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Litigation Impact of Joint and Several Liability Abolishment

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Pennsylvania has joined the growing number of jurisdictions that have eliminated or modified joint and several liability. Under the old rules, any defendant found negligent could be compelled to pay the entire verdict. Now, only a defendant found to be at least 60 percent at fault pays the entire verdict. Its impact on litigation will be heavily determined by the court's interpretation of 42 Pa.C.S. § 7102 (a.2), which provides:

"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."

The first question to be resolved is which clause the phrase "and who is not a party" modifies. If the phase refers only to entities that have already entered into a release, then this portion of the statute is of limited value. However, if the phrase modifies both categories of individuals in the earlier part of the sentence, it will have a significant impact on litigation.

Support for the proposition that liability can be assessed against defendants who are not parties to the litigation exists in two separate clauses of this paragraph. First, the legislature specifically excluded employers from the classification of parties that can share in a liability determination. There would be no need to do this unless the legislature contemplated an assessment of liability against a party immune from tort liability. Second, the legislature barred any collateral effects of a liability finding for parties covered by this provision in any subsequent litigation. If these parties had already entered into a release of liability, they would have no concerns with the final adjudicated apportionment. This clause protects only those defendants that could still be a party to a separate action. Both of these provisions support the potential for the jury to be permitted to apportion liability against an unnamed defendant.

Most problems can be avoided by plaintiffs counsel by initiating litigation six months prior to the statute of limitations to provide ample time to join unknown defendants. There are several scenarios where, despite the most diligent efforts of counsel, a party cannot be named in the suit. First, an entity may have been negligent but immune from the claim. The most frequent occurrence will likely involve state and local government entities. This poses a great dilemma for plaintiffs attorneys. If you try to join a government entity on a novel liability theory only to have it dismissed as immune, you have provided the groundwork for the other defendants to have the jury apportion liability against the government entity and reduce the total verdict.

Second, an entity may not be subject to personal jurisdiction in Pennsylvania. Products liability claims and negligent entrustment claims can both involve tortious conduct in another jurisdiction that leads to an injury in Pennsylvania. This scenario will lead to an important question on the scope of the joint liability rules. Do the joint liability rules only apply to tortious actions subject to jurisdiction in Pennsylvania? What if the other state has also abolished joint and several liability? Unlike the other two scenarios, this problem can be resolved by filing multiple lawsuits in different jurisdictions. While that may seem harsh, the only real change in the law is on whether the plaintiff or the defendant had to initiate this action.

Third, a party whose identification cannot be determined, such as the hit-and-run or phantom motorist. An often overlooked John

Doe is the individual who spilled the soda that the store owner should have cleaned up prior to the plaintiff's fall. What complicates this scenario is that Pennsylvania courts do not allow the use of John Doe designations to toll claims against parties whose existence is known but whose identity has yet to be determined, as in *Anderson Equipment v. Huchber*, 456 Pa. Super. 535, 690 A.2d 1239 (1997). These rules, though, apply to efforts to amend a pleading to add the person previously identified as John Doe as a party.

If the plaintiff cannot use a John Doe designation to preserve a claim against a potential party, can a defendant use a John Doe designation for purposes of apportioning liability against all culpable defendants? While it may seem harsh to burden the plaintiff with the loss associated with not being able to identify a tortfeasor, in the automobile liability scenario this risk can be avoided through the purchase of uninsured motorist benefits. Where uninsured motorist coverage exists, the use of a John Doe on the verdict sheet becomes necessary to protect against a double recovery.

Currently, the Rules of Civil Procedure do not define the mechanism to add nonparty defendants to the verdict sheet. Rule 1030 lists affirmative defenses that must be asserted as new matters.

The list, though, is not exhaustive, as it is qualified by the phrase "including but not limited to." The rules also allow for the joinder of additional defendants. Ultimately, the courts will need to determine whether a nonparty defendant must be joined or whether identifying them in a new matter will be sufficient. For plaintiffs who file actions close to the expiration of the statute of limitations, even the timely joinder of parties will result in defendants on the verdict sheet that have no duty to contribute to any award. This ruling, though, will not solve the problem of the party that cannot be joined. The prudent course of action will be to identify such parties in a new matter along with facts that would support the liability claim.

Plaintiffs will need to decide the mechanism to challenge these designations. Preliminary objections to a new matter would be one possibility. The judges, though, may defer ruling on such issues at the initial stage and give time to determine the potential claims against such defendants. A motion for partial summary judgment or motion in limine would be the next available opportunity to strike a nonparty defendant from the verdict sheet.

The trial itself becomes quite complicated. The plaintiff is saddled with the burden of defending a liability claim against an absent party. While difficult, it is no different than the strategy employed previously if a joint tortfeasor release had been executed. The more significant question will be whether or not the jury is told the significance of an apportionment of liability against the missing party. Should the jury be told that the plaintiff will not be able to recover that percentage assigned to the nonparty defendant? If so, would the jury be given a similar instruction for a party that was timely joined after the statute of limitations expired? At a minimum, a cautionary instruction would need to be given so the jury does not presume the missing party is negligent based on its failure to participate in the trial.

The revised rules on joint liability will change the landscape of litigation. In situations where multiple parties are involved, it will be the defendants, not the plaintiffs, that will seek out creative theories of liability, especially those involving entities that would be immune from suit. Deep-pocketed defendants now have much more to gain by aggressively going after their less affluent co-defendants.

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