

# The Assessment of Professional Liability Claims in the U.S.

InsuranceLawGlobal.com

July 18, 2024

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**P**rofessional liability claims in the United States are often pursued in state court, which means there can be a wide variety of statutes and common law applied to such claims, depending upon which of the fifty (50) jurisdictions is in play. This article will highlight three areas pertaining to the assessment of professional liability claims in the United States.

First, how liability is apportioned among culpable parties differs by state. This analysis considers two different types of apportionment: (1) apportionment among defendants and (2) apportionment between claimants and defendants. With respect to apportionment among defendants, in states where pure joint and several liability applies, any defendant who contributes to the harm of the claimant can be liable for the entirety of the claimant's damages.

Many states apply modified joint and several liability, where a defendant must be a certain percentage liable, usually at least in excess of fifty percent (50%), in order to be responsible for the entirety of the damages. For example, often a defendant who is less than fifty percent (50%) liable cannot be held responsible for one hundred percent (100%) of the damages. To the contrary, if a defendant is found to be sixty (60%) liable, that defendant may be responsible to pay one hundred percent (100%) of the damag-

es. Still other states have abolished joint and several liability, and damages in those states are apportioned pursuant to the percentage of the harm each defendant is found to have caused.

With respect to apportionment between claimants and defendants, we consider whether a state applies comparative negligence or contributory negligence. Many states apply a theory of comparative negligence, under which a claimant's damages will be reduced by the percentage portion of the claimant's harm which can be attributed to the claimant's own conduct as compared to the conduct of the defendant. For example, if a claimant is found to have been twenty percent (20%) responsible for causing his own harm, the damages required to be paid by defendants will be reduced to eighty percent (80%) of the proven damages. However, a much smaller number of states apply contributory negligence, a theory which can be extremely beneficial to the defense. In states where contributory negligence applies to professional liability claims, a claimant who is even one percent (1%) liable is completely barred from recovering against a defendant, even where that defendant's conduct also contributed to the claimant's harm.

Second, a question arises as to who is responsible to join potentially liable parties

and, again, this varies by state. Many states impose an entire controversy doctrine, pursuant to which all parties with a material interest, and all claims related to the controversy, must be joined to one litigation. Failure to join relevant third parties in an entire controversy doctrine state can preclude a party from later asserting liability of that third party. In other states, there is more flexibility pursuant to which the parties can pursue their claims. Claims for contribution and indemnity often arise at the conclusion of the matter giving rise to the obligations and, thus, those claims often can be brought as a separate and later cause of action.

Third, and this is perhaps the biggest difference in the assessment of professional liability claims in the United States as compared to other countries, citizens of the United States have the constitutional right to a jury trial. This is applicable in all states, and it does apply to professional liability claims. Many of you will be familiar with media reports regarding the astronomical nature of some jury verdicts in some United States

jurisdictions, and this is an important consideration for defense counsel in approaching all litigation, including professional liability claims. Of course, the right to a jury trial can be waived. Contracts can include provisions waiving the right to a jury trial, parties can agree to alternative dispute resolution through contractual provisions, a party can waive its right to a jury trial by failing to properly demand a jury when litigation is commenced, and parties can agree during the course of litigation to a bench trial or even binding arbitration instead of trial.

In sum, the assessment of professional liability claims in the United States is largely dependent upon the specific state in which you are litigating such claims, and an understanding of local statutes and common law is critical to defending such claims.



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