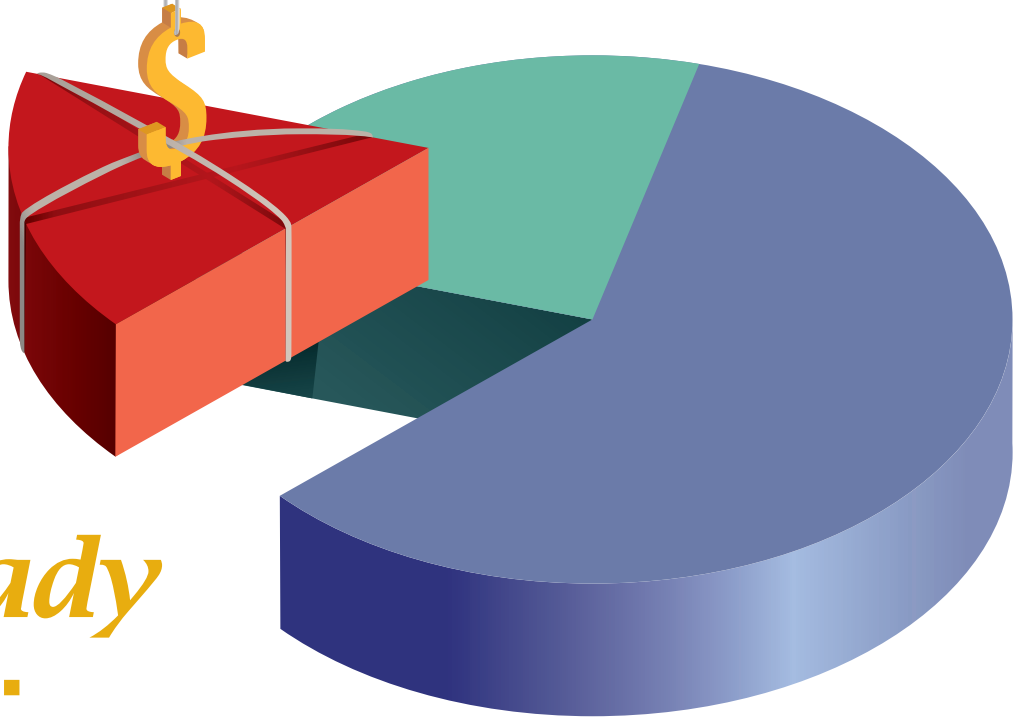


The Illinois Supreme court held in *Ready v United/Goedecke Services* that settling defendants are excluded from the joint-and-several-liability equation under section 2-1117. The effect is to leave nonsettling defendants at risk of a higher payout.

By David B. Mueller  
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## The *Ready* Answer:

### Settling Defendants' Fault Can't Be Used to Determine Joint Liability

One of the important issues before the Illinois Supreme Court in recent years was whether a settling party in a multi-party case would be considered in the equation under section 2-1117 of the Code of Civil Procedure<sup>1</sup> for the purposes of several liability. The question is whether the fault of settling defendants must be excluded in considering each remaining defendant's share of joint liability, thereby leaving those defendants at risk of a higher payout to a successful plaintiff.

That question has been decided against inclusion in *Ready v United/Goedecke Services, Inc.*<sup>2</sup> To appreciate the significance of the decision some understanding of the evolution of joint liability principles in this state is helpful.

1. 735 ILCS 5/2-1117.  
2. 2008 WL 5746087 (Ill Sup Ct).

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## Joint liability survives the advent of comparative fault

Prior to March 1977, the rule in Illinois was indivisible recovery – a plaintiff recovered all from a defendant or nothing. Liability was full or nonexistent, and defenses were either wholly ineffectual or wholly sufficient.

The same principles applied downstream between defendants inter se, and in third-party actions between defendants and parties who might be liable to them for full indemnity. Indemnification presupposed (1) a duty owed by both the putative indemnitor and indemnitee to the plaintiff,<sup>3</sup> (2) a pretort relationship between them,<sup>4</sup> and a “qualitative” distinction between the liability-producing factors applicable to each.<sup>5</sup>

With respect to the latter, any negligence or misconduct on the part of the party seeking indemnification that “actively” contributed to the plaintiff’s injury or was a “major” factor in bringing it about was sufficient to bar recovery, without regard to the magnitude of the indemnitee’s offense. The unfortunate effect of this unitary rule was to require one tortfeasor to take the bullet while others emerged unscathed.

Underlying the Draconian impact of the implied indemnity rule was the philosophical assumption that liability was indivisible and therefore incapable of apportionment.<sup>6</sup> In *Skinner v Reed-Prentice Div Package Mach Co*,<sup>7</sup> the court first recognized contribution among joint tortfeasors and in doing so began the process of apportioning liability commensurate with fault. Contribution was then recognized by the General Assembly.<sup>8</sup>

In *Alvis v Ribar*,<sup>9</sup> the court took the next step by allocating fault on a percentage basis between the plaintiff and the defendants. Having opened the apportionment process to that extent, the question became whether there was any reason in a multi-party case not to limit a defendant’s exposure to its share of the total fault. That was one of the issues in *Coney v JLG Industries*.<sup>10</sup>

In *Coney* the Illinois Supreme Court accepted jurisdiction to resolve two questions. The first, and that for which it is best known, was whether comparative fault principles apply in product liability cases. The second was whether proportionate fault principles vitiated the very theoretical underpinnings of joint liability. In other words, if a plaintiff’s claim is not barred by his own contributory negligence, is there any reason why a de-

fendant should pay more than his aliquot share of a judgment?

The court responded to the latter question by deciding that the comparative fault doctrine did not eliminate joint liability:

We find nothing in *Alvis* which mandates either a shift in who shall bear the risk of the insolvent defendant or the elimination of joint and several liability. Defendant has not cited nor have we found persuasive judicial authority for the proposition that comparative negligence compels the abolition of joint and several liability. On the contrary, most jurisdictions which have adopted comparative negligence have retained the doctrine.<sup>11</sup>

## The Tort Reform Amendments of 1986

*Coney* produced a groundswell of legislative activity on behalf of potential defendants. That movement culminated in the so-called Tort Reform Amendments of 1986.

In response to what was then identified as a “crisis,” the General Assembly enacted section 2-1116 of the Code of Civil Procedure<sup>12</sup> making Illinois a modified comparative fault state and recognizing the plaintiff’s “fault” as a defense in both negligence and product liability cases. (For a discussion of comparative fault in the legal malpractice context, see James W. Davison’s article in this issue.)

At the same time, section 2-1117 was passed. It limited joint liability for non-economic damages to defendants whose proportionate share of the culpability of those included in the equation was 25 percent or more.

As otherwise expressed, if a defendant’s percentage of the total fault under consideration was less than one-fourth, then that defendant’s liability was several. In its original form, section 2-1117 provided as follows:

Joint Liability. 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 plain-

tiff, 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.

Following the adoption of section 2-1117, it was not uncommon for defendants to assert several liability as an affirmative defense at the same time they sought a fault apportionment under the

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contribution statute. The interrelationship of the two statutes was particularly vexing in cases that involved a plaintiff’s employer, where the Workers’ Compensation Act<sup>13</sup> also came into play.

First, the supreme court held in *Doyle v Rhodes*<sup>14</sup> that an employer could be liable to the plaintiff despite the immunities of sections 5 and 11 of the Workers’ Compensation Act because those immunities had to be asserted as affirmative defenses.<sup>15</sup> The question then became

3. *Chicago and Ill Midland Ry Co v Evans Constr Co*, 32 Ill 2d 600, 604-605, 208 NE2d 573, 575-76 (1965).

4. *Muhlbauer v Kruzel*, 39 Ill 2d 226, 230, 234 NE2d 790, 792 (1968).

5. *Harris v Algonquin Ready Mix, Inc*, 59 Ill 2d 445, 449, 322 NE2d 58, 60 (1974).

6. *Skinner v Reed-Prentice Div Package Mach Co*, 70 Ill 2d 1, 12-15, 374 NE2d 437, 441-43 (1977).

7. *Id.*

8. 740 ILCS 100/1 et seq.

9. 85 Ill 2d 1, 421 NE2d 886 (1981).

10. 97 Ill 2d 104, 119-24, 454 NE2d 197, 203-06 (1983).

11. *Id.* at 124, 454 NE2d at 206.

12. 735 ILCS 5/2-1116.

13. 820 ILCS 305.

14. 101 Ill 2d 1, 461 NE2d 382 (1984).

15. See also *Braye v Archer-Daniels-Midland Co*, 175 Ill 2d 201, 676 NE2d 1295 (1997) and *Geise v Phoenix Co of Chicago*, 159 Ill 2d 507, 639 NE2d 1273 (1994).

whether the same reasoning applied to the language of section 2-1117.

In *Lilly v Marcal Rope and Rigging, Inc.*,<sup>16</sup> the fifth district construed the two statutes differently, holding that employers were not subject to joint liability and did not fall within the comparative fault equation for several liability purposes. Then in *Blake v Hy Ho Restaurant, Inc.*,<sup>17</sup> in a decision that would prefigure *Ready*, the fifth district held that settling defendants generally would not be included in the fault apportionment equation for the purposes of determining several liability under section 2-1117.

### **Unzicker v Kraft Food and the 2003 Amendment**

In *Unzicker v Kraft Food Ingredients Corp.*,<sup>18</sup> the Illinois Supreme Court rejected the *Lily* approach and determined that section 2-1117 did in fact include employers who were joined as third-party defendants, making them jointly liable. It did so in the setting of singularly egregious facts that can serve as a template in evaluating the impact of the statutory amendment that followed.

The jury in *Unzicker* returned a non-economic verdict in favor of the plaintiff for \$788,000. It apportioned the fault of the defendant, Kraft Food, and the plaintiff's employer, Nogle & Black Mechanical, Inc, for the purposes of contribution and joint liability. In that regard it found that Kraft's share of the total fault was 1 percent with Nogle having the 99 percent balance. As a consequence the liability of Kraft from non-economic damages was \$7,880, which was offset in its entirety by the employer's workers' compensation exposure, even assuming a *Kotecki*<sup>19</sup> "cap."

In *Unzicker* the plaintiff argued that the medical malpractice exception rendered the statute unconstitutional and, in any event, that *Lily* was correct and therefore Nogle should not have been considered in the joint liability equation. The supreme court disagreed in both respects. It held that the statutory reservation for medical malpractice cases was in response to a properly perceived "crisis in health care" and therefore was not "special legislation." Addressing the *Lily* argument, the court found the fifth district's reasoning inapt and inequitable:

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. The appellate court did not err in holding that Nogle was properly considered in the division of fault.<sup>20</sup>

*Unzicker* was legislatively overturned by an amendment of section 2-1117 that excluded employers from the fault calculus. Effective June 3, 2003, the statute provides as follows:

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 *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 except the plaintiff's employer, shall be jointly and severally liable for all other damages.

(Emphasis supplied.)

### **Who is a "defendant sued by the plaintiff?"**

Still unresolved was the question of whether a settling party would be included as a "defendant sued by the plaintiff" or as a "third party defendant" whose fault could be considered in determining whether the liability of a remaining defendant or defendants was less than 25 percent of the total. That question has

now been resolved in favor of exclusion. Thus, a settling defendant is not a defendant under section 2-1117.

In *Ready v United/Goedecke Services Inc.*,<sup>21</sup> the Illinois Supreme Court, in a split decision,<sup>22</sup> held that the preceding terms referred only to "defendants" or

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**Plaintiffs can now pursue a strategy of eliminating more culpable parties with "shallow pockets" by settling with them and continuing the litigation with those who remain.**

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"third party defendants" who remain after "good-faith settling tortfeasors [ ] have been dismissed from the lawsuit."<sup>23</sup> There an employee of Midwest Generation, LLC at its Joliet power plant was killed when a wooden truss flipped out of a sling, fell eight floors and hit him. At the time of the accident the truss was being lifted by United/Goedecke Services pursuant to a subcontract with BMW Constructors.

Ready's administrator sued both United and BMW. In turn they filed third-party contribution claims against Midwest.

During the course of the litigation the plaintiff settled with BMW and Midwest for \$1.113 million. Contribution claims against the settling parties were then dismissed after the court found that the settlements "were reached in good faith."<sup>24</sup> The case then proceeded to trial, leaving only the plaintiff and United/Goedecke as parties.

The trial court refused to include

16. 289 Ill App 3d 1105, 682 NE2d 481 (5th D 1997) abrogated by *Unzicker v Kraft Food Ingredients Corp.*, 203 Ill 2d 64, 783 NE2d 1024 (2002).

17. 273 Ill App 3d 372, 652 NE2d 807 (5th D 1995).

18. *Unzicker* (cited in note 16).

19. *Kotecki v Cyclops Welding Corp.*, 146 Ill 2d 155, 585 NE2d 1023 (1991).

20. *Unzicker* at 78-79, 783 NE2d at 1033-34.

21. *Ready* (cited in note 2).

22. Justice Freeman authored the opinion which was joined by Chief Justice Fitzgerald and Justice Burke; Justice Kilbride specifically concurred, with opinion; Justice Garman dissented, with opinion, joined by Justice Karmer. Justice Thomas took no part.

23. *Ready* at \*7 and \*9.

24. *Id.* at \*1.

BMW and Midwest<sup>25</sup> on the verdict form for fault apportionment purposes under section 2-1117. The jury found that United was guilty of negligence and awarded damages of \$14.23 million. That sum was then reduced to \$8.137 million based upon a further finding of comparative negligence by the decedent of 35 percent.

United/Goedeker appealed inter alia on the issue that the settling parties should have been included on the verdict form so that the jury could consider “whether to allocate some portion of the fault not only to Ready, but also to his employer and the general contractor.” The appellate court agreed and found that “a non-settling defendant’s fault should be assessed relative to the fault of all defendants, including settling defendants.” The supreme court accepted the case.

In reversing the appellate court and reinstating the judgment in favor of the plaintiff, the Illinois Supreme Court held that the term “defendants sued by the plaintiff” includes only those defendants who have not been dismissed following good-faith settlements.<sup>26</sup> Reaching that outcome the plurality found that “defendants sued by the plaintiff” is ambiguous and therefore applied two rules of construction.

First, the court noted that the General Assembly amended the statute in 2003, which was eight years after the fifth district in *Blake* excluded settling defendants. From that the court reasoned: (1) the legislature must have known of the decision and (2) determined that it was a correct interpretation of section 2-1117. Otherwise, the General Assembly would have amended the statute to eliminate the missed interpretation. In that regard the opinion states:

Where a statute is ambiguous, “courts may look to tools of interpretation to ascertain the meaning of a provision.” ...One such aid to construction is the principle 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....As previously noted, in 1995 our appellate court held that, under section 2-1117, settling defendants were not to be included in the apportionment of fault....The 2003 amendment to section 2-1117 did not deal with this prior holding in *Blake*. 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....<sup>27</sup>  
(Citations omitted.)

Second, the court looked to the Tort Reform Act of 1995.<sup>28</sup> There, the legislature specifically included settling parties by expanding the definition of “tortfeasor” under section 2-1116(b) to include any person whose fault contributed to cause the injury “regardless of whether that person may have settled with the plaintiff.” From that amendment the court reasoned that the language including settling parties was added because they were not originally “defendants sued by the plaintiff” within the meaning of that term in the original Act.<sup>29</sup>

As the Tort Reform Act of 1995 was found to be unconstitutional<sup>30</sup> the statute reverted to its original form. The plurality therefore concluded that settling parties were not included in the fault allocation equation for the purposes of determining several liability.<sup>31</sup>

It is interesting to note that the court made only passing reference to the public policy considerations raised by both sides. The defendant pointed to the inequities in degree of fault that led to the decision in *Unzicker*. The plaintiff argued that the elimination of several liability for thinly exposed defendants would promote settlement.<sup>32</sup> The court found that those are issues better left to the legislature.<sup>33</sup>

Justice Kilbride specially concurred, with opinion. He agreed that the phrase “defendants sued by the plaintiff” was unclear but opined that examination of the statute as a whole clarified the meaning to be “only those *defendants who remained ‘in’ the action* when liability was determined.”<sup>34</sup>

### The dissent

The dissent took issue with the plurality’s analysis and cautioned that the supreme court was “most vulnerable to a legitimate accusation of ‘legislating from the bench’ when we find ambiguity where there is none.”<sup>35</sup> Justice Garman’s opinion, which was joined by Justice Karmer, points out that the phrase “defendants sued by the plaintiff” was not ambiguous and that the verb tense “sued” renders the legislature’s choice to have only one reasonable outcome, which is not “only those defendants who were sued by the plaintiff but did not enter into a good-faith settlement agreement prior to the entry of judgment.”<sup>36</sup>

In disagreeing with the plurality’s construction of the statute, the dissent found

them in a “Catch-22.” “[I]f a statute is ambiguous, a subsequent amendment will clarify the statute rather than change the law by replacing the intent of the enacting legislature with the intent of the amending legislature.”<sup>37</sup> Thus, if “‘defendants sued by the plaintiff’ is ambiguous, the 1995 amendment cannot be used to reveal a presumed intent to change the law.”<sup>38</sup>

The dissent concluded that when fault is allocated among the plaintiff and all defendants sued, which they argue is required by the statute’s plain language, the legislature’s goal of protecting minimally responsible tortfeasors from excessive liability is reached. The plurality’s opinion, however, was inimical to those goals for three reasons.

First, the “plaintiff may be more likely to be made whole because his own degree of fault may be reduced.”<sup>39</sup> Second, plaintiffs may be inclined to “reject reasonable settlement offers from minimally responsible defendants with ‘deep pockets’ in an effort to keep such defendants in the case until judgment.”<sup>40</sup>

Finally, only including defendants who are still in the case at judgment is “unworkable in practice because it is not uncommon for one of several defendants to reach a settlement with the plaintiff during trial, or even while the jury is de-

25. Suit was filed before the effective date of the 2003 amendment to § 2-1117 which excluded employers.

26. *Ready* at \*7 and \*9.

27. *Ready* at \*5.

28. Public Act 89-7, *Ready* at \*6.

29. *Ready* at \*6-7.

30. *Best v Taylor Machine Works*, 179 Ill 2d 367, 689 NE2d 1057 (1997).

31. *Ready* at \*7.

32. As the dissent cautioned, “the plurality’s reading invites future plaintiffs to reject reasonable offers from minimally responsible defendants with ‘deep pockets’ in an effort to keep such defendants in the case until judgment....[who] will not be allowed to present evidence of other defendants’ shares of fault or to have the jury apportion fault among all the parties ‘who might have been responsible for the plaintiff’s injuries.’” *Ready* at \*21 (Garman dissenting).

33. *Ready* at \*7.

34. *Ready* at \*9 (Kilbride concurring) (emphasis in original).

35. *Ready* at \*19 (Garman dissenting).

36. *Ready* at \*12-15 (Garman dissenting).

37. *Ready* at \*16 (Garman dissenting).

38. *Ready* at \*16 (Garman dissenting).

39. *Ready* at \*20 (Garman dissenting) (noting that if the settling defendants had been included, it was possible that (1) plaintiff’s 35% of liability would have been reduced allowing more money to make plaintiff whole, or (2) the remaining defendant’s liability to be less than 25% and would limit that tortfeasor’s liability to its actual share but would not have been made plaintiff whole. “Either or both of these results...would be entirely consistent with the intent of the legislature.” *Id.*).

40. *Ready* at \*21 (Garman dissenting).

liberating.”<sup>41</sup> The dissent wondered if the trial would be required to start over after a defendant settles during the trial and evidence of that defendant had already been admitted? Or, if settlement was reached while the jury was deliberating, would there be a mistrial?<sup>42</sup>

### **Conclusion**

The bottom line from a defense stand-

point is that section 2-1117 may now be more of a hindrance than a benefit to defendants in multi-party cases. For their part, plaintiffs can pursue a strategy of eliminating more culpable parties with “shallow pockets” by settling with them and continuing the litigation with those who remain.

Beyond that, the dissent raises unanswered questions and points out inequi-

ties in the plurality’s opinion for plaintiff and defendant alike. Litigators must await another day to see how these issues play out. ■

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41. *Ready* at \*21 (Garman dissenting).

42. *Id.*

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