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One Response to Over-Naming of Asbestos Defendants: Allegations as Evidentiary Admissions

by Robert H. Wright

Defendants may be overlooking a response to the problem of over-naming of defendants in asbestos cases. When a complaint alleges that many defendants are responsible for the plaintiff's alleged exposures, a defendant should consider offering the complaint in evidence as the plaintiff's admission of the responsibility of the other named defendants. This analysis applies at least in comparative fault jurisdictions.

An article in the West Virginia Record illustrates the over-naming problem. *See* Chris Dickerson, *Judge Warns of 'Dreadful Experience' in Upcoming Asbestos Trial, Urges Parties to Settle*, West Virginia Record (Jul. 22, 2020), https://bit.ly/3tNSXh4. As the article recounts, a trial judge overseeing the asbestos docket in West Virginia chastised plaintiffs' law firms for naming too many defendants. The plaintiffs' firms had named a total of at least 331 defendants in six cases–an average of about 55 defendants per case. "Bottom line," reported the judge, he could not even mediate cases with such "vast number of defendants."

The problem is growing worse. The article states that between 2014 and 2018 the average number of asbestos defendants per case increased from 59 to 64. The trend was described by one attorney as "a scourge that costs litigants and impacts justice."

There may be a way for defendants to turn the tables. If a plaintiff is going to allege that dozens of defendants are responsible for the plaintiff's exposure to asbestos, the defendant should consider offering the complaint as evidence of the responsibility of the other named defendants. As a general matter, factual admissions in pleadings are admissible against the party making the admission. See, e.g., *Payne v. Peninsula School District*, 653 F.3d 863, 895 n. 11 (9th Cir. 2011) (holding that district court properly considered plaintiff's complaint, which qualified as an admission, when ruling on defendant's summary judgment motion); *Frank v. Bloom*, 634 F.2d 1245, 1251 (10th Cir. 1980) (holding that the "factual matter contained in the pleadings is admissible as an admission by a party made by his agent acting within the scope of his employment"); *Frederic P. Wiedersum Associates v. National Homes Const. Corp.*, 540 F.2d 62, 65 (2d Cir. 1976) (holding that district court erred by withholding from the jury the admissions in the plaintiff's complaint).

Courts have applied these principles in asbestos and toxic tort cases. In *Barnes v. Owens-Corning Fiberglas Corp.*, 201 F.3d 815, 829 (6th Cir. 2000), the sole remaining defendant in a consolidated asbestos case offered in evidence admissions from the plaintiffs' complaints that blamed plaintiffs' asbestos-exposure injuries on the other defendants. The district court admitted the statements

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and the Sixth Circuit affirmed. The statements were not hearsay because they were admissions by a party-opponent under Fed. R. Evid. 801(d)(2)(a). Further, the statements were "relevant to causation and sufficiently probative to survive Rule 403 scrutiny." *See also Williams v. Union Carbide Corp.*, 790 F.2d 552, 556 (6th Cir. 1986) (in case alleging toxic chemical exposure, reversing district court's decision to exclude from evidence a prior complaint alleging that a different defendant cause plaintiff's injuries); *In re NM Holdings Co., LLC*, 407 B.R. 232, 286 (Bankr. E.D. Mich. 2009) (noting that the pleadings in *Barnes* and *Williams* were treated as evidentiary admissions that could be contradicted, not as conclusively binding judicial admissions).

Although there are grounds for excluding pleadings, none should prevent a defendant from offering a complaint to show the fault of other defendants allegedly responsible for the plaintiff's exposure. Courts have excluded pleadings when necessary to protect the plaintiff's right to assert inconsistent pleas under Fed. R. Civ. Pro. 8(d)(3). Thus, the Ninth Circuit rejected the argument that inconsistent pleadings were admissions when a party alleged it had not entered into a contract or, if it had done so, the contract was lawfully cancelled. *Oki Am., Inc. v. Microtech Int'l, Inc.*, 872 F.2d 312, 313 (9th Cir. 1989). But the same analysis would not apply to the admission at trial of consistent pleas, such as the allegations that many defendants are all responsible for plaintiff's injury.

Older cases have also described a "modern trend" disallowing use of pleadings as admissions. But if such a trend existed, it is no longer. For example, in *Lytle v. Stearns*, 250 Kan. 783, 798, 830 P.2d 1197, 1207 (1992), the Kansas Supreme Court cited the third edition of McCormick on Evidence for the proposition that the "modern trend is to deny admission of such pleadings." *Lytle*, 250 Kan. at 798-99, 830 P.2d at 1207-08, citing McCormick on Evidence § 265 (3d ed. 1984). Although the older version of McCormick used the word trend three times, the current version drops that word and instead comments generally that "[s]ome courts have exhibited *sensitivity* to the potential unfairness involved in admitting pleadings." 2 McCormick on Evidence § 257 (8th ed. 2020) (emphasis added). As an example, the treatise describes the exclusion of inconsistent pleas when the defendant both denies the plaintiff's allegations in the complaint and seeks indemnity from a third party. *Id.* at § 257 n. 23. The challenges created by inconsistent pleas, and the sensitivity needed to address them, should be absent when the plaintiff makes consistent allegations of exposure to the products of many defendants.

So long as the problem of over-naming defendants in asbestos cases persists, defendants should consider offering the complaints in evidence as admissions of the responsibility of the other named defendants, at least as to those defendants who have not been dismissed on the merits.

