

## The Last One Standing Stands Tall: NJ Asbestos Trial Defendants Can Use Settled Defendants' Testimony to Prove Cross-Claims

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Most experienced asbestos trial lawyers will shout, "Depositions live forever!" suggesting that evidence produced in one case at one time and in one state may live to influence the outcome in many cases for decades to come. In 2018, a New Jersey appellate court issued a ruling that changed that adage, ruling that a defendant's depositions only live forever until a plaintiff settles with a defendant, at which time the deposition becomes inadmissible in the administration of justice for all non-settling defendants. In late 2019, however, the New Jersey Supreme Court corrected the impractical, illogical ruling so as to restore to non-settling asbestos trial defendants their full right to introduce evidence of a settled-defendant's culpability.

### Background

Companies facing exposure to toxic tort claims often find themselves as one of many defendants named in lawsuits filed by a handful of plaintiff firms representing multiple claimants against a wide range of defendants in several states. At any given time, defendants in asbestos litigation may have multiple cases in a dozen or more states. The vast majority of plaintiffs resolve those suits with a combination of settlements with some defendants and dismissals or summary judgments in favor of all others. However, sometimes the pretrial judge denies a worthy dispositional motion of a company which should not be in the case. For example, in *Condon v. Advanced Thermal Hydronics, Inc.*, a small Pennsylvania manufacturer of construction sealants, had to endure the expense and risks of trial, entry of an adverse judgment and appeal before receiving a ruling that the cases against it never should have gone to trial in the first place: "[W]e find the trial court should have granted summary judgment... the manufacturer was entitled to judgment as a matter of law."

As *Condon* illustrates, sometimes the "last one standing" is not the most culpable party, but rather it is the least. Still, plaintiff attorneys know that the final, non-settling defendant will be the only party against whom they will put on their case at trial. Often, the plaintiff attorney articulates a settlement demand well in excess of what most reasonable minds would allocate in a neutral setting. The last standing defendant and/or its liability insurer faces the choice of either paying more than their share or facing all the risks of a trial involving a sympathetic plaintiff or decedent's estate.

The last standing non-settling defendant finds itself as the sole target for a plaintiff whose case is well-financed by the settlements of the former co-defendants, none of whom are sitting in the courtroom anymore. The jury is never told that some or all of the other companies settled with the plaintiff. After many days of trial in which it seems that all the jury hears about is the last standing defendant's product, the non-settler gets its chance to prove the toxic exposures that the plaintiff experienced were from products made or sold by the settled former-defendants.

This is the cross-claim phase of trial – the opportunity for the non-settling defendant to prove that its product was far less responsible for the plaintiff's medical condition than were the products of the other companies whom plaintiff originally sued.

## Use of Inculcating Evidence from a Settled-Defendant

In most states, the non-settling trial defendant has a number of tools to prove that a silent, settled, former-defendant caused or contributed to the plaintiff's harm. It may have the former co-defendant's discovery responses or a deposition from a key representative in the case-at-bar. Likewise – and much more likely – the non-settling trial defendant may have inculcating evidence from a settled-defendant from another case in another jurisdiction. Such evidence, while technically categorized as 'hearsay,' was admissible under the hearsay rule's wide exception for a statement by a party against its own interest.

In 2018, however, a panel of appellate judges in New Jersey upset the apple cart of contribution and indemnity by misapplying New Jersey evidentiary law. The Appellate Division ruling in *Rowe v. Bell & Gossett Co.*, suggested that a settling defendant could not introduce a settled-defendant's inculcating sworn testimony from a prior case around the country because that company, having settled with the plaintiff in the case-at-bar, was no longer a "party." The Appellate Division's tortured interpretation of case law and the rules of evidence left non-settling defendants in New Jersey with the expensive and daunting task of having to prove a case against a settled-defendant with one – or perhaps both – of its hands tied. That is, the non-settling defendant could not use the deep pool of historical evidence on which the plaintiff relied in first suing that other defendant, and which motivated the settling-defendant to settle.

## 2019 Decision and its Implications for Inculcating Evidence Defense

The New Jersey Supreme Court reversed the Appellate Division. In *Rowe v. Bell & Gossett Co.*, the high court disavowed the lower court's twisted reasoning, reiterating instead that "it is only fair that each person only pay for injuries he or she proximately caused." The court emphasized that under the state's Comparative Negligence Act, N.J.S.A. 2A:15-5.2(a) and its Joint Tortfeasors Contribution Law, 2A:53A-1 to 53A-5, a non-settling defendant is entitled to have the jury make a "good-faith allocation of the percentages of [liability] among joint tortfeasors based on the evidence," regardless of whether one such joint tortfeasor previously settled with the plaintiff. The court repeated that "a non-settling defendant's right to a credit reflecting the settler's fair share of the amount of the verdict – regardless of the actual settlement – represents the judicial implementation of the statutory right to contribution."

The *Rowe* court ruled that if a corporate defendant's witness testified in a representative capacity so as to speak on behalf of the company, and where the facts to which the witness testified are against the financial or liability interests of the company at the time the person testified, that testimony – or the transcript thereof – is admissible by a non-settling defendant. The admissibility of the testimony is unharmed even if the settled-defendant's witness testified in a different case in a different state at a different time. Likewise, a settled-defendant's discovery responses in another case may be admissible too.

Had the intermediate level decision in *Rowe* by the Appellate Division have stood, New Jersey asbestos defendants would have faced incalculable costs associated with recreating, in every case, the discovery record of all prior cases involving each and every co-defendant. The costs of such file work-up in every case would have eroded liability insurance limits which include defense costs and artificially raised the price of settlements to reflect 'fear' more than 'relative culpability.' The New Jersey Supreme Court ended that dysfunction by restoring fundamental fairness to multi-defendant cases.

If you have questions or would like additional information, please contact Bill Kennedy ([kennedyw@whiteandwilliams.com](mailto:kennedyw@whiteandwilliams.com); 215.864.6816) or another member of our Product Liability Group.

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