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CONSTRUCTION NEWSLETTER

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Editor

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TERMINATED EMPLOYEE STILL OWED WORKERS' COMPENSATION BENEFITS

In the recent case of *Interstate Scaffolding Inc. v. Illinois Workers' Compensation Commission*, 2010 WL 199914 (2010), the Illinois Supreme Court addressed the issue of whether an injured worker should be entitled to temporary total disability (TTD) benefits after being terminated from his employment.

The claimant, Jeff Urban, was employed by Interstate Scaffolding as a union carpenter. On July 2, 2003, Mr. Urban sustained a work related injury to his head, neck and back. He returned to work soon after the injury but continued to suffer some lingering effects as a result of the injuries he sustained. From July 2, 2003 to May 25, 2005 Mr. Urban continued to seek medical treatment for his injuries and would occasionally be ordered by his doctor to take time off work. When not authorized completely off work, he was able to perform at a light duty demand which was provided for by Interstate Scaffolding. Mr. Urban was paid TTD benefits for the entire time period, including those periods that he did not work.

On May 25, 2005, Mr. Urban approached a secretary in Interstate Scaffolding's business office to report that an incorrect amount had been deducted from his paycheck. He also reported at

this time that he had received an overpayment in a previous check a few weeks prior. The secretary reported this information to Jan Coffey, who was the assistant to Interstate Scaffolding's president, Ron Fowler. This apparently struck a chord with Coffey who had previously learned that Mr. Urban had written some religious "graffiti" or slogans in a storage room on Interstate Scaffolding's premises. Believing Mr. Urban to be a hypocrite for preaching religious beliefs while at the same time accepting overpayments, Coffey confronted Mr. Urban. Outraged at the confrontation, Mr. Urban called the police and filed a complaint of harassment and religious discrimination. The police interviewed Coffey and Mr. Urban, but no arrests were made or other actions taken.

That same day Coffey called Fowler to inform him for the first time of the religious "graffiti". Following this conversation, Fowler contacted Mr. Urban's supervisor and instructed him to terminate Mr. Urban immediately. The stated reason for the termination was defacement of Interstate Scaffolding's property as a result of the religious graffiti Mr. Urban had written in the storage room.

When Interstate Scaffolding terminated Mr. Urban it also refused to pay him TTD

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benefits. Mr. Urban subsequently filed a petition with the Illinois Workers' Compensation Commission (IWCC) seeking benefits. The matter was heard before an arbitrator of the IWCC who found that Mr. Urban was not entitled to TTD benefits, but gave no explanation as to the reason for this finding. The matter was appealed to the Commission who reversed the arbitrator and found that Mr. Urban was entitled to benefits from the date of his termination through his hearing date before the arbitrator. This ruling was affirmed by the Circuit Court but reversed at the Appellate Court. In denying Mr. Urban's request for TTD benefits, the Appellate Court reasoned that it would not allow an employee to collect TTD from his employer after he was removed from the work force as a result of a volitional conduct unrelated to his injury. The Appellate Court further reasoned that to award benefits would not advance the goal of compensating an employee for a work-related injury where the employee was terminated "for cause".

The matter was appealed to the Supreme Court of Illinois who rendered their decision on January 22, 2010. The Supreme Court identified the issue before them as whether an employer's obligation to pay TTD benefits to an employee who suffered a work-related injury ends if

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We represent clients of all types, from insurers in complex catastrophic injury cases to individual companies looking for personal representation that is responsive to their individual needs. Our attorneys are willing to take the case all the way to trial if appropriate, but also have extensive experience in alternative dispute resolution. The bottom line is to determine what course of action makes the best business sense for our client.

the employee returns to work for a light-duty assignment and, while working light duty, is terminated for volitional conduct unrelated to his injury. The Supreme Court stated that it is a "well-settled principle that when a claimant seeks TTD benefits, the dispositive inquiry is whether the claimant's condition has stabilized, i.e., whether the claimant has reached maximum medical improvement". *Interstate* at 7. The Supreme Court found that the Illinois Workers' Compensation Act (Act) did not support the finding that TTD benefits may be denied as a result of an employee's discharge for volitional conduct. The Supreme Court identified the test for determining whether an employee is entitled to TTD benefits is whether the employee remains temporarily disabled as a result of a work-related injury and whether the employee is capable of returning to the work force. It further identified that the Act is a remedial statute that should be liberally construed to provide financial protection for injured workers. Based on these findings the Supreme Court reversed the Appellate Court's ruling and reinstated benefits to Mr. Urban.

However, the Supreme Court specifically notes that TTD benefits may be suspended or terminated if the employee refuses to submit to medical, surgical, or hospital

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treatment essential to his recovery, or if the employee fails to cooperate in good faith with rehabilitation efforts. It further provides that benefits may be suspended or terminate if the employee refuses to work within the physical restrictions prescribed by his doctor.

The primary rule to take away from this case is that a terminated employee, even one that is terminated for

cause, will be entitled to TTD benefits if they are working with restrictions at the time of their termination.

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THE EFFECT OF *READY* ON NON-SETTLING CO-DEFENDANTS AND GOOD FAITH FINDINGS

Since the Illinois Supreme Court has handed down its ruling in *Ready v. United/Goedecke Services*, 232 Ill.2d 369 (2008), there is a great deal of confusion and scrutiny for Motions for Good Faith Settlement findings and these motions are being contested more than ever before.

Rule 5/2-1117 establishes joint and several liability for the purpose of promoting equitable sharing of damages among tortfeasors according to their degree of fault. However, the plurality opinion in *Ready* states that the Illinois Joint Liability Statute excludes settling defendants from the jury verdict forms resulting in the apportionment of fault being made only among those defendants that remain in the case for trial. The only recourse for a defendant that does not settle prior to trial is a set-off in the amount paid by the settled defendants.

The strategy of both plaintiffs and defendants has changed based on the *Ready* decision. Adhering to the standards set forth in *Ready*, the jury may determine the defendants at trial are more liable simply because the settling co-defendants are not included on the jury verdict form. In addition, Plaintiffs are less inclined to accept good faith settlement offers from minimally liable defendants, and co-defendants are more inclined to strongly contest good faith settlements because they do not want to be the last defendant at trial. Moreover, it may be advantageous for the plaintiff to settle with the more culpable defendants if they are the “shallow pockets” in order to keep the “deep-pockets” in the case for trial. Placing more blame on the less culpable, wealthier defendants may return a larger jury verdict than plaintiff would have received through settlement. Prior to the

Ready decision, the joint liability statute would have protected the remaining defendants by having the settled defendants on the verdict form, but now, Plaintiffs are using this strategy of placing the entire blame on only the wealthy defendants remaining in the case regardless of equitable apportionment of fault in an effort to obtain larger awards.

Another post-*Ready* obstacle is that co-defendants are contesting settlements even when the settlements are accepted by plaintiffs because no defendant wants to be the only defendant at trial. Co-defendants might argue that granting a good faith settlement, even for a policy limit, is not appropriate based on the percentage of total negligence applicable to that defendant because they want to keep all the defendants in the case for trial to offset their own degree of fault. A negligent party can obtain dismissal of any contribution claim against it by entering into a good faith settlement with the plaintiff, and the good faith nature of the settlement triggers the discharge of the negligent party for contribution to any remaining defendant. Unfortunately the Act does not define the phrase “good faith” or what constitutes good faith.

The trial court will decide whether there is a good faith settlement, and the plaintiff and defendants must prove that there is a legally valid settlement agreement. In making its decision, the trial court is not required to determine the relative liability of the parties or the merits of the case. The standard of proof for lack of good faith is much higher than the standard of proof for the settling parties, which at most is a preponderance of the evidence. The remaining defendants must show by clear

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and convincing evidence that there is a lack of good faith which usually occurs when there is wrongful conduct, collusion or fraud between the settling parties.

In making this decision, the court will attempt to balance the public policy that favors peaceful settlement of disputes with the competing public policy of equitably apportioning damages among negligent parties. The disparity between the competing public policies becomes apparent if the remaining defendants cannot prove a lack of good faith as the trial court does not have to determine the relative liabilities of the parties. The trial court can, however, examine the amount of the settlement in relation to the probability of recovery along with the defenses raised and the defendants' potential legal liability. In the past, the Court appeared to be more likely to grant good faith settlements believing that the remaining defendants were protected, but now Courts

seem to be more stringent in agreeing to settlements because the joint liability statute does not protect co-defendants in the same way.

The conclusion to draw from the current post-*Ready* environment is that successfully settling multiple-defendant cases is more difficult than ever before. It requires familiarity of local judges, an understanding of the interests and strategies of plaintiffs as well as co-defendants, and a keen knowledge of all the implications and ramifications of *Ready* to navigate a fair settlement.

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Contractual Indemnity and the “Individual, Non-Severable Amount” Rule

Contractual indemnity, be it express or implied, can become an issue in construction defect cases where a defendant contractor is seeking indemnity from a third party for any amount it may be found liable to the plaintiff. One of the most significant issues to consider on either side of an indemnity action deals with what an indemnity plaintiff must prove in order to prevail on the claim. In a breach of contract case, where a defendant is seeking contractual indemnity from a third party, there is authority indicating that it must establish that the third party is 100% at fault for an identifiable, non-severable portion of plaintiff's damages. In this respect, contractual indemnity differs greatly from contribution in a tort claim.

There is very little case law on this issue. In fact, there is virtually no substantive commentary on the issue outside of the case of *Playskool v. Benson*, 147 Ill.App.3d 292 (1st Dist. 1986). *Playskool* involved the construction of a warehouse facility where the general contractor, Benson, was hired by owner Playskool to design and construct the warehouse. *Id.* at 293. Benson then subcontracted with CST to perform structural work. *Id.* at 294. Playskool sued Benson for breach of contract,

breach of warranty, and fraud for structural defects in the new facility. *Id.* at 295-296. Benson then filed a Third Party Complaint against CST for express contractual indemnification pursuant to a clause in the subcontract. *Id.* at 296. The case went to trial and a directed verdict was granted as to the Third Party Complaint in favor of CST. *Id.* at 296-297. The evidence at trial showed that Benson did a poor job in its design and work on the building. *Id.* As to the express indemnity claim against CST, the First District upheld the directed verdict in favor of CST. *Id.* at 300-302. The Court found that “for an indemnity you need an individual non-severable amount to pass along.” *Id.* at 300. In other words, the Court declared that indemnity is all or nothing. Either the entire amount gets passed to a subcontractor because the subcontractor is solely at fault, or none of it does. Because Benson clearly was at least a portion at fault for the damages, there was not a non-severable amount to pass along to CST. *Id.* at 300-302.

To illustrate the potential effects of the *Playskool* case further, consider, as an example, a construction defect situation where a building owner has sued a general contractor (“GC”) for breach of a construction contract. The

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GC was hired to design and construct a second floor addition on a private residence. Various subcontractors were hired by the GC to perform the work. The GC designed the addition and supervised the work. After construction was completed, the owner began to notice water was leaking and damaging the interior drywall. The owner has now filed a Complaint against the GC for breach of contract. No allegations of negligence are made. The Complaint alleges two separate defects, which, in combination, caused the damages. First, insufficient flashing was placed to divert the water. Second, the windows were improperly installed to prevent water from entering. The GC has subsequently filed a Third Party Complaint for express contractual indemnity against Subcontractors A and B premised on a clause in the subcontracts specifically stating that the subcontractor will indemnify the GC for causing the GC's breach of contract with the owner. Subcontractor A installed the flashing and Subcontractor B installed the windows. The prayer for relief in the Third Party Complaint requests that judgment be entered against each subcontractor in an amount equal to the relative degree of fault attributable to it in causing any of the owner's damages.

In this illustration, because the only cause of action pled against the GC by the owner is breach of contract, the GC has no contribution action against the subcontractors. Instead, it has attempted to seek a similar remedy through contractual indemnity. The facts of this case, however, do not put the GC in a good position to prevail against either subcontractor. The problem that the GC may have is that the owner has alleged that the two defects combined to cause the water damage. Therefore, there is no "individual, non-severable amount to pass along" to either subcontractor. Moreover, because the GC designed and supervised the project, there is a good chance it would share in the blame for the defects. If there is any fault on the part of the GC, then, again, there is not an "individual, non-severable amount to pass along."

Pursuant to *Playskool*, the GC in our example appears to be doomed. Of note, *Playskool* deals only with allegations of express contractual indemnity.¹ Therefore, the GC could attempt to state a cause of action against Subcontractors A and B for implied contractual indemnity. "Under the doctrine of implied contractual indemnity, where one party's breach of contract causes a second

party to breach a separate contract with a third party, the second party may shift its contractual liability to the first party." *Zielinski v. Miller*, 277 Ill.App.3d 735, 740 (3rd Dist. 1995).

There is no case law specifically applying the *Playskool* principles to cases involving implied indemnity. Nonetheless, it would be difficult to argue why *Playskool* should not apply to all claims of indemnity. The Fifth District quotes William Prosser in defining indemnity and distinguishing it from contribution: "There is an important distinction between contribution, which distributes the loss among the tortfeasors by requiring each to pay his proportionate share, and indemnity, which shifts the entire loss from one tortfeasor who has been compelled to pay it to the shoulders of another who should bear it instead." *Herington v. J.S. Alberici Construction Company, Inc.*, 266 Ill.App.3d 489, 494 (5th Dist. 1994), citing Prosser, *Law of Torts*, sec. 51, at 310 (4th ed. 1971).

If the courts were to allow partial contractual indemnity, they would essentially be allowing for contribution in contract actions, without the protections afforded by the Joint Tortfeasor Contribution Act, 740 ILCS 100/1 *et seq.* Specifically, if the party defending the contractual indemnity claim settles directly with the plaintiff, it

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would not be entitled to dismissal upon a finding of good faith. This would frustrate public policy in favor of settlements. *See, Herington*, 266 Ill.App.3d at 494. Accordingly, it would appear that *Playskool* would apply to all indemnity claims, whether they be express or implied.

The “individual, non severable amount” rule from *Playskool* should be considered for all cases of contractual indemnity. It requires careful pleading on the part of the party asserting the indemnity claim. It also provides a solid basis for a dispositive motion at the pleadings stage

for the party defending the claim.

¹ Section I of the *Playskool* opinion does have a discussion about implied indemnity; however, it relates to Illinois law prior to the Joint Tortfeasor Contribution Act and is not pertinent to this discussion. *See, Playskool*, 147 Ill.App.3d at 297.

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<p style="text-align: center;">PENDING ILLINOIS LEGISLATION: PROPOSED AMENDMENTS TO THE WORKERS' COMPENSATION ACT</p>
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HB0058 Amends the Workers' Compensation Act and the Workers' Occupational Diseases Act. Provides that an injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability; makes changes regarding notice of accidents; makes changes in computation of compensation paid to certain employees who, before the accident for which an employee claims compensation, had sustained an injury; makes changes regarding review of awards; limits certain cumulative awards for partial disability; provides for certification of permanent partial or total disability by physicians; provides that no compensation is payable for certain injuries involving alcohol or drugs; changes qualifications for commissioners and arbitrators; contains provisions regarding evidentiary matters and statutory construction; makes changes regarding the duties of the Workers' Compensation Advisory Board; requires performance audits of arbitrators; provides that an employer and the exclusive representative of its employees may agree to establish binding obligations and procedures relating to workers' compensation; and makes other changes.

HB5697 Amends provisions of the Workers' Compensation Act relating to compensation for an accidental injury resulting in death. Provides that if payments are to made to a child who is under 18 years of age, a guardian of the child's estate must be appointed under the Probate Act of 1975 and it shall be the responsibility of the guardian of the child's estate to manage the child's estate

in accordance with the Probate Act of 1975.

HB5721 Amends the Workers' Compensation Act. Provides that no compensation is payable if an injury was caused primarily by the intoxication of the employee, the influence of alcohol or certain drugs not prescribed by a physician, or the combined influence of alcohol and drugs that affected the employee to the extent that the intoxication constituted a departure from employment. Contains provisions regarding evidence, admissibility, presumptions, and other matters. Requires an employee to notify the employer of the prescription of any narcotic drug that may adversely affect the employee's ability to safely perform his or her job duties before the start of any job duties.

HB6159 Amends the Workers' Compensation Act as follows: defines "injury" as an injury that has arisen out of and in the course of employment; provides that an injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability; provides that an injury is deemed to arise out of and in the course of the employment only if specified conditions are met; provides that an injury resulting directly or indirectly from idiopathic causes is not compensable; provides that no compensation is payable if an injury was caused primarily by the intoxication of the employee or by the influence of alcohol or certain drugs and contains various provisions relating to the use of alcohol and drugs; requires commis-

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sioners and arbitrators to weigh the evidence impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts; and makes other changes. Effective immediately.

HB6226 Amends the Workers' Compensation Act. Provides that a subcontractor under contract to a general contractor may elect to be covered under any policy of workers' compensation insurance insuring the contractor upon written agreement of the contractor, by filing written notice of the election, on a form prescribed by the Illinois Workers' Compensation Commission.

SB3829 Amends the Workers' Compensation Act. Provides that an employer or group of employers and the representative of its employees may agree to establish binding obligations and procedures relating to workers' compensation. Provides that a copy of the agreement shall be filed with the Illinois Workers' Compensation Commission. Provides that the new provisions do not allow any agreement that diminishes an employee's entitlement to benefits under the Act, an agreement does not diminish an employee's entitlement to benefits, and an agreement that diminishes the employee's entitlement to benefits is void. Provides that an employer insured under the Act shall provide notice to its insurance carrier of its intent to enter into an agreement with its employees and obtain consent from its insurance carrier to enter into an agreement. Effective immediately.

SB3830 Amends the Workers' Compensation Act. Provides that permanent partial or total disability shall be certified by a physician and demonstrated by use of medically defined objective measurements, that subjective complaints shall not be considered unless supported by and clearly related to objective measurements, and that a specified publication shall be applied in determining the level of disability. Provides that temporary total disability payments shall not exceed 104 weeks if the injured employee's medical impairment rating determined as a percentage of the whole person is less than 70%. Provides that no compensation is payable if an injury was caused primarily by the intoxication of the employee or caused by the influence of alcohol or certain drugs that affected the employee to such an extent that the intoxication constituted a departure from employment, and includes provisions regarding evidence, presumptions, and other matters; and makes other changes.

SB3832 Amends the Workers' Compensation Act. Provides that the Illinois Workers' Compensation Commission may recall a decision or settlement when fraud has been determined to be committed related to the case. Provides that the Commission shall implement a rule to establish a process for recalling a decision or settlement that is subject to recall due to fraud. Provides that the fraud and insurance non-compliance unit of the Department of Insurance shall employ one or more attorneys as special prosecutors who shall initiate and prosecute any necessary criminal or civil actions in any court or tribunal of competent jurisdiction in this State. Provides that the special prosecutors may also assist State's Attorneys in prosecuting violations of this Section, without charge to the county; and makes other changes.

SB1420 Amends the Workers' Compensation Act. Provides that the Illinois Workers' Compensation Commission may recall a decision or settlement when fraud has been determined to be committed related to the case. Provides that the Commission shall implement a rule to establish a process for recalling a decision or settlement that is subject to recall due to fraud. Provides that the fraud and insurance non-compliance unit of the Division of Insurance of the Department of Financial and Professional Regulation shall employ one or more attorneys licensed to practice law in Illinois as special prosecutors

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who shall initiate and prosecute any necessary criminal or civil actions in any court or tribunal of competent jurisdiction in this State. Provides that the special prosecutors may also assist State's Attorneys in prosecuting violations of this Section, without charge to the county. Provides that when the Attorney General or a State's Attorney declines to prosecute a referral from the fraud and insurance non-compliance unit of an alleged violation of this Section, the Attorney General or the State's Attorney declining prosecution shall provide in writing a response to the unit within 30 days of such decision setting forth the reasons and basis for the decision. Provides that the unit shall provide the response to the employer.

SB1594 Amends the Workers' Compensation Act. Provides that an accidental injury incurred while an employee is under the influence of alcohol or certain drugs not prescribed by a physician, or a combined influence of alcohol and drugs, in violation of a work rule or an applicable provision of an employee policy manual is rebuttably presumed to not arise out of and in the course of the employee's employment and the employee is not entitled to workers' compensation benefits. Provides that evidence of the concentration of alcohol or any concentration of a drug in the employee's blood or breath at the time alleged, as determined by analysis of the employee's blood, urine, breath, or other bodily substance, is admissible in a hearing to determine compensability and serves as prima facie evidence to establish the rebuttable presumption.

For questions, comments, or more information about this newsletter, please contact:

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ABOUT OUR FIRM

The attorneys at Chilton Yambert & Porter are highly experienced civil litigation trial attorneys. We are focused on providing our clients with the most economic and efficient means of resolving a claim or dispute.

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