

Important Changes in Comparative Fault for 2005

by Francis J. Carney, Esq.

Important changes to the scheme for allocation of comparative fault became effective on May 2, 2005, with amendments to both the Liability Reform Act and the Utah Rules of Civil Procedure. Section 41 of the Liability Reform Act has been amended to require that in order to allocate fault, a party must submit a written designation naming all persons he claims to share fault, and outline the factual and legal basis for making those claims. That fault allocation designation must be made in the time and manner provided under Utah R. Civ. P. 9, but in no event later than 90 days before trial.¹

In turn, Rule 9 has been amended to require a written designation of fault allocation claims, stating the name and address of the person allegedly at fault, as well as the factual and legal basis for doing so.² That fault allocation designation must be made in the “responsive pleading,” typically the answer to the complaint. If the basis for the fault allocation claim is not known at the time of the responsive pleading, then the designation must be made within a “reasonable time” after discovery to show the basis for it. The discovery plan prepared by counsel now needs to set a binding deadline for fault allocation designations.³ Upon a showing of good cause, the trial court has the discretion to allow a later designation beyond the date set by the discovery plan, but never later than 90 days before trial.

“Hide-‘n-Seek” has long been a favorite game with some defense counsel when it comes to comparative fault. While the Liability Reform Act has always suggested an early designation of persons claimed to be at fault, defendants often skirted the intent of the statute, and judges failed to enforce it. So the

typical comparative fault “affirmative defense” in the answer was usually a boiler-plate claim that other unidentified parties were at fault, with equally-unrevealing interrogatory answers, e.g. “we can’t know who we claim is also at fault until discovery is completed...” Then, shortly before trial, defendants would designate other persons claimed to be at fault, knowing all along that they intended to do so.⁴ This meant that plaintiffs could not determine whether there were persons claimed to be also at fault until after the statute of limitations expired, or after discovery was completed.

The 2005 amendments should put an end to this game – the days of “someone else should share fault, but we won’t say who” are hopefully over. Yet there is still reasonable relief for those defendants who really do discover unforeseen fault claims late in the discovery process.

It is our job to see that the statute and rules are now followed. First, we should insist on fault allocation designations being filed with the answer to the complaint. Failure to do so should bar the allocation, unless the defendant proves that the basis for allocating fault could not have been known at the time it answered the complaint. Second, the Case Management Order should require the defendants to designate any later-discovered fault claims at any early date – perhaps 60 or 90 days after the order is entered – so that additional parties can be joined before limitations periods expire, and before discovery needs to be repeated for new parties and counsel. Third, we need to educate the trial courts that the rule and statute, when read together, do NOT suggest a “default” fault allocation designation date of 90 days before trial. Rather, the default date is the date when the complaint is

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answered. It is only later for persons whose alleged fault could not have not have been known originally.

Most defendants in most cases know right up front whom they intend to claim was also at fault, and there's no reason they can't be required to show their cards. Defendants with allocation claims that are *legitimately* discovered late should have no problem with these new changes; for the others, it's an early designation or lose the claim. These are welcome and long-needed changes.

1. Section 78-27-41(4) now provides: "Fault may not be allocated to a non-party unless a party timely files a description of the factual and legal basis on which fault can be allocated and information identifying the non-party, to the extent known or reasonably available to the party, including name, address, telephone number and employer. The party shall file the description and identifying information in accordance with Rule 9, Utah Rules of Civil Procedure or as ordered by the court but in no event later than 90 days before trial as provided in Rule 9, Utah Rules of Civil Procedure."

2. Utah R. Civ. P. 9(1) (effective May 2, 2005):

(l) Allocation of fault.

(l)(1) A party seeking to allocate fault to a non-party under Title 78, Chapter 27 shall file:

(l)(1)(A) a description of the factual and legal basis on which fault can be allocated; and

(l)(1)(B) information known or reasonably available to the party identifying the non-party, including name, address, telephone number and employer. If the identity of the non-party is unknown, the party shall so state.

(l)(2) The information specified in subsection (l)(1) must be included in the party's responsive pleading if then known or must be included in a supplemental notice filed within a reasonable time after the party discovers the factual and legal basis on which fault can be allocated but no later than the deadline specified in the discovery plan under Rule 26(f). The court, upon motion and for good cause shown, may permit a party to file the information specified in subsection (l)(1) after the expiration of any period permitted by this rule, but in no event later than 90 days before trial.

(l)(3) A party may not seek to allocate fault to another except by compliance with this rule.

3. Utah R. Civ. P. 26(f)(2) now provides:

The plan shall include:

(f)(2)(D) the deadline for filing the description of the factual and legal basis for allocating fault to a non-party and the identity of the non-party....

4. And, of course, under the Liability Reform Act, any allocation of fault against a person not joined as a defendant by plaintiff means the percentage of fault allocated on that non-party is deducted from the damage award.

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