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The Status of Third-Party Practice in Virginia

John M. Claytor
University of Richmond

THE STATUS OF THIRD-PARTY PRACTICE IN VIRGINIA

I. History

The past three decades have seen third-party practice in Virginia instituted, abolished and revived. The practice was first sanctioned by a 1948 amendment to the Virginia Code of 1919.[1] In the 1949 case of *Masters v. Hart,*[2] it was held that by virtue of the 1948 amendment the trial court could, in its discretion, permit third parties to be impleaded as the interests of justice may require. However, the supreme court in that decision also pointed out that the amendment was both confusing and incomplete; and, also noted that in order for a complete system of third-party practice to be adopted the statute would have to be clarified by general rules of court or appropriate legislation.

The General Assembly did not respond to the supreme court's suggestion. Instead, effective October 1, 1951, the supreme court simply abolished third-party practice in Virginia by adopting Rule 3:9.1.[3] In 1954, the General Assembly amended the statute (now identified as § 8-96 of the 1950 Code) and thereby repealed the statutory authority for third-party practice.[4]

However, third-party practice was re-established in Virginia effective March 1, 1972, when the supreme court adopted the current Rule 3:10. The Rule presently provides in part:

> At any time after commencement of the action a defending party, as a third-party plaintiff, may file and serve a third-party motion for judgment upon a person not a party to the action who *is or may be liable* to him for all or part of the plaintiff's claim against him. (emphasis added).

II. The Purposes of Third-Party Practice

The principal function of any impleader rule is to promote judicial econ-

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1. Section 6102 of the Code of 1919, as amended by Chapter 394 of the Acts of 1948. That statute, with the pertinent part of the 1948 amendment italicized, reads as follows:

> No action or suit shall abate or be defeated by the non-joinder or misjoinder of parties, plaintiff or defendant, but whenever such misjoinder or non-joinder shall be made to appear by affidavit or otherwise, new parties may be added and parties misjoined may be dropped by order of the court at any stage of the cause as the ends of justice may require; *and such new parties defendant may be added upon the affidavit and motion of any defendant, where it appears that such parties are or may be liable to such plaintiff or defendant for all or part of plaintiff's claim,* . . . .

2. 189 Va. 969, 55 S.E.2d 205 (1949).

3. Rule 3:9.1 stated in part: "Third-party practice is abolished and no defendant shall be permitted to bring in a new party. . . ."

4. The amendment consisted of deleting the italicized language in note 1, *supra.*

omy. Via third-party practice, all parties with an interest at stake in a particular transaction or occurrence are brought before the court which allows for a complete disposition of the matter. This results in the resolution of all common questions of law and fact in a single suit. As a consequence, any duplication of expenses or danger of inconsistent results is avoided. Besides saving precious judicial time (as well as that of the parties, the witnesses, and the attorneys), any circuity of action or multiplicity of actions is prevented as well. The use of impleader also avoids the long time delay involved in rendering a judgment against the original defendant and then obtaining a judgment in his favor against the third party defendant.[5]

III. Controversy, Confusion and the "Newport News Rule"

In at least one informal survey taken since Rule 3:10 was revived in 1972, it was indicated that there are a number of judicial circuits within Virginia that have not recognized third-party practice in actions for contribution or indemnification.[6] Instead, these circuits have appparently approved of the theory known as the "Newport News Rule," which generally requires

5. American Export Lines, Inc. v. Revel, 262 F.2d 122 (4th Cir. 1958), *aff'd*, 266 F.2d 82 (4th Cir. 1959); B&O v. Saunders, 159 F.2d 481 (4th Cir. 1947); Note, *Seventeenth Annual Survey of Developments in Virginia Law: 1971-1972*, 58 VA. L. REV. 1159, 1322-23 (1972).

6. The informal survey was the product of Richard Wright West, Esq. of Newport News who presented his results and views on the subject in the Virginia Association of Defense Attorneys Newsletter of May 1976 at pages 7-11. He also did an update on the same subject in Vol. 2, No. 1, pages 4 and 5 of the same publication. A further related article, not authored by Mr. West, was also published in that publication in Vol. 3, No. 2 at pages 21-24.

According to the survey, the following courts are on record as not having implemented Rule 3:10 in contribution or indemnification actions in the Virginia circuit court system: the 7th circuit (Newport News), the 8th circuit (Hampton), the 19th circuit (Fairfax Co.), and the 26th circuit (Rockingham Co.). At one time, Federal Judges Kellam and MacKenzie (both E.D. Va.) were also in that camp, although Mr. West later advises that they have apparently switched over and now permit impleader actions in these type cases.

The following courts, as indicated by the survey, take the opposite stance and do allow third-party practice in contribution and indemnification actions. In the state judicial system, the adherents are the 3rd circuit (Portsmouth), the 4th circuit (Norfolk), the 9th circuit (Williamsburg and York Co.), the 13th circuit (Richmond), the 14th circuit (Henrico Co.), and the 30th circuit (Norton, Lee Co., Scott Co., and Wise Co.). Federal Judges Merhige (E.D. Va.), Turk (W.D. Va.) and Widener (4th Cir.) have also allowed impleader in these actions.

Mr. West notes that the 2d circuit (Virginia Beach) and the 5th circuit (Suffolk) are hybrids in that third-party practice is permitted but the courts automatically sever the third-party motions for judgment.

It should be noted that this survey is not totally up to date and because state circuit court opinions are unpublished many of these circuits could have "crossed lines." It is suggested that each attorney check the case law in his forum to make certain of that circuit's position.

"the dismissal of third-party motions for judgment alleging actions for contribution or indemnification on the ground that the third-party plaintiff has no existing cause of action according to Virginia case law."[7]

The advocates of the Newport News Rule find strength for their position in the Virginia cases which have held that the right to contribution arises only upon the rendering of a judgment and upon the payment or discharge of the common obligation.[8] Also, there are other cases which have held that the right to indemnification arises only when actual loss or damage is established, and that does not occur unless and until the indemnitee has made payment on the debt.[9] Thus, in the impleader context, when a third-party defendant is brought into the litigation, the proponents of the above mentioned rule contend that the third-party action is actually premature because at that point in the proceeding the third-party plaintiff has no cause of action for contribution or indemnification.[10] The Newport News Rule requires two adjudications—one on the underlying occurrence establishing primary liability and then another to adjudicate any secondary liability on behalf of third-parties who would be responsible to those deemed liable in the first proceeding. The latter proceeding would arise only upon proof of payment in the case of contribution and proof of actual loss in the case of indemnification.

Another argument set forth by Newport News Rule proponents concerns a semantic interpretation of the phrase ". . . or may be liable . . ." as it appears in Rule 3:10. They would contend that the phrase speaks in the present and not in futurity. In other words, it is their contention that "may be" could just as easily refer to a present possibility as to a future probability. Thus, the effect of this interpretation is that the third-party defendant would have to be liable to the third-party plaintiff as of the filing of the original action. According to case law, this would not be possible in contribution or indemnification situations.[11]

A final argument propounded by the Newport News Rule advocates

7. Wright, *Third-Party Practice—An Update: The Newport News Rule,* Virginia Association of Defense Attorneys Newsletter, Vol. 2, No. 1, at p.4.

8. Bartlett Roberts v. Recapping, Inc., 207 Va. 789, 793, 153 S.E.2d 193 (1967); Nationwide Mutual Ins. Co. v. Jewel Tea Co., Inc., 202 Va. 527, 532, 118 S.E.2d 646 (1961); Van Winckel v. Carter, 198 Va. 550, 556, 95 S.E.2d 148 (1956); McKay v. Citizens Rapid Transit Co., 190 Va. 851, 857, 59 S.E.2d 121 (1950).

9. Allied Productions Inc., v. Duesterdick, 217 Va. 763, 766, 323 S.E.2d 774 (1977); City of Richmond v. Branch, 205 Va. 424, 430, 137 S.E.2d 882 (1964); American National Bank v. Ames, 169 Va. 711, 748, 194 S.E. 784 (1938).

10. *See generally* Brooks v. Brown, 307 F. Supp. 907 (E.D. Va. 1969).

11. Wright, *Third-Party Practice in Virginia: The Newport News Rule,* Virginia Association of Defense Attorneys Newsletter, May 1976, p. 9.

concerns the scope of the supreme court's rule making authority. It is contended that the rules of court are merely procedural and are not meant to create or modify any substantive rights a party may have.[12] In the *Brooks* case,[13] Judge Kellam quoted thhe following from Moore's Federal Practice: "Third-party practice . . . is procedural . . .[I]t does not 'abridge, enlarge, nor modify the substantive rights of any litigant.' It creates no substantive rights. . . ."[14] Proponents have found further authority for their position in the case of *Valley Landscape Co. v. Rolland*[15] in which the supreme court stated that ". . . impleader is proper only when a right to relief exists under the applicable substantive law. . . ."[16] In sum, it is argued that Rule 3:10 has the effect of creating a right of contribution or indemnification where none existed theretofore. Such is beyond the "procedural" authority given the supreme court in the Virginia Constitution.[17]

IV. Rule 3:10 Is Alive and Well in Virginia

Rule 3:10 states that a defending party, as a third-party plaintiff, may bring into the action another person who is not a party, provided that person "is or may be liable" to the third-party plaintiff for part or all of the original plaintiff's claim. A literal interpretation of the Rule would seem to indicate that the drafters intended the aforementioned phrase to allow the impleader of parties who are potentially liable to the third-party plaintiff. The phrase speaks to the possibility of future liability; in other words, if there is a possibility that such a party could, in the future, be held accountable to the third-party plaintiff, then that party can be impleaded into the present proceeding via this Rule.

An extremely poignant analogy can be drawn between Rule 3:10 and Rule 3:9, which sanctions the use of cross-claims. The original Rule 3:9 stated that "A defendant may, . . . plead as a cross-claim any cause of action that *he has* against one or more other defendants. . . ." The classic

12. *Id.*

13. *See* note 10 *supra.*

14. 3 Moore's Federal Practice ¶ 14.03. This language was also quoted with approval in Uptagrafft v. U.S., 315 F.2d 200, 202 (4th Cir.), *cert. denied,* 375 U.S. 318 (1963).

15. 218 Va. 257, 237 S.E.2d 120 (1977).

16. *Id.* at 263 (quoting Wright & Miller, 6 Federal Practice and Procedure § 1446, 250 (1971).

17. Virginia Const., Art. VI, § 5, states:

> The Supreme Court shall have the authority to make rules governing the . . . practice and procedures to be used in the courts of the Commonwealth, but such rules shall not be in conflict with the general law as the same shall, from time to time, be established by the General Assembly.

case that dealt with the Rule in this form was *City of Richmond v. Branch.*[18] In that case, the plaintiff, who was injured when his car hit a deep hole in a city street, sued both the city and the construction firm that had repaired the street. The city filed a cross-claim against the contractor alleging that it was entitled to be indemnified for any damages arising out of the performance of the contract. The supreme court held that the lower court had properly dismissed the cross-claim on the ground that the city had no claim for indemnification when it filed the cross-claim. Under Rule 3:9 as it was then stated, a party could plead as a cross-claim only a cause of action which it then had. (This is precisely the position taken by the advocates of the Newport News Rule in interpreting Rule 3:10). Apparently the supreme court did not approve of this interpretation of the Rule and in January, 1975,[19] they amended the Rule to specifically include any potential secondary liability by inserting the words "or may have" into the above quoted sentence immediately after the italicized words. This revision appears to reverse the interpretation of the Rule taken in *City of Richmond v. Branch.*[20] It can be persuasively argued that the supreme court intended a similar interpretation when it used nearly identical language in drafting Rule 3:10.

There are relatively few Virginia cases which have applied Rule 3:10; but, in the ones that have, the impleader of parties with contingent liability has been expressly sanctioned. In a recent federal case,[21] applying Virginia law,[22] in was held that the Rule was valid and should be given effect in an indemnity situation. In that case, the administrator of the decedent's estate brought an action against the bank for wrongful death. The bank in turn filed a third-party action for indemnity against the decedent's employer. The employer, as third-party defendant, relied on *Brooks*[23] (which was a pre-Rule 3:10 case) for the proposition that a cause of action which had not yet occurred was not the proper subject of a third-party action. The court in *Bell* was not persuaded by this argument and deter-

18. 205 Va. 424, 137 S.E.2d. 882 (1964).

19. 215 Va. 578 (1975).

20. *See* Note, *Twentieth Annual Survey of Developments in Virginia Law, 1974-1975,* 61 VA. L. REV. 1627, 1804 (1975), where it is stated that the amendment "clarified a troublesome ambiguity by specifically allowing a defendant to plead against a co-defendant not only causes of action that he is prepared to show are valid in fact but also those that he 'may have.' This approach assures the heretofore uncertain validity of a contingent cross-claim that matures only if the cross-claiming defendant is held liable for all or part of the prayed judgment."

21. Bell v. Federal Reserve Bank, 57 F.R.D. 632 (E.D. Va. 1972).

22. More specifically the case dealt with the application of Rule 14 of the Federal Rules of Civil Procedure to the claim asserted as determined by substantive state law.

23. *Brooks,* note 10 *supra.*

mined that the literal language of the Rule allowed for a third-party action under these circumstances despite the fact that the third-party plaintiff had suffered no loss to trigger the indemnification cause of action at that time.

In the case of *Valley Landscape Co. v. Rolland,*[24] the Virginia Supreme Court considered Rule 3:10. There, the third-party plaintiff impleaded on a third-party beneficiary contract theory. However, the court clearly indicated that secondary liability was a proper subject for third-party action.[25]

Another argument that can be advanced in support of third-party practice is that by its very nature it is a type of declaratory judgment proceeding which is expressly sanctioned by the Virginia Code.[26] Thus, when the court determines the future liability of the third-party defendant it is carrying out the same purpose as a declaratory judgment proceeding, namely, to afford relief from the uncertainty and insecurity attendant upon the controversy by declaring the rights of the parties before they mature.[27]

An argument advanced by proponents of the Newport News Rule is that the Rules of the Supreme Court are strictly procedural by nature and therefore should have no effect on existing substantive law. However,

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24. *Valley Landscape,* note 15 *supra.*

25. In that case, 218 Va. at 263, the court stated:

> Under Rule 3:10 a defendant can bring in a third-party defendant only for the purpose of passing through to the third-party defendant all or part of the liability which might be imposed on the defendant by the plaintiff as the result of the conduct of the third-party defendant. Rule 3:10 is the state counterpart of Rule 14 of the Federal Rules of Civil Procedure. In the discussion of when a third-party action is proper, Wright and Miller, 6 FEDERAL PRACTICE AND PROCEDURE § 1446, 245-50 (1971), states:
>
> > 'Rule 14(a) authorizes defendant to bring into a lawsuit any person "not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him." (Footnote omitted).
> >
> > 'A third-party claim may be asserted under Rule 14(a) only when the third party's liability is in some way dependent on the outcome of the main claim or when the third party is secondarily liable to defendant. The secondary or derivative liability notion is central and it is irrelevant whether the basis of the third-party claim is indemnity, subrogation, contribution, express or implied warranty, or some other theory. But impleader is proper only when a right to relief exists under the applicable substantive law. . . .' (Footnotes omitted). *See also* WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 76 (3d ed. 1976).

26. VA. CODE ANN. § 8.01-184 (Repl. Vol. 1977).

27. Regarding the purposes of a declaratory judgment act, *see generally* Liberty Mut. Ins. Co. v. Bishop, 211 Va. 414, 177 S.E.2d 519 (1970); Criterion Ins. Co. v. Grange Mut. Cas. Co., 210 Va. 446, 171 S.E.2d 669 (1970).

Judge Merhige in the *Bell* decision[28] directly addressed this contention and concluded that "the issues of substantive and procedural law are so intertwined as to make a concrete distinction between them overly formalistic."[29]

Finally, since the stated purpose of the Rules of the Supreme Court is to promote judicial economy,[30] a literal interpretation of Rule 3:10 allowing the impleader of a potentially liable third-party defendant would seem to be harmonious with this purpose. Such an application of Rule 3:10 would permit additional judicial efficiency by eliminating both time delays and further expenses by having directly related matters disposed of in a single proceeding.

V. CONCLUSION

The most recent third-party practice case to reach the supreme court was *Southern States Cooperative, Inc. v. Norfolk and Western Railway Co.*[31] That case was based on an indemnification provision in a lease between Southern States as lessee, and Norfolk and Western as lessor. At the time the action was filed there was no adjudication of a loss sustained by the lessor which would have triggered a cause of action for indemnification. Although indemnification was disallowed for other reasons,[32] the supreme court did not attack the validity of third-party practice. The briefs of both sides argued the contentions herein treated concerning the validity of Rule 3:10 and the Newport News Rule. However, the court chose not to address the issue in its opinion, which indicates that the court considered the validity of Rule 3:10 well-settled.

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28. *Bell*, note 21 *supra*.

29. Judge Merhige's feelings on the matter were stated as follows at 57 F.R.D. at 634:

> It is arguable at first blush that the change in Virginia procedural law should have no bearing upon existent substantive law, a contention supported by traditional rules of statutory construction. (Citation omitted). Nevertheless, the court concludes that the general principle is inapplicable here in the light of the history of Virginia procedural law with respect to third party suits.
>
> While the same substantive rule could well remain in effect despite the procedural change in Virginia practice, the result thereby is clearly inconsistent with the liberal spirit of said procedural changes (which in effect are modeled in turn upon the liberal language of Rule 14 F.R.C.P.). In short, the issues of substantive and procedural law are here so intertwined as to make a concrete distinction between them overly formalistic. This result at least prompts a re-evaluation of the Virginia substantive rule.

30. VA. CODE ANN. § 8.01-3(a) (Repl. Vol. 1977).

31. 219 Va. ____, 247 S.E.2d 461 (1978).

32. Indemnification was not allowed on the ground that a common carrier can not, for public policy reasons, be allowed to contract away its potential tort liability.

In sum, both the weight of authority and the spirit of the Rules of the Supreme Court lead to the conclusion that a presently existing substantive right to contribution or indemnification is not a *sine qua non* to invoking the procedural right of third-party impleader.

John M. Claytor