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Getting A 'Fair Share' Of Asbestos Liability In Pa.

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January 16, 2018, 11:44 AM EST


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Enacted on June 28, 2011, and immediately applicable to most tort causes of actions that accrued on or after that date, Pennsylvania's Fair Share Act (FSA) provides for apportionment of liability among tortfeasors, including in strict liability actions:

Where recovery is allowed against more than one person, including actions for strict liability, and where liability is attributed to more than one defendant, each defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of the amount of that defendant's liability to the amount of liability attributed to all defendants and other persons to whom liability is apportioned [consistent with the FSA].

42 Pa. Con. Stat. § 7102(a.1)(1). Moreover, the FSA provides that except in certain statutorily identified circumstances, a defendant's liability shall be several, not joint. Id. § 7102(a.1)(2). Thus, in many contexts, the FSA has the effect of abrogating joint liability among defendants and limiting a defendant's liability for damages to its adjudicated share of liability and nothing more, so that the defendant would have no responsibility for a codefendant's share.

Yet, although the language of the FSA appears to make the FSA applicable to strict liability actions, some trial courts in Pennsylvania refused to apply the FSA to strict liability claims in asbestos actions and perhaps in other types of strict liability cases. See, e.g., Hogan v. John Crane Inc., No. 120802323, 2014 WL 5490067 (Pa. Ct. Com. Pl., Phila. Cnty., order entered June 10, 2014) (granting plaintiff's motion in limine requesting per capita apportionment among strictly liable asbestos defendants).

Instead, despite the FSA, these trial courts continued to apply pre-FSA Pennsylvania Supreme Court precedent, such as Baker v. ACandS, 755 A.2d 664, 669 (Pa. 2000). That precedent stood for the proposition that strictly liable defendants' responsibility for damages was to be calculated on a per capita basis, that is, divided equally among strictly liable joint tortfeasors.

For example, if four defendants were determined to be strictly liable to a plaintiff, each defendant would be responsible for 25 percent of the plaintiff's recovery. But in Roverano v. John Crane Inc., No. 2837 EDA 2016, 2017 WL 6761077 (Pa. Super. Ct. Dec. 28, 2017) (per curiam), the Pennsylvania Superior Court ruled that the FSA does, indeed, apply to the apportionment of liability among strictly liable defendants, including in an asbestos action, and it reversed the trend that had been followed by some

trial courts. The Superior Court remanded for a new trial to apportion damages among the tortfeasors.

The plaintiffs in Roverano filed their complaint on March 10, 2014, which was well after the effective date of the FSA. They sued thirty named defendants, claiming that Mr. Roverano's exposure to the asbestos products of those defendants caused his lung cancer. More than a dozen of those thirty defendants had filed for bankruptcy.

Of the defendants that remained in the case, all but John Crane Inc. and Brand Insulations Inc. settled with the plaintiffs prior to the jury's verdict. The jury found in favor of the plaintiffs. It awarded $5,189,265 to Mr. Roverano and $1,250,000 to Mrs. Roverano on her loss of consortium claim. Id., 2017 WL 6761077 at *1.

Prior to the trial of the Roverano action, Crane, Brand and other defendants that had not yet settled with the plaintiffs moved in limine for a ruling that any liability that they might sustain would be apportioned by the jury according to the extent to which each defendant caused harm to Mr. Roverano; however, the trial court denied defendants' motion and ruled that the FSA could not apply to strictly liable defendants in asbestos cases. Id., 2017 WL 6761077 at *11.

The trial court explained: "[A]ll of the testimony I've heard in asbestos, no one quantifies it. They say that you can't quantify it. If you can't quantify it, how can the Fair Share Act apply?" Id. Then, in its post-trial opinion, the trial court took the position that it "properly denied [defendants'] motion to apply the Fair Share Act to this case because the jury was not presented with evidence that would permit an apportionment to be made by it." Id.

On appellate review of the issue of the FSA's applicability in strict liability asbestos cases, an issue of first impression for the Pennsylvania Superior Court, a three-judge panel was unanimous in its reversal of the trial court's ruling.

First, the Superior Court explained that the FSA "explicitly applies in tort cases in which 'recovery is allowed against more than one person, including actions for strict liability.'" Id. Thus, to the Superior Court, it was clear that the allocation provision of the FSA explicitly made the FSA as applicable to strictly liable tortfeasors as it did to tortfeasors liable in negligence.

Second, the Superior Court believed that the fact that the FSA does not explicitly instruct how allocation among strictly liable tortfeasors should be achieved does not render the FSA inapplicable in strict liability actions. Id., 2017 WL 6761077 at *12. In fact, the Superior Court observed that the FSA is silent on the factors to be considered in apportioning liability among tortfeasors in all kinds of tort cases, not just in strict liability cases, and that the allocation considerations utilized in negligence cases could apply to strict liability cases as well. Id.

Regarding the approaches for achieving allocation among strictly liable defendants in an asbestos action, Brand suggested in Roverano that liability could have been apportioned among strictly liable defendants in accordance with the amount of Mr. Roverano's potential exposure to each defendant's asbestos product. Crane suggested that the potency of the type of asbestos to which Mr. Roverano was exposed — chrysotile versus amphibole — was also a factor to be considered.

The Superior Court noted as much, but it reserved opinion on the factors that should be considered by a finder of fact in allocating liability among strictly liable defendants pursuant to the FSA.

It suggested, however, that although some Pennsylvania Supreme Court precedent may have prohibited a fault-based allocation among strictly liable defendants on the ground that negligence principles had no place in strict "no-fault" liability, in view of the Supreme Court's more recent decision in Tincher v. Omega Flex Inc., 104 A.3d 328 (Pa. 2014), that precedent is outdated, and there now is a legal basis in Pennsylvania for inclusion of negligence principles in strict liability analysis. Roverano, id., 2017 WL 6761077 at *12 n.9.

As a result, a comparison of the fault or wrongdoing on the part of strictly liable defendants might be permissible and may be instructive to a finder of fact in its efforts to allocate liability. Moreover, under the FSA, except in certain statutorily identified circumstances — such as where a strictly liable defendant's allocated share of liability is 60 or more percent of the total liability apportioned to all parties — the strictly liable defendant's liability shall be several, not joint. See 42 Pa. Con. Stat. § 7102(a.1)(2)-(3).

There is more to the FSA that is pertinent here. The FSA permits apportionment of liability to any defendant, and even to a nonparty (other than an employer) who has entered into a release with the plaintiff with respect to the action. Id. § 7102(a.2). Thus, a finder of fact should be permitted to apportion liability not only among strictly liable defendants that have taken their defenses to verdict, but also among defendants that have settled with the plaintiff prior to verdict, and among nonparties who have settled with the plaintiff regarding the subject matter of the action, even if those nonparties are bankrupt. Roverano, id., 2017 WL 6761077 at *14-15.

Of course, the finder of fact's consideration of the liability of, and the apportionment of liability to, settling defendants and nonparties is contingent upon the submission of proof that those entities are tortfeasors. Id., 2017 WL 6761077 at *14 n.11. And, of course, that proof would need to be submitted by nonsettling defendants, because a plaintiff would have no interest in the reduction of a favorable jury verdict by the shares of entities with which the plaintiff settled.

Given the FSA's explicit language making the statute applicable to strict liability actions, the Superior Court's holding in Roverano hardly seems to be a controversial one. The challenge will be, however, in formulating suggestions and developing evidence to convince a finder of fact that one strictly liable tortfeasor's share of liability should be greater or less than that of another. The Supreme Court's decision in Tincher, which purports to accept the inclusion of some negligence principles in the strict liability context, may facilitate more latitude for developing fault-based strategies for this purpose.

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