

Pretrial Practice & Discovery

American Bar Association Litigation Section

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Including a Few Key Words in a Release Can Save Your Client Down the Road

It is important to include key language in cases where a joint tortfeasor is obtaining a pro rata release.

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When pretrial settlement negotiations are successful, one of the last crucial considerations in wrapping up the matter is to consider a release agreement that fully protects your client. In some instances, failing to include key language in a release can expose your client to liability long after obtaining an executed settlement agreement and release (SA&R). When sorting through numerous provisions in an SA&R that require modification or when drafting a SA&R from scratch, it is important to include key language in cases where a joint tortfeasor is obtaining a pro rata release.

For example, pursuant to Pennsylvania's Uniform Contribution Among Tortfeasors Act, 42 Pa.C.S. § 8326, "[a] release by the injured person of one joint tort-feasor, whether before or after judgment, does not discharge the other tort-feasors unless the release so provides, but reduces the claim against the other tort-feasors in the amount of the consideration paid for the release *or in any amount or proportion by which the release provides that the total claim shall be reduced if greater than the consideration paid*" (emphasis added). Section 8326 encompasses both pro rata and pro tanto releases. Pro rata settlements reduce the final judgment by the settling defendant's proportional share of the judgment, even where the settlement amount is not the same as the amount determined by the fact finder. Pro tanto settlements reduce the judgment only by the amount paid by the settling defendant(s).

Pursuant to Section 8327,

[a] release by the injured person of one joint tort-feasor does not relieve him from liability to make contribution to another tort-feasor, unless the release is given before the right of the other tort-feasor to secure a money judgment for contribution has accrued **and** provides for a reduction to the extent of the pro rata share of the released tort-feasor of the injured person's damages recoverable against all the other tort-feasors.

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(Emphasis added.)

Accordingly, if the settling defendant obtains a release that does not include language expressly stating that it is pro rata release, then the release most likely will be construed to be a pro tanto release. Absent the required pro rata language, if the settling defendant's proportional share of the judgement is greater than the amount of the settlement, the settling defendant may be exposed to liability for contribution to the other defendants who paid a portion of the settling defendant's judgment. This wrinkle, however, is easily avoided by careful crafting of the SA&R with state-specific considerations in mind. Do not forget the details, beyond the standard release language, that may be necessary to protect your client.

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