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Third-Party Practice in Florida

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THIRD-PARTY PRACTICE IN FLORIDA

Rule 1.41 of the Florida Rules of Civil Procedure,[1] which was adopted on July 28, 1965, brings third-party practice into the procedural law of Florida. The acceptance of this rule by the Florida Supreme Court reflects a continuing trend toward the liberalization of the modes and means available to the attorney in handling a lawsuit.

Impleader, as this procedural device is often called, allows a defendant to bring in a person, not a party to the suit, who is or may be liable over to him for a judgment in favor of the plaintiff.[2] The purpose of this note is to analyze Rule 1.41 with the hope that the reader will obtain an understanding of the rule and its use in a lawsuit. Since the Florida rule is patterned after Rule 14 of the Federal Rules, much has been drawn from the law that has developed in the federal courts under that rule. The Florida Bar Subcommittee on Civil Procedure recommended adoption of Rule 1.41 after reveiwing the federal rule, the federal committee reports, and the operation of

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1. FLA. R. CIV. P. 1.41, which becomes effective January 1, 1966, provides: "(a) *When Defendant May Bring in Third Party.* At any time after commencement of the action a defendant as a third party plaintiff may cause a summons and complaint to be served 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. The third party plaintiff need not obtain leave to make the service if he files the third party complaint not later than twenty days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third party complaint, hereinafter called the third party defendant, shall make his defenses to the third party plaintiff's claim as provided in Rules 1.8 and 1.11 and his counterclaims against the third party plaintiff and cross-claims against other third party defendants as provided in Rule 1.13. The third party defendant may assert against the plaintiff any defenses which the third party plaintiff has to the plaintiff's claim. The third party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff. The plaintiff may assert any claim against the third party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff and the third party defendant thereupon shall assert his defenses as provided in Rules 1.8 and 1.11 and his counterclaims and cross-claims as provided in Rule 1.13. Any party may move to strike the third party claim or for its severance or separate trial. 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 for all or part of the claim made in the action against the third party defendant.

"(b) *When Plaintiff May Bring in Third Party.* When a counterclaim is asserted against the plaintiff, he may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so."

2. Rule 1.41 is identical with Rule 14 of the Federal Rules of Civil Procedure except that the defendant has twenty days to file the third-party complaint before leave must be obtained, whereas Rule 14 provides for a ten-day period.

the rule as discussed in Moore's *Manual*[3] and *Federal Practice and Procedure* by Barron and Holtzoff.[4] It can be expected, therefore, that the Florida courts also will look to the operation of the federal rule for guidance in developing the law under our own rule.[5]

HISTORICAL BACKGROUND

The historical basis of the modern procedural device of third-party practice is difficult to trace. Professor Moore finds its roots in the common law device known as "vouching to warranty."[6] A grantee with warranty title who was sued by a third party to recover his land could vouch his grantor in as a warrantor and request him to defend the suit. The grantor, however, was not required to join in the suit nor defend the action. Thus, if the grantee lost the land, another suit had to be brought against the grantor on the warranty. If the grantee could prove that a warranty existed between him and the grantor, that the grantor received notice of the prior suit, and that a judgment had been obtained against him causing him to lose the land, the grantor was bound by the outcome of the prior suit.

A theoretical basis for third-party practice is found in the general principles of equity that allowed for the calling in of all those necessary to the determination of a particular action.[7] In addition, the 56th Admiralty Rule,[8] which allows additional parties to be brought in, was formulated on the basis of inherent power of a court to do substantial justice in regard to an entire matter.[9]

LAW PRIOR TO RULE 1.41

Prior to the adoption of Rule 1.41, Florida did not specifically provide for the type of general third-party practice encompassed in Rule 14 of the Federal Rules. Two separate rules, however, might have allowed for such a procedure. Rule 1.18 provides in part that

3. MOORE, FEDERAL PRACTICE AND PROCEDURE (1964).

4. BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE (1960).

5. *Cf.* Carson v. City of Fort Lauderdale, 173 So. 2d 743, 744 (2d D.C.A. Fla. 1965).

6. MOORE, FEDERAL PRACTICE AND PROCEDURE §14.03 (1) (1964).

7. Note, 3 ST. LOUIS U.L.J. 428 (1955).

8. 28 U.S.C. Admiralty Rule 56 (1958) provides: "In any suit, whether in rem or in personam, the claimant or respondent, (as the case may be) shall be entitled to bring in any other vessel or person . . . who may be partly or wholly liable either to the libellant or to such claimant or respondent by way of remedy over, contribution or otherwise, growing out of the same matter." This rule originally was promulgated by the United States Supreme Court in *In re* New York & Porto Rico S.S. Co., 155 U.S. 523 (1895).

9. 2 BENEDICT, ADMIRALTY §349 (6th ed. 1940).

"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. . . ." Rule 1.13 (8) provides "when the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim or cross-claim, the court shall order them to be brought in as defendants . . . ."

In one respect, then, it would seem that Florida's procedure could have been broader than the federal practice, which allows a third-party claim against one who is not an original party only if he is or may be liable over to the third-party claimant. Under a liberal interpretation of the above rules, the requirement of the person being "liable over" found in the federal rules, would not appear to have been necessary under the Florida Rules.[10] On the other hand, Rule 1.13 (8) seems to limit the bringing in of additional parties to the determination of a counterclaim or cross-claim. Although it appears that a liberal construction of the Florida Rules would have allowed for third-party practice similar to Federal Rule 14, the Florida courts did not construe the rules to allow such a result.

An analysis of the case law prior to the adoption of Rule 1.41 will provide an historical background and perspective for understanding how Rule 1.41 will operate. In *Florida Fuel Oil v. Springs Villas*,[11] the defendant-contractor was sued by Springs Villas for failure to install an air conditioning system according to specifications and in the alternative for negligent installation and breach of contract of guaranty. Florida Fuel Oil sought to bring in, under Rule 1.13 (8), the architects who drew the plans and specifications for the installation. Florida Fuel Oil argued that any liability to Springs Villas arose from the architects' negligence and therefore Rule 1.13 (8) would permit a claim against the architects so that all the matters could be disposed of in one suit. The Florida Supreme Court held that Rule 1.13 (8) could not be employed to bring in the architects under the facts of the case. Justice Thornal, writing for the court, viewed the claim asserted against the architects as raising entirely unrelated issues to the original action and therefore affirmed the dismissal of the cross-claim against the architects. There is an interesting point raised in the opinion, however, that led some to believe the door was left open for a third-party practice similar to Rule 14. Justice Thornal wrote: "This is not a situation where a defendant seeks to bring into the principal case one who is indemnitor against liability of the defendant to the original plaintiff."[12] This language, read in the context of the

10. FLORIDA CIVIL PRACTICE BEFORE TRIAL §11.7 (1963).
11. 95 So. 2d 581 (Fla. 1957).
12. *Id.* at 583.

opinion, would seem to intimate that if the appellant had sought to bring in an indemnitor under Rule 1.13 (8) it might have been successful. If such a result had followed, Rule 1.13 (8), although containing substantially different language, would have operated much like Rule 14 of the Federal Rules. As later cases arose, however, the language of *Springs Villas* was not picked up by the courts and with respect to Rule 1.13 (8) this would appear justified. The language of Rule 1.13 (8) is substantially the same as the language of Federal Rule 13 (h) relating to counterclaims and cross-claims. It is obvious that the purpose of Federal Rule 13 (h) is different from that of Rule 14 and since Florida has adopted Federal Rule 13 (h) almost verbatim, a construction of Rule 1.13 (8) to include a third-party practice similar to the federal procedure would have been inconsistent. On the other hand, the liberal construction of Rule 1.18 mentioned above could have allowed for the implementation of the federal third-party practice without a change in the rules. It is interesting to note that originally some members of the Florida Bar Subcommittee on Civil Procedure felt that the adoption of Rule 1.41 was unnecessary because the equitable remedy for multiplicity of suits covered all of the area that needed to be covered under Rule 1.41.[13]

Pan American Surety Co. v. Jefferson Construction Co.[14] clearly explains the scope and limits of Rule 1.13 (8). In that case, the appellant sought a reversal of a judgment against it as surety on a performance bond. The appellant was not a party to the original action, but was brought in pursuant to Rule 1.13 (8). In reversing the trial court's denial to grant a motion to dismiss, the Third District Court of Appeal held that to bring in an additional party under Rule 1.13 (8), there must be a cross-claim or counterclaim against existing parties and the joining of the additional party must be related to the determination of that claim. Moreover, the joinder must be necessary to the granting of complete relief. This case would appear to clear up some of the confusion created by *Spring Villas* in which it seemed that under the proper circumstances a party might use Rule 1.13 (8) to join an additional party by filing a cross-claim or counterclaim against them, without such joinder being made pursuant to an existing cross-claim or counterclaim against an original party to the suit. The opinion of Judge Carroll in *Pan American Surety Co. v. Jefferson Construction Co.*[15] makes it clear that the bringing in of additional parties under Rule 1.13 (8) must be in conjunction with a counterclaim or cross-claim filed against existing parties.

13. Letter From Henry Trawick to Dennis McGillicuddy, March 24, 1965.
14. 99 So. 2d 726 (3d D.C.A. Fla. 1958).
15. *Ibid.*

The later case of *Crane Co. v. Bradford Builders, Inc.*[16] illustrates the limited use of third-party practice within the framework of Rule 1.13 (8) prior to the adoption of Rule 1.41. Appellee, Bradford, was a general contractor who was faced with the claims of his subcontractors. In seeking exoneration, Bradford deposited a sum of money with the court and joined the subcontractors and materialmen as defendants. Crane Company, a subcontractor's materialman, as a party to the suit, counterclaimed against Bradford and sought to bring in Bradford's surety as an additional party. The chancellor denied Crane Company's motion to join the surety and the Third District Court of Appeal reversed. The court found that because Crane Company's claim was $800 more than Bradford had allowed for in his complaint and because there was a possibility that other claims might exhaust Bradford's deposit, the chancellor should have allowed Bradford's surety to be brought in so that complete relief might be granted. Judge Carroll, who wrote for the court in *Pan American Surety,* dissented on the ground that it was within the chancellor's discretion whether it was necessary to bring in an additional party in order to grant complete relief and that in this case the chancellor had not abused his discretion because of Rule 3.2, which provides that a surety who is severally liable is not a necessary party. Whether Judge Carroll raised a valid point is not of concern in this note; however, the case as decided by the majority does illustrate the limited use of third-party practice within the framework of Rule 1.13 (8). It is at this point in the development of case law under Rule 1.13 (8) that Florida has adopted Rule 1.41 to allow for a broad third-party practice as provided under Rule 14 of the Federal Rules.

Florida's New Third-Party Practice Rule

Rule 1.41 can be termed a "hybrid" third-party practice[17] because the defendant may implead "as of right" until twenty days after serving his answer to the plaintiff's complaint; thereafter he must obtain leave to implead. The use of the term "as of right" is somewhat misleading. Although it seems to imply an absolute right to implead, this is not the case. "As of right" means only that the third-party plaintiff can bring in a third-party defendant without applying to the court for leave to do so. The court must still determine whether a valid claim exists and whether substantial justice will be afforded by allowing the impleader.

The advantage of allowing the defendant twenty days to file a third-party complaint without obtaining leave to do so is that the

16. 116 So. 2d 794 (3d D.C.A. Fla. 1960).
17. See Note, 43 Minn. L. Rev. 115 (1958).

court will not be required to have two hearings on the propriety of the impleader; but rather, its propriety can be determined in one hearing with all interested parties raising their objections at that time. After twenty days the defendant must obtain leave to file a third-party complaint. A hearing is then held on the motion to obtain leave to bring in a third-party defendant. If the motion is granted, a second hearing may often be required to deal with any objections that the impleaded party might raise. And so, by providing for the right to implead within twenty days after service of the answer, one hearing is all that is necessary for ruling on the impleader.

After the right to implead has lapsed, the hearing on the motion to bring in the third-party defendant is held without the presence of the party being impleaded. By having a hearing without all the interested parties present, a danger exists that the court may foreclose the use of Rule 1.41 without having all the pertinent facts brought out. For this reason, New York, among other states, has provided for impleader as of right unrestricted by a time limitation.[18] It would appear, however, that in most instances twenty days is sufficient time for the defendant to decide upon the utility of Rule 1.41. This "hybrid" rule assumes that an impleader not promptly made is of dubious admissibility and puts the burden on the defendant to justify a delayed impleader before the action is enlarged.[19] The disadvantage of having two hearings on the propriety of the impleader is thus subordinated to the protection afforded to the plaintiff and possible third-party defendants against undue delay and unmeritorious claims.

Who May Be Brought In?

Rule1.41 (a) allows the defendant to serve a summons and complaint "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." This allows the defendant to bring in a third person who may be liable over to him for all or part of the plaintiff's recovery on the basis of indemnity, subrogation, contribution, or express or implied warranty.[20] Thus, if a defendant can state sufficient grounds in his third-party complaint that, if true, would result in the liability of the third-party to the defendant for the plaintiff's recovery, impleader may be used. Rule 1.41, as a procedural device, does not enlarge or diminish substantive rights[21] and any attempt to do so would be in conflict with the purpose and policy of the rule. Therefore, it is necessary to understand the

18. N.Y. CIV. PRAC. §1007.

19. Kaplan, *Amendments to the Federal Rules of Civil Procedure, 1961-1963* (pt. 2), 77 HARV. L. REV. 801 (1964).

20. 1A BARRON & HOLTZOFF, FEDERAL PRACTICE & PROCEDURE §426 (1960).

21. D'Onofrio Constr. Co. v. Recon Co., 255 F.2d 904 (1st Cir. 1958).

substantive law of Florida out of which a third-party claim may arise. A brief look into the Florida law in the areas in which impleader may arise will serve as basis for understanding the proper use of third-party practice.

Indemnity. Perhaps the most common situation in which third-party practice may arise is when *A* sues *B*, and *B* has contracted with *C* for indemnification against the liability that *A* is asserting against *B*. *B* can serve a third-party complaint on *C* based upon their express agreement. Florida defines a contract of indemnity as an original undertaking by which the promisor, *C*, agrees to protect the promisee, *B*, against loss or damage by reason of liability to a third person, *A*.[22] A familiar example of an indemnity contract is the automobile liability insurance policy. Indemnity may arise also from an implied contract, as illustrated by the right of a trustee to reimbursement for expenditures made in behalf of an estate.[23]

Suretyship. Suretyship can be distinguished from indemnity in that indemnity protects against loss resulting from liability to a third person whereas suretyship protects the promisee against loss caused by the failure of a third person to carry out his obligations to the promisee.[24]

The case of *Ruckman & Hansen, Inc. v. Contracting & Material Co.*,[25] in the Seventh Circuit Court of Appeals, illustrates one way in which a suretyship arrangement can form the basis of a third-party complaint. Ruckman & Hansen, Inc. entered into a prime contract with the State of Indiana for construction of two highway overpasses. The excavation for the project was subcontracted to Contracting & Material Co. who assigned the subcontract to National Asphalt Paving Co. The Home Indemnity Co. executed a surety bond with Contracting & Material Co. on the performance by National Asphalt. When the assignee, National Asphalt, defaulted on the subcontract, Ruckman & Hansen, Inc. brought suit against Contracting & Material Co., who successfully brought in Home Indemnity on the surety bond. Although the case was concerned particularly with whether the surety was discharged to the extent of progress payments made by Contracting & Material Co. to the defaulting assignee, the factual pattern points up the common situation in which a suretyship arrangement will operate under Rule 1.41.

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22. *E.g.*, Royal Indemnity Co. v. Knott, 101 Fla. 1495, 136 So. 474 (1931).
23. 17 FLA. JUR. *Indemnity* §6 (1958).
24. 30 FLA. JUR. *Suretyship and Guaranty* §4 (1960).
25. 328 F.2d 744 (7th Cir. 1964).

In *Pan American Surety Co. v. Jefferson Construction Co.*,[26] previously discussed,[27] a surety on a subcontractor's performance bond was brought in by one of the original defendants. Although the decision does not indicate who brought the surety in, it undoubtedly was the general contractor. The Third District Court of Appeal held that the surety was improperly brought in because the requirements of Rule 1.13 (8), which allowed for the joining of additional parties pursuant to a counterclaim or cross-claim, were not met. The court pointed out, however, that if Florida had an equivalent to Rule 14 of the Federal Rules, the surety could have been brought in. Thus, if a similar case arose under Rule 1.41, the surety could be successfully impleaded.

Contribution. Contribution is an obligation imposed by law based on the theory that parties, standing equal before the law, should contribute equally to the discharge of a common liability.[28] Section 45.04 of the Florida Statutes provides for contribution in favor of cosurities on bonds, notes, drafts, and bills of exchange.[29] A joint owner of property who pays more than one-half of a debt owing on the property is entitled to contribution from the other joint owner.[30] In the situations described above, Rule 1.41 provides a means for bringing in a co-obligor and thereby making it possible to avoid a second suit.

In Florida, a joint tortfeasor does not have the right to contribution.[31] There is, however, a recognized exception to this general rule that allows for contribution when the tortfeasors are not *in pari delicto*. Thus, in *Seaboard Air Line Railway v. American District Electric Protective Co.*,[32] an employer who had been held liable to his employee for injuries received from defective wires in an alarm system was allowed contribution from the company that installed the system. The court recognized that although both the employer and the installer were wrongdoers, they did not stand in the same relationship to the injured employee. The installer, being guilty of active negligence, was the primary cause of the injury, whereas the employer was guilty of passive or constructive negligence based on the master-servant relationship. The court pointed out that the employer's right

26. 99 So. 2d 726 (3d D.C.A. Fla. 1958).

27. See discussion in text at note 14.

28. Meckler v. Weiss, 80 So. 2d 608 (Fla. 1955); 7 FLA. JUR. *Contribution* §2 (1956).

29. See Freed v. Giuliani, 164 So. 2d 234 (2d D.C.A. Fla. 1964).

30. Meckler v. Weiss, 80 So. 2d 609 (Fla. 1955).

31. Winn-Dixie Stores, Inc. v. Fellows, 153 So. 2d 45 (Fla. 1963); Seaboard Air Line Ry. v. American Dist. Elec. Protective Co., 106 Fla. 330, 143 So. 316 (1932).

32. 106 Fla. 330, 143 So. 316 (1932).

to recover against the installer arose out of the contract to install and maintain the system. Although the court held that this set of facts raises an exception to the general rule of no contribution among joint tortfeasors, it appears that the actual basis of the decision lies in an implied contract of indemnity. In similar situations, when a court distinguishes differing types of negligence on the basis of active and passive and declares the joint tortfeasors not to be *in pari delicto*, the indemnity concept seems to override the traditional concepts of contribution.[33] Full recovery by the employer in *Seaboard* for his liability to employee is further evidence that such is the case. Had Rule 1.41 been in effect, the employer could have properly impleaded the installer in the original action by the employee, thus avoiding the subsequent suit to determine his right to "contribution."

Subrogation. Subrogation can be defined as the substitution of one party in place of another with reference to a lawful claim or right originally held by the latter, which moves to the former because of some express or implied agreement or by operation of law.[34] The use of impleader in a common situation where subrogation arises is illustrated by *Glens Falls Indemnity Co. v. Atlantic Building Corp.*[35] Glens Falls was sued by their insured to recover payment of a settlement made by them arising out of an assault and battery by the president of the insured company. Glens Falls had refused to join in the original suit against their insured, having denied liability under the policy.[36] Glens Falls impleaded the president of the insured company on the theory that the damage suffered by the insured was caused by the president, and therefore he could be held liable to the insured for such damage. Because the policy provided for the subrogation of the insurer to the rights of the insured to recover in the event of payment by the insured, Glens Falls had a claim upon the president if their insured recovered against them. Thus, Glens Falls successfully impleaded the president under Rule 14 of the Federal Rules.

Warranty. Liability for breach of warranty is based upon the right of the purchaser to expect a saleable article answering the

33. Jones, *Contribution Among Tortfeasors*, 11 U. FLA. L. REV. 175, 193 (1958).

34. Boley v. Daniel, 72 Fla. 121, 72 So. 644 (1916). Florida recognizes two types of subrogation. "Legal" subrogation arises by operation of law when one party, having a liability, or a right, pays the debt of another and thereby is entitled to the security or obligation held by the one he has paid. North v. Albee, 155 Fla. 515, 20 So. 2d 682 (1945). "Conventional" subrogation arises when one party, having no real interest, pays the debt of another under an express or implied agreement. Lovingood v. Butler Constr. Co., 100 Fla. 1252, 131 So. 126 (1930).

35. 199 F.2d 60 (4th Cir. 1962).

36. Glens Falls could have been impleaded by their insured in the original suit, subject, of course, to the court's discretion.

description in the contract.[37] Although liability for breach of warranty in the area of products liability is undergoing rapid development,[38] a simple fact situation is illustrative of the use of third-party practice based upon warranty. *A*, a manufacturer, purchases component parts from *B*. *C*, who has been injured by the use of the article produced by *A*, brings suit against *A*. *A*, claiming that the injury to *C* was caused by a defect in the parts supplied by *B*, could seek to implead *B* on the theory of warranty.[39]

Recognizing that Rule 1.41 does not affect substantive rights, a question is raised whether impleader is proper where a substantive right to recovery against a third party is contingent upon liability being established against the party seeking recovery from the third person. In view of the underlying policy of the rule and the explicit language allowing impleader of a person "who is or *may* be liable," the question must be answered affirmatively. The federal courts in interpreting Rule 14 have consistently allowed for this acceleration of liability.[40] Acceleration means that the liability of the party seeking the impleader does not have to be established. It is sufficient that *if* liability is established a claim exists against the third-party defendant. Since many insurance policies indemnify only against "loss," refusal to allow for the third-party defendant's liability to be accelerated would rob the rule of its procedural advantage.[41] Therefore, although a judgment may be obtained on a third-party claim, execution on that judgment should be disallowed until the third-party plaintiff had discharged the judgment against him when the indemnity contract protects against loss only.[42] Also, even though Florida law requires that liability be fixed by judgment in the case of contribution,[43] acceleration of liability should not be precluded, since substantive rights are not affected.

PURPOSE

The purpose of third-party practice is to prevent circuity of action by allowing parties who may be ultimately liable to join in a single action in order that the claims arising out of the subject matter of the

37. See Posey v. Ford Motor Co., 128 So. 2d 149 (1st D.C.A. Fla. 1961).

38. See Note, 17 U. FLA. L. REV. 421 (1964) for a discussion of products liability in Florida.

39. See, *e.g.*, Delta Tank Mfg. Co. v. Weatherhead Co., 150 F. Supp. 525 (N.D. Ohio 1957).

40. *E.g.*, Glens Falls Indem. Co. v. Atlantic Bldg. Corp., 199 F.2d 60 (4th Cir. 1952); Jeub v. B/G Foods, Inc., 2 F.R.D. 238 (D. Minn. 1942).

41. D'Onofrio Constr. Co. v. Recon Co., 255 F.2d 904 (1st Cir. 1958).

42. MOORE, FEDERAL PRACTICE AND PROCEDURE §14.03 (7) (1964).

43. Lopez v. Lopez, 90 So. 2d 456 (Fla. 1956).

suit may be determined in one proceeding.[44] When used with propriety, third-party practice precludes the necessity of trying several related claims in separate law suits, thereby enhancing the administration of justice and expediting the settlement of disputes between parties.

Third-party practice allows for the facilitation of several desirable results. One is to eliminate the time lag between a judgment against a defendant and a subsequent judgment for the defendant against a third party who is liable to him for the amount recovered by the plaintiff. Prior to the adoption of impleader in Florida, only under limited circumstances could a party who had attempted to protect himself from ultimate liability for money damages through an indemnity contract have his rights under that contract adjudicated in the suit that determined his liability to the plaintiff.[45] The defendant, after a judgment had been entered against him, had to initiate a subsequent suit against his alleged indemnitor with a resulting time lag that may have handicapped him. Impleader obviates this handicap. The elimination of separate law suits through impleader also guarantees consistent results flowing out of the same basic set of facts.[46] The cost of duplicating evidence and inconvenience to witnesses by requiring testimony at an additional trial is also avoided.

PROPRIETY OF THE IMPLEADER

The propriety of the impleader should be determined on the basis of two considerations: (1) does the third-party complaint state a claim upon which relief can be granted[47] and (2) will the interests of justice, economy, and expedition be served with due regard to the parties involved.[48]

Legal Sufficiency of the Third-Party Claim

The third-party complaint must set forth a basis for liability of the third-party defendant over to the third-party plaintiff for the plaintiff's claim against the defendant.[49] Rule 1.41, however, should not require that the third-party complaint be based on the same theory as the plaintiff's complaint,[50] but only that the claim arise out

44. American Export Lines v. Revel, 262 F.2d 122 (4th Cir. 1958).
45. See discussion in text following note 10.
46. 1A BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE §422 (1960).
47. McPherson v. Hoffman, 275 F.2d 466 (6th Cir. 1960).
48. Andromidas v. Theisen Bros., 94 F. Supp. 150 (D. Neb. 1950).
49. McPherson v. Hoffman, 275 F.2d 466 (6th Cir. 1960).
50. American Fid. & Cas. Co. v. Greyhound Corp., 232 F.2d 89 (5th Cir. 1956).

of the same occurrence or transaction that makes up the aggregate of operative facts upon which the plaintiff's claim is founded.[51] In determining the legal sufficiency of the third-party complaint, the ultimate facts alleged should be taken as true[52] and a motion to dismiss or vacate the third-party complaint should be granted only if it appears that the third-party plaintiff would not be entitled to relief under any set of facts that could be proved in behalf of his claim.[53]

A third-party complaint cannot be based on direct liability to the plaintiff.[54] To allow such a complaint to stand would pervert third-party practice into an instrumentality for thrusting onto the plaintiff additional parties from whom he may be unwilling and reluctant to recover.[55] The federal courts, however, have held that when the third-party complaint alleges direct liability to the plaintiff as well as liability over to the defendant, the allegations of direct liability will not be fatal to the complaint but will be disregarded as surplusage.[56] When it appears that direct liability of the third-party defendant to the plaintiff is a possibility, the rule provides that the plaintiff *may* assert any claim against the third-party defendant that arises out of the same transaction or occurrence that is the subject matter of the suit. This language is permissive in order that the plaintiff may assert a claim if he so desires. To require the plaintiff to assert what might be a germane claim against the impleaded party could thwart the policy of the rule by requiring the plaintiff to litigate against a party whom he originally may have decided not to sue.

Discretion of the Court

The court may dismiss the complaint even though the third-party complaint states a claim upon which relief can be granted.[57] Such a ruling should be overturned only if there has been an abuse of discretion.[58] The propriety of the impleader is to be considered with due regard to the setting in which it arises, taking into account the timeliness of the impleader with respect to the service of the defendant's answer, and the time set for trial, so as to allow sufficient time for preparation by the third-party defendant.[59] The court should

51. Dery v. Wyer, 265 F.2d 804 (2d Cir. 1959).
52. See Ocala Loan Co. v. Smith, 155 So. 2d 711 (1st D.C.A. Fla. 1963).
53. Rodeheaver v. Sears, Roebuck & Co., 220 F. Supp. 120 (N.D. Ohio 1962).
54. Wolfe v. Johnson, 21 F.R.D. 280 (N.D. W. Va. 1958).
55. Andromidas v. Theisen Bros., 94 F. Supp. 150 (D. Neb. 1950).
56. Keller Crescent Printing & Engraving Co. v. Rosen, 135 F. Supp. 22 (W.D. Pa. 1955).
57. *E.g.*, General Elec. Co. v. Irvin, 274 F.2d 175 (6th Cir. 1960).
58. Wetherbee v. Elgin, Joliet & E. Ry., 191 F.2d 302 (7th Cir. 1951).
59. General Elec. Co. v. Irvin, 274 F.2d 175 (6th Cir. 1960).

also consider the extent to which the evidence required to prove both claims are the same and whether common issues are so closely intertwined that consistent results may depend on their being decided at one time.[60] If impleader will complicate the issues so as to confuse the jury, the third-party complaint may be struck, severed, or separated for trial,[61] although the fact that the issues are more complicated than usual will not by itself justify a denial of impleader.[62] The court should also take into account the risk of prejudice if a party, such as an insurance company, is impleaded.[63] In exercising its discretion, the court ought to apply a balancing test weighing the policy of the rule as against possible prejudice to the parties involved in terms of time, expense, or substantive prejudice.

THE THIRD-PARTY DEFENDANT

Once the third-party defendant has been brought in, a question is raised as to the extent of the impleaded party's rights and liabilities with respect to the other parties to the action. The import of Rule 1.41 is that once the third party is impleaded he becomes a party to the action for most purposes. He may make his defenses to the third-party complaint and move to have the complaint struck.[64] He may assert the defenses available to the third-party plaintiff against the original plaintiff, although he is not required to do so.[65] He may counterclaim against the third-party plaintiff and cross-claim against other third-party defendants.[66] He may also assert a claim against the plaintiff, provided it arises out of the operative set of facts upon which the plaintiff's original complaint is based;[67] and likewise the plaintiff may assert a claim against him.[68] The third-party defendant may also use Rule 1.41 to bring in a person who is or may be liable to him for all or part of a claim made against him in the action.[69]

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60. American Fid. & Cas. Co. v. Greyhound Corp., 232 F.2d 89 (5th Cir. 1956).

61. FLA. R. CIV. P. 1.41 (a).

62. United States v. Yellow Cab Co., 340 U.S. 543 (1951).

63. *Compare* American Zinc Co. of Ill. v. H. H. Hall Constr. Co., 21 F.R.D. 190 (E.D. Ill. 1957), *with* Rosalis v. Universal Distribs., Inc., 21 F.R.D. 169 (D. Conn. 1957). See DeParcq & Wright, *Impleader of Defendant's Insurer Under Modern Pleading Rules*, 38 MINN. L. REV. 229 (1954) for a general discussion on impleading insurance companies.

64. See FLA. R. CIV. P. 1.8, 1.11.

65. Wiggins v. City of Philadelphia, 216 F. Supp. 241 (E.D. Pa. 1963).

66. See FLA. R. CIV. P. 1.13.

67. FLA. R. CIV. P. 1.41.

68. *Ibid.*

69. FLA. R. CIV. P. 1.41 (b) allows a plaintiff to utilize impleader in a counterclaim asserted against him.

What is the extent of the impleaded party's liability to the third-party plaintiff beyond his liability for the plaintiff's claim? In *Noland Co. v. Graver Tank & Manufacturing Co.*,[70] a third-party complaint was filed against a supplier of the defendant subcontractor for his liability to the general contractor. The subcontractor sought to recover damages for loss of profits because of the supplier's default, in addition to recovery for his liability to the general contractor. The third-party defendant objected to this additional claim on the ground that Rule 14, by its language, limited liability to the extent of the defendant's liability to the plaintiff. The court, however, did not construe Rule 14 so narrowly. The additional claim was allowed because the parties had conceded that this claim was not complicated and the facts supporting the subcontractor's ancillary claim were substantially the same as those in the primary action. The result in this case can be justified on the basis of the policy of the rule. Since pretrial procedures can be used to foresee possible complications, allowing similar ancillary claims should be determined on the basis of the court's discretion whether the interests of justice are to be served in the particular case at hand.

JURISDICTION AND VENUE

The jurisdictional grounds for the third-party claim may be derived from the jurisdictional basis of the original claim.[71] Allowing ancillary jurisdiction as the basis for Rule 1.41 does not appear to contravene previous Florida law,[72] and to require independent grounds of jurisdiction would emasculate third-party practice. Likewise, venue should not be an obstacle to impleader. Sections 46.01, .02, .03, and .04 of the Florida Statutes determine the venue of the original action, and as long as these requirements are met the third-party defendant should not be heard to object on the basis of venue.[73] If substantial inconvenience inures to the third-party defendant, he may ask the court to exercise its discretion and dismiss the complaint against him.[74]

If the plaintiff asserts a claim against the third-party defendant, or if the third-party defendant asserts a claim against the plaintiff as permitted by Rule 1.41, the jurisdiction of the court should not be effected unless the amount in controversy exceeds the jurisdictional limits of the court.[75] Of course, if such a claim is asserted and there is jurisdictional basis for the claim, the right of a party to counter-

70. 301 F.2d 43 (4th Cir. 1962). (See change in text.)
71. Dery v. Wyer, 265 F.2d 804 (2d Cir. 1959).
72. See FLORIDA CIVIL PRACTICE BEFORE TRIAL §11.8 (1963).
73. *Accord*, United States v. Acord, 209 F.2d 709 (10th Cir. 1954).
74. Southern Milling Co. v. United States, 270 F.2d 80 (5th Cir. 1959).
75. *Cf.* FLORIDA CIVIL PRACTICE BEFORE TRIAL §6.25 (1963).

claim is governed by Rule 1.13. Also, no problem of venue should be raised with respect to these claims.[76] Venue is directed toward facilitating the convenience of the parties while requiring the forum to be related to the action. Since such a claim must arise out of the same occurrence or transaction that is the subject matter of the plaintiff's original claim, sufficient protection is afforded to see that the forum is reasonably related to the additional claim.

CONCLUSION

Third-party practice can be of great service to the administration of justice. The facility of this procedural device should cut down the ultimate cost of litigation, provide for the speedier determination of legal rights, and relieve, to some extent, the problem of crowded dockets.

A superficial examination of Rule 1.41 might lead to a conclusion that it is a tool for the defendant and so it should be construed liberally in favor of the defendant. The statement is true as far as it goes, but it does not present the whole picture. The plaintiff's interests must be protected so that his substantive rights are not affected and he is not required to litigate with a party he originally determined not to bring in the suit. The interests of the third-party defendant must also be protected to prevent Rule 1.41 from being used as a means of harassment.

The adoption of Rule 1.41 is a significant advancement in the procedural law of Florida; however, its success or failure will depend upon a proper utilization by the attorney and the "sense of justice" of the judge who determines the propriety of the impleader.

DENNIS J. MCGILLICUDDY

76. MOORE, FEDERAL PRACTICE AND PROCEDURE §14.03 (21) (1964).