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A CA'S VIEW

## BRINGING RATIONALITY BACK TO THE LEGAL LIABILITY SYSTEM

The need for legal liability reform has been discussed in countries around the world for decades. Ontario's Chartered Accounting profession thinks the time has come to get the discussion started, bring all interested parties to the table and begin working on a solution that enhances Canada's business environment.

We have all heard stories of litigants and their legal representatives casting the widest net possible – naming plaintiffs both directly and indirectly and, at times, even obscurely involved in a situation that resulted in a lawsuit. However, many people likely aren't aware of why this occurs. Why do lawsuits in certain jurisdictions involve so many parties, adding legal teams, complexities and expenses to cases that, to the outside eye, seem to be between two, perhaps three, parties at most?

The answer is our current joint and several legal liability system. By ensuring that any party found even a small percentage responsible for a loss can be made to pay the total cost of all damages, our current system provides an incentive for plaintiffs to name as many defendants as possible, thereby providing more and potentially deeper pockets from which to collect awarded damages.

This may seem rational for the individual claimants involved in a case, but for our overall economy, this is sheer folly. For example, those who argue joint and several protects the interests of investors miss the critical point that costs associated with this legal system are shouldered by all investors. How? It's more than legal fees; it's higher insurance premiums, time lost that could have been spent on building a company, and an overall business climate that is more risk averse and less likely to take anything but the safest work or make needed investments. That costs us growth, profits, innovation and, ultimately, jobs.

Why is Ontario's CA profession taking on the cause of legal liability reform? Our members, especially those engaged in public accounting work, know all too well the high costs of operating in a joint and several legal system.

After all, public accounting is the business of expressing independent assurance on financial statements and other financial information of enterprises of every size, to ensure that the information truly reflects their financial condition. Unless someone independent and qualified signs off on financial statements, they are unlikely to be taken at face value by potential investors, a serious hindrance if you want to attract investment and build your company.

CAs engaged in public accounting are proud to do this important work, but they also live under a microscope and under great pressure. In a joint and several environment, a CA providing a professional opinion is often betting his or her personal and firm's financial future because a single mistake or even the appearance of being mistaken could lead to being named in a lawsuit and potentially being held accountable for all subsequently awarded losses.

There have been cases where auditors who have earned thousands of dollars in fees have been held responsible for millions in damages, despite conducting their work properly and in good faith.

Because of the onerous demands of joint and several liability, the financial services industry is being forced to act as the de facto insurers of our capital markets. Joint and several legal actions can be appropriate in cases where outside parties, including auditors, conspire or benefit from an action. The CA profession doesn't argue otherwise.

However, we believe honest professionals working to the best of their abilities should only be held accountable for their share of a loss – no more, no less. That is the case when the legal system is based on proportionate liability; all parties are found responsible for their share of a loss, but are not required to act as the "deep pockets" if other parties cannot pay their share.

In the European Union, the United States and elsewhere, changes to legal liability systems, whether proportionate liability with negotiated caps on liability, are either in place, in the works or on the horizon. Unfortunately, this is not the case here. We need to begin this discussion in earnest, and the CA profession stands ready to join in this necessary and overdue debate. □

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While auditors cannot eliminate the risk of fraud, they are inevitably blamed when it occurs – even when it is the auditor who ultimately uncovers the fraud. This is a standard that no law enforcement agency could meet. The increasing burdens on auditors for fraud detection result in increasing audit cost burdens on all clients.

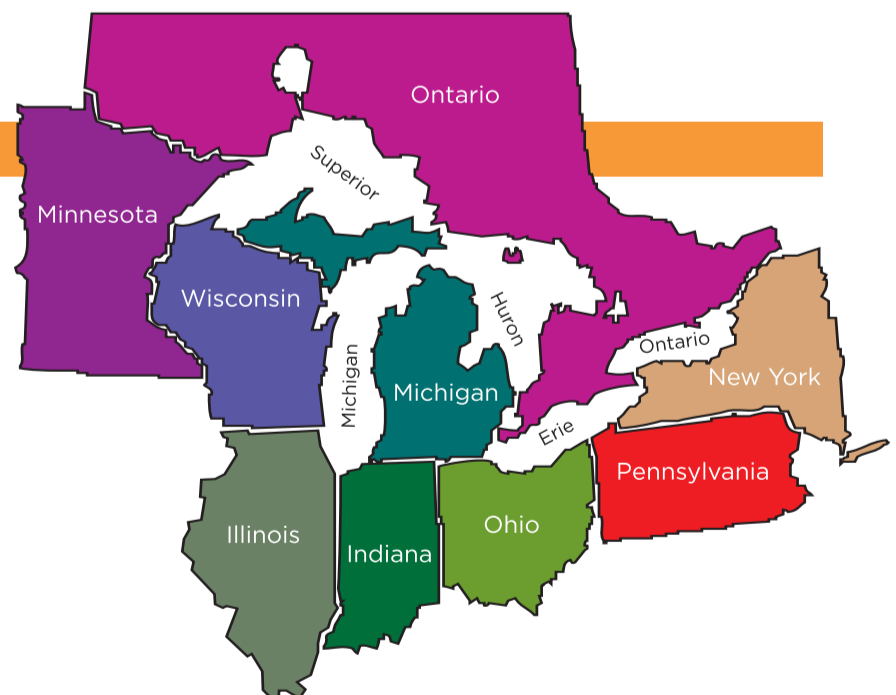
- The U.S. Chamber of Commerce, "Auditing: A Profession at Risk," January 2006

COMPETITIVE JURISDICTIONS

## KEEPING UP WITH THE NEIGHBOURS

Canada is in business competition with many countries around the world, none more so than the United States. For example, Ontario's economy lies at the heart of the Great Lakes basin, where more than 60 per cent of the population of the U.S. is within a 90-minute flight of Toronto. We should be ideally situated to compete in one of the largest and wealthiest marketplaces in the world. But as the accompanying map and chart shows, these neighbouring jurisdictions are well ahead of us in legal liability reform – and with it, in maintaining a competitive edge for business and investment.

- **Indiana:** Prohibits the application of joint and several liability in recovery of all damages.
- **Illinois:** Eliminated the rule of joint and several liability and provided for contribution among responsible parties.
- **Michigan:** Bars application of the rule of joint and several liability in the recovery of all damages, except in certain instances that are prescribed in the statute.
- **Minnesota:** When two or more persons are severally liable, contributions to awards shall be in proportion to the percentage of fault attributable to each, except in specific circumstances set out by legislation.
- **New York:** Limits joint and several liability by establishing that defendants found 50 per cent or less at fault are only severally liable for non-economic damages.



- **Ohio:** For each defendant determined responsible for 50 per cent or less of the tortious conduct, that defendant shall be liable to the plaintiff only for that defendant's proportionate share of the compensatory damages that represent economic loss.
- **Pennsylvania:** Abolishes joint and several liability.
- **Wisconsin:** Abolishes joint liability for defendants found less than 51 per cent at fault.

It bears noting that these are just a handful of the 42 U.S. states that have enacted some type of liability reform legislation. Other major states that have addressed the issue include California, Connecticut, Florida, New Jersey, Texas and Washington. □

Source: The U.S. National Association of Mutual Insurance Companies. [www.namic.org/reports/tortReform/JointAndSeveralLiability.asp](http://www.namic.org/reports/tortReform/JointAndSeveralLiability.asp)