IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

AMCO WATER METERING SYSTEMS, INC. Plaintiff, Counter Defendant v. TRAVELERS CASUALTY SURETY CO. OF AMERICA, Defendant, and FIELDTECH, INC. Third-Party Defendant v. ITRON, INC., Third-Party Defendant.	)	CIVIL ACTION NO. 3:03CV00003 3:03CV00012 MEMORANDUM OPINION JUDGE JAMES H. MICHAEL, JR.

Before the court is Defendant Itron, Inc.'s May 22, 2003 motion to dismiss. The above-captioned civil action was referred to the presiding United States magistrate judge for proposed findings of fact, conclusions of law, and a recommended disposition. *See* U.S.C. § 636(b)(1)(B) (West 1993 & Supp. 2003). In his July 11, 2003 Report and Recommendation, Judge B. Waugh Crigler rendered to this court a report setting forth findings, conclusions, and recommendations for the disposition of the outstanding issues. The defendant filed timely objections to portions of the Magistrate's Report and Recommendation on July 31, 2003.[1]

[1] Itron's objections were timely filed with the clerk of the court, however, this court was not made aware that objections had been filed until August 6, 2003. As a consequence, the court entered an order on August 4, 2003 adopting the Report and Recommendation in its entirety. This order was premised on the more lenient clear error standard of review called for where no objections to a report and

Field Tech then filed a timely response to the aforementioned objections on August 25, 2003 to which the defendant replied on September 9, 2003.

The court has performed a de novo review of those portions of the Report and Recommendation to which objections were made. *See* U.S.C. § 636(b)(1)(C) (West 1993 & Supp. 2002); FED. R. CIV. P. 72(b). Having thoroughly considered the entire case, the parties' memoranda, and all relevant law, for the reasons stated herein, the court shall grant in part and deny in part Itron's motion to dismiss and shall in all other respects accept the magistrate judge's Report and Recommendation.

I.

This matter concerns multiple claims arising from the failure of water metering equipment installed in various locations throughout the City of Charlottesville ("City"). In June of 2000, the City entered into a contract with AMCO Water Metering Systems ("AMCO"), formerly ABB Water Metering Systems, that provided for the installation of a mobile automatic meter reading system including individual remotely readable water meters. This system would permit the City to read the water usage of individual customers remotely, eliminating the need for water meters to be read by dispatched service employees. To fulfill its contract, AMCO purchased several water electronic read transmitting systems known as "Encode, Read, Transmit" devices ("ERTs") from Itron. AMCO then subcontracted with Field Tech to assemble and to install the ERTs. Field Tech fell behind on its contractually specified deadlines for the installation and assembly of the water meters. As a consequence, AMCO

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recommendation have been filed. *See* FED. R. CIV. P. 72(b) advisory committee's note (1983). The August 4 order was vacated on August 6, when the court learned of the timely objection made by Defendant Itron.

arranged for a second subcontractor, Metro Meter, to assist with the installation and assembly of the remaining ERTs.

Following completion of the entire water meter reading system, a substantial number of the ERTs failed to operate. Upon closer inspection, Field Tech discovered that many had rusted or malfunctioned and that a disproportionately high percentage of the inoperable ERTs had been installed by Field Tech. AMCO alleges that it requested Field Tech replace or repair the defective ERTs, but that Field Tech refused to do so. AMCO then brought this claim alleging both negligence and breach of contract.

Field Tech then brought a third-party complaint against Itron, alleging that Itron's negligent design of both the assembly and installation protocol for the ERTs and the ERTs themselves caused or contributed to the ERT failures complained of by AMCO. Specifically, Field Tech contends that, given the design of the ERTs, it was impossible to install them in such a way as to avoid the ensuing damage. Field Tech therefore argues that Itron is liable to Field Tech for indemnification or contribution should Field Tech be found liable for damages sustained by AMCO.

On May 22, 2003, Itron filed a motion to dismiss Field Tech's third-party complaint. This motion is the subject of the instant decision. Itron's motion alleges two grounds for dismissal: (1) failure to state a claim upon which relief may be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure, and (2) failure to meet the requirements for third-party complaints as required by Rule 14 of the Federal Rules of Civil Procedure. In his July 11, 2003 Report and Recommendation, Judge Crigler recommended that Itron's motion to dismiss be denied as to both grounds.

II.

Itron argues that Field Tech cannot state a valid claim for recovery on any ground. Field Tech counters that it has stated tenable claims for both contribution and equitable indemnification under Virginia law. The court will address the availability of each of these asserted claims in turn.

A.

Virginia's contribution statute provides that "[c]ontribution among wrongdoers may be enforced when the wrong results from negligence and involves no moral turpitude." VA. CODE. ANN. § 8.01-34 (2003). This statute has been held to give a right of contribution where the person injured "has a right of action against two persons for the same indivisible injury." *Virginia Elec. & Power Co. v. Wilson*, 277 S.E.2d 149, 150 (Va. 1981). Thus, before contribution may be had, "it is essential that a cause of action by the person injured lie against the alleged wrongdoer from whom contribution is sought." *Id.* (quoting *Bartlett v. Roberts Recapping, Inc.*, 153 S.E.2d 193, 196 (Va. 1967)).

Itron argues that Virginia's contribution statute does not abrogate the common law rule that recovery in tort is not available for purely economic loss absent privity between the parties. While it is true that Virginia's economic loss rule is in fact limited by a privity requirement, *see Sensenbrenner v. Russe, Orling & Neale, Architects, Inc.*, 374 S.E.2d 55 (Va. 1998), the court understands section 8.01-34 to make a contribution claim available to

joint tortfeasors, despite the general economic loss rule.[2] Such an interpretation of the contribution statute does not, as Itron contends "create any greater liability than existed before its enactment." Itron's Obj. at 4 (citing *Virginia Elec. & Power Co.*, 277 S.E.2d at 150). Rather, it merely permits the just apportionment of liability among tortfeasors who have contributed to the alleged injury. Itron's reliance on Virginia's economic loss rule as a bar to Field Tech's claim is therefore misplaced as the relevant inquiry concerns only the availability of an action for contribution.

In this instance, both elements of a claim for contribution under Virginia law are met. First, it is clear that the alleged injury is indivisible. The injury of which AMCO complains and the potential liability for which Field Tech claims a right of contribution is the damage to the malfunctioning ERTs. The ERTs were allegedly damaged by incorrect assembly and/or installation; whether the cause is later determined to be partly or wholly the result of negligence on the part of Field Tech or Itron is not relevant to this case. Second, it is clear that AMCO states a cause of action against Itron for the allegedly negligent designs. AMCO and Itron are in privity of contract with one another, therefore AMCO may claim breach of implied warranty pursuant to Virginia law. *See* VA. CODE. ANN. §8.2-314 (2003). Having met both elements, it is this court's judgement that Field Tech may persist in its claim for contribution.

B.

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[2] This understanding of the Virginia contribution statute is also suggested by the court's reasoning in *Kohl's*. There, the court determined that there could be no right of contribution against the impleaded third-party building contractor because the injured party was not in privity with the impleaded building contractor and therefore, the injured party had no cause of action against the building contractor. *Kohl's*, 214 F.R.D. at 414-15. As Field Tech points out in its memorandum, this situation is not presented here. Rather, the injured party (AMCO) may state a claim for breach of express or implied warranty against the impleaded third-party (Itron).

Itron also moves for dismissal of Field Tech's claim of a right to equitable indemnification for any liability Field Tech may accrue for the alleged negligent acts of Itron. Virginia recognizes a party's right to equitable indemnification where "a party without fault is nevertheless legally liable for damages caused by the negligence of another." *Carr v. The Home Ins. Co.*, 463 S.E.2d 457, 458 (Va. 1995). However, indemnification, unlike contribution, may not be claimed unless and until the plaintiff recovers from the indemnitee.[3] *City of Richmond v. Branch*, 137 S.E.2d 882 (Va. 1964); *Am. Nat'l Bank v. Ames*, 194 S.E. 784 (Va. 1938); 9B MICHIE'S JUR. *Indemnity* § 11 (1999). "The right to indemnification arises only where there has been actual loss of damage." *City of Richmond*, 137 S.E.2d at 886. Without the required initial determination of negligence, a claim of equitable indemnification is therefore unavailable. *Carr*, 463 S.E.2d at 458. Because there has been no such initial determination of negligence in this case, Field Tech's assertion of a right of recovery under principles of equitable indemnification must be dismissed until such time as liability may arise.

III.

Having determined the existence of a cause of action, the court must now assess the availability of third-party impleader in this case. Rule 14 addresses third-party practice, including the conditions under which a defendant may implead a third-party. Rule 14 provides in pertinent part that "a defending party, as a third-party plaintiff, may cause a summons and

[3] A claim based on alleged liability for contribution may be asserted against a third-party even though no liability judgement has been entered. This principle reflects one of the primary purposes for contribution and third-party practice—promoting judicial economy by having all claims, actual or potential, arising from the same occurrence adjudicated in the same proceeding. 4B MICHIE'S JUR. *Contribution and Exoneration* § 22 (1999).

complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim." FED. R. CIV. P. 14(a). A third-party claim can be maintained "only if the liability asserted is in some way derivative of the main claim." *Watergate Landmark Condo. Unit Owners Assoc. v. Wiss, Janey, Elstner Assoc., Inc.*, 117 F.R.D. 576 (E.D. Va. 1987). "Typically, proper third-party claims involve one joint tortfeasor impleading another, an indemnitee impleading an indemnitor, or a secondarily liable party impleading one who is primarily liable." *Id.* at 578.

Determining whether a claim is derivative or secondary, and thus the proper subject of a third-party complaint can be exceedingly complex. For example, in *Kohl's Department Stores, Inc. v. Target Stores, Inc.*, a case cited by both parties to this action, the court was confronted with multiple third-party complaints. 214 F.R.D. 406 (E.D. Va. 2003). In *Kohl's*, several buildings comprising a shopping center development suffered significant structural damage following the completion of the construction project. The building owners brought suit against the developer, with a subsequent onslaught of third-party complaints then filed against various subcontractors. Several of the building contractors moved to dismiss one of the third-party claims as improper under Rule 14. *Id*. at 412. The court agreed and determined that third-party impleader was unavailable under the circumstances presented. *Id.* at 413. In so doing, the court explained that the third-party plaintiff in essence "assert[ed] a variant of the 'it's him, not me' argument," rather than a claim of derivative or secondary liability. *Id.* Because the third-party plaintiff claimed that the damage was caused at least in part, if not in whole, by the negligence of the building contractor, any liability was not derivative but rather wholly independent of any possible liability of the third-party plaintiff. *Id.*

The factual circumstances of this case are substantially different from those at issue in *Kohl's*. Here, Field Tech does not claim that Itron independently caused the damage to the ERTs, but rather that, because Itron negligently designed the ERTs and the assembly and installation instructions, Field Tech could not meet its contractual obligation to perform the installation effectively. Such liability would clearly be derivative rather than independent. Accordingly, the court concludes that Field Tech's claim for contribution, based on the derivative liability of Itron, may serve as a proper basis for third-party impleader.[4]

IV.

For the reasons expressed herein, the court finds Field Tech has stated a claim for contribution against Itron and has properly asserted this claim in its third-party complaint pursuant to Rule 14 of the Federal Rules of Civil Procedure. The court further finds that Field Tech's claim for equitable contribution is premature, and it shall therefore be dismissed without prejudice. The court shall overrule Itron's remaining objections to the magistrate judge's Report and Recommendation, and shall adopt the magistrate judge's Report and Recommendation in all other respects. An appropriate order shall this day enter.

The Clerk of the Court hereby is directed to send a certified copy of this memorandum opinion and the accompanying order to all counsel of record and to Magistrate Judge Crigler.

ENTERED: _____

Senior United States District Judge

[4] The court recognizes that Rule 14 creates no new substantive rights, but rather requires litigants to look to some other rule of law on which to base a third-party complaint. *Uptagrafft v. United States*, 315 F.2d 200, 202-03 (4th Cir. 1963). Having stated a valid claim for contribution, Field Tech has met this requirement. *See Watergate*, 117 F.R.D. at 578.

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Date

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

AMCO WATER METERING SYSTEMS, INC.	)	CIVIL ACTION NO. 3:03CV00003
	)	3:03CV00012
Plaintiff, Counter Defendant	)	
	)	
v.	)	ORDER
	)	
TRAVELERS CASUALTY SURETY CO. OF AMERICA,	)	
	)	
Defendant, and	)	
	)	
FIELDTECH, INC.	)	
	)	
Third-Party Defendant	)	
	)	
v.	)	
	)	
ITRON, INC.,	)	
	)	
Third-Party Defendant.	)	JUDGE JAMES H. MICHAEL, JR.

For the reasons stated in the accompanying Memorandum Opinion, it is this day

ADJUDGED, ORDERED and DECREED

as follows:

1. Itron's Motion to Dismiss, filed May 22, 2003, shall be, and hereby is, DENIED IN PART with regard to Field Tech's claim for contribution, and GRANTED IN PART with regard to Field Tech's claim for Equitable Indemnification;

2. Field Tech's claim for Equitable Indemnification, filed March 12, 2003, shall be, and hereby is, DISMISSED without prejudice;

3. The remainder of Itron's Objections to Magistrate Judge's Report and Recommendation, filed July 31, 2003, shall be, and hereby are, OVERRULED; and

4. The magistrate judge's Report and Recommendation, filed July 11, 2003, shall be, and hereby is, ACCEPTED as modified, and ADOPTED in all pertinent respects.

The Clerk of the Court hereby is directed to send a certified copy of this Order and the accompanying Memorandum Opinion to Judge Crigler and to all counsel of record.

ENTERED:

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Senior United States District Judge

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Date