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ILLINOIS LAW MANUAL

CHAPTER III
CROSS-CLAIMS & THIRD-PARTY PRACTICE

B. INDEMNITY

Indemnity is the obligation of a person to make good any loss or damage another has incurred or may incur by acting on the first person's behalf, or for the first person's benefit. The right to indemnity derives from the principle that everyone is responsible for the consequences of their own acts. The process of indemnification arises where two or more persons are responsible by law to an injured party, and one of those persons is only secondarily liable because the damages were caused by the greater negligence of the other person. Indemnity is distinguished from contribution in that, with indemnity, the entire loss is shifted from one party to another. In contribution, only the amount in excess of the pro rata share of liability can be recovered from a joint tortfeasor.

Implied indemnity arises where one of the tortfeasors was not personally negligent, but there existed a special relationship or other facts which would permit a trier of fact to infer a right to indemnity. Examples of pre-tort relationships that give rise to a duty to indemnify include lessor-lessee and employer-employee. The Illinois Supreme Court has held that active-passive indemnity is no longer a viable theory for

shifting the whole cost of tortious conduct among jointly liable tortfeasors following the adoption of the Contribution Act. Skinner v. Reed Prentice, 70 Ill. 2d 1 (1978); In Re: Olympia Brewing Company Securities Litigation, 674 F. Supp. 597 (1979). The Illinois Supreme Court has also stated that active-passive indemnity no longer existed after the adoption of contribution. Allison v. Shell Oil Company, 113 Ill. 2d 26 (1986). In a contribution action, a defendant whose liability to the plaintiff is based upon his own negligence cannot obtain implied indemnity. However, the Contribution Act did not abolish common law implied indemnity if the party's liability to the plaintiff is based solely upon vicarious liability or the other pre-tort relationships (lessor-lessee, master-servant) noted above. American National Bank & Trust Company v. Columbus-Cuneo-Cabrini Medical Center, 154 Ill. 2d 347 (1992). Implied indemnity may also be recovered from a lessee's employee/driver who caused an accident with a leased vehicle. Richardson v. Chapman, 175 Ill. 2d 98 (1997). Also, where there is a pre-tort relationship between attorneys, accountants, or professional individuals, an implied indemnity claim will be allowed. Kerschner v. Weiss & Co., 282 Ill. App. 3d 497 (1996).

The Contribution Act permits a non-settling defendant to set off any amount which the plaintiff recovered from a settling defendant. The non-settling defendant must establish the exact amount of the settlement received or request the court to have an evidentiary hearing to allocate any settlement among parties and theories of recovery, Cianci v. Safeco Insurance Company, 356 Ill. App. 3d 767 (1st Dist. 2005). Muro v. Abel Freight Lines, Inc., 283 Ill. App. 3d 416 (1996). However, there is a presumption of validity pursuant to the Illinois Contribution Act whenever there is a resolution of a claim by virtue of a release or covenant. The burden to show lack of good faith shifts to the

party contesting the settlement. That party must prove by a preponderance of the evidence that there was fraud, mutual mistake, or mental incompetency. Johnson v. United Airlines, 203 Ill. 2d 121 (2003).

Express indemnification arises where there is a specific contractual agreement between the parties that creates an obligation to indemnify. Such clauses must 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). Agreements to insure or indemnify against one's own negligence in claims arising out of construction activity are void and unenforceable by reason of statute. 740 ILCS 35/0.01, et seq. However, these agreements to indemnify can be enforceable if a person knowingly and in writing has waived a limitation of liability (e.g., workers' compensation lien limitation). Braye v. Archer-Daniels-Midland Co., 175 Ill. 2d 201 (1997); Liccardi v. Stolt Terminals, Inc., 178 Ill. 2d 540 (1997). Contractual indemnity is still enforceable in non-construction lawsuits. Richardson v. Chapman, 175 Ill. 2d 98 (1997).

The statute of limitations for indemnity actions is the same as for contribution actions. An action must be commenced within two years after a party has been served with process in the underlying lawsuit, or 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. Section (C) of this statute expressly preempts all other statutes of limitations for contribution and indemnity actions. Although there are no cases on point at this time, the literal reading of the statute preempts the ten-year statute of limitations for written contractual indemnity and

the five-year statute of limitations for oral or implied indemnity. This statute would also reduce the four-year statute of limitations in construction litigation for the filing of contribution and indemnity actions to two years. This literal reading may overrule prior case law, although no court of review has addressed the issue.