

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

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|--------------------------------------|---|--------------------------|
| Z.B., by his mother and next friend, |) | |
| TARA KILMER, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | Civil No. 03-540-JM (NH) |
| |) | Civil No. 04-34-P-S (ME) |
| AMMONOOSUC COMMUNITY |) | |
| HEALTH SERVICES, INC., et al., |) | |
| |) | |
| Defendants. |) | |

**ORDER ON PLAINTIFF’S APPEAL OF THE MAGISTRATE JUDGE’S
DECISION GRANTING DEFENDANT LEAVE TO SERVE THIRD-PARTY
COMPLAINTS**

SINGAL, Chief District Judge

Defendant Littleton Regional Hospital asked the Magistrate Judge for leave to file third-party complaints under Rule 14 of the Federal Rules of Civil Procedure. (See Def.’s Mot. for Leave (Docket # 41).) Magistrate Judge Cohen granted Defendant’s request over Plaintiff’s objection. (See Mem. Decision on Mot. for Leave (Docket # 68).) Before the Court is Plaintiff’s appeal of this decision of the Magistrate Judge. (Pl.’s Obj. to Mem. Decision (Docket # 69).) Plaintiff argues that application of Rule 14 frustrates his substantive rights under New Hampshire law. After carefully reviewing the Magistrate Judge’s decision and the submissions of the parties, the Court finds the decision neither clearly erroneous nor contrary to law, and therefore DENIES Plaintiff’s appeal.

I. BACKGROUND

Plaintiff brought this suit for negligence and breach of contract against Defendant Littleton Regional Hospital and other named defendants for failing to detect, report, and otherwise prevent the abuse of Plaintiff, a six-year-old child, by his father. This suit was originally brought in the District of New Hampshire, but was transferred to this Court pursuant to 28 U.S.C. § 636(f). Federal jurisdiction is based on diversity of citizenship under 28 U.S.C. § 1332.

Pursuant to Rule 14(a), Defendant Littleton Hospital moved for leave to file third-party complaints against Plaintiff's father and mother for contribution. Defendant alleges that the father's abuse of Plaintiff and the father and mother's failure to report that abuse make them liable for contribution to any judgment rendered against Defendant. Plaintiff refused to consent to the third-party complaint, invoking his privilege under New Hampshire law. See N.H. Rev. Stat. Ann. § 507:7-g.

The question posed by Defendant's contested motion is whether Rule 14 of the Federal Rules of Civil Procedure, allowing impleader of a third-party defendant "at any time after commencement of the action," must be applied over the conflicting New Hampshire law, which allows impleader for contribution "if and only if the plaintiff in the principal action agrees." N.H. Rev. Stat. Ann. § 507:7-g(IV)(c). Under the New Hampshire statute, a defendant unable to obtain the plaintiff's consent may still obtain contribution, but must generally wait until after judgment is entered in the principal case. See N.H. Rev. Stat. Ann. § 507:7-f; Connors v. Suburban Propane Co., 916 F. Supp. 73, 76–77 (D.N.H. 1996) (summarizing relevant provisions of New Hampshire's contribution statute).

In his November 30, 2004, decision, the Magistrate Judge found that Rule 14 was consistent with the Rules Enabling Act, 28 U.S.C. § 2072, and therefore trumped New Hampshire's inconsistent rule requiring consent of the plaintiff to third-party complaints.

II. DISCUSSION

In this appeal, the Court will uphold the Magistrate Judge's non-dispositive decision unless it is "clearly erroneous or contrary to law." Fed. R. Civ. P. 72(a). In conducting this review, the Court considers the specific objections raised by Plaintiff.

Plaintiff's primary objection is that the Magistrate Judge wrongly concluded that New Hampshire's consent requirement was procedural rather than substantive. More specifically, Plaintiff asserts that the Magistrate Judge failed to adequately acknowledge or distinguish contrary First Circuit and District of New Hampshire case law. The First Circuit case, D'Onofrio Construction Co. v. Recon. Co., 255 F.2d 904, 906-07 (1st Cir. 1958), suggested in dicta that Rule 14 could not be applied over certain types of state contribution statutes. The District of New Hampshire case, Connors v. Suburban Propane Co., 916 F. Supp. 73, 81 (D.N.H. 1996), relied in part on D'Onofrio to hold that Rule 14 was inapplicable in diversity cases applying New Hampshire's contribution law. After setting out the legal principles that govern conflicts between state laws and the Federal Rules of Civil Procedure, the Court examines each of Plaintiff's objections in turn, finding that they are without merit and that the Magistrate Judge's decision was neither clearly erroneous nor contrary to law.

The starting point for any analysis of the applicability of any Federal Rule of Civil Procedure to a federal diversity action is the Supreme Court's decision in Hanna v. Plumer, 380 U.S. 460 (1965). Hanna set forth the proposition that the Federal Rules of Civil Procedure are to be followed in federal diversity actions so long as they comply

with the strictures of the Rules Enabling Act, 28 U.S.C. § 2072.¹ In so holding, the Court explicitly rejected the notion that Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), governs the analysis when a rule authorized by the Rules Enabling Act directly conflicts with a state rule. See Hanna, 380 U.S. at 470–471. The Court reasoned that

[w]hen a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided Erie choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act not constitutional restrictions.”

Id. at 471. Thus, the typical questions posed in an Erie analysis, such as whether applying the rule would be “outcome-determinative,” are far less relevant when a rule promulgated under the Rules Enabling Act is at issue.

In order to determine whether a Federal Rule of Civil Procedure is valid under the Rules Enabling Act, the Court must first “determine whether, when fairly construed, the scope of [the rule] is sufficiently broad to cause a direct collision with the state law or, implicitly, to control the issue before the court, thereby leaving no room for the operation of the law.” Burlington N. R. Co. v. Woods, 480 U.S. 1, 4–5 (1987). If so, the rule must be applied “if it represents a valid exercise of Congress’ rulemaking authority” under both the Constitution and the Rules Enabling Act. Id. at 5. Rules that are either “indisputably procedural” or “falling within the uncertain area between substance and procedure” but “rationally capable of classification as either” are within Congress’s power to regulate the courts and therefore constitutional. Id. Under the Rules Enabling

¹ The Rules Enabling Act provides that

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

28 U.S.C. § 2072.

Act, federal rules also must not “abridge, enlarge or modify any substantive right.” 28 U.S.C. § 2072; see also Burlington N. R. Co., 480 U.S. at 5. However, the Supreme Court has found with regard to the Rules of Civil Procedure that “Congress’ prohibition of any alteration of substantive rights of litigants was obviously not addressed to such incidental effects as necessarily attend the adoption of the prescribed new rules of procedure upon the rights of litigants.” Hanna, 380 U.S. at 465. As a result of these considerations, the Federal Rules are given “presumptive validity” under the Rules Enabling Act analysis. Burlington N. R. Co., 480 U.S. at 6.

Applying the Rules Enabling Act test set forth in Hanna and its progeny, federal courts have overwhelmingly upheld the various Federal Rules of Civil Procedure as controlling when they are found to conflict with state law.² See 17 James Wm. Moore et al., Moore’s Federal Practice § 124.05 (3d ed. 2000) (“Once the court determines that the federal rule conflicts with state law, these various analyses [under the Rules Enabling Act] result in application of the federal rule in almost all cases.”).

It is clear that the New Hampshire rule, requiring the plaintiff’s permission to implead a third-party defendant, and Federal Rule 14(a), allowing impleader “at any time after commencement of the action,” are in conflict. However, as the Magistrate Judge explained in his decision, there is a split within the District of New Hampshire over whether application of Federal Rule 14(a) over the conflicting New Hampshire statute violates the Rules Enabling Act. In Connors v. Suburban Propane Co., Judge McAuliffe

² Federal Rules have been held to control issues such as service of process methods under Rule 4, Hanna, 380 U.S. at 461, pleading requirements under Rules 8 and 9, Roberts v. Sears, Roebuck & Co., 573 F.2d 976, 984–85 (7th Cir. 1978), relation-back provisions under Rule 15(c), Ingram v. Kumar, 585 F.2d 566, 569–570 n.5 (2d Cir. 1978), cert. denied, 440 U.S. 940 (1978), notice requirements for class actions under Rule 23, Mace v. Van Ru Credit Corp., 109 F.3d 338, 346 (7th Cir. 1997), discovery rules, Frechette v. Welch, 621 F.2d 11, 14 (1st Cir. 1980), bifurcation of trials under Rule 42(b), Rosales v. Honda Motor Co., Ltd., 726 F.2d 259, 260–62 (5th Cir. 1984), conduct of voir dire under Rule 47, Perry v. Allegheny Airlines, 489 F.2d 1349, 1352 (2d Cir. 1974), preservation of objections under Rule 51, Platis v. Stockwell, 630 F.2d 1202, 1205 (7th Cir. 1980) and recovery of costs for expert witnesses under Rule 68, Aceves v. Allstate Ins. Co., 68 F.3d 1160, 1167–1168 (9th Cir. 1995).

found that application of Rule 14 over § 507:7-g would violate the Rules Enabling Act by “limiting plaintiff’s and enlarging defendant’s substantive rights under applicable state law.” 916 F. Supp. 73, 81 (D.N.H. 1996). Judge McAuliffe argued that the “right to control which parties may participate in the litigation” conferred on the plaintiff by New Hampshire’s consent requirement was substantive in nature, and, therefore, the application of Rule 14 would constitute the modification of a substantive right in violation of the Rules Enabling Act.

However, in Chapman v. Therriault, Judge Devine considered the same issue and reached the opposite conclusion. Civil No. 97-372-SD, 1998 U.S. Dist. LEXIS 23319 (D.N.H. Apr. 13, 1998). In Judge Devine’s analysis, the federalism concerns that underlie the Erie analysis are less significant in the analysis of a Federal Rule under the Rules Enabling Act. Id. at *7. Therefore, only “core rules governing the primary decisions respecting human conduct which our constitutional system leaves to state regulation” are to be considered “substantive” under the Rules Enabling Act analysis, regardless of how they might be construed under the more exacting Erie analysis. Id. at *8 (citing Hanna, 380 U.S. at 475 (Harlan, J. concurring)). Since New Hampshire’s consent requirement “bears simply on the relations between the parties during this federal judicial action rather than on the extra-judicial daily affairs of the parties,” Judge Devine found it to be procedural in nature.

The Court believes, like Judge Devine, that New Hampshire’s consent requirement is not substantive in nature under the Hanna analysis. Therefore, application of Rule 14 over the inconsistent New Hampshire rule cannot “abridge, enlarge or modify any substantive right.” 28 U.S.C. § 2072. While the right to obtain contribution is clearly substantive in nature, and therefore could not be either created or destroyed by a rule promulgated under the Rules Enabling Act, the method by which the right to

contribution is vindicated must be distinguished from the right itself. The “core purpose” of Rule 14’s liberal standard for impleader is not to create a right of contribution where none would otherwise exist, but rather to “avoid[] unnecessary duplication and circuitry of action” and ensure “efficient allocation of judicial resources.” Lehman v. Revolution Portfolio LLC, 166 F.3d 389, 395 (1st Cir. 1999).

Thus, it is clear that Rule 14(a) cannot be used to implead a third-party defendant for contribution in a diversity case if state law does not recognize a cause of action for contribution. See 6 Charles Alan Wright et al., Federal Practice and Procedure § 1448 (2d ed. 1990). However, Plaintiff does not deny that New Hampshire law recognizes a broad right to contribution:

[A] right of contribution exists between or among 2 or more persons who are jointly and severally liable upon the same indivisible claim, or otherwise liable for the same injury, death or harm, whether or not judgment has been recovered against all or any of them.

N.H. Rev. Stat. Ann. § 507:7-g. Although the statute makes the consolidation of a contribution claim with the principal action contingent upon the plaintiff’s consent, id. § 507:7-g(IV)(c), it also makes it clear that a defendant has a right to bring “a separate action” for contribution after the resolution of the principal claim even without plaintiff’s consent. Id. § 507:7-f. Thus, the nullification of the consent provision by Rule 14(a) cannot be understood as abridging, modifying, or enlarging the substantive right of contribution under section 507:7-f. The legal liability of potential third-party defendants is identical under both rules. Rule 14(a) merely “accelerates” the contribution claim by altering the procedural mechanism by which it may be brought.

As noted above, Plaintiff raises a number of objections to the Magistrate Judge’s characterization of the consent requirement as procedural rather than substantive. First, Plaintiff argues that the power to control the parties to an action is inherently substantive

in nature. The Court does not agree. The impleader of third parties by the defendant for contribution does not affect the legal liability of the defendant in any way. If the Court were to apply the New Hampshire contribution rules instead of Rule 14(a), Defendant would still be able to bring a separate suit against the father and mother for contribution upon a judgment in the principal action. Applying Rule 14(a) over New Hampshire's consent requirement merely "alters the mode of enforcing state-created rights." Hanna, 380 U.S. at 473. It does not "abridge, enlarge or modify the rules of decision by which [the] court will adjudicate [the parties'] rights." Id. at 465.

The fact that impleader may be used for tactical reasons unrelated to its core purpose of promoting judicial efficiency does not alter this analysis. Rules that may "incidentally affect litigants' substantive rights" are still valid under the Rules Enabling Act analysis "if reasonably necessary to maintain the integrity of that system of rules." Burlington N. R. Co., 480 U.S. at 5; see also Hanna, 380 U.S. at 464–465.

Plaintiff also argues that the Magistrate Judge failed to distinguish D'Onofrio Construction Co. v. Recon. Co., 255 F.2d 904, 906–07 (1st Cir. 1958). However, D'Onofrio held merely that Rule 14(a) did not conflict with a state contribution statute that allowed liability for contribution only if the defendant in the principal action first pays its pro-rata share of a judgment. Id. In so holding, the court interpreted the state statute as allowing impleader for a "contingent claim" of contribution that could only be enforced after the satisfaction of any judgment against the principal defendant. Id. Thus, its holding is inapplicable to the current controversy, in which there is clearly a "direct collision" between the New Hampshire's consent requirement and Rule 14(a). Burlington N. R. Co. v. Woods, 480 U.S. at 5.

D'Onofrio is only relevant to Plaintiff's argument for its dictum that Rule 14(a) is inapplicable in states that condition contribution claims between joint tortfeasors upon a

joint judgment against those tortfeasors. Id. at 906. According to the D’Onofrio court, allowing impleader for contribution in these cases would “enhance the substantive rights of the original defendant over what is given by state law.” Id. Despite pre-dating Hanna by seven years and using the Erie analysis that Hanna explicitly rejected, this dictum appears to remain valid. 6 Charles Alan Wright et al., Federal Practice and Procedure § 1448 (2d ed. 1990) (collecting cases) cited by Connors, 916 F. Supp. at 80. However, the rule discussed in D’Onofrio is distinguishable from New Hampshire’s consent requirement. While a plaintiff in a jurisdiction that conditions contribution liability upon a joint judgment is given the power to completely extinguish a defendant’s right to contribution by refusing to sue the joint tortfeasors, a plaintiff subject to New Hampshire law has only the power to delay the filing of a contribution claim until after obtaining judgment in the principal action. Unlike in the current case, applying Rule 14(a) over the rule discussed in D’Onofrio would, in effect, give the defendant the power to create liability for contribution where none would otherwise exist. In contrast, applying Rule 14(a) over New Hampshire’s consent provision has the effect of merely “accelerating” a contribution claim that would be ultimately available to the defendant regardless of the plaintiff’s consent.

Finally, Plaintiff takes issue with the Magistrate Judge’s statement that “plaintiff does not contend that allowing the impleading of two third-party defendants on a claim of contribution . . . would prejudice the proceedings in any way other than as discussed below.” (Mem. Decision (Docket # 68) at 2.) Plaintiff lists a number of ways in which he argues he would be prejudiced if the Court allows the impleader of his parents. Plaintiff asserts that his parents are indigent and would therefore be unable to hire lawyers to defend themselves. Thus, the result would “more likely reflect an imbalance in resources rather than the merits of the claims.” In addition, Plaintiff’s parents would

be unable to pay any judgment rendered against them. Furthermore, allowing the third-party complaints would “delay discovery and require postponement of trial” and would make it necessary to remove plaintiff’s mother as Plaintiff’s representative and replace her with a guardian ad litem.

“Whether a third-party defendant may be impleaded under Rule 14 continues to be a question addressed to the sound discretion of the trial court.” Lehman v. Revolution Portfolio LLC, 166 F.3d 389, 393 (1st Cir. 1999) (citing 6 Charles Alan Wright, et al., Federal Practice and Procedure § 1443 (2d ed. 1990)). However, under Rule 14’s “liberal standard,” the court “should allow impleader on any colorable claim of derivative liability that will not unduly delay or otherwise prejudice the ongoing proceedings.” Lehman, 166 F.3d at 395.

First, the Magistrate Judge was correct in stating that Plaintiff did not raise the issue of prejudice in his original objection except to the extent it furthered his Rules Enabling Act analysis. Plaintiff did argue that allowing contribution would “cause profound prejudice to the plaintiff’s substantive rights,” but only in an attempt to distinguish unfavorable precedent in his Hanna argument. Nowhere in his objection did Plaintiff suggest that the Magistrate Judge should reject Defendant’s motion under Rule 14(a).

Furthermore, even if the Court assumes that the issue of prejudice was properly raised, the decision of the Magistrate Judge to allow impleader under Rule 14 was not clearly erroneous. While it is no doubt true that the indigent status of the third-party defendants may impose special hardships upon them, Plaintiff has not convinced the

Court that these potential hardships are sufficient to reverse the well-considered decision of the Magistrate Judge.³

III. CONCLUSION

For the reasons discussed above, the Court finds that the Magistrate Judge's decision to allow the impleader of Plaintiff's mother and father was neither clearly erroneous nor contrary to law. See Fed. R. Civ. P. 72(a). As a result, Plaintiff's objection to the decision of the Magistrate Judge is DENIED.

SO ORDERED.

/s/ George Z. Singal
Chief U.S. District Judge

Dated this 26th day of January, 2005.

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³ The Court also notes that Plaintiff remains free to move for a separate trial under Rule 42(b) on grounds of prejudice at the appropriate time.

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