

Limiting Liability At Trial Through Evidence Of Exposure To Other Products

When the headlines report a big verdict for a plaintiff, we all naturally sit up and take notice. And as we read the accompanying article, each of us thinks, "How can I make sure this NEVER happens to my client?" We had this thought last fall when a jury in Los Angeles awarded plaintiffs over thirty-six million dollars in compensatory and punitive damages for

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injuries arising from Robert Treggett's exposure to asbestos. *Treggett v. Alpha Inc.*, No. BC307058 (Calif. Super. Ct., Los Angeles Cty, October 2004). (Our client had been dismissed on summary judgment from the case prior to trial, so we also breathed a huge sigh of relief!)

As we all know, there are some cases with big verdict potential that have to be tried. While the goal is always a defense verdict, a necessary aspect of defense strategy is to minimize the potential damages your client may have to pay in the event things go south at trial. One way to do that, allocation of damages to other responsible parties, is the focus of this article.

Mr. Treggett suffered from mesothelioma as a result of his exposure to asbestos while working as a nuclear-trained machinist on board the USS Marshall during the 1960s and 1970s. Mr. Treggett alleged he was exposed to various asbestos-containing products, including Garlock gaskets used on steam lines and inside valves, pumps and other equipment. He also alleged exposure to asbestos for two years during the mid-1970s while mixing and sanding Kelley-Moore Paco Quik-Set during a home renovation project.

Kelly-Moore Paint Co. and Garlock Sealing Technologies were the only defendants remaining in the case when it went to verdict in the compensatory damages phase. Kelly-Moore and Garlock were assessed 14 percent and 40 percent liability, respectively. The jury allocated the remaining 46 percent of fault to non-parties, including 39 percent to the U.S. Navy, under California's

Proposition 51.

Proposition 51 limits a defendant's liability for non-economic damages to that defendant's percentage of fault. The percentage is calculated on the basis of a defendant's fault as compared to all other possible tortfeasors, whether those parties are before the court or even specifically identified by the plaintiff. Thus, Proposition 51 limits each defendant's share or percentage liability to its portion of the universe of causes of plaintiff's injuries.

Like California, many states allow some form of allocation and specifically permit defendants to introduce evidence of other products. In Florida, for example, damages are apportioned under the Comparative Fault Act. Where the fact finder determines that there are joint tortfeasors, it can attribute a portion of fault to each and apportion damages accordingly. Under the Act, a "party" includes nonparties to the litigation, including those immune from suit. Other states that allow the apportionment of liability among tortfeasors by statute include Indiana, New York, Texas and Washington. Note that, in most states, the statute must be pled as an affirmative defense.

Taking advantage of these allocation or apportionment statutes is especially important in asbestos litigation. Many defendants in asbestos litigation today manufactured products that used asbestos-containing components purchased from suppliers. They are defendants only because the miners, manufacturers and other suppliers of asbestos are bankrupt. Plaintiffs sue large groups of solvent defendants, without regard to their actual role in asbestos exposure, forcing these defendants to bear the cost of the asbestos producers' liability. Allocating the damages to more accurately reflect probable actual exposure helps to level the playing field for these "third tier" defendants.

To maximize the potential benefit of allocation, defendants must focus on apportionment of liability and developing evidence to show exposure to "other products." Establishing the "other exposure" case will involve increased initial expenditures, but, as shown in *Treggett*,

can significantly reduce actual awards at trial. Defendants must use investigation and discovery to uncover ALL of plaintiff's asbestos exposures, and be prepared to establish a *prima facie* case against each responsible third party to get them on the verdict form. The elements of a *prima facie* case are: the identity of the product, the product contained asbestos, the product released asbestos dust, the manufacturer negligently failed to warn, and the product contributed to plaintiff's injury.

Careful investigation into responsible third parties should precede formal discovery, so that the information collected can be used at depositions. Starting with the facts set forth in the petition and initial discovery responses such as occupation and job site, defense counsel can uncover responsible parties not identified in the pleadings. Potential third parties include plaintiff's employer, the owners of the premises where plaintiff worked, contractors and subcontractors, distributors of asbestos products, asbestos producers and manufacturers, as well as the settled product defendants.

An important source of exposure evidence is claim forms filed with bankruptcy trusts. These claim forms can be used to prove exposure to the bankrupt's products and provide the foundation for the bankrupt's inclusion on the verdict form. They may also help you to impeach the plaintiff. (In jurisdictions that do not allow allocation, you may still be able to set off any settlement from the trust to the plaintiff).

There are many other sources that can be used to prove the elements of a case against responsible parties. In addition to bankrupt trust repositories, there are government agency repositories and product lists. Interrogatory responses from prior litigation, testimony of corporate representatives, prior testimony of plaintiff's experts, and annual reports also may be helpful. Other useful materials include Navy product lists, union records, product brochures and advertisements, Moody's Industrial Reports, and submissions in response to the Asbestos Information Act.

Formal discovery in an allocation case must also focus on all the potential sources of plaintiff's exposure to asbestos. When deposing the plaintiff, it is important to be familiar with all asbestos products associated with his or her particular occupation or work history. Defendants should question plaintiffs and co-workers about potential exposure to the widest possible range of products, including pipe insulation, asbestos cement pipe, boilers, block

insulation, refractory materials and asbestos blankets.

Plaintiffs' experts may also provide useful testimony regarding bankrupt companies and other third parties. Moreover, plaintiffs' own experts can be used to establish that every exposure above accepted background levels contributes to asbestos related diseases, and that plaintiff's employers, contractors, subcontractors and premises owners all had a duty to minimize potentially hazardous exposures.

If defendants are successful in establishing a case against third parties, they will be included on the verdict form, and the jury will assign a percentage of fault to each party. Allocation therefore takes defendants out of an all or nothing situation. Thus, even if the jury finds exposure to a defendant's product, that exposure may be minimal in comparison to the exposure from other manufacturers' products. A defense verdict now becomes a much smaller percentage of liability.

With verdicts as high as in the *Treggett* case, defendants can ill afford to not put on the "other exposure" case at trial. It is crucial to get as many potentially culpable parties on the verdict form as possible. Not only does this ensure the jury will hear the full exposure story, it provides an opportunity to spread plaintiff's damages across all defendants who share some of the fault.

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