

500.00
IMPLIED (“ACTIVE-PASSIVE”) INDEMNITY

INTRODUCTION

History

The history of the Illinois version of implied indemnity or, as it is commonly known, the doctrine of “active-passive” negligence is described in Ferrini, *The Evolution From Indemnity to Contribution--A Question Of The Future, If Any, Of Indemnity*, 59 Chi. B. Rec. 254 (1978). The common law did not permit contribution, i.e. the sharing of the loss between tortfeasors and the circumstances under which it permitted indemnity, the shifting of the entire loss from one tortfeasor to another, were quite restricted. The indemnitee could not have actively participated in the wrongdoing. His liability could only be “technical” or “passive” in nature. Indemnity was permitted only where such a party was exposed to liability by the misconduct of another. *Gulf Mobile & Ohio R. Co. v. Arthur Dixon Transfer Co.*, 343 Ill.App. 148, 98 N.E.2d 783 (1st Dist.1951) summarized the circumstances in which indemnity was permitted:

- (1) where a city was exposed to liability when a contractor or abutting owner breached his duty with respect to the public way;
- (2) where a party was injured by a subcontractor or tenant and the contractor or owner was thereby exposed to liability;
- (3) where one supplying goods or services, by his active negligence caused the liability of another;
- (4) where one created a dangerous condition and the passive tortfeasor was exposed to liability upon his failure to discover and rectify that condition; and
- (5) where the negligence of a third party caused the passive tortfeasor to be liable under the F.E.L.A. or Workers Compensation Act.

The doctrine is quasi-contractual in nature. In other words, there is an implied-in-law, as contrasted with an implied-in-fact, contract of indemnity. The active or primary tortfeasor has exposed the one who has not personally participated in the wrongdoing to liability and the law implies a contract of restitution. *Przybylski v. Perkins & Will Architects, Inc.*, 95 Ill.App.3d 620, 623; 420 N.E.2d 524, 527; 51 Ill.Dec. 110, 113 (1st Dist.1981).

The parameters of the doctrine changed in the 1960's in an apparent reaction to the prohibition against contribution. Indemnity evolved into a mere fault-weighting process. The tortfeasor who was prohibited from obtaining contribution could obtain full indemnity upon the theory that a stranger who happened to be a joint tortfeasor was guilty of conduct more culpable than that of the party seeking indemnity. Indemnity was thus allowed where there was no pre-tort relationship between the parties--and where the party seeking indemnity was personally at fault. *Reynolds v. Illinois Bell Tel. Co.*, 51 Ill.App.2d 334, 201 N.E.2d 322 (1st Dist.1964); *Sargent v. Interstate Bakeries, Inc.*, 86 Ill.App.2d 187, 229 N.E.2d 769 (1st Dist.1967).

The Reimposition of the Pre-Tort Relationship Requirement

The Illinois Supreme Court has held there can be no indemnity in the absence of a pre-tort relationship between the indemnitor and indemnitee. *Van Slambrouck v. Economy Baler Co.*, 105 Ill.2d 462, 475 N.E.2d 867, 86 Ill.Dec. 488 (1985); *Muhlbauer v. Kruzal*, 39 Ill.2d 226, 234 N.E.2d 790 (1968). By so ruling, the Court in effect reinstated the concept that the obligation of restitution was to be imposed upon the indemnitor because he had, by breach of duty owed the indemnitee, exposed the indemnitee to liability to a third party. A summary of “pre-tort relationships” or “conditions” from which a duty to indemnify has been implied is set forth in Feirich, *Third Party Practice*, 1967 U. Ill. L.F. 236, 242-243. The essential ingredient appears to be a contractual or quasi-contractual relationship between the indemnitor and the indemnitee from which the courts imply a duty and a promise to indemnify.

The above-cited description of the circumstances under which indemnity would be implied closely approximates the circumstances under which indemnity was permitted at the time of *Gulf Mobile & Ohio R. Co. v. Arthur Dixon Transfer Co.*, 343 Ill.App. 148, 98 N.E.2d 783 (1st Dist.1951). Nevertheless, *Muhlbauer* was not viewed as mandating a return to the concept that indemnity would be afforded only those who were technically liable and not personally at fault; the doctrine continued to be applied under circumstances where there was a mere disparity in the culpability of the parties. *Mullins v. Crystal Lake Park Dist.*, 129 Ill.App.2d 228, 262 N.E.2d 622 (1970). Nevertheless, the authorities emphasized that there had to be a qualitative distinction between the conduct of the indemnitee and that of the indemnitor. *Harris v. Algonquin Ready Mix, Inc.*, 59 Ill.2d 445, 322 N.E.2d 58 (1974); *Chicago & Illinois Midland Ry. v. Evans Constr. Co.*, 32 Ill.2d 600, 602; 208 N.E.2d 573, 574 (1965); *Stach v. Sears, Roebuck & Co.*, 102 Ill.App.3d 397, 429 N.E.2d 1242, 57 Ill.Dec. 879 (1st Dist.1981).

The Impact of Contribution

The Illinois Supreme Court's decision in *Skinner v. Reed-Prentice Div. Package Machinery Co.*, 70 Ill.2d 1, 374 N.E.2d 437, 15 Ill.Dec. 829 (1977), *certiorari denied* 436 U.S. 946, 98 S.Ct. 2849, 56 L.Ed.2d 787 (1978), adopting comparative contribution, placed the continued existence of the doctrine of “active-passive” indemnity into question. Does contribution supplant “active-passive” indemnity? In *Heinrich v. Peabody Int'l Corp.*, 99 Ill.2d 344, 459 N.E.2d 935, 76 Ill.Dec. 800 (1984), the Court declined to decide the issue because the parties had not taken an adversarial position on it. Appellate Court decisions reached conflicting conclusions as to the viability of the doctrine. *Compare Van Jacobs v. Parikh*, 97 Ill.App.3d 610, 422 N.E.2d 979, 52 Ill.Dec. 770 (1st Dist.1981); *Lowe v. Norfolk & Western Ry.*, 124 Ill.App.3d 80, 463 N.E.2d 792, 79 Ill.Dec. 238 (5th Dist.1984), *appeal denied* 101 Ill.2d 547, 467 N.E.2d 582, 81 Ill.Dec. 711 (1984); *Allison v. Shell Oil Co.*, 133 Ill.App.3d 607, 479 N.E.2d 333, 88 Ill.Dec. 720 (5th Dist.1985); *Jethroe v. Koehring Co.*, 603 F.Supp. 1200 (S.D.Ill.1985); and *LeMaster v. Amsted Industries, Inc.*, 110 Ill.App.3d 729, 442 N.E.2d 1367, 66 Ill.Dec. 454 (5th Dist.1982) (“active-passive” indemnity survives) with *Morizzo v. Laverdure*, 127 Ill.App.3d 767, 469 N.E.2d 653, 83 Ill.Dec. 46 (1st Dist.1984), *Heinrich v. Peabody Int'l Corp.*, 139 Ill.App.3d 289, 486 N.E.2d 1379, 93 Ill.Dec. 544 (1st Dist.1985), and *Holmes v. Sahara Coal Co.*, 131 Ill.App.3d 666, 475 N.E.2d 1383, 86 Ill.Dec. 816 (5th Dist.1985) (“active-passive” indemnity does not survive).

Finally, in *Allison v. Shell Oil Co.*, 113 Ill.2d 26, 495 N.E.2d 496, 99 Ill.Dec. 115 (1986), the Illinois Supreme Court held that “active-passive” indemnity would not longer be applied when contribution is available. However, other forms of indemnity may continue to exist.

Although “active-passive” indemnity does not apply to causes of action arising on or after March 1, 1978 (*see* Introduction to IPI 600.00, Contribution, *infra*), the instructions in this chapter have been retained and revised for use in cases arising prior to that date. In addition, some of them may apply to other types of indemnity actions.

The Basis of Active-Passive Indemnity

In *Miller v. DeWitt*, 37 Ill.2d 273, 226 N.E.2d 630 (1967), which was reaffirmed by the Supreme Court in *Doyle v. Rhodes*, 101 Ill.2d 1, 461 N.E.2d 382, 77 Ill.Dec. 759 (1984), the Court described the circumstances under which the jury could find that the third-party plaintiff architect was a passive tortfeasor and third-party defendant contractor was an active tortfeasor. The architect would be entitled to indemnity if the injury had been directly caused by improper construction methods used by the contractor and the architect's liability was bottomed solely upon his failure to stop the work on the job. In other words, indemnity is permitted only where the indemnitee did not personally participate in the wrongdoing--where he was exposed to liability by the indemnitor's breach of a duty owed the indemnitee.

This strict construction of the basis of indemnity is also supported by the Supreme Court's analysis in *Doyle v. Rhodes, supra*, of the circumstances under which the third-party plaintiff was entitled to complete rather than partial contribution. The third-party defendant had been charged with violating the Road Construction Injuries Act, a safety statute. The Court stated that if the evidence at trial showed that the third-party defendant's compliance with the statute would have prevented the third-party plaintiff from engaging in her negligence, the third-party plaintiff would be entitled to complete contribution. Although the Court stated that contribution envisions a sharing of liability by the culpable defendants even where the liability of one is grounded on the special duties imposed by a safety statute, the Court further noted:

If the evidence that emerges at trial shows that compliance by the road builder with the Road Construction Injuries Act would have prevented Rhodes from engaging in her “negligent” act or would have reduced its impact on Doyle to zero, Rhodes would not be guilty of comparative negligence under the Act and, contrary to what we understand was the holding of the appellate court, would be entitled to recover the entire award from Rein, Schultz & Dahl, as she urges. If, on the other hand, it is found that Rhodes' negligence would not have been deterred or prevented by compliance with the Act, or that her conduct fell sufficiently far short of acceptable driving practices as to amount to a misuse of the road under any condition, she would be entitled to recover in contribution only to the extent that the injury to Doyle is found to be the result of the failure of Rein, Schultz & Dahl to make its worksite safe rather than of her negligence.

The basis of indemnity was also described in *Van Slambrouck v. Economy Baler Co.*, 105 Ill.2d 462, 475 N.E.2d 867, 86 Ill.Dec. 488 (1985); *Van Jacobs v. Parikh*, 97 Ill.App.3d 610, 422

N.E.2d 979, 52 Ill.Dec. 770 (1st Dist.1981); and *LeMaster v. Amsted Industries, Inc.*, 110 Ill.App.3d 729, 442 N.E.2d 1367, 66 Ill.Dec. 454 (5th Dist.1982). A qualitative distinction alone between the conduct of the parties does not present a sufficient basis for indemnity. There must additionally be a duty to indemnify which arises not from the relative culpability of the parties but from their pre-tort relationship and responsibilities *inter se*. The shift of the entire responsibility for the payment of damages is based on the fact that the indemnitee is only technically liable for damages and the indemnitor is truly culpable.

The foregoing decisions confirm that indemnity cannot continue to be applied in the unfettered fashion as was pre-Skinner indemnity. A mere disparity in the culpability of the parties is a basis for contribution and not indemnity. The terminology previously used by this committee, i.e. major-minor fault, has never been expressly approved by the courts and the committee thus uses the “active-passive” language which the courts have adopted.

The Instructions

In view of the foregoing, the committee has amended the instructions. Those instructions follow the Supreme Court's analysis in *Miller v. DeWitt, supra*, and *Doyle v. Rhodes, supra*.

The subject matter of “pre-tort” relationship is not covered in these instructions since it is a matter of law to be ruled upon by the court, not a question of fact to be decided by a jury. As stated in *Isabelli v. Cowles Chemical Co.*, 7 Ill.App.3d 888, 899; 289 N.E.2d 12, 19 (1st Dist.1972): “The right to indemnification exists as a matter of law and because of the relationship of the parties to the transaction.” It will be up to the trial judge to determine whether or not the complaint contains sufficient allegations of the “requisite relationship.” See *Muhlbauer v. Krusel*, 39 Ill.2d 226, 234 N.E.2d 790 (1968).

The instructions presented here are not intended for use in cases involving contractual indemnity. Of course, where there is a contract of indemnity, the terms of the contract will govern the right to recovery. *Jackson v. Illinois Central Gulf R. Co.*, 18 Ill.App.3d 680, 309 N.E.2d 680, 690 (1st Dist.1974). But see 740 ILCS 35/1 (1994), prohibiting agreements holding one harmless or indemnifying one from one's own negligence in construction contracts.

Active-passive implied indemnity is not permitted in certain situations as a matter of public policy. *Wessel v. Carmi*, 54 Ill.2d 127, 295 N.E.2d 718 (1973) (one liable under Dram Shop Act may not secure indemnity); *McDonald v. Trampf*, 49 Ill.App.2d 106, 198 N.E.2d 537 (1st Dist.1964) (intoxicated driver may not seek indemnity from tavern operators); *St. Joseph Hospital v. Corbetta Const. Co.*, 21 Ill.App.3d 925, 960; 316 N.E.2d 51, 75 (1st Dist.1974) (one guilty of fraud may not seek indemnity from one that is careless).

Also, in the products liability area the original manufacturer may not recover indemnity from those who are down the distributive chain. *Burke v. Sky Climber, Inc.*, 57 Ill.2d 542, 316 N.E.2d 516 (1974) (indemnity not available to manufacturer against employer).

Costs and Attorney Fees

The court may add “properly taxable costs” to a judgment for indemnity. *Gatto v. Walgreen Drug Co.*, 23 Ill.App.3d 628, 320 N.E.2d 222 (1st Dist.1974), *reversed on other grounds*, 61 Ill.2d 513, 337 N.E.2d 23 (1975), *certiorari denied*, 425 U.S. 936, 96 S.Ct. 1669, 48 L.Ed.2d 178 (1976). In the absence of statute or express contract, attorneys fees, costs of investigation and other costs may not be recovered in an action for indemnity. *Reese v. Chicago, B. & Q. R.R.*, 5 Ill.App.3d 450, 283 N.E.2d 517 (2d Dist.1972), *affirmed*, 55 Ill.2d 356, 303 N.E.2d 382 (1973).

Upstream Indemnity in a Products Case

The committee is of the opinion that upstream indemnity which a purveyor of a product might seek from the party who sold him the product or its components is not properly part of the “active-passive” doctrine, but rather may be based upon strict liability in tort, warranty, or other applicable theory. Accordingly, the subject is not addressed here.

500.01 General Statement of Law

One who [is required to pay] [may be required to pay] [has paid] damages for causing injury to another may be reimbursed for that sum from a third party under certain circumstances, which will be explained to you in the following instructions.

This is known as indemnity.

SPECIAL NOTE ON USE

For simplicity, all of the instructions have been drafted using primarily the masculine gender, the present tense, and the singular form of nouns. When the parties referenced are actually female or impersonal (e.g., corporations), or when the plural form or past tense is required, the instruction should be changed accordingly. Also, if the instruction applies to fewer than all counts, it should be so limited by an introductory phrase.

Notes on Use

This instruction should be given in every indemnity case.

500.02 Definition--"Active Conduct"--"Passive Conduct"

When I say that [name of third party plaintiff] claims that [name of third party defendant]'s conduct was "active," I mean he claims [name of third party defendant]'s conduct was the significant cause of [name of plaintiff]'s injury and that [name of third party defendant] thereby caused [name of third party plaintiff] to be liable to [name of plaintiff].

When I say that [name of third party plaintiff] claims that his conduct was passive, I mean he claims that his conduct was different from, and minor or technical when compared to, that of [name of third party defendant] and that he was exposed to liability to [name of plaintiff] primarily because of [name of third party defendant]'s conduct.

The difference in the conduct of the parties must be a difference in quality or nature, rather than in quantity.

Notes on Use

See Special Note on Use at 500.01.

If any instruction is given which contains the defined terms, "active" or "passive" this instruction must be given.

500.03 Issues Made By the Pleadings--All Causes of Action--Indemnitee and Indemnitor Are Both Named and Charged as Tortfeasors in Prime Complaint--Complaint and Claim For Implied (Active-Passive) Indemnity Tried Concurrently

[1] In addition to the claim[s] of [name of plaintiff] against [name of defendant] in this case, [name of counterplaintiff] claims he is entitled to indemnity from [name of counterdefendant] for any sum [name of counterplaintiff] may become liable to pay [name of plaintiff].

[2] [name of counterplaintiff] claims that if he is found liable to [name of plaintiff], he, [name of counterplaintiff], is entitled to indemnity because his liability, if any, was the result of his passive conduct and [name of counterdefendant]'s conduct was active in causing the [injuries] [damages] to [name of plaintiff] in one or more of the following respects:

[Set forth in simple form without undue emphasis or repetition those allegations of the counterclaim as to the conduct of the counterdefendant which have not been withdrawn or ruled out by the court and are supported by the evidence.]

[3] [name of counterdefendant], [denies that he did any of the things claimed by [name of counterplaintiff]] [denies that his conduct was active in causing [name of plaintiff]'s (injuries) (damages)]; [denies [name of counterplaintiff]'s conduct was passive in causing [name of plaintiff]'s (injuries) (damages)].

[4] [name of counterdefendant] also asserts the following affirmative defense[s]:

[Set forth in simple form without undue emphasis or repetition those affirmative defenses in the answer to the counterclaim which have not been withdrawn or ruled out by the court and are supported by the evidence.]

[5] [name of counterplaintiff] denies [that] [those] affirmative defense[s].

Notes on Use

See Special Note on Use at 500.01.

An issues instruction appropriate for the prime case must be given with this instruction. Also, IPI 500.10 must be given with this instruction.

If the counterplaintiff alleges the counterdefendant is a tortfeasor under a cause of action or allegations of fault not alleged by the prime plaintiff, the instructions must be amended accordingly.

Only affirmative defenses should be set forth under the paragraph referring thereto.

Comment

Under the “all or nothing” requirement of indemnity, the amount to be recovered is fixed by the damages paid or assessed in the original suit. *Gatto v. Walgreen Drug Co.*, 23 Ill.App.3d 628, 640; 320 N.E.2d 222, 231 (1st Dist.1974), *reversed on other grounds*, 61 Ill.2d 513, 337 N.E.2d 23 (1975), *certiorari denied*, 425 U.S. 936, 96 S.Ct. 1669, 48 L.Ed.2d 178 (1976). The amount is automatically set at the same figure incurred by the indemnitee, and can be neither more nor less. (*But cf. Carver v. Grossman*, 6 Ill.App.3d 265, 272-273; 285 N.E.2d 468, 472-73 (1st Dist.1972), *reversed on other grounds*, 55 Ill.2d 507, 305 N.E.2d 161 (1973), where fraud or collusion may raise an exception. *See also LeMaster v. Amsted Industries, Inc.*, 110 Ill.App.3d 729, 442 N.E.2d 1367, 66 Ill.Dec. 454 (5th Dist.1982).)

Only affirmative defenses should be set forth under the paragraph referring thereto. *See* 735 ILCS 5/2-613(d) (1994). That statute also requires the pleading of other defenses which “... would be likely to take the opposite party by surprise.” Such “special defenses” may or may not be “affirmative defenses” to which paragraph [4] of the instruction applies. The criterion to be applied in determining whether a defense is an “affirmative defense” is whether, by raising it, defendant gives color to his opponent's claim and then asserts new matter by which the apparent right is defeated. *Baylor v. Thiess*, 2 Ill.App.3d 582, 277 N.E.2d 154 (2d Dist.1971); *Horst v. Morand Bros. Beverage Co.*, 96 Ill.App.2d 68, 237 N.E.2d 732 (1st Dist.1968).

500.04 Issues Made by the Pleadings--All Causes of Action--Indemnitor Is Not Charged as a Tortfeasor in Prime Complaint--Complaint and Claim for Implied (Active-Passive) Indemnity--Tried Concurrently

[1] In addition to the claim[s] of [name of plaintiff] against [name of defendant] in this case, [name of third party plaintiff] claims he is entitled to indemnity from [name of third party defendant] for any sum [name of third party plaintiff] may become liable to pay [name of plaintiff].

[2] *[Set forth those portions of the IPI issues instruction which are appropriate to the indemnitor's allegation(s) that the indemnitor was a tortfeasor who injured the prime plaintiff.]*

[3] [Name of third party plaintiff] claims that if he is found liable to [name of plaintiff], he [name of third party plaintiff], is entitled to indemnity because his liability, if any, was the result of his passive conduct and [name of third party defendant]'s conduct was active in causing the [injury] [damages] to [name of plaintiff].

[4] [Name of third party defendant]

[Set forth the indemnitor's denial that he did the things charged, that his conduct was tortious and that that conduct proximately caused injury to the plaintiff.]

[[Name of third party defendant] denies that his conduct was active in causing [name of plaintiff]'s (injury) (damage)].

[[Name of third party defendant] denies that [name of third party plaintiff]'s conduct was passive in causing [name of plaintiff]'s (injury) (damage)].

[5] [Name of third party defendant] also asserts the following affirmative defense[s]:

[Set forth in simple form without undue emphasis or repetition those affirmative defense(s) in that third party answer which have not been withdrawn or ruled out by the court and are supported by the evidence.]

[6] [Name of third party plaintiff] denies [that] [those] affirmative defense[s].

Notes on Use

See Special Note on Use at 500.01.

IPI 500.10 must be given with this instruction.

As noted in paragraph two, all pertinent paragraphs of the IPI issues instruction applicable to the particular cause of action alleged in the complaint for indemnity must be set forth within this instruction.

In instructing the jury as to the theory of liability against the indemnitor, use the appropriate IPI instructions. For instance, in charging negligence, use IPI 10.01, 15.01, and/or other appropriate instructions.

500.05 Issues Made by the Pleadings--All Causes of Action--Separate or Third Party Complaint for Implied (Active-Passive) Indemnity Tried Separately to Different Jury

[1] A judgment has been entered requiring [name of third party plaintiff] to pay a sum of money to [name of plaintiff]. [name of third party plaintiff] now seeks indemnity for that sum from [name of third party defendant].

[2] *[Set forth those portions of the IPI issues instruction which are appropriate to the indemnitee's allegation(s) that the indemnitor was a tortfeasor who injured the prime plaintiff.]*

[3] [Name of third party plaintiff] claims that he is entitled to indemnity because his liability was the result of his passive conduct and [name of third party defendant]'s conduct was active in causing the [injuries] [damages] to [name of plaintiff].

[4] [Name of third party defendant]

[Set forth indemnitor's denial that he did the things charged, that his conduct was tortious and that that conduct proximately caused injury to the plaintiff.]

[[Name of third party defendant] denies that his conduct was active in causing [name of plaintiff]'s (injuries) (damages)];

[[Name of third party defendant] denies that [name of third party plaintiff]'s liability was passive in causing [name of plaintiff]'s (injuries) (damages)].

[5] [Name of third party defendant] also asserts the following affirmative defense[s]:

[Set forth in simple form without undue emphasis or repetition those affirmative defenses in the third party answer which have not been withdrawn or ruled out by the court and are supported by the evidence.]

[6] [Name of third party plaintiff] denies [that] [those] affirmative defense[s].

Notes on Use

See Special Note on Use at 500.01.

As noted in paragraph two, all pertinent paragraphs of the IPI issues instruction applicable to the particular cause of action alleged in the complaint for indemnity must be set forth within this instruction.

In instructing the jury as to the theory of liability against the indemnitor, use the appropriate IPI instructions. For instance, in charging negligence, use IPI 10.01, 15.01, and/or other appropriate instructions.

This instruction should be used where a judgment against the third party plaintiff has been entered in a prior action. It should be used where the claim for indemnity was not tried in the original action and only when the third party defendant either participated or had an opportunity to participate in the original action.

If the indemnitor was not afforded that opportunity, the indemnitor is not bound by the injured party's judgment against the indemnitee and the statement of issues must be redrafted accordingly.

Comment

Where a party against whom indemnity is sought was tendered an opportunity to participate in the original action, but did not do so, he is bound by the judgment in the original action and is precluded under the doctrine of collateral estoppel from relitigating the issues of the original action. *Cowan v. Insurance Co. of North America*, 22 Ill.App.3d 883, 318 N.E.2d 315 (1st Dist.1974). He is not precluded, however, from raising issues concerning insurance policy coverage. *Id.*

Where there has been a trial after a proper tender, the indemnitee may not relitigate any issue that was necessary to reach the judgment in the original case. Accordingly, it has been held in *Security Ins. Co. v. Mato*, 13 Ill.App.3d 11, 17; 298 N.E.2d 725, 730 (2d Dist.1973), "An indemnitee ... is bound by all findings without which the judgment could not have been rendered; and if the judgment in the earlier action rested on a fact fatal to recovery in the action over against the indemnitor, recovery is denied in the action over." *See also Radosta v. Chrysler Corp.*, 110 Ill.App.3d 1066, 443 N.E.2d 670, 66 Ill.Dec. 744 (1st Dist.1982). If the indemnitee's conduct has been found to be "major fault" in the original case, then the indemnitee cannot successfully maintain a suit for indemnity. *Village of Lombard v. Jacobs*, 2 Ill.App.3d 826, 277 N.E.2d 758 (2d Dist.1972).

If the original case is disposed of by judgment and both the indemnitee and the indemnitor were parties in that case, both are bound by the judgment as it relates to the indemnitor's conduct. *Radosta v. Chrysler Corp.*, 110 Ill.App.3d 1066, 443 N.E.2d 670, 66 Ill.Dec. 744 (1st Dist.1982). It has been held that a summary judgment in the original case in favor of the indemnitor finding that it was not primary in causing damages barred any action for indemnity. *Karon v. E. H. Marhoeffer, Jr., Co.*, 14 Ill.App.3d 274, 302 N.E.2d 478 (1st Dist.1973).

Where the indemnitor is not a party to the original case, his opportunity to participate in that case will determine the binding effect of that judgment on him. For example, where the indemnitee failed to tender the defense of the original suit to the indemnitor, the indemnitor is not bound by the result in the original case. *Kapiolani Estate v. Atcherley*, 238 U.S. 119, 35 S.Ct. 832, 59 L.Ed. 1229 (1915). Likewise, where the indemnitor is prevented from participating in the original case by an erroneous severance of the indemnity action, the indemnitor is not bound by the judgment in the original case. *Palmer v. Mitchell*, 57 Ill.App.2d 160, 206 N.E.2d 776 (1st Dist.1965).

On the other hand, if there has been a tender of defense by the indemnitee to the

indemnitor which is wrongfully refused, then the indemnitor is bound by the judgment in the original case and the only question left open to the indemnitor to litigate is whether or not he is liable to furnish indemnity. *Karas v. Snell*, 11 Ill.2d 233, 142 N.E.2d 46 (1957). See also *Illinois Bell Tel. Co. v. Dynaweld, Inc.*, 70 Ill.App.3d 387, 388 N.E.2d 157, 26 Ill.Dec. 533 (1st Dist.1979). Finally, if there is a tender of defense which is properly refused, then the judgment in the original action is not binding upon the indemnitor. *Sears, Roebuck & Co. v. Employers Mut. Liab. Ins. Co.*, 6 Ill.App.3d 10, 284 N.E.2d 386 (1st Dist.1972). The Illinois cases to date have not furnished any helpful basis for determining whether or not a particular refusal of a tender of defense is proper or wrongful. See *Sears Roebuck & Co. v. Employers Mut. Liab. Ins. Co.*, *supra*.

Neither the indemnitee nor the indemnitor is bound by the result in the original action where that action is disposed of by settlement or by consent decree. *Mosley v. Northwestern Steel & Wire Co.*, 76 Ill.App.3d 710, 394 N.E.2d 1230, 31 Ill.Dec. 853 (1st Dist.1979). Recognizing that consent decrees do not constitute judicial findings, the courts have held that the indemnitor is free to litigate in the indemnity action all questions concerning its fault. *Sleck v. Butler Bros.*, 53 Ill.App.2d 7, 202 N.E.2d 64 (1st Dist.1964). See also *St. Paul Fire & Marine Ins. Co. v. Michelin Tire Corp.*, 12 Ill.App.3d 165, 298 N.E.2d 289 (1st Dist.1973). Likewise, the indemnitor is free to litigate in the indemnity action all issues concerning all parties' conduct. *Carver v. Grossman*, 6 Ill.App.3d 265, 285 N.E.2d 468 (1st Dist.1972), *reversed on other grounds*, 55 Ill.2d 507, 305 N.E.2d 161 (1973).

500.06 Issues Made by the Pleadings--All Causes of Action--Indemnitee and Indemnitor Are Both Named and Charged as Tortfeasors in Prime Complaint--Complaint and Third Party Complaint For Implied (Active-Passive) Indemnity Tried Consecutively to Same Jury

[1] You have returned a verdict requiring [name of counterplaintiff] to pay a sum of money to [name of plaintiff]. [Name of counterplaintiff] now seeks indemnity for that sum from [name of counterdefendant].

[2] [Name of counterplaintiff] claims that he is entitled to indemnity because his liability was the result of his passive conduct and [name of counterdefendant]'s conduct was active in causing the [injuries] [damages] to [name of plaintiff] in one or more of the following respects:

[Set forth in simple form without undue emphasis or repetition those allegations of the counterclaim as to the conduct of the counterdefendant which have not been withdrawn or ruled out by the court and are supported by the evidence.]

[3] [Name of counterdefendant] [denies that he did any of the things claimed by [name of counterplaintiff]]; [denies that his conduct was active in causing [name of plaintiff]'s (injuries) (damages)]; [denies that [name of counterplaintiff]'s liability was passive in causing [name of plaintiff]'s (injuries) (damages)].

[4] [Name of counterdefendant] also asserts the following affirmative defense[s]:

[Set forth in simple form without undue emphasis or repetition those affirmative defenses in the answer to counterclaim which have not been withdrawn or ruled out by the court and are supported by the evidence.]

[5] [Name of counterplaintiff] denies [that] [those] affirmative defense[s].

Notes on Use

See Special Note on Use at 500.01.

Only affirmative defenses should be set forth under the paragraph referring thereto. See 735 ILCS 5/2-613(d) (1994).

Comment

735 ILCS 5/2-613(d) (1994) also requires the pleading of other defenses which “would be likely to take the opposite party by surprise.” Such “special defenses” may or may not be “affirmative defenses” to which paragraph [4] of the instruction applies. The criterion to be applied in determining whether a defense is an “affirmative defense” is whether, by raising it, defendant gives color to his opponent's claim and then asserts new matter by which the apparent right is defeated. *Baylor v. Thiess*, 2 Ill.App.3d 582, 277 N.E.2d 154 (2d Dist.1971); *Horst v. Morand Bros. Beverage Co.*, 96 Ill.App.2d 68, 237 N.E.2d 732 (1st Dist.1968).

500.07 Issues Made By the Pleadings--All Causes of Action--Indemnitor Not Charged as a Tortfeasor in Prime Complaint--Separate or Third Party Complaint for Implied (Active-Passive) Indemnity--Tried Consecutively to Same Jury

[1] You have returned a verdict requiring [name of defendant] to pay a sum of money to [name of plaintiff]. [Name of third party or counterplaintiff] now seeks indemnity for that sum from [name of third party or counterdefendant].

[2] [Set forth those portions of the IPI issues instructions which support the indemnitee's allegation(s) that the indemnitor was a tortfeasor who injured the prime plaintiff.]

[3] [Name of third party or counterplaintiff] claims that he is entitled to indemnity because his liability was the result of his passive conduct and [name of third party or counterdefendant]'s conduct was active in causing the [injuries] [damages] to [name of plaintiff].

[4] [Name of third party or counterdefendant]

[Set forth indemnitor's denial that he did the things charged, that his conduct was tortious and that that conduct proximately caused injury to the plaintiff.]

[[Name of third party or counterdefendant] denies that his conduct was active in causing [name of plaintiff]'s (injuries) (damages)].

[[Name of third party or counterdefendant] denies that [name of third party or counterplaintiff]'s liability was passive in causing [name of plaintiff]'s (injuries) (damages)].

[5] [Name of third party or counterdefendant] also asserts the following affirmative defense[s]:

[Set forth in simple form without undue emphasis or repetition those affirmative defenses in the indemnitor's answer which have not been withdrawn or ruled out by the court and are supported by the evidence.]

[6] [Name of third party or counterplaintiff] denies [that] [those] affirmative defense[s].

Notes on Use

See Special Note on Use at 500.01.

See Notes on Use for IPI 500.04.

500.08 Issues Made By the Pleadings--Complaint for Implied (Active-Passive) Indemnity Following Settlement--All Causes of Action

[1] [Name of third party plaintiff] claims that he is entitled to indemnity from [name of third party defendant] for a sum of money he, [name of third party plaintiff], has paid to [name of injured party].

[2] [Name of third party plaintiff] claims that the payment was made in reasonable anticipation of his liability to [name of injured party].

[3] [Set forth those portions of the IPI issues instruction which are appropriate to the indemnitee's allegation(s) that the indemnitor was a tortfeasor who injured the prime plaintiff.]

[4] [Name of third party plaintiff] further claims that he is entitled to indemnity because his liability was the result of his passive conduct and [name of third party defendant]'s conduct was active in causing the damages to [name of injured party].

[5] [Name of third party defendant] [denies that the payment was made in reasonable anticipation of liability];

[Set forth indemnitor's denial that he did the things charged, that his conduct was tortious and that that conduct proximately caused injury to the plaintiff.]

[[Name of third party defendant] denies that his conduct was active in causing [name of injured party]'s damages]; [and]

[[Name of third party defendant] denies that [name of third party plaintiff]'s liability was passive in causing [name of injured party]'s damages].

[6] [Name of third party defendant] also asserts the following affirmative defense[s]:

[Set forth in simple form without undue emphasis or repetition those affirmative defenses in the answer which have not been withdrawn or ruled out by the court and are supported by the evidence.]

[7] [Name of third party plaintiff] denies [that] [those] affirmative defense[s].

Notes on Use

See Special Note on Use at 500.01.

See Notes on Use for 500.04.

500.09 Burden of Proof on the Issues--All Causes of Action--Affirmative Defenses--Complaint and Third Party Complaint--Tried Concurrently or Consecutively to Same Jury, or Separately to Different Jury

[Name of third party plaintiff] has the burden of proving each of the following propositions:

First, that his conduct was passive;

Second,

[Set forth those portions of the IPI burden of proof instruction which are appropriate for the cause of action alleged against the indemnitor];

Third, that [name of third party defendant]'s conduct, in one or more of the ways that I have described to you in these instructions, was active.

[[Name of third party defendant] has asserted the affirmative defense(s) that:

(Set forth in simple form without undue emphasis or repetition those affirmative defenses in the third party answer which have not been withdrawn or ruled out by the court and are supported by the evidence.)

[Name of third party defendant] has the burden of proving (this) (these) affirmative defense(s).]

If you find from your consideration of all the evidence that each of the propositions required of [name of third party plaintiff] has been proved, [and that (none of) [name of third party defendant]'s affirmative defense(s) has (not) been proved] then your verdict should be for [name of third party plaintiff].

If, on the other hand, you find from your consideration of all the evidence that any of the propositions required of [name of third party plaintiff] has not been proved, [or that (the) (any one of the) affirmative defense(s) of [name of third party defendant] has been proved] then your verdict should be for [name of third party defendant].

Notes on Use

See Special Note on Use at 500.01.

This instruction must be modified to fit the pleadings and the proof. Omit the references to affirmative defenses if they are inapplicable. As noted in paragraph "second," all pertinent paragraphs of the IPI burden of proof instructions applicable to the particular cause of action alleged in the complaint for indemnity must be set forth within this instruction.

500.10 Indemnity--Prime Complaint and Complaint for Indemnity Tried Concurrently--Absence of Liability to Original Plaintiff--No Occasion to Consider Indemnity

If you decide [name of third party or counterplaintiff] is not liable to [name of plaintiff], you will have no occasion to consider the question of indemnity.

500.11 Indemnity--Instruction on Use of Verdict Forms--One Third Party Plaintiff and One Third Party Defendant

[If you find for [name of plaintiff], also complete the appropriate verdict form relating to indemnity which is supplied with these instructions.] [Forms of verdict are supplied with these instructions.]

After you have reached your verdict, fill in and sign the appropriate form of verdict and return it to the court. The verdict should be signed by each of you. You should not write or mark upon this or any of the other instructions given you by the court.

If you find that [name of third party plaintiff] is entitled to indemnity from [name of third party defendant] then you should use the form of verdict which says:

“We, the Jury, find that [name of third party plaintiff] is entitled to indemnity from [name of third party defendant].”

If you find that [name of third party plaintiff] is not entitled to indemnity from [name of third party defendant] then you should use the form of verdict which says:

“We, the Jury, find that [name of third party plaintiff] is not entitled to indemnity from [name of third party defendant].”

Notes on Use

The first two sentences of this instruction are alternatives. The first bracketed sentence should be used when the action for indemnity and the original action are tried concurrently. When the original action was tried separately or was settled, use the second bracketed sentence.

500.12 Form of Verdict

We, the jury, find that [name of third party or counterplaintiff] is entitled to indemnity from [name of third party or counterdefendant].

[Signature Lines]

500.13 Form of Verdict

We, the jury, find that [name of third party or counterplaintiff] is not entitled to indemnity from [name of third party or counterdefendant].

[Signature Lines]