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Illinois Courts Expand, Then Narrow Validity of Arbitration Agreements In Nursing Home Litigation

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The Illinois appellate court recently issued two important decisions regarding the applicability and validity of binding arbitration agreements in nursing home cases.

Arbitration Agreements Generally Enforceable

In *Fosler v. Midwest Care Center II, Inc.*, 398 Ill. App. 3d 563, 928 N.E.2d 1 (2d Dist. 2009) (*modified upon denial of reh'g,* March 1, 2010), the court considered whether the Illinois Nursing Home Care Act (NHCA) invalidates binding arbitration agreements between the resident and her nursing home based on the Act's "antiwaiver" provisions. These antiwaiver provisions purport to guarantee a resident the right to a jury trial and to nullify any waiver of the resident's right to sue. The court found that the Act did not invalidate these arbitration agreements, and that the Federal Arbitration Act preempted the antiwaiver provisions of the NHCA.

Marie Fosler was a resident at the defendant's facility from 2004 to 2007. When Fosler was admitted to the facility, her daughter (acting as Fosler's "authorized representative,") signed an admission agreement which contained an arbitration clause. *Fosler*, 398 Ill. App. 3d at 565-566. The arbitration clause stated that any dispute between the resident and the facility would be resolved by binding arbitration. The clause further provided that the agreement was to be governed by the Federal Arbitration Act (FAA). *Id*.

According to provisions of the FAA:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (2010).

However, the NHCA states that any party to a claim brought under the Act "shall be entitled to a trial by jury and any waiver of the right to a trial by a jury, whether oral or in writing, prior to the commencement of an action, shall be null and void, and without legal force or effect." 210 ILCS 45/3-607 (West 2010).

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On the inside

The court determined that a conflict existed between the FAA and the NHCA, since the FAA permits and favors arbitration agreements while the NHCA invalidates them. *Fosler*, 398 Ill. App. 3d at 569. In the face of such a conflict, the Supremacy Clause of the United States Constitution and the resulting doctrine of federal preemption provide that the state law is preempted by the federal legislation. *Id.* at 567-568, *citing* U.S. Const., art. VI, cl. 2.

The United States Supreme Court has stated:

> We discern only two limitations on the enforceability of arbitration provisions governed by the Federal Arbitration Act: they must be part of a written maritime contract or a contract 'evidencing a transaction involving commerce' and such clauses may be revoked upon 'grounds as exist at law or in equity for the revocation of any contract.' We see nothing in the Act indicating that the broad principle of enforceability is subject to any additional limitations under state law.

Southland Corp. v. Keating, 465 U.S. 1, 10-11, 104 S. Ct. 852, 858 (1984) (citations omitted).

The court in *Fosler* found that the arbitration agreement at issue met both of the limitations identified by the Supreme Court.

With respect to the interstate commerce element, the court noted that the arbitration agreement was a contract between the plaintiff and the defendant facility. The court then determined that the facility received Medicare and Medicaid payments, that it received payments from out of state insurance programs and that it purchased medical equipment, supplies and over the counter medication from vendors outside the State of Illinois. Such commercial activity constituted evidence of transactions, at least by one party, involving interstate commerce. *Fosler*, 398 Ill. App. 3d 578.

In *Carter*, the court found that the public policy expressed in the NHCA was sufficient to invalidate arbitration agreements, even in the face of the potential conflict preemption between the FAA and the Nursing Home Care Act.

The *Fosler* court also considered whether the portions of the NHCA at issue stated "such grounds as exist at law or in equity for the revocation of any contract." *Id.* at 578. The plaintiff relied on *Carter v. SSC Odin Operating Co., LLC*, 381 Ill. App. 3d 717, 885 N.E.2d 1204 (5th Dist. 2008), in which the appellate court held that FAA *did not* preempt the NHCA. In *Carter*, the court found that the public policy expressed in the NHCA was sufficient to invalidate arbitration agreements, even in the face of the potential conflict preemption between the FAA and the Nursing Home Care Act. The *Fosler* court, however, refused to follow *Carter*, declaring instead that *Carter* misinterpreted the Supreme Court cases discussing the preemption issue. *Fosler*, 398 Ill. App. 3d at 571.

While the Second District Appellate Court was considering the *Fosler* case, the defendant in *Carter* was pursuing its appellate remedies. It filed a petition for leave to appeal in the Illinois Supreme Court, which was denied. *Carter v. SSC Odin Operating Co., LLC*, 229 Ill. 2d 618, 897 N.E.2d 250 (2008). The defendant then filed a petition for writ of *certiorari* in the United States Supreme Court, arguing that the Illinois appellate court misconstrued Supreme Court precedent and that the decision in *Carter* conflicted with two Supreme Court opinions, as well as with holdings in several other federal circuits. *Carter v. SSC Odin Operating Co., LLC*, 237 Ill. 2d 30, 37-8, 927 N.E.2d 1207 (2010). In the midst of the parties' briefing on the defendant's petition for writ of *certiorari*, the Second District issued the *Fosler* decision. *Id.*

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The defendant in *Carter* then filed a motion with the Illinois Supreme Court for reconsideration of the denial of its original petition for leave to appeal, citing a conflict between *Carter* and *Fosler*. The Illinois Supreme Court granted the petition and issued a written opinion agreeing with the *Fosler* analysis. See *Carter v. SSC Odin Operating Co., LLC*, 237 Ill. 2d 30, 927 N.E.2d 1207 (2010).

Agreeing with *Fosler*, the court identified and analyzed the apparent conflict between the appellate court's opinion in *Carter* and several Supreme Court opinions, including *Perry v. Thomas*, 482 U.S. 483, 107 S. Ct. 2520 (1987), *Southland Corp. v. Keating*, 465 U.S. 1, 104 S. Ct. 852 (1984), and *Preston v. Ferrer*, 552 U.S. 346, 128 S. Ct. 978 (2008). The court determined that the United States Supreme Court had already decided that the clear federal policy of rigorously enforcing private arbitration agreements placed the FAA in conflict with other laws requiring that litigants be provided a judicial forum for a certain type of dispute. *Carter*, 237 Ill. 2d at 38-49.

The court could find no basis to distinguish the antiwaiver provisions of the NHCA from the antiwaiver state laws cited in the above-referenced Supreme Court cases which were preempted by the FAA. The court concluded that the NHCA antiwaiver provisions were not "grounds which exist at law or in equity for the revocation of any contract," including arbitration agreements. *Carter*, 237 Ill. 2d at 50.

Non-agent Spouse's Execution of Arbitration Agreement Not Valid

In *Curto v. Illini Manors, Inc.*, No. 3-10-0260, 2010 WL 5113804 (3d Dist. Dec. 10, 2010), the appellate court held that a spouse's execution of an arbitration agreement did not bind a nursing home resident, or even the spouse herself, in subsequent litigation against the facility.

In 2007, Marilee Curto contracted with a residential long term care facility, Pekin Manors, for the placement and residence of her husband, Charles. *Curto*, 2010 WL 5113804, at *1. The contract apparently identified Charles as the "resident" and Marilee as "Guardian/Responsible Party." Marilee signed the contract on a preprinted signature line which identified her as "Legal Representative." *Id.* The parties also executed a separate arbitration agreement which directed that any dispute arising from Charles' residence be submitted to binding arbitration. Charles did not sign the agreement; Marilee signed it above a signature line that read "Signature of Resident Representative." *Id.*

In 2009, Marilee filed a complaint against the facility for damages Charles allegedly sustained during his residence there, including his death. Her complaint was brought under the Nursing Home Care Act, the Wrongful Death Act, the Survival Act and the Family Expense Act. *Id*. The facility filed a motion to dismiss and to compel arbitration based on the agreements executed by Marilee, asserting that Charles' estate was bound by the arbitration agreement. The trial court denied the motion, finding that Marilee was not acting as Charles' agent when she signed those documents. *Id.*

The appellate court affirmed the trial court's denial of the motion to dismiss and compel arbitration and remanded the case to the trial court. The appellate court framed the issue as one of simple agency, finding initially that a nonsignatory nursing home resident may only be bound by an arbitration agreement if the signatory had the authority to sign the agreement as the resident's agent. Significantly, the court noted that there is no presumption in Illinois that one spouse has the authority to act for another. *Id*. at *2.

A principal may only be bound by an agent's actions when the agent has the actual or apparent authority to act on behalf of the principal. Actual authority can be either express or implied. Implied authority is established when a reasonable interpretation of the principal's behavior causes the agent to believe that the principal wants her to act on the principal's behalf. *Id*. The appellate court found that Charles neither expressly nor implicitly authorized Marilee to execute the arbitration agreement. *Id.* at *3.

The court noted that there was no evidence that Charles gave Marilee express authority to act on his behalf. There was no written agreement or power of attorney granting her such authority. *Id.*

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Significantly, the appellate court also rejected the defendant's assertion that implied authority existed. The record did not suggest that Charles was present when Marilee signed the agreement and directed her to sign on his behalf. The court found no evidence that Charles knew that his wife signed the arbitration agreement and agreed to or adopted her signature. *Id*. The court concluded that absent some evidence that a resident-spouse gave the agent-spouse the authority to sign an arbitration agreement, the resident-spouse is not bound by its terms. Actual authority (express or implied) is controlled by the principal's conduct and "[s]uch authority is not dictated by an independent act or signature of the agent." *Id.* at *4.

The defendant also asserted, however, that Marilee was Charles' apparent agent when she executed the contract and arbitration agreement. The court noted that apparent authority exists when a principal creates an impression in a third party that the purported agent has the authority to act on his behalf. However, under this definition of apparent agency, the principal-resident's behavior is still crucial to the determination of the agency relationship. *Id.* at *5.

The court found no evidence to suggest that Charles did anything to indicate to the defendant that Marilee was acting as his agent. Of course, Marilee signed the admission documents and Charles then accepted residence in the facility for a period of time, suggesting that he agreed with the terms of the admission and his wife's authority to agree to it on his behalf. However, the appellate court refused to assign knowledge of the existence of the arbitration agreement to Charles without some indication in the record that he was aware of it and consented to his wife's agreement that he be bound by it. *Id*.

The court also held that even when a health care power of attorney exists, without more, the spouse *still* lacks authority to execute arbitration agreements on behalf of the resident-spouse. Citing to out-of-state cases, the appellate court found that health care powers of attorney are granted for the purpose of making medical decisions only, and cannot provide the basis for the waiver of legal rights. *Id.* at *4. The court cited the trial court's conclusion that "[t]he agreement to submit to binding arbitration is *ultra vires* of a power of attorney for health care and the duty/power to provide for the nursing home spouse's medical needs." *Id*.

As an aside, in the *Fosler* case, the resident's daughter signed the arbitration agreement as the resident's "authorized representative." One wonders how the *Fosler* court would have addressed the argument, had it been made, that ultimately carried the day for the plaintiff in *Curto*.

Practice Tip

The court suggested that Marilee's execution of the arbitration agreement would have bound Charles if (a) he had appointed her "attorney-in-fact" for the purpose of executing that document; (b) there was evidence suggesting that Charles knew of the arbitration agreement and agreed to or adopted Marilee's signature; or (c) there was evidence of Charles' own consent to the arbitration agreement. If long term care facilities include arbitration agreements in their admission contracts, they must obtain physical evidence of the resident's agreement to the arbitration agreement. The witnessed signature of the resident on the agreement itself should be sufficient, unless the resident's capacity is at issue. In that case, the facility should demand the signature of the resident's attorney-in-fact and should ensure that person is expressly authorized to enter into the arbitration agreement on the resident's behalf. ■

Illinois Citizens Won't Be "Slapped" Around, An Overview of Illinois' Citizen Participation Act (735 ILCS 110 et. seq.)

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Surely one of the most often voiced criticisms of our legal system is how it fails protect individuals against frivolous lawsuits that cost significant time, money and other resources to defend. Though far from the significant tort reform being suggested in the area of medical malpractice, our Illinois legislature has attempted to address a perceived deterrent that lawsuits sometimes have on the legitimate exercise of free speech and the right to meaningfully participate in government. The statute, which was signed into law on August 28, 2007, is known as the Citizen Participation Act (hereinafter the "CPA").

Overview of the Statutory Language

The CPA is also commonly known as the Illinois Anti-Strategic Lawsuits Against Public Participation Act or Anti-SLAPP Act. The purpose of the CPA is to protect defendants from "Strategic Lawsuits Against Public Participation (SLAPPs), which harass citizens for exercising their constitutional rights, such as the right to petition the government." *Mund v. Brown*, 393 Ill. App. 3d 994, 913 N.E.2d 1225, 332 Ill.Dec. 935 (5th Dist. 2009).

Specifically the CPA provides as follows:

> Pursuant to the fundamental philosophy of the American constitutional form of government, it is declared to be the public policy of the State of Illinois that the constitutional rights of citizens and organizations to be involved and participate freely in the process of government must be encouraged and safeguarded with great diligence. The information, reports, opinions, claims, arguments, and other expressions provided by citizens are vital to effective law enforcement, the operation of government, the making of public policy and decisions, and the continuation of representative democracy. The laws, courts, and other agencies of this State must provide the utmost protection for the free exercise of these rights of petition, speech, association, and government participation.
>
> Civil actions for money damages have been filed against citizens and organizations of this State as a result of their valid exercise of their constitutional rights to petition, speak freely, associate freely, and otherwise participate in and communicate with government. There has been a disturbing increase in lawsuits termed "Strategic Lawsuits Against Public Participation" in government or "SLAPPs" as they are popularly called.
>
> The threat of SLAPPs significantly chills and diminishes citizen participation in government, voluntary public service, and the exercise of these important constitutional rights. This abuse of the judicial process can and has been used as a means of intimidating, harassing, or punishing citizens and organizations for involving themselves in public affairs.
>
> It is in the public interest and it is the purpose of this Act to strike a balance between the rights of persons to file lawsuits for injury and the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government; to protect and encourage public participation in government to the maximum extent permitted by law; to establish an

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efficient process for identification and adjudication of SLAPPs; and to provide for attorney's fees and costs to prevailing movants. *735 ILCS 110/5*.

The CPA protects any acts of a moving party "in furtherance of the moving party's rights of petition, speech, association, or to otherwise participate in government." *735 ILCS 110/15.* "Acts in furtherance of the constitutional rights to petition, speech, association, and participation in government are immune from liability, regardless of intent or purpose, except when not genuinely aimed at procuring favorable government action, result or outcome." *Id.*

Finally, the CPA mandates that its provisions are to be "construed liberally to effectuate its purposes and intent fully." *735 ILCS 110/30(b).*

The CPA protects any acts of a moving party "in furtherance of the moving party's rights of petition, speech, association, or to otherwise participate in government. Acts in furtherance of the constitutional rights to petition, speech, association, and participation in government are immune from liability, regardless of intent or purpose, except when not genuinely aimed at procuring favorable government action, result or outcome."

Recent Illinois Precedent

Our Illinois Courts have been particularly active in recent months interpreting the provisions of this statute. Most recently, the Illinois Supreme Court took up the issue in *Wright Development Group, LLC v. John Walsh*, 238 Ill.2d 620, 939 N.E.2d 389, 345 Ill. Dec. 546 (Ill. 2010).

The defendant in the *Wright* case was a condominium association president (John Walsh) who attended a public meeting that was held at the office of his local alderman. *Wright Development Group, LLC v. John Walsh, et. al.*, 238 Ill.2d 620, 939 N.E.2d 389, 345 Ill. Dec. 546 (Ill. 2010). The purpose of the meeting was to provide the local residents the opportunity to communicate problems they had been experiencing with local developers and contractors. *Id.* Mr. Walsh attended this meeting and aired complaints about problems his condominium association had been experiencing. *Id.* Following the meeting, Mr. Walsh was approached by a reporter from a local newspaper and gave further details regarding problems with the developers at his building. *Id.* He also mentioned a lawsuit that had been filed against the developers alleging, among other things, fraud. *Id.* Mr. Walsh identified the developer as Wright Development Group, though this was not one of the named parties in the lawsuit alleging fraud. *Id.* Based upon the conversation, a story was published in the local newspaper identifying Wright Development Group as one of the entities named in the lawsuit. *Id.* The article also discussed alleged fraudulent representations about work performed on the building in question as well as problems with the building structure itself. *Id.* These problems and fraudulent misrepresentations were all attributed to Wright Development Group. *Id.*

Wright Development Group subsequently sued Mr. Walsh, as well as the newspaper, for defamation. *Id.* Various motions to dismiss were filed, one of which was a motion to dismiss based upon the protections of the CPA. *Id.* The motion sought a dismissal as well as an award of costs and attorney's fees. *Id.* The trial court initially

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denied the motion, indicating that the protections of the CPA did not extend to statements made to reporters after the meeting was completed. *Id.* The complaint was, however, dismissed on a motion to dismiss alleging application of the innocent construction rule. *Id.*

Walsh appealed the decision as he wanted to collect his attorney's fees and costs. *Id.* The appellate court initially dismissed the appeal as moot since the case had been dismissed on other grounds. *Id.* A petition to appeal, however, was accepted by the Supreme Court. *Id.*

The Supreme Court reversed the trial court's denial of Mr. Walsh's motion brought pursuant to the provisions of the CPA. In doing so, it reasoned as follows:

> The gravamen of Wright Development's defamation claim is the statement Walsh made in an alderman's office to a reporter concerning statements he had made at the official public meeting. This is clearly immunized activity. According to the uncontroverted deposition testimony of Walsh and Hrycko, the statements regarding the building issues at 6030 N. Sheridan were made inside the alderman's office while the alderman's staff continued to converse with meeting participants in the mingling session. The statements to the reporter addressed a public matter-the problems of condominium conversion and draft legislation-in furtherance of his right to petition the government. These statements were in response to Alderman Smith's public notice and addressed the subject matter of his testimony and the public meeting. At the very least, these statements affected the 262 unit owners at the 6030 building. They also potentially affected citizens of the 48th Ward and the City at large.
>
> Therefore, Walsh's statements were "in furtherance of" his rights to speech, association, petition or otherwise participate in government because the Act expressly encompasses exercises of political expression directed at the *electorate* as well as government officials. *Id.*

The Supreme Court emphasized that a statement need not be made directly to a government official in order to be protected. It stated "the Act does not limit the protected rights to petitioning the government only. The Act plainly includes the rights to 'speech' and 'association' as well. *Id.*

The Supreme Court remanded the case for the calculation of an award of reasonable costs and attorney's fees to Mr. Walsh. *Id.*

Other very recent examples of how the CPA is being very liberally construed by the Illinois Courts include *Shoreline Towers Condominium Ass'n v. Gassman*, 404 Ill. App. 3d 1013, 936 N.E.2d 1198, 344 Ill.Dec. 441 (1st. Dist. 2010) (holding that a condominium owner's complaints to government officials and a local newspaper of religious discrimination by her condominium association are protected); *Hytel Group, Inc. v. Michelle Z. Butler*, 405 Ill. App.3d 113, 938 N.E.2d 542, 345 Ill. Dec. 103 (2d Dist. 2010) (holding that a former employees wage claim against her former employer with the Department of Labor was protected); *Steven Sandholm v. Richard Kuecker, et. al.*, 2010 WL 4102998 (2d Dist. 2010) (holding that alleged defamatory statements by various members of the community made to the local school board, on a website and on the radio, about a high school basketball coach, were protected.

Analysis

The CPA has some real teeth to it in that it is being very liberally construed by the courts to protect all types of speech and other action, as long as it is in some way legitimately intended to procure favorable government action. The case law indicates that the covered activity is not limited to direct contact with government entities or officials. Speech and activity directed toward the electorate is protected as well. The only test is whether the

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defendant's speech or other activities, regardless of intent, are in furtherance of the moving party's rights of petition, speech, association, or to otherwise participate in government. These are very broad terms subject to many different interpretations. To date it does not appear that limits have been defined as to just how far the protections of the CPA may reach. Therefore, anyone defending a lawsuit which attacks a client's activities, which can arguably be tied to procuring favorable government action, should be aware of this statute. Not only does it provide for a quick and cost effective disposition for a certain category of cases, it also provides for the recovery of attorney's fees. The award of attorney's fees is mandatory if a movant is successful, the court has no discretion to decide whether they are warranted.

Many practicing attorneys are not even aware of the existence of this potent tool in defending a client's legitimate participation as a citizen in government. It would appear that based upon the strong language of the statute and the liberal construction being use by the courts, that this statute is indeed a powerful instrument in protecting a client from frivolous or retaliatory lawsuits. ■

Ready v. United/Goedecke II: The Sole Proximate Cause Defense is Alive and Well in Illinois

By: James Toohey and Rebecca Matthews
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In *Nolan v. Weil-McLain*, 233 Ill. 2d 416, 910 N.E.2d 549 (2009), the Illinois Supreme court brought clarity to long-standing confusion regarding whether defendants in asbestos-related injury cases could present evidence of the negligence of nonparty tortfeasors. Resolving an obvious conflict among several asbestos case rulings and its own decision in *Leonardi v. Loyola University of Chicago*, 168 Ill. 2d 83, 658 N.E.2d 450 (1995), the court held that evidence of the negligence of nonparties is admissible in any case in which a defendant raises the issue of sole proximate cause. *Nolan v. Weil-McLain*, 233 Ill. 2d at 444-45. A year earlier, however, the Illinois Supreme Court held that nonparty tortfeasors should not be on the jury form for assignment of a share of negligence liability and, as such, evidence of their negligence is inadmissible. *Ready v. United/Goedecke Services, Inc.*, 232 Ill. 2d 369, 905 N.E.2d 725 (2008)(*Ready I*). In a second decision in *Ready v. United/Goedecke Services, Inc.*, No. 108910, 2010 Ill. LEXIS 1538 (October 21, 2010)(*Ready II*), the supreme court clarified any possible conflict between *Ready I* and *Nolan.* The court reaffirmed that its decision in *Nolan* established that nonparty negligence is admissible on the issue of sole proximate cause, but is not admissible on the issue of apportionment of fault among joint tortfeasors. *Ready*, 2010 Ill. LEXIS 1538, at *6-9, 12-13.

Nolan: A Standard Established

In *Nolan*, the plaintiff alleged that the decedent's mesothelioma was caused by his exposure to the asbestos products negligently sold by 12 different defendants, including the defendant Weil-McLain. *Id.* at 419. Only Weil-McLain remained in the case at trial. *Id.* The trial court refused to permit Weil-McLain to introduce evidence of asbestos exposure from the dismissed defendants' and other manufacturers' products in support of its defense that its products did not cause the disease, but rather the asbestos products of the others solely caused the plaintiff's disease. *Id.* at 419-20. The divided appellate court affirmed the verdict entered for the plaintiff, relying on *Lipke v. Celotex Corp.*, 153 Ill. App. 3d 498, 505 N.E.2d 1213 (1st Dist. 1987) and subsequent appellate court cases, *Kochan v. Owens-Corning Fiberglass Corp.*, 242 Ill. App. 3d 781, 610 N.E.2d 683 (5th Dist. 1993), and *Spain v. Owens-Corning Fiberglass Corp.*, 304 Ill. App. 3d 356, 710 N.E.2d 528 (4th Dist. 1999), that interpreted

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Lipke as requiring the exclusion of such evidence. *Id*. at 427.

On review, the Illinois Supreme Court held that evidence of the negligence of nonparty tortfeasors was admissible if the defendant claimed that the negligence of those non-parties was the sole proximate cause of the plaintiff's injury. *Nolan*, 233 Ill. 2d at 444-45. The court stated, "*Lipke* simply holds that if a defendant's negligence proximately caused a plaintiff's harm, evidence that another's negligence might also have been a proximate cause is irrelevant—and therefore properly excluded--if introduced for the purpose of shifting liability to a concurrent tortfeasor." *Id.* at 437-38. The court noted that the defendant in *Nolan* had not sought to present evidence shifting liability to a concurrent tortfeasor, but rather to contest causation by proving that the nonparties were the sole proximate cause of the injury. *Id.* at 438. In reversing the *Nolan* trial and appellate courts and remanding for a new trial, the supreme court held that a proper reading of *Lipke, Leonardi*, and *Thacker v. UNR Industries, Inc.*, 151 Ill. 2d 343, 603 N.E.2d 449 (1992) required admission of the causative conduct of nonparties in cases in which sole proximate cause is at issue. *Id.* at 438-40. In so holding, the court expressly overruled *Kochan* and *Spain*, in which evidence of nonparty negligence had been barred despite that the defendant had proffered such evidence in support of a sole proximate cause defense. *Id.* at 444.

***Ready I*: Evidence in Danger**

The Illinois Supreme Court's decision in *Nolan* was sandwiched between its opinions in two other cases, *Ready I* and *Ready II,* in which the issue of admissibility of nonparty negligence was also addressed, but in a different context.

Ready I involved a suit originally filed against a site developer, Midwest Generation, L.L.C. (Midwest), its general contractor, BMW Constructors, Inc. (BMW), and BMW's subcontractor, United/Goedecke Services, Inc. (United). *Ready I*, 232 Ill. 2d at 372. The plaintiff's decedent was struck and killed by a falling wooden truss while working on the job. Before the trial, BMW and Midwest settled with the plaintiff. *Id.* At trial, the court prohibited United from presenting evidence that either Midwest or BMW were at fault for the accident and refused United's request that the nonparties be included on the verdict form. *Id.* at 373. The court also refused United's proposed jury instruction on sole proximate cause. *Id.* at 385. The defendant appealed from a verdict entered for plaintiff, and the appellate court reversed, holding that a jury could apportion liability for nonparties in its verdict, and, to do so, it needed to consider relevant evidence bearing on the negligence of those nonparty joint tortfeasors. *Id.* at 373-74. The appellate court did not reach the issue of sole proximate cause. *Id.* at 385.

> After an exhaustive statutory analysis, the supreme court reversed the appellate court on the first issue. *Id.* at 374-84. It concluded that the jury could not apportion liability to the nonparties and, thus, that the defendants could not present evidence of the negligence of such nonparties on that issue.

The supreme court granted review in *Ready I* and addressed two issues. First, it addressed the issue of whether the names of the nonparties should appear on the verdict form for the apportionment of liability and whether evidence of the negligence of those nonparties should be admitted at trial. *Id.* at 374. Second, it addressed the issue of whether a sole proximate cause jury instruction should have been given. *Id.* at 385.

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After an exhaustive statutory analysis, the supreme court reversed the appellate court on the first issue. *Id.* at 374-84. It concluded that the jury could not apportion liability to the nonparties and, thus, that the defendants could not present evidence of the negligence of such nonparties on that issue. *Id.* at 383. It then remanded the case back to the appellate court for ruling on the issue of sole proximate cause. *Id.* at 385. By the time the appellate court considered the issue on remand, the supreme court had handed down its ruling in *Nolan*. *Ready II*, 2010 Ill. LEXIS 1538, at *8-9. Based on its reading of *Nolan,* the appellate court again reversed the trial court, holding that, on retrial, the defendant should be permitted to introduce evidence of the negligence of the nonparties in support of its sole proximate cause defense. *Id.*

Ready II: The Sole Proximate Cause Defense Alive and Well

The plaintiff again petitioned the Illinois Supreme Court for leave to appeal from the appellate court's reversal of the jury verdict. In *Ready II*, the supreme court sought to clarify any possible confusion arising from its earlier decisions in *Ready I* and *Nolan*. The court stated that separate considerations of nonparty evidence relate to the apportionment of liability and the sole proximate cause defense. *See Ready II*, 2010 Ill. LEXIS 1538, at *6-9. It reaffirmed its conclusion from *Ready I* that such evidence is inadmissible for purposes of apportionment of liability to nonparties. *Id.* It also agreed with the appellate court, however, that the sole proximate cause issue remanded in *Ready I* actually consisted of two sub-issues. *Ready II*, 2010 Ill. LEXIS 1538, at *8-9. The first issue was whether evidence of nonparties' negligence was admissible for the purpose of bolstering the sole proximate cause defense. *Id.* The second issue was whether the evidence in that case warranted a sole proximate cause jury instruction. *Id.*

To address both sub-issues, the court turned directly to *Nolan*. *Id.* at *11. It stated that *Nolan* clearly held that evidence of nonparties' negligence is admissible in support of a sole proximate cause defense. *Id.* at *11-13. Further, if *some* evidence supporting that defense existed on the record, a jury instruction on sole proximate cause was warranted. *Id.*

Turning to the final part of its appellate analysis, the court examined whether the trial court's exclusion of that evidence was harmless error. *Id.* at *14. After examining the facts of the particular case, it concluded that, because the evidence presented established that United was charged with the design of the job and that the negligence arose from the design, the jury could not conclude that United was not *a* proximate cause. *Id.* at *14-19. As such, the error was harmless. *Id.* at *19. The court was careful, however, to apply the harmless error test as part of the *Nolan* standard and to limit its finding to the facts of the particular case. *Id.* at *13-14.

Conclusion

The Illinois Supreme Court now has brought clarity to the issue of the admissibility of evidence of nonparty negligence. As stated in *Nolan* and reaffirmed in *Ready II*, the mere fact that the negligence of others may have contributed to causing the injury does not allow introduction of evidence if the defendant seeks merely to shift an allocable share of its own liability to nonparties. Evidence of nonparty negligence is admissible, however, in any case in which the defendant presents some evidence that its negligence was not *a* cause of the injury and that it was caused solely by nonparties. ■

Limitations on the Use of Implied Indemnification in the Context of Products Liability Cases

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Implied indemnification is a tool available to sellers when a product they have placed in the stream of commerce fails because of a defect in the product. The doctrine is commonly used in the context of products liability cases and allows the seller to shift responsibility to the manufacturer (or supplier) of the parts that were used to make the eventual product.

But, under what circumstances may the seller of a product sued in a products liability action seek indemnity from the manufacturer/supplier? The answer is not as clear as it once used to be. The doctrine of implied indemnification has undergone significant changes in Illinois law over the past 20 years, in large part due to the passage of the Contribution Act. Courts in Illinois have whittled away at the situations when sellers may seek implied indemnification for product failures. Presently, implied indemnification in the context of products liability actions appears to be a narrow doctrine, applied in only limited circumstances, some of which occur long before the seller is ever sued. This article examines those limitations and offers advice to practitioners facing pursuing and facing implied indemnification actions.

Background on Indemnification in Illinois

Indemnification shifts the entire loss from one tortfeasor who has been compelled to pay to the shoulders of another who was actually at fault. It is distinguished from contribution, which distributes the loss among the tortfeasors by requiring each to pay its proportionate share. The right of indemnity and the right of contribution are separate and distinct theories of recovery and are mutually exclusive remedies for allocating the plaintiff's damages. *Frazer v. A.F. Munsterman, Inc.*, 123 Ill. 2d 245, 254, 527 N.E.2d 1248 (1988).

Implied indemnity arises in situations in which a promise to indemnify may be implied from the relationship between the parties (as opposed to express indemnification, which arises from a specific clause in a contractual agreement). *Dixon v. Chicago & North Western Transportation Co.*, 151 Ill. 2d 108, 118, 601 N.E.2d 704 (1992). It emerged as a means to avoid the harsh result of the common law rule prohibiting contribution and evolved from two distinct theories: tort principles and quasi-contract principles. *American National Bank and Trust Co. v. Columbus-Cuneo-Cabrini Medical Center*, 154 Ill. 2d 347, 350, 609 N.E.2d 285 (1992).

The theory based on tort principles developed into the doctrine of active-passive negligence, which allowed a less culpable, or passively negligent tortfeasor, to shift the entire burden of the plaintiff's loss to a more culpable, or actively negligent tortfeasor. *American National Bank*, 154 Ill. 2d at 351. The adoption of contribution among joint tortfeasors in *Skinner v. Reed-Prentice Division Package Machine Co.*, 70 Ill. 2d 1, 374 N.E.2d 437 (1977) ultimately abolished this theory. The legislature subsequently codified the *Skinner* decision with the passage of the Contribution Act in 1989 and the adoption of a form of pure comparative negligence in *Alvis v. Ribar*, 85 Ill. 2d 1, 421 N.E.2d 886 (1981). Today, active-passive negligence is no longer a recognized theory in Illinois. *Allison v. Shell Oil*, 113 Ill. 2d 26, 495 N.E.2d 496 (1986).

Implied indemnity based on quasi-contract principles is supported by a fundamentally different premise. This theory recognizes that a blameless party (the indemnitee) may be held liable to the plaintiff based upon that party's legal relationship with the one who actually caused the plaintiff's injury (the indemnitor). *American National Bank and Trust*, 154 Ill. 2d at 351. In these cases, the law implies a promise by the indemnitor to make good on the loss incurred by the indemnitee. *Dixon*, 151 Ill. 2d at 118-119.

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To state a cause of action for implied indemnity based on quasi-contractual principles, a third-party complaint must allege (1) a pretort relationship between the third-party plaintiff and the third-party defendant and (2) a qualitative distinction between the conduct of the third-party plaintiff and the third-party defendant. *Frazer*, 123 Ill. 2d at 255. Classic pre-tort relationships giving rise to a duty to indemnify include lessor-lessee, employer-employee, owner-lessee, and master-servant. With respect to the second prong—qualitative distinction—case law suggests that the presence of this element depends not only on what is alleged in the indemnity action, but also on the allegations contained in the plaintiff's complaint. Where the plaintiff's allegations address conduct solely attributable to the defendant, indemnity is generally denied. *Folkers v. Drott Manufacturing Co.*, 152 Ill. App. 3d 58, 63, 504 N.E.2d 132 (1st Dist. 1987). But, in situations where the plaintiff's allegations attack conduct based on some pretort relationship that could be attributable to either a defendant or a third-party defendant, indemnity is generally allowed. *Folkers*, 152 Ill. App. 3d at 63. The distinction is most clear in situations where a plaintiff seeks recovery for an injury allegedly caused by a defective product.

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Following the passage of the Contribution Act, many courts suggested that implied indemnification no longer existed as a viable means of shifting liability to another tortfeasor. The reasoning for this seemingly harsh rule was that the Contribution Act provided a means of recovery and there was no longer the need to shift liability to the responsible tortfeasor. Instead, culpable parties could merely seek contribution. But, that began to change when the Illinois Supreme Court decided *Allison v. Shell Oil, supra*, the first case to definitively rule on the issue of whether implied indemnification retained its viability in the wake of the Contribution Act.

Allison involved a third-party action for implied indemnification brought by an oil refinery and a subcontractor against a construction contractor for liability incurred from an injury sustained by the contractor's employee. The Supreme Court dismissed the implied indemnification claim and held that the doctrine of implied indemnity based upon varying degrees of negligence (*i.e.,* active-passive negligence), was dead:

> Having adopted the principles of apportioning rather than affixing liability … by the Contribution Act, the need for implied indemnity based upon an active-passive distinction has also evaporated … Active-passive indemnity is no longer a viable doctrine for shifting the entire cost of tortious conduct from one tortfeasor to another.

Allison, 113 Ill. 2d at 34-35.

Of particular importance was the Court's assertion that its decision did *not* speak to actions regarding a defective product. This declaration would set the stage for when implied indemnification was, and was not, available for a seller in products liability case.

Shortly after *Allison*, a number of cases addressing the issue held that implied indemnity still survived in cases involving some pretort relationship between the parties which gave rise to a duty to indemnity, *e.g.,* in cases involving vicarious liability (lessor-lessee; employer-employee; owner and lessee; master-servant) and

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with respect to "upstream" claims in a strict liability action. *AMF, Inc. v. Victor J. Andrew High School*, 172 Ill. App. 3d 337, 340-342, 526 N.E.2d 584, 586 (1st Dist. 1988).

The Survival of Implied Indemnification in Products Liability Cases

The viability of upstream implied indemnity actions in products liability cases following the Contribution Act was addressed by the Illinois Supreme Court in two cases filed in 1988: *Frazer*, *supra*, and *Thatcher v. Commonwealth Edison Co.*, 123 Ill. 2d 275, 527 N.E.2d 1261 (1988). Both decisions were handed down on the same day and both provided practical advice for practitioners faced with these types of actions.

In *Frazer,* the plaintiff suffered serious injuries when a rental trailer separated from the hitch on the back of a pickup truck and veered into oncoming traffic, where it struck plaintiff's car. The hitch was a portable mechanism that attached to the rear bumper of the truck. The plaintiff filed a negligence and products liability action against the operator of the trailer rental agency and the manufacturers of the portable hitch and trailer (among others). A.F. Munsterman, Inc., the rental agency operator, brought a third-party action against the manufacturers for contribution and implied indemnity. The remaining manufacturers each settled with the plaintiff and Munsterman was found liable for negligence following a jury trial. *Frazer*, 123 Ill. 2d at 252-254. After trial, the court dismissed Munsterman's third-party compliant on the ground that actions for implied indemnity, regardless of the theory presented for recovery, were no longer recognized following the adoption of contribution among joint tortfeasors. *Id.* at 254. The Supreme Court affirmed, finding that because Munsterman had been found liable for negligence, it could not later seek indemnity:

> Munsterman was found by the jury to be negligent in that it knew or should have known of a dangerous defect in the product. It would be unfair for it to be able, through an action of implied indemnity, to shift the entire loss to other defendants when its own negligence contributed to cause the plaintiff's injury.

Id. at 262.

The *Frazer* court also specifically noted that its decision did not mean that implied indemnity actions were extinguished by the Contribution Act. Some variations of implied indemnity still remained, despite the availability of the remedies found in the Contribution Act. For example, *Frazer* spoke to the issue of quality control standards and a seller's failure to inspect products received from manufacturers and suppliers prior to placing the product in the stream of commerce. Munsterman argued that implied indemnity should remain a viable theory against the distribution chain of products when strict liability actions are at issue. The reasoning for this was simple: ensuring that the public is safeguarded from defective products. Allowing sellers to assert implied indemnity against manufacturers and suppliers of products acts as an incentive to eliminate or correct the defects, when the manufacturers and suppliers are in the best position to do so. Thus, Munsterman argued, "upstream" actions for implied indemnity implement this policy by ultimately tracing liability back to the manufacturer/supplier so that it will bear the full burden of the loss caused by a defective product. *Id.* at 262.

The *Frazer* court was receptive to this argument, holding that "a negligent failure to inspect and discover a product defect by an intermediate seller bars a claim for indemnity from the manufacturer." *Id.* at 267. Because Munsterman failed to inspect the product before it placed it in the stream of commerce and because Munsterman was found culpable by a jury, it could not now seek indemnity. *Id.* at 270.

Thatcher expanded on the ruling in *Frazer* and held that a defendant who settled with the plaintiff in an underlying action could not maintain a third-party claim based on implied indemnity. *Thatcher*, 123 Ill. 2d at 279. In *Thatcher*, the plaintiff sued Commonwealth Edison Company ("Com Ed") and Dow Chemical Company

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("Dow") for injuries suffered at a Com Ed plant. The plaintiff was using a high pressure hose designed and manufactured by Dow at the time of the incident. Com Ed brought a third-party claim against Dow, based on strict product liability, seeking contribution and implied indemnity. Before trial, Com Ed settled with Thatcher and the trial court dismissed Com Ed's third-party claim. *Thatcher* addressed the issue that *Frazer* had remained silent on: what constitutes "culpability" for the purpose of determining whether a party may claim indemnity? *Thatcher* held that a defendant who settled with the plaintiff in an underlying action could not maintain a third-party claim based on implied indemnity. *Id.*

Thatcher considered the indemnity-seeking party's substantial settlement of $80,000 as an indication of culpability sufficient to preclude the settling party from bringing an indemnity action. *Id.* Other courts followed suit, preventing a settling defendant from seeking implied indemnification in upstream products liability cases. These cases suggest that implied indemnification is only available where the party seeking it is not negligent or otherwise at fault in causing the loss. If some culpability attaches to the party, then indemnification is not a means of shifting responsibility. *See e.g.*, *Berkum v. Christian, et al*., 1988 Ill. App. Lexis 1611 (1st Dist. Oct. 31, 1988); *Kemner v. Norfolk and Western Railway Corp.*, 188 Ill. App. 3d 245, 544 N.E.2d 124 (5th Dist. 1989); and *Dixon v. Chicago and North Western Transportation Co.*, 151 Ill. 2d 108, 601 N.E.2d 704 (1992).

Conclusion & Practice Pointers

Even with the passage of the Contribution Act, implied indemnity remains a viable theory of recovery in upstream products liability cases. But, counsel should be aware of certain precautions to ensure that implied indemnity remains a possible theory of recovery for sellers of products. The following pointers and tips should be followed whenever an attorney is faced with a products liability action:

- A seller's failure to discover a defect in the product, or knowledge of a defect and failure to correct it prior to the sale, may prevent the seller's right to indemnification from the manufacturer.
- Sellers should be aware that quality control programs must be in place to inspect and discover defects with those products they eventually place in the stream of commerce. Negligent inspection of parts received from manufacturers and suppliers could preclude a seller's ability to later seek indemnification.
- A determination of liability by the jury will preclude a seller's ability to seek implied indemnification from a manufacturer. Consider asserting the third-party action for implied indemnification *before* a determination of fault is made, not after a jury has determined fault.
- A seller's settlement with the plaintiff *may* preclude a later action for implied indemnification. Courts will determine whether a party seeking indemnity was at fault and when settlement is at issue, courts will look to various factors in assessing "fault." Ask the following questions when determining whether implied indemnification will be a viable theory for your client: How substantial is the settlement amount and does it amount to a figure sufficient enough to conclude that the party was culpable? Was settlement made to avoid a holding of liability? Was the settlement a substantial portion of the plaintiff's original demand? Could the settlement be considered "nuisance" value or "cost of defense?" When was the settlement entered into? Did it occur well before the case ever saw the inside of a courtroom or did it occur after the plaintiff had rested his case?

The existence of implied indemnification as a means of shifting liability to the tortfeasor who was actually at fault remains a viable theory of recovery for defendants in products liability actions. But, with the passage of the Contribution Act and the courts' limitations on the availability of the indemnity doctrine, counsel must be aware that the doctrine will be applied in narrow circumstances. Take care to ensure that your clients are protected and that the doctrine is available to them. ■

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