Apportionment and Joint & Several Liability

ACI Asbestos Claims and Litigation Conference

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Presented by:

David M. Cost
518.429.4286 | dcost@hblaw.com

Andrew J. Scholz
914.798.5442 | ascholz@goldbergsegalla.com
Apportionment Basics
What is Apportionment?

• Spreading the liability among other defendants, settled parties and bankrupt entities at trial in order to reduce the share of the verdict to your client and eliminate joint & several liability.

• In other words, getting as many potentially liable parties as possible on the verdict sheet to reduce your percentage of fault below the statutory threshold required to invoke joint & several liability.
How Does Apportionment Work?

- Need to prove a case of negligence against each and every party you are seeking to apportion against.
- Accomplished through Plaintiff’s testimony, interrogatories and documentary evidence.
- Essentially, it is a case within a case.
• Not only do you have to defend your client, but must also prove a case against multiple other parties.
• Must educate the jury on the types of exposure sustained from other products.
• Must find proof to support other shares.
Effect On Plaintiff’s Counsel

- Plaintiffs want the ability to collect from one party for total liability.
- They do not want to eat bankrupt or settled shares.
- They will try to eliminate as many shares as possible and focus the jury back on your client and try to establish reckless conduct.
Pure Joint & Several Liability States
*Plaintiff Can Recover Full Amount From One Defendant*

- Alabama
- Delaware
- Maine
- Maryland
- Massachusetts
- North Carolina
- Rhode Island
- Virginia

*However, joint tortfeasors have right to contribution from one another if a defendant pays more than its assessed share.*
### Pure Comparative Fault States

*Plaintiff recovers Defendants’ percentage of fault*

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* If the Plaintiff’s negligence is “slight”, then he/she is barred from recovery.
**Modified Comparative Fault States, 50% Rule:**

*For Plaintiff to recover, Defendants’ combined liability must be at least 50%*

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Modified Comparative Fault States, 51% Rule:

*For Plaintiff to recover, Defendants’ combined liability must be at least 51%*

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Pure Contributory Negligence States
For Plaintiff to recover, he/she must not bear any fault

Alabama
Maryland
North Carolina
Virginia
Washington, D.C.
Hot Jurisdictions-Statutes
Proportionate Liability
– Civil Code 1431.2-5 (Prop 51)(1986)
  • Distinguishes between economic and non-economic damages
  • *Pure comparative negligence where liability assessed in proportion to fault even if plaintiff’s fault is equal to or exceeds that of the defendant*
• **Economic Damages**
  – Economic damages are joint and several - Set-off from the judgment for economic damages in an amount equal to the economic portion of the settling joint tortfeasor’s settlement with the plaintiff

• **Non-Economic Damages**
  – No set-off for non-economic damages - Each defendant is responsible for his proportionate share of non-economic damages
California

Apportionment

– Defendant bears burden of establishing all elements of legal liability before damages can be allocated to another defendant or non-tortfeasor
– Defendant in asbestos case has the burden to establish concurrent or alternate causes of proving:
  • Plaintiff was exposed to defective asbestos-containing products of other companies and;
  • That the exposure was a substantial factor in contributing to an increased risk of developing an asbestos-related disease
New York

Apportionment

• New York Civil Practice Laws and Rules (C.P.L.R.) Section 1601 (1986)
  – An attempt to limit joint and several liability in personal injury and wrongful death claims
  – A defendant who bears 50% or less of the culpability for plaintiff's claims may be jointly liable for economic damages but only severally liable for non-economic damages
Apportionment

• New York Civil Practice Laws and Rules (C.P.L.R.) Section 1602 (2013)
  – Contains several limitations and exclusions to C.P.L.R. Section 1601.
  – 1602(7) “not apply to any person held liable for causing claimant's injury by having acted with reckless disregard for the safety of others.”
New York

• C.P.L.R. 1411: allows for discounting of plaintiff’s damages in proportion to his/her equitable share of blame in causing injury

• Courts will reduce a verdict by the amount of any settlements between plaintiff and other defendants before reducing the verdict for plaintiff’s comparative fault and apportioning liability among plaintiff and remaining defendants
• Causation against non-party defendants, defendant must meet its burden of showing that negligence by non-party defendants was a significant cause of plaintiff’s injuries.

• Significant cause was equated by USDC-Southern District of New York to proximate cause, “proximate cause is more important from the legal perspective because it is the cause whose proximity in time and space qualifies it as the legally significant cause that is sufficient to sustain a cause of action in tort.”
Illinois

Proportionate Liability

• 735 Illinois Compiled Statutes (ILCS) 5/2-1117

• “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 plaintiff, and any third party defendants except the plaintiff’s employer, shall be jointly and severally liable for all other damages.”
Asbestos – 735 ILCS 5/2-1118

Provides clear “carve out” for actions where the injury for which damages are sought was caused by exposure to asbestos

Illinois Supreme Court held that a settling defendant’s culpability may not be considered by jury when apportioning fault pursuant to 735 ILCS 5/2-1117 (Ready v. United/Goedecke Services, Inc. (2008))
Causation

• Until recently, Illinois courts generally followed the so-called “Lipke rule”- prohibited defendants from presenting any evidence of a plaintiff’s exposures other than those attributable to the defendant at trial

• April 2009: Nolan v. Weil-McLain - addressed the “Lipke rule” and held that a defendant may offer evidence of a plaintiff’s exposure to other asbestos products to prove that such exposure to other products was the sole proximate cause of a plaintiff’s injury. (910 N.E.2d 549 (Ill. 2009)}
• Significance of *Nolan* decision
  – Vastly changed asbestos litigation in the state
  – Illinois Supreme Court made it clear that Illinois would no longer be left “standing alone in excluding evidence of other asbestos exposures” and that defendants have the right to establish that “the conduct of another causative factor is the sole proximate cause of the injury.”
Apportionment of Liability

- Pure Comparative Fault Standard: Fla. Stat. § 768.81(3) (2006) provides that, “in a negligence action (which includes all theories under products liability), the court shall enter judgment against each party liable on the basis of such party’s percentage of fault and not on the basis of the doctrine of joint and several liability.”

- Any fault of the plaintiff proportionally reduces the amount that he is entitled to recover. Fla. Stat. § 768.81(2) (2011).
Apportionment of Liability

• Allocating Fault of Non-Parties:

• A defendant must affirmatively plead the fault of a non-party and, absent a showing of good cause, identify the non-party, if known, or describe the non-party as specifically as practicable, either by motion or in the initial responsive pleading when defenses are first presented, subject to amendment any time before trial. Fla. Stat. § 768.81(3)(a)(1).

• In order to allocate any or all fault to a non-party and include the named or unnamed non-party on the verdict form for purposes of apportioning damages, a defendant must prove at trial, by a preponderance of the evidence, the fault of the non-party in causing the plaintiff's injuries. Fla. Stat. § 768.81(3)(a)(2).
Non-Economic Damages

• Each defendant is responsible solely for its share of the non-economic damages

• Set-off for Non-Economic Damages: To receive a set-off for non-economic damages, the non-settling defendant is obligated to file appropriate pleadings and to ensure that any settling party or non-party appears on the verdict form. The non-settling defendants are allowed a set-off of the settlement amount, however, for non-economic damages this right is only triggered if the jury allocates some portion of liability to the settling party or the non-party. *D’Angelo v. Fitzmaurice*, 863 So.2d at 315-17 (Fla. 2003).
Florida

Economic Damages

• Unlike non-economic damages, for which Fla. Stat. § 768.81 eliminated joint and several liability, the set-off statutes continue to apply to economic damages for which parties continue to be subject to joint and several liability

• Therefore, a settling defendant does not have to be found liable before an economic damages set-off can be given. *D’Angelo v. Fitzmaurice*, 863 So.2d at 315-17 (Fla. 2003).
Florida

Causation

• Fla. Stat. § 774.204(1): Florida adopts the traditional “but for” test, whereby a plaintiff must show that asbestos exposure from a defendant’s product was a “substantial contributing factor” to plaintiff’s physical impairment
Pennsylvania

Apportionment of Liability

• Fair Share Act essentially eliminates joint and several liability

• Fair Share Act (June 28, 2011) eliminated joint and several liability with few exceptions. The effect of the law will most prominently impact strict liability matters involving asbestos claims, where defendants’ products were only a minor percentage of the plaintiffs’ overall exposures
Apportionment of Liability

  – Each defendant is liable for “that proportion of the total dollar amount awarded as damages in the ratio of the amount of that defendant’s liability to the amount of liability attributed to all defendants and other persons to whom liability is apportioned.”
  – Courts are required to “enter a separate and several judgment in favor of the plaintiff and against each defendant for the apportioned amount of that defendant’s liability.”
  – The Fair Share Act now allows for separate judgments for defendants found less than 60% liable. Note: Joint and several liability still applies where a defendant is liable for 60% or greater of the total liability. 42 Pa. Cons. Stat. § 7102(a.1)(3)(iii).
Exceptions to Limitations on Joint and Several Liability
New York

- Intentional acts, collusion and recklessness always trigger joint & several liability. N.Y. CPLR 1602.
- Thus, if the Plaintiff establishes reckless conduct, it will eliminate the ability to apportion to bankrupt entities.
Other Hot Jurisdictions

– **California**: strict liability cases
– **Pennsylvania**: intentional torts, environmental torts, defendants 60% at fault
– **Florida**: intentional tort or pollution
– **Illinois**: pollution & medical malpractice
Apportionment Trial Strategies
California

- “Defendant has the burden to establish plaintiff was exposed to defective asbestos-containing products of other companies, that the defective designs of the other companies' products were legal causes of the plaintiff’s injuries, and the percentage of legal cause attributable to the other companies. Sparks v. Owens-Illinois, Inc., 32 Cal. App. 4th 461
Burden of Proof

New York

• The negligence of a nonparty defendant was a significant cause of plaintiff’s injuries and that defendant had met its burden of showing the proper amount of the equitable shares attributable to the other companies. *Lustenring v. AC&S, Inc.*, 13 A.D.3d 69, 786 N.Y.S.2d 20; *Matter of New York Asbestos Litig. v. John Crane, Inc.*, 28 A.D.3d 255; *Matter of New York City Asbestos Litig.*, 36 Misc. 3d 1234A
Typical Types of Proof

- Plaintiff’s testimony and interrogatories
- Co-defendant’s discovery responses
- Plaintiff’s medical experts
- Plaintiff’s liability experts
- Co-defendant company documents and witnesses
- Your liability experts
- Your medical experts
- Bankruptcy claim documents
Plaintiff Admissions

- *Fields v. Georgia-Pacific*, Supreme Court of Georgia (September 9, 2013)

- A mesothelioma plaintiff's allegations in her complaint that she was exposed to asbestos manufactured or distributed by numerous companies were admissions, and were admissible evidence under *O CGA § 24-8-821*, even when withdrawn, and the manufacturers remaining in the suit could use these admissions as evidence that fault should be apportioned.
• Is your goal to get alternative exposures on the verdict sheet or to persuade a jury to assign significant percentages of responsibility to nonparties?
Every case is unique and requires careful strategic consideration; this should not simply be a “how many defendants can we get on the verdict sheet” approach.

Balance between defending the claim and proving nonparty’s responsibility.

Development of trial strategy early is crucial.
Who Do You Represent?

• The client you are defending will drive your apportionment strategy:
  – Product manufacturer
  – Product distributor
  – Equipment manufacturer with asbestos product as a component part
  – Supplier of raw asbestos
  – Equipment manufacturer defending an exterior insulation claim
  – Contractor installing or removing asbestos-containing products
Who is the Apportionment Target?

- Manufacturer apportioning responsibility to other manufacturer’s products, installers or premises owners.
- Distributor apportioning responsibility to manufacturer for same product.
- Equipment manufacturer apportioning responsibility to manufacturer of the asbestos-containing component part.
- Equipment manufacturer apportioning responsibility to manufacturer or installer of exterior insulation.
- Installer apportioning responsibility to manufacturer/distributor of same product.
What is the Nature of the Apportionment?

- Apportionment of unrelated asbestos exposure
- Upstream apportionment for same exposure
  - Shifting liability to distributor, manufacturer or supplier of raw asbestos
- Apportionment to other third-parties for same exposure; for example:
  - Shifting liability from premises owner to installer
  - Shifting exterior insulation claim from equipment manufacturer to insulation installer/distributor/manufacturer
  - Shifting responsibility from equipment manufacturer to component part supplier
Status of the Apportionment Target?

- Exposure to co-defendant product/work who is present at trial
- Exposure to co-defendant product/work who settled prior to trial
- Exposure to identified bankrupt company products/work
- Exposure to asbestos products with no identification
- Exposure unacknowledged by plaintiff
It is imperative to develop a thorough factual record during discovery to present an effective apportionment argument at trial:

- Total time of alternative exposure vs. exposure to your client’s product/work
- Total volume of alternative product use vs. volume of use of your client’s product
- Direct use of alternative products vs. bystander exposure to your client’s products
- Amphibole vs. chrysotile exposure
- Level of dust created through exposure
Length of Exposure - Hours

- Insulation: 780 hours of exposure (78%)
- Joint Compound: 190 hours exposure (19%)
- Valves: 30 hours exposure (3%)

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Amount of Asbestos in Volume

- USG Joint Compound: 9,500 pounds (95%)
- G-P Joint Compound: 500 pounds (5%)
Dilemma: Reliance on Proof From Other Cases

• Introduction of other company testimony and documents
  – Plaintiffs can rely on past discovery responses and testimony in other cases against company
  – Co-defendant cannot rely on that same proof because this plaintiff was not a party to the prior litigation

• Possible Solutions
  – Conduct discovery against co-defendants or nonparties
  – Subpoena company representative
  – Establish proof through plaintiff’s liability expert who has specifically written about company knowledge of asbestos
  – Plaintiff’s intended reliance on this proof in pretrial disclosures constitutes a waiver as to any objections
Dilemma: Conceded Asbestos Exposure, No Apportionment Target

• Plaintiff concedes exposure to asbestos product but cannot identify an apportionment target
  – Can/do you need to establish defect?
  – How do you address apportionment to unknown exposure on verdict sheet?
  – Can you argue reduced responsibility based solely on alternative exposure without inclusion on verdict sheet?
Dilemma: Exposure Without Admission of Asbestos

- Plaintiff identifies a product and manufacturer but does not know whether (or will not concede that) the product contains asbestos:
  - Must establish that identified product contains asbestos
  - Must establish exposure
  - Must establish defect or negligence
Bankrupt Companies

• If plaintiff files a claim with any bankruptcy trust claiming exposure, introduce plaintiff’s claim documents at trial and read contents to jury
• Where there is no claim, attempt to elicit testimony during discovery regarding asbestos exposure
• Seek to introduce bankrupt company documents through certified records from trustee (Johns Manville archive)
Interesting Apportionment Verdicts
Simpson v. A.W. Chesterton
Schenectady, NY (2009)

- 97% of verdict was apportioned to bankrupt entities.
- Plaintiff withdrew claim for punitive damages and did not seek recklessness charge.
- 28 Companies on the Verdict Sheet
How Was It Accomplished?

• Analyzing Invoices for Specific Ships Plaintiff Worked on.
• Using Plaintiff’s and co-worker’s testimony to establish exposure.
• Having Expert testify about products through use of charts to illustrate to jury.
### Chart of Insulation Products

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Asbestos Sources on Nuclear Subs
20,000 lbs of Asbestos

Electrical Components
• Arc Chutes
• Controllers
• Wire/Cable

Amosite Insulation on Equipment
• Owens Corning (Kaylo)
• Pitt-Corning (Unibestos)
  • Johns-Manville
    • Mud
    • Cloth

Amosite Insulation on Pipes
• Owens Corning (Kaylo)
• Pitt Corning (Unibestos)
  • Johns-Manville
    • Mud
    • Cloth

Gaskets
Brand A
Brand B
Brand C
Brand D
Brand E

Outside reactor compartment to which plaintiff could have been exposed

Valves
Brand A
Brand B
Brand C
Brand D
Brand E

Reactors
Brand A
Brand B

Boilers/Generators
Brand A
Brand B
Brand C
Brand D

Pumps
Brand A
Brand B
Brand C
Brand D
Brand E
Brand F
Jury asked three questions:

- Was plaintiff exposed to asbestos products made, sold, distributed or applied by the nonparty defendants
- Did any of those companies fail to exercise reasonable care by not providing an adequate warning about the potential hazards of exposure to asbestos
- Were those companies' failure to warn a substantial factor in causing Mr. Dummitt's mesothelioma

32 companies on verdict sheet

Jury found plaintiff was exposed to asbestos products made, sold or distributed by 18 of the 32

Jury only found two companies failed to exercise reasonable care for purposes of apportioning liability

Verdict on appeal
• Lower Court Rationale for Apportionment
  – Plaintiff introduced substantial evidence of Crane's specific knowledge of the dangers of asbestos through its membership in various trade associations, the participation of Crane's officers or employees in various organizations or associations whose publications and activities addressed issues related to the dangers of asbestos in the workplace and diseases caused by asbestos exposure.
  – Crane, on the other hand, failed to produce similar evidence of knowledge with respect to any of the Article 16 entitles, but instead chose to rely solely on the general state of the art evidence introduced through plaintiff's expert, Barry Castelman.
• John Crane was 12 percent
• Plaintiff 5 percent
• Navy was apportioned 70 percent responsibility
• C&H 13 percent
• After applying offsets and other costs, John Crane issued a check to plaintiff for $1,275,497.33.
• Plaintiff appealed claiming John Crane should be responsible for entire verdict based on, inter alia, John Crane’s failure to meet apportionment burden at trial.
• On appeal, the court stated: “The jury thus was instructed to apportion liability to an entity if it found the entity was at fault and that entity's fault was a substantial factor in causing Keeney's harm. As discussed above, there is substantial evidence to support the jury's findings of fault and allocation of liability.”
Five consolidated cases
Cleaver Brooks in 4 of 5 cases
Burnham in 3 of 5 cases
In 4 cases, Cleaver Brooks and/or Burnham were found less than 50 percent responsible
In one case, Burnham was found 55 percent responsible
Jury apportioned fault to every other company listed on all 5 verdict sheets (ranged from 4 to 28 companies)
Jury found Cleaver Brooks and/or Burnham for to have acted with reckless disregard to the safety of others in all five cases
• Crane tried case
• 16 of 18 companies on verdict sheet found responsible and apportioned fault
• Crane found 4 percent responsible
• Crane found to have not acted in reckless disregard for the safety of others
• $2 million total verdict
Keuhn v. Hedman Resources, Niagara Falls, NY (March 16, 2012)

- Total verdict $325,000
- Jury found
  - Plaintiff exposed to asbestos from 17 of 23 companies on verdict sheet
  - All 17 found negligent
  - Only 11 of the 17 found to have been a substantial factor
  - Jury apportioned 45 percent responsibility to plaintiff and remaining percentages among the 11 companies
  - Recklessness finding against Hedman Resources
Questions?