AN EXAMINATION BEFORE AND BEHIND THE "ENTIRE CONTROVERSY" DOCTRINE

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I. INTRODUCTION

I have been provided a set of decisions of the New Jersey courts compiled by Eric R. Posmantier of Rutgers (Camden) Law School, acting under the direction of Professor Allan Stein. I have carefully examined these decisions, but I have not gone outside them. The pivotal decision resulting in the present "Entire Controversy" rule is *Cogdell v. Hospital Center at Orange*.[1] The New Jersey decisions before *Cogdell* are entirely consistent with a more limited set of preclusion rules, generally referred to as the law of res judicata.[2]

It may be helpful at the outset to state my conclusions. First, *Cogdell* itself could have been decided on the basis of standard rules of res judicata.

Second, the "Entire Controversy" doctrine is unintelligible to lawyers, the people who must make the crucial decisions in giving shape to a complex civil litigation. There is no such thing *ex ante*—that is before dust in litigation has begun to settle—as *an* entire controversy. Rather, there are immediate and obvious controversies but also secondary controversies and contingent controversies. Most legal controversies, whether primary or secondary, will settle if the courts will leave them alone. Moreover, until the immediate and obvious controversies are resolved, by settlement or trial, it cannot be determined whether the secondary and contingent controversies will mature into actual legal disputes. Only upon such a shakedown will it be possible to tell what components of dispute will become involved in "the" controversy and what ones will become irrelevant or will resolve themselves. Related to the foregoing, the only vantage point from which a multi-party, multi-issue controversy can be viewed as "entire" is from the seat of the highest court that eventually entertains the case. In New Jersey this is the state supreme court, which necessarily sees lower court procedural problems *ex post*. Everyone else views the case in live, incomplete and plastic form.

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1. 116 N.J. 7, 560 A.2d 1169 (1989).
2. *See generally* RESTATEMENT (SECOND) OF JUDGMENTS (1982).

This may explain why the "Entire Controversy" doctrine may seem so sensible to the Supreme Court while being unintelligible to judges and lawyers in the courts below.

In consequence of the opacity of the "Entire Controversy" doctrine from everywhere but the final resting place of litigation, the doctrine introduces horrendous uncertainty into complex civil litigation. The doctrine holds that a person who could make a claim against anyone connected with a transaction, but who omits to make the claim in the first lawsuit filed, is at risk of forfeiting the claim. What does a rational litigant do, given this risk? Of course, the litigant files every conceivable claim against every conceivable target. Given the decision in *Circle Chevrolet Co. v. Giordano, Hallaran & Ciesla*,[3] this precaution must be taken against the lawyers employed in the principal litigation, considering the possibility that they might have forgotten something.[4] But this leads to the inference that the "Entire Controversy" doctrine, in search of reducing litigation, is as likely to promote litigation that otherwise would never eventuate.

Third, the standard rules of res judicata do as much as judicially administered rules sensibly can do to bring litigation to an end. In this connection, it should be recognized that the overwhelming number of civil suits are resolved by settlement, *i.e.*, by a decisional process in which judges do not participate at all or in which judicial pronouncements are peripheral. This pattern holds for secondary and tertiary disputes as well as issues of primary liability. There is no obvious reason for disturbing this pattern.

The standard rules of res judicata employ essentially three predicates for preclusion. The first predicate is the identity of an antagonist. This is the predicate in the rule of claim preclusion. Claim preclusion bars a claimant from a second litigation against the antagonist he has already sued.[5] An antagonist is a specific person identified in the pleadings, not an unnamed contingent target. The second predicate for preclusion under standard rules of res judicata is actual judicial determination, *i.e.*, issue preclusion resulting from the adjudication. A party is precluded from relitigating an issue of law or fact that the courts have already adjudicated.[6] A party knows that he has

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3. 142 N.J. 280, 662 A.2d 509 (1995).

4. This would require either that the lawyer in the principal case bring a contingent claim against himself or that the client be instructed to retain separate counsel to do so. The first course of action involves obvious conflict of interest. The second course of action involves an infinite regress.

5. *See* RESTATEMENT (SECOND) OF JUDGMENTS §§ 17-26.

6. RESTATEMENT (SECOND) OF JUDGMENTS §§ 27-29.

litigated something and has available information as to the identity of the issue involved.

The third predicate in standard res judicata doctrine is a set of various legal relationships conventionally called "privity." These are relationships of a procedural or substantive character between the party that is precluded and the party he subsequently tries to sue. Most all of these legal relationships involve an obligation of indemnity, contribution, respondeat superior or the like between the original party in the litigation and the third party subsequently being sued. By virtue of these relationships, the claimant is under various circumstances also precluded against the third party. These relationships are analytically the most difficult aspects of standard res judicata rules.[7]

Under standard res judicata rules the predicates leading to preclusion are ordinarily fully apparent to the litigants from the inception of litigation. That is, they are apparent *ex ante* in an adjudication and not merely *ex post*. The standard rules of claim preclusion require a claimant to fire at the opposing party all available legal ammunition, and require also that the opposing party fire back all available legal ammunition. The standard rules of issue preclusion require that a party who has once litigated an issue ordinarily cannot litigate it again against someone else. The rules of preclusion based on "privity" are essentially backstops for the rules of claim and issue preclusion. That is, most all of the cases invoking "privity" involve a claimant who is making a second attempt to assert a claim he has already failed to establish.

Finally, the "Entire Controversy doctrine" is not only opaque to very good lawyers and judges, but it is, in the proverbial phrase, a trap for the unwary among merely average lawyers.

With these conclusions in mind, I now address the precedents for the entire controversy rule announced in *Cogdell*. As historical antecedents of this rule they are a weak reed indeed. One subset consists of decisions prior to the 1947 Constitution, the other the decisions thereafter.

II. DECISIONS PRIOR TO THE 1947 CONSTITUTION

The cases in the first subset were decided before adoption of the modern New Jersey Constitution in 1947 and deal primarily with problems that were made obsolete by that Constitution. Most of problems arose from the old division between law and equity, procedures that were administered by

7. *See* RESTATEMENT (SECOND) OF JUDGMENTS §§ 39-61 (1982).

separate courts prior to 1947. Some of the cases arose from difficulty with the scope of a "cause of action" under the old code pleading system or with the necessary party rule as it was formerly understood.

Carlisle v. Cooper[8] involved the question of whether, when a court of equity is asked to enjoin a nuisance, the plaintiff must first have established his property right through an action at law, in which there was a right to a jury. The antecedent of this problem was the tradition that, affirmative in disputes over real property, the question of title must be resolved on the law side, with a jury deciding the facts, rather than by the chancellor sitting without a jury. The chancellor could proceed directly only if there had been a prior action at law, or if the property right was not disputed and only the matter of remedy was presented to the court of chancery. However, when the court of equity could so proceed, it could adjudicate monetary relief as well as the terms of the injunction. This authority was often called "equitable clean-up."[9] Another term to describe this authority of a chancery court was resolution of the "entire controversy." Obviously, however, the use of the term "entire controversy" in this context has nothing to do with compulsory joinder of parties.

Broad Street National Bank v. Holden[10] involved a problem under the necessary party rule. The suit was for an accounting by one beneficiary of an estate against the executor, where the defendant objected to the plaintiff's failure to join the other beneficiaries. The court concluded that dismissal was not necessary and directed that the bill be held in suspense until the other beneficiaries were made parties. This was a merely nominal correction and had no effect on the rights of the persons who were already parties. Moreover, unlike the "Entire Controversy" doctrine subsequently fashioned, the failure to join the absentees would not preclude the plaintiff from later suing the parties who had not been joined. Still further, when the necessary party objection *is* sustained, the result is dismissal of the action against the present parties (requiring the plaintiff to start over), not preclusion against the parties who had not been joined.[11]

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8. 21 N.J. Eq. 576 (E. & A. 1870).

9. *See* A. Leo Levin, *Equitable Clean-Up and the Jury: A Suggested Orientation*, 100 U. PA. L. REV. 320 (1951).

10. 109 N.J. Eq. 253, 156 A. 827 (1931).

11. *See* John W. Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 MICH. L. REV. 327, 483 (1957); Geoffrey C. Hazard, Jr. *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 COLUM. L. REV. 1254 (1961).

Smith v. Red Top Taxicab Corp.[12] presented the question of whether a plaintiff injured in an automobile accident had one "cause of action" for personal injury and a second cause of action for economic loss, or one cause of action for both. The same problem arose in practically every state in the union once automobile accidents became common, with resulting injury to person and damage to property. In *Red Top*, it was held that there was one cause of action, in accord with the resolution of that question which had been reached in most other states.[13] Since the plaintiff in *Red Top* had in fact brought two suits, no question of preclusion was presented—not even a question of claim preclusion. However, the court ordered the plaintiff to dismiss or abate one of the suits.

Mantell v. International Plastic Harmonica Corp.[14] was essentially like *Carlisle v. Cooper*, except that it involved claims for injunction and damages arising out of a contract transaction rather than a dispute over property. The problem again was the scope of equity jurisdiction to resolve the "entire controversy" between two parties, and not whether there was any preclusive effect in regard to other parties.

III. DECISIONS AFTER 1947

The 1947 New Jersey Constitution merged law and equity into one court having comprehensive jurisdiction but organized in Equity and Law Divisions. "Merger" gave rise to a series of procedural problems that the courts readily resolved.

Steiner v. Stein,[15] decided in 1949, was like *Carlisle* and *Mantell*. It involved the appropriate procedure where a plaintiff seeks both a legal and an equitable remedy. The court in *Steiner* reviewed the pre-1947 practice and then addressed how the problem should be resolved under the new Constitution and the Rules of Civil Procedure. (The new Rules, of course, were modeled on the Federal Rules of Civil Procedure.) The holding was that, there being no issue concerning which jury trial was a prerequisite, the Equity Division had authority to determine all issues arising in the litigation.[16] That is, the Equity Division had authority to decide "the entire controversy" rather than remanding part of it to the other division of the

12. 111 N.J.L. 439, 168 A. 796 (1933).
13. *See* FLEMING JAMES, JR., ET AL., CIVIL PROCEDURE § 9.3 (4th ed. 1992).
14. 141 N.J. Eq. 379, 55 A.2d 250 (1947).
15. 2 N.J. 367, 66 A.2d 719 (1949).
16. *Id.* at 380, 66 A.2d at 725-26.

court. But the controversy involved only litigation between the two immediate parties.

Massari v. Einsiedler[17] involved another variation on the problem of joinder of causes of action under the "merged" procedure under the new Constitution. The problem in *Massari* was whether a defendant who had lost a suit for damages on a contract could later bring suit to reform the contract.[18] The court properly answered that question in the negative.[19] It reviewed the old equity precedents in which such a second suit had been permitted, but pointed out that the very purpose of the new merged procedure under the 1947 Constitution was to require adjudication of all claims between the parties, including claims that under the old procedure would have been affirmative defenses—in this case, the defense of mistake.[20]

The court in *Massari* used the term "entire controversy," but again in the context of defining the law of res judicata. Under the modern law of res judicata—that is, the law since merger of law and equity—any contention that can reduce or avoid a claim must be asserted as defense or counterclaim, and failure to do so results in claim preclusion. This rule is set forth in Restatement (Second) of Judgments Section 22(2) as follows:

> A defendant who may interpose a claim as a counterclaim in an action but fails to do so is precluded, after the rendition of judgment in that action, from maintaining an action on the claim if:
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> ...
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> (b) The relationship between the counterclaim and the plaintiff's claim is such that successful prosecution of the second action would nullify the initial judgment or would impair rights established in the initial action.[21]

It will be noted that, as in the other cases employing the term "entire controversy," the court in *Massari* is referring to an entire controversy between two specific parties. That is, the rule is one of compulsory joinder of claims, not compulsory joinder of parties.

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17. 7 N.J. 303, 78 A.2d 572 (1951).

18. *Id.* at 307, 78 A.2d at 574.

19. *Id.* at 309-10, 78 A.2d at 576-77.

20. *Id.* at 307, 309, 78 A.2d at 574, 576.

21. It may be noted that *Massari v. Einsiedler* is cited in the Reporter's Note to section 22(2) of the Restatement (Second) of Judgments. *Accord* Woodward-Clyde Consultants v. Chemical and Pollution Sciences, Inc., 105 N.J. 464, 523 A.2d 131 (1986) (counterclaim in first action had been dismissed).

Ajamian v. Schlanger[22] dealt with another problem presented by the merger of law and equity, namely its effect on the scope of claim res judicata or, as we now call it, claim preclusion. The problem is this: If a claimant sues for rescission "in equity," and loses to the defense of ratification, does that bar the claimant (or his assignor) from later suing for damages "at law"? Again, given the new Rules of Civil Procedure, the answer is inevitable. Under the new rules the plaintiff could have pleaded both rescission and damages; hence, he has one "cause of action" in which he can assert alternative remedies.[23] Therefore, his first action results in bar under the claim preclusion rule of merger and bar.

This, too, is standard res judicata doctrine. As stated in Restatement (Second) of Judgments Section 24(1):

> When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar . . . the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.[24]

Again, the decision has nothing to do with preclusion against later suing other parties.

Nevertheless, *Ajamian* is evidently a source of some of the subsequent difficulties. The decision was authored by Justice Brennan whose great prestige, given the luster of his subsequent career in the judiciary, lends much weight to his words. In *Ajamian* Justice Brennan described the abolition of the distinction between law and equity in the New Jersey Constitution as:

> designed and purposed for the just and expeditious determination in a single action of the ultimate merits of an entire controversy between litigants. It is a fundamental objective of this procedural reform to avoid the delays and wasteful expense of the multiplicity of litigation which results from the splitting of a controversy.[25]

Justice Brennan uses the term "entire controversy" but he refers to an entire controversy "*between litigants*." This means between persons already

22. 14 N.J. 483, 103 A.2d 9 (1954).
23. *Id.* at 489, 103 A.2d at 12.
24. RESTATEMENT (SECOND) OF JUDGMENTS § 24(1).
25. *Ajamian*, 14 N.J. at 483, 103 A.2d at 10.

parties to the case, not others who might have been joined. Hence, he is describing the rule against splitting a cause of action. The rule against splitting a cause of action is set forth in Restatement Second Section 24(1) quoted above. That rule does indeed have the effect of requiring an "entire controversy" to be resolved "between litigants," if—but only if—the "entire controversy" is expressed in the several causes of action as between those litigants. The proper concept is thus that of claim preclusion. It seems evident that this was the concept to which Justice Brennan was referring.

More specifically, the rule against splitting a cause of action does not address whether a plaintiff is required to sue in the same action *all* potential defendants against whom he could plausibly proceed (the rule governing joinder of defendants is permissive, not mandatory); or whether plaintiffs injured in the same event or series of events are required to join in a single action against the wrongdoer (the rule governing joinder of plaintiffs is again permissive rather than mandatory); or whether alleged wrongdoers can stipulate to withhold claims they may have against each other (for example, for indemnity or contribution) until some later, separate and mutually more advantageous occasion for conducting such disputation (the rule on cross-claims generally is permissive rather than mandatory); or whether a defendant with an indemnity claim is required to bring in his alleged indemnitor as a third-party defendant (the rule governing impleader is permissive, not mandatory); or whether one of numerous persons similarly injured is required to bring a class suit on behalf of others (the class suit rule is generally permissive); or whether an insurer or other indemnitor of any of the parties—plaintiff or defendant—is required to enter litigation that someone else has commenced, on pain of forever thereafter remaining silent about their legal grievances (the rule governing intervention is permissive so far as the intervenor is concerned).[26]

IV. POST 1947 REJECTION OF "ENTIRE CONTROVERSY" DOCTRINE

One of the early post-1947 decisions is conspicuously negative as precedent for the "entire controversy" concept. This is *Allen B. DuMont Laboratories, Inc. v. Marcalus Manufacturing Co.*[27] Here the plaintiff sued

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26. The provisions on these matters in the Federal Rules of Civil Procedure are in Rules 13, 18, 19, 20, 23, and 24. The counterpart rules in New Jersey are New Jersey Rules of Civil Practice are §§ 4:7-1 to -7, 4:27-1 to -2, 4:28-1, 4:29-1 to -2, 4:32-1 to -4, and 4:33-1 to -3.

27. 30 N.J. 290, 152 A.2d 841 (1959).

to compel the defendant to perform a covenant in a land sale transaction.[28] Both parties held by conveyance from a common grantor and the defendant attempted to join that common grantor as a party to its counterclaim.[29] Unfortunately, however, the common grantor was an agency of the United States Government and as such apparently immune from the state's judicial jurisdiction. The New Jersey supreme court nicely finessed the problem of immunity by holding that joinder was unnecessary.[30] In the course of decision Chief Justice Weintraub observed that the judgment could have significance to the unjoined third party (the United States)

> by reason of some collateral obligation of the government to indemnify [plaintiff]. If that obligation does exist, it lies with the Government to decide whether to intervene as a party or to undertake to defend the counterclaim in discharge of that obligation. That a claim against the United States may be precipitated by the result in this case no more makes it an indispensable party than does the existence of an automobile liability policy operate to require the joinder of the carrier in a suit against its insured.[31]

That analysis seems to me a square rejection of any idea that the court could or should feel a necessity to resolve "the entire controversy."

Falcone v. Middlesex County Medical Society[32] involved the same problem as *Ajamian*—an attempted suit for damages following a suit for an injunction directed to the same wrong. The result, claim preclusion, is standard res judicata law.

Another precedent rejected an attempt to employ the "Entire Controversy" doctrine to preclude a subsequent suit that was not barred by the law of res judicata. *Humble Oil & Refining Co. v. Church*[33] was a suit by the owner of a truck involved in a multi-vehicle collision to recover damages to the truck from owners of the other vehicles. It was held that the truck owner was not barred by a prior consent judgment against the present parties that had settled a wrongful death claim by a passenger in one of the vehicles. The case evidently involved an insurer's interest in the background. It thus illustrates the wisdom of not trying to conclude the "entire

28. *Id.* at 295, 152 A.2d at 843-44.
29. *Id.* at 293-94, 152 A.2d at 843.
30. *Id.* at 301, 152 A.2d at 846-47.
31. *Id.* at 298, 152 A.2d at 845.
32. 47 N.J. 92, 219 A.2d 505 (1966).
33. 100 N.J. Super. 495, 242 A.2d 652 (1968).

controversy" as regards persons who are not parties and whose claims are therefore a matter of speculation.

In *William Blanchard Co. v. Beach Concrete Co.*,[34] Judge Pressler was moved to remark that "it is . . . apparent that the task of definitionally circumscribing the outer limits of a given controversy for purposes of application of the doctrine is inordinately difficult."[35] But, having recognized the pitfalls, the court in *Blanchard* nevertheless plunged in:

> [A]n evaluation must be made of each potential component of a particular controversy to determine the likely consequences of the omission of that component from the action and its reservation for litigation another day. If those consequences are likely to mean that the litigants in the action as framed will, after final judgment therein is entered, be likely to have to engage in additional litigation in order to conclusively dispose of their respective bundles of rights and liabilities which derive from a single transaction or series of transactions, then the omitted component must be regarded as constituting an element of the minimum mandatory unit of litigation.[36]

On this basis, the *Blanchard* court held that all claims by all claimants in a multi-party, multi-layered dispute arising out of a construction contract (involving, inevitably in such, the owner, the designer, the general contractor, subcontractors and fabricators of construction components) were a single controversy and had to be asserted in the pending litigation.[37] The decision imposed compulsory joinder in pending litigation, *not* preclusion in subsequent litigation. Moreover, the case could have gone off on the simpler ground: A party should be precluded from insisting, at the last minute before trial, on separate arbitration of some of its rights and duties in the teeth of a negotiated pre-trial order that, in order to overcome circular breakdown resulting from separate arbitrations, had waived arbitration rights and required all the claims to be presented in the consolidated, master litigation. Resting that sensible decision on the broad pronouncement in *Ajamian* illustrates how large misshapen oaks can grow from small judicial acorns.

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34. 150 N.J. Super. 277, 375 A.2d 675 (1977).
35. *Id.* at 293, 375 A.2d at 683.
36. *Id.* at 293, 375 A.2d at 683-84.
37. *Id.* at 298, 375 A.2d at 687.

V. THE 1979 PROMULGATION OF RULE 4:27-1(B)

In 1979 the "Entire Controversy" doctrine was translated into a rule of procedure, Rule 4:27-1(b):

> Each party to an action shall assert therein all claims which he may have against any other party thereto insofar as may be required by application of the entire controversy doctrine.

This formulation refers only to compulsory joinder of "claims ... against any other *party*." It does not speak to joinder of parties and says nothing about requiring joinder of additional parties. The reference to the "entire controversy" rule is a reference to decisional law as of the date Rule 4:27-1(b) was adopted. As of that date the "Entire Controversy" doctrine was essentially standard res judicata doctrine. Put differently, the adoption of Rule 4:27-1(b) is not basis for a concept of compulsory joinder of parties.

Ten years later, however, the court extended the concept of "entire controversy" preclusion in the now notorious case of *Cogdell v. Hospital Center at Orange*.[38] The result in *Cogdell* has some appeal in light of the facts, although much less appeal to many students of civil litigation than it did to the court. In any event, a result could have been better fashioned out of standard res judicata doctrine.

In *Cogdell*, a plaintiff mother (individually and as guardian of the daughter) sued two doctors for malpractice in delivering the daughter.[39] The plaintiff lost in a jury verdict.[40] She then sued the hospital, members of the auxiliary staff who assisted in the operation, and hospital administrators.[41] The allegations against the attending doctors had been that they botched the delivery. The subsequent claims against the hospital staff were that they had unreasonably delayed in assembling the medical equipment and surgical team that, so the doctors testified, should have been at hand but was not.[42] The court held that the Entire Controversy doctrine "appropriately encompasses the mandatory joinder of parties"[43] and that the plaintiffs should have included the claims against the hospital and its staff in the

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38. 116 N.J. 7, 560 A.2d 1169 (1989).
39. *Id.* at 9, 560 A.2d at 1169.
40. *Id.*, 560 A.2d at 1169.
41. *Id.*, 560 A.2d at 1170.
42. *Id.* at 10-11, 560 A.2d at 1170-71.
43. *Id.* at 26, 560 A.2d at 1178.

original suit. But the court felt impelled to apply the rule only prospectively.[44]

The plaintiff in *Cogdell* could have been barred by standard res judicata doctrine. Suppose that the doctors were employees of the hospital or were members of a partnership with the hospital and that the first suit was against the doctors and the second against the hospital, or vice versa. It is a standard rule of res judicata that an unsuccessful suit against a partner or a partnership precludes a later suit for the same injury against the other possible target. Restatement (Second) of Judgments Section 51 sets forth the standard doctrine, as follows:

> If two persons have a relationship such that one of them is vicariously responsible for the conduct of the other, and an action is brought by the injured person against one of them, the judgment in the action has the following preclusive effects against the injured person in a subsequent action against the other:
> (1) A judgment against the injured person that bars him from reasserting his claim against the defendant in the first action extinguishes any claim he has against the other person responsible for the conduct unless:
> (a) The claim asserted in the second action is based upon grounds that could not have been asserted against the defendant in the first action; or
> (b) The judgment in the first action was based on a defense that was personal to the defendant in the second action.[45]

Similarly, it also standard doctrine that an unsuccessful suit against a corporation or other business entity precludes a subsequent suit against an employee for the same injury.[46]

The rationale for these results is traditionally called "privity." The term "privity" is, however, conclusory. Proper application of the concept requires careful thinking about the relationship of the parties who were sued in the two litigations. In *Cogdell* and in similar situations, the point is that the rules of agency, respondeat superior, and implied right of indemnification require in effect that a plaintiff claiming against someone affiliated with an entity must not introduce irreconcilable conflicts among those rules—and try to get "two bites at the apple"—by successive suits against the entity and its affiliates. So to speak, if a plaintiff wishes to invoke rules of vicarious

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44. *Id.* at 28, 560 A.2d at 1179.
45. RESTATEMENT (SECOND) OF JUDGMENTS § 51 (1982).
46. RESTATEMENT (SECOND) OF JUDGMENTS §§ 59, 60 (1982).

responsibility, he is required to pursue procedural opportunities (*i.e.*, joinder of parties) that facilitate consistent administration of the rules of vicarious responsibility. The same point would hold, for example, in the case of a suit against a bus company and then against its driver, or vice versa.

The situation in *Cogdell* however, might be thought not to fit the foregoing pattern. This deviation arises from a peculiarity in the organization of medical services, at least as such services have been organized in the past. Simply put, the doctors are not employees of the hospital but independent contractors. Hence, the usual matrix of interdependent legal responsibilities is not so evident. And that seems to require that, absent something such as the "Entire Controversy" doctrine, it is open to a plaintiff situated as in *Cogdell* to bring a subsequent suit, after losing against the doctors who did the operation, now against those who helped them in doing so. However, two thoughts come into view.

First, standard res judicata rules could have yielded the result desired by the court in *Cogdell*. The point would be that the doctors, the hospital and the hospital staff were engaged in a joint venture. (Given the nature of usual surgical practice this is faithful to reality rather than a distortion.) A joint venture is in law a "weak" partnership and, in general, governed by the same rules as partnerships. If the first suit had been against the partners in a partnership, as already noted, under standard res judicata rules that litigation precludes a subsequent suit against the partnership and against its employees. A joint venture is a limited form of partnership. Ergo, the suit against the doctors is a bar to the second suit.[47]

An alternative pathway under standard res judicata doctrine could have been that of issue preclusion. The claim in *Cogdell* was that the doctors waited too long in performing the cesarean section from which the infant suffered the injury. One view of "the issue" was whether the doctors had indeed delayed too long. If *that* was the issue, then it was decided adversely to the plaintiff. Under standard rules of issue preclusion the determination of that issue is preclusive in favor of a person subsequently sued—in *Cogdell*, the hospital and its staff.[48] However, it could have been said that a different issue was involved. The doctors testified not only that they did not wait too long but also that, if they did unduly delay, it was because the hospital staff failed to set up the necessary equipment on time.

This aspect of *Cogdell* brings into focus a question of separation of powers that the *Cogdell* court seemed not to recognize. This is the question

47. RESTATEMENT (SECOND) OF JUDGMENTS § 60 cmt. d; § 61 cmt. a (1982).

48. RESTATEMENT (SECOND) OF JUDGMENTS §§ 27, 29 (1982).

of time-bar against the plaintiff. In the original *Cogdell* litigation the issue of whether the hospital staff was independently responsible for delay had surfaced in June 1984 in the discovery stage of the litigation; the trial was three years later.[49] The second action was filed thereafter. On this sequence in most situations the second action would have been met by the peremptory defense of the statute of limitations. Presumably because the beneficiary of the action is an infant, however, the statute had years to run. Statutes of limitation are a matter of public policy traditionally within the purview of the legislature. One would have thought that the courts should not have authority to circumvent the legislature on such a matter.

In any event, the temptation was strong to devise some other shield for the hospital staff. Nevertheless, the result in *Cogdell* could be formulated on a much narrower basis: A rule of estoppel against a claimant who was not barred by the statute of limitations but who had direct notice of a contention by the named defendants (the doctors) that some third party (the hospital staff) was really at fault. This would preclude the claimant as against the new defendants. (It might also lead to a suit for legal malpractice against the plaintiff's lawyer.) The opinion formulated in *Cogdell*, however, expanded the "Entire Controversy" doctrine to a rule of compulsory joinder of parties far beyond the scope of "privity" in standard res judicata doctrine.

The court itself recognized that there were virtually no contours to its new rule:

> We add that the contours of this rule are not fixed precisely by this decision. Its contents and bounds can evolve with experience in the course of this Court's regulatory authority over practice and procedure, either through formal rule-making or case-by-case adjudications.[50]

One may observe the reference to "*this Court's* regulatory authority." Unconsciously, the court may thereby have forecast the essential vice of the new doctrine: No one knows or can accurately predict the scope of the rule in a particular case until the supreme court of New Jersey says what it will be.

Since the decision in *Cogdell*, the New Jersey supreme court has further amended the Rules of Procedure to incorporate the new doctrine. The revision surely does nothing to clarify the meaning or scope of the doctrine. If anything, it consecrates obscurity.

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49. *Cogdell*, 116 N.J. at 10-12, 560 A.2d at 1170-71.
50. *Id.* at 28, 560 A.2d at 1179.

Rule 4:30A now provides that:

> Non-joinder of claims *or parties* required by the entire controversy doctrine shall result in the preclusion of the omitted claims to the extent required by the entire controversy doctrine . . . (emphasis supplied).

Textually, this formulation is entirely circular: The doctrine precludes what the doctrine precludes. Instrumentally the new formulation is no better. Perhaps the best evidence of the Rule's impenetrability is in the annotation under the heading "Application." Here there are no fewer than six "But see" references, meaning that the annotator recognized contradiction but could not elucidate it.

VI. THE REALITIES OF LEGAL CONTROVERSY

The vices of the "Entire Controversy" doctrine are revealed by posing questions to which the court in *Cogdell* did not have the answers, and indeed questions to which the courts ordinarily could not know the answers. A most pertinent question posed by the *Cogdell* situation is: Why didn't the plaintiff join the hospital and auxiliary staff in the first case? My best guess would be that the plaintiff's lawyer hoped that, by not joining the hospital and auxiliary staff people, the plaintiff might obtain less hostile testimony from the people at the hospital who were in a position to observe how the doctors had handled the operation. That would have helped prove a case in a kind of litigation where a claim is hard to prove, partly because a "conspiracy of silence" often enshrouds the doctors.

How could a court possibly know whether this was the underlying strategic consideration? And, if that were the underlying strategic consideration, why should the courts have such confidence in the ability of the judicial process to get at the truth—*i.e.*, how the doctors had actually handled the operation—that they hold a plaintiff's lawyer to be irresponsible in failing to join the hospital and its staff?

This strategic decision was, after all, made by the plaintiff's lawyer. In major personal injury litigation the plaintiff's lawyer is the effective entrepreneur. In my observation, most plaintiff's lawyers are sober, rational actors when it comes to litigation strategy. They know the rules of procedure permit them to join all possible defendants. They usually do join all possible defendants because they know that having multiple defendants usually induces each defendant to point the finger at the others—the Prisoner's Dilemma counter-gambit.

However, this counter-gambit does not always work. The gambit is subject to failure when used against defendants who have strong inducements to maintain solidarity. In medical malpractice cases there are such powerful inducements, whereby the accused medical operatives tacitly agree not to testify against each other. That is the efficient cause of the often-experienced "conspiracy of silence" in such cases. The result leaves the prosecutor (*i.e.*, plaintiff in a civil case) with a failure of proof.[51]

Hence, when a plaintiff's lawyer does *not* join an obvious defendant, the inference is that it was for good reason. On my not unlikely hypothesis, the good reason was a circumstance that the courts cannot discover and cannot remedy. Dear judges, my friends, we must tell you that conspiracies to maintain silence in litigation, or to maintain half-truths, are not unusual. In the public domain, what, after all, was Watergate, or Irangate or Whitewater-gate? In my observation such conspiracies are rampant in litigation involving corporate officials, municipal officers (the police, for example), law firms, etc. It is a reality.

The reality is *not* that there will inevitably be a conspiracy of silence. The reality is that there may well be a conspiracy of silence or tacit agreement to tell half-truths. This is a serious risk concerning which the plaintiff's lawyer has to make a calculated judgment: Should I join all the potential defendants and hope at least one of them will point the finger? Or should I omit some of them and hope that, being thus implicitly exonerated, they will tell what I think is the truth? This is an issue concerning matters which the good courts cannot ascertain the truth, let alone the whole truth. No plaintiff is going to say that his strategy was dictated by definite knowledge about the propensity of various defendants to tell the truth. After all, the plaintiff has not yet taken any discovery. And is a defendant going to say, "This time anyway, judge, none of us is going to lie."? For this reason there is no way the courts can remedy the situation. They simply cannot know until trial whether the plaintiff is simply a misfortunate complainer or the defendants are in league to stonewall. The courts probably cannot tell even then. Moreover, in the typical case it will not be the judges who will have to make that decision, but the jury, in the 3-5% of the filed cases that actually go to verdict.

Plaintiff's dilemma is ultimately a consequence of the judicial system's inability in some cases to deliver on its most solemn commitment: To decide

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51. Compare the court's discussion of fairness and strategy in *Cogdell*, 116 N.J. at 25-26, 560 A.2d at 1178. With all respect, that discussion is naive.

cases according to the truth of the matter. The judicial system's ambition to determine "the entire controversy" should not extend beyond its capabilities.

There is another kind of explanation for the plaintiff's omission in *Cogdell* to assert a claim against the hospital and its staff. It is of an entirely different character, but one that also cautions against a court trying to be the complete source of justice. The omission could have resulted from a decision by the client that she did not want to sue a particular potential defendant.

In the situation in *Cogdell*, for example, it is entirely possible that the plaintiff was, rightly or wrongly, deeply angry at the doctors but not at all at the hospital staff. It is notorious that many medical malpractice claims result from ineptitude on the part of doctors in responding to the distress of the patient after an unsuccessful procedure (or, in the case of a newborn child, at the distress of the parents). It is notorious that some doctors cannot deal with the emotional crises experienced by the parents and present themselves as cold and distant. It could be that the hospital staff in *Cogdell* was, in contrast, caring and compassionate. So perhaps the parent of the child in *Cogdell* did not want to sue the hospital people if she had a good claim against the doctors, as her lawyer advised that she did.

Or suppose there was some other reason—the hospital administrator was a relative of the mother, or went to the same church. What difference does it make *why* the mother did not want to go beyond suing the doctors, until the adverse verdict compelled her to turn elsewhere? Why should the courts insist that suit be brought against everyone who could be sued?

If the courts were really serious about resolving an "entire controversy" in a single suit, why should they not apply the same policy toward plaintiffs? That is, all plaintiffs who could join in the same suit would be required to do so, that there be one "entire controversy." Never mind that this would require some plaintiffs to surrender the right to choose their own lawyer. Never mind that it would drive plaintiffs into court who are inclined to refrain unless their injuries turn worse. And consider how the "entire controversy" would play out with in potential class suits: Every large multiple injury tort becomes a compulsory class action.

VII. THE METAPHYSICS OF "ENTIRE CONTROVERSY"

Why does the New Jersey supreme court suppose that there is—out there, *ex ante*, pre-existing—*an* "entire controversy?"

A legal controversy, like any other human relationship, is after all a responsive behavior whose origins extend back into a past that the courts cannot see and has consequences into the future that the courts cannot

control. The "Entire Controversy" doctrine depends, ultimately, on the notion that a legal controversy has an *a priori* scope and definition; that this scope and definition is as evident at the outset of litigation as it appears to the supreme court when litigation finally winds its way to that tribunal; that the highest court can see around the edges to discern the boundaries of the controversy; and that the court retroactively should sweep all aspects of a legal dispute within its ken and command. Sometimes these conditions obtain, but usually they do not. Most claims are never brought or are abandoned. Most cases that are brought are settled. Many claims are abandoned because other claims have been settled. Lawyers, not courts, do most of the heavy lifting. Standard res judicata and joinder doctrines and standard litigating incentives under permissive joinder rules handle most problems quite adequately.

The folly of the "Entire Controversy" doctrine, as now interpreted, is surely made manifest in *Circle Chevrolet Co. v. Giordano, Halleran & Ciesla*.[52] Why, in the name of any conception of justice and good order, should a client engaged in a complicated, expensive and protracted controversy with an opposing party be required to enlarge and complicate that litigation, perhaps with fatal effects on its merits, by extending the attack to his own lawyer in the middle of the proceeding?

Enough already.

VIII. A TIME FOR RETREAT

The overextension of preclusion doctrine reflected in *Cogdell* and *Circle Chevrolet* brings to mind a similar mistake by a very good judge speaking for a very good court. This is the decision in *Bernhard v. Bank of America*,[53] decided over a half-century ago, in an opinion by Justice Roger Traynor for the supreme court of California.

In *Bernhard*, Justice Traynor undertook an escape from the confines of the "mutuality" rule. The mutuality rule was that a party to an adjudication would be precluded from relitigating an issue actually decided (*i.e.*, issue preclusion) only if the preclusion was "mutual," *i.e.*, that if the first adjudication had gone the other way, the opposite party in that case would also have been bound in the second adjudication. Thus, under the mutuality rule if A sued B and lost, and then sued C in a claim involving the same issue, A could relitigate because C was not bound (in the absence of

52. 142 N.J. 280, 662 A.2d 509 (1995).

53. 122 P.2d 892 (Cal. 1942).

"privity" between C and B) by the adverse result suffered by B. This rule had long been criticized and the California court thought it ripe for repudiation.

In repudiating of the mutuality rule, Justice Traynor stated that:

> In determining the validity of a plea of res judicata three questions are pertinent: Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?[54]

The repudiation of the mutuality rule was well warranted but the substitute formulation was not well devised. As the California courts discovered with further experience, Justice Traynor's formulation failed to take account of variations and permutations, particularly regarding the adequacy of the opportunity for litigation of the issue in the first case. Accordingly, the formulation was revised to reflect that experience.[55]

There is a moral in the fact that Justice Traynor and the California Supreme Court could see their way clear to a revision in light of unsatisfactory experience.

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54. 122 P.2d at 895.

55. *See* RESTATEMENT (SECOND) OF JUDGMENTS §§ 27-29 (1982).