TESTIMONY

OF

THE PENNSYLVANIA AFL-CIO

ON

JOINT AND SEVERAL LIABILITY

BEFORE

HONORABLE RONALD MARSICO, CHAIRMAN
HOUSE JUDICIARY COMMITTEE

HARRISBURG, PA

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A significant factor in ensuring a safe workplace is the economic pressures and threat of products liability suits in the workplace. Product liability rules, after all, are at the very core of promoting safety and compensating victims for unsafe products.

Our opposition to eliminating or narrowing joint and several liability is rooted in the fact that employers may never be sued for safety violations, even where there is intentional harm, such as willfully removing guards from machinery to speed production. The sad truth is that under Pennsylvania law, an employer can essentially commit murder and their liability is limited to the Workers' Compensation death benefits, if any, to a spouse or child at about 50% of the worker's lost wages up to the statutory cap.

Poyser v. Newman, a case decided by the PA Supreme Court had affirmed both the trial court and the Superior Court that employers are immune from lawsuits by employees for any "injury" defined as such by the Workers' Compensation Act; citing that the immunity granted in section 303(a) of the Workers' Compensation Act, "is a version of the historical *quid pro quo* that employers received in return for being subject to a statutory, no-fault system of compensation for workers injuries." Poyser v. Newman & Co., Inc., *522 A.2d 548 (Supreme Court of PA. 1987).* The Supreme Court concluded that Poyser was unable to pierce the immunity provided by the workers' compensation law, despite the fact that Newman, the employer, deliberately concealed the defective machine from OSHA inspectors.

In a twisted way, the Workers' Compensation Act protects employers who intentionally create unsafe working conditions in exchange for increased productivity and profits. Worker safety should never be a cost-benefit analysis, rather an absolute which should never be reduced for the purpose of earning an extra dollar. The duty of care, given by employers and manufacturers now, is established by the threat of suit. Naturally, as you take away that threat, standard of care will also reduce.

Supporters of the "fair share" act claim that if enacted employment in the Commonwealth will "boom," it is our feeling that the only thing that will "boom" is workers compensation claims, and more lawsuits against employers and manufacturers, because the "fair share" act will simply entice employers who will disregard safety laws, and analyze the cost-benefit of following the law and profits. Is this what Pennsylvania citizens, workers, constituents really want—a safe harbor for bad businesses?

We must also point out that the Pennsylvania AFL-CIO does not believe, nor do we attempt to draw the conclusion that a majority of employers in Pennsylvania engage in such activity described above, however we make this point to be clear about the potential ramifications which the "fair share" act would lead to.

We should also note that PA AFL-CIO, Like Justice Nix, believes that employer immunity should be narrowed to no longer protect such willful disregard which may lead to a workers bodily harm or death.

Manufacturers of equipment that can be tampered with to remove guards or other safety devices are and should remain subject to suit. Because it is ultimately the manufacturers technical engineering which is capable of foreclosing the opportunity of employer purchasers from disengaging safety devices, such as removing safe guards, and protecting workers.

This is the state of our current law, and as long as workers can't sue their employers for pre-meditated, willful or negligent conduct that is virtually certain to cause injury or possibly even death, then a victim—either harmed or killed—will only be able to seek total retribution through the partially liable co-defendant, who may then seek to recover funds from the employer, who is now immune from suit from the employee.

As we stated at the beginning of the testimony, fairness should not be considered exclusively between defendants, rather we should consider fairness between victims (plaintiffs) and defendants, between a party who has been wronged, and a party who participated, assisted or contributed to the wrong. Our position is simple, make the injured worker whole—first and foremost.

Another reason why the Pennsylvania AFL-CIO opposes the "fair share" Act is because of the significant impact the legislation will have on worker's, pensions, health and welfare, and Taft-Hartley funds, ability to seek restitution when they have been victimized by fraud of co-defendants.

Pension funds, as well as health and welfare, and Taft-Hartley Funds are regularly involved in litigation to protect the funds' integrity. These suits, to be successful, must include negligence or worse on the part of the financial and legal advisors to employee benefit plans.

The Enron case is illustrative of this. Enron went bankrupt, yet the co-defendant Arthur Andersen Accounting Firm was in a position to pay total damages. The Public School Employees' Retirement System (PSERS) sued the co-defendants in attempt to recoup the $59 million lost due to the actions of the defendants. If the jury finds Enron and Andersen both 50% responsible, under the "fair share" act the Pension funds would only be able to recoup the 50% of the judgment from Andersen alone, despite the fact that both Enron and Andersen worked hand-in-glove to cause the harm. Under the current law the pension fund could recover 100% of the damages from Andersen and the fund would be made whole.

Our point is those who we pay and rely on for professional advice regarding employee benefit funds should not be able to walk away from the harm they knowingly participated in and which

they earned substantial profits from—because they entered into a fraudulent scheme with another entity that goes bankrupt or is financially insolvent. They should be held accountable for the entire damage, damage they factually contributed towards.

In order to protect worker's pensions, health and welfare funds, and Taft-Hartley funds, joint and several liability must be maintained.

The reality is, that if a business abides by the laws and regulations put in place to protect workers assets, workers benefits, workers safety, and workers lives, then more often than not the business or employer will not be faced with a workers' compensation claims, or joint liability suits. Accidents happen nobody here will debate this but not every claim is going to lead to a suit, and the ones that do, juries determine whether or not a defendant has contributed to the victims injuries, if they have they should be responsible jointly and severally to ensure that the victim has been fully compensated for the injury, which they have contributed towards.

To conclude our remarks, we would like to re-state that the Pennsylvania AFL-CIO OPPOSES any elimination or narrowing of joint and several liability, in order to ensure that injured workers, physically or financially, are completely made whole for their injury. That fairness should remain with the injured party, not be overtaken by a party who has factually and jointly assisted in causing an injury.

Thank you for this opportunity to submit testimony, and we would be happy to answer any questions you may have.