A CALL FOR A PURPOSIVE APPROACH TO THE APPLICATION OF THE REALLOCATION PROVISIONS OF MINNESOTA'S JOINT AND SEVERAL LIABILITY STATUTE

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Introduction

Minnesota's joint and several liability statute has been a frequent target for tort reform efforts since it was first enacted in 1978.[1] Most recently, Minnesota amended the statute so that joint liability does not attach unless a defendant is held to be more than 50 percent at fault.[2] The bill was signed into law by Governor Tim Pawlenty May 19, 2003,[3] and was described as Minnesota's most significant change in business liability law in 25 years at the time it was passed by the Legislature.[4] Not long after the enactment of the 2003 amendment, commentators and members of the trial bar noted that the Legislature in 2003 left unchanged the reallocation provisions of the statute, and on this basis concluded that for some defendants, the statute has left in place a scheme of *de facto* joint and several liability.[5]

As this article will demonstrate, the result of the 2003 amendment is that the joint and liability statute's reallocation provision contained in subdivision 2 does not apply to a defendant that is not held to be more than 50 percent at fault. The suggestion that the amendment does not affect the statute's reallocation provision, while certainly interesting, is untenable for several reasons, and will not withstand a court's purposive approach to the interpretation of the joint and several liability statute. The legislative history of the 2003 amendment to the joint and several

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[1] *See* Minn. Laws. 1986 c. 444; Minn. Laws 1986 c. 455; Minn. Laws 1988 c. 503 § 3; Minn. Laws 1989 c. 209, art. 1; Minn. Laws 2003 c. 71 § 1. *See also* Mark Cohen, *Lawmakers Change Joint and Several Threshold*, MINNESOTA LAWYER (May 19, 2003).
[2] MINN. STAT. § 604.02, subd. 1.
[3] Minn. Laws 2003 c. 71 § 1.
[4] Mike Hughlett, *Business Applauds Likely Liability Change, Opponents Say Some Victims to be Left Out*, ST. PAUL PIONEER PRESS, at C1 (May 15, 2003).
[5] *See, e.g.*, Scott M. Rusert, *Minnesota's New Joint & Several Liability Statute: Not What you Had Hoped For*, Flynn Gaskins Bennett LLP, at A-3, A-5 (2004).

liability statute does not in any way support the suggestion that the amendment does not affect the reallocation provision. Rather, the Legislature's implementation of "joint" and "several" liability for only those defendants determined to be more than 50 percent at fault reflects an intent to apply these specific concepts, as they have so often been used in case law, to a specific class of defendants. Moreover, interpreting the statute as implementing *de facto* joint and several liability through subdivision 2 would run counter to the state and nationwide historical development of joint and several liability. Additionally, the application of any one of several of the most familiar and frequently utilized canons of statutory interpretation controverts such an interpretation.

The Legislature's Clearly Expressed Intent in 2003 Was to Limit the Application of Joint and Several Liability to Defendants Determined to be More Than 50 Percent at Fault

In enacting the 2003 amendment, the Legislature expressly limited the application of "joint" liability and "several" liability, as those terms have been used by courts in Minnesota and elsewhere. This limitation was the central feature of the legislation. There can be no doubt that legislators had those specific terms in mind when they voted to amend the statute.

"Joint and Several" Liability in the Minds of Minnesota Legislators

The House Research Bill Summary, for example, described the proposed amendment as modifying the "common law principle" of joint and several liability, under which "where there are multiple defendants who are all liable, each one is responsible for all the plaintiff's damages if the other defendants cannot pay."[6] This interpretation is consistent with joint and several liability as it has been discussed in Minnesota case law for decades. For example, in 1970 the Minnesota Supreme Court in *Mathews v. Mills* expressed its view that "[i]t has always been the

[6] J. Johnson, House Research Bill Summary, H.F. 75 (Jan. 29, 2003) (on file at the Minnesota Judicial Center and with the authors).

law of this state that parties whose negligence concurs to cause an injury are jointly and severally liable although not acting in concert."[7]

The Legislature's Implementation of "Joint and Several" Liability for Defendants more than 50 Percent at Fault Trumps the Reallocation Language of Subdivision 2

The language of subdivision 1 following the 2003 amendment states that only those whose fault exceeds 50 percent are "jointly and severally liable for the whole award."[8] Nowhere in subdivision 2 can such specific language be found. Subdivision 2 states only that where an obligation is uncollectible, the court will "reallocate any uncollectible amount among the other parties, including a claimant at fault, according to their respective percentages of fault."[9]

The Legislature could not possibly have intended to implement *de facto* joint and several liability via the reallocation provision of subdivision 2 in the 2003 amendment. As one commentator has noted, "there hardly seems to be a legislative mandate to broadly expand cases in which joint and several liability will apply."[10] A purposive approach to the interpretation of the joint and several liability statute leads to the conclusion that given the Legislature's central purpose in enacting the 50-percent threshold in the 2003 amendment to the joint and several liability statute, reallocating uncollectible amounts under subdivision 2 without giving effect to the new threshold for joint and several liability set forth in subdivision 1 flatly contradicts its succinct and precise language.

The Historical Background and Legislative History Relating to the 2003 Amendment to the Joint and Several Liability Statute Contradict the Suggested Interpretation

An interpretation of *de facto* joint and several liability regarding reallocation under the joint and several liability statute must be the product of a formalistic, textual interpretation of the

[7] 178 N.W.2d 841, 844 (Minn. 1970).
[8] MINN. STAT. § 604.02, subd. 1(1).
[9] *Id.* § 604.02, subd. 2.
[10] Michael K. Steenson, *Joint and Several Liability in Minnesota: The 2003 Model*, 30 WM. MITCHELL L. REV. 845, 894 (2004).

statute. This interpretation is not supported by the historical development of joint and several liability in Minnesota, or by the legislative history of the 2003 amendment. Since the late nineteenth century, joint and several liability has been the law in Minnesota. Since 1978, the Legislature has periodically and incrementally reduced the scope of Minnesota's joint and several liability scheme.

The Legislature's Gradual Limitation of Joint and Several Liability

In 1978, the Legislature enacted a loss-allocation provision that holds all parties to a lawsuit responsible for the uncollectible shares of a judgment.[11] One commentator has described this legislation as "a middle position between full retention of the rule of joint and several liability and complete abolition of the rule in favor of several liability only."[12]

The 1978 legislation excluded products liability defendants in the chain of manufacture and distribution from the reallocation rule by providing that an uncollectible share of one of the defendants would be reallocated only to other defendants in the chain of manufacture and distribution.[13] Subdivision 3 is essentially a codification of the common law principle of strict products liability that a plaintiff may sue and recover all damages from any defendant in the chain of distribution. In *Farr v. Armstrong Rubber Co.*, for example, the Minnesota Supreme Court held in 1970 that an injured person may maintain an action for strict liability against a commercial seller of a defective product, even if that seller was not negligent.[14] In this respect, subdivision 3 can be distinguished from subdivision 2.[15]

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[11] Michael K. Steenson, J. David Prince, & Sarah L. Brew, 27 MINN. PRAC. PRODS. LIAB. LAW 7.12 (2008).
[12] Steenson, *supra* note 10, at 851.
[13] *Id.*
[14] 179 N.W.2d 64, 68 (Minn. 1970) (citing Restatement (Second) of Torts § 402A (1965)).
[15] Accordingly, the authors submit that subdivision 3's roots as the codification of a common law principle of strict products liability differentiates it from subdivision 2 and render inapplicable the Minnesota Court of Appeals' holding in *Marcon v. Kmart Corp.*, 573 N.W.2d 728, 732 (Minn. Ct. App. 1998), that the pre-2003 15-percent limitation of subdivision 1 did not apply to limit subdivision 3 reallocation.

The substance of subdivisions 2 and 3 of the statute has not changed since they were originally enacted:

> **Subd. 2. Reallocation of uncollectible amounts generally.** Upon motion made not later than one year after judgment is entered, the court shall determine whether all or part of a party's equitable share of the obligation is uncollectible from that party and shall reallocate any uncollectible amount among the other parties, including a claimant at fault, according to their respective percentages of fault. A party whose liability is reallocated is nonetheless subject to contribution and to any continuing liability to the claimant on the judgment.[16]
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> **Subd. 3. Product liability; reallocation of uncollectible amounts.** In the case of a claim arising from the manufacture, sale, use or consumption of a product, and amount uncollectible from any person in the chain of manufacture and distribution shall be reallocated among all other persons in the chain of manufacture and distribution but not among the claimant or others at fault who are not in the chain of manufacture or distribution of the product. Provided, however, that a person whose fault is less than that of a claimant is liable to the claimant only for that portion of the judgment which represents the percentage of fault attributable to the person whose fault is less.[17]

In 1986, the Legislature limited the liability of the state or of municipalities to two times their percentage of fault if their fault was less than 35 percent.[18] The Legislature again amended the law of joint and several liability in 1988 by adopting a new cutoff for joint and several liability cases (other than the already-exempted products liability cases and some cases involving statutorily based environmental liability) that provided a ceiling of four times the percentage of fault for those 15 percent or less at fault.[19] The 15-percent cutoff was the result of a legislative compromise from a different legislative session.[20] From 1988 until the 2003 amendment, subdivision 1 provided:

> **Subdivision 1.** When two or more persons are jointly liable, contributions to awards shall be in proportion to the percentage of fault attributable to each, except that each is jointly and severally liable for the whole award. Except in cases where liability arises under chapters 18B – pesticide control, 115 – water pollution control, 115A – waste management, 115B – environmental response and liability, 115C – leaking underground storage tanks, and 299J – pipeline safety, public nuisance law for damage to the environment or the public health,

[16] MINN. STAT. § 604.02, subd. 2.
[17] MINN. STAT. § 604.02, subd. 3.
[18] 1986 Minn. Laws ch. 455 § 85.
[19] 1988 Minn. Laws ch. 503 § 3 (codified at MINN. STAT. § 604.02, subd. 1 (2002)).
[20] Steenson, *supra* note 10, at 851.

> any other environmental or public health law, or any environmental or public health ordinance or program of a municipality as defined in section 466.01, a person whose fault is 15 percent or less is liable for a percentage of the whole award no greater than four times the percentage of fault, including any amount reallocated to that person under subdivision 2.
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> If the state or municipality as defined in section 466.01 is jointly liable, and its fault is less than 35 percent, it is jointly and severally liable for a percentage of the whole award no greater than twice the amount of fault, including any amount reallocated to the state or municipality under subdivision 2.[21]

Following the 2003 amendment, several liability is now the general rule. Minnesota Statute section 604.02, subdivision 1, now states:

> **Subdivision 1.** When two or more persons are severally liable, contributions to awards shall be in proportion to the percentage of fault attributable to each, except that the following persons are jointly and severally liable for the whole award:
> (1) a person whose fault is greater than 50%;
> (2) two or more persons who act in a common scheme or plan that results in injury;
> (3) a person who commits an intentional tort; or
> (4) a person whose liability arises under chapters 18B – pesticide control, 115 – water pollution control, 115A – waste management, 115B – environmental response and liability, 115C – leaking underground storage tanks, and 299J – pipeline safety, public nuisance law for damage to the environment or the public health, or any other environmental or public health law, or any environmental or public health ordinance or program of a municipality as defined in section 466.01.[22]

The 2003 amendment to the joint and several liability statute is part of a movement to limit the application of joint and several liability in Minnesota that has spanned decades. In this respect, Minnesota's 2003 amendment was in line with nationwide trends.[23] The Civil Justice Coalition, which is "a coalition of businesses, trade associations, non-profit organizations and government entities," noted in its 2003 lobbying effort in favor of the amendment that in the 20 years preceding the amendment, 35 states had made changes to their joint and several liability

[21] MINN. STAT. § 604.02, subd. 1 (2002).
[22] *Id.* § 604.02, subd. 1.
[23] Mike Hughlett, *Business Applauds Likely Liability Change; Opponents Say Some Victims to be Left Out*, ST. PAUL PIONEER PRESS, at C-1 (May 15, 2003)("[T]he changes enacted in Minnesota are part of a nationwide trend toward easing joint-and-several liability burdens on defendants[.]").

statutes.[24] The Coalition noted that among those 35 states, seven states had totally abolished joint and several liability, 16 states had abolished joint and several liability but retained certain exceptions, and 12 states had adopted higher thresholds for joint and several liability.[25]

The Legislature's Intent in 2003 to Limit the Application of Joint and Several Liability

Nothing in the materials on file at the Minnesota Judicial Center submitted by the dozen or more organizations that put forth formal opinions regarding the proposed legislation made any reference to the legislation departing in any way from the national trend toward limiting the application of joint and several liability, which would certainly be the case if commentators' conclusions regarding reallocation were what the Legislature had intended. The legislative history of the 2003 amendment consists almost entirely of general concerns regarding the existing joint and several liability scheme and its impact upon Minnesota businesses, insurers, and governmental entities. For example, in describing the then-existing scheme of joint and several liability and arguing in favor of its amendment moments before the Senate vote, Sen. Linda Scheid described it as violating her "sense of fairness," because in her view:

> There's one thing I that I think people would agree on – that's it's fair to have people or companies pay for the harm or the damage they cause. And I think that most people would agree that it is not fair for anyone to pay for harm or damages that are caused by someone else."[26]

In the words of commentator Michael Steenson, "No clear guidance concerning the interpretation of the amendment appears in the history, although Representative Johnson, the author of the bill, testifying before the House Civil Law Committee, indicated that the exceptions to joint and several liability were incorporated in the amendment because they were pre-existing

[24] Civil Justice Coalition, Handout 3 (S.F. 95), Jan. 20, 2003 (on file at the Minnesota Judicial Center and with the authors).
[25] *Id.*
[26] Video Tape: Sen. Linda Scheid speaking at Senate Floor Session (May 13, 2003)(available at http://www.senate.leg.state.mn.us/media/archive/2003/floor)(last visited Feb. 27, 2009).

exceptions."[27] In his analysis, Steenson noted that the subdivision 2 loss reallocation provision "was limited by the percentage cutoffs provided for in subdivision 1 of section 604.02."[28] Nothing in the legislative history of the 2003 amendment would suggest that this is not an accurate observation.

The Application of Several Canons of Statutory Interpretation Would Dictate that Subdivision 2 Reallocation Must Be Limited by Subdivision 1

The authors are aware of no courts to date that have squarely addressed subdivision 2 of the joint and several liability statute following its 2003 amendment. Absent judicial construction, several canons of statutory interpretation strongly suggest *de facto* joint and several liability as a product of reallocation is a misguided application of the statute.

Presumption of internal consistency: It is presumed that a statute will be interpreted so as to be internally consistent. A particular section of a statute is not to be divorced from the rest of the act, or from other statutes.[29] Commentators' analysis of the subdivision 2 reallocation provision creating a situation of *de facto* joint and several liability is not internally consistent with subdivision 1 following its 2003 amendment. Consider the following hypothetical situation and analysis one commentator used to support this interpretation:

> Defendant A manufactures a widget. Defendant B is not in the chain of distribution, but has performed independent service work on the widget. A claim arises from the use of the widget that results in a $100,000 judgment: 15% attributable to Defendant A and 85% attributable to Defendant B's negligent service work. If Defendant B is uncollectible, the 85% attributable to it can be reallocated to Defendant A. **Where Defendant A could previously be responsible for no more than 60% of the judgment (4 x 15%), it now can be 100% responsible.**[30]

In order to reach this conclusion, one must apply subdivision 2 in a vacuum. To reallocate this judgment in a manner that places 100-percent responsibility for the judgment in

[27] Steenson, *supra* note 10, at 860.
[28] *Id.* at 849.
[29] Norman J. Singer & J.D. Shambie Singer, *Statutes on the Same Subject Construed Together*, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 51:2 (2008).
[30] Rusert at A-4 (emphasis in original).

the hands of a defendant judicially determined to be 15 percent at fault is a classic example of the application of joint and several liability in the absence of any statutorily imposed limitations. Moreover, to do so contravenes the language of subdivision 1 that "contributions to awards shall be in proportion to the percentage of fault attributable to each," except for those greater than 50 percent responsible, to whom joint and several liability applies.[31] This illustration directly contradicts the spirit of subdivision 1, if not its express language.

***Noscitur a sociis* (a word is known by the company it keeps):** When a word or phrase is ambiguous, its meaning may be determined by reference to the rest of the statute.[32] The 2003 addition of language in subdivision 1 that joint and several liability applies only to "a person whose fault is greater than 50 percent" must be allowed to influence the interpretation of subdivision 2 because if it is not given effect, then the subdivision 2 "according to their respective percentages of fault" language directly undermines the legislature's expressed desire to limit joint and several liability to those defendants determined to be more than 50 percent at fault.[33]

Last in time: When two statutes conflict, the one enacted last prevails.[34] Certainly worth noting is the fact that the 2003 amendment is the last time the Legislature has spoken on the subject of joint and several liability in Minnesota. The subdivision 2 reallocation provision has been left virtually untouched by the Legislature since the joint and liability statute was first enacted more than three decades ago. According to this canon, to the extent subdivision 1 conflicts with subdivision 2, subdivision 1 must prevail.

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[31] MINN. STAT. § 604.02, subd. 1.
[32] *See, e.g., State v. Peck*, 756 N.W.2d 510, 515 (Minn. Ct. App. 2008).
[33] MINN. STAT. § 604.02, subds. 1 and 2.
[34] *See, e.g., Watt v. Alaska*, 451 U.S. 259 (1981). *See also* Singer & Singer, *supra* note 29.

Avoiding absurdity: Of course, it is always presumed that the Legislature did not intend an absurd or manifestly unjust result.[35] The example discussed above is arguably an absurd result that the Legislature never intended, because it almost directly contradicts the language of subdivision 1 of the statute.

The authors are not unmindful of Karl Llewellyn's astute, and frequently noted, observation that every canon has a "counter-canon."[36] In this case, however, applications of the canons set forth above make startlingly clear the logical disconnect between the 2003 amendment and *de facto* joint and several liability via subdivision 2.

Conclusion

Not a word of testimony at the committee hearings or on the floor of the Minnesota House of Representatives or the Senate, nor a word of written material in the materials submitted by opponents or proponents to the 2003 amendment to Minnesota's joint and several liability statute, suggests that anyone who voted to amend the statute believed its reallocation provisions would be interpreted in a manner that would serve as *de facto* joint and several liability for solvent defendants subject to a judgment involving insolvent defendants. By adopting a purposive approach to the interpretation of this statute following the 2003 amendment, Minnesota Courts will ensure that joint and several liability no longer applies to defendants pursuant to subdivision 2 unless their fault exceeds 50 percent.

[35] *See, e.g., City of New York v. Davis*, 7 F.2d 566 (2d Cir. 1925).
[36] *See* Karl Llewellyn, *Remarks on the Theory of Appellate Decisions and the Rules or Canons About How Statutes are to be Construed*, 3 VAND. L. R. 395 (1950).