

# Insurance/Tort Newsletter

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## Illinois Courts Split On How To Determine Whether A Tort Defendant Is Jointly And Severally Or Only Severally Liable

Section 2-1117 of the Illinois Code of Civil Procedure attempts to define the circumstances under which a defendant is jointly liable and when a defendant is only severally liable. That distinction has tremendous significance – a defendant that is jointly and severally liable is responsible for the entire amount of an adverse verdict, even if its negligence was only a very small portion of the total fault that caused the occurrence. On the other hand, a defendant that is only severally liable is responsible only for a pro rata share of an adverse verdict, corresponding to its share of fault.

Section 2-1117 of the Code of Civil Procedure provides that a 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 is jointly and severally liable for all damages. On the other hand, a defendant whose fault is less than 25% of the total fault is only severally liable for damages.

The Illinois Appellate Courts are split on the issue of how to apply the statute when some defendants settle with the plaintiff before trial. Some appellate courts have held that the phrase "defendants sued by the plaintiff" does not extend to defendants who have settled, and that the fault of settling defendants should not be included in determining whether the fault of the non-settling defendant is less or more than 25% of the "total fault attributable" to the "defendants sued by the plaintiff."

In *Ready v. United/Goedecke Services, Inc.*, 1-04-1762 (Ill.App. August 23, 2006), the Appellate Court for the First District addressed this issue for the first time. The Appellate Court held that the fault of settling defendants should be considered in making the determination of whether the fault of a non-settling party is less or more than 25% of the fault attributable to the defendants sued by the plaintiff. In reaching that conclusion, the court reasoned that a defendant who settles with the plaintiff is still a "defendant sued by the plaintiff." Moreover, the court found that only by including the fault of settling defendants would a minimally culpable defendant be held minimally responsible, which is the intent of this statute.

There is a direct conflict among the Appellate Courts on this issue. In accord with the decision by the First District in *Ready*, the Appellate Court for the Fourth District has also previously held that the fault of the settling defendant should be included. In contrast, the Appellate Court for the Fifth District, and the U.S. Court of Appeals for the Seventh Circuit, have held that the fault of settling defendants should not be included in determining whether remaining defendants are jointly and severally or only severally liable.

Because of the significance of this issue and the direct split among the Appellate Courts, presumably at some point the Illinois Supreme Court will address the issue and resolve the conflict. Until that occurs, however, the issue continues to have tremendous significance for the trial bar. Consider, for example, the result of a case in which one defendant, whose fault was 95% of the cause of the occurrence, settles with the plaintiff before trial and the sole non-settling defendant is found liable, but for only 5% of fault. The jury assesses damages of \$10,000,000.00. In the First District and in the Fourth District, the

defendant would only be liable for \$500,000.00, its pro rata share of the verdict. In the Fifth District, however, the same defendant would be liable for the entire amount of the verdict.

### **Landowners May Have More Duties To The Public Than They Think!**

The case of Marshall v. Burger King involved a negligence action brought by the estate of Detroy Marshall III, who was killed while eating at a Burger King restaurant when a car crashed through the wall of the restaurant. \_\_\_ N.E.2d \_\_\_, 2006 WL 1703488 (Ill., June 22, 2006). The complaint charged Burger King with lack of due care in the design and maintenance of the facility. As is the case with all negligence claims, in order to prove their case, the estate would have to show that a duty existed to Mr. Marshall, that Burger King breached its duty to Mr. Marshall, and that damages (in this case his demise) were proximately caused by the breach.

Burger King filed a motion to dismiss, arguing that it had no reason to know of this potential for harm and that it had no duty to protect Mr. Marshall from the actions of the third party who drove the vehicle in question. The Circuit Court in Winnebago County, IL granted the motion and the estate appealed. The Appellate Court reversed and remanded the case for further proceedings, holding that the complaint stated a cause of action on its face, and that whether the precautions suggested within the Complaint were beyond the reasonable duty of care that is imposed on a premises owner to its customers involved a question of fact.

One Justice in the Appellate Court dissented, arguing that the Estate had failed to allege facts sufficient to establish either that a duty existed or that proximate cause existed as to Burger King. He believed that Burger King's construction, maintenance, and design of the facility only furnished a condition that existed when the independent and subsequent act of the driver took place, so that proximate cause was not established.

In a 5-2 decision, the Supreme Court affirmed the decision of the Appellate Court, holding that under established law the restaurant did, in fact, owe a duty to aid or protect its customers against an unreasonable risk of physical harm posed by the negligent actions of third parties. The Court specifically held that the Complaint's allegations as to the placement of the location, the aspects of design and the lack of precautions taken in the construction were enough to properly allege a breach of that duty.

The Court was quick to point out, however, "merely concluding that the duty applies does not constitute an automatic, broad-based declaration of negligence liability". Even though the restaurant was under a duty, it remains for trier of fact to determine whether the restaurant exercised reasonable care to fulfill that duty. For this reason, the Court declined to expand premises liability defenses to hold that, as a matter of law, "a landowner who opens up their land to the public for business purposes have no duty to protect invitees against out-of-control drivers". Individual case analysis will continue to be the preferred manner of evaluating each case involving such claims.

The Supreme Court declined to opine on the issue of proximate cause, finding that the Defendants had waived this portion of their argument when they moved to dismiss the complaint solely on the issue of duty.

BryceDowney, LLC suggests that when faced with a circumstance where you are sued for the actions of a third-party, that careful fact gathering be completed to give you the best possible chance of success on the specific facts of the case. Also, we believe that all possible defenses be raised during any motion practice so as to have all of these available at the time of appeal. If, in this case, the issue of proximate cause had been included in the original arguments, the Supreme Court may have decided not to remand the case and may have issued a decision that would have eliminated additional litigation expense.

### **Indiana Statute On New Nonparty Defense**

The Indiana legislative has repealed the previous nonparty defense statute, 1C 34• 4• 33• 3 and 4, and replaced it with a new statute, 1C 34• 51• 2• 14. The new statutory language prescribes that: "[i]n an action based on fault, a defendant may assert as a defense that the damages of the claimant were caused in full or in part by a nonparty." The new statutory language defines a nonparty as "a person who caused or contributed to cause the alleged injury, death, or damage to property but who has not been joined in the action as a defendant." Such nonparties have been interpreted to include employers, tort immune entities and parties against

whom the statute of limitation, has run, among others. The statutory changes are not expected to alter the viability or utility of this helpful mechanism for Indiana tort defendants.

### **Falling Goalpost An Obvious Danger, Precluding Liability In Indiana**

Following a 2001 football game at Ball State University, twenty-one year old Andrew Bourne entered the field with other young persons, some of whom began to climb the goalposts in an attempt to pull them to the ground. (The scoreboard flashed a sign saying “the goalposts looks lonely.”) As he walked away from the goalpost, Bourne heard a crack but did not turn around. The falling goalpost struck him in the back, leaving him paralyzed. Bourne and his parents sued the goalpost manufacturer, Gilman Gear, in federal court in the southern district of Indiana claiming the goalpost was defective and unreasonably dangerous. The trial court granted a motion for summary judgment; it concluded that the risk was so obvious the goalpost could not be considered unreasonably dangerous under Indiana law.

Plaintiffs/appellants argued on appeal that the goalposts were defectively designed and unreasonably dangerous. The Seventh Circuit disagreed. *Andrew Bourne, et al. v. Gilman Gear, et al.* 452 F.3d 632 (7th Cir.2006). It pointed out that the claim of defective design rested solely upon the affidavit of expert Vaughn Adams, which the Court brushed aside as mere conclusions unsupported by factual allegations. (Among other things, Adams suggested that the use of aluminum instead of steel made the product unsafe.) Even an expert, the Court explained, must provide facts to support his or her conclusions if they are to have any evidentiary value. The Court also noted that the mere existence of safer products does not establish that a product is defective.

The claim that the goalpost was unreasonably dangerous also failed; the Court of Appeals held that the obviousness of the danger posed by collapsing goalposts undermines the claim that they were unreasonably dangerous. It explained that the test of what is unreasonably dangerous depends in large part upon the reasonable expectations of consumers. As the Court stated, “Indiana law does not permit someone to engage in an inherently dangerous activity and then blame the manufacturer.”

A dangerous hazard can become unreasonably so in part if its capacity to injure is not easily observable. On the other hand, when a product’s ability to inflict injury should be readily apparent—who has not watched goalposts toppled on television? - it cannot be said to be unreasonably dangerous under the Court’s reasoning in *Bourne*.

### **“Selective Tender” Rule Does Not Apply To Excess Policies**

The established rule in Illinois is that when an insured has multiple primary coverage available, it may make a “selective tender” to the insurer of its choice. In effect, the insured is allowed to choose which policy will apply.

In a recent case before the Illinois Appellate Court, *Kajima Construction Services, Inc., et. al v. St. Paul Fire and Marine Ins. Co.*, 1-05-1248 (September 15, 2006), the court held that an insured must exhaust all primary policies, including its own, before looking to any excess policy to satisfy a judgment, even excess policies written by the targeted or selected primary insurer.

In this case, Kajima was a general contractor insured by Tokio Fire and Marine. Midwestern was a subcontractor of Kajima and was insured by St. Paul. Midwestern’s policy listed Kajima as an additional insured for the subject project. Kajima was also named as an additional insured on Midwestern’s excess policy with St. Paul. A personal injury lawsuit ensued and \$1 million was paid by Tokio on behalf of Kajima. Tokio then sought to recover that money from St. Paul, arguing that it should be allowed to target tender this policy given the fact that Kajima was listed as an additional insured and the loss was covered under the St. Paul policy.

Kajima had tendered its defense to St. Paul long before the case was settled. St. Paul defended Kajima under a reservation of rights, but then refused to settle the lawsuit (on Tokio’s request) without Tokio contributing. When the case settled during trial, St. Paul paid the primary limits of \$2 million and Tokio contributed its primary limits of \$1 million. It was this \$1 million that Tokio then sought back, from the excess policy of St. Paul.

The Circuit Court had held that an insured must use up all primary insurance proceeds, even its own, before any

excess coverage applies. The Appellate Court agreed, further stating that the selective tender rule does not supercede the horizontal exhaustion doctrine. The “selective tender” rule only applies to concurrent primary coverages. In contrast, vertical exhaustion allows an insured to seek coverage from an insurer as long as the policies immediately beneath the excess policy have been exhausted. It was this second doctrine that Kajima sought to enforce and which the Court would not apply.

### **Lack Of Illinois License not A Ban To Expert Testimony**

In a case of first impression, the Illinois Supreme Court held that a civil engineer who was not licensed in the State of Illinois was not banned from testifying as an expert in a civil case merely because of the law of such a license. Thompson v. Gordon, 851 N.E.2d 123 (Ill. 2006). Rather the trial court is to consider, within its sound discretion whether the “knowledge, skill, experience, training and education” of the proposed expert are such as to “exceed that of an average witness” and likely to “aid the trier of fact in reaching its conclusions.” The state licensing status of the proffered witness is but one factor to consider in this analysis.

In Thompson, the plaintiffs were involved in an auto accident in which their vehicle was struck by an automobile which crashed through a median. The plaintiffs sued, among others, the designers of the intersection where the accident occurred. In response to the summary judgment motion filed by the designers, plaintiff submitted the affidavit from a civil engineer, licensed in the District of Columbia but not Illinois. The trial court struck the engineer’s affidavit on the basis he was not qualified to act as an expert. The appellate court reversed and remanded to the trial court, instructing it to examine all relevant factors, and not just the witness’ licensing status, in determining whether the witness qualified as an expert. The Supreme Court affirmed this decision.

Although not stated in its decision, it is quite probable that this case will not be limited to engineers but also be extended to other fields of expertise as well. Certainly, forensic medical experts are not required to be Illinois licensed physicians to be deemed qualified to provide expert testimony. Nonetheless, the issue of licensing is one factor parties should continue to explore and raise when retaining or possibly challenging an opponent’s proffered expert witness.

### **Navigating The Black Line Pool In Circuit Court Of Cook County**

The Black Line Pool of cases is a system recently instituted by the Chief Judge of the Law Division of the Circuit Court of Cook County to move the substantial backlog of cases along more quickly. The current system can create numerous problems for prosecuting or defending cases for the unprepared.

Cases pending in the Law Division of the Circuit Court of Cook County are subject to the Black Line Pool system and typically involve tort cases for property damage or personal injury with an amount of damages claimed of \$50,000 or greater. Such law division cases are initially assigned to a motion judge who presides over the matter through all pretrial discovery. The motion judge must ensure that all discovery is complete prior to the case entering the Black Line Pool of cases. The time-frame for the case to complete this pretrial discovery will run between 18 to 28 months depending upon the complexity of the case, number of parties, and amount of damages.

Once this prescribed time-frame for discovery has elapsed, the case will then enter the Black Line Pool of cases. The time-frame within which it will take the case to move from the bottom to the top of the Black Line Pool will vary depending upon the number of cases that are heard on the Black Line Trial Call each day.

At present, it appears as if the court is going through approximately 40 to 60 cases per day. Thus, the time-frame within which cases are moving from the bottom to the top of the Black Line pool is rapidly decreasing as more of these cases are pushed through each day. A good ballpark estimate is that the case will take between 4-6 months to work from the bottom to the top of the Black Line Pool.

The Black Line Pool status of the case can be monitored via the Clerk of the Circuit Court of Cook County website which has a Black Line Pool search function. The Chicago Daily Law Bulletin also lists cases toward the top of the Black Line Pool. To be safe, your defense counsel should monitor the Black Line status of their cases on a weekly basis.

The problem for some practitioners and their clients is that there is much less time within which to complete all

discovery prior to trial. Motion judges are much less likely to grant extensions of time due to the Black Line Pool system.

Accordingly, it is very important for clients and defense counsel to ensure that all discovery is completed in a timely fashion. Failure to do so may result in critical discovery being incomplete and possibly barred at the time of trial. For example, a Defendant's expert witnesses are normally the last to be disclosed in the sequence of discovery. If a case has risen to the top of the Black Line Pool and is called for trial and Defendants have not yet had an opportunity to retain and disclose their expert witnesses, they may lose the chance to do so.

The Law Division assignment judge who presides over the Black Line Trial Call will hear any motion to continue the trial when the case comes up to the top of the Black Line Pool. However, there is no guarantee that a motion for extension of time to complete discovery and to continue the trial will be granted.

There is no set rule for how many continuances will be granted or why they will be granted. The likelihood of getting an extension will be predicated largely on how old the case is, whether it has been in the Black Line Pool previously and the amount of discovery needed to be completed as well why not already completed and estimated time of completion.

It is much easier to get a trial continuance for completion of discovery if it is the first time up on the Black Line Trial Call. In that circumstance, the assignment judge will normally send the matter back to the motion judge for 6 months to complete outstanding discovery. It becomes progressively more difficult to get additional trial continuances after the initial trip through the Black Line Pool. Subsequent trial continuances will usually result in the case either being re-sequenced to the bottom or middle of the Black Line Pool to complete discovery.

Clients should discuss how they will deal with the Black Line Pool in their cases with defense counsel early and often. This will ensure that your company or insured are not deprived of the best defense possible simply because time ran out.

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