



FEBRUARY 2025

## Navigating the way forward while keeping our values

A look back at Prop 51 to better understand the challenges we face this year

BY GEOFF WELLS

2025 is going to be a year that will challenge us and, more importantly, the people we represent. As we navigate this year at the state level, let us always remember to keep our values. The values of honesty, integrity, civility, and decency. They matter, and they're going to be tested in California and in our country this year. We are already faced with concerning proposals being floated by city and county attorney groups seeking to put a cap on your clients' damages for cases against governmental entities. The U.S. Chamber of Commerce has come out with another misleading article about the tort system and its costs to society.

It is important to remember that the balance of fairness and risk to the victims of negligence and abuse is a vital one. To respond effectively to these threats, let's take a moment to review Proposition 51 (passed in 1986) and its history to see how we arrived at where we are today.

### The "deep pockets" initiative

Prop 51 was the so-called "deep pockets" initiative that sought to do away with joint and several liability for non-economic human damages. Lobbyists for the insurance companies spent millions of dollars telling the public that your clients were being unfairly compensated for non-economic damages from a defendant who was responsible for only part of the victim's injuries. The public opinion on this issue went against the plaintiffs, under a belief that it was unfair to hold a solvent defendant liable beyond their portion of fault for the injuries and harms suffered by your clients.

Under current law, after enactment of Prop 51, joint and several liability exists for only economic damages and holds that defendants are jointly and separately liable for the defendant's share of fault for economic damages. This involves an important public policy decision of who should bear the risk when a defendant doesn't have enough insurance or assets to pay its share of the economic damages in a case. Should it be the plaintiff or the solvent at-fault

defendant who bears this risk? Public policy reveals that it is clearly the at-fault solvent defendant who should bear this risk. Let's explore why.

First, let's acknowledge that we are talking about only economic damages. Non-economic damages are limited to the actual percentage of fault of each defendant. So, in the context of non-economic damages, it already is the plaintiff, and not the solvent defendant, who bears the burden of an insolvent or uninsured defendant.

Second, the law already reduces all defendants' fault for the economic damages by the plaintiff's percentage of fault, i.e., contributory negligence. So, in these cases, we are talking about joint and several liability for only the defendants' share of fault for economic damages. Additionally, a defendant has to pay the other defendants' share only when that defendant is not solvent. Many public entities today have or should have express indemnity agreements with their independent contractors and subcontractors as protection for economic damages provided to an injured party.

Clearly, the only issue is what happens to the collectability of economic damages when one defendant is solvent and the other defendant has no coverage or is insolvent. Some insurance and governmental lobby groups now want to shift this risk onto the plaintiff, who is the party least able to cover this loss, and place none of the risk on a solvent or insured at-fault defendant.

This would be terrible public policy. The better policy is that both the plaintiff and the solvent defendant share that risk; with non-economic damages, the risk is on the plaintiff, with economic damages, the risk is on the at-fault, solvent, and/or insured defendant.

### Consider the injured plaintiff

Think about it: In these cases, the severely injured plaintiff has suffered long-term economic damages, past and future medical bills, past and future wage loss. Allowing a solvent at-fault defendant to walk away from these obligations places the risk on a plaintiff when they are in the

most need of help and have the least ability to react to the insolvency of one or more of the defendants. As we all know, the severely injured plaintiff is in need of money to pay for past medical bills and future care that can help them get back to work and hopefully lessen their dependency on public assistance!

If you read or hear someone say that joint and several liability for non-economic damages doesn't seem fair, please respond! Remind that person that this risk is already being borne by the plaintiff. Remind them of the importance of a fair public policy on these issues that really affect the lives of our clients and their families!

Meanwhile, let's remember that in California we had a very successful election of officials who believe in the civil justice system, and support the rights of our citizens. I suggest you read the excellent article written by Lea-Ann Tratten in the December *Advocate* for a thorough analysis of the election and the results.

Ms. Tratten highlights why many Democrats sat out this election. However, we had many wins in our California Legislature with CAOC-backed candidates such as Robert Garcia in Assembly District 50 and Sade Elhawary in AD 57. She also acknowledges the excellent showing of our own Kipp Mueller: Even though he came up short in the vote total, Kipp is in this race for the long haul and eventually will be elected to the California Senate.

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