



# Arkansas Association of Defense Counsel

August 15, 2016

## WHY A CROSS-CLAIM OR THIRD PARTY COMPLAINT IS ALWAYS A GOOD IDEA IN MULTI-PARTY SUITS

### A. Introduction.

If you represent a Defendant in a multi-party personal injury or wrongful death suit, to preserve your contribution rights as permitted by statute and the Arkansas Rules of Civil Procedure, you should do more than assert those rights in your answer. File a Cross-Claim against your Co-Defendants—each of whom may be partially responsible for any alleged harm to Plaintiff, or a Third Party Complaint if the responsible party is not a Defendant, to preserve your client's right to applicable contribution and indemnity.

The Answer to Plaintiff's Complaint should allege the Defendant is entitled to contribution, credit for settlement, indemnity, setoff or apportionment of fault against Co-Defendants and any applicable non-parties. The Answer should request a jury instruction or interrogatory assigning fault to Co-Defendants, Non-Parties or Third Party Defendants, as well as indemnity, contribution, credit for settlement, setoff and/or apportionment of fault against the applicable parties.

The Crossclaim or Third Party Complaint should pray for apportionment, contribution and indemnity as the facts are determined by the trier of fact and specifically assert the right to apportionment in order to determine your client's proportionate share of fault, if any, and credit and setoff without regard to third party claims. The pleading should allege your client may only be held responsible for its several share of liability, if any, and that your client it is entitled to the appropriate jury instructions and interrogatories in assignment fault to the applicable cross-defendants, non-parties or third party defendants.

Your pleading should allege if there is an adverse verdict entered against your client in Plaintiff's favor, your client is entitled to indemnity, contribution, credit for settlement, setoff and/or apportionment of fault in a manner consistent with Arkansas law as a result of the fault of the cross-defendants or third-party defendants. Then specifically allege in the event of settlement with any of the cross-defendants or third-party defendants and Plaintiff, your client is entitled to a remittitur of any damages awarded by the amount of the consideration paid for the release or the amount of the proportion for which the release provides the total claim shall be reduced, whichever is greater.

The Arkansas' Uniform Contribution Among Tortfeasors Act ("UCATA") authorizes a Cross-Claim/Third Party Complaint because Co- or Third Party Defendants "may be liable" to your client depending on the outcome of Plaintiff's claims. See Ark. Code Ann. § 16-61-207 (2013); see also Ark. R. Civ. P. 13(f). Under the UCATA, "the right of contribution is not limited to money damages, but also includes the right to an allocation of fault among all joint tortfeasors and the rights provided for in § 16-61-204." *Id.* at § 16-61-202(c).

In addressing pleadings and motions practice, the UCATA provides:

A pleader may ... state as a cross-claim against a coparty any claim that the coparty is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant;

...

ARK. CODE ANN. § 16-61-207.

Similarly, Rule 13(f) provides:

A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence which is the subject matter either of the original action or of a counterclaim therein or relating to any property which is the subject matter of the original action. **Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.**

ARK. R. CIV. P. 13 (emphasis added). Rule 14(a) Ark. R. Civ. P. provides the same for Third Party Practice.

These pleadings ensure a non-settling Defendant will not lose contribution rights and provide a basis for demanding production of settlement agreements, even a confidential settlement agreement, subject to an appropriate protective order. For example, one reason to demand disclosure of a “confidential” settlement agreement is to determine whether it is a “Mary Carter” agreement – one made between a plaintiff and one or more, but not all defendants in a multi-party lawsuit. The general attributes of such an agreement are: (1) secrecy; (2) the agreeing defendants are maintained as parties; (3) the agreeing defendant’s liability is decreased in direct proportion to the non-agreeing defendant’s increase in liability; and (4) the agreeing defendant guarantees the plaintiff a specified amount of money if a judgment less than a specified sum is rendered against the non-agreeing defendant.

Arkansas dealt with Mary Carter agreements in *Firestone v. Little*, 276 Ark. 511, 639 S.W.2d 726 (1982). The Supreme Court held the plaintiff was

required to reveal the details of the agreement to the jury. In the final appeal the Arkansas Supreme Court held Mary Carter agreements would not be given effect in Arkansas when they affect the joint and several liability of all defendants. *Shelton v. Firestone Tire & Rubber*, , 281 Ark. 100, 102-103, 662 S.W.2d 473, 474-75 (1983).

## B. Background of Fault Allocation in Arkansas.

In 2003, via the Civil Justice and Reform Act (“CJRA”), the Arkansas legislature statutorily abolished the doctrine of joint and several liability and replaced it with “fair-share” liability, limiting a tortfeasor’s liability to its share of the fault, codified in section 16-55-201 of the Arkansas Code. Section 16-55-202 provided a procedure by which a defendant in a personal injury case could seek an allocation of fault among all tortfeasors, “regardless of whether the person or entity was or could have been named as a party to the suit.” *Id.* at § 16-55-202.

However, in *Johnson v. Rockwall Automation*, 2009 Ark. 241, at 8, 308 S.W.3d 135, 141 (2009), the Arkansas Supreme Court struck down section 16-55-202 as unconstitutional on separation of powers grounds. The *Johnson* Court affirmed section 16-55-201’s substantive change in the law from joint-and-several to fair-share liability. However, the court ruled Section 16-55-202 subverted the Supreme Court’s own procedures by setting up a new procedure to determine the fault of a nonparty and mandating that the factfinder consider the nonparty’s fault in an effort to reduce a plaintiff’s recovery.

Despite upholding the substantive law of section 16-55-201, the Arkansas Supreme Court recently interpreted the *Johnson* holding narrowly: “This is not the same as saying that section 16–55–201 vests a defendant ... with the substantive right of allocation of liability.” *ProAssurance Indem. Co., Inc. v. Metheny*, 2012 Ark. 461, at 16, 425 S.W.3d 689 (2012). The court then affirmed the trial court’s refusal to instruct the jury regarding fault allocation.

Just months later, the Arkansas Supreme Court affirmed its *Metheny* holding that section 16-55-201

did not provide a defendant a substantive right to have fault allocated among tortfeasors and went further to strike the defendant's third party complaint seeking contribution, which the court determined was obsolete in a proportionate liability scheme. *St. Vincent Infirmary Med. Ctr. v. Shelton*, 2013 Ark. 38, 425 S.W.3d 761 (2013).

In response to *Metheny* and *Shelton*, the Arkansas General Assembly promptly acted to amend the UCATA. On April 11, 2013, the legislature passed Act 1116—"An Act to Clarify the Meaning of [UCATA]; and for Other Purposes." By the act, the legislature attempted to clarify a defendant's right of contribution under the UCATA, even after the 2003 enactment of the CJRA, that the contribution right also includes a right to allocation of fault among joint tortfeasors, and these rights are substantive. See Act 1116 at Sec. 1. The language of Act 1116 makes apparent the legislature's attempt to mitigate the holdings of *Metheny* and *Shelton*. Act 1116 appears to provide defendants a substantive right to contribution from joint tortfeasors, including an allocation of fault. But the procedural vacuum of how a court should administer the substantive rights remains.

The Arkansas Supreme Court, on August 2, 2013 (shortly before Act 1116 was set to go into effect), appointed a Special Task Force on Practice and Procedure in Civil Cases (the "Task Force") to consider, among other items, procedural changes concerning the allocation of nonparty fault. See *In re Special Task Force on Practice and Procedure in Civil Cases*, 2014 Ark. 5 (Jan. 10, 2014) (per curiam). The Arkansas Supreme Court issued a per curiam opinion on January 10, 2014, which recommended new rules of procedure to address nonparty fault allocation. *Id.*

When the Arkansas Rules of Civil Procedure were amended and Rule 9 was amended in 2014, the addition to the Report's notes specifically acknowledged under Subdivision (h) a defendant asserts a contribution claim for allocation of non-party fault in an answer or amended answer. By contrast, a defendant seeking contribution for damages may bring a third party claim against a non-party under Rule 14 or a crossclaim against a co-party under Rule 13. The procedural section of

the Uniform Contribution Among Tortfeasors Act, Ark. Code Ann. §16-61-207 is inconsistent with Rule 9(h) and in some respects with Rules 13 and 14. Therefore, Section 16-61-207 (Third Party Practice – Amended Complaints – Counterclaims and Cross Complaints – Motion Practice) is superseded pursuant to Ark. Code Ann. §16-11-301 (Rules of pleading, practice and procedure – Supersession)<sup>ii</sup>.

Rule 9(h) deals with allocation of non-party fault. However, based on the present law and the *Johnson* decision declaring Ark. Code Ann. § 16-55-202(b) unconstitutional, 2009 Ark. 241, 2009 Ark. LEXIS 274, whether the Rule will survive subsequent challenges is unclear. Filing a cross-claim or third party complaint is necessary to provide a Defendant the protection it is entitled to under the Civil Justice Reform Act of 2003 and to afford the Defendant due process, a central component of the reforms put in place with the Civil Justice Reform Act of 2003. Ark. Code Ann. §§ 16-55-201, *et seq.* To ensure a Defendant is only held liable for his proportionate share of fault, a jury must consider the fault of all potential players. See Ark. Code Ann. § 16-55-202(a) and the contribution statute found at Ark. Code Ann. § 16-61-202 (c).

The new rules created untested waters. Consider Justice Josephine Linker Hart's dissent when she noted through the votes of four justices the same procedures which were deemed unconstitutional in *Johnson v. Rockwell Automation, Inc.*, 2009 Ark. 241, 308 S.W.3d 135, were rising up from the ashes. She opined the rules were unclear, unfair and may not survive further constitutional scrutiny. For example, Rule 49(c)(1) of the Arkansas Rules of Civil Procedure provides "the jury shall determine the fault of all persons or entities, including those not made parties, who may have joint liability or several liability," and Rule 49(c)(2) provides the "jury shall allocate the fault, on a percentage basis, among those persons or entities, including those not made parties, found to have contributed to the injury, death, or property damage." So in determining fault, the finder of fact examines those "who may have joint liability or several liability." She brought up the unclear issue of what to do if a non-party is immune from suit and noted with the adoption of the rule "it is not clear whether the finder of fact is to determine whether the non-

party's fault is considered despite the non-party's immunity. Further, these rules do not define what is meant by "contributed to" the injury, death or property damage and how this concept interacts with the law of comparative fault. Also, Rule 49(c)(1)(B) and Rule 52(a)(2)(A)(ii) required that "the defending party" must carry "the burden of establishing a prima facie case of the non-party's fault." The provisions do not explain whether the evidence should be viewed in the light most favorable to the defending party or the plaintiff. These questions "are left to be answered in later litigation and appeals." See In Re Special Task Force on Practice and Procedure in Civil Cases – Ark. R. Civ. P. 9, 49, 52 and Ark. R. Civ. P. 8 (August 7, 2014). 2014 Ark. 340, 2014 Ark. Lexis 439.

The Arkansas Constitution provides "every person is entitled to a certain remedy in the laws for all injuries or wrongs he may receive in his person, property or character." *Id.* citing Ark. Constitution Article II, Section 13. Further, the Constitution provides "no law shall be enacted limiting the amount to be recovered for injuries resulting in death or for injuries to persons or property." *Id.* (citing Art. V, Section 32.) Justice Hart's dissent noted these rules could limit an injured party's recovery and provide no remedy in law to the injured party, so "in future appeals, this court will face the unenviable task of considering the constitutionality of its own rules." *Id.* Justice Baker joined the dissent.

### **C. A Defendant cannot Dismiss Itself from Litigation by Settling with One, but not all Parties if a Cross-Claim or Third Party Complaint is Pending.**

A settling Defendant cannot dismiss itself from the litigation by settling with one, but not all Parties. However, certain Defendants might argue they are entitled to a complete dismissal due to the new rules of civil procedure related to Non-Party Fault.

A party opposing such a motion should argue if the Settling Defendant were granted summary judgment on a crossclaim based on a settlement, it would become a non-party. What would occur if the Plaintiff then argued, for example, that the

dismissed settling Defendant was immune from suit; therefore, not subject to allocation of fault? What if the release contained stipulations to this effect?

Underlying a Defendant's broad assertion of any and all contribution and/or indemnity rights available to it is the current state of flux in Arkansas law on this issue and the uncertainty created by recent judicial holdings and legislative response. In an effort to preserve your client's rights in a changing legal landscape, your client should affirmatively assert its rights to contribution (including allocation of fault) and/or indemnity based on the State's existing contribution scheme with reference to non-party fault.

Even though Cross-Claims and Third Party Complaints are statutorily authorized, a Settling Defendant may move for dismissal of Cross-claims and Third Party Complaints based on a release and settlement effectuated with Plaintiff; however, this writer is aware of no case in which a court has dismissed non-settling Defendant's cross-claim based on Plaintiff's settlement with a co-settling Defendant. The Settling Defendant may rely on Ark. Code Ann. §16-61-204(b), claiming there is: 1) no claim for express indemnity and 2) the principles of equity and fairness supporting a claim for implied indemnity find no support in the facts of the case; however, proposition number two normally ignores the allegations in the Plaintiff's Complaint against the Settling Defendant. Furthermore, proposition number two is a conclusory statement by counsel which is never a sufficient basis for a motion for summary judgment or a motion to dismiss. See Arkansas Model Jury Instruction 101A. A court should not consider an argument presented by a party when there is no citation to authority or a convincing argument provided by the objecting party to support the objection. See *Foremost v. Miller County*, 2010 Ark. 116, 361 S.W.3d 805; 2010 Ark. Lexis 145, \*\*6 (2010).

The Settling Defendant may claim its settlement with Plaintiff is a basis for denying the Cross-Claiming Defendant the right to exercise its due process right granted to it by Arkansas for contribution, credit for the settlement amount and for an allocation of fault among all joint tortfeasors. Ark. Code Ann. §16-61-204 provides: (a) a release by the injured person of

one joint tortfeasor, whether before or after judgment, does not discharge the other joint tortfeasors unless a release so provides. Subsection (b) provides:

A release by the injured person of a joint tortfeasor does not relieve the released tortfeasor from liability to make contribution to another joint tortfeasor unless the release is given before the right of the other joint tortfeasor to secure a money judgment for contribution has accrued and provides for a reduction, to the extent of the pro rata share of the released joint tortfeasor, of the injured person's damages recoverable against all joint tortfeasors.

Ark. Code Ann. §16-61-204(c) provides: "when the injured person releases a joint tortfeasor, the injured person's damages recoverable against all the other joint tortfeasors shall be reduced by the greatest of the following:

- (1) the amount of the consideration paid for the release;
- (2) the pro rata share of the released joint tortfeasor's responsibility for the injured person's damages; or
- (3) any amount or proportion by which the release provides that the total claim shall be reduced.

Ark. Code Ann. §16-61-204(d) provides when the injured person releases a joint tortfeasor, the remaining defendants are entitled to a determination by the finder of fact of the released joint tortfeasor's pro rata share of responsibility for the injured person's damages.

In *English v. Robbins*, 2014 Ark. 511, 452 S.W.3d 566 (2014), the Arkansas Supreme Court explained §16-61-204 provides rights for joint tortfeasors against released tortfeasors: "when the injured person releases a joint tortfeasor, the remaining defendants are entitled to a determination by the finder of fact of the released joint tortfeasor's pro rata share of responsibility for the injured person's damages." Ark. Code Ann. §16-61-204(d), 2014 Ark. 511.

*J-McDaniel Construction Co. v. Dale E. Peters Plumbing, Ltd.*, 2013 Ark. 177 (2013), involved a homeowner who filed a complaint against a defendant contractor alleging negligence and breach of implied warranties. The contractor filed a third party complaint against three subcontractors and two subcontractors filed cross-claims against each other. In a subsequent appeal, *J-McDaniel Construction Company v. Dale Peters Plumbing, Ltd.*, 2014 Ark. 282, 436 S.W.3d 458 (2014), the court held dismissing the homeowner's settled claims against the general contractor did not moot its claims against appellee's subcontractors even though under Ark. Code Ann. §16-61-202 (2005), the settlement extinguished the subcontractor's liability to the homeowners. The Civil Justice Reform Act, Ark. Code Ann. §16-55-201, which abolished joint liability, did not destroy the contribution claims, which still existed and they were not time barred because the statute of limitations did not begin until the joint tortfeasor paid more than his share of liability. In the opinion, the Arkansas Supreme Court clarified after the General Assembly passed Act 1116 of 2013, a claim for contribution pursuant to the Uniform Contribution Against Tort Feasors Act still existed after the 2013 enactment of the Civil Justice Reform Act. Therefore, summary judgment dismissing the contractor's indemnity claim was erroneous because equitable indemnity fact questions existed. This case mandates the denial of a Settling Defendant's Motion for Summary Judgment or to Dismiss a Non-Settling Defendant's Crossclaim or Third Party Complaint.

#### D. Defendants' Due Process Rights.

The Rules and applicable statutes expressly permit Cross-Claims and Third Party Complaints.



Depriving a Defendant of its right to allocate fault by granting a dismissal based on a Settlement with one, but not all parties, would be tantamount to providing a right without a remedy—a denial of a Defendant’s due process rights.

“Due process is intended to protect the individual from the arbitrary exercise of the powers of government.” *Johnson v. Encompass Ins. Co.*, 355 Ark. 1, 6, 130 S.W.3d 553, 556 (2003). Due process rights are either substantive or procedural. “Procedural due process guarantees that a state proceeding which results in deprivation of property is fair, while substantive due process guarantees that such state action is not arbitrary and capricious.” *Id.* Substantive due process protects “those fundamental rights and liberties which are, objectively, deeply rooted in this Nation’s history and tradition and implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed.” *Troesky v. Herrington*, 2012 Ark. 245, at 9, 409 S.W.3d 307, 313 (overruled in part on guardianship analysis at *Lineham v. Hyde*, 2015 Ark. 289, 467 S.W.3d 129 (2015)).

Motions to dismiss cross-claims or third party complaints based on a settlement between one, but not all parties, must be denied to assure damages are properly apportioned among responsible parties. *See Couch v. Red Roof Inns, Inc.*, 729 S.E.2d 378, 384 (Ga. 2012); *Evans v. Alaska*, 56 P.3d 1046, 1062-63 (Alaska 2002); *Smiley v. Corrigan*, 248 Mich. App. 51, 638 N.W.2d 151, 154 (Mich. App. 2001); *Haff v. Hettich*, 593 N.W.2d 383, 389-90 (N.D. 1999); *Church v. Rawson Drug & Sundry Co.*, 842 P.2d 1355, 1362-64 (Ariz. App. 1992); *but see Plumb v. 4th Judicial Dist.*, 927 P.2d 1011 (Mont. 1996) (Court found amendment to Mon. Code Ann. § 27-1-703 (1987) to apportion liability to non-parties was not rationally related to a legitimate government interest.). Allowing the cross-claim or third party complaint to proceed protects the Defendant’s due process right to request that the jury perform its normal function, i.e. allocating fault and calculating damages amongst all potentially responsible tortfeasors. *Couch*, 729 S.E.2d at 384; *Church*, 842 P.2d at 1362.

## E. Conclusion

It makes sense to allow the jury to formally allocate fault as to the named defendants to assure a defendant is only held liable for his several or proportionate share to

uphold the apportionment process and ensure the jury still fulfills its fundamental constitutional role as fact-finder. The jury will still make the determination as to liability of parties and fault on the part of all joint tortfeasors, as well as calculating the appropriate total damages while considering the fault of all potential players to protect the Cross-claiming or Third-Party complaint Defendants’ substantive rights afforded by the modification of joint and several liability as part of the Civil Justice Reform Act of 2003, namely, insuring fairness in the allocation of damages.

As the Supreme Court of Kansas explained:

There is nothing inherently fair about a defendant who is 10% at fault paying 100% of the loss, and there is no social policy that should compel defendants to pay more than their fair share of the loss. Plaintiffs now take the parties as they find them. If one of the parties at fault happens to be a spouse or a governmental agency and if by reason of some competing social policy the plaintiff cannot receive payment for his injuries from the spouse or agency, there is no compelling social policy which requires the codefendant to pay more than his fair share of the loss. The same is true if one of the defendants is wealthy and the other is not. Previously, when the plaintiff had to be totally without negligence to recover and the defendants had to be merely negligent to incur an obligation to pay, an argument could be made which justified putting the burden of seeking contribution on the defendants. Such argument is no longer compelling because of the purpose and intent behind the adoption of the comparative negligence statute.

*Brown v. Keill*, 580 P.2d 867, 874 (Kan. 1978).

The codified public policy preference is to impose proportionate fault. Any motion to dismiss a cross-claim or third party complaint based on a settlement with some, but not all Defendants, must be denied to satisfy due process and ensure a fair allocation of fault and achieve the stated public policy objectives of the Civil

Justice Reform Act of 2003 and the interplay between the modification of joint and several liability found at Ark. Code Ann. § 16-55-201 and the substantive non-party fault provisions of Ark. Code Ann. § 16-55-202(a).

In fact, the contribution claim, which includes allocation of fault by the jury in its definition (see ARK. CODE ANN. § 16-61-202(c)), must be brought in the pending lawsuit or else it would have no practical effect. The same jury that determines a Plaintiff's claims will allocate fault among joint tortfeasors—all of whom might be Co-Defendants based on Plaintiff's Complaint, but could later be dismissed based on immunity, settlement, or any other number of reasons.

One commentator has recently taken the opinion that the allocation of fault issue and the preservation of this substantive right to co-defendants are only protected if all defendants and perceivably non-immune parties remain defendants in the litigation. In "Empty Chair Act – a Critique of Act 1116," Benjamin McCorkle argues that Act 1116 does not cure the statutory/procedural issues raised by *Johnson* and its progeny, discussed above, and actually creates ambiguities. See *The Arkansas Lawyer*, 49:1 (Winter 2014), at 43. Assuming Mr. McCorkle's analysis is correct, then the only way for a Defendant to preserve its rights are by a Cross-Claim (or Third Party Complaint).

Pursuant to the standard of review on motions to dismiss and summary judgment, if the Plaintiff's allegations of negligence related to Co-Defendants were incorporated by reference into a Crossclaim, the allegations must be taken as true. Crossclaims and Third Party Complaints are based on Arkansas law, including Ark. Code Ann. §16-64-122(a), which provides "in all actions for personal injuries or wrongful death or injury to property in which recovery is predicated upon fault, liability shall be determined by comparing the fault chargeable to a claiming party with the fault chargeable to the party or parties from whom the claiming party seeks to recover damages." Fault can be based on a violation of a statute, omission, conduct, risk assumed, breach of warranty or breach of any legal duty. *Bishop v. Tariq, Inc.*, 2011 Ark. App. 455, 384 S.W.3d 659, 663 (2011). Comparative fault is

applicable to all actions for personal injury or wrongful death. *Id.* (In *Bishop* the wrongful death plaintiff claimed comparative fault was not applicable in enhanced injury cases. The Arkansas Appellate Court disagreed.)

In the Honorable Henry Woods' treatise on Comparative Fault, Judge Woods stated a non-settling defendant receives credit for the percentage of fault assessed by the jury against the settlers. See The Negligence Case: Comparative Fault, 3d, (1996) pg. 281. The non-settling defendant receives credit for the dollar amount paid by the settlers or the percentage of fault, whichever is greater and the non-settler receives no credit if the jury assesses no fault against the settlers. Comparative Fault, 3d, pg. 282. Consequently, as Judge Woods noted, in Arkansas, a defendant, especially one with a crossclaim or third party complaint pending against it, cannot settle itself out of the litigation, it must wait for the determination of the percentage of its fault. See Comparative Fault, 3d, pg. 283.

**The AADC thanks Elizabeth Fletcher of Munson, Rowlett, Moore & Boone, P.A. for writing this article.**



**We welcome your articles and thoughts for future editions.**

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<sup>i</sup> Arkansas Code § 16-61-204 provides a framework for reducing recoverable damages from remaining defendants after a defendant has been released.

<sup>ii</sup> § 16-11-301 provides "All statutes concerning pleading, practice, and procedure in all Courts shall be deemed superseded by rules adopted by the Supreme Court pursuant to

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Arkansas Constitution Amendment 80, § 3, or pursuant to the Supreme Court's Constitutional, inherent, or statutory authority prior to the effective date of the Arkansas Constitution, Amended 80.