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Procedural Aspects of Settlement: An Overview of Texas Law Lawyer's Forum - Settlements - New Perspectives.

J. Hadley Edgar

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**PROCEDURAL ASPECTS OF SETTLEMENT: AN OVERVIEW
OF TEXAS LAW**

• **J. HADLEY EDGAR**

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I. INTRODUCTION: TYPES OF SETTLEMENT AND THEIR EFFECT

Many people, including lawyers, often believe that the settlement of a case terminates further controversy. A valid settlement, governed by contract law principles, will serve to preclude the claimant from further assertion of a claim against the settlor regarding the subject matter of the parties' agreement.¹ The agreement, however, as a general rule, does not likewise operate to bind nonsettling parties from assertion of contribution claims,² nor does it extend to release nonsettlors from liability.³ While the purpose of settlement may be to conclude disputes between settling parties, when viewed in the context of multiple tortfeasor controversies, it frequently signals the commencement of litigation as the parties seek to establish the most advantageous position concerning respective liabilities.⁴ Therefore, before settlement is made, careful consideration should be given the rights created and limitations imposed thereby.

1. "[A] plaintiff may preclude himself from recovering from one of several tortfeasors without barring his action against the others if he does so by way of a covenant not to sue, or a release . . ." Hodges, *Contribution and Indemnity Among Tortfeasors*, 26 TEXAS L. REV. 150, 170-71 (1947); see, e.g., *Palestine Contractors, Inc. v. Perkins*, 386 S.W.2d 764, 767-68 (Tex. 1964) (plaintiff bound by express terms of covenant not to sue); *Gillam v. Alford*, 69 Tex. 267, 271, 6 S.W. 757, 759 (1887) (voluntary settlement agreement, an arm's length transaction, enforced per express terms); Comment, *Settlements in Multiple Tortfeasor Controversies - Texas Law*, 10 ST. MARY'S L.J. 75, 76 & n.7 (1978) (terms of settlement agreement within parties' discretion; generally not subject to court's approval).

2. *Palestine Contractors, Inc. v. Perkins*, 386 S.W.2d 764, 767 (Tex. 1964); see TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(d)-(e) (Vernon Supp. 1980) (procedural application of comparative fault allocation upon non-settling defendants); *id.* art. 2212 (Vernon 1971) (contribution statute; superceded by provisions of article 2212a in pure negligence actions); cf. *Callihan Interests, Inc. v. Duffield*, 385 S.W.2d 586, 587-88 (Tex. Civ. App.—Eastland 1964, writ ref'd) (tortfeasor discharging liability of all joint tortfeasors under agreed judgment entitled to seek contribution). See generally Comment, *Contribution Among Joint Tortfeasors*, 44 TEXAS L. REV. 326, 330-31 (1965) (elements of contribution suit).

3. *McMillen v. Klingensmith*, 467 S.W.2d 193, 196 (Tex. 1971) (release only effective as to named party in agreement). At common law, the release of a joint tortfeasor was construed as a complete surrender of claimant's cause of action. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 49, at 301 (4th ed. 1971). Texas' abandonment of the common law unity of release rule in *McMillen v. Klingensmith* has recently been extended to encompass settlements in vicarious liability controversies. See *Knutson v. Morton Foods, Inc.*, 603 S.W.2d 805, 806-07 (Tex. 1980) (release of employee or agent does not release principal) (overruling *Spradley v. McCrackin*, 505 S.W.2d 955 (Tex. Civ. App.—Tyler 1974, writ ref'd n.r.e.)).

4. See Comment, *Settlements in Multiple Tortfeasor Controversies - Texas Law*, 10 ST. MARY'S L.J. 75, 87-91 (1978) (trial strategy; claimant, settling tortfeasor, non-settling defendant).

Policy considerations favoring settlement agreements have given rise to the body of law surrounding the judicial treatment accorded settlements.⁵ This article will examine certain considerations which should be given to the settlement process, including: the doctrines of release and satisfaction; various types of settlement and their effect upon joint and several tortfeasor liability; and the impact of settlement upon claims for indemnity and contribution.

II. FROM PLAINTIFF'S VIEWPOINT: SETTLEMENT CONSIDERATIONS

A fundamental principle governing the effect of settlements in multiple tortfeasor controversies is that a plaintiff is entitled to but one satisfaction for a single wrong.⁶ The distinction drawn between a satisfaction and a release is applicable to the extent that a release may or may not fulfill plaintiff's claim for compensation.⁷ A further distinction may arise, depending on whether the nature of

5. The principle that settlement and compromise are encouraged by the courts, as being in the public interest, is well established in the Texas judicial system. *See, e.g.*, *Knutson v. Morton Foods, Inc.*, 603 S.W.2d 805, 808 (Tex. 1980); *Palestine Contractors, Inc. v. Perkins*, 386 S.W.2d 764, 771-73 (Tex. 1964); *Gillam v. Alford*, 69 Tex. 267, 271, 6 S.W. 757, 759 (1887).

6. *Bradshaw v. Baylor Univ.*, 126 Tex. 99, 104, 84 S.W.2d 703, 705 (Tex. Comm'n App. 1935, opinion adopted); *see, e.g.*, *T. L. James & Co. v. Statham*, 558 S.W.2d 865, 868 (Tex. 1977) (payment of judgment into registry of court under terms of judgment constitutes full compensation); *McMillen v. Klingensmith*, 467 S.W.2d 193, 195 (Tex. 1971) (satisfaction equals acceptance of full compensation for injury); *Hodges, Contribution and Indemnity Among Tortfeasors*, 26 TEXAS L. REV. 150, 170-71 (1947) (application of rule of one satisfaction for single wrong to partial settlements).

7. The distinction to be made between a satisfaction and a release may be stated thusly: "[A] satisfaction is an acceptance of full compensation for the injury; a release is a surrender of the cause of action, which may be gratuitous, or given for inadequate consideration." W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 49, at 301 (4th ed. 1971). *See also Stewart v. Mathes*, 528 S.W.2d 116, 118 (Tex. Civ. App.—Beaumont 1975, no writ) (applying law of contracts to settlement agreement); *Wedegartner v. Reichert*, 218 S.W.2d 304, 310 (Tex. Civ. App.—Waco 1948, writ ref'd n.r.e.) (court will not inquire into adequacy of consideration). A release of one tortfeasor discharges from liability only the named tortfeasor, and satisfies the claimant's cause of action as to the settlor. *McMillen v. Klingensmith*, 467 S.W.2d 193, 195-96 (Tex. 1971). A settlement with one tortfeasor may, however, operate to discharge all tortfeasors when the amount received fully satisfies the claim. *See Bradshaw v. Baylor Univ.*, 126 Tex. 99, 104, 84 S.W.2d 703, 705 (Tex. Comm'n App. 1935, opinion adopted) (prior settlement with joint tortfeasor in amount equal to judgment obtained against nontortfeasor); *cf. Palestine Contractors, Inc. v. Perkins*, 386 S.W.2d 764, 773 (Tex. 1964) (applying article 2212) (settlement with joint tortfeasor releases proportionate share of claim). *See also Knutson v. Morton Foods, Inc.*, 603 S.W.2d 805, 806-07 (Tex. 1980) (distinguishing concepts under theory of *Respondet Superior*).

the injury is characterized as divisible or indivisible.⁸ Interaction of the concepts of release and satisfaction in the divisible-indivisible injury context serve as focal points for the plaintiff's consideration in entering into a settlement agreement.

A. *Indivisible Injury by Multiple Tortfeasors: Joint and Several Liability*

If the independent conduct of two or more tortfeasors combines to produce an indivisible injury, the tortfeasors incur joint and several liability even though there is no common duty, design, or concert of action.⁹ A determination of indivisible injury and imposition of joint and several liability, as enunciated in *Landers v. East Texas Salt Water Disposal Co.*,¹⁰ is based upon the impracticability of reasonable apportionment of damages.¹¹ The primary concern under the rule of indivisible injury is to enable the injured party to obtain full relief by allowing joinder of all tortfeasors when necessary. This concern renders moot the theoretical possibilities of divisible fault; the court's interest lies in a realistic ap-

8. An indivisible injury involves concurrent or successive acts producing a single injury; a divisible injury is characterized as injury involving apportionable damages. See Sales, *Limitations on Recovery of Damages in Personal Injury Actions*, 18 S. TEX. L.J. 217, 255-61, 267-70 (1977). See generally, Fisher, Nugent & Lewis, *Comparative Negligence: An Exercise in Applied Justice*, 5 ST. MARY'S L.J. 655, 662-66 (1974).

9. *Landers v. East Texas Salt Water Disposal Co.*, 151 Tex. 251, 256, 248 S.W.2d 731, 734 (1952). Indivisible injuries generally arise under successive acts by independent tortfeasors which combine "to cause an injury incapable of apportionment." Sales, *Limitations on Recovery of Damages in Personal Injury Actions*, 18 S. TEX. L.J. 217, 259 (1977); see, e.g., *Krishnan v. Garza*, 570 S.W.2d 578, 582-83 (Tex. Civ. App.—Corpus Christi 1978, no writ) (liability against hospital and doctor joint and several when surgeon's negligence in failing to remove sponge from abdomen coupled with hospital's failure to properly review X-rays); *Armendariz v. Mora*, 553 S.W.2d 400, 406 (Tex. Civ. App.—El Paso 1977, writ ref'd n.r.e.) (liability against breaching party and interfering party is joint and several when plaintiff injured by breach of contract); Sales, *Limitations on Recovery of Damages in Personal Injury Actions*, 18 S. TEX. L.J. 217, 256 n.179 (1977) (digest of cases).

10. 151 Tex. 251, 248 S.W.2d 731 (1952).

11. *Id.* at 256, 248 S.W.2d at 734. As stated by the *Landers'* court, [w]here the tortious acts of two or more wrongdoers join to produce an indivisible injury, that is, an injury which from its nature cannot be apportioned with reasonable certainty to the individual wrongdoers, all of the wrongdoers will be held jointly and severally liable for the entire damages and the injured party may proceed to judgment against anyone separately or against all in the one suit.

Id. at 256, 248 S.W.2d at 734; accord, W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 52, at 314 (4th ed. 1971) (when no logical basis for apportionment exists, only practical course is to hold each defendant liable for the entire loss).

praisal of the feasibility of segregating and identifying the portion of injury attributable to all contributing causes.¹² If the injuries produced by an occurrence are construed as indivisible in nature, each tortfeasor is liable for plaintiff's entire damages under the concept of joint and several liability.¹³ The burden of apportionment is imposed upon the tortfeasors.¹⁴

The indivisible injury rule allows the plaintiff to sue several tortfeasors jointly and severally for the entire damages occasioned by the tortious conduct of each which caused the injury.¹⁵ If, however, a plaintiff's cause of action is grounded in indivisible injury, there is at law but a single injury for which there can be but one satisfaction.¹⁶ Thus, if the claimant has recovered the amount required for full satisfaction of damages, whether by payment of a judgment¹⁷ or under a settlement,¹⁸ all others who may be jointly

12. See *Landers v. East Texas Salt Water Disposal Co.*, 151 Tex. 251, 256, 248 S.W.2d 731, 734 (1952). The *Landers* decision expressly overruled *Sun Oil Co. v. Robicheaux*, 23 S.W.2d 713 (Tex. Comm'n App. 1930, judgment adopted), thereby abrogating the requirement of concert of action or unity of design from the concept of joint and several liability. See *Landers v. East Texas Salt Water Disposal Co.*, 151 Tex. 251, 255-56, 248 S.W.2d 731, 732-34 (1952). The reasoning of the court in extending joint and several liability to independent tortfeasors indicated a discontent with the burden of proof facing a plaintiff seeking to establish a correct apportionment of damages under procedural requirements mandating a severance of claims as to independent tortfeasors before being allowed a satisfactory recovery. See *id.* at 255-56, 248 S.W.2d at 734.

13. *Riley v. Industrial Fin. Serv. Co.*, 157 Tex. 306, 310, 302 S.W.2d 652, 655-56 (1957) (citing *Landers v. East Texas Salt Water Disposal Co.*). In *Riley* plaintiff brought suit against several finance companies alleging injury due to harsh and unreasonable collection efforts. Defendant Industrial Finance appealed the judgment of the trial court, asserting error in submission of a single damage issue. The supreme court affirmed the judgment of the lower court, finding plaintiff had suffered an indivisible injury, thereby subjecting each defendant to liability for the total damages caused. *Id.* at 311-12, 302 S.W.2d at 656. See also Sales, *Limitations on Recovery of Damages in Personal Injury Actions*, 18 S. TEX. L.J. 217, 256-59 (1977) (indivisible injury).

14. See *Borel v. Fibreboard Paper Prod. Corp.*, 493 F.2d 1076, 1095 (5th Cir. 1973) (applying Texas law), *cert. denied*, 419 U.S. 869 (1974) (recognizing shift in burden of proof under *Landers*); W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 52, at 319-20 (4th ed. 1971) (construing Texas indivisible injury cases as imposing burden of proof of basis for division upon defendants).

15. *Riley v. Industrial Fin. Serv. Co.*, 157 Tex. 306, 310, 302 S.W.2d 652, 655-56 (1957).

16. *Bradshaw v. Baylor Univ.*, 126 Tex. 99, 104, 84 S.W.2d 703, 705 (Tex. Comm'n App. 1935, opinion adopted). The *Bradshaw* court, in applying the rule that an injured party is entitled to but one satisfaction for his injury, noted that the rule of one satisfaction was "in no sense modified by the circumstance of more than one tortfeasor" being at fault. *Id.* at 104, 84 S.W.2d at 705.

17. *Hunt v. Ziegler*, 271 S.W. 936, 938 (Tex. Civ. App.—San Antonio 1925), *aff'd*, 280 S.W. 546 (Tex. Comm'n App., judgment adopted); see *T. L. James & Co. v. Statham*, 558

liable are thereby released.¹⁹ Take for example the typical indivisible injury case in which a party sustains injury in a collision involving the combined negligence of the drivers of two vehicles.²⁰ If that party enters into a full settlement and releases all claims against one driver, or seeks and obtains a judgment against one driver, which is subsequently paid, the claim is deemed fully satisfied, precluding recovery against the other driver.

The rule of one satisfaction is the substantive keystone in determining the procedural consequences of settlement.²¹ Frequently,

S.W.2d 865, 868 (Tex. 1977) (payment of judgment amount into court registry deemed satisfaction of claim); *Burrell v. Cornelius*, 588 S.W.2d 403, 405 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.) (community property division served to satisfy claim).

18. See *Bradshaw v. Baylor Univ.*, 126 Tex. 99, 104, 84 S.W.2d 703, 705 (Tex. Comm'n App. 1935, opinion adopted) (prior settlement with joint tortfeasor equal to judgment against nonsettling tortfeasor).

19. See *T. L. James & Co. v. Statham*, 558 S.W.2d 865, 868 (Tex. 1977). The court, in analyzing plaintiff's plea that a court decree ordering payment into the registry of the court should not operate to divest a claimant of the right to proceed against a joint tortfeasor not joined under the suit upon which appeal was taken, stated the following as the controlling rule:

[I]t is a universal rule that where there has been a judgment against one of two or more joint tortfeasors, followed by an acceptance of satisfaction, all other tortfeasors are thereby released, and the judgment and satisfaction may be successfully pleaded by them to the maintenance of the same or another suit by the same plaintiff involving the same cause of action. The rule is applied to joint tortfeasors because of the fundamental fact that there is but a single injury, in itself and of itself indivisible, and constituting an indivisible cause of action, for which both in law and good conscience there can be but one satisfaction; and when that satisfaction is made by one of the joint tortfeasors, or by any person, it has the effect of releasing all others who may be jointly, or jointly and severally liable.

Id. at 868 (quoting *Hunt v. Ziegler*, 271 S.W. 936, 938 (Tex. Civ. App.—San Antonio 1925), *aff'd*, 280 S.W. 546 (Tex. Comm'n App., judgment adopted)); *cf.* *Clemtex, Ltd. v. Dube*, 578 S.W.2d 813, 814 (Tex. Civ. App.—Beaumont 1979, writ ref'd n.r.e.) (settlement proceeds from party adjudged not joint tortfeasor do not constitute satisfaction of claim). See also *Broadway Plan v. Ravenstein*, 364 S.W.2d 741, 744 (Tex. Civ. App.—Fort Worth 1963, writ ref'd n.r.e.) (partial payment of judgment does not release other joint tortfeasors).

20. See, e.g., *Bradshaw v. Baylor Univ.*, 126 Tex. 99, 101, 84 S.W.2d 703, 703 (Tex. Comm'n App. 1935, opinion adopted) (passenger of bus injured in collision with railroad); *Hicks v. Brown*, 128 S.W.2d 884, 887 (Tex. Civ. App.—Amarillo 1939), *modified on other grounds*, 136 Tex. 399, 151 S.W.2d 790 (1941) (passenger of taxicab injured in intersectional collision); *Spears Dairy, Inc. v. Davis*, 124 S.W.2d 159, 159-60 (Tex. Civ. App.—Beaumont 1939, no writ) (passenger of third vehicle injured in successive collisions precipitated by accident between two other vehicles).

21. See, e.g., *Bradshaw v. Baylor Univ.*, 126 Tex. 99, 104, 84 S.W.2d 703, 705 (Tex. Comm'n App. 1935, opinion adopted); *Deal v. Madison*, 576 S.W.2d 409, 414-15 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.); *Hodges, Contribution and Indemnity Among Tortfeasors*, 26 TEXAS L. REV. 150, 171-72 (1947).

confusion results in distinguishing a release from a satisfaction, such confusion stemming from the common law "unity of release" rule. Historically, the release of one of two tortfeasors who acted in concert necessarily released the other; there being in the eyes of the law but one cause of action, the release of a tortfeasor liable therefore was deemed a surrender of the cause of action.²² The common law unity of release rule, finding its legal basis in the idea of unity of obligation or injury, was expressly overruled by the Texas Supreme Court in *McMillen v. Klingensmith*.²³ Noting the confusion attendant in adherence to the common law rule, the *McMillen* court provided clarification to the doctrines of settlement, release, and satisfaction.²⁴ A full and complete settlement with one tortfeasor fully satisfies the injured party, satisfaction being acceptance of complete compensation for the cause of action.²⁵ A release, on the other hand, is a surrender of the cause of action, and may be based on a gratuitous consideration.²⁶ Under *McMillen* only the party named in the release, and not the entire cause of action, is released.²⁷ The claimant's right to proceed against remaining tortfeasors is not thereby precluded. As the claimant is entitled to only one satisfaction, however, even though the settlement attributable to the release is intended as partial, if the consideration received fully satisfies the claim there can be no further recovery against the nonsettling tortfeasors.²⁸ Conversely, if the

22. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 49 (4th ed. 1971). See, e.g., *Sims v. Auringer*, 301 S.W.2d 286, 287 (Tex. Civ. App.—Fort Worth 1957, writ ref'd n.r.e.); *Borden v. Sneed*, 291 S.W.2d 485, 487-89 (Tex. Civ. App.—Waco 1956, writ ref'd n.r.e.); *Phillips v. Wright*, 81 S.W.2d 129, 131 (Tex. Civ. App.—Fort Worth 1935, writ dismiss'd); cf. *Cannon v. Pearson*, 383 S.W.2d 565, 567-70 (Tex. 1964) (recognizing modern trend of courts to look to parties' intent; release merely raises presumption of total surrender of cause of action). In an effort to ameliorate the harsh effects of the unity of release rule, several jurisdictions favored such devices as a covenant not to sue or a release containing an express reservation of the cause of action against non-settlers. *McMillen v. Klingensmith*, 467 S.W.2d 193, 195-96 (Tex. 1971) (citing Texas cases approving use of such contractual forms).

23. 467 S.W.2d 193, 196 (Tex. 1971).

24. See *id.* at 195-97; W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 49, at 301 (4th ed. 1971).

25. *McMillen v. Klingensmith*, 467 S.W.2d 193, 195 (Tex. 1971) (quoting Prosser, *Joint Torts and Several Liability*, 25 CAL. L. REV. 413, 423 (1937)).

26. *Id.* at 195.

27. *Id.* at 196. See also *Knutson v. Morton Foods, Inc.*, 603 S.W.2d 805, 806-07 (Tex. 1980) (release of employee does not release employer; extending *McMillen* holding to releases in vicarious liability controversies wherein parties not true joint tortfeasors).

28. See *Bradshaw v. Baylor Univ.*, 126 Tex. 99, 104, 84 S.W.2d 703, 705 (Tex. Comm'n

settlement accomplishes only a partial satisfaction, the claimant can attempt full compensation by proceeding against the nonsettlers.

1. *Partial Settlement with Less than All Tortfeasors.* There are several devices by which the injured party may settle part of the claim with less than all tortfeasors and proceed against nonsettling tortfeasors. These are known as covenants not to sue,²⁹ partial releases,³⁰ and reservation of rights agreements.³¹ The effect of such a settlement upon the right to recover from the nonsettling tortfeasor depends, in large measure, upon the procedural posture in which the problem arises.

If a claimant has received full satisfaction for the damages attributable to an indivisible injury, a subsequent cause of action is barred, even though the settlement was obtained through a partial release.³² In *Bradshaw v. Baylor University*,³³ the operation of the "one satisfaction" rule was brought to bear when plaintiff, a passenger on a bus owned and operated by Baylor University, was injured in a collision between the bus and a train. Bradshaw entered

App. 1935, opinion adopted).

29. See *Gillette Motor Transp. Co. v. Whitfield*, 186 S.W.2d 90, 93 (Tex. Civ. App.—Fort Worth 1945, writ ref'd w.o.m.); W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 49, at 303 (4th ed. 1971). See also Comment, *Contribution Among Joint Tortfeasors*, 44 TEXAS L. REV. 326, 334-35 (1965) (release distinguished from covenant not to sue).

30. See *McMillen v. Klingensmith*, 467 S.W.2d 193, 195 (Tex. 1971) (only named party released); cf. *Loy v. Kuykendall*, 347 S.W.2d 726, 728 (Tex. Civ. App.—San Antonio 1961, writ ref'd n.r.e.) (release expressly limited to personal injuries, not general release of cause of action for property damage).

31. See *Riley v. Industrial Fin. Serv. Co.*, 157 Tex. 306, 311, 302 S.W.2d 652, 655 (1957); *Western Guar. Loan Co. v. Dean*, 309 S.W.2d 857, 861 (Tex. Civ. App.—Dallas 1957, writ ref'd n.r.e.). As noted by Prosser, jurisdictions use the designation of reservation of rights and covenant not to sue interchangeably when addressing the issue of partial releases. See W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 49, at 303-04 (4th ed. 1971). Frequently, a release entitled "Covenant Not to Sue" will include a reservation of rights agreement. See, e.g., *Palestine Contractors, Inc. v. Perkins*, 386 S.W.2d 764, 765 (Tex. 1964); *Liberty Ins. Co. v. Rawls*, 358 S.W.2d 920, 931 (Tex. Civ. App.—Fort Worth 1962, no writ); *Gomez v. City Transp. Co.*, 262 S.W.2d 417, 418 (Tex. Civ. App.—Dallas 1953, writ ref'd n.r.e.). Recent pronouncements of the Texas Supreme Court have abrogated the need to expressly reserve the right to proceed with a cause of action against non-settling tortfeasors. See *Knutson v. Morton Foods, Inc.*, 603 S.W.2d 805, 806-07 (Tex. 1980); *McMillen v. Klingensmith*, 467 S.W.2d 193, 195 (Tex. 1971).

32. See *Bradshaw v. Baylor Univ.*, 126 Tex. 99, 104, 84 S.W.2d 703, 705 (Tex. Comm'n App. 1935, opinion adopted); Hodges, *Contribution and Indemnity Among Tortfeasors*, 26 TEXAS L. REV. 150, 172 (1947).

33. 126 Tex. 99, 84 S.W.2d 703 (Tex. Comm'n App. 1935, opinion adopted).

into a partial settlement with the railroad for \$6,500.00. In a subsequent action against Baylor University, a verdict of \$6,500 was rendered. The court held rendition of a take-nothing judgment proper; the money received in consideration for the covenant not to sue nonetheless being payment as compensation for plaintiff's injuries, fully satisfying the claim.³⁴

If a partial settlement is made for less than full satisfaction, plaintiff retains a viable cause of action for damages against non-settling tortfeasors, proportionately reduced under the rule of *Palestine Contractors, Inc. v. Perkins*.³⁵ In addressing the substantive consequence to be afforded the nonsettling tortfeasor of a previous settlement agreement, the *Palestine* court set out the following basic rule: A plaintiff settling part of the claim for less than the determined amount of damage is required to deduct the amount received from the settling tortfeasor, but in no event receives more than one-half of the sum determined by the jury.³⁶ The alternative selected by the court as the most effective method of harmonizing the conflicting interests of each party³⁷ can be broken down into

34. *Id.* at 104, 84 S.W.2d at 705. As is apparent from the operation of the single satisfaction rule, procedural devices such as a release containing a reservation of rights are not the controlling determinant; regardless of the claimant's intent as contained in the settlement agreement, a subsequent recovery is foreclosed if plaintiff is deemed fully compensated. See *T. L. James & Co. v. Statham*, 558 S.W.2d 865, 868 (Tex. 1977) (judgment tendered into registry of court, even though unclaimed, is legal compensation satisfying claim); *Hunt v. Ziegler*, 271 S.W. 936, 938 (Tex. Civ. App.—San Antonio 1925), *aff'd*, 280 S.W. 546 (Tex. Comm'n App. 1926, judgment adopted).

35. 386 S.W.2d 764 (Tex. 1964).

36. See *id.* at 773. See generally *Gattegno v. The Parisian*, 53 S.W.2d 1005, 1007 (Tex. Comm'n App. 1932, holding approved); Hodges, *Contribution and Indemnity Among Tortfeasors*, 26 TEXAS L. REV. 150, 170-72 (1947). The *Palestine Contractors* court, in setting out a definitive rule for application of pro rata versus credit recovery allowed a non-settlor, adopted Professor Hodge's interpretation of *Gattegno*. See *Palestine Contractors, Inc. v. Perkins*, 386 S.W.2d 764, 771-73 (Tex. 1964). The fact of settlement with one ultimately found to be a tortfeasor acts as a proportionate release based on the variable of total number of defendants. The claimant is deemed to have released one-half, or one-third, or one-fourth of his case depending on how many defendants are found to be tortfeasors. See Hodges, *Contribution and Indemnity Among Tortfeasors*, 26 TEXAS L. REV. 150, 170-72 (1947); Comment, *Contribution Among Joint Tortfeasors*, 44 TEXAS L. REV. 326, 335-38 (1965).

37. See *Palestine Contractors, Inc. v. Perkins*, 386 S.W.2d 764, 767-68 (Tex. 1964) (settlor's interest in finality of settlement, claimant's interest in full satisfaction, co-tortfeasor's interest in contribution); Comment, *Settlements in Multiple Tortfeasor Controversies - Texas Law*, 10 ST. MARY'S L.J. 75, 80-82 (1978) (problems with application of the *Palestine* rule).

the following elements: (1) in keeping with the rule of one satisfaction, the amount received in settlement is to be credited against the liability assessed the nonsettling tortfeasor; and (2) in effectuating the legislative scheme of distribution of liability among joint tortfeasors under contribution, a nonsettling defendant will in no event be required to bear more than his pro rata share of liability assessed.³⁸ The principle enunciated was deemed equitable, inasmuch as the pro rata reduction allowed the nonsettling tortfeasor satisfaction of the substantive right to contribution while insuring the settlor the finality of complete release from subsequent liability to a co-defendant.³⁹ The party standing to lose under the "pro rata reduction" rule is the plaintiff.⁴⁰ As noted by the court:

The unattractive feature of this rule is that the plaintiff will not receive the full compensation to which the jury found him entitled. His total recovery under this method will be as near to total compensation as is the settlement to one-half of the damages. In other words any loss would be due to the plaintiff's own action in settling with one joint tortfeasor in an arm's length transaction.⁴¹

Subsequent judicial interpretation of the *Palestine* doctrine implies a juristic approach grounded in the common law concept of unity of injury/unity of obligation to joint tortfeasor liability.⁴²

38. See *Deal v. Madison*, 576 S.W.2d 409, 414 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.) (substantive law concerning effect of settlement under contribution statute); Hodges, *Contribution and Indemnity Among Tortfeasors*, 26 TEXAS L. REV. 150, 170-72 (1947).

39. See *Palestine Contractors, Inc. v. Perkins*, 386 S.W.2d 764, 767-68 (Tex. 1964).

40. See *id.* at 768. Because of the speculative nature of some claims, a plaintiff faces the risk of an inadequate settlement operating to effect a pro rata deduction in recoverable damages under the *Palestine* rule. See Comment, *Settlements in Multiple Tortfeasor Controversies - Texas Law*, 10 ST. MARY'S L.J. 75, 87-88 (1978) (trial strategy); Comment, *Contribution Among Joint Tortfeasors*, 44 TEXAS L. REV. 326, 338 (1965) (citing dilemma faced by claimant as factor discouraging settlement).

41. *Palestine Contractors, Inc. v. Perkins*, 386 S.W.2d 764, 768 (Tex. 1964); cf. *Gillam v. Alford*, 69 Tex. 267, 271, 6 S.W. 757, 759 (1887) (voluntary settlement agreement, as arm's length transaction, enforced per express terms). Under the facts of *Palestine Contractors*, claimant's settlement agreement, in the form of a covenant not to sue, stated no suit would be instituted, "directly or indirectly," against settlor. *Palestine Contractors, Inc. v. Perkins*, 386 S.W.2d 764, 765 n.1 (Tex. 1964). As reasoned by the court, adoption and application of the pro rata reduction rule was necessary to insure finality of and adherence to the express terms of the settlement. See *id.* at 767-68. See also Hodges, *Contribution and Indemnity Among Tortfeasors*, 26 TEXAS L. REV. 150, 172 (1947) (allowance of claim for indemnification against settling tortfeasor amounts to indirect claim against settlor).

42. See, e.g., *McCrary v. Taylor*, 579 S.W.2d 347, 350 (Tex. Civ. App.—Eastland 1979, writ ref'd); *Leong v. Wright*, 478 S.W.2d 839, 846 (Tex. Civ. App.—Houston [14th Dist.]

The pro rata reduction principle applies only when nonsettling joint tortfeasors and tortfeasor settlors alike have been found negligent.⁴³ In the absence of a judicial interpretation of the settlor's theoretical liability, the reduction in judgment in proportion to the number of settlors is not allowed. The amount of settlement is simply subtracted from the judgment; the nonsettling tortfeasor in such instance receiving a pro tanto credit in accordance with the "single satisfaction" rule.⁴⁴ The following examples are illustrative of the pro rata and pro tanto reduction principles.

Plaintiff settles with one tortfeasor by partial release for \$6,500. Plaintiff sues a second tortfeasor, receiving a verdict of \$8,000. Plaintiff is required to deduct the amount received from the settling tortfeasor (single satisfaction rule), and is, therefore, entitled to \$1,500 from the nonsettling tortfeasor. If, however, the jury had awarded \$15,000, operation of the pro rata reduction rule (unity of injury/unity of obligation) would allow recovery of \$7,500 from the nonsettlor; an award of \$30,000 would subject the nonsettlor to a liability of \$15,000; etc. The nonsettling tortfeasor has received, indirectly, under a pro rata reduction, the proportionate reduction otherwise allowed a joint tortfeasor under contribution. The settling tortfeasor is assured the finality of settlement, no right of contribution remaining.

Given the above example, had the settlor not been adjudicated a tortfeasor, a settlement of \$1,500 in the instance of a \$15,000 verdict would result in the nonsettling tortfeasor receiving a pro tanto

1972, writ ref'd n.r.e.); *Petco Corp. v. Plummer*, 392 S.W.2d 163, 167 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.); cf. *Schering Corp. v. Giesecke*, 589 S.W.2d 516, 519 (Tex. Civ. App.—Eastland 1979, writ ref'd n.r.e.) (no credit allowed from settlement attributable to divisible injury); *Clemtex, Ltd. v. Dube*, 578 S.W.2d 813, 814 (Tex. Civ. App.—Beaumont 1979, writ ref'd n.r.e.) (settlement by party determined not negligent not considered as contributing to plaintiff's satisfaction).

43. See *Rexroat v. Prescott*, 570 S.W.2d 457, 459-60 (Tex. Civ. App.—Amarillo 1978, writ ref'd n.r.e.); *Leong v. Wright*, 478 S.W.2d 839, 846 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.); *Hodges, Contribution and Indemnity Among Tortfeasors*, 26 TEXAS L. REV. 150, 171 (1947) (application of pro rata deduction only "where . . . contribution is otherwise in order"). See generally Comment, *Settlements in Multiple Tortfeasor Controversies - Texas Law*, 10 ST. MARY'S L.J. 75, 81-83 (1978) (application of *Palestine Contractors* rule in various contexts when settlor not determined joint tortfeasor).

44. See, e.g., *E. I. du Pont de Nemours & Co. v. McCain*, 414 F.2d 369, 375 (5th Cir. 1969) (applying Texas law); *Connell v. Rosales*, 419 S.W.2d 673, 679-80 (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.).

reduction only, with plaintiff obtaining a \$13,500 judgment. As no right to contribution would obtain in such situation, the nonsettling defendant would not be allowed a pro rata reduction. In the true sense of the maxim, the reason for the rule having ceased, so does the rule.

2. *Partial Settlement Under Article 2212a.*⁴⁵ The concept of joint and several liability is altered in several respects under Texas' statutory scheme of "modified" comparative negligence.⁴⁶ As pertains to the substantive effects of settlement on tort liability, the basic precepts of *Bradshaw* and *Palestine Contractors* have been incorporated in subsections (2)(d) and (e).⁴⁷ The governing principle of "one satisfaction" underlies the statutory provisions dealing with apportionment of damages among remaining tortfeasors when a partial settlement has been previously consummated. The rules of contribution as developed under pre-2212a case law continue, but are modified in accordance with the comparative fault scheme of the statute.⁴⁸

Article 2212a applies only to negligence actions.⁴⁹ Concerning the

45. TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1980).

46. See generally Dorsaneo & Robertson, *Comparative Negligence in Texas*, 10 TEX. TECH L. REV. 933 (1979); Fisher, Nugent & Lewis, *Comparative Negligence: An Exercise in Applied Justice*, 5 ST. MARY'S L.J. 655 (1974).

47. See *Deal v. Madison*, 576 S.W.2d 409, 416-17 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.). In construing section 2 of article 2212a, the court stated:

[T]he evident purpose of this section is to apply the scheme of comparative negligence so as to require contribution from each defendant in proportion to the negligence attributable to him, rather than to require an equal contribution from each tortfeasor, as formerly required by article 2212, but still to permit only one satisfaction of his damages.

Id. at 416. The *Deal* court found no indication in the statutory provisions relating to the effect of settlements of legislative intent to change the underlying rule of *Bradshaw*. The court further stated the consequence of subsection (e) regarding a prior settlement is that the settlement was conclusive of a settlor's liability, thereby precluding any claim for contribution, in accord with the implications underlying *Palestine Contractors*. See *id.* at 417. See also Fisher, Nugent & Lewis, *Comparative Negligence: An Exercise in Applied Justice*, 5 ST. MARY'S L.J. 655, 662-66 (1974) (settlements with joint-tortfeasors).

48. See *Deal v. Madison*, 576 S.W.2d 409, 417 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.). Compare *id.* at 420 ("subdivision 2(d) as giving full effect to the *Bradshaw* rule in the context of comparative negligence") with *Schering Corp. v. Giesecke*, 589 S.W.2d 516, 519 (Tex. Civ. App.—Eastland 1979, writ ref'd n.r.e.) (proportionate "credit" and not proportionate reduction, appropriate remedy allowed non-settling defendant under article 2212a). See generally Comment, *Settlements in Multiple Tortfeasor Controversies - Texas Law*, 10 ST. MARY'S L.J. 75, 83-85 (1978).

49. *General Motors Corp. v. Simmons*, 558 S.W.2d 855, 862 (Tex. 1977).

effect of a partial settlement, the article administers rules apportioning recoverable damages on the basis of whether the settling tortfeasor is a party to the suit, that is, whether the settlor's proportionate degree of fault has been judicially determined.⁵⁰ Under subsection 2(d), addressing the situation in which the settlor's relative degree of negligence is not submitted to the jury, each defendant is allowed to deduct from the amount for which he is liable under the judgment a percentage of the settlement amount, equal to his adjudicated degree of fault.⁵¹ Operation of this subsection thus positions a previous partial settlement as a credit available to remaining defendants, following the pro tanto reduction rule fashioned under the general principles of both *Bradshaw* and *Palestine Contractors*. Conversely, when the settlor is joined as a party defendant, and his negligence determined by the jury, subdivision (2)(e) provides for a reduction in recoverable damages based on the proportion of negligence of the settling tortfeasor.⁵² The consequence of the settlor's adjudication of relative fault is to preclude recovery beyond the determined extent of liability and to allow proportional reduction of liability assessed nonsettling co-defendants, a modified form of the pro rata reduction rule of *Palestine Contractors*.

50. See TEX. REV. CIV. STAT. ANN. art. 2212a, §§ 1, 2(d)-(e) (Vernon Supp. 1980). See generally Dorsaneo & Robertson, *Comparative Negligence in Texas*, 10 TEX. TECH L. REV. 933, 943-49 (1979).

51. See TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(d) (Vernon Supp. 1980).

If an alleged joint tortfeasor pays an amount to a claimant in settlement, but is never joined as a party defendant, or having been joined, is dismissed or nonsuited after settlement with the claimant (for which reason the existence and amount of his negligence are not submitted to the jury), each defendant is entitled to deduct from the amount for which he is liable to the claimant a percentage of the amount of the settlement based on the relationship the defendant's own negligence bears to the total negligence of all defendants.

Id. See generally Dorsaneo & Robertson, *Comparative Negligence in Texas*, 10 TEX. TECH L. REV. 933, 943-45 (1979).

52. See TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(e) (Vernon Supp. 1980).

If an alleged joint tortfeasor makes a settlement with a claimant but nevertheless is joined as a party defendant at the time of the submission of the case to the jury (so that the existence and amount of his negligence are submitted to the jury) and his percentage of negligence is found by the jury, the settlement is a complete release of the portion of the judgment attributable to the percentage of negligence found on the part of that joint tortfeasor.

Id. See generally Dorsaneo & Robertson, *Comparative Negligence in Texas*, 10 TEX. TECH L. REV. 933, 945-48 (1979).

Application of the principles of comparative negligence to the substantive rules of settlements portends results indicated by the following examples:

Case 1. Amount received in settlement equals or exceeds damages found by the jury. Plaintiff enters into partial settlement with one tortfeasor for \$5,000 and subsequently sues a second tortfeasor under article 2212a. The jury finds damages of \$5,000. Plaintiff, who has received full satisfaction, can recover nothing from the second tortfeasor, thereby receiving a take nothing judgment.⁵³

Case 2. Amount received in settlement less than damages found by jury: percentage of settlor's negligence not submitted to the jury. Plaintiff settles with tortfeasor one for \$2,000. Jury finds plaintiff 40% negligent, tortfeasor two 60% negligent, and damages to be \$10,000. Tortfeasor two receives a credit of the settlement amount. Thus plaintiff recovers \$4,000 from tortfeasor two which, added to the sum already obtained from the settling tortfeasor, gives plaintiff a total recovery of \$6,000.⁵⁴

Case 3. Amount received in settlement less than damages found by jury: percentage of settlor's negligence is submitted to the jury. Plaintiff settles with tortfeasor one for \$2,000. Jury finds plaintiff 20% negligent, tortfeasor one 20% negligent, and tortfeasor two 60% negligent. Plaintiff's damages are \$10,000. Tortfeasor one, as a settling tortfeasor, is provided a complete release of the portion of the judgment attributable to the percentage of negligence so determined. Thus plaintiff recovers \$6,000 from tortfeasor two which, added to the \$2,000 obtained from tortfeasor

53. See *Deal v. Madison*, 576 S.W.2d 409, 419-20 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.); cf. *T. L. James & Co. v. Statham*, 558 S.W.2d 865, 869 (Tex. 1977) (reaffirming principle of only one satisfaction allowed). *But cf. Clemtex, Ltd. v. Dube*, 578 S.W.2d 813, 814 (Tex. Civ. App.—Beaumont 1979, writ ref'd n.r.e.) (when settlor impleaded and found not negligent, amount of settlement not considered as compensation or satisfaction for plaintiff's injury). Under the governing principle that a plaintiff is not entitled to more than one satisfaction, when the settlement amount equals a subsequent judgment, plaintiff is deemed fully satisfied. The provisions of article 2212a allowing for a credit or proportionate reduction in accord with the settlor's assessed degree of liability are inapplicable. See *Deal v. Madison*, 576 S.W.2d 409, 420 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.).

54. See, e.g., TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(d) (Vernon Supp. 1980); Dor-saneo & Robertson, *Comparative Negligence in Texas*, 10 TEX. TECH L. REV. 933, 943-45 (1979); Fisher, Nugent & Lewis, *Comparative Negligence: An Exercise in Applied Justice*, 5 ST. MARY'S L.J. 655, 663-64 (1974).

one in settlement, allows plaintiff a total recovery of \$8,000.⁵⁵

Texas settlement procedures under comparative negligence continue the principle adopted under *Palestine Contractors*, stemming from policy considerations favoring settlements, of absolving the settling tortfeasor from liability beyond the amount of settlement. A remaining issue is which party will bear the consequence of an inadequate settlement.⁵⁶ If the percentage of the settling tortfeasor's negligence is *not* submitted to the jury, the plaintiff recovers the full amount determined by the jury and the non-settling tortfeasor, receiving a variable reduction of the amount owed under the judgment, bears the loss.⁵⁷ If the settling tortfeasor's negligence *is* submitted to the jury, the non-settling tortfeasor is liable to plaintiff for the full amount attributable to his determined percentage of negligence, the settlor's liability under an adjudicated degree of fault being completely released.⁵⁸ In such case the amount plaintiff actually receives will vary, depending on the amount paid in settlement.⁵⁹

Inasmuch as the injured party's primary objective is to receive full compensation, balancing the amount of a possible settlement against an anticipated specified percentage of negligence by a potential settling tortfeasor is a fundamental, crucial decision.⁶⁰ An initial question, the propriety or necessity of submitting the percentage of a settling tortfeasor's negligence to the jury under article 2212a, has no clear answer. The literal wording of subsections

55. See, e.g., TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(e) (Vernon Supp. 1980); Dorsaneo & Robertson, *Comparative Negligence in Texas*, 10 TEX. TECH L. REV. 933, 945-48 (1979); Fisher, Nugent & Lewis, *Comparative Negligence: An Exercise in Applied Justice*, 5 ST. MARY'S L.J. 655, 663-66 (1979); Comment, *Settlements in Multiple Tortfeasor Controversies - Texas Law*, 10 ST. MARY'S L.J. 75, 84 (1978).

56. See Fisher, Nugent & Lewis, *Comparative Negligence: An Exercise in Applied Justice*, 5 ST. MARY'S L.J. 655, 663-66 (1979); Comment, *Settlements in Multiple Tortfeasor Controversies - Texas Law*, 10 ST. MARY'S L.J. 75, 84 (1978).

57. See note 52 *supra* and accompanying text; Fisher, Nugent & Lewis, *Comparative Negligence: An Exercise in Applied Justice*, 5 ST. MARY'S L.J. 655, 663-64 (1974).

58. See TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(e) (Vernon Supp. 1980).

59. See note 53 *supra* and accompanying text; Fisher, Nugent & Lewis, *Comparative Negligence: An Exercise in Applied Justice*, 5 ST. MARY'S L.J. 655, 664-66 (1974).

60. As suggested by one commentator, "[t]he 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." Comment, *Settlements in Multiple Tortfeasor Controversies - Texas Law*, 10 ST. MARY'S L.J. 75, 88 (1978).

2(d) and (e) of article 2212a would indicate that its drafters were of the opinion that the percentage of a settling non-party tortfeasor's negligence would not be submitted.⁶¹ An argument has been made, however, that the absence of a settling tortfeasor as a party defendant should not preclude submission of issues on the existence and percentage of his negligence, the theory being that "the distinction should be between a settlement made with one who was not legally liable and one who was."⁶² As noted in a discussion of this issue in *Deal v. Madison*,⁶³ the implications of the *Palestine* doctrine in section 2 of article 2212a that a settlement operates as a proportionate discharge of damages, thereby obviating the necessity of claims for contribution, renders the practice of impleading a settlor, against whom no further relief can be granted as between the original parties, "an empty formalism."⁶⁴ If, however, the non-settling tortfeasor has a cross-claim or third-party claim for indemnity or contribution against the settling tortfeasor, plaintiff's release of the latter will not preclude submission of the percentage of the settlor's negligence to the jury. Because the decision to assert this claim and the procedural joinder to protect contribution rights necessarily belongs to the non-settling tortfeasor, a plaintiff is well advised to assess a potential settlement with regard to a prospective percentage reduction in recoverable damages.⁶⁵

3. *Partial Settlement of a Claim Involving a Strict Liability Tortfeasor.* In the event of partial settlement of a claim in which either the settlor or non-settlor is accountable in strict liability in tort, contribution rights and the treatment of partial settlement are determined by principles arising under the general contribu-

61. See TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(d)-(e) (Vernon Supp. 1980). Several commentators discussing 2212a make the same assumption. Dorsaneo & Robertson, *Comparative Negligence in Texas*, 10 TEX. TECH L. REV. 933, 939-40 n.32 (1979) (citing authority). An alternative construction, however, would be that the language of article 2212a should not be literally construed, inasmuch as subsection 2(e) may have been intended to allow defendants the option of impleading the settlor. *Id.* at 945 n.61.

62. Keeton, *Torts, Annual Survey of Texas Law*, 28 Sw. L.J. 1, 14 (1974); see *Deal v. Madison*, 576 S.W.2d 409, 414-15 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.) (discussing practice of filing third-party claims to insure proportionate reduction of damages).

63. 576 S.W.2d 409 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.).

64. *Id.* at 415-16; accord, Dorsaneo & Robertson, *Comparative Negligence in Texas*, 10 TEX. TECH L. REV. 933, 945-49 (1979).

65. See Fisher, Nugent & Lewis, *Comparative Negligence: An Exercise in Applied Justice*, 5 ST. MARY'S L.J. 655, 666 (1974); Comment, *Settlements in Multiple Tortfeasor Controversies - Texas Law*, 10 ST. MARY'S L.J. 75, 87-88 (1978).

tion statute, article 2212.⁶⁶ In such case apportionment of recoverable damages is governed by the *Palestine* doctrine.⁶⁷ Thus, if plaintiff sues two tortfeasors, each upon theories of strict liability or one on a negligence theory and the other on strict liability in tort, a settlement with one tortfeasor entitles the nonsettlor to a credit for the amount of the settlement, plaintiff recovering no more than one-half the sum determined as damages by the jury.

B. *Divisible Injuries by Multiple Tortfeasors: Severability of Claims*

Plaintiff's injuries are sometimes divisible. That is, it can be proven that one tortfeasor broke plaintiff's jaw and another tortfeasor broke his leg. In such instances, the general elements of a tort action, mandating liability be imposed only to the extent a tortfeasor's acts are determined to be the proximate cause of injury, negate a conceptualization of joint liability.⁶⁸ Each tortfeasor is liable only for the damages shown to have been caused by his negligent conduct, the burden of proof as to causal connection resting upon the plaintiff.⁶⁹ Factual and medical proof of severability

66. See *General Motors Corp. v. Simmons*, 558 S.W.2d 855, 862 (Tex. 1977). As reasoned by the *Simmons* court, the Texas comparative negligence statute speaks only of negligence, whereas the contribution statute is expressly applicable to all torts. Because strict liability is based in tort, and further, because no system of apportionment of damages between a negligent and a strictly liable co-defendant is presented under article 2212a, article 2212 was deemed controlling. See *id.* at 862; Keeton, *Torts, Annual Survey of Texas Law*, 28 Sw. L.J. 1, 8 (1974). See also Edgar, *Products Liability in Texas*, 11 TEX. TECH L. REV. 23, 39 (1979); Sales, *Contribution and Indemnity Between Negligent and Strictly Liable Tortfeasors*, 12 ST. MARY'S L.J. 323, 346-47 (1980); Comment, *Comparative Causation, Indemnity, and the Allocation of Losses Between Joint Tortfeasors in Products Liability Cases*, 10 ST. MARY'S L.J. 587, 589-91 (1979).

67. See notes 35-43 *supra* and accompanying text; Sales, *Contribution and Indemnity Between Negligent and Strictly Liable Tortfeasors*, 12 ST. MARY'S L.J. 323, 347-48 (1980).

68. See W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 52, at 317-21 (4th ed. 1971); Sales, *Limitations on Recovery of Damages in Personal Injury Actions*, 18 S. TEX. L.J. 217, 260 & n.201 (1977). See also *Wm. Cameron & Co. v. Thompson*, 175 S.W.2d 307, 309-10 (Tex. Civ. App.—San Antonio 1943, writ ref'd w.o.m.) (no requirement to pay damage caused by another); Hodges, *Contribution and Indemnity Among Tortfeasors*, 26 TEXAS L. REV. 150, 152 (1947) (contribution statute inapplicable to party not a tortfeasor).

69. See, e.g., *Dallas Ry. & Terminal Co. v. Ector*, 116 S.W.2d 683, 685-86 (Tex. Comm'n App. 1938, opinion adopted) (charge of the court should instruct as to elements of damage stemming from defendant's acts); *Tyler Mirror & Glass Co. v. Simpkins*, 407 S.W.2d 807, 812 (Tex. Civ. App.—Tyler 1966, writ ref'd n.r.e.) (plaintiff's burden of proof); *Phillips v. Gulf & S. Am. S.S. Co.*, 323 S.W.2d 631, 635 (Tex. Civ. App.—Houston 1959, writ ref'd n.r.e.) (separate acts producing separate injuries not susceptible of imposition of joint and

of damages may be readily ascertainable in the more obvious cases of successive injuries occurring to different parts of the body, and likewise as to injuries to the same portion of the body due to distinct negligent acts.⁷⁰ Elements of proof establishing tortfeasor conduct separated by an interval of time and attributable to actions not undertaken in concert may provide a basis for determination of the injury as divisible.⁷¹ To the extent a plaintiff is able to segregate a claim of injury, a previous partial settlement, having no bearing upon satisfaction of a separate claim, should have no effect on the remaining tortfeasor's liability. In such instance no claim for contribution will lie and no credit or proportionate reduction is demanded for any previous payment made by a settlor.⁷² When the conduct of each tortfeasor combines to produce a single injury capable of apportionment, damages are divisible. Application of the rule of one satisfaction, however, requires a previous settlement be given effect, with the judgment against the non-settling tortfeasor being credited with the amount of settlement.⁷³ To prevent the non-settling tortfeasor from obtaining a pro rata reduction under the *Palestine Contractors* doctrine or a percentage reduction under article 2212a, plaintiff's attorney should make certain of two things. First, the settlement agreement should clearly state the specific injury or injuries which are the subject of the settlement. Second, as regards trial strategy, counsel should submit a damage issue clearly excluding the damages received in settlement, or, alternatively, the judgment should allow a credit for the amount of settlement. Plaintiff's goal of full compensation can thereby be adequately safeguarded.

several judgment).

70. See Sales, *Limitations on Recovery of Damages in Personal Injury Actions*, 18 S. TEX. L.J. 217, 260-61 (1977).

71. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 52, at 317-20 (4th ed. 1971); see, e.g., *Schering Corp. v. Giesecke*, 589 S.W.2d 516, 519 (Tex. Civ. App.—Eastland 1979, writ ref'd n.r.e.) (loss of hearing injury separate from additional injuries asserted under malpractice claim); *Leong v. Wright*, 478 S.W.2d 839, 841 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.) (injury to leg from automobile accident stipulated separate from subsequent loss of leg from improper cast setting); *Phillips v. Gulf & S. Am. S.S. Co.*, 323 S.W.2d 631, 635 (Tex. Civ. App.—Houston 1959, writ ref'd n.r.e.) (separate back injuries from separate acts of negligence).

72. See *Leong v. Wright*, 478 S.W.2d 839, 841 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.).

73. See *Schering Corp. v. Giesecke*, 589 S.W.2d 516, 519 (Tex. Civ. App.—Eastland 1979, writ ref'd n.r.e.). See also *RESTATEMENT (SECOND) OF TORTS* § 885 (2nd ed. 1979).

III. FROM DEFENDANT'S VIEWPOINT: OPTIONS AVAILABLE

A. *Indemnity*

1. *Common Law Indemnity.* As between defendants in multiple tortfeasor controversies application of the statutorily defined right of contribution may operate to reduce ultimate liability. The forerunner to legislative recognition of the principles of proportionate reduction in liability is to be found in the concept of common law indemnity.⁷⁴ While refusing to recognize any right of contribution among tortfeasors deemed equally culpable, or in *pari delicto*, the common law, in the proper situation, readily made allowance for what could categorically be termed a right to full reimbursement for damages paid under the theory of indemnification.⁷⁵ That is, when allowed, the party paying damages, the "indemnitee," to an injured party would be entitled to recover 100% of the amount paid from a tortfeasor "indemnitor."

Grounded upon basic equitable principles of unjust enrichment, there is no single test or general rule available for application of the principle of indemnity.⁷⁶ Situations giving rise to imposition of the duty to indemnify can be classified on the basis of the nature of liability as involving a right (1) implied in law from a pre-established relationship of the parties, or (2) existing by virtue of a separate liability of the indemnitor arising from the commission of a legal wrong against the indemnitee.⁷⁷ Within this framework the following instances can be identified as ones in which indemnity may be granted.

74. The following initial distinctions between indemnity and contribution are necessary. The right to indemnity is a creation of the common law; the right to contribution exists by virtue of statutory authorization. Under the general contribution statute, article 2212, the two rights are not coextensive. In situations allowing indemnification, per the common law theory of recovery, contribution is not available. *Strakos v. Gehring*, 360 S.W.2d 787, 797 (Tex. 1962); see *Heil Co. v. Grant*, 534 S.W.2d 916, 927 (Tex. Civ. App.—Tyler, writ ref'd n.r.e.); Hodges, *Contribution and Indemnity Among Tortfeasors*, 26 TEXAS L. REV. 150, 152 (1947).

75. See, e.g., *Austin Rd. Co. v. Pope*, 147 Tex. 430, 435, 216 S.W.2d 563, 564-66 (1949); Connally, *Contribution and Indemnity*, 16 TEX. B.J. 199, 199-200 (1953); Hodges, *Contribution and Indemnity Among Tortfeasors*, 26 TEXAS L. REV. 150, 150-62 (1947).

76. See W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 51, at 313 (4th ed. 1971).

77. Hodges, *Contribution and Indemnity Among Tortfeasors*, 26 TEXAS L. REV. 150, 152-53 (1947); see Comment, *Comparative Causation, Indemnity, and the Allocation of Losses Between Joint Tortfeasors in Products Liability Cases*, 10 ST. MARY'S L.J. 587, 594-96 (1979).

Cases involving an imputation of liability wholly derivative of another's fault routinely serve to position the party upon whom vicarious liability is imposed as an indemnitee. For example, if a plaintiff brings suit against an employer for an employee's negligence on a theory of *Respondeat Superior*, recovering \$10,000 from the employer, the employer is entitled to indemnity from the employee.⁷⁸ A like result may obtain when a party has incurred tort liability by performing an act not manifestly wrong, at the direction of and in reliance upon another. An agent, therefore, acting upon his principal's direction in selling cattle not known by the agent to be actually owned by another, may be charged by the true owner with conversion; the agent can obtain indemnity from the principal.⁷⁹

When vicarious liability was not at issue, the primary theory under which an award of indemnification was previously based was the "imaginary lawsuit" test. The standard employed by the Texas courts evolved into a consideration of the party seeking indemnity as a plaintiff suing the indemnitor in tort.⁸⁰ In such instance two tortfeasors were both liable to a plaintiff but one had breached a duty owing to the co-tortfeasor *and* the plaintiff while the other had breached a duty only to the plaintiff. The latter tortfeasor was allowed indemnity from the former on the premise that, as between themselves, the blameless tortfeasor should not bear liability. Blame, or fault, was determined by the device of the imaginary lawsuit.⁸¹ Encompassed within the principles set forth were numerous transactions giving rise to the right of indemnification, previously categorized on such various distinctions as degree of duty and passive versus active negligence.⁸² Common illustrations in-

78. See *Wheeler v. Glazer*, 137 Tex. 341, 345, 153 S.W.2d 449, 451 (1941); *South Texas Drive-In Theatre v. Thomison*, 421 S.W.2d 933, 948 (Tex. Civ. App.—Austin 1967, writ ref'd n.r.e.).

79. *Oats v. Dublin Nat. Bank*, 127 Tex. 2, 10-11, 90 S.W.2d 824, 829 (1936) (agent as blameless tortfeasor); cf. *Westheimer Transfer & Storage Co. v. Houston Bldg. Co.*, 198 S.W.2d 465, 467-68 (Tex. Civ. App.—Galveston 1946, writ ref'd n.r.e.) (indemnification allowed against independent contractor negligent in performance of non-delegable duty of indemnitee).

80. See *Austin Rd. Co. v. Pope*, 147 Tex. 430, 435, 216 S.W.2d 563, 565 (1949). See also *Hodges, Contribution and Indemnity Among Tortfeasors*, 26 TEXAS L. REV. 150, 162 (1947).

81. See *General Motors Corp. v. Simmons*, 558 S.W.2d 855, 859 (Tex. 1977); *Austin Rd. Co. v. Evans*, 499 S.W.2d 194, 200 (Tex. Civ. App.—Fort Worth 1973, writ ref'd n.r.e.); *Hodges, Contribution and Indemnity Among Tortfeasors*, 26 TEXAS L. REV. 150, 162 (1947).

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

cluded application of indemnity against a supplier of goods in favor of a retailer or user of the goods incurring liability because of a negligent reliance on the duty of care owed by the supplier.⁸³ The same result was reached when liability was imposed because of a negligent reliance on a co-tortfeasor's agreement to correct or repair a hazardous condition.⁸⁴ In each instance the party upon whom the indemnitee relied breached a duty to him. Additionally, an assignment of liability on the basis of special classification giving rise to a higher degree of care, such as a common carrier, was susceptible of qualification for indemnity as against the co-tortfeasor violating the duty of ordinary care.⁸⁵

The breach of duty analysis employed under the imaginary lawsuit test presupposes co-tortfeasors charged with negligent conduct.⁸⁶ The impact of comparative negligence under article 2212a on this concept of indemnity was recently addressed by the Texas Supreme Court. As announced in *B & B Auto Supply, Sand Pit, & Trucking Co. v. Central Freight Lines, Inc.*,⁸⁷ "the common law right of indemnity is no longer available between joint tortfeasors in negligence cases."⁸⁸ Under the reasoning presented in *B & B Auto Supply*, the common law doctrine of indemnity, a mechanism resulting in an entire shifting of the burden of loss, is incompatible with the comparative fault system underlying the statutory scheme of article 2212a; application of technical rules giving rise to imposi-

also Hodges, *Contribution and Indemnity Among Tortfeasors*, 26 TEXAS L. REV. 150, 157-63 (1947).

83. See *Air Shields, Inc. v. Spears*, 590 S.W.2d 574, 582 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.); W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 51, at 311, 312 & nn.1-2 (4th ed. 1971); Hodges, *Contribution and Indemnity Among Tortfeasors*, 26 TEXAS L. REV. 150, 156-57 (1947). See generally Sales, *Contribution and Indemnity Between Negligent and Strictly Liable Tortfeasors*, 12 ST. MARY'S L.J. 323, 338 (1980); Comment, *Comparative Causation, Indemnity, and the Allocation of Losses Between Joint Tortfeasors in Products Liability Cases*, 10 ST. MARY'S L.J. 587, 596-610 (1979).

84. See *Renfro Drug Co. v. Lewis*, 149 Tex. 507, 529, 235 S.W.2d 609, 623 (1950); W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 51, at 312 & n.3 (4th ed. 1971).

85. *Wheeler v. Glazer*, 137 Tex. 341, 345-46, 153 S.W.2d 449, 451-52 (1941); accord, *Brown & Root, Inc. v. United States*, 92 F. Supp. 257, 263 (S.D. Tex. 1950), *aff'd*, 198 F.2d 138 (5th Cir. 1952); *Panhandle Gravel Co. v. Wilson*, 248 S.W.2d 779, 783 (Tex. Civ. App.—Amarillo 1952, writ ref'd n.r.e.).

86. See, e.g., *General Motors Corp. v. Simmons*, 558 S.W.2d 855, 859-61 (Tex. 1977); *Austin Rd. Co. v. Pope*, 147 Tex. 430, 434, 216 S.W.2d 563, 565 (1949); Hodges, *Contribution and Indemnity Among Tortfeasors*, 26 TEXAS L. REV. 150, 160-62 (1947).

87. 603 S.W.2d 814 (Tex. 1980).

88. *Id.* at 817.

tion of ultimate responsibility is therefore abandoned when a basis for an assessment of percentage of fault exists.⁸⁹ In accordance with the court's rationale, indemnification rights based on a contractual agreement or upon derivative fault in the context of vicarious liability are excluded from the purview of the holding.⁹⁰ Theoretically all circumstances giving rise to indemnity under the standard embodied in the breach of duty test will, in the future, be submitted for an allocation of damages according to fault under the purview of article 2212a with losses between negligent tortfeasors being determined thereby.

The use of article 2212a as a judicial device to expand the concept of equalizing the allocation of loss is clearly illustrated by the *B & B Auto Supply* opinion. The court expressly recognizes that article 2212a has been interpreted to abolish the "all or nothing" approach, as between the plaintiff and defendant in negligence cases,⁹¹ concluding that a consistent application of the statute should result in a loss allocation between tortfeasors in proportion to their respective degrees of negligence.⁹² With the rejection of principles of indemnity, as pertains to negligent tortfeasors, Texas courts are equipped with a procedure for spreading the risk of loss.

There exists, however, in the field of strict products liability, a tort area in which common law indemnity may require re-examination. Two possible situations arise in which the problem is presented. In one, the plaintiff recovers from one tortfeasor on a negligence theory and from another on a strict products theory.⁹³ In the other situation, plaintiff recovers from both manufacturer and supplier on a strict products theory.⁹⁴

89. *Id.* at 817.

90. *Id.* at 817.

91. *Id.* at 816-17.

92. *Id.* at 817. An additional consideration, although not expressed by the court, is that administration of loss allocation under article 2212a will be much easier to apply than under the "imaginary lawsuit" test. The "imaginary lawsuit," based on breaches of legal duties owed by the tortfeasors, was dependent upon the resolution of legal, as distinguished from factual, issues and almost always required an appellate decision to resolve the controversy between the negligent tortfeasors. The jury will now perform that function.

93. See *General Motors Corp. v. Simmons*, 558 S.W.2d 855, 862 (Tex. 1977); *Bristol-Meyers Co. v. Gonzales*, 548 S.W.2d 416, 423, 427 (Tex. Civ. App.—Corpus Christi 1976), *rev'd on other grounds*, 561 S.W.2d 801 (Tex. 1978).

94. See *Griggs Canning Co. v. Josey*, 139 Tex. 623, 634, 164 S.W.2d 835, 840 (1942); *Ford Motor Co. v. Russell & Smith Ford Co.*, 474 S.W.2d 549, 557-58 (Tex. Civ. App.—Houston [14th Dist.] 1971, no writ).

In the first instance, both defendants are co-tortfeasors and have breached independent duties to the plaintiff. Accordingly, indemnity should be denied.⁹⁵ Under the present state of the law, article 2212 applies and contribution is allowed upon a ratable basis.⁹⁶ If, however, comparative fault were recognized, the loss could and should be allocated by the jury in a manner similar to that recognized in the *B & B Auto Supply* opinion.⁹⁷

The second situation presents a somewhat different problem. In one sense, the downstream supplier can be viewed as a mere conduit of the defective product, powerless to control or curtail the unreasonable danger the product possesses, and therefore, in a real sense, unable to prevent the loss. Accordingly, the ultimate responsibility should fall upon the manufacturer who placed the product in the stream of commerce. This policy, with the attendant "risk-spreading" available to the manufacturer, is one of the long standing justifications for the adoption of strict products liability.⁹⁸ If this policy is perceived to be sufficiently controlling at present, the downstream supplier should continue to obtain indemnity from those upstream so that the loss will, at least theoretically, fall upon the manufacturer.

On the other hand, one might view the downstream supplier and manufacturer as equally culpable, each owing independent duties to the plaintiff, thereby positioned to require a sharing of the loss based upon their percentages of culpability.⁹⁹ The loss, however, under the law of strict products liability is not normally considered to be based on personal culpability or fault. Liability focuses upon the offending product, not the conduct of the parties in its com-

95. See *Bristol-Myers Co. v. Gonzales*, 548 S.W.2d 416, 427-28 (Tex. Civ. App.—Corpus Christi 1976), *rev'd on other grounds*, 561 S.W.2d 801 (Tex. 1978); Keeton, *Torts, Annual Survey of Texas Law*, 32 Sw. L.J. 1, 13 (1978); Sales, *Contribution and Indemnity Between Negligent and Strictly Liable Tortfeasors*, 12 ST. MARY'S L.J. 323, 338-39 (1980).

96. See *General Motors Corp. v. Simmons*, 558 S.W.2d 855, 862 (Tex. 1977); note 66 *supra* and accompanying text.

97. See Edgar, *Products Liability in Texas*, 11 TEX. TECH L. REV. 23, 49 (1979); Keeton, *Torts, Annual Survey of Texas Law*, 32 Sw. L.J. 1, 13 (1978); Comment, *Comparative Causation, Indemnity, and the Allocation of Losses Between Joint Tortfeasors in Products Liability Cases*, 10 ST. MARY'S L.J. 587, 590-94 (1979).

98. See Edgar, *Products Liability in Texas*, 11 TEX. TECH L. REV. 23, 47 (1979). See generally *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787 (Tex. 1967).

99. See *Lubbock Mfg. Co. v. International Harvester Co.*, 584 S.W.2d 908, 912-13 (Tex. Civ. App.—Dallas 1979, writ *ref'd n.r.e.*); Sales, *Contribution and Indemnity Between Negligent and Strictly Liable Tortfeasors*, 12 ST. MARY'S L.J. 323 (1980).

mercial chain.¹⁰⁰ Therefore, in the normal strict products case, the downstream supplier, whose only involvement is the sale of the product, should continue to obtain indemnity from the upstream supplier and ultimately, the manufacturer.¹⁰¹

Procedural effect of common law indemnification. Although, under the present state of the law the right to indemnification in strict products cases remains unsettled, previous decisions have established that when a tort claimant obtains a judgment against the retailer, wholesaler, and manufacturer on strict liability, each product supplier is entitled to indemnity for the entire amount from his supplier.¹⁰² When indemnification fails, contribution rights prevail under article 2212, allowing for ratable contribution.¹⁰³ The effect of a previous settlement by plaintiff operates to reduce plaintiff's recovery and remaining defendants' liability under the principles of *Palestine Contractors*.

In the area of vicarious liability, the procedural consequences of a previous settlement upon rights of indemnification have recently undergone a dramatic change.¹⁰⁴ Earlier Texas decisions had gen-

100. See J. SALES & J. PERDUE, *THE LAW OF STRICT LIABILITY IN TEXAS* 97 (1977), also printed in 14 HOUS. L. REV. 1, 97 (1978).

101. See *B & B Auto Supply, Sand Pit, & Trucking Co. v. Central Freight Lines, Inc.*, 603 S.W.2d 814, 817 (Tex. 1980) (abolishing indemnity between negligent joint tortfeasors; opinion not reaching strict liability actions); *General Motors Corp. v. Simmons*, 558 S.W.2d 855, 860-61 (Tex. 1977) (citing cases allowing innocent distributor indemnification); cf. *Ford Motor Co. v. Russell & Smith Ford Co.*, 474 S.W.2d 549, 559 (Tex. Civ. App.—Houston [14th Dist.] 1971, no writ) (dicta) (recognizing right to indemnity). To be distinguished from the "normal" strict products case are certain cases in which indemnity should be denied the downstream supplier. For example, the failure of the automobile dealer to perform the dealer prep on a new unit or the assembler of a component part whose action combines with the original manufacturing defect to produce injury is a stronger case for contribution than indemnity because the downstream supplier has assumed an obligation to contribute to the product's safety, thereby giving rise to an independent breach of duty which is not present when he acts solely as a conduit. See Sales, *Contribution and Indemnity Between Negligent and Strictly Liable Tortfeasors*, 12 ST. MARY'S L.J. 323, 338-39 (1980).

102. Edgar, *Products Liability in Texas*, 11 TEX. TECH L. REV. 23, 47 (1979); see *Bond v. Otis Elevator Co.*, 388 S.W.2d 681, 687 (Tex. 1965); *Missouri Pac. R.R. v. Southern Pac. Co.*, 430 S.W.2d 900, 906 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ *ref'd n.r.e.*), cert. denied, 394 U.S. 1013 (1969).

103. See Edgar, *Products Liability in Texas*, 11 TEX. TECH L. REV. 23, 49 (1979) (citing *Bristol-Myers Co. v. Gonzales*, 561 S.W.2d 801 (Tex. 1978) and *General Motors Corp. v. Simmons*, 558 S.W.2d 855 (Tex. 1977)).

104. Compare *Knutson v. Morton Foods, Inc.*, 603 S.W.2d 805, 807 (Tex. 1980) (employer liable under *Respondeat Superior* has right to indemnification from settlor-employee) with *B & B Auto Supply, Sand Pit, & Trucking Co. v. Central Freight Lines, Inc.*, 603 S.W.2d 814, 817 (Tex. 1980) (common law indemnity abrogated between co-tortfeasors in

erally recognized that a plaintiff, by settling with a party against whom an established right of indemnification existed, had in turn released the indemnitee from liability.¹⁰⁵ The continued vitality of this rule was overturned in *Knutson v. Morton Foods, Inc.*,¹⁰⁶ which addressed the principles of indemnification existing under derivative liability arising under the doctrine of Respondeat Superior.¹⁰⁷ Focusing on policy considerations attendant to an application of the unity of release rule in a vicarious liability controversy, the court held, absent a showing of satisfaction, a claimant retains a right to proceed against the party derivatively liable.¹⁰⁸ The non-settling tortfeasor, whose right to indemnification continues under *B & B Auto Supply*,¹⁰⁹ has the remedy of "access to the courts for a full adjudication of his liabilities and his rights to indemnification."¹¹⁰

2. *Contractual Indemnity.* Parties are free to enter into agreements to indemnify, such representing contractual obligations con-

negligence cases though available in vicarious liability situations).

105. See *Spradley v. McCrackin*, 505 S.W.2d 955, 958 (Tex. Civ. App.—Tyler 1974, writ ref'd n.r.e.); *Panhandle Gravel Co. v. Wilson*, 248 S.W.2d 779, 784-85 (Tex. Civ. App.—Amarillo 1952, writ ref'd n.r.e.); Hodges, *Contribution and Indemnity Among Tortfeasors*, 26 TEXAS L. REV. 150, 172 (1947); Comment, *Settlements in Multiple Tortfeasor Controversies - Texas Law*, 10 ST. MARY'S L.J. 75, 86-87 (1978). The rationale employed in support of such an approach encompasses the broad policy considerations favoring settlement agreements. See *Spradley v. McCrackin*, 505 S.W.2d 955, 958 (Tex. Civ. App.—Tyler 1974, writ ref'd n.r.e.) (settlor denied effect of settlement if liability imposed by indemnity recognized); Hodges, *Contribution and Indemnity Among Tortfeasors*, 26 TEXAS L. REV. 150, 172 (1947) (settlement with ultimately liable tortfeasor operates to satisfy liability).

106. 603 S.W.2d 805 (Tex. 1980) (overruling *Spradley v. McCrackin*).

107. *Id.* at 806-07. Inasmuch as vicarious liability does not arise in favor of one tortfeasor against another, the holding of the court in *B & B Auto Supply* preserved the right of indemnification in the instance of vicarious liability. See *B & B Auto Supply, Sand Pit, & Trucking Co. v. Central Freight Lines, Inc.*, 603 S.W.2d 814, 817 (Tex. 1980) (abolishing common law indemnity between joint tortfeasors in negligence actions).

108. See *Knutson v. Morton Foods, Inc.*, 603 S.W.2d 805, 807 (Tex. 1980).

109. 603 S.W.2d 814, 817 (Tex. 1980).

110. *Knutson v. Morton Foods, Inc.*, 603 S.W.2d 805, 807 (Tex. 1980). The basic elements necessary to allow recovery of indemnification include demonstrating the settlor's own potential liability, showing that the settlement was reasonable and prudent, and establishing the existence of the basic right to indemnification. See *Powell v. Brantley Helicopter Corp.*, 395 F. Supp. 646, 653 (E.D. Tex. 1975); *Firemen's Fund Ins. Co. v. Commercial Standard Ins. Co.*, 490 S.W.2d 818, 824 (Tex. 1972). In addition to pursuing a separate claim for indemnification, the non-settlor may implead the settlor in the primary action, seeking indemnity or contribution against him. See *Bristol-Myers Co. v. Gonzales*, 561 S.W.2d 801, 803 (Tex. 1978); *Petco Corp. v. Plummer*, 392 S.W.2d 163, 164 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.).

strued in accordance with general principles of contract law.¹¹¹ While indemnity contracts have been held not to be against public policy,¹¹² enforcement of an agreement to indemnify a party against his own negligence is subject to what may be termed the "clear and unequivocal rule."¹¹³ A contract providing for indemnification for negligent conduct will be valid and binding so long as the agreement evidences the requisite intent and the language, strictly construed, so provides.¹¹⁴ It is not necessary for the agreement to state, in so many words, that "the negligence or other conduct" of the indemnitee is the subject of indemnity; a specific statement of the activity or instrumentality is adequate.¹¹⁵ This principle, however, is more properly categorized as an exception.¹¹⁶

111. See, e.g., *Joe Adams & Son v. McCann Constr. Co.*, 475 S.W.2d 721, 724 (Tex. 1971); *Spence & Howe Constr. Co. v. Gulf Oil Corp.*, 365 S.W.2d 631, 637 (Tex. 1963); *Mitchell's, Inc. v. Friedman*, 157 Tex. 424, 428-29, 303 S.W.2d 775, 777-78 (1957). Being part of a written agreement, the scope and effect to be given an indemnity provision depend on several factors:

[I]n determining the rights and liabilities of the parties, their intention will first be ascertained by rules of construction applicable to contracts generally. At this point neither party is favored over the other simply because their agreement is one of indemnity. After the intention of the parties has been determined, however, the doctrine of [strict construction] applies and the liability of the indemnitor under his contract as thus interpreted will not extend beyond the terms of the agreement.

Id. at 429, 303 S.W.2d at 778. See generally Reynolds, *Contracts of Indemnity in Texas*, 43 Tex. B.J. 297, 297-302 (1980).

112. *Spence & Howe Constr. Co. v. Gulf Oil Corp.*, 365 S.W.2d 631, 633 (Tex. 1963).

113. See, e.g., *Eastman Kodak Co. v. Exxon Corp.*, 603 S.W.2d 208, 211 (Tex. 1980); *Firemen's Fund Ins. Co. v. Commercial Standard Ins. Co.*, 490 S.W.2d 818, 822 (Tex. 1972); *Joe Adams & Son v. McCann Constr. Co.*, 475 S.W.2d 721, 723 (Tex. 1971). The basic rule is as follows: "[A] contract of indemnity will not afford protection to the indemnitee against the consequences of his own negligence unless the contract clearly expresses such an obligation in unequivocal terms." *Firemen's Fund Ins. Co. v. Commercial Standard Ins. Co.*, 490 S.W.2d 818, 822 (Tex. 1972).

114. *Mitchell's, Inc. v. Friedman*, 157 Tex. 424, 428-31, 303 S.W.2d 775, 777-79 (1957). See *Spence & Howe Constr. Co. v. Gulf Oil Corp.*, 365 S.W.2d 631, 633-34 (Tex. 1963).

115. *Mitchell's, Inc. v. Friedman*, 157 Tex. 424, 430, 303 S.W.2d 775, 779 (1957). *But cf.* *Joe Adams & Son v. McCann Constr. Co.*, 475 S.W.2d 721, 723 (Tex. 1971) (refusing enforcement of agreement to indemnify for damages sustained "through or on account of any act or in connection with the work of the Contractor").

116. *Eastman Kodak Co. v. Exxon Corp.*, 603 S.W.2d 208, 212 (Tex. 1980). As reaffirmed by the *Eastman Kodak* court, the position of the Texas Supreme Court is as follows: "[B]road general statements of the indemnity obligation are not sufficient to protect an indemnitee against his own negligence, and . . . the only presently recognized exceptions are limited to (1) agreements in which one person clearly undertakes to indemnify another against liability for injuries or damages caused by defects in certain premises or resulting from the maintenance or operation of a specified instru-

The general trend of the Texas courts since the 1950's has been progressively stricter in approaching such contracts of indemnity as unenforceable, unless the obligation to indemnify is expressed in clear and unequivocal terms.¹¹⁷ As stated by the Texas Supreme Court on several occasions, the "express negligence" rule has been approached as closely as possible without a total adoption.¹¹⁸ The end result is that a strict constructionist approach is taken in the interpretation of words of indemnity, with "nothing [read] into the intent of the parties which is not clearly and unequivocally expressed within the four corners of the contract."¹¹⁹ The crux of the issue, therefore, lies with the careful drafting of such indemnity provisions.

3. *Methods of Enforcing Indemnity.* A party entering into a settlement agreement with a tort claimant may be entitled to indemnification from another. Inasmuch as the right to indemnity unlike contribution does not depend upon statutory requirements of judicially determined liability,¹²⁰ enforcement of the settlor's claim may be had upon a lesser burden of proof. The indemnitee making a voluntary settlement without having liability judicially

mentality . . . [citing *Mitchell's, Inc. v. Friedman*, 157 Tex. 424, 303 S.W.2d 775 (1957) and *Houston & T.C.R. Co. v. Diamond Press Brick Co.*, 111 Tex. 18, 222 S.W. 204 (Tex. Comm'n App. 1920, holding approved)] . . . ; (2) agreements which fall within the peculiar circumstances of the indemnitor having complete supervision over the property and employees of the indemnitee in connection with the performance of the indemnitor's contract . . . [citing *Spence & Howe Constr. Co. v. Gulf Oil Corp.*, 365 S.W.2d 631 (Tex. 1963)] . . . ; and (3) contracts in which there is an unequivocal provision that indemnitor will protect and indemnify the indemnitee from any and all liability by reason of injuries to indemnitor's employees . . . [citing *Ohio Oil Co. v. Smith*, 365 S.W.2d 621 (Tex. 1963)].'

Id. at 212. See generally Reynolds, *Contracts of Indemnity in Texas*, 43 TEX. B.J. 297, 300-04 (1980).

117. *Eastman Kodak Co. v. Exxon Corp.*, 603 S.W.2d 208, 211 (Tex. 1980) (citing cases); Reynolds, *Contracts of Indemnity in Texas*, 43 TEX. B.J. 297, 300 (1980).

118. *Eastman Kodak Co. v. Exxon Corp.*, 603 S.W.2d 208, 211 (Tex. 1980); *Firemen's Fund Ins. Co. v. Commercial Standard Ins. Co.*, 490 S.W.2d 818, 822 (Tex. 1972). See Reynolds, *Contracts of Indemnity in Texas*, 43 TEX. B.J. 297, 300-02 (1980).

119. Reynolds, *Contracts of Indemnity in Texas*, 43 TEX. B.J. 297, 299 (1980).

120. See *Callihan Interests, Inc. v. Duffield*, 385 S.W.2d 586, 587 (Tex. Civ. App.—Eastland 1964, writ ref'd). Article 2212 makes express allowance for contribution, available only when indemnity rights are not present, after a "judgment." Because of the wording of the statute, courts generally permit contribution proceedings only in conjunction with judicially determined liability. See TEX. REV. CIV. STAT. ANN. art. 2212 (Vernon 1971); Comment, *Settlements in Multiple Tortfeasor Controversies - Texas Law*, 10 ST. MARY'S L.J. 75, 80 n.40 (1978).

determined is required to prove his *potential* liability to the injured party and that the amount of the settlement was reasonable.¹²¹ In other words, the settlor seeking indemnification must show the settlement was made in good faith and was reasonable and prudent under the circumstances.¹²²

When a nonsettlor is asserting a right to indemnification subsequent to a partial settlement, the procedural method of asserting the claim is clear: the settlor should be impleaded in the primary action and a cross-claim asserted for indemnity.¹²³ It is unclear, however, what form an assessment of liability against a settlor should take.¹²⁴ Theoretically, when a right to indemnity is established, a court may deem the nonsettlor released by the settlement,¹²⁵ allow a credit reduction for the amount of the settlement,¹²⁶ or award the nonsettlor full indemnification.¹²⁷ Under the

121. See *Firemen's Fund Ins. Co. v. Commercial Standard Ins. Co.*, 490 S.W.2d 818, 823-24 (Tex. 1972); *Gulf, Colo. & S.F. Ry. v. McBride*, 159 Tex. 442, 448, 322 S.W.2d 492, 497 (1958). An indemnitee desiring to settle with the injured party without a judicial determination of its liability should, absent an express contractual right to settle, notify the indemnitor of the pendency of the suit or claim and give the latter the opportunity to manage or defend the proceeding or matter. Subsequent to demand being made, a refusal of liability by the indemnitor justifies indemnitee's entering into settlement. See *Gulf, Colo. & S.F. Ry. v. McBride*, 159 Tex. 442, 447-48, 322 S.W.2d 492, 496-97 (1958); *Pan Am. Gas Co. v. Natural Gas Constr. Corp.*, 418 S.W.2d 380, 381 (Tex. Civ. App.—Waco 1967, writ ref'd n.r.e.). Furthermore, an indemnitor's refusal of liability and assertion of such under motion for summary judgment in an indemnity proceeding operates as a waiver of any right to a judicial determination of indemnitee's legal liability. *Mitchell's, Inc. v. Friedman*, 157 Tex. 424, 431, 303 S.W.2d 775, 779 (1957).

122. *Mitchell's, Inc. v. Friedman*, 157 Tex. 424, 431, 303 S.W.2d 775, 779 (1957).

123. 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.).

124. See *Dorsaneo & Robertson, Comparative Negligence in Texas*, 10 TEX. TECH L. REV. 933, 951-52 (1979); Comment, *Settlements in Multiple Tortfeasor Controversies - Texas Law*, 10 ST. MARY'S L.J. 75, 86-87 (1978).

125. See *Panhandle Gravel Co. v. Wilson*, 248 S.W.2d 779, 784-85 (Tex. Civ. App.—Amarillo 1952, writ ref'd n.r.e.) (allowing release of non-settling tortfeasor to avoid circuitry of of action under separate indemnity provision contained in settlement agreement). *But cf.* *Knutson v. Morton Foods, Inc.*, 603 S.W.2d 805, 806-07 (Tex. 1980) (abolishing unity release rule in settlements under vicarious liability controversies; possible circuitry of action not controlling issue).

126. See *Frantom v. Neal*, 426 S.W.2d 268, 272 (Tex. Civ. App.—Fort Worth 1968, writ ref'd n.r.e.) (indicating credit appropriate when indemnity claim available against one settling out under covenant not to sue).

127. See *Knutson v. Morton Foods, Inc.*, 603 S.W.2d 805, 808 (Tex. 1980); *Panhandle Gravel Co. v. Wilson*, 248 S.W.2d 779, 784-85 (Tex. Civ. App.—Amarillo 1952, writ ref'd n.r.e.); *Dorsaneo & Robertson, Comparative Negligence in Texas*, 10 TEX. TECH L. REV. 933, 951-52 (1979).

policy considerations favoring settlement agreements, construing the settlement as a complete satisfaction and therefore a release of the vicariously liable party, would appear to be the most consistent approach.¹²⁸

B. Contribution

1. *Availability and Application.* Contribution initially arose as a mitigator of the harsh "all or nothing" approach fostered by common law indemnity. Contribution entails 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."¹²⁹ This concept inherently involves two parts: 1) all contributing tortfeasors must be found liable or, under some theory, owing to the injured party; 2) the tortfeasor seeking contribution must have expended an amount in excess of his proportionate share.¹³⁰

Unlike indemnity, which traces its roots to the common law,¹³¹ contribution is a legal concept founded by statute.¹³² Since the en-

128. See Dorsaneo & Robertson, *Comparative Negligence in Texas*, 10 TEX. TECH L. REV. 933, 951-52 (1979); Hodges, *Contribution and Indemnity Among Tortfeasors*, 26 TEXAS L. REV. 150, 172 (1947). The rationale employed under such determination is "that to encourage settlements, which protects [the settlor] from further liability and to give [non-settling tortfeasors] an indemnity right, can only be accomplished by foreclosing the plaintiff from recovery." Dorsaneo & Robertson, *Comparative Negligence in Texas*, 10 TEX. TECH L. REV. 933, 951-52 (1979); see Hodges, *Contribution and Indemnity Among Tortfeasors*, 26 TEXAS L. REV. 150, 172 (1947).

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

130. See, e.g., *Gattegno v. The Parisian*, 53 S.W.2d 1005, 1007 (Tex. Comm'n App. 1932, holding approved); *H.M.R. Constr. Co. v. Wolco, Inc.*, 422 S.W.2d 214, 217 (Tex. Civ. App.—Houston [14th Dist.] 1967, writ ref'd n.r.e.); *Hampton & Kennedy Lumber Co. v. Whitfield*, 213 S.W.2d 152, 154-55 (Tex. Civ. App.—Texarkana 1948, no writ); TEX. REV. CIV. STAT. ANN. art. 2212 (Vernon 1971). See generally Comment, *Settlements in Multiple Tortfeasor Controversies - Texas Law*, 10 ST. MARY'S L.J. 75, 79-93 (1978).

131. *Strakos v. Gehring*, 360 S.W.2d 787, 797 (Tex. 1962); *Wheeler v. Glazer*, 137 Tex. 341, 344-45, 153 S.W.2d 449, 451 (1941). See generally Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130 (1932).

132. TEX. REV. CIV. STAT. ANN. art. 2212 (Vernon 1971). The Texas legislature first enacted the contribution statute in 1917 and it has since remained unchanged:

Any person against whom, with one or more others, a judgment is rendered in any suit on an action arising out of, or based on tort, except in causes wherein the right of contribution or of indemnity, or of recovery, over, by and between the defendants is given by statute or exists under the common law, shall, upon payment of said judgment, have a right of action against his co-defendant or co-defendants and

actment of Texas' contribution statute in 1917,¹³³ however, courts have confused these two distinct doctrines.¹³⁴ A primary indicator that contribution, rather than indemnity, is applicable is the stature of the tortfeasors in relation to the plaintiff. Indemnity has never been available to defendants standing in *pari delicto*.¹³⁵ Under such a circumstance multiple tortfeasors are considered to be equally liable, both owing an independent duty of care to the plaintiff while in turn owing no duty to the co-defendant.¹³⁶ Since the co-defendants' culpabilities are balanced, neither can be charged with unrequited liability to indemnify the other.

As previously discussed, the Texas Supreme Court recently narrowed the application of indemnity between negligent tortfeasors;¹³⁷ indemnification rights no longer exist when several negligent tortfeasors interact to injure a third party.¹³⁸ This action

may recover from each a sum equal to the proportion of all of the defendants named in said judgment rendered to the whole amount of said judgment. If any of said persons co-defendant be insolvent, then recovery may be had in proportion as such defendant or defendants are not insolvent; and the right of recovery over against such insolvent defendant or defendants in judgment shall exist in favor of each defendant in judgment in proportion as he has been caused to pay by reason of such insolvency.

Id.

133. See *id.* Note, however, that Texas enacted a comparative negligence statute in 1973. *Id.* art. 2212a (Vernon Supp. 1980). The primary difference between the two statutes is that article 2212a has been construed to supercede article 2212 in situations involving jointly negligent tortfeasors, but is not applicable in non-negligence actions. See *General Motors Corp. v. Simmons*, 558 S.W.2d 855, 861-62 (Tex. 1977). Additionally, article 2212a utilizes a modified comparative negligence approach for allocating liability, whereas article 2212 allocates loss on a pro rata basis. Compare TEX. REV. CIV. STAT. ANN. art. 2212 (Vernon 1971) with *id.* art. 2212a, § 1 (Vernon Supp. 1980).

134. Indemnity has on at least one occasion been erroneously labeled contribution. See *West Texas Util. Co. v. Renner*, 32 S.W.2d 264, 270 (Tex. Civ. App.—Eastland 1930), *aff'd in part, rev'd in part*, 53 S.W.2d 451 (Tex. Comm'n App. 1932, holding approved). Although the court allowed contribution, indemnity was the appropriate remedy based upon the facts and the test applied. *Id.* at 270; Comment, *Contribution Among Joint Tortfeasors*, 44 TEXAS L. REV. 326, 327 n.9 (1965).

135. *Gulf, Colo. & S.F. Ry. v. Bliss*, 368 S.W.2d 594, 596-97 (Tex. 1963); *Strakos v. Gehring*, 360 S.W.2d 787, 798 (Tex. 1962); *Austin Rd. Co. v. Pope*, 147 Tex. 430, 434-35, 216 S.W.2d 563, 565 (1949); see Keeton, *Contribution and Indemnity Among Tortfeasors*, 27 INS. COUNSEL J. 630, 631 (1960).

136. See Hodges, *Contribution and Indemnity Among Tortfeasors*, 26 TEXAS L. REV. 150, 152-53 (1947); Comment, *Contribution Among Joint Tortfeasors*, 44 TEXAS L. REV. 326, 331 (1965).

137. See *B & B Auto Supply, Sand Pit, & Trucking Co. v. Central Freight Lines, Inc.*, 603 S.W.2d 814, 817 (Tex. 1980).

138. *Id.* at 817. The court stated: "The common law right of indemnity is no longer available between joint tortfeasors in negligence cases." *Id.* at 817.

correspondingly broadened the scope of contribution.

2. *Contribution Rights in Non-Negligence Cases Under Article 2212.* Texas adopted its first contribution statute, article 2212, in 1917.¹³⁹ The statute was enacted to spread the burden of judgment among tortfeasors when one had satisfied the entire judgment, exceeding his pro rata share.¹⁴⁰ Integral to the application of article 2212 is the requirement of a judgment in the primary action.¹⁴¹ The statute literally requires that the right of contribution arise from the payment of a judgment by the contributee to the tort claimant. A payment by a tortfeasor in settlement, therefore, does not entitle the settlor to contribution.¹⁴² In comparison, however, an agreed judgment will entitle the contributee to contribution if, in the contribution action, facts necessary to demonstrate the contributor's liability to the plaintiff are established.¹⁴³ Further, if a judgment of dismissal is entered as the result of a successful compromise and settlement, the agreement must settle the claims against both settling and non-settling tortfeasors if the settling tortfeasor anticipates exercising the right of contribution against the non-settling tortfeasor.¹⁴⁴ Under such an agreement it is imper-

139. 1917 Tex. Gen. Laws, ch. 152, § 1, at 360.

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

141. *Lubbock Mfg. Co. v. International Harvester Co.*, 584 S.W.2d 908, 913 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.); *Callihan Interests, Inc. v. Duffield*, 385 S.W.2d 586, 587 (Tex. Civ. App.—Eastland 1964, writ ref'd); TEX. REV. CIV. STAT. ANN. art. 2212 (Vernon 1971) (“[a]ny person against whom, with one or more others, a judgment is rendered . . .”); see, e.g., *Hodges, Contribution and Indemnity Among Tortfeasors*, 26 TEXAS L. REV. 150, 166 (1947); Comment, *Indemnity and Contribution Among Joint Tortfeasors*, 15 HOUS. L. REV. 1004, 1008 (1978); Comment, *Settlements in Multiple Tortfeasor Controversies - Texas Law*, 10 ST. MARY'S L.J. 75, 79 (1978). It should be noted that article 2212a is not as explicit in requiring a final judgment; however, a reasonable construction thereof would be to require a judgment in the primary action. See TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1980).

142. See *Lower Neches Valley Auth. v. Beaumont*, 392 S.W.2d 733, 736 (Tex. Civ. App.—Beaumont 1965, writ ref'd n.r.e.). But see *Wm. Cameron & Co. v. Thompson*, 175 S.W.2d 307, 310 (Tex. Civ. App.—San Antonio 1943, writ ref'd w.o.m.). In *Cameron* the San Antonio Court of Civil Appeals determined that an agreement between the employee and a co-defendant railway company did not go so far as to bar contribution. *Id.* at 310.

143. *Callihan Interests, Inc. v. Duffield*, 385 S.W.2d 586, 588 (Tex. Civ. App.—Eastland 1964, writ ref'd); see *Lubbock Mfg. Co. v. International Harvester Co.*, 584 S.W.2d 908, 911 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.).

144. *Lubbock Mfg. Co. v. International Harvester Co.*, 584 S.W.2d 908, 911-12 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.); accord, *Traveler's Ins. Co. v. United States*, 283 F. Supp. 14, 29-30 (S.D. Tex. 1968); *Callihan Interests, Inc. v. Duffield*, 385 S.W.2d 586, 587 (Tex. Civ. App.—Eastland 1964, writ ref'd). In *Traveler's* the court set out the requirements

ative that the settlor negotiate for the release of any absent tortfeasor because the original plaintiff's reservation of the right to sue a non-settling tortfeasor will bar contribution.¹⁴⁵

The contribution rights of a settling tortfeasor against a non-settling tortfeasor hinge upon the terms of the settlement agreement.¹⁴⁶ Illustrative of this concept is the court's holding in *Callihan Interest, Inc. v. Duffield*,¹⁴⁷ in which a pre-trial agreement was construed as an agreed judgment, satisfying the requirement of a previous judgment.¹⁴⁸ Callihan was determined entitled to contribution from the non-settlor, Duffield, because plaintiff, in the settlement agreement, had released all tortfeasors from any suit arising out of plaintiff's cause of action.¹⁴⁹ The decisive elements of such agreed judgment, giving rise to contribution rights, include a release of all recognized tortfeasors and payment by the settlor in excess of his pro rata share.¹⁵⁰ On the contrary, if a party accomplishes an accord with plaintiff which does not dismiss plaintiff's claim as to all tortfeasors, such settlement merits no right to contribution.¹⁵¹

A settlement made for less than full value of the claim does not give rise to contribution. In *Lower Neches Valley Authority v. Beaumont*,¹⁵² the Valley Authority entered into a voluntary settle-

of article 2212 in reference to settlement agreements:

[Article 2212] does require . . . that the agreement receive the sanction of the court and that a judgment be entered finally disposing of the original plaintiff's cause of action against the defendant and the alleged *joint tortfeasor*. A dismissal of the plaintiff's cause of action with prejudice upon a settlement agreement of the parties accomplishes this result.

Id. at 30 (emphasis added).

145. See *Lubbock Mfg. Co. v. International Harvester Co.*, 584 S.W.2d 908, 911-12 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.); Comment, *Contribution Among Joint Tortfeasors*, 44 TEXAS L. REV. 333, 339 (1966).

146. If the settlement is made for full value of the claim, the right to contribution under article 2212 is dependent upon whether the agreement resembles a "judgment" or is merely a "settlement." See TEX. REV. CIV. STAT. ANN. art. 2212 (Vernon 1971); Comment, *Settlements in Multiple Tortfeasor Controversies - Texas Law*, 10 ST. MARY'S L.J. 75, 80 (1978).

147. 385 S.W.2d 586 (Tex. Civ. App.—Eastland 1964, writ ref'd).

148. See *id.* at 586, 587.

149. See *id.* at 586, 587. "To hold that Callihan lost its right to contribution because it agreed to the judgment . . . would be contrary to the policy of the law to encourage settlement of cases." *Id.* at 587.

150. See *id.* at 588.

151. See *id.* at 587.

152. 392 S.W.2d 733 (Tex. Civ. App.—Beaumont 1965, writ ref'd n.r.e.).

ment with the original plaintiffs and then sought contribution from the remaining tortfeasors.¹⁵³ The court denied contribution, reasoning the Valley Authority had perfected a settlement of only a partial value of the claim, allowing plaintiff a cause of action against the City of Beaumont.¹⁵⁴

In contrast to the situation of a settling tortfeasor seeking contribution from the non-settling tortfeasor is the stature of a co-tortfeasor who has paid a judgment at trial. Although there are many considerations to be contemplated by the non-settling tortfeasor, his initial concern is to have the settling tortfeasor adjudged liable for a portion of the plaintiff's injury.¹⁵⁵ Such adjudication can be accomplished through various methods, each designed to satisfy the "judgment" mandate of article 2212. The most direct method for gaining a judgment against the settlor is to join him as a party in the main action through a third-party complaint.¹⁵⁶ The settling tortfeasor's liability can thereby be established concurrent with that of the non-settling tortfeasor, entitling the non-settlor to contribution in the form of a ratable set-off.¹⁵⁷

The ratable reduction formula stems from the *Palestine Contractors* doctrine.¹⁵⁸ Under this formula, if the plaintiff settles with one tortfeasor for \$2,000, and subsequently sues a co-tortfeasor,

153. *Id.* at 734.

154. *Id.* at 734, 736; see *Traveler's Ins. Co. v. United States*, 283 F. Supp. 14, 27-28 n.24 (S.D. Tex. 1968); Dorsaneo & Robertson, *Comparative Negligence in Texas*, 10 TEX. TECH L. REV. 933, 949 (1979); Comment, *Settlements in Multiple Tortfeasor Controversies - Texas Law*, 10 ST. MARY'S L.J. 75, 89 (1978).

155. See, e.g., *E. I. du Pont de Nemours & Co. v. McCain*, 414 F.2d 369, 371 (5th Cir. 1969) (applying Texas law); *Connell v. Rosales*, 419 S.W.2d 673, 678-79 (Tex. Civ. App.—Texarkana 1967, no writ); *Petco Corp. v. Plummer*, 392 S.W.2d 163, 166-67 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.).

156. See *Petco Corp. v. Plummer*, 392 S.W.2d 163, 167 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.). *But cf.* *Deal v. Madison*, 576 S.W.2d 409, 415-16 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.) (considering application of article 2212a). In *Deal v. Madison* the court felt it pointless to require the non-settling tortfeasor to join the settlor simply to determine his liability existed. The court quoted Dean Keeton in concluding: "Bringing in a third party against whom no relief can be granted in order to determine what relief should be granted as between the original parties is an empty formalism." *Id.* at 416; Keeton, *Torts, Annual Survey of Texas Law*, 28 Sw. L.J. 1, 14 (1974).

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

158. *Palestine Contractors, Inc. v. Perkins*, 386 S.W.2d 764, 767 (Tex. 1964). Regardless of the monetary amount gained in settlement from a co-tortfeasor, the non-settling tortfeasor is entitled to a pro rata reduction based upon the number of settling tortfeasors. *Id.* at 767.

the recommended procedure for the latter tortfeasor is to join the former by a third-party action. If the jury finds facts that would otherwise impose joint and several liability on both tortfeasors, and determines a damage amount of \$10,000, the judgment should award plaintiff \$5,000, recoverable from the non-settling tortfeasor. The non-settlor recovers nothing from the settling tortfeasor, as the right to contribution has been satisfied.¹⁵⁹

Conversely, assume the settlement is greater than the sum afforded by ratable reduction. There is some authority to the effect that the non-settlor should be entitled to elect which sum he will expend.¹⁶⁰ Under such circumstances it would be more advantageous for the non-settling co-tortfeasor to obtain a credit for the amount of settlement, contributing the remainder of the judgment rather than his corresponding pro rata share. As a result, if the plaintiff settles with one tortfeasor for \$7,000 and then obtains a jury verdict against a co-tortfeasor for \$10,000, the judgment should award the plaintiff only \$3,000.¹⁶¹

Of principal importance to the non-settling tortfeasor is the joinder of settling tortfeasors in concurrent litigation. At present, a non-settling tortfeasor's right to a credit or ratable reduction in the absence of a determination of settlor's liability is uncertain.¹⁶² It is clear, however, that a tortfeasor will not gain a pro rata reduction in liability from a settling tortfeasor *not* joined as a party.¹⁶³ Finally, if the liability of the settling tortfeasor, though joined as a party, is not established, a question exists as to whether the non-settling tortfeasor should receive either credit or ratable reduc-

159. *See id.* at 767, 773. *See generally* Gattegno v. The Parisian, 53 S.W.2d 1005, 1007 (Tex. Comm'n App. 1932, holding approved); Hodges, *Contribution and Indemnity Among Tortfeasors*, 26 TEXAS L. REV. 150, 171 (1947). *See also* Bohlen, *Contribution and Indemnity Between Tortfeasors*, 21 CORNELL L.Q. 552, 567 (1936).

160. Dorsaneo & Robertson, *Comparative Negligence in Texas*, 10 TEX. TECH L. REV. 933, 944 (1979). *See also* Deal v. Madison, 576 S.W.2d 409, 423 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.) (construing article 2212a contribution rights).

161. *See* Dorsaneo & Robertson, *Comparative Negligence in Texas*, 10 TEX. TECH L. REV. 933, 944 & n.57 (1979).

162. *See id.* at 946 n.68; Comment, *Settlements in Multiple Tortfeasor Controversies - Texas Law*, 10 ST. MARY'S L.J. 75, 82, 90 n.116 (1978).

163. *Petco Corp. v. Plummer*, 392 S.W.2d 163, 167-68 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.); *accord*, *E. I. du Pont de Nemours Co. v. McCain*, 414 F.2d 369, 375 (5th Cir. 1969) (applying Texas law); *Connell v. Rosales*, 419 S.W.2d 673, 679 (Tex. Civ. App.—Texarkana 1967, no writ).

tion.¹⁶⁴ Since the non-settling tortfeasor would probably have been entitled to a credit had there been no joinder by the third-party action,¹⁶⁵ a credit has been recommended as the proper procedural consequence.¹⁶⁶

If the settling tortfeasor is not joined as a party in the main action and the amount of settlement is less than one-half the damages, the non-settling tortfeasors are allowed a credit for the settlement and contribution against each other.¹⁶⁷ For example, consider the situation where plaintiff settles with one tortfeasor for \$1,000 and sues two co-tortfeasors, who seek contribution from one another. Liability is established and plaintiff's damages are found to be \$10,000. The non-settling tortfeasors are entitled to a \$1,000 credit, resulting in a joint and several judgment against them for \$9,000¹⁶⁸ and providing for contribution between them of \$4,500. Had plaintiff settled with the first tortfeasor for \$6,000, the joint and several judgment should be for \$4,000, with contribution rights of \$2,000 between each non-settling tortfeasor.¹⁶⁹

Under more basic circumstances, a defendant is often one of several potential tortfeasors before the court, none of such tortfeasors having settled with plaintiff. To be assured that all tortfeasors be adjudged liable for an equivalent proportion of the verdict, each defendant should assert a cross-claim for contribution under rule 97(e).¹⁷⁰ Once judgment is rendered, each tortfeasor, while jointly

164. See Dorsaneo & Robertson, *Comparative Negligence in Texas*, 10 TEX. TECH L. REV. 933, 946 & nn. 67-68 (1979) (ratable reduction not available; credit reduction should be allowed).

165. See *id.* at 946; Comment, *Settlements in Multiple Tortfeasor Controversies - Texas Law*, 10 ST. MARY'S L.J. 75, 82 (1978).

166. See Dorsaneo & Robertson, *Comparative Negligence in Texas*, 10 TEX. TECH L. REV. 933, 946 (1979); Comment, *Settlements in Multiple Tortfeasor Controversies - Texas Law*, 10 ST. MARY'S L.J. 75, 82 (1978).

167. See *Petco Corp. v. Plummer*, 392 S.W.2d 163, 164, 167 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.).

168. See *id.* at 168.

169. See *id.* at 168.

170. TEX. R. CIV. P. 97(e). The rule reads, in pertinent part:

Cross-Claim Against Co-Party. A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

Id.

and severally liable to the plaintiff, has a judgment against the other tortfeasors to enforce equal payment of the award.¹⁷¹ *Union Iron & Metal Co. v. Gibson*¹⁷² provides a good example of this concept. Plaintiff sued four tortfeasors, obtaining a joint and several judgment for \$24,500.¹⁷³ The court determined that while plaintiff could obtain satisfaction from any defendant, any one of the defendants paying more than its proportionate share of \$6,125 could seek contribution,¹⁷⁴ provided such claim had been previously asserted. Contribution, however, could only be pursued and levied against a defendant paying less than a pro rata share of the judgment. In other words, any tortfeasor paying more than one-fourth of the judgment would be entitled to contribution from a counterpart paying less than that amount.¹⁷⁵

The situation will also arise when, although no settlement has been consummated, less than all the tortfeasors are before the court. A defendant confronted with such an event may seek leave to file a third-party claim for contribution against the absent tortfeasors under rule 38(a).¹⁷⁶

Although article 2212 would appear to require the presence of all tortfeasors in the primary suit,¹⁷⁷ a defendant is permitted to maintain a subsequent action for contribution against an absent tortfeasor if the latter was unknown at the time of trial or a procedural bar prevented joinder.¹⁷⁸ If, however, all tortfeasors have

171. *Union Iron & Metal Co.*, 374 S.W.2d 458, 462 (Tex. Civ. App.—Texarkana 1963, writ ref'd n.r.e.).

172. 374 S.W.2d 458 (Tex. Civ. App.—Texarkana 1963, writ ref'd n.r.e.).

173. *Union Iron & Metal Co.*, 374 S.W.2d 458, 460 (Tex. Civ. App.—Texarkana 1963, writ ref'd n.r.e.). The appellant, Mrs. Gibson, suffered injuries when hit by a Houston Transit Company bus and a truck driven by an employee of Union Iron and Metal Company. *Id.* at 459-60.

174. *See id.* at 462.

175. *See id.* at 462; TEX. REV. CIV. STAT. ANN. art. 2212 (Vernon 1971).

176. *See* TEX. R. CIV. P. 38(a). A defendant may choose to implead additional parties either because he believes they may be partially or totally liable for a portion of the plaintiff's recovery, or that they are directly liable so as to absolve the defendant's liability. Rule 38 defines impleader under such circumstances. *Id.*; *see* *Golden State Mut. Life Ins. Co. v. Adams*, 340 S.W.2d 77, 79 (Tex. Civ. App.—Fort Worth 1960, no writ). *See generally* R. McDONALD, TEXAS CIVIL PRACTICE IN DISTRICT & COUNTY COURTS § 3.45.1 (1970).

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

178. *Union Bus Lines v. Byrd*, 142 Tex. 257, 260, 177 S.W.2d 774, 776 (1944); *see* *Lottman v. Cuilla*, 288 S.W. 123, 126 (Tex. Comm'n App. 1926, holding approved). *See also* *Gattegno v. The Parisian*, 53 S.W.2d 1005, 1007 (Tex. Comm'n App. 1932, holding approved).

been joined as original defendants in a non-negligence action, contribution claims should be asserted in the primary suit. Otherwise, the compulsory counter-claim provision of rule 97(a) may have the effect of barring a future action.¹⁷⁹ For example, assume plaintiff sues two tortfeasors and only one cross-claims against the other for contribution. A joint and several judgment in favor of the plaintiff against both defendants would allow the cross-plaintiff contribution from the cross-defendant. A subsequent action for contribution, however, by the tortfeasor who failed to file a cross-claim may be barred by rule 97(a) as it was a compulsory counter-claim to the cross-claim in the first action.¹⁸⁰

It is important to differentiate the immediately preceding example from an action in which neither tortfeasor seeks contribution in the primary suit.¹⁸¹ If article 2212 does not require the tortfeasors to assert contribution claims in the primary suit, they are not precluded from a later claim under rule 97(a). Therefore, if neither tortfeasor filed a cross-claim against the other, either could maintain a subsequent action for contribution.¹⁸²

The exact status of a potential contributor not a party to the main action remains unresolved. In *Callihan Interests, Inc. v. Duffield*,¹⁸³ the contributee impleaded the contributor by a third-party

179. Tex. R. Civ. P. 97(a). The rule reads, in pertinent part:

Compulsory Counterclaims. A pleading shall state as a counterclaim any claim within the jurisdiction of the court, not the subject of a pending action, which at the time of filing the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction; provided, however, that a judgment based upon a settlement or compromise of a claim of one party to the transaction or occurrence prior to a disposition on the merits shall not operate as a bar to the continuation or assertion of the claims of any other party to the transaction or occurrence unless the latter has consented in writing that said judgment shall operate as a bar.

Id.

180. *Id.*; see *Griffin v. Holiday Inns of America*, 496 S.W.2d 535 (Tex. 1973).

181. *Hall v. Bleisch*, 400 F.2d 896, 897 (5th Cir. 1968) (per curiam) (applying Texas law).

182. *Cf. id.* at 896-97 (rule 97 does not bar subsequent assertion of cross-claims). It should be remembered, however, that in a negligence action, article 2212a, subsection 2(g) requires all named defendants to assert their contribution claims in the primary suit. See TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(g) (Vernon Supp. 1980).

183. 385 S.W.2d 586 (Tex. Civ. App.—Eastland 1965, writ ref'd). Salt water from Callihan's oil operations fouled the fresh water on Duffield's property. *Id.* at 587.

action.¹⁸⁴ The third-party action, however, was subsequently severed by agreement.¹⁸⁵ Left undecided was whether the damages of the first action must be relitigated before the contributor's liability to the contributee could be fixed and the basis for contribution established.¹⁸⁶

3. *Contribution Rights in Negligence Cases Under Article 2212a.* In comparison with the alternatives available under article 2212, discussed above, article 2212a provides the non-settling tortfeasor with a different series of options.¹⁸⁷ If, for example, there has been no settlement under article 2212 and all of the tortfeasors are before the court, each tortfeasor is jointly and severally liable for the entire judgment. Under article 2212a, however, the negligence of each party is determined on a percentage basis. If a tortfeasor's negligence is adjudged less than the plaintiff's negligence such tortfeasor is liable only for the percentage of his adjudicated negligence.¹⁸⁸ Further, each tortfeasor is permitted contribution for any sum paid to the extent payment is in excess of the amount represented by the percentage of his own negligence.¹⁸⁹

Assume the jury finds plaintiff 20% negligent, and tortfeasors one, two, and three 10%, 30%, and 40% negligent, respectively, with plaintiff's damages at \$10,000. Damages are first reduced commensurate with plaintiff's own contributory negligence of 20%, or \$2,000; the plaintiff being entitled to a judgment of \$8,000. The tortfeasors do not contribute to the judgment equally; rather, they are accountable for such sum to the following extent: tortfeasor one is liable for \$1,000 while tortfeasors two and three are jointly

184. *Id.* at 586.

185. *See id.* at 588.

186. *See id.* at 588.

187. Although contribution under article 2212a is an alternative in numerous negligence actions, worker's compensation insurance continues to bar contribution claims arising under the article. A tortfeasor would frequently have a valid claim for contribution against the tort claimant's employer but for article 8306, section 5. *See* TEX. REV. CIV. STAT. ANN. art. 8306, § 5 (Vernon 1925). Section 5 provides that the subscriber to worker's compensation shall have no liability from a judgment or settlement arising out of death or injury to the subscriber's employee. An argument was recently made that article 2212a repealed section 5 by implication. The court, however, held otherwise. *See* General Elev. Corp. v. Champion Papers, 590 S.W.2d 763, 764-65 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.).

188. TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(b) (Vernon Supp. 1980). Texas uses a modified comparative negligence approach which requires the plaintiff to be less than 51% negligent to recover damages. *See id.* § 1.

189. *Id.* § 2(f).

and severally liable for \$8,000. If tortfeasor two is required to pay more than \$3,000 or tortfeasor three more than \$4,000, the one paying more than his share is entitled to contribution from the tortfeasor paying less than his share.¹⁹⁰

A second distinction arising under article 2212a concerns the express requirement that all named defendants assert their claims in the primary suit.¹⁹¹ If there has been no settlement and all tortfeasors are before the court, those not seeking contribution are barred from obtaining it in a later action.¹⁹² Assume plaintiff sues two negligent tortfeasors, but only one tortfeasor files a cross-claim for contribution. The jury finds plaintiff 10% negligent, and each tortfeasor negligent to a greater extent than plaintiff, with damages set at \$10,000. A joint and several judgment should be entered against both tortfeasors for \$9,000, providing contribution in favor of the cross-plaintiff against the cross-defendant for any expenditure exceeding the sum proportionate to the percentage of cross-plaintiff's negligence. Since the cross-defendant did not seek contribution in the primary suit the judgment should not provide for it and such party is precluded, under the statute, from obtaining it in a subsequent action.¹⁹³

If less than all tortfeasors are before the court, with no settlement perfected, the defendants presumably, assuming there are no venue problems, have a right to seek joinder of the absent tortfeasor by a third-party claim for contribution.¹⁹⁴ Unsettled, however, is whether the trial court should submit the percentage of such third-party defendant's negligence to the jury.¹⁹⁵ A close examination of article 2212a, subsection 2(a), which defines "claimants," reveals that third-party claimants are not included, thereby supporting the argument that neither a third-party claim nor the percentage of a third-party defendant's negligence are to be submitted to the jury.¹⁹⁶ Otherwise, the third-party defendant, if proven negligent, might be subject to contribution. The operation of the statute as construed may be illustrated as follows. Plaintiff

190. *Id.* § 2(f).

191. *Id.* § 2(g).

192. *Id.* § 2(g).

193. *Id.* § 2(g). See also TEX. R. CIV. P. 97(a) (compulsory counterclaim).

194. TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(g) (Vernon Supp. 1980).

195. *Id.* § 2(a) (implying third party's negligence not submitted to jury).

196. *Id.* § 2(a).

sues one tortfeasor, who maintains a third-party action against another. The jury finds plaintiff 40% negligent, the original defendant 60% negligent, and damages of \$10,000. If the jury also finds the third-party defendant liable as a co-tortfeasor, the original defendant, liable to plaintiff for \$6,000, has a right to contribution, as a third-party plaintiff, from the third-party defendant for \$3,000.

Alternatively, if the trial court is allowed to submit the third-party defendant's percentage of negligence to the jury, the original defendants are jointly and severally liable, with contribution rights against the third-party defendant and one another.¹⁹⁷ This is exemplified by the situation in which plaintiff sues two tortfeasors, who maintain a third-party action against a co-tortfeasor. The jury finds plaintiff 10% negligent, the original defendants and the third-party defendant each 30% negligent, and damages of \$10,000. The original defendants are jointly and severally liable to plaintiff for \$9,000 and would be entitled to contribution from the third-party defendant for \$3,000. Even though the third-party defendant may or may not be financially able to effect contribution, payment of any sum to plaintiff by an original defendant in excess of \$4,500 would entitle him to the right of contribution from the other original defendant for the excess, and vice-versa.¹⁹⁸ On the other hand, any payment by an original defendant in excess of \$3,000 should entitle him to contribution from a third-party defendant who has paid less than \$3,000.

If a tortfeasor is not joined as an original or third-party defendant, it is unclear whether the court can properly submit the absent tortfeasor's percentage of negligence in the primary action. Subsections 2(d) and (e) of article 2212a indicate the legislature assumed it could not.¹⁹⁹ Unfortunately, this point remains unresolved; there are no cases and confusion abounds.

It is not necessary that the degree of negligence and resulting contribution liability for an absent tortfeasor be established in the primary action when those tortfeasors before the court are able to assert their claims against the absent tortfeasor. A subsequent ac-

197. *Id.* § 2(c)-(f).

198. *Id.* § 2(b). The section reads, in pertinent part: "In a case in which there is more than one defendant, . . . , contribution to the damages awarded to the claimant shall be in proportion to the percentage of negligence attributable to each defendant." *Id.*

199. *Id.* § 2(d)-(e).

tion for contribution against an absent tortfeasor who did not previously settle is expressly allowed.²⁰⁰ Thus, a negligent defendant who has satisfied a judgment can enforce a contribution claim in a subsequent suit against an absent, non-settling co-tortfeasor. Such a procedure, however, is replete with complications. Since the percentage of negligence should total 100%, a subsequent suit for contribution would logically require a relitigation and redetermination of all parties' negligence.²⁰¹ Clearly, the safest and most expeditious alternative would be for an original defendant to maintain a third-party action against all absent co-tortfeasors so that the rights and responsibilities of all parties to the occurrence could be determined at one time in the main action.

The existence of a settling tortfeasor affords the non-settling tortfeasor several options. Once the settling tortfeasor is joined as a party by the non-settling tortfeasor, via a third-party claim, the statute indicates the percentage of the settling tortfeasor's negligence should be submitted to the jury.²⁰² The settlement operates as "a complete release of the portion of the judgment attributable to the settling tortfeasor's percentage of negligence."²⁰³ The amount paid in settlement is of no consequence to the non-settling tortfeasors; they remain responsible for their respective liabilities on the judgment and, if they have asserted cross-claims for contribution among themselves, the judgment should award it.²⁰⁴ For example, assume plaintiff sues two negligent tortfeasors after settling with a third negligent tortfeasor for \$2,000. The non-settling tortfeasors join the settlor by a third-party claim, and seek contribu-

200. *Id.* § 2(g).

201. If article 2212 were applied instead of article 2212a, the contributees would be allowed contribution on a ratable basis. *See Callihan Interests v. Duffield*, 385 S.W.2d 586, 587 (Tex. Civ. App.—Eastland 1964, writ ref'd); TEX. REV. CIV. STAT. ANN. art. 2212 (Vernon 1971). *See also Petco Corp. v. Plummer*, 392 S.W.2d 163, 167 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.).

202. TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(e) (Vernon Supp. 1980). Article 2212a is silent as to the rights which a settling tortfeasor may have against a non-settling co-tortfeasor for contribution. One would conclude, therefore, that such a situation is governed by article 2212. *Compare id.* § 2(h) with *id.* art. 2212 (Vernon 1971).

203. *Id.* art. 2212a, § 2(e) (Vernon Supp. 1980). *See generally Keeton, Torts, Annual Survey of Texas Law*, 28 Sw. L.J. 1, 14 (1974).

204. *See, e.g., Deal v. Madison*, 576 S.W.2d 409, 422-23 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.); *Dorsaneo & Robertson, Comparative Negligence in Texas*, 10 TEX. TECH L. REV. 933, 947 nn. 69 & 70 (1979); *Keeton, Torts, Annual Survey of Texas Law*, 28 Sw. L.J. 1, 13-14 (1974).

tion from one another through cross-claims. If the jury finds plaintiff 20% negligent, one original defendant 20% negligent, the other original defendant and the third-party defendant each 30% negligent, and damages of \$10,000, the plaintiff recovers \$5,000, jointly and severally, from the non-settling tortfeasors. Considering the sum collected from the settlor, plaintiff receives a total of \$7,000 from all tortfeasors.²⁰⁵ The judgment should award each non-settling tortfeasor contribution from the other for an amount paid by either in excess of the sum represented by their respective percentages of negligence.²⁰⁶ The non-settling tortfeasors have no right of contribution against the settlor because their proportionate share of the judgment is reduced by the amount of the settlor's percentage of negligence.²⁰⁷

Conversely, if the sum received from the settlor is greater than the sum that would have been afforded by a percentage reduction, the non-settling tortfeasor's liability is unaffected.²⁰⁸ The non-settling tortfeasors remain liable for the percentages of their negligence. Assume that in the preceding example the settlor had settled with plaintiff for \$6,000, instead of \$2,000. The non-settling tortfeasors are still jointly and severally liable to plaintiff for the sum of \$5,000, which results in a total recovery of \$11,000 by the injured party. As before, the contribution rights between the non-settling tortfeasors remain unchanged.

Finally, assume the non-settling tortfeasors join the settling tortfeasor, but the jury refuses to find the settlor negligent. The non-settling tortfeasors would be unable to obtain a percentage reduction of their liability to plaintiff.²⁰⁹

If the settling tortfeasor is not joined as a party in the primary suit, article 2212a seems to assume the settlor's percentage of negligence is not to be submitted to or considered by the jury.²¹⁰ Each

205. In such situation, it is possible that plaintiff will receive a windfall. See Comment, *Comparative Negligence in Texas*, 11 Hous. L. Rev. 101, 112-13 (1973).

206. See TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(e) (Vernon Supp. 1980).

207. See *id.*; Dorsaneo & Robertson, *Comparative Negligence in Texas*, 10 TEX. TECH L. REV. 934, 944-45 (1979).

208. See Dorsaneo & Robertson, *Comparative Negligence in Texas*, 10 TEX. TECH L. REV. 934, 944-45 (1979).

209. See TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(d) (Vernon Supp. 1980). The implication is that the settlor would initially have to be found liable before the non-settlor would be entitled to a reduction. *Id.*

210. See *id.* § 2(a).

defendant, however, is entitled to deduct a proportionate amount of the settlement, determined by the ratio his negligence bears to the negligence of all defendants.²¹¹ The percentage of the settlor's negligence is immaterial. The amount actually paid in settlement, however, is of importance.²¹² As opposed to those circumstances when the settling tortfeasor's negligence is determined as a percentage of the whole, if the settling tortfeasor is not joined the defendants are entitled to a credit, the exact amount depending on the percentage of their own negligence.²¹³ The following illustrates the procedural operation under article 2212a. Plaintiff sues two tortfeasors after settling with their co-tortfeasor for \$1,200. The non-settling tortfeasors seek contribution from one another. The jury finds plaintiff 20% negligent, the defendants 50% and 30% negligent, respectively, and assesses plaintiff's damages at \$10,000. Although the defendants are jointly and severally liable, the first defendant is entitled to a credit commensurate with the percentage of his own negligence, or $\frac{1}{5}$ of the settlement (\$750), his liability being computed thusly: $50\% \times \$10,000 = \$5,000$, less \$750 = \$4,250. The second defendant is entitled to a credit of $\frac{3}{8}$ of the settlement (\$450), his liability being determined as follows: $30\% \times \$10,000 = \$3,000$, less \$450 = \$2,550. The defendants, therefore, are jointly and severally liable to plaintiff for \$6,800, with each being entitled to contribution from the other for any sum paid to plaintiff in excess of their respective shares. Plaintiff's total recovery from all tortfeasors is \$8,000. The plaintiff's recovery remains the same regardless of the amount of settlement; the greater the settlement, however, the lesser the actual dollar expenditure by the non-settling tortfeasors.²¹⁴

211. See *id.* § 2(d). "[E]ach defendant is entitled to deduct from the amount for which he is liable to the claimant a percentage of the amount of the settlement based on the relationship the defendant's own negligence bears to the total negligence of all defendants." *Id.* § 2(d).

212. See *id.* § 2(d). The non-settling tortfeasors deduct their percentage based on this amount. See *id.* § 2(d).

213. *Id.* § 2(d).

214. Assume the above facts except that plaintiff settles with tortfeasor three for \$2,400. Tortfeasor one is entitled to a credit of \$1,500 ($\frac{1}{5} \times \$2,400$) from his percentage of negligence, meaning his share is \$3,500 ($50\% \times \$10,000 = \$5,000$ less \$1,500 = \$3,500) and tortfeasor two is allowed a credit of \$900 ($\frac{3}{8} \times \$2,400$) from his percentage of negligence, meaning his share is \$2,100 ($30\% \times \$10,000 = \$3,000$ less \$900 = \$2,100). The nonsettling tortfeasors, therefore, are jointly and severally liable to plaintiff for \$5,600, each being entitled to contribution from the other for any excess paid over their respective shares. Plain-

Many tactical factors, of course, are involved in deciding whether to seek contribution in a third-party action. This is particularly true for the non-settling tortfeasor when plaintiff has settled with a co-tortfeasor in an action governed by article 2212a. If the non-settling tortfeasor anticipates that the settlor has paid more than his ultimate proportionate share, a third-party action should not be sought. On the other hand, if the non-settling tortfeasor believes the percentage of the settlor's negligence to be greater than the amount paid in settlement would bear, proportionately, to the judgment, a third-party action should be seriously contemplated.

IV. CONCLUSION

The settlement of claims in which multiple tortfeasors are involved frequently pose many subsequent problems for both the settling and non-settling parties. Consequently, the rights and responsibilities created by settlements should be carefully weighed before they are made. While a number of unanswered questions persisted prior to the adoption of article 2212a, there is no doubt that it created many more which, unfortunately, can only be answered on a case by case basis as specific problems arise.

tiff's total recovery from all tortfeasors is still \$8,000.