).

183 *Nat'l Union Fire Ins. Co.*, 210 F.3d 246, 250–51 (4th Cir. 2000) ("If [a present party] is able adequately to represent [the absent party's] interest, we would be inclined to conclude that [the absent party's] ability to protect its interest is not impaired or impeded by its absence from this suit.").

184 *Glancy*, 373 F.3d 656, 668 (6th Cir. 2004).

185 Lattanzio v. Brunacini, (No. CV 5:16-171-DCR), 2016 WL 7177610, at *2 (E.D. Ky. Dec. 8, 2016) ("issues of *res judicata* are not proper considerations for Rule 19, as Rule 19 is concerned with *practical* rather than *legal* implications."); Williams-Sonoma Direct, Inc. v. Arhaus, LLC, 304 F.R.D. 520, 533 (W.D. Tenn. 2015):

> The key language in Rule 19(a)(1)(B)(i) is 'as a practical matter.' Rule 19(a) 'recognizes the importance of protecting the person whose joinder is in question against the *practical* prejudice to him which may arise through a disposition of the action in his absence'… If an absent party is adequately represented, then there is no practical prejudice to the absent party.

(internal citation omitted).

186 *Williams-Sonoma Direct*, 204 F.R.D. at 533 (district court, when presented with two contradictory holdings from the Sixth Circuit, found the adequate representation analysis "highly persuasive").

entity will be greater than to the joined entity.[187] If it is, courts often conclude that the joined party may not serve as an adequate proxy.[188] Particularly when the absentee is the subsidiary, the resolution of whether there is adequate representation often turns on whether liability can be shared and the extent to which the conduct at issue was that of the absent corporation.[189] For instance, the Tenth Circuit determined that because the plaintiffs could not secure relief from the parent corporations on a theory of vicarious liability, the subsidiary had to be deemed an indispensable party because it was the sole entity subject to any liability.[190]

Circuits differ, however, in their willingness to find indispensability based only on the "primary participant" theory.[191] In cases where indispensability is premised on the subsidiary's conduct, courts often reason that the subsidiary's "presence is critical to the disposition of the important issues in the litigation."[192] A criticism of this rationale, however, is that it does not seem to be based on the Rule 19 factors but instead some general notion that involvement in actions giving rise to the suit sufficiently implicates the absent party.[193]

A comparison between some courts' willingness to find an absent corporation indispensable based on the "primary participant" theory and

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187 *Id.* at 532.

188 *Nat'l Union Fire Ins. Co.*, 210 F.3d at 251 (concluding that a parent company was a necessary party in a lawsuit against its subsidiary because the results of the litigation could have more serious future consequences for the parent); *see also* Sw. Ctr. for Biological Diversity v. Berg, 268 F.3d 810, 824 (9th Cir. 2001) ("[I]t is not Applicants' burden at this stage in the litigation to anticipate specific differences in trial strategy. It is sufficient for Applicants to show that, because of difference in interests, it is likely that Defendants will not advance the same arguments as Applicants.").

189 *See* Freeman v. Nw. Acceptance Corp., 754 F.2d 553, 559 (5th Cir. 1985) (joinder necessary where subsidiary "becomes more than a key witness whose testimony would be of inestimable value [and i]nstead it emerges as an active participant" in the alleged tort); Acton Co. v. Bachman Foods, Inc., 668 F.2d 76, 78, 81 (1st Cir.1982) (parent that played "substantial role" was indispensable party to action against subsidiary); Armco Steel Corp. v. United States, 490 F.2d 688, 690–91 (8th Cir.1974) (joinder of parent corporations would be ordered if parents were required to participate in remedy); Hanna Mining Co. v. Minn. Power and Light Co., 573 F. Supp. 1395, 1399 (D. Minn. 1983) (parents and subsidiary were indispensable parties where both had identical interests in subject of action) (citing Reserve Mining Co. v. U.S. Envtl. Prot. Agency, 514 F.2d 492, 534 (8th Cir.1975)); Heinrich v. Goodyear Tire & Rubber Co., 532 F. Supp. 1348, 1359 (D. Md.1982) (joinder of subsidiary not necessary where liability premised only on parent's acts).

190 Glenny v. Am. Metal Climax, Inc., 494 F.2d 651, 654–55 (10th Cir. 1974).

191 Pyramid Sec. Ltd. v. IB Resolution, Inc., 924 F.2d 1114, 1121 (D.C. Cir. 1991) (rejecting a per se rule that a subsidiary is *always* an indispensable party in a suit against its parent if the subsidiary is the primary participant in the actions complained of).

192 Haas v. Jefferson Nat. Bank of Miami Beach, 442 F.2d 394, 398 (5th Cir. 1971); *Freeman*, 754 F.2d at 559.

193 *Pyramid Sec. Ltd.*, 924 F.2d at 1121 (joined parent corporation "makes no effort to connect this theory to the language of Rule 19. The only appellate opinion it cites for so broad a principle is *Freeman*, which similarly rested indispensability only on the 'primary participant' theory . . . with no review of Rule 19's checklist of possible risks of non-joinder.").

courts' general approach to third parties in the contract context may be instructive. As noted above, in cases involving absent third parties, the success of a Rule 19 claim generally turns on whether the case actually involves a contract to which the absentee is a party.[194] So on one hand, this seems consistent with the "primary participant" theory since under that theory, an absent entity will generally be indispensable if its conduct is central to the litigation.[195] On the other hand, findings based on the "primary participant" theory may be understood as anomalous since, unlike in the third party contract context—wherein an absent party's direct interest in a definite agreement is requisite to a finding of indispensability—in the corporate context, more amorphous ideas of conduct and interest can be sufficient. The reasoning that seems to drive courts in the third party contract context is that merely having an interest in the litigation or being adversely affected by the outcome of the litigation affected does not necessarily mean that the party will be prejudiced within the meaning of Rule 19.[196] Conversely, under the "primary participant" theory, courts seem to accept impact as a proxy for direct interest without specifically describing how involvement in the dispute translates to prejudice to legally cognizable interest under the Rule 19 framework.

Another area of corporate law where absent parties are often found to be indispensable is in the context of stockholder derivative suits. When a stockholder brings a derivative suit, the corporation is an indispensable party.[197] As the Supreme Court noted, although the stockholder has a right to sue on behalf of the corporation, the stockholder is "at best the nominal plaintiff".[198] Instead, "[t]he corporation is a necessary party to the action; without it the case cannot proceed" because it is the real party in interest, the proceeds of the action belong to it, and it is bound by the result of the suit.[199] The indispensability of stockholders, however, is not as definitive.

Finally, a consideration unique to Rule 19 cases in the corporate context, is some courts' willingness to take absent parties' financial ability to bring another case in a proper venue into account. For instance, in a Rule 19 case seeking to join absent stockholders, the

194 *Compare Crouse-Hinds Co.*, 634 F.2d 690, 700–02 (2d Cir. 1980) (holding that a third party was necessary where the counterclaim specifically challenged the validity of the merger agreement and sought to set aside that agreement, so the actual contract involving the absent third party was the basis of the claim), *with MasterCard Int'l Inc.*, 471 F.3d 377, 386 (2d Cir. 2006) (holding that the absent party's ability to protect its interest in its contract with a joined party will not be impaired if not joined because the contract is not at issue in the suit).

195 *See Freeman*, 754 F.2d at 559 (recognizing that joinder was feasible because a party's presence was critical to the disposition of the case).

196 *MasterCard Int'l Inc.*, 471 F.3d at 387.

197 Ross v. Bernhard, 396 U.S. 531, 538 (1970) (holding the corporation to be an indispensable party to a stockholder-derivative suit).

198 *Id.*

199 *Id.*

district court found that prejudice to an unjoined party was reduced because absent stockholders were financially solvent, and therefore capable of enforcing their rights against the acquiring corporation in state court.[200] Similarly, the Second Circuit held that because an absent foreign corporation was dissolved and had no assets, the plaintiff would not be likely to pursue its chance to "procure blood from a stone" in a proper forum, making subsequent litigation, and potential inconsistent judgments, improbable.[201] This represents an example of some courts' amenability to practical, rather than theoretical, arguments regarding the level of actual prejudice parties will experience as a result of the indispensability determination.

In sum, it seems that the most compelling arguments in Rule 19 corporate disputes are those grounded in the potential for double, multiple, or otherwise inconsistent obligations as a result of res judicata or collateral estoppel, and those, to the extent possible, that emphasize the centrality of a contract, to which the absent entity is a party, to the suit at issue.

IV. CONCLUSION

The highly factual nature of Rule 19 has formed a seemingly unpredictable body of law that often defies generalization. Because of this, the need to identify commonalities both within and between categories of cases becomes all the more important. Relevant to the outcome of any Rule 19 case is the area of law, procedural posture, nature of the relationships between the joined and absent parties, and the specific interests at issue. Particularly, the category of case in which a Rule 19 claim arises may govern the way in which courts approach the analysis. Based on the area of law, courts will weigh Rule 19 factors differently in pursuit of "equity and good conscience."[202]

Although the focus of this paper was by no means strictly environmental, many of the cases addressed arose from disputes over natural resources or involved environmental laws. The sovereign immunity cases, for instance, often centered on the importance of tribes' ability to control their natural resources. In the context of real property, land, water, and mineral rights were at issue. A few of the insurance cases involved suits over the respective liability of different insurance companies under the Comprehensive Environmental Response, Compensation, and Liability Act.[203] Due to the ubiquitous nature of both contracts and corporations, the applicability of these sections to environmental law is clear. An understanding of which factors are most

200 Errico v. Stryker Corp., 281 F.R.D. 182, 191 (S.D.N.Y. 2012).

201 CP Sols. PTE, Ltd. v. Gen. Elec. Co., 553 F.3d 156, 160 (2d Cir. 2009).

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

203 *Schlumberger Indus.*, 36 F.3d 1274, 1277 (4th Cir. 1994); *Travelers Indem. Co.*, 884 F.2d 629, 631 (1st Cir. 1989).

compelling and why in these categories of law is therefore critical for effective Rule 19 advocacy in environmental litigation.