The Landscape of Joint and Several Liability;

A Nationwide Legal Analysis

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I. The Common Law Doctrine of Joint and Several Liability and The Realistic Implications of the “Deep Pocket” Rule

Commonly perceived legal dogma is the notion of apportionment of damages based on party fault. As just and logical as this precept seems, however, it is not always the governing rule. Surprisingly, the legal doctrine sanctioning a plaintiff’s recovery of the entire amount of a judgment from any single tortfeasor, despite the percentage of that tortfeasor’s negligence contributing to the plaintiff’s damages, is still alive and flourishing. Consequently, a less culpable tortfeasor will opt to settle an unwarranted claim rather than risk responsibility for limitless financial exposure.

“Deep pocket” defendants, such as accounting firms, become attractive and convenient targets for plaintiffs to recoup financial losses, notwithstanding their often tangential role in contributing to those losses. Juries have difficulty in overcoming the mistaken assumption that accountants and auditors investigate every single transaction undertaken by their clients. Moreover, the ever present difficulty in convincing a jury that an accounting firm’s failure to detect material errors in the financial statements is not necessarily the equivalent of professional negligence fuels the incentive for “deep pockets” to settle unwarranted claims.

Victimized by disproportionate liability schemes, the primary nemesis crippling the accounting profession is the survival of joint and several liability. Where a plaintiff’s injury is capable of apportionment amongst multiple tortfeasors, a single tortfeasor should be liable only for that portion of the total damages for which his conduct contributed to.\(^1\) However, the likely scenario is that a plaintiff’s damages are not capable of specific apportionment, and it is not feasible to apportion the plaintiff’s loss caused by the negligence of the accountant and the portion caused by the negligence of another tortfeasor. Equitable distribution of judgment awards is often sacrificed because aligning the degree of each tortfeasor’s liability to the proportion of damages is arduous and complex.

Consequently, joint and several liability empowers plaintiffs to recover total damages from an accountant regardless of the degree to which that accountant’s culpability contributed to plaintiff’s damages, and regardless of whether the plaintiff was contributory negligent for his own damages. The doctrine of joint and several liability allows a plaintiff who has suffered damages from multiple wrongdoers who acted either concurrently or successively to cause a single, indivisible injury, to recover the total amount of damages from any one of the tortfeasors,

\(^1\) Restatement (Second) of Torts §881 (1979).
notwithstanding that one tortfeasor may only have minimally contributed to causing the damages.\textsuperscript{2}

Evolving to be known as the “deep pocket” rule, plaintiffs have initiated all out searches for the deepest pockets and most financially lucrative defendants to ensure complete recoupment of losses and total satisfaction of judgments. A shrewd plaintiff will adopt a trial strategy that emphasizes the liability of the wealthier defendants. It is not uncommon for defendants with minimal financial support to be bypassed and litigation to proceed solely against defendants with ample financial sustenance and adequate professional insurance coverage.

Developing as two separate theories of liability, the common law doctrine of joint and several liability was strictly limited and applied only to joint tortfeasors acting in concert or in conspiracy.\textsuperscript{3} Such conduct usually abounded in actions involving a higher degree of intent and joint liability was originally an issue only in cases implicating intentional torts.\textsuperscript{4} The common law would not sanction a plaintiff to join all culpable parties in a single suit and recovery from one defendant would bar recovery from any of the others.\textsuperscript{5} The scope of joint and several liability soon widened and plaintiffs were permitted to join two defendants together in one action where two separate negligent acts resulted in a single indivisible harm.\textsuperscript{6} However, juries were considered inept at apportioning damages among defendants, and therefore a judgment against a single defendant would encompass the full amount of a plaintiff’s damages.

Proponents of joint and several liability contend that if two or more persons are the cause of the economic or financial loss of another, then they should not escape liability of the consequences. The fact that multiple wrongdoers contributed to the same loss should not preclude a plaintiff’s right to be fully compensated for damages and it would be unfair to shift the risk of a particular wrongdoer defendant’s inability to pay damages on the plaintiff. Societal policies underpinning the justification of joint and several liability include the need to encourage socially desirable behaviors, including caution and responsibility, the need to compensate innocent plaintiffs, and ultimately, the incentive to force the lion’s share of damages onto those defendants with the greatest capability to pay.\textsuperscript{7}

\textsuperscript{3} W. Page Keeton et al., Prosser & Keeton on the Law of Torts § 65, at 323 (5th ed. 1984). In fact, as delineated below, numerous state jurisdictions will only impose joint and several liability against tortfeasors acting in concert or engaging in intentional torts.
\textsuperscript{5} John W. Wade, Should Joint and Several Liability of Multiple Tortfeasors Be Abolished?, 10 Am. J. Trial Advoc. 193, 194 (1986).
\textsuperscript{6} Id.
II. Brief Historical Perspective on the Advent of Accounting Malpractice Claims and the Effect of Joint and Several Liability on Financially Solvent and Professionally Insured Accountants

The accountant professional liability landscape has evolved in recent years to witness the number of claims against certified public accountants virtually doubling over the past decade. Emerging only in the latter part of the nineteenth century, the contemporary accounting profession remains young and impressionable. Accountant roles are expanding and include preparation of published company financial data, assistance with business and financial maintenance and internal audit compliance examinations.

Prior to the industrial revolution, business financial report approval was solely within the discretion of the business owner, often the sole financier of the business. The demand for accurate financial reports emerged subsequent to the industrial revolution when business owners sought to secure outside investment capital from banks and other private lenders. Triggered in the latter half of the nineteenth century, the demand for financial reports ultimately led to the establishment of accounting societies, with New York becoming the first state to recognize the accountancy profession and subsequently license it practitioners. Accounting societies promulgated professional standards for the presentation of financial data known as generally accepted accounting principles (“GAAP”) and for procedures to verify the accuracy and completeness of the data known as generally accepted auditing standards (“GAAS”).

As accounting societal roles began to play an integral force in disseminating accounting principles and auditing standards, by the early 1930s, national accounting societies surfaced, including the most prominent of which being the American Institute of Certified Public Accountants (“AICPA”). With more than 330,000 members, the AICPA exists as the predominant society of certified public accountants in the United States and functions as a principal standard-setting body for the accounting profession.8

In 1929, the New York Stock Exchange adopted a rule requiring all companies whose shares were listed on the exchange to issue financial reports which were “certified” by an independent certified public accountant. As mandated by the Securities Act of 1933, Congress further extended this certification requirement to all companies whose shares were distributed to the public.

Beginning in the 1960s, the spawn of new technological advancements necessitated additional capital through either private placements or public financing, as the majority of such companies did not qualify for conventional bank financing. The securities market began to come of age in the 1960s and along with it saw hundreds of new companies effecting initial public offerings of their securities. Unsurprisingly, a majority of these new ventures failed and concerns as to the accuracy of the financial information supplied to the creditors and investors emerged.

8 Congressional formation of the Public Company Accounting Oversight Board (“PCAOB”) will likely diminish the role of the AICPA as the PCAOB is endowed with authority to establish and promulgate accounting and auditing standards.
The early 1970s saw an influx of securities litigation triggered by Section 10(b) of the Securities Exchange Act of 1934 which prohibits fraud in conjunction with the purchase or sale of securities. The professional community supported by professional liability insurance, including accountants and lawyers, became convenient litigation targets. The legal theory of “aiding and abetting” materialized and liability soon attached to individuals even remotely associated with an offering of securities or other disclosure of financial information to investors with failed securities. Underpinning the theory of “aiding and abetting” is Section 3 of Title 18 of the U.S. Code which attaches criminal liability to any person who “aids or abets” a statutory violation.

The judiciary soon tagged along and “aiding and abetting” became the primary legal basis under which accountants were held liable in securities law claims. While securities actions against accountants based on “aiding and abetting” represent only a fraction of total accountant liability claims, these particular suits generally popularized suits against accountants and paved the way towards public perception of damages recovery through litigation against accountants. Auditors became particularly vulnerable to baseless suits because an audit by nature necessitates considerable estimation and judgment against documents and materials prepared by others. Twenty-twenty hindsight demands near perfect audits – a task that is virtually impossible because by definition an audit involves estimation and judgment and cannot be “perfectly” accomplished.

Accountants are becoming convenient targets for clients suffering from financial collapse. Commonly perceived as “deep pockets”, accounting firms are susceptible to baseless claims of liability and imposition of joint and several liability has resulted in settlement of a vast majority of cases. Luckily, a large portion of states have modified the rule of joint and several liability and have apportioned liability among multiple tortfeasors in accordance with relative percentage of fault. Nonetheless, the doctrine is still alive in many jurisdictions, leaving open the door of unfettered liability for only marginally culpable accountants.

### III. States That Continue to Hold Multiple Tortfeasors Jointly and Severally Liable

Damages are not apportioned among joint tortfeasors in Alabama. Instead, joint tortfeasors are jointly and severally liable for the entire amount of damages awarded. Delaware preserves the doctrine of joint and several liability and an injured person is entitled to recover his damages from either or both of the tortfeasors, without distinction, subject to the limitation that his total recovery may not exceed the full amount of his damage and neither tortfeasor can require the injured party to pursue the other tortfeasor first. Moreover, in Delaware, to defeat a finding of

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10 Id.
12 Brown v. Comegys, et al., 500 A.2d 611, 1985 Del. Super. Lexis 1395 (Del. Super. Ct. 1985). The court further clarifies that while a tortfeasor is entitled to obtain apportionment for his share of responsibility towards a plaintiff’s damages, this entitlement does not interfere with the right of the injured party to recovery fully from either tortfeasor. Id.
joint and several liability, there must exist such a disproportionate level of fault among joint tortfeasors as to render inequitable an equal distribution among them of the common liability by contribution.\(^{13}\)

The general principle that tortfeasors who negligently act in concert are held jointly and severally liable for the damages they cause has been recognized in Illinois for over 100 years.\(^{14}\) More specifically, an independent, concurring tortfeasor is held jointly and severally liable because the plaintiff’s injury cannot be divided into separate portions. Moreover, the tortfeasor fulfills the standard elements of tort liability, namely that his tortious conduct was a proximate cause of the plaintiff’s injury. “The fact that another individual also tortiously contributes to the plaintiff’s injury does not alter the independent concurring tortfeasor’s responsibility for the entirety of the injury which he or she actually and proximately caused.”\(^{15}\)

Maine Statute Title 14, § 156 preserves the doctrine of joint and several liability and holds that cases “involving multi-party defendants, each defendant shall be jointly and severally liable to the plaintiff for the full amount of the plaintiff’s damages. However, any defendant shall have the right through the use of special interrogatories to request of the jury the percentage of fault contributed by each defendant.”

Maryland case law has long recognized that when tortfeasors act independently and their acts combine to cause a single harm, the tortfeasors are jointly and severally liable.\(^{16}\) Namely, a tortfeasor who acts independently and concurrently with other individuals to produce an indivisible injury to a plaintiff may be held jointly and severally liable for that injury, even though the tortfeasor does not act in concert with the other individuals, and shares no common purpose or duty with them.\(^{17}\) Such independent concurring tortfeasor is not held liable for the entirety of a plaintiff’s injury because he or she is responsible for the actions of the other individuals who contribute to the plaintiff’s injury.\(^{18}\) Rather, an independent, concurring tortfeasor is held jointly and severally liable because the plaintiff’s injury cannot be divided into separate portions, and because the tortfeasor fulfills the standard elements of tort liability, i.e., his or her tortious conduct was an actual and proximate cause the plaintiff’s injury.\(^{19}\) The fact that another individual also tortiously contributes to the plaintiff’s injury does not alter the independent, concurring tortfeasor’s responsibility for the entirety of the injury which he or she actually and proximately caused.\(^{20}\)

Missouri Revised Statute § 537.067 is clear in upholding the common law doctrine of joint and several liability. It provides in pertinent part that:

\(^{15}\) Id.
\(^{17}\) Id.
\(^{18}\) Id.
\(^{19}\) Id.
\(^{20}\) Id.
1. In all tort actions for damages, in which fault is not assessed to the plaintiff, the defendants shall be jointly and severally liable for the amount of the judgment rendered against such defendants.

2. In all tort actions for damages in which fault is assessed to plaintiff the defendants shall be jointly and severally liable for the amount of the judgment rendered against such defendants except as follows:

   (1) In all such actions in which the trier of fact assesses a percentage of fault to the plaintiff, any party, including the plaintiff, may within thirty days of the date the verdict is rendered move for reallocation of any uncollectible amounts;

   (2) If such a motion is filed the court shall determine whether all or part of a party's equitable share of the obligation is uncollectible from that party, and shall reallocate any uncollectible amount among the other parties, including a claimant at fault, according to their respective percentages of fault;

   (3) The party whose uncollectible amount is reallocated is nonetheless subject to contribution and to any continuing liability to the claimant on the judgment;

   (4) No amount shall be reallocated to any party whose assessed percentage of fault is less than the plaintiff's so as to increase that party's liability by more than a factor of two;

   (5) If such a motion is filed, the parties may conduct discovery on the issue of collectibility prior to a hearing on such motion;

   (6) Any order of reallocation pursuant to this section shall be entered within one hundred twenty days after the date of filing such a motion for reallocation. If no such order is entered within that time, such motion shall be deemed to be overruled;

   (7) Proceedings on a motion for reallocation shall not operate to extend the time otherwise provided for post-trial motion or appeal on other issues. Any appeal on an order or denial of reallocation shall be taken within the time provided under applicable rules of civil procedure and shall be consolidated with any other appeal on other issues in the case.

3. This section shall not be construed to expand or restrict the doctrine of joint and several liability except for reallocation as provided in subsection
In North Carolina, when two or more proximate causes join and concur in producing the result complained of, the author of each cause may be held for the injuries inflicted and the defendants are jointly and severally liable. 21 Oklahoma has not statutorily modified the common law doctrine of joint and several liability. In the case of joint tortfeasors some type of concert of action (or omission) is required, while in the case of concurrent tortfeasors, such concert is lacking, but a single or indivisible injury or harm is nonetheless produced. 22 It has long been established in Oklahoma that notwithstanding the lack of concerted action and even though the act of one may not have alone caused the injury or brought about the result, concurrent tortfeasors, like joint ones, are each responsible for the entire result if the plaintiff is free from negligence. 23

Pennsylvania also maintains the rule of joint and several liability. Pennsylvania Statute Title 42 § 7102(b) provides in pertinent part: “The plaintiff may recover the full amount of the allowed recovery from any defendant against whom the plaintiff is not barred from recovery. Any defendant who is so compelled to pay more than his percentage share may seek contribution.”

It is equally well established in Rhode Island that a plaintiff may recover 100 percent of his or her damages from a joint tortfeasor who has contributed to the injury in any degree. The joint tortfeasor may then seek contribution pursuant to statute either by a separate action or by impleading the fellow joint tortfeasor under third-party practice. 24 Moreover, South Carolina upholds the common law doctrine of joint and several liability and renders joint tortfeasors liable for a plaintiff’s damages, both jointly and severally. 25

Virginia has not abolished the doctrine of joint and several liability and holds that where separate and independent acts of negligence of two parties are the direct cause of a single injury to a third person and it is impossible to determine in what proportion each contributed to the injury, either or both are responsible for the whole injury. 26 Although concert may be lacking among concurrent tortfeasors, where the separate and independent acts or negligence of several combine to produce directly a single injury, each is responsible for the entire result, even though his act or

23 Kirkpatrick v. The Chrysler Corporation, 1996 OK 136, 920 P.2d 122 (1996); Boyles v. Oklahoma Natural Gas Co., 619 P.2d 613, 617 (Okla. 1980); All American Bus Lines v. Saxon, 197 Okla. 395, 172 P.2d 424, 429 (1946). Note, however, that Oklahoma institutes the one satisfaction rule – namely, “where liability is joint and several, the injured party may institute several suits against multiple tortfeasors, but satisfaction of a judgment against one of the tortfeasors bars a judgment against the other tortfeasors.” Cartwright v. MFA Mutual Insurance Co. of Columbia, Missouri, 499 P.2d 1380 (Okla. 1972); Powell v. Powell, 370 P.2d 909 (Okla. 1962); Sykes v. Wright, 201 Okla. 346, 205 P.2d 1156 (1949).
neglect alone might not have caused it.\textsuperscript{27} Namely, if the negligence of two persons concur in proximately causing a single indivisible injury, then such persons are jointly and severally liable for the entire damage sustained, although there was no common duty, common design, or concert of action. The jury in case of such finding may not apportion damages as between such persons. Moreover, in order for the negligence of two parties to concur with each other as a proximate cause, it is not necessary that they occur simultaneously, but the question of whether there is such concurring negligence is for the jury to decide.\textsuperscript{28}

West Virginia is a pure joint and several liability jurisdiction and West Virginia Code § 29-12A-7(d) provides that in comparative fault cases, joint and several liability is only limited to defendants assigned greater than 25 percent responsibility. This limitation, however, is only applicable in actions against political subdivisions, with pure joint and several liability applying in all other instances. West Virginia is committed to the concept of joint and several liability among joint tortfeasors and permits a plaintiff to elect suit against any or all of those responsible for his injuries and to collect his damages from whomever is able to pay, irrespective of their percentage fault.\textsuperscript{29} West Virginia classifies tortfeasors whose wrongful acts or omissions, whether committed intentionally or negligently, concur to cause injury as joint tortfeasors. These joint tortfeasors are jointly and severally liable for the damages which result from the wrongs so committed.\textsuperscript{30}

\textbf{IV. States That Have Legislatively Modified or Abolished the Common Law Doctrine of Joint and Several Liability and Provide for Apportionment of Damages on the Basis of Relative Percentages of Fault}

Various jurisdictions have legislatively or judicially adopted comprehensive modifications to the application of joint and several liability. Alaska Statute § 09.17.080 abolishes joint and several liability and mandates that in all actions involving fault of more than one person, the court shall determine and state in the judgment each party’s equitable share of the obligation to each claimant in accordance with each party’s respective percentage of fault. Moreover, the court shall enter judgment against each party liable on the basis of several liability in accordance with that party’s percentage of fault.

In Arizona, the Uniform Contribution Among Tortfeasors Act (“UCATA”), Arizona Revised Statute § 25-2506, abolished joint liability and replaced it with a system that requires the court to allocate responsibility among all parties who caused the injury, whether or not they are present in the action. Under the present version of the UCATA, the liability of each defendant is several only and not joint. Pursuant to Arizona Revised Statute § 12-2506(A), the fault of all actors is

\textsuperscript{27} Dickenson v. Tabb, 208 Va. 184, 156 S.E.2d 795 (1967)
\textsuperscript{28} Id.
\textsuperscript{30} Id. (holding that when a person’s unrelated tortuous conduct and intentional tortfeasor’s acts concur to cause harm to another, the rules of joint and several liability govern and further noting that the basic purpose of the joint and several liability rule is to permit an injured plaintiff to select and collect the full amount of his damages against one or more joint tortfeasors
compared and each defendant is severally liable for damages allocated in direct proportion to that defendant’s percentage of fault.

Arkansas Code § 16-55-201 modifies the doctrine of joint and several liability for actions in property damage and mandates that “the liability of each defendant for compensatory or punitive damages shall be several only and shall not be joint.” Moreover, “[e]ach defendant shall be liable only for the amount of damages allocated to that defendant in direct proportion to that defendant’s percentage of fault.”

California Civil Code § 1431.1 provides in pertinent part that:

(a) The legal doctrine of joint and several liability, also known as “the deep pocket rule,” has resulted in a system of inequity and injustice that has threatened financial bankruptcy of local government, other public agencies, private individuals and business, and has resulted in higher prices for goods and services to the public and in higher taxes to the taxpayers.

(b) Some governmental and private defendants are perceived to have substantial financial resources or insurance coverage and have thus been included in lawsuits even though there was little or no basis for finding them at fault. Under joint and several liability, if they are found to share even a fraction of the fault, they often are held financial liable for all the damage. The people—taxpayers and consumers alike—ultimately pay for these lawsuits in the form of higher taxes, higher prices and higher insurance premiums.

(c) Local governments have been forced to curtail some essential police, fire and other protections because of the soaring costs of lawsuits and insurance premiums.

Therefore, the People of the State of California declare that to remedy these inequities, defendants in tort actions shall be held financial liable in closer proportion to their degree of fault. To treat them differently is unfair and inequitable.

The People of the State of California further declare that reforms in the liability laws in tort actions are necessary and proper to avoid catastrophic economic consequences for state and local governmental bodies as well as private individuals and businesses.

Civil cases in Colorado also apportion liability based on percentages of fault. Colorado Revised Statute § 13-21-111.5 holds that “no defendant shall be liable for an amount greater than that represented by the degree or percentage of the negligence of fault attributable to such defendant that produced the claimed injury, death, damage, or loss”. However, “joint liability shall be
imposed on two or more persons who consciously conspire and deliberately pursue a common plan or design to commit a tortuous act.”

Similarly, Connecticut General Statute § 52-572h provides in pertinent part:

In a negligence action to recover damages resulting from...damage to property occurring on or after October 1, 1987, if the damages are determined to be proximately caused by the negligence of more than one party, each party against whom recovery is allowed shall be liable to the claimant only for such party's proportionate share of the recoverable economic damages and the recoverable non-economic damages.

However, the statute empowers the court to reallocate any particular defendant’s uncollectible amount among the other defendants according to their percentage of negligence.

Florida Statute Annotated § 768.81 accounts for a claimants contributory fault and reduces proportionately the amount awarded in economic and non-economic damages in accordance with such. Accordingly, § 768.81(3) provides that:

the court shall enter judgment against each party liable on the basis of such party’s percentage of fault and not on the basis of the doctrine of joint and several liability; provided that with respect to any party whose percentage of fault equals or exceeds that of a particular claimant, the court shall enter judgment with respect to economic damages against that party on the basis of the doctrine of joint and several liability.

However, §768.81(5) preserves the doctrine of joint and several liability to all actions in which the total amount of damages does not exceed $25,000.

The Official Code of Georgia § 51-12-33 severs joint and several liability, but only to the extent that the plaintiff is himself liable to some degree for the injury or damages claimed. Namely:

(a) Where an action is brought against more than one person for injury to person or property and the plaintiff is himself to some degree responsible for the injury or damages claimed, the trier of fact, in its determination of the total amount of damages to be awarded, if any, may apportion its award of damages among the persons who are liable and whose degree of fault is greater than that of the injured party according to the degree of fault of each person. Damages, if apportioned by the trier of fact as provided in this Code section, shall be the liability of each person against whom they are awarded, shall not be a joint liability among the persons liable, and shall not be subject to any right of contribution.
Hawaii Revised Statute § 663-10.9 abolishes the doctrine of joint and several liability for joint tortfeasors, who are defined as two or more persons jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them. However, joint and several liability is not abolished for joint tortfeasors in actions involving intentional torts. Moreover, §663-31 specifically states that contributory negligence will not serve as a bar to recovery in any action by any person or the person’s legal representative to recover damages for negligence resulting in injury to person or property, if such negligence was not greater than the negligence of the person or in the case of more than one person, the aggregate negligence of such persons against whom recovery is sought. But, any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person for whose injury or damage is made.

Idaho Code § 6-803 amends joint and several liability and holds a defendant liable only for his or her proportionate share of the total damages awarded. However, a party shall be jointly and severally liable for the fault of another person or entity or for payment of the proportionate share of another party where they were acting in concert or when a person was acting as an agent or servant of another party. “Acting in concert” is defined to mean pursuing a common plan or design which results in the commission of an intentional or reckless tortious act.

Under Indiana’s Comparative Fault Act, Indiana Code § 34-4-33-1, liability is to be apportioned among persons whose fault caused or contributed to causing the loss in proportion to their percentages of fault as found by a jury. Iowa Code §668.4 specifies that any actions sounding in liability in tort, the rule of joint and several liability shall not apply to defendants who are found to bear less than fifty percent of the total fault assigned to all parties. However, a defendant found to bear fifty percent or more of fault shall only be jointly and severally liable for economic damages and not for any non-economic damage awards.

Kansas Statute Annotated § 60-258a nullifies the concept of joint and several liability by specifically holding that:

> Where the comparative negligence of the parties in any action is an issue and recovery is allowed against more than one party, each such party shall be liable for that portion of the total dollar amount awarded as damages to any claimant in the proportion that the amount of such party’s causal negligence bears to the amount of the causal negligence attributed to all parties against whom such recovery is allowed.

Kentucky Revised Statute Annotated § 411.182 states that after the jury makes findings indicating the percentage of total fault of all the parties to each claim that is allocated to each claimant, defendant, or third-party defendant, the court shall state in the judgment each party’s equitable share of the obligation to each claimant in accordance with the respective percentages of fault.

Louisiana Civil Code Article 2324 states that a joint tortfeasor shall not be liable for more than his degree of fault and shall not be solidarily liable with any other person for damages.
attributable to the fault of such other person, regardless of such other person’s insolvency, ability to pay, degree of fault, immunity by statute, or that the other person’s identity is not known or reasonably ascertainable, or otherwise.

In Massachusetts, Bill S.402 substitutes joint and several liability in cases against accountants with “proportionate share” liability, as determined by a jury. Similarly, Michigan Compiled Laws §600.2956 holds that in an action based on tort or another legal theory seeking damages for property damage, the liability of each defendant for damages is several only and is not joint. “However, this section does not abolish and employer’s vicarious liability for an act or omission of the employer’s employee.”

Minnesota Statute § 604.02(1) provides that “[w]hen two or more persons are jointly liable, contributions to awards shall be in proportion to the percentage of fault attributable to each, except that each is jointly and severally liable for the whole award.” Minnesota Statute § 604.02(2) further clarifies that:

Upon motion made not later than one year after judgment is entered the court shall determine whether all or party of a party’s equitable share of the obligation is uncollectible for that party and shall reallocate any uncollectible amount among the other parties, including a claimant at fault, according to their respective percentages of fault. A party whose liability is reallocated is nonetheless subject to contribution and to any continuing liability to the claimant on the judgment.

Mississippi Code Annotated § 85-5-7(2) specifies:

[I]n any civil action based on fault, the liability for damages caused by two (2) or more persons shall be several only, and not joint and several and a joint tortfeasor shall be liable only for the amount of damages allocated to him in direct proportion to his percentage of fault. In assessing percentages of fault an employer and the employer's employee or a principal and the principal's agent shall be considered as one (1) defendant when the liability of such employer or principal has been caused by the wrongful or negligent act or omission of the employee or agent.

Mississippi Code §85-5-7(1) defines “fault” to be an act or omission of a person which is a proximate cause of injury…to another person or persons, damages to property, tangible or intangible, or economic injury, including, but not limited to, negligence, malpractice, strict liability, absolute liability or failure to warn. "Fault" shall not include any tort which results from an act or omission committed with a specific wrongful intent. However, § 85-5-7(3) imposes joint and several liability upon “all who consciously and deliberately pursue a common plan or design to commit a tortious act, or actively take part in it”, but “shall have a right of contribution from his fellow defendants acting in concert.”

In abolishing the doctrine of joint and several liability, Montana Code Annotated § 27-1-703 holds that a defendant is liable only for that percentage of damages that is equal to the ratio of
the defendant’s fault to the total fault attributed to all persons involved in the occurrence, including claimants, defendants, and persons not party to the action. § 27-1-703(6) places the burden on the defendant to affirmatively plead comparative fault and identify in the answer or within a reasonable amount of time after filing the answer as determined by the court, each person who the defendant alleges is at fault with respect to the occurrence that is the basis for the action. A defendant who pleads the comparative fault of another has the burden of proving the fault.

Preamble: The preamble attached to Ch. 429, L. 1997, provided:

"WHEREAS, efforts of the Legislature to amend the comparative negligence statute, which is premised on a modified joint and several liability scheme, have repeatedly been struck down by the Montana Supreme Court; and

WHEREAS, the Montana Supreme Court rulings prohibiting the consideration of fault attributable to nonparties impair the effectiveness of the current modified joint and several liability system in Montana; and

WHEREAS, the Legislature intends that the policy of the state should be a system of comparative fault in which persons are held responsible only to the extent to which they cause or contribute to the harm; and

WHEREAS, the current system of joint and several liability, which apportions all liability only among parties to the action, fails to apportion liability among all tortfeasors according to their equitable share of fault; and
WHEREAS, the Legislature recognizes that public policy favors fair settlements that accurately reflect the liability of settled or released parties; and

WHEREAS, the Legislature is concerned with the present inequitable results of solvent defendants having to pay for the liability of insolvent, immune, or settled parties; and

WHEREAS, the present system of joint and several liability for all tort actions does not reflect the state's policy of liability in proportion to fault; and

WHEREAS, the Legislature recognizes that joint and several liability should be retained for certain situations; and

WHEREAS, at least ten other states have abrogated the doctrine of joint and several liability, except for specific situations; and

WHEREAS, the Legislature has the power to alter tort causes of action to promote legitimate state interests.

THEREFORE, the Legislature declares that the doctrine of joint and several liability is abolished, except for specific causes of action, and is replaced with a comparative fault system utilizing the principles of several liability."

Nebraska Revised Statute § 25-21,185.1 imposes joint and several liability upon two or more defendants who act as part of a common enterprise or plan in concert to cause harm. In any other action involving more than one defendant, economic damages will be apportioned jointly and severally, but non-economic damages shall be several only and not joint. Non-economic damages will be allocated to that defendant in direct proportion to percentage of negligence.

New Hampshire Revised Statute § 507:7-e modifies the doctrine of joint and several liability. Each party that is liable shall have judgment entered on the basis of joint and several liability, except that if any party is found to be less than 50 percent at fault, then that party’s liability is several and not joint and liability will only extend for the damages attributable to him. In accordance with a majority of other states, New Hampshire extends joint and several liability to parties who knowingly pursue or take active part in a common plan or design resulting in the harm.

New Jersey Revised Statute § 2A:15-5.3 imposes a modified joint and several liability scheme. Multiple tortfeasors are jointly and severally liable to a claimant if their relative percentage of fault is determined to be 60% or greater. In the alternative, several liability extends to defendants who are found to be less than 60% liable for the total damages.
New York CPLR 1601 modifies the common law doctrine of joint and several liability by making a joint tortfeasor whose share of fault is 50 percent or less liable for a plaintiff’s non-economic loss only to the extent of that tortfeasor’s share of the total non-economic loss. In effect, low-fault New York tortfeasors are only liable for their actual assessed share of responsibility, rather than the full amount of the plaintiff’s non-economic loss. However, CPLR 1602 excepts certain types of actions from the scope of CPLR 1601, including actions requiring proof of intent. Moreover, defendants who are found to have committed intentional torts are precluded from invoking the benefits of CPLR 1601.\textsuperscript{31}

North Dakota Century Code § 32-03.2-02 abolishes joint and several liability and confers only several liability on joint tortfeasors based on each party’s percentage of fault. However, tortfeasors who act in concert in committing a tortious act or aid or encourage the act, or ratify or adopt the act for their benefit, are jointly liable for all damages attributable to their combined percentage of fault.

Ohio Revised Code Ann. § 2307.31 provides that where two or more tortfeasors proximately caused the same injury or loss, and where one defendant is found to be more than 50 percent negligent, that defendant shall be jointly and severally liable for all damages. In the alternative, if a defendant is found to be 50 percent or less liable, then that defendant shall be liable to the plaintiff only for that defendant’s proportionate share of plaintiff’s economic losses.

Oregon Revised Statute § 31.610 eliminates joint liability among multiple tortfeasors and assesses only several liability in civil actions arising out of property damage. The court is empowered to determine the award of damages to each claimant in accordance with the percentages of fault determined by the trier of fact. Moreover, where the court determines any amount to be uncollectible, any such amount will be reallocated among the other parties on the basis of each party’s respective percentage of fault. However, reallocation of uncollectible amounts will not apply where: (a) the claimant’s percentage of fault is equal to or greater than the individual tortfeasor; or (b) the party’s percentage of fault is 25 percent or less. Moreover, in assessing apportionment of liability, an Oregon jury cannot consider the fault of someone who was not a party to the litigation.\textsuperscript{32}

South Dakota Codified Annotation § 15-8-15.1 provides that:

If the court enters judgment against any party liable on the basis of joint and several liability, any party who is allocated less than fifty percent of the total fault allocated to all the parties may not be jointly liable for more than twice the percentage of fault allocated to that party.

Tennessee has adopted a modified system of comparative fault by which a plaintiff could recover damages if the plaintiff’s negligence was less than that of the defendant. However, the adoption of comparative fault eliminated the doctrine of joint and several liability and thereby created a

system in which each defendant is liable for only the percentage of damages caused by that defendant’s negligence.\textsuperscript{33}

Texas Civil Practice and Remedies Code § 33.013 upholds joint and several liability if the defendant’s responsibility is greater than 50 percent. Otherwise, only several liability equal to that defendant’s percentage of fault will be imposed.

Utah Code §78-27-38(3) provides that “[n]o defendant is liable to any person seeking recovery for any amount in excess of the proportion of fault attributed to that defendant”.

12 Vermont Statute Annotated § 1036 abolishes joint and several liability. Namely:

Where recovery is allowed against more than one defendant, each defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of the amount of his causal negligence to the amount of causal negligence attributed to all defendants against whom recovery is allowed.

Washington Revised Code § 4.22.070 confers the liability of each defendant as several only and not joint, except where the joint tortfeasors were acting in concert or “if the trier of fact determines that the claimant…was not at fault, the defendants against whom judgment is entered shall be jointly and severally liable for the sum of their proportionate share of the claimants total damages.” Wisconsin Statute § 895.045 imposes joint and several liability if negligence is 51% or more and several liability only if negligence is less than 51%. However, where multiple tortfeasors act in accordance with a common scheme or plan, joint and several liability is maintained against those tortfeasors. Wyoming Statute § 1-1-109 abolishes joint and several liability and apportions liability to each defendant only based on that defendant’s proportion of the total fault.

V. The Federal Adoption of Joint and Several Liability – Accountant Joint and Several Liability for Securities Act Violations for Knowing and Intentional Tortfeasors

Claims against accountants tend to be premised under the common law doctrine of negligence, which requires the plaintiff to prove that the accountant failed to conduct his or her engagement in accordance with applicable professional standards and the plaintiff was injured as a result.\textsuperscript{34} Recently, a significant portion of claims against accountants have alleged violations of federal or state securities laws.\textsuperscript{35} The Private Securities Litigation Reform Act of 1995 (“PSLRA”) amended the Securities Exchange Act of 1934 (“Exchange Act”) and replaced joint and several liability with a system of proportionate liability for committing a violation under the securities

\textsuperscript{35} Id.
laws. Specifically, liability for the activities of an issuer in connection with securities offerings are governed under Section 11 of the Exchange Act.

Accountant liability could stem from preparation of financial statements and registration statements in connection with various securities offerings. Prior to the enactment of the PSLRA, an accountant found liable under the Exchange Act was jointly and severally liable for plaintiff’s damages. Currently, proportionate liability will extend to a tortfeasors’ actions based upon non-knowing conduct. However, joint and several liability may be imposed upon a person only if a knowing violation of the securities laws was committed, whereby reckless conduct is not a knowing violation.

VI. The Sometimes Saving Grace of Joint and Several Liability – Contribution

The inherent inequity in the doctrine of joint and several liability necessitated the remedy of contribution among multiple tortfeasors. In some states and certain circumstances, an accountant who is liable under a negligence theory is entitled to a claim for contribution against another tortfeasor, including another accountant. An accountant who pays a disproportionate share of the judgment in comparison with actual percentage of fault may proceed against the other liable tortfeasors for contribution. Where contribution is an available remedy, it may not be sought until the accountant has paid more than his share of the judgment. Moreover, contribution is an available remedy only where tortfeasors are commonly liable and not for damages arising from intentional, willful or wanton conduct or for punitive damages.

Contribution is a remedy for a tortfeasor who pays more than his share of the judgment to seek compensation from co-tortfeasors. Contribution will only exist where a tortfeasor has been

36 Pennine Res., Inc. v. Dorwart Andrew & Co., 639 F. Supp. 1071 (E.D. Pa. 1986) (holding that auditors sued for negligence were permitted to bring a third party complaint against an accounting firm which allegedly performed services in connection with the transaction).
37 Uniform Contribution Among Tortfeasors Act § 1(c), (1955 Revised Act), 12 U.L.A. 63 (1975), provides: "There is no right of contribution in favor of any tortfeasor who has intentionally (willfully or wantonly) caused or contributed to the injury." The Commissioner’s Comment to § 1(c) states: "The policy... followed is that of the original rule as to contribution, that the court will not aid an intentional wrongdoer in a cause of action which is founded on his own wrong.” See, also, Blackburn, Inc. v. Harnischfeger Corp., 773 F. Supp. 296, 299 (D. Kan. 1991) (“A settling tortfeasor who has engaged in willful or wanton conduct is not entitled to proportional contribution from other, negligent tortfeasors. Nor are punitive damages recoverable in an action for contribution.”); Owens-Illinois, Inc. v. Armstrong, 326 Md. 107, 604 A.2d 47 (1992) (holding that the Uniform Contribution Among Tortfeasors Act, Md. Code art. 50, § 19, does not apply to punitive damages); Charter Builders v. Durham, 683 S.W.2d 487 (Tex. Ct. App. 1984) (applying Texas law, the defendant was precluded from obtaining contribution for any part of the exemplary damages award since the award was based on the defendant’s gross negligence, and thus, there is no right to contribution); N.D. Cent. Code 32-38-01 (providing same); Kan. Rev. Stat. § 412.030 (providing that contribution among wrongdoers may be enforced where the wrong is a mere act of negligence and involves no moral turpitude); Va. Code Ann. § 8.01-34 (providing same); In re Air Crash at Detroit Metro. Airport, 791 F. Supp. 1204 (E.D. Mich. 1992); Canavin v. Naik, 648 F. Supp. 268, 270 (E.D. Pa. 1986) (“It is well-settled under Pennsylvania law that contribution among joint tort-feasors is based on equitable principles which preclude an intentional tort-feasor from obtaining contribution for his own willful wrongdoing.”); Ziarko v. Soo Line R.R. Co., 234 Ill. App. 3d 860, 176 Ill. Dec. 698, 602 N.E.2d 5 (1992) (determining under Illinois law that contribution is not available to a joint tortfeasor whose liability has been premised on willful and wanton conduct).
found liable for some portion of the plaintiff’s damages and the tortfeasors’ were “joint” – namely, their actions, either individually or in concert, contributed to a single indivisible injury to the plaintiff.

State tort reform statutes that either abolish or limit joint and several liability generally preclude contribution actions or offer the remedy only in limited circumstances. Not surprisingly, in these states, a defendant already cannot be held liable for an amount of damages in excess of their percentage of fault. However, the Colorado appellate court that has held that the statute abolishing joint liability could co-exist and be reconciled with the contribution statute.

Despite jurisdictional restrictions on the availability of contribution, the Uniform Contribution Among Tortfeasors Act (“UCATA”) is in effect in many states and permits the right of contribution among multiple tortfeasors found jointly and severally liable. A small number of states have adopted the Uniform Comparative Fault Act, which effectively confers a right of contribution among tortfeasors based upon each person’s equitable share of the obligations, including the share of fault of a claimant. Other states have also effectively enacted their own contribution acts.

A. Pro Rata or Equal Shares of Contribution

38 See, e.g., Ralston v. Gallo Equip. Co., 749 F. Supp. 179, 181 (N.D. Ill. 1990) (applying Indiana law and holding that “contribution between joint tortfeasors is prohibited in Indiana.”); Foucher v. First Vt. Bank & Trust Co., 821F. Supp. 916 (D. Vt. 1993) (holding that Vermont law precludes contribution for both intentional and negligent tortfeasors); Roland v. Bernstein, 171 Ariz. 96, 828 P.2d 1237, 1238 (1991) (holding in Arizona that “A.R.S. § 12-2506 abolished joint and several liability, limiting recovery against any defendant to that percentage of a plaintiff’s total injuries representing that defendant’s degree of fault. Because recovery is so limited, contribution can never occur.”); Target Stores v. Automated Maintenance Servs., Inc., 492 N.W.2d 899, 903-904 (N.D. 1992) (citing to N.D.C.C. 32-03.2-02 and 32-03.2-03, the Supreme Court of North Dakota affirms that the liability of each tortfeasor is now several rather than joint and that a nonsued tortfeasor, who did not act in concert with, nor aid or encourage a sued tortfeasor, nor ratify or adopt that tortfeasor’s act, will not be liable for contribution to the sued tortfeasor.); Economy Fire & Casualty Co. v. Goar, 1564 So. 2d 867 (Ala. 1990) (confirming Alabama’s prohibition against contribution among joint tortfeasors).

39 Graber v. Westaway, 809 P.2d 1126, 1128 (Colo. Ct. App. 1991) (holding that Colorado’s proportionate fault statute, Colo. Rev. Stat. § 13-21-111.5 does not bar a defendant’s right to seek contribution from another tortfeasor and further clarified that “because the proportionate fault and contribution statutes can be reconciled to give effect to each, we hold that the abolition of joint and several liability does not extinguish a defendant’s right to contribution from other tortfeasors).  


Traditional apportionment of contribution was premised on a pro rata, or equal, basis. Namely, all joint tortfeasors, regardless of apportioned or percentage of fault, would equally divide a judgment among themselves. Although seemingly equitable, pro rata apportionment often resulted in disproportionate judgment obligations in comparison to actual level of fault.

As an illustration, a plaintiff in a comparative negligence state recovers a judgment against D1 and D2, whereby plaintiff was found 20% negligent, D1 30% negligent and D2 50% negligent. Plaintiff would thus be entitled to recover 80% of his loss from D1 and a pro rata contribution would allow D1 to recover only 40% from D2. Collecting 40% from D2 amounts to 10% less than the portion of plaintiff’s damages for which D2 is responsible. The balance of D2’s apportionment must now be borne by D1. The similar inequity would arise if plaintiff executed the judgment against D2 who would be entitled to recover 40% of the judgment from D1. Although continued reliance on pro rata shares is facially unjust, the rule was established prior to the adoption of comparative fault in order to redistribute the heavy burden of joint and several liability and collection of an entire judgment from only one tortfeasor.

B. Emergence of Proportionate Shares of Contribution Based on Comparative Fault

Focusing on the replacement of the inequitable contribution scheme of pro rata distribution, a number of states have instituted contribution schemes in accordance with comparative fault.

43 See Prosser, Law of Torts, § 50 (4th ed. 1971) (“Normally the apportionment of liability effected by contribution is on the basis that ‘equality is equity’, which means that each tortfeasor is required ultimately to pay his pro rata share, arrived at by dividing the damages by the number of tortfeasors.”).


45 See e.g., American Motorcycle Ass’n v. Superior Court of Los Angeles County, 20 Cal. 3d 578, 146 Cal. Rptr. 182, 578 P.2d 899 (1978) (noting the inequity of a rule which permits the entire burden of a loss, for which two joint tortfeasors are liable, to be placed on one while the other goes free, the California Supreme Court held that ”(t)he California common law equitable indemnity doctrine should be modified to permit a concurrent tortfeasor to obtain partial indemnity from other concurrent tortfeasors on a comparative fault basis.”); Dole v. Dow Chem. Co., 30 N.Y.2d 143, 333 N.Y.S.2d 382, 282 N.E.2d 288 (1972) (modifying New York State’s ”all-or-nothing” indemnity doctrine to permit a tortfeasor to obtain partial indemnification from another joint or concurrent tortfeasor on the basis of comparative fault); Bielski v. Schulze, 16 Wis. 2d 1, 114 N.W.2d 105 (1962) (holding in Wisconsin that ”the amount of liability for contribution of tortfeasors who sustain a common liability by reason of causal negligence should be determined in proportion to the percentage of causal negligence attributable to each.”).

State specific statutory provisions include:

- **Colorado**: Colo. Rev. Stat. § 13-50.5-103: The relative degrees of fault of the joint tortfeasors shall be used in determining their pro rata shares.

- **Illinois**: Smith-Hurd Ill. Com. Stat. Ann. § 100/3: The pro rata share of each tortfeasor shall be determined in accordance with his relative culpability. However, no person shall be required to contribute to one seeking contribution an amount greater than his pro rata share unless the obligation of one or more of the joint tortfeasors is uncollectible. In that event, the remaining tortfeasors shall share the unpaid portions of the uncollectible obligation in accordance with their pro rata liability.

(continued . . .)
These states apportion damages among joint tortfeasors in proportion to their respective degrees of fault. Accordingly, joint tortfeasors who are compelled to pay more than their percentage of fault are entitled to seek contribution from the other joint tortfeasors.

The application of pro rata versus proportionate share contribution can prove significant to accountants, since in many cases, the relative fault of the accountant is minor in comparison to other tortfeasors, including the client, its officers, and outside third-parties.46

VII. Concluding Implications on the Accounting Profession

Almost assuredly, accountants and auditors are alluring monetary defendants if not for any reason other than their perceived deep pockets or because they are potential defendants who remain solvent. Accountants practicing in joint and several liability states will continue to fear

( . . . continued)
- New Hampshire: N.H. Rev. Stat. Ann. § 507:7-f: [A] right of contribution exists between or among 2 or more persons who are jointly and severally liable upon the same indivisible claim, or otherwise liable for the same injury, death or harm, whether or not judgment has been recovered against all or any of them.

- New York: N.Y. Civ. Prac. Law & R. § 1402: The amount of contribution to which a person is entitled shall be the excess paid by him over and above his equitable share of the judgment recovered by in the injured party; but no person shall be required to contribute an amount greater than his equitable share. The equitable shares shall be determined in accordance with the relative culpability of each person liable for contribution.


- Pennsylvania: 42 Pa. Cons. Stat. Ann. § 7102b: Where recovery is allowed against more than one defendant, each defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of the amount of his causal negligence to the amount of causal negligence attributed to all defendants against whom recovery is allowed. The plaintiff may recover the full amount of the allowed recovery from any defendant against whom the plaintiff is not barred from recovery. Any defendant who is so compelled to pay more than his percentage share may seek contribution.

- Texas: Tex. Civ. Prac. & Rem. Code Ann. § 33.015. (a) If a defendant who is jointly and severally liable under Section 33.013 pays a percentage of the damages for which the defendant is jointly and severally liable greater than his percentage of responsibility, that defendant has a right of contribution for the overpayment against each other liable defendant to the extent that the other liable defendant has not paid the percentage of the damages found by the trier of fact equal to that other defendant's percentage of responsibility.

(b) As among themselves, each of the defendants who is jointly and severally liable... is liable for the damages recoverable by the claimant under Section 33.012 in proportion to his respective percentage of responsibility...

(c) If for any reason a liable defendant does not pay or contribute the portion of the damages required by his percentage of responsibility, the amount of the damages not paid or contributed by that defendant shall be paid or contributed by the remaining defendants who are jointly and severally liable for those damages. The additional amount to be paid or contributed by each of the defendants who is jointly and severally liable for those damages shall be in proportion to his respective percentage of responsibility.

inordinate or uncontained liability that is disproportionate to their culpable conduct and will ultimately be compelled to settle a large majority of baseless claims. Although starkly different from its original proposition of ensuring that plaintiffs receive redress for physical injury, the continued imposition of joint and several liability is rather brusque when applied to more complex business situations implicating economic loss and multiple actors. Numerous states have recognized the abuse of joint and several liability and therefore promote equitable outcomes by apportioning the amount of damages owed with the degree of responsibility.

However, the reality of joint and several liability empowers plaintiffs to hunt, target and litigate against the most financially viable defendants, oftentimes being the accounting firm that tends to only be marginally liable. In an effort to curtail unjust enrichment of plaintiffs and their attorneys, states with a powerful accountants’ lobby presence can petition and ultimately secure replacement of joint and several liability with proportionate liability. The more attractive proportional system of liability ensures that defendants are only responsible to plaintiffs for their culpable share of damages. Ultimately, the proportional system of liability facilitates the focus of litigation to ascertaining actual damages of each party instead of unfettered liability against an only minimally culpable defendant.