



KEY CLAUSES

The
Deconstruction of
**Joint, Several,
and Joint &
Several
Liability**
Clauses

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Introduction

*Joint, Several, and Joint and Several Liability clauses can get messy, but no attorney can afford to misunderstand them. These clauses are essential for divvying up liabilities among multiple parties. An important starting point: note that this trio is really three, distinct provisions: **Joint, Several, and Joint and Several Liability**. Each serves its own purpose and has its place in contractual agreements.*

THREE, DISTINCT PROVISIONS:





Introduction

We, nit-picky contract attorneys, already know and accept the importance of diligent, intentional, and methodical practice in selecting the best type of clause for each purpose. Working with this trio is no different.



The first step is establishing how each of the multiple obligors (those who owe an obligation under a contract) ought to be liable if the contractual relationship goes south.

The answer may not be simple since it depends on the specifics of the transaction, the parties involved and, of course, whom the drafting attorney is zealously representing.

The discussion below is about joint and several rights and liabilities arising from contractual obligations. It does not touch upon issues of joint and several liability in torts, including comparative fault issues. That's a whole other story. What follows should provide the legal drafter with an overview and at least some nuances in this fiddly trio.



Table of Contents

JOINT LIABILITY	4
SEVERAL LIABILITY	7
JOINT & SEVERAL LIABILITY	9
PRESUMED JOINT & SEVERAL LIABILITY	12
PRACTICAL CONSIDERATIONS	14
DRAFTING CONSIDERATIONS	16
KEY TAKEAWAYS	19
CONCLUSION	20





Joint Liability



JOINT LIABILITY



Joint liabilities arise when two or more obligors promise to jointly perform a single obligation under the contract.

In this case, each is liable to the full amount of their joint obligation to the obligee (the party to whom the obligation is owed). For example, A and B jointly are obligated to pay C a sum of \$5,000. If C sues, C will receive \$5,000 from either A or B or both of them. Whether A and B was actually at fault under the contract is none of C's concern. On the flip side, if A singlehandedly decides to fulfill the obligation and pay the entire sum to C, B will be discharged of his obligation, even though he did not contribute a cent. Here is a simple version of a joint liability clause:

— **Joint Liability.** Each representation, warranty, covenant and agreement made by Party A or Party B in this Agreement shall be deemed a representation, warranty, covenant and agreement made by Party A and Party B jointly, and all liability and obligations relating thereto shall be deemed a joint liability and obligation of Party A and Party B.



JOINT LIABILITY



Multi-party contracts regarding financial transactions with banks usually apply the joint liability principle to ensure payment. It is also commonly used in contracts for financial arrangements undertaken by married couples. For instance, when married couples take out a loan, mortgage, or open a line of credit, the contract prepared by the financial institution will often contain a joint liability clause. It is prudent, from the bank's perspective, to demand joint liability. If one of the spouses dies, the bank will still recover the full amount borrowed as the surviving spouse will continue to be liable for the entire outstanding obligation.



Although it is still quite possible to see joint (rather than joint and several) contractual liability in modern contracts among private parties, it is becoming less usual. Back in the day, enforcing joint liability in court required that all jointly liable parties be joined in a single suit designed to determine the total amount of their shared liability: a “compulsory joinder” rule. Naturally, that greatly complicated the enforcement of joint liability.

Today, nearly all states have relaxed or eliminated that rule and now allow the parties who are jointly liable on contract to be sued through separate actions.



Several Liability



SEVERAL LIABILITY



Several liability arises when obligors make separate promises under the same contract and so each take on liability for only their own obligations – almost the converse of joint liability.

or instance, multiple business partners take out a business loan so that each partner is responsible for a separate share (i.e., severally liable). If misfortune befalls and just one partner is unable to meet the obligation (or repay the debt), the lender can recover only the amount of that partner's obligation and only from that partner. Several liability clauses are commonly used in syndicated loan agreements. Here is an example of the language for such a clause:

— **Several Liability.** Each party to this Agreement enters into this Agreement solely on its own behalf, each such party shall solely be severally liable for any breaches of this Agreement by such party and in no event shall any party be liable for breaches of this Agreement by any other party hereto.

If multiple parties who are severally liable breach their promise, they may be sued in the same action or separate actions. It's the choice of the obligee, who retains the right to the several liability of a several obligor until the obligation is fully satisfied, even if a prior judgment against other severally liable obligors may have been obtained. Here's the picture. A and B are severally liable to C for \$5,000; each is responsible for half of the obligation. So, C can recover \$2,500 from B, even if C has already obtained a prior judgment against A for \$2,500.



Joint & Several Liability



JOINT & SEVERAL LIABILITY



Each Joint and Several obligor in the agreement is held wholly liable for the obligation, jointly or individually, irrespective of individual fault or omission.

Simply put, all obligors are equally liable and any can be held responsible for the full amount due.

A and B are both obligated to pay C up to \$5,000, so if B has the deepest pocket, C can sue and obtain a judgment for the full amount due. Below is an example of such a clause:

Joint and Several Liability. If Borrower consists of more than one person or entity, their liability for all liabilities and obligations shall be joint and several, and the compromise of any claim with, or the release of, any Borrower shall not constitute a compromise with, or a release of, any other Borrower.





JOINT & SEVERAL LIABILITY



Under a contract with this clause, the obligee may choose which obligor to sue, but that is not to say a wronged party will recover the full amount multiple times. While separate actions are allowed against joint and several obligors, once any results in a final judgment, that precludes its reassertion in any other action.



For obligors, the advantage of this clause is the right of contribution. Since the deep-pocket obligor is most often targeted for suit, oftentimes even if not at fault, he or she can, and usually will, turn around and demand contribution, or sue for proportionate shares from all other obligors. Nonetheless, if a co-party is unable to pay, then another must make up the difference.





PRESUMED JOINT & SEVERAL LIABILITY



Poorly drafted contracts with vague or incomplete clauses forced courts to create certain presumptions when it comes to Joint and Several Liability clauses. For example,

in California (and many other) courts, in absence of clear and explicit language in the contract, will presume joint and several liability when all liable parties benefit in some way from the past or present consideration –

the bargained-for value of the contract. Cal. Civ. Code §1659. Joint and several liability will also be presumed when several individuals execute a contract, even if the promise in the contract is in the singular number. Cal. Civ. Code §1660. As provided by The Uniform Partnership Act of 1994, in partnerships, all partners will be presumed to be jointly and severally liable for all obligations of the partnership unless it is stated otherwise in the agreement between the partners and except for newly accepted partners and partners in certain limited liability partnerships. Corp. Code §16306. A co-signer of promissory notes is also - presumed to be a “co-obligor” not “a guarantor,” although those presumptions are not conclusive and may be overcome with sufficient evidence indicating otherwise. In search of such evidence, the courts often examine the language and construction of the entire contract for the intent of the contracted parties.



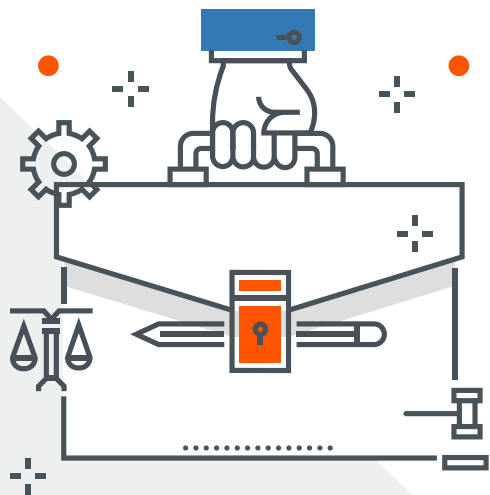


PRESUMED JOINT & SEVERAL LIABILITY



Undoubtedly, those presumptions should not be relied upon when drafting or signing an agreement.

An express provision on liability that accurately and completely describes the intention of the contractual parties should always be preferred.



It is even more important when the parties to a contract have different, unequal performance obligations and financial resources. An even more delicate situation that commends consideration and precision in drafting is that one of the obligors may not be able to fulfil his or her obligations until another obligor does.



PRACTICAL CONSIDERATIONS

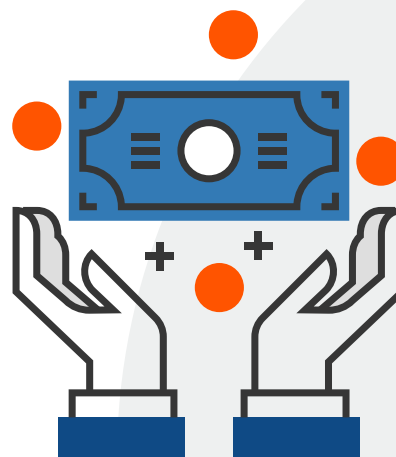


It is paramount to note that the drafters must always verify the applicable laws and regulations before choosing between the three clauses. Once the laws in the governing jurisdiction are sorted out,

there are two major points to consider when determining which liability clause to include:

- 1. who owes the obligation; and*
- 2. the allocation of assets among the obligors.*

The parties to whom obligation is owed should prefer either joint or joint and several clauses which would afford the obligee the choice of which obligor to sue. Naturally, the obligee will likely choose to demand payment from the most financially able party. This relieves the obligee of the time and effort of pursuing all parties, including those not solvent enough to satisfy the claim. It also removes the need to deal with apportionment among the co-obligors.





PRACTICAL CONSIDERATIONS



The co-parties who owe the obligation should favor several liability in their contractual commitments, especially where the co-signers are clearly of different financial health.

To protect themselves, each co-signer must sincerely evaluate the likelihood of the other's ability to pay. Equally, each should realistically assess their financial vulnerability and the gravity of the implications if they were to have to pay the entire debt on their own.

Another essential aspect that must be considered is to have a clear understanding among the co-obligors as to how their liability will be apportioned. For complex transactions involving many co-parties, it could be in the form of a stand-alone apportionment agreement. For more straightforward transactions, it could be just another provision in the agreement describing the allocation of a possible loss. It all depends on the particulars of the transaction, and that is why it is often said that drafting contracts is more art than science.

One major pitfall to watch out for in multi-party contracts is when the liability provision is insufficiently comprehensive. For example, merely stating that A and B will be liable to C is too vague and uncertain. Ambiguities are never welcome in contracts, especially not by the drafting party or parties who procure the instrument as it may be construed against them. The last thing anyone wants is to leave it all for courts to interpret.





DRAFTING CONSIDERATIONS



1

Include Proper Heading for Liability Clause.

Normally, headings for provisions and sections are included for the readers' convenience only. Oftentimes, a boiler-plate provision explicitly reiterates this fact. However, courts have used headings when searching for the parties' intent. A short, precise heading that correctly describes the allocation of liability is not only helpful to the reader but can also be invaluable for conveying the parties' intent in the instrument. Some examples of succinct headings for liability provisions may include "Several and Joint Liability," "Joint Liability," "No Joint Liability," and "Several Liability."

2

State What It Is and What It Is Not.

It may be useful, in some situations, to state not only how the liability is allocated between the parties but also how it is not meant to be allocated. To illustrate this point on the example where multiple business partners take out a loan and wish to be severally liable for their obligations, the provision in the loan agreement may include the following statement: "the obligations of each Borrower to Lender under this Agreement are several and not joint."





DRAFTING CONSIDERATIONS



3

Aim for Short, Concise Sentences Without Sacrificing the Clarity of the Provision.

Just as lengthy sentences and provisions are unwelcome because they most often dilute meaning or make it indigestible for readers, excessively short sentences and clauses can be too superficial and therefore ambiguous. For instance, simply stating “the obligations of each Borrower to Lender under this Agreement are several, and not joint,” as in the previous loan agreement example, would be insufficient. The learned art of skilled attorneys is to draft concise yet valid contractual provisions that capture precise meaning in each clause as is necessary to meet client needs. Some more complex situations, for example, may warrant the inclusion of the language that thwarts the creation of an accidental partnership, as exemplified in the paragraph below.

- **Several Liability.** The obligations of each Borrower to Lender under this Agreement are several, not joint with the obligations of any other Borrower. No Borrower shall have any liability or obligation arising out of commitments of another Borrower of his, her or its representations, warranties and covenants hereunder. Nothing in this Agreement and no action taken by any Borrower under this Agreement shall be deemed to constitute Borrowers as a partnership, a joint venture, or any other kind of entity or group.





DRAFTING CONSIDERATIONS



4

Liability Effective Upon Execution.

A subtle, yet important, qualification that may be necessary to include in the multi-obligor contracts is that each party becomes liable on execution of the agreement. This is to avoid a potential argument that the liability of one party was conditional on execution by all obligors. A simple sentence as follows would suffice.

- **The obligations imposed and rights conferred herein, shall be effective upon the execution of this Agreement by all the Parties.**

5

Ensure That Clients Understand Their Undertaken Liability.

Attorneys have an obligation to diligently counsel their clients. The liability clause should never be overlooked when counseling clients on a contract. This is especially true for complex multi-party transactions and high-stakes deals. Explaining the extent of clients' liability under a contract before they sign it helps to set accurate expectations for clients and potentially protect their assets if the triggering event occurs; it also shields the attorney from possible future accusations by the client. If a contract summary outlining salient points is drafted, it is wise to include joint, several, or joint and several liability in the summary.





KEY TAKEAWAYS



Joint Liability –

All obligors are fully liable for the entire amount of damages.

Several Liability –

Each obligor is only liable for their own share of the damages and not liable for any damages caused by any other obligors.

Joint and Several Liability –

All obligors are liable for the entire amount, but if plaintiff sues and recovers from one obligor, that obligor may recover all or part of damages paid from the other obligors.

Joint and Joint and Several Liability –

significant distinctions are disappearing.

Presumption of Joint and Several Liability may be implied under certain circumstances.

Draft contracts with liability provisions ensuring favorable-to-your client allocation of liability.

Ensure that the final draft accurately represents the agreed upon terms of liability.



CONCLUSION



Joint, Several and Joint and Several Liability clauses may leave attorneys befuddled. But legal practitioners must thoroughly understand, carefully weigh, and sensibly select for their client just the right one from the trio.

One size doesn't fit all, and the wrong choice may produce detrimental, if not devastating, consequences for the contracting parties.

To slow down and think through the situation of all parties and consider potential consequences of each choice means finding the best fit for your client. If the leverage is not on your client's side, it's only practical and ethical to counsel caution concerning the possible unfavorable consequences, use other ways to limit client's liability, and maybe also throw in a few prayers that liability provision is never triggered.



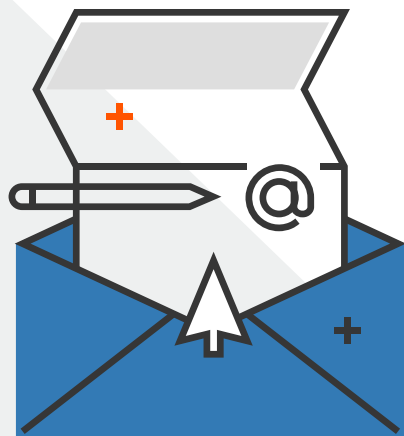


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AUTHOR'S NOTE



Inadequately drafted contracts leave contracting parties vulnerable. To fortify client protection, precise drafting of a contract is always essential. Clearly stating the intention of the contracting parties is by far the most practical (and cheapest!) way to limit rights and obligations for the parties to the agreement. The last thing anyone wants is to leave it all for courts to interpret. It is the learned art of skilled attorneys to draft concise yet comprehensive contractual provisions that effectively serve the clients' needs.



ABOUT

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Diana Isyanova is a business transactions attorney in Newport Beach, California.

Diana obtained her Bachelor of Arts in Business Economics from the University of California, Irvine, graduating magna cum laude. Her innate passion for learning and relentless drive to achieve led her to law school. In 2018, she received her Juris Doctor from Chapman University Dale E. Fowler School of Law. There, she was a recipient of academic merit scholarship and earned CALI awards (highest grade in class) in Negotiations, Legal and Equitable Remedies, Practice Foundation Transactions, Commercial Leasing, and Estate Planning courses.

During law school, Diana participated in the Tax Appeal Assistance Program with the Board of Equalization, published an article in the student-run scholarly publication, and served as a legal extern for a solo-practitioner assisting him with drafting estate plan, delving in business formation issues, and preparing for arbitration of financial disputes. After receiving her attorney license, Diana joined a large, multinational firm where she practiced complex civil litigation with a focus on the automotive industry. There, she dealt with reviewing and production of ESI, researching and analyzing automotive regulatory and safety-related issues, and drafting responses to inquiries from NHTSA.

Diana's exceptional ability to think outside the box and convert opportunities into workable realities, naturally lead her into the entrepreneurial world. Diana enjoys tremendously helping small businesses and solopreneurs – the main focus of her practice. She believes that a path to rising to the highest level of greatness lies through strong work ethics and rational optimism. Diana is also fluent in Russian. When she is not working, Diana loves spending time with her husband, three young daughters, a cat, and a dog.

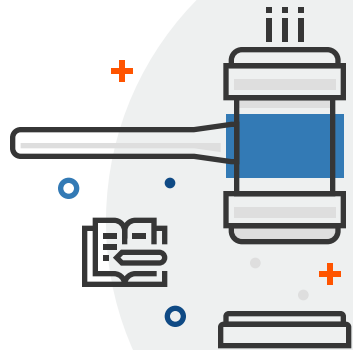
Diana is admitted to practice law in the State of California and to the United States District Court, Central District of California. She is also a member of the Orange County Bar Association and the OCBA Young Lawyers Division.

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ABOUT

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