

CPLR 1007: Court Refuses to Allow Cause of Action for Implied Indemnity Where No Common Basis of Liability Exists

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the automobile collision situation, where other policy considerations control.

The Court stated, *inter alia*, that the insurer should not "be required to make an election between its defense to the main action and its subrogation rights."³⁹ Furthermore, other features of the CPLR, such as severances, stays or separate trials, would provide an adequate remedy for the insured—should its rights be prejudiced in any way.⁴⁰

While the instant case clearly indicates that the *Ross* rule will be undisturbed in the automobile collision situation, it seems apparent that impleader will now be available in virtually all subrogation situations. CPLR 1007 will still remain, however, the ward of judicial discretion.⁴¹

CPLR 1007: Court refuses to allow cause of action for implied indemnity where no common basis of liability exists.

In *Fladerer v. Needleman*,⁴² the appellate division, third department, held that a vendor had no cause of action for implied indemnity against her attorney "not merely because of the failure to demonstrate an active-passive negligence situation but because . . . the contract vendor and her former lawyer occupy no common basis of liability to the contract vendee."⁴³

Vendor brought suit against her contract vendee for repudiation of their contract and the vendee counterclaimed on the ground that the vendor's title was unmarketable. Consequently the vendor impleaded her attorney whom she alleged was primarily liable for any damages on vendee's counterclaim. The attorney interposed the statute of limitations to bar the third party action, but the lower court rejected this defense since an action for indemnity "accrues not at the time of the commission of the tort . . . but at the time of the payment of the judgment. . . ." ⁴⁴

The appellate division sustained this conclusion, but refused to allow the vendor's cause of action for implied indemnity, because the counterclaim rested on contract and the third party complaint rested on negligence. Moreover, there was a failure to demonstrate an active-passive negligence situation. One suspects that the court's somewhat restrictive view of implied indemnity was prompted by a desire to protect the lawyer from possibly becoming, in its words, an insurer of title.

³⁹ 22 N.Y.2d at 156, 239 N.E.2d at 180, 292 N.Y.S.2d at 73.

⁴⁰ *Id.* at 153, 239 N.E.2d at 178, 292 N.Y.S.2d at 71.

⁴¹ See generally 7B MCKINNEY'S CPLR 1007, supp. commentary 56-60 (1968).

⁴² 30 App. Div. 2d 371, 292 N.Y.S.2d 277 (3d Dep't 1968).

⁴³ *Id.* at 375, 292 N.Y.S.2d at 280.

⁴⁴ *Id.* at 373, 292 N.Y.S.2d at 278.