September 1, 2006

Re: Joint and Several Liability Update
First District Appellate Court Rules that Settling Defendants are to appear on the verdict form

Illinois joint and several liability laws have seen a number of important changes in the last few years. In Illinois, joint and several liability is controlled by Section 2-1117 of the Illinois Code of Civil Procedure. Until 2003, that section read 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 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 defendant who could have been sued by the plaintiff, shall be jointly and severally liable for all other damages. (Emphasis added).

As you may recall, in 2002, the Illinois Supreme Court held in Unzicker v. Kraft Food Ingredient Corporation, 203Ill. 2d 64, 783 N.E.2d 1024(2002) that a third party defendant employer who had settled with the plaintiff was "a third party defendant who could have been sued by the plaintiff" for purposes of apportionment under 2-1117.

On the heels of the Unzicker decision, the Illinois legislature amended Section 2-1117 in 2003 and changed the phrase, "any third party defendants who could have been sued by the plaintiff" to "any third party defendants except the plaintiff's employer" (Emphasis added.) The effect of the amendment was essentially to nullify the Supreme Court's holding in Unzicker.

Important questions remained regarding the amendment. Left unanswered by Unzicker and the 2003 amendment were two issues. The first issue was whether defendants who have settled with the plaintiff prior to verdict remain on the verdict form to have their degree of negligence assessed against them by the jury. The second issue was whether the 2003 amendment applies retrospectively or prospectively.

In Skaggs v. Services of Central Illinois, the Fourth District Appellate Court held in 2005 that even though a defendant settles with a plaintiff and is dismissed from the case, that

defendant does not lose it's status as a "defendant sued by the plaintiff" and that 2-1117 requires the trier of fact to consider the percentage of fault of settling defendants. Skaggs v. Services of Central Illinois, 355 Ill. 3d 1120, 823 N.E.2d 1021. Skaggs was appealed to the Illinois Supreme Court. Unfortunately, before the Court was able to render a decision on this issue, the case settled, leaving us without a Supreme Court decision on this issue.

A recent First District Appellate case took up both of the aforementioned issues. In Ready v. United/Goedecke Services, Inc. et al, 2006 WL 2434935, the court held that a defendant who settles with a plaintiff prior to trial is a "defendant sued by the plaintiff" within the meaning of 2-1117. In Ready, the plaintiff sued United/Goedecke, BMW Constructors, Inc. (BMW) and Midwest Generation, EME, LLC, (Midwest) as a result of an accident in which Michael Ready was killed at Midwest's Factory on December 23, 1999. Terry Ready, the plaintiff's wife, settled her claims prior to trial with BMW and Midwest and proceeded to trial against United. The jury returned a verdict in the amount of $14, 230,000 and assessed Ready's comparative negligence at 35%, thereby reducing the judgment to $9,250,000. The court also allowed a set off of $1,112,502.58 which was the total amount paid by the settling defendants.

At trial, the court granted the plaintiff's motion in limine to bar the introduction of any evidence of negligence relating to defendants BMW and Midwest because they had previously settled with the plaintiff. The court determined that only United was to be included on the verdict form and that the jury would apportion fault only against Ready and United.

On appeal, the First District Appellate Court held that a defendant who settles with a plaintiff is still a "defendant sued by the plaintiff" and that settling defendants must appear on the verdict form so as not to affect the rights of non-settling defendants.

The court also held that the 2003 amendment to 2-1117 excluding the plaintiff's employer from the apportionment of fault equation was a substantive change and not a procedural change. Therefore, the court held that the amendment was to apply prospectively only. Consequently, the Court relied on the pre-amendment 2-1117 in rendering its opinion.

Thus, the law (at least in the First District and the Fourth District) is now that a defendant who proceeds to trial after other defendants have settled with the plaintiff will have the benefit of having the jury assess negligence against the settling defendants. This will be particularly beneficial to a minimally culpable defendant whose fault may be less than 25% of the total fault for the plaintiff's injuries. Under 2-1117, a defendant who is found to be less than 25% the total fault for the plaintiff's injuries is jointly liable for the plaintiff's medical expenses and severally liable for all other damages.

We will continue to monitor the progress of this case should an appeal be taken to the Illinois Supreme Court. Should you have any decisions regarding this opinion, please feel free to contact the undersigned or Ed Grassé.

Very truly yours,

C. William Busse, Jr.