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'Fair Share' Under Act 17 and Environmental Claims

On June 28, Gov. Tom Corbett signed Act 17 of 2011 into law. Act 17 purports to make joint and several liability the exception, rather than the rule, in actions against more than one tortfeasor in Pennsylvania.

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On June 28, Gov. Tom Corbett signed Act 17 of 2011 into law. Act 17 purports to make joint and several liability the exception, rather than the rule, in actions against more than one tortfeasor in Pennsylvania. Certain environmental claims seem to be among the exceptions, but this statute — whatever you think of the underlying policy decision to abolish joint and several liability — is not a model of drafting clarity.

The statute also assumes that good standards exist to *apportion* strict liability claims, when all the existing law seems only to address *allocation* of liability among jointly and severally liable defendants.

Act 17 amends section 7102 of title 42 of Pennsylvania Consolidated Statutes. Unamended section 7102 calls for *allocation* among liable defendants in proportion to their "causal negligence." This is a call for allocation among jointly and severally liable parties, not an *apportionment* of the liability among severally liable parties. Section 7102 addresses "comparative negligence."

Unamended section 4102 appears to apply only to actions "for negligence resulting in death or injury to person or property ..." With respect to this subset of all tort actions, section 7102(b) establishes joint and several liability of all liable defendants to the plaintiff and allows for allocation in contribution. That is, the plaintiff under unamended section 7102 may recover from any jointly and severally liable defendant, but the defendants may reallocate responsibility among themselves in a contribution action in proportion to "causal negligence."

The 2011 amendment removes section 7102(b) and in its place adds a new section 7102(a.1). Section 7102(a.1) applies to any action "[w]here recovery is allowed against more than one person, *including actions for strict liability* , and where liability is attributed to more than one defendant" (emphasis added).

It calls for *apportionment* of the liability for "the total dollar amount awarded as damages" among those defendants in proportion to "the ratio of [each] defendant's liability to the amount of liability attributed to all defendants and [settled parties and others] under subsection (a.2)." There is a provision for handling known liable persons who are not parties to the case.

Recognize that even before this amendment, not all cases with multiple defendants result in joint and several liability. When the case involves divisible harms to the plaintiff or when a reasonable basis for apportionment exists among the defendants, a court may render several liability judgments.

So, to take the environmental example from the Restatement of Torts most often cited, if two facilities spill oil in a stream and the oil catches fire causing damage to the plaintiff, there is no way to apportion the liability and it is joint and several. However, if the plaintiffs' cows drink the water and become sick, then the amount of oil discharged may be a basis for apportioning the harm, and several liability judgments against the defendants would be in order. (The drafters of the Restatement may have their science wrong on this one, but that is the example they give.)

In a circumstance when a court could apportion at common law, new section 7102(a.1) does not apply. Liability would be apportioned, and would not be allowed against more than one defendant. Thus, section 7102(a.1) only seems to apply to situations where each defendant would be liable for the whole of the harm at common law, and new section 7102(a.1) requires the court to apportion based on standards that it does not set out and that cannot be the common law standards (because if they applied, there would be no joint and several liability at common law).

Because the statute no longer refers to "causal negligence," but instead to the "amount of liability," the statute is recursive; each defendant is to be apportioned liability in proportion to the amount of liability that defendant is to be apportioned. There is no standard for apportionment, because "causal negligence" is no longer in the statute and cannot be the standard for apportioning a strict liability claim.

One might assume that the standard for apportionment ought to be whatever the common law standard would be in the circumstances. However, if the common law would allow apportionment, then section 7102 (a.1) would not apply because the liability would be several, and not joint and several. So, the common law standards for apportionment are not immediately helpful.

One suspects that the General Assembly had in mind apportioning using whatever standards would otherwise apply for *allocating* based on comparative fault. However, that "causal negligence" notion no longer appears in the statute, and no language explicitly refers to it. Environmental practitioners are more used to *allocating* based upon "equitable factors," as required under section 113(f)(1) of the Superfund statute. Perhaps courts will graft some meaning into the statutory language, but it is not yet there.

Assuming the courts can get past the fundamental ambiguity of apportioning without any standard for apportionment, one next reaches the question of whether Act 17 applies to all claims or just to some. It does seem to apply only to claims for "dollar amount[s] awarded as damages." In the environmental context, one might conclude that the statute therefore applies only to environmental torts, and not to statutory claims for equitable relief. That is, if a homeowner whose water well contains methane sues a natural gas well owner and the drill rig operator for damages, then section 7102(a.1) would apply. If, however, the Department of Environmental Protection sues the owner and the driller for an injunction to plug or to case the natural gas well, that enforcement claim would not fall under section 7102(a.1), and liability would be joint and several.

Section 7102(a.1)(3) casts doubt on that conclusion. The apportionment rule does not apply in all cases. Section 7102(a.1)(3) sets out five exceptions, one of which is environmental.

It provides: "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: ... (iv) A release or threatened release of a hazardous substance under section 702 of ... the Hazardous Sites Cleanup Act."

This provision is by no means clear. Just as a matter of grammar, "a release or threatened release of a hazardous substance" is not an "action." The statute uses "action" in the sense of "lawsuit" and the release is the event over which the action is brought.

Perhaps the General Assembly meant section 7102(a.1)(3)(iv) to refer to "a claim under the Hazardous Sites Cleanup Act as the result of a release of a hazardous substance." Importantly, though, those claims would typically be equitable, not legal. Even a claim for cost recovery is in the nature of a claim for restitution, not money damages. If those equitable claims are excepted from section 7102(a.1), then, presumably, other equitable claims are not excepted. So, a claim for municipal cost recovery under the Solid Waste Management Act or a claim to abate a polluting condition under section 316 or 401 of the Clean Streams Law might fall within the apportionment rule, and might not be subject to any exception. It is not at all clear what an apportioned judgment for an injunction would even mean.

But clever lawyers will argue that section 7102(a.1)(3)(iv) does not say anything about claims under the Hazardous Sites Cleanup Act. That section only refers to "a release or threatened release" under HSCA. Arguably, section 7102(a.1)(3)(iv) permits a joint and several liability judgment against any defendant on a claim on any theory that arises from a release or a threatened release of a hazardous substance. Perhaps a conventional negligence claim or a statutory claim or a claim for damage arising from an abnormally dangerous activity would all fall outside the apportionment rule. Perhaps not.

Proponents of Act 17 argued that it would limit frivolous litigation. Its inherent ambiguity promises to generate a lot of litigation issues. That seems contrary to the stated intention.

One might ascribe that outcome to haste. Act 17 happened fairly quickly. On June 13, state Sen. Stewart Greenleaf, R-Montgomery, introduced Senate Bill 1131. He subsequently withdrew his sponsorship and voted against the final bill. Nevertheless, after a one-day trip through the judiciary committee, the bill was considered the required three times in the Senate and ultimately passed on June 21. The House took up the bill on June 21, and passed it on June 27. The governor signed it the next day.

On the other hand, Act 17 reprises a similar effort to require apportionment of liability adopted as Act 57 of 2002. In *DeWeese v. Weaver*, the Commonwealth Court declared the 2002 amendment unconstitutional because the General Assembly passed it as a rider to an unrelated statute concerning DNA testing, violating the single-subject rule. The Supreme Court affirmed without opinion. So while Act 17 is new, the statutory language has been around for a while.

The environmental bar has struggled for decades to allocate among jointly and severally liable defendants in any number of contexts, and cannot do so with certainty or efficiency. Standardless apportionment is not going to happen any more easily. Settlement in the face of uncertain law is not going to happen more readily. Act 17 is not going to reduce the number of issues over which to litigate. We shall see what interests it in fact advances.

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