GUIDELINES FOR DETERMINING SETTLEMENT SETOFF AMOUNTS IN MEDICAL MALPRACTICE CASES

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Introduction

When a plaintiff settles with a cotortfeasor, the nonsettling tortfeasor is entitled to set off the consideration paid by the settling tortfeasor for economic damages. (Code Civ. Proc., § 877, subd. (a); *Laurenzi v. Vranizan* (1945) 25 Cal.2d 806, 813; *Hoch v. Allied-Signal, Inc.* (1994) 24 Cal.App.4th 48, 62–64, 67 (*Hoch*).) Determining the amount of the setoff is straightforward when the action is by one plaintiff with an indivisible injury and the settlement is paid in cash. In more complex cases, however, issues of valuation or allocation may arise:

"In the typical one-plaintiff, multiple-defendants, personal injury action each tortfeasor is potentially liable for the same injury to the plaintiff. Therefore the full settlement by one defendant will offset a judgment against other tortfeasors; no allocation of the settlement is required. But many lawsuits and many settlements do not fit this pattern. In some, the amount of the offset is uncertain because one settlement covers multiple plaintiffs or causes of action with different damages [citations], or because a sliding scale settlement is used and payments by the settling defendant are contingent upon the degree of plaintiff's success against the remaining defendants [citation]. In others, the amount of the offset is clouded by injection of noncash consideration into the settlement [citations] or . . . by settling claims for separate injuries not all of which would be attributable to conduct of the remaining defendants." (*Alcal Roofing & Insulation v. Superior Court* (1992) 8 Cal.App.4th 1121, 1124 (*Alcal Roofing*).)

The following guidelines should help to (1) ensure proper calculation of the settlement setoff in straightforward cases, and (2) identify the steps necessary to maximize the amount of available setoff in more complex cases.

Step One: Determine Whether the Settling and Nonsettling Tortfeasors are Liable for the Same Damages.

A setoff is available to a nonsettling tortfeasor who is "claimed to be liable for the same tort" as the settling tortfeasor. (Code Civ. Proc., § 877.) The courts have construed this to mean that the settling and nonsettling tortfeasors' acts or omissions must have combined to cause an indivisible injury. (*May v. Miller* (1991) 228 Cal.App.3d 404, 409 (*May*) ["The only relevant question in applying section 877 is whether there was one indivisible injury caused by two or more parties"]; see *McComber v. Wells* (1999) 72 Cal.App.4th 512, 517 (*McComber*); *Bobrow/Thomas & Associates v. Superior Court* (1996) 50 Cal.App.4th 1654, 1661; *Greathouse v. Amcord, Inc.* (1995) 35 Cal.App.4th 831, 840 (*Greathouse*) ["the jury verdict and the settlement both related exclusively to damages arising from the same 'indivisible injury' "]; *Hoch*, *supra*, 24 Cal.App.4th at pp. 63–64; *Lafayette v. County of Los Angeles* (1984) 162 Cal.App.3d 547, 554–556 [legal malpractice settlement set off against medical malpractice verdict; "Plaintiff clearly claimed [his former attorney] was liable for the damages resulting from the County's [medical malpractice] tort"]; *Kohn v. Superior Court* (1983) 142 Cal.App.3d 323, 328–329; *Sanchez v. Bay General Hospital* (1981) 116 Cal.App.3d 776, 795–796 [auto accident settlement set off against medical malpractice wrongful death verdict; the owners and operators of the auto "were charged with liability for this same tort, to wit, the death of Mrs. Sanchez"].)

Since the enactment of Proposition 51 (Civ. Code, § 1431.2), however, a settling tortfeasor's payment of *noneconomic* damages cannot be set off by a nonsettling tortfeasor. (See *Rashidi v. Moser* (2014) 60 Cal.4th 718, 720 (*Rashidi*) ["Liability for noneconomic damages is several only, so that defendants pay in proportion to their share of fault"]; *Schreiber v. Lee* (2020) 47 Cal.App.5th 745, 759 (*Schreiber*) ["when a defendant entitled to the full benefit of Proposition 51 settles, he or she is resolving, with respect to noneconomic damages, only his or her *own* share of those damages. [Citations.] And nonsettling defendants cannot look to that payment as resolving, in whole or in part, *their* proportional shares of those damages."]; *Hoch*, *supra*, 24 Cal.App.4th at pp. 63, 67 ["Although decedent's death is, literally, a single injury, the noneconomic harm caused plaintiffs is not indivisible; rather, by virtue of section 1431.2(a), it must be divided among the multiple tortfeasors according to their shares of fault"]; see also *Aetna Health Plans of California, Inc. v. Yucaipa-Calimesa Joint Unified School Dist.* (1999) 72 Cal.App.4th 1175, 1192 ["even though multiple tortfeasors may have caused an otherwise indivisible injury, joint and several liability is no longer the rule for noneconomic damages"].)

Another situation in which settling and nonsettling tortfeasors are not liable for the same damages is described in Haning et al., California Practice Guide: Personal Injury (The Rutter Group 2023) paragraph 4:688: "[W]here personal injury results in a claim by the victim, a loss of consortium claim by the spouse and potential wrongful death claims by the heirs, a pretrial settlement is properly credited against the judgment only to the extent the judgment awards damages for the same claims embraced by the settlement. If the potential wrongful death claimants joined in or were clearly intended to benefit from the settlement, but never recovered a judgment

against the nonsettling defendant (e.g., because the victim was still alive), *no credit* against plaintiff's (the prospective decedent's) personal injury judgment can be given for that portion of the settlement properly allocated to the wrongful death claims." (Citing *Wilson v. John Crane, Inc.* (2000) 81 Cal.App.4th 847, 860–865 (*Wilson*).)

However, there is an exception to this exception. An agent and the principal who is vicariously liable for the agent's tort are jointly and severally liable for the same noneconomic damages caused by the agent's tort. (*May*, *supra*, 228 Cal.App.3d at pp. 409–410.) The plaintiff may settle with the agent without releasing the principal. (*Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 304.) If that happens, the principal can offset the entire settlement against its liability to the plaintiff, without regard to any allocation of noneconomic damages, because the entire settlement was paid toward the satisfaction of an obligation owed jointly by the agent and the principal. (*May*, at pp. 409–410.)

Step Two: Determine Whether the Settling Parties Placed a Monetary Value on any Contingent or Noncash Consideration and Valued it in Good Faith.

"[Code of Civil Procedure section] 877 does not require the direct payment of money nor does it impose any requirement as to how and when the consideration is paid. [Citations.] [¶] In *Abbott Ford* [, *Inc. v. Superior Court* (1987) 43 Cal.3d 858 (*Abbott Ford*)], the Supreme Court explained the procedure to be followed in the context of a contingent payment settlement. The Supreme Court placed the *burden of determining the value of the settlement agreement on the settling parties*, and stressed that this should be done at the time the settlement agreement is confirmed so that the trial court can evaluate whether there has been a good faith settlement."

(*Arbuthnot v. Relocation Realty Service Corp.* (1991) 227 Cal.App.3d 682, 689, emphasis added; see *Franklin Mint Co. v. Superior Court* (2005) 130 Cal.App.4th 1550, 1557 (*Franklin Mint*) ["the amount of *consideration* paid within the meaning of section 877, subdivision (a) is not necessarily the amount of *money* paid"].) "[T]he procedures set forth in *Abbott Ford* for evaluating sliding scale agreements apply in instances . . . where payment is contingent or where value other than cash is given." (*Arbuthnot,* at p. 690; see *Abbott Ford*, *supra*, 43 Cal.3d at p. 879 ["the parties to [a sliding scale/'Mary Carter' settlement agreement], since they are in the best position to place a monetary figure on its value, should have the burden of establishing the monetary value of the sliding scale agreement"]; see also *United Services Auto. Ass'n v. Superior Court* (2001) 93 Cal.App.4th 633, 644 ["the valuation of the settlement agreement must include the valuation of the contingent consideration paid to the settling plaintiff, supported by specific evidence, declaration, or [expert] opinion"]; *Brehm Communities v. Superior Court* (2001) 88 Cal.App.4th 730, 735–737 ["Whatever methods of evaluation [of noncash components of the settlement] are selected, they must be based on competent evidence and not on mere speculation"]; *Arizona Pipeline Co. v. Superior Court* (1994) 22 Cal.App.4th 33, 46; *Regan Roofing Co. v. Superior Court* (1994) 21 Cal.App.4th 1685, 1710–1715 (*Regan*); *Aero-Crete, Inc. v. Superior Court* (1993) 21 Cal.App.4th 203, 209; *Erreca's v. Superior Court* (1993) 19 Cal.App.4th 1475, 1490–1491, 1496–1499, 1502–1504 (*Erreca's*); *Alcal Roofing*, *supra*, 8 Cal.App.4th at pp. 1124–1125 ["In a situation where the cash amount of the settlement does not dictate the amount of the offset, the settling parties *must* include . . . a valuation in their agreement" (emphasis added)], 1128–1129 ["If a settling defendant assigns indemnity rights to the plaintiff, the assignment may

constitute valuable additional consideration for settlement. . . . If the assigned rights were valuable, the settlement agreement should have set their value and the court should have considered the added value when determining whether the settlement was in good faith. [Citation.] The added value would then be included in any offset to any judgment against [a nonsettling defendant]."]; *Armstrong World Industries, Inc. v. Superior Court* (1989) 215 Cal.App.3d 951, 955–957; *Southern Cal. Gas Co. v. Superior Court* (1986) 187 Cal.App.3d 1030, 1035.)

"In evaluating the appropriateness of the parties' valuation . . . . the trial court should examine whether there is an adequate evidentiary basis for the valuation and whether it was reached in an atmosphere of such adverseness as to give rise to the presumption that a reasonable valuation was made. [Citation.] The trial court will then apply its discretion in determining whether the parties' showing is adequate." (*Regan*, *supra*, 21 Cal.App.4th at p. 1714.)

"In those cases in which the trial court is called on to assess the accuracy of the settling parties['] valuation of [a sliding scale agreement], the court may not be able to do more than simply make its best estimate, taking into account the size of the guaranty figure and the likelihood that the settling defendant will actually have to pay out either that amount or some lesser sum." (*Abbott Ford*, *supra*, 43 Cal.3d at p. 879, fn. 23.)

In those cases in which the trial court is called on to assess the accuracy of the settling parties' valuation of an assignment of the settling tortfeasor's indemnity rights to the plaintiff: "Considering the maximum entitlement to indemnity that the assignment represents, the parties may then assign a discount to that maximum entitlement based on the cost to prosecute the claims, the probability of prevailing on

them, and the likelihood of collecting on a judgment on them. . . . The extent of the assignor's potential comparative fault might serve to reduce the value of the assignment. It could also be considered whether the assignees had any intention of actually pursuing such indemnity right, or whether they preferred to pursue only their own direct rights." (*Regan*, *supra*, 21 Cal.App.4th at p. 1714.)

If the settling parties fail to value contingent or nonmonetary consideration, then a reasonable good faith valuation that is advantageous to the nonsettling party should be made. As explained below, that is the rule for *allocation* of settlements, and there does not seem to be any reason why the same rule should not apply to the issue of *valuation* of contingent or nonmonetary consideration.

Step Three: Determine Whether The Settling Tortfeasor Agreed To Allocate The Settlement Among Various Claims And Whether The Allocation Is In Good Faith.

"In a situation where the cash amount of the settlement does not dictate the amount of the offset, the settling parties *must* include an allocation . . . in their agreement." (*Alcal Roofing*, *supra*, 8 Cal.App.4th at pp. 1124–1125, emphasis added; accord, *Erreca's*, *supra*, 19 Cal.App.4th at p. 1489.) "Since the settling parties have the most knowledge of the value of the various claims they are attempting to settle, they are *required* to make an allocation of settlement proceeds among those various claims, subject to court approval of the showing made." (*Regan*, *supra*, 21 Cal.App.4th at p. 1702, emphasis added; accord, *Erreca's*, at p. 1491.) "[T]he settling parties *must* include an allocation or a valuation of the various claims in their settlement agreement in order to obtain a finding of good faith." (*Dillingham Const., N.A., Inc. v. Nadel Partnership, Inc.* (1998) 64 Cal.App.4th 264, 282 (*Dillingham*), original emphasis; see *id.* at pp. 279–281; *Gouvis Engineering v. Superior Court*

(1995) 37 Cal.App.4th 642, 648 ["The cases dealing with the obligation of the settling parties to allocate the settlement to various claims all impose that *requirement* for the specific purpose of arriving at the proper offset" (emphasis added)].)

"[W]here the settling parties have failed to allocate, the trial court *must* allocate in the manner which is most advantageous to the nonsettling party." (*Dillingham*, *supra*, 64 Cal.App.4th at p. 287, emphasis added; see *id.* at pp. 287–288; *Alcal Roofing*, *supra*, 8 Cal.App.4th at p. 1127 ["If any of [the settling defendants] did not allocate part of its settlement to nonroofing issues, roofer may obtain an offset for the *entire amount* of that defendant's settlement" (emphasis added)]; *Knox v. County of Los Angeles* (1980) 109 Cal.App.3d 825, 836 (*Knox*) ["Absent some good faith agreement between plaintiffs and [the settling defendants] allocating the settlement consideration . . . , defendants were entitled to a setoff of the *entire* settlement figure" (emphasis added)].)

Even where the settling parties have allocated, "[t]he effectiveness of such an allocation depends upon its good faith." (*Erreca's*, *supra*, 19 Cal.App.4th at p. 1491.) "The statutory requirement of good faith extends not only to the amount of the overall settlement but as well to any allocation which operates to exclude any portion of the settlement from the setoff." (*Knox*, *supra*, 109 Cal.App.3d at p. 837; accord, *Ehret v. Congoleum Corp.* (1999) 73 Cal.App.4th 1308, 1321 (*Ehret*); *Regan*, *supra*, 21 Cal.App.4th at p. 1701; see *Dillingham*, *supra*, 64 Cal.App.4th at pp. 279–282.)

The good faith of the allocation should be determined at the same time as the good faith of the overall settlement amount. (*Regan*, *supra*, 21 Cal.App.4th at p. 1703 ["the credit or offset to be accorded a nonsettling defendant should normally be fixed at the time that the settlement is reached, since the issue of the credit is part of

the overall good faith determination"]; *Erreca's*, *supra*, 19 Cal.App.4th at p. 1500, fn. 7 ["Determination of the credit issue to the extent possible cannot be deferred until after any eventual jury verdict, because the entire settlement must be determined to be in good faith as to both settling and nonsettling defendants"].)

The nonsettling tortfeasor bears the burden of proving the allocation is *not* in good faith. (Code Civ. Proc., § 877.6, subd. (d); see *Dillingham*, *supra*, 64 Cal.App.4th at p. 281, fn. 10; *Alcal Roofing*, *supra*, 8 Cal.App.4th at p. 1125.) *This burden does not arise*, however, until a party seeking confirmation of the settlement (1) explains to the court and to all other parties, by declaration or other written form, how the settlement is allocated and what the evidentiary basis for the allocation is, and (2) demonstrates that the allocation was reached in a sufficiently adversarial manner to justify a presumption of good faith. (*Franklin Mint*, *supra*, 130 Cal.App.4th at p. 1558; *Ehret*, *supra*, 73 Cal.App.4th at pp. 1320–1322; *Dillingham*, at pp. 279–281; *L. C. Rudd & Son, Inc. v. Superior Court* (1997) 52 Cal.App.4th 742, 750 (*L. C. Rudd*); *Regan*, *supra*, 21 Cal.App.4th at pp. 1700–1704; *Erreca's*, *supra*, 19 Cal.App.4th at pp. 1491–1496; *Alcal Roofing*, at pp. 1124–1125, 1129.)

An allocation is reached in a sufficiently adversarial manner to justify a presumption of good faith only if the settling parties have " 'truly adverse interests in the allocation.' " (*Erreca's*, *supra*, 19 Cal.App.4th at p. 1493.) "Collusion exists where only one of the parties cares how proceeds are allocated." (*Dillingham*, *supra*, 64 Cal.App.4th at p. 286.) "[I]f the allocation appears to be the result of collusion between parties, the trial court *must* find that the settlement, or at least the allocation, was not in good faith as a matter of law." (*Ibid.*, emphasis added.)

The ultimate test for determining the good faith of an allocation is whether it is " 'in the ballpark,' " i.e., provides a setoff that is "not 'grossly disproportionate' to the settling defendant's share of liability, thus providing at least some rough measure of fair apportionment of loss between the settling and nonsettling defendants." (*Abbott Ford*, *supra*, 43 Cal.3d at p. 874.) "The parameters of the 'ballpark' for the purpose of allocating the settlement proceeds between discrete claims is limited by evidence of the relation of the claims to the whole of the settlement amount." (*L. C. Rudd*, *supra*, 52 Cal.App.4th at p. 753 [in construction defect suit, where soils and foundation claims constituted approximately 55.1 to 61.1 percent of total cost of repairs, "[t]his is the 'ballpark' for purposes of allocation . . . . [T]he allocation [to the soils and foundation category] must come within these figures."]; accord, *Dillingham*, *supra*, 64 Cal.App.4th at p. 287, fn. 11.)

Step Four: Allocate The Settlement Between Economic And Noneconomic Damages.

"[E]ach defendant is solely responsible for its share of noneconomic damages under Civil Code section 1431.2 [Proposition 51]. Therefore, a nonsettling defendant may not receive any setoff under [Code of Civil Procedure] section 877 for the portion of a settlement by another defendant that is attributable to noneconomic damages." (*Poire v. C.L. Peck/Jones Brothers Construction Corp.* (1995) 39 Cal.App.4th 1832, 1838 (*Poire*); accord, *Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 327 (*Bigler-Engler*); *Wilson*, *supra*, 81 Cal.App.4th at pp. 863–864; *Ehret*, *supra*, 73 Cal.App.4th at p. 1319; *McComber*, *supra*, 72 Cal.App.4th 512, 518; *Scalice v. Performance Cleaning Systems* (1996) 50 Cal.App.4th 221, 234 (*Scalice*); *Torres v. Xomox Corp.* (1996) 49 Cal.App.4th 1, 35 (*Torres*); *Greathouse*, *supra*, 35 Cal.App.4th at p. 838;

Conrad v. Ball Corp. (1994) 24 Cal.App.4th 439, 442–443 (*Conrad*); *Hoch*, *supra*, 24 Cal.App.4th at pp. 62–68; *Regan*, *supra*, 21 Cal.App.4th at pp. 1705–1707; *Espinoza v. Machonga* (1992) 9 Cal.App.4th 268, 276–277 (*Espinoza*).)

To determine what portion of the settlement is *economic* damages subject to setoff, proceed as follows:

For a *preverdict* settlement, use the same percentage of economic damages as the jury's verdict. Thus, if the verdict is 75 percent economic damages, the settlement is 75 percent economic damages. (*Wilson*, *supra*, 81 Cal.App.4th at p. 864; *Ehret*, *supra*, 73 Cal.App.4th at pp. 1320–1321; *McComber*, *supra*, 72 Cal.App.4th at pp. 517–518; *Scalice*, *supra*, 50 Cal.App.4th at p. 235; *Torres*, *supra*, 49 Cal.App.4th at pp. 23, 33–34; *Poire*, *supra*, 39 Cal.App.4th at pp. 1838–1839, 1841; *Greathouse*, *supra*, 35 Cal.App.4th at pp. 838–842; *Conrad*, *supra*, 24 Cal.App.4th 439, 443–444; *Espinoza*, *supra*, 9 Cal.App.4th at pp. 273, 277.)

In MICRA cases, the percentage of economic damages in the verdict is calculated before the noneconomic damages are reduced. (*Francies v. Kapla* (2005) 127 Cal.App.4th 1381, 1387 (*Francies*).) Thus, where a plaintiff receives an award of $70,000 in economic damages and $425,000 in noneconomic damages, the economic damages constitute 14 percent of the award, and the plaintiffs' recovery should be offset by 14 percent of the amount of any preverdict good faith settlement. (*Ibid.*)

For a *postverdict* settlement, the settling tortfeasor is presumed to have paid in full its liability to the plaintiff for noneconomic damages. (*Torres*, *supra*, 49 Cal.App.4th at pp. 40–42.) The settlement is allocated first to noneconomic damages, up to the settling tortfeasor's liability for such damages, and then the remainder of the settlement (if any) is allocated to economic damages. (*Ibid.*) As

the Supreme Court explained in *Rashidi*, *supra*, 60 Cal.4th at p. 727, when defendants are protected by MICRA, their "[s]ettlement negotiations are based on liability estimates that are necessarily affected by the cap," and the MICRA cap "restrains the size of settlements." Accordingly, it makes no logical sense to allocate more than the MICRA cap to noneconomic damages when a defendant protected by MICRA settles.

Also note that Assembly Bill No. 35 (2021–2022 Reg. Sess.), effective January 1, 2023, increased the original $250,000 MICRA fixed limit on noneconomic damages. Under the current MICRA statute, there are separate caps for personal injury and wrongful death actions, and separate caps for healthcare providers and healthcare institutions (new categories of MICRA defendants). Assembly Bill No. 35 raises the limit on recovery for noneconomic losses, provides for fixed annual increases in the new higher limits for 10 years, and thereafter annually adjusts the limit by 2 percent to account for inflation. (Civ. Code, § 3333.2, subds. (b), (c), (g), (h).) The cap that is in effect at the time of judgment, arbitration award, or settlement controls the size of the noneconomic damage award.[1]

1 The MICRA caps applicable each year through 2034 are listed in Appendix A of the firm's 2024 MICRA Manual Update.

Step Five: Determine the Nonsettling Tortfeasor's Liability for Noneconomic Damages, Reducing it as Necessary to Ensure the Plaintiff Does Not Recover More than the Applicable MICRA Cap from All Defendants Who Are Covered by MICRA.

The nonsettling tortfeasor's liability for noneconomic damages must be determined by applying both the Proposition 51 allocation of fault and the applicable MICRA limit. Where all tortfeasors are covered by MICRA, noneconomic damages are reduced to the statutory limit *before* applying the defendants' comparative fault percentages under Proposition 51. (*Mayes v. Bryan* (2006) 139 Cal.App.4th 1075, 1100–1102 (*Mayes*); *Gilman v. Beverly California Corp.* (1991) 231 Cal.App.3d 121, 126–130 (*Gilman*.)

Where only one of multiple tortfeasors is covered by MICRA, noneconomic damages are reduced to the applicable limit *after* applying Proposition 51. (*Bigler-Engler*, *supra*, 7 Cal.App.5th at pp. 325–330 ["Because the applicability of MICRA's cap cannot be determined unless a defendant's liability is known, Proposition 51 logically must apply first"].) Where more than one tortfeasor is covered by MICRA, "the MICRA cap limits a plaintiff's recovery against all liable health care providers collectively [and all health care institutions collectively] to [the applicable MICRA cap]. If the health care providers collectively [or health care institutions collectively] are found to be liable for an amount exceeding [the MICRA cap], the MICRA cap applies and must be apportioned between them according to their relative faults." (*Id.* at p. 328.)

Relatedly, where a tortfeasor is *not* a healthcare provider, the noneconomic damages are reduced to the applicable MICRA cap *after* applying Proposition 51. (*Francies*, *supra*, 127 Cal.App.4th at pp. 1387–1389.)

Any overpayment of noneconomic damages by the settling tortfeasor should inure to the benefit of the nonsettling tortfeasor. (See, generally, *Schreiber*, *supra*, 47 Cal.App.5th at p. 759 ["even when a defendant entitled to the full benefit of Proposition 51 overestimates his or her share of fault and 'overpays' to resolve his or her share of the plaintiff's noneconomic damages[,] [citation] . . . as to noneconomic damages, the parties must live with the bargain they struck."].) For example, suppose the nonsettling tortfeasor is liable for $125,000 in noneconomic damages under the verdict, and the portion of the settlement allocated to noneconomic damages is $200,000. Is the plaintiff entitled to a total of $325,000? Or should the amount owed by the nonsettling tortfeasor be reduced to $50,000 so the plaintiff recovers only a total of $250,000 from all involved healthcare providers?

"Under MICRA, *where more than one health care provider jointly contributes to a single injury*, the maximum a plaintiff may recover for noneconomic damages is $250,000 [the former statutory limit]." (*Gilman*, *supra*, 231 Cal.App.3d at p. 128, emphasis added.) "[A] plaintiff cannot recover more than $250,000 [(the former statutory limit)] in noneconomic damages from all health care providers for one injury." (*Id.* at p. 129; accord, *Colburn v. U.S.* (S.D.Cal. 1998) 45 F.Supp.2d 787, 793 ["MICRA provides a $250,000 [the former statutory limit] maximum aggregate recovery for a single plaintiff"].) Nothing in Proposition 51 changes this fact. In other words, even though under Proposition 51, a nonsettling tortfeasor is not entitled to set off the noneconomic damages paid by a settling tortfeasor, in a medical malpractice case a "setoff" of sorts may still occur because of the applicable MICRA cap. The plaintiff should not be allowed to recover more than the applicable MICRA cap in noneconomic damages from defendants who are covered by MICRA—

regardless of who pays those damages.

However, in *Collins v. County of San Diego* (2021) 60 Cal.App.5th 1035, 1065–1068 (*Collins*), the Court of Appeal affirmed a different calculation where the settling codefendants were healthcare providers but the remaining codefendants included both healthcare providers and other county personnel. The plaintiff sued the sheriff deputies involved in his wrongful arrest, the county nurses who did his intake, and the doctors who saw him once he was transferred to a hospital. (*Id.* at pp. 1045–1046.) The hospital and its doctors settled before trial. (*Id.* at p. 1046.) The jury returned a verdict for the plaintiff against the remaining defendants, allocating 30 percent fault to the deputies and 70 percent fault to the nurses. (*Ibid.*) In reducing the noneconomic damages and calculating the setoff, the court applied the following formula. First, it determined the percentage of economic damages relative to the total damages in the jury's verdict to be 36.6 percent. (*Id.* at pp. 1063–1064, citing *Espinoza*, *supra*, 9 Cal.App.4th at pp. 276–277.) The court then apportioned 36.6 percent of the hospital's and physicians' $2,750,000 settlement as economic damages and deducted that amount from the economic damages awarded against all the nonsettling defendants. (*Id.* at p. 1064.) This meant the court allocated 63.4 percent of the $2,750,000 settlement by MICRA-protected defendants to noneconomic damages ($1,743,500) because 63.4 percent of the jury's $12,617,674 award was for noneconomic damages. (*Ibid.*) To determine the noneconomic damages, the court used the jury's allocation of fault to determine what percentage should be capped. (*Id.* at p. 1064 & fn. 16.) For the healthcare providers, the court took 70 percent of the noneconomic damages and reduced the amount to $250,000 (the applicable MICRA cap at the time). (*Ibid.*) The court added this to the remaining 30 percent,

attributed to the sheriff deputies, which did not need to be reduced. (*Ibid.*) Accordingly, the total damages were reduced from about $12.6 million to $6.2 million. (*Id.* at pp. 1046–1047.)

The defendants appealed, contending the court was required to apply the MICRA cap before it calculated the relative percentage. (*Id.* at p. 1065.) The Court of Appeal affirmed the trial court's calculations. Distinguishing *Mayes*, *supra*, 139 Cal.App.4th 1075, the court noted that *all* the *Mayes* defendants had been subject to MICRA, and the jury had determined the settling defendants' proportionate liability. (*Collins*, *supra*, 60 Cal.App.5th at p. 1065.) Instead, the court relied on *Rashidi*, where the trier of fact had not been asked to apportion the settling defendants' degree of fault. (*Id.* at pp. 1065–1066.) The court found that "*Rashidi*, although not perfectly aligned with the facts here, strongly suggests that application of MICRA before calculating the setoff is not required [here] because MICRA applies to damages awarded at trial, and not settlements." (*Id.* at pp. 1066–1067.) Thus, the trial court did not abuse its discretion when it calculated the setoff because the nonsettling defendants "were not held liable for any portion of noneconomic damages attributed to another defendant by the finder of fact, and received the benefit of MICRA." (*Id.* at p. 1067.)

Collins is flawed. It affirms a trial court's decision to allocate $1,743,500 of a $2,750,000 settlement by MICRA-protected defendants (a hospital and physicians) to noneconomic damages. That makes no sense. There's no rational justification for ruling that MICRA-protected defendants would have paid seven times more than their maximum potential liability for noneconomic damages in the settlement. (See *Rashidi*, *supra*, 60 Cal.4th at p. 727 [when defendants are protected by MICRA, their

"[s]ettlement negotiations are based on liability estimates that are necessarily affected by the cap" and the MICRA cap "restrains the size of settlements"].) The *Collins* court's reliance on *Espinoza*, *supra*, 9 Cal.App.4th 268 to justify the settlement allocation was misplaced since *Espinoza* did not involve a settlement by MICRA-protected defendants. Until *Collins* is expressly disapproved, counsel will need to explain why it is inconsistent with both logic and *Rashidi* and should not be followed. (See MICRA Manual, pp. 136–137.)