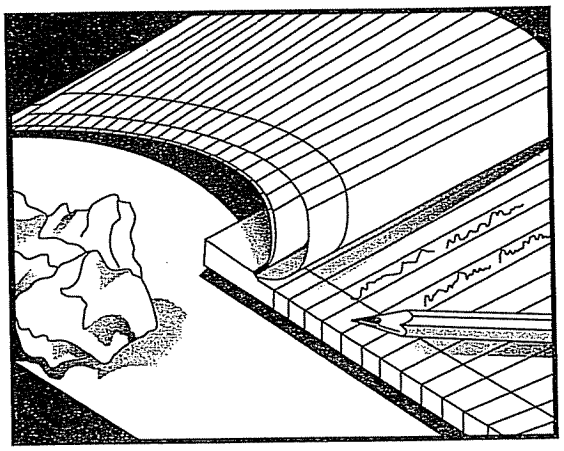
The Rise and Fall of Joint and Several Liability in Illinois Environmental Actions

By Richard M. Kuntz

While joint and several liability has been the norm in federal environmental actions since 1980 and the enactment of the CERCLA, or Superfund, law, 42 USC section 9607(a),[1] its status under Illinois environmental statutory and common law has been much less clear. In fact, a little noticed Illinois statute extended joint and several liability in the mid-1980s far beyond that provided by Illinois common law. Ten years later, however, the state enacted a two-pronged repeal of statutory joint and several liability.



Joint and several liability has been and on-again, off-again proposition under Illinois environmental law.

Background

Section 22.2(f) of the Illinois Environmental Protection Act (415 ILCS 5/22.2(f)), the state's "mini-superfund" provision, is clearly modeled on the federal Superfund, and thus joint and several liability would presumably apply in the same manner. No reported Illinois decision has addressed the issue, however, largely because most cost-recovery claims resulting from hazardous waste sites in Illinois have been litigated by U.S. EPA or private-party plaintiffs under CERCLA.

Indeed, the ability of defendants facing state claims under the Environmental Protection Act to in turn bring third-party claims against other responsible parties has been limited since *People v Brockman*, 143 Ill 2d 351, 574 NE2d 626 (1991). Nor have there been decisions discussing joint and several liability under the non-superfund provisions of the Illinois Environmental Protection Act — those relating to air, water, or solid waste pollution, 415 ILCS 5/9, 12, and 21 — although a court has held that it is no defense to liability under these sections that another party may have been partially responsible for the pollution violations in questions. *People v A.J. Davinroy Contractors*, 249 Ill App 3d 788, 618 NE2d 1282 (5th D 1993).

Several Pollution Control Board Decisions, however, impose joint and several liability under the nonsuperfund provisions of the Environmental Protection Act, though with little discussion of the theoretical underpinning. See, e.g. *IEPA v Bittle*, PCB 83-163 (Order on Reconsideration, June 10, 1987), which also stated that each respondent retained a right of contribution against the other.

With respect to underground storage tank enforcement, 415 ILCS 5/57.12 imposes UST liability on "the owner or operator, or both," and states at 57.12(g) that "the standard of liability under this section is the standard of liability under section 22.2(f) of the Act" (the mini-superfund provision discussed above). As with the other provisions, no cases have discussed the potential joint and several liability attaching to UST violations.

The assault on joint and several under the Code of Civil Procedure

The only explicit mention of joint and several liability under Illinois environmental law is contained not in the Environmental Protection Act but in a 1986 amendment to the Code of Civil Procedure at 735 ILCS 5/2-1118. From its enactment in 1986 until its repeal by the tort reform act of 1995 (PA 89-7, section 20), this provision governed all environmental cases in Illinois.

Presumably, the repeal applies only to cases filed after the March 9, 1995 effective date of tort reform, but the specific repealer itself does not make this clear. Note also that several trial courts have invalidated tort reform in whole or in part, and that the statute is under review by the Illinois Supreme Court. The joint and several liability provisions were held constitutionally invalid by Judge Henndon of the Third Judicial Circuit in *Best v Taylor*, No. 906 L 167 Order, at IV (8/20/96).

The provision at 5/2-1118 has been little noticed by environmental practitioners. Even though it is potentially applicable to both statutory and com-

1. The imposition of joint and several liability under CERCLA is not automatic. While most courts followed the standard established in *U.S. v Chem-Dyne*, 572 F Supp 802 (SD Ohio 1983) (burden rests with defendant to show that harm is divisible, Id at 811), in recent years, Courts of Appeal for the Second, Third and Fifth Circuits have declined to impose joint and several liability in the absence of a clearly indivisible injury. See, e.g. *U.S. v Alcan Aluminum*, 964 F2d 252 (3d Cir 1992). A recent federal case found the disposal of two chlorinated solvents to constitute a divisible injury, even though the solvents (PCE & TCE) are chemically similar, due to their disparate impact on the plaintiff's soil and groundwater, respectively. *One Weeler Road Associates v Foxborrough Co.*, No. 90-12873-RGS (D Mass Dec. 13, 1995).

mon law actions in Illinois courts and enforcement proceedings before the Pollution Control Board, it has never been used in any reported environmental cases, although it was a factor in two asbestos-in-buildings cases. *Tragarz v Keene Corp.*, 980 F2d 411, 429-30 (7th Cir 1992). (The Board's Procedural Rules provide that a particular provision of the Code of Civil Procedure may govern in the absence of a Board rule to the contrary; 35 Ill Admin Code 101.100(b), although section 2-1118 is not "procedural.")

Nonetheless, there have been two attempts to eliminate the statutory basis for joint and several liability in Illinois environmental cases — first, the tort reform statute, and second, PA 89-042, which took effect last July 1. PA 89-042 provides in section 58.9(a) of the Environmental Protection Act that neither the state of Illinois nor any private plaintiff may bring any action under the Act to require remediation or seek recovery of costs from any person "beyond the remediation of releases of regulated substances that may be attributed to being proximately caused by such person's act or omissions, or beyond such person's proportionate degree of responsibility for costs for the remediation of releases of regulated substances that were proximately caused or contributed to by two or more persons." Section 58.9(a)(1).[2]

Illinois thus has now joined states such as California, Arkansas, and Maryland, whose statutory schemes have provided for proportionate liability since the 1980's; Selmi, *State Environmental Law*, section 9.03[3][c] (1992). By contrast, states such as Michigan, Massachusetts, and Alaska explicitly mandate joint and several liability and place the burden of demonstrating divisibility on the defendant. Id at 9.[3][b]. Most states' environmental statutes, however, are silent on the subject. Note that this provision appears to eliminate strict, as well as joint and several, liability.

Notwithstanding this statute's July 1, 1996, effective date, the state as plaintiff may still seek joint and several liability in cost recovery actions if the costs sought to be recovered were incurred by the state prior to July 1, 1996. Section 58.9(f). Thus, not only are the state's ongoing actions unaffected, but it may bring new actions based on prior remedial activities.

Given the March 9, 1995 effective date of the tort reform repealer and the effective date of the Environmental Protection Act abolition of joint and several liability — and depending upon how tort reform fares on appeal — it would appear that joint and several liability may no longer be used in common law environmental actions, but may continue to be used in statutory actions founded upon the Environmental Protection Act where the state is the plaintiff. Thus, section 58.9 is limited to actions under the Environmental Protection Act, section 58.9 (a)(1), while the Code of Civil Procedure appears to apply to both statutory and common law actions.

Section 2-1118 — a reaction to tort reform 1980s-style

While the Code of Civil Procedure provision was *eliminated* pursuant to the tort reform amendments of 1995, it owed its *creation* to an earlier tort reform effort. In 1986, the legislature enacted section 2-1117 of the Code, which, for personal injury or property damage cases based on negligence or strict products liability, limited joint and several liability for the first time in Illinois, so that any defendant whose fault was less than 25 percent, could not be jointly and severally liable.[3]

The environmental community noticed this provision, and, fearful that the law could be enlarged to limit the liability of environmental defendants whose proportionate share was less than 25 percent, lobbied successfully for the enactment of section 2-1118, which became not a mere exception to the personal injury tort limitation but a statutory basis for a much broader imposition of joint and several liability in environmental cases than the common law had ever established.

The definition of an environmental case in section 2-1118 is expansive, encompassing several definitions of polluting materials, and while it does not specifically include petroleum or gasoline, terms which are excluded under the definition of "hazardous substances," it does include the term "contaminant," which has been construed by an Illinois court under the Environmental Protection Act to include gasoline. *People v Letsos*, 203 Ill App 3d 443 (2d D 1990).

The seventh circuit also broadly construed section 2-118 in *Tragarz v Keene Corp.*, 980 F2d 411, to cover nonstatutory cases, including those involving the "internal" environment (i.e., an asbestos release inside a building). After noting the legislative history of the exception to the joint and several liability limitation in strict products liability actions, the court agreed with the legislature that "in environmental cases it is too burdensome to require a plaintiff to divide the pie of culpability into potentially hundreds of distinct components....the burden of demonstrating the proportionate liability of many defendants would seem to be even more acute when considering that it sometimes takes years for injuries from environmental hazards to surface." Id at 430.

Conclusion

Again, it should be noted that while arising as a mere exception to a statutory limitation on joint and several liability, the statute, by its own terms and as read by *Tragarz*, goes far beyond the common law doctrine of joint and several liability. While few Illinois common law environmental cases dealt with joint and several liability, the Illinois courts frequently cite the Restatement (Second) of Torts in referring to areas of common law undeveloped in Illinois.

Here, the Restatement provisions on joint harms, sections 433A and 881, which give several examples from environmental scenarios, clearly do not support the blanket imposition of joint

(Continued on page 82)

2. The Pollution Control Board has opened it's rulemaking on this subject, R 97-16, Order, Dec. 5, 1996. On the next day, the Illinois Appellate Court ruled that defendants whose actions were held to have been incorrect would be held jointly and severally liable notwithstanding section 2-1117's exemption from such liability for defendants whose fault was found to be less than 25 percent. *Woods v Cole*, No. 4-96-0345 (Dec. 6, 1996).

3. Another little-noticed limitation upon common law joint and several liability was contained in a related Code provision, also enacted as part of the 1986 tort reform, section 2-1107.1, which provides in pertinent part: "In all actions on account of...physical damage to property based on negligence...the court shall instruct the jury in writing that the defendant shall be found not liable if the jury finds that the contributory fault of the plaintiff is more than 50%...." Unlike code section 2-1118, section 2-1107.1 survived the 1995 tort reform Civil Justice Act, and could be used to defeat, e.g., a landowner's cost-recovery against a tenant or other party responsible for disposing of waste on his property, if the landowner could be shown to also be substantially responsible. This would eliminate the common practice of appending state common law claims of negligence to CERCLA or state equivalent claims, although nuisance or trespass claims would be unaffected by this statutory limitation on negligence claims.

Apple just brought Steve Jobs back and bought his computer company (NeXT, Inc.). Apple made a great computer; NeXT made a superb one. However, they cost so much more than a standard PC that few people bought them. I don't see either Jobs or Apple switching horses. Thus, Microsoft has proven, once again, that it is dominant and spreading like an unstoppable weed.

What are the implications of its latest victory?

First, think long and hard about having your office use any word processor besides Microsoft Word. Others may be cheaper, but Word appears to be capturing the market. If everyone else is using Word, and you want to send a document to someone else, you'll have to go to a lot of trouble to convert it. Anyone who tells you otherwise is a liar or an idiot. Unlike the designers of the document format on the World Wide Web, word processing manufacturers never developed a standard format and the conversion programs that exist have never worked very well.

Second, and more broadly, stick with Microsoft for all of your products. Unless you buy all of your software from one vendor, you will have compatibility problems. One example of that is the HPC. If you buy an HPC and use an operating system other than Windows 95 on your PC, the two will not be compatible.

Remember that Bill Gates pulled the same stunt back in the days of PCs. He made sure that almost every PC sold in this country had MS-DOS pre-loaded on it. He then did the same with Windows and Windows 95. Now he's moving into the HPC market. History repeats.

Todd H. Flaming is secretary of the ISBA Committee on Legal Technology and an attorney with Schopf & Weiss in Chicago.

Options

The MAC Is Alive and Well

Todd Flaming says in no uncertain terms that Windows is the way to go when it comes to operating systems. Be that as it may, let me tell you why I think Apple's Macintosh is still a good bet.

1. The Mac has always been and continues to be the easiest computer to take out of the box and put to work — easier than PCs with Windows. Lawyers tend to overlook this important Mac advantage, which can lead to tremendous savings in technical support costs and sharply reduced learning curves.

2. Apple Computer is not going away. Mac users constitute a large and devoted group, and they know that the Mac is much easier to use and learn than Windows 95. Other major software vendors, including Microsoft and Timeslips, continue to support the Mac.

3. Windows runs on the Mac, both via software and, better yet, via a hardware "board" that installs inside your Mac and is actually a Pentium computer. This way, you can truly have the best of both worlds and run Windows and Macintosh software on your Mac.

Take heart, Mac users out there — keep circling the wagons, keep your eyes open, read the financial section of your newspaper, stay in touch with your stock broker. I wouldn't sell Apple Computer short.... many corporations have had problems changing with the times (even IBM...remember?), so why not stick with your Macintosh resources?

— **Paul Bernstein**
paulbern@Interaccess.com

"Options" features monthly product announcements and technology pointers from Paul Bernstein and Alan Pearlman of the ISBA Committee on Legal Technology.

Practice Tips (Continued from page 80)

and several liability. Instead, most instances of environmental contamination are viewed as divisible; see, e.g., section 881, comment d, illustrations 1 and 2, as well as cases cited in Prosser, *Torts* Section 52, pp 349, 352 (5th ed 1984), upon which these Restatement provisions are founded.

While Illinois enjoyed a 10-year period in which the common law doctrine was greatly expanded, joint and several liability was little used in environmental actions. Now, it appears, joint and several has been abolished.

Richard M. Kuntz is senior environmental attorney in The Law Office of James T.J. Keating, P.C.