House
Legislative
Analysis
Section

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JOINT & SEVERAL LIABILITY

House Bill 4508 (Substitute H-6)
First Analysis (4-27-95)

Sponsor: Rep. Michael Nye
Committee: Judiciary and Civil Rights

THE APPARENT PROBLEM:

The rule of joint and several liability provides that when a person has suffered an injury caused by two or more defendants in a lawsuit, each defendant may be held individually liable for the entire amount of damages. (However, a defendant who pays more than his or her share has a right to "contribution" from other defendants; that is, he or she can sue to get repaid the share of other defendants.) In its traditional form, the rule means that even though of two defendants one is 75 percent at fault and the other 25 percent at fault, each is liable for 100 percent of the damages awarded if the other cannot pay. The standard justification for the rule is that the injured party has a right to full compensation and each defendant is obligated to the injured party because he or she has committed a negligent act that was a proximate cause of the harm. Without each person's action, the injury would not have occurred. In 1986, as part of a package of so-called tort reforms, the legislature enacted a statute modifying the rule of joint and several liability. It applied to personal injury actions other than product liability cases.

The 1986 modification said that in cases involving an at-fault plaintiff, a party does not have to pay damages in an amount greater than his or her percentage of fault, except when a share of an award was uncollectible. Uncollectible amounts are to be reallocated among the other parties, including an at-fault claimant, according to their respective percentages of fault. A party cannot be required to pay a percentage of an uncollectible amount exceeding his or her percentage of fault. Further, the 1986 act said that governmental agencies, except hospitals and medical care facilities, are not required to pay a percentage of an uncollectible amount exceeding its percentage of fault even in cases in which the plaintiff was not at fault at all. For other defendants, when there is a plaintiff without fault, the old rule of joint and several liability applies.

Critics of the rule of joint and several liability are not satisfied with the 1986 amendments. For one thing, they did not apply to product liability cases, a growing segment of personal injury law. Further, the rule continues to apply in cases where a plaintiff has no share of the fault. Even in other cases, the modified rule forces a defendant to bear a share of damages out of proportion with the defendant's percentage of fault. The standard criticism of the rule of joint and several liability is that not only is it unfair on its face, particularly when a defendant with a relatively small percentage of fault is stuck with a large judgment, but it contributes, along with the "deep pockets" mentality of plaintiffs' lawyers, to ever increasing costs of doing business (including liability insurance) and a stifling of innovation and enterprise. The rule increases the exposure of those with assets (and/or insurance), including manufacturers and other businesses, as well as government, by providing an incentive for plaintiffs to bring them into lawsuits and pin some blame on them knowing they can be required to pay some or all of the share of damages assessed to asset-less, uninsured, but perhaps guiltier parties. Legislation has been introduced to abolish joint and several liability in many kinds of cases.

The 1986 reforms also addressed the issue of venue -- the proper place to file a lawsuit -- with the stated aim of preventing "forum shopping", or the search for the most advantageous locale to bring an action. Amendments have been proposed to further strengthen these provisions.

THE CONTENT OF THE BILL:

The bill would amend the Revised Judicature Act (MCL 600.1621 et al.) to make a number of revisions that would apply to actions based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death. The bill would essentially abolish joint and

several liability for such actions other than those alleging medical malpractice. It would also allow the reduction of damages to a plaintiff based on the fault of those who were not parties to the case (non-parties). The bill also would revise provisions dealing with venue (the determination of the proper place to file a lawsuit).

Joint And Several Liability

In 1986, a modified version of joint and several liability was enacted that applied to all personal injury actions except product liability actions (which remained under the old joint and several liability provisions). The 1986 amendment to the Revised Judicature Act provided that, except when a share of an award is uncollectible, a party does not have to pay damages in an amount greater than his or her relative degree of fault. If a party's share is determined to be uncollectible, the uncollectible amount is reallocated among the other parties, including an at-fault claimant, according to their respective percentages of fault. (The 1986 amendments replaced a joint and several liability rule that said when two or more defendants cause an injury, each defendant can be held individually liable for the entire amount of damages.)

House Bill 4508 would essentially eliminate joint and several liability for actions seeking damages for personal injury, property damage, or wrongful death (except medical malpractice actions). This includes product liability cases. It specifies that in such cases based on tort or another legal theory, the liability of each defendant for damages "is several only and is not joint." The bill says, however, that the provision would not abolish an employer's vicarious liability for an act or omission of the employer's employee.

The liability of each person in an action would be allocated by the trier of fact (a jury or judge serving without a jury) in direct proportion to the person's percentage of fault. Moreover, in assessing percentages of fault, the trier of fact would consider the fault of each person, regardless of whether the person was, or could have been, named as a party to the action.

The court would reduce the damages by the percentage of comparative fault of the plaintiff. If the plaintiff's percentage of fault is greater than the aggregate fault of the other person or persons, whether or not parties to the action, the court would reduce economic damages by the plaintiff's percentage of fault and non-economic damages could not be awarded.

(However, the trier of fact could not assess fault to a non-party unless a party gave notice within 182 days after the filing of the defendant's answer that the non-party was wholly or partially at fault. The notice would have to designate the non-party and set forth the non-party's name and last known address, or the best identification of the non-party possible, together with a brief statement of the basis for believing the non-party was at fault. Within 91 days after the filing and service of the notice identifying a non-party, a party could file and serve an amended pleading alleging one or more causes of action against that non-party. A cause of action added would not be barred by a period of limitation unless the cause of action would have been barred by a period of limitation at the time of the filing of the original action.)

The bill specifies that its joint and several liability provisions would not eliminate or diminish a defense or immunity that currently exists, except as expressly provided. Assessments of percentage of fault for non-parties would be used only to accurately determine the fault of named parties. If fault was assessed against a non-party, a finding of fault would not subject the non-party to liability in that action and could not be introduced as evidence of liability in another action.

The bill's provisions would apply to cases filed on or after its effective date. The bill specifies that the bill would take effect September 1, 1995.

Venue

The bill would amend the provisions in Section 1629 that specify the proper venue (i.e., the proper geographic location to file a lawsuit). The venue provisions now apply to actions based on tort. The bill would apply the provisions to an action based on tort "or another legal theory seeking damages for personal injury, property damage, or wrongful death." The first location to file a suit in the list of venue priorities is the county in which (1) "all or a part of the cause of action arose" and (2) where the defendant resides, has a place of business, or conducts business, or where the registered office of a defendant corporation is located. The bill would replace the phrase "in which all or a part of the cause of action arose" with the phrase "in which the original injury occurred." If no county satisfies the

criteria of the first priority, the proper county is one in which (1) all or part of the cause of action arose and (2) where either the plaintiff resides, has a place of business, or conducts business, or where the registered office of a plaintiff corporation is located. The bill would again use the phrase "in which the original injury occurred."

The section provides that either party may file a motion for a change of venue based on hardship or inconvenience. The bill would strike language that provides that venue can only be changed to the county in which the moving party resides.

The bill also specifies that, for the purposes of the section, in a product liability action, a defendant is considered to conduct business in a county in which the defendant's product is sold at retail.

Section 1641 of the act provides that when causes of action are joined, the venue could be laid in any county in which either cause of action, if sued upon separately, could have been commenced and tried, subject to separation and change. The bill would further specify that if more than one cause of action is pleaded in the initial complaint or added by amendment at any time during the action and one of the actions is based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, venue would be determined subject to Section 1629.

FISCAL IMPLICATIONS:

The House Fiscal Agency reports that the fiscal impact of the bill is indeterminate. (3-20-95)

ARGUMENTS:

For:

This bill takes a common sense approach to reforming the state's civil justice system. It says, in essence, that defendants should pay their fair share of damage awards and no more. A defendant's percentage share of an award should be equal to the share of fault apportioned to the defendant under the comparative negligence system. The current situation is clearly unfair: a defendant with a small portion of the fault can wind up paying all or a major part of a judgment. The current rule of joint and several liability encourages lawsuits, encourages the search for "deep pockets" defendants who can be made to pay for the negligence of others. This is one of the reasons why there is so much litigation, why so many people and businesses are drawn into lawsuits, and why lawsuits exact such a toll on our economy and society. The reforms enacted in 1986 were simply not strong enough. This bill would essentially abolish joint and several liability and replace it with "fair share liability." This will protect the state's businesses and individuals from being the targets of lawsuits just because they have sufficient assets to pay for the injuries cause by the negligence of others.

Allowing the apportionment of fault to "non-parties", those not involved in the lawsuit, is also a means of providing fair treatment for defendants. Currently, fault is apportioned among the parties to a lawsuit but the fault of a non-party is not taken into account as a means of reducing the liability of an at-fault defendant. This means a party with immunity, or with no assets, or who is beyond the reach of the courts can contribute significantly to an injury but the other defendants in the case must pick up the cost of the non-party's liability. This is clearly unjust and it imposes an unnecessary burden on those identified as "deep pockets" defendants.

The bill also makes the civil justice system fairer by preventing plaintiffs who are themselves more than 50 percent at fault from collecting non-economic damages. (It will not prevent them from collecting economic damages, such as medical care and lost wages.) Under the old contributory negligence system, a plaintiff who was in any degree negligent could not (except in special circumstances) recover from a defendant. With the advent in 1979 of a comparative negligence system, at-fault plaintiffs can sue and recover for a defendant's percentage of fault. The bill would modify the comparative negligence approach so that plaintiffs more than 50 percent at fault could not collect non-economic (e.g., pain and suffering, reduced quality of life) damages. This brings some balance to liability lawsuits. Why should defendants be forced to pay large pain and suffering awards to plaintiffs who themselves are largely responsible for the harm done to them?

The bill also would strengthen the provisions regarding venue or where a suit ought to be brought. It says cases should be brought "where the original injury occurred" rather than "where part or all of the cause of action arose." This is an effort to further restrict so-called forum shopping, in which plaintiffs seek to file cases in courts considered more advantageous to them.

Against:

The tort system has (at least) two basic purposes: to see that victims of negligence are fully compensated and to deter negligent behavior. This extreme and unjust bill would undermine both purposes. It would in many cases reduce dramatically the amount of damages a successful plaintiff could collect. It would forbid some victims, those judged to be more than 50 percent at fault themselves, from collecting any non-economic damages from negligent defendants, no matter how severely injured or how dramatically their lives have been altered. (It also implicitly assumes scientific exactitude in allocating fault.) It will relieve negligent parties from having to bear full responsibility for the harm to which they have contributed. Victims of negligence, both individuals and businesses, will be left without the resources they often need to repair the damage done to their lives. The deterrent effect of lawsuits will be weakened, and this will likely reduce the amount of care taken by corporations and individuals to avoid conduct that is harmful to others. It will lessen the incentive to make products safe.

A common complaint about the concept of joint and several liability is that it forces defendants with the financial means to pick up the portion of a damage award that would otherwise be uncollectible. But the alternative is to make the injured party bear these costs. That is what this bill would do. It would do this even when the injured party was completely innocent of fault. The choice is between making a negligent party bear the cost of uncollectible portions of judgments or making the innocent injured party bear the cost. This bill says: make the injured party pay. Is this fair? Under the current system, the responsibility for providing full compensation for injuries belongs to those responsible for the injuries and not to the victims. (It should be kept in mind that when plaintiffs have some percentage of fault, they too are responsible for some portion of uncollectible amounts.)

The bill also allows the apportioning of fault to those who are not defendants in the lawsuit, which will have the effect of further reducing compensation to victims of negligence. This "empty chair" tactic will allow defendants in a lawsuit to attempt to put the blame on other parties who cannot be brought into the case as defendants. These "non-parties" might have immunity, might be foreign operations out of the reach of the courts, or might be insolvent. If some portion of the fault is assigned to a non-party and there is no rule of joint and several liability, that will mean defendants in the case will escape that portion of the damages and plaintiffs will bear those costs. The incentive to name such non-parties will obviously be great. Trial lawyers argue that this provision will inhibit settlements and help clog the courts because defendants will have the opportunity at trial to shift blame to non-parties.

Trial lawyers also argue that abolishing joint and several liability (in conjunction with the "empty chair" doctrine) will result in lost Michigan jobs. This is because manufacturers will attempt to limit their liability by contracting work to foreign firms and subsidiaries that cannot be held accountable by the state's courts. With joint and several liability, a manufacturer or marketer of a product bears the responsibility if an unsafe product injures or kills a consumer. Without joint and several liability, a company could reduce its financial responsibility by contracting out design and production work to entities that state courts could not reach.

POSITIONS:

The following are among those who indicated their support for provisions in this bill to the House Judiciary and Civil Rights Committee (3-15-95): Michigan Voters Against Lawsuit Abuse; the Michigan Manufacturers Association; the Michigan Townships Association; the Michigan Association of Counties; The National Federation of Independent Business; and Amigo Mobility International, Inc.

The following are among those who indicated opposition to provisions in the bill (3-15-95): The Michigan Trial Lawyers Association; the Mid-Michigan Survivors of Breast Implants; the Michigan Consumer Federation; and the Michigan State AFL-CIO.