Contribution: An Area in Need of Clarity as to Manufacturers' Strict Liability

I. INTRODUCTION

Contribution is an equitable tool used to distribute losses among all parties responsible for injury to another. Like any other equitable concept, its development in American jurisprudence has been shaped by each jurisdiction's perception of "fairness" and "justice." As a result, application of the doctrine varies widely from state to state. With the appearance in recent years of industry-wide strict products liability actions,[1] contribution has taken on a new importance. But two obstacles continue to hinder its application. First, since contribution law does vary so widely, it is difficult for litigants to determine what law, if any, is applied in the relevant jurisdiction. This problem is made more complex by the fact that many of these cases are tried in federal courts which, under the principles of *Erie R.R. v. Tompkins*,[2] must themselves attempt to divine the status of the forum state's law. Second, contribution, a derivative of negligence law, is based on fault principles. On the other hand, strict liability is based on the existence of a defective product.[3]

Jurisdictions that allow contribution among negligent tortfeasors have generally been willing to allow contribution among strictly liable

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1. The doctrine of strict products liability has been recognized in the majority of states. *See* 1 PROD. LIAB. REP. (CCH) 4015 (1979). Most states have adopted RESTATEMENT (SECOND) OF TORTS § 402A (1965), which reads as follows:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
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> (a) the seller is engaged in the business of selling such a product, and
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> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
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> (2) The rule stated in Subsection (1) applies although
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> (a) the seller has exercised all possible care in the preparation and sale of his product, and
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> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

See generally Banks, *How Strict is Strict Liability?*, 13 F. 293 (1977).

2. 304 U.S. 64 (1938). The rule of the *Erie* case requires that a federal court, in diversity cases, follow state substantive law in most cases.

3. *See* Jensvold, *A Modern Approach to Loss Allocation Among Tortfeasors in Products Liability Cases*, 58 MINN. L. REV. 723 (1974).

tortfeasors.[4] However, since existing statutes and case law are directed primarily toward contribution among negligent tortfeasors,[5] rules of contribution among strictly liable defendants are unsettled and difficult to predict.

This comment will examine the area of contribution among tortfeasors and its applicability to manufacturers in strict products liability actions. More particularly, a closer look will be taken at the possible consequences of pretrial settlements between plaintiffs and defendants. The current status of asbestos-product litigation will be discussed as illustrative of the monetary as well as academic interests at stake.

II. ASBESTOS LITIGATION

Asbestos is a durable mineral used in the production of approximately 3,000 products. Among the most useful of its properties is its flame resistant quality. There is presently no product available at a reasonable cost which can replace it.[6] Health hazards related to the inhalation of asbestos dust were noted at the turn of the century; but it was not until the mid-1960s that the inherent dangers of asbestos became well-documented.[7]

In recent years, product liability actions concerning products containing asbestos have been commenced in epidemic numbers.[8] All major asbestos-product manufacturers have been and continue to be involved. One estimate predicts that tens of thousands of asbestos-related deaths will occur over the next thirty years, giving rise to massive litigation.[9]

Liability for the manufacture of asbestos was first established in *Borel v. Fibreboard Paper Products Corp.*[10] In this action, brought by an insu-

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4. *See, e.g.*, Sun Valley Airlines, Inc. v. Avco-Lycoming Corp., 411 F. Supp. 598 (D. Idaho 1976); Safeway Stores, Inc. v. Nest-Kart, 63 Cal. App. 3d 934, 134 Cal. Rptr. 150 (1976); Dole v. Dow Chemical, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972); Northwestern Mut. Ins. Co. v. Stromme, 4 Wash. App. 85, 479 P.2d 554 (1971); Bielski v. Schulze, 16 Wis. 2d 1, 114 N.W.2d 105 (1962). *But see, e.g.*, Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965); Mixter v. Mack Trucks, Inc., 224 Pa. Super. 313, 308 A.2d 139 (1973); Heil Co. v. Grant, 534 S.W.2d 916 (Tex. Civ. App. 1976); *But see* General Motors Corp. v. Simmons, 558 S.W.2d 855 (Tex. 1977).

5. *See, e.g.*, TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon 1971).

6. Mansfield, *Asbestos: The Cases and the Insurance Problem*, 15 F.860, 860-61 (1980).

7. Inhalation of asbestos dust over a long period of time has been found to be the cause, or an aggravating agent, of a variety of diseases, primarily asbestosis, pulmonary carcinoma and mesothelioma. Mansfield, note 6 *supra*, at 861-64. *See* Motley, *The Lid Comes Off*, 16 TRIAL 21 (Apr. 1980), for a history of asbestos research.

8. "At present there are apparently 3,000 plaintiffs seeking compensatory and punitive damages for the various asbestos-related diseases. . . ." Henderson, *Product Liability Disease Litigation: Blueprint for Occupational Safety and Health*, 16 TRIAL 25, 26 (Apr. 1980).

9. Mansfield, note 6 *supra*, at 865.

10. 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974). In an earlier deci-

lation worker against several manufacturers of asbestos products, the Fifth Circuit held the insulation manufacturers strictly liable.[11] The court determined that materials containing asbestos constituted unreasonably dangerous products because the manufacturers failed to give adequate warnings of the known or knowable dangers involved.[12] But, the court concluded that even though asbestos is an "unavoidably unsafe product,"[13] its utility may justify its manufacture, as long as its ultimate users are warned of the risks.[14] The *Borel* decision set the stage for subsequent cases holding manufacturers strictly liable on the same theory.[15] These actions have resulted in jury verdicts ranging from the comparatively modest verdict of $79,436.24 in *Borel* to, most recently, $3,000,000 in *Migues v. Nicolet Industries, Inc.*[16]

In *Migues*, the district court for the Eastern District of Texas found the defendant manufacturer strictly liable for the wrongful death of an insulation worker as a result of exposure to insulation materials containing asbestos.[17] Nicolet, an insulation manufacturer, was originally sued along with thirteen other manufacturers of insulation products containing

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sion, Bassham v. Owens-Corning Fiberglass Corp., 327 F. Supp. 1007 (D.N.M. 1971), the court dismissed an action brought by an insulation worker against manufacturers of asbestos products, holding that the plaintiff's alleged contraction of asbestosis was not actionable on a strict liability theory. The court held that the plaintiff had failed to show that asbestos was unreasonably dangerous. *Id.* at 1008. In addition, the court found that the action would be barred by the New Mexico statute of limitations. *Id.* at 1008-09. Moreover, the court maintained that asbestosis, an occupational disease, was not physical harm under a strict liability theory. *Id.* at 1009.

11. 493 F.2d at 1087-89. Texas has adopted the theory of strict liability in tort as expressed in RESTATEMENT (SECOND) OF TORTS § 402A (1965). The text of § 402A appears *supra* at note 1. The trial court also found all but two manufacturers negligent. 493 F.2d at 1086.

12. 493 F.2d at 1088-89.

13. *Id.* at 1088.

14. *Id.* In finding that the manufacturers had failed in their duty to adequately warn users of the hazards of inhalation of asbestos, the court held each manufacturer to the knowledge and skill of an expert. "The manufacturer's status as an expert means that at a minimum he must keep abreast of scientific knowledge, discoveries, and advances and is presumed to know what is imparted thereby." *Id.* at 1089 (footnote omitted). In addition, the court maintained that each manufacturer "has a duty to test and inspect his product." *Id.* at 1090-91 (footnote omitted). The court concluded, upon analysis of the history of asbestos research since 1924, that the manufacturers had failed in their duty to warn of the inherent dangers of exposure to asbestos products. *Id.* at 1083-86.

15. *See, e.g.*, Karjala v. Johns-Manville Prod. Corp., 523 F.2d 155 (8th Cir. 1975); Migues v. Nicolet Indus., Inc., 493 F. Supp. 61 (E.D. Tex. 1980).

16. 493 F. Supp. 61.

17. 493 F. Supp. at 61, 62. Asbestos is considered to be the major cause of mesothelioma, a malignant tumor that affects the subsurface tissues which line the body cavities. *See* Mansfield, note 6 *supra*, at 864.

asbestos.[18] Prior to trial, the thirteen other manufacturers reached a settlement agreement with the plaintiff, the decedent's widow, in the amount of $400,000.[19] The action against Nicolet proceeded and at trial the jury awarded plaintiff $3,000,000.[20]

Nicolet had filed cross actions against the other thirteen original defendants for contribution.[21] Based upon its interpretation of Texas contribution law, Nicolet urged the court to apportion the amount of the jury's verdict pro rata and to impose a judgment of $214,285, one fourteenth of the jury's verdict, for each of the fourteen original defendants.[22] The plaintiff argued that the $3,000,000 judgment should be reduced only by the amount paid in settlement.[23] With no Texas statutory authority or precedent "squarely on point,"[24] the district court decided the issue in favor of the plaintiff and allowed only a $400,000 reduction.[25] These large damage awards understandably cause concern among manufacturers within the industry as to the potential extent of liability to which one manufacturer may be bound. Because asbestos litigation rarely involves only one defendant manufacturer,[26] the issue of contribution is particularly important.

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18. 493 F. Supp. at 61.

19. *Id.*

20. *Id.* The district court found this amount excessive to the extent that it exceeds $1,500,000 and ordered a remittitur. *Id.* at 65. For purposes of this discussion, the exact amount awarded is not relevant, and the remittitur will not be discussed.

21. *Id.* at 62. Under TEX. REV. CIV. STAT. ANN. art. 2212 (Vernon 1971), contribution is permissible only among tortfeasors against whom judgment has been rendered. However, the statute has been judicially construed to permit defendants to implead other co-tortfeasors. *See* Lottman v. Cuilla, 288 S.W.123, 126 (Tex. Comm. App. 1926). *See* note 34, *infra*.

22. 493 F. Supp. at 62. The defendant relied upon TEX. REV. CIV. STAT. ANN. art. 2212 (Vernon 1973); and Palestine Contractors, Inc. v. Perkins, 386 S.W.2d 764 (Tex. 1964), a negligence action in which the Supreme Court of Texas reduced the verdict against one joint tortfeasor by one-half because the plaintiff had previously settled with the other joint tortfeasor. Pro rata apportionment, discussed at notes 36-38 *infra*, and accompanying text, is the equal division of damages among all liable parties.

23. 493 F. Supp. at 62. The district court relied chiefly upon Leger v. Drilling Well Control, 592 F.2d 1246 (5th Cir. 1979), a negligence case in which the court reduced the verdict by an amount equal to the percentage of negligence of the settling tortfeasors multiplied by the total amount of damages. *See* note 43 *infra*, and accompanying text.

24. 493 F. Supp. at 64. Texas, like many jurisdictions, has never addressed the issue of how contribution should be applied to strict liability tortfeasors.

25. *Id.* at 65.

26. For example, in *Borel*, plaintiff originally sued eleven manufacturers. In *Migues*, plaintiff sued fourteen manufacturers.

III. CONTRIBUTION

Contribution has evolved from the English common law rule that prohibited contribution among joint tortfeasors.[27] The basic policy opposing contribution among joint tortfeasors was that the law should not allow a person the right to recover against another based on his own wrongdoing.[28] However, recognition of the serious injustice that could result from such a rule[29] has caused most American jurisdictions to modify it and to allow contribution, at least among tortfeasors who are negligent and not guilty of wilful misconduct.[30]

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27. The rule against contribution has been traced to Merryweather v. Nixon, 8 Term Rep. 186, 101 Eng. Rep. 1337 (K.B. 1799). In this case, two defendants had been jointly convicted in an action for conversion. One of the defendants had been levied on for the entire judgment. When the paying defendant brought this case against the other defendant for contribution, the court ordered a nonsuit, refusing to grant an action for contribution among intentional tortfeasors. For a history of contribution, *see* Allen, *Joint Tortfeasors—A Case for Unlimited Contribution*, 43 MISS. L.J. 50, 53-57 (1972); Comment, *Contribution and the Distribution of Loss Among Tortfeasors*, 25 AM. U.L. REV. 203, 204-07 (1975). *See generally* W. Prosser, *Law of Torts* § 50, at 305-10 (4th ed. 1971); 18 AM. JUR. 2d *Contribution* § 1 (2d ed. 1965); 1 F. HARPER AND F. JAMES, THE LAW OF TORTS § 10.2, at 714-25 (1956).

"Contribution" and "indemnity" are often used interchangeably; however, it is important to distinguish between the two. Generally, idemnity refers to a complete shifting of the burden of loss; whereas contribution distributes the loss, requiring payment by all liable tortfeasors of their proportionate share. *See* Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130 (1932). *See also* Hodges, *Contribution and Indemnity Among Tortfeasors*, 26 TEX. L. REV. 150 (1948); Comment, *Comparative Causation, Indemnity, and the Allocation of Losses Between Joint Tortfeasors in Products Liability Cases*, 10 ST. MARY'S L.J. 587, 588-89 (1979).

The term "joint tortfeasor" has been somewhat inconsistently applied. For the purposes of this comment, it will encompass "all cases where there is joint liability for a tort, whether the acts of those jointly liable were concerted, merely concurrent, or even successive in point of time." Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130, 131 n.9 (1932). *See generally* 1 F. HARPER AND F. JAMES, THE LAW OF TORTS § 10.1, at 692-714 (1956). *See also* Oldham and Maynard, *Indemnity and Contribution Between Strictly Liable and Negligent Defendants*, 28 FED'N OF INS. COUNSEL Q. 139, 141 (1978); Comment, *Contribution and the Distribution of Loss Among Tortfeasors*, 25 AM. U. L. REV. 203, 203 n.1 (1975).

28. For discussion of arguments in favor of, and against, the rule against contribution, *see* F. HARPER AND F. JAMES, *supra* note 27, at 716-19; Leflar, note 27 *supra*, at 131-34; *Distribution of Loss Among Tortfeasors*, note 27 *supra*, at 211-16.

29. There is obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were equally, unintentionally responsible, to be shouldered onto one alone, according to the accident of a successful levy of execution, the existence of liability insurance, the plaintiff's whim or spite, or his collusion with the other wrongdoer, while the latter goes scot free.

PROSSER, *supra* note 27, at 307 (footnote omitted). *See* Hodges, *supra* note 26, at 151.

30. For those jurisdictions that now allow contribution, *see* notes 31 and 33 *infra*. Only a few jurisdictions have gone so far as to allow contribution among intentional tortfeasors.

The rule of contribution has varied from state to state. Some jurisdictions allow contribution only among tortfeasors against whom judgments have been rendered,[31] while other jurisdictions allow contribution among all liable parties[32] regardless of the existence of a judgment against all or any of them.[33]

In those jurisdictions that require the existence of a judgment as a prerequisite to contribution, the basic policy of equitable distribution of damages that underlies contribution is largely defeated. The plaintiff continues to have ultimate discretion in choosing which tortfeasors will be sued for his loss. Even if the plaintiff should desire to sue all liable parties, he might also be limited in joining multiple defendants in a law suit by jurisdictional restrictions. Thus, a defendant is often effectively prevented from shifting damages that exceed his share of liability to other joint tortfeasors.[34]

See, e.g. Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 110 A.2d 24 (1954); Bielski v. Schulze, 16 Wis. 2d 1, 114 N.W.2d 105 (1962).

31. For jurisdictions that allow contribution only between or among tortfeasors against whom judgments have been rendered, *see, e.g.*, CAL. CIV. CODE §§ 875-880 (Deering 1962); KAN. STAT. ANN. § 60-2413 (1976); LA. CODE CIV. PRO. ANN. art. 2324 (West 1979); MICH. STAT. ANN. § 600.2925(1) (1968); MISS. CODE ANN. § 85-5-5 (1972); MO. ANN. STAT. § 537.060 (Vernon 1953); N.Y. CIV. PRAC. LAW § 1402 (McKinney 1976); W. VA. CODE ANN. § 55-7-15 (1981).

32. Where recovery of contribution is permitted, it is usually held that there must be a common legal liability on the part of the tortfeasor toward the injured person. Common liability is said to come into existence "immediately after the acts of the tortfeasors which give rise to the cause of action against them."
F. HARPER AND F. JAMES, note 27 *supra*, at 718.

33. For jurisdictions that allow contribution even though judgment has not been rendered (*either by express statutory terms or court interpretation)*, see, e.g., ARK. STAT. ANN. §§ 34-1001-1009 (1962); DEL. CODE ANN., tit. 10, §§ 6301-6308 (1974); GA. CODE ANN. § 105-2012 (1966); HAWAII REV. STAT. § 663-12 (1976); KY. REV. STAT. § 412.030 (1979); MD. ANN. CODE art. 50, §§ 16-24 (1979); MASS. GEN. LAWS ANN. ch. 231B, §§ 1-4 (West 1974). N.J. STAT. ANN. §§ 2A:53A-1 to -5 (West 1952); N.M. STAT. ANN. §§ 41-3-1 to -8 (1978); N.C. GEN. STAT. § 1B-1 to -7 (1969); N.D. CENT. CODE § 32-38-01 to -04 (1976); OR. REV. STAT. § 18.440 (1979); PA. STAT. ANN. tit. 42, §§ 8321-8327 (1890 Pamphlet); R.I. GEN. LAWS §§ 10-6-1 to -11 (Supp. 1960); S.D. CODIFIED LAWS ANN. §§ 15-8-11 to -22 (1967); TEX. REV. CIV. STAT. ANN. art. 2212 (Vernon 1973).

34. Recognizing the injustice inherent in TEX. REV. CIV. STAT. ANN. art. 2212 (Vernon 1971), which expressly refers to joint tortfeasors against whom judgment has been rendered, the Texas appeals court judicially modified the rule, saying:

> It is true literally the statute applies to judgments rendered against two or more wrongdoers. But the evident purpose of the act was to relieve the rigor of the common law, so as to place the burden, as amongst themselves, equally upon all the solvent tortfeasors. There is no reason to hold the legislature meant to exclude from the benefits of the statute those cases where . . . the plaintiff did not elect to sue all the tortfeasors; but every consideration impels us to hold that the defendant sued may, and should be allowed to, bring in other wrongdoers, provided he does so in such way as not to delay or otherwise prejudice the plaintiff's case.

The doctrine of contribution is better served by those jurisdictions that allow contribution among all liable parties even though judgment has not been rendered against all or any of them.[35] In these jurisdictions, the right to contribution is retained among all tortfeasors and is not lost as a result of plaintiff's choice of defendants.

Another dissimilarity in the application of contribution is the way in which damages are apportioned among tortfeasors. Two basic methods have evolved: equal pro rata apportionment among the liable parties and division of damages on the basis of comparative fault.[36]

The equal pro rata share approach divides the amount of damages by the number of liable parties, ignoring the amount of fault attributable to each tortfeasor.[37] Because of the serious inequities that can sometimes result,[38] many jurisdictions have adopted a more subjective form of apportionment by imposing damages based upon the relative fault of each party.[39] Even though determination of a fault percentage is not precise, it

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Lottman v. Cuilla, 288 S.W. 123, 126 (Tex. Com. App. 1926).

35. *See* note 33 *supra*.

36. *See generally* PROSSER, note 27, *supra*, at 310; *see also* Comment, *Comparative Contribution and Strict Tort Liability: A Proposed Reconciliation*, 13 CREIGHTON L. REV. 889, 890-91 (1980); *Distribution of Loss Among Tortfeasors*, *supra* note 27, at 232-33.

37. *See* sources cited in note 36 *supra*. The equal pro rata share approach has its basis in the rule "equity is equity." This phrase generally means that the loss is divided equally among the parties. For jurisdictions that adhere to equal pro rata apportionment, *see, e.g.*, Nordstrom v. District of Columbia, 213 F. Supp. 314 (D.D.C.), *rev'd on other grounds*, 327 F.2d 863 (D.C. Cir. 1963); Safeway Stores, Inc. v. Nest-Kart, 63 Cal. App. 3d 934, 134 Cal. Rptr. 150 (1976); MASS. GEN. LAWS ANN., ch. 231B, §§ 1-4 (West 1974); Judson v. Peoples Bank & Trust Co., 25 N.J. 17, 134 A.2d 761 (1957); Hutcherson v. Slate, 105 W. Va. 184, 142 S.E. 444 (1928). The rule of equal pro rata apportionment is subject to exceptions. For example, in the case of vicarious liability, two or more tortfeasors may be charged with only one share. Additionally, in the event one or more joint tortfeasors is insolvent, the solvent joint tortfeasors may be required to equally absorb that portion of the damages. *See* PROSSER, note 27 *supra*, at 310; *Distribution of Loss Among Tortfeasors*, note 27 *supra*, at 232-33.

38. *See* Bielski v. Schulze, 16 Wis. 2d 1, 114 N.W.2d 105 (1962). In this case, one joint tortfeasor was found to be 95% at fault, while the other joint tortfeasor was found to be only 5% at fault. The lower court had allowed the contribution plaintiff (the joint tortfeasor 95% at fault) to recover 50% of the damage claim based upon the equal pro rata share rule. The Wisconsin Supreme Court reversed the decision and changed the existing equal pro rata apportionment law to allow contribution based on the percentage of negligence.

39. For jurisdictions that allow contribution according to relative degree of fault by each tortfeasor, *see, e.g.*, Kohr v. Allegheny Airlines, Inc., 504 F.2d 400 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975) (federal rule of contribution); Gomes v. Brodhurst, 394 F.2d 465 (3d Cir. 1967); Bass v. United States, 379 F. Supp. 1208 (D. Colo. 1974); ARK. STAT. ANN. § 34-1002(4) (1963), *construed in* Schultz v. Young, 205 Ark. 533, 169 S.W.2d 648 (1943); DEL. CODE ANN. tit. 10, § 6302(d) (1974), *construed in* Fehlhaber v. Indian Trails, Inc., 45 F.R.D. 285 (D. Del. 1968); Travelers Ins. Co. v. Ballinger, 312 So. 2d 249 (D. Ct. App. Fla. 1975). HAWAII REV. STAT. § 663-12 (1976), *construed in* Mitchell v. Branch, 45 Haw. 128, 363 P.2d

more justly allocates responsibility than does an equal pro rata system.

When a tortfeasor settles the entire claim of an injured plaintiff, the rule of contribution is relatively simple. Jurisdictions are generally in agreement that a settling tortfeasor who discharges a plaintiff's total claim against all tortfeasors has a right of contribution against the other joint tortfeasors. As a prerequisite, however, the settling joint tortfeasor must be able to show that the settlement was made in good faith and was reasonable. It must also be shown that the tortfeasors against whom contribution is sought were in fact liable to the plaintiff.[40] The question of contribution becomes more complicated if the settlement agreement results in the release of only the settling tortfeasor, and the plaintiff seeks recovery from the remaining tortfeasors.

The hodgepodge of rules relating to the effect of settlement upon contribution has resulted from the conflict between the policies of protecting the finality of a settlement and of protecting a tortfeasor's right of contribution.[41] If, upon release from liability by the plaintiff, a tortfeasor is still potentially liable for contribution from nonsettling joint tortfeasors, the tortfeasor accomplished nothing in seeking a settlement. From the other perspective, a pretrial settlement between one tortfeasor and a plaintiff, absent contribution rights, could result in an undue proportion of the loss being cast upon the nonsettling tortfeasors. In alleviating some of the inequities, the courts and legislatures have considered:

> (1) what effect a settlement amount should have upon a subsequent judgment for damages against a nonsettling tortfeasor(s); and, (2) whether a nonsettling tortfeasor is entitled to contribution in the event any judgment against him might exceed his proportionate share of the loss, or whether a settling tortfeasor is entitled to contribution from the nonsettling tortfeasor if the amount of settlement should exceed his share of the loss.[42]

One approach to the contribution dilemna has been to reduce the amount of the plaintiff's claim against the nonsettling tortfeasors by the amount of settlement. This approach would allow the plaintiff full recovery on his claim while also preventing overcompensation.[43] In addition to

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969 (1961); Packard v. Whitten, 274 A.2d 169 (Me. 1971); Tolbert v. Gerber Indus., Inc., 255 N.W.2d 362 (Minn. 1977); S.D. CODIFIED LAWS ANN. § 15-8-15 (1967); TEX. REV. CIV. STAT. ANN. art. 2212a, §§ 1, 2 (1973); Bielski v. Schulze, 16 Wis. 2d 1, 114 N.W.2d 105 (1962).

40. *See* Annot., 8 A.L.R.2d 196 (1949).

41. *See generally* Phillips, *Contribution and Indemnity in Products Liability*, 42 TENN. L. REV. 85, 116-18 (1974); *Distribution of Loss Among Tortfeasors*, note 6 *supra*, at 238-45.

42. 18 AM. JUR. 2d *Contribution* § 52, at 75-76.

43. The objective of allowing a plaintiff full recovery on his claim while at the same time preventing overcompensation is based upon the doctrine of "one recovery" and the principle of law that a plaintiff, absent punitive damages, should not be allowed to recover more than

reduction of the amount of the claim, contribution is allowed in the event one tortfeasor is overburdened.[44] This approach is problematic in that it destroys the finality of a settlement agreement, thereby defeating any incentive that may exist to settle a claim.

The interest in encouraging settlements has led some states to terminate contribution rights between or among tortfeasors upon settlement with one or more tortfeasors. In those jurisdictions that disallow any action for contribution against a settling tortfeasor, the amount of any damages imposed upon the nonsettling tortfeasors is reduced by the amount paid in settlement.[45] The benefits of this approach are twofold: it provides complete compensation to a plaintiff for his loss; and it encourages settlement by insuring finality. However, this approach ignores the inequitable results that are likely to occur against the nonsettling tortfeasor who risks being overburdened by virtue of his refusal to settle a claim for which he may legitimately feel a need to litigate.

In other jurisdictions that disallow contribution among settling and nonsettling tortfeasors, the amount of the total claim is reduced by the amount of the settling tortfeasor's proportionate share.[46] Arguably, this approach could tend to cast the burden of an unfulfilled claim upon the injured plaintiff. However, so long as a good faith settlement agreement is reached, no such injustice need exist. Moreover, this approach serves to prevent the potential inequity which can stem from a plaintiff's whim or connivance in choosing his defendants.

In examining the effects of settlement on contribution rights, it is necessary to consider equally all affected parties: the tort victim, the settling tortfeasor, and the nonsettling tortfeasor. In this light, a pro rata reduction of a plaintiff's claim, which eliminates the need for contribution, most effectively accomplishes equity toward all parties, while imposing upon all a minimal burden of good faith.

IV. A Solution—The Uniform Products Liability Act

At present, the development of contribution law as it is applied to strict product liability is unsatisfactory. The Uniform Product Liability Act,[47] promulgated by the United States Department of Commerce, offers

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the amount of the loss actually suffered. *See Distribution of Loss Among Tortfeasors*, note 26 *supra*, at 243 n.152.

44. This was the approach taken in *Uniform Contribution Among Tortfeasors Act* §§ 4-5 (1939 Version).

45. This approach was adopted by *Uniform Contribution Among Tortfeasors Act* § 4 (1955 Version).

46. *See* 18 Am. Jur. 2d, note 4 *supra*, at 76-77.

47. Uniform Products Liability Act, *reprinted in* 44 Fed. Reg. 62,714 (1979) [hereinafter cited as UPLA]. *See generally* Schwartz, *The Uniform Product Liability Act—A Brief*

a viable solution to the existing muddle. That Acts states: "The current system of having individual state courts develop product liability law on a case-by-case basis is not consistent with commercial necessity. Product sellers . . . need uniformity in product liability law so they will know the rules by which they are to be judged."[48] By combining the various theories of a product liability cause of action,[49] the Commerce Department has applied contribution rules to products liability without distinguishing strict liability from negligence. The Department has determined that the concern over conflicting theories of negligence and strict liability is "more theoretical than real."[50]

The Model Act addresses the two most important concerns of contribution as it is to be applied to strict products liability: apportionment of damages[51] and the effect of settlement on contribution.[52] Under the Act, damages are apportioned according to the relative percentage of responsibility.[53] This approach alleviates the necessity of showing degrees of fault, while at the same time, avoiding the potential injustice of equal pro rata apportionment.[54] Additionally, the Act provides that in the event of settlement with one tortfeasor, any judgment against the remaining tortfeasors is reduced by the settling tortfeasor's equitable share.[55] This serves best the interests of all parties.[56] Even though the Uniform Product Liability Act has been criticized by some,[57] its approach to contribution offers certainty to an uncertain area of tort law. Its use would enhance the equitable principles on which contribution is based.

V. CONCLUSION

Products produced by large-scale manufacturers are consumed from

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Overview, 33 VAND. L. REV. 579 (1980).

48. UPLA, Introduction, 44 Fed. Reg. at 62,714 (1979).

49. *Id.* at § 102(D), 44 Fed. Reg. at 62,719. This section consolidates the theories of negligence, warranty and strict liability into one "product liability claim."

50. *Id.* at § 111, 44 Fed. Reg. at 62,735 (analysis).

51. *Id.* at § 111, 44 Fed. Reg. at 62,734.

52. *Id.* at § 113, 44 Fed. Reg. at 62,739.

53. *Id.* at § 111, 44 Fed. Reg. at 62,735. Section 111(B)(3) states:"In determining the percentages of responsibility, the trier of fact shall consider, on a comparative basis, both the nature of the conduct of each person or entity responsible and the extent of the proximate causal relation between the conduct and the damages claimed."

54. *See* notes 37-39 *supra*, and accompanying text.

55. UPLA at § 113(E), 44 Fed. Reg. at 62,739 which states: [T]he claim of the releasing claimant against the other parties is reduced by the amount of the released party's equitable share of the obligation determined in accordance with the provisions of Section 111."

56. *See Part III of this Comment, supra.*

57. *See* Twerski & Weinstein, *A Critique of the Uniform Product Liability Law—A Rush to Judgment*, 28 DRAKE L. REV. 221 (1979).

coast to coast. A products liability lawsuit could ensue in any state. In preparing to defend, or possibly to settle, a lawsuit, the governing state's contribution law is of the utmost importance. With jurisdictions invoking a variety of contribution laws, a thorough knowledge of the applicable state's law is crucial. However, with the general confusion of contribution principles, particularly as they apply to strict product liability, few potential defendants are able to anticipate the possible extent of their liability.

Asbestos products are but one of many products, once thought harmless, that have been, and will continue to be, found to cause harm for which manufacturers will be held liable. In the interest of equity among jointly liable manufacturers, it becomes increasingly important to develop, at the least, a predictable system of apportionment of damages.

The premise upon which the contribution rule is based is meritorious; however, uncertainty with respect to the application of the rule has often resulted in essentially the same inequities that the rule seeks to prevent. Though the fault-based theory of contribution and the no-fault theory of strict liability are not commensurate, contribution is a useful tool that can be used to apportion industry-wide liability. However, in order to be effective, a standard application to strict liability must be established with each jurisdiction. Prompt legislative action is necessary in those jurisdictions that have yet to make a determination as to the application of contribution to strict liability.

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