Missouri Law Review

Volume 43
Issue 3 *Summer 1978*

Article 8

Summer 1978

Civil Procedure--Compulsory Joinder under Missouri Rule 52.04(a)--Persons Needed for Just Adjudication--State ex rel. Emcasco Insurance Co. v. Rush

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CIVIL PROCEDURE—COMPULSORY JOINDER UNDER MISSOURI RULE 52.04(a)—PERSONS NEEDED FOR JUST ADJUDICATION

State ex rel. Emcasco Insurance Co. v. Rush [1]

Charles Davis was involved in an automobile accident while driving a car owned by Donald and Shirley Carter. Davis and one passenger were killed and and two other passengers were injured. The Carter's insurer, the Emcasco Insurance Company (Emcasco), sought a declaratory judgment concerning its rights and liabilities under the Carter's insurance policy. Emcasco specifically alleged that the driver Davis was driving without the Carter's permission and that therefore he was not covered under the policy's omnibus clause. In the declaratory judgment action, the two injured passengers, the wife and parents of the deceased passenger, and the estate of the deceased driver were named as defendants. On motion of one of the injured passengers, the trial court ordered that the Carters also be joined in the declaratory judgment action. Emcasco objected to joinder of the Carters and sought a writ of mandamus to compel the trial court to vacate its order. The St. Louis District of the Missouri Court of Appeals issued the writ and held that the insured owners were neither "necessary" nor "indispensable" parties within the meaning of Missouri Rule of Civil Procedure 52.04 [2] and that therefore their joinder could not be compelled.

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1. 546 S.W.2d 188 (Mo. App., D. St. L. 1977).
2. Mo. R. Civ. P. 52.04 provides:
JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION
(a) PERSONS TO BE JOINED IF FEASIBLE. A person shall be joined in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant.
(b) DETERMINATION BY COURT WHENEVER JOINDER NOT FEASIBLE. If a person as described in subdivision (a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent party being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties;

The principles of compulsory joinder focus on the relationship of a nonparty with a pending lawsuit. Probably the most influential case in the development of compulsory joinder rules was *Shields v. Barrow.*[3] The United States Supreme Court recognized two types of parties in the context of compulsory joinder: "necessary" parties and "indispensable" parties. It defined necessary parties as those persons whose interest in litigation was sufficiently substantial that joinder should be compelled in order to do complete justice.[4] Indispensable parties were defined as those persons whose interest in litigation was so substantial that an action should be dismissed rather than carried on in their absence.[5] Subsequent courts have relied heavily on these definitions and have set up categories of potential parties.[6] The courts have found that in certain situations an absentee's interest was so closely related to a pending action that he *must* be joined. Such persons were designated indispensable parties. In other situations the absentee's relation to the lawsuit was such that the courts said that he *should* be joined, but if his joinder was not feasible, it could be excused and the lawsuit proceed in his absence.[7] These persons were labeled necessary or conditionally necessary. Such labels would have retained meaning had the courts used them after a thorough analysis of the facts to determine an absentee's relation to the lawsuit.[8] Instead, the courts have used the labels as a substitute for

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second, the extent to which by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder. . . .

3. 58 U.S. (17 How.) 129 (1854).

4. *Id.* at 139.

5. *Id.*

6. *Not proper:* persons who do not belong in the lawsuit and who may not be parties.

Proper: persons who may be a party to a lawsuit but whose joinder is not compulsory.

Necessary: persons who should be joined but if their joinder is not feasible then the court can still proceed.

Indispensable: persons who must be joined and if such is not feasible then the court must dismiss the case.

7. A court might be unable to join an absentee due to lack of service of process, destruction of subject matter jurisdiction (federal courts only), or objection to venue (in Missouri improper venue is not a recognized basis to refuse joinder).

8. *See* Willard, *Compulsory Joinder of Unwilling Plaintiffs in Civil Actions,* 25 Mo. L. Rev. 63, 66 (1960). Missouri courts seem to use the word "necessary" in the same sense as the federal courts use the word "indispensable," *i.e.,* meaning those persons who *must* be joined before the court will proceed with the action. *See also* Bank of California v. Superior Court, 16 Cal. 2d 516, 106 P.2d 879 (1940). The court labeled the absentee beneficiaries of a will as "necessary" parties, but then failed to require joinder of those absentee beneficiaries who could have been joined because others were not subject to the court's jurisdiction.

analysis and have relied upon characterizations of the abstract nature of the absentee's interest.

Neither adoption of the code joinder rules nor promulgation of the original Federal Rule of Court Procedure 19 alleviated the courts' reliance on labels.[9] In practice the rules' wording tended to strengthen the notions that an absentee "wears a label"[10] and that the conceptual test of "joint interest"[11] distinguished between permissive joinder and compulsory joinder. The reliance upon labels became so great that one decision suggested that the category of "indispensable" parties was a matter of substantive law and could not be altered by procedural rules.[12]

Although the traditional approach of using labels did not necessarily lead to undesirable results, it was unsatisfactory in that it did not take into consideration such factors as probability of future relitigation, harassment of defendants, protection of the absentee's interest, and the adequacy of the relief, all of which are relevant to the issue of compulsory joinder.[13] In 1966 Federal Rule of Civil Procedure 19 was extensively amended to eliminate the confusion which has surrounded the old rule 19 by eliminating the categories adopted from *Shields v. Barrow*.[14]

Labeling the beneficiaries as "necessary" potentially represented two different types of parties: persons who have an interest and may be joined but who do not have to be joined, *i.e.*, a "necessary" party is a proper party whose joinder would be permissible but not compulsory; and persons who should be made a party because of their interest, but in the event that joinder is not accomplished, the court may still proceed in their absence. Use of the label "necessary" to classify the absentees is in effect meaningless.

9. C. WRIGHT, LAW OF FEDERAL COURTS § 70 (3d ed. 1976). *See also* Advisory Committee's Notes to the 1966 Amendment to Rule 19, *reprinted in* 39 F.R.D. 89, 90 (1966), 28 U.S.C. Rule 19, at 7759 (1970).

10. C. WRIGHT, *supra* note 9, § 70. *But see* Fink, *Indispensable Parties and the Proposed Amendment to Federal Rule 19*, 74 YALE L.J. 403 (1965).

11. The "joint interest" test was not a workable division between compulsory joinder and permissive joinder. One would hardly expect that, under such a test, it would uniformly be held that joint tortfeasors were merely "proper" parties and their joinder was entirely optional, or that joint obligees would be thought to be "indispensable" while joint obligors were quite possibly only "proper" parties. The ancient concept of "joint interest" simply made no sense when applied to questions such as whether a majority of a board of directors must be parties to a suit to compel declaration of a dividend, or whether, in an action against a local federal officer, his superior in Washington must be joined.

C.WRIGHT, *supra* note 9, at 336 (footnotes omitted).

12. Provident Tradesmens Bank & Trust Co. v. Lumbermens Mut. Cas. Co., 365 F.2d 802 (3rd Cir. 1966), *vacated sub nom.* Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968).

13. *See* Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 MICH. L. REV. 327 (1957).

14. *Id.* at 483; Hazard, *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 COL. L. REV. 1254 (1961); F. JAMES, CIVIL PROCEDURE §§ 9.14-.21

The amended rule 19, which Missouri adopted in Missouri Rule of Civil Procedure 52.04,[15] reflected a new approach to compulsory joinder without changing the underlying principles.[16] Under the new approach the persons traditionally classified as necessary or indispensable parties generally will fall into the category of "persons needed for just adjudication."[17] However, courts now are required to analyze the facts of each case and to articulate the considerations and factors utilized in deciding whether a person should be joined.[18] It is improper for a court to rely blindly on a characterization of the abstract nature of the absentee's interest.[19]

As is reflected by the structure of the new rule, analysis of compulsory joinder problems is a two step process. The court first must determine whether the absentee is a person needed for just adjudication.[20]

(2d ed. 1977). *See also Developments in the Law–Multiparty Litigation in the Federal Courts,* 71 HARV. L. REV. 874, 879-89 (1958).

15. The language of MO. R. CIV. P. 52.04 is the same as in FED. R. CIV. P. 19 except that references to jurisdiction and venue have been eliminated.

16. *See* Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 116 n.12 (1968).

17. The modern approach is more liberal than the old "joint interest" test and reflects an affirmative policy of bringing before the court all those interested persons as are needed for just adjudication.

18. The courts frequently use the term "pragmatic consideration" or "pragmatic inquiry" as shorthand for the procedure employed in applying rule 52.04. This is a logical analysis of all relevant facts needed to determine whether an absentee comes within the meaning of the rule followed by a step by step disclosure of that factual analysis. In Broussard v. Columbia Gulf Transmission Co., 398 F.2d 885, 888 (5th Cir. 1968), the court said:

> The new Rule 19 is designed to ameliorate the catechistic distinction between "necessary" and "indispensable" parties, which had sometimes subordinated logic and reality to historical encrustations. Under the present rule pragmaticals are to be the solvents of joinder problems, replacing former rigid terminological descriptions of parties. We are not to be pinioned by categorical imperatives. Instead, the effect on the parties and on the litigation process is to be the fulcrum of decision.

19. There is no precise formula for determining whether a particular nonparty must be joined under Rule 19(a). The decision has to be made in terms of the general policies of avoiding multiple litigation, providing the parties with complete and effective relief in a single action and protecting the absent persons from the possible prejudicial effect of deciding the case without them. By its very nature Rule 19(a) calls for determinations that are heavily influenced by the facts and circumstances of individual cases.

7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1604 at 35 (1972) (footnotes omitted). Furthermore, courts are not bound by typical fact-patterned situations in which judicial responses of joinder are fairly standard since the rule permits the court to reach decisions as the equities of the factual situation require. *Id.* §§ 1612-1624.

20. *See* MO. R. CIV. P. 52.04(a), *supra* note 2.

If the court finds that the absentee is needed for just adjudication then he must be joined if joinder is feasible. If joinder is not feasiable, then the second part of the rule comes into play. It provides factors which must be considered by the court in deciding whether to proceed without the absentee.[21] This note will concern the first section of the rule which sets out the factors which must be considered by the court in determining whether an absentee is needed for just adjudication.

In order for the court to determine whether an absentee is a person needed for just adjudication, it must make a pragmatic inquiry into the facts and determine whether one of the three tests provided in the new rule is met.[22] If the facts of the case reveal that any one of the tests is met, then the absentee must be joined if feasible. The first test is whether complete relief can be granted without joining the absentee.[23] In order for a court to make this determination, it must consider two interests. One is the interest of those persons already parties in having the court provide adequate relief.[24] If the court would find itself obligated to grant partial or hollow relief, the absentee meets the criteria for joinder set out in the rule.[25] The other interest concerns judicial economy. The public has an interest not only in granting adequate relief but also in avoiding repeated litigation of the same issues.[26]

The second test[27] is whether, as a practical matter, the absentee's interest in the lawsuit will be impaired by a disposition in his absence.[28] Although the language of the rule says that the absentee must claim an interest, it has been construed to mean only that the absentee need have

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21. Mo. R. Civ. P. 52.04(b).
22. 7 C. Wright & A. Miller, *supra* note 19, § 1604.
23. Mo. R. Civ. P. 52.04(a)(1).
24. *See* note 28 *infra.*
25. *See* Advisory Committee's Notes to the 1966 Amendment to Rule 19, *reprinted in* 39 F.R.D. 89, 91 (1966), 28 U.S.C. Rule 19, at 7759 (1970).
26. *See* Prestenback v. Employers' Ins. Co., 47 F.R.D. 163 (D. La. 1969). *See generally* Evergreen Park Nursing & Convalescent Home, Inc. v. American Equitable Assurance Co., 417 F.2d 1113 (7th Cir. 1969); Diamond Shamrock Corp. v. Lumbermens Mut. Cas. Co., 416 F.2d 707 (7th Cir. 1969); International Union of Operating Engineers, Local 103 v. Irmscher & Sons, Inc., 63 F.R.D. 394 (N.D. Ind. 1973); Bradley v. School Bd., 51 F.R.D. 139 (E.D. Va. 1970); Ford Motor Credit Co. v. Beard, 45 F.R.D. 523 (D.S.C. 1968); J.M.L. v. C.L., 536 S.W.2d 944 (Mo. App. D. St. L. 1976).
27. Mo. R. Civ. P. 52.04(a)(2)(i).
28. Considerations in 52.04(a) overlap with 52.04(b). Rule 52.04(a)(1) is similar to the third factor in 52.04(b) and rule 52.04(a)(2) is similar to the first factor in 52.04(b). Despite this significant coincidence, it is important to note that they have different purposes and therefore different construction. Rule 52.04(a) reflects an affirmative policy of bringing all interested persons before the court, whereas the object of rule 52.04(b) is to determine whether it is possible to go forward with an action despite the nonjoinder of someone whose presence is desirable but not feasible. *See* Bennie v. Pastor, 393 F.2d 1 (10th Cir. 1968); 3A Moore's Federal Practice ¶ 19.07-1[O] (2d ed. 1977).

an interest[29] and not disclaim it. However, it should be noted that not every interest is sufficient to compel joinder. An absentee must have such a direct claim upon the subject of the action that he will either gain or lose by direct operation of the judgment.[30] Although courts have not set up criteria for determining whether an absentee has a "direct claim," the courts have discretion to deny compulsory joinder if they find that there is only a remote or conjectural possibility that the absentee will be affected by the disposition of the case.

The language of the rule that requires that the absentee's interest be impaired "as a practical matter" does not mean that a court always may proceed without considering the potential effect on the absentee simply because he would not be bound by a judgment in the technical sense.[31] The focal point of this consideration is either the legal or practical effect on the absentee's interest[32] in the event the case is disposed of in his absence.

The third test[33] is whether those persons already parties in the lawsuit will be prejudiced by a disposition of the case without the absentee. If adjudication would leave a party in a position where an absentee could subject him to double or otherwise inconsistent liability, sufficient prejudice exists to warrant the absentee's joinder.[34]

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29. *See* Walton v. United States, 415 F.2d 121 (10th Cir. 1969); Yonofsky v. Wernick, 362 F. Supp. 1005 (D.N.Y. 1973); Annot., 22 A.L.R. Fed. 765, 795-97 (1975).

30. Bunting v. McDonnell Aircraft Corp., 522 S.W.2d 161 (Mo. En Banc 1975).

31. Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968).

32. *See* Hass v. Jefferson Nat'l Bank, 442 F.2d 394 (5th Cir. 1971). *See also* State Farm Mut. Auto. Ins. Co. v. Mid-Continent Cas. Co., 518 F.2d 292 (10th Cir. 1975) (monetary interest); English v. Seaboard Coast Line R.R., 465 F.2d 43 (5th Cir. 1972) (employment opportunity interest); Evergreen Park Nursing & Convalescent Home, Inc. v. American Equitable Assurance Co., 417 F.2d 1113 (7th Cir. 1969) (tort claim which could subject defendants to multiple suits); A. & M. Gregos, Inc. v. Robertory, 384 F. Supp. 187 (E.D. Pa. 1974) (interest in being able to perform the contract); International Union of Operating Engineers, Local 103 v. Irmscher & Sons, Inc., 63 F.R.D. 394 (N.D. Ind. 1973) (economic interest); Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92 (C.D. Cal. 1971) (contract rights); Bevan v. Columbia Broadcasting System, Inc., 293 F. Supp. 1366 (S.D.N.Y. 1968) (contract rights); O'Shea v. Binswanger, 42 F.R.D. 21 (D. Md. 1967) (economic interest); J.M.L. v. C.L., 536 S.W.2d 944 (Mo. App., D. St. L. 1976), (reputation interest and interest in being present at a determination as to the identity of natural parent).

33. *See* Mo. R. Civ. P. 52.04(a)(2)(ii).

34. *See* State Farm Mut. Auto. Ins. Co. v. Mid-Continent Cas. Co., 518 F.2d 292 (10th Cir. 1975); Diamond Shamrock Corp. v. Lumbermens Mut. Cas. Co., 416 F.2d 707 (7th Cir. 1969); International Union of Operating Engineers, Local 103 v. Irmscher & Sons, Inc., 63 F.R.D. 394 (N.D. Ind. 1973); Hodgson v. School Bd., New Kensington-Arnold School District, 56 F.R.D. 393 (W.D. Pa. 1972); Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92

In *Emcasco* the court correctly explained the background and mechanics of the approach called for in the new rule.[35] However, in applying the rule the court reverted to the traditional approach and used conclusory statements rather than making the required pragmatic considerations.[36] For example, the court said that complete declaratory relief could be afforded without joinder of the Carters.[37] The court's reasoning was that because Emcasco did not deny that the Carters were covered by the policy; the only issue was whether the driver Davis was covered, and this determination could be made without joining the Carters.

The court failed to refer to particular facts and failed to consider whether the relief granted would be partial or hollow. The court first should have considered the practical consequences of this decree should the Carters elect to relitigate the issue of permission. In addition, the interest furthered by the rule's first test[38] is not limited to the parties' interest in having complete relief but also includes the public's interest in avoiding repeated litigation on the same issue. A finding that Davis had permission would not bind the Carters; therefore, they could relitigate the issue. Apparently, this factor was not considered.

In considering the second and third tests,[39] the *Emcasco* court found that joinder was not required because the Carters did not have a sufficient interest relating to the subject of the action.[40] The court did not discuss what interest, if any, was present, nor did it discuss why that interest was not a "sufficient interest." The court justified its conclusion that the Carters were not "necessary" by relying on cases decided under the traditional approach to compulsory joinder.[41] These earlier cases held that when an insurer has not denied coverage of its insured, the insured was neither a "necessary" nor an "indispensable" party to a de-

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(C.D. Cal. 1971); Window Glass Cutters League v. American St. Gobain Corp., 47 F.R.D. 255 (W.D. Pa. 1969); Bevan v. Columbia Broadcasting Sys., Inc., 293 F. Supp. 1366 (S.D.N.Y. 1968); O_F_L_ v. M_R_R_, 518 S.W.2d 113 (Mo. App., D.K.C. 1974).

35. 546 S.W. at 195-96.

36. *See* note 18 *supra.*

37. 546 S.W.2d at 196.

38. *See* Mo. R. Civ. P. 52.04(a)(1), *supra* note 2.

39. *See* Mo. R. Civ. P. 52.04(a)(2)(i), 52.04(a)(2)(ii), *supra* note 2.

40. 546 S.W.2d at 196-97.

41. St. Paul Fire & Marine Ins. Co. v. Aetna Cas. & Sur. Co., 357 F.2d 315 (10th Cir. 1966); Northwest Cas. Co. v. Kirkman, 119 F. Supp 828 (M.D.N.C. 1954); Glen Falls Indem. Co. v. Fredericksen, 8 F.R.D. 55 (D. Neb. 1947); Ohio Cas. Ins. Co. v. Maloney, 44 F. Supp. 312 (E.D. Pa. 1942). Decisions which used labels are no longer controlling. If one were to analyze those cases using the modern approach, he probably would find that the facts are inadequate to make the required pragmatic considerations. Policy factors concerning compulsory joinder are more liberal today and reflect an affirmative policy of bringing all interested persons before the court.

claratory judgment proceeding.[42] The court's reliance on cases decided under the traditional approach is typical of the analysis employed by Missouri courts before the adoption of the new rule.[43] The *Emcasco* court was simply trying to categorize the Carters' interest; this is not proper under the modern approach.

Provident Tradesmens Bank and Trust Co. v. Patterson[44] is a leading case discussing the operation of the new rule. While it is known primarily for its discussion of whether a court should proceed whenever joinder is not feasible, the district court's analysis of the interests of the parties[45] is representative of the approach required by the first part of the rule.[46] The factual similarity to *Emcasco* makes the issues raised and analyzed representative of the types of factors that should have been considered in *Emcasco*. In *Provident* a collision between a truck and a borrowed car caused serious injuries and several deaths. The estate of one of the passengers sued the estate of the driver, Donald Cionci, in federal court. The estate of the truck driver and a surviving passenger brought actions in state court against Cionci and Edward Dutcher, the owner of the car. These two actions in state court were still pending when the federal action against Cionci's estate was settled for $50,000. Cionci's estate was insolvent. The passenger's estate then sought a declaratory judgment to determine whether the driver Cionci was covered by Dutcher's insurance policy, which had a $100,000 upper limit. The only defendants in the declaratory action were the insurance company and Cionci's estate. Dutcher was not made a party; his joinder would have defeated diversity. The district court found that the measure of Dutcher's protection under his insurance policy was dependent upon the outcome of the declaratory judgment action.[47] The court pointed out that Dutcher had an interest in the question whether he would be protected by his insurance policy up to the $100,000 maximum or whether he would have to share the policy's coverage with Cionci's estate. If

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42. *See* cases cited in note 41, *supra.*

43. Mo. R. Civ. P. 52.04 was amended April 21, 1972, and became effective December 1, 1972. Missouri cases prior to this date and federal cases prior to July 1, 1966, the amended date of Fed. R. Civ. P. 19, follow the traditional approach.

44. 390 U.S. 102 (1968).

45. 218 F. Supp. at 805-06.

46. Fed. R. Civ. P. 19(a) is the same as Mo. R. Civ. P. 52.04(a). *See* note 2 *supra.*

47. Although *Provident* is noted for its discussion of Rule 19(b), it has significance in the construction of Rule 19(a). When the Supreme Court said, "[w]e may assume, at the outset, that Dutcher falls within the category of persons who, under ... [Rule 19] (a), should be 'joined if feasible,'" one can infer that the Court recognized and approved the district court's analysis of Dutcher's interest. 390 U.S. at 108.

Dutcher had to share his limited liability coverage with Cionci's estate, the policy would be worth less to him than if he had it all to himself.

The court's analysis of Dutcher's interest exemplifies the modern approach contemplated by rule 52.04 to determine whether an absentee "has an interest." If the court finds that the absentee by reason of his interest is a person needed for just adjudication, the absentee must be joined if his joinder is feasible. If joinder is not feasible, the court must then use the factors set out in rule 52.04(b) to determine whether in equity and good conscience the action should proceed in his absence.

The factual similarity between *Provident* and *Emcasco* makes the issues raised and analyzed in *Provident* representative of the issues that should have been considered in *Emcasco.* Before the *Emcasco* court could determine the Carters' interest in the lawsuit, it should have considered such issues as: whether the insurance policy had a maximum liability coverage for a single accident; the maximum liability coverage; the total amount of potential claims arising out of the accident; whether, as a practical matter as opposed to a mere remote possibility, the Carters could be liable under some principle of vicarious liability; and whether the Carters openly disclaimed their "interest." Without knowledge of such or similar facts, the court cannot properly justify a conclusion whether or not the Carters had an "interest" in the lawsuit. When the court said that the "Carters . . . have no sufficient 'interest relating to the subject of the action,' "[48] it could not be applying the modern approach required by the new rule.[49]

Although the court correctly laid out the mechanics of the new rule, it reverted in application to the tradtional approach of compulsory joinder by using conclusory statements and labels. The modern approach requires the court to disclose facts that demonstrate the existence or nonexistence of the three tests provided in rule 52.04(a) before determining whether the absentee is a person needed for just adjudication. Had the *Emcasco* court attempted to analyze the facts presented, it would have discovered that the facts were inadequate to make a pragmatic analysis and therefore insufficient to support a finding whether the Carters were "necessary" parties.[50] The court of appeals should have remanded *Emcasco* for further inquiry into the relevant facts.[51]

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48. 546 S.W.2d at 196-97.

49. *Accord,* Le Beau v. Libby-Owens-Ford Co., 484 F.2d 798 (7th Cir. 1973); Wright v. First Nat'l Bank, 483 F.2d 73 (10th Cir. 1973); Kingsley v. Burack, 536 S.W.2d 7 (Mo. En Banc 1976); Shaffer v. Dalrymple, 507 S.W.2d 65 (Mo. App., D.K.C. 1974).

50. *See* Kingsley v. Burack, 536 S.W.2d 7 (Mo. En Banc 1976).

51. *Id.*