Products Liability Series: What is Arkansas' Law on Joint and Several Liability?

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Arkansas limits a judgment against a defendant to no more than its proportional share of the damages. In other words, damages are allocated to a defendant in direct proportion to that defendant's percentage of fault. For example, when a product manufacturer and a product seller are found to be 10% and 90% at fault respectively, the plaintiff can recover 10% from the manufacturer and 90% from the seller. In Arkansas, a plaintiff may not recover the entire award from one of them.

Notable exceptions. Sometimes, plaintiffs will advance a claim based upon the theory that two defendants were in an agency relationship. If successful in proving this theory, there is a statutory exception that would suspend the protection offered by several liability and instead allow for joint liability, whereby, for example, the 10% at fault manufacturer could be on the hook for 100% of a judgment. There is one other statutory exception, and that is where two defendants consciously agreed to pursue a common plan to commit an intentional tort. Although nefarious sounding, this theory is unlikely to arise in the products context.

Among whom is fault apportioned? When properly noticed and preserved, Arkansas' model jury instructions allow for jury interrogatory responses apportioning fault among parties and in some cases non-parties to the litigation. Where allocated among parties, the assigned faults must simply add up to 100%. Where a defendant seeks to have the jury apportion fault to nonparties, Arkansas Rule of Civil Procedure 9(h) establishes notice requirements that must be followed to preserve this right, and when preserved this can be presented to the jury. But where a nonparty has settled with a party there is no notice requirement because by statute the remaining defendant is entitled to a determination of the settling defendant's pro rata share of the fault, and accordingly, the damages.

Implications for Practice. Apportioning fault to non-parties through Rule 9(h) involves investigating and responding to a complaint in a strategic manner so as to preserve a company's rights. It is often the defendant in a products liability case that is incentivized to add parties to the verdict form in an attempt to reduce the percentage of fault apportioned to its client. However, adding non-parties to the verdict form is more than simply identifying the appropriate entities or individuals pursuant to Rule 9(h). Additionally, any non-party placed on the verdict form for purposes of apportioning fault must have liability proved against it. This can be done either by the plaintiff or defendant; however, often the plaintiff has little incentive to prove a case against a non-party, and will actively avoid doing so during discovery or through its trial witnesses. When that occurs, the defense must be prepared to add witnesses or testimony during the deposition phase and at trial that is sufficient to meet this threshold.

Accordingly, decisions about apportioning fault must be made sufficiently early during the discovery phase to identify, disclose and depose any necessary witnesses to prove liability against the parties to appear on the verdict form. Once at trial, a fine line must be drawn between sufficiently proving the fault of these non-parties, and any arguments by the defense that no wrongdoing occurred in the first place. Often, this distinction can become blurred to a troublesome degree if not handled deftly.

This article is part of the Mitchell Williams Products Liability Series explaining the nuances of how Arkansas Products Liability law is interpreted and practiced.