

## Apportionment Applied

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### Background

When S.B. 120 became effective on April 9, 2003, Ohio became an “apportionment” state. Among other code sections, the bill enacted R.C. §2307.23(A) and (B) that permit a jury to assign a percentage of fault to any entity which contributed to causing the plaintiff’s harm. The new apportionment law is particularly applicable in the mass toxic tort asbestos litigation, where often the plaintiff sues several dozen defendants and files claims against additional non-party bankrupt entities. Pursuant to S.B. 120, defendants in mass tort lawsuits that go to verdict now are obligated to pay only their assigned portion of fault.

### Applicability

Because this law is relatively new, its practical application at trial has not been fully tested. In January 2008, in *Werts v. Goodyear Tire and Rubber Co., et al.*, Cuyahoga Common Pleas Case No. 541869, McMahon DeGulis attorneys tried an asbestos case to verdict. This experience was extremely instructive in how at least one court applies the apportionment statute in trial.

Judge Leo Spellacy, one of three Cuyahoga County judges handling the asbestos docket, set forth his requirements to include an entity on the verdict form for liability apportionment. At trial, the defense was required to present evidence that the decedent was exposed to asbestos containing products from each of those entities and that such exposure was a substantial factor in causing the decedent’s mesothelioma.

This could have been accomplished in numerous ways, including having the court take judicial notice of the manufacturers’ disclosed asbestos content published in the Federal Register, utilizing the testimony of the decedent himself, and using the discovery responses of the other defendants admitting the asbestos content of their products. Perhaps most effectively, the defense was able to read and display to the jury the decedent’s bankruptcy claim forms in which he admitted to significant exposure to friable asbestos products of several bankrupt companies.

Immediately following the Werts trial, McMahon DeGulis attorneys had the opportunity to apply seemingly similar apportionment concepts in the federal maritime asbestos case of *Charles Rich v. A-C Product Liability Trust, et al.*, N.D. Ohio Case No. 1:98CV14094. Unlike the application in Ohio state court, U.S. District Court Judge Jack Zouhary did not include bankrupt

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entities on the apportionment verdict form, but did include settled defendants. This was a more limited interpretation of apportionment than had been applied under Ohio law by Judge Spellacy.

### **Impact**

The ability to demonstrate decedents' extensive exposure to thermal insulation, pipe covering, block and other friable amosite asbestos products enabled the McMahon DeGulis team to successfully argue that decedents' use of our client's chrysotile asbestos containing products was a minimal part of their overall exposure picture. Indeed, the juries in both Werts and Rich never reached the apportionment question because they found that McMahon DeGulis's client was not a substantial factor in causing the decedents' mesotheliomas.

These cases provided a good roadmap and valuable experience regarding how the both State and Federal courts will apply the new apportionment law at trial, and how to most effectively present the alternative exposure evidence to the jury.

*For additional information on apportionment, please contact Steve Daniels at [sdaniels@mdllp.net](mailto:sdaniels@mdllp.net) or (216) 621-1312 ext. 105.*