

# Reed Armstrong Quarterly

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## Joint and Several Liability

### **The Fault of Settled Tortfeasors is Not a Consideration in Apportionment** *Ready v. United/Goedecke Services, Inc.*, 2008 WL 5046833 (Ill., Nov. 25, 2008)

The Illinois Supreme Court recently held that settled tortfeasors are not to be placed on the verdict form for purposes of apportionment of fault under section 2-1117 of the Illinois Code of Civil Procedure. The central issue in the case was whether settled tortfeasors are “defendants sued by the plaintiff” within the meaning of section 2-1117 of the Code. According to this section, a defendant whose fault is 25% or greater is jointly and severally liable for all damages, while a defendant whose fault is less than 25% is only severally liable for all damages other than medical expenses. In this case, the defendants argued that the settled defendants were “defendants sued by the plaintiff” pointing out that “sued” is in the past tense, indicating that even though they have settled, they were originally “sued” by the plaintiff. The plaintiff argued that section 2-1117 should be interpreted to permit an apportionment of fault to only those defendants that remain in the case when it is submitted to the judge or jury.

In its analysis, the Illinois Supreme Court stated that section 2-1117 is ambiguous because it was not clear whether the legislature intended to include settled tortfeasors within its scope. The Court also noted that the Appellate districts differed in their interpretation of the language of 2-1117 as well. The Court looked to the legislative history of the section and ultimately held that based on the legislature’s failure to amend that language in question following a judicial construction of the statute, as well as the amendment of the statute to add a new provision, section 2-1117 was never intended to include settling tortfeasors in the apportionment of fault. Therefore, the Court held that section 2-1117 does not apply to good faith settling tortfeasors who have been dismissed from the lawsuit.

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## Civil Procedure

### **Issuance of Subpoenas-HB4119** **House Bill 4119, introduced by House Rep. William B. Black**

House Bill 4119 seeks to amend the Illinois Code of Civil Procedure, section 5/2-1101, by allowing an attorney, as an officer of the court (instead of a clerk), to issue subpoenas on behalf of the court for witnesses and to counties in a pending action. This Bill was passed by both the House and Senate on November 11, 2008 and was sent to the Governor on December 19, 2008 for signature.

The status of this Bill can be monitored via the Illinois General Assembly’s website at the following link <http://www.ilga.gov/legislation/>

**Piecemeal Resurrection of the Sweeping Tort Reform Amendments of Unconstitutional Public Act 89-7 Continues**

*Jackson v. Victory Memorial Hospital*, 2008 WL 5105279 (Ill. App. 2d Dist., Dec. 2, 2008).

In 1997, sweeping tort reform amendments to the Code of Civil Procedure (Public Act 89-7) were declared unconstitutional. *Best v. Taylor Machine Works*, 179 Ill. 2d 367 (1997). While only specific amendments were held substantively unconstitutional, the remainder was deemed non-severable and, thus, void as well. Since that decision, the legislature has been amending sections of the code of Civil Procedure in the normal course of its business. In doing so, new amendments usually incorporate changes that had been made by Public Act 89-7. In December, the *Jackson* decision confirmed that as a general rule, the effect of such subsequent amendments is to validate the language of these formerly void amendments insofar as they are reincorporated into the new amendments. Unfortunately, exceptions to the general rule are still a cause of uncertainty because in at least one instance, a subsequent amendment reincorporating Public Act 89-7 language was held to have occurred by “legislative oversight” such that the reincorporated language was not enforced. *Jackson* citing *O’Casek v. Children’s Home & Aid Society of Illinois*, 229 Ill.2d 421 (2008). The decision also reaffirms that the version of the particular section of the Code of Civil Procedure that existed before Public Act 89-7 is law where no amendments have been made since the *Best* declaration.

In *Jackson*, the plaintiff voluntarily dismissed her medical malpractice lawsuit on December 20, 2005 after failing to attach an affidavit and physician’s report as required by section 2-622 of the Code of Civil Procedure. Exactly one year from the date of voluntary dismissal (the last permissible date under the statute of limitations) she re-filed her complaint. Attached to the re-filed complaint was an affidavit of her attorney pursuant to section 2-622 stating that he was unable to obtain a consultation with a medical professional before the expiration of the statute of limitations which would impair the action. At the time of filing, section 2-622 provided this as an alternative to the filing of an affidavit of meritorious cause based upon the attorney’s consultation with a medical professional so long as the affidavit of merit and medical professional report were ultimately filed within 90 days.

On motion of the defendants, the trial court dismissed the complaint stating that the plaintiff failed to satisfy the requirements of 2-622 because the attorney’s affidavit that he was unable to obtain a consultation before the expiration of the statute of limitations failed to state that the plaintiff “had not previously voluntarily dismissed an action based on the same or substantially same acts, omissions or occurrences.” The trial court relied on the 1995 amendment that added that requirement. However, in 1997, section 2-622 reverted back to its pre-1995 version with the Supreme Court decision in *Best*, which did not have the additional requirement set forth above. In 1998, the General Assembly passed another public act that amended section 2-622 by adding chiropractors to its coverage. However, it added chiropractors to the version struck down in *Best*, meaning that the 1998 version would not allow a 90-day extension if the plaintiff had previously voluntarily dismissed the same or similar cause of action. Then, after the

plaintiff filed her original complaint, but before she re-filed the complaint, yet another amendment was made to section 2-622 in 2005. This amendment removed the requirement of the above declaration. Therefore, the trial court's dismissal for failure to make the above declaration in the affidavit was reversed because the 2005 amended version of section 2-622 was applicable to the plaintiff's re-filed complaint, and it did not require such a declaration. Therefore, the Court held that the plaintiff was entitled to the 90-day extension to file the affidavit of merit and physician's report, irrespective of whether she had previously voluntarily dismissed her cause of action.

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## Workers Compensation

### **“Release of All Claims” in Settlement of Motor Vehicle Accident Claim is Ineffective to Release Worker’s Compensation Claim without Industrial Commission Approval**

*Maxit, Inc. v. Van Cleve, et al.*, 2008 WL 4603560 (Ill., Oct. 17, 2008)

During the scope of his employment with Maxit, Van Cleve suffered injuries as a result of a car accident caused by the negligence of an underinsured motorist. Van Cleve filed a worker's compensation claim against Maxit with the Illinois Industrial Commission as well as a claim under Maxit's underinsured-motorist insurance policy. Van Cleve then executed a release that stated in pertinent part that Van Cleve released Maxit from any and all claims on account of injuries resulting from the motor vehicle accident and covered by the underinsured-motorist policy. The release was not submitted to the Industrial Commission for approval. A year later, Maxit and Van Cleve entered into a written agreement for settlement of the worker's compensation claim. Under the agreement, which was approved by the Commission, Maxit agreed to pay the plaintiff \$200,000. A month later, Maxit filed its complaint against Van Cleve alleging a breach of the previously executed release. Maxit alleged that Van Cleve breached the terms of the release by refusing to consider their claim for worker's compensation benefits released by the earlier release.

The Illinois Supreme Court held that regardless of the issue of ambiguity or whether the parties intended the release to encompass the worker's compensation claim, it could not operate to release Van Cleve's worker's compensation claim without Industrial Commission approval. Section 23 of the Worker's Compensation Act provides that no employee has the power to waive any provisions in the Act with regard to the amount of compensation payable to the employee “except after approval by the Commission.” Although Maxit argued that the issue had nothing to do with the Worker's Compensation Act, but rather a simple breach of contract, the Court noted that pursuant to the Worker's Compensation Act, an employer was bound by the provisions of the Act and could not relieve himself from liability pursuant to a private agreement with an employee.

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## Firm News

### **Illinois Supreme Court Agrees with Reed Armstrong's Argument on Behalf of Pekin Insurance Company**

*Taylor v. Pekin Insurance Company*, 2008 WL 4943700 (Ill. 2008).

On November 20, 2008, Pekin Insurance Company, represented by Reed Armstrong partner Stephen Mudge, was victorious in the Illinois Supreme Court, which reversed the Fifth District Appellate Court of Illinois and affirmed the Madison County Circuit Court's dismissal of a declaratory judgment action brought against it by Billy Taylor in *Taylor v. Pekin Insurance Company*, 2008 WL 4943700 (Ill. 2008). In this case, the plaintiff was injured when he was involved in a car accident with an uninsured motorist. After receiving \$162,588.33 from Pekin Insurance Company pursuant to a workers' compensation policy, the plaintiff was awarded \$250,000.00 in benefits under its uninsured motorist coverage. Pursuant to the provisions of the Pekin automobile policy, Pekin delivered a check to the plaintiff in the amount of \$87,412.00, the difference between the arbitrators' award and the amount plaintiff had previously been paid in workers' compensation benefits.

The plaintiff filed a declaratory judgment action seeking a declaration that the amount of the setoff for worker's compensation benefits received should be reduced by the amount of attorney's fees the plaintiff incurred in obtaining the worker's compensation benefits. The trial court dismissed the declaratory judgment action but the Appellate Court, 5th District reversed, ruling that the setoff for worker's compensation payments should be reduced by \$40,467.00, reflecting the 25% fee plaintiff's attorney could have received under Section 5(b) of the Illinois Worker's Compensation Act had he had recovered a lien from a third-party tortfeasor.

The Workers' Compensation Act grants a lien to an employer for the amount of workers' compensation benefits paid on an employee's recovery against a third-party tortfeasor and requires the employer to pay the employee's attorney a fee in the amount of 25% of the amount recovered by the employer. 820 ILCS 305/5(b) (West 2006). The issue before the Supreme Court was "whether section 5(b) requires Pekin to pay the 25% fee where plaintiff has been compensated for his injuries through his employer's uninsured-motorist insurance rather than through a claim against a liable third party." Applying the plain language of the statute, the Court agreed with Pekin's contention that "section 5(b) by its terms does not apply because there was no recovery from a third-party tortfeasor." Further the Court agreed with the Appellate Court's dissenting Justice Donovan who asserted that since the workers' compensation carrier recovered no funds, there was no recovery triggering a 25% attorney fee pursuant to section 5(b).

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