EMERGING ISSUES IN ALLOCATION OF FAULT AND CONTRIBUTION

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The cases and materials presented here are in summary and outline form. To be certain of their applicability and use for specific claims, we recommend the entire opinions and statutes be read and counsel consulted.
EMERGING ISSUES IN ALLOCATION OF FAULT AND CONTRIBUTION

I. INTRODUCTION

In multiparty litigation, fault apportionment remains one of the most difficult areas to navigate. By its very nature, multiparty tort litigation involves working out difficult questions concerning how the plaintiff’s injuries occurred, which tortfeasors actually contributed to the plaintiff’s injuries, the proportion which each tortfeasors’ negligence contributed to that injury, and what amount of damages each contributing tortfeasor should pay in a verdict and judgment. As any Illinois attorney with multiparty tort litigation experience can attest to, answering these questions gets complicated very quickly.

Perhaps the most confusing aspect of multiparty litigation comes from the allocation of fault between joint defendants. 735 ILCS 5/2-1117 governs the apportionment of fault between multiple tortfeasors. Section 2-1117 only applies to situations in where the independent acts of multiple tortfeasors combine to cause a plaintiff’s injuries. The section and the analysis contained within this article does not apply to situations where tortfeasors act in concert to cause a plaintiff’s injuries. *Woods v. Cole*, 181 Ill. 2d 512, 520 (1998).

As of June 2003, the General Assembly amended the 1986 version of this section. It states as follows:

> [I]n 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 except the plaintiff's employer, 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 defendants except the plaintiff's employer, who could have been sued by the plaintiff shall be jointly and severally liable for all other damages.


The portions stricken through represent the text of the 1986 version, while the underlined text represents the amendments from 2003. These same amendments have muddied the waters as to whether fact finders should consider non-parties and settling defendants when apportioning fault and determining the ultimate amount that a single defendant must pay for plaintiff’s injuries. Recently, cases interpreting section 2-1117 of the Illinois Contribution Act have added
II. BRIEF HISTORY

A. The Origins of the Illinois Contribution Act

Prior to 1977, the rule in Illinois was one of indivisible recovery, with the plaintiff either recovering all (if the plaintiff was not found to be contributorily negligent) or nothing (if he/she was found negligent). Similarly, liability between defendants was an “all or nothing” situation, and a liable defendant could not obtain indemnity or contribution if that defendant was actively responsible for the injury. The Illinois legislature passed the Contribution Act to clarify fault apportionment and damages amongst multiple jointly and severally liable tortfeasors. In part, the Act codified the precedent set in *Skinner v. Reed-Prentice Division Package Machinery Co.*, 70 Ill. 2d 1 (1977). Prior to *Skinner*, Illinois held all defendants jointly and severally liable for a plaintiff’s injuries and each defendant could be required to pay the entirety of a plaintiff’s damages. In *Skinner*, the Court reasoned that equitable principles demanded that ultimate liability for plaintiff’s injuries be apportioned on the basis of the relative degree of fault for each tortfeasor involved. Thus, *Skinner* permitted joint tortfeasors to pursue contribution actions against one another to avoid overpaying for their respective, *pro rata* share of the plaintiff’s damages.

The Contribution Act lays out the requirements and methods for apportioning fault between multiple tortfeasors. 740 ILCS 100/0.01-5. The Act empowers defendant tortfeasors to pursue contribution actions: a cause of action where a tortfeasor, who has paid more than his *pro rata* share of the common liability, may recover that overpayment amount from other joint tortfeasors. 740 ILCS 100/2(b). Under the Act, no single tortfeasor is liable to make contribution payments in excess of his or her own *pro rata* share of the common liability: the common liability meaning the sum total money damages awarded to the plaintiff. *Id.* The right to contribution exists only among tortfeasors and not between a tortfeasor and the plaintiff. *Id.* 100/2(a). As such, only a defendant may assert a contribution action. *See Ponto v. Levan*, 2012 IL App (2d) 110355. To assert the right to contribution, the defendant must make a formal contribution pleading; in other words, if the defendant does not file a contribution action against a party, all discussion of fault apportionment to that party falls outside the scope of the pleadings and, as a matter of law, becomes barred from the court’s consideration. *See, e.g., Henry v. St. John’s Hospital*, 138 Ill. 2d 533, 550 (1990); *Zygmuntowicz v. Pepper Construction Co.*, 306 Ill. App. 3d 182, 183 (5th Dist. 1999); *Jones v. DHR Cambridge Homes, Inc.*, 381 Ill. App. 3d 18, 31-32 (1st Dist. 2008). Thus, when a plaintiff holds an individual tortfeasor jointly and severally liable for all damages, that tortfeasor can level the playing field by filing a formal contribution action, thus recovering his overpayments from other joint tortfeasors and ensuring that he only pays his *pro rata* share of the damages.
At the heart of the Contribution Act lies a crucial concept: how does one properly calculate an individual tortfeasor's pro rata share of the common liability? Section 2-1117 provides a two-fold answer to this question. First, the section requires fact finders to compare the relative fault between joint tortfeasors – i.e., the jury must determine the extent to which each tortfeasors' negligence individually contributed to the plaintiff's injuries. Jurors must look to the chain of events leading to plaintiff's injuries and determine each tortfeasors' relative culpability. While this first aspect to pro rata calculations seems obvious, it is the second aspect which sparks controversy.

Second, when apportioning fault, fact finders may only consider the negligent conduct of certain parties. Fact finders must apportion fault between three groups only: “...the total fault attributable to the plaintiff, the defendants sued by the plaintiff, and any third party defendants except the plaintiff's employer...” 735 ILCS 5/2-1117 (2003) (emphasis added). The italicized text above represents language specifically added in 2003’s amendments to the Act. Additionally, the 2003 amendment specifically removed “...any third party defendants who could have been sued by the plaintiff...” from the previous 1986 version of the statute. 735 ILCS 5/2-1117 (1986) (emphasis added). A plain reading of the current statute and its predecessor reveals two groups that fact triers cannot apportion any fault to: the plaintiff's employer and third party defendants not sued by the plaintiff (nonparty tortfeasors who haven’t been brought into the suit via a defendant’s formal assertion of the right of contribution).

It is arguable that fact triers can still consider third-party defendants not party to the suit in fault apportionment. However, this interpretation is highly doubtful for multiple reasons. First, the specific removal of “defendants who could have been sued by the plaintiff” shows intent to exclude such tortfeasors from fault apportionment, and this interpretation is consistent with the well-established principal of statutory interpretation: expression unius est exclusion alterius (“the express mention of one thing excludes all others”). Secondly, as discussed later in this article, recent case law has held that, for a fact finder to apportion fault to a tortfeasor not sued by the plaintiff, a defendant must pursue a formal contribution action to bring that tortfeasor into the suit as a third-party defendant. DHR Cambridge Homes, 381 Ill. App. 3d at 31-32. Section 2-1117 does not include in the division of fault ‘anyone who could have been sued by the plaintiff.’ Rather, it includes ‘any third party defendant who could have been sued by the plaintiff.’ In other words, the party must already have been brought into the case by a defendant for that party to be included in the division of fault.

Note that these exclusions are absolute; even if a plaintiff's employer or a non-sued third party defendant were at fault for 95 percent of the plaintiff's injuries, the statute would still prevent the fact trier from considering that fault for apportionment purposes. In such a situation, the remaining five percent of fault, attributable to the other defendants and the plaintiff, would become 100 percent of the fault apportioned by the fact finder for pro rata calculations. A more in-depth analysis of pro rata calculations follows in section III. A. of this article. These
amendments operate to benefit plaintiffs who receive their injuries at work by potentially increasing the amount of damages they can recover from minimally culpable tortfeasors.

The Illinois General Assembly made the 2003 amendments in response to the Illinois Supreme Court’s decision in Unzicker v. Kraft Food Ingredients Corp., 203 Ill. 2d 64 (2002) which held that, for apportionment purposes, a jury should consider an employer’s relative fault in conjunction with the relative fault of other named defendants. In Unzicker, the jury awarded the plaintiff a $879,400 verdict, with $91,400 in medical damages and the remaining $788,000 in non-medical. Additionally, the jury found the plaintiff’s employer 99 percent culpable for the plaintiff’s injuries compared to Kraft’s one percent. The trial court held that Kraft and the employer were jointly and severally liable for the medical damages, but that Kraft was only severally liable for one percent of the nonmedical damages: $7,880. Additionally, the court held that Kraft could file a third-party contribution action the employer to recover 99 percent of the medical damages: $90,486. Plaintiff’s employer appealed. The case reached the Illinois Supreme Court, which determined that plaintiff’s employer was a third-party defendant who could have been sued by the plaintiff, and therefore the jury should consider the fault of plaintiff’s employer for apportionment purposes. The Court supported its decision by citing to “[t]he clear legislative intent behind section 2-1117 is that minimally responsible defendants should not have to pay entire damage awards.” Unzicker, 203 Ill. 2d at 78. The Court continued: “Here, ignoring the party found to be 99% responsible for the plaintiff’s injuries and requiring the party found 1% responsible to pay all of the nonmedical damages would not be in accord with the clear legislative intent that minimally responsible defendants should not be liable for entire judgments.” Id. at 79. In response to Unzicker, the Illinois General Assembly amended 2-1117 to its current version, which forbids considering either plaintiff’s employer or non-sued third-party’s fault for apportionment purposes.

Because section 2-1117 limits who’s fault a jury can consider, a tortfeasor’s pro rata fault – and thus his or her pro rata share of the damages – must be distinguished from his or her own actual proportionate fault. When multiple tortfeasors act so as to contribute to a plaintiff’s indivisible injuries, the sum total of their tortuous acts forms the “actual collective fault.” Actual collective fault regards reality; it is comprised of the sum total of the negligence of all tortious actors responsible for plaintiff’s injuries. It follows then that actual proportionate fault refers to the each tortfeasor’s proportionate culpability – the percentage to which an individual tortfeasor’s negligence contributes to the actual collective fault. Both actual collective and actual proportionate fault include all parties responsible for plaintiff’s injuries, including includes plaintiff’s employer and non-parties to the suit.

Thus under the current iteration of section 2-1117, when calculating a defendant’s pro rata share of the common liability, fact finders do not and cannot look at actual proportionate fault or actual collective fault. As stated previously, the current version of section 2-1117 removes both the plaintiff’s employer and non-party tortfeasors from the fact finder’s fault apportionment. Instead, fact finders may only look at the negligence attributable to a qualified group of a statutorily defined class of tortfeasors: “...the total fault attributable to the plaintiff, the defendants sued by the plaintiff, and any third party defendants except the plaintiff’s
employer...” 735 ILCS 5/2-1117. To put it another way, when fact finders reach a verdict for a negligence claim involving multiple tortfeasors, the fact finders must apportion the entirety of that verdict amongst a limited pool of liable parties.

C. **Ready excludes settling defendants from jury fault apportionments under Section 2-1117**

Besides specifically exempting a plaintiff’s employer, the 2003 amendments also removed “any third party defendant who could have been sued by the plaintiff...” from the fact finder’s fault apportionment considerations. 735 ILCS 5/2-1117 (1986). In removing this language, the legislature opted for section 2-1117 to apply only to direct and third-party defendants. Thus, the question arose as to what parties classified as “defendants sued by the plaintiff” and “third-party defendants” covered by the statute: did these defendants need to be “actually sued” by the plaintiff; did third-party defendants include nonparty tortfeasors who, although partially culpable for the plaintiff’s injuries, were not defendants brought into the lawsuit? For years, Illinois courts failed to reach a consensus on these issues. See, e.g., *Dowe v. Amtrak*, No. 01-C-5808, 2004 U.S. Dist. LEXIS 7233 (N.D. Ill. April 26, 2004); *Skaggs v. Senior Services of Central Illinois, Inc.*, 355 Ill. App. 3d 1120 (4th Dist. 2005); *Heupel v. Jenkins*, 379 Ill. App. 3d 893 (1st Dist. 2008); *Yoder v. Ferguson*, 381 Ill. App. 3d 353 (1st Dist. 2008). Many of these inconsistencies were finally resolved when the Illinois Supreme Court issued its plurality decision in *Ready v. United/Goedecke Services, Inc.*, 232 Ill. 2d 369 (2008).

In *Ready*, the Illinois Supreme Court considered whether settling tortfeasors were considered “defendants sued by the plaintiff” within the meaning of section 2-1117. *Ready*, 232 Ill. 2d at 374 n.2 (quoting 735 ILCS 5/2-1117 (West 2004)). The case arose when plaintiff, whose husband died during a pipe-refitting construction project, brought wrongful death claims against several defendants: the general contractor, a scaffolding subcontractor, the building’s owner, and her husband’s employer. *Id.* at 372. Before trial, plaintiff reached settlement agreements with the decedent’s employer, the building owner, and the general contractor, leaving the scaffolding subcontractor alone for the trial. *Id.* At trial, the subcontractor attempted to present evidence that the settling defendants’ negligent acts contributed to the death of plaintiff’s husband, however the court barred these arguments from admission. Additionally, the court shot down the subcontractor’s attempts to include the settling defendants on the jury’s verdict forms, which would have allowed the jury to consider the settling defendants’ proportionate culpability in relation to the subcontractors. The jury found the subcontractor liable for negligence and returned a verdict of $14,230,000. They found the decedent was 35 percent at fault, thus reducing the subcontractor’s liability to $9,250,000. The trial court held the subcontractor jointly and severally liable for the full amount of the verdict minus the set-offs from the decedent’s comparative negligence and the amounts paid by the settling defendants. *Id.* at 373.

The subcontractor appealed, claiming that the trial court erred by not including the settling defendants on the verdict form. The subcontractor argued that if the jury had been permitted to consider the settling defendants’ share of the collective fault, they may have determined that the subcontractor’s share failed to reach 2-1117’s 25 percent threshold, which would make the
subcontractor only severally liable. *Id.* at 373. In agreeing with the subcontractor, the appellate court determined that section 2-1117 required that a nonsettling defendant’s fault be evaluated relative to the fault of all defendants, including settling defendants. Therefore, the trial court erred by not listing the settling defendants on the verdict forms for purposes of fault apportionment. *Id.* at 373-74.

On appeal, the Illinois Supreme Court reversed. The Court looked to the language and history of section 2-1117 and determined that settling defendants were not “‘defendants sued by the plaintiff’” within the meaning of the statute. *Id.* at 378. “[W]e disagree with the appellate court’s holding that, under section 2-1117, a remaining defendant’s culpability must be assessed relative to the culpability of all defendants, including settling defendants.” *Id.* at 383. Accordingly, the Supreme Court held that “section 2-1117 does not apply to good-faith settling tortfeasors who have been dismissed from the lawsuit” and reversed the portion of the appellate court’s judgment that had reversed the trial court as to liability. *Id.* at 385.

After the Illinois Supreme Court’s 2008 decision in *Ready*, appellate courts have uniformly interpreted *Ready* as barring settling defendants from appearing on jury verdict forms. See *Miranda v. Walsh Group, Ltd.*, 2013 IL App (1st) 122674, ¶ 14 (stating that, in *Ready*, “our supreme court held that a settling defendant was not a ‘defendant sued by the plaintiff’ under section 2-1117 of the Code and should not be named on the jury verdict form for the appropriation of fault”); *Cellini v. Village of Gurnee*, 403 Ill. App. 3d 26, 37 (1st Dist. 2010); *Jablonski v. Ford Motor Co.*, 398 Ill. App. 3d 222, 271 (5th Dist. 2010) (holding that, given the precedent set in *Ready*, the trial court did not abuse its discretion by refusing a defendant’s proposed verdict forms which would have required a jury to apportion fault between the defendant and a settling tortfeasor).

After remand, *Ready* came before the Supreme Court again and the Supreme Court then determined that the trial court erred in excluding evidence of the settling parties’ actual culpability, finding that it would have supported the defendant’s sole-proximate-cause defense. *Ready v. United/Goedecke Services, Inc.*, 238 Ill. 2d 582, 591-92 (2010). Thus, if a defendant pursues a sole-proximate cause defense, then the culpability of settling tortfeasors, nonparties, and the plaintiff’s employer are fair points for a jury’s fault considerations. However, if the defendant is found to be a contributing cause to the plaintiff’s injuries, the aforementioned tortfeasors would still be banned from contributory negligence jury forms.

D. *Ramirez* and other cases cast doubt on a fact finder’s ability apportion fault to third party defendants who are not actually parties in the case

Although *Ready* did not explicitly address whether unsued nonparties could be included in a fact finder’s fault apportionment considerations, the case and those following it cast serious doubt on this argument. For example, in *DHR Cambridge Homes*, 381 Ill. App. 3d at 31-32, the court shot down a defendant’s attempts to include a nonparty tortfeasor on the jury verdict form for fault apportionment purposes. The defendant had not pursued a formal third-party contribution action against this nonparty, which would have brought the nonparty into the lawsuit as a third-
party defendant. To support its decision, the court cited to language in *Unzicker* which stated that a party “must already have been brought into the case by a defendant for that party to be included in the division of fault.” *Unzicker*, 203 Ill. 2d at 78.

In *Ramirez v. FCL Builders, Inc.*, 2014 IL App (1st) 123663, the court went a step further in suggesting that unsued/non-party third party defendants could not be included in a jury’s fault apportionment. *Ramirez* involved an appeal due to the erroneous inclusion of the plaintiff’s employer on a jury form patterned from Illinois Pattern Instruction (IPI) B.45.03.a (a jury form dealing with the apportionment of fault pursuant to Section 2-1117). In determining that Section 2-1117 barred the inclusion of the employer from jury form B.45.03.a, the Illinois First District Appellate Court scrutinized the comments on IPI B.45.03.a which suggested that non-parties were proper parties for a jury’s fault apportionment considerations. *Ramirez*, 2014 IL App (1st) 123663, ¶ 192. IPI comment one stated:

> The need for the jury to consider the fault of nonparty tortfeasors arose subsequent to the adoption of comparative negligence in *Alvis v. Ribar*, 85 Ill. 2d 1 (1981). “Consideration of the negligence of both parties and non-parties to an action is essential for determining liability commensurate with degree of total fault.” *Bofman v. Material Serv. Corp.*, 125 Ill. App. 3d 1053 (1st Dist. 1984). In cases where contributory negligence is involved, it is permissible to introduce evidence of the liability of a non-party. The liability of non-party tortfeasors may be considered in order to determine the extent of plaintiff’s responsibility for his injuries. *Smith v. Central Ill. Pub. Serv. Co.*, 176 Ill. App. 3d 482 (4th Dist. 1988). See also *American Motorcycle Ass’n v. Superior Court*, 20 Cal.3d 578 (1978).

IPI Civil (2011) No. B45.03.A, Comment. IPI comment two said:

> In *Bofman*, a plaintiff was able to obtain reversal of a verdict because the jury was not properly instructed to account for the negligence of a settled nonparty. While *Ready v. United/Goedecke Services, Inc.*, 232 Ill. 2d 369 (2008) held that the percentage fault of a defendant who settled is not part of the calculation under 735 ILCS 5/2-1117, that case did not reduce the vitality of *Bofman* or *Smith*. If the jury hears evidence to suggest fault on the part of settled parties and if contributory negligence is claimed, the settled parties should be listed on the verdict form to correctly determine the percentage contributory fault of the plaintiff. The fault of the settling parties, however, should be disregarded for purposes of the 2-1117 calculation.

IPI Civil (2011) No. B45.03.A, Comment.

The court determined that these comments were inconsistent with the holding in *Ready*. Id. Though *Ramirez* did not set a precedent for disallowing nonparty defendants from jury apportionment forms, the dicta from this case indicates that the courts would look to such arguments unfavorably in the aftermath of *Ready*.
III. CURRENT ISSUES WITH THE OPERATION OF 2-1117

Those who take issue with the current operation of 2-1117 fall into two distinct camps. The first group takes issue for philosophical reasons. They criticize the statute’s current version for being unfair to minimally culpable tortfeasors. They believe that the section’s current iteration is fundamentally flawed and therefore must be amended in the interests of fairness. The second group takes accepts section 2-1117’s current iteration. However, they believe that the current jury forms do not accurately reflect the operation of the statute as interpreted under Ready. Thus, this second group advocates for updating the pattern jury instructions regarding the apportionment of contributory fault.

A. Overpayment by minimally liable parties

The biggest issue with the operation of 2-1117 is that it does not calculate damages based on the total respective fault of each tortfeasor, but rather it calculates damages based upon the statutory fiction of “common liability.” There are some safeguards in place; Illinois currently provides for reductions to damages paid by a single tortfeasor in lawsuits involving multiple joint and several tortfeasor defendants in the form of contribution set-offs. If a tortfeasor settles and obtains a good-faith finding, the non-settling tortfeasor may be entitled to a set-off against judgment in the amount paid by the settling party. 740 ILCS 100/2(c). The non-settling tortfeasor may receive this set-off even where the resulting judgment for plaintiff is reduced to zero. Pasquale v. Speed Products Engineering, 166 Ill. 2d 337 (1995). Though set-offs lessen the total amount that a minimally culpable tortfeasor would pay to the plaintiff, they are not based on actual proportionate fault. Therefore, these set-offs do nothing to remedy Section 2-1117’s biggest issue: when minimally culpable tortfeasors pay a disproportionate amount of the plaintiff’s damages.

The outcomes of Ready and Ramirez can greatly increase the potential exposure of minimally culpable defendants. To illustrate this concept, assume that a plaintiff obtains verdict against four defendants: his employer and defendant 1, 2, and 3. The total verdict award is $1,000,000. Of that verdict, $100,000 is awarded for medical bills and $900,000 for non-medical damages. Prior to the trial, defendant number 3 settles with the plaintiff for $100,000. Additionally, the employer’s workers’ compensation lien of $200,000 is waived. During the trial, the evidence reveals that the actual proportionate fault for plaintiff’s injuries goes as follows:

<table>
<thead>
<tr>
<th>Plaintiff’s Employer</th>
<th>50%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Plaintiff</td>
<td>0%</td>
</tr>
<tr>
<td>Defendant 1</td>
<td>5%</td>
</tr>
<tr>
<td>Defendant 2</td>
<td>15%</td>
</tr>
<tr>
<td>Defendant 3</td>
<td>30%</td>
</tr>
</tbody>
</table>
Under the old 1986 version of section 2-1117, defendants 1 and 2 and 3 are jointly and severally liable for the $100,000 of medical bills. Additionally, the 1986 version allowed the jury to consider the plaintiff’s employer for fault apportionment purposes. As such, each party’s share of the damages would be as follows:

<table>
<thead>
<tr>
<th>Plaintiff’s Employer</th>
<th>$200,000 (would not be liable for the additional $250,000 because the <em>Kotecki</em> cap limits liability to their WC payout amount)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Plaintiff</td>
<td>$0</td>
</tr>
<tr>
<td>Defendant 1</td>
<td>$45,000</td>
</tr>
<tr>
<td>Defendant 2</td>
<td>$135,000</td>
</tr>
<tr>
<td>Defendant 3</td>
<td>$100,000 (would not be liable for the additional $170,000 because they reached the $100,000 settlement with plaintiff)</td>
</tr>
</tbody>
</table>

**Plaintiff’s Total Award** | **$480,000**

In the above example, Defendant 1’s relative fault would not meet 2-1117’s 25 percent threshold for joint and several liability. The same is true for Defendant 2. As such, each would be only severally liable to pay their proportionate share of the non-medical damages: $45,000 and $135,000 respectively. Note also that although plaintiff’s employer caused $450,000 worth of plaintiff’s damages, *Kotecki* caps the employer’s liability at their $200,000 WC liability. Similarly, Defendant 3 pays $100,000 instead of $270,000 due to their settlement agreement with the plaintiff. In this scenario, the plaintiff recovers about half of their non-medical damages. This scenario is the most honest and fair to the defendants as each pays either their settlement amount or their a true proportionate share of the actual collective fault. However, this same scenario does compensate plaintiff for the full amount of her injuries, and thus the plaintiff is not “made whole” again.
Under the current version of 2-1117, though the plaintiff’s employer is responsible for 50 percent of the actual collective fault, a jury could not consider that fault during apportionment. With the employer’s fault excluded, the remaining fault is adjusted as follows:

<table>
<thead>
<tr>
<th>Plaintiff’s Employer</th>
<th>0% (barred from consideration)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Plaintiff</td>
<td>0%</td>
</tr>
<tr>
<td>Defendant 1</td>
<td>10% (versus 5% actual contribution)</td>
</tr>
<tr>
<td>Defendant 2</td>
<td>30% (versus 10% actual contribution)</td>
</tr>
<tr>
<td>Defendant 3</td>
<td>60% (versus 30% actual contribution)</td>
</tr>
</tbody>
</table>

Again, all three defendants remain jointly and severally liable for the $100,000 in medical damages. However, the adjusted fault apportionment greatly alters each defendant’s \textit{pro rata} share of the $700,000 of common liability ($900,000-$200,000 from employer’s WC set-off):

<table>
<thead>
<tr>
<th>Plaintiff’s Employer</th>
<th>$200,000 (the amount of their WC lien)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Plaintiff</td>
<td>$0</td>
</tr>
<tr>
<td>Defendant 1</td>
<td>$70,000 - several liability ONLY</td>
</tr>
<tr>
<td>Defendant 2</td>
<td>$210,000 - j&amp;s liable</td>
</tr>
<tr>
<td>Defendant 3</td>
<td>$100,000 (not liable for the additional $320,000 due)</td>
</tr>
<tr>
<td><strong>Plaintiff’s Total Award</strong></td>
<td><strong>$580,000</strong></td>
</tr>
</tbody>
</table>

With the exception of settling Defendant 3, the current version of 2-1117 nearly doubles each defendant’s \textit{pro rata} share of the common liability despite the fact each defendant’s actual proportionate contribution to plaintiff’s injuries remains unchanged.
Adding the holding of *Ready* creates an even larger disparity between a defendant’s actual proportionate fault and the amount their *pro rata* share. Since *Ready* forbids a jury from considering the relative fault of settling tortfeasors, the fault is apportioned as follows:

<table>
<thead>
<tr>
<th>Plaintiff’s Employer</th>
<th>0% (barred by current version of 2-1117)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Plaintiff</td>
<td>0%</td>
</tr>
<tr>
<td>Defendant 1</td>
<td>25%</td>
</tr>
<tr>
<td>Defendant 2</td>
<td>75%</td>
</tr>
<tr>
<td>Defendant 3</td>
<td>0% (settling tortfeasor, barred by <em>Ready</em>)</td>
</tr>
</tbody>
</table>

With Defendant 3 settled, defendants 1 and 2 are jointly and severally liable for the $100,000 in medical bills. After applying the employer’s WC and Defendant 3’s set-offs to the remaining $900,000 in non-medical expenses ($900,000-$200,000-$100,000), the remaining $600,000 of common liability is distributed as follows:

<table>
<thead>
<tr>
<th>Plaintiff’s Employer</th>
<th>$200,000 - (due to their WC lien)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Plaintiff</td>
<td>$0</td>
</tr>
<tr>
<td>Defendant 1</td>
<td>$150,000 - j&amp;s liable with right of contribution</td>
</tr>
<tr>
<td>Defendant 2</td>
<td>$450,000 - j&amp;s liable</td>
</tr>
<tr>
<td>Defendant 3</td>
<td>$100,000 - (due to their $100,000 settlement)</td>
</tr>
</tbody>
</table>

The above shows how the current interpretation of 2-1117 can force minimally culpable defendants to pay *pro rata* damages wildly in excess of their actual proportionate contributive negligence. In this scenario, Defendant 2 - with 10 percent actual culpability - pays as much as a 50 percent culpable plaintiff’s employer would pay under the Section’s 1986 iteration. Both Defendant 1 and Defendant 2 could be legally obligated to satisfy the entire judgment. Even with the right of contribution, a defendant minimally at fault for plaintiff’s injuries could end up paying far more than his or her fair share of the damages. The advantage to this scenario is that the plaintiff recovers the full amount of their damages. This disadvantage is that minimally culpable tortfeasors swallow a disproportionate burden of the common liability. Considering the Contribution Act’s equitable origins, it is especially troublesome that, under section 2-1117’s current iteration, minimally culpable defendants can be made to bear the brunt of the costs for a plaintiff’s injuries.
B. Jury Verdict Form Issues

Currently, two jury forms are used in contribution actions: form 600.14 and B45.03.A. Despite the decisions in Ready, Ramirez, and Jones, these verdict forms, on their face, continue to allow the jury to consider nonparty tortfeasors in the apportionment of fault. In their current format, these jury forms risk confusing the jury into believing that they may rightfully consider non-parties during fault apportionment.

IV. PROPOSED SOLUTIONS / EMERGING ISSUES WITH SECTION 2-1117

As previously stated, persons tend to take issue with Section 2-1117 for two reasons; people either fundamentally oppose its current iteration or they believe that the current jury forms fail to accurately portray the laws of contribution actions after Ready. Thus, these groups have each proposed a different class of potential solution: the first group advocates that Section 2-1117 be amended, while the second group proposes alterations to the current jury verdict forms.

A. Potential Amendments to Section 2-1117

Various members of the Illinois legislature have proposed that Section 2-1117 be amended again to correct the issues of minimally culpable tortfeasors accepting liability for disproportionate amounts of the damages. There exists three main versions of these proposed legislative amendments.

Some legislative members have proposed reverting back to the Section’s 1986 version.

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 except the plaintiff’s employer, 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 defendants who could have been sued by the plaintiff except the plaintiff’s employer, shall be jointly and severally liable for all other damages.

H.B. 2439, 99th Gen. Assemb. (Ill. 2015). Rep. Dwight Kay proposed this reversion on February 17, 2015 and the bill’s last activity occurred in being re-referred to the Rules Committee on March 27, 2015. However, it is unlikely that this amendment would go through, given that the legislature specifically amended the 1986 in favor of the current iteration.

Another proposed amendment would both prevent the court from instructing the jury of the consequences of their fault apportionment findings and allow the fact finder an unrestricted ability to consider all parties during fault apportionment:
Sec. 2-1107.1. Jury instruction in tort actions. In all actions on account of bodily injury or death or physical damage to property based on negligence, or product liability based on strict tort liability, the court shall NOT instruct the jury of the consequence of any findings of fault of any plaintiff or defendant pursuant to section 2-1116 or 2-1117 in writing that the defendant shall be found not liable if the jury finds that the contributory fault of the plaintiff is more than 50% of the proximate cause of the injury or damage for which recovery is sought.

Sec. 2-1117. Joint liability. 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 proximate cause of the injury or damage for which recovery is sought by the plaintiff total fault attributable to the plaintiff, the defendants sued by the plaintiff, and any third party defendant except the plaintiff’s employer, 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 proximate cause of the injury or damage for which recovery is sought by the plaintiff total fault attributable to the plaintiff, the defendants sued by the plaintiff, and any third party defendants except the plaintiff’s employer, shall be jointly and severally liable for all other damages.


This proposed bill would allow fact finders the unrestricted ability to consider any and all culpable parties during fault apportionment. Furthermore, since the bill would prevent the court from instructing the fact finders as to which parties to consider while apportioning liability, the bill would allow the jury to decide which tortfeasors to include during pro rata fault apportionment. It is likely that this bill would have the effect of making sure that multiple tortfeasors would each pay damages in proportion to their own individual actual contributive fault. However, this bill also seems unlikely to pass; it has been introduced a total of four times and none of those introductions have made it past the introductory phase.

The third proposed amended version of the bill goes a step further. Under this version, the jury could consider any and all parties for fault apportionment purposes. Additionally, a joint tortfeasors would be only severally liable if his or her fault was less than 50 percent of the total fault of all tortfeasors:

Sec. 2-1107.1. Jury instruction in tort actions. In all actions on account of bodily injury or death or physical damage to property based on negligence, or product liability based on strict tort liability, the court shall instruct the jury in writing
that (a) the defendant shall be found not liable if the jury finds that the contributory fault of the plaintiff is more than 50% of the proximate cause of the injury or damage for which recovery is sought and (b) if the defendant is found liable, (I) the defendant is jointly and severally liable for the plaintiff’s past and future medical and medically related expenses regardless of the fault attributed to the defendant and (II) the defendant is jointly and severally liable for the plaintiff’s other damages if the jury finds that the fault of the defendant is 50% or more of the proximate cause.

Sec. 2-1117. Joint liability. 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 50% 25% of the total fault of all tortfeasors, including but not limited to the plaintiff’s employer, nonparties, entities that have settled, or any other person that the trier of fact finds was at fault and a proximate cause of the injury or damage for which recovery is sought by attributable to the plaintiff, the defendants sued by the plaintiff, and any third party defendant except the plaintiff’s employer, shall be severally liable for all other damages. Any defendant whose fault, as determined by the trier of fact, is 50% 25% or greater of the total fault of all tortfeasors, including but not limited to plaintiff’s employer, nonparties, entities that have settled, or any other person that the trier of fact finds was at fault and a proximate cause of the injury or damage for which recovery is sought by attributable to the plaintiff, the defendants sued by the plaintiff, and any third party defendants except the plaintiff’s employer, shall be jointly and severally liable for all other damages.


Though introduced several times, this amendment has yet to make any significant progress past the introductory phase. Despite the fact that this and other amendments discussed herein have not gained any significant traction, it is important to note that proposed amendments to section 2-1117 have cropped up with increasing frequency over the past two years. Thus, some members of the legislature clearly view section 2-1117 as ripe for legislative change, and attorneys should keep their eyes out for future potential amendments to this section.

**B. Alterations to jury verdict forms**

Even if section 2-1117 remains in its current iteration, numerous persons have argued that the current jury forms for contribution must be changed in order to accurately reflect the holding in *Ready*. Recently, the Hon. Donald J. O’Brien Jr. and Cadence Tuttle published an article in the *Illinois Bar Journal* proposing that verdict forms B45.03.A and 600.14 be changed for two
reasons. First, both forms currently include “other” as an entity for the jury to attribute fault to, which the authors saw as impermissibly allowing a jury to attribute fault to a non-party. Hon. Donald J. O’Brien Jr. & Cadence Tuttle, *A Proposal to Revise Verdict Forms for Contribution and Apportionment*, 104 Ill. B.J. 46, March 2016. Second, the author’s believed that verdict form 600.14’s inclusion of third-party defendants could confuse a jury into who is liable to whom. *Id.* These authors proposed removing “other” and “third party defendants” from the parts of the form that list the persons who caused plaintiff’s injuries. The authors’ proposed changes are sound and would help the jury better understand that they could not consider non-parties during fault apportionment.
Steve R. Ayres  
- Of Counsel

Steve has more than 28 years of experience in a wide array of civil litigation matters, ranging from premises liability and vehicular accidents to complex construction defect and bodily injury cases, products liability cases, environmental and toxic tort claims, as well as related insurance coverage disputes. Steve has handled thousands of matters and tried many to verdict.

Steve was formerly a partner at Baker & McKenzie, and later a named partner at Cheely, O’Flaherty & Ayres prior to joining Heyl Royster in the firm’s Chicago office.

Steve has been a frequent speaker at Illinois CLE programs on construction litigation, mold litigation, and insurance coverage issues. He was named to the 2012 Illinois Super Lawyers list.

**Significant Cases**
- **Swann & Weiskopf v. Meed Associates** - Persuaded Illinois Appellate Court, First District, to affirm trial court’s summary judgment dismissing claim against engineering firm which had designed storm water retention system, as being untimely under Illinois Construction Statute of Limitations.
- **County of DuPage v. Hellmuth, Obata & Kassabaum**, 1996 WL 33413358 (Ill. App. 1996) - Represented general contractor in the highly publicized “sick building” case involving the new DuPage County Courthouse, with a defense verdict following a month long jury trial, which was upheld on appeal.
- **Capitol Indemnity v. Elston Self Service Wholesale Groceries** (7th Cir. 2009) - Persuaded 7th Circuit to affirm summary judgment for insured-client holding that alleged sale of counterfeit cigarettes falls within advertising injury coverage and not excluded by “prior acts” exclusion in policy.
- **Great American Insurance Co. v. Helwig**, 419 F. Supp. 2d 1017 (N.D. Ill. 2005) - Obtained summary judgment for insured for underground pollution of well water despite absolute pollution exclusion by arguing that that exclusion was not part of the personal injury or advertising coverage of the insured’s policy.
- **Sycamore Industrial Park Ass’n v. Ericsson**, No. 08-1118 (7th Cir. 2008) - Persuaded 7th Circuit to uphold summary judgment for seller of industrial park alleged to be liable under CERCLA and RCRA for asbestos in the buildings.
- **Farfan v. Commonwealth Edison**, No. 1-10-0502 (Ill. App. 2011) - Obtained summary judgment for utility in electrocution death case which was upheld on appeal in the Illinois Appellate Court, First District.

**Publications**

**Public Speaking**
- “Common Types of Insurance Coverage Disputes” National Business Institute Teleconference (2009)
- “Sick Building Syndrome and the DuPage County Courthouse” Chicago Bar Association (1994)
Professional Recognition

- Selected as a Leading Lawyer in Illinois in the area of Construction Law; Insurance, Insurance Coverage & Reinsurance Law; and Toxic Torts Defense Law. Only five percent of lawyers in the state are named as Leading Lawyers.
- Named to the Illinois Super Lawyers list (2012). The Super Lawyers selection process is based on peer recognition and professional achievement. Only five percent of the lawyers in each state earn this designation.

Professional Associations

- Builders Association of Chicago/Association of General Contractors
- Illinois State Bar Association
- Chicago Bar Association

Court Admissions

- State Courts of Illinois
- United States District Court, Northern District of Illinois
- United States Court of Appeals, Seventh Circuit
- United States Supreme Court

Education

- Juris Doctor, University of Illinois College of Law, 1984
- Bachelor of Arts (cum laude), De Pauw University, 1981