GAME CHANGER: AN ANALYSIS OF THE IMPACT OF THE NEW JOINT AND SEVERAL LIABILITY LAW ON TORT LITIGATION IN PENNSYLVANIA

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APPENDIX

The Pennsylvania Comparative Negligence Act as Amended. (The Fair Share Act)

I. INTRODUCTION

On June 28, 2011, Senate Bill 1131, or the "Fair Share Act", was signed into law by Governor Corbett. With the enactment of the Fair Share Act, dramatic changes were made to the Pennsylvania Comparative Negligence Act, 42 Pa. C.S.§7102, that essentially eliminated the doctrine of joint and several liability in the Commonwealth of Pennsylvania.[1] Before the passage of the Fair Share Act, defendants in a negligence case who were found to be joint tortfeasors were jointly and severally liable for the entire verdict. In other words, each joint tortfeasor was responsible for the full amount of the verdict regardless of the percentage of liability assessed against it. A defendant who was required to pay more than its percentage share of liability would have a right to seek "contribution" from the other tortfeasors to collect the difference between its share of the liability and the amount paid to the plaintiff, but frequently these co-defendants lacked the resources to make reimbursement. Thus, the solvent/insured defendant was often left "holding the bag" for its co-defendants who lacked financial resources.

The recently enacted amendments to the Comparative Negligence Act contained in the Fair Share Act provide that where recovery is allowed against more than one defendant, each defendant is liable only for that portion of the verdict for which it was found to be causally negligent. Unless one of the statutory exceptions applies, a defendant now will pay only its proportional share of liability and no more.

Although the Fair Share Act will bring about significant changes to tort litigation in Pennsylvania, parts of the Act are not well drafted and may be subject to differing interpretations. In this article, we have summarized the major provisions of the Fair Share Act

[1] Pertinent sections of the Fair Share Act are appended hereto.

and we offer our views as to how we believe they will affect different aspects of tort litigation in Pennsylvania.

A great deal of uncertainty will surround the rights and liabilities of litigants until key parts of the Act are reviewed and interpreted by the appellate courts. We do not pretend to know how these issues will be resolved by the judiciary. We simply have identified the issues that we anticipate will be raised during the course of litigation and then offer some suggestions as to how these issues may be resolved by the courts.

It is not an exaggeration to say that the landscape of tort litigation in Pennsylvania has been changed by the Fair Share Act. It may be a year or more until the first suits governed by the Fair Share Act reach the trial courts. However, the defense bar and claims professionals should be planning now so that they can take full advantage of this new statutory framework.

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II. HISTORY OF THE FAIR SHARE ACT

Legislation which was virtually identical to Senate Bill 1131 was signed into law in 2002 by Governor Mark Schweiker. Act 57, as it was known, was subsequently declared unconstitutional by the Pennsylvania Supreme Court, not on substantive grounds, but because it had been improperly attached by the Legislature to a separate piece of legislation that dealt with DNA testing of offenders being released from prison. The legislation was re-introduced and was passed by the Pennsylvania House and Senate in 2006, but it was vetoed by Governor Rendell. Although some members of the plaintiff's bar have indicated that they intend to challenge the constitutionality of the recently enacted Fair Share Act, these challenges will likely not meet with any success in the courts.

III. APPLICABILITY

Section 3 of the Act provides that it applies to all causes of action that "accrue after the effective date of this section". Section 4 states: "This Act shall take effect immediately." Therefore, the changes to the doctrine of joint and several liability apply to all causes of action that accrue on or after June 28, 2011, which is the date on which Senate Bill 1131 was signed into law by Governor Corbett.

Although the legal definition of the word "accrue" is somewhat convoluted, typically there is little difficulty in determining the accrual date. A cause of action accrues when the right to institute and maintain a suit arises or the moment when the plaintiff first could have maintained a cause of action to a successful conclusion. Simply put, the accrual date is usually the date on which the event causing injury occurred. The computation of time for the running of the statute of limitations begins on the accrual date.

The "discovery rule" provides an exception to the general rule which requires that a lawsuit for personal injuries be commenced within the applicable statute of limitations, in this instance two years. The "discovery rule" is an exception to the general principle that the statute of limitations begins to run on a readily ascertainable date, the date the tort is committed and injury occurs, and expires two years later. If the "discovery rule" applies, the statute of limitations does not begin to run until the plaintiff knows or reasonably should have known that he had been injured and that his injury was caused by the conduct of another. One can foresee medical malpractice actions commenced after the effective date of the Act that are premised upon negligence that allegedly occurred before the effective date of the Act and in which the plaintiff did not know at the time of the negligent conduct that he may have a cause of action against the physician. In that situation, the defendant physician may try to argue that plaintiff's cause of action did not "accrue" until after June 28, 2011, so that the doctor will not be exposed to joint and several liability. Plaintiff, on the other hand, will most likely try to argue that the cause of action accrued prior to the effective date of the Act.

IV. CONTRIBUTORY NEGLIGENCE

The amendments to the Comparative Negligence Act contained in the Fair Share Act did not change the general principles of contributory negligence applicable to a plaintiff. In all actions brought to recover damages for negligence, the fact the plaintiff may have been guilty of contributory negligence is not a bar to recovery unless the plaintiff's causal negligence is greater than fifty percent. The plaintiff's recovery, however, is reduced by the amount of causal negligence attributed to him. In other words, if the plaintiff is found to be 51 % contributorily

negligent he is barred from any recovery. If he is found to be 50% or less negligent, his recovery is reduced by that percentage of negligence the jury allocates to him.

However, the apportionment of responsibility to certain nonparties allowed by the Fair Share Act creates an interesting wrinkle with regard to the ability of a plaintiff to recover despite his own comparative negligence. The guiding rule regarding plaintiff's negligence before the Fair Share Act was that the plaintiff's own contributory negligence did not bar the plaintiff's recovery provided his negligence "was not greater than the causal negligence of the defendant or defendants <u>against whom recovery is sought</u>". If the plaintiff were found to be 50% negligent and two defendants were each found to be 25% negligent, the plaintiff could still recover damages (albeit reduced by 50%) even though his negligence exceeded that of the individual defendants. Negligence of nonparties was not allocated by the jury; it was not considered for any reason whatsoever.

The Fair Share Act contains the same language as the previous Comparative Negligence Act in the section addressing contributory negligence, however, the interplay of that section with the section allowing the jury to assess negligence against nonparties raises a novel and complex issue.[2] The significant language from the Comparative Negligence Act is as follows:

> "[T]he fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery by the plaintiff or his legal representative where such negligence was not greater than the causal negligence of the *defendant or defendants against whom recovery is sought,...*"

The words in italics create the problem when one takes this section and tries to reconcile it with the provisions in the Fair Share Act allowing apportionment of responsibility against

[2] A more detailed discussion of the provisions of Fair Share Act dealing with the assessment of liability against nonparties is contained in Section VIII, infra.

nonparties.[3] By definition, a nonparty is not a defendant. Although the plaintiff may have entered into a settlement agreement with a nonparty and in exchange was paid money, a nonparty is not a defendant "against whom recovery is sought". The following example illustrates the problem: assume a plaintiff settled with a potential tortfeasor before suit was started. At trial the plaintiff is found 40% contributorily negligent, the two defendants in the case are found each to be 15% negligent and the nonparty is found 30% negligent. Is the plaintiff barred from any recovery from the two defendants? Clearly plaintiff's negligence is greater than that of the "defendants against whom recovery is sought." The language of the Comparative Negligence Act, 42 Pa. C.S. §7102(a), would seem to bar plaintiff's recovery although it is questionable if this result was intended or whether this possibility was even contemplated when the Fair Share Act was written.

Another interesting issue that the courts will have to resolve concerns the instructions which will be given to juries at the conclusion of trial. Under existing practice, the jury is instructed that if they find that the plaintiff is more than 50% negligent, the plaintiff is barred from any recovery. In trials governed by the Fair Share Act, can a defendant request an instruction that if the jury finds a particular defendant 60% or more at fault, that defendant may be required to pay the full amount of the verdict to the plaintiff? Conversely, will a plaintiff be entitled to a jury instruction that each defendant who is found to be less than 60% at fault will only be required to pay that percentage of the verdict to the plaintiff?

V. THE LAW OF JOINT AND SEVERAL LIABILITY PRIOR TO THE FAIR SHARE ACT

In order to fully understand the extent of the changes which the Fair Share Act has brought about, it is necessary to review the law of joint and several liability as it existed before

[3] See, Section 7102(a.2), Apportionment of Responsibility Among Certain Nonparties and Effect.

the passage of the Fair Share Act. Before the Fair Share Act, if multiple tortfeasors were found negligent and were "joint tortfeasors" they were jointly (collectively) and severally (individually) liable to the plaintiff. The liability was for all of the harm caused to the plaintiff by their tortious conduct regardless of the degree of their comparative fault. At trial, the jury was required to apportion negligence between or among multiple defendants on a percentage basis. The jury, however, would not apportion damages but simply returned a single, lump sum damage award for the plaintiff. The principles of joint and several liability as they existed before the Fair Share Act provided that each of the defendants was jointly and severally responsible for the entire damages award, i.e., any defendant could be made to pay the entire award notwithstanding the fact that a defendant's causal negligence may have been found to have been considerably less than 100 percent. (This was sometimes referred to as the "1% rule").

The principle of joint and several liability was seen by some as encouraging plaintiffs to sue defendants whose liability for causing plaintiff's injuries may have been marginal or even highly questionable but who had substantial resources or insurance coverage ("deep pockets") in order to ensure that the plaintiff would recover 100 percent of any verdict in his favor. When deciding whether to settle a case or allowing it to go to a jury verdict, “deep pocket” defendants had to take into account the possibility that a more culpable co-defendant would be unable to pay its proportionate share of the verdict and that it, because of its greater resources, would be required by plaintiff to pay all of the verdict although its causal negligence may have been minimal. Any defendant that paid more than its proportionate share could seek contribution from the other defendants who did not pay their proportionate share. That was often cold comfort, however, if the defendant that had not paid its proportionate share didn't have the insurance coverage or money to pay that which it owed, was insolvent, or judgment proof. Thus,

the "1% rule" forced many solvent/insured defendants to pay significant amounts in settlement in order to avoid these "worst case scenarios" at trial.

VI. THE LAW AFTER THE FAIR SHARE ACT

As a general rule, the Fair Share Act abolishes joint and several liability although it does provide for limited exceptions. That law now provides that where recovery is allowed against more than one defendant, each defendant is liable for its proportionate share of the damages awarded. A defendant's liability is several, not joint. The trial court is to enter a separate judgment as to each defendant for its apportioned share of the damages. If, for example, a verdict against multiple defendants was returned in the amount of $100,000.00 and defendant X was found 20 percent causally negligent, the court will enter judgment against that defendant for $20,000.00. Plaintiff can not recover more than that amount from that defendant, assuming none of the exceptions applied to the cause of action.

Now, marginally liable defendants do not have to fear the "1% rule". Plaintiffs may now be reluctant to join "deep pocket" defendants where they have only a very tenuous theory of liability against these defendants. The "deep pocket" defendant usually will have the resources to challenge weak theories of liability, and they no longer have an incentive to offer significant amounts in settlement before trial. Thus, many more cases may go to jury verdict than in the past.

As noted above, the changes to joint and several liability are fundamental and will have a profound effect on all aspects of personal injury litigation in Pennsylvania. One must appreciate that some of the effects are subtle and will have a bearing on such seemingly unrelated matters as whether defendants will consider entering into a settlement agreement before trial; joinder of additional defendants; cooperation with other co-defendants during discovery and at trial;

retention of experts to testify against a co-defendant; discovery of settlement agreements, and many other practical considerations which are discussed below in Section X.

VII. JOINT AND SEVERAL LIABILITY IS STILL ALIVE

Joint and several liability is not dead entirely. A defendant's liability remains joint and several if one of the five statutory exceptions applies. These exceptions are:

A. Intentional Misrepresentation

As it will generally be to a plaintiff's advantage to establish that the claim against a particular defendant falls within an exception to the bar of joint and several liability, plaintiff's counsel will no doubt seek ways to invoke the application of one of these exceptions. With regard to the exception for "intentional misrepresentation", for example, plaintiff's counsel may assert in a products liability suit that product manuals or sales literature were misleading and that the product manufacturer intentionally misrepresented important information concerning the product. If the plaintiff is successful in establishing that there was an intentional misrepresentation by the manufacturer, and that this misrepresentation was a substantial factor in bringing about the harm, the defendant manufacturer will be jointly and severally liable for the full amount of plaintiff's damages.

B. Intentional Tort

By definition, the Comparative Negligence Act does not apply to intentional torts.[4] Therefore, it is not clear why this exception was included in the Fair Share Act. Moreover, whenever a claim is made in a plaintiff's complaint that a defendant "intentionally" caused injury to the plaintiff, there will almost always be insurance coverage issues created because of the standard policy exclusions for intentional acts or because of the definition of an "occurrence" in

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[4] Section 7102(a) of Title 42 provides: "In all actions brought to recover damages for negligence resulting in death or injury to person or property, ..."

most policies. Therefore, plaintiff's attorneys most likely will avoid pursuing claims of intentional misconduct against a defendant. Because of inherent problems with insurance coverage, this exception probably will not be frequently employed by the plaintiff's bar.

C. Where A Defendant Has Been Held Liable For Not Less Than 60% Of The Total Liability Apportioned To All Parties

This exception will no doubt be the one which is most vigorously pursued by plaintiffs. Whereas in the past plaintiffs would not be shy about naming as defendants persons or companies who only had minimal liability, plaintiff's counsel will now try to identify one or two "target" defendants and will probably refrain from naming as defendants fringe or marginal parties. This strategy should increase the plaintiff's chances of there being a finding that a particular defendant was 60% or more at fault, thereby imposing joint and several liability on that defendant.

In order to identify the "best" parties to sue, plaintiff's counsel will want to know as soon as possible what the available insurance coverage is for each of the potential defendants. There is a possibility that plaintiffs will file suit against several different defendants and then in the course of discovery, plaintiff will seek to learn as soon as possible what the insurance coverage is for each defendant. Plaintiff may then seek to dismiss certain defendants or even dismiss the original lawsuit and refile the suit with only the "target" defendants named as parties. Conversely, it now seems to be to the advantage of defendants to join as many parties as possible in an effort to avoid a finding of 60% comparative fault against them. There is no reason why a defendant cannot join as an additional defendant an entity which is insolvent or uninsured, since the jury will not know anything about the collectability of an award against such entities.[5]

[5] All parties must be mindful of the implications of Pennsylvania Rule of Civil Procedure 1023, regarding frivolous suits or joinders.

D. A Release Or Threatened Release Of A Hazardous Substance Under What Is Known As The Hazardous Sites Cleanup Act

The Hazardous Sites Cleanup Act, 35 P. S. Sec. 6020.101, was enacted in 1988 after the legislature concluded that many hazardous sites within the Commonwealth did not qualify for cleanup under federal legislation, the Federal Superfund Act, although the sites posed health and environmental risks. Therefore, an independent state operated program was created to address the problem of hazardous substance releases within the Commonwealth. The Act provides for the cleanup of hazardous waste sites; grants powers and bestows duties upon state agencies relative to cleanup projects; provides for response and investigations for assessment of liability on offenders and recovery of cleanup costs; establishes a Hazardous Sites Cleanup Fund; and provides for imposition of certain fees, and for enforcement, remedies and penalties.

E. A Civil Action In Which A Defendant Has Violated Section 497 Of The Liquor Code

The Dram Shop Act establishes statutory liability against a liquor licensee who serves a patron while that patron is visibly intoxicated. The Dram Shop Act provides that a licensee is not liable to third persons on account of damages inflicted upon them by a customer unless the customer was sold or furnished alcohol by the licensee or his employees while the customer was visibly intoxicated. Only the holder of the liquor license can be liable under the Liquor Code, although lawsuits in which it is alleged that a defendant is liable to plaintiff for serving liquor to a third party are sometimes loosely called Dram Shop actions. The Dram Shop exception in the Fair Share Act does not appear to include claims premised on social host liability or illegal sales to minors. Unless the plaintiff's claims are specifically governed by Section 497 of the Liquor Code, joint and several liability will not apply, unless of course the defendant is found to be 60% or more negligent.

VIII. ASSESSMENT OF LIABILITY AGAINST NONPARTIES

Subsection (a.2) to Section 7102 represents a significant change in prior practice and case law. Previously, in order for a jury to assess liability against a person or entity, that person or entity had to be a party to the lawsuit. Under the new provisions of the Fair Share Act, if a person has entered into a settlement agreement before suit, and that person is not joined as a defendant in the lawsuit, an original defendant may nevertheless request that the liability of that person be determined by the jury.[6] Because the nonparty will not be represented by counsel at trial, how evidence will be introduced against (or in favor of) this nonparty is unclear. The Act states that the question of the liability of the nonparty "shall be transmitted to the trier of fact upon appropriate requests and proofs by any party". What exactly "appropriate requests and proofs" are is not defined in the Act. How all of this will work in practice is something that the trial courts will have to wrestle with when cases begin to reach the trial stage.

When introducing evidence concerning the liability of nonparties who have settled with the plaintiff, defendants must be mindful of the prohibitions regarding evidence of releases, settlements or compromises. *See,* Pennsylvania Rule of Evidence 408.

Finally, it should be noted that employers do not fall within the category of nonparties whose liability may be assessed by a jury. Employers retain their full statutory immunity granted by the Worker's Compensation Act.

IX. CONTRIBUTION AND INDEMNITY

The Fair Share Act does not appear to make any changes to current law pertaining to contribution or indemnity rights. Subsection (a.1)(4) of the Act provides:

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[6] Subsection (a.2) provides, in pertinent part: "For purposes of apportioning liability only, the question of liability of any defendant or other person who has entered into a release with the plaintiff with respect to the action and who is not a party shall be transmitted to the trier of fact upon appropriate requests and proofs by any party".

> Where a defendant has been held jointly and severally liable under this subsection and discharges by payment more than that defendant's proportionate share of the total liability, that defendant is entitled to recover contribution from defendants who have paid less than their proportionate share. Further, in any case, any defendant may recover from any other person all or a portion of the damages assessed that defendant, pursuant to the terms of a contractual agreement.

Contribution is simply the right to seek reimbursement for discharging the debt of another. A defendant who is compelled to pay to the plaintiff more than the percentage share attributed to him based on the amount of his causal negligence may seek contribution from other defendants to recover the excess amount paid. The right to contribution exists among joint tortfeasors under the Uniform Contribution Among Tortfeasors Act, 42Pa.C.S. §8324(a). A right of contribution arises by operation of law and is based on simple principles of equity or fairness.

Indemnity is a remedy that shifts the entire loss, as opposed to a portion of it, from one party to another. It is not a fault sharing remedy, but one which shifts fault from one party to another. Indemnity at law is a legal doctrine recognizing that one who was compelled by legal obligation to pay a judgment because of the negligence or legal duty of another is entitled to full reimbursement.

A right to indemnification may be created by contract. One party, such as the lessee of a commercial premise, may agree in writing with another party, for example, the lessor, to indemnify the lessor if the latter is found liable for an injury to a customer of the lessee while on the leased premises.

A right to indemnity may also be granted by law. For example, if a party the law considers secondarily liable discharges the liability of a party the law deems primarily liable, the secondarily liable party is entitled to indemnification (full repayment) by the primarily liable party. A common example of indemnity by operation of law is encountered in products liability

cases. A retailer may be sued under a defective design theory. The retailer's liability is premised upon the fact that it was a seller of a defective product, but if the retailer is found to be liable to the plaintiff and is made to pay the verdict entered against it, the retailer is entitled to full indemnity from the product manufacturer because ultimate responsibility rests with the manufacturer.

Obviously, with joint and several liability eliminated by the Fair Share Act, except in limited circumstances, contribution claims will become infrequent, e.g., when one of several defendant's is found more than 60 percent causally negligent and pays the entire verdict. In that instance the payer would have the right to seek contribution from all other defendants found causally negligent.

X. PRACTICAL CONSIDERATIONS

The Fair Share Act will require both the claims professional and defense counsel to make decisions about certain courses of action virtually as soon as a claim is made or the defense is assigned to counsel. We have listed below some of the major tactical issues which we believe will arise in litigation governed by the Fair Share Act.

A. Cooperation Among Defendants

The willingness and extent to which defendants can or will cooperate with each other may change dramatically in certain cases and one defendant's criticism of another defendant may be less subtle. In the past, defendants often were reluctant to overtly criticize another defendant for fear the defendants would end up at each other's throats, leading the jury to conclude that clearly one or more of them must have been negligent. To some extent, that practice may be a thing of the past, particularly in cases in which one or more of the defendants believes its liability is marginal and that of another defendant is in excess of 60 percent. It also will be interesting to

see what position defendants take in actions in which there are only two defendants and either conceivably could be found more than 60 percent negligent but only one of the two has the wherewithal to satisfy the likely verdict.

B. Settlements

Because of the elimination of joint and several liability, plaintiffs are not likely to settle with any defendant who may be 60% or more at fault, unless this defendant pays virtually full value for the settlement. In other words, because that defendant would be jointly and severally liable for the full amount of the judgment, a plaintiff will not be inclined to give a significant discount to that defendant in order to settle the case. Even if two defendants are believed to be equally at fault, a plaintiff may be reluctant to settle with either one unless close to full value is received.

With regard to defendants who are not likely to be assessed 60% or more of the comparative fault, any settlements with these defendants will most likely reflect the individual exposure of these defendants only. Because a defendant is no longer exposed to the "1% rule", defendants will be inclined to offer in settlement only an amount that reflects their likely exposure to the plaintiff.

C. Discovery Of Settlements

Because liability can now be assessed or apportioned against a party with whom plaintiff settled before suit was started it is imperative that during discovery defense counsel serve interrogatories and a request for production asking if plaintiff has entered into any settlement agreements concerning the action and to obtain copies of all releases. While that was usually done before the Fair Share Act, it must now be pursued vigorously in all negligence cases.

D. Presentation Of Evidence At Trial

In the event a person settled with plaintiff before trial and a defendant wants to have the jury make a liability assessment against that person, it appears that a request must be made to the trial judge and proof offered sufficient to raise a question as to the liability of the nonparty. How this will actually work is very unclear. Is the defendant who is the requesting apportionment against a nonparty required to make out a *prima facie* case against that nonparty? In short, must that defendant produce evidence sufficient to raise a jury question regarding the liability of the nonparty? If so, that may require action and expenditures not usually encountered by defendants in the past. The issue of proof or evidence which must be presented to make out a *prima facie* case is rather simple in most cases. For example, in multiple vehicle cases the evidence about the accident as a whole frequently has a bearing on the negligence of all the drivers.

The issue is more complex in medical malpractice or products liability cases where expert testimony may be needed to establish the liability of any one defendant. For example, in order to raise a question for the jury in a medical malpractice action the plaintiff ordinarily must present expert testimony that the defendant physician did not comply with the standard of care and this lapse caused the plaintiff's injury. Under the Fair Share Act, if a physician is released from the case but the remaining defendant wants the jury to apportion negligence against that doctor, must the remaining defendant present expert testimony against the released nonparty at trial? If the remaining defendant doesn't make out a *prima facie* case, can the plaintiff object to a request for apportionment?

E. Joinder Of Additional Defendants

With the changes to joint and several liability, defendants must now give greater consideration to joining additional defendants. Defendants will be more likely to join all

potentially responsible parties even if uninsured or insolvent. In the past a defendant usually would not join an uninsured or insolvent party because even if that party was found 99% at fault the joining party would have to pay the entire verdict based upon a finding of 1% negligence and was left with a worthless right of contribution against the uninsured or insolvent defendant. Under the Fair Share Act, the joining defendant in this situation would now be responsible for only 1% of the verdict. This represents a dramatic change from the past.

F. Delay Damages

Because the court is required to enter a separate and several judgment in favor of the plaintiff and against each defendant for the apportioned amount of that defendant's liability, the computation of delay damages for each such judgment after trial should be a relatively easy matter. Again, marginally liable defendants would only have to make settlement offers commensurate with their exposure in order to avoid the imposition of delay damages, rather than being exposed to delay damages on the full amount of the verdict for failing to make a pre-trial settlement offer which is within 125% of the total verdict.

G. Entry Of Judgments

Suppose that the jury returns a verdict in the amount of $100,000 and assesses liability at 60% for defendant A, 20% for defendant B and 20% for defendant C. Presumably, the court will enter a judgment of $100,000 as to defendant A, since it was found to be 60% negligent and therefore is jointly and severally liable for the full amount of the judgment. Separate judgments, each in the amount of $20,000 would also be entered as to defendants B and C. However, this may create considerable confusion because the total amount of the judgments recorded on the court docket would be $140,000, not the $100,000 awarded by the jury.

XI. IMPACT IN MEDICAL MALPRACTICE CASES

The most significant effect of the Fair Share Act in medical malpractice cases may be the erosion of the long standing reluctance of one defendant physician to criticize another, or for a medical institution to criticize the treating physician. In those cases in which a very high verdict is a distinct possibility - - particularly a verdict that would exceed the coverage of defendant doctors - - it may become more common for those defendants to try to separate themselves from the other defendants and actually argue to the jury that one or more of the other defendants should bear the lion's share of responsibility. In the past, two physicians accused of malpractice in a case with significant exposure both risked having personal assets exposed because of joint and several liability. Now, one of the two defendants may contest his liability at a trial but, in order to decrease the likelihood that the verdict against him would exceed his available insurance coverage, he may also argue that, at worst, his liability was marginal and that the other defendant was more culpable. A brief example illustrates the issue. If two physicians have insurance coverage of one million dollars each and there is a likelihood of a three million dollar verdict, has the Fair Share Act increased the likelihood that the two defendants each will try to convince the jury that his liability, if any, is less than sixty percent so as to reduce the likelihood that the defendant would be exposed to an excess verdict? Insurers must bear in mind that even though they may insure two or more defendants in the same case, the interests at stake at trial are that of the defendant doctors, not that of the insurer. Defense counsel for one doctor ethically may be obligated to aggressively defend his client by blaming another defendant, if that is in the best interests of his client, regardless of the insurer's position on that tactic.

Medical institutions may also become more aggressive in defending claims brought against them. Not infrequently a hospital was named as a defendant, even though its liability was dubious, because it had substantial coverage and could satisfy a large verdict. Plaintiff's counsel knew that if they could "nick" the hospital, i.e., convince the jury it bore some liability, however slight, it would become liable to pay the entire verdict, which the individual defendant doctors might not be able to satisfy. Knowing these risks, hospitals would in very large exposure cases have to consider if paying a relatively small amount in settlement was the better part of valor. This, of course, redounded to the benefit of the defendant doctors. With the passage of the Fair Share Act, hospitals may become increasingly reluctant to put significant money into the settlement pot where they evaluate their liability as marginal.

XII. IMPACT IN PRODUCT LIABILITY CASES

With the inclusion of five words in Section (a.1)(1) of Section 7102, the Pennsylvania Legislature may have reversed almost 40 years worth of case law in the field of products liability.

The recently enacted statutory provision states: "Where recovery is allowed against more than one person, including actions for strict liability, and where liability is attributed to more than one defendant, each defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of the amount of that defendant's liability to the amount of liability attributed to all defendants and other persons to whom liability is apportioned under subsection (a.2)". The significant phrase which is at issue here is the five words underlined.

Prior to the enactment of the Fair Share Act, Pennsylvania courts had been very careful to avoid the introduction of any negligence theories or defenses in a strict product liability suit. By definition, a strict products liability suit does not contain an element of fault. Rather, the focus

of the inquiry is whether the product is defective, i.e., whether it lacked any element necessary to make it safe. If there is a finding of defectiveness, liability may be imposed on the manufacturer or distributor regardless of whether this defendant exercised reasonable care in the design, manufacture or sale of the product.

As with other provisions in the Fair Share Act, this particular language is not a model of clarity. It would appear that the Legislature has specifically decided to permit the introduction of the negligence concept of apportionment of liability into strict liability cases. Under this new statutory provision, a strict liability defendant will be allowed to argue that other parties or nonparties were negligent, thereby reducing its liability to the plaintiff. Presumably, the same rules will apply regarding the joinder of parties by the strict liability defendant, regardless of whether the joined parties are solvent or what their ability is to pay an adverse judgment.

How these cases will be presented to the jury is not at all clear. An immediate question that comes to mind is whether plaintiff's comparative fault will reduce the liability of all defendants or just defendants found to be liable to plaintiff on a negligence theory. (In the past, the plaintiff's comparative fault could not be used as a defense on behalf of a strict liability defendant).

Another thorny issue will be what guidance will be given to the jury in order to apportion liability between negligent defendants (and nonparties) and strict liability defendants. In effect, the jury will be asked to compare "apples to oranges". A strict product liability case focuses on the condition of the product at the time that it left the control of the defendant. As noted above, liability may be imposed regardless of whether that defendant exercised the highest degree of care in designing and making the product. In contrast, a negligence cause of action focuses on the conduct of the defendant, and the jury is asked to determine whether this conduct fell below

the applicable standard of care. Courts may have to employ some new, different terminology in these cases, such as comparative causation, in order to assist juries in making this apportionment.

XIII. IMPACT IN AUTO AND GENERAL NEGLIGENCE CASES

In order to ensure that their clients receive maximum recovery for their claims, the plaintiff's bar will no doubt encourage their clients to increase their UM and UIM coverages. This will help to avoid the possibility that some portion of their judgments may be uncollectable if the judgment is obtained, in part, against an uninsured defendant, or a defendant lacking sufficient assets. Thus, an increase in UM and UIM claims can reasonably be anticipated.

In addition, the plaintiff's bar may pursue even more vigorously claims of bad faith against insurance carriers in an effort to make up for any shortfalls in their recoveries caused by the provisions of the Fair Share Act

XIV. CONCLUSION

Joint and several liability was considered to be the "Sword of Damacles" that would hang over the heads of solvent/insured defendants involved in tort litigation in Pennsylvania. With the passage of the Fair Share Act, joint and several liability has been significantly curtailed. However, as with most new legislation, it may take several years before the courts provide firm guidelines as to how cases will be litigated and tried under this new statutory framework. Although much uncertainty will persist for some time, one thing is clear – this legislation should result in significant, long-term benefits for defendants and their insurers.

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APPENDIX

The Fair Share Act

PENNSYLVANIA ADVANCE LEGISLATIVE SERVICE

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PENNSYLVANIA 195TH GENERAL ASSEMBLY -- 2011-12 REGULAR SESSION

ACT NO. 17

SENATE BILL NO. 1131

2011 Pa. ALS 17; 2011 Pa. Laws 17; 2011 Pa. SB 1131

BILL TRACKING SUMMARY FOR THIS DOCUMENT

SYNOPSIS: AN ACT Amending Title 42 (Judiciary and Judicial Procedure) of the Pennsylvania Consolidated Statutes, in general provisions relating to civil actions and proceedings, amending provisions relating to comparative negligence.

NOTICE: **[A>** Text within these symbols is added **<A]**
[D> Text within these symbols is deleted **<D]**

To view the next section, type .np* TRANSMIT.
To view a specific section, transmit p* and the section number. e.g. p*1

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

[*1] Section 1. Section 7102 of Title 42 of the Pennsylvania Consolidated Statutes is amended to read:

Section 7102. Comparative negligence.

(a) General rule.--In all actions brought to recover damages for negligence resulting in death or injury to person or property, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery by the plaintiff or his legal representative where such negligence was not greater than the causal negligence of the defendant or defendants against whom recovery is sought, but any damages sustained by the plaintiff shall be diminished in proportion to the amount of negligence attributed to the plaintiff.

[A> (a.1) Recovery against joint defendant; contribution.-- <A]

[A> (1) Where recovery is allowed against more than one person, including actions for strict liability, and where liability is attributed to more than one defendant, each defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of the amount of that defendant's liability to the amount of liability attributed to all defendants and other persons to whom liability is apportioned under subsection (a.2). <A]

[A> (2) Except as set forth in paragraph (3), a defendant's liability shall be several and not joint, and the court shall enter a separate and several judgment in favor of the plaintiff and against each defendant for the apportioned amount of that defendant's liability. <A]

[A> (3) A defendant's liability in any of the following actions shall be joint and several, and the court shall enter a joint and several judgment in favor of the plaintiff and against the defendant for the total dollar amount awarded as damages: <A]

[A> (i) Intentional misrepresentation. <A]

[A> (ii) An intentional tort. <A]

[A> (iii) Where the defendant has been held liable for not less than 60% of the total liability apportioned to all parties. <A]

[A> (iv) A release or threatened release of a hazardous substance under section 702 of the act of October 18, 1988 (P.L.756, No.108), known as the Hazardous Sites Cleanup Act. <A]

[A> (v) A civil action in which a defendant has violated section 497 of the act of April 12, 1951 (P.L.90, No.21), known as the Liquor Code. <A]

[A> (4) Where a defendant has been held jointly and severally liable under this subsection and discharges by payment more than that defendant's proportionate share of the total liability, that defendant is entitled to recover contribution from defendants who have paid less than their proportionate share. Further, in any case, any defendant may recover from any other person all or a portion of the damages assessed that defendant pursuant to the terms of a contractual agreement. <A]

[A> (a.2) Apportionment of responsibility among certain nonparties and effect.--For purposes of apportioning liability only, the question of liability of any defendant or other person who has entered into a release with the plaintiff with respect to the action and who is not a party shall be transmitted to the trier of fact upon appropriate requests and proofs by any party. A person whose liability may be determined pursuant to this section does not include an employer to the extent that the employer is granted immunity from liability or suit pursuant to the act of June 2, 1915 (P.L.736, No.338), known as the Workers' Compensation Act. An attribution of responsibility to any person or entity as provided in this subsection shall not be admissible or relied upon in any other action or proceeding for any purpose. Nothing in this section shall affect the admissibility or nonadmissibility of evidence regarding releases, settlements, offers to compromise or compromises as set forth in the Pennsylvania Rules of Evidence. Nothing in this section shall affect the rules of joinder of parties as set forth in the Pennsylvania Rules of Civil Procedure. <A]

[D> (b) Recovery against joint defendant; contribution.--Where recovery is allowed against more than one defendant, each defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of the amount of his causal negligence to the amount of causal negligence attributed to all defendants against whom recover is allowed. The plaintiff may recover the full amount of the allowed recovery from any defendant against whom the plaintiff is not barred from recovery. Any defendant who is so compelled to pay more than his percentage share may seek contribution. <D]

(b.3) Off-road vehicle riding.--

(1) Off-road vehicle riding area operators shall have no duty to protect riders from common, frequent, expected and nonnegligent risks inherent to the activity, including collisions with riders or objects.

(2) The doctrine of knowing voluntary assumption of risk shall apply to all actions to recover damages for negligence resulting in death or injury to person or property brought against any off-road vehicle riding area operator.

(3) Nothing in this subsection shall be construed in any way to abolish or modify a cause of action against a potentially responsible party other than an off-road vehicle riding area operator.

(c) Downhill skiing.--

(1) The General Assembly finds that the sport of downhill skiing is practiced by a large number of citizens of this Commonwealth and also attracts to this Commonwealth large numbers of nonresidents significantly contributing to the economy of this Commonwealth. It is recognized that as in some other sports, there are inherent risks in the sport of downhill skiing.

(2) The doctrine of voluntary assumption of risk as it applies to downhill skiing injuries and damages is not modified by subsections (a) and [D> (b) <D] [A> (a.1) <A] .

[A> (c.2) Savings provisions.--Nothing in this section shall be construed in any way to create, abolish or modify a cause of action or to limit a party's right to join another potentially responsible party. <A]

(d) Definitions.--As used in this section the following words and phrases shall have the meanings given to them in this subsection:

"Defendant or defendants [D> against whom recovery is sought <D] ." Includes impleaded defendants.

"Off-road vehicle." A motorized vehicle that is used off- road for sport or recreation. The term includes snowmobiles, all-terrain vehicles, motorcycles and four-wheel drive vehicles.

"Off-road vehicle riding area." Any area or facility providing recreational activities for off-road vehicles.

"Off-road vehicle riding area operator." A person or organization owning or having operational responsibility for any off-road vehicle riding area. The term includes:

(1) Agencies and political subdivisions of this Commonwealth.

(2) Authorities created by political subdivisions.

(3) Private companies.

"Plaintiff." Includes counter claimants and cross-claimants.

[*2] Section 2. Nothing in the amendment of 42 Pa.C.S Section 7102 or in the act of June 19, 2002 (P.L.394, No.57), entitled "An act amending Title 42 (Judiciary and Judicial Procedure) of the Pennsylvania Consolidated Statutes, providing for DNA testing of certain offenders; reestablishing the State DNA Data Base and the State DNA Data Bank; further providing for duties of the Pennsylvania State Police; imposing costs on certain offenders; reestablishing the DNA Detection Fund; further providing for the apportionment of liability and damages; imposing penalties; and making a repeal," shall be construed to diminish the immunity of an employer to the extent that the employer is granted immunity from liability or suit pursuant to the act of June 2, 1915 (P.L.736, No.338), known as the Workers' Compensation Act.

[*3] Section 3. The amendment of 42 Pa.C.S. Section 7102 shall apply to causes of action which accrue on or after the effective date of this section.

[*4] Section 4. This act shall take effect immediately.

HISTORY:
Approved by the Governor on June 28, 2011

SPONSOR: Greenleaf

NOTES:
SESSION OF 2011 ACT NO. 2011-17 THE GENERAL ASSEMBLY OF PENNSYLVANIA SENATE BILL NO. 1131

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