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# THE LITIGATOR

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## The Chair's Comments

### A Word from Allison O. Van Laningham: Bye-Bye Disingenuous

At the beginning of every new year, there are lists of words or phrases that people suggest should be retired from the American vocabulary. 2010 is no different, and there are plenty of published suggestions for words we ought to abandon. Some of the words have outlasted their usefulness. This result can come from overuse or the fact that the phrase was never accurate in the first place. Rick Klein of ABC News included "Let me be clear" on his list of political phrases to retire in 2010, noting that it was a "bipartisan favorite" but that "[b]eing clear is often harder than saying you're being clear." Rick Klein, "Top Five Political Phrases to Retire in 2010," available at <http://abcnews.go.com/Politics/top-political-phrases-retire-2010/story?id=9507525>. Others represent a morphing of the language that someone finds objectionable (e.g., stacycation, recessionista). Still others simply are annoying to the list maker. For 2010, one author includ-



Van Laningham

ed the word "whatever," defining it as a "dismissive answer/statement" that is an "equal-opportunity irritant." Mary Winters, *2009's Most Annoying Words, and Some Keepers* (available at [www.politicsdaily.com/2009/12/30/2009s-most-annoying-words-and-some-keepers](http://www.politicsdaily.com/2009/12/30/2009s-most-annoying-words-and-some-keepers)). In all events, though, the list makers think that our language and vocabulary would be better if we jettisoned these items.

Perhaps we should have a similar list of words for legal writing and argument. Each of us reads briefs and other court submissions that are full of words and phrases we would rather not see. We hear arguments that likewise have words or phrases that we could all do without. Many times, it is not just annoyance or good sense that causes us to think that a word has no place in our profession – it is instead an affirmative belief that the profession would be better if we did not use these words. This goes beyond writing or sentence structure and extends to good manners and professionalism.

At the top of my list of words to discard is "disingenuous." This word increasingly finds its way into legal writing and argument and almost always is used to describe opposing counsel. No matter how many syllables or how high-brow it might sound, at its base, it is really only a dressed-up word for liar. Like "lie," one definition of disingenuous is a calculated effort to mislead. Instead of saying "opposing counsel is disingenuous," one might as well say that "opposing counsel is a liar." The truth is that practically no lawyer would ever call opposing counsel a liar in a brief or argument, perhaps for fear of sanction or lawsuit, but that same lawyer feels free to use "disingenuous" with abandon.

Dictionary definitions of disingenuous include "lacking in candor." See <http://www.merriam-webster.com/dictionary/disingenuous>.

Of course, as lawyers we have an ethical duty of candor toward the tribunal, at a minimum. See North Carolina Rules of Professional Conduct, Rule 3.3. If a lawyer asserts that another lawyer is disingenuous in her representations to the court, by word if not intent, the accusing lawyer may be alleging an ethical breach. The corollary is that a lawyer has a duty to report known ethical breaches by another lawyer if the provisions of Professional Conduct Rule 8.3 apply. See North Carolina Rules of Professional Conduct, Rule 8.3(a) ("A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the North Carolina State Bar or the court having jurisdiction over the matter.") My bet is that few lawyers who use "disingenuous" to describe the actions of other lawyers intend to make accusations of unethical behavior and that those who actually need to make a report of unethical behavior likely would not use the word in doing so. It is instead the verbal form of road rage – a rude and inappropriate crutch word, used when a lawyer either cannot control a desire to "teach a lesson" to the other side or cannot think of a more creative way to convey the stamping of his foot and wagging of his finger. (As a small aside and perhaps a word to the wise, when I was a law clerk and saw "disingenuous" in briefs or heard it in arguments, this is exactly how I understood the use of the term. Although I cannot speak for the judges for whom I clerked, I feel fairly certain they often read it the same way.) When other kids used bad words at school, my Mom would tell me that it was because they were not smart or

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**Comments** *from page 2*

clever enough to think of something else to say. Perhaps the regular use of "disingenuous" in legal papers and argument is emblematic of a similar malady.

"Disingenuous" is also a word of emotion rather than logic. It is usually used in the heat of the moment, rather than after calm reflection. If we accept the proposition that legal decisions should be made with logic under the law, such an emotionally-charged word has no place in our briefs or court arguments for this additional reason.

Likely, there are few other professions in which there is the opportunity to bandy such terms about regarding other professionals (and get away with it, unfortunately). Imagine what we would think if doctors or accountants were writing or speaking such things about one another on a regular basis. Ever read a medical record in which one doctor writes that another doctor's diagnosis was disingenuous? Even if it is wrong or there is room for more than one opinion, the term likely does not properly apply to either a doctor's diagnosis or a lawyer's argument. If we wonder why members of the public (and sometimes judges and other

lawyers) have a low opinion of the practicing bar, we need not look beyond our poison pens and our vituperative language. When we consistently use words like "disingenuous" to describe one another, we should not be surprised that others believe what we say about our colleagues and apply the definition broadly to the whole profession.

If we could get rid of all of the loaded words of scorn, contempt and sarcasm in legal writing and argument, we would make a leap forward for our profession. My vote is that we start with "disingenuous." If there really is a lack of candor or a presence of untruthfulness, then we should use those words to describe the breach. They are clear and demonstrate that we really do mean to make the allegation. As far as "disingenuous" goes, if we cannot explain to a police officer why there was no other option than to tailgate a driver who cut us off or to our mothers why there was no other option than to use a forbidden curse word, maybe we also should not try to explain to a court or other lawyers why we needed to use "disingenuous" to describe a fellow professional. ■

**The Litigation Section of the NCBA Annual Meeting and CLE: Practical Advice for Pivotal Moments in Your Case**

June 24, 2010, 12:30 p.m. - 4:45 p.m.  
Hilton Wilmington Riverside

The Litigation Section is proud to present a panel of distinguished speakers who will discuss ways to win your case at critical moments. Hear from experienced litigators about the imperative of an effective pre-trial strategy. Learn how to frame and argue convincing dispositive motions. Discover the best ways to undermine your opponent's expert and to inoculate your own expert against challenges. Understand the art and science behind successful jury arguments. The CLE will also feature a presentation from the distinguished **Justice Rebecca Love Kourlis**, a nationally renowned speaker and former Justice on the Colorado Supreme Court, who will talk about the "vanishing trial syndrome," underscoring the need to position your case for victory long before you arrive at the courthouse for trial. This afternoon CLE takes place on the eve of the Bar Association's Annual Meeting at the Hilton Wilmington Riverside, which recently underwent an \$11 million expansion and renovation. **Members of the Litigation Section receive a 50 percent discount on registration fees for the Bar Convention.** ■ (See ad, back cover for more information)

## The Advocate's Award

The Litigation Section is pleased to solicit nominations for the Advocate's Award, to be conferred in June 2010 in conjunction with the annual meeting of the Litigation Section in Wilmington, NC. The Advocate's Award has been established to recognize members of the Litigation Section who are the "superstars" of our profession. The recipient of the award should:

- have the highest ethical standards;
- have shown great skill and ability as a litigator/trial lawyer and commitment to the very best work product;
- demonstrate a true commitment of service to clients;
- demonstrate a respect for and love of the law;
- be held in the highest regard by both bench and bar;
- be dedicated to the community and the bar with a track record of pro bono or volunteer service;
- serve as an example of how to effectively balance both outstanding professional performance and other life endeavors.

The Litigation Section is currently soliciting nominations for the Advocate's Award. A form for submission follows (Page 15) and is also available on the Litigation Section Web site at <http://litigation.ncbar.org/>.

The deadline for nominations is Thursday, April 15, 2009.



### LIVE PROGRAMS

CLE Credit: 6.0 Hours

Cary • April 15  
LIVE and WEBCAST

Charlotte • April 16  
LIVE

Registration: 8:15–8:55 a.m.  
Program: 8:55 a.m.–4:15 p.m.

## The Amazing Case

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Featuring Thomas A. Mauet and Michael P. Cash

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When jurors think of "courtroom drama," they envision tearful testimony and powerful arguments. How do you persuade a jury when your fight for justice involves a seemingly emotionless commercial case? Tom Mauet and Mike Cash will show you how, with the flair, professionalism and impact that you should expect from such a dynamic team.

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Register online: [www.ncbar.org/CLE/programs.aspx](http://www.ncbar.org/CLE/programs.aspx)  
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NORTH CAROLINA  
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# The Road to Comparative Fault in North Carolina

## Plaintiff's Perspective

by Burton Craige

*[Note from the Editors: In May 2009 the North Carolina House of Representatives passed HB 813, entitled An Act to Enact the Uniform Apportionment of Tort Responsibility Act, which if passed by the Senate and signed into law, would abolish contributory negligence and adopt a system of modified comparative fault and joint and several liability in the North Carolina courts. The bill is expected to be considered by the Senate during the 2010 session. We've asked Burton Craige, former president of the North Carolina Advocates for Justice, and Ken Kyre, former president of the North Carolina Association of Defense Attorneys, to provide a plaintiff and defense counsel's perspective on the bill and to convey their thoughts on the competing policies at issue, the strengths and weaknesses of the bill, and any improvements they would like to see made to it when taken up by the Senate later this year. Mr. Craige's article, written from the plaintiff's perspective, begins below; Mr. Kyre's article from the defense perspective begins on the opposite page (Page 5).]*

North Carolina is one of only five jurisdictions that retain the antiquated doctrine of contributory negligence. Here, as in Alabama, Maryland, Virginia and the District of Columbia, a plaintiff whose negligence makes the slightest contribution to his injury is barred from recovering any damages against the tortfeasor. The other 46 states, either by judicial decision or by statute, have adopted some form of comparative fault, allocating damages based on the degree of fault among the plaintiff and the defendants.

In May 2009, the North Carolina House of Representatives passed a bill that would abolish contributory negligence, adopt a system of modified comparative fault, and modify joint and several liability. Modeled on the Uniform Apportionment of Tort Responsibility Act (UATRA), the bill attracted bipartisan sponsorship and support. After the sponsors agreed to several last-minute amendments that favored defendants, the

bill (HB 813) passed by a margin of 67-50, overcoming strong opposition from business and insurance interests.

In the 2010 session, the North Carolina Senate will consider HB 813. If the bill passes the Senate, it will end the long, harsh regime of contributory negligence, and bring North Carolina tort law into the modern era.

This article discusses the provisions of UATRA, the amendments adopted in the House, and the principal objections to the bill.

### The Uniform Apportionment of Tort Responsibility Act and HB 813

For many decades, while many commentators have agreed that the contributory negligence defense should be abolished, there has been a lack of consensus about the optimal form of comparative fault. States that have abandoned contributory negligence have devised a wide range of systems of comparative fault and imposed diverse limitations on joint and several liability. Some systems have been viewed as unfairly favoring plaintiffs, and others as unfairly favoring defendants.

In 2002, the National Conference of Commissioners on Uniform State Laws approved UATRA. A broadly representative 12-member committee, including North Carolina Court of Appeals Judge James A. Wynn, Jr., drafted the model act.

The UATRA drafters surveyed the states and sought to create a bill that incorporated the best features of the comparative fault jurisdictions. They faced five critical questions:

#### 1. What Degree of Fault Will Bar the Plaintiff from Recovering Damages?

Under the traditional rule of contributory negligence, still applicable in North Carolina, even 1 percent fault by the plaintiff is a complete bar to recovery.

In a "pure" system of comparative fault,

in effect in 13 states (Alaska, Arizona, California, Florida, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, New York, Rhode Island, South Dakota, Washington), a plaintiff is barred from recovering any damages only if she is 100 percent at fault. If her relative fault is less than 100 percent, she is entitled to recover the amount of damages awarded, reduced by her percentage of responsibility. For example, in a pure comparative fault jurisdiction, if the plaintiff is 70 percent at fault and the defendant is 30 percent at fault, and the jury determines that the plaintiff's damages are \$100,000, judgment will be entered against the defendant for \$30,000.

Thirty-three states have adopted "modified" comparative fault, which bars the plaintiff from recovery if her fault exceeds a certain threshold. Under the most common variant, prevailing in 21 states (Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, Ohio, Oregon, Pennsylvania, South Carolina, Texas, Vermont, Wisconsin, Wyoming), the plaintiff may not recover any damages if her fault is "greater than" 50 percent. The other common variant, used in 12 states (Arkansas, Colorado, Georgia, Idaho, Kansas, Maine, Nebraska, North Dakota, Oklahoma, Tennessee, Utah, West Virginia), bars the plaintiff from recovery if her fault is "equal to or greater than" 50 percent.

The UATRA drafters endorsed modified comparative fault and left to the state legislature the choice between the two common variants. The sponsors of the North Carolina bill chose the version that permits the plaintiff who is 50 percent at fault to recover 50 percent of her damages:

If the claimant's contributory fault is greater than the combined responsibility of all other parties and released persons whose responsibility is determined to have caused personal injury or harm to

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# Comparative Fault, Several Liability, and House Bill 813

## Defense Perspective

by Kenneth Kyre, Jr.

*I have been requested to present a defense perspective on House Bill 813, named “An Act to Enact the Uniform Apportionment of Tort Responsibility Act.” In everyday parlance, it is referred to as the comparative fault bill, and it is poised to drastically change the way tort litigation is practiced in North Carolina. Please note that the comments and observations I relay below are mine alone and I am not speaking on behalf of any association or group. Rather, I am sharing my thoughts as one who has been a defense attorney for more than three decades and who wants to see North Carolina law be fair and reasonable for all sides. And you will see below that I feel that HB 813 needs some changes to be a fairer and more balanced bill. For instance, no reallocation of damages when a defendant cannot pay his share of damages (thus finally doing away with the extraordinarily unfair “deep pocket” litigation) and juries should be allowed to allocate fault to all persons who were at fault for the plaintiff’s injuries, even if they are not a party to the lawsuit.*

Contributory negligence is a time-honored principle in North Carolina, recognized for over 160 years. The first case I have found that actually used the phrase “contributory negligence” was decided in 1872. A good early explanation of the law appears in *Manly v. The Wilmington & Weldon Railroad Co.*, 74 N.C. 655 (1876):

The general rule as to contributory negligence, most approved by the decisions and most agreeable to reason and justice, is that when the injury arises . . . from . . . the neglect of ordinary care, and the parties are mutually in fault, the negligence of both being the immediate and proximate cause of the injury, a recovery is denied upon the ground that the injured party must be taken to have brought the injury upon himself. For the parties being mutually in fault, there can be no apportionment of damages, no rule existing to settle in such cases, what one shall pay more than another.

I gladly admit that all old principles should not survive the test of time, but contributory negligence, and the concept of being responsible for one’s own conduct, would seem to be worthy of retention, and those principles have served this state well. Nevertheless, from what I hear and read, this is the year that North Carolina just might embrace the principle of comparative fault. Any attempt to change the law in North Carolina from contributory negligence to comparative negligence boggles the mind, since it can and will impact so many aspects and facets of the law and litigation practice.

From a defense perspective, a prerequisite to abandoning the current law of contributory negligence is the abandonment also of the principle of joint and several liability. Just as plaintiffs complain about the perceived unfairness of being unable to recover when their negligence contributed in only a small way to their injuries, defendants have felt that they are treated unfairly when they can be required to pay 100 percent of a plaintiff’s damages even when their negligence is only 10 percent of the cause of the injuries.

### Overview

House Bill 813, filed in the House on March 25, 2009, stands to significantly change the litigation landscape in North Carolina with respect to contributory negligence. The bill is based upon the Uniform Apportionment of Tort Responsibility Act (“UATRA”), an act drafted by a committee appointed by the National Conference of Commissioners on Uniform State Laws, and approved by those Commissioners in 2003. The bill ostensibly seeks to abolish contributory negligence and joint and several liability, but as noted below, there are problems with the bill. It is important to remember that no state has adopted UATRA, and North Carolina’s General Assembly is the only legislature in the country currently considering its passage. Therefore, as our General Assembly takes up the bill during this year’s short session, it should not feel bound to adopt all of

the Commissioners’ recommendations.

UATRA updates and is intended to be a replacement for the Uniform Comparative Fault Act promulgated by the National Conference of Commissioners on Uniform State Laws in 1977. Interestingly, when the Uniform Comparative Fault Act appeared in 1977, about two-thirds of the states had already adopted some form of comparative negligence. Apparently no state adopted the Uniform Comparative Fault Act.

By one count, 46 states have adopted some form of comparative fault (sometimes referred to as comparative responsibility) – 10 by judicial decision and 36 by legislation. Seven of the 10 states in which comparative responsibility has been judicially adopted have “pure” comparative responsibility, but only six of the 36 states in which the legislature has adopted comparative responsibility have gone with “pure” comparative responsibility. (A “pure” comparative responsibility scheme means that no matter what percentage of responsibility a plaintiff has for his own injuries, he can still recover something, even if he were 99 percent at fault.) In 33 states a plaintiff cannot recover if his responsibility reaches a certain percentage.

Only four states with comparative responsibility still have complete joint and several liability. Not surprisingly, since there has been no adoption of a uniform act regarding comparative responsibility and several liability, there are many permutations of the application of these principles. Some states have completely abolished joint and several liability, and each defendant is only liable for the percentage of the plaintiff’s damages equal to the defendant’s fault. Some other states have abolished joint and several liability but with exceptions for concerted actions, intentional torts, and hazardous waste. There are some states which have abolished joint and several liability in cases where the plaintiff is also negligent. Several states distinguish between economic and non-economic damages, and several others condition their abolition of

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## Plaintiff *from page 4*

the property of the claimant, the claimant may not recover any damages.

HB 813 § 1F-10(b) (as filed)  
(emphasis added).

In a key concession to business and insurance interests, the House sponsors agreed to an amendment adopting the minority position, barring a plaintiff from any recovery if his contributory fault is “equal to or greater than” the fault of the other responsible parties. HB 813 §1F-10(b) (as amended). The amendment affects cases in which the jury finds the plaintiff to be equally at fault with the defendant. Without the amendment, a plaintiff who is 50 percent at fault would recover 50 percent of his damages. With the amendment, a plaintiff who is 50 percent at fault would recover nothing.

Under UATRA, where more than one defendant is at fault, a plaintiff may recover part of the damages caused by each culpable defendant, even though the plaintiff’s fault equals or exceeds that of a particular defendant, as long as the claimant’s fault does not exceed the combined fault of the other responsible parties.

### 2. Is Fault Allocated to Non-Parties?

The second critical question is whether the allocation of fault includes non-parties. The plaintiff may not be able to identify every person at fault, or a culpable person may be immune from liability or outside the court’s jurisdiction. If the jury is instructed to allocate fault among non-parties as well as parties, the party defendant may be able to drastically diminish its responsibility by shifting the blame to alleged tortfeasors who could not have been named as defendants.

If, on the other hand, the allocation of fault is confined to parties, a defendant cannot deflect responsibility to another alleged tortfeasor unless it joins that person as a co-defendant. When fault is allocated only to parties, the defendant has the burden of joining the third party or pursuing the culpable non-party in a subsequent action for contribution.

The comparative fault jurisdictions are split on this issue. In some states, fault is allocated only among the parties that remain in the case at the time the case is submitted to the trier of fact. *See, e.g.*, Nev. Rev. Stat. § 41.141.2 (jury returns a special verdict indicating the percentage of negligence attributable to “each party remaining in the action”).

In other states, fault is allocated to all tortfeasors, even if they were never parties to the action. *See, e.g.*, Ariz. Rev. Stat. § 12-2506(B) (“In assessing percentages of fault the trier of fact shall consider the fault of all persons who contributed to the alleged injury, death or damage to property, regardless of whether the person was, or could have been, named as a party to the suit.”) **Allied-Signal, Inc. v. Fox**, 623 So.2d 1180 (Fla. 1993) (interpreting Florida’s tort reform statute as requiring allocation of fault to employer that was immune from suit under workers’ compensation statute); Tex. Civ. Prac. & Rem. Code § 33.004 (allocation of fault includes non-parties designated by defendant). Taking a middle course, other states allocate fault to the parties at trial and to parties who previously settled with the plaintiff. *See Viera v. Cohen*, 927 A.2d 843, 851-52, 283 Conn. 412, 423 (2007) (medical malpractice) (interpreting Conn. Gen. Stat. § 52-572h(f)); Ky. Rev. Stat. § 411.182 (allocation limited to claimant, defendants, third-party defendants, and released persons); **Lexington-Fayette Urban County Gov’t v. Smolcic**, 142 S.W.3d 128 (Ky. 2004) (immune defendant excluded from allocation); Iowa Code § 668.3.2 (allocation limited to claimant, defendants, third-party defendants, and released persons); Or. Rev. Stat. § 31.600 (“The trier of fact shall compare the fault of the claimant with the fault of any party against whom recovery is sought, the fault of third party defendants who are liable in tort to the claimant, and the fault of any person with whom the claimant has settled.”).

The drafters of UATRA followed the middle path, limiting the allocation of fault to the current parties and “released persons.” If the plaintiff settles with one defendant and proceeds to trial against the second defendant, the jury is asked to apportion fault between the plaintiff, the current defendant, and the released defendant. The jury, however, is not permitted to consider the fault of an alleged tortfeasor that is not a party or has not entered into a settlement with the plaintiff.

### 3. Under What Circumstances Are Tortfeasors Jointly Liable?

North Carolina, like the other contributory negligence jurisdictions, retains full joint and several liability. Under joint and several liability, the plaintiff can recover the

entire amount of the recovery from any defendant adjudged to have contributed to an indivisible injury, even if that defendant was only partly at fault.

After states adopted comparative fault, judges, legislators, and commentators questioned the fairness of holding one of multiple tortfeasors responsible for more than its proportional share of the damages, especially when the plaintiff was also at fault. In many states, the advent of comparative fault was accompanied by the partial abolition of joint and several liability.

In a system of pure several liability, each tortfeasor is responsible only for its percentage share of fault. While advocates for defendants perceived inequities in the coexistence of comparative fault and joint and several liability, advocates for plaintiffs understood that the complete elimination of joint liability would create other inequities. In almost all comparative fault jurisdictions, courts and legislators have created exceptions to the general rule of several liability.

Incorporating three common exceptions to several liability, UATRA retains joint liability in the following circumstances:

(a) **Vicarious liability.** Under UATRA, tortfeasors are jointly liable if there is a principal-agent relationship. UATRA provides that “the court shall determine the extent to which the responsibility of one party, which is based on the act or omission of another party, warrants that the parties be treated as a single party for the purpose of submitting interrogatories to the jury . . .” HB 813 § 1F-15(c) (as filed). The most common reason for unitary treatment is a *respondeat superior* relationship between principal and agent, including employer and employee.

(b) Parties acting in concert or with an intent to cause harm are subject to joint and several liability. § 1F-25(a)(1) (as filed).

(c) “If a party is adjudged liable for **failing to prevent another party from intentionally causing personal injury** to, or harm to the property of, the claimant, the court shall enter judgment jointly and severally against the parties for their combined shares of responsibility.” § 1F-25(a)(2) (emphasis added).

The original version of HB 813 included

all three exceptions to several liability. On the floor, the House amended the bill to remove the “acting in concert” provision. HB 813 § 1F-25 (as amended).

#### **4. When Multiple Defendants Are Liable, Who Bears the Risk of an Insolvent Defendant?**

Under traditional principles of joint and several liability, if one of two defendants is insolvent, the plaintiff has the right to collect all her damages from the solvent co-defendant. The defendant who satisfies the judgment has the burden of initiating a contribution action against the non-paying co-defendant.

The most important consequence of the abolition of joint and several liability is shifting the risk of a co-defendant’s insolvency from the solvent co-defendant to the plaintiff. Under a system of pure several liability, if the insolvent defendant is 80 percent at fault and the solvent defendant is 20 percent at fault, the plaintiff will recover only 20 percent of her damages.

Recognizing the unfairness of saddling the plaintiff with the entire risk of a co-defendant’s insolvency, seven states have adopted a procedure for reallocating the share of the damages attributed to the insolvent tortfeasor. For example, in Minnesota, any damages that cannot be collected from one defendant are reallocated to the plaintiff and the remaining defendants in proportion to their comparative fault. Minn. Stat. § 604.02, subd. 2. In Connecticut, economic damages are reallocated to the remaining solvent defendants, and non-economic damages are reallocated to the plaintiff and the remaining solvent defendants based on their proportional fault. Conn. Gen. Stat. § 52-572h.

As in the reallocation jurisdictions, UATRA provides a procedure for shifting the risk of a co-defendant’s insolvency from the plaintiff to the solvent co-defendant. After the trier of fact apportions fault among the parties and makes its award of damages, the plaintiff may move the court to determine whether any of the share for which a party is liable “will not be reasonably collectible.” HB 813 § 1F-20(b). Once the court has determined that all or part of a share is not reasonably collectible, it reallocates the uncollectible share to the other parties, including the claimant and any released person, based on each of the remaining parties’ relative proportion of responsibility.

When the plaintiff is partly at fault, she shares the burden of reallocation. Suppose that P is 20 percent at fault, and D1 (insolvent) and D2 (solvent) are each 40 percent at fault. After reallocation, P’s comparative share of the fault vis-à-vis D2 is 33.3 percent. She will be entitled to recover only 66.7 percent of the damages awarded – not the 80 percent that she could have recovered in a system of pure joint and several liability.

In another concession to business and insurance interests, the House sponsors of HB 813 accepted an amendment providing that the share for which a defendant is liable “may not be increased by reallocation if the party’s percentage of responsibility is less than the claimant’s percentage of responsibility.” HB 813 § 1F-20(b1) (as amended). As a result, the entire burden of the uncollectible share will fall on the plaintiff when his fault exceeds the fault of the solvent co-defendant.

#### **5. To What Extent Does a Prior Settlement with a Co-Defendant Diminish the Plaintiff’s Recovery from a Defendant Adjudged To Be Liable?**

The final critical question in designing a system of comparative fault is the extent to which a prior settlement diminishes the plaintiff’s recovery from a liable defendant.

Under joint and several liability, the amount of the settlement is deducted from the amount awarded at trial on a dollar-for-dollar basis. Consider a case in which the plaintiff settles with one co-defendant (D1) for \$30,000, proceeds to trial against the second co-defendant (D2), and receives an award of damages from the jury of \$300,000. The court will impose a set-off of \$30,000 for the prior settlement and enter judgment against D2 for \$270,000, leaving the plaintiff with a total recovery of \$300,000, the full amount of the jury award.

A system of comparative fault and several liability alters this calculus to the plaintiff’s detriment. As in the previous example, suppose that P settles with D1 for \$30,000, proceeds to trial against D2, and again obtains a verdict of \$300,000. Assume that the jury apportions fault equally between D1 and D2. If liability is several and not joint, P will be able to recover only \$150,000 from D2 (\$300,000 x .50), for a total of \$180,000 (\$30,000 plus \$150,000), or \$120,000 less than she would have recovered in a system of joint and several liability.

Because UATRA includes released parties

in the apportionment of fault, it places on the plaintiff the entire risk of obtaining an inadequate settlement from the settling party.

#### **6. What is the Effective Date of the Act?**

The North Carolina House of Representatives faced a final question, not addressed in UATRA: when does the Act become effective? The original House bill provided that the new statute would apply to actions “originally filed” on or after the effective date. The amended version provides that the statute would apply to actions “arising from acts or omissions occurring” on or after that date. HB 813 § 8 (as amended). The most important consequence of the amendment is to preserve the contributory negligence defense in product liability actions arising from latent defects where the manufacturer’s alleged negligence preceded the effective date of the act.

Cumulatively, the effect of the four House amendments is to provide significantly more protection to defendants, and less protection to plaintiffs.

Response to Objections to HB 813

The North Carolina Chamber of Commerce and allied business groups have mobilized to try to block the enactment of HB 813. The opponents have made three principal objections: (1) the bill will sharply raise automobile insurance rates; (2) the reallocation provision is unfair to the solvent joint tortfeasor; (3) the reallocation provision will complicate and prolong litigation. None of the objections has merit.

#### **1. HB 813 Will Not Raise Automobile Insurance Rates.**

On the floor of the House, opponents of HB 813 asserted that the adoption of comparative fault would result in a 45 percent increase in automobile insurance rates for North Carolina drivers. The opponents offered no credible data to support their claim, and the spectre of higher auto insurance premiums failed to derail the bill.

On the Senate side, the business and insurance lobby has again tried to stoke fears that the end of contributory negligence will dramatically raise auto insurance premiums. Thoughtful senators have asked for a reliable analysis that addresses the issue.

In response to the senators’ request, the North Carolina Advocates for Justice retained Pinnacle Actuarial Resources, a

## Plaintiff *from page 7*

company that specializes in actuarial analyses for the insurance industry. Pinnacle's report, released in July 2009, demolishes the claim that the adoption of comparative fault will significantly increase insurance premiums in North Carolina. Here is Pinnacle's summary of its findings and conclusion:

Fast-Track data through March 31, 2009 show that . . . the mean pure premium in the comparative fault states exceeds the mean pure premium in the contributory negligence states by less than one percent.

Mean pure premiums in North Carolina are close to those of its comparative fault neighbors South Carolina and Tennessee . . . .

The historical data show that converting to comparative fault did not result in any substantial increase in pure premiums in South Carolina and Tennessee. Indeed, since those states adopted comparative fault in 1991 and 1992, pure premiums in North Carolina and Virginia, the neighboring contributory negligence states, have increased more rapidly than in South Carolina and Tennessee . . . .

Based on a comparison of changes in pure premiums in these four contiguous states since 1991, we conclude that the adoption of UATRA is unlikely to have a material adverse impact on automobile insurance rates in North Carolina.

Pinnacle Actuarial Resources, *Analysis of Pure Premiums for Personal Automobile Insurance in Contributory and Comparative Negligence States* at 1, 12 (July 29, 2009). Since Pinnacle released its report in July 2009, the opponents of HB 813 have produced nothing to refute its findings or conclusion.

**2. Reallocation is the Fairest Method of Apportioning the Uncollectible Share.** HB 813, like UATRA, is a compromise that combines modified comparative fault with modified several liability. The opponents of HB 813 want to combine modified comparative fault with pure several liability. Accordingly, they have lobbied to eliminate HB 813's reallocation provision. When one joint tortfeasor is insolvent, they want the plaintiff to bear the entire burden

of the uncollectible share.

In adopting UATRA in 2002, the National Conference of Commissioners on Uniform State Laws, after considering all the variants of comparative fault, determined that a reallocation system struck the fairest balance. In doing so, they reached the same conclusion as other neutral groups that have considered the problem of the uncollectible share.

In 1986, North Carolina Bar Association President Robert C. Vaughn appointed the NCBA Special Committee on the Tort Liability System, including fifteen leaders of the plaintiffs' and defendants' bar, as well as three law school professors. After ten months of deliberations, the Special Committee recommended a modified comparative fault system, abolition of joint and several liability, and reallocation of a party's uncollectible share:

The share of the claimant's injury attributed to a person shall be reallocated when that person is a party and all or part of his share is uncollectible. The share or uncollectible part of the share shall be reallocated among all other parties, including the claimant, who were at fault on the basis of the percentage of fault attributed to each.

*Report of the NCBA Special Committee on the Tort Liability System* (January 1987) at 2 ("Joint and Several Liability"). The Committee explained the core principle behind its recommendation: "the reallocation principle recommended by the committee not only is fairer, but also accomplishes the underlying objective of comparative negligence to allocate losses based on fault." *Id.* at 3.

In 2000, the American Law Institute published *Restatement of Torts: Apportionment of Liability*. The Restatement comprehensively surveyed the variants of comparative fault, including the systems used to allocate damages among joint tortfeasors. After reviewing the full range of possibilities, the authors of the Restatement identified reallocation as the "fairest means" of addressing the risk of insolvency because it "imposes the financial risk of insolvency on all legally responsible parties in proportion to their responsibility." Restatement § C21a.

The American Law Institute, the

National Conference of Commissioners on Uniform State Laws and the North Carolina Bar Association's Special Committee on the Tort Liability System have each independently concluded that reallocation is the fairest system. The North Carolina General Assembly should reach the same conclusion.

**3. Reallocation Will Not Result in Collateral Litigation.** UATRA critics in North Carolina have claimed that the question of whether a share is "not reasonably collectible" will generate extensive collateral litigation. A review of appellate cases in the seven reallocation states completely refutes that assertion. (Memorandum from Burton Craige to Senate Subcommittee on Comparative Fault, Reallocation and "Collateral Litigation" (Nov. 19, 2009)). After decades of trials in Connecticut, Oregon, Minnesota, New Hampshire, Arkansas, Montana and West Virginia, it appears that no appellate court has ever been asked to resolve a dispute about whether a share is uncollectible. The scant litigation concerning reallocation has instead required appellate courts to resolve issues of statutory construction, most of which were addressed by the drafters of UATRA.

The absence of appellate decisions confirms what we learned from lawyers in the reallocation states: because the statute provides clear guidance, parties rarely if ever disagree about the reallocation of damages, and no judicial intervention is needed.

## Conclusion

HB 813 is a sensible compromise that fairly balances the interests of plaintiffs and defendants. In 2010, North Carolina has the opportunity to join the 46 states that have adopted comparative fault, ending the harsh and inequitable doctrine of contributory negligence. ■

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joint and several liability on certain levels of fault for either the plaintiff or the defendant. Finally, in several states, reallocation of damages may occur among the defendants and the plaintiff if damages cannot be collected from a defendant because of insolvency. HB 813 tends to follow this latter approach.

### What Is Fair?

There is an inherent tension between the principles of having plaintiffs receive full compensation for their injuries and defendants not paying more compensation than their share of responsibility for plaintiffs' injuries. The few states which have adopted comparative responsibility While retaining joint and several liability do so in an effort to maximize the chance that an injured plaintiff will receive "fair" compensation, but to the detriment of defendants whose fault is small.

The scheme reflected in House Bill 813 is unduly favorable toward plaintiffs, so that although joint and several liability is technically abolished among solvent defendants (or fully insured defendants), whenever at least one defendant cannot pay their share of damages, then the law actually allows a "modified" joint and several liability. The damages initially imposed against the unable-to-pay defendant is reallocated to other defendants who can pay, and those latter defendants end up paying more than intended by the jury when it determined the relative responsibility of the parties. Examples of the unfairness to defendants abound, and defense counsel can trot out as many stories of unfair treatment under the law as plaintiffs' attorneys can with respect to contributory negligence. One scenario: Plaintiff sues two defendants for a motor vehicle accident, and the jury finds plaintiff having no fault and Defendant A 20 percent responsible for plaintiff's injuries and Defendant B 80 percent, with the damage award being \$500,000. If Defendant B has only \$30,000 in insurance and has no assets subject to execution, then under the current HB 813, Defendant A must pay plaintiff \$470,000, even though he is only 20 percent responsible and would have been liable for only \$100,000 if Defendant B had a \$1 million insurance policy. (Practically speaking, it is more likely that companies, rather than individuals, will have greater amounts of insurance, and so it is likely that companies will more often still be the "deep pocket" in

cases where the primary responsible party is an individual.)

House Bill 813 provides that "[i]f the claimant's contributory fault is equal to or greater than the combined responsibility of all other parties and released persons whose responsibility is determined to have caused personal injury to or harm to property of the claimant, the claimant may not recover any damages." This simple proposition belies a major limitation of UATRA: the percentage of responsibility is apportioned only among the plaintiff, the remaining defendants (and third-party, fourth-party, etc. defendants), and any person who has settled with plaintiff. Therefore, if a person who is 80 percent at fault for plaintiff's injury is not made a defendant (such as because of lack of jurisdiction or the company is out of business and had no insurance), then the jury is not to apportion any percentage of responsibility to that non-party.

House Bill 813 does not require a plaintiff to sue everyone who might be responsible for his injury but instead leaves it up to a defendant to bring into the lawsuit all potentially responsible persons. The best practice would be for the plaintiff to have the burden of suing every party that he reasonably believes (and consistent with Rule 11) has some responsibility for his injury, and if the plaintiff does not do so (maybe for tactical or personal reasons), there could be some repercussions, from losing out on that missing person's share of damages or paying court costs for defendant to bring them into the lawsuit as a third-party defendant. However, this is not a realistic amendment to House Bill 813, given the strong case history in North Carolina supporting a plaintiff's right to decide who to sue. Practically speaking, if apportionment of responsibility is limited to named parties and persons who have settled, then defendants will have great incentive to bring into the lawsuit every person imaginable who might have some responsibility for plaintiff's injury, even if only 5 percent. It is unlikely a defendant for strategic reasons will decline to sue a person, as sometimes happens under the current joint-and-several liability system. In other words, under the current HB 813, more parties will likely be brought into a lawsuit by a defendant, since the more named parties in a lawsuit, the more parties for a jury to apportion responsibility.

House Bill 813 does not explicitly state that the percentages of responsibility for plaintiff, all defendants, all third-party defendants, and all settled persons (whether previously a named party or not) are to add up to 100 percent, although that certainly is implicit in the scheme. The comments of the National Conference of Commissioners on Uniform State Laws regarding UATRA state that the intention of the Act is for percentages of responsibility found by the jury to add up to 100 percent. (I believe it would be preferable for the statute to expressly state that the percentages must add up to 100 percent.)

The draft legislation provides that a court will enter judgment against each defendant and third-party defendant still remaining in the case for its share of damages (the full damages multiplied by that defendant's percentage of responsibility), with the judgment to also note plaintiff's and any settling persons' percentage of responsibility as found by the jury. The court will also include in the judgment any interest to be added to a particular party's share of damages and any costs, including attorney's fees if otherwise allowed by law. I feel that it is important that the legislation distinguish between damages awarded by a jury and other amounts added post-trial. Although UATRA seems to try to do this, without specificity a court might interpret the Act (if reallocation is retained) to allow reallocation of not only damages but any amount owed plaintiff by a defendant who cannot pay. Other parties should not pay interest or other costs imposed on another party who cannot pay.

### Joint and Several Liability Is Not Actually Abolished

A major deficiency of House Bill 813 is that joint and several liability would continue to apply (in practice) in cases where there are two defendants, one who can pay its share and the other who cannot. Under current House Bill 813, the share of the defendant who cannot pay will be reallocated to the other defendant (assuming the plaintiff has not been found to have any responsibility for his injuries). From a defense perspective, reallocating uncollectible damages apportioned to a defendant to other defendants runs counter to the basic concept of apportioning

*See DEFENSE page 10*

responsibility. If a defendant is only 20 percent responsible for plaintiff's injury, then he should not pay more than 20 percent of the damages. The fact that parties sometimes have to pay more than their share is what is wrong with the current joint and several liability system, and the deficiencies and fallacies of "deep pocket" litigation are well known among insurance companies and the business world.

In other words, under the current HB 813, plaintiffs give up little, while defendants give up much. If a defendant in a multiple-defendant lawsuit cannot pay plaintiff's damages, then the plaintiff simply obtains her damages from the other defendants. However, defendants would face a litigation landscape no longer with a defense of contributory negligence (if plaintiff's share of responsibility is no greater than 49 percent). Therefore, the current HB 813 is not balanced; it is too skewed in favor of plaintiffs.

I believe that there should be a compromise between the two competing social policies at play here, between the desire to fully compensate an injured person and the desire that a defendant only partially responsible for the injury not pay more than his "fair share." I also believe that to achieve some semblance of fairness, the Act must include a scheme under which, in some circumstances, an injured plaintiff will not be able to recover 100 percent of the damages awarded by the jury. Injured persons already have that risk where the only defendant who caused the injury has no insurance and is judgment-proof.

It would seem that to remain true to the concept of proportionality of responsibility, no reallocation of damages should occur (although a decent argument could be made to reallocate to a defendant whose intentional conduct was a cause of the plaintiff's injury). If a defendant is found by a jury to have 20 percent responsibility for the plaintiff's injury, that defendant should only be required to pay 20 percent of the damages. However, I suspect that the plaintiffs' bar will vigorously oppose such an approach, for they would argue that an injured person should receive as much compensation as possible. This is especially true where the plaintiff did not contribute to his injuries. In such circumstances, plaintiffs' attorneys would argue that the plaintiff is "innocent" and that the burden of payment should fall on the "non-

innocent" defendant, even where that defendant is only 20 percent at fault. Plaintiffs' attorneys may believe that would be fair, but try convincing a defendant who is only 20 percent at fault that he must pay for damages apportioned to a defendant who is 80 percent at fault. I do not believe they will see it as fair, and it is the fallacy of reallocation.

Reallocation tests just how serious a state is about instituting several liability of tortfeasors and rejecting the unfair principle of joint and several liability. An example of a creative approach to several liability is the New Hampshire statute, which does not provide for reallocation or joint and several liability for defendants found to be less than 50 percent responsible for plaintiff's injuries. The New Hampshire Supreme Court had some instructive observations when it upheld that statute against a plaintiff's attack on constitutional grounds:

[T]he legislative history . . . plainly demonstrates that an underlying purpose of the 1989 amendment was to relieve defendants involved in personal injury lawsuits from damages liability exceeding their percentage of actual fault. Specifically, the legislature sought to alleviate the burden imposed by joint and several liability upon 'deep pocket' defendants targeted because of their potential financial resources rather than their degree of culpability. Rather than adopt pure several liability, however, the legislature reserved the joint and several liability rule for application to tortfeasors 50 percent or more at fault, reflecting an intention to balance the interests of injured plaintiffs with those of defendants bearing relatively low fault percentages.

The problem of 'deep pocket' suits is one that jurisdictions throughout the United States have recognized. Many jurisdictions have supplanted the joint and several liability doctrine with pure several liability or a hybrid rule that employs a percentage threshold . . . . Legislatures in a number of such jurisdictions have noted the inequity of 'deep pocket' suits as a factor underlying the amendment of their respective states' tort liability regimes. . . .

. . . The New Hampshire legislature first enacted a comparative negligence statute in 1969, motivated by 'a deep conviction

that the contributory negligence rule was so basically unfair and illogical that it should have no further place in [the State's] law.' By doing away with the doctrine of contributory negligence, the legislature bestowed a considerable benefit upon injured plaintiffs. However, the statute abolished not only contributory negligence, but joint and several liability as well. . . . Thus, the 1969 comparative negligence statute clearly demonstrates a legislative objective to balance the interests of plaintiffs and defendants.

**DeBenedetto v. CLD Consulting Engineers, Inc.**, 153 N.H. 793, 807-08, 903 A.2d 969, 983-84 (2006).

### Juries Are Not Required to Apportion Responsibility to All Persons and Companies Responsible for a Plaintiff's Injuries

Another major deficiency of House Bill 813 from the defense perspective is that a jury is not allowed to allocate responsibility or fault to all persons who were responsible or at fault for the plaintiff's injuries. Instead, the allocation only is among persons who are parties in the lawsuit or who have settled. That means if a company is actually 90 percent at fault for an injury, but that company is no longer in business and there is no applicable insurance, and another person is only 10 percent at fault but is sued for the injuries, then the jury must find that defendant 100 percent responsible, even though in actuality he is only 10 percent at fault. This is the very inequity that the current joint and several liability law allows.

If a jury is not to consider non-parties in apportioning responsibility, then defendants will often be apportioned a greater percentage of responsibility than the facts would truly warrant. Of course, theoretically, a plaintiff's share of responsibility would also be greater. Therefore, if a non-party is 80 percent responsible, plaintiff 10 percent responsible, and the defendant 10 percent responsible, then a jury should find plaintiff and defendant each 50 percent responsible on the verdict form, and plaintiff would recover nothing for his injuries under current HB 813. Therefore, if a plaintiff has some responsibility for his injuries, requiring a jury to

consider non-parties' responsibility would likely reduce the percentage that a jury would allot to that plaintiff.

I believe that for juries to better understand the interplay between the persons who actually caused and have some responsibility for a plaintiff's injury, and to more accurately apportion responsibility, they should be allowed to consider evidence of a non-party's responsibility. If a defendant can argue to the jury that a non-party has most of the responsibility for plaintiff's injury, then that could significantly factor into a jury's consideration of the relative fault of the defendant. If the jury is told only to consider the relative responsibility between plaintiff and defendant, then defendant's actions will be "magnified." I anticipate that a jury will find a greater percentage of responsibility for a defendant in the absence of not being able to consider non-parties' responsibility.

Another example: Say a jury were to consider the conduct of non-parties, and the plaintiff is found to be 20 percent responsible, the defendant 30 percent, and a non-party 50 percent. Say the greater percentage for the non-party is because of evidence that such party played a significant role in the incident at issue. The ratio of responsibility between plaintiff and defendant would be 40 percent plaintiff and 60 percent defendant. However, if the jury from the beginning only considers defendant's responsibility, there could be a tendency to find a greater responsibility as to defendant when only considering the relative fault between plaintiff and defendant. In other words, defendant's conduct takes on a greater impact. A jury might therefore find defendant 70 percent responsible and plaintiff 30 percent responsible. I believe it is a practical problem when a jury is not allowed to consider and find responsibility of all parties. (And from a non-legal perspective, a defendant would likely prefer news reports that a jury found it only 20 percent responsible and a non-party 80 percent responsible rather than a jury having found it 100 percent responsible (which could occur under the current House Bill 813 when a plaintiff has no contributory fault).)

To remedy the unfairness of HB 813, the jury should be allowed to allocate responsibility/fault to all persons, whether a party to the lawsuit or not. For example, a provision could be added to House Bill 813 that states: "Defendant shall identify to the court all persons who cannot be parties to the lawsuit and who defendant has reason to believe has some

responsibility for plaintiff's injury or property damage, and the defendant may present evidence and argue to the jury the non-party's responsibility."

Of course, some standard needs to exist as to the amount of evidence that a defendant must present before the court will allow the jury to consider and return a verdict regarding the responsibility of the non-party. An obvious standard would be that the evidence must be sufficient to allow a verdict of liability to stand if the non-party were a party.

Another question that arises is whether the non-party must be identifiable. Will "phantoms" (a term used by some authors) be allowed? Suppose, for example, in a pollution case, there is evidence that someone is contributing to the pollution of a stream that allegedly caused plaintiff's injuries, but that person cannot be identified. Should a defendant be able to argue to the jury to apportion some responsibility to that unknown person? What about a hit-and-run culprit, whose conduct contributed to plaintiff's injury? Should a jury apportion responsibility to that unknown person? Or should the standard be that the non-party must at least be identified by name? It probably is better policy to require that the non-party can at least be identified by name. Such a non-party could include an out-of-business company with no insurance, or a deceased individual, or a person in bankruptcy, or a person over whom the North Carolina court does not have jurisdiction.

Another issue which is not expressly addressed is what to do about immune persons. Immunity usually means not that the immune person (such as a governmental entity) was not a cause of plaintiff's injuries, only that they are not legally liable for the injury. I tend to feel that the responsibility of immune persons should be decided by a jury in all instances, even if the Act ultimately will not allow non-parties' responsibility to be considered by the jury.

The Commissioners' comments to UATRA recounts that an earlier draft of UATRA did take into account the conduct of non-parties. However, that was eventually rejected. The Commissioner explained:

First, who is it that should qualify as a 'non-party at fault'? Anyone over whom the court lacks jurisdiction? Or, does it matter that jurisdiction is lacking because the person is, for example, a foreign diplomat or an immune governmental or other entity, as compared to someone

upon whom service cannot be perfected because the person is out of the country or whose location is unknown? Second, to qualify as a 'non-party at fault', does the person have to be identifiable and, if so, in what manner or particulars? Third, it was also thought that the absence, and non-participation, of such a person tended to skew the trial process unfairly. Finally, it was noted that a defendant always has the right to seek contribution from any legally responsible person whose fault also contributed to the claimant's injury or harm and that this right, in most cases, will permit a defendant to join someone who was not already a defendant. If joinder is not possible, a defendant who is held responsible may subsequently pursue an absent tortfeasor in a separate action.

The Commissioners' comments also explained:

Although the Act expressly authorizes a defendant to bring a third-party action against any person who may be responsible for all or part of the personal injury or harm to property claimed by a plaintiff, it has to be recognized that this may not always be possible because the third person may not be subject to the jurisdiction of the court. On balance, however, it seemed preferable to have a defendant shoulder the responsibility of pursuing the third person in another jurisdiction, presumably where the parties will have an opportunity to fully litigate their rights, rather than risking that the trial process will be skewed in the original action, which may result in an irreversible injustice." Nevertheless, the Commissioners acknowledged that some states might want to include non-parties when a jury apportions responsibility.

National Conference of Commissioners on Uniform State Laws, Preface, Uniform Apportionment of Tort Responsibility Act, at p. 7 (2003).

Although there will be concerns about and different suggested approaches to the question of non-parties, the General Assembly should amend HB 813 to allow juries to apportion responsibility to non-parties, as well as to parties named in a lawsuit.

### Uncollectible Damages

If the new Act, if ever passed, ultimately allows reallocation of “uncollectible” damages in some form and under certain circumstances, there should be some definition of “uncollectible damages” in the Act. I propose the following definition: “Uncollectible damages’ shall mean damages (excluding interest, costs, treble damages, and punitive damages) for which a defendant or third-party defendant is ordered to pay plaintiff in the initial judgment and which plaintiff cannot obtain within 180 days of the entry of the initial judgment with reasonable efforts from that defendant or third-party defendant or from an insurance company who that defendant or third-party defendant contends should pay the damages on its behalf.” This is a somewhat general definition, and it employs the reasonableness concept (“reasonable efforts”) and the courts would need to decide what is reasonable. I do not think it should be limited to a party being insolvent (since there can be different methods to determine insolvency), it should not require bankruptcy or a party who could, if they chose to file for bankruptcy.

Also, the current HB 813 provides for only 90 days within which a plaintiff who obtained a judgment for damages must seek to determine if damages are uncollectible before seeking reallocation. Ninety days is entirely insufficient time to undertake discovery of a defendant’s assets or to undertake efforts at execution of property, and the time needs to be expanded to at least 180 days (or maybe even longer), with an outside limit of one year to request the court for reallocation (so that defendants will not be on the hook indefinitely for reallocation). A plaintiff should have the burden to make “reasonable efforts” to collect the damages from defendants, and if they have not done so, then the court should not allow reallocation. For example, a plaintiff should not be permitted to wait until 150 days after the initial judgment to begin looking to collect money from a defendant and then 30 days later complain to the Court that he has not been paid.

Any definition of “uncollectible damages” should be limited to only those compensatory damages initially apportioned to a defendant or third-party defendant. It should not include interest or costs imposed by the court, or treble or punitive damages, and it

should not include uncollected damages that have been reallocated but which a defendant cannot pay (either in part or total). Although I read House Bill 813 as not allowing reallocation of initially reallocated damages, the Act may leave room for some court in the future to interpret the Act as allowing such re-allocation. This should be made clear in the Act, and using a definition of uncollectible damages is one way to accomplish that.

### The Uniform Contribution Among Tortfeasors Act Should Be Repealed

House Bill 813 should have a provision that explicitly repeals the Uniform Contribution Among Tortfeasors Act, N.C. GEN. STAT. § 1B-1, et seq. Because the traditional principle of joint and several liability is being abandoned by House Bill 813 (except when reallocation of damages occurs, if reallocation is retained in some form in the final bill), there should be no need for the Uniform Contribution Among Tortfeasors Act. The Commissioners on Uniform State Laws have stated that UATRA is intended to replace the Uniform Contribution Among Tortfeasors Act, and their comments include:

Many jurisdictions employing comparative fault today have been persuaded to severely limit joint and several liability. In some ways, one might observe that the law in this area has come full circle, as it were, and has returned in large part to the position of the early common law. As a general rule, where defendants have acted in concert, joint and several liability has been retained. In addition, some jurisdictions have retained joint and several liability where multiple defendants have engaged in conduct that results in environmental harm. Beyond these two situations, however, many jurisdictions today in some manner have abolished joint and several liability and, thereby, any necessity to recognize rights of contribution among joint tortfeasors.

However, House Bill 813 does not repeal the Uniform Contribution Among Tortfeasors Act. Rather, the bill amends § 1B-2 to state: “In determining the pro rata shares of tort-feasors in the entire liability, all of the following apply: (1) Their relative

degree of fault shall not be considered, unless liability is based upon acts or omissions that constitute contributory fault as defined in G.S. 1F-5, in which case the provisions of Chapter 1F of the General Statutes shall be the basis for determining the allocation of liability.” This is not a clear provision, and it could be read to mean that a defendant’s percentage of responsibility as found by a jury is to be ignored if the plaintiff has no responsibility for his injury, since “contributory fault” is defined as conduct that only a plaintiff performs (*e.g.*, contributory negligence, assumption of risk). That is contrary to the intent of the Commissioners on Uniform State Laws for UATRA, and should be corrected in future versions of the bill.

If a modified UATRA is eventually enacted by the N.C. General Assembly, I feel that any application of contribution should be limited to those few instances addressed in UATRA, and keeping the Uniform Contribution Among Tortfeasors Act will unnecessarily create confusion and uncertainty as to its application. Therefore, any remnants of contribution should be addressed in the version of UATRA that might be passed by the North Carolina Legislature, such as in § 1F-30.

### Other Miscellaneous Suggested Changes to HB 813

**Last Clear Chance.** I would like to see a provision added to House Bill 813 that provides that the doctrine of last clear chance will be applicable only to the extent that it influences the percentages of responsibility of the parties. Last clear chance, a concept connected with contributory negligence, should no longer be needed by a plaintiff to avoid contributory negligence as a bar (even though a plaintiff is barred under UATRA if his percentage of responsibility is 50 percent or greater). In keeping with the concept of comparative responsibility, the doctrine of last clear chance should be used only insofar as it weighs on a defendant’s responsibility (likely to increase that responsibility), but it should not be used to forgive a plaintiff’s own negligence.

**Products Liability Cases.** Although House Bill 813 refers to apportionment of tort responsibility, the Act would appear to cover more than torts in products liability cases, by extending coverage to breach of war-

ranty claims. Section 1F-10(a) provides that “in an action seeking damages for personal injury or harm to property based on negligence or on any other claim for which the claimant may be subject to a defense in whole or part based on contributory fault, any contributory fault chargeable to the claimant diminishes the amount that the claimant otherwise would be entitled to recover as compensatory damages for the injury or harm by the percentage of responsibility assigned to the claimant . . . .” Contributory fault is defined in § 1F-5(1) to include “[c]ontributory negligence, misuse of a product, [and] unreasonable failure to avoid or mitigate harm,” which are all defenses under the North Carolina Products Liability Act to breach of warranty claims.

However, House Bill 813 oddly amends the North Carolina Products Liability Act by adding as § 99B-1.1(b) the following: “When liability is based upon acts or omissions that constitute contributory fault as defined in G.S. 1F-5, the provisions of Chapter 1F of the General Statutes shall apply to product liability actions under this Chapter.” Because “contributory fault” is defined in § 1F-5(1) so that it would essentially be conduct of a plaintiff, it is not unreasonable to interpret the proposed § 99B-1.1(b) to mean that the UATRA only applies in products liability actions when a plaintiff has some responsibility for his injuries, but it does not apply if plaintiff is blameless. Certainly that should not be the case. I feel that there is no need for § 99B-1.1(b), but if there is to be such a section, *it needs to be made clear that UATRA applies to all products liability claims.*

A final minor point: Section 1F-45 states that “[i]n applying and construing this Chapter, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.” That language comes directly from the original UATRA. It is understandable why the Commissioners would want that; it is intended to be a uniform law. However, no other state has adopted UATRA, or its predecessor, and considering North Carolina’s own jurisprudence, I do not believe it is a good idea for North Carolina courts to be compelled to consider how other states might eventually apply UATRA. Proposed § 1F-45 should be deleted, especially if, as I hope happens, HB 813 will be revised by the Senate.

By the way, under UATRA, the total damages awarded by a jury to a plaintiff apparently will not be reduced by any settlements that

plaintiff received before the verdict, as would now occur under current law. This is because a settled person’s responsibility is determined by the jury and whatever his share of the total damages would be due to his percentage of responsibility in effect reduces the damages to be paid by non-settling defendants. Therefore, if a plaintiff receives more in settlement from a person than the jury would have apportioned, it could be seen as a windfall to the plaintiff, and the remaining defendants do not get the benefit of all of the settlement. If plaintiff receives a smaller amount in settlement from a person than the jury apportions to that person, then plaintiff loses out on the difference and non-settling defendants are benefited. For example, if the jury finds Defendant A 60 percent responsible and settling Defendant B 40 percent, with \$100,000 total damages awarded, Defendant A must pay plaintiff \$60,000. If Defendant B settled for \$30,000, plaintiff in essence loses \$10,000. However, if Defendant B settled for \$50,000, then plaintiff receives “extra,” because he keeps the \$50,000 of settlement plus he receives \$60,000 from Defendant A. Under the current law, Defendant A would have received a credit for the \$50,000 paid by Defendant B in settlement and would end up paying \$50,000. This possibility will have some impact on settlement negotiations and the chances of settling for a “reasonable” amount. I predict that under UATRA, plaintiffs may not be as willing to accept low settlement offers for fear that they will adversely impact recovery from other sources.

Much more could be written about HB 813, but I have limited my comments to those matters I felt either needed to be addressed to render the bill more balanced and more true to its purpose of apportion-

ing responsibility, or matters which should be considered to avoid unintended appellate court rulings because of ambiguous or unclear wording of the bill. If some version of HB 813 is passed, there will be numerous articles written about the legal and practical impact and effect of the change in long-established North Carolina law. For example, I predict that if the current HB 813 is passed, there would be less settlements, more trials, more individuals and companies made parties to lawsuits, more finger pointing among defendants and third-party defendants, less cooperation among defendants, higher litigation costs, and, of course, more lawsuits filed. The litigation world in North Carolina would change significantly.

With the admirable goal of proportionality of responsibility sought by any bill that adopts comparative negligence and abolishes joint and several liability, changes in the way claims are pursued and defended will inevitably occur. At this time, the current version of HB 813 does not adequately reach its goal of proportionality of responsibility, and so changes to the bill are absolutely essential to make it more balanced and more fair to the interests of individuals and businesses who will find themselves as defendants in a “new world” of litigation. ■

*Ken Kyre is with the Greensboro civil litigation firm of Pinto Coates Kyre & Brown, PLLC*



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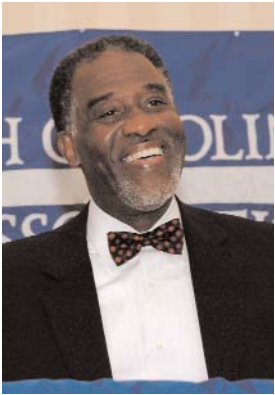
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Home of North Carolina Bar Association and NCBA Foundation, Lawyers Insurance Agency, North Carolina Association of Defense Attorneys, Wake County Bar Association and 10th Judicial District Bar

# The Advocate's Award

## Recognizing the Litigation Section's "Superstars"



Charles L. Becton,  
inaugural recipient (2006)

A 1969 graduate of the Duke University School of Law, He earned his bachelor's degree from Howard University (1966) and received an LL.M. from the University of Virginia School of Law (1986). Becton served on the N.C. Court of Appeals from 1981-90 and was named N.C. Appellate Judge of the Year in 1985. He previously served as president of the N.C. Academy of Trial Lawyers.

He has received numerous other awards, including the ABA Tort Trial & Insurance Practice Section's Pursuit of Justice Award, the Justice William J. Brennan Jr. Trial Advocacy Award, the Roscoe Pound Foundation's Richard S. Jacobson Award and the N.C. Academy of Trial Lawyers' Trial Advocacy Award that was named in his honor.

An esteemed author and lecturer as well, Becton has served since 1976 as the John Scott Cansler Lecturer at the UNC School of Law and since 1980 as the Senior Lecturer in Law at the Duke University School of Law. It was also in 1980 that Becton served as president of the N.C. Association of Black Lawyers.

Becton served as president of the North Carolina Bar Association in 2008-2009, chaired the Finance Committee in 2007-08, served as a member of the Board of Governors from 2005-07 and as an NCBA vice president in 1984-85.

He is the John Scott Cansler Lecturer at the University of North Carolina School of Law in Chapel Hill, a Senior Lecturer in Law at Duke University School of Law, and the 2010 Charles Hamilton Houston Chair at North Carolina Central University. He has taught and lectured at trial advocacy skills institutes across the country, in Canada, and in the Republic of South Africa. Mr. Becton has received three of the four national trial advocacy teaching awards.

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The North Carolina Bar Association's Litigation Section honored Cowan as the second recipient of the Advocate's Award in 2008. He is revered for his commitment to the academic community and continuing legal education. He serves as Senior Lecturing Fellow for the Duke University School of Law and, since 1992, provides annual presentations to the N.C. Superior Court Judges Conference and the N.C. Fellows of the American College of Trial Lawyers. He has also provided countless CLE presentations, including the Civil Law Update that is regarded as the most popular continuing legal education program at the NCBA Annual Meeting.

A Raleigh native, Cowan is a 1965 graduate of Wake Forest University and 1968 graduate of the Wake Forest University School of Law. He served from 1968-73 in the U.S. Army, where he attained the rank of captain. Cowan has been active within the NCBA throughout his career. He chaired the Young Lawyers Division in 1979-80 and served on the Board of Governors from 1983-85. He chaired the Litigation Section in 1985-86 and the CLE Committee from 1988-91. He served as president of the NCBA in 1992-93.

A Fellow and Regent of the American College of Trial Lawyers, as well as a Fellow of the American Academy of Appellate Attorneys, Cowan has served on the ABA House of Delegates and as president of Legal Services of North Carolina. He has served multiple terms on the Wake Forest University Board of Trustees and served as president of the Wake Forest Law Alumni Association.



J. Donald Cowan, Jr.  
(2008)

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Grady Barnhill, Jr. joined Womble Carlyle in 1958 and first tried a case to jury verdict six months later. Over the ensuing 49 years, he has tried hundreds of cases to jury verdict or settled prior to or during trial.

Georgia native, Barnhill grew up in the eastern North Carolina community of Whitakers. He attended Atlantic Christian College (now Barton College) for two years before transferring to Wake Forest College. After serving in the U.S. Air Force from 1951-55, Barnhill returned to Wake Forest and completed law school in 1958.

He is a member of several organizations, including: Forsyth County Bar Association, where he served as president (1979-80); the North Carolina Bar Association; and the American Bar Association. He is a Permanent Member of the U.S. Fourth Circuit Judicial Conference; a Fellow of both the American Bar Foundation and the American College of Trial Lawyers for which he served as State Chairman (1986-88); an Advocate of the American Board of Trial Advocates; a member of North Carolina Association of Defense Attorneys; a member of the Local Rules Committee of the United States District Court for the Middle District of North Carolina; a member of the Magistrate Selection Committee for the United States District Court for the Middle District of North Carolina; and a Master of the Bench, Inns of Court.

He has been admitted to practice before the United States Supreme Court, the Judicial Panel on Multi-district Litigation, the United States Courts of Appeals for the Fourth and Federal Circuits, and the United States District Court for the Eastern, Middle, and Western Districts of North Carolina. He has made appearances in the courts of 12 states, and his foreign-based litigation includes Canada, England, Hong Kong, Peru, and Dominican Republic. ■



H. Grady Barnhill, Jr.  
(2009)

# Nomination form for The Advocate's Award (the Award of the Litigation Section)

The Advocate's Award was created to recognize "superstars" of the Litigation Section and of our profession. Nominees should (1) have the highest ethical standards; (2) have shown great skill and ability as a litigator/trial lawyer and commitment to the very best work product; (3) demonstrate a true commitment of service to clients; (4) demonstrate a respect and love of the law; (5) be held in the highest regard by both bench and bar; (6) be dedicated to the community and the bar with a track record of pro bono and/or volunteer service; and (7) serve as an example of how to effectively balance both outstanding professional performance and other life endeavors.

## 1. Information about Nominee:

Name: \_\_\_\_\_

Business Address: \_\_\_\_\_

Date Licensed to Practice Law: \_\_\_\_\_

## 2. On Separate Sheet(s), Please Address the Following About the Nominee:

- A. General description of Nominee and his or her practice
- B. How the Nominee meets each of the criteria listed above
- C. Other reasons for the nomination (such as service as a role model or mentor, service to the N.C. Bar Association, the N.C. State Bar, the Litigation Section or other state or national bar groups, other contributions to the law and/or legal profession.)

## 3. Supporting Information

You are encouraged to attach supporting information and up to five letters on behalf of your nomination.

## 4. Information About Person Making Nomination

Name: \_\_\_\_\_

Business Address: \_\_\_\_\_

Telephone: \_\_\_\_\_ Fax: \_\_\_\_\_

***NOTICE: You may be contacted by a member of the Advocate's Award Committee about your nominee.  
The nomination and supporting information, and all communications, will be kept confidential.***

Please return this form and supporting information to:

Julianne D. Fink, NCCP  
North Carolina Bar Association  
P.O. Box 3688, Cary, NC 27519-3688  
jfink@ncbar.org

**Nominations and Supporting Information Due by April 15, 2010**

Up to five letters of recommendation are suggested



## LIVE PROGRAM

Thursday, June 24  
Hilton Wilmington  
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CLE Credit: 4.0 Hours

Registration: 12:00–12:45 p.m.  
Program: 12:45–5:00 p.m.

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Thursday, June 24, 2010

**Hilton Wilmington Riverside**  
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Phone: (910) 763-5900

Registration 12:00–12:45 p.m. / Program 12:45–5:00 p.m.

**Exclusive Offer for Litigation Section Members ONLY!** Litigation Section members attending the June 24 Litigation Section Annual Meeting will receive a 50% discount off the NC Bar Association's Annual Meeting Registration!

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Register online: [www.ncbar.org/CLE/programs.aspx](http://www.ncbar.org/CLE/programs.aspx)  
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