



3-1-1978

Settlements in Multiple Tortfeasor Controversies - Texas Law.

Ann C. Livingston

Follow this and additional works at: <https://commons.stmarytx.edu/thestmaryslawjournal>



Part of the [State and Local Government Law Commons](#), and the [Torts Commons](#)

Recommended Citation

Ann C. Livingston, *Settlements in Multiple Tortfeasor Controversies - Texas Law.*, 10 ST. MARY'S L.J. (1978).

Available at: <https://commons.stmarytx.edu/thestmaryslawjournal/vol10/iss1/4>

This Article is brought to you for free and open access by the St. Mary's Law Journals at Digital Commons at St. Mary's University. It has been accepted for inclusion in St. Mary's Law Journal by an authorized editor of Digital Commons at St. Mary's University. For more information, please contact egoode@stmarytx.edu, sfowler@stmarytx.edu.

COMMENTS

SETTLEMENTS IN MULTIPLE TORTFEASOR CONTROVERSIES—TEXAS LAW

ANN C. LIVINGSTON

Many torts involve more than one potential defendant.¹ In multiple tortfeasor controversies it is common for the injured party to settle with fewer than all of the tortfeasors. These settlements, unlike settlements for single tortfeasor injuries, present difficult problems because opposing policies must be weighed and conflicting interests of the claimant, settlor, and nonsettlor adjusted. If the settlement satisfies the claim, the settlor may have certain rights against his cotortfeasors. If the settlement is only a partial satisfaction, however, its effect on a subsequent judgment against nonsettling tortfeasors must be considered. The major difficulty lies in furthering the policy of encouraging settlements by protecting the interests of the settling parties without resulting in unfairness to nonsettling tortfeasors. An understanding of the rules governing settlements is important to each party in order to further his own interests and to avoid unexpected adverse effects.

SETTLEMENTS AND PARTIAL SETTLEMENTS

It is often repeated that the law favors settlements.² Encouraging settlements has been an important policy consideration reflected in many decisions governing the validity and effect of settlements.³ The policy is grounded in the belief that the public interest as well as the interests of the parties will best be advanced if they are free to work out their dispute

1. Multiple tortfeasor controversies involve two aspects which are easily confused. As a matter of procedure, liberal joinder rules have been enacted so that multiple tortfeasors may be joined as defendants. See TEX. R. CIV. P. 39, 40, 41. A second aspect involves the substantive nature of each tortfeasor's liability; that is, whether the liability is entire or apportionable. See generally W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 47, at 297-99 (4th ed. 1971); Jackson, *Joint Torts and Several Liability*, 17 TEXAS L. REV. 399 (1939); Comment, *Recent Developments in Joint and Several Tort Liability*, 14 BAYLOR L. REV. 421 (1962).

2. See, e.g., *General Motors Corp. v. Simmons*, 558 S.W.2d 855, 857 (Tex. 1977); *McGuire v. Commercial Union Ins. Co.*, 431 S.W.2d 347, 352 (Tex. 1968); *Palestine Contractors, Inc. v. Perkins*, 386 S.W.2d 764, 772 (Tex. 1964).

3. See, e.g., *McGuire v. Commercial Union Ins. Co.*, 431 S.W.2d 347, 352 (Tex. 1968) (evidence of settlement not admissible); *Palestine Contractors, Inc. v. Perkins*, 386 S.W.2d 764, 772 (Tex. 1964) (settlor not liable for contribution after partial settlement); *Callihan Interests, Inc. v. Duffield*, 385 S.W.2d 586, 587 (Tex. Civ. App.—Eastland 1964, writ ref'd) (settlor entitled to contribution after full settlement).

without resort to a costly, lengthy trial.⁴ Settlements alleviate congestion in the courts and avoid unnecessary expenditure of public funds.⁵ Negotiation between the parties themselves is most likely to result in a mutually agreeable conciliation.⁶

The parties to a settlement are generally free to work out any arrangement they desire.⁷ A settlement is governed by contract law⁸ and will be upheld if the parties have acted in good faith without fraud or misrepresentation.⁹ A valid settlement precludes the claimant from asserting further claims against the settlor arising from the same subject matter.¹⁰ One limitation, important when a claimant settles with fewer than all multiple tortfeasors, is that a settlement does not bind nonsettling parties.¹¹

A settlement with fewer than all joint tortfeasors may discharge all tortfeasors by releasing them or by fully satisfying the claim.¹² Other settle-

4. See *Beckham v. Reed*, Kapt. H. Krohn, G.M.B.H., 217 F. Supp. 749, 751 (S.D. Tex. 1963); *Ross v. Seip*, 154 S.W.2d 958, 960 (Tex. Civ. App.—Texarkana 1941, writ ref'd w.o.m.); *Grisham v. Ward*, 179 S.W. 893, 894 (Tex. Civ. App.—Fort Worth 1915, no writ). See also *Bell, Admissions Arising Out of Compromise—Are They Irrelevant?*, 31 TEXAS L. REV. 239, 252 (1953); Note, *The Mary Carter Agreement—Solving the Problems of Collusive Settlements in Joint Tort Actions*, 47 S. CAL. L. REV. 1393, 1397-98 (1974).

5. *Bell, Admissions Arising Out of Compromise—Are They Irrelevant?*, 31 TEXAS L. REV. 239, 252 (1953).

6. See Note, *The Mary Carter Agreement—Solving the Problems of Collusive Settlements in Joint Tort Actions*, 47 S. CAL. L. REV. 1393, 1397 (1974).

7. The parties may settle before suit, during trial, or pending appeal. If the settlement is after the suit is brought the court should render judgment according to the settlement. *Edwards v. Gifford*, 137 Tex. 559, 563, 155 S.W.2d 786, 788 (1941). Only in limited situations is a settlement subject to the court's approval. See *Leong v. Wright*, 478 S.W.2d 839, 840 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.) (court must approve settlement for minor plaintiff); TEX. R. CIV. P. 42(e) (compromise of class action requires court approval).

8. *Stewart v. Mathes*, 528 S.W.2d 116, 118 (Tex. Civ. App.—Beaumont 1975, no writ). Consideration is required. See *Walker-Neer Mach. Co. v. Acme Mfg. Co.*, 279 S.W.2d 156, 159 (Tex. Civ. App.—Fort Worth 1955, writ ref'd n.r.e.). The court will not inquire into the adequacy of the consideration. *Wedegartner v. Reichert*, 218 S.W.2d 304, 310 (Tex. Civ. App.—Waco 1948, writ ref'd n.r.e.).

9. *Gillman v. Gillman*, 313 S.W.2d 931, 941 (Tex. Civ. App.—Amarillo 1958, writ ref'd n.r.e.); *Iden v. Ackerman*, 280 S.W.2d 643, 647 (Tex. Civ. App.—Eastland 1955, writ ref'd); *Wedegartner v. Reichert*, 218 S.W.2d 304, 309 (Tex. Civ. App.—Waco 1948, writ ref'd n.r.e.).

10. *R.C. Bowen Estate v. Continental Trailways, Inc.*, 152 Tex. 260, 264, 256 S.W.2d 71, 73 (1953); *Hart v. Traders & Gen. Ins. Co.*, 144 Tex. 146, 149, 189 S.W.2d 493, 494 (1945).

11. This limitation is illustrated by cases holding that a settlement by an insurance company does not necessarily bind the insured. See *Brightwell v. Rabeck*, 430 S.W.2d 252, 255 (Tex. Civ. App.—Fort Worth 1968, writ ref'd n.r.e.); *Department of Pub. Safety v. Shields*, 415 S.W.2d 21, 23 (Tex. Civ. App.—Waco 1967, writ ref'd n.r.e.).

12. See *Bradshaw v. Baylor Univ.*, 126 Tex. 99, 103-04, 84 S.W.2d 703, 705 (1935) (prior settlement with one joint tortfeasor equal to judgment against nonsettling tortfeasor); cf. *Spradley v. McCrackin*, 505 S.W.2d 955, 958 (Tex. Civ. App.—Tyler 1974, writ ref'd n.r.e.) (release of servant releases master); *Callihan Interests, Inc. v. Duffield*, 385 S.W.2d 586, 587 (Tex. Civ. App.—Eastland 1964, writ ref'd) (payment of agreed judgment discharged all tortfeasors).

ments may be only partial, thereby allowing further recovery from tortfeasors who chose not to settle.¹³ To the extent possible, neither type of settlement should prejudice the rights of nonsettlers but this result is complicated by the policy of encouraging settlements. Complete settlements are encouraged if a tortfeasor who fully satisfies a claim by settling has the same right to contribution or indemnity as if he had satisfied the claim by paying a judgment. This requires subjecting a nonsettlor to liability arising from a settlement to which he was not a party.¹⁴ Partial settlements are encouraged if the settlor can rely on a final negotiated liability, but this requires either denying the nonsettlor with a judgment against him a right to contribution or indemnity which he might otherwise have had, or reducing the judgment so that the nonsettlor pays only his own share.¹⁵

There is a second area in which the treatment of settlements in multiple tortfeasor controversies calls for the resolution of opposing policies. It is well established that evidence of a settlement offer is not admissible on the issue of liability.¹⁶ This rule has been expanded to disallow evidence of completed settlements with third parties; evidence of a partial settlement between the plaintiff and one tortfeasor is not admissible on the issue of liability in a suit against a nonsettling cotortfeasor.¹⁷ The rule excluding settlement evidence is based on the policy of encouraging settlements.¹⁸ In the case where the plaintiff has partially settled, the prejudicial effect of such evidence on the plaintiff's cause of action against nonsettlers might discourage him from settling.¹⁹ A jury which is aware that the plaintiff has

13. See *McMillen v. Klingensmith*, 467 S.W.2d 193, 195 (Tex. 1971).

14. See *Callihan Interests, Inc. v. Duffield*, 385 S.W.2d 586, 587 (Tex. Civ. App.—Eastland 1964, writ ref'd) (settlor seeking contribution); cf. *Fireman's Fund Ins. Co. v. Commercial Standard Ins. Co.*, 490 S.W.2d 818, 824 (Tex. 1972) (settlor seeking indemnity).

15. See *Palestine Contractors, Inc. v. Perkins*, 386 S.W.2d 764, 767-68 (Tex. 1964) (nonsettling defendant seeking contribution); cf. *Frantom v. Neal*, 426 S.W.2d 268, 272 (Tex. Civ. App.—Fort Worth 1968, writ ref'd n.r.e.) (nonsettling defendant seeking indemnity).

16. See, e.g., *Texas Gen. Indem. Co. v. Scott*, 152 Tex. 1, 7, 253 S.W.2d 651, 655 (1952); *Sullivan v. Missouri, K. & T. Ry.*, 110 Tex. 360, 362, 220 S.W. 769, 770 (1920); *Hundere v. Tracy & Cook*, 494 S.W.2d 257, 260 (Tex. Civ. App.—San Antonio 1973, writ ref'd n.r.e.). See also TEX. REV. CIV. STAT. ANN. art. 3737f (Vernon Supp. 1978); 2 C. McCORMICK & R. RAY, TEXAS LAW OF EVIDENCE § 1142, at 29-30 (Texas Practice 2d ed. 1956).

17. *General Motors Corp. v. Simmons*, 558 S.W.2d 855, 857 (Tex. 1977); *Texaco, Inc. v. Pursley*, 527 S.W.2d 236, 240 (Tex. Civ. App.—Eastland 1975, writ ref'd n.r.e.); *Petco Corp. v. Plummer*, 392 S.W.2d 163, 168 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.); *Skyline Cab Co. v. Bradley*, 325 S.W.2d 176, 182 (Tex. Civ. App.—Houston 1959, writ ref'd n.r.e.).

18. *McGuire v. Commercial Union Ins. Co.*, 431 S.W.2d 347, 352 (Tex. 1968); see Bell, *Admissions Arising Out of Compromise—Are They Irrelevant?*, 31 TEXAS L. REV. 239, 239 (1953); McCormick, *The Scope of Privilege in the Law of Evidence*, 16 TEXAS L. REV. 447, 457-59 (1938). The rule rests on the belief that the parties will be encouraged to compromise if they can negotiate without fear that their efforts, if unsuccessful, could work against them in a subsequent trial. *City of Houston v. Derby*, 215 S.W.2d 690, 693 (Tex. Civ. App.—Galveston 1948, writ ref'd).

19. See *Skyline Cab Co. v. Bradley*, 325 S.W.2d 176, 182 (Tex. Civ. App.—Houston 1959,

already received some recovery may be influenced by such knowledge when instructed to determine the full amount of the plaintiff's damages.

Apart from policy considerations, the exclusionary rule is sometimes explained in terms of relevancy.²⁰ Evidence of an attempt to settle is said to be irrelevant when offered to show the weakness of a claim or defense.²¹ Similarly, a prior partial settlement with a cotortfeasor could be said to be irrelevant to minimize the strength of the plaintiff's case. Often, however, a nonsettling defendant offers partial settlement evidence to show interest or bias of a party to the settlement who later testifies.²² Partial settlements can result in a settlor's testimony being influenced by a settlement of which the jury is unaware. Since there is a strong policy of informing the jury of interest or bias of a witness,²³ evidence of certain settlements has been held admissible for impeachment purposes.²⁴

RELEASE—FULL AND PARTIAL SETTLEMENTS

At common law a partial settlement that released the claimant's cause of action against only one joint tortfeasor was not possible; any settlement which released one was a release of the others.²⁵ To avoid this "unity of release rule," the courts favored devices such as a covenant not to sue or a release with reservation of rights against nonsettlers.²⁶ Such devices are unnecessary today because Texas no longer adheres to the unity of release rule. In *McMillen v. Klingensmith*²⁷ the Texas Supreme Court held that a settlement which releases one tortfeasor does not interfere with the claimant's right to proceed against tortfeasors not named in the release.²⁸ It is important, however, to determine the proper effect of such a settlement on

writ ref'd n.r.e.).

20. See 4 J. WIGMORE, EVIDENCE § 1061, at 36 (Chadbourn rev. 1972).

21. *Id.* at 36; see *Sullivan v. Missouri, K. & T. Ry.*, 110 Tex. 360, 362, 220 S.W. 769, 770 (1920); *Hundere v. Tracy & Cook*, 494 S.W.2d 257, 260 (Tex. Civ. App.—San Antonio 1973, writ ref'd n.r.e.) (offer does not represent offeror's actual position).

22. See, e.g., *Bristol-Myers Co. v. Gonzales*, 561 S.W.2d 801, 805 (Tex. 1978); *Miller v. Bock Laundry Mach. Co.*, 21 Tex. Sup. Ct. J. 141, 144 (Dec. 30, 1977); *General Motors Corp. v. Simmons*, 558 S.W.2d 855, 858 (Tex. 1977).

23. *Trinity County Lumber Co. v. Denham*, 88 Tex. 203, 207, 30 S.W. 856, 858 (1895); *Robertson Tank Lines, Inc. v. Watson*, 491 S.W.2d 706, 709 (Tex. Civ. App.—Beaumont 1973, writ ref'd n.r.e.).

24. See *Bristol-Myers Co. v. Gonzales*, 561 S.W.2d 801, 805 (Tex. 1978); *General Motors Corp. v. Simmons*, 558 S.W.2d 855, 858-59 (Tex. 1977); *McMullen v. Coleman*, 135 S.W.2d 776, 779 (Tex. Civ. App.—Waco 1940, no writ).

25. See W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 49, at 301 (4th ed. 1971). The common law rule applied to tortfeasors who had acted in concert. American courts extended the rule by holding that a release of a concurrent tortfeasor released the plaintiff's entire cause of action. *Id.* at 301. See also *McMillen v. Klingensmith*, 467 S.W.2d 193, 197 (Tex. 1971) (overruling cases which followed common law rule).

26. *McMillen v. Klingensmith*, 467 S.W.2d 193, 195 (Tex. 1971).

27. 467 S.W.2d 193 (Tex. 1971).

28. *Id.* at 196.

a nonsettlor's liability. A claimant is entitled to only one satisfaction of his claim, so even if a settlement is intended to be partial, there can be no further recovery against a nonsettling joint tortfeasor when the settlement has fully satisfied the claim.²⁹ If the settlement is only a partial satisfaction, the claimant can attempt to approach full compensation by recovering from the nonsettlor, but the amount of his recovery may be substantially affected because of the prior settlement.

Partial settlements with joint tortfeasors have been distinguished from settlements in a vicarious liability controversy. In *Spradley v. McCrackin*³⁰ it was held that "a valid release of the servant from liability for a tort committed by the servant operates to release the master."³¹ The rationale for this rule was tied to the master's right to indemnity. The court was reluctant to allow recovery from the master while denying him indemnity from the servant. Yet the court realized that to allow the master a right to indemnity would render the prior release of the servant meaningless. The dilemma was resolved by holding that both were released.³² Although *Spradley* involved a settlement with an employee, the same rationale should be applicable in any relationship where the nonsettlor's liability is only derivative.

POST-SETTLEMENT RIGHTS AND LIABILITIES AMONG MULTIPLE TORTFEASORS

Article 2212: Contribution

The common law rule was that there could be no contribution among joint tortfeasors.³³ In 1917 Texas enacted a contribution statute, article 2212.³⁴ Its purpose was to equalize the burden among joint tortfeasors.³⁵ If one discharges the joint liability, he is entitled to contribution from other tortfeasors for any amount he pays that exceeds his pro rata share.³⁶

The language in article 2212 suggests that payment of a joint judgment is required to obtain contribution,³⁷ but it has been interpreted to mean that if fewer than all potentially liable joint tortfeasors are named as

29. See *Bradshaw v. Baylor Univ.*, 126 Tex. 99, 104, 84 S.W.2d 703, 705 (1935) (settlement equalled subsequent judgment); cf. *Pearce v. Hallum*, 30 S.W.2d 399, 401-02 (Tex. Civ. App.—Dallas 1930, writ ref'd) (full satisfaction may be intended).

30. 505 S.W.2d 955 (Tex. Civ. App.—Tyler 1974, writ ref'd n.r.e.).

31. *Id.* at 958.

32. *Id.* at 958.

33. *Austin Rd. Co. v. Pope*, 147 Tex. 430, 434, 216 S.W.2d 563, 564-65 (1949); *Wheeler v. Glazer*, 137 Tex. 341, 344, 153 S.W.2d 449, 451 (1941).

34. TEX. REV. CIV. STAT. ANN. art. 2212 (Vernon 1971).

35. *Austin Rd. Co. v. Pope*, 147 Tex. 430, 434, 216 S.W.2d 563, 565 (1949).

36. *Gattegno v. The Parisian*, 53 S.W.2d 1005, 1007 (Tex. Comm'n App. 1932, holding approved).

37. *Callihan Interests, Inc. v. Duffield*, 385 S.W.2d 586, 587 (Tex. Civ. App.—Eastland 1964, writ ref'd).

defendants, they can implead the others or seek contribution in an entirely separate suit.³⁸ The contribution statute is said "to create a cause of action for contribution and not to prescribe the procedure by which it is to be obtained."³⁹ Nevertheless, because of the wording of the statute, which speaks in terms of contribution when "a judgment is rendered," the courts are reluctant to permit a contribution proceeding when there has been no judicially determined liability.⁴⁰ Thus, when a settlement has fully discharged the liability of all tortfeasors, the question that arises is whether the settling tortfeasor is entitled to contribution from tortfeasors who were not parties to the settlement. A tortfeasor who discharges the liability of all joint tortfeasors by entering into an agreed judgment is entitled to seek contribution.⁴¹ A dismissal with prejudice satisfies the requirement of a judgment so that a settlement after the suit is instituted can be the basis of a contribution suit.⁴² In contrast to the present rule in Texas, some other jurisdictions that allow contribution allow the settlor to recover contribution based on an out-of-court settlement.⁴³ One Texas case indicates that such a cause of action might exist.⁴⁴ The settlor should be required to prove that he discharged liability to the claimant which he shared with the nonsettlor as a joint tortfeasor.⁴⁵ Also he must show that he has paid more than his share of the joint liability and that the settlement was reasonable.⁴⁶ Allowing one who settles in full to seek contribution would further the policy of encouraging settlements.⁴⁷ Furthermore, there is some authority indicating that a rule denying contribution can be circumvented by assignment of the plaintiff's cause of action to the settlor.⁴⁸

38. *Union Bus Lines v. Byrd*, 142 Tex. 257, 260-61, 177 S.W.2d 774, 776 (1944).

39. *Callihan Interests, Inc. v. Duffield*, 385 S.W.2d 586, 587 (Tex. Civ. App.—Eastland 1964, writ ref'd).

40. Article 2212, in literal terms, allows contribution after a "judgment." See *Traveler's Ins. Co. v. United States*, 283 F. Supp. 14, 25 (S.D. Tex. 1968); *Callihan Interests, Inc. v. Duffield*, 385 S.W.2d 586, 587 (Tex. Civ. App.—Eastland 1964, writ ref'd).

41. *Callihan Interests, Inc. v. Duffield*, 385 S.W.2d 586, 587-88 (Tex. Civ. App.—Eastland 1964, writ ref'd).

42. *Traveler's Ins. Co. v. United States*, 283 F. Supp. 14, 30 (S.D. Tex. 1968).

43. See W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 50, at 309 n.74 (4th ed. 1971) (citing cases). See also *UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT* § 1(d), Commissioner's Comment.

44. See *Wm. Cameron & Co. v. Thompson*, 175 S.W.2d 307, 310 (Tex. Civ. App.—San Antonio 1943, writ ref'd w.o.m.) (contribution denied because nonsettlor not found negligent). See also Hodges, *Contribution and Indemnity Among Tortfeasors*, 26 TEXAS L. REV. 150, 168 (1947); Comment, *Contribution Among Joint Tortfeasors*, 44 TEXAS L. REV. 326, 332 (1965).

45. *Traveler's Ins. Co. v. United States*, 283 F. Supp. 14, 31 (S.D. Tex. 1968).

46. *Id.* at 31.

47. *Callihan Interests, Inc. v. Duffield*, 385 S.W.2d 586, 587 (Tex. Civ. App.—Eastland 1965, writ ref'd).

48. See *Bradshaw v. Baylor Univ.*, 126 Tex. 99, 103, 84 S.W.2d 703, 704 (1935); *Friedman v. Martini Tile & Terrazzo Co.*, 298 S.W.2d 221, 226 (Tex. Civ. App.—Fort Worth 1957, no

A partial settlement, one which does not discharge the liability of the nonsettling tortfeasors, also requires that the policies of encouraging settlements and distributing liability among joint tortfeasors be harmonized. Where the injured party partially settles and then proceeds to judgment against nonsettling joint tortfeasors there are three generally recognized alternatives to resolve the proper effect of the prior settlement.⁴⁹ One alternative is to require a nonsettlor to pay the judgment less a credit for the amount of the settlement and allow him to sue the settling tortfeasor for contribution.⁵⁰ A second alternative is to credit the amount of the settlement to the judgment but to disallow any contribution from the settlor.⁵¹ Finally, a nonsettling defendant could be held liable for a judgment that is reduced by the settlor's pro rata share of the damages, regardless of the amount of the settlement.⁵² In *Palestine Contractors, Inc. v. Perkins*⁵³ Texas adopted the "pro rata reduction" rule after careful consideration of all three alternatives. If the plaintiff has partially settled with one joint tortfeasor for an amount equal to or less than his pro rata share of damages, and proceeds to judgment against another tortfeasor, the judgment is reduced by the settlor's pro rata share.⁵⁴

Application of the pro rata reduction rule requires that the settling and nonsettling tortfeasors be jointly liable and that there be a judgment against the nonsettlor for a disproportionate share of damages.⁵⁵ The set-

writ). Conceivably the settlor could then recover much more than a contribution suit would allow.

49. See *Palestine Contractors, Inc. v. Perkins*, 386 S.W.2d 764, 767 (Tex. 1964); Note, *Settlement in Joint Tort Cases*, 18 STAN. L. REV. 486, 492-93 (1966); Note, *Settlement With One Joint Tortfeasor Bars Recovery Against Others of the Settling Tortfeasor's Proportionate Share of Damages*, 19 SW. L. J. 650, 653-56 (1965); Comment, *Contribution Among Joint Tortfeasors*, 44 TEXAS L. REV. 326, 335-36 (1965).

50. *Palestine Contractors, Inc. v. Perkins*, 386 S.W.2d 764, 767 (Tex. 1964).

51. *Id.* at 767, 770.

52. See *id.* at 767-68. There are viable arguments against each alternative. If a settlor is to be subjected to contribution he will be discouraged from settling because his inducement is to obtain a final negotiated liability. *Id.* at 767-68. On the other hand, if the nonsettling defendant is denied contribution, the policy of equalizing the burden among joint tortfeasors is defeated. *Id.* at 770-71. Yet, reducing the plaintiff's judgment on a pro rata basis might discourage plaintiffs from partially settling. *Id.* at 771.

53. 386 S.W.2d 764 (Tex. 1964).

54. *Id.* at 772. *Palestine Contractors* did not discuss the effect of a partial settlement which exceeds the settlor's pro rata share. There is authority for the proposition that the entire amount of the settlement would be deducted from the judgment. See *Gattegno v. The Parisian*, 53 S.W.2d 1005, 1008 (Tex. Comm'n App. 1932, holding approved); *Hodges, Contribution and Indemnity Among Tortfeasors*, 26 TEXAS L. REV. 150, 171 (1947).

55. Contribution must be "otherwise in order." *Hodges, Contribution and Indemnity Among Tortfeasors*, 26 TEXAS L. REV. 150, 171 (1947); see Comment, *Contribution Among Joint Tortfeasors*, 44 TEXAS L. REV. 326, 330-31 (1965) (elements of contribution suit). When the nonsettlor is a successive tortfeasor, the application of the pro rata reduction rule is unclear. *McMillen v. Klingensmith*, 467 S.W.2d 193, 197 (Tex. 1971); see *Leong v. Wright*, 478 S.W.2d 839, 841 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.). *Leong*

tlor must be impleaded in the primary suit and "contribution" sought against him. When the nonsettling defendant fails to implead the settlor, the courts have refused to allow a pro rata reduction.⁵⁶ When the settlor is impleaded but not found liable to the plaintiff, the pro rata rule will not apply.⁵⁷ Thus the *Palestine Contractors* rule allows the judgment to be reduced by pro rata shares of settlors who have been found in that suit to be joint tortfeasors; the rule is inapplicable when the nonsettling defendant merely alleges that other tortfeasors participated.⁵⁸ If the nonsettling defendant fails to establish a basis for a pro rata reduction, the question remains whether a pro tanto credit should be given for the amount of the settlement. Because of the policy that a plaintiff is entitled to only one satisfaction, the courts consistently allow the credit when the settlor is not impleaded.⁵⁹ The major problem is whether this credit should be allowed when the settlor is impleaded but not found to be liable to the plaintiff. Because of the "single satisfaction" rule it would seem that the judgment should be reduced, yet cases can be found in which the plaintiff recovered the entire judgment.⁶⁰

Difficulties arise when there is more than one tortfeasor who partially settles with the claimant. In *Petco Corp. v. Plummer*⁶¹ the plaintiff settled with three tortfeasors and proceeded to judgment against a fourth. The nonsettling defendant impleaded only one settlor and established a right of "contribution" against him.⁶² The court indicated that if the other two settlors had been impleaded and shown to be jointly liable, the judgment would have been reduced by three pro rata shares and the nonsettlor liable for only one-fourth.⁶³ Since this had not been done, the court credited the

was a malpractice suit instituted after the plaintiff had settled with a tortfeasor who caused the original injury. The settlement had no effect on the malpractice judgment. *See id.* at 841.

56. *See* E.I. du Pont de Nemours & Co. v. McCain, 414 F.2d 369, 375 (5th Cir. 1969); *Leong v. Wright*, 478 S.W.2d 839, 846 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.); *Connell v. Rosales*, 419 S.W.2d 673, 679 (Tex. Civ. App.—Texarkana 1967, no writ); *Petco Corp. v. Plummer*, 392 S.W.2d 163, 167 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.).

57. *See* *Gill v. United States*, 429 F.2d 1072, 1078 (5th Cir. 1970)(applying Texas law); *E. I. du Pont de Nemours & Co. v. McCain*, 414 F.2d 369, 375 (5th Cir. 1969)(applying Texas law).

58. *Petco Corp. v. Plummer*, 392 S.W.2d 163, 167 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.).

59. *See* E.I. du Pont de Nemours & Co. v. McCain, 414 F.2d 369, 375 (5th Cir. 1969); *Leong v. Wright*, 478 S.W.2d 839, 846 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.); *Petco Corp. v. Plummer*, 392 S.W.2d 163, 165 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.).

60. *Compare* *Gill v. United States*, 429 F.2d 1072, 1078-79 (5th Cir. 1970)(allowed pro tanto credit) with *Miller v. Bock Laundry Mach. Co.*, 21 Tex. Sup. Ct. J. 141, 141, 145 (Dec. 30, 1977) (judgment not reduced) and *Texaco, Inc. v. Pursley*, 527 S.W.2d 236, 238 (Tex. Civ. App.—Eastland 1975, writ ref'd n.r.e.) (judgment not reduced).

61. 392 S.W.2d 163 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.).

62. *Id.* at 164-65.

63. *See id.* at 166-67.

judgment with the amount paid by the non-impleaded settlors and then reduced the remaining amount by half on the theory that only two tortfeasors had been adjudged to be jointly liable.⁶⁴

The *Palestine Contractors* rule is also troublesome when there are two or more tortfeasors who do not settle, one of whom is insolvent.⁶⁵ If one settlor is impleaded and found jointly liable the judgment can be reduced by his pro rata share. If there are two nonsettling defendants and one is insolvent, the solvent nonsettlor pays two shares of the damages.⁶⁶ Had there been no settlement, the two solvent tortfeasors would have shared the burden created by the insolvency of the third.

Article 2212a: Comparative Contribution

Article 2212a⁶⁷ is the comparative negligence statute, enacted to abolish the absolute defense of contributory negligence.⁶⁸ If the plaintiff's negligence is fifty percent or less than that of the defendant, or defendants taken as a group, he can recover the portion of his damages not attributable to his own negligence.⁶⁹ Article 2212a also governs contribution among negligent tortfeasors⁷⁰ and modifies the principle of joint and several liability.⁷¹ The statute also contains provisions that deal with the apportionment of damages when the claimant has previously entered into a partial settlement.⁷² A different rule applies in cases where the settling tortfeasor is a party to the suit than where he is not a party.⁷³

When the settlor is a party, his degree of negligence is determined by the jury. If a judgment is entered for the plaintiff, it is reduced according to the settlor's percentage of negligence.⁷⁴ Presumably, if the settlor is not

64. *Id.* at 165.

65. See Note, *Settlement With One Joint Tortfeasor Bars Recovery Against Others of the Settling Tortfeasor's Proportionate Share of Damages*, 19 Sw. L.J. 650, 661 (1965); 12 RUTGERS L. REV. 533, 537-38 (1958).

66. The plaintiff will sue both nonsettlers in order to minimize the pro rata reduction. Article 2212, however, allows contribution only among solvent tortfeasors. TEX. REV. CIV. STAT. ANN. art. 2212 (Vernon 1971).

67. TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1978).

68. See Keeton, *Torts, Annual Survey of Texas Law*, 28 Sw. L.J. 1, 8 (1974).

69. *Id.* at 8-10.

70. See TEX. REV. CIV. STAT. ANN. art. 2212a, § 2 (Vernon Supp. 1978).

71. A tortfeasor whose liability is less than that of the plaintiff is liable only for the percentage of the judgment attributable to his own negligence. See TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(c) (Vernon Supp. 1978).

72. TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(d), (e) (Vernon Supp. 1978).

73. *Id.* This distinction is criticized by Professor Keeton who states that regardless of whether the settlor is made a party, the partial settlement should satisfy that part of the judgment attributable to the settlor's negligence. See Keeton, *Torts, Annual Survey of Texas Law*, 28 Sw. L.J. 1, 14 (1974).

74. TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(e) (Vernon Supp. 1978). This reduction is made regardless of the amount of the settlement. Thus, if the settlement was for more than the settlor's subsequently determined portion of liability, the plaintiff enjoys a windfall. See Comment, *Comparative Negligence in Texas*, 11 Hous. L. Rev. 101, 112-13 (1973).

found to be a negligent joint tortfeasor there will be no reduction of the judgment. Past experience with the *Palestine Contractors* rule indicates that it will be incumbent on nonsettling defendants to implead settlors and show that they are entitled to the deduction.⁷⁵ In fact, 2212a contains a provision which requires that claims for "contribution" be determined in the primary suit.⁷⁶

If the settling tortfeasor is not made a party, the issue of his negligence is not submitted to the jury. If a judgment is entered against nonsettling defendants each is entitled to deduct a part of the settlement amount computed in proportion to his own percentage of negligence.⁷⁷ This credit is allowed despite the fact that the settlor's liability to the plaintiff is never judicially determined.⁷⁸ The result is analogous to the pro tanto credit for the amount of settlement allowed in article 2212 cases when the nonsettling defendant failed to implead the settlor.⁷⁹

In either situation the settling tortfeasor is absolved from liability beyond the amount of his settlement. The major problem is in determining who should bear the loss of an inadequate settlement. If the nonsettling defendant impleads the settlor and shows him to be a negligent joint tortfeasor the plaintiff bears the loss of the difference between the amount of the settlement and the settlor's would-be portion of damages. If the settlor is not impleaded, the nonsettling defendants bear this loss. The treatment of partial settlements under article 2212a is consistent with the *Palestine Contractors* pro rata reduction rule. In both schemes tortfeasors are encouraged to settle and the nonsettlor's right to contribution is acknowledged. One advantage under article 2212a is that a claimant can settle with a tortfeasor whose liability is assessed to be nominal without the risk that his subsequent judgment will be reduced by half. Thus small partial settlements, especially with tortfeasors against whom the plaintiff feels he has a weak case, are encouraged. Under the *Palestine Contractors* rule the plaintiff was wise to forego any settlement with such a tortfeasor.

The question remains as to which system of dealing with contribution and settlements will be applicable in any given situation. Because of the language of article 2212a, it appears to be applicable when a plaintiff sues

75. Under the *Palestine Contractors* rule the nonsettling defendant must show a right to contribution. See notes 55 and 56 *supra* and accompanying text.

76. TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(g) (Vernon Supp. 1978). The only exception is that a claim for contribution may be made against a nonsettlor who was not a party to the primary suit. *Id.*

77. *Id.* § 2(d); Fisher, Nugent & Lewis, *Comparative Negligence: An Exercise In Applied Justice*, 5 ST. MARY'S L.J. 655, 663-64 (1974).

78. TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(d) (Vernon Supp. 1978). This results in the somewhat anomalous situation that if the settlor is not impleaded the judgment will be automatically credited, whereas if he is impleaded and found not negligent, there will apparently be no reduction. Compare TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(d) (Vernon Supp. 1978) with *id.* § 2(e).

79. See note 59 *supra* and accompanying text.

nonsettlers after a partial settlement but not when a tortfeasor who has fully settled seeks contribution.⁸⁰ Article 2212 may still be available as a basis for the contribution suit.⁸¹ Arguably the comparative negligence statute is inapplicable when the plaintiff is not negligent.⁸² It is illogical, however, that the liability of multiple tortfeasors would be compared on a percentage basis when the plaintiff is negligent but divided on a pro rata basis when the plaintiff is not negligent.⁸³ One recent case which applied article 2212a compared the negligence between defendants on a percentage basis without finding negligence on the part of the plaintiff.⁸⁴ Another problem with the applicability of article 2212a was noted in a recent Texas Supreme Court case. At trial a settling tortfeasor was impleaded and found negligent but a nonsettling defendant was found liable under the theories of strict liability and negligence.⁸⁵ Because article 2212a is worded in terms of negligence whereas article 2212 refers to "torts," the court felt obliged to state that the principles developed under article 2212 for the treatment of partial settlements would be applicable.⁸⁶ Thus it appears that whenever a defendant is found strictly liable the *Palestine Contractors* rule applies.

Common Law Right of Indemnity

The right to contribution does not exist when there is a right of indemnity.⁸⁷ In the area of indemnity, when settlements and multiple tortfeasors are involved, the problems are analogous to those that arise when contribution is sought pursuant to article 2212. The common law right of indemnity allows one tortfeasor to shift the *entire* burden of compensating the plaintiff to another tortfeasor.⁸⁸ The courts have been unable to develop an overall test to determine when this right exists, but in most successful indemnity proceedings one tortfeasor, the indemnitor, had breached a duty owed to a cotortfeasor, the indemnitee.⁸⁹

A joint tortfeasor who has entered a full settlement with the claimant, thereby satisfying the claim and discharging the common liability, may be

80. See TEX. REV. CIV. STAT. ANN. art 2212a, § 2 (Vernon Supp. 1978).

81. See notes 40 and 42 *supra* and accompanying text.

82. Keeton, *Torts, Annual Survey of Texas Law*, 28 Sw. L.J. 1, 10(1974).

83. See *id.* at 10-11.

84. *City of Gatesville v. Truelove*, 546 S.W.2d 79, 84 (Tex. Civ. App.—Waco 1976, no writ).

85. *General Motors Corp. v. Simmons*, 558 S.W.2d 855, 861-62 (Tex. 1977).

86. *Id.* at 862. The court expressed a desire for legislative reform. *Id.* at 863.

87. *Austin Rd. Co. v. Pope*, 147 Tex. 430, 434, 216 S.W.2d 563, 565 (1949); *Wheeler v. Glazer*, 137 Tex. 341, 344, 153 S.W.2d 449, 451 (1941).

88. See Hodges, *Contribution and Indemnity Among Tortfeasors*, 26 TEXAS L. REV. 150, 151 (1947). Indemnity should not be confused with contribution which is "the payment by each tortfeasor of his proportionate share of the plaintiff's damages to any other tortfeasor who has paid more than his proportionate part." *Id.* at 150.

89. *General Motors Corp. v. Simmons*, 558 S.W.2d 855, 859-60 (Tex. 1977).

entitled to indemnity. The right of indemnity, unlike contribution, does not depend on a statute which implies that judicially determined liability is a prerequisite. A settling tortfeasor who satisfies a claim can obtain indemnity from a nonsettlor upon a showing of his own potential liability and that the settlement was reasonable and prudent under the circumstances.⁹⁰ Of course, the settlor must also demonstrate his right to shift the entire liability.⁹¹

The issue may also arise as to the effect of a partial settlement on a subsequent judgment against a nonsettling tortfeasor who would otherwise be entitled to indemnity from a tortfeasor who has settled.⁹² Whenever a nonsettlor is sued after a partial settlement, the settlor may be impleaded and indemnity or contribution sought against him.⁹³ If the nonsettling defendant establishes a right to contribution, the judgment will be reduced. If, however, the nonsettlor can show that he has a right to be indemnified, the court is faced with a three-way dilemma. The alternatives are to subject the settling tortfeasor to further liability,⁹⁴ deny the nonsettling defendant his right to indemnity,⁹⁵ or limit the plaintiff's recovery to the amount of the settlement.⁹⁶ Subjecting the settling tortfeasor to further liability would discourage partial settlements and denying the nonsettling defendant his right to indemnity would allow the "most guilty" tortfeasor to settle out from under the "less guilty" tortfeasor. Limiting the plaintiff's recovery to the amount of the settlement would be consistent with the contribution rules which allow reduction of damages: "[T]he plaintiff having accepted the settlement in satisfaction of his claim against one

90. See *Powell v. Brantly Helicopter Corp.*, 396 F. Supp. 646, 653 (E.D. Tex. 1975); *Fireman's Fund Ins. Co. v. Commercial Standard Ins. Co.*, 490 S.W.2d 818, 824 (Tex. 1972).

91. *Powell v. Brantly Helicopter Corp.*, 396 F. Supp. 646, 653 (E.D. Tex. 1975); *Fireman's Fund Ins. Co. v. Commercial Standard Ins. Co.*, 490 S.W.2d 818, 823 (1972).

92. In some situations a partial settlement may not be possible. See *Spradley v. McCrackin*, 505 S.W.2d 955, 958 (Tex. Civ. App.—Tyler 1974, writ ref'd n.r.e.) (release of servant is release of master).

93. See *Bristol-Myers Co. v. Gonzales*, 561 S.W.2d 801, 802 (Tex. 1978); *Petco Corp. v. Plummer*, 392 S.W.2d 163, 164 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.).

94. See *Panhandle Gravel Co. v. Wilson*, 248 S.W.2d 779, 784-85 (Tex. Civ. App.—Amarillo 1952, writ ref'd n.r.e.). The plaintiff had partially settled with two tortfeasors and the settlement provided that the plaintiff would indemnify the settlors if they were adjudged liable for further damages. At trial the nonsettlor established a right to indemnity. To avoid circuitry of action, the court absolved the nonsettler of any liability. *Id.* at 784-85. Under this reasoning, had the settlement *not* contained the indemnity provision, the settlors would be liable for indemnity.

95. See *Frantom v. Neal*, 426 S.W.2d 268, 272 (Tex. Civ. App.—Fort Worth 1968, writ ref'd n.r.e.). In *Frantom* the nonsettlor's right to shift liability was recognized, but since the nonsettlor had not properly impleaded the settlor, the effect of this right on the judgment was not considered. The court indicated, however, that a nonsettlor would be entitled to a credit for the settlement only. *Id.* at 272.

96. See *Hodges, Contribution and Indemnity Among Tortfeasors*, 26 TEXAS L. REV. 150, 172 (1947).

tortfeasor and it having been determined, that as between the tortfeasors the settling tortfeasor was liable for the entire amount, then the entire liability should be satisfied."⁹⁷

TRIAL STRATEGY

Claimant

The injured party's primary objective is to be fully compensated. After evaluating the strength of his claim and the extent of damages likely to be obtained the claimant will usually accept a settlement which approximates this evaluation.⁹⁸ When there are multiple tortfeasors, additional considerations come into play. After releasing a servant, the claimant can not subsequently sue the master,⁹⁹ but he can release a joint tortfeasor and then proceed to judgment against any tortfeasor not named in the release.¹⁰⁰ The settlement should state that it is not intended as a full satisfaction. Regardless of the plaintiff's intent, however, a subsequent recovery is foreclosed if the settlement is found to have fully satisfied the claim.¹⁰¹

The plaintiff who contemplates a non-comparative negligence suit after a partial settlement should be aware that the settlement could result in a reduction of his judgment by the settlor's pro rata share.¹⁰² Similarly, the plaintiff who anticipates a comparative negligence suit should realize that a partial settlement could result in a reduction of his judgment according to the percentage of the settlor's negligence.¹⁰³ In either situation a plaintiff must consider the risk of accepting an inadequate settlement. The greater risk exists under the comparative negligence scheme. For example, the plaintiff who unwittingly settles with a tortfeasor who is later impleaded and found to be eighty percent negligent will have his judgment reduced by eighty percent regardless of the amount of the settlement.¹⁰⁴ The greatest pitfall for the plaintiff may be a settlement with a tortfeasor who has himself breached a duty to a nonsettling tortfeasor. If the plaintiff subsequently sues the nonsettlor and the nonsettlor demonstrates a right to

97. *Id.* at 172.

98. One commentator has suggested the following guide: "The settlement value of a case equals the probable expectancy of establishing liability multiplied by the probable collectible damages." Schneider & Mone, *A Positive Approach to Tort Settlements*, 17 *PRAC. LAW.* 27, 30 (Mar. 1971). The claimant will also consider his need for immediate funds and the solvency of the tortfeasor.

99. *Spradley v. McCrackin*, 505 S.W.2d 955, 958 (Tex. Civ. App.—Tyler 1974, writ ref'd n.r.e.). This holding probably extends to any situation where the nonsettlor's liability is derivative. *See id.* at 958.

100. *McMillen v. Klingensmith*, 467 S.W.2d 193, 196 (Tex. 1971).

101. *Bradshaw v. Baylor Univ.*, 126 Tex. 99, 103, 84 S.W.2d 703, 705 (1935).

102. *See Palestine Contractors, Inc. v. Perkins*, 386 S.W.2d 764, 771-73 (Tex. 1964).

103. *See TEX. REV. CIV. STAT. ANN.* art. 2212a, § 2(e) (Vernon Supp. 1978).

104. *See id.*

indemnity, the plaintiff could be left with only the settlement as compensation.¹⁰⁵

The plaintiff who negotiates a partial settlement in a suit to be governed by article 2212 should assess his claim against the potential settlor in terms of the expected judgment divided by the number of joint tortfeasors. If he feels he has a strong case he should settle for an amount which approaches that figure—an approximation of the settlor's pro rata share. At trial he should name all potentially liable nonsettlers as defendants because for each negligent joint tortfeasor the pro rata reduction is smaller. The plaintiff who partially settles a claim to be governed by article 2212a should assess his claim against the potential settlor in terms of the expected judgment multiplied by his estimation of the percentage of the settlor's liability. Depending on the strength of his case against the settlor he should try to approach that amount. In either case the plaintiff should consider rejecting an inadequate settlement and proceeding against any or all defendants for the full amount of damages. The defendants would then be left to work out contribution among themselves. The plaintiff should be aware, however, of the changes in article 2212a relating to joint and several liability. A plaintiff who has been contributorily negligent cannot recover an entire judgment against a tortfeasor whose percentage of negligence is less than his own.¹⁰⁶

If a claimant has been injured by the successive acts of two or more tortfeasors, the absence of joint liability could have profound effects on the application of any of the above-mentioned rules. To the extent that liability is apportionable, a settlement with one tortfeasor should have no effect on the liability of another.¹⁰⁷

Settling Tortfeasor

In addition to limiting his liability according to his evaluation of the plaintiff's case, a settling tortfeasor desires that the settlement be a final resolution of his liability. The rules under both article 2212 and 2212a encourage the joint tortfeasor to enter a partial settlement since he will not be subject to further liability for contribution. Although it is unclear whether he could be held liable for indemnity to a nonsettling defendant, he can protect himself by insisting that the claimant give him an indemnity provision in the settlement agreement.¹⁰⁸

105. The law is unsettled on this point. See Hodges, *Contribution and Indemnity Among Tortfeasors*, 26 TEXAS L. REV. 150, 172 (1947). See notes 94-96 *supra* and accompanying text.

106. TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(c)(Vernon Supp. 1978).

107. See *Leong v. Wright*, 478 S.W.2d 839, 841 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.) (prior settlement by plaintiff with original tortfeasor had no effect on subsequent judgment in malpractice suit).

108. See *Panhandle Gravel Co. v. Wilson*, 248 S.W.2d 779, 784-85 (Tex. Civ. App.—Amarillo 1952, writ ref'd n.r.e.).

A tortfeasor who fully satisfies the plaintiff's claim should consider the possibility of obtaining contribution or indemnity from joint tortfeasors. The full settlor is entitled to reimbursement if a right to indemnity exists.¹⁰⁹ The settlor should be aware, however, of the current rule in Texas that only a judgment can be the basis of a contribution suit.¹¹⁰ This requirement can be satisfied by obtaining a dismissal with prejudice.¹¹¹ Additionally, there are cases which seem to allow the contribution statute to be circumvented entirely if the settlor obtains an assignment of the plaintiff's cause of action.¹¹²

Nonsettling Defendant

If a nonsettlor is sued by a claimant who has previously settled with a cotortfeasor, a threshold question should be whether the settlement has discharged all tortfeasors. This could be the result of an express release of all who are potentially liable or of a settlement that has fully satisfied the claim. In either situation, the claimant is precluded from further recovery although the nonsettlor may find himself liable to the settlor for contribution or indemnity.¹¹³ If the plaintiff has settled with a servant a nonsettling master is also released.¹¹⁴

The defendant who chooses not to settle but is adjudged to be liable to the plaintiff should not be unduly prejudiced by a settlement to which he was not a party. When there has been a partial settlement, the rules allowing reduced judgments are consistent with this policy. The nonsettling defendant may implead and seek "contribution" against settling tortfeasors if his suit is to be governed by article 2212. The settlor must be found to be jointly liable in that suit in order for the pro rata reduction rule to apply.¹¹⁵ Alternatively, the nonsettlor may choose not to implead

109. See *Powell v. Brantly Helicopter Corp.*, 396 F. Supp. 646, 653 (E.D. Tex. 1975); *Fireman's Fund Ins. Co. v. Commercial Standard Ins. Co.*, 490 S.W.2d 818, 824 (Tex. 1972).

110. See *Traveler's Ins. Co. v. United States*, 283 F. Supp. 14, 30 (S.D. Tex. 1968); *Callihan Interests, Inc. v. Duffield*, 385 S.W.2d 586, 588 (Tex. Civ. App.—Eastland 1964, writ ref'd).

111. *Traveler's Ins. Co. v. United States*, 283 F. Supp. 14, 30 (S.D. Tex. 1968).

112. See *Bradshaw v. Baylor Univ.*, 126 Tex. 99, 103, 84 S.W.2d 703, 704-05 (1935); *Friedman v. Martini Tile & Terrazzo Co.*, 298 S.W.2d 221, 225-26 (Tex. Civ. App.—Fort Worth 1957, no writ).

113. See *Fireman's Fund Ins. Co. v. Commercial Standard Ins. Co.*, 490 S.W.2d 818, 823 (Tex. 1972)(settlor entitled to indemnity); *Callihan Interests, Inc. v. Duffield*, 385 S.W.2d 586, 588 (Tex. Civ. App.—Eastland 1964, writ ref'd)(settlor who has paid agreed judgment entitled to contribution).

114. *Spradley v. McCrackin*, 505 S.W.2d 955, 958 (Tex. Civ. App.—Tyler 1974, writ ref'd n.r.e.).

115. *Petco Corp. v. Plummer*, 392 S.W.2d 163, 167 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.). If the plaintiff has settled with an insolvent tortfeasor there is a windfall to the nonsettlor. The pro rata reduction rule applies despite the settlor's insolvency. *Palestine Contractors, Inc. v. Perkins*, 386 S.W.2d 764, 773-74 (Tex. 1964). Contribution, however, exists only between solvent tortfeasors. TEX. REV. CIV. STAT. ANN. art 2212 (Vernon 1971).

the settlor and seek a pro tanto credit against the judgment for the amount of the settlement.¹¹⁶ If the plaintiff has failed to name all nonsettlers as defendants, the nonsettling defendant should not implead other nonsettling tortfeasors who are insolvent. They will decrease the pro rata reduction and are not liable for contribution.¹¹⁷ Another possibility is to defend the suit alone, obtain the maximum pro rata reduction, and seek contribution from solvent nonsettlers in a subsequent suit.

The nonsettling party who will defend in an article 2212a suit should compare the amount of the partial settlement with the probable percentage of liability on the part of the settling party multiplied by the expected judgment. This enables him to intelligently decide whether to implead the settlor and have the judgment reduced according to the settlor's negligence or whether to seek a credit against the judgment according to the amount of the settlement.¹¹⁸ Most often the greatest reduction will be obtained by impleading the settlor, unless the plaintiff has made an adequate settlement.¹¹⁹

The nonsettling defendant should also be aware that if indemnity is appropriate rather than contribution, there is authority for the contention that the settlor be subjected to further liability. He may also argue that the plaintiff be considered to have already satisfied the claim by settling with the indemnitor.¹²⁰ Although the law is unsettled, at the very least he should be entitled to a reduction for the amount of the settlement.¹²¹

The nonsettling defendant should realize the potential for abuse of the rules governing partial settlements by a claimant who would like to guarantee himself some recovery by partially settling, yet collect as much as possible in a subsequent suit against a nonsettlor. Although the various schemes for dealing with partial settlements tend to discourage collusive settlements by reducing the judgment on a pro rata or percentage basis,¹²² the reduction is not automatic. To be entitled to the reduction the nonsettlor must implead the settlor and show joint liability.¹²³ If joint liability is

116. It appears that the judgment will be reduced pro tanto if the settlor is not impleaded. If the settlor is impleaded and not found to be liable to the plaintiff, however, most courts do not reduce the judgment at all. See notes 59 and 60 *supra* and accompanying text.

117. See TEX. REV. CIV. STAT. ANN. art 2212 (Vernon 1971).

118. See Fisher, Nugent & Lewis, *Comparative Negligence: An Exercise In Applied Justice*, 5 ST. MARY'S L.J. 655, 663-66 (1974).

119. *Id.* at 666. If the plaintiff has settled a weak case for a large sum the settlor should not be impleaded. See *id.* at 664.

120. Compare *Panhandle Gravel Co. v. Wilson*, 248 S.W.2d 779, 785 (Tex. Civ. App.—Amarillo 1952, writ ref'd n.r.e.) (implies settlor would be liable for indemnity) with *Hodges, Contribution and Indemnity Among Tortfeasors*, 26 TEXAS L. REV. 150, 172 (1947) (plaintiff has satisfied claim).

121. See *Frantom v. Neal*, 426 S.W.2d 268, 272 (Tex. Civ. App.—Fort Worth 1968, writ ref'd n.r.e.).

122. See *Gomes v. Brodhurst*, 394 F.2d 465, 468 (3d Cir. 1967) (pro rata and percentage reductions discourage collusive settlements).

123. See *Petco Corp. v. Plummer*, 392 S.W.2d 163, 167 (Tex. Civ. App.—Dallas 1965,

not proven the plaintiff collects the entire judgment.¹²⁴ There is nothing to prevent a claimant from settling with an alleged tortfeasor and contending at trial that the settlor was never liable,¹²⁵ but when such evidence is presented, the nonsettling defendant may suspect the plaintiff's motives. The traditional rule excluding evidence of settlements prevents the jury from knowing of the partial settlement. Thus, under this rule, the nonsettlor cannot explain the plaintiff's financial interest in absolving the settlor.¹²⁶

EVIDENCE OF PARTIAL SETTLEMENTS TO SHOW BIAS

Recent Texas cases have held that evidence of certain types of partial settlements is admissible to show bias.¹²⁷ In normal partial settlement situations, the settling tortfeasor has no interest in the outcome of the claimant's suit against a nonsettling tortfeasor.¹²⁸ Sometimes, however, the terms of a partial settlement may give the settlor an interest in the plaintiff's recovery. Two such settlements are the "Mary Carter" and "loan receipt" agreements.¹²⁹ The result of both types of agreements is that the settlor acquires a financial interest in the outcome of the plaintiff's suit.¹³⁰ Following these agreements, the settlor, retaining the posture of a defendant, may testify.¹³¹ Because of his financial interest, it would be to the settlor's benefit to further the plaintiff's case and absolve himself of liability. The traditional rule excluding evidence of settlements prevents the jury from knowing of his alignment with the plaintiff. Be-

writ ref'd n.r.e.)(pro rata reduction); TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(e) (Vernon Supp. 1978)(percentage reduction).

124. See *Texaco, Inc. v. Pursley*, 527 S.W.2d 236, 238 (Tex. Civ. App.—Eastland 1975, writ ref'd n.r.e.); TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(e) (Vernon Supp. 1978). *But see Gill v. United States*, 429 F.2d 1072, 1078-79 (5th Cir. 1970)(allowed pro tanto reduction).

125. See *Skyline Cab Co. v. Bradley*, 325 S.W.2d 176, 181 (Tex. Civ. App.—Houston 1959, writ ref'd n.r.e.); *McMullen v. Coleman*, 135 S.W.2d 776, 778 (Tex. Civ. App.—Waco 1940, no writ).

126. See *Miller v. Bock Laundry Mach. Co.*, 21 Tex. Sup. Ct. J. 141, 144 (Dec. 30, 1977).

127. See *Bristol-Myers Co. v. Gonzales*, 561 S.W.2d 801, 805 (Tex. 1978); *General Motors Corp. v. Simmons*, 558 S.W.2d 855, 858-59 (Tex. 1977).

128. *General Motors Corp. v. Simmons*, 558 S.W.2d 855, 857 (Tex. 1977).

129. See *Bristol-Myers Co. v. Gonzales*, 561 S.W.2d 801, 804-05 (Tex. 1978)(loan agreement); *General Motors Corp. v. Simmons*, 558 S.W.2d 855, 857-58 (Tex. 1977)(Mary Carter agreement). See generally *Freedman, The Expected Demise of "Mary Carter": She Never Was Well!*, 1975 Ins. L.J. 602; *Scoby, Loan Receipts and Guaranty Agreements*, 10 FORUM 1300 (1975); Note, *The Mary Carter Agreement—Solving the Problems of Collusive Settlements in Joint Tort Actions*, 47 S. CAL. L. REV. 1393 (1974).

130. *General Motors Corp. v. Simmons*, 558 S.W.2d 855, 858 n.1 (Tex. 1977). Generally in a "Mary Carter" settlement the settlor guarantees the plaintiff a certain sum of money; this amount need not be paid if the judgment exceeds a certain amount. *Id.* at 857. In a loan receipt agreement, the settlor loans money to the plaintiff who repays only if he recovers a certain amount. *Id.* at 858 n.1.

131. See *General Motors Corp. v. Simmons*, 558 S.W.2d 855, 858 (Tex. 1977).

cause of ethical considerations and concern over "distortions in the adversary system" some jurisdictions have held Mary Carter or loan receipt agreements to be void; other jurisdictions have upheld them on the basis that they encourage settlements.¹³² In *General Motors Corp. v. Simmons*¹³³ the Texas Supreme Court dealt with a Mary Carter settlement. The court noted that there had been no contention that the agreement should be void.¹³⁴ A settling tortfeasor had remained a defendant in the plaintiff's subsequent trial against a joint tortfeasor. The court held that since the settlor had acquired a direct financial interest in the outcome of the suit, its testimony could be impeached to show bias by admitting evidence of the settlement.¹³⁵ In *Bristol-Meyers Co. v. Gonzales*¹³⁶ a settling tortfeasor who had advanced money to the plaintiff pursuant to a loan agreement later testified as a third-party defendant. His testimony was held to be impeachable by evidence of the partial settlement which gave him a financial interest in a recovery for the plaintiff.¹³⁷

Both the Mary Carter and loan receipt agreements should be treated as other partial settlements for the purpose of reducing a judgment against a nonsettling defendant.¹³⁸ The nonsettlor may implead the settlor and seek "contribution" in the form of a reduced judgment according to the rules under article 2212 or 2212a whichever is applicable. For purposes of the evidence rule, however, these settlements are not given the secrecy afforded to usual settlements. The present test for admissibility seems to be that the partial settlor have a financial interest in the plaintiff's recovery and that he testify as a witness at trial.¹³⁹ The evidence is then admissible to show his bias.¹⁴⁰

Though this test for admissibility is narrow, it is a step in the right direction. Evidence of partial settlements should be admissible in other

132. See *Booth v. Mary Carter Paint Co.*, 202 So. 2d 8, 11 (Fla. Dist. Ct. App. 1967) (Mary Carter valid); *Reese v. Chicago, B. & Q. R.R.*, 303 N.E.2d 382, 386 (Ill. 1973) (loan receipt valid); *Lum v. Stinnett*, 488 P.2d 347, 353 (Nev. 1971) (Mary Carter void). See also Scoby, *Loan Receipts and Guaranty Agreements*, 10 FORUM 1300 (1975).

133. 558 S.W.2d 855 (Tex. 1977).

134. *Id.* at 858.

135. *Id.* at 858-59.

136. 561 S.W.2d 801 (Tex. 1978).

137. *Id.* at 805.

138. Neither the pro rata reduction rule nor the rules under article 2212a seem to require the partial settlement to have been actually paid. See *Palestine Contractors, Inc. v. Perkins*, 386 S.W.2d 764, 765, 772 (Tex. 1964); cf. Fisher, Nugent & Lewis, *Comparative Negligence: An Exercise in Applied Justice*, 5 ST. MARY'S L.J. 655, 663 n.22 (1974).

139. See *Bristol-Myers Co. v. Gonzales*, 561 S.W.2d 801, 805 (Tex. 1978).

140. *Id.* at 805. Difficulties related to this rule are whether the partial settlement should be discoverable and what to do about self-serving statements within the settlement agreement. These problems are discussed in Comment, *Blending Mary Carter's Colors: A Tainted Covenant*, 12 GONZ. L. REV. 266, 276-81 (1977); Note, *The Mary Carter Agreement—Solving the Problems of Collusive Settlements in Joint Tort Actions*, 47 S. CAL. L. REV. 1393, 1410-13 (1974).

situations to show bias. A good argument can be made that the *plaintiff's* testimony should be impeachable by evidence of a partial settlement. In *McMullen v. Coleman*¹⁴¹ the plaintiff had partially settled, but at trial against a nonsettling joint tortfeasor the plaintiff's attorney urged the jury to absolve the settlor of all charges of negligence.¹⁴² The apparent motive was to avoid reduction of the judgment.¹⁴³ The court held that evidence of the partial settlement should have been admitted.¹⁴⁴ Similarly, when a settling tortfeasor testifies so as to place the entire blame on the nonsettling defendant the result may be to absolve himself of liability, thus avoiding a reduction of the plaintiff's damages. It is quite likely that the motive for such testimony could be a "gentleman's agreement" to partially settle for testimony. In such a case, the settlor's testimony, even if not influenced by a financial stake in the plaintiff's recovery at trial, should be impeachable with evidence of the partial settlement. In the interest of fairness to nonsettling defendants, perhaps a looser test of admissibility should be considered.

CONCLUSION

The body of law surrounding the treatment of partial settlements has been heavily influenced by the policy of encouraging settlements. Judgments are reduced, questionable settlements upheld, and relevant evidence excluded on the basis of this policy. Partial settlements, however, often result in harshness to the claimant and unfairness to the nonsettling defendant. Furthermore, partial settlements do not prevent litigation; implicit in a partial settlement is the assumption that it may be followed by a suit against nonsettlers. What *should* be encouraged are complete and fair settlements. The rule requiring a judgment as a basis for contribution is clearly an impediment to this goal. Rigid adherence to the rule excluding evidence of partial settlements is often unfair to nonsettling defendants. The courts and the legislature would be wise to examine the reasons for encouraging settlements when developing rules governing them. If these reasons are not advanced, or are advanced at the expense of fairness to all parties concerned, perhaps other policies should take precedence.

141. 135 S.W.2d 776 (Tex. Civ. App.—Waco 1940, no writ).

142. *Id.* at 778.

143. *Id.* at 779.

144. *See id.* at 779. Otherwise the jury may view such evidence as an admission by the plaintiff and weigh it accordingly. *See id.* at 779.