8 SEVERAL (NOT JOINT) LIABILITY[1]

Alaska has abolished joint and several liability in tort actions in favor of a system of pure several liability among parties to the action. For causes of action accruing on or after August 7, 1997 the fact finder determines the percentage of fault of all "persons," rather than "parties." "Persons" include not only the plaintiff and any former parties that may have settled out before trial or otherwise been released, but also any other person responsible for the damages, whether named as a party to the action or not. There is an exception to this rule where the person (1) was identified as a potentially responsible person; (2) is not protected by the new statute of repose; and (3) could have been joined as a party in the lawsuit.

If a person who either is not a party at the time of fault allocation or never was a party to the lawsuit is allocated some of the fault, judgment cannot be entered against them. The percentage of fault allocated to a non-party is used only to calculate the percentage of the total fault and to determine the amount of the judgment attributable to each named party.[2] Additionally, the Alaska Supreme Court held that a third-party defendant may be sued for apportionment of fault under the equitable apportionment statute, even though the statute of limitations has run on the plaintiff's original tort claim.[3]

Problems arise in lawsuits where a plaintiff has sued fewer than all the responsible parties -- especially if a defendant asserts a third-party defensive fault allocation claim against some new party after the statutory limitations period has run. The Alaska Supreme Court has held that, in such a situation, the third-party defendant may be held liable for money damages to the original plaintiff, even though the limitations period has expired with respect to plaintiff's original tort claim.[4]

Prior to the Tort Reform Act of 1997, entities immune from suit (such as an employer whose liability is exclusive pursuant to Alaska's Worker's Compensation Act, AS 23.30.055) could not be allocated a portion of the total fault.[5] The *Lake* case was overruled by the 1997 Tort Reform Act, which allows allocation of fault to a negligent employer. Thus, for actions accruing on or after August 7, 1997 entities that are

---

[1] When a cause of action "accrues" is sometimes, but not always, as straightforward as determining when an injury occurs. For a discussion of when a cause of action "accrues," *see* Tab 3.

[2] *See* AS 09.17.080. The Alaska Supreme Court has held that AS 09.17.080 is facially constitutional. *See Evans v. State*, 56 P.3d 1046 (Alaska 2002).

[3] *See Alaska Gen. Alarm v. Grinnell*, 1 P.3d 98 (Alaska 2000).

[4] *Id.*

[5] *See Lake v. Construction Mach.*, 787 P.2d 1027 (Alaska 1990).

immune from suit may be allocated a portion of the total fault. Such parties may potentially include employers, the state, the federal government, and unidentified tortfeasors.

Another significant change in the law of several liability concerns the way that an employer's worker's compensation lien is now treated. Under prior law, the employer's fault was not considered in a tort action by an employee against other parties. The employer's or workers' compensation carrier's payment of benefits entitled it to a claim for reimbursement from the employee from any recovery the employee was able to obtain against third parties. That right of reimbursement is now subject to proportionate reduction for the percentage of fault allocated to the employer in the tort action. In other words, if fault is allocated to an employer, the employee can reduce the amount of the lien owed to the employer for workers' compensation payments under AS 23.30.015(g) by an amount equal to the employer's share of the damages assessed under AS 09.17.080(c).[6]

A non-settling party will not receive the benefit of a co-defendant's settlement by way of an offset to its liability. Rather, a plaintiff is owed the full amount which corresponds to the percentage of fault allocated to a defendant, even if that means that plaintiff receives more than the total amount of his or her damages.[7] The common law rule against double recovery does not apply in Alaska in the context of pure several liability. In so ruling, the Alaska Supreme Court has held that AS 09.17.080 mandates the court to enter judgment against each party liable on the basis of several liability in accordance with that party's percentage of fault, and the court further relied on policy reasons -- encouraging settlement and avoiding windfalls to non-settling defendants.[8]

Joint liability was abolished in Alaska for all causes of action accruing after March 5, 1989. There is also no longer a statutory right to contribution since there is no longer a need for contribution when a defendant cannot be required to pay more than his or her percentage of plaintiff's damages. Certain federal claims, such as maritime claims, may subject defendants to different rules.

---

[6] For more information on workers' compensation, *see* Tab 28.

[7] *Petrolane Inc. v. Robles*, 154 P.3d 1014 (Alaska 2007).

[8] *Sowinski v. Walker*, 198 P.3d 1134, 1148 (Alaska 2008).

However, Alaska continues to recognize **common law contribution**. The Alaska Supreme Court has held that a defendant can maintain a separate and subsequent action seeking common law contribution from a non-party to the original suit.[9]

Appendices:

Alaska Civ. R. 14(c)
AS 09.17.080
AS 23.30.015
AS 23.30.055

[9] *See McLaughlin v. Lougee,* 137 P.3d 267 (Alaska 2006) (the decision was, however, limited to cases arising between 1989 and 1997, and the court expressed no opinion about the application of its holding to cases arising after August 7, 1997, when the Alaska Legislature made substantial changes to Alaska's tort law. *See also*, Tab 6.

Rule 14. Third-Party Practice.

(a) **When Defendant May Bring in Third Party.** At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or maybe liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff. The third-party plaintiff need not obtain leave to make the service if the third-party plaintiff files the third-party complaint not later than 10 days after serving the original answer. Otherwise the third-party plaintiff must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make any defenses to the third-party plaintiff's claim as provided in Rule 12 and any counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert any defenses as provided in Rule 12 and any counterclaims and cross-claims as provided in Rule 13. Any party may move to strike the third-party claim or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or maybe liable to the third-party defendant for all or part of the claim made in the action against the third-party defendant.

(b) **When Plaintiff May Bring in Third Party.** When a counterclaim is asserted against the plaintiff, the plaintiff may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

(c) **Equitable Apportionment.** For purposes of apportioning damages under AS 09.17.080, a defendant, as a third-party plaintiff, may follow the procedure of paragraph (a) to add as a third-party defendant any person whose fault may have been a cause of the damages claimed by the plaintiff. Judgment may be entered against a third-party defendant in favor of the plaintiff in accordance with the third-party defendant's respective percentage of fault, regardless of whether the plaintiff has asserted a direct claim against the third-party defendant.

(Adopted by SCO 5 October 9, 1959; amended by SCO 258 effective November 15, 1976; by SCO 1153 effective July 15, 1994; and by SCO 1200 effective July 15, 1995)

Annotations

Cases

The fact that an insurance company's agent is a party to an action brought by the insured against the agent and insurer does not preclude the insurer from impleading the agent when the agent, who has obtained a summary judgment against the insured, is no longer a party to action. **Austin v. Fulton Insurance Co.**, Op. No. 808, 498 P2d 702 (Alaska 1972).

Res judicata and collateral estoppel do not bar a claim that might have been asserted against impleaded party in a prior action. **Drickersen v. Drickersen**, Op. No. 1228, 546 P2d 162 (Alaska 1976).

Appellate review of a court order of attorney's fees to the prevailing party in a dismissed third-party action was warranted where the court departed from the accepted and usual course of proceedings in dismissing the claim rather than either severing it from the main action or ordering the pleadings amended and the purported third-party defendants joined as additional counterclaim defendants. **Aleut Corp. v. Rogers**, Op. No. 2212, 619 P2d 472 (Alaska 1980).

Motion by defendant, the obligor on a promissory note, to join a third-party defendant was meritorious, but any error in the trial court's denial of the motion was harmless, since the third party had already confessed liability to the obligor. **Jackson v. Nagle**, Op. No. 2773, 677 P2d 242 (Alaska 1984).

Trial court's decision denying leave to permit the filing of a third-party complaint more than ten days after service of the original answer was not an abuse of discretion. **Ross Laboratories v. Thies**, Op. No. 3125, 725 P2d 1076 (Alaska 1986).

Because AS 09.17.080 allows allocation of fault to a co-plaintiff as a party to the action without requiring defendant to implead the co-plaintiff as a third-party defendant and because defendant provided adequate notice of its intent to allocate fault to co-plaintiff, trial court did not err in reducing plaintiffs' recovery by co-plaintiff's allocation of fault despite defendant's failure to implead co-plaintiff as third-party defendant under this rule. **Fancyboy v. Alaska Village Elec. Co-Op.**, Op. No. 5153, 984 P2d 1128 (Alaska 1999).

Statute of limitations for tort actions does not apply to claims for equitable apportionment, thus third-party defendant who was sued for apportionment of fault under AS 09.17.080 after statute of limitations on plaintiff's underlying personal injury claim had run could nonetheless be liable to plaintiff for money damages. **Alaska General Alarm, Inc. v. Grinnell**, Op. No. 5263, 1 P3d 98 (Alaska 2000).

Sec. 09.17.080. Apportionment of damages. (a) In all actions involving fault of more than one person, including third-party defendants and persons who have settled or otherwise been released, the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating

(1) the amount of damages each claimant would be entitled to recover if contributory fault is disregarded; and

(2) the percentage of the total fault that is allocated to each claimant, defendant, third-party defendant, person who has been released from liability, or other person responsible for the damages unless the person was identified as a potentially responsible person, the person is not a person protected from a civil action under AS 09.10.055, and the parties had a sufficient opportunity to join that person in the action but chose not to; in this paragraph, "sufficient opportunity to join" means the person is

(A) within the jurisdiction of the court;

(B) not precluded from being joined by law or court rule; and

(C) reasonably locatable.

(b) In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each person at fault, and the extent of the causal relation between the conduct and the damages claimed.

(c) The court shall determine the award of damages to each claimant in accordance with the findings and enter judgment against each party liable. The court also shall determine and state in the judgment each party's equitable share of the obligation to each claimant in accordance with the respective percentages of fault as determined under (a) of this section. Except as provided under AS 23.30.015(g), an assessment of a percentage of fault against a person who is not a party may only be used as a measure for accurately determining the percentages of fault of a named party. Assessment of a percentage of fault against a person who is not a party does not subject that person to civil liability in that action and may not be used as evidence of civil liability in another action.

(d) The court shall enter judgment against each party liable on the basis of several liability in accordance with that party's percentage of fault. (§ 1 ch 139 SLA 1986; am §§ 15, 16 ch 14 SLA 1987; am 1987 Initiative Proposal No. 2, § 1; am §§ 11 — 13 ch 26 SLA 1997)

Cross references. — For effect of this section on Alaska Rules of Civil Procedure 49, 52, and 58, see §§ 5-7, ch. 139, SLA 1986, in the Temporary and Special Acts; for advance payments in medical malpractice actions, see AS 09.55.546.

For provisions relating to the effect of the 1997 amendments to subsection (a) on Rule 49, Alaska Rules of Civil Procedure, see § 50, ch. 26, SLA 1997 in the 1997 Temporary and Special Acts.

For a statement of legislative intent relating to the provisions of ch. 26, SLA 1997, see § 1, ch. 26, SLA 1997 in the 1997 Temporary and Special Acts. For severability of the provisions of ch. 26, SLA 1997, see § 56, ch. 26, SLA 1997 in the 1997 Temporary and Special Acts.

Effect of amendments. — The 1997 amendment, effective August 7, 1997, rewrote subsection (a); in subsection (b), substituted "person" for "party" and deleted the former last sentence, which read: "The trier of fact may determine that two or more persons are to be treated as a single party if their conduct was a cause of the damages claimed and the separate act or omission of each person cannot be distinguished"; and, in subsection (c), deleted ", subject to a reduction under AS 09.16.040," following "with the findings" in the first sentence, added "as determined under (a) of this section" at the end of the second sentence, and added the third and fourth sentences.

Editor's notes. — 1987 Initiative Proposal No. 2, § 4 provides: "Sections 1 — 2 of this Act apply to all causes of action accruing after the effective date of this Act [March 5, 1989]."

1987 Initiative Proposal No. 2, § 5 provides: "If any provision of this Act, or the application thereof to any person or circumstances is held invalid, the remainder of this Act and the application to other persons or circumstances shall not be affected thereby."

AS 09.16.040, referred to in subsections (a) and (c), was repealed by 1987 Initiative Proposal No. 2, § 2.

Section 55, ch. 26, SLA 1997 provides that the provisions of ch. 26, SLA 1997 apply "to all causes of action accruing on or after August 7, 1997."

Sec. 23.30.015. Compensation where third persons are liable. (a) If on account of disability or death for which compensation is payable under this chapter the person entitled to the compensation believes that a third person other than the employer or a fellow employee is liable for damages, the person need not elect whether to receive compensation or to recover damages from the third person.

(b) Acceptance of compensation under an award in a compensation order filed by the board operates as an assignment to the employer of all rights of the person entitled to compensation and the personal representative of a deceased employee to recover damages from the third person unless the person or representative entitled to compensation commences an action against the third person within one year after an award.

(c) Payment of compensation into the second-injury fund as a result of death operates as an assignment to the employer of all rights of the representative of the deceased to recover damages from the third person.

(d) An employer under an assignment may either institute proceedings for the recovery of damages or may compromise with a third person, either without or after instituting an action.

(e) An amount recovered by the employer under an assignment, whether by action or compromise, shall be distributed as follows:

(1) the employer shall retain an amount equal to

(A) the expenses incurred by the employer with respect to the action or compromise, including a reasonable attorney fee determined by the board;

(B) the cost of all benefits actually furnished by the employer under this chapter;

(C) all amounts paid as compensation and second-injury fund payments, and, if the employer is self-insured or uninsured, all service fees paid under AS 23.05.067;

(D) the present value of all amounts payable later as compensation, computed from a schedule prepared by the board; and the present value of the cost of all benefits to be furnished later under AS 23.30.095 as estimated by the board; the amounts so computed and estimated to be retained by the employer as a trust fund to pay compensation and the cost of benefits as they become due and to pay any finally remaining excess sum to the person entitled to compensation or to the representative; and

(2) the employer shall pay any excess to the person entitled to compensation or to the representative of that person.

(f) Even if an employee, the employee's representative, or the employer brings an action or settles a claim against the third person, the employer shall pay the benefits and compensation required by this chapter.

(g) If the employee or the employee's representative recovers damages from the third person, the employee or representative shall promptly pay to the employer the total amounts paid by the employer under (e)(1)(A) — (C) of this section insofar as the recovery is sufficient after deducting all litigation costs and expenses. Any excess recovery by the employee or representative shall be credited against any amount payable by the employer thereafter. If the employer is allocated a percentage of fault under AS 09.17.080, the amount due the employer under this subsection shall be reduced by an amount equal to the employer's equitable share of damages assessed under AS 09.17.080(c).

(h) If compromise with a third person is made by the person entitled to compensation or the representative of that person of an amount less than the compensation to which the person or representative would be entitled, the employer is liable for compensation stated in (f) of this section only if the compromise is made with the employer's written approval.

(i) If the employer is insured and the carrier has assumed the payment of compensation, the carrier shall be subrogated to all the rights of the employer.

(j) Notice of the commencement of an action against a third party shall be given to the board and to all interested parties within 30 days. (§ 30 ch 193 SLA 1959; am § 7 ch 42 SLA 1962; am § 1 ch 73 SLA 1965; am § 2 ch 75 SLA 1977; am § 36 ch 26 SLA 1997; am § 3 ch 89 SLA 2000)

Sec. 23.30.055. Exclusiveness of liability. The liability of an employer prescribed in AS 23.30.045 is exclusive and in place of all other liability of the employer and any fellow employee to the employee, the employee's legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from the employer or fellow employee at law or in admiralty on account of the injury or death. The liability of the employer is exclusive even if the employee's claim is barred under AS 23.30.022. However, if an employer fails to secure payment of compensation as required by this chapter, an injured employee or the employee's legal representative in case death results from the injury may elect to claim compensation under this chapter, or to maintain an action against the employer at law or in admiralty for damages on account of the injury or death. In that action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of the employment, or that the injury was due to the contributory negligence of the employee. (§ 4 ch 193 SLA 1959; am § 1 ch 42 SLA 1962; am § 11 ch 79 SLA 1988)

Opinions of attorney general. — While it is true that under the Alaska Workmen's Compensation Act, employers, including the state (AS 23.30.265) (now AS 23.30.395), are excluded from admiralty liability, this exclusive liability provision cannot act as a limitation on suits against the state under the federal maritime