If you have questions or would like further information regarding Joint and Several Liability, please contact:

David Flynn
312-540-7662
dflynn@querrey.com

Querrey & Harrow
Result Oriented. Success Driven.
www.querrey.com®

Updated: 9-23-08

ILLINOIS LAW MANUAL

CHAPTER I
CIVIL PROCEDURE

H. JOINT AND SEVERAL LIABILITY

On June 11, 2003, Section 2-1117 was amended. The change specifically prohibits a jury from apportioning percentages of fault to a plaintiff's employer. As this section was signed into law in June of 2003, the first question was whether Illinois judges would apply it prospectively (to causes of action that accrued after that date) or retroactively (to all causes of action). The court in Carollo v. Al Warren Oil Company, 355 Ill. App. 3d 172, 289 Ill. Dec. 919, 820 N.E. 2d 994 (1st Dist, 2004) concluded that the amendment to 735 ILCS 5/2-1117 would be applied prospectively meaning cases accruing on or after the effective date of the amendment, June 11, 2003. Subsequent cases addressing the issue have concurred.

As previously stated, under Illinois law (735 ILCS 5/2-1117), any defendants found liable are jointly and severally liable for the plaintiff's past and future medical and medically related expenses. However, any defendant whose fault is determined by the jury to be less than 25% is only severally liable for all other damages such as pain and suffering, lost wages, disability, and disfigurement. Until the recent amendment, case law interpreting Section 2-1117 held that a jury was required to take into account in attributing fault the

actions of the plaintiff, all of the defendants sued by the plaintiff, and any other third party who could have been sued by the plaintiff. As you might imagine, plaintiff's lawyers argued long and hard that a plaintiff's employer could not be sued by the plaintiff due to the exclusive remedy provisions of the Worker's Compensation Act. However, the Illinois Supreme Court in Unzicker v. Kraft Food Ingredients Corporation, 203 Ill. 2d 64, 783 N.E.2d 1024 (2002), ruled on November 22, 2002, that an employer was a party who "could have been sued" by the plaintiff due to the fact that exclusivity of the worker's compensation remedy was an affirmative defense and could be waived by the employer. Under the circumstances, the court in Unzicker upheld a verdict in which the jury found the employer to be 99% responsible for the plaintiff's injuries.

Arguably, the Illinois Supreme Court's decision in Unzicker was the most devastating blow to the plaintiff's bar, especially in the construction setting. In the construction setting more often than not, it is the employer that is the primary tortfeasor. The plaintiff's bar quickly mobilized and through the legislature overturned Unzicker. As to any cause of action accruing on or after June 11, 2003, the fault of the employer cannot be considered in the apportionment of fault pursuant to 735 ILCS 5/2-1117.

As of this date, the courts have not considered any constitutional challenges to the amendment. Although the amendment appears to be "special legislation" and therefore, unconstitutional, the defense Bar will have an uphill battle. Under common law, a plaintiff had a right to sue his employer however, those cases were easily defended by the employer asserting the plaintiff's own comparative fault or the fault of a fellow worker. The plaintiffs bargained away their common law right to sue an employer in exchange for the protections afforded by the Worker's Compensation Act. Pursuant to the Worker's

Compensation Act, fault is not an issue, however, recovery is limited. At first glance, both the plaintiff and employer received a benefit and relinquished a right. With the recent amendment to 735 ILCS 5/2-1117, the plaintiff no longer relinquishes a right. Rather, the plaintiff has been granted the ability to take the fault of the employer and attribute it to the other defendant(s).

In addition to guidance as to when an employer can be included on the verdict form for purposes of apportioning fault, there had been issues as to whether a settling defendant can be included on the verdict form. In Ozik v. Gramins, 345 Ill. App. 3d 502, 279 Ill. Dec. 68, 799 N.E. 2d 871 (1st Dist. 2003), the court initially held that a settling party could not be included on the verdict form for purposes of apportioning fault pursuant to 735 ILCS 5/2-1117. However, the initial opinion was withdrawn. In the subsequent opinion, the court held that the argument had been waived and withdrew the first opinion. The issue of whether a settling party should be included on the verdict form surfaced in underlying Carollo v. Al Warren Oil Company, 355 Ill. App. 3d 172. In Carollo, the court did not directly address whether or not a settling party could be included on the verdict form. In Carollo, the issue was whether the amendment was retroactive or prospective and thus whether the employer should be included on the verdict form. Although the court did not directly address whether a settling party should be included on the verdict form, it is important to note that the employer had settled out prior to trial and the court concluded that the amendment was prospective, and therefore, the employer should have been included on the verdict form. Clearly, one could infer that it was permissible to include settling parties.

In Ready v. United/Goedecke Services, Inc., 367 Ill. App. 3d 272, 854 N.E. 2d 758 (1st Dist, 2006), the court concluded that a settling party can be included on the verdict form. It is important to note that the issue addressed by the court in Ready was whether the old or amended version of 735 ILCS 5/2-1117 applied. The court concluded that the original version was applicable to the case at hand. In its evaluation as to whether a settling defendant is included on the verdict form, the court answered the question with regards to the old version of 735 ILCS 5/2-1117 and not to the amended version. The court reasoned that the purpose of 2-1117 is to avoid shifting the entire loss to a party with minimal culpability. The court noted that, in order to effectuate the purpose, it did not make a difference to whether the tortfeasor was a party or had settled. The court dismissed plaintiff's contention that in order to consider a tortfeasor's culpability, the tortfeasor must be a party. Although the court in Ready did not address whether the amended version of 2-1117 would allow inclusion of a settling tortfeasor, its reasoning allows that conclusion to be drawn. Since there are subtle changes in the language of the amendment, a different outcome concerning the amended version of 2-1117 is possible.

Recently, the First District Appellate Court decided Yoder v. Ferguson, 381 Ill. App. 3d 353 (1st Dist. 2008). In Yoder, the Illinois Appellate Court held that a settling defendant should not be included on the Verdict Form for purposes of allocating fault among joint tortfeasors. The jury must apportion the fault among the remaining defendants (and the plaintiff assuming contributory negligence has been alleged). Both Ready and Yoder are First District opinions. Since there is a split within the First District, a trial judge can elect to follow one or the other. We anticipate that the issue will be addressed by the Illinois Supreme Court in the near future. In Yoder, several

plaintiffs were horrifically injured and the culpable defendant had a small policy which had been tendered. Had the settling/most culpable party been included on the Verdict Form, the fault attributable to the "deep pockets" would have been minimal. In Yoder, the Court seemed to be more driven by the result as opposed to the principles of joint and several liability. Unfortunately, we cannot predict which route the Supreme Court will take. Ready and the statute are more logical and fair however, at a very powerful plaintiff's bar may very well be successful in "selling" the reasoning in the and the statute are more logical and fair however, at a very powerful plaintiff's bar may very well be successful in "selling" the reasoning in the Yoder case.