

## One Year Old Fair Share Act's Impact Upon Tort Litigation in Pennsylvania

Tort reform is an often discussed and debated topic in Pennsylvania. Some are for it. Some are against it. The question prior to June, 2011 in the minds of those who follow the debate was—where does the legislature stand on the issue? With the passing of Fair Share Act (17-2011), into law in June 2011, the Pennsylvania General Assembly and Governor Corbett weighed in. Liability or fault in lawsuits involving claims of strict liability and negligence (personal injury and/or property damage) will now be apportioned among Defendants according to each Defendant's assessed percentage of liability/fault, determined by a judge or jury in a verdict.

The goal of the Fair Share Act? The Act addresses principles of fairness and equity in the Commonwealth. The Act limits a Plaintiff's ability to collect a judgment from non-settling Defendants in multi-Defendant litigation to an amount which reflects the non-settling Defendant's proportionate share of liability or fault. In other words, for causes of action accruing on or after June 28, 2011, a Defendant who proceeds to trial against a Plaintiff in negligence or strict liability will no longer be required to pay more money than a judge or jury assigns to it as its "fair share."

Prior to the passage of the Act, Pennsylvania law required that each Defendant in multi-Defendant tort litigation share liability or fault "jointly and severally" among themselves, regardless of the percentage of fault assigned to each Defendant in a verdict entered by a court or jury, where a Plaintiff was determined to be 50% or less at fault for its own injury or property damage.

In the prior "joint and several" system, where a Plaintiff sued more than one Defendant for bodily injury or property damage and settled a case before trial with less than all Defendants, the remaining, non-settling Defendants were responsible to pay to Plaintiff the entire verdict amount, regardless of the percentage of fault assigned to each of the non-settling Defendants.

For example, Plaintiff sues Defendants A and B. Plaintiff settles with Defendant A prior to trial and proceeds to trial against Defendant B. At the conclusion of trial, a Judge or jury awards Plaintiff \$200,000, assigning fault as follows: 10% fault or contributory negligence to Plaintiff; 45% fault to settled Defendant A; and 45% fault to Defendant B. In the joint and several system, Defendant B was required to pay the entire \$180,000, or 90% of the verdict (based upon the combined fault of Defendants A and B) to the Plaintiff. Defendant B could then recover \$90,000 of the \$180,000 it paid to Plaintiff from settled Defendant A in an action for contribution.

Now, true to its name, in most instances where no exception to the Act applies, the Fair Share Act requires in the same scenario that Defendant B pay to Plaintiff only the \$90,000 which reflects Defendant B's proportionate share of the total liability of all Defendants (45% of the total 90% assigned to Defendants), or its "fair share." A court or jury will enter separate judgments in favor of Plaintiff against each Defendant.

The Fair Share Act allows the judge or jury to assign responsibility or fault not only to settled Defendants, but also to non-parties who signed releases with the Plaintiff prior to the filing of the lawsuit. Plaintiff must now disclose settlements of this type to Defendants during discovery and prior to trial.

Some exceptions apply and require application of the common law "joint and several" liability system. Liability

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or fault among Defendants remains joint and several where:

- 1.) The percentage of fault assigned to any one Defendant equals or is greater than 60% of the total fault assigned to all Defendants;
- 2.) Claims of intentional misrepresentation are alleged;
- 3.) Intentional torts such as battery or assault are alleged in a civil lawsuit;
- 4.) The release or threatened release of a hazardous substance is alleged; or
- 5.) A violation of the Liquor Code is alleged.

In each of the above 5 instances, where Plaintiff is 50% or less responsible for its own injury or property damage, Plaintiff may recover from any one Defendant the entire percentage of liability assigned to all Defendants. The one Defendant from whom Plaintiff recovers may then seek contribution from all other Defendants, based upon their proportionate share of liability or fault.

What are the practical effects of this drastic statutory change? Most who have followed this significant legal development agree that it may be too early to tell. Cases governed by the Fair Share Act are presently in the

process of working their way through our legal system to trial. Early indicators suggest that for Plaintiffs, this wholesale change in statutory system will discourage the filing of lawsuits against “deep pocket” Defendants who have only minor liability, but that it may also remove the hurdles for a Plaintiff associated with settling a multiple Defendant case as to less than all Defendants prior to trial.

For Defendants, there is a larger incentive to join other potentially responsible parties as Defendants to the action to reduce the percentage of fault assigned to each Defendant, particularly below the 60% threshold. In other words, Defendants may now adopt the “more the merrier” approach to tort litigation. Legal commentators view this step in the direction of tort reform as a positive development for business in the Commonwealth, particularly for industry and corporate Defendants managing risk on a state-wide or national level.

Lawyers await the first significant group of verdicts and judgments in order to assess the true impact of this change. Stay tuned! For more information, please refer to Pennsylvania Consolidated Statutes Annotated, Comparative Negligence at 42 Pa. C.S.A. §7102.

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Jaime serves as the head of the firm’s Litigation and Labor & Employment Groups, with a practice including commercial and construction litigation, defense of product liability and toxic tort claims, insurance defense and coverage analysis.

Her clients include corporations, insurance companies, title agencies, municipalities, professional and recreational associations, school districts, private developers, and regional contractors and subcontractors. She has also worked on behalf of design professionals and sureties. She advises her clients on risk allocation, and risk shifting mechanisms including insurance, indemnity and bonding provisions in contract formation. She is panel counsel for several insurance companies and works with insurers and third-party administrators to defend construction defect, product liability, property and casualty losses.

Jaime has successfully represented clients in nonjury and jury trials in courtrooms across Pennsylvania. She has also litigated complex construction claims on behalf of owners, contractors and subcontractors before the American Arbitration Association.



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