GRADER'S GUIDE

***** QUESTION NO. 9 *****

SUBJECT: CIVIL PROCEDURE

I.A. PURPOSE, PROCEDURE, AND REMEDIES (40 points)

Alaska Rule of Civil Procedure 19 is titled: "Joinder of Persons Needed for Just Adjudication." Its purpose is to determine whether a party should be joined to permit an orderly adjudication of the controversy among those already before the court. It is distinguished from the permissive joinder rule which allows the plaintiff to choose and name the defendants but does not require that a plaintiff name all who might be joined. The idea behind Rule 19 is to bring in third parties without whom it would be awkward for the court to work out a judgment between the existing parties. It serves to protect the rights and interests of those who are not before the court; it protects the rights of those who are before the court by protecting them from a threat of multiple liability and inconsistent judgments; and it protects society's interest in avoiding unnecessary lawsuits and in having a final judgment that is as complete as possible. Rule 19 sometimes is referred to as the "necessary party" rule.

Even though the rule may be called the "necessary party" rule, "necessary party" is something of a misnomer. There are actually two classes of persons under Rule 19. Rule 19(a) speaks to "persons to be joined if feasible." These are persons who must be included in an action unless there is a valid excuse for their nonjoinder. They are "conditionally necessary." Rule 19(b) addresses what is commonly referred to as the "indispensable party," that is, a person whose joinder is so important to a just resolution of the case that, if they cannot be joined, the action should not be allowed to proceed.

Under Rule 12 of the Alaska Rules of Civil Procedure, questions relating to the joinder of "Persons Needed for Just Adjudication" pursuant to Rule 19 may be raised either by preanswer motion or by inserting the defense of nonjoinder in the answer itself. Rule 12(b) provides that "[e]very defense, in law or fact…shall be asserted in the responsive pleading" except for certain defenses which may be made by motion including "failure to join a party under Rule 19." See Rule 12(b)(7).

According to Rule 12(a), the defendant is required to "serve an answer within 20 days after the service of the summons and complaint." If a Rule 12(b)(7) motion is filed in lieu of an answer, it should be filed within the same 20 days. Once the motion is filed, the defendant is not required to file an answer until 10 days after notice is given by the court that the motion is denied or that it intends to postpone ruling on the motion. A Rule 12(b)(7) motion will usually be decided when it is made and almost always before trial unless the court

determines that the joinder question is bound up in the issues of the case. In that case, the court may defer its resolution until the trial. See Rule 12(d).

While, technically, Rule 12(b) contemplates that a Rule 19 issue be raised within the 20 days following service of the complaint, it is unlikely a court would consider the issue waived if not timely raised. In fact, Rule 12(h)(2) expressly provides that the "defense of failure to join a party indispensable under Rule 19" is preserved throughout the trial. Even though the language of Rule 12(h)(2) only references "indispensable parties," a court would likely permit a defendant to raise a late-filed motion to join a "non-indispensable" party under Rule 19(a). *Wright, Miller and Kane, § 1609*. Some courts have even considered the "indispensable party" issue for the first time on appeal. *See Padgett v. Theus,* 484 P.2d 697, 700 (Alaska 1971).

On the facts here, HAHA should raise the issue of failure to join Larry Lam and the remaining property owners either through its answer or by motion within the 20 days following service of the complaint. The burden would be on HAHA to show that the persons not joined are needed for a just adjudication. If the court determines that the absentee persons should be joined in accordance with the criteria set forth in Rule 19(a), "the court shall order that the person be made a party." Rule 19(a). *See also, Silvers v. Silvers,* 999 P.2d 786 (Alaska 2000) (where party fails to join necessary party, appropriate remedy is not dismissal but, rather, joinder of the necessary party.) If the absentee persons cannot be joined for some reason, the court must then determine, by analyzing the factors set forth in Rule 19(b), whether to proceed without joining the absentee persons or whether to dismiss the action. A dismissal under Rule 12(b)(7) is not considered to be on the merits and is without prejudice. *Wright, Miller and Kane, § 1609*.

II. ANALYSIS UNDER RULE 19(a). (30 points)

Rule 19(a) is applicable when nonjoinder would have either of the following effects. First, it would prevent complete relief from being afforded those who are parties to the action or, second, the absentee "claims an interest relating to the subject of the action and is so situated" that the nonparty's absence from the action will have a prejudicial impact on that person's ability to protect that interest or will "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."

The second prong of Rule 19(a) is implicated here. Looking first at Larry Lam, he clearly has an interest in the subject matter of this litigation and its outcome. The judgment will determine whether he can continue to keep llamas on his property. Indeed, his interest is more direct than HAHA's for the reason

that HAHA is not an actual property owner with a stake in the outcome. It is very conceivable, as well, that in Larry Lam's absence, his interests will not be vigorously protected. While HAHA has taken an initial position consistent with Larry Lam's, there is no guarantee that HAHA will continue to assert or protect that interest. For one thing, it is possible that a majority of the landowners who comprise HAHA will assert adverse interests. Even if they don't, without a stake in the outcome, there is no incentive for HAHA to spend money vigorously defending any position in this litigation. To adequately protect Larry Lam's interests, he should be joined.

The issue is less clear as to the remaining landowners. Without more facts, it is difficult to know whether there are conflicting views and interests among the various landowners. It is not clear what position the remaining nine original purchasers would take with regard to the original covenants or whether the issue is something that they even care about sufficiently to assert an interest. Likewise, it isn't clear what position the remaining landowners would take with regard to the 2000 covenants – whether llamas are permissible pets or not. It is possible that the failure to resolve these issues as to all of the property owners through this litigation would lead to subsequent litigation with conflicting results. On the other hand, it would be difficult and burdensome to join the remaining 123 landowners.

In a 1988 case involving the issue of abandonment of certain restrictive covenants, the Alaska Supreme Court concluded that it was not necessary to join all of the approximately 90 lot owners in a subdivision in a suit between several property owners. The covenant in question concerned the rights of an uphill landowner to preserve a view by requiring a downhill landowner to cut trees interfering with that view. *B.B.P. Corp. v. Carroll*, 760 P.2d 519 (Alaska 1988). The court noted that the "risk of multiple lawsuits is always present where the issue of abandonment of a subdivision covenant is involved." *Id. at 525.* Balanced against this, though, the court weighed the fact that requiring that all residents of a subdivision be joined "would place a heavy burden on the courts and on the parties." *Id.* What the court considered most significant was that while there was "some risk of multiple suits and inconsistent judgments within the subdivision, there is not a 'substantial risk' that any single lot owner will be subject to inconsistent obligations…." *Id.*

It is hard to say what result would obtain here. Whereas in the *B.B.P. Corp. v. Carroll* case, the covenant at issue affected only the rights between neighboring landowners and, therefore, there was not a 'substantial risk' that any single lot owner would be subject to inconsistent obligations, the determination of and interpretation of the applicable covenant here arguably affects more than just the immediately adjacent neighboring property owner. It arguably affects the rights of and property values of all the owners as well as the character of the

subdivision. Therefore it is uncertain whether the court would order joinder of the remaining landowners.

III. ANALYSIS UNDER RULE 19(b). (30 points)

Rule 19(b) lists four factors to be evaluated by the court for determining "whether in equity and good conscience" an absent party is indispensable and the action should be dismissed. The factors listed are:

> [F]irst, 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 or 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.

On the facts here, a court would be unlikely to dismiss the action for want of a handful of property owners. Dismissal would clearly leave the plaintiff without an adequate remedy. *See State v. Crosby,* 410 P.2d 724, 725-26 (Alaska 1966) (in concluding that the United States was not an indispensable party in a suit over a right of way, the court emphasized the potential denial of a remedy "because of an ideal desire to have all interested persons before the court"). *Compare City of Fairbanks v. Electric Distribution System,* 413 P.2d 165 (Alaska 1966) (court found that United States was an indispensable party to an action involving a rural electrification system, thereby depriving the plaintiff of a forum). And, while the absent parties might possibly be prejudiced by their absence, it is very likely that their interests in the outcome of this case would align with one or more of those persons who are joined, such that their interests would be fairly and adequately represented. Such a consideration moved the court in *Peloza v. Freas,* 871 P.2d 687 (Alaska 1994) to uphold the denial of a Rule 12(b)(7) motion to dismiss on the ground that the plaintiff failed to join the City of Kenai as an indispensable party. *Peloza* involved a suit against the Kenai city clerk by a city council candidate challenging the constitutionality of a three year residency requirement. In concluding that the City of Kenai was not an indispensable party under the *Crosby* test, the court stated:

> It cannot be fairly said that the interests of the City of Kenai were not adequately represented before the superior court. The Kenai city attorney represented Freas, the city clerk, at all stages of the case at bar. Thus, it appears that the City of Kenai

> perceived its interests to be identical to those of [the city clerk] in this litigation.

Balancing the factors here, it is unlikely a court would dismiss for failure to join the absent landowners as indispensable parties.