



## 25th Annual Claims Handling Seminars

FIGHTING THE STRATEGIC BATTLE TO WIN THE WAR

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# THIRD-PARTY LIABILITY: CONTRIBUTION, INDEMNITY, AND SET-OFFS

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<b>I.</b>	JOINT AND SEVERAL LIABILITY .....	J-4
<b>A.</b>	<i>Unzicker v. Kraft Food Ingredients Corp.</i> .....	J-5
<b>II.</b>	SECTION 2-1117 IN ITS CURRENT FORM .....	J-6
<b>III.</b>	SETTLING PARTIES .....	J-8
<b>A.</b>	A Historical Perspective .....	J-8
<b>1.</b>	Third District Implies That the Fault of a Settling Party (Plaintiff’s Employer) Should Be Considered .....	J-8
<b>2.</b>	Supreme Court follows <i>Alvarez</i> .....	J-9
<b>3.</b>	Fifth District Finds That the Fault of a Settling Party Should Be Considered, Following <i>Lannom</i> .....	J-9
<b>4.</b>	Fifth District Finds That the Fault of a Settling Party Should Not Be Considered.....	J-9
<b>5.</b>	Seventh Circuit Follows <i>Blake</i> and Holds the Fault of a Settling Party Should Not Be Considered.....	J-10
<b>6.</b>	District Court Says <i>Frieslinger</i> Was Wrongly Decided and Follows <i>Lannom</i> .....	J-10
<b>7.</b>	First District Suggests, Somewhat Awkwardly, That Settling Parties Should Be Considered .....	J-10
<b>8.</b>	District Court Finds That the Settling Party’s Fault Should Be Considered, Following <i>Lannom</i> .....	J-11
<b>9.</b>	Fourth District Interprets Current Section 2-1117 and Finds Settling Party’s Fault Should Be Considered.....	J-12
<b>10.</b>	First District Holds that Settling, Non-Parties Are “Defendants Sued by the Plaintiff” Pursuant to 2-1117 .....	J-12
<b>11.</b>	The Next Day, the First District Decides Differently .....	J-13
<b>B.</b>	<i>Ready</i> or Not, Here It Comes!.....	J-15
<b>C.</b>	<i>Ready</i> in Practice – What Does It Mean? .....	J-16
<b>D.</b>	Recent Case Law Applying <i>Ready</i> .....	J-17

<b>IV.</b>	SET-OFF.....	J-18
	<b>A.</b> What About Set-Offs and Section 2-1117?.....	J-18
	<b>B.</b> Illinois Supreme Court Holds That a Non-Settling Defendant Is Entitled to a Set-Off If It Is Properly Preserved .....	J-19
<b>V.</b>	STRATEGIC CONSIDERATIONS .....	J-22
	<b>A.</b> Is Sole Proximate Cause a Defense in Illinois? .....	J-22
	<b>B.</b> Should a Contribution Claim Be Filed Against Plaintiff’s Employer? .....	J-24
	<b>C.</b> Should Plaintiff’s Co-Workers Be Added As Third-Party Defendants? .....	J-25
	<b>D.</b> Does 2-1117 Apply to Defendants Acting in Concert?.....	J-25
	<b>E.</b> What About the Fault of Non-Parties Who Have Not Settled? .....	J-26
	<b>F.</b> What About the Statute of Limitations? .....	J-27
	<b>G.</b> Is Any Version of Section 2-1117 Constitutional? .....	J-27
<b>VI.</b>	INDEMNITY.....	J-28
	<b>A.</b> Contractual Indemnity.....	J-28
	<b>1.</b> Construction Accidents.....	J-29
	<b>2.</b> Non-Construction Setting.....	J-29
	<b>B.</b> Implied Indemnity.....	J-31

## **THIRD-PARTY LIABILITY: CONTRIBUTION, INDEMNITY, AND SET-OFFS**

### **I. JOINT AND SEVERAL LIABILITY**

The apportionment of fault in multi-party litigation can be difficult to determine and raises many unanswered questions. Effective June 3, 2003, the General Assembly amended the 1986 version of 735 ILCS 5/2-1117 ("Joint Liability"). The text of the provision states:

[I]n actions on account of bodily injury or death or physical damage to property, based on negligence, or product liability based on strict tort liability, all defendants found liable are jointly and severally liable for plaintiff's past and future medical and medically related expenses. Any defendant whose fault, as determined by the trier of fact, is less than 25% of the total fault attributable to the plaintiff, the defendants sued by the plaintiff, and any third party defendant ~~who could have been sued by the plaintiff, except the plaintiff's employer~~, shall be severally liable for all other damages. Any defendant whose fault, as determined by the trier of fact, is 25% or greater of the total fault attributable to the plaintiff, the defendants sued by the plaintiff, and any third party defendants ~~who could have been sued by the plaintiff, except the plaintiff's employer~~, shall be jointly and severally liable for all other damages.

735 ILCS 5/2-1117.

In this latest version of the Code, the fault of plaintiff's employer is not considered. Without that fault considered, the statute clearly operates to benefit plaintiffs who are injured at work.

Furthermore, pursuant to the recent Supreme Court decision in *Ready v. United/Goedecke Services, Inc.*, No. 103474, 2008 WL 5046833 (Nov. 25, 2008), plaintiffs are now given the opportunity to receive an even bigger windfall when bringing suits against multiple defendants as settling defendants will no longer be considered in the allocation of fault for apportionment under 2-1117.

However, defendants, at least those in the asbestos realm, are now able to strike back with the overturn of *Lipke v. Celotex Corp.*, 153 Ill. App. 3d 498, 505 N.E.2d 1213, 106 Ill. Dec. 422 (1st Dist. 1987), via the recent Supreme Court decision in *Nolan v. Weil-McLain*, 233 Ill. 2d 416, 910 N.E.2d 549, 331 Ill. Dec. 140 (2009). In sum, a defendant will not be barred from introducing evidence of other potential causes of injury where it pursues a sole proximate cause defense.

Before we discuss these issues and more, a brief review of the history of how 2-1117 has evolved over the years will assist us in our discussion.

**A. *Unzicker v. Kraft Food Ingredients Corp.***

Four months prior to the enactment of the current version of 2-1117, the Illinois Supreme Court held the 1986 version of that statute (which closely mirrored today's version) was constitutional. Essentially, the court determined the plaintiff's employer could be included in the fault apportionment calculations. *Unzicker v. Kraft Food Ingredients Corp.*, 203 Ill. 2d 64, 783 N.E.2d 1024, 270 Ill. Dec. 724 (2002).

In *Unzicker*, plaintiff obtained a verdict in the amount of \$879,400, \$91,400 of which was medical and \$788,000 of which was non-medical. The jury found plaintiff's employer 99 percent at fault and defendant, Kraft Foods, 1 percent at fault. The trial court entered judgment on the jury's verdict finding Kraft and plaintiff's employer were jointly and severally liable for plaintiff's past and future medical expenses of \$91,400. Kraft was severally liable for 1 percent of the non-medical damages (\$7,880). Plaintiff's employer was then liable to Kraft on Kraft's third-party complaint for \$90,486 in contribution, which represented 99 percent of the medical damages.

On appeal, plaintiffs argued that the fault of plaintiff's employer should not be considered for apportionment purposes, since plaintiff's employer was not a "third party defendant who could have been sued by the plaintiff" given that plaintiff's employer was immune from suit under the Workers' Compensation Act (820 ILCS 305/1 *et seq.*). *Unzicker*, 203 Ill. 2d at 69. In determining that the fault of plaintiff's employer should be considered for apportionment purposes, the Illinois Supreme Court stated as follows:

The clear legislative intent behind section 2-1117 is that minimally responsible defendants should not have to pay entire damage awards. The legislature set the line of minimal responsibility at less than 25%. In order to apportion responsibility, the legislature looked to those people in the suit: the plaintiff, the defendants sued by the plaintiff, and any third-party defendants who could have been sued by the plaintiff. In our opinion, the broad wording in the statute merely shows that the legislature intended the division of responsibility to include those people in the suit who might have been responsible for the plaintiff's injuries. Here, ignoring the party found to be 99% responsible for the plaintiff's injuries and requiring the party found 1% responsible to pay all of the nonmedical damages would not be in accord with the clear legislative intent that minimally responsible defendants should not be liable for entire judgments.

*Id.* at 78-79.

The General Assembly quickly responded to this decision by enacting the current version of 2-1117, which clearly states the fault of a plaintiff's employer (which many times exceeds that of any defendant) will not be utilized in determining whether a defendant is jointly or severally liable. The minimally culpable defendant at present is now faced with possibility of being jointly and severally liable.

## II. SECTION 2-1117 IN ITS CURRENT FORM

Currently, the fault of plaintiff's employer, no matter how egregious, is removed from the calculations for determining joint and several liability. After the jury apportions fault to the various parties, the court must then engage in reallocation to determine joint and several liability. The following example shows, in theory, how minimally culpable defendants may now be asked to pay a grossly disproportionate share, if not all, of the judgment.

Verdict - \$1,000,000

Medical bills: \$100,000

Non-medical damages: \$900,000

Defendant 1 - 1%

Defendant 2 - 1%

Defendant 3 - 1%

Plaintiff's employer - 97%

### **Prior 2-1117**

Defendants 1, 2 and 3 are each jointly and severally liable for the medical bills.

Defendants 1, 2 and 3 are severally liable for the non-medical damages (or \$9,000 each).

### **Current 2-1117**

Plaintiff's employer's fault is removed.

Defendants 1, 2 and 3 are each 33 1/3% at fault.

Defendants 1, 2 and 3 are jointly and severally liable for the medical bills and the non-medical damages.

Under the above example, plaintiff's employer bears almost all of the fault, but the court will ignore the fault of plaintiff's employer in determining joint and several liability. After the employer's fault is removed, each defendant will share 1/3 of the total fault. Each defendant could be asked to satisfy the entire judgment, in theory. Any defendant doing so would then have rights of contribution against the remaining defendants. Regardless, each defendant could be responsible for paying a substantially larger portion of the judgment than would otherwise have existed under the prior version of section 2-1117.

The result reached in *Unzicker* would also be entirely different under the current version of section 2-1117. Using the facts in *Unzicker*, the following result would now occur:

Verdict - \$879,400  
Medical: \$91,400  
Non-medical: \$788,000

Kraft fault - 1%  
Plaintiff's employer's fault - 99%  
Plaintiff's recovery from Kraft - \$879,400

The 99 percent fault of plaintiff's employer is removed for determining joint and several liability. Despite being only 1 percent at fault, Kraft's fault is 100 percent of the fault once the court reallocates to determine joint and several liability. Kraft would still have a right of contribution against plaintiff's employer, but the employer's exposure would be substantially mitigated by the limitation of liability provided for in *Kotecki v. Cyclops Welding Corp.*, 146 Ill. 2d 155, 585 N.E.2d 1023, 166 Ill. Dec. 1 (1991) (which limits the liability of plaintiff's employer in contribution to the amount of the workers' compensation benefits that the employer is obligated to pay the injured employee). Accordingly, Kraft, under the current section 2-1117, would pay, incredibly, the entire judgment even though the jury found it only 1 percent at fault.

Expanding upon the *Unzicker* example, the current application of section 2-1117 can potentially operate to substantially reward plaintiff even where plaintiff bears more fault than the defendant. For example, consider the following:

Total verdict - \$879,400  
Medical: \$91,400  
Non-medical: \$788,000

Percentages of fault  
Plaintiff's employer: 96%  
Kraft: 1%  
Plaintiff: 3%

Kraft pays plaintiff: \$853,018 (or  $\$879,400 \times .97$ )

Given the application of section 2-1117, the fault of plaintiff's employer will be dropped out of the equation by the court for purposes of determining joint and several liability. After the fault of plaintiff's employer is removed, the fault of the plaintiff versus Kraft is compared, which represents a ratio of 3:1. In essence, Kraft would bear 25 percent and plaintiff 75 percent of the total responsibility upon reallocation. Kraft would end up paying virtually all of the verdict even though it was found to be only 1 percent at fault by the jury. Plaintiff's fault of 3 percent simply reduces Kraft's responsibility by a very small amount.

There are obvious questions associated with this hypothetical. Plaintiff will still be allowed to recover despite the fact that the apportionment of fault calculations reveal that plaintiff bears 75 percent of the total fault. The example again highlights the unfair application of section 2-1117 in requiring Kraft, only 1 percent at fault, to pay virtually all of the verdict. When the court considers apportionment, Kraft suffers greatly, while plaintiff, whose fault is 75 percent of the total fault for apportionment purposes, benefits greatly. The result seems absurd, and the court may be faced with the decision of trying to determine how plaintiff's fault should be evaluated in this context.

This is an area undecided at this time, and the answer probably lies within the construction and application of sections 2-1116 and 2-1117. Section 2-1116 provides that a plaintiff will not recover if "the trier of fact" determines that the plaintiff is more than 50 percent at fault. The court may take the position that section 2-1116 only operates to deny plaintiff a recovery when the trier of fact (not the court during reallocation) finds plaintiff's fault is more than 50 percent. Therefore, the court only evaluates plaintiff's fault in the context of reallocation for joint and several liability, not to determine whether plaintiff should recover.

### **III. SETTLING PARTIES**

The question of whether the fault of a settling defendant who has been dismissed should be considered for apportionment went unresolved for a great deal of time. There were opinions on both sides of the issue. However, the recent Supreme Court decision in *Ready* seems to have put this issue to rest. In Illinois, settling defendants will **NOT** be considered for apportionment.

#### **A. A Historical Perspective**

For a historical perspective regarding the issue of whether to consider settling tortfeasors for apportionment, the following cases should be addressed:

##### **1. Third District Implies That the Fault of a Settling Party (Plaintiff's Employer) Should Be Considered**

*Alvarez v. Fred Hintze Const.*, 247 Ill. App. 3d 811, 617 N.E.2d 821, 187 Ill. Dec. 364 (3d Dist. 1993) – Plaintiff was injured at a construction site and filed suit against the general contractor and owner. Both defendants filed third-party complaints for contribution against plaintiff's employer. Plaintiff's employer then reached a settlement with plaintiff and obtained a good-faith finding. Plaintiff's employer was then dismissed. The general contractor argued that the dismissal of the plaintiff's employer would deny its right to obtain apportionment under section 2-1117 (the 1986 version). The Third District concluded that, even where one tortfeasor has settled, the jury should still be able to assess the defendant's relative culpability.

## 2. Supreme Court follows *Alvarez*

*Lannom v. Kosco*, 158 Ill. 2d 535, 634 N.E.2d 1097, 199 Ill. Dec. 743 (1994) – Plaintiff filed suit for injuries he sustained while working alongside a highway. The defendant driver then filed a third-party complaint for contribution against his employer. Plaintiff’s employer then moved to dismiss the third-party complaint on the basis that it was waiving the workers’ compensation lien. Defendant argued that dismissing plaintiff’s employer would obstruct the purpose of section 2-1117 (the 1986 version). The Illinois Supreme Court disagreed, stating in relevant part:

We note, however, that this dilemma arises whenever a defendant or third party settles with the plaintiff or is dismissed from an action for any reason. Section 2-1117 was not intended to prohibit the dismissal of a defendant or a third party from an action, where such dismissal is otherwise warranted. Moreover, the **defendant’s** rights under section 2-1117 are not abolished simply because a defendant or third party settles or is dismissed from an action. The jury may still assess the remaining **defendants’** relative culpability, and if the degree of fault attributable to one or more defendants is less than 25%, those defendants’ liability is several only.

*Lannom*, 158 Ill. 2d at 542-43 (emphasis added).

## 3. Fifth District Finds That the Fault of a Settling Party Should Be Considered, Following *Lannom*

*Banovz v. Rantanen*, 271 Ill. App. 3d 910, 649 N.E.2d 977, 208 Ill. Dec. 617 (5th Dist. 1995). Plaintiffs were passengers involved in a multi-vehicle accident in Madison County. They filed suit against a driver of the vehicle in which they were passengers and against the driver of a tractor trailer and his employer. The defendants filed counterclaims against each other seeking contribution. The truck driver’s employer settled with one of the plaintiffs and obtained a good-faith finding. However, the trial court did not dismiss pending contribution claims between the truck driver’s employer (who had settled) and the driver of the vehicle in which plaintiffs were passengers.

The Fifth District found that the failure to dismiss was improper. It noted further that upon retrial the fault of the settling party will be presented to the jury for apportionment purposes under section 2-1117 (the 1986 version). It relied upon the reasoning employed in the Illinois Supreme Court’s decision of *Lannom v. Kosco*.

## 4. Fifth District Finds That the Fault of a Settling Party Should Not Be Considered

*Blake v. Hy Ho Restaurant, Inc.*, 273 Ill. App. 3d 372, 652 N.E.2d 807, 210 Ill. Dec. 5 (5th Dist. 1995) – A wrongful death action was filed when a City of Belleville employee was killed by methane gas fumes while removing grease deposits that clogged a city sewer line near two

restaurants (both of which were named defendants). The City of Belleville settled and moved to dismiss the third-party claims for contribution filed against it. The trial court found the settlement was in good faith and dismissed all claims against the City of Belleville.

Defendants argued on appeal that the fault of the City of Belleville should still be considered by the trier of fact to apportion fault among all tortfeasors. The Fifth District concluded that the plain language of section 2-1117 (the 1986 version) established that once the City of Belleville settled it was no longer a defendant for purposes of section 2-1117 apportionment. It noted that 2-1117 does not address “former defendants” or “dismissed defendants.”

**5. Seventh Circuit Follows *Blake* and Holds the Fault of a Settling Party Should Not Be Considered**

*Freislinger v. Emro Propane Co.*, 99 F.3d 1412 (7th Cir. 1996) – The Seventh Circuit followed the analysis employed by the Illinois Fifth District Appellate Court in *Blake v. Hy Ho Restaurant, Inc.* in determining that “defendants sued by the plaintiff” under section 2-1117 (the 1986 version) only applies to defendants who remain in the case when it is submitted to the jury. It does not apply to settled parties. Furthermore, it held that plaintiff’s employer was not to be included in the section 2-1117 calculation since plaintiff’s employer was not a third-party defendant “who could have been sued by the plaintiff.” Obviously, the latter part of the court’s analysis was subsequently overruled in the *Unzicker* decision. It is also noteworthy that the Seventh Circuit in this opinion appears to improperly analyze the Illinois Supreme Court’s decision in *Lannom v. Kosco*. The Seventh Circuit interpreted the decision in *Lannom* to suggest that the fault of settling parties is not to be included for apportionment purposes.

**6. District Court Says *Frieslinger* Was Wrongly Decided and Follows *Lannom***

*Costello v. U.S.*, No. 96-C-187, 1998 WL 341615 (N.D. Ill. June 23, 1998) – The lawsuit arose from a midair collision between two airplanes. The only issue which the district court addressed was whether the United States, as the only remaining defendant, was jointly and severally liable or simply severally liable based upon the settlements entered into by the other defendants in the case. The district court determined that the Illinois Supreme Court in the *Lannom* decision intended to apportion fault between all defendants, including those who had settled. Accordingly, the district court found that the trier of fact will apportion fault among all parties, including parties who had settled. The district court specifically noted that the Seventh Circuit in *Frieslinger* had misinterpreted the Illinois Supreme Court’s decision in *Lannom*.

**7. First District Suggests, Somewhat Awkwardly, That Settling Parties Should Be Considered**

*Lombardo v. Reliance Elevator Co.*, 315 Ill. App. 3d 111, 733 N.E.2d 874, 248 Ill. Dec. 199 (1st Dist. 2000) – Plaintiff was employed in the maintenance department at a bank. He was injured when a lift he was riding upon suddenly fell. He filed suit against the owner of the building, two

companies that maintained the lift and the beneficiary of the trust which held title to the building. Plaintiff's employer (the bank) was then made a third-party defendant. One of the maintenance companies settled, and plaintiff's employer also settled.

On appeal, plaintiff argued that the maintenance company and plaintiff's employer (who had both settled) should not have been included on the verdict form for purposes of apportioning fault. It is noteworthy that 90 percent of the fault was attributed to plaintiff's employer at trial. The First District disagreed with plaintiff's argument. It held that including both non-parties and settling defendants helps protect defendants' interests in preserving their right to contribution. In addition, upon re-trial, the First District noted that the trial court should include plaintiff's employer and any other settling defendants on the verdict form. It went on to add that the trial court should only consider the fault of those parties specified within section 2-1117. This last statement by the First District leaves the interpretation of who was to be included for apportionment subject to debate.

#### **8. District Court Finds That the Settling Party's Fault Should Be Considered, Following *Lannom***

*Dowe v. Nat'l R.R. Passenger Corp.*, No. 01-C-5808, 2004 WL 887410 (N.D. Ill. April 26, 2004) – The lawsuit arose from a collision of an Amtrak passenger train with a truck at a railroad crossing in Bourbonnais, resulting in the loss of many passengers' lives and injuries to many others. The district court held that settling defendants would not be kept off the verdict form. In *dicta*, the court found there was reason to believe that the Illinois Supreme Court would find that the fault of a settling party should be considered by the jury for apportionment purposes. The court stated as follows:

Settling defendants and third party defendants are among the 'defendants sued by the plaintiff' and, in this case at least, are among the 'third party defendant[s] who could have been sued by the plaintiff.' The real question is the time at which whether a party is or was a 'defendant' is to be determined. *Freislinger* and *Blake* says that the determination depends on who remains in the case when it is submitted to the fact finder; *Lannom* and *Alvarez* indicate that the answer depends only on whether a party was a defendant or third party defendant at some point during the case. Though both approaches give meaning to the statute's language, the latter approach is more faithful to the Illinois Supreme Court's statement that '[t]he clear legislative intent behind section 2-1117 is that minimally responsible defendants should not have to pay entire damage awards.'

*Dowe*, 2004 WL 887410 at \*9, quoting *Unzicker*, 203 Ill. 2d at 77-78.

**9. Fourth District Interprets Current Section 2-1117 and Finds Settling Party's Fault Should Be Considered**

*Skaggs v. Senior Services of Cent. Illinois, Inc.*, 355 Ill. App. 3d 1120, 823 N.E.2d 1021, 291 Ill. Dec. 435 (4th Dist. 2005) – The Fourth District reviewed section 2-1117 in its current form after determining that a settlement was in good faith, discharging a tortfeasor from any further liability. It followed the Illinois Supreme Court's analysis in *Unzicker*, finding that a minimally responsible defendant should not have to pay entire damage awards. In determining that the fault of a settling tortfeasor should be considered for apportionment purposes, the Fourth District stated in relevant part:

The revision to section 2-1117 excepts a plaintiff's employer from being considered in the apportioning of fault, but the legislative intent remains the same with respect to minimally responsible defendants. Forcing a minimally responsible defendant to shoulder the nonmedical expenses only because the more culpable defendant settled would allow plaintiffs to circumvent the purpose of the statute. In 1993, an Illinois appellate court suggested as follows:

"[T]he rights of a nonsettling defendant under Section 2-1117 'cannot be negated simply because another tortfeasor has settled with the plaintiff.' [Citation.] . . . [E]ven where one tortfeasor has settled with the plaintiff, '[t]he jury should still be able to assess the defendant's relative culpability, and if the defendant's level of fault falls below the 25[%] threshold, its liability is several only and is not affected by the plaintiff's settlement with the other tortfeasor.'" [Citation omitted].

\* \* \*

The plain language of the statute includes "defendants sued by the plaintiff." 735 ILCS 5/2-1117 (West Supp. 2003). Even though a defendant settles with a plaintiff and is dismissed from the case, that defendant does not lose its status as a defendant sued by the plaintiff. Therefore, we hold section 2-1117 requires the trier of fact to consider the percentage of fault of settling defendants.

*Skaggs*, 823 N.E.2d at 1028-29.

The Illinois Supreme Court granted a petition for leave to appeal the *Skaggs* decision during its September 2005 term, but before the court was able to render a decision, the case settled.

**10. First District Holds that Settling, Non-Parties Are "Defendants Sued by the Plaintiff" Pursuant to 2-1117**

*Heupel v. Jenkins*, 379 Ill. App. 3d 893, 884 N.E.2d 1263, 319 Ill. Dec. 18 (1st Dist. 2008) – Here, two vehicles, one driven by defendant and the other by Nivethitha Murugeson, collided at an intersection in Chicago. The facts indicate that the defendant had the right of way at the time of

the collision. As a result of the collision, defendant's vehicle spun into the adjacent sidewalk, striking plaintiff. Prior to filing suit, plaintiff entered into a settlement agreement with Murugeson, the more culpable of the two defendants, for \$100,000, the amount of Murugeson's insurance coverage. Plaintiff subsequently filed suit sounding in negligence against defendant. Defendant prevailed at trial, and plaintiff appealed alleging the trial court erred by including Murugeson, a settling non-party, on the jury verdict form. The facts in this case are therefore unique as Murugeson was never a named defendant.

The First District, Third Division, held that the legislative intent of 2-1117 was to apportion fault among all tortfeasors. Consequently, "a third party need not be a named defendant in order for her relative fault to be considered by the jury." *Heupel*, 379 Ill. App. 3d at 902. The court further noted its support for the holding in *Skaggs* that the name of a prior settling defendant must appear on the jury verdict form. Essentially, settling defendants do not lose their status as "defendants sued by the plaintiff" pursuant to 2-1117.

*Heupel* represented the first case in Illinois to find that settling non-parties should be considered "defendants sued by the plaintiff" pursuant to 2-1117.

## **11. The Next Day, the First District Decides Differently**

*Yoder v. Ferguson*, 381 Ill. App. 3d 353, 885 N.E.2d 1060, 319 Ill. Dec. 380 (1st Dist. 2008) – Just one day after the First District, Third Division holding in *Heupel*, the First District, Fourth Division came to a contrary conclusion in *Yoder*. Here, the court held that the trial court did not err in refusing to consider settling defendants in the allocation of fault for apportionment.

In *Yoder*, a multi-vehicle accident occurred on I-90 near Rockford involving plaintiff and her family. At the time of the accident, Scott Yoder was driving. Jerelyn Yoder was in the passenger seat, and their two children, Zachary and Teagan, were in the back seat. Jerelyn and Scott Yoder suffered severe injuries, Zachary was profoundly disabled, and Teagan was killed as a result of the accident. Jerelyn Yoder brought suit individually, as next friend of Zachary, and as administrator of Teagan's estate against the following defendants: (1) James Ferguson and his employer, Romar Transportation Systems ("Ferguson"); (2) Thomas Alexander and his employer, Single Source Transportation ("Alexander"); (3) David Knoll and his employers, Kee Transport and Roundy's ("Knoll"); (4) Mary Beth Marshall ("Marshall"); (5) Joseph Rezetko ("Rezetko"); and (6) her husband, Scott Yoder. Scott Yoder named the same defendants in his suit, and the cases were consolidated for trial.

The evidence in the case revealed the following about the accident:

**Marshall:** The semi in front of her began to fishtail, causing her to slow down on a bridge which was described as "like an ice skating rink." However, she never lost control of her vehicle. While slowing down, Rezetko rear-ended Marshall. This caused the semi behind Rezetko, driven by Ferguson, to come to a sudden stop. In doing so, his trailer ended up perpendicular to the road,

thus blocking the Interstate. It is noteworthy that Mary Beth Marshall's passenger testified similarly as well.

**Rezetko:** He was driving behind Marshall, who did not have her lights on. At the bridge, the weather worsened and Rezetko lost sight of Marshall. Just after crossing the bridge, Rezetko saw Marshall's brake lights and realized she was stopped. He pumped his brakes but was unable to stop his vehicle, rear-ending Marshall. The two cars remained in the right lane, and two cars passed in the left lane. Shortly thereafter, Ferguson's trailer blocked both lanes of the Interstate after rear-ending Rezetko.

**Ferguson:** He had driven semis for 15 years. On the day of the accident, two cars passed (Marshall and Rezetko) him before the bridge. When he got closer to the bridge, he noticed the same two cars in front of him with their passenger sides facing him. He realized they were blocking part of the road. To avoid hitting them, he pumped the brakes, but his truck failed to slow down. He then directed it to the right guardrail to help stop the truck. He lost control of the truck, and it jackknifed short of the cars, blocking the entire Interstate. Ferguson did not turn his hazard lights on.

**Alexander:** Alexander had been driving semis for 14 years at the time. He admitted that at one point, his visibility was reduced to 15-30 feet, yet he continued to drive despite having the option to pull over. He saw Ferguson's truck ahead but could not slow down without losing control of his semi-trailer. He tried to veer right, but determined he could not pass on the shoulder. He locked up his brakes and veered left to avoid a major collision. Alexander slid into Ferguson's truck, coming to rest diagonally. Once stopped, he turned on his hazards and looked in his rearview mirror. He saw the Yoder vehicle careen off a vehicle in the right-hand lane, come back across the Interstate and come to rest crashing under a semi trailer (driven by Knoll). Alexander testified that the Yoder vehicle was traveling approximately 65 mph. He based this on the erratic way the vehicle came through traffic and the damage to the vehicle.

**Knoll:** He was driving a semi at the time. He had been driving this same route three times a week for several months. At the bridge, his visibility was reduced to about 100 feet, at which point he reduced his speed to less than 45 mph. Shortly thereafter, he saw Alexander's and Ferguson's trucks obstructing the roadway. He did not turn his hazard lights on but maintained brake pressure for the final 17 seconds his truck was traveling. He finally came to a complete stop partially in the median, with his trailer remaining partly in the left lane. Shortly thereafter, Scott Yoder collided with the rear of his trailer.

Prior to trial, Jerelyn Yoder entered into good faith settlements with two defendants, Scott Yoder and Joseph Rezetko. Scott Yoder paid approximately \$500,000, and Joseph Rezetko paid \$300,000. After an eight-week trial, the jury found Scott Yoder was 51 percent at fault, and judgment was thereby entered against him in his case. However, in Jerelyn's cases, the jury did not determine that Scott Yoder was the sole cause of the accident. Furthermore, as a result of their prior settlements, Scott Yoder and Joseph Rezetko were not included on the verdict forms. The jury entered a verdict for \$38.3 million. Specifically, \$7.3 million was awarded for Jerelyn's

personal injury claims, \$3.5 million as administrator of Teagan's estate, and \$27.5 million as next friend of Zachary. Fault was allocated as follows among the remaining four defendants:

- (1) Ferguson: 30% (\$11,490,000)
- (2) Alexander: 10% (\$3,830,000)
- (3) Knoll: 27% (\$10,341,000)
- (4) Marshall: 33% (\$12,639,000)

After trial, Marshall settled for \$10.8 million, which was found to be in good faith. Knoll also settled for \$10,341,000, the full amount of his apportionment of the verdict. However, Ferguson and Alexander both appealed a number of issues, including the issue of whether the trial court erred by excluding the settling defendants from the jury fault allocation forms.

The First District, Fourth Division in a result-oriented decision adopted the rationale in *Blake*, thus holding that settling defendants are no longer "defendants sued by the plaintiff." The court noted that the legislature's subsequent amendments to 2-1117 did not modify the language in response to established case law, and thus the legislature must agree with the *Blake* interpretation.

*Yoder* now serves to highlight how unfairly the Supreme Court's decision in *Ready*, as will be discussed, can operate. Minimally culpable defendants, such as Marshall, whom arguably did very little wrong, can now be found disproportionately responsible due to our Supreme Court's recent decision.

## **B. Ready or Not, Here It Comes!**

*Ready v. United/Goedecke Services, Inc.*, 367 Ill. App. 3d 272, 854 N.E.2d 758, 305 Ill. Dec. 166 (1st Dist. 2006) – The lawsuit arose when plaintiff's decedent was killed during a pipe re-fitting project at his employer's factory. Both decedent's employer and the general contractor for the project settled with plaintiff, leaving the scaffolding subcontractor (United) in the case at trial.

After trial, the jury returned a verdict of \$14,230,000. They assessed 35 percent of the fault with decedent, reducing the judgment to \$9,250,000, and United was then allowed a set-off of \$1,112,502.58, which was the amount paid by the settling defendants.

On appeal, United raised numerous issues relating to the admissibility of evidence and that the trial court erred in excluding the settling defendants from the jury verdict form.

Notably, the First District held the pre-amendment version of 2-1117 applied as the amendment was a substantive change and could not be applied retroactively (the accident occurred in 1999 and the amendment was passed in 2003).

United relied on most of the cases cited above (including *Alvarez*, *Dowe*, and *Skaggs*) to support its position that settling defendants should be included on the jury form. The First District

agreed with United and earlier interpretations of 2-1117, in that “a remaining defendant’s culpability should be assessed relative to the culpability of all defendants, including settling defendants.” It further noted that a defendant that settles with a plaintiff is still “[a] defendant sued by the plaintiff” as stated in 2-1117. In the court’s opinion, because *Lannom* held a settling defendant and its dismissal does not affect a nonsettling defendant’s rights under 2-1117, “it follows that settling defendants must appear on the verdict form so as not to affect the rights of the nonsettling defendants.” Since the prior 2-1117 applied in this matter, the employer was to be included on the verdict form, and a new trial on liability was required.

The Illinois Supreme Court granted a petition for leave to appeal the *Ready* decision during its November 2006 term, and finally issued its decision on November 25, 2008.

*Ready v. United/Goedecke Services, Inc.*, No. 103474, 2008 WL 5046833 (Nov. 25, 2008) – After embarking on a lengthy exercise of statutory construction, the Supreme Court in a plurality decision (5-4) held that settling tortfeasors are NOT “defendants sued by the plaintiff” pursuant to 2-1117. Therefore, settling defendants are not considered for fault apportionment purposes.

Throughout its analysis, the Supreme Court focused on the phrase “defendants sued by the plaintiff” included in the language of 2-1117. Ultimately, the court determined that the meaning of the phrase is ambiguous. The court held that where the legislature chooses not to amend a statute after judicial construction, it is presumed the legislature has acquiesced in the court’s assessment of legislative intent. The court noted that the 1995 amendments were passed by the legislature after the holding in *Blake*. Consequently, the court determined that the amendments are a compelling indication that the legislature never intended settling defendants to be included in the apportionment of fault under 2-1117. The court’s analysis is particularly interesting as it looks back to the Fifth District’s holding in *Blake* in 1995, but chooses to ignore a number of other relevant cases.

On March 23, 2009, the Supreme Court denied rehearing on this matter.

### **C. *Ready* in Practice – What Does It Mean?**

The outcome in *Ready* increases the potential exposure of minimally culpable defendants, as the following example illustrates:

Verdict - \$1,000,000

Medical: \$100,000

Non-medical: \$900,000

Defendant 1 - 10%

Defendant 2 - 20%

Defendant 3 - 30%

Employer - 40%

Plaintiff settles with defendants 2 and 3 for a total of \$200,000.  
Employer's workers' compensation lien of \$300,000 is waived.

<b>Settling Parties Considered for Apportionment</b>	<b>Settling Parties Not Considered - Per Ready</b>
Defendant 1 represents 16% of the total fault for apportionment	Defendant 1 is only 10% at fault
Defendant 1's responsibility: Medical: \$100,000 Non-Medical: <u>\$144,000</u> \$244,000	But, Defendant 1 still represents 100% of the total fault for apportionment
Defendant 1 gets a set-off of \$500,000	Defendant 1 is jointly and severally liable for the entire \$1,000,000 verdict
Defendant 1 has no exposure after set-off	Defendant 1 gets a set-off of \$500,000
	Defendant 1's responsibility is \$500,000

#### **D. Recent Case Law Applying Ready**

Since the decision in *Ready*, the following pertinent Illinois cases have interpreted and applied the decision:

*Heupel v. Jenkins*, 395 Ill. App. 3d 689, 919 N.E.2d 378, 335 Ill. Dec. 659 (1st Dist. 2009). On remand, the First District held that the trial court's inclusion on the verdict form of a joint tortfeasor who settled with plaintiff warranted a new trial. The court noted the decision in *Ready*, whereby the Illinois Supreme Court held that good faith settling tortfeasors are not "defendants sued by the plaintiff" within the meaning of section 2-1117. The First District therefore reversed and remanded for a new trial. The court specifically held that a new trial was warranted because at the trial court level where the jury returned a verdict for the defendant, the settling tortfeasors should not have been listed on the verdict form or considered in the apportionment of fault. Petition for re-hearing was denied on January 19, 2010.

*Jablonski v. Ford Motor Co.*, No. 5-05-0723, 2010 WL 378527 (5th Dist. Feb. 1, 2010). At the jury instructions conference, the defendant, Ford Motor Company, submitted proposed verdict forms that would have required the jury to allocate fault between the defendants, Ford and Natalie Ingram. Defendant Ingram settled with plaintiffs prior to trial. The trial court rejected Ford's proposed verdict forms. The Fifth District noted that when this case was briefed and argued there was a conflict between the Fourth and Fifth Districts as to whether a defendant who settles before trial should be included in the jury's apportionment of fault under section 2-1117. Specifically, the court was referring to the Fifth District decision in *Blake* where the court held that a settling tortfeasor should not be included in the jury's apportionment of fault and the Fourth District decision in *Skaggs* concluding that the jury should be informed about a settling tortfeasor. The Fifth District recognized that this conflict has been resolved by the Illinois

Supreme Court's decision in *Ready* where it was held that settling tortfeasors should not be included in apportionment of the fault pursuant to 2-1117. Accordingly, the trial court did not abuse its discretion in refusing defendant Ford Motor Company's proposed verdict forms. A petition for re-hearing was denied on February 25, 2010.

#### **IV. SET-OFF**

##### **A. What About Set-Offs and Section 2-1117?**

Illinois provides a right of contribution where two or more persons are subject to liability in tort arising out of the same injury. 740 ILCS 100/2. 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 100/2(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, 654 N.E.2d 1365, 211 Ill. Dec. 314 (1995). Nothing within section 2-1117 suggests that a non-settling tortfeasor should be deprived of a set-off.

A non-settling tortfeasor's right to a set-off arises under the Contribution Act (740 ILCS 100/0.01, *et seq.*) as a result of settlements reached between plaintiff and other joint tortfeasors. A defendant's right to apportion liability for joint and several liability purposes arises under section 2-1117. The defendant's rights to a set-off and apportionment are wholly independent. Therefore, the non-settling tortfeasor should be entitled to apportionment under section 2-1117 and to a set-off under the Contribution Act for any amounts paid by settling tortfeasors.

Expanding upon an earlier example, please consider the following:

Verdict - \$1 million  
Medical: \$100,000  
Non-medical: \$900,000

Percentages of fault  
Defendant 1 - 1%  
Defendant 2 - 1%  
Defendant 3 - 1%  
Plaintiff's employer - 97%

Before trial, plaintiff settles with Defendants 2 and 3 as well as his employer.  
Plaintiff's employer's workers' compensation lien of \$400,000 is waived.  
Defendant 2 pays \$100,000 in settlement and Defendant 3 pays \$150,000 in settlement.

What happens?

Defendant 1 is jointly and severally liable under section 2-1117 (because Defendant 1's fault was one third of the total fault excluding the fault of the employer)

Defendant 1 is entitled to a set-off of \$400,000, the amount of the waived workers' compensation lien.

Defendant 1 is entitled to a set-off of \$250,000, the total amounts paid in settlement by Defendants 2 and 3.

Defendant 1's total set-off is \$650,000.

Defendant 1 pays plaintiff \$350,000 (\$1 million minus \$650,000).

A recent Seventh Circuit decision, *Baltzell v. R & R Trucking Co.*, 554 F.3d 1124 (7th Cir. 2009), sheds further light on this subject. In *Baltzell*, plaintiff-employee was critically injured when he was crushed by a tractor-trailer while working. Plaintiff received workers' compensation benefits from his employer. Additionally, plaintiff and his wife brought suit against the owner of the tractor-trailer, the tractor manufacturer, and the trailer manufacturer. All three defendants filed third-party claims for contribution against the employer. Plaintiffs prevailed before a jury against all three defendants and were awarded \$13,980,120. The employer waived its workers' compensation lien after trial and moved to dismiss the contribution claims, which the district court denied. It is noteworthy that the workers' compensation case was not closed and future payments were undetermined at the time of trial.

On appeal, the Seventh Circuit vacated and remanded. The court held that the employer could waive the workers' compensation lien after trial and was thus not liable in contribution. However, the court concluded that the defendants were entitled to a set-off for any workers' compensation benefits the employee and his wife received from the employer. Furthermore, once future workers' compensation benefits were determined, the defendants would be entitled to a set-off for those amounts as well.

**B. Illinois Supreme Court Holds That a Non-Settling Defendant Is Entitled to a Set-Off If It Is Properly Preserved**

In *Thornton v. Garcini*, No. 107028, 2009 WL 3471065 (Opinion filed Oct. 29, 2009; modified on April 22, 2010), plaintiff Toni Thornton brought an action for medical negligence and negligent infliction of emotional distress against defendants Dr. Francisco Garcini, Silver Cross Hospital, and individual nurses. Plaintiff's lawsuit arose out of the death of her son, Jason, who was born prematurely in a breech position at the gestational age of 24 weeks. During childbirth, Jason's head became stuck in his mother's vagina, with the rest of his body outside the vagina. The infant died when the nurses at the hospital were unable to complete the delivery. Dr. Garcini, an obstetrician, arrived at the hospital an hour and 10 minutes later.

Plaintiff, as administrator of Jason's estate, brought wrongful death and survival claims against the defendants which alleged medical malpractice. Significantly, she also brought a claim on her own behalf for infliction of emotional distress.

At trial, Dr. Garcini testified that he initially learned that Ms. Thornton was at the hospital having contractions when he received a call from a nurse at his home at 6:35 a.m. Dr. Garcini gave the nurse certain instructions. Thirty-five minutes later, at 7:10 a.m., the infant partially delivered in a breech position. There were nurses present for the delivery, but no physician was present. Jason became entrapped at the neck during the delivery so the nurses called Dr. Garcini again. He instructed the nurses not to deliver the infant unless it could be done easily, because of a risk of decapitation. After being informed of the partial delivery, Dr. Garcini took a shower and then drove to the hospital. The nurses were unable to deliver Jason, and he died before Dr. Garcini left his house. Upon arriving at the hospital, Dr. Garcini delivered the dead infant. The testimony established that Ms. Thornton waited for over an hour, with the deceased infant partially delivered, before Dr. Garcini arrived to complete the delivery.

Ms. Thornton testified about her emotional status as a result of lying in a hospital bed for over an hour with her deceased son partially delivered. Plaintiff testified that there was nothing she could do but "sit there like that with my baby." She further testified that she has these thoughts "all the time" and she has had thoughts of suicide because "it was so horrible and I'm always reminded of that hour and ten minutes that I sat there with him." Plaintiff stated that she became depressed, and could not eat or sleep. The infant's father and Ms. Thornton's mother testified about the adverse effects that Jason's death and the circumstances of the delivery had on plaintiff.

At the first trial, the jury found in favor of Dr. Garcini and the nurses on all claims. However, the jury found against Silver Cross Hospital on the emotional distress claim and awarded Ms. Thornton \$175,000. Plaintiff filed post-trial motions against all of the defendants. She then settled all of her claims against Silver Cross Hospital and the nurses for \$175,000 in return for a release of claims and satisfaction of judgment. The trial court later denied plaintiff's post-trial motion with respect to Dr. Garcini.

Plaintiff appealed the jury's verdict relating to Dr. Garcini on various grounds, including juror bias and jury instructions issues. The Third District Appellate Court reversed and granted plaintiff a new trial. *Thornton v. Garcini*, 364 Ill. App. 3d 612, 846 N.E.2d 989, 301 Ill. Dec. 386 (3d Dist. 2006).

Plaintiff then proceeded to trial solely against Dr. Garcini. After the second trial, the jury found in favor of Dr. Garcini on the medical malpractice claims but found him guilty of negligent infliction of emotional distress and awarded damages of \$700,000. Dr. Garcini appealed, arguing that Ms. Thornton failed to prove negligent infliction of emotional distress because she did not introduce any expert testimony to support her claim that she suffered emotional distress due to Dr. Garcini's acts or omissions. Specifically, Dr. Garcini argued that plaintiff failed to introduce expert testimony to establish that her emotional distress was caused by the delay in delivering the deceased infant. Dr. Garcini also contended that he should receive a setoff of \$175,000 due to the settlement previously paid by Silver Cross Hospital.

The Third District Appellate Court rejected Dr. Garcini's arguments and affirmed the jury's verdict of \$700,000. *Thornton v. Garcini*, 382 Ill. App. 3d 813, 888 N.E.2d 1217, 321 Ill. Dec. 284 (3d Dist. 2008). Subsequently, the Illinois Supreme Court also rejected Dr. Garcini's claim that he was entitled to a set-off of \$175,000 due to the settlement reached with the hospital and nurses. The Supreme Court found that Dr. Garcini had forfeited his ability to assert a set-off because he did not raise the issue until he filed a post-trial motion. The *Thornton* court examined section 2-608 of the Code of Civil Procedure and found that it requires a defendant to assert a claim for set-off "in the pleadings." (735 ILCS 5/2-608) The *Thornton* court suggested that section 2-608 provides that a set-off may be raised as a cross-claim in the defendant's answer to the complaint. Accordingly, the *Thornton* court rejected Dr. Garcini's request for a set-off because he did not request a set-off until after the conclusion of the trial.

On April 22, 2010, the Illinois Supreme Court issued a modified opinion in *Thornton* which holds that a claim for set-off does not have to be raised in the pleadings or even before trial. Upon consideration of Dr. Garcini's petition for rehearing, the court was persuaded that a modification of its previous opinion was necessary. The defendant argued that its request for set-off (for the amounts paid by settling defendants) was in the nature of an enforcement action. Dr. Garcini contended that a set-off is not a counterclaim to be evaluated by the trier of fact and therefore, a claim for set-off may be brought at any time.

The *Thornton* court agreed with Dr. Garcini and explained that the term set-off is used in two distinct ways. A set-off can refer to a situation when a defendant has a distinct cause of action against the same plaintiff who filed suit against him. With this type of set-off, the claim must be raised in the pleadings. A set-off can also refer to a defendant's request for a reduction of the damage award because a third party has already compensated the plaintiff for the same injury. This occurs, for example, when a co-defendant who would be liable for contribution settles with the plaintiff. The *Thornton* court ruled that this type of set-off may be raised at any time.

The *Thornton* court found that the defendant's set-off request constituted an enforcement action rather than a counterclaim. Therefore, the defendant's claim for set-off was not forfeited simply because it was not raised in the pleadings. The court went on to find, however, that the trial court properly denied defendant's request for set-off because the judgment against the defendant in the second trial was only for Toni Thornton's claim of negligent infliction of emotional distress and the settlement with the hospital was not merely for damages sought by Toni Thornton, individually, but also for damages sought by her as special administrator of the estate of Jason Ebner. In addition, the settlement agreement released a variety of claims against the hospital and the individual nurses who had not been found liable prior to settlement. The court rejected Dr. Garcini's argument that he was not required to establish the proper allocation of the settlement proceeds. The *Thornton* court stated:

Generally, a nonsettling party seeking a setoff bears the burden of proving what portion of a prior settlement was allocated or attributable to its share of the liability. (Citation omitted.)

Here, plaintiff's \$175,000 settlement with the hospital specifically provided that plaintiff was not settling her claims against defendant. The settlement was not merely for damages sought by Toni Thornton, individually, but also for damages sought by Toni Thornton, as special administrator of the estate of Jason Ebner, deceased. In addition, it released a variety of claims against the hospital as well as against the individual nurses who had not been found liable prior to settlement. *The judgment against defendant in the second trial, however, was only for Toni's individual claim of negligent infliction of emotional distress.*

\* \* \*

Defendant also contends he is entitled to a set-off of the full settlement amount but admits he has failed to offer any proof of the proper allocation based on his share of the liability. Given the multiple parties, injuries, and claims settled in plaintiff's agreement with the hospital, the allocation of the full settlement proceeds to set off defendant's liability for only the negligent infliction of emotional distress cannot be justified in the absence of any supporting proof. No independent judicial determination of the proper allocation is possible. Accordingly, we hold that the trial court properly denied defendant's request for a setoff. (Emphasis added.)

*Thornton v. Garcini*, No. 107028, slip op. at 12 (Apr. 22, 2010).

The *Thornton* case highlights the importance of filing a timely pleading which asserts that a non-settling defendant is or may be entitled to a set-off. A more specific claim for setoff (which references the amount(s) of any settlement(s)) can be filed after a plaintiff reaches a settlement with one or more parties. Based on the *Thornton* court's reasoning in its modified opinion, a crafty plaintiff's attorney could attempt to avoid the application of a set-off or credit by arguing that the settlement related to only one element of damages (i.e., wage loss or medical bills). By filing a timely request for a set-off or credit, a non-settling party should be able to preserve the issue or force plaintiff's counsel to simply agree to full a set-off or credit. If plaintiff's counsel does not agree to a full set-off or credit, then the non-settling party should ask the court to either award the set-off or credit, or to allocate the settlement proceeds in a fair manner.

## **V. STRATEGIC CONSIDERATIONS**

### **A. Is Sole Proximate Cause a Defense in Illinois?**

In *Lipke v. Celotex Corp.*, 153 Ill. App. 3d 498, 505 N.E.2d 1213, 106 Ill. Dec. 422 (1st Dist. 1987), the First District distinguished the rights of a defendant involved in asbestos litigation. In *Lipke*, an asbestos worker filed suit against 27 asbestos manufacturers to recover for damages sustained as a result of continued exposure to asbestos products. By the time of trial, all of the

defendants, except one, had obtained settlement with plaintiff. A verdict of \$629,000 in compensatory damages was awarded, along with \$175,000 in punitive damages.

The remaining defendant appealed this decision, and argued, among other things, that a series of errors made by the trial court resulted in the denial of a fair trial. One such error was the exclusion of evidence of plaintiff's exposure to other asbestos-containing products. The First District did not find this to constitute error. Evidence of other exposures was deemed irrelevant.

The *Lipke* court noted that where there is more than one proximate cause of an injury, a party guilty of negligence cannot avoid responsibility just because another is also guilty of negligence contributing to the same injury. See, *Lipke*, 153 Ill. App. 3d at 509, citing, *Sears v. Kois Bros. Equip., Inc.*, 110 Ill. App. 3d 884, 889, 443 N.E.2d 214, 66 Ill. Dec. 531 (1st Dist. 1982). The First District concluded that where such guilt is present, it is no defense that another contributed to bring about the result for which damages are claimed; either or both are liable and, therefore, the fact that plaintiff used a variety of asbestos products does not relieve a defendant of liability.

However, there are circumstances where a defendant would argue its actions were not the proximate cause to an injury suffered by a plaintiff. In those circumstances, nothing should prevent that defendant from presenting evidence of a settled party's negligence under the auspices that the settling defendant was the "sole proximate cause" of the injury.

Since this decision, defendants in asbestos-related cases face the potential of being the only party left on the hook for damages in the event all other defendants settle and it stands alone when a verdict is announced. The only arguments remaining for such a defendant are set-off and sole proximate cause.

Asbestos defendants continued in their efforts to have *Lipke* overturned. In 2006, the Fourth District ruled in *Nolan v. Weil-McLain*, 365 Ill. App. 3d 963, 851 N.E.2d 281, 303 Ill. Dec. 383 (4th Dist. 2006), that a boiler manufacturer was barred from introducing evidence of a decedent's exposures to other asbestos-containing products. The defendant in that matter petitioned for leave to appeal this decision (essentially, asking for the Illinois Supreme Court to overrule *Lipke*). The Supreme Court accepted defendant's petition, and oral arguments were made May 16, 2007.

On April 16, 2009, the Supreme Court reversed the circuit court and Fourth District and remanded to the circuit court. *Nolan v. Weil-McLain*, 233 Ill. 2d 416, 910 N.E.2d 549, 331 Ill. Dec. 140 (2009). In a decision that overturns *Lipke*, the Supreme Court held the following:

The single paragraph in *Lipke* from which the exclusionary rule of other-exposure evidence is derived neither suggested nor held that a defendant should be barred from introducing evidence of other potential causes of injury where it pursues a sole proximate cause defense, nor that juries should be deprived of evidence critical to a causation determination. As observed by the dissenting justice below, the appellate court's erroneous interpretation of *Lipke*, *Thacker* and

*Leonardi* in its rulings in *Kochan* and *Spain* left Illinois standing alone in excluding evidence of other asbestos exposures, and conflicted with our well-settled rules of tort law that the plaintiff exclusively bears the burden of proof to establish the element of causation through competent evidence, and that a defendant has the right to rebut such evidence and to also establish that the conduct of another causative factor is the sole proximate cause of the injury. We hold that the circuit court erred by relying on the appellate court's erroneous - and now overruled - decisions to prevent defendant from presenting evidence of decedent's other asbestos exposures in support of its sole proximate cause defense.

*Nolan*, 233 Ill. 2d at 444-45.

The *Nolan* decision is a significant victory for defendants. *Nolan* makes it quite clear that defendants should be allowed to argue that its actions were not the proximate cause of an injury suffered by a plaintiff. Accordingly, nothing should prevent defendants from presenting evidence of the negligence of either a settling tortfeasor or a non-party tortfeasor under the auspice that the actions of other tortfeasors were the "sole proximate cause" of the injury.

Despite *Ready*, sole proximate cause remains an available strategy to utilize at trial. Section 2-1117 deals strictly with apportionment of fault. If fault can only be apportioned to one defendant (100 percent vs. 0 percent), then the party that is 0 percent liable should not be forced to pay.

## **B. Should a Contribution Claim Be Filed Against Plaintiff's Employer?**

Given the operation of section 2-1117, the fault of plaintiff's employer will not be considered by the court in reallocating fault for purposes of 2-1117. However, the contribution claim is still a valuable tool. The Contribution Act (740 ILCS 100/0.01 *et seq.*) is designed to make sure that a joint tortfeasor does not pay more than its pro rata share. A contribution claim will reduce the amount of the exposure even in situations where the minimally culpable defendant ends up paying substantially more than it ever should.

Plaintiff's employer's contribution liability will still be limited by its *Kotecki* cap. The operation of section 2-1117 will not ensure the result intended by the Contribution Act (i.e., joint tortfeasors should pay their pro rata share of liability), but it will still help limit the exposure of the defendant found jointly and severally liable. Furthermore, the third-party contribution claim against plaintiff's employer may help get the workers' compensation lien waived, which will operate as a set-off, should a good-faith finding be obtained, at the time of trial. *See, Wilson v. Hoffman Group, Inc.*, 131 Ill. 2d 308, 546 N.E.2d 524, 137 Ill. Dec. 579 (1989).

It is important to note, however, that getting a complete lien waiver may become more difficult since the minimally culpable defendant may now be compelled to pay the entire judgment ensuring plaintiff's employer payback of the lien. Lastly, contract documents should be carefully reviewed to determine whether plaintiff's employer may have waived its *Kotecki* lien protection.

If so, the contribution claim could help even more to offset the injustice foisted upon a minimally culpable defendant by section 2-1117.

### **C. Should Plaintiff's Co-Workers Be Added As Third-Party Defendants?**

Under the current joint liability statute, the only tortfeasor whose fault is excluded from the apportionment process is the "plaintiff's employer." The statute is silent with respect to any other culpable parties, such as plaintiff's co-workers. Section 5(a) of the Workers' Compensation Act, 820 ILCS 305/5(a), immunizes employers and co-workers from liability to the plaintiff, *Fregeau v. Gillespie*, 96 Ill. 2d 479, 484, 451 N.E.2d 870, 71 Ill. Dec. 716 (1983); *Rylander v. Chicago Short Line Ry. Co.*, 17 Ill. 2d 618, 628, 161 N.E.2d 812 (1959). The immunity provided by the Workers' Compensation Act is an affirmative defense which must be asserted. *Doyle v. Rhodes*, 101 Ill. 2d 1, 461 N.E.2d 382, 77 Ill. Dec. 759 (1984).

The Illinois Supreme Court has also recognized that, for Contribution Act purposes, any liability for the fault of a co-worker must be paid by the employer, not by the co-worker. *Ramsey v. Morrison*, 175 Ill. 2d 218, 231, 676 N.E.2d 1304, 222 Ill. Dec. 100 (1997). The *Ramsey* court determined that the co-worker immunity that exists within the Workers' Compensation Act bars a direct suit against the co-worker and also bars a third-party contribution action against the co-employee. *Id.* at 229-30. However, the Illinois Supreme Court also held that this immunity must be asserted in order to be effective, citing section 5(a) of the Workers' Compensation Act. *Id.* at 231. This is an area that has not been addressed by the courts. If a co-worker is added as a third-party defendant, a motion to dismiss will likely be filed, contending that the co-worker is immune from a third-party claim for contribution. The motion to dismiss will likely be granted.

The question which remains unanswered is whether the co-worker, who was named as a third-party defendant but subsequently dismissed, is considered a "third-party defendant" for apportionment purposes under section 2-1117. This appears to be a difficult argument to make given the rationale employed in the *Ramsey* decision, but it is an area that is unsettled. Section 2-1117 by its very terms excludes the plaintiff's employer from the fault calculations, not plaintiff's co-workers.

### **D. Does 2-1117 Apply to Defendants Acting in Concert?**

Under the common law, a tortfeasor who acts in concert with other individuals in causing plaintiff's injury is jointly and severally liable for the injury because the tortfeasor is legally responsible for the actions of the other individuals. The Supreme Court has held that section 2-1117 does not apply to cases where tortfeasors act in concert, stating that it is "legally impossible to apportion liability among tortfeasors who act in concert." *Woods v. Cole*, 181 Ill. 2d 512, 520, 693 N.E.2d 333, 230 Ill. Dec. 204 (1998).

In *Rice v. White*, 374 Ill. App. 3d 870, 874 N.E.2d 132, 314 Ill. Dec. 222 (4th Dist. 2007), three individuals hosted a party at the home of the mother of one of the individuals. Prior to the party, a flyer was distributed advertising the party and stating, "We will check for weapons." One of the

guests at the party was shot and killed by the third-party defendant. A Sangamon County jury awarded plaintiff's estate \$700,000 and found that the three individuals who hosted the party, as well as the mother at whose home the party was held, acted in concert with one another in bringing about the victim's death. Interestingly, the jury was allowed to apportion fault and attributed 19 percent to the mother, 2 percent to each of the three individuals who hosted the party, and 75 percent to the shooter. Because the mother and three individuals who hosted the party had liability which totaled 25 percent, the trial court held them jointly and severally liable under section 2-1117 for the entire \$700,000 award.

One of the issues on appeal was whether the "in concert" defendants were jointly and severally liable for the damages. The Fourth District declined to address the issue regarding joint and several liability. Instead, it found that there was not sufficient evidence to allow a claim to proceed upon a theory of voluntary assumption of duty and, accordingly, defendants were entitled to a directed verdict.

#### **E. What About the Fault of Non-Parties Who Have Not Settled?**

There is no language within section 2-1117 which addresses whether the fault of non-party tortfeasors should be considered for purposes of determining joint and several liability under section 2-1117. Under *Ready*, non-party tortfeasors who have settled with plaintiff prior to suit will not be considered. However, there may be circumstances where a non-party has not settled and is not a named party. Obviously, the inclusion of non-parties could operate to reduce the potential exposure to a defendant. The inclusion of a non-party is certainly consistent with the language within the *Unzicker* decision which suggests that minimally responsible defendants should not have to pay entire damage awards. On the other hand, plaintiffs will argue that *Ready* makes it clear that only those parties at the time of trial should be considered for apportionment purposes.

Illinois courts will generally consider the fault of non-parties for contribution purposes. See, *Truszewski v. Outboard Motor Marine Corp.*, 292 Ill. App. 3d 558, 685 N.E.2d 992, 226 Ill. Dec. 537 (1st Dist. 1997) (excluding a non-party tortfeasor's fault on the verdict form causes an unfair determination of a party's pro rata share under the Contribution Act); *Bofman v. Material Service Corp.*, 125 Ill. App. 3d 1053, 1063-64, 466 N.E.2d 1064, 81 Ill. Dec. 262 (1st Dist. 1984) (the fault of non-party tortfeasors was allowed to be considered in determining the extent of plaintiff's responsibility in a purely comparative fault setting). The Illinois Pattern Jury Instructions suggest that the jury apportion fault between the plaintiff, all defendants, third-party defendants and non-parties. The First District's decision in *Lombardo* suggests that the inclusion of non-parties and settling defendants should be on the verdict form, since it helps protect the rights of a plaintiff to an appropriate attribution of plaintiff's own fault, as well as protecting defendant's contribution rights. However, it is unclear whether a non-party (a party never sued) should be considered for apportionment of fault under section 2-1117.

## **F. What About the Statute of Limitations?**

The Contribution Act states that claims for contribution must be filed within two years of being served with process in the underlying action. 735 ILCS 5/13-204. In addition, section 13-204(b) allows the two-year period to be extended where a party, or its privy, did not know or did not have reason to know of any act or omission giving rise to the action for contribution.

In addition, a contribution claim can be filed despite the passing of the two-year statutory period under section 5/13-204 of the Contribution Act. The Supreme Court has held that section 5/13-207 of the Code of Civil Procedure is a saving provision for counterclaims which can be utilized to file a responsive contribution claim despite the passing of the two-year limitations period. *Barragan v. Casco Design Corp.*, 216 Ill. 2d 435, 837 N.E.2d 16, 297 Ill. Dec. 236 (2005). Here, the court reasoned that 13-207 was not a statute of limitations because it serves to preserve cases, not bar them. *Id.* at 448-49. Furthermore, the court noted that nothing from section 13-204 indicates that it was meant to circumvent the saving clause of 13-207. *Id.* at 449.

The two-year statute of limitations period for contribution claims, rather than the one-year statute of limitations under the Tort Immunity Act, will apply to a contribution action against a local public entity. *Brooks v. Illinois Cent. R. Co.*, 364 Ill. App. 3d 120, 846 N.E.2d 931, 301 Ill. Dec. 328 (1st Dist. 2005). In *Brooks*, the First District noted that the plain language of the Contribution Act states that, "in actions for contribution, its applicable limitations preempts *all* other statutes of limitation or repose." Additionally, the court recognized that contribution claims might not arise until well after the event giving rise to the underlying action, thus the two-year statute applies. *Id.* at 123. As such, in actions for contribution, the two-year statute of limitations should trump all other potentially applicable statutes.

Finally, keep in mind that a contractually shortened statute of limitations is enforceable, so long as the limitations period is otherwise reasonable. *Village of Lake In the Hills v. Illinois Emcasco Ins. Co.*, 153 Ill. App. 3d 815, 506 N.E.2d 681, 106 Ill. Dec. 881 (2d Dist. 1987). Accordingly, it is imperative to review all contracts pertaining to an underlying claim as the contract's language may shorten your client's time to file a valid contribution claim.

## **G. Is Any Version of Section 2-1117 Constitutional?**

In 1986, the Illinois Legislature enacted the version of section 2-1117 which provided that defendants found less than 25 percent at fault would be severally liable only, except as to medical expenses. This particular provision, along with several others, was amended by the Illinois Legislature in 1995 when it adopted pure several liability. The amended version was subsequently declared unconstitutional in *Best v. Taylor Mach. Works*, 179 Ill. 2d 367, 689 N.E.2d 1057, 228 Ill. Dec. 636 (1997), resulting in the 1986 version being reinstated. The Supreme Court in *Best* found that section 2-1117 was unconstitutional because it was special legislation exempting medical malpractice claims from its scope. *Best*, 179 Ill. 2d at 432-33. In essence, the Illinois Supreme Court in *Best* found that special benefits were conferred upon medical malpractice plaintiffs.

The rationale utilized in the *Best* decision can apply with equal force to the current version of section 2-1117. The *Unzicker* decision made it clear that minimally responsible defendants should not have to pay entire damage awards. The current version of section 2-1117 unfairly benefits a certain class of plaintiffs (i.e., those injured at work). If a plaintiff is injured at work, he or she stands to benefit greatly from the operation of the statute, something clearly forbidden based upon the rationale employed by the Supreme Court in its *Best* decision.

The constitutionality of the statute has not been addressed and, as a practical matter, will have little relevance to handling most cases. In an appropriate setting, consideration should be given to challenging the provision. It is noteworthy that even though the Supreme Court in *Ready* looked at the prior version of 2-1117, the constitutionality of the current version was never addressed.

Evaluating fault in multi-party cases can be a confusing task. However, due to the recent Supreme Court holdings in *Ready* and *Nolan*, a great deal of light has been shed on this subject. Although defendants will be able to introduce the fault of other tortfeasors to argue sole proximate cause, plaintiffs benefit greatly with the recent decision in *Ready*, since settling defendants are not considered “defendants sued by the plaintiff” pursuant to 2-1117, and thus will not be considered in the allocation of fault. Consequently, defendants, particularly deep-pocket defendants, may be forced to pay a disproportionate share in settlement even where they are only minimally culpable.

## **VI. INDEMNITY**

Indemnity is based in common law and contract doctrine. In general terms, it is an obligation on one party to make good a loss or damage incurred by another. Indemnity thus shifts the entire responsibility for payment from a party who has been compelled to pay to the one that is actually at fault. Indemnity may be either expressed in a contractual provision or implied in the relationship between the tortfeasors.

### **A. Contractual Indemnity**

Contractual indemnity, or express indemnity, can be expressed by either word of mouth or via a written contract. Written indemnity agreements are common in construction contracts, and typically take one of the following three basic forms:

- (1) Agreements that obligate a contractor to indemnify another contractor but only for the first contractor’s negligence;
- (2) Agreements that obligate a contractor to indemnify another contractor for all liability except for the second contractor’s sole negligence; and

- (3) Agreements that obligate a contractor to indemnify another contractor for all liabilities, including the second contractor's negligence.

### **1. Construction Accidents**

The Illinois Anti-Indemnity Act states that, with respect to construction contracts, agreements to indemnify or hold harmless another person from that person's own negligence are void as against public policy and wholly unenforceable. 740 ILCS 35/1.

### **2. Non-Construction Setting**

Prior to the Illinois Supreme Court's recent decision in *Buenz v. Frontline Transp. Co.*, 227 Ill. 2d 302, 882 N.E.2d 525, 317 Ill. Dec. 645 (2008), barring clear and explicit language, Illinois courts were often reluctant to provide indemnification for one's own negligence in non-construction related agreements. See, *Karsner v. Lechters Illinois, Inc.*, 331 Ill. App. 3d 474, 771 N.E.2d 606, 264 Ill. Dec. 902 (3d Dist. 2002). After the Supreme Court's holding in *Buenz*, Illinois courts may be more likely to liberally construe indemnification agreements in favor of the party seeking indemnification in a non-construction setting.

*In Buenz, supra*, Olga Buenz was involved in a multiple vehicle traffic accident that resulted in her death. Her husband, John Buenz, filed a wrongful death action alleging negligence on the part of defendants COSCO, Frontline, and Frontline's employee, Vicente Zepeda. Plaintiff alleged that Zepeda was Frontline's employee and the driver of the tractor trailer that struck Olga Buenz. COSCO filed a counterclaim against Frontline seeking a declaration that Frontline be obligated, pursuant to express contractual terms set forth in an equipment interchange agreement, to indemnify COSCO for costs and expenses associated with the litigation. The circuit court granted summary judgment in favor of COSCO and the Appellate Court affirmed.

At issue before the Supreme Court was whether the Appellate Court properly affirmed the circuit court's grant of COSCO's motion for summary judgment and subsequent denial of Frontline's motion to reconsider. Frontline argued that the holding in *Karsner* stands for the proposition that the interchange agreement between COSCO and Frontline does not provide COSCO indemnity for its own negligence. Frontline acknowledged that the Appellate Court declined to follow *Karsner*, but Frontline contended that the language of the indemnification provision in *Karsner* was similar to the language in the indemnification provision in this case.

The Supreme Court reviewed the equipment interchange agreement. Pursuant to this agreement, Frontline agreed to indemnify COSCO for "any and all claims . . . arising out of . . . the possession, use, operation or returning of the equipment during all periods when the equipment shall be out of the possession of [owner]." The court concluded that the agreement clearly provided indemnification to COSCO for COSCO's own negligence. The court held that, "[i]t is not simply the use of the phrase 'any and all' that determines whether a particular contract provides indemnification for an indemnitee's own negligence." Rather, the phrase "any

and all” must be considered in the context of the entire contract. If warranted by the contract, the phrase “any and all” may indicate that the parties intended the indemnitee to be indemnified for the indemnitee’s own negligence. The Supreme Court thus overruled the holding in *Karsner* and held that, barring a statutory provision to the contrary, contracts that clearly and explicitly provide indemnity for one’s own negligence are valid and enforceable.

In *Nicor Gas Co. v. Village of Wilmette*, 379 Ill App. 3d 925, 884 N.E.2d 816, 318 Ill. Dec. 848 (1st Dist. 2008) the plaintiff gas utility brought suit sounding in, among other things, both negligence and breach of contract, alleging that a broken water main owned by the village damaged the utility’s property and caused a natural gas outage. The village filed a motion to dismiss, contending the utility could not recover because the contract between the parties included a provision indemnifying the village for any damages resulting from the utility’s occupation of an easement. Significantly, the indemnification agreement used the phrase “any and all,” as discussed in *Buenz*. The circuit court granted the motion to dismiss, based in part on the indemnification agreement. On appeal, the utility contended that the indemnification clause between the parties was not so clear, specific and unequivocal as to require indemnification of the village for its own alleged negligence. The First District, in applying *Buenz*, held that the phrase “any and all” may indeed indicate the parties’ intent to indemnify the indemnitee for its own negligence. It was further noted that in *Buenz*, there was no limiting language, thus the indemnification clause was construed as very broad and sufficient to encompass even claims arising out of the indemnitee’s own negligence. Accordingly, the First District found the indemnification clause to be very broad due to the phrase “any and all” without any additional limiting language present. As a result, it was concluded that the parties’ agreement clearly and explicitly provided indemnification for the village’s own negligence.

In *Downs v. Rosenthal Collins Group, LLC*, 385 Ill. App. 3d 47, 895 N.E.2d 1057, 324 Ill. Dec. 342 (1st Dist. 2008), a member of a limited liability company brought an action against the company for breach of contract and a declaratory judgment alleging that the company breached its operating agreement by failing to indemnify him for his attorney’s fees incurred in successfully defending an earlier action brought by the company. The circuit court granted the company’s motion to dismiss with prejudice and the plaintiff appealed. On appeal, the First District affirmed and held that the indemnification clause did not expressly include attorney’s fees and thus did not entitle the plaintiff to indemnification for such fees. The plaintiff argued that the decision in *Buenz* mandated that the Appellate Court allow for an indemnification obligation based on the general language in the indemnity contract. The First District agreed with plaintiff’s contention that *Buenz* supports the assertion that indemnity contracts are to be analyzed like any contract and that broad language may allow indemnification. However, the court disagreed that *Buenz* required reversal of the trial court. Specifically, the *Downs* court noted that *Buenz* did not address the issue of attorney’s fees. Therefore, the court did not find that *Buenz* supported an overcoming of the “American Rule” that requires specific statutory or contractual authority to receive an award for attorney’s fees. The court found that the American Rule extends to indemnification agreements just as any other contract.

In *American Management Consultant, LLC. v. Carter*, 392 Ill. App. 3d 39, 915 N.E.2d 411, 333 Ill. Dec. 605 (3d Dist. 2009), the plaintiff landlord brought a forcible entry and detainer action against the defendant tenant. The circuit court entered judgment for the landlord and the tenant appealed. One issue addressed on appeal by the Third District was the plaintiff's attempt to obtain indemnity for its own negligence. The Third District recognized that, pursuant to *Buenz*, contracts that clearly and explicitly provide indemnity against one's own negligence are valid and enforceable. However, the Third District placed significant emphasis on the holding in *Blackshare v. Banfield*, 367 Ill. App. 3d 1077, 857 N.E.2d 743, 306 Ill. Dec. 344 (5th Dist. 2006), whereby the Fifth District ruled against the indemnitee's action seeking indemnification for its own negligence. The Third District noted that an agreement to indemnify a party for its own negligence is so unusual and extraordinary that the intent to indemnify to that extent must be beyond doubt by express stipulation. Furthermore, any ambiguity in the indemnity contract is to be construed most strongly against the indemnitee. In the end, the Third District held that the agreement did not contain an "express stipulation" that plaintiff was to be indemnified for its own negligence.

## **B. Implied Indemnity**

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 implied 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 Division Package Machinery Co.*, 70 Ill. 2d 1, 374 N.E.2d 437, 15 Ill. Dec. 829 (1977). The Illinois Supreme Court has also stated that implied indemnity no longer existed after the adoption of contribution. *Allison v. Shell Oil Co.*, 113 Ill. 2d 26, 495 N.E.2d 496, 99 Ill. Dec. 115 (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 aforementioned pre-tort relationships. *American Nat. Bank & Trust Co. v. Columbus-Cuneo-Cabrini Medical Center*, 154 Ill. 2d 347, 609 N.E.2d 285, 181 Ill. Dec. 917 (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, 676 N.E.2d 621, 221 Ill. Dec. 818 (1997). Finally, 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, 667 N.E.2d 1351, 217 Ill. Dec. 775 (1st Dist. 1996.)



## Joseph G. Feehan

- Partner

Joe has spent his entire legal career with Heyl Royster, beginning in 1988 in the Peoria office. He is the co-chair of the firm's Truck/Motor Carrier Litigation Practice Group. Joe concentrates his expertise in all areas of civil litigation including products liability, sexual torts, trucking/transportation, premises liability, auto, and commercial litigation.

In recent years, Joe has developed a special focus on defending sexual tort claims, particularly those brought against corporations and religious entities. Many of his cases are against leading Chicago and national counsel where damages sought against these target defendants typically reach several million dollars.

Although always prepared to try cases when necessary, Joe is a skilled negotiator and has had great success resolving cases through mediation. Over the last five years, Joe has resolved over 20 lawsuits through mediation.

Joe is a frequent speaker at programs and seminars on civil litigation, including such topics as effective trial techniques, expert witnesses, and evidentiary issues. Joe has published many articles on various trial practice and evidence issues. He served as Editor-in-Chief of the *Illinois Defense Counsel Quarterly*, the official journal of the Illinois Association of Defense Trial Counsel, and as a contributor to the IDC Quarterly's Evidence and Practice Tips column for several years. Joe co-authored the chapter on UCC Warranties in the *Contract Law Handbook* published in 2008 and 2005 by the Illinois Institute of Continuing Legal Education. Currently, Joe serves as Chair of the Peoria County Bar Association's Continuing Legal Education Committee and is President of the Abraham Lincoln Chapter of the Inns of Court.

Joe enjoys an "AV" rating by Martindale-Hubbell. He has been designated an Illinois "*Super Lawyer*" (top 5%) as a result of a survey of Illinois attorneys and judges conducted by *Chicago* magazine, as were 13 of his partners.

### Publications

- Life After "Same Part of the Body:" An Update on Admissibility of Prior Injuries, *Illinois Bar Journal*

- *Contract Law Handbook*; Chapter on UCC Warranties, Disclaimers and Limitations, Illinois Institute of Continuing Legal Education (2008 and 2005 editions)
- Illinois Appellate Court First District Vacates \$25 Million Jury Verdict Because Trial Court Improperly Barred Expert Testimony Regarding Plaintiff's Blood-Alcohol Level, *Illinois Defense Counsel Quarterly*

### Professional Recognition

- Martindale-Hubbell AV Rated
- Named to the Illinois *Super Lawyers* list (2008-2010). The *Super Lawyers* selection process is based on peer recognition and professional achievement. Only five percent of the lawyers in each state earn this designation.
- Selected as a *Leading Lawyer* in Illinois. Only five percent of lawyers in the state are named as *Leading Lawyers*
- Illinois Association of Defense Trial Counsel Distinguished Service Award, 2007

### Professional Associations

- National Diocesan Attorneys Association
- Trucking Industry Defense Association
- Defense Research Institute
- Illinois Association of Defense Trial Counsel (IDC Quarterly regular columnist and past Editor-in-Chief)
- Abraham Lincoln Inn American Inn of Court (presently President)
- American Bar Association
- Illinois State Bar Association
- Peoria County Bar Association (Chair of Continuing Legal Education Committee)

### Court Admissions

- State Courts of Illinois
- United States District Court, Central and Northern Districts of Illinois

### Education

- Juris Doctor (Cum Laude), Northern Illinois University College of Law, 1988
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