THE IDC MONOGRAPH:

Proposed Changes to the Illinois Code of Civil Procedure and Related Statutes and Doctrines

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Proposed Changes to the Illinois Code of Civil Procedure and Related Statutes and Doctrines

For this Monograph, we choose to go in a different direction. Rather than provide insight on a topical issue or a case analysis, we decided to offer proposals for certain rule changes that, in the opinion of the authors, could significantly improve certain areas of tort law and procedure. To that end, this Monograph contains proposals relating to admissibility of unpaid medical bills, Section 2-1117 of the Illinois Code of Civil Procedure (joint and several liability), the Illinois Jury Act, and the use of depositions in mass tort cases. These proposals do not represent perfect modifications or changes; instead, they are meant to promote discussions about these topics. This Monograph also discusses recent developments on the learned intermediary doctrine.

The "Changing Times" Do Not Call for a Change to the Learned Intermediary Doctrine

Prescription drug manufacturers are an inviting target for trial lawyers. Perceived as having deep pockets, combined with the large consumer base of potential plaintiffs, it is easy to understand why prescription drug manufacturers frequently find themselves defending personal injury lawsuits based on their products. By its very definition, a prescription drug is unavoidably unsafe, which is why a prescription from a licensed medical provider is required. All prescription drugs have side effects, and the science of pharmaceuticals is such that it is impossible to predict exactly how a drug will interact with each particular user. Thus, the majority of personal injury lawsuits brought against prescription drug manufacturers are based on a failure to warn rather than on design or manufacturing defects. Plaintiffs routinely assert that the side effect they suffered as a result of using a drug was not adequately disclosed by the manufacturer.

The biggest obstacle such plaintiffs face is the learned intermediary doctrine. In Illinois, the learned intermediary doctrine states that the manufacturer only has a duty to warn the prescribing physician (i.e. the "learned intermediary") of the risks of a prescription drug.[1] The physician then is required to use his or her medical knowledge to weigh the risks and benefits of a particular patient using the drug and relay any relevant warnings to the patient. The doctrine is based on the idea that the physician is in the best position to decide, based on each patient's unique condition, whether to prescribe a particular drug to a patient. Physicians are also in the best position to warn patients of the possible side effects of a particular drug and help patients weigh the risks and benefits of using that drug.

The most common method plaintiffs use to avoid the doctrine is to allege that the manufacturer inadequately warned the prescribing physician. If a physician is unaware of a potential side effect that the manufacturer knew or should have known about, the physician cannot be considered a learned intermediary for purposes of the doctrine. This exception to the doctrine is sensible, because a manufacturer with knowledge of a side effect should not be able to shield itself behind a physician without such knowledge.

Proving that a prescribing physician is not a learned intermediary can be difficult for several reasons. First, even if the manufacturer fails to warn the physician of a particular risk, the physician will still be treated as a learned intermediary if the physician had independent knowledge of the risk.[2] Second, a plaintiff must establish that a physician would have acted differently had he or she known of the undisclosed risk. Physicians, however, may be hesitant to admit that they would have acted any differently for fear of exposing themselves to liability.

Perhaps due to the difficulty of overcoming the learned intermediary doctrine, plaintiffs have asserted multiple legal theories that either weaken the doctrine's protection or bypass it altogether. The modern trend by courts has been to side with these theories and weaken the protection afforded to manufacturers by the doctrine. This trend has largely been limited to courts outside Illinois, but a few Illinois cases appear to open the door to plaintiffs' attacks. It is highly likely that plaintiffs will continue to challenge the doctrine in Illinois courts.

One of the most troubling exceptions to the doctrine is the direct-to-consumer ("DTC") advertising exception.[3] Under this exception, currently recognized only in New Jersey, a

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manufacturer loses the protection of the doctrine by advertising the drug at issue directly to consumers. The rationale behind this exception is the "changing times" argument. The New Jersey Supreme Court provided three reasons for abrogating the doctrine where DTC advertising has been used: (1) the shift to patient-centered ethics centered on the doctrine of informed consent, the decline of paternalism, and the patient's right to participate in healthcare decision-making; (2) the effects of managed care on the doctor-patient relationship which decreases the amount of time a doctor has to deliver an adequate warning to the patient; and (3) the development of communication from the drug manufacturers to patients and to potential patients through mass media.[4]

Although the DTC exception has not been adopted by any other states, it has also not been explicitly rejected. At first blush, it seems surprising that this exception has not yet been challenged in other jurisdictions. The DTC exception, however, is rather narrow in scope, because the vast majority of prescription drugs are not marketed directly to consumers. Although it may appear to anyone who watches television that there is a large amount of prescription-drug advertising, the bulk of that advertising is limited to relatively few drugs. Pharmaceutical manufacturers do not use DTC marketing for any narcotic or other high-risk drugs. Primarily, DTC marketing is used for lifestyle drugs. Thus, the drugs that generally attract trial lawyers (such as Vioxx), have not been marketed directly to consumers and the DTC exception is unavailable.

A review of the three reasons provided for not applying the doctrine illustrates the real danger of the New Jersey opinion. Two out of the three rationales (patients' increased role in healthcare decision-making and the effects of managed care) have nothing to do with DTC marketing. Thus, these two rationales could be used to justify the abrogation of the learned intermediary doctrine in all cases, as opposed to only DTC cases.

While it may be true that more patients today play a greater role in their healthcare decision-making, and physicians may not devote the optimal amount of time to each patient, this does not support the elimination of the learned intermediary doctrine. Physicians remain the gatekeepers with respect to prescription drugs. Physicians make the ultimate decision, based on their medical judgment and knowledge of patients' conditions, whether to prescribe a certain drug to a particular patient.

The learned intermediary doctrine is generally based on four rationales, which remain valid today. First, courts were hesitant to force manufacturers to intrude upon the doctor-patient relationship. Second, physicians may be in a superior position to convey meaningful information to their patients, since it is their duty to secure informed consent. Third, drug manufacturers lack effective means to communicate directly with patients, making it necessary to rely on physicians to convey the relevant information. Fourth, because of the complexity of risk information about prescription drugs, comprehension problems would complicate any effort by manufacturers to translate physician labeling for lay patients.[5]

The New Jersey Supreme Court challenged the third rationale regarding communication between manufacturers and consumers in today's society, where advertising is so prominent.[6] Even with the broad reach of pharmaceutical advertising, however, a manufacturer cannot assume that every potential consumer has viewed the commercial. The prescribing physician remains the only guaranteed contact that a patient will have regarding the drug at issue. Also, as opposed to an advertisement containing warnings, a physician interacts with a patient, answers questions and helps the patient evaluate the warnings in the context of the patient's unique medical condition.

Accordingly, any attempts to weaken or abrogate the learned intermediary doctrine in Illinois should be strongly opposed. Illinois courts have, for the most part, been reluctant to find exceptions to the doctrine. The Illinois Supreme Court's latest opinion on the subject in *Happel v. Wal-Mart Stores, Inc.*,[7] likely raised the hopes of trial attorneys who view the opinion as an opportunity to erode the doctrine. In *Happel*, the Supreme Court declined to apply the learned intermediary doctrine to protect a pharmacy that had knowledge of a customer's allergy to a prescribed drug but failed to warn the customer or the prescribing physician of the contraindication. However, a subsequent Illinois appellate court opinion, *Kennedy v. Medtronic,* correctly characterized the *Happel* opinion as extremely narrow and declined to expand it.[8]

Illinois defense lawyers can expect to see continued attacks on the learned intermediary doctrine and should be prepared to defend it. Some of the attacks will be based on previously asserted theories, such as the "changing times" rationale, and undoubtedly there will be additional theories. The counterattack for each of these challenges to the doctrine can generally be found in the rationales originally articulated when the doctrine was formulated, which remain just as relevant and valid today.

Joint Liability and Comparative Fault

There have been several court rulings and legislative efforts to interpret and modify Section 2-1117 of the Code of Civil Procedure.[9] In 2003, in response to the courts' interpretation of legislative intent, the legislature enacted a modification to Section 2-1117. The 2003 modification to Section 2-1117 did not greatly impact a court's interpretation of the original legislative intent of Section 2-1117 but simply addressed a perceived omission by the legislature regarding the applicability of the Workers' Compensation Act to Section 2-1117. Unfortunately, this modification to Section 2-1117 is not beneficial to either side of the bar and has simply led to more confusion in the application of Section 2-1117. Section 2-1117 should be changed to accurately reflect the legislature's original intent in enacting Section 2-1117. This modification to Section 2-1117 would properly apply the legislature's intent and make the application of Section 2-1117 much less confusing and more equitable to all parties.

Section 2-1117

Prior to P.A. 93-12, enacted in 2003, Section 2-1117 of the Code of Civil Procedure stated:

> **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 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.

Section 2-1117, enacted in 1986, represented a compromise between competing public policies. In *Unzicker v. Kraft Food Ingredients Corp.*, [10] the Illinois Supreme Court explained:

> [t]he clear legislative intent behind section 2-1117 is that minimally responsible defendants should not have to pay entire damage awards. The legislature set the line of minimal responsibility at less than 25%. In order to apportion responsibility, the legislature looked to those people in the suit: the plaintiff, the defendants sued by the plaintiff, and any third party defendants who could have been sued by the plaintiff.

The court also stated that "[t]he legislature intended to provide that minimally culpable defendants should not be responsible for entire judgments and set forth clear rules for how that policy would be implemented."[11]

Prior to the 1986 enactment of Section 2-1117, all defendants were jointly liable for a plaintiff's damages, notwithstanding the fact that a defendant may have been 1% at fault for a plaintiff's injury. With Section 2-1117, the legislature was attempting to protect those individuals that could be most susceptible to disproportionate judgments based on their wealth rather than their liability for a particular injury. Accordingly, any assessment or interpretation of Section 2-1117 must involve a review of its effect on the defendants rather than on the plaintiff.

The facts of *Unzicker* are helpful in understanding the import of Section 2-1117. The plaintiff, Martin Unzicker, was employed by Nogle & Black Mechanical. The plaintiff was injured at a Kraft plant while employed by Nogle & Black. The plaintiff filed a claim against Nogle under the Workers' Compensation Act, then filed suit against Kraft. Kraft filed a third party complaint for contribution against Nogle. The jury determined that Kraft was 1% at fault for the plaintiff's injuries and that Nogle was 99% at fault for the plaintiff's injuries. The jury assessed total damages of $879,400.

The trial court applied Section 2-1117 and found Kraft to be liable for all of the plaintiff's medical expenses but severally liable for 1% of the nonmedical damages. Moreover, the trial court found that under the Joint Tortfeasors Contribution Act and the *Kotecki* decision, the plaintiff's employer, Nogle, was liable in contribution in an amount equal to its workers compensation liability. Kraft and Nogle were jointly and severally liable for the plaintiff's medical damages of $91,400. Kraft was only liable for 1% of the nonmedical damages, which amounted to $7,880. In the end, the plaintiff recovered less than $100,000 of a nearly $900,000 judgment.

The *Unzicker* decision was based on sound principles of statutory construction and fully addressed the constitutionality of Section 2-1117. A primary issue was whether the plaintiff's employer was a "third party defendant who could have been sued by the plaintiff." The Illinois Supreme Court held that the employer could be sued by the plaintiff, because

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the exclusive remedy provision of the Workers' Compensation Act must be raised as an affirmative defense and, in theory, can be waived by the employer, if not properly raised. More importantly, the court held that construing Section 2-1117 to include the plaintiff's employer in the liability apportionment calculation, gives effect to the clear legislative intent behind Section 2-1117.

Following *Unzicker*, the legislature amended Section 2-1117 in 2003 by substituting "except the plaintiff's employer" for "who could have been sued by the plaintiff" in two places.

As amended in 2003, Section 2-1117 now provides:

> 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 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 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.[12] (Emphasis added.)

In amending Section 2-1117, the legislature only affected the applicability of the statute to the plaintiff's employer and did nothing to modify the legislative intent expressed by the *Unzicker* court. This fact was recently verified by the Fourth District in *Skaggs v. Senior Services of Central Illinois*.[13] The *Skaggs* court stated,

> [t]he revision to section 2-1117 excepts a plaintiff's employer from being considered in the apportioning of fault, but the legislative intent remains the same with respect to minimally responsible defendants. Forcing a minimally responsible defendant to shoulder the nonmedical expenses only because the more culpable defendant settled would allow plaintiffs to circumvent the purpose of the statute.[14]

More recently, the First District joined the *Skaggs* court in *Ready v. United/Goedecke Services, Inc*.[15] Therefore, in the First and Fourth Districts, third-party defendants who settle with the plaintiff must be included in the calculation made to determine whether the non-settling defendant(s) will be severally (less than 25% at fault) or jointly (25% or more at fault) liable for the plaintiff's nonmedical damages.

It is clear from the 2003 amendment to Section 2-1117 that the legislature took issue with *Unzicker* and acted swiftly to provide for a legislative reaction. As the amendment only addressed the application of Section 2-1117 to the plaintiff's employer and did not in any way address the stated legislative intent of Section 2-1117, one can conclude that the legislature did not disagree with the Supreme Court's interpretation of the original legislative intent behind Section 2-1117, which was to protect the interests of minimally culpable defendants.

Unfortunately, the current version of Section 2-1117 does not adequately implement the stated legislative intent. Section 2-1116 defines Illinois' paradigm of modified comparative negligence as follows:

> **Limitation on recovery 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 plaintiff shall be barred from recovering damages if the trier of fact finds that the contributory fault on the part of the plaintiff is more than 50% of the proximate cause of the injury or damage for which recovery is sought. The plaintiff shall not be barred from recovering damages if the trier of fact finds that the contributory fault on the part of the plaintiff is not more than 50% of the proximate cause of the injury or damage for which recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of fault attributable to the plaintiff.[16]

Section 2-1116 continues by stating that "all tortfeasors" are to be included for the purposes of calculation of plaintiff's fault.[17] The Illinois Pattern Jury Instructions set forth a consistent view, providing that the plaintiff's liability is to be determined in comparison to all tortfeasors, including the employer, non-parties and settling parties.

Under the current statutory scheme, the plaintiff's fault is compared to that of the plaintiff's employer, settling defendants and even non-parties to determine the plaintiff's percentage of comparative fault while, conversely, when calculating whether the non-settling defendant is severally or jointly liable, the plaintiff's employer's liability is specifically ex-

cluded from the calculation of liability for the non-settling defendant. Although it is possible to navigate this legal quagmire, the issues that arise with the differing interpretations of the two statutes must be reconciled. Putting aside any arguments that the current version of Section 2-1117 may be unconstitutional, the current legal framework of Sections 2-1116 and 2-1117 simply fails to properly effect the legislature's intent.

Most issues arising out of Section 2-1117 relate to which parties are to be included in the Section 2-1117 equation. In *Unzicker*, the issue was whether the plaintiff's employer was to be included in the Section 2-1117 equation. In *Skaggs* and *Ready*, the issue was whether a settling defendant should be included in the Section 2-1117 equation.

These issues may be eliminated if the dichotomy that exists between Sections 2-1117 and 2-1116 were eliminated. In order for Sections 2-1116 and 2-1117 to remain logically consistent, and for Section 2-1117 to actually effectuate the clear purpose of protecting minimally culpable defendants, Section 2-1117 should be amended 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 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, 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, shall be jointly and severally liable for all other damages.

Modifying Section 2-1117 in this manner would eliminate the legal inconsistencies currently present in the two provisions and would most logically effect the legislative intent of protecting the minimally culpable defendant.

To illustrate the manner in which the current version of Section 2-1117 fails to effectuate the legislative intent, consider a hypothetical situation that modifies the facts of *Unzicker* slightly. In our modified *Unzicker* scenario, assume that the jury determined that the plaintiff was 1% at fault, that Kraft was 1% at fault and that Nogle was 98% at fault. Comparing the plaintiff's fault to all tortfeasors, including the plaintiff's employer, the plaintiff's comparative fault is less than 50% of the total fault and he is entitled to recover, with his recovery diminished by 1% for his own fault. If the damages total $100,000, the plaintiff will recover $99,000. This recovery will be against Kraft as the employer is omitted from the calculation. This clearly does not accomplish the legislative intent of Section 2-1117.

If Section 2-1117 mirrored Section 2-1116 and the non-settling defendant's liability is determined based on comparison to only the plaintiff, then the plaintiff's fault should be determined in exactly the same manner. Thus, using the modified *Unzicker* scenario above, if the plaintiff's employer were removed from the Section 2-1117 equation, then it should also be removed from the Section 2-1116 calculation, and the plaintiff's 1% fault would be compared only to Kraft's fault of 1%. Under this analysis, the plaintiff's fault would be 50% of the total fault and the plaintiff would recover only $50,000, albeit still from Kraft. If the jury assessed the plaintiff with 3% of the fault and Kraft with 2% of the fault, the plaintiff would not recover at all as his fault would exceed 50%. None of these scenarios accomplish the goals of Sections 2-1116 and 2-1117. However, if the plaintiff is permitted to compare his fault to the defendant and a settling third-party, so too should the non-settling defendant.

It should be reasonably clear that the present code provisions leave many variables available for both plaintiffs and defendants to attempt to impact the fault calculations based on who is part of that equation and who is omitted from the equation. The jury's determination of fault should involve all potential tortfeasors and should not be affected by legal arguments of either side as to which persons or entities should be part of the calculation. If the legislature desires to protect minimally culpable defendants, the legislature should enact a statutory provision that adequately accomplishes this goal. Furthermore, the legislature should not allow gamesmanship to determine which individuals or entities should be part of the calculation. If the proposed Section 2-1117 provision as set forth above is enacted, the jury would be instructed to include in their calculation of fault any party or tortfeasor that was a proximate cause of the plaintiff's injuries. Only with a statutory provision which treats all parties equally can the true legislative intent be upheld.

Admissibility of Unpaid Medical Bills

"The reasonable expense of necessary medical care, treatment, and services received."[18] At first glance, this phrase appears to be straightforward. For many years, this was the case. An injured person presented evidence that medical bills were paid and those medical bills were entered into evidence before the jury. However, with the proliferation of HMO's, PPO's and other health care plans, the meaning of "reasonable expense of necessary medical care, treatment and services" has changed drastically.

The healthcare industry today operates through arrangements with the medical providers that provide treatment to the insured patients. These arrangements set fee structures for each procedure rendered to the patient. For each procedure, the healthcare insurer pays only a set fee to the healthcare provider. Even though the healthcare provider is fully aware of these arrangements at the time of treatment, the provider typically submits a bill to the patient for the full charge and also submits the full charges to the insurer. The insurer will only pay the discounted amount of the bill that complies with the arrangement with the provider. For example, an MRI may be billed to the patient at $1,500 but the insurer will only pay the provider $800. The patient is not responsible for the remaining $700, even though the patient is billed $1,500.

Clearly, there are only three parties to these arrangements: the insurer, the provider and the patient. The patient pays for insurance from the insurer and the insurer enters into agreements to set particular fees with the providers. The question then becomes: when reviewing these bills for trial purposes, what constitutes the reasonable expense of necessary medical care, treatment and services? This issue was recently addressed by the Illinois Supreme Court in *Arthur v. Catour*.[19]

In *Arthur*, the plaintiff had incurred medical bills of $19,355.25; however, the insurer only paid $13,577.97, due to its arrangement with the provider. The question presented was which amount should be submitted to the jury as the amount of reasonable medical expenses. The plaintiff argued that the collateral source rule applied, and that the $19,355.25 should be provided to the jury. The defense argued that the collateral source rule only applied to the $13,577.97, the amount actually paid and accepted as payment in full. The trial court ruled in favor of the defense and held that the "plaintiff will be limited to seeking compensatory damages not exceeding those actually paid to her medical providers."[20]

The Appellate Court reversed the trial court and held that the "plaintiff's damages are not limited to the amount paid by her insurer."[21] The court further stated that the charges must be "reasonable expenses of necessary medical care."[22]

The Illinois Supreme Court decided *Arthur* in July 2005. The court cited the longstanding rule of law that "damages recovered by the plaintiff from the defendant are not decreased by the amount the plaintiff received from insurance proceeds where the defendant did not contribute to the payment of the insurance premiums."[23] The court explained that a defendant should not receive a benefit from the expenditures, the contracts or other relations of the plaintiff.[24]

The court further explained that "the collateral source rule is not an evidentiary rule that permits a defendant to limit a plaintiff's ability to introduce evidence of the reasonable cost of health care necessitated by the defendant's conduct."[25] The court then went on to address the substance of the issue. The court stated that "[w]hen evidence is admitted, through testimony or otherwise, that a medical bill . . . has been paid, the bill is prima facie reasonable. . . . A party seeking the admission into evidence of a bill that has not been paid can establish reasonableness by introducing testimony . . . that the bills are fair and reasonable."[26] The court then stated that a "plaintiff cannot make a prima facie case of reasonableness based on the bill alone, because she cannot truthfully testify that the total billed amount has been paid. Instead, she must establish the reasonable cost by other means."[27]

Taking these statements together, it appears that the court is stating that the full amount of the total medical bill can be admitted into evidence, but only if there is testimony that the total charged bill has been paid or that the total charged was reasonable and necessary. As the plaintiff cannot testify that the entire bill was paid when only a portion of the bill has been paid, some other witness must testify that the total amount charged was reasonable and necessary. The court does not explain how this combination of testimony is to be presented to the jury.

The dissent, authored by Justice McMorrow, discusses the problems with this dichotomy of issues. Normally, a plaintiff will testify that a bill has been paid and the bill will then be introduced into evidence. In cases where only a portion of the bill sought to be introduced has been paid, it is not possible for the plaintiff to testify that the full amount has been paid. The plaintiff can only testify that a portion has been paid, yet the plaintiff will need testimony that the full amount charged was reasonable and necessary in order to admit the total bill into evidence. The jury thus will hear testimony as to the total amount charged. However, testimony that only a portion of the bill was paid, and that a different, greater amount was actually reasonable, may potentially confuse the jury. Additionally, it is an open question whether the jury will know

that the difference in numbers resulted from the plaintiff being insured.

The primary focus of Justice McMorrow's dissent was to point out the lack of instruction from the court as to how this testimony is to be elicited at trial. The following proposed legislation addresses this issue:

Admissibility of Unpaid Medical Bills

(a) Unless evidentiary foundations are satisfied, medical bills shall only be admissible into evidence in any action on which recovery is sought for said medical bills if the medical bills are paid. If only a portion of the total medical bill is paid, only the paid portion shall be admissible into evidence. If the proponent of an unpaid bill or any portion thereof proffers evidence that the total bill was reasonable and necessary and causally related to the occurrence in question, than a rebuttable presumption exists that the unpaid amount is proper and that unpaid amount shall be admissible in evidence.

(b) Regardless of the requirements of paragraph (a), the source of payment for any medical bill shall be inadmissible in any action.

(c) Paragraph (b) shall not apply to any action upon which the payment of the medical bill is an evidentiary requirement or foundation to the cause of action.

(d) This amendatory act shall become effective _____.

This proposed legislation clarifies the standards for admissibility and describes what testimony should be introduced at trial in order to admit medical bills into evidence. The proposal is in conformance with *Arthur v. Catour* and explains that paid medical bills are admissible into evidence, while unpaid portions of any medical bill require testimony that the total bill was reasonable and necessary. The proposal also accounts for the collateral source rule and states that the source or amount of payment shall be inadmissible in any action. An exception is created for any action in which payment of the medical bill is part of the evidentiary or foundational requirement for the cause of action. This includes breach of contract, subrogation, and other actions where recovery is sought for repayment of a paid medical bill.

The *Arthur* decision does not create a rule of evidence nor does it change the law as it relates to evidence. Rather, the *Arthur* decision simply explains the rule of law as it applies to the current state of medicine and insurance. A codification of this rule of law would make the rule clear and not open to interpretation.

Editor's Note: Legislation relating to the admissibility of unpaid medical bills which is similar to the authors' proposal was recently introduced. Set forth below is HB 2034, which was proposed by Representative Chapin Rose from the 110th Legislative District in Charleston:

Section 5. The Code of Civil Procedure is amended by adding Section 8-1212 as follows:

(735 ILCS 5/8-1212 new)
Sec. 8-1212. Presumption as to bills for services rendered.

(a) As to plaintiff's claim for compensatory damages for services rendered:

(1) A rebuttable presumption as to the amount and reasonableness of the damages may be established by proof that, and to the extent to which, a bill for the services has been paid and accepted as payment in full for the services.

(2) A party attempting to rebut the presumption of the amount and reasonableness of the damages must prove that:

(A) the amount paid was paid in error and is therefore not a proper measure of plaintiff's damages;

or

(B) that the plaintiff remains liable to pay an amount for the services rendered in addition to the amount paid.

(b) This Section applies to actions commenced or pending on or after the effective date of this amendatory Act of the 95th General Assembly.

Section 99. Effective date. This Act takes effect upon becoming law.[28]

Jury Service in Illinois: Amendments to the Illinois Jury Act

The foundation of the American justice system rests in part on its venerable jury system. Thomas Jefferson considered "trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution."[29] The United States and Illinois Constitutions preserve the right of its citizens to be judged by a jury of their peers.[30] Indeed, all states include compulsory jury service as one of the few mandatory requirements of citizenship.[31] Regrettably, this paramount foundation of our freedom has started to crumble.

Juror panels have been decimated by no-shows, impermissible excuses to avoid service, and an overall unwillingness and shiftlessness of the general public to observe its civic duty.[32] These factors erode the true intent of the jury process, to develop a representative jury of one's peers. In fact, certain segments of the community serve in disproportionate numbers on juries.[33]

The current Illinois Jury Act fails to properly attain the goal of equal representation. In order to restore faith in the jury system, and to provide a truly representative cross section of the community, Illinois must amend its jury act.

In 2005, Senators Kirk Dillard and John Cullerton proposed amendments to the Illinois Jury Act.[34] This legislation sought to improve on the current system through increasing juror pay, limiting excuses and hardships, and raising fees imposed for failure to appear for a jury summons.[35] The proposed amendments, however, ended *sine die*.[36]

This year, Senator Dillard re-ignited the fight to overhaul our jury system. On February 9, 2007, Senator Dillard offered Senate Bill 1548, a set of amendments similar to those originally suggested in 2005.[37] In addition, in 2007, Representative Jack Franks introduced to the House of Representatives an alternative bill to enhance juror pay.[38] The impact of this legislation may be extremely far-reaching. It will improve jury participation by all individuals through a stronger incentive to serve, and by instilling a greater sense of civic duty in the citizens of Illinois. Illinois should swiftly pass the amendments to the Jury Act.

The Illinois legislature should also permit attorneys to review juror questionnaires, and participate in the process of determining exclusions and exemptions, especially those based on hardship. Or, in the alternative, the state should require jury commissioners to record all data obtained from the questionnaires for review by the parties involved. This article examines the current Illinois Jury Act and the proposed amendments.

The Illinois Jury Act

The Illinois Constitution secures an individual's right to a trial by jury.[39] This fundamental right imposes a duty on its citizens to serve as part of a jury.[40] To that end, Illinois compiles a list of eligible jurors in a particular county from its lists of legal voters, and those who possess an Illinois driver's license, identification card, or disabled person identification card.[41] Illinois requires that prospective jurors: 1) inhabit the county requiring service; 2) have attained at least 18 years of age; 3) exhibit fair character, approved integrity, sound judgment, be well informed and able to understand English; and 4) be citizens of the United States of America.[42] From this list, the jury administrator or jury commissioner identifies a definite number of prospective jurors to serve on petit and grand juries.[43]

A prospective juror is randomly selected from the list and summoned to appear before the court.[44] The selection process attempts to ensure adequate representation of all classes, sex, and race. A prospective juror then typically receives a summons by mail or under certain circumstances, by the county's sheriff, to appear in court.[45]

A summons to appear does not indicate whether a prospective juror will ultimately serve on a jury. To the contrary, an individual may be dismissed after answering a questionnaire, by peremptory challenge, or for cause during voir dire. Furthermore, the individual may delay or indefinitely postpone his obligation if he can prove sufficient hardship.[46]

Illinois currently allows an individual to claim hardship based on "the nature of the prospective juror's occupation, business affairs, physical health, family situation, active duty in the Illinois National Guard or Illinois Naval Militia, or other personal affairs…"[47] Some counties in Illinois send out jury questionnaires to determine whether a "person is approved for or excused from jury duty."[48] The use of questionnaires attempts to streamline the selection process.

Jury commissions in several other states use juror questionnaires, which are sent before the prospective juror appears in court.[49] The prospective juror completes the questionnaire and returns it to the jury commissioner.[50]

These questionnaires tend to highlight individuals claiming hardship for personal and economic reasons. For example, the Sangamon County questionnaire requests that individuals provide information relating to their qualifications as jurors and whether they may be exempted from jury service.[51] The questionnaires used in both Sangamon and Bureau Counties

inquire about the individual's occupation.[52] The jury commissioners use the answers provided in the questionnaires to prescreen prospective jurors.

The pre-screening process allows the jury commissioners to eliminate individuals they believe have an exemption or exclusion from service.[53] Some states explicitly allow jury commissioners the ability to dismiss prospective jurors.[54] Absent an express statutory provision, however, a jury commissioner should not exercise a function of the judicial process.

For example, the Louisiana Supreme Court overturned a conviction when it determined the jury commissioner improperly dismissed a potential juror.[55] In *State v. Procell*, Hugh Lee Procell was charged and subsequently convicted of second-degree murder.[56] Mr. Procell contended the jury was improperly impaneled because certain "qualified citizens were not given an opportunity to be considered for jury service."[57]

In Procell, the jury commission of the Sabine Parish had rejected prospective jurors that fell under possible exemptions to service by automatically excluding them from the juror rolls.[58] The prospective jurors had the opportunity to waive the exemptions, if they desired but the Sabine Parish commissioner did not allow them to take advantage of the waiver.[59] The Louisiana Supreme Court found that "this exclusion clearly contravenes the letter and spirit of the law. It means that the general venire is not selected impartially, as our constitution and statutes require, and that the general venire was improperly constituted."[60] Jury commissioners should not be allowed unfettered power to exclude jurors without at least some review by the parties involved.[61]

Additionally, the juror questionnaires are not usually turned over to the parties. Instead the jury commissioner maintains the questionnaires.[62] In states that allow jury commissioners to excuse prospective jurors, the attorneys never see nor can they inquire as to the reasons certain jurors were dismissed. In New York, however, the jury commissioner must turn over the questionnaires when instructed by the Appellate Court.[63] This action works retroactively. A more effective and proactive approach would allow attorneys the right to review the questionnaires to evaluate the prospective jurors' request for exclusion. The Illinois legislature should work with the judiciary to allow attorneys this opportunity.

Finally, individuals in certain occupations, including doctors and lawyers, tend to receive excuses based on their occupation.[64] It is improper to place a higher burden of jury service on any one segment of the community. As Michael Devereaux, the jury supervisor for the St. Louis City Circuit Court, pointed out, "Why should a certain group be excused just because of their job? My job as a plumber is just as important to me and my family as Dr. Zhivago's job at Barnes Hospital as a surgeon."[65] The system is in dire need of change.

Jury Patriotism Act and Proposed Amendments to the Illinois Jury Act

The American Legislative Exchange Counsel (ALEC) has developed model legislation to increase jury participation among all individuals.[66] ALEC developed the model rules in response to low juror turnout across every spectrum of citizens, and specifically those in higher socio-economic standing.[67] The proposed legislation seeks full participation on petit juries by all citizens, allows a juror one automatic postponement at the juror's request, severely limits excuses from service, protects jurors' jobs and provides increased pay depending on the length of service.[68]

Several states have enacted portions of the Jury Patriotism Act.[69] Senator Dillard's 2007 proposed amendments in Illinois Senate Bill 1548 are partially based on the Jury Patriotism Act.[70] Taken together, these amendments operate to increase jury participation.

One of the amendments seeks to alleviate jury service problems in Illinois by establishing a fund for lengthy jury trials and ending the perennial use of the hardship excuse.[71] Most individuals claiming an economic hardship point out that the current Jury Act fails to provide adequate compensation for the jurors' participation.[72] Currently, Illinois jurors are paid a sum from $4 to $10 per day.[73] Illinois jurors may also receive sums to offset travel costs and day care expenses. These amounts are flexible and may be changed by the respective county board.[74]

The payments to jurors fall below the government's minimum standard of wages.[75] This presents a huge problem for all individuals enlisted to serve jury duty. The length of jury service strains the pocket book of many prospective jurors. The single working mother that lives paycheck to paycheck cannot afford to serve on a jury for an extended length of time.

Two competing bills seek to increase the sum paid to jurors.[76] House Bill 303, offered earlier this year and sponsored by Representative Franks, only applies to payments to jurors. It would increase payment from the current rate to "an amount equal to minimum wage for 8 hours of work for each day."[77] This bill would eliminate a county's discretion to set the payment.[78] The bill does not specify the minimum wage used in its calculation. The minimum wage in Illinois differs based on the age of the worker, the type of industry and eventually, time in service with the individual's particular employer.[79]

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Assuming the current hourly rate minimum for individuals 18 and over in non-tip industries of $6.50 per hour, the amount per day for jury duty would total $52.00 per day, plus travel expenses and day care costs.

Senate Bill 1548, sponsored by Senator Dillard, takes a different approach. First, Senate Bill 1548 establishes a Lengthy Trial Fund.[80] The proposed amendment requires a charge of ten dollars on newly filed cases "be paid to the clerk of the court for deposit into the Lengthy Trial Fund."[81] This fund "provide(s) full or partial wage replacement or wage supplementation to jurors who serve as petit jurors for more than 10 days."[82]

The fund would pay jurors a maximum of "$300 per day per juror beginning on the 11th day of service."[83] Upon reaching the 11th day of service, the court may also provide an additional "$100 per day from the 4th to 10th day of jury service" for any juror the court deems suffered a "significant financial hardship."[84] Payments "shall be limited to the difference between the State-paid fee and the actual amount of wages a juror earns."[85] In other words, an individual cannot receive jury payments larger than what that individual earns at his current job. Nor can an individual receive payment for sums greater than $300 per day, regardless of the amount to which the person would otherwise be entitled from his current employer. The amounts provided will be reduced by "any amount the juror actually receives from the employer during the same time period."[86] Establishing payments to jurors for extended jury duty would alleviate many financial hardship excuses.[87]

Senate Bill 1548 leaves intact the current jury payment rate for the first three days of service, but potentially alters payment for days four to ten, depending on the length of service and hardship claims noted above. Most importantly, Senate Bill 1548 still allows the individual counties to increase payments to jurors, if they so desire.[88]

It is illegal for an employer to fire or suspend an employee for jury service.[89] Currently the employer has the option to require its employees to use vacation or sick time while serving jury duty. Senate Bill 1548 eliminates the employer's option and goes further by expressly prohibiting such action.[90]

The current jury act requires all citizens to appear when summoned or face the possibility of fines or jail time.[91] The judge has the power to fine the individual from $5 to $100.[92] Senate Bill 1548 would increase the maximum amount of the fine to $500, and allow the court to impose community service in addition to or in lieu of any fine. The community service period must at least equal the amount of time required for the prospective juror to have completed jury service.[93] These changes should serve as an incentive to appear. The jury amendments, however, do allow for proper excuses from duty.

One of the novel aspects of Senate Bill 1548 allows a prospective juror an automatic one-time postponement from jury duty for 24 months.[94] Individuals that use this exemption must notify the court in writing and provide documentation for the hardship.[95] Once excused, the prospective juror must indicate a time in the future he can serve.[96] All of the amendments in Senate Bill 1548 provide enhanced incentives for every individual to serve on a jury.

The outlook is not dim. Jurors across the nation should view jury service in a bright light.[97] Given the opportunity, individuals embrace their civic duty and leave jury duty feeling fulfilled and with a desire to participate in the future.[98] Illinois' enactment of Senate Bill 1548 will mend our fractured system and establish new supports to the foundation of our freedom.

Use of Prior Depositions in Mass Tort Cases

Plaintiffs enjoy a considerable advantage in the arena of mass torts. In cases throughout the country, plaintiffs' attorneys cherry-pick the best depositions to use as a sword against defendants. They identify witness testimony from prior depositions that elicit the most favorable testimony for their clients while hiding behind an antiquated common law rule to prevent similarly favorable testimony from defendants' witnesses. The prevalence of mass torts highlights and perpetuates this practice.

Mass torts is a term of art that distinguishes certain tort actions from general product liability claims.[99] The two main differences are "(1) [t]he high degree of commonality of issues and actors among the claims within a litigation, and (2) the extraordinary interdependence of case values."[100] Mass torts involve large-scale claims of product or premises liability arising out of product exposure or use.[101] Examples of mass tort claims include: "Accutane, Asbestos, Bextra/Celebrex, Ciba Geigy, Diet Drug, HRT, LBMGP, Lead Paint, Ortho Evra, PPA, Risperdal/Seroquel/Zyprexa, Tobacco and Vioxx."[102]

Mass torts have exploded in the last few decades.[103] Several factors affecting the increase in claims include advances in legal theories allowing suits against common defendants, increased social awareness and the mass marketing of products.[104] The commonality between the defendants, witnesses, parties and specialized law firms resulted in numerous depositions involving the same witnesses.

The liberal use of discovery procedures allows litigants to clarify and narrow the scope of mass tort cases. Litigants use several methods of discovery, including interrogatories, depositions and affidavits.[105] Deposition testimony is one of the most important and useful discovery devices.

Depositions allow parties the opportunity to investigate the knowledge of a particular witness.[106] In the traditional civil action, a small number of depositions are taken. However, in mass tort actions, the use of depositions may number in the hundreds, creating a strain on the judicial system.[107] Typically, these depositions involve the same defendants, similar testimony and circumstances; only the plaintiff differs.

Depositions taken in a prior suit may be used under limited circumstances in subsequently filed actions. Traditionally, plaintiffs could use prior depositions against a defendant. Plaintiffs argued the defendant had an opportunity to adequately represent its interests in the prior deposition. Since the plaintiff is different in each case, however, the defendant would not enjoy the same opportunity. This allows a plaintiff to identify and choose the most advantageous prior depositions and ignore those harmful to its case. The defendant has no such privilege.

An emerging trend fairly balances the interests of both parties by expanding the use of depositions taken in earlier actions and allowing it as evidence during later lawsuits by focusing on the adequacy of the cross-examination in the prior testimony. Depositions taken in mass tort cases involve the same or similar circumstances. Therefore, parties in this type of litigation have similar motives to develop testimony.

The use of prior depositions hastens the development of relevant information and promotes judicial economy. The Illinois Supreme Court should take this opportunity to amend Supreme Court Rule 212 to permit a more liberal use of such depositions. This article reviews the traditional theories behind the use of depositions and suggests enlarging the scope of the discovery rules.

General Role of Depositions

Traditionally, depositions and other discovery procedures serve to disclose facts and evidence to the parties.[108] Discovery promotes judicial economy by ascertaining and limiting relevant information prior to trial.[109] To that end, all forms of discovery are liberally construed.[110]

Illinois differentiates between discovery and evidentiary depositions.[111] A discovery deposition permits the attorneys to inquire about the substance of an issue.[112] Attorneys are permitted "wide latitude" in the scope and manner of questioning during a discovery deposition.[113] An evidence deposition, on the other hand, is more formal and may be used as evidence at trial.[114]

Limitations apply to both types of depositions.[115] Deposition testimony may be considered hearsay, especially when taken in a prior case. Hearsay is an out-of-court statement used to prove the truth of the matter asserted and is admissible only under limited circumstances.[116] Statutes and common law doctrines allow certain out-of-court statements to be used in trial.

For example, discovery depositions may be used at trial: 1) to impeach the witness; 2) as an admission by a party or his agent; 3) when otherwise admissible under a hearsay exception; 4) "for any purpose for which an affidavit may be used;" or 5) upon notice to all parties that it will be used as evidence "if the court finds that the deponent is neither a controlled expert witness nor a party," an evidence deposition

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has not been taken and the deponent is unable to appear in court due to death or infirmity.[117] Evidence depositions may be used at trial when the deponent is unavailable for the following reasons:1) death, age, sickness, infirmity or imprisonment; 2) the deponent is out of the county not due to the fault of the party offering the deposition; or 3) a party is unable to procure the deponent after reasonable diligence.[118]

There are instances where a plaintiff or defendant may seek leave to introduce a deposition from a previous matter as evidence in a new case. Parties have used testimony involving similar facts and circumstance for a number of years.[119] Illinois currently allows some depositions taken in prior actions to be used in later filed actions.[120] The use of such depositions is limited to actions "involving the same subject matter…brought between the same parties or their representatives or successors in interest."[121]

Testimony in mass tort cases generally involves similar facts and circumstances.[122] Typically, the same plaintiff and defense firms are involved in the litigation. The use of previous deposition testimony significantly aids litigants in complex mass tort cases and serves the interests of judicial economy.

Depositions in Mass Tort Cases

Mass tort claims involve complex yet amazingly similar facts and issues.[123] For example, tort litigants in asbestos claims generally attempt to show that exposure to a certain defendant's asbestos-containing product caused the plaintiff's injury.[124] In fact, each such plaintiff must prove "the decedent [or Plaintiff] regularly worked in an area where the Defendant's asbestos was frequently used and . . . the decedent worked close enough to this area to come into contact with the Defendant's product."[125] The issues for most cases are identical or at least similar in all mass tort actions. Depositions taken in one case may be relevant to another and may ultimately speed the judicial process.

Traditionally, the parties must receive notice of the deposition in order to be bound by the testimony.[126] Notice for a deposition in one case may bind the party or witness to that testimony in a later filed action.[127] Furthermore, as the Illinois First District Appellate Court noted "[t]here is no per se rule prohibiting a deposition taken in one case from being used in another."[128]

McInturff v. Insurance Co. of North America was one of the first Illinois cases to examine an exception for prior testimony in civil litigation.[129] John and Sarah McInturff were charged with arson of their property, which was insured by the Insurance Company of North America (ICNA).[130] In the criminal action, Thomas Blay offered damaging testimony against John McInturff. The criminal court entered a verdict of not guilty for the McInturffs. After the verdict was entered, but before the civil action was filed, John McInturff killed Thomas Blay.[131]

In the civil case, John McInturff sought damages for the burned property from ICNA, alleging that ICNA breached its obligation to pay under the insurance contract. ICNA moved to introduce the prior criminal court testimony of Thomas Blay.[132] The trial court denied the request and ICNA appealed. [133] The Illinois Supreme Court affirmed, rigidly requiring that the parties in each case be identical. [134]

The Illinois Supreme Court departed from this strict adherence in *George v. Moorhead.*[135] That action involved a will contest between the apparent heirs of Berthold Wetstone and Dr. Lewis Moorhead, the primary beneficiary under the will.[136] In a separate probate action, Mr. Wetstone's potential heirs requested that the probate court determine heirship.[137] The heirs sought to introduce testimony of witnesses from the heirship proceeding in the will contest even though Dr. Moorhead was neither a party nor a party in privity to the heirship proceeding.[138] The trial court sustained Dr. Moorhead's motion and denied the use of the prior testimony.[139]

The Illinois Supreme Court departed from the strict rule of sameness for a more general requirement that "both actions involved the same issue between the same parties or their privies."[140] The Court could not determine the extent of privity between the parties, but found the issues involved ranged broadly between the two cases. The testimony taken in the prior heirship proceeding did not allow the current party against whom the deposition would be used a full and fair opportunity to cross-examine the witness.[141]

Illinois courts have allowed the use of prior deposition testimony when it concerns similar matters or facts. In *Thompson v. City of Bushnell*, the plaintiff alleged the city of Bushnell negligently failed to provide proper ventilation to its sewage vents. [142] The improper ventilation led to a deadly buildup of methane and butane gas.[143] This gas seeped into Herman Thompson's basement and he ignited a flame without knowledge of the presence of the gas.[144]

Herman Thompson sued Bushnell for his injuries.[145] During the initial action, the plaintiff deposed Claude Romine.[146] After the deposition and prior to trial, Mr. Thompson died from his injuries.[147] Myrtle Thompson, as administrator of his estate, filed a wrongful death suit under the Injuries Act.[148] In this action, the plaintiff sought to introduce at trial the deposition of Claude Romine taken during the suit originally filed by Herman Thompson.[149] The defendant objected, claiming the deposition was improperly admitted.[150]

The appellate court allowed the deposition to be admitted at trial.[151] It found the subject matter of the wrongful death suit involved the same circumstances as the previous suit.[152]

> [I]t is not material that the parties be identical, or that there be complete mutuality in respect to their relation to each other, or to the subject matter. It is sufficient, if the same matter were in issue in both cases, and those against whom the depositions are offered, or those under whom they claim the estate or right in question, had opportunity of cross-examining the witnesses and testing the truth of their testimony.[153]

A deposition may be admitted even if the parties in interest are not exactly the same.[154]

The Illinois Supreme Court has continued to ease this requirement. In *Laboy v. Industrial Commission*, a fight ensued between two employees at Gold Eagle Products, Inc. (Gold Eagle).[155] Juan Laboy filed a criminal complaint against Felix Pegan.[156] Mr. Pegan testified in a preliminary hearing in the criminal action, but returned to Puerto Rico before testifying in Mr. Laboy's workers' compensation suit.[157] The arbitrator in the workers' compensation action permitted Mr. Pegan's prior preliminary hearing testimony to be used as evidence against Mr. Laboy.[158]

The Illinois Supreme Court affirmed the arbitrator's decision.[159] It acknowledged several commentators' harsh criticism of *McInturff* "as 'a flagrant sacrifice of justice on the alter [sic] of technicalism.'"[160] The Court noted how modern authority would change the result in *McInturff* and the Court would admit such evidence now.[161] In the present case, the Court focused on the party's "right or opportunity to cross-examine . . . [t]he nature and scope of the cross-examination" and the opportunity to subject the prior testimony to cross-examination rather than the specific identities of the parties involved.[162]

The Court continued to expand its meaning of the adequacy of cross-examination as "an opportunity to effectively cross-examine."[163] But the mere opportunity to cross-examine "is not per se adequate opportunity."[164] Each determination must be "decided on the circumstances of each case."[165] The lower courts, however, did not immediately embrace this shift in theory.

In *Wilkerson v. Pittsburgh Corning Corporation*, Ravalee Wilkerson sued Pittsburgh Corning (PC), alleging products it manufactured caused her husband to develop a lung malignancy.[166] During trial, the plaintiff introduced the deposition of Robert Sindelar.[167] Sindelar was a plaintiff in a previous suit filed against PC.[168] He testified that he had used Unibestos, at a time PC manufactured the product, as an insulator for Cordova.[169] Sindelar worked during the same time period as Wilkerson.[170] The trial court allowed the plaintiff to use Sindelar's deposition.[171]

PC attempted to rebut Sindelar's position by introducing the depositions of Mr. Fuhs and Mr. Buckley, employees of PC during the significant time period.[172] They had previously testified during depositions concerning when PC ceased production of Unibestos products and when warnings were placed on the contents.[173] The trial court refused to allow the introduction of these depositions.[174]

The Fourth District Appellate Court affirmed the trial court. In accepting the use of Sindelar's deposition the court noted "the matters in issue are essentially the same . . . in which Sindelar was the plaintiff in an asbestos-related suit against PC."[175] However it found no similarity in Fuhs or Buckley's depositions.[176] The only difference between the cases was the plaintiffs involved. These cases involved similar asbestos related suits and a similar question of fact; namely when PC ceased production of Unibestos.

The court determined that the current plaintiff did not have a "full opportunity to test the veracity of the testimony of Fuhs or Buckley through cross-examination during the prior proceedings."[177] The plaintiff in the case where Fuhs and Buckley testified had an interest similar to that of the current plaintiff, to identify when PC halted manufacturing Unibestos and when the warnings were placed on the product. The court arbitrarily denied the use of these factually relevant and thoroughly cross-examined depositions.

Subsequently, the Fourth District Appellate Court had another opportunity to examine the issue of prior testimony. In *McClure v. Owens Corning Fiberglas Corporation*, several plaintiffs sued Owens Corning Fiberglas Corporation (OCF) and Owens-Illinois (OI) alleging that products they manufactured caused the plaintiffs to develop asbestosis.[178] At trial, OI attempted to introduce prior deposition testimony from its industrial hygienist, Willis Hazard, taken pursuant to the Federal Rules of Civil Procedure.[179] The plaintiffs were not parties to the action in which Mr. Hazard was deposed.[180] Hazard passed away sometime after his federal deposition and prior to the current trial.[181] The trial court did not allow OI to introduce Hazard's deposition and OI appealed.[182]

The Fourth District Appellate Court found that Hazard's deposition should have been admitted.[183] The court distinguished between a discovery or evidence deposition. If it was a discovery deposition it might constitute an admission.[184] However, the deposition also could have been admitted as an evidence deposition.[185] Ultimately, the court determined

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whether the traditional rules that require a predecessor-in-interest to be in privity "against whom the evidence is offered" still applied.[186]

The predecessor-in-interest requirement no longer requires privity between the parties. Instead, "the court must satisfy itself that the interests of the party against whom the deposition is sought to be admitted were protected by the presence of a party at the deposition with the opportunity and a similar motive to develop testimony."[187] If a party contests the use of the prior deposition it should "point up distinctions in her case not evident in the earlier litigation that would preclude similar motives of witness examination."[188]

The Illinois Supreme Court has already begun to shift its focus from a blind application requiring similarity between the parties to a better reasoned, case by case approach involving the adequacy of cross-examination in the prior testimony. Illinois Supreme Court Rule 212 should remove the requirement that the use of prior testimony in a later filed action be "brought between the same parties or their representatives or successors in interest."[189] Instead, prior depositions should be allowed if a "party against whom the deposition is sought to be admitted were protected by the presence of a party at the deposition with the opportunity and a similar motive to develop testimony" as the current party.[190] This change would fairly balance the interests of both parties, speed the collection of relevant information and promote judicial economy.

Endnotes

[1] *See Kirk v. Michael Reese Hospital & Medical Center*, 117 Ill. 2d 507, 513 N.E.2d 387 (1987).

[2] *See Ashman v. SK & F Lab. Co*., 702 F. Supp. 1401, 1405 (N.D. Ill. 1988).

[3] *See Perez v. Wyeth Lab. Inc.*, 161 N.J. 1, 734 A.2d 1245 (1999).

[4] *Id.* at 18-19.

[5] *See id.* at 17-18.

[6] *Id.* at 18-19.

[7] *Heppel v. Wal-Mart Stores, Inc.*, 199 Ill. 2d 179, 766 N.E.2d 1118 (2002).

[8] *Kennedy v. Medtronic, Inc.*, 366 Ill. App. 3d 298, 851 N.E.2d 778 (1st Dist. 2006).

[9] 735 ILCS 5/2-1117; *see, e.g., Unzicker v. Kraft Food Ingredients Corp.*, 203 Ill. 2d 64, 783 N.E.2d 1024 (2002); *Skaggs v. Senior Services of Cent. Illinois*, 355 Ill. App. 3d 1120, 823 N.E.2d 1021 (4th Dist. 2005); *Ready v. United/Goedecke Services, Inc.*, 367 Ill. App. 3d 272, 854 N.E.2d 758 (1st Dist. 2006).

[10] *Unzicker v. Kraft Food Ingredients Corp.*, 203 Ill. 2d 64, 78, 783 N.E.2d 1024 (2002).

[11] *Id*. at 94.

[12] 735 ILCS 5/2-1117 (emphasis added).

[13] *Skaggs v. Senior Services of Cent. Illinois, Inc.*, 355 Ill. App. 3d 1120, 823 N.E.2d 1021 (4th Dist. 2005) *petition for leave to appeal granted*, 216 Ill. 2d 734, 839 N.E.2d 1037 (2005).

[14] *Id*. at 1129.

[15] *Ready v. United/Goedecke Services, Inc.*, 367 Ill. App. 3d. 272, 854 N.E.2d 758 (1st Dist. 2006).

[16] 735 ILCS 5/2-1116.

[17] 735 ILCS 5/2-1116(c).

[18] IPI 30.06.

[19] *Arthur v. Catour*, 216 Ill. 2d 72, 833 N.E.2d 847 (2005).

[20] *Id.* at 76.

[21] *Id*. at 77.

[22] *Id*.

[23] *Id*. at 79, *citing Peterson v. Lou Bachrodt Chevrolet Co.*, 76 Ill. 2d 353, 362, 29 Ill. Dec. 444, 392 N.E.2d 1 (1979); *see Biehler v. White Metal Rolling & Stamping Corp.*, 30 Ill. App. 3d 435, 444, 333 N.E.2d 716 (1975).

[24] *Id*. at 79.

[25] *Id.* at 80.

[26] *Id.* at 82.

[27] *Id.* at 83.

[28] H.B. 2034, 95th General Assembly (Ill. 2007).

[29] Letter From Thomas Jefferson to Thomas Paine (July 11, 1789), in 15 The Papers of Thomas Jefferson 269 (Julian P. Boyd, ed. 1958), cited in Evan R. Seamone, *A Refreshing Jury COLA: Fulfilling the Duty to Compensate Jurors Adequately*, 5 N.Y.U. J. Legis. & Pub. Pol'y 289 fn. 1 (2001-2002).

[30] U.S. Const. art. III, §2, cl. 3, amend. VI, VII; IL Const. art. I, §13.

[31] *Immediato v. Rye Neck School District*, 73 F.3d 454, 459 (2d Cir.1996) (*citing Hurtado v. United States*, 410 U.S. 578, 589 n. 11 (1973)).

[32] *Jury Patriotism Act Targets Poor Turnout*, 133 USA Today (Magazine) 2716 (January 1, 2005).

[33] Kristin Armshaw, *Why Every State Should Have a Jury Patriotism Act: Bad Excuses and Broad Exemptions Are Hurting Our Jury Pools*, (July 14, 2004), at http://writ.findlaw.com/commentary/20040714_armshaw.html. (last visited March 9, 2007).

[34] S.B. 1481, 94th Gen. Assem. Reg. Sess. (Il. 2005).

[35] *Id.*

[36] *Sine die* is the adjournment of a legislative session without establishing a new date to hear laws that have not been voted on. The net effect is to end consideration of the matter. See "*Sine die*" available at http://ilga.gov/legislation/glossary.asp (last visited March 9, 2007).

[37] S.B. 1548, 95th Gen. Assem. Reg. Sess. (Il. 2007).

[38] H.B. 303, 95th Gen. Assem. Reg. Sess. (Il. 2007).

[39] IL Const. art. I, §13.

[40] *People v. James*, 304 Ill. App. 3d 52, 58, 710 N.E.2d 484, 489 (2d Dist. 1999) ("Jury service is not voluntary…"); see also *Immediato*, 73 F.3d 454, 459 (2d Cir.1996) (*citing Hurtado v. United States*, 410 U.S. 578, 589 n. 11 (1973)).

[41] 705 ILCS 305/1 (West 2007). See S.B. 20, 95th Gen. Assem. Reg. Sess. (Il. 2007) (A bill to amend the Illinois Income Tax Act, Jury Act and the Jury Commission Act to add individuals claiming an Illinois earned income credit to the jury list.)

[42] 705 ILCS 305/2 (West 2007).

[43] *Id*.

[44] 705 ILCS 305/8 (West 2007).

[45] 705 ILCS 305/9-10.1 (West 2007).

[46] 705 ILCS 305/10.2 (West 2007).

[47] *Id*.

[48] *People v. Johnson*, 197 Ill. App. 3d 74, 80, 554 N.E.2d 696, 699 (3d Dist. 1990) (reh'g denied); see also Bureau County Clerk of the Circuit Court, *Bureau County Circuit Court Sample Juror Questionnaire*, *at* http://www.bccirclk.gov/jury.htm (last visited March 9, 2007) [hereinafter *Bureau County Questionnaire*]; and Sangamon County Jury Commission Office, *Sample Juror Qualification Questionnaire*, *at* http://www.co.sangamon.il.us/court/Jury Questionnaire.pdf (last visited March 9, 2007) [hereinafter *Sangamon County Questionnaire*].

[49] *Id*. *See also People v. Taylor*, 743 N.Y.S.2d 253 (N.Y. Sup. Ct. 2002); *State v. Wooten*, 972 P.2d 993 (Ariz. Ct. App. 1999); Ariz. Rev. Stat. § 21-315 (West 2007). *See Johnson*, 197 Ill. App. 3d 74, 80, 554 N.E.2d 696, 699 (3d Dist. 1990) (reh'g denied); *Sangamon County Questionnaire; Bureau County Questionnaire*.

[50] *Id*.

[51] *See Sangamon County Questionnaire*.

[52] *See Sangamon County Questionnaire; Bureau County Questionnaire.*

[53] *People v. Taylor*, 743 N.Y.S.2d 253 (N.Y. Sup. Ct. 2002); *State v. Wooten*, 972 P.2d 993 (Ariz. Ct. App. 1999); Ariz. Rev. Stat. § 21-315 (West 2007).

[54] *Id.*

[55] *State v. Procell*, 332 So.2d 814 (La. 1976).

[56] *Id.*

[57] *Id.* at 815. Mr. Procell pursued the two most common reviews of improper jury selection, 1) a violation of due process and 2) the jury did not represent a true cross section of the community.

[58] *Id.* at 817.

[59] *Id.*

[60] *Id.*

[61] *Page v. Siemens Energy and Automation, Inc.*, 728 So.2d 1075 (Miss. 1998) (reh'g denied). The Mississippi Supreme Court faced a similar issue. The county clerk improperly excluded potential jurors that served within the past two years by "granting excuses to jurors without them coming to court." It overturned a judgment in favor of Siemens due to the exclusion of these potential jurors.

[62] *People v. Taylor*, 743 N.Y.S.2d 253 (N.Y. Sup. Ct. 2002).

[63] *Id.*

[64] Lawyers and doctors received automatic exemptions for several years, but now are at least required to appear when summoned. See *People v. Wallace*, 247 Ill. App. 489 (1st Dist. 1928).

[65] Donna Walter, *Missouri Legislation Seeks to Reform State's Jury System*, Feb. 19, 2004, *available at* 2004 WLNR 5693439.

[66] Victor E. Schwartz, Mark A. Behrens, and Cary Silverman, *The Jury Patriotism Act: Making Jury Service More Appealing and Rewarding to Citizens*, The State Factor, April 2003, 10-13 (*available at* http://www.alec.org/meSWFiles/pdf/0309.pdf) (Last visited March 9, 2007).

[67] *Patriotism Act Targets Poor Turnout*, 133 USA Today (Magazine) 2716 (January 1, 2005).

[68] *Jury Patriotism Act* (2003) (*available at* http://www.alec.org/meSWFiles/pdf/0309.pdf) (Last visited March 9, 2007).

[69] See Ariz. Rev. Stat. § 21-301, et seq. (West 2007); La. Rev. Stat. Ann. § 3041, et seq. (West 2007); Miss. Code Ann. § 13-5-1, et seq. (West 2007); Mo. Rev. Stat. § 494.400, et seq. (West 2007); Okla. Stat. tit. 38, § 18, et seq. (West 2007).

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[70] S.B. 1548, 95th Gen. Assem. Reg. Sess. (Il. 2007).

[71] *Id.*

[72] Natalie Patton, *Steps Suggested to Improve Juries*, Las Vegas Review-Journal, March 16, 2002, *available at* 2002 WLNR 456179.

[73] 55 ILCS 5/4-11001 (West 2007).

[74] *Id.*

[75] The current federal minimum wage is $5.15 per hour. The Fair Labor Standards Act, 29 U.S.C. § 201, et seq. (West 2007). Illinois' minimum wage will continue to increase for the next several years. Currently the minimum wage for individuals 18 and over in non-tip industries is $6.50 per hour. This rate is set to increase to a maximum of $8.25 on 7/01/10. 820 ILCS 105/1, et seq. (2007) (for a complete table of Illinois minimum wage rate schedules please see Illinois Hourly Minimum Wage Rates by Year, available at http://www.state.il.us/Agency/idol/Facts/mw.htm (last visited March 9, 2007)).

[76] S.B. 1548, 95th Gen. Assem. Reg. Sess. (Il. 2007) (Senate Bill); H.B. 303, 95th Gen. Assem. Reg. Sess. (Il. 2007) (House Bill).

[77] H.B. 303, 95th Gen. Assem. Reg. Sess. (Il. 2007).

[78] *Id.*

[79] 820 ILCS 105/1,et seq. (2007) (This statute establishes varying minimum wages for Illinois workers. The current amount for individuals 18 and over in non-tip industries equals $6.50 per hour.)

[80] S.B. 1548, 95th Gen. Assem. Reg. Sess. (Il. 2007).

[81] *Id.* The bill provides exceptions to select attorneys and causes of action, e.g. 1) government attorneys appearing in their official capacity, 2) pro se litigants, 3) small claims cases, and 4) claims seeking the following: social security disability determinations, individual veterans' compensation disability determinations, recoupment actions for government backed educational loans or mortgages, child custody and support cases, actions brought in forma pauperis, and any other filings designated by rule that involve minimal use of court resources and that customarily are not afforded the opportunity for a trial by jury.

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] For a comprehensive view on juror compensation please see Evan R. Seamone, *A Refreshing Jury COLA: Fulfilling the Duty to Compensate Jurors Adequately*, 5 N.Y.U. J. Legis. & Pub. Pol'y 289 fn. 1 (2001-2002).

[88] S.B. 1548, 95th Gen. Assem. Reg. Sess. (Il. 2007).

[89] 705 ILCS 305/4.1 (West 2007).

[90] S.B. 1548, 95th Gen. Assem. Reg. Sess. (Il. 2007).

[91] 705 ILCS 305/15 (West 2007).

[92] *Id.*

[93] S.B. 1548, 95th Gen. Assem. Reg. Sess. (Il. 2007).

[94] *Id.*

[95] *Id.* Physical or mental hardships require "documentation from a physician." An economic hardship requires the prospective juror provide "federal and state income tax returns, medical statements from licensed physicians, proof of dependency or guardianship, and similar documents." Failure to provide the requisite documentation will result in a denial of the postponement.

[96] *Id.*

[97] *Jury Service: Is Fulfilling Your Civic Duty a Trial?*, Prepared for American Bar Assoc., July 2004, available at http://www.abanews.org/releases/juryreport.pdf. (Last visited March 9, 2007) (84% of Americans view jury service as an important civic duty and jurors who serve have a positive experience and a majority would serve again).

[98] *Id.*

[99] Deborah Hensler, *Understanding Mass Personal Injury Litigation*, *at* http://www.rand.org/pubs/research_briefs/RB9021/index1.html (last visited March 13, 2007).

[100] *Id.*

[101] Deborah Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 Duke J. Comp. & Int'l L. 179, 181 (2001).

[102] *See* New Jersey Judiciary, Frequently Asked Questions, *at* http://www.judiciary.state.nj.us/mass-tort/faq.htm#guide (last visited March 13, 2007).

[103] Deborah Hensler, *Understanding Mass Personal Injury Litigation*, *at* http://www.rand.org/pubs/research_briefs/RB9021/index1.html (last visited March 13, 2007).

[104] Id.

[105] Ill. Sup. Ct. R. 201(a) (West 2007).

[106] Ill. Sup. Ct. R. 201, et seq. (West 2007).

[107] Daniel J. Siegel, *Navigating the Complexity of Mass Tort Litigation*, XXV Penn. Law Weekly 32, August 19, 2002.

[108] *Buehler v. Whalen*, 70 Ill. 2d 51, 374 N.E.2d 460, 467 (1977).

[109] *Dept. of Transp. v. Chicago Title and Trust Co.*, 303 Ill. App. 3d 484, 707 N.E.2d 637 (1st Dist. 1999).

[110] *Avery v. Sabbia*, 301 Ill. App. 3d 839, 845, 704 N.E.2d 750, 754 (1st Dist. 1998) (Illinois Supreme Court Rule 201(c)(1) is designed to "prevent abuses of the liberal discovery afforded under our discovery rules.").

[111] Ill. Sup. Ct. R. 202. (West 2007).

[112] Ill. Sup. Ct. R. 212(a) (West 2007).

[113] *In re Estate of Rennick*, 181 Ill. 2d 395, 401, 692 N.E.2d 1150, 1154 (1998).

[114] Ill. Sup. Ct. R. 212(b); See also *In re Estate of Rennick*, 181 Ill. 2d at 401, 692 N.E.2d at 1154.

[115] Ill. Sup. Ct. R. 212.

[116] *Gunn v. Sobucki*, 352 Ill. App. 3d 785, 789, 817 N.E.2d 588, 592 (2d Dist. 2004).

[117] Ill. Sup. Ct. R. 212(a).

[118] Ill. Sup. Ct. R. 212(b).

[119] *Thompson v. City of Bushnell*, 348 Ill. App. 395, 109 N.E.2d 346 (3d Dist. 1952); *Haskell v. Siegmund*, 28 Ill. App. 2d 1, 170 N.E.2d 393 (3d Dist. 1960).

[120] Ill. Sup. Ct. R. 212(d).

[121] *Id*.

[122] Deborah Hensler, *Understanding Mass Personal Injury Litigation*, *at* http://www.rand.org/pubs/research_briefs/RB9021/index1.html (last visited March 13, 2007).

[123] Daniel J. Siegel, *Navigating the Complexity of Mass Tort Litigation*, XXV Penn. Law Weekly 32, August 19, 2002. (Mass tort litigation involves "common aspects.").

[124] *Johns-Manville/Asbestosis Cases*, 93 F.R.D. 853, (N.D. Ill. 1982).

[125] *Johnson v. Owens-Corning Fiberglass Corp.*, 284 Ill. App. 3d 669, 676-677, 672 N.E.2d 885, 890 (3d Dist. 1996).

[126] Ill. Sup. Ct. R. 202; Ill. Sup. Ct. R. 204(a)(3); *Cf McClure v. Owens Corning Fiberglas Corp.*, 298 Ill. App. 3d 591, 698 N.E.2d 1111 (4th Dist. 1998) (rev'd on other grounds).

[127] *Haskell v. Siegmund*, 28 Ill. App. 2d 1, 170 N.E.2d 393 (3d Dist. 1960).

[128] *Fremont Compensation Ins. Co. v. Ace-Chicago Great Dane Corp.*, 304 Ill. App. 3d 734, 741, 710 N.E.2d 132, 137 (1st Dist. 1999).

[129] *McInturff v. Insurance Co. of North America*, 248 Ill. 92, 93 N.E. 369 (1910).

[130] *Id.* at 94.

[131] *Id*.

[132] *Id*.

[133] *Id.* at 93.

[134] *Id.* at 95.

[135] *George v. Moorhead*, 399 Ill. 497, 78 N.E.2d 216 (1948).

[136] *Id.* at 498.

[137] *Id*.

[138] *Id*. at 499.

[139] *Id*. at 499.

[140] *Id.* at 500.

[141] *Id*. at 501.

[142] *Thompson v. City of Bushnell*, 348 Ill. App. 395, 397-398, 109 N.E.2d 346, 347 (3d Dist. 1952).

[143] *Id.*

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] *Id.*

[148] *Id.*

[149] *Id.*

[150] *Id.* at 402.

[151] *Id*.

[152] *Id.*

[153] *Id*. at 404.

[154] *See* also *George v. Moorhead*, 399 Ill. 497, 78 N.E.2d 216 (1948).

[155] *Laboy v. Industrial Comm'n.*, 74 Ill. 2d. 18, 383 N.E.2d 954 (1978).

[156] *Id*. at 20.

[157] *Id.* at 21.

[158] *Id.* at 21.

[159] *Id.* at 24.

[160] *Id.* (citing McCormick, Evidence § 256 (2d ed. 1972); Wigmore, Evidence § 1387 (Chadbourn Rev. Ed. 1974)).

[161] *Id*. at 22.

[162] *Id*. at 22.

[163] *People v. Horton*, 65 Ill. 2d 413, 417, 358 N.E.2d 1121, 1124 (1977) (reh'g denied).

[164] *Id*.

[165] *People v. Rice*, 166 Ill. 2d 35, 39, 651 N.E.2d 1083, 1085 (1995) (reh'g denied).

[166] *Wilkerson v. Pittsburgh Corning Corp.*, 276 Ill. App. 3d 1023, 659 N.E.2d 979 (4th Dist. 1996) (reh'g denied).

[167] *Id.* at 1027.

[168] *Id.* at 1035.

[169] *Id.* at 1027.

[170] *Id*.

[171] *Id* at 1035.

[172] *Id.*

[173] *Id.*

[174] *Id.*

[175] *Id.*

[176] *Id*.

[177] *Id.* at 1036.

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[178] *McClure v. Owen Corning Fiberglas Corp.*, 298 Ill. App. 3d 591, 698 N.E.2d 1111 (4th Dist. 1998) (rev'd on other grounds).

[179] *Id.* at 602.

[180] *Id.*

[181] *Id.*

[182] *Id*.

[183] *Id*. *See also Horne v. Owens-Corning Fiberglas Corp.*, 4 F.3d 276, 282-83 (4th Cir. 1993). The Fourth Circuit Court allowed the depositions of Mr. Hazard under similar circumstances to the case at issue.

[184] *Id*. (citing *In re Estate of Rennick*, 181 Ill. 2d 395, 405, 692 N.E.2d 1150, 1155 (1998)).

[185] *Id*. "[E]vidence depositions may be used 'by any party for any purpose' if the deponent is dead." (citing ILL. SUP. CT. R. 212(b)).

[186] *Id*. at 603.

[187] *Id.*

[188] *Horne*, 4 F.3d at 283.

[189] ILL. SUP. CT. R. 212(d).

[190] *McClure*, 298 Ill. App. 3d at 602, 698 N.E.2d at 1119.