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IMPLEADER OF DEFENDANT'S INSURER UNDER MODERN PLEADING RULES

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May a defendant in a negligence action implead his liability insurer under Rule 14 of the Minnesota Rules of Civil Procedure, and under the similar rule in other jurisdictions which have adopted modern pleading? This question has been much discussed among lawyers since the Minnesota Rules became effective.

In the first trial court decision on the point under the Minnesota Rules, it was held that such impleader was proper. The insurance company sought to appeal from an order denying its motion to vacate the order allowing impleader. The present writers filed a brief *amici curiae* in which we canvassed the holdings in other jurisdictions on the procedural point involved. Since the supreme court held, quite correctly, that an order allowing impleader, or an order refusing to vacate impleader previously allowed, is interlocutory and therefore not appealable,¹ the court had no occasion to get to the merits of the question. But the issue is sure to come up again. With the thought, therefore, that the cases we had collected might be helpful to other judges faced with the question, and to members of the bar interested in its determination, we have undertaken to present the substance of our brief in this Article.

At the outset we note that this problem can arise only in that limited class of cases where the insurer has disclaimed liability and refused to defend on behalf of the defendant insured. If the insurer is conducting the defense, it is hardly likely to seek to implead itself; and any attempt by the insured to implead the insurer who has not disclaimed liability would clearly be a breach of the "cooperation" clause of the policy of insurance.

When the problem is thus delimited, its answer is as clear as

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1. *Luethi v. Stanko*, 61 N. W. 2d 522 (Minn. 1953). The New Jersey Supreme Court has reached the same result under statutes similar to those of Minnesota and involving the same fact situation, *viz.*, an order refusing to dismiss a third party complaint against defendant's insurance company. *Petersen v. Falzarano*, 6 N. J. 447, 79 A. 2d 50 (1951). The court buttressed its conclusion that the order was not appealable by pointing out that impleader of the insurer does not deprive it of any substantial right.

the answer to any legal problem ever can be: there can be no possible doubt but that Rule 14 does permit impleader of the insurer who has refused to defend.

Every instinct of convenient and economical administration of justice compels this answer. And it is equally compelled by the unanimous teaching of the authorities. With the exception of a few trial court decisions, which have been repudiated by the appropriate appellate court, every American decision interpreting an impleader rule substantially similar to Minnesota Rule 14.01 has allowed defendant to implead his liability insurer where the insurer has refused to defend.

A leading state court decision is *Pioneer Mutual Compensation Co. v. Cosby*.² Defendant had impleaded his insurer under Colorado Rule 14 (a). The insurer raised numerous objections to the impleader, among which was that the "no action" clause of the insurance policy barred this procedure. The Colorado Supreme Court affirmed bringing in the insurance company as a third party defendant saying:

"If the Insurance Company has by its policy agreed to insure against liability on the part of the Cosbys, or either of them, then this third party procedure is justified and the third party plaintiffs are only seeking to compel the Insurance Company to do that which it contracted to do but now refuses to do. * * * The insured had a right to file a third party complaint against the insurer to have all rights and liabilities determined in one action, it appearing that the Insurance Company was not defending the main action on behalf of its insured."³

A recent New York trial court decision⁴ held that impleader of defendant's insurer was "squarely within" the provisions of Section 193-a of the New York Civil Practice Act, which is substantially the same as Minnesota Rule 14.01.⁵ There is dicta in a Missouri case that the Missouri statute⁶ identical to Minnesota Rule 14.01, allows impleader where the "third party is liable as guarantor,

2. 125 Colo. 468, 244 P. 2d 1089 (1952). That the public policy in Colorado against allowing the jurors to know of the existence of insurance is not less strong than in Minnesota is indicated by *Crowley v. Hardman Brothers*, 122 Colo. 489, 223 P. 2d 1045 (1950), holding that Colo. R. Civ. P. 18 and 20 do not permit plaintiff to join the insurer as a party defendant.

3. 125 Colo. at 471-472, 244 P. 2d at 1091-1092.

4. *Koolery v. Lindemann*, 91 N. Y. S. 2d 505 (Sup. Ct. 1949).

5. To the same effect see also *Lecouna Cuban Boys, Inc. v. Kiamasha Concord, Inc.*, 276 App. Div. 808, 93 N. Y. S. 2d 113 (3d Dep't 1949); *J. A. Ewing & McDonald, Inc. v. Municipal Warehouse Co.*, 193 Misc. 173, 81 N. Y. S. 2d 559 (N.Y. City Ct. 1948).

6. Mo. Rev. Stat. § 507.080 (1949).

surety, insurer or indemnifier of the principal defendant."⁷ In addition, such impleader has been approved by the commentators⁸ and has been said to have been proper in the federal courts.⁹ Finally, the principal draftsman of the Federal Rules, on which the Minnesota Rule here involved is patterned, indicated that this result should be reached.¹⁰

The argument has been advanced that although impleader of an insurer may be proper in the abstract, still it is not permissible where the policy of insurance contains either a "no action" clause or a provision that "nothing contained in this policy shall give any person or organization any right to join the company as a co-defendant in any action against the insured to determine the insured's liability." The authoritative answer to this argument is made by Professor Moore who says:

"The fact that the policy stipulates that no action will lie against the insurer until judgment has been rendered against the insured and has been paid by him is no bar to impleader: as we have shown above third-party practice may accelerate the accrual of a right, and its objectives would be defeated if a 'no action' clause were held to make rule 14 inapplicable."¹¹

7. *Hipp v. Kansas City Public Service Co.*, 237 S. W. 2d 928, 931 (Mo. App. 1951).

8. See Holtzoff, *Some Problems Under Federal Third-Party Practice*, 3 La. L. Rev. 408, 411 (1941): "In those instances, which form a comparatively small minority of cases, in which insurance carriers dispute liability on the policy, the defendant may bring in the insurance carrier as a third party defendant 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." And Note, 49 Col. L. Rev. 861, 862 (1949), concludes: "Thus, impleader of an insurer results in an appreciable saving in litigation and will spare the insured defendant the considerable delay in securing reimbursement which would otherwise result from crowded calendars." See also Crawford, *Third-Party Practice Under the Missouri Code*, 19 Kan. City L. Rev. 16, 33-34 (1950); Wright, *Joinder of Claims and Parties Under Modern Pleading Rules*, 36 Minn. L. Rev. 530, 615-617 (1952); Commentary, *Impleading of Insurer as Third-Party Defendant*, 2 Fed. R. Serv. 650 (1940); Comment, *Estoppel, Third-Party Practice, and Insurer's Defense*, 19 U. of Chi. L. Rev. 546 (1952).

9. *E.g.*, *Axton-Fisher Tobacco Co. v. Ziffrin Truck Lines*, 36 F. Supp. 777 (W.D. Ky. 1941), *aff'd*, 126 F. 2d 476 (6th Cir. 1942); *Jenkins v. Black & White Cab Co.*, 19 Fed. R. Serv. 14a.221, case 1 (D. D.C. 1953); *Knapp v. Hankins*, 106 F. Supp. 43 (E.D. Ill. 1952).

10. Proceedings of Cleveland Institute on Federal Rules, 250-259 (A.B.A. 1938). The only contrary authorities seem to be 6 *Cyclopedia of Federal Procedure* § 17.08 (3d ed. 1951), which concedes that impleader of an insurer falls within the language of the rule, but says that "public policy considerations may well enter in to prevent such consummation," though citing no authority later than 1941; and *Chizik v. Fuchs*, 193 Misc. 297, 76 N. Y. S. 2d 437 (N.Y. City Ct. 1947), which, as will be seen, has been repudiated by later New York decisions.

11. 3 Moore, *Federal Practice* § 14.12 (2d ed. 1948).

Two trial court decisions have rejected Professor Moore's reasoning and have held that a "no action" clause or a policy provision against joinder of insurer, is a waiver of the right to implead the insurance company.¹² But the great bulk of decisions has been to the opposite effect.

The leading case is *Jordan v. Stephens*,¹³ which has been relied on not only in federal courts but also by the Colorado Supreme Court.¹⁴ In the *Jordan* case the court said:

"The 'no-action' clause is directly opposed to Rule 14. It poses a question as to whether the court should permit litigants to circumvent rules of court by contractual arrangements. Rule 14 was promulgated not only for the purpose of serving litigants but as a wise exposition of public policy. The object of the rule was to facilitate litigation, to save costs, to bring all of the litigants into one proceeding, and to dispose of an entire matter without the expense and the labor of many suits and many trials. The no-action provision of the policy is neither helpful to the third-party defendant, to the courts, nor generally is it in the interest of the public welfare. Its object is to put weights on the already too slow feet of justice. Moreover, such provision, if permitted to become effective, should not operate in this case for the reason that the third-party defendant is alleged to have breached its contract. According to the third-party complaint, it has declined to perform the obligation of its undertaking in any way. It has refused to defend the defendants or third-party plaintiffs and has declined to meet the expenses contemplated by its contract. Under such circumstances it should not be permitted to interpose contractual provisions of a contract it has repudiated."¹⁵

Similarly in another recent federal case it was said that the "no action" clause is "unenforceable, as being against the public policy to simplify procedure and administer prompt justice, declared in Rule 14."¹⁶ The court gave as an alternative ground for its holding the fact that the policy also contained a promise to defend on behalf of the insured, and that the insurer was, in any event, properly impleaded because of its breach of this promise.

The cases previously cited holding that the "no action" clause is a waiver of the right to implead were New York trial court decisions. Appellate decisions in that jurisdiction have gone the other

12. *Auliso v. California Oil Co.*, 120 N. Y. S. 2d 582 (Sup. Ct. 1952); *Litman v. Garfinkle*, 81 N. Y. S. 2d 296 (Sup. Ct. 1948).

13. 7 F. R. D. 140 (W.D. Mo. 1945).

14. *Pioneer Mutual Compensation Co. v. Cosby*, 125 Colo. 468, 244 P. 2d 1089 (1952). See note 2 *supra* and text thereto.

15. *Jordan v. Stephens*, 7 F. R. D. 140, 142 (W.D. Mo. 1945).

16. *McLouth Steel Corp. v. Mesta Machine Co.*, 17 Fed. R. Serv. 14a.221, case 1 (E.D. Pa. July 1, 1952).

way and held specifically that the "no action" clause is not such a waiver of or a bar to impleader.¹⁷ These cases are said to have overruled the trial court decisions denying impleader where the policy contained a "no action" clause.¹⁸

It has been suggested, on the basis of *Anderson v. State Farm Mutual Automobile Insurance Co.*¹⁹ that a "no action" clause creates a "substantive right" which may not be affected by a mere rule of procedure. This suggestion requires an analysis of the nature of this supposed substantive right. Such an analysis was offered by the court in a well-reasoned New York decision:²⁰

"I think this provision, reasonably construed, means merely that there may be no recovery against the assurer except on the basis of a final judgment against the assured or unless the claim has been liquidated by agreement of the parties with the consent of the assurer. * * * It seems to me, therefore, that the purpose underlying the above-quoted provision of the policy is met if at the time recovery is had against the assurer, judgment has been allowed, even though not yet formally entered, against the assured. The interposition of a cross complaint or of a third party complaint under section 193-a of the Civil Practice Act, is not in derogation of the said provision of the policy. The underlying purpose of that provision is fully achieved inasmuch as there can be no recovery under the third-party complaint * * * There is no reason why the loss or expense suffered by the assured, and the right of the assured to indemnity from the assurer, may not be determined in the same action if only the assurer is safe against the possibility that there will be recovery against it in the absence of and before judgment is allowed against the assured."²¹

Finally, it has been intimated in some cases that impleader of the insurer may prejudice it, and that this is sufficient reason for denying such impleader though it would fall within the language of the Rule. The argument is advanced in greatest detail by a lawyer for an insurance company²² who suggests that it is not necessary to do more than "state the proposition" in order to demonstrate its validity. The proposition does, indeed, find some support in cases

17. *Brooklyn Yarn Dye Co. v. Empire State Warehouse Corp.*, 276 App. Div. 611, 96 N. Y. S. 2d 738 (2d Dep't 1950); *Adelman Mfg. Corp. v. New York Wood Finisher's Supply Co.*, 277 App. Div. 1117, 100 N. Y. S. 2d 867 (2d Dep't 1950).

18. *Shapiro v. City of New York*, 121 N. Y. S. 2d 609 (Sup. Ct. 1953).

19. 222 Minn. 428, 24 N. W. 2d 836 (1946).

20. *Judy Negligee, Inc. v. Portnoy*, 194 Misc. 508, 89 N. Y. S. 2d 656 (N.Y. City Ct. 1949).

21. *Id.* at 510-511, 89 N. Y. S. 2d at 657-658.

22. *Bisselle, Impleader of Casualty Insurance Companies in New York State*, 18 Ins. Counsel J. 37 (1951).

which have allowed impleader but have ordered separate trials of the claim against the insurer from the principal claim, at least where the trial is to be to a jury rather than to the court.²³ Recent authorities, however, reject this line of argument. In *A B & C Motor Transportation Co. v. Moger*²⁴ the court said:

"The argument in the reply brief, that to import the insurance company into the case may react unfavorably to this plaintiff before a jury, is less than convincing. In this day and generation there may possibly remain a vestige of ingenuousness in the minds of jurors concerning insurance vehicles, but I venture to doubt it. The current facts of life, concerning the ultimate financial responsibility involved, are pretty generally known by personal experience or the reading of newspaper and magazine advertising, on the part of those of sufficient intelligence to qualify as jurors in this court. Indeed, the size of the verdicts may not be unrelated to that awareness."²⁵

And in another federal case the court said, with regard to the argument that the insurer would be prejudiced if it were known that liability might be visited upon it:

"While there have been many judicial decisions to this effect, beginning many years ago when automobile insurance was much less customary, it may be doubted whether now, in view of the fact that automobile liability insurance is so general, the rule should be so rigidly applied * * * In case the insurer denies liability and refuses to defend the action in accordance 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."²⁶

23. *Remch v. Grabow*, 193 Misc. 731, 70 N. Y. S. 2d 462 (Sup. Ct. 1947); *DeLany v. Allen*, 105 N. Y. S. 2d 635 (Sup. Ct. 1951); *Casserta v. Beaver Construction Corp.*, 197 Misc. 410, 95 N. Y. S. 2d 131 (Sup. Ct. 1949); *Kane v. Kane Ship Repair Corp.*, 202 Misc. 530, 118 N. Y. S. 2d 515 (Sup. Ct. 1952).

24. 10 F.R.D. 613 (E.D. N.Y. 1950).

25. *Id.* at 615. The Minnesota Supreme Court seems to take the same attitude. Thus in *Odegaard v. Connolly*, 211 Minn. 342, 345-346, 1 N. W. 2d 137, 139 (1941), the court said:

"We think too much is made of the fact that parties to an automobile collision carry insurance. It is safe to assert that the majority of every jury, called to try such a case in the Twin Cities, comes from families owning cars carrying liability insurance. Every person fit to be a juror knows that none but the wholly irresponsible and reckless fail to carry liability insurance on the car they own or drive. Owners of cars for the protection of their families and guest passengers carry such insurance. So long as the insurance is not featured or made the basis at the trial for an appeal to increase or decrease the damages, the information would seem to be without prejudice."

26. *Tullgren v. Jasper*, 27 F. Supp. 413, 416 (D. Md. 1939); *cf. Jenkins*

CONCLUSION

It has been shown that courts in some twenty cases, from such disparate jurisdictions as New York, Colorado, New Jersey, Missouri, and the federal courts, have held that impleader of an insurer is proper when the insurer has denied liability and refused to defend. With the exception of a few trial court decisions, now repudiated by the appropriate appellate court, no American court has refused to allow impleader under these circumstances when it has been governed by a rule substantially similar to Minnesota Rule of Civil Procedure 14.01. It may confidently be expected that Minnesota courts will continue to permit such impleader and, save under extraordinary circumstances, will not grant a separate trial as to the insurer.

v. *Black & White Cab Co.*, 19 Fed. R. Serv. 14a.221, case 1 (D. D.C. 1953). Perhaps the best analysis supporting the conclusion that no prejudice to the insurer can result from its impleader is contained in 36 Minn. L. Rev. 421 (1952); and see also Comment, 19 U. of Chi. L. Rev. 546 (1952), arguing that it is to the insurer's advantage, in cases where he has refused to defend, to be impleaded, and that if he is not impleaded he should seek to intervene in the action.