FOR THE RECORD

BY CRAIG SANDBERG

Illinois Supreme Court Rules Section 2-1117 Apportionment Applies Only to Non-Settling Defendants

On November 25th, the Illinois Supreme Court handed down its long-awaited decision in the matter of *Ready v. United/Goedecke Services, Inc.* (Docket No. 103474) holding that apportionment under section 2-1117 of the Code of Civil Procedure does not apply to tortfeasors or defendants who have settled before judgment. This As a result, the Court found that settling defendants should not be included in the apportionment of fault for the purposes of determining relative liability pursuant to section 2-1117.

In December 1999, a pipe-refitting project was under way at the Midwest Generation, LLC ("Midwest"), power plant in Joliet, Illinois, where Michael Ready was employed as a maintenance mechanic. As part of this project, scaffolding material had to be raised from the ground to the level of the eighth floor. The general contractor of the project, BMW Construction, Inc. ("BMW") had subcontracted with United/Goedecke Services, Inc. ("United"), to perform the scaffolding work, including the lifting of scaffolding materials.

On December 23, 1999, a United employee was supervising the lifting of wooden trusses. Another United was rigging the trusses for lifting, using a single sling. Ready was standing beneath the rigging so that he could give hand signals to the operator of the tugger that was being used to lift trusses. The tugger was owned by Midwest and was being operated by a Midwest employee. Eight trusses were lifted without incident. As the ninth truss was being lifted, it slipped out of the sling, falling eight floors to the ground floor where it struck and killed Ready.

Ready was survived by his wife, Terry, and two children. The wrongful death suit brought by Terry, as administrator of Ready's estate, named two defendants: United and BMW. Both defendants filed third-party complaints against Midwest pursuant to the Joint Tortfeasor Contribution Act ("Contribution Act") (740 ILCS 100/0.01 et seq.) Plaintiff amended her complaint, adding Midwest as a defendant. She reached settlement agreements totaling $1.113 million with BMW and Midwest. United did not object to the settlements and the trial court found that they were reached in good faith.

Prior to trial, based on rulings on certain motions *in limine*, United was not allowed to present any evidence at trial regarding the conduct of the settling defendants. In addition, the trial court denied United's motion to list BMW and Midwest on the verdict form so that if the jury found United at fault, it could consider whether to allocate some portion of the fault no only to Ready, but also to his employer and the general contractor.

The case proceed to trial with United as the sole defendant. The jury found United liable for negligence and awarded damages of $14.23 million. Based on Section 2-1117 of the Code of Civil Procedure, the trial court found United jointly and severally liable for the amount of the verdict remaining after offset for Ready's comparative negligence (35%) and the settlement amounts paid by BMW and Midwest. United was held liable in the amount of $8.137 million.

The Appellate Court of Illinois, First District reversed in part and remanded for a new trial as to liability only concluding that, under section 2-1117, a nonsettling defendant's fault should be assessed relative to the fault of all defendants, including settlement defendants. The court thus held that, in the case at bar, BMW and Midwest should have be included on the verdict form for purposes of apportioning fault.

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The Illinois Supreme Court, however, found that settling defendants should not be included in the apportionment of fault for the purposes of determining. The plurality opinion, written by Justice Freeman and joined by Chief Justice Fitzgerald and Justice Burke, construed the statutory language "defendants sued by the plaintiff" to be ambiguous, citing the diverse appellate holdings, as well as the majority's disagreement with the Justice Garmen's dissenting opinion. The plurality referred to: (1) the legislature's failure to amend the statute after it was first construed not to apply to settled parties in a Fifth District decision in 1995 (*Blake v. Hy Ho Restaurant, Inc.*, 273 Ill. App. 3d 372, 652 N.E.2d 807 (5th Dist. 1995)), and (2) the 1995 tort reform amendments (struck down in *Best v. Taylor Machine Works*, 179 Ill. 2d 367, 689 N.E.2d 1057 (1997)) which had included settling defendants in the apportionment of fault as evidence that section 2-1117, as enacted in 1986, was never intended to include settling tortfeasors in the allocation of fault. The plurality also found support for its conclusion in certain recent remarks made by State Senator Cullerton as cosponsor of Senate Bill 1296, which the General Assembly had not enacted into law. Justice Garman, in her dissent, found the plain meaning of section 2-1117 to be unambiguous based on dictionary definitions of the word "sued" and disagreed with the plurality's reliance on certain tools of statutory construction. The dissent concluded that the result reached by the plurality was contrary to the goals of the legislature in striking a balance between fully compensating injured parties and fair imposition of liability upon tortfeasors.

U.S. Supreme Allows "Light" Tobacco Lawsuits

On December 15th the Supreme Court of the United States (*Altria Group Inc., et al., v. Good, et al.*; No. 07-562) cleared the way for smokers to file lawsuits to challenge deceptive marketing of cigarettes as "light" and "low in tar and nicotine." The Court found that either the Federal Cigarette Labeling and Advertising Act's (Labeling Act) (15 U.S.C. §1334(b)) preemption provision nor the Federal Trade Commission's actions in this field preempt respondents' state-law fraud claim alleging violation of the Maine Unfair Trade Practices Act ("MUTPA"). The 5-4 ruling, with Justice John Paul Stevens writing for the majority, was announced in his absence by Justice Anthony M. Kennedy, who was also in the majority.

Respondents, who have for over 15 years smoked "light" cigarettes manufactured by petitioners, Philip Morris USA, Inc., and its parent company, Altria Group, Inc., claimed that petitioners violated the Maine Unfair Trade Practices Act ("MUTPA"). Specifically, they allege that petitioners' advertising fraudulently conveyed the message that their "light" cigarettes deliver less tar and nicotine to consumers than regular brands despite petitioners' knowledge that the message was untrue. Petitioners denied the charge, asserting that their advertisements were factually accurate. The merits of the dispute were not before the Supreme Court because the District Court entered summary judgment in favor of petitioners on the ground that respondents' state-law claim was preempted by the Labeling Act. The U.S. Court of Appeals for the First Circuit reversed that judgment, and the Supreme Court granted certiorari to review its holding that the Labeling Act neither expressly nor impliedly preempts respondents' fraud claim. ■