THE IDC MONOGRAPH:

APPORTIONMENT AND THE MINIMALLY CULPABLE DEFENDANT – 2-1117 AFTER *UNZICKER*

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Introduction

In 1986, the Tort Reform Act[1] significantly modified Illinois common law relative to joint and several liability. As a part of that act, 735 ILCS 5/2-1117, hereinafter (2-1117) was added to the Illinois Code of Civil Procedure. That section states as follows:

> 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 the 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 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 who could have been sued by the plaintiff, shall be jointly and severally liable for all other damages.

This section of the Code of Civil Procedure was left unaltered until the Illinois legislature passed the Civil Justice Reform Amendments of 1995,[2] which abandoned the 25% rule (with one exception) in favor of several liability. In 1997, the entire 1995 act was declared void by the Illinois Supreme Court in *Best v. Taylor Mach. Works*.[3] In that opinion, the Supreme Court held that the amended 2-1117 was special legislation and therefore unconstitutional.[4] Consequently, the original 1986 version of the section was resurrected.

The importance of this section in determining the potential exposure of any defendant in multiple defendant litigation is undeniable. Indeed, long before any litigation is filed, the determination of the settlement value of any claim involving multiple potentially culpable parties depends largely on the formula as written in that section. As 2-1117 is in derogation of the common law, the passage of that provision in 1986 raised many questions as to precisely how the 2-1117 formula would operate.[5]

There has been a regrettable dearth of appellate law interpreting section 2-1117 in the almost 17 years since the passage of that Act. The lack of guidance from our courts of review has left litigators without answers to a number of critical questions regarding the effect, and operation of 2-1117. One paramount question has always been whether the fault of defendants and third party defendants who have settled with the plaintiff prior to trial should be included in the 2-1117 formula. Equally important is the related question of whether the fault of a defendant who has been involuntarily dismissed should be included in the 2-1117 equation. Regrettably, these questions are still largely unanswered.

Also unanswered are questions regarding the interplay of 2-1117 and the Illinois Pattern Jury Instructions. The I.P.I. sample calculations are at a minimum less than illuminating, and at most extremely confusing.

Other still unresolved issues include the applicability of 2-1117 to certain statutory causes of action and precisely whose fault is to be considered in the apportionment equation.

As if those issues were not enough with which to contend, questions regarding the constitutionality of 2-1117 have been looming in the background. The constitutionality of

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The authors would like to express their appreciation to **Michael DeSanto** of law firm of *Busse & Busse, P.C.* for his valuable assistance in preparing this article.

the 1986 version of 2-1117 has been a target of the plaintiff's bar since at least 1995. The Supreme Court's decision in *Best v. Taylor Mach. Works,*[6] holding that the 1995 version of 2-1117 was unconstitutional special legislation, gave rise to the argument that the 1986 version was unconstitutional for the very same reasons.

Until recently, the question of whether a plaintiff's employer is a "third party defendant who could have been sued by the plaintiff" for purposes of apportionment remained unanswered. That issue has caused much confusion in Illinois trial courts. In 1997, the Fifth District Appellate Court in *Lilly v. Marcal Rope & Rigging,*[7] held that a third party defendant/employer was not a "third party defendant who could have been sued by the plaintiff" for purposes of 2-1117 apportionment.

This issue was recently decided by the Supreme Court in *Unzicker v. Kraft Food Ingredients Corp.*[8] The Supreme Court's reasoning answered several questions regarding the operation of 2-1117. Many important questions remained unanswered.

This article will analyze in detail the issues and arguments raised in the Supreme Court's opinion in *Unzicker* and will explore how the decision impacts on the mechanics of the 2-1117 equation. The article will also address other appellate court decisions and certain unanswered questions regarding the operation of 2-1117. Finally, the article will address the interplay between 2-1117 apportionment and the I.P.I verdict forms.

Unzicker

Marlin Unzicker was injured on July 20, 1991, at defendant Kraft's plant in Champaign. At the time of his injury, Unzicker was employed by Nogle & Black Mechanical Inc. (Nogle). Unzicker was standing on a manlift welding flanges to a pipe. Unzicker's foreman attempted to deliver equipment to him while standing in the basket of a forklift. The forklift collided with the manlift on which Unzicker was standing, causing Unzicker's injuries. The forklift was owned by Kraft but was operated by another Nogle employee.

Unzicker applied for and received workers' compensation benefits. He and his wife then filed suit against Kraft, alleging negligence and violations of the Structural Work Act.[9] Kraft filed a third party complaint for contribution against Nogle. At the conclusion of the trial, the jury returned a verdict against the plaintiffs on the Structural Work Act count, but found in favor of the plaintiffs on the negligence counts. The jury awarded $91,400 for medical and medically related expenses and $788,000 for non-medical damages for a total of $879,000.

The jury found Nogle 99% liable for Unzicker's injuries and that only one percent of the liability was attributable to Kraft. The trial court then applied Section 2-1117 of the Illinois Code of Civil Procedure and apportioned the damages awarded in the verdict accordingly.

One can readily appreciate the effect the 2-1117 apportionment had on the plaintiffs' recovery. In what can only be termed an understatement, the Supreme Court noted that the apportionment rendered the verdict "somewhat of a loss for plaintiffs."[10] The application of apportionment under 2-1117 rendered Kraft severally liable for only one percent of the plaintiff's non-medical damages. Nogle, on the other hand, was only liable for contribution in an amount equal to its workers' compensation liability in accordance with *Kotecki v. Cyclops Welding Corp.*[11] The end result was that Kraft and Nogle were jointly and severally liable for the $91,400 of Unzicker's past and future medical expenses and Kraft was severally liable for only one percent of the plaintiff's non-medical damages, or $7,880.

The plaintiffs filed a post trial motion arguing that the trial court erred in applying 2-1117 in accordance with the Fifth District Appellate Court's holding in *Lilly.*[12] The *Lilly* court held that a plaintiff's employer cannot be included in the 2-1117 equation because the Workers' Compensation Act gives the employer immunity from suit.[13] The Fifth District relied on the wording of Section 5(a) of the Workers' Compensation Act, which provides that, "[N]o common law or statutory right to recover damages from the employer . . . for injury or death sustained by any employee . . . other than the compensation herein provided, is available to any employee who is covered by the provisions of this Act."[14] Thus, the *Lilly* court reasoned that a plaintiff's employer is not a party who "could have been sued by the plaintiff." Therefore, the employer is not a "third party defendant who could have been sued by the plaintiff" for 2-1117 purposes.

The *Unzicker* court rejected the *Lilly* court's interpretation and held that the fault of a plaintiff's employer can indeed be considered for 2-1117 purposes. In so holding, the Supreme Court relied on the language in its prior decision of *Doyle v. Rhodes.*[15] In that case, the Supreme Court held that the Contribution Act applies to third party defendant employers. There, the court noted:

> The Workers' Compensation Act provides employers with a defense against any action that may be asserted against them in tort, but that defense is an affirmative one whose elements – the employment relationship and the nexus between the employment and the injury – must be established by the employer, and which is

> waived if not asserted by him in the trial court. (Citations.) Thus, the plaintiff may recover a tort judgment against his employer for a work-related injury if the employer fails to raise the defense the Workers' Compensation Act gives him (citation), and on occasion the employer may choose not to raise it in the hope that the plaintiff will be unable to prove negligence to a jury's satisfaction. The potential for tort liability exists until the defense is established. As this court has recently decided in interpreting the phrase of the Contribution Act at issue here, "liability" is determined at the time of the injury out of which the right to contribution arises, and not at the time the action for contribution is brought (citations). At the time of an injury for which an employer's negligence is partly responsible, the employer is in fact "subject to liability in tort" to his employee, although that liability can be defeated depending on the response he chooses to make to his employee's claim in the event the employee decides to sue in tort. [16]

In specifically overruling *Lilly*, the *Unzicker* court addressed many of arguments raised by the *Lilly* court. One of the key arguments upon which the *Lilly* court relied was that the legislature had been aware of the Supreme Court's decision in *Doyle v Rhodes* when it enacted 2-1117. Therefore, the *Lilly* court reasoned that if the legislature had intended for employers to be included in 2-1117, it would have used the phrase, "subject to liability in tort" because that phrase had already been construed to include employers.[17]

The *Lilly* court held that by using the phrase, "could have been sued," the legislature did not mean to include merely theoretical actions. The *Lilly* court reasoned that such a construction could include a plaintiff's wife, his state, his God, or his pet iguana because the plaintiff could theoretically file a piece of paper naming such persons, animals, or entities as defendants and such an interpretation of this section would be absurd.[18]

The Supreme Court rejected *"Lilly's* somewhat fanciful hypothesis of legislative intent."[19] Regarding the issue of legislative intent, the *Unzicker* court held:

> [W]hen the legislature enacted section 2-1117, it was aware of our construction of the phrase "subject to liability in tort" in the Contribution Act. We held that employers, despite their immunity provided by the Workers' Compensation Act, are still subject to liability in tort because the protection of the Workers' Compensation Act is in the nature of an affirmative defense that must be raised in the trial court if the plaintiff brings a suit. (Citations omitted) . . . In section 2-1117, the legislature referred to a division of fault among the plaintiff, the defendants sued by the plaintiff, and any third-party defendants who could have been sued by the plaintiff. Under our analyses in *Doyle*, *Braye*, and *Geise*, a plaintiff's employer who is a third-party defendant is a party who "could have been sued by the plaintiff."[20]

The Supreme Court concluded that if the legislature had intended to use language that would exclude employers, it simply would have so stated. The Supreme Court reasoned that it would be difficult to believe that the legislature would not have chosen a phrase that explicitly excluded employers if it so desired.

Relative to *Lilly's* fears of a flood of "iguana litigation," the Supreme Court noted:

> 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. Unless defendants in tort suits begin filing contribution claims against the plaintiff's pets, *Lilly*'s fears of iguana litigation will never be realized.[21]

The Unzickers raised alternative arguments in support of their interpretation of 2-1117. They argued that 2-1117 conflicted with Sections 3 and 4 of the Contribution Act. Those sections state as follows:

> Amount of Contribution. The pro rata share of each tortfeasor shall be determined in accordance with his relative culpability. However, no person shall be required to contribute to one seeking contribution an amount greater than his pro rata share unless the obligation of one or more of the joint tortfeasors is uncollectible. In that event, the remaining tortfeasors shall share the unpaid portions of the uncollectible obligation in accordance with their pro rata liability. If equity requires, the collective liability of some as a group shall constitute a single share.[22]

> Rights of Plaintiff Unaffected. A plaintiff's rights to recover the full amount of his judgment from any one or more defendants subject to liability in tort for the

same injury to person or property, or for wrongful death is not affected by the provisions of the Act.[23]

The plaintiffs argued that these two sections recognized a plaintiff's right to recover all damages from any responsible defendant. On the other hand, 2-1117 eliminates a plaintiff's ability to recover the full amount of non-medical damages from any defendant found less than 25% responsible for the plaintiff's injuries.

"The Contribution Act merely allowed a defendant who has paid damages in excess of his or her proportionate share of fault the opportunity to seek contribution under the act."

The Supreme Court held there was no conflict between the two statutes. The court stated that Section 4 of the Contribution Act merely clarified that nothing in the Contribution Act affects a plaintiff's right to recover the full amount of damages from any one or more defendants. Section 2-1117 was not a part of the Contribution Act; therefore, the modification of joint and several liability that 2-1117 provides does not conflict with Section 4 of the Contribution Act.

As to Section 3, the court held that 2-1117 comes into play before the Contribution Act is applied to determine liability. The Contribution Act merely allowed a defendant who has paid damages in excess of his or her proportionate share of fault the opportunity to seek contribution under the act. Therefore, the Supreme Court reasoned that Section 3, which explains how the amount of contribution is determined when one or more of the tortfeasors is insolvent, does not conflict with 2-1117.

The plaintiffs raised numerous constitutional challenges to 2-1117. They initially argued that 2-1117 was unconstitutional as being an arbitrary abolition of a common law remedy, relying on Article 1, Section 12 of the Illinois Constitution. Section 12 provides that: "[E]very person shall find a certain remedy in the laws for all injuries and wrongs for which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely and promptly."[24]

The *Unzicker* court stated:

> [T]his constitutional provision is merely an expression of philosophy and not a mandate that a certain remedy be provided in any specific form . . . Here, [plaintiff] received the benefit of the no-fault workers' compensation system when he applied for and received his benefits.[25]

The plaintiffs also argued that 2-1117 violated the special legislation[26] and the equal protection clauses[27] of the Illinois Constitution. The plaintiffs argued that the legislature created an arbitrary and invalid classification when it retained full joint and several liability for bodily injury or property damage only in toxic tort and medical malpractice cases. The Supreme Court noted that the reason for these classifications was not apparent from the face of the statute. Consequently, the court undertook a comprehensive review of the legislative history of Public Act 84-1431 which added sections 2-1117 and 2-1118 to the Code of Civil Procedure.

Using a "rational basis test," the court found that one of the primary concerns in passing the act was the accessibility and affordability of certain lines of insurance. The court also found that the legislature's recent passage of malpractice legislation was a rational basis for preserving joint and several liability in medical malpractice cases.

As to the toxic tort cases, the court reasoned that the legislature apparently believed that the numerous defendants typically involved in toxic tort cases would make the abolition of joint and several liability unduly burdensome on toxic tort plaintiffs. To modify joint and several liability in this area could require a plaintiff to file suit against scores of defendants in order to have a chance at complete recovery.

The Supreme Court likewise rejected the plaintiff's argument that 2-1117 was unconstitutional under the separation of powers clause of the Illinois Constitution.[28] The plaintiffs had argued that 2-1117 amounted to a mandatory arbitrary legislative remittitur, thus invading on the province of the jury to exercise its discretionary powers of remittitur on a case-by-case basis. The *Unzicker* court held that 2-1117 merely determines when a defendant can be held liable for the full amount of a jury's verdict and when a defendant's liability is limited to an amount equal to his or her percentage of fault. It does not reduce the amount of the jury's verdict.

Finally, the court rejected the plaintiffs' argument that 2-1117 violated the due process guarantee of the Illinois Constitution[29] because it was "vague, indefinite, and uncertain,

that persons of ordinary intelligence must guess at its meaning."[30] The Supreme Court noted that differing interpretations of 2-1117 do not necessarily render the statute unconstitutionally vague.

Questions Answered by *Unzicker*

The 39 page *Unzicker* slip opinion has provided us with long awaited answers to certain questions regarding 2-1117. That section has now survived the constitutional challenges that were presented to the Illinois Supreme Court. The opinion makes it clear that for purposes of apportionment, a third party defendant employer is a person that "could have been sued by the plaintiff."

Questions Unresolved by *Unzicker*

Unfortunately, *Unzicker* left a number of questions unresolved. One issue that was never fully addressed in the Supreme Court's opinion is whether 2-1117 constitutes an affirmative defense that must be pleaded. The trial court ruled that plaintiffs had waived any argument regarding the application of 2-1117 because they had failed to strike Kraft's affirmative defense regarding apportionment.[31] The trial court also noted that if the issue had not been waived by the plaintiffs, it would have been constrained to follow the holding in *Lilly*.[32]

In *Unzicker*, the Fourth District Appellate Court held that the 2-1117 issue had not been waived because 2-1117 does not have to be raised as an affirmative defense. The Fourth District held that 2-1117 can be raised at any time as it operates to allocate damages according to the jury's verdict. Accordingly, the Fourth District held that motions relative to 2-1117 issues can be filed after the entry of the verdict.[33]

This issue was never fully addressed by the Supreme Court. Nevertheless, the Fourth District's logic appears to be sound.

The Fourth District court disagreed that 2-1117 issues must be raised by affirmative defense and stated:

> [A]n affirmative defense is one that gives color to the claim of an opposing party and then asserts new matter by which the apparent right is defeated. *Zook v. Norfolk & Western Ry. Co.*, 268 Ill. App. 3d 157, 169, 642 N.E.2d 1348, 1357, 205 Ill. Dec. 231 (1994); *see also LaFever v. Kemlite Co.*, 185 Ill. 2d 380, 405, 706 N.E.2d 441, 454, 235 Ill. Dec. 886 (1998) (proper to raise compensation lien in a posttrial motion and to waive the lien after the jury verdict). That is not how section 2-1117 operates. Section 2-1117 operates as a matter of law to allocate damages according to the verdict of the jury. No facts or other affirmative matters are required to apply its provisions, so long as defendant has joined any necessary third-party defendants and the jury has determined the percentages of fault. Kraft was not required to raise section 2-1117 in an affirmative defense, and Unzicker cannot be faulted for failure to move to strike such an affirmative defense. Both parties were entitled to address the issue in motions filed after the verdict was entered.[34]

Even though the appellate court held that 2-1117 need not be pleaded as an affirmative defense, the wary practitioner may consider raising it anyway. If a trial court grants a motion to strike the affirmative defense as being unnecessary, the record is protected until such time as the Illinois Supreme Court rules on this specific issue.

Apportionment and the Settling Defendant

One of the most important questions that was left unanswered by the Supreme Court's opinion is whether the fault of a defendant who enters into a pre-trial settlement with the plaintiff can be factored for 2-1117 purposes. There appears to be a split in authority on this question.[35] The issue was raised before the Supreme Court once, but the Supreme Court did not definitively rule on the question.

In *Lannom v. Kosco,*[36] a county employee was injured while working at the side of a road. He sued Kosco, the driver of the car that hit him. Kosco filed a third-party complaint for contribution against the County of Williamson, the plaintiff's employer. Kosco alleged that the County of Williamson was guilty of willful and wanton conduct because the county's truck was parked on the wrong side of the road without hazard lights or any warning device.

On the day of the trial, the County of Williamson agreed to waive its workers' compensation lien and moved for a dismissal, which was granted. Kosco opposed the motion for a number of reasons.

The primary issue presented to the Illinois Supreme Court was whether a third-party defendant/employer who waives its workers' compensation lien is entitled to a dismissal. The Supreme Court answered in the affirmative.

At the very end of the opinion, the *Lannom* court briefly addressed the 2-1117 issue in two short paragraphs. Kosco had argued that the dismissal of the county would obstruct the purpose of 2-1117 because it would preclude the jury from apportioning any fault to the county due to its absence from the litigation. Kosco therefore argued that he would be denied his right to obtain an apportionment of fault of 25% or less, "and the resulting opportunity to be only severally liable for some of the plaintiff's damages."[37]

Addressing the apportionment issue, the court stated:

> [W]e note, however, that this dilemma arises whenever a defendant or third party settles with the plaintiff or is dismissed from an action for any reason. Section 2-1117 was not intended to prohibit the dismissal of a defendant or third party from an action, where such dismissal is otherwise warranted. Moreover, the defendant's rights under section 2-1117 are not abolished simply because a defendant or third party settles or is dismissed from an action. The jury may still assess the remaining defendants' relative culpability and if the degree of fault attributable to one or more defendants is less than 25%, those defendants' liability is several only.[38]

"Kosco alleged that the County of Williamson was guilty of willful and wanton conduct because the county's truck was parked on the wrong side of the road without hazard lights or any warning device."

Thus, the Supreme Court held that when a defendant or third party defendant enters into a settlement agreement with a plaintiff, it does not "abolish" the remaining defendants' 2-1117 rights.[39] It remains unclear as to whether the "remaining defendants' relative culpability" include the settling defendant. If, on the other hand, the court is saying that the "remaining defendants' relative culpability" does not include the culpability of a settling defendant, a problem arises.

Consider the situation where the plaintiff sues defendants A, B, C and D. Defendant A is, in reality, 75% the cause of the plaintiff's injuries and the plaintiff has no comparative negligence. Defendant A settles with the plaintiff and is dismissed from the litigation. If the fault of the settling defendant is never factored by the court, the court may be left to assess 100% of the fault against three minimally culpable defendants. As the *Lannom* decision does not prevent the jury from fully apportioning fault, this issue may be moot.

The Fifth District Appellate Court has applied *Lannom* twice and seems to have interpreted it differently in each decision.

In *Banovz v. Rantanen*,[40] the Fifth District indicated that including a settling defendant's fault in the apportionment was perfectly acceptable. In *Banovz*, the plaintiffs were passengers in a car driven by Rantanen. The plaintiffs Banovz and Seketa were injured when Rantanen's vehicle collided with a tractor-trailer truck. Both plaintiffs sued Rantanen and the driver of the tractor-trailer. They also sued Whittaker, the owner of the tractor-trailer and Whittaker's employer, Mickow Corporation. The defendants filed contribution counterclaims against each other. Judgment was entered on the jury's verdict in favor of Banovz in the amount of $1,005,120 and in favor of Seketa in the amount of $817,769. The jury found defendant Rantanen 40% at fault and the defendants Mickow Corporation and Whittaker 60% at fault.

Rantanen settled with Banovz and appealed the judgment in favor of Seketa. The primary issue on appeal was whether the pretrial "settlement agreement" that had been entered into between Seketa and Mickow was a "Mary Carter" agreement that should have been disclosed to the jury. The Fifth District answered that question in the negative. The *Banovz* court remanded the case for a trial on the issue of liability alone. In so ordering, the court commented as follows:

> On retrial, the issue of apportionment of fault pursuant to Section 2-1117 of the Code of Civil Procedure . . . between the plaintiff, Rantanen, and Mickow, may also be presented to the jury. In *Lannom v. Kosco* (citation omitted), our Supreme Court discussed the effect of a settlement agreement between one defendant and plaintiff on the apportionment of fault with respect to a remaining defendant. Our Supreme Court stated that such a settlement does not abolish the remaining defendant's right to apportionment under section 2-1117. The Supreme Court concluded that the jury may still assess the remaining defendant's relative culpability, and if the degree of fault attributable to that defendant is less than 25%, that defendant's liability is several only.[41]

Approximately one month after the *Banovz* decision, the Fifth District Appellate Court seemed to hold to the contrary. In *Blake v. Hy Ho Restaurant*,[42] the wife of a city employee brought a wrongful death action against Hy Ho Restaurant, Inc. and five other defendants for the death of her husband. Her husband was killed by methane fumes while removing grease deposits that clogged a city sewer line near two restaurants. The plaintiff alleged that the restaurant's negligent disposal and maintenance practices caused the deposits.

All of the defendants filed cross claims against each other and contribution claims against the City of Belleville

and also raised apportionment under 2-1117 in their prayer for relief.

Prior to trial, the City of Belleville settled with the plaintiff for $125,000 and agreed to waive its workers' compensation lien. Over the objection of the remaining defendants, the trial court made a good faith finding on the settlement between Belleville and the plaintiffs and ordered that all contribution and apportionment claims be dismissed. The sole issue appealed was whether the trial court erred in dismissing the third-party defendant prior to a determination of fault.

"It is the opinion of these authors that to allow a jury to allow the negligence of a settling defendant or a defendant that has been dismissed from the litigation is the better reasoned and more equitable approach."

The appellants argued that 2-1117 requires the trial court to defer the dismissal of a settling co-defendant or third-party defendant until after fault has been apportioned. In the alternative, they argued that even if the city was properly dismissed from the action, the city should be maintained as a nominal party so that the trier of fact can apportion fault among all of the tortfeasors.

The appellants further argued that the only way to achieve this apportionment of fault under 2-1117 is for the fact-finder to apportion fault among *all* alleged tortfeasors, including those who settled with the plaintiff and who are dismissed prior to trial.

The Fifth District Appellate Court rejected this argument stating, "To require that a defendant's fault be assessed despite its prior settlement with plaintiff would frustrate Illinois public policy favoring peaceful and voluntary resolutions of claims through settlement agreements."[43]

The *Blake* court noted that Section 2(c) of the Contribution Act provides that a settling tortfeasor's payment reduces the remaining defendant's liability by the dollar amount of the settlement agreement and that Section 2(d) specifically provides that the settling tortfeasor is to be discharged from all contribution to any other tortfeasor. Thus, the court held:

> [A]ppellants' argument that their respective liability should be reduced by the *pro rata* share of the dismissed defendant's liability is misdirected and erroneous. If such were the case, a nonsettling defendant would receive a double benefit. First, any judgment amount entered in favor of a plaintiff would be reduced to reflect the partial settlement. Then, potentially, the nonsettling defendants would reap an additional benefit if found less than 25% at fault because the judgment having once been reduced to reflect the settlement could be subject to less than full satisfaction under the terms of section 2-1117.[44]

The court went on to rule that the clear language of the statute itself gave the appellants no right to insist on a 2-1117 apportionment of fault which included a settling party. The court held:

> We find the statutory language of section 2-1117 to be plain and unambiguous. Section 2-1117 applies to "any defendant" and "any third party defendant who could have been sued." . . . When the City settled and was dismissed from the action, it ceased to be a defendant. The statute does not include former defendants or dismissed defendants. To read dismissed defendants into section 2-1117 and require that they be apportioned fault after their dismissal would be a gross contortion of the legislative intent.[45]

The Third District Appellate Court has addressed this issue only once and then only in *dicta.* Nevertheless, the Third District appears to be more receptive to the concept of factoring the negligence of a settling defendant and/or third-party defendant for 2-1117 purposes.

In *Alvarez v. Fred Hintze Constr.*,[46] an injured employee filed a negligence action against various contractors. Those contractors filed third-party complaints for contribution against the employer, J.S. Alberico. The plaintiff settled her claims with J.S. Alberico. Over the objections of defendants Fred Hintze Construction (Hintze) and Pleasant Knoll Joint Venture, the court dismissed the defendants' third-party complaints for contribution against Alberico.

One of the arguments raised by Hintze was that allowing Alberico's settlement with the plaintiff would preclude the jury from apportioning any fault to Alberico for 2-1117 purposes due to Alberico's absence from the litigation.

The *Alvarez* court held:

> [T]hat section 2-1117 cannot be read to preclude a finding that a settlement has been made in good faith un-

der the Contribution Act even where a nonsettling defendant claims to be less than 25% at fault. This conclusion does not necessarily deny a nonsettling defendant the potential benefit provided by section 2-1117, however. It has been suggested that the rights of a nonsettling defendant under section 2-1117 "cannot be negated simply because another tortfeasor has settled with the plaintiff." (Walsh & Doherty, "Section 2-1117: Several Liability's Effect on Settlement and Contribution," 79 Ill. B.J. 122, 125 (1991).) Walsh and Doherty posit that even where one tortfeasor has settled with the plaintiff, "[t]he jury should still be able to assess the defendant's relative culpability, and if the defendant's level of fault falls below the 25 percent threshold, its liability is several only and is not affected by the plaintiff's settlement with the other tortfeasor." Walsh & Doherty, 79 Ill. B.J. at 125.[47]

The Seventh Circuit Court of Appeals took up this issue in the 1996 decision of *Freislinger v. Emro Propane Co.*[48] In that case, the Seventh Circuit, relying on *Lannom v. Kosco* and *Blake v. Hy Ho Restaurant, Inc.*, held that, "the term 'third-party defendants who could have been sued by the plaintiff' refers to anyone who could have been sued in tort. Under the Supreme Court of Illinois' decision in *Kotecki v. Cyclops Welding Corp.* (citation omitted), this language does not include an employer protected by the workers' compensation system"[49] . . . (and) is not a party who 'could have been sued' by the plaintiff. Two years later, in *Costello v. The United States*,[50] the United States District court for the Northern District of Illinois interpreted *Lannom v. Kosco* as allowing the fault of settling defendants to be factored in the apportionment formula.

The issue of factoring the fault of a settling party has been addressed once by the Seventh Circuit Court of Appeals. In *Jansen v. Aaron Process Equip. Co.*,[51] the Seventh Circuit held that an employer was not a "third-party defendant who could have been sued by the plaintiff" for purposes of 2-1117.

Obviously the *Unzicker* decision has superceded some of the federal decisions. There is a great deal of controversy on this issue. Nevertheless, it is clear that 2-1117 cannot be used to prevent a settling defendant from being dismissed from the litigation.

It is the opinion of these authors that to allow a court to allow the negligence of a settling defendant or a defendant that has been dismissed from the litigation is the better reasoned and more equitable approach. The language of 2-1117 draws no distinction between settling defendants and nonsettling defendants. The statute merely speaks in terms of "fault attributable to the plaintiff, the defendants sued by the plaintiff and any third party defendant who could have been sued by the plaintiff." As noted by the Supreme Court in *Unzicker*, "[t]he clear legislative intent behind section 2-1117 is that minimally responsible defendants should not have to pay entire damage awards."[52] The Supreme Court was very concerned about the status of the "minimally responsible defendant," having mentioned that phrase or similar words no less than thirteen times. Under one interpretation of 2-1117, any settlements entered into prior to trial will be entered into by the most culpable defendants, leaving the remaining minimally responsible defendants to shoulder the 2-1117 burden.

It has been argued that the Contribution Act cures this inequity, as the nonsettling defendants are entitled to a set off for the amount that was paid by a settling defendant. Unfortunately, this argument assumes that the settlement amount reached with the settling defendant equals the amount of fault that a jury would assess against that defendant. This is not always the case.

The plaintiffs settle with single parties in multiple defendant litigation for a myriad of reasons and relative fault of the settling party is only one factor. Other factors include a defendant's limited insurance coverage, solvency of the defendant, immunity issues, statutes of limitations concerns, statutes of repose problems and Supreme Court Rule 103(b) issues. These factors may compel a plaintiff to settle with the most culpable defendant for a nominal amount. Denying the remaining defendants the opportunity to have a jury assess the fault of the settling defendant under these circumstances works an inequity on that "minimally responsible defendant." A related issue remains undecided by Illinois courts of review - should the fault of a defendant who has been involuntarily dismissed from the litigation be considered? Certainly, that defendant fits the definition of a "defendant who could have been sued by the plaintiff." Moreover, the concerns of the *Unzicker* court regarding the "minimally responsible defendant" would be even more applicable in the situation where the most culpable defendant was involuntarily dismissed and the remaining minimally responsible defendants were left to shoulder the entire verdict without the benefit of any setoff.

Comparison of Different Types of Fault

Another issue that was not raised in *Unzicker* is whether different categories of fault can be compared for 2-1117 purposes. This issue was addressed in the First District Appellate Court opinion of *Hills v. Bridgeview Little League Ass'n.*[53] In that case, the coach of a children's baseball team

was assaulted by an opposing team's volunteer manager of coaches during a tournament. The plaintiff sued his assailant, Loy, in intentional tort. He also sued the Bridgeview Little League Association (Bridgeview) and Justice Willow Springs Little League (Justice). The jury awarded the plaintiff $632,700 and his wife $125,000 in loss of consortium and apportioned the fault equally to Bridgeview and Justice. On appeal, Bridgeview and Justice contended that the trial court erred in allowing the jury to apportion fault between Bridgeview and Justice and not to the Loys. The court stated:

> [A]ccording to Bridgeview, section 2-1117 required the trial court to have allowed the jury to apportion fault among the Loys as well. The plaintiffs counter that the section distinguishes between actions based on negligence and those based on intentional torts, and therefore the trial court properly excluded the Loys from the joint and several liability determination. We agree with plaintiffs, and do not find that the trial court abused its discretion in excluding the Loys from that determination. The plaintiffs sued the Loys for intentional torts, not for negligence. Illinois courts have suggested that if the legislature had intended to allow apportionment under section 2-1117 for all tort actions, it would have used corresponding specific language.[54]

The crux of the problem is found in the language of 2-1117 that states, "except as provided in Section 2-1118, in actions on account of bodily harm injury or death . . . *based on negligence, or product liability based on strict tort liability* . . ." (Emphasis added.) The outcome of that opinion seems to be consistent with the language of 2-1117, but it yields a rather bizarre result: The defendants against whom the plaintiff alleged ordinary negligence were unable to have their fault compared to the fault of the defendant who committed an intentional tort (i.e. battery) and was the primary cause of the plaintiff's injuries.

To deny a defendant who has been found liable for negligence the opportunity to compare his fault with the fault of a co-defendant found liable for intentional conduct or willful and wanton conduct certainly seems to run contrary to the logic that underlies apportionment.

The Illinois Supreme Court held in *Burke v. 12 Rothschild's Liquor Mart*[55] that for purposes of comparing negligence, a plaintiff's negligence could not be compared to a defendant's willful and wanton conduct. The *Burke* court reasoned that ". . . willful and wanton conduct carries a degree of opprobrium not found in merely negligent behavior."[56] In other words, it would not be equitable to compare the negligence of a plaintiff in causing his own injuries to the willful and wanton conduct of a defendant for comparative negligence purposes.

Conversely, it would seem perfectly consistent with the purposes of 2-1117 to consider the fault of a defendant whose conduct was willful and wanton. Unfortunately, the first sentence of 2-1117 speaks only in terms of negligence and strict product liability. The remainder of 2-1117 speaks in terms of fault and not negligence. Possibly, the only solution to this problem is a rewriting of 2-1117 to allow different types of fault to be compared in allocating total fault for the plaintiff's injuries, including the comparative negligence of the plaintiff. Under this scenario, the comparison of apples and oranges would be very appropriate.

Defendants Who "Act in Concert"

One exception to a defendant's ability to invoke 2-1117 is the situation where the defendants are found to have been acting in concert.

In *Woods v. Cole,*[57] Hill, Carrerra and the decedent planned to go shooting at a farm. The decedent fell asleep during the drive to the farm. Carrera and the defendant hatched a scheme to scare the decedent. At the farm, the group awakened the decedent by firing their weapons into the ground. When the decedent woke up, the defendant and Carrera pointed their weapons at the decedent and announced, "It's time to die" and pulled their triggers on what were supposed to have been empty chambers. Unfortunately, Hill's weapon was loaded and it discharged, killing the decedent.

Prior to trial, the defendant in the wrongful death action made a claim for apportionment under 2-1117. The plaintiff objected, arguing that the defendants were "persons acting in concert" as defined by the Restatement (Second) of Torts, thereby denying them the availability of 2-1117. Pursuant to Supreme Court Rule 308, the trial court certified the question of whether 2-1117 is applicable to negligence actions where several tortfeasors acted in concert to cause a single, indivisible harm.

The Fourth District Appellate Court answered in the negative, stating:

> [I]n our view, each of these scenarios depicts a single and indivisible course of tortious conduct for which each is an equal participant and equally liable. The conduct of one actor cannot be compared to the conduct of another for purposes of apportioning liability because each agreed to cooperate in the tortious conduct or tortious result and each is liable for the entirety of the damages as if there were but one actor.[58]

Presumably, in accordance with *Woods v. Cole*, the mere allegation in a complaint that defendants were acting in concert would negate a defendant's hope of availing himself of 2-1117. The "acting in concert" allegation may become more frequently used now that 2-1117 has passed constitutional muster. The issue of the applicability of the Restatement of Torts to a statutory provision in derogation of the common law was never explored by the *Woods* court. Nevertheless, defense counsel faced with this situation should consider the use of a special interrogatory inquiring whether the defendants were acting in concert. If the answer is in the negative, a defendant should still be able to raise 2-1117 for the first time after the jury has rendered its verdict.

Applicability of 2-1117 to Other Statutory Causes of Action

One question relative to the applicability of 2-1117 that has been partially answered is whether a defendant can avail himself of 2-1117 when the sole cause of action filed by the plaintiff is a statutory cause of action. That question was answered in 1997 by the First District Appellate Court in *Branum v. Slezak Const. Co.*[59] In that case a construction worker sued a general contractor and steel company under the Structural Work Act. The defendants argued on appeal that 2-1117 applied to the Structural Work Act, making them jointly and severally liable for past medical expenses awarded by the jury and only severally liable for the remaining judgment, less any setoffs. The First District disagreed, holding:

> [T]he plain language of section 2-1117 provides that the section applies only to 'actions on account of bodily injury or death or physical damage to property, based on negligence, or product liability based on strict liability' (citation omitted). Accordingly, plaintiff's claims under the Structural Work Act do not fall within the express categories to which section 2-1117 apply.[60]

It should be noted that the *Branum* decision addressed the interface between 2-1117 and the Structural Work Act. While that question may be somewhat moot with the repeal of the Structural Work Act, the opinion may not necessarily be interpreted to preclude the applicability of 2-1117 to all statutory causes of action. Whether 2-1117 applies to other statutory causes of action where the gravamen of the action is negligence is still an open question.

Instructing the Jury on Several Liability

It is often observed that "the devil is in the details." This is an apt observation when instructing the jury regarding contribution and several liability and in making the post verdict calculations which are required before entering judgments. The Illinois Supreme Court Committee on Pattern Jury Instructions in civil cases issued its most recent edition of civil jury instructions in 2000. This edition of the jury instructions combines contribution and 2-1117 issues into a single instruction for the jury. This is geared to eliminate the calculation anomalies that led to the reversal of the verdict in *Hackett v. Equipment Specialists, Inc.*[61]

". . . the coach of a children's baseball team was assaulted by an opposing team's volunteer manager of coaches during a tournament."

The choice of verdict form depends on the circumstances. The Committee suggests the use of B45.03.A in cases where contributory negligence is claimed, contribution is sought between defendants, or several liability is asserted. If contribution is sought against third party defendants, IPI 600.14 is to be used.

IPI 600.1 advises the jury of the general concept of contribution by informing them that one who is required to "pay money for causing injury to another may be entitled to contribution for a percentage of that sum from a third party." The IPI contains no similar instruction informing the jury of the concepts of joint and several liability nor any instruction advising the jury of the consequences of finding one defendant less than 25% at fault. But in a similar vein, there is no instruction informing the jury that a defendant whose fault is 25% or greater might be compelled to pay the entire judgment.

The Committee's Comments to IPI B45.03.A accurately observe that "determination of the 'joint and several' questions present the most numerous and difficult threshold questions of law."[62] In this regard, the Committee notes several unresolved questions of law which existed when the 2000 IPI was promulgated. These include the following:

1. Whether a previous party who has settled is a "defendant";

2. Whether a settled tortfeasor who was never a formal party is a "defendant";

3. Whether an absent tortfeasor against whom no claim has been made is a "defendant";

4. Whether a single defendant can attempt to claim several liability; and

5. Whether an immune or otherwise protected third-party defendant "could have been sued by the plaintiff."[63]

The *Unzicker* decision partially resolves the last of those issues identified by the Committee. All other issues remain unresolved under Illinois law.

The IPI instructions require the jury to apportion fault between the plaintiff, all defendants, third-party defendants, and non-parties. The inclusion of nonparty tortfeasors in the calculation complicates matters when applying 2-1117. For instance, nonparty tortfeasors could conceivably include "phantom" tortfeasors who have never been identified or named as a defendant. Given the language of 2-1117, it is unlikely that the courts would ever factor in the phantom defendant's negligence in apportioning fault for the purposes of determining several liability. Nonparty tortfeasors might also include those defendants or third-party defendants who have settled and have been dismissed from the suit.

In contrast, nonparty tortfeasors and defendants or third-party defendants who have settled are to be included in calculating the share of negligence for the purposes of determining comparative negligence and contribution.[64]

The verdict forms do not require the jury to calculate the various judgments which would be entered when taking into consideration contribution and joint and several liability. Rather, the Committee Comments to the verdict forms state that "[a]fter the jury has returned its verdict, the trial judge and the parties will take the jury's allocated percentages of fault and use them for the calculations necessary to enter a judgment or judgments consistent with the principles of comparative negligence, contribution, and joint and several liability."[65] The court is to use the percentages reported back by the jury, make the calculations required by Section 2-1117, and then determine whether a particular defendant is only severally liable for the non-medical elements of the plaintiff's damages.

The manner in which these calculations are to be made is not entirely clear under 2-1117.The statute is not clear on the issue of whether a defendant who has been found less than 25% at fault must pay all of the medical damages plus its proportionate share of the non medical damages or whether it must only pay its proportionate share of the entire judgment (assuming the medical expenses are less than the severally liable defendant's percentage of the fault).

The comments to IPI B45.03 convey the Committee's assumption that the severally liable defendant should have a judgment against it for all of the medical expenses and its proportionate share of the non-medical damages. The authors of this article caution the practitioner to challenge that assumption and note that the Committee's comments are appropriate guidance for selecting the appropriate IPI but are not conclusive on the issue of statutory interpretation. In other words, the trial court should submit the instruction as set forth but the post-verdict calculations should be conducted in accord with the court's interpretation of 2-1117 and not necessarily in accord with the example calculations provided by the IPI Committee.

Hypothetical Illustrations

A. The Employer as Third Party Defendant and No Settlement

The resolution of several of the issues discussed in this article can be illustrated in a hypothetical suit: Mr. Gecko was injured at a machine shop owned by Iguana, Inc. and incurred $200,000 of medical expenses. He was using a saw manufactured by Komodo Saws, Inc. (Komodo). Prior to the accident, the saw was sold by Komodo to Salamander, Inc. (Salamander). Salamander removed the blade guard and later sold it to Iguana. Mr. Gecko filed suit against Komodo, which in turn filed third party claims for contribution against Salamander and Iguana. Komodo also asserted a comparative negligence defense arising out of the plaintiff's careless use of the saw. Iguana is still a third party defendant at the time of trial and has not waived its workers compensation lien, which totals $380,000. Salamander is a third party defendant but is insolvent and cannot satisfy a judgment. The case was tried and the jury was provided with IPI Verdict Form 600.14. The jury found in favor of the plaintiff against Komodo but found that the plaintiff was comparatively negligent. The jury also found in favor of Komodo and against Iguana and Salamander on the third party claims for contribution. The jury determined that damages in the case totaled $1 million, including $200,000 for medical expenses. Finally, the jury apportioned fault as follows:

Plaintiff	10%
Komodo	20%
Iguana	40%
Salamander	30%

The IPI Committee's assumptions used in a post-verdict calculation would have Komodo jointly responsible for 90% of the plaintiff's medical expenses ($180,000) plus its pro-

portionate share of non-medical damages, i.e., $160,000 ($800,000 x 20%). Thus, the net amount that Komodo must pay to the plaintiff is $340,000 ($180,000 + $160,000). *(Contrast this with the result obtained if 2-1117 is interpreted to require that the severally liable defendant pay only its proportionate share of the entire judgment. In that event, Komodo would face a judgment of $200,000, rather than $340,000)* Komodo, in turn has a judgment against Iguana and Salamander for the same amount. However, since Iguana has a lien for more than that judgment, the net effect is that the plaintiff receives no money as a result of the trial. While some may view this result as unfair, the authors believe this result fairly balances the various evocations of public policy found in the Contribution Act, Section 2-1117 and the Illinois Workers Compensation Act.

B. The Employer Has Settled and been Dismissed

The hypothetical scenario can be changed slightly to illustrate the impact which occurs if the courts hold that a settling party's share of fault cannot be used to calculate apportionment of fault for the purposes of determining several liability under 2-1117. If we assume that Iguana released its lien and was dismissed from the suit, the jury is still asked to apportion fault among the plaintiff, Komodo, Iguana and Salamander in the verdict form set forth in IPI B45.03A. (This is because for the purposes of determining comparative fault, the negligence of non parties is to be considered). The jury would again assign the plaintiff 10% of the fault, Komodo 20%, Iguana 40% and Salamander 30%. But in determining several liability for the purposes of 2-1117, the court would only consider the fault of the plaintiff, Komodo and Salamander. The court should distribute Iguana's portion of fault between the plaintiff, Komodo and Salamander in proportion to their shares of fault as determined by the jury. This would be calculated as follows:

Plaintiff	10 + (1/6 x 40)	=	17%
Komodo	20 + (2/6 x 40)	=	33%
Salamander	30 + (3/6 x 40)	=	50%
			100%

Komodo's share of fault is now 33% and it is jointly liable for the judgment since it is not entitled to the benefits of 2-1117. Since Salamander is judgment proof, Komodo will face a judgment to the plaintiff of $900,000 rather than $340,000.

C. Intentional Tort Claims

The calculations to be made by the trial court are further complicated if one of the defendants is sued under an intentional tort theory as was the case in *Hills v Bridgeview Little League Association*[66] or under a statutory scheme such as the Structural Work Act. This complication will also be present if the appellate courts hold that willful and wanton claims are not to be compared to negligence claims for purposes of 2-1117. In such cases the verdict form should be no different since there is no reason the jury cannot apportion fault among the various parties despite differing theories of fault, i.e., negligence, comparative negligence, willful and wanton, statutory liability, or intentional tort.

Our example can be used to illustrate this if we assume that Salamander is sued under a theory which would not allow the court to factor Salamander's share of fault in determining several liability under 2-1117. Salamander's 30% share of fault must now be distributed among the other parties as follows:

Plaintiff	10 + (1/7 x 30)	=	14%
Komodo	20 + (2/7 x 30)	=	29%
Iguana	40 + (4/7 x 30)	=	57%
			100%

In this example, Komodo is now a joint tortfeasor potentially responsible for a $900,000 judgment.

D. Settlement of Party and a Set Off Claim

For this example, assume that Salamander settled with the plaintiff for $100,000 which was approved as a good faith settlement. Assume further that the trial court held that Salamander's negligence should not be considered for the purposes of 2-1117 and that the jury apportioned fault as follows:

Plaintiff	10%
Komodo	20%
Iguana	60%
Salamander	10%

The court would distribute Salamander's share of negligence among the remaining parties as follows:

Plaintiff	10 + (1/9 x 10)	=	11%
Komodo	20 + (2/9 x 10)	=	22%
Iguana	60 + (6/9 x 10)	=	67%
			100%

Fortunately for Komodo, it is still only severally liable and its total exposure would be $357,600 ((.9 x $200,000) + (.22 x $800,000). But the question is whether Komodo will be entitled to the set off for the $100,000 paid earlier by Salamander. Komodo would argue that the Contribution Act clearly affords the set off and nothing in that Act or 2-1117 can be read to deprive it of the set off. On the other hand, the

plaintiff will argue that allowing the set off will unfairly benefit the severally liable defendant at the expense of the plaintiff. In all likelihood, the courts will side with the plaintiff. Holding otherwise could be viewed as discouraging the plaintiff from settling and thus thwart the goal of the Contribution Act. A compromise result might be to allow the several tortfeasor his proportionate share of the settlement amount. In our example, Komodo would thus have a $20,000 set off (.20 x $100,000).

Conclusion

There are, to be sure, numerous problems presented by the language of 2-1117. These problems are complicated substantially when one considers the interface between 2-1117 and the verdict forms. Defense counsel must be intimately familiar with the relationship between the jury instructions and 2-1117. All fault calculations must be based on the percentage of fault that the defendant bears to the liability of those parties that are in the suit at the time of the verdict, not to the total of all fault. For 2-1117 purposes, the court will only consider the fault of the "plaintiff, the defendants sued by the plaintiff, and any third-party defendants who could have been sued by the plaintiff." However, the jury may assess fault against all tortfeasors under I.P.I. 45.03A. This could lead to a minimally culpable defendant paying much more than his actual percentage of the total fault.

The Illinois Supreme Court Committee on Jury Instructions in Civil Cases noted that "the percentage figure calculated for a particular defendant for ' 2-1117 purposes may or may not equal the percentage for which that defendant is severally liable."[67] The Committee was well aware of the fact that very little appellate case law existed to address who may be apportioned fault for a 2-1117 calculation.[68] As the *Unzicker* court has held that the clear language of 2-1117 does not allow for non-parties to be included in the 2-1117 calculation, the result is somewhat clearer. Unfortunately the question of "who is a non-party" was never fully explained.

Taking the example directly from the Committee Comments to I.P.I. 45.03A, assume that a jury assesses fault as follows:

Plaintiff	20%
Defendant 1	20%
Defendant 2	10%
Nonparty	50%

Under this verdict, both defendants would seem to be only severally liable under 2-1117 as they were held to be less than 25% at fault. However, the *Unzicker* court has ruled that the nonparty may not be apportioned fault in the 2-1117 equation. The court must assess the relative liability of the "plaintiff, the defendants sued by the plaintiff and any third-party defendants who could have been sued by the plaintiff."

According to 2-1117, the court could not consider the 50% fault of the non-party. The court would assess the relative liability of the plaintiff at 40% (20/50), Defendant 1 at 40% (20/50) and Defendant 2 at 20% (10/50). As such, Defendant 2 remains less than 25% at fault for the relative liability of the remaining parties.

This result, although consistent with the language of 2-1117, clearly does not fit its intent nor does it comply with the court's reasoning in *Unzicker*. The *Unzicker* court agreed that "the clear legislative intent in section 2-1117 was that minimally responsible defendants should not be responsible for entire judgments."[69] By enacting 2-1117, the legislature "set the line of minimal responsibility at less than 25%."[70] The court stated: "[I]n our opinion, the broad wording in the statute merely shows that the legislature intended the division of responsibility to include those people in the suit who might have been responsible for the plaintiff's injuries."[71] It is hard to imagine that the legislature's intent was to prevent "minimally responsible defendants" from paying entire judgments while, at the same time, providing the means by which a minimally responsible defendant would pay an entire judgment.

In the above example, the jury found Defendant 2 to be 20% at fault. It would seem that the legislature intended Defendant 2 to pay only 20% of the non-medical award. However, under the Supreme Court's interpretation of 2-1117, Defendant 2 accounts for 40% of the fault and is jointly and severally liable for all damages. The end result is that Defendant 2 shoulders a disproportionate share of the verdict, while the plaintiff's comparative fault remains in accordance with the jury's verdict.

It may well be that the conflict between the verdict forms and 2-1117 is unresolvable. It is clear that in order to reflect the clear intent of the legislature to protect minimally responsible defendants from paying entire judgments, a redrafting of 2-1117 may be necessary. Until such time as that happens, defense counsel would be well served to become familiar with the pitfalls presented by the interface of 2-1117 and the I.P.I. verdict forms. Without that knowledge, a case that initially appears to present minimal exposure to a defendant may turn out to be something very different once 2-1117 is applied.

Sample Verdict Forms

B45.03A Verdict Form A - Single Plaintiff and Claimed Multiple Tortfeasors - Comparative Negligence - Verdict for Plaintiff Against Some But Not All of Defendants - Causes of Action Accruing On and After 11/25/86

VERDICT FORM A

We, the jury, find for _____
name of first defendant

and against the following defendant or defendants:

_____ Yes _____ No _____
name of first defendant

_____ Yes _____ No _____
name of second defendant

_____ Yes _____ No _____
etc.

We further find the following:

First: Without taking into consideration the question of reduction of damages due to the [negligence] [fault] of _____, if any, we find that the total amount of damages suffered by _____
name of plaintiff name of plaintiff

as a proximate result of the occurrence in question is [$_____.] [itemized as follows:

The reasonable expense of past medical and medically related expenses:	$ _____
The present cash value of future reasonable medical and medically related expenses reasonably certain to be necessary in the future: (See Notes on Use.)	$ _____
(Other Damages: Insert from 30.03, 30.04, 30.05, 30.05.01, 30.07, 30.08, 30.09, or as applicable.)	$ _____
PLAINTIFF'S TOTAL DAMAGES:	$ _____]

Second: Assuming that 100% represents the total combined [negligence] [fault] of all persons or entities whose [negligence] [fault] proximately caused _____ 's
name of plaintiff

injury, including _____ , [and] any defendant whom you have found
name of plaintiff

liable, [and any other person or entity identified on this verdict form whose (negligence) (fault) proximately caused _____ 's injury] we find the percentage of such [negligence] [fault] attributable to each as follows:

(a) _____ _____ %
name of plaintiff

(b) _____ _____ %
name of first defendant

(c) _____ _____ %
name of second defendant

(d) _____ _____ %
name of third-party defendant

(e) _____ _____ %
name or describe non-party

TOTAL 100%

(Instructions to Jury: If you find any defendant not liable to the plaintiff, or that any non-party was not [negligent] [at fault] in a way that proximately caused plaintiff's injury, or if you find that the plaintiff was not contributorily [negligent] [at fault], then you should enter a zero (0) as to that person or persons.)

Third: After reducing the plaintiff's total damages [from paragraph First)] by the percentage of [negligence] [fault] if any, of _____ [(from line (a) in
name of plaintiff

paragraph Third)], we award _____ recoverable damages in the
name of plaintiff

amount of $_____.

600.14 Verdict Form - Verdict for Plaintiff

VERDICT FORM A

We, the jury, find for _____ and against the following
name of plaintiff

defendant or defendants:

_____ Yes _____ No _____
name of first defendant

_____ Yes _____ No _____
name of second defendant

_____ Yes _____ No _____
name of second defendant

_____ Yes _____ No _____
etc.

We further find the following:

First: Without taking into consideration the question of reduction of damages due to the [negligence] [fault] of _____, if any, we find that the total amount
name of plaintiff

of damages suffered by _____ as a proximate result of the occurrence
name of plaintiff

in question is [$_____.] [itemized as follows:

The reasonable expense of past medical and medically related expenses:	$ _____
The present cash value of future reasonable medical and medically related expenses reasonably certain to be necessary in the future: (See Notes on Use.)	$ _____
(Other Damages: Insert from 30.03, 30.04, 30.05, 30.05.01, 30.07, 30.08, 30.09, or as applicable.)	$ _____
PLAINTIFF'S TOTAL DAMAGES:	$ _____

Second: As to the contribution claims against third-party defendant[s] _____,
name(s) of third-party defendant(s)

we find as follows:

For _____
name of third-party plaintiff(s)

and against _____ Yes _____ No _____
name of first third-party defendant

For _____
name of third-party plaintiff(s)

and against _____ Yes _____ No _____
name of second third-party defendant

Third: Assuming that 100% represents the total combined [negligence] [fault] of all persons or entities whose [negligence] [fault] proximately caused _____'s
name of plaintiff

injury, including _____, any defendant whom you have found liable, [and] any
name of plaintiff

third-party defendant you find liable, [and any other person or entity identified on this verdict form whose (negligence) (fault) proximately caused _____'s injury]
name of plaintiff

we find the percentage of such [negligence] [fault] attributable to each as follows:

(a) _____ _____ %
name of plaintiff

(b) _____ _____ %
name of first defendant

(c) _____ _____ %
name of second defendant

(d) _____ _____ %
name of third-party defendant

(e) _____ _____ %
name or describe non-party

TOTAL 100%

(Instructions to Jury: If you find any defendant not liable to the plaintiff, or that any third-party defendant or non-party was not [negligent] [at fault] in a way that proximately caused plaintiff's injury, or if you find that the plaintiff was not contributorily [negligent] [at fault], then you should enter a zero (0) as to that person or persons.)

Fourth: After reducing the plaintiff's total damages [(from paragraph First)] by the percentage of [negligence] [fault], if any, of _____ [from line (a) in
name of plaintiff

paragraph Third)], we award _____ recoverable damages in the amount
name of plaintiff

of $ _____.

Endnotes

[1] P.A. 84-1431.
[2] P.A. 89-7.
[3] *Best v. Taylor Mach. Works*, 179 Ill. 2d 367, 689 N.E.2d 1057 (1997).
[4] *Id.*
[5] See David Levitt's rather prescient article, "Section 2-1117 - Still More Questions Than Answers" *IDC Quarterly*, Vol. 4 No. 1.
[6] *Best*, 179 Ill. 2d 367, 689 N.E.2d 1057.
[7] *Lilly v. Marcal Rope & Rigging*, 289 Ill. App. 3d 1105, 682 N.E.2d 481, 224 Ill. Dec. 920 (5th Dist. 1997).
[8] *Unzicker v. Kraft Food Ingredients Corp.*, Docket No. 92838, 2002 WL 31619037.
[9] 740 ILCS 150/0.01 *et seq.* (Repealed 1995)
[10] *Unzicker*, 2002 WL 31619037 at 2, 2002 Ill. LEXIS 957 at 5.
[11] *Kotecki v. Cyclops Welding Corp.*, 146 Ill. 2d 155, 585 N.E.2d 1023, 166 Ill. Dec. 1 (1991).
[12] *Lilly*, 289 Ill. App. 3d 1105, 682 N.E.2d 481, 224 Ill. Dec. 920.
[13] *Id.*
[14] *Id.* at 1107.
[15] *Doyle v. Rhodes*, 101 Ill. 2d 1, 461 N.E.2d 382, 77 Ill. Dec. 759 (1984).
[16] *Id.* at 10-11.
[17] *Lilly*, 289 Ill. App. 3d at 1108.
[18] *Id.* at 1113.
[19] *Unzicker*, 2002 WL 31619037 at 6, 2002 Ill. LEXIS 957 at 16.
[20] *Id.* at 6 (WL), Id. at 15-16 (LEXIS).
[21] *Id.* at 7, Id. at 17 (LEXIS).
[22] 740 ILCS 100/3.
[23] 740 ILCS 100/4.
[24] Illinois Constitution 1970, Article I § 12.
[25] *Unzicker*, 2002 WL 31619037 at 10, 2002 Ill. LEXIS 957 at 26-27.
[26] Illinois Const. 1970, Article IV, § 13.
[27] Illinois Const. 1970, Article I, § 2.
[28] Illinois Const. 1970, Article II, § 1.
[29] Illinois Const. 1970, Article I, § 2.
[30] *Unzicker*, 2002 WL 31619037 at 16, 2002 Ill. LEXIS 957 at 45.
[31] *Unzicker v. Kraft Food Ingredients Corp.*, 325 Ill. App. 3d 587, 758 N.E.2d 474, 259 Ill. Dec. 351 (4th Dist. 2001).
[32] *Id.*
[33] *Id.* at 592.
[34] *Id.* at 592.
[35] *See, Lannom v. Kosco*, 158 Ill. 2d 535, 634 N.E.2d 1097, 199 Ill. Dec. 743 (1994); *Banovz v. Rantanen*, 271 Ill. App. 3d 910, 649 N.E.2d 977, 208 Ill. Dec. 617 (5th Dist. 1995); *Blake v. Hy Ho Restaurant*, 273 Ill. App. 3d 372, 652 N.E.2d 807, 210 Ill. Dec. 5 (5th Dist. 1995).
[36] *Lannom*, 158 Ill. 2d 535, 634 N.E.2d 1097, 199 Ill. Dec. 743.
[37] *Id.* at 542.
[38] *Id.* at 542-543.
[39] *Id.* at 543.
[40] *Banovz*, 271 Ill. App. 3d 910, 649 N.E.2d 977, 208 Ill. Dec. 617.
[41] *Id.* at 921.
[42] *Blake*, 273 Ill. App. 3d 372, 652 N.E.2d 807, 210 Ill. Dec. 5.
[43] *Id.* at 374.
[44] *Id.* at 375.
[45] *Id.* at 376.
[46] *Alvarez v. Fred Hintze Const.*, 247 Ill. App. 3d 811, 617 N.E.2d 821, 187 Ill. Dec. 364 (3d Dist. 1993).
[47] *Id.* at 818.
[48] *Freislinger v. Emro Propane Co.*, 99 F.3d 1412 (7th Cir. 1996).
[49] *Id.* at 1419.
[50] *Costello v. United States*, 1998 WL 341615, 1998 U.S. Dist LEXIS 9277.
[51] *Jansen v. Aaron Process Equip. Co.*, 207 F.3d 1001 (7th Cir. 2000).
[52] *Unzicker*, 2002 WL 31619037 at 7, 2002 Ill. LEXIS 957 at 17.
[53] *Hills v. Bridgeview Little League Assn*, 306 Ill. App. 3d 13, 713 N.E.2d 616, 239 Ill. Dec. 85 (1st Dist. 1999). *rev'd on other grounds*, 195 Ill. 2d 210, 745 N.E.2d 1166, 253 Ill. Dec. 632 (2000).
[54] *Id.* at 21.
[55] *Burke v. 12 Rothschild's Liquor Mart*, 148 Ill. 2d 429, 593 N.E.2d 522, 170 Ill. Dec. 633 (1992).
[56] *Id.* at 451.
[57] *Woods v. Cole*, 285 Ill. App. 3d 721, 675 N.E.2d 132, 221 Ill. Dec. 225 (4th Dist. 1996).
[58] *Id.* at 724.
[59] *Branum v. Slezak Constr. Co.*, 289 Ill. App. 3d 948, 682 N.E.2d 1165, 225 Ill. Dec. 88 (1st Dist. 1997).
[60] *Id.* at 969.
[61] *Hackett v. Equipment Specialists, Inc.*, 201 Ill. App. 3d 186, 559 N.E.2d 752, 147 Ill. Dec. 412 (1st Dist. 1990).
[62] I.P.I. 45.03A, Committee Comments at p. 213.
[63] *Id.*
[64] *Hills*, 306 Ill. App. 3d 13, 713 N.E.2d 616, 239 Ill. Dec. 633.
[65] I.P.I. 45.03A, Committee Comments at p. 213.
[66] *Hills*, 306 Ill. App. 3d 13, 713 N.E.2d 616, 239 Ill. Dec. 633.
[67] I.P.I. 45.03A, Committee Comments, § I, C. Joint and Several Liability.
[68] *Id.*
[69] *Unzicker*, 2002 WL 31619037, 2002 Ill. LEXIS 957 at 15 (Ill. Nov. 21, 2002).
[70] *Id.* at 7 (WL), Id. at 18 (LEXIS).
[71] *Id.* at 7 (WL), Id. at 18 (LEXIS).