NONPARTY INSURERS IN FEDERAL CIVIL ACTIONS: THE NEED FOR NEW WRITTEN CIVIL PROCEDURE LAWS

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I. INTRODUCTION

Written laws guiding civil actions in the federal district courts chiefly address the presentation, preparation and resolution of claims involving parties. However, the courts often also consider claims involving nonparties as well as nonclaim matters involving parties and nonparties alike. Guidelines here mainly appear in federal precedents and, to a lesser extent, in local court rules. They often follow in-state court practices. The absence of written general laws for nonparty claims and nonclaim matters often leads to unnecessary confusion and

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unfair procedures. New, generally applicable written guidelines could help reduce uncertainty and promote fairness.

To exemplify, we shall particularly explore possible reforms in settlement conference settings where the interests of nonparty insurers are at stake, as well as in adjudicatory settings where nonparty insurers seek recoveries from proceeds obtained by their insureds as party claimants. Before doing so, we will review briefly the major forms of adjudicatory and ancillary powers over nonparty claims and nonclaim matters not only to illustrate the absence of nonparty insurers in written civil procedure laws, but also because any possible reforms must take account of these limited powers. We then shall examine several settlement conference and adjudicatory authority cases involving nonparty insurers that have prompted confusion and unfairness. We conclude with suggestions on promoting fuller recognition and participation of nonparty insurers in federal civil actions, as well as with some thoughts on other nonparty claims and on nonclaim matters.

II. THE TREATMENT OF NONPARTY CLAIMS AND NONCLAIM MATTERS IN WRITTEN FEDERAL SUBJECT MATTER JURISDICTION LAWS

Written general federal civil procedure laws treat claims between parties and both nonparty claims and nonclaim matters differently. These differences, and the resulting difficulties, are illustrated by the guidelines for the federal district courts on initial and subsequent adjudicatory subject matter jurisdiction and on ancillary authority.

1. Seemingly, the scope of written Federal Civil Procedure laws has influenced the teaching of Federal Civil Procedure, a staple of first year legal education. Thus, there is little attention paid in most basic civil procedure texts not only to resolutions of nonparty claims, but also to other important civil practices unaddressed in writing, including the validity of settlement pacts; settlement authority; settlement enforcement; informal discovery, including ex parte communications, surveillance and tape-recording; liens on judgment proceeds; and, the secrecy afforded certain civil litigation materials. For suggestions on how these practices might be taught in advanced civil procedure courses, see Jeffrey A. Parness, Evolving Views of Civil Litigation: Future Civil Procedure Courses, 31 Am. St. L.J. 945 (1999).

2. While we strongly favor new general laws rather than local court rulemaking initiatives on nonparty insurers, we question whether all new lawmaking should be undertaken by rulemakers rather than Congress. A strong case on why rulemaking is usually preferable is made in Robert G. Bone, The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy, 87 Geo. L.J. 887, 889 (1999) ("court rulemaking is better suited than legislation to the task of inferring general principles from existing practice and designing an integrated system of rules based on those principles").

3. For us, adjudicatory subject matter jurisdiction encompasses judicial power to hear and resolve civil claims on the merits, while ancillary authority covers judicial power necessary for courts to function successfully in adjudication. On occasion, courts characterize all these powers as jurisdictional. See, e.g., Kokkonen v. Guardian Life Ins.
There are significant differences in the statutes on the subject matter jurisdiction of the federal district courts over claims between parties and over nonparty claims. Such jurisdiction encompasses the power to hear and resolve civil claims on the merits, at times with juries. While such adjudicatory power exists over both claims between parties and over nonparty claims, federal statutes typically address in detail only initial adjudicatory power over claims between parties. As well as by resolution through adjudication, claims in federal civil actions may be resolved with or without judicial assistance by settlements. Where settlements are reached, they may involve not only pending civil claims, but also civil claims that were never (and could never have been) presented for adjudication. Jurisdiction to facilitate settlements involving nonparty claims and to enforce any later breaches (a form of subsequent adjudicatory power) typically is unaddressed in statute. In fact, statutes fail to speak much even to settlement facilitation and enforcement proceedings involving claims between named parties. Finally, many written civil procedure laws speak to federal district court ancillary authority over nonclaim matters, such as sanctions for civil litigation misconduct, without differentiating between the authority over parties and the authority over nonparties, even though such distinctions often are crucial in determining the bounds of ancillary power.

As noted, initial adjudicatory power over claims between parties is addressed almost wholly in statutes. Original (or independent or freestanding) subject matter jurisdiction typically takes one of two forms - diversity or federal question. These forms are described separately in general statutory provisions, though there also exist special and separate statutes for each. Supplemental (or pendent or dependent) jurisdiction is also available "for two, separate, though sometimes related purposes: (1) to permit disposition by a single court of claims that are . . . factually interdependent . . . and (2) to enable a court to function successfully, that is to manage its proceedings, vindicate its authority and effectuate its decrees . . . ").

4. While initial adjudicatory jurisdiction seems comprehensively covered in Title 28 of the United States Code, at least some principles on the discretionary exercises of this jurisdiction appear in federal precedents. Thus, discretion involving "supplemental" claims is guided by statute while discretion involving "abstention" is guided by case law.

5. The American Law Institute has defined a "freestanding" claim as "a claim of relief that is within the original jurisdiction of the district courts" independently of supplemental jurisdiction. The American Law Institute, Federal Judicial Code Revision Project at 1 (Tentative Draft No. 2 April 14, 1998) (black letter and comments, not annotations, approved by Institute members on May 14, 1998).

dent) subject matter jurisdiction over claims between parties is also addressed in general statutory provisions. Here, adjudicatory powers over chiefly American state law claims are reliant upon some preexisting or simultaneous original jurisdiction.

Federal district court subject matter jurisdiction to resolve non-party claims and federal district court authority over nonclaim matters is addressed, for the most part, in federal case precedents. The United States Supreme Court's 1994 decision in *Kokkonen v. Guardian Life Insurance Co. of America* establishes the basic guidelines. Here the Court said that in the absence of a statutory basis, a federal district court could exercise "ancillary jurisdiction . . . for two, separate, though sometimes related purposes: (1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent . . . and (2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority and effectuate its decrees." Further, the provisions do not demand expressly either that all supplemental claims that are heard and that are capable of being joined actually be for many civil rights claims); 28 U.S.C. § 1335(a) (2000) (describing special diversity law for most interpleader claims).

7. For us this term includes both the pendent and the ancillary jurisdiction recognized in federal precedents before the enactment of the supplemental jurisdiction statute, 28 U.S.C. § 1367. Unlike the diversity and federal question setting, with supplemental claims there are few special statutory provisions. But see 28 U.S.C. § 1338(b) ("original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright, patent, plant variety protection or trade-mark laws").


9. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 379 (1994) (After exploring earlier precedents, the court concluded that the doctrine of ancillary jurisdiction could "hardly be criticized for being overly rigid or precise.").


11. 28 U.S.C. § 1367(a) (2000). The claims subject to supplemental jurisdiction in the new American Law Institute project report are similar. The American Law Institute, Federal Judicial Code Revision Project, *supra* note 5, at 1 (supplemental claim "part of the same case or controversy under Article III" and "asserted in the same civil action" as the related freestanding claim).
pleaded or otherwise formally presented or that all supplemental claims that are heard actually be capable of being joined.\textsuperscript{12}

Little else is addressed in the supplemental jurisdiction provisions. For example, they do not recognize United States Supreme Court precedents indicating that the ancillary adjudicatory power, always discretionary in nature, operates differently for "related" non-party claims and for "related" claims between parties. The Court has said that ancillary power over "factually interdependent" claims is less available when the claims involve "parties not named in any claim that is independently cognizable by the federal court" because such claims are "fundamentally different."\textsuperscript{13} Beyond necessary relatedness, as well as the considerations of "the convenience of the litigants" and "judicial economy" that underlie all exercises of ancillary jurisdiction, adjudicatory power over nonparty claims as well as over claims against parties only joined through ancillary jurisdiction also require "an examination of the posture" in which the claims were asserted and of the specific statutes that confer original jurisdiction over claims between parties.\textsuperscript{14}

The supplemental jurisdiction statute specifically speaks to posture and a specific jurisdictional statute when it addresses at least one type of claim joined against a party who is not subject to original jurisdiction. It disallows a plaintiff the opportunity to seek exercise of adjudicatory power involving a third-party defendant under the Federal Rules of Civil Procedure ("Fed. R. Civ. P.") where original jurisdiction over the plaintiff's claim against the defendant is founded on the general diversity statute.\textsuperscript{15} Any such joinder under Fed. R. Civ. P. 14 seemingly would involve a "factually interdependent" claim under \textit{Kokkonen}.\textsuperscript{16}

By contrast, the supplemental jurisdiction statute does not speak at all to posture or to the preexisting original jurisdiction when subse-

\textsuperscript{12} In fact, even some original jurisdiction claims that are actually adjudicated are not formally presented before trial in pleadings or other writings (e.g., pretrial conference orders). See Fed. R. Civ. P. 15(b) (Issues tried by "implied consent of the parties ...treated in all respects as if they had been raised in the pleadings" and failure to amend pleadings later "does not affect the result of the trial of these issues."); Fed. R. Civ. P. 54(c) (Except in default settings, judgment should grant appropriate relief to a party "even if the party has not demanded such relief in the party's pleadings.").

\textsuperscript{13} Finley v. United States, 490 U.S. 545, 549 (1989).

\textsuperscript{14} Finley, 490 U.S. at 551-52.

\textsuperscript{15} 28 U.S.C. § 1367(b) (2000) (also speaking to posture, in the setting of other joinder rules, together with the general diversity statute, so that only potential named parties are covered).

\textsuperscript{16} Under Fed. R. Civ. P. 14(a), the original plaintiff may join a claim against a third-party defendant as long as the claim arises "out of the transaction or occurrence that is the subject matter of the plaintiff's claim against" an original defendant who had earlier joined under Fed. R. Civ. P. 14(a), and perhaps supplemental jurisdiction, the third-party defendant. \textit{Fed R. Civ. P. 14(a).}
quent ancillary adjudicatory power is exercised over nonparty claims, such as claims between prevailing plaintiffs and their attorneys. Ancillary adjudicatory power over such nonparty claims is seemingly appropriate, under Kokkonen, where the claims are “factually interdependent” and, similarly, under the supplemental jurisdiction statute, where the nonparty claims are “so related” to the claims pending between parties “that they form part of the same case or controversy.” While such nonparty claims often are adjudicated, there are no written laws guiding federal district court discretion to adjudicate nonparty claims involving fee and other (e.g., malpractice) disputes between attorneys and their clients who are prevailing claimants.

As well, the supplemental jurisdiction provisions do not address, and the original (federal question and diversity) jurisdiction provisions are usually not read to encompass, civil claims usually thought to be outside traditional joinder (and thus pleading) rules, as they are presented later in the case, often after all initial adjudicatory power has disappeared. For example, subsequent adjudicatory power involving civil claims arising from breaches of settlement agreements were recognized in Kokkonen as within the federal district court ancillary jurisdiction under certain circumstances, presumably embodying “disposition . . . of claims that are, in varying respects and degrees, factually interdependent.” Adjudicatory power over settlement breaches is not described in the supplemental jurisdiction statute, though discretion seemingly is available as to its use; as well, pleading, joinder, and other possibly relevant rules are silent. The resolution of settlement disputes involves hearing procedures on civil claims quite different from the procedures guiding initial adjudicatory power over civil claims. The court in Kokkonen also suggests settlement breaches may be reviewed in several other ways, as under the federal court ancillary authority over nonclaim matters when court “authority” is vindicated through criminal contempt punishment of those who breach (as there are violations of court orders) and when court “decrees” are effectuated through coercive contempt proceedings.

Nonparty claims adjudicated in federal civil actions often involve insurers. At times, the insurers, as nonparties, seek judicial remedies from existing parties, as when they place liens on the proceeds of any

17. Kokkonen, 511 U.S. at 379-80 (stating that the Court had asserted ancillary jurisdiction with the purpose to allow a single court to determine “factually interdependent” claims); 28 U.S.C. § 1367(a) (2000) (stating that a district court has supplemental jurisdiction where nonparty claims are “so related” to the claims pending between the parties “that they form part of the same case or controversy”).

18. On the exercise of discretionary adjudicatory jurisdiction over such claims, see Cluett, Peabody & Co. v. CPC Acquisition Co., 863 F.2d 251, 256 (2d Cir. 1988), stating that a federal court may, upon its discretion, use ancillary jurisdiction to decide fee disputes.
judgments or out-of-court settlements these parties may obtain as claimants. Conceivably, similar remedies may even be pursued by nonparty insurers against other nonparties; for example, nonparty insurers of plaintiffs may seek to resolve claims against nonparty insurers of defendants that are “related” to the pending claims between plaintiffs and defendants.

Nonparty insurers can also be bound to federal court judgments rendered against their insureds as party defendants. Judgments against insureds who were defendants often are binding on their non-party insurers as long as the insurers’ defense duties were properly noticed, the insureds’ cooperation duties were adequately met, and there arose no insurance coverage issues. Judgments against named insureds may bind their nonparty insurers even where these insurers could not have been formally joined as codefendants or otherwise.

Statutory guidelines seemingly also do little to address the ancillary authority under Kokkonen over nonclaim matters that allows a federal court to “function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees.” As with nonparty claims, nonclaim matters may involve nonparty insurers. To manage its proceedings a federal district court may wish to order the attendance of a nonparty insurer at a settlement conference under Fed. R. Civ. P. 16. To vindicate its authority the court may wish to sanction a nonparty insurer that fails to comply with such an order. And, to effectuate its decree the court may wish to order the nonparty insurer to comply with a settlement incorporated into a final judgment.

While statutes are relatively silent, many court rules speak to the ancillary authority necessary for federal district courts to function

19. While such liens may not arise from the “same group of circumstances” as the claims of the insureds against third parties, the liens “derive from a common nucleus of operative fact” and would “ordinarily be expected” to be tried “in one judicial proceeding” that also involves the insureds’ claims. United Mine Workers of America v. Gibbs, 383 U.S. 715, 725 (1966) (rejecting as a guideline for ancillary jurisdiction (over “factually interdependent” claims as later described in Kokkonen) a test involving “the same group of circumstances” as it was “unnecessarily grudging”).

20. This can occur where nonparty insurers of individual plaintiffs are assigned parts of their insureds’ claims against individual defendants which then may be pursued directly against the defendants’ insurers.

21. But see, e.g., 28 U.S.C. § 1927 (2000) (establishing attorney’s fee awards against an “attorney or other person admitted to conduct cases” for unreasonable and vexatious multiplication of federal court proceedings). While statutes are relatively silent, the Fed R. Civ. P. do provide significant guidance, at least as to nonclaim matters involving the vindication of federal district court authority. See e.g., Fed. R. Civ. P. 11; Fed. R. Civ. P. 16; Fed. R. Civ. P. 37. See also Kokkonen, 511 U.S. at 379-80 (stating that the United States Supreme Court has “asserted ancillary jurisdiction . . . to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees . . .”).
successfully. Yet too often parties and nonparties are not properly distinguished in these rules, causing confusion and unfairness. For example, to manage its proceedings, Fed. R. Civ. P. 16(c) now permits a district court to “direct the attorneys for the parties and any unrepresented parties” as well as a “representative” of a party to appear before it for a settlement conference. It is unclear under this rule whether and when nonparty insurers may be directed. As well, to vindicate its authority, Fed. R. Civ. P. 16(f) now allows a district court to sanction “a party or a party’s attorney” for settlement conference misconduct. It is unclear whether nonparty insurers may be sanctioned under this rule, assuming their attendance may be compelled or is actually effected.

The differing treatment in written federal civil procedure laws of claims between parties and of both nonparty claims and nonclaim matters is illustrated in the statutory guidelines on ancillary subject matter jurisdiction and ancillary authority. The relative absence of written civil procedure laws covering nonparty claims and nonclaim matters here and elsewhere has led to unnecessary confusion and unfortunate inequalities. The troubles are well exemplified in cases involving federal district judges who exercise ancillary authority under Kokkonen by directing the attendance of nonparty insurers at settlement conferences and who exercise ancillary jurisdiction by resolving subrogation claims of nonparty insurers. We now look to a few such cases because the challenges are significant, run deep, are easily understood, operate in arenas of considerable practical import, and can significantly be remedied through new written laws.

III. COMPELLING THE ATTENDANCE OF NONPARTY INSURERS AT SETTLEMENT CONFERENCES

Nonparty insurers frequently play important roles in settlements of federal civil actions. Their unpleaded interests in the monetary recoveries of their insureds certainly often influence settlement outcomes. Additionally, their duties involving defense costs and judgment payments on behalf of their insureds named as defendants

also significantly affect settlements.\textsuperscript{23} While federal district judges are expressly encouraged to facilitate settlements, their ancillary authority under \textit{Kokkonen} over nonparty insurers at settlement conferences remains uncertain, thus deterring some courts from functioning more successfully.\textsuperscript{24} Consider existing written civil procedure laws as analyzed in the two major federal court precedents.

The guidelines for pretrial settlement conferences in the federal district courts are contained in Fed. R. Civ. P. 16. It provides that courts may direct the attorneys for any party and any unrepresented party to appear at a pretrial conference for the purpose of “facilitating the settlement of the case.”\textsuperscript{25} The rule further permits courts to “take appropriate action” with respect to settlement, including “the use of special procedures to assist in resolving the dispute.”\textsuperscript{26} Finally, Fed. R. Civ. P. 16 allows courts to issue controlling orders after pretrial conferences and, when appropriate, to impose sanctions for failures to comply with court orders or to appear at scheduled conferences “substantially” prepared to participate fully.\textsuperscript{27} Problems have arisen concerning the ancillary authority of federal district courts to direct and sanction nonparties, such as insurers, even when they effectively control the litigation for the named parties. Thus, there have been problems when nonparty insurers withhold full settlement authority from either their insureds, who are named defendants, or the insureds’ attorneys.\textsuperscript{28} Because federal courts are not expressly permitted to direct or sanction nonparties, three distinct approaches have developed regarding the authority of Fed. R. Civ. P. 16 to compel the appearance of nonparty insurers.\textsuperscript{29}

\textsuperscript{23} For example, plaintiffs seemingly will settle for less with the defendants’ insurers (who may possess settlement authority if there are viable insurance policies and no coverage issues) when serious questions are raised about either coverage or adequate and timely notice to the insurers of the civil actions.

\textsuperscript{24} \textit{FED. R. CIV. P. 16(a)} (stating that a court may direct parties to participate in a conference for the purpose of facilitating settlement of the dispute).

\textsuperscript{25} \textit{FED. R. CIV. P. 16(a)(5)}.

\textsuperscript{26} \textit{FED. R. CIV. P. 16(c)(5)}.

\textsuperscript{27} \textit{FED. R. CIV. P. 16(e)} (stating that courts shall issue controlling orders after pretrial conferences); \textit{FED. R. CIV. P. 16(f)} (stating that a court can impose sanctions for failure to comply with court orders or to appear at scheduled conferences “substantially” prepared to participate fully).

\textsuperscript{28} \textit{In re Novak}, 932 F.2d 1397, 1405-06 (11th Cir. 1991) (noting two settings where “pretrial conference participants, through no fault of their own, are not fully prepared to discuss settlement;” one instance involves nonparty insurers “in charge” of the litigation for some of the parties who maintain “full settlement authority,” while the other - addressed in Fed R. Civ. P. 16 since 1993 - involves represented parties who retain “full settlement authority” but who send only their attorneys to settlement conferences).

\textsuperscript{29} An earlier analysis of Fed. R. Civ. P. 16 authority and suggestions for changes (including express recognition of nonparty insurers) appears in Jeffrey A. Parness &
The first method of applying Fed. R. Civ. P. 16 to nonparty insurers who possess settlement authority, demonstrated by the majority opinion in *G. Heileman Brewing Co. v. Joseph Oat Corp.*,\(^30\) recognizes judicial power to direct appearances under the "inherent power" to govern proceedings, seemingly a form of the ancillary authority recognized under *Kokkonen* to insure that courts function successfully. For the majority in *G. Heileman Brewing Co.*, Judge Kanne wrote for the United States Court of Appeals for the Seventh Circuit that while Fed. R. Civ. P. 16 did not then expressly authorize the courts to compel the attendance of nonparties at pretrial proceedings, the Fed. R. Civ. P. did not "completely describe and limit the power of the federal courts."\(^31\) Judge Kanne reasoned that the absence of language in any rule expressly authorizing certain power did not necessarily bar exercising such power.\(^32\) Judge Kanne explained that written civil procedure laws only "form and shape certain aspects of a court's inherent power" and thus may allow the exercise of unwritten power, though any "inherent authority" should only be exercised "to make the operation of the court more efficient, to preserve the integrity of the judicial process, and to control courts' dockets."\(^33\) Judge Kanne found the breadth of inherent power, "derived from the very nature and existence" of the judicial office, spans the "broad field over which the Fed. R. Civ. P. are applied."\(^34\) He concluded: "[i]nherent authority remains the means by which district judges deal with circumstances not proscribed or specifically addressed by rule or statute, but which must be


30. 871 F.2d 648 (7th Cir. 1989) (en banc). *G. Heileman Brewing Co.* involved an appeal of sanctions imposed when the corporate defendant, Joseph Oat, failed to comply with a trial court directive for the defendant to produce a corporate agent with full settlement authority at a pretrial settlement conference. *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648, 650 (7th Cir. 1989). Joseph Oat appealed arguing that Fed. R. Civ. P. 16 provided authority for the court to compel appearances by the attorneys of represented parties and any unrepresented parties but not by the employees or representatives of a represented party. *G. Heileman Brewing Co.*, 871 F.2d at 650. While *G. Heileman Brewing Co.* dealt specifically with a court's authority to direct the attendance of a represented party, its analysis is germane to issues involving court authority over nonparty insurers. *Id.*


32. *G. Heileman Brewing Co.*, 871 F.2d at 651. Judge Kanne did observe that inherent powers may not be exercised "in a manner inconsistent with rule or statute." *Id.* at 652.

33. *Id.* at 652 (stating that the rules form and shape certain aspects of a court's inherent powers); *id.* at 651 (stating that the procedural techniques are designed to make the operation of the court more efficient to preserve the integrity of the judicial process, and to control the court's dockets). Judge Kanne did observe that inherent powers may not be exercised "in a manner inconsistent with rule or statute." *Id.* at 652.

34. *G. Heileman Brewing Co.*, 871 F.2d at 653.
addressed to promote the just, speedy, and inexpensive determination of every action.”35

The second method, found in the dissents in G. Heileman Brewing Co., requires a strict reading of Fed. R. Civ. P. 16, usually resulting in no federal court power that is not expressly referenced in written laws. In one dissent, Judge Richard Allen Posner recognized “obvious dangers in too broad an interpretation of the federal courts’ inherent power” to promote settlement, including the danger that because people retain attorneys to “economize on their own investment of time in resolving disputes,” there is a risk that judges using inherent power may override a party’s judgment and “ignore the value of other peoples’ time” in their eagerness to settle cases.36 Judge Posner found this danger present in G. Heileman Brewing Co., as the defendant “had made it clear” that it did not intend to pay any money in settlement, thus making it unlikely that compelling the defendant to send a representative to a settlement conference would yield positive results.

In their separate dissenting opinions, both Judges John Louis Coffey and Kenneth Francis Ripple also favored a strict reading of Fed. R. Civ. P. 16. Judge Coffey expressed concerns about the tensions between broad district court inherent authority to facilitate settlement and the powers of Congress and the United States Supreme Court to promulgate uniform federal procedural law standards.37 He also warned that use of “inherent authority” in the case posed due process problems as it circumvented the subpoena process that affords summoned parties the opportunity to be heard on motions to quash.38 Judge Ripple noted that a broad interpretation of “inherent authority” would encourage each individual court to “march to the beat of its own drummer.”39

The third method, demonstrated in the United States Court of Appeals for the Fourth Circuit, reasons that a nonparty insurer or its agent could be compelled indirectly under Fed. R. Civ. P. 16 to appear at a pretrial conference by virtue of its involvement in pending litigation on behalf of its insured.40 The court failed to address the argument that district court authority to order Novak, a senior claims analyst for the defendant's insurer, to appear at a settlement conference derived from the “inherent power” to effectuate Fed. R. Civ. P. 16
as such authority was unnecessary. Instead, the court reasoned that because the legal and financial interests of the named defendant and its insurer were "aligned" (the insurer being contractually bound to pay any judgment entered against the insured), an order directing the insured as a party to produce a person with full settlement authority could effectively "coerce cooperation" from a nonparty insurer, as an agent of the defendant/insured, at settlement talks.

Each of these methods of applying Fed. R. Civ. P. 16 to nonparty insurers presents problems. The first, an "inherent power" approach, embodies broad judicial discretion, with the likelihood of divergent precedents and inconsistent standards. The second, a plain language approach, forecloses the possibility of compelling the appearance of any nonparty, no matter how key its role is in settlement, if the non-party is not expressly recognized in the rule. This can make a pretrial settlement conference an exercise in futility when full settlement authority is not vested in the attending attorneys and/or parties, with the likely result being wasted judicial resources and increased litigation costs. Finally, an indirect approach, whereby a nonparty insurer is deemed an agent of the party under Fed. R. Civ. P. 16, not only stretches the rule uncomfortably, but also is particularly troublesome where the interests of the nonparty insurer and the insured are not aligned, as when there is a dispute about policy coverage. A simple solution is to amend Fed. R. Civ. P. 16 to include guidelines expressly addressing ancillary authority over nonparty insurers. Such guidelines should eliminate difficult inquiries into ambiguously written laws, inherent power, and back door techniques.

Ironically, written guidelines covering nonparty insurers were proposed in 1993 when Fed. R. Civ. P. 16 was last revised. A rejected 1993 proposal to amend Fed. R. Civ. P. 16 stated a "court may require that parties, or their representatives or insurers, attend a conference

41. Novak, 932 F. 2d at 1408. The court upheld the finding of criminal contempt, though grounded on an unavailable inherent authority, because the district court's order was "neither transparently invalid nor patently frivolous" so as to allow a person to disobey it with impunity. Id. at 1408-09.

42. Novak, 932 F.2d at 1408 (assuming settlement authority remained with the insurer).

to consider possibilities of settlement."44 Notwithstanding this rejection, some federal courts have similar local rules. For instance, the Local Rules for the Eastern District of Michigan say that "at all conferences designated as settlement conferences, all parties shall be present, including, in the case of a party represented by an insurer, a claim representative with authority adequate for responsible and effective participation in the conference."45 Likewise, the Western District of Michigan has a local rule saying "in cases where an insured party does not have full settlement authority, an official of the insurer with authority to negotiate a settlement may be required to attend."46

While such local rules certainly help, the need for similar general written federal guidelines is clear.47 A case-by-case or court-by-court approach to ancillary authority over nonparty insurers in settlement conference settings invites divergent and conflicting practices. New general rules should, however, go beyond the noted local rules, as the local rules neither speak to the participatory rights of nonparty insurers nor recognize the necessary bounds of discretion, as does the supplemental jurisdiction statute.

Newly formulated federal rules governing the pretrial participation of nonparty insurers in settlement talks must recognize broad discretion for the purpose of facilitating the just, speedy, and inexpensive resolutions of civil actions while simultaneously providing at least some guidance on the limits of such discretion. Any new rule involving nonparty insurers must account for consideration of the likelihood of settlement, the need to maintain judicial impartiality, and the value of people's time.48

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46. U.S. Dist. Ct., W.D. Mich. Local R. 16.8. It may be these Michigan federal court rules are tied to Mich. Ct. R. 2.401(F) (1985) (Where "meaningful discussion of settlement is anticipated," court holding pretrial conference may direct persons with authority to settle to be present, including "agents of parties, representatives of lien holders, or representatives of insurance carriers.").
47. The general guidelines need not, as in the Michigan local rules, expressly cover insurers. For example, U.S. Dist. Ct., C.D. Ill., Local R. 16.1(B) says, in part:

The presiding judge may order the parties to submit to settlement conferences at any time if it appears that a case may be resolved by settlement. The settlement conference will be by personal appearance unless otherwise directed by the presiding judge. In addition to the attorney responsible for the actual trial of the case, someone with final settlement authority shall be required to attend the settlement conference, either in person or by telephone.

Id.

IV. RESOLVING THE SUBROGATION CLAIMS OF NONPARTY INSURERS AGAINST THEIR INSUREDS

Beyond compelled attendance at settlement conferences, difficulties arise in federal civil actions regarding the breadth of ancillary subject matter jurisdiction over the affirmative claims of nonparty insurers that are factually related to the original plaintiff's claims. Such nonparty claims usually involve nonparty insurers seeking recoveries from their insureds of expenses paid on behalf of these insureds who are then seeking recoveries of these same expenses, and others, from third-parties.49

At times defendants seek to join such nonparty insurers as co-plaintiffs.50 When they do, troubles often arise under Fed. R. Civ. P. 17 and Fed. R. Civ. P. 19. Federal Rule of Civil Procedure 17(a) says that "every action shall be prosecuted in the name of the real party in interest."51 Federal Rule of Civil Procedure 19(a)(2)(ii) states that persons claiming an interest in the subject of a civil action shall be joined if their absence may "leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest."52 Where a plaintiff's recovery is subject to a contractual subrogation right of a nonparty insurer, the insurer arguably is a "real party at interest" claiming an interest in "the subject" of the action.53 Generally, a defendant will seek to join a nonparty insurer for two reasons. First, it is worried about possible double liability if the plaintiff runs off with judgment proceeds without paying the nonparty insurer.54 Second, the defendant hopes to reduce sympathy for the plaintiff by informing

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49. Of course, an insured will usually not sue if most or all of any recovery will likely go to a nonparty insurer. See Draper v. Aceto, 33 P.3d 479, 479 (Cal. 2001) (Employee and employee's attorney get nothing from settlement with tortfeasor as employer received all proceeds in order to cover workers' compensation benefits earlier paid to the employee.).

50. Interestingly, nonparty insurers have been joined as co-defendants by a plaintiff. Vandervest v. Wisconsin Central Ltd., 936 F. Supp. 601, 605 (E.D. Wis. 1996) (Joiner "solely to protect their subrogated interests;" codefendants are not "real parties in interest" so their citizenship does not matter in the plaintiff's diversity action.).


53. Fed. R. Civ. P. 17 and Fed. R. Civ. P. 19 are often used together since a party whose joinder is necessary to protect the interests and rights of persons already parties to the suit from multiple obligations under Fed. R. Civ. P. 19 will often be deemed a real party in interest under Fed. R. Civ. P. 17.

54. Thus, a defendant will not usually turn over settlement monies to a plaintiff whose subrogated nonparty insurer has not released the defendant from any future liability. See, e.g., Pratt v. Philbrook, 38 F. Supp. 2d 63, 65-67 (D. Mass. 1999) (insurer of defendant would not pay because plaintiff and her sister, an unnamed party who also settled with the defendant, had not arranged for the payment of an outstanding lien on settlement proceeds to one of the sisters).
the fact finder, often a jury, that at least a portion of any recovery will be paid to an insurer.\textsuperscript{55} In the absence of written guidelines, federal courts have handled these joinder issues inconsistently, though usually finding them governed by uniform federal law standards.\textsuperscript{56}

One such “real party in interest” case is \textit{Story v. Pioneer Housing Systems, Inc.}\textsuperscript{57} In denying the defendant’s motion to add the plaintiff’s insurer as real party in interest, the court in \textit{Story} held that even if there existed a contractual subrogation right of a nonparty insurer, the defendant could be protected against any risk of multiple liability under the precedent of \textit{Dudley v. Smith}.\textsuperscript{58} There, the United States Court of Appeals for the Fifth Circuit rejected a defendant’s assertion that under the United States Supreme Court holding in \textit{United States v. Aetna Casualty Surety Co.},\textsuperscript{59} Fed. R. Civ. P. 19(a)(2)(i) directs the joinder of a plaintiff’s insurer. In \textit{Dudley}, the court suggested that “any multiplicity of suit risk can be obviated” through the use of a trust in favor of the person claiming the right to subrogation.\textsuperscript{60}

Other federal courts, however, have demanded the joinder of nonparty insurers who have such subrogation rights. In \textit{Sikora v. AFD Industries Inc.},\textsuperscript{61} an Illinois federal district court held that an employer with subrogation rights involving workers compensation benefits must be joined as a real party in interest in the plaintiff/employee’s product liability action. While reluctant to require joinder of a partial subrogee under Fed. R. Civ. P. 17(a), the court felt compelled by the United States Court of Appeals for the Seventh Circuit

\begin{footnotesize}
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\item \textsuperscript{55} But see June F. Entman, \textit{Compulsory Joinder of Compensating Insurers: Federal Rule of Civil Procedure 19 and the Role of Substantive Law}, 45 Case. W. Res. L. Rev. 1, 69-71 (1994) (finding possible jury prejudice a “non-problem” because a jury need not know of an insurer’s interest even if the insurer “is named in the pleadings”). \textit{See also Ga. Code Ann. § 33-4-7(d) (Supp. 2002) (insurer is “unnamed party not disclosed to jury”).}
\item \textsuperscript{56} But see Entman, 45 Case W. Res. L. Rev. at 72-80 (“unsatisfactory situation” involving conflicting Fed. R. Civ. P. 17 and Fed. R. Civ. P. 19 federal decisions “arises in large part because federal courts do not permit the substantive law of subrogation, often that of a state, to play its rightful role in determining the parties to the suit.”).
\item \textsuperscript{57} 191 F.R.D. 653 (M.D. Ala. 2000).
\item \textsuperscript{58} 504 F.2d 979 (5th Cir. 1975).
\item \textsuperscript{59} 338 U.S. 366 (1949). The Supreme Court said in \textit{Aetna} that “although either the subrogee or subrogor may sue, joinder may be compelled upon timely motion.” United States v. Aetna Casualty Surety Co., 338 U.S. 366, 381-82 (1949). The \textit{Dudley} Court distinguished \textit{Aetna} on the grounds that in \textit{Aetna} the Court compelled joinder of insureds where three plaintiffs were insurers who proceeded as partial subrogees. \textit{Dudley} v. Smith, 504 F.2d 979, 983 (5th Cir. 1974). The \textit{Dudley} Court suggested that when a civil action was brought by an insured for the full amount of the loss, joinder of the insurer may be unnecessary. \textit{Dudley}, 504 F.2d at 983. The \textit{Dudley} court also noted that Fed. R. Civ. P. 19 has been amended in relevant parts since the \textit{Aetna} ruling. \textit{Id.}
\item \textsuperscript{60} \textit{Dudley}, 504 F.2d at 983 (citing Brainiff Airways, Inc. v. Falkingham, 20 F.R.D. 141 (D. Minn. 1957)).
\item \textsuperscript{61} 18 F. Supp. 2d 841 (N.D. Ill. 1998).
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holding in *Wadsworth v. United States Postal Service* 62 where the appellate court, looking to *Aetna* (the case distinguished in *Dudley*), held that when asserting a claim in which an insurer had a subrogation interest, the plaintiff must join the insurer under Fed. R. Civ. P. 17(a). 63 In recognizing that it was "not writing on a blank slate," the court in *Sikora* found the *Wadsworth* precedent compelled joinder of the subrogee. 64

Application of the *Aetna* precedent continues to cause confusion. 65 New written civil procedure laws could provide the federal judiciary with express guidelines for determining if and when nonparty insurers with subrogation rights should be joined, prompting either federal procedural laws similarly applied nationally or federal court use of in-state practices. These guidelines should cover not only joinder or constructive trust principles, but also supplemental jurisdiction principles. Since disputes over the subrogation rights of nonparty insurers seemingly should not always be adjudicated when the insureds' claims against third-parties are resolved, and since the dividing lives are unclear, written directions on proper exercises of, and restraints on, subject matter jurisdiction are needed. 66

V. REFORMING OTHER CIVIL PROCEDURE LAWS INVOLVING NONPARTY INSURERS

The ancillary authority of federal district courts to compel the attendance of nonparty insurers (including those with interests in plaintiffs' proceeds and those who defend and indemnify defendants) at settlement conferences should be addressed in written civil procedure laws, as should the adjudicatory power of these courts over certain

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62. 511 F.2d 64 (7th Cir. 1975).
63. *Sikora v. AFD Indus. Inc.*, 18 F. Supp. 2d 841, 846 (N.D. Ill. 1998) (expressing the court's reluctance under Rule 17(a) to add a partial subrogee) (The trial court was also reluctant to require the joinder of the plaintiff's employer because the court agreed with the plaintiff's assertion that the defendant was seeking joinder primarily to overcome a statute of limitations defense on a contribution claim the defendant sought to make against the employer.); *Wadsworth v. United States Postal Service*, 511 F.2d 64, 65-66 (7th Cir. 1975) (stating that under the real-party-in-interest rule an insurer having paid a portion of a loss must be joined as a plaintiff).
64. 18 F. Supp. 2d at 846.
66. For example, where a plaintiff/insured's claims against a third-party are settled early on, but where any subrogation claim foreseeably will require a trial, or at least extensive pretrial activity prior to settlement, discretionary dismissal of the non-party insurer's subrogation claim seems appropriate where a state forum is also available, convenient, conversant in state insurance laws, and expeditious in civil case disposition. *Cf. 28 U.S.C. § 1367(c) (2000)* (general guidelines on exercising supplemental jurisdiction).
affirmative civil claims presented by nonparty insurers in federal civil actions. Elsewhere, there may be similar difficulties and a comparable need for new, generally applicable written laws.

For example, as noted earlier, it is now uncertain whether and how nonparty insurers may be subject to the ancillary sanctioning authority of the federal courts for misconduct involving pretrial settlement conferences. Similarly, it is unclear whether nonparty insurers may be sanctioned if they are chiefly "responsible" for violations of Fed. R. Civ. P. 11 (involving "paper" presentations), of formal discovery rules, or of court orders involving formal discovery. Because these written federal civil procedure laws are unclear, it may be that certain state civil practice duties for insurers, embodied in substantive insurance law statutes, must apply in the federal district courts. It may also be that certain state professional conduct stan-


68. FED. R. CIV. P. 11(c) (stating that a court may impose sanctions on a party that has violated Fed. R. Civ. P. 11(b); FED. R. CIV. P. 11(a) (stating that an unsigned "paper" will be stricken unless promptly corrected). Formal discovery papers are not included. FED. R. CIV. P. 11(d); FED. R. CIV. P. 11(b) (relating to presentations). FED. R. CIV. P. 37(b) expressly allows certain sanctions involving such violation to be directed only against a "party," an "officer, director, or managing agent of a party," or "the attorney advising" the party who fails to act properly. FED. R. CIV. P. 37(b). FED. R. CIV. P. 37(b) expressly permits certain sanctions involving failures to obey court orders involving formal discovery be directed only against "a party," "an officer director or managing agent of a party," "a person designated... to testify on behalf of a party," "a deponent," or "the attorney advising" the party who fails to obey a court order involving formal discovery. FED. R. CIV. P. 37(b).

69. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) (state practices applicable if forum shopping concerns and equal protection denials are significant). Seemingly, often questions involving choosing federal or state law standards are avoided because the standards are similar. We do not discuss herein either the Tenth Amendment federal constitutional limits on Congressional control of nonparty insurers interested in federal civil actions or the Enabling Act, 28 U.S.C. § 2072(b) (2000) (rules shall not enlarge, abridge or modify substantive rights) limits on federal civil procedure rulemaking by the U.S. Supreme Court. See also MONT. CODE ANN. § 33-18-201(13) (2001) (in title on insurance and insurance companies, a statutory bar on insurers who "fail to promptly settle claims, if liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage."). MONT. CODE ANN. § 33-18-201(6) ("neglect to attempt in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear"); MONT. CODE ANN. § 33-18-242(1) ("Insured or a third-party claimant has an independent cause of action against an insurer for actual damages caused by the insurer's violation of subsection... 6 ... or 13 of MONT. CODE ANN. § 33-18-201.").
standards for insurance adjusters, embodied in lawyer conduct provisions, must also apply in federal courts.\textsuperscript{70}

Also, as described earlier, neither the supplemental jurisdiction statute nor other written law speaks to posture or preexisting original jurisdiction when ancillary adjudicatory power is exercised directly over certain nonparty claims, including claims involving nonparty insurers resolved on the merits following considerations of discretion.\textsuperscript{71} Should such power regularly be exercised over nonparty insurers with liens (or other asserted interests) on any proceeds to plaintiffs or over nonparty insurers involved in insurance coverage or bad faith disputes with named defendants that are factually related to pending civil claims?\textsuperscript{72} Seemingly these questions require independent answers from federal lawmakers, as they concern federal district court subject matter jurisdiction operating within constitutionally-limited adjudicatory power.

Further, when such discretionary adjudicatory power is exercised over nonparty claims, how should nonparty claims involving insurance be set forth (as they are not presented in pleadings) and otherwise processed? While certain of these process questions appear capable of resolution by simply referencing in-state civil procedure practices, the Seventh Amendment jury trial right will prompt inde-

\textsuperscript{70} See, e.g., Jones v. Allstate Ins. Co., 45 P.3d 1068, 1075-76 (Wash. 2002) (stating that insurance claims adjusters, when preparing and completing documents which affect the legal rights of third party claimants and when advising third parties to sign such documents, must comply with the standard of care of a practicing attorney; court does not decide whether such activities by adjusters constitute the unauthorized practice of law as no one asked the court to enjoin or prohibit the acts of adjusters).

\textsuperscript{71} 28 U.S.C. § 1367(b). Other factors relevant to the possible disposition of claims involving nonparty insurers within the ambit of 28 U.S.C. § 1367(a) ("so related to claims in the action with such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution") are noted in the statute, though they are quite general in nature. See also 28 U.S.C. § 1367(c) (Disposition should be declined where, e.g., there is "a novel or complex issue of State law" or an "exceptional" circumstance.).

\textsuperscript{72} With insurance coverage or bad faith claims, as contrasted with nonparty claims involving the liens of insurers, more difficulties seemingly will arise with exercises of ancillary (or even original) adjudicatory power as the very strong state governmental interests in regulating insurers' interactions with their insureds are often in play. See, e.g., 15 U.S.C. § 1012(b) ("No Act of Congress shall be construed to . . . impair . . . any law enacted by any State for . . . regulating the business of insurance . . . unless such Act specifically relates to the business of insurance."). See generally Hartz v. Liberty Mut. Ins. Co., 269 F.3d 474, 476 (4th Cir. 2001) ("Maryland has made a considered decision not to recognize a tort action for bad faith failure to settle with an insured," opting for an administrative process). See also M. DeMatteo Const. Co. v. Century Indemnity Co., 182 F. Supp. 146, 160 (D. Mass. 2001) (claim fails where Insurance Commissioner was afforded "the exclusive authority to enforce" the statutes relied upon by claimant).
dependent federal practices in response to other questions. Yet other questions may prompt resolutions referencing in-state lawyer professional conduct standards or in-state substantive insurance company standards. Additionally, certain questions may require a "uniform federal standard" that should not "give way to contrary local policies," where a national norm is then implemented through either Fed. R. Civ. P. amendment or statutory initiative.

Finally, there is little written federal civil procedure law on the exercise of what might be called the indirect ancillary adjudicatory power over nonparty claims involving insurers. For example, at times a nonparty insurer of a named defendant may be bound by a civil court judgment against its insured. Thus, res judicata can make the nonparty insurer financially responsible for a judgment against its in-

73. In-state civil procedure practices on setting forth nonparty claims involving insurance seemingly would be more likely used, if their use was not already demanded by Erie R.R. Co., 304 U.S. at 75 (state law employed when federal courts resolve state law claims where "uniformity in the administration of the law of the state" is necessary), where they facilitate proper federal court application of state substantive law (as when the procedures are tied to the "made whole" doctrine which limits recoveries by non-party insurers asserting certain liens), while independent federal civil procedure laws would more likely be employed where uniformity of practices in all federal district courts appears necessary and would not undermine the enforcement of state substantive laws. Federal court facilitation of the enforcement of state insurance laws and their underlying policies is urged in 15 U.S.C. § 1012(a) ("The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.") and 15 U.S.C. § 1012(b) ("No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance"); See, e.g., Poole v. Gwin, Lewis & Punches, LLP, 792 So. 2d 987, 991 (Miss. 2001) (finding no jury trial right in Mississippi state courts when discharged contingent fee attorney sues former client in quantum meruit for fees, though such a right arises in a federal district civil action under Webb v. B.C. Rogers Poultry, Inc., 174 F.3d 697 (5th Cir. 1999)).

74. See generally Fla. R. Regulating the Fla. Bar, Rules of Prof'L Conduct 4-1.8(j) (2002 & Supp. 2002) (requires insurance defense lawyers, in personal injury and property damage tort cases not involving government and where insurers foot the bill, to provide clients with a "Statement of Insured Client's Rights," which includes information on fees and costs; litigation guidelines; confidentiality; conflicts of interest; settlement; and, the right to hire one's own lawyer). See also Mont. Code Ann. § 33-18-201(13).

75. Consider, for example, questions involving the extent, if any, that a lawyer for a defendant/insured may simultaneously represent the nonparty insurer where the insured consents and the interests of the insured and insurer are aligned. See, e.g., Pine Island Farmers Coop v. Erstad and Riemer, P.A., 649 N.W.2d 444, 449 (Minn. 2002) (state laws differ, with some saying an insured is always the sole client of defense lawyer paid for by the insurer).

76. The guiding principle was set out in Hartford Ins. Co. v. Henderson & Son, Inc., 371 S.E.2d 401, 402 (Ga. 1988) where the court said:

The general rule is that because there is no privity of contract, a party may not bring a direct action against the liability insurer of the party who allegedly caused the damages unless there is an unsatisfied judgment against the insured or it is specifically permitted either by statute or a provision in the policy.

Id.
sured (at least to the insurance policy limits) as long as the insured meets its contractual duties involving cooperation and the nonparty insurer can significantly control, per the insurance contract, the defense where there are no policy coverage questions. A comparable res judicata effect may also arise even where the insured runs off and thus fails to cooperate, as long as the plaintiff sufficiently informs the nonparty insurer of the pending civil action against the departed defendant/insured and the nonparty insurer has adequate opportunity to be heard on any policy coverage questions and on any questions involving its insured's acts. Here, the nature of the plaintiff's burden of informing the nonparty insurer and the nature of any hearing generally should be governed by federal civil procedure laws which do not follow in-state practices because uniform practices among all federal district courts are usually desirable.

VI. CONCLUSION

Nonparty insurers often participate in federal civil actions. Sometimes nonparty claims involving insurers are adjudicated. Other times ancillary authority is exercised over nonparty insurers in order that the federal district courts may function successfully. While they are frequently present, their participation is infrequently addressed in written federal civil procedure laws. Exemplary are the subject matter jurisdiction statutes. As a result, difficulties have arisen regarding the participatory rights of nonparty insurers in federal cases. In particular, there has been trouble with the ancillary authority to direct the attendance of nonparty insurers at settlement conferences and with the ancillary adjudicatory powers over the interests of nonparty insurers in recoveries by their insureds who are named plaintiffs. New written federal civil procedure laws addressing varying forms of participation by nonparty insurers in federal civil actions

77. Res judicata effects at times are accomplished statutorily through requirements on insurance contracts rather than through common law precedents. See, e.g., CAL. INS. CODE § 11580(b)(2) (West 1988); N.Y. INS. LAW § 3420 (McKinney 2000). Where there are alleged failures, as with the insured's alleged lack of cooperation or timely notice, states differ on who carries the burden of proof on prejudice to the insurer. Compare Clementi v. Nationwide Mut. Fire Ins. Co., 16 P.3d 223 (Colo. 2001) (stating that the insurer bears burden to show prejudice), with Alcazar v. Hayes, 982 S.W.2d 845 (Tenn. 1998) (stating that prejudice to insurer is often presumed, but may be rebutted by the insured). See also Phillips Way v. American, 795 A.2d 216 (Md. Ct. Spec. App. 2002) (noting that under statutes, prejudice needed where insured fails to cooperate with insurer when third party sues insurer, but not when insured sues insurer).

78. See, e.g., Vega v. Gore, 730 N.E.2d 587 (Ill. App. Ct. 2000) (no such effect where insurer received actual notice of civil action against insured after entry of a default judgment).
would be helpful. We have suggested a few reforms. We hope they and others will be discussed by the Congress and by the drafters of the federal civil procedure rules.