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From Contribution to Good Faith Settlements: Equity Where Are You?

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FROM CONTRIBUTION TO GOOD FAITH SETTLEMENTS: EQUITY WHERE ARE YOU?

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THE RIGHT OF contribution is a remedy provided by the law to a defendant which is compelled to pay more than its fair share of a judgment to a plaintiff.[1] Its existence is necessitated by the concept of joint and several liability, which allows a plaintiff to collect any part of its judgment, or all of it, against any defendant which is found liable at trial, regardless of that defendant's share of fault.[2] There is presently a lack of uniformity among state contribution laws, a variance which creates confusion in lawsuits where the application of more than one state's law is a possibility. Nowhere is this confusion more apparent than in aviation litigation, which, due to the nature of flight itself, almost always involves occurrences and parties with multiple state involvements and connections.

Legal strategies and decisions by plaintiffs and defendants

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[1] STORY, EQUITY JURISPRUDENCE §§ 492, 493 (11th ed. 1873).

[2] Howard v. Spafford, 321 A.2d 74 (Vt. 1974).

alike can be greatly affected by the applicable law of contribution. It will be the purpose of this paper to examine the inconsistencies inherent in our present contribution laws and to analyze the various legal devices which have been created in an attempt to insure equitable apportionment of damages among defendants. The paper will pay special attention to the duty, which has been recognized in a number of states, of one defendant to another to settle in good faith, a duty which is fast becoming the last bastion in the judicial arsenal to insure equitable apportionment of damages. Hopefully, this discussion will provide aviation insurers, adjusters and attorneys with a useful tool for understanding the maze of contribution laws, and their progeny, so that litigation decisions can be made in the best interests of all affected parties.

I. JOINT AND SEVERAL LIABILITY

If the law is supposed to mirror man's concept of fairness, perhaps no law is more at odds with this concept than the law of joint and several liability.[3] What man on the street would accept as "just" a rule which can allow one party to be compelled to pay more than its fair share of plaintiff's damages, while allowing a more blameworthy party to go scot free?

Joint and several liability reflects the higher priority which the law places on the principle that a plaintiff should be made whole for its damages than it does on the principle that damages should be apportioned equitably.[4] This principle of making the plaintiff whole, even at the expense of a defendant compelled to pay more than its fair share of the loss, is

[3] Joint and several liability is justified by the argument that theoretically, a defendant who is found liable, regardless of its percentage share of fault, is proximately responsible for all of plaintiff's injuries. *See generally* Fleming, *Report to the Joint Committee of the California Legislature on Tort Liability on the Problems Associated with American Motorcycle Association v. Superior Court*, 30 HASTINGS L.J. 1465 (1979).

[4] Without joint and several liability, a plaintiff might not be able to collect all of its judgment if one of the defendants found liable cannot pay its rightful share due to insolvency or low insurance policy limits. Joint and several liability allows the plaintiff to collect all of its judgment, and thus, be made "whole," as long as any of the defendants has sufficient assets to satisfy that portion of the judgment which cannot be collected due to the insolvency of another party.

currently the law in the vast majority of states.[5] An example will help to explain the force and effect of joint and several liability. Let us assume that we have a plaintiff, P, who obtains a $1 million verdict against defendants A, B and C. The jury has apportioned the respective liability of the defendants as follows: A - 10%, B - 45%, C - 45%. In a state which has joint and several liability, P can collect the full $1 million judgment against A, even though A's fair share of the verdict is only $100,000.

In joint and several liability states which do not specifically allocate a percentage of fault among defendants, the results are just as unnatural.[6] In such states, a verdict in the above example would simply find A, B and C negligent for plaintiff's injuries without a specific percentage allocation of negligence as to any of the defendants. Each defendant would be liable for an equal share, in this instance, one-third, but again, P can choose to select the entire $1 million from A rather than the $333,333.33 to which A should rightfully be subjected.

In a joint and several liability jurisdiction, the deep pocket defendant cannot hope for a reasonable settlement where one or more of the other defendants is without assets or has low policy limits. In such cases, the plaintiff must keep the mon-

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[5] Only three states clearly prohibit joint and several liability: Kansas, New Hampshire and Vermont. In Kansas, see Brown v. Keill, 224 Kan. 195, 580 P.2d 867, 875 (1978); in New Hampshire, see N.H. REV. STAT. ANN. § 507:7-(a); in Vermont, see Howard v. Spafford, 321 A.2d 74 (1974). In Kentucky, the question of whether joint and several liability will apply is up to the jury. If the jury apportions negligence among two or more defendants by percentage, liability is considered several. If the jury does not make a percentage allocation, the court speculates that the jury intended the liability to be joint. Ohio River Pipeline Corp. v. Landrum, 580 S.W.2d 713 (Ky. Ct. App. 1979).

[6] Some states do not allocate a specific percentage of fault, but merely find all defendants who are negligent equally liable. *See, e.g.*, Celotex Corp. v. Campbell Roofing and Metal Works, Inc., 352 So. 2d 1316 (Miss. 1977). Some other states apportion fault according to percentage. *See, e.g.*, MINN. STAT. ANN. § 604.02(1) (West 1984); MONT. CODE ANN. § 27-1-703(2) (1983); TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1984); Pachowitz v. Milwaukee & Suburban Trans. Corp., 56 Wisc. 2d 383, 202 N.W.2d 268 (1972). In Utah, only where there is disproportionate fault between two or more defendants is the jury to allocate negligence by a percentage; otherwise, a Utah jury will find each negligent defendant equally liable. UTAH CODE ANN. § 78-27-40(2) (1953).

ied defendant in the action if it wants to be assured of collecting its total jury award. In our above example, assume that B and C each have $100,000 policy limits and that A has a $5 million limit. Assume also, that the above-cited percentages of negligence (A - 10%, B - 45%, C - 45%) and damages ($1 million) are easily discernible prior to trial. In a state which has joint and several liability, P is not likely to accept a $100,000 settlement offer from A, even though the offer is reasonable given A's complicity in the accident. P knows that at trial, the most it can collect from B and C is a total of $200,000. P also knows that, assuming it obtains a liability finding against all three defendants, it can collect from A whatever it cannot collect from B and C. Thus, unless A is willing to offer $800,000 in settlement, eight times its true exposure, P is not likely to settle with A, and at trial, A can expect to pick up the lion's share of the judgment despite its minimal share of fault.

II. ENTER THE RIGHT OF CONTRIBUTION

As mentioned earlier, where there is no joint and several liability, there is no need for a right of contribution.[7] Contribution is the method by which one defendant can recover from another defendant that portion of plaintiff's damages which the former defendant paid, but which the latter defendant should have paid.[8] In our example above, if P collects $800,000 from A, $100,000 from B and $100,000 from C,

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[7] Brown v. Keill, 224 Kan. 195, 580 P.2d 867, 875 (1978). Only a few states allow joint and several liability but do not recognize a right of contribution. *See, e.g.,* Consolidated Pipe & Supply Co. v. Stockham Valves & Fittings, 365 So. 2d 968, 970 (Ala. 1978); Holmes v. Hoemako Hospital, 117 Ariz. 403, 573 P.2d 477, 479 (1977); Fox v. Fox, 168 Conn. 592, 262 A.2d 854 (1975); Jackson v. Record, 211 Ind. 141, 5 N.E.2d 897 (1937), *aff'd,* Barker v. Cole, 396 N.E.2d 964 (Ind. App. 1979); Horton v. United States, 622 F.2d 80 (4th Cir. 1980) (South Carolina).

[8] The right of indemnity is to be distinguished from the right of contribution. The right of indemnity traces itself to a pre-tort relationship between defendants, such as that between a general contractor and a sub-contractor, or between a retailer and manufacturer, where the former party in both examples can be held technically liable for the latter's negligence. In that situation, allowing the plaintiff to obtain and collect its entire judgment from the technically liable party is justified by the fact that the technically liable party, in entering into its pre-tort relationship, accepts a duty to the plaintiff to be liable for the acts of the other party. There, indemnity is the means by

the right of contribution would provide A with a remedy to recover $350,000 from B and $350,000 from C, resulting in a net payout by each defendant consistent with the jury's allocation of fault. Obviously, if the subject state did not have joint and several liability, there would be no need for this right of contribution since P could not have collected more than $100,000 from A to begin with.

The most glaring deficiency with the contribution remedy is that it provides no cure to the A's of the world, where B and C have low policy limits and few assets. In those circumstances, P will collect the vast majority of the judgment from A, and A's right of contribution against B and C is rendered valueless due to the financial status of B and C. As stressed earlier, A's predicament here is the result of a judicial system which places a higher priority on making the plaintiff whole than it does on equitably apportioning damages (quite a paradox given the fact that only a few years ago, a number of jurisdictions would not allow a plaintiff to recover any portion of its damages if it was found to be at all contributorily negligent).

But what about those situations where B and C have assets or big policy limits and P nevertheless asserts all or most of its collection rights against A? This can occur when collection, for whatever reason, can be accomplished easier from A, or where P is friendlier with B and C and therefore looks to A for its compensation. The potential for this situation is enhanced by the "heat of battle" nature of trials, and if P is angered by A's conduct at trial, P might well go after A for more than A's fair share of the verdict amount. But how is A able to assert its right of contribution and what can A do to

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which the technically liable party can later seek reimbursement from the culpable party.

The right of contribution cannot be traced to a pre-tort relationship where one party has accepted a duty to pay plaintiff for the acts of another party. In fact, the relationship between parties who maintain rights of contribution against each other is not initiated until the occurrence of the tort itself. In this situation, where one party has been compelled to pay plaintiff for the liability of another, a liability which the "paying" party never accepted, the need to "equalize" through the right of contribution is more compelling than the need which justifies the right of indemnity. *See* LeMaster v. Amsted Indus., 110 Ill. App. 3d 729, 442 N.E.2d 1367 (1982).

assure that it is not left "holding the bag" for another party's fair share with respect to plaintiff's judgment amount? The next section will deal with asserting one's right of contribution.

III. METHOD FOR ASSERTING RIGHT OF CONTRIBUTION

In some jurisdictions, a cause of action for contribution does not accrue until a joint tortfeasor pays more than its proportionate share of damages.[9] Additionally, the party against whom the joint tortfeasor seeks contribution must be discharged from further liability to the plaintiff before the right of contribution will be enforceable.[10] Thus, in our above example, A would have to wait until P collected from A an amount in excess of A's percentage share of the judgment, and until B's and C's further liability was discharged by a satisfaction of the judgment, before A would have an enforceable right of contribution against B and C.

Many states, however, recognize an inchoate right of contribution which comes into being when the underlying incident causing P's injuries occurs.[11] In these jurisdictions, local procedural rules must be scrutinized carefully to determine if a joint tortfeasor sacrifices its right of contribution if a cross claim for contribution is not timely filed prior to the trial of P's lawsuit. A good example of the conflict in judicial decisions with respect to the question of the appropriate time to file a contribution action can be seen by looking to the law of one state, Illinois, where appellate courts in different districts have come up with opposite conclusions as to what the law should be.

In *Tisoncik v. Szczepankiewica,*[12] the Illinois Appellate Court for the First District ruled that a contribution claim must be

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[9] Coulson v. Larsen, 94 Wis. 2d 56, 287 N.W.2d 754 (1980); Bishop v. Klein, 380 Mass. 285, 402 N.E.2d 1365 (1980); Hart v. Cessna Aircraft, 276 N.W.2d 166 (Minn. 1979); Dairyland Ins. Co. v. Mumert, 212 N.W.2d 436 (Iowa 1973).

[10] Sochenski v. Sears, Roebuck & Co., 504 F. Supp. 187 (E.D. Pa. 1980).

[11] For examples of state laws which recognize an inchoate right, see OKLA. STAT. ANN. tit. 12 § 832(a) (West Supp. 1983-84): OR. REV. STAT. § 18.440(1) (1981); and MICH. COMP. LAWS ANN., § 600.2925(a)(1) (West Supp. 1983-84).

[12] 113 Ill. App. 3d 240, 446 N.E.2d 1271 (1983).

asserted by counter-claim or third-party claim in the plaintiff's action or the right of contribution between defendants will be lost. There, one defendant was voluntarily dismissed by the plaintiff during trial, and the remaining defendant objected because this dismissal would effect the remaining defendant's right of contribution against the dismissed defendant. The court held that the remaining defendant did not have standing to object because by not asserting its right of contribution before the trial, it lost its right and thus had nothing to lose by the dismissal of the other defendant.

In *Laeu v. Leifheit*,[13] the Illinois Appellate Court for the Second District held that a contribution action may be filed by one defendant against another defendant *after* judgment has been entered by the court in the underlying plaintiff's lawsuit. A category of cases not mentioned above involves situations where A might seek contribution against N, a non-party in P's lawsuit.[14] This paper does not address itself specifically to that scenario because there, A's equitable right to a fair apportionment of damages among defendants is not threatened since N is not a defendant and thus joint and several liability cannot be used by P to collect N's share from A. It is, however, important to note that while some jurisdictions[15] will not recognize A's right of contribution against N until after A has paid P, thereby extinguishing N's liability, other jurisdictions might[16] require A to file a third party complaint against N in P's lawsuit or risk losing the right of contribution against N after a verdict has been rendered in P's case.[17]

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[13] No. 830192, slip opinion (Ill. App. Ct. Dec. 29, 1983).

[14] MICH. COMP. LAWS ANN. § 600.2952a(5) (West Supp. 1983-84) (requiring that a settling defendant make a reasonable effort to notify any non-party against whom it intends to seek contribution of the pending lawsuit in order to maintain its right of contribution against the non-party). The purpose of this rule is apparently to provide the non-party an opportunity to participate in the settlement.

[15] *See supra* notes 9-10.

[16] *See Tisoncik*, 113 Ill. App. 3d 240, 446 N.E.2d 1271 (1983).

[17] See MICH. COMP. LAW. ANN. § 600.2925a(7) (West Supp. 1983-84), for the rule that a party cannot obtain contribution against a non-party after satisfying part or all of a judgment unless a reasonable offer was made to notify the non-party of the action.

IV. EFFECT OF SETTLEMENT ON RIGHTS OF CONTRIBUTION

No one event creates a wider variety of response within the framework of state contribution laws than when one joint tortfeasor settles prior to the time that a judgment is entered. Questions arise with respect to the effect of the settlement on the contribution rights of the settling joint tortfeasor as well as the effect of the settlement on the contribution rights of the non-settling joint tortfeasor. This next section will address these effects and discuss strategies which the plaintiff, settling defendant and non-settling defendant might utilize given their respective positions in the settlement.

A. *Effect on Settling Joint Tortfeasor*

In almost every jurisdiction, a settling joint tortfeasor will lose its right of contribution against the non-settling joint tortfeasors if the settlement does not extinguish the non-settlors from further liability to the plaintiff.[18] In our example, if A settles with P for $500,000 and the release does not also release B and C, the settlement extinguishes A's rights of contribution against B and C. The extinguishment of A's right of contribution in this circumstance is not particularly troublesome. A is free to settle with P or to stay in the litigation until a judgment is rendered. A has control over its own destiny and since its voluntary decision to settle knowingly cuts off its rights of contribution against B and C, the extin-

[18] The following state statutes require that a settling joint tortfeasor, through the release provided by the plaintiff, extinguish the further liability to plaintiff of any party against whom it seeks contribution: ALASKA STAT. § 09.16.010(d) (1983); ARK. STAT. ANN. § 34-2003(3) (1962); COLO. REV. STAT. § 13-50.5102(4) (West Supp. 1983); DEL. CODE ANN. tit. 10, § 6302(c) (1964); FLA. STAT. ANN. § 768.31(20)(3) (West Supp. 1984); HAWAII REV. STAT. § 663-23 (West Supp. 1983-84); IDAHO CODE § 6-803(2) (1949); ILL. ANN. STAT. ch. 70 § 302(e) (Smith-Hurd Supp. 1983-84); MD. ANN. CODE art. 50 § 17 (1983); MICH. COMP. LAWS ANN. § 600.2925(a)(3)(a)-(d) (West Supp. 1983-84); NEV. REV. STAT. § 17.115(3) (1979); N.M. STAT. ANN. § 41-3-2(c) (1982); N.C. GEN. STAT. § 1B-1(d) (1983); N.D. CEN. CODE § 32-38-01(4) (1960); OHIO REV. CODE ANN. § 2307.31(b) (Page 1981); OKLA. STAT. ANN. tit. 12 § 832(d) (West Supp. 1983-84); PA. CONS. STAT. ANN. § 8324(c) (Purdon 1982); OR. REV. STAT. § 18.440(3) (1981); S.D. COM. LAWS ANN. § 15-8-14 (1969); TENN. CODE ANN. § 29-11-102(d) (1980); UTAH CODE ANN. § 78-27-40 (1953); and, VA. CODE § 301.25.1(B) (1983).

guishment of the right does not create any inequities. A is not compelled to settle for an amount over what it believes its exposure to be, and it thus does not have an equitable need for contribution from B or C.

As mentioned above, however, if A's settlement with P extinguishes the further liability of B or C, A is able to maintain a contribution action against B and C.[19] Thus, if in consideration of A's settlement with P for $500,000, A required P to enter into a general release, or an agreement which specifically released B and C from further liability, A would be free to file a contribution action against B or C in an attempt to prove that some portion of A's settlement with P should have been paid by B or C, given their share of culpability. This strategy might be appropriate where A doubts P's willingness or ability to prove a case against B or C and A believes it could be more successful going against B or C directly without P remaining in the lawsuit. In such a circumstance, A will be best advised to settle with P for the entire amount of P's damages, obtaining a release, and to rely on a contribution action against B and C after settlement to seek an equitable apportionment of damages for B and C.

An example of a case where a joint tortfeasor would have benefited by this strategy is *Cardio Systems, Inc. v. Superior Court.*[20] There plaintiff sued a hospital and the distributor of a heart lung machine for the death of the plaintiff-decedent. After suit was filed, plaintiff dismissed the distributor in exchange for the distributor's agreement not to pursue costs against the plaintiff. The court interpreted this agreement as a settlement since the settling defendant arguably "paid" the amount of its costs which it may have recovered. This settlement in turn was held to bar the hospital's right of contribution against the distributor of the heart lung machine. It was clear from the pre-trial discovery that the distributor shared liability with the hosptial for the death of plaintiff's decedent but was dismissed because plaintiff believed the strict liability case necessary to prove the distributor's liability might con-

[19] For supporting cases, see *supra* note 18.

[20] 176 Cal. Rptr. 254, 122 Cal. App. 3d 880 (1981).

fuse the jury and that the negligence case against the hospital would be easier to explain. Additionally, since the hospital had sufficient policy limits for any likely verdict amount, as a matter of trial tactics plaintiff believed it was in a better position without the distributor defendant in the lawsuit. Thus, the hospital was forced to shoulder the full liability for the plaintiff decedent's death. Had the hospital settled first with plaintiff for the full amount of plaintiff's damages and extinguished the distributor's liability via its release with the plaintiff, the hospital would then have been able to pursue a contribution action against the distributor and been in a far better position than it ultimately occupied.

Suffice it to say, a party must be aware of the applicable contribution law in making its settlement decisions. It must know whether or not a settlement on its behalf will extinguish its right of contribution against other joint tortfeasors before it can decide what it should be willing to pay in settlement. Where the language of its release with plaintiff governs whether a contribution action might be maintained, it must make certain that where it pays more than its fair share of damages with the goal of seeking contribution later, its release with plaintiff extinguishes the further liability of those parties against whom contribution will be sought. A release containing language which discharges "any and all other persons whether herein named or not" has been held to clearly and explicitly discharge not only the signing tortfeasor, but all persons.[21]

B. *Effect of Settlement on Non-Settling Joint Tortfeasors*

While the potential extinguishment of a settling joint tortfeasor's right of contribution should not be a cause of concern among legal purists, the exact opposite is true when we look to the effect a settlement has on the right of contribution of the remaining joint tortfeasors. In our prior example, where C, who is likely to be found 45% liable for P's $1 million in damages, settles for a nominal amount prior to trial,

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[21] Doganieri v. United States, 520 F. Supp. 1092 (N.D. W. Va. 1981).

what happens to A's and B's rights of contribution against C? What effect does C's settlement with P have on the eventual judgment amount which may be collected from A or B? An analysis of the answers to these questions will bear out the weaknesses and the lack of uniformity in present state laws to ensure equitable apportionment of damages.

1. *Is the Right of Contribution to Remaining Joint Tortfeasors Extinguished?*

Only in a minority of jurisdictions can a non-settling joint tortfeasor maintain its right of contribution against a settling joint tortfeasor in all circumstances.[22] In such jurisdictions, the joint tortfeasors who remain in the litigation have the right to argue the settling joint tortfeasor's liability to the jury and to include the settling joint tortfeasor on the verdict form.[23] In the event that the settling joint tortfeasor's share of damages as allocated by the jury is greater than the amount it paid in settlement, the remaining joint tortfeasors have a right of contribution for the difference.[24] In our example, if P settles with C for $100,000, and the verdict is for $1 million in damages with liability apportioned as follows: A-10%, B - 45%, C - 45%, and P collects $450,000 from B and $450,000 from A ($1 million less the $100,000 settlement, less the $450,000 collected from B), A will have a right of contribution against the already settled joint tortfeasor, C, for $350,000 ($450,000 less $100,000 already paid in settlement).

The vast majority of those jurisdictions which recognize a right of contribution extinguish that right for all joint tortfeasors against any party who has settled with the plain-

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[22] GA. CODE ANN. § 51-12-32(a) (Supp. 1981). Mississippi common law would also seem to dictate this result. *See* Standard Oil Co. v. Illinois Central R.R., 421 F.2d 201 (1969).

[23] In all circumstances where the percentage of settling tortfeasor's negligence has an impact on the ultimate liability, tortfeasor's name will be included on the verdict form. *See* Smith v. Fenner, 399 Pa. 633, 161 A.2d 150 (1960), *discussed infra* note 25, and Clemtex, Ltd. v. Dube, 578 S.W.2d 813 (Tex. Civ. App. — Waco 1979, writ ref'd n.r.e.), *discussed infra* note 29. In each case the percentage of the settling tortfeasor's negligence may have served to reduce the liability of the remaining tortfeasors at trial.

[24] *See, e.g., supra* note 22.

tiff.[25] In these circumstances, the principle that damages should be equitably apportioned again clashes with a higher priority legal principle, this time, the principle that settlements should be encouraged, and again, equitable apportionment comes out playing second fiddle.

It is easy to see why settlement would not be encouraged if a settling defendant was still subject to the non-settling parties' rights of contribution. In our above example, C would have little motive to settle with P, even for a favorable amount, if it knew that it was still subject to A's and B's right of contribution. This is especially true given the fact that, at least by not settling, C has an opportunity to defend itself at trial. If A and B maintain their rights of contribution against C where C has settled, C would be subject to the jury's alloca-

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[25] ALASKA STAT. § .09.16.949(2) (1983); CAL. CIV. PROC. CODE § 877(b) (West 1980); COLO. REV. STAT. § 768.31(5)(b) (West 1984); ILL. ANN. STAT. ch. 70 § 302(d) (Smith-Hurd 1983); MASS. ANN. LAWS. ch. 231 B § 4(b) (Mitchie/Law Co-op. 1974); NEV. REV. STAT. § 17.245(2) (1979); N.Y. GEN. OBLIG. LAW § 15-108(b) (McKinney 1978); N.D. CENT. CODE § 32-38-04(2) (1976); OHIO REV. CODE ANN. § 2307.32(f)(2) (Page 1981); TENN. CODE ANN. § 29-11-105(a)(2) (1980); VA. CODE § 8.0135.1(2) (Supp. 1983); WYO. STAT. § 1-1-113(a)(ii) (1983).

See also ARK. STAT. ANN. § 34-1005 (1962); DEL. CODE ANN. tit. 10 § 6304(b) (1975); GA. CODE ANN. § 51-12-32(a) (Supp. 1981); HAWAII REV. STAT. § 663-25 (1976); IDAHO CODE § 806 (1979); MD. ANN. CODE art. 50 § 20 (1979); N.M. STAT. ANN. § 41-3-5 (Supp. 1981); PA. CONS. STAT. ANN. § 8327 (Purdon 1981); R.I. GEN. LAWS § 10-6-8 (1970); S.D. COMP. LAWS ANN. § 15-8-18 (1967); UTAH CODE ANN. § 78-27-43 (1977). In each of these statutes, the settling defendant must state in its release that the remaining defendants will have a *pro rata* credit for the share of the settlor's liability in order for the settlor to be immune from contribution actions by the non-settling defendants. In the Pennsylvania case of Smith v. Fenner, 399 Pa. 633, 161 A.2d 150 (1960), the court had an opportunity to deal with this requirement. There, the plaintiff sued A and B. A and B in turn filed a 3rd party complaint against C. C had settled with P for $4,500 and had asserted its release as a bar to B's and C's third party action for contribution. The release language stated, in part, that "should it appear that two or more persons or entities are jointly or severally liable in tort for the said injuries to person or damage to property resulting from or arising out of said accident, the consideration for this release shall be received in reduction of the total damages recoverable against all other tort-feasors *to the extent of the pro-rata share of the said [release]*" (emphasis added).

The release was held to be a bar to A's and B's action for contribution against C. At trial, the jury returned a verdict for $110,833.17 jointly against A, B and C. The court reduced A's and B's liability by C's one-third *pro rata* share, resulting in a liability to A and B of $36,944.39 each. C was not compelled to pay any more than its $4,500.00 settlement amount. P ended up with a recovery of $78,388.78 in spite of its verdict for $110,833.17 due to its "light" settlement with C.

tion of damages. If A and B choose to wait until after a verdict is rendered before filing their contribution action against C, C will be in the position of having had its liability being ascertained while not being present at trial. This predicament is obviously one not to be relished by C. Before entering into settlement, C should determine the applicable law with respect to the rights of others for contribution against it after it settles with P. Where the right of contribution is not extinguished, unless C pays an amount in settlement which it is certain will cover an eventual allocation by the jury against its own empty chair, C is not able to buy its peace through the settlement.[26] If settlement does not extinguish the rights of others to obtain contribution against C, C risks far greater exposure by settling and then being absent from trial, and thus has no reason to settle.

While this paper recognizes that the principle of equitable apportionment of damages cannot coexist with the principle of encouraging settlements, it questions giving the latter principle higher priority. After all, if settlement is to be encouraged, it is only because it ends the costs associated with litigation. But the litigation was not initiated by the non-settling defendants. Is it fair that they be the very parties whose rights are extinguished in order to partially cut off a process which they did not start! Additionally, extinguishing the right of contribution against a settling defendant only results in piecemeal settlements; the litigation as to the remaining defendants continues. What overall advantage is there with respect to ending the ills of litigation if the lawsuit continues against non-settling defendants? And continue it will, because as pointed out earlier, as long as there is joint and several liability, a plaintiff would be foolish to settle with a deep pocket defendant for a reasonable amount where it

[26] GA. CODE ANN. § 51-12-32(a) (1981) states: "The right of joint tortfeasor to contribution from others continues unabated and is not lost by compromise and settlement of a claim of injury to person, property or wrongful death and release therefrom." Thus, if a settling defendant pays less in settlement than the jury ascertains its liability to be, that defendant will be liable for the difference between the settlement amount and the amount of liability entered against it by the jury to the defendant against whom plaintiff collects that excess amount.

needs that deep pocket defendant on its jury verdict in order to be able to collect from it any part or all of the judgment, where other defendants have low policy limits or few assets. (Remember our example of A needing to settle for $800,000, eight times its true culpability, in order to hope to settle in a joint and several liability jurisdiction!)

2. *The Effect Of The Settlement:* Pro Rata *or* Pro Tanto

All of the states which recognize a right of contribution also recognize that if that right is to be extinguished as against the settling defendant, a counter-action safeguard is necessary to promote equitable apportionment of damages.[27] The response in a minority of jurisdictions is to reduce the plaintiff's eventual judgment by the *pro rata*, or percentage, share of the settling defendant's fault.[28] In states where this occurs, in order to determine the settling defendant's *pro rata*

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[27] *See* statutes cited *infra* notes 28 and 31; each of these statutes provide some form of credit to the non-settling defendant for the settling defendant's settlement.

[28] Harvey v. Travelers Ins. Co., 163 So. 2d 915 (La. Ct. App. 1964); Cartel Capital Corp. v. Fireco, 410 A.2d 674 (N.J. 1980); Bartels v. City of Williston, 276 N.W.2d 113 (N.D. 1979); Clemtex, Ltd. v. Dube, 578 S.W.2d 813 (Tex. Civ. App. — Waco 1979, writ ref'd n.r.e.); Ladwig v. Ermanco, Inc., 504 F. Supp. 1229 (E.D. Wis. 1981). *See also* LA. CIV. CODE ANN. art. 2203 (West 1952) (which has been interpreted as allowing a *pro rata* reduction); N.J. REV. STAT. § 2A:53A-3 (1952) (permits recovery from other joint tortfeasors for excess paid over *pro rata* share).

In New York, the court will reduce the plaintiff's eventual judgment by the *pro rata* share of the settlor's fault if that amount is greater than the dollar amount of the settlement. N.Y. GEN. OBLIG. LAW § 15-108(a) (McKinney 1978).

The following state courts will reduce the plaintiff's eventual judgment by the *pro rata* share of the settlor's fault if the release between the plaintiff and the settlor so specified: ARK. STAT. ANN. § 34-1005 (1947); DEL. CODE ANN. tit. 10 § 6304(b) (1975); HAWAII REV. STAT. § 663-15 (1976); IDAHO CODE § 6-806 (1979); MD. ANN. CODE art. 50, §§ 19, 20 (1957); N.M. STAT. ANN. §§ 41-3-4, -5 (1978); PA. CONS. STAT. ANN. §§ 8326-27 (Purdon 1982); R.I. GEN. LAWS §§ 10-6-7, -8 (1969); S.D. COMP. LAWS ANN. §§ 15-8-17, -18 (1967); UTAH CODE ANN. §§ 78-27-42, -43 (1953).

If the release did not so specify, the non-settling defendants retain their rights of contribution against the settlor, so that the effect on the non-settling joint tortfeasors is an equitable one. To illustrate, in those states, if P settles with C for $100,000, with eventual fault allocated by the jury of A - 10%, B - 45% and C - 45%, and P's damages are $1 million, if C's release specified a *pro rata* reduction, P's judgment, recoverable against A and B will be reduced to $550,000. If the release did not specify *pro rata* reduction, P's judgment would only be reduced by the $100,000 settlement. However, A and B would retain their rights of contribution against C for $350,000 which, assuming recovery from C, would result in the same net exposure of A and B to P for $550,000, their fair joint liability.

share, its name must be on the verdict form so that the jury can allocate the appropriate percentage of negligence to the settling defendant.[29] In our example, if P settles with C for $100,000 and at trial the jury verdict is for $1 million , allocating the fault of A at 10%, B at 45% and the settled C at 45%, P's judgment is reduced by $450,000, which represents C's *pro rata* share of P's damages (45% of $1 million). P is then only able to collect $550,000 from A and B, and if it chooses to collect all of that amount from A, A's right of contribution against B would entitle A to collect reimbursement from B in the sum of $450,000.

In jurisdictions which reduce the plaintiff's eventual judgment by the *pro rata* share of the settling defendant's fault,[30] the non-settling defendant's lost right of contribution as against the settlor has been completely neutralized. In our example above, A and B do not need a right of contribution against C in order to insure equitable apportionment of damages because the full amount of the lost right has been deducted from A's and B's eventual exposure to P.

In fact, in jurisdictions where judgments are reduced by the *pro rata* share of the settling defendant's fault, the remaining tortfeasors are actually in a better position than they would be if the settlement did not eliminate their rights of contribution. If the settlement above had not eliminated A's and B's rights of contribution against C, and the settlement was not reduced by C's *pro rata* share of fault, P could collect $1 million from A, and although A would then have a right of contribution against B and C for $450,000 each, if C is insolvent or has low policy limits, A is not likely to collect a significant portion of its rightful contribution amount against

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[29] In Clemtex, Ltd. v. Dube, 578 S.W.2d 813 (Tex. Civ. App. — Waco 1979, writ ref'd n.r.e.), the plaintiff sued four defendants, A, B, C, and D. Plaintiff settled with A and B before trial jointly for $160,000. In plaintiff's trial against C and D, A's and B's names were on the verdict form. The jury found A and B 0% negligent; C and D 60% negligent; and plaintiff 40% contributorily negligent. Plaintiff's damages were $202,326.53, which, after reducing for plaintiff's own negligence, were $121,395.92. Plaintiff was able to recover the full $121,395.92 from C and D in spite of its settlement with A and B, since a *pro rata* reduction of the judgment by A's and B's percentage share of fault had no effect on the amount.

[30] *See supra* note 28.

C. A is thus in a worse position than it would be in a jurisdiction which eliminates A's right of contribution against C upon C's settlement with P, but which also reduces P's eventual judgment by C's *pro rata* share of fault.

The majority of jurisdictions which extinguish non-settling defendants' rights of contribution against the settling defendant reduce the plaintiff's eventual judgment not by the percentage of the settlor's fault (*pro rata* reduction) but by the dollar amount of the settlor's settlement (*pro tanto* reduction).[31] In these jurisdictions, in our example, C's settlement for $100,000 would result in a $100,000 reduction in P's judgment of $1 million against A and B, in spite of C's 45% share of fault. A and B would lose their right of contribution against C as a result of C's settlement with P. If P chose to collect the entire net balance of its judgment of $900,000 from A, A's lone right of contribution would be for $450,000 against B. Even if A could collect its rightful share of contribution from B, A's net payout would be $450,000, which is $350,000 more than its fair share of P's judgment, and A would have no right of contribution against the defendant who got out $350,000 light, the fortunate Mr. C.

The only party whose strategy will be affected by the question of whether a *pro tanto* or *pro rata* reduction is in effect is the plaintiff. The non-settling defendants A and B are obviously not in a position to make a decision with respect to

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[31] Maddox v. Druid City Hosp. Bd., 357 So. 2d 974 (Ala. 1978); Adams v. Dion, 509 P.2d 201 (Ariz. 1973); Barker v. Cole, 396 N.E.2d 964 (Ind. App. 1979); ALASKA STAT. § 09.16.040(1) (1983); CAL. CIV. PROC. CODE § 877(a) (West 1980); COLO. REV. STAT. § 13-50.5-105(a) (Supp. 1983); FLA. STAT. ANN. § 768.31(5)(a) (West 1984); ILL. ANN. STAT. ch. 70 § 302(c) (Smith-Hurd 1983); MASS. GEN. LAWS ANN. ch. 231 B, § 4(a) (West 1974); MICH. COMP. LAWS ANN. § 600.295(c) (West Supp. 1984); OHIO REV. CODE ANN. § 2307.32(f)(1) (Page 1981); OR. REV. STAT. § 18.455(a) and (b) (1981); PA. STAT. ANN. tit. 42 § 8326 (Purdon 1982); R.I. GEN. LAWS § 10-6-7 (1970); TENN. CODE ANN. § 29-11.105(a)(1) (1980); VA. CODE § 8.01-35.1 (Supp. 1982); W. VA. CODE § 55-7-12 (1981). Note that in Iowa, the court allows a *pro tanto* credit where to allow a *pro rata* credit would give the plaintiff a windfall. In Wadle v. Jones, 312 N.W.2d 510 (Iowa 1981), plaintiff sued A and B. A settled prior to trial for $45,000.00. At trial, plaintiff obtained a judgment against A and B jointly for $45,125.95. Since only allowing a 50% reduction of the judgment amount would have resulted in plaintiff collecting, as a result of its settlement and judgment, an amount far in excess of the jury's determination of damages, the court applied a *pro tanto* reduction resulting in B's exposure on the judgment being reduced to $125.95. *Id.*

whether or not C's settlement offer should be made or accepted. The settling defendant, C, is unaffected after its settlement by the manner in which the applicable law reduces P's ultimate judgment against A and B. Where C's settlement extinguishes A's and B's rights of contribution against C, it does not matter to C whether P's ultimate verdict will be reduced by C's percentage share of fault or by the amount of C's settlement. C is subject to no further exposure in either case.

The question of whether the applicable law reduces plaintiff's judgment *pro rata* or *pro tanto* will have a profound effect on plaintiff's decision to settle. In a jurisdiction which allows a *pro rata* reduction, plaintiffs will be ill-advised to settle with a defendant with low policy limits, where that defendant has a high percentage of negligence exposure. Unless a plaintiff can collect from the settlor an amount equal to that party's true exposure, the plaintiff risks losing the full amount of its miscalculation. In our example, if P settles with C, even for C's policy limits of $100,000, P will have made a mistake which costs it $350,000 where *pro rata* reduction laws are applicable, for as a result of the settlement, P would lose the right to collect C's exposure over its policy limits ($450,000 less $100,000, or $350,000) from defendants A and B, a right it would maintain if it refused to settle with C and obtained a joint judgment against A, B and C.

In a state which applies *pro tanto* reduction laws, P risks nothing in settling with C, no matter what the settlement amount. Assuming P is able to obtain a judgment against A and B, P's judgment is only reduced by what it already obtained from C resulting in a net balance to P of what it would have obtained even had it not settled with C.

The question of whether a state will apply a *pro tanto* or *pro rata* reduction rule should greatly influence a plaintiff's decision with respect to settlement. Although it will not affect the decision process of settling or non-settling joint tortfeasors, the question of whether the applicable reduction rule is *pro rata* or *pro tanto* will greatly impact on the ultimate exposure of the non-settling joint tortfeasor. Where the *pro rata* reduc-

tion rule is applicable, the non-settling joint tortfeasor's lost right of contribution against the settlor is completely neutralized, and then some. Where the *pro tanto* reduction rule is in effect, however, the non-settling joint tortfeasor is the lone victim where a plaintiff has settled with a defendant for an amount less than that defendant's fair share of fault.

Both the *pro tanto* and the *pro rata* reduction rules contain the inherent potential for inequity, but the inequity is visited upon different parties depending upon which rule is in use. It will not be able to collect its true damages if it settles with one of two or more defendants for an amount less than the jury eventually allocates as that defendant's fair share. In a *pro tanto* state, the non-settling defendant is the party at risk. It will have to pay more than its fair share of plaintiff's damages if plaintiff settles with a co-defendant for an amount less than that co-defendant's true share of liability. Even though both the *pro rata* and *pro tanto* rules are potentially inequitable, at least in a *pro rata* state, the party who is at risk, the plaintiff, can control its own destiny by virtue of the settlement amount it accepts. Only in a *pro tanto* state is the party who is at risk, the non-settling defendant, at the complete mercy of others, the plaintiff and the settling defendant, and in that respect, the *pro tanto* rule is the one which creates the most concern.

What remedy, if any, does the law provide to a defendant whose equitable right to pay only its fair share of plaintiff's damages has been obliterated by joint and several liability; whose second line defense — the right of contribution — has been extinguished by its joint tortfeasor's settlement; and who, instead of receiving a fair credit for the joint tortfeasor's share of fault against the plaintiff's ultimate judgment, only receives a credit for the amount of the settlement, no matter how low that settlement might have been in relation to the settlor's true exposure?

A review of the judicial arsenal reveals that there is one remedy which is available to the non-settling defendant when an unfairly low settlement results in it being exposed to liability beyond its true share. The remedy is the requirement that

a settlement in a multi-party lawsuit be in good faith as to the non-settling defendants. The next section will discuss this concept and the way in which it has been applied by the courts.

V. ENTER THE DUTY OF GOOD FAITH

A number of states which extinguish the non-settlor's right of contribution against the settling tortfeasor and proceed to compound the inequity by only allowing the non-settlor a *pro tanto* reduction against the eventual judgment do impose a good faith duty with respect to the contribution extinguishing settlement. Presently, the good faith standard has been enacted by statute in 17 states.[32] The typical statute states that in order for the settlor to be discharged from the contribution rights of joint tortfeasors, its settlement must be in good faith.[33] The purpose of the good faith standard is to insure that a settling defendant's settlement amount is not so low so as to impose a potentially disproportionate cost on the defendant ultimately selected for suit.[34]

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[32] The states that have enacted good faith statutes are:

1. Alaska - ALASKA STAT. § 09.16.040 (1983).
2. Cal. - CAL. CIV. PROC. CODE § 877.6 (West 1980).
3. Colo. - COLO. REV. STAT. § 13-50.5-105 (Supp. 1983).
4. Fla. - FLA. STAT. ANN. § 768.31(5) (West 1984).
5. Ill. - ILL. ANN. STAT. ch. 70 § 302(c) (Smith-Hurd 1983).
6. Mass. - MASS. ANN. LAW ch. 231 B § 4 (Mitchie/Law Co-op. 1974).
7. Mich. - MICH. COMP. LAWS ANN. § 600.295(c)(a) (West Supp. 1984).
8. Nev. - NEV. REV. STAT. § 17.245 (1979).
9. N.Y. - N.Y. GEN. OBLI. LAW § 15-108 (Consol. 1978).
10. N.C. - N.C. GEN. STAT. § 18-4 (1983).
11. N.D. - N.D. CENT. CODE § 32-38-04 (1976).
12. Ohio - OHIO REV. CODE ANN. § 2307.32(F) (Page 1981).
13. Okla. - OKLA. STAT. ANN. tit. 12 § 832(H)(1) and (2) (West Supp. 1983-84).
14. Or. - OR. REV. STAT. § 18.455(1)(a) & (b) (1981).
15. Tenn. - TENN. CODE ANN. § 29-11-105(a) (1980).
16. Va. - VA. CODE § 801-35.1(1) (Supp. 1982).
17. Wyo. - WYO. STAT. § 1-1-113(a) (1983).

[33] *See, e.g.*, any of the statutes cited *supra* note 32.

[34] Dompeling v. Superior Court, 117 Cal. App. 3d 798, 173 Cal. Rptr. 38, 41 (Ct. App. 1981).

The good faith duty becomes the last frontier in the law's efforts to promote equitable apportionment of damages. As such, it should be a powerful and well-delineated remedial tool. In practice, however, it is a weak, vague standard that has created more confusion than help where knowledge of its presence even exists. How do the courts apply this duty on which the law now relies as its last stop-gap device to insure fair payment of damages? A review of the relevant case law will illustrate the difficulty presented by the good faith concept.

A. *What Is Good Faith and Is Lack of it Actionable?*

Where the duty to settle in good faith has been established by statute, the courts have recognized that a breach of the duty of good faith provides a cause of action for damages to a non-settling defendant against the settlor for contribution.[35] Thus, where the settlement is not in good faith, the settlement will not extinguish the non-settling parties' rights of contribution.

In determining whether or not a breach of the duty of good faith has occurred, the sole test should be the amount of the settlement as it relates to the settlor's true exposure. Such a test would be consistent with the goal of utilizing the good faith standard to insure equitable apportionment of damages.

After all, if the purpose behind the concept is to prevent a non-settling defendant from having to pay more than its fair share of a judgment, it must be understood that the only way to effect that purpose is to prevent a settling defendant from settling for less than its fair share of liability. If the court allows any criterion other than the amount of a settlement to be determinative of that settlement's good faith, the court will be straying from the goal of the concept in the first place. It is therefore quite strange that so many courts look to factors other than the amount of the settlement to ascertain whether a settlement has been made in good faith.

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[35] River Garden Farms, Inc. v. Superior Court, 26 Cal. App. 3d 986, 996, 103 Cal. Rptr. 498, 505 (Ct. App. 1972).

There are primarily two categories of judicial tests for good faith settlements, the "collusion" test[36] and the "unreasonably cheap settlement" test.[37]

The collusion test, where utilized, dictates that a settlement which results in an inequitable apportionment of damages will not be set aside as lacking good faith if tortious conduct on the part of the plaintiff or settling defendant is not present.[38] This requirement of tortious conduct is interpreted as necessitating proof of collusion or a motive to injure the non-settling tortfeasor in order to find good faith lacking.[39]

In *River Garden Farms, Inc. v. Superior Court*,[40] where plaintiffs' attorney settled with all but one defendant and allocated the majority of the settlement funds to the plaintiffs with the least damages, the remaining defendant challenged the settlement as lacking good faith since the allocation resulted in a smaller *pro tanto* credit to be applied towards the plaintiffs with the greatest damages. The court there stated that "any negotiated settlement involves cooperation, but not necessarily collusion. It becomes collusive when it is aimed to injure the interest of an absent tortfeasor."[41]

In *Dompeling v. Superior Court*,[42] the court, in reviewing the *River Garden* decision, stated that "[c]ollusion between settling parties was identified in *River Garden Farms, Inc.* as a major element of bad faith."[43] In *Dompeling*, the plaintiff was injured in an auto accident when a truck driver swerved to miss a bus which was stopped partially on the roadway. Plaintiff settled with the truck driver, and the bus company challenged the settlement as lacking good faith. In a very disturbing opinion, the California appellate court held that:

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[36] *See* Dompeling v. Superior Court, 117 Cal. App. 3d 798, 805, 173 Cal. Rptr. 38, 42 (Ct. App. 1981).

[37] The term "unreasonably cheap settlement" was first used in River Garden Farms, Inc. v. Superior Court, 26 Cal. App. 3d 1986, 996, 103 Cal. Rptr. 498 (Ct. App. 1972).

[38] *Dompeling*, 117 Cal. App. 3d at 809-10, 173 Cal. Rptr. at 45.

[39] *Id.*

[40] 26 Cal. App. 3d 986, 103 Cal. Rptr. 498 (Cal. Ct. App. 1972).

[41] *Id.* at 505.

[42] 117 Cal. App. 3d 798, 173 Cal. Rptr 38 (Cal. Ct. App. 1981).

[43] 117 Cal. App. 3d at 805, 173 Cal. Rptr. at 42.

> Bad faith is not established by a showing that settling defendant paid less than his theoretical proportionate or fair share of the value of plaintiff's case. A settlement always removes the settling defendant from the action; this necessarily results in a possibility that the remaining defendants will suffer judgment greater in amount than if there had been no settlement . . . . [A] settling defendant does not owe a legal duty to adverse parties, the non-settling defendants, to pay the plaintiff more so that the adverse parties may pay plaintiff less . . . . [T]he settling parties owe the non-settling defendants a legal duty to refrain from tortious or other wrongful conduct; absent conduct violative of such duty, the settling parties may act to further their respective interests without regard to the effect of their settlement upon other defendants.[44]

In *Ford Motor Co. v. Schultz*,[45] where the plaintiff in an auto accident case settled with the driver of the car that hit him but kept his lawsuit alive against Ford, Ford challenged the good faith test enunciated in *Dompeling*, and the court held that "the rationale to be applied in any instance where the good faith character of a settlement is challenged is one which will find the existence of that element absent any adequate showing of collusion 'aimed at injuring the interests of the absent tortfeasor.' "[46]

There appear to be at least two reasons why the application of a test which requires proof of tortious conduct or collusion before a court will find a good faith settlement lacking. First, simply looking to the price of a settlement to determine if a settlement has been in good faith would require that a court conduct a mini-trial on the substantive issues present in the plaintiff's underlying tort lawsuit. After all, how else would the court be able to determine the settlor's likely percentage of liability and the amount of plaintiff's damages? No court in any jurisdiction has been willing to conduct such a mini-trial in order to determine whether a settlement has been in good faith.

Second, in instances where the settlor has low policy limits,

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[44] 117 Cal. App. 3d at 809-10, 173 Cal. Rptr. at 44-45.
[45] 147 Cal. App. 3d 941, 195 Cal. Rptr. 470. (Ct. App. 1983).
[46] 147 Cal. App. 3d at 950, 195 Cal. Rptr. at 475.

the settlement might not fairly reflect that defendant's fair share of culpability, while the amount, nevertheless, is to the full extent of its assets or policy limits. Again, no court has been willing to hold a settlement of policy limits in bad faith, even where the policy limits were disproportionately low given the settlor's share of fault.

In *Stambaugh v. Superior Court*,[47] one of two defendants in the wrongful death action prior to trial settled with the plaintiff for $25,000, the full extent of its policy limits. The non-settling defendant challenged the good faith of the settlement, arguing that the settlement amount did not represent a fair proportion of the settlor's exposure. The court opined that good faith cannot be determined by the amount the settlement bears to the damages of the claimant because damages are speculative and the probability of legal liability uncertain. The court also stated that, even where a plaintiff's damages are great and liability is certain, a disproportionately low settlement figure is often reasonable in the case of a relatively insolvent and uninsured or underinsured joint tortfeasor. The court went on to affirm the settling defendant's motion for summary judgment with respect to the cross-claim filed against it by the non-settling defendant who had alleged a bad faith settlement.[48]

In *Torres v. State of New York*,[49] a father defendant was sued by the estates of his three children who died as a result of an automobile accident where the father was the driver. The father was both administrator for the children's estates and defendant in their lawsuits. As a defendant, he paid a total of $30,000 for the three childrens' death cases ($10,000 for each child), which represented the per-person limits of his liability insurance policy. A non-settling defendant counter-claimed against the father seeking contribution, claiming that the settlement was not in good faith. The court dismissed the counter-claim, holding that the release was given in exchange

[47] 62 Cal. App. 3d 231, 132 Cal. Rptr. 843 (1976).

[48] *Id.*

[49] 67 A.D.2d 814, 413 N.Y.S.2d 262 (1979).

for substantial consideration.[50]

Obviously, the consideration in *Torres* was not substantial. It is clear in this and the other decisions cited above that where a joint tortfeasor offers its policy limits in settlement, even where those limits are small with relation to that defendant's fair share of fault, the settlement will not be deemed to have been made in bad faith.

Although settlements in the amount of policy limits can be disproportionate to the settlor's share of fault, holding such settlements to be in good faith does not really worsen the position of the remaining tortfeasors. In these policy limit cases, even if the settlement had not occurred, the plaintiff is not likely, in any event, to have collected more than the policy limits from the settlor, no matter what the amount and percentage of its judgment against the settlor would have been at trial. Thus, even though the policy limits might not reflect the settlor's fair share of plaintiffs' damages, the remaining defendants would have been compelled to pay the coverage whether or not the settlement had taken place, and the lost right of contribution against the assetless settlor would have been valueless.

In the courts' efforts to circumvent a price test as a good faith standard in policy limits cases they have, however, formulated standards which create poor precedent for those cases where the settling defendant would be able to pay its fair share of a judgment but nevertheless settles for far less than that amount. These resulting judicial standards which require proof of collusion or tortious conduct between the plaintiff and the settling defendant in order to deem a settlement to be in bad faith are inconsistent with the goals of promoting equitable apportionment of damages. In almost all instances, a disproportionately low settlement, or even an "unreasonably cheap settlement," will be the sole result of a defendant's having looked out for its own best interests in settling for the best price it possibly can. Although that situation might result in a severe inequity being visited upon the

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[50] *Id.*

remaining defendants where the settlement is extremely disproportionate to the settlor's fault, it will not be the result of collusion or conduct on the part of the settlor with any ulterior motive other than to buy its peace. If the courts are going to require proof of collusion or improper ulterior motives before they are willing to set aside unfairly low settlements on the grounds of bad faith, the good faith standard will be rendered completely useless.

There are only two classes of cases where proof of collusion, tortious conduct or improper ulterior motives are likely to be present. The first class of cases involves employer-employee or intra-familial immunity. The typical scenario here is where a party who is immune from suit by a plaintiff but subject to a third-party action for contribution by a defendant settles with the plaintiff. The immune defendant could not possibly have been liable to the plaintiff, and its sole reason for settling is to avoid the contribution action by the remaining defendant. In these situations, the courts are likely to find that the settlements are violative of the good faith standard and that they do not extinguish the remaining defendants' rights of contribution against the settlor.[51]

The second class of cases in which tortious conduct is likely to be provable is that category of cases where an attorney represents a number of plaintiffs who are all in the same family. This situation existed in *River Garden*[52] and *Lareau v. Southern Pacific Transp. Co.*[53] In both cases the same attorney

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[51] In Fuquay v. General Motors Corp., 518 F. Supp. 1065 (M. D. Fla. 1981), a husband settled with his wife, in spite of inter-spousal tort-immunity, in order to avoid a third-party suit for contribution. There in spite of the obvious superfluousness of the settlement, the court held it to be in good faith because it was for the husband's policy limit of $15,000.

In LeMaster v. Amsted Ind. Inc., 442 N.E.2d 1367 (1982), a defendant sought contribution from the plaintiff's employer who had settled with plaintiff. Under the applicable law (Ill.), the employer could not be held liable to the plaintiff because workmen's compensation was the exclusive remedy. However, the employer could be subject to a contribution action by third parties derivative of the employee's lawsuit. Here, the court held the settlement in bad faith and allowed the contribution action against the employee because the settlement was not supported by consideration since the plaintiff could not relinquish anything to the employee in return for the settlement.

[52] 26 Cal. App. 3d 986, 103 Cal. Rptr. 498.

[53] 44 Cal. App. 3d 783, 188 Cal. Rptr. 837 (1975).

represented the injury and wrongful death cases which were generated as a result of an accident which affected more than one member of the same family. In such cases, the attorney might obtain a lump sum from one defendant in return for a release of the various cases which the attorney represents and the attorney will retain the right to allocate the money amongst his clients as he sees fit. In such cases, the plaintiffs' attorney will have the ability to allocate most of the money toward the cause of action with the least exposure and allocate a small portion of the settlement toward the cause of action with the greatest exposure as to the remaining defendants. As a result of this type of allocation, only a small credit will inure to the benefit of the remaining defendants in the big exposure case where reasonableness would have dictated allocating the vast share of the settlement to that case. The plaintiffs' attorney's motives are obviously to obtain a big settlement from the settlor without allowing for a like amount credit in its big exposure case. In cases of this type, the courts have recognized the potential for bad faith, even though it would be the plaintiff, and not the settlor, who would be guilty of a breach of a duty.[54]

Other than the two classes of cases mentioned above, it is unlikely that a non-settling defendant will be able to prove even the most disproportionately low of settlements as being collusive. Fortunately, there is a movement in certain enlightened courtrooms against the collusion requirement. These courts look strictly to the amount of the settlement and will find good faith lacking if the settlement amount does not reflect the relative liability of the settling defendants.

In *Owen v. United States*,[55] the Government settled with plaintiff and attempted to obtain contribution for a portion of the settlement amount from co-defendant BCI. BCI quickly entered into a settlement with the plaintiff and then asserted the settlement as a defense to the government's contribution action.

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[54] *Lareau*, 44 Cal. App. 3d at 783, 118 Cal. Rptr. at 837; *River Garden*, 26 Cal. App. 3d at 986, 103 Cal. Rptr. at 498.

[55] 713 F.2d 1461 (9th Cir.1983).

The government's claim for contribution was dismissed by the United States District Court for the Northern District of California and the government appealed to the United States Court of Appeals for the Ninth Circuit. On appeal, BCI argued that the court should apply a test followed by the California State Appellate Courts, requiring proof of tortious conduct and collusion by the settling parties before finding its settlement lacking in good faith. The government argued that if the settlement amount did not reflect BCI's relative liability, the court should find good faith lacking, even absent tortious conduct or collusion.

The Court of Appeals reviewed the California state decisions and in an uncommon showing of dissatisfaction stated:

> We feel that this case presents one of those rare instances where convincing evidence exists that the highest court of a state will not follow the result reached by some of that state's inferior appellate courts. It appears manifest that the unduly restrictive *Dompeling* test is but a temporary stop on the path of California law.[56]

The court went on to hold that allowing a settlement of this nature to pass under the California statute involved would advance neither of the statute's goals of equity and promotion of settlement. It is inequitable because it fails to reflect the relative liabilities of the parties *inter sese*.[57]

Whether a party is the plaintiff, settling defendant or non-settling defendant, it is important to be aware of the good faith standard likely to be applied to a proposed settlement. As was seen in *Owen v. United States*,[58] a settlement which would pass muster under the collusion test may fail to meet the requirements of a test which looks only to the price of the settlement to determine if it fairly reflects the relative liabilities of the parties.

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[56] *Id.* at 1465.

[57] *Id.* at 1467. *See* CAL. CIV. PROC. CODE § 877 (West 1980).

[58] *See supra* notes 55-57 and accompanying text.

B. *How Can We Utilize the Good Faith Concept?*

Although the good faith concept has proved difficult to define and to apply, in jurisdictions where the standard is in effect, there are certain things which plaintiffs and defendants can do to insure a minimum of wasted settlement efforts. The plaintiff and the potential settlor should immediately inform all other parties of the terms of the settlement agreement once it is achieved.

Upon settling, the settling defendant should in turn move to amend its response to the cross-claim for contribution, if one had been filed, and add an affirmative defense alleging its good faith settlement as a bar to the contribution action. The settling defendant should then move for summary judgment based upon its affirmative defense. Most courts will give priority to the motion for summary judgment and will stay the underlying tort action while it determines whether there has been a settlement and if so, whether the settlement has been in good faith.[59]

During the hearing on the question of the good faith settlement, the settling defendant has the burden of proving a settlement has been made. The non-settling defendant has the burden of proving the settlement lacked good faith.[60]

This precise procedure was followed in *Cario Systems v. Superior Court*.[61] There, the non-settling defendant hospital had filed a cross-claim for contribution against the settling defendant machine distributor prior to the settlement. Immediately after settlement, the distributor amended its answer to the cross-claim to include as an affirmative defense its good faith settlement with plaintiff. The court granted an immediate hearing on the good faith issue where it allowed testimony from the various affected parties to be submitted as offers of proof.

As mentioned earlier, no court has been willing to conduct a mini-trial on the good faith issue, and without such a fo-

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[59] Fisher v. Superior Court, 103 Cal. App. 3d 434, 163 Cal. Rptr. 47 (1980).

[60] *Id.*

[61] 122 Cal. App. 3d 1880, 176 Cal. Rptr. 254 (1981).

rum, it will not be possible for a court to determine with any accuracy whether a settlement amount fairly reflects the relative liability of the settling party. However, some courts are now willing to accept affidavits, copies of deposition transcripts, and even jury verdict reporters to assist in determining the likely range of plaintiff's damages.[62] Courts which utilize a "price" test in determining whether a settlement has been made in good faith and which accept a full range of evidence to ascertain the likely percentage of culpability of the settling defendant and the range of plaintiff's damages provide the most effective remedy to non-settling defendants for the equity lost because of joint and several liability and extinguished rights of contribution.

V. CONCLUSION

The principle that damages should be apportioned equitably has been subverted by the principle that a plaintiff should be made whole for its damages, regardless of who pays, and by the principle that settlements should be encouraged, even at the cost of a fair allocation of plaintiff's loss. The present arsenal of legal devices whose purpose it is to lessen the potential for inequitable apportionment of damages, including the right of contribution and its progeny, have fallen short of this goal. The shortfall has been primarily due to the use of standards which are impossible to define and difficult to apply.

In spite of the shortcomings in the present system of damage apportionment, it is nevertheless important for all persons connected with the aviation litigation field to be aware of the variances in the respective state laws so that the interests of the parties affected by the various rules, statutes and case law can be best served.

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[62] *See Owen*, 713 F.2d 1461.