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The Civil Litigator

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New Role for Nonparties in Tort Actions—The Empty Chair

by Reed D. Benson

In courtroom drama, the spotlight rarely falls on an empty chair. That may change, due to a new Colorado statute allowing factfinders to consider the negligence or fault of nonparties in tort actions.¹ The new statute may not give nonparties starring roles in every trial, but it will certainly thicken the plot.

The concept of considering nonparty fault was included within the new statute which establishes several liability among joint tortfeasors² and abrogates the common law rule of joint and several liability. CRS § 13-21-111.5 is a key element in the 1986 tort reform legislation. In the abolition of joint and several liability and by allowing the factfinder to consider the fault of nonparties who may or may not be potentially liable to the plaintiff, the Colorado legislature embraced a policy that no tortfeasor should have to pay more than his or her "fair share" of damages.

An underlying concept or goal of CRS § 13-21-111.5 is that all known causal negligence or fault will be present in the courtroom and evaluated by the factfinder. Whether this approach will invariably result in an appropriate recovery for a deserving plaintiff or, in certain circumstances, work to preclude such a full recovery remains problematical. Putting aside questions of fundamental fairness, the "presence" of nonparties in the courtroom may raise problems for civil litigators. This article discusses the new statute and some potential problems.

Nonparties Under the New Statute

The new statute requires the finder of fact in a tort action to consider the negligence or fault of a nonparty if (1) the claimant has entered into a settlement agreement with the nonparty or (2) the defendant has given notice that a nonparty was wholly or partially at fault.³

Notice must be given within ninety days of the commencement of the action unless the court determines that more time is needed. The defendant gives notice by filing a pleading,

designating such nonparty and setting forth such nonparty's name and last-known address, or the best identification of such nonparty which is possible under the circumstances, together with a brief statement of the basis for believing such nonparty to be at fault.⁴

The jury (or judge in a non-jury case) then may assign a percentage of negligence or fault to any nonparty who settled with the claimant or who was properly named by the defendant.

A finding of negligence or fault against a nonparty does not constitute a conclusive or presumptive finding as to that nonparty in another action.⁵ The court may assess attorneys' fees if it finds that a defendant's designation of a nonparty was substantially frivolous, groundless or vexatious.⁶

A New Time Factor

Once an action is commenced, the defendant has ninety days (or more if the

court finds it necessary) in which to give notice that a nonparty is wholly or partially at fault and to identify the nonparty.⁷ The plaintiff must then amend the complaint if he wishes to have the nonparty joined in the suit and must do so before the statute of limitations runs. As the limitation period for most tort actions was recently shortened to two years,⁸ the plaintiff should act promptly to join newly discovered parties if joinder is feasible and appropriate.

An obvious way for a plaintiff to attempt to avoid having claims time-barred is to file the original complaint more than three months prior to the end of the limitation period. However, this may not always be feasible. In addition, reliance on a lead time of ninety days could be to no avail if the court allows the defendant extra time to name a nonparty and does not also toll the statute of limitations during that time.⁹ Requests for extensions of the

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This month's article was written by Reed D. Benson, a second year law student at the University of Michigan Law School, while he was employed as a summer clerk with the firm of Holme Roberts & Owen, Denver, and Charles J. Kall, a partner of that firm. Authors wishing to submit articles concerning civil litigation for this column are encouraged to do so.

18. *Barrett v. Omaha Nat'l Bank*, 584 F.Supp. 22 (D.Neb. 1983). See also, *Cummings*, *supra*, note 13.

19. See, e.g., *Bundy*, *supra*, note 4; *Coley v. Consol. Rail Corp.*, 561 F.Supp. 645 (E.D. Mich. 1982).

20. *Rabidue*, *supra*, note 10.

21. *Id.*

22. *Id.* at 433.

23. *Vinson*, *supra*, note 2 at 4706.

24. *Vinson v. Taylor*, 753 F.2d 141 (D.C. Cir. 1985).

25. *Vinson*, *supra*, note 1 at 4707.

26. *Id.*

27. *Id.*

28. *Id.* at 4708.

29. See, e.g., *Henson*, *supra*, note 4; *Scott*, *supra*, note 11; *Harris*, *supra*, note 10; *Davis*

v. Western-Southern Life Ins. Co., 34 FEP Cases 97 (N.D. Ohio 1984).

30. See, e.g., *Heelan*, *supra*, note 5.

31. While most victims of hostile environment sexual harassment are women, it has been reported that men have been victimized as well. See, *National Law Journal* (July 7, 1986) at 11.



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ninety-day period may become common as defendants endeavor to avoid penalties for the frivolous designation of a non-party¹⁰ and for violation of the good-faith pleading requirement.¹¹

A plaintiff should also seek to preserve potential claims against unknown nonparties by the prompt use of interrogatories to the defendant. All defendants should be asked at an early stage to identify nonparties upon which they intend to place fault. Defendants would then seem to have a continuing duty to inform the plaintiff of any such nonparties.¹²

Naming "John Doe" defendants in the original complaint and filling in the names of nonparties as they become known ordinarily will not work.¹³ An amendment naming a new party normally relates back to the original complaint only if the new

party, prior to the end of the limitation period, had such notice of the action that the new party will not be prejudiced in maintaining his defense on the merits, and if he knew or should have known that the action would have been brought against him if there had been no mistake as to the identity of the proper party.¹⁴

Effects of Settlement on Recovery

The finder of fact must consider the negligence or fault of a person who has entered into a settlement agreement with the plaintiff.¹⁵ This provision of the new statute is particularly important because the legislature also changed the way settlements are applied against judgments. The new law requires that the judgment be reduced by the percentage of fault attributed to any parties who have settled with the plaintiff.¹⁶ In other words, the plaintiff's recovery is reduced not by the amount for which the plaintiff has settled, but by the

amount of negligence or fault attributed to the party with whom he settled.

Impact on Motivation to Settle

Presumably, the legislature concluded that the provisions of CRS § 13-21-111.5 would not discourage the resolution and settlement of civil disputes. Indeed, it can be argued that the relative certainty that no one will be liable for more than his appropriate share will generate a strong incentive to evaluate a case early and settle before incurring substantial defense costs. There is another potential consequence of such relative certainty (knowledge that the potential exposure is limited to a predictable range, even if the amount is not precisely known). It may act to harden the position of the parties, and force the resolution of matters into the courtroom. Only time and experience will determine whether either of these situations will materialize.

Further, it remains to be seen whether the "presence" of nonparties in the courtroom will act to discourage the settlement of claims. The existence of a nonparty will provide the defendant with the opportunity to try an "empty chair." The fact that a party who is no longer in the courtroom has settled (if the fact of settlement is deemed admissible) may cast an unwarranted incriminating light on the absent party. At the other table, the plaintiff may have to try to "defend" the empty chair as well as himself against the defendants' arguments.¹⁷ In some circumstances, the plaintiff may be in the awkward position of having built a damaging case against a defendant and, after settling with that defendant, watching his efforts used against him.

Finally, because the potential "presence" of a nonparty in the courtroom—particularly a settling (non)party—may provide certain tactical advantages to a defendant, some defendants may have less motivation to settle claims. Of course, it is impossible to predict how the various parties will view the advantages or disadvantages of the existence of the empty chair. Each case will present a different set of variables. However, it does seem certain that in the telling of the whole story (all causal factors present at one time in one case), the part played by the empty chair will take on a major role in determining how the case proceeds.

Potentially Liable Nonparties

A defendant may designate a nonparty who remains potentially liable to the plaintiff, and the finder of fact must determine the degree of negligence or fault of that nonparty. Potentially liable nonparties include those who were not joined for reasons of jurisdiction or venue, as well as those the plaintiff chooses not to join.

The statute specifies that "[a]ny finding of a degree or percentage of fault or negligence of a nonparty shall not constitute a presumptive or conclusive finding as to such nonparty" in another action.¹⁸ As a practical matter, this language should work to preclude the plaintiff from asserting an earlier finding of fault or negligence of a nonparty as the basis for the offensive use of collateral estoppel in a later suit.

This provision may act as a brake to discourage any argument that the traditional law of collateral estoppel was somehow changed by the statute. The legislature did not address the separate question of whether a finding of no fault or no negligence in a nonparty could be asserted defensively by that nonparty when he is made a defendant in another action.¹⁹ Ac-

tually, it did not have to. There is no reason why the common law rules of collateral estoppel should not also govern in this circumstance.²⁰

Effect on Joinder—Uniform Contribution Among Tortfeasors Act

The abolition of joint and several liability and the possible impact of nonparties may encourage the plaintiff to join all potentially liable persons.

On the other hand, the defendant in a tort case now apparently will be able to implead only where he has a claim of indemnity against a third party. Colorado Rules of Civil Procedure Rule 14 dictates that the defendant may implead a third person only where that person "is or may be liable to him for all or part of the plaintiff's claim against him."²¹ While the Uniform Contribution Among Tortfeasors Act remains the law,²² the abolition of joint and several liability negates the concept of contribution²³ and thus the use of third-party claims to join other tortfeasors.

The abolition of joint and several liability also removes the chief incentive and rationale for the joinder of others by the defendant, and provides a strong motive for the plaintiff to join all those who may be liable. If the plaintiff cannot or does not join such other parties, these nonparties may provide the defendant(s) in the courtroom with certain tactical advantages. On the other hand, if the plaintiff can and does get all potentially liable defendants into the same courtroom at the same time, the result for better or worse, and within the limits of human fallibility, could well represent a fair and realistic verdict.

Joinder by the Court

Potentially liable nonparties may be brought in at any time on the court's own motion²⁴ if the court determines that they are necessary parties to the action.²⁵ However, it is hard to imagine a situation where the court would join a nonparty under the new statute.

First, by specifying a procedure (including the special verdict procedure) for considering the fault of nonparties, the statute implicitly endorses the policy that the litigation should proceed despite the absence of potentially liable persons. Second, the parties undoubtedly will not want the court to join a nonparty. If a potentially liable person is not a party to the action, it is because the plaintiff either would not or could not join that person as a defendant. The defendant apparently cannot (absent a right of indemnity) implead a third party and, in any event, may not want a nonparty joined.

Designation of the Unknown Nonparty

A defendant may be able to designate a nonparty whose identity is unknown. The defendant must file a pleading "designating such nonparty and setting forth such nonparty's name and last-known address, or the best identification of such nonparty which is possible under the circumstances. . . ." ²⁶ It is not clear how much freedom to maneuver this language will allow in naming "John Doe" nonparties. The Colorado Rules of Civil Procedure make provision for the identification of parties whose true names are unknown,²⁷ but may not apply to nonparties. Even so, the existing Rules are not much help in this context.

For example, in an action arising from a traffic accident, could a defendant make the following good faith designation as a nonparty, "The driver of a blue 1977 Plymouth coupe with Nebraska plates"? or "The unknown vandal who defaced the stop sign at the intersection of 1st and A Streets"? The statute clearly intends that only good faith designations are to be made, and counsel will undoubtedly adhere to that concept. However, the problem is not so much "good faith" as that different perspectives can generate honest and substantially different views of cause or fault.

The statute does address the issue in that the court may award attorneys' fees if it finds that the designation of a nonparty was substantially frivolous, groundless or vexatious.²⁸ However, until the courts begin to address these and similar questions on a case-by-case basis, the specificity required in the designation of unknown persons will remain uncertain.

Nonparties Not Potentially Liable

A defendant may give notice of any nonparty who he believes may be wholly or partially at fault.²⁹ The new statute does not seem to require that these designated nonparties be potentially liable to the plaintiff before their negligence or fault may be considered. Examples of possible nonparties with no potential liability but who are potentially at fault include those shielded by a statute of limitations, covered employers who have paid worker's compensation to the plaintiff, and public entities protected by the Colorado Governmental Immunity Act.³⁰

The workplace injury presents a good illustration of the "at fault but not liable" issues raised by the new statute. An employer covered by the Workmen's Compensation Act has no separate tort liability beyond that imposed by statute to an em-

ployee injured on the job.³¹ However, the injured employee can still recover in tort against a third party.³² Third-party tortfeasors have not been allowed to implead employers in these work-setting cases, receive indemnity or contribution from them³³ or, as a general proposition, assert the employer's negligence as a defense.³⁴

CRS § 13-21-111.5 adds a new twist to a relatively settled area of the law. By designating the employer as a nonparty, a third-party tortfeasor would now seem to be able to seek reduction in his potential exposure by the percentage of fault attributed to the employer. In addition, the employer or insurer who pays a worker's compensation claim normally retains the right of subrogation regarding amounts paid to the employee if the employee recovers damages from a third party.³⁵ These circumstances undoubtedly will have a substantial impact on the evaluation, prosecution and defense of third-party tort actions stemming from workplace injuries.

Conclusion

The law pertaining to nonparties in comparative negligence actions varies greatly from state to state.³⁶ Colorado appears to be unique in that it has now abolished joint and several liability and created a role for nonparties by statute. The sheer novelty of the legislature's action will increase the normal uncertainty that inevitably follows any major change in the law.

Colorado practitioners and Colorado courts may find some guidance in the de-

terminations of Kansas,³⁷ Oklahoma³⁸ and New Mexico,³⁹ each of which has allowed consideration of nonparty fault and abrogated (or at least limited) joint and several liability by case law. However, for now, the size and character of the role which nonparties will actually play in Colorado tort actions will remain a mystery to be solved as the case law unfolds.

NOTES

1. CRS § 13-21-111.5. The new statute changes the common-law rule on nonparties under the Colorado Comparative Negligence Act. *National Farmers Union Property and Casualty Co. v. Frackelton*, 662 P.2d 1056 (Colo. 1983).

2. S.B. 70, signed into law May 16, 1986.

3. CRS § 13-21-111.5(3)(b).

4. *Id.*

5. CRS § 13-21-111.5(3)(a).

6. CRS § 13-17-102(4).

7. CRS § 13-21-111.5(3)(b).

8. CRS § 13-80-102.

9. Colorado courts rarely make nonstatutory exceptions to the statutory limitation period. *See, Bennett v. Furr's Cafeterias, Inc.*, 549 F.Supp. 887 (D.Colo. 1982).

10. CRS § 13-17-102(4).

11. Colorado Rules of Civil Procedure (*hereafter*, "C.R.C.P."), Rule 11.

12. C.R.C.P. Rule 26(e)(1).

13. *Watson v. Unipress, Inc.*, 733 F.2d 1386 (10th Cir. 1984).

14. C.R.C.P. Rule 15(c).

15. CRS § 13-21-111.5(3)(b).

16. CRS § 13-50.5-105(1)(a).

17. *Mayhew v. Berrien County Road Comm'n*, 326 N.W.2d 366, 371 (Mich. 1982).

18. CRS § 13-21-111.5(3)(a).

19. *See, National Farmers Union Property and Casualty Co.*, *supra*, note 1 at 1060.

20. *See, Metropolitan Gas Repair Service, Inc. v. Kulik*, 621 P.2d 313 (Colo. 1980).

21. C.R.C.P. Rule 14(a); *Public Service Co. of Colorado v. District Court in and for the City and County of Denver*, 638 P.2d 772 (Colo. 1981).

22. CRS § 13-50.5-101 *et seq.*

23. *See*, § 13-50.5-103, as amended by S.B. 70.

24. C.R.C.P. Rule 21.

25. C.R.C.P. Rule 19(a); 59 Am.Jur.2d *Parties* § 191 (1971).

26. *Emphasis added.* CRS § 13-21-111.5(3)(b).

27. C.R.C.P. Rules 19(a)(2) and 10(a).

28. CRS § 13-17-102(4).

29. CRS § 13-21-111.5(3)(b).

30. CRS § 24-10-101 *et seq.*

31. CRS § 8-42-102.

32. CRS § 8-52-108(1).

33. *Hilzer v. McDonald*, 169 Colo. 230, 454 P.2d 928 (1969); *Holly Sugar Corp. v. Union Supply Co.*, 194 Colo. 316, 572 P.2d 148 (1977); *Hammond v. Kolberg Manufacturing Corp.*, 542 F.Supp. 662 (D.Colo. 1982).

34. 101 C.J.S. *Workmen's Compensation* § 984 (1958).

35. CRS § 8-52-108(1).

36. Compare the approaches of Illinois, 466 N.E.2d 1064; New Jersey, 417 A.2d 1064; Iowa, 372 N.W.2d 486; Louisiana, 458 So.2d 1308; and Wisconsin, 355 N.W.2d 557.

37. *Brown v. Keill*, 580 P.2d 867 (Kan. 1978).

38. *Paul v. N. L. Industries, Inc.*, 624 P.2d 68 (Okla. 1981)

39. *Bartlett v. New Mexico Welding Supply, Inc.*, 646 P.2d 579 (N.M. App.), *cert. denied*, 648 P.2d 794 (N.M. 1982).