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Diane K. Wohlfarth

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# Joint Tortfeasors in Toxic Substance Litigation: Paying your Fair Share.

In recent years, the incidence of toxic-substance litigation has been steadily increasing. Cases include suits for recovery of damages for exposure to substances such as asbestos, silica, talc and benzene. Cases of this type have been most prevalent in America's industrial centers, states such as Pennsylvania, New Jersey, Michigan, Illinois, Louisiana and Texas.

Litigation for recovery for injury resulting from these toxic substances has been complex, involving many defendants. Ascertaining which of these defendants should carry the burden of the plaintiff's injury is difficult, if not impossible. In many of these cases, the jury must apportion damages among joint tort-feasors.[1] Joint tort-feasors include defendants liable under principles of strict liability, negligence, and breach of warranty, among other theories.[2] In states which have adopted the Uniform Contribution Among Tort-Feasors Act,[3] a right of contribution exists among joint tort-feasors.[4] Thus, contribution may be awarded among joint

1. A joint tort-feasor, as characterized by the Uniform Contribution Among Tort-Feasors Act § 1 et seq (12 ULA 1975), involves "two or more persons jointly or severally liable in tort for the same injury to persons or property or for the same wrongful death, . . . even though judgment has not been recovered against all or any of them." Uniform Contribution Among Tort-feasors Act, § 1(a).

2. See for example, *Svetz v Land Tool Co.*, 355 Pa Super 233, 513 A2d 403 (1986), allocatur denied, 515 Pa 584, 527 A2d 544 (1987).

3. Eighteen states have adopted the Uniform Contribution Among Tort-feasors Act, including: Arizona, Arkansas, Colorado, Delaware, Florida, Hawaii, Maryland, Massachusetts, Nevada, New Mexico, North Carolina, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, and Tennessee.

4. Uniform Contribution Among Joint Tort-feasors, § 1(a). The Uniform Contribution Among Tort-feasors Act provides, in pertinent part:

§ 1. [Right to Contribution]

(a) Except as otherwise provided in this Act, where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgement has not been recovered against all or any of them.

(b) The right of contribution exists only in favor of a tort-feasor who has paid more than his pro-rata share of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share. No tort-feasor is compelled to make contribution beyond his own pro rata share of the entire liability.

(c) There is no right of contribution in favor of any tort-feasor who has intentionally

tort-feasors held liable under principles of negligence and strict liability.[5] Attribution of liability among defendants have been handled differently in the various circuits. Most states have applied principles of comparative negligence. Since the scope of this analysis has been limited to cases involving allocation of liability among joint tortfeasors in toxic substance litigation, most cases examined are from geographic areas with greater degrees of industrialization, where toxic substance exposure is more prevalent. Consequently, case authority from circuit and state courts in the First Circuit (Maine),[6] Third Circuit (New Jersey and Pennsylvania),[7] the Fifth Circuit (Texas and Louisiana),[8] the Sixth Circuit (Michigan and Tennessee)[9] and the Eighth Circuit (Arkansas)[10] will be analyzed. Applicable state court opinions have been included under the appropriate circuit heading. Additionally, cases falling under the jurisdiction of admiralty laws or the Federal Tort Claims Act[11] have not been addressed.

## First Circuit

In *Austin v Raymark Industries, Inc.*,[12] plaintiff brought suit against various suppliers of asbestos products[13] to the Bath Iron

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[wilfully or wantonly] caused or contributed to the injury or wrongful death.
(d) 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.
§ 2. [Pro Rata Shares]
In determining the pro rata shares of tort-feasors in the entire liability
(a) their relative degrees of fault shall not be considered;
(b) if equity requires the collective liability of some as a group shall constitute a single share; and
(c) principles of equity applicable to contribution generally shall apply.
Uniform Contribution Among Tort-feasors Act, §§ 1,2.

5. See *Svetz v Land Tool Co.*, 355 Pa Super 233, 513 A2d 403 (1986), allocatur denied, 515 Pa 584, 527 A2d 544 (1987).

6. See *Austin v Raymark Industries, Inc.*, 841 F2d 1184 (1st Cir 1988).

7. See *Taylor v The Celotex Corp.*, 393 Pa Super 566, 574 A2d 1084 (1990); and *Rocco v Johns-Manville Corp.*, 754 F2d 110 (3d Cir 1985).

8. *McNair v Owens-Corning Fiberglas Corp.*, 890 F2d 753 (5th Cir 1989); *Moore v Johns-Manville Sales Corp.*; 781 F2d 1061 (5th Cir 1986); and *Martin v American Petrofina, Inc.*, 785 F2d 543 (5th Cir 1986).

9. See *Laney v Celotex Corp.*, 901 F2d 1319 (6th Cir 1990); *Dykes v Raymark Industries, Inc.*, 801 F2d 810 (6th Cir 1986).

10. See *Arhart v Micro Switch Mfg. Co.*, 798 F2d 291 (8th Cir 1986).

11. Federal Tort Claims Act, 28 USCA §§ 1346(b), 2401(b), 2402, 2671-80 (1976).

12. 841 F2d 1184 (1st Cir 1988).

13. Suppliers included Johns-Manville Products Corporation, Celotex Corporation, UNARCO Industries, Inc., Nicolet Industries, Keene Building Products Corporation, Eagle-

Works, where her since-deceased husband had worked from 1952 through 1976.[14] Her complaint was brought under Maine law in negligence, strict products liability and breach of warranty.[15] Before trial, the plaintiff entered into twelve "Release and Indemnity Agreements" with thirteen of the defendants.[16] Three non-settling defendants (Johns-Manville, UNARCO and Raymark) remained at the time of trial.[17] The jury returned a verdict in favor of the defendants on the negligence claim.[18] The plaintiff appealed. While the appeal was pending, one of the remaining defendants, UNARCO, entered Chapter 11 Bankruptcy proceedings and a bankruptcy determination was subsequently issued.[19]

On appeal, plaintiffs were granted a new trial on a claim based on strict liability.[20] In the new trial, the jury found Raymark strictly liable for plaintiff-decedent's injury and death, and awarded damages of $323,456.06.[21] The jury apportioned liability among the four defendants as follows: Raymark, 9%; Johns-Manville, 22%; UNARCO, 60%; and H. K. Porter, 9%.[22]

The court then entered judgment in two stages. First, the award was reduced by all of the settlement amounts, or the amount equivalent to the company's proportionate liability, whichever was larger.[23] The award was reduced by $279,611.05, leaving a judgment for plaintiff of $43,845.01.[24] The court then reallocated the percentage of liability the jury had assessed against UNARCO among the three remaining defendants, resulting in a finding of lia-

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Picher Industries, Forty-Eight Insulations, Inc., GAF Corporation, Armstrong Cork, Owens-Corning Fiberglas Corporation, Raybestos-Manhattan, Inc., Pittsburgh Corning Corporation, Amatex Corporation, Southern Textile Company, H. K. Porter Company, Inc., J. P. Stevens & Company, Inc., Owens-Illinois Inc., and Fibreboard Corporation. Nicolet Inc. and J. P. Stevens were subsequently voluntarily dismissed by the plaintiff, leaving sixteen defendants in the case. *Austin*, 841 F2d at 1185-86.

14. Id at 1185.

15. Id.

16. Id. One of the settlement agreements covered both H. K. Porter Company and Southern Textile Company. Id.

17. Id. Johns-Manville subsequently entered into a "Release and Indemnity Agreement" with plaintiff. Id at 1186.

18. Id. The court granted the defendants' motions for directed verdict on the breach of warranty and strict liability claims. Id.

19. Id.

20. Id. A change in Maine law allowed the application of strict liability to injuries occurring after the strict liability statute's effective date, regardless of the sale date of the products. Id.

21. Id at 1186-87.

22. Id at 1187.

23. Id.

24. Id.

bility against Raymark of 22.5%, Johns-Manville of 55%, and H. K. Porter of 22.5%.[25] The prior award was then adjusted by deducting an amount equal to the proportionate liability of Johns-Manville and H. K. Porter, plus the total of all settling defendants' settlement amounts. The plaintiff's verdict was then adjusted to $0.00.[26]

On appeal, the court found that the verdict should have been reduced only by an amount equivalent to the proportionate liability of those defendants found to be causally responsible for plaintiff's injury.[27] In reaching this conclusion, the court determined that the form of the settlement agreement took precedence over Maine law. The plaintiff executed a *Pierringer* release with each of the settling defendants.[28] The *Austin* court found that no prior courts dealing with parties which had used a *Pierringer* release had construed the release to require an offset of the settlement amounts.[29] Instead, each court reduced a damage award by the amount equivalent to the settling defendants' proportionate liability.[30] The *Austin* court also determined that the parties in this action intended to follow the *Pierringer* doctrine.[31] The court applied the *Pierringer* doctrine rather than Maine law.[32] "If the parties truly meant to rely upon Maine law in determining the amount of the offset, they would have so specified clearly [in the language of the releases]."[33]

The appeals court next addressed the method the trial court used in reallocating the percentage liability of the insolvent de-

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25. Id.

26. Id.

27. Id at 1187-88.

28. Id. A *Pierringer* release, first approved by the Supreme Court of Wisconsin in *Pierringer v Huger*, 21 Wis 2d 180, 124 NW2d 106 (1968), specified that plaintiff preserved the cause of action against the non-settling defendants while barring those defendants' right of contribution from the settling defendants. A part of the cause of action against the non-settling defendants was satisfied in an amount equivalent to the proportionate liability of the settling defendants. *Austin*, 841 F2d at 1189.

29. Id at 1190.

30. Id citing, *Johnson v Rogers*, 621 F2d 300, 302-04 (8th Cir 1988); *McDonough v Van Eerden*, 650 F Supp 78 (E D Wis 1986); *Shantz v Richview, Inc.*, 311 NW2d 155 (Minn 1981).

31. *Austin*, 841 F2d at 1195.

32. Id. Under 14 Me Rev Stat Ann § 163 (1980), a trial court could reduce the verdict against an amount equal to the settlement with parties adjudged liable. The verdict could not be reduced by settlement amounts with parties "who the verdict declares are without causative fault." Id at 1192 (quoting *Thurston v 3K Kamper Ko., Inc.*, 482 A2d 837 (Me 1984)).

33. *Austin v Raymark*, 841 F2d at 1193.

fendant UNARCO.[34] The trial court determined that by reallocating UNARCO's 60% liability among the other defendants, Raymark's share of the verdict increased from 9% to 22.5%, or $72,777.61.[35] The appeals court affirmed, reasoning that "the court effectively accommodated two equally powerful principles of Maine tort law: that the plaintiff collect the full damage award through operation of the rule of joint and several liability; and that each joint tortfeasor pay its proportionate share of the verdict through operation of the rule of comparative negligence."[36]

### THIRD CIRCUIT

In the Third Circuit, the method of attribution of causal liability is determined by the application of the appropriate state law. In New Jersey, the Comparative Negligence Act[37] provides for apportionment of liability among joint tort-feasors in accordance with the jury's findings of causal fault.[38] In *Taylor v The Celotex Corp.*,[39] a recent Pennsylvania Superior Court case, the plaintiff sought to recover damages from numerous asbestos manufacturers and suppliers for injuries resulting from a long-term occupational exposure to asbestos. The action, which was based on theories of negligence and strict liability, was tried on issues of liability and damages pursuant to New Jersey substantive law.[40] A number of settlements were reached with named defendants prior to trial.[41] The jury returned a verdict for the plaintiff, awarding $800,000

34. Id at 1195.
35. Id at 1196.
36. Id, citing 14 Me Rev Stat Ann § 156 (West 1980) which provides; "in a case involving multi-party defendants, each defendant shall be jointly and severally liable to the plaintiff for the full amount of the plaintiffs damages. However, any defendant shall have the right through the use of special interrogatories to request of the jury the percentage of fault contributed by each defendant." 14 Me Rev Stat Ann § 156.
37. NJ Stat Ann § 2A:15-5.1 (West 1987).
38. *Taylor*, 574 A2d at 1099, 1100.
39. *Taylor v The Celotex Corp*, 393 Pa Super 566, 574 A2d 1084 (1990).
40. *Taylor*, 574 A2d at 1087.
41. Id. Settlements were reached with the following named defendants: Raybestos Manhattan, Inc.; Forty-Eight Insulation, Inc.; Nicolet Industries, Inc.; GAF Corp.; H.K. Porter Co., Inc. & Southern Asbestos Co.; Garlock, Inc.-Precision Seal Division; U.S. Rubber Co. & Uni-Royal, Inc.; and Owens-Corning Fiberglas Co., Inc. In addition, Johns-Manville Corp. & Johns-Manville Sales Corp., UNARCO Industries, Inc., Pacor, Inc., and Amatex Corp., additional named defendants filed for protection under Chapter Eleven of the Bankruptcy Code, and the causes of action against these defendants were stayed. J. P. Sevens Co., Asbestos Textile Institute, Inc., and Asten Hill Manufacturing Co. were dismissed from the action when the trial court granted their motions for a summary judgment. Their dismissal is not challenged on appeal. Id at 1087 n.2.

compensatory damages and $100,000 for loss of consortium to the spouse.[42] By use of special interrogatories, fault was apportioned by the jury among 18 different companies, including settling and non-settling defendants,[43] and the defendants who had gone into bankruptcy.[44] The jury apportioned causal fault equally among these companies. The trial court molded the verdict to $500,000.[45]

On appeal, the verdict against the non-settling defendants was reduced to $220,000 compensatory damages and $27,500 damages for loss of consortium.[46] The appellate court reasoned that New Jersey authorities require that the verdict be molded in accordance with the jury's findings of causal fault. Following the Comparative Negligence Act,[47] each tort-feasor is liable for the percentage of the judgment equal to the percentage of negligence attributed to him by the trier of fact.[48] It follows then, that "a non-settling defendant is chargeable with the total verdict less that attributable to the settling defendant's percentage share."[49]

By way of contrast, in Pennsylvania, the Pennsylvania Joint Tort-Feasor's Act[50] has been interpreted to provide for pro-rata apportionment of liability among joint tort-feasors in an asbestos case.[51] *Rocco v Johns-Manville Corp.*[52] is a Third Circuit case in

42. Id at 1087.

43. Id. Non-settling defendants include: Celotex Corp., Eagle-Picher Industries, Inc., Keene Corp., Owens-Illinois, Inc., and Pittsburgh-Corning Corp. Id.

44. Id. See note 41.

45. Id at 1087.

46. Id at 1100-01. This amount equals the percentage share of the jury verdict for the five non-settling defendants. The jury allocated causal fault among 18 companies and determined by means of special interrogatories that each was equally at fault. Id.

47. NJ Stat Ann § 2A:15-5.1 et seq.

48. *Taylor*, 574 A2d at 1099, citing NJ Stat Ann § 2A:15-5.2 (The Comparative Negligence Act) provides:

> In all negligence actions in which the question of liability is in dispute, the trier of fact shall make the following as findings of fact:
>
> a. The amount of damages which would be recoverable by the injured party regardless of any consideration of negligence, that is, the full value of the injured party's damages;
>
> b. The extent, in the form of a percentage, of each parties' negligence. The percentage of negligence of each party shall be based on 100% and the total of all percentages of negligence of all the parties to a suit shall be 100%.
>
> c. The judge shall mold the judgement from the finding of act made by the trier of fact.

NJ Stat Ann § 2A:15-5.2.

49. *Taylor v The Celotex Corp.*, 574 A2d at 1100 (quoting *Cartel Capital Corp. v Fireco of New Jersey*, 81 NJ 548, 419 A2d 674, 685 (1980)).

50. 42 Pa Cons Stat Ann §§ 8321 to 8327 (Purdon 1982).

51. *Rocco v Johns-Manville Corp.*, 754 F2d 110 (3d Cir 1985).

52. 754 F2d 110 (3d Cir 1985).

which the plaintiff and one defendant[53] appealed the lower court decision awarding damages based on strict liability. The damages were related to the plaintiff's exposure to dust from asbestos products which resulted in plaintiff contracting asbestosis.[54] Upon determining that the conduct of the two non-settling defendants[55] was a proximate cause of the plaintiff's injuries, the jury awarded $500,000 to the husband-plaintiff and $50,000 to his wife.[56] In response to special interrogatories, the jury found that six settling defendants had also proximately caused plaintiff's injury.[57] A seventh settling defendant, Owens-Corning Fiberglas,[58] acknowledged, by terms of the release, that they were a joint tort-feasor.[59] A third group of defendants[60] were not identified as joint tortfeasors, either by terms of their releases with the plaintiff, or by the jury.[61] Applying the Uniform Contribution Among Tort-Feasors Act,[62] the district court concluded that there were nine joint tort-feasors, seven settling and two non-settling, and held that each defendant's pro-rata share was one-ninth.[63] Thus, the two non-settling defendants were jointly and severally liable for two-ninths of the total verdict.[64]

In Pennsylvania, the amount the plaintiff may recover from the

53. *Rocco*, 754 F2d at 112. Plaintiffs and defendant, Pittsburgh Corning appealed. Id.

54. Id.

55. Id. The two non-settling defendants were Johns-Manville and Pittsburgh Corning. Id.

56. Id.

57. Id. These six settling defendants were categorized by the court as Group C, and consisted of the following: Celotex Corporation, Eagle-Picher Industries, Inc., Fibreboard Corporation, Garlock, Inc., H. K. Porter Co., Inc., and UNARCO Industries, Inc. Id at 113.

58. Id. Owens-Corning Fiberglas was the sole defendant categorized by the court as Group B. Id.

59. Id. The Uniform Contribution Among Tort-feasors Act, 42 Pa Cons Stat Ann § 8322 defines "joint tort-feasors" as "two or more persons jointly or severally liable in tort for the same injury to persons or property, whether or not judgment has been recovered against all or some of them." 42 Pa Cons Stat Ann § 8322.

60. *Rocco*, 754 F2d at 113. This group of eight settling defendants was categorized as Group A by the court, and included; Amatex Corporation, Asten-Hill Manufacturing Co., Inc., Forty-eight Insulations, Inc., GAF Corporation, Nicolet Industries, Inc., Owens-Illinois Glass Corporation, Pacor, Inc., and Raybestos-Manhattan, Inc. Id at 112-13 and n.3.

61. Id at 112-13.

62. 42 Pa Cons Stat Ann §§ 8321 to 8327. 42 Pa Cons Stat Ann § 8324(a) provides, "The right of contribution exists among joint tort-feasors." 42 Pa Cons Stat Ann § 8324(a).

63. The nine joint tort-feasors included Johns-Manville, Pittsburgh-Corning and the Group B and Group C defendants. *Rocco*, 754 F2d at 113. As categorized by the court, Owens-Corning Fiberglas was the sole Group B defendant. Group C defendants included Celotex Corporation, Eagle-Picher Industries, Inc., Fibreboard Corporation, Garlock, Inc., H.K. Porter Co., Inc., and UNARCO Industries, Inc. Id.

64. Id.

non-settling defendants is reduced "to the extent of the pro rata share or the amount paid for the release, whichever is greater."[65] This act only applies after the codefendants have been established to be joint-tortfeasors, either through adjudication, or by terms of a release.[66] A released party who has not been identified as a joint tortfeasor is considered a volunteer. An amount paid for a release by a volunteer is not deducted from the amount assessed against the non-settling tortfeasors.[67] In this case, the amount paid by the Group A[68] settling defendants should not have been deducted from the total verdict, since there was no acknowledgement of liability either through adjudication, or by the terms of their releases.[69]

The appeals court affirmed the establishment of liability against the defendants,[70] but noted that the amount of judgment could not be computed because of pending claims against an additional defendant, which had yet to be adjudicated.[71]

## FIFTH CIRCUIT

In the Fifth Circuit, liability of defendant joint tort-feasors in asbestos cases has consistently been calculated on a percentage share basis.[72] *McNair v Owens-Corning Fiberglas Corp.*[73] affirmed the district court's interpretation of the Texas Comparative Responsibility Statute.[74] In *McNair*, plaintiffs brought suit against 13 defendants under theories of negligence, breach of warranty and strict liability for injuries resulting from exposure to asbestos dust from the defendants' products.[75] Plaintiffs settled[76] with all but two defendants, Celotex and Raymark. In a verdict for the plain-

65. Id at 114 (citing 42 Pa Cons Stat Ann §§ 8321-27).
66. Id at 114-15.
67. Id at 115.
68. See note 60.
69. *Rocco*, 754 F2d at 115.
70. Liability against the Group C settling defendants and Pittsburgh Corning and Johns-Manville was affirmed. Id at 119.
71. Id. Claims against Keene Corporation had previously been severed and must still be adjudicated. The portion of liability attributable to Johns-Manville and Pittsburgh-Corning cannot be determined until it is determined whether Keene is a joint tort-feasor. Id at 116.
72. *McNair v Owens-Corning Fiberglas Corp.*, 890 F2d 753 (5th Cir 1989); *Moore v Johns-Manville Sales Corp.*, 781 F2d 1061 (5th Cir 1986); *Dartez v Fibreboard Corp.*, 765 F2d 456 (5th Cir 1985); *Martin v American Petrofina, Inc.*, 785 F2d 543 (5th Cir 1986).
73. 890 F2d 753 (5th Cir 1989).
74. Tex Civ Prac & Rem Code Ann §§ 33.001-.016 (Vernon Supp 1989).
75. *McNair*, 890 F2d at 754.
76. Id. Cash settlements were reached totalling $53,800. Id at 754-55.

tiffs, the jury determined that plaintiffs were entitled to a recovery of $125,000 in compensatory damages. In response to special interrogatories, the jury assigned responsibility for plaintiff's injuries as follows: 30% to Celotex, 10% to Raymark and 60% to the settling defendants. The court determined that Celotex and Raymark were jointly and severally liable for the amount of the jury award, less the amount of the cash settlements.[77]

The Fifth Circuit affirmed, noting that the district court properly interpreted the Comprehensive Comparative Responsibility Statute,[78] enacted in 1987 by the Texas legislature to govern

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77. Id at 755. The jury award of $125,000 less the settlement of $53,800 left Celotex and Raymark jointly and severally liable for $71,200. Id.

78. Tex Civ Prac & Rem Code Ann §§ 33.001-016. Section 33.012 provides:

> (a) If the claimant is not barred from recovery under Section 33.001, the court shall reduce the amount of damages to be recovered by the claimant with respect to a cause of action by a percentage equal to the claimant's percentage of responsibility.
> (b) If the claimant has settled with one or more persons, the court shall further reduce the amount of damages to be recovered by the claimant with respect to a cause of action by a credit equal to . . .
> (1) the sum of the dollar amounts of all settlements; . . .

Tex Civ Prac & Rem Code Ann § 33.012.

Section 33.013 provides:

> (a) Except as provided in Subsections (b) and (c), a liable defendant is liable to a claimant only for the percentage of the damages found by the trier of fact equal to that defendant's percentage of responsibility with respect to the personal injury, property damage, death, or other harm for which the damages are allowed. . . .
> (c) Notwithstanding Subsection (a), each liable defendant is, in addition to his liability under Subsection (a), jointly and severally liable for the damages recoverable by the claimant under Section 33.012 with respect to a cause of action if:
>
> . . .
>
> (3) the claimant's personal injury, property damage, or death resulted from a "toxic tort." "Toxic tort" means a cause of action in tort or for breach of implied warranty under Chapter 2, Business & Commerce Code, arising out of exposure to hazardous chemicals, hazardous wastes, hazardous hydrocarbons, similarly harmful organic or mineral substances, hazardous radiation sources, and other similarly harmful substances (which usually, but need not necessarily, arise in the work place), but not including any "drug" as defined in Section 81.001(3), Civil Practice and Remedies Code.

Tex Civ Prac & Rem Code Ann § 33.013.

Section 33.015 provides:

> (a) If a defendant who is jointly and severally liable under Section 33.013 pays a percentage of the damages for which the defendant is jointly and severally liable greater than his percentage of responsibility, that defendant has a right of contribution for the overpayment against each other liable defendant to the extent that the other liable defendant has not paid the percentage of the damages found by the trier of fact equal to that other defendant's percentage of responsibility.
> (b) As among themselves, each of the defendants who is jointly and severally liable under Section 33.013 is liable for the damages recoverable by the claimant under Section 33.012 in proportion to his respective percentage of responsibility. If a defendant who is jointly and severally liable pays a larger proportion of those damages than is

"plaintiffs' recovery, defendants' liability, and the handling of settlement offsets and contribution claims in all Texas products liability actions."[79]

An earlier asbestos exposure case applying Texas law, *Moore v Johns-Manville Sales Corp.*,[80] held that a jury, in response to special interrogatories, properly apportioned liability among the defendants.[81] In this case, the jury found that (1) each plaintiff was exposed to the products of each defendant; (2), each defendant's

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required by his percentage of responsibility, that defendant has a right of contribution for the overpayment against each other defendant with whom he is jointly and severally liable under Section 33.013 to the extent that the other defendant has not paid the proportion of those damages required by that other defendant's percentage of responsibility.

(c) If for any reason a liable defendant does not pay or contribute the portion of the damages required by his percentage of responsibility, the amount of the damages not paid or contributed by that defendant shall be paid or contributed by the remaining defendants who are jointly and severally liable for those damages. The additional amount to be paid or contributed by each of the defendants who is jointly and severally liable for those damages shall be in proportion to his respective percentage of responsibility.

(d) No defendant has a right of contribution against any settling person.

Tex Civ Prac & Rem Code Ann § 33.015.

Section 33.016 provides:

(a) In this action, "contribution defendant" means any defendant, counterdefendant, or third-party defendant from whom any party seeks contribution with respect to any portion of damages for which that party may be liable, but from whom the claimant seeks no relief at the time of submission.

(b) Each liable defendant is entitled to contribution from each person who is not a settling person and who is liable to the claimant for a percentage of responsibility but from whom the claimant seeks no relief at the time of submission. A party may assert this contribution right against any such person as a contribution defendant in the claimant's action.

(c) The trier of fact shall determine as a separate issue or finding of fact the percentage of responsibility with respect to each contribution defendant and these findings shall be solely for purposes of this section and Section 33.015 and not as a part of the percentages of responsibility determined under Section 33.003. Only the percentage of responsibility of each defendant and contribution defendant shall be included in this determination.

(d) As among liable defendants, including each defendant who is jointly and severally liable under Section 33.013, each contribution defendant's percentage of responsibility is to be included for all purposes of Section 33.015. The amount to be contributed by each contribution defendant pursuant to Section 33.015 shall be in proportion to his respective percentage of responsibility relative to the sum of percentages of responsibility of all liable defendants and liable contribution defendants.

Tex Civ Prac & Rem Code Ann § 33.016.

79. *McNair*, 890 F2d at 755.

80. 781 F2d 1061 (5th Cir 1986). In this case, three separate actions were consolidated for trial. Each plaintiff, Thomas Moore, Jack Robinson and Glenn Ray Lloyd, was found to have been suffering from asbestosis. *Moore*, 781 F2d at 1062.

81. Id.

products were "defective and unreasonably dangerous"; and (3) the defendants' products were a "producing cause" of the plaintiff's asbestosis.[82] Causation was allocated in varying percentages among defendant manufacturers of asbestos-containing products which the jury determined caused the plaintiffs' injury.

This court, in relying on *Dartez v Fibreboard Corporation*,[83] stated "that the jury in an asbestos product liability case 'must apportion the liability between 'all whose action or products combined to cause the entirety of the plaintiff's injury.' "[84] The *Moore* court, in response to appellees' argument for pro-rata contribution,[85] noted that the jury was presented with sufficient evidence of relative causation to warrant its apportionment of liability among the defendants based on the defendants' respective roles in causing the injury.[86]

*Martin v American Petrofina, Inc.*,[87] was a Fifth Circuit case applying Louisiana law. In that case, the plaintiff sought recovery from defendant manufacturers of asbestos-containing insulation products, alleging that his asbestos exposure caused him to contract mesothelioma.[88] Fourteen defendants reached settlement with the plaintiff before the matter was submitted to the jury.[89] The District Court instructed the jury to determine the comparative fault of the fourteen settling defendants and the sole remaining defendant, Benjamin Foster.[90] Based on these instructions, the jury found Benjamin Foster liable for 2% of the damages which were set at $500,000.[91] On appeal, the court found that the award

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82. Id at 1062-63.

83. 765 F2d 456 (5th Cir 1985).

84. *Moore*, 781 F2d at 1063 (quoting *Dartez v Fibreboard Corporation*, 765 F2d at 474, quoting *Duncan v Cessna Aircraft Company*, 665 SW2d 414, 428 (Tex 1984)).

85. The court in *Duncan v Cessna Aircraft Company*, 665 SW2d 414 (Tex 1984) considered pro rata contribution as "crude headcounting." *Moore*, 781 F2d at 1064 (quoting *Duncan*, 665 SW2d at 430). *Duncan* adopted comparative causation as "a feasible and desirable means of eliminating confusion and achieving efficient loss allocation in strict liability cases." *Moore* 781 F2d at 1063 (quoting *Duncan*, 665 SW2d at 427).

86. *Moore*, 781 F2d at 1065.

87. 785 F2d 543 (5th Cir 1986).

88. *Martin v American Petrofina, Inc.*, 779 F2d 250, 251 (5th Cir 1985).

89. *Martin*, 779 F2d at 251.

90. Benjamin Foster Division of Achem Products.

91. *Martin*, 779 F2d at 253-54. The District Court applied La Civil Code Art 1804 (West 1985) which provided:

> Among solidary obligors, each is liable for his virile portion. If the obligation arises from a contract or quasi-contract, virile portions are equal in the absence of agreement or judgment to the contrary. If the obligation arises from an offense or quasi-offense a virile portion is proportionate to the fault of each obligor.

against the sole non-settling defendant should be reduced by the pro-rata shares[92] of the settling defendants, or fourteen-fifteenths.[93] On petition for rehearing, the Fifth Circuit opinion was modified.[94] The court determined that the non-settling defendant, "Benjamin Foster was entitled to a reduction in any damage award against it in the amount of shares of the fourteen relesed [sic] tort-feasors. These shares must be computed on a proportionate fault, as opposed to virile pro-rata, basis, because Benjamin Foster's right to claim contribution was on a proportionate fault basis."[95] The court found that the award against Benjamin Foster should be reduced by 98%, the settling defendant's proportionate share of

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La Civil Code Art 1804.

92. The Appeals Court noted that La Civil Code Art 1804, (see note 91), incorporated the substance of article 2103, and was in compliance with the theory of comparative negligence, which was introduced in Louisiana on August 1, 1980. Prior to that date, a joint tortfeasor in Louisiana was entitled to a reduction in damages equal to the settling defendants' pro-rata share. Article 2103 provided:

> When two or more debtors are liable in solido, whether the obligation arises from contract, a quasi-contract, an offense, or a quasi-offense, it should be divided between them. As between the solidary obligors, each is liable only for his virile portion of the obligation.

La Civil Code Ann Vol. 16.

When comparative negligence was introduced in Louisiana, Section 4 of Act No. 431 of the 1979 Session of the Louisiana Legislature provided that: "The provisions of this act shall not apply to claims arising from events that occurred prior to the time this act becomes effective." *Martin*, 779 F2d at 254 (quoting Act 431, Section 4 of the 1979 Session of the Louisiana Legislature).

The court reasoned, since the plaintiff's injuries arose from events occurring in 1956-1961, and prior to the effective date of comparative negligence, subsequent legislation was inapplicable, and the pre-1980 article 2103 must be applied. Id at 254. This court also relied on *Harvey v Travelers Insurance Company*, 160 S2d 915, 920-22 (La App 3d Cir 1964), which "established the principle that an obligee's release of a joint tortfeasor reduces the amount recoverable against the remaining joint tortfeasors by the amount of the virile (pro-rata) share of the one released, since the plaintiff, in releasing a joint tortfeasor, has prejudiced the remaining tortfeasors by depriving them of their right of contribution from the one so released." *Martin*, 779 F2d at 254, citing *Dunn v Sears Roebuck and Co.*, 645 F2d 511, 513 (5th Cir 1981); *Wall v American Employers Ins. Co.*, 386 S2d 79, 82 (La 1980); *Canter v Koehring Co.*, 283 S2d 716, 727-28 (La 1973). The *Harvey* rule was codified in La Civil Code Art 1803(1) (1985). The award of damages against the non-settling defendants should be reduced by the pro rata shares of the settling defendants. *Martin*, 779 F2d at 254-55.

93. Id at 255.

94. *Martin v American Petrofina, Inc.*, 785 F2d 543, 545 (5th Cir 1986). The court noted that a tort-feasor's cause of action for contribution against joint tort-feasors "arises when judicial demand by the injured party is made upon one of the joint tort-feasors." Id at 544 (citing *Ducre v Executive Officers of Halter Marine, Inc.*, 752 F2d 976, 987-89 (5th Cir 1985)). Consequently, Article 2103 as amended in 1980 was applicable in this case. *Martin*, 785 F2d at 544.

95. Id at 545.

fault.[96]

## Sixth Circuit

In *Laney v Celotex Corporation*,[97] a recent asbestos case in which a single non-settling asbestos manufacturer was found liable, the Court of Appeals in the Sixth Circuit reversed the trial court and remanded for a new trial. Of the 35 named defendants in this case, only Celotex[98] remained at time of trial.[99] The trial court refused to allow Celotex to introduce evidence of the fiber content of other defendants' products. The jury was instructed to disregard testimony concerning the plaintiff's exposure to the settling defendants' products.[100] Under Michigan law, in cases in which several factors contributed to the injury, a defendant is not liable unless his negligence was a substantial factor in producing the plaintiff's injury.[101] The court of appeals determined that Celotex should have been permitted to present evidence of other possible causes of the plaintiff's injury.[102] The court not that "evidence of Plaintiff's exposure to other asbestos products goes to the fundamental question of cause. A jury may consider all evidence of contributing factors to determine which, if any, were substantial factors in causing Plaintiff's injury. The substantial factor analysis cannot be made in a vacuum."[103] The court noted that the defendant may introduce evidence that the plaintiff's injury may be attributed to the negligence of another, even if that actor is not a party to the present action.[104]

The court of appeals also noted that under Michigan law, in cases in which the actions of multiple defendants combine to cause a single injury, each defendant is jointly and severally liable. In Michigan, apportionment of fault among joint tort-feasors is prohibited.[105]

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96. Id.

97. 901 F2d 1319 (6th Cir 1990).

98. Celotex Corporation was successor in interest to Philip Carey Manufacturing Company. *Laney*, 901 F2d at 1319.

99. Id at 1320.

100. Id. The trial court stated "that the only issue to be decided was whether Defendant's product was a substantial factor in causing Plaintiff's injury." Id.

101. Id (citing *Brisboy v Fibreboard Corp.*, 429 Mich 540, 418 NW2d 650 (1988)).

102. *Laney*, 901 F2d at 1321.

103. Id.

104. Id at 1320 (citing *Mitchell v Steward Oldford & Sons*, 163 Mich App 622, 415 NW2d 224 (1987); and *Kujawski v Cohen*, 83 Mich App 239, 268 NW2d 358 (1978)).

105. *Laney*, 901 F2d at 1321.

*Dykes v Raymark Industries, Inc.*,[106] a Sixth Circuit case applying Tennessee law, examined the application of Tennessee's Contribution Among Tort-Feasors Act[107] to punitive damages. Plaintiffs brought suit against 16 companies who manufactured and sold asbestos products.[108] All defendants but one[109] settled with plaintiffs.[110] The jury awarded plaintiffs $300,000 in compensatory damages and $200,000 in punitive damages for injuries the plaintiff-husband suffered from exposure to asbestos-containing products.[111] The court, in applying the Tennessee Contribution Among Tort-feasors Act[112] completely set off the compensatory award, but allowed the punitive award to stand. The court reasoned "that the equitable remedy of contribution is not available to parties whose conduct was willful and wanton."[113] The Sixth Circuit Court of Appeals disagreed,[114] noting that Tennessee's version of the Uniform Contribution Among Tort-feasors Act does not expressly exclude punitive awards.[115] Only intentional conduct of a joint tortfeasor is specifically excluded from remedy under Tennessee's Act.[116] "There is no right of contribution in favor of any tort-feasor who has intentionally caused or contributed to the injury or wrongful death."[117] In adopting this version of the Uniform Contribution Among Tortfeasors Act, the court reasoned that the Tennessee legislature must have intended to exclude a right of contribution for intentional, but not willful or wanton acts contributing to a plaintiff's injury.[118] The court of appeals held that an amount awarded by the jury to the plaintiff for punitive damages based on willful or wanton conduct can be set off by amounts contributed by settling joint tortfeasors.[119]

106. 801 F2d 810 (6th Cir 1986).
107. Tenn Code Ann § 29-11-101-106 (Michie 1968).
108. *Dykes*, 801 F2d at 812.
109. National Gypsum was the only defendant which failed to reach a settlement.
110. *Dykes*, 801 F2d at 812. The total amount of settlement was $503,725.00. Id.
111. Id.
112. Tenn Code Ann §§ 29-11-101-106.
113. *Dykes*, 801 F2d at 812.
114. Id at 815.
115. Id at 813.
116. Id.
117. Tenn Code Ann § 29-11-102(c).
118. *Dykes*, 801 F2d at 814.
119. Id at 815.

EIGHTH CIRCUIT

In *Arhart v Micro Switch Mfg. Co.*,[120] plaintiff brought a products liability action against three defendants[121] to recover damages for injuries received in an industrial accident.[122] Settlement was reached with two of the defendants,[123] which did not affect the cross claim for contribution and indemnity filed by the non-settling defendant.[124] The court instructed the jury that settlement had been reached, but did not advise the jury of the amount of the settlement.[125] After receiving all evidence, the court instructed the jury to determine the negligence and comparative negligence of the plaintiff and the sole remaining defendant, Micro Switch.[126] The court then intended that the jury would further deliberate the issue of contribution between Micro Switch and the settling defendants, if the jury returned a verdict against Micro Switch.[127] Since the jury returned a take-nothing verdict, this bifurcated procedure was not necessary.[128]

The court applied the Uniform Contribution Among Tort-Feasors Act,[129] which establishes a right of contribution among joint tortfeasors.[130] The statute also provides "that each tortfeasor

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120. 798 F2d 291 (8th Cir 1986).

121. Defendants in this action were Custom Stainless Equipment Company, Inc., Weiler East, Inc., and Micro Switch Manufacturing Company, a division of Honeywell, Inc. *Arhart*, 798 F2d at 292.

122. Id. This case does not involve injuries to a plaintiff as a result of exposure to a toxic substance, but rather injuries suffered in an industrial accident. This case has been included because of the court's unique handling of jury instructions.

123. Id. During trial, settlement was reached with defendants Custom Stainless Equipment Company, Inc., and Weiler East, Inc., for $465,000. Id.

124. Id.

125. Id.

126. Id.

127. Id at 293.

128. Id.

129. Ark Stat § 34-1001—34-1009 (1947).

130. *Arhart*, 798 F2d at 293, citing Ark Stat § 34-1002, which provided:

(1) The right of contribution exists among joint tortfeasors.

(2) A joint tortfeasor is not entitled to a money judgment for contribution until he has by payment discharged the common liability or has paid more than his pro rata share thereof.

(3) A joint tortfeasor who enters into a settlement with the injured person is not entitled to recover contribution from another joint tortfeasor whose liability to the injured person is not extinguished by the settlement.

(4) When there is such a disproportion of fault among joint tortfeasors as to render inequitable an equal distribution among them of the common liability by contribution, the relative degrees of fault of the joint tortfeasors shall be considered in determining their pro rata shares solely for the purpose of determining their rights of contribution among themselves, each remaining severally liable to the injured person for

will be credited with amounts paid by other joint tort-feasors, Ark Stat 34-1004,[131] but the statute is silent about how the matter is to be handled."[132]

In the absence of guiding statutory authority,[133] the court in *Arhart* held that the manner of submission for determining apportionment of damages is at the trial court's discretion and may vary depending upon the facts of the case.[134] The court determined that the trial court did not abuse its discretion when the judge submitted the case to the jury on the initial questions of liability and damages.[135] Since the jury returned a verdict in favor of the defendant, no issue of apportionment remained. However, if the jury had returned a verdict in favor of the plaintiff, the court would have then properly submitted the issue of apportionment to the jury.[136]

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the whole injury at common law.

Ark Stat § 34-1002.

131. Ark Stat § 34-1004 provided:

> A release by the injured person of one joint tortfeasor, whether before or after judgment, does not discharge the other tortfeasors unless the release so provides; but reduces the claim against the other tortfeasors in the amount of the consideration paid for the release, or in any amount or proportion by which the release provides that the total claim shall be reduced, if greater than the consideration paid.

Ark Stat § 34-1004.

132. *Arhart*, 793 F2d at 293-94 (citing *Walton v Tull*, 234 Ark 882, 356 SW2d 20, 25 (1962)).

133. The court recognized that a judgment had never been reversed on the basis of either advising a jury or not advising a jury about settlement with other tortfeasors. *Arhart*, 793 F2d at 295. See, *Giem v Williams*, 215 Ark 705, 222 SW2d 800 (1949), where both the fact and amount of settlement were submitted to the jury, and the settlement amount was not deducted from the verdict; *Walton v Tull*, 234 Ark 882, 356 SW2d 20, 25 (1962), where the court noted that deduction of settlement amount was proper when the jury was not informed of settlement; *Woodard v Holliday*, 235 Ark 744, 361 SW2d 744 (1962), where the jury was not informed of settlement and the verdict was reduced by the settlement amount; *Bailey v Stewart*, 236 Ark 80, 364 SW2d 662 (1963), where the jury was informed of the fact and amount of settlement, and the verdict was not credited with the settlement amount; and *Arkansas Kraft Corp. v Johnson*, 257 Ark 629, 519 SW2d 74 (1975), where the jury was advised of the fact and amount of a prior FELA settlement. *Arhart*, 798 F2d at 294-95.

134. Id at 295. This case was compared to *Jackson v Johns-Manville Sales Corp.*, 727 F2d 506 (5th Cir 1984) reinstated en banc 750 F2d 1314, 1317. In *Jackson*, the jury found two defendants strictly liable in an asbestos products liability case applying Mississippi law. Eight other defendants settled prior to trial. The jury was informed of the fact of settlement, but not the settlement amount. The jury was then instructed to disregard prior settlements in their deliberations. After verdict against the defendants, the trial court then properly gave the defendants full credit for the prior settlement. The *Arhart* court noted that Arkansas has adopted the same rules as Mississippi in relation to contribution among joint tortfeasors. *Arhart*, 798 F2d at 295-96.

135. Id at 296, 297.

136. Id at 296.

## Conclusion

Based on the cases surveyed, it is interesting to note the diversity in application of the respective contribution statutes. Three of the jurisdictions surveyed have implemented the Uniform Contribution Among Tortfeasors Act,[137] yet each has interpreted the act differently. Pennsylvania allows contribution on a pro-rata share, even from settling defendants.[138] Tennessee and Arkansas allow contribution from settling defendants up to the settlement amount, but Arkansas leaves it up to the court's discretion to determine how to apportion liability. Other jurisdictions, which have not adopted the Uniform Contribution Among Tortfeasors Act[139] allow contribution among non-settling defendants on a percentage share basis. Contribution from settling defendants is allowed, in some jurisdictions,[140] only to the extent that the jury found the settling defendant liable. Other jurisdictions[141] allow contribution up to the full settlement amount. It is ironic that an area of law that is based on a uniform statute is subject to so many different variations in interpretation.

Those jurisdictions which allow contribution from non-settling joint tortfeasors based on the percentage of liability allocated to them by the jury seem to have the most equitable solution. The defendants have all had ample opportunity to present evidence, which the jury has weighed in determining the percentages. Each defendant pays his fair share. When contribution is allowed only on a pro-rata basis, a defendant's share is influenced by the number of other defendants who the jury has found liable, regardless of degree. A defendant who caused the plaintiff to be exposed to asbestos-containing products for only three months would have to pay the same amount as another defendant whose products were in use around the plaintiff for thirty years. Such an arbitrary allocation is hardly equitable.

When other defendants have settled with the plaintiff prior to the jury returning a verdict, the issue of contribution becomes more complex. The jurisdictions surveyed allow set-off of settlement amounts; some allowing a set-off of the full amount,[142] others

137. Pennsylvania, Tennessee and Arkansas.

138. Contribution is allowed from settling defendants on a pro rata share basis, or up to the amount paid in settlement, whichever is greater. 42 Pa Cons Stat Ann §§ 8321-27.

139. Maine, New Jersey, Texas, Louisiana and Michigan.

140. Wisconsin, New Jersey and Louisiana.

141. Maine and Texas.

142. Maine, Texas, Tennessee and Arkansas have allowed set-off of the full settlement

allowing a set-off of the settlement amount only up to the amount equivalent to the percentage liability that the jury found against that defendant.[143] That means that if no evidence is introduced at trial identifying that defendant's product (which may be a likely scenario since that defendant, once settled, may not even be present at trial)[144] the settlement amount is not even considered for contribution. In the event that the liability of a settling defendant is not considered, the plaintiff ends up with an amount the jury has determined was fair compensation for the injury, plus the additional settlement amount, which is a windfall. This method of allocation encourages the defendants still in the case to spend valuable court time proving the liability of settling defendants so that their settlement amounts can be used to set-off the verdict. Liability of settling defendants should be irrelevant, since they have already made their peace with the plaintiff. This method also encourages nuisance cases, since a plaintiff knows that it is unlikely that a jury award would be reduced by a settlement made with a defendant whose liability is questionable.

Allowing a set-off from a jury award of the full settlement amount is a more equitable way of apportioning liability. The plaintiff is always guaranteed at least an amount equivalent to the jury award. If he has happened to make agreements with defendants for a greater amount, the plaintiff still gets the benefit of the bargain. Settlement is encouraged, since a plaintiff should not be willing to take a case to trial, thereby expending valuable and limited judicial resources, unless he anticipates that the jury would "make him whole" and return a verdict significantly higher than the aggregate amount of settlement. When cases do go to trial, the remaining defendants will not waste valuable court time trying to prove attribution of causation among the settling defendants. All parties benefit from this approach. The plaintiff gets the greater of the settlement amount or the amount which the jury has decided fairly compensates him for his injury. Each non-settling defendant gets the benefit of the other defendants' settlement.

*Diane K. Wohlfarth*

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amount.

143. New Jersey and Louisiana have allowed set-off of the settlement amount up to the amount of the settling defendants' percentage liability.

144. Note, however that some jurisdictions provide that a defendant has a right to require that a settling codefendant remain in the case in order to establish joint tortfeasor status. See *Rocco*, 754 F2d at 114; citing *Davis v Miller*, 385 Pa 348, 123 A2d 422 (1956) and *Slaughter v Pennsylvania X-Ray Corp.*, 638 F2d 639 (3d Cir 1981).