Finding Opportunity to Chip Away at Prop. 51

By Robert Glassman & Kevin Boyle

For the California trial lawyer, several obstacles stand in the way of pursuing and obtaining justice for victims of corporate or individual malfeasance. The number of obstacles is increasing too. Our state supreme court's recent holding in *Howell v. Hamilton Meats* underscores that troubling fact. But as the old adage goes, "where there's a will, there's a way." And in the case of the trial lawyer, there is no shortage of will.

This article explores the beginning stages and the subsequent interpretation and application of one of the longstanding tort reform obstacles that has been embedded in our legal landscape for over a quarter of a century, plaguing virtually each and every one of our cases, and the ways in which to overcome it.

In the months leading up to the June 1986 California primary election, big insurance companies and tort reform enthusiasts cried out against "deep pocket" jury awards and lambasted trial lawyers' organizations across the state for promoting "the glut of lawsuits with dubious merits." ('86 Ballot Pamphlet). They published and disseminated brochure materials endorsing a ballot measure that would modify the then-existing joint and several liability doctrine in California, and, in effect, would drastically limit noneconomic damages in civil lawsuits. They aroused the masses with blistering words of hyperbole in the Ballot Pamphlet for the Primary Election like: "Don't let 5,400 trial lawyers hold 26 million Californians hostage. *VOTE YES ON PROPOSITION 51!*" And on June 3, 1986, that's what 62% of California voters did – enacting into law Proposition 51.

Formally known as the "Fair Responsibility Act of 1986," Prop. 51, codified into Civil Code section 1431 et seq., limits an individual tortfeasor's liability for noneconomic damages to a proportion of such damages equal to the tortfeasor's own percentage of fault. (*Evangelatos v. Superior Court (Van Waters & Rogers, Inc.)* (1988) 44 Cal.3d 1188, 1192.) The law explicitly declares that its purpose is to hold defendants "liable in closer proportion to their degree of fault. To treat them differently is unfair and inequitable." The prefatory language of Prop. 51 further "declare[s] 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."

Almost immediately following its passage into law, Prop. 51 was attacked for being unconstitutional. In *Evangelatos*, the plaintiff argued that the newly enacted law was facially unconstitutional because it was both "too vague and ambiguous" to satisfy due process and violated the equal protection clause by establishing classifications that are not rationally related to a legitimate state interest. (*Id.*, at 1200.)

The California Supreme Court disagreed. And, by employing similar reasoning the court had used in deciding a series of cases a few years prior to *Evangelatos* challenging the validity of a variety of provisions of another legislative tort reform measure known as the Medical Injury Compensation Reform Act of 1975 (MICRA), the court concluded that "Our decisions in the earlier MICRA cases clearly establish that plaintiff's current constitutional challenges lack merit." (*Ibid.*)

Interestingly, however, the court acknowledged that "the language of Proposition 51 may not provide a certain answer for every possible situation in which the modified joint and several liability doctrine may come into play" and therefore found that "[a]pplication of the statute in ambiguous situations can be resolved by trial and appellate courts in time-honored, case-by-case fashion by reference to the language and purposes of the statutory scheme as a whole." (*Id.*, 1202.) In case there was any doubt about the applicability of employing such "case-by-case" adjudication in the context of Prop. 51, the Court explained that "[t]he judiciary's traditional role of interpreting ambiguous statutory language or 'filling in the gaps' of statutory schemes is, of course, as applicable to initiative measures as it is to measures adopted by the Legislature." (*Ibid.*)

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Sure enough, soon after the passage of Prop. 51 and the *Evangelatos* decision, California appellate courts found that the language of the newly enacted initiative did "not provide a certain answer" to several of the situations in which they faced and so took upon themselves the responsibility of "filling in the gaps." In particular, since *Evangelatos*, courts have held that Prop. 51 is inapplicable when joint liability is imposed based solely on the relationship between two tortfeasors or because of statutory mandate. Below are some examples.

Prop. 51 Does Not Abrogate Doctrine of Respondeat Superior

In *Miller v. Stouffer* (1992) 9 Cal.App.4th 70, the Second District Court of Appeal held that "Proposition 51 does not shield a vicariously liable employer who is liable under the doctrine of respondeat superior from liability for noneconomic damages." (*Id.*, 85.) Rather, "[the employer] stands in [the employee's] shoes and the entire liability of these two defendants toward [the plaintiff] is co-extensive." (*Id.*, 84.) Establishing that the vicariously-liable employer was not entitled to the benefit of Prop. 51 was necessary, according to the court, because a contrary rule would leave victims, limited to recovering non-economic damages only from the negligent employee who, in many cases, would have little in the way of assets, "uncompensated while employers would be able to avoid much of the risk incident to their enterprise." (*Ibid.*)

Prop. 51 Has No Application to a Defendant Upon Whom Vicarious Liability Is Statutorily Imposed

Shortly after its holding in *Miller*, the court found another instance in which Prop. 51 did not apply in *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847. In determining whether Prop. 51's prohibition against joint liability for noneconomic damages was applicable to Vehicle Code section 17150's provisions for the liability of vehicle owners, the *Rashtian* court held that "the shield of Proposition 51 does not extend to the jointly liable defendant whose liability is not based on fault but rather is imposed by statute as a matter of public policy." (*Id.*, at 1854.) (See also *Galvis v. Petito* (1993) 13 Cal. App.4th 551.) Whether liability rests upon imputed negligence or statutory fiat, the court stated, it "is imposed not because of independent culpability which can be measured and evaluated but because of status or relationship. To read Proposition 51 so as to shield *every* defendant from liability for non-economic damages beyond that attributable to his or her own fault, 'largely would abrogate the vicarious tort liability of persons for the acts of others. Nothing in the language or intent of Proposition 51 conveyed to the voters in June 1986 dictates such a drastic change in California tort law." (*Ibid.*)

Prop. 51 Does Not Abrogate the Nondelegable Duty Rule

In 1994, the Second District Court of Appeal yet again found a situation in which Prop. 51 was inapplicable in *Srithong v. Total Investment Company* (1994) 23 Cal. App.4th 721. The court held that when the defendant's liability is based on a nondelegable duty, and because the nondelegable duty doctrine is a form of vicarious liability, Prop. 51 is inapplicable. (*Id.*, at 724.) In holding that the defendant lessors could not escape liability for failure to maintain property in a safe condition by delegating this duty to an independent contractor, the court concluded that there was no fault to apportion and the defendant lessors were fully liable for the independent contractor's negligence and plaintiff's noneconomic damages.

Prop. 51 Has No Application in a Product Liability Case Against a Defendant in the Chain of Distribution

Some courts have also held that Prop. 51 does not require apportionment of liability for noneconomic damages in a product

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liability action among defendants who are in the chain of distribution of the defective product. (See e.g. *Wimberly v. Derby Cycle Corp.* (1997) 56 Cal.App.4th 618, 628-634; *Bostick v. Flex Equipment Co., Inc.* (2007) 147 Cal.App.4th 80, 93-95.) In *Wimberly*, the first case to decide whether Prop. 51 applied in product liability cases, the Fourth District Court of Appeal determined that based upon the similarities between strict products liability and vicarious liability and upon the reasoning of the courts that had held Prop. 51 does not apply in vicarious liability cases, the statute was inapplicable because liability was not based on comparative fault, "and for that reason there is nothing to compare." (*Id.*, at 633; see also *Henry v. Superior Court* (2008) 160 Cal.App.4th 440, 458.)

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Public policy is the vehicle that drives the justification for the foregoing situations falling outside the purview of Prop. 51. As articulated in the *Wimberly* decision:

> "The losses caused by the torts of employees, which as a practical matter are sure to occur in the conduct of the employer's enterprise, are placed upon that enterprise itself, as a required cost of doing business. They are placed upon the employer because, having engaged in an enterprise, which will on the basis of all past experience involve harm to others through the torts of employees, and sought to profit by it, it is just that he, rather than the innocent plaintiff, should bear them; and because he is better able to absorb them, and to distribute them, through prices, rates or liability insurance, to the public, and so to shift them to society, to the community at large." (630).

So, since Prop. 51's enactment, the courts have made clear that the statute limits liability for noneconomic damages to several *only* when liability is based upon comparative fault. That got us thinking. What other types of cases would or should be immune from the application of Prop. 51? We believed we found the answer in the case of *Doe v. Bar Defendants*. Thus, as we were gearing up for trial in *Doe*, a case brought pursuant to Business and Professions Code section 25602.1 (Sale of Alcoholic Beverages to Obviously Intoxicated Minors), we sought to prevent the application of Prop. 51, a difficult feat that had not been raised before in any published decision for a case of this kind.

Accordingly, we argued at trial that in the case of an obviously intoxicated minor, it is the *furnishing* of the alcoholic beverage that is the proximate cause of injuries resulting from intoxication, not the consumption of the alcohol. (*Rogers v. Alvas* (1984) 160 Cal.App.3d 997, 1001.) By permitting third party liability suits against restaurants and bars for serving obviously intoxicated minors that cause injury, the Legislature strictly provided that the furnishing of alcohol creates liability, not the consumption. Therefore, we argued, comparative negligence standards do not apply when determining the liability of an offending restaurant and the minor. This was akin to a dog bite case wherein the dog owner must be held liable, not the dog. We maintained that based on the Legislature's intent when creating this limited exception to the sweeping prohibition of dram shop liability claims in California and the holdings of the cases set forth above, the licensed provider of alcohol has no liability separate and apart from the liability of the obviously intoxicated minor, i.e., that they are coextensive and there is no basis for comparison or apportionment. No basis for the bars' liability existed apart from the negligence or fault of the obviously intoxicated minor. For the purposes of Prop. 51, they are a single tortfeasor. And our judge agreed.

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Shortly after the judge made his ruling, the case settled. Until that time, however, liability was hotly contested. Had we not been able to successfully argue that Prop. 51 should not apply in the case and ultimately to the apportionment of noneconomic damages, the case would not have likely settled for high value, if at all, and the jury would have put at least 90% of fault, if not all, on the judgment-proof minor – denying the plaintiff from fair and reasonable noneconomic damages.

We found our opportunity to chip away at Prop. 51 based on the case precedent and analysis discussed in this article. We hope that you too will find yours. When there's a will, there's a way. ■

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