Some Problems Under Federal Third-Party Practice

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Third-party practice is one of the notable and progressive features which mark the new federal civil procedure. It permits a defendant to implead a third party who may be directly liable to the plaintiff on the claim asserted in the complaint or who may be secondarily liable to the defendant. By this means circuity of action is avoided, useless expenditure of time is eliminated, and the cost of litigation is reduced. The rights of all of the parties originating out of what is, in essence and spirit, a single controversy, may be adjudicated by a single judgment. Like most of the reforms inaugurated by the Federal Rules of Civil Procedure, third-party practice was not a novelty. It had been tried in the crucible elsewhere and had proved successful. It was no longer even in an experimental stage, for in some jurisdictions it had been in operation for many years.

In England it was originated in the 1870's, when the present simple civil procedure was adopted in that country. One of the earliest cases on the subject came before the Court of Appeal in 1876. It involved an action instituted by the owner of a ship against the charterer to recover demurrage incurred for failure to unload the vessel with required expedition. The defendant brought in as a third party the consignee of the cargo, alleging that the latter had neglected to unload with requisite dispatch and was, therefore, liable over to the charterer. This procedure met with the approbation of the court. It should be noted, however, that in England third-party practice may be invoked only in cases in which the third party is liable over to the defendant, and then only in the discretion of the court. It does not seem to extend to cases in which the third party may be primarily liable directly to the plaintiff.

Third-party practice has likewise existed in several states. In New York it was introduced in 1923, where it is also confined to

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cases in which the third party is secondarily liable to the original defendant. Due to this limitation a joint tortfeasor may not be brought in, because of lack of contribution between joint tortfeasors. In 1929 Pennsylvania adopted third-party practice in a liberal form, which enabled the defendant to implead any party either who was liable over to him or who was jointly or severally liable directly to the plaintiff. Another precursor of federal third-party practice is found in Wisconsin, where it was introduced in the restricted form in 1935. 

Louisiana for many years has had a practice sui generis. Its Code of Practice, Articles 37-38, permits a defendant to institute a "demand of warranty," i.e., a claim against a person who has contracted to defend the defendant against the claim asserted against him by the plaintiff. It will be observed that this provision on its face is not intended to cover indemnitors, but merely parties who have undertaken an obligation such as devolves on a warrantor under a deed, a liability insurance carrier, and other persons who are obligated to defend against the claim interposed by the plaintiff in the action.

Third-party practice has not been entirely a stranger to the federal courts. It has long been a well established feature of admiralty procedure, where it has been accorded a broad scope and may be applied to parties directly liable to the plaintiff as well as to those secondarily liable to the original defendant. Moreover, in admiralty the defendant may bring in a third party as of right. The matter is not within the discretion of the court. In addition, by virtue of the Conformity Act, resort could be had to third-party practice in actions at law in the federal courts sitting in one of those few states in which such practice was a part of state procedure.

The Federal Rules of Civil Procedure have made third-party practice a regular feature for all civil cases, except the few categories exempted from the operation of the Rules.


The salient provisions of Rule 14, by which third-party practice is governed, are as follows:

"Before the service of his answer a defendant may move ex parte or, after the service of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable to him or to the plaintiff for all or part of the plaintiff's claim against him. If the motion is granted and the summons and complaint are served, the person so served, hereinafter called the third-party defendant shall make his defenses as provided in Rule 12 and his counterclaims and cross-claims against the plaintiff, the third-party plaintiff, or any other party as provided in Rule 13. . . . The plaintiff may amend his pleadings to assert against the third-party defendant any claim which the plaintiff might have asserted against the third-party defendant had he been joined originally as a defendant. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him or to the third-party plaintiff for all or part of the claim made in the action against the third-party defendant."

The Rule is broad in its scope and comprehends two classes of cases: those in which the third party is liable to the original defendant; and those in which he is directly liable to the plaintiff. Typical of the first category are claims for contribution and indemnity and other forms of secondary liability.⁹

Some misgivings have been advanced as to whether a defendant who carries insurance against liability for negligence should be allowed to bring in his insurance carrier as a third-party defendant. Fears have been expressed that if he is permitted to do so, the result would be to render nugatory the rule which prevails in most jurisdictions, that the fact that the defendant in a negligence action carries liability insurance may not be disclosed to the jury. As a practical matter, however, generally no difficulty should arise in such a situation. In most cases the insurance carrier undertakes and conducts the defense of the action in behalf of the defendant. Necessarily, it may thereby

⁹ See Saunders v. Goldstein, 30 F. Supp. 150 (D. C. 1939), in which suit was brought by a person who was injured by a nut contained in a confection. The defendants were the owners of the pharmacy in which the plaintiff had purchased the candy and the manufacturer who had sold it to the pharmacy. The concern from which the manufacturer had purchased the nuts was brought in as a third party.
prevent itself from being brought in as a party. In those in-
stances, which form a comparatively small minority of cases, in
which insurance carriers dispute liability on the policy, the de-
fendant may bring in the insurance carrier as a third-party de-
fendant in order to secure an adjudication of his rights under his
insurance policy in the same action in which his liability to the
plaintiff is to be determined. The following observations on this
subject were made by Judge Chesnut in Tullgren v. Jasper: 10

"... there may be cases in which a liability insurer could
properly be brought in as a third-party defendant by the in-
sured. In the ordinary case this is not at all likely to occur
because, as is well known, the insurer, where there is no ques-
tion of its liability under the policy to the insured, defends the
suit for the insured by the insurer's counsel; that is to say, the
insurer is in control of the litigation and its counsel would
ordinarily decline to make the insurer a party. But in case the
insurer denies liability and refuses to defend the action in ac-
cordance with its policy, I see no logical reason to deny to the
insured, who is the defendant in a suit, the right to bring in
the insurer as a third-party defendant, where under the terms
of its policy it will be liable over to the insured defendant and
where the judgment against the defendant will establish the
liability of the insurer. Of course in such case the defendant
insurer is entitled to a hearing and trial of any defenses that
it may set up against its liability and it is probable that the
court would order a separate trial of its controversy with its
insured under Rule 42 (b). The primary object of Rule 14 is to
avoid circuity of action and thus to finally dispose in one liti-
gation of an entire subject matter arising from a particular set
of facts." 11

The second group of cases in which third-party practice may
be invoked consists of those in which the third party is directly
liable to the plaintiff. The following test has been formulated by
Justice Luhring of the District of Columbia to determine what
constitutes a proper claim within this category:

"If the claim set out in the third party complaint might have
been asserted against the third party defendant had he been
joined originally as a defendant, it follows that the defendant

10. 27 F. Supp. 413 (D. C. Md. 1939).
11. Id. at 416.
is entitled, as a third party plaintiff, to bring in such third party defendant. . . .”

Typical cases in which the third party is directly liable to the plaintiff are those involving joint tortfeasors. There are other cognate situations of a varied character. For example, in one case a pedestrian fell against a cellar door in front of a store and filed suit against the storekeeper. The defendant brought in his landlord as a third party, on the ground that the latter was in control of the cellar. An interesting series of cases arose out of the crash of a transport plane, in which several persons were killed. Suits were brought for the death of some of the victims against the air transport company and the concern which manufactured the airplane, the latter being charged with negligence in installing a defective cylinder, which was claimed to have been the cause of the accident. The second of the defendants then joined the manufacturer of the forging out of which the cylinder had been fabricated, as a third party, contending that the manufacturer had been negligent. Perhaps the most extreme case in which third-party practice was held applicable was one decided in the District of Columbia. A person injured in an automobile accident sued an insurance company, which carried liability insurance in behalf of the person whose negligence resulted in the injuries. The complaint alleged that the defendant had made a special agreement with the plaintiff to compensate him for the damages that he had sustained. The defendant then brought the plaintiff’s attorney in as a third party, alleging that the latter was liable to the plaintiff for negligence in failing to institute suit against the party who had caused the accident within the period prescribed by the applicable statute of limitations. It was contended that the original defendant’s liability to the plaintiff and the liability of the third-party defendant to the plaintiff were based on different and distinct claims and did not constitute a single controversy. This objection, however, was overruled, and the court permitted the third-party proceeding to be maintained, on the ground that in essence the two claims arose out of the same state of facts.

It will be observed that Rule 14 provides that a defendant

“may move” for leave to bring in a third party. It further states that “if the motion is granted” certain consequences shall follow. Does this phraseology imply that it is within the discretion of the court to grant or withhold leave to bring in a third party by the procedure provided by Rule 14? This question was answered in the affirmative by the Court of Appeals for the District of Columbia. The court called attention to the distinction between the phraseology of Rule 14 and that of Admiralty Rule 56. The latter provides that the claimant or respondent “shall be entitled” to bring in any other vessel or person, and, therefore, in admiralty impleader is a matter of right. The court stressed the peculiar phraseology of Rule 14, which has just been quoted, and held that there can be no doubt that it was thereby intended to make the impleading of third parties discretionary with the trial court. The court felt constrained by the language of Rule 14 to reach the conclusion that a defendant might not invoke the Rule as a matter of right, but that whether or not he was to be permitted to do so lay within the bounds of judicial discretion. It further concluded that an appellate court might not reverse an order denying or granting a motion for leave under Rule 14, except in a case of abuse of discretion.

Probably, the court had no alternative but to reach the conclusion at which it arrived. There is still room for discussion, however, as to whether the discretion conferred on the trial court is to be entirely untrammeled and uncontrolled or whether certain rules or formulae can be developed to guide and govern trial courts in reaching a determination as to whether or not discretion shall be exercised in favor of or against granting leave to bring in a third party. It is to be hoped that the latter will be the case, because otherwise it is entirely conceivable that, not only will a diversity of practice arise as between various districts, but also in many cases the intent of the framers of the Rule may be unintentionally frustrated and liberality of practice defeated.

On some future occasion, when it is determined to undertake amendments to the Rules, consideration might well be given to amending Rule 14 so as to make impleader a matter of right, as it is in admiralty. The satisfactory experience so far had with Rule 14 would certainly justify such an advance.

A basic problem that arose at the very outset involved the question as to whether a third-party complaint had to meet federal jurisdictional requirements, such as diversity of citizenship.

It had been held in those rather limited instances in which the use of third-party practice had been attempted in the federal courts under state laws permitting such proceedings, that a third-party complaint initiates a separable controversy and that, therefore, a third-party complaint must show diversity of citizenship as between the parties, if the complaint is not based on a right granted by the Constitution or an act of Congress. The fact that federal jurisdiction existed as between the original parties to the action was not deemed a sufficient basis for the third-party proceeding.\textsuperscript{18}

Early commentators on the Rules anticipated that this problem would be encountered.\textsuperscript{19} The question is one of great practical importance, for, as was aptly remarked by Judge McClintic, if a narrow construction were placed upon Rule 14 and it were to be held that for jurisdictional purposes a third-party claim should be regarded as a separate controversy, it would be found "that in the most numerous class of cases in federal jurisdiction the rule will be absolutely useless."\textsuperscript{20} Judge Chesnut, in discussing an objection to jurisdiction raised by a third-party defendant, elaborated the same thought, as follows:

"It is obvious that if the objection is good the scope of application of the rule will be greatly restricted as to third-party practice, where the general jurisdiction of the court is based alone on diverse citizenship. Under this class of federal jurisdiction the more usual type of case is where a non-resident plaintiff sues a resident defendant in the district court. If the defendant has a right of action over against a third-party as indemnitee or joint tort feasor, it is likely that the third-party will be a citizen of the same State as that of the defendant. And in cases where the third-party may be a citizen of another State, it is not often the case that he can effectively be served with process under the federal statutes."\textsuperscript{21}

The solution of the problem was dependent in turn on the question as to whether the third-party claim was to be regarded as an ancillary proceeding incidental to the main action, or


\textsuperscript{19} Clark and Moore, A New Federal Civil Procedure (1935) 44 Yale L. J. 1291, 1322.


whether it was to be deemed as a separate and an independent suit. If the former view is adopted, then, obviously, it is not necessary to establish a ground for federal jurisdiction, such as diversity of citizenship, for the third-party claim. A contrary result would be reached if the second view prevailed. To be sure, to regard a third-party claim as an ancillary proceeding perhaps involves some expansion in the concept of what constitutes an ancillary proceeding. It can hardly be said, however, that the adoption of this position would do violence to fundamental principles governing ancillary jurisdiction of the federal courts. Judge Hincks made the following pertinent observation on this point:

"It must be noted that the scope of ancillary jurisdiction depends only upon the subject-matter of supplemental proceeding. The number, identity or relationship of the parties affected by the supplemental proceedings have nothing to do with the existence of ancillary jurisdiction over the subject-matter. Thus it has long been established that ancillary jurisdiction over the subject-matter may obtain even though the supplemental proceeding brings in new parties." 22

In every case in which the point was involved the district courts, without a dissenting voice, have upheld federal jurisdiction and ruled that a third-party claim must be deemed ancillary to the main action and, therefore, does not require a separate ground for federal jurisdiction, such as diversity of citizenship between the third-party plaintiff and the third-party defendant, or between the original plaintiff and the third-party defendant. 23 Some illuminating remarks on this point are found in an opinion rendered by Judge Picard:

"Turning to Webster's International Dictionary, we find that the word 'ancillary' means 'subordinate to or in aid of another' primary action. Legal definitions are of the same tenor. It can hardly be said that a suit between third party plaintiffs in this cause and third party defendants is 'in aid of' any main action, but it can hardly be denied that it is

'subordinate' to that main action and the tendency of the courts throughout is that in the aid of justice and equity once the matter has come before the federal courts and the question of venue is not one of paramount importance or is not affected, the jurisdictional requirements are not looked upon as insurmountable when no great hardship or inequity is inflicted upon those third parties. In fact neither the question of jurisdiction nor of the ancillary nature of the proceedings in those cases which have reached the district courts has interfered with the joining of third party defendants, and our district courts that have spoken have all gone under the theory that where there is some connection between the nature of plaintiff's claim against defendant and defendant's claim against third parties has some relation, the entire matter should be threshed out once jurisdiction has been obtained."

Although neither the Supreme Court nor any circuit court of appeals has as yet had occasion to express itself on this question, which vitally affects the third-party practice rule, the enthusiasm and unison with which the district courts have adopted the liberal view warrant the conclusion that such may be regarded as the proper interpretation of Rule 14.

The same cannot, however, be said as to venue requirements in respect to third-party claims.

It seems difficult to discern why a proceeding which is regarded as ancillary for the purposes of jurisdiction should not likewise be ancillary for all other purposes, including venue. As was remarked by Judge Goddard, "If there is no necessity for an independent basis of jurisdiction over the ancillary causes of action set forth in the third-party complaints, it should also follow that the venue requirements of an independent action need not be met." Some of the decisions to which reference has been previously made, holding that a third-party proceeding is to be deemed ancillary, make no differentiation between jurisdiction and venue, while others expressly include venue. It is submitted that the doctrine upheld by this line of cases is desirable and advances that simplicity of practice and avoidance of circuity of action which the framers of the Rule undoubtedly contemplated.

Shortly after the Rules went into effect, however, it was held in the Western District of Arkansas that the venue requirements

applicable to an independent action govern a third-party proceeding.\textsuperscript{20} It should be noted, however, that this decision preceded the line of cases discussed above, which unanimously hold that a third-party proceeding does not present a separate controversy, but is ancillary to the action out of which it arises. Whether, in the light of those decisions, the federal court in Arkansas would have reached the conclusion that it did, is perhaps questionable.

The line of cleavage between the authorities on the question of venue was brought to a head by the above mentioned series of suits arising out of the crash of a transport airplane in which a number of passengers met their death.\textsuperscript{27} A number of actions were instituted to recover damages for the death of the victims. Some of them were brought in the Southern District of New York, while others were filed in the District of Connecticut. One of the defendants sought to implead a third party. In each instance it was held that a third-party proceeding is ancillary to the main action and, therefore, does not require an independent basis for federal jurisdiction.

In the Southern District of New York the same disposition was made of the question of venue.\textsuperscript{28} On the other hand, in Connecticut a distinction was drawn between jurisdiction and venue, and the conclusion was reached that, although the proceeding was ancillary for jurisdictional purposes, nevertheless, compliance with venue requirements was to be exacted in order to permit the third-party proceeding to be maintained.\textsuperscript{29} The two decisions were rendered a few days apart, and it is reasonable to assume that neither judge knew of the result reached by his colleague in the adjoining district. In the Connecticut case it was held not only that venue requirements had to be met, but also that a third-party proceeding is to be regarded as not being based on diversity of citizenship, even if such exists, but on a federal right. As a consequence, the conclusion was reached that the provision of the Judicial Code which enables suit based on diversity of citizenship to be brought in the district of which either the plaintiff or the defendant is an inhabitant might not be invoked, but that suit must be brought in the district of the defend-

\textsuperscript{26} King v. Shepherd, 26 F. Supp. 357 (W. D. Ark. 1938).
The court went still further and indicated that, if the original action had been removed from a state court, federal jurisdiction must be deemed as founded, not on diversity of citizenship, but on the Removal Act.

While the weight of authority seems to be in accord with the view that a third-party proceeding must be regarded as ancillary for all purposes, and that, therefore, neither jurisdictional nor venue requirements need be met by it, nevertheless, the split in the decisions just indicated necessarily leads to the conclusion that the question is not entirely foreclosed, but will have to be determined by higher authority. Should the rule of the Arkansas and Connecticut cases eventually prevail, the result would constitute a fruitful source of perplexity. If the third-party defendant resides in the district in which the suit is pending, there will be no difficulty, for compliance with venue requirements will be found in the fact that the third-party proceeding is being instituted in the district of the residence of the third-party defendant. Complications will arise, however, if the third-party defendant is an inhabitant of another district. If in such event the third-party plaintiff resides in the district in which suit is brought, we are then confronted with a situation in which an action is brought in the district whereof the plaintiff is an inhabitant. Such an action may, however, be maintained only if it is based on diversity of citizenship, since otherwise it must be brought in the district whereof the defendant is an inhabitant. Accepting arguendo the premise that a third-party proceeding is a separate independent suit for purposes of venue, it would seem logical to conclude that the action in such an instance is based on diversity of citizenship and, therefore, may be brought either in the district of the plaintiff's residence or in that of the defendant's residence. The Connecticut case holds otherwise, however, and on the theory there propounded the third-party proceeding would not lie. Also, if both the third-party plaintiff and the third-party defendant are inhabitants of districts other than that in which the main action is pending, venue for the third-party proceeding would necessarily be lacking. If the original action had been brought to enforce a federal right and was not founded on diversity of citizenship, then indubitably venue could not be laid

for a third-party proceeding, if the third-party defendant were an inhabitant of another district.

All of these perplexities will be avoided if the majority rule prevails and it should eventually become established that venue requirements need not be met by a third-party proceeding. Such a consummation would be highly desirable as being in the interests of expeditious disposition of controversies.

Another aspect of third-party practice, which is still to be explored, relates to third-party claims involving a liability directly from the third-party defendant to the original plaintiff. The rule provides that the plaintiff may amend his pleadings to assert against the third-party defendant any claim which he might have asserted had such defendant been originally joined. What would happen, however, if, after the third-party defendant is brought in, the plaintiff declines to amend his complaint and to proceed against such party? Or, suppose the plaintiff opposes a motion for leave to serve such a third-party defendant on the ground that he would decline to assert a claim against him? In other words, has a plaintiff an option as to whether or not to prosecute his claim against any third-party whom the original defendant chooses to bring in, and should he be permitted, if he so desires, to restrict himself to asserting his claim against the original defendant? It is entirely conceivable that situations of this nature may frequently arise. For example, a passenger in an automobile who sustains physical injuries as a result of a collision between that vehicle and another car may file suit for negligence against the driver of the other automobile. The defendant may then bring in the plaintiff's host as a third-party defendant. The plaintiff may prefer not to assert any claim against the latter and limit himself to recovery against the original defendant. Does he have such an option? It would certainly seem to be in accord with conventional and traditional concepts that no one should be compelled unwillingly to sue another. It is also consonant with customary practice, in cases in which several parties are liable on the same obligation, to permit a plaintiff to sue all or as many of them as he chooses at his own election. On the other hand, it may well be argued, perhaps, that as a matter of ethics and abstract justice a plaintiff should not be permitted at will to select one of several obligors and compel him to carry the entire burden.\(^\text{31}\)

\(^{31}\) See Gregory, Legislative Loss Distribution in Negligence Actions (1936) 33-41.
To revert to the supposititious case just suggested, it may well be contended that it is unfair for the passenger to seek to exculpate his host while endeavoring to recover from the driver of the other vehicle, if both drivers happen to be joint tortfeasors.

There appear to be only three cases decided under the new Rules in which the court adverts to this phase of third-party practice. In a case decided in the District of Columbia, Justice Luhring alluded to the existence of a doubt as to what would be the consequence if the plaintiff declined to amend his complaint and to assert a claim against the third-party defendant. He indicated that he was inclined to believe that under such circumstances judgment could not be awarded against the latter.\textsuperscript{32}

Two cases involving this point were decided in February, 1940, within less than a week of each other, one in New Jersey and the other in the Western District of Louisiana. In the former\textsuperscript{33} Judge Forman held that, if the plaintiff indicates that he will under no circumstances seek to recover from the third-party defendant tendered by the original defendants, the third party should be dismissed. In the Louisiana case, however, Judge Porterie held to the contrary.\textsuperscript{34} Suit had been brought for personal injuries, caused as a result of a collision between two motor vehicles. The liability insurance carrier of the party charged with negligence was named as defendant, in the light of a state statute which accorded to an injured party a right of action directly against a liability insurer. The defendant, claiming that a person other than its insured was a joint tortfeasor, sought to bring in the insurance carrier of the latter as a third-party defendant. The court adverted to the peculiar rule of Louisiana law, which provided for contribution as between joint tortfeasors in cases in which a judgment has been jointly rendered against all. On the point now under discussion he reached a conclusion contrary to that of the New Jersey case, indicating that it is immaterial whether or not the plaintiff desires to assert a claim as against a third-party defendant. The view of the Louisiana case appears to be that the plaintiff has no option in the matter. Judge Porterie makes the following observations on this point:

"Rule 14, by its very raison d'être, precludes a vested right of election of defendants in the original plaintiffs; the rule

\textsuperscript{34} Gray v. Hartford Accident & Indemnity Co., 31 F. Supp. 299 (W. D. La. 1940).
permits the defendant, when he converts himself into a third-party plaintiff, to bring third-party defendants into the case whether or not the original plaintiff elected to put them into the case.\textsuperscript{35,86} 

In this connection, it may be of interest to refer to some rulings of the Pennsylvania courts on this question, in view of the fact that in that state a person directly liable to the original plaintiff may be brought in as a third-party defendant. It has been held in Pennsylvania that the procedure does not contemplate that under such circumstances the plaintiff should amend his complaint. If the plaintiff recovers, the jury or the court, as the case may be, must specify whether the additional defendant is liable over to the original defendant, or whether he is jointly or severally liable with him to the plaintiff, and judgment is entered accordingly. It would seem to follow that under such a procedure the plaintiff has no choice as to whether he should or should not allege a claim against the third-party defendant.\textsuperscript{36} 

There is no reason to doubt that in the course of time a satisfactory solution will be found to the problems discussed in this article. With almost complete unanimity the courts have been following the admonition contained in Rule 1, that the Rules "shall be construed to secure the just, speedy, and inexpensive determination of every action." One is justified in expressing confidence, therefore, that this precept will likewise guide them in respect to the open questions involved in third-party practice.

\textsuperscript{35} Id. at 305. 