

## Unfair Shares: PA Supreme Court Mandates *Per Capita* Allocation Among Liable Product Defendants and Settled Parties

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The Pennsylvania Supreme Court has issued a tort decision with far-reaching implications for all manufacturers and sellers of products throughout the state. Absent further legislation beyond the 2011 Fair Share Act, liable product defendants in Pennsylvania must pay a *per capita* share of damages allocated among all product liability defendants and released non-parties.

### ***Per Capita* Allocation for Strict, Product Liability Defendants**

By a 6-1 vote in *Roverano v. John Crane, Inc.*, (February 19, 2020, 2020 Pa. LEXIS 1035) the Pennsylvania Supreme Court ruled that defendants found liable in a strict, product liability lawsuit for personal injuries or death must pay a *per capita* amount of the awarded damages, regardless of how much the defendant's product actually affected the plaintiff's disease process.

Although *Roverano* arose from exposure to asbestos, the genesis of the court's ruling suggests the *Roverano* rationale will apply to all strict, product liability actions in Pennsylvania. In reaching its decision, the Pennsylvania Supreme Court suggests that if the Legislature and Governor intend to pass a statute repealing what the judicial branch has already decided is the common law, they must have language that leaves no room for argument otherwise.

Plaintiffs, insurers, manufacturers and bankruptcy trusts were among the many constituencies awaiting the Pennsylvania Supreme Court's ruling in *Roverano*, which arose under the Fair Share Act, 42 Pa. Cons. Stat. §7102. The 2011 legislation had seemed to abrogate Pennsylvania's common law under which damages assessed against multiple product liability defendants were allocated on a *per capita* basis. The plain language of the Fair Share Act includes strict liability matters:

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. [Emphasis added.]

*Roverano* involved a 30-year smoker who contended that his lung cancer resulted not solely from cigarettes, but also from exposure to a variety of asbestos products over ten years of industrial employment. He sued 30 product defendants and made successful claims to seven asbestos-bankruptcy trusts. Some of the named-defendants were dismissed before the seven-day trial in the Philadelphia Court of Common Pleas in 2016. Another eight defendants settled before trial, and a ninth settled during the trial, leaving only two defendants at the end of trial. The jury found against those two defendants, as well as against six of the eight settled-defendants. The jury found damages over \$6.4 million for both the plaintiff and his wife. The trial court entered judgment against each of the two non-settling product defendants for one-eighth of the total damages because the jury found against eight defendants, including six of which had settled and were protected by a release.

Relying on the Fair Share Act, the non-settling product defendants contended that they should only be responsible for the actual percentage of their product's causal effect on the plaintiff's development of the disease. A Pennsylvania mid-level appellate court agreed, ruling that damages should be allocated according to the extent to which each of the liable manufacturers' product caused

harm.

The Supreme Court disagreed. It ruled that the Fair Share Act did not go far enough to repeal the prior common law requirement for *per capita* allocation among liable product defendants. It held that another section of the Act preserved the pre-existing common law of *per capita* allocation. The *Roverano* majority emphasized that unlike defendants in "negligence" lawsuits, the tort theory underlying strict, product liability "does not contain an element of fault." Instead, if the jury concludes that a product was "defective," and if the jury also finds that the defect was a cause of the harm, then the product maker or seller is "strictly liable" despite the user's carelessness with the product and/or despite any efforts made by the product maker or seller to ameliorate the product's risks.

Historically, Pennsylvania product liability law incorporates the strict liability constructs of the Restatement (Second) of Torts, Section 402A. Although most states have evolved to the more balanced approach of the Restatement (Third) of Torts, in 2014, the Pennsylvania Supreme Court again wedded the Commonwealth's common law to the more draconian, archaic Section 402A. In *Tincher v. Omega-Flex*, 628 Pa. 296, 104 A.3d 328 (Pa. 2014), the court ruled that a jury may find that a product is "defective" if (1) the product's danger is unknowable and unacceptable to the average consumer (the "consumer expectations" test) or (2) if a reasonable person would conclude that the probability and seriousness of harm posed by the product outweighed the costs of taking precautions against those risks (the "risk/utility" test.)

## The Importance of Asserting and Proving Crossclaims

*Roverano* requires all liable product defendants to pay *per capita*, which begs the all-important question of "who counts as a liable defendant?" At trial in *Roverano*, evidence had been introduced not merely about the asbestos-containing products of the two non-settling defendants, but also of the asbestos products made by many of the settled-defendants. Although the jury found six such settled defendants were liable, the releases obtained by those parties in pre-trial settlements protect them from having to pay any more than what they previously agreed to pay. With the jury finding two non-settling defendants liable and another six settled-defendants liable, the trial court allocated damages eight ways.

On appeal, the liable defendants contended the jury should have evaluated causal contribution of products whose makers had awarded the plaintiff money through their asbestos bankruptcy trusts. The defendants relied on Section (a.2) of the Fair Share Act which requires that "the question of liability of any ... person who has entered into a release ... and who is not a party shall be transmitted to [the jury]..." The Supreme Court ruled that this language "contemplates apportioning liability to two [types of] entities: (1) defendants; or (2) any non-party 'who has entered into a release with the plaintiff with respect to the action.'"

The Supreme Court ruled that the one specific bankruptcy trust which had been joined into the case should have been treated "as a legally responsible tortfeasor" for purposes of the jury's consideration of liable parties. Further, the Supreme Court ruled that the trial court should have evaluated whether there was any evidence of seven other "bankrupt entities' liability" – and if there was such evidence, then the question of liability of those bankrupt parties should also have gone to the jury.

This second part of the *Roverano* decision emphasizes the importance of thorough workup of a tort suit – whether an asbestos matter or any other multi-defendant matter. Each defendant needs to be vigilant not only with respect to the evidence against its interests, but also to the evidence that could be used against other defendants. Each defendant needs to assess whether all the right parties are in the case, and if they are not, to take steps to bring those parties into the suit. A defendant's ability to join an out-of-state defendant may be limited by federal concepts of personal jurisdiction.

If you have questions or would like additional information, please contact Bill Kennedy ([kennedyw@whiteandwilliams.com](mailto:kennedyw@whiteandwilliams.com); 215.864.6816) or another member of our Product Liability Group.

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