

DRAFT  
FOR DISCUSSION ONLY

## **APPORTIONMENT OF TORT LIABILITY ACT**

---

NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

---

OCTOBER, 2000

## **APPORTIONMENT OF TORT LIABILITY ACT**

*WITH REPORTER'S NOTES*

Copyright© 2000

By  
NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

---

*The ideas and conclusions set forth in this draft, including the proposed statutory language and any comments or reporter's notes, have not been passed upon by the National Conference of Commissioners on Uniform State Laws or the Drafting Committee. They do not necessarily reflect the views of the Conference and its Commissioners and Drafting Committee and its Members and Reporters. Proposed statutory language may not be used to ascertain the intent or meaning of any promulgated final statutory proposal.*

## **DRAFTING COMMITTEE ON APPORTIONMENT OF TORT LIABILITY ACT**

GENE N. LEBRUN, P.O. Box 8250, Suite 900, 909 St. Joseph Street, Rapid City, SD 57709, *Chair*

W. MICHAEL DUNN, P.O. Box 3701, 1000 Elm Street, Manchester, NH 03105

KENNETH ELLIOTT, City Place Building, Twenty-Second Floor, 204 N. Robinson Avenue, Oklahoma City, OK 73102

JOHN F. HAYES, 20 W. 2<sup>nd</sup> Avenue, 2<sup>nd</sup> Floor, P.O. Box 2977, Hutchinson, KS 67504-2977

SCOTT N. HEIDPRIEM, 431 N. Phillips Avenue, Suite 400, Sioux Falls, SD 57104, *Enactment Plan Coordinator*

ROGER C. HENDERSON, University of Arizona, James E. Rogers College of Law, 1201 Speedway, P.O. Box 210176, Tucson, AZ 85721-0176, *National Conference Reporter*

M. KING HILL, JR., Suite 2239, 8810 Walther Boulevard, Baltimore, MD 21234

RICHARD B. LONG, P.O. Box 2039, 20 Hawley Street, East Tower, Binghamton, NY 13902

JAMES C. McKAY, JR., Office of Corporation Counsel, 6<sup>th</sup> Floor South, 441 4<sup>th</sup> Street, NW, Washington, DC 20001, *Committee on Style Liaison*

HARVEY S. PERLMAN, University of Nebraska, College of Law, P.O. Box 830902, Lincoln, NE 68583

STEVE WILBORN, Suite 403, 305 Ann Street, Frankfort, KY 40601

JAMES A. WYNN, JR., Court of Appeals, One West Morgan Street, P.O. Box 888, Raleigh, NC 27602

## **EX OFFICIO**

JOHN L. McCLAUGHERTY, P.O. Box 553, Charleston, WV 25322, *President*

TERESA ANN BECK, House Legislative Services Office, P.O. Box 1018, Jackson, MS 39215, *Division Chair*

## **AMERICAN BAR ASSOCIATION ADVISOR**

MARC S. MOLLER, 100 Park Avenue, Floor 18, New York, NY 10017-5590

## **EXECUTIVE DIRECTOR**

FRED H. MILLER, University of Oklahoma, College of Law, 300 Timberdell Road, Norman, OK 73019

WILLIAM J. PIERCE, 1505 Roxbury Road, Ann Arbor, MI 48104, *Executive Director Emeritus*

Copies of this Act may be obtained from:  
NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS  
211 E. Ontario Street, Suite 1300  
Chicago, Illinois 60611  
312/915-0195  
[www.nccusl.org](http://www.nccusl.org)

# APPORTIONMENT OF TORT RESPONSIBILITY ACT

## SECTION 1. DEFINITIONS. In this [Act]:

(1) "Fault" includes:

(A) an act or omission that is in any measure negligent or reckless toward the person or property of the actor or another person or that subjects a person to strict liability in tort;

(B) breach of warranty;

(C) unreasonable assumption of risk not constituting an express enforceable agreement;

(D) misuse of a product for which a person otherwise would be liable; and

(E) unreasonable failure to avoid injury or death or to mitigate damages.

(2) "Nonparty at fault" [means] [includes] a person who is allegedly responsible for all or part of a claimant's injury or harm and, as to that injury or harm, has been released from liability, is legally immune from liability, or is not amenable to service of process or to the jurisdiction of the court where the claim [has been filed] [is being adjudicated].

(3) "Person" means an individual, corporation, business trust, estate, trust, partnership, association, joint venture, government; governmental subdivision, agency, or instrumentality; public corporation, or any other legal or commercial entity.

### Reporter's Notes

The definition of "fault" is taken from the Uniform Comparative Fault Act. Notice that it does not allude to intentional acts, but the definition is not exclusive so that one could argue that intentional acts could be compared.

The "nonparty at fault" definition was not part of the Uniform Act because the Act did not contemplate that the fault of a nonparty would be taken into account.

The definition of "person" is a standard version definition employed by the Conference.

## SECTION 2. EFFECT OF CONTRIBUTORY FAULT. In an action based on fault seeking to recover

damages for [bodily] injury to or death of a person or [physical] harm to [tangible] property, any contributory fault

chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for the injury

or harm attributable to the claimant's contributory fault, but does not bar recovery [unless the claimant's fault is

1 [equal to or] greater than the combined fault of all of the other persons whose fault is determined in the action to  
2 have caused the injury or harm to the claimant].

3 **Reporter's Notes**

4 Two basic issues are raised. What types of tort cases should be governed by the Act? Should the Act adopt  
5 a pure comparative fault system or a modified system? If it is to be a modified system, what should the threshold  
6 be—50 percent or 51 percent or some other figure?  
7

8 **SECTION 3. APPORTIONMENT OF DAMAGES.**

9 (a) In all actions seeking to recover damages for [bodily] injury to or death of a person or  
10 [physical] harm to [tangible] property involving fault of more than one person, unless otherwise agreed by all  
11 parties, the court shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings,  
12 indicating:

13 (1) the amount of damages each claimant would be entitled to recover if any contributory fault is  
14 disregarded; and

15 (2) as to each claim, the percentage of the total fault of all the parties and nonparties that is  
16 allocated to each claimant, defendant, and nonparty.

17 (b) In submitting interrogatories to the jury or in making its findings under subsection (a), the  
18 court may determine that two or more persons are to be treated as a single party.

19 (c) In determining the percentages of fault, the trier of fact shall consider both the nature of the  
20 conduct of each party and nonparty at fault and the extent of the causal relation between the conduct and the  
21 damages.

22 [(d) Legal requirements of causal relation apply both to fault as the basis for liability and to  
23 contributory fault.]

24 **Reporter's Notes**

25 This language is taken from the Uniform Act, but it differs in that it takes into account the conduct of  
26 nonparties at fault, something the Uniform Act did not do. Should the fault of nonparties be taken into account?  
27 Do we need the bracket language in subsection (d). It was in the Uniform Act.

28  
29 **SECTION 4. DETERMINING DAMAGE AWARD; ENTERING JUDGMENT.** Upon motion of a

1 party, the court shall determine the award of damages to each claimant in accordance with the percentage of fault  
2 findings made pursuant to Section 3 and enter judgment for the amount severally against each party liable. The  
3 court shall also enter judgment against ~~all~~ the liable parties for the total amount recoverable by the claimant on the  
4 basis of rules of joint-and-several liability, but condition such liability of the judgment debtors upon the  
5 requirements of Section 5.

6 **Reporter's Notes**

7 Most jurisdictions require that the trier of fact determine the percentages of fault and the amount of  
8 damages separately. It is the responsibility of the court to make the necessary calculations to enter judgment.

9 The Uniform Act provided for joint and several liability. This section provides for several liability, but  
10 conditions joint liability upon the inability of a judgment debtor to satisfy his or her responsibility for the damages  
11 assessed. The conditions for joint liability are set out in Section 5.  
12

13 **SECTION 5. SATISFACTION OF JUDGMENT.**

14 (a) Except as otherwise provided in subsection (b), upon entry of judgment containing an award  
15 of damages under rules of joint-and-several liability under Section 4, a judgment creditor may only proceed to  
16 satisfy the judgment against each judgment debtor on the basis of several liability.

17 (b) Upon motion made not later than [one year] after judgment is entered, a judgment creditor may  
18 petition the court to determine whether all or part of a judgment debtor's several share is uncollectible. If the court  
19 makes such a determination, the court [may][shall]:

20 (1) authorize the judgment creditor to satisfy the judgment under the rules of joint-and-  
21 several liability; or

22 (2) reallocate all or part of any uncollectible amount to the other judgment debtors and  
23 authorize the judgment creditor to satisfy the judgment from the other judgment debtors to the extent of the  
24 reallocation.

25 (c) Any relief granted under this section does not relieve the judgment debtor from any continuing  
26 liability to the judgment creditor or from any obligation to pay contribution to other judgment debtors.

27 **Reporter's Notes**

28 The key provision in this section is subsection (b) which would permit or require, depending on the  
29 language chosen in the brackets in line 15, the court to order a judgment debtor who has been conditionally  
30 adjudged jointly and severally liable to pay more than the several share of responsibility. If the Committee were to  
31 choose "may" version, the court would have the discretion to grant or not grant the motion of a judgment creditor.

1 Should the court have this kind of discretion and, if so, should there be criteria set out in the Act which would  
2 govern the court's decision?

3 If the court were to grant the motion of a judgment creditor to reallocate the responsibility of the parties to  
4 the judgment under this section, subsection (b) also would allow the court to do two different things: (1) enter an  
5 order that would permit the judgment creditor to satisfy the judgment as if it had originally been entered on a joint  
6 and several basis or (2) the court could recalculate the shares as if the insolvent judgment debtor had not been at  
7 fault (or perhaps on some other basis). The second option could, but would not necessarily have to, take into  
8 account any share of fault assessed against a judgment creditor. Do we want to give the court the discretion  
9 contemplated in the two basic approaches and, if so, should the court have the discretion permitted within the second  
10 option?

11  
12 **SECTION 6. SETOFF.** A claim and counterclaim shall not be set off against each other, except by  
13 agreement of the parties. On motion, however, the court, if it finds that the obligation of either party is likely to be  
14 uncollectible, may order that both parties make payment into the court for distribution. The court shall distribute the  
15 funds received and declare obligations discharged as if the payment into court by either party had been a payment to  
16 the other party and any distribution of those funds back to the party making payment had been a payment to him by  
17 the other party.

#### 18 **Reporter's Notes**

19 This is the language from the Uniform Comparative Fault Act.

20 **SECTION 7. RIGHT OF CONTRIBUTION.** A judgment debtor who is [subject to liability under  
21 Section 5(b) for more than the debtor's assessed share of liability under Section 4 or] jointly and severally liable  
22 with one or more other judgment debtors upon the same indivisible claim for the same injury, death, or harm, may  
23 seek contribution from the other judgment debtors for any amount the judgment debtor has paid in excess of the  
24 several amount for which the judgment debtor is responsible. It may be enforced either in the original action or by a  
25 separate action brought for that purpose.

#### 26 **Reporter's Notes**

27 This language, except for that in brackets, is taken from the Uniform Comparative Fault Act and would be  
28 applicable to situations under the Apportionment of Tort Responsibility Act where joint and several liability is  
29 preserved. If the Committee were to adopt the approach under subsection (b) of Section 5 allowing a judgment to be  
30 satisfied on a joint and several basis or otherwise requiring a judgment debtor to pay more than his or her assessed  
31 share under Section 4, it probably would be advisable to have an explicit reference in Section 7 to ensure that the  
32 right of contribution extends to the situation under subsection (b). The bracketed language is an attempt to  
33 recognize and assure that right of contribution.

**SECTION 8. EFFECT OF RELEASE.** A release, covenant not to sue, covenant not to execute a judgment, or similar agreement entered into by a claimant and a person subject to liability discharges the person from liability to the claimant to the extent provided in the release and for contribution to any other person that is subject to liability to the claimant for the same injury, death or harm. The release does not discharge any other person subject to liability upon the same claim unless it so provides. The claim of the releasing person against other persons liable for the same injury, death, or harm for which the released person is liable is reduced by the amount of the released person's several share of the obligation, determined in accordance with Section 3.

## Reporter's Notes

Although I have rewritten this provision which was contained in the Uniform Comparative Fault Act, I do not think there is any substantive difference. Section 3 specifically contemplates that any releasing party's fault will be an issue in the continuing litigation between the claimant and nonreleasing parties. The effect of the release is determined by whatever share of responsibility is ultimately assessed against the releasing party and the nonreleasing parties are not responsible for that share.

**SECTION \_\_. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In applying and construing this Uniform Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among States that enact it.

**SECTION \_\_. SHORT TITLE.** This [Act] may be cited as the Uniform Apportionment of Tort Responsibility Act.

**SECTION \_\_. SEVERABILITY CLAUSE.** If any provision of this [Act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

**SECTION \_\_. APPLICABILITY.** This [Act] applies to actions [filed on or][accruing] after its effective date.

1

2

**SECTION \_\_. EFFECTIVE DATE.** This [Act] takes effect on ....

3

4

**SECTION \_\_. REPEALS.** The following acts and parts of acts are repealed:

5

(1) ....

6

(2) ....

7

(3) ....

8