YOU PAY FOR YOUR WRONG AND NO ONE ELSE'S: THE ABOLITION OF JOINT AND SEVERAL LIABILITY

By:
Alice Chan

In April 2006, Florida abolished the doctrine of joint and several liability in negligence cases. Joint and several liability provides that, among joint defendants, if the defendants are found liable to the plaintiff(s), any one defendant can be made to pay the entire judgment against the plaintiffs, regardless of that defendant's percentage of fault. It would then be incumbent upon the paying defendant to seek from the other defendants their portion of liability.

In the past decade, 18 states in the country have passed legislation eliminating completely or partially the doctrine of joint and several liability.[1] In those states that have partially eliminated it in the past decade, a defendant usually had to be less than 50% liable in order to be exclusively responsible for their percentage of fault only.

The theory behind joint and several liability is the belief that once the plaintiff has proven the fault of the defendants and judgment is rendered against them, the plaintiff should not have the additional burden of enforcing the judgment against the respective defendants. With joint and several liability, the burden to collect from the defendants for their portion of liability would fall on the defendants. This is also premised on the idea that the defendants have the financial capacity and should bear the burden of paying and/or collecting on the judgment, rather than the plaintiffs.

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1 *Joint and Several Liability Rule Reform* (America Tort Reform Association, Tallahassee, FL), March 2006.

Payment on and effecting judgments against the defendants have evolved over time and the burden has shifted from the plaintiffs to the defendants. The concept of contributory negligence, where, if the plaintiff was found partially liable for their own injuries would result in no recovery for the plaintiff was replaced by comparative negligence in which percentages of fault was allocated to all parties. This allowed the defendants to reduce their liability by the plaintiff's own negligence without the harsh penalty to the plaintiff of no recovery. With joint and several liability, the plaintiff's potential to recover the entire judgment from the defendants was increased as they could seek to recover the entire judgment from any financially sound or well-insured defendant.

During debate of the Florida bill to abolish joint and several liability, state legislatures argued for and against passage of the bill. Arguments made during passage of the Florida bill, as well as general issues commonly raised are:

Proponents of Joint and several liablity

Proponents of joint and several liability argue that the law to abolish it would create an environment in which plaintiffs would not be fully compensated for their injuries. The rule creates a grossly unlevel playing field and would be unfair to families of the injured as it would be more difficult to collect on judgments due to insolvent defendants.

As plaintiffs are not fully compensated for their injuries, the plaintiffs would then fall back on state welfare and public assistance programs, causing social service budgets to rise as well as taxes.[2]

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[2] Dave Davis and Necati Aydin, Ph.D., *Repeal of Joint and Several Liability Would Likely Have Little Impact on State Medical and Social Services Costs,* Florida Tax Watch Research Report, March 2006.

Additionally, the abolishment of joint and several liability may create an explosion of new cases in the court system where every conceivable defendant, no matter how negligible the liability may be, will be brought in a lawsuit. This, in turn, would clog up the court system and affect the ability of plaintiffs to effectively and efficiently seek justice.

Despite arguments of proponents to abolish joint and several liability that business climates would improve, opponents of the legislation argue that the business environment will not change as a result of the abolition of joint and several liability due to increased taxes and the financial impact on the general public.

Finally, corporations and industries should live up to a high standard of personal responsibility and that financially sound or well insured corporations are not victims.

Opponents of Joint and Several Liability

Opponents of joint and several liability argue that we are on a fault-based system of justice: not a no-fault system where every victim is compensated. Individuals should only be made to pay their share of damages for which they are responsible and that liability should be distributed equitably.[3]

This rule encourages lawsuits to be filed against financially viable or well-insured defendants regardless of their levels of liability. It would stop the targeting of insurers, corporations and others thought to have "deep pockets." These suits then clog the courts and damage deserving plaintiffs from seeking proper and efficient justice.

The risk of possibly having to pay for the full amount of damages from the injuries causes "deep pocket" defendants to settle out of court rather than risk paying the full judgment even if they were only minimally at fault for the injury. As a result, it

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[3] *Id.*

creates loss of jobs as a result of settlement payments or lawsuit judgments and/or costs for defense. An unfair business environment is thus developed.

These unfair lawsuits, settlements and judgments contribute to higher premiums and difficulty in getting coverage for businesses based on the possibility of having to pay entire judgments.

Economic development is closely tied to a state's litigation environment and as such, abolishment of joint and several liability encourages growth of businesses and reduces business closures and economic harm to businesses. Also, small businesses are forced to close because they were made to pay more than their fair share of damages.

Additionally, abolishing the rule would increase employment and productivity in the economy as decreasing litigation costs prevent the rise of the cost of goods and services.

RECENT TRENDS AND LAW IN THE UNITED STATES:[4]

In the past decade,

6 states have abolished joint and several liability:

Florida	(2006)
Georgia	(2005)
Mississippi	(2004)
Utah	(1999)
Kentucky	(1996)
Louisiana	(1996)

10 states rendered joint and several liability inapplicable if the defendant had less than a certain percentage of fault, some with exceptions:

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[4] Tort Law Desk Reference, A Fifty-State Compendium (Morton E. Daler ed., 2006)

Less than 50% of fault:

Missouri	(2005)
South Carolina	(2005)
Oklahoma	(2004)
(in cases where plaintiff has some degree of fault)	
Minnesota	(2003)
Ohio	(2003)
Texas	(2003)
Iowa	(1997)
Montana	(1997)

Less than 40% of fault:

Pennsylvania	(2002)
(except in cases involving intentional torts)	

Less than 30% of fault:

West Virginia	(2005)

Arkansas has enacted a sliding scale:

In Arkansas, if a defendants proportion of liability is 10-50% their share of liability can be increased by 10%. If it is over 50%, their share of fault can be increased by 20%.[5]

[5] See §§ 16-55-203(a)(3)(B), 16-55-203(a)(3)(c) (2003).

STATUS OF REMAINING STATES:

Joint and Several Liability Eliminated:

Alaska	
Arizona	
Colorado	(except conspiracy or joint acts done to commit injury)
Idaho	(except in cases where defendants are acting in concert in intentional or reckless tortious act or they were agent/servants of one another)
Indiana	(except if defendants jointly owe a duty or independent acts result in single harm for which fault can not be determined)
Kansas	
Michigan	(except in medical malpractice cases where defendant is without fault and vicarious liability of employer for employee's actions)
New Mexico	(except cases involving intentional torts and vicarious or strict liability)
North Dakota	(except in conduct involving a common plan or scheme)
Oregon	

Tennessee	(Except in cases involving vicarious liability for agency relationships, joint tortfeasors acting in concert or strict products liability)
Vermont	(only for negligence cases)
Washington	(except in cases where plaintiff has no fault, defendants act in concert, agency exists, or hazardous materials are involved)
Wyoming	

Joint and Several Liability applied:

Alabama	
Connecticut	
Delaware	(where the plaintiff has no fault)
District of Columbia	
Hawaii	
Illinois	
Maine	
Maryland	
New York	(If less than 50% at fault, joint and several liability does not apply to non-economic damages except in cases involving property damage or wrongful death)
North Carolina	
Rhode Island	
South Dakota	
Virginia	

States applying joint and several only to economic damages and not non-economic damages:

California
Nebraska (If defendants did not act in a common plan)

States rendering joint and several liability inapplicable if the defendant had less than a certain percentage of fault, some with exceptions:

50% or Less
Wisconsin (except when acting in a common plan or scheme)

Less than 50%
New Hampshire

Less than 40%
New Jersey

State(s) applying joint and several liability but as between defendants share the judgment through equal contribution, regardless of their percentage of fault:

District of Columbia

The recent trend provides a promising outlook for insurers, corporations and all defendants to establish equity in payment of judgments when partial fault is assigned. While abolishment of joint and several liability may increase the chances that certain plaintiffs may not be fully compensated, the burden to pay for damages should not be placed on defendants for fault that has not been attributed to them.