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the importance of detailed analysis of the probative value of the evidence and the necessity of balancing probative value against the prejudicial impact.[102] Only through detailed analysis and evaluation can the Fourth Circuit define and maintain clear standards to apply when considering similar acts evidence.[103]

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IX. INSURANCE

Joinder of Partially Subrogated Insurers

To promote justice, speed, and economy in litigation, the Federal Rules of Civil Procedure (Federal Rules) provide measures for assembling in one action all persons and issues that are necessary for the complete resolution of a dispute.[1] A court usually will not allow an additional person or issue in a lawsuit if the extra person or issue could prejudicially affect the resolution of the suit.[2] For example, the disclosure of a party's insurance coverage may be prejudicial because a jury may consider an insurance company better than an individual at absorbing the cost of in-

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[102] *See* FED. R. EVID. 404(b); *supra* notes 83 & 84 and accompanying text (some courts admit similar acts evidence without analysis).

[103] *See supra* note 83 and accompanying text (some courts admit similar acts evidence without analysis).

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[1] *See* FED. R. CIV. P. 1 (goal of civil procedure is speedy, fair, and inexpensive litigation); F. JAMES & G. HAZARD, CIVIL PROCEDURE § 10.1 at 451-52 (2d ed. 1977) (Federal Rules of Civil Procedure provide for liberal joinder of parties and claims in one lawsuit). The Federal Rules of Civil Procedure (Federal Rules) contain various ways that a court or a party can include additional issues or parties in an action. *See* FED. R. CIV. P. 13(a)-(f) (counterclaim provides means of adjudicating all claims between opposing parties); FED. R. CIV. P. 13(g) (cross-claim permits adjudication of claims between coparties that arise out of same transaction as original claim); FED. R. CIV. P. 42(a) (court may consolidate actions involving common question of law or fact); FED. R. CIV. P. 19 (court can compel joinder of person when risk of multiple litigation or prejudice exists); FED. R. CIV. P. 24 (persons with interest in action may intervene).

[2] *See* Dupont v. Southern Pacific Co., 366 F.2d 193, 196-97 (5th Cir. 1966) (consolidation of two related accident claims prejudicial if consolidation creates confusion for jurors), *cert. denied*, 386 U.S. 958 (1967); Atkinson v. Roth, 297 F.2d 570, 575-76 (3d Cir. 1961) (consolidation of accident cases rendered issues and jury instructions too confusing and prejudicial because automobile driver was plaintiff in one action and defendant in four other actions); Baker v. Waterman S.S. Corp., 11 F.R.D. 440, 440-41 (S.D.N.Y. 1951) (consolidation of personal injury cases arising out of explosion was improper because disparity in degree of plaintiffs' injuries created risk of jury prejudice to defendant); *see also infra* text accompanying note 3 (disclosure of party's insurance coverage tends to prejudice jury against insured party).

juries or damages.[3] A majority of state jurisdictions, therefore, do not allow evidence of an insurer's interest in a lawsuit,[4] and relatively few states allow a direct action against a tortfeasor's insurance company.[5] The reason behind the majority view is to prevent a jury from finding liability only because a defendant's insurer can afford to pay a damage award.[6] A similar rationale exists when a plaintiff has insurance, because a jury might refuse to find liability only because the plaintiff's insurer can bear the cost of damages better than an individual defendant.[7] The possibility of compulsory joinder under Federal Rules 17 and 19, therefore, can be a strategic disadvantage to a plaintiff in a diversity case involving a partially subrogated insurer.[8]

Generally, the term subrogation means that one person may take a second person's place with respect to legal rights and remedies against a third person.[9] Subrogation of an insurer occurs when the insurer com-

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[3] *See* 2 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 282a at 148 (Chadbourn rev. 1979) (risk of jury prejudice derives from financial disparity between insurance company and individual party); *see also* Edwards, Inc. v. Arlen Realty & Dev. Corp., 466 F. Supp. 505, 513 (D.S.C. 1978) (substantial risk of jury prejudice exists if jury is aware of insurance coverage); White Hall Bldg. Co. v. Profexray Div. of Litton Indus., 387 F. Supp. 1202, 1206 (E.D. Pa. 1974) (indisputable risk of jury prejudice exists upon disclosure of insurance coverage), *aff'd mem.*, 578 F.2d 1377 (3d Cir. 1978); *cf.* F. JAMES & G. HAZARD, *supra* note 1, § 9.4 at 399-400 (concealing insurance from jury provides strategic advantage to insured party); Kennedy, *Federal Rule 17(a): Will the Real Party in Interest Please Stand?*, 51 MINN. L. REV. 675, 686 (1967) (insurers avoid joinder to prevent prejudice).

[4] *See* 23 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE & PROCEDURE § 5361 at 426-27 (1980) (most states have provision that prohibits evidence of insurance coverage on issue of defendant's liability); *see also* ARIZ. REV. STAT. ANN. §§ 12-2301 to -2302 (1956); CAL. EVID. CODE § 1155 (1966 & Supp. 1981); MINN. R. EVID. 411; N.J. R. EVID. 411; N.M. R. EVID. 411; OHIO R. EVID. 411; WASH. R. EVID. 411; WIS. R. EVID. 904.11.

[5] *Compare* LA. REV. STAT. ANN. § 22.655 (West 1978) (injured person may bring direct action against tortfeasor's insurer when accident or injury occurs in Louisiana) *and* WIS. STAT. ANN. § 632.24 (West 1980 & Supp. 1982) (injured person may bring direct action against insurer) *with* VA. CODE § 38.1-380 (Repl. 1981) (injured person can bring direct action against defendant's insurer only after unexecuted judgment against defendant).

[6] *See* Phillips, *Mention of Insurance During Trial*, 1961 TRIAL LAW. GUIDE 247, 247 (practical reason behind general rule prohibiting evidence of insurance is to prevent excessive verdicts and verdicts of liability that may result from jury's knowledge that defendant won't have to pay the award); *see also* FED. R. EVID. 411 advisory committee note (disclosure of defendant's insurance gives jury an improper basis for finding liability).

[7] *See* Kint v. Terrain King Corp., 79 F.R.D. 10, 12 n.4 (M.D. Pa. 1977) (disclosure of a plaintiff's insurance may prejudice jury against the insured plaintiff); Kennedy, *supra* note 3, at 686 (jury's awareness of a plaintiff's insurance coverage may be prejudicial to the plaintiff); Kessner, *Federal Court Interpretations of the Real Party in Interest Rule in Cases of Subrogation*, 39 NEB. L. REV. 452, 461-62 (1960) (joinder of a plaintiff's insurer may result in jury prejudice).

[8] *Compare* Wadsworth v. United States Postal Serv., 511 F.2d 64, 65 (7th Cir. 1975) (defendant can compel joinder of plaintiff's partially subrogated insurer) *with* Miller v. Tomlinson, 194 Va. 367, 372-73, 73 S.E.2d 378, 380-82 (1952) (Virginia law protects plaintiffs from jury prejudice by prohibiting compulsory joinder of subrogated insurers).

[9] *See* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 250-52 (1973) (subrogation occurs

pensates an insured person for a loss caused by a third person.[10] An insurer becomes a subrogee when the insurer fully compensates an insuree, and the insuree becomes a subrogor.[11] An insurer is a partial subrogee if the insurer only partially compensates an insuree.[12]

Federal Rule 17 requires that the real party in interest prosecute an action.[13] A real party in interest is a person that may enforce a substan-

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when one person may substitute for another person to enforce right against third person). Subrogation originated as an equitable remedy that prevented unfair results, such as the unjust enrichment of an obligor. *Id.* at 250-51. Subrogation protected any person that for a legitimate reason had discharged an obligor's obligation with the discharger's personal property. *Id.* at 251-52; *see* RESTATEMENT OF RESTITUTION § 162 (1937 & Supp. 1982) [hereinafter cited as RESTATEMENT]. At common law, equity courts used subrogation to permit a subrogee that had discharged an obligation to sue in the name of a subrogor against the person that was primarily responsible for the obligation. *See* RESTATEMENT, *supra*, at 455. Equity courts constructed an equitable obligation that mirrored the discharged obligation to give the subrogee a cause of action. *See id.* at 653-54. Prior to the merger of law and equity, however, a subrogee could not enforce a right in his own name in an action at law. *See* United States v. Aetna Casualty & Sur. Co., 338 U.S. 366, 381 (1949) (subrogee's action at common law had to be in subrogor's name); Clark & Hutchins, *The Real Party in Interest*, 34 YALE L.J. 259, 270-72 (1925) (subrogee could not sue in own name at law). *But see* F. JAMES & G. HAZARD, *supra* note 1, at 399-402 (subrogee and partial subrogee now can sue in own names).

[10] *See* 16 G. COUCH, CYCLOPEDIA OF INSURANCE LAW, §§ 61:2-61:4 at 238-40 (2d ed. 1966) (insurer becomes subrogated upon payment of compensation). *See generally* R. HORN, SUBROGATION IN INSURANCE THEORY AND PRACTICE chs. 2-4 (1964) (history, theory, and legal significance of subrogation of insurers). When an insurer compensates a person that sustained a loss, the insurer may be discharging the obligation of a person that caused the loss. *Id.* at 24-26. The insurer, therefore, assumes the compensated person's rights against the person responsible for the loss. *Id.*

[11] *See* R. HORN, *supra* note 10, at 14 (insurer becomes subrogee by compensating injured person and compensated person becomes subrogor).

[12] *See* Note, *Splitting a Cause of Action and Partial Subrogation in the Insurance Situation*, 39 IOWA L. REV. 355, 356 (1954) (partial subrogee is person that has paid only part of another person's obligation); *see also* F. JAMES & G. HAZARD, *supra* note 1, at 401-402 (partial subrogation involves less than total compensation for a loss). Partial compensation for an insured's loss includes situations where an insured's policy has a deductible amount. *See* Wadsworth v. United States Postal Serv., 511 F.2d 64, 65-67 (7th Cir. 1975) (deductible clause in policy makes an insured a partial subrogor with sufficient interest to be a real party in interest). Although equity courts allowed a total subrogee to sue in his own name, a partial subrogee could not recover except through a suit by the partial subrogor for the use of the partial subrogee. *See* RESTATEMENT, *supra* note 9, at 655-56. Currently, however, a partial subrogee may be a real party in interest that can sue to recover any compensation paid to an insured person. *See* United States v. Aetna Casualty & Sur. Co., 338 U.S. 366, 380-81 (1949) (both partial subrogee and partial subrogor are entitled to sue as real parties in interest against tortfeasor); *infra* text accompanying note 16 (majority of state jurisdictions consider partial subrogee real party in interest).

[13] FED. R. CIV. P. 17(a). Federal Rule 17 provides that the real party in interest must be the named party that prosecutes an action. *Id.* A real party in interest must possess a substantive right to enforce a claim. *See* Rosenfeld v. Continental Bldg. & Operating Co., 135 F. Supp. 465, 467 (W.D. Mo. 1955) (definition of real party in interest is person with right to enforce claim); 3A J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 17.07 at 17-65 (2d ed. 1982) [hereinafter cited as MOORE] (real party in interest refers to person with substantive

tive right.[14] In diversity cases, courts look to state law to determine the person entitled to enforce a right.[15] A majority of state jurisdictions con-

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right to bring suit). Federal Rule 17 recognizes that the real party in interest is not necessarily the person that will ultimately benefit from the suit. *See* FED. R. CIV. P. 17(a). Federal Rule 17 lists several examples of real parties in interest that have statutory or common law authorization to sue on behalf of someone else. *See id.* (trustees, bailees, executors, third party beneficiaries, and guardians are examples of real parties in interest that can sue on behalf of someone else).

Federal Rule 17 provides three remedial measures to validate a lawsuit when a person other than a real party in interest brings an action. *See id.* First, a court can substitute the real party in interest for the original plaintiff. *Id.* Second, the real party in interest can join as a coplaintiff in the action. *Id.* Third, the real party in interest can ratify the action such that the real party in interest will be bound by the judgment. *See id.*; *see also* Urrutia Aviation Enterprises v. B.B. Burson & Assoc., 406 F.2d 769, 770 (5th Cir. 1969) (written instrument that bound both assignor and assignee complied with Federal Rule 17). Dismissal of an action for a real party in interest defect is not appropriate until the plaintiff has had both notice and an opportunity to correct the defect. *See* FED. R. CIV. P. 17(a) (plaintiff has reasonable time after notice of real-party-in-interest objection to seek ratification, joinder, or substitution of real party in interest).

Courts disagree whether a plaintiff may proceed alone when the plaintiff is one of several real parties in interest. *Compare* Prevor-Mayorsohn Caribbean, Inc. v. Puerto Rico Marine Management, Inc., 620 F.2d 1, 4 (1st Cir. 1980) (as long as one real party in interest sues, additional real parties in interest need not join in lawsuit if the judgment will bind all real parties in interest) *and* Allen v. Baker, 327 F. Supp. 706, 709-10 (N.D. Miss. 1968) (one real party in interest could sue without compulsory joinder of other real parties when state wrongful death statute allowed suit by any of several persons) *with* Levitt & Sons, Inc. v. Swirnow, 58 F.R.D. 524, 529-31 (D. Md. 1973) (all property owners interested in injunctive proceeding must join as plaintiffs). A majority of courts require joinder of additional real parties only when a defendant moves for joinder, because the purpose of joinder is to protect a defendant from multiple actions. *See* United States v. Aetna Casualty & Sur. Co., 338 U.S. 366, 381 (1949) (defendant could compel joinder of additional real party in interest by timely motion); Virginia Elec. & Power Co. v. Westinghouse Elec. Corp., 485 F.2d 78, 84 (4th Cir. 1973) (joinder of all real parties in interest is usually appropriate upon motion by defendant), *cert. denied*, 415 U.S. 935 (1974); *see also* 3A MOORE, *supra*, ¶ 17.09 at 17-92 to -93 (defendant can waive joinder requirement concerning all real parties in interest because joinder is only a protective measure for defendants). Some courts, therefore, deny a defendant's motion for joinder when one action will completely adjudicate a claim and bar related suits by other real parties in interest. *See* Glacier Gen. Assurance Co. v. G. Gordon Symons Co., 631 F.2d 131, 134-35 (9th Cir. 1980) (joinder of reinsurers that were real parties in interest was not necessary because state law allowed insurer to prosecute entire claim and federal law precluded subsequent action by reinsurers); Estate of Johnson v. Bellville Hosp., 56 F.R.D. 380, 384 (S.D. Tex. 1972) (no need to join all persons that are additional real parties in interest if state law authorizes plaintiff to sue on behalf of other real parties in interest and no risk of multiple actions exists); *see also infra* text accompanying note 21 (discussion of joinder under Federal Rule 19).

[14] *See* White Hall Bldg. Corp. v. Profexray Div. of Litton Indus., 387 F. Supp. 1202, 1204 (E.D. Pa. 1974) (test for real party in interest is whether party has a legal right to enforce a claim), *aff'd mem.*, 578 F.2d 1377 (3d Cir. 1978); *see also* 3A MOORE, *supra* note 13, ¶ 17.07 at 17-65 to 17-75 (real party in interest possesses substantive right to sue on claim); 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1543 at 639-47 (1971) (person with legal right to bring suit is real party in interest) [hereinafter cited as WRIGHT & MILLER].

[15] *See* Erie R.R. v. Tompkins, 304 U.S. 64, 69-78 (1938) (state law controls on substan-

sider both a partial subrogee and a partial subrogor to be real parties in interest and allow either to prosecute an action.[16] A partial subrogor is a real party in interest because the partial subrogor should be able to supplement his partial compensation with an award against the tortfeasor that caused the loss.[17] A partial subrogee is a real party in interest because the partial subrogee should assume the partial subrogor's right to recover the balance of the loss from the tortfeasor.[18]

Jurisdictions vary on whether a court must join a partial subrogee as an involuntary plaintiff in a suit by the partial subrogor when the defendant moves for joinder.[19] Although Federal Rule 19 permits a party to add another person whose joinder is feasible,[20] the rule requires a showing that the person's absence will create a substantial risk of injustice or inefficiency before the party can accomplish joinder.[21] In a par-

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tive issues in diversity cases); *see also* Virginia Elec. & Power Co. v. Westinghouse Elec. Corp., 485 F.2d 78, 83 (4th Cir. 1973) (state law determines who is real party in interest in diversity cases), *cert. denied*, 415 U.S. 935 (1974); 6 WRIGHT & MILLER, *supra* note 14, § 1544 at 647-51 (citing federal cases where state law supplied identification of real parties in interest); Kennedy, *supra* note 3, at 678 (determination of real party in interest derives from state substantive law).

[16] *See* Virginia Elec. & Power Co. v. Westinghouse Elec. Corp., 485 F.2d 78, 83-84 (4th Cir. 1973) (both partial subrogee and partial subrogor are real parties in interest under Virginia law), *cert. denied*, 415 U.S. 935 (1974); Carlson v. Consumers Power Co., 164 F. Supp. 692, 693-94 (W.D. Mich. 1957) (both partial subrogee and partial subrogor are real parties in interest under Michigan law); Braniff Airways v. Falkingham, 20 F.R.D. 141, 143 (D. Minn. 1957) (Minnesota law considers partial subrogees and partial subrogors to have enforceable rights); *see also* 3A MOORE, *supra* note 13, ¶ 17.01 at 17-106 to 17-109 (citing state and federal cases that hold partial subrogee and partial subrogor real parties in interest).

[17] *See* United States v. Aetna Casualty & Sur. Co., 388 U.S. 366, 381 (1949) (insured still owns part of claim against tortfeasor in partial subrogation situation); *see also supra* text accompanying notes 9-12 (explanation of subrogation).

[18] *See* United States v. Aetna Casualty & Sur. Co., 338 U.S. 366, 381 (1949) (insurer possesses right to sue on portion of claim in a partial subrogation situation and is a real party in interest); *see also supra* text accompanying notes 9-13 (explanation of subrogation and real party in interest).

[19] *Compare* Garcia v. Hall, 624 F.2d 150, 152, 152 n.5 (10th Cir. 1980) (defendant cannot compel joinder of partial subrogee in action by partial subrogor when no risk of multiple litigation exists) *with* Wadsworth v. United States Postal Serv., 511 F.2d 64, 65-67 (7th Cir. 1975) (joinder of partial subrogee required in suit by partial subrogor when defendant moves for joinder). Disagreement about joinder in partial subrogation situations exists due to the 1966 amendments to Federal Rule 19 and the Supreme Court's decision in United States v. Aetna Casualty & Sur. Co., 338 U.S. 366 (1949). *See infra* text accompanying notes 77-80 (discussion of facts, holding, and impact of *Aetna*); *infra* text accompanying note 21 (comparison of original and amended versions of Federal Rule 19); *see also infra* text accompanying notes 81-83 (additional cases showing disagreement on joinder of partial subrogees).

[20] *See* FED. R. CIV. P. 19(a). Joinder is feasible when a person is amenable to service of process and the person's presence will not defeat subject matter jurisdiction. *Id.* Joinder may not be feasible, however, if a person objects to venue. *See* 3A MOORE, *supra* note 13, ¶ 19.04 at 19-76; 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 1610 at 94-108 (1972).

[21] *See* FED. R. CIV. P. 19(a). Federal Rule 19(a) addresses the compulsory joinder of all

tial subrogation situation, however, the joinder of an insurer may create a substantial risk of jury prejudice.[22]

In *Travelers Insurance Co. v. Riggs*,[23] the United States Court of Appeals for the Fourth Circuit addressed the relationship between Federal Rules 17 and 19 in a partial subrogation context.[24] In *Travelers*, an airplane owned by Riggs and piloted by Reid crashed into the home of

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persons whose joinder is desirable and feasible. *See* Edwards, Inc. v. Arlen Realty Dev. Corp., 466 F. Supp. 505, 512 (D.S.C. 1978) (Federal Rule 19 allows courts to compel joinder of persons who should be parties); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments to the Federal Rules of Civil Procedure*, 81 HARV. L. REV. 356, 364-65 (1967) (Federal Rule 19 encompasses all situations where joinder is theoretically and practically desirable); *see also supra* text accompanying note 20 (discussion of feasibility). Joinder is desirable when nonjoinder would create a risk of injustice or inefficiency. *See* FED. R. CIV. P. 19(a); 7 WRIGHT, *supra* note 20, at 33. Nonjoinder may create a risk of inefficiency or prejudice to the parties already present, to the person whose joinder is at issue, or to the judicial system in general. *See* FED. R. CIV. P. 19(a)(1) (nonjoinder may render relief between parties incomplete); *id.* at (a)(2)(i) (nonjoinder may prejudice absent person's interest in action); *id.* at (a)(2)(ii) (nonjoinder may create risk of subsequent or inconsistent judgments against defendant); *see also* White Hall Bldg. Corp. v. Profexray Div. of Litton Indus., 387 F. Supp. 1202, 1207 (E.D. Pa. 1974) (Federal Rule 19 requires joinder to insure complete and final adjudication of claim), *aff'd mem.*, 578 F.2d 1377 (3d Cir. 1978); Ward v. Franklin Equip. Co., 50 F.R.D. 93, 95 (E.D. Va. 1970) (joinder under Federal Rule 19 insures that all persons interested in recovery participate in litigation).

If joinder is desirable, but not feasible, a court must determine whether an absent person is an indispensable party. *See* FED. R. CIV. P. 19(b); Garcia v. Hall, 624 F.2d 150, 152 (10th Cir. 1980) (courts should look to guidelines for indispensability in Federal Rule 19(b) when joinder is desirable but defeats jurisdiction). The term "indispensable" is a conclusory term for describing a person that has an interest in an action such that a court should dismiss the action when the person's joinder is not possible. *See* 3A MOORE, *supra* note 13, ¶ 19.01 at 19-16. Factors that Federal Rule 19 lists to determine whether an action should proceed without a person whose joinder is desirable include the degree of potential prejudice to parties, the potential for corrective measures, the adequacy of a judgment, and the potential for an adequate remedy in another forum. *See* FED. R. CIV. P. 19(b); 3A MOORE, *supra* note 13, ¶ 19.01 at 19-14 to 19-17 (discussing four factors contained in Federal Rule 19(b) that determine indispensability); *see also* Cohn, *The New Federal Rules of Civil Procedure*, 54 GEO. L.J. 1204, 1204-11 (1966) (discussion of factors relevant to indispensability under amended version of Federal Rule 19).

The original version of Federal Rule 19(a) provided that joinder was necessary whenever a person had a joint interest in the subject matter of a lawsuit. *See* 3A MOORE, *supra* note 13, ¶ 19.01 at 19-6 to 19-12 (test for necessary joinder under old Federal Rule 19 was whether person had a joint interest with a party to the litigation). The rule was amended in 1966 to avoid the confusion generated by the terms "joint interest" and "necessary party." *See* FED. R. CIV. P. 19 advisory committee note. The amended version of Federal Rule 19 contains specific practical guidelines for determining when a person should join an action and when a court should dismiss the action because the person cannot join. *See* FED. R. CIV. P. 19; *see also infra* note 79 (reason for amendment to rule was confusion about meaning of term "necessary party").

[22] *See supra* text accompanying note 3 (disclosure of a party's insurance coverage may result in jury prejudice).

[23] 671 F.2d 810 (4th Cir. 1982).

[24] *Id.* at 812-14.

John and Veronica Frankenstein.[25] Travelers Insurance Company (Travelers) paid the Frankensteins almost $27,000 under the Frankensteins' $100 deductible homeowners policy.[26] The Frankensteins' filed a diversity action in the United States District Court for the Eastern District of Virginia against Riggs and Reid's estate.[27] Riggs and Reid's executrix alleged that Travelers was the real party in interest and moved to substitute Travelers as the plaintiff.[28] The district court granted the defendants' motion after determining that Travelers was completely subrogated to the Frankensteins' claim.[29] The district court reasoned that Travelers was a total subrogee and the only real party in interest because the amount of recovery that the Frankensteins sought was equal to the amount of compensation that Travelers had paid.[30] The court denied Travelers' motion to increase the prayer for relief by the amount of the Frankensteins' uninsured loss and to add the Frankensteins as co-plaintiffs.[31] The court suggested that either Travelers should sue for the total amount of the loss for the use and benefit of the Frankensteins,[32] or

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[25] *Id.* at 812.

[26] *Id.*

[27] *Id.* In *Travelers*, the plaintiff homeowners sued the estate of a pilot that had flown a plane into the plaintiffs' house and had died in the crash. *Id.* The district court substituted Travelers Insurance Co. (Travelers) for the homeowners. *Id.* On appeal to the Fourth Circuit, Travelers argued that substitution prejudiced the jury against the insurance company and in favor of the pilot's widow, who was the executrix of the estate. *See* Brief of Appellant at 10, Travelers Ins. Co. v. Riggs, 671 F.2d 810 (4th Cir. 1982). The *Travelers* court rejected the prejudice argument and held that prejudice from procedural tactics does not affect a party's substantive rights. *See* 671 F.2d at 813-14.

[28] 671 F.2d at 812; *see supra* text accompanying note 13 (substitution is a remedy for a real-party-in-interest defect).

[29] *Id.* In *Travelers*, the district court substituted an insurer as the real party in interest in the lawsuit. *Id.* Counsel for Travelers, the insurer, had represented the Frankensteins prior to the substitution of Travelers. *Id.* The district court rejected Travelers' offer to ratify the action. *See* Reply Brief of Appellant at 2, Travelers Ins. Co. v. Riggs, 671 F.2d 810 (4th Cir. 1982) (Travelers requested reconsideration of substitution motion and suggested alternative of ratification agreement); *see also supra* text accompanying note 13 (ratification is one remedy for a real-party-in-interest defect).

[30] 671 F.2d at 812-13.

[31] *Id.* In *Travelers*, the amount of the plaintiff's uninsured loss was $710.60. *Id.* at 812. One hundred dollars was for the deductible in the plaintiffs' homeowners policy. *Id.* The balance of the $710.60 represented the actual replacement cost of a damaged rug over and above the amount that plaintiffs had received as compensation for that item. *Id.*

[32] *Id.* At common law, a partial subrogee could recover damages only through a suit in the name of an insured for the "use and benefit" of the insurer. *See* United States v. Aetna Casualty & Sur. Co., 338 U.S. 366, 381 (1949). Currently, however, a partial subrogee usually has a choice between suing in the partial subrogee's name or having the partial subrogor prosecute the action. *See* VA. CODE § 38.1-31.2 (Repl. 1981) (action may be in name of subrogee or subrogor); *see also supra* notes 12 & 16 (majority of states consider both partial subrogee and partial subrogor to be real parties in interest and allow either to bring suit).

The Fourth Circuit in *Travelers* never discussed the district court's suggestion that Travelers sue for the total amount of loss for the use and benefit of the Frankensteins. *See* 671 F.2d at 812-14. In all likelihood, the *Travelers* court considered a discussion of the "use

the Frankensteins should petition for intervention.[33] Travelers rejected both the district court's alternatives and preserved for appeal an objection to the court's substitution order.[34] The only issue at trial was the cause of the plane crash,[35] and the jury's verdict was for the defendants.[36]

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and benefit" option unnecessary because the *Aetna* Court had stated that the merger of law and equity under the Federal Rules eliminated the need for the "use and benefit" practice. *See Aetna*, 338 U.S. at 381.

[33] 671 F.2d at 812. Intervention allows a person to become a party voluntarily to protect the person's interests in an action. *See* 3B MOORE, *supra* note 13, ¶ 24.02 at 24-13 to -16 (intervention is means by which person becomes party voluntarily). There are two types of intervention under Federal Rule 24. *See* FED. R. CIV. P. 24(a)-(b). If a person seeks permissive intervention under Federal Rule 24(b), the person must show that a federal statute grants a conditional right to intervene or that the person's claim and the pending action share an issue of fact or law. *See* FED. R. CIV. P. 24(b)(1)-(2). When a person seeks intervention of right under Federal Rule 24(a), the person must show that a federal statute grants an unconditional right to intervene. *See* FED. R. CIV. P. 24(a)(1). A person must establish four facts to intervene under Federal Rule 24(a) when there is no federal statute conferring a right to intervene. *See* FED. R. CIV. P. 24(a)(2). First, a person's application to intervene must be timely. *Id.* Second, a person seeking intervention must establish an interest in the suit. *Id.* Third, a person must show potential prejudice to the person's interest as a result of the disposition of the suit. *Id.* Finally, a potential intervenor must show that the parties already present in the suit will not adequately represent the intervenor's interests. *Id. See generally* 3B MOORE, *supra* note 13, ¶ 24.07 (discussion of requirements for intervention of right under Federal Rule 24).

[34] 671 F.2d at 812.

[35] *Id.* In *Travelers*, the parties offered expert testimony concerning the cause of a plane crash. *Id.* On appeal, Travelers challenged several evidentiary rulings by the trial court, including the exclusion of the conclusory portions of a National Transportation Safety Board (NTSB) report. *Id.* at 816. The NTSB had prepared a report on the airplane crash that damaged the Frankensteins' house. *Id.* The trial court had admitted factual statements in the NTSB report but had excluded conclusory remarks that supported a finding of pilot negligence. *Id.* The Fourth Circuit upheld the exclusion of the NTSB conclusions about pilot negligence on the basis of a federal statute prohibiting the use of NTSB accident reports as evidence in actions for damages. *Id.* The Fourth Circuit did not determine whether the federal statute required the exclusion of factual statements in a NTSB report because neither party raised the question on appeal. *Id.*

[36] *Id.* at 812. The plaintiff in *Travelers* had requested a jury instruction on the doctrine of res ipsa loquitur to help establish pilot negligence as the proximate cause of a plane crash. *Id.* at 814-15. Use of the res ipsa loquitur doctrine would have benefitted Travelers by allowing the facts of the unusual accident to imply negligence although Travelers had no evidence of actual negligent conduct by the pilot. *See* 1 S. SPEISER, RES IPSA LOQUITUR § 1:3 at 9-11 (1972) (res ipsa loquitur permits a jury to infer negligence from the fact of an unusual accident in the absence of evidence of actual negligence); 9 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2509 at 377 (3d ed. 1940 & Supp. 1980).

In *Travelers*, both parties agreed that state law governed the applicability of res ipsa loquitur to airplane crashes. 671 F.2d at 815; *see* Smith v. Spina, 477 F.2d 1140, 1144 (3d Cir. 1973) (state law controls use of res ipsa loquitur in diversity cases). The district court denied Travelers' request for a res ipsa loquitur instruction because the court determined that state law did not permit use of the res ipsa loquitur doctrine in plane crash cases. 671 F.2d at 815. *See* Surface v. Johnson, 215 Va. 777, 779-80, 214 S.E.2d 152, 154 (1975) (res ipsa loquitur is not applicable to airplane crashes because such crashes can be due to phenomena other than pilot negligence). On appeal, however, Travelers argued that the district court

On appeal to the Fourth Circuit, Travelers challenged the district court's order to substitute Travelers for the Frankensteins.[37] The Fourth Circuit affirmed the lower court's decision in all respects, including the substitution of Travelers.[38] Although the Fourth Circuit determined that the substitution of Travelers was technically improper, the Fourth Circuit held that the substitution was not prejudicial because the district court gave Travelers the option of having the Frankensteins intervene.[39]

The *Travelers* court found that the substitution of Travelers was technically improper because Travelers was only partially subrogated to the Frankensteins' claim due to the deductible clause in the Frankensteins' insurance policy.[40] The Fourth Circuit held that the substitution of an insurer is proper only when the insurer is a total subrogee.[41] The *Travelers* court found, however, that a prior Fourth Circuit decision permits a trial court to join a partial subrogee involuntarily in an action by the partial subrogor.[42] The Fourth Circuit determined, therefore, that

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had incorrectly interpreted the Virginia Supreme Court's decision in *Surface*. 671 F.2d at 815.

In *Surface*, an airplane crash resulted in the deaths of a student pilot and three passengers. 215 Va. at 778, 214 S.E.2d at 153. The crash occurred at night under poor weather conditions. *Id.* The *Surface* court reasoned that unexplained plane crashes could result from numerous causes other than pilot negligence. *Id.* at 779-80, 214 S.E.2d at 154. *Surface* indicates, therefore, that res ipsa loquitur is applicable only when negligence is the only logical explanation for an accident. *Id.*

In *Travelers*, Travelers argued that the *Surface* court's discussion of res ipsa loquitur was only dicta because the precise question before the *Surface* court was the sufficiency of the plaintiff's evidence to create a question of fact for the jury. 671 F.2d at 815. Because the *Surface* court had found sufficient evidence of negligence without the benefit of res ipsa loquitur, Travelers argued that *Surface* was not a clear expression of Virginia's position on res ipsa loquitur when no evidence of negligence exists. *Id.* The Fourth Circuit found, however, that the discussion of res ipsa loquitur in *Surface*, although not strictly necessary to the disposition of the *Surface* case, provided a reliable indication that the Virginia Supreme Court would reject the use of res ipsa loquitur in all airplane crash cases. *Id.*

In refusing to find that Virginia would follow the majority of states that permit the use of res ipsa loquitur in airplane crash cases, the *Travelers* court was in line with the Fourth Circuit's decision in *Pierce v. Ford Motor Co.*. *See* 190 F.2d 910, 915 (4th Cir. 1951) (proper for federal court to predict Virginia's position on a manufacturer's liability for negligent construction of automobile). The *Pierce* court held that a federal court may assume that a state will follow the majority view among other states only when the state's case law contains no indication to the contrary. *Id.*

[37] 671 F.2d at 812.

[38] *Id.*

[39] *Id. See supra* text accompanying note 33 (intervention under Federal Rule 24 allows person to become party).

[40] 671 F.2d at 812-13.

[41] *See id.*

[42] *Id.* at 813. The Fourth Circuit rule that a defendant can compel the joinder of a partial subrogee in an action by the partial subrogor stems from a prior Fourth Circuit decision. *See* Virginia Elec. & Power Co. v. Westinghouse Elec. Corp., 485 F.2d 78 (4th Cir. 1973), *cert. denied*, 415 U.S. 935 (1974). In *Virginia Electric*, Virginia Electric & Power Company (VEPCO), a partial subrogor, sued Westinghouse to recover damages for losses sustained when one of VEPCO's generating stations built by Westinghouse failed. *Id.* at 81. VEPCO

the defendants should have moved for Travelers' joinder, rather than substitution, and that joinder would have resulted in the presence of both Travelers and the Frankensteins as plaintiffs.[43] Because both Travelers and the Frankensteins would have been plaintiffs if Travelers had chosen to have the Frankensteins intervene, the Fourth Circuit held that there was no prejudice to Travelers' interests.[44] The *Travelers* court held, therefore, that the improper substitution of a partial subrogee is harmless error because the involuntary joinder of the partial subrogee would have the same result as the substitution of the partial subrogee plus the intervention of the partial subrogor.[45]

Travelers argued, however, that it would not have been a party, absent substitution, because the federal rule of involuntary joinder of partial subrogees does not govern a real party in interest determination in a diversity case.[46] Travelers contended that the applicable choice of law was Virginia law, which not only accords a partial subrogor a substantive right to sue without joining the partial subrogee,[47] but also prohibits the involuntary joinder of a partial subrogee in an action by the partial subrogor.[48] Travelers based its choice of law argument on the doctrine of *Erie Railroad v. Tompkins*.[49] Under *Erie*, courts resolve conflicts between state law and federal law in diversity actions by applying state substantive law and federal procedural law in the absence of a specific Federal Rule or federal statute.[50] The *Erie* test provides two grounds for

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sought to recover $200,000 for uninsured losses and $1,900,000 for VEPCO's partially subrogated insurer. *Id.* The *Virginia Electric* court affirmed the trial court's denial of Westinghouse's motion to dismiss for failure to join the partial subrogee as an indispensable party. *Id.* at 86. *See supra* text accompanying note 21 (discussion of indispensable party). The *Virginia Electric* court held that VEPCO's insurer was not an indispensable party, because the action would completely adjudicate the claim against Westinghouse with no risk of subsequent litigation. 485 F.2d at 86. The *Virginia Electric* court found, however, that a defendant can always compel the joinder of a partial subrogee when joinder is feasible. *Id.* at 85. The court did not require joinder of VEPCO's insurer because the insurer's presence would have defeated diversity jurisdiction. *Id.* at 85-86.

[43] 671 F.2d at 813.

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *See* VA. CODE § 38.1-31.2 (Repl. 1981).

[48] *See* VA. CODE § 8.01-5(B) (Repl. 1981).

[49] 304 U.S. 64 (1938). The question in *Erie* was whether a court in a diversity case should follow state or federal law concerning a railroad's duty of care to pedestrians that use a path along the railroad's tracks. *Id.* at 69-71. The *Erie* Court defined state law as decisions of a state's highest court and state statutes. *Id.* at 78. The Court held that state law governs all matters in a diversity case that are not covered by the United States Constitution or a federal statute. *Id.* The *Erie* Court found, therefore, that state laws should supply the standard for a railroad's duty of care. *Id.* at 78-80.

[50] *See id.*; *see also* Hanna v. Plumer, 380 U.S. 460, 470-73 (1964) (*Erie* covers conflict between state and federal law in absence of specific Federal Rule or federal statute); Stoner v. Presbyterian Univ. Hosp., 609 F.2d 109, 111 (3d Cir. 1979) (*Erie* test inapplicable when Federal Rule or federal statute covers issue).

determining when a state law is substantive.[51] If a court concludes that the conflicting federal law significantly affects the nature or result of a suit,[52] or that a difference in the character or outcome of a suit due to the application of the federal law encourages litigants to opt for a federal forum,[53] then the state law should govern.[54] Travelers contended that the district court's characterization of the Virginia statutes as inapplicable procedural rules was both erroneous under *Erie* and prejudicial under Federal Rules 17 and 19.[55] Travelers argued that the district court's choice of federal law resulted in a tactical advantage for the defendants because, under state law, the jury would not have been aware of Travelers' role as an insurer.[56]

The Fourth Circuit in *Travelers* rejected Travelers' argument and held that the involuntary joinder of partial subrogees is a procedural issue because the resultant risk of prejudice to insurance companies is only a legitimate strategical consideration.[57] The *Travelers* court recognized that the involuntary joinder of an insurer affects the conduct of a trial and may encourage forum shopping by defendants.[58] The

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[51] *See* Hanna v. Plumer, 380 U.S. 460, 468 (1965) (the two factors in *Erie* test are forum shopping by litigants and inconsistency between state and federal forums).

[52] *See id.*

[53] *See id.*

[54] *See* Hanna v. Plumer, 380 U.S. 460 (1965). In *Hanna*, the Supreme Court addressed a direct conflict between state law and a Federal Rule of Civil Procedure. 380 U.S. at 461-62. The *Hanna* Court resolved the conflict in favor of the Federal Rule because the Court presumed the validity and applicability of a Federal Rule. *Id.* at 469-73. The *Hanna* test asks only whether congress exceeded its constitutional authority by promulgating the Federal Rule in question. *Id.* The *Hanna* Court held that when no specific Federal Rule or federal statute is involved the *Erie* conflict-of-laws test applies. *Id.* at 467-69. The Supreme Court in *Hanna* restated the *Erie* test to be whether the application of federal case law will significantly affect the nature or outcome of a lawsuit or will encourage litigants to forum shop. *Id.* at 468 & n.9; *see also* Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 535-40 (1958) (an exception to rule favoring application of state law may exist if federal policies underlying a federal decision outweigh state policies underlying a conflicting state provision); Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530, 533 (1949) (any state laws qualifying or restricting a state-created right of action control in diversity cases); Guaranty Trust Co. v. York, 326 U.S. 99, 108-12 (1945) (courts should apply state law in diversity actions whenever the failure to apply state law would significantly affect the action's outcome).

The Supreme Court's most recent decision concerning an *Erie* choice of law is *Walker v. Armco Steel Corp.* *See* 446 U.S. 740 (1980). The *Walker* Court upheld *Ragan* and emphasized that *Erie* furnishes the proper test for choosing between state and federal law unless there is a "direct collision" between state law and a Federal Rule or statute. *Id.* at 749.

[55] 671 F.2d at 813-14.

[56] *Id.*

[57] *Id.*

[58] *Id.* The *Travelers* court found that voir dire examination of jurors would prevent jury prejudice upon disclosure of an insurer's interest. *Id.* at 814. *But see* Langley v. Turner's Express, Inc., 375 F.2d 296, 297 (4th Cir. 1967) (risk of jury prejudice from disclosure of insurance outweighs value of voir dire questions to discover jurors' biases about insurance).

Fourth Circuit determined, however, that a state statute is not substantive under *Erie*, absent conflicting case law, when the federal law affects a lawsuit's outcome or encourages forum shopping only by providing a tactical advantage.[59] The *Travelers* court held that the federal policy favoring disclosure of all interested parties provided additional grounds for refusing to apply Virginia law because the federal policy outweighed Virginia's policy against disclosure of insurance.[60] The *Travelers* court concluded, therefore, that the Fourth Circuit's federal rule permitting the involuntary joinder of partial subrogees controls in a diversity case.[61]

Travelers also challenged the involuntary joinder rule on the basis of the guidelines of Federal Rule 17 for determining a real party in interest.[62] Federal Rule 17 incorporates state provisions that authorize suit without joinder of a person that will benefit from the action.[63] Travelers argued that Federal Rule 17 effectively restricted joinder under Federal Rule 19 because Virginia law authorizes an insured to sue without joining the insurer.[64]

The *Travelers* court held, however, that a real-party-in-interest determination has two steps.[65] The Fourth Circuit held that Virginia law determined only whether Travelers and the Frankensteins were real

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[59] *Id.* at 814. The *Travelers* court found that there was precedent establishing that federal law governs joinder. *Id.* at 813; *see* Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 125 n.22 (1968) (federal law usually controls joinder of parties). Nevertheless, the *Travelers* court applied an *Erie* analysis on the involuntary joinder of a partial subrogee. 671 F.2d at 813; *see supra* text accompanying notes 49, 54 (explanation of *Erie* test for conflict between state and federal law).

[60] 671 F.2d at 814; *see* Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 535-40 (1958). In *Byrd*, the question was whether the federal policy in favor of jury determinations on issues of fact should displace a state workmen's compensation statute committing the factual determinations of an affirmative defense to a trial judge. *Id.* at 533-35. The *Byrd* Court found that the seventh amendment to the Constitution directly supported the federal policy favoring determinations of disputed facts by juries. *Id.* at 537-39. The policy underlying the provision in the state statute that delegated the factual issues in an affirmative defense to a trial judge was litigational economy. *Id.* at 536. The *Byrd* Court held, therefore, that when federal policies outweigh conflicting state policies, there may be an exception to the rule favoring the application of state law in diversity cases. *Id.* at 535-40. The *Byrd* Court recognized, however, that state law, including procedural rules, controls in a diversity case when the state's law may affect the outcome of the case and no Federal Rule, federal statute, or overriding federal policy exists. *Id.* at 536-37.

[61] 671 F.2d at 814.

[62] *Id.*

[63] *See* FED. R. CIV. P. 17(a) (when statutory authorization exists for a party to sue on behalf of person that will benefit from lawsuit, the party may prosecute action as real party in interest without joining the other person); *see also supra* text accompanying note 47 (Virginia statute authorizes action in name of partial subrogor without joinder of partial subrogee).

[64] 671 F.2d at 814.

[65] *Id. See* Carlson v. Consumers Power Co., 164 F. Supp. 692, 693 (W.D. Mich. 1957) (under Federal Rule 17 state law determines persons entitled to be the named parties but federal law determines who the named parties will be); Rosenfeld v. Continental Bldg. Operating Co., 135 F. Supp. 465, 467-70 (W.D. Mo. 1955) (first question under Federal Rule 17 is who has right to bring action and second question is in whose name action will proceed).

parties in interest.[66] The Fourth Circuit found that Virginia law gives a partial subrogor the right to sue without joining the partial subrogee.[67] The *Travelers* court reasoned that once the district court had identified all the real parties in interest under Virginia law, federal law would govern the next appropriate procedural step.[68] The *Travelers* court, therefore, relied upon the Fourth Circuit rule of involuntary joinder of partial subrogees and refused to apply state law to determine whether Travelers' substitution constituted prejudicial error.[69]

In rejecting Travelers' choice of law argument, the Fourth Circuit relied upon a distinction between the substantive question of who is a real party in interest and the procedural question of the appropriate response when there are several real parties in interest.[70] Although a majority of circuit courts hold that federal law governs joinder,[71] a majority of courts also hold that state law determines a real-party-in-interest question.[72] Under the majority view, therefore, a diversity case involving multiple real parties in interest poses both a substantive issue and a procedural issue.[73] The *Travelers* court, however, is the first circuit court to

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[66] 671 F.2d at 814; *see* Carlson v. Consumers Power Co., 164 F. Supp. 692, 696 (W.D. Mich. 1957) (statutory authorization to sue pursuant to Federal Rule 17 does not restrict joinder under Federal Rule 19).

[67] 671 F.2d at 814; *see* Virginia Elec. & Power Co. v. Westinghouse Elec. Corp., 485 F.2d 78, 83 (4th Cir. 1973) (partial subrogor has substantive right under Virginia law to prosecute action for entire loss), *cert. denied*, 415 U.S. 935 (1974).

[68] 671 F.2d at 814.

[69] *Id.*

[70] *Id.*

[71] *See, e.g.*, Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 125 n.22 (1968) (joinder is usually question of federal law in diversity cases); Glacier Gen. Assurance Co. v. G. Gordon Symons Co., 631 F.2d 131, 134 (9th Cir. 1980) (Federal Rule 19 governs joinder); Garcia v. Hall, 624 F.2d 150, 152 n.4 (10th Cir. 1980) (federal law determines which persons will be the named parties in diversity actions); White Hall Bldg. Corp. v. Profexray Div. of Litton Indus., 387 F. Supp. 1202, 1207 (E.D. Pa. 1974) (state law concerning joinder is procedural and not binding on federal courts), *aff'd mem.*, 578 F.2d 1377 (3d Cir. 1978).

[72] *See, e.g.*, Virginia Elec. & Power Co. v. Westinghouse Elec. Corp., 485 F.2d 78, 83 (4th Cir. 1973) (state law determines who qualifies as real party in interest), *cert. denied*, 415 U.S. 935 (1974); White Hall Bldg. Corp. v. Profexray Div. of Litton Indus., 387 F. Supp. 1202, 1204 (E.D. Pa. 1974) (real party in interest must have substantive right to bring action under state law), *aff'd mem.*, 587 F.2d 1377 (3d Cir. 1978); Carlson v. Consumers Power Co., 164 F. Supp. 692, 693 (W.D. Mich. 1957) (real party in interest is question of state law); Rosenfeld v. Continental Bldg. Operating Co., 135 F. Supp. 465, 467 (W.D. Mo. 1955) (state substantive law determines who is real party in interest); *see also* Kennedy, *supra* note 3, at 678 (federal courts usually look to state law for determination of real parties in interest).

[73] *See* Glacier Gen. Assurance Co. v. G. Gordon Symons Co., 631 F.2d 131, 134 (9th Cir. 1980) (Montana substantive law and federal procedural law control on joinder of additional real parties in interest); Garcia v. Hall, 624 F.2d 150, 152 & n.4 (10th Cir. 1980) (Texas substantive law and federal procedural law determine joinder in action involving several real parties in interest); *see also* Virginia Elec. & Power Co. v. Westinghouse Elec. Corp., 485 F.2d 78, 83 (4th Cir. 1973) (determination of named real party in interest involves substantive state law and federal procedure law), *cert. denied*, 415 U.S. 935 (1974).

address a direct conflict between a state's substantive insurance and subrogation provisions and federal case law concerning joinder in partial subrogation situations since the 1966 amendments to Federal Rule 19.[74]

The Fourth Circuit's involuntary joinder rule derives from a case decided by the United States Supreme Court prior to the 1966 amendments to the Federal Rules.[75] In *United States v. Aetna Casualty & Surety Co.*,[76] the Supreme Court allowed an insurer that was partially subrogated to a claim under the Federal Tort Claims Act to prosecute a tort action against the United States.[77] The *Aetna* Court determined that Aetna Surety & Casualty Co. (Aetna), the partial subrogee, was a real party in interest because a partial subrogee owns part of the partial subrogor's claim.[78] Nevertheless, the *Aetna* Court asserted in dicta that Aetna's partial subrogor was a necessary party under Federal Rule 19 whose joinder could be compelled by the United States upon a timely motion.[79]

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[74] *See* Brief for Appellant at 7-8, Travelers Ins. Co. v. Riggs, 671 F.2d 810 (4th Cir. 1982) (no precedent exists for applying federal procedural law concerning joinder when federal law conflicts with state substantive law); Virginia Elec. & Power Co. v. Westinghouse Elec. Corp., 485 F.2d 78, 80-84 (4th Cir. 1973) (no mention of conflict between Virginia substantive law and federal precedent for joinder of partial subrogees), *cert. denied*, 415 U.S. 935 (1974); City Stores Co. v. Lerner Shops, 410 F.2d 1010, 1012-13 (D.C. Cir. 1969) (involuntary joinder of partial subrogee without reference to other law); *see also* White Hall Bldg. Corp. v. Profexray Div. of Litton Indus., 387 F. Supp. 1202, 1206-1207 (E.D. Pa. 1974) (Federal Rule 19 controls joinder of partial subrogee when state law concerning joinder is merely a procedural rule), *aff'd mem.*, 578 F.2d 1377 (3d Cir. 1978). *But cf.* Carlson v. Consumers Power Co., 164 F. Supp. 692, 693-96 (W.D. Mich. 1957) (state workmen's compensation statute authorizing administratrix to bring wrongful death action did not prevent joinder of partial subrogee under old Federal Rule 19).

[75] *See* United States v. Aetna Casualty & Sur. Co., 338 U.S. 366 (1949).

[76] *Id.*

[77] *Id.* at 380-83. In *Aetna*, Aetna Casualty & Surety Company (Aetna) became a partial subrogee by partially compensating an injured person for personal injuries resulting from a government employee's negligence. *Id.* at 368; *see supra* text accompanying notes 9-12 (definition and significance of subrogation). Aetna sued the United States government under the Federal Tort Claims Act. 338 U.S. at 368.

[78] 338 U.S. at 380-81.

[79] 338 U.S. at 382 (dicta). Although the terms "necessary" and "indispensable" parties antedate the Federal Rules, the original version of Federal Rule 19 incorporated both concepts. *See* 3A MOORE, *supra* note 13, ¶ 19.01 at 19-6 to 19-7; *see also* Shields v. Barrow, 58 U.S. (17 How.) 130, 139 (1854) ("necessary" and "indispensable" are labels for persons that should be parties so that court can completely resolve controversy). A necessary party was a person with an interest in an action that should be present in the action to insure complete and final adjudication of a claim. *Id.* A necessary party also was indispensable if the court found that an action could not proceed without joinder. *Id.*; *see* United States v. New York Bank & Trust Co., 296 U.S. 463,480 (1935) (action cannot proceed without indispensable party). *See generally* Hazard, *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 COLUM. L. REV. 1254 (1961) (tracing development of necessary and indispensable party concepts.) The amended version of Federal Rule 19 abandoned the term "necessary" and retained the term "indispensable" because the Advisory Committee considered the concept of necessary parties incomplete and confusing. *See* FED. R. CIV. P. 19 advisory committee note at (c); *see also supra* text accompanying note 21 (amendments to Federal Rule 19 significantly

In light of the *Aetna* dicta, federal courts disagree whether a defendant always can compel joinder of a partial subrogee in a suit by the partial subrogor.[80] Some courts hold that *Aetna* mandates joinder of a partial subrogee whenever joinder does not create a jurisdictional problem.[81] Other courts distinguish *Aetna* either on its facts[82] or because of the subsequent amendment to Federal Rule 19, which eliminates the concept of necessary parties and does not support a rule of automatic joinder of a partial subrogee.[83] Relatively few courts have decided the propriety of the joinder of a partial subrogee without reference to *Aetna*.[84]

Travelers indicates that the involuntary joinder of a partial subrogee in an action by the partial subrogor is an invariable rule of federal law.[85] Several reasons exist, however, for questioning the Fourth Circuit's assumption that *Aetna* mandates joinder of a partial subrogee

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affect joinder by requiring examination of risk of prejudice or inefficiency in a particular case).

[80] *See* Glacier Gen. Assurance Co. v. G. Gordon Symons Co., 631 F.2d 131, 134 (9th Cir. 1980) (federal courts differ on joinder of partial subrogees); *see also* cases cited *infra* note 81 (courts holding that involuntary joinder of partial subrogees is fixed rule); *infra* note 83 (courts basing joinder determination in partial subrogation situation upon particular facts of case).

[81] *See* Wadsworth v. United States Postal Serv., 511 F.2d 64, 65 (7th Cir. 1975) (joinder of partial subrogee required if defendant moves for joinder); Virginia Elec. & Power Corp., 485 F.2d 78, 84-85 (4th Cir. 1973) (*Aetna* established that partial subrogee is person to be joined if feasible upon motion by defendant), *cert. denied*, 415 U.S. 935 (1974); Executive Jet Aviation v. United States, 507 F.2d 508, 513 (6th Cir. 1974) (defendant can join insurers involuntarily whenever insurers are partially subrogated); City Stores Co. v. Lerner Shops, 410 F.2d 1010, 1012-13 (D.C. Cir. 1969) (insurers that are partial subrogees are subject to involuntary joinder).

[82] *See* Dudley v. Smith, 504 F.2d 979, 983 (5th Cir. 1974) (joinder of partial subrogee is not necessary in suit by partial subrogor for entire loss becuase *Aetna* only applies in suits by partial subrogees when risk of subsequent litigation exists); White Hall Bldg. Corp. v. Profexray Div. of Litton Indus., 387 F. Supp. 1202, 1207 (E.D. Pa. 1974) (*Aetna* does not mandate joinder of partial subrogee in action by partial subrogor when partial subrogee participates in litigation without joinder), *aff'd mem.*, 578 F.2d 1377 (3d Cir. 1978); *see also* Garcia v. Hall, 624 F.2d 150, 152 n.5 (10th Cir. 1980) (*Aetna* applies only in cases where risk of subsequent litigation exists).

[83] *See* Glacier Gen. Assurance Co. v. G. Gordon Symons Co., 631 F.2d 131, 133-34 (9th Cir. 1980) (joinder of partial subrogee unnecessary in a lawsuit when complete and binding relief is possible without joinder); Garcia v. Hall, 624 F.2d 150, 151-52 (10th Cir. 1980) (involuntary joinder rule does not apply in cases when no risk of subsequent litigation exists); Kint v. Terraine King Corp., 79 F.R.D. 10, 11-12 (M.D. Pa. 1977) (joinder of partial subrogee is not proper when no risk of prejudice or multiple litigation exists); White Hall Bldg. Corp. v. Profexray Div. of Litton Indus., 387 F. Supp. 1202, 1204-1207 (E.D. Pa. 1974) (joinder of insurers that are real parties in interest is not necessary when complete and final adjudication is possible without joinder), *aff'd mem.*, 578 F.2d 1377 (3d Cir. 1978); Braniff Airways v. Falkingham, 20 F.R.D. 141, 143-44 (D. Minn. 1957) (partial subrogee is real party in interest but not necessary party when insured sues for full amount of loss).

[84] *See* Glacier Gen. Assurance Co. v. G. Gordon Symons Co., 631 F.2d 131, 133-34 (9th Cir. 1980) (resolving joinder of partial subrogee without reference to *Aetna*).

[85] *See* 671 F.2d at 813.

whenever joinder does not create a jurisdictional problem.[86] First, the Supreme Court decided *Aetna* prior to the 1966 amendments to the Federal Rules.[87] The *Aetna* Court characterized a partial subrogee as a necessary party under old Federal Rule 19 because a partial subrogee has a joint interest in the partial subrogor's claim.[88] The amended version of Federal Rule 19, however, provides for a detailed examination of the circumstances of a particular controversy and requires a showing of prejudice or inefficiency before permitting joinder.[89] In *Travelers*, Travelers' absence created no risk of prejudice to Travelers' interests because the Frankensteins adequately represented Travelers' interests.[90] Travelers' absence did not create a risk of prejudice to the interests of Riggs or of Reid's executrix because a judgment would bind both Travelers and the Frankensteins and would bar a subsequent action by Travelers against Riggs and Reid's executrix.[91] Therefore, the joinder of Travelers was not necessary under Federal Rule 19 to ensure complete relief between the parties, to protect Travelers' interests, or to protect Riggs and Reid's executrix against multiple liability.[92]

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[86] *See* cases cited *supra* note 82 (some courts limit the applicability of *Aetna* to actions by partial subrogees that present risk of subsequent litigation by partial subrogor); *infra* notes 87-89 (Supreme Court decided *Aetna* prior to 1966 amendment to Federal Rules and the amendments alter the test for compulsory joinder under Federal Rule 19); *see also supra* note 21 (comparison of original and amended versions of Federal Rule 19).

[87] *See* Dudley v. Smith, 504 F.2d 979, 983 n.4 (5th Cir. 1974) (*Aetna* is distinguishable because *Aetna* was decided prior to 1966 amendment to Federal Rule 19).

[88] *See* United States v. Aetna Casualty & Sur. Co., 338 U.S. 366, 381-82 (1949) (partial subrogee is a necessary party); *supra* text accompanying note 21 (necessary party under original version of Federal Rule 19 was a person with joint interest in a claim or defense).

[89] *See* FED. R. CIV. P. 19(a) (party must show risk of prejudice or inefficiency to accomplish compulsory joinder of a person); *see also* Glacier Gen. Assurance Co. v. G. Gordon Symons Co., 631 F.2d 131, 134 (9th Cir. 1980). The *Glacier* court held that compulsory joinder pursuant to Federal Rule 19(a) is not proper unless there is a risk of prejudice to an absent person's interest in the lawsuit or a risk of subsequent litigation by the absent person. *Id.*

[90] *See* 671 F.2d at 812. In *Travelers*, a partially subrogated insurer retained counsel to represent the partial subrogor. *Id.* A subrogor adequately represents a subrogee's interests when the subrogee's counsel participates in prosecution of the subrogor's claim. *See* White Hall Bldg. Corp. v. Profexray Div. of Litton Indus., 387 F. Supp. 1202, 1206-1207 (E.D. Pa. 1974), *aff'd mem.*, 578 F.2d 1377 (3d Cir. 1978). A partial subrogor that obtains a judgment against a tortfeasor becomes a trustee for the partial subrogee of the amount of compensation that the partial subrogee paid to the partial subrogor. *See* Glacier Gen. Assurance Co. v. G. Gordon Symons Co., 631 F.2d 131, 134 (9th Cir. 1980) (court will impose a trust on a subrogor's recovery from a tortfeasor to protect the subrogee's interest).

[91] *See* Virginia Elec. & Power Co. v. Westinghouse Elec. Corp., 485 F.2d 78, 84 (4th Cir. 1973) (judgment in action by partial subrogor usually binds partial subrogee), *cert. denied*, 415 U.S. 935 (1974); *see also* White Hall Bldg. Corp. v. Profexray Div. of Litton Indus., 387 F. Supp. 1202, 1206-1207 (E.D. Pa. 1974) (res judicata bars subsequent action by person with interest in action that participated in or controlled litigation), *aff'd mem.*, 578 F.2d 1377 (3d Cir. 1978).

[92] *See* FED. R. CIV. P. 19(a); *supra* text accompanying notes 90-91 (nonjoinder in *Travelers* did not create risk of prejudice to Travelers' interests or risk of subsequent litigation against defendants).

Second, the Supreme Court's language in *Aetna* suggests that the Court limited its conclusion that the defendant could join a partial subrogee to the specific facts of the controversy between the United States and Aetna.[93] Third, the Aetna Court's discussion of joinder in the subrogation context was dicta because the only question before the Court was whether a partial subrogee could prosecute an action against the United States.[94] By interpreting *Aetna* to mean that a partial subrogee is a necessary party in every case involving partial subrogation, a court completely bypasses a Federal Rule 19 analysis.[95] Such summary treatment of a joinder issue renders Federal Rule 19 superfluous.[96]

The *Travelers* court's refusal to apply Virginia law on the involuntary joinder of a partial subrogee is questionable because the Fourth Circuit's *Erie* analysis was incomplete, if not imprecise.[97] Federal law may differ from state law on the method of enforcing a state claim.[98] Federal courts, however, may not disregard a state statute that modifies or qualifies a cause of action.[99] *Travelers* involved a state tort claim by a

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[93] *See* Dudley v. Smith, 504 F.2d 979, 983 (5th Cir. 1974) (*Aetna* applies only in suits by partial subrogees when risk of subsequent litigation by partial subrogor exists). *Aetna* contains a general statement that partial subrogees and partial subrogors are real parties in interest. *See* United States v. Aetna Casualty & Sur. Co., 338 U.S. 366, 380 (1949). The *Aetna* Court, however, limited the discussion of joinder to the particular parties that were before the Court. *See id.* at 381-82.

[94] *See* 338 U.S. at 367-68 (dicta); *see also* White Hall Bldg. Corp. v. Profexray Div. of Litton Indus., 387 F. Supp. 1202, 1207 (E.D. Pa. 1974) (*Aetna* Court's discussion of joinder of partial subrogees is merely dicta), *aff'd mem.*, 578 F.2d 1377 (3d Cir. 1978).

[95] *See* White Hall Bldg. Corp. v. Profexray Div. of Litton Indus., 387 F. Supp. 1202, 1207 (E.D. Pa. 1974) (Courts should not construe *Aetna* as displacing a Federal Rule 19 analysis of the facts of a case involving partial subrogation), *aff'd mem.*, 578 F.2d 1377 (3d Cir. 1978); Edwards, Inc. v. Arlen Realty Dev. Corp., 466 F. Supp. 505, 511-12 (D.S.C. 1978) (an automatic rule of involuntary joinder that is based on *Aetna* is incomplete because the rule neglects an analysis of the factors listed in Federal Rule 19); *see also supra* text accompanying note 21 (joinder pursuant to Federal Rule 19 is proper only when risk of subsequent litigation, incomplete relief between parties, or prejudice to absent person's interests exists).

[96] *See* Edwards, Inc. v. Arlen Realty & Dev. Corp., 466 F. Supp. 505, 511-13 (D.S.C. 1978). The *Edwards* court reluctantly followed Fourth Circuit precedent requiring the involuntary joinder of a partial subrogee. *Id.* The court in *Edwards* criticized the Fourth Circuit rule of automatic joinder of partial subrogees because the rule contradicted the purpose and provisions of Federal Rule 19 by eliminating the requirement that a party show a risk of prejudice or multiple litigation before accomplishing joinder. *Id.* at 512; *see also supra* text accompanying note 21 (purpose of joinder pursuant to Federal Rule 19 is protection of an absent person's interest in suit and prevention of multiple lawsuits on same claim).

[97] *See infra* text accompanying notes 101-108 (Virginia statute prohibiting involuntary joinder of insurers is substantive under *Erie* and related Supreme Court decisions).

[98] *See* Guaranty Trust Co. v. York, 326 U.S. 99, 108 (1945) (federal and state forums often differ on mode of enforcement of claims).

[99] *See* Walker v. Armco Steel Corp., 446 U.S. 740, 745-52 (1980) (courts must apply state law in diversity cases when state law relates to cause of action by affecting probability of party's recovery or nonrecovery); Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530, 533-34 (1949) (federal courts must follow state law qualifying a cause of action because disregard of the state law would enlarge party's rights).

partial subrogor.[100] Under Virginia law, a partial subrogor has the right to prosecute an action to recover the entire amount of a loss.[101] Virginia law further qualifies the rights of a partial subrogor by protecting against the involuntary joinder of the partial subrogee because the partial subrogee's presence may prejudice a jury and affect the merits of the partial subrogor's claim.[102] The involuntary joinder of an insurer, therefore, may affect the character and outcome of a trial and encourage forum shopping.[103] The potential effect of the Fourth Circuit's involuntary joinder rule renders Virginia law substantive under *Erie* and requires a court to apply the state statute restricting joinder in insurance cases.[104] Nevertheless, the *Travelers* court cited no support for the conclusion that state law protecting the merits of a claim against tactical prejudices is inapplicable under the *Erie* test in a diversity action.[105]

Although significant federal policies that outweigh conflicting state policies may constitute an exception to the application of state law under Erie, the *Travelers* case did not involve such a conflict.[106] The policy underlying compulsory joinder pursuant to amended Federal Rule 19 is the avoidance of multiple litigation on the same claim by giving careful consideration to the interests of the public, the parties, and the absent person.[107] The application of Virginia law in *Travelers* was not inconsistent with the prevention of multiple actions because a refusal to join Travelers created no risk of a subsequent action by Travelers, the par-

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[100] 671 F.2d at 812-14.

[101] *See* VA. CODE § 38.1-31.2 (Repl. 1981) (partial subrogor may prosecute action against tortfeasor); Virginia Elec. & Power Co. v. Westinghouse Elec. Corp., 485 F.2d 78, 83-84 (4th Cir. 1973) (Virginia law gives partial subrogor a substantive right to sue for entire loss), *cert. denied*, 415 U.S. 935 (1974).

[102] *See* VA. CODE § 8.01-5(B) (Repl. 1981) (involuntary joinder of insurer not permissible in suit by insured); Miller v. Tomlinson, 194 Va. 367, 372-73, 73 S.E.2d 378, 380-81 (1952) (combined effect of Virginia statute authorizing suit in subrogor's name and statute prohibiting joinder of subrogee is prevention of prejudice to subrogor's claim); *see also supra* text accompanying note 3 (disclosure of a party's insurance coverage to jury is likely to prejudice jury against insured party).

[103] *See Travelers*, 671 F.2d at 813-14 (joinder of partial subrogee may have strategic impact on litigation and may encourage defendant to seek removal to federal forum in order to gain the advantage of joinder); *see also supra* text accompanying note 3 (disclosure of insurance coverage creates risk that jury will determine liability on the basis of which party has insurance).

[104] *See* cases cited *supra* note 54 (federal courts must apply state law in diversity cases when state law has an effect upon nature or result of litigation).

[105] *See* 671 F.2d at 813-14.

[106] *See* Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 535-40 (1958) (court may disregard state law in diversity cases when countervailing federal policies outweigh the state policies); *see also infra* text accompanying notes 107-08 (no conflict between state and federal policies existed in *Travelers* case).

[107] *See* FED. R. CIV. P. 19(a) advisory committee note; *see also* Cohn, *supra* note 21, at 1207 (policy considerations of new Federal Rule 19 include interest of parties, absent person, and general public); *supra* text accompanying note 21 (discussion of Federal Rule 19). In *Travelers*, the Fourth Circuit incorrectly identified the policy underlying joinder as the prevention of undisclosed interests in litigation. *See* 671 F.2d at 814.

tial subrogee, whose claim depended on the viability of the partial subrogor's claim.[108] Therefore, the Fourth Circuit's conclusion that state law on the involuntary joinder of insurers is inapplicable under *Erie* and the policy exception to *Erie* is not persuasive.[109]

A second basis for the *Travelers* court's refusal to apply state law was the court's finding that state authorization for the Frankensteins to sue Riggs and Reid's estate did not restrict joinder pursuant to Federal Rule 19.[110] The hypothetical joinder of Travelers, however, was proper only under the Fourth Circuit's involuntary joinder rule, not under Federal Rule 19.[111] Furthermore, the district court's error in *Travelers* was improper substitution under Federal Rule 17, rather than joinder.[112] The Fourth Circuit found nothing prejudicial in the substitution of Travelers because the court equated the Frankensteins' option to intervene after the substitution of Travelers with the involuntary joinder of Travelers.[113] The Fourth Circuit's finding was incorrect because the grounds for the Frankensteins' intervention were more difficult to establish than the grounds for Travelers' joinder pursuant to the Fourth Circuit rule.[114] For example, to intervene under Federal Rule 24, the Frankensteins had to show an interest in the action and prejudice to their interest because of inadequate representation by Travelers.[115] Riggs and Reid only had to show that Travelers was an interested partial subrogee to join Travelers under the Fourth Circuit's involuntary joinder rule.[116] Moreover, the *Travelers* court compared the effect of joinder with the effect of substitution and intervention to discover whether there was a risk of prejudice only to Travelers' interests, not to

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[108] *See supra* text accompanying note 91 (nonjoinder of partial subrogee in suit by partial subrogor does not create risk of multiple litigation).

[109] *See supra* text accompanying notes 99-108 (in *Travelers*, the Fourth Circuit's *Erie* analysis was incorrect).

[110] *See* 671 F.2d at 814.

[111] *See* Edwards, Inc. v. Arlen Realty & Dev. Corp., 466 F. Supp. 505, 511-14 (D.S.C. 1978) (Federal Rule 19 does not require joinder of partial subrogee when no risk of subsequent litigation exists and partial subrogor adequately represents partial subrogee's interests).

[112] *See* 671 F.2d at 812-13.

[113] *Id.*

[114] *See infra* text accompanying notes 115-119 (comparison of factors necessary for intervention with factors necessary for involuntary joinder demonstrates that intervention was more difficult to accomplish than joinder in *Travelers*).

[115] *See* FED. R. CIV. P. 24(a)(2); *see also supra* note 33 (person with an interest in a lawsuit must show likelihood of prejudice and inadequate representation before person may intervene under Federal Rule 24).

[116] *See* 671 F.2d at 813 (Fourth Circuit rule is that defendant can compel joinder of partial subrogee automatically when joinder will not defeat jurisdiction). *But see* FED. R. CIV. P. 19(a) (compulsory joinder is proper when joinder is feasible and nonjoinder will create risk of prejudice or multiple litigation); *supra* note 21 (discussion of factors necessary for compulsory joinder under Federal Rule 19).

the interests of the Frankensteins, the original plaintiffs.[117] The only time that intervention is comparable to joinder is when a court joins a person to protect that person's interests.[118] The intervention of the Frankensteins was not comparable to the joinder of Travelers because the purpose of joining Travelers would not have been to prevent prejudice to either Travelers' or the Frankensteins' interests.[119] The effect of Travelers' presence in the action through either substitution or joinder was a risk of prejudice to the Frankensteins' claim.[120] The intervention of the Frankensteins could not alleviate this prejudice because Travelers would remain a party even if the Frankensteins intervened.[121]

Although Federal Rule 17 protects a partial subrogor's right to bring an action without joining the partial subrogee, Federal Rule 19 should permit the joinder of a partial subrogee only when failure to join the partial subrogee threatens the interests of the parties, the partial subrogee, or the public.[122] The *Travelers* court's holding overlooks the purpose and

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[117] *See* 671 F.2d at 813-14. In *Travelers*, the Fourth Circuit equated the intervention of a partial subrogor in a suit by the partial subrogee with the joinder of a partial subrogee because joinder and intervention had the same impact on the partial subrogee's interests. *Id.* The proper focus for determining a person's intervention is the effect of nonintervention upon the person's interests. *See* FED. R. CIV. P. 24; *see also supra* note 33 (to intervene in action a person must show that prejudice to the person's interests would result from nonintervention). A joinder inquiry considers the effects of nonjoinder upon the interests of the absent person and the parties. *See* FED. R. CIV. P. 19(a); *see also supra* note 21 (to accomplish joinder a party must show that nonjoinder would have prejudicial effect upon absent person or parties). The *Travelers* court, therefore, should have compared the Frankensteins' intervention with Travelers' joinder by considering the risk of prejudice to the Frankensteins' interests. Travelers' original argument emphasized the Frankensteins' right to sue without joining Travelers and the Frankensteins' interests in avoiding any jury prejudice that would result from the joinder of Travelers. *See* Brief of Appellant, *supra* note 74, at 7-10. Travelers ultimately argued, however, that the Fourth Circuit's review of the district court's substitution order should consider only the rights and interests of Travelers. *See* Reply Brief of Appellant, *supra* note 29, at 1-2.

[118] *See* Cascade Nat'l Gas Corp. v. El Paso Nat'l Gas Co., 386 U.S. 129, 134 n.3 (1967) (intervention under Federal Rule 24(a)(2) is comparable to joinder under Federal Rule 19(a)(2)(i) because both measures protect an absent person's interests).

[119] *See* 671 F.2d at 812-14 (potential for prejudice to partial subrogor is not determinative of joinder of partial subrogee); Virginia Elec. & Power Co. v. Westinghouse Elec. Corp., 485 F.2d 78, 82 (4th Cir. 1973) (choice between joinder or nonjoinder of partial subrogee depends on defendant's interests), *cert. denied*, 415 U.S. 935 (1974). *But see* White Hall Bldg. Corp. v. Profexray Div. of Litton Indus., 387 F. Supp. 1202, 1206-1207 (E.D. Pa. 1974) (risk of prejudice to partial subrogor is valid reason for denying joinder of partial subrogee), *aff'd mem.*, 578 F.2d 1377 (3d Cir. 1978); *see also supra* text accompanying note 3 (disclosure of an insurer's interest in a lawsuit may be prejudicial to the insured party).

[120] *See* White Hall Bldg. Corp. v. Profexray Div. of Litton Indus., 387 F. Supp. 1202, 1206 (E.D. Pa. 1974) (joinder of partially subrogated insurer will create risk of prejudice to the insurer and the insured plaintiff), *aff'd mem.*, 578 F.2d 1377 (3d Cir. 1978).

[121] *See* 671 F.2d at 813-14 (both partial subrogee and partial subrogor would be parties if partial subrogor intervened after the substitution of the partial subrogee).

[122] *See* FED. R. CIV. P. 17(a) (party with statutory authorization to sue may prosecute