



LAST WILL AND TESTAMENT

KNOW ALL MEN BY THESE PRESENTS:

I, _____ name of testator _____
single/married to _____ insert name of spouse if any _____
resident of _____ insert address _____, being of sound and
undue influence or intimidation from anyone, do hereby
Last Will and Testament, in English, the language which

I desire that should I die, it is my wish to be buried according

Applicability of Michigan's Comparative-Fault Statutes to Probate Litigation

By Frank R. Ortiz and Corinne F. Shoop

Before 1996, Michigan adhered to common-law joint and several liability. In 1995, Michigan enacted sweeping tort reform legislation,¹ part of which abolished joint and several liability in most circumstances² and created an allocation-of-fault system for most torts (the comparative-fault statutes).³ The comparative-fault statutes are a mechanism for allocating fault and liability among parties and nonparties alike.⁴ The Estate and Protected Individuals Code (EPIC),⁵ on the other hand, has only a general liability provision and no mechanism for allocating liability among additional parties or nonparties who may be at fault in a probate case involving a breach of fiduciary duty. Although there has yet to be a reported decision applying comparative fault to such breach-of-fiduciary-duty claims, we propose that the comparative-fault statutes would apply to breach-of-fiduciary-duty claims in circumstances in which EPIC does not conflict.

Michigan's Comparative-Fault Scheme

The purpose of the comparative-fault statutes is to allocate liability on the basis of the relative fault of all persons contributing to the plaintiff's damages.⁶ The comparative-fault statutes apply to actions "based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death...."⁷ The comparative-fault statutes, however, have been interpreted as applying to *all* tort actions, not just those involving personal injury, property damage, or wrongful death.⁸

Under the comparative-fault statutes, the trier of fact in a tort action must determine the relative fault of each person who contributed to the plaintiff's injury, regardless of whether that person is a named party.⁹ In cases of conflict between the comparative-fault statutes and other statutes governing the allocation of fault



FAST FACTS

The comparative-fault statutes are a mechanism for allocating fault and liability among parties and nonparties alike.

The Estate and Protected Individuals Code provides only general guidance concerning liability, while the comparative-fault statutes provide detailed instructions on allocating fault and liability when multiple persons (e.g., trustees, beneficiaries, and nonparties) are at fault.

and liability, the statute that is more specific with regard to the subject matter is the controlling statute.¹⁰

Specific Situations in Which Comparative Fault Would Not Be Applicable

There are several specific circumstances in which the comparative-fault statutes are not applicable. Each of these situations is limited, and the reasoning used to preclude application of the comparative-fault statutes would not apply to a probate breach-of-fiduciary-duty claim.

Comparative Liability Does Not Apply Under Absolute Liability Statutes

The comparative-fault statutes do not apply in actions brought under Michigan's dog-bite statute,¹¹ which provides that if there is provocation by the victim of the attack, the dog owner has no

liability; and if there is no provocation by the victim, the dog owner has absolute liability.¹²

In *Hill v Sacka*, a dog owner attempted to mitigate his liability by using the comparative-fault statutes. The Court of Appeals held that the comparative-fault statutes were inapplicable in dog-bite-stature cases because the comparative-fault statutes are predicated on "concepts of fault."¹³ In contrast, any concept of the allocation of fault would be immaterial in a dog-bite case because there is either zero or absolute liability. Rather than assigning fault and apportioning liability using that allocation of fault, the dog-bite statute assigns liability on the basis of the presence or lack of provocation by the person attacked.¹⁴ Accordingly, the comparative-fault statutes do not apply in cases in which a statute accords absolute liability without any consideration of the allocation of fault.

In contrast to the dog-bite statute, EPIC does not provide for absolute liability without consideration of fault except in limited situations.¹⁵ Thus, the reasoning preventing the application of the comparative-fault statutes to dog-bite claims does not apply to a probate breach-of-fiduciary-duty claim.

Comparative Liability Does Not Apply Under the UCC Conversion Statute

In *John Hancock Fin Servs v Old Kent Bank*, the bank attempted to mitigate its liability by claiming that the comparative-fault statutes apply to statutory conversion claims under the Uniform Commercial Code (UCC).¹⁶ The United States Court of Appeals for the Sixth Circuit held that allocation of fault under the UCC could not be enforced without a conflict with the comparative-fault statutes resulting.¹⁷ Under § 3-406 of the UCC, fault for payment on a forged instrument is allocated between the party whose negligence substantially contributed to the forgery of the instrument and the party to be paid on the instrument. The UCC does not expressly allocate fault to the forger, unlike Michigan's comparative-fault statutes. The court ruled that the comparative-fault statutes do not apply to situations in which there are statutes more specific to the subject area that conflict with them.¹⁸

Do the Comparative-Fault Statutes Apply to Probate Breach-of-Fiduciary-Duty Claims?

The comparative-fault statutes allocate liability among individuals at fault in cases of tort, or cases under another legal theory seeking damages for personal injury or property damage, unless there is a more specific fault-allocation statute.

A Breach of the Fiduciary Duty of a Trustee is a Common-Law Tort

Michigan courts have affirmed that a breach of fiduciary duty is a common-law tort.¹⁹ In *Miller v Magline*, the Court of Appeals held that a breach of fiduciary duty by the officers of a corporation sounded in tort. Accordingly, the Court concluded that the general statute of limitations applied rather than the statute of limitations under the corporation act.²⁰ Although there is no Michigan authority on point, numerous other jurisdictions have held

trustees in probate litigation to an even higher standard of fiduciary duty than required in the corporate context.²¹ Thus, even more so than in the corporate setting, a breach of fiduciary duty in probate should sound in tort.

EPIC Does Not Conflict with the Comparative-Fault Statutes

The comparative-fault statutes provide specific guidelines and details on the allocation of fault and liability.

MCL 600.2957(1) states that “[i]n an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each person shall be allocated under this section by the trier of fact and . . . in direct proportion to the person's percentage of fault.” In determining the liability of each party, the trier of fact must determine the total amount of each plaintiff's damages and the percentage of fault of all persons that contributed to the damages, regardless of whether that person was a party.²²

The comparative-fault statutes have been interpreted as applying to *all* tort actions, not just those involving personal injury, property damage, or wrongful death.

In determining percentages of fault “the trier of fact shall consider the fault of each person, regardless of whether the person is, or could have been, named as a party to the action.”²³ Further, the trier of fact must consider both the nature and conduct of each person at fault and the extent of the causal relationship between the person's actions and the harm to the injured party.²⁴ If the defendant attempts to mitigate his or her liability by claiming that the plaintiff is partially at fault, the defendant must first prove that the plaintiff's conduct was the proximate cause of the plaintiff's injuries.²⁵ Finally, the comparative-fault statutes require that the existence of a duty to the plaintiff be established before fault is assigned to a third party in a negligence case.²⁶

Taken as a whole, the comparative-fault statutes forge a detailed guide to allocating fault and liability in situations in which fault lies with multiple individuals, including persons who are not parties in the case.

In contrast to the comparative-fault statutes, EPIC provides no guidance for the allocation of fault and liability among multiple persons at fault. Instead, EPIC has a general liability provision and two specific liability mitigation provisions for certain cases involving multiple trustees.

EPIC's general trustee liability provision states that “[a] trustee is personally liable for an obligation arising from ownership or control of the trust estate property or for a tort committed in the course of administration of the trust estate only if the trustee is personally at fault.”²⁷ EPIC and Michigan caselaw provide no further explanation of what “personally at fault” means.

EPIC contains two very specific provisions for the mitigation of liability when there are multiple trustees. First, MCL 700.7406(4)

states that all actions, besides those expressly denoted in the trust instrument or having to do with voting securities,

shall be performed by both of the trustees if there are 2 [trustees] or by a majority of the trustees if there are more than 2 [trustees]. A trustee who has not joined in exercising a power is not liable to a beneficiary or another person for the consequences of the exercise of that power.

Although EPIC states nothing further about this provision, the provision appears to apply only when a majority of the trustees acted without consulting the remaining trustee.

Second, MCL 700.7406(4) further states that “[a] dissenting trustee is not liable for the consequences of an act in which the dissenting trustee joins at the direction of the other trustees, if the dissenting trustee expressed dissent in writing to a cotrustee at or before the time of joinder.”

EPIC's general liability provision and multiple-trustee-liability exceptions do not provide for the allocation of fault when fault

lies with a party who is not a trustee or a nonparty. EPIC's lack of guidance for allocating fault in cases in which persons other than the parties (i.e., the trustee and the beneficiary) are at fault stands in

stark contrast to the comparative-fault statutes. Further, EPIC's general guidance on liability does not conflict with the comparative-fault statutes.

The Comparative-Fault Statutes Should Apply to Probate Breach-of-Fiduciary-Duty Claims

Accordingly, the comparative-fault statutes should apply to torts involving a breach of fiduciary duty in the probate context. EPIC provides only general guidance concerning liability, while the comparative-fault statutes provide detailed instructions on allocating fault and liability when multiple persons (e.g., trustees, beneficiaries, and nonparties) are at fault. The statutes do not conflict, and the comparative-fault statutes should be used as a tool to allocate fault and liability in probate breach-of-fiduciary-duty cases when parties other than trustees or nonparties may be at fault.

Implications from Using Comparative Fault in Probate Litigation

The extension of the comparative-fault statutes to probate breach-of-fiduciary-duty claims will bring detailed rules for assigning fault and liability to probate litigation. The trier of fact may not assign fault to a nonparty unless notice of the nonparty being at fault has been given to the court and the other parties.²⁸ A defendant trustee has 91 days from his or her first responsive pleading to file notice of a claim that a nonparty is wholly or partially at fault.²⁹ Then, the plaintiff has 91 additional days from the defendant's filing of this notice to file an amended pleading stating

a claim against the nonparty.³⁰ Once the defendant has provided notice of a nonparty at fault, the defendant has the burden of alleging and proving the nonparty's fault.³¹

The trier of fact's assessment of fault by a nonparty is used only to determine the fault of the named parties and cannot be used to subject the nonparty to liability, nor can it be used as evidence of liability against the nonparty in another action.³² Finally, a plaintiff is not barred from recovering damages even if the plaintiff is found to have contributed to his or her injuries.³³

Conclusion

The comparative-fault statutes should be used to allocate fault in breach-of-fiduciary-duty claims in probate litigation. This is consistent with Michigan's longstanding policy of requiring those causing a loss to share responsibility. In some cases, this will result in a claimant recovering less than the full amount of the loss, but that is an ever present risk in tort litigation regardless of the forum. ■



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FOOTNOTES

1. 1995 PA 161, effective March 28, 1996.
2. MCL 600.2956.
3. The comparative-fault statutes are found at MCL 600.2957, MCL 600.6304, and MCL 600.2959.
4. MCL 600.2957(1).
5. MCL 700.1101 *et seq.*
6. *Lamp v Reynolds*, 249 Mich App 591, 596; 645 NW2d 311 (2002) (interpreting the legislative intent behind the enactment of the comparative-fault statutes).
7. MCL 600.2957; MCL 600.6304; MCL 600.2959.
8. See *Holton v A+ Insurance Associates, Inc*, 255 Mich App 318, 324; 661 NW2d 248 (2003) (involving negligent failure to provide insurance coverage); *Kmart Corp v Logan*, unpublished opinion per curiam of the Court of Appeals, issued July 10, 2003 (Docket No. 232393); 2003 WL 21583385 (involving employee embezzlement).
9. MCL 600.2957(1).
10. *Hill v Sacka*, 256 Mich App 443, 457; 666 NW2d 282 (2003).
11. MCL 287.351.
12. See *Hill*, 256 Mich App at 454–456.
13. *Id.* at 454.
14. *Id.*
15. The exceptions are specific multiple-trustee cases involving MCL 700.7406(4), discussed later in this article.
16. *John Hancock Fin Servs v Old Kent Bank*, 346 F3d 727, 730 (CA 6, 2003).
17. *Id.* at 732.
18. *Id.*, citing *Hill*, 257 Mich App at 455.
19. See, e.g., *Riverview Coop, Inc v First Nat'l Bank & Trust Co of Mich*, 417 Mich 307, 321; 337 NW2d 225 (1983); *Miller v Magline*, 76 Mich App 284, 313; 256 NW2d 761 (1977); see also *Lear Corp v Butzel Long, PC*, unpublished opinion per curiam of the Court of Appeals, issued May 18, 2006 (Docket No. 258669); 2006 WL 1360286, at *3; *Simmons v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued January 18, 2002 (Docket Nos. 221657 and 226121); 2002 WL 77163, at *3.
20. *Miller*, 76 Mich App at 313.
21. See, e.g., *In re Mueller's Trust*, 28 Wis 2d 26; 135 NW2d 854 (1965); *In re Maxedon Estate*, 24 Kan App 2d 427; 946 P2d 104 (1997); *Saigh v Saigh*, 218 SW3d 556 (Mo App, 2007).
22. MCL 600.6304(1).
23. MCL 600.2957(1).
24. MCL 600.6304(2).
25. *Lamp*, 249 Mich App at 598–599.
26. *Romain v Frankenmuth Mut Ins Co*, 483 Mich 18, 20; 762 NW2d 911 (2009).
27. MCL 700.7306(2).
28. MCR 2.112(K)(2).
29. MCR 2.112(K)(3)(c).
30. MCL 600.5957(2); MCR 2.112(K)(4).
31. MCL 600.2960(1).
32. MCL 600.2957(3).
33. MCL 600.2958.

