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**Pennsylvania Bar Association**

**Testimony Before the House  
Judiciary Committee**

*Your Other Partner*  
**Joint and Several Liability**

**May 14, 2002**

Good afternoon. My name is Jay Silberblatt. I am the immediate past chair of the Civil Litigation Section of the Pennsylvania Bar Association and an attorney with Silberblatt Mermelstein in Pittsburgh. I am pleased and honored to provide testimony on behalf of the Pennsylvania Bar Association to this distinguished Committee of the House.

Before I begin my testimony, I wish to commend the efforts of this Committee, and in particular Chairman Gannon, in conducting this hearing on such an important matter and in endeavoring to understand the complicated legal principal known as joint and several liability.

Pursuant to the authority set forth in 42 Pa.C.S.A. §1728, the Supreme Court recently designated the Pennsylvania Bar Association as “the association that is most broadly representative of the members of the bar of this Commonwealth.” In light of this designation, the PBA has a broad responsibility when reviewing important matters such as the topic before us today. Moreover, the Pennsylvania Bar Association has a long and honored tradition of advocating on behalf of all citizens of the Commonwealth of Pennsylvania.

The Pennsylvania Bar Association has historically opposed the elimination of the joint and several liability doctrine. In 1999, a special, broad-based Task Force of the PBA engaged in a rigorous analysis of SB 5, tort reform legislation that included a proposal eliminating joint and several liability and recommended that the PBA oppose this legislation.

In 1996, the PBA opposed amendments that would have carved out an exception to joint and several liability as it applied exclusively to a particular profession.

In 1986, the Civil Litigation Section of the PBA opposed tort reform legislation that included a provision eliminating joint and several liability.

If we were to close our eyes to all of the flag waving and political posturing, and turn a deaf ear to all of the anecdotal evidence, the issue of joint and several liability boils down to a very simple question that involves a matter of fundamental fairness. The answer to this question has been obvious to the lawyers of the Pennsylvania Bar Association, whether they be plaintiff's lawyers, defense lawyers, tax lawyers, divorce lawyers, or government lawyers. The question is: In a situation where several defendants have combined to cause harm to a plaintiff, who should bear the risk that one of the defendants is unable to pay the compensation to the plaintiff that a jury has determined the plaintiff is entitled to receive? Should that risk be assumed by the defendant-wrongdoers or should that risk be borne by the plaintiff who has suffered harm at the hands of the defendants?

The doctrine of joint and several liability has centuries of sound tradition and legal precedent at its roots. The doctrine recognizes that the defendant-wrongdoer is in a better position to bear the risk than the injured plaintiff. Tort law in this Commonwealth is designed to make the innocent injured victim whole to the extent possible. At the same time our tort law will reduce the recovery of those plaintiffs whose conduct contributed to their own injuries. But joint and several liability assures that the party who is most deserving and most in need – the innocent and injured victim – has the opportunity for a full recovery. The policy simply places the burden of dividing up the monetary obligation made by a jury's verdict upon the wrongdoers. The doctrine of joint and several liability assures that a victim who has suffered as a result of the negligence of several people or entities will be fully and fairly compensated even when one or more of

those who have been adjudicated as wrongdoers are not able to pay their share of the damages that have been assessed by a jury.

The doctrine of joint and several liability must be understood in light of the Uniform Contribution Among Joint Tortfeasors Act. It would be inaccurate to argue that the doctrine of joint and several liability forces some wrongdoers to pay more to a victim than a jury has obligated them to pay. To make such an argument is to ignore the concept of contribution.

At common law, all persons who acted in concert to cause harm to someone else were held liable for the entire result. Therefore, a victim who was awarded \$100 by a jury against two defendants could collect the whole \$100 from only one of the defendants. If only one of the defendants paid the entire \$100, the plaintiff was made whole but one of the defendants walked away scott free. Such a result did not seem fair.

Gradually, the common law recognized the unfairness of this result. Pennsylvania was one of the first states to judicially permit the defendants to make claims against one another in the event one paid more than its proportionate share. Soon thereafter, Pennsylvania adopted the Uniform Contribution Among Joint Tortfeasors Act. Under our present statutory scheme, if a jury awards a plaintiff \$100 and determines that defendant #1 is 30% responsible and defendant #2 is 70% responsible, the plaintiff can recover \$30 from defendant #1 and \$70 from defendant #2. But what if defendant #2 simply refuses to pay? Or what if defendant #2 claims that is unable to pay its \$70? Since the courts cannot force defendant #2 to satisfy its obligation, the law has created a backup plan in the form of joint and several liability. Under this plan, the plaintiff can still recover the entire \$100 from either defendant or any combination of the two without regard to the jury's actual apportionment of percentages. But, under the Uniform

Contribution Among Joint Tortfeasors Act, if defendant #1 pays the entire \$100, defendant #1 can recover \$70 directly from defendant #2.

This scheme assures the victim the full measure of compensation that the jury has determined the victim is entitled to receive while, at the same time, allowing the defendant-wrongdoers to make any adjustments that need to be made as between them. The victim is not forced to chase one or more of the wrongdoers in an effort to collect that to which the jury has determined the victim is entitled. If there is to be any such chasing, our statutory scheme simply provides that it will be the wrongdoers who will have to chase one another.

The Pennsylvania Bar Association believes that the elimination of joint and several liability would unfairly shift the burden of recovering a jury's award from the wrongdoers to the injured victim. Moreover, if other responsible defendants do not have insurance or the assets to pay their proportionate share of the plaintiff's damages, then the plaintiff not only bears the often irreplaceable losses that arise from an injury but must also bear the financial burden of not receiving the full monetary compensation to which the plaintiff has been found entitled.

While the joint and several liability doctrine on occasion may result in some unfairness to a defendant-wrongdoer, it is the PBA's position that such a burden is most appropriately placed on the wrongdoer rather than the victim. At the same time, our present statutory scheme provides the wrongdoer with the opportunity and right to pursue indemnity or contribution from others who have also been adjudicated to be wrongdoers and responsible for the victim's injuries.

For the foregoing reasons, the Civil Litigation Section of the PBA recommended that the PBA Board of Governors oppose legislation currently pending before the Senate

that proposes to eliminate the doctrine of joint and several liability. The Board of Governors agreed and the resolution of our Section was presented to the PBA House of Delegates, the policy making body of our Association, on May 3, 2002. After debating this issue, the members of the House of Delegates voted to oppose legislation eliminating this doctrine.

The Pennsylvania Bar Association urges you to oppose any legislation that would eliminate the doctrine of joint and several liability and replace it with proportional liability.

The Pennsylvania Bar Association and I thank you for allowing me the opportunity to present testimony to this distinguished Committee. I would be happy to answer any questions you may have.