

late to help develop business that Reed had originated, responded with hostility, but the substance of his response was an emphatic demand that sex and gender not intrude upon their professional relationship. Infantino's response was somewhat crude, but not lubricious or in the nature of a proposition. Moreover, the statement itself consisted of a conditional clause that was never completed by a main clause because Reed hung up the phone. Infantino could have ended the sentence by saying, "... let's disregard the gender stuff, and focus on getting a client."

I therefore agree with the majority that the plaintiff "likely would not have passed the 'good faith reasonable[ness] test' of *Manoharan* if the only evidence offered at trial had been Infantino's isolated comment." Maj. Op. at 1179. The majority then turns to other evidence in the record and concludes that Reed "could reasonably have perceived Infantino's comment as merely the last in a series of incidents that led her to believe that she was the victim of a hostile work environment." *Id.* at 1180. Specifically, they cite: (1) Reed's trial testimony that Lumley "once told me I was acting like a bitch in heat and he was just not happy working with me;" and (2) evidence suggesting that even before the incident with Infantino, plaintiff "felt she was not getting the proper credit for what she does and felt [that] being a female she wasn't as appreciated."

In my view, reliance on this evidence is error. This is a retaliation case. The objective of Title VII's retaliation provision is "obviously to forbid an employer from retaliating against an employee *because of the latter's opposition to an unlawful employment practice.*" *Manoharan*, 842 F.2d at 593 (emphasis added). Thus, the only relevant conduct in evaluating whether plaintiff has suffered retaliation is the conduct that she opposed and challenged in her complaint to her employer. *See id.* at 592 (referring to opposed conduct and challenged actions). The basis of Reed's retaliation claim is the complaint she made to Rita Harfield, which did not concern Lumley. Reed testified that when she met with Harfield:

I told her about [Infantino's] comment, but I also expressed to her my frustration in dealing—... I said, you know, this tension is continuing, Chuck [Infantino] is really

aggressive, he is really being pushy with me. And the other day he used this phrase and I thought like why is he referring to his body parts, I don't want to hear that at work. I just think it was inappropriate.

In the absence of any record evidence that Reed ever opposed or made her employer aware of Lumley's ugly statement, it cannot serve as a basis for Reed's retaliation claim.

The record does (elsewhere) show that Reed complained to Harfield and therefore to her employer that, "being a female," she received insufficient credit and appreciation. But this grievance, generalized as to names and occasions, does not begin to describe a hostile work environment, and is an insufficient makeweight. The conduct Reed complained about was that Infantino was an "aggressive" individual who made a single inappropriate remark. That comment stands alone, and does not pass the good faith reasonableness test of *Manoharan*.

I would reverse the district court's order denying the defendant's Rule 50(b) motion for judgment as a matter of law on Reed's retaliation claim.



**HB GENERAL CORP.; HB Limited
Realty Corp., Appellants,**

v.

**MANCHESTER PARTNERS,
L.P., Defendant/Third-
Party Plaintiff,**

v.

**H.B. PARTNERS, L.P. and Vanderbilt
Development Corporation, Third-
Party Defendants.**

No. 95-5396.

United States Court of Appeals,
Third Circuit.

Argued March 21, 1996.

Decided Sept. 13, 1996.

General partner and limited partner
brought suit against other limited partner,

seeking declaratory judgment that defendant breached partnership agreement by failing to meet capital call. Defendant counterclaimed. The United States District Court for the District of New Jersey, Alfred M. Wolin, J., 1995 WL 311351, dismissed case on ground that partnership itself was an indispensable party whose joinder destroyed diversity jurisdiction. Plaintiffs appealed. The Court of Appeals, Becker, Circuit Judge, held that because all partners of the small limited partnership were before the district court, joinder of partnership entity was not required.

Reversed and remanded.

1. Federal Courts ⇨754.1, 870.1

District court's determination that joinder is required if feasible is reviewed under plenary standard to extent that it rests on conclusions of law, and under clear error standard as to any subsidiary findings of fact. Fed.Rules Civ.Proc.Rule 19(a), 28 U.S.C.A.

2. Federal Courts ⇨817

Court of Appeals reviews for abuse of discretion district court's determination that person is indispensable and that dismissal is required because the person's joinder is not feasible. Fed.Rules Civ.Proc.Rule 19(a), 28 U.S.C.A.

3. Declaratory Judgment ⇨295

In action by general partner and limited partner against another limited partner, seeking declaratory judgment that defendant breached partnership agreement by failing to meet capital call, partnership should have been joined if feasible; defendant limited partner's obligation to provide capital, the alleged breach of which was the basis of the suit, ran to the partnership. Fed.Rules Civ. Proc.Rule 19(a), 28 U.S.C.A.

4. Declaratory Judgment ⇨295

Although partnership should have been joined, if feasible, in action by general partner and limited partner against another limited partner, seeking declaratory judgment that defendant breached partnership agreement by failing to meet capital call, joinder would have destroyed diversity and thus was not feasible; nevertheless, partnership was

not indispensable party and case could proceed without partnership, since protective provisions in the judgment could effectively avoid any prejudice to defendant that might be caused by excluding partnership from the litigation, partnership was effectively represented by the partners, all of whom were before the court, and defendant's counterclaims could be heard in federal court. Fed. Rules Civ.Proc.Rule 19(b), 28 U.S.C.A.

5. Federal Courts ⇨302

For diversity jurisdiction purposes, limited partnership is considered citizen of each state in which its partners are citizens.

6. Federal Civil Procedure ⇨201

Although indispensability of party is question of federal law, in diversity action, state law determines nature of interests of all individuals concerned. Fed.Rules Civ.Proc. Rule 19, 28 U.S.C.A.

7. Partnership ⇨115

Under Delaware law, partnership had interests as an entity in action between partners; partnership may have had cause of action that would be effectively decided, and if defendant won the litigation, it would compel sale of partnership's undeveloped real property.

8. Partnership ⇨375

In Delaware, general partners have power to sue directly on behalf of partnership on partnership's claims.

9. Partnership ⇨199

Although Delaware has "common name" statute, allowing partnerships to sue and be sued in partnership name, its use, although often convenient, is not mandatory. 10 Del.C. § 3904.

10. Federal Courts ⇨305

Because its interests were aligned with those of plaintiff general partner, limited partner was appropriately considered a plaintiff for jurisdictional purposes.

11. Federal Courts ⇨290.1

Even in suit brought in representative capacity, citizenship of named representative

generally controls for purposes of diversity jurisdiction.

12. Declaratory Judgment ¶295

Even if general partner's and limited partner's claims were derivative or otherwise on behalf of partnership, joinder of partnership was not required in declaratory judgment action so that action could be prosecuted in name of real party in interest; insofar as plaintiffs were authorized to bring suit under Delaware law, even derivatively or otherwise on behalf of partnership, they were also real parties in interest. Fed.Rules Civ. Proc.Rule 17(a), 28 U.S.C.A.

13. Federal Civil Procedure ¶131

There may be multiple real parties in interest for a given claim, and if plaintiffs are real parties in interest, it is not necessary to add other parties also fitting that description in order to satisfy requirement that action be prosecuted in name of real party in interest. Fed.Rules Civ.Proc.Rule 17(a), 28 U.S.C.A.

14. Federal Courts ¶286.1

Complete diversity is required only when federal court jurisdiction is exercised under federal diversity jurisdiction statute. 28 U.S.C.A. § 1332.

15. Federal Courts ¶286.1

Under the Constitution, diversity jurisdiction requires only minimal diversity among parties, i.e., at least one defendant and one plaintiff need be citizens of different states.

16. Federal Courts ¶24

In action by general partner and limited partner against another limited partner, seeking declaratory judgment that defendant breached partnership agreement by failing to meet capital call, district court had statutory authority to exercise jurisdiction over defendant limited partner's counterclaims under supplemental jurisdiction statute; defendant's counterclaims relied on essentially the same facts as its defense to plaintiff's claims. 28 U.S.C.A. § 1367.

17. Federal Courts ¶14.1, 20.1

Rule authorizing assertion of supplemental jurisdiction over claims that lack an inde-

pendent basis of jurisdiction if those claims "are so related to claims" within the court's jurisdiction "that they form part of the same case or controversy under Article III of the United States Constitution" applies even to claims asserted by or against additional parties. 28 U.S.C.A. § 1367.

18. Federal Courts ¶14.1

Although supplemental jurisdiction statute places certain limits on court's ability to exercise supplemental jurisdiction over claims by or against nondiverse additional parties when basis for original claim is diversity jurisdiction, those limits only apply when the additional claims are brought by plaintiffs. 28 U.S.C.A. § 1367.

19. Federal Courts ¶14.1

Claims are part of "same case or controversy," within meaning of statute authorizing assertion of supplemental jurisdiction over claims that lack an independent basis of jurisdiction if those claims "are so related to claims" within the court's jurisdiction "that they form part of the same case or controversy under Article III of the United States Constitution," if they share significant factual elements. 28 U.S.C.A. § 1367.

See publication Words and Phrases for other judicial constructions and definitions.

20. Federal Civil Procedure ¶201

One purpose of rule governing joinder of persons needed for just adjudication is to avoid piecemeal litigation, but this purpose is limited to prevention of piecemeal litigation caused by failure to join an interested person. Fed.Rules Civ.Proc.Rule 19, 28 U.S.C.A.

21. Declaratory Judgment ¶5.1

Decision whether to grant declaratory judgment is committed to district court's discretion.

Peter D. Isakoff (argued), James W. Robertson, Weil, Gotshal & Manges, Washington, DC, Frederic K. Becker, Wilentz, Goldman & Spitzer, P.A., Woodbridge, NJ, for Appellants, HB General Corp.; HB Limited Realty Corp.

Gage Andretta (argued), Arthur S. Goldstein, Jennifer E. Morris, Wolff & Samson, Roseland, NJ, for Appellees-Defendants/Third-Party Plaintiffs, Manchester Partners, L.P.

Before: BECKER, McKEE, Circuit Judges, and POLLAK, District Judge.*

OPINION OF THE COURT

BECKER, Circuit Judge.

This is a diversity suit arising out of a dispute among the members of a small limited partnership, HB Partners, L.P. Plaintiffs HB General Corp. and HB Limited Corp., brought suit in the district court against the third partner, Manchester Partners, L.P., seeking a declaratory judgment that Manchester had breached the Partnership Agreement. Although there is complete diversity among the three partners, Manchester argues that the Partnership itself—which shares the citizenship of all of the parties—is an indispensable party whose joinder destroys diversity jurisdiction. The district court agreed with Manchester and dismissed the case. Resolution of the other partners' appeal turns on the interplay between the "technical, precedent-bound" rule that, for diversity jurisdiction purposes, a limited partner is considered a citizen of each state in which its partners are citizens, and the flexible, pragmatic federal procedural rules of joinder.

We reverse. Applying the joinder rules pragmatically, we hold that, because all of the partners of this small limited partnership are before the district court, joinder of the partnership entity is not required. Specifically, we conclude that, given proper protective provisions in the judgment, proceeding in the absence of the Partnership will cause no prejudice to Manchester; that the Partnership is effectively represented by the partners and consequently suffers no prejudice from its exclusion; that whether or not the plaintiffs' claims are "derivative" is immaterial; and that Manchester's counterclaims can be heard in this federal court

action and thus there is no risk of piecemeal litigation. For these reasons, the requisites of Federal Rule of Civil Procedure 19 are satisfied. We also hold that under Delaware law, the source of any cause of action plaintiffs have for breach of the Partnership Agreement, they are real parties in interest within the meaning of Federal Rule of Civil Procedure 17.

I. Facts and Procedural History

HB Partners, L.P. (the Partnership) was formed in October 1991, to develop three properties in Manchester, Vermont for commercial leasing. At its inception, the Partnership consisted of one general partner, plaintiff HB General Corp., and two limited partners, plaintiff HB Limited Realty Corp. and defendant Manchester Partners, L.P. HB General and HB Limited (the HB entities) are controlled by Ben Hauben, a major developer of retail stores in Vermont. They are both Delaware corporations with their principal places of business in Vermont. Manchester is organized under New Jersey law and all of its partners are New Jersey residents. The Partnership was formed under Delaware law, and Delaware law governs construction of the Partnership Agreement.

Under that Agreement, Manchester was to provide the bulk of the Partnership's capital. It contributed \$990,000 at the Partnership's formation and was to provide additional capital up to a total of \$1,980,000 in response to capital calls made by the general partner, HB General. The Partnership Agreement provides that HB General may call for additional contributions of capital whenever the Partnership will hold less than \$500,000 in cash or cash equivalents in the ensuing thirty days. Each capital call can be for up to \$500,000, of which ninety-nine percent is to be paid by Manchester and one percent by HB General.

HB General made a series of capital calls which were met by Manchester without incident. However, problems arose in the summer of 1994. On June 10, 1994, HB General

sitting by designation.

* Honorable Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania,

made a capital call for \$250,000, of which Manchester's share was \$247,500. Manchester sent a check for this amount, but placed conditions on its use, demanding that the funds be held in escrow until all building permits and required approvals were obtained. HB General found these conditions improper and returned the check to Manchester. On August 11, 1994, HB General again made a capital call, this time for \$400,000, \$396,000 of which was due from Manchester. Manchester notified HB General by letter dated September 13, 1994, that it would not make the capital contribution.

The Partnership Agreement provides that if Manchester fails to make a requested capital contribution, it will be considered to have withdrawn from the Partnership and shall have no further rights as a partner. In such event, Manchester becomes a subordinated creditor of the Partnership and is entitled only to a return of its capital contributions at a specified time in the future. The HB entities assert that Manchester's failure to meet the August 11 capital call has triggered this provision. They brought this declaratory judgment action in the district court, seeking a declaration that Manchester has lost its status as a limited partner and is now a subordinated creditor. Federal jurisdiction was asserted on the basis of diversity of citizenship.

According to Manchester, however, the parties' dispute is much more complicated than whether Manchester failed to meet a simple capital call. Manchester asserts that at the time of the August 11 capital call, the Partnership was significantly behind schedule in developing the Vermont properties, and that HB General had failed to meet numerous requirements of the Partnership Agreement. Manchester claims that because of these problems, it had informed HB General—prior to the final capital call—that it would exercise its "redemption option." This option, provided for in the Partnership Agreement, allows Manchester to have its Partnership interest "redeemed" at a price specified by formula in the event that the Partnership fails to commence construction on two of the three properties (the Manchester Square II Property and the Riverbend

Property) by October 10, 1994. The agreement states that if the Partnership does not pay the redemption price, Manchester's sole remedy is to compel a sale of any undeveloped parcels then owned by the Partnership.

Manchester maintains that by August 11, 1994, when HB General made the final capital call, HB General knew both that the Partnership could not commence construction on the Manchester Square II Property and the Riverbend Property by October 10, 1994, and that Manchester intended to exercise its redemption option. Manchester claims that HB General made the capital call in bad faith to force Manchester to choose between infusing a substantial sum of cash into the Partnership just prior to exercising its right of redemption—money that might not be recoverable given the redemption option's limited remedy—or defaulting on its obligation.

According to Manchester, it intended to file suit to force HB General to recognize Manchester's right to exercise its redemption option, but before it could do so, the HB entities filed this action. Manchester therefore counterclaimed against HB General and HB Limited, and against third-party defendants, the Partnership itself and Vanderbilt Development Corporation (another entity controlled by Ben Hauben). Manchester complains that because of the Partnership's failure to commence construction as scheduled and to recognize Manchester's right to exercise its redemption option, the plaintiffs breached the Partnership Agreement, their fiduciary duties to Manchester, and their covenant of good faith and fair dealing. Manchester seeks, *inter alia*, the following relief: (a) specific performance of those provisions of the Partnership Agreement giving Manchester the right to exercise its redemption option and to compel the sale of the properties; (b) attachment, foreclosure and sale of the Partnership properties and the other properties for which Partnership funds have been expended; (c) imposition of a constructive trust on all the properties; and (d) damages.

After Manchester unsuccessfully moved to transfer the case to the United States District Court for the District of Vermont, Man-

chester filed a parallel action in Vermont state court, seeking essentially the same relief as it seeks in federal court. Manchester then moved to dismiss this federal action on the basis that the Partnership was an indispensable party whose joinder would destroy diversity. The district court granted Manchester's motion. Applying Federal Rule of Civil Procedure 19(a), the court held that the Partnership itself has significant interests in this litigation and should be joined if feasible. The court then concluded under Rule 19(b) that the Partnership is indispensable, even if joinder is not feasible, in view of prejudice to Manchester and to the Partnership that would arise if the Partnership is excluded. Because, for diversity jurisdiction purposes, a limited partnership is considered a citizen of each state in which its partners (both general and limited) are citizens, *Carden v. Arkoma Associates*, 494 U.S. 185, 110 S.Ct. 1015, 108 L.Ed.2d 157 (1990), joinder of the Partnership would destroy diversity of citizenship. Thus, the district court dismissed the case for lack of subject matter jurisdiction.

[1, 2] We review the district court's Rule 19(a) determination that joinder is required if feasible under a plenary standard to the extent that it rests on conclusions of law and under a clear error standard as to any subsidiary findings of fact. *Janney Montgomery Scott, Inc. v. Shepard Niles, Inc.*, 11 F.3d 399, 404 (3d Cir.1993). We review for abuse of discretion the court's Rule 19(b) determination that a person is indispensable and that dismissal is required because the person's joinder is not feasible. *Id.* at 403.

II. Rule 19(a)

Federal Rule of Civil Procedure 19 determines when joinder of a particular person is compulsory. A court must first determine whether the person should be joined pursuant to Rule 19(a). If Rule 19(a) is satisfied but joinder is "not feasible"—because, *inter alia*, joinder would destroy diversity jurisdiction—the court must apply Rule 19(b) to determine whether, "in equity and good conscience," the party is "indispensable." If the court determines that the party is indispensable, the action must be dismissed.

[3] We agree with the district court that, pursuant to Rule 19(a), this Partnership should be joined if feasible. Under Rule 19(a), a person should be joined if:

(1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Fed.R.Civ.P. 19(a). Assuming that the Partnership has interests as an entity, a question to which we will turn presently, the Partnership clearly has an interest in this case: Manchester's obligation to provide capital—the alleged breach of which is the basis of the HB entities' suit—ran to the Partnership, *see* 4 Alan R. Bromberg & Larry E. Ribstein, *Bromberg and Ribstein on Partnership* § 15.04(g), at 15:34 (1994) (stating that the partnership itself has a claim for nonpayment of a limited partner's contribution to the partnership); and, if Manchester remains a partner it will force the sale of the Partnership's real property. Given the Partnership's interests, joinder of the Partnership is required under Rule 19(a)(2) if feasible: the Partnership might be able to bring identical claims against Manchester, or, alternatively, the Partnership's claims might be extinguished in this action by the HB entities.

III. Rule 19(b)

A. Introduction

[4, 5] Although Rule 19(a) requires joinder if feasible, joinder is not feasible in this case because of the Supreme Court's ruling in *Carden v. Arkoma Associates*, 494 U.S. 185, 110 S.Ct. 1015, 108 L.Ed.2d 157 (1990). *Carden* held that, for diversity jurisdiction purposes, a limited partnership is considered a citizen of each state in which its partners are citizens. Thus, although there is complete diversity without joinder of the Partnership because the suit is brought by two

Delaware and Vermont citizens against a New Jersey citizen, diversity will be destroyed if the Partnership, a citizen of Vermont, New Jersey, and Pennsylvania, is joined.¹ Because joinder is therefore not feasible, this case should be dismissed if the Partnership is deemed an indispensable party. The question, then, is whether this case can, "in equity and good conscience," proceed without the Partnership as a party, Fed. R.Civ.P. 19(b). We conclude that the district court abused its discretion in holding that the case cannot so proceed.

In contrast to *Carden*'s jurisdictional rule, which the Supreme Court acknowledged to be "technical, precedent-bound, and unresponsive to policy considerations," *Carden*, 494 U.S. at 196, 110 S.Ct. at 1021, whether a person is indispensable depends on "pragmatic considerations," Fed.R.Civ.P. 19 Advisory Committee Notes to the 1966 Amendment; see *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 116 n. 12, 88 S.Ct. 733, 741 n. 12, 19 L.Ed.2d 936 (1968). Rule 19(b) lists several factors to consider in deciding whether a person is indispensable:

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

Fed.R.Civ.P. 19(b). Applying these factors, the district court dismissed the case, concluding that exclusion of the Partnership would prejudice the Partnership's interests and, because of the possibility that the Partnership itself could later sue on the same claims, would prejudice Manchester's interests; that

protective provisions in the judgment could not lessen this prejudice; and that the plaintiffs have an adequate remedy if the suit is dismissed because of the identical litigation filed by Manchester in Vermont state court. The court also decided that the HB entities' suit is a derivative action, and found guidance in cases holding that a partnership is an indispensable party in derivative actions. Manchester echoes all of these reasons and offers, as an additional reason for dismissal, that its counterclaims against the Partnership cannot be heard in federal court. We conclude that none of the reasons offered for dismissal is meritorious.

B. Manchester's Interests

Taking the easiest question first, we conclude that protective provisions in the judgment can effectively avoid any prejudice to Manchester that might be caused by excluding the Partnership from the litigation. We acknowledge that Manchester would be prejudiced if this litigation will not bind the Partnership itself, thus allowing the Partnership to later bring an identical claim. But the Partnership, like a marionette, cannot make a move unless some human being pulls the strings. And all the people who, under the Partnership Agreement, have the power to cause the Partnership to bring suit—probably only HB General, see Partnership Agreement § 5.2, App. 142 ("No Limited Partner in its capacity as Limited Partner shall take part in the conduct or control of the business of the Partnership or have any right or authority to act for or bind the Partnership."), but in no case people other than the present parties, HB General, HB Limited, and Manchester—are before the court. The court can therefore enjoin all the partners from bringing a subsequent suit on behalf of the Partnership.

Furthermore, the court can require HB General to cause the Partnership to release its claim against Manchester as a condition of

1. Arguably, the joinder of the Partnership may not destroy diversity. If, as the HB entities contend, Manchester's failure to meet the August 11 capital call caused Manchester to lose its status as a partner, the Partnership is a citizen of only Delaware and Vermont. Joining the Partnership as a plaintiff, then, would not destroy complete diversity, because the suit would be brought by

three Delaware and Vermont citizens against one New Jersey citizen. However, this argument was not raised by the HB entities. Moreover, it appears to tie the jurisdictional inquiry inextricably to the merits. Thus, although the argument presents interesting (as well as difficult) questions, we will not reach it.

judgment, thus ensuring that even if one of the current partners assigns its partnership interest to a new person, that person cannot initiate suit on behalf of the Partnership. See Partnership Agreement § 6.1, App. 142 (Subject to certain limitations, "the General Partner is authorized, in furtherance of the business of the Partnership, to make decisions, take actions and enter into and perform contracts of any kind necessary, proper, convenient or advisable to effectuate the purposes of the Partnership.") In short, protective provisions in the judgment can avoid all prejudice to Manchester, and thus prejudice to Manchester is not a reason to dismiss this case.

C. The Partnership's Interests

[6] The district court also decided, and Manchester argues, that exclusion of the Partnership would prejudice the Partnership's interests. We disagree. Although indispensability under Rule 19 is a question of federal law, state law determines the nature of the interests of all the individuals concerned. See *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 125 n. 22, 88 S.Ct. 733, 746 n. 22, 19 L.Ed.2d 936 (1968); *Hertz v. Record Publishing Co.*, 219 F.2d 397, 399-400 (3d Cir.), *cert. denied*, 349 U.S. 912, 75 S.Ct. 601, 99 L.Ed. 1247 (1955). The relevant state law here is that of Delaware, as the partnership is organized pursuant to Delaware law, Partnership Agreement Art. III, App. 137-38, and Delaware law is the source of any cause of action the Partnership may have for Manchester's breach of contract, see Partnership Agreement § 17.5, App. 174 ("[T]his Agreement shall be governed by and construed in accordance with the laws of Delaware...").

First we must decide whether, under Delaware law, the Partnership has interests as an entity in this case. Historically, the common law considered partnerships to be collections of individuals rather than distinct jural entities with their own interests. See 1 Bromberg & Ribstein, *supra* § 1.03, at 1:20; *Puerto Rico v. Russell & Co.*, 288 U.S. 476, 480, 53 S.Ct. 447, 448, 77 L.Ed. 903 (1933); *Silliman v. DuPont*, 302 A.2d 327, 331 (Del.Super.Ct.1972), *aff'd*, *F.I. Du Pont, Glove, For-*

gan & Co. v. Silliman, 310 A.2d 128 (Del. 1973). However, today there is much ambivalence about the appropriate characterization of partnerships. See 1 Bromberg & Ribstein, *supra* § 1.03, at 1:19 to 1:20, 1:40. Delaware, like most states, has not adopted either a pure aggregate or pure entity theory of partnerships, but seems to treat partnerships differently for different purposes. See *Silliman*, 302 A.2d at 332 n. 4 (noting that the evolution of the Uniform Partnership Act has been viewed as a "realistic accommodation of entity theory to aggregate practice which leaves unresolved many problems concerning the legal nature of partnerships..."). Limited partnerships, with their limitations on limited partner liability and control, are clearly more entity-like than general partnerships, but even these are not treated as entities in all contexts. See 3 Bromberg & Ribstein, *supra* § 11.03(a), at 11:27; *cf. Silliman*, 302 A.2d at 327 (recognizing the lack of a coherent view of the nature of partnerships in a case involving a limited partnership).

[7] We conclude that, under Delaware law, the Partnership has interests as an entity in this case. Delaware treats partnerships—even general ones—as entities for purposes of owning property, see generally 1 Bromberg & Ribstein, *supra* § 1.03(c)(1), at 1:23 to 1:25. For example, a partnership can acquire and convey real property in its own name, Del.Code Ann. tit. 6, § 1508(c); an individual partner has only limited rights to possession and assignment of partnership property, *id.* § 1525(b); an individual partner's right in partnership property is not subject to attachment or execution, except on a claim against the partnership, *id.*; and an individual partner cannot devise partnership property, *id.* Moreover, this Partnership has several property interests that are implicated by this litigation. Most obviously, if Manchester wins this litigation, it will compel a sale of the Partnership's undeveloped real property. In addition, a partnership's causes of action are themselves partnership property, see 2 Bromberg & Ribstein, *supra* § 5.03(d), at 5:21, and the Partnership may have a cause of action that will be effectively decided in this case. Manchester has allegedly breached a duty to the Partnership, and

thus it appears that the Partnership itself has a cause of action against Manchester. See 4 *id.* § 15.04(g), at 15:34 (stating that the partnership itself has a claim for nonpayment of a limited partner's contribution to the partnership). Thus, under Delaware law, the Partnership, as an entity, has interests in this case.

That said, we do not believe the Partnership's interests would, as a practical matter, be prejudiced by excluding it from the action. Even though the Partnership has its own interests, it is an artificial entity: its interests must ultimately derive from the interests of the human beings that are its members (albeit through the medium of other partnerships and corporations). The exact relationship between the Partnership's interests as an entity and those of the individual partners has not been addressed by the Delaware courts. But, following Rule 19's pragmatic approach, we are guided by common sense. A partnership's interests as an entity consist of an aggregation of those interests of each of the individual partners that are relevant to the purpose of the partnership. Thus, at least in certain cases, it is possible that a partnership's interests can be effectively represented in litigation by participation of its partners.

We believe that to be the case here. This partnership consists of at most three partners, all of whom are before the court. Although each of the partners may arguably bring to bear some interests (the nature of which no one has identified) that are distinct from those of the Partnership, we have no doubt that the Partnership's interests in this case are adequately represented by the partners. If the Partnership has a claim against Manchester and the right to retain its real property, these interests will be effectively advanced by the HB entities. And even if the HB entities' interests are not entirely consistent with those of the Partnership, they are not antagonistic. Furthermore, to the

extent the HB entities' interests diverge from the Partnerships's interests, Manchester can protect them.²

This case is thus analogous to *Delta Financial Corp. v. Paul D. Comanduras & Associates*, 973 F.2d 301 (4th Cir.1992). There, the Fourth Circuit stated, in an action between the only two partners of a limited partnership:

Even if the partnership entity may under some circumstances be a necessary or indispensable party to litigation involving the constituent partners, which we do not suggest, we are of opinion that Vanguard [the partnership] is not necessary or indispensable to the instant dispute. This action arises out of a strictly internal conflict between the partners, all of whom, after our decision today, will be before the district court. PDS has failed to establish that Vanguard itself has any interest distinct from the interests of the several partners. Thus, we are satisfied that "complete relief [may] be accorded among those already parties," and that Vanguard claims no interest different from the interest of the partners that may be impaired by the imposition of the case and that Vanguard's absence will not "leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations."

Id. at 303-04 (citations omitted); see also *DM II, Ltd. v. Hospital Corp.*, 130 F.R.D. 469, 473 n. 5 (N.D.Ga.1989) (stating, in an action brought by some but not all partners, "Joinder of each non-party partner would ordinarily satisfy Rule 19, since the interests of the partnership would be adequately represented"). Although in some cases the interests of the partners may sufficiently diverge from those of the partnership that the partnership is an indispensable party, we simply cannot conceive of any interest the Partnership has as an entity in this case that will not be advanced by the three partners.³

2. Finally, we note that the claim here is the dispute over the contract that forms and controls the Partnership itself, and thus defines the interests of the Partnership.

3. While it might be troubling to say that a human being could be excluded from litigation because

his or her interests are adequately pressed by other people, a partnership is not a human being. A partnership's interests can never be known except through those who comprise it. Thus, as a practical matter, the Partnership is not prejudiced by having others represent its interests in this case. Although a partnership's interests can

D. Derivative Actions

The district court and Manchester also attach much significance to whether this action is a derivative action. In their view, the HB entities' action is derivative and they believe this provides a special reason that the Partnership must be joined. They cite to many cases finding the Partnership to be an indispensable party in derivative actions. See, e.g., *Bankston v. Burch*, 27 F.3d 164, 167-68 (5th Cir.1994); *Buckley v. Control Data Corp.*, 923 F.2d 96, 98 (8th Cir.1991).

1. Is this Action Derivative?

As a preliminary matter, we are not at all certain that this is a derivative action. It is true that Delaware courts have stated the general rule that whether an action is derivative or direct depends on whether the harm alleged by the plaintiff is independent of harm suffered by the corporation or partnership itself. See *Kramer v. Western Pacific Industries, Inc.*, 546 A.2d 348, 351-52 (Del. 1988); *Litman v. Prudential-Bache Properties, Inc.*, 611 A.2d 12, 15 (Del.Ch.1992); see also generally 12B *Fletcher's Cyclopedic of Corporations* § 5911, at 483-84. And here the harm alleged by the HB entities—breach of Manchester's obligation to provide capital to the Partnership—was suffered by the partners only through its harm to the Partnership.

But, in this case brought by those in control of the Partnership, the action may still not be derivative. The derivative action device, with its attendant demand requirement, was developed to aid investors who have no control over a company redress harms to the company in the face of management's inaction. See *Ross v. Bernhard*, 396 U.S. 531, 534, 90 S.Ct. 733, 735-36, 24 L.Ed.2d 729 (1970); 2 Bromberg & Ribstein, *supra* s 5.05(a), at 5:35 ("The substantive distinction [between direct] enforcement of a partner-

only be known through the medium of human beings, the choice of which human being(s) will represent the partnership's interests may have practical effects. Thus, if there is a conflict between interests of a partnership and those of the partners sufficient to require the partnership, if it is joined, to be represented by its own attorney, the failure to join the partnership would cause it real prejudice. In such a case,

ship right by fewer than all the partners [and a derivative action] is not always clear but seems to be this: In a derivative suit, the plaintiff partner is typically acting against the wishes of those partners who have decisionmaking authority for enforcement of the partnership right...."); see also Del.Code Ann. tit. 6, § 17-0001 (stating, in the subchapter entitled "Derivative Actions," "A limited partner may bring an action in the Court of Chancery in the right of a limited partnership to recover a judgment in its favor if general partners with authority to do so have refused to bring the action or if an effort to cause those general partners to bring the action is not likely to succeed.") (emphasis added).

[8-10] Here, the action was brought in part by the general partner, who has authority to act for the Partnership. In Delaware, general partners have the power to sue directly on behalf of the partnership on the partnership's claims. See *Thompson Door Co. v. Haven Fund*, 351 A.2d 864, 865 (Del. 1976) ("Each [general] partner has the power to use ordinary legal process to enforce obligations owed the partnership and therefore may engage counsel to sue on behalf of the firm."); Partnership Agreement § 6.1, App. 142 (Subject to certain limitations, "the General Partner is authorized, in furtherance of the business of the Partnership, to make decisions, take actions and enter into and perform contracts of any kind necessary, proper, convenient or advisable to effectuate the purposes of the Partnership."); 4 Bromberg & Ribstein, *supra* § 15.02(b), at 15:13, & § 15.02(e), at 15:16 to 15:17. The power to sue "on behalf" of a partnership does not mean that the partnership itself must be named as a party: although Delaware has a "common name" statute, allowing partnerships to sue and be sued in the partnership name, see Del.Code Ann. tit. 10, § 3904, its "use, although often convenient, is not man-

joinder of the partnership would do more than change the name of the caption, but would provide the partnership with the practical benefit of having an advocate wholly devoted to its own interests. Here there are no allegations that the Partnership's interests in this case so diverge from those of the partners that it should be represented by its own attorney.

datory.” *Furek v. University of Delaware*, 594 A.2d 506, 513 (Del.1991); see, e.g., *Verlaque v. Charles A. Zonko Builder, Inc.*, 1989 WL 112029 (Del.Super.Ct. Sept.11, 1989) (action brought by plaintiff “individually and on behalf” of a partnership). Thus, the HB entities can sue directly to enforce Manchester’s obligation to the Partnership, and do not need to resort to a derivative action.⁴

Another reason this action may not be derivative is that the HB entities may have the right to bring suit directly as individuals. The basis for any cause of action here is Manchester’s alleged breach of the Partnership Agreement. Both HB General and HB Limited are parties to the agreement, and breach of a Partnership Agreement has been held to constitute an individual as well as a partnership claim. See 4 Bromberg & Ribstein, *supra* § 15.04(h), at 15:37 & n. 35. Thus the HB entities can bring this suit through a number of different means, and the action need not be characterized as derivative.

2. The Immateriality of the Characterization of this Suit

(a) To Rule 19

[11] For purposes of this appeal, we need not decide, however, whether, under state

4. At least, HB General can sue on behalf of the Partnership as the general partner. HB Limited would then be an appropriate party as well because of its interests in the litigation. See Fed. R.Civ.P. 19(a). More precisely, because its interests are aligned with those of plaintiff HB General, HB Limited is appropriately considered a plaintiff for jurisdictional purposes. See *Development Finance Corp. v. Alpha Housing & Health Care, Inc.*, 54 F.3d 156, 159–60 (3d Cir.1995) (in determining the alignment of the parties for jurisdictional purposes, the court must consider the parties’ actual adversity of interest).

5. Aside from the issue of joinder, which we will discuss in the text, whether the HB entities’ action is derivative or on behalf of the Partnership is irrelevant to the diversity jurisdiction determination. Even in representative suits, the citizenship of the named representative generally controls for purposes of diversity jurisdiction. See *McSparran v. Weist*, 402 F.2d 867, 870–71 (3d Cir.1968), *cert. denied sub nom. Fritzinger v. Weist*, 395 U.S. 903, 89 S.Ct. 1739, 23 L.Ed.2d 217 (1969). And, unless the Partnership is

law, the HB entities are suing derivatively, directly on behalf of the Partnership, or directly as individuals.⁵ As far as Rule 19 is concerned, state law is relevant only in determining the interests of those affected by the litigation. See *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 125 n. 22, 88 S.Ct. 733, 746 n. 22, 19 L.Ed.2d 936 (1968); *Hertz v. Record Publishing Co.*, 219 F.2d 397, 399–400 (3d Cir.), *cert. denied*, 349 U.S. 912, 75 S.Ct. 601, 99 L.Ed. 1247 (1955). Once these interests are determined, federal law governs the balancing of interests in determining indispensability. See *Patterson*, 390 U.S. at 125 n. 22, 88 S.Ct. at 746 n. 22; *Hertz*, 219 F.2d at 400. Thus, even if the relevant state law requires joinder of a partnership in derivative actions and actions on behalf of the partnership in cases brought in the state’s courts, that will not affect the balancing of interests under Rule 19. See *Hertz*, 219 F.2d at 399–400 (“Even if, in a suit in a Pennsylvania court, such officers are indispensable as a procedural requirement, they are not necessarily indispensable in a federal court.”).

Moreover, the characterization of this action as derivative or on behalf of the Partnership has no impact on our earlier analysis of the interests of the Partnership and the partners. The only significant consequence of such a characterization for determining the

joined, there is complete diversity among the parties here.

The characterization of this suit seems of little consequence to most other aspects of the case as well. Suing either directly on behalf of a partnership or suing derivatively means that any damages recovered belong to the Partnership and not to suing partners. See 2 Bromberg & Ribstein, *supra* § 5.03(d), at 5:21–23 (direct claims on behalf of the partnership); *Kramer v. Western Pacific Industries, Inc.*, 546 A.2d 348, 351 (Del.1988) (derivative claims). But in this case, the plaintiffs only seek a declaratory judgment and thus the implications for damages that might flow from characterizing the case as derivative are irrelevant. Likewise, the characterization seems irrelevant to issues of res judicata: whatever the characterization of the suit, the Partnership can be bound to the judgment by requiring HB General to agree to execute a release on behalf of the Partnership. The characterization of this suit, may, of course, have significant implications for who pays for the costs of the litigation. See 4 Bromberg & Ribstein, *supra* § 15.05(g)(5), at 15:66.

relevant interests is that the Partnership itself has a cause of action. But we considered the Partnership's potential cause of action and its implications in that earlier analysis.

We recognize that the Supreme Court has stated, in the corporations context, that the corporation is an indispensable party in stockholder derivative actions. See *Ross v. Bernhard*, 396 U.S. 531, 538, 90 S.Ct. 733, 738, 24 L.Ed.2d 729 (1970); *Koster v. Lumbermens Mut. Casualty Co.*, 330 U.S. 518, 522 n. 2, 67 S.Ct. 828, 831 n. 2, 91 L.Ed. 1067 (1947); *Davenport v. Dows*, 85 U.S. (18 Wall.) 626, 627, 21 L.Ed. 938 (1873); see also *Guerrino v. Ohio Casualty Insurance Co.*, 423 F.2d 419, 422 (3d Cir.1970). If meant as a general rule, this statement is in tension with the Court's admonitions that "Whether a person is 'indispensable,' that is, whether a particular lawsuit must be dismissed in the absence of that person, can only be determined in the context of particular litigation," and that "[t]here is no prescribed formula for determining in every case whether a person ... is an indispensable party." *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 118 & n. 14, 88 S.Ct. 733, 742 & n. 14, 19 L.Ed.2d 936 (1968) (citations and internal quotation marks omitted). But even if it is the rule that the corporation is indispensable in a shareholder's derivative action, the partnership context in general, and this case in particular, are distinguishable.

Unlike partnerships, the corporation's status as a distinct jural entity is deeply rooted in our law; the bright lines that come with this status are one of the corporate form's major attractions. Thus, a clear rule for joinder may be uniquely appropriate for the corporation context. And, generally, shares in corporations are much more quickly and easily transferred than partnership interests, making a determination of whether the aggregation of stockholder's interests sufficiently represents the corporation extremely difficult. Partnerships lack consistent entity-treatment, and, at least for small partnerships, the determination of whether the partners' interests align with those of the partnership is not difficult. In this case, the partnership consists of essentially two

(though formally three) members, and we are easily able to determine that the individual partners effectively represent the Partnership.

(b) To Rule 17

[12] Of course, the state-law characterization of an action as derivative or on behalf of another might affect joinder via Rule 17.⁶ Rule 17(a) states that "[e]very action shall be prosecuted in the name of the real party in interest," and that an action shall be dismissed if the real party in interest is not substituted or joined. The Supreme Court, in stating that the corporation is an indispensable party in a stockholder's derivative action, stated that the corporation is the real party in interest. *Ross v. Bernhard*, 396 U.S. 531, 538, 90 S.Ct. 733, 738, 24 L.Ed.2d 729 (1970). We conclude, however, that Rule 17 does not require the *partnership's* joinder even if the HB entities' claims are derivative or otherwise on behalf of the Partnership.

[13] The real party in interest rule ensures that under the governing substantive law, the plaintiffs are entitled to enforce the claim at issue. See *Lubbock Feed Lots, Inc. v. Iowa Beef Processors, Inc.*, 630 F.2d 250, 256-57 (5th Cir.1980); *Virginia Elec. & Power Co. v. Westinghouse Elec. Corp.*, 485 F.2d 78, 83 (4th Cir.1973), *cert. denied*, 415 U.S. 935, 94 S.Ct. 1450, 39 L.Ed.2d 493, and *cert. denied sub nom. Stone & Webster Engineering Corp. v. Virginia Elec. & Power Co.*, 415 U.S. 935, 94 S.Ct. 1450, 39 L.Ed.2d 493 (1974); 6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1543, at 334 (2d ed. 1990). There may be multiple real parties in interest for a given claim, and if the plaintiffs are real parties in interest, Rule 17(a) does not require the addition of other parties also fitting that description. See Wright et al. *supra*, at 340; see also, e.g., Fed.R.Civ.P. 17(a) ("An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party

6. Manchester has not challenged the HB entities'

capacity, under Rule 17(b), to bring this suit.

for whose benefit the action is brought...."). Thus, insofar as the HB entities are authorized to bring suit under Delaware law—even derivatively or otherwise on behalf of the Partnership—they are also real parties in interest.

This conclusion is informed by the fact that the original purpose of the real party in interest rule was permissive—to allow an assignee to sue in his or her own name. Fed.R.Civ.P. 17 Advisory Committee Notes to the 1966 Amendment. The “modern function of the rule in its negative aspect is simply to protect the defendant against a subsequent action by the party actually entitled to recover, and to ensure generally that the judgment will have its proper effect as *res judicata*.” *Id.* As noted above, any doubt as to the preclusive effect of this litigation on the Partnership can be resolved by protective provisions in the judgment.

In sum, this action may well not be derivative but, at all events, the characterization of the suit is immaterial to either Rule 19 or Rule 17.

E. Manchester’s Counterclaims

Manchester offers one reason for dismissal not relied on by the district court: that the Partnership is an indispensable party to Manchester’s counterclaims but that joinder would destroy subject matter jurisdiction over the counterclaims because Manchester and the Partnership share citizenship in New Jersey. If Manchester cannot pursue its counterclaims without participation of the Partnership and the Partnership must be excluded from the litigation, Manchester would have a strong argument for dismissal. The third factor of Rule 19(b)—“whether a judgment rendered in the person’s absence will be adequate”—considers the extent to which exclusion of an interested person would leave significant matters adjudicated. See *Provident Tradesmens Bank &*

Trust Co. v. Patterson, 390 U.S. 102, 111, 88 S.Ct. 733, 738–39, 19 L.Ed.2d 936 (1968) (“We read the Rule’s third criterion ... to refer to this public stake in settling disputes by wholes, whenever possible....”). However, as we shall presently explain, the Partnership can be joined as to Manchester’s counterclaims, without destroying subject matter jurisdiction.

[14–16] Complete diversity is required only when federal court jurisdiction is exercised under the federal diversity jurisdiction statute, 28 U.S.C. § 1332. See *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 530–31, 87 S.Ct. 1199, 1203–04, 18 L.Ed.2d 270 (1967). Under the Constitution, diversity jurisdiction requires only minimal diversity among the parties, i.e., at least one defendant and one plaintiff need be citizens of different states. *Id.* Here the district court has statutory authority to exercise jurisdiction over Manchester’s counterclaims under the supplemental jurisdiction statute, 28 U.S.C. § 1367.

[17, 18] 28 U.S.C. § 1367 provides that, in general, if the district court has jurisdiction over one claim, it can maintain jurisdiction over claims that lack an independent basis of jurisdiction if those claims “are so related to claims” within the court’s jurisdiction “that they form part of the same case or controversy under Article III of the United States Constitution.”⁷ The rule applies even to claims asserted by or against additional parties. *Id.* Although the statute places certain limits on a court’s ability to exercise supplemental jurisdiction over claims by or against non-diverse additional parties when the basis for the original claim is diversity jurisdiction, those limits only apply when the additional claims are brought by *plaintiffs*. See *Development Finance Corp. v. Alpha Housing & Health Care, Inc.*, 54 F.3d 156, 160–61 (3d Cir.1995).⁸ Indeed, we have spe-

7. The statute states in subsection (a):

Except as provided in subsections (b) and (c) ... in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or

controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties. 28 U.S.C. § 1367(a).

8. Subsection (b) states:

cifically held that in a diversity action, the district court may exercise supplemental jurisdiction over a *defendant's* counterclaim against non-diverse parties joined as third-party defendants to the counterclaims. See *In re Texas Eastern Transmission Corp. PCB Contamination Insurance Coverage Litig.*, 15 F.3d 1230, 1236-38 (3d Cir.), cert. denied sub nom. *Texas Eastern Corp. v. Fidelity & Cas. Ins. Co.*, — U.S. —, 115 S.Ct. 291, 130 L.Ed.2d 206 (1994).

[19] Thus, the only remaining question is whether Manchester's counterclaims are "so closely related to [the HB entities' claims] that they form part of the same case or controversy under Article III of the United States Constitution." Claims are part of the same case or controversy if they share significant factual elements. See *Sinclair v. Soniform, Inc.*, 935 F.2d 599, 603 (3d Cir.1991) ("Claims are part of the same constitutional case if they derive from a common nucleus of operative fact . . .") (quoting *United Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966)); *White v. County of Newberry*, 985 F.2d 168, 172 (4th Cir.1993) ("The claims need only revolve around a central fact pattern.").

[20] Manchester's counterclaims rely on essentially the same facts as does its defense to the HB Entities' claims. Manchester's primary defense is that HB General's final capital call was ineffective because the Partnership could not commence construction as scheduled and thus that Manchester appropriately exercised its redemption option before the capital call was due. Manchester's

In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title [diversity jurisdiction], the district courts shall not have supplemental jurisdiction under subsection (a) over claims by *plaintiffs* against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by *persons proposed to be joined as plaintiffs* under Rule 19 of such rules, or seeking to intervene as *plaintiffs* under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

28 U.S.C. § 1367(b) (emphasis added).

9. Manchester makes another argument based on the purported inability of the district court to hear its counterclaims that we conclude is irrele-

counterclaims are that the Partnership, along with the HB entities and Vanderbilt Development Corporation (a Vermont corporation with its principal place of business in Vermont), breached the Partnership Agreement and the covenant of good faith and fair dealing due to its failure to recognize Manchester's right to redemption and its attempted conversion of Manchester's partnership interest into that of a subordinated creditor. Both the defense and the counterclaims require proof that construction was not commenced as scheduled; that, under the Partnership Agreement, Manchester had the right to exercise the redemption option; and that Manchester did exercise the redemption option. Manchester's counterclaims are thus within the supplemental jurisdiction of the district court.⁹

In sum, joinder of the Partnership on the counterclaims will not destroy subject matter jurisdiction over the counterclaims even though Manchester and the Partnership share citizenship in New Jersey.

IV. Conclusion

[21] For the reasons we have explained, the district court's decision to dismiss this action for failure to join the Partnership was an abuse of discretion. Because all the partners of this small limited partnership are before the court, the exclusion of the Partnership entity causes no prejudice to defendant Manchester or to the Partnership. The presence of all the partners ensures that the district court can fashion protective provisions in the judgment to protect Manchester

vant to this appeal. Manchester argues that its counterclaims, which assert rights to land located in Vermont, constitute a "local action" that can only be prosecuted in the state where the land is located, and thus this case should be dismissed to permit all claims to be tried in a single proceeding in Vermont state court. We need not consider this argument because it has nothing to do with the necessity or infeasibility of joinder of the Partnership. We recognize that one of Rule 19's purposes is to avoid piecemeal litigation. But this purpose is limited to prevention of piecemeal litigation *caused by the failure to join an interested person*. While Manchester's argument might be relevant to a motion to transfer venue or to forum non conveniens, it says nothing about joinder under Rule 19.

from a subsequent suit and that the interests of the Partnership will be effectively represented. Furthermore, plaintiffs HB entities can proceed without the Partnership whether or not the action is derivative under state law: that characterization is only relevant to determine the relative interests involved, which, as we have shown, will not be prejudiced by exclusion of the Partnership. Finally, Defendant Manchester can bring its counterclaims against the Partnership in this action under the district court's supplemental jurisdiction, and thus there is no risk of piecemeal litigation. The judgment of the district court will be reversed, and the case remanded for further proceedings.¹⁰



Samantha KNEIPP, an incompetent person by; Ronald A. Cusack, Sr.; Rosanne M. Cusack, Individually and as Guardians; Alexander August Dalmisano, a Minor, Appellants

v.

Wesley TEDDER, Individually and in his Official Capacity; John Doe and Others, Individually and in their official capacities; City of Philadelphia.

No. 95-2044.

United States Court of Appeals,
Third Circuit.

Argued June 3, 1996.

Decided Sept. 18, 1996.

Civil rights complaint was brought against city and police officers, alleging that officers left intoxicated pedestrian alone to walk home on cold night, resulting in viola-

tion of pedestrian's substantive due process right and her liberty interest in personal security, under theory that officers increased risk of harm to pedestrian, who fell down embankment and suffered brain damage. The United States District Court for the Eastern District of Pennsylvania, John P. Fullam, Senior District Judge, entered summary judgment in favor of city and officers, and pedestrian's legal guardian appealed. The Court of Appeals, Mansmann, Circuit Judge, held that: (1) "state-created danger" theory was viable mechanism for establishing constitutional violation under civil rights law; (2) facts alleged, if proven, would sustain prima facie case of violation of pedestrian's substantive due process right and her liberty interest in personal security under the "state-created danger" theory that city police officers increase the risk of harm to pedestrian; (3) on remand, court considering claims against city would have to determine whether city's training program for handling intoxicated persons was adequate, whether city was deliberately indifferent to the deficiency, and whether deficiency actually caused officers' indifference to pedestrian's intoxication and need for assistance.

Reversed and remanded.

1. Civil Rights ⇌192

Civil rights law does not, by its own terms, create substantive rights; it provides only remedies for deprivations of rights established elsewhere in the Constitution or federal laws. 42 U.S.C.A. § 1983.

2. Civil Rights ⇌196.1

To establish civil rights claim, plaintiff must demonstrate violation of right secured by the Constitution and laws of United States, and demonstrate that alleged deprivation was committed by person acting under color of state law. 42 U.S.C.A. § 1983.

10. We will not reach Manchester's argument that we should affirm the district court's judgment on the ground that the plaintiffs HB entities' action does not satisfy the criteria necessary for obtaining declaratory relief. The decision whether to grant a declaratory judgment is committed to the

district court's discretion, *Wilton v. Seven Falls Co.*, — U.S. —, ———, 115 S.Ct. 2137, 2143-44, 132 L.Ed.2d 214 (1995), and Manchester concedes that it did not raise this argument in the district court.