REMARKS TO

JUDICIARY COMMITTEE, HOUSE OF REPRESENTATIVES
COMMONWEALTH OF PENNSYLVANIA

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Clifford A. Rieders, President
Pennsylvania Trial Lawyers Association

Rieders, Travis, Humphrey, Harris,
Waters & Waffenschmidt
161 West Third Street
Williamsport, PA 17701
(570) 323-8711
(800) 326-9259
fax: (570) 567-1025
e-mail: crieders@riederstravis.com
www.riederstravis.com

Commonwealth of Pennsylvania
House of Representatives
Judiciary Committee
Chair Thomas Gannon

My name is Clifford Rieders, President of the Pennsylvania Trial Lawyers Association.

The subject is "joint and several liability."

As you have heard or will hear from the law professors, this doctrine has an ancient origin. There are those who say that joint and several liability goes back to the English common law in the year 1613.

It is important to speak from the point of view of the practitioner, and that is how I will address my remarks.

I practice law in the northern part of the Middle District of Pennsylvania. I am located in Williamsport, Pennsylvania. I am admitted in New York state, the District of Columbia, and Pennsylvania. Therefore, I have the distinct advantage of seeing cases handled and tried in rural areas, as well as the more metropolitan regions of the northeastern United States.

Joint and several liability assures that all parties to a transaction will be responsible not only for themselves, but also for one another.

Abolishing or weakening joint and several responsibility benefits no one except the wrongdoer, and takes needed funds away from the victim.

The existence of joint and several liability also makes it easier to settle cases, because parties understand that by associating themselves with other wrongdoers, they are liable in extreme circumstances, to paying an entire award or judgment.

The way cases are tried from a practical point of view is that jurors are given special verdict questions. The first question typically is whether

negligence has been proven against one or more wrongdoers. Only if the jury answers "yes" does the jury then go on and indicate whether that negligence was a substantial factor in causing harm. Only once a jury has found negligence and substantial factor in the case of two or more parties to a transaction who are joint tortfeasors does the finder of fact apportion the liability between the parties. Once that has occurred, the jury then fills in the amount of damages.

It is absolutely crucial to understand that joint and several liability does not kick in unless the following events occur:

(1) negligence has been found against two or more parties;

(2) there is a finding that the negligence was a substantial factor in causing harm as between two or more parties;

(3) there has been an apportionment of responsibility;

(4) there has been an award of damages;

(5) one or another party becomes unable to pay its percentage share.

If one or more parties pays more than its percentage share, they still have the remedy of contribution and sometimes contractual indemnity against the non-paying party.

If the party that did not pay its percentage share cannot do so because it is uninsured, underinsured or insolvent, then it is possible, in such rare and limited circumstances, for one or another party to pay more than their percentage share of responsibility as found by a jury.

While this is a rare occurrence, it does happen on occasion.

I have been asked on many occasions "why worry about the existence of the doctrine of joint and several liability if it is so difficult to occur and so rare that a party would pay more than its percentage share of responsibility"? In other words, if it does not happen very much, why worry about it?

The answer is simple. The purpose of the tort law is to effect behaviors. The purpose of the tort law is to make parties careful. The purpose of the tort law is to make sure that people deal with those who are responsible both in terms of their behavior and financially. Take away that incentive from parties to be careful by limiting their responsibility to an artificial percentage, and you will have greater likelihood of misadventures.

We learned a very important lesson with medical malpractice. We learned that medical malpractice premiums were driven by medical malpractice occurrences. We learned that Pennsylvania and the nation as a whole was faced with a catastrophe of medical errors. We learned that according to some, medical errors were the third leading cause of death in the United States. Finally, we came to understand that wrong-sided surgery was increasing rapidly because of the advent of managed care and HMO's.

We came to understand that the best way to reduce premiums for medical malpractice was to reduce the occurrences of medical malpractice.

How does this all relate to joint and several liability? The way it relates is that we must understand that as in physics, for every reaction there is an equal and opposite reaction. That is the basic law of physics, and is also a basic law of human behavior.

If we are going to reduce the incentive to be safe by artificially saying that no one would ever have to pay more than their percentage of liability regardless of the circumstances, then there are going to be more misadventures, more negligence, and less care. That would inevitably raise insurance costs and health care costs.

If you think this is a theoretical possibility, I would respectfully suggest that you examine the literature on the field.

Our entire tort system, going back as far as Exodus in the Bible, is built upon the assumption that people who are held financially responsible will be more careful. You might want to look, for example, at Why Lawsuits are Good for America, Discipline Democracy, Big Business and the Common Law by Carl T. Bogus, New York University Press. Another excellent summary is In Defense of Tort Law, by Thomas H. Koenig and Michael L. Rustad, New York University Press.

Why does eliminating joint and several liability or weakening it create more accidents? I was vice president of one of the nation's leading quality control engineering companies between 1982 and 1987. In my role as financial vice president, risk analysis was a very important aspect of our work. The founder of the company did not believe in liability insurance, but rather believed in safety. Although I lost many nights' sleep about it, the officers and directors of the company refused to secure liability insurance in connection with product defects. The company's behavior was solely dictated by safety and by the risk of loss. I can tell you that this company, which did quality control work for the nation's 500 top corporations with regard to calibration of high-tech machinery, very carefully weighed with whom it did business and under what circumstances.

If you say to a big company, which has the means, resources and assets, to most carefully guard its behavior, that it will never have to pay more than its apportioned share of liability, then it actually has the incentive not to perform much oversight in dealing with small contractors who may have direct relationships with the ultimate customer. However, if the major manufacturer knows that it could potentially be liable for 100% of the liability, it is going to make sure that the people with whom it does business are adequately insured, that they act with a great deal of safety, and that their subcontractors not create liability that could expose what is sometimes referred to as the "deep pocket."

I think it is extremely important that this committee take seriously the fact that behaviors are influenced by the tort law. Weakening the tort law to protect those in the best position to protect consumers has a downstream cost consequence. As indicated, that downstream cost consequence is higher transactional cost with regard to medical care and the like.

The importance of joint and several liability is demonstrated in a number of key areas:

1. *Auto cases*. Those of us who practice law know that every drunk driver who causes a terrible accident will blame his or her actions on someone else. That someone else may be a tire manufacturer, the auto manufacturer, the service station that inspected the brakes, or someone else. We also know that in society, many bars and establishments encourage their bartenders to

serve drinks, casting aside the rules against serving a visibly intoxicated person. I can tell you for a fact that one of the biggest incentives that bar owners and restaurants have for not serving visibly intoxicated persons is the risk that they could be wholly responsible for the damages their behavior may cause. Juries will typically put most of the negligence on the drunk driver, but that does not mean that the bar or restaurant is not responsible. That bar or restaurant still has to be found negligent for serving a visibly intoxicated person, there still has to be causation, and of course there has to be damages. We want bars and restaurants to be careful, and we want them to know they can be totally responsible for damages. A failure to provide for complete recovery to the plaintiff will mean that someone else has to pay, whether it is Department of Public Welfare, whether the health care provider will go uncompensated, or whether a lien will not be repaid. Do not assist drunk drivers by eliminating joint and several liability. There is a well known case handled by Attorney Joseph Quinn from Wilkes-Barre, where a drunk driver who had minimal coverage was responsible for the death of a state trooper. Discovery in the case proved that a well known hotel chain in Pennsylvania actually had a manual encouraging its bartenders to push drinks on those who seemed most willing and anxious to drink. Without joint and several liability, the family of that state trooper would have been left bereft, from a financial point of view. That would have been unfair.

2. *Phantom liability*. One of the most pernicious aspects of this Bill is that it creates phantom liability. What this means is that the jury can apportion liability to somebody who is not in the case or who is even immune. Under such circumstances, people can irresponsibly be present at trial who committed terrible acts of neglect, but try to blame 5 or 10% of it on someone else. There is nobody there to defend that position, since the blame is against an absent party. In that circumstance, should the jury find that there is 5 or 10% blame against someone else, that 5 or 10% comes off the plaintiff's recovery! Why should the plaintiff pay the price because he did not sue enough people or because the defendant did not bring in other people to sue? It is clear that phantom liability will cause the plaintiffs or the defendant to bring in additional defendants who have a more marginal responsibility. The accusation that joint and several liability makes liable people with marginal responsibility is not true.

However, the phantom liability created by the bills in both the House and the Senate would indeed "force" parties to bring in marginally responsible people. This will drive up insurance rates, defense costs, and litigation expenses. Phantom liability makes no sense.

3. *Business Torts*. Many business cases depend upon finding of negligence. Under the Uniform Commercial Code, the handling of check transactions frequently requires an apportionment of liability. The Uniform Commercial Code does statutorily enforce joint and several liability. Joint and several liability is absolutely crucial for the orderly function of our entire banking and financial system. I have represented a bank since I have been in the practice of law. The bank I represent is a plaintiff much more often than it is a defendant. We have an excellent litigation prevention program, and we are rarely sued. However, we frequently go after deadbeats. Let me give you one example. We had a case where we were receiving forged endorsements. The bookkeeper was forging checks of her boss. Naturally, the bookkeeper was a deadbeat and went bankrupt. We found out, however, that some of the money being stolen by the bookkeeper was being shared with the employer, who was trying to hide money from his wife. He was solvent. Thanks to joint and several liability, the bank was able to get back all of its money from these two parties who acted wrongfully. It is true that this was a fraud action, but it also depended upon the UCC definitions of negligence. We asserted a negligence action against the business owner and others in the corporation for negligently supervising the conduct of the bookkeeper. Whether the bank was negligent in not catching the forgery was also an issue in the case.

4. *Enron – Arthur Andersen*. Needless to say, the actions against Arthur Andersen will be based upon negligence. If joint and several liability is abolished, it is clear that the $89 million lost by the teacher pension plans will be picked up by the taxpayer. Pensions in Pennsylvania with regard to teachers are defined benefit plans, which means that if the benefit cannot be paid, the pension plans have the right to come back to the school districts. The school districts will overtax Pennsylvanians, many of whom are already screaming for property tax relief. This is real. This is a real problem and not a theoretical problem. To abolish joint and several liability will have a debilitating affect upon the responsibility of those who have

defrauded pensioners, school districts, and ultimately the taxpayers. As indicated, it is not only a matter of fraud, but also of neglectful conduct.

5. *Ford Firestone*. A public opinion poll was taken as to whether people would want to see Ford held fully and totally 100% responsible in the event that Firestone went out of business. The question was based upon indications of the fact that both entities had been negligent. Over 85% of the people said that Ford should be totally responsible, 100%, in the event that Firestone went out of business. The public understands the role of joint and several responsibility.

6. *Environmental matters*. None other than an assistant attorney general in the Reagan administration and head of the EPA wanted to preserve joint and several liability with regard to the Superfund Act, because they knew that without it there would be no way of cleaning up the environment when two or more people acted wrongfully. I have actually represented defendants in environmental cases, in particular, a noted scrap metal dealer in the Williamsport, Pennsylvania, area. Joint and several liability kept them in business! Had this particular company not been able to rely upon joint and several liability in asserting claims against a major national company, they would never have been able to pay the assessment against them for conditions of the waste site, and they would be out of business today, with the resultant loss of about 100 jobs. This is a direct saving of 100 jobs in North Central Pennsylvania, and it occurred because joint and several liability was kept in the environmental laws. This is a real saving and not a theoretical one.

7. *Products liability*. I had a case very recently where some people were driving along at about 25 miles per hour, minding their own business, when they were hit head-on by another driver. The front seat passenger was killed, and the driver was permanently disabled. The seat belt system failed in the crash. There is no doubt that without the seat belt system having failed, there would have been injuries, but because of the failure, the injuries were far enhanced. In Pennsylvania, joint and several liability is not needed because strict liability is not compared on an apportionment basis with negligence, in this case, negligence of the other driver.

However, under versions of the law being discussed, there would not be a comparison of negligence but rather a comparison of responsibility. That was discussed in Professor Frank Vandall's article dealing with the apportionment project of the American Law Institute. I might mention that I was on the Consultative Group of the American Law Institute, which considered apportionment of liability and ultimately could not arrive at any conclusion that there was an empirical reason to adopt any particular joint and several plan. Instead, five different alternatives were put forward, including current Pennsylvania law. I can tell you from attending the meetings and listening to the corporate counsel who spoke, together with a law professor, that there were no empirical data indicating that elimination, abrogation or dilution of joint and several liability would accomplish anything other than a sense of "feel good" for the Chamber of Commerce.

8. *Thurston v. Quigley*. Ellen Thurston went into Robert Packer Hospital to have a small tumor removed from her lung. During the surgery, Dr. Quigley put a hole in Mrs. Thurston's diaphragm. During the week to ten days that followed, Mrs. Thurston became very ill. Coffee-like grounds of substance were coming out of her chest tubes. There was absolutely no communication between the attending surgeon, the residents and the nurses. Although the nurses observed the terrible sequelae of the surgery, and wrote it down, the residents, under the supervision of the hospital, never discussed findings of the nurses with the doctor. The doctor never read the nurse's notes. Aside from the negligence of the doctor in not reading the chart and discussing the case with his residents and nurses, there was a total systemic breakdown in communication. As a result, Mrs. Thurston's stomach herniated through the diaphragm, pouring the stomach contents into her body cavity. This caused her to have one lung removed with a bronchial stump that has never healed. The acid that poured out of her stomach and the infection caused a permanent open wound in her back, which has to be cleaned twice a day. Mrs. Thurston is a living shell of a human being, with over $300,000 in medical bills and the prospect of facing years of uncertain surgery ahead. The jury apportioned 55% of the damages to Dr. Quigley who, with his own coverage from the CAT Fund, had total coverage of $1.2 million. The Chief Resident was found to be 30% responsible, who was insured also to a total of $1.2 million.

Robert Packer Hospital was found to be 15% responsible for its systemic failure. The total verdict was $16.8 million. The case settled for $6.2 million. Had it not been for joint and several liability, there would not have been a settlement, and clearly Mrs. Thurston would have received a fraction of what she was entitled to. Mrs. Thurston has specifically asked that reporters not call her. She wrote, on May 8, 2002:

> I appreciate all that you have done for me, but the strain of the case definitely took its toll on my health, which was already precarious. I can't add to the pressure now.
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> I hope that you understand my rationale. I just need to live the rest of my life in peace.

There are may other examples of how joint and several liability are important, such as cases involving women's protection from sex offenders, securities matters, and business torts.

Finally, I would like to tell you a personal story of joint and several liability. What is funny about this story is that after I told it, I heard almost the identical story from Jerry McHugh. I asked around and found that a number of people my age had very similar stories to tell. When I was a kid, I wanted to play golf, just like my Daddy. Unfortunately, we lived on a small corner acre lot. So I went up and got my Dad's clubs, golf balls and tee. I tried hitting the ball off the tee, but simply could not do it. My friend, Norman, told me "I'll show you how to do it." Norman took a swing, hit the ball squarely, and the ball sailed right through Mrs. Moore's window. Norman, of course, took off. When my father got home that night, he brought me into the den and told me that I would be cutting lawns the rest of the summer to pay for Mrs. Moore's window. I said: "That's not fair, Norman was the one who hit the ball." My father said: "Oh, it is fair. You should have known better. It was my golf club, our lawn, and it was our neighbor's window. Norman's father will take care of Norman. In the meantime, you will take care of the whole cost of the window." And so it was, that I cut lawns for the rest of the summer, paid the $25.00, and Norman never contributed a dime. That is joint and several liability. When

joking with Jerry McHugh about this recollection, he said that it is probably no mystery that so many trial lawyers had the same good upbringing.

As a footnote, my son was playing baseball with his friend in a crowded neighborhood last weekend. A crusty older gentleman saw the two kids before I did, and was concerned about them putting a window out. He screamed at them: "If you kids break a window, which ever one of you I catch is going to pay for it." It seems as though joint and several liability still exists when we want to tell our children how to behave.

I respectfully suggest that we should expect no less of people who commit acts of negligence than we expect from our own children. Those who engage in transactions with others that result in damages must remain fully and completely responsible for those damages or it is the victim who will wind up paying in the end. That is not right.