PARTIAL SETTLEMENT OF MULTIPLE TORTFEASOR CASES UNDER THE INDIANA COMPARATIVE FAULT ACT

I. Introduction

Indiana adopted statutory comparative fault in 1983, effective Jan. 1, 1985.[1] Although Indiana courts have stated that settlement and compromise are encouraged by the law[2], the Indiana Comparative Fault Act makes no provision for settlement. The Uniform Comparative Fault Act[3] and the legislation[4] or judicial decisions of several other States[5] ac-

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1. Ind. Code §§ 34-4-33-1 to 34-4-33-14, effective Jan. 1, 1985. Section 2 of P.L. 317-1983, which enacted this statute, provided that the statute would not apply to any action accruing before its effective date. See Bayliff, *Drafting and Legislative History of the Comparative Fault Act*, 17 Ind. L. Rev. 863, 873 (1984) for an overview of the amendments to the Act made before its effective date.

2. *See, e.g.* Kavanaugh v. Butorac, 140 Ind. App. 139, 221 N.E.2d 824, 829 (1966) (evidence of unsuccessful settlement negotiations excluded so as not to penalize one who has made an effort to compromise a claim out of court); Indiana Insurance Co. v. Handlon, 216 Ind. 442, 447, 24 N.E.2d 1003, 1005 (1939) (same issue as above, stating: "Since it is the policy of the law to favor and encourage the compromise of differences, one who makes an unsuccessful effort toward that end should not be penalized.") The courts of other jurisdictions agree, one going so far as to state: "Compromises are favored by the Court. This is such a universal rule as to require no citation of authority." State Highway Comm'n v. Arms, 163 Mont. 487, 490, 518 P.2d 35, 37 (1974).

3. Unif. Comparative Fault Act § 6, 12 U.L.A. 37 (Supp. 1988), and Comment thereto. *See also* Unif. Contribution Among Tortfeasors Act § 4, 12 U.L.A. 57 (1975 & Supp. 1988). The Uniform Contribution Among Tortfeasors Act has been adopted by eighteen states, but the Prefatory Note to the Uniform Comparative Fault Act states:

> Both of [the Uniform Contribution Acts (1939 and 1955)] provide for pro rata contribution, which may be suitable in a state not applying the principle of comparative fault, but is inappropriate in a comparative-fault state apportioning ultimate responsibility on the basis of the proportionate fault of all the parties involved. . . .
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> It has . . . been decided not to amend the separate Uniform Contribution Among Tortfeasors Act, 1955, but to leave the act for possible use by states not adopting the principle of comparative fault.

Unif. Comparative Fault Act, Prefatory Note, 12 U.L.A. 37, 38 (Supp. 1988). For an analysis of the Uniform Contribution Among Tortfeasors Act, see Note, *Settlement in Joint Tort Cases*, 18 Stan. L. Rev. 486 (1966).

4. *See, e.g.* N.H. Rev. Stat. Ann. § 507:7h (Supp. 1988), (makes provision for effect of release or covenant not to sue, settlement to reduce claim of plaintiff by amount of consideration given); Alaska Stat. § 09.17.090 (1986) (provides that a release or covenant not to sue releases only the agreeing tortfeasor, credits the remaining defendants with the amount given, and discharges the tortfeasor from any responsibility for contribution); Ariz. Rev. Stat. Ann. §§ 12-2501(D), 12-2504(1) and (2) (1984).

5. *See, e.g.* American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 146 Cal. Rptr. 182, 578 P.2d 899 (1978) (providing for reduction of award by amount of settlement); Giem v. Williams, 215 Ark. 705, 222 S.W.2d 800 (1949).

knowledge the importance of compromise and settlement by providing for it specifically.

The purpose of this Note is to examine some of the possibilities and problems of the Indiana Act in the context of settlement by one of multiple tortfeasors under the statute. Since settlement does not take place in a vacuum, consideration of several corollary or threshold questions is necessary. Therefore, the analysis will focus not only on settlement itself, but on the threshold issues to settlement, including joint and several liability and contribution, and the decision as to whose fault will be considered in any allocation. This will be accomplished by posing questions which will inevitably arise under the Act in the multiple tortfeasor-settlement context, and then undertaking an examination of the caselaw and legislation of selected other states with an eye toward comparing and contrasting them to Indiana's new Act and its existing caselaw. This comparison will highlight the questions which Indiana courts will be called upon to answer, and will show the potential problems caused by omission of definite guidelines for the consequences of settlement in a multiple tortfeasor context.

The primary states used for comparison will be Kansas and Minnesota, with other states illustrating specific points. Kansas enacted its comparative fault act in 1974.[6] The Kansas Act abolishes joint and several liability,[7] making each tortfeasor responsible only for her[8] own percentage of the total award. Kansas defendants may bring in "additional parties" or "phantom tortfeasors," the rough equivalent of Indiana's nonparties, and have their fault considered along with the fault of parties to the action.[9] Kansas courts have not allowed contribution among tortfeasors.[10] These factors tend to make Kansas' comparative fault the most analogous to Indiana's at this time, affording a wealth of case law upon which to predict how Indiana courts might react to the new Comparative Fault Act.

Minnesota's Comparative Fault Act[11] resembles the Uniform Comparative Fault Act.[12] However, the Minnesota legislature has never of-

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6. KAN. STAT. ANN. § 60-258a (Supp. 1987).

7. KAN. STAT. ANN. § 60-258a(d), as interpreted in Brown v. Kiell, 224 Kan. 195, 580 P.2d 867 (1978). There is still some question regarding whether or not the Indiana Act has had the effect of abrogating the common law doctrine of joint and several liability. *See infra*, notes 46-49 and accompanying text.

8. The feminine pronoun is used throughout to represent both genders, except when referring to parties whose gender is specified by facts.

9. Hardin v. Manitowoc-Forsythe Corp., 691 F.2d 449 (10th Cir. 1982).

10. *See, e.g.* Kennedy v. Sawyer, 228 Kan 439, 447, 618 P.2d 788, 797 (1980).

11. MINN. STAT. ANN. §§ 604.01 to 604.08 (West 1988).

12. UNIF. COMPARATIVE FAULT ACT, 12 U.L.A. 37 (Supp. 1988). The Uniform Act has been adopted by Iowa (IOWA CODE §§ 668.1 to 668.14, adopted 1984) and Washington (WASH. REV. CODE §§ 4.22.005 to 4.22.925, adopted 1981).

ficially adopted the Uniform Act. Instead, it modeled its original statute on the Wisconsin Contributory Negligence Act and surrounding caselaw in 1969.[13] Later amendments brought it closer to the Uniform Act. The Minnesota statute provides for joint and several liability,[14] and the case law surrounding it allows contribution.[15] The Minnesota Act does not provide for joinder of nonparties. These factors make the Minnesota comparative fault system almost diametrically opposed to that of Kansas (and perhaps Indiana) in the settlement context. Finally, the Minnesota statute specifically provides for partial settlement of claims.[16]

II. Indiana Law Before and After the Enactment of Comparative Fault

A. Background: Settlement in Indiana Prior to the Act

Prior to the enactment of comparative fault, Indiana courts endorsed and allowed several different types of settlement agreements between plaintiffs and one or more joint tortfeasors. The intent behind the agreement decided the form, which then dictated its legal effect.[17] Settlement agreements could take a number of different forms, including

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13. The Wisconsin Act, enacted in 1931, Wis. Stat. Ann. § 895.045 (West 1983), is one of the oldest in the country. It provides:

> "Contributory negligence shall not bar recovery in an action . . . to recover damages for negligence resulting in death or injury . . . if such negligence was not greater than the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person recovering."

Id. While the statute itself is simple and sparse, it is supported by a large amount of caselaw. The Minnesota Supreme Court acknowledged the Wisconsin statute as the source of the Minnesota Comparative Fault Act in Busch v. Busch Const., Inc., 262 N.W.2d 377, 393 (Minn. 1977) and Marier v. Memorial Rescue Service, Inc. 296 Minn. 242, 207 N.W.2d 706 (1973), which held that the Minnesota statute's basis in Wisconsin law included the caselaw and interpretation of the Wisconsin statute up until the time of adoption. *See also* 1969 Committee Comment, Minn. Stat. Ann. § 604.01 (West 1988).

14. Minn. Stat. Ann. § 604.02(1) (West Supp. 1989). *See generally* Steenson, *Recent Legislative Responses to the Rule of Joint and Several Liability*, 23 Tort and Insurance Law Journal 482 (1988).

15. Minn. Stat. Ann. § 604.02(2) (West 1988). *See also supra* note 13.

16. Minn. Stat. Ann. § 604.01, subparts (2), (3), (4), and (5) (West 1988). Wisconsin's comparative negligence scheme provides for the consequences of settlement in the Wisconsin evidence code. Wis. Stat. Ann. § 885.285(3) (West Supp. 1988).

17. Fetz v. E & L Truck Rental Co., 670 F. Supp. 261, 263 (S.D. Ind. 1987); Sanders v. Cole Mun. Fin., 489 N.E.2d 117, 120 (Ind. Ct. App. 1986) (lists settlement options open to plaintiff and states that intent of the parties is relevant to the characterization of the settlement); Northern Indiana Public Service Co. v. Otis, 145 Ind. App. 159, 250 N.E.2d 378, 392 (1969).

loan receipt agreements,[18] covenants not to sue,[19] and covenants not to execute[20]. These devices were not considered releases *per se*.[21]

The danger in any settlement agreement for the plaintiff was in the common law maxim that the release of one joint tortfeasor[22] served as

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18. In a loan receipt agreement, a potentially liable defendant advances funds to a plaintiff in the form of a no-interest loan. In exchange, defendant receives a promise not to pursue a cause of action against that defendant. Fullenkamp v. Newcomer, 508 N.E.2d 37 (Ind. Ct. App. 1987) (decided under contributory fault because the cause accrued prior to the effective date of the Comparative Fault Act). Often, the loan is paid back out of recovery from the defendants remaining in the case. American Transp. Co. v. Central Indiana Ry. 255 Ind. 319, 323, 264 N.E.2d 64, 66 (1970). Courts approved of these transactions because they compensated plaintiffs without the usual protracted wait for a trial, and because they allowed plaintiffs to acquire funds to pursue claims against other defendants. Ohio Valley Gas, Inc. v. Blackburn, 445 N.E.2d 1378, 1382 (Ind. Ct. App. 1983). *See also American Transp. Co.*, 255 Ind. at 322-23, 264 N.E.2d at 67; *Northern Ind. Pub. Serv. Co.*, 145 Ind. App. at 179-80, 250 N.E.2d at 392. The amount given for a loan receipt agreement does not diminish the ultimate award to plaintiff because it is not considered to be in partial satisfaction, but is looked at as subject to repayment. *Sanders*, 489 N.E.2d at 120; Barker v. Cole, 396 N.E.2d 964 (Ind. Ct. App. 1980). *See also* Strohmeyer, *Loan Receipt Agreements Revisited: Recognizing Substance Over Form*, 21 IND. L. REV. 439 (1988).

19. Plaintiff agreed in exchange for consideration not to pursue her claim against a settling tortfeasor. Plaintiff did not release or waive her claim against that tortfeasor, retaining the claim in order to pursue it if the settling tortfeasor reneged, and reserving her claim against any other tortfeasors. National Mut. Ins. Co. v. Fincher, 428 N.E.2d 1386, 1388, nn.4-5 (Ind. Ct. App. 1981). The consideration paid under a covenant not to sue was in partial satisfaction of the claim, and therefore diminished any award the plaintiff ultimately received. *Sanders*, 489 N.E.2d at 120 (citing cases).

20. Plaintiff, in exchange for consideration, would agree not to execute any judgment received against the tortfeasor, retaining her cause of action against that tortfeasor and any other potentially liable persons. Barker v. Sumney, 185 F. Supp. 298 (N.D. Ind. 1960). The covenant not to execute was not dispositive of the issue of the settling tortfeasor's negligence, and the plaintiff could pursue her suit to its conclusion, as the covenant would not be effective until a judgment was obtained, at which point the settling tortfeasor could raise it as a defense if plaintiff sought to enforce the judgment. *Barker*, 185 F. Supp. 298; *Sanders*, 489 N.E.2d at 120. Amounts obtained by plaintiff under such a covenant were in partial satisfaction of her claim and so reduced her ultimate award *pro tanto*. *Sanders*, 489 N.E.2d at 120.

21. *Fetz*, 670 F. Supp. at 262-63 (1986)(citing cases).

22. Joint liability may be incurred when the acts of wrongdoers, through cooperation or concert, injure a plaintiff. Also, independent acts of several tortfeasors which combine to produce a single injury may subject them to joint liability. Young v. Hoke, 493 N.E.2d 1279, 1280 (Ind. Ct. App. 1986). Independent successive acts, *e.g.* an auto accident followed by medical malpractice in the emergency room, may not lead to joint responsibility between the tortfeasors. Wecker v. Kilmer, 260 Ind. 198, 294 N.E.2d 132 (1973). This Note will not deal with determination of the jointness of responsibility of tortfeasors, assuming that aspect in dealing with settlement questions.

a release of all.[23] In *Cooper v. Robert Hall Clothes*,[24] the Supreme Court of Indiana vacated a Court of Appeals judgment[25] dealing with a document which was entitled "Release," but which had reserved certain parts of plaintiff's cause of action against another defendant in the action.[26] The Court of Appeals had attempted to abandon the common law rule and institute instead the Restatement rule,[27] which would allow a plaintiff to give a release to one joint tortfeasor without releasing all. The Indiana Supreme Court expressly rejected the Restatement,[28] stressing the difference between transactions such as covenants not to sue and releases. A release entirely waived a claim, rendering a reservation of part of a claim inconsistent and void.[29] The court stated that the purpose of this rule was to prevent a plaintiff from recovering in excess of her actual damages by piecemeal settlements with various defendants.[30] Additionally, the court stressed that because joint tortfeasors constitute one jointly and severally liable entity, a release of part of that entity acknowledged that none of the components of the entity were liable.[31] A plaintiff also ran the risk of having a covenant not to sue or execute held to be a release as to all tortfeasors if the consideration which a settling tortfeasor paid equaled all of plaintiff's damages.[32]

This settlement and release regime inevitably worked injustices on various parties. Plaintiffs were disadvantaged if they executed a contract

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23. Cooper v. Robert Hall Clothes, Inc., 390 N.E.2d 155 (Ind. 1979); Bedwell v. DeBolt, 221 Ind. 600, 609, 50 N.E. 875, 878 (1943); Cleveland, C., C. & St. L. Ry. v. Hilligoss, 171 Ind. 417, 422-23, 86 N.E. 485, 487 (1908). "Release" is defined in Standard Auto Ins. Ass'n v. Reese, 83 Ind. App. 500, 149 N.E. 137 (1925): "A release is the act or writing by which some claim or, interest is surrendered to another person . . . . It is a species of contract, and like any other contract, it must have a consideration." *Id.* at 503, 149 N.E. at 138 (quoting Jaqua v. Shewalter, 10 Ind. App. 234, 36 N.E. 173 (1893), *reh'g denied*, 37 N.E. 1072 (1894)). *See also* PROSSER, HANDBOOK OF THE LAW OF TORTS § 49 (1971).

24. 390 N.E.2d 155 (Ind. 1979).

25. Cooper v. Robert Hall Clothes, Inc., 375 N.E.2d 1142 (Ind. Ct. App. 1978).

26. Parts of the release document are reproduced in *Cooper*, 390 N.E.2d at 156-57.

27. RESTATEMENT (SECOND) OF TORTS § 885(1) (1965) provides: "A valid release of one tortfeasor from liability for a harm, given by the injured person, does not discharge others liable for the same harm, unless it is agreed that it will discharge them."

28. *Cooper*, 390 N.E.2d at 157.

29. *Id.*

30. *Id.*

31. *Id.*

32. Bedwell v. Debolt, 221 Ind. 600, 609, 50 N.E.2d 875, 879; Moffett v. Gene B. Glick Co., Inc., 621 F. Supp. 244, 289 (N.D. Ind. 1985). In Scott v. Krueger, 151 Ind. App. 479, 514, 280 N.E.2d 336, 357 (1972), the court stated that the amount paid could be brought before the jury, who would then decide whether it had served to satisfy all plaintiff's damages and would therefore be a release. *Id.*

believing it to be a covenant and the court found it to be a release,[33] thereby denying plaintiffs a full recovery. Inequities to settling defendants also resulted because the settling joint tortfeasor had no right of contribution against the other tortfeasors who benefitted when the contract was found to be a release, or when a covenant not to sue was found to fully satisfy plaintiff's damages.[34] This meant that the settling defendant was released, but other, perhaps more blameworthy, defendants paid nothing at all. The settling defendant could not get any repayment from other defendants for procuring their release because contribution was not allowed.

When a covenant not to sue or not to execute was held to be valid, that is, it did not release all the tortfeasors, only the one who executed the settlement, the remaining defendants suffered. Joint and several liability,[35] combined with the fact that plaintiff's award was diminished only by the dollar amount of the settlement,[36] meant that the remaining defendants would pay the entire balance of any award, regardless of how faulty they were. The remaining defendants would have no right to seek contribution from the settling tortfeasor. Indeed, they had no right to seek contribution against *any* of their fellow joint tortfeasors.[37]

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33. *See Cooper*, 390 N.E.2d 155. Although both the appellate court and supreme court clearly found the *Cooper* settlement to be a release, it is logical to assume that since the plaintiff included a reservation of rights against the remaining defendants she thought that she could do so and have the release operate as a covenant not to sue. This becomes even more obvious when the amounts given in exchange for the release are considered: plaintiff originally stated her claim at Seventy-Five Thousand Dollars, and settled with one defendant for One Thousand Nine Hundred and Ninety Nine Dollars and the other defendant for Ten Dollars. *Id.* at 156.

34. Sanders v. Cole Mun. Fin., 489 N.E.2d 117, 121. *See* Recent Decisions, *Release of Joint Tortfeasors—Document Styled "Covenant Not To Sue" Held to Amount to Release*, 36 NOTRE DAME LAWYER 443 (1960).

35. Indiana followed the common law doctrine of joint and several liability which allowed a plaintiff to recover all her damages from any one of the named defendants against whom she received a judgment. Barker v. Cole, 396 N.E.2d 964, 971 (Ind. Ct. App. 1979)

36. *Sanders*, 489 N.E.2d 117, 120. Amounts received by a plaintiff under a loan receipt agreement did not diminish the final award at all. *Id. See supra* note 18.

37. Contribution is a system by which a tortfeasor who has paid plaintiff's full damages or more than that defendant's equal share is entitled to seek repayment from the other joint tortfeasors. The shares were calculated on a *pro rata* basis, that is, the full amount of the judgment was divided by the number of tortfeasors liable, each defendant being responsible for her equal share. This is a traditional common law doctrine. *See* PROSSER, HANDBOOK OF THE LAW OF TORTS 50. There has never been a right to contribution among joint tortfeasors in Indiana. Barker v. Cole, 396 N.E.2d 964, 971; The American Express Co. v. Patterson, 73 Ind. 430, 436 (1881); Hunt v. Lane, 9 Ind. 248 (1857). *See also* Recent Decisions, *Torts-Joint Tortfeasors-Contribution-Exceptions*, 6 NOTRE DAME LAWYER 267 (1930-1931).

A loan receipt agreement did not diminish plaintiff's award at all and left the remaining nonprevailing defendants to pay the whole amount, with any sort of repayment of the loan being a contractual matter between plaintiff and settling tortfeasor.[38] These features combined to make settlement relatively predictable, despite the technical risks to unwary settlers (especially the release rule) characterized as "boobytraps" by the drafters of the Restatement rule.[39]

B. The Indiana Comparative Fault Act

In 1985, Indiana joined the numerous states which have adopted some form of comparative fault.[40] The Indiana Act strongly emphasizes the procedural aspects of comparative fault.[41] The basic change in the law made by this statute is, of course, that contributory fault no longer bars a plaintiff's recovery against a tortfeasor unless the plaintiff's fault is "greater than the fault of all persons whose fault proximately contributed to the claimant's damages."[42]

1. Joint and Several Liability and Contribution.—Section 34-4-3-5(b) of the Indiana Act gives the jury explicit instructions on how to apportion the fault of multiple parties.[43] It makes no provision, however, for how

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38. In *Northern Indiana Public Service Co. v. Otis*, the court noted that "authorities from Indiana and other jurisdictions certainly provide for the use of a loan receipt agreement and use of the same is neither contribution among joint tortfeasors or [sic] an assignment of a cause of action sounding in tort." 145 Ind. App. 159, 180, 250 N.E.2d 378, 392-93. (citing cases collected in 1 A.L.R. 1528, 132 A.L.R. 607, and 157 A.L.R. 1261). A loan receipt agreement could be considered an "end run" on the prohibition against contribution insofar as the loaning party was paid back out of the proceeds of judgments against other parties. *See* Strohmeyer, *supra* note 18.

39. RESTATMENT (SECOND) OF TORTS § 885, Comment (d) (1965).

40. IND. PUB. L. 317-1983 (which enacted most of the provisions of IND. CODE §§ 34-4-33-1 to -14 in 1983); IND. PUB. L. 174-1984 (which amended various sections of the Act). Each provided that its effective date was to be January 1, 1985. For a list of the states which had judicially or legislatively adopted comparative fault or comparative negligence before Indiana, see Smith and Wade, *Fairness: A Comparative Analysis of the Indiana and Uniform Comparative Fault Acts*, 17 IND. L. REV. 969, n.3 (1984).

41. *See, e.g.* IND. CODE § 34-4-33-5 (1988) (providing the procedure by which a jury arrives at the ultimate allocation of fault and recovery); IND. CODE § 34-4-33-6 (1988) (providing for special verdict forms); and IND. CODE § 34-4-33-10 (1988) (providing for nonparty defense, including time for pleading and burden of proof).

42. IND. CODE § 34-4-33-4(b) (1988). IND. CODE § 34-4-33-3 (1988) provides: "In an action based on fault, any contributory fault chargeable to the claimant diminishes proportionally the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery except as provided in section 4 of this chapter."

43. IND. CODE § 34-4-33-5(b) (1988) provides:

In an action based on fault that is brought against two (2) or more defendants,

a settlement might affect the apportionment of fault or how any award of damages might be diminished by a settlement between a plaintiff and one of several defendants.[44] The Act is also silent on the topic of joint and several liability, which has sparked a debate among the legal scholars of Indiana as to whether the joint and several liability doctrine survived the enactment of the Comparative Fault Act.[45] Some of these scholars and writers have assumed the abrogation of joint and several liability,[46] while others have assumed its continued existence or argued in favor of retention of the doctrine.[47]

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and that is tried to a jury, the court, unless all the parties agree otherwise, shall instruct the jury to determine its verdict in the following manner:

(1) The jury shall determine the percentage of fault of the claimant, of the defendants, and of any person who is a nonparty. The percentage of fault figures of parties to the action may total less than one hundred percent (100%) if the jury finds that fault contributing to cause the claimant's loss has also come from a nonparty or nonparties.

(2) If the percentage of fault of the claimant is greater than fifty percent (50%) of the total fault involved in the incident which caused the claimant's death, injury, or property damage, the jury shall return a verdict for the defendants and no further deliberation of the jury is required.

(3) If the percentage of fault of the claimant is not greater than fifty percent (50%) of the total fault,the jury shall then determine the total amount of damages the claimant would be entitled to recover if contributory fault were disregarded.

(4) The jury next shall multiply the percentage of fault of each defendant by the amount of damages determined under subdivision (3) and shall enter a verdict against each such defendant (and such other defendants as are liable with the defendant by reason of their relationship to such defendant) in the amount of the product of the multiplication of each defendant's percentage of fault times the amount of damages as determined under subdivision (3).

IND. CODE § 34-4-33-5(b) (1988). *See also* suggested jury verdict forms in Indianapolis Bar Association Young Lawyer's Division Handbook, SUPER SATURDAY IN COURT - COMPARATIVE FAULT (April 9, 1988).

44. Mr. Bayliff, one of the drafters of the Act, states, "Jurors will simply diminish the claimant's recovery by the percentage of fault (not by the amount paid) of the tortfeasors who have settled." Bayliff, *Drafting and Legislative History of the Indiana Comparative Fault Act*, 17 IND. L. REV. 863, 869 (1984). This assumes the abrogation of joint and several liability.

45. *See generally*, *Symposium on Indiana's Comparative Fault Act*, 17 IND. L. REV. (1984). This has been an issue in other states when comparative systems are adopted legislatively and judicially. *See* H. WOODS, COMPARATIVE FAULT § 13:4 (1987).

46. *See* Bayliff, *supra* note 44, at 867, stating that the Act "implicitly abrogates the traditional rule of joint and several liability for concurrent wrongs"; Easterday and Easterday, *The Indiana Comparative Fault Act: How Does It Compare With Other Jurisdictions?*, 17 IND. L. REV. 883, 899 (1984); Eilbacher, *Nonparty Tortfeasors in Indiana: The Early Cases*, 21 IND. L. REV. 413, 417. (1988) (assuming the abolition of joint and several liability). Other non-Indiana authors have also assumed the abrogation of joint and several liability by the Indiana statute. *See, e.g.* 2 MATTHEW BENDER, COMPARATIVE NEGLIGENCE § 13.20[3] (1984); H. WOODS, COMPARATIVE FAULT, app., at 587 (1987).

47. *See* Pardieck, *The Impact of Comparative Fault in Indiana*, 17 IND. L. REV.

The importance of joint and several liability to settlement lies in its effect on the ultimate award to a plaintiff, who will recover fully if she can arrive at the full award by a combination of the settlement amount and recovery from the tortfeasors remaining in the action. For defendants, the effect of joint and several liability can be that one defendant ends up paying the entire judgment (because of insolvency or unavailability of co-tortfeasors) without being able to resort to contribution to recoup some of the amount paid. This is problematic in that the purpose of the allocation of proportional fault is defeated if a plaintiff may recover more than a defendant's allocated share of the damages from that defendant. As Lawrence Wilkins points out in his article analyzing the Indiana Act:

> Adoption of comparative fault signals the embrace of a policy of refining the compensation function of tort law in order that injured parties' needs may be more widely and accurately served. Abolition of joint and several liability operates against that policy. At the same time, the fairness element inherent in the comparative fault system powerfully favors the interests of tortfeasors who rightfully claim that liability apportioned to fault is meaningless if they are made to bear more than their assessed percentage of fault.[48]

In *Gray v. Chacon*,[49] Judge Barker of the Southern District of Indiana cited the abrogation of joint and several liability as one of the reasons for the demise of the release rule under Indiana's Comparative Fault Act.[50] Referring to the Indiana Supreme Court's justifications for

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925, 936-938 (1984) (arguing that the policies of tort law and the availability of insurance militate in favor of the retention of joint and several liability, especially in cases where the plaintiff is fault-free); Schwartz, *Comparative Negligence in Indiana: A Unique Statute That Will Reshape the Law*, 17 IND. L. REV. 957, 967 (1984) (assuming that the statute has preserved joint and several liability). One author notes the arguments of both sides and recommends solutions that neither entirely abrogate joint and several liability nor keep it intact. Wilkins, *The Indiana Comparative Fault Act at First (Lingering) Glance*, 17 IND. L. REV. 687, 717 (1984).

48. Wilkins, *supra* note 47 at 717. The polar policies mentioned by Professor Wilkins are in this Note termed "allocation oriented" (favoring the precise allocation of fault and the idea that each should be responsible only for her own share of fault) and "compensation oriented" (favoring full compensation of injured parties, even at the expense of defendants). Professor Wilkins points out that the abrogation of joint and several liability will curtail the use of such devices as the loan receipt agreement, because if the plaintiff must repay the loan from her proportional recovery from remaining defendants, she has not only lost the proportional recovery from the settling defendant, but has her remaining recovery from the other defendants diminished by the amount of repayment. *Id.* at 719, n.156.

49. 684 F. Supp. 1481 (S.D. Ind. 1988).

50. *Id.* at 1485.

the release rule set forth in *Cooper v. Robert Hall Clothes*,[51] Judge Barker concluded that the Comparative Fault Act removed any danger of a plaintiff receiving more than her proven damages by piecemeal successive settlement.[52] This is because no defendant or nonparty would ever be required to pay more than her own share of fault, and no incentive exists under the Act for a tortfeasor to settle and be released for more than her estimated proportion of fault.[53] Judge Barker further stated: "[D]ue to the Act's abolition of joint and several liability multiple tortfeasors can no longer be properly considered as 'one entity' in Indiana. . . . [F]ar from being 'one entity,' joint defendants in Indiana are now as separate and independent from each other as they are from the plaintiff herself."[54] Acknowledging that "it is possible to create a 'law professor's' argument in favor of the notion that the Act retained joint and several liability, . . . such an interpretation lacks persuasive force and is at odds with the legislative motivation otherwise evidenced throughout the Act."[55] It is unclear what the effect of this dicta will be because no Indiana state court has made a pronouncement on whether joint and several liability has survived, whether intact or modified.

One result effected by the *Gray* decision with regard to settlement under the Comparative Fault Act is that the court made it abundantly clear that the common law release rule[56] has no place in a comparative fault system which does not incorporate joint and several liability.[57] The court recommended, instead, adoption of the Restatement Section 885 rule: release of one tortfeasor does not serve to release all unless intended to do so.[58] This position is in keeping with that expressed in *Young v. Hoke*,[59] a case decided by the Indiana Court of Appeals. *Young* was decided under the old contributory negligence scheme because the cause of action accrued before the 1985 effective date of the Comparative Fault Act.[60] Although the result in the case was that the release rule was applied,[61] concurring and dissenting opinions questioned its continued vitality.

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51. 271 Ind. 63, 390 N.E.2d 155 (1979).
52. *Gray*, 684 F. Supp. at 1484. *See supra* notes 23-32 and accompanying text.
53. *Gray*, 684 F. Supp. at 1484.
54. *Id.* at 1485 (footnote omitted).
55. *Id.* at n.6.
56. *See supra* text accompanying notes 24 -36.
57. *Gray*, 684 F. Supp. at 1485.
58. RESTATEMENT (SECOND) OF TORTS § 885 (1965): *See supra* note 27.
59. 493 N.E.2d 1279 (Ind. Ct. App. 1986).
60. *Id.* The Young's cause of action arose out of an automobile accident which took place on December 18, 1981. *Id.*
61. *Id.* at 1280.

The concurring opinion compared the Indiana Act to that of Kansas and noted that Kansas courts reasoned that the release rule no longer applied under the Kansas comparative fault system.[62] The concurrence agreed that the release rule should apply in cases not within the ambit of the Comparative Fault Act, declining to join the dissent in advocating an abrogation of the release rule in that particular case,[63] but stated clearly that the release rule should not apply to cases where fault is proportioned. This reasoning, like that in *Gray*, was based on an assumption that Indiana, like Kansas, left joint and several liability behind in enacting comparative fault.[64] The effect of the *Gray* opinion and the *Young* concurrence regarding the release rule will depend on the decisions Indiana courts eventually make on the issue of joint and several liability and how they interact with proportioned fault.

These decisions will be affected by the fact that the Act unambiguously continues Indiana's common law bar against contribution between tortfeasors: "In an action under this chapter, there is no right of contribution among tortfeasors."[65] Contribution has been looked upon as balancing joint and several liability, ameliorating its harsh effect on defendants forced to pay plaintiff's entire damages despite the presence of other defendants who should rightfully pay a share.[66] With contribution statutorily circumscribed, courts might feel constrained to abrogate joint and several liability in order to avoid the unbalanced, harsh effect on defendants which would result with joint and several liability only.[67]

2. The Nonparty Provisions of the Act.—The Indiana Act makes specific provision for consideration of the fault of tortfeasors not parties to the action.[68] According to Section 34-4-33-5(b)(1) of the Act, the jury is to be instructed to "determine the percentage of fault of the claimant,

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62. *Id.*

63. The dissent, written by Judge Garrard, attacked the release rule on the basis of policy, stating that the rule is outdated and an anachronism which fails to give effect to the clear intent of the parties. *Id.* at 1281-1283.

64. *Id.* at 1280-81.

65. IND. CODE § 34-4-33-7 (1988).

66. *See* PROSSER, HANDBOOK OF THE LAW OF TORTS § 50 (1971).

67. *See* Wilkins, *supra* note 47, at 718. Wilkins notes: "Why the Indiana legislature considered it necessary to include the ban is open to question, given the Act's purported abolition of joint and several liability, and the fact that contribution is presently unavailable in Indiana." *Id.* (footnotes omitted). Wilkins states: "When joint and several liability is abolished, the rule against contribution is redundant; no detriment is imposed against defendant's interests which needs to be counterbalanced. All of the detrimental effects are borne on the plaintiff's side of the bar." *Id.* at 720. *See generally* Comment, *Tort Law: Joint and Several Liability Under Comparative Negligence-Forcing Old Doctrines on New Concepts*, 40 U. FLA. L. REV. 469 (1988) (disapproving of Florida judicial retention of joint and several liability because detrimental to defendants).

68. IND. CODE §§ 34-4-33-5(b)(1), 34-4-33-10 (1988).

of the defendants, and of any person who is a nonparty."[69] Nonparty is defined as "a person who is, or may be, liable to the claimant in part or in whole for the damages claimed but who has not been joined in the action as a defendant by the claimant."[70]

Another section provides for a "nonparty defense," made by a defendant in order to have the fault of a tortfeasor not joined as a defendant considered.[71] The defense must be affirmatively asserted in order to have the nonparty's fault considered.[72] Finally, in providing

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69. IND. CODE § 34-4-33-5(b)(1) (1988). See *supra* note 44 for the full text of IND. CODE § 34-4-33-5(b). The section provides that "[t]he percentage of fault figures of parties to the action may total less than one hundred percent (100%) if the jury finds that fault contributing to cause the claimant's loss has also come from a nonparty or nonparties." *Id.* While IND. CODE § 34-4-33-5(b)(1) may seem to imply that juries may consider the fault of nonparties spontaneously, without having the issue introduced by the court or a party, IND. CODE § 34-4-33-10 (1988) provides specific procedural provisions for the introduction of the issue, and juries are apparently not allowed to consider nonparty fault unless it is introduced into the case. *See* Wilkins, *supra* note 47, at 739.

70. IND. CODE § 34-4-33-2(a) (1988). The statute specifies that an employer may not be a nonparty. *Id.* This Note does not deal with the ramifications of the exclusion of employers from nonparty status.

71. IND. CODE § 34-4-33-10 (1988).

72. IND. CODE § 34-4-33-10 (1988) provides in pertinent part:

> (a) In an action based on fault, a defendant may assert as a defense that the damages of the claimant were caused in full or in part by a nonparty. Such a defense is referred to in this section as a nonparty defense.
>
> (b) The burden of proof of a nonparty defense is upon the defendant, who must affirmatively plead the defense. However, nothing in this chapter relieves the claimant of the burden of proving that fault on the part of the defendant or defendants caused, in whole or in part, the damages of the claimant.
>
> (c) A nonparty defense that is known by the defendant when he files his first answer shall be pleaded as part of the first answer. A defendant who gains actual knowledge of a nonparty defense after the filing of an answer may plead the defense with reasonable promptness. However, if the defendant was served with a complaint and summons more than one hundred fifty (150) days before the expiration of the limitation of action applicable to the claimant's claim against the nonparty, the defendant shall plead the nonparty defense not later than forty five (45) days before the expiration of that limitation of action. The trial court may alter these time limitations or make other suitable time limitations in any manner that is consistent with:
>
> (1) giving the defendant a reasonable opportunity to discover the existence of a nonparty defense; and
>
> (2) giving the claimant a reasonable opportunity to add the nonparty as an additional defendant to the action before the expiration of the period of limitation applicable to the claim. . .

IND. CODE § 34-4-33-10 (1988). The first case to interpret the statutory nonparty defense was Walters v. Dean, 497 N.E.2d 247 (Ind. Ct. App. 1986) (a single defendant case in which the defendant pleaded a nonparty defense in his answer to plaintiff's complaint). After reviewing some of the case law of other jurisdictions, the court concluded that the allocation of nonparty fault is to be made "only in those cases where the non-party defense is specially pleaded by a named defendant." *Id.* at 253.

for the forms of the verdicts, the legislature has required that "[i]f the evidence in the action is sufficient to support the charging of fault to a nonparty, the form of verdict also shall require a disclosure of the name of the nonparty and the percentage of fault charged to the nonparty."[73] This effectively precludes the consideration of the fault of unidentified tortfeasors. These provisions of the Act are unique in comparative fault jurisdictions, with other states answering the questions brought up by nonparty inclusion by means of case law.[74]

The status of nonparties has an impact in the area of settlement with regards to what happens to the fault of a settling tortfeasor. If the settling tortfeasor is considered a nonparty, her fault will be allocated under the nonparty provisions of the Act. This result has been assumed by several Indiana authors, one of whom states that "[t]he nonparty likely to be encountered by the jury most frequently is that tortfeasor with whom the plaintiff has reached a settlement."[75] If so, Indiana courts will be called upon to make decisions regarding whether juries should be told that a tortfeasor is a nonparty rather than a defendant because she has settled with the plaintiff. This creates a potential problem if unsophisticated juries view settlement as evidence of admitted liability, allocating undue amounts of fault to nonparty settling tortfeasors. The problem created if juries are not told of a settlement is the confusion engendered when a clearly faulty tortfeasor is a nonparty who does not defend herself. Besides being told of the mere fact of a settlement, there will be questions as to whether juries should be told the amount of a settlement.[76]

Situations will also arise where nonsettling defendants bring settling tortfeasors back in as nonparties and attempt to heap fault on them. This would, in effect, force the plaintiff to defend the settling wrongdoer,

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73. IND. CODE § 34-4-33-6 (1988).

74. Eilbacher, *Comparative Fault and the Nonparty Tortfeasor*, 17 IND. L. REV. 903, 905, n.2 (1984). *See also* C. HEFT & C.J. HEFT, COMPARATIVE NEGLIGENCE MANUAL § 8.100 (1986); 2 MATTHEW BENDER COMPARATIVE FAULT § 13.20[2] (1989).

75. Eilbacher, *supra* note 74, at 908.

76. This would also be an evidentiary question. Evidence of offers to compromise or evidence of settlements made is, as a rule, inadmissible. 12 R. MILLER, INDIANA PRACTICE § 408.101 (1984). This rule does not apply if the evidence of settlement is offered for some other purpose than to prove liability. *Id.* Also, "[e]vidence that a party made an offer to settle a related claim with a non-party is not admissible to show the party's belief in the weakness of his case. If the non-party is called as a witness, however, evidence of the offer may be admissible to show the witness' bias or prejudice." *Id.* at § 408.103. *See also* Note, *Knowledge by the Jury of a Settlement Where a Plaintiff has Settled With One or More Defendants Who Are Jointly and Severally Liable*, 32 VILL. L. REV. 541 (1987), which looks at the problems involved in this issue in a number of jurisdictions, including those which control the exposure of the jury to settlement agreements statutorily.

who has no incentive to defend herself because she has been released. On the other side of this is the unfairness to defendants if plaintiffs are allowed to keep settling tortfeasors out of the fault allocation equation entirely, which would force the trier of fact to allocate the fault between plaintiff and the nonsettling defendant, causing the nonsettling defendant to pay more than her fair share of the damages.[77] The case law involving the Indiana Act has focused primarily on the nonparty provisions of the Act.[78] Several cases deal with the question of whether a tortfeasor may be a nonparty under the provision of the statute defining a nonparty as one who "is or may be liable" to the claimant.[79] In *Hill v. Metropolitan Trucking,*[80] the Northern Federal District Court of Indiana held that fellow employees of the plaintiff's decedent could not be nonparties because the plaintiff had no right of recovery against them.[81] Since the would-be nonparties were state employees and no Tort Claims notice had been filed, they were immune to suit; therefore they could not be liable, and further, could not be named as nonparties.[82] A different result was reached several months later in the Southern District of Indiana in *Huber v. Henley*,[83] in which the court found that the State could have been liable if a Tort Claims notice had been filed, and as a result could be named as a nonparty even though plaintiff had waived his right to recover from the State by not filing the notice.[84]

In the settlement context, these cases bring up the issue of whether a settling defendant can be considered a party who is or may be liable to the claimant. In the larger sense, a settling tortfeasor is still one who is liable, but that liability has been dealt with by contract between the parties. This controls not necessarily the right, but the recovery (as in a covenant not to sue). In the narrow sense, if a release has been given, the settling party is freed. The plaintiff in this situation has contracted away her right to pursue that tortfeasor any further, thereby precluding the naming of that tortfeasor as a nonparty who is or may be liable to the plaintiff.

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77. *See* Wilkins, *supra* note 47, at 732. *See also* 2 MATTHEW BENDER COMPARATIVE NEGLIGENCE § 13.20 (breaks down the advantages and disadvantages to parties when nonparty tortfeasors are brought in or kept out in joint and several liability or several liability only jurisdictions).

78. *Supra* notes 69-77 and accompanying text.

79. IND. CODE § 34-4-33-2 (1988).

80. 659 F. Supp. 430 (N.D. Ind. 1987).

81. *Id.* at 434-35.

82. *Id.*

83. 669 F. Supp. 1474 (S.D. Ind. 1987). This case had been in the same court earlier on the same issue. Huber v. Henley, 656 F. Supp. 508 (S.D. Ind. 1987).

84. *Huber*, 669 F. Supp. at 1479.

The federal court in *Moore v. General Motors Corp.*[85] ruled that the conduct of plaintiff's employer (who could not be brought in as a nonparty because the statute specifically precludes an employer from being a nonparty)[86] could be brought in and considered under the proximate cause provisions of the Act.[87] The court issued a warning in the opinion that the defendants must not try to do indirectly what they could not do directly, that is, to have the employer's fault considered by the jury, but stated that evidence of the employer's conduct could be presented to defend against plaintiff's claim of negligence on the causation level only.[88] The court's admonition made it clear that the employer was not to be allocated any fault. However, consideration of a wrongdoer's fault without allocation is bound to be confusing to juries, and begins to resemble the "phantom tortfeasor" concept (dealt with later in this Note), which also involves bending the nonparty provisions of a statute.[89]

Bowles v. Tatom,[90] decided in June 1988 by the Indiana Court of Appeals, refined the interpretation of the nonparty defense further in terms of how and whether the defense is pleaded. In *Bowles*, plaintiff was injured when he was hit broadside in an intersection by the defendant, who had run a stopsign obscured by foliage.[91] Plaintiff Tatom originally named as defendants Bowles, the city, the mayor, and the adjacent property owners whose trees had obscured the stopsign.[92] When Plaintiff had finished presenting his evidence and rested, the defendants city, mayor, and landowners moved to have the claims against them dismissed. The court granted the motion without objection by defendant Bowles.[93]

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85. 684 F. Supp. 220 (N.D. Ind. 1988).
86. IND. CODE § 34-4-33-2(a) (1988).
87. IND. CODE § 34-4-33-1(b)(1) and (2) (1988).
88. *Moore*, 684 F. Supp. at 222:

> Defendants are cautioned, however, that in presenting evidence to refute the elements of plaintiff's negligence claim, they must be very careful to structure their arguments so as to avoid confusing the jury. . . . The defendant's arguments cannot be used to indirectly accomplish an allocation of fault to unnamed defendants by the jury, a result inconsistent with the express provisions of the Indiana Comparative Fault Act.

Id. The court based its decision in part on the portion of the Act that states: "[N]othing in this chapter relieves the claimant of the burden of proving that fault on the part of the defendant or defendants caused, in whole or in part, the damages of the claimant." IND. CODE § 34-4-33-10(b) (1988). This stricture appears in the nonparty defense portion of the statute. *Id.* at 221.

89. *See infra* notes 151-55 and accompanying text.
90. 523 N.E.2d 458 (Ind. Ct. App. 1988).
91. *Id.* at 460.
92. *Id.*
93. *Id.*

This left Bowles as the only defendant, and the trial judge assessed one hundred percent liability against her.[94]

The appellate court found this one hundred percent fault allocation inappropriate, stating that while the evidence of the obstruction of the stopsign did not show that Bowles was not at fault, it did establish that she could not be one hundred percent at fault. The court also held:

> Although the City, the Mayor, and the [landowners] were dismissed from the lawsuit, fault percentage could be allocated to them even though Bowles did not plead the empty chair defense. In the present case, the City, the Mayor, and the [landowners] were parties up until the close of Tatom's case-in-chief. As such, Bowles was entitled to rely on the fault allocation provisions of the Comparative Fault Act without specific pleading, and could continue to rely on the fault allocation after the other named defendants were dismissed. . . . [T]he dismissal did not amount to a zero percent (0%) fault allocation.[95]

This appears to indicate that a defendant need not plead a nonparty defense to assert it if the nonparties were defendants in the action and were dismissed. If a court determines that the principles in *Bowles* apply equally when the dismissal is by agreement between the plaintiff and a settling defendant, rather than by the court, then a defendant who settled during trial and was released and dismissed would automatically have her fault allocated as though she had remained in the action. The nonsettling defendants would not have to plead any nonparty issues in order to have the settling defendant's fault allocated.

The *Bowles* dissent took a different view, focusing on the statutory definition of nonparty, which requires that the nonparty be one "who is or may be liable to the claimant . . . but *who has not been joined in the action as a defendant* by the claimant."[96] The dissenting judge stated: "By statutory definition, parties in a comparative fault action can never revert to nonparty status,"[97] and thus the dismissal of the city, the mayor and the landowners functioned as an allocation of zero percent of the fault to them. Under this view, a defendant who settles cannot be brought back in to the action as a nonparty for fault allocation. However, the dissent also focused on the fact that the dismissal was by the court under T.R. 50(A) motion,[98] which would distinguish the *Bowles*

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94. *Id.*

95. *Id.* at 461.

96. *Id.* at 462 (Conover, J. dissenting) (emphasis in original).

97. *Id.* at 462.

98. IND. TRIAL R. 50 provides for Judgment on the Evidence (Directed Verdict). The trial court in *Bowles* dismissed the City, the Mayor, and the adjacent landowners because it determined that there was no evidence of liability on the part of those defendants. 523 N.E.2d at 460.

case from a case where the dismissal is by agreement between a defendant and the plaintiff.

It is clear that Indiana courts will be called upon to further interpret the nonparty provisions of the Indiana Act. Because the comparative fault statute is unique in its precise, procedural nonparty provisions, courts will face the interpretation without much help from the case law of other jurisdictions such as Kansas, which has a vague nonparty provision its courts have found very malleable.[99] While it is simple to dismiss settlement issues under the nonparty provisions by stating that settling parties will become nonparties for the allocation of fault, this does not necessarily solve the practical and policy-oriented consequences of doing so. The questions raised above can and will be brought up by parties, and the courts will have to balance the policies of full compensation for claimants with fairness to defendants and the ideal of completely proportional liability.

III. Comparison With the Kansas Act

A. Background

Prior to the enactment of the Kansas comparative fault statute, settlement in Kansas was much the same as in Indiana. Tortfeasors were jointly and severally liable for the injuries they caused concurrently or in concert.[100] The effect of a settlement document was determined by examining the intent of the parties to the agreement as manifested by the agreement.[101] As in Indiana, a covenant not to sue or a loan receipt agreement was distinguished from a release and did not release all joint tortfeasors, only those who were parties to the agreement.[102] The amount received under such a covenant or loan receipt reduced the recovery of the plaintiff by the dollar amount received.[103] If the amount received

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99. *See supra* notes 113-16, 154-59 and accompanying text.

100. Note, *Multiple Party Litigation Under Comparative Negligence in Kansas—Damage Apportionment as a Replacement for Joint and Several Liability*, 16 Washburn L.J. 672 (1977).

101. Harvest Queen Mill & Elevator Co. v. Newman, 387 F.2d 1 (10th Cir. 1967); Reynard v. Bradshaw, 196 Kan. 97, 409 P.2d 1011 (1966).

102. Cullen v. Atchison, Topeka & Santa Fe Ry. Co., 211 Kan. 368, 507 P.2d 353 (1973) (loan receipt agreement found to be valid, and in context of rule that release of one tortfeasor releases all joint tortfeasors was found to constitute a covenant rather than a release) Sade v. Hemstrom, 205 Kan. 514, 471 P.2d 340 (1970) (language indicating that parties intended the settlement amount to be full satisfaction for the injuries suffered by plaintiff caused agreement to be interpreted as release rather than covenant not to sue); Jacobsen v. Woerner, 149 Kan. 598, 601, 89 P.2d 24, 27 (1939).

103. *Cullen*, 211 Kan. at 220, 507 P.2d at 362; *Jacobsen*, 149 Kan. at 602, 89 P.2d at 28 (judgment reduced by amount received under covenant not to sue even though settling defendant was not in fact liable).

fully satisfied plaintiff's claim the settlement, regardless of the form, served as a release because plaintiff was entitled to only one satisfaction. An unconditional release still served to release all joint tortfeasors.[104]

Technically, a defendant in Kansas had no right to contribution.[105] It was plaintiff's prerogative to decide who to sue and against whom she would collect any judgment.[106] This meant that defendants had no option to bring in other defendants who might be involved in the incident unless they were persons who had a responsibility to indemnify the defendant. Thus plaintiff could effectively foreclose any chance of a defendant receiving a joint judgment. However, if there were multiple defendants, once a joint judgment was entered and paid in full by one of them under joint and several liability, that defendant then had a statutory right to pursue contribution from other jointly liable defendants and recover a pro rata amount of the judgment paid.[107] This gave "implicit expression to the common law rule that in the absence of a judgment against them there is no right of contribution between joint tortfeasors."[108]

B. Kansas Comparative Fault

Kansas enacted statutory comparative fault in 1974.[109] At the time,

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104. *Cullen*, 211 Kan. at 219, 507 P.2d at 361; *Jacobsen*, 149 Kan. 598, 89 P.2d 24. Kansas' release rule was interpreted much less strictly than the Indiana release rule. Plaintiffs were allowed to give a release to one joint tortfeasor which reserved a right against another joint tortfeasor, and have the agreement found to be valid. Edens v. Fletcher, 79 Kan. 139, 98 P. 784 (1908). This was because the release rule was combined with the rule that the intent behind the release determined its effect, and a reservation of rights evidenced an intent not to release all joint tortfeasors. *Id. See also* Sade v. Hemstrom, 205 Kan. 514, 521, 471 P.2d 340, 347 (1970). The reservation could be oral. Scott v. Kansas State Fair Ass'n, 102 Kan. 653, 171 P. 634 (1918). A general background on the release rule and the exceptions made to avoid its Procrustean effect is found in Stueve v. American Honda Motors Co., Inc., 457 F. Supp. 740 (D. Kan. 1978).

105. Alseike v. Miller, 196 Kan 547, 551, 412 P.2d 1007, 1011 (1966); Rucker v. Allendorph, 102 Kan. 771, 172 P. 524 (1918). In *Alseike*, defendant was not allowed to join a third party defendant who she claimed was responsible for plaintiff's injuries because the third party defendant was not liable to indemnify the defendant. The court decided that allowing her to join the third party would amount to contribution. *Alseike*, 196 Kan. at 551, 412 P.2d at 1011-12.

106. *Alseike*, 196 Kan. at 552, 412 P.2d at 1012.

107. McKinney v. Miller, 204 Kan. 436, 464 P.2d 276 (1970). The statute was KAN. STAT. ANN. § 60-2413(b) (1983), which provides: "Contribution between joint obligors. . . (b) Judgment debtors. A right of contribution or indemnity among judgment debtors, arising out of the payment of the judgment by one or more of them, may be enforced by execution against the property of the judgment debtor from whom contribution or indemnity is sought."

108. *McKinney*, 204 Kan. 436, 439, 464 P.2d 276, 279. *But see* dissent, 204 Kan. at 440, 464 P.2d at 280. *See also* Comment, *Civil Procedure - Tort-feasor's Right to Contribution*, 10 WASHBURN L.J. 135 (1970) (casenote on *McKinney).*

109. KAN. STAT. ANN. § 60-258a (Supp. 1987). *See* Comment, *Comparative Neg-*

the Kansas Act was described in much the same terms that the Indiana Act is presently being described:

> In this instance the pains and strains of abrupt change may prove particularly acute, for the Kansas statute is of mixed ancestry and its effect is more uncertain than if the legislature had chosen as a model an existing statute with a history of judicial construction. While the Kansas act borrows from the laws of other jurisdictions, it is identical with none. The result is a truly unique version of comparative negligence. Nothing can be more certain to breed uncertainty.[110]

The Kansas Act, like Indiana's, does not provide specifically for settling tortfeasors. It does provide that in multiple tortfeasor cases,

> [w]here the comparative negligence of the parties in any action is an issue and recovery is allowed against more than one party, each such party shall be liable for that portion of the total dollar amount awarded as damages to any claimant in the proportion that the amount of such party's causal negligence bears to the amount of the causal negligence attributed to all parties against whom such recovery is allowed.[111]

This provision has been interpreted by the Kansas Supreme Court to eliminate the common-law concept of joint and several liability in negligence actions.[112]

The Kansas Act provides for the joinder of causally negligent individuals who have not been made defendants. Section (c) states: "On

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ligence - A Look at The New Kansas Statute, 23 U. KAN. L. REV. 113 (1974) for a basic overview of the Kansas Act at the time of enactment.

110. Kelly, *Comparative Negligence - Kansas*, 43 J. KAN. BAR ASS'N 151, 151 (1974). Cf. Schwartz, *Comparative Negligence in Indiana: A Unique Statute That Will Reshape the Law*, 17 IND. L. REV. 957 (1984).

111. KAN. STAT. ANN. § 60-258a(d) (Supp. 1987).

112. Brown v. Keill, 224 Kan. 195, 580 P.2d 867 (1978). The abrogation of joint and several liability in Kansas was subject to the same criticisms that are being leveled at that interpretation of the Indiana Act. *Compare* Kelly, *Comparative Negligence - - Kansas*, 43 J. KAN. BAR ASS'N 151, 189-90 (1974) (suggesting that the Kansas statute had not abolished joint and several liability but had instead created a system of comparative contribution, which would include a retention of joint and several liability) *with* Wilkins, *supra* note 48. *See also* Vasos, *Comparative Negligence Update - A Discussion of Selected Issues*, 44 J. KAN BAR ASS'N 13, 16-17 (1975) (suggesting that the abrogation of joint and several liability, throwing the risk of nonrecovery totally on the plaintiff, is inconsistent with the aim of comparative fault to expand the ability of injured persons to recover fully). In Oklahoma, joint and several liability was judicially abrogated only to have it immediately reinstated by the legislature. *See* McNichols, *Judicial Elimination of Joint and Several Liability Because of Comparative Negligence - A Puzzling Choice*, 32 OKLA. L. REV. 1, (1979).

motion of any party against whom a claim is asserted for negligence . . . any other person whose causal negligence is claimed to have contributed to such death, personal injury, property damage, or economic loss, shall be joined as an additional party to the action."[113] Clearly, Kansas' "additional part[ies]" are not nearly so well defined and regimented as Indiana's nonparties.[114] The procedural section of the Kansas statute directs the trier of fact to allocate percentages of fault among the "parties,"[115] but the Kansas Supreme Court has recognized that the comparative negligence statute is "silent as to what position the added party occupies once that party is joined."[116]

1. The Demise of Joint and Several Liability and Interpretation of the Kansas Additional Party Provisions.—The Kansas Act, like its Indiana counterpart, was first interpreted by federal courts.[117] In *Nagunst v. Western Union Tel. Co.*,[118] the Kansas District Court looked at the effect of the Kansas "forced joinder" provisions on settlement. The plaintiff-passenger in *Nagunst* settled with the driver of the vehicle in which she had been injured, and then sued Western Union, lessee of the other car involved.[119] Defendant Western Union attempted to join the released party under Kansas Statute Section 60-258a(c), which would have destroyed the court's diversity jurisdiction.[120] The court also saw the covenant not to sue given to the settling party by the plaintiff as a potential bar to the joinder, because Kansas law held that a covenant not to sue barred a subsequent action although it did not extinguish the right.[121] The court denied the joinder on the basis that the covenant

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113. KAN. STAT. ANN. § 60-258a(c) (Supp. 1987). *See also* Comment, *Comparative Negligence—A Look At the New Kansas Statute*, 23 U. KAN L. REV. 113, 123 (1974).

114. IND. CODE § 34-4-33-10 (1988).

115. KAN. STAT. ANN. § 60-258a(b) (1983). This section of the act provides:

> (b) Where the comparative negligence of the parties in any such action is an issue, the jury shall return special verdicts, or in the absence of a jury, the court shall make special findings, determining the percentage of negligence attributable to each of the parties, and determining the total amount of damages sustained by each of the claimants, and the entry of judgment shall be made by the court. No general verdict shall be returned by the jury.

Id.

116. Kennedy v. City of Sawyer, 228 Kan. 439, 454, 618 P.2d 788, 803 (1980); Brown v. Keill, 224 Kan. 195, 580 P.2d 867 (1978).

117. Beach v. M & N Modern Hydraulic Press Co., 428 F. Supp. 956 (D. Kan. 1977); Greenwood v. McDonough Power Equip., Inc., 437 F. Supp. 707 (D. Kan 1977); Nagunst v. Western Union Tel. Co., 76 F.R.D. 631 (D. Kan. 1977). *See* Comment, *Torts: Damage Apportionment Under the Kansas Comparative Negligence Statute - the Unjoined Tortfeasor*, 17 WASHBURN L.J. 698 (1978) (analyzing *Beach*, *Greenwood*, and *Nagunst*).

118. 76 F.R.D. 631 (D. Kan. 1977).

119. *Id.* at 632.

120. *Id.*

121. *Id.* at 633.

precluded it, stating that "[d]efendants' right to have their proportionate liability reduced by that attributable to others should not be defeated by plaintiff's voluntary decision to settle with other potential defendants."[122] The court explained this conclusion as follows:

> If a plaintiff voluntarily chooses not to sue such a person, as by execution of a covenant not to sue, he simply loses his right to recover against that person the percentage of the total award which corresponds to the percentage of negligence attributable to the party not sued. . . . While such a percentage-crediting procedure may introduce an element of risk into plaintiff's settlement negotiations with the non-party (that is, the plaintiff is not guaranteed of recovery of 100% of the jury's award), the risk is certainly no greater than that which would inure were the named defendant(s) to join the party as an additional defendant under K.S.A. 60-258a(c).[123]

The court also noted that allowing joinder of the nonparty under Section 60-258a(c) would serve to nullify part of the consideration given for entering the covenant not to sue, which included freeing the released party from the expense and inconvenience of defending herself in the action.[124] Preventing the joinder was seen as encouraging settlement and

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122. *Id.* at 634. The court viewed this as carrying over to the comparative fault system the traditional common law principle that mandated that the amount given in a covenant not to sue diminished the plaintiff's recovery accordingly. However, to continue the dollar for dollar credit given to the nonsettling defendant would be to continue joint and several liability, which would defeat the allocation ideal behind comparative fault. *Id.*

123. *Id.* at 634-35. The court also cited Pierringer v. Hoger, 21 Wis.2d 182, 124 N.W.2d 106 (1963), which involved an innovative (at that time) settlement and release whereby plaintiff released a defendant from his ultimate proportion of fault by agreement, regardless of what that proportion was determined to be by the trier of fact. The *Nagunst* conclusion was consistent with the one arrived at in Greenwood v. McDonough Power Equip., Inc., 437 F. Supp. 707 (D. Kan. 1977), an earlier federal case in products liability, where the court refused to allow formal joinder by defendant of parties whose joinder would destroy diversity jurisdiction, but stated that the negligence of those parties must be considered in allocating fault. The *Greenwood* court achieved this by allowing the negligence of the nonparties to be considered under the provisions of KAN. STAT. ANN. § 60-258a(d), which was characterized as substantive because it granted the defendant the right to have the causal negligence of all involved parties considered. At the same time, the court refused to allow the *Greenwood* defendants to destroy its diversity jurisdiction by joining the nonparties under KAN. STAT. ANN. § 60-258a(c), which it characterized as procedural. This allowed the court to retain its jurisdiction while preventing plaintiff from getting unfair advantage by strategic choice of defendants, who would otherwise end up paying for the fault of the nonparties.

124. *Nagunst*, 76 F.R.D. at 634. However, the court specifically rejected the result in Mihoy v. Proulx, 113 N.H. 698, 313 A.2d 723 (1973), where the New Hampshire

release. However, in holding that fairness required the consideration of the released party's fault, the court failed to acknowledge the practical aspects of who would plead and prove or disprove the fault of the released party and what her actual involvement would amount to.

This case is comparable to the initial cases interpreting the Indiana nonparty provisions. Courts in both jurisdictions are concerned with ensuring that all fault is allocated properly. The Kansas statute, being rather inexact, allowed the courts to consider the fault of the nonparty without formal joinder, foreshadowing the "phantom tortfeasor" concept. The procedural exactitude of the Indiana statute would prevent such a result because it requires that the defendant raise and plead the nonparty defense within a specific timeframe,[125] and that the nonparty be named in the verdict form.[126] In *Moore v. General Motors*,[127] the Indiana court could not allow plaintiff's employer to be joined because the employer was statutorily excluded from nonparty status. In *Nagunst*, the potential destruction of the court's diversity jurisdiction and the fact that the covenant was considered a bar prevented joinder as an additional party.[128]

The respective courts arrived at the same solution: ignore the statutory nonparty joinder provisions and allow the fault of the nonparty to be considered without formal joinder. This is a much greater bending of the Indiana Act than the Kansas Act, because the Indiana Act is much more precise in its requirements. The restraints of the Indiana Act show in that the Indiana federal court felt constrained to reinforce the idea that fault would not and could not be *allocated* to the employer as a nonparty,[129] although it is not clear how this was to be communicated to a jury. The Kansas federal court allowed the fault of the released individual to be considered and allocated along with the fault of the defendants.

Nagunst presaged the interpretation that the Kansas Supreme Court would adopt in *Brown v. Keill*,[130] the first major state case interpreting the Kansas Act. In *Brown*, the plaintiff sued for property damage to his Jaguar, caused when plaintiff's son was driving the car and had a

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Supreme Court decided that the apportionment of fault would be only among named defendants and would not include tortfeasors not sued because of the prior execution of a covenant not to sue. *See also* UNIF. COMPARATIVE FAULT ACT § 6, 12 U.L.A. 52, § 6 Comment (Supp. 1989); *infra* note 224.

125. IND. CODE § 34-4-33-10 (1988).

126. IND. CODE § 34-4-33-6 (1988).

127. 684 F. Supp. 220 (1988). *See also supra* notes 85 - 89 and accompanying text.

128. *Nagunst*, 76 F.R.D. at 634-35.

129. *Moore*, 684 F. Supp. at 222.

130. 224 Kan. 195, 580 P.2d 867 (1978).

collision with the defendant.[131] Prior to the filing of this suit, the defendant driver had settled with the driver of the Jaguar.[132] The trial court found the defendant responsible for ten percent of the fault involved, and the driver of the Jaguar, who had not been joined by either plaintiff or defendant, responsible for ninety percent of the fault involved, and the plaintiff free of fault.[133]

The Kansas Supreme Court saw the issues as being 1) whether the doctrine of joint and several liability had been retained under comparative fault and 2) whether the fault of all individuals involved in the collision was to be considered even though one of the negligent parties was not joined or served with process.[134] The court perceived the legislative intent in enacting the comparative negligence statute as being to "equate recovery and duty to pay to degree of fault"[135] and noted:

> Of necessity, this involved a change of both the doctrine of contributory negligence and of joint and several liability. There is nothing inherently fair about a defendant who is 10% at fault paying 100% of the loss, and there is no social policy that should compel defendants to pay more than their fair share of the loss. Plaintiffs now take the parties as they find them. . . . Any other interpretation of K.S.A. 60-258a(d) destroys the fundamental conceptual basis for the abandonment of the contributory negligence rule and makes meaningless the enactment of subsection (d).[136]

The court held that joint and several liability no longer applied in Kansas comparative negligence actions and that as a result, defendant's liability was to be based on her proportional fault alone, obviating the need for contribution between joint judgment debtors.[137]

The court's emphasis in this analysis was on allocation of fault rather than compensation of injured parties.[138] It appears that the intent

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131. *Id.* at 197, 580 P.2d at 869.

132. *Id.*

133. *Id.* The plaintiff was free of fault because the negligence of his son, the driver of the Jaguar, could not be imputed to him as bailor. *Id.*

134. *Id.* at 198, 580 P.2d at 870.

135. *Id.* at 201, 580 P.2d at 873-74.

136. *Id.* at 202, 580 P.2d at 874.

137. *Id. See supra*, notes 107 - 108 and accompanying text.

138. In *Brown*, this was probably an equitable question as well, because in reading the case it becomes clear that the owner of the Jaguar, the plaintiff, was attempting to manipulate the system by recovering for the damage to his car when it must have been clear to him, as it apparently was to the jury, that his son the driver was more faulty than the defendant. *Brown*, 224 Kan. 195, 580 P.2d 867. Knowing that the driver's fault would not be imputed to him as bailor, and that as a result he would be fault free, the

of the legislature was perceived to encompass only the policy of ensuring that every party, whether plaintiff or defendant, be responsible only for her own fault. While this is a valid policy stance, the policies inherent in abolishing the bar of contributory fault in the first place involved not only a more precise allocation of fault, but also an expanded compensation function.[139] The court merely stated:

> The law governing tort liability will never be a panacea. There have been occasions in the past when the bar of contributory negligence and the concept of joint and several liability resulted in inequities. There will continue to be occasions under the present comparative negligence statute where unfairness will result.[140]

While it is clear that the court is correct in stating that no system of compensation can be perfectly and without exception fair, the court did not follow through with an analysis of *who* would suffer most of the inequities caused, and why it would be best that those parties be the ones to bear that burden.

The result in *Brown* was clearly fair to the parties involved, but the ultimate result, the abrogation of joint and several liability, left the comparative fault system in Kansas less flexible and more hostile to plaintiffs. Defendants under the Kansas system pay only the determined percentage of their own fault or any settlement amount they may negotiate with the plaintiff. Plaintiffs, on the other hand, absorb their own percentage of fault, the percentages of any tortfeasor they have settled with, joined or unjoined, the percentage of any judgment-proof defendant, and the percentage of any faulty nonparty. The Kansas Supreme Court acknowledged that "[t]he ill fortune of being injured by an immune or judgment-proof person now falls upon plaintiffs rather than upon the other defendants,"[141] and stated that this risk was in exchange for the risk of total bar to a plaintiff's recovery under the contributory fault system.[142] The only ameliorating factor is that plaintiffs are allowed to keep any windfall resulting when a settlement amount represents more than the ultimate percentage of fault of the settling tortfeasor would dictate.[143]

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plaintiff apparently wanted to force the defendant, only ten percent at fault, to pay for all the damage to the car. The court could hardly do else than consider the fault of the driver, in fairness. It is possible that the case was carried as far as it was specifically to have the questions of joint and several liability and additional parties answered.

139. Wilkins, *supra* notes 47-48 and accompanying text.

140. *Brown*, 224 Kan. 195, 202, 580 P.2d 867, 874.

141. Miles v. West, 224 Kan. 284, 288, 580 P.2d 876, 880 (1978).

142. *Id. See generally* Comment, *Brown and Miles: At Last An End To Ambiguity In The Kansas Law of Comparative Negligence*, 27 KAN. L. REV. 111 (1978) (critical analysis of the two cases).

143. Geier v. Wikel, 4 Kan. App. 2d 188, 190, 603 P.2d 1028, 1030 (1979).

The Indiana cases intimating that joint and several liability has been abrogated are thus far all federal, and no state court has yet made a binding determination regarding joint and several liability. Hopefully when Indiana state courts are called upon to answer this question, they will consider both sides of the policy question involved, considering who is to bear the most risk and why.

The second issue presented in *Brown* was that of allocation of fault to actors not joined as parties, either by the plaintiff or as "additional parties."[144] The Kansas federal court examined a similar question in *Beach v. M & N Modern Hydraulic Press.*,[145] where the defendant tried to join the plaintiff's employer to have the employer's fault determined even though plaintiff had no right of recovery against the employer.[146]

The *Beach* court focused on the language of Section 60-258a(d) which specifies that a defendant is liable for her fault in proportion to the fault of negligent parties "against whom . . . recovery is allowed."[147] The court decided that the immunity of the employer did not prevent allocation of fault to it,[148] but that the employer could not be found liable for that fault, its liability instead falling on the defendant.[149] This was because the plaintiff had not voluntarily left out the employer when naming defendants, but was involuntarily prevented by the employer's immunity from joining it as a named defendant.[150] The harshness of this result, which appears to impose a type of joint and several liability on the named defendant, was, according to the court, ameliorated if the defendant could prove negligence on the part of both the plaintiff and the employer in order to reduce the plaintiff's award.[151] These

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144. KAN. STAT. ANN. § 60-258a(c) (1983).

145. 428 F. Supp. 956 (D. Kan. 1977).

146. Worker's Compensation is an exclusive remedy for injured employees in Kansas. *Id.* at 958-59, 963.

147. KAN. STAT. ANN. § 60-258a(d): *See supra* text accompanying note 111.

148. *Beach*, 428 F. Supp. at 966. Apparently this was to be done under the "phantom tortfeasor" method later elaborated on by the *Greenwood* and *Nagunst* courts: that is, the fault was to be allocated, but the employer was not to be formally joined either by the plaintiff or under KAN. STAT. ANN. § 60-258a(c).

149. *Id.*

150. *Id.*

151. *Id.* at 966. The *Beach* court stated:

> Under our interpretation of this section, plaintiff's award of damages is reduced by the ratio which his percentage of negligence bears to the total amount of negligence allocated among the plaintiff and any third parties against whom the plaintiff may recover. Thus in this case the plaintiff's award of damages is reduced by a fraction: the numerator of which is the plaintiff's percentage or negligence; the denominator of which is the combined percentages of negligence of the plaintiff and the (allegedly negligent) third parties, M & N and Monroe.

Id. The reasoning used was later elaborated on in Greenwood v. McDonough Power

ponderings were on issues similar to the Indiana cases of *Hill*[152] and *Huber*.[153] In Kansas, the issue of whether an "additional party" or "phantom tortfeasor" had to have actual or potential liability to plaintiff was rendered moot by the *Brown* opinion. The *Brown* court stated:

> [W]ill proportionate liability be defeated when a party joined under subsection (c) has a valid defense such as interspousal immunity, covenant not to sue and so forth? The added party in such case would not be a party "against whom such recovery is allowed" and if subsection (d) is taken literally such a party's percentage of fault should not be considered in determining the judgment to be rendered. It appears after considering the intent and purposes of the entire statute that such a party's fault should be considered in each case to determine the other defendant's percentage of fault and liability, if any. . . . [W]e conclude the intent and purpose of the legislature in adopting K.S.A. 60-258a was to impose individual liability for damages based on the proportionate fault of all parties to the occurrence . . . even though one or more parties cannot be joined formally as a litigant or be held legally responsible for his or her proportionate fault.[154]

Although the nonparty in question had not been joined under Section 60-258a(c), the court found that the pleadings and evidence were sufficient to have his fault considered, thus initiating the "phantom tortfeasor" concept.[155] This encompasses tortfeasors not joined for whatever reason,

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Equip., 437 F. Supp. 707 (D. Kan. 1977), where the court distinguished between plaintiff's voluntary choice not to sue an involved entity or individual (as when plaintiff settles with a potential defendant) and an involuntary non joinder by plaintiff. *See* Nagunst v. Western Union, 76 F.R.D. 631 (D. Kan. 1977). The *Greenwood* court stated that plaintiff should not be able to use a voluntary choice not to sue in order to avoid a damaging allocation of fault to immune or insolvent tortfeasors, but notes that a different result obtains in a situation such as in *Beach*, where the plaintiff's inability to sue the employer was involuntary. *Greenwood*, 437 F. Supp. at 713.

152. Hill v. Metro. Trucking, 659 F. Supp. 430 (N.D. Ind. 1987).

153. Huber v. Henley, 669 F. Supp. 1474 (S.D. Ind. 1987). *See supra* notes 79 - 84 and accompanying text.

154. Brown v. Kiell, 224 Kan. 195, 204, 580 P.2d 867, 876 (1978).

155. *Id.* The Kansas District Judges Association Committee on Pattern Jury Instructions has provided an instruction to be used in directing the jury in the consideration of the fault of a nonparty or phantom:

> In this case it is claimed that [name] was at fault in the (collision) (occurrence) in question. Even though (he) (she) has (they have) not appeared or offered evidence, it is necessary that you determine whether [name] was at fault in the (collision) (occurrence) and determine the percentage of fault, if any, attributable

whose fault is still presented to and allocated by the jury: "Under [Section] 60-258a all tortfeasors may be made parties to a lawsuit and even if they are not made parties their percentage of fault may be determined."[156]

With *Brown*, the Kansas Supreme Court summarily disposed of common law joint and several liability in favor of totally proportionate liability, which then paved the way for an interpretation of the Kansas "additional party" provisions of section 60-258a(c) designed to prevent plaintiff from circumventing proportional allocation.[157] The interpretation of the additional party portion of the statute apparently included endowing courts with a discretionary power to create "phantom parties," whose fault was evaluated without their being joined by a named defendant, as was done in *Brown*. The feasibility of such a solution to allocation questions is questionable in Indiana because the nonparty defense must specifically be asserted by a named defendant, and apparently may not be raised *sua sponte* by the court.[158] If defendants desire to spread the fault among nonparties, they must plan ahead and

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to (him) (her) (them).

Pattern Instructions for Kansas, Civil, PIK 20.05 (Supp. 1975). The Comment to PIK 20.05 states:

> Where the evidence warrants it, the court must add that person as a party solely for the purpose of determining and allocating fault on a one hundred percent basis. . . . This situation may exist where a contributing tortfeasor was given a release with reservations, a covenant not to sue, or may be unavailable as a party for lack of jurisdiction or unidentifiability, such as a phantom driver. A settling tortfeasor or absent tortfeasor is a party only for the purpose of allocation of percentage of fault.

Id., Comment to PIK 20.05. The Comment then cites Pierringer v. Hoger, 21 Wis.2d 182, 124 N.W.2d 106 (1963) for the "reason and procedure in accounting for the fault of a settling tortfeasor who was not joined as a party." *Id.*

156. Miles v. West, 224 Kan. 284, 287, 580 P.2d 876, 879 (1978). *Miles* was decided four days after *Brown*, and served to reaffirm the conclusions reached in *Brown*. *Cf.* V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 16.5 (1986), stating: "A result . . . compatible with the goals of comparative negligence is reached by determining the negligence of all concurrent tortfeasors irrespective of whether they are parties to the suit." *Id.*

157. Plaintiff was not allowed to circumvent proportional allocation by carefully choosing whom to name as defendant. This hearkens back to the concerns aired by the federal court in Beach v. M & N Modern Hydraulic Press, 428 F. Supp. 956 (D. Kan. 1977) and Greenwood v. McDonough Power Equip., 437 F. Supp. 707 (D. Kan. 1977), both of which refused to allow plaintiff to circumvent total allocation, whether the circumvention was purposeful on plaintiff's part (not joining a settled party) or involuntary (due to immunity on the part of a tortfeasor). *See supra* notes 117 - 124 and accompanying text; Wilkins, *supra* note 47, at 732-33.

158. IND. CODE § 34-4-33-10(b) (1988). *See* Walters v. Dean, 497 N.E.2d 247 (Ind. Ct. App. 1986); *supra* notes 70-80 and accompanying text.

carefully follow the Act, and may name only identified or identifiable nonparties.[159]

The Kansas cases evidence a strong orientation toward the fair allocation policies of tort systems, which tend to favor defendants, without consideration of the compensation oriented policies. The Indiana Act, with its emphasis on precise allocation, has the potential to be very similar to the Kansas system as interpreted in *Brown* if the state courts decide, as the Kansas court did, that joint and several liability has been displaced by comparative fault.

2. Kansas Settlement Cases.—As contemplated in Indiana's *Gray v. Chacon*,[160] the abolition of joint and several liability in Kansas resulted in the concomitant abolition of the release rule. Again, the issue first came up in federal court. In *Stueve v. American Honda Motors Co.*,[161] the plaintiff settled with the other party involved in a collision, and then pressed suit against the manufacturer of plaintiff's decedent's motorcycle.[162] Predicated on the *Brown* opinion, the court decided that the abolition of joint and several liability made any release irrelevant as far as the manufacturer was concerned, because each defendant could be held liable "only for that percentage of injury attributable to his fault, [and] a release of [one] defendant cannot inure to the benefit of potential co-defendants."[163]

A state court decided this question in *Geier v. Wikel*,[164] where plaintiff gave a release to a railroad company, whose train had been involved in an accident which injured plaintiff, and then sued the driver of the car involved.[165] The court of appeals decided that because all the fault was to be allocated to the persons involved regardless of immunity or whether they had been joined, and because the abrogation of joint and several liability prevented the plaintiff from collecting anything but a defendant's assigned portion of liability from that defendant, the release rule was no longer applicable.[166] The court stated:

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159. IND. CODE § 34-4-33-6 (1988) requires that the name of the nonparty appear on the verdict form.

160. 684 F. Supp. 1481 (S.D. Ind. 1988). *See supra* notes 50-59 and accompanying text.

161. 457 F. Supp. 740 (D. Kan. 1978).

162. *Id.* at 745. The court established that it believed that Kansas state courts would find the comparative fault act applicable to products liability cases. *Id.* at 750-56. *See also* 3 KAN. STAT. ANN. § 167 (Vernon Supp. 1988).

163. *Stueve*, 457 F. Supp. at 748-49. The court also decreed the effect that the covenant not to sue should have on the overall award: "[D]efendant should receive a *pro rata* credit against any award calculated with reference to the percentage of fault attributed to [the releasee]." *Id.*

164. 4 Kan. App. 2d 188, 603 P.2d 1028 (1979).

165. *Id.* at 1030.

166. *Id.*

> An injured party whose claim is exclusively subject to the Kansas comparative negligence statute may now settle with any person or entity whose fault may have contributed to the injuries without that settlement in any way affecting his or her right to recover from any other party liable under the act. The injured party is entitled to keep the advantage of his or her bargaining, just as he or she must live with an inadequate settlement should the jury determine larger damages or a larger proportion of fault than the injured party anticipated when the settlement was reached.[167]

This decision clearly shows the effect of *Brown* and the federal decisions on partial settlements under the Kansas comparative negligence scheme. The fault of the settling tortfeasor will be considered with the fault of named defendants, regardless of whether the settling party was joined as an "additional party" or had her fault considered in the "phantom" mode. Plaintiff is free to settle with any party she chooses, but her award will be diminished by the settling tortfeasor's proportion of fault.

Geier made it clear that plaintiffs must accurately estimate the defendant's proportion of fault and get the absolute best bargain they can, in order to offset the potential loss of large percentages of their damages. Defendants must estimate accurately in order to avoid a settlement which would allow plaintiff a windfall. However, under this system, a defendant who does not settle need not worry about paying more than her proportion of fault, and need not worry that she will be responsible for the fault of unjoined tortfeasors. Plaintiff, on the other hand, knows that she will have to be concerned with the proportionate fault of *all* involved tortfeasors, and may not control from whom she will recover. This means that the flexibility of the Kansas system is minimal and that it does not particularly encourage partial settlement unless the defendant is convinced that she is settling for much less than her proportionate fault and unless the plaintiff is sure she is settling for more than the settling defendant's proportion of fault.

3. "Comparative Implied Indemnity".—Settling tortfeasors had no right of contribution in Kansas under contributory fault,[168] and it appeared that the same finality would be true of settlement under com-

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167. *Id.*

168. Settlements were final, contractual matters between plaintiff and the settling defendant. Statutory contribution was reserved for joint judgment debtors, and had to be triggered by the payment of the entire judgment by one of the jointly liable defendants, who could then pursue other defendants for contribution. *See supra* notes 106-09 and accompanying text.

parative negligence until the case of *Kennedy v. City of Sawyer*.[169] In *Kennedy*, plaintiff sued the city, which had had weedkiller sprayed near plaintiff's land, killing plaintiff's cattle.[170] The city filed a third party complaint against the chemical company that had sold the weedkiller to the city; the chemical company in turn filed a third party petition against the manufacturer of the weedkiller.[171] The trial court found against the city and dismissed both third party complaints.[172] While the city's appeal was pending, plaintiff and the city settled, using a document which released the entire claim.[173]

The City of Sawyer persisted in its appeal, objecting to the dismissal of the third party defendants against whom it sought indemnification.[174] The Kansas Supreme Court decided that although the chemical company and manufacturer had not been brought in as additional parties under Section 60-258a(c), the pleadings were complete enough to consider them in that light.[175]

The court determined that traditional indemnity shifted one hundred percent of the loss from the indemnitee to the indemnitor,[176] where contribution shifted only a portion of the responsibility. Finding that the release given to the City of Sawyer had relieved the third party defendants of any possible liability to the plaintiff,[177] the court held:

> [I]n comparative negligence cases when full settlement of all liability to an injured party has been accomplished and a release obtained, proportionate causal responsibility among the tortfea-

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169. 228 Kan. 439, 618 P.2d 788 (1980). *See* Note, *Torts - Indemnification, Settlement, and Release in Strict Products Liability in the Wake of Kennedy v. City of Sawyer*, 30 UNIV. KAN. L. REV. 131 (1981) for an exploration of some of the issues brought up in *Kennedy*, which was procedurally both awkward and complex.

170. *Kennedy*, 228 Kan. at 442, 618 P.2d at 791.

171. *Id.* at 793-94. (The third party joinder provisions appear at KAN. STAT. ANN. § 60-214 (1983)).

172. *Id.* at 792. The trial court had not considered comparative fault in this decision. *Id.*

173. *Id.* at 791-93.

174. *Id.*

175. *Id.* at 794-95. This included a determination that the comparative negligence act was applicable in strict products liability cases. *Id.* at 797-98.

176. The court distinguished between express indemnity (by contract) and implied indemnity, where one is made to pay a loss that, by rights, another was responsible for, *e.g., respondeat superior*. The indemnity claimed in *Kennedy* was implied indemnity. *Id.* at 801-2.

177. The court distinguished the release from the one used in Geier v. Wikel, 4 Kan. App. 2d 188, 603 P.2d 1028, because the *Geier* release had indicated an intent to pursue the claim further against other tortfeasors, whereas the *Kennedy* release had indicated an intent to completely release all parties involved. *Kennedy*, 228 Kan. at 450, 618 P.2d at 799.

> sors should be determined and indemnity should be decreed based on degree of causation of the respective tortfeasors.[178]

This scheme was christened "comparative implied indemnity," and was triggered when one party with actual legal liability obtained a full release in exchange for a reasonable amount, and then continued the action against the nonsettling defendants under an indemnity theory.[179] While the court called this solution indemnity, it is clear that the proportionate nature of the repayment, and the overtones of joint and several liability evident in one tortfeasor's paying the entire obligation (albeit voluntarily), have more the flavor of contribution than indemnity. The court itself described indemnity as a one hundred percent reallocation, proportional reallocation being the mark of contribution.[180] Judge Woods of the Eastern District of Arkansas stated: "This form of 'comparative implied indemnity' is nothing more than contribution according to proportionate fault."[181]

The Kansas Supreme Court appeared to regret this broad holding, and narrowed and explained itself in *Ellis v. Union Pacific Railroad Co.*[182] Following a car-train collision, plaintiffs sued the railroad company which then joined certain governmental entities for a determination of their proportion of fault pursuant to Section 60-258a(c).[183] Plaintiffs did

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178. *Kennedy*, 228 Kan. at 455, 618 P.2d at 804.

179. *Id.* at 803. The court was very specific on the procedures to be used: plaintiff's fault was to be determined only insofar as to establish that actual legal liability had existed (i.e., that plaintiff was not forty-nine percent or more at fault); defendant had the responsibility to bring in all parties it considered causally negligent; the apportionment was to be made in the pending action, or a separate action if suit had not been filed; the court would determine a reasonable settlement figure if the action had not progressed as far as the jury for determination of damages; and the maximum amount to be redistributed was to be the amount of the settlement. *Id.*

180. In Note, *supra* note 169, the author describes this innovation in his conclusion as comparative contribution. The dissenting opinion took issue with the majority's cavalier treatment of the fact that the chemical company and the manufacturer were in the action as third-party defendants under KAN. STAT. ANN. § 60-214 (1983) for indemnity rather than being in the action as joint tortfeasors, and preferred that the action be treated as one for one hundred percent indemnity on a contractual theory. *Id.* at 805-07. The comparative implied indemnity concept not only differed from traditional indemnity (which could be sued for post-settlement, Cason v. Geis Irrigation Co., 211 Kan. 406, 507 P.2d 295 (1973), if the proposed indemnitee could prove that she was legally liable) but also from Kansas' limited statutory contribution under contributory fault, which was not allowed for mere settlement, but required that one defendant pay an entire joint *judgment*. *See supra* notes 107-08.

181. H. WOODS, COMPARATIVE FAULT § 13:20, at 293 (1987).

182. 231 Kan. 182, 643 P.2d 158, *aff'd on rehearing*, 232 Kan. 194, 653 P.2d 816 (1982) (with dissenters also affirming their dissents).

183. *Id.* The governmental entities were the county, township, and city in which the accident occurred.

not amend their complaint to assert any claims against the governmental entities, and the governmental entities specifically forbade the defendants to settle the case on their behalf. The railroad defendants then settled with the plaintiffs in a form which specifically released the governmental entities and pledged the plaintiffs' assistance to the railroad in obtaining indemnity for the settlement. The trial court dismissed the indemnity claims and the railroad appealed.[184]

The Kansas Supreme Court analyzed *Ellis* in terms of its decision in the *Kennedy* case.[185] Comparative implied indemnity was seen as a method to encourage complete settlements: for plaintiffs because they could achieve full compensation in one transaction, for defendants because they could get proportional repayment for settling the entire claim if the consideration given was reasonable.[186]

The pivotal point in distinguishing *Ellis* from *Kennedy* was the position occupied by and the liability of the additional parties.[187] The court perceived the purposes of Section 60-258a(c) to be to reduce the defendant's potential liability by allocating fault to other causally responsible persons and to prevent the plaintiff from circumventing the allocation procedures by strategic choice of defendants.[188] The provision benefitted defendants only, not affecting plaintiff's case by the possibility of greater recovery from the additional parties.[189] This led to the conclusion that although defendant had followed the procedures laid down in *Kennedy*, its joinder of the governmental entities by use of Section 60-258a(c) had not asserted a claim against those entities that would subject them to monetary liability, and plaintiff had not asserted any claim against them.[190]

The upshot of this was that the *Kennedy* decision was strictly limited: if the proposed indemnitor could not have had any actual liability to

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184. *Id.* The dismissal was because plaintiffs had never asserted a valid claim against the governmental entities, although they had had the opportunity to do so before the statute of limitations ran. *Id.*

185. *Id.* at 186, 643 P.2d at 162. The court noted that the new comparative implied indemnity concept, which it compared to the "partial indemnity" concept of American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 146 Cal. Rptr. 182, 578 P.2d 899 (1978), had the potential to be confused with the traditional concept of contribution. The court stated that this confusion should be avoided, and that the concept was a modernization to bring the traditional all or nothing indemnity concept into accord with the principles of comparative negligence. *Id.*

186. *Ellis*, 231 Kan. at 186, 643 P.2d at 162.

187. *Id.* at 188, 643 P.2d at 164.

188. *Id.*

189. *Id.*

190. In contrast, the court found that the settling defendant in *Kennedy* had asserted a third party claim against the additional parties which *would* have subjected them to monetary liability. *Id.* at 189, 643 P.2d at 165.

plaintiff, then the proposed indemnitee could not call for comparative implied indemnity. The court would not allow the settling defendant to "broaden another defendant's liability beyond what it would have been had the case gone to trial."[191]

Two dissents to the *Ellis* majority opinion vociferously contested the analysis leading to this holding. The first stated that a joinder under Section 60-258a(c) should be a joinder for all purposes.[192] The other stated that *not* treating Section 60-258a(c) as a joinder for all purposes also had the effect of rendering it useless, as the apportionment of fault to parties not named by plaintiff could just as easily be accomplished by defendant's naming the nonparties in her answer, the "phantom tortfeasor" concept, as was approved in *Brown*.[193]

Indiana has always forbidden contribution,[194] and the Comparative Fault Act perpetuates this in Section 34-4-33-7: "In an action under this chapter, there is no right of contribution among tortfeasors. However, this section does not affect any rights of indemnity."[195] Proportional repayment between joint tortfeasors is usually a remedy aimed at evening out the effects of joint and several liability, and so is not considered necessary in the absence of joint and several liability. The Kansas court found this to be untrue in a context where one defendant settles on behalf of all, and in *Kennedy* attempted to make this settlement situation more fair to the defendant who has settled.

However, questions arose out of *Kennedy* relating to the finality of settlements and releases in the one defendant-full settlement context. The *Kennedy* decision muddied the water on the issue of whether contribution was or was not allowed after a full settlement, who would have to contribute, and what their liability to plaintiff had to be. *Ellis*, in attempting to refine "comparative implied indemnity," further confused

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191. *Id.* "The plaintiff may choose to forgo any recovery from other tort-feasors. In that event, a settling defendant has no claim to settle but his own." *Id.* at 190, 643 P.2d at 166. *See also* Teepak, Inc. v. Learned, 237 Kan. 320, 699 P.2d 35 (1985) (later case in which *Ellis* was followed).

192. *Ellis*, 231 Kan. at 190, 643 P.2d at 166. (Herd, J., dissenting) Justice Herd noted that a distinction had been made in *Brown* between parties formally joined and those who were not formally joined but had their fault allocated anyway, stating: "This distinction indicates formal joinder with service of process can impose liability independant of a formal assertion of a claim." *Id.*

193. *Id.* at 192, 643 P.2d at 168 (Fromme, J., dissenting). Fromme, J., who had authored the *Brown* and *Kennedy* opinions, joined in Herd's dissent and elaborated further in his own, stating that he saw "no valid reason for the court to set up a different rule in cases based on ordinary negligence," *Id.* at 167, and that he felt that the majority had limited the *Kennedy* opinion to products liability cases, thus discouraging settlement of plaintiff's entire claim by defendants. *Id.*

194. *See supra* note 38 and accompanying text.

195. IND. CODE § 34-4-33-7 (1988).

the issue, and the court's distinction between indemnity and contribution (made with the intent of assuring that comparative implied indemnity was not to be confused with contribution) remains unclear.

Despite the fact that indemnity is specifically permitted by the Indiana Act, given Indiana's tradition of barring contribution between tortfeasors, even if Indiana follows the case law of Kansas in interpreting its own Act, it is unlikely that Indiana courts will take the path that Kansas courts took in this settlement situation. This is so regardless of the fact that Indiana encourages full settlement by defendants early in the proceedings. The cases illustrate, however, the awkwardness of the solutions to the problems caused by the inflexibility of the Kansas system, which should warn Indiana courts to avoid the pitfalls of interpreting the Act in a haphazard fashion.

Apparently the Kansas court felt the need to reinstate some sort of allocation between wrongdoers in the full settlement context. In doing so, it hit upon "comparative implied indemnity," which is remarkably similar to the joint judgment obligor statutory system of contribution which had been used under contributory fault in Kansas.[196] The difference between the two is that the reallocation is proportional (which means that the fault must be allocated in court) rather than in equal shares, and that "comparative implied indemnity" apparently applies only in the full settlement context, whereas statutory contribution applied only if a joint tortfeasor paid an entire judgment.

The *Kennedy* and *Ellis* cases continue the emphasis of the Kansas system on proper allocation of fault so that no defendant pays more than her fair share of a plaintiff's damages. The Kansas Act has as its main focus the proper proportional allocation of fault between tortfeasors, leaving plaintiff to bear the possibility of insolvent or immune tortfeasors and the risks involved in settlement. Other states, specifically Minnesota, demonstrate that a system which has the opposite emphasis, that is, a compensation-oriented system, can achieve the fairness sought by the Kansas courts.

IV. Minnesota Comparative Fault

A. Background: Prior to Comparative Fault

Under contributory fault, Minnesota differentiated between covenants not to sue and releases.[197] Prior to the enactment of Minnesota's comparative fault act in 1969, the courts had arrived at a system whereby

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196. *See supra* notes 107-08 and accompanying text.

197. *See, e.g.*, Gronquist v. Olson, 242 Minn. 119, 123, 64 N.W.2d 159, 163-64 (1954).

the intent behind a settlement determined whether it constituted a covenant not to sue or a release, regardless of what the document was called.[198] While a release of one joint tortfeasor released all,[199] several factors were considered in determining whether a compromise was a release or merely a covenant not to sue, the first being the intent of the parties to the agreement.[200] If by its terms the release only applied to some of the joint tortfeasors, it was not a release unless it plainly said so, a reservation of rights being unnecessary to retain those rights, but indicative of the intent behind the settlement.[201]

The second determinative factor was whether or not the plaintiff had received full compensation under the agreement.[202] Plaintiff was entitled to only one recovery, and a full satisfaction amounted to a release.[203] However, if plaintiff received a partial satisfaction not intended to be a release of the entire claim, she was free to pursue her claim among the other tortfeasors and was not barred on her claim until she received full satisfaction.[204] Any partial satisfaction served to diminish plaintiff's ultimate award *pro tanto*.[205]

Joint and several liability balanced by contribution among tortfeasors was the rule in Minnesota.[206] The courts imposed a strict requirement that in order to garner contribution from codefendants after having paid more than her equal share of a joint judgment, the proposed contributee must show that there was common liability, not merely common negligence, between herself and the co-defendants.[207]

B. Comparative Fault

Minnesota initially adopted comparative negligence based on the Wisconsin statute in 1969.[208] The system was refined over the years and

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198. *Id.* at 163 (citing Musolf v. Duluth Edison Elect. Co., 108 Minn. 369, 122 N.W. 499 (1909); Joyce v. Massachusetts Real Estate Co., 173 Minn. 310, 217 N.W. 337 (1928)).

199. *Joyce*, 173 Minn. at 311, 217 N.W. at 338.

200. *Gronquist*, 242 Minn. at 124, 64 N.W.2d at 165.

201. *Joyce*, 173 Minn. at 311, 217 N.W. at 338.

202. *Gronquist*, 242 Minn. at 124, 64 N.W.2d at 165.

203. Philips v. Aretz, 215 Minn 325, 10 N.W.2d 226 (1943).

204. *Gronquist*, 242 Minn. at 124, 64 N.W.2d at 164-65 (citing Musolf v. Duluth Edison Elect. Co., 108 Minn. 369, 122 N.W. 499).

205. *Id.*

206. *See* Underwriters at Lloyd's of Minneapolis v. Smith, 166 Minn. 388, 208 N.W. 13 (1926); American Auto Ins. Co. v. Molling, 239 Minn. 74, 57 N.W.2d 843 (1953). *See also* Note, *Contribution and Indemnity - An Examination of the Upheaval in Minnesota Tort Loss Allocation Concepts*, 5 WM. MITCHELL L. REV. 109, 118 (1979).

207. *American Auto Ins.*, 239 Minn. 74, 57 N.W.2d 847; Lunderberg v. Bierman, 241 Minn. 349, 63 N.W.2d 355 (1954).

208. *See supra* notes 11-16 and accompanying text.

in 1978 was revised to resemble the Uniform Comparative Fault Act.[209] Section 604.01 of the Minnesota Act provides for the abolition of contributory fault and its replacement with comparative fault,[210] defines fault,[211] and specifically makes provision for the effects of settlement in subdivisions (2), (3), (4), and (5).[212]

Section 604.04(5) of the Minnesota Act requires that settlements made "shall be credited against any final settlement or judgment," provided only that if the settlement is for more than the settling party's liability, if any, the plaintiff is not required to refund any part of it.[213] The subdivision further provides that the plaintiff's proportion of fault shall first be measured against the defendant's and if the defendant's is greater, the plaintiff's proportion of fault shall be subtracted (pursuant

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209. *See supra* notes 11-16 and accompanying text.

210. Contributory fault shall not bar recovery in an action by any person . . . to recover for fault resulting in death or injury to person or property, if the contributory fault was not greater than the fault of the person against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of fault attributable to the person recovering.

MINN. STAT. ANN. § 604.01(1) (West 1988). It should be noticed that this statute requires that the plaintiff's fault be measured against that of each defendant individually, as opposed to the fault of all the defendants in aggregate as is done in Kansas and apparently Indiana. *See* H. WOODS, COMPARATIVE FAULT, Appendix (1987). This became an issue in several cases involving settlement and contribution issues because a defendant with less fault than the plaintiff is considered not liable to the plaintiff, and hence has no common liability with the defendant seeking contribution. *See* Hosley v. Armstrong Cork Co., 364 N.W.2d 813, 817 (Minn. App. 1985), *rev'd on other grounds*, 383 N.W.2d 289 (Minn. 1986).

211. MINN. STAT. ANN. § 604.01(1)(a) (West 1988).

212. MINN. STAT. ANN. § 604.01(2), (3), (4), and (5). Subdivisions (2) and (3) provide that any settlement or payment for personal injury, death or damage to property shall not be considered admissions of liability. Subdivision (4) states: "Except in an action in which settlement and release has been pleaded as a defense, any settlement or payment referred to in subdivisions 2 and 3 shall be inadmissible in evidence on the trial of any legal action." Subdivision (5):

All settlements or payments made under subdivisions 2 and 3 shall be credited against any final settlement or judgment; provided however that in the event that judgment is entered against the person seeking recovery or if a verdict is rendered for an amount less than the total of any such advance payments in favor of the recipient thereof, such person shall not be required to refund any portion of such advance payment voluntarily made. Upon motion to the court in the absence of a jury and upon proper proof thereof, prior to entry of judgment on a verdict, the court shall first apply the provisions of subdivision 1 and then shall reduce the amount of the damages so determined by the amount of the payments previously made to or on the behalf of the person entitled to such damages.

MINN. STAT. ANN. § 604.01(5) (West 1988).

213. MINN. STAT. ANN. § 604.04(5) (West 1988).

to section 604.04(1)) before the award is diminished by the settlement amount.[214]

Despite the fact that the Minnesota statute provides for the effect of a settlement on the allocation process and result, elaboration was required and was forthcoming from the Minnesota courts. The statute does not, for example, specify whether the amount subtracted from the overall award is proportionate to the settling party's fault, or is a straight subtraction of the amount given in settlement. Logically, under joint and several liability, with its compensation orientation, only the dollar amount would be subtracted, thus guaranteeing plaintiff a full recovery under joint and several liability but no more.[215] However, the apportionment orientation of modern comparative fault statutes would dictate that the subtraction be based on the proportional amount.

In *Rambaum v. Swisher*,[216] the Minnesota Court of Appeals plainly endorsed the proportional credit in the settlement context, diminishing the award to plaintiff not by the settlement amount but by the settling party's percentage of fault.[217] Other methods discouraged settlements by plaintiff because she would gain no benefit from a good bargain if the settlement amount were subtracted regardless of proportion, but would still be disadvantaged by a bad bargain.[218] Defendants would be dis-

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214. MINN. STAT. ANN. § 604.04(5). The order in which the plaintiff's fault and the settlement amount are subtracted from the total award can make a difference in the amount of plaintiff's ultimate recovery. See examples given and analysis made in Note, *A Dollars and Sense Approach to Partial Settlements: Judicial Application of the Gross Damages Method*, 72 IOWA L. REV. 1147 (1987).

215. *See* Lanning, *Settlement and Liability in Montana: State Ex Rel Deere & Co. v. District Court*, 48 MONT. L. REV. 401, 408-13 (1987), for a concise description of the "dollar credit rule" (nonsettling defendant credited with the dollar amount of the settlement) and the "percent credit approach" (nonsettling defendant credited with the settling party's percentage of the judgment based on her percentage of the fault). Mr. Lanning states: "[T]he percent credit rule merely places the plaintiff in a multiple-defendant action on an equal basis with the plaintiff in a single-defendant action. In the latter, the plaintiff takes a chance when settling: he may receive more through settlement than through trial, or he may receive less." *Id.* at 410. *See also* SCWARTZ, COMPARATIVE NEGLIGENCE § 16.5 (1986).

216. 423 N.W.2d 68 (Minn. App. 1988) (citing Anunti v. Payette, 268 N.W.2d 52 (Minn. 1978)). In *Anunti*, the settlement was effected during the trial, after the jury had begun deliberating but before the verdict was returned. The court interpreted the word "settlement" in MINN. STAT. ANN. § 604.01(2) and (5) to refer to payments made "prior to the determination of the case," and found that since the settlement between plaintiff and a third party defendant had been effected during trial and the settling defendant was found to be without fault, the nonsettling tortfeasor should not benefit by the agreement. The court refused to reduce the judgment against the nonsettling defendant at all. *Anunti*, 268 N.W.2d at 56.

217. *Rambaum*, 423 N.W.2d at 77.

218. *Id.* The settlement agreement released the settling defendant's proportion of

couraged from settling if they received a credit in the dollar amount of the settlement because as soon as one tortfeasor settled, defendants would know that they would get the benefit of plaintiff's bargain if she settled for more than the settling party's proportion of fault. Also, if plaintiff settled for less than the settling party's proportion of fault, the nonsettling defendant would still be liable for only her own percentage of fault.[219] The parties in *Rambaum* had used a *Pierringer* release, designed to have the effect of giving the nonsettling party a credit based on the settling party's proportion of fault.

The Minnesota legislature wisely avoided a furor over how the statute affected joint and several liability by specifically providing in Section 604.02(1) that joint and several liability was retained, with certain limits added in 1988.[220] The caselaw interpreting this section of the statute has

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fault and indemnified him against contribution claims by the nonsettling defendant. This means that plaintiff could get no more than the settlement amount from the settling party and if the settlement amount were much less than the settling party's percentage of liability, she could apply joint liability to collect the rest from the nonsettling defendant, but if the nonsettling defendant pressed a contribution action against the settling party, plaintiff would have to pay that proportional contribution under the agreement. *See infra* notes 225-35 and text accompanying for further explanation of this particular type of release, widely used in Minnesota.

219. *Id.* at 76. The nonsettling defendant would be liable only for her percentage of fault despite joint and several liability because a *Pierringer* release was used. This released the settling party's percentage of fault and indemnified the settling party for any contribution claims. This means that even if plaintiff pressed for the payment of any shortfall between the settlement amount and the settling party's percentage of fault under joint and several liability, the nonsettling defendant could still sue the settling party for contribution of the amount paid over her proportional liability, and plaintiff would be required to pay that contribution amount. The effect of this rather convoluted path is that the nonsettling defendant ends up paying no more than her proportional liability dictates.

220. MINN. STAT. ANN. § 604.02 (West 1988 and Supp. 1989):

> When two or more persons are jointly liable, contributions to awards shall be in proportion to the percentage of fault attributable to each, except that each is jointly and severally liable for the whole award. Except in cases where liability arises under [naming certain environmental and pollution statutes] . . . environmental or public health law, . . . a person whose fault is 15 percent or less is liable for a percentage of the whole award no greater than four times the percentage of fault.

MINN. STAT. ANN. § 604.02(1) (West Supp. 1989). This Note will not deal with the limitation "a person whose fault is 15 percent or less" because it has been added very recently and impinges on settlement issues only in a peripheral way.

MINN. STAT. ANN. § 604.02(2) also provides a procedure whereby uncollectible portions of a judgment are reallocated among all faulty parties, including plaintiff, in proportion to their fault. See Hosley v. Pittsburg Corning Corp., 401 N.W.2d 136 (Minn. App. 1987) for a discussion of the reallocation statute. Subdivision (3) of the same Section provides for reallocation in products liability actions and also that in a products action "a person

balanced the retention of joint and several liability with the retention of Minnesota's common law right to contribution between joint tortfeasors.[221]

The effect of the retention of joint and several liability and contribution has occupied much of the caselaw interpreting the settlement provisions of the Minnesota Act. Part of this preoccupation stems from the problem of finality of settlements. A settling party wishes to be freed entirely of any worry of having to pay further and enters a settlement agreement to achieve this. However in Minnesota, a settlement does not necessarily offer this finality. Nonsettling defendants subject to a joint judgment (that is, one which includes the settling party's fault) may pursue contribution from the settling party if the nonsettling party has paid more than her percentage share of the judgment under joint and several liability.[222] This means that a settlement and release under Minnesota's Comparative Fault Act does not truly release the settling tortfeasor, which can be a disincentive to settlement since the settling tortfeasor will end up responsible for her percentage of any judgment

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whose fault is less than that of the claimant is liable to the claimant only for that portion of the judgment which represents the percentage of fault attributable to the person whose fault is less." MINN. STAT. ANN. § 604.02(3) (West 1988). This seems to change, for products liability purposes, the provision of MINN. STAT. ANN. § 604.01(1) (West 1988) which mandates the comparison of plaintiff's fault with each defendant individually, barring plaintiff if her fault is more. The products provision makes a defendant whose fault is less than plaintiffs pay, but only to the extent of their proportion. Cases commenting on the retention of joint and several liability are Maday v. Yellow Taxi Co., 311 N.W.2d 849 (Minn. 1981) (when acts concur to cause injury or when injury is indivisible, joint liability results); Ruberg v. Skelly Oil Co., 297 N.W.2d 746 (Minn. 1980) (if the injury is indivisible and the defendant against whom joint and several liability is asserted is indeed liable to the plaintiff, that defendant is liable for the whole award).

221. *See, e.g.* Lange v. Schweitzer, 295 N.W.2d 387 (Minn. 1980). The court specified that the contribution was to be only for those amounts the nonsettling defendant paid that exceeded his proportional liability. This was regardless of the dimunition of plaintiff's award due to the execution of a settlement agreement in which plaintiff agreed to indemnify the settling defendant for all contribution claims, as that dimunition was forseeable at the time of execution of the agreement. *Id.* at 390. The Uniform Act also retains both joint and several liability and contribution:

> The common law rule of joint and several liability continues to apply under this Act. . . . The plaintiff can recover the total amount of his judgment against any defendant who is liable. The judgment for each claimant also sets forth, however, the equitable share of the total obligation to the claimant for each party, based on his established percentage of fault. This indicates the amount that each party should eventually be responsible for as a result of the rules of contribution. Stated in the judgment itself, it makes the information available to the parties and will normally be a basis for contribution without the need for a court order arising from motion or separate action.

UNIF. COMPARATIVE FAULT ACT, Comment to § 2, 12 U.L.A. 37, 44 (Supp. 1988).

222. *See, e.g. Lange*, 295 N.W.2d 387.

and will not get the benefit of any bargain she may strike.[223] The plaintiffs and defendants of Minnesota have reached a middle ground regarding joint and several liability, contribution, and finality of settlement through the use of a "*Pierringer* release."[224] This is a settlement device whereby plaintiff releases the settling joint tortfeasor's proportion of fault and agrees to indemnify her for any contribution, plaintiff retaining her right to pursue the remainder of her recovery from the other tortfeasors involved.[225] The settling party is included in the allocation of fault, but is not required to remain a party to the action.[226]

The Minnesota Supreme Court pronounced *Pierringer* releases acceptable in Minnesota and laid down guidelines for their use in *Frey v. Snelgrove*.[227] *Frey* involved a car accident in which plaintiff, a passenger, was injured due to the alleged negligence of the driver and the manufacturer of the tires on the car.[228] On the sixth day of trial, the plaintiff settled and executed a *Pierringer* release with the driver and the owner of the car, informed the court of the settlement, and continued against the manufacturer.[229] The settling co-defendants were not dismissed and the jury was not informed of the settlement.[230] The tire manufacturer appealed the trial court's ruling permitting the settled co-defendants to continue as parties.[231]

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223. This is in contrast to the Uniform Act, which provides:

> A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution, but it does not discharge any other persons liable on the same claim unless it so provides. However, the claim of the releasing person against other persons is reduced by the amount of the released person's equitable share of the obligation.

UNIF. COMPARATIVE FAULT ACT § 6 12 U.L.A. 37, 50 (Supp. 1988). The Comment to § 6 of the Uniform Act explains why this configuration was chosen: if a release does not free the released person from liability for contribution, then there exists no incentive for tortfeasors to settle, as they will end up paying their percentage of fault anyway. This is the problem that Minnesota defendants, plaintiffs, and courts faced under their statute and the existing caselaw. UNIF. COMPARATIVE FAULT ACT Comment to § 6, 12 U.L.A. 37, 50 (Supp. 1988).

224. Based on Pierringer v. Hoger, 21 Wis. 2d 182, 124 N.W.2d 106 (1963). *See* V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 16.5 (2d ed. 1986); C. HEFT & C.J. HEFT, COMPARATIVE NEGLIGENCE MANUAL § 4.140 (1987).

225. *Pierringer*, 21 Wis. 2d at ____, 124 N.W.2d at 108. The Wisconsin Supreme Court upheld and enforced the agreement.

226. *Id.* at ____, 124 N.W.2d at 111-12.

227. 269 N.W.2d 918 (Minn. 1978). "The use of a so-called Pierringer release is in accord with Minnesota practice and our law of comparative negligence in tort actions." *Id.* at 921.

228. *Id.* at 920.

229. *Id.*

230. *Id.* at 920-21.

231. *Id.* at 920.

The court listed the elements of a *Pierringer* release:

> (1) The release of the settling defendants from the action and the discharge of a part of the cause of action equal to the part attributable to the settling defendant's causal negligence; (2) the reservation of the remainder of plaintiff's causes of action against the nonsettling defendants; and (3) plaintiff's agreement to indemnify the settling defendants from any claims of contribution made by the nonsettling defendants to the extent the settling defendants have been released.[232]

Mr. John Simonett, in his article on *Pierringer* releases in Minnesota,[233] notes that the *Pierringer* release is "designed to operate in a jurisdiction which has comparative negligence to apportion liability between defendants, uses the special verdict form,[234] and allows contribution between joint tortfeasors,"[235] making it the ideal form of settlement for Minnesota.

The *Frey* court held that defendants settling under a *Pierringer* release should usually be dismissed from the action, "but their negligence should nevertheless be submitted to the jury."[236] Nonparties and phantom parties

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232. *Id.*, n.1. The court notes that the release in *Frey* contained two unusual provisions: "The indemnity clause covered cross-claims for indemnity as well as contribution and the amount paid for the settlement was contingent upon the amount recovered from the nonagreeing party at trial rather than a sum certain." *Id.*

233. Simonett, *Release of Joint Tortfeasors: Use of the Pierringer Release in Minnesota*, 3 WM. MITCHELL L. REV. 1 (1977).

234. That is, each defendant is assigned a specific percentage of fault, rather than having an overall percentage assigned to all the defendants together. Special verdict forms are necessary to the comparison contemplated in MINN. STAT. ANN. § 604.01(1) (West 1988). IND. CODE § 34-4-33-6 (1988) provides for special verdict forms.

235. Simonett, *supra* note 233, at 11.

236. *Frey*, 269 N.W.2d at 922. The Uniform Act would have the percentage of fault of released parties considered:

> In all actions involving fault of more than one party to the action, including third-party defendants *and persons who have been released* . . . the court . . . shall instruct the jury to answer special interrogatories . . . indicating:
> (1) the amount of damages each claimant would be entitled to recover if contributory fault is disregarded; and
> (2) the percentage of the total fault of all the parties to each claim that is allocated to each claimant, defendant, third-party defendant, *and person who has been released from liability under Section 6.*

(emphasis added) UNIF. COMPARATIVE FAULT ACT § 2, 12 U.L.A. 43, (Supp. 1988). The Comment to § 2 goes on to explain why causally negligent but unjoined tortfeasors are not considered:

> The limitation to parties to the action means ignoring other persons who may have been at fault with regard to the particular injury but who have not been joined as parties. This is a deliberate decision. It cannot be told with certainty whether that person was actually at fault or what amount of fault should be

are not dealt with in the Minnesota Act, but *Frey*[237] and *Lines v. Ryan*[238] make it clear that the settling party's fault is to be considered in the allocation process. The Minnesota District Judges Association, citing *Lines*, supplies a jury instruction directing the jury to consider the fault of all causally involved persons, whether parties or not.[239] This puts Minnesota in line with Kansas on the nonparty issue, with the crucial difference being that the plaintiff has the incentive to join all tortfeasors because under joint and several liability she will not be penalized for doing so by having fault allocated to one who cannot pay, which fault is absorbed by plaintiffs under the Kansas regime. This is, however, hard on defendants because they absorb the fault of such persons under joint and several liability and must seek contribution, which is costly and time consuming. For this reason, defendants are encouraged to settle by means of a *Pierringer* release, thereby freeing themselves of this possibility.

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attributed to him, or whether he will ever be sued, or whether the statute of limitations will run on him, etc. An attempt to settle these matters in a suit to which he is not a party would not be binding on him.

Id., Comment to § 2. This Comment acknowledges the practical problems of a the inclusion of nonparties in the allocation process, but the Kansas courts would rightly note that this allows plaintiffs to circumvent the allocation procedure by strategic choice of which tortfeasors to sue and which to let go.

237. *Frey*, 269 N.W.2d at 922-23.

238. 272 N.W.2d 896 (Minn. 1978).

It is established without doubt that, when apportioning negligence, a jury must have the opportunity to consider the negligence of all parties to the transaction, whether or not they be parties to the lawsuit and whether or not they can be liable to the plaintiff or to the other tort-feasors either by operation of law or because of a prior release.

Connar v. West Shore Equip., 68 Wis. 2d 42, 45, 227 N.W.2d 660, 662 (1975). *See also* Hosley v. Armstrong Cork Co., 383 N.W.2d 289 (Minn. 1986), where the fault of fourteen asbestos manufacturers was allocated even though twelve had settled prior to trial.

239. JIG 149 instructs:

During the trial evidence has been presented concerning the involvement in the (accident) (injury) (collision) (occurrence) of persons who are not parties, that is, not plaintiffs or defendants, to this lawsuit. Even though [name of person] is not a party, you will still be asked to determine whether [name of person] was (negligent) (at fault) and whether [name of person] (negligence) (fault) was a direct cause of the (accident) (injury) (collision) (occurrence). That is to ensure that the apportionment of (negligence) (fault) you make in answering question [number] is fair and accurate.

4 Minn. Prac. Jury Instruction Guides Civil 127, JIG 149 (1986). The Comment to the instruction advises that "[i]f the fault of an absent person is considered, it may be desirable to explain to the jury why the fault of an absent person is being considered." *Id.*

C. Practical Matters: Informing the Jury and the Problem of Secret Settlements

The *Frey* court also addressed the practical point of what the jury is to be told when a party has settled but her fault must still be allocated.[240] In this situation the settled party, if she has executed a *Pierringer* release, has no incentive to further defend herself because she will not have to pay any more, due to the plaintiff's indemnification in case of contribution claims. However, a settlement may give the impression of admitted liability to the jury, causing them to put undue amounts of fault on the settling defendant, which would be absorbed by plaintiff under a *Pierringer* release. If the settling party is dismissed, as is recommended in *Frey*,[241] the jury may be puzzled by her absence and possibly attribute undue fault to the remaining parties.

The *Frey* court suggests guidelines which include a notification of the court and the other parties and making the settlement agreement part of the record.[242] "Where the settlement and release agreement is executed during trial, the court should usually inform the jury that 'there has been a settlement and release if for no other reason than to explain the settling tortfeasor's conspicuous absence from the courtroom.' "[243] The court notes that a settlement agreement would be admissible to prove bias or prejudice of a witness, and leaves the admissibility of the actual agreement to the trial court's discretion.[244] The court last specifies that "as a general rule the amount paid in settlement should never be submitted."[245]

1. "Mary Carter" Agreements.—The question of who should be informed of a settlement is most fiercely argued in relation to secret settlements, also referred to as "*Mary Carter* agreements"[246] or "*Gallagher* agreements."[247] These agreements typically have the following features: the guarantee of a certain amount of recovery for plaintiff if she does not prevail or recovers less than expected from the remaining

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240. *Frey*, 269 N.W.2d at 923-24.

241. *Id.* at 923.

242. *Id.*

243. *Id.* (quoting Simonett, *supra* note 233, at 30). *See generally* Note, *Knowledge by the Jury of a Settlement Where a Plaintiff Has Settled With One or More Defendants Who Are Jointly and Severally Liable*, 32 VILL. L. REV. 541 (1987).

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

245. *Id.* This is because the settlement amount is arrived at through the use of factors not appropriately put before the jury, such as estimations of liability and compromise. Also, the settlement figure may have little relation to the plaintiff's actual damages. *Id.*

246. Named after Booth v. Mary Carter Paint Co. 202 So. 2d 8 (Fla. Dist. Ct. App. 1967). *See generally* H. WOODS, COMPARATIVE FAULT § 13:21 (1987).

247. Named for City of Tucson v. Gallagher, 108 Ariz. 140, 493 P.2d 1197 (1972).

defendants; a limit on the settling defendant's liability to that amount; a requirement that the settling defendant stay in the case as a defendant; and finally, they are secret from the court, the opposing parties, and the jury.[248] This is obviously unfair to defendants who remain in the action unaware that such an agreement has been made. It also does nothing to encourage true settlement because if plaintiff is aware that one or more defendants will, *sub rosa*, be "on her side," giving her the advantage over the remaining defendant(s), she need not be vitally interested in compromising with those remaining defendants.

Ethical considerations aside, these features make such agreements very appealing in jurisdictions which have abolished joint and several liability and contribution.[249] This is because plaintiff has a guaranteed minimum recovery and assistance from the settling defendant in putting maximum blame on the nonsettling defendants, with the result that plaintiff's and settling defendant's fault is small and nonsettling defendant's proportional fault is large. This lessens the need on plaintiff's part for joint and several liability to attain full recovery, and the settling defendant need not worry about contribution.[250]

The courts which have dealt with such agreements have objected not to the agreements themselves but to the secrecy which is one of their main elements.[251] The agreement itself, without the secrecy and cooperation between the plaintiff and the settling defendant, somewhat resembles a *Pierringer* release. In *Johnson v. Moberg*,[252] the Minnesota Supreme Court dealt with a secret settlement made minutes before final

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248. Mullins and Morrison, *Who is Mary Carter and Why is She Saying All Those Nasty Things About My Pre-trial Settlements?*, 23 For the Defense 14, 15 (1981). The Mary Carter agreement was described as "basically a contract by which one co-defendant secretly agrees with the plaintiff that, if such defendant will proceed to defend himself in court, his own maximum liability will be diminished proportionately by increasing the liability of the other co-defendants." Ward v. Ochoa, 284 So. 2d 385, 387 (Fla. 1973).

249. Entman, *Mary Carter Agreements: An Assessment of Attempted Solutions*, 38 Univ. Fla. L. Rev. 521, 557 (1986). The author notes that the commentary on these agreements arises mostly from non-contribution jurisdictions, but that they are unfair in all jurisdictions. *Id.* at 524. *See also* Eubanks and Cocchiarella, *In Defense of Mary Carter*, 26 For the Defense 14 (February 1984), stating that when the nonsettling defendant is not making a realistic attempt, commensurate with her share of fault, to settle plaintiff's case, a Mary Carter agreement is fair to the parties and may encourage settlement. The authors recommend disclosure to minimize any adverse effects. *Id.* at 21.

250. Eubanks and Cocchiarella, *supra* n.249, at 19.

251. *See, e.g.* Johnson v. Moberg, 334 N.W.2d 411, 415 (Minn. 1983), citing cases which have required disclosure of Mary Carter agreements. However, one court has held that such agreements are void as a matter of public policy, finding that they are unethical and encourage champerty and maintenance, as well as make it impossible for the nonsettling defendant to get a fair trial. Lum v. Stinnett, 87 Nev. 402, 488 P.2d 347 (1971).

252. 334 N.W.2d 411 (Minn. 1983).

arguments in a "dram-shop" case, where the settling defendant continued and made a closing argument.[253]

The court held that *Mary Carter* agreements must be disclosed to the court and the other litigants immediately when made, stating: "This kind of settlement can affect the motivation of the parties, and, indeed, the credibility of witnesses, and only by bringing these settlements into the open can a trial proceed in a fair and proper adversarial setting."[254] The court recommended that on remand the guidelines laid down in *Frey* regarding revelation of settlement agreements be followed.[255]

Disclosure of settlements does not afford a final solution to the problem of *Mary Carter* settlements, because revealing a self-serving agreement containing protestations of innocence and condemnation of the nonsettling defendant can be just as damaging to the nonsettling defendant as secret cooperation between the plaintiff and the settling defendant to achieve the same end.[256] Prejudice results also if the disclosure leads the jury to think that the nonsettling defendant did not settle because she was more at fault or that plaintiff has received a recovery through settlement and does not deserve any more.[257] Further, if the agreement is entirely secret, nonsettling defendants will not even know to ask for revelation of the agreement.[258]

It is probable that Indiana courts will face this problem as comparative fault is refined with the passage of time. This is because if a plaintiff is faced with the prospect of no joint and several liability and the knowledge that the fault of a settling party will be considered and allocated, then she will join as many defendants as possible and enlist as many as possible to her cause. This may be done through the use of agreements which require defendants to stay in the case post-settlement and defend themselves rather than leave plaintiff to defend an absent nonparty tortfeasor.[259]

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253. *Id.* at 414.

254. *Id.* at 415.

255. *Id. See supra* notes 240-45 and accompanying text for the *Frey* guidelines.

256. Entman, *supra* note 249, at 559.

257. Note, *Appellate Decisions - Evidence - Disclosing Gallagher Agreements to The Jury*, 22 ARIZ. L. REV. 1135, 1141 (1980)

258. Entman, *supra* note 249, at 561-62. Mullins and Morrison, *supra* note 248, at 18, refer to Mary Carter agreements as "Typhoid Mary" and recommend using discovery requests to discover agreements when they seem likely.

259. Professor Wilkins, in his article describes the "empty chair" defense as a weapon in the plaintiff's arsenal, which it was when plaintiff had control over whose fault was to be considered. This was because the trier of fact had no choice but allocate one hundred percent of the involved fault, and if the "empty chair" tortfeasor was not in court, the only place to put that fault was on the defendants in court. Under a comparative fault regime where the fault of all parties is considered, the "empty chair" becomes a tool of use to the defense, in that fault may be allocated to the "empty chair" tortfeasor. Wilkins, *supra* note 47, at 732-33.

Although ethical considerations will hopefully prevent most attorneys from entering secret agreements,[260] Indiana courts and legislators will have to consider the temptations that will arise under the comparative fault system. This consideration will lead to putting in place a requirement that settlement agreements be timely revealed to the court and the other litigants, as has been done in other jurisdictions.[261] Such a requirement would serve to keep honest lawyers honest.

To counterbalance the possible bad effects of revealing and admitting an agreement condemning a nonsettling defendant, the trial court should be given the discretion to decide which parts can be revealed without prejudice to any party. This is recommended in *Frey*.[262] Minnesota courts also have Jury Instruction Guides tailored to the settlement situation described above, telling the jury that a defendant has settled and that the jury is not to concern itself with why the settlement occurred, warning them not to draw conclusions from the settlement, and telling them that they will be required to allocate the settling party's fault.[263]

2. Reasonableness Hearings.—The Washington comparative fault statute includes a provision requiring that the court and other parties to the action be informed of any contemplated settlement agreement and that the agreement be subject to approval by the court.[264] This

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260. Eubanks and Cocchiarella, *supra* note 249, at 22, stress that such agreements are doubtful ethically.

261. *See, e.g.* Johnson v. Moberg, 334 N.W.2d 411 (Minn. 1983), and cases cited *Id.* at 415. Frey v. Snelgrove, 269 N.W.2d 918, 923-24 makes it clear that the court is to be informed of *Pierringer* releases.

262. *Frey*, 269 N.W.2d at 923-24.

263. Jury Instruction Guide 148:

> [Defendant] is no longer a party to this lawsuit, because [defendant] and [plaintiff] have entered into a settlement agreement. You are not to concern yourselves with the reasons for the settlement agreement. You are not to draw any conclusions from the fact of settlement or from the fact that other defendants remain in the lawsuit. The settlement agreement between [plaintiff] and [defendant] should in no way influence your judgment about the (negligence)(fault) of [defendant], the remaining defendant(s) or the plaintiff(s). Even though [defendant] is no longer a party to this lawsuit, you will still be asked to determine whether [defendant] is (negligent) (at fault) and whether that (negligence) (fault) was a direct cause of the(accident) (injury) (collision) (occurrence). This is to ensure that the apportionment of (negligence) (fault) you make in answering question [number] is fair and accurate.

4 MINN. PRAC. JURY INSTRUCTION GUIDES CIVIL 125, JIG 148, (1986).

264. WASH. REV. CODE. § 4.22.060(1) (1987). The section provides:

> (1) A party prior to entering into a release, covenant not to sue, covenant not to enforce judgment, or similar agreement with a claimant shall give five days' written notice of such intent to all other parties and the court. The court may for good cause authorize a shorter notice period. The notice shall contain a copy of the proposed agreement. A hearing shall be held on the issue of the

section provides for a hearing on the proposed settlement, including evidentiary presentations, and also that settlements entered into before the action was filed may be subject to hearing upon motion by a party.[265] This portion of the Washington statute serves several purposes. First, it guarantees that any settlement is brought to the attention of the court, thereby avoiding the collusion and prejudice of a *Mary Carter* agreement. Second, it assures both parties of a fair settlement, as judged by the court. Third, it assists the parties in realistically assessing the amount of fault for which each is responsible.[266]

The reasonableness hearing requirement was examined in *Glover v. Tacoma General Hosp.*,[267] where the court was attempting to determine how much credit a remaining defendant should receive for settlements with other defendants.[268] The court noted that the legislature had not set out factors or guidelines for courts to use in determining reasonableness.[269] The factors which the court decided upon included a balance of plaintiff's damages, the merits of the party's cases, ability to pay,

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> reasonableness of the amount to be paid with all parties afforded an opportunity to present evidence. A determination by the court that the amount to be paid is reasonable must be secured. If an agreement was entered into prior to the filing of the action, a hearing on the issue of the reasonableness of the amount paid at the time it was entered into may be held at any time prior to final judgment upon motion of a party. The burden of proof as to the reasonableness of the settlement offer shall be on the party requesting the settlement.

Id. Washington has adopted the Uniform Act, UNIF. COMPARATIVE FAULT ACT, 12 U.L.A. 37 (Supp. 1988), but the reasonableness requirement for settlements is a variation on the Uniform Act's § 6. California has a similar "good faith" requirement for settlements. *See* River Garden Farms, Inc. v. Superior Court, 26 Cal. App. 3d 986, 103 Cal. Rptr. 498 (1972).

265. WASH. REV. CODE § 4.22.060(1) (1987).

266. Accurately assessing the percentages of fault attributable to the various parties will always be a major practical headache. *See* Handbook for Indianapolis Bar Ass'n, *Super Saturday in Court - - Comparative Fault*, 6 (April 9, 1988); HEFT & HEFT, COMPARATIVE NEGLIGENCE MANUAL §§ 4.40 - 4.110 (1987), suggesting various percentages of fault to be used in settlement negotiations, according to the type of accident involved.

267. 98 Wash. 2d 708, 658 P.2d 1230 (1983).

268. *Id.* at 713, 658 P.2d at 1235.

269. *Id.* at 714, 658 P.2d at 1236. The court quoted the Senate Select Committee on Tort and Product Liability Reform Final Report at 54: "The bill does not establish any standards for determining whether the amount paid for the release was reasonable or not. It is felt that the courts can rule on this issue without specific guidance from the Senate." Stating that "sweetheart deals" (Mary Carter agreements) were one of the concerns of the legislature in enacting the provision, the court refused to allow total discretion in the lower court. *Id.* at 713, 658 P.2d at 1235. The court also refused a test which strictly reflected the remaining defendant's relative liability, on the basis that determining the liability would entail a mini-trial or waiting until the jury had allocated all the fault. *Id.*

collusion or fraud, good faith, the cost and timeframe of the litigation, and the interests of the parties not being released.[270]

This system would not be as efficient as allowing the parties to work out their settlements under comparative fault without the interference of the court, but would encourage fair settlement. It would also serve the purpose of discouraging unfair *Mary Carter* agreements and assist the parties in their negotiations.

The Minnesota system embodies a concern for the compensation aspects of the tort system which tend to favor plaintiffs. It is interesting to note that given a system with joint and several liability which guarantees plaintiff a full recovery, and contribution to assure that no defendant pays more than her full share, the bar and courts of Minnesota have favored *Pierringer* settlements which approximate a completely allocation-oriented system.[271] The difference lies in that it is plaintiff's choice to bear the risks associated with *Pierringer* releases, and if she chooses not to, she can pursue a judgment and have any of the jointly and severally liable defendants pay. In such a case, it is the defendant who bears the risk of insolvency or immunity of one of the other defendants. In Kansas this is impossible, and the plaintiff bears all the risks, both of an unwise settlement and of the immunity or insolvency of a defendant.

Clearly the Minnesota legislature and courts considered carefully both policy and practicality in enacting the Minnesota statute. The statute created is detailed enough that courts could interpret it in a logical and consistent fashion, giving litigants some certainty, yet flexible enough that parties are given the most room possible to negotiate and arrive at creative, final, and fair settlements.

V. Summary and Conclusion

The systems of both Kansas and Minnesota have features which recommend them in the settlement context, Kansas' being the precise allocation of fault to parties, which makes it fairest for those accused of negligence, Minnesota's being the joint and several liability doctrine

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270. *Id.*

271. The effect of a *Pierringer* release is that plaintiff receives the settlement amount and any remaining judgment amount less the settling defendant's proportion of fault. The settling defendant is freed of any threat of a contribution suit by an agreement whereby plaintiff will indemnify that defendant in case a codefendant presses a contribution suit. The nonsettling defendant pays only her own proportion of fault, or, if forced to pay part of a settling defendant's fault can go against the settling defendant for contribution. This circuitous route leads to each defendant being responsible for her own fault and no more, as under a system such as Kansas'. *See supra* notes 218, 219 and 225-35, and accompanying text.

balanced by contribution, which emphasizes the compensation of injured persons. For ease of administation, the Kansas Act, by not allowing contribution, makes for more efficiency.[272] The Minnesota system, which requires further action on the part of a defendant in order to get contribution, is less efficient, but gives the parties more flexibility to craft fair and effective settlements, and in combination with *Pierringer* releases provides a strong incentive to settlement.

Which state Indiana follows will depend in part upon how her courts answer the threshold questions of whether joint and several liability has been retained and the position of settling parties in the case post-settlement. The fact that the Act has foreclosed contribution and the federal court's decision in *Gray*[273] indicate that Indiana will probably follow Kansas in abrogating joint and several liability. The position of settled tortfeasors will be a harder question for Indiana courts and lawyers, dealing with nonparty provisions which are more detailed than any other state's and with no indication yet as to whether settled parties will be nonparties or *sui generis*. The courts must decide what role a settling defendant or tortfeasor will play in the consideration and allocation of fault.

The practical aspects of trying a case in which one of multiple tortfeasors has settled will center around the position the settling parties will occupy vis a vis the plaintiff and remaining defendants. The courts must state whether or not the settling tortfeasor will become an automatic nonparty and give guidelines for settlement under the Act and the allocation of fault to the settling tortfeasors, providing jury instructions and procedures designed to protect both the plaintiff and defendant.

By referring to the caselaw and statute interpretation of other states, as well as the policies represented by the fault allocation systems involved, Indiana courts will be equipped to provide cogent answers to the threshold questions and provide the certainty which lawyers and parties need in order to effect the most advantageous settlements possible.

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272. Except in a comparative implied indemnity case such as *Kennedy*, which encompasses a further action by settling defendants in order to get proportional contribution.

273. 684 F. Supp. 1481 (S.D. Ind. 1988)