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Casenotes

***Evangelatos v. Superior Court:* Clarifying the Rule on Retroactive Intent**

In 1986 California voters passed The Fair Responsibility Act (Proposition 51)¹ limiting the liability of a defendant for noneconomic damages to an amount directly proportionate to his percentage of fault.² Among the uncertainties arising after the passage of Propo-

1. CAL. CIV. CODE § 1431.2 (West Supp. 1988) (codifying Proposition 51). Proposition 51 was passed on June 3, 1986. Initiative statutes become effective the day after the election in which they are approved. Cal. Const. art. XVIII, § 4, (West 1983). Thus, Proposition 51 took effect on June 4, 1986. Proposition 51 was passed by a vote of 62 to 38 percent. See *Evangelatos v. Superior Court*, 44 Cal. 3d 1188, 1231, 753 P.2d 585, 620, 246 Cal. Rptr. 629, 664 (1988) (Kaufman, J., concurring in part, dissenting in part). Gene Livingston, Chairman of the Association for California Tort Reform (ACTR) was the official proponent who filed Proposition 51 with the California Attorney General requesting preparation of a title and placement on the ballot. See F. HIESTAND & P. HALVONIK, THE FAIR RESPONSIBILITY ACT OF 1986: AN ANALYSIS OF ITS APPLICATION AND CONSTITUTIONALITY 9 [hereinafter ACTR Occasional Paper]. Mr. Hiestand is General Counsel for ACTR and prepared the Amicus Brief for ACTR on behalf of defendants in *Evangelatos*.

2. Civil Code section 1431.2 states:

[T]he liability of each defendant for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against that defendant for that amount.

CAL. CIV. CODE § 1431.2 (West Supp. 1988). Consequently, Proposition 51 limits the effect of the "deep pocket rule," since plaintiffs, who could previously sue any solvent defendant and recover full judgment, must now sue all potential defendants in order to obtain full compensation for non-economic damages. However, Proposition 51 does not affect joint and several liability for economic damages. Consequently, those plaintiffs who seek only economic losses, such as medical expenses and lost wages, may still recover the full judgment from any solvent defendant. See *infra* notes 18-30 and accompanying text (discussing the development of apportionment between economic and non-economic damages).

sition 51 are its constitutionality and applicability retroactively.³ The resolution of these issues resulted in a split between the Court of Appeal for the First and Second Appellate District in California.⁴ In *Evangelatos v. Superior Court*,⁵ the California Supreme Court held that Proposition 51 survived the scrutiny of vagueness⁶ and equal protection⁷ challenges brought by the plaintiff.⁸ However, the court limited the application of Proposition 51 to causes of action which accrued after the passage of the statute.⁹

The trial of *Evangelatos v. Student Science Stores, Inc.*¹⁰ occurred three weeks after the passage of Proposition 51.¹¹ The trial court and the Court of Appeal for the Second Appellate District determined that Proposition 51 was constitutional and should be applied to all cases which had not gone to trial before its effective date.¹² *Evangelatos* resolved the conflict between the Court of Appeals in the First and Second Appellate Districts regarding the constitutionality and retroactivity of Proposition 51.¹³ Under *Evangelatos*, legal drafters must expressly state an intent to apply laws retroactively or no retroactive application will be allowed.¹⁴

Part I of this note discusses the legal background preceding the changes made by Proposition 51.¹⁵ Part II examines the majority and

3. *Joint and Several Liability, The Tough Issues*, CAL. CEB PROGRAM BOOKLET 7-8 (July/Aug 1986) [hereinafter CAL. CEB PROGRAM BOOKLET].

4. *Compare* Russell v. Superior Court, 185 Cal. App. 3d 810, 813, 230 Cal. Rptr. 102, 103-04 (1987) (holding that Proposition 51 was not retroactive) with *Evangelatos v. Superior Court*, 198 Cal. App. 3d 320, 328, 234 Cal. Rptr. 344, 349 (1987) (holding Proposition 51 retroactive to all cases pending trial on its effective date), *rev'd*, 44 Cal.3d 1188, 753 P.2d 585, 246 Cal. Rptr. 629 (1988).

5. 44 Cal. 3d 1188, 753 P.2d 585, 246 Cal. Rptr. 629 (1988).

6. *See infra* notes 71-80 and accompanying text (discussing the void for vagueness challenges).

7. *See infra* notes 81-100 and accompanying text (discussing the equal protection challenge).

8. *Evangelatos*, 44 Cal. 3d at 1202-1205, 753 P.2d at 593-595, 246 Cal. Rptr. at 636-639.

9. *Id.* at 1193, 753 P.2d at 587, 246 Cal. Rptr. at 631.

10. *See id.* at 1193-94, 753 P.2d at 588, 246 Cal. Rptr. at 632 (stating that the original action was against Student Science Stores, Inc. and Van Waters and Rogers).

11. *Id.* *See* Complaint for Damages for Personal Injury, *Evangelatos v. Student Science Stores, Inc.*, No. C 373 428 (Los Angeles County Sup. Ct. July 3, 1981) (on file at the *Pacific Law Journal*). The cause of action accrued on or about July 7, 1980. The complaint was filed July 3, 1981.

12. *Evangelatos*, 44 Cal. 3d at 1195-96, 753 P.2d at 588-89, 246 Cal. Rptr. at 630-31.

13. *See id.* at 1193-94, 753 P.2d at 587, 246 Cal. Rptr. at 631.

14. *See infra* notes 114-176 and accompanying text (discussing the retroactive analysis of the majority).

15. *See infra* notes 18-52 and accompanying text.

minority opinions in *Evangelatos*.¹⁶ Part III considers the possible legal ramifications of the decision.¹⁷

I. LEGAL BACKGROUND

A. Joint and Several Liability Doctrine

The current comparative fault system of California is a judicially created answer¹⁸ to the harsh consequences of a contributory negligence system.¹⁹ Generally, the contributory negligence system prevents plaintiffs from recovering if they contributed to their harm in any manner.²⁰ The contributory negligence system also requires any defendant found liable to pay full damages even if he was only minimally negligent.²¹ In *Li v. Yellow Cab Co.*, the California Supreme Court replaced the doctrine of contributory negligence with the principle of comparative fault.²² Under comparative negligence, the recovery of the plaintiff is diminished in direct proportion to his degree of fault.²³

*American Motorcycle Association v. Superior Court*²⁴ further refined the scope of comparative fault by permitting one tortfeasor to obtain a right of partial equitable indemnity against other concurrent tortfeasors.²⁵ Consequently, under *American Motorcycle*, each tortfeasor bears liability in direct proportion to his respective degree of fault.²⁶ *American Motorcycle* also allows defendants to join other

16. See *infra* notes 64-209 and accompanying text.

17. See *infra* notes 210-226 and accompanying text.

18. See *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 808, 532 P.2d 1226, 1229, 119 Cal. Rptr. 858, 861 (1975).

19. See generally RESTATEMENT (SECOND) OF TORTS § 470 (1965) (describing when contributory negligence will bar a plaintiff's action); W. KEETON, D. DOBBS, R. KEETON & D. OWENS, PROSSER AND KEETON ON TORTS § 67 (5th ed. 1984) [hereinafter W. KEETON] (describing the doctrine of comparative negligence).

20. See W. KEETON, *supra* note 19, § 67.

21. See *id.*, § 47 (describing plaintiff's option to take judgment against one joint tortfeasor and dismiss the action against other joint tortfeasors).

22. *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 812-13, 532 P.2d 1220, 1232, 119 Cal. Rptr. 858, 864 (1975). Different forms of comparative fault are used throughout the United States. The form adopted by California is referred to as "pure" comparative fault and compensates an injured party for all harm attributable to the wrongdoer. See W. KEETON, *supra* note 19, § 67.

23. *Li*, 13 Cal. 3d at 812-13, 532 P.2d at 1232, 119 Cal. Rptr. at 864.

24. *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).

25. *Id.* at 591, 578 P.2d at 907, 146 Cal. Rptr. at 190.

26. *Id.*

concurrent tortfeasors through the use of cross-complaints.²⁷ However, a defendant can still be held jointly and severally liable for all of the plaintiff's damages, economic as well as noneconomic.²⁸

To clarify further the problems of contribution and indemnity among joint tortfeasors, the Court of Appeal for the Second Appellate District, in *Sears, Roebuck & Co. v. International Harvester Co.*,²⁹ determined that a settling concurrent tortfeasor has the right of comparative indemnity against a concurrent tortfeasor not named by the plaintiff.³⁰ In *Paradise Valley Hospital v. Schlossman*,³¹ the Court of Appeal for the Fourth Appellate District held that solvent defendants must apportion among themselves the shortfall created by any concurrent insolvent defendants in direct proportion to the respective degrees of culpability of the solvent defendants.³²

B. Proposition 51

Although the judicially developed doctrine of comparative fault apportioned liability in a closer degree to the direct proportion of the defendant's fault, minimally culpable but solvent defendants, such as local and state governments, often bore the entire obligation to pay for a plaintiff's damages because other, more culpable defendants were insolvent.³³ Initially, the Association for California Tort

27. *Id.* at 607, 578 P.2d at 917, 146 Cal. Rptr. at 200.

28. *Id.* at 606, 578 P.2d at 917, 146 Cal. Rptr. at 200.

29. 82 Cal. App. 3d 492, 147 Cal. Rptr. 262 (1978).

30. *Sears, Roebuck & Co.*, 82 Cal. App. 2d at 495-96, 147 Cal. Rptr. at 264.

31. 143 Cal. App. 3d 87, 191 Cal. Rptr. 531 (1983).

32. *Paradise Valley Hosp.*, 143 Cal. App. 3d at 88-89, 191 Cal. Rptr. at 532-33.

33. See ACTR Amicus Brief on Behalf of Defendants, *Evangelatos v. Superior Court*, No. S00194, at 33 [hereinafter ACTR Amicus Brief] (copy on file at the *Pacific Law Journal*) referring to the REP. LEGIS. BUDGET COMMITTEE, THE 1986-87 BUDGET: PERSPECTIVES AND ISSUES (1986) (stating that from 1975 to 1985, the total civil filings for personal injury, property damage, and death in California increased by 55 percent, while the population increased by only 21 percent); *Clemente v. State*, 101 Cal. App. 3d 374, 161 Cal. Rptr. 799 (1980) (state found liable for \$3.1 million even though its estimated degree of fault was only one percent). But cf. Comment, *Rumors of Crisis: Considering the Insurance Crisis and Tort Reform in an Information Vacuum*, 37 EMORY L.J. 404, 414 (citing the National Center for State Courts press release which states that there was "no evidence to support the existence of a 'national litigation explosion' in state trial courts"). The comment states that perception of a litigation crisis is largely derived from federal, rather than state caseload data. *Id.* at 415. The comment also asserts that reliance on this data is misplaced because federal and state caseload data cannot be correlated. *Id.* at 416. According to the comment, litigation over asbestos claims accounts for over one quarter of product liability claims and non-product liability tort cases account for only 2.8 percent of the increase in federal tort filings. Furthermore the article states that divorce and post-divorce proceedings account for the greatest increase in state court dockets, not tort claims. *Id.*

Reform (ACTR) sponsored legislation that attempted to reduce the effects of the “deep pocket rule”³⁴ and ameliorate the allegedly increasing costs of an “insurance crisis”³⁵ by limiting the liability of a concurrent tortfeasor to his proportionate share.³⁶ These attempts failed, however, when bills that passed the Senate were not approved by the Assembly Judiciary Committee.³⁷ In response to this legislative vacuum, ACTR wrote Proposition 51, drawing heavily from the previously unpassed bills.³⁸ The final product retained the traditional joint and several liability doctrine for economic damages and imposed several liability for noneconomic damages.³⁹ Proposition 51, however, did not explicitly state whether it would apply retroactively to cases that accrued before its passage.⁴⁰

In *Russell v. Superior Court*,⁴¹ the Court of Appeal for the First Appellate District held that Proposition 51 was not retroactive.⁴² In *Russell*, the plaintiff allegedly suffered lung disease from exposure to asbestos products, and he sued several manufacturers of those products.⁴³ Russell’s suit was awaiting trial when Proposition 51 passed.⁴⁴ Russell⁴⁵ filed a motion in limine regarding the application of Proposition 51 to the case.⁴⁶ The trial court held Proposition 51 applied retroactively.⁴⁷

The Court of Appeal for the First Appellate District reversed, stating that there was no clear indication of an implied intent to apply Proposition 51 retroactively.⁴⁸ Presiding Justice Low, writing for the court, reasoned that the use of the word “shall” in the Proposition indicated an intent that it apply prospectively and not

34. See Kirsch, *Prop. 51 Shakes (barely) the House of Torts*, Cal. Law, June 1986 at 69 (explaining the “deep pocket rule”).

35. The question of whether an “insurance crisis” actually ever existed is still debated. See generally Comment, *supra* note 33, at 404 (discussing the data on which the “insurance crisis” is based).

36. See, e.g., S.B. 75, Cal. Senate, Reg. Sess. 1985-86; S.B. 575, Cal. Senate, Reg. Sess. 1983-84; S.B. 500, Cal. Senate, Reg. Sess. 1981-82.

37. *Evangelatos v. Superior Court*, 44 Cal. 3d 1188, 1199, 753 P.2d 585, 591, 246 Cal.Rptr. 629, 635 (1988).

38. See ACTR Amicus Brief, *supra* note 33, at 2.

39. See *supra* note 2 (text of Proposition 51).

40. See *Russell v. Superior Court*, 185 Cal. App. 3d 810, 813, 230 Cal. Rptr. 102, 103 (1987) (finding Proposition 51 unclear on the question of retroactivity).

41. 185 Cal. App. 3d 810, 230 Cal. Rptr. 102 (1987).

42. *Russell*, 185 Cal. App. 3d at 813, 230 Cal. Rptr. at 103.

43. *Id.* at 812, 230 Cal. Rptr. at 103.

44. *Id.*

45. *Id.* at 813, 230 Cal. Rptr. at 103.

46. *Id.*

47. *Id.*

48. *Id.* at 820, 230 Cal. Rptr. at 109.

retroactively.⁴⁹ He found that the passage of Proposition 51 alone mitigated any insurance crisis by allowing for a reduction in premiums.⁵⁰ Furthermore, the opinion stated that retroactive application of Proposition 51 would decrease the liability of a defendant without a corresponding reduction of insurance premiums.⁵¹ The court reasoned that the California electorate would not give the insurance industry such a windfall so lightly.⁵²

II. THE CASE

In *Evangelatos*, the California Supreme Court upheld the constitutionality of Proposition 51, but limited its application to causes of action which accrued after its passage.⁵³ The court rejected the defendants' arguments, that there was an implied intent to make Proposition 51 retroactive.⁵⁴ *Evangelatos* settles conflicts between the Courts of Appeal for the First and Second Appellate Districts regarding the constitutionality and retroactivity of Proposition 51.⁵⁵

A. The Facts

Gregory Evangelatos, an eighteen-year-old high school student, was seriously injured⁵⁶ while attempting to make fireworks at home with chemicals purchased from the Student Science Store, Inc., a retail store.⁵⁷ Evangelatos brought actions based on negligence and strict

49. *Id.* at 819, 230 Cal. Rptr. at 107.

50. *Id.* at 820, 230 Cal. Rptr. at 109.

51. *Id.*

52. *Id.*

53. *Evangelatos v. Superior Court*, 44 Cal.3d 1188, 1193, 753 P.2d 585, 587, 246 Cal.Rptr. 629, 631 (1988).

54. See *infra* notes 127-177 and accompanying text (discussing defendants arguments in favor of a retroactive application of Proposition 51).

55. Compare *Evangelatos v. Superior Court*, 198 Cal. App. 3d 320, 234 Cal. Rptr. 344 (1982) (holding that Proposition 51 is retroactive), *rev'd*, 44 Cal. 3d 1188, 753 P.2d 585, 246 Cal. Rptr. 629 (1988) with *Russell v. Superior Court*, 185 Cal. App. 3d 810, 813, 230 Cal. Rptr. 102, 103 (1987) (holding that Proposition 51 is not retroactive).

56. Evangelatos lost all of his left thumb, parts of three fingers on his left hand, part of his right thumb, part of his right index finger, all vision in his right eye, and all but light/dark differentiation in his left eye. See Petition for Appropriate Peremptory/Alternative Extraordinary Writ Relief; Memorandum of Points and Authorities, *Evangelatos v. Superior Court*, No. C 373 428, at 7 (Los Angeles County Sup. Ct. 1988) (copy on file at *Pacific Law Journal*) [hereinafter Petition].

57. Petition, *supra* note 56, at 7-8. Specifically, Mr. Evangelatos brought a pestle in contact with a mortar containing aluminum flake powder, sulfur, and sodium chlorate. Instantaneous detonation occurred. *Id.*

liability theories against the retailer, wholesaler, and four manufacturers.⁵⁸ The case was assigned for trial June 23, 1986, almost three weeks after Proposition 51 became law.⁵⁹ Counsel for both sides filed motions with the trial court questioning whether Proposition 51 applied to this case.⁶⁰ The trial court ruled that Proposition 51 should be applied to all cases which had not yet gone to trial.⁶¹ The Court of Appeal for the Second Appellate District affirmed,⁶² thus creating a conflict with the First Appellate District decision in *Russell*.⁶³

B. *The Majority Opinion*

In an opinion by Associate Justice Arguelles, the California Supreme Court unanimously upheld the constitutionality of Proposition 51,⁶⁴ but divided four to three in reversing the Court of Appeals on the issue of retroactivity by finding that Proposition 51 applied prospectively only.⁶⁵ On the issue of constitutionality, the court held that Proposition 51 was not unconstitutional on either a void for

58. *Evangelatos v. Superior Court*, 44 Cal. 3d 1188, 1195, 753 P.2d 585, 588, 246 Cal. Rptr. 629, 632 (1988). The court granted three of the manufacturers summary judgment because chemicals which were originally packaged with warning labels had been repackaged and relabeled by the retailer, a practice over which the manufacturer had no control. The plaintiff dismissed the action against the fourth manufacturer. *Id.*

59. *Id.* at 1195, 753 P.2d at 588, 246 Cal. Rptr. at 632.

60. *Id.*

61. *Id.*

62. See *Evangelatos v. Superior Court*, 198 Cal. App. 3d 320, 234 Cal. Rptr. 344 (1987). Prior to the Supreme Court's receipt of the petition for review, *Russell* held that Proposition 51 was inapplicable to all causes of action which accrued prior to its effective date. *Russell v. Superior Court*, 185 Cal. App. 3d 810, 813, 230 Cal. Rptr. 102, 104 (1988). *Evangelatos* was remanded to the Court of Appeal to reexamine it in light of *Russell*. *Evangelatos*, 44 Cal. 3d at 1195, 246 Cal. Rptr. at 632, 753 P.2d at 588. Nonetheless, the Court of Appeal upheld the trial court's determination that the Act was intended to apply to all cases which had not been tried by the time of its effective date. *Evangelatos*, 198 Cal. App. 3d at 327, 234 Cal. Rptr. at 344, *rev'd*, 44 Cal. 3d 1188, 753 P.2d 585, 246 Cal. Rptr. 629. The appellate court rejected the reasoning in *Russell* for three reasons. First, the court found that to deny the Act's retroactivity frustrated electoral intent by delaying the effectiveness of the decision of the electorate by several years. Second, the court found the *Russell* court's interpretation of the word "shall" in the Proposition as connoting future activity was misplaced. Third, the court found that the *Russell* analysis of an insurance industry windfall was inaccurate, noting that since insurance premiums are regulated by the free market insurance companies' losses must affect their future rates so that they can turn a profit. *Id.* at 327, 234 Cal. Rptr. at 348.

63. *Russell*, 185 Cal. App. 3d at 813, 230 Cal. Rptr. at 103-04.

64. *Evangelatos v. Superior Court*, 44 Cal. 3d 1188, 1193, 753 P.2d 585, 587, 246 Cal. Rptr. 629, 631. In contrast, the Court of Appeal for the Second Appellate District did not discuss the constitutionality of Proposition 51. *Russell*, 185 Cal. App. 3d at 810, 230 Cal. Rptr. at 102.

65. See *infra* notes 71-177 and accompanying text (describing the reasoning of the court on the issues of constitutionality and retroactivity).

vagueness challenge⁶⁶ or under a rational basis equal protection analysis.⁶⁷ The court parted company on the issue of retroactivity, dividing four to three on whether Proposition 51 was applicable to causes of action which accrued before the passage of the Act.⁶⁸ The majority rejected the five arguments made by defendant for retroactive application of the statute, finding the statute lacked the manifestation of intent necessary to render its application retroactive.⁶⁹

1. Constitutional Challenge

The court unanimously held that Proposition 51 did not violate either the vagueness doctrine or equal protection clause.⁷⁰ The plaintiff cataloged a number of questions alleged to be instances of ambiguity and uncertainty in Proposition 51⁷¹ and asserted that the sheer number of questions illustrated the necessity of weighing them

66. See *infra* notes 71-80 and accompanying text (discussing the void for vagueness challenge). See also *Connally v. General Constr. Co.*, 269 U.S. 385 (1926) (giving the definition of a statute that is void for vagueness as that which is so unclearly defined that persons "of common intelligence must necessarily guess at its meaning and differ as to its application.").

67. See *infra* notes 71-100 and accompanying text (discussing the constitutional challenges).

68. *Evangelatos*, 44 Cal. 3d at 1189, 753 P.2d at 585, 246 Cal. Rptr. at 629.

69. See *infra* notes 127-177 and accompanying text (discussing reasons for rejecting a retroactive application of Proposition 51).

70. See *infra* notes 71-100 and accompanying text (discussing the constitutionality of Proposition 51). Although Justices Kaufman, Eagleson and Anderson dissented from the majority opinion on the issue of retroactivity, they concurred in the judgment that Proposition 51 is constitutional. *Evangelatos*, 44 Cal. 3d at 1193, 753 P.2d at 587, 246 Cal. Rptr. at 631.

71. Plaintiff's questions were as follows:

1. Does Prop. 51 apply retroactively?: to existing lawsuits or causes of action?; is it effective as of date cause of action arose, or date suit filed, or date of trial?; what about retrials on other grounds? 2. What cases are affected by Prop. 51?: actions in which defendants are liable without fault, e.g. strict products liability?; or on an intentional tort theory?; actions in which plaintiff is faultless?; actions against only a single defendant because plaintiff has settled with other wrongdoers before filing suit? 3. What damages are covered by Prop. 51?: is there a new standard of proof ("objectively verifiable, monetary") for economic losses?; is it applicable to future losses (earning capacity, future medical expenses, etc.)? 4. Whose fault is considered?: defendants who have already settled?; cross-defendants?; employer-employee?; tortfeasors immune from suit (e.g. employers covered by workers comp., governmental tortfeasors)?; tortfeasors not subject to jurisdiction? 5. How is fault determined?: fault of tortfeasors not before the court? (must prove they were not the major wrongdoers?); at good faith settlement hearings?; at trial?; new jury instructions required?; new special verdict forms required? 6. "Mary Carter" Agreements Effect?

Memorandum of Points and Authorities in Support of Plaintiff's Objections in Opposition to Defendant's Proffered Jury Instructions and Special Verdict Forms, *Evangelatos v. Superior Court*, No. C 373 428, at 44-45 [hereinafter Plaintiff's Objections] (copy on file at *Pacific Law Journal*).

against the principles of the vagueness doctrine.⁷² Additionally, the plaintiff asserted that Proposition 51 confuses the public and leaves judges and jurors to decide cases without any standards to guide them.⁷³

The court refuted this contention in holding that as long as the statute does not infringe upon a constitutional right, a challenger of Proposition 51 must show impermissible vagueness in all, not merely some, of its applications.⁷⁴ The court held that Proposition 51 was not vague in all its applications.⁷⁵ For example, application of Proposition 51 to cases accruing after June 4, 1986, and application of the statute to a multiple tortfeasor case in which all defendants are solvent and joined is not vague.⁷⁶ Finally, the court analogized the factual situation to that presented in *American Bank & Trust Co. v. Community Hospital*.⁷⁷ In *American Bank*, the plaintiff challenged the validity of California Code of Civil Procedure section 667.7 on vagueness grounds.⁷⁸ The court in *American Bank* stated that the ambiguities raised by plaintiff were not insurmountable and that any uncertainties could be addressed by allowing the courts to fill gaps in the statutory scheme on a case-by-case basis.⁷⁹ In applying the reasoning of *American Bank*, the court in *Evangelatos* stated that the same reasoning applied to Proposition 51 and found no merit in the claim of unconstitutional vagueness.⁸⁰

72. *Id.* at 45.

73. *Id.* at 47. "Civil as well as criminal statutes must be sufficiently clear as to give a fair warning of the conduct prohibited, and they must provide a standard or guide against which conduct can be uniformly judged by courts and administrative agencies." *Morrison v. State Bd. of Educ.*, 1 Cal. 3d 214, 231, 461 P.2d 375, 387, 82 Cal. Rptr. 175, 187 (1969) (male teacher who engaged in limited noncriminal homosexual relations with a fellow male teacher was not subject to disciplinary action under a state statute authorizing revocation of teaching credentials unless teacher's actions indicated unfitness to teach).

74. *Evangelatos v. Superior Court*, 44 Cal. 3d 1188, 1201, 753 P.2d 585, 592-93, 246 Cal. Rptr. 629, 635-36. The court stated that most statutes are ambiguous in some respects. *Id.* Justice Arguelles pointed out that the statute can be applied quite clearly in a number of situations including cases accruing after its effective date. *Id.* at 1202, 753 P.2d at 593, 246 Cal. Rptr. at 637.

75. *Id.* at 1202, 753 P.2d at 593, 246 Cal. Rptr. at 637.

76. *Id.*

77. *Id.* at 1201-02, 753 P.2d at 593, 246 Cal. Rptr. at 636-37 (referring to *American Bank & Trust Co. v. Community Hosp.*, 36 Cal. 3d 359, 683 P.2d 670, 204 Cal. Rptr. 671 (1984)) (holding MICRA constitutional under a void for vagueness challenge).

78. *American Bank & Trust Co. v. Community Hosp.*, 36 Cal. 3d at 364, 683 P.2d 670, 672, 204 Cal. Rptr. 671, 673. Plaintiff challenged section 667 of the California Code of Civil Procedure, part of the Medical Injury Reform Compensation Act (MICRA) on the ground that a provision mandating periodic payments raised questions of how a trial court is to formulate a payment plan in the absence of detailed special jury verdicts. *Id.*

79. *Id.* at 378, 683 P.2d at 682, 204 Cal. Rptr. at 683.

80. *Evangelatos v. Superior Court*, 44 Cal. 3d 1188, 1202, 753 P.2d 585, 593, 246 Cal. Rptr. 629, 637 (1988).

Next, the decision discussed the plaintiff's two theories that Proposition 51 violated the Equal Protection Clauses of the state and federal constitutions.⁸¹ Under the first theory, the plaintiff urged that Proposition 51 irrationally discriminated between those plaintiffs who suffered economic losses and those who sought recovery of non-economic losses.⁸² Under the second theory, plaintiff contended that Proposition 51 created an irrational distinction between plaintiffs injured by solvent versus insolvent tortfeasors.⁸³ Specifically, the plaintiff asserted that those who suffered economic losses received greater protection than those who suffered non-economic losses.⁸⁴ The court responded to this argument by analogizing the *Evangelatos* facts to those of *Fein v. Permanente Medical Group*,⁸⁵ which held that discrimination in the form of limitations on recovery of non-economic damages was not a violation of equal protection even under a rational basis analysis.⁸⁶

81. CAL. CONST. art.I, §§ 11, 21. Article I, sections 11 and 21 of the California Constitution guarantee to every person that "[a]ll laws of a general nature shall have a uniform operation" and that "[no] citizen, or class of citizens, [shall] be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens". *Id.* The Fourteenth Amendment to the United States Constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

82. *Evangelatos*, 44 Cal. 3d at 1203, 753 P.2d at 594, 246 Cal. Rptr. at 637. The United States Supreme Court has employed three levels of scrutiny with regard to upholding legislation under the equal protection clause of the 14th Amendment. Strict scrutiny is applied to any statute that is based on a suspect classification or which impairs a fundamental right. *See generally* *Hernandez v. Texas*, 347 U.S. 475 (1954) (demonstrating that legislation that discriminated in jury selection against Mexican-Americans was subject to strict scrutiny because the classification effectively disfavored them as a group); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (holding that a poll tax violated the equal protection clause by depriving citizens of the fundamental right of voting; a right the court stated was preservative of all other rights). This kind of legislation will be upheld only where necessary to promote a compelling government interest. *Harper*, 383 U.S. at 667. The other recognized level of constitutional review of equal protection challenges is the "rational relation" review. *See, e.g.,* *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166 (1980) (upholding a modification of railroad retirement benefits despite the lack of articulation of legislative purpose, by finding as long as there was some rational reason for Congress to make the classification it became constitutionally irrelevant whether Congress actually did base the legislation on that particular reason). Finally, the Supreme Court has utilized a third level of review which has not been openly acknowledged. This mid-level scrutiny is formulated by the test articulated by the Court in *Toll v. Moreno*, 458 U.S. 1, 20, (1982) (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920)) (stating that the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike). The standard set forth in *Toll* and *F.S. Royster* is still the standard used today.

83. *Evangelatos v. Superior Court*, 44 Cal. 3d 1188, 1204, 753 P.2d 585, 594, 246 Cal. Rptr. 629, 638. *See also infra* notes 84-93 and accompanying text (discussing discrimination between plaintiffs suffering economic and non-economic damages).

84. *Evangelatos*, 44 Cal. 3d at 1204, 753 P.2d at 594, 246 Cal. Rptr. at 638.

85. 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368 (1985).

86. *Fein*, 38 Cal. 3d at 162, 695 P.2d at 683, 211 Cal. Rptr. at 385.

In *Fein*, plaintiff challenged the constitutionality of the Medical Injury Compensation Reform Act (MICRA) which was intended to respond to what the legislature called "an insurance crisis" in the medical malpractice area by placing a cap of \$250,000 on the recovery of noneconomic damages.⁸⁷ Because limiting recovery of noneconomic damages alone was considered a cost-effective means of alleviating the crisis, the *Fein* court held MICRA to be rationally related⁸⁸ to the goal of alleviating the insurance crisis, and therefore, not a violation of equal protection provisions.⁸⁹ Furthermore, the Justices in *Fein* stated that they knew of no case law that immunized the recovery of noneconomic damages from legislative limitation or revision.⁹⁰ Relying on this statement, the *Evangelatos* court held that although Proposition 51 imposed a classification which may give an advantage of greater recovery to persons suffering economic loss, the drafters of the Proposition were not required to take away that advantage in order to achieve equal protection for both classes.⁹¹ The court stated that since the distinction drawn by Proposition 51 between economic and non-economic damages was less severe than the limitation imposed by MICRA, it also did not violate the equal protection clauses.⁹² The court pointed out that Proposition 51 placed no limitation on the amount of non-economic damages recoverable but only a limitation on the proportion of those damages to be paid by a particular defendant.⁹³

Second, the plaintiff contended that the Act impermissibly discriminated within the class of plaintiffs who suffer noneconomic damages by granting a full recovery only to those persons injured by solvent

87. *Id.* at 160, 695 P.2d at 680, 211 Cal. Rptr. at 383. *See also* CAL. CIV. CODE § 3333.2 (West Supp. 1988) (providing the text of MICRA).

88. The plaintiff argued that in order to survive a constitutional challenge that a statute violates equal protection, the court must apply mid-level scrutiny. The plaintiff did not specify why this level of scrutiny was chosen as applicable in this case. *See* Plaintiff's Objections, *supra* note 71, at 56 (quoting *Reed v. Reed*, 404 U.S. 71, 75-76 (1971)) (equal protection clause denies the states the power to enact laws that treat persons differently and divide persons into different classes based on criteria wholly unrelated to objectives of the statute); *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) (holding that classifications made by state legislatures must be reasonable). The majority, however, applied a rational relation test to Proposition 51. *See Evangelatos v. Superior Court*, 44 Cal. 3d 1188, 1203-04, 753 P.2d 585, 594-95, 246 Cal. Rptr. 629, 637-38 (1988).

89. *Fein v. Permanente Medical Group*, 38 Cal. 3d 137, 160, 695 P.2d 665, 680, 211 Cal. Rptr. 368, 383 (1985) (holding MICRA constitutional under an equal protection challenge).

90. *Id.* at 159-60, 695 P.2d at 681, 211 Cal. Rptr. at 384.

91. *Evangelatos*, 44 Cal. 3d at 1203, 753 P.2d at 594, 246 Cal. Rptr. at 638.

92. *Id.* at 1203, 753 P.2d at 594, 246 Cal. Rptr. at 638.

93. *Id.* at 1203-04, 753 P.2d at 594, 246 Cal. Rptr. at 638.

tortfeasors.⁹⁴ The court rejected this contention.⁹⁵ Unless the drafters of Proposition 51 intended to discriminate between those suffering non-economic injuries by solvent as opposed to insolvent tortfeasors the classification would not be impermissible.⁹⁶ The court stated that Proposition 51 intended to limit the liability of each defendant for non-economic damages to his proportion of fault.⁹⁷ Consequently, a distinction between this category of plaintiffs alone was not enough to render Proposition 51 unconstitutional.⁹⁸ The court allowed the use of legislation to limit non-economic damage liability finding it entirely appropriate, thus reinforcing its decisions in the MICRA cases of *Fein*⁹⁹ and *American Bank*.¹⁰⁰

2. The Retroactivity Challenge

The second major assertion involved the reliance interest of parties to the litigation in then-existing rules of joint and several liability.¹⁰¹ The plaintiff contended that this reliance interest would be unfairly defeated by a retroactive application of the Proposition.¹⁰² The court agreed, noting that before the enactment of Proposition 51, several plaintiffs and defendants relied on the existing joint and several liability rules in deciding which parties to join and in rejecting or accepting settlement offers.¹⁰³ The defendants asserted that the nature and purposes of Proposition 51 necessitated a retroactive application.¹⁰⁴ The court held the statute prospective in application.¹⁰⁵ First, the court dispensed with the argument that the issue of retroactivity was not raised by the factual situation because application of Proposition 51 to cases tried after the effective date of Proposition 51 was prospective application.¹⁰⁶ Justice Arguelles emphasized that ap-

94. *Id.* at 1204, 753 P.2d at 594, 246 Cal. Rptr. at 638.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Fein v. Permanente Medical Group*, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368 (1985).

100. *American Bank & Trust v. Community Hosp.*, 36 Cal. 3d 359, 683 P.2d 670, 204 Cal. Rptr. 671 (1984).

101. *Evangelatos v. Superior Court*, 44 Cal. 3d 1188, 1205, 753 P.2d 585, 595, 246 Cal. Rptr. 629, 639 (1988).

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 1227, 753 P.2d at 611, 246 Cal. Rptr. at 655.

106. *Id.* at 1205-06, 753 P.2d at 595-96, 246 Cal. Rptr. at 639-40.

plication of a tort reform statute to a cause of action which arose before the effective date of the statute but tried after the effective date of the statute constitutes a retroactive application of the statute.¹⁰⁷ Second, the court found the general rule of statutory construction cases dictate that a presumption of prospectivity exists.¹⁰⁸ Finally, the court rejected five assertions made by the defendant that an implied intent for retroactive application must be found.¹⁰⁹

a. Prospective or Retroactive Application

Amici for defendants had asserted that the application of Proposition 51 to *Evangelatos* would be prospective, thus retroactivity was not involved.¹¹⁰ They reasoned that since the case had not yet gone to trial, no retroactive application of the statute was involved.¹¹¹ The California Supreme Court found this contention to be meritless.¹¹² The court restated the definition of a retroactive law as one affecting rights, obligations, acts, transactions and conditions performed or existing before the effective date of the statute.¹¹³ The court further emphasized that both the United States Supreme Court and other state courts follow the rule enunciated in *Winfree v. Northern Pacific Railway Co.*¹¹⁴ In *Winfree*, the Court held that applying a tort reform statute to a case tried after the effective date of the statute constitutes retroactive application of the statute.¹¹⁵

b. Rule of Statutory Interpretation

In deciding whether Proposition 51 applied retroactively the court relied upon the general principles of statutory construction and upon

107. *Id.* at 1206, 753 P.2d at 596, 246 Cal. Rptr. at 639-40.

108. *Id.* at 1206-09, 753 P.2d at 596-98, 246 Cal. Rptr. at 640-42.

109. See *infra* notes 127-177 and accompanying text (discussing the reasoning for rejecting a retroactive application of Proposition 51).

110. *Evangelatos v. Superior Court* 1188, 1205-06, 753 P.2d 585, 595-96, 246 Cal. Rptr. 629, 639-40 (1988).

111. *Id.*

112. *Id.*

113. This definition of retroactivity was explained in great detail in *Aetna Casualty & Sur. Co. v. Industrial Accident Comm'n*, 30 Cal. 2d 388, 391, 182 P.2d 159, 159-60 (1947). *Aetna* held that legislative intent to apply a statute retroactively cannot be implied from the fact the statute is remedial and subject to liberal construction. *Id.*

114. 227 U.S. 296 (1913).

115. *Winfree*, 227 U.S. at 301.

section three of the California Civil Code.¹¹⁶ According to the majority, statutes are generally construed prospectively, unless the legislation clearly manifests an intent to the contrary.¹¹⁷ California Civil Code section three reinforces this presumption by declaring that all statutes in the Code are to be construed prospectively unless there is an express intent to the contrary.¹¹⁸

The majority acknowledged the cases cited by the dissent¹¹⁹ in which the principle of statutory construction transcended the general rule of prospectivity.¹²⁰ These cases held that the intent of the legislature was controlling. Consequently, a presumption of prospectivity applied only after a finding that the legislative intent was impossible to determine.¹²¹ However, the majority stated that the language relied upon by the dissent¹²² did not indicate that California had opted for an application of the prospectivity principle that was unique and distinct from the United States Supreme Court and that of other states.¹²³ Rather, Justice Arguelles emphasized that in cases decided subsequent to those relied upon by the dissenters,¹²⁴ the

116. Civil Code section 3, states that [s]tatutes will be construed as operating prospectively unless an intention that they shall have retrospective effect is clearly expressed. CAL. CIV. CODE § 3 (West 1983).

117. *Evangelatos v. Superior Court*, 44 Cal. 3d 1188, 1207, 753 P.2d 585, 596, 246 Cal. Rptr. 629, 640 (1988).

118. See CAL. CIV. CODE § 3 (West 1983).

119. The cases cited by the dissent were *Marriage of Bouquet*, 16 Cal. 3d 583, 587, 546 P.2d 1371, 1373, 128 Cal. Rptr. 427, 429 (1976) (listing factors to consider in the determining whether a statute should be retroactively applied); *Mannheim v. Superior Court*, 3 Cal. 3d 678, 686-87, 478 P.2d 17, 21, 91 Cal. Rptr. 585, 589 (1970) (stating that the presumption of prospectivity is subordinated to the canon that statutes are construed to effectuate legislative intent); *In re Estrada*, 63 Cal. 2d 740, 746, 408 P.2d 948, 951-52, 48 Cal. Rptr. 172, 175-76 (1965) (stating the presumption of retroactivity should be applied only after it is determined impossible to ascertain legislative intent).

120. *Evangelatos*, 44 Cal. 3d at 1208-09, 753 P.2d at 597-98, 246 Cal. Rptr. at 641-42.

121. See *Evangelatos*, 44 Cal. 3d at 1208, 753 P.2d at 597, 246 Cal. Rptr. at 641.

122. The language to which the majority referred is that stating that the presumption of prospectivity must be subordinated to "the transcendent canon of statutory construction that the design of the legislature be given effect . . . [and] is to be applied only after, considering all pertinent factors, it is determined that it is impossible to ascertain the legislative intent." *Evangelatos*, 44 Cal. 3d at 1208, 753 P.2d at 597, 246 Cal. Rptr. at 641 (quoting *Marriage of Bouquet*, 16 Cal. 3d 583, 546 P.2d 1371, 128 Cal. Rptr. 427 (1976) and *Mannheim v. Superior Court*, 3 Cal. 3d 678, 478 P.2d 17, 91 Cal. Rptr. 585 (1970)).

123. *Id.* at 1208, 753 P.2d at 597-98, 246 Cal. Rptr. at 641 (referring to the U.S. Supreme Court decision in *United States v. Security Indus. Bank*, 459 U.S. 70 (1982)).

124. *Id.* at 1208, 753 P.2d at 598, 246 Cal. Rptr. at 641-42; refers to *Hoffman v. Board of Retirement*, 42 Cal. 3d 590, 593, 724 P.2d 511, 513, 229 Cal. Rptr. 825, 827 (1986) (pronouncing the general rule that statutes affecting an employee's substantive rights are construed prospectively unless the legislature clearly expresses an intent to the contrary); *Fox v. Alexis*, 38 Cal. 3d 621, 637, 699 P.2d 309, 314, 214 Cal. Rptr. 132, 137 (1985) (stating the factors to be applied to ascertain a legislative intent for retroactivity); *White v. Western Title Ins. Co.*, 40 Cal. 3d 870, 884, 710 P.2d 309, 316, 221 Cal. Rptr. 509, 516 (1985) (unless a

presumption of prospectivity in statutory interpretation has been followed.¹²⁵ As a result, the majority finding no expression of retroactive intent, applied the prospectivity presumption.¹²⁶

c. *Retroactive Application*

The majority of the court acknowledged that even when a statute does not contain an express provision requiring a retroactive application, one can be implied if the legislative history or context of the act provides a sufficiently clear indication of an intent to make it retroactive.¹²⁷ The defendants made five arguments that the requisite implied intent to make Proposition 51 retroactive existed.¹²⁸ Rejecting each of these arguments, a majority of the court held that, in the absence of an objective manifestation of intent to apply Proposition 51 retroactively, none could be inferred.¹²⁹

The defendant's first contention involved inferring an intent to make Proposition 51 retroactive by considering factors enunciated in the case of *Marriage of Bouquet*.¹³⁰ These factors included the context of the enactment, the ends sought to be achieved, the evils sought to be remedied, and the history of the times and legislation on the

statute makes a retroactive application clear, it will not be construed to have retroactive effect); *Baker v. Sudo*, 194 Cal. App. 3d 936, 943, 240 Cal. Rptr. 38, 43 (1987) (statutory amendment broadened rather than merely clarified civil liability for providing intoxicating liquors to minors and therefore was not subject to retroactive application); *Sagadin v. Ripper*, 175 Cal. App. 3d 1141, 1156, 221 Cal. Rptr. 675, 683 (1985) (legislation eliminating liability of social hosts could not be applied retroactively to immunize social hosts found liable for a pre-legislation accident); *Glavinich v. Commonwealth Land Title Ins. Co.* 163 Cal. App. 3d 263, 272, 209 Cal. Rptr. 266, 271 (1984) (statutes are not to be applied retroactively unless express language or clear and unavoidable implication negates the presumption).

125. *Evangelatos*, 44 Cal. 3d at 1208-09, 753 P.2d at 598, 246 Cal. Rptr. at 641-42.

126. *Id.* at 1209, 753 P.2d at 598, 246 Cal. Rptr. at 642.

127. *Id.* at 1210, 753 P.2d at 599, 246 Cal. Rptr. at 642-43.

128. Defendants argued the following: (1) Proposition 51 must be applied retroactively when considering it in light of factors announced in *Marriage of Bouquet*, 16 Cal. 3d 583, 587, 546 P.2d 1371, 1373, 128 Cal. Rptr. 427, 429 (1976); (2) the electorate intended Proposition 51 to apply retroactively; (3) a prospective operation of Proposition 51 would fail to accomplish the primary intent of Proposition 51; and (4) Proposition 51 should be applied retroactively by analogy to the retroactive application of *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975) and *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978). *Evangelatos*, 44 Cal. 3d at 1209-27, 753 P.2d at 598-610, 246 Cal. Rptr. at 642-54.

129. *Evangelatos*, 44 Cal. 3d at 1209, 753 P.2d at 598, 246 Cal. Rptr. at 642 "[W]e find nothing in the language of Proposition 51 which expressly indicates that the statute is to apply retroactively. . . . [T]he absence of any express provision directing retroactive application strongly supports prospective operation of the measure." *Id.*

130. *Id.* at 1210, 753 P.2d at 599, 246 Cal. Rptr. at 641; *Marriage of Bouquet*, 16 Cal. 3d 583, 587, 546 P.2d 1371, 1373, 128 Cal. Rptr. 427, 429 (1976).

same subject.¹³¹ The statute at issue in *Bouquet* was accompanied by a resolution indicating a specific discussion of retroactivity during the debate on the measure which illustrated that it was intended to apply retroactively.¹³² In contrast, the court in *Evangelatos* found that the findings and declaration of purpose for Proposition 51 did not indicate any conscious consideration of retroactivity.¹³³ The defendants also had failed to offer any comparable evidence of retroactive intent.¹³⁴ The court stressed that, in considering the history of the times and legislation on the same subject, the drafters either knew or should have known that Proposition 51 would not be applied retroactively.¹³⁵

Second, the defendants contended that Proposition 51 should be applied retroactively regardless of the drafter's intent since electoral intent controls a proposition.¹³⁶ The court acknowledged that the intent of the electorate would prevail if it conflicted with the intent of the drafters.¹³⁷ However, the court found no basis from which to determine electoral intent.¹³⁸ The majority implied that the lack of an express provision for retroactive intent indicated that, in all probability, uninformed members of the public did not consider the issue at all.¹³⁹ Furthermore, the court surmised that informed members of the public who actually considered the issue probably assumed the general presumption of prospectivity applied.¹⁴⁰ Additionally, the majority explained that the remedial nature of the Proposition as indicated by the Findings and Declaration of Purpose,¹⁴¹ was not necessarily indicative of an intent to apply the statute retroactively.¹⁴²

131. *Bouquet*, 16 Cal. 3d at 587, 546 P.2d at 1373, 128 Cal. Rptr. at 429.

132. *Evangelatos v. Superior Court*, 44 Cal. 3d 1188, 1211, 753 P.2d 585, 599-600, 246 Cal. Rptr. 629, 643 (1988). See *Marriage of Bouquet*, 16 Cal. 3d 583, 590, 546 P.2d 1371, 1375, 128 Cal. Rptr. 427, 430-31 (1976).

133. *Evangelatos*, 44 Cal. 3d at 1211, 753 P.2d at 599-600, 246 Cal. Rptr. at 643.

134. *Id.*

135. *Id.* at 1211-12, 753 P.2d at 600, 246 Cal. Rptr. at 644. Because ACTR was the principal drafter and proponent of Proposition 51 and was also involved in post-MICRA litigation involving the retroactivity of MICRA, the court held that it must have chosen not to insert a provision for Proposition 51's retroactive application perhaps in order to avoid the political consequences of including a retroactive provision. *Id.*

136. *Id.* at 1212, 753 P.2d at 600-01, 246 Cal. Rptr. at 644.

137. *Id.* at 1212, 753 P.2d at 601, 246 Cal. Rptr. at 644.

138. *Id.*

139. *Id.* at 1212-13, 753 P.2d at 601, 246 Cal. Rptr. at 644-45.

140. *Id.*

141. See CAL. CIV. CODE § 1431.1 (West Supp. 1988). The findings and declaration of purpose section indicates that the measure was an attempt to create a fairer system than that of the preexisting joint and several liability doctrine by holding defendants liable in direct proportion to their degree of fault. *Id.*

142. *Evangelatos v. Superior Court*, 44 Cal. 3d 1188, 1213, 753 P.2d 585, 601, 246 Cal. Rptr. 629, 645 (1988).

The majority indicated that if voters had considered the retroactive application of Proposition 51, they might have opposed it.¹⁴³

Third, the defendants argued that a prospective operation of Proposition 51 would fail to assuage the effects of the insurance crisis, which was the primary intention of Proposition 51.¹⁴⁴ The court held that prospective application of Proposition 51 would not cause delay of insurance premium reductions that the statute intended to facilitate.¹⁴⁵ Defendants contended that there would be a failure to effectuate relief from the insurance crisis because several years would pass before a cause of action accruing after the effective date of the Proposition came to trial.¹⁴⁶ The defendant alleged that the electorate could not have intended this kind of result.¹⁴⁷

The court found three major flaws in this argument.¹⁴⁸ First, the court stated that insurance companies calculate premiums based on potential damages a defendant may have incurred during the entire

143. *Id.* at 1215-18, 753 P.2d at 603-05, 246 Cal. Rptr. at 646-48. In the court's hypothetical situation, grounds for opposition to retroactivity would stem from reliance on the preexisting joint and several liability rule by litigants who would be put in a worse position than litigants under the modification accomplished by the Proposition. *Id.* For example, a plaintiff whose causes of action arose before the enactment of Proposition 51 may not have sued all parties responsible for his non-economic injuries because of increased expenses in litigation. *Id.* at 1213-14, 753 P.2d at 603, 246 Cal. Rptr. at 645. This strategy would have been based on the previous rule that defendants could bring in additional tortfeasors by means of cross-complaints. *Id.* at 1215, 753 P.2d at 603, 246 Cal. Rptr. at 646-47. If Proposition 51 were applied to those plaintiffs, many would not be able to recover full non-economic damages because the statute of limitations would have expired as to those unjoined additional tortfeasors. *Id.* Finally, the court pointed out that retroactive application of the Act would disturb settled expectations of parties who entered settlement agreements in reliance on the previous joint and several liability doctrine. *Id.* at 1216, 753 P.2d at 603, 246 Cal. Rptr. at 647. For example, plaintiffs may have settled with some defendants for a sum less than they otherwise would have if they knew that defendants would be held only severally liable for non-economic harm. Likewise, defendants may have settled with a plaintiff for a sum greater than they otherwise would have paid under Proposition 51 in reliance on the right to obtain equitable indemnity from concurrent tortfeasors. *Id.* If a defendant would sue concurrent tortfeasors for indemnity when insolvent defendants were also present, the suing defendant would obtain only the sued, solvent defendant's proportionate share determined by his percentage of fault and not necessarily the equitable indemnity previously allowed. *See* CAL. CIV. CODE § 1431.2 (West Supp. 1988). The suing defendant would have paid an amount greater than his proportion of fault in reliance on a doctrine which previously allowed him to apportion the shortfall created by the insolvent tortfeasors among those he sued for indemnity. *See* *Paradise Valley Hosp. v. Schlossman*, 143 Cal. App. 3d 87, 93, 191 Cal. Rptr. 531, 536 (1983). By comparing the unfair and unexpected consequences that could result from retroactive application of the Proposition against the delay of providing the benefits of it to defendants, the court indicated the more fair approach was a prospective application of Proposition 51 which would protect all parties' reliance interests. *Evangelatos*, 44 Cal. 3d at 1217, 753 P.2d at 604, 246 Cal. Rptr. at 648.

144. *Evangelatos*, 44 Cal. 3d at 1218, 753 P.2d at 605, 246 Cal. Rptr. at 649.

145. *Id.* at 1218-21, 753 P.2d at 605-07, 246 Cal. Rptr. at 649-51.

146. *Id.* at 1218, 753 P.2d at 605, 246 Cal. Rptr. at 649.

147. *Id.*

148. *Id.* at 1218-19, 753 P.2d at 605, 246 Cal. Rptr. at 649.

time period for which the insurance policy is in force.¹⁴⁹ Thus, any damages awarded for actions accruing after June 3, 1986 should cause an immediate reduction in premiums, thereby affording immediate benefits to potential defendants.¹⁵⁰ Second, the court found that a retroactive application of Proposition 51 might result in a windfall for insurance companies that collected pre-Proposition 51 insurance premiums based on rates calculated under the previous joint and several liability rule.¹⁵¹ As support for this assertion, the court pointed out that Proposition 51 did not contain a provision requiring insurers to return any portion of previously collected premiums to their insured.¹⁵² Third, the court stated that the prospective application of Proposition 51 would not create the delay in alleviating the insurance crisis predicted by the defendants.¹⁵³ The court predicted that the benefits of Proposition 51 would be felt much earlier than the trial waiting period which, in *Evangelatos*, was approximately six years.¹⁵⁴ The prediction was based on the fact that almost all cases are resolved by settlement for an amount reflecting the potential liability of a defendant at trial.¹⁵⁵ The majority added that alleviation of an insurance crisis, standing alone, was not sufficient evidence of an intent to apply a statute retroactively.¹⁵⁶ The court examined measures similar to Proposition 51 that consciously focused on the issue of retroactivity in other jurisdictions.¹⁵⁷ Justice Arguelles wrote that each of these measures differed as to whether and to what extent each statute should apply to a preexisting cause of action.¹⁵⁸ In light of this examination, the court concluded that a prospective applica-

149. *Id.*

150. *Id.*

151. *Id.* at 1219, 753 P.2d at 605, 246 Cal. Rptr. at 649. In fact, the court noted that the potential windfall to insurance companies resulting from the Act's retroactive application may have been one of the reasons the drafters chose to exclude the issue of retroactivity since it may have made the measure less attractive to the electorate. *Id.*

152. *Id.*

153. *Id.* at 1219, 753 P.2d 605-06, 246 Cal. Rptr. at 649.

154. *Id.* Gregory Evangelatos was injured in July 1980. His case was assigned for trial June 23, 1986, nearly six years from the date of injury and almost five years after the action was filed. *Id.* at 1195, 753 P.2d at 588, 246 Cal. Rptr. at 632.

155. *Id.* at 1219, 753 P.2d at 605-06, 246 Cal. Rptr. at 649.

156. *Id.* at 1219-20, 753 P.2d at 605-06, 246 Cal. Rptr. at 649-50.

157. *Id.*

158. *Id.* at 1220, 753 P.2d at 606, 246 Cal. Rptr. at 650. For example, the court found the statutes of Florida, Missouri, and Nevada were explicitly made applicable only to causes of action accruing after the date of the enactment. *See* FLA. STAT. ANN. § 768.71(2) (West Supp. 1988); MO. ANN. STAT. § 538.235 (Vernon Supp. 1988); NEV. REV. STAT. § 41.141 2 (1987).

tion must control since Proposition 51 was silent as to the question of retroactivity.¹⁵⁹

Fourth, defendants argued that Proposition 51 should be analogized to the retroactive application of *Li v. Yellow Cab Co.*¹⁶⁰ and *American Motorcycle Association v. Superior Court*¹⁶¹ and applied retroactively.¹⁶² The court flatly rejected this contention quoting the well established rule announced by Justice (now Chief Justice) Rehnquist regarding the operation of a statute.¹⁶³ That rule stated, what Justice Rehnquist called "a principle familiar to every law student," that statutes operate prospectively only while judicial decisions operate retrospectively.¹⁶⁴ *Li* and *American Motorcycle* were judicial rather than statutory enactments.¹⁶⁵ The *Evangelatos* majority emphasized that the judiciary was the appropriate body to determine the retroactivity of the changes in *Li* and *American Motorcycle* since the court made the policy decision to change the common law rules at issue in those cases.¹⁶⁶ However, the court felt bound by Civil Code section three and the rules of statutory construction to apply Proposition 51 prospectively because it was silent on the retroactivity question.¹⁶⁷

The defendants' final argument involved an analogy to what the defendants termed "a line of cases."¹⁶⁸ This line of cases applied

159. *Evangelatos v. Superior Court*, 44 Cal. 3d 1188, 1220, 753 P.2d 585, 605-06, 246 Cal. Rptr. 629, 649-50 (1988). The court supported this conclusion with the decision in the MICRA case of *Bolen v. Woo*, 96 Cal. App. 3d 944, 158 Cal. Rptr. 454 (1979). In *Bolen*, the question raised was whether one of the MICRA provisions should apply retroactively to a case which accrued before MICRA's enactment but tried after its effective date. *Id.* at 959, 158 Cal. Rptr. at 462-63. The *Bolen* court rejected defendant's contention that the skyrocketing costs of medical malpractice insurance mandated a retroactive application of MICRA, emphasizing that the legislature could have inserted a retroactive provision if it had intended one to be applicable. *Id.*

160. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

161. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).

162. *Evangelatos*, 44 Cal. 3d at 1221, 753 P.2d at 607, 246 Cal. Rptr. at 651.

163. *Id.* at 1207, 753 P.2d at 596, 246 Cal. Rptr. at 640 (quoting *United States v. Security Indus. Bank*, 459 U.S. 70, 79-80 (1982)).

164. *Id.*

165. *Id.* at 1221, 753 P.2d at 607, 246 Cal. Rptr. at 651.

166. *Id.* at 1222, 753 P.2d at 607, 246 Cal. Rptr. at 651.

167. *Id.*

168. *Id.* at 1222-25, 753 P.2d at 608-10, 246 Cal. Rptr. at 651-54. The line of cases to which defendant referred included: *Tulley v. Tranor*, 53 Cal. 274 (1878) (involving former Civil Code section 3336 which had allowed a plaintiff to choose his measure of damages in wrongful conversion cases until it was amended to provide plaintiffs with only one measure of damages; since Tulley's action accrued before the amendment of the statute, the statute was construed as requiring retroactive application); *Feckenscher v. Gamble*, 12 Cal. 2d 482, 85 P.2d 885 (1938) (original Civil Code section 3343 allowed a defrauded plaintiff to collect the difference between the defendant's representation as to the value of the property plaintiff

statutory amendments modifying the measure of damages in wrongful conversion cases to all trials conducted after the effective dates of the statutes.¹⁶⁹ In rejecting the analogy drawn by defendants, the court noted that cases cited by the defendants did not establish a broad rule mandating that any change in recovery of damages must be applied retroactively.¹⁷⁰ The court referred to its decision in *White v. Western Title Insurance Co.*,¹⁷¹ as illustrating the inaccuracy of inferring that the presumption of prospectivity is not applicable to statutes modifying damages.¹⁷² The court conceded that the line of cases cited by defendant provided support for the legislative alteration of the measure of damages to pre-existing causes of action.¹⁷³ However, the court concluded that the same cases do not reject the ordinary presumption of prospective application.¹⁷⁴ The majority acknowledged that plaintiffs may still obtain a full recovery of damages by joining all responsible tortfeasors.¹⁷⁵ Nonetheless, the court reiterated that a retroactive application of the Proposition could put plaintiffs in pending actions in a position worse than plaintiffs whose actions accrued after the effective date of the Proposition.¹⁷⁶ Justice Arguelles reasoned that the statute of limitations may have run on pending actions denying plaintiffs full recovery by preventing them from joining all tortfeasors.¹⁷⁷

C. Minority Opinion

Justice Kaufman, writing for the minority, was joined by Justices Eagleson and Anderson.¹⁷⁸ Justice Kaufman concurred with the ma-

received and the actual value of the property, while the amended version allowed the plaintiff to recover the actual value the plaintiff paid and the actual value of what he received; *Stout v. Turney*, 22 Cal. 3d 718, 586 P.2d 1228, 150 Cal. Rptr. 637 (1978) (also involving a revision of Civil Code section 3343 which dealt with the measure of damages recoverable in a real estate fraud action).

169. *Evangelatos*, 44 Cal. 3d at 1222-25, 753 P.2d at 608-10, 246 Cal. Rptr. at 651-54.

170. *Id.* at 1223-24, 753 P.2d at 608-09, 246 Cal. Rptr. at 652-53.

171. 40 Cal. 3d 870, 710 P.2d 309, 221 Cal. Rptr. 509 (1985).

172. *See White*, 40 Cal. 3d at 884, 710 P.2d at 316, 221 Cal. Rptr. at 516 (holding that a statute would not be construed retrospectively, especially when it diminishes or extinguishes a cause of action).

173. *Evangelatos*, 44 Cal. 3d at 1224, 753 P.2d at 609, 246 Cal. Rptr. at 653.

174. *Id.*

175. *Id.* at 1215-16, 753 P.2d at 603, 246 Cal. Rptr. at 647.

176. *Id.* at 1224-25, 753 P.2d at 609-10, 246 Cal. Rptr. at 653.

177. *Id.* at 1225, 753 P.2d at 609, 246 Cal. Rptr. at 653.

178. *Id.* at 1242, 753 P.2d at 585, 246 Cal. Rptr. at 671 (Kaufman, J. concurring in part and dissenting in part).

jority on the issue of the constitutionality of Proposition 51, but concluded that the statute should be applied retroactively.¹⁷⁹ Justice Kaufman felt the majority opinion utilized erroneous legal assumptions backed up by factually incorrect practical considerations.¹⁸⁰ First, he argued that the court incorrectly assumed that absent an express statement of legislative intent, Proposition 51 must be applied prospectively.¹⁸¹ He argued that this "presumption of prospectivity" controls only when no legislative intent can be ascertained.¹⁸²

Applying the *In re Marriage of Bouquet* factors,¹⁸³ Justice Kaufman concluded that the majority failed to consider the history of Proposition 51.¹⁸⁴ This history revealed that governmental agencies and private businesses could not afford the high insurance costs resulting from increasingly common multi-million dollar tort judgments and exposure to liability in percentages in excess of their proportion of fault.¹⁸⁵ Considering this historical context, together with the explicit declaration of Proposition 51 to remedy the inequity of liability in proportion greater than the existence of fault, the dissent found an implied intent to apply Proposition 51 retroactively.¹⁸⁶

The dissent pointed out that California courts apply statutes retroactively when the legislation seeks to remedy an existing inequity.¹⁸⁷ The dissent held this principle applicable to civil as well as criminal cases.¹⁸⁸ After concluding that a retroactive intent can be inferred

179. *Id.* at 1227, 753 P.2d at 617, 246 Cal. Rptr. at 661 (Kaufman, J., concurring in part and dissenting in part).

180. *Id.* at 1228, 753 P.2d at 617, 246 Cal. Rptr. at 661 (Kaufman, J., concurring in part and dissenting in part).

181. *Id.* (Kaufman, J., concurring in part and dissenting in part).

182. *Id.* See *In re Estrada*, 63 Cal. 2d 740, 746, 408 P.2d 948, 951, 48 Cal. Rptr. 172, 176 (1965) (holding that the presumption of prospectivity applies only after examination of all factors fails to reveal legislative intent). See also *supra* notes 130-35 and accompanying text (discussing application of the factors by the majority).

183. See *In re Marriage of Bouquet*, 16 Cal. 3d 583, 587, 546 P.2d 1371, 1376, 128 Cal. Rptr. 427, 432 (1976). Those factors included the context of the legislation, its objective, the evils sought to be remedied, the history of the times and of legislation upon the same subject, public policy, and contemporaneous construction. *Id.*

184. *Evangelatos v. Superior Court*, 44 Cal. 3d 1188, 1231, 753 P.2d 585, 619, 246 Cal. Rptr. 629, 663-64 (1988) (Kaufman, J., concurring in part and dissenting in part).

185. *Id.* at 1231-32, 753 P.2d at 619-20, 246 Cal. Rptr. at 664 (Kaufman, J., concurring in part and dissenting in part).

186. *Id.* (Kaufman, J., concurring in part and dissenting in part).

187. *Id.* at 1233, 753 P.2d at 621, 246 Cal. Rptr. at 664-65 (Kaufman, J., concurring in part and dissenting in part) (referring to *In re Estrada*, 63 Cal. 2d 740, 408 P.2d 948, 48 Cal. Rptr. 172 (1965)).

188. *Id.* at 1233, 753 P.2d at 621, 246 Cal. Rptr. at 665 (Kaufman, J., concurring in part and dissenting in part) (citing *Abrams v. Stone*, 154 Cal. App. 2d 33, 315 P.2d 453 (1957)) (statute is not made retroactive merely because it draws on facts before its enactment for

from a remedial purpose, the dissent argued that the issue became the justification of such an inference in the context of Proposition 51.¹⁸⁹ To make this determination, Justice Kaufman found it necessary to interpret the holding of *Aetna Casualty & Surety Co. v. Ind. Acc. Com.*¹⁹⁰ He argued that the majority incorrectly interpreted *Aetna* as holding that retroactive intent cannot be inferred from remedial purposes alone.¹⁹¹ Justice Kaufman stated that the proper interpretation of *Aetna* was that one rule of statutory construction could not supercede another.¹⁹² In addition, the dissent stated that the court was capable of weighing probative evidence to determine whether Proposition 51 was remedial in nature.¹⁹³ Justice Kaufman emphasized that the measure was intended to alleviate a crisis, and thus, an inference could be drawn justifying retroactive application of the statute.¹⁹⁴

In addition, Justice Kaufman rejected two practical considerations used by the majority to justify their decision.¹⁹⁵ The first of those considerations involved concern over the possibility of an insurance windfall resulting if the statute were applied retroactively.¹⁹⁶ Justice Kaufman contended that the majority should decide retroactivity of Proposition 51 with the same impartiality displayed in *Li* and *Amer-*

operation; to have retroactive effect it must give the previous transaction to which it relates different legal effect from that which it had when it occurred). *Accord* *Andrus v. Municipal Court*, 143 Cal. App. 3d 1041, 192 Cal. Rptr. 341 (1983) (an amendment which repealed the statutory right for an appeal to the superior court challenging an extraordinary writ proceeding in municipal court was meant to apply retroactively because "the obvious goal of the amendment . . . suggest[ed] the logic of retroactive application"); *Harrison v. Workman's Comp. Appeals Bd.*, 44 Cal. App. 3d 197, 118 Cal. Rptr. 508 (1974) (holding that the intent of an amendment to the Labor Code designed to remedy procedural delay and expense caused by previous law would not be effectuated unless applied retrospectively as well as prospectively); *Coast Bank v. Holmes*, 19 Cal. App. 3d 581, 97 Cal. Rptr. 30 (1971) (a statute does not operate retroactively merely because some of the facts or conditions on which its application depends existed before its enactment); *City of Sausalito v. County of Marin*, 12 Cal. App. 3d 550, 90 Cal. Rptr. 843 (1970) (curative statute which nullified judicial decisions overturning local zoning proceedings for technical procedural omissions construed as applying retroactively because the legislative purpose could be fully effectuated only by retroactive application).

189. *Evangelatos v. Superior Court*, 44 Cal. 3d 1188, 1233, 753 P.2d 585, 622, 246 Cal. Rptr. 629, 666 (1988) (Kaufman, J., concurring in part and dissenting in part).

190. *Id.* See also *Aetna Casualty & Sur. Co. v. Industrial Accident Comm'n*, 30 Cal. 2d 388, 182 P.2d 159 (1947).

191. *Evangelatos*, 44 Cal. 3d at 1235, 753 P.2d at 622-23, 246 Cal. Rptr. at 666-67.

192. *Id.* at 1235, 753 P.2d at 622, 246 Cal. Rptr. at 666 (Kaufman J., concurring in part and dissenting in part).

193. *Id.* at 1236, 753 P.2d at 623, 246 Cal. Rptr. at 667 (Kaufman, J., concurring in part and dissenting in part).

194. *Id.* (Kaufman, J., concurring in part and dissenting in part).

195. *Id.* (Kaufman, J., concurring in part and dissenting in part).

196. *Id.* at 1236-38, 753 P.2d at 623-24, 246 Cal. Rptr. at 667-68 (Kaufman, J., concurring in part and dissenting in part).

ican Motorcycle.¹⁹⁷ He explained that before the court adopted comparative negligence, insurance companies calculated their rates based on the ability of contributory negligence to act as a complete bar to recovery by a plaintiff.¹⁹⁸ He noted that the court did not express any concern over the greater sums that insurance companies had to pay when the court opted for a limited retroactive application of comparative negligence, even though the sums were neither anticipated nor compensable.¹⁹⁹ Thus, the dissenters found no logical reason for being concerned with the prospect of a “windfall” for insurance companies in this case.²⁰⁰

Second, the dissent found that the majority incorrectly concerned itself with the reliance of the parties on pre-Proposition 51 law in choosing whom to sue and how to settle.²⁰¹ The dissent argued that no evidence existed which showed that plaintiffs previously declined to sue potentially liable defendants in reliance on the ability to sue other parties.²⁰² Therefore, no inference could be drawn that plaintiffs took such action.²⁰³ The dissent asserted that general experience teaches that plaintiffs sue everyone who might be liable.²⁰⁴ Even if plaintiffs did not sue everyone, the dissent stated that it was unfair to allow plaintiffs to take tactical advantage of an old rule that allowed them to choose which defendants would pay for total economic and noneconomic damages when Proposition 51 intended to remedy the very unfairness of such an advantage.²⁰⁵

Finally, on the issue of settlement, the dissent found the majority concern for plaintiff's settling for less than a reasonable sum illusory.²⁰⁶ Justice Kaufman first indicated that good faith settlements must reflect a reasonable range of the proportionate share of the

197. *Id.* at 1237, 753 P.2d at 623, 246 Cal. Rptr. at 667 (Kaufman, J., concurring in part and dissenting in part).

198. *Id.* at 1236, 753 P.2d at 623, 246 Cal. Rptr. at 667 (Kaufman, J., concurring in part and dissenting in part).

199. *Id.* at 1237, 753 P.2d at 623, 246 Cal. Rptr. at 667 (Kaufman, J., concurring in part and dissenting in part).

200. *Id.* at 1237-38, 753 P.2d at 623, 246 Cal. Rptr. at 667 (Kaufman, J., concurring in part and dissenting in part).

201. *Id.* at 1238-39, 753 P.2d at 624-25, 246 Cal. Rptr. at 668 (Kaufman, J., concurring in part and dissenting in part). *See also* note 143 and accompanying text (discussing the majority's interpretation of the reliance issue).

202. *Evangelatos v. Superior Court*, 44 Cal. 3d 1188, 1238, 753 P.2d 585, 625, 246 Cal. Rptr. 629, 668 (Kaufman, J., concurring in part and dissenting in part).

203. *Id.* (Kaufman, J., concurring in part and dissenting in part).

204. *Id.* (Kaufman, J., concurring in part and dissenting in part).

205. *Id.* (Kaufman J., concurring in part and dissenting in part).

206. *Id.* (Kaufman J., concurring in part and dissenting in part).

settlor's liability.²⁰⁷ The dissent acknowledged that plaintiffs might settle for less than the proportionate share of liability of the defendant in reliance on the "deep pocket" rule.²⁰⁸ However, the dissent made it clear that a settlement below the reasonable range of liability should not be sanctioned by any trial court because of its unfairness to other nonsettling defendants.²⁰⁹

III. LEGAL RAMIFICATIONS

Evangelatos effectively quashes future constitutional challenges to Proposition 51 that are based on vagueness and equal protection violations because of the unanimous decision on the constitutional question. More important, *Evangelatos* provides firm guidance for California courts in interpreting legislative enactments or voter measures that are silent on the issue of retroactivity. Under *Evangelatos*, drafters of bills should expressly state a retroactive intent or the court will not likely give it retroactive application.²¹⁰ Despite the holding in *Evangelatos*, three of the Justices adamantly expressed the view that Proposition 51 should be applied retroactively.²¹¹ Since the prospective operation of the statute has the potential to keep the doctrine of joint and several liability alive for several years to come,²¹² *Evangelatos* may not prevent the litigation of retroactivity from arising in the future. For example, it remains unclear whether Proposition 51 applies to a victim injured over a prolonged period of time comprising both pre and post-Proposition 51 law. Parties injured

207. *Id.* (Kaufman, J., concurring in part and dissenting in part) (referring to the holding in *Tech-Bilt, Inc. v. Woodward-Clyde & Associates*, 38 Cal. 3d 488, 698 P.2d 159, 213 Cal. Rptr. 256 (1985)).

208. *Id.* at 1240, 753 P.2d at 625, 246 Cal. Rptr. at 669-70 (Kaufman, J., concurring in part and dissenting in part).

209. *Id.* (Kaufman, J., concurring in part and dissenting in part).

210. *See id.* at 1214, 753 P.2d at 602, 246 Cal. Rptr. at 645. "The presumption of prospectivity assures that reasonable reliance on current legal principles will not be defeated in the absence of a clear indication of a legislative intent to override such reliance." *Id.*

211. *See* notes 180-209 and accompanying text (discussing the reasons why the dissent believed the majority opinion was operating under incorrect assumptions).

212. For example, if an attorney negligently drafted a will before June 4, 1986, and the testator dies in 1996, it is unclear whether the beneficiary's cause of action for negligent infliction of emotional distress falls under the pre- or post-Proposition 51 rules. *See* telephone conversation with Steven Smith, counsel for defendant in *Evangelatos*, June 10, 1988 (notes on file at the *Pacific Law Journal*). Mr. Smith states that he does not purport to know the answer to the question posed. Although it may appear that Proposition 51 could not apply to this situation since there is no liability to sever, the question appears to remain valid for situations in which one attorney or firm has recommended the negligent party for the drafting.

by exposure to certain chemicals, cigarettes, or radiation may not become aware of their injuries for years. Asbestos victims, affected more than any other class of plaintiffs by the decision in *Evangelatos*, experienced no noticeable trauma and had no reason to believe during their labors that they were subjecting themselves to any risks.²¹³

Evangelatos impacts the legal community by permitting two distinct case strategies to remain viable. First, for causes of action that accrued prior to Proposition 51, plaintiffs still retain the option of searching for at least "one deep" pocket defendant, bringing suit against him alone, and allowing him to assert claims against potential fellow tortfeasors for indemnity.²¹⁴ However, for causes of action accruing after the effective date of Proposition 51, plaintiffs must seek out all potential defendants in order to obtain full recovery of non-economic damages. Consequently, in the latter situation, plaintiffs must assess the potential financial worth of defendants to determine the value of a case. The "deep pocket" defendant is eliminated since he is liable only for his proportionate share of damages.²¹⁵

Of course, *Evangelatos* does not solve all of the interpretation problems of Proposition 51.²¹⁶ One of these problems is the interpretation of the application of the Proposition to any action based on principles of comparative fault.²¹⁷ When the plaintiff is free from fault, comparative fault may be inapplicable under the guiding principle announced in *Li v. Yellow Cab Co.*²¹⁸ Another problem in interpreting Proposition 51 is whether it applies to negligence cases only or to the area of strict products liability and intentional mis-

213. See *Brief of Asbestos Victims of America and the White Lung Association as Amicus Curiae in Support of Plaintiff and Petitioner Gregory Evangelatos*, *Evangelatos v. Superior Court*, No. C 373 428, at 6, 13 (on file at *Pacific Law Journal*). Almost all the records that would prove which products were used and what the manufacturers knew and did have been lost or destroyed. *Id.* at 6. Thus, in addition to proving causation, plaintiffs injured both before and after June 4, 1986 must contend with whether Proposition 51 applies to their injuries.

214. See *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 532 P.2d 1226, 146 Cal. Rptr. 858 (1978) (permitting one concurrent tortfeasor to seek indemnity from other concurrent tortfeasors).

215. See CAL. CIV. CODE § 1431.2 (West Supp. 1988).

216. See generally CAL. CEB PROGRAM BOOKLET, *supra* note 3 (discussing problems in interpreting Proposition 51).

217. See CAL. CIV. CODE § 1431.2 (West Supp. 1988).

218. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975). *Li* states that the contributory negligence of the plaintiff should not bar recovery but diminish that recovery in proportion to the amount of negligence attributable to the person recovering. Thus, the argument is that comparative fault principles apply only where the plaintiff is at fault in some degree. *Id.* at 1232, 119 Cal. Rptr. at 875. See also CAL. CEB PROGRAM BOOKLET, *supra* note 3, at 9.

conduct cases as well.²¹⁹ This issue is unclear because Proposition 51 speaks in terms of comparative fault rather than the more limited term "comparative negligence".²²⁰

Additionally, courts will have to resolve questions regarding the interpretation of Proposition 51 in the area of settlements.²²¹ For example, in a situation where a plaintiff sues a negligent driver and a government entity for injuries caused by a dangerous condition on the highway, and plaintiff settles with the negligent driver for the policy limit, it is unclear whether the case that proceeds to trial against the public entity may be based on principles of comparative fault. Another question posed in the area of settlement arises when the plaintiff, who has been catastrophically injured, enters into a good faith settlement with a tortfeasor for \$100,000. A judgment is subsequently awarded against remaining tortfeasors for an amount greatly in excess of \$100,000. The question is to what extent the \$100,000 settlement is attributable to economic as opposed to non-economic damages.²²²

Finally, despite the court's holding in *Evangelatos* that Proposition 51 was rationally related to accomplishing the goal of alleviating the "insurance crisis," the issue of whether Proposition 51 actually meets that goal is still hotly contested. A current study, undertaken by Alameda County Supervisor, Don Perata, attempts to ascertain whether any liability relief for municipalities occurred after the Proposition's passage.²²³ Additionally, consultants to the Insurance Services Office (ISO), the rate making arm of the insurance industry, have conducted a study attempting to analyze the impact of tort law restrictions with regard to alleviating the "insurance crisis."²²⁴ An

219. See CAL. CEB PROGRAM BOOKLET, *supra* note 3, at 9.

220. See CAL. CIV. CODE § 1431.2(a) (stating that in an action based on principles of comparative fault, the liability of each defendant for non-economic damages shall be several only).

221. See CAL. CEB PROGRAM BOOKLET, *supra* note 3, at 23-24.

222. *Id.*

223. Although only 16 of 58 states have responded, preliminary results show the following: (1) In almost every instance, counties have gone self insured. Some counties which are self insured stated that, although their insurance was not cancelled outright, they would have received mid-term cancellations since their insurers dropped all public entity business; (2) fourteen of 16 responding counties have experienced no relief due to the passage of Proposition 51 while the other two responding counties indicated some relief due to psychological impact on plaintiffs; (3) of nine major Alameda County based health clinics for whom insurance data was available, premium rates increased 122 percent over 1985-86 rates; and (4) generally, insurance companies received over five dollars in premiums for every one dollar paid in claims. See ALAMEDA BOARD OF SUPERVISORS, PRELIMINARY REPORT OF FINDINGS (June 4, 1987) (copy on file at *Pacific Law Journal*).

224. See ACCESS TO JUSTICE, THE NEW ISO STUDY: RESTRICTIONS ON LEGAL RIGHTS

analysis of the ISO study concluded that the tort law restrictions have no impact upon insurance rates.²²⁵ Furthermore, the Access to Justice's analysis concludes that victim's rights should not be "slashed" in order to allow insurance companies to gain more profits.²²⁶

IV. CONCLUSION

In *Evangelatos*, the California Supreme Court ruled that Proposition 51 was constitutional but declined to give it retroactive applicability. The court stated that the statute was not void for vagueness. The court also found that Proposition 51 did not violate the equal protection clauses of the state or federal constitutions, holding that severing the liability of concurrent tortfeasors for non-economic damages rationally relates to achieving a reduction of the effects of the insurance crisis.

The majority gave Proposition 51 a prospective operation only. The court stated that a presumption of prospectivity existed where a proposition or legislation is silent as to retroactive intent. The presumption favoring prospectivity can be overcome by either an explicit provision for retroactivity or by clear evidence indicating the electorate consciously considered the issue. The defendants failed to prove either. The *Evangelatos* majority asserted that the prospective operation of the statute will protect the reliance interest of plaintiffs who can no longer join all potential tortfeasors because of the expiration of the statute of limitations. It appears clear for the present that the impact of *Evangelatos* will create two categories of plaintiffs separated by strategies in pre and post-Proposition 51 actions.

Karen A. Asplund

WORTHLESS 2 (June 1, 1988) (copy on file at the *Pacific Law Journal*). The study was analyzed by Access to Justice, a consumer group which states its goal as obtaining comprehensive, honest, insurance reform.

225. *Id.* Specifically, in examining state restrictions on joint and several liability, including Proposition 51, the study concluded that in only one out of six hypothetical scenarios, Proposition 51 would have only a moderate effect. *Id.* at 4.

226. *Id.* at 5. According to Access to Justice, insurance companies profits rose by 604 percent in 1986. *Id.*

