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NOTES

THE PROPER STANDARD OF REVIEW FOR REQUIRED PARTY DETERMINATIONS UNDER FEDERAL RULE OF CIVIL PROCEDURE 19

*Brandon R. Coyle**

Rule 19 of the Federal Rules of Civil Procedure, concerning the required joinder of parties, ensures that all parties with an interest in an action are joined in the litigation. At any time during the suit, a court may determine that an absent party has a specific interest that requires its presence in the dispute. When the court cannot join the absent party, however, the court must use Rule 19(b) to determine whether to continue the litigation without the absentee or dismiss the suit entirely. Despite the potentially drastic consequence of dismissal, federal courts of appeals cannot agree on the proper standard of review for Rule 19(b) decisions. Should the court review the decision de novo as if it were examining the issue for the first time? Or should it review for abuse of discretion with deference to the district court's analysis?

This Note explores the history and application of Rule 19 before examining the two standards of review and the factors set out by the Supreme Court in Pierce v. Underwood *to help appellate courts determine which of the two standards should apply. This Note argues that an analysis of those factors demonstrates that both Rule 19(a) and 19(b) decisions should be reviewed for abuse of discretion. It proposes that reviewing courts should use the single standard, but that the amount of deference given to the district court opinion depends on the specific determination within the larger Rule 19 inquiry.*

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INTRODUCTION

Generally, the plaintiff possesses a great deal of power in the American legal system. Among other things, the plaintiff has the ability to choose whether, and to what extent, multiple plaintiffs or multiple defendants will be joined in the litigation.[1] The plaintiff's decision is not absolute, however, because other parties, absentees, and the court itself may take action to override the plaintiff's chosen party structure.[2] One such

1. *See* FED. R. CIV. P. 20(a) (permissive joinder of parties).

2. *See, e.g.*, *id.* 14(a) (permitting a defendant to implead third-party defendants who owe the defendant indemnity or contribution for all or part of the plaintiff's claim); *id.* 24 (permitting absentees to intervene).

exception is compulsory party joinder,[3] which is governed in federal courts by Rule 19 of the Federal Rules of Civil Procedure[4] (or "the Rule"). Under Rule 19(a), the court may decide that compelling interests—primarily the protection of other parties and absentees—require that an absent party be joined.[5]

Because Rule 19 allows the court to overrule a plaintiff's decision not to name parties to the litigation, it can be a powerful tool for the defendant when properly employed.[6] Under Rule 19(b), if an absent required party cannot be joined, the court must decide whether to continue the litigation in its absence or dismiss the action.[7] If the action is dismissed, the plaintiff may have to bring the action in what it believes to be a less favorable forum.[8] Occasionally, the court may dismiss the entire case for failure to join a required party under Rule 19 even when no other forum exists in which the action could be brought, effectively preventing relief for the plaintiff.[9] An adverse Rule 19 determination can destroy one side's litigation strategy and often leads to an appeal.

At the appellate level, the standard of review is critical. It governs the amount of deference the reviewing court gives the lower court's decision and "more often than not determines the outcome."[10] For example, a party is more likely to persuade an appellate court to reverse the district court's decision if the court reviews the decision de novo rather than for abuse of discretion.[11]

Although so much rides on Rule 19 determinations, federal circuit courts disagree as to the proper standard of review of a district court's decision under Rule 19(b) over whether to continue the litigation without the absent required party or dismiss the action outright. The large majority of circuit courts review Rule 19(b) decisions only for abuse of discretion and give deference to the district court's determination.[12] The Sixth Circuit,

3. Lopez v. Martin Luther King, Jr. Hosp., 97 F.R.D. 24, 28 (C.D. Cal. 1983).

4. FED. R. CIV. P. 19.

5. *See id.* 19(a).

6. *See id.* 12(b)(7) (allowing a court to dismiss an action for "failure to join a party under Rule 19").

7. *Id.* 19(b).

8. *E.g.*, Walsh v. Centeio, 692 F.2d 1239, 1244 n.5 (9th Cir. 1982) (stating that the Oregon plaintiffs filed suit against Hawaii defendants in federal district court because they believed that Hawaii state court would be unfair to out-of-state residents).

9. *E.g.*, Republic of Philippines v. Pimentel, 553 U.S. 851, 873 (2008) (dismissing the action after the absent required parties claimed sovereign immunity, which prevented any court from continuing with the litigation).

10. Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1391 (1995).

11. *See* STEVEN WISOTSKY, PROFESSIONAL JUDGMENT ON APPEAL: BRINGING AND OPPOSING APPEALS 180 (2d ed. 2009) (stating that the chances that a reviewing court will reverse the district court are greatest under the nondeferential de novo standard).

12. *See infra* Part II.B.1. The courts reviewing under the more deferential standard hold that Rule 19(b) decisions fall more within the discretion of the district court because they are based on the very specific and particular facts of the case at hand.

however, reviews de novo, granting no deference to the lower court's Rule 19(b) decision.[13]

This Note analyzes the differing approaches to appellate review of Rule 19(b) decisions and proposes that federal circuit courts should adopt the abuse of discretion standard for both Rule 19(a) and 19(b) determinations. Part I.A tracks the history of compulsory joinder in the United States, up to and through the 1966 amendment to Rule 19, and the Rule's current application. Part I.B discusses the de novo and abuse of discretion standards of review and lists the various factors the U.S. Supreme Court has announced to help appellate courts determine which standard is appropriate. Part II surveys how the federal courts of appeals have addressed this issue. Finally, Part III applies the different factors announced by the Court to determine what the standard of review should be for Rule 19 determinations. Part III argues that the abuse of discretion standard of review is appropriate but that reviewing courts should closely examine the precise issue on appeal to determine how much deference to give the district court's decision.

I. THE RULE 19 INQUIRY AND THE TWO STANDARDS OF REVIEW

Part I.A discusses Rule 19, from its historical underpinnings through its application today. It seeks to highlight what the Advisory Committee was trying to do when it revised the Rule, as well as what the Supreme Court has said about how Rule 19 should be interpreted by lower courts. Part I.B examines the two standards used by appellate courts to review Rule 19(b) decisions: de novo and abuse of discretion. Most importantly, Part I.B discusses the various factors appellate courts should consider when deciding whether to review a certain issue de novo or for abuse of discretion.

A. Rule 19's History, Modern Application, and Supreme Court Interpretation

This part begins with the genesis of the modern Rule 19: *Shields v. Barrow*.[14] Part I.A.2 points out the rigid categorization by courts after *Shields* and describes the original Rule 19. The original Rule was unsuccessful in the eyes of many, and Part I.A.3 discusses the Advisory Committee's revisions to the Rule and briefly discusses the Rule's modern-day application. Finally, Part I.A.4 summarizes the three Supreme Court cases squarely addressing Rule 19.

13. *See infra* Part II.B.2. The Sixth Circuit views Rule 19(b) decisions as legal conclusions that warrant de novo review. *See infra* Part I.B.1 (discussing de novo standard of review for questions of law).

14. 58 U.S. 130 (1854).

1. *Shields v. Barrow* and Early Compulsory Joinder Analysis

Rule 19 can be traced back to the 1854 decision *Shields v. Barrow*,[15] the most influential case in early American jurisprudence on the required joinder of parties.[16] In *Shields*, the Supreme Court created and articulated the party classifications with which all judges are now familiar, describing "necessary" and "indispensable" parties based on levels of interest at stake and the ability of the court to continue in the absence of a party.

Dissatisfied with an arrangement to repurchase his recently sold plantation, Robert Barrow filed suit against two Mississippi citizens in a federal circuit court in Louisiana, alleging that the agreement was improperly obtained.[17] This arrangement involved a promissory note signed by a Louisiana citizen and endorsed by six individuals: the two Mississippi defendants and four Louisiana citizens.[18] Joining the Louisiana signatory and the four Louisiana endorsers would have defeated complete diversity and prevented the circuit court from exercising jurisdiction over the case.[19] Thus, Barrow sued only the Mississippi citizens, and the circuit court issued a decree with only the Mississippi endorsers represented.[20] The Supreme Court reversed, holding that the Louisiana citizens were indispensable parties and that the circuit court had no power to issue a decree in their absence.[21]

In *Shields*, Justice Curtis highlighted the distinction between "necessary" and "indispensable" parties.[22] Necessary parties are "[p]ersons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it."[23] Indispensable parties, on the other hand, are persons "who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience."[24]

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15. *Id.* The doctrine of compulsory joinder itself can be traced back to English courts of equity in the 1600s. *See generally* Geoffrey C. Hazard, Jr., *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 COLUM. L. REV. 1254 (1961).

16. John W. Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 MICH. L. REV. 327, 340 (1957).

17. *Shields*, 58 U.S. at 137.

18. *Id.*

19. *Id.* at 139; *see also* Reed, *supra* note 16, at 341–42 (summarizing the facts of *Shields* and noting that joinder of the Louisiana citizens "would have ousted jurisdiction under the 'complete diversity' doctrine").

20. *Shields*, 58 U.S. at 142.

21. *Id.* at 139.

22. *Id.*

23. *Id.*

24. *Id.*

Federal courts, as well as some state courts, relied on these definitions in subsequent decisions, and *Shields* provided the foundation for the joinder provisions of the Federal Rules of Civil Procedure.[25]

2. Compulsory Joinder's Rigid Application After *Shields*

Although *Shields* defined necessary and indispensable parties, the Court failed to mention any specific factors that led it to determine that the Louisiana citizens were indeed indispensable parties and to dismiss the plaintiff's claim in their absence.[26] Moreover, the Court did not discuss the consequences of dismissing the action or any possible alternatives.[27] Scholars and courts could only make assumptions about the reasoning behind the Court's decision.[28]

Subsequent case law fleshed out the factors that courts considered when determining whether a party is indispensable such that the action cannot go forward in its absence,[29] leading to a "jurisprudence of labels" and a "sloganeering process."[30] Judges, after determining that joining an absent required party was infeasible, did not examine thoroughly all the considerations of the specific situation.[31] Instead, courts rigidly relied on concepts of "separability" or "jointness" and declared an absentee party "indispensable" if its interests were considered "joint," "common," or "united in interest" with another party in the suit.[32] Courts were more concerned with the nature of the rights asserted than with weighing the pros and cons of continuing the litigation without joining the necessary party.[33]

Adopted in 1938, the original Rule 19 of the new Federal Rules of Civil Procedure (or "the 1938 Rule") incorporated much of the existing necessary/indispensable jurisprudence, including its shortcomings.[34] The 1938 Rule was intended to facilitate efficient litigation and minimize multiple lawsuits "by abandoning the mystical, inefficient, and narrow older tests in favor of a simpler and broader inquiry."[35] However, in practice, the rule failed to lead judges away from the rigid categorization of required parties.[36] The original Rule 19 included the familiar concepts of

25. Reed, *supra* note 16, at 340–41.

26. *See* Carl Tobias, *Rule 19 and the Public Rights Exception to Party Joinder*, 65 N.C. L. REV. 745, 749 (1987).

27. *See* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 361–62 (1967) (discussing the possible consequences of and alternatives to the Court's decision).

28. *See* Tobias, *supra* note 26, at 749.

29. Katherine Florey, *Making Sovereigns Indispensable:* Pimentel *and the Evolution of Rule 19*, 58 UCLA L. REV. 667, 674 (2011).

30. Tobias, *supra* note 26, at 749.

31. *Id.*

32. *Id.*

33. Kaplan, *supra* note 27, at 362.

34. *See* Florey, *supra* note 29, at 675.

35. Richard D. Freer, *Rethinking Compulsory Joinder: A Proposal to Restructure Federal Rule 19*, 60 N.Y.U. L. REV. 1061, 1066–67 (1985).

36. *See* Kaplan, *supra* note 27, at 363 ("Rule 19 . . . did not avoid the defects and frustrations of the courts' treatment of the required joinder problem during the previous

"necessary" and "indispensable" parties, as well as "joint interests."[37] In addition to its traditional terminology problems, the 1938 Rule failed to direct courts to consider the practical consequences of their decisions, such as hardships on the litigants and absentees.[38] Thus, the original Rule 19 did little to improve the "shoddy and unimaginative method" of making the necessary and/or indispensable distinction that began in *Shields* and continued decades later.[39]

3. The 1966 Amendment Revisions and the Modern Rule 19 Inquiry

In 1966, after years of scholarly criticism of the 1938 Rule and its practical application,[40] the Federal Rules Advisory Committee overhauled the text of Rule 19.[41] The Advisory Committee recognized that the 1938 Rule's phrasing was defective and did not direct courts to "the proper basis of decision."[42] Imprecise language led courts to focus on "the technical or abstract character of the rights or obligations" of the parties instead of on "the pragmatic considerations which should be controlling."[43] Specifically, courts sometimes failed to examine "the particular consequences" of continuing with the litigation and the ways by which the court could shape the final relief or take other precautions to ameliorate these consequences.[44] To correct this problem, the revised Rule 19 explicitly stated which factors a court should consider when making a required party determination.[45]

Determining whether a party should be joined under Rule 19 is a three-step process.[46] First, the court must consider whether the absent party is

century."); Tobias, *supra* note 26, at 750 ("[T]he rule failed to affect significantly the deficiencies in judicial treatment of the party joinder issue that had developed over the preceding 100 years.").

37. *See* Tobias, *supra* note 26, at 750.

38. *See* FED. R. CIV. P. 19 advisory committee's note to 1966 amendment at 26 [hereinafter Advisory Note]; *see also* Tobias, *supra* note 26, at 750 ("This use of traditional terminology directed the courts to focus on the abstract or technical nature of absentees' interests while diverting judicial attention from practical concerns, like hardships imposed on litigants and absentees, that should have been considered more important.").

39. Reed, *supra* note 16, at 355; *see also* Kaplan, *supra* note 27, at 363 ("[T]here was little in [the original Rule 19's] language or mood positively to induce the courts to change their indurated habits.").

40. *See, e.g.*, Hazard, *supra* note 15; Fleming James, *Necessary and Indispensable Parties*, 18 U. MIAMI L. REV. 68 (1963); Reed, *supra* note 16; Note, *Indispensable Parties in the Federal Courts*, 65 HARV. L. REV. 1050 (1952).

41. *See generally* Advisory Note, *supra* note 38, at 26.

42. *Id.* at 25.

43. *Id.* at 26.

44. *Id.*; *see also* Provident Tradesmens Bank & Tr. Co. v. Patterson, 390 U.S. 102, 116–17 n.12 (1968).

45. Advisory Note, *supra* note 38, at 26. Since 1966, Rule 19 has remained practically unchanged, with only minor revisions in terminology occurring in 1987 and 2007. The changes made in 1987 by the Advisory Committee were "technical" only. FED. R. CIV. P. 19 advisory committee's note to 1987 amendment ("No substantive change is intended."). The 2007 amendment was "stylistic," replacing "necessary" with "required" and removing the term "indispensable," which the Committee considered "redundant." Advisory committee's note to 2007 amendment.

46. *See* EEOC v. Peabody W. Coal Co., 400 F.3d 774, 779 (9th Cir. 2005); Glancy v. Taubman Ctrs., Inc., 373 F.3d 656, 666 (6th Cir. 2004). In most instances, the defendant

subject to mandatory joinder as a required party under Rule 19(a).[47] Second, if the absent party is a required party, the court must assess whether it is feasible to join that party—i.e., whether joinder of the absent party will deprive the court of the ability to hear the case.[48] Third, if the absent party cannot be joined, the court must analyze the Rule 19(b) factors to determine whether the court should continue without the absent party or dismiss the case because the absent party is indispensable.[49]

Rule 19(a)(1) establishes three categories of parties that qualify as "required."[50] The first category includes parties without which "the court cannot accord complete relief among existing parties."[51] Specifically, courts tend to focus on whether they can grant "meaningful" relief—i.e., relief that would achieve the objective of the litigation.[52] The other two categories of required parties necessitate a showing that the absent party "claims an interest relating to the subject of the action."[53] When such a showing is made, the court must first determine whether, as a practical matter, the absent party's interest might be impaired or impeded by the disposition of the case.[54] The court may determine that there is no prejudice to the absent party if the party's interests are adequately represented by those parties already present in the litigation.[55] Second, the court examines whether, in that party's absence, the existing parties would

will initiate the compulsory joinder analysis by motion. *See* FED. R. CIV. P. 12(b)(7) (allowing a party to move to dismiss for "failure to join a party under Rule 19"). The court, however, may raise the issue itself sua sponte ("of its own accord"). *Glancy*, 373 F.3d at 676; *see* Citizens Against Casino Gambling in Erie Cnty. v. Kempthorne, 471 F. Supp. 2d 295, 312 (W.D.N.Y. 2007) ("[T]he issue of indispensability . . . is one that courts have an independent duty to consider *sua sponte*, if there is reason to believe dismissal on such grounds may be warranted.").

47. *See Glancy*, 373 F.3d at 666.

48. *See id.*

49. *See id.*

50. *See* FED. R. CIV. P. 19(a)(1). An absent party only needs to fall under one of the categories to be considered a required party. *See id.*

51. *Id.* 19(a)(1)(A).

52. *See* Disabled Rights Action Comm. v. Las Vegas Events, Inc., 375 F.3d 861, 879 (9th Cir. 2004) (finding the absent party not required because an order directed at existing parties would achieve the objective sought by the plaintiff). It disserves the needs of those parties already in the litigation as well as the public interest in avoiding duplicative lawsuits if the court can grant only partial or "hollow" relief without the absent party. *See* Advisory Note, *supra* note 38.

53. FED. R. CIV. P. 19(a)(1)(B). The interest claimed by the absent party must be a legally protectable interest, not simply an indirect financial interest. *See* Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. California, 547 F.3d 962, 970 (9th Cir. 2008); Liberty Mut. Ins. Co. v. Treesdale, Inc., 419 F.3d 216, 230 (3d Cir. 2005).

54. FED. R. CIV. P. 19(a)(1)(B)(i). Although the defendant might invoke Rule 19(a)(1)(B)(i) out of concern for the absent party, as a practical matter, the defendant is probably seeking dismissal of the case rather than joinder of the absent party. *See Glancy*, 373 F.3d at 669 ("The defendant has no incentive to invoke [Rule 19(a)(1)(B)(i)] unless the absentee that the defendant seeks to join cannot be joined for reasons of jurisdiction or venue and because the defendant seeks to rid itself of the case.").

55. *See, e.g.*, Salt River Project Agric. Improvement & Power Dist. v. Lee, 672 F.3d 1176, 1180 (9th Cir. 2012) (finding that the Indian tribe was not a required party when it was adequately represented by tribal officials who were parties).

be "subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations."[56]

If the court determines that the absentee is a required party, it must consider whether it is feasible to join the absent party in the litigation. If there is no obstacle to joining the absent party, the court must do so.[57] There are, however, a number of reasons why joinder of the absent party may not be feasible. The most common reason is that joinder of the required party would destroy complete diversity, thus divesting the federal court of subject matter jurisdiction.[58] Also, the court may not be able to join the required party because the required party enjoys sovereign immunity,[59] is not subject to personal jurisdiction in the forum court,[60] or objects to venue and its joinder would make venue improper.[61]

If the court has determined that a Rule 19(a) required party cannot be joined, it must move to the third step in the analysis. The court now has two choices: proceed without the required party or dismiss the case.[62] The court must determine "in equity and good conscience" which choice is appropriate after considering a number of factors: (1) the extent to which a judgment rendered in the party's absence might prejudice the absentee or existing parties; (2) whether the court can take any measures to lessen or avoid such prejudice; (3) the adequacy of the judgment if it is rendered in the party's absence; and (4) whether the plaintiff will have an adequate remedy if the action is dismissed.[63] These considerations are not exhaustive,[64] but instead highlight the most important factors the court should consider.[65]

One of the specific factors under Rule 19(b) is the extent to which the absentee will be prejudiced by an adjudication in its absence.[66] This inquiry is very similar to the prejudice and impairment inquiry under Rule

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56. FED. R. CIV. P. 19(a)(1)(B)(ii). The risk of inconsistent *outcomes* is not sufficient, but rather there must be a risk of inconsistent *obligations*. Bacardí Int'l Ltd. v. V. Suárez & Co., 719 F.3d 1, 12 (1st Cir. 2013). An obligation is inconsistent if a party must breach one court's order to comply with another court's order. *See* Dawavendewa v. Salt River Project Agr. Improvement & Power Dist., 276 F.3d 1150, 1158 (9th Cir. 2002) (noting the risk that one court might enjoin a hiring policy while a different court might order the specific performance of the policy).

57. FED. R. CIV. P. 19(a)(2).

58. *See, e.g.*, *Glancy*, 373 F.3d at 672.

59. *See, e.g.*, Republic of Philippines v. Pimentel, 553 U.S. 851, 865 (2008); Yashenko v. Harrah's NC Casino Co., 446 F.3d 541, 552–53 (4th Cir. 2006).

60. *See, e.g.*, Hendricks v. Bank of Am., 408 F.3d 1127, 1135 (9th Cir. 2005).

61. FED. R. CIV. P. 19(a)(3).

62. *Id.* 19(b); *see also* Provident Tradesmens Bank & Tr. Co. v. Patterson, 390 U.S. 102, 109 (1968). If the court elects to dismiss the case, the dismissal is without prejudice, meaning the plaintiff can possibly file the suit in a more appropriate forum. FED. R. CIV. P. 41(b) (stating that a dismissal under Rule 19 does not operate as an adjudication on the merits); N. Arapaho Tribe v. Harnsberger, 697 F.3d 1272, 1284 (10th Cir. 2012).

63. FED. R. CIV. P. 19(b)(1)–(4).

64. *Pimentel*, 553 U.S. at 862.

65. *See* Gen. Refractories Co. v. First State Ins. Co., 500 F.3d 306, 319 (3d Cir. 2007) (declaring that the four factors, while not exhaustive, are the most important).

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

19(a)(1)(B).[67] The difference is one of degree: in the "required party" analysis, the court is concerned with whether nonjoinder of the absent party *could have* any of those adverse effects mentioned in that provision of the rule. The possibility of harm makes the absentee a required party.[68] When determining how to proceed once the court decides the absentee cannot be joined, however, the court is more concerned with whether the harm *actually will* occur and, if so, the severity of that harm.[69]

Under the second factor, the court weighs the various measures by which prejudice could be lessened or avoided.[70] This provision encourages a court to be creative when issuing its final judgment.[71] Other procedural devices available to the parties may also affect a court's Rule 19(b) decision. When a defendant alleges that it will suffer prejudice in the absence of a required party, the court may consider whether the defendant has the ability to join that party through impleader or otherwise.[72] Similarly, when the absent required party alleges prejudice if not joined in the litigation, the court may consider the absentee's ability to avoid prejudice by intervening.[73]

The third factor—whether a judgment rendered without the absentee would be "adequate"—looks to the extent of the relief that can be accorded among the present parties, which works in conjunction with the other Rule 19(b) factors.[74] Finally, the fourth Rule 19(b) factor asks whether the plaintiff could find adequate relief elsewhere and indicates that the court

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67. *See Harnsberger*, 697 F.3d at 1282 (stating that prejudice and practical impairment are "essentially the same"); Capitol Med. Ctr., LLC v. Amerigroup Md., Inc., 677 F. Supp. 2d 188, 194 n.9 (D.D.C. 2010) ("Evaluation of the first Rule 19(b) factor 'overlaps considerably with the Rule 19(a) analysis.'" (quoting Gardiner v. V.I. Water & Power Auth., 145 F.3d 635, 641 n.4 (3d Cir. 1998))). The court also examines whether the absent parties are adequately represented. *See* Marvel Characters, Inc. v. Kirby, 726 F.3d 119, 134 (2d Cir. 2013) (finding the absent parties not indispensable because the remaining parties had identical interests and were even represented by the same counsel); Hooper v. Wolfe, 396 F.3d 744, 749–50 (6th Cir. 2005) (finding the limited partnership not indispensable because the limited partner adequately represented its interests).

68. *See* FED. R. CIV. P. 19(a)(1).

69. *See id.* 19(b)(1); *see also* Doré Energy Corp. v. Prospective Inv. & Trading Co., 570 F.3d 219, 232 (5th Cir. 2009) (holding that, because one existing party entered into an agreement with the absent parties that allowed the absent parties to continue to receive the same royalty payments regardless of the outcome of the suit, the absent parties no longer had a stake in the outcome and there was no obstacle to continuing the suit in their absence).

70. FED. R. CIV. P. 19(b)(2).

71. The Advisory Committee noted the example of awarding money damages in lieu of specific performance where the latter may adversely affect the absentee. Advisory Note, *supra* note 38, at 29.

72. *See id.* at 29 (discussing use of defensive interpleader); EEOC v. Peabody W. Coal Co., 610 F.3d 1070, 1086–87 (9th Cir. 2010) ("The courts of appeals that have addressed the question are unanimous in holding that if an absentee can be brought into an action by impleader under Rule 14(a), a dismissal under Rule 19(b) is inappropriate."). *See generally* FED. R. CIV. P. 14 (discussing how a defendant may join a third party).

73. *See* Advisory Note, *supra* note 38, at 29–30; *see also* Takeda v. Nw. Nat'l Life Ins. Co., 765 F.2d 815, 820 n.5 (9th Cir. 1985). *See generally* FED. R. CIV. P. 24 (discussing absent party intervention).

74. Advisory Note, *supra* note 38, at 30. This meshes particularly well with the "shaping of relief" mentioned in the second factor. *Id.*

should consider the practical effects of its decision and whether it is possible for the plaintiff to sue effectively in another forum, such as in state court.[75] The existence or lack of an alternative forum is not dispositive either way: under Rule 19(b), the court must weigh all four factors together.[76]

4. Supreme Court Jurisprudence Discussing Rule 19

Shortly after the 1966 revision, the Supreme Court comprehensively discussed the modern Rule 19 in *Provident Tradesmens Bank & Trust Co. v. Patterson*,[77] which involved a dispute over a traffic accident.[78] The suit was a classic car accident case. The bank, acting as the administrator of the estate of one of the deceased victims, sued the estate of one of the drivers, who had borrowed the car from a friend.[79] The bank did not, however, sue the owner of the vehicle because joining him would defeat complete diversity and prohibit the bank from bringing the action in federal court.[80] The district court directed verdicts in favor of the bank,[81] but the court of appeals reversed, holding that the vehicle owner was an indispensable party.[82] The Supreme Court reversed yet again, conceding that the vehicle owner was a required party under Rule 19(a) and focusing instead on the Rule 19(b) factors.[83]

The Court made clear that the Rule 19(b) factors should be examined practically and flexibly.[84] It emphasized that "[w]hether a person is 'indispensable,' that is, whether a particular lawsuit must be dismissed in the absence of that person, can only be determined in the context of particular litigation,"[85] stressing that "there is no prescribed formula for determining in every case whether a person . . . is an indispensable party."[86] Instead, "[t]he decision whether to dismiss . . . must be based on factors varying with the different cases, some such factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests."[87] Thus, the Court made clear that the new rule broke away from the overly rigid compulsory joinder analysis of the past

75. *See id.*

76. *See, e.g.*, Dainippon Screen Mfg. Co. v. CFMT, Inc., 142 F.3d 1266, 1273 (Fed. Cir. 1998) ("[T]he fact that an alternative forum exists does not automatically warrant dismissal of the case given Rule 19(b)'s mandate to consider all of the relevant factors and the equities of the situation.").

77. 390 U.S. 102 (1968).

78. *Id.* at 104.

79. *Id.*

80. *Id.* at 105.

81. *Id.* at 106.

82. *Id.*

83. *See id.* at 108–09.

84. Florey, *supra* note 29, at 677.

85. *Provident Tradesmens Bank*, 390 U.S. at 118.

86. *Id.* at 118 n.14 (quoting Niles-Bement-Pond Co. v. Iron Moulders' Union, Local No. 68, 254 U.S. 77, 80 (1920)).

87. *Id.* at 118–19.

and that the individual factual and procedural circumstances of each case should guide the court when deciding whether dismissal is necessary.[88]

Using the Rule 19(b) factors as guideposts, the Court directed that judges should decide whether to proceed or dismiss the lawsuit pragmatically and on a case-by-case basis.[89] It suggested that the Rule 19(b) factors should be examined with four interests in mind: (1) the plaintiff's "interest in having a forum"; (2) the defendant's "wish to avoid multiple litigation, or inconsistent relief, or sole responsibility for a liability he shares with another"; (3) "the interest of the outsider"; and (4) "the interest of the courts and the public in complete, consistent, and efficient settlement of controversies."[90] Balancing these interests, the Court found in favor of the plaintiff, reversing the dismissal and allowing the action to continue in federal court.[91]

Provident Tradesmens Bank was the first case in which the Supreme Court interpreted the newly amended Rule 19. It is the Court's most complete statement discussing the operation of Rule 19 and remains the most authoritative precedent on compulsory joinder to this day.[92]

The Court did not address Rule 19 and compulsory joinder again until 1990 in *Temple v. Synthes Corp.*[93] Temple had surgery to implant a spinal device manufactured by Synthes Corporation ("Synthes"), and sometime after the surgery the screws broke apart in his back.[94] Temple sued Synthes in district court in Louisiana and sued the doctor and the hospital in Louisiana state court.[95] Synthes moved to dismiss pursuant to Rule 19(b) for failure to join the doctor and the hospital associated with the procedure.[96] The district court ordered Temple to join these parties in the interest of judicial economy, but he refused.[97] The district court dismissed the action and the Fifth Circuit affirmed.[98] The court of appeals held that it would be prejudicial to the defendants to be involved in multiple lawsuits because the corporation's defense might be negligence on the part of the physicians and hospital staff, while the state court defendants might argue that the corporation was negligent.[99] In a brief per curiam opinion, the Supreme Court reversed.[100]

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88. Florey, *supra* note 29, at 678.

89. *See Provident Tradesmens Bank*, 390 U.S. at 116–17 n.12 (noting that "the new version emphasizes the pragmatic consideration of the effects of the alternatives of proceeding or dismissing"); *see also* Advisory Note, *supra* note 38, at 24–28; Republic of Philippines v. Pimentel, 553 U.S. 851, 862–63 (2008).

90. *Provident Tradesmens Bank*, 390 U.S. at 109–11.

91. *Id.* at 112.

92. The *Pimentel* Court, for example, cited to *Provident Tradesmens Bank* repeatedly during its Rule 19 analysis. *See generally Pimentel*, 553 U.S. 851.

93. 498 U.S. 5 (1990).

94. *Id.* at 5–6.

95. *Id.* at 6.

96. *Id.*

97. *See id.*

98. *Id.*

99. *Id.*

100. *Id.* at 8.

The Court began its discussion by reaffirming the longstanding rule that it is not necessary that all joint tortfeasors be named as defendants in a single lawsuit.[101] The doctor and hospital, as joint tortfeasors, were therefore not required parties.[102] If a party is not necessary under Rule 19(a), there is no need to continue the joinder inquiry under Rule 19(b).[103] Although the Court did not address the rest of Rule 19, the decision shows that there are some guidelines for determining whether an absentee is a required party.[104]

The Supreme Court most recently addressed the application of Rule 19 in the context of sovereign immunity in *Pimentel v. Republic of Philippines*.[105] *Pimentel* featured a complicated procedural posture. In the first phase of the litigation, a class of plaintiffs sued the estate of former Philippine President Ferdinand Marcos, alleging human rights violations under his regime.[106] The district court awarded the plaintiffs a $2 billion judgment.[107] The plaintiffs located a $35 million Merrill Lynch account, allegedly set up by a company incorporated by the former President, and attempted to attach it to satisfy their judgment.[108]

However, given the existence of other competing claims against the account, the district court directed Merrill Lynch to file an interpleader action to determine the rights to the fund.[109] Among the defendants named in the interpleader were the Republic of the Philippines ("the Republic") and the Philippine Presidential Commission on Good Governance ("the Commission"), which was set up to recover assets misappropriated by the Marcos regime.[110] The Republic and the Commission asserted sovereign immunity from the interpleader suit under the Foreign Sovereign Immunities Act[111] and then moved to dismiss on the grounds that they were required parties that could not be joined under Rule 19(b).[112]

The district court eventually dismissed the two parties but decided that the litigation should continue in their absence.[113] The Republic and the Commission appealed the decision, and the circuit court affirmed.[114] Among the reasons the court of appeals gave was that the absent sovereign

101. *Id.* at 7 (citing numerous prior Supreme Court cases and the Advisory Committee notes to the 1966 amendment to Rule 19(a)).
102. *Id.* at 8.
103. *Id.*
104. *See id.* at 7.
105. 553 U.S. 851 (2008).
106. *See* Hilao v. Estate of Marcos, 103 F.3d 767, 771 (9th Cir. 1996).
107. *Pimentel*, 553 U.S. at 857–58.
108. *Id.*
109. *Id.* at 859. Interpleader is a procedure by which a stakeholder—someone owning some sort of property to which title is disputed—can ask a court to determine which of the competing claimants holds title to the item or fund. *See* 28 U.S.C. § 1335 (2012).
110. *Pimentel*, 553 U.S. at 855, 858.
111. 28 U.S.C. § 1604.
112. *Pimentel*, 553 U.S. at 859.
113. *Id.* at 859–60.
114. *Id.* at 860.

entities would not prevail on their claims.[115] The Supreme Court reversed, concluding that the court of appeals gave insufficient weight to the foreign sovereign status of the absent parties and that the court erred in reaching and discounting the merits of their claims.[116]

The Court began by highlighting the "in equity and good conscience" language of Rule 19:

> The design of the Rule, then, indicates that the determination whether to proceed will turn upon factors that are case specific, which is consistent with a Rule based on equitable considerations. This is also consistent with the fact that the determination of who may, or must, be parties to a suit has consequences for the persons and entities affected by the judgment; for the judicial system and its interest in the integrity of its processes and the respect accorded to its decrees; and for society and its concern for the fair and prompt resolution of disputes.[117]

The Court then started its analysis of Rule 19 as it applied to the specific facts of the case. The parties and the Court agreed that the absent parties were required under Rule 19(a) because, in their absence, their interests in the subject matter would not be protected.[118] Before turning to the Rule 19(b) factors, the Court discussed prior cases where joinder and governmental immunity intersected.[119] It declared, "[W]here sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign."[120] Despite this broad declaration, the Court continued to walk through the four factors listed under Rule 19(b).

Under the first factor, the Court considered the prejudice toward the absent parties, observing that the "privilege [of sovereign immunity] is much diminished if an important and consequential ruling affecting the sovereign's substantial interest is determined, or at least assumed, by a federal court in the sovereign's absence and over its objection."[121] The Court noted the "important comity concerns" implicated by the defendants' assertion of foreign sovereign immunity.[122] As to the second factor, no obvious measures existed to lessen such prejudice.[123] Further, a judgment rendered in the sovereign parties' absence would not be "adequate" because they would not be bound by it (the third factor).[124]

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115. *Id.* The court of appeals discussed the likelihood that the absent parties' claims were time-barred under New York law and the problems they would face asserting those claims to assets held abroad. *Id.*

116. *Id.* at 855.

117. *Id.* at 862–63.

118. *Id.* at 863–64; *see* FED. R. CIV. P. 19(a)(1)(B)(i).

119. *Pimentel*, 553 U.S. at 866–67 (citing Mine Safety Appliances Co. v. Forrestal, 326 U.S. 371, 373–75 (1945) and Minnesota v. United States, 305 U.S. 382, 386–88 (1939)).

120. *Id.* at 867.

121. *Id.* at 868–69.

122. *Id.* at 869.

123. *Id.* at 869–70.

124. *See id.* at 870–71. At least one scholar has noted the novel way the Court defined "adequate." *See* Florey, *supra* note 29, at 705 n.247 ("[U]nder this view of 'adequacy' (that

Finally, the Court looked to the adequacy of the plaintiff's remedy if the case were dismissed. The Court noted that Merrill Lynch (not the entire *Pimentel* class) was the nominal plaintiff[125] and that its interest would not be impaired by dismissal in the same way that a typical plaintiff's might be.[126] Although Merrill Lynch would normally be subject to the risk of competing claims to the $35 million in different courts that could reach conflicting results, it was not likely to suffer an adverse outcome because Merrill Lynch could obtain dismissals of any such actions on the grounds that the Republic and the Commission were indispensable parties.[127]

Pimentel underscores the important comity concerns a district court should consider throughout its Rule 19(b) analysis of required parties claiming sovereign immunity.[128] The Court's language and the history of the case suggest that the Court may have been motivated by political concerns, namely that it would be inappropriate to litigate matters concerning the Philippine government in U.S. courts.[129] The Court only addressed the Rule 19 analysis when an absent required party claims sovereign immunity. Moreover, the Court's analysis of the fourth factor (adequacy of remedy) suggests that the particular facts of the case were important. Had the *Pimentel* class been the named plaintiff, perhaps the Court would have reached a different conclusion. Regardless of the result, *Pimentel* stresses Rule 19's focus on pragmatic considerations and the specific facts of the case at hand.

Each of the three cases stands for a different proposition. *Provident Tradesmens Bank* was the first time the Court addressed the revised Rule 19, and the Court emphasized the more flexible nature and pragmatic application of the amended rule. *Temple*, although it only provides a short discussion by the Court, shows that there are certain established rules as to who is a required party.[130] Finally, the Court's most recent application of Rule 19 in *Pimentel* demonstrates that there may be overarching interests (such as comity concerns when a party invokes sovereign immunity) that will weigh quite heavily throughout the Rule 19(b) analysis. Most important for the purposes of this Note, these cases also shed some light on

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is, whether the judgment will bind all those parties that may have interests in the dispute), the third factor will weigh in favor of dismissal in virtually any Rule 19(b) analysis, since by definition Rule 19(b) comes into play only in situations in which a potentially affected party cannot be joined.").

125. *See Pimentel*, 553 U.S. at 871 ("It is Merrill Lynch, however, that has the statutory status of plaintiff as the stakeholder in the interpleader action.").

126. *See id.* at 871–72.

127. *See id.*

128. *See id.* at 869.

129. Florey, *supra* note 29, at 707–10 (discussing the strategy adopted by the lawyers representing the Republic and the amicus brief of the solicitor general arguing for dismissal).

130. Beyond the Court's holding that joint tortfeasors are not required parties, there are other "rules" when deciding whether a party is required or indispensable. *See* 4 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 19.06 (3d ed. 1997) (providing case law to support various trends in Rule 19 jurisprudence, such as that co-obligors are generally necessary but not indispensable and parties to a contract are generally indispensable, among others).

how an appellate court is to review a district court's compulsory joinder decision. Yet, despite the Supreme Court's discussion of how lower courts should *apply* Rule 19, the Court has not declared how courts of appeals should *review* Rule 19 decisions.

B. The Two Standards of Review: De Novo and Abuse of Discretion

"In federal appellate practice, the standard of review is the name of the game."[131] Indeed, it is so important that it is now a required section of every appellate brief filed at the federal level.[132] Because the standard of review determines how much deference the reviewing court will give to the actions or decisions under review, it is often "outcome determinative."[133] In other words, it can make the difference between victory and defeat. To determine which standard of review is appropriate, district court decisions have traditionally been divided into three categories: questions of fact, reviewed for "clear error"; questions of law, reviewed "de novo"; and matters of discretion, reviewed for "abuse of discretion."[134] In the context of Rule 19, the federal circuit courts are split as to whether a compulsory joinder decision qualifies as a question of law or a matter of discretion. Moreover, appellate courts in general still struggle to define what abuse of discretion means or when it applies. Fortunately, the Supreme Court has provided some factors that the courts of appeals should consider when deciding between reviewing an issue de novo or for abuse of discretion.

Part I.B.1 discusses what the de novo standard of review is and why it exists. Part I.B.2 examines the abuse of discretion standard and briefly discusses the difficulty appellate courts have in trying to reach a single definition. Part I.B.3 lays out what the Supreme Court has said in an attempt to help reviewing courts determine which standard is more appropriate for a particular issue.

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131. Peter Nicolas, *De Novo Review in Deferential Robes?: A Deconstruction of the Standard of Review of Evidentiary Errors in the Federal System*, 54 SYRACUSE L. REV. 531, 531 (2004).

132. *See* FED. R. APP. P. 28(a)(8)(B), 28(b)(4).

133. Nicolas, *supra* note 131, at 531 (citing various cases showing that the standard of review is "outcome determinative").

134. Pierce v. Underwood, 487 U.S. 552, 558 (1988); *see also* Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed From Above*, 22 SYRACUSE L. REV. 635, 645–46 (1971) ("[A]ll appellate Gaul is divided into three parts for review purposes: questions of fact, of law and of discretion."). The "clearly erroneous" standard for questions of fact is governed by Rule 52 of the Federal Rules of Civil Procedure. FED. R. CIV. P. 52(a)(6) (stating that findings of fact by the district judge "must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility"). Under this standard, a district court's decision will not be reversed unless "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948). This Note focuses on only the de novo and abuse of discretion standards of review.

1. Questions of Law, Reviewed De Novo

Appellate review of questions of law is rather straightforward. Issues of law are reviewed de novo[135]: the reviewing court need not give deference to the district court's conclusion.[136] This is also sometimes referred to as *free, independent*, or *plenary* review.[137]

Justice Blackmun described why questions of law are reviewed de novo:

> Independent appellate review of legal issues best serves the dual goals of doctrinal coherence and economy of judicial administration. . . . Courts of appeals . . . are structurally suited to the collaborative juridical process that promotes decisional accuracy. With the record having been constructed below and settled for purposes of the appeal, appellate judges are able to devote their primary attention to legal issues. As questions of law become the focus of appellate review, it can be expected that the parties' briefs will be refined to bring to bear on the legal issues more information and more comprehensive analysis than was provided for the district judge. Perhaps most important, courts of appeals employ multijudge panels that permit reflective dialogue and collective judgment.[138]

2. Matters of Discretion, Reviewed for Abuse of Discretion

The abuse of discretion standard, by contrast, escapes such an easy description. Examples of rulings that warrant this standard include procedural motions, objections during trial, criminal sentencing, admissibility of evidence, and general conduct issues such as findings of contempt.[139] For these discretionary rulings, "[t]he question, of course, is not whether [the Supreme] Court, or whether the Court of Appeals, would as an original matter have dismissed the action; it is whether the District Court abused its discretion in so doing."[140] Thus, discretion implies the power to choose within a range of acceptable options.[141] Generally, however, an abuse of discretion

> occurs either when the judge has considered incorrect factors (or has failed to consider necessary factors) in applying his discretion, or when his exercise of discretion . . . is contrary to the evidence or experience, or

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135. The Latin phrase de novo means "anew." *De novo*, BLACK'S LAW DICTIONARY (10th ed. 2014).

136. *Appeal de novo*, BLACK'S LAW DICTIONARY (10th ed. 2014); 1 STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW § 2.14 (4th ed. 2010).

137. 1 CHILDRESS & DAVIS, *supra* note 136, § 2.14. However, a well-written opinion by the lower court judge may be persuasive and have a subtle effect on the appellate court. *See* Kevin Casey, Jade Camara & Nancy Wright, *Standards of Appellate Review in the Federal Circuit: Substance and Semantics*, 11 FED. CIR. B.J. 279, 359 (2002).

138. Salve Regina Coll. v. Russell, 499 U.S. 225, 231–32 (1991) (citation omitted).

139. Kelly Kunsch, *Standard of Review (State and Federal): A Primer*, 18 SEATTLE U. L. REV. 11, 34 (1994).

140. Nat'l Hockey League v. Metro. Hockey Club, 427 U.S. 639, 642 (1976) (discussing standard in context of dismissal for discovery violations).

141. *See* Wheat v. United States, 486 U.S. 153, 164 (1988) ("Other district courts might have reached differing or opposite conclusions with equal justification, but that does not mean that one conclusion was 'right' and the other 'wrong.'").

> is so arbitrary . . . that the appellate court feels compelled to reject the actual choice.[142]

The amount of deference the reviewing court gives to the trial court ruling under this standard varies. Scholars and judges agree that there is a spectrum of deference within the abuse of discretion standard, which ranges from granting the district court practically no deference at all to "complete appellate abdication."[143]

The reasons why the trial judge had that discretionary power in the first place help determine the level of deference.[144] There are five reasons for conferring discretion on the trial court: (1) judicial economy; (2) trial court morale; (3) finality of decision; (4) sheer impracticability of formulating general rules of decision based on the issue's multifarious or novel nature; and (5) the superiority of the trial court's position in being closer to the action, particularly when a decision is "based on facts or circumstances that are critical to decision and that the record imperfectly conveys."[145] Adding to the discussion, the Supreme Court addressed the difficulty of defining the abuse of discretion standard and determining when and how it applied.

3. Supreme Court Factors for Choosing Between De Novo and Abuse of Discretion

The Supreme Court directly addressed the abuse of discretion standard as it concerns civil matters in *Pierce v. Underwood*.[146] At issue in *Underwood* was whether the government's (losing) position in a civil rights case was substantially justified so as to prevent attorney fee shifting under the Equal Access to Justice Act[147] (EAJA). The district court granted the motion to award attorney's fees, and the court of appeals affirmed, concluding that the district court did not abuse its discretion.[148] The Supreme Court began its discussion by considering whether the court of appeals applied the proper standard of review.[149]

For some trial court decisions, the standard of review is established by statute or rule; "[f]or most others, the answer is provided by a long history of appellate practice."[150] However, when the trial court determination has "neither a clear statutory prescription nor a historical tradition," it is

142. 2 CHILDRESS & DAVIS, *supra* note 136, § 7.06[2][a] (discussing Rosenberg, *supra* note 134).

143. Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 765 (1982). *See generally* Robert C. Post, *The Management of Speech: Discretion and Rights*, 1984 SUP. CT. REV. 169; Maurice Rosenberg, *Appellate Review of Trial Court Discretion*, 79 F.R.D. 173 (1978); Rosenberg, *supra* note 134.

144. *See* Friendly, *supra* note 143, at 764.

145. Rosenberg, *supra* note 134, at 660–65.

146. 487 U.S. 552 (1988).

147. *Id.* at 556–57.

148. *Id.* at 557.

149. *Id.* at 557–58.

150. *Id.* at 558.

difficult to determine the proper analytical framework for appellate review.[151]

The Court, while acknowledging that it was not establishing a "comprehensive test," discussed several "significant relevant factors" that weigh in favor of or against an abuse of discretion standard.[152] The reviewing court should ask itself a number of questions: Does the language of the statute imply a level of deference, even if it is not perfectly clear?[153] Do other provisions within the statutory scheme call for deferential review in analogous determinations?[154] Which judicial actor is "better positioned than another to decide the issue" as a "matter of the sound administration of justice"?[155] Is it impracticable to formulate a rule of decision for the issue because the problem is multifarious, novel, fleeting, and resists generalization for now?[156] And, finally, are there substantial consequences and liability of an erroneous decision?[157]

The Court found that, in this case, the statutory language weighed in favor of deferential review. Specifically, the Court found the words "unless *the court finds* that the position of the United States was substantially justified" to suggest an implied directive that the court's "substantial justification" decision is to be reviewed deferentially.[158] The Court noted that analogous provisions under the overarching statutory scheme called for deference, which weighed in favor of allowing the district court some discretion.[159]

In addition, the Court found the trial court better positioned to decide the question of "substantially justified" because the decision might have turned on evidentiary matters, settlement conferences, et cetera, of which the trial court had firsthand knowledge, whereas the appellate court would be required to spend an inordinate amount of time and energy to place itself in a comparable position.[160] The Court described the question of what constitutes "substantially justified" as one that falls squarely under the fourth factor for granting deference to the district court, impracticable to formulate a general rule of decision: "[B]ecause the number of possible situations is large, we are reluctant either to fix or sanction narrow

151. *Id.*
152. *Id.* at 559.
153. *Id.*
154. *Id.*
155. *Id.* at 559–60 (quoting Miller v. Fenton, 474 U.S. 104, 114 (1985)) (borrowing the policy approach used to determine whether mixed law-fact questions would receive deference on appeal).
156. *Id.* at 561–62 (quoting extensively from Rosenberg, *supra* note 134, at 662–63).
157. *Id.* at 563. *See generally* Martin B. Louis, *Discretion or Law: Appellate Review of Determinations That Rule 11 Has Been Violated or That Nonmutual Issue Preclusion Will Be Imposed Offensively*, 68 N.C. L. REV. 733 (1990) (arguing for free review of sanctions and collateral estoppel in part based on the consequences of such findings).
158. *Underwood*, 487 U.S. at 559 (quoting 28 U.S.C. § 2412(d)(1)(A) (1982)).
159. *Id.*
160. *Id.* at 559–60.

guidelines for the district courts to follow."[161] The last factor—the substantial amount of liability produced by the district judge's decision—often goes against deferential review, but not in connection with an EAJA fee award.[162] The Court concluded that deference was appropriate and affirmed the circuit court's decision to review the issue of "substantially justified" under the abuse of discretion standard.[163]

Justice White, in dissent, pointed to factors not explicitly considered by the majority that cut against the deferential standard. One factor the court may have considered implicitly was how the issue fits within the common understandings of law and discretion; if the answer could go either way, it should be addressed by the reviewing court.[164] According to Justice White, other policy factors include appellate consistency and uniformity, as well as the possibility of short-term guidance to the lower courts.[165] In *Underwood*, there was a good deal of precedent on the specific issue, with nearly all circuits finding the matter reviewable de novo.[166] Justice White contended that this should have counted for something as it does in other inquiries.[167]

In any event, *Underwood*, by listing several factors and establishing a balancing approach, gives courts a rather straightforward process for determining the level of deference when reviewing unsettled issues.[168] The next significant case discussing the review of matters arguably within the district court's discretion came two years later in *Cooter & Gell v. Hartmarx Corp.*,[169] in which the Court addressed the standard of review for sanctions under Rule 11 of the Federal Rules of Civil Procedure.[170]

The Court first pointed out that the district court's Rule 11 decision involved three types of issues:

> The court must consider factual questions regarding the nature of the attorney's prefiling inquiry and the factual basis of the pleading or other paper. Legal issues are raised in considering whether a pleading is "warranted by existing law or a good faith argument" for changing the law and whether the attorney's conduct violated Rule 11. Finally, the district court must exercise its discretion to tailor an "appropriate sanction."[171]

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161. *Id.* at 562 (quoting Curtiss-Wright Corp. v. Gen. Elec. Co., 446 U.S. 1, 10–11 (1980)).
162. *Id.* at 563 (noting that the average amount of EAJA fee awards was under $3000).
163. *See id.*
164. *See id.* at 583–85 (White, J., dissenting in part).
165. *See id.* at 584–85.
166. *See id.* at 586 (collecting cases).
167. *See id.*
168. 2 CHILDRESS & DAVIS, *supra* note 136, § 7.06[3][b].
169. 496 U.S. 384 (1990).
170. FED. R. CIV. P. 11.
171. *Cooter & Gell*, 496 U.S. at 399 (quoting Rule 11).

Several circuit courts had applied a different standard of review to each inquiry, while others combined the issues in various ways.[172] In *Cooter & Gell*, the Court merged these inquiries and applied a "unitary abuse of discretion standard to all aspects of a Rule 11 proceeding."[173] The Court seemed to do away with the distinction between the clearly erroneous and abuse of discretion standards of review: "When an appellate court reviews a district court's factual findings, the abuse-of-discretion and clearly erroneous standards are indistinguishable[, and a] court of appeals would be justified in concluding that a district court had abused its discretion in making a factual finding only if the finding were clearly erroneous."[174] Further, the Court noted the difficulty of distinguishing between legal and factual issues.[175]

Similarly, even pure legal errors, such as misunderstanding the scope of Rule 11 or relying on an incorrect view of the law, could be reviewed within the abuse of discretion inquiry.[176] In other words, a court "would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence."[177]

The Court used certain *Underwood* factors to determine that deference is appropriate on even the legal conclusion of sufficiency under Rule 11, as opposed to de novo review.[178] In this specific context, the Court asserted that the inquiry is not only into "purely legal questions, such as whether the attorney's legal argument was correct," but also considers "issues rooted in factual determinations," which include plausibility, credibility calls, and reasonableness under the circumstances.[179] Sufficiency is a "fact-dependent legal standard."[180] Therefore, "the district court is better situated than the court of appeals to marshal the pertinent facts and apply" this fact-dependent legal test under the judicial position factor.[181] The Court further concluded that two other *Underwood* factors—sound administration of justice by better-positioned actors and the difficulty of generalizing a clear legal principle in such "fact-intensive close calls"—supported deference to Rule 11 decisions.[182]

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172. *See id.* The circuit courts that separated the analysis divided the issues into fact-findings (reviewed under the clearly erroneous standard), legal questions (reviewed de novo), and the actual sanction decision (reviewed for abuse of discretion). *Id.*

173. *Id.* at 403.

174. *Id.* at 401.

175. *Id.* (citing Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982)).

176. *Id.* at 402 ("An appellate court would be justified in concluding that, in making such errors, the district court abused its discretion.").

177. *Id.* at 405. This point was reemphasized in *Koon v. United States*, 518 U.S. 81, 100 (1996) ("The abuse-of-discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions.").

178. *See Cooter & Gell*, 496 U.S. at 400–05.

179. *Id.* at 401–02.

180. *Id.* at 402. Although one might expect a "legal standard" to generally be judged by a de novo standard, *Underwood* "also concluded that [a] district court's rulings on [such fact-dependent] legal issues should be reviewed deferentially." *Id.* at 403.

181. *See id.* at 402.

182. *Id.* at 403–04.

These cases demonstrate that while certain decision making evolves from being within a district court's discretion to a legal rule,[183] there is no reason to break decisions down into smaller and smaller inquiries, each with a different standard of review. "[I]t is undesirable to make the law more complicated by proliferating review standards without good reason."[184] In *Underwood*, the Court listed several factors to help determine when the abuse of discretion standard is appropriate.[185] The strength or presence of these factors may also help appellate courts determine the amount of deference within the abuse of discretion standard.[186]

So far, this Note has discussed the history of Rule 19 and has examined the two standards of review used by circuit courts for Rule 19 decisions. The next part lays out the current circuit split and analyzes the reasoning provided by the courts of appeals for their different appellate approaches.

II. RULE 19(B) AND OTHER FEDERAL RULES OF CIVIL PROCEDURE: MATTERS OF DISCRETION OR QUESTIONS OF LAW?

This part describes the two approaches the circuit courts have taken when reviewing Rule 19 decisions. Part II.A discusses the very little guidance the Supreme Court has given specifically on the appropriate standard of review. Part II.B surveys the circuit court approaches, listing which standard each circuit has chosen along with the courts' reasons for adopting one standard over the other. Part II.C briefly discusses the standards of review that circuit courts use for decisions made under other related Federal Rules of Civil Procedure.

A. Supreme Court Decisions Do Not Provide Guidance

The Supreme Court has only briefly addressed the standard of review for Rule 19 determinations made by a district court. In *Pimentel*, the parties agreed that the absent parties claiming sovereign immunity were required parties under Rule 19(a) but disagreed as to whether the district court properly applied Rule 19(b).[187] The Court reviewed in detail the lower court's Rule 19(b) decision but devoted only one sentence of its analysis to discussing the appropriate standard of review: "The case-specific inquiry that must be followed in applying the standards set forth in subdivision (b), including the direction to consider whether 'in equity and good conscience' the case should proceed, implies some degree of deference to the district court."[188] However, in *Pimentel*, the Court found errors of law in the lower court decisions.[189] The Court did not announce the proper standard of review because the judgment would not stand regardless of whether the

183. That is, when the appellate court is willing to declare a general legal principle after a "long history of appellate practice." *Cf.* Pierce v. Underwood, 487 U.S. 552, 558 (1988).
184. First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 948 (1995).
185. *See generally Underwood*, 487 U.S. 552.
186. 2 CHILDRESS & DAVIS, *supra* note 136, § 7.06[4].
187. Republic of Philippines v. Pimentel, 553 U.S. 851, 863–64 (2008).
188. *Id.* at 864.
189. *Id.*

Court reviewed the lower court's decision de novo or for abuse of discretion.[190]

The other two major Rule 19 decisions from the Supreme Court provide even less guidance as to what the proper standard of review should be. The posture of *Provident Tradesmens Bank* was different than most appeals of Rule 19 determinations. First, the court of appeals, not the district court, engaged in the compulsory joinder analysis in the first instance, so the Supreme Court reviewed the court of appeals's reasoning, not a district court's.[191] Second, the court of appeals did not actually apply Rule 19.[192] *Provident Tradesmens Bank* does not help federal appellate courts determine the proper standard of review for district court decisions under either Rule 19(a) or 19(b). In *Temple v. Synthes Corp.*, the Court held that the district court "abused its discretion in ordering [the absent parties] joined as defendants and in dismissing the action when Temple failed to comply with the court's order."[193] The Court did not discuss why it used the phrase "abused its discretion."

B. The Two Approaches Taken by the Circuit Courts

The Supreme Court's only brief discussion of the proper standard of review for Rule 19 decisions has led to some confusion in the circuit courts. The courts of appeals have taken two different approaches to reviewing district court decisions under Rule 19(b) to continue with the litigation in the required party's absence or dismiss the case.[194] Almost all circuit courts have adopted, either implicitly or explicitly, the abuse of discretion

190. *See id.* ("Whatever the appropriate standard of review, a point we need not decide, the judgment could not stand.").

191. Provident Tradesmens Bank & Tr. Co. v. Patterson, 390 U.S. 102, 106–07 (1968).

192. *See id.* at 116–17 ("The Court of Appeals' reasons for disregarding the Rule remain to be examined. The majority of the court concluded that the Rule was inapplicable because 'substantive' rights are involved, and substantive rights are not affected by the Federal Rules." (footnote omitted)).

193. Temple v. Synthes Corp., 498 U.S. 5, 8 (1990).

194. Although a district court must first determine whether the absent party is required under Rule 19(a), there appears to be consensus that the necessary party determination is reviewed for abuse of discretion. *See* Picciotto v. Cont'l Cas. Co., 512 F.3d 9, 15 (1st Cir. 2008) (noting that all of the circuit courts that have examined the issue have applied an abuse of discretion standard to Rule 19(a) determinations). One case declared that Rule 19(a) decisions are reviewed de novo, but the issue on appeal was the legal interpretation of an insurance policy. *See* Koppers Co. v. Aetna Cas. & Sur. Co., 158 F.3d 170, 174 (3d Cir. 1998). Subsequent Third Circuit cases do not cite this proposition and instead are more specific with their language. *See, e.g.*, Huber v. Taylor, 532 F.3d 237, 247 (3d Cir. 2008) ("To the extent a district court's Rule 19(a) determination is premised on a conclusion of law, this court's review is plenary."). One court declared that Rule 19(a)(1)(B)(ii) decisions are reviewed de novo, citing as support only a Ninth Circuit case reviewing de novo a district court's interpretation of state collateral estoppel law. *See* W. Md. Ry. Co. v. Harbor Ins. Co., 910 F.2d 960, 963 n.6 (D.C. Cir. 1990) (discussing what was then Rule 19(a)(2)(ii)). The D.C. Circuit has not discussed the standard of review for Rule 19(a) decisions generally. Because there is no genuine disagreement among the circuits, this part focuses only on Rule 19(b) decisions.

standard for Rule 19(b) decisions.[195] Standing alone, the Sixth Circuit applies the de novo standard.[196]

Part II.B.1 begins by discussing *Walsh v. Centeio*[197]—the first case in which a circuit court examined the standard of review for district court decisions made under Rule 19(b) and adopted the abuse of discretion standard. Most courts of appeals continued the trend, sometimes stating additional reasons why the abuse of discretion standard is more appropriate. Part II.B.2 examines the Sixth Circuit's split from the majority and its reasoning for adopting the de novo standard.

1. Majority of Circuit Courts Review for Abuse of Discretion

The first court to address in depth the standard of review for a district court's Rule 19(b) decision whether to dismiss or continue with the litigation was the Ninth Circuit in *Walsh v. Centeio*.[198] In *Walsh*, the beneficiaries of a series of trusts filed suit in federal district court, alleging various instances of mismanagement, self-dealing, and breach of fiduciary duty by the trustees and seeking damages and removal of the trustees.[199] Three of the five beneficiaries were plaintiffs in the action.[200] The instruments creating the trusts specifically required that each trust be separate and distinct from any other, with each beneficiary entitled to separate income under separate accounts.[201] The instruments also provided, however, for joint administration and management of the trusts and required that there be at all times the same three trustees of all the trusts.[202] The

195. *See Picciotto*, 512 F.3d at 14–15; Marvel Characters, Inc. v. Kirby, 726 F.3d 119, 132 (2d Cir. 2013); Janney Montgomery Scott, Inc. v. Shepard Niles, Inc., 11 F.3d 399, 403 (3d Cir. 1993); Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Rite Aid of S.C., Inc., 210 F.3d 246, 250–54 (4th Cir. 2000); Hood ex rel. Miss. v. City of Memphis, 570 F.3d 625, 632–33 (5th Cir. 2009); Extra Equipamentos e Exportação Ltda. v. Case Corp., 361 F.3d 359, 361 (7th Cir. 2004); Scenic Holding, LLC v. New Bd. of Trs. of Tabernacle Missionary Baptist Church, Inc., 506 F.3d 656, 665 (8th Cir. 2007); Am. Greyhound Racing, Inc. v. Hull, 305 F.3d 1015, 1022 (9th Cir. 2002); N. Arapaho Tribe v. Harnsberger, 697 F.3d 1272, 1277 (10th Cir. 2012); Laker Airways, Inc. v. British Airways, PLC, 182 F.3d 843, 847 (11th Cir. 1999); Kickapoo Tribe of Indians of Kickapoo Reservation in Kan. v. Babbitt, 43 F.3d 1491, 1495 (D.C. Cir. 1995).

196. *E.g.*, Keweenaw Bay Indian Cmty. v. Michigan, 11 F.3d 1341, 1346 (6th Cir. 1993).

197. 692 F.2d 1239 (9th Cir. 1982).

198. *Id.* The Seventh Circuit very briefly addressed it two years before but only in a footnote. *See* Pasco Int'l (London) Ltd. v. Stenograph Corp., 637 F.2d 496, 505 n.22 (7th Cir. 1980) (recognizing that it was reviewing a matter "arguably within the discretion of the district court" and willing to adopt it for the review of that particular case).

199. *Walsh*, 692 F.2d at 1240.

200. *Id.* The three plaintiffs were Oregon residents, and the defendants were from Hawaii. *Id.* The court's jurisdiction was grounded on diversity of citizenship. *Id.* The Constitution grants federal courts jurisdiction to adjudicate, among other things, "Controversies . . . between Citizens of different States." U.S. CONST. art. III, § 2, cl. 1. As currently codified and interpreted, this "diversity jurisdiction" requires "complete diversity"—no plaintiff can be a resident or citizen of the same state as any defendant. *See* 28 U.S.C. § 1332 (2012); Strawbridge v. Curtiss, 7 U.S. 267 (1806). The other two beneficiaries were from Hawaii. *Walsh*, 692 F.2d at 1240. Naming them as plaintiffs would have divested the federal district court of its ability to hear the case.

201. *Walsh*, 692 F.2d at 1240.

202. *Id.*

district court determined that the settlor intended the trusts to be administered in a unified manner by one set of trustees.[203] Any beneficiaries not joined in the action could have later challenged the authority of the successor trustees appointed by the court to administer their individual trusts, which would have frustrated the settlor's original intent.[204] Because the two remaining beneficiaries were not joined, the court dismissed the lawsuit for failure to join a party under Rule 19.[205]

Before turning to the merits of the case, the court of appeals discussed the reasons for reviewing Rule 19(b) decisions for abuse of discretion.[206] The court rejected the argument that the de novo standard should apply because a number of appellate courts, including the Ninth Circuit, have raised the indispensability issue sua sponte and conducted an independent analysis.[207] The court noted that it did not have to raise the issue sua sponte and often remanded similar cases back to the district court to develop the record and conduct its own Rule 19 analysis first.[208] The independent analysis was necessary only because the district court failed to examine the issue.[209] When the district court does engage in a Rule 19 analysis, the appellate court is not required to review that decision de novo.[210]

The court then discussed the lack of guidance in previous circuit decisions. It noted the numerous examples of circuit courts reversing a lower court's Rule 19 decision that a party is indispensable without stating that the district court abused its discretion[211] and of other appellate decisions engaging in an independent analysis under Rule 19(b) without referencing the standard of review at all.[212] It also observed that other courts alluded to an abuse of discretion standard but then engaged in their own independent analyses.[213]

Without definitive authority, the court turned to the language of the rule. Rule 19(b) lists several factors the court must consider and, thus, "requires the district court to analyze various equitable considerations within the context of particular litigation, rather than to decide a purely legal issue."[214] The legislative history reinforced this notion: "The 1966 amendment . . . still [left] the district court with substantial discretion in

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203. *Id.* at 1241.
204. *Id.*
205. *Id.*; *see* FED. R. CIV. P. 12(b)(7).
206. Actually, the Ninth Circuit had just held that abuse of discretion is the proper standard of review for Rule 19 cases in *Bakia v. County of Los Angeles*, 687 F.2d 299, 301 (9th Cir. 1982) (per curiam). However, that case was decided after oral arguments in *Walsh*, and the court provided additional rationale in *Walsh* because it felt the outcome turned on the standard of review. 692 F.2d at 1241.
207. *See Walsh*, 692 F.2d at 1241 (collecting cases).
208. *See id.* (citing Sams v. Beech Aircraft Corp., 625 F.2d 273 (9th Cir. 1980)).
209. *See id.*
210. *See id.*
211. *Id.* (collecting cases).
212. *Id.* (collecting cases).
213. *Id.* at 1242 (citing Broussard v. Columbia Gulf Transmission Co., 398 F.2d 885 (5th Cir. 1968)).
214. *Id.*

considering which factors to weigh and how heavily to emphasize certain considerations in deciding whether the action should go forward in the absence of someone needed for a complete adjudication of the dispute."[215] After looking for guidance from a variety of sources, the Ninth Circuit rejected the plaintiff's arguments in favor of the de novo standard and adopted the abuse of discretion standard of review for a district court's Rule 19(b) decisions.[216]

Turning to the merits, the court noted that the weight of authority was probably against dismissal for not joining all trust beneficiaries when the administration of the trust is at issue.[217] However, it applied the more deferential standard of review and affirmed the dismissal.[218] Given the settlor's particular intention that the trusts be jointly administered, the circuit court determined that the district court did not abuse its discretion.[219]

Walsh was the first attempt by a circuit court to analyze the standard of review question. The majority of circuits followed the Ninth Circuit's lead and adopted the abuse of discretion standard of review for Rule 19(b) determinations.

The D.C. Circuit, the second court of appeals to address the standard of review issue, relied on the Ninth Circuit's reasoning in *Walsh* and cited many of the same sources.[220] The court noted that the 1966 Rule 19 revision encourages courts to look at "the pragmatic considerations" of its compulsory joinder decisions, instead of focusing only on the "technical and abstract characterization of the rights or obligations" of the absent required party.[221] "[T]he ultimate question Rule 19(b) poses is not 'a purely legal issue'; it calls for the exercise of 'judgmental discretion.' A district judge, 'closer to the arena,' is often better situated than is an appellate panel 'to survey the practicalities involved in the litigation.'"[222] If the lower court's decision "reflects a clear understanding that the Rule calls for practically-oriented consideration of the competing interests at stake, we should not balance the equities anew."[223] The other courts of appeals echoed these same reasons.[224]

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215. *Id.* at 1242–43 (quoting 7 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1604 (1972)).

216. *Id.* at 1243 & n.4 (stating that both Rule 19(a) and 19(b) determinations are reviewed for abuse of discretion).

217. *Id.* at 1244 (citing the American Law Reports and a district court case allowing the litigation to continue after a thorough analysis of a very similar situation).

218. *See id.* at 1245.

219. *Id.*

220. *See generally* Cloverleaf Standardbred Owners Ass'n v. Nat'l Bank of Wash., 699 F.2d 1274 (D.C. Cir. 1983).

221. *Id.* at 1276–77 (quoting Advisory Note, *supra* note 38).

222. *Id.* at 1277 (quoting *Walsh*, 692 F.2d at 1242).

223. *Id.*

224. *See, e.g.*, Extra Equipamentos e Exportação Ltda. v. Case Corp., 361 F.3d 359, 361 (7th Cir. 2004) (declaring that the rule is "just a medley of imponderables" that the reviewing court is in no better place to decide); Travelers Indem. Co. v. Dingwell, 884 F.2d 629, 635 (1st Cir. 1989) (discussing how other circuit courts have dealt with this issue); Envirotech Corp. v. Bethlehem Steel Corp., 729 F.2d 70, 75 (2d Cir. 1984) (stating that a "Rule 19(b) determination [is] more in the arena of a factual determination than a legal one"

2. The Sixth Circuit Goes the Other Way

The Sixth Circuit alone has decided to give no deference to a district court's Rule 19(b) determination. Despite the trend among the majority of circuits to review such decisions for abuse of discretion, it adopted a de novo standard in *Local 670, United Rubber, Cork, Linoleum & Plastic Workers of America v. International Union, United Rubber, Cork, Linoleum & Plastic Workers of America*.[225] The court began by acknowledging that the Sixth Circuit had implicitly adopted an abuse of discretion standard of review,[226] but it noted that the Sixth Circuit and other courts have reversed a district court's dismissal under Rule 19 without resort to the abuse of discretion standard.[227]

The Sixth Circuit concluded that a determination that a required party is indispensable "represents a legal conclusion reached after balancing the prescribed factors under Rule 19."[228] Thus, the determination is "a conclusion of law," which the court reviews de novo.[229] Despite cutting away from the other courts of appeals that had considered this issue, the Sixth Circuit devoted only a paragraph to its discussion on the proper standard of review.[230]

The Sixth Circuit reemphasized this holding in *Keweenaw Bay Indian Community v. Michigan*[231]: "[W]e made clear [in *Local 670*] that the distinct indispensability analysis under Rule 19(b) is inherently a legal question."[232] Because it is a legal question, a district court's decision to dismiss the case because the absent party is indispensable or to continue the litigation without the absent party is reviewed de novo.[233] The Sixth Circuit has continued to review Rule 19(b) decisions de novo despite the Supreme Court's dicta in *Pimentel* that the rule suggests some deference to the lower court.[234]

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and stating that review is for abuse of discretion). Some circuits adopted the abuse of discretion standard after the Sixth Circuit decided to review Rule 19(b) determinations de novo. *E.g.*, Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Rite Aid of S.C., Inc., 210 F.3d 246, 250 n.7 (4th Cir. 2000) (recognizing the circuit split before adopting the abuse of discretion standard).

225. 822 F.2d 613 (6th Cir. 1987). The case concerned arbitration claims brought under a collective bargaining agreement, and the district court dismissed the action after it found that the other contracting party could not be joined without defeating diversity jurisdiction. *Id.* at 616–18.

226. *Id.* at 618–19 (citing Jenkins v. Reneau, 697 F.2d 160, 163 (6th Cir. 1983)).

227. *See id.* at 619 (citing Smith v. United Bhd. of Carpenters & Joiners of Am., 685 F.2d 164, 166 (6th Cir. 1982) and Pasco Int'l (London), Ltd. v. Stenograph Corp., 637 F.2d 496, 505 & n.22 (7th Cir. 1980)).

228. *Id.* (citing Challenge Homes, Inc. v. Greater Naples Care Ctr., Inc., 669 F.2d 667, 669 n.3 (11th Cir. 1982)).

229. *Id.*

230. *Id.*

231. 11 F.3d 1341 (6th Cir. 1993).

232. *Id.* at 1346.

233. *See id.*

234. *See* United States v. City of Detroit, 712 F.3d 925, 948 (6th Cir. 2013); Laethem Equip. Co. v. Deere & Co., 485 F. App'x 39, 43 (6th Cir. 2012).

Although it has now adopted the abuse of discretion standard, the Seventh Circuit did discuss at one time the possibility of reviewing a Rule 19(b) decision de novo. According to the Seventh Circuit, the issue of dispensability "is not one that obviously requires such deference to the district court."[235] Further, "it can be argued that the finding of indispensability is so fell in its consequences, requiring as it does the dismissal of the entire suit, that the appellant should receive a broader scope of review."[236]

C. Standards of Review for Federal Rules of Civil Procedure Related to Rule 19

There are many other Federal Rules of Civil Procedure that concern the joinder of parties. The standards used to review decisions made under these other rules inform how an appellate court should review Rule 19 determinations. Similar to joinder, some appellate courts review for abuse of discretion a district court's decision to allow a litigant to implead a third-party defendant under Rule 14.[237] Decisions made under Rule 20, which covers *permissive* joinder of parties, are also reviewed for abuse of discretion.[238] Likewise, a decision to "add or drop a party" under Rule 21 (for misjoinder and the like) is reviewed under the more deferential standard.[239]

Rule 24 governs intervention by an outside party, and it discusses two types: permissive intervention and intervention of right.[240] Rule 24(b) decisions on permissive intervention are generally reviewed for abuse of discretion.[241] However, many courts distinguish decisions made under Rule 24(a) intervention of right from those concerning permissive intervention and review the former de novo.[242] Those courts of appeals that

235. Pasco Int'l (London) Ltd. v. Stenograph Corp., 637 F.2d 496, 505–06 n.22 (7th Cir. 1980).

236. Sokaogon Chippewa Cmty. v. Oneida Cnty., 879 F.2d 300, 304 (7th Cir. 1989).

237. *E.g.*, United States v. One 1977 Mercedes Benz, 708 F.2d 444, 452 (9th Cir. 1983). *See generally* FED. R. CIV. P. 14.

238. *E.g.*, Hagan v. Rogers, 570 F.3d 146, 152 (3d Cir. 2009). *See generally* FED. R. CIV. P. 20.

239. *E.g.*, City of Syracuse v. Onondaga Cty., 464 F.3d 297, 307 (2d Cir. 2006); Sutherland v. Mich. Dep't of Treasury, 344 F.3d 603, 612 (6th Cir. 2003). *See generally* FED. R. CIV. P. 21.

240. FED. R. CIV. P. 24.

241. *E.g.*, Griffith v. Univ. Hosp., L.L.C., 249 F.3d 658, 661–62 (7th Cir. 2001). While Rule 24(b) suggests that decisions on permissive intervention are committed to the discretion of the court, "[i]n exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." FED. R. CIV. P. 24(b)(3).

242. Prete v. Bradbury, 438 F.3d 949, 953–54 n.6 (9th Cir. 2006); *see also* B.H. v. McDonald, 49 F.3d 294, 297 (7th Cir. 1995) (reviewing de novo the denial of a Rule 24(a) motion); Sierra Club v. Robertson, 960 F.2d 83, 85 (8th Cir. 1992) (adopting de novo review over intervention of right and adequate representation; citing cases in the Fifth, Sixth, Ninth, Eleventh, and D.C. Circuits; and rejecting cases applying the abuse of discretion test in the First, Second, Third, and Fourth Circuits). Certain Rule 24(a) inquiries are still reviewed for abuse of discretion. *E.g.*, Stupak-Thrall v. Glickman, 226 F.3d 467, 472 (6th Cir. 2000)

do not differentiate between the two categories continue to apply the abuse of discretion standard.[243] Although both decisions made under Rule 24 are reviewed under the same standard, the application of that standard may vary. The abuse of discretion standard is simply not the same: the reviewing court gives less deference to a district court decision on intervention of right than to a decision on permissive intervention.[244]

III. RULE 19 DECISIONS SHOULD BE REVIEWED FOR ABUSE OF DISCRETION

This part examines the question of which standard of review is appropriate for Rule 19 determinations by applying the *Underwood* factors. The Supreme Court has listed several factors an appellate court should consider when deciding the proper standard for reviewing decisions that are arguably within the district court's discretion.[245] Although some of these factors point in opposite directions, the analysis overall demonstrates that Rule 19 decisions should be reviewed under the "abuse of discretion" standard.

Part III.A argues that Rule 19(a) and 19(b) decisions should be reviewed for abuse of discretion. Though the district court's discretion should be quite limited under Rule 19(a), the reasons for limiting discretion under Rule 19(a) do not exist under 19(b). Thus, the reviewing court should be more deferential to the district court's decision to dismiss or proceed with the litigation. Part III.B concludes that, even if there may be legal conclusions made by the district court throughout its Rule 19(b) inquiry, the Supreme Court's shift toward consolidating standards of review supports reviewing the entire analysis for abuse of discretion.

A. The Underwood *Factors Weigh in Favor of the Abuse of Discretion Standard of Review*

The Supreme Court stated in *Underwood* that, to determine the appropriate standard of review, the appellate court should first look to the text of the statute or rule and its appellate history.[246] The text of Rule 19 does not specifically mention how decisions analyzing the required joinder of parties should be reviewed, nor does it prescribe the amount of deference a reviewing court should give a district court's party joinder decisions.[247]

(noting that the timeliness element, "under both types of intervention," is reviewed for abuse of discretion only).

243. *E.g.*, Geiger v. Foley Hoag L.L.P. Ret. Plan, 521 F.3d 60, 64 (1st Cir. 2008); *In re* Holocaust Victim Assets Litig., 225 F.3d 191, 197 (2d Cir. 2000); Kleissler v. U.S. Forest Serv., 157 F.3d 964, 969 (3d Cir. 1998).

244. The First Circuit emphasized that adopting the abuse of discretion standard for both Rule 24(a) and Rule 24(b) decisions "does not mean that the scope of review is identical"; instead, the "standard is 'more stringent' as applied to denials of intervention of right than as applied to denials of permissive intervention." Int'l Paper Co. v. Inhabitants of Jay, Me., 887 F.2d 338, 344 (1st Cir. 1989) (citing Harris v. Pernsley, 820 F.2d 592, 597 (3d Cir. 1987)).

245. *See supra* notes 152–67 and accompanying text.

246. *See supra* note 150 and accompanying text.

247. *See* FED R. CIV. P. 19.

While trial courts have been conducting some form of compulsory joinder analysis for centuries,[248] appellate courts have not developed a single practice for reviewing such decisions.[249] Thus, as the Supreme Court instructed, a court should weigh several different factors to determine the proper standard of review.[250] For the sake of clarity, this Note analyzes all of these factors as they pertain to Rule 19(a) decisions before discussing them in the context of Rule 19(b).

1. Reviewing Courts Should Afford Only Slight Deference to a District Court's Rule 19(a) Determination

The *Underwood* factors listed by the majority as well as those mentioned by Justice White in his dissent weigh against reviewing a Rule 19(a) decision for abuse of discretion, or at least against giving much deference to the lower court.[251] The text of Rule 19(a) does not allow much room for the district court to choose among different options. Some of the determinations are mandatory if the prerequisite conditions are met: in its current form, the provision includes "must" three times.[252] On the other hand, Rule 19(a)(1)(B)(i) includes the phrase "as a practical matter," which seems to run counter to the very specific language throughout the rest of Rule 19(a).[253]

An examination of how appellate courts review decisions made under rules related to Rule 19 provides little help. The majority of decisions made under party joinder rules in federal courts are reviewed for abuse of discretion.[254] However, the decisions on intervention of right (the most analogous determination to whether a party is required) are often reviewed without deference under the de novo standard.[255] Even those courts that review for abuse of discretion do not give the lower court much discretion on the question of intervention of right.[256]

The third factor—which judicial actor is in a better position to decide the issue—depends on the specific inquiry made within a broader compulsory joinder analysis. The majority of determinations made under Rule 19(a) involve legal conclusions, such as whether the absent party claims an

248. *See supra* note 15 and accompanying text.
249. *See supra* notes 211–13 and accompanying text.
250. *See supra* note 152 and accompanying text.
251. *See supra* notes 152–57, 164–67 and accompanying text.
252. *See* FED. R. CIV. P. 19(a).
253. *See id.*
254. *See supra* notes 237–39 and accompanying text.
255. *See supra* note 242 and accompanying text. *Compare* FED. R. CIV. P. 24(a)(2) (stating that "the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest"), *with id.* 19(a)(1)(B)(i) (stating that a "person . . . must be joined as a party if . . . that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may . . . as a practical matter impair or impede the person's ability to protect the interest").
256. *See supra* notes 243–44 and accompanying text.

interest or whether that interest might be impaired or impeded.[257] The appellate court is in just as good of a position as, if not better than, the district court to make these decisions based on some interpretation of law.[258] Other questions, such as what constitutes "substantial" in "substantial risk" of inconsistent obligations for the defendant, are better answered by the district court.[259]

As to the fourth factor, the courts have shown that it is not impracticable to formulate rules to help determine whether an absentee is a required party. Because many of the provisions within Rule 19(a) are really legal determinations,[260] appellate courts have developed some practical rules. For example, it is now well established that joint tortfeasors are not required parties.[261] In some cases it may be difficult to establish workable rules, but Rule 19 jurisprudence shows that it is not impossible. Certain decisions may evolve from being within a district court's discretion to a legal rule.[262] An appellate court should defer to the district court only when the issue truly is novel, fleeting, and resists generalization, whereas a decision that easily falls within an established general rule (and could be considered a legal conclusion) should be reviewed without deference. Thus, this factor points in both directions as well.

The risk of an erroneous decision is not very great, which allows for a more deferential standard. An absent party, wrongfully deemed not to be a required party, may be able to intervene under Rule 24 to avoid any prejudice to itself or the other parties.[263] If the court decides the absentee is necessary and joinder is feasible, the litigation proceeds. Finding that an absent party's joinder is required only becomes important if the absentee cannot be joined, in which case the decision whether the court should dismiss or continue the litigation becomes critical. But as to the Rule 19(a) determination itself, there is little consequence.[264]

The two factors mentioned in Justice White's dissent cut against one another.[265] A common interpretation of the words "required party" suggests a matter of law. If a person is required to run, that person almost certainly does not have the option to walk. A requirement, by definition, proscribes any discretion. Finally, appellate consistency, uniformity, and short-term guidance to lower courts cannot all be had in this case. All circuit courts that have addressed the standard of review for Rule 19(a)

257. *See supra* notes 50–56 and accompanying text.

258. *See supra* note 138 and accompanying text.

259. *See supra* notes 160–61 and accompanying text (summarizing the Supreme Court's finding that a district court is in a better position to answer the "substantially justified" question within the attorney fee-shifting inquiry).

260. *See supra* notes 50–56 and accompanying text.

261. *See supra* note 130 and accompanying text.

262. *See supra* note 183.

263. *See* FED. R. CIV. P. 24.

264. If the district court errs in concluding that the absentee is a required party under Rule 19(a) but still allows the litigation to continue without the required absent party, the reviewing court can easily reverse and set aside any verdict rendered at the district court level. *E.g.*, Temple v. Synthes Corp., 498 U.S. 5, 8 (1990).

265. *See supra* notes 164–67 and accompanying text.

decisions have concluded that an abuse of discretion standard is appropriate.[266] Appellate uniformity would require all of the circuit courts to review Rule 19(a) decisions for abuse of discretion. However, an abuse of discretion standard means that the district court can choose from a range of acceptable options without being reversed.[267] Thus, district courts could reach opposite conclusions under Rule 19(a) with similar facts, yet both could be affirmed, severely limiting appellate consistency and short-term guidance for lower courts.

The majority of the *Underwood* factors seem to lean toward the de novo standard of review. There are enough reasons, however, to give the district court decision at least some deference. Thus, the abuse of discretion standard is appropriate, but little to no deference should be given to quasi-legal conclusions—questions for which appellate courts have established general rules or might be in as good of a position as the district court to decide. This part now turns to the proper standard of review for a district court's decision under Rule 19(b) to dismiss or continue the litigation without the absent required party.[268]

2. Rule 19(b) Decisions Fall More Squarely Within the Discretion of the District Court

While many of the *Underwood* factors seemed to point toward both de novo and deferential review of Rule 19(a) rulings, the same factors almost uniformly demonstrate a need for district court discretion under Rule 19(b). Like Rule 19(a), 19(b) lacks an explicit statement on the proper level of deference a reviewing court should give a district court's Rule 19(b) decision.[269] Because there is no agreement as to the proper standard of review for Rule 19(b) decisions,[270] the *Underwood* factors help determine which standard is more appropriate.

The first two factors—language of the rule and comparison to related rules within the statutory scheme—weigh in favor of reviewing a Rule 19(b) decision for abuse of discretion. First, the provision directs courts to consider whether "in equity and good conscience" the case should proceed, which implies a level of deference.[271] Rule 19(b) tells district courts to weigh a series of factors and determine which action is appropriate, whereas Rule 19(a) requires the court to join the absentee if any of those conditions are met.[272] The different language between the two provisions

266. *See supra* note 194.
267. *See supra* note 141 and accompanying text.
268. Although the next question in the three-step inquiry under Rule 19 is whether joinder of the absent required party is feasible, *see supra* note 48 and accompanying text, there is no question that matters of law concerning feasibility, such as subject matter jurisdiction, should be reviewed de novo by the appellate court. *See* Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., 73 F.3d 546, 577 (5th Cir. 1996).
269. *See* FED. R. CIV. P. 19(b).
270. *See supra* Part II.B.
271. *See supra* notes 4, 188 and accompanying text.
272. *See* FED. R. CIV. P. 19.

demonstrates that, if anything, a reviewing court should defer more to a district court's Rule 19(b) decision.

The fact-intensive inquiry required by Rule 19(b) puts the district court in a better position than the reviewing court to decide the issue of indispensability. This decision requires a careful examination of the facts and practicalities involved in the lawsuit.[273] The court weighs several factors together, ensuring that no single factor is dispositive.[274] Indeed, courts can consider factors not listed under Rule 19(b), and the rule encourages courts to be creative when shaping relief and issuing its final judgment.[275] The flexible nature of Rule 19(b) requires some deference to the district court.

The very case-specific nature of the indispensability analysis makes it exceedingly difficult for courts to develop general rules governing Rule 19(b) decisions. Whether an absent party is indispensable "can only be determined in the context of particular litigation."[276] There is no "prescribed formula."[277] The Advisory Committee specifically wanted to shift courts' focus away from the "technical or abstract character of the rights or obligations" toward more "pragmatic considerations."[278] While the courts of appeals have established some rules governing indispensability determinations,[279] it is generally impractical to generate rules of decisions for future cases because Rule 19 requires courts to look at the specific facts of each case.

Although all the factors mentioned above support adopting the abuse of discretion standard of review, the final factor—consequences of an erroneous decision—weighs against the deferential standard. An inappropriate dismissal cheats the plaintiff of its lawful power to bring an action in the forum of its own choosing.[280] In some cases, it could prevent the plaintiff from finding any relief at all.[281] Alternatively, the court may mistakenly decide to continue the litigation, greatly harming the named defendant(s). In the context of sovereign immunity, the district court's error may implicate important comity concerns, effectively diminishing the privilege itself.[282] Of course, once a district court has issued its ruling on the merits of the claim, there is the societal interest in finality of judgments, as well as the judicial interest in the integrity of its processes and the respect accorded its decrees.[283] For these reasons, a reviewing court may hesitate to reverse a final, valid judgment even though it would reach a different result. Nevertheless, there are interests, whether of the parties, of

273. *See supra* note 222 and accompanying text.
274. *See supra* note 76 and accompanying text.
275. *See supra* notes 44, 64, 70–71 and accompanying text.
276. *See supra* note 85 and accompanying text.
277. *See supra* note 86 and accompanying text.
278. *See supra* notes 43, 220–24 and accompanying text.
279. *See supra* note 130.
280. *See supra* note 1 and accompanying text.
281. *See supra* note 9 and accompanying text.
282. *See supra* notes 121–22 and accompanying text.
283. *See supra* note 117 and accompanying text.

the legal system, or of society at large,[284] that are so important that they severely limit the district court's discretion under Rule 19(b).

The common understanding of law and discretion suggests reviewing for abuse of discretion. While a determination that a party is indispensable has a somewhat legal effect (that is, the litigation is dismissed), that decision only comes after weighing numerous factors. The question of indispensability is not an easy one to answer, and such a difficult, multifarious decision should be at least somewhat discretionary. Furthermore, the large majority of circuit courts review Rule 19(b) decisions under the abuse of discretion standard.[285] While appellate consistency may suffer because of more deferential review, there would finally be uniformity among the federal courts of appeals.

Finally, determining that Rule 19(b) decisions are conclusions of law does not automatically warrant de novo review. The Sixth Circuit may not be wholly incorrect in stating that a Rule 19(b) decision "represents a legal conclusion."[286] However, the Supreme Court made clear in *Cooter & Gell* that such decisions may not be "*purely* legal questions" but are instead "issues rooted in factual determinations."[287] Much like the sufficiency inquiry under Rule 11, whether a party is indispensable under Rule 19(b) could be considered a "fact-dependent legal standard."[288] Such determinations are "close calls," and deference is appropriate.[289]

Almost all of the *Underwood* factors support the abuse of discretion standard of review for Rule 19(b). This does not mean that the district court has complete discretion: it can still abuse its discretion if it fails to consider one or more of the factors listed under the Rule.[290] Still, there are many reasons for giving deference to the district court's Rule 19(b) decision.

B. A Unitary Standard of Review for All Rule 19 Decisions Follows Supreme Court Precedent

Although the analysis above shows that an appellate court should defer less to a district court's Rule 19(a) determination than to the lower court's Rule 19(b) decision, the reviewing court should still apply the deferential abuse of discretion standard to all Rule 19 decisions. The Supreme Court wants reviewing courts to be more efficient when stating and applying standards of review.[291] Adopting one standard of review for all Rule 19 decisions achieves this goal while still accounting for the various particular issues within the larger compulsory joinder inquiry: a district court abuses

284. *See supra* note 117 and accompanying text.
285. *See supra* note 195 and accompanying text.
286. *See supra* note 228 and accompanying text.
287. *See supra* note 179 and accompanying text (emphasis added).
288. *See supra* note 180 and accompanying text.
289. *See supra* note 182 and accompanying text.
290. *See supra* note 142 and accompanying text.
291. *See supra* note 184 and accompanying text.

its discretion when a finding of fact is clearly erroneous and when it makes an error of law.[292]

In *Cooter & Gell*, the Court applied a single abuse of discretion standard of review to all aspects of the district court's determination for sanctions under Rule 11.[293] It did this after acknowledging that the determination involved all three types of issues: factual, legal, and discretionary.[294] Decisions made by a district court undergoing a Rule 19 analysis necessarily consist of factual, legal, and discretionary matters as well. There is no reason not to similarly apply the single standard of review to Rule 19 determinations.

CONCLUSION

The compulsory party joinder analysis has not always been consistent in federal courts. Rule 19 in its amended form attempts to provide some uniformity to the analysis. Having two distinct approaches for reviewing Rule 19 decisions is at odds with that goal. In *Underwood*, the Supreme Court listed several factors that courts should balance to determine whether the de novo or abuse of discretion standard applies. Although these factors are not exhaustive, they should guide appellate courts on the question of the proper standard of review.

An examination of Rule 19(a) in light of these factors shows that the reviewing court should grant only slight deference to the district court. Because the Rule and its application have developed over time, appellate courts are now just as capable of making many of the determinations that once were within district courts' discretion. The pragmatic analysis required under Rule 19(b)—specifically the weighing of a variety of factors—smacks of a decision that calls for discretion on the part of a district court. For that reason, its decision should be given deference. A reviewing court should not afford all Rule 19 decisions by the district court the same amount of deference, but it should still apply only one standard of review: abuse of discretion.

292. *See supra* notes 174, 176–77 and accompanying text.
293. *See supra* note 173 and accompanying text.
294. *See supra* note 171 and accompanying text.