Legal Backgrounder

Vol. 34 No. 17 November 15, 2019

Washington Legal Foundation
Advocate for Freedom and Justice®
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Washington, DC 20036
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# New Jersey Supreme Court Issues Compelling Precedent Removing Hearsay Bar to Third-Party-Fault Evidence

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Asbestos personal-injury plaintiffs routinely sue scores of entities whose use of the substance allegedly contributed to their injuries. Since defendants invariably drop out of such suits through settlements and pre-trial dismissals, asbestos personal-injury *trials* often involve only one or two of the companies. Those remaining defendants ("trial defendants") face enormous financial risk. One tactic trial defendants can use to reduce their liability exposure is attribute fault to settled entities[1] in the hope that, where permitted, the jury will assign those absent companies a share of the liability.

When attempting to allocate responsibility to a settled or otherwise unavailable defendant, the trial defendant bears the burden of proving the settled defendant's responsibility.[2] Trial defendants typically meet that burden by using product-exposure evidence obtained during discovery, along with the settled entities' sworn deposition testimony and written discovery responses from prior cases. The settled defendant's prior statements are necessary to establish largely undisputed facts regarding, among other things, (1) the asbestos content of the settled defendant's product(s) with which or near which the plaintiff may have worked and (2) the type of warnings given for those products.

Because most courts recognize that plaintiffs' admissions are admissible at trial for all purposes, judges commonly admit into evidence statements of product exposures made by the plaintiff or his co-workers.[3] However, particularly in New York County Asbestos Litigation ("NYCAL") trials, trial defendants often encounter resistance in the form of hearsay objections when attempting to offer deposition testimony[4] from other cases[5] about the settled defendants. The resolution of those objections can significantly impact a trial defendant's ability to argue for a fair allocation of liability.

Because the settled defendant is often beyond the subpoena power of the trial court, plaintiffs' hearsay objections, when sustained, effectively block the trial defendant from offering essential, undisputed

[1] In *Rowe v. Bell & Gossett Co.* (the focus of this paper), New Jersey Law applied and only settled defendants could be assigned third-party shares at trial. The verdict-allocation rules vary from state-to-state. Nevertheless, for purposes of consistency, the authors use the term "settled defendants" to include the entire panoply of entities who are not at trial for various reasons, including settlements and bankruptcies, but who may be assigned verdict shares under the law of a particular jurisdiction.

[2] The precise nature of the burden may differ by jurisdiction.

[3] This treatment is reflected in Federal Rule of Evidence 803(d)(2), which provides that statements made or adopted by an opposing party or its agent do not fall within the definition of hearsay.

[4] Recently revised NYCAL Case Management Order permits the use of third-party interrogatory answers, but still does not permit the use of deposition testimony for this purpose. Given the nature of written discovery responses, those are often far-less useful in establishing what are largely undisputed facts regarding a settled defendants' activities.

[5] Given the repetitive nature of asbestos litigation, it is unnecessary and wasteful to depose the same corporation in every lawsuit to establish undisputed facts that have been admitted in prior cases.

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facts that would enable the jury to assign liability to those not present at trial. Absent evidence that another entity or other entities may be responsible for the plaintiff's injuries, the plaintiff is able to create the legal fiction that the remaining trial defendant—often associated with a *de minimis* exposure product—was the lone or prevailing cause of a particular plaintiff's disease. Ultimately, these evidentiary exclusions can lead to verdicts that disproportionately allocate fault to trial defendant(s).

Several potential exceptions to the rule against hearsay could enable trial defendants to offer settled-defendant admissions from other cases into evidence. No exception stands out more starkly, however, than the "statement-against-interest" exception in Federal Rule of Evidence 804(b)(3) and also recognized by New York common law.[6] After all, in this age of runaway verdicts, no entity would concede that (1) it made or sold an asbestos-containing product or (2) that it did not issue a warning regarding the use of that product unless the statements were absolutely true. A corporation's admission to either effect, therefore, has an extremely high indicia of truthfulness. Nevertheless, despite the reliable nature of this evidence, NYCAL judges have repeatedly blocked trial defendants' attempts to use settled defendants' deposition testimony to prove alternative liability shares.[7]

Recently, in *Rowe v. Bell & Gossett Co.*, the highest court of New York City's neighbor, New Jersey, addressed the use at trial of admissions contained in a settled defendant's corporate deposition testimony on the asbestos content of products and/or the absence of warnings about those products. The Supreme Court of New Jersey adopted a common-sense rule that recognizes that because no corporation would make admissions of this nature unless they were true, trial defendants should be permitted to rely upon this reliable and undisputed evidence to prove the fault of settled defendants. This ruling, and the logic underlying it, should provide a platform for courts across the county, especially the NYCAL, to adopt a similar approach.

**The New Jersey Statement-Against-Interest Exception as Applied in *Rowe***

In *Rowe*, plaintiffs alleged that Ronald Rowe contracted mesothelioma as a result of his exposure to asbestos-containing products made or sold by more than twenty defendants during his work as an automobile mechanic and boiler repairman. Prior to trial, plaintiffs settled their claims with eight other defendants, leaving only Hilco., Inc., an alleged successor in interest to Universal Engineering Co., Inc. (which sold a dry cement product), as the lone defendant at trial. At trial, Hilco moved to admit into evidence excerpts from the settling defendants' corporate-representative depositions and answers to interrogatories from other asbestos lawsuits; the settling defendants' statements pertained primarily to the asbestos content of the settled defendants' products and the warnings associated with those products.[8] The trial court allowed Hilco to introduce many of those statements into evidence. Ultimately, the jury returned a verdict allocating 20% of the fault to Hilco/Universal and, over plaintiffs' objection, 80% to the settling defendants.

Plaintiffs appealed the trial court's ruling to the New Jersey Superior Court, Appellate Division, which reversed the trial court and remanded the case for a new trial on allocation of fault only, holding that the settling defendants' answers to interrogatories and corporate-representative deposition testimony excerpts were inadmissible hearsay. According to the Appellate Division, the proffered evidence did not meet any exception to the general rule against hearsay, because the admission-against-interest exception did not apply when the defendant offered the statement against a party other than the one that made it. The

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[6] *See*, *infra*, p. 3age ___. *Basile v. Huntington Utilities Fuel Corp.*, 60 A.D.2d 616, 617 (2d Dep't 1977); *accord Comm. Ins. Co. of Newark, New Jersey v. Popadich*, 68 A.D.3d 401, 402 (1st Dep't 2009); *Kelleher v. F.M.E. Auto Leasing Corp.*, 192 A.D.2d 581, 583 (2d Dep't 1993).

[7] Among the NYCAL cases in which deposition read-ins from settled defendants have been excluded from evidence are *Geoffrey Anisansel* (Index No. 190250/13); *Edward Robaey* (Index No. 190276/13) and *Walter Andrews* (Index No. 190035/15).

[8] Unlike New York law, New Jersey law does not permit the jury to allocate fault to bankrupt entities, so Hilco's third-party claims involved eight other defendants who settled their claims with plaintiffs and were dismissed from the case before trial.

 

Appellate Division also found that the statements were not against the declarants' interests, because they "comprised only one piece of the broader picture required to establish liability." The Appellate Division further suggested that the settling defendants' statements were not "admissions," because they consisted of "well-known historical facts."

The Supreme Court of New Jersey reversed and reinstated the jury's verdict. The Supreme Court first held that, when applying the statement-against-interest exception, courts should analyze each statement separately. Next, the court noted that the statements at issue were, in all but two instances, so clearly against the settling defendants' interests as to render them admissible. Moreover, the Supreme Court rejected the Appellate Division's suggestions that (1) a statement against interest must, in and of itself, establish a complete basis for the declarant's liability and (2) the statement-against-interest exception applies only when the statement is offered against the declarant who made it. Rather, the Supreme Court focused on the critical point that, so long as the statement is so far contrary to the declarant's interest that no reasonable person would have made it unless true, the statement is an admission against interest, and is admissible under the exception to the rule against hearsay.

**The Application of *Rowe's* Rationale in Other States**

New Jersey's statement-against-interest exception to the hearsay rule is essentially the same rule that exists under the Federal Rules of Evidence and the common law.[9] The rule in all its forms essentially permits the admission of an unavailable declarant's out-of-court statements that "a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability."[10] As stated under New York common law, an unavailable person's admission is admissible where "(1) the declarant is unavailable, (2) the declaration when made was against the pecuniary, proprietary or penal interest of the declarant, (3) the declarant had competent knowledge of the facts, and (4) there is no probable motive to misrepresent the facts."[11] Under the logic of *Rowe*, third-parties' corporate-representative depositions from prior lawsuits unquestionably meet the requisite standard of admissibility under either of these formulations.

As a threshold matter, citizens of foreign states and corporations immune to suit are certainly "unavailable" at trial. Moreover, New York precedents correctly hold that settled defendants are no longer parties and should not be forced to testify at trial, so they, too, are unavailable.[12] Accordingly, settled defendants and bankrupt entities meet the definition of "unavailable."[13] Moreover, given the substantial

[9] *Compare* N.J.R.E. 803(c)(25) *with* F.R.E. 804(b)(3).

[10] F.R.E. 804(b)(3).

[11] *Rabinowitz v. Roland Stafford Golf School,* 596 N.Y.S.2d 991, 993 (N.Y. Sup. Ct., Mar. 9, 1993); *see also Kittredge v. Granis*, 155 N.E. 88 (N.Y. 1926) (finding entries in the books of partnership showing misappropriation of client funds, where all partners were deceased, to be admissible statements against interest).

[12] *See*, *e.g.*, *Carilli v A.O. Smith Water Prods.*, 2017 N.Y. Misc. LEXIS 3831, *6 (Sup. Ct., N.Y. Cty. Oct. 5, 2017); *Gallen v AERCO Intl., Inc.*, 2017 N.Y. Misc. LEXIS 3705, *8 (Sup. Ct., N.Y. Cty. Sept. 28, 2017). *See also*, *Salvatore Felice v. St. Agnes Hospital*, 65 AD2d 388, 400, 403 (2d Dep't 1978) (noting that "after settlement, the settling tortfeasor could only be subpoenaed as a witness to testify at trial" and holding that they "had no place as parties in the lawsuit, once they settled); *Theresa Mielcarek v. Mary E. Knights, as Executrix of William C. Knights, Jr., Deceased, et al.*, 50 AD2d 122 (4th Dep't 1975) (holding that under GOl 15-108, "settling tortfeasor was not required to attend and participate as party defendant in trial against remaining defendant tortfeasors" "within no potential liability and no interest in the litigation the settling tortfeasor appears to have no place as a party in this lawsuit" and "removal of the settling tortfeasor as a party encourages settlement while no prejudicing the rights of the non-settling defendants"); *Cosmo Madaffari v. Wilmod Co., Inc.*, 96 Misc.2d 729, 732 (NY Sup. CT 1978) quoting *Mielcarek v. Knights*, 65 AD2d 388, 400, 403 (4th Dept. 1975) (holding that "[u]nder GOL 15-108 a settling tortfeasor "is not required to attend and participate as a party defendant in the trial of the action against the remaining tortfeasors.").

[13] *See People v. Brown*, 257 N.E.2d 16 (N.Y. 1970) (finding that "[t]]he rule on admissions against interest was based on the absence of the witness; and usually this meant that he was dead. But whether the person is dead, or beyond the jurisdiction, or will

  ISBN 1056 3059

liability an entity faces when its corporate representative admits that the entity manufactured or sold asbestos-containing products and did not provide sufficient warnings, those statements are against the corporation's pecuniary or proprietary interest.[14] Under those circumstances, the possibility of misrepresentation is low to non-existent.

Currently, section XIII.A of the NYCAL Case Management Order (CMO) provides that answers to the NYCAL standard interrogatories by non-parties may be admitted into evidence in a NYCAL asbestos trial to show (1) that a product contained asbestos or was used in conjunction with asbestos and/or (2) that the answering entity failed to warn about the asbestos content of the product at issue. However, the NYCAL CMO inexplicably applies only to written discovery responses, and does not mention deposition testimony, trial testimony, or other forms of corporate admissions made in other lawsuits. Nevertheless, regardless of the form in which they are made, those statements are precisely the sort of statements against interest that the *Rowe* court correctly recognized fall squarely within the letter and spirit of the hearsay exception for such statements. Arbitrary restraints on the *form* of evidence that should be admissible to establish settled-defendant shares cannot be justified.

**Conclusion**

In many cases, hearsay objections to reliable evidence have enabled plaintiffs to unduly focus fault and causation arguments on a trial defendant, and to avoid reliable evidence pointing to myriad other potential causes of an asbestos-related injury. When sustained, those objections deprive jurors of the chance to fairly allocate fault among all potentially responsible entities. Removing arbitrary evidentiary hurdles to the admission of those important and undisputed facts—as did the Supreme Court of New Jersey in *Rowe*—will level the playing field and create a better opportunity for jurors to fairly allocate respective entities' fault in future asbestos trials.

not testify, and cannot be compelled to testify because of a constitutional privilege, all equally spell out unavailability of trial testimony.").

[14] *See Rabinowitz*, 596 N.Y.S.2d at 993 (noting that "potential civil liability involves the declarant's pecuniary interest," citing *Kittridge*, 155 N.E. 88 (N.Y. 1926).

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