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FOR DISCUSSION ONLY

APPORTIONMENT OF TORT RESPONSIBILITY ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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APPORTIONMENT OF TORT RESPONSIBILITY ACT

WITH REPORTER'S NOTES

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1 **APPORTIONMENT OF TORT RESPONSIBILITY ACT**

2 (Second Tentative Draft, January 29, 2001)

3 **SECTION 1. DEFINITIONS.** In this [Act]:

4 (1) "Fault" includes:

5 (A) an act or omission that is in any degree negligent or reckless toward the person
6 or property of the actor or another person or which subjects a person to strict liability in tort;

7 (B) breach of warranty;

8 (C) unreasonable assumption of risk unless the actor has expressly agreed to assume
9 the risk;

10 (D) misuse of a product; and

11 (E) unreasonable failure to avoid injury or to mitigate damages.

12 (2) "Person" means an individual, corporation, business trust, estate, trust, partnership,
13 limited liability company, association, joint venture, government; governmental subdivision, agency,
14 or instrumentality; public corporation, or any other legal or commercial entity.

15 **Reporter's Notes**

16 The definition of "fault" is taken from the Uniform Comparative Fault Act. Notice that it does
17 not allude to intentional acts, but the definition is not exclusive so that one could argue that
18 intentional acts could be compared.

19 The definition of "person" is a standard version definition employed by the Conference.

20 **SECTION 2. EFFECT OF CONTRIBUTORY FAULT.** In an action based on fault
21 seeking damages for personal injury or [physical] injury to [tangible] property, any contributory fault
22 chargeable to the claimant diminishes proportionately the amount that may be awarded as
23 compensatory damages for the injury attributable to the claimant's contributory fault but does not

1 preclude recovery [unless the claimant's fault is [equal to or] greater than the combined fault of all
2 other persons whose fault is determined to have caused the injury].

3 **Reporter's Notes**

4 Two basic issues are raised. What types of tort cases should be governed by the Act? Should
5 the Act adopt a pure comparative fault system or a modified system? If it is to be a modified
6 system, what should the threshold be--50 percent or 51 percent or some other figure?

7 **SECTION 3. APPORTIONMENT OF DAMAGES.**

8 (a) In this section, "nonparty at fault" [means] [includes] a person who is allegedly responsible
9 for all or part of injury to a claimant or a claimant's property and, as to that injury, has been released
10 from liability, is legally immune from liability, or is not amenable to service of process or subject to
11 the jurisdiction of the court where the claim [has been filed] [is being adjudicated].

12 (b) In an action to recover damages for personal injury or [physical] injury to [tangible]
13 property involving the fault of more than one person, unless otherwise agreed by all the parties, the
14 court shall instruct the jury to answer special interrogatories or, if there is no jury, make findings
15 stating:

16 (1) the amount of damages that each claimant would be entitled to recover if any
17 contributory fault is disregarded; and

18 (2) as to each claim, the percentage of the total fault of all the parties and nonparties
19 allocated to each claimant, defendant, and nonparty.

20 (c) In submitting interrogatories to the jury or making findings under subsection (b), the court
21 may treat two or more persons as a single party.

1 (d) In determining the percentages of fault, the trier of fact shall consider both the nature of
2 the conduct of each party and nonparty at fault and the extent of the causal relation between the
3 conduct and the damages.

4 [(e) The legal requirements of causal relation apply both to fault as the basis of liability and
5 to contributory fault.]

6 **Reporter's Notes**

7 This language is taken from the Uniform Act, but it differs in that it takes into account the
8 conduct of nonparties at fault, something the Uniform Act did not do. Should the fault of
9 nonparties be taken into account?

10 The “nonparty at fault” definition was not part of the Uniform Act because the Act did not
11 contemplate that the fault of a nonparty, other than that of a settling joint tortfeasor, would
12 be taken into account.

13
14 Do we need the bracket language in subsection (e). It was in the Uniform Act?

15 **SECTION 4. DETERMINING DAMAGES; ENTERING JUDGMENT.** Upon motion
16 of a party, the court shall determine the award of damages to each claimant in accordance with the
17 percentage of fault found pursuant to Section 3 and enter judgment for the amount severally against
18 each party that is liable. The court shall also enter judgment against all the parties found liable for the
19 total amount recoverable by the claimant on the basis of rules of joint and several liability but shall
20 condition the liability of the judgment debtors on the requirements of Section 5.

21 **Reporter's Notes**

22 Most jurisdictions require that the trier of fact determine the percentages of fault and the
23 amount of damages separately. It is the responsibility of the court to make the necessary
24 calculations to enter judgment.

25
26 The Uniform Act provided for joint and several liability. This section provides for several
27 liability, but conditions joint liability upon the inability of a judgment debtor to satisfy his or
28 her responsibility for the damages assessed. The conditions for joint liability are set out in
29 Section 5.

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(b) Upon motion made not later than [one year] after judgment is entered, a judgment creditor may petition the court to determine whether all or part of a judgment debtor's several share is uncollectible. If the court makes this determination, the court [may][shall]:

(2) reallocate all or part of any uncollectible amount to the other judgment debtors and authorize the judgment creditor to satisfy the judgment from the other judgment debtors to the extent of the reallocation.

Reporter's Notes

The key provision in this section is subsection (b) which would permit or require, depending on the language chosen in the brackets in line 9, the court to order a judgment debtor who has been conditionally adjudged jointly and severally liable to pay more than the several share of responsibility. If the Committee were to choose "may" version, the court would have the discretion to grant or not grant the motion of a judgment creditor. Should the court have this kind of discretion and, if so, should there be criteria set out in the Act which would govern the court's decision?

1 take into account any share of fault assessed against a judgment creditor. Do we want to give
2 the court the discretion contemplated in the two basic approaches and, if so, should the court
3 have the discretion permitted within the second option?
4

5 **SECTION 6. SETOFF.** A claim or counterclaim may not be set off against each other except
6 by agreement of the parties. However, on motion, if the court finds that the obligation of either party
7 is likely to be uncollectible, the court may order that both parties make payment into the court for
8 distribution. The court shall distribute the funds received and declare obligations discharged as if the
9 payment into court by either party had been a payment to the other party and any return of those
10 funds to the party making payment had been a payment to that party by the other party.

11 **Reporter's Notes**

12 This is the language from the Uniform Comparative Fault Act.

13 **SECTION 7. RIGHT OF CONTRIBUTION.** A judgment debtor who is [subject to liability
14 under Section 5(b) for more than the debtor's assessed share of liability under Section 4 or who is]
15 jointly and severally liable with one or more other judgment debtors upon the same indivisible claim
16 for the same injury may seek contribution from the other judgment debtors for any amount the
17 judgment debtor has paid in excess of the several amount for which the judgment debtor is
18 responsible. The claim may be asserted either in the original action or in a separate action brought
19 for that purpose.

20 **Reporter's Notes**

21 This language, except for that in brackets, is taken from the Uniform Comparative Fault Act
22 and would be applicable to situations under the Apportionment of Tort Responsibility Act
23 where joint and several liability is preserved. If the Committee were to adopt the approach
24 under subsection (b) of Section 5 allowing a judgment to be satisfied on a joint and several
25 basis or otherwise requiring a judgment debtor to pay more than his or her assessed share
26 under Section 4, it probably would be advisable to have an explicit reference in Section 7 to
27 ensure that the right of contribution extends to the situation under subsection (b). The
28 bracketed language is an attempt to recognize and assure that right of contribution.

SECTION 8. EFFECT OF RELEASE. A release, covenant not to sue, covenant not to execute a judgment, or similar agreement by a claimant and person subject to liability discharges the person from liability to the claimant to the extent provided in the agreement and from liability for contribution to any other person subject to liability to the claimant for the same injury. The agreement does not discharge any other person subject to liability upon the same claim unless the agreement so provides. The claim of the releasing person against other persons liable for the same injury for which the released person is liable must be reduced by the amount of the released person's several share of the obligation, determined pursuant to Section 3.

Reporter's Notes

Although I have rewritten this provision which was contained in the Uniform Comparative Fault Act, I do not think there is any substantive difference. Section 3 specifically contemplates that any releasing party's fault will be an issue in the continuing litigation between the claimant and nonreleasing parties. The effect of the release is determined by whatever share of responsibility is ultimately assessed against the releasing party and the nonreleasing parties are not responsible for that share.

SECTION 9. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this Uniform Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among States that enact it.

SECTION 10. SHORT TITLE. This [Act] may be cited as the Uniform Apportionment of Tort Responsibility Act.

SECTION 11. SEVERABILITY CLAUSE. If any provision of this [Act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

1 **SECTION 12. APPLICABILITY.** This [Act] applies to actions [filed on or][accruing] after
2 its effective date.

3 **SECTION 13. EFFECTIVE DATE.** This [Act] takes effect on

4 **SECTION 14. REPEALS.** The following acts and parts of acts are repealed:

5 (1)

6 (2)

7 (3)