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CPLR 1007: Second Department Permits Third-Party Claim for Damages in Excess of Sum Demanded in Plaintiff's Complaint

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situation, the defendant has reason to know that a class may be certified; it is suggested, therefore, that only where a defendant can show actual prejudice should the relief granted be limited to the named plaintiff.[58]

Moreover, the *O'Hara* decision severely weakens the utility of the class action device by affording the defendant a possible escape from liability to the remainder of the putative class.[59] Indeed, the result reached in *O'Hara* may encourage some defendants served with a class action complaint to use the motion to dismiss only to preempt class certification. The Court is exhorted, therefore, to reevaluate its position to avoid the abuses and injustices that its decision may foster.

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ARTICLE 10—PARTIES GENERALLY

CPLR 1007: Second department permits third-party claim for damages in excess of sum demanded in plaintiff's complaint

CPLR 1007 permits a defendant to implead a nonparty "who is or may be liable to him for all or part of the plaintiff's claim

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decision on the merits on the court's own motion or on motion of the parties, CPLR 902; *see* note 31 *supra*, certification at the time summary judgment is granted under CPLR 3211(c) could be seen as an extension of the wide discretion the court has on the certification issue. *See generally* THIRTEENTH ANN. REP. OF THE JUD. CONFERENCE ON THE CPLR (1975), in TWENTY-FIRST ANN. REP. N.Y. JUD. CONFERENCE 252 (1976). *See also* Jimenez v. Weinberger, 523 F.2d 689, 697 (7th Cir. 1975).

Furthermore, it is submitted that since the class action and the accelerated judgment serve similar purposes, the two devices should be permitted to achieve most effectively their intended functions. The summary judgment procedure enables the courts to avoid needless litigation in cases where the issues are merely superficial. Andre v. Pomeroy, 35 N.Y.2d 361, 364, 320 N.E.2d 853, 854, 362 N.Y.S.2d 131, 133 (1974); Richard v. Credit Suisse, 242 N.Y. 346, 350, 152 N.E. 110, 111 (1926). Permitting several claims to be sued upon in one proceeding, the class action also reduces the burdens on the judicial system. Homberger, *State Class Actions and the Federal Rule*, 71 COLUM. L. REV. 609, 609-11 (1971).

[58] *See* Alexander v. Aero Lodge No. 735, 565 F.2d 1364, 1371-72 (6th Cir. 1977), *cert. denied*, 436 U.S.946 (1978); Senter v. General Motors Corp., 532 F.2d 511, 520-22 (6th Cir.), *cert. denied*, 429 U.S. 870 (1976); Jimenez v. Weinberger, 523 F.2d 689, 697-99 (7th Cir. 1975).

[59] One of the intended functions of the class action is to allow many individuals with small claims to share the otherwise prohibitive costs of the litigation with others similarly situated. *See* SIEGEL § 139, at 173. Following the decision in *O'Hara*, it is possible that expense will deter any other class member from initiating a subsequent action, thus enabling a wrongdoer to escape substantial liability to the balance of the actual class members.

against him."[60] While the courts may exercise considerable discretion in determining whether to allow a third-party action,[61] third-party claims for damages exceeding those sought in the plaintiff's complaint consistently have been dismissed.[62] Recently, however, in *George Cohen Agency, Inc. v. Donald S. Perlman Agency, Inc.*,[63] the Appellate Division, Second Department, ruled that where the allegations in a third-party claim "largely mirror" those contained in the defendant's answer,[64] a third-party demand for relief greater

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[60] CPLR 1007 (1976). Third-party practice, popularly referred to as impleader, SIEGEL § 155, permits a defendant to bring in an additional party for the purpose of expeditiously determining in a single lawsuit both the plaintiff's claim and the defendant's related claim against the added party. ELEVENTH ANN. REP. N.Y. JUD. COUNCIL 370 (1945). Impleader is permissible whenever the impleaded party may be required to reimburse the defendant for any part of the plaintiff's recovery. SIEGEL § 155; 2 WK&M ¶ 1007.05; *see* note 90 *infra*. Even though a third-party action "amounts to a premature suit," *see* SIEGEL § 159, impleader, nevertheless, has been permitted. *Id.*; *see* Madison Ave. Properties Corp. v. Royal Ins. Co., 281 App. Div. 641, 645, 120 N.Y.S.2d 626, 630 (1st Dep't), *appeal denied*, 281 App. Div. 1030, 122 N.Y.S.2d 631 (1953); TWELFTH ANN. REP. N.Y. JUD. COUNCIL 203 (1946). "A defendant serving a third-party complaint [is] styled a third-party plaintiff and the person so served [is] styled a third-party defendant." CPLR 1007 (1976). For a discussion of the development of impleader in New York, see *id.*, commentary at 33-35; 3 MOORE'S FEDERAL PRACTICE ¶ 14.02 (1974); Comment, *Third-Party Practice in New York*, 37 CORNELL L.Q. 721, 723-25 (1952). For a history of impleader in general, see TWELFTH ANN. REP. N.Y. JUD. COUNCIL 197-99 (1946); Comment, *Third-Party Practice in New York*, 37 CORNELL L.Q. 721, 721-23 (1952).

[61] *See* CPLR 1010 (1976); TWELFTH ANN. REP. N.Y. JUD. COUNCIL 201 (1946); *Developments in the Law—Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874, 909 (1958). The Supreme Court, Nassau County, in Norman Co. v. County of Nassau, 63 Misc. 2d 965, 314 N.Y.S.2d 44 (Sup. Ct. Nassau County 1970), described the test for impleader as "whether the third-party defendant may be liable to defendant-third-party plaintiff, for whatever reason, for damages for which the latter may be liable to plaintiff." *Id.* at 969, 314 N.Y.S.2d at 50. This test generally has been followed. *See* Lazarow, Rettig & Sundel v. Castle Capital Corp., 63 App. Div. 2d 277, 287, 407 N.Y.S.2d 490, 496 (1st Dep't 1978); Holloway v. Brooklyn Union Gas Co., 50 App. Div. 2d 603, 604, 375 N.Y.S.2d 396, 397 (2d Dep't 1975); SIEGEL § 157. As stated by Dean McLaughlin, "the question now is whether there is a possible ground upon which the third-party defendant may be held liable to the defendant for even a portion of the defendant's liability to the plaintiff." CPLR 1007, commentary at 34 (1976). The liabilities of the defendant and the impleaded party may be premised on different theories of law. Taft v. Shaffer Trucking, Inc., 52 App. Div. 2d 255, 259, 383 N.Y.S.2d 744, 747 (4th Dep't 1976); SIEGEL § 157. For example, in Krause v. American Guar. & Liab. Ins. Co., 22 N.Y.2d 147, 239 N.E.2d 175, 292 N.Y.S.2d 67 (1968), the Court of Appeals held that a defendant's insurer may assert a contingent claim for subrogation against a tortfeasor in a third-party complaint. *Id.* at 152-53, 239 N.E.2d at 178, 292 N.Y.S.2d at 71. *But cf.* Ross v. Pawtucket Mutual Ins. Co., 13 N.Y.2d 233, 195 N.E.2d 892, 246 N.Y.S.2d 213 (1963) (insurer sued under collision coverage may not implead tortfeasor).

[62] *See, e.g.*, Funt v. Ruiz, 58 App. Div. 2d 801, 396 N.Y.S.2d 418 (2d Dep't 1977); CPLR 1007, commentary at 38 (1976); *id.* at 9 (Supp. 1979-1980).

[63] 69 App. Div. 2d 725, 419 N.Y.S.2d 584 (2d Dep't 1979).

[64] *Id.* at 730, 419 N.Y.S.2d at 587.

than that requested by the plaintiff will be permitted.[65]

The plaintiff, George Cohen Agency, Inc. (Cohen), sued to recover on promissory notes executed by the defendants, Donald S. Perlman and Donald S. Perlman Agency, Inc., (collectively Perlman).[66] Cohen had sold Perlman a portfolio of the insurance business of Continental Casualty Company (Continental), and the notes represented the sum remaining on the purchase price.[67] Perlman contended that Cohen, acting alone or in concert with Continental and an attorney who had negotiated the transaction,[68] had fraudulently induced him to purchase the almost valueless portfolio.[69] Perlman therefore counterclaimed against Cohen[70] and interposed a third-party complaint against Continental and the attorney.[71] The damages sought in the third-party complaint greatly exceeded the amount demanded by the plaintiff;[72] Continental moved to dismiss the third-party action on the ground that the demand for excess relief was improper in an impleader action.[73] The

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[65] *Id.* at 733, 419 N.Y.S.2d at 588.

[66] *Id.* at 727, 419 N.Y.S.2d at 585.

[67] *Id.*

[68] Both Cohen and Perlman had employed I. Edward Pogoda to function as broker and attorney for the deal. *Id.* at 727, 419 N.Y.S.2d at 585.

[69] *Id.* The essence of Perlman's allegation of fraud was that, because the portfolio at the time of the sale did not conform to New York State Insurance Department rules, it was offered to the public illegally. *Id.* at 727-28, 419 N.Y.S.2d at 585. In addition, Continental rescinded Perlman's right to issue policies violating those regulations promptly after the Cohen-Perlman contract was signed. *Id.* at 728, 419 N.Y.S.2d at 585.

[70] The counterclaim sought the alternative relief of rescission or reformation of the contract with Cohen. *Id.*

[71] *Id.* Perlman's third-party complaint alleged that Continental was cognizant of the Cohen-Perlman sale, the Insurance Department regulations and Perlman's reliance on the apparent value of the insurance portfolio when it entered into an agency agreement with him for the sale of its contents. *Id.* Perlman also impleaded Pogoda for attorney malpractice and for conspiracy with Cohen and Continental to defraud him. *Id.*

It should be noted, however, that in lieu of the third-party complaint, Perlman could have asserted his claims against Continental and Pogoda in the counterclaim against Cohen. CPLR 3019(a) authorizes a defendant to include in a counterclaim a cause of action against "a plaintiff and other persons alleged to be liable." CPLR 3019(a) (1974). To bring the nonparty into the action, the defendant must serve him with a summons and the answer containing the counterclaim. CPLR 3019(d) (1974). *See* Galloway v. Wolfe, 232 App. Div. 163, 168, 249 N.Y.S. 608, 613-14 (1st Dep't 1931); Renis Fabrics Corp. v. Millworth Converting Corp., 25 Misc.2d 280, 283, 201 N.Y.S.2d 13, 17-18 (Sup. Ct. New York County 1960); CPLR 3019, commentary at 221 (1974).

[72] 69 App. Div. 2d at 728, 419 N.Y.S.2d at 585. The counterclaim and third-party claim sought $545,000 in compensatory damages, $2,500,000 in punitive damages, more than $25,000 in attorney's fees and an indeterminate sum previously paid to Cohen. *Id.* The plaintiff, however, had sued to recover only $52,528 on the promissory notes. *Id.* at 727, 419 N.Y.S.2d at 585.

[73] *Id.* at 728, 419 N.Y.S.2d at 586.

motion was denied by special term.[74]

On appeal, the Appellate Division, Second Department, affirmed,[75] emphasizing that an adjudication of the rights of all the parties to the underlying transaction in one action would promote judicial efficiency.[76] Writing for a unanimous court, Justice Titone[77] acknowledged that third-party plaintiffs previously have been prohibited from seeking damages greater than those sought by the plaintiff.[78] Observing that some commentators have questioned the rigidity of this rule,[79] the appellate division held that where, as in the case at bar, the factual issues presented "are essentially the same as in the main cause and would have to be tried in any event,"[80] impleader should lie notwithstanding the amount of damages sought by the third-party plaintiff.[81] The court also noted that

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[74] *Id.* at 727, 419 N.Y.S.2d at 585.

[75] *Id.* at 737, 419 N.Y.S.2d at 591.

[76] *Id.* at 729, 419 N.Y.S.2d at 586; *see, e.g.*, Krause v. American Guar. & Liab. Ins. Co., 22 N.Y.2d 147, 153, 239 N.E.2d 175, 178, 292 N.Y.S.2d 67, 71 (1968); Madison Ave. Properties Corp. v. Royal Ins. Co., 281 App. Div. 641, 644, 120 N.Y.S.2d 626, 629 (1st Dep't), *appeal denied*, 281 App. Div. 1030, 122 N.Y.S.2d 631 (1953); Merritt v. Rhodes, 232 App. Div. 422, 422, 252 N.Y.S.114, 115 (2d Dep't 1931) (per curiam); ELEVENTH ANN. REP. N.Y. JUD. COUNCIL 370 (1945). *See generally* note 60 *supra*.

[77] Justice Titone was joined in his opinion by Justices Hopkins, Margett and Mangano.

[78] 69 App. Div. 2d at 729, 419 N.Y.S.2d at 586; *see, e.g.*, Funt v. Ruiz, 58 App. Div. 2d 801, 396 N.Y.S.2d 418 (2d Dep't 1977); Gleason v. Sailer, 203 Misc. 227, 116 N.Y.S.2d 409 (Sup. Ct. Nassau County 1952). Justice Titone stated that the judicial rule barring third-party claims for damages in excess of those sought by the plaintiff was based on the premise that:

> [t]he liability of the third-party defendant must rise from the liability of the defendant to the plaintiff . . . , thus implying that any liability of the third-party defendant which did not arise from the defendant's liability in the original complaint would be an improper subject for a third-party action.

Id. at 729, 419 N.Y.S.2d at 586 (quoting Horn v. Ketchum, 27 App. Div. 2d 759, 759, 277 N.Y.S.2d 177, 178 (3d Dep't 1967)).

[79] 69 App. Div. 2d at 731-32, 419 N.Y.S.2d at 586-88; *see* CPLR 1007, commentary at 9 (Supp. 1979-1980); SIEGEL § 164. *See generally* 2 WK&M ¶ 1007.05; *Developments in the Law—Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874, 909 (1958).

[80] 69 App. Div. 2d at 731, 419 N.Y.S.2d at 587.

[81] *Id.* at 737, 419 N.Y.S.2d at 591. In allowing the third-party action to proceed, the *George Cohen Agency* court expressly overruled any contrary suggestions in its prior decision in Funt v. Ruiz, 58 App. Div. 2d 801, 396 N.Y.S.2d 418 (2d Dep't 1977). In *Funt*, a mortgage foreclosure action, the defendants interposed a third-party complaint alleging that the third-party defendant was liable to them on the basis of fraud for any damages recovered by the plaintiff. The third-party plaintiffs sought damages arising from the fraud and also sought relief for mental anguish in excess of the amount demanded by the plaintiff. The cause of action for fraud was sustained, but the claim for mental anguish was dismissed. *Id.* at 802, 396 N.Y.S.2d at 419. The *Funt* court considered the third-party claim for fraud as essentially a demand to be indemnified for the defendant's liability in the foreclosure action. *Id.* Moreover, the court noted that both the third-party and the plaintiff's claims "arose . . . from a

its decision comports with the CPLR's liberalized rules of pleading, including those concerning impleader,[82] and that the discretionary remedies set forth in CPLR 1010[83] and CPLR 602[84] remain available to sever or dismiss third-party claims that might unduly hamper

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common nucleus of operative fact" and that the same issues would be tried in both actions. *Id.* Therefore, the court concluded that trial of the third-party claim would not unduly delay the main action. *Id.* Addressing the third-party cause of action for mental anguish, the *Funt* court declared that it requested "judgment in excess of the amount sought by plaintiff [and, therefore,] must be dismissed." *Id.*

In *George Cohen Agency*, however, Justice Titone analyzed the *Funt* decision, 69 App. Div. 2d at 729-31, 419 N.Y.S.2d at 586-87, and stated:

> [w]ithout going into the merits as to whether [the *Funt* court's] dismissal [of the mental anguish claim] was based on the fact that damages in excess of those sought by plaintiff were requested therein, clearly such cause of action would place an impermissible burden on the litigation involved under the complaint and the third-party plaintiff's . . . cause of action [for fraud].

Id. at 730, 419 N.Y.S.2d at 587.

[82] 69 App. Div.2d at 731, 419 N.Y.S.2d at 587; *accord* Taft v. Shaffer Trucking, Inc., 52 App. Div. 2d 255, 257, 383 N.Y.S.2d 744, 746 (4th Dep't 1976) (third-party pleading construed liberally); *see* CPLR 1007 (1976) (impleader available against party who is or may be laible to plaintiff); CPLR 3026 (1976) (all pleadings construed liberally). *See generally* CPLR 601 (1976) (party may join all claims against another); CPLR 1401 (1976) (contribution available against any person subject to liability for same injury); CPLR 3014 (1974) (allegations may be stated alternatively or hypothetically). In Lazarow, Rettig & Sundel v. Castle Capital Corp., 63 App. Div. 2d 277, 407 N.Y.S.2d 490 (1st Dep't 1978), the court permitted a third-party claim for fraud against the sellers of oil lease interests and their accountants where the primary action was for breach of contract against the corporate promoters of the deal. The first department explained that an adequate nexus between the claims existed because the third-party defendant foreseeably might have to account to the defendant for acts causing potential liability to the primary plaintiff. *Id.* at 279, 407 N.Y.S.2d at 496. In Taft v. Shaffer Trucking, Inc., 52 App. Div. 2d 255, 383 N.Y.S.2d 744 (4th Dep't 1976), a third-party complaint for malpractice was sustained against the plaintiff's attorney in an action for fraud in the settlement of a claim. The court found that the third-party plaintiff's claim for contribution was viable as long as the third-party defendant participated in the actions causing harm to the plaintiff. *Id.* at 259, 383 N.Y.S.2d at 747. A fourth-party complaint was sustained in Holloway v. Brooklyn Union Gas Co., 50 App. Div. 2d 603, 375 N.Y.S.2d 396 (2d Dep't 1975), although no direct connection existed between the fourth party and the main claims. *Id.* at 604, 375 N.Y.S.2d at 398.

[83] CPLR 1010 (1976) provides:

> The court may dismiss a third-party complaint without prejudice, order a separate trial of the third-party claim or of any separate issue thereof, or make such other order as may be just. In exercising its discretion, the court shall consider whether the controversy between the third-party plaintiff and the third-party defendant will unduly delay the determination of the main action or prejudice the substantial rights of any party.

[84] CPLR 602(a) (1976) provides:

> When actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

the main action.[85]

Repudiating a long line of cases limiting the relief available in third-party actions to indemnity or contribution,[86] *George Cohen Agency* represents the first case in which a New York appellate court has permitted a third-party claim requesting damages greater than those sought by the plaintiff.[87] More important, perhaps, is the court's implicit approval of third-party actions for affirmative relief.[88] It must be noted, however, that in order to assert an affirmative claim for relief, not only should the claim be related to the plaintiff's cause of action,[89] but the third-party plaintiff apparently must also have a colorable claim for indemnity or contribution

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[85] 69 App. Div. 2d at 733, 419 N.Y.S.2d at 589. The court also rejected Continental's claim that the third-party complaint should be dismissed because it contained a complete defense to the plaintiff's cause of action. *Id.* Continental argued that the third-party action could not be sustained where the allegations negated Perlman's liability to Cohen, since the third-party defendant's liability must be derived from the liability of the third-party plaintiff to the plaintiff. *Id.*; *see* Cleveland v. Farber, 46 App. Div. 2d 733, 733, 361 N.Y.S.2d 99, 100 (4th Dep't 1974); Scivetti v. Niagara Mohawk Power Corp., 33 App. Div. 2d 884, 884, 307 N.Y.S.2d 563, 564 (4th Dep't 1969); Central Budget Corp. v. Perdigon, 32 Misc. 2d 655, 655, 228 N.Y.S.2d 311, 311-12 (Sup. Ct. App. T. 1st Dep't 1961) (per curiam); Blonstein v. 241 Fifth Ave. Corp., 154 N.Y.S.2d 602, 605 (Sup. Ct. Kings County 1956). The court noted that the third-party complaint pleaded alternative theories, some of which would not defeat the plaintiff's claim against the defendant. 69 App. Div. 2d at 733, 419 N.Y.S.2d at 589. The court further observed that the theory that a third-party action must be dismissed whenever proof of its allegations would provide a complete defense to the main action has been criticized. *Id.* at 734, 419 N.Y.S.2d at 589; *accord* SIEGEL § 158. *See generally* 2 WK&M ¶ 1007.02. Stating that "[s]uch notion is based on the antiquated theory that third-party practice only lies for [an] . . . indemnity claim," Justice Titone opined that the existence of a "logical relationship" between the claims should determine whether impleader is proper. 69 App. Div. 2d at 734, 419 N.Y.S.2d at 589. Moreover, " 'the capacity of the one [claim] to negate the other' " is some evidence the claims have this " 'logical relationship.' " *Id.* (quoting SIEGEL § 158). *But see* CPLR 1007, commentary at 37 (1976).

[86] *See, e.g.*, Funt v. Ruiz, 58 App. Div. 2d 801, 396 N.Y.S.2d 418 (2d Dep't 1977); Cleveland v. Farber, 46 App. Div. 2d 733, 361 N.Y.S.2d 99 (4th Dep't 1974); Horn v. Ketchum, 27 App. Div. 2d 759, 277 N.Y.S.2d 177 (3d Dep't 1967); Gleason v. Sailer, 203 Misc. 227, 116 N.Y.S.2d 409 (Sup. Ct. Nassau County 1952); Carroll Sheet Metal Works, Inc. v. Mechanical Installations, Inc., 201 Misc. 689, 110 N.Y.S.2d 581 (Sup. Ct. Queens County 1951); Victory Painters & Decorators, Inc. v. Miller, 198 Misc. 196, 101 N.Y.S.2d 350 (Sup. Ct. Kings County 1950).

[87] *See generally* CPLR 1007, commentary at 38 (1976).

[88] *See* 69 App. Div. 2d at 733, 419 N.Y.S.2d at 589. The *George Cohen Agency* court maintained that in deciding whether to permit a third-party claim, the determinative factor should be whether it is so related to the main action that it would be more efficient to adjudicate both the plaintiff's and the third-party claims in one proceeding. *Id.* It would seem that this "relationship of the claims" analysis equally would apply to third-party complaints not seeking more damages than those requested by the plaintiff. *See* SIEGEL §§ 157-158.

[89] 69 App. Div. 2d at 733, 419 N.Y.S.2d at 589; TWELFTH ANN. REP. N.Y. JUD. COUNCIL 203 (1946).

against the third-party defendant.[90]

Although the holding in *George Cohen Agency* seems to contravene the legislative determination that impleader is available only "for all or part" of the third-party plaintiff's liability to the plaintiff,[91] it nevertheless appears permissible under the liberal joinder of claims provisions of the CPLR.[92] Moreover, it discourages

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[90] In enacting CPA § 193-a (1946), the predecessor to CPLR 1007, the Judicial Council observed that, among the states, there were two distinct types of impleader statutes:

> [f]irst those allowing impleader where the third party claim emanates from the claim asserted in the original action and is conditioned upon a recovery by the plaintiff against the original defendant; second, those allowing impleader irrespective of a recovery by the plaintiff in the original action whenever the identity or similarity of the issues of fact warrants the joint trial of both controversies.

TWELFTH ANN. REP. N.Y. JUD. COUNCIL 203 (1946). The Judicial Council placed the previous New York statues, CPA § 193(3) (1923), within the first category of statutes, requiring that the third-party plaintiff be found liable to the plaintiff before he could recover against the third-party defendant and did not intend CPA § 193(a) to embody any change in this respect. *Id.* at 204. Impleader, therefore, was based on indemnification. *Id.* The Court of Appeals in Dole v. Dow Chem. Co., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972), enlarged the scope of impleader to include claims for contribution among joint tortfeasors. *See, e.g.*, Taft v. Shaffer Trucking, Inc., 52 App. Div. 2d 255, 258-59, 383 N.Y.S.2d 744, 747 (4th Dep't 1976).

Since impleader traditionally has been based upon indemnification, TWELFTH ANN. REP. N.Y. JUD. COUNCIL 204 (1946), it would seem that the absence of such a claim in a third-party complaint would nullify the historical and theoretical underpinnings of third-party practice. *See* CPLR 1007, commentary at 35-37 (1976); TWELFTH ANN. REP. N.Y. JUD. COUNCIL 204 (1946); 2 WK&M ¶ 1007.02. It is not suggested that the indemnity or contribution claim must be one that would not arise but for the defendant's potential liability to the plaintiff. *See* Norman Co. v. County of Nassau, 63 Misc. 2d 965, 969, 314 N.Y.S.2d 44, 50 (Sup. Ct. Nassau County 1970); note 61 *supra*. *But see* Horn v. Ketchum, 27 App. Div. 2d 759, 759, 277 N.Y.S.2d 177, 178 (3d Dep't 1967). Rather, it is submitted that any claim alleging that the third-party defendant is responsible for the defendant's liability to the plaintiff, for whatever reason, should be sufficient without regard to whether or not the defendant's claim against the third-party defendant "arose out of" the plaintiff's claim against the defendant. *See* Norman Co. v. County of Nassau, 63 Misc. 2d 965, 969, 314 N.Y.S.2d 44, 50 (Sup. Ct. Nassau County 1970); CPLR 1007, commentary at 34 (1976); note 61 *supra*.

Since the claim in *George Cohen Agency* was for affirmative relief and not wholly in indemnity or contribution, it appears that the second department will permit recovery against a third-party defendant regardless of whether the third-party plaintiff is held liable to the plaintiff. Consequently, it is submitted that the court's decision diverges from the intent of the Judicial Council and now resembles its second example, allowing impleader where factual issues are interrelated. *See* TWELFTH ANN. REP. N.Y. JUD. COUNCIL 216 (1946).

[91] *See generally* CPLR 1007; TWELFTH ANN. REP. N.Y. JUD. COUNCIL 204 (1946); notes 60 & 90 *supra*.

[92] CPLR 601, New York's rule for joinder of claims, states that "[t]he plaintiff in a complaint or the defendant in an answer setting forth a counterclaim or cross-claim may join as many claims as he may have against an adverse party." CPLR 601 (1976). Dean McLaughlin has suggested that a third-party plaintiff should be considered a plaintiff within the meaning of § 601 and, therefore, be entitled to join his additional claims freely. CPLR 1007, commentary at 9 (Supp. 1979-1980); *see* CPLR 601, commentary at 165 (1976); *cf.* FED. R. CIV. P. 18(a) (third-party claimant "may join . . . as many claims . . . as he may have

the "multiplicity and circuity of actions" that impleader was designed to prevent[93] by eliminating the necessity for a defendant to commence an independent action for his own damages, only to have it later consolidated for trial with the main claim.[94] It is suggested, however, that where the affirmative third-party claim does not possess a factual or legal nexus with the main claim, the affirmative claim should be dismissed or severed in the court's discretion, to avoid unnecessary prejudice to the plaintiff's action.[95]

Robin E. Eichen

ARTICLE 30—REMEDIES AND PLEADING

CPLR 3025(a): Amendment of counterclaim permitted within 20 days after last responsive pleading in multiparty litigation

CPLR 3025(a) grants a party the right to amend his pleading

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against an adverse party").

[93] Krause v. American Guar. & Liab. Ins. Co., 22 N.Y.2d 147, 153, 239 N.E.2d 175, 187, 292 N.Y.S.2d 67, 71 (1968) (quoting ELEVENTH ANN. REP. N.Y. JUD. COUNCIL 58 (1945)); Lazarow, Rettig & Sundel v. Castle Capital Corp., 63 App. Div. 2d 277, 287, 407 N.Y.S.2d 490, 496 (1st Dep't 1978); Morey v. Sealright Co., 41 Misc. 2d 1068, 1070, 247 N.Y.S.2d 306, 309 (Sup. Ct. Oneondaga County 1964); ELEVENTH ANN. REP. N.Y. JUD. COUNCIL 370 (1945); SIEGEL § 155; 2 WK&M ¶ 1007.01.

[94] *See generally* CPLR 602 (1976). In *George Cohen Agency,* Perlman contended that it was entitled to bring a separate action which could be consolidated for trial with the main action if its third-party action were dismissed. 69 App. Div. 2d at 727, 419 N.Y.S.2d at 585. The question of consolidation became academic when the third-party claim was permitted. *Id.* at 737, 419 N.Y.S.2d at 591. In Ellenberg v. Sydharv Realty Corp., 41 Misc. 2d 1078, 247 N.Y.S.2d 226 (Sup. Ct. Kings County 1964), the common questions of law and fact between the primary and third-party actions were held sufficient to warrant consolidation but not impleader, since there was no "liability over from the third-party defendants to the third-party plaintiff." *Id.* at 1081, 247 N.Y.S.2d at 229. More recently, however, in Mallis v. Kates, 56 App. Div. 2d 818, 393 N.Y.S.2d 18 (1st Dep't 1977), the court refused to dismiss the third-party action on the pleading, stating that where the transactions in the primary and impleader complaints were so entangled that they would require consolidation if brought as independent actions, it would be preferable and more economical to adjudicate the rights of all parties in one trial. *Id.* at 818, 393 N.Y.S.2d at 19-20. It is submitted that as long as there is also a viable claim for indemnification or contribution, *see* note 90 *supra,* third-party actions for affirmative relief should be permitted where questions that would be subject to consolidation under CPLR 602 if sued upon separately are involved. *See* Norman Co. v. County of Nassau, 63 Misc. 2d 965, 970, 314 N.Y.S.2d 44, 50-51 (Sup. Ct. Nassau County 1970).

[95] Dismissal or severance of the impleader under CPLR 1010 will occur when the relationship of the primary claim and the impleader are so "remote" that the original action is hampered by delay or prejudice to a party. *See* Norman Co. v. County of Nassau, 63 Misc. 2d 965, 969-70, 314 N.Y.S.2d 44, 50 (Sup. Ct. Nassau County 1970); SIEGEL § 161.