

TOXIC AND HAZARDOUS SUBSTANCES LITIGATION

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IN THIS ISSUE

Stephanie A. Fox and Joseph G. Grady report on recent Court review of the 2011 Pennsylvania “Fair Share Act” which fundamentally changed Pennsylvania’s long-standing practice of joint and several liability.

Is Pennsylvania Chipping Away at Your Fair Share? Superior Court Panel Deems Fair Share Act Inapplicable When Plaintiff is Not Contributorily Negligent

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The Pennsylvania Fair Share Act was signed and became law almost ten (10) years ago on June 28, 2011. It amended Title 42 of the Pennsylvania Judicial Code to essentially eliminate the doctrine of Joint and Several Liability. Under the Fair Share Act, a civil defendant found less than sixty (60) percent liable is responsible for paying only their fair share of any damage's verdict.

The Fair Share Act amended the Comparative Negligence Statute and Pennsylvania's long-standing practice of joint and several liability to a model that permits a jury to award damages based on a percentage of fault.

Judicial application of the Fair Share Act remained essentially untouched for almost nine (9) years. Then, on February 19, 2020, the Pennsylvania Supreme Court issued a long-awaited opinion in the matter of *Roverano v. John Crane, Inc., et al.*, 226 A.3d 526 (2020). In *Roverano*, the Pennsylvania Supreme Court concluded that liability should be apportioned equally, or on a per capita basis, in strict liability asbestos cases. No distinction was made between asbestos cases involving mesothelioma, lung cancer, or asbestosis. The Court reasoned that an injury that results from asbestos inhalation is "inherently a single, indivisible injury that is incapable of being apportioned in a rational manner," given the Court's determination that any defendant's individual contribution to a plaintiff's total dose would be impossible to segregate. In his dissent,

Pennsylvania Supreme Court Justice Saylor challenged the notion that comparative apportionment of liability was impossible in asbestos cases, and agreed with the Pennsylvania Superior Court that the legislature intended to allow for allocation by fault in all cases, including strict liability cases, in their wording of the Fair Share Act.

Since the *Roverano* decision, there has been increased debate over the applicability of the Fair Share Act. On March 18, 2021, a three-judge panel of the Pennsylvania Superior Court issued an opinion in the matter of *Spencer v. Johnson*, No. 2021 WL 1035175 (Pa. Super. Ct. Mar. 18, 2021) holding that the Fair Share Act only applies in situations where plaintiffs are comparatively at fault.

By way of case background, Keith Spencer was struck by a vehicle that the Philadelphia Joint Board Workers United Union owned and provided to union worker Tina Johnson. Tina Johnson's husband, Cleveland Johnson, was driving the vehicle at the time of the incident. Mr. Spencer sued the union, Tina Johnson and Cleveland Johnson and the case ultimately proceeded to trial. A Philadelphia county jury ultimately found Tina Johnson 19% liable, Cleveland Johnson 36% liable and the union 45% liable for Mr. Spencer's injuries and damages. Mr. Spencer was awarded a \$12.9 million judgment and the case was appealed.

In an eighty-seven (87) page opinion, a three-judge Pennsylvania Superior Court panel in *Spencer* concluded that “[t]he Fair Share Act concerns matters where a plaintiff’s own negligence may have or has contributed to the incident; that set of circumstances does not apply to the present matter.” In reaching its decision, the Court noted that the general rules of application for the Fair Share Act focus on scenarios involving comparative negligence. The Act then proceeds to subsection a.1 that begins with “where recovery is allowed against more than one person.” The Court inferred that the above language coupled with the legislative history of the Comparative Negligence Act (the Fair Share Act’s predecessor) demonstrate that the Pennsylvania General Assembly promulgated the Fair Share Act only to “modify which parties bear the risk of additional losses in cases where the plaintiff was not wholly innocent.” According to the Court, “[t]here is no indication the legislature intended to make universal changes to the concept of joint and several liability outside of cases where a plaintiff has been found to be contributorily negligent.”

The *Spencer* decision has been universally applauded by the plaintiffs’ bar. In fact, one prominent Pennsylvania plaintiffs’ attorney said that the *Spencer* decision “blows a hole” in the Fair Share Act. If not appealed and overruled, *Spencer* could create a host of problems for trial courts and especially defendants moving forward. In asbestos, benzene and other mass tort/products liability matters, plaintiffs would most likely focus even more time and attention on lack

of knowledge/failure to warn arguments to overcome contributory negligence theories and remove cases from the purview of the Fair Share Act. If a trial court found the Fair Share Act to be inapplicable, individual defendants would then have to weigh the increased risks of proceeding to trial with troublesome jury questions and instructions and joint and several liability damages-type awards at play.

Within the last couple weeks, the U.S. Chamber of Commerce, National Association of Mutual Insurance and more than a dozen other groups have filed an application requesting *en banc* Superior Court review of the panel’s decision. These concerned groups and businesses also filed a twenty-one (21) page *amicus* brief arguing that the three-judge panel ruling will “wreak havoc on Pennsylvania jurisprudence, causing a split of authority and forcing state trial courts and federal courts applying Pennsylvania law to choose between following a decade of precedent or the panel’s new, novel reading of the statute.” The *amicus* brief further states that: “[n]ow, plaintiffs will be incentivized once again to sue deep pocket defendants like hospitals, healthcare providers, and other businesses to bankroll a much larger verdict than a jury might expect them to have to pay That perversion of the judicial system—finding a deep pocket, any deep pocket, and constructing a case to have the jury assess even minimal fault against that deep pocket—is what led to the passage of the Fair Share Act in the first place.”



The Superior Court has not yet decided whether the *Spencer* decision will be reviewed *en banc*. However, it only seems “Fair” that such a significant break with long-standing legislation and case law should be reviewed and hopefully reversed soon.

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