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# The Effect of Comparative Fault on California Contribution/ Indemnification Rights: How to Employ and Avoid the New Tortious Quicksand

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*This article discusses the effect of comparative fault principles upon contribution rights in California, including the somewhat bizarre impact on settlement and releases between the plaintiff and one of several joined concurrent tortfeasors. It emphasizes decisions and tactics that should be made by litigators in response to a variety of important contribution issues.*

Comparative fault has, for the most part, been absorbed into California court law with only minor confusion and trauma. There is one area, however, where both the confusion and the trauma have been considerable. This concerns the effect comparative fault principles have on the right of a defendant to obtain a contribution or indemnification judgment against another co-defendant and whether that right can be frustrated by a settlement between the latter and plaintiff.

This article presents legal conclusions and tactical advice based upon the newly developed California case and statute laws and the author's litigation experience concerning these issues. Simple

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hypothetical case situations are presented as a framework for these legal conclusions and tactical advice.

PLAINTIFF SUES DEFENDANTS "A" AND "B" AS JOINT AND  
CONCURRENT TORTFEASORS

*Problem I:* After deliberation, the jury returns special verdicts finding that plaintiff suffered general and special damages totaling \$100,000.00; that the plaintiff was 10% at fault in causing those damages, defendant *A* 80% at fault, and defendant *B* 10% at fault. How much of the verdict sum may plaintiff collect and from whom?

*Answer To Problem I:* Plaintiff may collect \$90,000.00 from either defendant (\$100,000.00 minus \$10,000.00 measuring plaintiff's 10% fault).

*Summary Of Law:* The comparative fault rule has not repealed joint and several liability principles that permit a plaintiff to recover the net judgment from any one of the joined defendants who is found by the jury to be at fault for plaintiff's loss.<sup>1</sup> And if the plaintiff chooses, he may collect the entire amount from the co-defendant whom the jury has concluded owes only 10% of the total fault.<sup>2</sup>

*Problem II:* Suppose plaintiff collects upon execution the entire net judgment of \$90,000.00 from defendant *B*, who is found by the jury to owe but 10% of the total fault. May *B* compel *A* to reimburse *B* for part of the judgment amount? If so, how much must *A* contribute to *B* and how should *B* assert its claim?

*Solution To Problem II:* The joint and concurrent tortfeasor co-defendant, *B*, may assert a right to equitable indemnification from *A* and obtain a judgment against *A* for \$80,000.00. Equitable indemnification compels contribution from a joint and several tortfeasor co-defendant proportionate with both parties' fault percentages. Thus, *B*, owing 10% of fault but forced to pay \$90,000.00 at plaintiff's election, is entitled to indemnification from *A* for \$80,000.00, the money equivalent of *A*'s fault.

The common law rule of contribution as well as the prior rule in California requires a 50/50 allocation of the judgment between the

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1. American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).

2. Sorensen v. Allred, 112 Cal. App. 3d 717, 169 Cal. Rptr. 441 (1980); State v. Southern Pac. Transp. Co., 115 Cal. App. 3d 116, 171 Cal. Rptr. 187 (1981).

joint and concurrent tortfeasor defendants.<sup>3</sup> This is so even though the co-defendant who is forced to pay the judgment may have been only slightly at fault, while the co-defendant's fault may have been substantial. Thus, in non-comparative fault states, defendant *B*, responsible for 10% of total fault, is entitled to a contribution judgment from *A* of only \$45,000.00 (50% of the \$90,000.00 judgment).

But comparative fault in California has abolished this terrible result and permits equitable indemnification in proportion to the judgment. Thus, as between joint and concurrent tortfeasor defendants, each shall bear the loss in proportion to his fault.<sup>4</sup>

#### PLAINTIFF SUES ONLY ONE OF MULTIPLE DEFENDANTS

*Problem III:* Suppose plaintiff elects, for tactical or other reasons, to sue *B* only. May *B* implead *A* and obtain a judgment of partial indemnification to the extent of \$80,000.00?

*Solution To Problem III:* Co-defendant *B* may compel joinder of joint and concurrent tortfeasor *A* as a co-defendant and assert a cause of action against him for partial indemnification. *B*'s motion to the court for leave to join *A* as a new party defendant *must* be granted.

*Summary Of Law:* The California Supreme Court decided in the *American Motorcycle Association* case that comparative fault principles could be equitably applied as between joint and concurrent tortfeasors only if one of the latter, if sued separately, was given the right to compel joinder of all others who potentially shared in the total fault. Writing for the majority, Justice Tobriner said:

Accordingly, we conclude that under the governing statutory provisions a defendant is generally authorized to file a cross-complaint against a concurrent tortfeasor for partial indemnity on a comparative fault basis, even when such concurrent tortfeasor has not been named a defendant in the original complaint.<sup>5</sup>

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3. *City and County of San Francisco v. Ho Sing*, 51 Cal. 2d 127, 330 P.2d 802 (1958); *Bielski v. Schulze*, 16 Wis. 2d 1, 114 N.W.2d 105 (1962); *Packard v. Whitten*, 274 A.2d 169 (Me. 1971).

4. *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978); *Parker v. Morton*, 117 Cal. App. 3d 751, 173 Cal. Rptr. 197 (1981).

5. 20 Cal. 3d at 607, 578 P.2d at 917, 146 Cal. Rptr. at 200.

*Tactical Advice:* A plaintiff may gain three advantages by electing to sue but one of two or more joint and concurrent tortfeasors:

1. He avoids a possible sympathy reduction of the jury award by suing a "target" defendant (*e.g.*, major corporation, truck line) and excluding from the case one or more of the prospective defendants with whom the jury might empathize (*e.g.*, corporate employee, truck driver). Experienced plaintiffs' lawyers know that a mixture of "deep pockets" and "small pockets" defendants often produces a "medium pocket" award;
2. Even though the lone defendant will be able to implead the excluded tortfeasor for partial indemnification under the *American Motorcycle Association* case and introduce evidence showing the latter's shared fault, the jury is likely to view the impleaded defendant as the target of the impleader, not the plaintiff, and the size of the verdict will not be affected. Further, proof of the impleaded defendant's fault may reduce the percentage of fault which the jury assigns to plaintiff himself, increasing the net verdict amount which the plaintiff may then collect from the impleading defendant;
3. By limiting the number of sued defendants, plaintiff avoids the litigation bruises stemming from "gang tackling." Counsel for multiple defendants can enormously increase their effectiveness if they can avoid one-upmanship impulses long enough to plan and carry out a joint defense.

The defendant's response to plaintiff's non-joinder strategy is to implead by cross-complaints all third parties who may even potentially share in the fault that caused plaintiff's injury. "Good faith" should be defense counsels' only restriction on a free-wheeling joinder effort. It is usually a matter of simple mathematics. The more defendants there are to share in the percentage distribution of fault, the smaller will be the percentage which the jury may allocate to the impleading defendant.

#### EFFECT OF SETTLEMENT ON CONTRIBUTION/INDEMNITY RIGHTS

*Problem IV:* Suppose that prior to or during trial, *A* settles with the plaintiff for \$20,000.00 and is dismissed from the case. Suppose, further, that the jury's net verdict against *B* is \$70,000.00 (total damages of \$100,000.00 less plaintiff's 10% fault and less the \$20,000.00 settlement). Can *B* obtain a contribution/partial indemnification judgment from *A* either under *B*'s cross-complaint against *A* in the same suit or under a separate suit for this purpose?

*Solution To Problem IV:* B must pay the entire net verdict of \$70,000.00 and can recover nothing from A by way of contribution. This is true even though, had evidence of A's fault been permitted at trial, the jury would have found A to be 80% at fault for plaintiff's damages and B only 10% at fault for them. But no evidence of A's fault will be presented to the jury since, using procedures set forth in the recently enacted California Civil Procedure Code section 877.6, A will have obtained a complete dismissal from the suit before a verdict is returned.<sup>6</sup>

*Summary Of Law:* California law is clear about the right of a joint and severally liable defendant to avoid all contribution and partial indemnification liability to a co-defendant by settling with the plaintiff. California Civil Procedure Code section 877(b) is unambiguous on the subject:

It [a good faith settlement] shall discharge the tortfeasor to whom it is given from all liability for any contribution to any other tortfeasor.<sup>7</sup>

Some speculated that the statutory rule was modified by adoption of comparative fault. It seems logical that if, as is now the case, a jury was required to apportion percentage fault among all joint and concurrent tortfeasors, one who settled with plaintiff/claimant would no longer be let off the hook. He should be required to pay contribution to the non-settling defendant who is forced to pay the entire judgment. The settling defendant's contribution should be measured by his fault percentage times the total damages attributable to all defendants, less the settlement payment.<sup>8</sup>

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6. CAL. CIV. PROC. CODE § 877.6 (West Supp. 1981) became effective in 1980 and provides for a court determination, after a hearing, that a "good faith" settlement was or was not made. Any party claiming settlement was not in "good faith" has the burden of proof. Upon a determination that the settlement was in "good faith," the statute provides that all claims for contribution against the settlor are barred.

7. CAL. CIV. PROC. CODE § 877(b) (West 1980).

8. For example, assume the jury found plaintiff's total damages to be \$100,000; that plaintiff was 10% at fault, settling defendant 80% at fault and non-settling defendant 10% at fault; also assume that the settlement amount paid plaintiff was \$20,000. Under the view that comparative fault altered the non-contribution rule of CAL. CIV. PROC. CODE § 877(b), the settling defendant would pay his co-defendant the difference between \$20,000 and 80% of \$80,000, or \$44,000. *But see* Baget v. Shepard, 128 Cal. App. 3d 433, 180 Cal. Rptr. 386 (1982). This court has interpreted CAL. CIV. PROC. CODE § 877(a) to mean that the reduction of plaintiff's claim against the non-settling defendant is by the percentage of the settling defendant's fault, not by the amount appearing on the release. The court said the settling defendant's fault should be determined during the later trial. It is highly questiona-

But neither reason nor logic was destined to play any part. The California Supreme Court opted to retain the Draconian no-contribution rule rather than engraft an exception because of comparative fault. Said the court in *American Motorcycle Association*:

We conclude that from a realistic perspective the legislative policy underlying the provision dictates that a tortfeasor who has entered into a "good faith" settlement . . . with the plaintiff must also be discharged from any claim for partial or comparative indemnity that may be pressed by a concurrent tortfeasor.<sup>9</sup>

#### TACTICAL TIPS FOR NON-SETTLING TORTFEASORS

*Problem V:* What can a joint tortfeasor do to prevent one or more other joint tortfeasors from extinguishing the former's contribution/indemnification rights and subjecting him to a larger liability than his fault justifies?

Short of settling with plaintiff himself<sup>10</sup> there are two tactics available to the non-settling joint tortfeasor that will preserve his contribution or indemnity rights if supporting evidence can be found.

##### Assert a Claim for Total Indemnification

If the joint tortfeasor can prove that he has a right to be totally indemnified from another joint tortfeasor because of a contract indemnification clause or because he is only secondarily liable to plaintiff while the indemnitor is primarily liable, then he, the indemnitee, is entitled to recover every dollar of his payout to plaintiff. His rights do not rest on contribution principles and, therefore, are unaffected by a settlement between plaintiff and the indemnitor joint tortfeasor, by the bar of California Civil Procedure Code section 877.<sup>11</sup>

##### Assert the Settlement is Collusive

When a settlement is reached prior to trial and the non-settling

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ble whether the California Supreme Court will allow this decision to stand. There is no doubt that the decision produces an equitable result, but it does obvious violence to a clear, unambiguous statutory phrase. One of the cardinal principles of statutory construction is if the language is clear, it should be applied rather than interpreted.

9. 20 Cal. 3d at 604, 578 P.2d at 915, 146 Cal. Rptr. at 198.

10. A settlement will be advantageous to a joint tortfeasor whenever it can be achieved for an amount less than (a) the probable fees and expenses incurred at trial, *plus* (b) the median percentage of fault that a jury will probably allocate to the settlor defendant *times* the median total damages which the jury will probably award plaintiff.

11. *Rollins v. State*, 14 Cal. App. 3d 160, 92 Cal. Rptr. 251 (1971); *Herrero v. Atkinson*, 227 Cal. App. 2d 69, 38 Cal. Rptr. 490 (1964).

defendant seeks indemnification, the liability of the dismissed co-defendant may not be indicated to the court. Thus, where good faith is an issue, the parties may have to present evidence concerning liability factors relevant to the settlement. This evidence would be limited to considerations that were present at the time of the settlement.

A release obtained in bad faith is contrary to the policy of the law and is, therefore, an illegal contract. If it is the product of collusion between the plaintiff and settlor both are *in pari delicto* and barred from judicial aid.

The settlement becomes collusive when it is designed to injure the interests of an absent tortfeasor. Although many kinds of collusive injury are possible, the most obvious and frequent one is that created by an unreasonably cheap settlement.<sup>12</sup> This is because a non-settling defendant has a financial stake in the amount of settlement and, thus, a justifiable interest in the question of good faith.

#### SUMMARY OF LAW SUPPORTING NON-SETTLOR'S "GOOD FAITH" CHALLENGE TO THE SETTLEMENT

California Civil Procedure Code section 877, new section 877.6, and supporting authorities<sup>13</sup> make it clear that a settlement between plaintiff and one joint tortfeasor bars contribution/partial indemnification rights only if it was a "good faith" settlement. If it was not executed in good faith insofar as it affects the non-settling joint tortfeasor, this party retains an unimpaired right to obtain partial indemnification from the settling party. The amount of indemnification would be the excess of the net plaintiff's judgment that the non-settling party is compelled to pay over his proportionate percentage liability.<sup>14</sup> The issue of "good faith" presents a question of fact for the court's determination, and may be raised by any interested party upon a noticed motion.<sup>15</sup>

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12. *River Garden Farms, Inc. v. Superior Court*, 26 Cal. App. 3d 986, 103 Cal. Rptr. 498 (1972).

13. *Fisher v. Superior Court*, 103 Cal. App. 3d 434, 163 Cal. Rptr. 47 (1980); *Stambaugh v. Superior Court*, 62 Cal. App. 3d 231, 132 Cal. Rptr. 843 (1976); *Lareau v. Southern Pac. Transp. Co.*, 44 Cal. App. 3d 783, 118 Cal. Rptr. 837 (1975).

14. *River Garden Farms, Inc. v. Superior Court*, 26 Cal. App. 3d 986, 103 Cal. Rptr. 498 (1972).

15. CAL. CIV. PROC. CODE § 877.6 (West Supp. 1981).



