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Contribution Among Joint Tortfeasors: A Florida Case Law Survey and Analysis

KENDALL B. COFFEY*

Recent decisions of the Florida district courts of appeal have engrafted inconsistent requirements on the Uniform Contribution Among Tortfeasors Act's requisites for contribution. The author critically examines these decisions and explores the mechanics of seeking contribution under the Act. The article also explores the effect of release from liability on joint tortfeasors and defendants who settle with plaintiffs, an extremely troublesome area that is fraught with traps for the unwary.

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I. INTRODUCTION

Contribution is a right of action entitling one party liable in tort to impose a share of damages awarded the plaintiff upon another party jointly or concurrently liable for the same tort. This loss allocation device was born in equity and codified by the State of Florida in the Uniform Contribution Among Tortfeasors Act ("Uniform Contribution Act.")¹ When Florida passed the Uniform Contribution Act, it joined the great majority of states recognizing

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1. 1975 Fla. Laws ch. 75-108 (codified, as amended, at FLA. STAT. § 768.31 (1981)). For a description of the background of contribution, see *Love v. Gibson*, 2 Fla. 598, 620 (1849). See also *VTN Consol., Inc. v. Coastal Eng'r Assocs.*, 341 So. 2d 226, 229 (Fla. 2d DCA 1977).

the right of contribution in negligence actions.² Borrowed from proposed model contribution legislation,³ the Florida statute creates rights markedly different from the seemingly related case law doctrines of indemnity and subrogation.

Indemnity is a case law doctrine related to statutory contribution among joint tortfeasors.⁴ Indemnity, however, is distinguishable from contribution in two fundamental respects. First, it is not founded on joint participation in a tort, but instead arises from an express or implied promise by one party to compensate another party for damages caused by claims of a third party.⁵ Insurance contracts are classic examples of express indemnity agreements.⁶

2. More than forty states now allow contribution; a majority create this right by statute. See Comment, *Contribution in Missouri — Procedure and Defenses Under the New Rule*, 44 Mo. L. Rev. 691, 694 (1979). Before promulgating the Uniform Contribution Act, Florida generally recognized no such right in tort, although that rule was subject to various exceptions. See generally *Lincenberg v. Issen*, 318 So. 2d 386 (Fla. 1975).

This article will focus on Florida's statutory right of contribution among joint tortfeasors. The term "contribution," however, also describes the rights among co-obligors of a joint obligation in contract. *Lopez v. Lopez*, 90 So. 2d 456 (Fla. 1956). See generally *Walker v. Sarven*, 41 Fla. 210, 25 So. 885 (1899). This contractual basis of joint liability arises when parties are co-makers of the same note or otherwise become jointly obligated for a common debt.

There are two significant common law rules concerning joint obligation in contract. First, each joint obligor is an indispensable party and must be joined in any suit by the creditor. *Alderman v. Puleston*, 24 So. 2d 527 (Fla. 1946); *Edward Corp. v. David M. Woolin & Son*, 113 So. 2d 252, 254 (Fla. 3d DCA 1959). Second, the release of one joint obligor releases all, even if the obligee intends to release only one joint obligor. *Atlantic Coastline R.R. v. Boone*, 85 So. 2d 834 (Fla. 1956); *Eason v. Lau*, 369 So. 2d 600, 601 (Fla. 1st DCA 1978); see also *Hurt v. Leatherby Ins. Co.*, 380 So. 2d 432, 433 (Fla. 1980). A recently enacted Florida statute eliminates this common law rule. FLA. STAT. § 46.015 (1981).

Today these traditional rules create few impediments to suits by creditors because modern commercial paper invariably provides that the liability of co-obligors shall be severable as well as joint. The contribution doctrine, however, still remains a significant basis for pro rata recoupment among debtors who have discharged a common obligation. *Walker v. Sarven*, 41 Fla. 210, 25 So. 885 (1899); *Epstein v. Drusin*, 249 So. 2d 479, 481 (Fla. 3d DCA 1971). See also *Mackler v. Weiss*, 80 So. 2d 608 (Fla. 1955) (co-obligor who pays more than his share of debt is entitled to contribution).

3. 12 UNIFORM LAWS ANN., *Contribution Among Tortfeasors* 59 (1979). The Uniform Contribution Act is one of almost two dozen model statutes proposed by the National Conference of Commissioners on Uniform Laws. See 7 FLA. ST. U.L. REV. 167, 172 n.25 (1979).

4. See generally *Houdaille Indus., Inc. v. Edwards*, 374 So. 2d 490 (Fla. 1979); *Charles Poe Masonry, Inc. v. Spring Lock Scaffolding Equip. Co.*, 374 So. 2d 487 (Fla. 1979); *Stuart v. Hertz Corp.*, 351 So. 2d 703 (Fla. 1977).

5. *Houdaille Indus., Inc. v. Edwards*, 374 So. 2d at 493.

6. E.g., *Old Dominion Iron & Steel Corp. v. Maryland Cas. Co.*, 374 So. 2d 5 (Fla. 1st DCA 1979); *American Home Assurance Co. v. City of Opa Locka*, 368 So. 2d 416 (Fla. 3d DCA 1979). The rule as to indemnities given by parties who are not regular insurers is that "the indemnity provision must be construed in favor of the indemnitor." *Sol Walker & Co. v. Seaboard Coast Line R.R. Co.*, 362 So. 2d 45, 49 (Fla. 2d DCA 1978). See also *Spring Lock Scaffolding Rental Equip. Co. v. Charles Poe Masonry, Inc.*, 358 So. 2d 84, 85 (Fla. 3d

An implied right of indemnity arises when a special relationship or duty exists that entitles a wrongdoer to shift his total loss to another party.⁷ Recent Florida cases have limited the equitable reach of implied indemnity by rejecting the "active-passive" test, which allowed a "passive" tortfeasor (one secondarily liable) to shift his total loss to an "active" tortfeasor.⁸ The cases now emphasize that one seeking indemnity must be without any fault and only "vicariously, constructively, derivatively, or technically liable for the wrongful acts"⁹ of the indemnitor. That technical liability must originate from a special duty, not from a weighing of the relative fault of the tortfeasors.¹⁰

The second distinction between contribution and indemnity lies in their respective consequences. Contribution provides only a proportional sharing of the judgment awarded a claimant; indemnity provides the indemnitee with full reimbursement for all damages, including his costs and attorneys' fees.¹¹

The right of subrogation, like indemnity, is created either by contract or by operation of law based on equitable considerations. It generally arises in contractual settings and allows one who has properly satisfied a debt owed by another to step into the shoes of the satisfied creditor and assert the latter's original claim against the debtor.¹² In contrast to its recent narrowing of the scope of indemnity, the Supreme Court of Florida has apparently expanded the doctrine of equitable subrogation in the tort context. In *Underwriters at Lloyds v. City of Lauderdale Lakes*,¹³ the court allowed the first wrongdoer who had paid the injured party's claim

DCA 1978), *aff'd in part, quashed in part on other grounds*, 374 So. 2d 487 (Fla. 1979).

7. See *Olin's Rent-A-Car Sys., Inc. v. Royal Continental Hotels, Inc.*, 187 So. 2d 349 (Fla. 4th DCA 1966); *Fincher Motor Sales, Inc. v. Lakin*, 156 So. 2d 349 (Fla. 4th DCA 1966).

8. For a thoughtful review of the development and demise of the "active-passive" test, see 32 U. FLA. L. REV. 345, 348-49 (1980).

9. *Houdaille Indus., Inc. v. Edwards*, 374 So. 2d at 492.

10. *Id.* at 493.

11. Compare FLA. STAT. § 768.31(3) (1981) (permitting tortfeasors to share pro rata in the entire liability) and *Kennedy & Cohen, Inc. v. Van Eyck*, 347 So. 2d 1085, 1086 (Fla. 3d DCA 1977) (construing FLA. STAT. § 768.31(3) (1975)) with *Borg-Warner Acceptance Corp. v. Philco Fin.*, 356 So. 2d 830, 832 (Fla. 1st DCA 1979) (attorneys fees made part of damage award may be entirely assumed by one party in indemnity cases).

12. Subrogation has co-existed with contribution and indemnity in Florida as a recognized device for recoupment after payment. *VTN Consol., Inc. v. Coastal Eng'g. Assocs.*, 341 So. 2d 226, 228 (Fla. 2d DCA 1976). Noncontractual or "legal" subrogation is allowed when, in the court's discretion, it is compelled by the equities. See, e.g., *Dantzler Lumber & Export Co. v. Columbia Cas. Co.*, 115 Fla. 541, 156 So. 116 (1934).

13. 382 So. 2d 702 (Fla. 1980).

for the initial injury to become subrogated to the plaintiff's entitlement and to file a separate action against a successive tortfeasor who had caused a subsequent injury aggravating the earlier harm.¹⁴ By permitting third-party relief in instances of successive injuries, the court extended the reach of the subrogation doctrine beyond the "same injury" test for contribution and the "all or nothing" test for indemnity. How far the doctrine reaches, however, is still uncertain.¹⁵

While acknowledging that these various loss allocation devices frequently interact, this article will focus on Florida's statutory right of contribution among joint tortfeasors. After reviewing the case law construing the statute, and the occasional conflict over the scope of contribution, this article will examine the mechanics of applying the statute and then address the problematic subject of release.

II. SCOPE OF STATUTORY CONTRIBUTION

Although the Uniform Contribution Act defines the right of contribution, the actual scope of that right is far from certain. Section 768.31(2)(a) of the Florida Statutes provides:

Except as otherwise provided in this act, when two or more persons become jointly or severally liable in tort for the same injury to person or property, or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.¹⁶

The statute specifically precludes parties who are liable for breaches of trust or other fiduciary obligations, and reckless, willful, wanton or intentional torts, from seeking contribution.¹⁷ Thus, to obtain contribution a party must be liable for no more than or-

14. *Id.* at 704. The supreme court had previously refused to allow third-party claims for contribution or indemnity against a doctor in similar circumstances. *Stuart v. Hertz Corp.*, 351 So. 2d 703 (Fla. 1977). By permitting the assertion in a separate action of the subrogation claim based on the doctor's negligence, the supreme court in *Underwriters at Lloyds* avoided infusing the burden and complexity of medical malpractice litigation into the injured party's suit for relief.

15. Although the expansive application of equitable subrogation in *Underwriters at Lloyds* is a commendable innovation, the supreme court did little to define the equitable considerations governing its applicability.

16. FLA. STAT. § 768.31(2)(a) (1981).

17. *Id.* § (2)(c), (g); see *Nesbitt v. Auto-Owners Ins. Co.*, 390 So. 2d 1209, 1211 (Fla. 5th DCA 1980) (willful, wanton or reckless conduct constitutes intentional tort precluding contribution); *Johnson v. Ludwig*, 328 So. 2d 35, 37 (Fla. 3d DCA 1976) ("wanton acts" bar contribution).

dinary or gross negligence. Presumably, a defendant charged with a more culpable tort could still state a claim for contribution by alleging that, if liable for anything, he is liable only for ordinary negligence.¹⁸

A. "Joint," "Concerted," and "Several" Tortfeasors

Under Florida Statutes section 768.31(2)(a), the right of contribution is available only when "two or more persons become jointly or severally liable in tort for the same injury to person or property."¹⁹ This language suggests that liability for the "same injury" is the determinative test. Thus, contribution does not apply when different tortfeasors cause successive injuries, because even though they further aggravate the same condition, they do not cause the same injury.²⁰ By posing joint and several liability as alternatives, however, the statute apparently does not require joint action by tortfeasors as long as there is a common injury that gives rise to at least several liability. Nonetheless, cases construing the provision require some interrelation among acts by fellow tortfeasors to sustain an action for contribution, even though "split-second timing" is not mandated.²¹

In *VTN Consolidated, Inc. v. Coastal Engineering Associates*,²² for example, the District Court of Appeal, Second District, denied contribution to a wrongdoer even though his wrongful acts had combined with the acts of another potentially liable party to cause a single injury. The plaintiff in *VTN*, a land development company, had obtained designs for a street and drainage system from an engineering firm. When problems developed with the de-

18. *Johnson v. Ludwig*, 328 So. 2d 35 (Fla. 3d DCA 1976). In *Johnson*, the court allowed a defendant charged with wanton conduct to seek contribution since he might have been liable for mere negligence. *Id.* at 37; cf. *Bodin Apparel, Inc. v. Superior Steam Serv., Inc.*, 328 So. 2d 533, 535 (Fla. 3d DCA 1976) (allegation of active negligence against defendant does not preclude that defendant from later asserting a claim for indemnity).

19. FLA. STAT. § 768.312(2)(a) (1981).

20. *Stuart v. Hertz Corp.*, 351 So. 2d 703, 706 (Fla. 1977). If an initial tortfeasor causes one injury, which is then aggravated by the negligence of a different tortfeasor, the initial tortfeasor may now use the doctrine of equitable subrogation in place of indemnity or contribution to recover from the second tortfeasor damages paid for the additional harm. See text accompanying notes 12-15, *supra*; *Underwriters at Lloyds v. City of Lauderdale Lakes*, 382 So. 2d 707 (Fla. 1980). The situation of successive injuries differs from cases in which successive acts contribute to a single, indivisible injury. See, e.g., *Leesburg Hosp. Ass'n v. Carter*, 321 So. 2d 433 (Fla. 2d DCA 1975).

21. *Leesburg Hosp. Ass'n v. Carter*, 321 So. 2d 433, 434 (Fla. 2d DCA 1975).

22. 341 So. 2d 226 (Fla. 2d DCA 1976), *cert. denied*, 345 So. 2d 428 (Fla. 1977). The court also held that *VTN* was not entitled to indemnification from the engineers. *Id.* at 228-29.

signs, the development company sued the surveyor that had originally prepared the topographical maps used by the engineers in drawing the plans for the plaintiff. The surveyor, in turn, filed a third-party complaint against the engineers, alleging that they had failed to properly use the topographical maps. Because the plaintiff claimed that the negligent design of the street and drainage systems caused its losses, there apparently was a single injury caused by the acts of the surveyor and the engineers.²³

In refusing to allow the defendant-surveyor to bring the engineering firm into the suit as a person liable for all or part of the plaintiff's claim,²⁴ the Second District denied the surveyor's claim for contribution. The court examined the relationship between the conduct of the surveyor and the engineers, not the commonality of injury caused by their separate acts.²⁵ The court stated that "the claim for contribution must be related to the original cause of action—it must arise out of the same transaction or series of transactions."²⁶ Apparently focusing on the fact that the topographical maps were prepared two years before the engineers allegedly misused them, the court held that they were not part of the same series of transactions.²⁷ The Second District thus appears to have engrafted a transactional, or time-proximity, test upon a statutory standard that ostensibly could have been met by merely showing the "same injury."²⁸

A similar transactional predicate for contribution issued from the District Court of Appeal, Third District, in *Touche Ross & Co. v. Sun Bank*.²⁹ In *Touche Ross*, the plaintiff-hospital sued an accounting firm for failing to uncover an embezzlement of hospital funds. The accounting firm subsequently sought contribution from Sun Bank for improperly negotiating and honoring the checks withdrawing funds from the hospital's accounts.³⁰ These facts clearly present a single injury because the hospital's loss consisted of embezzled funds paid pursuant to the alleged wrongful honor of

23. 341 So. 2d at 226-27.

24. See FLA. R. CIV. P. 1.180.

25. 341 So. 2d at 228-29.

26. *Id.* at 229.

27. *Id.*

28. See FLA. STAT. § 768.31(2)(a) (1981). In general, use of "or" requires only one of the accompanying alternatives to be met. "In its elementary sense, the word 'or' is a disjunctive particle [sic] that marks an alternative, generally corresponding to 'either,' as 'either this or that'; a connective that marks an alternative." *Pompano Horse Club, Inc. v. State ex rel. Bryan*, 93 Fla. 413, 425, 111 So. 801, 805 (1927).

29. 366 So. 2d 465 (Fla. 3d DCA 1979).

30. *Id.* at 467.

the check.

Despite this evidence of a single injury, the Third District affirmed the trial court's denial of the accounting firm's contribution claim against the bank. Citing *VTN Consolidated, Inc. v. Coastal Engineering Associates*, the Third District stated that the accounting firm and the bank were "not exposed to [the hospital] under the 'same set of circumstances.'" ³¹ While conceding that there was an overlap in the damage caused by the two tortfeasors, the court ruled that contribution was unavailable because the hospital's damages "were in no way the result and/or outcome of either joint or concurrent actions on the part of the parties hereto." ³²

The Second District had placed a slightly different emphasis on the "single injury" test in *Leesburg Hospital Association v. Carter*, ³³ a case that preceded *VTN* and *Touche Ross*. In *Leesburg Hospital*, a patient sued a hospital for malpractice, alleging that hospital personnel had ignored her worsening symptoms after she arrived for treatment. The hospital brought a third-party contribution claim against the physician who had examined her when her condition deteriorated, but who allegedly abandoned her to perform surgery on a different patient. ³⁴ The Second District allowed the hospital's contribution claim, noting that no demonstrable separation in time and effect existed between the hospital's acts and those of the doctor. Although acknowledging the possibility that the alleged tortfeasors' acts "did not precisely coincide in time," the court held that "nevertheless their acts combined to produce a single injury." ³⁵

The court's holding in *Leesburg Hospital* does not suggest that there must be concerted action on the part of wrongdoers to sustain a contribution claim. Its dicta implies, however, that although negligent acts might be wholly independent, contribution requires the wrongful acts to occur with some proximity in time, although not with "split-second timing." ³⁶ Accordingly, this ruling

31. *Id.* (quoting *VTN Consol., Inc. v. Coastal Eng'r Assocs.*, 341 So. 2d 226, 229 (Fla. 2d DCA 1976)). The District Court of Appeal, First District, distinguished both *VTN Consol., Inc.* and *Touche Ross & Co.* in *Salley v. Charles R. Perry Const., Inc.*, 403 So. 2d 556, 557 (Fla. 1st DCA 1981). The court found that an architect and a general contractor participating on the same project satisfied both "common enterprise" criteria and owed a common duty "intertwined in both time and substance."

32. *Id.* at 468.

33. 321 So. 2d 433 (Fla. 2d DCA 1975).

34. *Id.* at 433-34.

35. *Id.* at 435.

36. *Id.*

is not inconsistent with the Second District's subsequent opinion in *VTN*, which concluded that acts separated by two years were not part of the same series of transactions under the contribution statute. On the other hand, the *Leesburg Hospital* analysis less easily accommodates *Touche Ross* because the former required only some proximity in time; the latter demanded joint or concerted action.

Whether these cases create a time-proximity requirement or a joint-action requirement, they demonstrate a judicially engrafted addition to the statutory requisites for contribution. On its face, the intent of the statute is to facilitate equitable contribution and loss distribution.³⁷ To promote this goal, courts should use only the express statutory requirement of "same injury," whether there is joint or several liability. Cases such as *VTN*, *Touche Ross*, and *Leesburg Hospital*, which impose further requirements on the statute's single-injury test, obviously compromise that purpose.

A time-proximity requirement is difficult to justify in either analytical or policy terms. For purposes of contribution, the fact that a party designs plans two years rather than two days before they are implemented should be irrelevant. For example, under the *VTN* rationale, an architect whose plans are stored for a few years might have no right of contribution against a contractor should the building's owner sue the architect for latent construction defects, because the plans and the construction would not arise from the "same transaction." On the other hand, had the general contractor used three-day-old designs rather than plans drawn two years earlier, a court could find him liable for contribution.

For purposes of defining "single injury" under the Uniform Contribution Act, distinctions among wrongful acts based upon time or concerted action are illogical. If two different parties are liable for the same injury, the interrelation of their wrongful acts is irrelevant to the principles of fairness and loss distribution that prompted the development of contribution doctrines and statutes. Ostensibly guided by these principles, but without detailing its reasoning, the District Court of Appeal, Fourth District, declined to require either concerted or sequential acts in allowing contribution. In *Moore v. St. Cloud Utilities*,³⁸ a minor was injured when he touched a live power line. The injury occurred after the driver of the car in which the minor was a passenger stopped to assist the

37. See FLA. STAT. § 768.31(3)(c) (1981).

38. 337 So. 2d 982 (Fla. 4th DCA 1976).

occupants of another vehicle that had slammed into and toppled a utility pole. The court concluded that the driver of the minor's car, the driver of the car that hit the pole, and the utility company were jointly liable for the minor's injuries and therefore subject to contribution claims among themselves.³⁹ Here, no defendant had acted in concert with any other. Moreover, the wrongful conduct was not necessarily concurrent. Indeed, the utility company's alleged negligence in designing the electrical power pole might have occurred years before the accident. The Fourth District nevertheless affirmed the availability of contribution.

The Second District has also squarely rejected any need for "concerted action" among fellow tortfeasors as a predicate for contribution. In *Sol Walker & Co. v. Seaboard Coast Line Railroad*,⁴⁰ the court allowed a railroad company to seek contribution from a shipper after the railroad company had been held liable for injuries to one of its employees under the Federal Employers Liability Act.⁴¹ The railroad company could require contribution from the shipper under the Uniform Contribution Act because "[e]ven in the absence of concerted action . . . there was a jury question on whether the negligent acts of the parties combined to become the direct and proximate cause of a single injury" to the employee.⁴²

The joint tortfeasors in *Sol Walker* acted in close physical and time proximity. The court's narrow holding, therefore, presents no necessary conflict with the restrictive approaches to contribution taken in *VTN* and *Touche Ross*.⁴³ Yet the court's liberal analysis of contribution, although dictum, may well be inconsistent with those cases. The *Sol Walker* court emphasized not the interrelationship of acts among tortfeasors, but rather the common liability created by such acts: "[T]he theory of contribution among tortfeasors is predicated upon the fact that all are legally liable to respond in damages to an injured party because of their wrongful act."⁴⁴ The court's language flatly rejecting any need for concerted action is clearly at odds with *Touche Ross*. Furthermore, by stating the test for contribution as depending simply on whether the defendants' acts made them liable for the same injury, the Second

39. *Id.* at 984.

40. 362 So. 2d 45 (Fla. 2d DCA 1978).

41. 45 U.S.C. § 51 (1976).

42. 362 So. 2d at 50.

43. In *Sol Walker*, the court ultimately held that the railroad company's claim for contribution was precluded by the judgment that had been entered upon the directed verdict in favor of the shipper in the initial action brought by the employee. *Id.* at 53.

44. *Id.* at 50.

District apparently declined to follow other decisions that engrafted additional requirements on the contribution statute. By requiring no more than the statute directs, the *Sol Walker* decision faithfully meets the statutory terms. Moreover, by making contribution more readily accessible, the Second District advances the statute's policy encouraging loss distribution and sharing.

B. Common Liability

In addition to the "joint," "several," and "same injury" terminology of section 768.31(2)(a), the Uniform Contribution Act contains several references to "common liability,"⁴⁵ beginning with the statement in section 768.31(2)(b) that "[t]he right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share of the common liability"⁴⁶ As a result, several decisions have held that contribution is available only if defendants have a common liability to the injured party, although the basis of each defendant's liability may be unique.⁴⁷ Other cases, however, without analyzing "common liability," have authorized contribution among parties when it was clear that not all were "legally liable to respond in damages to an injured party because of their wrongful act."⁴⁸ Although these decisions provide rules governing limited circumstances, no clear rule can be drawn from them that will yield a consistent analysis and accurately predict future results.

In *Seaboard Coast Line Railroad v. Smith*,⁴⁹ the Supreme Court of Florida affirmed the dismissal of a railroad company's action seeking contribution from the employer of an accident victim. When the injured employee sued the railroad for compensation, the railroad filed a third-party contribution claim against the plaintiff's employer, which had previously paid workmen's compensation benefits to the plaintiff. Because the workmen's compensation laws barred the plaintiff from suing his employer, the court held that no common liability to the injured man existed between

45. FLA. STAT. § 768.31(2)(b), 4(d)(1), (2) (1981); see notes 74-79 and accompanying text *infra*.

46. FLA. STAT. § 768.31(2)(b) (1981).

47. *E.g.*, *Sol Walker & Co. v. Seaboard Coast Line R.R.*, 362 So. 2d 45, 51 (Fla. 2d DCA 1978). See also *Seaboard Coast Line R.R. v. Smith*, 359 So.2d 427, 429 (Fla. 1978); *Liberty Mut. Ins. Co. v. Curtiss*, 327 So. 2d 82, 85-86 (Fla. 1st DCA 1976).

48. *Sol Walker & Co. v. Seaboard Coast Line R.R.*, 362 So. 2d 45, 50 (Fla. 2d DCA 1978).

49. 359 So. 2d 427 (Fla. 1978).

the railroad and the employer. "The key words of the contribution act [section 768.31] are 'common liability' to the employee. Such 'common liability' cannot exist where the employer is immunized from liability by the Compensation Act for tort."⁵⁰ Thus, contribution was not available to the railroad. The court further said that contribution rights arise only when codefendants have a "common tort liability" to an injured party.⁵¹

The District Court of Appeal, First District, is equally clear in its emphasis on the "common liability" requirement. In *Liberty Mutual Insurance Co. v. Curtiss*,⁵² a case arising before the Uniform Contribution Act took effect in Florida,⁵³ the victim of an automobile accident sued two culpable truck drivers and the insurance company of one of the truck drivers. When the trial court entered summary judgment in favor of one of the truck drivers, the other defendants (the second truck driver and his insurance company, Liberty Mutual) paid the plaintiff a settlement.⁵⁴ Liberty Mutual then sued the exonerated defendant, Curtiss, for contribution.⁵⁵ The First District ruled that Liberty Mutual did not have a cause of action for contribution against Curtiss because he had already been exonerated from liability by a competent court.⁵⁶

Because Liberty Mutual had participated in the litigation in which Curtiss was exonerated, the court could have reached its result through *res judicata* or related principles.⁵⁷ Instead, the court

50. *Id.* at 429.

51. "We have heretofore said, and repeat here, that indemnity is bottomed on entirely different considerations from contribution. The latter arises only when there is a common tort liability to the injured person." *Id.* See also *Armor Elevator Co. v. Elevator Sales & Serv., Inc.*, 360 So. 2d 1129 (Fla. 3d DCA 1978).

52. 327 So. 2d 82 (Fla. 1st DCA 1976).

53. See *id.* at 84 n.1.

54. *Id.* at 83-84.

55. The accident had taken place in Georgia; three persons were injured. *Id.* at 83. The plaintiff-victim in *Curtiss* brought his action in Florida's Circuit Court for the Fourth Judicial Circuit. Although Georgia law controlled the victim's cause of action against the defendants and Liberty Mutual's contribution claim against Curtiss, Florida law determined the effect of the Florida judgment exonerating Curtiss on Liberty Mutual's contribution claim. *Id.* at 84.

56. *Id.* at 85.

57. *Id.* at 84-86. See also *Sol Walker & Co. v. Seaboard Coast Line R.R.*, 362 So. 2d at 52.

Although courts have generally acknowledged the applicability of *res judicata* analysis to contribution, it may be difficult to justify in cases in which a possible claim is not pleaded for tactical or other reasons. Generally, *res judicata* applies only to matters that a party is obligated to litigate in a particular action. *Jackson Grain Co. v. Lee*, 150 Fla. 232, 7 So. 2d 143 (1942).

Under the Florida Rules of Civil Procedure, cross-claims, the vehicle for asserting con-

based its holding on the principle that a defendant who has been properly absolved of liability logically cannot share a common liability with another defendant: "[t]he issue is [not] whether Liberty Mutual has had its day in court on the issue of Curtiss' liability. It is simpler than that . . . Curtiss shared no common liability with Liberty Mutual."⁵⁸

Similarly, the District Court of Appeal, Third District, ruled in *3-M Electric Corp. v. Vigoa*⁵⁹ that the lack of common liability defeated a defendant's contribution claim against the parents of a child who was injured by the defendant's negligence. Because the family tort immunity doctrine would bar an action by the child against his parents, the court held that the parents did not share a common liability with the defendant, even though the parents' negligence had allegedly contributed to the child's injury.⁶⁰

Despite such clear interpretations of common liability in both supreme court and district court rulings, the Supreme Court of Florida reached a squarely contrary result in a case involving interspousal tort immunity. In *Shor v. Paoli*,⁶¹ the court allowed a tortfeasor to seek contribution from the spouse of the injured plaintiff. The plaintiff, a passenger in an automobile driven by his wife, was injured when their automobile collided with the defendant's vehicle. The plaintiff recovered a judgment against the other driver, who then sought contribution against the plaintiff's wife, claiming she was negligent in her operation of the plaintiff's automobile.⁶² Without discussing the common liability requirement, the supreme court allowed the contribution claim against the plaintiff's wife.⁶³ The plaintiff's wife was unquestionably immune from liability to the plaintiff under the doctrine of inter-

tribution among codefendants, are never mandatory. FLA. R. CIV. P. 1.170(g). See also H. TRAWICK, JR., *TRAWICK'S FLORIDA PRACTICE AND PROCEDURE* § 12-6, at 188 (1979 ed.). Res judicata, accordingly, should not be a bar to a subsequent contribution claim that was available as a cross-claim in an earlier action. The related doctrines of estoppel by judgment or collateral estoppel may be more properly applicable, at least when codefendants actually litigate adversely to each other. *E.g.*, *Corn v. Hoffman*, 230 So. 2d 188 (Fla. 4th DCA 1970).

The Uniform Contribution Act presently addresses this issue only to the extent that the tortfeasors participated in the original action. FLA. STAT. § 768.31(4)(f) (1981). If one such tortfeasor was not a party to the earlier proceeding, he is plainly not bound by either res judicata or estoppel by judgment principles. *E.g.*, *Burleigh House Condominium, Inc. v. Buchwald*, 368 So. 2d 1316 (Fla. 3d DCA 1979).

58. 327 So. 2d at 85-86.

59. 369 So. 2d 405 (Fla. 3d DCA 1979).

60. *Id.* at 407.

61. 353 So. 2d 825 (Fla. 1977).

62. *Id.* at 826.

63. *Id.*

spousal tort immunity; thus, the plaintiff's wife and the defendant shared no common liability. Equitable considerations, such as unjust enrichment, apparently prompted this analytically flawed decision.⁶⁴

Analytically, there is no reason why the Supreme Court of Florida should distinguish a "common liability" defeated by interspousal tort immunity from a "common liability" overridden by the family tort immunity doctrine or workmen's compensation laws. But the court's decision in *Shor* is not necessarily inauspicious, for it eliminates one inequitable obstacle to common liability that operates to extinguish contribution. Others remain. For example, a fortunate tortfeasor might escape liability to the plaintiff because the plaintiff failed to comply with discovery or omitted an essential element in his case. If the plaintiff later pursued a different tortfeasor, this new defendant could be precluded from seeking contribution against the earlier, luckier defendant, who had escaped liability because of the plaintiff's procedural errors. The latter defendant would no longer share any common liability with the plaintiff.

Similarly, should an injured party delay suing a tortfeasor until the statute of limitations has almost elapsed, that tortfeasor is arguably barred from seeking contribution from any joint tortfeasors once the period of limitation expires on the plaintiff's claim. The third-party defendant could argue that once the plaintiff's claim against him is tolled by the statute of limitations, he is shielded from contribution because he shares no common liability to the plaintiff with the initial defendant. Although most jurisdictions have rejected such an argument, no Florida case has decided whether a time bar will be effective against a contribution claim.⁶⁵

64. Florida is among the minority of states that adhere to the common law doctrine of interspousal tort immunity; Florida courts show no signs of abandoning the rule. *See, e.g.*, *Heaton v. Heaton*, 304 So. 2d 516 (Fla. 4th DCA 1974), *citing Corren v. Corren*, 47 So. 2d 774 (Fla. 1950).

65. *See* note 47 *supra*, and authorities cited therein. In light of the consensus from the other jurisdictions, it appears likely that Florida will also allow a third-party contribution claim after the statute of limitations period expires on the underlying claim. *See Kelecut X-Ray Corp. v. United States*, 275 F.2d 167 (D.C. Cir. 1960); *Adams v. Valequier*, 48 F. Supp. 275 (W.D. Pa. 1942); *Goldsberry v. Frank Clendaniel, Inc.*, 49 Del. 69, 109 A.2d 405 (1954); *McGlone v. Corbi*, 59 N.J. 86, 97, 279 A.2d 812, 817 (1971); *Cooper v. Philadelphia Dairy Prod. Co.*, 34 N.J. Super. 301, 308, 112 A.2d 308, 314 (1955); *Wnek v. Boyle*, 374 Pa. 27, 30, 96 A.2d 857, 858 (1953); *McKay v. Citizens Rapid Trans. Co.*, 190 Va. 851, 858, 59 S.E.2d 121, 123 (1950). *See also* Comment, *supra* note 2, at 712.

In dictum, one Florida court recently concluded that the expiration of a limitations period on the original plaintiff's claim would not bar contribution. *Showell Indus., Inc. v.*

To harmonize Florida decisions, and to facilitate analysis in future holdings, the present contribution requirement of "common liability" should be discarded. The wording of the statute does not necessarily establish it as a component of contribution. Using "common liability" as a prerequisite to contribution promises little benefit in exchange for possible analytic confusion.⁶⁶

The holdings in *Smith*⁶⁷ (workmen's compensation) and *Liberty Mutual*⁶⁸ (exoneration of a codefendant) are not inconsistent with this suggestion. These holdings, analyzed in accordance with the doctrinal underpinnings of contribution, make sense without reference to the concept of common liability. To allow contribution against an employer protected under workmen's compensation laws would infringe on the policies underlying the compensation acts and create a discordant juxtaposition of compensation laws against the Uniform Contribution Act.⁶⁹ Furthermore, constructing a "common liability" requirement to protect an exonerated defen-

Holmes County, 409 So. 2d 78 (Fla. 1st DCA 1982).

In a well-reasoned analysis of this issue, Professor Peter B. Kutner agrees with the position taken by the courts and commentators criticizing the draftsmen of the Uniform Contribution Act for not providing a definition of "common liability." Kutner, *Contribution Among Tortfeasors: The Effects of Statutes of Limitations and Other Time Limitations*, 33 OKLA. L. REV. 203, 212 (1980). Kutner also reviews the impact of the statute of limitations on contribution claims when the statutes have different time limitations for different classes of defendants. Should an injured party sue defendant A three years after the injury, Professor Kutner reasons that A could assert contribution against defendant B, against whom a two-year period would ordinarily apply. *Id.* at 218-22. Florida's two-year limitation for professional malpractice could well present such a problem in view of the four-year limitation for negligent non-professionals. Compare FLA. STAT. § 95.11(4)(a),(b) (1981) with FLA. STAT. § 95.11(3) (1981).

66. Professor Kutner suggests several interpretations of common liability. Kutner, *supra* note 65, at 212. A Rhode Island court has held that common liability exists for purposes of contribution irrespective of procedural barriers such as interspousal immunity. *Zarella v. Miller*, 217 A.2d 673, 676 (R.I. 1966). See also Comment, *Right of Contribution is Not Barred by Doctrine of Interspousal Immunity in Florida*, 7 FLA. ST. U.L. REV. 167 (1979). There are two major difficulties with this holding. First, defenses such as immunity or privilege, like other affirmative defenses, are generally considered substantive rights. See *Avila South Condominium Ass'n v. Kappa Corp.*, 347 So. 2d 599, 608 (Fla. 1977). See also 1A J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 0.310, at 3139-44 (1981) (state law governs these matters). Second, it is difficult to understand why interspousal immunity is more procedural in nature than the family immunity doctrine or the employer immunity created by workmen's compensation laws. *Coates v. Potomac Elec. Power Co.*, 95 F. Supp. 779 (D.D.C. 1951); *Seaboard Coast Line R.R. v. Smith*, 359 So. 2d 427, 429 (Fla. 1978). See also 3-M Elec. Corp. v. Vigoa, 369 So. 2d 405 (Fla. 3d DCA 1979).

67. *Seaboard Coast Line R.R. v. Smith*, 359 So. 2d 427 (Fla. 1978).

68. *Liberty Mut. Ins. Co. v. Curtiss*, 327 So. 2d 82 (Fla. 1st DCA 1976).

69. In describing the importance of workmen's compensation laws to an employer's tort immunity, the Supreme Court of Florida said: "Such immunity is the heart and soul of [workmen's compensation laws]." *Seaboard Coast Line R.R. v. Smith*, 359 So. 2d at 429.

dant from contribution is unnecessary; *res judicata* principles achieve the same result.⁷⁰ A common liability requirement is not only unnecessary as a decisionmaking tool, it will actually cause incongruous results if faithfully followed. In *Shor v. Paoli*,⁷¹ the Supreme Court of Florida simply ignored the "common liability" requirement in order to reach a just result. A common liability requirement should be similarly discarded in certain other situations where contribution is sought. A party whose claim against an exonerated defendant was never really litigated should not be barred from contribution against the defendant. It would also be unfair to deny contribution to a defendant against a prospective third-party defendant because the plaintiff's claim was barred by the statute of limitations. Such an unjust result is not compelled by the legislative intent underlying the Uniform Contribution Act, but it would be nonetheless mandated if the defendant and the third-party defendants were required to share a "common liability" to the plaintiff.

The haphazard application of "common liability" in contribution cases is an evil that can be extinguished. Rather than simply ignoring the common liability issue to achieve a just result, the courts should be intellectually honest and pointedly discard any such requirement. In the purest situation, when an alleged tortfeasor is exonerated after a trial on the merits, collateral estoppel will protect him from contribution. When there is no trial at all, or only a procedural decision, the question of his responsibility for the injury remains open. If, in a subsequent contribution suit, he is shown to be a wrongdoer, he should contribute to the compensation of the injured party. Workmen's compensation cases are entitled to special treatment because of the public policy inherent in workmen's compensation laws; an employer's immunity from liability in industrial accidents is the essence of workmen's compensation laws.⁷² Thus, the employer should be immune from contribution claims as well.

70. To the extent that a party does not litigate against a codefendant, any exoneration of the codefendant from liability will not create a common law bar to contribution under principles of *res judicata* or even estoppel by judgment. See note 41 *supra*. Under Florida's Uniform Contribution Act, codefendants are bound, for purposes of contribution, by the judgment of the court exonerating any defendant from liability. FLA. STAT. § 768.31(4)(f) (1981).

71. 353 So. 2d 825 (Fla. 1978); see text accompanying notes 61-64 *supra*; see also Comment, *supra* note 66, at 175 (criticizing *Shor's* lack of analysis although agreeing with its result).

72. See note 69 *supra*.

The operative terms of the Uniform Contribution Act allow contribution when persons are "jointly or severally liable in tort for the same injury to person or property"⁷³ Significantly, the Act speaks to liability for the "same injury" rather than for the tortfeasors' "common liability" to the plaintiff. Its wording plainly allows for a broader scope of contribution than is permitted by "common liability" to plaintiff. A defendant and a prospective third-party defendant can both be responsible for the same injury to the plaintiff even though only the defendant may be legally liable. The defendants would share no "common liability to the injured party," but because the acts of both caused the plaintiff's injuries, both should be liable for the "same injury."

Concededly, several references to "common liability" appear in the subsections following the initial definitional provision of the Uniform Contribution Act.⁷⁴ In this context, however, common liability should be construed to mean liability for a single injury rather than concurrent legal liability to the plaintiff. Any different construction would render other provisions in the Act superfluous.⁷⁵ For example, section 768.31(5)(b) protects a defendant released by the plaintiff against contribution claims by codefendants.⁷⁶ Because a released defendant has no common liability to the plaintiff, an express provision immunizing him from contribution implies that the absence of common liability does not, by itself, defeat contribution.⁷⁷ Similarly, section 768.31(4)(f) explicitly absolves from contribution a defendant who has been exonerated of the plaintiff's claim.⁷⁸ This defendant would plainly have no common liability to the injured party. By specifically setting forth this immunity, the Act implies that it was not otherwise available. By these inferences, immunity from contribution does not invariably accompany absence of common liability.

Accordingly, the provisions of the Uniform Contribution Act,

73. FLA. STAT. § 768.31(2)(a) (1981).

74. FLA. STAT. § 768.31(2)(a) (1981) defines the right to contribution. Subsections 2(b), and 4(d)(1) and (2) refer to common liability.

75. FLA. STAT. § 768.31(4)(f), (5)(b) (1981). See *Pinellas County v. Woolly*, 189 So. 2d 217, 219 (Fla. 2d DCA 1966) ("[W]ords in a statute should not be construed as surplusage.").

76. FLA. STAT. § 768.31(5)(b) (1981).

77. Florida courts recognize this maxim of construction: "We have oft-times held that the rule 'Expresio unius est exclusio alterius' is applicable in connection with the statutory construction." *Dobbs v. Sea Isle Hotel*, 56 So. 2d 341, 342 (Fla. 1952). See also *Graham v. Azar*, 204 So. 2d 193, 195 (Fla. 1967); *O'Brian Assocs. v. Tully*, 184 So. 2d 202, 204 (Fla. 4th DCA 1966).

78. FLA. STAT. § 768.31(4)(f) (1981).

when read *in pari materia* (as any statute must be),⁷⁹ support the conclusion that tortfeasors need not have a common legal liability to the plaintiff for contribution to lie. Any such requirement creates doctrinal inconsistency as well as incongruity in policy and should, therefore, be discarded by Florida courts.

III. MECHANICS OF CONTRIBUTION

A. Procedure for Asserting Contribution Under the Uniform Contribution Act

Contribution may be asserted in any of several ways under the Uniform Contribution Act. A defendant may cross-claim against a codefendant already in the action,⁸⁰ or, if the plaintiff did not sue the prospective contribution defendant, the initial defendant may join the prospective contribution defendant by a third-party complaint.⁸¹ Alternatively, within thirty days after final judgment, a defendant can seek contribution against a codefendant on motion to the trial court.⁸² Indeed, in *Best Sanitary Disposal Co. v. Little Food Town, Inc.*,⁸³ the District Court of Appeal, Second District, approved a post-judgment motion for contribution by a defendant that had voluntarily dismissed its cross-claim for contribution prior to trial. On the other hand, contribution will be denied if the joint tortfeasors from whom contribution is sought were dropped or dismissed as parties before the motion was filed.⁸⁴

Finally, a party may institute an independent action for contribution within one year after final judgment is rendered in the

79. See, e.g., *Ferguson v. State*, 377 So. 2d 709, 710 (Fla. 1979). Another rule of statutory construction favoring a limited, flexible definition of common liability is the maxim abhorring any "[c]onstruction of a statute which would lead to an absurd result." *McKibben v. Mallory*, 293 So. 2d 48, 51 (Fla. 1974); *Winter v. Playa del Sol, Inc.*, 353 So. 2d 598, 599 (Fla. 4th DCA 1977).

80. *Christiani v. Popovich*, 363 So. 2d 2, 10 (Fla. 1st DCA 1978), *aff'd*, 389 So. 2d 1179 (Fla. 1980); cf. *Seaboard Coast Line R.R. v. Gordon*, 328 So. 2d 206 (Fla. 1st DCA 1976) (defendant may not cross-claim against settling codefendant). See also FLA. R. Civ. P. 1.170(g).

81. *New Hampshire Ins. Co. v. Petrik*, 343 So. 2d 48, 51 (Fla. 1st DCA 1977); *Mount Sinai Hosp. v. Mora*, 342 So. 2d 1063, 1064 (Fla. 3d DCA 1977); *VTN Consol., Inc. v. Costal Eng'r Assocs.*, 341 So. 2d 226, 228 (Fla. 2d DCA 1976); *Florida Power Corp. v. Taylor*, 332 So. 2d 687, 693 (Fla. 2d DCA 1976); *Nationwide Mut. Ins. Co. v. Fouts*, 323 So. 2d 593, 594 (Fla. 2d DCA 1975). See also FLA. R. Civ. P. 1.180.

82. FLA. STAT. § 768.31(4)(b) (1981). See also *Sobik's Sandwich Shops, Inc. v. Davis*, 371 So. 2d 709, 710 (Fla. 4th DCA 1979); *Frier's, Inc. v. Seaboard Coast Line R.R.*, 355 So. 2d 208, 212 (Fla. 1st DCA 1978); *Kennedy & Cohen, Inc. v. Van Eyck*, 347 So. 2d 1085, 1086 (Fla. 3d DCA 1977).

83. 339 So. 2d 222, 225 (Fla. 2d DCA 1976).

84. *Quinn v. Millard*, 358 So. 2d 1378, 1385 (Fla. 3d DCA 1978).

main action.⁸⁵ If the defendant seeking contribution has "discharged by payment the common liability" (i.e., settled) before the entry of judgment, he must similarly initiate his claim for contribution within one year after payment.⁸⁶

B. Apportionment

Following the promulgation of the Uniform Contribution Act, Florida courts initially rejected any apportionment of relative fault among joint tortfeasors.⁸⁷ Therefore, even if a jury believed one codefendant to be far more culpable than the other, each would be equally liable to the plaintiff for damages. Moreover, the less negligent tortfeasor could obtain no more than a pro rata recoupment from the more culpable codefendant. Thus, irrespective of their degree of fault, each codefendant would share equally in the consequences.⁸⁸

85. *Johns-Manville Sales Corp. v. Zack Co.*, 374 So. 2d 1150, 1151 (Fla. 3d DCA 1979); *Sol Walker & Co. v. Seaboard Coast Line R.R.*, 362 So. 2d 45, 50 (Fla. 2d DCA 1978); *Mount Sinai Hosp. v. Mora*, 342 So. 2d 1063, 1065 (Fla. 3d DCA 1977). In *Johns-Manville*, the court said a party seeking contribution must "either file in the original action brought by plaintiff by a motion for contribution prior to the expiration of thirty days after any final judgment . . . or commence a separate action within one year of the rendition of the final judgment if the moving party does not take an appeal." 371 So. 2d at 1151. The court added that an unsuperseded appeal taken by one defendant would not toll the one year limitation period for the nonappealing defendant. *Id.* at 1151 n.1.

86. FLA. STAT. § 768.314(d)(1), (2) (1981). The Act distinguishes between settlements paid when no action is pending, and settlement after suit is filed. In the former situation, any nonlitigated settlement must be paid within the limitations period of the claimant's right of action. Although no Florida contribution case has yet decided the issue, any such party seeking contribution must generally show the reasonableness of the settlement. *E.g.*, *W.D. Rubright Co. v. International Harvester Co.*, 358 F. Supp. 1388, 1392 (W.D. Pa. 1973). This is the rule in Florida respecting indemnity claims, except where an indemnity defendant has prior notice of and opportunity to participate in settlement of the underlying claim. *Atlantic Coast Dev. Corp. v. Napoleon Steel Contractors*, 385 So. 2d 676, 681 (Fla. 3d DCA 1980). In that event, the indemnity defendant, and presumably a contribution defendant, is bound by the sum of settlement in the absence of fraud or collusion. *Id.*

87. *Lincenberg v. Issen*, 318 So. 2d 386, 392 (Fla. 1975). *See, e.g.*, *Moore v. St. Cloud Utils.*, 337 So. 2d 982, 984 (Fla. 4th DCA 1976) (court reversed trial court's apportionment of 20%, 20%, 35%, and 25% among four joint tortfeasors). Most statutes authorizing contribution continue to prorate liability among tortfeasors rather than assess their damages according to relative fault. Comment, *supra* note 2, at 695.

88. Comment, *supra* note 2, at 695. *But see Kennedy & Cohen, Inc. v. Van Eyck*, 347 So. 2d 1085 (Fla. 3d DCA 1977). In *Van Eyck*, the Third District affirmed a trial court's 80%/20% allocation of liability between codefendants based on the Act's direction that "[p]rinciples of equity applicable to contribution generally shall apply." *Id.* at 1086 (citing FLA. STAT. § 768.31(3)(c) (1975)). The court's decision preceded the legislative amendment authorizing apportionment according to relative fault. 1976 Fla. Laws ch. 76-168 (codified in FLA. STAT. § 768.31(3)(a) (1981)). Arguably, the equitable power of apportionment upheld in *Van Eyck* was retained following the 1977 legislative modification.

A 1976 amendment to Florida Uniform Contribution Act abrogated the case law prohibiting any assessment of comparative fault among tortfeasors.⁸⁹ A court may now apportion the relative percentage of fault among defendants for purposes of contribution, either upon special jury interrogatories or through its own post-verdict findings.⁹⁰ In *Vigilant Insurance Co. v. Kernin*,⁹¹ for example, a jury found that one of three codefendants was only twenty-percent liable for the plaintiff's injuries and that the other two codefendants were eighty-percent liable.⁹² Based on these findings, the District Court of Appeal, First District, held that the defendant that was twenty-percent liable could recover from its codefendants any sums it had paid the plaintiff in excess of twenty-percent of the verdict.⁹³ The First District, however, quoted the trial court in emphasizing that irrespective of the apportionment of relative fault among defendants for contribution purposes, each remained fully liable to the plaintiff for the total sum of the judgment.⁹⁴

C. Exoneration

Section 768.31(4)(f) of the Uniform Contribution Act now provides that a finding by the trier of fact that one defendant is not liable to the plaintiff is binding on all the defendants in determining their contribution rights.⁹⁵ The District Courts of Appeal for the First and Second Districts differed on exoneration prior to the effective date of this provision. The First District in *Liberty Mutual Insurance Co. v. Curtiss*,⁹⁶ ruled that unless codefendants actually raise contribution claims in the underlying action, res judicata will not block subsequent attempts to seek contribution against a defendant exonerated of liability.⁹⁷ The Second District, on the other hand, held in *Sol Walker & Co. v. Seaboard Coast*

89. 1976 Fla. Laws ch. 76-168 (codified in FLA. STAT. § 768.31(3)(a) (1981)); see also *Sobik's Sandwich Shops, Inc. v. Davis*, 371 So. 2d 708, 711 n.5 (Fla. 4th DCA 1979); *Kennedy & Cohen, Inc. v. Van Eyck*, 347 So. 2d at 1086 n.1.

90. Compare *Lincenburg v. Issen*, 318 So. 2d 386, 393 (Fla. 1975) and *Vigilant Ins. Co. v. Keiser*, 391 So. 2d 706 (Fla. 1st DCA 1980) with *Kennedy & Cohen, Inc. v. Van Eyck*, 347 So. 2d 1085 (Fla. 3d DCA 1977).

91. 391 So. 2d 706 (Fla. 1st DCA 1980).

92. *Id.* at 707-08.

93. *Id.* at 713.

94. *Id.* at 709.

95. FLA. STAT. § 768.31(4)(f) (1981), as amended by 1976 Fla. Laws ch. 76-186; see *Sol Walker & Co. v. Seaboard Coast Line R.R.*, 362 So. 2d 45, 53 (Fla. 2d DCA 1978).

96. 327 So. 2d 82 (Fla. 1st DCA 1976).

97. *Id.* at 85.

*Line Railroad*⁹⁸ that res judicata bars subsequent contribution claims if the codefendants in the previous trial "did actually litigate adversely," irrespective of whether adverse claims are actually filed.⁹⁹ The only aspect of exoneration not addressed by the Act is its applicability to claims by persons not joined in the original action. Because the Act expressly immunizes exonerated defendants from subsequent contribution claims, the reasoning of *Liberty Mutual* suggests that even if a joint tortfeasor had no opportunity to participate in the original litigation, he would be unable to obtain contribution from a previously exonerated defendant. The *Liberty Mutual* court emphasized that contribution requires "common liability."¹⁰⁰ If an original defendant is exonerated of liability to the plaintiff, then he does not share a "common liability" to the plaintiff with any subsequent defendant and is thus immune to contribution claims. The defendant denied contribution in *Liberty Mutual* had, however, been a party to the action exonerating its codefendant, thus the court's statement is only dictum.

As discussed above,¹⁰¹ it is unfair to construe the term "common liability" to defeat a subsequent defendant's contribution claim when developments beyond his control have defeated the plaintiff's claim against the original defendant. Such a construction of "common liability" would be especially inequitable if applied to one having no chance to participate in the original exoneration of his fellow tortfeasors. Although the Uniform Contribution Act does not address exoneration of nonparticipants in the original action, courts should construe the Act to forbid such a result. The Act makes the plaintiff's judgment binding "as among such defendants" participating in the suit.¹⁰² In dictum, one court has suggested that this explicit reference to participating defendants implies that exoneration is inapplicable to nonparticipants.¹⁰³ With the scope of exoneration so delimited by the legislature, the courts should not broaden the effect of a judgment. The Supreme Court of Florida recently resolved a conflict among the district courts when it held that defendants may appeal the exoneration of a codefendant that substantially affects their rights against the code-

98. 362 So. 2d 45 (Fla. 2d DCA 1978).

99. *Id.* at 51.

100. 327 So. 2d at 85-86.

101. See text accompanying notes 71-72 *supra*.

102. FLA. STAT. § 768.31(4)(f) (1981).

103. *Sol Walker & Co. v. Seaboard Coast Line R.R.*, 362 So. 2d at 45 n.6 (Fla. 2d DCA 1978).

fendant.¹⁰⁴ This right exists even if the defendants appealing the exoneration did not previously assert a claim for contribution.¹⁰⁵

IV. RELEASE

The effect of a release on the right to contribution is problematic. Under the Uniform Contribution Act, a plaintiff's release of one joint tortfeasor generates consequences fundamentally different from those arising at common law.¹⁰⁶

A. Release of One Tortfeasor Does Not of Itself Release Others

Florida's Uniform Contribution Act specifically provides that a plaintiff's release of one tortfeasor does not discharge other joint tortfeasors from liability.¹⁰⁷ This provision abrogates the common law rule under which the release of one joint tortfeasor released all.¹⁰⁸

A recent decision by the Supreme Court of Florida examined the effect of the Act on a printed general release clause. In *Hurt v. Leatherby Insurance Co.*,¹⁰⁹ the court held that a general release by a claimant of one defendant, as well as "any other person . . . which might be charged with responsibilities for injury,"¹¹⁰ did not, as a matter of law, absolve remaining joint tortfeasors. Whether a

104. *Pensacola Interstate Fair, Inc. v. Popovich*, 389 So. 2d 1179, 1181 (Fla. 1980). The District Court of Appeal, Fifth District, has held that an order dismissing a cross-claim for contribution is a nonappealable interlocutory order. *Gallo v. Esser*, 407 So. 2d 1062 (Fla. 5th DCA 1981).

105. See *Christiani v. Popovich*, 363 So. 2d 9 (Fla. 1st DCA 1978), *aff'd*, 389 So. 2d 1179 (Fla. 1980); *Sol Walker & Co. v. Seaboard Coast Line R.R.*, 362 So. 2d 45, 53 (Fla. 2d DCA 1978); *Liberty Mut. Ins. Co. v. Curtiss*, 327 So. 2d 82, 86 (Fla. 1st DCA 1976).

106. *Eason v. Lau*, 369 So. 2d 600, 601 (Fla. 1st DCA 1978).

107. FLA. STAT. § 768.31(5) (1981) provides:

When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death; (a) it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and, (b) it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

108. *Atlantic Coast Line R.R. v. Boone*, 85 So. 2d 834, 841 (Fla. 1956).

109. 380 So. 2d 432 (Fla. 1980).

110. *Id.* at 433. The court emphasized that the Uniform Contribution Act authorizes release of all possible tortfeasors if the terms of the release "so provide." *Id.* (citing FLA. STAT. § 768.31(5)(a) (1979)). The court also instructed, however, that the intent to release all possible tortfeasors must be clearly manifested on the release.

printed release effectively discharges other than specifically named tortfeasors is a question of fact.

B. *Effect of Release On A Defendant Who Settles*

As long as a settling tortfeasor's settlement was made in good faith, he is protected from any right of contribution that the remaining defendants might subsequently assert against him.¹¹¹ But he is similarly barred from seeking contribution from them.

Section 768.31(5)(b) of the Act creates the settling defendant's immunity from contribution. The statutory immunity is anchored in policy considerations that favor out-of-court settlements.¹¹² Without protection from contribution, the defendant would gain nothing from a settlement because he would remain liable for contribution to his codefendants for a proportionate share of the plaintiff's eventual judgment. The prospect that a defendant might settle, only to find himself thrust back into the case by a codefendant's contribution claim, made it impracticable for a tortfeasor to settle.¹¹³

The Act requires that the codefendant settle in good faith¹¹⁴ to obtain immunity from contribution. The most extensive discussion by a Florida court of the good faith requirement is presented in *Frier's, Inc. v. Seaboard Coast Line Railroad*.¹¹⁵ In *Frier's*, defendant Seaboard filed a post-trial motion for contribution against codefendants Frier's and Hartford Accident and Indemnity Company, both of whom had previously settled with the plaintiff pursuant to a "Mary Carter" agreement.¹¹⁶ Like other Mary Carter

111. FLA. STAT. § 768.31(5)(b) (1981). See *Metropolitan Dade County Transit Auth. v. Simmons*, 375 So. 2d 858 (Fla. 3d DCA 1979); *Seaboard Coast Line R.R. v. Gordon*, 328 So. 2d 206, 207 (Fla. 1st DCA 1976). Although a non-settling defendant may have no contribution rights against the settling party, he is entitled to set-off the amount paid in settlement against the final adverse judgment. See, e.g., *Quinn v. Millard*, 358 So. 2d 1378, 1384 (Fla. 3d DCA 1978); *Atlantic Ambulance & Convalescent Serv., Inc. v. Asbury*, 330 So. 2d 477, 478 (Fla. 4th DCA 1975). See FLA. STAT. § 768.31(5)(a) (1981).

112. See *Sobik's Sandwich Shops, Inc. v. Davis*, 371 So. 2d 709, 711 (Fla. 4th DCA 1979); *Frier's, Inc. v. Seaboard Coast Line R.R.*, 355 So. 2d 208, 211 (Fla. 1st DCA 1978).

113. *Frier's, Inc. v. Seaboard Coast Line R.R.*, 355 So. 2d 208, 211 (Fla. 1st DCA 1978).

114. FLA. STAT. § 768.31(5) (1981).

115. 355 So. 2d 208 (Fla. 1st DCA 1978).

116. *Id.* at 209-10.

A "Mary Carter" agreement is a secret contract in which one codefendant guarantees a stipulated minimum recovery to the plaintiff regardless of the outcome of the litigation. The defendant agrees to proceed to trial as if he were still a genuine adversary, but his liability is actually limited by the contract, regardless of the verdict. *Id.* at 210. See generally *Ward v. Ochoa*, 284 So. 2d 385, 387 (Fla. 1973); *Quinn v. Millard*, 358 So. 2d 1378 (Fla. 3d DCA 1978); *Booth v. Mary Carter Paint Co.*, 202 So. 2d 8 (Fla. 2d DCA 1967).

agreements, this settlement was reached secretly, decreased the settling defendant's liability in proportion to the increase in the non-settling defendants' liability, and guaranteed the plaintiff a definite recovery from the settling defendant regardless of the trial's outcome.¹¹⁷

Following the trial, the plaintiff obtained a judgment against Seaboard in a sum that, by virtue of the Mary Carter agreement, relieved Frier's and Hartford from any liability. Seaboard successfully moved for contribution from the codefendants. Seaboard's motion for contribution did not, however, allege that the plaintiff and the other defendants entered into the settlement agreement in bad faith. Accordingly, the District Court of Appeal, First District, was presented with the issue of whether using a Mary Carter agreement to settle establishes a lack of good faith. The First District declined so broad a proclamation. It instead granted Seaboard leave to amend its motion for contribution to allege a lack of good faith, and remanded for an evidentiary hearing on this issue.¹¹⁸ Although the court held that a Mary Carter agreement did not per se evidence bad faith, it offered no guidelines for determining what circumstances would demonstrate bad faith.¹¹⁹

In one recent case, *Sobik's Sandwich Shops, Inc., v. Davis*,¹²⁰ the District Court of Appeal, Fourth District, refused to bar contribution against a defendant who had secured a release from the plaintiff because the release was not given in good faith. In *Sobik's Sandwich Shops*, a jury had found three defendants jointly liable for \$83,186.96. Before any of the defendants served notice of appeal, the plaintiffs announced that they would collect their judgment in the same order in which the defendants filed their appeals.¹²¹ The plaintiffs' obviously intended to discourage an appeal of the verdict. The defendants nonetheless appealed, unsuccessfully. The plaintiffs then required the defendant who had first appealed to pay \$50,000 for his release; the second defendant paid \$31,984.97, and the third defendant paid only \$1,000.¹²² The first defendant filed a claim for contribution against the third, alleging that the release was not given in good faith as required by section 768.31(5) of the Act. The trial court denied the motion. On appeal,

117. 355 So. 2d at 210.

118. *Id.* at 211-12.

119. *Id.* at 211.

120. 371 So. 2d 709 (Fla. 4th DCA 1970).

121. *Id.* at 710.

122. *Id.*

the Fourth District held that the release of the third defendant was not given in good faith.¹²³ To hold otherwise, the court noted, would allow a claimant to arbitrarily decide how much each tortfeasor would pay on the basis of which tortfeasor had been more cooperative.¹²⁴

The District Court of Appeal, Third District, established a less exacting standard of good faith in *Metropolitan Dade County Transit Authority v. Simmons*.¹²⁵ In *Simmons*, one codefendant settled with the plaintiff for \$1,000. The other codefendant, Dade County, refused to settle and ultimately suffered a \$60,000 judgment. The Third District affirmed the trial court's ruling that the settlement was not demonstrably made in good faith.¹²⁶ The *Simmons* court can be criticized for attaching no significance to the sixty-to-one disparity between the amount of the judgment and the sum paid in settlement. A settlement in an amount substantially less than the defendant's pro rata share of the final judgment should, at the least, impose either a burden to show good faith, or a rebuttable presumption of bad faith.

Both *Simmons* and *Frier's, Inc. v. Seaboard Coast Line Railroad*¹²⁷ effectively eliminate any requirement that the settling codefendant demonstrate his good faith to ensure immunity from contribution. Instead, these cases place the burden on the nonsettling defendant to prove that the settlement was made in bad faith. Unfortunately, shifting the burden of proof in this manner could lead to unfairness. Because the statutory immunity from contribution liability substantially benefits the settling defendant, he should be the party with the duty to show good faith. If "good faith settlement" is, in substance, an affirmative defense, then ordinary principles of pleading and evidence require that the party asserting a good faith settlement bear the burden of proof.¹²⁸

It is difficult for one party to prove the bad faith of another. Whichever defendant the plaintiff selects for settlement could, therefore, easily satisfy the *Simmons* standard irrespective of the sums paid in settlement. By allowing the plaintiff unfettered discretion to select the codefendant to whom he may grant an easy

123. *Id.* at 711-12.

124. *Id.* at 711.

125. 375 So. 2d 858 (Fla. 3d DCA 1979).

126. *Id.* at 859. *But see* *River Garden Farms, Inc. v. Superior Court*, 26 Cal. App. 3d 986, 103 Cal. Rptr. 498 (1972) (unreasonably low settlement as an indication of bad faith).

127. 355 So. 2d 208 (Fla. 1st DCA 1978).

128. *E.g.*, *Hough v. Menses*, 95 So. 2d 410 (Fla. 1957).

settlement, courts once again make the plaintiff " 'lord of his action' [who], when injured by the joint and several tort of two or more, may place the loss where and how he sees fit.'"¹²⁹ The contribution doctrine arose to combat such private, instead of judicial, control over distribution of loss.¹³⁰

Judicial standards for measuring good faith would provide an adequate safeguard from settlement abuses. So far, Florida courts have offered no general guidelines, but instead have merely determined whether particular circumstances constitute bad faith as a matter of law. One California decision¹³¹ relied upon by the First District in *Frier's* suggested several criteria for determining good faith. These include the settling party's solvency, the strengths or weaknessness of its defenses, the overall value of the plaintiff's claim, and the amount of the settlement. Although this listing is far from exhaustive, it indicates that appropriate standards can be formulated to guide the trial court through this critical determination.

Another issue raised by the release of the settling defendant is whether he may obtain contribution against nonsettling defendants in the event his settlement exceeds a pro rata share of the ultimate judgment. Section 768.31(2)(d) of Florida's Uniform Contribution Act provides that a settling defendant "is not entitled to recover contribution from another tortfeasor whose liability for the injury or wrongful doing is not extinguished by the settlement."¹³² The District Court of Appeal, Second District, applied this provision strictly in *Best Sanitary Disposal Co. v. Little Food Town, Inc.*,¹³³ in which the defendant Little Food Town paid \$45,000 to the plaintiff in exchange for a release of its liability. The plaintiff did not release the remaining defendant, Best Sanitary, which proceeded to trial. The jury returned a verdict of \$45,000. Because the plaintiff had already received that sum when it settled with Little Food Town, he could only obtain court costs from Best Sanitary. Thereafter, Little Food Town successfully sued Best Sanitary for

129. *Sobik's Sandwich Shops, Inc. v. Davis*, 371 So. 2d 709, 711 (Fla. 1st DCA 1978).

130. See UNIFORM LAWS ANNOTATED, *supra* note 3, at 61 (1975).

131. *River Garden Farms, Inc. v. Superior Court*, 26 Cal. App. 3d 986, 103 Cal. Rptr. 498 (1972); see Comment, *Sliding Scale Agreements and the Good Faith Requirement of Settlement Negotiations*, 12 PAC. L.J. 121, 142 (1980) (citing *Stambaugh v. Superior Court*, 62 Cal. App. 3d 231, 132 Cal. Rptr. 843 (1976) (suggests California decisions have diluted significance of good faith test). In *Stambaugh*, the court presumed good faith absent "rare cases of collusion or bad faith." 62 Cal. App. 3d at 238, 132 Cal. Rptr. at 847.

132. FLA. STAT. § 768.31(2)(d) (1981).

133. 339 So. 2d 223 (Fla. 2d DCA 1976).

contribution, arguing that Little Food Town's \$45,000 settlement payment essentially extinguished the plaintiff's damages, and relieved Best Sanitary of its liability to the plaintiff.¹³⁴ The District Court of Appeal, Second District, reversed, holding that Little Food Town could not be considered to have "released" or absolved Best Sanitary because the Act expressly provides that a release naming one defendant does not release all.¹³⁵

The court also noted that the statute protected the settling party from contribution claims by other nonsettling defendants, and should therefore also protect the nonsettling defendants from contribution sought by the settlor.¹³⁶ Had the jury verdict been greater than \$45,000, Little Food Town would have been protected from contribution and thus shielded from pro rata exposure as a result of its \$45,000 settlement. Consequently, the court held it unjust to allow Little Food Town contribution when its settlement later proved disadvantageous. Little Food Town paid a disproportionate amount of the plaintiff's claim, but that was a circumstance of its own making.¹³⁷

Both the logic and fairness of *Best Sanitary Disposal Co.* are compelling, and the case is consistent with the Uniform Contribution Act, but it may nevertheless impede the policy of encouraging substantial settlements.¹³⁸ Any defendant's counsel who urges settlement runs a risk of embarrassment should the settlement be greater than a pro rata share of the ultimate verdict. To avoid such a result, defense counsel may be wise to avoid solo settlements unless the sum is plainly less than a proportionate share of the lawsuit's value. Conversely, should the settlement fall too safely below the expected pro rata share, it could be attacked as lacking "good faith."

The court's concern for equalizing the benefits and burdens of the settling defendant may therefore run counter to the goal of creating a favored position for the settlor.

V. CONCLUSION

Florida's Uniform Contribution Act is a major departure from common law contribution. It aptly serves the modern goals of contribution: broad distribution of loss and flexible allocation of liabil-

134. *Id.* at 225.

135. *Id.* at 225-26; see FLA. STAT. § 768.31(5)(a) (1981).

136. 339 So. 2d at 226.

137. *Id.*

138. See text accompanying note 112, *supra*.

ity. Because the statute now permits relative apportionment of fault among tortfeasors, contribution is a loss allocation tool that allows the trier of fact to consider all circumstances relevant to the fault of wrongdoers. It is thus clearly preferable to the all or nothing remedies of indemnity and subrogation.

When courts engraft time proximity or joint action requirements onto the Uniform Contribution Act, they severely restrict the trier of fact's ability to assign appropriate degrees of liability among joint tortfeasors. The requirement of "concerted action" or "common liability" is a technicality that may be irrelevant to the central issue of fault; it may also produce inconsistent analyses as courts strain to avoid unjust results. The trier of fact should be free to weigh such factors as the remoteness in time and attenuation in causality of the tortfeasors' roles when assigning fault.

A more stringent application of the good faith requirement in settlements is, however, necessary to further the policy favoring out-of-court resolution of cases. An inexpensive partial settlement that extricates one defendant at the expense of others will do little to reduce litigation because the other defendants must proceed to trial. A court might actually impede the complete settlement of a case by sanctioning a cheap settlement for one defendant, because the remaining defendants become more reluctant to settle because the more fortunate defendant's settlement imposes a greater proportionate liability upon them. Accordingly, the good faith of a settlement should be strictly tested against defined criteria. The criteria should be based on the factors that attorneys consider in any honest appraisal of a settlement, such as the value of the plaintiff's overall claim, the strengths and weaknesses of a particular defendant's position, and even the relative solvency of the defendants. Although no standards can guarantee good faith, closer guidelines may encourage defendants concerned with fulfilling the good faith requirement to agree to higher initial settlements. Such higher initial settlements would both promote fairness in ultimate loss sharing, and facilitate resolution of the entire litigation by making final settlement more affordable to the remaining defendants.

Contribution is a doctrine warranting broad application so that responsibility for wrongdoing may be flexibly allocated. This vehicle for the sharing of loss should not be compromised by inexpensive, partial settlements that can disserve the goal of resolving cases out of court. Nor should the statutory innovation of contribution be unduly confined by judicially created limitations that ignore the doctrine's equitable purpose.