

## Chapter 9

# Third-Party Practice

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### I. INTRODUCTION

#### § 9:1 Scope note

Fed. R. Civ. P. 14, entitled “Third-Party Practice,” allows a defendant to bring suit against, or “implead,” a person who is not a party to the suit if the third party “is or may be liable to [the defendant] for all or part of the claim against it.”<sup>1</sup> The Rule refers to a defendant who has brought another party into the action as

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#### [Section 9:1]

<sup>1</sup>Fed. R. Civ. P. 14(a)(1).

a “third-party plaintiff” and the party brought into the action as the “third-party defendant.”

The primary purpose of Fed. R. Civ. P. 14 is to promote judicial efficiency.<sup>2</sup> A defendant may implead a third party who is potentially liable to the defendant for all or part of the main plaintiff’s claim so that, in the event the defendant is found liable to the plaintiff, the defendant does not have to bring a separate action against the third party. Courts liberally construe Fed. R. Civ. P. 14 to allow third-party complaints in order to enhance efficiency and to allow related claims to be disposed of in a single action.<sup>3</sup>

This chapter begins with a discussion of the strategic considerations related to impleader.<sup>4</sup> It next addresses the procedural elements of third-party practice, including the factors that courts consider when deciding whether to allow impleader.<sup>5</sup> Various litigation scenarios involving third-party practice are then reviewed.<sup>6</sup> The chapter concludes with relevant checklists<sup>7</sup> and forms.<sup>8</sup>

## II. STRATEGIC CONSIDERATIONS

### § 9:2 Objectives of third-party actions

Impleader is available to any party defending against a claim. In most situations, the only alternative to impleader is bringing a separate suit against the third party.<sup>1</sup> In deciding whether to assert a third-party claim, a defendant should consider the impact that such a claim is likely to have on the case both before trial and at trial.

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<sup>2</sup>*Lehman v. Revolution Portfolio L.L.C.*, 166 F.3d 389, 394, 42 Fed. R. Serv. 3d 1289 (1st Cir. 1999) (“A district court must oversee third-party practice with the core purpose of Rule 14(a) in mind: avoiding unnecessary duplication and circuity of action.”).

<sup>3</sup>*Dishong v. Peabody Corp.*, 219 F.R.D. 382, 384-385, 58 Fed. R. Serv. 3d 332 (E.D. Va. 2003) (“Impleader will be liberally allowed, if it will prevent duplication of suits based on closely related matters.”); *Monarch Life Ins. Co. v. Donahue*, 702 F. Supp. 1195, 1197 (E.D. Pa. 1989); *American Zurich Ins. Co. v. Cooper Tire & Rubber Co.*, 512 F.3d 800, 805 (6th Cir. 2008) (“The purpose of Rule 14 is to permit additional parties whose rights may be affected by the decision in the main action to be joined so as to expedite the final determination of the rights and liabilities of all the interested parties in one suit.”); *Brown v. Mason and Dixon Lines, Inc.*, 2009 WL 196105, \*1 (W.D. Ky. 2009).

<sup>4</sup>See §§ 9:2 to 9:6.

<sup>5</sup>See §§ 9:7 to 9:22.

<sup>6</sup>See §§ 9:23 to 9:31.

<sup>7</sup>See §§ 9:32 to 9:34.

<sup>8</sup>See §§ 9:35 to 9:37.

#### [Section 9:2]

<sup>1</sup>See the discussion of alternatives to impleader at § 9:6.

**§ 9:3 Objectives of third-party actions—General advantages of impleader**

Impleader offers a number of benefits to the defendant in the main action including the ability to litigate all issues in one action and, thus, to bind the third-party defendant. Absent the use of impleader, the main defendant's only recourse would be to sue the third party in a separate action in which issues determined in the main action may need to be re-litigated. Thus, for example, if a defendant impleads a third party under an agreement for contribution, the defendant will not need to bring a separate suit against the third party to recover the third party's share of the damages (if any) in the main action.

Litigating the third-party claim in the main action rather than a separate action is likely to have significant cost advantages for the main defendant. In addition, having the third-party claim resolved in the main action limits both the possibility of inconsistent results and any prejudice that may result from the delay in obtaining judgment on the third-party claim in a separate action.<sup>1</sup> As discussed later in this chapter, in recognition of the advantages of resolving third-party claims in the main action, impleader under Fed. R. Civ. P. 14 is available even where the applicable state substantive law does not give rise to a claim (such as for indemnity or contribution, two principal grounds for impleader) until the main defendant has satisfied a judgment against it.<sup>2</sup>

A defendant who would prefer to be in federal court, but has no basis to remove an action commenced in state court, may consider impleader as a potential route to federal court. In most jurisdictions, a third-party defendant will not be permitted to remove.<sup>3</sup> Nonetheless, there are several courts who have upheld the right

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**[Section 9:3]**

<sup>1</sup>Blais Const. Co., Inc. v. Hanover Square Associates-I, 733 F. Supp. 149, 152 (N.D. N.Y. 1990) (impleader limits the prejudice incurred by the defendant due to the time gap between a judgment against the defendant and a judgment against a third-party defendant).

<sup>2</sup>See discussion at § 9:9. See also *Andrulonis v. U.S.*, 26 F.3d 1224, 1233-1234, 29 Fed. R. Serv. 3d 443 (2d Cir. 1994) ("In a federal case governed by New York law, Rule 14(a) nevertheless permits a defendant to implead a joint tortfeasor for contribution before the right to contribution accrues, because that third party 'may be liable to the defendant for a share of the plaintiff's primary judgment.'").

<sup>3</sup>See discussion at § 9:7 and Chapter 12 "Removal to Federal Court" (§§ 12:1 et seq.). See also *Easton Financial Corp. v. Allen*, 846 F. Supp. 652, 653 (N.D. Ill. 1994) ("[T]he substantial majority of the many judicial opinions that have dealt with the subject have consistently held that a third-party defendant cannot invoke removal jurisdiction at all."); *Federal Insurance Company v. Tyco International Ltd.*, 422 F. Supp. 2d 357, 372-376 (S.D. N.Y. 2006) (adopting majority rule that there is no statutory right to removal for third-party defendants);

of a third-party defendant to remove an action.<sup>4</sup>

### § 9:4 Objectives of third-party actions—At trial

If it is anticipated that the case may go to trial, counsel should be aware of potentially negative consequences of having the third-party defendant present and participating in the trial. The presence of a third-party defendant may result in the “who should pay” issues taking center stage, thereby strengthening the plaintiff’s position before the jury. As a matter of trial tactics, counsel for the main defendant will want to avoid a scenario in which the main defendant is forced, in effect, to argue that it is not liable to the plaintiff, but if it is liable, then the third-party defendant is liable to the main defendant. The main defendant would much prefer to offer a clear and unqualified message to the jury, that the main defendant is not liable to the plaintiff.

There are other risks for the main defendant in having a third-party defendant at trial. These include the possibility that the third-party defendant’s conduct at trial—for example, with respect to its examination of witnesses and argument to the jury—will be inconsistent with the trial strategy of the main defendant.

In addition, asking a jury to resolve the third-party claim as well as the plaintiff’s claim against the main defendant adds a layer of complexity that may not be helpful for the main defendant. For example, a defendant company sued for wrongful acts of certain of its directors and officers may implead its provider of Directors & Officers Liability Insurance if the insurer has refused to provide coverage under the policy. The issues in the underlying litigation involving wrongful acts of the directors and officers, however, may be entirely distinct from the reasons that caused the insurer to refuse to cover the insured company. Asking the jury to resolve both sets of issues may cause undue confusion to the jury and complicate the defendant’s efforts to present its defenses.

Another relevant consideration is that bringing an impleader action will negate the ability of the main defendant to assert at trial that an absent third party is responsible for any loss suf-

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USA Satellite & Cable, Inc. v. Glen Health and Home Management, Inc., 2015 WL 1185478, at \*2-4 (N.D. Ill. 2015) (rejecting alternative argument that 28 U.S.C.A. § 1335 can serve as basis for removal where there is not complete diversity).

<sup>4</sup>See, e.g., National American Ins. Co. v. Advantage Contract Services, Inc., 200 F. Supp. 2d 620, 621-22 (E.D. La. 2002) (stating Fifth Circuit rule); Hayduk v. United Parcel Service, Inc., 930 F. Supp. 584, 152 L.R.R.M. (BNA) 2728 (S.D. Fla. 1996) (discussing removal by third-party defendants in detail); Nolan v. Boeing Co., 919 F.2d 1058, 1066 (5th Cir. 1990) (permitting removal by foreign state third-party defendant under 28 U.S.C.A. § 1441(d)).

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ferred by plaintiff. Commonly known as the “empty chair” defense, this strategy can be effective for the very reason that the third-party defendant is not at the trial to defend itself. At least one appellate court has held that the trial court did not err by refusing to instruct the jury that the main defendant could have impleaded a third party, but did not do so.<sup>1</sup>

Given the risks attendant with a third-party defendant present at trial, the main defendant will want to consider the possibility of an agreement with the third-party defendant that would commit the latter to paying an agreed portion of any judgment obtained by the plaintiff against the main defendant. This type of arrangement may have more appeal to the main defendant where its claim is based on contribution rather than indemnity because of the particular risks of having a contributing defendant at trial, but could also be used in the latter context. From the main defendant’s perspective, such an arrangement might be preferable, depending on the circumstances, to having the third-party defendant participate at trial, or even to suing the third-party defendant in a separate action after judgment is rendered in the main case. From the third-party defendant’s perspective, such an arrangement may be preferable to the risks of participating in the trial as a contributing defendant. But, a third-party defendant may also prefer to control or at least participate in the defense strategy at trial.

There may be situations where, despite the trial risks, a main defendant will conclude that it is advantageous to have a third-party defendant at trial. For example, if the main defendant and the third-party defendant can agree on a common strategy for defeating the plaintiff’s claim, the main defendant may benefit from the third-party defendant’s resources and contributions to the defense effort. In this scenario, the main and third-party defendants each would have an opportunity to cross-examine the plaintiff’s witnesses and to present arguments to the jury, thus being able to reinforce the points they view as harmful to the plaintiff’s case. To be effective in this effort, however, the third-party and main defendants must be well coordinated so as to avoid diluting any cross-examination success achieved by the other or causing the jury to view the defense case as unduly repetitive.

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[Section 9:4]

<sup>1</sup>*Fernandez v. Corporacion Insular De Seguros*, 79 F.3d 207, 210, 34 Fed. R. Serv. 3d 1204 (1st Cir. 1996) (affirming trial court’s refusal to instruct jury in medical malpractice case that the defendant had the right to implead the plaintiff’s personal physician because impleader is not mandatory).

### § 9:5 Objectives of third-party actions—Settlement

Impleader offers the practical advantage of enhancing the prospects of a comprehensive settlement.<sup>1</sup> For one thing, the participation of a third-party defendant may result in another contributor to the settlement pot, making it more likely that a deal can be struck with the plaintiff. For example, a pharmaceutical company that markets and sells a pharmaceutical product may implead the manufacturer of the active ingredient of the product in any suit by a consumer of the product for injuries. The consumer may not be aware that the defendant company who marketed and sold the product did not manufacture the active ingredient of the product, and the participation of the two companies in the litigation creates a larger amount of resources that could be contributed to a settlement with the plaintiff.

In addition, the nature of the relationships between the parties and the third-party defendant can work to the main defendant's advantage in settlement negotiations. For example, an auditor sued by a client corporation for failure to detect fraud might assert third-party claims against the corporation's officers. In that situation, a settlement may be more likely because the corporation may wish to avoid a litigation where its officers' statements and conduct would be at issue. Another example is found when an insured impleads its insurer. In that situation, the insurer may opt to defend the insured and may have resources to improve the quality of the defense. This could increase the chances of obtaining a favorable settlement.

It should be kept in mind that a third-party defendant is allowed to fully participate in pretrial discovery. Thus, the third-party defendant's settlement posture may be affected by facts and other information it learns during discovery. While it is difficult to generalize as to how this may impact settlement, one could imagine, for example, that if the third-party defendant's participation in discovery leads it to conclude that the plaintiff's claim is strong and that the damages are likely to be significant, the third-party defendant may be more willing to contribute to a settlement so as to limit its exposure. The converse, of course, is equally true. Thus, if the third-party defendant concludes that the plaintiff's claim is weak, or that the damages are relatively low, it may be less willing to contribute to a settlement.

A defendant, of course, is not required to implead a third party in order to bring that party into settlement negotiations. In many cases, the mere possibility of impleader or a third-party claim af-

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[Section 9:5]

<sup>1</sup>See generally Chapter 35 "Settlements" (§§ 35:1 et seq.).

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ter the main case is resolved will induce a third party to engage in negotiations designed to reach a consensual resolution.

§ 9:6 Alternatives to impleader

As noted above, instead of impleading a third party, a defendant may bring a separate suit against that party.<sup>1</sup> In view of the cost savings of litigating one case rather than two, impleader may be the preferable course, unless strategic considerations such as those discussed above<sup>2</sup> outweigh the cost considerations.

Another alternative to impleader, which may be available in some circumstances, is the common law practice of “voucher”<sup>3</sup> under which the defendant who seeks indemnification from a third party serves a notice to defend on that party. The notice informs the indemnitor of the pendency of the action against the defendant and offers the indemnitor the opportunity to appear and defend the action. If the indemnitor refuses to assume the defense, the defendant, if unsuccessful in the main action, may bring a separate action to enforce the indemnity. In the separate action, the indemnitor may dispute the existence and scope of the indemnity but is precluded, under collateral estoppel, from relitigating issues decided in the main action.<sup>4</sup>

While some courts have recognized the existence of voucher after the enactment of the Federal Rules of Civil Procedure,<sup>5</sup> it is not clear whether voucher remains a viable practice given the adoption of the Rules.<sup>6</sup> For example, the Second Circuit, while determining that voucher “remains a valid practice under certain circumstances,” has noted that it is “a superfluous procedure

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[Section 9:6]

<sup>1</sup>See § 9:2.

<sup>2</sup>See § 9:3.

<sup>3</sup>SCAC Transport (USA) Inc. v. S.S. Danaos, 845 F.2d 1157, 1161-1162, 1988 A.M.C. 1827 (2d Cir. 1988) (holding that stevedore could be vouched into arbitration proceeding by the vessel owner without stevedore’s consent and is bound by arbitrator’s finding that its negligence caused the accident during loading of cargo on a vessel).

<sup>4</sup>Restatement Second, Judgments § 57.

<sup>5</sup>See SCAC Transport (USA) Inc. v. S.S. Danaos, 845 F.2d 1157, 1161-1162, 1988 A.M.C. 1827 (2d Cir. 1988); West Indian Co. v. S. S. Empress of Canada, 277 F. Supp. 1, 1968 A.M.C. 2369 (S.D. N.Y. 1967).

<sup>6</sup>Hydrite Chemical Co. v. Calumet Lubricants Co., 47 F.3d 887, 890, 25 U.C.C. Rep. Serv. 2d 723 (7th Cir. 1995) (“[T]here are doubts, unnecessary to resolve in this case, whether a rule of state law requiring impleader in a particular class of cases binds the federal courts, given that the procedure in cases brought in federal court, including diversity cases, is governed by federal rather than state law.”).



where impleader is available.”<sup>7</sup> Most courts faced with the issue have questioned the continued viability of voucher and declined to permit voucher claims on other grounds.<sup>8</sup>

The Uniform Commercial Code provides an independent basis for voucher with respect to warranty claims. Under U.C.C. § 2-607(5), when a defendant-buyer is sued for breach of warranty or another cause of action, it may serve notice on its seller-indemnitor, which informs the seller of the action and offers an opportunity for the seller to appear and defend the action.<sup>9</sup>

Although voucher may be worth considering, if available, where the court lacks personal jurisdiction over the indemnitor, impleader generally is preferable because there is no doubt as to the viability of the procedure, and because impleader requires the third-party defendant to participate in the action or to suffer a default judgment.

### III. PROCEDURE FOR THIRD-PARTY ACTIONS

#### A. BRINGING THIRD-PARTY ACTIONS

##### § 9:7 Timing and nature of motion

As set forth in Fed. R. Civ. P. 14(a), a defendant may implead a third party without leave of court within fourteen days after serving its main answer.<sup>1</sup> The majority of courts have found that the fourteen-day period begins anew if the plaintiff amends its complaint and the third-party claim arises from the new allegations.<sup>2</sup> While at least one court has found that any amended

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<sup>7</sup>SCAC Transport (USA) Inc. v. S.S. Danaos, 845 F.2d 1157, 1162, 1988 A.M.C. 1827 (2d Cir. 1988).

<sup>8</sup>Baggott v. Piper Aircraft Corp., 101 F. Supp. 2d 556, 557 (S.D. Ohio 1999); Ferrostaal, Inc. v. American Commercial Barge Lines, L.L.C., 2002 A.M.C. 986, 2002 WL 338158 (N.D. Ill. 2002); Berg Chilling Systems, Inc. v. Hull Corp., 49 U.C.C. Rep. Serv. 2d 189 (E.D. Pa. 2002); Western Home Ins. Co. v. Cambridge Integrated Services Group, Inc., 2010 WL 3614102 (D. Minn. 2010).

<sup>9</sup>See Chapter 117 “Warranties” (§§ 117:1 et seq.) for additional discussion of U.C.C. § 2-607(5).

##### [Section 9:7]

<sup>1</sup>Fed. R. Civ. P. 14(a)(1). Pursuant to an order of the Supreme Court of the United States, US Orders 2009-17, the time set in the former Fed. R. Civ. P. 14(a) at ten days was revised to fourteen days, effective December 1, 2009. See Fed. R. Civ. P. 14(a) 2009 Notes of Advisory Committee. Cases cited in this chapter that were decided prior to the December 1, 2009 rule change, therefore, refer to the relevant time period as ten days.

<sup>2</sup>Carney’s Point Metal Processing, Inc. v. RECO Constructors, 2006 WL 924992, at \*1-\*2 (E.D. Pa. 2006) (finding that amended complaint did not restart 10-day time period because it did not set forth any new theories of liability against the defendant); United Nat. Ins. Corp. v. Jefferson Downs Corp., 220