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NON-SETTLING DEFENDANTS' JUDGMENT FORECAST IN CALIFORNIA

RICHARD T. MILLER

$$(L\% \times NE) + (V \times E\%) - (P.S. \times E\%) = J$$

WHILE FORECASTING potential jury verdicts is at best an inexact science, some ways are better than others when making an educated guess. Experience to some extent allows for the relative valuation of certain claims. However, experience also tells us that juries are very unpredictable. In California, the process is further complicated by legislative action and voter initiatives which credit non-settling defendants for certain portions of pre-trial settlements made by other defendants.

California Civil Code Section 1431.2¹ codified voter initiative Proposition 51, which ended joint and several liability for non-economic damages (that is, losses not objectively provable). Only several liability remains for non-economic damages, mean-

¹ CAL. CIVIL CODE § 1431.2 (West Supp. 1996).

§ 1431.2. Several liability for non-economic damages

(a) In any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against that defendant for that amount.

(b)(1) For purposes of this section, the term "economic damages" means objectively verifiable monetary losses including medical expenses, loss of earnings, burial costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, loss of employment and loss of business or employment opportunities.

(2) For the purposes of this section, the term "non-economic damages" means subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation.

ing that each defendant found liable is responsible only for its proportionate share of liability for non-economic damages. Indeed, the California Supreme Court has held that it is appropriate to reduce an award by the percentage of non-economic damages attributable to an immune party such as an employer.² And, it was held error to exclude from the jury's consideration the proportionate liability of a pre-trial settling party because the Proposition 51 reduction would be lost.³

Moreover, California Code of Civil Procedure Section 877⁴ generally provides that a judgment against a non-settling defendant shall be reduced by an amount paid prior to trial by a settling defendant. But, California courts have taken the position that a non-settling defendant is entitled only to a credit for the portion of the pre-trial settlement attributed to "economic damages" (that is, objectively provable); conversely, under this statute, no credit is given to non-settling defendants for non-economic damages paid in pre-trial settlements.⁵ Further, there will be no reduction for pre-trial settlements where the jury does not make a distinction between economic and non-economic

² *DaFonte v. Up-Right, Inc.*, 2 Cal. 4th 593 (1992).

³ *Roslan v. Permea, Inc.*, 17 Cal. App. 4th 110 (1993).

⁴ CAL. CIV. PROC. CODE § 877 (West Supp. 1996).

§ 877. Release of one or more joint tortfeasors or co-obligors; effect upon liability of others

Where a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment is given in good faith before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort, or to one or more other co-obligors mutually subject to contribution rights, it shall have the following effect:

(a) It shall not discharge any other such party from liability unless its terms so provide, but it shall reduce the claims against the others in the amount stipulated by the release, the dismissal or the covenant, or in the amount of the consideration paid for it whichever is the greater.

(b) It shall discharge the party to whom it is given from all liability for any contribution to other parties.

(c) This section shall not apply to co-obligors who have expressly agreed in writing to an apportionment of liability for losses or claims among themselves.

(d) This section shall not apply to a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment given to a co-obligor on an alleged contract debt where the contract was made prior to January 1, 1988.

⁵ *Espinoza v. Machonga*, 9 Cal. App. 4th 268, 271-77 (1992); *In re Piper Aircraft*, 792 F. Supp. 1189, 1191-93 (N.D. Cal. 1992); *Hoch v. Allied-Signal, Inc.*, 24 Cal. App. 4th 48 (1994).

damages awarded.⁶ Also, it has been held that the credit attributed to economic damages will apply even when the settling parties have been ultimately found to have zero percent of the fault.⁷

Of course, as in trying to predict a jury verdict, it is likewise difficult to predict a jury's finding of economic versus non-economic damages. In a rare case, the court may assist the parties by making a ruling in the context of a good faith settlement hearing. But note that the California Court of Appeals has reversed the application of a pre-trial stipulated agreement as to the percentage of economic and non-economic damages; instead, the jury findings as to these percentages were applied.⁸

With this background, it is possible to make some reasonable estimates of potential judgments, factoring in various variables and assumptions. These variables include the following: pre-trial settlement amounts, potential overall verdicts, percentage of liability among defendants, percentage of comparative negligence, percentage of economic versus non-economic damages, and related offsets. An example would be as follows: \$1 million potential verdict with a determination of 30% economic and 70% non-economic damage, along with a finding of 50% proportionate share liability to a non-settling defendant and a \$400,000 pre-trial settlement. The non-settling defendant would be responsible for judgment in the amount of \$530,000—that is, 50% of \$700,000 (non-economic damages) plus \$180,000 (\$300,000 minus 30% of \$400,000 pre-trial settlement, or \$120,000), leaving a total judgment of \$530,000.

Attached as Appendices A, B, and C are a number of tables (the Miller Tables) using the same \$400,000 pre-trial settlement, but varying the verdicts and percentage of non-economic and economic variables. These can be used as a guideline in attempting to forecast potential judgments where other defendants have settled. Of course, the numbers will vary in each individual case according to its own dynamics. As such, the tables will have to be adapted to fit each fact scenario and related projections. However, the formula provided is a good starting point in attempting to put a reasonable range on the potential exposure of a non-settling defendant going to trial.

⁶ *Hoch*, 24 Cal. App. 4th at 62-68.

⁷ *Poire v. C.L. Peck/Jones Bros. Constr. Corp., Inc.*, 39 Cal. App. 4th 1832 (1995).

⁸ *Greathouse v. Amcord, Inc.*, 35 Cal. App. 4th 831 (1995).

APPENDIX A

400K PRETRIAL SETTLEMENT		90% NON-ECONOMIC	10% ECONOMIC	
VERDICT	LIABILITY PERCENTAGE	NON-ECONOMIC DAMAGES	ECONOMIC DAMAGES	JUDGMENT
				$+(100-40) =$
\$ 1 Million	100%	900	60	960
	90	810	60	870
	80	720	60	780
	70	630	60	690
	60	540	60	600
	50	450	60	510
	40	360	60	420
	30	270	60	330
	20	180	60	240
	10	90	60	150
				$+(90-40) =$
900K	100%	810	50	860
	90	729	50	779
	80	648	50	698
	70	567	50	617
	60	488	50	538
	50	405	50	455
	40	324	50	374
	30	243	50	293
	20	162	50	212
	10	81	50	131
				$+(80-40) =$
800K	100%	720	40	760
	90	648	40	688
	80	576	40	616
	70	504	40	544
	60	432	40	472
	50	360	40	400
	40	288	40	328
	30	216	40	256
	20	144	40	184
	10	72	40	112
				$+(70-40) =$
700K	100%	630	30	660
	90	567	30	597
	80	504	30	534
	70	441	30	471
	60	378	30	408
	50	315	30	345
	40	252	30	282
	30	189	30	219
	20	126	30	156
	10	63	30	93

VERDICT	LIABILITY PERCENTAGE	NON-ECONOMIC DAMAGES	ECONOMIC DAMAGES	JUDGMENT
			+ (60-40) =	
600K	100%	540	20	560
	90	486	20	506
	80	432	20	452
	70	378	20	398
	60	324	20	344
	50	270	20	290
	40	216	20	236
	30	162	20	182
	20	108	20	128
	10	54	20	74
			+ (50-40) =	
500K	100%	450	10	460
	90	405	10	415
	80	360	10	370
	70	315	10	325
	60	270	10	280
	50	225	10	235
	40	180	10	190
	30	135	10	145
	20	90	10	100
	10	45	10	55

APPENDIX B

400K PRETRIAL SETTLEMENT		80% NON-ECONOMIC	20% ECONOMIC	
VERDICT	LIABILITY PERCENTAGE	NON-ECONOMIC DAMAGES	ECONOMIC DAMAGES	JUDGMENT
			(200-80) =	
\$ 1 Million	100%	800	120	920
	90	720	120	840
	80	640	120	760
	70	560	120	680
	60	480	120	600
	50	400	120	520
	40	320	120	440
	30	240	120	360
	20	160	120	280
	10	80	120	200
			(180-80) =	
900K	100%	720	100	820
	90	648	100	748
	80	576	100	676
	70	504	100	604
	60	432	100	532
	50	360	100	460
	40	288	100	388
	30	216	100	316
	20	144	100	244
	10	72	100	172
			+(160-80) =	
800K	100%	640	80	720
	90	576	80	656
	80	512	80	592
	70	448	80	528
	60	384	80	464
	50	320	80	400
	40	256	80	336
	30	192	80	272
	20	128	80	208
	10	64	80	144
			+(140-80) =	
700K	100%	560	60	620
	90	504	60	564
	80	448	60	508
	70	392	60	452
	60	336	60	396
	50	280	60	340
	40	224	60	284
	30	168	60	228
	20	112	60	172
	10	56	60	116

VERDICT	LIABILITY PERCENTAGE	NON-ECONOMIC DAMAGES	ECONOMIC DAMAGES	JUDGMENT
			+ (120-80) =	
600K	100%	480	40	520
	90	432	40	472
	80	384	40	424
	70	336	40	376
	60	288	40	328
	50	240	40	280
	40	192	40	232
	30	144	40	184
	20	96	40	136
	10	48	40	88
			+ (100-80) =	
500K	100%	400	20	420
	90	360	20	380
	80	320	20	340
	70	280	20	300
	60	240	20	260
	50	200	20	220
	40	160	20	180
	30	120	20	140
	20	80	20	100
	10	40	20	60

APPENDIX C

400K PRETRIAL SETTLEMENT		70% NON-ECONOMIC	30% ECONOMIC	
VERDICT	LIABILITY PERCENTAGE	NON-ECONOMIC DAMAGES	ECONOMIC DAMAGES	JUDGMENT
				$+(300-120) =$
\$ 1 Million	100%	700	180	880
	90	630	180	810
	80	560	180	740
	70	490	180	670
	60	420	180	600
	50	350	180	530
	40	280	180	460
	30	210	180	390
	20	140	180	320
	10	70	180	250
				$(270-120) =$
900K	100%	630	150	780
	90	567	150	717
	80	504	150	654
	70	441	150	591
	60	378	150	528
	50	315	150	465
	40	252	150	402
	30	189	150	339
	20	126	150	276
	10	63	150	213
				$(240-120) =$
800K	100%	560	120	680
	90	504	120	624
	80	448	120	568
	70	392	120	512
	60	336	120	456
	50	280	120	400
	40	224	120	344
	30	168	120	288
	20	112	120	232
	10	56	120	176
				$(210-120) =$
700K	100%	490	90	580
	90	441	90	531
	80	392	90	482
	70	343	90	433
	60	294	90	384
	50	245	90	335
	40	196	90	286
	30	147	90	237
	20	98	90	188
	10	49	90	139

VERDICT	LIABILITY PERCENTAGE	NON-ECONOMIC DAMAGES	ECONOMIC DAMAGES	JUDGMENT
			(180-120) =	
600K	100%	420	60	480
	90	378	60	438
	80	336	60	396
	70	294	60	354
	60	252	60	312
	50	210	60	270
	40	168	60	228
	30	126	60	186
	20	84	60	144
	10	42	60	102
			(150-120) =	
500K	100%	350	30	380
	90	315	30	345
	80	280	30	310
	70	245	30	275
	60	210	30	240
	50	175	30	205
	40	140	30	170
	30	105	30	135
	20	70	30	100
	10	35	30	65

Comments

