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Pace Law Review

Volume 14
Issue 2 *Summer 1994*

Article 4

June 1994

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Note

Sommer v. Federal Signal Corp.: Clarifying the Confusion Over the Tort/Contract Borderland and the Rules of Contribution

I. Introduction

"And the Lord said: Let there be contracts and Let there be torts. And it was so. And He divided contracts from torts."[1] Unfortunately, there is not always such a clear and divine division between contract and tort. In fact, there is a confusing area where contract and tort mesh termed the tort/contract borderland.[2] *Sommer v. Federal Signal Corp.*,[3] a recent New York Court of Appeals decision, involved an action that implicated both tort and contract law.[4] Thus, the court had to determine if it would allow claims in tort, claims in contract, or both.[5] The court ultimately held that claims in tort and in contract arose from the facts.[6]

In *Sommer*, a fire alarm monitoring service company attempted to escape both direct and contributive liability for its acts by claiming as a defense an exculpatory clause in a contract between the monitoring service and a building owner.[7] The

1. KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 346 n.315(b) (1960).

2. Rich v. New York Cent. & Hudson River R.R., 87 N.Y. 382, 390 (1882) (explaining that tort and/or contract claims could be brought where the facts give rise to both actions, and separation of the facts into neat categories of tort and contract is difficult).

3. 79 N.Y.2d 540, 593 N.E.2d 1365, 583 N.Y.S.2d 957 (1992).

4. *Id.* at 550-51, 593 N.E.2d at 1368, 583 N.Y.S.2d at 960.

5. *Id.* at 551, 593 N.E.2d at 1369, 583 N.Y.S.2d at 961.

6. *Id.* at 553, 593 N.E.2d at 1370, 583 N.Y.S.2d at 962.

7. *Id.* at 549, 593 N.E.2d at 1368, 583 N.Y.S.2d at 960.

plaintiffs alleged that the acts of alarm-related defendants,[8] in combination with the acts of the alarm monitoring service, caused a delay which allowed a small, containable fire to grow into an uncontrollable blaze.[9] The New York Court of Appeals held that the exculpatory clause was to be effective to insulate against ordinary negligence.[10] However, the exculpatory clause was unenforceable against claims of gross negligence,[11] due to the important public interest of having competent fire alarm monitoring services.[12]

The court also analyzed the contribution claims asserted by alarm-related defendants and the building owner in light of the court's determination that the monitoring service had a duty to the building owner, and that the exculpatory clause defense was enforceable only against ordinary negligence.[13] The court held that ordinary negligence would trigger the alarm-related defendants' contribution claim against the monitoring service.[14] However, where the building owner was seeking contribution from the monitoring service if found liable to tenants, only gross negligence would allow the contribution claim.[15]

Part II of this Note will discuss the development of the tort/contract borderland, contractual exculpatory clauses and claims for contribution. Part III will discuss *Sommer v. Federal Signal Corp*. Part IV will analyze how the decision in *Sommer* helped to clarify the confusion surrounding both the borderland and the rules of contribution, especially where multiple parties, contracts, and claims are involved. Part V will argue that by allowing the contribution claims to the extent that public policy permitted, the court's decision in *Sommer* allowed our adversarial judicial system to provide justice to both injured parties and joint tortfeasors.

8. "Alarm-related defendants" is a term used to refer to those defendant entities related to the fire detection system, including designers, manufacturers, parts suppliers, installers and inspectors. *Id.*

9. *Id.* The fire resulted in damages exceeding $7 million. *Id.*

10. *Id.* at 554, 593 N.E.2d at 1370, 583 N.Y.S.2d at 963.

11. *Id.* at 554, 593 N.E.2d at 1371, 583 N.Y.S.2d at 963.

12. *Id.* at 552, 593 N.E.2d at 1370, 583 N.Y.S.2d at 962.

13. *Id.* at 558, 593 N.E.2d at 1373, 583 N.Y.S.2d at 965-66.

14. *Id.* at 560, 593 N.E.2d at 1374, 583 N.Y.S.2d at 967.

15. *Id.*

II. Background

A. *Tort/Contract Borderland*

In many cases it is clear whether an action is one in tort or one in contract. However, "[b]etween actions plainly *ex contractu*[16] and those as clearly *ex delicto*[17] there exists . . . a border-land, where the lines of distinction are shadowy and obscure, and the tort and the contract so approach each other, and become so nearly coincident as to make their practical separation somewhat difficult."[18] This tort/contract borderland situation arises where there is duty between parties because of a relationship which was created by contract.[19] "Negligence, considered merely as a tort, is a wrong independent of contract, but negligence may also be a breach of contract if the contract itself calls for care."[20]

Classification of an action as sounding in tort or in contract can prove to be consequential. This classification can affect jurisdiction,[21] the applicable statute of limitations,[22] the appropri-

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16. An action *ex contractu* is defined as a cause of action "from or out of a contract." BLACK'S LAW DICTIONARY 566 (6th ed. 1990); Eads v. Marks, 249 P.2d 257, 260 (Cal. 1952) (an action *ex contractu* arises from a breach of a promise set forth in a contract).

17. An action *ex delicto* is defined as a cause of action which is "founded upon a wrong or a tort." BLACK'S LAW DICTIONARY 567 (6th ed. 1990).

18. Rich v. New York Cent. & Hudson River R.R., 87 N.Y. 382, 390 (1882) (holding that an action in tort could be pleaded even though the facts also give rise to an action in contract).

19. Peter W. Thornton, Note, *The Elastic Concept of Tort and Contract as Applied by the Courts of New York*, 14 BROOK. L. REV. 196, 196 (1948) (discussing the development of the tort/contract borderland).

20. Lord Elec. Co. v. Barber Asphalt Paving Co., 226 N.Y. 427, 432, 123 N.E. 756, 757 (1919) (holding that a subcontractor who negligently caused a fire could be liable for damages to property under both contract and tort principles).

21. *See* Busch v. Interborough Rapid Transit Co., 187 N.Y. 388, 389-90, 80 N.E. 197, 197 (1907) (plaintiff, by suing in contract, was under proper jurisdiction in the Municipal Court of the City of New York, a court of limited jurisdiction, even though the wrongful act also amounted to an action for the tort of assault and battery, an action over which the municipal court did not have jurisdiction).

22. *See In re* Paver & Wildfoerster, 38 N.Y.2d 669, 672, 345 N.E.2d 565, 566, 382 N.Y.S.2d 22, 23 (1976) (plaintiff's claims, although cognizable in either contract or tort, were timely where asserted within the six year period of limitations for contracts); Lewis v. Dunbar & Sullivan Dredging Co., 178 Misc. 980, 981-82, 36 N.Y.S.2d 897, 898-99 (Sup. Ct. Oswego County 1942) (plaintiff sued in contract to receive the benefit of a six-year statute of limitations, rather than in tort which had a three-year statute of limitations). *See generally* Gregory D. Zahs, Note, Santulli v. Englert, Reilly & McHugh, P.C.: *The New York Court of Appeals Pounds*

ate measure of damages[23] and the availability of contribution.[24]

Courts have noted that "a contracting party may be charged with a separate tort liability arising from a breach of a duty distinct from, or in addition to, the breach of contract."[25] A simple breach of contract will not qualify as an action in tort "unless a legal duty independent of the contract itself has been violated."[26] Thus, where a contract governs a particular subject matter, an action in tort would be precluded for events arising from the same subject matter.[27] However, a legal duty may arise from extraneous circumstances not specifically stated in, but nonetheless related to, the contract.[28]

For example, public policy may impose a legal duty to use reasonable care because of the nature of the services to be performed in the contractual relationship.[29] Although the relation-

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Another Nail in the Coffin of CPLR Section 214(6), 13 PACE L. REV. 721 (1993).

23. *See* Miller v. Foltis Fisher Inc., 152 Misc. 24, 272 N.Y.S. 712 (Sup. Ct. App. T. 1st Dep't 1934) (although plaintiff recovered for personal injuries, plaintiff was also entitled to interest on the recovery because the court viewed the claim as one in contract).

24. *See* Board of Educ. v. Sargent, Webster, Crenshaw & Folley, 71 N.Y.2d 21, 517 N.E.2d 1360, 523 N.Y.S.2d 475 (1988) (holding that, under New York law, contribution is unavailable in contract cases).

25. North Shore Bottling Co. v. Schmidt & Sons, 22 N.Y.2d 171, 179, 239 N.E.2d 189, 193, 292 N.Y.S.2d 86, 92 (1968) (recognizing that an action in tort did arise where the defendant conspired with others to cheat and defraud plaintiff of his exclusive beer distribution business, despite defendant's ability to sue in contract); *see also Rich*, 87 N.Y. at 398 (despite the availability of a contract action, the court recognized a tort action where the defendant willfully and fraudulently violated its contract with plaintiff); Albermarle Theatre v. Bayberry Realty Corp., 27 A.D.2d 172, 176, 277 N.Y.S.2d 505, 511 (1st Dep't 1967) (finding that defendant lessees' conduct in conspiring to destroy lessor's interest in a theater constituted a breach of contract); Schisgall v. Fairchild Publications, 207 Misc. 224, 230, 137 N.Y.S.2d 312, 317 (Sup. Ct. N.Y. County 1955) (stating that, although an intentional breach of contract does not create a tort liability, an intentional infliction of injury in relation to a breach of contract is tortious).

26. Clark-Fitzpatrick, Inc. v. Long Island R.R., 70 N.Y.2d 382, 389, 516 N.E.2d 190, 193, 521 N.Y.S.2d 653, 656 (1987) (holding that the existence of a contract governing particular subject matter would preclude recovery in quasi contract or tort for events arising from the same subject matter); *see also Rich*, 87 N.Y. at 390.

27. *Clark-Fitzpatrick*, 70 N.Y.2d at 389, 516 N.E.2d at 194, 521 N.Y.S.2d at 656-57.

28. *Id.*; *see also Rich*, 87 N.Y. at 398.

29. *Sommer*, 79 N.Y.2d at 551-52, 593 N.E.2d at 1369, 583 N.Y.S.2d at 961.

ships of bailor-bailee,[30] carrier-passenger[31] and innkeeper-guest[32] arise from contracts, the courts have imposed a duty to exercise due care in the protection of person and property.[33] This duty is based on considerations of public policy that are imposed above and beyond the contract. If in these relationships there is a failure of the duty to exercise due care, the bailor, carrier or innkeeper would be subject to tort liability.[34]

In addition to *Sommer v. Federal Signal Corp.*,[35] many of the cases discussed in this Note involve alarm monitoring companies.[36] These companies, as with a bailor or a carrier, perform a service that implicates public policy, giving rise to a duty of care that transcends any contractual relationship.[37] The courts consider public policy because of the potentially catastrophic consequences of failing to perform competently.[38]

The New York courts have also examined the nature of the injury, the manner in which the injury occurred and the recovery for the resulting harm, in their attempts to shed light on the tort/contract borderland.[39] Where the injury is to person or

30. Sherber v. Kinney Systems, 42 Misc. 2d 530, 248 N.Y.S.2d 437 (Civ. Ct. N.Y. County 1964) (holding that failure of bailee to properly guard against unlawful entry into a garage constituted negligence of bailee, allowing an action in tort).

31. Eisman v. Port Authority Trans Hudson Corp., 96 Misc. 2d 678, 409 N.Y.S.2d 578 (Sup. Ct. N.Y. County 1978) (holding that, where passenger could demonstrate an assumption of a duty to provide safe, secure and adequate protection by carrier, a failure of that duty would constitute a tort).

32. Friedman v. Shindler's Prairie House, Inc., 224 A.D. 232, 230 N.Y.S. 44 (3d Dep't 1928) (holding that innkeeper may be liable in tort to guest where innkeeper fails to exercise reasonable care for safety of guest).

33. Thornton, *supra* note 19, at 197.

34. *See id.*; *see also supra* notes 30-32.

35. 79 N.Y.2d 540, 593 N.E.2d 1365, 583 N.Y.S.2d 957 (1992).

36. *See, e.g.*, Eaves Brooks Costume Co. v. Y.B.H. Realty Corp., 76 N.Y.2d 220, 556 N.E.2d 1093, 557 N.Y.S.2d 286 (1990); Florence v. Merchants Cent. Alarm Co., 51 N.Y.2d 793, 412 N.E.2d 1317, 433 N.Y.S.2d 91 (1980); Melodee Lane Lingerie Co. v. American Dist. Tel. Co., 18 N.Y.2d 57, 218 N.E.2d 661, 271 N.Y.S.2d 937 (1966); World Trade Knitting Mills v. Lido Knitting Mills, 154 A.D.2d 99, 551 N.Y.S.2d 930 (1st Dep't 1990); Appliance Assoc. v. Dyce-Lymen Sprinkler, 123 A.D.2d 512, 507 N.Y.S.2d 104 (4th Dep't 1986).

37. *Sommer*, 79 N.Y.2d at 553, 593 N.E.2d at 1370, 583 N.Y.S.2d at 962.

38. *Id.*

39. *See, e.g.*, Bellevue S. Assocs. v. H.R.H. Constr. Corp., 78 N.Y.2d 282, 293, 579 N.E.2d 195, 200, 574 N.Y.S.2d 165, 170 (1991). In *Bellevue*, the court found that delamination of tiles could not be classified as a tort because: there was no injury to person or property; the injury was a gradual process of the product failing to perform as anticipated rather than a cataclysmic occurrence; and the recovery

property rather than solely to a product, the wrong bears an indicia of a tort.[40] Where there is an abrupt, cataclysmic occurrence, rather than a process[41] of failure of the product to perform, there is an indication of tort.[42] And where the recovery is for damages other than the replacement of the product, there is also an indication of tort.[43] The idea behind examining these factors is to determine whether the party has been injured due to failure to exercise due care (an action in tort), or whether the party is merely seeking to enforce a bargain (an action in contract).[44]

Until recently, the New York courts have dealt with the tort/contract borderland by distinguishing between misfeasance, which is improper performance of an act[45] sounding in tort, and nonfeasance, which is nonperformance of an act[46] sounding in contract.[47] The distinction between misfeasance and nonfeasance was justified on the grounds that, once a person has assumed to act, he becomes subject to the duty to act with due care.[48] Unfortunately, the misfeasance and nonfea-

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for the resulting harm was simply replacement of the tiles. *Id.* at 282, 294, 579 N.E.2d at 195, 200, 574 N.Y.S.2d at 166, 170.

40. *Id.* at 294, 579 N.E.2d at 200, 574 N.Y.S.2d at 170.

41. Process is defined as "[a] series of actions, motions, or occurrences . . . whereby a result or effect is produced." BLACK'S LAW DICTIONARY 1205 (6th ed. 1990).

42. *Bellevue*, 78 N.Y.2d at 294, 579 N.E.2d at 200, 574 N.Y.S.2d at 170.

43. *Id.*

44. *Id.* at 294-95, 579 N.E.2d at 200, 574 N.Y.S.2d at 170.

45. Misfeasance is defined as the "improper performance of some act which a person may lawfully do." BLACK'S LAW DICTIONARY 1000 (6th ed. 1990).

46. Nonfeasance is defined as the "[n]onperformance of some act which [a] person is obligated or has [a] responsibility to perform." BLACK'S LAW DICTIONARY 1054 (6th ed. 1990).

47. Eaves Brooks Costume Co. v. Y.B.H. Realty Corp., 76 N.Y.2d 220, 225-26, 556 N.E.2d 1093, 1095, 557 N.Y.S.2d 286, 288 (1990). "[A] number of lower courts have held that sprinkler maintenance and alarm companies can be liable to noncontracting parties only for misfeasance in the performance of the contract and that the failure to detect flaws in a sprinkler system or the failure of the alarm system is nonfeasance." *Id.* (citations omitted); *see also* World Trade Knitting Mills v. Lido Knitting Mills, 154 A.D.2d 99, 551 N.Y.S.2d 930 (1st Dep't 1990) (the alleged acts of negligence including failure to inspect alarm system and failure to respond to alarm system, were found to constitute nonfeasance rather than misfeasance and, therefore, only an action in contract was permitted); Appliance Assoc. v. Dyce-Lymen Sprinkler Co., 123 A.D.2d 512, 507 N.Y.S.2d 104 (4th Dep't 1986) (failure of alarm company to receive or respond to alarm which would have activated sprinkler system constituted nonfeasance rather than misfeasance).

48. *Eaves*, 76 N.Y.2d at 226, 556 N.E.2d at 1096, 557 N.Y.S.2d at 289.

sance labels confused the tort/contract borderland even further because the distinction was often unclear and led to illogical conclusions.[49]

In *Eaves Brooks Costume Co. v. Y.B.H. Realty Corp.*,[50] a commercial tenant sued two companies that were under contract with the landlord to inspect and maintain a sprinkler system that malfunctioned and damaged the tenant's property.[51] Although the New York Court of Appeals affirmed the lower court's dismissal of the complaint, which was based on the distinction between misfeasance and nonfeasance, the court specifically rejected those labels as a basis for attaching liability.[52] Rather, it held that both failing to act (nonfeasance) and defectively acting (misfeasance) may beget a tort cause of action if the defendant assumed a duty of due care.[53] "[T]he proper inquiry is simply whether the defendant has assumed a duty to exercise reasonable care to prevent foreseeable harm to the plaintiff."[54] Where a party has assumed a duty to exercise reasonable care and has failed to live up to that duty, thereby causing foreseeable injury, there results an action in tort.[55]

B. *Contractual Exculpatory Clauses*

Absent a statute or public policy to the contrary, a contracting party may use an exculpatory clause to exempt itself from the consequences of its own ordinary negligence if the contractual language limiting liability is clear and unambiguous.[56]

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49. *Id.* at 225-26, 556 N.E.2d at 1095-96, 557 N.Y.S.2d at 288-89.

50. 76 N.Y.2d 220, 225-26, 556 N.E.2d 1093, 1095-96, 557 N.Y.S.2d 286, 289 (1990).

51. *Eaves*, 76 N.Y.2d at 222, 556 N.E.2d at 1094, 557 N.Y.S.2d at 287.

52. *Id.* at 225-26, 556 N.E.2d at 1095-96, 557 N.Y.S.2d at 288-89 (citing criticism that "the line between misfeasance and nonfeasance is difficult to draw," and declining to make such an attempt). "An inspection that fails to uncover a defect could be labeled either misfeasance for negligent performance of the inspection or nonfeasance for failure to conduct some procedure that would have revealed the defect. There is no founded reason why liability should depend on such semantics." *Id.* at 226, 556 N.E.2d at 1096, 557 N.Y.S.2d at 289.

53. *Id.* at 226, 556 N.E.2d at 1096, 557 N.Y.S.2d at 289.

54. *Id.*

55. *Id.*

56. *See* Kirshenbaum v. General Outdoor Advertising Co., 258 N.Y. 489, 495, 180 N.E. 245, 247 (1932) (enforcing clause relieving landlord from liability); Graves v. Davis, 235 N.Y. 315, 319-20, 139 N.E. 280, 281 (1923) (enforcing clause restricting liability of tug owners).

The intention of the parties must be expressed in "unmistakable language" in order for the exculpatory clause to insulate a party from liability.[57] In addition, limitations of liability may be valid notwithstanding a statute or public policy to the contrary, where the subscriber is given a voluntary choice of obtaining full or limited liability.[58] The New York courts have previously upheld alarm contract limitation of liability clauses in cases of ordinary negligence.[59]

However, public policy dictates that a party not be permitted to insulate itself from damages caused by gross negligence.[60] In *Kalisch-Jarcho, Inc. v. City of New York*,[61] a heating and air conditioning contractor that worked on a New York City municipal construction project sued the city for three million dollars in damages caused by delays and cost overruns.[62] The New York Court of Appeals reversed the lower court judgment for the plaintiff, holding that endless revisions and the city's mismanagement of the prime contractors, which plaintiff claimed caused the overruns, would have to be deemed willful or grossly negligent before the court could override an exculpatory clause in their contract.[63] The court stated that "an exculpatory clause is unenforceable when . . . the misconduct for which it would

57. Gross v. Sweet, 49 N.Y.2d 102, 107, 400 N.E.2d 306, 309, 424 N.Y.S.2d 365, 368 (1979); *see also* Ciofalo v. Vic Tanney Gyms, 10 N.Y.2d 294, 297, 177 N.E.2d 925, 926, 220 N.Y.S.2d 962, 964 (1961) (contractual language limiting liability must be "sufficiently clear and unequivocal"); Boll v. Sharp & Dohme, 281 A.D. 568, 570-71, 121 N.Y.S.2d 20, 22 (1st Dep't 1953), *aff'd*, 307 N.Y. 646, 120 N.E.2d 836 (1954) (contractual language limiting liability must be "clear and explicit").

58. Where there is no opportunity for an alarm system subscriber to pay an annual service charge providing for full liability recovery, a contractual limitation of liability clause will be deemed invalid. Melodee Lane Lingerie Co. v. American Dist. Tel. Co., 18 N.Y.2d 57, 69-70, 218 N.E.2d 661, 667-68, 271 N.Y.S.2d 937, 946 (1966) (limitation of liability clause declared invalid because there was no opportunity for full liability recovery).

59. Florence v. Merchants Cent. Alarm Co., 51 N.Y.2d 793, 795, 412 N.E.2d 1317, 1318, 433 N.Y.S.2d 91, 92 (1980) (enforcing a contractual clause that limited liability to $50 as liquidated damages in the event that the burglar alarm failed).

60. Kalisch-Jarcho, Inc. v. City of New York, 58 N.Y.2d 377, 384-85, 448 N.E.2d 413, 416-17, 461 N.Y.S.2d 746, 749-50 (1983) (exculpatory agreement was unenforceable against claims of willful or gross negligence due to public policy).

61. 58 N.Y.2d 377, 448 N.E.2d 413, 461 N.Y.S.2d 746 (1983).

62. *Id.* at 381, 448 N.E.2d at 414, 461 N.Y.S.2d at 747.

63. *Id.* at 385-86, 448 N.E.2d at 417-18, 461 N.Y.S.2d at 750-51.

grant immunity smacks of intentional wrongdoing."[64] The court in *Kalisch* explained that gross negligence is conduct which "betokens a reckless indifference to the rights of others"[65] and, therefore, renders a contractual exculpatory clause unenforceable.[66] Since public policy condemns such conduct, even if the contracting parties sought to be exculpated for that specific conduct, the exculpatory clause will be unenforceable.[67]

The New York Legislature has also resolved that a limitation of liability does not apply where the party seeking to enforce the limitation acted with "reckless disregard for the safety of others."[68] Tortfeasors that act with "reckless disregard for the safety of others" are barred from taking advantage of New York Civil Practice Law and Rules (CPLR) 1601, which limits liability where joint tortfeasors are found to be less than fifty percent at fault.[69]

Recently, in *Hanover Insurance Co. v. D & W Central Station Alarm Co.*,[70] the Supreme Court, Appellate Division held that public policy precludes exemption from liability for grossly negligent acts, even where there is a provision in the contract

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64. *Id.* at 385, 448 N.E.2d at 416, 461 N.Y.S.2d at 750.

65. *Id.* at 385, 448 N.E.2d at 417, 461 N.Y.S.2d at 750.

66. *Id.*

67. *Id.*; *see also* Peckham Rd. Co. v. State of New York, 32 A.D.2d 139, 141-42, 300 N.Y.S.2d 174, 177 (3d Dep't 1969), *aff'd*, 28 N.Y.2d 734, 269 N.E.2d 826, 321 N.Y.S.2d 117 (1971) (stating that if a party's conduct amounts to "active interference," an exculpatory clause will not be enforceable); Johnson v. City of New York, 191 A.D. 205, 181 N.Y.S. 137 (2d Dep't 1920), *aff'd*, 231 N.Y. 564, 132 N.E. 890 (1921) (determining that an exculpatory clause cannot be construed to permit an unreasonable and unjust result, despite the parties' intent).

68. N.Y. CIV. PRAC. L. & R. 1602(7) (McKinney 1976 & Supp. 1994).

69. N.Y. CIV. PRAC. L. & R. 1601(1) & 1602(7). Article 16 of the New York CPLR is a relatively new law that alters the traditional joint and several liability rule. Joint and several liability means that each tortfeasor will not only be liable for the portion of the damages he caused (several liability), but also for the portion of the damages other tortfeasors caused (joint liability). DAVID D. SIEGEL, NEW YORK PRACTICE § 168A, at 247 (2d ed. 1991). Section 1601(1) of the CPLR allows tortfeasors that are found to have "fifty percent or less of the total liability" to be only severally liable. N.Y. CIV. PRAC. L. & R. 1601(1). Thus, the tortfeasor that is 50% or less responsible will be liable only for damages proportional to his culpability. However, this culpability-based limitation of liability is subject to many exceptions listed under CPLR 1602, one of which is that tortfeasors acting with a "reckless disregard for the safety of others" are jointly and severally liable for the damage they cause. N.Y. CIV. PRAC. L. & R. 1602(7).

70. 164 A.D.2d 112, 560 N.Y.S.2d 293 (1st Dep't 1990).

that purports to limit liability for negligence.[71] In *Hanover*, a subscriber to a central station alarm monitoring service sued the contractor providing the service after a burglary loss.[72] The contract provided that if loss occurred due to equipment failure, fire, smoke, etc., "regardless of whether or not such loss, damage or personal injury was caused by or contributed to by lessor's [alarm monitoring service's] negligent performance or failure to perform any obligation under" the contract, the alarm monitoring service's liability would be severely limited.[73] The court held that the limitation of liability clause in the central station alarm contract would not be enforceable against acts of gross negligence.[74]

C. *Contribution*

Contribution is a doctrine based on equity and justice.[75] Contribution arises from the rule of law that tortfeasors generally are jointly and severally liable for a judgment—each is responsible for the full amount regardless of culpability.[76] Under the doctrine of contribution, a tortfeasor who has paid more than his proportionate share of liability joins and seeks recovery from another tortfeasor who was partly liable to the plaintiff.[77]

Contribution did not exist at common law.[78] At common law, "the wrongdoer selected by the injured party for suit must have succeeded in avoiding any part of responsibility; . . . other-

71. *Id.* at 115, 560 N.Y.S.2d at 295.

72. *Id.* at 113-14, 560 N.Y.S.2d at 294.

73. *Id.* at 114, 560 N.Y.S.2d at 295.

74. *Id.* at 115, 560 N.Y.S.2d at 295-96.

75. Professional Beauty Supply v. National Beauty Supply, 594 F.2d 1179, 1185 (8th Cir. 1979) (defining contribution as "an equitable doctrine based on the principle of justice between the parties"); Vickers Petroleum Co. v. Biffle, 239 F.2d 602, 606 (10th Cir. 1956) (defining contribution as an equitable doctrine based on principles of fundamental justice).

76. *See Professional Beauty Supply*, 594 F.2d at 1185; *Vickers Petroleum*, 239 F.2d at 606.

77. Green Bus Lines v. Consolidated Mutual Ins. Co., 74 A.D.2d 136, 147-48, 426 N.Y.S.2d 981, 989-90 (2d Dep't 1980).

78. Merryweather v. Nixan, 101 Eng. Rep. 1337 (K.B. 1799) (holding that there is no right of contribution among joint tortfeasors whether negligent or intentional). For a discussion of the historical background of contribution, see Kevin J. Grehan, Note, *Comparative Negligence*, 81 COLUM. L. REV. 1668, 1690-1701 (1981).

wise he would have to assume all of it without redress."[79] One reason for the common law's abhorrence of contribution was the policy that a wrongdoer should not be entitled to seek relief from the court.[80] A second reason was the premise that parties should continue to file pleadings until they have defined an issue with a yes or no answer, limiting the recovery to either all or nothing.[81]

In New York, historically, loss was apportioned between joint tortfeasors by statute as well as through case law. Under former CPLR 1401, loss was apportioned between wrongdoers pro rata, but not in proportion to fault.[82] It allowed one joint tortfeasor subject to judgment to compel equal contribution by another joint tortfeasor subject to the same judgment.[83] However, the statute did not confer a right to defendants to implead other wrongdoers, and basically left it up to plaintiff to sue all wrongdoers.[84] Because of its restrictions, the statute proved to be an ineffective attempt to apportion loss and was repealed.[85]

Case law also attempted to apportion loss between joint tortfeasors. For example, New York courts developed an active-passive negligence concept.[86] The active-passive concept provided that a passively negligent defendant could implead an ac-

79. Dole v. Dow Chem. Co., 30 N.Y.2d 143, 148, 282 N.E.2d 288, 291, 331 N.Y.S.2d 382, 386 (1972).

80. John W. Wade, *Should Joint and Several Liability of Multiple Tortfeasors Be Abolished?*, 10 AM. J. TRIAL ADVOC. 193, 196 (1986). *See Green Bus Lines*, 74 A.D.2d at 148, 426 N.Y.S.2d at 990 (explaining that under common law it was against public policy to allow a wrongdoer to plead his own tort as part of his cause of action) (citing Gilbert v. Finch, 173 N.Y. 455, 462, 66 N.E. 133, 135 (1936)).

81. Wade, *supra* note 80, at n.5.

82. Act of Apr. 4, 1962, ch. 308, § 1401, 1962 N.Y. Laws 1344, *amended by* Act of Apr. 10, 1964, ch. 388, § 5, 1964 N.Y. Laws 1256, *repealed by* Act of June 7, 1974, ch. 742, § 1, 1974 N.Y. Laws 1915.

83. *Dole*, 30 N.Y.2d at 148, 282 N.E.2d at 291, 331 N.Y.S.2d at 386.

84. *See* Act of Apr. 4, 1962, ch. 308, § 1401, 1962 N.Y. Laws 1344.

85. *See* Act of Apr. 4, 1962, ch. 308, § 1401, 1962 N.Y. Laws 1344, *repealed by* Act of June 7, 1974, ch. 742, § 1, 1974 N.Y. Laws 1915.

86. Jackson v. Associated Dry Goods Corp., 13 N.Y.2d 112, 116, 192 N.E.2d 167, 169, 242 N.Y.S.2d 210, 213 (1963) (finding defendant store owner not guilty of active negligence, therefore permitting defendant store owner to recover contribution from another defendant); *see also* Jordan v. Madison Leasing Co., 596 F. Supp. 707, 709 (S.D.N.Y. 1984) (utilizing a primary-secondary liability concept, similar to the active-passive negligence concept, in order to determine if indemnity or apportionment is proper between joint tortfeasors).

tively negligent tortfeasor.[87] This attempt to apportion loss simply provided for a shift in the blame. If the blame were successfully shifted from a passively negligent tortfeasor to an actively negligent tortfeasor, the actively negligent tortfeasor would be fully liable for the judgment. Because this system only provided for shifting blame, rather than apportioning it between two or more wrongdoers, it also ultimately failed.[88]

Then came the landmark decision of *Dole v. Dow Chemical Co.*[89] In *Dole*, the administratrix of the estate of a deceased employee brought an action against Dow Chemical Company ("Dow") for negligently causing the employee's death.[90] The employee died while cleaning employer's grain storage bin.[91] The grain storage bin had recently been fumigated with methyl bromide, a poisonous fumigant used to control storage insects and mites.[92] The fumigant was produced by Dow.[93] The administratrix alleged that Dow was negligent in failing to properly label the fumigant.[94]

Dow asserted a third-party claim against the employer for breach of an alleged independent duty owed to it by the employer.[95] The New York Court of Appeals held that Dow would be permitted to maintain its third-party complaint against the employer for apportionment of damages.[96] Thus, the decision in *Dole* gave rise to the rule of contribution in New York.[97] The

87. *Dole*, 30 N.Y.2d at 148, 282 N.E.2d at 291-92, 331 N.Y.S.2d at 387.

88. *Id.* at 147-48, 282 N.E.2d at 291, 331 N.Y.S.2d at 386-87.

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

90. *Id.* at 145-46, 282 N.E.2d at 290, 331 N.Y.S.2d at 384-85.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 146, 282 N.E.2d at 290, 331 N.Y.S.2d at 385.

95. *Id.* at 152, 282 N.E.2d at 294, 331 N.Y.S.2d at 390.

96. *Id.* at 153, 282 N.E.2d at 295, 331 N.Y.S.2d at 391-92. Subsequent cases have embraced the principles in *Dole*, allowing third-party actions for an apportionment of responsibility among the parties. *See, e.g.*, Jordan v. Madison Leasing Co., 596 F. Supp. 707, 709 (S.D.N.Y. 1984) (citing *Dole* as authority for apportionment of responsibility among the parties); *Green Bus Lines*, 74 A.D.2d at 153, 426 N.Y.S.2d at 993 (allowing a *Dole*-type claim to be asserted in a third-party action resulting in equitable apportionment between the joint tortfeasors based upon their relative degrees of fault in causing the injuries complained of by the prime plaintiff).

97. *Dole*, 30 N.Y.2d at 153, 282 N.E:2d at 295, 331 N.Y.S.2d at 391-92.

goal of the *Dole* rule is equitable loss sharing by all the wrongdoers, and thus, fairness to tortfeasors who are jointly liable.[98]

The holding in *Dole* was subsequently codified at CPLR article 14.[99] The statute states that a tortfeasor that pays more than his fair share of the judgment may recover the excess from other joint tortfeasors.[100] In addition, a defendant may assert a cause of action for contribution in a separate action or in the main action by cross-claim, counterclaim or third-party claim.[101] Together, *Dole* and CPLR article 14 allow for distribution of the loss among culpable parties in accordance with their relative degrees of fault.[102]

III. *Sommer v. Federal Signal Corp.*[103]

A. *Facts*

Plaintiff, 810 Associates ("Associates"), owned a forty-two story building in midtown Manhattan, which was equipped with a central station fire alarm system.[104] Associates entered into a contract with Holmes Protection, Inc. ("Holmes"), a fire alarm monitoring company, to obtain a central station monitoring service.[105] Holmes would receive signals of any alarms sounded on the premises of Associates and would notify the fire department accordingly.[106] This contract included an exculpatory clause that read as follows: "Holmes shall not be liable for any of [Associates's] losses or damages . . . caused by perform-

98. *Id.* at 150, 282 N.E.2d at 293, 331 N.Y.S.2d at 389.

99. N.Y. Civ. Prac. L. & R. art. 14 (McKinney 1976 & Supp. 1994).

100. N.Y. Civ. Prac. L. & R. 1401-02 (McKinney 1976 & Supp. 1994). "[T]wo or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them." *Id.*

101. N.Y. Civ. Prac. L. & R. 1403 (McKinney 1976 & Supp. 1994). "A cause of action for contribution may be asserted in a separate action or by cross-claim, counterclaim or third-party claim in a pending action." *Id.*

102. *See Dole*, 30 N.Y.2d at 148-49, 282 N.E.2d at 291-92, 331 N.Y.S.2d at 386-87; N.Y. Civ. Prac. L. & R. 1402 (McKinney 1976 & Supp. 1994). "The amount of contribution to which a person is entitled shall be the excess paid by him over and above his equitable share of the judgment recovered by the injured party . . . . The equitable shares shall be determined in accordance with the relative culpability of each person liable for contribution." *Id.*

103. 79 N.Y.2d 540, 593 N.E.2d 1365, 583 N.Y.S.2d 957 (1992).

104. *Id.* at 548, 593 N.E.2d at 1367, 583 N.Y.S.2d at 959.

105. *Id.*

106. *Id.*

ance or non-performance of obligations imposed by this contract or by negligent acts or omissions by Holmes."[107] The contract also included a clause that limited liability to "the lesser of $250 or 10% of the annual service charge as liquidated damages."[108]

On April 13, 1985, at 8:58 a.m., Associates called Holmes to request temporary deactivation of the alarm system.[109] Once the system was "deactivated," Holmes would continue to receive alarm signals, but would not report them to the fire department.[110] Holmes's policy was to restore normal alarm service within eight to twelve hours unless otherwise requested.[111] In accordance with its policy, Holmes reactivated the alarm monitoring service at 8:58 p.m. on April 13.[112]

At 7:58 a.m., on April 15, Associates called Holmes to verify reactivation of the system.[113] Holmes's dispatcher, "allegedly an untrained inexperienced substitute,"[114] became confused by the request of reactivation since the system had already been reactivated on April 13.[115] Without attempting to clarify the situation, the dispatcher assumed that Associates was requesting deactivation.[116]

Approximately eight minutes later, Holmes began receiving alarm signals from Associates.[117] The dispatcher ignored the signals, believing that the service was "deactivated."[118] However, a four-alarm fire had started on the 28th floor and was reported by others directly to the fire department.[119] The re-

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107. *Id.* at 549, 593 N.E.2d at 1368, 583 N.Y.S.2d at 960.

108. *Id.*

109. Sommer v. Federal Signal Corp., 174 A.D.2d 440, 441, 571 N.Y.S.2d 228, 229 (1st Dep't 1991). The alarm system was temporarily deactivated because work was being done on the building. *Sommer*, 79 N.Y.2d at 548, 593 N.E.2d at 1367, 583 N.Y.S.2d at 959.

110. *Sommer*, 79 N.Y.2d at 548, 583 N.E.2d at 1367, 583 N.Y.S.2d at 959.

111. *Id.*

112. *Id.*; *Sommer*, 174 A.D.2d at 441, 571 N.Y.S.2d at 229-30.

113. *Sommer*, 174 A.D.2d at 441, 571 N.Y.S.2d at 230.

114. *Sommer*, 79 N.Y.2d at 548-49, 593 N.E.2d at 1367, 583 N.Y.S.2d at 959.

115. *Id.* at 549, 593 N.E.2d at 1367, 583 N.Y.S.2d at 959.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* The fire caused over $7 million worth of damages. *Id.* at 549, 593 N.E.2d at 1368, 583 N.Y.S.2d at 960.

ports were made minutes after Holmes began receiving signals.[120]

B. *Procedural History*

1. *The Decision of the Supreme Court, New York County*

Associates sued Holmes contending that the fire detection system failed to detect the fire in a timely manner and the fire further spread due to Holmes's failure to transmit the alarm to the fire department.[121] Several actions ensued.[122] Associates sued Holmes,[123] claiming that Holmes's breach of contract and Holmes's grossly negligent breach of a duty of reasonable care resulted in over seven million dollars in damages.[124] Associates also sued Holmes under strict tort liability and breach of warranty theories.[125] Associates sued alarm-related entities—designers, manufacturers, parts suppliers, installers, and inspectors of the fire detection system—under similar theories because the fire detection system failed to detect the fire in a timely manner.[126] Tenants of the building sued both Associates and Holmes for damage to their property.[127] Tenants of the building also sued the other alarm-related entities.[128] Associates and the alarm-related entities all sought contribution from Holmes.[129] These actions were consolidated into one action.[130]

At the close of pleadings, the Supreme Court of New York County granted Holmes's motion for summary judgment and dismissed all complaints, cross-claims, counterclaims and third-party claims against Holmes.[131] The court concluded that no evidentiary facts were asserted sufficient to raise a material, triable issue of fact as to whether Holmes's actions constituted gross negligence.[132] The court reasoned that, due to the con-

120. *Id.* at 549, 593 N.E.2d at 1367, 583 N.Y.S.2d at 959.
121. *Id.* at 549, 593 N.E.2d at 1368, 583 N.Y.S.2d at 960.
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.* at 550 n.1, 593 N.E.2d at 1368 n.1, 583 N.Y.S.2d at 960 n.1.
126. *Id.* at 549, 593 N.E.2d at 1368, 583 N.Y.S.2d at 960.
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Sommer*, 174 A.D.2d at 441-42, 571 N.Y.S.2d at 230.

tract's exculpatory clause, only gross negligence would support an action.[133] The court dismissed the action, determining that the only questions raised regarded ordinary negligence, liability for which was precluded by the exculpatory clause.[134]

2. *The Decision of the Supreme Court, Appellate Division*

The first department of the appellate division reversed the trial court, holding that a genuine issue of material fact existed as to whether Holmes was grossly negligent in failing to respond to alarm signals, thus precluding summary judgment.[135] The court reaffirmed the holding of *Hanover Insurance Co. v. D & W Central Station Alarm Co.*,[136] which stated that public policy precludes exemption from liability in the case of gross negligence.[137] The appellate court opined that the record in this case suggested that triable issues of fact existed as to whether Holmes was grossly negligent in its failure to respond to alarm signals received from Associates's building.[138] The first department remanded and ordered that the contribution claims be reinstated if Holmes were found to be grossly negligent.[139]

C. *The Decision of the New York Court of Appeals*

The Court of Appeals agreed with the appellate division's determination that there was a triable issue of fact as to gross negligence, but concluded that the appellate division erred in its contribution analysis.[140] The Court of Appeals first determined that Associates could pursue both tort claims and contract claims against Holmes.[141] The court found that Holmes's duty to exercise reasonable care stemmed from Holmes's contract with Associates and from the nature of its services.[142]

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133. *Id.*

134. *Sommer*, 79 N.Y.2d at 549-50, 593 N.E.2d at 1368, 583 N.Y.S.2d at 960.

135. *Sommer*, 174 A.D.2d at 442, 571 N.Y.S.2d at 230.

136. 164 A.D.2d 112, 560 N.Y.S.2d 293 (1st Dep't 1990).

137. *Sommer*, 174 A.D.2d at 440, 571 N.Y.S.2d at 229; *see Hanover*, 164 A.D.2d at 115, 560 N.Y.S.2d at 295; *supra* notes 70-74 and accompanying text.

138. *Sommer*, 174 A.D.2d at 442, 571 N.Y.S.2d at 230. The court considered in the record the tape and transcript of the conversation recorded between Associates's chief engineer and the Holmes dispatcher. *Id.*

139. *Id.* at 440, 571 N.Y.S.2d at 229.

140. *Sommer*, 79 N.Y.2d at 550, 593 N.E.2d at 1368, 583 N.Y.S.2d at 960.

141. *Id.* at 552, 593 N.E.2d at 1370, 583 N.Y.S.2d at 962.

142. *Id.*

A fire alarm monitoring company's service protects a significant public interest because "failure to perform the service carefully and competently can have catastrophic consequences."[143] Accordingly, Holmes had a duty to exercise reasonable care independent of the Holmes-Associates contract.[144] The court noted that breach of this duty, combined with the tortious nature of the injuries and the "abrupt cataclysmic" nature of the occurrence supported a tort action against Holmes.[145]

The Court of Appeals affirmed the appellate division's holding that the contractual exculpatory clauses would be enforceable against claims of ordinary negligence,[146] but not against claims of gross negligence.[147] The court also affirmed the appellate division's reversal of the trial court's grant of summary judgment in Holmes's favor.[148] The Court of Appeals reasoned that it would be for a jury to decide whether Holmes's actions were "a simple mistake or reckless indifference."[149]

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143. *Id.* at 553, 593 N.E.2d at 1370, 583 N.Y.S.2d at 962.

144. *Id.*

145. *Id.*; *see supra* notes 39-44 and accompanying text.

146. *Sommer*, 79 N.Y.2d at 554, 593 N.E.2d at 1371, 583 N.Y.S.2d at 963. *Compare* Melodee Lane Lingerie Co. v. American Dist. Tel. Co., 18 N.Y.2d 57, 218 N.E.2d 661, 271 N.Y.S.2d 937 (1966) (holding that, in the absence of a statute, a contracting party could exempt itself from the consequences of its own ordinary negligence if the language so specifies, yet holding that the limitation of liability was improper for other reasons); Ciofalo v. Vic Tanney Gyms, 10 N.Y.2d 294, 177 N.E.2d 925, 220 N.Y.S.2d 962 (1961) (slip and fall case where the court upheld a gymnasium membership agreement that clearly expressed the parties' intent to completely insulate the defendant from liability for injuries due to the defendant's ordinary negligence).

147. *Sommer*, 79 N.Y.2d at 554, 593 N.E.2d at 1370-71, 583 N.Y.S.2d at 963. *Compare* Kalisch-Jarcho, Inc. v. City of New York, 58 N.Y.2d 377, 448 N.E.2d 413, 461 N.Y.S.2d 746 (1983) (city could be liable to contractor for project delays only if delays were caused by city's gross negligence or bad faith). "[A]n exculpatory agreement, no matter how flat and unqualified its terms, will not exonerate a party from liability under all circumstances. Under announced public policy, it will not apply to exemption of willful or grossly negligent acts." *Id.* at 384-85, 448 N.E.2d at 416, 461 N.Y.S.2d at 749.

148. *Sommer*, 79 N.Y.2d at 560, 593 N.E.2d at 1375, 583 N.E.2d at 967.

149. *Id.* at 555, 593 N.E.2d at 1371, 583 N.Y.S.2d at 963-64. Courts have explained that, "[t]o grant summary judgment it must clearly appear that no material and triable issue of fact is presented." Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404, 144 N.E.2d 387, 392, 165 N.Y.S.2d 498, 505 (1957). *But see* David Gutter Furs v. Jewelers Protection Servs., Ltd., 79 N.Y.2d 1027, 594 N.E.2d 924, 584 N.Y.S.2d 430 (1992) (holding that no issue of fact was raised as to whether alarm company performed its duties in a grossly negligent manner, so as to render contractual exculpatory clauses unenforceable).

The Court of Appeals next addressed the two classes of contribution claims brought against Holmes.[150] First, the alarm-related defendants sought contribution from Holmes in the event that they were found liable to Associates.[151] Even though contribution has been held unavailable in contract cases,[152] the court held that contribution would not be barred[153] because Holmes's actions sounded in tort.[154] The court also determined that it was immaterial whether Holmes owed a duty to the alarm-related defendants.[155] What was material was that Holmes owed a duty to exercise reasonable care to the injured party, Associates.[156]

The critical question for the court was whether contribution could be activated upon a finding of ordinary negligence or only upon a finding of gross negligence.[157] The court found that, although the exculpatory clause precluded Holmes's liability to Associates for ordinary negligence, the clause did not preclude liability to others for ordinary negligence.[158] The clause was like a "special defense" specific to Associates.[159] Because the alarm-related defendants were not parties to the Holmes-Associates contract, they should not be bound by its exculpatory clause.[160] Therefore, the alarm-related defendants' contribution

150. *Sommer*, 79 N.Y.2d at 555-60, 593 N.E.2d at 1372-75, 583 N.Y.S.2d at 964-67.

151. *Id.* at 555-58, 593 N.E.2d at 1372-74, 583 N.Y.S.2d at 964-66.

152. Board of Educ. v. Sargent, Webster, Crenshaw & Folley, 71 N.Y.2d 21, 29, 517 N.E.2d 1360, 1365, 523 N.Y.S.2d 475, 479 (1988).

153. *Sommer*, 79 N.Y.2d at 558, 593 N.E.2d at 1373, 583 N.Y.S.2d at 965-66. *Compare Sargent*, 71 N.Y.2d at 21, 517 N.E.2d at 1360, 523 N.Y.S.2d at 475.

154. *See supra* notes 144-45 and accompanying text.

155. *Sommer*, 79 N.Y.2d at 557-58, 593 N.E.2d at 1373, 583 N.Y.S.2d at 965.

156. *Sommer*, 79 N.Y.2d at 558, 593 N.E.2d at 1373, 583 N.Y.S.2d at 965; *see also id.* at 557, 593 N.E.2d at 1373, 583 N.Y.S.2d at 965 ("The rule of apportionment applies when two or more tort-feasors have shared . . . in the responsibility by their conduct or omissions in causing an accident, in violation of the duties they respectively owed to the injured person." (quoting Rogers v. Dorchester Assocs., 32 N.Y.2d 553, 564, 300 N.E.2d 403, 409, 347 N.Y.S.2d 22, 31 (1973))).

157. *Sommer*, 79 N.Y.2d at 558, 593 N.E.2d at 1373, 583 N.Y.S.2d at 965.

158. *Id.* at 558, 593 N.E.2d at 1373-74, 583 N.Y.S.2d at 965-66.

159. *Id.*

160. *Id.*; *see also* Franzek v. Calspan Corp., 78 A.D.2d 134, 434 N.Y.S.2d 288 (4th Dep't 1980) (holding that pre-accident release of claims by passengers to river trip promoter did not insulate promoter from contribution claims by parties also sued by passenger).

claims against Holmes would be triggered upon a finding of ordinary negligence.[161]

In the second class of contribution claims, the court addressed Associates's action against Holmes, seeking contribution for the claims brought by the tenants against Associates.[162] The court reasoned that, although contribution is usually founded upon a breach of a duty owed to the plaintiff, it may also be based upon a duty owed to the defendant.[163] Because Holmes had a duty to Associates, Holmes would be required to contribute for any recovery by the tenants against Associates.[164] However, the court again examined the issue of whether this contribution action would be triggered upon a finding of ordinary negligence or only upon a finding of gross negligence.[165] The court found that, because Holmes's exculpatory clause was enforceable against Associates as to ordinary negligence, Associates's contribution claim against Holmes would be triggered only upon a finding of gross negligence.[166]

In summary, the court held that public policy required Holmes to be liable to Associates for gross negligence,[167] and that an issue of fact existed as to whether Holmes met this threshold.[168] Accordingly, the Court of Appeals held that the appellate division correctly denied summary judgment for Holmes.[169] As to the claims by Associates against the alarm-related defendants, Holmes would be liable for contribution upon a showing of ordinary negligence, because Holmes could

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161. *Sommer*, 79 N.Y.2d at 558, 593 N.E.2d at 1373, 583 N.Y.S.2d at 965-66.

162. *Id.* at 558-60, 593 N.E.2d at 1374-75, 583 N.Y.S.2d at 966-67.

163. *Id.* at 559, 593 N.E.2d at 1374, 583 N.Y.S.2d at 966; *see also id.* ("If an independent obligation can be found on the part of a concurrent wrongdoer to prevent foreseeable harm, he should be held responsible for the portion of the damage attributable to his negligence, despite the fact that the duty violated was not one owing directly to the injured party." (quoting Garrett v. Holiday Inns, 58 N.Y.2d 253, 261, 447 N.E.2d 717, 721, 460 N.Y.S.2d 774, 778 (1983))).

164. *Sommer*, 79 N.Y.2d at 559, 593 N.E.2d at 1374, 583 N.Y.S.2d at 966.

165. *Id.*

166. *Id.* at 559-60, 593 N.E.2d at 1374, 583 N.Y.S.2d at 966; *see* Melodee Lane Lingerie Co. v. American Dist. Tel. Co., 18 N.Y.2d 57, 218 N.E.2d 661, 271 N.Y.S.2d 937 (1966) (holding that where a company's contractual clause limiting liability was held to be unenforceable, customer's right to indemnification was unaffected).

167. *Sommer*, 79 N.Y.2d at 560, 593 N.E.2d at 1374, 583 N.Y.S.2d at 966.

168. *Id.* at 548, 593 N.E.2d at 1367, 583 N.Y.S.2d at 959.

169. *Id.* at 560, 593 N.E.2d at 1374, 583 N.Y.S.2d at 967.

not rely on an exculpatory clause against one not a party to the contract.[170] Because Associates was a party to the contract, Associates could only obtain contribution against Holmes if Holmes's conduct was grossly negligent.[171] Actions by the alarm-related defendants against Holmes for contribution from the tenant's claims were properly dismissed, because Holmes owed no duty to either of them.[172]

IV. Analysis

A. *Tort / Contract Borderland*

The New York courts have wrestled with the tort/contract borderland, attempting to develop rules and tests to clarify the confusion.[173] The Court of Appeals' analysis of the borderland in *Sommer v. Federal Signal Corp.*[174] was a logical and positive step in the right direction. The opinion sets forth clear guidelines for trial courts to follow as they navigate through the borderland.

In *Sommer*, the Court of Appeals found that the facts gave rise to actions in tort as well as in contract.[175] The court avoided the traditional labels of nonfeasance and misfeasance.[176] If the court had applied these labels, most likely Holmes's failure to respond to an alarm signal would have been characterized as nonfeasance, allowing only for an action in contract.[177] Instead, the court reasoned that the fire alarm monitoring services affected a great public interest.[178] Fire alarm monitoring service providers have a duty to perform the services carefully, because failure to do so could cost many lives and

170. *Id.* at 558, 593 N.E.2d at 1373, 583 N.Y.S.2d at 965-66.

171. *Id.* at 560, 593 N.E.2d at 1375, 583 N.Y.S.2d at 967.

172. *Id.* at 558, 593 N.E.2d at 1374, 583 N.Y.S.2d at 966.

173. Bellevue S. Assocs. v. H.R.H. Constr. Corp., 78 N.Y.2d 282, 579 N.E.2d 195, 574 N.Y.S.2d 165 (1991); Clark-Fitzpatrick Inc. v. Long Island R.R., 70 N.Y.2d 382, 516 N.E.2d 190, 521 N.Y.S.2d 653 (1987); World Trade Knitting Mills v. Lido Knitting Mills, 154 A.D.2d 99, 551 N.Y.S.2d 930 (1st Dep't 1990).

174. 79 N.Y.2d 540, 593 N.E.2d 1365, 583 N.Y.S.2d 957 (1992).

175. *Sommer*, 79 N.Y.2d at 553, 593 N.E.2d at 1370, 583 N.Y.S.2d at 962; *see supra* notes 141-45 and accompanying text.

176. *Sommer*, 79 N.Y.2d at 553, 593 N.E.2d at 1370, 583 N.Y.S.2d at 962.

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

178. *Sommer*, 79 N.Y.2d at 553, 593 N.E.2d at 1370, 583 N.Y.S.2d at 962.

great expense to property.[179] Accordingly, the court imposed a duty above and beyond that created by the contract.[180]

Significantly, the court permitted claims in tort because this, in turn, cleared the way for contribution claims.[181] By allowing the action to proceed in tort, the contribution claims, otherwise unallowable, could go forward. Although the court did not formulate a new test or a new rule to clarify the borderland, its analysis was simple and clear, making the borderland seem less confusing.

B. *Exculpatory Clauses*

The court's decision that exculpatory clauses shall be unenforceable against claims of gross negligence was well supported by case law and public policy.[182] Where there is an exculpatory clause in a contract, the parties should be bound to it so long as there is only ordinary negligence.[183] Associates voluntarily chose to enter into the contract, which included the exculpatory clause, and should have been bound to its terms.[184]

However, where there is a finding of gross negligence, exculpatory clauses will be unenforceable.[185] Public policy dictates that liability for conduct evincing a reckless disregard for the safety of others will not be excused by an exculpatory clause. Therefore, Holmes could not escape liability where it has been grossly negligent. This public policy encourages enti-

179. *See supra* note 143 and accompanying text.

180. *Sommer*, 79 N.Y.2d at 553, 593 N.E.2d at 1370, 583 N.Y.S.2d at 962. Subsequent to this decision, the first department applied the reasoning found in *Sommer* in another context. The potential consequences to pedestrians of a defective building facade were held to create a duty of due care for the contractor, independent from its contractual obligation. Trustees of Columbia Univ. v. Gwathmey Siegel & Assocs. Architects, 192 A.D.2d 151, 601 N.Y.S.2d 116 (1st Dep't 1993).

181. *See supra* note 141 and accompanying text.

182. *See, e.g.*, Kalisch-Jarcho, Inc. v. City of New York, 58 N.Y.2d 377, 448 N.E.2d 413, 461 N.Y.S.2d 746 (1983).

183. *See supra* note 56 and accompanying text.

184. *See supra* notes 105-08 and accompanying text.

185. *Sommer*, 79 N.Y.2d at 554, 593 N.E.2d at 1370-71, 583 N.Y.S.2d at 963. This standard was followed in a 1993 decision of the Court of Appeals. The court held that the exculpatory clause of a burglary alarm service contract was enforceable because failure to wire a skylight of an art gallery, from which burglars entered and escaped, did not amount to gross negligence. Colnaghi, U.S.A., Ltd. v. Jewelers Protection Servs., 81 N.Y.2d 821, 611 N.E.2d 282, 595 N.Y.S.2d 381 (1993).

ties with responsibilities that have a significant impact on the general public to avoid gross negligence. This decision will further encourage fire, burglar and other alarm services to be more careful with the lives and property that their services protect.

C. *Contribution Claims*

Ever since the pro-plaintiff principle of joint and several liability was first recognized, the courts and legislature have attempted to promote an equivalent fairness to joint tortfeasors.[186] Because the doctrine of joint and several liability may require a defendant to pay 100% of the damages (even if not found to be 100% at fault), fairness to joint tortfeasors requires that the courts allow for as much contribution as possible. It is more equitable to allow our adversarial system to determine the percent of liability rather than to impose the full amount of damages on one of many joint tortfeasors.[187]

The rules of contribution outlined by the decision result in a just outcome for both plaintiffs and defendants. The result that Associates could recover for contribution from Holmes, only if Holmes was found to be grossly negligent,[188] is just; Associates should be bound by its contract and should not be able to recover for ordinary negligence. Consistent with the analysis of Associates's direct claim against Holmes, Associates chose to enter into the contract and must abide by its clauses. However, public policy dictates that exculpatory clauses be unenforceable against gross negligence.[189] Therefore, it is fair to allow Associates to recover for contribution from Holmes only if Holmes was grossly negligent.

In the action by Associates against the alarm-related defendants, the alarm-related defendants were not parties to the contract.[190] Therefore, they should not be bound by the exculpatory clause.[191] Since, under the theory of joint and several liability, the alarm-related defendants may have to pay 100% of

186. *See* N.Y. CIV. PRAC. L. & R. art. 14 (McKinney 1976 & Supp. 1994); Dole v. Dow Chem. Co., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

187. *Sommer*, 79 N.Y.2d at 556-57, 593 N.E.2d at 1372, 583 N.Y.S.2d at 964.

188. *Id.* at 560, 593 N.E.2d at 1374, 583 N.Y.S.2d at 966.

189. *See supra* note 60 and accompanying text.

190. *See supra* note 160 and accompanying text.

191. *See supra* notes 158-60 and accompanying text.

the damages to Associates, even if not 100% at fault, it is fair that they be able to seek contribution from Holmes in proportion to Holmes's fault.

Although one may argue that allowing this contribution based on ordinary negligence may cause inflation in rates charged by alarm monitoring service companies, there are stronger arguments that support such contribution. The cost of possible litigation will be filtered to the consumer either through the monitoring company or through the other alarm-related entities. Therefore, it is logical to use the fairer system. The fairer system allows an entity that has paid more than its proportion of fault to recover in contribution from the other entities at fault. Allowing this type of contribution encourages the monitoring companies to improve their services, thereby benefiting the consumer, and justifying their assumption of the increased associated costs.

V. Conclusion

Although the New York Court of Appeals in *Sommer v. Federal Signal Corp.*[192] did not invent a new rule or new test to clarify the tort/contract borderland confusion, the court showed how to examine the duties of the parties in light of the present tort/contract rules in order to make a clear determination as to whether both tort and contract claims can be pursued. The court found that Holmes's exculpatory clause would be unenforceable against claims of gross negligence. This finding is important because the court reaffirmed its view that public policy can make contract liability limitation clauses unenforceable.

The court's analysis of the contribution claims provides a clear framework for cases involving multiple parties and multiple contracts. The court allowed the contribution claims to the extent that public policy permitted. Allowing as many contribution claims as possible ensures that, through our adversarial system, justice will be served to the injured parties as well as to the joint tortfeasors.

Natasha V. Konon

192. 79 N.Y.2d 540, 593 N.E.2d 1365, 583 N.Y.S.2d 957 (1992).