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PRODUCT LIABILITY: LITIGATION & DISPUTE RESOLUTION UPDATE

Illinois Supreme Court Rules that Settled Defendants Should Not Be Considered For Comparative Fault Determination

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The Illinois Supreme Court has resolved the question of whether defendants that have settled with the plaintiff prior to trial should be considered for purpose of assessing comparative fault under section 2-1117 of the Illinois Code of Civil Procedure (735 ILCS 5/2-1117). In its November 25, 2008, 4-2 ruling in *Ready v. United/Goedecke Services*, the court held that settled defendants cannot be taken into account when allocating fault under section 2-1117.

Section 2-1117 provides that, except for medical expenses and certain toxic tort claims falling under section 2-1118, a defendant is only jointly and severally liable if its share of fault is 25 percent or greater of the total fault "attributable to the plaintiff, the defendants sued by the plaintiff, and any third party defendants except the plaintiff's employer." By excluding settled defendants from this calculation, the Illinois Supreme Court has made it more difficult for any defendant remaining at trial to avoid joint and several liability, even where that defendant may have played only a minor role in causing the plaintiff's injury.

The decedent in *Ready* was a mechanic at a power plant in Joliet, Illinois. He was killed when a truss slipped and fell from the eighth floor during a pipe-refitting project.

The plaintiffs sued United, the subcontractor that dropped the truss, as well as the power plant and the general contractor for the project. They settled with the power plant and the general contractor and went to trial against United.

At trial, the judge excluded evidence of negligence by the power plant and general contractor and declined to include them on the verdict form. The jury found United 65 percent at fault and the decedent 35 percent at fault. After offsets for the decedent's negligence and the prior settlements, the jury found United liable for $8.1 million. The appellate court reversed in pertinent part, holding that under section 2-1117 fault should be assessed relative to all defendants, including defendants that settled before trial.

The plurality opinion, written by Justice Freeman and joined by Chief Justice Fitzgerald and Justice Burke, began with the text of section 2-1117. The court applied the 1986 version of the statute (it was amended in 2003 to exclude "the plaintiff's employer"), which stated:

> Except as provided in Section 2-1118, in 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, 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, shall be jointly and severally liable for all other damages.

The plurality concluded that the phrase "defendants sued by the plaintiff" is ambiguous with respect to settled defendants. It rejected United's plain language argument that "sued" is in the past tense and that settled defendants are "defendants sued by the plaintiff."

Instead, because "sued" is not defined in the statute, the plurality turned to standard dictionary definitions to support its finding of ambiguity. The plurality noted that "sued" could mean, consistent with United's view, "to seek justice or right from (a person) by legal process: bring an action against: prosecute judicially." It could also mean, consistent with the plaintiff's view, "to proceed with (a legal action) and follow up to proper termination: gain by legal process."

Thus, the plurality concluded, the "definitions provide no help in determining which of these contradictory views might have been intended" and "[w]e find no clear indication of a legislative preference for either of the parties' asserted meanings over the other." The plurality bolstered its finding of ambiguity by noting the conflicting interpretations of the statute by the appellate courts. For example, the plurality cited *Blake v. Hy Ho Restaurant, Inc.*, 273 Ill. App. 3d 372 (1995), which held that settled defendants should not be included when apportioning fault under section 2-1117, and *Skaggs v. Senior Services of Central Illinois, Inc.*, 355 Ill. App. 3d 1120 (2005), which held that settled defendants do not lose their status as "defendants sued by the plaintiff" and should be included when apportioning fault.

The plurality sought to determine legislative intent using two principles of statutory construction. The first principle stated that "where the legislature chooses not to amend a statute after a judicial construction, it is presumed that the legislature has acquiesced in the court's statement of the legislative intent." The appellate court had ruled in *Blake* that settled defendants are excluded when apportioning fault. The 2003 amendment to section 2-1117 did not react to the prior holding. Thus, the plurality concluded, the "legislature's failure to address *Blake*'s holding at that time is an indication of the legislature's acceptance, as of 2003, of this judicial interpretation of section 2-1117."

The second principle holds that "an amendment to a statute creates a presumption

that the amendment was intended to change the law." Here, the plurality relied on the *Tort Reform Act of 1995*, which was later held unconstitutional in *Best v. Taylor Machine Works*, 179 Ill. 2d 367 (1997). The Act specified that a party is a "tortfeasor" "regardless of whether that person may have settled with the plaintiff." The plurality found that "the 1995 amendments are a compelling indication that settling defendants were not meant to be included in the apportionment of fault under the 1986 statute."

After applying these principles, the plurality also cited statements by Illinois Senator John Cullerton during the floor debate on Senate Bill 1296. The bill was passed by the Senate in March 2007 but remains pending in the House. Senator Cullerton stated that Senate Bill 1296 was intended to clarify "what the intent of the 1986 law was. *** It just makes it clear, if you settle with somebody, their names don't go on the verdict form." These statements, according to the plurality, confirm the conclusion that settled defendants are not "defendants sued by the plaintiff" within the meaning of section 2-1117.

Justice Kilbride concurred, providing the fourth vote to overturn the appellate court. He agreed that the phrase "defendants sued by the plaintiff" is ambiguous, but found that the text of section 2-1117 as a whole clarified its meaning.

Justice Kilbride focused on the first sentence of section 2-1117, which addresses liability for medical expenses. He noted that it refers to "all defendants found liable" "in" certain actions. He concluded that this "strongly suggests that the statute was intended to include only those defendants who remained 'in' the action when liability was determined." Justice Kilbride then carried over this same limitation to the second and third sentences of section 2-1117 to explain the meaning of "defendants sued by the plaintiff."

Justice Garman wrote the dissent, which Justice Karmeier joined. They concluded that the phrase "defendants sued by the plaintiff" "unambiguously refers to those individuals or entities against whom the plaintiff filed suit." The dissent noted that *Black's Law Dictionary* defines the word "sue" as "[t]o institute a lawsuit against (another party)," and suggested that the conflicting general usage definitions cited by the plurality do not make sense in the context of the statute. The statute, as the dissent pointed out, used the word "sued" in the past tense, which "renders only one of the two usages reasonable." Thus, the dissent concluded, settled defendants were plainly "sued by the plaintiff."

The dissent was also highly critical of the plurality's tools of statutory construction. With respect to the amendment in the *Tort Reform Act of 1995*, the dissent noted that if a statute is ambiguous (as the plurality had found), "a subsequent amendment will clarify the statute rather than change the law." Indeed, the Illinois Supreme Court had previously confirmed that an "amendment of an unambiguous statute indicates a purpose to change the law, while no such purpose is indicated by the mere fact of an amendment of an ambiguous provision." Thus, according to the dissent, the plurality's principle of construction is "entirely misplaced" in this case.

The dissent also explained that the 2003 amendment had nothing to do with *Blake*. Instead, the legislature was acting for a specific purpose involving a different portion of the statute. In *Unzicker v. Kraft Food Ingredients Corp.*, 203 Ill. 2d 64 (2002), the Court had held a plaintiff's employer could be including in allocating fault, noting that if "the legislature intended to use language that would exclude employers, we believe that it would have simply put in language specifically excluding employers." In 2003, the legislature did just that, inserting the phrase "except the plaintiff's employer" into the statute. The dissent was skeptical that the legislature was even aware of *Blake*, an appellate court ruling, when it made this change. Thus, the 2003 amendment is not an indication of legislative acquiescence.

Moreover, as the dissent explained, other pre-2003 cases — such as *Lombardo v. Reliance Elevator Co.*, 315 Ill. App. 3d 111 (2000) — had concluded, contrary to *Blake*, that settled defendants could be considered in allocating fault under section 2-1117. Thus, the dissent asked, "if the 2003 amendment evinces the legislature's intent to acquiesce in the prior judicial construction of the statute, on what basis does the plurality presume acquiescence with the 1995 decision in *Blake* rather than the 2000 decision in *Lombardo*?"

Finally, Justice Garman's dissent pointed out the fallacy of relying on Senator Cullerton's statements in 2007 to determine the legislative intent behind the 1986 statute. As the dissent explained, a "member of a subsequent legislature who favors amending the existing statute is not an appropriate source of information as to the intent of the enacting legislature. I strongly object to the suggestion to the circuit and appellate courts that they should look to the content of floor debates in the current legislative session to determine the meaning of statutory language that has been on the books for decades."

The Illinois Supreme Court's opinion in *Ready* will have significant implications going forward. As an initial matter, lower courts will likely face the question of whether evidence concerning settled defendants is ever admissible at trial. In *Ready*, the trial judge excluded such evidence as irrelevant under section 2-1117, which the Illinois Supreme Court ultimately affirmed. Plaintiffs will likely use *Ready* to oppose the admission of evidence concerning settled defendants.

This evidence should still be admissible for other purposes, such as showing that a settled defendant was the sole proximate cause of the plaintiff's injury. This issue was not addressed in *Ready*. However, in a tort action, if the defendant elects to rebut the plaintiff's case, he is entitled to do so by any available means, including "show[ing]" any "evidence that negates causation." *Leonardi v. Loyola Univ. of Chicago*, 168 Ill. 2d 83, 94 (1995). In *Leonardi*, the Illinois Supreme Court held that where there is evidence of other causes of a plaintiff's injury, the defendant is "always" permitted to introduce that evidence so the jury can resolve whether some other cause was the sole proximate cause of the injury. Following two appellate court decisions that held that this evidentiary rule does not apply in asbestos cases, the Supreme Court is currently considering the proper role of a sole proximate

cause defense in asbestos cases in *Nolan v. Weil-McClain* (Case No. 103137). The Court's highly-anticipated decision in Nolan may further define the proper role for such evidence.

The rule announced in *Ready* will also have important practical implications. Plaintiffs can settle with defendants who are predominantly at fault for an injury but have minimal assets and/or insurance to pay any damages. Plaintiffs can then go to trial with deep-pocket defendants, even if their relation to the injury is tenuous. With the settled defendants out of the picture, the odds are greatly increased that the fact finder will allocate more than 25 percent of the fault to the remaining trial defendants, rendering them jointly and severally liable for any damages.

This scheme naturally increases the pressure on a defendant to settle, even if a defendant has meritorious defenses and/or the settlement is out of proportion to its culpability. The exclusion of settled defendants from the joint and several liability calculation under section 2-1117 makes it very dangerous to be the last defendant standing at trial. In addition, provided that the plaintiff's settlement with another defendant was made in good faith, the trial defendant will be unable to sue the settling defendant for contribution. 740 ILCS 100/2(d). In all, the value of proportionate fault and limited joint and several liability appears to be greatly diminished. The legislature originally enacted section 2-1117 with the "clear intent" that "minimally responsible defendants should not have to pay entire damage awards." *Unzicker*, 203 Ill. 2d at 78. Yet, the Court's interpretation of section 2-1117 may lead to this exact result.

If you have any questions about the Ready *decision or any other matter addressed in this Update, please contact the Mayer Brown lawyer with whom you regularly work or any of the lawyers listed below.*

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