

Fairness in the **courtroom** requires a **concerted effort**

By **Stuart J. Setcavage**



As president of the Pennsylvania Defense Institute (PDI), I am often approached by business leaders who ask what can be done to improve our state's legal system to ensure fairness for all involved. My advice is: Don't wait for others to solve the problem—mobilize the business community and become advocates for legal reform.

Since 1969, PDI's defense attorneys and insurance executives have been urging the General Assembly to adopt certain commonsense changes to our legal system to increase fairness for all, individuals and

businesses alike, which in turn would improve Pennsylvania's economy and allow us to better compete with other states and nations.

But we can't do it alone.

Only through a concerted effort with like-minded groups can we hope to move forward with essential reform of our legal system. We also must remain vigilant to ensure that existing laws and procedures that do promote fairness remain in place.

A good example of that vigilance occurred this past summer when an amendment was offered to a Senate bill that would change our existing legal system to allow juries instead of judges to decide complex insurance bad faith cases. PDI, along with

the leadership of the Pennsylvania Chamber of Business and Industry and the Insurance Federation of Pennsylvania, quickly mobilized business groups to oppose the amendment.

The current insurance bad faith statute, which has been in effect for nearly 20 years, allows for judges to hear bad faith cases. Plaintiffs' attorneys and their organizations sought a change to the system to allow juries to decide such cases. Clearly, the plaintiffs' bar believes that juries would be more likely to render verdicts against corporate defendants, and award significant money damages, than would judges who are more familiar with the complex issues presented by insurance contracts.

My predecessor as PDI President, Armand Della Porta Jr. of Marshall Dennehey in Philadelphia, explained it this way in a letter to the Senate: "It is our opinion that bad faith cases are more suited to being decided by judges than juries. Judges are able to decide whether an issue of fact, law or procedure is a genuine issue."

He added, "Judges can draw the necessary distinction that, even where the initial decision in the underlying claim at issue is decided in a way adverse to the insurer's position, the insurer had a reasonable basis to have taken that position and was entitled to litigate. Where the statute expressly provides for punitive damages, and the only defendants under the statute are insurance companies, there is obviously a substantial difference between having those cases decided by experienced jurists or by juries."

PDI would not oppose a re-examination of the entire bad faith statute. However, it should be done comprehensively with legislative hearings to consider all bad faith issues, not just a change in the jury system through an amendment to an unrelated Senate bill. PDI believes legislative hearings should examine all issues of the bad faith statute, including the scope and formulation of recoverable attorneys' fees; the scope and/or standards to be applied in differing types of insurance disputes; the recoverability of consequential damages; and the applicability of the statute to excess verdict third-party cases.

This past June, the Pennsylvania Chamber of Business and Industry drafted a letter to the Senate regarding the proposed change to the bad faith statute that was signed by nearly a dozen business and advocacy groups. The bill remains on the Senate calendar, and these groups are expecting the plaintiffs' bar to try to move the legislation before the end of the session.

The effort to oppose this proposed change is an example of the type of coalition needed by the business community to ensure that the concerns of both plaintiffs and defendants are addressed

fairly by our courts. But there are many more legal reforms that should be considered by the General Assembly.

The chief reform measure needed in Pennsylvania remains the Fair Share Act. As you may recall, the statute passed initially in 2002 and was signed into law by Gov. Mark Schweiker. In 2005, the Pennsylvania Supreme Court overturned the statute because the General Assembly violated the single-subject rule in adding the Fair Share Act as an amendment to another bill.

The General Assembly passed the statute for a second time in 2005, but Gov. Ed Rendell vetoed the bill the following year, as he was seeking re-election.

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Why do we need a Fair Share Act? In Pennsylvania, a defendant who is deemed responsible for as little as 1 percent of the total fault in a civil case could be required to pay all (100 percent) of the damages. This outdated legal

concept of "joint and several" liability unfairly impacts businesses by requiring them to pay more (often much, much more) than their fair share of responsibility for an injury or property loss.

Passing a Fair Share Act, which would tie financial responsibility directly to the defendant's fair share of fault, remains a priority for PDI and should be a priority for your business.

Other legal reforms that deserve the attention of the General Assembly include:

Product Liability: The business community should be seeking a measure that would require plaintiffs to obtain verification from a licensed professional that a product is defective and has caused injury before the start of a product liability action (*Read more about this and other reforms advocated by PA Chamber members on page 26.*). The action would be similar to "certificate of merit" that the General Assembly requires plaintiffs to obtain before proceeding with a medical malpractice case. This would cut down

on the number of frivolous product liability lawsuits.

Limitations on Non-economic Damages:

The business community should be seeking an amendment to the Pennsylvania Constitution to give the General Assembly the authority to place reasonable limits on the recovery of non-economic damages. Those damages (i.e., for pain and suffering, emotional distress, loss of consortium or companionship and other intangible injuries) involve no direct economic loss and therefore have no measurable value. An amendment to the Constitution would give the Pennsylvania General Assembly the same authority that 47 other states legislatures have to limit unreasonable jury awards.

Limit Venue: The business community should be seeking legislation that would prohibit lawsuits from being filed in jurisdictions that have little or no relation to the defendant or occurrence. This "forum-shopping" is practiced by the plaintiffs' bar in an effort to find the county with the jury pool most likely to make excessive awards. Such legislation would be similar to a provision in the MCare Act of 2002 that limited the venue options for medical malpractice suits.

There are many more legal reforms that are supported by PDI and the Pennsylvania Chamber of Business and Industry. I would welcome a dialogue on these ideas among members of the business community. We need to convince the General Assembly that Pennsylvania needs legal reform to make Pennsylvania competitive, improve our economy and create jobs. ♦

■ **Stuart J. Setcavage**, *President of the Pennsylvania Defense Institute, is Litigation Team Manager at State Farm Insurance. He is responsible for automobile-related litigation in 38 Pennsylvania counties. Setcavage graduated from Florida Southern College. For more information, please go to www.padefense.org.*