Sedgwick LLP

Pointing to the Empty Chair – Illinois Reaffirms the 'Sole Proximate Cause' Defense

Pharmaceutical Law Update

November 2010

By: David Grycz

Last week, the Illinois Supreme Court in *Ready v. United/Goedecke Services, Inc.*, --- N.E.2d ---, 2010 WL 4126244 (Ill. Oct. 21, 2010) (*Ready II*), reaffirmed the availability of the sole proximate cause defense during trial. As its name suggests, this defense permits a defendant to introduce evidence that the conduct of a settling co-defendant(s) was ***the*** cause of the plaintiff's injuries at the time of trial. This opinion, a sequel to the court's 2008 decision in *Ready v. United/Goedecke Services, Inc.*, 905 N.E.2d 725 (Ill. 2008) (*Ready I*), decided two issues left open by the court in *Ready I* pertaining to the admissibility and use of evidence, at trial, of a settling party's culpability.

In *Ready I*, the court addressed the question of whether a settling co-defendant's name can be included on the jury verdict form for purposes of apportioning fault among the various jointly and severally liable defendants. The Illinois Supreme Court answered that question in the negative, holding that a settling co-defendant's name cannot be included on the jury verdict form. The court arrived at this decision by interpreting the language of Section 2-1117 of the Illinois Code of Civil Procedure (735 ILCS 5/2-1117), known as the Illinois Joint and Several Liability statute.

In *Ready II*, however, the Illinois Supreme Court reaffirmed the availability of the "sole proximate cause" defense, notwithstanding that a settling defendant's name cannot be included on the jury verdict form for purposes of determining joint and several liability. The court held that a defendant who goes to trial may introduce evidence that a settling defendant's conduct caused the plaintiff's injuries. Specifically, the court stated that "a defendant has the right not only to rebut evidence tending to show that defendant's acts are negligent and the proximate cause of claimed injuries, but also has the right to endeavor to establish by competent evidence that the conduct of a third person, or some other causative factor, is the sole proximate cause of plaintiff's injuries." *Id.* at *4 (quoting *Leonardi v. Loyola Univ. of Chicago*, 658 N.E.2d 450, 459 (Ill. 1995)). Moreover, the court held that a defendant may obtain a jury instruction on the sole proximate cause defense so long as there is "some evidence in the record . . . tending to show that the sole proximate cause of the accident was the conduct of a party other than the defendant." *Id.* at *5. In *Ready II*, the trial court refused to give a jury instruction stating that the settling defendant's fault caused the death of a plant employee. The Illinois Supreme Court determined that the trial court's refusal to give the instruction was harmless error because the evidence introduced at trial firmly established that the defendant was, in fact, a proximate cause of the plaintiff's death - and thus no other settling defendant could be the sole proximate cause of the plaintiff's injuries. Despite the unique result of *Ready II*, the decision confirms that a defendant may introduce evidence of a settling defendant's conduct at trial, and receive a jury instruction on the sole proximate cause defense so long as there is some basis for it in the record. A defendant seeking to assert the sole proximate cause defense, however, is best advised to deny that it caused the plaintiff's injuries in its answer and discovery responses, and

should specifically assert an affirmative defense stating that the plaintiff's injuries were caused by the negligence or other legal fault of some other persons or entities.

Related Practices:

Drug & Medical Device