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**IN SUPPORT OF H.B. 1 TO AMEND 42 PA. C.S. §7102
(RELATING TO JOINT-AND-SEVERAL LIABILITY)**

BEFORE THE PENNSYLVANIA HOUSE
JUDICIARY COMMITTEE
MARCH 29, 2011

I am an attorney in the Pittsburgh office of K&L Gates LLP. For the past twenty years, I have represented defendants in toxic exposure lawsuits throughout Pennsylvania, and throughout the United States. My experience extends to analyzing liability-allocation mechanisms across the United States.

As matters now stand in Pennsylvania, any joint tortfeasor is responsible for paying for damages caused by any other joint tortfeasor, so long as those damages have not been paid to, or released by, the plaintiffs. In practice, the fear of being required to pay for harms caused by others has dissuaded Pennsylvania defendants from attempting to attribute any liability to persons or entities that may have been primarily responsible for plaintiffs' injuries, even when those persons or entities have compensated the plaintiff for his injuries.

The fact that Pennsylvania defendants are unable presently to place fault with persons or entities who may have caused the lion's share of a plaintiffs' harm has not precluded Pennsylvania *plaintiffs* from obtaining money from those other persons and entities outside of the tort system. Thus, while Pennsylvania law provides plaintiffs with a 100% recovery from those who pay within the somewhat narrow confines of the tort system, Pennsylvania's antiquated joint tortfeasor allocation statute does not permit defendants to allocate fault to potential joint tortfeasors who pay plaintiffs outside of the tort system, through a series of asbestos bankruptcy trusts holding reserves valued at up to \$30 billion¹, see *Reed v. Allied Signal, Inc.*, No. 1720 Nov. Term 2006 (Phil. Ct.,

¹ The asbestos bankruptcy trusts pay for harms caused by entities that went into bankruptcy as a result of asbestos liabilities.

Pa.) (12/22/06, slip. op. at 12) or from settlements that occur outside of the tort system. See *Rocco v. Johns-Manville Corp.*, 754 F.2d 110 (3d. Cir. 1985) (holding their shares of “volunteers” are not deducted from the recovery against a non-released party”).

Pennsylvania’s “Fair Share” Act, as embodied by the current version of House Bill No. 1 and Senate Bill No. 2, address these concerns by allowing juries to attribute liability to any “defendant” as well as to any person to whom plaintiffs have given a release. In this manner, juries can allocate fault among all entities from whom a plaintiff has received money, and Pennsylvania defendants will no longer be required to pay for harms caused by entities from whom plaintiffs have collected money outside of the tort system.

The “Fair Share” Act’s approach in this regard is neither novel, nor inconsistent with Pennsylvania law. Recently, in *Reed v. Allied Signal, Inc.*, the Court of Common Pleas of Philadelphia County ruled that asbestos bankruptcy trusts that pay plaintiffs outside of the tort system are tantamount to joint tortfeasors, even if they do not meet the express statutory definition of that term. In allowing the jury to allocate fault to these trusts, the “Fair Share” Act recognizes that solvent defendants should not have to pay for damages attributable to those who pay outside of the tort system, and plaintiffs should not be afforded more than a complete recovery, whether inside or outside the confines of the tort system. Thus, allowing jurors to allocate legal responsibility to those who pay plaintiffs outside of the tort system is entirely consistent with Pennsylvania law, and no one has offered any other alternative for addressing the payments that presently exist outside of the tort system.

When faced with the prospect of plaintiffs losing the dual ability to (1) collect fully in the tort system, and (2) collect more-than-fully outside of the tort system, some now express concern that Pennsylvania plaintiffs will be denied a “complete” recovery if defendants are permitted to pay only for the harm that they caused. This conclusion is not supported by the facts. The “Fair Share” Act does not allow fault to be allocated to anyone who is not a trial defendant or who has not paid money to plaintiffs, already. Accordingly, the notion that jurors will be inundated with the names of entities from whom plaintiffs cannot recover is simply incorrect.

Finally, a settlement agreement or verdict share attributable to an entity that seeks bankruptcy protection does not go away. *Rocco v. Johns-Manville Corp.*, 754 F.2d 110 (3d Cir. 1985). Rather, the plaintiff can pursue that claim in bankruptcy court, and collect whatever remedy the law provides. To impose liability upon an entity for harm that it did not cause shifts liability unfairly to defendants who meet the lone criterion of being solvent. This is neither logical, nor is it in the best interests of the Commonwealth.