

1980

The Covenant Not to Sue: Virginia's Effort to Bury the Common Law Rule Regarding the Release of Joint Tortfeasors

Linda Flory Rigsby
University of Richmond

Follow this and additional works at: <http://scholarship.richmond.edu/lawreview>

 Part of the [Contracts Commons](#), and the [Torts Commons](#)

Recommended Citation

Linda F. Rigsby, *The Covenant Not to Sue: Virginia's Effort to Bury the Common Law Rule Regarding the Release of Joint Tortfeasors*, 14 U. Rich. L. Rev. 809 (1980).

Available at: <http://scholarship.richmond.edu/lawreview/vol14/iss4/8>

This Comment is brought to you for free and open access by UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized administrator of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

THE COVENANT NOT TO SUE: VIRGINIA'S EFFORT TO BURY THE COMMON LAW RULE REGARDING THE RELEASE OF JOINT TORTFEASORS

I. INTRODUCTION

The 1979 Virginia General Assembly turned the last shovel of earth onto the grave of the common law "release rule"¹ by adopting the covenant not to sue as a viable settlement device in joint tortfeasor actions.²

1. Early common law as developed in England allowed a release of one tortfeasor to act as a release of all other tortfeasors responsible for the same harm. The law regarded the single harm as being only one cause of action against the defendants; when a release of a judgment was effected against one, this destroyed the entire cause of action and, therefore, released the other tortfeasor. W. PROSSER, *THE LAW OF TORTS* § 49, at 301 (4th ed. 1971).

2. VA. CODE ANN. § 8.01-35.1 (Cum. Supp. 1979) (revised in 1980)

Effect of covenant not to sue or settlement upon liability and contribution among joint tortfeasors—A. When a covenant not to sue is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:

1. It shall not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide; but it shall reduce the claim against the others to the extent of any amount stipulated by the covenant, or in the amount of the consideration paid for it, whichever is the greater; and

2. It shall discharge the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

B. A tortfeasor who enters into a settlement with a claimant is not entitled to recover contributions from another tortfeasor whose liability for the injury or wrongful death is not extinguished by the settlement, nor in respect to any amount paid in a settlement which is in excess of what was reasonable.

The preceding form proved to be an unsatisfactory attempt to negate the common law rule of release and was quickly amended by the 1980 General Assembly to the following:

VA. CODE ANN. § 8.01-35.1 (Cum. Supp. 1980).

Effect of release or covenant not to sue in respect to liability and contribution among joint tortfeasors—A. When a release or a covenant not to sue is given in good faith to one of two or more persons liable in tort for the same injury, or the same property damage or the same wrongful death:

1. It shall not discharge any of the other tortfeasors from liability for the injury, property damage or wrongful death unless its terms so provide; but any amount recovered against the other tortfeasors or any one of them shall be reduced by any amount stipulated by the covenant, or in the amount of the consideration paid for it, whichever is the greater; and

2. It shall discharge the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

B. A tortfeasor who enters into a release or covenant not to sue with a claimant is not entitled to recover by way of contribution from another tortfeasor whose liability for the injury, property damage or wrongful death is not extinguished by the release

By this statutory adoption, Virginia became the last state to recognize, either by statute or judicial mandate, that a properly drawn covenant not to sue can act to release one or more tortfeasors without automatically releasing all those tortfeasors liable for the same injury or wrongful death.³ Judicial interpretations of the covenant not to sue,⁴ particularly those of California, Michigan and North Carolina, will be examined here in order to present salient factors for the Virginia practitioner to consider when drafting a covenant not to sue.

or covenant not to sue, nor in respect to any amount paid by the tortfeasor which is in excess of what was reasonable.

C. A release or covenant not to sue given pursuant to this section shall be subject to the provisions of §§ 8.01-55 and 8.01-424.

The remainder of this article will refer to the 1980 amended statute unless otherwise noted. However, practitioners should be aware that the original statute will control any covenant signed between July 1, 1979 and June 30, 1980.

3. Over the past fifty years all other states have come to recognize the need to eliminate the harshness and injustice created when an unknowing plaintiff released one defendant and discovered that he had ended his entire cause of action against any other defendant. Change first came when states began to recognize a release of one would release all joint tortfeasors only if they were acting in concert. If the wrongdoers were termed joint tortfeasors only because their independent and concurrent tortious conduct contributed to the plaintiff's single injury, they were not automatically released by a settlement with one of the concurrent wrongdoers, especially when the release specifically included a reservation of rights against other co-defendants. W. PROSSER, *supra* note 1, § 49, at 301-02.

But many states regarded a release of any kind as an abandonment of a claim. They consequently adopted the covenant not to sue as an instrument which did not extinguish the cause of action but rather acted as an agreement between the parties whereby the plaintiff would refrain from enforcing a cause of action rather than surrendering it altogether as a release would. *Id.* § 49, at 303.

By 1972, 15 states (Arizona, Connecticut, Idaho, Iowa, Kansas, Kentucky, Maine, Minnesota, Nebraska, New Hampshire, Oklahoma, Oregon, South Carolina, Texas and Washington) had modified the "release rule" by judicial recognition that the intention of the parties should control the effect of a release. Courts of another six states (Colorado, Georgia, Illinois, Ohio, Wyoming and Vermont) allowed a covenant not to sue to act as a release of only the covenanting parties and not all tortfeasors.

In addition by 1977, 23 states had statutorily adopted the covenant not to sue as an effective settlement device. *See* notes 24, 28 and 30 *infra*.

4. The scope of this article will not include the specialized covenant not to sue known as a Mary Carter agreement. This represents a new development in tortfeasor settlement devices and has been declared valid in only a few states. *See* *Maule Industries, Inc. v. Rountree*, 264 So. 2d 445 (D.C. Fla. 1972), *modified*, 284 So. 2d 389 (Fla. 1973). *But see* *Lum v. Stinnett*, 87 Nev. 402, 488 P.2d 347 (1971) (Mary Carter agreements criticized as being unfairly prejudicial to the nonagreeing defendants' rights to a fair trial).

II. CONTRIBUTION AND RELEASE LAW IN VIRGINIA PRIOR TO THE 1979 STATUTE

A brief history of Virginia's view of contribution, releases and covenants not to sue will be helpful in understanding the newly enacted statute. As early as 1950, the Virginia Supreme Court merely recognized the existence of the covenant not to sue but refused to acknowledge that a covenant which reserved the right to sue other defendants could act as a release of only the covenanting party, especially if the plaintiff accepted some form of compensation for the covenant.⁵

In 1963, Chief Justice Eggleston's opinion in *Lackey v. Brooks*⁶ acknowledged the difference between a covenant not to sue and a release as stated in the Restatement of Torts section 885(2).⁷ However, this dictum did nothing to advance a modification of Virginia's release law because the instrument involved was a lease signed before the cause of action arose. The court ruled that such a lease acted as a covenant not to sue rather than a release solely because it was signed previous to the existence of a claim. Furthermore, there had been no accord and satisfaction associated with the instrument; therefore, it did not relieve all joint tortfeasors even though one was thereby released.

In 1967, the supreme court further explained that a mere dismissal of a claim against one tortfeasor did not act as a release of all tortfeasors.⁸

5. In *Shortt v. Hudson Supply & Equip. Co.*, 191 Va. 306, 60 S.E.2d 900 (1950), the injured party executed a covenant not to sue his employer in exchange for \$3500. The Virginia Supreme Court ruled that he had settled for this sum after having made a common sense estimate of what he was willing to accept, thus his acceptance acted as an accord and satisfaction which discharged all tortfeasors. For early Virginia law regarding a release other than a covenant not to sue, see *First & Merchants Nat'l Bank v. Bank of Waverly*, 170 Va. 496, 197 S.E. 462 (1938).

All courts have recognized the importance of allowing only one complete satisfaction in order to avoid double recovery and unjust enrichment, but difficulties have arisen in distinguishing between a satisfaction of the plaintiff's entire claim of damages and a satisfaction of the plaintiff's claim against the released defendant. The strict common law rule, as demonstrated by *Shortt*, viewed the latter as well as the former as a complete satisfaction and release of all tortfeasors. See Annot., 73 A.L.R.2d 403 (1960).

6. 204 Va. 428, 132 S.E.2d 461 (1963).

7. Adopted in 1939, the RESTATEMENT OF TORTS § 885 (1939) specified three points concerning release:

- 1) A valid release of one tortfeasor acts as a release of all tortfeasors unless the parties to the release agree that the release shall not discharge the others.
- 2) A covenant not to sue one tortfeasor for a harm does not discharge any other liable for the harm.
- 3) Payments by one tortfeasor will accordingly diminish the amount of claim against another.

8. *Dickenson v. Tabb*, 208 Va. 184, 156 S.E.2d 795 (1967).

However, the court again warned that the "acceptance of satisfaction . . . operates to extinguish [the] plaintiff's cause of action against other joint tort-feasors."⁹

Finally, in 1977, an intentional tort case involving a covenant not to sue was appealed to the Virginia Supreme Court.¹⁰ Since all courts recognize that covenants not to sue, as well as releases, act to release all tortfeasors if the tort is of an intentional nature, the Virginia decision ruled that the covenants in the instant case did in fact release all co-defendants. However, Justice Poff, pointing to the four guiding principles¹¹ concerning all releases in Virginia, further stated that the plaintiff's acceptance of \$50,000 amounted to satisfaction for the tortious conduct of the two defendants which extinguished the cause of action and released all tortfeasors. In conclusion, Justice Poff noted, "[u]nfortunately, the rule sometimes works harsh results. Yet, the rule is one of ancient origin, honored without exception in this Commonwealth, and fully familiar to bench and bar. Both counsel and courts must be governed by it."¹² The court did not indicate that these rules would be applicable to intentional torts only.

Recognizing that the judicial branch of Virginia's government was not inclined to modify the release law, the 1979 General Assembly enacted the covenant not to sue statute.¹³

In like manner the 1950 legislature had changed the common law of contribution so that this right would be allowed among wrongdoers when the tort resulted from negligence and involved no moral turpitude.¹⁴ As a

9. *Id.* at 194, 156 S.E.2d at 802-03.

10. *Wright v. Orlowski*, 218 Va. 115, 235 S.E.2d 349 (1977) (action brought by the mother of a teenaged boy paralyzed when several classmates jokingly threw him out of a window). Two covenants not to sue were executed between the plaintiff and two of the defendants' insurance companies for \$25,000 each. The instruments expressly reserved the right to sue all co-defendants but agreed not to sue their insurance companies. There was further evidence that the plaintiffs orally agreed to take a nonsuit as to the two defendants whose insurance companies had settled. The trial court ruled the signed instruments plus the oral agreements constituted a release of all defendants. The Virginia Supreme Court affirmed.

11. The four principles invoked were:

- 1) A release activates the common law rule.
- 2) The making of an accord and acceptance of satisfaction will effect a release.
- 3) When a plaintiff accepts satisfaction from one tortfeasor for his part in the tort, this releases all tortfeasors.
- 4) These rules of law cannot be defeated by a unilateral reservation of rights.

Id. at 120, 235 S.E.2d at 353.

12. *Id.* at 122-23, 235 S.E.2d at 354.

13. VA. CODE ANN. § 8.01-35.1 (Cum. Supp. 1979). See note 2 *supra* for full text.

14. VA. CODE ANN. § 8.01-34 (Repl. Vol. 1977). A right of contribution will lie even though

further modification of joint tortfeasor law, another 1950 statute¹⁵ changed the common law position of allowing a judgment without satisfaction to act as a release.¹⁶ The modification allowed such a judgment against one tortfeasor to act as a discharge of all tortfeasors only if one of the judgments had been fully satisfied and accepted by the injured party.¹⁷ However, the revisers' note following the statute states that satisfaction is determined by case law and could include full payment, accord and satisfaction, or a covenant not to sue supported by consideration. Obviously because of the enactment of section 8.01-35.1 of the Virginia Code, a covenant not to sue supported by consideration should not be deemed a satisfaction sufficient to release all tortfeasors unless the amount paid can be judged to be full compensation for the claim.¹⁸ Otherwise the covenant statute¹⁹ would have no meaning and any consideration paid in exchange for the release or covenant not to sue one co-defendant would release all co-defendants.

III. STATUTORY SETTLEMENT DEVICES IN OTHER STATES

In order to utilize the covenant statute, one must understand the technical similarities and differences between Virginia's statute and the release and covenant statutes in other states. Particular attention should be given to the 1955 Uniform Act as adopted in North Carolina. This stat-

there has been no previous judgment determining the issues of negligence or contributory negligence; however, there must have been a compromise settlement *paid*. See *North River Ins. Co. v. Davis*, 274 F. Supp. 146 (W.D. Va. 1967), *aff'd*, 392 F.2d 571 (4th Cir. 1968) *Nationwide Mut. Ins. Co. v. Jewel Tea Co.*, 202 Va. 527, 118 S.E.2d 646 (1961).

15. VA. CODE ANN. § 8.01-443 (Repl. Vol. 1977).

16. See *McLaughlin v. Siegel*, 166 Va. 374, 185 S.E. 873 (1936).

17. VA. CODE ANN. § 8.01-443 (Repl. Vol. 1977). This statute is very similar to the UNIFORM CONTRIBUTION AMONG JOINT TORTFEASORS ACT § 3(e), 12 UNIFORM LAWS ANN. 89 (1955) [hereinafter cited as 1955 UNIFORM ACT] which reads: "The recovery of a judgment for an injury or wrongful death against one tortfeasor does not of itself discharge the other tortfeasors from liability for the injury or wrongful death unless the judgment is satisfied. The satisfaction of the judgment does not impair any right of contribution."

18. See generally *McKenna v. Austin*, 134 F.2d 659 (D.C. Cir. 1943) for some insight into determining what full satisfaction may be. Each case will vary; the facts and intentions of the parties should prevail over assumptions based on the mere fact of settlement. Ordinarily the claimant would not obtain a full satisfaction from one or more tortfeasors unless the others were judgment proof. Therefore the presumption should be against full satisfaction and discharge of all co-defendants.

The opinion further states that the instrument involved reserved rights against some defendants and it was, therefore, immaterial whether the document was deemed a covenant not to sue or a release. In either case it did not act as a release of more than the covenanting parties.

19. VA. CODE ANN. § 8.01-35.1 (Cum. Supp. 1980).

ute²⁰ served as the model for Virginia's new law.

Most all of the twenty-four states that now have covenant not to sue laws and/or modified release laws have enacted them with the hope of encouraging settlements and preventing plaintiffs from arbitrarily choosing where the burden of common fault must fall.²¹ This also was the goal of the Commissioners on Uniform State Laws²² when they included section four in the Uniform Contribution Among Tortfeasors Act in 1939.²³ While this Act speaks only of releases, the courts in most of the eleven adopting states²⁴ have viewed releases and covenants on an equal basis so long as neither acts as a full satisfaction of the plaintiff's claim.²⁵

Furthermore, section four²⁶ of the 1955 revised version,²⁷ as adopted by

20. N.C. GEN. STAT. § 1B-4 (Repl. Vol. 1969). The 1979 Virginia drafters were not willing to adopt the entire 1955 Uniform Act because it was a contribution act which they felt was not needed in Virginia. Moreover, they omitted all language of release found in the North Carolina statute. However, the 1980 amended version acknowledges that a release of one tortfeasor will act just as a similar covenant not to sue.

21. *E.g.*, *Markey v. Skog*, 129 N.J. Super. 192, 322 A.2d 513 (1974); *Wheeler v. Denton*, 9 N.C. App. 167, 175 S.E.2d 769 (1970).

22. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT, Commissioners' Prefatory Note, 12 UNIFORM LAWS ANN. 57 (1939) [hereinafter cited as 1939 UNIFORM ACT].

23. 1939 UNIFORM ACT § 4 reads:

[Release; Effect on Injured Person's Claim]—A release by the injured person of one joint tortfeasor, whether before or after judgment, does not discharge the other tortfeasors unless the release so provides; but reduces the claim against the other tortfeasors in the amount of the consideration paid for the release, or in any amount or proportion by which the release provides that the total claim shall be reduced, if greater than the consideration paid.

24. Arkansas, ARK. STAT. ANN. §§ 34-1001 to -1009 (Repl. Vol. 1962); Delaware, DEL. CODE ANN. tit. 10 §§ 6301-08 (Revised 1974); Hawaii, HAW. REV. STAT. §§ 663-11 to -17 (Repl. Vol. 1976); Idaho, IDAHO CODE §§ 6-803 to -806 (1979); Maryland, MD. ANN. CODE art. 50, §§ 16-24 (Repl. Vol. 1979); Mississippi, MISS. CODE ANN. § 85-5-5 (1972); New Jersey, N.J. STAT. ANN. §§ 2A:53A-1 to -5 (West Cum. Supp. 1979); New Mexico, N.M. STAT. ANN. §§ 41-3-1 to -8 (1978); Pennsylvania, 42 PA. CONS. STAT. ANN. §§ 8321-27 (Purdon Cum. Supp. 1979); Rhode Island, R.I. GEN. LAWS §§ 10-6-1 to -11 (Repl. Vol. 1969); South Dakota, S.D. COMP. LAWS ANN. §§ 15-8-11 to -22 (1967).

25. 1955 UNIFORM ACT § 4, Commissioners' Note. Most state courts viewed a special or limited release as releasing only the covenanting tortfeasor while a general release released all others if the intention to do so was clear and if the covenanting party was making a *full* settlement for *all* damages connected with the tort. *See, e.g.*, *Weldon v. Lehmann*, 226 Miss. 600, 84 So. 2d 796 (1956).

26. 1955 UNIFORM ACT § 4 states:

[Release or Covenant Not to Sue]—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

an additional nine states,²⁸ included the words "covenant not to sue" in order to make this point clear.²⁹

Four additional states have enacted individual covenant not to sue or release laws without adopting either version of the Uniform Act.³⁰ Two of these, California and Michigan, mention both releases and covenants not to sue as acceptable devices. Missouri and West Virginia mention release only. However, court rulings in all four states indicate either directly or by implication that a properly drawn covenant will release only a settling tortfeasor just as would a properly drawn special release under the applicable statutes.³¹

With the enactment of the 1979 covenant law, Virginia was the only state to limit its settlements to covenants not to sue. Because of the past conservative tenor of the Virginia courts, it is safe to assume that any form of release signed between July 1, 1979 and June 30, 1980 will be interpreted as a release of all tortfeasors. The distinction between the two instruments rests on whether the phraseology indicates an abandonment

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.

27. The 1955 UNIFORM ACT was revised in 1955 because adopting states had greatly modified its provisions. To re-establish some degree of uniformity, to reconcile the serious variations, and to eliminate the confusion, the Commissioners studied all variations and adopted the most popular and workable solutions. 1955 UNIFORM ACT, COMMISSIONERS' PREFATORY NOTE.

28. Alaska, ALASKA STAT. §§ 09.16.010-.060 (1978); Colorado, COLO. REV. STAT. §§ 13-50.5-101 to -106 (Cum. Supp. 1979); Florida, FLA. STAT. ANN. § 768.31 (West Cum. Supp. 1980); Massachusetts, MASS. GEN. LAWS ANN. ch. 231B, §§ 1-4 (Michie-Law Co-op 1974); Nevada, NEV. REV. STAT. § 17.225-.305 (1979); North Carolina, N.C. GEN. STAT. §§ 1B-1 to -6 (Repl. Vol. 1969 & Cum. Supp. 1977); North Dakota, N.D. CENT. CODE §§ 32-38-01 to -04 (Repl. Vol. 1976); Tennessee, TENN. CODE ANN. §§ 23-3101 to -3106 (Cum. Supp. 1979); Wyoming, WYO. STAT. §§ 1-1-110 to -113 (Cum. Supp. 1980).

29. See generally *Ottinger v. Chronister*, 13 N.C. App. 91, 185 S.E.2d 292 (1971). Cf. *Simpson v. Plyler*, 258 N.C. 390, 128 S.E.2d 843 (1963) (decided before North Carolina had adopted the 1955 Uniform Act, and holding that a release would act as an extinguishment of the action while the covenant would not).

30. California, CAL. CIV. PROC. CODE § 877 (West 1980); Michigan, MICH. COMP. LAWS ANN. § 600.2925(d) (Cum. Supp. 1979); Missouri, MO. ANN. STAT. § 537.060 (Vernon 1953); West Virginia, W. VA. CODE § 55-7-12 (1966).

31. *Stewart v. Cox*, 55 Cal. 2d 857, 362 P.2d 345, 13 Cal. Rptr. 521 (1961); *Thomas v. Checker Cab Co.*, 66 Mich. App. 152, 238 N.W.2d 558 (1975); *New Amsterdam Cas. Co. v. O'Brien*, 330 S.W.2d 859 (Mo. 1960). While no West Virginia case was found which addressed the effect of a covenant not to sue, the liberal view of the state courts since 1960 indicates the same result. See *Tennant v. Craig*, 156 W. Va. 632, 195 S.E.2d 727 (1973); *Hardin v. New York Cent. R.R.*, 145 W. Va. 676, 116 S.E.2d 697 (1960).

of a claim or merely an agreement to enforce an existing cause of action.³²

Most courts that use judicial rather than statutory precedent to distinguish between covenants and releases do so based on the language used, the amount paid, the substance of the agreement and intention of the parties. However, courts issuing decisions based on statutory interpretation concentrate on the technical language used in the instrument. Most courts refuse to allow the title of the instrument to be a determining factor.³³

It seems likely that it was a recognition that content should rule over title that caused the Virginia legislators to amend their original covenant statute, and that the amended version eliminates any artificial distinction between the two and allows either to act as a release of only one tortfeasor so long as the language is not overly broad.

In looking to the proper language necessary for an appropriate release or covenant not to sue, careful attention must be paid to whether the applicable statute expressly requires a reservation of rights. Those states operating under either of the Uniform Acts do not have this requirement; the instrument extends only to those tortfeasors who are expressly described or identified, unless the terms provide otherwise.³⁴ The California and Michigan statutes are identical in that they expressly prevent release of all tortfeasors unless the terms of the instrument so provide.³⁵ However, the Missouri statute³⁶ has been judicially interpreted in at least one case to require an express reservation of rights to preserve a cause of action against the noncovenanting parties even though the statute does not imply this requirement.³⁷

32. *But see* *Pellett v. Sonotone Corp.*, 26 Cal. 2d 705, 711, 160 P.2d 783, 786 (1945), where the court stated:

[T]he distinction between a release and a covenant not to sue is entirely artificial. As between the parties to the agreement, the final result is the same in both cases, namely, that there is no further recovery from the defendant who makes the settlement, and the difference in the effect as to third parties is based mainly, if not entirely, on the fact that in one case there is an immediate release, whereas in the other there is merely an agreement not to prosecute a suit.

33. *See, e.g.* *Rector v. Warner Bros. Pictures, Inc.*, 102 F. Supp. 263 (S.D. Cal. 1952).

34. *Rio Grande Gas Co. v. Stahmann Farms, Inc.*, 80 N.M. 432, 457 P.2d 364 (1969); *Brown v. City of Pittsburgh*, 409 Pa. 357, 186 A.2d 399 (1962). *Cf.* note 38 *infra* and accompanying text.

35. *See* note 30 *supra*.

36. *Id.*

37. *Swope v. General Motors Corp.*, 445 F. Supp. 1222 (W.D. Mo. 1978). "What" is released and not "who" is released by the document is important. The release of only one tortfeasor as mentioned in the instrument is not conclusively a special release. The court will look to whether the entire cause of action was satisfied. *See* *Liberty v. J.A. Tobin Con-*

The close technical similarity between the Virginia statute and the statutes of North Carolina, California and Michigan would indicate that no reservation will be required; but all state courts previously mentioned will not hesitate to rule to the contrary if given a loosely drawn instrument purporting to release any person, corporation, association or partnership other than the covenantee for any and all claims which the covenantor might have as a result of the tort.³⁸ Words of restriction should be included in order to mention that the consideration paid is to be received in full for all claims against the covenantee *only* and is to be accepted as final adjustment and settlement for injuries for which the covenantee, only, may be liable.³⁹

Apart from the technical criteria for drafting an acceptable and binding covenant not to sue, there are several considerations which will influence its effective use as a settlement device in Virginia. Again in comparison with the statutes of California, Michigan and North Carolina, each consideration will be discussed separately throughout the remainder of this article.

IV. SCOPE OF THE STATUTE WITH REGARD TO PERSONAL INJURY, PROPERTY DAMAGE AND WRONGFUL DEATH CLAIMS

With regard to the four statutes under study herein, the Virginia covenant law, before the 1980 amendment, specifically applied to torts involving a personal injury or wrongful death. Similar language appears in the Michigan and North Carolina statutes.⁴⁰ The California law is more general in its reference to tortfeasors "claimed to be liable for the same tort."⁴¹ The question arises as to whether property damage torts will be included under the umbrella of the original statute.

Virginia's 1980 amendment specifically includes torts involving property damage. Consequently, any covenant or release involving such a tort, executed after July 1, 1980 will be valid. By enacting the change, the Virginia General Assembly demonstrated its unwillingness to leave the ques-

str. Co., 512 S.W.2d 886 (Mo. App. 1974).

38. *Twentieth Century-Fox Film Corp. v. Winchester Drive-In Theatre, Inc.*, 351 F.2d 925 (9th Cir.), cert. denied, 382 U.S. 1011 (1965); *Clark v. Brooks*, 377 A.2d 365 (Del. Super. Ct. 1977); *Hurt v. Leatherby Ins. Co.*, 354 So. 2d 918 (Fla. Dist. Ct. App. 1978); *Dean v. Bennett M. Lifter, Inc.*, 336 So. 2d 393 (Fla. Dist. Ct. App. 1976); *Battle v. Clanton*, 27 N.C. App. 616, 220 S.E.2d 97 (1975).

39. *Swope v. General Motors Corp.*, 445 F. Supp. 1222 (W.D. Mo. 1978).

40. MICH. COMP. LAWS ANN. § 600.2925(d) (Cum. Supp. 1979); N.C. GEN. STAT. § 1B-4 (Repl. Vol. 1969).

41. CAL. CIV. PROC. CODE § 877 (West 1980).

tion open to interpretation by the state courts. However, the application of similar statutes in other states and a review of related Virginia decisions indicate that Virginia courts may have allowed releases and covenants to be operative in torts involving property damage.

The statutory language of Virginia's 1979 law clearly allowed all personal injury actions to be covered, just as they have been in other states.⁴² The similar North Carolina statute⁴³ has also allowed covenants and releases to be effective in property damage cases. The language of section one of the 1955 Uniform Act, as adopted in North Carolina, expressly includes a reference to both property damage and personal injury.⁴⁴ In like manner, the California courts have recognized the usefulness of a covenant not to sue in a property case⁴⁵ even though California has not adopted the express language of the Uniform Act.

In addition, the Virginia courts, in recognizing the interrelationship between the original covenant statute and the joint tortfeasor contribution statute,⁴⁶ may have interpreted them similarly. The Virginia Supreme Court, in *Nationwide Mutual Insurance Co. v. Jewel Tea Co.*,⁴⁷ allowed contribution to include recovery for property damage as well as personal injury. The insurer, as subrogee of a joint tortfeasor, was permitted to enforce contribution for both types of claims. The court was willing to allow contribution even though that statute did not specify what type of negligent actions would be covered therein. It seems unlikely that a judicial interpretation of the 1979 covenant law would have rejected the interrelationship of two statutes whose purposes were so similar.

However, the legislature may have been justified in believing an amendment was necessary. The right to release or covenant with one tortfeasor without releasing all other wrongdoers is a statutory right in

42. *Cobb v. Southern Pac. Co.*, 251 Cal. App. 2d 929, 59 Cal. Rptr. 916 (1967); *Sobotta v. Vogel*, 37 Mich. App. 59, 194 N.W.2d 564 (1971); *Battle v. Clanton*, 27 N.C. App. 616, 220 S.E.2d 97 (1975).

43. N.C. GEN. STAT. § 1B-4 (Repl. Vol. 1969).

44. *Id.* § 1B-1(a).

45. *Twentieth Century-Fox Film Corp. v. Winchester Drive-In Theatre, Inc.*, 351 F.2d 925 (9th Cir.), cert. denied, 382 U.S. 1011 (1965).

46. VA. CODE ANN. § 8.01-34 (Repl. Vol. 1977). Both the contribution statute and the covenant not to sue statute are found in tit. 8.01, art. 3 of the Virginia Code and were enacted to nullify the harsh common law rules regarding joint tortfeasors. There is Virginia case law to support the proposition that all code provisions dealing with the same subject should be construed together and reconciled. *Shepherd v. F.J. Kress Box Co.*, 154 Va. 421, 153 S.E. 649 (1930). Therefore the statutes should be read in conjunction with one another so as to allow both to apply to personal injury and to property damage.

47. 202 Va. 527, 118 S.E.2d 646 (1961).

derogation of the common law and, thereby, requires strict construction.⁴⁸ A strict construction of the original law may have rejected its validity in any property damage case solely because such a situation was not specified at the same time that personal injury and wrongful death situations were clearly expressed. The General Assembly chose to clarify the issue by legislation rather than to leave it open to judicial construction.

The wrongful death language in section 8.01-35.1⁴⁹ represents a more obtuse problem. Many practitioners feel that an amendment to section 8.01-50⁵⁰ is necessary in order for the covenant law to take full effect. The wrongful death claim established in section 8.01-50 is wholly statutory and reverses the common law concept that a tortfeasor who negligently caused the death of another was immune from civil liability. This section confers a new right of action upon the personal representative of the deceased as a substitute for the decedent's cause of action for injuries sustained.⁵¹ Because the right is statutorily conceived, it must be strictly construed.⁵² Many practitioners feel, therefore, that an amendment which specifically grants the right to settle a wrongful death action by a valid covenant not to sue is appropriate. However, such an amendment seems unnecessary in light of present persuasive authority and related wrongful death statutes found in the Virginia Code.

Again one must recognize the purposes of the contribution and covenant not to sue statutes—both were enacted to negate the harshness of the common law concerning joint tortfeasors. Virginia courts have had no difficulty in allowing contribution for wrongful death actions.⁵³ Case law in North Carolina and California also supports the recovery of contribution in such claims.⁵⁴ In addition, both a California court⁵⁵ and a Florida

48. See *Chesapeake & Ohio Ry. v. Kinzer*, 206 Va. 175, 142 S.E.2d 514 (1965); 17 MICHIE'S JURISPRUDENCE, *Statutes* § 70 (1979).

49. VA. CODE ANN. § 8.01-35.1 (Cum. Supp. 1980).

50. VA. CODE ANN. § 8.01-50 (Repl. Vol. 1977).

51. *Lawrence v. Craven Tire Co.*, 210 Va. 138, 169 S.E.2d 440 (1969).

52. See generally *Simmons v. Wilder*, 6 N.C. App. 179, 169 S.E.2d 480 (1969).

53. In *Nationwide Mutual Ins. Co. v. Minnifield*, 213 Va. 797, 196 S.E.2d 75 (1973), the Supreme Court of Virginia allowed Nationwide to obtain contribution from a joint tortfeasor in an action involving two death claims paid by Nationwide on behalf of its insured.

54. *Wiener v. United Air Lines*, 216 F. Supp. 701 (S.D. Cal. 1962), *aff'd in part, modified in part*, 335 F.2d 379 (9th Cir.), *cert. dismissed*, 379 U.S. 951 (1964); *Jordan v. Blackwelder*, 250 N.C. 189, 108 S.E.2d 429 (1959); *Etheridge v. Carolina Power & Light Co.*, 249 N.C. 367, 106 S.E.2d 560 (1959). A wrongful death provision was added to § 1 and § 4 of the 1955 Uniform Act in order to cover wrongful death claims, including but not limited to those falling under the Federal Employers' Liability Act. 1955 UNIFORM ACT, § 1 Commissioners' Note.

court⁵⁶ have indicated that a wrongful death action may be settled as to one tortfeasor without releasing other tortfeasors when the settlement device is one included under the appropriate statutes.⁵⁷ In light of these decisions, section 8.01-50 may not be interpreted as a bar to partially settling a wrongful death claim by a release or covenant, especially when that section is read in conjunction with the express language in section 8.01-35.1.⁵⁸

Furthermore, legislators have long recognized the need to compromise a wrongful death claim as evidenced by their enactment of section 8.01-55.⁵⁹ Since the purpose of both a compromise statute and a covenant not to sue statute is to encourage settlement of tort claims and to minimize extensive and costly litigation, there should be no judicial objection to a partial release or covenant releasing only specified tortfeasors in a wrongful death action so long as the covenant is properly approved by the appropriate court.⁶⁰ The amended version of the covenant statute eliminates any question that a release or covenant may not be effective in such

55. *Steele v. Hash*, 212 Cal. App. 2d 1, 27 Cal. Rptr. 853 (1963). The plaintiff, as administrator of decedent's estate, received \$2500 in exchange for an agreement to dismiss the action against one of the two automobile drivers responsible for the collision in which decedent was killed.

The district court affirmed the lower court ruling that evidence of this settlement should be submitted to the jury in order to allow an appropriate reduction of any further amount awarded to the plaintiff. The court determined that a subsequent verdict in favor of the remaining tortfeasor was based on the jury's finding him free of negligence rather than ruling that a full satisfaction had been given to the plaintiff by way of the \$2500.

56. In *Frier's Inc. v. Seaboard Coastline R.R.*, 355 So. 2d 208 (Fla. Dist. Ct. App. 1978), the court ruled the settlement agreement between an automobile owner and his insurer and the mother of a passenger killed in an automobile-train collision was both a valid *Mary Carter* agreement and a valid covenant not to enforce judgment under the Florida statute. See note 4 *supra*.

57. CAL. CIV. PROC. CODE § 877 (West 1980); FLA. STAT. ANN. § 768.31 (West Cum. Supp. 1979).

58. Statutes dealing with closely related subjects must be construed together so that effect may be given to their total provisions. *Norfolk & W. Ry. v. White*, 158 Va. 243, 160 S.E. 218 (1931).

59. VA. CODE ANN. § 8.01-55 (Repl. Vol. 1977) reads in part:

The personal representative of the deceased may compromise any claim to damages arising under or by virtue of § 8.01-50, including claims under the provision of a liability insurance policy, before or after action brought, with the approval of the court wherein any such action has been brought, or if none has been brought, with the consent of any circuit court.

60. In *Caputo v. Holt*, 217 Va. 302, 228 S.E.2d 134 (1976), the court declared that a \$20,000 settlement received by an administrator who was not a statutory beneficiary did not prevent the proper administratrix from recovering a further settlement of \$25,000 since the court had not given its approval of the compromise.

claims. It concludes with the caveat that any release or covenant will be subject to the provisions of section 8.01-55.

V. COVENANTS INVOLVING PERSONS UNDER A DISABILITY

Just as required for a compromise settlement in wrongful death claims, Virginia law⁶¹ requires that any settlement of a claim involving a person under a disability be approved by an appropriate court. Such court approval is necessary for a compromise made on behalf of an incompetent, insane, incapacitated, or infant plaintiff.⁶² And just as in the wrongful death situation, the amended version of section 8.01-35.1 specifies that the provisions of section 8.01-424 must be followed if the covenant or release is executed on behalf of a "disabled" person. A covenant or release which is not properly approved will not be binding on either covenanting party. Further, the court approval of such a settlement and receipt of the funds by the clerk or a duly appointed fiduciary will not be deemed to be full satisfaction of the entire claim against all tortfeasors unless the terms of the settlement itself so provide. In the North Carolina case of *Payseur v. Rudisill*⁶³ the court noted that once a judge approves of the compromise, the infant or disabled plaintiff has the same rights as an adult in reference to his ability to sue other tortfeasors; any other rule would obliterate the protective posture of the court in overseeing settlements involving disabled persons.⁶⁴

VI. ELEMENTS OF GOOD FAITH

The Virginia covenant statute, as well as the California and Michigan statutes, provides that a discharge is effective only if the release or covenant is given in good faith. A similar requirement was added to section four of the 1955 Uniform Act to give a court the opportunity "to determine whether the transaction [is] collusive . . ." ⁶⁵ This provision allows a look beyond the transaction in order to ascertain whether it was inspired by spite, sympathy, kinship, or ease of collection.⁶⁶

Because an injured party may accept a nominal settlement from any of

61. VA. CODE ANN. § 8.01-424 (Repl. Vol. 1977).

62. *Id.*, Revisers' Note.

63. 15 N.C. App. 57, 189 S.E.2d 562, *cert. denied*, 281 N.C. 758, 191 S.E.2d 356 (1972).

64. *Id.*

65. 1955 UNIFORM ACT, § 4 Commissioners' Note. The omission of the good faith provision in the 1939 Uniform Act had prevented realization of the goal of equitable financial distribution among the parties at fault; *accord*, *Frier's Inc. v. Seaboard Coastline R.R.*, 355 So. 2d 208 (Fla. Dist. Ct. App. 1978).

66. 1955 UNIFORM ACT, Commissioners' Note.

the tortfeasors and thereby discharge the covenantee from further liability for contribution,⁶⁷ a good faith provision is necessary in order to carry out one of the stated purposes of the 1955 Uniform Act—that of preventing a plaintiff from pursuing a disproportionate claim against a nonsettling tortfeasor.⁶⁸ Otherwise the plaintiff could bring great financial pressure on a nonsettling tortfeasor by accepting unreasonably small settlements from one or more co-defendants and requesting the remainder of his damages from the tortfeasor who might be less judgment proof or have more insurance coverage.

The California case of *River Garden Farms, Inc. v. Superior Court*⁶⁹ contains a full discussion of the good faith requirement for releases. In explaining what collusion and good faith are, the court of appeals said:

Any negotiated settlement involves cooperation, but not necessarily collusion. It becomes collusive when it is aimed to injure the interests of an absent tortfeasor. Although many kinds of collusive injury are possible, the most obvious and frequent is that created by an unreasonably cheap settlement. Applied *pro tanto* to the ultimate judgment, such a settlement contributes little toward equitable—even though unequal—sharing . . . The price of a settlement is the prime badge of its good or bad faith.⁷⁰

In determining what monetary levels will invalidate a settlement, the court pointed to generally accepted criteria

recognized by the personal injury bar, insurance claims departments and pretrial settlement courts. When testing the good faith of a settlement figure, a court may enlist the guidance of the judge's personal experience and of experts in the field. Represented by knowledgeable counsel, settlement negotiators can predict with some assurance whether a settlement is within the reasonable range permitted by the criterion of good faith.⁷¹

However, a North Carolina court has pointed out that a mere inequality in the ultimate settlement figure will not automatically indicate bad

67. VA. CODE ANN. § 8.01-35.1(A)(2) (Cum. Supp. 1980).

68. 1955 UNIFORM ACT, Commissioners' Note.

69. 26 Cal. App. 3d 986, 103 Cal. Rptr. 498 (1972). Two children made claims against several joint tortfeasors for damages for their own personal injuries and for the wrongful deaths of their parents. Three of the defendants settled the claims for \$1,290,000. An agreement approved by the trial court without the knowledge of the remaining defendant apportioned the settlements as to the wrongful death claims at \$800,000 leaving \$490,000 for the personal injury awards, thus subjecting the remaining defendant to the potentially larger claim for personal injuries. The defendant argued that the settlements were invalid for lack of good faith. The court partially agreed but refused to nullify the contracts and permitted a separate trial to determine if bad faith was present and if damages were appropriate.

70. *Id.* at 996, 103 Cal. Rptr. at 505.

71. *Id.* at 998, 103 Cal. Rptr. at 506-07.

faith.⁷² Many times a tortfeasor may wish to negotiate a settlement for his own best interests whether they be for financial advantage or for the purpose of finality of litigation. The validity of the release will not be questioned because of the unequal proportion of his settlement in relation to the damages of the plaintiff unless there is a showing of collusion or bad faith.⁷³ This is especially true if the defendant is insolvent, uninsured, or underinsured.⁷⁴

The illustration of potential bad faith discussed in *Lareau v. Southern Pacific Transportation Co.*⁷⁵ may be helpful in understanding this issue. The injured parties were involved in an automobile accident followed by an automobile-train collision. The first collision resulted in only minor lacerations for Mrs. Lareau and undetermined injuries to her retarded son. The second collision, only nine minutes later, resulted in major back injuries to Mrs. Lareau and fatal head injuries to her son. Mr. and Mrs. Lareau settled with three of the four co-defendants for a total of \$130,000 apportioned as follows: \$30,000 for Mr. Lareau's injuries, \$6,000 for Mrs. Lareau's injuries, and \$94,000 for the son's wrongful death claim. Thereafter a jury verdict of \$125,000 for Mrs. Lareau's injuries was returned against Southern Pacific. The \$6,000 previously allocated by settlement to these injuries was deducted, leaving a judgment against the railroad of \$119,000.

The parties had previously acknowledged that Mrs. Lareau's claim was the highest, and therefore, the court had set a \$50,000 upper limit on the wrongful death claim and a \$150,000 limit on Mrs. Lareau's personal injuries. Thus, the \$94,000 wrongful death and the \$6,000 personal injury apportionments in the covenant did indeed raise a question of bad faith. Consequently the court granted Southern Pacific's motion for a separate trial to litigate the issues of good faith and damages but refused to find a lack of good faith as a matter of law. The ruling indicated that there may have been a justification for the seemingly disproportionate settlement; evidence of why the railroad refused to participate in settlement negotiations and its reasonableness in insisting on a trial would be relevant to the issue of good faith.

72. *Wheeler v. Denton*, 9 N.C. App. 167, 175 S.E. 2d 769 (1970).

73. *See, e.g. Stambaugh v. Superior Court*, 62 Cal. App. 3d 231, 132 Cal. Rptr. 843 (1976); *Lareau v. Southern Pac. Transp. Co.*, 44 Cal. App. 3d 783, 118 Cal. Rptr. 837 (1975).

74. 62 Cal. App. 3d 231, 238, 132 Cal. Rptr. 843, 848 (1976). The court ruled that a defendant's settlement for the full amount of his insurance coverage was not enough to indicate a bad faith settlement in a wrongful death action worth many times that amount, especially in light of no lower court charge of bad faith.

75. 44 Cal. App. 3d 783, 118 Cal. Rptr. 837 (1975).

As seen in *Lareau*, the conduct and motives of all covenanting parties will be taken into account in determining the good faith issue.⁷⁶ Depending upon who acted in bad faith, a court may declare the settlement contract invalid or may allow a civil claim for damages. If the plaintiff acted in bad faith but the settling tortfeasor did not, the decision in *River Garden Farms* suggests that the contract will be upheld but the nonsettling tortfeasor will have a claim for damages against the plaintiff.⁷⁷ The damages should be measured by the portion of the judgment the settling tortfeasor would have been liable for had he not been released by the settlement. "In money terms, he [the nonsettling tortfeasor] receives pro rata rather than *pro tanto* credit against the judgment."⁷⁸

However, if the settling tortfeasor has acted in bad faith, the court, upon motion by either the plaintiff or the nonparticipant,⁷⁹ will declare the instrument void and allow the plaintiff to bring suit against any or all tortfeasors. If the nonsettling tortfeasor is sued alone, he may be allowed to join the tortfeasor who acted in bad faith as a party defendant, thereby protecting any contribution claim he may have against his co-defendant.⁸⁰

In practice, the question of bad faith may be litigated apart from the tort claim.⁸¹ Once a settlement allocates a disproportionate amount to a certain wrongdoer, the nonsettling tortfeasor may bring a suit to determine if bad faith existed. The issue of bad faith is a question of fact based on the evidence in each case, and further guidelines are impossible to establish.⁸² The practitioner must keep in mind possible motives of spite, sympathy, and kinship as well as adequate or inadequate insurance coverage in deciding whether an apparently small settlement seems to be the result of collusion and bad faith.

VII. RIGHTS OF SETTLING AND NONSETTLING TORTFEASORS AFTER EXECUTION OF A VALID COVENANT NOT TO SUE

Subsection A(2) of the Virginia covenant statute discharges a settling tortfeasor from any obligation to contribute to other joint tortfeasors who may be liable for the same injury or wrongful death. Similar provisions found in most other release statutes including those following the 1955

76. *Id.* at 798, 118 Cal. Rptr. at 846.

77. 26 Cal. App. 986, 103 Cal. Rptr. 498 (1972).

78. *Id.* at 1001, 103 Cal. Rptr. at 509.

79. A third person whose interests are affected by an illegal contract may invoke the illegality as a defense to the contract. 14 WILLISTON ON CONTRACTS § 1630 B at 31 (3d ed. 1972).

80. 26 Cal. App. 3d at 1000, 103 Cal. Rptr. at 508.

81. 44 Cal. App. 3d 783, 118 Cal. Rptr. 837 (1975).

82. *Id.*

Uniform Act have been interpreted to prevent a nonsettling tortfeasor from receiving any contribution from a settling co-defendant.⁸³ This greatly encourages settlements by allowing a covenantee to "close the file as to his liability."⁸⁴

However, this section presents an important consideration for the nonsettling tortfeasor. He must be aware of any increased liability he may incur if the released tortfeasor settles for less than his proportionate share. The remaining defendant may be liable for the balance of the entire judgment. While this system may seem a bit inequitable, it does continue to encourage settlement. A plaintiff is willing to settle because he is allowed to receive as complete a satisfaction as before. He receives the settlement figure plus any amount awarded against the nonsettling tortfeasor. It also encourages the covenantee or releasee to settle so as to totally extinguish his liability. Additionally the largest burden of the claim rightly falls on the party who was willing to settle.

In pursuit of a similar objective, subsection B of section 8.01-35.1⁸⁵ prevents the settling tortfeasor from obtaining contribution from a nonsettling defendant in most situations. This is true even if a settling party pays an amount greater than his proportional share of negligence. Again those principles of equity which prevent a settling party from being forced to contribute to another wrongdoer also dictate that the same settling party not be allowed to claim contribution from anyone whose liability has not been extinguished and who has not been a party to the settlement agreement. If the settling tortfeasor were allowed to force contribution, the threat of unreasonably high settlements would increase.

83. *Stambaugh v. Superior Court*, 62 Cal. App. 3d 231, 132 Cal. Rptr. 843 (1976); *Hester v. Gatlin*, 332 So. 2d 660 (Fla. Dist. Ct. App. 1976); *Boston Edison Co. v. Tritsch*, 370 Mass. 260, 346 N.E.2d 901 (1976); *Levi v. Montgomery*, 120 N.W.2d 383 (N.D. 1963).

84. 1955 UNIFORM ACT § 4, Commissioners' Note at 99. Section 4 of the 1955 UNIFORM ACT modified § 5 of the 1939 UNIFORM ACT which had prevented rather than encouraged settlements by failing to completely discharge a settling tortfeasor's liability unless the release had expressly provided for a reduction of damages "to the extent of the pro rata share of the released tortfeasor." *Id.*

Under the earlier UNIFORM ACT, a defendant was unwilling to pay for a release or covenant before his pro rata share had been determined because he might have remained liable for contribution if his settlement had been less than his share. Subsequent to the 1955 UNIFORM ACT, decisions in those states following the 1939 UNIFORM ACT have adopted the 1955 ACT's reasoning and prevented a nonsettling tortfeasor from recovering contribution when he has been ordered to pay more than his pro rata share. *Tino v. Stout*, 90 N.J. Super. 395, 217 A.2d 885 (1966). However the nonsettling tortfeasor is often given credit for only a pro rata reduction of the claim rather than a *pro tanto* credit when the settling tortfeasor pays more than his pro rata share. *Theobald v. Angelos*, 44 N.J. 228, 208 A.2d 129 (1965).

85. VA. CODE ANN. § 8.01-35.1 (Cum. Supp. 1980).

The singular exception occurs if the instrument involved completely extinguishes the entire cause of action.⁸⁶ Such a situation could arise if the release or covenant were so loosely worded as to release all other tortfeasors or if the settlement figure were so large that the plaintiff had received total reimbursement for his loss. Such exception has previously been followed by several courts even though no preliminary judgment had determined joint liability. Nevertheless, a separate action to enforce contribution would then require a determination that the nonsettling party was, indeed, liable and that the covenant or release had extinguished all such liability.⁸⁷ If the joint liability of the defendants is not established or if bad faith between the covenanting parties is proven, the nonsettling tortfeasor need not contribute,⁸⁸ even if the amount paid is large enough to satisfy the plaintiff's entire claim.

The problem presented by subsection B is that it tends to negate one of the purposes of a covenant or release—the avoidance of litigation. If a settling tortfeasor is allowed to enforce contribution upon a charge that his covenant or release extinguished the entire cause of action, any potential contributor must first be sued for contribution and would then wish to lengthen litigation by questioning the issues of liability and bad faith. However, most authorities believe this weakness is outweighed by such benefits as equalizing the financial burden among wrongdoers and avoiding needless litigation when there is no question that a covenant has failed to extinguish the entire tort claim.

Another matter to consider is notice of settlement. Most courts do not require that a tortfeasor notify another defendant of his intention to set-

86. Subsection B of the original covenant law was taken verbatim from the 1955 UNIFORM Acr § 1(d). However, the 1980 version contains several substitutions and additions. The new language makes no substantive change but merely erases any doubt that a "settlement" may be anything but a release or covenant not to sue. The clarification also specifies that a tortfeasor may not recover "by way of contribution" from a nonsettling tortfeasor if the settling defendant pays an amount more than he reasonably should have paid. VA. CODE ANN. § 8.01-35.1 (Cum. Supp. 1980).

87. *Halifax Chick Express, Inc. v. Young*, 50 Del. 596, 137 A.2d 743 (1957); *O'Keefe v. Baltimore Transit Co.*, 201 Md. 345, 94 A.2d 26 (1953); *Swartz v. Sunderland*, 403 Pa. 222, 169 A.2d 289 (1961). *But cf.* *Best Sanitary Disposal Co. v. Little Food Town Inc.*, 339 So.2d 222 (Fla. Dist. Ct. App. 1976) (release purported to be only a financial arrangement and was not intended to affect the liability of the parties. The court ruled the settling tortfeasor could not enforce contribution because the \$45,000 settlement figure did not extinguish the other defendants' liability even though a later verdict was for the exact amount of the previous settlement).

88. *Drumgoole v. VEPCO*, 170 F. Supp. 824 (E.D. Va. 1959); *see* *Alamida v. Wilson*, 53 Hawaii 398, 495 P.2d 585 (1972); *Nationwide v. Jewel Tea Co.*, 202 Va. 527, 118 S.E.2d 646 (1961).

tle, even though the settlement may be an extinguishment of the entire claim and, thereby, establish a right to receive contribution from the non-settling defendant.⁸⁹ Many courts have ruled that the right of contribution arises from the injury caused by the concurring negligent acts and remains inchoate and contingent until one of the tortfeasors pays a full satisfaction.⁹⁰ In such a jurisdiction, a nonsettling party is put on constructive notice of his contribution liability at the time that tort occurs.

In contrast, Virginia contribution law has been interpreted to mean that the right to contribution arises only when one joint tortfeasor has paid a claim for which the other tortfeasor is liable.⁹¹ Even with this difference it seems unlikely that actual notice of a settlement need be given to a nonsettling co-defendant for the simple reason that a settling tortfeasor will not consciously agree to pay a sum so large as to extinguish the entire cause of action and activate the right to contribution.

As originally enacted, section 8.01-35.1(A)(1) provided that the claim against other tortfeasors would be reduced by the amount stipulated in the covenant or the consideration paid in exchange for the covenant. Such language is identical to the statutes in California, Michigan and those states following the 1955 Uniform Act.⁹² Cases interpreting such statutes have ruled that a subsequent monetary judgment against other tortfeasors must be reduced by an amount equal to that stipulated in or actually paid in exchange for the covenant.⁹³ Such an interpretation indicates a *pro tanto* reduction as compared to a *pro rata* reduction. Under the *pro rata* method as used in those states following the 1939 Uniform Act, if three tortfeasors are liable for a single injury and one settles with the plaintiff, the amount of the judgment against the other two tortfeasors must be reduced by one-third.⁹⁴ The release or covenant executed in those states must provide that the damages recoverable against other tortfeasors are to be reduced to the extent of the *pro rata* share of

89. *Hodges v. United States Fidelity & Guaranty Co.*, 91 A.2d 473 (D.C. 1952). Cf. *MICH. COMP. LAWS ANN.* § 600.2925a(3)(b) (Cum. Supp. 1979) (requires a reasonable effort be made to notify the contributtee of a pending settlement) (while the statute refers to contributtee, it should probably read contributor).

90. *Albert v. Dietz*, 283 F. Supp. 854 (D. Hawaii 1968); *Markey v. Skog*, 129 N.J. Super. 192, 322 A.2d 513 (1974).

91. *Laws v. Spain*, 312 F. Supp. 315 (E.D. Va. 1970); *North River Ins. Co. v. Davis*, 274 F. Supp. 146 (W.D. Va. 1967); *Bartlett v. Roberts Recapping, Inc.*, 207 Va. 789, 153 S.E.2d 193 (1967); *Nationwide v. Jewel Tea Co.*, 202 Va. 527, 118 S.E.2d 646 (1961).

92. See *supra* notes 28 and 30.

93. *McGee v. Cessna Aircraft Co.*, 82 Cal. App. 3d 1005, 147 Cal. Rptr. 694 (1978); *Sobotta v. Vogel*, 37 Mich. App. 59, 194 N.W.2d 564 (1971); *Wheeler v. Denton*, 9 N.C. App. 167, 175 S.E.2d 769 (1970); *Levi v. Montgomery*, 120 N.W.2d 383 (N.D. 1963).

94. *Smith v. Fenner*, 399 Pa. 633, 161 A.2d 150 (1960).

the released tortfeasor.⁹⁵

Under the *pro tanto* method, there is no proportionate distribution of negligence between tortfeasors before a reduction of the monetary judgment occurs. The stated settlement figure is simply subtracted from any award the plaintiff may subsequently receive against a nonsettling tortfeasor. Many practitioners believe that the 1979 covenant statute did not adequately express the legislature's intention to adopt such a method of reduction. It should be noted, however, that a few courts have interpreted identical statutes to provide for a *pro tanto* reduction.⁹⁶

The amended version attempts to clarify the language by removing the word "claim" and substituting "verdict."⁹⁷ Otherwise a plaintiff may have been required to reduce only his initial prayer for damages against a nonsettling tortfeasor by that amount already received against the settling defendant. Any subsequent verdict would not have been reduced, and he may have actually provided a total compensation larger than the plaintiff's entire claim was worth. The language now specifies that "any verdict recovered against the other tortfeasors or any one of them shall be reduced by any amount stipulated by the covenant, or in the amount of the consideration paid for it, whichever is the greater."⁹⁸

VIII. APPLICABILITY OF THE COVENANT STATUTE TO PENDING CASES AND CLAIMS

A split of authority has arisen concerning the application of a release or covenant statute to claims arising before the effective date of the statute. The basic conflict deals with whether the provisions of the statute are procedural or substantive in nature.

Those jurisdictions ruling that such statutes are procedural in nature find that no vested rights will be impaired by retroactive application. In an unanimous opinion⁹⁹ dealing with a covenant not to sue which fully complied with the 1939 Uniform Act, the Pennsylvania Supreme Court said:

As the law stood at the time of the happening of the accident *if* any one of

95. *Harding v. Evans*, 207 F. Supp. 852 (D.Pa. 1962).

96. *See supra* text accompanying note 92.

97. VA. CODE ANN. § 8.01-35.1(A)(1) (Cum. Supp. 1980).

98. *Id.* The word "release" was inadvertently omitted from this portion of the amended statute and should be added by the 1981 legislature in order to reconcile all subsections within the statute.

99. *Smith v. Fenner*, 399 Pa. 633, 161 A.2d 150 (1960); *accord*, *Holve v. Draper*, 95 Idaho 193, 505 P.2d 1265 (1973); *Op. Va. Att'y Gen.* 247 (1979).

the three appellees had entered into a settlement of Smith's claim against that particular appellee and if Smith had given a release to such appellee, the other two appellees would thereby have been released from any claim by Smith. The Uniform Act changed the effect of such release, if given, but it effected no change in the cause of action nor did it increase what could have been the liability of any one or all appellees at the time the cause of action arose The change effected by the Uniform Act [was one of procedure which] did not disturb any substantive right of any of appellees.¹⁰⁰

As a corollary to this reasoning, several courts have ruled that there is no right of contribution between joint tortfeasors until the settlement or joint judgment is paid by one of the tortfeasors.¹⁰¹ If no cause of action for contribution is established at the time the tort occurs, there is no vested right which will be affected by a retroactive application.

Concerning retroactivity of the covenant statute, one preliminary caveat is necessary; the tort may occur before the statute takes effect, but the settlement instrument must become valid after the act's effective date in order for the statute to apply.¹⁰² *Smith v. Fenner* further justifies this reasoning by emphasizing that the release therein was executed after the adoption of the applicable statute and "the parties knew or should have known of the provisions of the Uniform Act."¹⁰³

A contrary consideration often applied to the retroactivity issue is that the covenant statute's provisions are substantive in nature and vested rights will be disturbed if the statute is applied retroactively. Again a relationship exists between covenants not to sue and contribution. A few decisions, including an early Virginia case, have ruled that the right to contribution exists from the time the tort occurs.¹⁰⁴ One of these opinions went so far as to distinguish the substantive right to contribution from the procedural right to institute action for contribution arising when a judgment is rendered or a settlement is made.¹⁰⁵ However, this reasoning overlooks the fact that the first right is inchoate and contingent upon an actual judgment or payment. Therefore it cannot be a vested right until

100. 399 Pa. at ____, 161 A.2d at 155.

101. *Augustus v. Bean*, 56 Cal. 2d 270, 363 P.2d 873, 14 Cal. Rptr. 641 (1961); *Pierce v. Turner*, 205 Cal. App. 2d 264, 23 Cal. Rptr. 115 (1962); *Coniaris v. Vail Associates, Inc.*, ____, Colo. ____, 586 P.2d 224 (1978).

102. *Kansas City So. Ry. v. McDaniel*, 131 F.2d 89 (8th Cir. 1942).

103. 399 Pa. at ____, 161 A.2d at 155.

104. *Distefano v. Lamborn*, 81 A.2d 675 (Del. Super. Ct. 1951); *F.H. Ross & Co. v. White*, 224 Ga. 324, 161 S.E.2d 857 (1968); *Massey v. Sullivan County*, 225 Tenn. 132, 464 S.W.2d 548 (1971); *Norfolk & So. Ry. v. Beskin*, 140 Va. 744, 125 S.E. 678 (1924).

105. *Distefano v. Lamborn*, 81 A.2d 675 (Del. Super. Ct. 1951). *Contra*, *Halifax Chick Express Inc. v. Young*, 50 Del. 596, 137 A.2d 743 (1957).

one of these actions occurs; and if the vesting occurs after the contribution statute becomes effective, there is no problem with a retroactive application.

Tennessee is the only state that has consistently ruled a covenant or release statute may not be applied retroactively since such application would destroy previous substantive rights.¹⁰⁶ However, its decisions¹⁰⁷ can be distinguished from a similar set of facts in Virginia because the laws of the two states before the present covenant statutes became effective were very different. Before 1968, a covenant not to sue in Tennessee released only the covenanting party, but the amount received for the release was not credited to the judgment against a co-defendant. The plaintiff could continue to receive a full judgment from the nonsettling party. After the 1955 Uniform Act was adopted,¹⁰⁸ the consideration paid for the release was credited to a subsequent judgment.

In Virginia before July 1, 1979, a covenant not to sue acted to release everyone, and the plaintiff could expect to receive no judgment from a nonsettling party; now, however, the covenant will act to release only the covenantee and the covenantor will be entitled to a judgment minus the consideration.

In *Miller v. Sohns*,¹⁰⁹ the Tennessee Supreme Court ruled that the injured party's right to make a covenant not to sue and receive full judgment plus the consideration given for the covenant was a vested right at the time the tort occurred and could not be restricted by the retroactive application of the Uniform Act. In Virginia, however, an injured party previously had no right to release a single tortfeasor and continue to expect any judgment from a nonsettling party. Consequently no substantive right would be impaired by the retrospective covenant statute.¹¹⁰

A review of previous Virginia cases regarding contribution shows that courts have consistently (with only one early exception)¹¹¹ viewed this

106. At first glance, *Simmons v. Wilder*, 6 N.C. App. 179, 169 S.E.2d 480 (1969) would also seem to support the premise that substantive rights of release prevent retroactive application of a covenant statute. However full review of the case shows that the release statute in North Carolina at the time of the settlement was not applicable to plaintiff's wrongful death action; also the 1955 UNIFORM ACT had not become effective when the release was signed. See note 103 *supra* and accompanying text.

107. *Miller v. Sohns*, 225 Tenn. 158, 464 S.W.2d 824 (1971); *Massey v. Sullivan County*, 225 Tenn. 132, 464 S.W.2d 548 (1971).

108. TENN. CODE ANN. § 23-3105 (Cum. Supp. 1979).

109. 225 Tenn. 158, 464 S.W.2d 842 (1971).

110. VA. CODE ANN. § 8.01-35.1 (Cum. Supp. 1980).

111. *Norfolk & So. R.R. v. Beskin*, 140 Va. 744, 125 S.E. 678 (1924).

right as arising when one joint tortfeasor pays a claim for which other tortfeasors are also liable.¹¹² The payment may be either a monetary settlement or satisfaction of a monetary judgment.¹¹³ The courts view the payment and the vesting of the contribution right as occurring simultaneously. Thus, it seems clear that the covenant statute will be applied retroactively to injuries occurring before July 1, 1979, so long as the covenant not to sue is executed after that date.

IX. APPLICABILITY OF THE COVENANT STATUTE TO A VICARIOUS LIABILITY SITUATION

Another issue which has resulted in a split of authority across the country is the applicability of a release or covenant statute to a situation where the tortfeasors have not acted in concert; one is not himself negligent in causing the tort but is liable only vicariously through the actions of another.¹¹⁴ The negligence of an employee imputed to the employer under the doctrine of *respondeat superior* is the most common example of such a situation.

Some courts take the position that the release of an employee conclusively negates the liability of the employer; if the employee is exonerated, the only rational basis for the liability against the party who is secondarily and derivatively liable is lost.¹¹⁵ One Missouri decision states further that it does not matter how the servant is released from liability; so long as he is free from blame, his master should also be held blameless.¹¹⁶ The basis for this approach is that the employer and employee are not joint tortfeasors; that is to say, they do not act in concert and, therefore, do not fall within the older definition of joint tortfeasors.¹¹⁷ It is probably no coincidence that all but one of the states that follow this approach have adopted the 1939 Act or an independent statute of release.¹¹⁸ This paral-

112. See note 91 *supra*.

113. See VA. CODE ANN. § 8.01-34 (Repl. Vol. 1977).

114. See generally Annot., 92 A.L.R.2d 533 (1976).

115. *Seaboard Air Line R.R. v. Coastal Distrib. Co.*, 273 F. Supp. 340 (D.S.C. 1967); *Bacon v. United States*, 209 F. Supp. 811 (E.D. Mo. 1962); *Clark v. Brooks*, 377 A.2d 365 (Del. Super. Ct. 1977).

116. *Max v. Spaeth*, 349 S.W.2d 1 (Mo. 1961).

117. See note 3 *supra* and accompanying text.

118. Tennessee adopts the concerted action approach but follows the 1955 UNIFORM ACT. See *Jones v. City of Memphis*, 444 F. Supp. 27 (W.D. Tenn. 1977); *Craven v. Lawson*, ___ Tenn. ___, 534 S.W.2d 653 (1976); *Stewart v. Craig*, 208 Tenn. 212, 344 S.W.2d 761 (1961). But see *O'Rear v. Oman Constr. Co.*, 210 Tenn. 651, 362 S.W.2d 217 (1962) (if both vicarious liability and independent negligence are alleged, the plaintiff may sue the master or employer if the covenant not to sue includes a specific reservation of rights).

1el developed from the specific use of the words "joint tortfeasors." While they clearly appear in the 1939 Act, they were omitted from the 1955 Act because the authors hoped to quell the belief that both concerted action and joinder of defendants were necessary prerequisites to the tortfeasor terminology in the Act. While revision was being discussed, many states continued to allow joinder only if the defendants acted in concert. They refused to allow concurrently negligent tortfeasors to be joined or to be called joint tortfeasors. Therefore the drafters of the 1955 Act believed omission of "joint" would allow the Act to be applied to both concurrent and concerted action between wrongdoers.¹¹⁹

Their goal has been realized in most of the states where the 1955 Act has been adopted, and most of these jurisdictions have ruled that a vicariously liable wrongdoer is not automatically released when a co-defendant is released. However, the Tennessee courts have refused to follow this lead. They base their decisions on a theory that neither the Tennessee legislators nor the Commissioners on Uniform State laws intended to include derivative liability within the statutes. In *Craven v. Lawson*,¹²⁰ the court stated that a change in the indemnity section of the 1955 Uniform Act, when compared to the earlier Act, showed a clear intention to exclude any situation where indemnity would apply.¹²¹ Therefore, the court reasoned that any covenant not to sue given to an employee would also release the vicariously liable employer since their relationship invoked a right to full indemnity.

Furthermore, the court reasoned that an employer's right to indemnify the released employee could create a circuitry of action. If the employer was not also released, he would sue the employee for indemnification, and the employee would in turn sue the plaintiff for breach of covenant. This possibility would reduce a servant's desire to settle out of court since such a settlement would not end his liability.¹²²

Although the facts of *Craven* are based upon an employer-employee relationship, a broad interpretation of the decision could extend it to

119. 1955 UNIFORM ACT § 1, Commissioners' Note.

120. ____ Tenn. ____, 534 S.W.2d 653 (1976).

121. The 1939 UNIFORM ACT § 6 reads: "This Act does not impair any right of indemnity under existing law." The 1955 UNIFORM ACT § 1(f) adds: "Where one tortfeasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution, and the indemnity obligor is not entitled to contribution from the obligee for any portion of his indemnity obligation."

122. Note, *Torts—Vicarious Liability—Covenant Not to Sue Servant or Agent as Affecting Liability of Master or Principle*, 44 TENN. L. REV. 188 (1976) [hereinafter referred to as *Torts—Vicarious Liability*].

other active-passive indemnity situations.¹²³ However the court failed to acknowledge that a suit by the plaintiff against an employer may not be interpreted to be a breach of the covenant between the plaintiff and the released party.¹²⁴ Further, the *Craven* decision interpreted the pertinent indemnity section to prevent *any* contribution, whereas that section can be seen as merely defining the rights among tortfeasors without referring to any rights the injured party may have against defendants.¹²⁵

Both Michigan and California, whose statutes are similar to Virginia's, have refused to allow a covenant issued to an employee to act as a release of his employer. However, the Michigan courts have seen fit to divide this issue into two parts. An actual release of an employee will release the employer,¹²⁶ whereas a covenant not to sue an employee will not release the employer.¹²⁷ This solution seems to be poorly reasoned since the Michigan statute itself eliminates any distinction between a release and a covenant not to sue.

The recent case of *Alaska Airlines, Inc. v. Sweat*¹²⁸ contains an excellent discussion of the split of authority on this issue. Under the Alaska covenant statute,¹²⁹ modeled after the 1955 Uniform Act, the court found no reference to joint tortfeasors and no reason to hold that two or more persons jointly or severally liable in tort may not include those who are only vicariously liable. Even under the more restrictive 1939 Uniform Act, two courts have ruled that a master and servant fit the definition of "joint tortfeasors" as given in section one of that Act.¹³⁰

How Virginia will decide to rule in a vicarious liability situation may depend upon how narrowly it defines a joint tortfeasor. Virginia procedure has long allowed parties who were concurrent tortfeasors and not acting in concert to be joined and, therefore, to be termed "joint tortfeasors."¹³¹ Furthermore the legislative intent in refusing to mandate a strict interpretation seems evident in the omission of any reference to "joint tortfeasors" in the covenant act as presented to the legislature.¹³²

123. For a discussion of the pros and cons of this extension, see *id.*

124. *Hertz Corp. v. Hellens*, 140 So. 2d 73 (Fla. Dist. Ct. App. 1962).

125. *Torts—Vicarious Liability*, *supra* note 122.

126. *Witucke v. Presque Isle Bank*, 68 Mich. App. 599, 243 N.W.2d 907 (1976).

127. *Thomas v. Checker Cab Co.*, 66 Mich. App. 152, 238 N.W.2d 558 (1975).

128. 568 P.2d 916 (Ala. 1977).

129. ALASKA STAT. §§ 09.16.010-.060 (1978).

130. *Holve v. Draper*, 95 Idaho 193, 505 P.2d 1265 (1973); *Smith v. Raparot*, 101 R.I. 565, 225 A.2d 666 (1967); *accord*, *Ritter v. Technicolor Corp.*, 27 Cal. App. 3d 152, 103 Cal. Rptr. 686 (1972).

131. *North River Ins. Co. v. Davis*, 274 F. Supp. 146 (W.D. Va. 1967).

132. 1979 Acts of Assembly c.697 (Act of March 31, 1979).

While the statute does include the term "joint tortfeasors," a related statute¹³³ regarding interpretation of section headlines indicates that these must be considered as catch words only.¹³⁴ Hopefully Virginia will continue in its modernization trend in tort law by choosing to follow those states that have ruled a release of an employee does not automatically release the vicariously liable employer.

X. CONCLUSION

Virginia has taken a major step in recognizing the right of a plaintiff to settle his lawsuit with one tortfeasor while continuing to maintain his action against another who is unwilling to approach the bargaining table. The increased number of lawsuits and the rising costs involved mandate a law that will encourage settlements while enforcing principles of fairness and equity. Virginia's release and covenant not to sue law is a significant effort in that direction.

Covenants not to sue and specially drawn releases may be used for personal injury, property damage and wrongful death claims in light of the overwhelming acceptance of this practice in all other states and in light of past Virginia affinity for compromising and settling all such claims. Such covenants may be used to compromise a disabled person's claim so long as the appropriate court first gives its approval.

Good faith in executing a valid covenant is a necessary requirement for all parties involved. A disproportionate settlement figure alone is not *prima facie* evidence of bad faith; however, the inequitable settlement will mandate a thorough examination for possible collusion between the parties.

A settling tortfeasor cannot be forced to contribute to another wrongdoer after his settlement, nor can he expect to receive contribution from another. A single exception arises when the covenant acts as an extinguishment of an entire cause of action. The noncovenanting party can expect to receive a credit against his judgment equal to the consideration stipulated in or exchanged for the covenant. If the covenantee settles for less than his pro rata share of liability, the nonsettling party must then pay the entire balance of the judgment even if this is more than his pro rata share. Conversely, if the settling party pays more than his share, the remaining co-defendant need only pay the balance and not his entire pro rata share.

133. VA. CODE ANN. § 1-13.9 (Repl. Vol. 1979).

134. See *Norfolk & W. Ry. v. White*, 158 Va. 243, 163 S.E. 530 (1931); *Jordon v. Town of South Boston*, 138 Va. 838, 122 S.E. 265 (1924).

Under Virginia law, the covenant not to sue will probably be applied retroactively to claims arising before July 1, 1979, without disturbing any vested rights since no rights will vest until the release is executed and consideration is exchanged.

Hopefully, the covenant statute will be deemed to cover a vicarious liability relationship so that a plaintiff releasing an employee will not inadvertently release his employer. In view of the fact that past Virginia law does not prohibit this interpretation, such an approach will result in a more uniform application of the new law and will be clearly indicative of the intentions of the covenanting parties.

Linda Flory Rigsby

