

The Pennsylvania Fair Share Act

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Introduction

On June 19, 2002, then-Pennsylvania Governor Mark Schweiker signed into law Act 57 of 2002, the so-called Fair Share Act. This piece of legislation provided a sweeping departure from the Commonwealth's joint and several liability rules among joint tortfeasors. The Act alters the landscape of multi-defendant litigation and also raises questions as to its full impact.

Challenges to the Act

One challenge to the Act is presently pending before the Commonwealth Court. Certain legislators filed suit, contending that the law is a nullity since it violated Pennsylvania's "single subject" rule. The rule prohibits the General Assembly from passing bills into law (other than appropriations bills) that contain two different subjects.

In a Philadelphia County action, plaintiffs in Hicks v. Daimler Chrysler et al. raised a similar challenge. On June 25, 2004, the Honorable James Murray Lynn ruled the Act unconstitutional for violating the "single subject" rule. An appeal by some of the Hicks defendants was transferred to the Pennsylvania Supreme Court for review on July 1, 2004. While no appellate court in the Commonwealth has ruled on the Act's constitutionality to date, Judge Lynn's ruling could be a harbinger of similar rulings from other courts in Pennsylvania and will certainly be cited by parties challenging the Act.

Recognizing the constitutional concerns, a substantially similar bill was introduced in the state Senate in March 2004. The co-sponsors are seeking to ensure that these changes to Pennsylvania's comparative negligence statute will survive in the event the courts invalidate the 2002 law.

Effective Date

The Pennsylvania Fair Share Act applies to all cases which "accrue" after August 19, 2002. Thus, any claims with a date of accident/loss of August 20, 2002, or later, must be handled and analyzed under this Act. However, The Act must still withstand constitutional muster with the appellate courts. An appeal is still pending before the Commonwealth Court.

Change in Apportionment of Joint Tortfeasor Verdicts

In the past, Pennsylvania law provided for a pure joint and several liability system among joint tortfeasors. In cases with multiple joint tortfeasors, the plaintiff was free to collect the entire jury award from any single liable defendant, even if that single defendant was assessed only a nominal share of liability. As such, situations arose in which defendants that were assessed the majority of

liability would escape paying their share of a judgment due to insufficient insurance coverage limits, uninsured status, or being otherwise judgment-proof.

In such cases, plaintiff attorneys were compelled to include as many “deep pocket” defendants in their lawsuits as possible, even if the viability of the claims against these defendants were tenuous or questionable. Plaintiff’s complaint would assert allegations against the “deep pocket” defendant(s) to keep it as a viable defendant until trial or to negotiate a settlement prior to trial due to the threat of a possible high verdict if the “deep pocket” defendant was found to be even 1% liable.

The above scenario has now changed. Amendments to the Comparative Negligence Act, 42 Pa. C.S.A. 7102 were recently signed into law. In short, any defendant found less than 60% liable will only be responsible for paying its percentage share of the entire verdict.

Exceptions to New Law

The Act provides five (5) exceptions:

Intentional Misrepresentation

Intentional Torts

When a Defendant is found 60% or more responsible

Actions for Release or Threatened Release of Hazardous Substances

Dram Shop Act/ Liquor Liability Cases

Strict Liability Cases

The Fair Share Act applies to negligence and strict liability lawsuits for damages to person or property.

Entry of Judgment

If none of the five (5) exceptions apply, the Trial Court must now enter a separate award/verdict against each individual defendant. Plaintiffs will now have to collect their verdicts separately from the defendants.

Joinder of Additional Defendants

The right to join additional defendants is not affected by the Act.

Contribution

Contribution is still permissible for a joint and severally liable defendant. Plaintiff may still collect the entire damage award from one defendant, if that defendant’s liability is 60% or greater, or another exception applies. A defendant that pays more than its percentage of liability may pursue the other defendant(s) for contribution up to their proportionate shares of liability.

Apportionment Against Non-parties

The trial jury may be requested to apportion liability to persons or entities that settled with the plaintiff but are not parties to the lawsuit. The Act permits the trial jury to assess a percentage of liability against a settling person or entity, even though they are not parties to the lawsuit. However, a judgment cannot be entered against them. Any liability percentage against such a

person or entity reduces the percentage against the defendants who are parties to the lawsuit.

Application of Workers' Compensation Act

A plaintiff's employer is still immune from suit or liability. The Act, explicitly states, that employer immunity pursuant to the Pennsylvania Workers' Compensation Act is not affected by the recent amendments to the Act. With limited exceptions, a plaintiff's employer cannot be joined in a lawsuit even merely to assess the percentage of liability against the employer.

Joint Tortfeasor Settlements

The effects on the frequency and meaning of joint tortfeasor settlements are unclear. Under the Uniform Contribution Among Tortfeasors Act, a settling defendant is protected via a *pro rata* release from paying contribution to a joint tortfeasor if the settling party paid less than its proportionate share of liability. Since jointly and severally liable defendants may seek contribution from defendants that "have paid less than their proportionate share" and settling defendants are not exempted from the Act's terms, careful consideration should be given to the language of *pro rata* releases.

Some in the plaintiff's bar believe that these changes will increase the number of cases that will proceed to trial. Without the threat of exposure to large verdicts in cases where a defendant has limited liability, these "deep pocket" defendants will be emboldened to defend cases to trial. Conversely, the Act will decrease the chances of plaintiffs recovering large verdicts from the marginally or minimally liable defendants. It may make economic sense for plaintiffs to accept a reasonable settlement offer as early as possible, rather than expending large sums attempting to build cases against parties with limited chances for sizable returns.

The Act

Section 7102. Comparative negligence.

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.

(B.1) Recovery Against Joint Defendant; Contribution

(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 (B.2).

(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.

(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:

(I) Intentional Misrepresentation.

(II) An Intentional Tort.

(III) Where a defendant has been held liable for not less than 60% of the total liability apportioned to all parties.

(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.

(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.

(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.

(B.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 non admissibility 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.

PRACTICAL APPLICATIONS

Liability Case

Plaintiff sues Defendants "A" and "B" on a \$1,000,000 personal injury claim. The jury finds plaintiff 20% liable, Defendant A 10% liable, and Defendant B 70% liable. A has coverage in the amount of \$1 million and B has coverage of \$50,000.

Old System (Joint and Several)

A 10%=100,000 share

B 70%=700,000 share

Net verdict \$800,000.

Plaintiff recovers \$800,000
A pays \$750,000
B pays \$50,000

Plaintiff may seek satisfaction of \$800,000 verdict from either defendant. Plaintiff seeks satisfaction from A and receives \$800,000 from A. A seeks contribution from B and receives \$50,000.

New System

A 10%=100,000 share
B 70%=700,000 share

Net verdict \$800,000.

Plaintiff recovers \$150,000
A pays \$100,000
B pays \$50,000

Plaintiff may only recover from A its share, or \$100,000. B, being underinsured, can only pay \$50,000 of its \$700,000 share.

Note: Had the liability coverages of A and B been reversed, plaintiff would recover entire \$800,000 since B was found to be greater than 60 % liable and joint and several liability would still attach.

UM Case

Plaintiff is a passenger in vehicle A which has \$15,000 in liability coverage. Vehicle B is uninsured. Plaintiff's injuries are deemed to be \$100,000 in value. A is 50% liable and B is 50% liable. Plaintiff has \$1 million in available UM coverage.

Old System (Joint and Several)

Plaintiff recovers \$100,000

15,000 A liability coverage
85,000 UM

New System

Plaintiff recovers \$65,000

15,000 A liability coverage
50,000 UM

Under the old system, plaintiff can advance an UM claim asserting that B is uninsured. B, under joint and several would be responsible for satisfying the whole verdict, less contribution from A. As such, plaintiff would be able to recover \$85,000 in UM benefits and the total \$100,000 value of the case.

Now, since B would only have to pay his share, \$50,000, the UM claim is limited to \$50,000 and not the whole verdict.

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