

Impact on Equitable Contribution

A defendant's liability for non-economic damages cannot exceed his or her proportionate share of fault, as compared

with all fault responsible for the plaintiff's alleged injuries and not merely that of the defendants present in the lawsuit at the time. Indeed, trial courts must assess, or allow the jury to assess, the comparative fault of other defendants who have settled before trial.

In cases with multiple defendants, defendants must know whether "joint and several" liability applies. If it does, a time might come in the case regarding whether a defendant should settle around the co-defendant(s) and either "cut his losses" or "pay and change."

Further, when determining if "joint and several" liability applies, it must then be determined if liability is actually "several" among the various co-defendants or if modified "joint and several" liability applies, as in California. Further, if an argument can be fashioned that the plaintiff is at least partially to blame for his or her own injuries, what effect, if any, does that have on the co-tortfeasor/defendants' liability?

Joint and Several Liability in California

California, as noted above, is a modified "joint and several" liability state. Indeed, in any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and

shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against that defendant for that amount. CA Civ Code § 1431.2(a), aka "Proposition 51."

In an action for personal injuries venued in California, a plaintiff's recovery from non-settling tortfeasors should be diminished only by the amount that the plaintiff has recovered in a good-faith settlement from any concurrent tortfeasor, rather than by an amount measured by the settling tortfeasor's proportionate responsibility for the injury. *Roslan v. Permea, Inc.*, 17 Cal. App.4th 110, 21 Cal. Rptr. 66 (1993) (holding that, in a personal injury action, the trial court erred in not allowing the jury to assess the comparative fault of two defendants who had settled before trial, and in not allowing a third defendant to present evidence of the culpability of one of those settling defendants); *See also McGee v. Cessna Aircraft Co.*, 82 Cal.App. 3d 1005, 147 Cal. Rptr. 694 (1978).

"Joint and several liability" also comes into play on personal injury actions involving alleged negligence asserted against multiple defendants. "One of the principal by-products of the joint and several liability rule is it frequently permits an injured party to obtain full recovery for his injuries, even when one or more of the responsible parties do not have the financial resources to cover their liability." *American Motorcycle Assn. v. Superior Court*, 20 Cal.3d 578, 590 (1978).

Defendants are potentially "joint and several" tortfeasors if they are potentially liable to the same plaintiff for the same harm. Such defendants need not act at the same time or in the same way; rather, the

measure of "joint and several" liability is whether the defendants' conduct produced an indivisible, single harm.

Contribution Actions

In California, jointly and severally liable defendants are generally entitled to recover from one another the percentage of damages that are attributed to the other's conduct in what is known as a contribution action. Calif. Code Civ. Proc. § 875(a). A tortfeasor who intentionally injures another has no right of contribution from any other tortfeasors. Calif. Code Civ. Proc. § 875(d). However, intentional tortfeasors in California are permitted to seek contribution and indemnity from other intentional tortfeasors in the action. *Baird v. Jones*, 21 Cal.App.4th 684, 686 (1993).

In 1968, California adopted Proposition 51, which is codified in California as Civil Code § 1431.2. This code section (Proposition 51) altered California's rules about who must pay for *non-economic damages*. Joint tortfeasors in California are still jointly liable for *economic damages*. However, under Proposition 51, "in any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of each defendant for *non-economic damages* shall be several only and shall not be joint. Calif. Civ. Code § 1431.2. Indeed, in California, a defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against that defendant for that amount." Cal. Civ. Code § 1431.2(a). Stated differently, a defendant may be responsible for 100 percent of a plaintiff's *economic damages*, if such defendant is assigned at least a one percent share of liability for plaintiff's harm, but is only be responsible for a pro rata share of plaintiff's non-economic harm in direct proportion with such defendant's share of fault.



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The apportionment of non-economic damages under Proposition 51 is designed to benefit co-defendants who acted negligently. Proposition 51 did not, however, change the law regarding intentional tortfeasors, whose liability is not based on comparative fault. Intentional tortfeasors in California remain “jointly and severally” liable for all of the plaintiff’s damages and are not entitled to Proposition 51 apportionment with respect to non-economic damages. See, e.g., *Thomas v. Duggins Const. Co., Inc.*, 139 Cal.App.4th 1105, 1112–13 (2006).

Modified Joint and Several Liability Hypothetical

The best way to illustrate how “joint and several” liability works in reality is with a real life example. Suppose that there is one plaintiff and two defendants—State and Jones—and that the plaintiff has asserted negligence claims against both defendants as related to a singular motor vehicle accident. State owned, operated, and/or controlled the highway where the subject motor vehicle accident occurred. Jones, on the other hand, was the operator of one of the two motor vehicles involved in what turned out to be a catastrophic motorcycle vs. SUV accident. The plaintiff was operating the motorcycle and Jones was operating the SUV. Both defendants, State and Jones, answered the plaintiff’s complaint and, in turn, cross-complained against one another for implied equitable indemnity and contribution. The case was ultimately mediated as to both defendants and, shortly after mediation, defendant Jones accepted the mediator’s proposal and agreed to settle with the plaintiff for \$15 million. Subsequently, the court entered an order pursuant to California Code of Civil Procedure § 877.6, determining that the settlement as between the plaintiff and Jones was made “in good faith.” This determination, in turn, barred all joint tortfeasors, including the defendant State, from pursuing any further claims against the settling tortfeasor, the defendant Jones, for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault. Calif. Code Civ. Proc. § 877.6(c).

All \$15 million of the defendant Jones’ settlement funds were allocated to the plaintiff’s claims, and there was no pretrial stipulation between the parties or court order concerning how to allocate the defendant Jones’ settlement funds as between the plaintiff’s economic and non-economic damages. The case ultimately proceeded to

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trial, and the defendant/cross-complainant Jones remained in the case for the sole purpose of pursuing his cross-complaint against the defendant/cross-defendant State, upon the theory that Jones overpaid in settlement, as compared with State’s proportionate share of fault for the plaintiff’s harm.

At trial, the jury awarded \$17 million to the plaintiff, and determined that State was 15 percent liable for the plaintiff’s harm and that Jones was 85 percent liable for the plaintiff’s harm. The jury allocated \$12 million to the plaintiff’s economic damages and \$5 million to the plaintiff’s non-economic damages. The jury was not aware of the settlement between the plaintiff and the defendant Jones until after the jury issued its verdict in the case, and was led to believe that the plaintiff was pursuing claims against both defendants, State

and Jones, at trial. In reality, the plaintiff’s only target at trial was the defendant State, insofar as the plaintiff previously settled with the defendant Jones for \$15 million.

Post-trial, the plaintiff submitted a proposed judgment to the court, suggesting that the plaintiff was entitled to recover \$17 million in economic damages from State, pursuant to Proposition 51, plus \$750,000 in non-economic damages, calculated as follows: \$5 million x 15 percent. The plaintiff’s proposed judgment was silent as to what recovery, if any, Jones should have against State in connection with Jones’ cross-complaint against State.

Jones, in turn, objected to the plaintiff’s proposed judgment, and asked the court for a settlement allocation with respect to Jones’ \$15 million settlement with the plaintiff. Pursuant to *Espinoza v. Machonga* 9 Cal.App.4th 268, 277 (1992), the court properly determined that 70.6 percent of Jones’ \$15 million settlement amount, or \$10.59 million should be allocated to economic damages and that 29.4 percent, or \$4.41 million of Jones’ \$15 million settlement amount should be allocated to non-economic damages.

At the hearing on Jones’ objection to the plaintiff’s proposed judgment, counsel for Jones argued that Jones “prevailed” on his cross-complaint against cross-defendant State and was entitled to recover back from State as a result of Jones’ “overpayment” to the plaintiff in connection with the \$15 million settlement as between the plaintiff and the defendant Jones. The plaintiff, in turn, argued that Jones should not be allowed to recover against State and urged that the plaintiff was entitled to his “full recovery” against State in accordance with the jury’s verdict in the case.

Given that the jury awarded \$12 million to the plaintiff in economic damages and \$5 million to the plaintiff in non-economic damages, the plaintiff argued that he should be permitted to recover all \$12 million in economic damages against the defendant State, pursuant to Proposition 51, plus 15 percent of the jury’s \$5 million non-economic damage award, or \$750,000 in pro-rata non-economic damages, for a total recovery in favor of the plaintiff and against State in the amount of \$12.75 million.

In response, the defendant/cross-complainant Jones argued that “each defendant was liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant’s percentage of fault, and a separate judgment shall be rendered against that defendant for that amount.” Calif. Civil Code §1431.2(a); *See also Ehret v. Congoleum Corp.*, 73 Cal.App.4th 1308, 1320–22 (1999) (holding that a non-settling defendant is not entitled to a “setoff” for prior settlements allocated to non-economic damages.)]

In California, indemnity is allowed in those fact situations where in equity and good conscience the burden of the judgment should be shifted from the shoulders of the person seeking indemnity to the one from whom indemnity is sought. The right depends on the principle that everyone is responsible for the consequences of his or her own wrong. The determination of whether indemnity should be allowed must of necessity depend upon the facts of each case. *Herrero v. Atkinson*, 227 Cal.App.2d 69, 74 (1964); *American Motorcycle Assn. v. Superior Court*, 20 Cal.3d. 578, 599 (1978) (A concurrent tortfeasor may obtain partial indemnity on a comparative fault basis.)

Further, pursuant to *Union Pacific Corp. v. Wengert*, 79 Cal.App.4th 1444 (2000), “one acting in good faith in making a payment under a reasonable belief that it is necessary to his or her protection is entitled to equitable indemnity, even though it develops that the settlor had no interest to protect.”

Pursuant to Proposition 51, “joint” liability is restricted to economic damages, and there is no “setoff” available to State related to the jury’s award in favor of the plaintiff, as related to non-economic damages. *Ehret v. Congoleum Corp.*, *supra*, 73 Cal.App.4th at 1320–22. Thus, there was no disputing that State was responsible for 15 percent of the jury’s \$5 million non-economic damage award, or \$750,000, notwithstanding the fact that the plaintiff has already received \$10.59 million in economic damages and \$4.41 million in non-economic damages from the defendant Jones in connection with the \$15 million good-faith settlement as between the plaintiff and Jones.

Pursuant to Calif. Code of Civil Procedure § 875, where a money judgment has been rendered jointly against two or more defendants in a tort action, there shall be a right of contribution among them. Such right of contribution shall be administered in accordance with the principles of equity. Calif. Code Civ. Proc. § 875(b).

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Ehret states that in the absence of some evidence upon which the trial court could allocate settlement payments in a manner other than how the jury allocated between economic and non-economic damages, the jury’s allocation in the trial verdict applies to the settlement funds as well, just as in *Espinoza v. Machonga Hoch*, like *Ehret*, holds that an award to a plaintiff may be greater or less than the amount of recoverable damages found by the jury or court. *Hoch v. Allied-Signal, Inc.*, 14 Cal.App.4th 48 (1994).

In *Hoch*, a wrongful death action for negligence and strict product liability, the plaintiffs settled before trial with the defendant automobile manufacturer and other defendants, receiving a total

of \$382,500. The plaintiffs, in turn, proceeded to trial against the defendant seat belt manufacturer, stipulating that any jury award would be deemed purely non-economic damages. The trial court properly gave judgment for the plaintiffs in the amount of \$175,000 as that portion payable by the seatbelt manufacturer, 35 percent of the \$500,000 damages awarded by the jury based on comparative fault. This added to the settlement funds of \$382,500 resulting in a total recovery of \$557,500, with an acceptable \$57,500 windfall for the plaintiff under Proposition 51.

Had Jones dismissed his cross-complaint against State upon settling with the plaintiffs in our hypothetical case and not actively participated in the trial of this matter, State would be obligated to pay the \$12 million in economic damages and \$750,000 in non-economic damages to the plaintiff. This case, however, was different; both the plaintiff and Jones were pursuing the same funds from State at the time of trial, leaving open the door for equitable contribution under California Code of Civil Procedure § 875.

Indeed, there was no disputing that the plaintiff received an “overpayment” from Jones for her loss, based upon the jury’s special verdict in the case awarding \$12 million in economic damages and \$5 million in non-economic damages to the plaintiff.

Applying simple math to the jury’s verdict and percentages of fault as between Jones and State, Jones would be responsible for \$10.2 million of the \$12 million that the jury awarded to the plaintiff in economic damages (85 percent x \$12 million), and \$4.25 million of the \$5 million that the jury awarded to the plaintiff in non-economic damages (85 percent x \$5 million). Conversely, State would be responsible for \$1.8 million in economic damages and \$750,000 in non-economic damages.

By contrast, the trial court allocated \$10.59 million of Jones’ \$15 million settlement amount to economic damages and \$4.41 million of Jones’ \$15 million settlement amount to non-economic damages. Thus, Jones “overpaid” the plaintiff by \$390,000 with respect to economic damages and by \$160,000 with respect to non-economic damages, for a total “overpayment” from Jones to the plaintiff of

\$550,000 [(\$10.59 million - \$10.2 million) + (\$4.41 million - \$4.25 million)].

The fact of overpayment, of course, was a direct and proximate result of Jones' pre-trial decision, made in good faith, to settle with the plaintiff for \$15 million under a reasonable belief that it was necessary for Jones' protection to enter into this settlement. Cross-complainant Jones was entitled to equitable indemnity and/or contribution under these facts even though it ultimately turned out that Jones "had no interest to protect." Calif. Code Civ. Proc. § 875(b); *Union Pacific Corp. v. Wengert*, supra, at 1444.

For all of these reasons, the trial court properly concluded, based on equitable principles, that cross-complainant Jones was entitled to equitable contribution and recovery of \$550,000 back from cross-defendant State, and that the plaintiff's recovery against State was properly reduced by \$550,000.

Solvency and Joint and Several Liability

As suggested above, "joint and several liability" allows a plaintiff to "sue for and recover the full amount of recoverable damages from any defendant. Restatement (Third) of Torts: Apportionment of Liability § 10 (2000). In its pure form, the practical effect of this doctrine is that the plaintiff can recover the entire amount of damages from any of the jointly and severally liable tortfeasors, regardless of a particular defendant's percentage share of fault. This is intended to address the inequity that flows from a responsible actor being unable to pay. In such a case, someone—the plaintiff or another defendant—will end up paying for the insolvent party's share. States are, in turn, left with having to decide where to shift the risk created by the judgment-proof defendant. The choice of who (between the remaining defendants and the plaintiff) will ultimately bear the risk is one of policy, which the states pursue according to their own preferences. Indeed, in order to have a viable claim for equitable contribution, the plaintiff must be able to prove that it paid "more than its fair share." *Scottsdale Insurance Co. v. Century Surety Co.*, 182 Cal. App. 4th 1023 (2010).

For states that choose to have defendants bear this burden, pure "joint and several

liability" is clearly the preferred option. Where the doctrine applies, the plaintiff is likely to search for a financially viable defendant with a sufficiently "deep pockets" to ensure full recovery. California, for instance, takes a modified approach, permitting "deep pocket" recoveries only with respect to economic damages, but not with

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respect to non-economic damages, which are shared among co-tortfeasors on a pro rata basis. Cal. Civ. Code § 1431.2(a). For further discussion, please see Restatement (Third) of Torts: Apportionment of Liability § 17, comment a (2000), explaining the five different approaches nationwide with respect to "joint and several" liability.

Throughout the nation, there are as many as three (if not more) different approaches to dealing with multiple tortfeasors. Restatement (Third) of Torts: Apportionment of Liability § 17, comment a (2000). Each approach allocates the risk

of insolvency of one or more of the responsible tortfeasors differently. Pure "joint and several" liability places the risk of insolvency and the burden of identifying nonparty tortfeasors on defendants. The second approach is pure "several" liability. Under pure several liability, the plaintiff may recover from each severally liable defendant only the portion of damages that are attributable to that defendant's fault.

Because the wholesale risk-shifting of these two approaches can lead to unfair results, many states—including California—have adopted varied or hybrid versions of these allocation schemes, typically known as "modified joint and several" liability. Under this modified approach, "joint and several" liability applies to the solvent defendants, but the comparative share of any insolvent tortfeasor is spread out among the remaining parties, sometimes the plaintiff included, in proportion to their share of the fault. Another approach splits the risk of insolvency between the plaintiff and the solvent defendants, and imposes "joint and several" liability on each tortfeasor whose share of the harm exceeds a certain percentage of fault.

Joint and Several Liability in Contract Actions

In addition to these variations, many states draw distinctions between damages based on the type of action in which they are sought. Contract actions are frequently treated differently from tort cases, insofar as contract damages typically involve economic damages while tort damages tend to be a hybrid of both economic and non-economic damages. Further, while the risk of loss might be on the plaintiff in a negligence case, "joint and several" liability will apply for intentional tort cases or in cases based upon breach of contract.

Conclusion

In conclusion, before determining whether to "cut your losses" or to "pay and change," you will first need to determine if you are in a pure "joint and several" liability state, a pure "several" state, or a modified "joint and several" liability state like California, as each approach will potentially yield a different outcome for your client. 