

## **Construction Law**

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# **Post-Ramirez: A Close Focus on the Current State of the 55-Series Illinois Pattern Instructions**

Ideally all jurors will strictly apply the law as it is described to them in the jury instructions. Many trial attorneys view the jury instruction process as the single most important part of a trial. For defense counsel handling construction negligence cases, prevailing caselaw regarding the 55-Series Illinois Pattern Instructions (IPI) may throw a wrench into the instruction conference and application of the law to the facts.

In *Ramirez v. FCL Builders, Inc.*, the Illinois Appellate Court First District found that the IPI for Construction Negligence, 55.01 “did not accurately state the law” as it relates to the RESTATEMENT (SECOND) OF TORTS, § 414. *Ramirez v. FCL Builders, Inc.*, 2014 IL App (1st) 123663, ¶ 165. Specifically, the court found that the term “some control” as utilized within IPI 55.01 renders the instruction inaccurate because a defendant must have more than “some control” over a subcontractor’s work before liability may attach under Section 414 of the Restatement. *Ramirez*, 2014 IL App (1st) 123663, ¶ 168. Although *Ramirez* appears to be a watershed moment in construction negligence instructions, one may consider that neither the Illinois Supreme Court, nor the Rules Committee has recently weighed in on the propriety of the 55-Series Illinois Pattern Jury Instructions. Prior Illinois Appellate Court decisions have approved those instructions. Practitioners should take an in-depth look at the current state of the 55-Series IPIs before submitting jury instructions in the context of a construction negligence case. This article highlights relevant issues to be considered and provides some guidance regarding the potential tendering of modified instructions post-*Ramirez*.

### **Pattern Versus Non-Pattern Instructions**

Trial counsel must make a strategic decision whether to submit standard or modified jury instructions for the judge to instruct the jurors prior to their deliberations. In many cases, this is a non-issue because Illinois Supreme Court Rule 239(a) provides that an Illinois Pattern Jury Instruction must be given, unless the trial court determines that the instruction does not accurately state the law. Ill. S. Ct. R. 239 (West 2014). Although trial judges pay consideration to prevailing caselaw, as well as to the facts presented, “[a] trial court is required to use an Illinois Pattern Jury Instruction when it is applicable in a civil case . . . unless the court determines that the instruction does not accurately state the law.” *Schultz v. N.E. Ill. Reg’l Commuter R.R. Corp.*, 201 Ill. 2d 260, 274 (2002). That general rule is well-reasoned as the Illinois Supreme Court has found IPI instructions to be “of inestimable importance and value [.]” *Powers v. Illinois Cent. Gulf R.R.Co.*, 91 Ill. 2d 375, 385 (1982). These instructions save a considerable amount of time and energy for both judges and attorneys alike.

Providing the jury with an instruction that is inaccurate is considered an error that warrants reversal if the error resulted in “serious prejudice” to a litigant’s right to a fair trial. *Studt v. Sherman Health Sys.*, 2011 IL 108182, ¶ 28. Therefore, if the trial court determines that a particular IPI does not accurately state the law, then a non-pattern jury instruction may be given. After all, “[e]ach party has the right to have the jury clearly and fully instructed.” *Mikolajczyk v. Ford Motor Co.*, 231 Ill. 2d 516, 561 (2008).

### **IPI 55.01**

IPI 55.01 provides as follows:

A[n] [owner] [contractor] [other] who entrusts work to a [subcontractor] [contractor] [other] can be liable for injuries resulting from the work if the [owner] [contractor][other] retained some control over the safety of the work and the injuries were proximately caused by the [owner’s] [contractor’s] [other’s] failure to exercise that control with ordinary care.

IPI Civil (West 2014) No. 55.01.

In light of the Illinois Appellate Court’s decision in *Ramirez*, practitioners may argue that the entire 55-Series IPIs may no longer accurately state the law. *Ramirez*, 2014 IL App (1st) 123663, ¶ 165. According to the *Ramirez* Court, the “some control” language included within IPI 55.01 renders the entire instruction inaccurate as a party must have more than “some control” over a subcontractor’s work before liability may attach under Section 414 of the Restatement. *Id.* ¶ 168. The remainder of the 55-Series instructions utilizes or builds upon that language, such that the remainder of the series, including 55.02, 55.03, and 55.04, may be called into question. However, the Illinois Supreme Court Committee on Jury Instructions in Civil Cases has not yet spoken as to the effect of *Ramirez* on the 55-Series IPIs. Currently, it remains unknown whether the Rules Committee will ever address the propriety of the 55-Series. After all, language contained within the 55-Series was successfully challenged at the appellate level years prior to the *Ramirez* decision (albeit in an unpublished opinion), yet the instructions were not subsequently amended. *See Sheldon v. Kimball Hill, Inc.*, No. 1-02-3693 (Ill. App. Ct. 1st Dist., June 29, 2004).

Tendering a modified construction negligence instruction, however, is not necessarily a foregone conclusion. Practitioners must carefully weigh whether to tender modified 55-Series instructions to the court. On one hand, failing to tender alternative jury instructions typically waives the issue for review before the appellate court. *Auton v. Logan Landfill, Inc.*, 105 Ill. 2d 537, 549 (1984). On the other hand, submitting an inaccurate instruction to the jury may be reversible error if it caused “serious prejudice” to a party’s right to a fair trial. *Studt*, 2011 IL 108182, ¶ 28. Depending on the circumstances, the most prudent course of action may be to submit modified 55-Series instructions to preserve the issue for appeal. A trial court may erroneously give an instruction without committing *reversible* error, but an attorney that fails to submit a modified instruction for consideration by the court may forever forfeit the issue.

### **Did Ramirez Actually Change the Efficacy of the 55-Series IPIs?**

A trial court can only give a non-pattern jury instruction when the IPIs do not accurately state the law. The first question should be whether the 55-Series IPIs are accurate. *See* Ill. S. Ct. R. 239(a). While *Ramirez* found the 55-Series to be an inaccurate statement of the law, other panels of the Illinois Appellate Court First District previously found that these pattern instructions were an accurate statement

of the law. See *Diaz v. Legat Architects, Inc.*, 397 Ill. App. 3d 13, 50 (1st Dist. 2009); see also *Jones v. DHR Cambridge Homes, Inc.*, 381 Ill. App. 3d 18, 38 (1st Dist. 2008). While it is well-settled that the opinion of one district, division, or panel of the appellate court is not binding on other districts, divisions, or panels, recent Section 414 decisions present a dilemma for the trial judge who is bound by the appellate court. See *O'Casek v. Children's Home & Aid Soc'y*, 229 Ill. 2d 431, 440 (2008). With regard to the 55-Series IPIs, trial courts are subject to several appellate court decisions with what appear to be irreconcilable views of the 55-Series IPIs. Practitioners are left to anticipate which case or cases will be followed.

A close reading of two of the most recent Section 414 cases suggests that *Ramirez* provides the most accurate interpretation of the 55-Series IPIs. First, the opinion from Justice Gordon in *Ramirez* suggests an implicit overruling of *Jones* and *Diaz* with regard to the 55-Series IPIs. *Ramirez*, 2014 IL App (1st), ¶ 172. The *Ramirez* opinion went to great lengths to distinguish both *Jones* and *Diaz*, noting that the parties and the court in *Jones* may have gotten it wrong because they proceeded with a faulty assumption that the 55-Series IPI was accurate. *Id.* Second, the First District recently confirmed that the IPI discussion contained within the *Ramirez* decision was “consistent with the evolution in our case law [on Section 414].” *Lee v. Six Flags Theme Parks, Inc.*, 2014 IL App (1st) 130771, ¶ 86. It is worth noting that the First District division that authored *Lee* is the same division that submitted the diametrically opposite *Diaz* opinion five years earlier, alluding to a shift in the winds of interpretation of Section 414. Finally, other recent appellate court decisions affirmed summary judgment for the defendants by following a narrower approach to liability under Section 414, consistent with the *Ramirez* approach. See *Cain v. Contarino*, 2014 IL App (2d) 130482; see also *Fonseca v. Clark Const. Grp., LLC*, 2014 IL App (1st) 130308. It may be reasonable to presume that a trial court will likely give deference to *Ramirez*, and follow its holding that the 55-Series IPIs are not an accurate statement of the law.

### **Crafting a Non-Pattern Instruction**

Operating under the presumption that the trial court will be inclined to follow *Ramirez* the issue then becomes *how* to craft and submit a non-pattern instruction. The authors of this article leave it to the practitioner to interpret the holding of *Ramirez* in crafting the substance of their non-pattern construction negligence instruction.

First, the trial judge should be provided with a comprehensive legal memorandum on the state of Section 414 law in Illinois. This is no easy task, as there are dozens of decisions interpreting Section 414—many simply irreconcilable. Given the multitude of factual scenarios addressed in the various Section 414 cases decided since 1965, one may be best served by crafting arguments around factually similar cases rather than trying to draw out any sweeping legal propositions. A detailed legal memorandum should aim to make the trial judge’s job more manageable in terms of assessing the applicability of each relevant decision.

Second, the proposed non-pattern instruction should be properly worded. Guidelines from the original IPI foreword noted that non-pattern instructions must be simple, brief, impartial, and free from argument. See Illinois Pattern Jury Instructions, Civil, 2000 Ed. (Foreword to 1st Ed., 1961). While commonly used words need not be defined (*Simmons v. Garces*, 319 Ill. App. 3d 308, 319 (1st Dist. 2001)), the specific words “retain” and “control” found in IPI 55.01 are worthy of further explanation. That is particularly important in light of the *Ramirez* court’s discussion of that aspect of 55.01 IPI. Those words are at the core of any liability assessment in a construction negligence case. Moreover,

potentially argumentative words and phrases that may be found in IPI 55.01, such as “*can* be liable” and “*some control*” should be avoided or modified if possible.

Finally, instructions should be crafted with lay jurors as the intended audience, not attorneys or jurists. Lifting legal terminology from an opinion has been discouraged by the Illinois Supreme Court. *Kingson v. Turner*, 115 Ill. 3d 445, 460 (1987) (stating, the “practice of lifting sentences from court opinions and converting them into instructions . . . is not a good one, as it often leads to serious error.”) Elusive terms that are difficult for lawyers to define, such as “means and methods” and “operative details,” are not likely to be helpful to most lay jurors. Essentially, “legalese” should be avoided at all costs when drafting a non-pattern instruction.

## **Conclusion**

The instruction of the jury by the trial judge is one of the most pivotal points of a trial. Experienced trial attorneys carefully craft the theme of their case around the instructions that will be given. They know that proper jury instructions that reflect the specific evidence presented can carry the day. Instructions that do not accurately state the law can unnecessarily expose a party to the risk of an adverse jury verdict that may fall outside the bounds of liability as defined by the caselaw. Practitioners are forewarned of the conflicts surrounding the 55-Series IPIs and should be prepared to tender modified IPIs if warranted by their trial strategy.

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