

Fair Share Act

The model Fair Share Act builds upon and replaces ALEC's Joint and Several Liability Abolition Act, which was approved in 1995. It retains the central feature of the earlier model act: each defendant is liable only for damages in direct proportion to that defendant's responsibility. It also continues to provide juries with the opportunity to consider the full picture of the events surrounding an injury when allocating responsibility, including the responsibility of settling parties and those who were not named as defendants. The updated model act incorporates helpful features of state laws enacted in recent years.

Joint and Several Liability

The rule of joint liability, commonly called joint and several liability, provides that when two or more persons engage in conduct that might subject them to individual liability and their conduct produces a single, indivisible injury, each defendant may be held liable for a plaintiff's entire compensatory damages award. Thus, a jury's finding that a particular defendant may have been only 1% at fault is overridden and that defendant may be forced to pay 100% of the award if other responsible defendants are insolvent or unable to pay their "fair share."

Joint liability has its origin in a time in which the doctrine of contributory negligence barred a plaintiff that was even partially at fault for his or her own injury from any recovery. When this rule was in place, it was felt that it was fairer for the culpable defendant to bear the loss than to leave the blameless plaintiff without a full recovery. With the widespread adoption of comparative fault, the principal justification for requiring one defendant to bear another individual or entity's share of fault was lost.¹ In the vast majority of jurisdictions, a plaintiff who is partially to blame for his or her own injury is not barred from recovery but will have his or her recovery reduced in proportion to that individual's share of responsibility for the harm. In this legal environment, in which liability is closely linked with fault, courts and scholars have criticized continued application of joint liability.²

The Vast Majority of States Have Moved Away from Joint Liability

"Over the past two decades, the shortcomings of joint liability rules have become increasingly apparent: A defendant only minimally at fault bears a disproportionate and unfair burden."³ Joint liability blunts incentives for safety, because it allows negligent actors to under-insure and puts full responsibility on those who may have been only marginally at fault. In addition, joint liability encourages plaintiffs' attorneys to engage in "shotgun pleading" because they know that if they join enough "deep pockets," they are likely to be able to convince the jury to assign at least one percent responsibility to one of them, assuring that at least one party will be available to pay the entirety of a potentially large award.

Recognizing the need for reform, forty-one states have abolished or limited the application of joint liability through legislation or court decision. These reforms show a

clear movement toward equating liability with fault. Significantly, no state that has repealed or modified its joint liability law has ever gone back and amended the law to restore joint liability.

- Only eight states and the District of Columbia retain full joint liability.⁴ Half of those states, however, retain contributory negligence as a complete bar to recovery. Several other states have generally adopted several liability, but provide broad exceptions in which joint liability continues to apply.⁵
- Nineteen states have abolished joint liability, replacing it with several (“fair share”) liability, or sharply limited the application of joint liability to narrow situations.⁶
- Seventeen states have abolished joint liability for defendants whose degree of fault falls below a specified threshold (e.g., no joint liability for defendants found to be less than fifty percent at fault), retaining joint liability only for defendants with a major share of the fault for the plaintiff’s harm.⁷ Washington State applies joint liability only when the plaintiff bears no degree of fault and other limited situations.
- Seven states have limited joint liability for noneconomic damages, such as pain and suffering, while retaining joint liability for certain economic losses, such as medical expenses or lost wages.⁸
- A few states combine some of these approaches.

Oklahoma and Pennsylvania are the most recent states to enact joint liability reform. The Oklahoma experience shows that states can successfully take a step-by-step approach to reducing joint liability. In 2004, Oklahoma moved from full joint liability to a 50% threshold approach, but continued to apply joint liability when it is found that the defendants acted willfully or recklessly, or where the plaintiff had no comparative negligence. Five years later, the Oklahoma legislature eliminated these exceptions, but otherwise retained the 50% threshold approach. Most recently, in 2011, Oklahoma abolished joint liability except where the state brings the lawsuit.⁹

Pennsylvania moved toward several liability on June 28, 2011, when Governor Tom Corbett signed the Fair Share Act into law. The Pennsylvania law is similar to Oklahoma’s first step in joint liability reform. Pennsylvania’s Fair Share Act eliminates joint liability except where a defendant is responsible for 60% or greater of the total fault apportioned to all parties and in several other limited situations.¹⁰

Other states that have reformed their joint and several liability laws over the past decade include Arkansas, Florida, Georgia, and Mississippi, which abolished joint liability, Missouri and South Carolina, which limited joint liability to defendants who are found at least 50% responsible for the injury, Ohio, which adopted both a 50% threshold and limited joint liability to economic damages, and Texas, which clarified its procedures for allocation of fault to nonparties. In addition, West Virginia placed modest limitations on joint liability.¹¹

Consideration of All Parties

The area of greatest deviation, ambiguity, and confusion in the states is with respect to a jury's ability to allocate fault to individuals or entities that are not present at trial, but whose conduct may have contributed to the plaintiff's injury. This issue arises in states that have otherwise abolished joint liability, modified joint liability to apply only to those whose responsibility for the injury reaches a certain threshold percentage, or enacted other limitations on joint liability.

There are many reasons why a person or company may not be named as a defendant in litigation, even if it contributed to the plaintiff's injury. A company that shares responsibility for the injury may have gone out of business or may be insolvent. An individual who clearly is largely at fault for the harm may be "judgment proof," meaning he or she has little or no assets to pay damages. Some people or entities are immune from litigation. For example, states have sovereign immunity, employers liability for on-the-job injuries is generally limited to workers' compensation, and, in some states, charitable organizations have limited liability. A plaintiff may also choose not to sue a individual or entity because it is beyond the jurisdiction of the court or not subject to service of process, such as a foreign company that does little business in the United States. In addition, it is common for plaintiffs to settle with those who have little financial resources, even if those parties bear most of the responsibility for the injury, to focus their litigation on "deep pockets" that had a lesser role in the harm.

If a jury is only allowed to consider the responsibility of parties that are before the court, the effect is to shift liability on the named defendants for the actions of others. Such a result is contrary to the purpose of several liability and, effectively, retains a form of joint liability. As the authoritative Prosser treatise, recognizes, "[T]he failure to consider the negligence of all tortfeasors, whether parties or not, prejudices the joint defendants who are thus required to bear a greater proportion of the plaintiff's loss than is attributable to their fault."¹²

Nevertheless, this issue is subject to a great deal of litigation because some state laws have referred to allocation of fault to "parties" or "defendants." Some courts have narrowly interpret these terms to limit allocation of fault to those who are named as a defendants in the litigation.¹³ Some states, such as Illinois, do not even allow the jury to consider the responsibility of settling parties.¹⁴ In other states, judges interpret state law as permitting juries to allocate fault to nonparties.¹⁵ Several states have adopted statutes that explicitly permit the jury to allocate fault nonparties, Some of these states provide a specific procedure for a defendant to provide notice to the plaintiff of its intention to allocate fault to a nonparty¹⁶ while others do not provide such detail.¹⁷ Finally, in some states, the law on allocation of fault to nonparties may be unclear. The model act makes clear that juries may allocate fault to any person or entity that shared responsibility for the injury, regardless of whether it is named as a defendant.

Section-by-Section Analysis

Section 1 abolishes joint liability and adopts several liability, under which a defendant is liable only for its share of responsibility for the plaintiff's injury. In allocating responsibility, jurors (or the court in a bench trial) consider the responsibility of each claimant, defendant, settling party, or nonparty designed by a defendant. A jury's allocation of fault to a nonparty does not bind that person or entity to pay damages and may not be used in any subsequent legal proceeding. The jury allocates responsibility to nonparties only as a way of accurately determining the defendant's liability.

Notes: In adopting several liability, this provision retains the policy of the ALEC's 1995 Joint and Several Liability Abolition Act. Some states have gradually amended their joint and several liability laws to move from full joint liability, to a threshold approach, to several liability, and reduced exceptions under which joint liability applies along the way. Under any approach, it is essential that legislation explicitly recognize that juries may allocate fault to nonparties regardless of whether the person or entity was or could have been named as a party to the action. Without such a provision, courts may interpret the law to shift liability onto named defendants for the responsibility of those who are not in court.

Section 2 provides a specific procedure for designation of nonparties to which the jury may allocate responsibility. The model act suggests that states require a defendant to provide a plaintiff with 60 days notice prior to the date of trial of the identity of the nonparty to be considered unless the court finds good cause warranting a later designation. A person or entity may be designated as a responsible nonparty regardless of whether the person was or could have been named as a party to the action and irrespective of whether the nonparty is insolvent, immune, or not subject to service of process in the jurisdiction. After discovery, a plaintiff may challenge the designation of a nonparty on the ground that there is no evidence that the designated person is responsible for any portion of the claimant's alleged injury or damage. At that point, the defendant must produce evidence showing a question of fact for the jury as to the nonparty's responsibility.

Notes: States that require defendants to designate nonparties for allocation of fault vary on how and when such notice is to be given to the plaintiff.¹⁸ The model act recommends providing notice of an intent to allocate fault to a nonparty by filing a motion no later than 60 days prior to the date of trial or the close of discovery, whichever is closer to trial, to provide fairness to plaintiffs. Those considering developing procedures based on Section 2 should consider that in one state, Arkansas, the state supreme court has found that requiring the filing of a pleading by a certain date violates the separation of powers by intruding on court rules.¹⁹ If court decisions in your state raise such a concern, then an alternative is the Arizona approach, which requires only that the defendant provide notice before trial in accordance with requirements established by court rule.²⁰

Section 3 recognizes that adoption of several liability and recognition that fault may be allocated to nonparties does not impact three areas: (1) concert of action claims; (2) vicarious liability; (3) a defendant's rights to contribution or indemnity, or procedural rules for filing of cross-claims or counterclaims.

Notes: Joint liability continues to apply to “concert of action” claims, where it is alleged that a person or entity consciously and deliberately pursued a common plan or design to commit an intentional tort and actively take part in that intentional tort. Some form of this exception is contained in most several liability laws. Elimination of joint liability should not be misconstrued to alter a separate area of the law, vicarious liability. Vicarious liability arises only when there is a special relationship, recognized by law, that imposes liability for one parties acts upon another. For example, an employer is generally vicariously liable for the acts of employees acting within the scope of their job responsibilities. Finally, the allocation of fault provisions of the model act are not intended to affect the assertion by a defendant of rights to contribution or indemnity. Nothing in this section affects the filing of cross-claims or counterclaims.

¹ See Victor E. Schwartz, *Comparative Negligence* § 1.05[e][3], at 29 (5th ed. 2010).

² *Dix & Associates Pipeline Contractors, Inc. v. Key*, 799 S.W.2d 24, 27 (Ky. 1999); *McIntyre v. Balentine*, 833 S.W.2d 52, 58 (Tenn. 1992); see also Restatement (Third) of Torts: Apportionment of Liability § 10 cmt. a (2000) (stating “it is difficult to make a compelling argument” for full joint liability).

³ Steven B. Hantler et al., *Is the “Crisis” in the Civil Justice System Real or Imagined?*, 38 Loy. L.A. L. Rev. 1121, 1147 (2005).

⁴ Jurisdictions retaining full joint liability include Alabama, Delaware, District of Columbia, Maine, Maryland, Massachusetts (limited to proportionate share of common liability), North Carolina, Rhode Island, and Virginia.

⁵ Connecticut, Hawaii, Nevada, New Mexico, Washington, and West Virginia are examples of states with statutes that include broad exceptions in which joint liability continues to apply.

⁶ States that have largely replaced joint liability with several liability include Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, North Dakota, Oklahoma, Tennessee, Utah, Vermont, and Wyoming.

⁷ States that have adopted the “threshold approach” include Illinois (25%), Iowa (50%), Minnesota (50%), Missouri (51%), Montana (50%), Nevada (less than plaintiff’s fault), New Hampshire (50%), New Jersey (60%), New York (50%), Ohio (50%), Oregon (equal or less than plaintiff or 25%), Pennsylvania (60%), South Carolina (50%), South Dakota (50%), Texas (50%), West Virginia (30%), and Wisconsin (51%).

⁸ States that have limited joint liability for noneconomic damages, but retained joint liability in some circumstances for economic damages, include California, Hawaii, Illinois, Iowa, Nebraska, New York, and Ohio.

⁹ S.B. 862 (2011) (codified at Okla. Stat. tit. 23, § 15.1).

¹⁰ 42 Pa. Cons. Stat. § 7102. The Pennsylvania law also continues to apply joint liability where there is an intentional misrepresentation, an intentional tort, for certain environmental claims, and where there is a violation of the state’s dram shop law.

¹¹ The West Virginia law eliminates joint liability for defendants 30% or less at fault. If a claimant has not been paid after six months of the judgment, however, defendants 10% or more responsible are subject to reallocation of uncollected amount. Defendants less than 10% at fault or whose fault is equal to or less than the claimant’s percentage of fault are not subject to reallocation. W. Va. Code Ann. § 55-7-23.

¹² See W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* 475-76 (5th ed. 1984) (emphasis added).

¹³ See, e.g., *Donner v. Kearsce*, 662 A.2d 1269 (Conn. 1995); *Baker v. Webb*, 833 S.W.2d 898 (Ky. Ct. App. 1994); *Jensen v. ARA Servs., Inc.*, 736 S.W.2d 374 (Mo. 1987); *Bencivenga v. J.J.A.M.M., Inc.*, 609 A.2d 1299 (N.J. Super Ct., App. Div. 1992); *Bowman v. Barnes*, 282 S.E.2d 613 (W. Va. 1981); *Connar v. West Shore Equip. of Milwaukee, Inc.*, 227 N.W.2d 660 (Wis. 1975); *Board of County Commissioners v. Ridenour*, 623 P.2d 1174 (Wyo. 1981).

¹⁴ See *Ready v. United/Goedecke Services, Inc.*, 905 N.E.2d 725 (Ill. 2008).

¹⁵ See, e.g., *DaFonte v. Up-Right, Inc.*, 828 P.2d 140 (Cal. 1992); *Idaho Dep't of Labor v. Sunset Marts, Inc.*, 91 P.3d 1111 (Idaho 2004); *Brown v. Keill*, 580 P.2d 867 (1978); *Hunter v. General Motors Corp.*, 729 So.2d 1264 (Miss. 1999); *Bode v. Clark Equip. Co.*, 719 P.2d 824 (Okla. 1986).

¹⁶ See, e.g., Ariz. Rev. Stat. § 12-2506; Colo. Rev. Stat. § 13-21-111.5; Fla. Stat. Ann. § 768.81(3); Ga. Code Ann. § 51-12-33; Ind. Code Ann. § 34-51-2; Mich. Comp. Laws §§ 600.2957, 600.6304; Tex. Civ. Prac. & Rem. Code Ann. §§ 33.003, 33.004; Utah Code Ann. § 78-27-38(4)(a).

¹⁷ See, e.g., La. Civ. Code art. 2323(A); N.M. Stat. Ann. § 41-3A-1(B); N.D. Cent. Code § 32-03.2-02.

¹⁸ See, e.g., Ariz. Rev. Stat. § 12-1506(B) (requiring notice before trial in accordance with requirements established by court rule); Colo. Rev. Stat. § 13-21-111.5(3)(b) (requiring notice within 90 days of commencement of an action unless the court determines a longer period is necessary); Fla. Stat. Ann. § 768.81(3) (requiring a defendant to affirmatively plead the fault of a nonparty either by motion or in the initial responsive pleading when defenses are first presented, subject to amendment any time before trial in accordance with state rules of civil procedure); Ga. Code Ann. § 51-12-33 (requiring notice by filing a pleading within 120 days prior to the date of trial); Ind. Code Ann. § 34-51-2-16 (requiring defendant to raise nonparty fault as an affirmative defense in the first answer or not later than 45 days before the expiration of the statute of limitations subject to alteration of the time limit by the court); Mont. Code Ann. § 27-1-705(6) (requiring defendant to affirmatively plead comparative fault and identify in the answer or within a reasonable amount of time after filing the answer, each person who the defendant alleges is at fault); Tex. Civ. Prac. & Rem. Code Ann. § 33.004(a) (requiring defendant to file a motion within 60 days of the trial date unless the court finds good cause for the motion to be filed at a later date); Utah Code Ann. § 78-27-41(4) (requiring a defendant to file a description of the factual and legal basis on which fault can be allocated and information identifying the non-party no later than 90 days before trial).

¹⁹ See *Johnson v. Rockwell Automation, Inc.*, 308 S.W.3d 135 (Ark. 2009).

²⁰ Ariz. Rev. Stat. § 12-2506. Legislators may also consider the approach of states such as Louisiana, New Mexico, and North Dakota, which have adopted laws that explicitly provide for allocation of fault to nonparties but do not provide a specific procedure for doing so. This approach, however, may also raise the potential for a constitutional challenge as the Montana Supreme Court, in invalidating a law authorizing allocation of fault to nonparties, found that it lacked “any kind of procedural safeguard” when compared to such statutes in other states and “imposed a burden upon plaintiffs to anticipate defendants’ attempts to apportion blame [to a nonparty] up to the time of submission of the verdict form to the jury.” *Newville v. Department of Family Servs.*, 883 P.2d 793, 802 (Mont. 1994).

Fair Share Act

Summary

ALEC's model Fair Share Act provides that each defendant is liable only for damages in direct proportion to that defendant's responsibility. The model act also ensures that juries have an opportunity to consider the full picture of the events surrounding an injury when allocating responsibility, including the contribution of settling parties and those who were not named as defendants to the alleged harm. Defendants are required to provide plaintiffs with adequate notice of their intent to designate one or more nonparties as wholly or partially responsible for damages. Defendants must present sufficient evidence to support such assertions. Joint liability applies to those who consciously and deliberately pursue a common plan or design to commit an intentional tort or who are subject to vicarious liability under existing law.

Model Legislation

{Title, enacting clause, etc.}

Fair Share Act; abolishing joint and several liability and providing for allocation of responsibility.

Section 1. {Several liability.}

(A) In any civil action based on any legal theory seeking damages for personal injury, property damage, wrongful death, or other harm for which damages are allowed, the liability of each defendant shall be several only and shall not be joint. Each defendant shall be liable only for the amount of damages allocated to that defendant in direct proportion to that defendant's percentage of responsibility for the claimant's harm, and a separate judgment shall be rendered against the defendant for that amount.

(B) The trier of fact shall consider the responsibility of all persons or entities that contributed to a claimant's harm, including: (1) each claimant; (2) each defendant; (3) each settling person or entity; and (4) each responsible nonparty, designated under Section 2 of this Act., regardless of whether the person or entity was or could have been named as a party to the action and irrespective of whether the nonparty is insolvent, immune, or not subject to service of process in the jurisdiction.

(C) Assessments of responsibility regarding nonparties shall be used only to determine the liability of named parties. Such assessments shall not subject any nonparty to liability and may not be introduced as evidence of liability in any action.

Section 2. {Designation of Responsible Nonparties.}

(A) A defendant may file a notice to designate a person or entity as a responsible nonparty not later than 60 days prior to the date of trial or the close of discovery, whichever is closer to trial, unless the court finds good cause to allow the defendant to file the notice at a later date.

(B) After adequate time for discovery, a party may move to strike the designation of a responsible nonparty on the ground that there is no evidence that the designated person is responsible for any portion of the claimant's alleged injury or damage. The court shall grant the motion to strike unless a defendant produces sufficient evidence to raise a genuine issue of fact regarding the designated person's responsibility for the claimant's injury or damage.

Section 3. {Limitations.}

(A) Notwithstanding this Act, joint and several liability shall apply to any person or entity that consciously and deliberately pursues a common plan or design to commit an intentional tort and actively take part in that intentional tort. Any person or entity held jointly liable for acting in concert shall have a right of contribution against co-defendants.

(B) Nothing in this Act abrogates or affects the doctrine of respondeat superior or vicarious liability to the extent recognized by existing law.

(C) Nothing in this Act affects the third-party practice as recognized in the rules and statutes of this state with regard to the assertion by a defendant of rights to contribution or indemnity. Nothing in this section affects the filing of cross-claims or counterclaims.

Section 4. {Severability clause.}

Section 5. {Repealer clause.}

Section 6. {Effective date.}