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RECENT DEVELOPMENTS

Eleventh Amendment, Judicial Code, and Federal Rules of Civil Procedure Restrict Ability of United States To Implead a State in Connection With Suit Commenced by a Private Citizen—*Parks v. United States**

Suit was brought by an individual against the United States under the Federal Tort Claims Act[1] to recover compensation for property damage alleged to have been caused by the Government's negligence in constructing and maintaining the physical components of a flood-control project in New York. Relying upon New York's promise to hold the United States harmless on any liability arising from damage of this nature, the Government impleaded the state. On a motion before the United States District Court for the Northern District of New York to dismiss the state as a third-party defendant, *held*, motion granted. The Federal Rules of Civil Procedure do not authorize service of a third-party complaint on a state, and the federal courts do not have jurisdiction to entertain such a complaint filed by the United States; moreover, the eleventh amendment to the federal constitution circumscribes an attempt by the Government to join a state as an involuntary third-party defendant when the principal action was commenced by a private citizen.[2]

Rule 14(a) of the Federal Rules of Civil Procedure allows a defendant in a federal court to bring before the tribunal any "person" subject to its jurisdiction who may be liable to the defendant for all or part of the amount which the plaintiff seeks to recover.[3] After he has been properly served with process, this newcomer is termed a third-party defendant, and in relation to him the defendant in the principal action is the third-party plaintiff.[4] As a matter of

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* 241 F. Supp. 297 (N.D.N.Y. 1965).

1. 28 U.S.C. § 1346(b) (1964).

2. U.S. CONST. amend. XI: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." See generally note 19 *infra*.

3. Rule 14(a) provides in part: "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 United States, as a defendant in a suit under the Tort Claims Act, may implead a third party under rule 14(a). Schetter v. Housing Authority, 132 F. Supp. 149 (W.D. Pa. 1955); see Fong v. United States, 21 F.R.D. 385 (N.D. Cal. 1957); Skinner v. United States, 209 F. Supp. 854 (E.D. Ill. 1960).

4. See 1A BARRON & HOLTZOFF, FEDERAL PRACTICE & PROCEDURE § 421 (Rules ed. 1960).

ordinary legal usage, however, the sovereign is not a "person."[5] The court in the principal case believed that this usage was helpful in determining the applicability of rule 14(a) when an attempt is made to implead a state, especially in light of the fact that Congress had defined "person" in the canons of construction for the United States Code, to which the Federal Rules of Civil Procedure are appended, without suggesting that the word was meant to embrace states.[6] There is no indication in the canons themselves, however, that Congress intended the definition of any term therein to be exclusive.[7] In fact, the United States Supreme Court, after examining the "legislative environment" of several Code provisions employing the word "person," has found states to be within the meaning of the term as used in those particular sections.[8] Although rule 14(a) does not expressly provide that states can be impleaded, it does not even suggest that they cannot be, and its draftsmen do not appear to have felt that states should be immune from service of a third-party complaint.[9] Rule 14(a) is usually construed liberally, because an impleader proceeding saves the time of courts and litigants alike by functioning as an alternative to an independent suit by the defendant in the principal action against a third party after the former has been found liable to the principal plaintiff.[10] Indeed, the United States and various federal and state agencies have been successfully impleaded under rule 14(a),[11] and, as the court in the principal case recognized, third-party practice is just as useful whether the third party is a state, an individual, or other entity.[12]

The court in the principal case also held that the language in section 1345 of title 28 of the United States Code,[13] which gives fed-

5. United States v. United Mine Workers, 330 U.S. 258, 272 (1947).

6. 1 U.S.C. § 1 (1964).

7. *Ibid.*

8. *E.g.*, Sims v. United States, 359 U.S. 108 (1959) (states are "persons" within the meaning of INT. REV. CODE OF 1954, § 6332); Georgia v. Evans, 316 U.S. 159, 161 (1942) (states are "persons" as that term is used in § 7 of the Sherman Act, 26 Stat. 210 (1890), as amended, 15 U.S.C. § 15 (1964)); Ohio v. Helvering, 292 U.S. 360, 370 (1934) (states are "persons" within the meaning of REV. STAT. § 3244 (1875)). See also United States v. California, 297 U.S. 175, 186 (1936), where the Court observed: "The presumption [that the sovereign is not bound unless named] is an aid to consistent construction of statutes when their purpose is in doubt, but it does not require that the aim of a statute fairly to be inferred be disregarded because not explicitly stated."

9. See FED. R. CIV. P. 14(a) (Notes of Advisory Committee).

10. See, *e.g.*, Spring Hill Dairy v. Elswick, 20 F.R.D. 397 (E.D. Ky. 1957).

11. See, *e.g.*, United States v. Yellow Cab Co., 340 U.S. 543 (1951) (United States impleaded); Darby v. L. G. DeFelice & Son, 94 F. Supp. 535 (E.D. Pa. 1950) (Pennsylvania Turnpike Commission impleaded). In none of these cases did the court specifically deal with the meaning of the term "person" in rule 14(a).

12. The principal case is the first to decide whether the United States may implead a state in connection with a suit initiated by a private party. United States v. Arizona, 214 F.2d 389 (9th Cir. 1954), discussed but did not decide the question.

13. 28 U.S.C. § 1345 (1964): "Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings

eral district courts jurisdiction over "all civil actions, suits or proceedings when commenced by the United States," did not confer jurisdiction over the Government's third-party claim against a state because the principal action to which the third-party claim would have been ancillary had been commenced by a private party and not by the United States. However, the Government, as the third-party plaintiff, had commenced the impleader action, and "proceeding," the crucial word in section 1345, has been defined broadly enough to include the adjudication of a third-party claim.[14] Moreover, the court's interpretation does violence to the statutory scheme of which section 1345 is an integral part. By acceding to the federal constitution, the states have "agreed" to be sued by the United States.[15] Prior to the 1948 revision of the Judicial Code, however, only the United States Supreme Court had jurisdiction over such actions.[16] To allow federal district courts to entertain Government suits against the states, Congress in 1948 enacted section 1345 along with section 1251(b)(2) of title 28. The latter provision vests the Supreme Court with "original but not exclusive jurisdiction of all controversies between the United States and a State."[17] The Reviser's Note to section 1251 and at least one appellate court opinion indicate that the effect of sections 1251(b)(2) and 1345 taken together is to eliminate the need for any further congressional action to confer upon the district courts jurisdiction to hear any type of judicial controversy between the federal government and a state.[18] It appears, therefore, that the word "commence" in section 1345 is unnecessary to give effect to the purpose of the provision insofar as the enactment confers jurisdiction over litigation between the United States and a state.

Possibly believing that its interpretations of rule 14(a) and section 1345 were overly restrictive, the court dismissed the Government's third-party complaint only after giving extensive consideration to the eleventh amendment, which protects a state's sovereign right not to be made an involuntary defendant to a claim asserted by a private individual by providing that no federal court has jurisdiction to entertain an action by a private citizen against a state which has not consented to be sued.[19] While the court was unques-

commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress."

14. See Statter v. United States, 66 F.2d 819, 822 (9th Cir. 1933).

15. United States v. Texas, 143 U.S. 621, 644-46 (1892).

16. See United States v. California, 328 F.2d 729 (9th Cir.), *cert. denied*, 379 U.S. 817 (1964).

17. See generally United States v. California, *supra* note 16.

18. *Id.* at 737; see Wagner, *The Original and Exclusive Jurisdiction of the United States Supreme Court*, 2 ST. LOUIS U.L.J. 111, 142 (1952); 38 N.Y.U.L. REV. 405, 410 (1963).

19. After the Supreme Court accepted jurisdiction of a suit against a state by a citizen of another state in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), the anxiety manifested by the several states was so strong that at the first session of Congress sub-

tionably correct in stating that rule 14(a) cannot be employed in a manner which would infringe a third party's substantive rights[20]—let alone in a way which would override the United States Constitution—it was mistaken in concluding that the eleventh amendment or the policy behind its adoption serves to immunize a state from a third-party proceeding initiated by the United States simply because the federal government was the defendant in the principal action initiated by a private citizen.

The United States may sue a state irrespective of the latter's consent.[21] Indeed, the court in the principal case recognized that if the plaintiff obtained a judgment against the United States, the Government would be able to recover from New York by bringing a later, independent action in a federal court.[22] Therefore, to have considered the application of rule 14(a) to New York as an infringement of the state's substantive rights, the court must have believed that, if the third-party complaint were not dismissed, the plaintiff in the principal action would have received some advantage inconsistent with the state's prerogative not to be sued by him. However, the test for determining whether a third party may be brought into court under rule 14(a) is not whether the plaintiff in the principal action appears to have a claim against him, but rather whether the principal defendant may have a right of recovery from him—by way of indemnity, contribution, or otherwise—for any part of the principal plaintiff's claim for which the principal defendant is found liable.[23] Furthermore, a third-party defendant's joining the litigation creates no rights against him in favor of the plaintiff.[24] Conse-

sequent to the Court action the eleventh amendment was proposed. See U.S. LEGISLATIVE REFERENCE SERVICE, THE CONSTITUTION OF THE UNITED STATES OF AMERICA 1046-47 (1964). Although the amendment does not expressly prohibit a suit in a federal court by a private citizen against his own state, the Court has so construed it. Hans v. Louisiana, 134 U.S. 1 (1890).

20. See Hanna v. Plumer, 380 U.S. 460 (1965).

21. United States v. Texas, 143 U.S. 621 (1892).

22. See United States v. Arizona, 214 F.2d 389 (9th Cir. 1954), suggesting by way of dictum that the United States may assert a right of recovery over against a state in a federal district court. See also United States v. California, 328 F.2d 729 (9th Cir.), *cert. denied*, 379 U.S. 817 (1964), holding that federal district courts have jurisdiction to entertain suits commenced by the United States against a state, regardless of the subject of the controversy.

23. 1A BARRON & HOLTZOFF, *op. cit. supra* note 4, § 426, at 681-82; 3 MOORE, FEDERAL PRACTICE ¶ 14.10 (2d ed. 1964).

24. Davies v. Dotson, 198 F. Supp. 612 (E.D. Pa. 1961) (third-party action in a federal court adjudicates the rights of the third-party plaintiff and the third-party defendant *inter sese*). The plaintiff in the principal action, however, is free to amend his complaint to state a claim against the third-party defendant once the latter has been brought into court. FED. R. CIV. P. 14(a). Nevertheless, with almost complete unanimity courts have held that the controversy initiated by such an amendment can be maintained only if it could have been the basis for an independent suit between the principal plaintiff and the third-party defendant in the same court. 3 MOORE, FEDERAL PRACTICE ¶ 14.27, at 721 (2d ed. 1964).

quently, a judgment against the third-party defendant on the third-party complaint inures solely to the benefit of the defendant in the principal action.[25] The principal case apparently represents the first attempt by a defendant against whom sovereign immunity from involuntary suit was no defense to implead a state when the plaintiff in the principal action could not have sued the state. However, there are decisions which have held that the United States may be impleaded by a defendant on whose behalf the Government had waived its immunity, despite the fact that it had not waived its immunity for the benefit of the plaintiff in the principal action.[26] These cases suggest that, when an attempt is made to bring a sovereign entity

25. Davies v. Dotson, 198 F. Supp. 612 (E.D. Pa. 1961); Chevassus v. Harley, 8 F.R.D. 410 (W.D. Pa. 1948); 1A BARRON & HOLTZOFF, *op. cit. supra* note 4, at 681; see note 24 *supra*.

26. A federal employee injured in the course of his employment can demand compensation from the Government only under the Federal Employees Compensation Act § 751a, 63 Stat. 861 (1949), 5 U.S.C. § 751 (1964). It is generally said that the United States has waived its immunity to suit to the extent that the employee is permitted to recover under the act. See Drake v. Treadwell, 299 F.2d 789 (3d Cir.), *vacated & remanded per curiam*, 322 U.S. 772 (1963). Occasionally a federal employee injured in the course of his employment because of the concurrent negligence of the United States and some third party has sued the third party in tort. Generally, a defendant who is a joint tortfeasor with the Government has a right to contribution from the United States and can enforce it by impleading the Government under the Federal Tort Claims Act. See United States v. Yellow Cab Co., 340 U.S. 543 (1951). However, since the injured employee who had commenced the tort suit against the private joint tortfeasor could not have sued the United States in a tort action, the question has arisen whether this defendant is still free to implead the Government in connection with the employee's suit, so as to enforce the defendant's right of contribution. It has generally been held that impleader is permissible. Drake v. Treadwell, C.A. No. 14517, W.D. Pa., orders of May 24, 1963, and July 7, 1963, *on remand from* 372 U.S. 772 (1963); Hart v. Simons, 223 F. Supp. 109 (E.D. Pa. 1963). *But see* Busey v. Washington, 225 F. Supp. 416 (D.D.C. 1964). See Martin v. United States, 162 F. Supp. 441 (E.D. Pa. 1958), suggesting in dictum that a municipality's immunity from suit for the negligence of its agents which would bar plaintiff's claim against the municipality might not prevent the United States from impleading the municipality. See also Schetter v. Housing Authority, 132 F. Supp. 149 (W.D. Pa. 1955).

The holding in the principal case not only denied the United States the privilege of initiating an impleader proceeding but also would force the Government to relitigate the question of its liability to the plaintiff in the principal action in any subsequent suit brought by the United States against New York to recover the amount of a judgment obtained against the Government by the principal plaintiff. Generally, an indemnitor, such as New York, who was given notice of a claim against his indemnitee of the type to which his indemnity agreement refers and an opportunity to join the defense of that claim is bound by a finding establishing the indemnitee's liability to the claimant. Washington Gas Light Co. v. District of Columbia, 161 U.S. 316 (1896); New York & Porto Rico S.S. Co. v. Lee's Lighters, Inc., 48 F.2d 372 (E.D.N.Y. 1930); RESTATEMENT, JUDGMENTS § 107 (1942). However, an attempt by the United States to bind New York by a judgment adverse to the Government, rendered after the dismissal of the state as a third-party defendant, would be met by an objection similar to that which the court in the principal case considered determinative of the impleader issue, since the attempt would have arisen from an effort to force the state to appear in the same proceedings with the plaintiff in the principal action and to assist the Government in defeating the principal plaintiff's claim. See 65 COLUM. L. REV. 1506, 1509 (1965).

into court as a third-party defendant, no attention need be given to the question whether the principal plaintiff can sue the sovereign.

Actually, the court in the principal case did recognize that if New York were impleaded it would not be subjected to suit by a private citizen, but felt that in effect the state would be engaged in the proceedings as though it were being sued by the principal plaintiff—an impermissible situation absent state legislation indicating a waiver of immunity. As long as no judgment is sought against it, however, the mere fact that a state is involved in a judicial proceeding and is forced to litigate against a private citizen to protect its interests does not indicate that the state is being sued within the meaning of the eleventh amendment.[27] Furthermore, rather than having demanded, as a prerequisite to allowing the state to be impleaded, evidence that New York had waived its immunity from suit by a private party, the court could simply have held that New York's "consent" to suit by the United States, expressed by the state's acceding to the federal constitution, was broad enough to include consent to become a party to a proceeding commenced by impleader by the United States.[28]

Suits by the federal government against the states must inevitably increase in number as both the national and state governments expand their activities.[29] By giving undue respect to the doctrine of sovereign immunity, the principal case presents an unnecessary impediment to the efficient adjudication of these disputes.

27. See Gardner v. New Jersey, 329 U.S. 565, 573-74 (1947).

28. See note 15 *supra* and accompanying text. An additional ground for saying that New York impliedly waived its sovereign immunity could be found in its promise to hold the United States harmless on its liability for damage of the type which occurred in the principal case. Because such indemnity agreements often lead to third-party proceedings, it would seem logical to hold that New York had consented to involvement in such proceedings. See 65 COLUM. L. REV. 1509 (1965).

29. See United States v. California, 328 F.2d 729 (9th Cir.), *cert. denied*, 379 U.S. 817 (1964).