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Keeping the Pierringer Promise: Fair Settlements and Fair Trials

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Keeping the Pierringer Promise: Fair Settlements and Fair Trials

Abstract

This article explores why Pierringer releases have failed to promise fairness to the nonsettling defendant. For over thirty years, Pierringer releases have been part of the ebb and flow of civil litigation. In 1978, the Minnesota Supreme Court officially approved the use of Pierringer releases in Minnesota. When first adopted, the release seemed to promise something for everyone. The Pierringer release even offered a promise of fairness to the nonsettling defendant: Be assured that, no matter what the outcome of trial, you will pay no more than your “fair share” of the verdict. Unfortunately, however, largely because of the impact Pierringer settlements have on litigation and trial, the this promise to the nonsettling defendant has too often failed to keep. Part II of this article reviews how the need for a release that permitted piecemeal settlements in comparative fault cases led to the development and adoption of Pierringer releases in Wisconsin and Minnesota. Part III explores two different sets of problems: first, the appellate definition and modification of how Pierringer settlements allocate fault; and second, how Pierringer releases can change the conduct of discovery and trial, and the impact these changes can have on the apportionment of fault. This second set of problems has received scant attention from the appellate courts, and Part IV discusses possible explanations for this. Finally, Part V proposes solutions to some of the problems Pierringer releases have created.

Keywords

Minnesota torts, torts, personal injury, settlement, comparative fault, piecemeal Settlement, liability, covenant not to sue, partial release, Mary Carter, allocation of fault

Disciplines

Torts

KEEPING THE *PIERRINGER* PROMISE: FAIR SETTLEMENTS AND FAIR TRIALS

PETER B. KNAPP†

“[T]he nonsettling tortfeasors are assured . . . that they will not pay more than their fair share of the yet-to-be-determined plaintiff’s award.”¹

—The *Pierringer* Promise

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1. *Rambaum v. Swisher*, 435 N.W.2d 19, 22 (Minn. 1989).

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I. INTRODUCTION

For over thirty years now, *Pierringer* releases have been part of the ebb and flow of civil litigation. In October of 1963, the Wisconsin Supreme Court decided the case of *Pierringer v. Hoger*.² Fifteen years later, in 1978, the Minnesota Supreme Court officially approved the use of *Pierringer* releases in Minnesota.³ Today, the *Pierringer* release remains a critically important part of modern tort litigation.

The *Pierringer* release is important because it permits a plaintiff who has sued several defendants to settle with one and preserve its claims against the rest. The plaintiff can then proceed to trial against the remaining defendants. At the end of trial, the jury will apportion fault among all the parties, including the settling defendants. The plaintiff is entitled to recover the percentage of damages the jury has allocated to the *nonsettling* defendants.⁴ The plaintiff is not entitled, however, to any further recovery from the settling defendants,⁵ nor may the nonsettling defendants seek contribution from the settling defendants.⁶

2. 124 N.W.2d 106 (Wis. 1963).

3. *Frey v. Snelgrove*, 269 N.W.2d 918, 922 (Minn. 1978).

4. As a practical matter, *Pierringer* releases are most commonly used in products liability and other personal injury cases involving multiple defendants. *Pierringer* releases may be used, however, in any case in which the jury apportions fault among the parties. See, e.g., *Bougie v. Sibley Manor*, 504 N.W.2d 493, 498 (Minn. Ct. App. 1993) (considering whether a *Pierringer* release of a fellow employee in a sexual harassment action required reduction of the judgment against the nonsettling defendants); *City of Menomonie v. Evensen Dodge, Inc.*, 471 N.W.2d 513, 516 (Wis. Ct. App. 1991) (allowing use of a *Pierringer* release in a negligence case for breach of fiduciary duty). In Wisconsin, use of the *Pierringer* release is restricted to cases involving joint tortfeasors, and may not be used if one defendant is sued in tort and the other in contract. *Eden Stone Co. v. Oakfield Stone Co.*, 479 N.W.2d 557, 563-64 (Wis. Ct. App. 1991).

Minnesota recognizes a more expansive use of *Pierringer* releases. Minnesota courts have, for example, approved *Pierringer* releases in cases involving construction contracts, *Barr/Nelson, Inc. v. Tonto's, Inc.*, 336 N.W.2d 46 (Minn. 1983); claims of fraudulent conveyance, *In re Hancock-Nelson Mercantile Co.*, 95 B.R. 982, 1001-02 (Bankr. D. Minn. 1989); and arbitration of claims relating to securities law violations, *Stassen v. Tschida*, No. C2-91-2070, 1992 WL 67536 (Minn. Ct. App. April 7, 1992).

5. See, e.g., *Shantz v. Richview, Inc.*, 311 N.W.2d 155 (Minn. 1980) (allowing settling defendant to settle without fear of future suit). Conversely, the settling defendant cannot request return of the settlement proceeds if the jury finds the plaintiff suffered no compensable damages. See, e.g., *Rambaum*, 435 N.W.2d at 22 (holding that settling tortfeasors are dismissed with prejudice from the lawsuit and any possible crossclaims). See part II.A for a discussion of the problems associated with allocation of damages.

6. Under the terms of a *Pierringer* release, the plaintiff must indemnify the settling defendants against any claims of contribution. See, e.g., *Pierringer*, 124 N.W.2d at 108; John E. Simonett (now Justice), *Release of Joint Tortfeasors: Use of the Pierringer Release in Minnesota*, 3 WM. MITCHELL L. REV. 1, 3 (1977).

Courts welcomed the *Pierringer* release as a principled way to encourage settlement in complicated multi-party litigation.⁷ Here, at last, was a release that “correctly” implemented the principles of the tort recovery system without suffering from the disadvantages of earlier forms of settlement such as the *Mary Carter* release⁸ or the covenant not to sue.⁹

When first adopted, the *Pierringer* release seemed to promise something for everyone. The *Pierringer* release promised the plaintiff certainty of a partial recovery and an opportunity to finance further litigation directed toward proving the remaining defendants’ fault. For the settling defendant, the *Pierringer* release promised the certainty of absolute repose, freeing the settling defendant from worry over any future claims for contribution. The *Pierringer* release offered a promise of fairness to the nonsettling defendant: Be assured that, no matter what the outcome of trial, you will pay no more than your “fair share” of the verdict.¹⁰

This last *Pierringer* promise, an assurance of a fair result to the nonsettling defendant, was hardly a trifle. The *Pierringer* release offered a promise that alternative forms of releases, because of the possibility of collusion or improper allocation of fault, were

7. See, e.g., *Rambaum*, 435 N.W.2d at 23 (accepting the results of *Pierringer* releases due to their strong encouragement of settlement).

8. A *Mary Carter* release essentially is a settlement agreement in which the settling defendant guarantees the plaintiff a certain recovery, promises to defend itself during the litigation and at trial, and receives a “rebate” on its settlement payment for any increase in the plaintiff’s recovery against the nonsettling defendant. *Booth v. Mary Carter Paint Co.*, 202 So.2d 8, 10-11 (Fla. Dist. Ct. App. 1967), *overruled by Ward v. Ochoa*, 284 So.2d 385 (Fla. 1973). The governing notion of the *Mary Carter* settlement is that the settling defendant has an incentive to increase the liability of the nonsettling defendant and, thus, increase the plaintiff’s damage award. *Mary Carter* agreements often provide that the plaintiff will pay the settling defendant a percentage of its recovery against the nonsettling defendants. See, e.g., *General Motors Corp. v. Simmons*, 558 S.W.2d 855, 858 (Tex. 1977) (finding the *Mary Carter* settlement to be a loan receipt-type agreement). For additional discussion of *Mary Carter* agreements, see part I.D.

9. A covenant not to sue is not really a release, but rather is simply an agreement by the plaintiff not to pursue a cause of action. See *infra* notes 17 & 18 and accompanying text. In most jurisdictions, at the time *Pierringer* releases were created, a covenant not to sue bought the settling defendant little peace. Even though the plaintiff had contracted not to pursue its cause, the settling defendant still faced the possibility of defending the nonsettling defendant’s contribution claim. See, e.g., *Pierringer*, 124 N.W.2d at 109.

10. See, e.g., *Frey*, 269 N.W.2d at 922 (“[T]he nonsettling defendant is relieved from paying more than his fair share of the verdict”); *Simonett*, *supra* note 6, at 9 (“[T]he non-settling tortfeasor had no cause to complain, for after all he was relieved from paying any more than what his share might prove to be.”).

unable to make. Unfortunately, largely because of the impact *Pierringer* settlements have on litigation and trial, it is a promise the *Pierringer* release has too often failed to keep.

This article explores why this promise has been broken. Part II reviews how the need for a release that permitted piecemeal settlements in comparative fault cases led to the development and adoption of *Pierringer* releases in Wisconsin and Minnesota. Part III explores two different sets of problems: first, the appellate definition and modification of how *Pierringer* settlements allocate fault; and second, how *Pierringer* releases can change the conduct of discovery and trial, and the impact these changes can have on the apportionment of fault. This second set of problems has received scant attention from the appellate courts, and Part IV discusses possible explanations for this. Finally, Part V proposes solutions to some of the problems *Pierringer* releases have created.

II. AND YOU MAY FIND YOURSELF IN A BEAUTIFUL HOUSE. . .¹¹

Judges and lawyers like settlements. Lawyers like them because they are certain. Judges like them because they are efficient. Efficiency is critical because we do not have enough judges, courtrooms, or days in the week to try even half of the civil suits filed.¹² Settlement of complicated multi-defendant civil litigation is particularly valuable, because complicated civil trials can consume enormous amounts of a judge's time and can be expensive for the parties. However, settling multi-defendant civil litigation can be especially difficult. Different defendants have different tolerances for risk, and some defendants are simply far less willing to settle than others. Consequently, our civil litigation system needs a mechanism that permits defendant-by-defendant, "piecemeal" settlement of multi-defendant civil lawsuits.

11. TALKING HEADS, *Once in a Lifetime*, ON STOP MAKING SENSE (Sire Records 1984).

12. At present, over 90 percent of civil suits settle prior to judgment. Figures for the 1960s and 1970s are similar. See, e.g., 1990 *Director of the Admin. Off. of the U.S. Courts Ann. Report in REP. OF THE PROC. OF THE JUD. CONF. OF THE U.S.*, 1990. Of federal cases terminated during the twelve month period ending June 30, 1990, only 4.3 percent reached trial. Only 9.0 percent of terminated torts cases reached trial. *Id.* at 153. Comparison of statistics for total civil cases terminated and total civil trials for the years 1963 to 1978 indicates that between 10.7 percent and 5.7 percent of civil cases reached trial. 1978 *Director of the Admin. Off. of the U.S. Courts Ann. Report in REP. OF THE PROC. OF THE JUD. CONF. OF THE U.S.*, 1978 at 177, 264.

This was as true thirty years ago as it is today. Thirty years ago, however, two related sets of legal problems made it much more difficult to settle multi-defendant civil suits. First, though judges have always favored settlements, until quite recently, tort law actually discouraged piecemeal, defendant-by-defendant settlement. In the 1960s and early 1970s, the doctrines governing release of defendants and contribution among defendants made piecemeal settlements perilous. Second, prior to *Pierringer* releases, the mechanisms available for partial settlement created a number of other difficulties for plaintiffs and defendants. *Pierringer* releases developed in response to these two related sets of problems.

A. *The Piecemeal Settlement Problem*

In 1962, the year before the decision in *Pierringer*, settlement of multi-defendant litigation presented serious legal complications. On one hand, a plaintiff contemplating settlement with one of several defendants faced the possibility that release of the one defendant would also extinguish all claims against the non-settling defendants.¹³ On the other hand, in jurisdictions which permitted contribution among joint tortfeasors,¹⁴ a settling defendant faced the possibility of post-settlement contribution

13. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 49, at 332 & nn.6 & 7 (5th ed. 1984). Prosser states “[u]ntil quite recent decades, most of the courts continued to hold that a release to one of two concurrent tortfeasors was a complete surrender of any cause of action against the other, and a bar to any suit against the other, without regard to the sufficiency of the compensation actually received.” *Id.* (footnotes omitted). Minnesota adhered to this rule as late as 1970. See, e.g., *Holmgren v. Heisick*, 287 Minn. 386, 391, 178 N.W.2d 854, 858 (1970) (holding that the release of one joint tortfeasor releases any others).

Today, the general rule in Minnesota is that “the release of one alleged tortfeasor will release all others *if* the settlement agreement manifests such an intent, *or if* the plaintiff received full compensation in law or in fact for damages sought against the remaining tortfeasors. *Bixler by Bixler v. J.C. Penney Co.*, 376 N.W.2d 209, 214-15 (Minn. 1985) (citing *Luxenburg v. Can-Tex Industries*, 257 N.W.2d 804, 807-08 (Minn. 1977)).

14. Few jurisdictions permitted contribution among joint tortfeasors in the 1960s. “The great majority of our courts . . . refused to permit contribution even where independent, although concurrent, negligence had contributed to a single result. Until the 1970’s—for a period of more than a century—only nine American jurisdictions came to the contrary conclusion, allowing contribution without legislation.” KEETON, *supra* note 12, § 50, at 337 & nn.11 & 12. Wisconsin and Minnesota were among that minority of nine jurisdictions permitting contribution. See, e.g., *Skaja v. Andrews Hotel Co.*, 281 Minn. 417, 420, 161 N.W.2d 657, 660 (1968) (holding that where common liability exists contribution is due as of right); *Mitchell v. Raymond*, 195 N.W. 855, 859 (Wis. 1923) (holding that joint liability requires contribution).

claims made by the nonsettling defendants.¹⁵ In essence, the law in the 1960s and early 1970s worked to discourage parties from settlement.

At that time, a plaintiff was reluctant to grant a release that could be construed as a complete satisfaction of any part of a cause of action, for fear it would release all joint tortfeasors. A defendant, on the other hand, was loathe to settle absent a complete release, for fear that anything less would permit the remaining defendants to seek contribution for a future judgment. Although lawyers like settlement because it offers certainty, settlement of multi-defendant litigation in the early 1960s offered little certainty to either plaintiffs or defendants.

B. Problems of Allocation: Pre-Pierringer Settlement

The piecemeal settlement problem was not insoluble, but the solutions available to litigants in most jurisdictions in the 1960s and early 1970s were not particularly satisfying. The two most common forms of partial settlement were the covenant not to sue and the infamous *Mary Carter* release. In addition, in the early 1960s, litigants in Wisconsin and a few other jurisdictions could also settle using *pro rata* releases.¹⁶ However, each of these alternatives presented difficult problems for litigants and the courts. The acceptance of *Pierringer* releases has largely been a response to the problems created by these other forms of release, particularly the *Mary Carter* agreement.

1. Covenants Not to Sue: The Problem of Uncertainty

A covenant not to sue is not really a release. It is simply a plaintiff's agreement not to pursue a cause of action against a particular defendant. At the time of settlement, the plaintiff executes a covenant to refrain from suing the settling defendant. If the plaintiff already sued the defendant, the plaintiff can

15. This issue was particularly problematic in pre-*Pierringer* Wisconsin. At the time *Pierringer* was decided, Wisconsin law permitted contribution among joint tortfeasors, and settling defendants were subject to contribution if the plaintiff reserved its rights to the full cause of action against the nonsettling defendant. *Pierringer*, 124 N.W.2d at 109. "[W]e construed a release providing for complete discharge of the settling tort-feasor with a reservation of rights of the full cause of action against the nonsettling tort-feasor to be in the nature of a covenant not to sue and held the nonsettling tort-feasor's right to contribution was not affected." *Id.* (citing *State Farm Mut. Auto. Ins. Co. v. Continental Casualty Co.*, 59 N.W.2d 425 (1953)).

16. See *infra* note 21 and accompanying text.

promise not to collect any portion of the judgment from the settling defendant. Tort doctrines governing joint and several liability gave a plaintiff the discretion necessary to make this promise. A victorious plaintiff was free to collect the judgment from any joint tortfeasor it chose.¹⁷ Consequently, a plaintiff could promise not to collect any part of a judgment from a settling defendant.

Since a covenant not to sue is not a complete release, it does not protect a settling defendant from future contribution claims. In jurisdictions such as Minnesota and Wisconsin, where contribution among tortfeasors was permitted, plaintiffs could not promise settling defendants that the covenant not to sue would protect them from future contribution actions.¹⁸ At best, the covenant not to sue permitted a settling defendant to purchase only a partial and uneasy peace.

2. *Partial Releases: The Problem of Misallocation*

Wisconsin, unlike most other jurisdictions in the early 1960s, had solved some of the common law problems plaguing settlement of multi-defendant litigation. Joint tortfeasors had the right to seek contribution from one another, but Wisconsin law provided for two forms of release that protected a settling defendant from future claims of contribution: the *pro tanto* and *pro rata* releases.

In the late nineteenth century, Wisconsin had set aside the common law rule that the release of one joint tortfeasor released all joint tortfeasors, and instead provided that settlement agreements should be construed according to the intent of the parties.¹⁹ Consequently, a plaintiff in Wisconsin had the option of settling with one joint tortfeasor and pursuing the nonsettling joint tortfeasors for the remainder of the claim.

17. See WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 46, at 271 (3d ed. 1964); see also *Gronquist v. Olson*, 242 Minn. 119, 126, 64 N.W.2d 159, 164 (1954) (stating that receipt of part of a judgment from one tortfeasor does not relieve any other tortfeasor from liability).

18. For an example of more modern use of the covenant not to sue, see *Faber v. Roelofs*, 298 Minn. 16, 212 N.W.2d 856 (1973). In *Faber*, the plaintiff and settling defendant did not disclose the covenant until the close of evidence at trial. The court stated its disapproval of secret settlements, but held that the settling defendant's presence at trial was not improper because the settling defendant was still subject to the cross-claims of the other defendants. *Id.* at 861.

19. *Ellis v. Essau*, 6 N.W. 518, 520 (Wis. 1880).

Exactly what constituted “the remainder of the claim” depended on which of two forms of release the Wisconsin plaintiff chose, the *pro tanto* release or the *pro rata* release.²⁰ A plaintiff opting for a *pro tanto* release would settle with one defendant, and then proceed to trial against the remaining defendants. If the plaintiff recovered a verdict against the nonsettling defendants, the trial judge would reduce the amount of the verdict by the amount of the settlement.²¹ A *pro rata* release allowed the plaintiff to settle with one of two defendants, and proceed to trial against the remaining defendant. The trial judge would reduce the amount of any verdict for damages by the settling defendant’s *pro rata* share, which, in this case, is one-half.²²

From the settling defendant’s perspective, both of these alternatives were preferable to the covenant not to sue, because both provided the settling defendant protection from future claims of contribution. From the perspective of the plaintiff and nonsettling defendants in Wisconsin in 1962, however, both forms of settlement posed serious problems. Both the *pro tanto* and *pro rata* settlements created a risk of misallocation.

20. For a complete explanation of the development of Wisconsin law governing settlements and releases prior to *Pierringer v. Hoyer*, see Harrold J. McComas, *Tort Releases in Wisconsin*, 49 MARQ. L. REV. 533 (1965-66). Both the *pro tanto* and the *pro rata* releases were creatures of the common law. *Ellis*, 6 N.W. at 520-22; *Heimbach v. Hagen*, 83 N.W.2d 710 (Wis. 1957). Prior to the decision in *Pierringer*, Wisconsin had adopted the Uniform Joint Obligations Act. UNIF. JOINT OBLIGATIONS ACT, ch. 235, 1927 Wis. Laws 273 (codified as amended at WIS. STAT. § 113 (West 1992)). The bench and bar in Wisconsin, however, found it difficult to fit the commonly used forms of settlement release into the statutory categories. See McComas, *supra*, at 535-36; see, e.g., *Pierringer*, 124 N.W.2d at 111 (stating that section 113 of the Wisconsin statutes applies to a tort release only when the statute is explicitly referred to or when the parties’ intent cannot clearly be determined); *Heimbach*, 83 N.W.2d at 713 (declining to determine whether to apply section 113 of the Wisconsin statutes because the parties’ intent was clear).

21. *Ellis*, 6 N.W. at 521. The settlement in *Ellis* was a release under seal, and the court could easily have construed the release as either a general release of all the tortfeasors or, alternatively, a covenant not to sue. The *Ellis* court ruled that the parties intended neither result and that the intent of the parties should govern construction of the release. *Id.* at 520. The court held that the release did not discharge the nonsettling defendants, but did protect the settling defendant from future claims of contribution. *Id.* at 524. The amount of the plaintiff’s eventual verdict, if any, would be reduced by the amount of the settlement. *Id.* at 521. Voila! a *pro tanto* release was created.

22. *Heimbach*, 83 N.W.2d at 712-13. The release in *Heimbach* simply provided that the settlement amount satisfied one-half of the plaintiff’s claim, and that the settling defendant was released from any future claims of contribution. *Id.* The court upheld the release because the nonsettling defendant would be required to pay only one-half of the verdict, or that defendant’s fair share. *Id.* at 713.

a. Pro tanto Problems of Misallocation

Suppose a plaintiff entered a *pro tanto* settlement with a defendant for \$10,000, and then proceeded to trial against the remaining defendant. If the jury returned a verdict of \$20,000, then all parties could look at the settlement and believe justice had been done. The plaintiff would recover \$20,000, half from each of the joint tortfeasors.

However, if the verdict moves very far from that \$20,000 it becomes harder to find justice. For example, if the nonsettling defendant is found to be negligent and the verdict is only \$10,000, then the nonsettling defendant will owe the plaintiff nothing. On the other hand, if the verdict is \$100,000, then the nonsettling defendant will owe the plaintiff \$90,000.²³ In both situations, the judgment against the nonsettling defendant bears no relation to that defendant's "fair share" of negligence. Consequently, the *pro tanto* release has created a misallocation of damages.²⁴

b. Pro rata Problems of Misallocation

As with the *pro tanto* settlement, the problem of misallocation also haunts the *pro rata* settlement. Prior to the development of

23. In some jurisdictions, a *pro tanto* release did not extinguish a nonsettling defendant's right of contribution. This was, for example, the original rule under the Unif. Contribution Among Tortfeasors Act § 5 (1939) historical note, 12 U.L.A. 58 (1975); see also PROSSER, *supra* note 16, § 47, at 277-78. Permitting contribution against the settling defendant eliminates half of the problem because the nonsettling defendant will have the right to seek contribution from the settling defendant for any amount the nonsettling defendant has paid in excess of its "fair share." Eliminating the misallocation problem, however, revives the uncertainty problem. Unless the *pro tanto* release extinguishes the right of contribution, it gives the settling defendant no more peace than a covenant not to sue. Largely for this reason, the 1955 revision to the Uniform Contribution Among Tortfeasors Act adopted the alternative approach and discharged a settling tortfeasor from liability for future contribution. UNIF. CONTRIBUTION AMONG TORTFEASORS ACT § 4(b) commissioner's comment, 12 U.L.A. 99-100 (1975).

24. There is an implicit assumption here that merits further discussion. The *pro tanto* release misallocates fault if we accept the notion that the law of equal contribution between tortfeasors is a "proper" allocation of fault. This notion certainly has been open to dispute, and the dispute about the fairness of *pro rata* contribution was part of the impetus in the development of comparative fault. See *supra* notes 40-41 for a discussion of comparative fault in Minnesota. It seems easier to assert that a jury's allocation of individual percentage shares of comparative fault is the "proper" allocation of fault, but that assertion also contains implicit assumptions that invite controversy. Fine-tuning comparative fault, however, is mercifully beyond the scope of this article. For purposes of this discussion, fair allocation of fault is defined as an allocation of fault that closely matches the apportionment a jury would have made had all parties been present at trial to litigate their fault.

comparative fault and contribution according to comparative allocation, the *pro rata* release seemed an adequate solution to the piecemeal settlement problem. With the advent of comparative fault, however, the *pro rata* release potentially created misallocation problems similar to those of the *pro tanto* release.

Suppose a plaintiff enters a *pro rata* settlement with one of two defendants. The *pro rata* allocation of damages seems fair as long as the jury equally allocates fault to each defendant. If the fault allocation moves from equipoise, however, then the *pro rata* settlement has misallocated damages. This occurs because the plaintiff has released one-half of its claim in the *pro rata* settlement. The *pro rata* release effectively capped the nonsettling defendant's share of damages at one-half of the plaintiff's total damages.²⁵ If, for example, the jury then allocated ninety percent of fault to the nonsettling defendant, the plaintiff would be undercompensated.²⁶ As a matter of settlement strategy, a plaintiff in an era of comparative fault would be foolish to enter a *pro rata* settlement with the defendant the plaintiff believes to be least at fault.

Pro rata and *pro tanto* settlements may have presented better solutions to the piecemeal settlement problem than covenants not to sue. Nonetheless, these forms of release were partial solutions at best. The problem of misallocation remained, and was sufficiently severe so as to undermine the usefulness of both the *pro tanto* and *pro rata* settlement in an era of comparative fault. Comparative fault is the source of the *Pierringer* release; the need for the *Pierringer* release flows from that source.

C. *Pierringer Settlements: A Solution to the Allocation Problem?*

1. *Wisconsin Invents the Pierringer Settlement*

The trial bench and bar were quick to welcome the *Pierringer* release because it presented an elegant solution to the problem of piecemeal settlement in multi-party litigation. The original "*Pierringer* release" grew out of an attempt to resolve a particularly complicated and protracted piece of litigation. On Novem-

25. The nonsettling defendant's share would be capped at one-third if there are three defendants, one-fourth if there are four, and so on.

26. The same caveat concerning a proper allocation of fault offered above is offered here. See *supra* note 24. The plaintiff is undercompensated only if we accept the notion that the jury's allocation of fault is the "proper," "correct," or "fair" allocation of fault.

ber 1, 1957, Loschel Pierringer, Burton Hoger, and William Bormann were working near a gas-fired boiler at Schmitz Ready Mix, Inc., a concrete plant in Port Washington, Wisconsin. Hoger, Bormann, and Pierringer were all injured in an explosion caused when part of the gas piping was disconnected in an attempt to bleed the gas line and ignite the boiler.²⁷

In the middle of 1958, Pierringer, Hoger, and Bormann each brought suit against Schmitz Ready Mix, Milwaukee Gas Light Company and several other defendants. Milwaukee Gas cross-complained, alleging that Mathias Greisch improperly installed a pressure regulator, causing the explosion. Three years of intensive litigation followed, but by 1962, Mr. Pierringer and the two other plaintiffs were apparently nearing a settlement with all the defendants except Greisch.²⁸

While the parties in *Pierringer* were negotiating settlement, the Wisconsin Supreme Court decided *Bielski v. Shulze*,²⁹ which changed Wisconsin's common law doctrine governing contribution. Prior to *Bielski*, Wisconsin followed a rule that "equity was equality"; contribution among joint tortfeasors was shared on an equal *pro rata* basis.³⁰ *Bielski* changed that. Now defendants were liable for contribution based on the jury-apportioned percentage of their comparative negligence.³¹ *Bielski* invited a new form of settlement that would reflect this new law of contribution.³² *Pierringer* was the first of these new settlements.

27. *Pierringer v. Hoger*, 124 N.W.2d 106, 107 (Wis. 1963). Since the court's statement of facts is unfortunately quite terse, see also Brief of Burton E. Hoger and William Bormann, Respondents at 3, *Pierringer v. Hoger*, 124 N.W.2d 106 (Wis. 1963) (No. 32); Brief of Defendant-Respondent Milwaukee Gas Light Company at 4, *Pierringer* (Nos. 31 and 32); see also McComas, *supra* note 19. Harrold McComas, of then Foley, Sammond & Lardner, was one of the principal architects of the release. He represented the Milwaukee Gas Light Company, and his article is a first-hand account of the development of that first *Pierringer* release, complete with a copy of the text of the original release.

28. See McComas, *supra* note 20, at 534. Mr. McComas's description of the litigation sounds strikingly modern: "More than three years had been consumed following commencement of the actions in multitudinous pleadings, examinations, depositions, motions, and other procedures which are largely unavoidable when multiple parties are involved in claims resulting from such an intricate industrial occurrence." *Id.*

29. 114 N.W.2d 105 (Wis. 1962).

30. *Id.* at 108 (citing Estate of Ryan, 147 N.W. 993 (Wis. 1914)).

31. *Bielski*, 114 N.W.2d at 107. For a discussion of the impact the *Bielski* decision had on the settlement negotiations in *Pierringer*, see McComas, *supra* note 20, at 534-40.

32. *Bielski*, 114 N.W.2d at 111. In response to the defendant's argument that abolition of the common law rule of equal, *pro rata* contribution would complicate the law of settlements and releases, the *Bielski* court stated:

In order for a plaintiff to give a release and covenant which will protect the settling tortfeasor from a claim of contribution, the plaintiff must agree to

On May 15, 1962, Loschel Pierringer signed the first release, settling his claims against all defendants except Mathias Greisch.³³ The release contained four critical elements:

1. A complete release of the Milwaukee Gas Light Company and the other settling defendants;
2. A discharge of the claim to the extent of the "portions or fractions or percentages of causal negligence" of the settling defendants, as later determined by the jury at trial;
3. A reservation of the claim against the remaining, nonsettling defendant; and,
4. An indemnification of the settling defendants against any future claims of contribution.³⁴

With these four elegant strokes, the *Pierringer* release had seemingly solved the piecemeal settlement problem. The plaintiff preserved his cause of action against the nonsettling defendant. The settling defendants gained absolute repose, free of worry from future claims of contribution. In the event that contribution claims were made, the settling defendants could look to the plaintiff for indemnification.

Best of all, the *Pierringer* release did not seem to create problems of misallocation, as had *pro rata* and *pro tanto* settlements. The plaintiff discharged only part of his claim—that percentage portion of fault that the jury would later allocate to the settling defendants. This provision answered the invitation extended in *Bielski*. The jury would allocate a percentage of fault to each of the negligent parties, whether they had settled out or not. There could be no problem of misallocation, so it seemed, because the nonsettling defendant, Greisch, would be held liable for that exact portion of damages equal to his percentage of jury-allocated fault, no more and no less.

satisfy such percentage of the judgment he ultimately recovers as the settling tortfeasor's causal negligence is determined to be of all the causal negligence of all the co-tortfeasors.

Id.

33. For a text of that first release, see McComas, *supra* note 20, at 533, 540-42. Mr. Griesch, the only remaining defendant, appealed the trial court's summary judgment dismissing the settling defendants from the action. The supreme court affirmed the summary judgment, and ruled that the releases effectively precluded the nonsettling defendant from seeking contribution from the settling defendants. The court held that the plaintiff could proceed to trial against the remaining defendant and recover the percentage of negligence, if any, the jury assessed against that defendant. *Pierringer v. Hoyer*, 124 N.W.2d 106, 112 (Wis. 1963).

34. See McComas, *supra* note 20, at 540-42.

On appeal, the Wisconsin Supreme Court enforced the release and held that it barred the nonsettling defendant's right to contribution.³⁵ Consistent with the decision in *Bielski* and with the intent of the release, the court ruled that the jury should consider the negligence of all the parties, including the settling defendants.³⁶ Greisch, the nonsettling defendant, would be liable for only that portion of the judgment equal to his percentage of negligence.³⁷ Significantly, the Wisconsin court also ruled that the settling defendants need not remain active participants at trial. Greisch argued that if the settling defendants did not participate at trial, "a proper issue of causal negligence could not be submitted to the trier of the fact."³⁸ The court rejected this argument, holding that:

The issue between the plaintiff and the nonsettling defendant . . . is the percentage of causal negligence, if any, of the nonsettling defendant, but such percentage of negligence can only be determined by a proper allocation of all the causal negligence, if any, of all the joint tortfeasors and of the plaintiff if contributory negligence is involved. The determination of this issue between the plaintiff and the nonsettling defendant does not require the settling defendants to remain parties because *the allocation, if any, of the causal negligence to the settling tortfeasors is merely a part of the mechanics by which the percentage of causal negligence of the nonsettling tortfeasor is determined.*³⁹

As argued in the following section, determining the negligence of a settling defendant involves more than mere "mechanics," but this might have seemed a minor quibble in 1963. In effect the *Pierringer* court said "Go home, settling defendants! Your part here is over." In 1963, piecemeal settlement was a vexing problem for lawyers. In fact, Prosser said piecemeal settlement "has perhaps given more difficulty than any other

35. *Pierringer*, 124 N.W.2d at 111.

36. As the *Pierringer* court stated: "[H]ere, the failure to include in the apportionment question the causal negligence of the settling respondents would because of the releases necessarily be prejudicial to the nonsettling appellant." *Id.* at 112.

37. The court stated in this regard:

Upon the trial the release should be given immediate effect, as it is for contribution purposes, and the judgment, if any, against the nonsettling defendant should only be for that percentage of negligence allocated to him by the findings or the verdict. The claim for the balance has been satisfied by the plaintiff and there is no point in going through the circuitry of ordering a judgment for a larger amount and requiring the plaintiff to satisfy it.

Id. at 112.

38. *Id.* at 111.

39. *Pierringer*, 124 N.W.2d at 111-12 (emphasis added).

problem.”⁴⁰ Following the decision in *Pierringer*, it must have seemed that this difficult problem had finally been laid to rest.

2. *Today Wisconsin, Tomorrow Minnesota: Adoption of Pierringer Releases Outside Wisconsin*

During the late 1960s and early 1970s, state courts wrestled with comparative fault and the piecemeal settlement problem. As these states adopted comparative fault in one form or another, *Pierringer*-style solutions to the piecemeal settlement problem became increasingly viable.⁴¹ Minnesota adopted comparative fault in 1969,⁴² and, shortly thereafter, lawyers in Minnesota began using *Pierringer* settlements.⁴³

In 1977, John Simonett (now Justice) wrote an article about the use of *Pierringer* releases in Minnesota, correctly predicting

40. KEETON, *supra* note 12, § 47, at 277 (3d ed. 1964).

41. The three principal jurisdictions using *Pierringer* releases are Wisconsin, Minnesota, and North Dakota. Maine initially approved limited use of *Pierringer* releases, but in the last ten years has drastically narrowed even that limited use. See part III.B. In other jurisdictions, courts have adopted types of releases that are similar to *Pierringer* releases, and have used Minnesota and Wisconsin law to guide their interpretations of their own law. See, e.g., *Montana ex rel. Deere & Co. v. District Court of Fifth Judicial Dist. ex rel. Beaverhead County*, 730 P.2d 396, 409 (Mont. 1986) (Gulbrandson, J., concurring and dissenting) (arguing Montana should follow Wisconsin, Minnesota and North Dakota in adopting the percent credit rule with respect to its comparative fault statute); *Quick v. Crane*, 727 P.2d 1187, 1207 (Idaho 1986) (citing *Pierringer v. Hoger*, 124 N.W.2d 106 (Wis. 1963)); *Gaudin v. Burlington N., Inc.*, 654 P.2d 383, 391 (Kan. 1982) (referring to *Frey v. Snelgrove*, 269 N.W.2d 918 (Minn. 1978)); *Hoerr v. Northfield Foundry & Mach. Co.*, 376 N.W.2d 323, 329-30 (N.D. 1985) (citing *Frey*, 269 N.W.2d 918). In some jurisdictions, lawyers have attempted to use *Pierringer* releases to settle cases and included in the releases language to the effect that the releases are interpreted in accordance with Minnesota and Wisconsin. See, e.g., *Schick v. Rodenburg*, 397 N.W.2d 464, 467 (S.D. 1987). In addition, the Uniform Comparative Fault Act adopts an approach to settlement that is quite similar to *Pierringer* settlements. UNIF. COMPARATIVE FAULT ACT §§ 2, 4, 12 U.L.A. 50, 54 (Supp. 1993).

42. Act of May 23, 1969, ch. 624, 1969 Minn. Laws 1069 (codified as amended at MINN. STAT. § 604.01-.02 (1992)). For an overview of Minnesota's adoption of comparative fault, see Michael K. Steenson, *The Fault with Comparative Fault: The Problem of Individual Comparisons in a Modified Comparative Fault Jurisdiction*, 12 WM. MITCHELL L. REV. 1, 6-22 (1985). For the earliest judicial reference to the use of *Pierringer* releases in Minnesota, see *Nebben v. Kosmalski*, 307 Minn. 211, 212 n.1, 239 N.W.2d 234, 236 n.1 (1976). The release referred to in the opinion was executed in 1974. For further discussion of the use of the *Pierringer* release in Minnesota before 1978, see part III.A.1.

43. Subdivision 5 of Minnesota Statutes section 604.01 provides that settlement payments are to be credited against the final judgment. MINN. STAT. § 604.01, subd. 5 (1992). In *Rambaum v. Swisher*, 435 N.W.2d 19 (Minn. 1989), the Minnesota Supreme Court held that the term “payments” in the statute, with respect to *Pierringer* settlements, “refers only to payment for that portion of plaintiff's damages representing the settling defendant's share of liability.” *Id.* at 23.

that "conditions are favorable in Minnesota for the adoption of this settlement device."⁴⁴ A year later, the Minnesota Supreme Court, citing Simonett's article as "definitive," gave official approval to the *Pierringer* release.⁴⁵ While the Minnesota court was influenced by many of the same considerations that prompted adoption of the *Pierringer* release in Wisconsin, there was one important difference.

By the time Minnesota adopted *Pierringer* releases, lawyers were relying upon another form of release—the *Mary Carter* agreement.⁴⁶ When first faced with the question of whether to approve the use of a *Mary Carter*-type agreement, the Minnesota Supreme Court stated that the validity of settlement agreements had to be determined on a case-by-case basis.⁴⁷ The court approved the particular agreement used in that case, but stated, "[i]t is not proper or desirable for this court to condone or condemn types of settlement agreements generically."⁴⁸ The court soon abandoned this ad hoc approach to settlement agreements.

Much has been written about *Mary Carter* agreements, most of it critical of the agreements for distorting trial following settlement. At least some of that criticism prompted Minnesota, less than a year after *Pacific Indemnity*, to generically condone *Pierringer* settlements, and offer guidelines for their use to assure a fair trial to all parties.⁴⁹ For these reasons, *Mary Carter* agreements merit a closer look.

44. Simonett, *supra* note 6, at 4.

45. *Frey v. Snelgrove*, 269 N.W.2d 918 (Minn. 1978).

46. *See infra* note 49.

47. *Pacific Indemnity Co. v. Thompson-Yaeger, Inc.*, 260 N.W.2d 548, 558 (Minn. 1977).

48. *Id.* The agreement in *Pacific Indemnity* was actually a hybrid settlement agreement. It shared characteristics of both the "classic" *Mary Carter* agreement and a loan-receipt agreement. A loan-receipt agreement is a device typically used between insurers and insureds to allow an insured who could not otherwise afford it to maintain an action against third parties to recover amounts the insurer would otherwise be obligated to pay. *Id.* at 556.

49. *See Frey v. Snelgrove*, 269 N.W.2d 918, 923 (Minn. 1978). There can be no doubt that, at the time of its decision in *Frey*, the Minnesota Supreme Court was well aware of the power of *Mary Carter* agreements to distort trial. The appellant in *Frey* repeatedly characterized the *Frey* settlement as a *Mary Carter* agreement rather than a *Pierringer* release, and focused its appeal on the impact the settlement had on the conduct of trial. Brief of Appellant Firestone at 20-21, *Frey v. Snelgrove*, 269 N.W.2d 918, 922 (Minn. 1978) (No. 47620).

D. *The Problem of Trial Distortion: Mary Carter Agreements*

The most notorious form of piecemeal settlement is the *Mary Carter* agreement.⁵⁰ A *Mary Carter* agreement is essentially a settlement agreement in which the settling defendant guarantees a minimum total recovery to the plaintiff regardless of whether the plaintiff wins or loses at trial. The settling defendant agrees to defend itself during the litigation and at trial. The plaintiff, in turn, promises to execute any judgment only against the nonsettling defendants. The *Mary Carter* agreement gives the settling defendant a financial interest in maximizing the plaintiff's recovery against the other nonsettling defendants. The settling defendant's guaranteed payment will be offset by the plaintiff's recovery from the nonsettling defendants.⁵¹ The governing notion of the *Mary Carter* agreement is that the settling defendant works actively at trial to increase the plaintiff's recovery and especially the plaintiff's damage award from the nonsettling defendant.⁵²

50. See *Booth v. Mary Carter Paint Co.*, 202 So.2d 8 (Fla. Dist. Ct. App. 1967), *overruled by* *Ward v. Ochoa*, 284 So.2d 385 (Fla. 1973). The *Mary Carter* release does not seem to have been widely used—or at least to have drawn much attention—until the mid-1970s. There is no indication that the Wisconsin Supreme Court had *Mary Carter* agreements in mind when approving the release in *Pierringer*. See *Pierringer v. Hoger*, 124 N.W.2d 106 (Wis. 1963). Nor is there any indication in reported decisions that litigants in Wisconsin were commonly using *Mary Carter* agreements or similar forms of release in the early 1960s. One of the principal reasons for this is, no doubt, the fact that the Wisconsin Supreme Court voided a *Mary Carter*-type agreement in 1934. *Trampe v. Wisconsin Tel. Co.*, 252 N.W. 675 (Wis. 1934). For a more complete overview of the early history of *Mary Carter*-type releases, see Katherine Gay, Note, *Mary Carter in Arkansas: Settlements, Secret Agreements, and Some Serious Problems*, 36 ARK. L. REV. 570, 572 (1983). *Mary Carter* agreements played a more prominent role in Minnesota's adoption of *Pierringer* releases. Minnesota litigants were using *Mary Carter*-type agreements at the time Minnesota approved *Pierringer* releases, and the appellant in *Frey* attempted to characterize the release in that case as a *Mary Carter* agreement. Brief of the Appellant at 20, *Frey v. Snelgrove*, 269 N.W.2d 918 (Minn. 1978) (No. 47620).

51. *Mary Carter* agreements may provide that the plaintiff will offset the settling defendant's guarantee with the recovery against the other defendants on a dollar-for-dollar basis. Alternatively, the agreement may provide that the guarantee will be offset with a percentage of the plaintiff's recovery against the nonsettling defendants. See, e.g., *General Motors Corp. v. Simmons*, 558 S.W.2d 855 (Tex. 1977). In either situation, the settling defendant still has a financial interest in working to increase the plaintiff's overall damage award, thus increasing the plaintiff's recovery from the nonsettling defendants.

52. In *Ward v. Ochoa*, 284 So.2d 385 (Fla. 1973), the Florida Supreme Court defined *Mary Carter* agreements as "a contract by which one co-defendant secretly agrees with the plaintiff that, if such defendant will proceed to defend himself in court, his own maximum liability will be diminished proportionately by increasing the liability of the other co-defendants." *Id.* at 387. Other definitions abound. The Texas Supreme

Criticism of *Mary Carter* agreements has been unusually hostile and shrill.⁵³ Though courts and commentators have railed about the clandestine nature of *Mary Carter* agreements,⁵⁴ the problem that has provoked the most scholarly and judicial bile is the impact *Mary Carter* agreements have on trial, and particularly

Court used a broader definition in a recent decision declaring *Mary Carter* agreements "void as violative of sound public policy." *Elbaor v. Smith*, 845 S.W.2d 240, 250 (Tex. 1992). The *Elbaor* court stated that "a *Mary Carter* agreement exists when the settling defendant retains a financial stake in the plaintiff's recovery and remains a party at the trial of the case." *Id.* at 247.

53. This criticism has also often been gratuitously misogynistic. For example one author wrote:

Like a lady of the night, she has many aliases. In Florida she is called "Mary Carter," but in Arizona she is known as "Gallagher." She has been branded a "painted lady" in Florida, but she has been popular with those who use her. Some in New York have wished her a hasty death. . . . Who is this sleazy lady? She is a living character in the law, best described as the "guaranteed verdict agreement." Such agreements are unholy alliances arising in cases that involved a single plaintiff and multiple co-defendants.

Larry Bodine, *The Case Against Guaranteed Verdict Agreements*, 29 DEF. L.J. 233 (1980). Bodine's chastisement is not unique. See, e.g., Edward W. Mullins, Jr. & Stephen G. Morrison, *Who is Mary Carter and Why is She Saying Nasty Things About My Pre-Trial Settlements?*, 23 FOR DEF., Dec. 1981, at 14 ("Who, or what is this 'Mary Carter?' Is it a well-disguised femme fatale, who lures the unwary much as the fabled Lorelei? Or is it a lawyer's 'Typhoid Mary,' claiming her unknown victims by appearing to aid others?"); Warren Freedman, *The Expected Demise of 'Mary Carter': She Never Was Well!*, 633 INS. L.J. 602, 603 (1975) ("The very existence of the 'Mary Carter agreement' makes it a contractual monstrosity which plagues the settlement aspects of liability law."); John Edward Herndon, Jr., *'Mary Carter' Limitation on Liability Agreements Between Adversary Parties: A Painted Lady is Exposed*, 28 U. MIAMI L. REV. 988 (1974).

54. Some courts and commentators focus on secrecy as the greatest of the *Mary Carter* evils. E.g., *Ward v. Ochoa*, 284 So.2d 385, 387 (Fla. 1973) ("Secrecy is the essence of such an arrangement, because the court or jury as trier of the facts, if apprised of this, would likely weigh differently the testimony and conduct of the signing defendant as related to the non-signing defendants."). In fact, secrecy is not the "essence" of *Mary Carter* releases, for reasons suggested in *Ward* itself. If secrecy really were the problem, it would be a problem easily remedied. Many of the jurisdictions that have considered the validity of *Mary Carter* agreements require the agreement to be disclosed to the court and opposing counsel. See, e.g., *General Portland Land Dev. Co. v. Stevens*, 291 So.2d 250 (Fla. Dist. Ct. App. 1974).

To be sure, some lawyers might violate the law and hide the existence of a *Mary Carter* agreement, particularly since the secrecy of the agreement could give an advantage to the plaintiff and settling defendant at trial. However, this same objection applies as well to the proposed solution of outright prohibition. Lawyers who break the law and hide *Mary Carter* agreements would probably also be willing to break the law and enter into *Mary Carter* agreements. More to the point, nothing about the *Mary Carter* necessitates secrecy, and the problems *Mary Carter* agreements create at trial cannot be completely solved by requiring disclosure of the agreements. For an opposing point of view, see David J. Grant, Note, *The Mary Carter Agreement—Solving the Problems of Collusive Settlements in Joint Tort Actions*, 47 SO. CAL. L. REV. 1393 (1974) and Ronald W. Eubanks & Alfonse J. Cocchiarella, *In Defense of 'Mary Carter'*, 26 FOR DEF., Feb. 1984, at 14.

the impact *Mary Carter* agreements have on the nonsettling defendants.

Courts and commentators complain that *Mary Carter* agreements distort trial, robbing it of "adversary vigor."⁵⁵ Jurors come to trial expecting the plaintiff to present evidence against all the defendants and expecting all the defendants to stand firm and present evidence against the plaintiff. The *Mary Carter* settlement realigns interests and reshapes trial in a way that is contrary to these expectations. Unfamiliar with the ways of litigation and settlement, so the argument goes, jurors will be confused and overwhelmed by evidence or argument that runs counter to their expectations. The method used to confound jurors may vary from case to case. For example, counsel for the settling defendant might concede liability or damages during closing argument; alternatively, witnesses for the settling defendant might shade their testimony to favor the plaintiff.⁵⁶

55. Grant, *supra* note 54, at 1402.

56. There is no better, and certainly no more popular, illustration of this concern than a portion of the closing argument in *Ponderosa Timber & Clearing Co. v. Emrich*, 472 P.2d 358, 360 (Nev. 1970), a case involving claims arising from an automobile accident. All four of the defendants in the case pled defenses of contributory negligence and assumption of risk. The plaintiff negotiated a *Mary Carter* settlement with two of the defendants and then proceeded to trial. At the end of the trial, the lawyer for one of the settling defendants gave this closing argument:

Now I am not going to stand here and make a fool of myself by telling you people that there is any merit in the defense of contributory negligence. There isn't. Even though that was asserted in the defenses here, as far as I am concerned, you can forget about that. You heard no instruction on assumption of risk. So the second side of this case, if there was a second side, is out of the case, too. . . . I submit to you ladies and gentlemen there aren't three sides to this case, there aren't even two sides, there is one side, and that side is that all of these defendants are responsible to the plaintiff, and I consider it my duty as an officer of this court to suggest to you that in the interest of justice in this case, if we are to have justice in this case, there must be a plaintiff's verdict against all of the defendants. . . . This is the kind of a case when a lawyer . . . has to remind himself of the oath that he took when he was admitted to practice . . . to see that justice is done.

Id. at 362-63. This segment of the closing argument is quoted in the dissent. The *Ponderosa* majority upheld the trial judge's denial of the nonsettling defendants' motion for new trial. The majority stated that there was no impropriety in the settling defendant admitting liability. "That," the court ruled, "is a matter of trial strategy," and the settling defendant did not indicate the jury should return a verdict in excess of \$20,000, the amount of the settlement. *Id.* at 360. The dissent pointed out that the settling defendant did, however, concede special damages in excess of \$15,000. *Id.* at 363. This quote from the closing argument is a special favorite of commentators. See, e.g., Richard Casner, Note, *Admission into Evidence of a Mary Carter Agreement from a Prior Trial is Harmful Error*, 18 TEX. TECH L. REV. 997, 1010 (1987); Patricia R. Morrow, Note, *Is Mary Carter Alive and Well in Michigan: Taking a Stand on Secret Settlements in Multiparty Tort Litigation*, 2 DET. C.L. REV. 605, 632-33 (1985); David R. Miller, Comment, *Mary Carter*

No matter what the method, the core concern is the same: the “unnatural” *Mary Carter* realignment of interests distorts trial and misleads jurors. The plaintiff and the settling defendant will use this warping of trial to work in concert to manufacture an unrealistically large recovery.

Concern that *Mary Carter* settlements distort trial is very real and is supported by available case law. Courts and commentators have identified and criticized a whole host of trial problems spawned by *Mary Carter* releases. The litany of distortion is lengthy, and includes problems with jury selection,⁵⁷ opening statement,⁵⁸ direct examination,⁵⁹ cross-examination,⁶⁰ expert witness testimony,⁶¹ and closing argument.⁶² Distortion of the trial process, in turn, creates a risk of distortion of the trial result. In short, the risk is that the *Mary Carter* agreement can alter jury verdicts, causing nonsettling defendants to pay more than their fair share.⁶³

Agreements: Unfair and Unnecessary, 32 Sw. L.J. 779, 789 (1978); Freedman, *supra* note 53, at 620; Bodine, *supra* note 53, at 244.

57. See, e.g., *Lum v. Stinnett*, 488 P.2d 347, 348 (Nev. 1971) (allowing settling defendants to “assist” nonsettling defendants with jury selection without disclosing imminent settlement); *Elbaor v. Smith*, 845 S.W.2d 240, 246 (Tex. 1992) (noting that during voir dire, settling defendants’ lawyers told prospective jurors that plaintiff’s damages were “devastating,” “astoundingly high,” and “astronomical”).

58. See, e.g., *Lum*, 488 P.2d at 348 (noting plaintiff’s complaint had focused on settling defendants, but opening statement targeted the nonsettling defendant).

59. *Id.* at 349.

60. *Id.* Here, counsel for settling defendant thoughtfully cross-examined plaintiff about loss of income from tips, after plaintiff’s counsel failed to elicit that testimony on direct. See also *Degen v. Bayman*, 200 N.W.2d 134, 138 (S.D. 1972).

61. See, e.g., *Elbaor*, 845 S.W.2d at 246. In *Elbaor*, the respondent’s experts testified that respondent’s doctor committed malpractice. However, in voir dire and opening statements, respondent’s attorney stated that her doctor was “heroic.” *Id.*

62. See, e.g., *Degen*, 200 N.W.2d at 139. The *Degen* defense counsel, over objection, stated:

I have no doubt, ladies and gentlemen, that in this case you’re going to give Billy Degen a verdict and believe me, in this argument and particularly in a case like this, I think the attorneys have a real responsibility to be candid with the jury, and I’m trying to be with you because this is a very serious case. There isn’t any doubt in my mind but what you’re going to give Billy Degen a verdict. There isn’t any doubt in my mind that it’s going to be a substantial one.

Id. The South Dakota court ruled that the statement was improper, stating that the jury, “[n]ot knowing the motive for the evaporation of adversary vigor” could only have viewed the statement as “a shattering admission.” *Id.* The court ruled that relief was “necessary to let the adversary process put the issues in perspective.” *Id.*

63. The implicit assumption, discussed *supra* at note 24, returns in full force. The idea that a distortion in process can lead to an “erroneous” verdict assumes that there is some “correct” apportionment of fault that jurors can divine by means of “correct” trial of the case under consideration. This may be a controversial notion in some quarters.

E. Pierringer Releases: A Solution to the Trial Distortion Problem?

The *Pierringer* release is assumed to be a valid alternative to the covenant not to sue because it solves the piecemeal settlement problem.⁶⁴ It is also assumed to be a valid alternative to the *Mary Carter* agreement because it solves the trial distortion problem.⁶⁵ Whether it is a valid alternative, that is, whether it solves or creates trial distortion, turns on whether the *Pierringer* promise is kept or broken: Does the nonsettling defendant pay neither more nor less than its fair share of the verdict?

III. YOU MAY SAY TO YOURSELF "THIS IS NOT
MY BEAUTIFUL HOUSE. . ."

Although the *Pierringer* release is a vast improvement over its predecessors, the *Pierringer* release is not faultless. Two sets of problems vex *Pierringer* settlements: problems of allocation and problems of distortion. Appellate courts created the first set of problems by permitting one party in litigation to bear more than its fair, jury-allocated share of fault. Part A of this section discusses these problems of allocation. Problems of distortion are the product of the *Pierringer* release's impact on litigation and trial, and are akin to the types of problems created by *Mary Carter* releases. Part B explores these problems of distortion.

A. Problems of Allocation: Judicial Alteration of the Ideal

The ideal settlement release would promise that each party to the litigation receive that which is fair. The plaintiff would receive full compensation, and no more than full compensation, for those damages proximately caused by the fault of the defendants. In turn, each defendant would pay for only that share of the damages its fault had proximately caused. That is a description of the ideal; it is not a description of the *Pierringer* release.

This article, however, rests upon an assumption that jurors come closer to a "just," "correct," or "fair" apportionment of fault when they hear available evidence about each party's fault and understand the motivation each party has for presenting that evidence.

64. See, e.g., Simonett, *supra* note 6, at 22.

65. *Id.* at 20. Simonett noted that "[t]he *Pierringer* release does not offend any public policy and thus can be distinguished from the somewhat discredited 'Mary Carter Agreement,' which is kept secret from everyone and corrupts the adversary nature of the trial." *Id.* (footnote omitted).

Pierringer allocation of damages differs from the ideal in at least four respects.⁶⁶ First, the *Pierringer* release promises that *nonsettling* defendants will only pay their “fair share” of damages; the *Pierringer* release is silent with respect to fairness to settling defendants and plaintiffs. Second, in situations involving immune or insolvent defendants, the other defendants may be required to pay more than their allocated share of damages. Third, a *Pierringer* settlement with a defendant who is an agent or intentional tortfeasor may constitute a release of claims against other *nonsettling* defendants. Fourth, at least in Minnesota, the law is unclear whether settling defendants may seek contribution from other defendants for amounts paid in settlement.

1. *The Promise Defined: Good Deals, Bad Deals*

The ideal measure of a settlement might be whether it distributes damages fairly to all parties, including plaintiffs, settling defendants, and *nonsettling* defendants. This has not been the measure of *Pierringer* settlements. Instead, the *Pierringer* promise of fairness is only that the *nonsettling* defendant will pay neither more nor less than its fair share of the plaintiff's damages. The *Pierringer* promise ignores plaintiffs and settling defendants for a very good reason. Early on, courts decided that evaluating a *Pierringer* settlement from the standpoint of plaintiffs or settling defendants would sacrifice certainty in the name of fairness.⁶⁷

Consider the following hypothetical. A woman is injured when her hand is caught in a ball-return machine while she is bowling. She sues two defendants, the out-of-state manufacturer of the ball-return machine and the local bowling alley. Suppose that our hypothetical plaintiff believes she has suffered damages amounting to \$100,000. She negotiates a *Pierringer* settlement with the bowling alley for \$30,000 and proceeds to trial against the manufacturer of the ball-return machine. Imagine first that the jury finds that the plaintiff has suffered damages amounting to \$100,000, for which the bowling alley is eighty percent at fault and the manufacturer is twenty percent at fault.

66. There is a fifth deviation from the ideal, though it is less significant. An ideal settlement structure would allocate costs as of the date of settlement according to relative fault. If trial and verdict follow a *Pierringer* settlement, however, costs will be assessed only against the *nonsettling* defendants. *Peller v. Harris*, 464 N.W.2d 590, 594 (Minn. Ct. App. 1991).

67. See Simonett, *supra* note 6, at 18.

The negotiated *Pierringer* settlement now appears to have been “unfair” in the sense that the ultimate distribution of damages is at odds with the jury’s allocation of the “actual” fault. In this situation, the settlement is unfair to the plaintiff, who will receive compensation for only half her damages: the \$30,000 settlement from the bowling alley plus the \$20,000 judgment (twenty percent of the \$100,000 verdict). The settling defendant is the beneficiary of that unfairness; absent the *Pierringer* settlement, the bowling alley would have faced a judgment of \$80,000.

Now imagine that the jury had returned a different verdict, finding damages of \$100,000, but instead allocating one hundred percent of fault to the manufacturer and zero percent of fault to the bowling alley. This second verdict causes the settlement to seem unfair to the settling defendant, which has paid \$30,000 but has been exonerated by the jury allocating no portion of the fault to that defendant. Here, the plaintiff is the beneficiary of the unfairness; she has received a total of \$130,000 in compensation for her \$100,000 of damages.

Both these situations may seem unfair, but the unfairness is court-approved.⁶⁸ The rationale behind judicial approval of the results in these types of cases is twofold. First, courts reason that the plaintiff and the settling defendant have struck an arms-length deal and both should be bound by the terms of that agreement even if it produces a distribution of damages at odds with the trial verdict. Appellate courts simply let the chips fall where they may. A plaintiff may well be shrewd enough to negotiate a *Pierringer* settlement with a defendant ultimately deter-

68. *Rambaum v. Swisher*, 435 N.W.2d 19 (Minn. 1989). In *Rambaum*, the plaintiff negotiated a \$200,000 *Pierringer* settlement with one defendant on the first day of trial. Following trial, the jury verdict resulted in a total net award to the plaintiff of \$268,241.67. The jury allocated ten percent of fault to the settling defendant. The court refused to deduct the settlement amount from the net award, and instead allowed the nonsettling defendant only a ten percent credit for the fault apportioned to the settling defendant. “The time to judge the fairness of the *Pierringer* is at the time it is made; and if subsequent events sometimes result in a so-called ‘windfall’ for plaintiff, that result is acceptable within the context of the law’s strong policy to encourage settlement of disputes.” *Id.* at 23. The result in *Rambaum* is completely in accord with the rationale underlying *Pierringer* settlements. The case was remarkable, however, because the result directly contravenes the clear language of section 604.01, subd. 5 of the Minnesota Statutes, requiring settlement amounts to be credited against final judgments on a dollar-for-dollar, *pro tanto* basis. See *supra* note 41 for an earlier discussion of this issue.

mined to have no liability.⁶⁹ That shrewd plaintiff should enjoy the benefits of the settlement. By the same token, the canny defendant who negotiates a favorable settlement should not be asked to pay additional damages after the jury returns its verdict.⁷⁰ A deal is a deal.

Appellate courts have used a second rationale to justify *Pierringer* settlements that distribute damages at variance with the jury's allocation. Both of the hypothetical verdicts discussed above resulted in the settling defendant paying damages in an amount different from its jury-allocated "fair share" of damages. On the other hand, in both situations, the nonsettling defendant paid exactly its jury-allocated "fair share" of damages. Courts have tended to accept the "fairness" of the *Pierringer* settlement to the nonsettling defendant as a measure of the settlement's overall fairness.⁷¹ In short, questions about double recovery for the plaintiff and questions about whether the settling defendant has paid too little or too much are, as far as appellate courts are concerned, irrelevant in assessing the fairness of a *Pierringer* settlement. Fairness to the nonsettling defendant defines the fairness of a *Pierringer* settlement.⁷²

69. See, e.g., *Shantz v. Richview, Inc.*, 311 N.W.2d 155 (Minn. 1981). The *Shantz* court reasoned:

It should be no concern of the nonsettling defendant how much the plaintiff received from the settling defendant—in some cases (like this one, where it was later determined by the jury that the settling defendant was not negligent) plaintiff will have made the better bargain; in others, the settling defendant will have made the better bargain.

Id. at 156.

70. See, e.g., *Frederickson v. Alton M. Johnson Co.*, 402 N.W.2d 794 (Minn. 1987). Plaintiff negotiated a \$20,000 *Pierringer* settlement with defendant Hunt prior to trial. The jury returned a verdict of \$800,000 and allocated forty percent of the fault to settling defendant Hunt. *Id.* at 796.

71. See *Shantz*, 311 N.W.2d at 156. "[A]ll that should concern the nonsettling defendant is that he not be required to pay more than his percentage share of the total damages which the jury determines the plaintiff sustained." *Id.* See also, *Austin v. Raymark Indus.*, 841 F.2d 1184, 1191 (1st Cir. 1988). *Austin* involved a *Pierringer* settlement of asbestos litigation in Maine. The court stated:

If the settlement turns out to be greater than the amount equivalent to the proportionate liability of the settling defendant, then the plaintiff, in effect, will have made a good bargain. Conversely, if the settlement turns out to be less than this sum, then the plaintiff will have made a bad bargain. *In either case, the nonsettling defendant's position is the same: it will only pay its fair share of the verdict.*

Id. (emphasis added).

72. This is the same test of fairness adopted in the Uniform Comparative Fault Act. UNIF. COMPARATIVE FAULT ACT § 6 comment, 12 U.L.A. 57 (Supp. 1993). See *Thomas v. Solberg*, 442 N.W.2d 73 (Iowa 1989), for a discussion of Iowa's adoption of the proportionate credit rule.

This definition of fairness may at first seem difficult to accept. After all, double recovery of damages hardly seems fair. On the other hand, none of the other forms of settlement release are perfectly fair. Each of the alternative forms of release measures fairness differently and, consequently, each suffers from different types of unfairness. For example, the *pro tanto* release measures fairness in terms of the plaintiff's recovery.⁷³ With a *pro tanto* release, the settlement amount is subtracted from the verdict, insuring that the plaintiff's total recovery cannot be more than the verdict.⁷⁴ The *pro tanto* release looks to the plaintiff's recovery as the measure of fairness, and hence it has both the benefits and disadvantages of that measure of fairness. The settling defendant could pay more than its fair share of the plaintiff's damages.⁷⁵ Alternatively, in a separate case, the nonsettling defendant could also pay more than its fair share.⁷⁶ This too may seem unfair, but in this situation it is an unfairness judged irrelevant because the measure of the fairness of a *pro tanto* release is whether the plaintiff's total recovery equals the verdict amount.

The *Pierringer* release strikes a different balance by accepting the possibility of unfairness to plaintiff and settling defendant while insisting on fairness to the nonsettling defendant. The rationale behind this measure of fairness is sound. If a *Pierringer* settlement ultimately proves unfair to either the plaintiff or the settling defendant, then they have only themselves to blame. Unfairness arises only when the settling defendant pays too much or too little. In theory, if the plaintiff and settling defend-

73. See *supra* notes 20, 23-24 and accompanying text.

74. However, if the settlement amount is greater than the verdict, the plaintiff will not receive any damages in addition to the settlement payment.

75. Imagine that our bowling plaintiff had negotiated a *pro tanto* release with the ball-return manufacturer for \$80,000. After trial, the jury returns a verdict of \$100,000, and allocates 80% of the fault to the alley owner and 20% to the plaintiff. The ball-return manufacturer will have paid more than its trial-determined fair share of fault.

76. For example, the Uniform Contribution Among Tortfeasors Act provides that a *pro tanto* settlement would discharge the settling defendant from all liability for contribution. UNIF. CONTRIBUTION AMONG TORTFEASORS ACT § 4(b), 12 U.L.A. 98 (1975). That arrangement gives certainty to the settling defendant and thus encourages settlement, though at the expense of fairness to the nonsettling defendant. In that situation, the settling defendant might pay only \$10,000 of a \$100,000 verdict, leaving the nonsettling defendant liable for the remainder and bereft of any right of contribution.

ant negotiate wisely, the risk of unfairness should disappear.⁷⁷ Although this rationale is theoretically sound, it has a very important logical consequence. The fairness of *Pierringer* releases hinges upon fairness to the nonsettling defendant. The *Pierringer* promise is ultimately a promise made to nonsettling defendants: this form of release is fair because nonsettling defendants will pay no more than their fair, jury-allocated share of damages.⁷⁸

2. *The Promise Modified: Insolvent or Immune Defendants*

Suppose that our hypothetical bowling plaintiff, in addition to suing the bowling alley and ball-return manufacturer, had also originally brought a claim against the maker of her bowling ball. What happens if the jury finds that the bowling ball manufacturer is liable for a share of the plaintiff's damages, but the bowling ball manufacturer is insolvent? Are the other two defendants responsible for the insolvent defendant's share of liability? What if one of those defendants signed a *Pierringer* settlement before the trial?

a. *The Wisconsin and North Dakota Approach: Allocation to Nonsettling Defendants*

Courts have split in their approach to this set of issues. In North Dakota and Wisconsin, courts have held that joint and several liability among nonsettling defendants survives a *Pierringer* settlement. Consequently, a nonsettling defendant may be liable for the entire verdict, reduced only by that portion of fault attributable to the settling defendants.⁷⁹ If all nonsettling defend-

77. In practice, *Pierringer* releases may result in unfairness to either the plaintiff or the settling defendant for reasons other than unwise negotiation. See *infra* part II.B. for a discussion of the problems of trial distortion.

78. Some jurisdictions have modified the promise, guaranteeing the nonsettling defendant that it would pay no *more* than its jury-allocated fair share of the verdict and also guaranteeing that the plaintiff would not recover more than the total amount of the verdict. For example, New York adopted a hybrid approach that reduces the verdict by either the amount received by the plaintiff in settlement or the settlor's equitable share, whichever amount is greater. N.Y. GEN. OBLIG. LAW § 15-108 (McKinney 1988). See *In re Eastern & S. Dists. Asbestos Litig.*, 772 F.Supp. 1380, 1391-92 (E. & S.D.N.Y. 1991). This hybrid approach eliminates the possibility of overcompensation, but leaves open the possibility that the nonsettling defendant might be held liable for *less* than its share of the verdict. Essentially, the New York approach adapts the *pro tanto* measure of fairness—the plaintiff's ultimate recovery—to a comparative fault setting.

79. *Hoerr v. Northfield Foundry & Mach. Co.*, 376 N.W.2d 323, 330 (N.D. 1985); *Chart v. General Motors Corp.*, 258 N.W.2d 680, 687 (Wis. 1977).

ants are solvent, then each will pay only its individual, jury-allocated share of the verdict. If a remaining defendant is insolvent, however, then the plaintiff may collect the insolvent defendant's share of damages from any of the other solvent defendants. Ultimately, an insolvent defendant's share of liability can be reallocated to all of the other nonsettling defendants according to their own respective shares of fault. This reallocation can be made either via the trial judge's reapportionment of the judgment or a later action for contribution.⁸⁰

Suppose the jury in our modified hypothetical returns a verdict for \$100,000 and allocates fault as follows:

Plaintiff	10 percent
Bowling Alley	20 percent
Return Manufacturer	40 percent
Ball Maker	30 percent

If the ball maker is insolvent, its thirty percent share of fault will be reallocated to the two other defendants. The alley owner will assume responsibility for one-third of the insolvent defendant's share and pay a total of \$30,000; the return manufacturer will assume responsibility for two-thirds of the insolvent defendant's share and pay a total of \$60,000.⁸¹ None of the insolvent defend-

80. North Dakota law seems open to the trial judge's reapportionment of the insolvent defendant's share of damages. *Hoerr*, 376 N.W.2d at 333. This approach makes sense, since it eliminates the necessity of a later separate action for contribution.

Wisconsin law is murky on this point. The court in *Chart* stated, "[t]here exists no rule requiring solvent, nonsettling tortfeasors to equitably share that part of a judgment which is uncollectible from an insolvent, nonsettling tortfeasor." *Chart*, 258 N.W.2d at 687. In *Chart*, there was only one remaining solvent, nonsettling defendant. *Chart* declined to permit that nonsettling defendant to seek from the settling defendant recovery of a share of the insolvent defendant's portion of damages. The court's rationale was that the recovery would ultimately come from the plaintiff who, under the terms of the settlement, stepped into the shoes of the settling defendant. This would make settlement too uncertain, the *Chart* court reasoned. *Id.* at 688. Later Wisconsin courts have, however, permitted equitable allocation among nonsettling defendants of an insolvent or immune defendant's share of damages. *Raby v. Moe*, 441 N.W.2d 263, 271 (Wis. Ct. App. 1989); *Larsen v. Wisconsin Power & Light Co.*, 355 N.W.2d 557, 564 (Wis. Ct. App. 1984). *But see* *Leverence v. PFS Corp.*, 504 N.W.2d 874 (table), 1993 WL 233338, at *4 (Wis. Ct. App. 1993) (refusing to impute settling defendant's share of immune defendants' liability to plaintiffs).

81. To determine the alley owner's additional responsibility: (1) total the remaining solvent defendant's percentage shares of fault (here, the total is 0.60); (2) divide the alley owner's individual share of fault by that total (0.20 divided by 0.60); (3) multiply that result (0.33) by the insolvent defendant's share of the verdict.

ant's share is reallocated to the plaintiff, even though the jury has found that the plaintiff was also at fault.⁸²

Wisconsin and North Dakota courts have not, however, held that joint liability survives among nonsettling and settling defendants. Suppose that our hypothetical plaintiff in the bowling alley case negotiates a *Pierringer* settlement with the return manufacturer. At trial, the jury returns a verdict for \$100,000 and allocates fault as set out above. Under Wisconsin and North Dakota law, the alley owner will be liable for a total of \$50,000, its own share of the verdict plus the entire share of the insolvent defendant's verdict.⁸³ In Wisconsin and North Dakota, the *Pierringer* settlement effectively transfers all responsibility for the insolvent defendant's share of liability to the nonsettling defendants.⁸⁴

82. See *Chart*, 258 N.W.2d at 687 & n.8. In *Chart*, the jury allocated three percent of fault to the plaintiff. The nonsettling defendant, General Motors, requested that any portion of the insolvent defendant's liability be allocated to the plaintiff on the basis of her fault. Instead, the Wisconsin court reallocated all of the insolvent defendant's share of fault to General Motors. *Id.* at 687-88. Apparently North Dakota has not considered the issue of the effect that fault of the plaintiff may have on reallocation of an insolvent defendant's share of liability. The court did not reach this issue in *Hoerr* because the jury allocated no fault to the plaintiff. *Hoerr*, 376 N.W.2d at 325. Yet the *Hoerr* court did rely on *Chart* in reaching its result. *Id.* at 333.

83. *Hoerr*, 376 N.W.2d at 332; *Chart*, 258 N.W.2d at 687. For other courts reallocating an insolvent defendant's liability to nonsettling defendants, but refusing to reallocate that share of liability to settling defendants, see *In re Eastern & Southern Districts Asbestos Litigation*, 772 F. Supp. 1380, 1403 (E. & S.D.N.Y. 1991), and the cases cited therein, and affirming on this issue *In re Brooklyn Navy Yard Asbestos Litigation*, 971 F.2d 831, 845 (2d Cir. 1992), and the cases cited therein. The *In re Brooklyn* cases did not involve *Pierringer* settlements, but instead centered upon interpretation of New York statutory law. *In re Brooklyn*, 971 F.2d at 845. However, the district court's analysis did rely in part on *Hoerr* and *Chart*. *Eastern & S. Dists.*, 772 F. Supp. at 1402.

84. At least one Wisconsin court has criticized this approach. *Raby v. Moe*, 441 N.W.2d 263, 272 (Wis. Ct. App. 1989), *rev'd on other grounds* 450 N.W.2d 452 (Wis. 1990). The *Raby* court relied on *Larsen v. Wisconsin Power & Light Co.*, 355 N.W.2d 557 (Wis. Ct. App. 1984). At issue in *Larsen* was the proper allocation of the fault of defendants immune to judgment. The court ruled that the immune defendants' fault should be reallocated to the other defendants. *Id.* at 563-64. However, none of those defendants had settled with the plaintiff prior to trial. *Raby* misrelied on *Larsen* because *Raby* reallocated part of the insolvent defendant's fault to a settling defendant but there were no settling defendants in *Larsen*. Additionally, for an early, pre-*Chart* critique of the Wisconsin approach authorized by the *Larsen* judge, see Gordon Myse, *The Problem of the Insolvent Contributor*, 60 MARQ. L. REV. 891, 903 (1977). Judge Myse authored the *Larsen* decision.

In *Leverence v. PFS Corp.*, 504 N.W.2d 874 (table), 1993 WL 233338 (Wis. Ct. App. 1993), the court critiqued the decisions in *Larsen* and *Raby*. Relying on *Chart*, the *Leverence* court refused to apportion the liability of an immune defendant. *Id.* at *5.

b. The Minnesota Approach: Allocation to All Defendants

Minnesota has adopted a far different approach to reallocation of an insolvent defendant's share of liability. Minnesota's comparative fault statute provides that if a defendant's share of liability is "uncollectible," then that share must be reallocated among all the other parties, including the plaintiff, "according to their respective percentages of fault."⁸⁵

Imagine our hypothetical plaintiff had gone to trial against all three defendants and a Minnesota jury returned the same verdict, awarding the plaintiff \$100,000, and allocating fault as follows:

Plaintiff	10 percent
Bowling Alley	20 percent
Return Manufacturer	40 percent
Ball Maker	30 percent

Once again, suppose that the judgment against the ball maker is uncollectible. Under Minnesota's statutory scheme, one-seventh (ten-seventieths) of the insolvent defendant's share of fault will be reallocated to the plaintiff. The plaintiff's judgment will be reduced by \$4285.71; the alley owner will be liable for its own share plus two-sevenths of the insolvent defendant's share, paying a total \$28,571.43; and the return manufacturer will pay \$57,142.85, its own share plus four-sevenths of the insolvent defendant's share.⁸⁶

Minnesota has also adopted a different approach for reallocation of an insolvent defendant's fault if one or more of the solvent defendants has settled pursuant to a *Pierringer* release. In *Hosley v. Armstrong Cork Co.*,⁸⁷ the Minnesota Supreme Court held that an insolvent defendant's fault should be reallocated not only to the plaintiff and the nonsettling defendants, but also to

85. MINN. STAT. § 604.02, subd. 2 (1992). The 1978 Minnesota Comparative Fault Act's loss reallocation provision is virtually identical to the loss reallocation provision contained in the 1977 Uniform Comparative Fault Act. Compare UNIF. COMPARATIVE FAULT ACT § 2(d), 12 U.L.A. 50 (Supp. 1993) with 1978 Minn. Laws 840. For a review of the development and analysis of Minnesota's loss reallocation provisions, see Michael K. Steenson, *Comparative Fault and Loss Reallocation*, MINN. TRIAL LAW, July-Aug. 1981, at 8.

86. For example, the procedure for calculating the alley owner's responsibility for its portion of the insolvent defendant's share of liability is as follows: (1) total the remaining solvent defendants' percentage shares of fault and the plaintiff's share of fault (here, the total is 0.70); (2) divide the alley owner's individual share of fault by that total (0.20 divided by 0.70); (3) multiply that result (0.29) by the insolvent defendant's share of the verdict.

87. 383 N.W.2d 289 (Minn. 1986).

the settling defendants.⁸⁸ In Minnesota, a *Pierringer* release does not transfer responsibility for the insolvent defendant's share of liability from the settling to nonsettling defendant. Instead, unless the settling parties make some other agreement, reallocation of the insolvent defendant's liability will be the same whether or not there has been a *Pierringer* settlement.

The principal objection to the Minnesota approach is that it discourages settlement.⁸⁹ The Wisconsin Supreme Court stated that reallocation of the insolvent defendant's fault to the settling defendant would defeat the purpose of settlement.⁹⁰ "The monetary value of the release . . . would become contingent on the lawsuit, and thus the certainty and rationality of fixing the rights and liabilities between the settling defendant and plaintiff would be lost."⁹¹

This concern, however, may be overstated. For plaintiffs, the value of every *Pierringer* release is contingent upon trial. It is true, however, that the Minnesota approach introduces a measure of uncertainty for settling defendants. The settling defendant risks later responsibility for paying its share of any uncollectible portion of the judgment. The best way to deal with this concern is to allow a would-be settling defendant and the plaintiff to negotiate who should bear this risk.

Under the approach the Minnesota Supreme Court adopted in *Hosley*, plaintiffs and would-be settling defendants remain free to allocate this risk to plaintiff instead of the settling defend-

88. *Id.*, 383 N.W.2d at 292-93. The same approach was adopted by the First Circuit Court of Appeals interpreting the effect of a *Pierringer* release in a Maine settlement. *See Austin v. Raymark Indus.*, 841 F.2d 1184, 1195-96 (1st Cir. 1988) (citing *Hosley v. Armstrong Cork Co.*, 383 N.W.2d 289 (Minn. 1986)).

89. North Dakota offered a different objection to the Minnesota approach. *Hoerr v. Northfield Foundry & Mach. Co.*, 376 N.W.2d 323 (N.D. 1985). "Although the *Hosley* majority's result might well be considered an 'expected consequence' of *Pierringer* settlements in Minnesota, the same cannot be said of . . . *Pierringer* settlements in North Dakota." *Id.* at 331. This is a fine objection, especially in light of Minn. Stat. § 604.02, subd. 3. It is, however, an objection that should only work once. The *Hoerr* court could have solved this problem by mandating prospective reallocation, thus making the Minnesota approach an "expected consequence" of all future North Dakota *Pierringer* settlements.

90. *Chart v. General Motors Corp.*, 258 N.W.2d 680, 687-88 (Wis. 1977).

91. *Id.* at 688. The court in *Chart* was concerned about the value of the settlement to the plaintiff because it assumed that the plaintiff's general promise to indemnify the settling defendant for future claims of contribution would work to make the plaintiff liable for the settling defendant's share of any uncollectible judgment. However, as set forth in *Hosley*, 383 N.W.2d at 294, discussed *infra* at notes 92-94 and accompanying text, the settling parties can negotiate a different arrangement.

ant.⁹² The *Pierringer* release in that case expressly provided that the plaintiff would indemnify the settling defendants for "all claims based on the amount of any subsequent judgment determined to be uncollectible."⁹³ The settling defendants, consequently, did not pay any additional amount for their reallocated shares of the insolvent defendant's liability. Instead, the plaintiff's judgment was reduced by this amount.⁹⁴

Minnesota's approach is preferable to the approach taken in Wisconsin and North Dakota. It is fundamentally unfair to allow a plaintiff and a settling defendant to contract to have a nonsettling defendant bear the entire risk of uncollectibility. However, this is exactly what the North Dakota and Wisconsin approach permit. Rather than allocating all of the risk caused by an insolvent co-defendant to nonsettling defendants, the Minnesota approach distributes that risk among all defendants. In addition, the Minnesota approach also permits the plaintiff and the settling defendant to negotiate an alternative allocation of that risk.

What happens if the parties fail to include express language in the agreement concerning reallocation in the event of insolvency? By definition, all *Pierringer* releases contain a plaintiff's general promise to indemnify the settling defendants for claims of contribution. In at least one case, the Minnesota Supreme Court has apparently held that this sort of general promise could also bind a plaintiff to indemnify a settling defendant for damages reallocated as a result of insolvency.⁹⁵ The result seems at odds with *Hosley*, but makes sense in light of the language in *Pier-*

92. *Hosley v. Armstrong Cork Co.*, 383 N.W.2d 289, 290 (Minn. 1986).

93. *Id.* at 294.

94. *Id.* at 294 & n.3. The *Hosley* decision seems to turn on the plaintiff's express agreement in the *Pierringer* releases to indemnify the settling defendants for any reallocation pursuant to the Minnesota statute. See generally, Sharon L. Van Dyck, Comment, *Loss Allocation and Reallocation in Minnesota: A Road in Need of Repair*, 13 WM. MITCHELL L. REV. 389 (1987).

95. See *Frederickson v. Alton M. Johnson Co.*, 402 N.W.2d 794, 797 (Minn. 1987). The *Pierringer* release contained no specific language concerning reallocation in the event of insolvency. Brief for Appellant at A-80-82, *Frederickson v. Alton M. Johnson Co.*, 402 N.W.2d 794 (Minn. 1987) (Nos. C1-85-2102, C3-85-2117). The court's broad construction of the *Pierringer* general indemnity provision seems inappropriate in light of its insistence on strict construction of indemnity provisions in other contracts. See, *infra* note 96, for the effect of the release language contained in the *Pierringer* release. Courts in other jurisdictions have reached a similar result, however, apparently without concern for the existence of any reallocation statute or the presence of specific language in the release promising indemnification for reallocation of uncollectible damages. See *Austin v. Raymark Industries, Inc.*, 841 F.2d 1184, 1195-96 (1st Cir. 1988) (noting that language in release apparently promised only that the plaintiff would "sat-

ringer settlements releasing the settling defendant from all further claims. Ideally, the issue of reallocating uncollectible damages should be expressly addressed in every *Pierringer* settlement. However, absent express language permitting the plaintiff to seek uncollectible damages from the settling defendant, the *Pierringer* release provisions should bar the plaintiff from asserting a later claim against the settling defendant for reallocation of uncollectible damages.⁹⁶

3. *The Promise in Hiding: Release of Agents and Intentional Tortfeasors*

As part of the solution to the piecemeal settlement problem, the *Pierringer* release made it possible for a plaintiff to release its claim against one defendant without worry that the release would extinguish its claims against all other defendants. There are, however, at least two situations in which release of a single defendant could constitute an effective release of the plaintiff's claims against other defendants as well. Both of these situations can ensnare unwary plaintiffs. The first arises when a plaintiff releases an agent and attempts to recover damages from the principal; the second, when a plaintiff releases an intentional tortfeasor.

a. *Release of Agents*

The most common of these two situations is the release of an agent. In Minnesota and North Dakota, if the plaintiff negotiates a *Pierringer* settlement with an agent, that settlement may constitute a release of the plaintiff's claims against the principal. If the plaintiff's claim against the principal is one of vicarious

isfy" contribution claims against the settling defendants and "stand in the shoes" of those defendants).

96. Typically, *Pierringer* agreements contain release language promising that the plaintiff will "refrain forever from instituting any other action or making any other demand or claim of any kind against" the settling defendant. See MDLA RELEASE DESKBOOK (Eric J. Magnuson, ed., 2d ed. 1990), F-3. The *Pierringer* agreement used in *Frederickson* contained identical release language. Brief for Appellant at A-80-82, *Frederickson v. Alton M. Johnson Co.*, 402 N.W.2d 794 (Minn. 1987) (Nos. C1-85-2102, C3-85-2117). The *Frederickson* court reached the right result for the wrong reason. The language in the *Pierringer* agreement should not have been construed to require the plaintiff to indemnify the settling defendant for any reallocation claims; it should have been construed to bar the plaintiff from making any such claims. I am indebted to my colleague, Professor Daniel Kleinberger, for his willingness to share insights on this issue during conversations with me.

liability, any release of the agent removes the basis of that vicarious liability claim.⁹⁷

This rule permits the nonsettling principal to avoid liability and, in a sense, pay less than its share of damages. On the other hand, a principal may be entitled to indemnity from its agent for vicarious liability stemming from the agent's negligent acts. Since a plaintiff agrees in a *Pierringer* settlement to indemnify the settling agent, the plaintiff steps into the shoe of the agent and becomes liable to the principal.⁹⁸ As a general rule, release of an agent also releases the principal.⁹⁹ Plaintiffs need to be alert to the fact that a *Pierringer* settlement creates no exception to this doctrine.¹⁰⁰ Caution suggests that a plaintiff avoid settlement with an agent or employee if the plaintiff intends to pursue claims against the principal.¹⁰¹

97. Minnesota law seems clear on this point. See, e.g., *Reedon of Faribault, Inc. v. Fidelity & Guar. Ins. Underwriters, Inc.*, 418 N.W.2d 488 (Minn. 1988). *Reedon* involved an action for negligent failure to provide adequate fire insurance, wherein *Pierringer* settlement with the negligent agent constituted a release of the vicariously liable insurance company. *Id.* at 488. See also *Hoffman v. Wiltscheck*, 411 N.W.2d 923 (Minn. Ct. App. 1987) (finding that a *Pierringer* settlement with a negligent driver constituted release of the vicariously liable employer).

North Dakota law is also fairly clear. See, e.g., *Horejsi by Anton v. Anderson*, 353 N.W.2d 316 (N.D. 1984). In *Horejsi* a guardian ad litem brought an action on behalf of a child injured by his caregiver. The court found release of the caregiver constituted a release of the injured child's parents, who had employed the caregiver. *Id.* at 318. But see *McLean v. Kirby Co.*, 490 N.W.2d 229 (N.D. 1992). The *McLean* plaintiff brought an action for damages against the salesman who raped her, the vacuum cleaner distributor who employed him, and the vacuum cleaner manufacturer that employed the distributor as an independent contractor. *Id.* at 232. The court found the *Pierringer* settlement with the distributor did not serve to release the manufacturer. *Id.* at 244.

Wisconsin law is not as clear on the vicarious liability question. Wisconsin has ruled that a *Pierringer* settlement of a minor-driver did not constitute a release of claims against the parent-sponsor. *Swanigan v. State Farm Ins. Co.*, 299 N.W.2d 234 (Wis. 1980). But see *Schroeder v. Pedersen*, 388 N.W.2d 927 (Wis. Ct. App. 1986) (holding release of active tortfeasor constitutes release of joint venture partners from vicarious liability); *St. Clare Hosp. v. Schmidt, Garden, Erickson, Inc.*, 437 N.W.2d 228, 232-33 (Wis. Ct. App. 1989) ("[W]here a settling plaintiff assumes the strictly liable tortfeasor's share of responsibility for the damages, leaving only ordinarily negligent tortfeasors as defendants, the plaintiff has assumed all of the liability attributable to the product."). The decision in *St. Clare* has been subject to criticism. See *Komanekin v. Inland Truck Parts*, 819 F. Supp. 802, 811 (E.D. Wis. 1993) ("By distinguishing this case from *St. Clare*, the court does not want to give added authority to that decision, the logic of which is not terribly compelling.").

98. *Hoffmann*, 411 N.W.2d at 926.

99. *Reedon*, 387 N.W.2d at 446.

100. *Id.*

101. This is certainly true if the claims against the principal or employer are based on a theory of vicarious liability. Other types of claims against principals or employers may survive a *Pierringer* release. In *Bougie v. Sibley Manor, Inc.*, 504 N.W.2d 493 (Minn.

b. Release of an Intentional Tortfeasor

In Wisconsin, a negligent tortfeasor is entitled to seek indemnity from an intentional tortfeasor. This rule has an enormous impact on *Pierringer* settlements. In Wisconsin, a plaintiff who releases a defendant later found to have acted intentionally has also released its claims against all other negligent tortfeasors. In *Fleming v. Threshermen's Mutual Insurance Company*,¹⁰² the plaintiff brought an action for injuries received from a sawed-off shotgun blast.¹⁰³ Plaintiff negotiated a *Pierringer* settlement with the person who fired the gun, and proceeded to trial against the person who made the gun available. Because the jury found that the settling defendant acted intentionally, the Wisconsin court ruled that the nonsettling defendant could seek indemnity.¹⁰⁴ Since the *Pierringer* release provided that the plaintiff indemnified the settling defendant, the plaintiff lost his right to recover from the nonsettling defendant.¹⁰⁵

Though Minnesota once adhered to a similar rule, the advent of comparative fault has largely eroded this doctrine.¹⁰⁶ Unfortunately, Minnesota law is not completely clear, and at least one court has suggested that an intentional tortfeasor might still be held to have lost its right to contribution.¹⁰⁷ This approach was rejected in a situation involving a *Pierringer* release, however. In

Ct. App. 1993), the court of appeals considered a *Pierringer* settlement in a sexual harassment case. The plaintiff released her supervisor who she claimed had harassed her. *Id.* at 495. Plaintiff proceeded to trial against her former employer, as well as the employer's owners. *Id.* at 496. The *Pierringer* settlement with the supervisor did not release the plaintiff's claims against the employer. In fact, the court held that the claims against the employer based upon the "sexually charged" atmosphere of the office did not rest upon theories of liability based upon the supervisor's knowledge and actions. *Id.* Consequently, the court of appeals upheld the trial judge's refusal to deduct the settlement amount from the judgment against the employer! *Id.*

102. 388 N.W.2d 908 (Wis. 1986).

103. *Id.*

104. *Id.* at 911.

105. *Id.* at 912. In *City of Menomonie v. Evensen Dodge, Inc.*, 471 N.W.2d 513 (Wis. Ct. App. 1991), the Wisconsin court declined to extend *Fleming* to include a claim for indemnity based on a negligent tortfeasor's responsibility to disgorge profits in excess of damages. *Id.* at 515.

106. See, e.g., *Kempa v. E.W. Coons Co.*, 370 N.W.2d 414, 420 (Minn. 1985) ("[S]tatutory comparative fault . . . and apportionment of damages . . . have had a significant impact on the principles of loss allocation embodied in the doctrines of contribution and indemnity.").

107. See *Jendro v. Honeywell, Inc.*, 392 N.W.2d 688, 690 (Minn. Ct. App. 1986) (citing *Kempa v. E.W. Coons Co.*, 370 N.W.2d 414, 420-21 (Minn. 1985)). For a more complete discussion of indemnity issues in the comparative fault context, see Steenson, *supra* note 42, at 36 n.158.

Lange v. Schweitzer,¹⁰⁸ the plaintiff entered a *Pierringer* release and proceeded to trial against the remaining defendants. The jury found that one of the remaining defendants was negligent. The plaintiff argued that the defendant's liability stemmed from a statutory violation, and this "illegal act" barred the defendant from seeking contribution. Consequently, the plaintiff argued, the verdict amount ought not be reduced by the amount of fault allocated to the settling defendant. The court rejected this argument.¹⁰⁹

Parties negotiating a *Pierringer* settlement should not have to speculate about whether one of the defendants will lose its right to contribution. The necessity of this sort of speculation prompted one commentator to write:

In my youth, I had an older cousin who delighted in telling me that there were snakes under my bed and if I so much as put a toe down, they would work their venomous will upon me. I was fairly certain there weren't any snakes, but it took a literal and figurative leap of faith to make it from bed to bathroom to answer nature's call. I relive that experience every time I am confronted with the prospect of a *Pierringer* Release.¹¹⁰

The trepidation is understandable. As the law stands, plaintiffs in both Wisconsin and Minnesota are well advised to refrain from settling with defendants who might be intentional tortfeasors.

4. *The Promise Befuddled: Survival of Contribution Rights*

Does a nonsettling defendant have the right to contribution from a settling defendant? When a plaintiff signs a *Pierringer* release, the plaintiff makes a promise to indemnify the settling defendant against any future claim for contribution made by one of the nonsettling defendants. As a practical matter, courts do not require nonsettling defendants to pay the plaintiff the entire judgment amount and then bring an action for contribution against the settling defendant, who is in turn indemnified by the plaintiff.¹¹¹ Since the plaintiff is ultimately responsible for the

108. 295 N.W.2d 387 (Minn. 1980).

109. *Id.* at 390.

110. J. Michael Riley, *Now, About that Pierringer . . .*, 16:4 WIS. ACAD. OF TRIAL LAW. 30 (1993).

111. *See, e.g., Haase v. R. & P. Indus. Chimney Repair Co.*, 409 N.W.2d 423, 427 (Wis. Ct. App. 1987) (holding that a settling defendant's contribution under a *Pierringer* re-

settling defendant's share of liability, courts simply reduce the judgment by that amount.¹¹²

What about the opposite situation? Should a *settling* defendant recoup the amount it has paid in settlement through contribution from a nonsettling defendant? Clearly not. Allowing a settling defendant a right to contribution would effectively subject the nonsettling defendant to liability both for its own share of fault and for the settling defendant's share of fault.¹¹³ This would be an outright betrayal of the *Pierringer* promise.

a. A Clear "No": North Dakota

Of the three principal *Pierringer* jurisdictions, only North Dakota has legislatively resolved this issue. North Dakota statutory law flatly prohibits a settling defendant from obtaining contribution from other, nonsettling defendants.¹¹⁴ *Houser v. Gilbert*¹¹⁵ tested the applicability of this statute to situations involving *Pierringer* settlements.¹¹⁶ *Houser* involved a wrongful death action brought as the result of a tractor-trailer accident that occurred near a sugar beet field.¹¹⁷ The plaintiff sued the driver (Gil-

lease is imputed to the plaintiff); *Fleming v. Threshermen's Mut. Ins. Co.*, 388 N.W.2d 908, 911 (Minn. 1986) (same).

112. The *Pierringer* release does not extinguish the right of the nonsettling defendant to seek contribution. Instead it transfers liability for contribution to the plaintiff. See, e.g., *Haase*, 409 N.W.2d at 427; *Fleming*, 388 N.W.2d at 911.

113. This occurs because the nonsettling defendant is paying an amount that is greater than his or her share based upon the jury's allocation of fault. Permitting a settling defendant to seek contribution may create additional inequities. See *Charles v. Giant Eagle Markets*, 522 A.2d 1, 4 n.3 (Pa. 1987). The court in *Charles* stated:

Moreover, settlement is not encouraged by allowing the settling defendant the right of contribution against the remaining defendants. Although the possibility of a recoupment of losses may be an additional incentive to the settling defendant who may make a bad bargain, it would be unjust to the plaintiff who makes an unfavorable settlement arrangement and is bound by it. Nor is it appropriate to allow the settling defendant to enhance his bargaining based upon the subsequent trial, the consequences of which his agreement was designed to avoid.

Id.

114. N.D. CENT. CODE § 32-38-01(4) (1992). The statute provides that "a tort-feasor who enters into a settlement with a claimant is not entitled to recover contribution from another tort-feasor whose liability for the injury or wrongful death is not extinguished by the settlement nor in respect to any amount paid in a settlement which is in excess of what was reasonable." *Id.* The North Dakota statute is identical to the Uniform Contribution Among Tortfeasors Act. See UNIF. CONTRIBUTION AMONG TORTFEASORS ACT § 1(d), 12 U.L.A. 63 (1975).

115. 364 N.W.2d 62 (N.D. 1985).

116. *Id.* at 65.

117. *Id.* at 63. *Houser* was killed when his tractor-trailer collided with a tractor-trailer driven by Gilbert. Gilbert settled with Fraedrich and Houser. Gilbert and

bert), the trucking company that owned one of the vehicles involved (Fraedrich), and the farmer that owned the sugar beet field (Brakke).¹¹⁸

The plaintiff negotiated a *Pierringer* settlement with Gilbert and Fraedrich for \$250,000. Neither of the two settling defendants was dismissed and both continued to participate at trial to press Fraedrich's claim against Brakke for property damage to his truck. The jury returned a verdict allocating one hundred percent of fault to Brakke, awarding Houser \$378,000 in damages, and awarding Gilbert and Fraedrich \$47,000.¹¹⁹ Gilbert and Fraedrich then brought a motion seeking contribution from Brakke for \$250,000, the amount of their *Pierringer* settlement with the plaintiff.¹²⁰

Despite the fact that the jury found Gilbert and Fraedrich bore zero percent of the fault for the accident, and even though both Gilbert and Fraedrich participated as parties at trial, the North Dakota Supreme Court held that the two settling defendants were barred from seeking contribution from Brakke.¹²¹ The court relied on the North Dakota statute in prohibiting the contribution action,¹²² but the decision would have been correct even without the statute.

A post-*Pierringer* verdict is not reduced by the settlement amount but only by the settling defendant's percentage share of fault. Consequently, the plaintiff in *Houser* was entitled to keep the settlement proceeds and also collect one hundred percent of the verdict amount from the nonsettling defendant. This result permitted the plaintiff to recover a total greater than the jury-determined damages, but the result was deemed fair because Brakke, the nonsettling defendant, would be required to pay no more than his jury-allocated share of the verdict (one hundred percent of \$378,000). If the settling defendants had been per-

Fraedrich remained parties against Brakke, seeking property damages to Fraedrich's tractor-trailer. *Id.* at 64.

118. *Id.* at 63. Many other third-, fourth-, and fifth-party defendants eventually became parties to the suit, but their role in the accident has no bearing on the issues arising out of the *Pierringer* settlement. See, e.g., *Houser v. Gilbert*, 389 N.W.2d 626 (N.D. 1986) (concerning insurance coverage issues related to the accident).

119. *Houser*, 364 N.W.2d at 64.

120. *Id.*

121. *Id.* at 65.

122. *Id.* The court noted "in view of our conclusion that [the statute] bars Gilbert and Fraedrich from recovering contribution, we need not determine whether the language of the release they secured . . . would also bar contribution." *Id.* at 66.

mitted to seek contribution from Brakke, he could have ended up paying a total of \$628,000 for the plaintiff's damages. That result would be fatal to the *Pierringer* definition of fairness.

The law should flatly prohibit a settling defendant from bringing a claim for contribution against a nonsettling defendant. When a defendant signs a *Pierringer* release, that defendant signs away the right to seek contribution from the other nonsettling defendants. The law should, however, permit a settling defendant to bring a claim for its own damages against a nonsettling defendant. Signing a *Pierringer* release should not preclude a defendant from continuing a cause of action for damages the defendant has sustained that are the fault of the other nonsettling defendants. The *Houser* court also drew this distinction: Fraedrich could continue his claim against Brakke for damages to his truck,¹²³ but could not seek contribution from Brakke for his settlement with the plaintiff.¹²⁴

b. A Confusing "Maybe": Minnesota

North Dakota has a statute that forbids a settling defendant from seeking contribution from a nondefendant as well as a supreme court decision that clearly applies that rule to *Pierringer* settlements. Neither Wisconsin nor Minnesota has a statute similar to North Dakota's, and their courts have yet to write local versions of *Houser*.¹²⁵ Consequently, the law in both jurisdictions is uncertain. Unfortunately, in Minnesota the law is not only uncertain, it is confusing.

Minnesota law is confusing for at least three reasons.¹²⁶ First, in the best of situations it can be difficult to distinguish between contractual rights to indemnity and contribution from equitable common law rights to indemnity and contribution. A *Pierringer* release creates new contractual rights of indemnity, further complicating matters.¹²⁷ Second, courts sometimes fail to draw clear

123. *Houser v. Gilbert*, 364 N.W.2d 62, 64 (N.D. 1985).

124. *Id.* at 65.

125. With respect to Wisconsin law, see discussion *infra* at note 133.

126. It is probably unfair to blame all the confusion on just three factors. For a discussion of other factors contributing to this wealth of confusion, including Minnesota's own statutory response to contractual indemnity, see Daniel S. Kleinberger, *No Risk Allocation Need Apply: The Twisted Minnesota Law of Indemnification*, 13 WM. MITCHELL L. REV. 775 (1987).

127. The complexity arises because new contractual rights exist between the plaintiff and settling defendant. Questions of indemnity and contribution frequently arise in construction litigation involving breach of contract and negligence claims. Asking ju-

lines between a defendant's right to seek damages for its own injuries and a defendant's right to seek damages for amounts paid in settlement. A *Pierringer* settlement may have no impact on the former, but it should absolutely preclude the latter.¹²⁸ Third, courts have been too quick to turn to pre-*Pierringer*, pre-comparative fault authority when looking for answers to questions about contribution and indemnity following a *Pierringer* settlement.¹²⁹ Principles and considerations that once justified post-settlement contribution and indemnity are simply no longer applicable.

In the days before official approval of *Pierringer* releases, it made sense for Minnesota courts to permit a settling defendant to seek contribution from a nonsettling defendant. For example, contribution was permitted in one case where a defendant negotiated a global settlement with one defendant that also re-

rors to allocate fault in these cases creates indemnity law problems that are positively Byzantine. See, e.g., *Lemmer v. IDS Properties, Inc.*, 304 N.W.2d 864 (Minn. 1980). In *Lemmer*, defendants Waco and IDS settled with the plaintiff prior to verdict. *Id.* The jury exonerated IDS and Waco and allocated 20% of the fault to the plaintiff and 80% to another defendant, Turner. IDS and Waco sought indemnity and contribution from Turner. *Id.* at 866. IDS had a contractual right to indemnity from Turner; Waco did not. *Id.* at 869. Turner attempted to characterize the settlement as a *Pierringer* release and argued that IDS and Waco were barred from attempting to recoup their settlement payments. Brief for Appellant at 19-20, *Lemmer v. IDS Properties, Inc.*, 304 N.W.2d 864 (Minn. 1980) (Nos. 50327, 50463). The court held that both IDS and Waco were entitled to indemnity. *Id.* at 869-70.

128. See, e.g., *Stewart v. Frisch*, 381 N.W.2d 1 (Minn. Ct. App. 1986). *Stewart* arose out of a wrongful death action involving a motorcycle accident. Wayne Denzer was driving a motorcycle when it struck a horse owned by Donald and Mary Frisch. Ricky Stewart, a passenger on the motorcycle, was killed in the accident. The trustee for Stewart's next-of-kin sued Denzer and the Frischs. The trustee negotiated a \$17,500 settlement with Denzer, and the two parties signed a *Pierringer* release in 1982. In 1985, Denzer moved to be dismissed from the lawsuit. The trial judge granted his motion and dismissed Denzer's indemnity and contribution cross-claim against the Frischs. At trial, the jury allocated 80% of the fault to settling defendant Denzer, 20% to decedent Stewart, and none to the Frischs. *Id.* at 1-2. Six years after the accident and two years after the trial, Denzer brought an action for damages against the Frischs. See *Denzer v. Frisch*, 430 N.W.2d 471 (Minn. Ct. App. 1988). The Frischs argued that the earlier jury allocation of fault collaterally estopped the claim. The court of appeals disagreed; "[C]entral to our analysis is that the foregone cross-claim was for contribution/indemnification, not for Denzer's damages." *Id.* at 474. Denzer's complaint in the later action contained no claim for recoupment of the settlement paid to Stewart. Brief for Appellant at 12, *Denzer v. Frisch*, 430 N.W.2d 471 (Minn. Ct. App. 1988) (No. C7-88-871).

129. See, e.g., *Lemmer v. IDS Properties, Inc.*, 304 N.W.2d 864, 868-70 (Minn. 1980). Though *Lemmer* concerned contractual rights to indemnity, much of the court's decision seems to rest on pre-*Pierringer* settlement law. *Id.* at 868-69 (discussing the "common liability rule" which allowed contribution "where both parties were liable to the plaintiff, but where they were not joint tortfeasors.").

leased all other defendants, but the other defendants paid nothing toward the settlement.¹³⁰ Contribution may seem just in situations where the settling defendant has "overpaid," and this overpayment results in some benefit or unjust enrichment to the nonsettling defendant.¹³¹

With *Pierringer* settlements, however, this rationale does not work. The nonsettling defendant must pay its jury-allocated share of the verdict regardless of the dollar amount of the *Pierringer* settlement. *Pierringer* releases are supposed to eliminate the possibility of unjust enrichment of the nonsettling defendant. Consequently, there is no reason to permit a settling defendant to seek equitable contribution or indemnity following a *Pierringer* settlement.¹³² Permitting this kind of claim for contribution exposes a nonsettling defendant to liability for more than its jury-allocated share of fault. This is an outright betrayal of

130. *Samuelson v. Chicago, Rock Island & Pac. R.R.*, 287 Minn. 264, 178 N.W.2d 620 (1970). Defendant Rock Island Railroad settled the entire claim, obtained a general release from the plaintiff, and sued a third-party defendant for contribution to the settlement. The court reasoned that permitting the third-party defendant "to avoid contribution on the ground that Rock Island's liability has not been adjudicated would . . . unjustly enrich third-party defendant, a result which the remedy of restitution upon a claim of either contribution or indemnity was intended to prevent." *Id.* at 624. *But see* *Tefft v. Tefft*, 471 A.2d 790, 795 (N.J. Super. Ct. App. Div. 1983) (holding that settlement by all tortfeasors bars an action for contribution).

131. Problems of unjust enrichment might also warrant contribution in situations in which the amount of the settlement is deducted from the verdict (a *pro tanto* reduction). If the settlement is large enough (or the verdict small enough) and the settlement amount is set-off against the verdict, the nonsettling defendant may end up paying less than its jury-allocated share of the verdict. *See, e.g.*, *Charles v. Giant Eagle Mkts.*, 522 A.2d 1, 2 (Pa. 1987). Contribution is barred in this situation under the Uniform Contribution Among Tortfeasors Act, which was the model for the North Dakota statute discussed *supra* in part II.A.4.a. UNIF. CONTRIBUTION AMONG TORTFEASORS ACT § 1(d), 12 U.L.A. 63 (1975). If the verdict amount defines the plaintiff's "true" damages, unjust enrichment of the nonsettling defendant is not possible in jurisdictions that discount verdicts on a *pro rata* basis. Assume that the plaintiff and the settling defendant negotiate a \$50,000 settlement. The plaintiff proceeds to trial against the one remaining defendant, and the jury awards a total of only \$20,000 in damages. The verdict will be discounted by one half (the settling defendant's *pro rata* share), and the nonsettling defendant will pay \$10,000. The settling defendant may have overpaid, but that overpayment has not resulted in any tangible benefit to the nonsettling defendant.

132. A *Pierringer* release should not, however, extinguish a settling defendant's claims against the nonsettling defendant for damages stemming from the settling defendant's own injuries. Nor should a *Pierringer* release extinguish a settling defendant's independent contractual right to indemnity, should one exist. Both these kinds of claims survive a *Pierringer* settlement. Cautious practice would counsel that the release expressly preserve these claims. The holding in *Denzer*, 430 N.W.2d at 474, however, suggests that the release need not expressly reserve a settling defendant's claim for damages for its own injuries.

the *Pierringer* promise. Both Minnesota and Wisconsin¹³³ should clarify their law concerning contribution and indemnity following a *Pierringer* settlement. As it stands, Minnesota law is an open invitation to error.¹³⁴

B. Problems of Distortion: The Effect of Pierringer Releases on Litigation and Trial

If the world and litigation were ideal, the *Pierringer* settlement would promise that each party will pay damages in accordance with its jury-allocated share of fault. As shown in the previous section, the *Pierringer* settlement cannot make this promise. Instead, the *Pierringer* settlement offers an alternative promise: that the nonsettling defendant will pay no more nor less than its share of fault. Unfortunately, because of the impact that the *Pierringer* settlement has on the litigation and trial process, this promise too is broken. Appellate decisions have offered insufficient guidance regarding the conduct of litigation and trial following a *Pierringer* settlement.

133. A recent Wisconsin Court of Appeals decision may accomplish this. In *Unigard Ins. v. Insurance Co. of N. Am.*, No. 93-1644, 1994 WL 120022 (Wis. Ct. App. Apr. 12, 1994), *Unigard* sought contribution and indemnity for amounts it paid pursuant to a *Pierringer* settlement in another action. Following the trial in that action, the jury determined that the plaintiff's injuries were caused solely by the plaintiff's own fault and the fault of other nonparty tortfeasors. *Unigard* argued it was entitled to contribution and that it had expressly reserved its right to seek contribution and indemnity from other nonsettling tortfeasors in the *Pierringer* release. Stating that "*Unigard* could . . . reserve only what it rightfully and equitably possessed," the Wisconsin court ruled that a *Pierringer* release extinguishes a settling defendant's right to seek contribution and indemnity for amounts paid in settlement from any other tortfeasor, whether a named party or not. *Id.* at *4. The Wisconsin court further noted that permitting a second trial of the same fact situation "would defeat all the salutary effects of *Pierringer* law and frustrate judicial economy." *Id.* at n.6.

134. At least one court may have accepted this invitation. *Alumax Mill Prods. v. Congress Fin. Corp.*, 912 F.2d 996 (8th Cir. 1990) (applying Minnesota law). *Alumax* involved the financial collapse of an aluminum fabricator. *Alumax*, an aluminum supplier, filed a suit for lender and accountant liability. The lender, Congress Financial, filed a separate suit against the two accountants. *Alumax* negotiated a *Pierringer*-type settlement with the two accountants. Citing *Denzer v. Frisch*, the court of appeals held that the settlement had no preclusive effect on the settling accountants. *Id.* at 1012. It is unclear what claims the settling defendants preserved against Congress Financial since the district court dismissed with prejudice the accountants' claims for contribution and indemnity. *Id.* at 1001. The *Pierringer* settlement also should have precluded the accountants from asserting claims for settlement payments in any other suit because Congress Financial suffered no independent harm from the accountants other than by *Alumax's* claims.

The result is that *Pierringer* settlements have distorted litigation and trial in some instances. *Pierringer* settlements create problems at trial due to difficulties surrounding proof of the settling defendant's fault. At a trial following a *Pierringer* settlement, the plaintiff no longer has an incentive to prove the settling defendant's fault, but the remaining defendants do. Unfortunately, problems created by the settlement may undermine the parties' ability to prove the settling defendant's fault or absence of fault. Following a brief overview of the guidance appellate courts have given about the conduct of trial after a *Pierringer* settlement, this section explores the problems of proof these settlements may create at trial.

These problems of proof at trial are the most obvious way *Pierringer* settlements distort the litigation process. However, like a stone dropped in a pond these problems at trial ripple outward. A *Pierringer* release not only disrupts determination of fault at trial, it may also distort the process of discovery. This distortion of trial and discovery may, in turn, create problems affecting settlement. In the backwash of these problems, the *Pierringer* settlement can no longer keep its promise that the nonsettling defendant will pay neither more nor less than its fair share of fault.

1. *Guidance from the Bench*

In the thirty years since *Pierringer v. Hoyer*,¹³⁵ few reported decisions have given much attention to the conduct of litigation and trial following a *Pierringer* settlement. The *Pierringer* decision itself offers little practical guidance to the trial court. *Pierringer* states only that the settling defendant need not participate in trial and that the settling defendant's fault should be included in the special verdict apportionment question.¹³⁶

For specific advice about litigation and trial following a *Pierringer* settlement, a trial judge must turn to the decision in *Frey v. Snelgrove*.¹³⁷ *Frey* offers four specific suggestions for what should be done following a *Pierringer* settlement:

135. 124 N.W.2d 106 (Wis. 1963).

136. *Id.* at 111-12.

137. 269 N.W.2d 918 (Minn. 1978).

1. Lawyers for the settling parties should notify the trial court immediately after the *Pierringer* settlement and have the terms of the agreement made part of the record.¹³⁸
2. The settling defendants should be dismissed following settlement unless the settling defendant must "continue as a party for the limited purpose of defending against the surviving cross-claim."¹³⁹
3. If the settlement is executed during trial, the court should inform the jury that there has been a settlement in order to explain the settling defendant's absence.¹⁴⁰
4. Generally, however, the amount paid in settlement should never be submitted to the jury.¹⁴¹

To a certain extent, each of these suggestions is appropriate, and each is helpful to a trial judge faced with a mid-trial *Pierringer* settlement. Unfortunately, in the fifteen years following the *Frey* decision, there has been virtually no further development in this area of the law.

2. *Problems of Proof at Trial*

Mary Carter releases are held in disrepute largely because of the impact they may have on a trial.¹⁴² Courts disapprove of *Mary Carter* releases because they rob a trial of its adversarial vigor.¹⁴³ The defendant settling pursuant to a *Mary Carter* release works to maximize the plaintiff's recovery from other de-

138. *Id.* at 923.

139. *Id.*

140. *Id.* If settlement occurs before trial, the court has discretion whether to disclose the settlement to the jury. In this situation there is admittedly no sudden and mysterious disappearance of a defendant that needs explanation. If, however, a settling defendant's fault is at issue and evidence of that fault will be introduced at trial, the trial court should disclose the existence of the settlement to the jury. Without this disclosure, the jury will be left to guess why the settling defendant is not in court. See *Mujwid v. Gillis*, No. C3-92-2461, slip op. at 3 (Minn. Ct. App. May 11, 1993) (finding that the fault or negligence of the settling defendant should be submitted to the jury where the record contains evidence of its fault or negligence). For an eloquent dissent to the rule of disclosure by a recent commentator, see Riley, *supra* note 110, at 30.

141. *Frey*, 269 N.W.2d at 923.

142. See *supra* notes 50 through 63 and accompanying text for a discussion of the use of *Mary Carter* releases.

143. See *Corn Exch. Bank v. Tri-State Livestock Auction Co.*, 368 N.W.2d 596, 599 (S.D. 1985); *Degen v. Bayman*, 200 N.W.2d 134, 139 (S.D. 1972); *City of Houston v. Sam P. Wallace & Co.*, 585 S.W.2d 669, 674 (Tex. 1979).

defendants.¹⁴⁴ This ostensibly leaves jurors bewildered and unable to “correctly” apportion fault.¹⁴⁵

Although courts have been quick to comment on and criticize the problems *Mary Carter* releases create at trial,¹⁴⁶ they have given scant attention to the similar problems *Pierringer* releases may create.¹⁴⁷ Unfortunately, *Pierringer* settlements may also rob a trial of at least a portion of its “adversary vigor.” This happens for two reasons. First, like *Mary Carter* releases, *Pierringer* settlements create an incentive for participants at trial to take positions contrary to those the jury would expect. Second, *Pierringer* settlements may deprive the jury of much of the evidence concerning the settling defendant’s liability.

a. Who Will Prove the Settling Defendant’s Fault?

Following a *Pierringer* settlement, a plaintiff no longer has any incentive to prove the settling defendant’s fault. Recalling our hypothetical with the bowling plaintiff, assume that the plaintiff settles with the ball-return manufacturer. The jury will consider the manufacturer’s fault in its special verdict, and the plaintiff has an interest in seeing that the percentage of fault allocated to the manufacturer is as small as possible. If the jury allocates one hundred percent of fault to the settling manufacturer, the plaintiff will recover nothing from the nonsettling defendants. If the jury allocates zero percent of fault to the settling manufacturer,

144. See *supra* note 8 and accompanying text.

145. Once again we face the metaphysical issue of what the “correct” apportionment of fault might be. Is a fault allocation determined by a jury somehow more fair than a fault allocation arrived at through settlement negotiation? What is meant by “fair”? A fault allocation is fair if it is the same as the allocation the jury would have made had there been no settlement. This is my definition. It is also the definition appellate courts implicitly adopt when making the *Pierringer* promise—the *Pierringer* release is fair because the nonsettling defendant will pay no more or less than its jury-allocated share of fault. This promise only has substance if it means the nonsettling defendant will pay no more or less (or not a whole lot more or less) than it would have absent the settlement.

146. See *supra* note 53 and accompanying text.

147. The effect *Pierringer* releases may have on trial has not gone completely unrecognized. In his seminal article on *Pierringer* releases, Simonett warned:

The *Pierringer* release may place the non-settling tortfeasor at a tactical disadvantage, but this does not taint the release’s validity. . . . Also, the non-settling tortfeasor finds himself no longer able to cross-examine the settling tortfeasor as an adverse party. . . . He can attempt to place the blame for the tort on the settling tortfeasor who is no longer defending himself, except to the extent plaintiff’s counsel indirectly assumes his defense.

Simonett, *supra* note 6, at 21-22.

the plaintiff will recover its judgment from the bowling alley and also keep the settlement proceeds from the manufacturer.

Following the *Pierringer* settlement between the plaintiff and the ball-return manufacturer, the bowling alley has an incentive to prove the manufacturer's fault. The bowling alley wants the jury to allocate as large a share of fault as possible to the manufacturer because this will work to reduce the bowling alley's own share of fault.¹⁴⁸ If the bowling alley fails to introduce evidence of the manufacturer's fault, then the trial judge may direct a verdict in favor of the manufacturer.¹⁴⁹

In other words, a *Pierringer* release does more than simply give the bowling alley owner the *incentive* to prove the fault of the manufacturer. The *Pierringer* settlement transfers to the remaining defendant the *burden to prove* the settling defendant's fault. If the remaining defendant fails to meet that burden, the trial court can direct a verdict against the settling defendant and strike that defendant's name from the special verdict list of parties to whom the jury will allocate fault.¹⁵⁰

Whether the nonsettling defendant is easily able to meet this burden of proof depends on two factors: (1) the timing of the *Pierringer* settlement; and (2) the nonsettling defendant's trial strategy. Suppose our hypothetical bowler negotiates a *Pierringer* settlement with the manufacturer well before trial. Because of

148. The bowling alley has a second alternative to reduce its share of fault. The bowling alley could also attempt to prove that the plaintiff is at fault for her own accident. If this has been the alley's strategy all along, if the alley planned on conceding—or actively arguing—that the manufacturer was not at fault, then the *Pierringer* release will have no adverse impact on the bowling alley's strategy.

149. *Independent Sch. Dist. No. 622 v. Keene Corp.*, 495 N.W.2d 244, 250 (Minn. Ct. App. 1993) (reasoning that "given Keene's failure to introduce evidence sufficient to justify sending the question of the codefendants' fault to the jury, the trial court properly declined to instruct on this issue"); *see also Nelson v. Trinity Medical Ctr.*, 419 N.W.2d 886, 890 (N.D. 1988) (holding that, in a medical malpractice case, the trial judge's refusal to submit the fault of settling doctors to the jury was not erroneous because the nonsettling hospital had failed to introduce evidence of the doctors' fault).

150. If the nonsettling defendant introduces no evidence of the settling defendant's fault, the plaintiff should affirmatively request that the fault of the settling defendant not be submitted to the jury. If the plaintiff fails to object to submission of the settling defendant's fault, then the court will include the settling defendant in the allocation question. The jury is apparently then free to allocate fault to that defendant, and this allocation will not normally be disturbed on appeal. *See Bloom v. Hydrotherm, Inc.*, 499 N.W.2d 842, 845-46 (Minn. Ct. App. 1993).

Likewise, an appellate court ought not reverse a trial judge's decision not to submit a settling defendant's fault to the jury if the remaining defendant failed to object at the time. *See Fire Ins. Exch. v. Adamson Motors*, No. C7-93-1680, 1994 WL 120025 (Minn. Ct. App. Apr. 12, 1994).

the advance notice of settlement, the bowling alley can accordingly plan to prove the manufacturer's fault at trial.¹⁵¹ Conversely, if the settlement is made during trial, the nonsettling defendant may be caught by surprise and have to dramatically alter its trial strategy.¹⁵² Suppose the bowling alley planned to defend by focusing on the plaintiff's own conduct, claiming that the ball-return was in safe working order and the accident was completely the result of the plaintiff's carelessness. The bowling alley now has two choices. First, it can change its strategy in mid-trial, which may be difficult to do without damaging its credibility with the jury. Second, it can allow the case to proceed without presenting any evidence against the manufacturer and hope that the jury is persuaded that the plaintiff is principally at fault.¹⁵³

If the nonsettling defendant presents evidence of the settling defendant's fault, then the plaintiff finds itself in an awkward position. Unless the plaintiff allows that evidence to come in uncontested, it will have to offer proof exonerating the settling defendant. In other words, if the bowling alley submits evidence of the manufacturer's fault, the plaintiff must offer rebuttal evidence that the manufacturer was innocent of fault. Since the plaintiff sued and settled with the manufacturer, the jury may have trouble accepting this evidence and the jury may doubt the plaintiff's credibility.¹⁵⁴

151. As argued in the following section, this may not be as easy as it would be if the manufacturer were still a party to the suit.

152. It seems reasonable to believe that a significant proportion of *Pierringer* settlements are negotiated on the eve of trial or during trial. By my calculations, of the 48 most recent Minnesota court of appeals decisions indicating the timing of *Pierringer* settlement in the case, one-fourth indicate that the settlement occurred at trial or immediately before.

153. Has settlement changed anything if the bowling alley simply follows its planned strategy and presents evidence of the plaintiff's fault? Settlement has increased the risk associated with the bowling alley's strategy. If no evidence against the manufacturer comes in, then the jury will not have the opportunity to allocate fault to the manufacturer. If the strategy fails and the jury is persuaded that the plaintiff is not at fault, then 100% of fault may be allocated to the bowling alley. If the manufacturer were still at trial, the plaintiff would have an incentive to present evidence of the manufacturer's fault, and the jury might allocate some fault to the manufacturer. In short, absent settlement, there is another party to whom the jury may allocate fault in case the defense strategy fails.

154. So what? Don't plaintiffs deserve this problem? In situations where plaintiffs settle with defendants who may bear a substantial share of fault for the damages, we can criticize the plaintiffs' strategy and say that they have created a problem they deserve. If plaintiffs, however, believe they do not have the ability to introduce credible evidence minimizing the settling defendant's fault, then plaintiffs may decide not to settle. The

In short, a *Pierringer* settlement realigns interests at trial in somewhat the same manner that a *Mary Carter* settlement realigns those interests. After a *Pierringer* settlement, defendants may have an unexpected incentive to present evidence against one another, and plaintiffs may face the challenging prospect of defending settling tortfeasors.

b. How Will the Settling Defendant's Fault be Proved?

Pierringer releases realign the interests of litigants. This realignment may not only be contrary to what many jurors perceive as the natural interests of the remaining parties, but also may be contrary to a party's own interest in forming its trial strategy. Even in the best of situations, it may be awkward for the plaintiff and remaining defendants to prove or disprove the settling defendant's fault. Unfortunately, trials are seldom the best of situations. Frequently, proof of the settling defendant's fault is not simply awkward, it is nearly impossible. When a *Pierringer* settlement is reached, a great deal of evidence about a settling defendant may evaporate.

i. Loss of Plaintiff's Evidence

First, the plaintiff's own evidence implicating the settling defendant may never reach the jury. Let us return to our hypothetical with the bowling alley. Following the settlement with the ball-return manufacturer, the plaintiff no longer has any incentive to present evidence of the manufacturer's fault.¹⁵⁵ This evidence would reduce the plaintiff's recovery from the bowling alley. To be sure, the bowling alley will want to prove the manufacturer's fault. The alley, however, will not have equal access to the plaintiff's expert testimony—probably the most important evidence implicating the manufacturer. If the plaintiff's expert has been deposed, then the bowling alley can introduce the dep-

justice system favors settlements—even piecemeal settlements—so the structure of trial following a *Pierringer* settlement should not discourage settlement. Remember, also, that the *Pierringer* promise is that the nonsettling defendant will pay neither more nor less than its share of fault. If the bowling alley can introduce uncontradicted evidence of the settling manufacturer's fault, then the bowling alley may end up paying less than its fair share of the plaintiff's damages.

155. Actually, the plaintiff has almost no incentive to present this evidence. The plaintiff may choose to introduce some evidence of the settling defendant's fault simply to avoid a loss of credibility with the jury. In particular, if the plaintiff's testifying experts opined on the settling defendant's fault in earlier reports, the plaintiff may want the experts to testify about this to avoid impeachment on cross-examination.

osition. If there is no deposition, the alley owner may have to rely on the expert's written report or responses to interrogatories. All of this is a poor substitute for live testimony.

ii. Absence of the Settling Defendant

Unlike the situation following a *Mary Carter* agreement, once the ink has dried on the *Pierringer* release, the settling defendant disappears from trial. Some courts have held that a settling defendant's absence is simply not a problem.¹⁵⁶ This view seems myopic. In all likelihood, the settling defendant will be the best source of information about its own fault or lack thereof.

In our hypothetical, the bowling alley may well believe that close questioning of the manufacturer or its employees is critical to prove the manufacturer's fault. The manufacturer's testimony may also be the best evidence the plaintiff has of the manufacturer's absence of fault. The remaining parties to the litigation have a legitimate interest in introducing the settling defendant's testimony and the jury needs to hear that testimony in order to apportion fault among all the parties. As other courts have recognized, determination of an absent party's fault "may well lack the vigor and clarity which would be present if the absent party were actually in the litigation."¹⁵⁷

156. See, e.g., *Young v. Verson Allsteel Press Co.*, 524 F. Supp. 1147, 1152 (E.D. Pa. 1981). The plaintiff in *Young* settled with defendant Verson pursuant to a "Griffin" release—a Pennsylvania form of release similar to a *Pierringer* release. The nonsettling defendant, Federal Pacific Electric, objected to the settlement on the grounds that it would be prejudiced if Verson were absent from trial. *Id.* at 1148. Relying on the decision in *Pierringer*, the Pennsylvania court stated:

It is simply a *non sequitur* to maintain, as Federal does, that without the presence of Verson, the factfinder cannot determine the extent of Federal's comparative negligence vis-a-vis Young. Nothing prevents Federal from introducing whatever probative evidence of Verson's culpability it may otherwise have offered with Verson present at trial.

Simply put, there is no practical economic benefit that will inure to Federal from Verson's presence. The potentially dramatic effect of pointing at an acquiescent defendant is not a sufficient reason to force Verson to bear the additional expense of appearing at trial after settling with plaintiff and after signing a release that provides Federal with all the economic benefits which Federal could have achieved after a trial in which Verson was present.

Id. at 1152 (footnote omitted).

157. *Bowman v. Barnes*, 282 S.E.2d 613, 620 (W. Va. 1981). *Bowman* involved a question of whether absent tortfeasors should be included in the jury's allocation of fault. Although the decision looks to *Pierringer* for some guidance, *Bowman* did not arise out of an absence due to settlement. *Id.* at 620. See also, *Gaulden v. Burlington Northern, Inc.*, 654 P.2d 383, 391 (Kan. 1982). *Gaulden* involved a *Pierringer* settlement. The majority held that the settling defendant's fault should have been submitted to the jury

In some situations, absence of the settling defendant is a problem easily solved. If the settling defendant is within the court's subpoena power, any of the remaining parties can compel the settling defendant to appear and testify at trial.¹⁵⁸ Returning to our bowling hypothetical, the settling defendant is the manufacturer, an out-of-state corporation. If the trial judge dismissed the manufacturer from the lawsuit, as would occur following most *Pierringer* settlements, the manufacturer and its employees may be beyond the court's subpoena power. In these situations, it is reasonable to expect that the remaining parties will have deposed the manufacturer's key employees. Although these depositions can be used at trial,¹⁵⁹ a deposition is a poor substitute for live testimony. The jury will be left to decide the fault of

following the *Pierringer* settlement, but that settling defendant was properly dismissed from the litigation. *Id.* at 392. The concurring justice contended:

[T]he railroad [the remaining defendant] is entitled to have James [the settling defendant] remain as a party in the lawsuit regardless of James' settlement with the plaintiff. This permits all issues of liability and damages to be litigated within the context of the original lawsuit where all potentially responsible parties are available. Whether James continues to retain counsel to represent him as a party in the action, however, is a matter entirely within his discretion.

Id. at 395. See also, *Gross v. Midwest Speedways, Inc.*, 260 N.W.2d 36, 44 (Wis. 1977) (dissent).

158. At trial, the plaintiff and the remaining defendants will all be able to examine the settling defendant. At least one authority has suggested, however, that the party calling the settling defendant will be unable to cross-examine the witness. See Simonett, *supra* note 6, at 21 & n.99 (citing MINN. R. CIV. P. 43.02). Rule 43.02 permits cross-examination of not only the hostile or adverse witness, but also of "a witness identified with an adverse party." MINN. R. CIV. P. 43.02. Most often, this means that an employee or agent of the adverse party may be cross-examined. *But see* Hemze v. County of Renville, 255 Minn. 115, 117, 95 N.W.2d 596, 597 (1959) (concluding that since the county is not an "adverse party" under Rule 43.02, its employee is not subject to being called for cross-examination). However, trial judges have wide discretion as to when cross-examination is warranted, and "[a]ll that need be established is that the relationship between the witness and the adverse party is such that the witness appears to have sufficient interest in the litigation so as to be identified with the adverse party." 2 DAVID F. HERR & ROGER S. HAYDOCK, MINNESOTA PRACTICE, CIVIL RULES ANNOTATED § 43.7 (2d ed. 1985 & Supp. 1993). In most trials following a *Pierringer* settlement, the remaining defendant will attempt to establish the settling defendant's fault and the plaintiff will attempt to minimize that fault. In this type of situation, it makes good sense for a trial judge to exercise discretion and permit the remaining defendant to cross-examine the settling defendant.

159. MINN. R. CIV. P. 32.01(c)(2). This Rule permits a party to use the deposition of an out-of-state witness "unless it appears that the absence of the witness was procured by the party offering the deposition." *Id.* In a sense, the plaintiff's decision to settle procures the absence of the settling defendant. Should this bar the plaintiff from introducing the deposition? No, unless the remaining defendant can show that the settlement was negotiated principally to procure the absence of the settling defendant.

a party never seen and assess the credibility of witnesses never heard.

iii. Absence of the Settling Defendant's Experts

From a plaintiff's standpoint, the most important evidence lost following a *Pierringer* settlement may well be the testimony of the settling defendant's experts. In many cases, the most potent evidence rebutting a settling defendant's fault will be that defendant's own expert testimony. Once the plaintiff and the settling defendant have reached agreement, the burden of proving the settling defendant's fault passes to the remaining defendants. For example, in our hypothetical, after the plaintiff settles with the manufacturer, the bowling alley will attempt to prove the manufacturer's fault. The plaintiff, in turn, will have both the incentive and responsibility for rebutting whatever proof the bowling alley offers. Otherwise, the plaintiff will find its recovery reduced because a portion of the fault is allocated to the manufacturer.

As argued above, a *Pierringer* settlement at or near trial may catch the remaining defendants off guard. In our hypothetical, it is possible that the bowling alley will have no expert of its own to testify about the manufacturer's fault. It is virtually certain, however, that the plaintiff will have no expert of her own to rebut testimony about the manufacturer's fault. Our plaintiff cannot hire a "backup" expert who will be available to testify, in the event of settlement, that the manufacturer's product was not defective after all. A plaintiff cannot develop evidence exonerating a defendant.¹⁶⁰ The one and only source of expert opinion supporting a settling defendant will likely be the settling defendant's own experts. Must a party simply forego all expert testimony proving the settling defendant's fault? Following the *Pierringer* settlement, our plaintiff has three possible avenues to this testimony.

The first avenue is through the settling defendant itself. The settling defendant may be willing to allow the plaintiff access to its experts before and during trial, in effect permitting the plain-

160. Why not? Because, assuming that no *Pierringer* settlement is made before trial, the plaintiff cannot be certain it will be able to settle with a particular defendant. Consequently, to survive summary judgment of its claims, a plaintiff must develop a prima facie case against each of the defendants. Development of evidence favorable to any one defendant would effectively scuttle the plaintiff's own claims against that defendant, as well as the plaintiff's ability to negotiate a settlement with that defendant.

tiff to hire those experts. If so, then the plaintiff and settling defendant can make this arrangement part of their *Pierringer* settlement.¹⁶¹ Without the settling defendant's agreement, however, the attorney work product doctrine may bar the plaintiff from obtaining access to these experts.¹⁶² If settling defendants were routinely willing to allow plaintiffs access to their experts, this problem would be solved. It is unrealistic to expect, however, that defendants will always be so accommodating. It is easy to imagine situations in which a defendant would be reluctant to permit plaintiff's counsel ready access to an expert. In most product liability cases, as well as many professional malpractice cases, a defendant may have strategically sound reasons for refusing to allow a plaintiff to have access to its experts.¹⁶³

The second avenue to the settling defendant's expert testimony is more traditional. If the expert has been deposed, the plaintiff may simply introduce the deposition transcript. Ideally, the plaintiff will have anticipated the possibility of settlement and will have obtained a videotaped deposition of the expert. If there is no deposition, the plaintiff will have to rebut expert testimony of fault with the settling defendant's expert witness reports or interrogatory responses that were sent to the plaintiff. In all likelihood, these reports or interrogatory responses will be far less complete and far less compelling than live testimony.¹⁶⁴

161. For example, see the *Pierringer* settlement negotiated between the plaintiff Alumax and the accounting defendants in *Alumax Mill Products, Inc. v. Congress Financial Corp.*, 912 F.2d 996 (8th Cir. 1990), which allowed the plaintiff access to the defendants' experts. Brief of Appellee Alumax Mill Products, Addendum *Pierringer Settlement Agreement* at 7, *Alumax Mill Prods., Inc. v. Congress Fin. Corp.*, 912 F.2d 996 (8th Cir. 1990) ("H & N and McGladrey further agree that Alumax may call, without the necessity of a trial subpoena, any witnesses from H & N or McGladrey, or under their control, including, but not limited to, H & N's or McGladrey's expert witnesses (at Alumax's expense), at trial in this matter.").

162. The experts are employees of the settling defendant's counsel. As such, their work may be protected by the attorney work product doctrine, to the extent it is not discoverable pursuant to the Rules of Civil Procedure. If the expert's opinions are not protected by the attorney work product doctrine, the remaining defendant may subpoena the expert provided that the remaining defendant is willing to pay the expert's regular fees. If the expert is an "in-house" expert—someone whom the settling defendant itself employs—that witness may possibly be classified as a fact witness and then subpoenaed as would be any other fact witness.

163. For example, a product manufacturer will not want to allow plaintiff's counsel access to its experts since counsel may later represent another plaintiff with similar claims against this same defendant.

164. Does this matter? Who cares if the plaintiff is unable to rebut testimony about the settling defendant's fault? Shouldn't the plaintiff have factored that into the settlement? Perhaps, but remember that the argument for fairness of *Pierringer* releases turns

Absence of the settling defendant's experts may present a parallel problem for the remaining defendants. It is possible that the settling defendant developed the best expert testimony about the plaintiff's fault. What happens to that testimony? Once again, the expert's work may be inaccessible because it is protected by the attorney work product doctrine. If the expert has been deposed, the remaining defendant can introduce the deposition.¹⁶⁵ If not, the remaining defendant can attempt to negotiate an agreement with the settling defendant permitting the expert to be called at trial.¹⁶⁶ Absent this kind of an agreement or a deposition, the jury will never hear the testimony of the settling defendant's expert.

iv. Impact of the Loss of Evidence

As Justice Simonett wrote, "The *Pierringer* release may place the nonsettling tortfeasor at a tactical disadvantage."¹⁶⁷ In fact, *Pierringer* releases routinely create tactical disadvantages. After the release, the normal avenues for proof of the settling defend-

on an assumption that the remaining defendants will pay neither more nor less than their fair share of fault. If that is to happen, the jury needs to hear evidence of the settling defendant's fault (otherwise the remaining defendants will pay more than their fair share) and evidence rebutting the settling defendant's fault (otherwise the remaining defendants will pay less than their fair share). One side of the story is not enough. Fairness demands that the jury hear both.

165. The settling defendant may have fewer strategic objections to permitting a co-defendant access to an expert opining on the plaintiff's contributory fault. The defendants' interests in proving the plaintiff's fault are aligned prior to a *Pierringer* settlement. Unlike a *Mary Carter* agreement, the *Pierringer* settlement will not realign those interests.

166. Should a plaintiff be able to use a *Pierringer* settlement to prevent a settling defendant's expert from testifying at trial? Suppose that a plaintiff and a defendant include a provision in their *Pierringer* settlement requiring the settling defendant to assert the work product doctrine to protect the expert's testimony. Suppose that the plaintiff agrees to assume responsibility for the expert's fees—essentially buying the benefits of the protecting doctrine from the settling defendant. Whether these types of provisions should be enforced ought to depend, at least in part, on when the settlement is negotiated. If the remaining defendant has notice of the settlement before the close of discovery, that defendant has a fair opportunity to develop its own expert testimony about a plaintiff's contributory fault. On the other hand, suppose that the settlement occurs during trial, the evening before the remaining defendants expect the settling defendant's expert will testify. The plaintiff and the settling defendant report to the trial judge and the remaining parties that the *Pierringer* agreement has been signed, and that the expert witness—now in the employ of the plaintiff—is on his way to the airport. The trial judge has a number of options: declare a mistrial; grant a continuance; go forward with trial as if nothing has happened; or recall the expert for deposition or trial testimony. Of all the options, the last is best. Plaintiffs and defendants ought not be able to collude to hide witnesses.

167. Simonett, *supra* note 6, at 21.

ant's fault are too often closed. Because of this, juror's may not hear the best—or any—evidence of a settling defendant's fault. Justice Simonett concluded that the tactical disadvantages *Pierringer* releases create do “not taint the release's validity.”¹⁶⁸ Unfortunately, however, this is not always true. When evidence of a settling defendant's fault fails to reach the jury, the jury may well underestimate the settling defendant's share of fault. Some of that fault will be reallocated to the remaining defendant and that remaining defendant can no longer be assured that it will pay no more than its fair share of fault. The *Pierringer* promise has then been broken.

3. Problems during Discovery

The impact that *Pierringer* releases have on the litigation process ripples out from trial. A *Pierringer* settlement may also have a profound effect on discovery. The possibility of a *Pierringer* settlement will cause cautious defendants to change their discovery strategy. Once settlement is a reality, a *Pierringer* settlement changes the way that defendants can conduct discovery.

a. The Means of Discovery

Having signed a *Pierringer* settlement, a settling defendant may be dismissed from the litigation.¹⁶⁹ A party has to respond to interrogatories, requests for production of documents, and requests for admissions;¹⁷⁰ a nonparty does not. Once a settling defendant is dismissed from the litigation, it is no longer compelled to respond to these discovery requests.¹⁷¹

A settling defendant, however, cannot escape discovery altogether. The remaining parties can still obtain information from the settling defendant through depositions and subpoena duces

168. *Id.*

169. *See, e.g.,* Frey v. Snelgrove, 269 N.W.2d 918, 922 (Minn. 1978).

170. *See, e.g.,* MINN. R. CIV. P. 33-34 & 36.

171. Fietzer v. Ford Motor Co., 383 F. Supp. 33, 36 (E.D. Wis. 1974). Plaintiff Fietzer was injured in an auto accident, entered a *Pierringer* settlement with the driver of the other car, and then sued Ford. Ford filed a third-party complaint against the settling driver, who pleaded the release as a defense. Over Ford's objections, the trial judge dismissed the settling driver from the suit. *Id.* at 34.

If the third-party defendants remain as parties to the suit, they will be subject to the more liberal discovery proceedings of a party defendant, and, thus, if they are dismissed, Ford contends it will have lost such discovery advantages. While Ford's claim of prejudice may have arguable substance, the fact remains that the third-party defendants “have bought their peace in any event.”

Id. at 36.

tecum.¹⁷² However effective they may be, depositions are a more narrowly focused mode of discovery. A remaining party may have to conduct several depositions to obtain the same breadth of information discoverable through a document production or a set of interrogatories. *Pierringer* settlements make discovery from a settling defendant more costly and more cumbersome.¹⁷³

b. The Ends of Discovery

Pierringer releases may have yet another effect on discovery that is more troubling and more nebulous. The possibility of piecemeal settlement creates the need for piecemeal discovery. In other words, cautious defendants must recognize and prepare for the possibility that a co-defendant may settle prior to trial. Settlement means that the remaining defendants will inherit the burden, which was previously the plaintiff's, of proving the settling defendant's fault. As such, a defendant must anticipate the necessity and conduct the discovery accordingly to prove this fault. Since any of the co-defendants may settle before trial, the cautious defendant will have to build a case against all other co-defendants as well as the plaintiff.

Building a case against all other defendants means discovery will be longer and more expensive. It means attorneys will take more time crafting theories of co-defendant liability and strategies to prove those theories at trial. It means hiring more experts. Since every other defendant in the lawsuit will be just as cautious, it also means an enormous duplication of effort, time, and money.

The looming possibility of a *Pierringer* settlement does more, however, than multiply the costs of discovery. It also divides the defendants. *Pierringer* settlements make it more difficult for de-

172. See, e.g., MINN. R. CIV. P. 30 & 45.04.

173. See *Hefley v. Textron, Inc.*, 713 F.2d 1487, 1497 (10th Cir. 1983). *Hefley* involved potential defendants who were not parties to the suit because of a claim of immunity, rather than from a *Pierringer* settlement. The defendant argued it was prejudiced because two other potential defendants were not subject to broader party discovery. The court noted that discovery from nonparties is often more expensive and inconvenient. *Id.* The court refused to permit broader discovery from the immune defendants. "A great number of factors, many of them regrettably unrelated to concepts of justice and fairness, influence the assessment of comparative fault. We are not convinced that the more generous discovery allowed from parties inevitably would result in more favorable assessment." *Id.* at 1497 n.2. The court's reasoning is baffling; the court seems to suggest that unfairness in some parts of the tort recovery system may be overlooked simply because other parts of the system are also unfair.

defendants to follow any kind of unified defense strategy.¹⁷⁴ Our hypothetical provides an example of this result. In the hypothetical, the bowling alley and the ball-return manufacturer each face the very real possibility that they may be responsible for proof of the other's fault at trial. Any spirit of cooperation between the defendants may melt away in the face of this possibility. For example, it is difficult to cooperate with a co-defendant when that co-defendant is asking questions at depositions that seem to help the plaintiff. It will also be difficult to cooperate with that defendant when planning discovery strategies, and to cooperate with that defendant during settlement negotiations. In a sense, *Pierringer* releases have facilitated piecemeal settlements at the expense of universal settlements.

4. *Problems Affecting Settlement*

Smart lawyers realize that *Pierringer* settlements create tactical advantages and disadvantages for the remaining parties. Lawyers negotiate *Pierringer* settlements with these considerations in mind. Sometimes, in fact, these tactical advantages and disadvantages may have more impact on the price paid for settlement than on the merits of the claim.¹⁷⁵

Pierringer releases also turn the intuitive logic of settlement on its head. Intuition suggests that the more likely it is that a defendant will be liable for a large share of fault, the greater that defendant's incentive to settle will be. Intuition also suggests that the greater the evidence of a defendant's fault, the greater that defendant's incentive to settle will be. These defendants may have a strong incentive to settle, but a plaintiff would have little incentive to oblige them. When a plaintiff negotiates a *Pier-*

174. Comparative fault also creates some of this difficulty, since it creates an incentive for defendants to place fault on one another. The *Pierringer* settlement heightens the problem, however, because following a *Pierringer* settlement a defendant may have both the incentive and the sole responsibility for proving a settling co-defendant's fault.

175. See, e.g., Robert J. Hauer, Jr., *Pierringer Releases*, DRAFTING SETTLEMENT AND RELEASE DOCUMENTS: STRATEGIES AND TECHNIQUES (MINN. CLE NOTEBOOK) (1989). Mr. Hauer posits a hypothetical situation in which plaintiff passenger "A" suffers \$35,000 of damages while riding with an uninsured motorist. "If you are the attorney representing A, your best scenario is to settle A's claim for substantially more than \$35,000.00." *Id.* at 4. Mr. Hauer then explains how the intersection of law governing *Pierringer* releases and uninsured motorist claims may make this possible. *Id.* See also John E. Simonett (currently Justice Simonett), *Indemnity, Contribution and Limited Releases*, PRODUCTS LIABILITY: BEYOND THE BASICS (MINN. CLE NOTEBOOK) 1 (1979) ("The *Pierringer* release is useful in putting the insurer of the nonsettling defendant in a position to settle or risk a bad faith excess claim.").

ringer settlement with one defendant, the plaintiff hopes that the remaining defendants will find little or no evidence of that settling defendant's fault and the jury will apportion little or no fault to that settling defendant.¹⁷⁶ In other words, plaintiffs want to settle with defendants in a fashion that will create the greatest possible tactical disadvantage for the remaining defendants. The impact that a *Pierringer* settlement has on proof at trial is a boon to savvy plaintiffs and a snare for the unwary.¹⁷⁷

Is this really a cause for concern or simply the inevitable reality of litigation? After all, it is hardly shocking that settlement involves more than just the merits of the claim. The impact that a *Pierringer* release has on trial, discovery, and settlement is cause for concern, however, for at least two reasons. First, as argued in Part IV of this article, our concern may produce tangible benefits. There are realistic solutions to many of the problems that *Pierringer* releases can create. Second, our concern is warranted because *Pierringer* releases were supposed to avoid exactly this type of problem. Courts and commentators lauded the *Pierringer* release because it permitted piecemeal settlement without the drawbacks of the *Mary Carter* agreement. Unfortunately, like a *Mary Carter* agreement, the *Pierringer* release can also distort trial, discovery, and settlement.

IV. AND YOU MAY ASK YOURSELF "WELL, HOW DID I GET HERE?"

Appellate courts have made a promise to nonsettling defendants that, following a *Pierringer* settlement, they will pay neither more nor less than their fair share of fault.¹⁷⁸ If this promise is being broken, why are the appellate courts silent? There are two easy explanations. First, perhaps the problems *Pierringer* releases may create at trial have not come to the attention of the appel-

176. "Ordinarily, unless the sum paid for the *Pierringer* is large, plaintiff will be inclined to settle only with what appear to be peripheral defendants and keep his cause of action against a target defendant." Simonett, *supra* note 6, at 34.

177. The unwary plaintiff may settle with a defendant and then learn at trial that it has lost access to rebuttal evidence necessary to exonerate the settling defendant. With a wealth of accessible discovery available to establish the settling defendant's fault—and none available to rebut—the remaining defendants may be able to convince the jury to allocate an unfairly large percentage of liability to the settling defendant. In this situation, the *Pierringer* promise is broken to the detriment of the plaintiff: the share of fault allocated to the remaining defendants will be smaller than it would have been absent a settlement.

178. See part III.A.1.

late bench. Second, it may be that appellate courts do not feel the broken promise is sufficiently serious to warrant correction. Ultimately, neither of these easy explanations seem correct.

A. *"We Had No Idea": Perhaps the Problems are Hidden*

New laws, whether created by the legislature or the judiciary, are easier to conceive than to implement. Once enacted and applied, new laws are bound to spawn unexpected problems. Why should the law creating *Pierringer* releases be any different? Perhaps the problems *Pierringer* releases pose are especially difficult to predict. Perhaps the appellate courts were simply unable to foresee the practical difficulties of implementing this new form of release. This explanation tempts, but ultimately it does not persuade.

The Minnesota Supreme Court gave official approval to *Pierringer* releases in *Frey v. Snelgrove*,¹⁷⁹ but these releases were hardly new to Minnesota. There is ample evidence that by the time *Frey* was decided in 1978, *Pierringer* releases had been in common use in Minnesota for some time. There is also ample evidence that in 1978 the problems that *Pierringers* could create at trial were not only known to the bar, but also known to the *Frey* court itself.

1. *Appellate Familiarity with Pierringer Releases: Minnesota Law Before Frey v. Snelgrove*

In 1974, four and one-half years before *Frey*, the Eighth Circuit Court of Appeals applied Minnesota law in *Riske v. Truck Insurance Exchange*.¹⁸⁰ The *Riske* court upheld an insured's claim of bad faith failure to settle against its insurance carrier.¹⁸¹ The insurer argued that it could not accept the proffered settlement because Minnesota law permitted contribution between joint tortfeasors, and a covenant not to sue would have exposed its policyholder to later claims by the co-defendant.¹⁸² The Eighth Circuit rejected this argument:

179. 269 N.W.2d 918, 923 (Minn. 1978).

180. 490 F.2d 1079, 1082 (8th Cir. 1974).

181. *Riske*, 490 F.2d at 1086.

182. *Id.* at 1087. The plaintiffs in *Riske* were the owner and operator of a snowmobile. An exchange student from Hong Kong, Cynthia Ngan, was injured while riding the snowmobile, and subsequently brought suit against the Riskes and the snowmobile manufacturer. During trial, Ms. Ngan's attorney made a settlement proposal, and offered to give the Riskes a covenant not to sue if the settlement was accepted. The

[I]t appears that a proper type of release could have been worked out. In fact, during the trial of this case [insurer's] counsel indicated that a proper type of release was known as a "*Pierringer* type release." Therefore, when [the insurer] failed to apprise the [policyholder] of the offer, it was impossible for them to consult their private attorney in order that he might suggest the proper form of release.¹⁸³

The Eighth Circuit did not explain how the policyholder's private attorney would be able to opine that a *Pierringer* release was a "proper form of release" without some authority in the jurisdiction permitting use of *Pierringers*. Nevertheless, *Riske* demonstrates that *Pierringer* releases were at least known and used in Minnesota as early as 1970, the date of trial in *Riske*.¹⁸⁴

The *Frey* decision also indicates that the courts were aware that *Pierringer* releases were already used in Minnesota before the decision in that case. According to the supreme court in *Frey*: "The use of a so-called *Pierringer* release is in accord with Minnesota practice and our law of comparative negligence in tort actions. The bar and trial bench of this state have recently been following the procedures set forth in *Pierringer v. Hoger*."¹⁸⁵ Even more striking is the fact that none of the parties in *Frey*—the

insurer did not tell the Riskes about the settlement offer, claiming that no available form of release would have protected its policy-holder. The insurer also argued that it would have been unethical to accept the settlement offer because it was contingent upon the jury not being told of the settlement. *Id.* The Eighth Circuit held that the insurer's failure to communicate the offer was nonetheless bad faith, because that failure foreclosed the Riskes "from demanding that [the insurer] secure a ruling from the trial judge as to the propriety of such an agreement." *Id.* The need for this contingency illustrates one of the principal difficulties *Pierringer* releases were meant to eliminate.

183. *Id.*

184. *Riske* is not the only case predating *Frey v. Snelgrove* in which a court mentions that a Minnesota party may settle with one of several joint tortfeasors by means of a *Pierringer* release. The Minnesota Supreme Court in *Nebben v. Kosmalski*, 307 Minn. 211, 213 n.1, 239 N.W.2d 234, 236 n.1 (1976), notes that the plaintiff settled with one of the defendants using a *Pierringer* release without offering an opinion about the propriety of *Pierringer* releases. The settling defendant's insurer paid the money remaining on the liability policy. A portion of the remaining insurance proceeds were paid to another claimant apparently in consideration of a dismissal with prejudice of that claimant's suit. The remaining insurance proceeds were held by the court until after trial of the plaintiff's lawsuit, and then were paid out to the plaintiff apparently pursuant to a *Pierringer* release. Interestingly, the *Nebben* jury found that neither the settling defendant nor the nonsettling defendant were negligent. *Id.* at 215, 239 N.W.2d at 237.

185. *Frey*, 269 N.W.2d at 921 (citation omitted). See also Simonett, *supra* note 6, at 3. "In recent years, however, the Minnesota trial bar has been using with increasing frequency a simple and ingenious device called the *Pierringer* release." *Id.* The Simonett article appeared in 1977.

plaintiff, the settling defendants, the nonsettling defendant—felt it was necessary to raise any question about the permissibility of *Pierringer* releases! To be sure, the plaintiff mentioned in passing that “whether or not *Pierringer v. Hogar* [sic] . . . will be followed in this state remains an open question.”¹⁸⁶ The nonsettling defendant’s response to this opening demonstrates how widespread the acceptance of *Pierringer* releases must have been at the time:

*Even if one could seriously maintain that this Court will not be receptive to a Pierringer release, it does not follow that doubts as to the enforceability of such agreements entitle a settling defendant to remain a party to an action in the face of a motion for dismissal by the non-settling defendant.*¹⁸⁷

Simply put, by the time the Minnesota Supreme Court considered the issue, *Pierringer* releases were apparently so widely used in Minnesota that it was impossible for lawyers in the state to “seriously maintain” that the court would not approve their use.

2. *Appellate Familiarity with the Broken Promise: Appeal of Pierringer-created Problems During Trial*

Frey also introduced Minnesota appellate courts to the problems *Pierringer* releases can create at trial. The issue on appeal in that landmark case was not the validity of *Pierringer* releases, but the conduct of trial following a *Pierringer* settlement. The *Pierringer* settlement in *Frey* occurred during trial. Rather than dismissing the settling defendants from the case, the judge permitted them to remain at trial. The lawyer for the settling

186. Brief for Plaintiff-Respondent at 11, *Frey v. Snelgrove*, 269 N.W.2d 918 (Minn. 1978) (No. 47620). Plaintiff mentioned the fact that the question is undecided, but did not raise—much less brief—the issue for the court’s consideration.

187. Reply Brief of Appellant Firestone at 8, *Frey* (No. 47620) (citation omitted, emphasis added). In hindsight, the nonsettling defendant’s decision not to challenge the permissibility of *Pierringer* releases was certainly reasonable. The decision not to challenge the validity of *Pierringer* releases may have had much to do with the Minnesota Supreme Court’s then recent decision in *Pacific Indemnity Co. v. Thompson-Yaeger, Inc.*, 260 N.W.2d 548 (Minn. 1977). In that case, the court cites an earlier Minnesota case, *Gronquist v. Olson*, 242 Minn. 119, 64 N.W.2d 159 (1954), to support the proposition that settlement agreements discharge all parties only if the parties intend the settlement payment to be full compensation for the plaintiff’s injuries; if there is only partial compensation, the plaintiff may pursue the nonsettling joint tortfeasors. *Pacific Indem.*, 260 N.W.2d at 558. That language seems to suggest that the court’s approval of *Pierringer* releases was very nearly a foregone conclusion. On the other hand, neither the parties nor the court in *Frey* make reference to this language or the *Gronquist* case in any discussion of *Pierringer* releases.

defendants cross-examined witnesses and delivered a closing argument following settlement. On appeal, nonsettling defendant Firestone argued unsuccessfully that the trial court's failure to dismiss the settling defendants deprived Firestone of a fair trial.¹⁸⁸

In addition to its contention that the settling defendants should have been dismissed from the case, Firestone presented the *Frey* court with a litany of complaints about the conduct of the trial following settlement.¹⁸⁹ Firestone's appeal raised many of the fundamental questions about the influence *Pierringer* releases can have on trial and fault allocation:

1. Firestone complained that evidence of the settling defendant's fault was presented unfairly.¹⁹⁰ According to Firestone, the plaintiff attempted to rebut evidence of the settling defendant's fault.¹⁹¹ While denying this was a

188. On appeal, the supreme court suggested that in future cases "the trial court should ordinarily dismiss the settling defendant from the case" following a *Pierringer* settlement. *Frey*, 269 N.W.2d at 923. The requirement is not absolute. "A trial court's deviation would not constitute error if those modifications substantially protect the rights of all parties and preserve the adversary process." *Id.* With respect to Firestone's claim, the court stated, "We have examined the record and find no prejudicial error to defendant Firestone." *Id.* at 922. The court had already ruled, however, that under the facts of the case before it, Firestone was precluded from claiming the settling defendants should have been dismissed because Firestone refused to dismiss its own cross-claims with prejudice. *Id.* at 921.

189. Throughout its brief, Firestone attempted to characterize the settlement in *Frey* as a *Mary Carter* agreement rather than a *Pierringer* release. Brief of Appellant Firestone, *Frey v. Snelgrove*, 269 N.W.2d 918 (Minn. 1978) (No. 47620). For example, Firestone stated:

Mary Carter agreements were defined . . . as "basically a contract by which one co-defendant secretly agrees with the plaintiff that, if such defendant will proceed to defend himself in court, his own liability will be diminished proportionately by increasing the liability of the other co-defendants." *Ward v. Ochoa*, 284 So. 2d 385, 387 (Fla. 1973). . . . [A] *Mary Carter* agreement usually has the added elements of secrecy from the jury and continued participation of the settling defendant.

Id. at 20-21. Though not adopted by the supreme court, this characterization was not altogether unreasonable. The agreement in *Frey* provided that any recovery from remaining defendant Firestone, up to the amount of the settlement, would be credited to the settling defendants. *Id.* at 6-7.

190. The plaintiff actually reached a settlement with two defendants. One was the owner of the car involved in the accident, and the other was the driver of the car. At the close of evidence, the trial judge granted the defendant owner's motion for a directed verdict, and the issue of this defendant's negligence was not submitted to the jury. Firestone included this ruling in its bill of errors for its motion for new trial, but did not appeal this issue. Appendix to Brief of Appellant Firestone at A-57, *Frey* (No. 47620).

191. Prior to the settlement, the plaintiff had introduced evidence that the settling defendant was driving faster than the speed limit. After the settlement, Firestone com-

problem at trial in *Frey*, plaintiff did admit “when a settlement is made, it is true that there may be some motive on the part of the parties to slant their testimony—especially where the joint conduct of the settling party and the non-settling defendant combine to cause the accident.”¹⁹²

2. The plaintiff in *Frey* also mentioned additional problems of proof that could arise following a *Pierringer* settlement. If a settling defendant is dismissed, plaintiff argued, “the disappearance . . . affords the remaining defendant a much clearer field to heap the blame on the now-absent party.”¹⁹³
3. Firestone argued that the settlement unfairly shifted the focus of the trial to Firestone’s liability. Following settlement, Firestone became the “target” defendant. Firestone complained that the settling parties set them up. During closing argument, plaintiff’s counsel argued that the defective tire had caused the accident and gave, in Firestone’s words, “a purportedly frank appraisal of a lack of responsibility on the part of . . . [the settling defendants].”¹⁹⁴
4. Firestone complained that the parties to the settlement kept the agreement secret from the court and Firestone, hampering Firestone’s ability to modify its trial strategy. According to Firestone, “The settlement was no doubt verbally entered before . . . plaintiffs had introduced a substantial portion of their testimony regarding damages and before Firestone or the settling defendants even began presenting their evidence.”¹⁹⁵

Firestone raised concerns about the fairness of *Pierringer* releases in three areas: problems of proof, problems of strategy, and problems of settlement. Firestone complained in its brief that the *Pierringer* settlement created problems that deprived Fire-

plained, the plaintiff challenged testimony suggesting that the settling defendant was speeding at the time of the accident. Brief of Appellant Firestone at 46, *Frey* (No. 47620).

192. Brief of Plaintiff-Respondent at 19, *Frey* (No. 47620).

193. *Id.* at 18.

194. Brief of Appellant Firestone at 48, *Frey v. Snelgrove*, 269 N.W.2d 918 (Minn. 1978) (No. 47620). This seems a little disingenuous, doesn’t it? Certainly Firestone must have understood that the plaintiff would focus on the liability of the large, out-of-state, corporate manufacturer that did not settle. The point here, however, is not that Firestone could have anticipated that its liability would become the principal focus of trial; the point is that a *Pierringer* settlement will inevitably cause some shift of focus, and Firestone raised this issue on appeal.

195. Reply Brief of Appellant Firestone at 12-13, *Frey* (No. 47620).

stone of a fair trial.¹⁹⁶ The Minnesota Supreme Court responded by approving the use of *Pierringer* releases in the state, but provided only minimal guidance to trial judges concerned with the conduct of trial following a *Pierringer* settlement.¹⁹⁷

B. "It's Not a Problem": Perhaps the Promise is Not Broken

Appellate courts in Minnesota, Wisconsin, and North Dakota have been largely silent about *Pierringer*-created problems at trial and during discovery. Is it possible that the problems simply aren't very serious? Again, this is an explanation that, although tempting, is ultimately unpersuasive. Though *Pierringer* releases are most prevalent in Minnesota, Wisconsin, and North Dakota, they are also used in other jurisdictions.¹⁹⁸ Confronted with *Pierringer*-created problems of proof and unfairness to the remaining parties at trial, appellate courts in one of those other jurisdictions decided to sharply curtail the use of *Pierringer* releases.

Maine first formally approved the limited use of *Pierringer* releases in 1984.¹⁹⁹ Since that time, however, the Maine Supreme

196. Brief of Appellant Firestone at 8-9, *Frey* (No. 47620). The *Frey* court declined to reach this issue, ruling: "Under the facts of this case, Firestone is precluded from now claiming that the trial court should have dismissed all cross-claims and removed the settling defendants from the lawsuit." *Frey*, 269 N.W.2d at 921. Firestone did not appeal the jury's finding that the tire was defective, nor did Firestone contest the amount of damages the jury awarded. Brief of Appellant Firestone at 46 n.4, *Frey* (No. 47620). Firestone's complaint on appeal was with the jury's allocation of fault. The jury allocated 80% of fault for the accident to Firestone and 20% to the settling defendant driver. Plaintiff's counsel argued in closing that the jury should allocate 35% of fault to the settling defendant driver. The plaintiff suggested this was evidence of the fairness of the trial; Firestone pointed to this as further evidence of the unfairness of the trial. Brief of Plaintiff-Respondent at 16; Reply Brief of Appellant Firestone at 15.

197. The guidance provided may be minimal, but it is still the most complete appellate statement about the conduct of trial following a *Pierringer* release. The absence of additional guidance on conduct of litigation following a *Pierringer* settlement is not so much the fault of the *Frey* decision, but the failure of later appellate courts to complete the framework in *Frey*. Appellate courts in Wisconsin and North Dakota have also turned away from *Pierringer*-created problems, offering little or no guidance to the trial court about solution of those problems. See, e.g., *Bartels v. City of Williston*, 276 N.W.2d 113, 121 (N.D. 1979); *Johnson v. Heintz*, 243 N.W.2d 815, 823 (Wis. 1976). See also *Barlage v. The Place, Inc.*, 277 N.W.2d 193 (Minn. 1979), in which the court paid only scant attention to similar issues concerning the impact of a loan-receipt agreement on trial. The appellant's brief, however, offered considerable criticism of the effect of the settlement agreement on trial. See Brief of Appellant Firestone at 4-11, *Frey* (No. 47620).

198. See, e.g., *Quick v. Crane*, 727 P.2d 1187 (Idaho 1986); *Gaulden v. Burlington No. Inc.*, 654 P.2d 383 (Kan. 1982).

199. *Thurston v. 3K Kamper Ko., Inc.*, 482 A.2d 837 (Me. 1984). Admittedly, Maine's approval of *Pierringer* releases was limited to a narrow set of circumstances.

Court has drastically narrowed the use of *Pierringer* releases. Maine's rationale for retrenchment has been a concern that *Pierringer* releases create unfairness for the parties remaining at trial.²⁰⁰

In *Lavoie v. Celotex Corp.*,²⁰¹ the Maine court held that a defendant settling pursuant to a *Pierringer* agreement should *not* be dismissed from the lawsuit if the nonsettling defendant brought a cross-claim against the settling defendant and objected to the dismissal.²⁰² The court in *Lavoie* was concerned that dismissal would create problems of proof at trial: "We cannot agree that the settlement arrangement has no practical effect on the nonsettling defendant. The practical effect of a nonsettling defendant arguing the question of liability in the absence of the settling defendant is dependent on the circumstances in each case, and cannot be determined in the abstract."²⁰³

Maine subsequently reaffirmed that its statutes usually require a verdict be reduced by the dollar amount of any *Pierringer* settlement. In two separate cases, Maine's supreme court ruled that the amount of the *Pierringer* settlement must be subtracted from the verdict if the jury apportioned any fault to the settling defendant or if the trial judge dismissed the settling defendant and its fault was not submitted to the jury.²⁰⁴ Each of these decisions

Maine statutory law provides that a plaintiff's verdict should be reduced by the amount of any prior settlement with "persons causing the injury." ME. REV. STAT. ANN. tit. 14, § 163 (1980). Since the jury did not apportion any fault to the settling defendant in *Thurston*, the court reasoned that the settling defendant was not a person "causing the injury," and declined to reduce the verdict by the amount of the settlement. *Thurston*, 482 A.2d at 842.

200. For a post-*Thurston* critique of the need for *Pierringer* releases in Maine, see John W. Bernotavicz, *The Pierringer Question*, BAR BULL. (Me. State Bar Ass'n), July 1985, at 157.

201. 505 A.2d 481 (Me. 1986).

202. *Id.* at 483.

203. *Id.* *Lavoie* effectively put an end to an innovative approach proffered by a federal judge. In *Stacey v. Bangor Punta Corp.*, 108 F.R.D. 72 (D. Me. 1985), the trial judge permitted the nonsettling defendant to choose whether or not to submit the fault of the settling defendant to the jury for apportionment. *Id.* at 76. If the remaining defendant chose to submit the fault, then the verdict would be reduced by the percentage share of fault. If the remaining defendant chose not to submit the fault, then the verdict would be reduced by the dollar amount of the settlement. *Id.* The passing of the *Stacey* approach is to be mourned, if only because it creates such interesting problems of trial strategy.

204. See *Hewitt v. Bahmueller*, 584 A.2d 664, 666 (Me. 1991); *Clockedile v. Town of Yarmouth*, 520 A.2d 1075, 1077 (Me. 1987). In *Hewitt*, the nonsettling defendant's cross claims against one of the settling defendants were dismissed, so the trial judge did not submit that settling defendant's fault to the jury. *Hewitt*, 584 A.2d at 666. Nonethe-

further reduced the incentive for parties to use *Pierringer* releases when settling multi-party litigation.

Maine recently expanded a remaining defendant's right to object to dismissal of a settling defendant following a *Pierringer* agreement.²⁰⁵ The court in *Petit v. Key Bancshares of Maine*²⁰⁶ held that a trial judge "may not enter a *Pierringer* order extinguishing the contribution claims of a nonsettling defendant, whether they are inchoate or asserted in a pending cross-claim, over the objection of the nonsettling defendant."²⁰⁷ The *Petit* decision effectively eliminates *Pierringer* releases in Maine and leaves little doubt as to why Maine's supreme court decided to write an end to their use of *Pierringer* releases in that jurisdiction.²⁰⁸ Reviewing the rationale of the *Lavoie* decision, the *Petit* court wrote, "[W]e were mindful of the distortion of the adversarial relationships that invariably accompanies *Pierringer* releases."²⁰⁹

Maine chose to eliminate *Pierringer* releases. Here in Minnesota and Wisconsin, at the wellspring of *Pierringer* releases, that decision may seem like an overreaction. The fact remains, however, that the problems *Pierringer* releases can create during litigation and trial are serious enough to have convinced one appellate court to effectively do away with *Pierringer* releases altogether.²¹⁰

C. *Well Then, How Did We Get Here?*

As reflected by its decisions, it is clear that Maine's supreme court was deeply troubled by *Pierringer*-created problems of fairness. It is impossible to be certain why appellate courts have not offered more guidance about proof of fault following settlement.

less, the amount of the plaintiff's settlement with that defendant was deducted from the verdict. *Id.*

205. See *Petit v. Key Bancshares of Me., Inc.*, 614 A.2d 946, 948 (Me. 1992).

206. *Id.*

207. *Id.*

208. Neither the plaintiff nor the settling defendant have any incentive to negotiate a *Pierringer* agreement. The plaintiff's verdict will be reduced by the dollar amount of the settlement (unless the jury considers the settling defendant's fault and apportions zero percent to the settling defendant). The settling defendant will still be required to attend trial.

209. *Petit*, 614 A.2d at 947.

210. *Id.* at 948. If Maine's decision seems like an overreaction, it is also worthwhile to remember that the problems that prompted Maine to take this step are not so different from the problems that prompted other jurisdictions to ban *Mary Carter* agreements. See, e.g., *Elbaor v. Smith*, 845 S.W.2d 240, 250 (Tex. 1992).

In a dissenting opinion written in 1977, a Wisconsin Supreme Court Justice complained:

. . . [T]here are difficulties in having the jury allocate fault to persons who are not parties. . . . Writers in the field of comparative negligence have paid some attention to this problem of proof of negligence of multi-tortfeasors some of whom are not parties, but courts have been relatively silent. . . . I understand the majority's reluctance to deal with this issue, but we must start establishing guidelines for the sake of the bench, the bar and the public.²¹¹

Nearly two decades later, it is harder to understand the continuing silence on this issue. Discussion of that silence is necessarily speculative. It is speculation that is worthwhile, however, if it helps build a fuller understanding of how problems in the law can take root and spread.

1. *It's Just a Trial*

Perhaps our appellate courts believe that problems of fairness at trial are best left to trial judges. Appellate courts are traditionally reluctant to second-guess the trial process. In theory, our system affords the trial judge enormous discretion over the trial process. In a sense, appellate courts want no part in the actual conduct of trial.²¹² Given this division of labor, perhaps it makes sense that appellate courts are silent on problems of proof at trial. If *Pierringer* releases create problems at trial, shouldn't correction of those problems rest with the trial judges?

At times, however, it seems as if appellate courts are motivated by more than simple deference to the trial bench. At times, appellate courts appear motivated by a desire to distance analysis of the law from the trial process. We need look no further than *Pierringer v. Hoger*²¹³ itself to find the seeds of this phenomenon:

The determination of this issue [liability] between the plaintiff and the nonsettling defendant does not require the settling

211. *Gross v. Midwest Speedways, Inc.*, 260 N.W.2d 36, 44 (Wis. 1977) (Abrahamson, J., dissenting). *Gross* did not involve a *Pierringer* settlement, but Justice Abrahamson raised this concern in the context of a discussion about the *Pierringer* case. *Id.* at 42.

212. For example, evidentiary rulings and jury instructions present likely opportunities for an error of law at trial. If no objection is made at the time of trial, however, an erroneous evidentiary ruling or jury instruction will usually not be disturbed on appeal. *See, e.g.*, *State v. McMorris*, 373 N.W.2d 593, (Minn. 1985) (holding that failure to object to the trial court's handling of a jury request to review evidence results in forfeiture of the right to appeal any error).

213. 124 N.W.2d 106, 112 (Wis. 1963).

defendants to remain parties because the allocation, if any, of the causal negligence to the settling tort-feasors is merely a part of the mechanics by which the percentage of causal negligence of the nonsettling tort-feasor is determined.²¹⁴

Those mere “mechanics” are known by another name—trial and litigation. The work that lawyers, judges, and jurors must do to allocate comparative fault both before and during trial is anything but “mere mechanics.” Implementation of the law is more than a simple, mechanical process. Like it or not, trial, with all of its uncertainties and vagaries, is as much a part of our tort system as the comparative fault statute.²¹⁵

2. *Unfairness Works*

There may be another, more troubling explanation for the appellate silence on this issue. The unfairness of a *Pierringer* settlement serves the system well. Following a *Pierringer* settlement, particularly at or near trial, the remaining parties may find it very difficult to either prove or rebut the fault of the settling party.²¹⁶ Left uncorrected, these difficulties may create an overwhelming incentive for the remaining party suffering the tactical disadvantage to agree to settlement.²¹⁷ In short, *Pierringer* releases not only make piecemeal settlement easy, they also make

214. *Id.*

215. For another illustration of this phenomenon, see *Hefley v. Textron, Inc.*, 713 F.2d 1487 (10th Cir. 1983). That case raised questions about problems of proof and discovery that were essentially identical to *Pierringer*-created problems, though the defendant was missing from the case due to immunity rather than settlement. Private Tommy Hefley was injured in a helicopter crash and he sued Textron, the manufacturer of the helicopter. Textron, in turn, filed a third-party complaint against the United States, among others. The circuit court held that the United States was immune from suit, but agreed that its fault should be submitted to the jury anyway, so that remaining defendant Textron would be liable only for its own share of fault. So far, so good. Textron also requested that the United States not be dismissed as a party so that Textron could serve document requests and interrogatories on the government in order to establish that fault. The circuit court balked:

[T]o any extent that inclusion of the United States as a party would allow more extensive discovery, which presumably would provide evidence that would persuade the jury to assign a lesser degree of fault to Textron, we conclude that the effect on the outcome of the case is trivial. In no event will Textron be liable for more than its proportionate share of fault.

Id. at 1497. The holding here is astonishing, and is tantamount to saying simply “since the remaining defendant will pay what it will pay, the result must be fair.” Appellate courts should not ignore the fact that the process of trial plays a part in determining the outcome of a case.

216. See generally discussion in part II.B. *supra*.

217. If the fault of the settling defendant will be difficult to prove, then the remaining defendant is the party at a tactical disadvantage. If, on the other hand, the fault of

the trial after the settlement very difficult indeed. If trial promises to be difficult, the remaining parties will also likely settle. In a system that favors settlement, this incentive is seen as a blessing. As one trial judge stated: "The policy of encouraging settlement outweighs the prejudice, if any, which the dismissal of the settling tort-feasor may occasion to the remaining parties."²¹⁸

This concept undermines our notion of judicial process. It is simply unjust to permit unfairness to serve as the driving engine of settlement. If nothing else, this concept wholly betrays the *Pierringer* promise. Moreover, as argued in the next section, it is possible to take simple steps to correct some of the problems associated with trial following a *Pierringer* settlement and still preserve incentives for remaining parties to settle.

V. INTO THE BLUE AGAIN, NOW THAT THE MONEY'S GONE

What then is to be done? It can be argued that *Pierringer* releases do not work, but it cannot be denied that they work better than *Mary Carter* releases or covenants not to sue. Absent fundamental revisions in tort law, we seem to be stuck with *Pierringer* releases. Is there some way to fix *Pierringer* settlements so that they no longer undermine the fairness of the litigation and trial that may follow settlement?

A better solution may be to attempt to fix the litigation and trial after the *Pierringer* settlement. In essence, we need to reshape postsettlement litigation in a way that protects the non-settling parties' access to information without jeopardizing the settling defendant's need for repose. To strike this balance, we will need the help of the trial bench. In cases involving a *Pierringer* settlement, judges will have to oversee discovery and trial to ensure that the jury has a reasonable basis for the apportionment of fault to the settling defendant. This means making minor changes in the role of the judge, as well as more significant changes in the settling defendants' use of discovery, the use of expert witnesses, and the conduct of trial.

the settling defendant is difficult to rebut, then the plaintiff suffers the tactical disadvantage. Either way, the *Pierringer* promise is broken.

218. *Fietzer v. Ford Motor Co.*, 383 F. Supp. 33, 36 (E.D. Wis. 1974). The court in *Johnson v. Heintz*, 243 N.W.2d 815 (Wis. 1976), said much the same thing: "Unfortunate effects from a viewpoint of trial tactics may or may not result to the nonsettling codefendants, but these incidences do not constitute a legally cognizable bar to the release, which is facilitating a policy of reducing litigation and stimulating accord." *Id.* at 823.

A. *Early Notice of Settlement*

Without notice of settlement, the court and the remaining parties will find it impossible to make the changes during litigation and trial necessary to enable the jury to fairly allocate the fault. Delay in notice can substantially hamper the nonsettling defendants' ability to conduct effective discovery and plan for trial. Most jurisdictions require parties to a *Pierringer* settlement to notify the court and other parties of the settlement; Minnesota requires the court and the other parties to "be immediately notified."²¹⁹ Trial judges need to clarify, however, what "immediate notice" means.

If the *Pierringer* settlement occurs during discovery, parties to the settlement should be required to notify the court and other parties of the settlement within a very short period of time, such as three days.²²⁰ The remaining defendants need notice of settlement so they can adjust their litigation strategy. During trial, however, a delay of three days or even one day may have a profound impact since the nonparties may need to alter their plans for examination of witnesses. Consequently, if the settlement occurs during trial, the settling parties should be required to notify the court and other parties before the next witness testifies. Judges should articulate these standards in their standing rules or in the discovery scheduling orders in each civil case.

Clarifying what is meant by "immediate notice" is not a complete solution. Trial judges need a means to enforce these rules. Plaintiffs, in particular, have an incentive to delay notice of a settlement since delay—particularly at trial—may create insoluble problems of proof for the remaining defendants.²²¹ More-

219. *Frey v. Snelgrove*, 269 N.W.2d 918, 923 (Minn. 1978).

220. Three days seems to be the shortest reasonable period for notification of settlement. Because a *Pierringer* settlement realigns litigation interests, all parties should ideally receive notice of settlement before any other significant development in the litigation, such as the taking of additional discovery. For example, five days notice is regarded as the minimal reasonable notice in most cases for taking depositions. See 2 DAVID F. HERR & ROGER S. HAYDOCK, MINNESOTA PRACTICE, CIVIL RULES ANNOTATED 30.7 (2d ed. 1985). It makes sense to require a shorter period of notice for settlement to forestall completion of discovery during the time between settlement and notice.

221. If a plaintiff hides the fact of settlement until after the close of discovery, it may be too late for the remaining defendant to develop the evidence needed to prove the fault of the settling party. If a plaintiff hides the fact of a settlement that has occurred during trial, the remaining defendants may take a position at trial that would be inconsistent with proof of the settling defendant's fault. It is probably impossible to determine if a significant number of *Pierringer* settlements are hidden from the court and the remaining parties until late in discovery or late in trial. In *Frey*, it appears that settle-

over, as discussed below, trial judges can do much to reduce the incentive to delay. Judges also need to create disincentives, or sanctions, for delay.

At present, judges have at least two means in their power to sanction parties who fail to report a settlement. First, judges could refuse to dismiss the settling defendant from the suit if notice of the settlement is delayed.²²² This would place the onus of notification on the settling defendant.²²³ Second, continuing litigation against a party after settlement violates the rule of professional responsibility prohibiting a lawyer from asserting a frivolous claim.²²⁴ Conceivably, a judge could report a lawyer to the Board of Professional Responsibility if the lawyer failed to disclose a settlement.

B. *Changes in Postsettlement Discovery*

Many *Pierringer* settlements occur during discovery, well before trial.²²⁵ If settlement occurs during discovery, the trial court can easily solve many of the distortions of litigation that the *Pierringer* release might otherwise cause. First, the trial court needs to clarify burdens of proof following the settlement. Second, the trial court needs to “capture” available evidence that is apt to evaporate following the *Pierringer* settlement. Steps to accomplish

ment was unreported for at least one full trial day. *See* Brief of Appellant at 6, Firestone, Brief of Plaintiff-Respondent Frey at 4, and Brief of Respondents Snelgrove and Anderson at 15, *Frey* (No. 47620). The settlement was signed on Friday, October 31, 1975; defendant Firestone received notice of the settlement on either Tuesday, November 4, or Wednesday, November 5.

222. *Frey*, 269 N.W.2d at 923. *Frey* provides that, following a *Pierringer* settlement, “[T]he trial court should *ordinarily* dismiss the settling defendant from the case.” *Id.* (emphasis added). If a settlement has been hidden from the remaining defendants, requiring the settling defendant to remain a party at trial may be an effective way both to punish the delay in notice and to cure *Pierringer*-created problems of trial distortion. In this situation, the judge could give the jury notice of the settlement and the new alignment of the party’s interests.

223. Settling defendants can bear this burden lightly because they have no incentive to hide settlement from the court.

224. The Minnesota Rules of Professional Conduct provide that “[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous” MINN. RULES OF PROFESSIONAL CONDUCT Rule 3.1. Additionally, if a trial judge has specifically inquired whether the plaintiff has reached settlement, and the lawyers for the settling parties deny settling, then the lawyers have breached Rule 3.3 of the Professional Rules, which forbids a lawyer from knowingly making a false statement of fact to a tribunal. *Id.* at 3.3(a)(1).

225. *See supra* note 150.

these goals need to be taken before the settling defendant is dismissed from the lawsuit.

1. *Postsettlement Conference*

Once parties give notice of the *Pierringer* settlement occurring during discovery, the court should convene a discovery conference.²²⁶ At this conference, the judge can review the pleadings and release, and determine whether or not the settling defendant may be dismissed from the litigation.²²⁷ In addition, the judge should also determine what discovery has been completed, focusing in particular on discovery by the settling defendant and its experts. The judge should also signify that the remaining defendants will bear the burden of proving the settling defendant's fault.²²⁸

2. *Completing Discovery from Settling Defendants*

At the postsettlement conference, the judge should determine whether the plaintiff and remaining defendants have completed their discovery against the settling defendant. If depositions have been completed in the time between the settlement and notice of the settlement, the judge should consider allowing the remaining defendants to reopen those depositions.²²⁹

226. A judge has the discretion to direct attorneys and parties to appear for a conference for "improving the quality of the trial through more thorough preparation," and for "facilitating the settlement of the case." MINN. R. CIV. P. 16.01(d), (e). Either purpose would appear to justify a post-*Pierringer* settlement conference.

227. In most cases, it is appropriate to dismiss the settling defendant. *Frey* suggests that dismissal is appropriate unless "a nonsettling party has cross-claims for both contribution and indemnity, either of which is not covered by the terms of the release" *Frey*, 269 N.W.2d at 923. Typically, a *Pierringer* release provides that the plaintiff indemnifies the settling defendant for all claims of indemnity or contribution asserted by the remaining defendants. See *supra* note 6 and accompanying text. But see *Alumax Mill Prods., Inc. v. Congress Fin. Corp.*, 912 F.2d 996, 1008 (8th Cir. 1990). Dismissal may be inappropriate if the defendants have cross-claims asserting independent causes of action against each other. If the court believes that it makes sense to resolve these issues during trial of the plaintiff's action, then the court should refuse to dismiss the settling defendant. *Id.* at 1011.

228. This postsettlement conference should not involve any significant increase in the trial judge's workload. At present, settling defendants need to bring a motion for dismissal following a *Pierringer* settlement. A judge can conduct the postsettlement conference and, once notified that discovery from the settling defendant is complete, file the order dismissing the settling defendant without an additional hearing.

229. Because the *Pierringer* settlement realigns parties' interests, fairness may require reopening those depositions. Allowing the depositions to be reopened will also help eliminate the incentive to delay notice. If there has been a significant delay in notice, interrogatories or requests for production may have been completed in the interval

If there are pending motions to compel discovery from the settling defendant, the judge should decide those motions and retain jurisdiction over the settling defendant until the settling defendant has complied with the judge's order. If the defendant resides outside the court's subpoena power, the judge should inquire whether or not the defendant and its fact witnesses have agreed to be present for trial. If not, the judge should ensure that testimony from these witnesses has been preserved for trial.²³⁰

If the plaintiff and remaining defendants have not completed document and interrogatory discovery against the settling defendant and its fact witnesses, the judge should retain jurisdiction over the settling defendant. The judge can request a motion for expedited discovery to accelerate the time needed to complete interrogatory and document discovery.²³¹ Once that discovery is complete, the judge can dismiss the settling defendant.

Refusing to dismiss a settling defendant until this discovery is complete does diminish the value of settlement. This loss of "settlement repose" is slight, however, particularly in light of the fact that these changes would make information available to remaining parties which they could otherwise obtain only through deposition.

3. *Completion of Expert Witness Discovery*

When *Pierringer* settlements occur early in discovery, before parties have designated the experts they will call at trial, there is little the judge need do other than remind parties of the change in burdens of proof wrought by the *Pierringer* release. The remaining parties are then free to hire experts as they see fit. Likewise, there is little a judge need do if the *Pierringer* settlement occurs after all the designated experts have been deposed. For better or worse, the remaining parties can rely on the deposition transcripts at trial.²³²

between settlement and notice. If so, the court may also want to consider permitting additional interrogatories and document production as well.

230. The judge can either order a videotape deposition of the settling defendant or retain jurisdiction over the defendant to mandate the defendant's presence at trial.

231. MINN. R. CIV. P. 33.01(b), 34.02. Since nonparties may be deposed, there is no real need to retain jurisdiction over a settling defendant to facilitate depositions.

232. A remaining party may be able to make a compelling case that it needs a trial deposition of one of the settling defendant's experts or of the plaintiff's expert on the

Matters are more complicated when the *Pierringer* settlement occurs after testifying experts have been designated and some or all of those experts have yet to be deposed. If this is the case, the trial judge needs to look carefully at which experts have been deposed and which have not. *Pierringer* settlements can have a profound impact on the availability of four categories of expert witness testimony:

Category One: Experts the settling defendant hired to testify about the liability of other defendants. A defendant manufacturer may, for example, have hired an expert witness to testify about defects in component parts made by another defendant. If the component parts manufacturer is still a defendant, the plaintiff will want this evidence in front of the jury. If the plaintiff has also settled with the component parts manufacturer, the remaining defendants will want this testimony in evidence.

Category Two: Experts the settling defendant hired to testify about the plaintiff's fault. The remaining defendants will want this testimony in evidence.

Category Three: Experts the plaintiff hired to testify about the settling defendant's fault. Following settlement, the plaintiff will have little incentive to introduce this evidence, but the remaining defendants will want this evidence to go before the jury.

Category Four: Experts the settling defendant hired to rebut evidence of its own fault. Plaintiffs will want to introduce this evidence to minimize the liability of settling defendants.

Trial courts need to ensure that the jury has a reasonable basis on which to assess the fault of a settling party, and at the same time take care that no party be permitted to escape its burdens of presentation and persuasion. When deciding what to do about experts who have been designated to testify, have not been deposed, and are likely to "evaporate" following a *Pierringer* settlement, a trial judge needs to answer two questions. First, do the remaining parties have the ability to develop similar expert testimony? Second, is it appropriate that they do so? The answers to these questions may depend on the category of the expert.

settling defendant's fault. If the judge believes the discovery deposition of the expert is inadequate to convey an expert's opinion to the jury, it would make sense to permit a trial deposition of one or more experts prior to dismissal of the settling defendant.

a. *Categories One and Two: Experts on the Plaintiff's Fault and the Remaining Defendants' Fault*

A *Pierringer* release can realign interests at trial and shift burdens of proof, but it has no impact on the parties' incentives to develop this type of expert testimony. A defendant has an incentive to develop expert testimony about the plaintiff's fault both before and after a *Pierringer* settlement. If discovery is still open, the remaining defendants have both the ability and the incentive to develop their own expert testimony about the plaintiff's fault. Likewise, the plaintiff can develop its own testimony about the fault of the remaining defendants. Requiring these remaining parties to develop this evidence is consistent with those parties' burdens of presentation and persuasion.

If discovery is closed, then the judge has three options. First, the judge could order that the settling defendant's experts be deposed. Second, the judge could reopen discovery to permit alternative experts to be hired. Third, the judge could order the parties to proceed to trial without benefit of expert testimony on these issues. Unless the remaining parties have some credible explanation for their failure to develop this type of expert testimony, this last option is probably best.²³³

b. *Category Three and Four Experts: Experts establishing or rebutting the settling defendant's fault*

Because a *Pierringer* settlement will create a new set of incentives concerning proof of the settling defendant's fault, experts on the settling defendant's fault present a different situation. It makes sense to permit the deposition of these experts, regardless of whether or not discovery is still open. For example, prior to a *Pierringer* settlement, a plaintiff has no incentive to develop expert testimony exonerating the settling defendant. Likewise, a nonsettling defendant may have had no reason to develop expert testimony about the settling defendant's fault. If expert testimony about the settling defendant's fault or lack of fault exists, it makes sense to permit discovery of that testimony. Discovery of the testimony will provide the jury with the evidence it needs to make a reasoned allocation of fault to the settling defendant.

233. What would a credible excuse be? A remaining defendant might find itself without an expert about a certain aspect of the plaintiff's fault because the defendants had agreed that the settling defendant would develop expert testimony in this area.

If the plaintiff has hired an expert who, for example, has issued a report opining that the settling defendant is at fault, it seems appropriate to permit the remaining defendants to depose that expert. Alternatively, the plaintiff should be allowed to depose the expert that the settling defendant hired to testify about its own lack of fault.

C. *Settlement during or Shortly before Trial*

When a *Pierringer* settlement occurs during or shortly before trial, it may be more difficult for the judge to solve some of the potential problems of unfairness. The *Pierringer* settlement creates the same potential problems of unfairness on the eve of trial as it does during discovery. Proximity to trial, however, may magnify the impact of those problems. The judge must still clarify the changed burdens of proof and capture evidence that is likely to evaporate. Unfortunately, a settlement occurring near trial limits both the time and the tools available to accomplish these goals.²³⁴

1. *Conference Concerning the Settlement*

Once notified of the *Pierringer* settlement, the judge should convene lawyers for all of the parties to discuss the settlement. The judge could review the *Pierringer* agreement, and enter its terms on the record.²³⁵ As with a *Pierringer* settlement occurring during discovery, the judge could then discuss with the parties the realigned burdens of proof. The plaintiff and remaining defendants should disclose the witnesses that they plan to call to prove and rebut the settling defendant's fault. The trial judge could review this proposed evidence to determine whether steps need to be taken to capture evidence that is in danger of "evaporating." Arrangements can be made at this conference concerning the testimony of the settling defendant.²³⁶

234. When a *Pierringer* settlement occurs just before trial, there may be cases when it makes sense to grant a continuance to reopen discovery—perhaps to give the remaining defendants an opportunity to depose critical experts who now will not be available to testify. In most cases, if the *Pierringer* settlement is negotiated just before trial, it will make sense to give the remaining parties at least a half-day to restructure their trial strategy.

235. See, e.g., *Frey v. Snelgrove*, 269 N.W.2d 918, 923 (Minn. 1978).

236. The settling defendant will presumably be present in court, and in any event, has not yet been dismissed from the lawsuit. If necessary, the remaining party desiring the settling defendant's testimony can serve a subpoena. If appearance later at trial will work a substantial hardship on the settling defendant, the trial court may consider or-

2. Preventing "Evaporation" of Evidence

When a *Pierringer* release is signed at or near trial, a judge will have the opportunity to preserve the testimony of the settling defendant through subpoena or deposition. The evidence most in danger of "evaporating" after the *Pierringer* settlement is expert testimony.²³⁷ As is the case with *Pierringer* settlement during discovery, there are four categories of expert evidence at issue.

It is important that the jury hear any existing testimony from Category Three and Four experts—the experts establishing or rebutting the settling defendant's fault.²³⁸ The parties wishing to proffer this testimony will not have had an incentive to develop this evidence themselves prior to the *Pierringer* release. For that reason, the judge may need to take all reasonable steps to capture existing testimony from the plaintiff's expert on the settling defendant's fault and the settling defendant's own rebuttal expert. If these experts are not available to testify by subpoena, the court should permit free use of their depositions at trial. If these experts have not been deposed or their depositions are inadequate, the trial judge should consider recessing trial to permit video depositions of these experts.²³⁹

Judges should also consider using this same approach to experts in Categories One and Two—the settling defendant's experts on the fault of the remaining defendants and on the fault of the plaintiff. If the remaining parties do not have other similar expert witnesses available to testify, the judge should take reasonable steps to insure that the jury hears the testimony of these experts as well. It is true that the remaining parties, both plaintiff and defendant, had the opportunity and incentive to develop

dering the video deposition of the settling defendant or taking the settling defendant's testimony out of order. This last option might be helpful in circumstances where the jury would not otherwise hear the settling defendant's testimony until late in the trial.

237. Other evidence, such as documentary evidence of the settling defendant's fault, will presumably have been produced for all parties during discovery. If settlement occurs at trial or on the eve of trial, that evidence may already be marked and ready for introduction.

238. In some types of cases, professional malpractice actions for example, expert testimony on the fault of the settling defendant will be required before the jury can deliberate about that defendant's fault. *See, e.g., Reinhardt v. Colton*, 337 N.W.2d 88, 95 (Minn. 1983).

239. If this is impractical, the court should permit free use of expert reports and interrogatory responses at trial. These are poor substitutes for depositions, however, and place the party forced to rely on this "second-best" evidence at an unfair tactical disadvantage.

this evidence themselves during discovery. If they have survived summary judgment, however, and relied on the availability of the settling defendant's experts at trial, then it seems only fair to do what can be done to capture this evidence.²⁴⁰

Finally, as a practical matter, judges should allow the remaining parties free use at trial of depositions of settling parties and witnesses in a settling party's control—both fact and expert witnesses. The Rules of Civil Procedure permit "an adverse party" to use "the deposition of a party . . . for any purpose."²⁴¹ Trial courts should read "the deposition of a party" to include depositions of any person who was once a party to the lawsuit, but since has settled. Trial courts should also read "adverse party" broadly. For purposes of using the deposition of a settling defendant, both the plaintiff and the nonsettling defendants should be defined as "adverse" parties.²⁴² Free use of these depositions balances the requirement of fair fault allocation with the settling defendant's desire for repose. Use of depositions increases the jury's ability to assess fault of the settling defendants and may decrease the need to have those defendants—and all their witnesses—appear at trial to testify.

240. This argument may seem reasonable with respect to the remaining defendants, and less so with respect to the plaintiff. On the other hand, blocking a plaintiff's access to a defendant's experts following settlement will only discourage the plaintiff from settling with that defendant. This disincentive occurs because the plaintiff would then find it difficult to prove the settling defendant was not at fault. For a general discussion of the problems associated with proving fault, see *supra* part II.B.2.

241. MINN. R. CIV. P. 32.01(b).

242. Free use of these depositions also requires some thinking about Rule 32.02, which governs objections to admissibility of deposition testimony at trial. MINN. R. CIV. P. 32.02. The rule preserves objections to admissibility "for any reason which would require the exclusion of evidence if the witness were then present and testifying." *Id.* Practically speaking, this means that objections to form or foundation are waived unless made at the time of the deposition. Objections to leading questions present a problem. Federal Rule of Evidence 611(c) permits a party to use leading questions when interrogating an adverse party or a witness identified with an adverse party. FED. R. EVID. 611(c). Trial courts should read this rule's use of "adverse party" broadly, as well. Comparative fault and the possibility of a *Pierringer* settlement mean that *any other party* is potentially an "adverse party." Trying to figure out whether a settling defendant was an adverse party during the deposition or is an adverse party at trial is tricky and probably pointless. Trial courts should permit both plaintiff and remaining defendants to use the deposition of a settling defendant as if that defendant were an adverse party, and should overrule any objections made in the deposition that the question posed was leading.

3. *Explanation of the Settlement to the Jury*

As Justice Simonett wrote, "the jury should be entitled to know there has been a settlement and release if for no other reason than to explain the settling tortfeasor's conspicuous absence from the court room."²⁴³ At trial, judges need to take care that the evidence about a settling party's fault can be presented to the jury in a fashion the jury can understand. During the beginning of trial, the judge should explain that the plaintiff has settled with one of the defendants.²⁴⁴ If counsel for the remaining parties fails to do so during opening statement, the judge may need to make a brief statement identifying the settling defendant and explaining that the jury will also need to assess the fault of this defendant.²⁴⁵

Prior to the close of the remaining defendant's case, the judge should assure that the remaining defendant has had an opportunity to present evidence of the settling defendant's negligence. Similarly, the judge should also assure that the plaintiff has had an opportunity to rebut that evidence. Finally, the judge should instruct the jury about assessing the settling defendant's fault, and include that settling defendant with the other parties listed in the apportionment question on the special verdict form.²⁴⁶

243. Simonett, *supra* note 6, at 30, *quoted with approval in* Frey v. Snelgrove, 269 N.W.2d 918, 923 (Minn. 1978). As Simonett also notes, the fact of the settlement is also admissible to demonstrate the bias of a witness. *Id.* at 30-31; *see also* Johnson v. Heintz, 243 N.W.2d 815, 825 (Wis. 1976) (stating the trial court should have allowed the introduction of the fact of settlement to prove bias).

244. There is no need to disclose the amount of the settlement to the jury. It is irrelevant. *Frey*, 269 N.W.2d at 923 ("[A]s a general rule the amount paid in settlement should never be submitted."). For a complete discussion of this issue, see Simonett, *supra* note 6, at 31-33.

245. *See, e.g.*, Minn. Dist. Judges Ass'n, 4 Minn. Practice, MINN. JURY INSTRUCTION GUIDES, Civil JIG 148-49 (3d ed. 1986 & Supp. 1992) (suggesting a jury instruction regarding the settling defendant's absence). The judge may also wish to explain how the settlement has realigned the interests of the remaining parties. This can be done simply: "Members of the jury, the remaining defendant will try to convince you that the settling defendant is at fault for the plaintiff's damages. The plaintiff will try to convince you that the settling defendant is not at fault, and that the fault of the remaining defendant caused plaintiff's damages."

246. Of course, if the remaining parties fail to present sufficient evidence of the settling defendant's fault, then the judge can direct a verdict in favor of the settling defendant and strike its name from the apportionment question.

IV. CONCLUSION

Will these changes make trial easier following a *Pierringer* settlement? They may. Then won't these changes undermine the remaining parties' incentive to settle? They will not. Rather, these changes will balance the remaining parties' incentive to settle. At present, *Pierringer*-created problems of fairness may place one of the remaining parties at an enormous tactical disadvantage.²⁴⁷ When this happens, the disadvantaged party has a tremendous incentive to settle. However, as great as that incentive to settle might be, it is no greater than the opposing party's incentive to press its advantage and proceed to trial. If the changes proposed here eliminate some of the *Pierringer*-created tactical disadvantages, they may actually help to increase the incentive to settle.

Will these changes eliminate *Pierringer*-created problems of unfairness? Undoubtedly not, but they may help. Within ethical limits, nothing can or should prevent imaginative trial lawyers from finding seams in the fabric of law and using those seams to their client's advantage. The changes suggested here may help correct some of the problems that *Pierringer* releases have created. More important, we should incorporate the processes of discovery, litigation, and trial into our thinking and writing about law. These processes are the inherent and inevitable context in which our notions of law must be played out and proved. If we are to understand new ideas about law, we must understand how those ideas will influence litigation and trial and how, in turn, litigation and trial will shape the application of our ideas.

This awareness of the effect of litigation and trial—and of their context—has never figured significantly in writings about *Pierringer* releases. The problems with *Pierringer* releases are, in a very real sense, the expected residue of the willingness to dismiss allocation of fault to settling defendants as “merely a part of the mechanics by which the . . . negligence of the nonsettling tortfeasor is determined.”²⁴⁸ Litigation and trial are anything but “mere mechanics.” Trial is the proving ground for *Pierringer* releases; trial is where *Pierringer* releases must sink or swim.

247. In many cases, the remaining party with the greatest tactical disadvantage will be the remaining defendant. As argued in Section II, however, the disadvantage may sometimes be the plaintiff's.

248. *Pierringer v. Hoyer*, 124 N.W.2d 106, 112 (Wis. 1963).

The guidance given to the trial bench and bar about *Pierringer* releases has been drained of almost any reference to the context in which those releases must be used. On the parched page of the appellate opinion, *Pierringer* releases seem to work very well indeed. However, immersed in the fluid environment of the courtroom, *Peirring* releases too often sink. We should not have expected more. We forgot to mention the water.

