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TORT LAW—GENERAL RELEASE FORMS—THE FREE RIDE FOR JOINT TORTFEASORS IS OVER. *Moore v. Missouri Pacific Railroad*, 299 Ark. 232, 773 S.W.2d 78 (1989).

On September 13, 1984, an automobile driven by Mary A. Richardson collided with a train, owned and operated by Missouri Pacific Railroad, in Benton, Arkansas. Mary Richardson was killed instantly. The passenger in the car, Winnie Ruth Thomas, was seriously injured.

On September 25, 1984, an insurance adjuster representing Mary Richardson's liability carrier, Sentry Insurance,¹ visited Winnie Thomas' son, W. Lee Moore, in the hospital where Thomas was a patient. The adjuster told Moore that Mary Richardson only had \$25,000 in liability insurance coverage and that "it was the most they could get so they might as well go ahead and settle."² Acting on this advice and without benefit of counsel, Lee Moore executed the release of Mary Richardson on behalf of Winnie Thomas on October 24, 1984.³ Moore was acting under power of attorney given to him by Winnie Thomas on October 2, 1984.⁴

In addition to the name Mary A. Richardson, the release executed by Lee Moore purported to release the following: "his successors and assigns, and/or his, her, their heirs, executors and administrators, *and also any and all other persons, associations and corporations, whether herein named or referred to or not*, and who, together with the above named, may be jointly or severally liable to the Undersigned, of and from any and all, and all manner of, actions and causes of action, rights, suits, covenants, contracts, agreements, judgments, claims and demands whatsoever in law or equity. . . ."⁵

Winnie Ruth Thomas died on May 15, 1985. Her surviving heirs, Lee Moore and Shirley Barnett, filed suit against Missouri Pacific Railroad and John C. Peterson, Jr., the conductor of the train which struck Thomas, claiming that the railroad's failure to properly maintain the crossing and Peterson's negligence caused the injuries

1. *Moore v. Missouri Pac. R.R.*, 299 Ark. 232, 233, 773 S.W.2d 78, 78 (1989).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* at 233, 773 S.W.2d at 78-79 (emphasis added).

and ultimate death of Thomas.⁶ On November 24, 1986, Missouri Pacific Railroad and Peterson filed a motion for summary judgment arguing that the benefit of the release executed by Moore inured to Missouri Pacific Railroad and Peterson, and thus, they should incur no liability.⁷ The trial court agreed and granted the motion.

Before the Arkansas Supreme Court, Moore and Barnett contended that the trial court erred in granting summary judgment because the general release, containing the phrase "any and all persons, associations and corporations, whether herein named or referred to or not,"⁸ executed by Moore relinquishing a claim against Mary Richardson, was not effective to discharge Missouri Pacific Railroad and Peterson. The Arkansas Supreme Court agreed.⁹ *Moore v. Missouri Pacific Railroad*, 299 Ark. 232, 773 S.W.2d 78 (1989).

At common law, the release of one joint tortfeasor released the other because there was, in the eyes of the court, but one actionable cause against the two which was surrendered by the release.¹⁰ Courts justly criticized this result because it forced the plaintiff to either forego the opportunity of obtaining a settlement from one defendant without filing suit, or to give up the entire right against the other without receiving just compensation.¹¹

To avoid this harsh result, courts developed the covenant not to sue. The covenant allowed a court, without depending on the enactment of statutes, to retreat from the common law rule that release of one joint tortfeasor discharged all other joint tortfeasors.¹² The covenant not to sue was not an abandonment or relinquishment of the right or claim, "but merely an agreement not to enforce an existing cause of action."¹³ This device arose from the sheer desire of never depriving a plaintiff his cause of action.¹⁴

Common law releases in Arkansas followed much the same historical development as did the majority of jurisdictions. In *Jones v.*

6. *Id.* at 234, 773 S.W.2d at 79.

7. *Id.* In response to the motion for summary judgment, Moore and Barnett submitted an affidavit executed by Moore stating that his intent was not to release any party other than Mary Richardson. Moore and Barnett also filed an affidavit signed by a reading teacher, Jerri Delamar, stating that Lee Moore was "capable of reading on no higher than a fourth grade level." *Id.*

8. *Id.*

9. *Id.*

10. See generally W. KEETON, D. DOBBS, R. KEETON & D. OWENS, PROSSER AND KEETON ON THE LAW OF TORTS § 49 (5th ed. 1984) [hereinafter PROSSER & KEETON].

11. *Id.*

12. *Hicklin v. Anders*, 201 Or. 128, 135-36, 253 P.2d 897, 899-900 (1953).

13. *Pellett v. Sonotone Corp.*, 26 Cal. 2d 705, 711-12, 160 P.2d 783, 787 (1945).

14. PROSSER & KEETON, *supra* note 10.

*Chism*¹⁵ the court held that “[w]herever the person injured by the wrong of several joint tortfeasors has settled his claim for damages, and received satisfaction from one of them, the cause of action is discharged as to all.”¹⁶ Arkansas courts also recognized the covenant not to sue.¹⁷

The Uniform Contribution Among Tortfeasors Act (UCATA) was drafted in 1939.¹⁸ Section four of the UCATA provides that the release of one joint tortfeasor did not discharge the other joint tortfeasor unless the release so provided.¹⁹ This provision changed the common law rule under which a release to one released all others.²⁰ Arkansas adopted the UCATA in 1941,²¹ and seventeen other states have also adopted the Act.²² The court in *Moore* identified two additional states which have adopted section four of the UCATA.²³

A review of judicial interpretations of the UCATA from the adopting jurisdictions reveals quite diverse results. Three different views²⁴ emerge as to whether the release of a single tortfeasor accom-

15. 73 Ark. 14, 83 S.W. 315 (1904).

16. *Id.* at 15, 83 S.W. at 316 (quoting 1 JAGGARD ON TORTS § 117). See also *Magnolia Petroleum Co. v. McFall*, 178 Ark. 596, 12 S.W.2d 15 (1928) (re-affirming the *Jones* decision).

17. *Texarkana Tel. Co. v. Pemberton*, 86 Ark. 329, 336, 111 S.W. 257, 260 (1908). “A covenant not to sue one of two joint tortfeasors does not operate as a release of the other from liability.” *Id.*

18. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE FORTY-NINTH ANNUAL CONFERENCE 243 (1939).

19. *Id.* at 246.

20. *Id.* “Since this result may be avoided anyhow by giving a covenant not to sue instead of a release, it was thought wise to obviate what must frequently be considered a technical pitfall by an injured person who releases one of two or more joint tortfeasors for a certain sum, presumably approximately the released person’s share of the damage, intending to pursue his claim against the others.” *Id.*

21. 1941 Ark. Acts 315 §§ 1 to 12 (codified at ARK. CODE ANN. §§ 16-61-201 to 212 (1987)).

22. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT, 12 U.L.A. 72 (Supp. 1990). See ARIZ. REV. STAT. ANN. §§ 12-2501 to 2509 (Supp. 1989); COLO. REV. STAT. §§ 13-50.5-101 to 106 (Repl. 1987); DEL. CODE ANN. tit. 10, §§ 6301 to 6308 (1974); FLA. STAT. ANN. § 768.31 (West 1986); HAW. REV. STAT. §§ 663-11 to 17 (Supp. 1989); MD. ANN. CODE art. 50 §§ 16 to 24 (Repl. 1986); MASS. GEN. LAWS ANN. ch. 231B, §§ 1 to 4 (West 1986); NEV. REV. STAT. ANN. §§ 17.225 to 305 (Michie 1986); N.M. STAT. ANN. §§ 41-3-1 to 8 (Repl. 1986); N.C. GEN. STAT. §§ 1B-1 to 6 (1983); N.D. CENT. CODE §§ 32-38-01 to 04 (Repl. 1976); OHIO REV. CODE ANN. §§ 2307.31 to .33 (Anderson Supp. 1989); 42 PA. CONS. STAT. ANN. §§ 8321 to 8327 (Purdon 1982); R.I. GEN. LAWS §§ 10-6-1 to 11 (1985); S.C. CODE ANN. §§ 15-38-10 to 70 (Law. Co-op. 1976); S.D. CODIFIED LAWS ANN. §§ 15-8-11 to 22 (1984); TENN. CODE ANN. §§ 29-11-101 to 106 (Repl. 1980).

23. IDAHO CODE § 6-805 (1979) and ILL. ANN. STAT. ch. 70, para. 302 (Smith-Hurd 1989). 299 Ark. 232, 235, 773 S.W.2d 78, 79 (1989).

24. See generally Annotation, *Release of One Joint Tortfeasor as Discharging Liability of Others: Modern Trends*, 73 A.L.R.2d 403 (1960).

panied by a boilerplate release of "all other persons, associations and corporations, whether herein named or referred to or not,"²⁵ discharges all tortfeasors.²⁶ There is neither a clear majority nor a detectable trend of preferring one view over the others.²⁷

The first approach is to look at the intention of the parties to the release. The Colorado Supreme Court held that "the 'intent' rule most nearly comports with existing Colorado case law and most effectively promotes the purpose and spirit of the UCATA."²⁸ The justification for the "intent" rule derives from the potential for confusion in general release forms which attempt to release the world as well as the settling tortfeasor.²⁹ Other states recognized the far-reaching consequences that an injured plaintiff would suffer if the execution of a general release discharged all potential defendants.³⁰ For these reasons, it is imperative that the releasor's intent be clearly expressed.³¹ The mere signing of a printed form which happens to contain broad, general release language, in addition to providing spaces for the specifically discharged parties, is insufficient to provide a clear manifestation of intent.³²

Tennessee also favors the "intent" rule.³³ Since the 1968 adoption of the UCATA in Tennessee,³⁴ a general release form is only effective to release all joint tortfeasors if it is so intended by the releasor.³⁵ The desirability of the "intent" rule is two-fold. It prevents the harsh consequences that the general release can have upon an unsuspecting plaintiff without imposing the burden of specifically naming or identifying every tortfeasor to be discharged.³⁶ The releasor's intent may be demonstrated by extrinsic evidence.³⁷

Another interpretation of the UCATA is the "specific identity" rule. Under this rule, the statutory phrase "unless the release so provides" requires that a release either expressly name or otherwise spe-

25. *Moore*, 299 Ark. at 233, 773 S.W.2d at 78.

26. Annotation, *supra*, note 24.

27. *Neves v. Potter*, 769 P.2d 1047 (Colo. 1989) (en banc).

28. *Id.* at 1053.

29. *Chakov v. Outboard Marine Corp.*, 429 A.2d 984, 985 (Del. 1981).

30. *Hurt v. Leatherby Ins. Co.*, 380 So. 2d 432, 433 (Fla. 1980).

31. *Id.*

32. *Id.* at 434. *See also* *McInnis v. Harley-Davidson Motor Co.*, 625 F. Supp. 943 (D.R.I. 1986).

33. *See Kreutzmann v. Bauman*, 609 S.W.2d 736 (Tenn. Ct. App. 1980).

34. TENN. CODE ANN. §§ 29-11-101 to 106 (Repl. 1980).

35. *Kreutzmann*, 609 S.W.2d at 738.

36. *Hurt*, 380 So. 2d at 434.

37. *Id.*

cifically identify or describe any tortfeasor to be discharged.³⁸ Broad general language like "all other persons, associations and corporations, whether herein named or referred to or not,"³⁹ is insufficient.⁴⁰

*Young v. State*⁴¹ illustrates the "specific identity" rule. In *Young* the plaintiff was a passenger in a vehicle driven by Edward Krivak⁴² who lost control of his car and crashed.⁴³ Young filed a personal injury action against Krivak, Peter Kiewit Sons Company, and the State of Alaska.⁴⁴ Approximately one year after filing the suit, Young executed a release of Krivak in return for three thousand dollars.⁴⁵ The release in part contained the following language: "[T]he Under-signed . . . does hereby . . . discharge . . . all other persons, corporations, firms, associations or partnerships . . ."⁴⁶ The Alaska Supreme Court held that because the release did not specifically mention Peter Kiewit or the State of Alaska, it did not effectively discharge them.⁴⁷

The underlying justification for the "specific identity" rule is that it brings the most clarity to the conflicting release rules and minimizes the possibility of a releasor being misled.⁴⁸ The releasee does not have to be named. Specifically identifying or describing the tortfeasor is sufficient.⁴⁹ For example, a release could meet the statutory requirement by describing the releasee as "the driver of the car which struck the motorcycle."⁵⁰

The "flat-bar" rule is a third approach to construing the statutory phrase, "unless the release so provides."⁵¹ Under this rule, the boilerplate language releasing "all other persons, associations and corporations, whether herein named or referred to or not,"⁵² discharges

38. *Beck v. Cianchetti*, 1 Ohio St. 3d 231, 235, 439 N.E.2d 417, 420 (1982).

39. *Moore v. Missouri Pac. R.R.*, 299 Ark. 232, 233, 773 S.W.2d 78, 78 (1989).

40. *Beck*, 1 Ohio St. 3d at 235, 439 N.E.2d at 420.

41. 455 P.2d 889 (Alaska 1969).

42. *Id.*

43. *Id.*

44. *Id.* Young alleged that Krivak was negligent in his operation of the car. Peter Kiewit Sons Company was the prime contractor under contract with the State of Alaska for the construction of the road where the accident occurred. Young alleged that Peter Kiewit Sons Company and the State of Alaska were negligent for failing to post proper warnings of the single lane bridge where the accident occurred. *Id.*

45. *Id.*

46. *Id.* at 890.

47. *Id.* at 893.

48. *Id.*

49. *Beck v. Cianchetti*, 1 Ohio St. 3d 231, 235, 439 N.E.2d 417, 420 (1982).

50. *Id.*

51. ARK. CODE ANN. § 16-61-204 (1987).

52. *Moore*, 299 Ark. at 233, 773 S.W.2d at 78.

all joint tortfeasors.⁵³ In *Buttermore v. Aliquippa Hospital*⁵⁴ the court held that the parties to a release may settle their differences in terms that are suitable to them.⁵⁵ It is their responsibility to include or exclude terms⁵⁶ such as a reservation of the right to sue a joint tortfeasor. By placing the burden on the parties to the agreement, the literal language of their agreement is binding absent a showing of fraud, accident, or mutual mistake.⁵⁷ Other courts enforce the literal language of the release by prohibiting the introduction of extrinsic evidence absent a claim of ambiguity.⁵⁸

Many other jurisdictions have adopted provisions similar to the UCATA. As in the UCATA states, judicial interpretation of these provisions varies. In Texas, for example, a joint tortfeasor can claim the benefit of the release only if it refers to him by name or with such descriptive particularity that his connection with the tortious event is undoubted.⁵⁹ This is comparable to the "specific identity" rule. The District of Columbia Court of Appeals, on the other hand, held that the general release form was ambiguous and allowed extrinsic evidence to determine the parties subjective intent.⁶⁰ Some non-UCATA jurisdictions, such as Missouri, adhere to the "flat-bar" rule.⁶¹

The history of section four of the UCATA in Arkansas is sparse at best. Since Arkansas adopted the UCATA in 1941,⁶² three federal circuits⁶³ have construed the meaning of section four.⁶⁴

53. See *Ralkey v. Minnesota Mining and Mfg. Co.*, 63 Md. App. 515, 492 A.2d 1358 (1985); *Johnson v. City of Las Cruces*, 86 N.M. 196, 521 P.2d 1037 (1974); *Buttermore v. Aliquippa Hosp.*, 522 Pa. 325, 561 A.2d 733 (1989).

54. 522 Pa. 325, 561 A.2d 733 (1989).

55. *Id.* at 329, 561 A.2d at 735.

56. *Id.*

57. *Id.*

58. *Johnson v. City of Las Cruces*, 86 N.M. 196, 197, 521 P.2d 1037, 1038 (1974).

59. *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 420 (Tex. 1984). For a discussion, see Comment, "*Sooner or Later*" Is Now, 36 BAYLOR L. REV. 429 (1984).

60. *Lamphier v. Washington Hosp. Center*, 524 A.2d 729, 732 (D.C. 1987). See also *Bjork v. Chrysler Corp.*, 702 P.2d 146 (Wyo. 1985). "[T]he burden is upon those who are not parties to the release and have made no payment toward satisfaction of the claim, to (a) establish that the parties intended that they be discharged by producing proof to that effect or (b) prove the releasor has received full compensation." *Id.* at 156.

61. See *Liberty v. J.A. Tobin Constr. Co.*, 512 S.W.2d 886 (Mo. Ct. App. 1974).

62. 1941 Ark. Acts 315, § 4 (codified at ARK. CODE ANN. § 16-61-204 (1987)).

63. *Douglas v. United States Tobacco Co.*, 670 F.2d 791 (8th Cir. 1982); *Morison v. General Motors Corp.*, 428 F.2d 952 (5th Cir.), cert. denied, 400 U.S. 904 (1970); *Allbright Bros., Contractors, Inc., v. Hull-Dobbs Co.*, 209 F.2d 103 (6th Cir. 1953).

64. ARK. CODE ANN. § 16-61-204 (1987) provides that:

[a] release by the injured person of one (1) joint tortfeasor, whether before or after judgment, does not discharge the other tortfeasors unless the release so provides; but reduces the claim against the other tortfeasors in the amount of the consideration

The Sixth Circuit provided the first interpretation of section 16-61-204 in *Allbright Bros., Contractors, Inc. v. Hull-Dobbs Co.*⁶⁵ *Allbright* involved an action by one tortfeasor, the appellant, for contribution against joint tortfeasors after judgments were entered upon a settlement agreement between the appellant and the injured parties. The appellant contended that the settlements and judgments satisfied the claims of the injured parties and therefore released the joint tortfeasors from liability.⁶⁶ Construing section 34-1004 of the Arkansas Statutes Annotated,⁶⁷ the court held that the release did not discharge the joint tortfeasors because the release agreement did not name them.⁶⁸

The Fifth Circuit in *Morison v. General Motors Corporations*⁶⁹ addressed the question of whether, in Arkansas, a general release containing the language "all other persons, firms or corporations liable or who might be claimed to be liable"⁷⁰ was effective to discharge all joint tortfeasors. The court held that it was.⁷¹ The plaintiff executed a release for the sum of \$10,000 to the driver and owner of the car in which he was a passenger at the time of the accident.⁷² Subsequent to the execution of the release, the plaintiff filed an action⁷³ against General Motors making five claims for liability.⁷⁴ The plaintiff contended that the release did not discharge General Motors from liability because General Motors was not a party to the settlement and did not pay any amount of consideration for its release.⁷⁵

The court found this argument appealing⁷⁶ and posed the question, "[w]hy should a release paid for by Wilma Roach and/or her insurer benefit General Motors which not only paid nothing for the

paid for the release, or in any amount or proportion by which the release provides that the total claim shall be reduced, if greater than the consideration paid.

Id. (emphasis added).

65. 209 F.2d 103 (6th Cir. 1953).

66. *Id.* at 104. The judgments were entered in a state court in Arkansas and thus, the Arkansas Joint Tortfeasor Statute was controlling. *Id.* at 103-04.

67. Currently codified at ARK. CODE ANN. § 16-61-204 (1987).

68. *Allbright*, 209 F.2d at 104.

69. 428 F.2d 952 (5th Cir.), *cert. denied*, 400 U.S. 904 (1970).

70. *Id.* Arkansas law was applied because the accident occurred in Arkansas. *Id.* at 953.

71. *Id.* at 954.

72. *Id.* at 952. The release specifically named the driver of the car, Wilma Roach, and "all other persons, firms or corporations liable or who might be claimed to be liable." *Id.*

73. *Id.* at 952-53.

74. *Id.* The claims were for negligence, strict liability, breach of warranty, wanton misconduct, and fraud/misrepresentation.

75. *Id.* at 953. Morison and his "settling" attorney also submitted affidavits that they did not intend to release General Motors. *Id.*

76. *Id.* at 953-54.

release, but probably, did not even know of it until long afterwards?"⁷⁷ However, the Fifth Circuit declined to adopt this argument. Citing policy reasons,⁷⁸ the court held that the general boilerplate language releasing all tortfeasors was clear and satisfied the requirement of section 34-1004 of the Arkansas Statutes Annotated.⁷⁹

The Eighth Circuit provided the most recent construction of section 16-61-204 in *Douglas v. United States Tobacco Co.*,⁸⁰ a decision similar to the ruling in *Morison*. Douglas appealed from a district court decision that a general release executed by the decedent, Ada Clayborn, discharged all joint tortfeasors,⁸¹ including the appellee, United States Tobacco Company. The plaintiff's contentions for reversal were (1) that the general boilerplate did not satisfy the requirement of section 34-1004, and (2) that the court erred by failing to allow parol evidence to prove that the parties did not intend to release United States Tobacco Company.⁸²

As to the plaintiff's first contention, the court held that the policy considerations set forth in *Morison* were sound: the defendant who procures the release has nothing to gain if the releasee can proceed against other joint tortfeasors.⁸³ As to the claim that parol evidence should be admitted to demonstrate the intent of the parties, the court reasoned that the phrase, "all other persons, firms, corporations, associations or partnerships" was clear and unambiguous and thus, extrinsic evidence was inadmissible.⁸⁴ The court held that the general release satisfied the requirement of the Arkansas statute.⁸⁵

*Moore v. Missouri Pacific Railroad*⁸⁶ involved a case of first impression in Arkansas. The sole issue considered was whether a gen-

77. *Id.*

78. *Id.* The court reasoned that the release would never have been executed unless all tortfeasors were released because Wilma Roach would have lost her right to contribution against General Motors and would have been open to contribution herself. *Id.*

79. *See supra* note 67.

80. 670 F.2d 791 (8th Cir. 1982).

81. *Id.* at 792. Clayborn developed oral cancer from the use of snuff. He sued his doctor, R. H. Manley, for failing to properly diagnose his condition, but settled before the trial date. The settlement consisted of the release of Mary B. Manley, as Administratrix of the Estate of R. H. Manley, Deceased . . . and all other persons, firms, corporations, associations or partnerships *Id.*

82. *Id.*

83. *Id.* at 794. The court noted that the Arkansas legislature had ample time to respond to the *Morison* decision had it thought that it was inconsistent with Arkansas law. *Id.*

84. *Id.* at 795.

85. ARK. CODE ANN. § 16-61-204 (1987).

86. 299 Ark. 232, 773 S.W.2d 78 (1989).

eral release discharging "any and all persons, associations and corporations, whether herein named or referred to or not," was effective to release potential joint tortfeasors not specifically named or identified in the release.⁸⁷ As a preliminary matter, the Arkansas Supreme Court recounted the history⁸⁸ of the common law release form and its progression through Arkansas' adoption of the UCATA.⁸⁹

The court's analysis focused on the relevant provisions of the UCATA found in section 16-61-204 of the Arkansas Code Annotated. It states in part that a release of one joint tortfeasor does not discharge other joint tortfeasors unless the release so provides.⁹⁰ Because an Arkansas court had not interpreted this provision before, the supreme court looked to other jurisdictions for guidance. It discovered that in jurisdictions with statutes virtually identical to Arkansas', three basic approaches existed⁹¹—the "intent" rule,⁹² the "specific identity" rule,⁹³ and the "flat-bar" rule.⁹⁴ The court found the reasoning in *Beck v. Cianchetti*⁹⁵ and *Alsup v. Firestone Tire & Rubber Co.*⁹⁶ the most persuasive.

In a fact situation⁹⁷ similar to that in *Moore*, the court in *Beck*

87. *Id.* at 232-33, 773 S.W.2d at 78. The trial court granted summary judgment to the Missouri Pacific Railroad on the basis that the release was effective to discharge all potential joint tortfeasors. *Id.*

88. *Id.* at 234-35, 773 S.W.2d at 79.

89. *Id.*

90. ARK. CODE ANN. § 16-61-204 (1987).

91. 299 Ark. at 236, 773 S.W.2d at 80.

92. See *McInnis v. Harley-Davidson Motor Co.*, 625 F. Supp. 943 (D.R.I. 1986); *Hurt v. Leatherby Ins. Co.*, 380 So. 2d 432 (Fla. 1980); *Flanagan v. State Dept. of Transp.*, 532 So. 2d 714 (Fla. Dist. Ct. App. 1988).

93. See *Alaska Airlines Inc. v. Sweat*, 568 P.2d 916 (Alaska 1977); *Young v. State*, 455 P.2d 889 (Alaska 1969); *Alsup v. Firestone Tire & Rubber Co.*, 101 Ill. 2d 196, 461 N.E.2d 361 (1984); *Aid Ins. Co. v. Davis County*, 426 N.W.2d 631 (Iowa 1988); *Beck v. Cianchetti*, 1 Ohio St. 3d 231, 439 N.E.2d 417 (1982); *Spector v. K-Mart Corp.*, 99 A.D.2d 605, 471 N.Y.S.2d 711 (1984); *Sage v. Hale*, 75 Misc. 256, 347 N.Y.S.2d 416 (Sup. Ct. 1973); *Bjork v. Chrysler Corp.*, 702 P.2d 146 (Wyo. 1985).

94. See *Auer v. Kawasaki Motors Corp., USA*, 830 F.2d 535 (4th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988); *Douglas v. United States Tobacco Co.*, 670 F.2d 791 (8th Cir. 1982); *Morison v. General Motors Corp.*, 428 F.2d 952 (5th Cir.), *cert. denied*, 400 U.S. 904 (1970); *Doganieri v. United States*, 520 F. Supp. 1093 (N.D. W. Va. 1981); *Johnson v. City of Las Cruces*, 86 N.M. 196, 521 P.2d 1037 (Ct. App. 1974); *Hasselrode v. Gnagey*, 404 Pa. 549, 172 A.2d 764 (1961).

95. 1 Ohio St. 3d 231, 439 N.E.2d 417 (1982).

96. 101 Ill. 2d 196, 461 N.E.2d 361 (1984).

97. The plaintiff was a passenger on a motorcycle which was hit by an automobile. She executed a release discharging the driver and "all other persons, firms, corporations, associations or partnerships." Later, she brought suit against a joint tortfeasor who was not a party to the release. *Beck*, 1 Ohio St. 3d 231, 439 N.E.2d 417 (1982).

stated that the legislature apparently intended to change the common law; otherwise no reason existed to enact the statute.⁹⁸ The *Beck* decision stated that the objective of the UCATA was to retain the liability of tortfeasors. Therefore the phrase "unless its terms otherwise provide" must be narrowly construed so as to require a degree of specificity.⁹⁹

In *Alsup*, also factually similar to *Moore*,¹⁰⁰ the court noted the strong criticism of the common law rule.¹⁰¹ It reasoned that if it gave the general language in the release its literal effect and discharged all tortfeasors, "an important purpose of the Act would be thwarted by the unintended release of persons who were strangers to the release contract."¹⁰²

The Arkansas Supreme Court held that it was the "intention of the Arkansas Legislature in enacting 16-61-204 to abrogate the common law rule that a release of one tortfeasor released all other tortfeasors jointly liable for the occurrence, thereby retaining the liability of joint tortfeasors."¹⁰³ To satisfy the legislative intent, the court held that the statutory language "unless the release so provides"¹⁰⁴ requires that a release name or otherwise specifically identify the tortfeasors to be discharged.¹⁰⁵ Broad boilerplate language is insufficient to release all joint tortfeasors.¹⁰⁶

Justices Hickman, Hays, and Glaze dissented from the majority opinion.¹⁰⁷ They argued that the majority ignored Arkansas law requiring that when parties to a contract expressed their intention in clear and unambiguous language in a written instrument, it is the court's duty to construe the writing in accordance with the plain meaning of that language.¹⁰⁸ Furthermore, the dissenting justices

98. *Id.* at 234-35, 439 N.E.2d at 420.

99. *Id.*

100. The plaintiffs were injured when their car was struck by another vehicle. Subsequently, the plaintiffs executed a release to the driver of the second vehicle, discharging him and "all other persons, firms, and corporations, both known and unknown, of and from any and all claims." *Alsup*, 101 Ill. 2d 196, 198, 461 N.E.2d 361, 362 (1984).

101. *Id.* at 200-01, 461 N.E.2d at 363-64. "It has been described as 'harsh,' 'without any rational basis,' and 'very unfair.'" *Id.*

102. *Id.* at 200-01, 461 N.E.2d at 364.

103. *Moore*, 299 Ark. at 239, 773 S.W.2d at 82.

104. ARK. CODE ANN. § 16-61-204 (1987).

105. 299 Ark. at 239-40, 773 S.W.2d at 82.

106. *Id.* Under this reasoning, the court concluded that the release executed by the plaintiff discharging Mary Richardson was not effective to release Missouri Pacific Railroad or John Peterson because they were not named or specifically identified in the release. *Id.* at 240, 773 S.W.2d at 82.

107. *Id.*

108. *Id.* at 241, 773 S.W.2d at 83.

criticized the majority for overlooking "the rule of statutory construction that statutes in derogation of the common law will be strictly construed."¹⁰⁹ Under a strict construction, the dissenting justices contended that the boilerplate found in the general release form satisfied the statutory language "unless the release so provides."¹¹⁰ The dissent also recognized that federal courts interpreting the Arkansas statute have held that general releases satisfy the statutory requirement.¹¹¹

The dissent agreed that the legislature intended "to abolish the common law rule that produced an involuntary discharge of joint tortfeasors upon the release of one tortfeasor,"¹¹² but believed that the majority went too far by adopting the "specific identity" rule.¹¹³ The dissent conceded that there may be sound policy behind the majority's reasoning,¹¹⁴ but argued that it is not the court's duty to construe the language of the statute to best conform to the legislature's intent.¹¹⁵ On the contrary, the court's duty is "to effectuate the plain intent expressed in the enactment."¹¹⁶

The court's decision essentially destroys the use of the general release form, both past and future. All general release forms executed to date will be ineffective to release those whom the joint tortfeasor thought he had released.¹¹⁷ To effectuate a release of all tortfeasors prospectively, every conceivable tortfeasor must be named or identified in some way. How specific must a description be to satisfy the court that a tortfeasor has been identified? Only through continued litigation will this be answered. Does the same incentive remain for the probable tortfeasor to settle? Absolutely not.

Before the *Moore* holding, a probable tortfeasor could safely settle with the victim by executing a general release form, discharging all tortfeasors. Since the *Moore* decision, contribution deters both the victim and the tortfeasor from settlement. Section 16-61-204 cannot

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 242, 773 S.W.2d at 83.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. Lindsey, in *Documentation of Settlements*, 27 ARK. L. REV. 27 (1973), provided a guide to drafting and executing releases and settlements. He indicated that the *Moore* holding was probably the rule in Arkansas. However, on page 32 of the article, he states that the language, "all other persons, firms or corporations whomsoever," should be used to effectuate a release of all joint tortfeasors. As the *Moore* decision illustrates, this language can no longer be depended on to discharge anyone.

be read alone—section 16-61-205 must be read with it.¹¹⁸ A joint reading reveals that the release of a tortfeasor does not protect him against contribution unless it releases him from his pro rata share. Releasing a tortfeasor from his pro rata share is a risky move. If he has offered in consideration fifty percent of the total injury, but is released from his pro rata share, it is the pro rata share and not the consideration paid which will reduce the judgment against the joint tortfeasor. Thus, if the court finds that the discharged tortfeasor is ninety percent negligent, the victim loses forty percent of his satisfaction. The alternative is to release the tortfeasor only for consideration paid. Under this theory, there is no incentive for the tortfeasor to settle when he is still open to contribution for his comparative fault. He should take his chances in court.

In short, the policy in *Moore* is sound: a person not a party to a settlement, who has paid no consideration should not get the benefit of the release unless named or specifically identified. However, the holding created some very real problems. Who will ever be sure that they sufficiently identified all tortfeasors? Should the victim release a tortfeasor from his pro rata share and take the risk of less than full satisfaction? Should the tortfeasor settle without being released of his pro rata share and open himself to future litigation over contribution? These questions are sure to be litigated, producing no clear answers. The only clear answers are fewer releases, fewer settlements, and more litigation.

Marshall S. Ney

118. ARK. CODE ANN. § 16-61-205 (1987) states that:

[a] release by the injured person of one (1) joint tortfeasor does not relieve him from liability to make contribution to another joint tortfeasor unless the release is given before the right of the other tortfeasor to secure a money judgment for contribution has accrued, and provides for a reduction, to the extent of the pro rata share of the released tortfeasor, of the injured person's damages recoverable against all the other tortfeasors.