

## The Rise and Fall of the Entire Controversy Doctrine as Applied to Attorney Malpractice Actions

### INTRODUCTION

The entire controversy doctrine is a New Jersey rule of civil procedure that requires all legal issues involved in a controversy to be resolved in one judicial proceeding.<sup>1</sup> It mandates the joinder of all related claims and parties with a material interest in the outcome of a legal action.<sup>2</sup> The doctrine, which began as a practical rule intended to promote fairness and judicial efficiency, was radically expanded in *Circle Chevrolet v. Giordano, Halleran & Ciesla*,<sup>3</sup> where the Supreme Court of New Jersey announced that the doctrine would apply in the context of attorney malpractice actions.<sup>4</sup> That application spurred tremendous controversy and confusion within the New Jersey bar.<sup>5</sup> Ultimately, the New Jersey Supreme Court

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<sup>1</sup> See *Cogdell v. Hospital Ctr.*, 116 N.J. 7, 15, 560 A.2d 1169, 1172 (1989); see also *Olds v. Donnelly*, 150 N.J. 424, 431, 696 A.2d 633, 637 (1997) (holding that “the entire controversy doctrine seeks to assure that all aspects of a legal dispute occur in a single lawsuit.”); *Circle Chevrolet Co. v. Giordano, Halleran & Ciesla*, 142 N.J. 280, 289, 662 A.2d 509, 513 (1995) (explaining that the entire controversy doctrine requires adjudication of a legal dispute in one court proceeding).

<sup>2</sup> See *Cogdell*, 116 N.J. at 15, 560 A.2d at 1172.

<sup>3</sup> 142 N.J. 280, 662 A.2d 509 (1995).

<sup>4</sup> See *id.* at 289, 662 A.2d at 513 (holding that the entire controversy doctrine obligates a client to assert any legal malpractice claims against his attorney in the underlying legal action or forfeit his right to sue that attorney in a later action). The *Circle Chevrolet* decision was accompanied by three other decisions pertaining to the entire controversy doctrine, all expanding its scope. See generally *Mortgageling Corp. v. Commonwealth Land Title Ins. Co.*, 142 N.J. 336, 344, 662 A.2d 536, 540 (1995) (dismissing plaintiff’s claim under the entire controversy doctrine where related action had been brought in federal court in another state); *Mystic Isle Dev. Corp. v. Perskie & Nehmad*, 142 N.J. 310, 326, 662 A.2d 523, 531 (1995) (holding that the entire controversy doctrine barred a real estate developer from bringing a malpractice action against its attorney); *Ditrollo v. Antiles*, 142 N.J. 253, 278-80, 662 A.2d 494, 507-08 (1995) (concluding that entire controversy doctrine barred action against defendants despite the fact that initial action had been resolved in settlement, without a trial on the merits). These four decisions have been affectionately referred to in legal circles as “The Four Horsemen of the Apocalypse.” Dana Coleman, *Entire-Controversy Controversy: Panelists Decry Fallout From High Court Ruling*, N.J. LAW., Apr. 22, 1996, at 3.

<sup>5</sup> See Albert L. Cohn & Terri A. Smith, *Practice and Malpractice after Circle Chevrolet*, in SEMINAR MATERIAL: ENTIRE CONTROVERSY DOCTRINE: NEW JERSEY INSTITUTE FOR CONTINUING LEGAL EDUCATION 23, 23 (1996) [hereinafter SEMINAR MATERIAL: ENTIRE CONTROVERSY DOCTRINE] (on file with the *Seton Hall Law Review*)

overruled itself by carving out an exception to the entire controversy doctrine for attorney malpractice actions.<sup>6</sup> Despite critics' assessments that the supreme court should have abandoned the doctrine completely, the entire controversy doctrine still remains a viable rule of New Jersey civil procedure.<sup>7</sup>

This Note will explore the impact that the entire controversy doctrine has had on litigation in New Jersey, specifically in the arena of attorney malpractice actions. Part I defines the doctrine and articulates its purposes. Part II explores the history of the entire controversy doctrine from the first rules of party joinder to the doctrine as it exists today. Part III details the criticisms of applying the doctrine to attorney malpractice actions. Part IV focuses on the New Jersey Supreme Court's eventual decision to overrule

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(noting that "[w]hat began as a common-sensical procedural rule, intended to cut down on the number of cases filed by requiring joinder of claims and parties, has become a source of concern and confusion for the practicing attorney"). For a detailed analysis of criticism of the entire controversy doctrine in the context of attorney malpractice, see *infra* notes 80-138 and accompanying text.

<sup>6</sup> See *Donohue v. Kuhn*, 150 N.J. 484, 485, 696 A.2d 664, 664-65 (1997); *Karpovich v. Barbarula*, 150 N.J. 473, 476, 696 A.2d 659, 660 (1997); *Olds*, 150 N.J. at 442-46, 696 A.2d at 643-45; see also Ronald B. Grayzel, *Correcting the Mistakes of the Past: The Court Looks Back on Some Prior Decisions and Reformulates its Position*, N.J. L.J., Sept. 1, 1997, at S-6 (noting that as a result of heated debate in the profession, "the Court overruled *Circle Chevrolet* . . . and signaled an intention to re-examine its entire commitment to the compulsory joinder of parties to the entire controversy doctrine.").

<sup>7</sup> See *Olds*, 150 N.J. at 473, 696 A.2d at 659 (Stein, J., concurring in part and dissenting in part) (arguing that the court should overrule *Cogdell* rather than simply carve out an exception for attorney malpractice claims). Justice Stein posited that the root of the problem does not lie in the doctrine's application to attorney-malpractice claims. Rather, the fundamental flaw in [the court's] approach to party joinder is that the preclusive aspect of the entire controversy doctrine is not the appropriate mechanism to enforce whatever level of mandatory party joinder the Court ultimately deems to be essential.

*Id.* at 451, 696 A.2d at 647 (Stein, J., concurring in part and dissenting in part). The justice opined that the court's ruling in *Cogdell* was erroneous and, further, that merely exempting legal malpractice claims from the preclusive effect of the entire controversy doctrine does not eliminate the numerous problems associated with the doctrine. See *id.* at 452, 696 A.2d at 647 (Stein, J., concurring in part and dissenting in part); see also *Donohue*, 150 N.J. at 488, 696 A.2d at 666 (Stein, J., concurring in part and dissenting in part) (stating that the entire controversy doctrine should be abolished altogether); *Karpovich*, 150 N.J. at 483, 696 A.2d at 664 (Stein, J., concurring in part and dissenting in part) (stating the same).

The majority opinion in *Olds* also recognized the problems associated with the entire controversy doctrine beyond the context of attorney malpractice actions, but declined to overrule *Cogdell*. See *Olds*, 150 N.J. at 440-43, 696 A.2d at 641-43. Instead, the majority indicated that it would reserve consideration of abandoning the entire controversy doctrine altogether until its biennial review of proposed amendments to the New Jersey Rules of Civil Practice. See *id.* at 446, 696 A.2d at 644. The court explained that it will rely on recommendations from the Committee on Civil Practice's subcommittee on the Entire Controversy Doctrine, as well as comments from the bar in determining whether to disregard the entire controversy doctrine or amend Rule 4:30A. See *id.* at 446, 449, 696 A.2d at 644, 646.

itself and exempt attorney malpractice actions from the doctrine. Finally, Part V predicts future developments for the doctrine.

### I. WHAT IS THE ENTIRE CONTROVERSY DOCTRINE?

The entire controversy doctrine requires mandatory joinder of all causes, claims, and defenses stemming from the same underlying cause of action between parties involved in litigation.<sup>8</sup> It mandates that plaintiffs litigate all claims and join all parties in one action rather than in several separate actions.<sup>9</sup> The purposes of the doctrine include (1) the need for finality through the avoidance of piecemeal decisions, (2) fairness to all material parties to the action, and (3) judicial efficiency and the avoidance of delay.<sup>10</sup> The New Jersey Supreme Court reasoned that the entire controversy doctrine would promote judicial economy and fairness to defendants by requiring all potential claims arising out of the same underlying event to be joined in a single suit.<sup>11</sup>

Essentially, the doctrine is a rule of preclusion.<sup>12</sup> It effectuates its goals by barring a party from bringing subsequent claims when that party

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<sup>8</sup> See *Cogdell v. Hospital Ctr.*, 116 N.J. 7, 16, 560 A.2d 1169, 1173 (1989). The doctrine operates in a manner similar to the principle of *res judicata*. See Susan Carboni, New Jersey Developments, *The Entire Controversy Opinions of 1995 and Attorney Malpractice: What Price Economy in New Jersey?*, 48 RUTGERS L. REV. 1273, 1274 (1996) (opining that “[t]he doctrine is a close cousin to the principle of *res judicata*, though broader in scope”). For a detailed analysis of the principle of *res judicata* in the context of mandatory joinder, see David C. Zuckerbrot, Comment, *Mandatory Joinder of Parties: The Wave of the Future*, 43 RUTGERS L. REV. 53, 66-69 (1990) (explaining that *res judicata* is a procedural device used to bar claims previously litigated).

<sup>9</sup> See *Mystic Isle*, 142 N.J. at 322, 662 A.2d at 529; see also Gage Andretta, *Move Carefully Through the Court’s Entire Controversy Doctrine Minefield*, N.J. L.J., Feb. 19, 1996, at 10; Rocco Cammarere, *Circle Chevrolet Rattles Attorneys*, N.J. LAW., Feb. 26, 1996, at 1.

<sup>10</sup> See *Ditrollo v. Antiles*, 142 N.J. 253, 267, 662 A.2d 494, 502 (1995); see also *Olds*, 150 N.J. at 431, 696 A.2d at 637 (holding that “the goals of the doctrine are to promote judicial efficiency, assure fairness to all parties with a material interest in an action, and encourage the conclusive determination of a legal controversy”); *Cogdell*, 116 N.J. at 15, 560 A.2d at 1173 (stating that “the entire controversy doctrine has evolved to ‘eliminate delay, prevent harassment of a party and unnecessary clogging of the judicial system, avoid wasting the time and effort of the parties, and promote fundamental fairness’”) (citation omitted).

<sup>11</sup> See *Circle Chevrolet Co. v. Giordano, Halleran & Ciesla*, 142 N.J. 280, 289, 662 A.2d 509, 513 (1995); see also Henry Gottlieb, *Appellate Panel Further Loosens Circle’s Strictures*, N.J. L.J., July 1, 1996, at 3 (stating that the doctrine furthers judicial economy and fairness by mandating that each potential defendant and claim be disclosed as soon as they become known to the plaintiff).

<sup>12</sup> See Kevin P. Duffy, *Sweeping Rule Changes Take Effect Next Month*, N.J. L.J., Aug. 9, 1990, at 12 (stating that the entire controversy doctrine imposes the consequence of claim preclusion for failure to join particular claims or parties). Duffy suggests that the entire controversy doctrine does not require joinder of a party in order to proceed with the initial action; however, failure to do so will bar any suit against

failed to join any related parties or claims in the original action.<sup>13</sup> The preclusive effect of the entire controversy doctrine serves to avoid prejudice to parties not joined in the original suit.<sup>14</sup> The doctrine, however, is not absolute. Under certain circumstances, in the interest of fairness to all parties involved and at the discretion of the court, the preclusive effect of the entire controversy doctrine can be discarded in order to provide every party with a reasonable opportunity to have his or her claim litigated.<sup>15</sup>

## II. EVOLUTION OF THE ENTIRE CONTROVERSY DOCTRINE

### A. Early Law

The origins of the entire controversy doctrine precede the merger of the courts of law and equity in New Jersey.<sup>16</sup> Accordingly, the earliest references to the entire controversy doctrine can be found in decisions handed down before the enactment of the 1947 New Jersey Constitution.<sup>17</sup> These

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that party. *See id.*; *see also* Editorial, *Forswearing the Merits*, N.J. L.J., Sept. 4, 1995, at 24 (noting that “the doctrine commands the joinder in a single action of all claims, against all parties, generated by every controversy implicated by each of the claims in suit” or the claim is precluded).

<sup>13</sup> *See* Duffy, *supra* note 12, at 11 (stating that the penalty for failing to comply with the mandates of the entire controversy doctrine is preclusion).

<sup>14</sup> *See* Andretta, *supra* note 9, at 10 (pointing out that one purpose of barring a subsequent action against defendants who were not joined in the initial suit is to avoid prejudice to those defendants because of their absence in the earlier proceeding).

<sup>15</sup> *See* Cogdell, 116 N.J. at 27-28, 560 A.2d at 1169 (emphasizing that “[a]ny possible unfairness to litigants, confusion in the presentation of issues, administrative unmanageability, or distortion in the truth-determining process that may result from compulsory joinder of parties . . . can be eliminated or at least minimized by a trial court possessed of the discretion to excuse joinder or to order severance”); *see also* Circle Chevrolet, 142 N.J. at 293, 662 A.2d at 515 (holding that “[t]he trial court is vested with the authority and responsibility to devise a litigation plan that is efficient and fair to all parties”).

Following the decision in *Circle Chevrolet*, there were several New Jersey cases in which the entire controversy doctrine did not act as a bar to a subsequent action. *See, e.g.*, Joel v. Morocco, 147 N.J. 546, 547, 688 A.2d 1036, 1037 (1997) (finding that the entire controversy doctrine did not mandate the joinder of individual partners in zoning dispute in order to enforce the partners’ monetary obligations in a subsequent action); Hernandez v. Region Nine Hous. Corp., 146 N.J. 645, 661, 684 A.2d 1385, 1393 (1996) (holding that an adverse finding by the Equal Employment Opportunity Commission with regard to employee’s employment discrimination claim did not bar a subsequent claim by employee under New Jersey’s Law Against Discrimination); B.F. & K.L.F. v. Division of Youth & Family Servs., 296 N.J. Super. 372, 380, 686 A.2d 1249, 1253 (App. Div. 1997) (holding that the entire controversy doctrine was inapplicable to action brought by the Division of Youth and Family Services).

<sup>16</sup> *See* Olds v. Donnelly, 150 N.J. 424, 432, 696 A.2d 633, 637 (1997).

<sup>17</sup> *See, e.g.*, Mantell v. International Plastics Harmonica Corp., 141 N.J. Eq. 379, 393 (1947) (holding that “[i]t is the settled rule that where equity has rightfully assumed jurisdiction over a cause for any purpose, it may ordinarily retain the cause

decisions focused primarily on the division between courts of law and equity.<sup>18</sup> The courts interpreted the entire controversy doctrine as preventing a single controversy from being litigated twice, once in the courts of law and once in the courts of equity.<sup>19</sup> Thus, early use of the term “entire controversy” had a different purpose and meaning than its use in modern law.<sup>20</sup>

In 1947, a constitutional provision merged the New Jersey courts of law and equity.<sup>21</sup> The New Jersey Supreme Court then interpreted the 1947 constitutional provision as mandating the adjudication of an entire legal controversy in one proceeding.<sup>22</sup> Critics of this interpretation have argued,

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for all purposes, and proceed to a final determination of the entire controversy, and establish purely legal rights and grant legal remedies”); *Smith v. Red Top Taxicab Corp.*, 111 N.J.L. 439, 440-41 (1933) (opining that “a single or entire cause of action cannot be subdivided into several claims, and separate actions maintained thereon”); *Broad St. Nat’l Bank v. Holden*, 109 N.J. Eq. 253, 256, 156 A. 827, 828 (1931) (stating that while all trust beneficiaries should have been joined in the bill, failure to do so should not result in dismissal of the case); *Carlisle v. Cooper*, 21 N.J. Eq. 576, 579 (1870) (concluding that “courts of equity have concurrent jurisdiction with courts of law in cases of private nuisances; the interference of the former in any particular case being justified on the ground . . . of preventing multiplicity of suits”) (citations omitted).

<sup>18</sup> See, e.g., *Mantell*, 141 N.J. Eq. at 393 (finding that an equity court can grant legal rights and remedies in order to resolve the entire controversy in one proceeding and avoid multiple litigation); *Smith*, 111 N.J.L. at 440-41 (holding that the entire controversy should be litigated in one court action); *Carlisle*, 21 N.J. Eq. at 579 (addressing the issue of whether equity courts could interfere with a nuisance action when the controversy had already been brought in a court of law).

<sup>19</sup> See *Carboni*, *supra* note 8, at 1277 (arguing that the constitutional provision enacted in 1947 merely codified “a familiar equitable principle: once a court of equity has jurisdiction over a cause of action, it decides legal as well as equitable matters.”).

<sup>20</sup> See Geoffrey C. Hazard, Jr., *An Examination Before and Behind the “Entire Controversy Doctrine,”* in SEMINAR MATERIAL: ENTIRE CONTROVERSY DOCTRINE, *supra* note 5, at 35, 39 (proposing that the 1947 constitution made early cases concerning litigation of the “entire controversy” in one proceeding obsolete by merging the courts of law and equity).

<sup>21</sup> See N.J. CONST., art. VI, § 3, ¶ 4. The constitutional provision states:

Subject to the rules of the Supreme Court, the Law Division and the Chancery Division shall each exercise the powers and functions of the other division when the ends of justice so require, and legal and equitable relief shall be granted in any cause so that all matters in controversy between the parties may be completely determined.

*Id.* This provision, while merging the law and equity into one court with comprehensive jurisdiction, still provided for separate law and equity divisions within the court. See *Hazard*, *supra* note 20, at 35.

<sup>22</sup> See *Cogdell v. Hospital Ctr.*, 116 N.J. 7, 15, 560 A.2d 1169, 1172-73 (1989) (declaring that “the [entire controversy] doctrine has become such a fundamental aspect of judicial administration, it has achieved constitutional confirmation.”). See generally *Carboni*, *supra* note 8, at 1278-87 (describing the history of the entire controversy doctrine); Kevin Haverty, Note, *The Entire Controversy Doctrine in New Jersey and the Nominal Party Exception: When is the Entire Controversy not the Entire Controversy?*, 23 RUTGERS L.J. 341, 344-45 (stating that the 1947 New Jersey Constitution is the source of the entire controversy doctrine).

however, that the 1947 constitution merely effectuated the merger of the courts of law and equity and did not in any way authorize a preclusive joinder rule.<sup>23</sup> In fact, most of the early problems concerning litigation of the proverbial “entire controversy” in one judicial proceeding were eliminated following the abolition of separate law and equity courts.<sup>24</sup> The issues of claim or party joinder were simply not addressed.

### B. *Mandatory Joinder of Claims*

It took years for the entire controversy doctrine to evolve into the present rule that compels compulsory joinder of *both* parties and claims in one action. The initial growth of the entire controversy doctrine occurred in the area of mandatory joinder of claims.<sup>25</sup> A body of common law developed that continually expanded the doctrine’s application to claim joinder, eventually including defenses and counterclaims.<sup>26</sup> Ultimately, the entire contro-

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<sup>23</sup> See *Olds v. Donnelly*, 150 N.J. 424, 453-54, 696 A.2d 633, 648 (1997) (Stein, J., concurring in part and dissenting in part) (arguing that the New Jersey Supreme Court has misinterpreted the purpose of the 1947 constitutional provision). Justice Stein stated that “any misperception that the preclusive application of the entire controversy doctrine to mandatory party joinder is in some respect authorized or even encouraged by the 1947 constitution permanently should be dispelled” because the purpose of the constitutional provision was to effectuate the merger of the courts of law and equity. *Id.* Justice Stein pointed out that early cases applying the 1947 constitutional provision demonstrated that it was enacted to merge the courts of law and equity. See *id.* at 454, 696 A.2d at 648 (Stein, J., concurring in part and dissenting in part); see also *Zuckerbrot*, *supra* note 8, at 69-73 (describing the early use of the entire controversy doctrine).

<sup>24</sup> See *Olds*, 150 N.J. at 454, 696 A.2d at 648. Even after the entire controversy doctrine received constitutional confirmation, early decisions concerning this doctrine continued to focus on conflicts between legal and equitable issues. See *O’Neill v. Vreeland*, 6 N.J. 158, 164-65, 77 A.2d 899, 901-02 (1951) (discussing the power of either court to grant both legal and equitable relief); *State v. Jones*, 4 N.J. 374, 383, 72 A.2d 872, 876 (1950) (stating that it was “quite impossible for a litigant to go on to trial in one Division of the Superior Court and then assert, after judgment, a right to be heard, except on appeal, in another”); *Steiner v. Stein*, 2 N.J. 367, 378, 66 A.2d 719, 724 (1949) (holding that when a plaintiff seeks both a legal and an equitable remedy, the chancery court has the authority to adjudicate both the legal and equitable issues in order to resolve the entire controversy in one proceeding).

<sup>25</sup> See, e.g., *Thornton v. Potamkin Chevrolet*, 94 N.J. 1, 5, 462 A.2d 133, 134-35 (1983) (opining that the entire controversy doctrine was meant to apply to the joinder of claims rather than the joinder of parties); *Aetna Ins. Co. v. Gilchrist Bros., Inc.*, 85 N.J. 550, 559-60, 428 A.2d 1254, 1258-59 (1981) (concluding that the entire controversy doctrine does not preclude a second action for failure to join parties).

<sup>26</sup> See, e.g., *Korff v. G & G Corp.*, 21 N.J. 558, 571-72, 122 A.2d 889, 896 (1956) (holding that the entire controversy doctrine applied to a defendant’s counterclaim against a nonresident plaintiff who voluntarily brought a lawsuit in this state); *Vacca v. Stika*, 21 N.J. 471, 476, 122 A.2d 619, 622 (1956) (holding that the entire controversy doctrine included the joinder of representative parties necessary for the presentation and resolution of claims); *Ajamian v. Schlanger*, 14 N.J. 483, 488, 103 A.2d 9, 12 (1954) (holding that the entire controversy doctrine includes affirmative claims that could be brought as counterclaims); *Massari v. Einsiedler*, 6 N.J. 303,

versy doctrine became “a mandatory rule for the joinder of virtually all causes, claims, and defenses relating to a controversy between the parties engaged in litigation.”<sup>27</sup> In 1979, the Supreme Court of New Jersey promulgated a rule of civil procedure requiring joinder of all claims arising from the same underlying transaction involving those parties already named in the lawsuit.<sup>28</sup> This rule referred only to compulsory joinder of claims and did not address joinder of parties.<sup>29</sup>

### C. Mandatory Joinder of Parties

In contrast to claim joinder, the expansion of the entire controversy doctrine to mandatory joinder of parties was a slower process.<sup>30</sup> Initially, the entire controversy doctrine was not applied in the context of party joinder.<sup>31</sup> Instead, under the common law, party joinder was mandatory only as

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312-13, 78 A.2d 572, 576-77 (1951) (holding that the entire controversy doctrine encompasses the joinder of defenses); *Wm. Blanchard Co. v. Beach Concrete Co.*, 150 N.J. Super. 277, 294-95, 375 A.2d 675, 684 (App. Div. 1977) (determining that the entire controversy doctrine requires defendants to assert all cross-claims and counterclaims arising out of the underlying transaction).

<sup>27</sup> *Cogdell*, 116 N.J. at 16, 560 A.2d at 1173.

<sup>28</sup> See N.J. Ct. R. 4:27-1(b) (amended 1990). The rule states:

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

*Id.* (emphasis added). In 1990, this paragraph was deleted from the claim joinder rule and the rule was amended to its current form:

Subject to R. 4:30A (entire controversy doctrine), the plaintiff in the complaint or in an answer to a counterclaim denominated as such and the defendant in an answer setting forth a counterclaim may join, either as independent or alternate claims, as many claims, either legal or equitable or both, as he or she may have against an opposing party. There may be a like joinder of claims when there are multiple parties if the requirements of R. 4:28 (joinder of parties), R. 4:29 (joinder of multiple parties), and R. 4:31 (interpleader) are satisfied. There may be a like joinder of crossclaims or third-party claims if the requirements of R. 4:7 (counterclaim and cross-claim) and R. 4:8 (third-party practice) respectively are satisfied.

*Id.*

<sup>29</sup> See *id.* See generally Hazard, *supra* note 20, at 48 (arguing that the adoption of Rule 4:27-1(b) was essentially a standard *res judicata* doctrine and did not form a basis for the concept of party joinder).

<sup>30</sup> See *Olds v. Donnelly*, 150 N.J. 424, 433, 696 A.2d 633, 638 (1997).

<sup>31</sup> See *Thorton v. Potamkin Chevrolet*, 94 N.J. 1, 5, 462 A.2d 133, 134-35 (1983) (holding entire controversy doctrine was meant to apply to mandatory joinder of claims and is not applicable to mandatory joinder of parties); *Aetna Ins. Co. v. Gilchrist Bros., Inc.*, 85 N.J. 550, 559, 428 A.2d 1254, 1258-59 (1981) (explaining that entire controversy doctrine should not automatically be applied in the context of mandatory joinder of parties so as to bar claims against parties not joined in the original action). *But see* *Crispin v. Volkswagenwerk*, 96 N.J. 336, 343, 476 A.2d 250, 253 (1984) (refusing to apply the entire controversy doctrine retroactively to party joinder but holding that joinder of parties in a single action should be effectuated where possible).

to “indispensable” parties.<sup>32</sup> Thus, parties who were not indispensable, but whose participation in the action was only deemed to be “necessary and proper,” were not required to be joined in the action.<sup>33</sup> Although “neces-

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<sup>32</sup> See *Crispin*, 96 N.J. at 344, 476 A.2d at 254 (holding that “compulsory joinder extends only to parties without whom litigation cannot feasibly proceed”). A party is deemed indispensable when that party “has an interest inevitably involved in the subject matter before the court and a judgment cannot justly be made between the litigants without either adjudging or necessarily affecting the absentee’s interest.” *Allen B. DuMont Lab., Inc. v. Marcalus Mfg. Co.*, 30 N.J. 290, 298, 152 A.2d 841, 845 (1959). In *Sheilds v. Barrow*, the Supreme Court declared that a party is indispensable when that party’s interest in the controversy is “of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.” 58 U.S. 130, 139 (1854).

The New Jersey Court Rules eventually codified this standard. Thus, Rule 4:28-1 provides:

(a) PERSONS TO BE JOINED IF FEASIBLE. A person who is subject to service of process shall be joined as a party to the action if (1) in the person’s absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest in the subject of the action and is so situated that the disposition of the action in the person’s absence may either (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 other inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant.

(b) DISPOSITION BY COURT IF JOINDER NOT FEASIBLE. If a person should be joined pursuant to R. 4:28-1(a) but cannot be served with process, the court shall determine whether it is appropriate for the action to proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, the extent to which a judgment rendered in the person’s absence might be prejudicial to that 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 non-joinder.

N.J. Ct. R. 4:28-1.

<sup>33</sup> See *Sheilds*, 58 U.S. at 139. “Necessary parties” have been defined as “[p]ersons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it.” *Id.* The Supreme Court clarified that if the parties’ interests “are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court,” then the parties were deemed necessary rather than indispensable. *Id.*

sary and proper” parties had a recognized interest in the litigation, this interest could be separated from the existing action.<sup>34</sup>

Gradually, the New Jersey judiciary began to move away from the common-law practice of excluding party joinder from the entire controversy doctrine.<sup>35</sup> New Jersey courts articulated practical reasons for making party joinder mandatory under the entire controversy doctrine.<sup>36</sup> In *Crispin v. Volkswagenwerk*,<sup>37</sup> the New Jersey Supreme Court first recognized that the entire controversy doctrine could bar a subsequent action against a party who had a material interest in a pending action, but who had not been joined in that action.<sup>38</sup> Following *Crispin*, the court promulgated Rule 4:5-1, a rule of pleading that requires party joinder in limited circumstances.<sup>39</sup> The *Crispin* court, however, did not make the preclusive effects of the entire

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<sup>34</sup> See *Codgell v. Hospital Ctr.*, 116 N.J. 7, 20, 560 A.2d 1169, 1175 (1989); see also *Aetna*, 85 N.J. at 558, 428 A.2d at 1258 (finding that the entire controversy doctrine will not act to bar a subsequent action for failure to join a party with an interest in the action); *McFadden v. Turner*, 159 N.J. Super. 360, 369, 388 A.2d 244, 248 (App. Div. 1978) (holding that “the entire controversy doctrine is a rule of mandatory joinder of claims, not parties.”).

<sup>35</sup> See, e.g., *Aetna*, 85 N.J. at 559, 428 A.2d at 1259 (conceding that “under some circumstances the failure of a party to be joined or to intervene in a prior action should, after adjudication, bar a second action against that party involving the same subject matter.”); *Newmark v. Gimbel’s Inc.*, 54 N.J. 585, 601, 258 A.2d 697, 705 (1969) (holding that joinder of both the manufacturer and retailer in a products liability action would be more practical than having separate actions against each party); *McFadden*, 159 N.J. Super. at 372-73, 388 A.2d at 250 (Bidler, J., dissenting) (recognizing that extending the entire controversy doctrine to include the joinder of necessary and proper parties was compelled “by both the logic and basis of the Doctrine”).

<sup>36</sup> See *Aetna*, 85 N.J. at 559, 428 A.2d at 1259; *Newmark*, 54 N.J. at 601, 258 A.2d at 705.

<sup>37</sup> 96 N.J. 337, 343, 476 A.2d 250, 253 (1984).

<sup>38</sup> See *id.* Despite the New Jersey Supreme Court’s recognition that the entire controversy doctrine should be applicable to party joinder, the court refused to extend the entire controversy doctrine outright because doing so would invoke problems of retroactivity. See *id.*, 476 A.2d at 254.

<sup>39</sup> See N.J. Ct. R. 4:5-1(b)(2). The rule provides:

Each party shall include with the first pleading a certification as to whether the matter in controversy is the subject of any other action pending in any court or of a pending arbitration proceeding, or whether any other action or arbitration proceeding is contemplated; and, if so, the certification shall identify such actions and all parties thereto. Further, each party shall disclose in the certification the names of any other party who should be joined in the action. Each party shall have a continuing obligation during the course of the litigation to file and serve on all other parties and with the court an amended certification if there is a change in the facts stated in the original certification. The court may compel the joinder of parties in appropriate circumstances, either upon its own motion or that of a party.

*Id.*

controversy doctrine mandatory.<sup>40</sup> Rather, the court held that failure to join a party in a pending action *could* later bar a subsequent action against the absent party.<sup>41</sup>

The key decision in the area of party joinder finally came in *Cogdell v. Hospital Center*,<sup>42</sup> where the court expanded the reach of the entire controversy doctrine to make joinder of parties compulsory.<sup>43</sup> In *Cogdell*, the plaintiffs sued two doctors for negligence (1) in performing a Cesarean Section and (2) in subsequent resuscitation efforts to the newborn infant that resulted in severe birth defects.<sup>44</sup> The action proceeded to trial and resulted in a jury verdict for the defendants.<sup>45</sup> The plaintiffs then brought a second action against a new set of defendants: the hospital where the birth occurred and several of its administrators.<sup>46</sup> The plaintiffs claimed that the new defendants negligently failed to assemble a qualified operating team in a reasonable amount of time.<sup>47</sup> In response, the hospital and its codefendants claimed that the entire controversy doctrine barred this second action.<sup>48</sup>

The supreme court declared that the entire controversy doctrine encompassed the mandatory joinder of parties.<sup>49</sup> The court reasoned that “to the extent possible courts must determine an entire controversy in a single judicial proceeding and that such a determination necessarily embraces not only joinder of related claims between parties, but also joinder of all persons who have a material interest in the controversy.”<sup>50</sup> The court recognized the problems that would emerge following such a radical extension of the doctrine, but concluded that the benefits of judicial fairness and economy significantly outweighed any potential problems.<sup>51</sup>

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<sup>40</sup> See *Crispin*, 96 N.J. at 343, 476 A.2d at 253.

<sup>41</sup> See *id.*

<sup>42</sup> 116 N.J. 7, 560 A.2d 1169 (1989).

<sup>43</sup> See *id.* at 26, 560 A.2d at 1178.

<sup>44</sup> See *id.* at 9, 560 A.2d at 1169.

<sup>45</sup> See *id.*

<sup>46</sup> See *id.*, 560 A.2d at 1170.

<sup>47</sup> See *id.*

<sup>48</sup> See *Cogdell*, 116 N.J. at 13, 560 A.2d at 1171.

<sup>49</sup> See *id.* at 26, 560 A.2d at 1178.

<sup>50</sup> *Id.*

<sup>51</sup> See *id.* at 27, 560 A.2d at 1179. The Supreme Court of New Jersey did not hesitate to establish limits on when the doctrine's mandatory joinder rule would be applicable. Accordingly the court stated:

[Its limits] are reached when the joinder would result in significant unfairness or jeopardy to a clear presentation of the issues and a just result. Implicit in the development of the entire controversy doctrine is the recognition that the economies and the efficient administration of justice should not be achieved at the expense of these paramount concerns. . . . Any possible unfairness to litigants, confusion in the presentation of issues, administrative unmanageability, or distortion

Turning to the case at hand, the court emphasized that during the plaintiffs' initial action against the doctors there was clear information indicating the hospital's negligence.<sup>52</sup> Therefore, the plaintiffs were on notice that the hospital and its administrators were potential defendants.<sup>53</sup> The court, however, refused to apply the rule retroactively to the case at bar.<sup>54</sup>

Nonetheless, history had been made. After *Cogdell* it became evident that parties to an action must present every claim against any other named or potential party, with preclusion as the penalty for omitting to join either a claim or a party.<sup>55</sup> Following *Cogdell*, the Supreme Court of New Jersey codified the entire controversy doctrine as Rule 4:30A.<sup>56</sup>

#### D. Circle Chevrolet and its Progeny: Application of the Entire Controversy Doctrine to Attorney Malpractice Actions

After the *Cogdell* decision and the subsequent adoption of Rule 4:30A, the New Jersey Supreme Court continued to expand the entire controversy doctrine. In 1995, four decisions pronounced by the court radically expanded the entire controversy doctrine and had a profound effect on

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in the truth-determining process that may result from compulsory joinder of parties—or claims—can be eliminated or at least minimized by a trial court possessed of the discretion to excuse joinder or to order severance.

*Id.* at 27-28, 560 A.2d at 1179. The *Cogdell* court based its interpretation of mandatory party joinder upon notions of "judicial economy and avoidance of waste, efficiency and the reduction of delay, fairness to parties, the need for complete and final disposition through the avoidance of 'piecemeal decisions.'" *Id.* at 15, 560 A.2d at 1173; see also John Scott Hickman, Note, *Efficiency, Fairness and Common Sense: The Case for One Action as to Percentage of Fault in Comparative Negligence Jurisdictions that Have Abolished or Modified Joint and Several Liability*, 48 VAND. L. REV. 739, 754-55 (1995) (describing the motivating factors behind the *Cogdell* decision).

<sup>52</sup> See *Cogdell*, 116 N.J. at 10-11, 560 A.2d at 1170-71.

<sup>53</sup> See *id.*

<sup>54</sup> See *id.* at 28, 560 A.2d at 1179. It should be noted that some critics of *Cogdell* have proposed that the case should have been decided under the doctrine of res judicata rather than the entire controversy doctrine. See Hazard, *supra* note 20, at 49 (proposing that the plaintiff's action could have been precluded under the doctrine of res judicata).

<sup>55</sup> See *Forswearing the Merits*, *supra* note 12, at 24 (stating that the result of *Cogdell* was the requirement that parties to an action must assert all claims against all potential parties and the penalty for failing to do so was preclusion of the claim).

<sup>56</sup> See N.J. CT. R. 4:30A. Rule 4:30A codified the entire controversy doctrine:

Non-joinder of claims or parties required to be joined by the entire controversy doctrine shall result in the preclusion of the omitted claims to the extent required by the entire controversy doctrine except as otherwise provided by R. 4:64-5 (foreclosure actions) and R. 4:67-4(a) (leave required for counterclaims or cross-claims in summary actions).

*Id.*; see also Duffy, *supra* note 12, at 12 (explaining that R. 4:30A was enacted in order to ensure that members of the bar do not overlook the entire controversy doctrine and the *Cogdell* decision).

mandatory joinder of parties.<sup>57</sup> The four decisions illustrate the New Jersey Supreme Court's firm commitment to upholding the entire controversy doctrine.<sup>58</sup> The principle holding of the four cases was that all parties related to an underlying event must be joined in one single action even if the claims against the respective parties are completely unrelated.<sup>59</sup> Although the four decisions profoundly affected the scope of the entire controversy doctrine, *Circle Chevrolet* was the most controversial by affirmatively declaring that the doctrine would be applicable to attorney malpractice actions.<sup>60</sup>

The supreme court's decision in *Circle Chevrolet* required attorney malpractice actions to be joined in the litigation giving rise to the malpractice claim.<sup>61</sup> In *Circle Chevrolet*, the defendant law firm, Giordano, Halleran & Ciesla (Giordano), represented the plaintiff in drafting a thirty-year leasing agreement.<sup>62</sup> Giordano made a miscalculation in the document that resulted in the plaintiff overpaying its rent.<sup>63</sup> Giordano then represented the plaintiff in a suit for reformation of the lease.<sup>64</sup> Giordano was never joined in the initial reformation action, despite that the plaintiff was aware of the firm's potential negligence in failing to discover the miscalculations in the lease.<sup>65</sup> Following the conclusion of the reformation action in the plaintiff's favor, the plaintiff brought a malpractice action against Giordano.<sup>66</sup>

The Supreme Court of New Jersey, however, barred the plaintiff's claim against Giordano, reasoning that the defendant should have been joined in the initial reformation action.<sup>67</sup> *Circle Chevrolet* determined that

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<sup>57</sup> See *Mortgagelinq Corp. v. Commonwealth Land Title Ins. Co.*, 142 N.J. 336, 336, 662 A.2d 536, 536 (1995); *Mystic Isle Dev. Corp. v. Perski & Nehmad*, 142 N.J. 310, 310, 662 A.2d 523, 523 (1995); *Circle Chevrolet Co. v. Giordano, Halleran & Ciesla*, 142 N.J. 280, 280, 662 A.2d 509, 509 (1995); *Ditrollo v. Antiles*, 142 N.J. 253, 253, 662 A.2d 494, 494 (1995).

<sup>58</sup> See generally Carboni, *supra* note 8, at 1276 (describing the supreme court's solid commitment to expansion of the entire controversy doctrine); see also Russ Bleemer, *First Thing You Do, Sue All the Lawyers*, N.J. L.J., Aug. 7, 1995, at 1 (arguing that these four opinions asserted the entire controversy doctrine's vitality and importance).

<sup>59</sup> See Andretta, *supra* note 9, at 10 (stating that "[i]n essence, the court has, as a matter of policy, determined that any and all parties who could conceivably be related to a controversy must be joined, even if the legal theories to be applied to the parties are markedly different.").

<sup>60</sup> See *Circle Chevrolet*, 142 N.J. at 289, 662 A.2d at 513 (holding that the plaintiff's legal malpractice claims against her attorney were barred under the entire controversy doctrine).

<sup>61</sup> See *id.*

<sup>62</sup> See *id.* at 285, 662 A.2d at 511.

<sup>63</sup> See *id.* at 286, 662 A.2d at 511.

<sup>64</sup> See *id.* at 286-87, 662 A.2d at 512. The firm was ultimately replaced mid-litigation due to a conflict of interest. See *id.*

<sup>65</sup> See *id.* at 287, 662 A.2d at 512.

<sup>66</sup> See *Circle Chevrolet*, 142 N.J. at 288, 662 A.2d at 512.

<sup>67</sup> See *id.* at 298, 662 A.2d at 513.

the entire controversy doctrine operated to bar attorney malpractice actions that were not joined in the underlying litigation even if the attorney represented the plaintiff in that action.<sup>68</sup> The court reasoned that applying the entire controversy doctrine in this context furthered judicial efficiency and fairness.<sup>69</sup>

The *Circle Chevrolet* court then addressed several of the potential problems that might arise from applying the entire controversy doctrine to attorney malpractice actions.<sup>70</sup> First, the court concluded that, because the attorney already had an ethical obligation to inform a client of a potential malpractice claim,<sup>71</sup> applying the entire controversy doctrine would not place an additional burden on the attorney-client relationship.<sup>72</sup> Second, the court answered the plaintiff's concerns that requiring the attorney malpractice claim to be joined in the underlying action would waive the attorney-client privilege and thereby risk exposure of otherwise privileged information.<sup>73</sup> The court rejected this argument, concluding that several protections

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<sup>68</sup> See *id.*; see also Cammarere, *supra* note 9, at 40 (explaining that the entire controversy doctrine requires the client to assert a malpractice claim against an attorney even if the attorney is still representing the client in the underlying case).

<sup>69</sup> See *Circle Chevrolet*, 142 N.J. at 291, 294, 662 A.2d at 514, 515.

<sup>70</sup> See *id.* at 291-95, 662 A.2d at 514-16.

<sup>71</sup> See *id.* at 291-92, 662 A.2d at 514. The New Jersey Rules of Professional Conduct provide that "a lawyer shall not represent a client if the representation of that client may be materially limited by the . . . lawyer's own interests, unless . . . the client consents after a full disclosure of the circumstances and consultation with the client." N.J. RULES OF PROFESSIONAL CONDUCT Rule 1.7(b)(2). Further, Rule 1.4(b) states that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." *Id.* at Rule 1.4(b).

<sup>72</sup> See *Circle Chevrolet*, 142 N.J. at 291-92, 662 A.2d at 514 (interpreting the rules of professional conduct as placing a mandatory duty on an attorney to immediately notify a client when he or she makes a mistake, and to further explain that the client might have a right to sue the attorney with the assistance of new counsel); see also On-line Seminar, *Circle Chevrolet: Pitfalls in Legal Malpractice*, N.J. L.J., July 1, 1996, at S-1, 3 (reflecting the argument of Christopher Carey, a New Jersey practitioner, that the obligation to inform a client about a mistake "is a duty imposed by the RPCs and is not something new to the entire controversy doctrine. . . . [and] should [not] take the bar by surprise.").

<sup>73</sup> See *Circle Chevrolet*, 142 N.J. at 292, 662 A.2d at 514. Attorneys defending themselves from a malpractice claim are permitted to reveal confidential information to establish a defense. See N.J. RULES OF PROFESSIONAL CONDUCT Rule 1.6(c)(2). Rule 1.6(c)(2) states:

A lawyer may reveal such information to the extent the lawyer reasonably believes necessary . . . to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client or to establish a defense to a criminal charge, civil claim or disciplinary action against the lawyer based upon the conduct in which the client was involved.

*Id.* The New Jersey Rules of Evidence provide a similar right to attorneys. See N.J. R. EVID. 504(2)(c) (stating that the lawyer-client privilege shall not extend "to a communication relevant to an issue of breach of duty by the lawyer to his client, or

against this danger were already in place: (1) attorneys were not permitted to reveal all confidences during the course of a malpractice action, but only those necessary to aid in their defense<sup>74</sup> and (2) the entire controversy doctrine only required notification of the malpractice claim to the court, rather than actual litigation simultaneously with the underlying action.<sup>75</sup> Third, the court emphasized that the trial judge had discretion to formulate a litigation plan that would be fair to all parties involved, including a number of procedural tools designed to ensure fairness and efficiency.<sup>76</sup> Finally, the *Circle Chevrolet* court stressed that the entire controversy doctrine did not bar unknown, unarisen, or unaccrued claims.<sup>77</sup>

*Circle Chevrolet* had tremendous implications on both attorneys and their clients. First, it required an in-depth analysis of every case to determine the applicability of the entire controversy doctrine.<sup>78</sup> Second, it obligated attorneys to explain to their clients the ramifications of every single action taken in a law suit so that the clients could make informed decisions whether to sue their attorneys.<sup>79</sup>

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by the client to his lawyer.”).

<sup>74</sup> See N.J. RULES OF PROFESSIONAL CONDUCT Rule 1.6(c) (stating that lawyers can only reveal confidential information “to the extent the lawyer reasonably believes necessary.”).

<sup>75</sup> See *Brown v. Brown*, 208 N.J. Super 372, 382, 506 A.2d 29, 34 (App. Div. 1986) (holding that the trial court had discretion to determine whether a claim arising out of the same controversy should be joined in the action or reserved).

<sup>76</sup> See *Circle Chevrolet*, 142 N.J. at 293, 662 A.2d at 515; see also Cammarere, *supra* note 9, at 1 (noting that the *Circle Chevrolet* majority claimed that the decision would not lead to bad results given the trial judge’s discretion in scheduling cases and his or her ability to sever the malpractice suit from the underlying action if necessary).

<sup>77</sup> See *Circle Chevrolet*, 142 N.J. at 294, 662 A.2d at 515. In *Grunwald v. Bronkesh*, the supreme court concluded that legal malpractice claims will not begin to accrue until the client suffers actual damage and discovers, or should have discovered through the use of reasonable diligence, the facts essential to the malpractice claim. See 131 N.J. 483, 493-94, 621 A.2d 459, 464 (1993). Thus, legal malpractice claims fall within the special class of claims that are governed by the “discovery rule.” See *id.* at 493, 621 A.2d at 459. Accordingly, when a claim is unknown, unarisen, or unaccrued within the boundaries of the discovery rule, the entire controversy doctrine will not operate to bar such a claim if it is not joined in the underlying action. See *Circle Chevrolet*, 142 N.J. at 294, 662 A.2d at 515; see also Russ Bleemer, *New Standard of Proof in Legal Malpractice Cases*, N.J. L.J., July 29, 1996, at 1.

A final adjudication, however, is not necessary in order for the statute of limitations in a legal malpractice claim to begin running. See *Grunwald*, 131 N.J. at 495, 621 A.2d at 465. Nonetheless, most attorneys are under the mistaken belief that a legal malpractice claim does not begin to accrue until damages in the underlying case are fixed. See Hilton L. Stein, *Lawyers Beware! Court Extends the Entire Controversy Doctrine: Legal Malpractice Claims Expected to Increase*, N.J. LAW., Sept. 18, 1995, at 29, 30.

<sup>78</sup> See Stein, *supra* note 77, at 29. After *Circle Chevrolet*, “every case now must require an in-depth analysis as to whether it is appropriate to file a legal malpractice case to add an attorney as defendant.” *Id.* (emphasizing that “[t]his is true regardless of the nature of the underlying transaction.”).

<sup>79</sup> See Cammarere, *supra* note 9, at 40 (declaring that “when a goof occurs, it is the lawyer’s duty to tell a client he has a malpractice claim and should file it right

### III. CRITICISM OF THE ENTIRE CONTROVERSY DOCTRINE AND ITS APPLICATION TO ATTORNEY MALPRACTICE ACTIONS

At first blush, the entire controversy doctrine appears to serve some very altruistic goals, including fairness and efficiency.<sup>80</sup> Soon after the Supreme Court of New Jersey announced its decision in *Circle Chevrolet*, however, it became abundantly clear that the doctrine did not achieve its stated goals.<sup>81</sup> Although the supreme court's decision to expand the entire controversy doctrine to joinder of parties in *Cogdell* was intended to promote noteworthy procedural goals, the court's subsequent decision in *Circle Chevrolet* made it evident that this doctrine was more of a hindrance than a benefit to New Jersey litigants. At the least, the entire controversy doctrine should have created an exception for legal malpractice claims.<sup>82</sup>

*Circle Chevrolet* sparked a vigorous uproar in the New Jersey bar and triggered almost immediate efforts to have the entire controversy doctrine abolished completely or, in the alternative, to have an exception carved out in the context of legal malpractice actions.<sup>83</sup> Further, New Jersey courts, as well as members of the bar, quickly realized that the doctrine was not effectuating its goals.<sup>84</sup> Dissenting justices on the New Jersey Supreme

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away or it will forever be barred.”).

<sup>80</sup> See *Circle Chevrolet*, 142 N.J. at 289, 662 A.2d at 513.

<sup>81</sup> See *The Year at a Glance*, N.J. L.J., Dec. 25, 1995, at 15 (stating that in *Circle Chevrolet* and its companion cases, the supreme court stiffened the party joinder rules to such a great extent that the only logical course of action to follow was to “sue early and sue everyone, including your own lawyer.”).

<sup>82</sup> See *For the New Year*, N.J. L.J., Jan. 8, 1996, at 26 (urging the New Jersey Bar to persuade the New Jersey Supreme Court that the entire controversy doctrine is not meeting its stated goals and has in fact caused more problems than it is worth). Several critics have argued that merely carving out an exception for legal malpractice actions is not enough and that the doctrine's application to mandatory party joinder should be abandoned altogether. See *infra* note 180 and accompanying text.

<sup>83</sup> See Coleman, *supra* note 4, at 3 (describing the New Jersey legal community's hostile reaction to the court's expansion of the entire controversy doctrine); Ronald B. Grayzel, *Once More into the Black Hole: The Entire Controversy Doctrine Grows in Scope and Complexity*, N.J. L.J., Sept. 2, 1996, at S-4 (noting the frustration of trial lawyers due to the complexity and confusion surrounding the entire controversy doctrine); Bennett J. Wasserman, *The Circle Chevrolet Fallout Continues, Problems the Supreme Court Did Not Solve*, N.J. L.J., July 28, 1997, at S-4 (stating that “[t]he publication of *Circle Chevrolet* and its companion cases hit the practicing bar like a lightning bolt”); Cheryl Winokur, *Let's Keep It in the Family: Divorce Bar Seeks to Limit Entire Controversy Doctrine*, N.J. L.J., Oct. 28, 1996, at 1, 15 (arguing that “[l]ike income taxes, the rule established by *Circle Chevrolet* is viewed as a misery in which everyone should share.”). There have been “[f]ew, if any, issues [that] have galvanized the bar so swiftly and forcefully into action.” Coleman, *supra* note 4, at 3.

<sup>84</sup> See Cammarere, *supra* note 9, at 1 (recognizing that *Circle Chevrolet* resulted in “confusion among lawyers, inconsistent interpretations by trial judges, and preclusion of valid claims by clients due to mistakes by lawyers”); Coleman, *supra* note 4, at 40 (noting Allan R. Stein's comment that “[t]he purpose of the doctrine—to prevent defendants from being dragged into a suit more than once—is valid . . . but an absent defendant has never been sued, so ‘why should he care about being sued

Court sharply criticized the court's expansion of the entire controversy doctrine.<sup>85</sup> In addition, the New Jersey Supreme Court's Civil Practice Committee proposed altogether elimination of the entire controversy rule.<sup>86</sup>

A. *The Entire Controversy Doctrine Does Not Promote Its Stated Goals*

The most obvious problem with the expansion of the entire controversy doctrine was that it did not meet its stated goals. First, application of the entire controversy doctrine to attorney malpractice actions often did not promote fairness in the outcome of the litigation. Rather, the result of applying the entire controversy doctrine often denied litigants the opportunity to bring valid claims.<sup>87</sup> Furthermore, parties joined in the original suit often

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later rather than earlier?"); Grayzel, *supra* note 6, at S-7 (concluding that "[t]he extension of the doctrine to legal malpractice actions in *Circle Chevrolet* has impaired a lawyer's ability to make judgment decisions and casts a cloud over attorney/client relationships."); Editorial, *Time to Reconsider Circle Chevrolet*, N.J. LAW., Nov. 4, 1996, at 6 (declaring that *Circle Chevrolet* is not meeting its stated goals, including judicial economy and efficiency, nor is it avoiding waste or delay).

For a more general description of the problems resulting from *Circle Chevrolet*, see Wasserman, *supra* note 83, at S-4. Wasserman states what he believes to be the four problems arising from the *Circle Chevrolet* holding: (1) it "drove a wedge" in the attorney-client relationship; (2) it penalized an innocent client for failing to join the attorney as a defendant, even when the lawyer's mistake might not ultimately constitute malpractice; (3) it forced a client to make the impossible choice between discharging and suing his lawyer or forever losing the chance to bring a subsequent malpractice action against the attorney; and (4) it jeopardized the clients' underlying case because confidential information revealed to the attorney in preparation for the underlying matter could be used against the client in the malpractice action. *See id.*

<sup>85</sup> See *Mortgagelinq Corp. v. Commonwealth Land Title Ins. Co.*, 142 N.J. 336, 348-55, 662 A.2d 536, 542-46 (Pollock, J., dissenting). Justice Pollock noted that the majority's application of the entire controversy doctrine was not consistent with the concepts of judicial fairness and economy that underlie the doctrine. *See id.* at 353, 662 A.2d at 545 (Pollock, J., dissenting). The justice criticized the majority for losing sight of judicial efficiency and equity. *See id.* For a general discussion of the holding in *Mortgagelinq*, see Jonathan Neal Marcus, Case Survey, 26 SETON HALL L. REV. 485, 489 (1995).

<sup>86</sup> See *Mortgagelinq*, 142 N.J. at 351, 662 A.2d at 543-44 (Pollock, J., dissenting) (noting that the Civil Practice Committee acknowledged that, although theoretically the entire controversy doctrine had some appeal, in practice it had created more problems than it solved); see also Rocco Cammarere, *Entire Controversy: Push for Change*, N.J. LAW., Nov. 26, 1996, at 1 (stating that an ad hoc committee of the state bar association is considering the practical impacts of the doctrine); Carboni, *supra* note 8, at 1275 (noting the Civil Practice Committee's proposed reevaluation of the doctrine).

<sup>87</sup> See Bleemer, *supra* note 58, at 20 (arguing that the dismissal of claims pursuant to the entire controversy doctrine will prevent a decision on the merits). For example, when a case is settled, but the litigation was instituted against only some of several potential defendants, a second suit against different defendants will be barred despite the fact that the first case was settled. *See Andretta*, *supra* note 9, at 10. The result is justified because allowing the second suit to proceed would de-

suffered the consequences and hardships of admitting newly discovered parties while in the midst of litigation.<sup>88</sup> After *Circle Chevrolet*, asserting a malpractice action might result in the client having to obtain a new attorney despite that the underlying litigation with the original attorney was still ongoing.<sup>89</sup> The doctrine often forced parties to make the impossible choice of forfeiting the right to a cause of action or unnecessarily delaying and complicating the ongoing matter by the addition of new claims and parties.<sup>90</sup> As a result, the doctrine generated procedural unfairness by destroying a party's ability to make strategic decisions concerning joinder.<sup>91</sup> These results clearly conflicted with the doctrine's goal of promoting procedural fairness for all litigation parties.<sup>92</sup>

In addition to failing to promote procedural fairness, the entire controversy doctrine did not result in judicial economy. First, the entire controversy doctrine required litigants to assert claims against their attorneys that might not otherwise have been asserted.<sup>93</sup> Second, interfering with a

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prive the courts of the efficiency of having the matter concluded in one single proceeding. *See id.* By mandating such a result, however, the doctrine acts to bar parties from actually litigating their claim on the merits. *See id.*

<sup>88</sup> *See Cammarere, supra* note 86, at 6 (arguing that requiring the belated joinder of additional parties with potentially material interests in the outcome of the lawsuit imposes a significant burden on the original parties because matters such as pleadings and discovery become far more complicated and often take longer to conclude).

<sup>89</sup> *See Cynthia M. Jacob, The Entire Controversy Doctrine and Attorney Malpractice: A Study in Failure, N.J. LAW., Jan./Feb. 1997*, at 5 (referring to the President of the New Jersey Bar Association's statement questioning whether the entire controversy doctrine serves the client's interest when it forces the client to hire an independent attorney to handle the malpractice claim while the underlying litigation is occurring).

<sup>90</sup> *See Robert R. Cordell, Joinder Rule in Divorce Suits Disastrous, N.J. LAW., Nov. 18, 1996*, at 7 (discussing the impossible position in which the entire controversy doctrine places parties in a divorce).

<sup>91</sup> *See generally Hazard, supra* note 20, at 54-58 (explaining the various strategic decisions that can arise when determining which parties to join in the initial litigation). Determining which parties and claims to join is often a tactical decision to which parties give great weight in determining litigation strategy. *See id.* The entire controversy doctrine, by forcing a party to join each and every potential party in the first action or forfeit the right to later sue absent parties, removes such tactical decisions from litigants. *See id.*

<sup>92</sup> *See supra* note 10 and accompanying text (discussing the goals of the entire controversy doctrine).

<sup>93</sup> *See On-line Seminar, supra* note 72, at S-10 (reflecting Seton Hall Law School Professor Howard Erichson's comment that normally a client who is made aware of a potential malpractice claim by his attorney will "allow the lawsuit to proceed against the initial adversary or adversaries, on the significant chance that the lawyer's error will ultimately prove harmless or largely harmless and that therefore no malpractice claim will be asserted."). Accordingly, the practical effect of the entire controversy doctrine is that parties are being forced to join additional parties whom might not otherwise have been joined. *See id.* This "complicates and delays the underlying litigation by adding layers of unnecessary complexity to discovery and other pretrial proceedings." *Id.*

party's strategic reasons for failing to join a party in the original action might result in more complicated and less effectively managed cases.<sup>94</sup> This is especially true when the claims asserted are very different because the court is then forced to deal with twice as many issues and attorneys.<sup>95</sup> Thus, the holding in *Circle Chevrolet* resulted not in judicial economy, the goal of the entire controversy doctrine, but in converting simple cases into complex litigation.<sup>96</sup>

### B. Damage to Attorney-Client Relationships

The significant burden on the attorney-client relationship was an additional problem that emerged from *Circle Chevrolet*. The *Circle Chevrolet* court reasoned that expanding the doctrine to legal malpractice claims would not damage the attorney-client relationship because attorneys were already ethically obliged to advise their clients of potential malpractice claims.<sup>97</sup> It soon became evident, however, that the court underestimated the wedge that would be driven between an attorney and his client following the expansion of the entire controversy doctrine.<sup>98</sup>

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<sup>94</sup> See Editorial, *Efficiency and Justice*, N.J. L.J., July 28, 1997, at 26 (arguing that plaintiffs often have legitimate strategic reasons for omitting parties from the first action and that, by precluding plaintiffs from making such decisions, the entire controversy doctrine creates a risk that cases will be managed less effectively).

<sup>95</sup> See *id.* (proposing that when two litigations have almost no shared elements, it is possible that a complex, multi-party, multi-claim action will absorb a significantly greater amount of energy and resources); see also Editorial, *An Unfortunate One-Two Punch*, N.J. L.J., Feb. 15, 1990, at 6 (arguing that "[t]he requirement that all parties join all other persons having a potentially material interest in the litigation threatens vast overcomplication of the scope of litigation."); *Forswearing the Merits*, *supra* note 12, at 24 (recognizing that since the expansion of the entire controversy doctrine, plaintiffs have faced increasing costs for litigation due to the fact that an action must involve multiple parties and claims).

<sup>96</sup> See *Time to Reconsider Circle Chevrolet*, *supra* note 84, at 6. In essence, the supreme court's expansion of the entire controversy doctrine sent a message to attorneys to "sue everybody." See Bleemer, *supra* note 58, at 21 (emphasizing that attorneys will have to "examine the litigation, and if there is any, any, any possibility that there is somebody who can be involved in this, you have to bring them into the lawsuit."); Ronald B. Grayzel, *Setting Higher Hurdles: Trial Lawyers Meeting Stricter Procedures and Tougher Sanctions*, N.J. L.J., Sept. 4, 1995, at S-4, S-19 (arguing that the entire controversy doctrine has grown out of control because it will spark attorneys to adopt defensive strategies and sue every possible party on every possible claim).

<sup>97</sup> See *Circle Chevrolet Co. v. Giordano, Halleran & Ciesla*, 142 N.J. 280, 292, 662 A.2d 509, 514 (1989) (declaring that the entire controversy doctrine does not violate the lawyer-client relationship because the attorney already has an ethical duty to disclose any potential malpractice claims to the client).

<sup>98</sup> See Cammarere, *supra* note 86, at 14 (quoting Alan S. Gould, New Jersey practitioner, as stating that "[s]topping in the middle of a case to tell a client to hire a new lawyer and file a malpractice lawsuit does not breed good faith and a good working relationship."); Tim O'Brien, *Going Around in Circle*, N.J. L.J., Jan. 8, 1996, at 1 (declaring that *Circle Chevrolet* is harming the attorney-client relationship).

The application of the entire controversy doctrine to legal malpractice actions had a negative impact on the attorney-client relationship for several reasons. First, the doctrine forced the client to make the nearly impossible choice between discharging and then suing his attorney, or forever relinquishing the right to bring a legal malpractice action.<sup>99</sup> Second, applying the doctrine to attorney malpractice actions resulted in the innocent client losing the right to sue his attorney despite that the attorney's mistake might not have initially qualified as malpractice.<sup>100</sup> Finally, the doctrine created the danger that confidential attorney-client communications would be revealed during the course of the underlying litigation.<sup>101</sup>

By forcing a client to make the difficult choice between suing the attorney or losing his or her right to pursue later a malpractice action, the entire controversy doctrine often resulted in the inevitable destruction of long-standing attorney-client relationships.<sup>102</sup> *Circle Chevrolet* made such a re-

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<sup>99</sup> See Wasserman, *supra* note 83, at S-4. For a good hypothetical demonstrating how the entire controversy doctrine forces the client to prematurely sue his attorney before waiting until the conclusion of the underlying suit to determine whether the malpractice resulted in a loss, see Editorial, *Circling the Wagons in Circle Chevrolet*, N.J. Law., Sept. 4, 1995, at 6; see also On-line Seminar, *supra* note 72, at S-10 (reflecting the argument of Professor Howard Erichson that "the entire controversy doctrine undermine[s] a valued fiduciary relationship. . . . [u]nless a client is willing to waive potential malpractice claims, the client will be forced to sever an otherwise valued relationship and go to the expense and trouble of hiring new counsel.").

<sup>100</sup> See Wasserman, *supra* note 83, at S-4.

<sup>101</sup> See *id.*

<sup>102</sup> See On-line Seminar, *supra* note 72, at S-10. Professor Howard Erichson of Seton Hall University School of Law succinctly described the strain placed on the attorney-client relationship by the entire controversy doctrine. See *id.* Erichson proposed that, although the attorney is under an ethical obligation to report any potential malpractice to his or her client, the client might still make the decision to retain the attorney for the underlying litigation. See *id.* As Professor Erichson explained, there are several reasons why continued representation might be desirable: (1) it might preserve a long standing relationship between the lawyer and the client; (2) retaining the attorney is more efficient, given the fact that the attorney who has represented the client since the beginning of the lawsuit undoubtedly possesses the most knowledge about the litigation; and (3) continued representation provides the lawyer with the opportunity to correct any malpractice by receiving a favorable judgment. See *id.* Professor Erichson pointed out, however, that the entire controversy doctrine takes this decision from the client, forcing the client to join the potential malpractice claim or lose the chance to bring such a claim in a subsequent action. See *id.* Essentially, it precludes the client from having both opportunities—"keep the lawyer for the litigation to cure the underlying problem, AND preserve the malpractice claim in case the underlying action fails to cure the problem." *Id.* (questioning why the client should be forced to make that choice).

Under the logic of *Circle Chevrolet*, it is irrelevant that a client had a long-standing relationship with his attorney or that the client was actually satisfied with the attorney's handling of the underlying case. See 142 N.J. at 292, 662 A.2d at 514. If there was even the slightest possibility that the attorney was negligent in some manner or made even the smallest mistake, the client was forced to join him as a party before learning whether the mistake had any result whatsoever on the out-

sult inevitable by forcing a client to join the malpractice claim even if the attorney was still representing the client in the underlying action.<sup>103</sup> This legal predicament created a contradiction in logic because requiring the attorney to protect his or her own interests as well as those of the client was often implausible, if not impossible.<sup>104</sup>

Another major criticism of *Circle Chevrolet* centered on the danger its application posed to confidential attorney-client communications. The danger stemmed from the ethical rule that allows a defendant attorney to divulge any confidential communication necessary to aid in his defense of a malpractice claim.<sup>105</sup> Thus, when a client joins a malpractice action with the underlying action, confidential information that might hurt the client's underlying case can be divulged by the attorney in his defense.<sup>106</sup> While the New Jersey Supreme Court opined that this danger could be curtailed,<sup>107</sup> the inadequacies of any protection did little to safeguard attorney-client confidences.<sup>108</sup>

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come. *See id.* Thus, the client was forced to create premature turmoil by firing his lawyer and hiring a new lawyer mid-litigation. *See Forswearing the Merits, supra* note 12, at 24.

<sup>103</sup> *See Circle Chevrolet*, 142 N.J. at 292-93, 662 A.2d at 514-15; *see also* Daniel M. Serviss, Case Survey, 26 SETON HALL L. REV. 498, 503-04 (stating that the *Circle Chevrolet* decision created "an environment where the attorney stands before the judge or jury, representing the interests of the client while at the same time being compelled to protect his or her own interests.").

<sup>104</sup> *See Serviss, supra* note 103, at 503; *see also Circling the Wagons in Circle Chevrolet, supra* note 99, at 6 (arguing that the doctrine is devastating to the judicial process because the lawyer must defend himself against a malpractice claim while at the same time trying to achieve a favorable result for the client).

<sup>105</sup> *See* N. J. RULES OF PROFESSIONAL CONDUCT Rule 1.6.

<sup>106</sup> *See* On-line Seminar, *supra* note 72, at S-6 (reproducing comments by Glenn Bergenfield, a solo practitioner in New Jersey). Bergenfield argues that lawyers need to warn their clients: "Everything you tell me is confidential unless I screw up your case and force you to sue me. Then I will tell your adversary every private thought you have ever entrusted me with." *Id.* Bergenfield suggested that an attorney can, in essence, blackmail the client to refrain from suing the lawyer by threatening the client with divulgence of confidential information should the client sue him. *See id.*

<sup>107</sup> *See Circle Chevrolet*, 142 N.J. at 292-93, 662 A.2d at 514-15. The *Circle Chevrolet* majority argued that the danger that confidential information will be exposed is prevented by two safeguards: (1) the Rules of Professional Conduct, which prevent an attorney from divulging unnecessary information, and (2) by the fact that the trial court has the discretion to sever the action if necessary to protect client confidences. *See id.*

<sup>108</sup> *See* On-line Seminar, *supra* note 72, at S-6 (reflecting the criticism of Bergenfield, a solo practitioner in New Jersey, to the supreme court's proposed solution to the problem of exposure of confidential information). In response to the *Circle Chevrolet* court's conclusion that the trial judge's power to sever a malpractice action will protect attorney-client confidences, critics have responded that "the attorney-client relationship is too important to the administration of justice to allow different judges all over the state to come to different conclusions on whether that relationship is more important in a given set of circumstances than litigating all claims against parties in one courtroom at one time." *Id.*

### C. Excess Litigation

Applying the entire controversy doctrine to legal malpractice actions also fostered excessive and often unnecessary litigation. The problems created by the doctrine in this respect were twofold. First, clients brought malpractice actions against their attorneys that may not have been brought otherwise.<sup>109</sup> Second, an additional round of litigation was triggered to enforce the doctrine.<sup>110</sup> Thus, *Circle Chevrolet* spurred an increase in motions, cases, and claims out of fear that failure to take such action would result in their preclusion.<sup>111</sup>

With regard to the first problem, the *Circle Chevrolet* holding required clients to bring suits against their attorneys for any potential claim, including minor errors, despite that such errors might never have resulted in malpractice.<sup>112</sup> A mistake by an attorney oftentimes will not result in a malpractice suit because the attorney is able to correct the error and the underlying suit results in the client's favor.<sup>113</sup> Applying the entire controversy doctrine to attorney malpractice actions, however, obliterated the client's opportunity to await the results of the underlying suits before determining whether to sue his attorney.<sup>114</sup> The doctrine thereby shortened the client's time to determine whether he had suffered any damages from malpractice.<sup>115</sup> Accordingly, *Circle Chevrolet* had a counterintuitive effect because it generated litigation of claims that may have never been brought.<sup>116</sup>

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<sup>109</sup> See On-line Seminar, *supra* note 72, at S-7 (reproducing criticisms of the Entire Controversy Doctrine by Andrew Rubin, a New Jersey solo practitioner).

<sup>110</sup> See *Olds v. Donnelly*, 150 N.J. 424, 464, 696 A.2d 633, 654 (1997) (Stein, J., concurring in part and dissenting in part).

<sup>111</sup> See Russ Bleemer, *Decisions Spark Fear of "Naked" Lawyers*, N.J. L.J. Mar. 25, 1996, at 3 (declaring that the application of the entire controversy doctrine to attorney malpractice actions increased litigation out of fear that if the claims were not brought they would be precluded).

<sup>112</sup> See *Time to Reconsider Circle Chevrolet*, *supra* note 84, at 6 (stating that after *Circle Chevrolet* clients were forced to immediately join prior counsel in the underlying action even if there was only a remote possibility of legal malpractice).

<sup>113</sup> See *id.* (discussing how attorneys often avoid the costs, stress, and pressure of a malpractice suit by obtaining a favorable judgment for their clients in the underlying litigation); see also Cammarere, *supra* note 86, at 14 (stating that "[a] lot of times . . . a legal malpractice action is not necessary because by the time the case is completed and a settlement or verdict has been reached, any errors or mistakes by the attorney usually have been fixed.").

<sup>114</sup> See Cammarere, *supra* note 86, at 14; see also On-line Seminar, *supra* note 72, at S-7 (reflecting Andrew Rubin's argument that although "[l]awyers make mistakes all the time. . . . [m]ost mistakes are overcome or are resolved during the course of an action."). The entire controversy doctrine, however, places "an affirmative burden on a lawyer to announce his mistakes without allowing him the opportunity to cure. . . . [this] create[s] and prolong[s] litigation." *Id.* (emphasis added).

<sup>115</sup> See Cammarere, *supra* note 86, at 14 (arguing that application of the entire controversy doctrine to attorney malpractice actions "drastically shorten[ed] a client's time to decide whether to sue for malpractice.").

<sup>116</sup> See Coleman, *supra* note 4, at 40 (quoting Allan R. Stein, Professor of Law at

The second manner in which *Circle Chevrolet* created excess litigation was by creating, in essence, a second round of litigation strictly concerning the interpretation of the entire controversy doctrine.<sup>117</sup> After *Circle Chevrolet*, excess motions were filed to have cases dismissed pursuant to the doctrine.<sup>118</sup> The implications were clear: motions had to be filed and claims brought in order to determine whether the doctrine applied because failure to act promptly might result in preclusion of the claim altogether.

Finally, applying the doctrine to attorney malpractice actions opened a virtual "Pandora's Box."<sup>119</sup> *Circle Chevrolet* created a vicious circle: if an attorney failed to join any claim his client may have against a prior attorney, the subsequent attorney might also be liable under a legal malpractice theory.<sup>120</sup> The client would then be forced to assert a malpractice claim against the subsequent attorney for failing to assert the client's malpractice claim against the prior attorney. Stemming from this scenario is the legal anomaly in which lawyers are suing lawyers for failing to sue other lawyers.<sup>121</sup>

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Rutgers School of Law at Camden, as stating that "[t]he doctrine itself generates inefficiencies. . . . [by forcing] the assertion of claims that might not otherwise be brought."). In *Prevatril v. Mohr*, Justice Stein recognized the fact that the entire controversy doctrine might create a "race to the courthouse." See 145 N.J. 180, 201-02, 678 A.2d 243, 253-54 (1996) (Stein, J., concurring in part and dissenting in part). The justice opined that the entire controversy doctrine did not meet its stated goals of clearing backlog, but, in fact, may have had the opposite effect, causing a flurry of litigation. See *id.*

<sup>117</sup> See Grayzel, *supra* note 83, at S-7 (proposing that interpretation of the doctrine has become a "cottage industry" due to the large amount of motions and appellate decisions addressing the entire controversy doctrine).

<sup>118</sup> See Bleemer, *supra* note 58, at 20 (stating that the entire controversy doctrine does not promote judicial economy but is in fact encouraging more short term litigation because defense attorneys are bringing more motions to get cases dismissed pursuant to the doctrine); see also Cammarere, *supra* note 9, at 1 (citing reports by a legal malpractice attorney that at least 50% of the motions filed in legal malpractice cases at his office ask a judge to determine the application of the entire controversy doctrine).

<sup>119</sup> See Andretta, *supra* note 9, at 36. The Pandora's Box can be illustrated as follows: if the newly hired attorney delays too long in joining the previous attorney in the underlying action pursuant to *Circle Chevrolet*, then the new attorney might be subject to suit for his or her negligence in failing to join the previous attorney. See *id.* The new attorney will then also have to be joined in the underlying action pursuant to the entire controversy doctrine. See *id.*

<sup>120</sup> See Stein, *supra* note 77, at 29 (stating that lawyers must join all of the client's potential malpractice claims in the underlying litigation to avoid preclusion of those claims because failure to do so will result in that lawyer being guilty of malpractice).

<sup>121</sup> See Henry Gottlieb, *Circle Chevrolet Recalled, But Don't Expect a Refund*, N.J. L.J., July 21, 1997, at 1 (pointing out that "[t]he [*Circle Chevrolet*] decision also threatened to start a niche market: lawyers who sue lawyers for not suing lawyers.").

*D. A Rule Unique to New Jersey*

As evidence of the entire controversy doctrine's impracticality, no other jurisdiction in the United States, with the possible exception of Kansas,<sup>122</sup> has a remotely similar preclusive joinder rule.<sup>123</sup> Although other jurisdictions do have party joinder rules, New Jersey's rule is far broader than the rules that govern party joinder in other jurisdictions.<sup>124</sup> Most notably, the federal joinder provisions are significantly different.<sup>125</sup>

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<sup>122</sup> See *Albertson v. Volkswagenwerk Aktiengesellschaft*, 634 P.2d 1127, 1130 (Kan. 1981). In *Albertson*, the Kansas Supreme Court created its "one action" rule. See *id.* The plaintiff in *Albertson*, a victim of a car accident, sued the driver of the other car, and the jury determined that the plaintiff was 40% at fault for the accident and the defendant was 60% at fault. See *id.* at 1128. Subsequently, the plaintiff filed an action against Volkswagenwerk alleging that the car was defective. See *id.* The Kansas Supreme Court held that the second action was barred by a finding of comparative fault in the first trial. See *id.* at 1132. The *Albertson* court reasoned that since the court in the first action had apportioned all possible fault, there was no fault remaining to be placed on the defendant in the subsequent action. See *id.* The Kansas Supreme Court interpreted the Kansas Comparative Fault Act as barring successive actions regarding the same controversy. See *id.* at 1129-30. This rule became known as the "one action rule." See Hickman, *supra* note 51, at 758 (providing a detailed analysis of Kansas's one action rule).

<sup>123</sup> See Wasserman, *supra* note 83, at S-4 (noting that "New Jersey became infamously unique in that no other state had adopted as draconian a rule as the entire controversy doctrine and applied it to legal malpractice claims."); see also Allan R. Stein, *Commentary: Power, Duty and the Entire Controversy Doctrine*, 28 RUTGERS L.J. 27, 30 (1996) (describing the uniqueness of New Jersey's entire controversy doctrine).

<sup>124</sup> See generally Coleman, *supra* note 4, at 40 (recognizing Allan R. Stein's comment "New Jersey has the broadest joinder rule in the nation because it precludes joinder against parties not named in the first suit.") (emphasis added).

<sup>125</sup> See FED. R. CIV. P. 18(a); *id.* at R. 19; *id.* at R. 20; *id.* at R. 21. Rule 18(a), which governs joinder of claims and remedies, provides:

(a) Joinder of Claims. A party asserting a claim to relief as an original claim, counterclaim, cross-claim or third-party claim, may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as the party has against an opposing party.

*Id.* at R. 18(a). Rule 19 states the federal rule with regard to joinder of parties:

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action 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. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would

While the federal system contains rules providing for permissive and compulsory joinder of certain claims, none of these rules have the preclusive effect of New Jersey's entire controversy doctrine.<sup>126</sup> Failure to join a party in a federal action will not necessarily preclude that party from being sued in subsequent litigation.<sup>127</sup> It follows then that a plaintiff has more

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render the venue of the action improper, that party shall be dismissed from the action.

(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to 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.

*Id.* at R. 19. Rule 20 provides for permissive joinder of parties and states, in relevant part:

(a) Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons . . . may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

(b) Separate trials. The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom the party asserts no claim and who asserts no claim against the party, and may order separate trials or make other orders to prevent delay or prejudice.

*Id.* at R. 20. Finally, Rule 21 provides the consequences for misjoinder of parties:

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

*Id.* at R. 21.

<sup>126</sup> See, e.g., FED. R. CIV. P. 13(a) (governing compulsory counterclaims); *id.* at R. 13(b) (addressing permissive counterclaims); *id.* at R. 13(g) (stating procedure for permissive cross-claims).

<sup>127</sup> See *id.* at R. 19(a). Although Rule 19(a) requires certain defendants to be joined "if feasible," it does not require joinder unless failure to do so would prevent complete relief or the absent party has an interest in the subject matter of the litigation.

leeway to decide strategically which defendants to join in the action.<sup>128</sup> Thus, the entire controversy doctrine is a rule unique to New Jersey.<sup>129</sup>

#### E. Confusion Among Lower Courts

As illustrated through conflicting lower court decisions since 1995, the problems associated with *Circle Chevrolet* created confusion and uncertainty among the lower courts in New Jersey, with some courts using the entire controversy doctrine as a means of preclusion and others refusing to apply it.<sup>130</sup> For example, in *Perry v. Tuzzio*<sup>131</sup> the appellate division held that the entire controversy doctrine was not applicable to the probate court.<sup>132</sup> In *Fischer v. Heck*,<sup>133</sup> the superior court held that a special civil part action did not bar a subsequent law division action under the entire controversy doctrine.<sup>134</sup> In contrast, however, the chancery division in *Mustilli v. Mustilli*<sup>135</sup> held that a legal malpractice claim must be joined with a marital claim, despite that matrimonial claims are equitable and are tried without a jury.<sup>136</sup> This lack of uniform application of the doctrine resulted in a confused and frustrated New Jersey bar.<sup>137</sup> Despite this confu-

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tion and his absence will prejudice his ability to protect his interest. *See id.*

<sup>128</sup> *See id.* at R. 20(a); *see also* *Mortgagelinq Corp. v. Commonwealth Land Title Ins. Co.*, 142 N.J. 310, 350, 662 A.2d 536, 544 (1995) (Pollock, J., dissenting). Justice Pollock recognized that the joinder rules under the Federal Rules of Civil Procedure were less restrictive than New Jersey's rules and gave parties more discretion in determining trial strategies. *See id.* To illustrate the importance of giving a plaintiff discretion as to joinder, the justice referred to federal diversity actions. *See id.* Justice Pollock explained that in order to preserve complete diversity, plaintiffs are not forced to join all potential defendants. *See id.* Under the federal rules, electing to sue only certain defendants in such a manner will not preclude a subsequent action against the unnamed parties. *See id.*

<sup>129</sup> *See Mortgagelinq*, 142 N.J. at 350, 662 A.2d at 543 (Pollock, J., dissenting) (recognizing that New Jersey's rules regarding claim preclusion are unique).

<sup>130</sup> *See Cammarere, supra* note 86, at 14 (discussing the conflicting interpretations of the entire controversy doctrine in the appellate courts). Critics have argued that perhaps the entire controversy doctrine seemed sensible to the New Jersey Supreme Court because, as the state's highest court, the supreme court only sees the procedural problems of the lower courts on an ex post basis. *See Hazard, supra* note 20, at 36. This reasoning might explain why, despite the New Jersey Supreme Court's view of the entire controversy doctrine, the doctrine remained unintelligible to both lower courts and attorneys. *See id.*

<sup>131</sup> 288 N.J. Super. 223, 672 A.2d 213 (App. Div. 1996).

<sup>132</sup> *See id.* at 229, 672 A.2d at 215-16. The *Perry* court based its holding on the fact that the probate court is a court of limited jurisdiction. *See id.*

<sup>133</sup> 290 N.J. Super. 162, 675 A.2d 254 (Law Div. 1996).

<sup>134</sup> *See id.* at 174-75, 675 A.2d at 259-60. Like the court in *Perry*, the appellate division in *Fischer* based its holding on the fact that the special civil division is a court of limited jurisdiction. *See id.*

<sup>135</sup> 287 N.J. Super. 605, 287 A.2d 650 (Ch. Div. 1995).

<sup>136</sup> *See id.* at 620, 287 A.2d at 657.

<sup>137</sup> *See Cammarere, supra* note 9, at 1 (noting the comment by Hilton L. Stein, a New Jersey legal malpractice attorney, that the problem with the entire controversy

sion, lawyers were convinced that the court's holdings in *Circle Chevrolet* and its progeny evidenced a firm commitment to the doctrine.<sup>138</sup>

#### IV. THE SUPREME COURT OVERRULES *CIRCLE CHEVROLET* AND CARVES OUT AN EXCEPTION TO THE ENTIRE CONTROVERSY DOCTRINE FOR ATTORNEY MALPRACTICE ACTIONS.

Perhaps based on the tremendous amount of pressure placed on the Supreme Court of New Jersey by the state's bar following *Circle Chevrolet*, or perhaps because the court realized that the decision was not serving its intended objectives, the court overruled *Circle Chevrolet* in 1997.<sup>139</sup> In *Olds v. Donnelly*,<sup>140</sup> one of three 1997 New Jersey Supreme Court decisions addressing the entire controversy doctrine, the court held that the doctrine no longer applied in the context of attorney malpractice actions.<sup>141</sup>

In *Olds*, the plaintiff, Olds, hired Donnelly to represent him in a medical malpractice suit.<sup>142</sup> Eventually, Donnelly terminated his representation of Olds and the trial court dismissed the medical malpractice suit with

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doctrine is the lack of uniform application); Gottlieb, *supra* note 11, at 3 (describing conflicting interpretations of the entire controversy doctrine that are confusing lawyers as to its application in legal malpractice actions).

<sup>138</sup> See Carboni, *supra* note 8, at 1277 (describing the New Jersey Supreme Court's overwhelming support of the entire controversy doctrine).

<sup>139</sup> See *Olds v. Donnelly*, 150 N.J. 424, 428, 696 A.2d 633, 636 (1997); *Karpovich v. Barbarula*, 150 N.J. 473, 476, 696 A.2d 659, 660 (1997); *Donohue v. Kuhn*, 150 N.J. 484, 488, 696 A.2d 664, 666 (1997). For a general description of the *Olds* decision, see Lydia Barbara Bashwiner, *The Doctrine's Party-Joinder Requirements Do Not Extend to Legal-Malpractice Claims*, N.J. LAW., July 21, 1997, at 26 and Michael A. Riccardi, *N.J. Ends Experiment with Legal Malpractice Complaints*, THE LEGAL INTELLIGENCER, July 21, 1997, at 1.

<sup>140</sup> 150 N.J. 424, 696 A.2d 633 (1997).

<sup>141</sup> See *id.* at 428, 696 A.2d at 636. The two companion cases to *Olds* reached similar holdings. In *Karpovich*, the supreme court held:

The settlement of the underlying action did not sufficiently involve the use of judicial resources to invoke the entire controversy doctrine as a bar to th[e] legal malpractice action. . . . [T]he entire controversy doctrine does not compel either notice to the trial court of the possible legal-malpractice claim or the joinder of the attorney in the underlying action that gives rise to that claim.

150 N.J. at 476, 696 A.2d at 660. The *Karpovich* court found that the settlement of the underlying claim did not provide the plaintiff with an adequate opportunity to litigate the legal malpractice claim, and, furthermore, that precluding the plaintiff's claim under the entire controversy doctrine would run counter to the doctrine's goal of fairness. See *id.* at 481, 696 A.2d at 663. The supreme court further held that applying the doctrine in this case would "undermine the public policy favoring settlements." *Id.* at 482, 696 A.2d at 663. Similarly, in *Donohue*, the supreme court held that the plaintiffs' legal malpractice claims were not barred under the entire controversy doctrine for failing to join the claims with the underlying wrongful death and survivorship actions. See 150 N.J. at 488, 696 A.2d at 666.

<sup>142</sup> See *Olds*, 150 N.J. at 428, 696 A.2d at 636.

prejudice for failure to serve timely the defendant doctor.<sup>143</sup> Olds subsequently brought suit against Donnelly, alleging that Donnelly was negligent in failing to effect timely service in the underlying action.<sup>144</sup> Donnelly brought a motion for summary judgment, arguing that Olds's claim should be dismissed pursuant to the entire controversy doctrine.<sup>145</sup> The trial court denied this motion.<sup>146</sup> The jury then returned a verdict for \$500,000, but the trial court granted Donnelly's motion for judgment notwithstanding the verdict (JNOV).<sup>147</sup> The appellate division reversed the JNOV, reinstated the judgment for Olds, and further concluded that Olds's claims against Donnelly were not barred under the entire controversy doctrine.<sup>148</sup>

The supreme court affirmed the judgment of the appellate division, holding that the entire controversy doctrine did not bar Olds's legal malpractice claim against Donnelly.<sup>149</sup> The majority opinion, written by Justice Pollock, declared that the entire controversy doctrine would no longer apply in the context of attorney-malpractice actions.<sup>150</sup> The court agreed with the appellate division's conclusion that the entire controversy doctrine did not apply to Olds's legal malpractice claim because Olds did not sustain any actual damage until the trial court dismissed the underlying medical malpractice suit.<sup>151</sup> Thus, the court concluded that the legal malpractice action did not accrue until that time.<sup>152</sup> In addition to these findings, the court took

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<sup>143</sup> See *id.* at 429, 696 A.2d at 636.

<sup>144</sup> See *id.* at 430, 696 A.2d at 636.

<sup>145</sup> See *id.*, 696 A.2d at 637.

<sup>146</sup> See *id.*

<sup>147</sup> See *id.* In *Olds*, Donnelly argued that Olds' malpractice claim was barred under the entire controversy doctrine because it was not asserted in the underlying medical-malpractice action. See *id.*

<sup>148</sup> See *Olds v. Donnelly*, 291 N.J. Super. 222, 227, 232, 677 A.2d 238, 240, 243 (App. Div. 1996) (holding that Olds' legal malpractice action against Donnelly was not precluded pursuant to *Circle Chevrolet* because the claim did not accrue until the medical-malpractice action had been dismissed).

<sup>149</sup> See *Olds*, 150 N.J. at 428, 696 A.2d at 635-36.

<sup>150</sup> See *id.*

<sup>151</sup> See *id.* at 439, 696 A.2d at 641.

<sup>152</sup> See *id.* In reaching this conclusion, the supreme court reiterated its prior holding in *Grunwald v. Bronkesh*, 131 N.J. 483, 621 A.2d 459 (1993), that the discovery rule applies to the accrual of statute of limitations in attorney-malpractice actions. See *Olds*, 150 N.J. at 439, 696 A.2d at 641. The court then reasoned that under *Grunwald* the limitations period on Olds' claim against Donnelly did not begin to run until the underlying claim was dismissed with prejudice. See *id.* at 438-39, 696 A.2d at 640-41. The *Olds* court found that "mere knowledge of an attorney's negligence does not cause a legal malpractice claim to accrue. The client must sustain actual damage." *Id.* at 437, 696 A.2d at 640. Accordingly, the *Olds* court affirmed the appellate division's holding that Olds' claim against Donnelly did not accrue until the medical-malpractice claim had been dismissed. See *id.* at 439, 696 A.2d at 641.

notice of the criticism directed toward applying the entire controversy doctrine to legal malpractice actions.<sup>153</sup>

The supreme court recognized several problems caused by its prior decision in *Circle Chevrolet*.<sup>154</sup> First, the *Olds* court recognized the doctrine's potential to have a chilling effect on the attorney-client relationship.<sup>155</sup> Second, the court acknowledged that applying the doctrine to legal malpractice actions could jeopardize attorney-client confidences.<sup>156</sup>

Despite recognition of these significant problems, the *Olds* majority declined to overrule *Cogdell v. Hospital Center*<sup>157</sup> and altogether abolish mandatory party joinder.<sup>158</sup> Instead, the court limited its decision by providing an exception to the entire controversy doctrine for attorney malpractice actions.<sup>159</sup> Further, the *Olds* court reserved consideration as to whether the entire controversy doctrine should be abandoned altogether until its biennial review of the rules of practice.<sup>160</sup> In reaching this conclusion, the *Olds* court emphasized that the preclusive effect of the entire controversy doctrine should be used only as a tool of last resort.<sup>161</sup> Finally, the

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<sup>153</sup> See *Olds*, 150 N.J. at 440, 443, 696 A.2d at 641, 643.

<sup>154</sup> See *id.* at 440-43, 696 A.2d at 641-43. The problems recognized by the New Jersey Supreme Court in *Olds* reflect the criticisms articulated by New Jersey lawyers following the *Circle Chevrolet* decision. See Grayzel, *supra* note 6, at S-6.

<sup>155</sup> See *Olds*, 150 N.J. at 440-41, 696 A.2d at 641-42. The supreme court acknowledged that applying the entire controversy doctrine to attorney malpractice actions chills the attorney-client relationship in many ways including: forcing the client to spend time and money to hire a second attorney to pursue the legal malpractice claim; separating the first attorney's interests from those of the client so that the attorney will place his or her own interests above those of the client; and placing clients in the position of firing an attorney with whom they may have had a long-time successful relationship or forever waiving their right to sue. See *id.* at 441, 696 A.2d at 642. Such results "do not provide the fairness the entire controversy doctrine is designed to encourage." *Id.*

<sup>156</sup> See *id.* at 441, 696 A.2d at 642. The New Jersey Supreme Court recognized that when attorneys are sued for legal malpractice, information that was previously privileged becomes discoverable and may be disclosed to aid in the attorney's defense. See *id.*; see also notes 97-108 and accompanying text (discussing the implications of *Circle Chevrolet* on attorney-client communications). The *Circle Chevrolet* court had concluded, however, that the risk disclosing confidential communications could be minimized by protections in the Rules of Professional Conduct and the discretion of the trial judge. See *Circle Chevrolet Co. v. Giordano, Halleran & Ciesla*, 142 N.J. 280, 292, 662 A.2d 509, 514 (1995). The *Olds* court dismissed this reasoning, holding that "on further consideration, however, we believe that the risk of disclosure of privileged information and the generally adverse effects on attorney-client relationships outweighs any benefit from requiring a client to assert a malpractice claim in the pending lawsuit." *Olds*, 150 N.J. at 441-42, 696 A.2d at 642.

<sup>157</sup> 116 N.J. 7, 560 A.2d 1169 (1989).

<sup>158</sup> See *Olds*, 150 N.J. at 446, 696 A.2d at 644-45.

<sup>159</sup> See *id.* at 446, 449, 696 A.2d at 644, 646.

<sup>160</sup> See *id.*

<sup>161</sup> See *id.* at 446-47, 696 A.2d at 645; see also *Gelber v. Zito Partnership*, 147 N.J. 561, 565-66, 688 A.2d 1044, 1046 (1997) (describing measures that the trial court

supreme court concluded that the decision should be applied on a limited retroactive basis to all pending claims.<sup>162</sup> Pursuant to this finding, the court then granted certification in a number of cases barred under the entire controversy doctrine, reversed the holdings, and remanded the cases for a decision consistent with *Olds*.<sup>163</sup>

## V. FUTURE IMPLICATIONS

The *Olds* exemption of attorney malpractice actions from the entire controversy doctrine will have many practical effects for New Jersey lawyers. Clients can now wait to learn the results of the underlying action before determining whether or not to bring a malpractice action without fear of preclusion; thus, the number of malpractice actions will probably decrease.<sup>164</sup> Consequently, malpractice insurance premiums will be lowered.<sup>165</sup> Furthermore, although some attorneys argue that excluding attorney malpractice actions from the entire controversy doctrine deprives attorneys of an important defense when being sued, the decrease in the number of malpractice suits will effectively counter the loss of this defense.<sup>166</sup>

In addition to the practical changes that will result from exempting attorney malpractice actions from the reach of the entire controversy doctrine, the future implications of *Olds* may be far broader. Namely, *Olds*

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could have employed in place of the entire controversy doctrine to insure fairness to all parties).

<sup>162</sup> See *Olds*, 150 N.J. at 449-50, 696 A.2d at 646. Many individuals have criticized the *Olds* court's decision to apply its holding retroactively only to those cases pending on appeal or still in the trial court, while ignoring those cases that were dismissed under *Circle Chevrolet*. See Wasserman, *supra* note 83, at S-5 (arguing that plaintiffs who feel their cases were unjustly dismissed under *Circle Chevrolet* should be permitted to reinstate their case and have it decided).

<sup>163</sup> See, e.g., *Schwartz v. Dollinger*, 151 N.J. 68, 68, 697 A.2d 542, 542 (1997); *Coralczyk v. Olesnycky*, 151 N.J. 68, 68, 697 A.2d 542, 542 (1997); *Jablonski v. Robinson, Wayne, Levin, Riccio & LaSala*, 151 N.J. 68, 68, 697 A.2d 542, 542 (1997); *Wills v. C. Morrison*, 151 N.J. 69, 69, 697 A.2d 543, 543 (1997); *Bailey v. Pcaro & Pcaro*, 151 N.J. 69, 69, 697 A.2d 543, 543 (1997); *Carlin v. Cornell, Hegarty & Koch*, 151 N.J. 69, 69, 697 A.2d 543, 543 (1997); *T&M Realty, Inc. v. Steinberg*, 151 N.J. 70, 70, 697 A.2d 543, 543 (1997).

<sup>164</sup> See Rocco Cammarere, *Entire Controversy Doctrine: High Court Backs Down: Justices Come Full Circle*, N.J. LAW., July 21, 1997, at 1.

<sup>165</sup> See *id.* (arguing that one benefit of *Olds* will be lower malpractice insurance premiums).

<sup>166</sup> See *id.* (arguing that the loss of any potential advantages attorneys received under the entire controversy doctrine will be offset by a decrease in the number of legal malpractice suits). Despite the overwhelmingly positive implications of the *Olds* decision, there are still those lawyers, particularly malpractice defense attorneys and attorneys who had a malpractice suit against them dismissed pursuant to *Circle Chevrolet*, who are disappointed by the supreme court's decision. See Henry Gottlieb, *Orphans of a Dead Doctrine: What's Next for Legal Malpractice Claims Affected by Circle Chevrolet's Demise?*, N.J. L.J., Aug. 4, 1997, at 1.

may be a harbinger of the death of mandatory party joinder altogether in New Jersey.<sup>167</sup> Although the supreme court declined completely to overrule *Cogdell* in *Olds*, the court was very conscious of the tremendous criticism directed at mandatory party joinder.<sup>168</sup> In fact, the *Olds* majority twice noted that consideration as to whether the entire controversy doctrine should be abolished, modified, or changed would be made in its biennial review of the proposed amendments to the New Jersey Rules of Practice.<sup>169</sup> In addition, the *Olds* court warned that, even in cases not involving legal malpractice, preclusion of a subsequent lawsuit should be a remedy of last

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<sup>167</sup> See Cammarere, *supra* note 9, at 1 (arguing that *Olds* may be foreshadowing the death of the entire controversy doctrine).

<sup>168</sup> See *Olds v. Donnelly*, 150 N.J. 424, 444-45, 696 A.2d 633, 644 (1997). The court noted the following criticisms of *Cogdell*: (1) “mandatory party joinder is counter-productive”; (2) the entire controversy doctrine “generates uncertainty and is too difficult for lawyers and judges to understand”; (3) the “doctrine impairs valuable relationships by requiring the assertion of claims against parties one otherwise would not sue”; (4) “the preclusion of a claim because of the failure to assert the claim in an earlier proceeding is overkill”; (5) “the doctrine proceeds from the incorrect assumption that mandatory party joinder is necessary to avoid unfairness to absent defendants and others”; and (6) “critics question the premise that the plaintiff controls the initial proceeding.” *Id.*

<sup>169</sup> See *Olds*, 150 N.J. at 446, 696 A.2d at 644. The court reasoned that [o]ur biennial review of proposed amendments to the Rules of Practice, which we will undertake next term, provides a suitable occasion to review proposals for modifications of the entire controversy doctrine, expanded use of party joinder and other suggestions to improve the administration of justice. The Civil Practice Committee, to which [the Supreme Court] regularly looks for recommendations on proposed rule changes, has already appointed a subcommittee on the entire controversy doctrine. That subcommittee is the logical entity to consider initially the various proposals concerning the doctrine.

*Id.* The supreme court again mentioned this process of review in a later section of the opinion:

As previously indicated, our Committee on Civil Practice has appointed an Entire Controversy Doctrine Subcommittee to examine exemptions from mandatory party joinder under the entire controversy doctrine. We are asking the Committee to broaden the examination to include all other aspects of the doctrine. Consistent with our traditional practice, we shall provide the opportunity for the bar and others to comment on any modification of the entire controversy doctrine, including any proposed amendments to Rule 4:30A.

*Id.* at 449, 696 A.2d at 646. Despite these indications, there is still some doubt whether the court will overrule *Cogdell*. Based on the fact that Justice Stein was the lone voice for overruling *Cogdell*, some lawyers are uncertain about the court’s commitment to abandon the doctrine altogether. See *id.* at 450, 696 A.2d at 646 (Stein, J., concurring in part and dissenting in part); see also Cammarere, *supra* note 9, at 1 (arguing that because Justice Stein was the only justice to recommend overruling *Cogdell*, the *Olds* decision might not be an indication that “the doctrine is living on borrowed time.”).

resort.<sup>170</sup> Clearly, these high court comments indicate its willingness to consider abolishing a rule that is not meeting its stated objectives.

It is evident that the *Olds* trio is a step in the right direction, but the three decisions still leave many questions unanswered. There are several other categories of professionals who stand in the same position as attorneys with regard to malpractice actions, yet these professionals have not received similar exceptions from the entire controversy doctrine.<sup>171</sup> Many critics argue that it is unfair to exempt only attorney malpractice actions from the confines of the entire controversy doctrine while failing to provide exemptions to actions against other similarly situated professionals.<sup>172</sup> Other critics, however, support *Olds*, arguing that lawyers should be exempt from the reach of the entire controversy doctrine because of their unique position in adversarial proceedings.<sup>173</sup> Still, it seems apparent that providing an exception to the entire controversy doctrine solely for attorney malpractice actions will only create further confusion because the *Olds* court did not elaborate on the scope of this exception.<sup>174</sup> Finally, a balancing of the interests relative to the entire controversy doctrine shows that, despite the decisions in *Olds* and its progeny, the purposes served by the doctrine are outweighed by its negative implications.<sup>175</sup>

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<sup>170</sup> See *Olds*, 150 N.J. at 448, 696 A.2d at 645-46.

<sup>171</sup> See *id.* at 446, 696 A.2d at 644-45. The majority in *Olds* confined its decision to the doctrine's application to attorney malpractice actions, declining to address whether other professionals should be excluded. See *id.* Such professionals might include doctors, accountants, architects, engineers, and psychologists. See *id.*, 696 A.2d at 644.

<sup>172</sup> See *id.* at 451, 696 A.2d at 647 (Stein, J., concurring in part and dissenting in part) (concluding that, although exempting attorney malpractice actions from the entire controversy doctrine will calm the bar, such an exemption is hard to justify when the doctrine can still be used to dismiss malpractice claims against other professionals); see also Nancy J. Moore, *Implications of Circle Chevrolet for Attorney Malpractice and Attorney Ethics*, 28 RUTGERS L.J. 57, 76-77 (1996) (questioning the wisdom of exempting attorney malpractice claims from the entire controversy doctrine while continuing to apply the doctrine to accountants, architects, engineers, physicians, psychologists, and other professionals). Bennett J. Wasserman, a New Jersey practitioner who sat on the New Jersey State Bar Association's Entire Controversy Committee, discussed the fact that giving preferential treatment to attorneys would hurt an already shaky public opinion of lawyers. See Wasserman, *supra* note 83, at S-5.

<sup>173</sup> See Editorial, *Barbershop Quartet*, N.J. LAW., Aug. 19, 1997, at 6 (arguing that attorneys should receive a special exemption from the entire controversy doctrine because "lawyers are different precisely because [their] unique role in dispute resolution is impaired by making [them] part of the dispute.").

<sup>174</sup> See Wasserman, *supra* note 83, at S-5. Because the lawyer serves the client in several fiduciary roles, including advocate, adviser, accountant, investment consultant, and broker, and often receives the assistance of non-lawyers in doing so, it will be unclear whether such non-lawyer fiduciaries should be exempt from the entire controversy doctrine. See *id.*

<sup>175</sup> See *Efficiency and Justice*, *supra* note 94, at 26 (arguing that "[m]inimizing litigation and conserving courts' energies are relative values to be weighed with other

There are several other contexts where there are substantial justifications for carving out additional exceptions to the entire controversy doctrine.<sup>176</sup> Indeed, the supreme court has recognized several other exceptions to the entire controversy doctrine outside the context of attorney malpractice actions.<sup>177</sup> The problem with simply carving out exceptions to the entire controversy doctrine is clear: where do the exceptions end? There are feasible reasons for carving out an exception in almost any context and almost any matter. For this reason, it is highly probable that the future will bring complete abandonment of the entire controversy doctrine. In its place, trial courts can be given the discretion, with the aid of several other procedural rules, to determine the result of failing to join a party in the original action without being affirmatively obligated to declare the action barred.<sup>178</sup> By doing so, the goals of the entire controversy doctrine—namely efficiency and fairness—can be more readily achieved.<sup>179</sup>

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values on the scale of justice; minimization of litigation is not an end in itself and it has its price.”).

<sup>176</sup> See, e.g., Winokur, *supra* note 83, at 1 (summarizing the position of the New Jersey State Bar Association’s Family Law Section that the entire controversy doctrine should be restricted in domestic cases). The divorce bar argued that applying the entire controversy doctrine in the matrimonial context will result in increased costs and delay. See *id.* Furthermore, the bar contends that carving out an exception for domestic actions would reduce malpractice suits because it would allow clients more time to “weigh the options.” See *id.*; see also Cordell, *supra* note 90, at 7 (stating that applying the entire controversy doctrine in the matrimonial context is “nonsensical”).

<sup>177</sup> See *Olds*, 150 N.J. at 446, 696 A.2d at 644 (noting that, “[f]or policy considerations, [the court] has recognized that the doctrine should not apply in certain contexts, such as non-germane claims against a mortgagor in a mortgage foreclosure . . . and indemnification claims when the putative indemnitee complies with” New Jersey statutes). For examples of where the supreme court has held that the entire controversy doctrine does not apply, see generally *Joel v. Morrocco*, 147 N.J. 547, 688 A.2d 1036 (1997) (holding that in a zoning suit the entire controversy doctrine did not preclude action against individual partners to enforce monetary obligations under a settlement agreement where such partners were not joined in the initial action) and *Harley Davidson Motor Co. v. Advance Die Casting Inc.*, 150 N.J. 489, 500, 696 A.2d 666, 672 (1997) (declaring that the entire controversy doctrine should not apply to indemnification claims when the putative indemnitee complies with New Jersey statutory law).

<sup>178</sup> See *Barbershop Quartet*, *supra* note 173, at 6. One example is N.J. Ct. R. 4:37-4, which mandates that a plaintiff who brings an action that is voluntarily dismissed must pay the defendant’s costs for the first, discontinued action if the plaintiff subsequently brings a second suit for the same claim. See *id.* Another suggestion is imposing extra costs on a plaintiff who fails to join a party in the original action; costs similar to those imposed for abuse of the discovery process, including the costs of recreating prior work, forcing witnesses to testify twice, and paying court costs. See *id.* Justice Stein, dissenting in *Olds*, recommended several provisions that could be strengthened to aid existing court rules in avoiding duplicative law suits. See *Olds*, 150 N.J. at 467-68, 696 A.2d at 656 (Stein, J., concurring in part and dissenting in part). For example, N.J. Ct. R. 4:28 can be used to give a trial court more discretion with regard to party joinder. See *id.* One commentator has suggested how Rule 4:28 could be used:

## VI. CONCLUSION

The entire controversy doctrine has traveled a rocky road during its short life. Although the intentions of the Supreme Court of New Jersey in creating such a procedural rule were noble, the rule in a practical setting did not turn out as well as intended. Thus, the most prudent course for the New Jersey Supreme Court is to overrule *Cogdell* altogether and exempt party joinder from the preclusive results of the entire controversy doctrine.<sup>180</sup> Rather than creating an absolute rule of preclusion, discretion with regard to case management should be given to the trial judge in determining which parties should be joined and when an action should be dismissed for failure to join a party.<sup>181</sup> The party joinder rule in New Jersey should resemble the federal joinder rules more closely so that failure to join an indispensable party might result in the dismissal of an action, but not in the preclusion of a subsequent action. Furthermore, certain joinder rules could be subject to sanctions for failure to comply.<sup>182</sup> There are a variety of ap-

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R. 4:28 authorizes dismissal of the first case if an indispensable party cannot be joined and no practical means exist of avoiding the prejudice caused by the party's absence, but that judgment is to be made with pragmatism and practicality. If an action proceeds without a party whose joinder was desirable, no bar exists to a subsequent action against that omitted party.

*Efficiency and Justice*, *supra* note 94, at 26. Justice Stein also suggested that N.J. Ct. R. 4:5-1(b), which requires lawyers to disclose the names of any parties that should be joined in a lawsuit, could be used as a means of sanctioning lawyers who fail to advise the court that there might be more than one potential action. *See Olds*, 150 N.J. at 468, 696 A.2d at 656 (Stein, J., concurring in part and dissenting in part). Additionally, Justice Stein proposed that pre-trial conferences, as required under N.J. Ct. R. 4:25-1, could be used as a means of determining what parties should be joined in the litigation. *See id.*

<sup>179</sup> *See Barbershop Quartet*, *supra* note 173, at 6 (arguing that the majority in *Olds* suggested that preclusion under the entire controversy doctrine might not be as advantageous as encouraging joinder through active case management).

<sup>180</sup> *See Grayzel*, *supra* note 6, at S-7 (noting that the New Jersey State Bar Association and the Civil Practice Committee are reviewing the issue of whether to adopt the recommendation made in Justice Stein's dissent in *Olds* to overrule *Cogdell* altogether). Appellate Division Judge Sylvia B. Pressler, who headed the supreme court's Civil Practice Committee, recommended that mandatory party joinder under the entire controversy doctrine should be ended completely. *See Coleman*, *supra* note 4, at 40. Judge Pressler stated: "The entire controversy doctrine's effect has been that plaintiff's with valid claims have courthouse doors slammed on them if they failed to name a party initially, and the only ones receiving justice are those who hauled everyone into court." *Id.*; *see also Winokur*, *supra* note 83, at 15 (quoting Professor Howard Erichson of Seton Hall University School of Law School as stating that "the best answer is not to carve out special exceptions for practice areas, but rather to abolish the mandatory party joinder component of the entire controversy doctrine.").

<sup>181</sup> *See Olds*, 150 N.J. at 467-70, 696 A.2d at 656-57 (Stein, J., concurring in part and dissenting in part) (opining that Rule 4:28 should be amended to enhance the authority of the trial court to order joinder of parties).

<sup>182</sup> *See Olds*, 150 N.J. at 468, 696 A.2d at 656 (Stein, J., concurring in part and dis-

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proaches that can be taken by the court to discourage duplicative litigation and promote judicial economy. The entire controversy doctrine, however, is clearly not the solution, and the time has come to abandon it completely in favor of a more workable approach.

*Stacey Eisenberg*

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sending in part) (suggesting that Rule 4:5-1(b)'s requirement of disclosure of absent parties should be made subject to sanctions in order to give the trial judge all available information in deciding whether joinder of a party is required).