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HOUSE OF REPRESENTATIVES

JUDICIARY COMMITTEE

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TUESDAY, MARCH 29, 2011
10:00 A.M.

HEARING ON
HOUSE BILL 1 (SCHRODER)

BEFORE:

HONORABLE RONALD MARSICO, MAJORITY CHAIRMAN
HONORABLE THOMAS CALTAGIRONE, MINORITY CHAIRMAN
HONORABLE CURT SCHRODER, PRIME SPONSOR
HONORABLE MATTHEW BRADFORD
HONORABLE DOM COSTA
HONORABLE BRYAN CUTLER
HONORABLE SHERYL DELOZIER
HONORABLE EUGENE DePASQUALE
HONORABLE BRIAN ELLIS
HONORABLE KEITH GILLESPIE
HONORABLE GLEN R. GRELL
HONORABLE MARK KELLER
HONORABLE DEBERAH KULA

CONTINUED:

HONORABLE JOHN SABATINA
HONORABLE RICK SACCONI
HONORABLE JOSH SHAPIRO
HONORABLE TODD STEPHENS
HONORABLE MARCY TOEPEL
HONORABLE RONALD WATERS

ALSO PRESENT:

RYAN BOOP, EXECUTIVE DIRECTOR (R)
DAVID TYLER, EXECUTIVE DIRECTOR (D)

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CHAIRMAN MARSICO: Good morning, everyone. Thanks for being here. We have a really good turnout, as you can see. We need to get some more copies of the testimony for you, so we appreciate your waiting patiently for us to get this hearing started.

I'm Representative Ron Marsico, I'm the Republican Chair of the House Judiciary Committee. I have to make an announcement that we are being videotaped, you can see the red lights on the camera, just so everyone knows that. I'm going to ask each member of the Committee to introduce themselves, let's start over here to my far left.

REPRESENTATIVE GILLESPIE: Thank you, Mr. Chairman. Keith Gillespie, 47th District, York County.

REPRESENTATIVE ELLIS: Brian Ellis, 11th District, Butler County.

REPRESENTATIVE GRELL: I'm not on the far left, but Glen Grell, 87th District, Cumberland County.

REPRESENTATIVE KELLER: Mark Keller, the 86th District, Perry and Franklin Counties.

MR. BOOP: I'm Ryan Boop, the Executive Director for the Judiciary Committee.

REPRESENTATIVE CALTAGIRONE: Tom Caltagirone, 127th District, Berks County.

MR. TYLER: David Tyler, Executive Director for the Committee.

REPRESENTATIVE DePASQUALE: Eugene DePasquale, 95th House District.

REPRESENTATIVE SABATINA: John Sabatina, 174th District, Philadelphia County.

REPRESENTATIVE SHAPIRO: Josh Shapiro, 153rd District, from Montgomery County.

REPRESENTATIVE TOEPEL: Marcy Toepel, 147th District, Montgomery County.

REPRESENTATIVE CUTLER: Hi, good morning. Bryan Cutler, 100th District,

southern Lancaster County.

REPRESENTATIVE DELOZIER: Sheryl Delozier, 88th District, Cumberland County.

REPRESENTATIVE STEPHENS: Todd Stephens, 151st District, Montgomery County.

REPRESENTATIVE COSTA: Dom Costa, 21st District, Allegheny County.

REPRESENTATIVE SACCONI: Rick Sacconi, 39th District, Allegheny and Washington Counties.

CHAIRMAN MARSICO: Okay, we have everyone.

I want to say that, first of all, thanks for being here. Today we are holding a public hearing on House Bill 1, known as the Fair Share Act. Prime sponsor Representative Curt Schroder is here with us today, and I'm going to ask him to give a few comments, before I'm going to make one other statement.

As many people know, the Fair Share Act and the language contained in House Bill 1 is not new to the General Assembly. In fact, we have had, since 2006, the language has been before many of the members, but we have a number of new members on the Committee and in the House, and the staff and I thought it would be best to, along with Caltagirone, to have an informational meeting like we're having today. So that you understand why we're having this meeting, it's for the benefit of us older members and also the new members, to refresh the language and the intent of the bill. I think that, I hope that we have a good conversation, discussion about the language of the bill, the intent.

I'll turn it over to Chairman Caltagirone for a few comments.

CHAIRMAN CALTAGIRONE: Thank you, Chairman Marsico.

As with anything that we do within the General Assembly and having a few years of experience, it's always good to hear from both sides on any issue. I know this is an extremely

controversial issue. One of the things, I look through this audience and I watch Terry Madonna religiously on Sundays and I know that some of you appear there quite regularly with Terry on that program and this is one of the issues that I know you have discussed with great intensity. I look forward to the testimony today, and let's get on with the show.

Thank you, Mr. Chairman.

CHAIRMAN MARSICO: Thank you, Mr. Chairman.

As I mentioned, Chairman Schroder is here, the prime sponsor of House Bill 1. Chairman Schroder, if you would like to begin go right ahead.

REPRESENTATIVE SCHRODER: Thank you, Chairman Marsico, Chairman Caltagirone, and members of the House Judiciary Committee. Good morning.

As prime sponsor of House Bill 1, also known as the Fair Share Act, I am pleased to be with you today to begin the process of restoring the Fair Share Act to our system of legal justice here in Pennsylvania. Now, why do I say restore? Well, Chairman Marsico eluded to those reasons. But for those not around as long as Chairman Marsico, Chairman Caltagirone and myself, there are a few things I think we should know. That is that the General Assembly has passed this same measure not once, but actually twice, and sent it to Governors.

In 2002 then Governor Schweiker signed the Fair Share Act into law. It was later struck down by the Supreme Court based upon the way it was passed – but not the substance or the merits in the law itself. A few years later the same bill, same piece of legislation was sent to Governor Rendell, but Governor Rendell vetoed it.

Now, House Bill 1, the Fair Share Act, will restore an element of fairness to our system of civil justice that has been missing for a long time. No longer will a defendant be responsible for a disproportionate share of its liability in a civil law suit. Right now, if a defendant is found

to be, let's say 30% at fault, that same defendant can be held responsible for paying 100% of the verdict or the damages awarded in that trial. In my mind, this violates principles of fundamental fairness.

Under the Fair Share Act, proportional liability will be the rule. Defendants will only be responsible for the entire verdict if their share of fault, as determined by the jury, is 60% or more. If it's less than 60% then they will only pay the proportion of fault that was assigned to them.

Now, there are also several well-crafted and well thought out exceptions in the bill that would continue, joint and several liability, in certain situations. Today you will hear from job creators, hospitals, and others, about the damaging impact of the joint and several liability rule on Pennsylvania's economy and our health-care system. In today's economic climate, we cannot afford to cling to ancient policies that cost jobs and inhibit job creation. All they are asking for is that all parties to a lawsuit be treated fairly, and on the same playing field. The Fair Share Act will restore this balance.

Finally, it must be pointed out that Pennsylvania is one of only nine States that has not reformed this ancient and outmoded doctrine dating back to English Common Law and predating the founding of this country. Let's get with the times and pass this legislation.

Thank you, Mr. Chairman.

CHAIRMAN MARSICO: Thank you, Mr. Chairman. You are certainly welcome to join the Committee as we proceed with the testimony from each panel.

REPRESENTATIVE SCHRODER: Thank you.

CHAIRMAN MARSICO: I have divided the speakers into three panels. Each panel will be given 10-minutes for testimony divided any way that the speakers would like. Following the

testimony we will allow for 15-minutes of questions. Given the time constraints we are under, we would like to have each panel to have a total of 25-minutes in length.

I want to ask that each member of the Committee that would like to ask questions can do so and at least one question, if we have remaining time we will go to a second round of questions.

The first panel will be, if you could come up to the table, Frank Trembulak who is the Executive Vice President and Chief Operating Officer from the Geisinger Health System and Dr. Stuart Shapiro from the Pennsylvania Health Care Association.

Mr. Trembulak, you are up first, you may begin.

VICE PRESIDENT TREMBULAK: Thank you very much.

Chairman Marsico and members of the Committee, as noted, my name is Frank Trembulak, I'm the Executive Vice President of the Geisinger Health System. Geisinger is an integrated health service organization dedicated to health, research, education, and community service serving about 2.6 million people in north central/north eastern Pennsylvania covering over 40 Counties.

I am also a past Chairman of the Hospital & Health system Association of Pennsylvania, and presently the Chairman of the Hospital Association's Medical Liability Task Force.

HAP, as many of you know, represents and advocates on behalf of nearly 250 Commonwealth hospitals, acute care and specialty facilities, and also the patients and citizens in the various communities in which the hospitals reside.

We appreciate the opportunity and the invitation to comment on views of medical liability reform, especially joint and several liability in House Bill 1.

Pennsylvania is consistently identified as having one of the worst legal climates in the

nation, and our physicians and hospitals, as a result face some of the highest medical liability costs in the nation. These high legal costs translate into higher health benefit costs and other costs that are borne by the citizens of the Commonwealth, employers, health care providers, and governments that really stunt the Commonwealth's economic growth, job creation, and access to medical care. An important legal reform adopted in most other States, as you heard earlier, is joint and several liability rule reform.

Pennsylvania follows the rule of joint and several liability, or the "deep pocket" rule, which makes each at fault defendant in a civil liability case responsible for the entire amount of the plaintiff's damages regardless of the defendants' relative degrees of fault. For example, if a plaintiff sues three defendants, two of who are found on a combined basis 95% responsible for the plaintiff's injuries, but are bankrupt, the plaintiff may recover 100% of the damages from the solvent defendant who might only have been liable for 5%.

The effect of joint and several liability is to convert lawsuits into searches for financially viable defendants. In many cases, causes defendants to settle out of court for fear of being found fully liable or responsible for substantial judgments.

House Bill 1, as Representative Schroder indicated, includes the same language that the General Assembly passed twice before. It eliminates joint and several liability in the recovery of all damages, making damage awards proportional to responsibility for the injury or loss, but has exceptions in the case where the defendant is found liable for intentional fraud or tort; automobile drunk driving; and also more than 60% liable for injury or loss.

The Hospital and Health System Association throughout the Commonwealth, all of its members support House Bill 1. On behalf of HAP, we look forward to working with the General Assembly to enact meaningful legal reform that will inject fairness, common sense, and personal

responsibility into our legal system.

Thank you.

PRESIDENT SHAPIRO: My name is Stuart Shapiro, and I am President and CEO of the Pennsylvania Health Care Association and the Center for Assisted Living Management.

PHCA/CALM is a Statewide advocacy organization for the Commonwealth's elderly and disabled, and their providers of care; nursing homes, assisted living, personal care, some hospices, some home health care agencies, and some home care agencies. Our mission is to ensure that Pennsylvanian's receive quality care in the most appropriate setting as they age.

I'm not going to read my testimony, but I'll be glad to hit on a couple of key points and I'll be happy to answer any questions.

To even the casual observer, it is clear that Pennsylvania's legal climate is structured in such a way that we invite predatory law firms to come to Pennsylvania to troll for business. We've all seen the billboards, we've all seen the newspapers, we've seen the TV commercials. Sometimes they target insurance companies, sometimes health care providers, sometimes other kinds of businesses. These law firms aren't coming to Pennsylvania because we have subpar insurance companies or health care providers or businesses. We have some of the best in the country. They come here because they believe they can get rich quick. While these law firms clearly have a right to advertise, they and their actions become the poster child, or in our case today, the poster board for some legal reform.

If you look to my left, I'd like to share with the Committee what this law firm does here in Pennsylvania. These ads are from a Florida based law firm that has launched an ugly campaign against Pennsylvania's nursing homes. This is the same law firm that has made millions of dollars suing nursing homes, hospitals, and other providers in other States. They

historically buy full-page advertisements in newspapers, saying that, "if your loved one has been a resident at such-and-such a facility, call us." This poster just shows, and think there are 11 of them or 10 of them up there, a sampling of some of the misleading ads that have been published in Pennsylvania newspapers across the Commonwealth. You can find similar ads if you pick up a newspaper in West Virginia, in Kentucky, and just last week in Arizona.

Notice, they don't say, "If your loved was harmed in a nursing home, call us." They simply say that if your loved one has been a resident in a nursing home, call us. They cite deficiencies in these ads that date back years, long resolved, and of course, they don't tell you that in the ad. This isn't about a law firm getting its day in court. In court, a jury would see the quality of the nursing home, they'd see that the qualities of nursing homes in Pennsylvania are above average, and they continue to improve.

This is about making a decision that is cheaper and less risky for a nursing home to settle a case, than to spend money to fight it in court, even when there's no merit. In other words, this isn't about trial lawyers seeking their day in court. This isn't about seeking justice, this is only about getting rich. They do this by preying on the fears of families who are already feeling guilty that their loved ones are in nursing homes. These nursing homes roll the dice with cases, following the same pleadings over, and over, and over, again, changing little other than the cover sheet.

These same law firms launched an identical campaign against nursing homes in Florida about 10-years ago. They filed lawsuit after lawsuit after lawsuit, and drove insurance companies and providers out of the State. It totally disrupted the provider market and the insurance market. Access became a problem.

Finally, the legislature responded with legal reform. Today, the insurance markets have

stabilized, the elderly now have access to quality providers again who have returned to the State.

It is now time to enact similar laws in Pennsylvania.

We support broad based legal reform that would send these out-of-State lawyers packing their bags. We support replacing joint and several with the rule of proportional liability. The repeal of joint and several should not in any way be the end of lawsuit abuse reform in the Commonwealth.

First, apology legislation, we thank the Chairman of this Committee and many others on this Committee for their leadership to have this passed by the House recently, and we hope the Senate will take action soon. We also support extending the punitive damages limits that are in the Mcare Act currently only for physicians to all health care providers. And while punitive damages in Pennsylvania are very infrequent, they are routinely asked for in today's lawsuits. The difficulty in predicting whether a jury will award crazy punitive damages has so distorted the discussion that might take place about settlement that we really need limits on punitive damages. We also support amending the Certificate of Merit Law so that the following of a certificate would be a condition along with when you assert a liability claim. Right now current law provides for 60-days. Finally, an issue critical to nursing homes is the hostile use of Department of Health's annual survey in the courts. These surveys often have absolutely nothing to do with the patient or the resident who the lawsuit is about. Judges sometimes let these unrelated surveys in. Ohio has limited them, and we think similar things should happen in Pennsylvania.

In conclusion, it is time for Pennsylvania to pass broad based legal reform that not only would result in a fair legal system and not only would generate savings, not only would generate jobs, but would once again allow doctors and nurses and hospitals and nursing homes to spend

their time caring for people instead of giving depositions and fishing expeditions by trial lawyers.

I hope my testimony has been helpful, and I'll be delighted to also answer any questions.

Thank you.

CHAIRMAN MARSICO: Well, thank you both.

I want to acknowledge the presence of Representative Kula.

Are there any questions for the panel from the Committee? Representative DePasquale.

REPRESENTATIVE DePASQUALE: Thank you, Mr. Chairman.

I have a question, one each for each of the panel, if that's okay.

Mr. Trembulak, we're all concerned about the cost of health care. I think that's obviously been a major national issue, not just in Pennsylvania, for the past couple of decades. Texas has instituted what many believe to be some of the most aggressive tort reform actions in the country, yet many of their counties have actually seen increases in the cost of health care as opposed to reductions. Meanwhile, studies have shown that comprehensive care, such as what happens at the Mayo Clinic and at the Cleveland Clinic, actually help hold down costs and deliver better quality care, and yet the Governor has proposed cutting assistance in the State budget to the Hershey Medical Center, which would be an example of something that provides that type of comprehensive soup to nuts care that can actually hold down costs.

Shouldn't our focus be more on trying to replicate the Cleveland Clinic and the Mayo Clinic as opposed to replicating Texas, which is actually seeing an increase in costs?

VICE PRESIDENT TREMBULAK: I would suggest it's really on both. Clearly, medical liability costs add to the overall cost of health care, where there are direct premiums paid, settlements paid, or defensive medicine, which drives up the utilization of care. So it's a major

contributor. In addition, as many of you may know, many of the private insurance companies left the Pennsylvania market and now to substitute for that, hospitals and other organizations, groups of physicians, had to come together to create pooled insurance views, which again, add costs because all they're doing is sharing liability. So, it is clearly a major driver of costs and medical care and access to care because we can't recruit physicians or keep residents that are graduating from Hershey and other places in the Commonwealth. Clearly, the aspect of integrated care is a focus of even a national perspective under the rubric of accountable care organizations. The aspects of that, I think, will be positive once implemented, but that is a journey that is long in coming, but I think it's a journey that's well worth taking. I think the liability issue has been with us historically and it needs to be addressed.

REPRESENTATIVE DePASQUALE: I understand that, but how come it didn't work in Texas to reduce costs but we should expect it to work in Pennsylvania? That is my issue, where the Cleveland Clinic and the Mayo Clinic models we have seen, granted, that is not a path that just happens overnight, but that is a path that we see directly result in better care and lower costs, where in Texas we did not see lower costs.

VICE PRESIDENT TREMBULAK: I can't speak to the particulars in Texas, as to their care delivery models, but they have organizations like Scott & White, which is very similar to Cleveland Clinic. Geisinger is modeled the same as those organizations.

REPRESENTATIVE DePASQUALE: And that is why I'm concerned about the costs of Geisinger as proposed in the budget.

VICE PRESIDENT TREMBULAK: And our experience would dictate that we have a lower medical liability cost on average, but the ability to recruit physicians adds to our cost, and in many communities we have seen the closure of medical delivery services, like obstetric

services, where we are now a hub and for patients up to 50 – 100 miles away because there is no obstetric care.

REPRESENTATIVE DePASQUALE: And one of the things to follow-up on that, Representative Shapiro has a great bill that would actually, for medical students that stay in Pennsylvania we would have a loan forgiveness program, which I think would be a great tool to help combat that. I'm sorry, I just wanted to make sure that that legislation got the appropriate notice.

VICE PRESIDENT TREMBULAK: But I think that type of aspect is very beneficial, but again, I think residents coming out of training see the insurmountable, in many cases, specialty insurance costs that they may have to incur and therefore leave the Commonwealth.

REPRESENTATIVE DePASQUALE: Thank you for those answers.

Dr. Shapiro, thank you, we have worked together on several bills in the past, so I appreciate your testimony. I just want to talk about the Florida issue, for example. Look, I'm not going to defend how some of these law firms go after ads, if we're going to sit here, there are a lot of ads I disagree with, and quite frankly I don't buy their products. Some of them I do if I like the product anyway. But, specifically in Florida, that's being held up as a model that something that the legislature addressed the issue. However, their unemployment rate in the State is about 4 percentage points higher than Pennsylvania right now. So, if I'm to take the argument that the Florida legal reforms will lead to an economic boom in Pennsylvania, yet our unemployment rate is significantly lower than Florida's, I find it hard to make the connection. Same thing, South Carolina gets held up as sort of this model State government, yet their unemployment rate hovers at 13%. And not that anyone should find Pennsylvania's unemployment rate acceptable, but I just find it hard to draw the conclusion that if we do what Florida did we'll have an economic boom

when they're in an economic collapse.

PRESIDENT SHAPIRO: Let me address that very specifically. I can show you data, and I'll get it to you this afternoon if you like, that shows that the minute tort reform was enacted in Florida insurance companies came back to the State, and there were jobs, I can show you that nursing homes came back to the State and access went up. I can show you that the per bed liability cost dropped, so they could pay employees more money because they were spending so much money on defending lawsuits, most of them that went away, that it drove up their cost of liability reform, that they therefore couldn't give people appropriate wages. While I don't want to talk about the Florida economy because I think that is impart driven by the housing sectors, I can talk specifically about tort reform. And there is unequivocal data that the day after tort reform was enacted, health care costs came down, and we can show you the same data for tort related costs in Texas. You cite some very important information, but I don't think that they are directly on point here.

REPRESENTATIVE DePASQUALE: The reason I bring it up is part of the argument is that if you do this, it leads to an economic boom. I'm just looking at States that have done this, and they're in a worse economic shape then we are in.

PRESIDENT SHAPIRO: But I can tell you, it reduced health care costs related to tort. And that is the critical issue. If you segregate—

REPRESENTATIVE DePASQUALE: But you need the job creation, though.

PRESIDENT SHAPIRO: Oh, it does.

REPRESENTATIVE DePASQUALE: Then why is Florida four to five percentage points higher than us in unemployment?

PRESIDENT SHAPIRO: Because we're not talking about non-health care in my case. I'm

talking purely about health care.

REPRESENTATIVE DePASQUALE: I understand what you're saying, but, and I don't want to dispute that. We can go into that in a minute. But it doesn't lead to a Statewide economic boom.

CHAIRMAN MARSICO: We can move on, if you can provide that information to us we certainly appreciate it, to the entire Committee.

PRESIDENT SHAPIRO: My pleasure.

CHAIRMAN MARSICO: Any other questions? I believe Representative Grell has questions.

REPRESENTATIVE GRELL: Thank you, Mr. Chairman.

A question for Dr. Shapiro. During your testimony, I believe you mentioned that punitive damages, or the prospect of punitive damages, affect the negotiating posture of parties in these kinds of cases. Could you explain for us how changing the law in joint and several liability would affect this?

PRESIDENT SHAPIRO: The joint and several liability itself won't affect the punitive damages piece. What I am suggesting is that there is, that in addition to joint and several, in addition to passing House Bill 1, that we also need to do other forms of law suit abuse reform, and one of them would be to expand the limits on punitive damages from just physicians under the Mcare Act to also include hospitals, nursing homes, and others.

REPRESENTATIVE GRELL: Okay. Thank you.

CHAIRMAN MARSICO: Representative Sabatina.

REPRESENTATIVE SABATINA: Thank you, Chairman.

Again, my question is for Dr. Shapiro. Doctor, I, like my last two preceding questions,

just fail to see a causal connection between this bill, this specific bill, House Bill 1, where we are talking about joint and several liability, and although those ads are distasteful, I'll agree with you. I often tell people that ask me, can I be sued for this? I say that anybody can be sued for anything at any time. I just don't understand how joint and several liability will help you in the health care industry as a President of an older age facility.

PRESIDENT SHAPIRO: Let me answer that very specifically, and I'm sure my associate also has an answer. We have a legal climate where lawyers are going after deep pockets. If you have the current status of joint and several without proportional liability, they can find a hospital or a nursing home 10% liable and a bunch of other plaintiffs very liable to the 60 or the 40 or whatever the proportional liability, but the nursing home or the hospital is there, has much deeper pockets, and then under the current system they go right after it. It's all about— Trial lawyers in general, and some of them are very good guys, but they generally go after deep pockets. And that is what the passing of House Bill 1 will prevent and will change the entire nature of the debate. That is why we're encouraging you guys to pass Representative Schroder's bill.

VICE PRESIDENT TREMBULAK: I would say that we see experience where we are drawn into cases only because I'll say, we touched the patient and no liability to the injury to the event, and yet we are touched for two reasons. One is to move venue, because sometimes we have practices in counties and if the other is really a non-health care provider they'll move the venue to that. The other aspect, again, is deep pockets. If we can have any attribution of any liability we're going to stand to be 100% accountable for the award, if the other organization can't step up. So we see that in our market, and we see it both dealing with other health care providers, because we are a large referral center. A lot of hospitals go bare or have minimal

coverage, so we wind up picking up the balance of an award and so forth. So it clearly will address that issue of shopping.

REPRESENTATIVE SABATINA: Thank you, gentlemen, I appreciate your answers. I just, it just sounds to me like maybe lawyers are not your best friends at the current situation.

Thank you.

CHAIRMAN MARSICO: Representative Bradford.

REPRESENTATIVE BRADFORD: Thank you, Chairman. I apologize, I showed up a little late today so maybe you covered this. One of the things I've heard so far is a lot of talk about lawyers and de minimis negligent codefendants. One of the things that I think the conversation misses a lot is talk about the patients and the victims who will not be made whole if joint and several was to be abandoned in Pennsylvania.

I guess one of the concerns that I always have, and maybe it's just a simple issue of fairness since it's of the Fair Share Act is, how do we propose that victims be made whole? Really, we're just putting the burden on the victim to pursue a defendant which may be possible to collect against. I fail to see how abandoning joint and several makes victims whole. Can you tell me how you propose victims are made whole?

VICE PRESIDENT TREMBULAK: Well, I would suggest again, we have a journey here, and in health care there were some medical liability relief provided previously. I mentioned venue as an example. Well, in health care venue now was addressed. I think this is a major step in addressing the inequity where we have innocent or de minimis participants in an injury. Clearly there is the aspect of fairness to someone who is legitimately injured, and I think that has to be something discussed beyond, as another step to saying, okay, let's fix the Fair Share Act, create that equity, but we also need a broader policy and how are we going to address these

issues? There are conversations around, are there alternative dispute resolution mechanisms that would provide objectivity in assessing an injury and creating fair value and assessing that value appropriately. The issue then, is how do you fund that economic award that is given in that process. I think it is something that has to be discussed beyond taking one inequity and replacing it with another inequity.

REPRESENTATIVE BRADFORD: Okay, so you would concede that all we're doing here is shifting the inequity from a negligent codefendant to an innocent victim?

VICE PRESIDENT TREMBULAK: No, no, no. I think that it is broader because I think the issue is a lot larger. First off, the aspect of how many of these suits are developed is totally, in my view, inappropriate because we have this opportunity to escalate the cost and escalate the process and dump that to, again, some party that has minimal responsibility. I think the aspect of saying if there is a true issue dealing with an injured party, how do we then look at policy to deal with the true injured party and not just assess it to another innocent party. It doesn't make any sense.

REPRESENTATIVE BRADFORD: Doesn't the Commonwealth, though, typically become the backstop in that case? If what we're going to do is leave, and I think what you're saying is that we've got to come up with a way, even if you were to succeed in getting the Commonwealth to abandon doing joint and several that you would need some third party to kind of insure that victims are compensated. Isn't DPW (Department of Public Welfare) that third party?

VICE PRESIDENT TREMBULAK: No, I would suggest that is not the case. If you look at all the States who have passed the joint and several liability reform, none of them have seen an escalation due to that passage that have escalated their medical assistance or their process.

CHAIRMAN MARSICO: If I could just interrupt there. We are under time constraints and you missed the initial ground rules for the questionings. If we have time we'll follow back to you, Representative. Okay.

Any other questions?

Representative Shapiro.

REPRESENTATIVE SHAPIRO: Thank you, Mr. Chairman. I'll fire these off real quick. First off, at Geisinger, can you just tell me what has happened over the last 3-years, 5-years as it relates to reimbursements for medical procedures from insurance companies to Geisinger? Gone up, gone down, stayed the same?

VICE PRESIDENT TREMBULAK: Generally they have stayed the same, or have gone down on an average basis.

REPRESENTATIVE SHAPIRO: Gone down.

VICE PRESIDENT TREMBULAK: Yes.

REPRESENTATIVE SHAPIRO: Okay.

Number two, what is the overall cost savings that you project as a result of this reform bill that Representative Schroder has put forth, assuming that were to become law, what do you see Geisinger saving as a result of it?

VICE PRESIDENT TREMBULAK: Well, generally our medical liability costs run around the \$30-35 million a year, I would expect anywhere from a 15-20% reduction.

REPRESENTATIVE SHAPIRO: Just as a result of—

VICE PRESIDENT TREMBULAK: Of the Fair Share Act.

REPRESENTATIVE SHAPIRO: —of this.

Number three, as it relates to the physicians that work at Geisinger, they are all hospital

owned, correct? Meaning that they are all within the hospital system, there is no independent physicians that you are referring to when you talk about the Geisinger Health Systems, is that correct?

VICE PRESIDENT TREMBULAK: When we refer to ours, it is really our employed physicians in our related clinic.

REPRESENTATIVE SHAPIRO: Your employed physicians. So they are all part of the Geisinger system.

VICE PRESIDENT TREMBULAK: Right. We don't provide coverage to non-Geisinger physicians. We interact with them, we see referrals and we practice in about 11-15 other hospitals, so we have interactions with others that have other coverage's.

REPRESENTATIVE SHAPIRO: So the cost saving you project is related solely to the Geisinger System, not at all to independent physicians?

VICE PRESIDENT TREMBULAK: Right. It's the type of experiences I related where we get a referral, there is a suit on, I'll say the sending end, and we get pulled into that suit because we touched the patient.

REPRESENTATIVE SHAPIRO: Okay, and that 15% or so savings that you cite – was it 15% you cited in terms of the cost savings?

VICE PRESIDENT TREMBULAK: Yes.

REPRESENTATIVE SHAPIRO: Okay. Do you have some documentation, some back-up that you can share with me or with the Chairman for this Committee that can further elaborate on that number?

VICE PRESIDENT TREMBULAK: Yeah, we'll pull some information together and we'll send it in.

REPRESENTATIVE SHAPIRO: But I assume that is based on some analysis that you all have done, correct?

VICE PRESIDENT TREMBULAK: Yes, looking at the nature of the cases that we get involved in and the aspect that is really attributable to this type of being drawn into a case that we're not a primary liability for.

REPRESENTATIVE SHAPIRO: So that 15% savings is assuming you have a several liability situation, ergo Geisinger would no longer be a party to that suit, whereas under the current law today they would be a party to the suit?

VICE PRESIDENT TREMBULAK: Well, we might be a party to the suit but we would only have proportional liability, not—

REPRESENTATIVE SHAPIRO: Excuse me, correct, that is what I meant.

So that is where you come up with that figure?

VICE PRESIDENT TREMBULAK: Yes.

REPRESENTATIVE SHAPIRO: Just a final question, the question that Representative Bradford was asking before. Would you favor having some sort of a victims compensation fund established and funded with either tax dollars, hospital assessments, physician assessments, some form of money that there is a pot of money that could go to the victims were under a several liability situation they would not be able to recover the full amount that would be owed to them?

VICE PRESIDENT TREMBULAK: I think that is one alternative, but I would like to study other mechanisms to do that and look at some of these other States who have passed joint and several liability to see what their experience demonstrates.

REPRESENTATIVE SHAPIRO: Doctor Shapiro, do you have an opinion on that?

PRESIDENT SHAPIRO: I think Pennsylvania, as the Chairman pointed out, is one of

only two handfuls of States that still hasn't yet enacted joint and several proportional liability reform. I think you'd need to look at some of those States before you jump to any conclusions.

REPRESENTATIVE SHAPIRO: I'm not jumping to conclusions, I'm just asking you a pretty simple question. Do you think that in the instance where under several liability, which is what you are advocating for, for those under the 60% threshold – those who don't fall under the exceptions, I should say – there is going to be a situation where a plaintiff is not going to be able to recover the full amount that has been awarded to her. And my question to you is for that delta, do you favor having a victims compensation fund to make up the difference?

PRESIDENT SHAPIRO: I think that is something that needs to be looked at, but I don't at this point have a position on that.

REPRESENTATIVE SHAPIRO: Thank you.

Thank you, Mr. Chairman.

CHAIRMAN MARSICO: We have time for one more question, Representative Cutler.

REPRESENTATIVE CUTLER: Thank you, Mr. Chairman.

Thank you for your testimony. As a prior health care worker that was caught up in one of these suits, I can certainly understand the fear that comes with it with being named. I certainly didn't have the deep pockets, but I was on the suit nonetheless. I have a question, because I believe Dr. Shapiro, you eluded to the fact that sometimes the negotiating position you are in as a possible defendant puts you in an awkward position, because even though you are only 10% liable, you could potentially be liable for the entire payout should it go to trial. My question is, do either of you or inside your own organizations have any statistics on the number of cases that settle versus the ones that go to trial and then the comparative payouts? Because I recognize the economic reality in that sometimes it is unfortunately cheaper just to settle and get the issue off

the table. I was wondering if you had any data or could expand on that issue.

PRESIDENT SHAPIRO: I don't have that data, specifically at hand, but we can get that for you or at least some rough estimates. I can tell you that right now it's cost about \$2.58 of every day in a nursing home for settling lawsuits, defending lawsuits, preparing for lawsuits, and buying insurance. That's higher than in other States and that number drops down considerably and has consistently dropped down once there is some meaningful lawsuit abuse reform, and that data comes from AON, it's not our own data. But I can try to get you an answer to your question.

VICE PRESIDENT TREMBULAK: And I can do similarly. We have some of that, but we'll have to see what is joint and several related versus not.

REPRESENTATIVE CUTLER: That would be very helpful, thank you.

Additionally, and the \$2.58, if you wouldn't mind also adding historically how that has changed over time—

PRESIDENT SHAPIRO: I can do that.

REPRESENTATIVE CUTLER: —that would also be very helpful to me as we analyze it. Thank you.

CHAIRMAN MARSICO: I look forward to your information you are going to provide us, and thank you for your insight and your testimony.

VICE PRESIDENT TREMBULAK: Thank you.

PRESIDENT SHAPIRO: Thank you.

CHAIRMAN MARSICO: Moving on to our second panel, our second panel will be Attorney Scott Cooper, Vice President of the Pennsylvania Association for Justice. I believe originally you were going to have an associate with you who was unable to attend, but we'll give you the full 10-minutes.

VICE PRESIDENT COOPER: Sure.

CHAIRMAN MARSICO: You may begin.

VICE PRESIDENT COOPER: Thanks, Mr. Chairman.

I don't think I'll need the full 10-minutes.

Thank you Chairman Marsico, Chairman Caltagirone and the Committee. My name is Scott Cooper, I am an attorney with the local Harrisburg law firm of Schmidt Kramer where I mainly practice car accident cases, and I handle all plaintiffs personal injury cases. I am also currently the Vice President of the Pennsylvania Association for Justice.

I think I bring a different view, obviously, than the preceding people who speak and the people who will speak after in that I bring the perspective of the actual victim, both past, present, and future, as to how people are injured in these types of cases.

As a preliminary matter, I think it is important to keep in mind, as some of the previous people who have asked questions have understood, these cases generally only involve cases where you have people who have been catastrophically injured. These are not the everyday run of the mill rear-end car accident soft tissue cases where someone goes back to work in 6-months. These are people who, as Representative Shapiro pointed out, may need, if this bill passes, a victim compensation fund to pay for economic damages that they are not going to recover. I think to not admit and recognize that people are not going to be made whole for damages that they have been awarded by juries is not right. The one thing, whether I agree with it or disagree with it, obviously I disagree, with what Senator Corman said yesterday at the press conference which I happened to read about. He said, people will not be made whole. This is really a choice about they were business over people, and that is what it comes down to. That is really what this bill is all about, injured individuals not being made whole. Representative Bradford asked a

question and you deserve an answer. The answer to the question is, yes, people will not be made whole. That is the goal of this legislation. Let's not run away with it. It's basically, the people on juries determining how much you should be awarded and people will not receive full compensation.

Now, as far as this bill itself, I recognize the train has left the station. I understand that. This is going to pass no matter what happens. I know many of you in this Committee in other sessions have already spoken and said, I support this bill. If you have spoken and supported this bill for the last 9-years, nothing I say is going to change the way you feel. There are practical implications that everyone in this room, in front of me and behind me, need to keep in mind, and there are problems with these so called "well crafted" exceptions. The problems with the well crafted exceptions, as I point out, are threefold and then I will explain.

One, the alcohol dram shop exception, there is a big problem with it that I think people need to recognize. Two, the intentional act or criminal exception has a weakness, and three, this does not exempt the people who are going to need this the most, the children. People who are minors either who are injured or in a wheelchair for the rest of their lives, or children whose parents are killed in a car accident by a tractor trailer and are left orphans who are going to have to live for the rest of their lives without their parents.

The reason why these are big problems, one, the dram shop exception, is Pennsylvania is one of only a few States that does not recognize and mandate mandatory dram shop insurance. So, when you hear that there is a dram shop exception, I hear a lot of people in our organization in Montgomery County, going up the T, Butler County, Armstrong County, where there are bars who have served visibly intoxicated people. These visibly intoxicated people cause an accident and the person is catastrophically injured. That person who causes the accident may have a low

policy limit, but at the same time, under this exception, everyone who votes for this will say, oh, well the person is going to be able to fully recover because there is a dram shop exception. Many of these bars don't have dram shop insurance to cover for serving the visibly intoxicated person. So, one of the things we would like to see if this is going to pass, not look at it into the future, but look at it now and say, there has to be mandatory dram shop insurance just like there has to be mandatory auto insurance before you can operate a vehicle. If a bar wants to operate, they have to have mandatory dram shop insurance for being liable for serving a visibly intoxicated person.

The second issue is the intentional act. Intentional acts are obviously criminal, but it doesn't cover a situation where a defendant is grossly negligent or acts reckless or as we know in the legal community as a jury would have to decide, with a reckless indifference to the rights of others where punitive damages could be awarded. A lot of these times I see them, at least, are in tractor trailer cases where you have a trucking company or an employer who has a driver who has been involved in three prior accidents and they let them on the road and they are involved in an accident and they fake their logs, and the driver is under fatigue, and they cause the accident. That is recklessness and it is not necessarily intentional, and that is not going to be covered under this law. So if you are going to craft and make a well crafted exception, make the standard recklessness and not intentional, where someone is liable. If you are liable for punitive damages, I believe you should be liable for the full amount of the award.

Third, the children. There are two numbers that I would like everyone on this Committee, and I have looked this up, to keep in mind. It is 59 and 17. And the numbers 59 and 17, you are probably saying, what is that? Well, what that is are the number of children and grandchildren that the members of just this Committee have. Because I went through everyone's Web site, and assuming everyone is up to date, and maybe I'm off by one or two, if it's 57 I apologize. That is

an important point, because the children— There are some States who exempt children from these types of laws. If you're going to do something, then don't exempt intentional acts. That's not covered under insurance and people aren't going to get compensated anyway. Exempt children. We already do that in laws with the minors tolling statute, in auto insurance with limited tort and full tort, and even to settle cases with minors you have to go in front of a judge and actually get it approved to make sure it's in the best interest of the child. If you're going to do something, cover children. If you're injured or you're a child whose parents were killed, make sure you're going to be fully compensated.

Those would be three areas. Before I finish up I did want to address a few other issues that have popped up earlier today. In my testimony I do point out that what we also think should be considered is as part of passing this bill, if there is going to be such a savings, then pass it along to the insured who has the insurance policy. There is nothing in this bill which says it is going to be passed along. Maybe create a victim compensation fund, but not 10-years down the road when it is too late. Create it at the same time that you're looking at this bill.

Also, it's a question about whether or not this is Constitutional in and of itself. It was unconstitutional, clearly, 8-years ago, but I have spoken to people that have told me that this would be unconstitutional in and of itself because it would act as a cap on someone's damages, which everyone here knows, because everyone here is in support of changing our Constitution anyway to uncap damages, to cap damages, that you'd be passing a law that is going to end up taking away what someone has told they can receive for compensation.

To address some of the things which have already been said earlier today. About job creation, and Representative DePasquale pointed this out, Florida, I believe they passed their tort reform law around 2007, one of the major changes. In 2006 Florida's unemployment rate was

lower than ours. Assuming they passed their tort reform law in 2007, last year their unemployment rate was 3-4% higher than ours. If you're saying that it helps unemployment, it surely didn't help it in Florida.

There was a discussion about, a lot of discussion about West Virginia. West Virginia has had tort reform, and West Virginia is also one of those States that has a higher unemployment rate, and they even have a lower growth earnings than Pennsylvania.

As far as the ads, I didn't see the ads but I'm sure I could tell what they were. I don't necessarily agree with them, either. I just practice here in central Pennsylvania and that is it. I do some work around the State, but one of the things that was pointed out is, they do it in West Virginia. Well, it has nothing to do with joint and several. It's just that is what that firms business does. And whether you agree with or not, everyone here has the right, if you think it is improper, you can go and report it to the disciplinary board. You can say, it is an ethical violation and this law firm should be sanctioned. I would encourage anyone, and if anyone in this Committee wants, I will be more than happy to fax you or give you the Web site to the disciplinary board and you can go and report that law firm. That is not a Pennsylvania law firm, and no one in that law firm is a member of our Association.

As far as doctors, in 2002 when this was passed, keep in mind the number of doctors in the State have gone up since 2002. At least that is my understanding. Texas, Texas has the highest amount of uninsured people in the country for health, and they even, and this was brought up, they have a doctor shortage in rural areas as well. If business is so bad in hospitals, I would just finish up with, why did a corporation just buy a hospital in Scranton yesterday for \$150 million if doing a hospital is a loss-leader?

I would be happy to answer any questions.

CHAIRMAN MARSICO: Thank you, Mr. Cooper.

Let me just remind the members that when you ask a question, it is one question within that question. Okay? Do we all understand that?

Representative Ellis.

REPRESENTATIVE ELLIS: Thank you very much, Mr. Chairman.

Attorney Cooper, thank you for coming today. Your comments today, and one of the other Representatives indicated that certainly we are concerned about making the victims whole. But where I am struggling with that is, on the defense side of the issue, they charge an hourly fee, but in your side you collect generally somewhere in the vicinity of 30-40%, even if they are not made whole. Even if somebody cannot, under this legislation, would it be the position to not accept on a percentage basis and move to an hourly fee so that whenever somebody, if they are entitled to \$2 million, the jury says \$2 million is what they are awarded and because of this legislation they can only cover \$100,000 are you still going to take your 30% out of that? How would you respond to that?

MR. COOPER: That is a good question. First, I don't believe anyone in my firm has ever taken a 40% fee. I have not taken a 35% fee. Have I taken a 33 1/3% fee? Yes. Have I taken a 30% fee? Yes. Have I also, when someone has not been made whole, and if my clients waive their confidentiality I'll put them in touch with you or anyone in this Committee, have I waived my fees or lowered them to 10% or 15 or 20% based on the case? Yes. It is a matter of contract between us and our clients, and on a lot of these cases when you're dealing with catastrophically injured people in joint and several, these have to be court approved. The court is the one that ends up approving the fees on a lot of these cases, particularly with the children, and a lot of them, particularly Dauphin County, I believe, and I could be wrong, I know Dauphin because I

practice here, limited to 25% plus any of your costs that are out-of-pocket. There are safeguards in place to cover that. There are a lot of cases that we take that we are not successful with.

REPRESENTATIVE ELLIS: Thank you very much.

CHAIRMAN MARSICO: Representative DePasquale.

REPRESENTATIVE DePASQUALE: Thank you for your testimony. After hearing all of the evidence, juries make the decision as to what the award should be. Is that correct?

MR. COOPER: Yes.

REPRESENTATIVE DePASQUALE: In a murder trial, after hearing all of the evidence, who makes the decision as to whether the defendant gets the death penalty? I'll answer it. It's juries. It doesn't count because I'm going to answer the question. He answered it before I had a chance to answer it.

MR. COOPER: Actually, what I meant to say is, the jury decides in civil and then assuming it's a death penalty then they would decide, too.

REPRESENTATIVE DePASQUALE: The only question I have, the only question I have on this, is why is it not okay for a jury to make a decision on what the punishment should be in a civil case, understanding the Constitutional rights in a criminal case, but we're okay with a jury deciding whether someone should be executed or not?

MR. COOPER: Obviously, I agree with that, and I think it goes a step further that last year many members on this Committee and in the House, I'm sure a lot of you remember argue and damages. Everyone stood up, or testified at a Senate hearing with Senator White how we have to have faith in the jury system and the jury system works, and there is no need to give a jury a guide, and it would be unfair. And in those cases it was okay for the jury. In this case, it's just like if you're going to put faith in someone to decide whether to die or not for a criminal

action or a bank robbery or something, you don't separate if there are four people who rob a bank, you charge each one with robbing the bank. You don't figure out and proportion out and say, well, you were 25% responsible for that, you were 50%, you were 10, figure out it's a 20-year sentence and then apportion it down, but the person who is 60% responsible for the offense gets 100% of the sentence. It just doesn't make sense.

It also goes to, I think, on the punitive damage issue that was eluded to earlier, if you have such faith in the jury to decide death penalty, apportioning damages, awarding money, then you should have the same faith in awarding the amount of punitive damages. I don't think they necessarily are any different when they are awarding punitive damages than compensatory damages.

CHAIRMAN MARSICO: Representative Mark Keller.

REPRESENTATIVE KELLER: Thank you, Mr. Chairman.

This question is one question. Philadelphia recently was named the number one judicial hellhole in the country. As a member of the civil plaintiff bar and a member of the million dollar verdict club, do you have any comments on that designation?

MR. COOPER: Yes, I think that the judicial hellhole designation, I think you need to look at the source of where it is coming from, and I think that the phrase you could use is garbage in, garbage out. That is from a business lobbying group that is funded mainly out of Washington that comes out of this every year. They come up with this list every year, and I think if you look at the top five cities, I went actually this morning to double-check, and three of those cities are in Florida, actually, four of the five. Philly is number one, but number two is in Nevada, Illinois, Florida, and California. Everyone here knows California is great, apparently, to people because they have a damage cap. It can't be that good or accurate when four of the five on

the list are already in States that have issues, have already done these issues that this Committee is looking at. In addition, there have already been published news articles every year that come out this judicial hellhole study that show there is no methodology to what is in the report, it's questioned its accuracy, and even in one case they reported one lawsuit when it actually was in a different State 1,000 miles away.

CHAIRMAN MARSICO: Thank you.

I would like to acknowledge the presence of Representative Mike Turzai, our majority leader, who was one of the original prime sponsors of Fair Share Act. Welcome.

Representative Cutler, question.

REPRESENTATIVE CUTLER: Thank you, Mr. Chairman.

Thank you, Mr. Cooper, for your time. Good to see you again. It is a compound question, so, I want to hit on the punitive damages piece, and I think that is a good segway.

I don't practice tort law, but thinking back to law school, my understanding of punitive damages is to deter future behavior and act as a punishment to that company or that tort fee. The other piece is that it can, in fact, take into account other actions that occurred previously. If, for example, if they have a long history of negligence or a long history of bad actions and you are looking to deter that.

My question is this: with the addition of punitive damages, can the jury amounts that are awarded actually exceed the determined value of the actual injury, and, subsequently, if so, and I believe it does, would you support changing our current law to redirect punitive damages to a fund that would better benefit all of society versus the one person who won the suit against that company?

MR. COOPER: Well, I am assuming I understand the question.

REPRESENTATIVE CUTLER: I would love to break it down, but I can't.

MR. COOPER: If there is a punitive damage award, yes, because the person, say, has been awarded \$50,000, so the punitive damages are 25, they are going to recover 75.

REPRESENTATIVE CUTLER: Right.

MR. COOPER: So they are getting \$25,000. Is there a fund, that maybe it could go to? It really would have to be what type of fund you are looking at, and I think that is part of, if you're going to look at a package. Maybe it's part of Representative Shapiro's victim compensation package or something like that, but you can't, it really depends, because you also don't know if people are not being made whole how much is going to fund into this because I think that the threat of punitive damages, or how people talk about it, is more overblown than in reality. I think that when you hear about \$100 million punitive damage awards, you hear about it, but the punitive damage awards are really few and far between. Look at Dauphin County. The average compensatory damage award last year I think was \$400 in a civil case. Certainly not a punitive damage worry going on here. Philadelphia, obviously, is probably a little higher. Also, now, the Supreme Court of the United States has passed certain cases that have put a guide on what should be and should not be for punitive damage.

Is it something that you could look at? Yes, but I think that is one of the problems, sometimes, with what I have seen, and I just do car accidents and stuff, that when you put everything in one bill and say, here, it's well crafted and everything, you're going to pass it, you forget 10-years from now. What's going to happen to someone who is a victim 10-years from now? There was a well-known lobbyist, if anyone in this room wants to Google him his name is Frank Cornelius. He helped pass, he was one of the lobbyists who was instrumental in passing the Indiana caps law. Ten years after it passed he was a victim of malpractice and he ended up

with \$5 million of non-economic losses, and theirs is a straight cap. He ended up, a few months before dying, doing a letter to the editor or I think it was called, I forgot what it is, but if you look it up on the Internet, where he ended by saying he rues the day that he ever helped pass tort reform.

REPRESENTATIVE CUTLER: Thank you, Mr. Cooper. I'll follow-up with a sidebar after, I'd be interested in discussing that with you and possibly directing the monies towards Mcare or some other fund that is out there.

MR. COOPER: Well, I would say what about the victims.

CHAIRMAN MARSICO: Okay, thank you.

Representative Schroder.

REPRESENTATIVE SCHRODER: Thank you. I just wanted to mention that in this discussion about allowing the juries to make the decision, no one is taking away from that. In fact, it should also be remembered that the juries are not informed about the doctrine of joint and several liability and how that could impact the pay-outs of the apportion of liability that they assign. Juries who place a nominal amount of liability of the defendant are not informed that that defendant could, in fact, be paying the full amount of the verdict.

Now, the question. You made a lot about the inadequacy of the dram shop exception in this bill. As I see this, we're not changing the law. The current law would allow joint and several liability recovery in a dram shop action. So we're not doing anything here to harm that from the victims standpoint. What am I missing here?

MR. COOPER: Well, I think that the people in the business community and in press releases have touted this as, there is a special consideration being given to make sure people are going to be made whole if they are injured by someone who, a bar that violated the dram shop

act. I just would like there to be something, an acknowledgement on the record, for people to recognize and admit that people won't be. That it is not changing the law to make it so that people are getting extra protection.

REPRESENTATIVE SCHRODER: But your previous arguments seem to set around your desire to see an insurance component introduced in this. Well, what happens now if there's no insurance component? I believe that the plaintiff would end up owning a bar at the end of a case, with a liquor license that is worth probably a heck of a lot of money, and wouldn't be able to get compensation that way.

So I'm just not following this argument that this is so limiting in a dram shop situation.

MR COOPER: I just think it's important because I've been on different areas where people have said, well, people are going to fully recover because there's a dram shop exception, and would you agree with me that right now there is no mandatory dram shop insurance?

REPRESENTATIVE SCHRODER: In a hearing we ask the questions from this side, but, the point being that we're not changing current law. Would you not agree with me that if there's no insurance and that exposes the owner to liability and possible loss of their business and loss of their liquor license, which is probably the real value to the business, and everything that comes along with it. So, I would think that there would be compensation in that case, whether it is adequate, of course, depends on the size of the verdict and things like that.

MR. COOPER: Well, that is an excellent point, and it is something that is accurate to a certain extent, also, I think, if you're going to start being worried about juries being misinformed, I think as part of this legislation there should also be something thrown in there, we're concerned about making sure the juries know the impact of their award, that this could be 100%, make sure the jury knows now, well, if you only award 55%, they're only going to have to pay 55% of the

verdict. If the jury wants the person to be fully compensated, they should.

REPRESENTATIVE SCHRODER: I think it's a pretty fair that the jury assumes that right now and that is in fact, not accurate what they assume.

MR. COOPER: Well I would beg to differ.

REPRESENTATIVE SCHRODER: No one tells the jury, in fact, they do tell the jury, that the plaintiff is 51% return to the court room because there will be no liability and the ability for that plaintiff to recover. So they are told in that situation, but what I'm saying is they're not told in other situations.

MR. COOPER: But they don't—

CHAIRMAN MARSICO: If we could move on to the next—

MR. COOPER: Okay, but just as someone who has actually tried a case to a jury and spoken to jurors, jurors don't know. Other than the 51%.

CHAIRMAN MARSICO: Representative Shapiro.

REPRESENTATIVE SHAPIRO: Thank you, Mr. Chairman.

I would like to utilize Representative Cutler's compound question tactics, if I may, just to drive at one point.

Mr. Cooper, I want to just focus on the impact this legislation will have on an independent physician. That is, a physician not in the Geisinger System, for example, or some other health care system. If you have a simple situation where a hospital is 20% at fault and the physician is 80% at fault and it is a \$10 million verdict, just to make the math pretty simple for me.

MR. COOPER: We do Dauphin, like \$100,000.

REPRESENTATIVE SHAPIRO: Ten million is easier for me.

MR. COOPER: Okay.

REPRESENTATIVE SHAPIRO: The docs on the hook for \$8 million, the hospital is on the hook for \$2 million under Representative Schroder's bill. Correct?

MR. COOPER: No. Under this bill, if you read it, and the way it is written and allegedly well crafted, the doctor who is 80% at fault is fully responsible and a judge shall enter an award for 100% or the \$10 million.

REPRESENTATIVE SHAPIRO: Because he is over the 60?

MR. COOPER: Because he is over the 60.

REPRESENTATIVE SHAPIRO: Excuse me, then, let me change the example.

MR. COOPER: Sorry.

REPRESENTATIVE SHAPIRO: No, no, you are correct. I am incorrect.

MR. COOPER: That's the way it is. That is one of the problems with it.

REPRESENTATIVE SHAPIRO: That part of the question doesn't count.

Put the doc at 55 and the hospital at 45. This is what I'm driving at. If the docs on the hook for 5.5 million and the hospital is on the hook for 4.5. They pay their 4.5, they are out. The doc has 5.5 that she owes. She has a \$1 million mandatory insurance policy. What happens for the other 4.5, practically speaking, if this bill becomes law? As a trial lawyer, someone who has been in the court room, you have testified to that today. Are you going after the docs personal assets? Is there more likelihood that you go after their personal assets under this bill than you would under current law? Just explain the impact. That is my question, in a nutshell. What is the impact on an independent doc who is not affiliated or owned by a hospital?

MR. COOPER: The impact under this bill is the independent doctor is holed in the bag for the rest of the 4.5 million. Under the current law, what would probably happen is the doctor

would pay their million, the hospital would pay the rest, and the victim would be fully compensated. The doctors personal assets would not be exposed. Under this law, the doctors personal assets would be exposed and assuming they are wealthy, a lot of lawyers will have their obligation to go after the doctors personal assets. I've seen, I've read actually this morning in Nevada they passed a damages cap a few years ago, and actually more doctors now are going bankrupt since they passed tort reform there because of inadequate insurance.

REPRESENTATIVE SHAPIRO: The tort reform they passed there, joint and several you are referring to?

MR. COOPER: They capped damages, but they already have—

REPRESENTATIVE SHAPIRO: Well, let's compare apples to apples. In the States where there is that—

MR. COOPER: The doctors personal assets would be exposed and I think there would be an extremely higher likelihood that someone would go after them.

REPRESENTATIVE SHAPIRO: Okay. Thank you. Thank you, Mr. Chairman.

CHAIRMAN MARSICO: Representative Stephens.

REPRESENTATIVE STEPHENS: I have a comment and a question, if that's okay Mr. Chairman.

On your robbery example, I think that's a poor example, because while four people may be convicted of robbery, their varying levels of responsibility will yield varying sentences from the judge, and actually to the point of this bill, if one of them should die before completing their sentence, we don't tack on the balance of their sentence to one of the other members of the robbery crew.

To get at my question, to follow-up on Representative Shapiro's question, in that instance

where you claim that the victim would, instead, seek to go after the docs personal assets. Under the current system, wouldn't the hospital have a claim? An equally viable claim to the doctors personal assets in order to recover the amount that they are forced to pay above and beyond what the jury has said they should pay?

MR. COOPER: Yes. On the backend they would have a contribution claim after the victim is paid, but I don't think it happens. If it does happen, I think they just pay it and everyone goes their own way and is just not happy.

REPRESENTATIVE STEPHENS: But under the current system they certainly would be entitled to that claim much the same way the victim under the proposal advanced in this bill would be entitled to assert that claim on the doctors personal assets. So it's no different, legally speaking, in terms of the claim that could legally be recognized.

MR. COOPER: It's different in that under the proposed bill the victim's not fully compensated up front. That's the big difference. It's shifting the monies from one to the other.

REPRESENTATIVE STEPHENS: Thank you.

CHAIRMAN MARSICO: Representative Delozier.

REPRESENTATIVE DELOZIER: Thank you, Mr. Chairman.

Thank you for your testimony. I just have a quick question. In your testimony, it was mentioned earlier in some of the questions but not specifically so I wanted to ask you. On page five you mention the fact that uncompensated costs will ultimately be the burden of the taxpayers. Can you be specific as to exactly how you see that happening and also if you would be willing to provide documentation as to how you have seen that happen, in possibly cases you have been involved in?

MR. COOPER: Well, it hasn't happened yet because—

REPRESENTATIVE DELOZIER: Right. So how you suppose that it would happen?

MR. COOPER: Sure. I think this was eluded to in one of the earlier questions about the Department of Public Welfare. In a lot of personal injury cases, when medical bills are paid, by whether it be the Department of Public Welfare or a self-funded union plan pays health benefits, or workers compensation. When there is a recovery in many cases there is what is called subrogation. That the plaintiff doesn't keep the money. They recover the medical bills and the wage loss depending on the claim, and then it is reimbursed to either the Department of Public Welfare or the self-funded union plan or the HMO, or whoever. That is ultimately passed on to whoever the subscriber is, the citizen or the taxpayers or something. That means they aren't taking as much of a hit. Under the proposal, if less money is being recovered, because clearly less money would be recovered under many cases, then the subrogation interest is going to be impacted just as much. That money is not going back to either the self-funded union plan, the Department of Public Welfare, Medicare, they have a lot of liens, or even workers compensation. And then ultimately when those plans or the government or whoever is not getting enough money in, then you have to do something. You'd have to raise taxes, raise premiums, or do something.

REPRESENTATIVE DELOZIER: So at this point in time – just a follow up – at this point in time, you're saying that it's already happening where you've seen where it's gone. Do you have that data that you could provide us with the cases?

MR. COOPER: No, I just think it would be common sense. It hasn't happened in Pennsylvania, so—

REPRESENTATIVE DELOZIER: You've seen it happen in other States where it has come down?

MR. COOPER: I've never looked at a, I've never done a study on that.

REPRESENTATIVE DELOZIER: Okay. Thank you.

CHAIRMAN MARSICO: Okay, here's the deal. We have three members that have questions and we have five minutes. Representative Sabatina from Philadelphia.

REPRESENTATIVE SABATINA: Thank you, Mr. Chairman. I just wanted to make a statement that I am proud to be from the great city of Philadelphia, the birthplace of America, and the economic engine that drives this great State of Pennsylvania. I will skip the Pledge of Allegiance and move right to my question.

Mr. Cooper, could you please explain the exception that you stated regarding children? Could you please explain that in more detail?

MR. COOPER: It would just be plainly something which says a defendant is joint and severally liable if the plaintiff is a minor under the age of 18 or the beneficiary of the claim. That's it. Then any defendant would be joint and severally liable to make sure a child recovers 100%.

REPRESENTATIVE SABATINA: Okay, and your rationale is just that it is a child.

MR. COOPER: Right. It's a morally, are we picking children or companies? If you want to pick companies, so be it.

REPRESENTATIVE SABATINA: Thank you.

CHAIRMAN MARSICO: Representative Kula.

REPRESENTATIVE KULA: Mine will be very brief. I just want to make a statement first, and as I'm sitting here listening to the testimony I'm trying to figure out exactly my answer to my constituents as this begins to happen as to why they are not receiving their full award from a jury verdict. I'm sitting here still trying to figure out that statement.

It's also been, we've been led to believe, that all of this will reduce the amount of lawsuits. Can you explain to me or do you, do you see that happening?

MR. COOPER: I think if anything it would potentially increase lawsuits because what will happen is, I'll give you a perfect example. Under current system if my client is hit head on by someone driving on Forester Street and killed, normally what happens is, and say that person says, well, I just got the car out of the shop and it must have been that the guy screwed the brakes up or something. People think, the guy crosses head on it has nothing to do with the brakes. Now what would happen is the case would probably mostly settle. The person is catastrophically injured, my client would be entitled to underinsured motorist coverage because they would have underinsured motorist coverage and they would be fully compensated.

Under this scenario, with this bill, if this defendant says, well, it's the brake shop or something, now I'm going to go file a lawsuit. So now you have one extra lawsuit in the system where I have to sue both the driver and the service shop – which that is one of the reasons why I'm not sure why small business people are in favor of this – and now they are going to be battling it out for 50/50

REPRESENTATIVE KULA: If I thought that it would reduce people being harmed or people being injured I would certainly vote for this in a heartbeat, but I don't think that is what is going to happen, and I thank you for your answer.

MR. COOPER: Thank you.

CHAIRMAN MARSICO: Finally, Representative Bradford.

REPRESENTATIVE BRADFORD: Thank you, Chairman.

Real quick, I just want to make sure conceptually I got this. I think a lot of it might just be based on perspective, where you sit depends on where you stand kind of thing. In the current

system, from the victim perspective, you get paid first. If there is a negligent codefendant it is up to the negligent codefendant to pursue the contribution, and the exposure of a judgment proof codefendant is on the defendant. If we basically move to abandoning joint and several, the victim potentially is the one who is not made whole. It is the victim who must pursue the contribution claim, and it's the victim who has the exposure to the negligent codefendant. Is that pretty much how that shifting of burdens would go if you would abandon joint and several?

MR. COOPER: Yes, and I think Representative Stephens, his question explained it with the contribution and stuff like that. That's what happens, you're shifting it from one to the other, and I think, one last thing because I know we're out of time, is keep in mind that a lot has to happen before a defendant even gets apportioned responsibility. A defendant has to be held negligent, a defendant has to be held to be a substantial factor in causing the accident or the injuries, and the plaintiff has to have sustained injuries. I don't know if there are any studies, but I could tell you that more times often than not, and you could ask defense lawyers, most cases juries don't even find substantial factor. You have to prove that they are a substantial factor before you even get to the apportioning.

REPRESENTATIVE BRADFORD: So any talk of de minimis there is a threshold inquiry, so when hear that it's a 1% negligent defendant, unless a jury has found that is a substantial contributing factor there is no real de minimis.

MR. COOPER: Right. It's basically, if the defendant was there by himself, he or she or whoever, the defendant would have been held responsible at 100%. It's just because you have two defendants or three defendants that you have to apportion it because a person can't get more than 100%.

CHAIRMAN MARSICO: Thank you, Mr. Cooper. I appreciate your being here and your

testimony, and good to see you. Thank you.

MR. COOPER: Thank you.

CHAIRMAN MARSICO: The third and final panel; Attorney William Sylianteng, member of the firm of Bennett, Bricklin, & Saltzburg; Bill Carr from New Enterprise Stone & Lime; and Nicholas Vari, a partner with K&L Gates. Mr. Carr, you may begin when you are ready. I'm sorry, Mr. Sylianteng.

MR. SYLIANTENG: Good morning honorable Chairs and honorable members of the Judiciary Committee. I thank the Committee for allowing me to speak today. My name is William Sylianteng, I am an attorney out of Philadelphia and I appear before you as the Vice President for the Eastern Region for the Pennsylvania Defense Institute, which is an organization comprised of insurance companies, self insured, as well as the attorneys that service that sector.

My comments will be brief, I don't plan on reiterating everything that is in my testimony because a lot of it has been touched on by prior speakers, but just briefly.

Pennsylvania is, as noted by one of the previous speakers, one of only nine States in this country that still have a pure joint and several liability law. What this basically means is that any defendant, even if found 1% liable, can be held accountable for the 100% of the verdict. What that does is it leaves it to inequities with respect to how we settle cases as defendants, how we try cases as defendants, and how we spend the money defending these cases as defendants.

Too often, parties who have little or no liability in Pennsylvania are dragged into personal injury lawsuits simply because of the deep pockets. One need not look very far and can walk into any court house in this Commonwealth and see how this happens every single day. This doesn't happen, necessarily, just for the catastrophic injured plaintiff, this doesn't necessarily happen against just businesses. This is happen in a common rear end accident, three car rear end

accident. Plaintiff is in the first car, codefendant one is in the second car stopped behind the plaintiff, and the third car comes slamming in behind the second car and pushes the second car into the first car. Unfortunately, in many situations, there is an uninsured driver in the third car. What that does is it pushes the second car driver into the lawsuit simply because, one, he has insurance or he has assets that may be recoverable in the personal injury lawsuit. It also brings in, you can go through any court house in Philadelphia, any court house in Allegheny County, and you can see where manufacturers of component parts are being brought in as well even though their part did not cause the injury complained of. Their parts simply, their liability is simply a guilt by association by being a part of or next to a part manufactured by a third part that they have no control over. Because they are still viable and the other party is bankrupt, they are held holding the proverbial bag for the 100%.

Now, our organization and its members are not looking to absolve the liability of all defendants in Pennsylvania. Part of the contrary. Under the proposed change in the law, a liable defendant will still have to pay, and I think that hasn't been mentioned yet today. A liable defendant that is found liable by a jury will still have to pay. The only difference is they only pay their fair share under the proposed Fair Share Act.

Fair share will act simply to eliminate the inequities associated with defendants with minimal to virtually no liability. It's PDI's belief, it's the organizations belief that this will lead to less defendants added to lawsuits which will undoubtedly save defendants and the businesses within the Commonwealth money with respect to defense costs to go after or to protect against these lawsuits.

Thank you.

CHAIRMAN MARSICO: Mr. Carr.

MR. CARR: Thank you, Mr. Chairman and members of the Committee. I appreciate the opportunity to speak and share a couple real life examples that I've been able to live through as the Risk Manager of New Enterprise Stone & Lime Company. I've held that position for 21-years. I am not an attorney, though. My responsibilities include overseeing the management of liability claims. In order to help control our cost of insurance protect, we try to assume much of the financial responsibility through large deductibles.

New Enterprise is a heavy highway contractor, construction material supplier, and maintenance and traffic protection contractor. On the heavy highway side of things we produce and provide an array of general contracting services for governmental agencies and commercial and residential customers. Services include general contracting, grading, blacktop and concrete paving, drainage, bridge construction, and safety products and services. We build infrastructure that our citizens rely upon.

Our customers include PennDOT and the Pennsylvania Turnpike Commission, for which we are one of the largest contractors in the State, and additionally, we work for many local municipalities and private owners. We employ approximately 2700 people in Pennsylvania and utilize many independent contractors to help us complete and perform our work. Many of the independent contractors that we need to help us carry limits of liability protection generally in the area of about \$1 million.

We believe that the current law regarding joint and several liability with the "one percent rule" distorts civil litigation in Pennsylvania by focusing the efforts of the plaintiffs on those with the ability to pay rather than those who may actually be responsible for causing the accident.

One recent case that we were involved with included an independent contractor that we hired to haul millings from the project site the off site location. That particular business owner

carried \$1 million of automobile liability, and I found over the years in dealing with the insurance carriers and brokers that seems to be a realistic amount that most of those types of businesses can secure in the insurance market.

While at the job site, an employee of another contractor bent down in front of this truck while he was waiting for a load. The truck driver didn't realize the worker was in front of his truck and drove over this man who died from his injuries.

New Enterprise was named in the suit with the allegation that we had responsibility to protect the other contractor's employee from the actions of our independent contractor. To defend the case, it cost over \$300,000 in legal fees spent on this one particular case.

The overwhelming focus of the one week trial was unfounded attempts to convince the jury that New Enterprise was at least 1% at fault. Ultimately, the jury found New Enterprise to be free from fault, or 0%, and the plaintiff to be 80% at fault, which barred recovery. Understanding that if we were found to be 1% at fault, we would have had to pay the difference between the truck driver's limits of a million dollars, and whatever award the jury might present. Our insurance carrier settled the case for \$1 million before the verdict was read. In this case, the carrier for the truck driver had tendered its limits before the suit was filed. The entire litigation process was fueled by the potential windfall of establishing 1% negligence on New Enterprise.

In another case involving an independent contractor, the jury verdict was seven-and-a-half million dollars. The plaintiff was found 25% at fault, which reduced the award to \$5.625. The truck driver was found to be 37% at fault and New Enterprise was found 38% at fault. The insurance carrier for the truck driver paid its limit of \$1 million, our carrier paid the \$4.625 shortfall, and our 38% share of the verdict would have been \$2.850. Not only did New Enterprise pay more than 60% of our fair share, but the litigation was lengthy and an amicable resolution

was prevented by the 1% rule.

These are just a few examples of how we believe the current law has distorted our civil justice system. Although the original intent of the 1% rule was to assure injured parties received compensation, the reality is that the financially responsible businesses are targeted in unfounded lawsuits simply because of the 1% rule. As a result, the cost of risk to our company is substantially higher than the risk created by our organization's activities.

The total cost of risk for these unfair assessments and sometimes frivolous lawsuits are ultimately passed back to our customers, including PennDOT, The Pennsylvania Turnpike Commission, local municipalities, and provide industries in the form of more expensive products and services.

We applaud your efforts to return our civil legal system to a more fair system of justice by having responsible parties assessed on their percentage of fault and not their ability to pay.

Thank you.

CHAIRMAN MARSICO: Thank you. Mr. Vari, you may begin.

MR. VARI: Thank you, Mr. Chairman and members of the Committee. I greatly appreciate all of you giving an opportunity to me to address you today on what is a very important issue in my field.

I am a lawyer with K&L Gates in Pittsburgh. For the last 20-years I have been defending primarily toxic substance cases across the Commonwealth and across the United States. In that capacity, I have been able to see how the Pennsylvania law works over a period of time and how other States have dealt with these issues and how they're dealt with in other places.

My comments really just seek to address briefly three aspects of the proposed bill that I think need to be brought out. Specifically, I want to focus on experience in the asbestos

litigation, which is a major litigation in Philadelphia and Pittsburgh and it dots across the State and affects a lot of companies

Under the present system, the law does not account for monies recovered from what are called bankruptcy trusts. What that means is that the defendants who are originally sued when the asbestos litigation began are long gone, and they have gone into bankruptcy but not away. Because of a feature of the Federal Bankruptcy Code, those companies establish trusts. Those trusts are set up to pay present and future claimants with claims against those entities or their products. The company comes out clean, and then the trust provides a compensation system. Based upon the way the joint and several liability system presently works in Pennsylvania, the 100% recovery, the making whole that everyone speaks of, is just of those defendants that can be sued in the tort system. And these bankruptcy recoveries exist outside of the tort system. It is the tree falling in the forest that nobody hears. The money comes in, but yet it has no impact on what is full remuneration in the tort system.

Now, what the Fair Share Act would do here is allow these defendants, these tort system defendants, these solvent defendants, to allocate responsibility to the entities that have paid money to the plaintiffs, or that will pay money. It is not an empty share. These people are paying, or these trusts are paying money and the defense, through this Act, is solely able to put on the verdict slip companies that have already paid money.

Now, one thing that the bill does not do in this context is allow people on the verdict slip that are just these empty shares or dead shares, the Act says that the only people to whom the jury can allocate liability are, one, a defendant – the person who is sued – or, two, and other person who is entered in a release with the plaintiff. That means that person has paid the plaintiff. The plaintiff has given them a release of liability. It's the only way you can get a

release. So, you have defendants and you have people with releases. Those are the only people to whom the jurors can assess liability or allocate liability.

That brings me to my third and final point, which is that is not universally popular across the defense side of this. This is far from a home run for the defendants. There are a lot of potential shares out there that won't get on these verdict slips because of this restriction. What this points out is, is this is a compromise. This exists as a well-thought compromise that looks at the interests of both sides and doesn't seek to leave plaintiffs penniless, and doesn't seek to leave a defendant having to pay for a vast amount of harm that it didn't cause.

Because it addresses those competing concerns, it's a fair compromise and it's a good bill. Thank you very much for giving me the opportunity to speak.

CHAIRMAN MARSICO: We're going to 10 minutes after 12, and we have six members that have questions. The first is Representative DePasquale.

REPRESENTATIVE DePASQUALE: The pressure is on, Mr. Chairman.

This, and I apologize, with the last name DePasquale, so don't take this personally, but Attorney Sylianteng. I apologize that, but I get used to it myself.

MR. SYLIANTENG: I am used to it.

REPRESENTATIVE DePASQUALE: You are a defense attorney, and there's a plaintiff's attorney, a defense attorney, and you have a client to represent. In your case it may be somebody who could potentially be accused of being at fault. If this 60% rule were to go in and your representing your client that is on the borderline, would it not be your duty – and by the way, I say this, this is not anything other than your doing your job as an attorney – to bring that under 60% which would mean potentially pulling in other defendants that would have potential liability? I say that just asking if that would be something you would see as your duty in

representing your client.

MR. SYLIANTENG: If I understand the question correctly, the Honorable Representative is asking me whether or not as a defense attorney I would have the duty to cast the wide net to try to bring my—

REPRESENTATIVE DePASQUALE: For people that are legitimately potentially part of the suit. I'm not suggesting anything other than that.

MR. SYLIANTENG: Assuming that they are legitimately a necessary party to the suit, I assume the plaintiff would have already brought them in. My job as I see it is to defend my client as vigorously and zealously as possible. It is within my ethical accountance to do so. Within that, absolutely. If I don't believe that my client is over 60%, it's my job to argue that. Whether you bring somebody else in, again, ethically I could not bring it unless I had a good faith basis to bring that person in. Based on that hypothetical, would I? If there is another liable party that is available that is actually liable, potentially I would join them in there.

REPRESENTATIVE DePASQUALE: I appreciate that, thank you.

CHAIRMAN MARSICO: Representative Shapiro.

REPRESENTATIVE SHAPIRO: Thank you, Mr. Chairman. There seems to be two competing positions at the table there. Mr. Vari, you testified that this bill is a compromise, it doesn't seek to leave the plaintiff penniless, I believe were your words. Mr. Sylianteng, you testified in the sixth or so paragraph of your testimony about these instances where there is the 1% liable plaintiff who is on the hook for all of the damages because the ninety-nine percenter, if you will, has no money to pay in. Clearly, if you are the 1% guy under the Schroder bill and you're paying 1%, you're potentially leaving the plaintiff in the situation where he or she is penniless. I would like, though, to probe the 1% comment you made. We have heard it a number

of times today. Are you stating that rhetorically or are you stating that as a point of fact in that it actually occurs in Pennsylvania? Is there any data to back up the comment that you made? And before you answer me with a legal answer, I understand that it is possible, certainly. I do get that, I'm an attorney I understand how the law works. But is it happening in Pennsylvania? And if so, how many times has it happened, where has it happened, is there any evidence to suggest that happens?

MR. VARI: Well, the 1% really comes into play with respect to settlement in the Commonwealth. And Mr. Carr can address his concerns as a business owner with respect to that 1%. But as a defense attorney, when faced with a joint and several liability, a potential joint and several liability situation where I have a virtually liability free defendant who has been brought in simply because they are the only viable defendant, it is my job to instruct as well as to advise my client that they can be on the hook for say a million dollar verdict despite being minimally liable. A plaintiff's attorney has to convince a jury simply that there is just a little bit of liability on this guy to put 100% on the hook. What that does then is that makes me have to go up to my client and make that economic decision as to whether or not, what the settlement value is. I'm going to tell you right now, if I have a, if we lived in a world where I knew that my client defendant only had 1% liability and I could advise them, you know what, at the end of this, given the chance that it's only 1% that there could be a defense verdict as a result of this, let's take this to trial and let's win this. Under the current system I have a hard time doing that, which would have been my honest advice to my client because I know the risks. And I can't put them on the hook for \$1 million when I know—

REPRESENTATIVE SHAPIRO: Okay. How many cases have you had where your client is 1% at fault?

MR. VARI: I have been involved in at least 20 cases where there have been multiple, five or six defendants brought in, where at the end of it five or six defendants or four of the five defendants will settle for minimal—

REPRESENTATIVE SHAPIRO: No, no, no, I understand what you're saying. How many times has a jury returned a 1% verdict slip for your client?

MR. VARI: None. None that I have personally handled.

REPRESENTATIVE SHAPIRO How many times are you aware that that has ever happened in Pennsylvania?

MR. VARI: Representative Shapiro, I don't have the studies in front of me, so I can't tell you whether that has occurred, whether that hasn't occurred.

REPRESENTATIVE SHAPIRO: So your argument is the threat of being 1% responsible, which at least given your vast expertise as a defense attorney has never happened to any of your clients, the threat is what then causes the settlement discussions to occur. Is that your point? That is not what you testified. And that is one of the reasons why you support the Schroder bill, and I'm not being critical of Curt of his legislation right now, I'm just saying that you stated a reason. That reason is because at 1% you would be responsible for 100%, I'm asking you when that ever happens and you're effectively telling me that it has never happened to you and you're not aware that it has happened in Pennsylvania.

MR. VARI: Representative Shapiro, my testimony is based on what really drives this legal system. The majority of trials, the majority of lawsuits in the Commonwealth of Pennsylvania never make it in front of a jury. However, the threat of that 1% pushes numerous lawsuits into settlement. That is what actually costs the defendants the money—

REPRESENTATIVE SHAPIRO: Respectfully, I appreciate your bias on this. I really do.

There is a reason why you are on this panel. I'm just asking a practical question. You testified in very specific terms about the 1% versus 99%, I'm just asking if that ever happens. It sounds like those extremes don't happen. I get that you're for this, I get why you're for this. I get the impact you believe it has. I'm just asking about the 1%. It sounds like you're testifying that that does not happen.

MR. VARI: I am not aware of the 1%, I am aware of a couple of 10%.

REPRESENTATIVE SHAPIRO: You should change your testimony, then.

CHAIRMAN MARSICO: Okay, that was seven questions.

REPRESENTATIVE SHAPIRO: Cutler rule.

CHAIRMAN MARSICO: Compounding that, the Chair has been very lenient and flexible.

REPRESENTATIVE SHAPIRO: Chairman, I do thank you. Thank you.

CHAIRMAN MARSICO: We have until 10 minutes after 12 and that is it.

Representative Cutler.

REPRESENTATIVE CUTLER: Thank you, Mr. Chairman.

I'm going to move outside of the victims versus the defendants and the 1, 10, 90% and actually get to the mechanics of the jury, if I may. I'd be interested in your opinions.

Are the juries actually told the effects and the outcomes of apportioning liability and how that can financially affect each individual defendant in their case?

MR. SYLIANTENG: I can start. The cases in which I am primarily involved are strict liability cases where they don't put a percentage on them under the present law, the Fair Share Act would provide for that. They just check a box, yes or no, are they a substantiating contributing factor, and no they are not advised as to what the impact of that is on any particular

defendant.

MR. CARR: I am not an attorney, but it is my understanding from working with attorneys in my position that that direction is not given to the jury in an explanation of how it might impact the award and who pays based on percentage of liability.

MR. VARI: My answer is fairly the same, there is really no instruction to the jury one way or the other.

REPRESENTATIVE CUTLER: Thank you, Mr. Chairman.

I just think that we should point out that if we're talking about fundamental fairness, it should apply to both sides. Thank you.

CHAIRMAN MARSICO: Representative Schroder.

REPRESENTATIVE SCHRODER: Thank you, Mr. Chairman.

Attorney Sylianteng, question for you. It was brought up earlier, it was suggested earlier that passage of the Fair Share Act would result in a search for 60% or more defendants and bringing in all of these other defendants. However, under today's system, defendants join other defendants all the time in lawsuits, don't they? Aren't you under the same obligations to your client, to be a zealous advocate and to protect that client, even in today's system before any of this is being changed?

MR. SYLIANTENG: Absolutely. Without having to go any further, the duty and the ethical canons on an attorney with respect to the zealous advocacy for his or her client stays the same regardless of the Fair Share Act.

REPRESENTATIVE SCHRODER: That is what I thought, but I just wanted to clear that up because I think there was an attempt to make an argument that this would result in joining additional defendants and the lawsuits, but the point is, is that happens as a routine matter right

now.

MR. SYLIANTENG: Absolutely.

REPRESENTATIVE SCHRODER: Now, there is also another assumption underlying a lot of the arguments here in opposition to this that we are, quote, protecting wrong-doers, protecting evil-doers, protecting people with malice who injure these plaintiffs. Based upon your years of representation of various defendants in civil actions, is that in fact the case? Are these defendants in civil actions wrong-doers and evil merely because they are sued in a lawsuit? That seems to be the suggestion, the overwhelming suggestion of opponents of this measure. If they're sued, well, they must have done something wrong, they must be guilty, they must really be hit hard to be responsible to the plaintiff or to whomever.

MR. SYLIANTENG: Well, the quote unquote evil defendant is seen in the most light as the intentional tortfeasor. There is a carve out for intentional tortfeasors in the Fair Share Act. But with respect to most defendants that are out there, they are sued under the negligence they are, at least in tort actions. What that basically means is they were negligent. You and I can be negligent without having to be characterized as being evil.

REPRESENTATIVE SCHRODER: Could I just mention, negligence in and of itself does not suggest a wrong-doing on the part of a defendant like an intentional act would.

MR. SYLIANTENG: Agreed. Not an intentional, obviously wrong-doing.

But with respect to these, and I guess I reiterate from my testimony earlier, that the defense bar is not necessarily looking to absolve liability with respect to the defendants in this Commonwealth. It's just to pay the fair share that that defendant owes. That a jury has decided, this is the percentage that you owe, and this is the percentage you should pay. That is all we simply ask.

REPRESENTATIVE SCHRODER: So it's fairness in compensation is what we're seeing here.

MR. SYLIANTENG: Absolutely.

REPRESENTATIVE SCHRODER: Thank you, Mr. Chairman.

CHAIRMAN MARSICO: Thank you. Chairman Caltagirone.

CHAIRMAN CALTAGIRONE: Thank you. Just one broad general question to all the testifiers today. We keep hearing about this 1%. If anybody has statistics on this 1% over the last year, 5-years, 10-years, I really think it would be beneficial to the Committee to find out what the truth is. How many times has that 1% issue come into play, and in addition to that, how many cases have been settled out of court. You start the lawsuit and all of a sudden you decide whether it's defense, plaintiff, whatever, let's settle this thing, the attorneys are making a little too much money, let's get this done and over with. I think the Committee deserves to have that kind of information to see exactly what's been happening in this Commonwealth.

Thank you, Mr. Chairman.

CHAIRMAN MARSICO: Thank you, Chairman Caltagirone. We have one final question, Representative Saccone.

REPRESENTATIVE SACCONI: Thank you, Mr. Chairman.

I've been sitting here listening to both sides of this, and it's a very good discussion, but I'm struggling with the morality of causing someone, holding someone liable to pay for something they really did not cause. This is troubling for me. I got this letter from the Attorney General yesterday talking about how the Commonwealth is sometimes dragged into these situations because the Commonwealth, meaning all of us together, the taxpayers together, have deep pockets and can somehow pay for something that we did not cause. We've used the

example of the 1% as kind of to try to make fun of that may be possibly that this really isn't viable, but can you clarify and give us some examples where maybe it wasn't 1%, but it was 5%, it was 10%, it was 15%, it was 20%, anytime someone is caused to pay for more than they were actually liable for. To me, that's immoral.

So I would just like it if you could give some examples on that.

MR. VARI: Sure. And I apologize to the Committee because I obviously introduced the 1% rule in my testimony. At the end of the day, the real issue here is the de minimis or the minimally liable defendant being forced to pay the 100%. Regardless of whether it is 1% or 40%. It is that you are not the majority liable defendant.

Now, Mr. Carr actually probably can speak more on, as an employee of a business in Pennsylvania, as to when that actually has happened.

MR. CARR: Rarely do we know what the jury thinks. I think because of the understanding of the minimal amount of liability that could cause you to end up paying the whole amount, I don't think there were very many times that business owners, insurance companies, defense lawyers, are willing to take it the distance to find out what a jury thinks a percentage is. To me, it's more about everybody understanding that it only takes 1% and it doesn't take very much to convince someone, at least in our business it's rather difficult, it's road construction, a lot of moving parts, a lot of different people involved with it, and when you go in and try and be certain that you can convince a jury that we didn't do at least 1% something wrong, it's I think next to impossible. I don't think we're going to find the statistics, Mr. Chairman, that you're looking for, because most people will not take it the distance to find out what a jury thinks, they'll end up settling it before it gets there in hoping it's a good business decision and settling it for a lesser amount than a jury might award.

REPRESENTATIVE SACCONI: Thank you.

CHAIRMAN MARSICO: Thank you.

This concludes the panel for this testimony.

I want to just mention that, speaking of statistics, there have been some questions regarding the affect of this on DPW as well, and if there are any statistics that can be provided that will show this affect on the State and how it affects States, we would certainly like to get that information as well just to put them on the record.

Again, we thank you for your testimony and being here today. This concludes your testimony.

There were actually a number of witnesses that were not able to be here this morning, so we are going to leave the record open. Provide testimony to my office by Friday at noon. So if you want to provide testimony to the Committee, you have until Friday at noon, and this concludes the hearing. I thank everyone for being here, I thank the members, and thank the testifiers.

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Jessica L. Rabuck, Reporter's Office