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Commentary

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Introduction

In 2011, Pennsylvania enacted the Fair Share Act[1] joining the large majority of states that have abandoned "deep pocket" liability. It appeared that the Act would not only largely abolish joint and several liability, but would also provide for fault-based allocation among culpable parties and non-parties in asbestos cases. Trial courts, however, applied the Fair Share Act inconsistently with regard to whether fault should be allocated on a pro rata (percentage share) or per capita (equal share) basis. Additionally, parties were left guessing as to what non-parties, if any, would be permitted on a verdict sheet. These questions ultimately formed the basis of the Pennsylvania Supreme Court's February 2020 decision in *Roverano v. John Crane, Inc.*[2]

In *Roverano*, the court held that per capita allocation is required in strict liability asbestos cases because the court found the lung cancer at issue to be an "indivisible injury."[3] The holding effectively removed the "fair share" concept from the Act in strict liability asbestos cases and unraveled what could have been a straightforward method of apportionment. The *Roverano* court's per capita mandate for strict liability asbestos cases complicates the litigation considerably given the hybrid theories of liability (negligence and strict liability) typically at issue.

The court in *Roverano* also held that bankruptcy trusts "joined as third-party defendants, or that have entered into a release with the plaintiff may be included on the verdict sheet upon submission of 'appropriate requests and proofs.'"[4] But control of bankruptcy trust filings in Pennsylvania falls squarely with plaintiffs. Asbestos plaintiffs' counsel routinely delay trust claim submissions to avoid the inclusion of the bankrupt entities on verdict sheets. Consequently, in the absence of the successful joinder of bankrupt entity trusts, fact finders remain unable to allocate fault to the historically most culpable (but now immune) companies.

A New Chapter of Confusion: Impractical Consequences of the Per Capita Mandate for Strictly Liable Asbestos Defendants

As stated, per capita allocation is the law for asbestos strict liability cases in Pennsylvania post-*Roverano*.[5] Pro rata allocation remains the method of apportionment for negligence cases.[6] *Roverano* does not disrupt or necessarily complicate jury verdict sheets in pure negligence or pure strict liability cases, as illustrated by the scenarios below.

Scenario One: Strict Liability Case

For this scenario, assume that a jury finds four asbestos product manufacturers strictly liable for a plaintiff's injury (named SL1, SL2, SL3, and SL4).[7] Plaintiff

conduct is not a permissible consideration in a strict product liability case.[8] Following *Roverano*'s per capita allocation for strict liability asbestos cases, if the total damages awarded are $100,000, each of the four strictly liable defendants will be responsible for 25%, or $25,000, of the total verdict.

Scenario Two: Negligence Case

For this scenario, assume that a jury finds two asbestos premises defendants liable on a negligence theory (N1 and N2) and finds that the plaintiff's own negligence contributed to the injury as well. Because allocation is on a pro rata basis for negligence cases, the jury must assign a percentage of fault to each.[9] Assume that the jury calculates the percentages as follows – Plaintiff 20%, N1 38%, and N2 42% for a total of 100% – and awards damages of $100,000. In this scenario, N1 would be responsible for $42,000 and N2 would be responsible for $38,000 of the total verdict.

Scenario Three: Hybrid Strict Liability/ Negligence Case

Today's asbestos litigation involves a broad spectrum of defendants and rarely involves defendants sued solely based upon strict liability or negligence. Complaints typically include negligence and strict liability claims against manufacturers and suppliers and negligence claims against employers or premises defendants.[10] In these hybrid situations, *Roverano*'s per capita allocation for strict liability defendants causes significant confusion because fact finders must allocate responsibility on both a per capita and pro rata basis. Consider the following scenario.

Assume a case involves proof against three defendants sued under strict liability (named SL1, SL2, and SL3) and one defendant sued on a negligence theory (N1). For simplicity sake, assume no negligence by the plaintiff and that each of the four defendants are found to have been a factual cause of the injury.

Issues will arise when the jury reaches the question seeking allocation of responsibility by percentage for the defendant (N1) that was sued on a negligence theory. We consider a few options.

One option would be for the jury verdict sheet to include a line for the jury to assign a percentage of fault to the negligence theory defendant, N1. A jury could ascribe any percentage up to and potentially including 100% against N1, which would create an inconsistency because of the per capita allocation for SL1, SL2 and SL3. Some instructive limiting language will be necessary. Finding appropriate language that may offer a jury guidance to avoid 100% allocation to negligence-based defendants will be a challenge in hybrid cases. Further, the omission of an inquiry related to the other defendants is likely to invite speculation by the jury as to why there is no opportunity to examine the totality of the liable parties.

Another option would be for trial courts to instruct the jury that it may assign any percentage up to and potentially including 99% to N1. But a lay juror would see the verdict sheet as nonsensical because the only option would be to assign a percentage allocation to N1 without an opportunity to balance the totality of liability of the other culpable defendants, SL1, SL2 and SL3. This would present a perception of an incomplete determination, or worse, could expose the only defendant subject to the jury's assessment to a higher percentage designation.

Can this troublesome perception be resolved if the jury verdict sheet provides one line for the jury to assign a percentage to the negligence theory defendant and another line for the jury to assign a percentage to the strictly liable defendants as a collective set (e.g., allowing the jury to assign 50% to N1 and 50% to SL1, SL2 and SL3 as a group)? This verdict sheet could also inspire a jury to place unnecessary weight on one set of defendants versus another.

Logic and fairness require a pro rata assessment by way of percentage designation against each liable defendant in the hybrid case. The jury would allocate a percentage of liability to the strict liability and the negligence defendants as if all of the defendant been sued solely on a negligence theory. The award would need to be molded by the trial court to properly calculate the amount due on the verdict by each party to be consistent with *Roverano*.

For example, in a scenario where N1 is apportioned 10% liability and total damages are $100,000, the trial court would mold the verdict to account for a per capita allocation for SL1, SL2, and SL3 regarding the balance of the total liability. This would result in N1 paying $10,000 (10% of $100,000) and SL1. SL2

and SL3 each paying $30,000 (90% of $100,000 divided by the number of strictly liable defendants).

Keep in mind that the per capita allocation mandate in *Roverano* invites more questions than those presented above in hybrid liability case scenario example above. These include:

- Defendant Sued on Two Theories: Defendants are sometimes sued under both negligence and strict liability theories. Does pro rata or per capita allocation apply to these defendants?
- Plaintiff's Negligence: Plaintiff's negligence is not a proper consideration for strictly liable defendants, but is a consideration for negligence cases. How does a jury properly account for a plaintiff's negligence in a hybrid strict liability/ negligence case?
- Related Liability: It is common for a premises defendant or employer to be sued based solely on the theory that another entity's asbestos-containing product was utilized on the premises defendant's property or during the course of a plaintiff's employment. Therefore, this raises the question of how might a verdict sheet address issues that relate to that defendant where plaintiff's theory of liability against that defendant may solely relate to the existence of a strictly liable manufacturer co-defendant's defective product.
- Second-Tier Liability: How would a premises defendant delineate second tier liability as against a product liability defendant who may be subject to a per capita allocation depending upon the liability theory pursued by the cross-claiming defendant?
- Cross-Claim Issues: A plaintiff may choose to pursue claims in strict liability only at trial. Those defendants, however, may have cross-claims against other defendants on a theory of negligence, including claims against settled or joined bankruptcy trusts. How is a jury instructed to apportion liability in a strict liability plaintiff's case with hybrid cross-claims?

Pro Rata Allocation is Needed for Hybrid Asbestos Cases

The only workable solution to potential unfair disparate treatment and jury confusion created by the potential for two different allocation schemes in the hybrid strict liability/negligence case is simple: allow a fact finder to assess liability on a pro rata basis. The jury would weigh issues of fault as they relate to all evidence and all defendants rather than in a split fashion.

Pennsylvania products liability law has recently developed such that defendants are able to introduce negligence principles in defending their products.[11] To employ an allocation method that requires a comparative assessment of liability would neither be far-reaching nor novel.[12] Furthermore, allocating liability among strictly liable parties in the same manner as negligent joint tortfeasors in a hybrid case would be logical and would not appear to run afoul of *Roverano*, which was a pure strict liability case like Scenario One above. Indeed, the Pennsylvania Supreme Court failed to acknowledge that it will be impossible *not* to assess liability among strictly liable defendants when the case also includes negligence defendants.

Asbestos-related injuries should not be treated differently than general liability injuries and cannot be distinguished in this regard where negligence liability is part of the case. Expert testimony and facts derived in proofs related to causation would provide the basis upon which liability can be assessed by a jury in hybrid cases, just as in many other states that have abolished joint and several liability.

Avoidance of Allocation Against Bankruptcy Trusts

A plaintiff in the asbestos litigation can uniquely obtain compensation for one injury from two sources – the tort system and the bankruptcy trust system. In many cases, the inclusion of bankrupt entities on the verdict sheet is a vital part of providing a fact finder the opportunity to consider all potential causes of a plaintiff's harm. Juries should know and account for a plaintiff's entire exposure history when determining a particular defendant's share of compensation for a plaintiff's injury. In the absence of that opportunity, named defendants may pay disproportionate awards that fail to account for the contribution of the dominant producers of asbestos products to a plaintiff's harm.

The *Roverano* decision allows bankrupt entities to be included on verdict sheets for allocation purposes. On its face, the holding appears beneficial to asbestos

defendants as a means to increase the number of potential per capita shares in strict liability cases (driving down the percentage paid by each one) and provide jurors with the means to consider all culpable entities.

Defendant companies, however, have cause to believe this aspect of the ruling will not result in a meaningful change in the litigation. The reasons are two-fold.

First, *Roverano*'s holding allowing the inclusion of non-parties on verdict sheets only applies to bankruptcy trusts with whom plaintiffs have settled and have executed a release. Plaintiffs are effectively encouraged to delay settlement with trusts until after their civil suits have fully resolved. It has been well-documented that this practice is already problematic in the litigation, especially in Philadelphia.[13] The timing of trials, the applicable statutes of limitations for bankruptcy trust claims, and a plaintiff's ability to defer trust claims all provide plaintiffs with a way to avoid allocation to bankrupt entities at trial without impacting the amount a plaintiff may receive from the trusts.

Second, although bankruptcy trusts joined as third-party defendants can be included on verdict sheets, a party seeking to join a trust may face procedural challenges that make the benefit of this aspect of the *Roverano* ruling impractical or impossible. Most every Trust Distribution Procedure ("TDP") fails to include language to expressly allow for such joinder. The TDP is the document that controls the process and rules pertaining to compensation from a particular trust. The Manville Trust is exceptional in that the Manville Trust TDP includes specific language permitting third-party claims.[14]

Defendants are left with the uncertain recourse of attempting to join trusts for allocation purposes. Nothing in the typical TDP specifically prohibits bankruptcy trusts from joinder and the Fair Share Act provides that joinder is consistent with the notion that the joinders would be for apportionment purposes only. Further, certain trusts' TDPs already allow for certain civil litigation claims to proceed against them.[15] Thus, the joinder complaints should not disrupt the protections offered generally by the bankruptcy administrative process.

Negotiating the complications of suing and serving bankruptcy trusts may be met with resistance in the form of motions to dismiss by trusts whose TDPs lack express permissive joinder language. Further, a consistent application of the rules by trial courts in response to third party joinder complaints may not be realistic given the history that led this aspect of the Fair Share Act to be the subject of the Pennsylvania Supreme Court's consideration.

These issues make this particular aspect of the *Roverano* ruling a challenging path to obtain a practical benefit. Litigants may need to consider seeking to resolve these issues through a general case management order in those Pennsylvania counties that have general docket management. A General Order that provides the protection that the TDP of the Manville Trust includes may be a solution to consider. A General Order providing that bankrupt trusts joined for this purpose may not object to the joinder of the trust as a party where the trust is brought as a party for the limited purpose of apportionment. The Order could provide that a trust shall not be required to enter an appearance as to third-party complaint or applicable cross-claim, nor shall it be subject to party discovery or to default judgment or levy and execution on any judgment. If such an Order makes clear, like the Manville Trust TDP process does, that the trust shall be required to pay claims, whether for asbestos-related conditions or for contribution or indemnification, objections that may otherwise be raised by a trust would be moot.

A Case Management Order may alleviate some of the hurdles joining defendants would face, but whether any county in the Commonwealth would allow it is yet another challenge litigants will undoubtedly face. Defendants can expect that such a streamlined process that would embody both the spirit of the Fair Share Act and the *Roverano* ruling will be met with resistance from the other side of the bar. Fairness and logic should remove the control of including culpable parties like bankrupt trusts from the plaintiffs and instead take the approach consistent with the most basic of tenants of the tort system: rely upon submission of "adequate proofs."

The best solution is legislation to require plaintiffs to file all eligible bankruptcy trust claims prior to trial, as some sixteen states have done.[16] This would largely alleviate the control a plaintiff would otherwise have to avoid inclusion of a potentially culpable party or non-party, and would likewise eliminate the complicated

joinder issues. Plaintiffs would be protected given that no trust could be included in the absence of appropriate proofs.

Conclusion

While the *Roverano* opinion provided some clarity to longstanding issues in the Pennsylvania asbestos litigation following the Fair Share Act, the decision also created a myriad of complications for the parties left to litigate. Hybrid case verdict sheets will require complex pre-trial motion practice that will undoubtedly delay or preclude resolutions of cases and will likely result in inconsistent decisions by trial courts. As a result, parties are left without a predictable or exposure driven basis to realistically assess any defendant's potential liability in the typical hybrid asbestos case.

Plaintiffs can continue to delay trust claim submissions thereby maintaining control, rather than court or fact finder control, of opportunities to account for the full source of an asbestos plaintiff's source of exposure on verdict sheets. Joining trusts as parties is an uncertain path to reconcile the issues arising from the delay of claim submissions, and will meet the same verdict sheet complications that hybrid cases without bankruptcy trusts present.

Legislation is needed to address the issues the *Roverano* decision creates with respect to the application of the Fair Share Act in hybrid asbestos cases and to allow juries to apportion fault to all potentially liable parties and non-parties, fulfilling the promise of "fair share" liability.

Endnotes

1. 42 Pa.C.S. § 7102.

2. *Roverano v. John Crane, Inc.,* 226 A.3d 526 (Pa. 2020).

3. *Id.* at 541.

4. *Id.* at 546.

5. Strict liability was the only theory litigated against the non-settled defendants in *Roverano*.

6. *See id.* at 549 (Wecht., J., concurring) (*citing* Baker v. AC&S, Inc., 755 A.2d 664, 669 (Pa. 2000)).

7. *See* Pa. SSJI (Civ) 16.70 ("If you find that the product was defective, the defendant is liable for all harm caused to the plaintiff by such defective condition. A defective condition is the factual cause of harm if the harm would not have occurred absent the defect. [In order for the plaintiff to recover in this case, the defendant's conduct must have been a factual cause of the accident.]").

8. *See, e.g., Gaudio v. Ford Motor Co.*, 976 A.2d 524, 540 (Pa. Super. 2009), *appeal denied*, 989 A.2d 917 (Pa. 2010) ("negligence concepts have no place in a strict liability action.") (citation omitted); *Phillips v. Cricket Lighters*, 841 A.2d 1000, 1006 (Pa. 2003) (plurality) (same).

9. *See* Pa. SSJI (Civ) 13.200 ("If you decide that both [name of plaintiff] and [name of defendants] were negligent and that the negligence of [both] [several] parties was a factual cause of the plaintiff's [injury] [harm], you must then decide how much each party's negligence contributed to the plaintiff's [injury] [harm] [damage].").

10. The Pennsylvania Supreme Court abrogated employer immunity from claims for latent diseases manifesting over 300 weeks after the last date of employment. *See Tooey v. AK Steel Corp.,* 81 A.3d 851 (Pa. 2013). *Tooey* opened the door for common law complaints against employers for products such as asbestos or benzene. Previously, such claims were barred pursuant to Pennsylvania's Workers' Compensation Act.

11. *See Tincher v. Omega Flex, Inc.*, 104 A.3d 328 (Pa. 2014).

12. *See Amato v. Bell & Gossett*, 116 A.3d 607, 617 (Pa. Super. 2015), *appeal dismissed sub nom. Vinciguerra v. Bayer Cropscience, Inc.*, 150 A.3d 956 (Pa. 2016) (holding that *Tincher* applies in failure to warn context).

13. *See In re Garlock Sealing Techs., LLC*, 504 B.R. 71 (W.D.N.C. Bankr. 2014).

14. 2002 Manville TDP – Nov. 2019 Revision, § I(1)(c) ("Third-party claims may be asserted against the Trust

for the sole purpose of listing the Trust on a verdict form or otherwise as necessary to ensure that any verdict reduction in respect of the Manville (or Trust) liability share is made pursuant to applicable law. No objection shall be made by the Trust or the claimant to the filing by a Co-Defendant of a third-party complaint or to the joinder of the Trust as a party for this limited purpose only. However, the Trust shall not be required to enter an appearance as to third-party or any other claims, nor shall it be subject to party discovery or to default judgment or levy and execution on any judgment. Under no circumstances shall the Trust be required to pay claims, whether for asbestos-related conditions or for contribution or indemnification, except in accordance with this TDP.").

15. For example, Quigley Co., Inc. Asbestos PI TDP § 7.6. states that claimants who disagree with the Trust's determination may submit their claims to non-binding arbitrations and ultimately civil suits. *See also* Pittsburgh Corning Corp. Asbestos PI TDP, § 7.6 ("If the holder of a disputed Channeled Asbestos PI Trust Claim disagrees with the Asbestos PI Trust's determination regarding the Disease Level of the claim, the claimant's exposure history or the liquidated value of the claim, and if the holder has first submitted the claim to non-binding arbitration . . . , the holder may file a lawsuit against the Asbestos PI Trust in the Claimant's Jurisdiction. . .."); Eagle-Picher Indus., Inc. Asbestos Injury Claims Resolution Procedures, Amended Nov. 29, 2017, § 7.8.

16. *See* ALA. CODE §§ 6-5-680 to 6-5-685; ARIZ. REV. STAT. § 12-782; IOWA CODE §§ 686A.1–.9; KAN. STAT. §§ 60-4912–.4918; MICH. CODE § 600.3010–.3016; MISS. CODE §§ 11-67-1 to -15; N.C. GEN. STAT. §§ 1A-1, Rule 26; 8C-1, Rule 415; and 1-75.12; N.D. CENT. CODE §§ 32-46.1-01 to -05; OHIO REV. CODE §§ 2307.951–.954; OKLA. STAT. TIT. 76, §§ 81–89; S.D. CODIFIED LAWS §§ 21-66-1 to -11; TENN. CODE §§ 29-34-601 to -609; TEX. CIV. PRAC. & REM. CODE §§ 90.051–.058; UTAH CODE §§ 78B-6-2001 to -2010; W. VA. CODE §§ 55-7F-1 to -11; WIS. STAT. § 802.025. ■

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