

Several Liability and Multi-Party Litigation

Lessons learned from an asbestos case
— by Rudy R. Lachenmeier

Most adjusters, and for that matter most defense attorneys, are only occasionally involved in multi-party litigation. Fewer still are ever involved in asbestos litigation. Nonetheless, a recent asbestos trial caused me to have to analyze in detail the comparative fault and several liability statutes and the lessons I learned have general applicability to cases with multiple defendants.

As part of the tort reform movement, the 1995 legislature fleshed out several liability, for claims arising on or after September 9, 1995. Without belaboring the point, in Multnomah County asbestos litigation, my trial in May 2005 was the first time the court applied several liability, and only did so once the jury determined that the cancer developed on or after September 9, 1995. The reason had to do with the court's belief that "arising after September 9, 1995", related to the injury, not the commencement of the lawsuit.

In asbestos litigation as in many mass torts, there are always multiple defendants, often as many as 50. The statutes that bear on the handling of such claims include ORS 31.600, which deals in subsection 2 with the comparative fault of the plaintiff and other parties, ORS 31.605 which deals with questions that go to the jury and ORS 31.610 which explains how it all works.

ORS 31.600(2) states:

The trier of fact shall compare the fault of the claimant with the fault of any party against whom recovery is sought, the fault of third party defendants who are liable in tort to the claimant, and the fault of any person with whom the claimant has settled... Except for persons who have settled with the claimant, there shall be no comparison of fault with any person:

- (a) Who is immune from liability to the claimant;
- (b) Who is not subject to the jurisdiction of the court; or
- (c) Who is not subject to action because the claim is barred by a statute of limitation or statute of ultimate repose.

Under ORS 31.600(3), the burden of proof as to the fault of third party defendants or parties who have settled with the claimant is shifted to the party claiming the third party defendants or settling parties were at fault.

The statutory scheme further provides under ORS 31.605(1), that when requested by any party, the trier of fact shall answer special questions indicating:

- (a) The amount of damages to which a party seeking recovery would be entitled, assuming that party not to be at fault.
- (b) The degree of fault of each person specified in ORS 31.600(2). The degree of each person's fault so determined shall be expressed as a percentage of the total fault attributable to all persons considered by the trier of fact pursuant to ORS 31.600.

ORS 31.605(2) then rather incongruently indicates that the jury will be informed of the legal affect of its answers, but under subsection 3, they will not be informed of the settlements. Thus, they are told to apportion fault to a party that is not there without being told why they are not there!

Continuing the statutory scheme, ORS 31.610 then provides generally that the liability of a

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defendant for most claims is several only for noneconomic damages. Note that defendants are still jointly and severally responsible for economic damages. The statute also states that there is no reduction for the amount of settlements which makes sense because you are only being asked to pay your several part. ORS 31.610(3) provides that there can be a re-apportionment for up to a year after the judgment, if plaintiff proves that one or more of the defendants' shares is not collectible. However, under 31.610(4), re-allocation does not occur against a defendant whose percentage of fault is equal to or less than the claimants, or if the percentage of fault for that particular defendant is 25% or less.

The benefit of this statutory scheme is that a defendant should never have to pay more than its proportionate share of fault for noneconomic damages, unless the judgment against another party is uncollectible, and then only if the plaintiff's fault does not exceed that of the defendant and that defendant is more than 25% at fault. The disadvantage is there are no offsets for settlement, as there was under joint and several liability, since you only owe your share.

By way of example, in my asbestos case, there were multiple defendants. As trial approached, seven or eight defendants settled. Others got out for other reasons, but as trial progressed only two defendants remained in the case. This was a lung cancer case. Plaintiff was an ex-smoker, so plaintiff's comparative fault was an issue. In order to spread the fault between more than just the two defendants left, defendants were going to have to prove the fault of the settling defendants. ORS 31.600 exempts parties who are immune from liability and who are not subject to the jurisdiction of the court from being included on the verdict form, but only if they are not settled parties. In asbestos litigation, a large number of defendants have gone bankrupt, set up trusts, and do in fact settle with the plaintiff. We took the posi-

tion that one of these settled parties went on the verdict form even though they were theoretically immune as a bankrupt defendant, because they had settled, and the court allowed their inclusion on the verdict form.

More problematic was how to prove the fault of the other defendants who had settled. It was made even more difficult by the court's failure, until very late in the trial, to make a ruling regarding our right to prove the fault of the other defendants. The answer was twofold. First of all, in Oregon, current pleadings of a party are admissible as admissions against interest and to the extent that the plaintiff alleged the fault of settled defendants, the pleadings were admissible. That allegation against settled defendants, was and should be, construed as an admission that others were at fault, and plaintiffs were estopped to deny it.

Nonetheless plaintiffs' bare allegations did not seem like much proof, so in anticipation of this issue, we filed Requests for Admissions in which we asked plaintiffs to admit or deny that each and every settled defendants' asbestos containing products were substantial factors in causing plaintiff's disease. For the most part, plaintiffs admitted these allegations and we were able to get a jury instruction indicating that plaintiffs could not rebut in any way a response to a request for admission that they had admitted. In effect, the jury was instructed that as a matter of law, these defendants were a cause of plaintiff's injury and damages.

In subsequent asbestos litigation, I have had plaintiffs deny these kinds of requests for admissions, which seems to me to create ethical issues for them. If they filed a Complaint consistent with ORCP 17, and attested these facts to be true and further settled with these defendants, I think they have both ethical and credibility issues with the court if they later deny they were causes of plaintiff's injuries. In one pending case, the remedy was to file a motion to determine the

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sufficiency of the answers to the Request for Admissions. As of the date I wrote this article, the court had not made a ruling on that issue.

Assuming you have that kind of admission, or that you actually put on specific evidence of fault of other defendants for the jury to consider, there are still interesting issues as to what the verdict form looks like and why. As indicated, ORS 31.605 has questions that go to the jury, including plaintiff's total money damages, the degree of fault of each party or settled party, and indicates that the jury will be informed of the legal affect of its answers. Nonetheless, the jury is not informed that some of these defendants have settled. However, when you introduce Complaints with these parties' names there, and admissions as to their fault, I think the jury would have little problem figuring out that there were in fact settlements and that makes the statutory provision not to tell them sort of silly.

Ultimately in my case, the jury had to answer two questions that mattered. The first question was, was my client a substantial factor in causing plaintiff's disease? The answer was "no". The second question was were the other defendants a substantial factor in causing plaintiff's disease. The co-defendant was found to be at fault, but the jury found the plaintiff himself to be 40% at fault, mostly for his smoking history, and the settling defendants to be 52% at fault, and came up with a rather small damage award of which my co-defendant at trial owed 8%!

Thus, it is extremely important to pay attention to the fault of co-defendants. Using responses to Requests for Admissions and offering pleadings, plus paying attention to cross-examine each and every witness about the fault of others, should pay dividends in all kinds of multi-defendant litigation. ❖

— For more information about this topic, please feel welcome to contact the author at rudy@erlaw.com, or call (503) 768-9600.