THIRD PARTY PRACTICE

Jeremy N. Boeder
Tribler Orpett & Meyer, P.C.

I. INTRODUCTION

Illinois law has evolved to make third party practice an important and often-used tool in apportioning liability and damages to responsible parties. By adding new parties to a lawsuit through a third party complaint, when appropriate, a defense attorney has the ability to spread risk to parties other than his client. Although it is not always beneficial to the defense attorney to force the plaintiff’s attorney to litigate its claim against several defendants, rather than just one, this is very often the case. Because of the strategic advantages that may be gained through third party practice, this is a topic with which every defense litigator should be familiar. Plaintiffs’ attorneys should also have at least a basic familiarity with the bases for and nuances of third party practice, as this procedural tool may have a significant effect on the plaintiff’s case, as well.

These materials will briefly address third party practice in Illinois, discussing the types and manner of claims that be asserted against third parties in a variety of actions along with a brief overview of how and when such claims can be asserted. This article will also provide a brief explanation of types of cases in which parties can be added along with the classes of parties that can be added to each particular action.

II. TYPES OF THIRD PARTY CLAIMS

A. Contribution

The most common form of third party practice is contribution, in which a defendant seeks to spread its potential liability to other parties. The Contribution Among Joint Tortfeasors Act, 740 ILCS 100/1 (the “Contribution Act”), gives tortfeasors the right to seek contribution from any other tortfeasors who would be also subject to liability for the same injury. If a tortfeasor settles and obtains a good-faith finding, the non-settling tortfeasor is entitled to a set-off against the judgment by the amount paid by the settling tortfeasor. 740 ILCS 10012(c). The non-settling tortfeasor is entitled to the set-off even if the resulting judgment in favor of plaintiff is reduced to zero. Pasquale v. Speed Products Engineering, 166 Ill. 2d 337 (1995).

Judgment need not be entered against a tortfeasor before that party may seek contribution from another. 740 ILCS 100/2(a). Nevertheless, the Illinois Supreme Court has held that, where an injured party names a defendant in a “first party” action, the defendant must assert any contribution claims that it possesses by counterclaim or third-party claim or the defendant will be barred from pursuing the contribution claim through other litigation. Laue v. Leifheit, 105 Ill. 2d 191 (1984).

Generally, the right of contribution allows a party to recover all amounts paid in excess of the tortfeasor’s liability from the contribution defendants or third party defendants. 740 ILCS
100/1(b). The notable exception to this rule is where an employer is sued in a contribution action. In such a scenario, a judgment against the employer cannot exceed the amount of the employer's liability in worker's compensation. *Kotecki v. Cyclops Welding*, 146111. 2d. 155 (1991). However, this limitation of the liability may be expressly waived. Specifically, Illinois courts have held that indemnity clauses contained in construction contracts are intended to bind the parties to unlimited contribution, and thus are interpreted as a waiver of a workers' compensation cap on damages. See *Braye v. Archer-Daniels-Midland Co.*, 175 Ill. 2d 201 (1997); *Liccardi v. Stolt Terminals*, 178 Ill. 2d 540,687 N.E.2d 968 (1997). In such a scenario, the indemnity language in a contract can expose the employer to unlimited contribution to the extent that the employer is responsible for causing the accident to his employee.

Not all claims have the right of contribution. Contribution claims are not permitted in dram shop liability cases. See, *e.g.*, *Johnson v. Mers*, 279 Ill. App. 3d 372 (1996). Illinois courts have also held that intentional tortfeasors have no right to contribution under the Act. *Tornabene v. Paramedic Services of Illinois, Inc.*, 314 Ill. App. 3d 494 (2000).

**B. Express Indemnity**

Express indemnity exists when an express agreement between the parties creates an obligation to indemnify. Illinois courts require that indemnification provisions be clear and unambiguous in order to be upheld, and are strictly construed against the party seeking indemnification, *Westinghouse Electric v. LaSalle Monroe*, 395 Ill. 429, 433-434 (1946). Such agreements may even be entered-into after an accident or injury has occurred. *Bassick Co., Div. of Stewart-Warner Corp. v. Mississippi Valley Erection Co.*, 104 Ill. App. 3d 517 (1st Dist. 1982). The notable exception to such express indemnification provisions are agreements to insure or indemnify against one’s own negligence. Illinois has several statutes that state that indemnification agreements that seek to indemnify for one’s own negligence are void as a matter of public policy. See, *e.g.*, 740 ILCS 35/0.01, et. seq. (construction contracts); 765 ILCS 705/1 (lease agreements). However, these agreements to indemnify do not void other exculpatory provisions such as limitations of liability. *Braye v. Archer-Daniels-Midland Co.*, 175 Ill. 2d 201 (1997).

**B. Implied/Equitable Indemnity**

Another form of third-party practice is “implied indemnity” (also sometimes referred to as “equitable indemnity”), in which the indemnitor and indemnitee stand in a certain relationship to one another such that the law “implies” a contract requiring indemnification. The current form of implied indemnity is not based in tort or designed to distribute pro-rata shares of liability. Instead, implied indemnity based on quasi-contract principles that recognizes that a blameless party may be held derivatively liable to the plaintiff based upon that party’s legal relationship with the one who actually caused the plaintiff's injury. Thus, implied indemnity is akin to a form of “vicarious liability,” in which the indemnitor assumes the entire responsibility and cost of making the parties whole. See, *e.g.*, *American Nan Bank & Trust Co. v. Columbus-Cuneo-Cabrini Medical Center*, 154 Ill. 2d 347, 354 (1992).
Examples of implied indemnity include “upstream” product liability indemnity against a retailer or manufacturer; indemnity actions from truck lessors against the truck driver who caused an accident with a leased vehicle; and actions against attorneys or accountants who directed that the indemnitee to give negligent advice. See Frazer v. A.F Munsterman Inc., 123 Ill. 2d 245 (1988) (product liability); Richardson v. Chapman, 175 Ill. 2d 98 (1997) (truck driver); Kerschner v. Weiss & Co., 282 Ill. App. 3d 497 (1996) (attorneys).

Another common form of implied contractual indemnity is where one party’s breach of contract causes another to breach his contract to a third party, in which case the second breaching party may be able to obtain indemnification from the first breaching party. Joe & Dan International Corp. v. Us. Fidelity & Guaranty Co., 178 Ill. App. 3d 741 (1st Dist. 1998).

III. ASSERTING THIRD PARTY CLAIMS

A. Generally

Third-party claims are generally brought in the same manner as are first-party claims. All pleadings must contain a concise statement of the pleader’s cause of action that alleges each action in a separate count. 735 ILCS 5/2-603(b). Third-party complaints are generally filed within the time for filing an answer or with leave of court. 735 ILCS 5/2-406(b). Service of process is the same as for third parties as it is for defendants. 735 ILCS 5/2-406(c).

B. Time in which to File

An action for contribution or indemnity must be commenced within two years after a party has been served with process in the underlying lawsuit, or within two years of when the party knew or should have known of any act or omission giving rise to the cause of action for contribution or indemnity, whichever period expires later. 735 ILCS 5/13-204. For indemnification actions, such an action accrues when the judgment is entered against the claimant or until he settles the claim made against him. Pistrui Group, Inc. v. ABSG Consulting Inc., 2005 U.S. Dist. LEXIS 13702 (S.D. III. 2005).

Until somewhat recently, the time limitations for certain contribution actions were governed by their respective limitations of liability. For example, contribution based on construction defect claims was governed by the four-year statute of limitation established by 735 ILCS 5/13-214. However, 735 ILCS 5/13-204 (c) now expressly preempts all other statutes of limitations for contribution and indemnity actions, with the sole exception of contribution claims based on a medical malpractice theory of liability. Consequently, it is imperative that any contribution action that can be asserted against a third party be filed within the two-year statute of limitations.

IV. PARTIES THAT MAY BE ADDED TO A THIRD PARTY ACTION

Each type of claim has its own set of actors that could be added as third party defendants depending on the facts of the particular case. This section will provide a brief explanation of the
classes of parties that may be added to a particular proceeding. One should keep these parties in mind when defending or even prosecuting such claims. This list is not meant to limit additional parties, but should rather open the door to thinking broadly about different classifications of parties that can be added when a claim is made. Thinking about additional parties may lead to a broader distribution of loss, and also lead to greater creativity in case handling.

A. Negligence

1. Automobile

In the case of an automobile claim, the most likely culpable parties are the drivers of the vehicles. However, other parties may share liability as well. These include, but are not limited to: a municipal, state, or federal entity with respect to roadway design or maintenance; a private landowner with respect to an obstructed view or a failure to maintain roadways or property; entities which may obstruct a highway, as for example, a railroad; and entities or contractors placing signage on highways, making highway repairs, changing lane configurations, designing highway, streets.

Other parties who may be liable in automobile accident cases include: a car mechanic/tire repair/car dealer; restaurants or taverns; drivers’ employers; auto rental companies; and persons leaving car keys in a location where they can be taken by someone not authorized to drive. Liability in any of these cases is always fact-specific, so it is important to have a full understanding of the case before bringing in any additional parties.

2. Premises Cases

Premises liability cases provide their own set of actors who could also be liable for the plaintiff's damages. These parties, include, but are not limited to: an owner/manager/maintenance company for the premises; an entity or person providing maintenance, repair, cleaning services, etc. to the premises; contractors working at the premises, providing services such as elevator, lighting, flooring, and other miscellaneous construction-related services; architects/engineers/designers of the premises; tenants or landlords that have responsibility to maintain the property; security personnel; anyone harboring or owning a dog or other animal that causes injury on the premises; snow plowing companies; a party that sold, installed, or maintained a defective or dangerous device which caused an injury, such as a stove, refrigerator, etc.; and abutting landowners creating dangerous conditions on the property.

3. Construction Claims

Construction defect and injury claims are, more often than not, littered with third-party claims against the many other construction professionals and suppliers who performed work on the subject property. These include, but are not limited to: owners/engineers/architects for providing improper plans or information or approving unsafe means methods or designs; subcontractors; employers of the injured person for failing to adequately train or supervise (keeping in mind that Kotecki limitations may apply); sellers, lessors, and manufacturers of construction equipment; sellers or distributors of construction materials; safety professionals or
consultants; and other contractors working on the job, even those not in privity with the one being sued, who contribute to cause a loss.

4. Product Liability Claims

Product liability claims have their own set of actors to whom liability can be distributed. These include, but are not limited to: distributors and sellers of the product, such as the store and regional distributor; manufacturer of the product; designer of the product; consultants providing safety or technical information; owners of a product having knowledge of an unsafe or defective condition, or who fail to maintain a product; employers of those using products who failed to maintain the product or use it improperly; sellers or lessors of a product; those in the distributive chain who failed to provide warnings or failed to update warnings; those who carelessly or knowingly use the product for an improper purpose or in an improper way; anyone performing repairs or making modifications or alterations to a product which make that product unsafe or dangerous.

V. CONCLUSION

The practitioner involved in litigation, or who contemplates being involved in litigation, should have an understanding of the bases for and pitfalls that may arise in bringing third party actions. Although third party practice is frequently implemented, there is often the option for shifting liability or damages that is not exercised. The practitioner should consider the potential bases for third party actions when assessing the facts particular to any matter and should remain open-minded when developing a litigation strategy.