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Traps for the Unwary: Why Counsel Should Think Twice Before Joining Additional Parties in Civil Litigation

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One of the first important strategy decisions that defense counsel across the Commonwealth of Pennsylvania often face at the outset of a civil case is whether to join a third party as an additional defendant. Because of applicable time limits, many counsel make the decision quickly, with only minimal information, in an attempt to shift to the joined party all or a portion of the liability for plaintiff's claim. At the time the joinder decision must be made, however, counsel may not realize the explosive, adverse consequences that the joined party's presence may create at trial.

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Counsel may be unaware that once a defendant joins a third party, the defendant will be foreclosed from discontinuing its claims, even if it later becomes apparent through discovery that the joined party's presence will *prejudice* the defendant.

Consider a recent case arising out of an automobile accident involving two vehicles. Vehicle A contains three occupants — the mother-driver and her two daughters, who are passengers. Vehicle B is driven by an employee of a deep-pocket corporation. While Vehicle B is passing Vehicle A, the mother loses control of her vehicle and it plunges off the road. The two daughters are seriously injured.

After investigating their case for close to two years, the two daughters file suit against the driver of Vehicle B and his employer, but do not name their mother, the driver of Vehicle A, as a defendant. Defendants are served with the complaint two weeks before the expiration of the two-year statute of limitations applicable to personal injury actions.¹

Faced with the sixty-day time limit under the Pennsylvania Rules of Civil Procedure for joining additional defendants as of right,² defendants quickly join the mother-driver as an additional defendant. Defendants join the mother within the sixty-day period to preserve their right to argue that she is "solely liable on the plaintiff's cause of action."³

Subsequent discovery shows that the mother's driving indeed was negligent and that she was principally, if not wholly, responsible for the accident. The decision to join the mother as an additional

1. 42 PA. CONS. STAT. § 5524 (1997).

2. PA. R. CIV. P. 2253 ("[N]either praecipe for a writ to join an additional defendant nor a complaint if the joinder is commenced by complaint, shall be filed by the original defendant or an additional defendant *later than sixty (60) days* after the service upon the original defendant of the initial pleading of the plaintiff or any amendment thereof unless such filing is allowed by the court upon cause shown.") (emphasis added).

3. See PA. R. CIV. P. 2252(a)(1) (a defendant may join as an additional defendant any person, whether or not a party to the action, who may be "solely liable on the plaintiff's cause of action"). In the example, if defendants do not join the mother-driver within the sixty-day period, the joinder will occur outside the original statute of limitations on plaintiff's claims. Joining an additional defendant outside the original statute of limitations restricts defendants to bringing only an action for contribution or indemnity against the mother-driver. Defendants will be prevented from arguing that the mother-driver is "solely liable" to plaintiffs. See *Oviatt v. Automated Entrance System Co.*, 583 A.2d 1223 (Pa. Super. Ct. 1990); *Dash v. Wilap Corp.*, 495 A.2d 950, 954 (Pa. Super. Ct. 1985); *Brown v. Mendisana*, 11 Pa. D. & C. 3d 218, 220 (C.P. Northampton County 1979); *Harvan v. Colancecco*, 65 Pa. D. & C.2d 533, 535 (C.P. Carbon County 1974); 7 GOODRICH-AMRAM 2D, STANDARD PENNSYLVANIA PRACTICE, § 2252(a): 16 (1992) (discussing effect of statutes of limitation on the right to join additional defendants).

defendant, thus, appears to have been a wise one. Discovery, however, also reveals a troubling fact: the mother has only limited liability insurance and no other financial resources to satisfy a jury verdict.

Because of this latter revelation, defendants now unwittingly have placed themselves in a quandary. If the case proceeds to trial and a substantial jury verdict is entered jointly against the defendants and the insolvent additional defendant mother, defendants will be responsible for satisfying *not only* the percentage of fault attributed to them by the jury, *but also* that amount of the verdict that the mother cannot satisfy because of her limited resources.⁴ When the harsh effects of the doctrine of joint and several liability become clear,⁵ defendants attempt to

4. Under Pennsylvania's age-old doctrine of joint and several liability, each party is liable to the plaintiff for the full amount of any judgment that she obtains. *See* 42 PA. CONS. STAT. ANN. § 7102(b) (1997). Therefore, if the additional defendant mother cannot pay her judicially-determined share of a judgment awarded to plaintiffs at trial, the original defendants (as the deep-pockets) must make up the difference.

5. Several courts have noted that application of the doctrine of joint and several liability produces unfair results in some circumstances. *See* *Elder v. Orluck*, 515 A.2d 517, 524 (Pa. 1986) (noting the unfairness that may result under the doctrine of joint and several liability when a tortfeasor cannot be made to pay his proportionate share of damages); *Smith v. Weissenfels*, 657 A.2d 949 (Pa. Super. Ct. 1995) (contribution allowed among joint tortfeasors because it is unfair to impose the financial burden of the plaintiff's loss on one tortfeasor to the exclusion of the others).

In *Charles v. Giant Eagle Markets*, 522 A.2d 1 (Pa. 1987), Justice Papadokos intimated that Pennsylvania's adoption of comparative negligence modified the common law of joint and several liability:

In my view our comparative negligence statute represents a departure from the prior law on the subject which made all tortfeasors jointly and severally liable for an equal pro tanto proportion of the judgment. If meaning is to be given to the legislature's definition of a defendant's liability, I have no choice but to conclude that *joint and several liability, as formerly known to the common law, has been modified to some extent by our comparative negligence statute.*

Charles, 522 A.2d at 10 (Papadokos, J., concurring) (citations omitted, emphasis added). Despite these statements, Pennsylvania courts have not abandoned joint and several liability. Only eleven jurisdictions apply the doctrine of joint and several liability: Alabama, Delaware, Maine, Maryland, Massachusetts, Pennsylvania, Rhode Island, South Carolina, South Dakota, Virginia, and West Virginia.

The other American jurisdictions have either modified or completely abolished joint and several liability. *See* VICTOR E. SCHWARTZ, *COMPARATIVE NEGLIGENCE* § 15.4 (3d ed., 1994 & Supp. 1997); Kathleen M. O'Connor & Gregory P. Sreenan, *Apportionment of Damages: Evolution of a Fault-Based System of Liability For Negligence*, 61 J. AIR L. & COM. 365 (1996); Jonathan Cardi, Note, *Apportioning Responsibility to Immune Nonparties: An Argument Based on Comparative Responsibility and the Proposed Restatement (Third) of Torts*, 82 IOWA L. REV. 1293 (1997). *See also* ALASKA STAT. § 09.17.080 (1997); ARIZ. REV. STAT. ANN. § 12-2506 (A) (1997); COLO. STAT. ANN. § 13-21-111.5 (1990); *Watters v. Pelican Int'l Inc.*, 706 F. Supp. 1452 (D. Colo. 1989); KAN. STAT. ANN. § 60-258(a) (1987); *Stueve v. American Honda Motors*, 457 F. Supp. 740 (D. Kansas 1978); TENN. CODE ANN. § 29-11-101 to -106 (1997);

discontinue their third-party claims against the mother. Although plaintiffs thoroughly investigated their case prior to filing and chose *not* to name their mother as a defendant, they now object to the dismissal.

How should a court rule on this motion to discontinue? The equities seem to favor allowing defendants to discontinue their claims against the mother-driver.⁶ A contrary ruling would seem to reward plaintiffs for sleeping on their rights by failing to join a known potential tortfeasor, and penalize defendants for their diligence in promptly joining all other parties who were potentially liable for the accident. Nevertheless, Pennsylvania courts, when faced with an objection by a plaintiff, most likely would deny leave to defendants to discontinue their third-party claims.⁷

McIntyre v. Balentine, 833 S.W.2d 52, 57-58, 60 (Tenn. 1992) (discussing "obsolete" doctrine of joint and several liability); WASH. REV. CODE § 4.22.070 (1997).

Several commentators also have harshly criticized the doctrine. *See, e.g.*, Aaron D. Twerski, *The Joint Tortfeasor Legislative Revolt: A Rational Response to the Critics*, 22 U.C. DAVIS L. REV. 1125, 1132 (1989) (the doctrine "exponentially multiplies" the inherent unfairness of tort liability); Gregory C. Sisk, *Interpretation of the Statutory Modification of Joint and Several Liability: Resisting the Deconstruction of Tort Reform*, 16 U. PUGET SOUND L. REV. 1, 6 (1992) (discussing the Washington Tort Reform Act).

6. PA. R. CIV. P. 229, which governs the discontinuance of claims against an additional defendant before the commencement of trial, provides that written consent of all parties or leave of court is required before claims can be discontinued "as to less than all defendants." *Id.* at subsection (b). A court, upon petition and after notice, may strike off a discontinuance in order to protect the rights of any party from "unreasonable inconvenience, vexation, harassment, expense, or prejudice." *Id.* at subsection (c). Some courts have required a party seeking to strike off a discontinuance to show that he has been deprived of a substantial right (*Martinelli v. Mulloy*, 299 A.2d 19, 20 (Pa. Super. Ct. 1972)), or that he has suffered actual prejudice. *Id.*

In determining whether to strike off a discontinuance, a court will consider the prejudice to both sides and balance the competing interests of the parties. Courts also will inquire into the fairness of the discontinuance and the impact of the discontinuance on the defendant's ability to defend. *Mizes v. Mizes*, 10 Pa. D. & C. 4th 669, 671 (C.P. Montour County 1989).

A discontinuance will be stricken off where its purpose is to harass the defendant through the commencement of another suit in a different court on the same cause of action. *Kline v. State Public School Bldg. Auth.*, 152 A.2d 455 (Pa. 1959); *Brown v. T.W. Phillips Gas & Oil Co.*, 74 A.2d 105 (Pa. 1950); *Brower v. Berio Vending Co.*, 386 A.2d 11 (Pa. Super. Ct. 1978).

7. *Goodrich-Amram* summarizes the current state of Pennsylvania law:

In view of the rights accorded the plaintiff against the additional defendant once he has been joined, and because the action is treated as one in which the plaintiff had sued both the original and additional defendants initially, *the joining party cannot obtain a discontinuance over the objection of the plaintiff.*

7 GOODRICH-AMRAM 2D, STANDARD PENNSYLVANIA PRACTICE, § 2255(d):1 (1992) (emphasis added) (citing *Staccone v. Scranton-Spring Brook Water Service Co.*, 5 Pa. D. & C. 2d 191 (C.P. Lycoming County 1955)).

The Court of Common Pleas of Forest County, Pennsylvania recently ruled upon the scenario presented in the example and denied defendants' motion to discontinue their third-party claim. The case arose out of an automobile accident case involving catastrophic

This article addresses the pitfalls in third-party practice that may trap the unseasoned practitioner and bedevil the experienced one as well. A defendant's decision to join a third party, though well-intentioned, may have the effect of requiring the defendant to pay more than its judicially allocated share of damages.⁸ The article contends that the current joinder rules, in some circumstances, unfairly penalize a defendant who diligently brings before the court in one action all additional parties who may be liable for the events at issue. For these reasons, the article proposes an amendment to the joinder rules and to the standards applicable to a defendant's dismissal of its claims against a joined party before trial.

I. PENNSYLVANIA'S JOINDER RULES

Pennsylvania imposes a very short time limit on defendants for joining third parties as a matter of right.⁹ Pa. R. Civ. P. 2253 provides a defendant with only sixty days after service of the initial pleading to join an additional defendant.¹⁰ After this period,¹¹

injuries to passengers. Defendants sought to discontinue their third-party claims against the driver (plaintiffs' mother) of the car in which the passengers were riding because of the potentially harmful effects of joint and several liability. Despite the fact that both plaintiffs and their counsel were well aware of plaintiffs' mother and had chosen initially not to sue her, plaintiffs opposed the discontinuance. The court, without opinion, denied defendants' motion to discontinue. *Lundy, et. al., v. Holtz, et. al.*, No. 35 of 1993 (C.P. Forest County) (orders dated Oct. 1, 1996 and Dec. 20, 1996).

8. Joinder, to some, may appear to be a mundane topic. The legendary Philip W. Amram, in addressing Pennsylvania's joinder rules nearly sixty years ago, thanked his audience at the Pennsylvania Bar Association for "the attention you have given me because [third-party] practice is, unfortunately, a dull subject, although it is interesting to us, who are working on it actively." Philip W. Amram, *The New Procedural Rules*, Report of the Forty-Fifth Annual Meeting of the Pennsylvania Bar Ass'n 86 (June 21, 1939).

As will be demonstrated, the decisions to join an additional defendant, and the timing of the joinder, are anything but ministerial tasks. The decisions are important and often substantially impact the amount of settlement, or the amount of damages following trial, that an original defendant ultimately pays.

9. Pennsylvania's joinder rules, on their face, are simply worded. Pa. R. Civ. P. 2252(a) allows a defendant to join as an additional defendant a third party who may be (1) solely liable on the plaintiff's cause of action, or (2) liable over to the joining party on the plaintiff's cause of action, or (3) jointly or severally liable with the joining party on the plaintiff's cause of action, or (4) liable to the joining party on any cause of action arising out of the transaction or occurrence upon which the plaintiff's cause of action is based. *Id.*

10. Pa. R. Civ. P. 2253; *see supra* note 2. Pa. R. Civ. P. 2253 was originally adopted on February 14, 1939 and was effective September 4, 1939. The Rule was amended in 1942, 1958, and most recently on April 4, 1990. Pa. R. Civ. P. 2253 (note).

11. The 60-day period is especially short when compared to the time that it normally takes to move a case through discovery and to trial. In most counties in Pennsylvania, this period will span at least several years due to lengthy discovery, court backlogs and the increased number of case filings. These issues are sometimes brought to the public's

defendants can only join an additional defendant with leave of court "upon cause shown."¹² Courts have held that "cause shown" requires the defendant to demonstrate, by affidavit or otherwise, its diligence in determining the identity of the additional defendant and promptness in seeking leave to join the entity as a party.¹³ If a defendant does not proffer a reasonable justification for the untimely joinder, the trial court can and will deny leave to join.¹⁴

Once a third party is joined, Pa. R. Civ. P. 2255 governs third-party practice. Pa. R. Civ. P. 2255 provides that an action between a defendant and a joined party is "the same as though the

attention in unflattering and often slanted newspaper articles. *See, e.g.*, Margaret Gibbons, *Arbitration 'Fast Track' Hoped to Cut Into Backlog*, THE LEGAL INTELLIGENCER, Aug. 21, 1996, at S5 (detailing civil case backlog in the Court of Common Pleas of Montgomery County); *see also*, Bill Heltzel, *The Court's Most Diligent Judge*, PITTSBURGH POST-GAZETTE, Feb. 17, 1998, at A-1, A-8 (discussing civil case backlog in the Court of Common Pleas of Allegheny County).

12. Pa. R. Civ. P. 2253 does not specify what constitutes "cause shown," nor does it delineate the criteria that a court should consider in deciding a petition for joinder. *Lamoree v. Penn Central Transp. Co.*, 357 A.2d 595, 597 (Pa. Super. Ct. 1976). These issues are instead left to the sound discretion of the trial courts across the Commonwealth.

13. The defendant bears the burden of demonstrating sufficient cause to allow the late joinder. *NPW Med. Ctr. of N.E. Pa., Inc. v. L.S. Design Group, P.C.*, 509 A.2d 1306 (Pa. Super. Ct. 1986); *Kovalesky v. Esther Williams Swimming Pools*, 497 A.2d 661 (Pa. Super. Ct. 1985). Leave is by no means freely granted. Whether an extension of time will be granted is largely a matter of trial court discretion. A defendant must demonstrate: (1) some reasonable justification or excuse for the delay; (2) a statement of the facts alleged to render the proposed additional defendant liable, liable with or liable over to the defendant; and (3) allegations that the late joinder will not be prejudicial to the proposed additional defendant. *DiLauro v. One Bala Avenue Assoc.*, 515 A.2d 939, 942 (Pa. Super. Ct. 1986); *see* 7 GOODRICH-AMRAM 2D, STANDARD PENNSYLVANIA PRACTICE, §§ 2253:6-9 (1992).

Trial courts have refused to allow joinder in cases where defendants failed to provide reasonable justification for the delay. *Consul v. Burke*, 589 A.2d 246 (Pa. Super. Ct. 1991); *Desiderio v. R&R Tire Center, Inc.*, 363 A.2d 1197 (Pa. Super. Ct. 1976); *Lamoree v. Penn Central Transp. Co.*, 357 A.2d 595 (Pa. Super. Ct. 1976); *Moore v. Howard P. Foley Co.*, 340 A.2d 519, 523 (Pa. Super. Ct. 1975).

Pennsylvania courts have declined to adopt fixed time limits in determining whether a particular delay in joining a third party is too lengthy. For example, a delay of thirteen-and-a-half months after the expiration of the 60-day period "[was] a long time, but this, in and of itself, [would] not [be] determinative." *Zakian v. Liljestrang*, 264 A.2d 638, 641-642 (Pa. 1970); *see also Lamoree*, 357 A.2d at 595 (trial court abused its discretion in refusing joinder eight and one-half months after expiration of the 60-day period in Pa. R. Civ. P. 2253). *But see Welch Foods, Inc. v. Bishopric Products Co.*, 385 A.2d 1007, 1009 (Pa. Super. Ct. 1978) (joinder following substantial discovery over three years in three different cities, including the depositions of fifteen witnesses, would unduly delay pending action).

14. If the trial court denies leave to join, a defendant still possesses an action for contribution and/or indemnity against the additional party, which can be initiated up to six years after the conclusion of the principal suit. 42 PA. CONS. STAT. ANN. § 5527 (1982); *Pennsylvania Nat'l Mut. Ins. Co. v. Nicholson Constr. Co.*, 542 A.2d 123, 126 (Pa. Super. Ct. 1988). Because of the time and expense that it normally takes to litigate the principal suit to conclusion, however, this option is inefficient and is often impracticable.

party joining the additional defendant were a plaintiff and the additional defendant were a defendant."¹⁵ Subsection (d) of Pa. R. Civ. P. 2255 further provides:

The plaintiff *shall recover* from an additional defendant *found liable to him* alone or jointly with the defendant as though such additional defendant had been joined as a defendant and duly served and the initial pleading of the plaintiff had averred such liability.¹⁶

Subsection (d) of Pa. R. Civ. P. 2255 is the Rule that Pennsylvania courts have applied inequitably to defendants. Pa. R. Civ. P. 2255(d) expressly provides that before a plaintiff can recover against a joined party, the party must *be found liable* to her. In other words, for the plaintiff to gain the benefit of recovery, the additional defendant must remain a party at the time the case proceeds to a finding of liability.¹⁷ Pa. R. Civ. P. 2255(d) is silent on whether a defendant should be permitted to dismiss its third-party claims against the joined party before a finding of liability.

Even though Pa. R. Civ. P. 2255 does not preclude a defendant from discontinuing its third-party claims, it is generally acknowledged that the Rule permits a plaintiff to block a defendant's attempt to dismiss its third-party claims before trial.¹⁸ The Supreme Court of Pennsylvania and other lower courts have interpreted Pa. R. Civ. P. 2255 to vest plaintiffs with direct claims against an additional defendant *from the time of joinder* forward,

15. Pa. R. Civ. P. 2255(a).

16. *Id.* subsection (d) (emphasis added).

17. Under operation of Pa. R. Civ. P. 2253, if a third party is timely joined at the outset of the case (*i.e.*, within sixty days after the service upon the original defendant of the initial pleading of the plaintiff) and the party is found liable to plaintiff, plaintiff can directly recover against the additional defendant, solely or jointly and severally, with the defendant. Plaintiff can recover just as though the joined party was named as an original defendant at the beginning of the case. The joined party is subject to the plaintiff's claims with the same force and effect just as if she was named as an original defendant. *Sheriff v. Eisele*, 112 A.2d 165, 166 (Pa. 1955); *Burke v. Duquesne Light*, 332 A.2d 544, 547 (Pa. Super. Ct. 1974); *Pushnik v. Winky's Drive-in Restaurants, Inc.*, 363 A.2d 1291, 1297-98 (Pa. Super. Ct. 1976); *Richards v. Alston*, 553 A.2d 488, 490-91, *appeal denied*, 574 A.2d 75 (Pa. 1989). In other words, plaintiff's complaint is deemed to incorporate all allegations of third-party liability contained in the defendant's third-party complaint. *Incollingo v. Ewing*, 282 A.2d 206, 221 (Pa. 1971).

18. *See, e.g.*, *Staccone v. Scranton-Spring Brook Water Serv. Co.*, 5 Pa. D. & C. 2d 191, 192 (C.P. Lycoming County 1955); 7 GOODRICH-AMRAM 2D, STANDARD PENNSYLVANIA PRACTICE, § 2255(d):1 (1992). The dearth of case law on this important issue is rather surprising, given the wording of Pa. R. Civ. P. 2255(d), which allows a plaintiff to "recover from an additional defendant *found liable to him . . .*" (emphasis added).

not merely following a finding of liability.¹⁹ Thus, even though a defendant determines, at *its* option, whether to join an additional party, a plaintiff immediately upon joinder becomes the "master" of all third-party claims.

The practical effect of this interpretation often has dramatic consequences. A defendant faced with the sixty-day time limit for joinder who, in the exercise of diligence, joins an additional party at the outset of litigation likely becomes forever stuck with the joined party. The defendant likely will be prevented from later discontinuing its claims against the joined party, regardless of whether the joined party's presence will prejudice the defendant at trial.²⁰ When the additional defendant turns out to be judgment-proof, plaintiffs can capitalize on a quickly-forced joinder decision that only later, in light of discovery, proves to be improvident.²¹ This result is inequitable, especially in circumstances where the plaintiff knew or should have known the identity of the additional defendant before filing suit yet chose not to sue the joined party. In these circumstances, plaintiffs should have no right to block the discontinuance.

II. CASE LAW INTERPRETATION OF THE JOINDER RULES

The Supreme Court of Pennsylvania's decision in *Sheriff v. Eisele*²² was the first case to vest a plaintiff with rights against the joined party immediately at the time of joinder, rather than after a verdict holding the joined party either solely or jointly liable to

19. *Sheriff*, 112 A.2d at 166; see *supra* note 7.

20. *Staccone*, 5 Pa. D. & C. 2d at 192. As an added windfall, the plaintiff need not take any action to claim advantage of this rule. An additional defendant becomes subject to the plaintiff's claim without the plaintiff ever needing to amend his complaint to include him. See *Sheriff*, 112 A.2d at 166; *Pushmik*, 363 A.2d at 1297-98.

21. A diligent defendant, with especially keen foresight, may quickly attempt to discover the financial resources of an additional defendant before initiating joinder. The realities of litigation, however, make it extremely difficult to pursue such discovery successfully within the sixty-day period. See *infra* note 76. Such discovery, in any event, is by no means routinely attempted by defense counsel before joinder is completed.

A court may not be at all sympathetic to a defendant's contention that joinder was delayed beyond the sixty-day period due to incomplete discovery on the issue of whether the additional defendant was judgment proof. Cf. *Ferrari v. Antonacci*, 689 A.2d 320 (Pa. Super. Ct. 1977) (affirming trial court's dismissal of action on grounds that it had not been timely transferred to state court following its dismissal by federal court for lack of subject matter jurisdiction; superior court refused to acknowledge plaintiff's "excuse" that the delay was caused by uncertainty over whether the defendant was "judgment proof"), *appeal denied*, 698 A.2d 594 (Pa. 1997).

22. 112 A.2d 165 (Pa. 1955).

plaintiff. The distinction is crucial: if the plaintiff's rights do not vest until a finding of liability, plaintiff should have no power to block a defendant's decision to dismiss its third-party claims before that finding.

In *Sheriff*, the supreme court held that plaintiff's default judgment against the additional defendant did not preclude plaintiff's claims against the original defendant.²³ After quoting the language of Pa. R. Civ. P. 2255(d), the court, in dicta, went on to state that "*an additional defendant, when joined as such, becomes immediately subject to plaintiff's claim in every respect and with the same force and effect as if he had been originally named as a defendant, and even without the necessity of any pleading being filed by the plaintiff against him.*"²⁴

Since *Sheriff*, plaintiffs have seized on the "immediately subject to plaintiff's claim" language to contend that they control third-party claims against an additional defendant *from the time of joinder*, and that defendants, as a consequence, have no right to dismiss an additional defendant before a finding of liability. Most decisions have accepted this argument. In *Moscatiello v. Pittsburgh Contractors Equip. Co.*,²⁵ the superior court applied *Sheriff v. Eisele* to hold that "an additional defendant [who] is joined pursuant to Rule 2255(d) . . . becomes subject to the plaintiff's claim in every respect and with the same force and effect 'as if he had been originally named as a defendant . . .'"²⁶ In *Pappas v. Asbel*,²⁷ the court held that "[t]he effect of a third party complaint

23. The court initially complained that the appeal followed a "pattern, all too frequent, in which an inordinate amount of time is consumed in fruitless litigation involving merely procedural controversies." *Sheriff*, 112 A.2d at 166. The court then went on to adopt an interpretation of the joinder rules that is inconsistent with the legislative history and intent of the rules. See *infra* Section III.

24. *Sheriff*, 112 A.2d at 166 (emphasis added). Interestingly, the supreme court in *Sheriff* did not cite to a single prior decision or otherwise provide authority or a rationale for its departure from the interpretation of the rule followed by all of the cases prior to its ruling. See *infra* Sections III and IV. Nor has the supreme court since *Sheriff* shown any inclination to return to its prior interpretation of the rule. See *infra* notes 57-73 and accompanying text.

25. 595 A.2d 1198 (Pa. Super. Ct. 1991), *appeal denied*, 602 A.2d 860 (Pa. 1992). In *Moscatiello*, the superior court held that the trial court did not err in finding the additional defendant directly liable to the plaintiff where the additional defendant was properly joined, and where the facts at trial supported a conclusion that the additional party was solely liable to plaintiff. The court noted that "[t]he sole issue is whether the facts at trial established that [the additional defendant] was liable to [plaintiff] Moscatiello solely, jointly, or severally." *Id.* at 1203.

26. *Id.* at 1203.

27. 675 A.2d 711 (Pa. Super. Ct. 1996).

joining an additional defendant is thus to make the additional defendant 'immediately subject to the plaintiff's claim . . . ' ²⁸ Other courts have held similarly.²⁹ The road is very short from the proposition that an additional defendant is "immediately subject to" plaintiff's claims to the holding that a plaintiff can block a defendant's attempt to dismiss its claims against an additional defendant before a finding of liability.³⁰

Contrary to the dicta in *Sheriff*, the plain language of Pa. R. Civ. P. 2255 provides only that a plaintiff "shall recover from an additional defendant found liable to him . . ." ³¹ The Rule states that plaintiff's rights against the additional defendant do not attach until after the evidence establishes that the joined party is liable to plaintiff, either alone or jointly with the defendant. Nevertheless, the *Sheriff* court effectively amended the language of Pa. R. Civ. P. 2255 by stating that the filing of a third-party complaint "immediately" vests a plaintiff with rights against the joined party.

Notwithstanding the dicta in *Sheriff*, a small number of courts have suggested that the joinder rules do not vest a plaintiff with rights against a joined party until a finding of liability.³² In

28. *Id.* at 718. In *Pappas*, the superior court held that the fact that an original defendant joined a third-party defendant, with no further action by plaintiff, did not preclude plaintiff from recovering from the additional defendant upon a finding at trial that the additional defendant was liable to plaintiff. The court noted that even though plaintiff did not expressly assert claims against the additional party, he still could recover directly against him if the facts adduced at trial demonstrated sole or joint liability to plaintiff.

29. See cases cited in *supra* note 17.

30. See, e.g., *Staccone v. Scranton-Spring Brook Water Service Co.*, 5 Pa. D. & C. 2d 191, 192 (C.P. Lycoming County 1955). The court in the *Lundy v. Holtz* case, see *supra* note 7, relied on the *Sheriff* language to block defendants' attempt to dismiss the additional defendant before trial. Plaintiffs argued that defendants, by joining the additional defendant, vested plaintiffs with a direct cause of action against the additional party and forfeited their right to dismiss the third-party claims. The court considered defendants' arguments regarding the inequity of requiring the additional defendant to remain in the case, but ultimately sided with plaintiffs and denied leave to discontinue.

31. Pa. R. Civ. P. 2255(d) (emphasis added).

32. These decisions seemingly have attempted to back away from the bright line created in *Sheriff* and have held that the joinder rules do not create rights in a plaintiff until trial. *Martinelli v. Mulloy*, 299 A.2d 19 (Pa. Super. Ct. 1972), see *infra* note 33, is the most thoroughly reasoned decision.

In *Richards v. Alston*, 553 A.2d 488, 490-91 (Pa. Commw. 1989), appeal denied, 574 A.2d 75 (Pa. 1989), the commonwealth court noted that under Pa. R. Civ. P. 2255(d), a plaintiff, "even though he or she may have asserted no claim against an additional defendant in a pleading against it, may recover directly from an additional defendant as from an original defendant when the facts established at trial show that the additional defendant is liable to him or her either solely or jointly or severally with the original defendant" (emphasis added). In other words, Pa. R. Civ. P. 2255(d) does not vest a plaintiff with rights until evidence establishes at trial that the additional defendant is liable. Before that point, a plaintiff should be able to

Martinelli v. Mulloy,³³ the court noted that the joinder rules “were not intended to enable a plaintiff *who has no control over litigation between the defendant and the additional defendant*, to effectively prevent an adjudication of their rights.”³⁴ The *Martinelli* court reasoned that purpose of Pa. R. Civ. P. 2255 is “to save the original defendant from possible harm resulting from loss of evidence as might result if compelled to await the end of the suit before proceeding against those from whom he seeks contribution.”³⁵ The court noted that “[t]he overriding concern must be to allow the defendant to protect her position by the exercise of her right to face the jury together with the party she sought to join.”³⁶

Similarly, in *Dash v. Wilap Corp.*,³⁷ the trial court granted defendant’s petition to discontinue its third-party claims and denied plaintiff’s motion to file an amended complaint naming the additional defendant as a defendant. The superior court, without considering the *Sheriff* decision, affirmed the trial court’s

assert no control over the third-party complaint. *See also* *Dash v. Wilap Corp.*, 495 A.2d 950 (Pa. Super. Ct. 1985) (affirming trial court’s allowing a defendant to discontinue his third-party complaint before trial, but permitting plaintiff to amend his complaint to add claims against the additional defendant).

33. 299 A.2d 19 (Pa. Super. Ct. 1972). In *Martinelli*, plaintiff-passenger in an automobile accident sued the driver of the automobile in which she was riding and the driver of another automobile for her injuries. Immediately before trial, plaintiff discontinued her claims against one defendant, and the remaining defendant attempted to file a third-party complaint against the dismissed defendant. The trial court denied the defendant’s motion for leave. The superior court reversed, holding that the remaining defendant should have been allowed additional time in which to join the other driver as an additional defendant.

Analyzing Pa. R. Civ. P. 2252, the *Martinelli* court noted that the Rule should be given a broad interpretation, not only to compel every interested person to defend the action by the plaintiff “but also to save the original defendant from possible harm resulting from loss of evidence as might result if compelled to await the end of the suit before proceeding against those from whom he seeks contribution.” *Id.* at 21.

34. *Id.* at 21-22 (emphasis added). In reaching its holding, the court relied on several decisions handed down before *Sheriff v. Eisele*. *See* *Wnek v. Boyle*, 96 A.2d 857, 859 (Pa. 1953); *Rau v. Manko*, 17 A.2d 422, 424 (Pa. 1941); *Vinnacombe v. City of Philadelphia*, 147 A. 826, 828 (Pa. 1929). The *Martinelli* court relied on these decisions for the proposition that the joinder rules are to be construed to avoid multiplicity of suits by adjudicating in one suit the rights and liabilities of all the parties to a single transaction which constitutes the cause of action. *Martinelli*, 299 A.2d at 21.

35. *Id.* at 21.

36. *Id.* at 22.

37. 495 A.2d 950 (Pa. Super. Ct. 1985). In *Dash*, plaintiff filed suit against a defendant-landowner for injuries sustained from an assault. The assault was committed by an individual who used the wild conditions on the landowner’s property as cover in order to gain access to plaintiff’s property. The defendant filed a third-party complaint against the assailant, but later sought to dismiss the claims when it became evident that the individual was judgment-proof.

allowance of defendant's discontinuance of the third-party complaint and rejected plaintiffs' argument that the joinder rules vested them with the exclusive authority to discontinue claims against a party-litigant.³⁸ The court observed that "because the original defendant (joining party) and additional defendant Rightly (joined party) were to be considered as plaintiff and defendant, respectively (*see* Pa. R. Civ. P. 2255(a)), the trial court acted properly under the imprimatur of Pa. R. Civ. P. 229 in acting upon [defendant's] motion to discontinue as to [additional defendant] Rightly."³⁹

III. LEGISLATIVE DEVELOPMENT OF PENNSYLVANIA'S JOINDER RULES

The legislative history and the historical developments leading up to Pennsylvania's present joinder rules do not support the *Sheriff v. Eisele* interpretation that a joined party becomes "immediately subject to" plaintiff's claims. Rather, the legislative history demonstrates that the primary intent of the joinder rules was to aid *defendants* by providing them with a procedural device to adjudicate, at their election, all rights and liabilities of all those potentially liable in a single suit. The rules were designed to allow defendants the option to avoid multiplicity of suits and secure a speedy and inexpensive determination of all rights in one suit.⁴⁰

"What is frequently referred to as 'Third Party Procedure' had its origin in Pennsylvania . . ."⁴¹ Pennsylvania's rules governing joinder of additional defendants were originally enacted in 1929 to allow a defendant a means to place before the court all persons who are or may be liable to a plaintiff on her cause of action.⁴² These rules

38. *Id.* at 956.

39. *Id.* at 956 n.3. The court, however, went on to hold that the plaintiffs were entitled to amend their complaint in order to add the dismissed party as a defendant, even though the statute of limitations had long since run. *Id.* at 956. The court provided no rationale or authority for this holding, which effectively amended the statute of limitations applicable to plaintiff's claims by allowing her to make claims against the additional defendant a full two years after the statute had run.

40. *Martinelli*, 299 A.2d at 21; *see also Wnek*, 96 A.2d at 859; *Rau*, 17 A.2d at 424-25; *Vinnacombe*, 147 A. at 827-28.

41. Pennsylvania Bar Ass'n, Report of the Forty-Eighth Annual Meeting, June 30 - July 2, 1942, at 141. In 1927, the Pennsylvania Bar Association Committee on Civil Law recommended a "brief and simple" statute to initiate the "novelty" of third-party practice in the United States. *Id.* The suggested statute was brought up for approval in 1928 and became law in 1929. *Id.*

42. *See* Pub. L. No. 197, April 10, 1929. Prior to the enactment of the 1929 joinder statute, the common law governed joinder of additional parties. Common law joinder depended entirely upon the nature of the plaintiff's cause of action. If the plaintiff's cause of

were designed to alleviate the prejudice suffered by named defendants in having to pursue several actions to obtain contribution or indemnity from a missing party.⁴³ The new rules permitted an original defendant to join a third party from whom the original defendant claimed contribution as a result of the suit commenced by the plaintiff.⁴⁴ Under this procedure, the plaintiff had no interest in the litigation between the original defendant and the additional defendant.⁴⁵

The procedure set forth in the original joinder rules proved to be problematic where, at trial, the original defendant's evidence demonstrated that the additional defendant was solely liable to the plaintiff.⁴⁶ In this circumstance, no judgment could be entered in plaintiff's favor against the joined party because it was understood that "[n]othing in the act shows the slightest intention to affect plaintiffs . . ."⁴⁷ Plaintiffs were left with no recourse against an

action was joint, *i.e.*, involved the alleged action or inaction of more than one defendant, and one of the joint defendants was not named as a party, the named defendant's only recourse was to seek an abatement of the action for nonjoinder of the essential party. *See* 7 GOODRICH-AMRAM 2D, STANDARD PENNSYLVANIA PRACTICE, § 2252:1 (1992). If the missing defendant was liable over to the named defendant on any ground other than pure joint liability, the named defendant had no recourse but to wait until judgment was entered against him and pursue a second suit against the missing defendant. *Id.* If the named defendant wished to assert the sole liability of a missing defendant at trial, his only option was to present evidence of the missing defendant's sole liability and argue it to the jury. *Id.*

43. *See* Pub. L. No. 197. In the preamble to Pub. L. No. 197, the Pennsylvania legislature explained the purpose of the statute: "To regulate procedure where a defendant desires to have joined as additional defendants persons whom he alleges are liable over to him, or jointly or severally liable with him, for the cause of action declared on."

44. *See* 12 PA. STAT. § 141, *suspended by* Pa. R. Civ. P. 2275(1) and repealed by Pub. L. No. 202 § 2(a) [1100], April 28, 1978; *Vinnacombe*, 147 A. at 828; 7 GOODRICH-AMRAM 2D, STANDARD PENNSYLVANIA PRACTICE, § 2252:1 (1992).

45. *Vinnacombe*, 147 A. at 828; *see* discussion at *infra* notes 57-73 and accompanying text.

46. 7 GOODRICH-AMRAM 2D, STANDARD PENNSYLVANIA PRACTICE, § 2252:1 (1992).

47. *Id.*; *Vinnacombe*, 147 A. at 828. The court described the complex procedure with respect to judgments:

If, at trial, the jury's verdict is in favor of the original defendant, they need go no further, but, if they find in favor of plaintiff, they should also specify in their verdict . . . whether . . . [the additional defendant] or any of them, are liable over to the original defendant, or jointly or severally liable with him, for the amount awarded to plaintiff, and the extent of such liability . . . Whenever the final judgment is in favor of the original defendant, the judgment against the additional defendants, if one has been entered, should be stricken off on motion; but if it is adverse to both the original and the additional defendants, plaintiff, upon receiving satisfaction from the original defendant, should mark the suit to the use of the latter, and the additional defendants will be liable to them, and execution may issue against them . . . for the proportion of the recovery adjudged to be payable by them, without any further proceedings being required to establish such liability.

additional defendant other than to pursue a second suit against that party, provided that the statute of limitations had not yet run.

To remedy this situation, the Pennsylvania legislature, in 1931, passed Pub. L. No. 236, which amended the original joinder statute.⁴⁸ Pub. L. No. 236 adopted what is now known as the "dual object procedure."⁴⁹ Under the procedure set forth in Pub. L. No. 236, a plaintiff was permitted to recover directly against an additional defendant if the liability of the additional defendant *was proven at trial*.⁵⁰ Pub. L. No. 236 provided:

*Where it shall appear that an added defendant is liable to the plaintiff, either alone or jointly with any other defendant, the plaintiff may have verdict and judgment or other relief against such additional defendant to the same extent as if such defendant had been duly summoned by the plaintiff and the statement of claim had been amended to include such defendant . . .*⁵¹

The stated intent of the legislature in enacting the amendment to the joinder rules was to allow plaintiffs *to recover a judgment* against additional defendants if the evidence at trial so warranted:

*To regulate procedure where a defendant desires to have joined, as additional defendants, persons whom he alleges are alone liable or liable over to him, or jointly or severally liable with him, for the cause of action declared on, and providing for entry of judgments against such additional defendants.*⁵²

Nowhere does the law provide, nor did the legislature intend to grant, plaintiffs sole control over the cause of action against a joined party.⁵³ To the contrary, plaintiffs' rights under Pub. L. No. 236 do not arise until the liability of an added defendant is determined.⁵⁴ Even then, plaintiffs obtain only the right against the

Vinnacombe, 147 A. at 829.

48. Pub. L. No. 236, June 22, 1931, 12 PA. STAT. §141, *suspended by* Pa. R. Civ. P. 2275(2) and repealed by Pub. L. No. 202 §2(a)[1100], April 28, 1978.

49. 7 GOODRICH-AMRAM 2D, STANDARD PENNSYLVANIA PRACTICE, § 2252:1 (1992). Under the dual object procedure, a plaintiff is permitted to have direct recovery against an additional defendant whenever the liability of the additional defendant is proven. *Id.* The judgment entered in the proceeding "finally determine[s] the rights of all three parties [without the necessity of plaintiff filing a separate action against the liable additional defendant] . . ." *Id.*

50. Pub. L. No. 236.

51. *Id.* (italics in original).

52. *See supra* note 50 (italics in original).

53. *See supra* notes 47 and 48 and accompanying text.

54. *Id.*

joined party to recover a verdict or judgment.⁵⁵ Moreover, the initial case law discussing the original joinder statute and the 1931 joinder amendment, Pub. L. No. 236, interprets the statutes consistent with their plain language.⁵⁶

IV. CASE AUTHORITY INTERPRETING THE INITIAL JOINDER STATUTES

The pre-*Sheriff* cases that applied the original joinder rules and the Pub. L. No. 236 amendment consistently held that the joinder rules conferred benefits on defendants and granted only a right of recovery to plaintiffs rather than control over the action between defendants and additional defendants. In *Vinnacombe v. City of Philadelphia*,⁵⁷ the seminal case interpreting the original joinder rules, the Supreme Court of Pennsylvania stated this holding in unmistakable terms:

*Nothing in the act shows the slightest intention to affect plaintiffs in such suits. Consequently, the adding of additional defendants will give no higher right to plaintiffs than they had before. As to them the action proceeds against the original defendant only, exactly as it would have done if the additional defendants had not been named . . .*⁵⁸

Similarly, in *McCaulif v. Griffith*,⁵⁹ the Superior Court of Pennsylvania came to the same conclusion:

Nothing in the Act [of 1929] shows the slightest intention to affect plaintiffs in such suits . . . The Act of 1929 was intended to expedite procedure by avoiding a multiplicity of suits, and *it confers undoubted benefits upon defendants who pursue the remedy indicated therein*; but it does not alter the rights which existed previous to its passage . . .

The amendment of June 22, 1931, *supra*, gives the right, at the *instance of defendant*, to have joined, as additional defendants, persons whom he alleges are alone liable, or

55. *Id.*

56. *McCaulif v. Griffith*, 168 A. 536 (Pa. Super. Ct. 1933); *Huber Invest. Co. v. Philadelphia Nat'l Bank*, 176 A. 751 (Pa. Super. Ct. 1935); *Sullivan v. City of Pittsburgh*, 27 A.2d 270 (Pa. Super. Ct. 1942).

57. 147 A. 826 (Pa. 1929). The *Vinnacombe* decision was the Supreme Court of Pennsylvania's first exercise of the rule-making power conceded to it by the General Assembly. See Pennsylvania Bar Ass'n, Report of the Forty-Eighth Annual Meeting, June 30 - July 2, 1942 at 142.

58. *Vinnacombe*, 147 A. at 828 (emphasis added).

59. 168 A. 536 (Pa. Super. Ct. 1933).

jointly or severally liable with him . . . and *provides for the entry of judgments against such additional defendants*. It, however, as indicated by its title, was 'to regulate procedure' . . .⁶⁰

The superior court, in *Huber Invest. Co. v. Philadelphia Nat'l Bank*,⁶¹ again interpreted the provisions of the original joinder statute and the Pub. L. No. 236 amendment as only enlarging a trial court's power to enter judgments in favor of plaintiffs against additional defendants and *not* providing plaintiffs with control over the action between the defendant and additional defendant. In analyzing whether, under the joinder statutes, a joined party could be solely liable to the plaintiff, *i.e.*, when the original defendant was held to be not liable, the court stated:

If we had the original statute alone to construe, under the case of *Vinnacombe v. City of Philadelphia*, we would sustain, unhesitatingly, the appellant's contention that a judgment cannot be directly entered in favor of the plaintiff . . . The Legislature, in 1931, however, saw fit to enlarge the powers of the court, so that an additional defendant alone may be *held to be primarily liable to plaintiff* [and judgment entered in favor of plaintiff].⁶²

Other cases decided before *Sheriff v. Eisele* also interpreted the joinder rules, specifically Pa. R. Civ. P. 2255(d) which governs plaintiffs' rights against additional defendants, consistent with the pre-Rule statutes.⁶³ In *Rau v. Manko*⁶⁴ the supreme court stated that

60. *McCaulif*, 168 A. at 539 (emphasis added) (citations omitted).

61. 176 A. 751 (Pa. Super. Ct. 1935).

62. *Huber Invest. Co.*, 176 A. at 752 (citations omitted) (emphasis added). The *Huber* court upheld the judgment entered against the additional defendant and in favor of plaintiff, recognizing only that the June 1931 amendment enlarged its powers to enter judgments. *Id.* Similarly, in *Sullivan v. City of Pittsburgh*, the additional defendants argued that because the original defendants alleged only liability over, and the original defendants' allegations were insufficient to support a verdict against the additional defendants, they could not be held to be solely liable to plaintiff. The court held that the Pub. L. No. 236 amendment "permitted verdict and judgment in favor of plaintiff against the additional defendants, as if the latter had been directly sued by plaintiff." 27 A.2d 270, 271 (emphasis added).

63. Pa. R. Civ. P. 2255 was adopted in 1939, revised slightly in 1942, and has remained unchanged since.

64. 17 A.2d 422 (Pa. 1941). At the time the *Rau* case was decided, the Rules of Civil Procedure required a plaintiff to elect whether to file a supplemental statement against the additional defendant. *Rau*, 17 A.2d at 424. If the plaintiff was not interested in the claim between the original defendant and the additional defendant, she could elect not to file a supplemental statement. She then, however, was precluded from taking recovery against the additional defendant. *Id.* However, plaintiff's decision not to file a supplemental statement

Pa. R. Civ. P. 2252⁶⁶ is "substantially the same as the corresponding provision in the amendment of June 22, 1931 . . . [and] the Act of April 10, 1929 . . . both of which are suspended by the Rules."⁶⁶ The court also recognized that Pa. R. Civ. P. 2252 "does not and was not intended to enable a plaintiff, who has no control over the litigation between the defendant and the additional defendant, to prevent adjudication of their rights."⁶⁷

Similarly, in *Zachrel v. Universal Oil Prod. Co.*⁶⁸ and *Simodejka v. Williams*,⁶⁹ the Supreme Court of Pennsylvania held that procedure between original defendants and joined parties "shall be the same as though the party joining the additional defendant were a plaintiff and the additional defendant were a defendant."⁷⁰ Nothing in the decisions vested a plaintiff with rights at the time of joinder; rather, a plaintiff's rights vested only after a finding at trial that the additional defendant was liable to plaintiff. This interpretation is consistent with pre-Rule cases and the plain language of present-day Pa. R. Civ. P. 2255.

Finally, the Pennsylvania Bar Association, in discussing the "new" joinder rules in 1942, noted that the rules give "the plaintiff the *right to recover directly* from an additional defendant . . . who is *found solely liable to him or jointly with the defendant*, exactly as if he had been an original defendant."⁷¹ The discussions evidenced the understanding that plaintiffs' right of recovery develops at the

did not affect the issues for resolution between the original defendant and the joined party. *Id.*

66. Pa. R. Civ. P. 2252, which governs the grounds on which a person may be joined as an additional defendant, was adopted in 1939 and amended several times, with the most recent amendment in 1990. However, the grounds on which a person may be joined as an additional defendant have remained substantially unchanged since the passage of the rules. Indeed, a comparison of the language of Pa. R. Civ. P. 2252(a) and the Pub. L. No. 236 amendment demonstrates the strong similarity: Present day Pa. R. Civ. P. 2252 allows joinder of any person "who may be (1) solely liable on the plaintiff's cause of action, or (2) liable over to the joining party . . . , or (3) jointly or severally liable with the joining party . . . ; or (4) liable to the joining party . . ." PA. R. CIV. P. 2252. Pub. L. No. 236 allowed joinder by a defendant of any "person alleged to be [1] alone liable or [2] liable over to him . . . or [3] jointly or severally liable therefor with him . . ."

66. *Rau*, 17 A.2d at 424. See also *Land Title Bank & Trust v. Cheltenham Nat'l Bank*, 66 A.2d 768, 773 (Pa. 1949) ("Because of the similarity in the wording of the new rule and that of the Act of 1929 . . . [t]he rules of Civil Procedure . . . do not change the law as we declared it in the cases [previously] cited.")

67. *Rau*, 17 A.2d at 424.

68. 49 A.2d 704 (Pa. 1946).

69. 62 A.2d 17 (Pa. 1948).

70. *Zachrel*, 49 A.2d at 706; *Simodejka*, 62 A.2d at 17-18.

71. Pennsylvania Bar Ass'n, Report of the Forty-Eighth Annual Meeting, June 30 - July 2, 1942 at 146-47 (italics in original).

time of a finding of liability and not at the time of joinder.⁷² As then understood, plaintiffs did not have any control over the litigation between the original and additional defendants before a finding of liability.⁷³

V. ANALYSIS OF THE DEVELOPMENT OF THE JOINDER RULES AND ITS EFFECT ON CURRENT INTERPRETATION

The legislative history of Pennsylvania's joinder rules, including the case law interpreting them (until the 1955 decision in *Sheriff v. Eisele*), supports the plain language of Pa. R. Civ. P. 2255(d) that a plaintiff may "recover from an additional defendant *found liable* as though such additional defendant had been joined as a defendant . . ." ⁷⁴ The statute, when viewed in light of the history of joinder in Pennsylvania and by its own terms, does not provide a plaintiff with any rights in the third-party claim *unless and until* the additional defendant is shown to be liable.⁷⁵ The pre-*Sheriff* decisions recognized that Pa. R. Civ. P. 2255(d) does not contain any language that would strip away the rights of original defendants on their claim against the additional defendant. And, Pa. R. Civ. P. 2255(d) does not, by its terms, prohibit an original defendant from discontinuing its claim against a third-party defendant *prior* to a finding of liability. By its terms, Pa. R. Civ. P. 2255(d) merely permits the trial judge to mold a verdict *after a finding of liability* to save the plaintiff the cost and expense of filing another complaint against the third-party defendant.

VI. A PROPOSED SOLUTION TO PROTECT THE INTERESTS OF DEFENDANTS IN THIRD-PARTY PRACTICE

The recent case law interpreting Pennsylvania's joinder rules often places defendants in the untenable position of either having to (1) join a third party quickly at the outset of litigation, before having a meaningful opportunity to gather information regarding the effect that the joinder may have later in the case,⁷⁶ or (2) wait

72. *See id.*

73. *Id.*

74. PA. R. CIV. P. 2252(d) (emphasis added).

75. *See* 7 GOODRICH-AMRAM 2D, STANDARD PENNSYLVANIA PRACTICE, § 2252:1 (1992).

76. The realities of modern-day litigation make it extremely difficult, if not impossible, to conduct effective discovery within 60 days of a defendant's receipt of a complaint to determine the extent of plaintiff's injuries or other alleged harm, the identity of potential additional defendants, their financial wherewithal and available resources to satisfy a

until sufficient information is developed before attempting to join the third party. If a defendant chooses the former, it risks substantially increasing the amount that it eventually may be forced to pay to resolve the case.⁷⁷ If a defendant chooses the latter, it risks the court disallowing joinder on the basis of untimeliness or being precluded from alleging that the joined party is solely liable to the plaintiff. Moreover, in this latter circumstance, even if leave to join is granted by the court, the defendant will be restricted to recovering only contribution and/or indemnity from the joined party because of the expiration of the statute of limitations period on plaintiff's claim. Because of the Hobson's choice that defendants currently face, which can have a dramatic adverse impact on the amount of damages that a defendant ultimately may be required to pay, we propose several amendments to Pennsylvania's joinder rules.

A. Proposed Amendments to Pennsylvania's Joinder Rules

Several amendments (signified by italics) to the current joinder rules would level the playing field of Pennsylvania third-party practice.

1. Extension of Time for Joinder as a Matter of Right

The time limit for joining parties as a matter of right should be extended from sixty to one hundred twenty days following service of the complaint, to allow a defendant to investigate fully and consider the impact of the joinder decision. Such investigation would allow defendants a fair and reasonable opportunity to

judgment, and other strategic issues that may bear upon the decision to join a third party. For example, defense counsel may only receive the complaint from their client after many of the 60 days have elapsed. A change in defense counsel at the outset of a case will also consume much of the allotted time.

Even if defense counsel promptly commences discovery, extensions of time to respond to interrogatories and document requests are routinely requested and granted as professional courtesies. Moreover, plaintiffs often need substantial time to gather the requested documents that may influence and impact the issue of whether to join a third party. Gathering relevant documents from nonparties also takes significant time. Third-party subpoenas and depositions, even under the best of circumstances, often take months to schedule and complete.

In light of these factors, the 60-day time limit for joinder as of right is simply too short. The time period should be substantially increased.

77. Regardless of whether a settlement is reached or a verdict ultimately entered, a solvent or deep-pocket defendant will be required to make up the insolvent additional defendant's share of liability.

explore through discovery both the potential amount of damages at issue and the third party's ability to satisfy a potential judgment. Pa. R. Civ. P. 2253 would thus be amended as follows:

Rule 2253. Time for Filing Praecipe or Complaint

Except as provided by Rule 1041.1(e), neither praecipe for a writ to join an additional defendant nor a complaint if the joinder is commenced by a complaint, shall be filed by the original defendant or an additional defendant later than *one hundred twenty days (120)* after the service upon the original defendant of the initial pleading of the plaintiff or any amendment thereof unless such filing is allowed by the court upon cause shown.

2. *Allow a Specified Time Period for Dismissal of a Joined Party as a Matter of Right*

Defendants should also be permitted to dismiss their third-party claims within a specified period of time should it become clear that the joinder will work to their detriment at trial, *i.e.*, by requiring a defendant to pay not only its judicially determined share of damages, but also the share of an insolvent joined party. A 120-day period for this discontinuance is proposed. Combined with the previous amendment, defendants could use the 120-day period at the commencement of an action either to investigate whether joinder of right is advantageous or, if joinder is completed before the expiration of the 120 days, to determine whether the earlier joinder will prejudice their case.

Rule 2255. Procedure

(a) The procedure, including pleadings, between the party joining an additional defendant and the additional defendant shall be the same as though the party joining the additional defendant were a plaintiff and the additional defendant were a defendant.

(1) The third-party plaintiff shall have the right, within one hundred twenty (120) days after service upon the third-party plaintiff of the initial pleading of the plaintiff or any amendment thereof, to discontinue any action brought by the third-party plaintiff against any additional

*defendant.*⁷⁸

(2) Within thirty (30) days following discontinuance of a third-party claim by a third-party plaintiff, the original plaintiff shall be permitted to file an amended complaint naming the additional defendant as a party upon cause shown. Cause shown shall require the original plaintiff to demonstrate that she (i) exercised due diligence before filing suit to determine all persons who may be liable to her on the cause of action, and (ii) despite her exercise of due diligence, she was unable to ascertain the identity of the additional defendant sought to be added.

B. A Defense of the Proposed Amendments

The proposed rules seek to balance the interests of plaintiffs in proceeding to trial quickly without devoting excessive time to procedural issues, with the interests of defendants in being able to investigate the effects that joinder of a third party might have on the case. The proposed rules avoid the inequitable shifting of burdens that currently occurs when defendants are forced to make joinder decisions quickly, without being able to discover or obtain information about the potential liability of the third party and the ability of the third party to pay any portion of a verdict assessed against her.

The first proposed amendment, which simply enlarges the time within which a defendant may join an additional defendant as of right, permits defendants approximately the same opportunity to investigate the facts and circumstances that plaintiffs have before initiating suit. At the same time, the new 120-day time limit on joinder as a matter of right should ensure that additional parties will not enter the litigation at a late stage and, therefore, delay a trial on the merits.⁷⁹

78. Alternatively, the 120-day period for joinder or dismissal of joined claims could be calculated back from the close of discovery or the trial date. In many Pennsylvania counties, however, discovery deadlines and/or trial dates are not set sufficiently in advance to allow such a joinder and/or dismissal decision to be planned. In these counties, a "backward" running of the time computation would prove impracticable.

79. Goodrich-Amram notes that "[w]ithout some limitation on the time within which this right [joinder as a matter of course] must be exercised, it would be possible for the defendants to delay the plaintiff indefinitely by collusively joining a series of additional defendants." 7 GOODRICH-AMRAM 2D, STANDARD PENNSYLVANIA PRACTICE, § 2253:1 (1992). Simply enlarging the time period for joinder as of right from 60 to 120 days will not run afoul of this

The second amendment provides similar results for both parties. The amendment allows defendants an opportunity following prompt joinder to continue to investigate the additional defendant's potential liability and impact on the litigation. If, upon conducting discovery, an original defendant learns that the joined party's presence will prejudice its case, the original defendant has an opportunity to discontinue its third-party action.

At the same time, the 120-day time limit on discontinuance by an original defendant of the action against the joined party assures plaintiffs that procedural issues will not delay trial on the merits. This proposed amendment also provides plaintiffs with the additional safeguard of reinitiating claims against the joined party if the plaintiff can show that she exercised due diligence before filing suit to identify all persons potentially liable to her, but that she still had no knowledge of the joined party's identity at the time she filed her complaint.⁸⁰

VII. CONCLUSION

The issue of whether a defendant remains master of the claims against a joined party is critically important, especially in light of the trend of increasing jury verdicts and Pennsylvania's unwavering allegiance to the concept of joint and several liability.⁸¹ A defendant who, without sufficient opportunity to investigate the facts, joins an additional party may find itself in the unhappy situation of paying a

legitimate concern. An additional 60 days will not delay trial in most, if not all, circumstances. *See supra* discussion in notes 11, 76.

80. This proposed amendment may result, in some circumstances, in an extension of the statute of limitations applicable to plaintiff's claims. The joinder rules, however, already provide for such an extension by permitting a defendant to allege that an additional defendant is "solely liable" to plaintiff, notwithstanding the statute of limitations, provided that the additional defendant is joined with 60 days following service of the complaint. PA. R. CIV. P. 2252(a)(i), 2253; *see supra* notes 3, 17. The courts have also interpreted the joinder rules in some circumstances to allow an extension of the applicable statute of limitations. *See Dash v. Wilap Corp.*, 495 A.2d 950, 956 (Pa. Super. Ct. 1985); *see also supra* note 39.

In theory, it remains possible for a plaintiff, who misses the statute of limitations against an additional defendant, to collude with a defendant to bring a third-party claim. If these circumstances are discovered by the additional defendant, the trial court should strike the joinder or, at the very least, allow the additional defendant to present evidence of the collusive activity to the jury. *See, e.g., Hatfield v. Continental Imports*, 610 A.2d 446 (Pa. 1992) (remedy for collusive "Mary Carter" settlement agreement is to allow the admissibility of the agreement at trial to show party's biased financial interests).

81. *See* 42 PA. CONS. STAT. ANN. § 7102(b) (1997); *Walton v. Avco Corp.*, 610 A.2d 454, 462-63 (Pa. 1992) (discussing liability of joint tortfeasors found strictly liable to plaintiffs); *Charles v. Giant Eagle Markets*, 522 A.2d 1, 4 (Pa. 1987).

large verdict, even though it has only minimal liability. Amendments are needed to level the playing field of third-party litigation and bring it in line with the original intent of the joinder rules.

