

SEVERAL LIABILITY AND THE EFFECT OF SETTLEMENT ON CLAIM REDUCTION: FURTHER THOUGHTS

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INTRODUCTION

Thomas R. Harris' recent articles¹ have provided valuable commentary on two important facets of Washington's treatment of tort claims against joint tortfeasors.² Washington's two attempts at reform legislation, the first in the product liability reform legislation of 1981 and the second in the Tort Reform Act of 1986, struggled with two distinct but related problems: (1) where the plaintiff is himself at fault, should he still be entitled to joint and several liability; and (2) where a plaintiff settles with one of two or more joint tortfeasors, how much should his claim against the remaining tortfeasors be reduced?

In both areas the later legislation provided a different answer from the earlier: (1) as to the question of joint and several liability, the legislature initially left intact the judiciary's determination that the adoption of comparative negligence would not eliminate the plaintiff's right to joint and several liability.³ But in the 1986 legislation joint and several liability is retained only when the plaintiff is not at fault, or when other circumstances (*e.g.*, concert

1. Harris, *Washington's Unique Approach to Partial Tort Settlements: The Modified Pro Tanto Credit and the Reasonableness Hearing Requirement*, 20 GONZ. L. REV. 69 (1984/85) [hereinafter "Harris(1)"]; Harris, *Washington's 1986 Tort Reform Act: Partial Tort Settlements After the Demise of Joint and Several Liability*, 22 GONZ. L. REV. 67 (1986/87) [hereinafter "Harris(2)"].

2. A joint tortfeasor is one whose negligence (or other breach of duty serving to make him liable to the plaintiff) concurrently caused the plaintiff's harm, thus making him jointly liable for the plaintiff's damages. See *infra* text accompanying note 8.

3. The legislature reaffirmed this position in 1985. WASH. REV. CODE § 4.22.030 (1985). See Harris(2), *supra* note 1, at 73 n.36.

among the defendants, or certain environmental violations) make it appropriate.⁴ (2) As to the question of the amount of claim reduction resulting from a settlement with one of two or more joint tortfeasors, the legislature again changed its mind: in the 1981 Act a settlement with one defendant reduced the plaintiff's claim against remaining defendants only by the amount actually received by the plaintiff.⁵ In the 1986 Act the legislature provided that the plaintiff's claim would be reduced by the percentage share of liability attributable to the settling parties.⁶ At first blush both changes may appear noncontroversial—indeed they may appear (as presumably they did to the legislature) to be significant improvements over the 1981 Act. However, each has significant drawbacks.

In fact, both measures represent an overcorrection of perceived defects. In the case of joint and several liability, the earlier approach placed all of the burden of a defendant's insolvency upon the remaining defendants; by contrast, the newer legislation places all of the insolvency upon the plaintiff (unless he is free from fault or qualifies for the other exception to the rule of several liability). Similarly, in the case of claim reduction, the earlier approach could be faulted for providing the plaintiff too much of an incentive to settle, leaving remaining defendants "holding the bag." By contrast, the 1986 legislation makes partial settlement at best unattractive and at worst an invitation to malpractice.

This article suggests that there is a happy medium in both cases. As to the question of joint and several liability, the Uniform Comparative Fault Act, promulgated in 1977,⁷ provides for a proportionate sharing of the risk of insolvency, so that plaintiffs and defendants "pay" for a defendant's insolvency according to their respective percentages of fault. In the area of claim reduction, the Commissioners have not been as successful, and it is to this question that the bulk of the article is addressed. After canvassing the three alternative formulations and noting the inadequacies of each,

4. Harris(2), *supra* note 1, at 67-68.

5. Unless the amount of the settlement was found to be "unreasonable," in which case the credit would be adjusted upward to such amount as would have been reasonable; see Harris(2), *id.* at 71.

6. *Id.* at 91-96.

7. UNIFORM COMPARATIVE FAULT ACT, 12 U.L.A. 35 (Supp. 1983) [hereinafter "1977 ACT"].

this article suggests a modification of the "pro tanto" or "dollar" reduction formula, so as to ensure that plaintiffs have adequate incentives both to settle and to settle fairly.

I. THE QUESTION OF JOINT AND SEVERAL LIABILITY

The doctrine of joint and several liability—that each joint tortfeasor is responsible for the whole of the plaintiff's damages even where other tortfeasors contributed to the harm—developed at a time when only fault-free plaintiffs were allowed to recover, and where no contribution was permitted between joint tortfeasors. The rule of joint and several liability provides that where two defendants are found to be liable in damages to the plaintiff, the plaintiff is entitled to collect his entire judgment from either one, without regard to the greater or lesser degrees of fault as between the defendants.⁸ The two reasons were (1) that the defendant, by definition found to be at fault (since without fault he would not be liable for any damages), was a more logical party to bear the loss than the plaintiff, by definition an innocent party (since any fault on his part would bar recovery altogether); and (2) there was no ready mechanism for sorting out the relative fault of the defendants.⁹

With the advent of comparative negligence,¹⁰ both of these rationales were weakened. First, recoveries were no longer limited to plaintiffs who were fault-free; that was the purpose of permitting comparative negligence. Second, since juries were now permitted to

8. Without the principle of joint and several liability, a plaintiff who recovered a judgment against two defendants might receive a judgment for half of his damages against both defendants. If either or both of the judgments turned out to be uncollectible, it would be treated as no different from any other uncollectible judgment. However, the common law did not follow such an approach: "[T]he common law developed a separate principle, that a defendant might be liable for the entire loss sustained by the plaintiff, even though the defendant's act concurred or combined with that of another wrongdoer to produce the result. . . ." W. PROSSER & W. KEETON, TORTS § 47, at 328 (5th ed. 1984).

9. See *infra* note 11.

10. There are two varieties of comparative negligence: the so-called "pure" and "modified." Under pure comparative negligence the plaintiff's recovery is reduced by his percentage of fault, regardless of the amount thereof. Under modified comparative negligence the plaintiff cannot recover unless his fault is, alternatively, either "not greater than" (the so-called 50% rule) or "less than" (the so-called 49% rule) the defendants' fault. The Uniform Comparative Fault Act recommends the pure form; Dean Prosser thought the modified form of comparative negligence "impossible to justify . . . on any basis except one of pure political compromise." Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 494 (1953).

assess the relative fault of defendants and plaintiffs in percentage terms, there remained no obstacle to doing likewise for the relative shares of defendants' liability.

Thus, several courts considered whether the adoption of comparative negligence, either legislatively or judicially, ought to spell the end of joint and several liability. Some courts, like the California Supreme Court, decided that joint and several liability ought to be retained in its entirety, for a variety of policy reasons.¹¹ Other courts decided that joint and several liability ought to be abandoned, for opposite reasons.¹² Because of the numerous complications caused by the varieties of comparative negligence it was hard to find much in the way of consensus. However, the Uniform Commissioners in the Uniform Comparative Fault Act (1977)¹³ proposed a third alternative: instead of forcing the defendant or the plaintiff to shoulder the burden of an insolvent defendant, the

11. In *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 588, 578 P.2d 899, 905 (1978), 146 Cal. Rptr. 182, 188, the defendant argued that the replacement of the contributory negligence rule with the comparative principle should end the rule of joint and several liability, since "[t]he reason for imposing liability on each for the entire consequences is that there exists no basis for dividing damages and the law is loath to permit an innocent plaintiff to suffer as against a wrongdoing defendant." 20 Cal. 3d at 588, 578 P.2d at 905, 146 Cal. Rptr. at 188, quoting *Finnegan v. Royal Realty Co.*, 35 Cal. 2d 409, 433-34, 218 P.2d 17, 32 (1950)(emphasis removed). The California Supreme court rejected this argument for three reasons: first, it feared that the rule would be extended to faultless plaintiffs, who then might bear losses caused by insolvent codefendants; second, because the plaintiff's negligence is less culpable than the defendant's, since it harms himself, not others; third, because one of the purposes of tort law is to provide compensation, which would be compromised by an abolition of joint and several liability. 20 Cal. 3d at 589-90, 578 P.2d at 905-06, 146 Cal. Rptr. at 188-89.

Justice Clark dissented, arguing that this outcome violated the principle that "the extent of fault should govern the extent of liability." *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 811, 532 P.2d 1226, 1231, 119 Cal. Rptr. 858, 863 (1975). He complained that the court had adopted the principle in *Li* only to "reject it for almost all cases involving multiple parties." 20 Cal. 3d 578, 609, 578 P.2d 899, 919, 146 Cal. Rptr. 182, 202 (1978)(Clark, J., dissenting). Justice Clark suggested virtually the same approach as that adopted by the Uniform Comparative Fault Act. 20 Cal. 3d at 614, 578 P.2d at 922, 146 Cal. Rptr. at 205.

12. See e.g., *Laubach v. Morgan*, 588 P.2d 1071 (Okla. 1978)(interpreting Oklahoma comparative negligence statute to have eliminated joint and several liability); but see *Boyles v. ONG*, 619 P.2d 613 (Okla. 1980)(elimination of joint and several liability only applies where comparative fault is involved, i.e., plaintiff is at fault); see also McNichols, *Judicial Elimination of Joint and Several Liability Because of Comparative Negligence—A Puzzling Choice*, 32 OKLA. L. REV. 1 (1979); McNichols, *The Complexities of Oklahoma's Proportionate Several Liability Doctrine of Comparative Negligence—Is Products Liability Next?*, 35 OKLA. L. REV. 193 (1982). See generally Harris(2), *supra* note 1, at 86 n.112.

13. 1977 Act, *supra* note 7, at § 2(d).

two parties could divide the insolvency in the same proportion as the jury found their respective percentage shares of fault. Since retention of joint and several liability forces the defendant(s) to bear the entire loss from insolvency, and abandonment forces the plaintiff to bear the entire loss, a proportional system appears more balanced and thus more equitable.

For example, where the plaintiff was, say, 30% at fault, Defendant (1) was 10% at fault, and Defendant (2) 60% at fault but insolvent, the plaintiff would wind up with three times as much of Defendant (2)'s share of the judgment (45%) as Defendant (1) (15%); in other words, plaintiff would have his judgment reduced by 75% and Defendant (1) would pay 25% of the judgment, thus keeping the proportion of their liability in proportion to the relative fault found by the jury.¹⁴

There are several attractive features of this arrangement. The first is that joint and several liability is retained where the plaintiff is not at fault—a result that has been agreed upon even in those jurisdictions that have otherwise abandoned joint and several liability.¹⁵ The second feature is that it makes it more or less irrelevant whether or not the insolvent party is actually sued, since if there is no means of recovering from that party his share of negligence will not affect the outcome; the crucial question for the jury is the relative fault of the plaintiff and the solvent parties.¹⁶ Fi-

14. *Id.*

15. See *Boyles v. ONG*, 619 P.2d 613 (Okla. 1980).

16. In some jurisdictions the jury is asked to determine the fault percentage of absent or so-called "phantom" tortfeasors. For example, in Indiana, the jury is asked to determine "the percentage of the claimant, of the defendant, and of any person who is a nonparty." IND. CODE § 34-4-33-5 (Supp. 1984). ("Nonparty" is defined in § 34-4-32-2 as "a person who is, or may be, liable to the claimant in part or in whole for the damages claimed but who has not been joined in the action as a defendant by the claimant.")

Normally, both plaintiff and defendant will have an incentive to add to the lawsuit all parties who might have contributed to the injury, since they can help compensate for the plaintiff's loss. However, because of insolvency, death, immunity, or other cause, a tortfeasor may not be joined as a party.

Parties will try to include absent tortfeasors, such as is done in Indiana, under the following scenarios: (1) where the "modified" system of comparison is used, making the plaintiff anxious to increase the likelihood that his fault will be found less than the defendants' (see *supra* note 10); (2) where the rule of joint and several liability is abolished or modified, thus giving the defendant an incentive to reduce his liability in direct proportion to the amount of liability assigned to nonparties; or (3) where the defendant is attempting to take advantage of the "empty chair" phenomenon; see *infra* note 33. The requirement of

nally, this approach represents a compromise between the extremes of having the entire liability for insolvent parties arbitrarily assigned to plaintiff or defendant. This proportional system is more consistent with the general purpose of comparative negligence, which is to have liability follow fault.

It is unfortunate that the Washington State Legislature did not pause at this happy medium. In its haste to avoid the extreme of having all the liability fall upon the defendant, the legislature embraced the opposite extreme of having all the liability fall upon the plaintiff. Perhaps in future reform legislation, a better balance can be struck.

II. THE PROBLEM OF CLAIM REDUCTION

A. *The Nature of the Problem*

1. The (Ir)relevance of Joint and Several Liability

It might be thought that, however unjust the abandonment of joint and several liability might be, it would at least eliminate the squabbling over the amount remaining defendants would have to pay when one defendant is insolvent or settles out. But answering the question of insolvency by no means solves the problem of what to do when a plaintiff settles with only one defendant and then recovers a judgment against remaining defendants. Several aspects of settlement should make clear the difference between joint and several liability on the one hand and claim reduction for settlement on the other.

determining the fault of nonparties is a significant disadvantage of any such system, since "it cannot be told with certainty whether [the nonparty] was actually at fault or what amount of fault should be attributed to him. . . ." UNIF. CONTRIBUTION AMONG TORTFEASORS ACT, 12 U.L.A. 63 (1955) [hereinafter "1955 ACT"], § 2 comment.

None of these conditions, except possibly the latter, obtain in the system proposed by the 1977 ACT—at least where a party is absent for some reason other than settlement. Thus for most purposes the parties can simply ignore the absence of joint tortfeasors they are unable to join. Because an insolvent tortfeasor's share would simply be redistributed among the remaining parties, it makes no difference whether the party is named (and then removed) or not named at all. In theory, the finding that plaintiff's fault was three times greater than that of the Defendant should obtain whether it is expressed as 30% to 10% or 75% to 25%. However, the percentage approach employed by the 1977 ACT (and by Washington's 1986 Tort Reform Act) requires the determination of the fault percentage of any tortfeasor who is absent by reason of settlement, thus defeating in large measure the simplification of issues it would otherwise promote. *See infra* § IID.

The first point is that joint and several liability only makes a difference where one or more of the defendants is insolvent (or partially so, i.e., has less than adequate resources to pay a judgment entered against him¹⁷). While the plaintiff might have a less complicated task of collecting his judgment where he has to collect from only one as opposed to collecting from several, nonetheless, the important question is whether he will be able to recover all or only part of his judgment.¹⁸ By contrast, the problem of claim reduction exists whether or not any of the defendants is insolvent.

The second point is that wherever the plaintiff is not at fault, joint and several liability will still apply. As noted above, even in those jurisdictions that have supposedly abandoned joint and several liability, "several liability" turns out to apply only in those cases where the plaintiff is at fault. Thus there will continue to be a substantial number of cases in which the modification or elimination of joint and several liability will have no effect.

2. The Alternatives

The alternatives in claim reduction can be most easily grasped in a hypothetical: suppose plaintiff P suffers \$100,000 damages in an accident caused by defendants D_S and D_N , who would be found 60% and 40% at fault, respectively. Suppose that P settles with D_S for \$10,000 but pursues his claim against D_N , and D_N is found liable at trial with P's damages fixed at \$100,000. By how much should P's claim against D_N be reduced because of his settlement with D_S ? The possibilities present a spectrum, illustrated by the following chart:

17. Throughout this article the term "insolvent" will be used to refer to partial as well as total inability to pay a judgment.

18. Even as far as defendants are concerned, joint and several liability usually makes a difference only where one of the defendants is insolvent; the only exception is where contribution is provided on some basis other than proportional liability. As noted below, *infra* note 32, the trend is toward proportional liability as the basis for contribution among joint tortfeasors.

(Type of Claim Reduction Method)

(Payor)	1955 (Dollar)	1939 (Equal Shares)	1977 (Percentage)
Settling Defendant	\$10,000	\$10,000	\$10,000
Nonsettling Defendant	90,000	50,000	40,000
Plaintiff recovers	\$100,000	\$60,000	\$50,000

At one extreme, P's claim might simply be reduced by \$10,000, the amount he received in settlement (I call this the "dollar solution"¹⁹); at another extreme, the claim might be reduced by \$60,000, the amount of D_S's comparative "share" (I call this the "percentage solution"²⁰). In between one might of course find compromise positions, such as arbitrarily setting D_S's share at 50%, and reducing the claim by \$50,000 (I call this the "equal shares solution"²¹). As it turns out, each of the three approaches has at one time or another been championed by the Uniform Commissioners. In 1939 the Uniform Contribution Among Joint Tortfeasors Act²² used the equal shares approach. In 1955 a revision of the same act²³ used the dollar approach. And in 1977 the Uniform Comparative Fault Act²⁴ followed the percentage approach. Each has advantages, but each has serious disadvantages. In fact, the authors of the Restatement (Second) of Torts analyzed each approach and declined to recommend any, concluding that "[i]mportant policy reasons . . . weigh against each of the three solutions."²⁵

A brief historical, and analytical review of the three acts will help clarify their respective problems.

19. It has also been called the "pro tanto" approach. This was the method used by Washington from 1981 to 1986.

20. This is Washington's current approach, as a result of the 1986 Tort Reform Act.

21. It has also been called the "pro rata" approach, although there is some confusion from this term, since some have used "pro rata" to mean proportional even if unequal, whereas others have used the term to mean equal even if not proportional. To eliminate confusion, I have chosen the terms "equal shares" and "percentage" to distinguish the two variants.

22. UNIF. CONTRIBUTION AMONG TORTFEASORS ACT, 12 U.L.A. (1939) [hereinafter "1939 Act"].

23. 1955 ACT, *supra* note 16.

24. 1977 ACT, *supra* note 7.

25. RESTATEMENT (SECOND) OF TORTS § 886A, Comment on Caveat (1977).

B. *The 1939 Act: The Equal Shares Solution*

The first model act, approved in 1939, recommended an "equal shares" solution.²⁶ In order to extinguish his potential liability for contribution to the nonsettling defendant ("D_N"), the settling defendant ("D_S") had to extract an agreement from plaintiff ("P") that any judgment P obtained at trial would be reduced by 1/n, "n" representing the number of joint tortfeasors.²⁷ Thus in a case against two defendants, P's settlement with D_S would reduce P's claim by one-half.

A provision for a defendant's settling with a plaintiff without at the same time extinguishing his liability for contribution from another defendant is a purely formal one; it has almost no practical application. A settlement that failed to extinguish his liability for contribution would mean that D_S could find himself sued on essentially the same case, for essentially the same damages, by D_N rather than P. The money paid in settlement would have gone for naught. Consequently, the form of settlement in which the vast majority of defendants will be interested is that which extinguishes the right of any other party to contribution.²⁸

26. The language of the ACT is somewhat confusing. It initially indicates that P's claim will only be reduced by the dollar amount paid, but goes on to say that in order for the settling tortfeasor to extinguish his liability to other defendants for contribution, P's release must stipulate that the plaintiff's claim has been reduced by the settling tortfeasor's "pro rata [equal] share."

27. "§ 5. RELEASE; EFFECT ON CONTRIBUTION.—A release by the injured person of one joint tortfeasor does not relieve him from liability to make contribution to another joint tortfeasor unless the release . . . provides for a reduction, to the extent of the pro rata share of the released tortfeasor, of the injured person's damages recoverable against all the other tortfeasors." 1955 ACT § 4 (1955), Commissioner's Comment.

28. One of the defendant's strongest motivations in settlement is the desire to "close his file." Without an extinction of further liability, his "desire for settlement is blunted." *River Garden Farms, Inc. v. Superior Court*, 26 Cal. App. 3d 986, 989, 103 Cal. Rptr. 498, 506, (Cal. 1972), citing 1955 ACT, *supra* note 16, Commissioners' Comment; Note, *Settlement in Joint Tort Cases*, 18 STAN. L. REV 486, 488-89 (1966); Thaxter, *Joint Tortfeasors: Legislative Changes in the Rules Regarding Releases and Contributions*, 9 HASTINGS. L. J. 180, 187-88 (1958).

The less cumbersome way of accomplishing this result is to provide statutorily for extinction of the settling defendant's liability both to the plaintiff and to codefendants, which is precisely what the 1939 Act did.

It would, of course, be possible to accomplish the result of claim extinction indirectly, through an agreement with the plaintiff rather than directly by statute. For example, assume that plaintiff P settles with D_S for \$10,000, but D_S is not given any relief from the court or fellow defendant D_N. The case could be taken to trial and D_N might be found liable for damages of \$100,000. If D_S were determined to be a joint tortfeasor, he would be liable

The main feature of this system is that it establishes an arbitrary figure for the settling defendant's share. Whereas at trial a jury might find that D_S 's share of liability is 70%, and D_N 's is 30%, a settlement with D_S will reduce P's claim by 50%. A number of objections could be raised to this procedure on the ground that liability has not followed fault. The Procrustean bed of equal shares necessarily creates the risk that two similarly situated defendants will pay much more (or less) because of settlement; as a corollary, two defendants whose culpability differs markedly may wind up paying the same amount. However, the major reason for the abandonment of the "equal shares" approach by the 1955 revision of the Act was that the procedure discourages settlement.²⁹ To be more specific, it tends to discourage *partial* settlements.³⁰

It is not difficult to see why this is so. The most pronounced case of discouraging settlement is where a marginal defendant—one whose liability would be very difficult to prove, or whose assets are minimal—offers to settle with the plaintiff for a nominal sum. If the plaintiff accepts (and if the defendant is to secure pro-

for contribution to D_N of an "equal share" of \$50,000. To allow D_S to "close the file," P could agree with D_S to hold him harmless from any such liability. P would "pay" for this liability by accepting a reduced judgment from D_N of \$50,000. The net effect would be a system of claim reduction whereby the plaintiff's claim against nonsettling defendants would be reduced by whatever "shares" were represented by the defendants who had settled.

29. 1955 Act, *supra* note 16, Commissioners' Comment.

30. Some commentators have suggested that only "global" settlements (those that dispose of the case in its entirety) are worthy of encouragement, whereas "partial" settlements (those that remove some defendants but allow the plaintiff to pursue his claim against remaining parties) are not. Note, *supra* note 28, at 489; 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). According to this view, the discouragement of such settlements ought not to be viewed as a drawback of the 1939 Act. This article is based on a different value assumption. While global settlement is obviously preferable to a partial settlement, there are two important reasons why partial settlements should be preferred to no settlement at all. First, partial settlements reduce the issues that need to be addressed at trial; for example, in a two-defendant case settlement with one defendant means that the jury needs to consider only the liability issues relating to the remaining defendant. Similarly, partial settlements eliminate the legal costs otherwise incurred by defendants who are able to settle. But second, and more importantly, in many cases partial settlements will lead toward, rather than away from, total settlements. Some defendants prefer to settle early, before they have expended significant legal resources. Others prefer to wait until the value of the case is more definite. If the plaintiff were forced to settle either with all the defendants or none at all, there is an increased risk that he will settle with none. On the other hand, if the parties are free to proceed at their own pace, they may each arrive at settlement in their own fashion.

tection from liability for contribution) then the plaintiff must give up a pro rata share of his claim against the remaining defendants. He is better off simply leaving the defendant in the case, however silly that might be for all parties concerned. But even where the settling defendant is not "marginal," but still less culpable than the remaining defendants, the pro rata scheme presents obstacles to settlement. In order to give up the pro rata share of his claim, plaintiff should demand a pro rata share of what he expects to get at trial.³¹ The less culpable defendant, however, knows that at trial he can expect to collect, through contribution, the lion's share of whatever judgment may obtain from him.³² Whereas plaintiff wants at least the pro rata share of the expected recovery, the less culpable defendant will offer something less than his pro rata share.

For example, assume that D_N is 70% at fault and D_S is 30% at fault, and P's chances of succeeding at trial are no more than 50% with both defendants in the case. Even assuming that P's chances against D_N alone are still 50%,³³ D_S would evaluate his exposure at

31. Of course, the plaintiff may be willing to take something less than an equal share if he is sufficiently risk-averse. Plaintiffs in lawsuits, like most individuals, are risk-averse; that is, they will prefer a \$10,000 settlement to a 10% chance of \$110,000. *See e.g.*, H. RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* 73-77 (1982). If so, risk-aversion could cause a plaintiff to take less in settlement than he would otherwise expect to get (on average) from trial. However, this article will assume—unless stated otherwise—that all parties are risk-neutral.

32. As originally formulated, the 1939 Act provided for determination of percentage shares as between the defendants only where "there is such a disproportion of fault among joint tortfeasors as to render inequitable an equal distribution among them of the common liability. . . ." Thus, the share given up in settlement would in many cases correspond to the proportion that the defendant would have paid at trial. Now, however, of the 21 jurisdictions that adopted the 1939 or 1955 Act, only five (Alaska, Hawaii, Massachusetts, Mississippi, and South Dakota) have retained the equal shares approach from the 1939 Act; most states have adopted some form of comparative contribution. Thus, the defendant who is less at fault can generally count on paying less than his equal share even if he is found liable at trial.

33. Leaving aside the possibility that a jury might find D_S liable, but not D_N , it is likely that leaving D_S in the lawsuit will increase the likelihood that D_N will be found liable. Two or more defendants will have an incentive to place responsibility for the plaintiff's loss upon other defendants, thus strengthening the plaintiff's case. This is sometimes known as "putting two cats in a bag," the result being that they claw at one another. The opposite phenomenon is known as the "empty chair." Where a possible tortfeasor is not named as a defendant, or has been released through settlement or otherwise, the remaining defendant(s) may take advantage of that fact; first, they may emphasize those facts suggesting that the accident was caused by the party who would have occupied the "empty chair"; and second, the jury may be reluctant to saddle only the defendant(s) in the courtroom with all of the financial responsibility which belongs in substantial measure to the tortfeasor who

trial as a 50% chance of paying \$100,000, all but \$70,000 of which can be recovered from D_N , making his net exposure \$15,000. But if P gives away half of his claim for \$15,000, he has taken a claim with a value of \$50,000 (a 50% chance at \$100,000) and reduced it to \$40,000 (\$15,000 plus a 50% chance of \$50,000)—again even with the assumption that the liability case against D_N alone is as good as his case against D_N and D_S . Unless P is substantially risk-averse (leading him to accept a smaller average recovery in return for the certainty of *some* recovery), or the costs of trial weigh so heavily for the less culpable defendant (leading him to pay more than the net value of the claim against him), settlement will be unattractive. Certainly in comparison with the practice prior to the adoption of contribution (where P's claim was only reduced by the dollar amount received),³⁴ the equal shares approach will discourage settlement with less culpable defendants. Wherever there is a chance that the liability case against the remaining defendant will be weakened, the discouragement of settlement will be even more pronounced.

Settling with the more culpable defendant presents different, but similarly discouraging, problems. Settlement is more attractive to the more culpable defendant, since he will bear the lion's share of the judgment as a result of contribution.³⁵ However, he will still want to bargain for a sum of money less than the worst he would expect to pay at trial. If there is a 50% chance that he will have to pay \$70,000 at trial, D_S will offer at most \$35,000. But even if settlement is relatively attractive to the defendant, it will usually be less attractive to the plaintiff, who will face the problem of the "empty chair"—the primary defendant now being absent from the

would have occupied the "empty chair." See generally, Wilkins, *The Indiana Comparative Fault Act at First (Lingering) Glance*, 17 IND. L. REV. 687, 732-39 (1984).

34. The early common law rule was that the release of one tortfeasor was the release of all, and thus in theory it was impossible to settle only part of a tort claim. *Tech-Bilt Inc. v. Woodward-Clyde & Assoc.*, 38 Cal. 3d 488, 493, 698 P.2d 159, 161 213 Cal. Rptr. 256, 259 (Cal. 1985). However, as a practical matter, partial settlements could be arranged by drafting a "covenant not to sue" instead of a release. *River Garden Farms*, *supra* note 18, 26 Cal. App. 3d at 999, 103 Cal. Rptr. at 507 (Cal. 1972). Lacking any basis upon which to determine the "share" of the settling tortfeasor, and lacking any means by which to provide for contribution in most cases, courts simply reduced the judgment by the compensation already received. See W. PROSSER & W. KEETON, *TORTS* § 49 at 335-36 (5th ed. 1984).

35. Except in those jurisdictions that provide for equal, rather than proportional, division among joint tortfeasors. See *supra* note 32.

case³⁶—and in many cases making his claim against the remaining defendant hardly viable.

In sum, the 1939 Act was a first attempt to rectify the traditional common law rejection of contribution actions. However, because of difficulties experienced in attempting to settle cases under the provisions of the 1939 Act, the Uniform Commissioners found that the Act was either being rejected or so substantially modified that the Commissioners withdrew it “for further study and revision.”³⁷

C. *The 1955 Act: The Dollar Solution*

In order to solve the problem of disincentives to partial settlement, the Uniform Act was revised in 1955 to create a new procedure. It essentially recreated, for settlement purposes, the law as it was before contribution was permitted.³⁸ If P settled with D_S, he had his claim reduced only by the amount received.³⁹ In other words, D_N, if found liable, would have a judgment entered against him for all of P's damages, less a judgment credit for whatever had been received in settlement. The only limitation placed upon this procedure was the requirement that P's release of D_S was given “in good faith.”⁴⁰ The dollar solution has generated two major criticisms. The first is that it has the potential of producing results that defeat the *Li* principle⁴¹—to have liability follow fault. Where

36. See *supra* note 33.

37. Commissioners' Prefatory Note, 1955 Act, *supra* note 16.

38. See *supra* note 33.

39. 1955 Act, *supra* note 16, § 4 [Release or Covenant Not to Sue]:

When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:

(a) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide; but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and

(b) It discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

40. As will be discussed below (*see infra* text accompanying note 51-64) some courts and legislatures have attempted to use the term “good faith” (or a standard of “reasonableness,” which turns out to be conceptually equivalent) to reduce or eliminate the potential inequities arising out of the dollar solution. That discussion will be delayed, however, until we have established what kind of settlement dynamics might be expected.

41. *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d at 589-90, 578 P.2d at 905-06, 146, Cal. Rptr. at 188-89.

P has claims against both D_S and D_N , he is free to settle with D_S for \$10,000 and then attempt to obtain a judgment against D_N at trial for \$90,000. Unless D_N 's "fault" was nine times greater than D_S 's, liability has not followed fault.

A second, related objection suggests that, while the dollar solution may encourage *partial* settlement, it discourages settlement of the case as a whole.⁴² Because plaintiff can continue to seek a complete recovery from the remaining defendants, he is in effect encouraged to "split his bets"—to settle with one defendant and continue to litigate against the remaining defendant. Thus, the dollar solution may create the worst of both worlds: producing unfair outcomes while retaining most of the costs of litigation.

The potential problems with the dollar solution have been extensively discussed in states adopting the 1955 Act. In order to give this provision some teeth, Washington and several other jurisdictions required pretrial judicial review of settlements to insure that they are in "good faith."⁴³ The focal point of the discussion has been the Act's requirement that, in order to extinguish the settling defendant's contribution liability, and to reduce the plaintiff's claim only by the amount received, the settlement must have been in "good faith." One can read this requirement either expansively or narrowly; on the one hand, "good faith" might mean that the settling parties had an obligation to nonsettling defendants similar to that of an insurance company toward its insured: a fiduciary duty.⁴⁴ On the other hand, one might treat "good faith" as simply requiring arm's-length negotiations as opposed to a gratuitous release based on friendship or family relationship.

1. The California Experience

California's treatment of "good faith" serves as a good illustration of the state of the debate.⁴⁵ California enacted a version of the

42. See *supra* note 30.

43. Harris(2), *supra* note 1, at 71-72.

44. *River Garden Farms, Inc.* 26 Cal. App. 3d 986, 103 Cal. Rptr. 498 (1972).

45. In an extensive discussion of the treatment of the "good faith" requirement in California, Professor Roberts suggested the adoption of a position between the two extremes, namely that the court should determine whether the settlement fell within the "reasonable range of the settling tortfeasor's proportionate share of comparative liability for the plaintiff's injuries." Roberts, *The "Good Faith" Settlement: An Accommodation of Competing Goals*, 17 *LOV. (L.A.) L. REV.* 841, 917 (1984). This test was adopted more or less in

dollar solution in 1957.⁴⁶ "Good faith" was first defined in *River Garden Farms, Inc. v. Superior Court*⁴⁷ in its most expansive sense, as being "analogous" to that of an insurer when deciding whether to settle a claim against its insured.⁴⁸ Subsequently, the California Supreme Court judicially adopted comparative fault⁴⁹ and comparative contribution.⁵⁰ Thereafter the legislature acted to codify the comparative contribution principle, and to establish a hearing procedure to pass upon whether settlements were in "good faith."⁵¹ While there was no apparent legislative or judicial intention to modify the standard established in *River Garden Farms*, subsequent cases began to move toward the other end of the "good faith" spectrum, so that only settlements exhibiting "tortious conduct" would result in invalidation. For example, in *Dompeling v. Superior Court*,⁵² the nonsettling defendant challenged the plaintiff's settlement with another tortfeasor for the limit of the settling defendant's insurance coverage. The court held that "settling parties owe the nonsettling defendants a legal duty to refrain from tortious or other wrongful conduct; absent conduct violative of

toto by the California Supreme Court in *Tech-Bilt Inc.*, *supra* note 34, 38 Cal. 3d 488, 499, 698 P.2d 159, 166, 213 Cal. Rptr. 256, 263 (1985) (trial court should inquire, "among other things, whether the amount of the settlement is within the reasonable range of the settling tortfeasor's proportional share of comparative liability for the plaintiff's injuries"). See *infra* notes 54-59.

46. CAL. CIV. PROC. CODE §§ 875-880 (West 1980). The similarities between the 1955 Act and the 1957 legislation are discussed in *River Garden Farms*, 26 Cal. App. 3d 986, 995-6, 103 Cal. Rptr. 498, 504-05 (1972).

47. *Id.* at 986, 103 Cal. Rptr. at 498.

48. *Id.* at 997, 103 Cal. Rptr. at 506. The court acknowledged that no precise definition of good faith was possible; but a "standard so nebulously expressed imposes no great hardship on settlement negotiators. An analogous problem exists when an insurance carrier is called upon to exercise good faith in accepting or rejecting an offer to settle within the limits of its policy. The carrier's duty of good faith extends beyond fraud or dishonesty and encompasses any kind of unfair dealing." The court recognized the competing value of promoting settlement, thus requiring an assurance of finality, but held both goals to be of equal value: "Neither statutory goal should be applied to defeat the other." 26 Cal. App. at 998, 103 Cal. Rptr. at 506.

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

50. *American Motorcycle Ass'n.*, 20 Cal. 3d 578, 146 Cal. Rptr. 182, 578 P.2d 899 (1978). Prior to *American Motorcycle* California had a contribution statute, see *supra* note 51 and accompanying text, but loss was allocated on the basis of equal shares, rather than proportionate fault.

51. Cal. Civ. Code § 877.6. (West 1980) See *Tech-Built, Inc.*, 38 Cal. App. 3d 488, 494, 698 P.2d 159, 164, 213 Cal. Rptr. 256, 261 (1985).

52. 117 Cal. App. 3d 798, 173 Cal. Rptr. 38 (1981) *overruled* 38 Cal. App. 3d 488, 698 P.2d 159.

such duty, the settling parties may act to further their respective interests without regard to the effect of their settlement upon other defendants.”⁵³

This movement toward minimizing the requirements of “good faith” was decisively reversed in *Tech-Bilt, Inc. v. Woodward-Clyde & Assoc.*,⁵⁴ in which the California Supreme Court disapproved the “tortious conduct” standard.⁵⁵ It held that the trial court should determine whether the settlement fell within the “reasonable range of the settling tortfeasor’s proportional share of comparative liability for the plaintiff’s injuries.”⁵⁶ In considering the reasonableness of the settlement, the trial court is invited to consider a laundry list of factors, including an estimation of damages, relative insolvency, distribution of liability, etc.⁵⁷ The burden would be upon the nonsettling defendant to satisfy the trial court “that the settlement is so far ‘out of the ballpark’ in relation to these factors as to be inconsistent with the equitable objectives of the statute.”⁵⁸ In the “rare” event that a settlement is found not to

53. 117 Cal. App. at 809-10; 173 Cal. Rptr. at 45 *overruled* 38 Cal. App. 3d 488, 698 P.2d 159. Similarly, in *Stambaugh v. Superior Court*, 62 Cal. App. 3d 231, 132 Cal. Rptr. 843 (1976), the court held that good faith does not require that the settlement bear a relationship to the proportion of liability attributable to the settling tortfeasor:

For the damages are often speculative, and the probability of legal liability therefore is often uncertain and remote. And even where the claimant’s damages are often great, and the liability therefore certain, a disproportionately low settlement figure is often reasonable in the case of a relatively insolvent, and uninsured, or underinsured joint tortfeasor.

62 Cal. App. 3d at 238, 132 Cal. Rptr. at 848.

54. “We disapprove of *Dompeling* and its progeny, including *Cardio Systems, Inc. v. Superior Court* 122 Cal. App. 3d 880, 176 Cal. Rptr. 254 (1981) and *Burlington Northern R.R.Co. v. Superior Court* 137 Cal. App. 3d 942, 187 Cal. Rptr. 376 (1982), to the extent that those cases are inconsistent with this opinion.” 38 Cal. 3d at 500, 698 P.2d at 167, 213 Cal. Rptr. at 264 n.7.

55. 38 Cal. 3d at 500, 698 P.2d at 166, 213 Cal. Rptr. at 263.

56.

[T]he intent and policies underlying section 877.6 require that a number of factors be taken into account including a rough approximation of plaintiff’s total recovery and the settlor’s proportionate liability, the amount paid in settlement, the allocation of settlement proceeds among plaintiffs, and a recognition that a settlor should pay less in settlement than he would if he were found liable after a trial. Other relevant considerations include the financial conditions and insurance policy limits of settling defendants, as well as the existence of collusion, fraud, or tortious conduct aimed to injure the interests of nonsettling defendants.

38 Cal. 3d at 499, 698 P.2d at 166, 213 Cal. Rptr. at 263-64.

57. *Id.* at 499, 698 P.2d at 167, 213 Cal. Rptr. at 264.

58. *Id.*

be in good faith, "the parties will have opportunity to renegotiate in light of this ruling."⁵⁹

2. The Washington Experience

California's adoption of the "reasonable range" test is not unlike the procedure used in Washington following the passage of the 1981 Tort Reform Act.⁶⁰ Like the California statute, the Washington statute adopting contribution among joint tortfeasors provided for a pretrial determination of the "reasonableness" of the settlement entered into.⁶¹ Just as the California Supreme Court in *Tech-Bilt Inc.* suggested a laundry list of factors to be considered in determining whether a settlement was within the "reasonable range" of potential liability, the Washington Supreme Court in *Glover v. Tacoma General Hospital*⁶² quoted with approval an amicus brief suggesting a similar set of factors.⁶³

Whether in response to the criticism of the dollar approach, or in an attempt to make the system of claim reduction correspond to the adoption (at least in part) of "several liability," the Washington legislature in the 1986 Tort Reform Act replaced the dollar approach with the percentage approach. Before analyzing the

59. *Id.* at 500, 698 P.2d at 167, 213 Cal. Rptr. at 264, n.8. Chief Justice Bird dissented from the majority holding, arguing that the requirement that the settlement meet some "reasonable range" test "will clog our trial courts with unnecessary hearings, discourage the settlement of legitimate claims, and severely strain the resources of the parties and the trial and appellate courts of this state." 38 Cal. 3d at 502, 698 P.2d at 168, 213 Cal. Rptr. at 265 (Bird, C.J., dissenting).

60. While the "Product Liability and Tort Reform Act" was primarily concerned with product liability, one section dealt with contribution among joint tortfeasors, and was intended to apply to any tort action, not just those involving products. WASH. REV. CODE § 4.22.060 (1962). See Harris (1), *supra* note 1, at 75 n.12; Anderson, *Contribution Among Tortfeasors in Washington: The 1981 Tort Reform Act*, 57 WASH. L. REV. 479 (1982).

61. Harris(2), *supra* note 1, at 71-72.

62. 98 Wash. 2d 708, 658 P.2d 1230 (1983).

63. *Id.* at 718, 658 P.2d at 1236. The relevant factors, quoted by the court from the amicus brief, included:

[t]he releasing person's damages; the merits of the releasing person's liability theory; the merits of the released person's defense theory; the released person's relative faults; the risks and expenses of continued litigation; the released person's ability to the extent of the releasing person's investigation and preparation of the case; and the interests of the parties not being released.

Id. The court continued: "We believe each of these factors are proper considerations for a trial judge to use in approving settlements. We emphasize, however, that no one factor should control. The trial judge faced with this task must have discretion to weigh each case individually." *Id.*

problems associated with the percentage approach, it is helpful to pinpoint what it is about the dollar approach that makes it appear unfair to nonsettling defendants.

3. The Reasons for "Disproportionate" Settlements

It can be seen from the very broad standards (and very broad discretion) given to the trial courts by the "laundry list" instructions in California and Washington that there is no clear idea about what makes a settlement in "good faith," or by contrast, what makes it so "disproportionate" as to be "unreasonable." Even the *River Garden Farms* court, which went so far as to analogize the duty of the settling parties to that of an insurer toward its insured,⁶⁴ acknowledged that "inequality in the ultimate cost does not signalize bad faith," because of the difficulty of accurately assessing the value of a case at the time it is being settled.⁶⁵ For example, suppose a judge is faced with a case where P agrees to settle for \$10,000 with one defendant (D_S) in a case where the plaintiff claims damages in excess of \$100,000, and both D_S and the nonsettling defendant (D_N) appear to be about equally at fault. D_N faces a risk at trial of a judgment exceeding \$90,000. He will obviously protect the extinction of his right to contribution for a mere \$10,000. As the *River Garden Farms* court held, this "inequality" or disproportion by itself does not justify a conclusion of bad faith. Then what does? In the average case, where the trial judge is given the facts of the case and an accounting of the settlement proceeds, but has no opportunity to assess the credibility of the witnesses or gauge the range of the jury verdict with anything approaching accuracy, how can he declare the settlement to be "unreasonable" or in "bad faith"? What should "signalize bad faith" if not "inequality in the ultimate cost"?

Before attempting a detailed evaluation of what kinds of cases evidence such a "disproportion" as to suggest bad faith, it is useful to catalogue those phenomena that might cause a plaintiff to enter into such a "disproportionate" settlement in the first place. After all, why should a plaintiff get less from a defendant than that defendant's proportionate share? Particularly in view of the "empty

64. See *supra* notes 45-48 and accompanying text.

65. 26 Cal. App. 3d at 997, 103 Cal. Rptr. at 506.

chair" phenomenon,⁶⁶ what would motivate a plaintiff to settle with a defendant who is 50% liable for only 10% of the potential recovery? There are five primary reasons, each of which will be sketched in this section: (a) Discounts taken for the risk of trial; (b)(Relative) insolvency; (c)Poor judgment on the part of the plaintiff; (d)Risk aversion on the part of the plaintiff; or (e)Strategic maneuvering.

a. *Discounts Taken for the Risk of Trial.* One of the major sources of potential unfairness to a nonsettling defendant arises from the fact that the settling defendant may pay considerably less than what he would have been required to pay at trial, because of a discount for the possibility that plaintiff might lose at trial. In our hypothetical case, where P's damages are, say, \$100,000, and liability is evenly divided between two defendants, D_S and D_N , P's settlement with D_S will likely reflect the uncertainty of P's success at trial. The lower the probability that P will prevail at trial against either defendant, the higher will be the discount taken. Thus, where liability is certain, P would be likely to take closer to \$50,000; where liability is remote he will take closer to zero.

b. *D_S 's (Relative) Insolvency.* A second reason that P might take less from D_S in settlement is if D_S 's ability to pay a judgment is substantially less than the hoped for recovery at trial. Suppose D_S had an insurance policy with limits of \$15,000, and no other assets with which to satisfy a judgment. P might take \$10,000 from D_S , even though his percentage of fault is equal to or greater than D_N 's, simply because P cannot expect a significantly greater recovery from D_S even if he were able to obtain a judgment at trial.

c. *Poor Judgment.* A third reason for a "disproportionate" settlement is where P simply fails to properly assess the merits of his case. P may think the average damage award is likely to be \$40,000 instead of \$100,000, making an offer of \$10,000 seem much more attractive. This may lead him to be willing to settle cheaply with D_N as well. In any event, an initial underestimation of the damages potential may induce a disproportionate settlement.

Error may also be present in evaluating liability. P may think his chances of getting a judgment against any defendant are con-

66. See *supra* note 33.

siderably less than 50%. He may be happy to get \$10,000, and D_S is the first defendant with whom he has meaningful settlement discussions. Additionally, and most important for our purposes, P may misjudge the relative culpability—hence likelihood of success against— D_S and D_N . P may be willing to settle with D_S because he (mistakenly) believes the case against D_N is much stronger. Any experienced trial lawyer is familiar with the difficulty of accurately assessing the merits of a case. It is certainly possible that, with a dollar scenario, P will make a mistake; part of this error will be absorbed by P in terms of statistically poorer recovery; but a large part will also be absorbed by D_N if he ends up being found liable at trial.

d. Plaintiff's Risk Aversion. Another reason P might take less from D_S in settlement is in order to ameliorate the possibility of getting nothing at trial. If P (or his lawyer) is sufficiently risk-averse,⁶⁷ it may be preferable to accept \$10,000 even if it means reducing the value of the remaining claim by considerably more than \$10,000.

e. Strategic Reasons. A final reason for P to consider releasing D_S for only \$10,000 is if P perceives a strategic advantage in doing so. Even if D_S and D_N are solvent, and if P correctly perceives their relative liability shares, and even if P is still risk-neutral, it may still be to his advantage to settle with D_S for \$10,000. Assuming that the value of the case to P before settlement is \$50,000 (a 50% chance of recovering \$100,000), there are cases in which a settlement with D_S will not cause the value of the case to drop below \$40,000. The following scenarios, while not necessarily typical, may not be uncommon:

(1) *No significant reduction in odds of recovery.* For example, suppose P is treated by physicians D_S and D_N . Both fail to diagnose cancer and P dies. P's estate sues. The negligence of both D_S and D_N is clear; but a jury would probably distribute the blame 70% to D_S , and 30% to D_N . However, there is only a 50% likelihood of P being able to show proximate cause, since it is questionable whether P would have survived even if the cancer had been diagnosed. P decides to settle for \$20,000 with D_S , but will go to trial against D_N . Doing so will increase his average recovery from

67. See *supra* note 29.

\$50,000 to \$60,000 (\$20,000 received in settlement plus a 50% chance of an additional \$80,000). D_N meanwhile, has seen his exposure increase from \$15,000 (a 50% chance of a net judgment of \$30,000) to \$40,000 (a 50% chance of a net judgment of \$80,000).⁶⁸

(2) *Advantage of removing certain defendants.* There may also be a strategic advantage in removing a particular defendant (or a particular lawyer) from the case. For example, suppose in our physician hypothetical that D_S is an appealing family practitioner, whereas D_N is a haughty specialist. In those circumstances, a jury might be *more* willing to find D_N liable if they were not forced at the same time to find D_S liable.⁶⁹ The same thing is also true if D_S has a more highly skilled lawyer, more likely to devastate P's case. Settling with D_S may actually increase the chance of a favorable judgment being entered, even though D_S is (in terms of comparative negligence) the more culpable party.⁷⁰

68. A similar scenario is well known in antitrust cases, for example where a plaintiff alleges a price-fixing conspiracy among a number of defendants. Almost by definition, the plaintiff's right to recover from one defendant is coextensive with his right to recover from all; either he proves the conspiracy exists, or he does not. Even if D_S sold 70% of the products purchased by P, and D_N sold 30%, proof of the conspiracy will require D_N to pay the entire judgment. Thus, P loses nothing by settling with D_S ; indeed he can use the initial settlements to finance the rest of the lawsuit. (Exacerbating this phenomenon from the defendant's point of view is the fact that there is at present no provision for contribution among antitrust defendants. See e.g., Sellers, *Contribution in Antitrust Damage Actions*, 24 VILL. L. REV. 829 (1979)).

An analogous situation, except with the addition of the availability of contribution, is the toxic tort case, such as one involving asbestos exposure. P, an insulator who breathed asbestos dust during his working career, sues D_S and D_N for negligence in the manufacture and distribution of asbestos. A swarm of defenses are available to D_S and D_N , including the statute of limitations, assumption of risk, contributory negligence, government specifications, etc. Suppose P's chances of prevailing at trial are 50%, and that D_S would be liable for 70% of the damages (because he sold 70% of the asbestos involved), while D_N would be liable for 30%. P might readily take \$10,000 in settlement from D_S and go to trial against D_N , since he would be trading a case worth \$50,000 (a 50% chance of recovering \$100,000) for one worth \$55,000 (\$10,000 plus a 50% chance of recovering \$90,000). If we assume that P is somewhat risk-averse, the settlement with D_S is even more attractive. Moreover, as in the antitrust cases, P can take advantage of the defendants' desire not to be the lone remaining defendant.

69. This possibility is suggested by Roberts, *supra* note 45, at 916.

70. In *Commercial Union v. Ford Motor Co.*, 640 F.2d 210 (9th Cir. 1981), *cert. denied*, 454 U.S. 858 (1981), a plaintiff sued a Ford dealership and Ford itself for injuries. Fearing Ford's expert witnesses, the plaintiff simply dismissed Ford immediately before trial and then recovered a judgment against the dealership. The Ninth Circuit reversed, finding that the dismissal could not be classified as a good faith settlement since it was clearly not the product of a negotiation process. Roberts, *supra* note 45 at 916, noted the

4. Distinguishing "Good Faith" from "Bad Faith" Reasons

Assuming that a trial judge were able to distinguish which combination of the above five reasons caused the proposed settlement to be disproportionate, what should he then do? We might rank the relative merit of the motivations according to good faith and bad faith. Clearly the least objectionable reason is where there is insolvency. Indeed, this is explicitly recognized in both California's and Washington's "laundry lists" as being an acceptable factor in settlement.⁷¹ The next most meritorious reason is the discount taken for the risk of trial. If the plaintiff has a slim chance of success at trial, he cannot be expected to extract large settlements. At the same time, however, it should be recognized that this very factor will create even greater injustice if in fact the nonsettling defendant is eventually found liable. For instead of sharing the liability more or less equally with his codefendant, the nonsettling defendant will be required to pay close to the entire judgment. Under the "laundry list" approach, however, there seems to be no way to avoid this problem.⁷²

Tending closer to the "bad faith" end of the spectrum is a misjudgment by the plaintiff's lawyer as to the value of the case. In a reversal of roles plaintiff at the settlement hearing will tend to downplay the strength of his liability case against the settling defendant, and the likely damages to be proven, while the nonsettling defendant will urge the strength of the plaintiff's case and his potentially large recovery.⁷³ Not even the most astute trial judge can be expected to identify what part of the plaintiff's argument reflects genuine—and justified—caution, and what represents posturing in order to get the settlement approved.⁷⁴

practitioner response would be to add some "process" to make the outcome appear to be a negotiation, rather than a tactical maneuver.

71. See *supra* notes 56 (California) and 63 (Washington).

72. Note that under the "modified dollar solution" proposed in § III, *infra*, this discount is accounted for by the requirement of a parallel offer to all defendants. Since his offer to defendants must be proportional to their relative culpability, pessimism or optimism with respect to the outcome at trial will be reflected in the offer made to *all* defendants, not just one.

73. See Roberts, *supra* note 45, at 916.

74. One thing seems clear, however: whatever the plaintiff may say about the case at the settlement hearing cannot be used against him in later proceedings. He can be as pessimistic as he likes about the odds of a jury's delivering the big verdict, but that should not prevent him from asking for it—and obtaining it—when he litigates his case against the

Even more likely to be characterized as a bad faith reason for a disproportionate settlement is the plaintiff's risk aversion. Again, however, the difficulty is in distinguishing this motivation from the other closely related reasons for taking less in settlement than a "proportionate" share. How is a trial judge expected to know whether risk aversion is disguising itself as ignorance or in pessimism about the odds of success at trial?

Finally, the "strategic maneuvering" reason is most likely to be considered a bad faith motive for settlement, but again the difficulty lies in expecting a judge to be able to distinguish the presence of this motive when it is surrounded by arguably "good faith" motivations.

In sum, there are serious problems with the dollar solution, even when it is governed by a requirement of "good faith" or "reasonableness."⁷⁵ Because the trial judge is given no practical guidance as to how to rank the various reasons for settlement, nor any help in distinguishing when an unacceptable motivation is masquerading as a legitimate motivation, the imposition of a hearing requirement is likely to create additional burdens on litigants without measurably improving the fairness of the settlement process.

Before considering possible modifications to the dollar solu-

remaining defendant(s). Thus when a trial judge listens to a plaintiff's lawyer downplay the value of his case against the settling defendant, the judge may be both inclined to agree that there are many uncertainties about trying cases, and also reluctant to second-guess what may appear to him to be an erroneous appraisal of the value of a case. After all, how can the judge declare the settlement to be disproportionate without in effect telling the plaintiff that his lawyer isn't representing him well?

75. Roberts, *supra* note 45, Professor Roberts' suggestion of a "reasonable range" test for good faith was adopted by the California Supreme Court in *Tech-Bilt Inc.*, 38 Cal. 3d 488, 698 P.2d 159, 213 Cal. Rptr. 263. This test provides little in the way of guidance to trial courts so as to avoid either unfair settlements on the one hand or a clog in the litigation process on the other. For example, where a plaintiff agrees to settle with a defendant for \$10,000, can one meaningfully describe the "reasonable range" of that defendant's potential liability? Damages might range from \$50,000 to \$200,000; the settling defendant's share of liability might range between 20% and 50%; the plaintiff's chances of winning are between 40% and 90%. Do we take a 40% chance of recovering 20% of \$50,000 as the appropriate standard, and therefore find the settlement reasonable? Do we take the average of those factors? It is hard to answer dissenting Chief Justice Bird's complaint that the "reasonable range" test "will clog our trial courts with unnecessary hearings, discourage the settlement of legitimate claims, and severely strain the resources of the parties and the trial and appellate courts of this state." 38 Cal. 3d at 502, 698 P.2d at 168, 213 Cal. Rptr. at 265 (Bird, J., dissenting).

tion, however, it is necessary to consider the last alternative proposed by the Uniform Commissioners—the “percentage solution” contained in the 1977 Act.

D. *The 1977 Act: The Percentage Solution*

As noted above, the 1939 Uniform Act provided for a pro rata or “equal shares” reduction of the plaintiff’s claim; in other words, in a two defendant case the settling tortfeasor’s liability share was conclusively presumed to be 50%. An immediate objection to this approach, as noted above, was the arbitrariness of the percentage figure assigned.⁷⁶ The percentage solution is an answer to this inequity. Instead of assigning an arbitrary equal share to D_S , the amount of the judgment reduction is based upon the percentage of D_S ’s share of the liability. For example, if D_S is responsible for 30% of the injury, P’s claim against D_N would be reduced by 30%.⁷⁷ The costs of this greater “equity,” however, are enormous. First, there is the cost of determining what percentage figure should be used in replacing the arbitrary pro rata amount. Second, and more significant, there is the substantial cost associated with the fact that this approach recreates the same incentives—perhaps in more pronounced form—as those that crippled the 1939 Act.

1. The Costs of Determining the Amount of the Percentage

One preliminary question is the timing of the determination of the settling defendant’s percentage share (i.e., the amount by which the plaintiff’s claim is to be reduced). In theory this could be made before trial, in a proceeding somewhat like the good faith hearing that is used in states adopting the dollar approach.⁷⁸ How-

76. The injustice can work either way. For example, if D_S in our hypothetical were an insolvent driver with only \$15,000 insurance policy, P’s settlement with him would result in a \$50,000 reduction in his potential claim. This would be a windfall to D_N , and might induce P to keep D_S in the lawsuit through judgment even if D_S offered the entire \$15,000 in settlement. See *infra* text accompanying note 83. On the other hand, if D_S was perfectly solvent, but more negligent (say 70%), he could agree with P to settle out for \$50,000, which would reduce P’s claim by the same amount, but so long as P had a good claim against D_N the arrangement might be beneficial. See *supra* text accompanying note 68. D_N , however, would be prejudiced, since his potential net exposure has gone from \$30,000 to \$50,000.

77. This is the approach of the 1977 version of the Uniform Comparative Fault Act. New York’s version, however, provides for a reduction by the dollar amount received or by the allocable percentage, whichever is higher. See *infra* notes 87-88.

78. See *supra* text accompanying note 45.

ever, the critical difference is that instead of simply voting thumbs up or thumbs down on whether the settlement is "reasonable," a trial judge would need to determine the exact amount of the credit. It is certainly possible that the settling parties would have agreed among themselves the amount of the percentage. The settling defendant's percentage may have figured into the bargaining over the amount to be paid. But since the plaintiff has every incentive to assign a low number to this percentage (since every percentage point of the settling defendant's share has the equivalent financial effect of a finding of contributory negligence on the plaintiff's part⁷⁹), and the settling defendant has no reason to challenge a low percentage of fault, one cannot expect that "agreed upon" number to be very reliable. Similarly, the plaintiff and the nonsettling defendant are unlikely to be able to agree upon a percentage figure for the settling defendant, since their interests are diametrically opposed.

If a trial judge is called upon to settle this dispute, it would be unfair to expect that a decision could be made in anything resembling a summary procedure. Since the subtle determination of relative fault has such dramatic consequences, a fact-finder would undoubtedly want to hear witnesses, judge demeanor and credibility, etc. No mechanism suggests itself except the equivalent of a full-blown trial on the merits. Indeed, no one has suggested that the determination of the settling defendant's percentage share could be determined elsewhere but at the trial itself.

But the costs of postponing a decision on the value of the settling defendant's share until trial—months or years after the settlement has been reached—are substantial. The first cost is the amount of legal resources spent in determining the absent tortfeasor's share. As noted above, under the 1977 Act, in the case of insolvent defendants, a determination of the absent tortfeasor's

79. For example, assume a plaintiff with \$100,000 damages, and a settling defendant whose share is calculated at 20%. That reduces the plaintiff's recovery by 20%, just as would a finding that the plaintiff was 20% at fault. (Of course, in a modified comparative negligence jurisdiction the plaintiff is concerned not only about having his recovery reduced, but even barred if it exceeds the halfway mark. See *supra* text accompanying notes 10-11. Similarly, where one of the parties is insolvent, a finding of contributory negligence will require the plaintiff to bear his proportion of the insolvency. See *supra* note 6. Nonetheless, in most cases the financial effect of a percentage point assigned to the settling defendant will be the same as one assigned to the plaintiff.)

share is unnecessary, since it usually will not affect the outcome of the case.⁸⁰ However, the "empty chair" of the settled tortfeasor—a significant headache even where no percentage share is assigned to him⁸¹—will loom even larger where the jury's calculation of his relative share of fault will directly lower plaintiff's judgment. Although the settling defendant is no longer a party (a fact which must be explained to the jury with some delicacy), his large profile at trial may overshadow defendants who still are parties.⁸²

2. Disincentives to Settle

Perhaps more serious than the burdens created by these additional procedures is the likelihood that they will significantly discourage settlement.

a. (Relatively) Insolvent Defendants. One difficulty that has not been considered by the 1977 Act is the question of whether a settlement with a (relatively) insolvent defendant will have the same effect as a settlement with a solvent defendant. For example, suppose P has received injuries of \$100,000 through the fault of D_S and D_N , and D_S 's only asset is a \$20,000 insurance policy. D_S foresees that a judgment will be entered against him for a substantial sum, and offers the entire \$20,000 to P in exchange for a complete release. What would happen to P if he accepts this offer? Under the 1977 Act, the jury would determine the relative fault of D_S (who, being absent from the courtroom, may appear quite culpable), and then that percentage amount would be subtracted from any judgment recovered by P. If the percentage were, say, 50%, P would stand to lose \$50,000 in exchange for the \$20,000 in settlement. By contrast, assuming P is not himself at fault, P can simply obtain a judgment against D_S and D_N , and recover his entire judg-

80. See *supra* note 12.

81. See *supra* note 33.

82. Moreover, the issue of contingent settlement agreements (i.e., agreements to settle only if a certain percentage or less is attributed to D_S 's share) must be addressed. Harris has suggested that contingent agreements to settle should be prohibited by statute, since they are not real agreements, and hence do not create justifiable controversies. Harris(1), *supra* note 1, at 145-48. This is an almost inescapable conclusion, given the fact that otherwise the judge's determination of reasonableness would in effect become an advisory opinion. Nonetheless, if a plaintiff knows that his remaining claims may be reduced by a judge's determination that the settlement is unreasonable, he will either demand more in the way of a settlement or be reluctant to settle at all.

ment from D_N , who in turn would collect \$20,000 from D_S .⁸³ Unless some special provision is made for settlement with insolvent defendants, P will have no choice but to refuse settlement with D_S and continue litigating what would otherwise be a pointless issue.⁸⁴

b. *Solvent Defendants.* Leaving aside the burden of continuing to try a case against an absent tortfeasor, the most discouraging aspect of a settlement for P is the fact that he is required in effect to buy a pig in a poke. He must accept a sum of money in exchange for an unknown (and at the time of settlement unknowable) percentage of the value of his case. Substantial changes in the availability of witnesses, or new evidence, or any of the other ills that flesh is heir to could make his initial impressions unreliable. Moreover, the share attributable to D_S when D_S is in the courtroom defending his own skin might be lower than where he is just another witness with no real stake in the outcome.⁸⁵

In effect, the 1977 Act is the functional equivalent of a provision for comparative contribution with no extinction of liability for settling defendants. If such a provision were enacted, plaintiffs would simply agree with a settling defendant to hold him harmless

83. If P is at fault, the result of a fully litigated case will depend upon whether the 1977 Act is followed or Washington's several liability principle is invoked. Under the 1977 Act, P would bear his proportionate share of D_S 's insolvency; see *supra* text accompanying notes 13-14. But where the plaintiff is not found at fault, joint and several liability is unaffected. Even if the plaintiff was found, say, 20% at fault, under the 1977 Act it might still behoove P (particularly given the problems already mentioned with the "empty chair" phenomenon, see *supra* note 33) to avoid losing the entire share attributable to D_S (by settlement) as opposed to only P's relative share of D_S 's insolvency. Even under Washington's current approach, any plaintiff who thought there was a significant possibility that he would be found at fault would have essentially the same incentives. Only the plaintiff who knows (for example, by way of partial summary judgment) that he will be found at fault will be able to settle with a partially insolvent defendant with no penalty.

84. The Restatement also noted this problem; see *infra* text accompanying note 93.

85. Justice Clark, whose dissent in *American Motorcycle Ass'n*, *supra* note 11, suggested something like the percentage approach, acknowledged that the nonsettling defendant would have "an incentive to magnify the fault of the settling defendant," but concluded that it was nonetheless appropriate to "place the burden of defending the settling defendant upon the plaintiff" in part because the plaintiff "in obtaining his settlement may secure the cooperation of the settling defendant for the later trial." 20 Cal. 3d. at 603, 578 P.2d at 923, 146 Cal. Rptr. at 206 (Clark, J., dissenting). It must be recognized, however, that there is a great disparity between the attitude of a witness who has simply agreed to appear at trial, and that of a defendant who may have a substantial judgment entered against him. Aside from agreeing to appear at trial, it is unclear exactly what "cooperation" could be "secured" in any enforceable way.

from any future contribution judgment.⁸⁶ He would then be in the exact position as he is left by the 1977 Act: free to settle for whatever he can get, but ultimately liable for whatever percentage of fault is assigned to the settling defendant. If stated in this bald form, it would be hard to classify the 1977 Act as an "improvement" over the previous treatments of the contribution. But there is only one feature of the provisions of the 1977 Act to distinguish it from what is an obviously severe disincentive to settlement.

That feature is the provision that the plaintiff's judgment is reduced by the percentage of the settling defendant's fault, even where that amount is less than the amount received. This creates the possibility of a windfall to the plaintiff, in excess of his actual damages,⁸⁷ but that possibility is remote. It requires that the settling defendant agree to pay more than his relative share of the damages and/or that he take no discount for sparing the plaintiff the risk of trial.

As noted above, in most settlements a discount is taken from the amount of plaintiff's damages based upon the less than certain chance that plaintiff will succeed at trial.⁸⁸ Since the jury's calculation of the settling defendant's share will only take place after liability has been decided in plaintiff's favor, the discount taken in settlement will not be applied, and the resulting share for the settling defendant will likely be considerably higher than what was obtained in settlement. For this reason, it is quite unlikely that the amount of the judgment reduction resulting from the jury's determination of relative fault will ever exceed the amount received in settlement. Thus, the apparent "evenhanded" treatment of the settlement proceeds is small comfort in the vast majority of cases.

c. *Extant Criticism.* The only jurisdiction that has used the formula of the 1977 Act for any length of time has been New York. Following the judicial adoption of contribution among joint

86. See *supra* note 28.

87. For example, suppose plaintiff "P" settles with one defendant (D_S) for \$50,000 and goes to trial against a remaining defendant (D_N). At trial P's damages are fixed at \$100,000; and D_S 's share of liability fixed at 30% and D_N 's at 70%. Under this rule P would be entitled to \$100,000 minus the 30% share he had already settled for, leaving \$70,000. Added to the \$50,000 already received, this would give him \$120,000—more than the \$100,00 assessed by the jury as his actual damages.

88. See *supra* text accompanying note 66.

tortfeasors in *Dole v. Dow Chem. Co.*,⁸⁹ the principle was codified by the New York legislature.⁹⁰ At the same time, the legislature provided that settlement by one tortfeasor with the plaintiff entitled the settling tortfeasor to the extinction of contribution claims against him, but the plaintiff's claim would be reduced by the settling tortfeasor's "equitable share."⁹¹ An early review of the impact of the *Dow* case concluded that

while section 15-108 of the GOL undoubtedly achieves its aim of encouraging defendants to settle, it discourages settlement by plaintiffs, whose lawyers must now be certain, before settling, that a defendant is paying a sum roughly equivalent to what the jury will ultimately determine to be his proportionate share of the total damages. Absent such certainty, a plaintiff's lawyer would, and should, be reluctant to settle.⁹²

Indeed, it makes little sense to speak of encouraging defendants to settle while discouraging plaintiffs from doing so. Both must find it to their advantage to settle, or neither will do so.

Similarly, the Restatement (Second) of Torts summarizes each of the three "solutions" to the problem of how to treat the release of a joint tortfeasor, and noted the difficulties of each. With respect to the percentage solution, it observed:

This solution works most strongly against the interest of the injured party and may have the effect of discouraging him from entering into a settlement. It may, for example, make it not desirable for him to accept the full amount of coverage in a minimum insurance policy if the equitable share of the obligation of the tortfeasor is likely to be substantially larger.⁹³

As a consequence, the Restatement concluded that each solution "has its drawbacks and no one is satisfactory."⁹⁴

This conclusion should come as no surprise. After all, the percentage solution essentially recreates all of the difficulties of the original "equal shares" approach, minus the Procrustean bed created by its arbitrary numerical division. Viewed in light of the ma-

89. 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

90. N.Y. CIV. PRAC. L. & R. §§ 1401-04 (McKinney Supp. 1974).

91. N.Y. GEN. OBLIG. LAW § 15-108(a) (McKinney Supp. 1974).

92. Wilner & Farrell, *Dole v. Dow Chemical Co.: The Kaleidoscopic Impact of a Leading Case*, 42 BROOKLYN L. REV. 457, 465 (1976).

93. RESTATEMENT (SECOND) OF TORTS § 886A, Comment on Caveat (1977).

94. *Id.*

major criticism of the 1939 Act—that it tended to discourage settlement—⁹⁵ the 1977 Act is in fact worse; now that the share of the settling tortfeasor is flexible rather than fixed, there is greater uncertainty on the part of the plaintiff as to just what he is giving up, and he is forced to expend resources to convince the jury that the settling defendant's share was minimal.

III. A PROPOSAL: THE DOLLAR SOLUTION REVISITED

If in fact the dollar solution appears workable but unfair, while the percentage solution appears fair but unworkable, is there an alternative? Or are we left with the Restatement's dismal conclusion that no solution is satisfactory? This article suggests that the dollar solution can be modified so as to remove its major drawbacks; and indeed that it is easier to modify the dollar solution to make it fair than it would be to modify the percentage solution to make it workable.

It will be recalled that there were three ways in which a "disproportionate settlement" could be inflicted—unfairly—upon the nonsettling defendant. First, the plaintiff might simply choose to "split his bets," because he is risk-averse, strategically using one defendant to insure that he gets a certain recovery, while using the other defendant to try to obtain a full recovery. Second, he might find that his liability case is as strong or stronger against a (nonsettling) defendant with the settling defendant—even though quite culpable—removed from the litigation. Finally, he may simply blunder in his assessment of liability and/or damages. A procedure designed to flush such cases into the open would go a long way toward removing the inequities of the dollar solution.

The essence of the proposal suggested here is that in order to limit the reduction of his judgment to the amount received in settlement, P should be required to show that he made a "parallel offer" (as described below) to *all* of the defendants known to P at the time of settlement. If, after trial, D_N can establish that the amount of D_S 's payment, compared with the offer made to him, was not "reasonable," as defined hereafter, he is entitled to a re-determination of the amount of settlement credit. The settlement credit would then be set at an amount equivalent to what D_S 's

95. See *supra* accompanying text note 16.

payment *reasonably* would have been.

A. *The Mechanics of the Modified Dollar Solution*

1. The "Parallel Offer"

Under the proposed solution, in order to have his claim reduced only by the dollar amount received from D_S , P would have to establish that he had made a "parallel offer" to the other defendants whose potential contribution rights would be extinguished by the settlement. The offer is parallel only in the sense that it occurs at the same time, and offers the same kind of complete release which is presumably being given to D_S . The determination of the amount of money demanded in order to settle the case would be made by P (although it would be subject to the review described below). For example, consider our hypothetical in which P has a claim against two defendants D_S and D_N . If P reaches agreement with D_S on a settlement of \$10,000, and wishes to have his claim reduced by only \$10,000, he would be required to show that at the same time he had made a settlement offer to D_N .⁹⁶ If he chose, he could demand \$90,000 from D_N for settlement, and satisfy the "parallel offer" step. However, as shown below, the higher the amount demanded from D_N , the greater the risk of a redetermination of the settlement credit.

2. The Attack on Reasonableness

The major feature of this proposal is that D_N would have the opportunity, *after* the case had been tried, to file a motion with the judge to increase the amount of credit applied to the judgment against him, based on proof that the amount actually received from D_S , which would otherwise establish the amount of the credit, was unreasonably low. For example, in the hypothetical case, if D_N went to trial and were found liable, he could ask the court to deter-

96. To protect himself, P might want to make his offer contingent upon all defendants settling for the amounts specified. Because of the "empty chair" phenomenon discussed earlier, *see supra* note 33, P might be reluctant to settle only with a more culpable tortfeasor, as opposed to settling with only the less culpable tortfeasor. Thus he might make his offer of settlement to one defendant contingent upon all defendants settling. For example, if he offers to settle with D_1 for \$20,000, his "parallel offer" to D_2 might be \$40,000, but only upon the condition that D_1 settle at the same time. P could also make a noncontingent offer to D_2 of \$50,000—the difference representing the declining leverage that P would have to either settle with D_1 or try the case against D_1 after D_2 has become an "empty chair."

mine that, given the offer to him of \$90,000, the \$10,000 for which D_S was permitted to settle was unreasonably low, and the amount of credit applied to D_N 's judgment should correspondingly be raised to some reasonable amount. D_N would have the burden of proof, and P would be able to present evidence to rebut D_N 's case. If the court is not persuaded by D_N 's evidence, the inquiry is at an end and the judgment will be the amount of the jury's verdict (plus costs), minus the amounts received by P in settlement. To this extent, the proposed solution is much like the dollar solution, for in most cases it is likely that D_N would be unsuccessful. However, if the court were to be persuaded by D_N (upon grounds discussed in the next section), P's claim would be reduced by that amount which would have been reasonable (discussed in section 4, below).

3. The Grounds for Redetermination

As noted above, if D_N is successful, P's claim might be reduced by an amount in excess of the dollar amount received. How should the judge determine whether P's settlement was reasonable or not? The essence of this proposal is that P is required to make a reasonable settlement offer to all parties. In doing so he must determine the total value of the case and then allocate percentages among the remaining defendants. The essence of D_N 's attack must be that the percentage of liability assigned to him was too high, given what was known about the case at the time. Before discussing the merits of this question, it is worth observing that in some jurisdictions we already have a preliminary answer to that question. In some jurisdictions⁹⁷ the jury is asked, when determining the percentage of negligence attributable to each defendant, to include the share of absent tortfeasors, including those who have settled out. Suppose, for example, that D_S paid \$10,000 to P in settlement, but that P demanded \$40,000 from D_N in a parallel offer. In some jurisdictions the jury would still be asked to determine the amount of negligence attributable to all the tortfeasors, including D_S . If the jury decides that D_S was 50% at fault and D_N 50% at fault, does that mean that the settlement offer was unreasonably low?

Not necessarily, P's prospects of recovery against D_S and D_N might have altered dramatically since the time of settlement. For

97. See *supra* note 12.

example, a crucial witness might have appeared or disappeared, causing an apparently promising case against D_N to turn into a disappointment, or vice versa. I will discuss below whether or not an error in P's judgment should be visited upon P or D_N , however, the reasonableness of the offer should be judged by the facts as they were known at the time of *settlement*, rather than by what ultimately was found at trial.

But assume that we do have a determination made at trial, or that for one of a variety of reasons the determination made at trial is not a useful measure of reasonableness. How should the court determine whether the settlement made by P with D_S was reasonable?

The sole question for the court is whether the ratio between the offer to D_S and the offer to D_N accurately reflected what could have been reasonably believed at the time about the respective distribution of liability between D_S and D_N . In the hypothetical case, for example, where P settled with D_S for \$10,000 but demanded \$90,000 from D_N , could P have reasonably believed that D_N was nine times more at fault than D_S ? If so, the offer would be reasonable and the inquiry would be at an end.

It must be emphasized that it is irrelevant that the amount of the judgment differs radically from the amount of the settlement offers. For example, with settlement offers of \$10,000 and \$90,000 the judgment at trial might be for \$20,000 or \$200,000. Settlement offers reflect predictions of what juries would award in the way of damages, and the relative strength of liability theories. If D_S only paid \$10,000, but the jury returns a verdict of \$200,000, that by itself is irrelevant—even though D_N would wind up paying nineteen times as much as D_S . Also, if the positions were reversed, and D_N had agreed to settle for \$90,000, while D_S had refused to pay \$10,000, D_S might be required to pay a judgment of \$160,000 if found liable at trial. There, too, the only question for the judge is whether or not the distribution of the settlement offers accurately reflected what a reasonable plaintiff might believe about the respective liability shares of the defendants. Plaintiff's damages might have significantly increased between the time of the settlement offer and the time of trial. Or a jury might be unusually generous compared with the usual range of verdicts. But these "discrepancies" are reflected in the sum of all of the contributions

required by the plaintiff to settle the case; if he offers to settle the case cheap, so long as that burden is fairly distributed among the defendants, none can complain if his case turns out to be worth more than that amount. Similarly, if his demand is extravagant, but equitably distributed, it is no cause for complaint if one defendant chooses to pay his share of the ransom and get out—he simply benefits the other defendants. Just as the plaintiff must bite the bullet in determining the total value of his case, the defendants must bite the bullet in deciding whether to settle or take their chances at trial.

On the other hand, if the distribution of settlement offers does not accurately reflect the liability shares, there may still be some mitigating circumstances. (Relative) insolvency is an obvious example. Suppose D_S had an insurance policy with limits of \$20,000, and no other assets, whereas D_N had a policy with \$100,000 limits; it might be appropriate to accept \$10,000 from D_S while still demanding \$50,000 from D_N , even in a scenario where all litigants would agree that D_S was, if anything, more culpable than D_N .

Should an honest mistake be another mitigating circumstance? Under the proposed approach, it would not. In determining whether the plaintiff could have *reasonably* believed that the liability shares were distributed in accordance with the ratio of his settlement offers, the judge would apply an objective rather than a subjective standard. If the judge finds that, even considering the limited knowledge available at the time, the plaintiff's distribution of liability was unreasonable, it would not matter whether the disparity was a function of ignorance pure and simple, a product of risk aversion or other strategic maneuvering pure and simple (as described in section C, *supra*), or some combination of both. Whatever the reason, D_N would be entitled to an increased credit.

It is safe to assume that judges would tend to be reluctant to make a finding of unreasonableness. When a trial takes place months or years after a settlement offer has been made and accepted, it will probably take an egregious case to provoke a trial judge into readjusting the amount of settlement credit. Judges may be inclined to treat motions for review of the settlement credit with the same attention devoted to the defendant's predictable request for a judgment N.O.V. Nonetheless, D_N might increase his chances of success by documenting (with a letter written to P at

the time of settlement) his objections to the distribution of liability represented in the settlement offer.⁹⁸

4. The Amount of the Increased Credit

Assume that in our hypothetical case a judge has examined what was known about the case at the time of the parallel offer, and finds that there was no reasonable basis for the disparity between the two offers. By how much should the judgment be reduced? Under this proposal, the judge should increase the credit against D_N 's judgment to an amount which would have been reasonable in terms of the offer made to D_N . For example, suppose that P demanded \$40,000 from D_N but settled with D_S for \$10,000. If the judge found \$10,000 unreasonably low given the \$40,000 demanded of D_N , he should raise the credit from \$10,000 to the lowest number that bore a reasonable relationship to the \$40,000 demanded of D_N . For example, if the evidence available at the time pointed to the fact that D_S was at least as negligent as D_N , and no special circumstances presented themselves, then the judge might find that the price of D_S 's release should have been \$40,000, and thus D_N 's judgment should be reduced accordingly.

Some additional hypotheticals will illustrate the working of this proposal:

(1) P settles with D_S for \$10,000 but makes no parallel offer to D_N until much later. Since the parallel offer is an essential part of the working of this system, the unexcused failure of P to make a parallel offer must be subject to a significant sanction. However, there are some cases in which the plaintiff may be justifiably ignorant of the identity or liability of some tortfeasor. The most direct way to deal with this problem is to provide that where no timely parallel offer is made to D_N , D_N 's right of contribution is not extinguished; however, the right of contribution will be collectible from P rather than from D_S . In other words, where P has settled with D_S , and later decides to sue D_N , he must bear the cost of any contribution judgment obtained by D_N against D_S .⁹⁹ If the facts sug-

98. See *infra* note 102.

99. Another approach, amounting to much the same thing, would be simply to refuse to extinguish the right of contribution against D_1 if the parallel offer step has not been satisfied. If this were the case, one would expect defendants routinely to demand from plaintiffs a hold-harmless clause in any settlement agreement, providing that plaintiff would

gest to either P or D_S that there might be a D_N out there who could be sued, then they both have an incentive to include him in settlement discussions through the parallel offer process. However, if the defendant cannot be located, or if at some later point a defendant appears who was excusably ignored in the earlier settlement process with D_1 , then P should at that time make a "parallel offer" based upon what is known at the time. If a judge is satisfied that P made the parallel offer to D_N at the earliest practical time, then the parallel offer step will be found satisfied and the judge should simply proceed to analyze its reasonableness.

(2) P settles with D_S for \$10,000 and makes a parallel offer to D_N of \$50,000. Judgment against D_N is entered for \$100,000 minus settlement credit. The judge finds P should have known at the time of settlement that D_S was at least equally at fault, and that liability was virtually certain; however, D_S only had \$20,000 in available assets. The judge might find the settlement reasonable, or that the settlement with D_S should have been closer to \$20,000, in which case the settlement credit could be adjusted upward to a maximum of \$20,000.

(3) P settles with $D_{S(1)}$ for \$10,000, $D_{S(2)}$ for \$10,000 and $D_{S(3)}$ for \$10,000 and makes a parallel offer to D_N of \$20,000. The case is tried and D_N is found liable with damages set at \$100,000. If the judge finds that D_N was known at the time to be equally culpable, and no special circumstances present themselves, the settlement credit of $D_{S(1)}$, $D_{S(2)}$ and $D_{S(3)}$ could be set at \$20,000 each, making the credit \$60,000 and the judgment \$40,000.

(4) P settles with D_S for \$40,000, and makes a parallel offer to D_N of \$40,000. The case is tried and D_N is found liable with damages set at \$100,000. After trial the judge determines that D_S was solvent and should have been known to be at least 75% liable. The judge sets the settlement credit at \$75,000 and reduces P's judgment against D_N to \$25,000, reflecting the amount that D_S would have paid if P had appropriately divided the liability shares at the time of the settlement offer.

B. *The Benefits of the Proposal*

The mechanics of the proposed solution having been sketched, it is appropriate to consider the benefits and costs. In general, compared with the pure dollar solution it is more cumbersome, but compared to the percentage solution it is much simpler. By contrast, in comparison to the percentage solution it is not perfectly "fair," but it is much better than the pure dollar solution. Rather than attempt to evaluate the relative mix of these two characteristics, let us examine each of them separately: Is the modified dollar solution fair, and is it workable?

1. Achieving "Fair" Results

The major reason for the adoption of the percentage solution was the perception that the dollar solution would produce inequitable results in a significant number of cases. As noted above,¹⁰⁰ it takes a special combination of factors to produce unfair results even with an unmodified dollar solution. With the modifications proposed, the dollar solution becomes even more attractive. While it is still possible under the dollar solution, even with the modifications proposed, for a defendant to wind up paying an amount disproportionate to the amount paid by the settling defendant, this would generally be a result of changed circumstances not foreseen by the parties, for example where the amount of damages initially forecast is substantially underestimated. Note, too, that in all circumstances the defendant who is "stuck" for a disproportionate share of liability has turned down a settlement offer which he thought was unreasonable; if a defendant wants to avoid the possibility of being "stuck" he can opt for settlement.

Additionally, it is questionable whether the percentage solution is inherently more "fair" than the dollar solution. Assuming that the plaintiff has decided to settle his case, is it likely that the percentage assigned to the settling defendant's share will perfectly correspond with what would have been attributed to that defendant had the case been tried?

2. Minimizing the Use of Judicial Resources

The most important feature of the proposal advanced here is

100. See *supra* text accompanying notes 68.

that it significantly reduces judicial resources. It does so in several ways:

a. *Encouraging Settlement.* The most important feature of the proposal is that it does not create any barriers to settlement, except for the minimal requirement that the plaintiff prepare an omnibus settlement proposal rather than an individual one. So long as the plaintiff is offering to settle for amounts which correspond to the relative liability percentages given the information he has, he should be confident that there will be no readjustment of the settlement credit after trial.¹⁰¹ On the other hand, the percentage solution, which requires the plaintiff at his peril to guess the share to be assigned to the settling defendant (and then to defend that share at trial), significantly reduces the incentives for parties to settle.

b. *Eliminating the Need to Determine Absent Tortfeasors' Shares.* Another significant savings is in eliminating the need to litigate the percentage share of the absent tortfeasor. Traditionally, the factfinder has been concerned with the liability of the parties actually present at trial; if other defendants had settled their claims, the remaining parties might attribute certain characteristics to their conduct, but it would be unnecessary for the jury to make any determination of their liability or nonliability. The 1977 Act's approach to insolvency eliminates the need to consider the absent tortfeasor's share in cases of insolvency; since an uncollectible share is simply redistributed to the remaining parties, the result of leaving the tortfeasor out from the beginning is the same as inserting him and then removing him. By contrast, the treatment of claim reduction reintroduces the problem by requiring that each tortfeasor's liability share be determined, whether he is present at trial or not.

c. *Administrative Costs.* The proposed solution does require P to prepare an omnibus settlement proposal, rather than one directed only at the specific target of settlement, but in most cases it should not require a great deal of additional effort simply to pre-

101. Of course, partial settlements entered into for strategic purposes, as sketched in *supra* § IIC, will be less attractive compared to the pure dollar solution, but it is precisely those settlements that the percentage solution is designed to prevent; unfortunately, this is a remedy that is worse than the disease, because of the pall cast over even legitimate settlements.

pare such a proposal.¹⁰² Of course, there is also the possibility that the case will go to trial against D_N , that liability will be found, and that the reasonableness of the initial settlement will be attacked. While this is unlikely,¹⁰³ it certainly must be evaluated. If so, D_N will present his case and the plaintiff must be prepared to defend his settlement offer. Admittedly, this is an added burden. But it is to be expected that in most cases the trial judge will have little sympathy with the defendant's request for redetermination. After all, the defendant is attempting to second-guess the plaintiff's decisions in evaluating the case, which trial judges know are extremely difficult.

IV. CONCLUSION

It is not surprising that the problems of determining the amount of judgment reduction for settling tortfeasors have remained unresolved. As reviewed in this article, the problems are subtle, and do not command a high profile on the legal landscape. Particularly because they are part of the process of settlement, which usually removes a case from visibility in terms of appellate decisions, the perceived injustices resulting from the various solutions detailed in this article may have frequently appeared to be the price of settlement's "imperfect justice." However, this article has attempted to demonstrate that there is a mechanism for ameliorating the injustices threatened by partial settlement—one that can be implemented without clogging the litigation process. Indeed, by requiring settling plaintiffs to extend settlement offers to *all* known defendants, and then giving nonsettling defendants the right to challenge the reasonableness of those offers after trial, it can be hoped that the likelihood of settlement, and relatively fair settlement at that, can be increased.

102. One likely outcome is that both plaintiff and defendants will attempt carefully to document their settlement offers in letters to opposing counsel as to why particular offers are being made or rejected, so as to provide a useful record at any post-trial proceeding. While undoubtedly self-serving, these documents might actually improve the quality of the settlement discussions, since they would force each side to articulate its position.

103. Most cases settle; thus, even if a settlement is perceived by another defendant as unfair, it is likely that he too will settle, thus eliminating the entire controversy over the settlement's reasonableness. This is a decided advantage over procedures such as those in Washington or California, which require *every* partial settlement, even those that are ultimately completely settled, to be approved by a judge. See *supra* text accompanying notes 56-63.