



Patton & Ryan LLC
Attorneys at Law

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Issue 13

PATTON'S GENERAL TORT NEWS

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A Word From John W Patton, Jr.

At Patton & Ryan, we know that our clients expect the best yet most cost effective representation possible. We strive to fulfill those expectations, day-in and day-out; and I thank you for the opportunity to do so.

Please call me at your convenience if we can assist you in any way. - John

John W. Patton, Jr.
(312) 261-5166
jpatton@pattonryan.com



PATTON & RYAN AT THE FOREFRONT OF JURY FORM ISSUE

John W. Patton, Jr. Urges Illinois Supreme Court to Retain Settling Defendant as a Named Party for Purposes of Fault Allocation

One of the key issues facing Patton & Ryan clients in Illinois is whether defendants who settle prior to trial will appear on the verdict form for the purpose of fault apportionment. As is so often the case, Patton & Ryan lawyers are fighting to affirm an Appellate Court ruling favorable to the defense bar.

The importance of this issue can best be demonstrated with an example. Suppose there is an accident in which a site owner (O), a general contractor (G), and an uncollectible subcontractor (S) are all at fault for injuring a plaintiff/passersby (P), who was also partly at fault herself. Suppose also that the percentage of fault, by the objective facts, is:

O - 30%
G - 20%
S - 40%
P - 10%

Under Illinois law, G would be shielded from joint liability on non-medical damages under these facts, since his percentage of fault falls below 25%. He would thus owe no more than 20% of the total verdict if this case goes to trial against all three defendants. However, suppose O decides to settle, and P proceeds to trial against only G and S. If O is left off the verdict form as a settling defendant, that means O's 30% share of fault is off the table, but since the total fault percentages must still equal 100, an honest jury would return a verdict dividing the fault pro rata, that is, along the following compromise lines:

G - 30%
S - 55%
P - 15%

Note that G's percentage of allocated liability has risen above 25%, exposing it to joint liability. This fact, combined with the fact that S is likely uncollectible, means that G will be required to pay the entire verdict. Thus, by removing the settling defendant from the verdict form, G's share of payment goes up from 20% to 100%, even though his actual share of objective fault is unchanged.

It is evident that the question of who is identified on the verdict form should be a significant factor in whether a peripheral defendant such as G will settle or try the case. If he proceeds to trial knowing that he can successfully blame O and S, he stands a high probability of bringing home a low allocation of fault and thus a low exposure. But if he knows that O has settled but will not appear on the verdict form, the incentives are very high for G to follow suit and settle as well.

Illinois' law on this issue is governed by 735 ILCS § 5/2-1117. In relevant part, "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 [other than medical]." The question that this statute fails to answer is whether a settled defendant such as O in the above example is still a "defendant sued by the plaintiff."

Up through early 2008, the case law answering that question was also in conflict, but the conflict was at least along normal lines. The Fifth District of the Illinois Appellate Court had decided that "defendants sued by the plaintiff" meant "sued at the time of trial," and that settling defendants remain omitted from the verdict form. The Fourth District, on the other hand, decided an identical case the other way.

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Illinois Fault Allocation ...continued from page 1

In 2006, the First District decided the matter of *Ready v. United-Goedecke Services, Inc.*, a case in which the named defendant was represented at the trial level by John Patton of Patton & Ryan. In that case, the First District decided that settled defendants should be placed on the verdict form. They wrote:

Here, we agree with United . . . that a remaining defendant's culpability should be assessed relative to the culpability of all defendants, including settling defendants. Only in this manner can the intent of section 2-1117, that minimally culpable defendants be held minimally responsible, be achieved.

A petition for leave to appeal was granted, and *Ready* is currently pending before the Illinois Supreme Court.

Then, in 2008, the First District decided, almost simultaneously, two matters addressing this identical issue. The first of these, *Yoder v. Ferguson*, in which Patton & Ryan again represented the named defendant, held that settling defendants are omitted from the verdict form. In refusing to follow its own decision in *Ready*, the *Yoder* court noted that the Blake decision pre-dated the most recent amendment of §2-1117, and held:

Even if we were to agree with the analysis provided by the Ready court, the decision in Blake found that settling defendants are no longer "defendants sued by the plaintiff" for purposes of section 2-1117. The legislature's subsequent amendment of the statute did not modify this language in response to established case law. We must presume that the legislature knew of the judicial decisions interpreting this language when it revised the statute. Accordingly, with its failure to clarify or modify this language at the time, we must presume it agreed with the Blake interpretation and cannot read the statute as defendants argue.

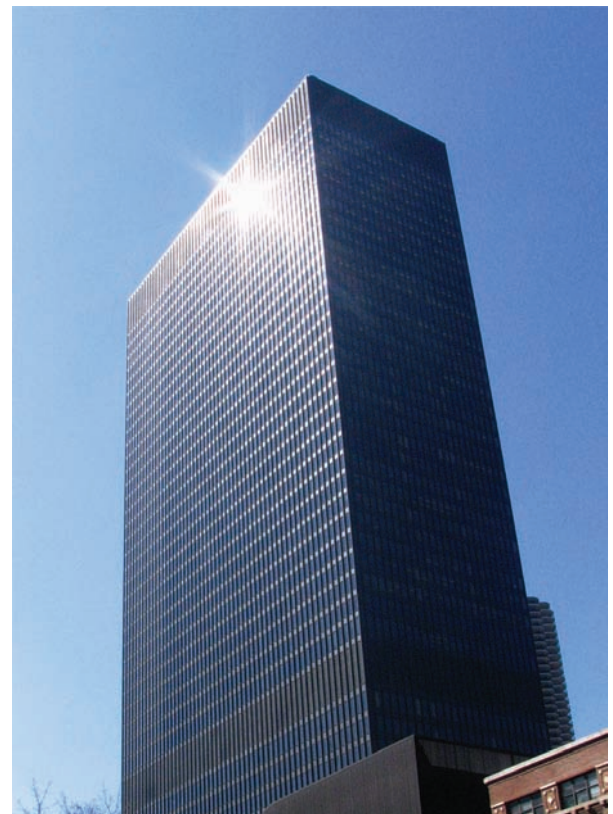
The second case, *Heupel v. Jenkins*, held that defendants should be placed on the form. To make matters more interesting, the Heupel case involved a "defendant" who had settled with the plaintiff pre-suit. The court nevertheless held that she belonged on the verdict form.

It is evident that *Heupel* and *Yoder* were decided by two different panels of the appellate court—evidently, what 2-1117 means by "defendants sued by the plaintiff," depends on which judge is deciding the case. Moreover, the simultaneity of *Yoder* and *Heupel* (*Heupel* was decided a day earlier than *Yoder*, and neither one mentions the other) means that any trial judge has a selection of precedents from which to choose. In other words, this month, the First District has turned this vitally important area of law into utter chaos - chaos that the efforts of Patton & Ryan attorneys will soon end when the Supreme Court decides *Ready*. ●

PATTON & RYAN RETAINED IN CATASTROPHIC CTA RED LINE ACCIDENT IN CHICAGO

Patton & Ryan of Chicago, Illinois, has been retained as lead investigatory and trial counsel in the expected wrongful death and injury cases that arose out of the Friday, April 25, 2008 accident that occurred at the Cermak/Chinatown CTA Red Line commuter station. The accident occurred when a semi tractor-trailer operated by White Line Express of Plymouth, Michigan, exiting the Dan Ryan expressway, ran into an EL station passenger escalator at the height of the rush hour commute. The accident caused two fatalities and at least 20 injuries. The cause is under investigation by Federal and State authorities as well as by the Patton & Ryan reconstruction team.

Patton & Ryan specializes in defending catastrophic cases involving its transportation clients. This case will be litigated by Patton & Ryan partners John W. Patton, Jr. and Richard W. Schumacher. ●



PATTON & RYAN SETTLES HIGH-PROFILE FIRE CASE FOR FRACTION OF ORIGINAL DEMAND

22 Individual Plaintiffs Participate in Global Settlement

Patton & Ryan was retained to serve as trial counsel in the "Cook County Fire" case; a case that involved six fatalities and 16 serious personal injuries. With the trial date looming, Patton & Ryan was instrumental in negotiating a favorable settlement on behalf of client and claimed target defendant, SimplexGrinnell LP in a case arising from a 2003 high-rise fire in Chicago. The fire occurred on October 17, 2003, at the Cook County Administration building located at 69 W. Washington Street in downtown Chicago. In the year prior to the fire, SimplexGrinnell LP had inspected the building's life-safety system, including the fire alarms, the fire panel, the one-way telephone system, and the two-way fireman's phones, and had determined that the system performed as designed.

On the day of the fire, after hearing a fire alarm, building security guards called the building engineer, who confirmed the existence of a fire and told the guards to call 911. The guards then began announcing a full building evacuation over the building's public address system before the arrival of the Chicago Fire Department. Tenants were told to use the stairwells instead of the elevators, but were not specifically told which stairwell to use. The stairwell doors automatically locked when the access door closed, and re-entrance from the stairwell side could be obtained only by use of a key.

Upon arrival, the Fire Department began fighting the fire from the southeast stairwell. Without first searching the stairwell above the fire floor, Fire Department personnel broke down the door separating the 12th floor stairwell from the tenant space, resulting in a rush of smoke into the stairwell. Several tenants who were attempting to evacuate higher floors via the southeast stairwell could not continue downward past the firemen on the 12th floor, and they could not re-enter the tenant space above. Six tenants died from smoke inhalation, and several others suffered related injuries, including post-traumatic stress disorder.

At least one of the evacuating tenants picked up a fireman's phone in the stairwell to call for assistance but received no answer. Originally the plaintiffs claimed that the fireman's phones were not functional during the fire. However, this claim was quickly proven to be false, and the evidence instead showed that building personnel did not properly respond to the tenant who used the phone. Consequently, the Plaintiffs' claim against SimplexGrinnell LP was reduced to a single allegation that SimplexGrinnell LP owed a duty to the building's owners to suggest a life-safety system with a different design. The existence of this duty, and whether SimplexGrinnell LP breached such a duty, were vigorously contested issues in expert discovery and in trial motion practice.

When Patton & Ryan joined the case, the demand against SimplexGrinnell LP well exceeded the self-insured retention amount of \$5 million. However, after weeks of well-strategized mediation negotiations with the plaintiffs and retired Judge/Mediator, Donald O'Connell, and after months of relentless, hard-hitting trial preparation, Patton & Ryan was able to settle all of the 22 pending cases for \$2.5 million, just half of the client's self-insured retention. The entire case thereafter settled for \$100 million. Both the client and the Patton & Ryan trial team, led by John W. Patton, Jr. and Richard W. Schumacher, were pleased with this hard-fought result. ●

THE INSURER'S CHOICE OF FORUM - STATE OR FEDERAL COURT UPON SERVICE OF THE COMPLAINT

One of the most critical decisions concerning defense strategy must be made immediately upon service of the Summons and Complaint – where to defend the case – State or Federal Court?

Federal Court jurisdiction extends to Federal Question and Federal Diversity of Citizenship cases. Typically, our clients receive a Complaint filed in State Court; the jurisdiction of choice of most Plaintiff's attorneys in liberal jurisdictions. If the case arises under the auspices of a federal statute, Federal Question jurisdiction exists. If the case arises under general State tort law, but involves citizens of different states, Federal Diversity jurisdiction exists if the case has a legitimate amount in controversy that is in excess of \$75,000.00 and if all plaintiffs and all defendants are diverse – that is – citizens of different states.

The Federal Rules require that a case must be removed from the state court system within 30 days after it is served upon the defendant. The time limit is strictly construed and an untimely removal will be returned to the State court as a matter of course. Since there is always the usual delay in forwarding the suit papers to the insurer, and assigning a claim person once they have arrived, extreme and immediate care must be used in evaluating whether removal is possible. In all but the most unusual of cases, removal to Federal Court is always recommended, for a variety of reasons.

These reasons include the location and reputation of the State court; the identity of the assigned Judge; the geographical location from which potential jurors are chosen; the speed with which decision-making is needed; and appellate court considerations. The general consensus in the trial bar, although there are exceptions, is that the Federal system runs a much tighter ship, is more conservative and thus is more predictable as to outcome. It is simply a much more civilized forum to try a serious lawsuit.

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MEET OUR NEWEST ASSOCIATES



(L to R): Denise Keliuotis, Melissa Blankinship, Melissa Hunt, Brian McGinnis

State or Federal Court? ...Continued from page 3

The practical result in one of our catastrophic loss, motor carrier cases: Both the Federal system and the State of Indiana have codified Rules of Evidence. A police officer investigates an accident, diagrams the scene, speaks to the drivers and the eye witnesses and makes findings of fact as to driver causation, noting such on the official police report. Indiana substantive law bars recovery by a plaintiff who is >50% at fault. If the case were in the Indiana state court system, the findings would be inadmissible since there is a specific state Rule of Evidence that makes them procedurally inadmissible. The case was removed from the state system to the Federal Court upon service. The Federal Rule of Evidence is much broader and permits officially recorded findings of fact to be admitted as substantive evidence – a tremendous advantage to a non-culpable defendant.

Our clients are urged to contact assigned counsel immediately in order to determine removal possibilities and discuss the advantages. Again – the Patton & Ryan way of initiating and implementing aggressive and successful defense strategy. ●

CONTACT INFORMATION



Patton & Ryan LLC
Attorneys at Law

Patton & Ryan LLC
330 N. Wabash Ave.
Chicago, IL 60611

Telephone: (312) 261-5160
Facsimile: (312) 261-5161
www.pattonryan.com

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