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Release of Joint Tortfeasors-Virginia Code Section 8.01-35.1 and its Retroactive Application

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RELEASE OF JOINT TORTFEASORS—VIRGINIA CODE SECTION 8.01-35.1 AND ITS RETROACTIVE APPLICATION

I. INTRODUCTION

This comment was prompted by the 1979 enactment of Section 8.01-35.1 of the Code of Virginia,[1] which changed the law in Virginia regarding the release of, and contribution among, joint tortfeasors. Contribution statutes such as section 8.01-35.1 provide an equitable remedy for the problem of unjust enrichment (or, more accurately, unequal punishment) whenever one of several joint tortfeasors pays more than his ratable share of a claim. There has been considerable debate concerning the retroactive effect of these statutes—that is, whether a newly promulgated contribution statute can be applied retroactively to affect a claim which arose before the statute was enacted. The debate focuses on the formulation of a workable definition of the "right of contribution," and the determination of when that right arises.

Three cases have recently been decided in Virginia discussing the retroactive application of Virginia Code section 8.01-35.1.[2] The differing opinions and conclusions of the various courts have left the state of the law on this issue uncertain. This Comment will attempt first to explain the nature of the right of contribution; then to resolve the uncertainties as to the retroactive application of section 8.01-35.1; and finally to determine how it should properly be applied in future cases involving release and contribution among joint tortfeasors in Virginia.

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1. VA. CODE ANN. § 8.01-35.1 (Repl. Vol. 1984).

2. Carickhoff v. Badger-Northland, Inc., 562 F. Supp. 160 (W.D. Va. 1983); Shiflet v. Eller, 228 Va. ____, 1 V.L.R. 131 (1984); Dillon v. Potomac Hospital Corp., Law No. 10472, memorandum op. (Cir. Ct. Prince William County, Va. Jan. 4, 1984). One other case, Hayman v. Patio Prod., Inc., 226 Va. 482, 311 S.E.2d 752 (1984) was also decided applying § 8.01-35.1 of the Virginia Code. The *Hayman* case did not directly deal with the issue of the retroactive application of statute, and so is not central to the scope of this Comment. However, the *Hayman* court did discuss the intent of the legislature in passing § 8.01-35.1. The court considered that intention to be of paramount importance in deciding whether or not to apply the 1979 statute, or a later amended version, to an accident that occurred in 1977.

The *Shiflet* court discusses *Hayman* only briefly, stating that *Hayman* is distinguishable because it did not address the retroactivity issue. *Shiflet*, 228 Va. at ____, 1 V.L.R. at 139. Although the *Hayman* case may not have raised the retroactivity issue directly, the court clearly looked to the version of the statute that was in effect at the time of the covenant not to sue, and decided that it was the governing law in the case. The *Shiflet* court's attempt to distinguish the *Hayman* decision is of questionable validity.

II. History of Joint Tortfeasor and Contribution Law

A. *The Release of Joint Tortfeasors*

Generally, joint tortfeasors are "liable for the entire damage done."[3] At common law, the release of one tortfeasor operated as a release of all.[4] This is based upon the English rule that the plaintiff could obtain only one judgment on a joint tort, because the actions of one were considered to be the actions of all. Thus, there was only one cause of action. When this cause of action was "reduced to a certainty or merged in the judgment, . . . the judgment against one alone, even though unsatisfied, barred any later action against another."[5] Virginia first recognized this general common law rule in 1808[6] and followed it strictly[7] until it was changed in 1979 by Virginia Code section 8.01-35.1.[8]

In enacting section 8.01-35.1 of the Virginia Code, the General Assembly abrogated the common law rule that the release of one tortfeasor operated as a release of all joint tortfeasors. One year later, this section was amended[9] and the amended version provided that covenants not to sue *and* releases may be entered into by one of two or more persons liable in tort for the same injury or wrongful death without necessarily discharging the remaining tortfeasors.[10] Thus, under the terms of the statute, a plaintiff can now release one joint tortfeasor without releasing others.

Pursuant to a 1982 amendment, subsection D was added, expressly requiring application of section 8.01-35.1 to "all . . . covenants not to sue executed on or after July 1, 1979 and to all releases executed on or after July 1, 1980, regardless of the date the causes of action affected thereby arose."[11]

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3. W. Prosser, Handbook of the Law of Torts § 46, at 291 (4th ed. 1971).

4. *Id.* at 301.

5. Day v. Porter, 2 Moody & R. 151, 152, 174 Eng. Rep. 245, 246 (1838) (case dealing with trespass); *see also* King v. Hoare, 13 M. & W. 495, 505, 153 Eng. Rep. 206, 210 (Ex. Ch. 1844) (recovery of debt for goods sold and delivered); Brown v. Wootton, Cro. Jac. 73, 74, 79 Eng. Rep. 62, 63 (K.B. 1600) (recovery in trover).

6. Ruble v. Turner, 12 Va. (2 Hen. & M.) 38, 44 (1808).

7. *See, e.g.*, Strickland v. Dunn, 219 Va. 76, 244 S.E.2d 764 (1979); Wright v. Orlowski, 218 Va. 115, 235 S.E.2d 349 (1977); Short v. Hudson Supply & Equip. Co., 191 Va. 306, 60 S.E.2d 900 (1950); First & Merchants Nat'l Bank of Richmond v. Bank of Waverly, 170 Va. 496, 197 S.E. 462 (1938). See *infra* notes 8-11 and accompanying text for a synopsis of Va. Code Ann. § 8.01-35.1 and its amendments.

8. 1979 Va. Acts 697 (codified at Va. Code Ann. § 8.01-35.1 (1979)). This statute provided, in part, that when a covenant not to sue was given in good faith to one of two or more persons liable in tort for the same injury or wrongful death, it would not discharge any of the other joint tortfeasors unless its terms specifically provided for the release of that other joint tortfeasor. *Id.*

9. 1980 Va. Acts 411.

10. Va. Code Ann. § 8.01-35.1 (Repl. Vol. 1984).

11. *Id.* § 8.01-35.1(D). The present text of the statute reads as follows:

B. *Contribution and Release*

The fact that one joint tortfeasor was liable for all of the damage done, regardless of his percentage of fault, led to the emergence of the equitable doctrine of contribution.[12] This doctrine prevents one joint tortfeasor from paying more than his share of a particular claim. The Virginia rule which allows contribution among joint tortfeasors is founded upon English common law.[13] Virginia codified this rule in 1919: "Contribution

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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 tort-feasors from liability for the injury, property damage or wrongful death unless its terms so provide; but any amount recovered against the other tort-feasors or any one of them shall be reduced by any amount stipulated by the covenant or the release, or in the amount of the consideration paid for it, whichever is greater. A release or covenant not to sue given pursuant to this section shall not be admitted into evidence in the trial of the matter but shall be considered by the court in determining the amount for which judgment shall be entered; and

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

B. A tort-feasor who enters into a release or covenant not to sue with a claimant is not entitled to recover by way of contribution from another tort-feasor whose liability for the injury, property damage or wrongful death is not extinguished by the release or covenant not to sue, nor in respect to any amount paid by the tort-feasor 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.

D. This section shall apply to all such covenants not to sue executed on or after July 1, 1979, and to all releases executed on or after July 1, 1980, regardless of the date the causes of action affected thereby accrued.

12. Glover v. Johns Manville Corp., 525 F. Supp. 894, 900 (E.D. Va. 1979), *aff'd in part, vac'd in part*, 662 F.2d 225 (4th Cir. 1981); Nationwide Mut. Ins. Co. v. Minnifield, 213 Va. 797, 800, 196 S.E.2d 75, 77-78 (1973); Hudgins v. Jones, 205 Va. 495, 501, 138 S.E.2d 16, 21 (1964).

13. *See* Hatcher, *Battersey's Case (1623): Some Ups and Downs of the Rule There Pronounced, Affecting Contribution Between Joint Wrongdoers*, 47 W. VA. L.Q. 123 (1941). Mr. Hatcher cites English cases from 1622 and 1623 as the earliest he could find concerning actions between joint wrongdoers. Arundel v. Gardiner, Cro. Jac. 652, 79 Eng. Rep. 563 (K.B. 1622); Battersey's Case, Winch 49, 124 Eng. Rep. 41, *sub nom.* Fletcher v. Harcot, Hutton 55, 123 Eng. Rep. 1097 (C.P. 1623). *See* 47 W. VA. L.Q. at 123. These cases dealt with joint wrongdoers and the general rule was that between wrongdoers there was neither indemnity nor contribution. *Id.* However, Mr. Hatcher notes that the *Battersey* court found an exception to that rule when the tortious act itself was "indifferent" and not "unlawful" or "illegal." The rest of the article stresses that this "exception" has remained the law of England to the present day, but that a 1799 English case confused the issue by stating that no contribution whatever could be had between joint tortfeasors. *Id.* (citing Merryweather v. Nixan, 8 T.R. 186, 101 Eng. Rep. 1337 (K.B. 1799)).

The English courts criticized the *Merryweather* decision and limited it to joint wrongdoers. 47 W. VA. L.Q. at 123 (citing Betts v. Gibbons, Ad. & E. 57, 111 Eng. Rep. 22 (K.B. 1834)). Nonetheless, some early American decisions did adopt the *Merryweather* rule. 47 W.

among wrongdoers may be enforced when the wrong is a mere act of negligence and involves no moral turpitude."[14]

In 1979, Virginia enacted the statute herein examined, abrogating the common law rule that the release of one joint tortfeasor operated to release all.[15] In addition, the statute provides for the release of the settling tortfeasor from liability for contribution to the other tortfeasors and vice versa.

The effect of the current contribution statute on the common law rules regarding contribution rights after the plaintiff has entered into a covenant not to sue, or a release of a joint tortfeasor, is clear. The issue which has divided the courts in Virginia, however, is defining the nature of the "right of contribution." Resolution of this issue will determine the efficacy of applying section 8.01-35.1 retroactively, allowing it to affect claims which arose before the enactment of the statute.

VA. L.Q. at 125.

Virginia, however, followed the reasoning of *Battersey*. In Thweatt's Adm'r v. Jones, 22 Va. (1 Rand.) 328, 10 Am. Dec. 538 (1823), Judge Green stated as follows:

> [W]hen any burthen ought, from the relation of the parties, or in respect of property held by them, to be equally borne, and each party is in *aequali jure*, contribution is due, unless the claim to contribution has arisen out of some *actual fraud*, or *voluntary wrong*, in which the party claiming contribution has participated.

Id. at 332, 10 Am. Dec. at 541. Judges Coalter and Brooke used similar reasoning. *Id.* at 338, 343, 10 Am. Dec. at 545, 549.

It should be noted that in 1909, a solitary Virginia case seemed to change the rule without citation of any authority. The court in Walton v. Miller, 109 Va. 210, 63 S.E. 458 (1909), held that the right of contribution did not exist among joint tortfeasors. Mr. Hatcher refers to the *Walton* decision and notes that its

> holding was repeated in several later Virginia cases [*see* Palmer v. Showalter, 126 Va. 306, 318, 101 S.E. 136, 140 (1919); Virginia Ry. & Power Co. v. Hill, 120 Va. 397, 404, 408, 91 S.E. 194, 197 (1917)] until checked in 1919 by the following statute: "Contribution among wrongdoers may be enforced where the wrong is a mere act of negligence and involves no moral turpitude." [VA. CODE ANN. § 8-627 (1950)]. Thus the statute revived . . . the doctrine of *Battersey's Case* as well as the judicial declarations in *Thweat's Adm'r v. Jones*, which seemingly had been unchallenged in Virginia from 1823 to 1909.

47 W. VA. L.Q. at 126.

Further reference to the common law and Virginia statutory law can be found in Brooks v. Brown, 307 F. Supp. 907, 908 (E.D. Va. 1969); Nationwide Mut. Ins. Co. v. Jewel Tea Co., 202 Va. 527, 530, 118 S.E.2d 646, 648 (1961); Norfolk & Portsmouth Belt Line R.R. v. Parker, 152 Va. 484, 505, 147 S.E. 461, 467 (1929). The reference in each of these cases to the fact that there was no contribution at common law can probably be explained by the confusion created by *Merryweather*, explained *supra*.

14. VA. CODE ANN. § 8-627 (1950). The current version of this statute, VA. CODE ANN. § 8.01-35.1 (Repl. Vol. 1984), deleted the words "mere act."

15. Act of March 31, 1979, ch. 697, 1974 Va. Acts 1011 (codified at VA. CODE ANN. § 8.01-35.1 (Repl. Vol. 1984)). For a complete text of the statute, *see supra* notes 8-11 and accompanying text.

In the recent opinion of *Shiflet v. Eller*,[16] the Virginia Supreme Court addressed the issue of the retroactivity of section 8.01-35.1. The court ruled that the statute could not be accorded retroactive application.[17] There are some troubling aspects of this decision, however, which make the supreme court's interpretation of this section questionable. Below is an analysis of the *Shiflet* case in light of two earlier decisions, one federal[18] and one state circuit court,[19] which applied the same version of section 8.01-35.1 but reached opposite results.

III. Recent Case Law Interpreting Virginia Code Section 8.01-35.1

A. *The Facts of* Shiflet v. Eller[20]

In October 1977, a collision occurred between a vehicle driven by appellant Mary W. Shiflet, in which appellant Harvey W. Shiflet III was a passenger, and two other motor vehicles. The other vehicles were driven by Everette F. Horton and appellee Murray L. Eller. The Shiflets filed separate damage suits against Horton and Eller in 1979, seeking judgments for negligence against the defendants jointly and severally.

In May of 1981, the Shiflets settled their claims against defendant Horton, executing separate documents, both entitled "Release or Covenant Not to Sue Agreement Pursuant to Virginia Code Section 8.01-35.1, As Amended." These documents released Horton from further liability to the Shiflets, but purported to reserve all of the Shiflets' rights and claims against Eller. The lower court found that the release of Horton also acted to release Eller, concluding that the accident occurred before enactment of the statute, and was therefore not affected by it.[21]

The Shiflets appealed the lower court decision to the Virginia Supreme Court, contending that the lower court's ruling ignored the provisions of Virginia Code section 8.01-35.1 and the terms of the release document, which had been drafted in strict compliance with the statute. The Shiflets argued that the lower court erred when it refused to apply the 1979 statute to the 1981 release of Horton, even though the Shiflets' cause of action for damages arose in 1977.[22]

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16. 228 Va. ___, 1 V.L.R. 131 (1984).
17. *Id.* at ___, 1 V.L.R. at 137 (1984).
18. Carickhoff v. Badger-Northland, Inc., 562 F. Supp. 160 (W.D. Va. 1983).
19. Dillon v. Potomac Hospital Corp., Law No. 10472, memorandum op. (Cir. Ct. Prince William County, Va. Jan. 4, 1984).
20. 228 Va. ___, 1 V.L.R. 131 (1984).
21. *Id.* at ___, 1 V.L.R. at 132.
22. *Id.* at ___, 1 V.L.R. at 133.

B. *The Facts of* Carickhoff v. Badger-Northland, Inc.

In *Carickhoff v. Badger-Northland, Inc.*,[23] the plaintiff filed suit for an injury suffered on August 16, 1976, while he was using an allegedly defective liquid manure pump manufactured by the defendant, Badger-Northland, Inc. The defendant Badger-Northland impleaded the Patterson Equipment Co. of Fairfield, Virginia, as a third-party defendant. On May 8, 1982, the plaintiff, in consideration of the sum of $30,000 paid to him by Patterson Equipment, released Patterson from all liability on any of plaintiff's claims or causes of action arising out of the accident.

Notwithstanding passage of section 8.01-35.1 and its amendments, the defendant, Badger-Northland, Inc., proferred a motion for summary judgment, contending that the plaintiff's release of Patterson released Badger-Northland as well. Badger-Northland argued that the law to be applied to the case was the law that existed on the day of the accident, August 16, 1976; therefore, the date of plaintiff's release of Patterson was not determinative.[24]

C. *The Facts of* Dillon v. Potomac Hospital Corp.

Dillon v. Potomac Hospital Corp.[25] addressed very similar issues. The plaintiff, a committee for Hilda Amidon, sued Potomac Hospital Corp., alleging negligence on the part of the hospital, its agents and employees in rendering medical services to Amidon. The events which gave rise to this suit occurred on September 16, 1977. Plaintiff filed an amended motion for judgment on April 27, 1982, naming Potomac, two physicians, the administrator of the estate of a third physician, and a fourth individual as defendants. The fourth individual was non-suited on July 14, 1983, and, in consideration of $475,000, a covenant not to sue was entered into with the two physicians and the administrator of the third physician's estate.[26]

As in *Carickhoff*, Virginia Code section 8.01-35.1 was enacted and amended after the alleged tort and before the entering of the covenant not to sue. Availing itself of the same argument used by Badger-Northland in *Carickhoff*, Potomac Hospital moved for summary judgment, contending that the law to be applied was the law existing on the day of the alleged negligence in 1977; thus, the covenent not to sue the three doctors released Potomac as well.[27]

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23. 562 F. Supp. 160 (W.D. Va. 1983).
24. Carickhoff v. Badger-Northland, Inc., 562 F. Supp. 160, 162 (W.D. Va. 1983).
25. Law No. 10472, memorandum op. (Cir. Ct. Prince William County, Va. Jan. 4, 1984).
26. *Id.*
27. *Id.*

D. *Issues Raised and Addressed*

The *Carickhoff* and *Dillon* courts attempted to determine the nature of the "right of contribution." Both courts were concerned with whether it was a substantive or procedural right. It is at this point that the courts diverge. *Carickhoff* found that the right of contribution arises on the date of the accident, and is a substantive right as of that date.[28] Though *Carickhoff* used the word "substantive" to describe the right of contribution, implicit in the court's conclusion was that the right was vested. The court held that if the statute were applied retroactively, it would deprive the defendant of a substantive right, thus violating the defendant's guarantee of due process of law under the United States Constitution.[29] The Constitution, however, protects only vested interests or contractual rights.[30]

The *Dillon* court did not confuse the terms, and, focusing its determination upon the *inchoate* nature of the right to contribution, the court found the *Carickhoff* decision to be erroneous.[31] The *Dillon* court concluded that the right of contribution did not *vest* until the actual payment by a co-defendant.[32] Using this premise, the court found no obstacle barring retroactive application of section 8.01-35.1 because inchoate, procedural and remedial rights are subject to alteration or destruction at any time prior to their vesting.[33]

The *Shiflet* court reasoned that the right of contribution is a substantive right.[34] Unlike *Carickhoff*, *Shiflet* makes a distinction between the terms "vested" and "substantive".[35] Unfortunately, the court did not detect *Carickhoff's* confusion of the two terms and cites *Carickhoff* for the proposition that a retroactive application of the statute would violate the defendant's due process rights.[36]

The definition of the nature of the right of contribution affects whether or not the Virginia contribution statute can be applied retroactively. The remainder of this Comment will outline the Virginia rules regarding retroactive application of statutes. The Comment will then attempt to apply these rules in defining when Virginia Code section 8.01-35.1 should be applied retroactively.

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28. Carickhoff v. Badger-Northland, Inc., 562 F. Supp. 160, 164 (W.D. Va. 1983).
29. *Id.*
30. *See infra* notes 120-24 and accompanying text.
31. Dillon v. Potomac Hospital Corp., Law No. 10472, memorandum op., at 3 (Cir. Ct. Prince William County, Va. Jan. 4, 1984).
32. *Id.*
33. *Id.*
34. Shiflet v. Eller, 228 Va. ___, ___, 1 V.L.R. 131, 137 (1984).
35. *Id.* at ___, 1 V.L.R. at 135.
36. *Id.* at ___, 1 V.L.R. at 137.

IV. The Retroactivity Issue—The Virginia Position

Virginia Code section 1-16 states that no new law shall affect "any right accrued, or claim arising" before the effective date of the new law.[37] The Code continues, "save only that the proceedings thereafter had shall conform, so far as practicable, to the laws in force at the time of such proceedings."[38] Interpreting this latter clause, Virginia courts have resolved that this statute does not bar retroactive application of laws referring solely to matters of remedy and procedure.[39] The procedural provisions of a statute in effect on the date of the trial control.[40] It has been further held that this is especially true where the legislature "expressly declares" that the particular law shall have retroactive application.[41]

Section 8.01-1 of the Virginia Code provides that "the applicable law in effect on the day before the effective date of the particular provisions [of this title] shall apply if in the opinion of the court any particular provision (i) may materially change the substantive rights of a party . . . ."[42] The *Shiflet* court found that Virginia Code section 8.01-35.1 does affect substantive rights.[43] Accordingly, the court correctly reasoned that section 8.01-1 governed the retroactivity issue, and refused to apply section 8.01-35.1 retroactively.[44]

It is important to note that subsection D of section 8.01-35.1 was not in effect when the Shiflets' releases were effectuated[45] and therefore could have no bearing on the case. With the advent of subsection D in 1982, however, section 8.01-35.1 now expressly declares that it shall have retroactive effect.[46] To this extent, section 8.01-35.1 overrides section 8.01-1 of

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37. Va. Code Ann. § 1-16 (Repl. Vol. 1979).

38. *Id.*

39. Virginia & W. Va. Coal Co. v. Charles, 251 F. Supp. 83 (W.D. Va. 1917), *aff'd*, 254 F. 379 (4th Cir. 1918); Fletcher v. Tarasidis, 219 Va. 658, 250 S.E.2d 739 (1979); Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978); Hurdle & Foelak v. Prinz & Meihm, 218 Va. 134, 235 S.E.2d 354 (1977); Paul v. Paul, 214 Va. 651, 203 S.E.2d 123 (1974).

40. Smith v. Commonwealth, 219 Va. at 476, 248 S.E.2d at 148.

41. Phipps v. Sutherland, 201 Va. 448, 453, 111 S.E.2d 422, 426 (1959). The District Court for the Western District of Virginia noted in 1982 that the plain language of a procedural statute applying retroactivity is to be given much weight. Chapman v. Edgerton, 529 F. Supp. 519, 520 (W.D. Va. 1982). The court observed that "[t]he exemption statute [in Virginia's Medical Malpractice Act] is purely procedural and by its very wording clearly implies a legislative intent that it be applied retroactively. The standard of care statute, on the other hand, contains no language that implies it is to operate retroactively." *Id.* (emphasis added).

42. Va. Code Ann. § 8.01-1 (Repl. Vol. 1984).

43. Shiflet v. Eller, 228 Va. ____, ____, 1 V.L.R. 131, 139 (1984).

44. *Id.* at ____, 1 V.L.R. at 135, 139.

45. The release took place in May, 1981. *Id.* Subsection D of Va. Code Ann. § 8.01-35.1, which specifically gives the statute retroactive application, was not enacted until 1982. *See supra* note 29 and accompanying text.

46. "This section shall apply to all such covenants not to sue executed on or after July 1,

the Virginia Code.[47]

In the absence of express language in a statute addressing its retroactive application, such as the clear language of section 8.01-35.1(D), the Virginia Supreme Court has stated that the question of whether a statute will be applied retroactively hinges upon the type of rights it affects. If the statute affects vested rights, it will not be applied retroactively.[48] In order to determine the efficacy of applying section 8.01-35.1 retroactively under this standard, questions concerning the nature and vesting of the right to contribution must be resolved.

V. *SHIFLET* AND THE "SUBSTANTIVE RIGHT" ARGUMENT

The *Shiflet* case involved a release that was effected prior to the enactment of subsection D of Virginia Code section 8.01-35.1. Accordingly, section 8.01-1 controlled and the issue was whether the right of contribution was substantive or procedural. *Shiflet* found the right of contribution to be substantive.[49] The court concluded that the right became a substantive right at the time the joint tort occurred.[50] Undeniably, the right of contribution is a substantive right. The real issue, however, is at what point that right exists. In this regard, the *Shiflet* court's conclusion is questionable.

The logic behind the "substantive" argument is based upon the premise that the right to enforce contribution is incidental to the plaintiff's cause of action against the joint tortfeasors.[51] A Wisconsin case which embraced the "substantive" view focused upon the existence of the right "in contemplation of law until it is no longer needed as a resource."[52] At the same time, the court seems to acknowledge that the right is "contingent, subordinate or inchoate . . . ."[53] Although *Shiflet* referred to the lan-

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1979, and to all releases executed on or after July 1, 1980, *regardless of the date the causes of action affected thereby accrued.*" VA. CODE ANN. § 8.01-35.1(D) (Repl. Vol. 1984) (emphasis added).

47. The Virginia Supreme Court has held that:

> [I]f a later statute does not by its terms or by necessary implication repeal entirely a former one *in pari materia*, yet it clearly appears that the later statute was intended to furnish the only rule to govern a particular case, it repeals the former to that extent. And in deciding that question "the occasion and the reason of the enactment, the letter of the act, the context, the spirit of the act, the subject matter and the provisions of the act, have all to be considered."

American Cyanamid Co. v. Commonwealth, 187 Va. 831, 841-42 (1948) (citations omitted).

48. Duffy v. Hartsock, 187 Va. 406, 416, 46 S.E.2d 570, 574 (1948); *see also* Stancil v. United States, 200 F. Supp. 36, 44 (E.D. Va. 1961).

49. Shiflet v. Eller, 228 Va. ___, ___, 1 V.L.R. 131, 137 (1984).

50. *Id.*

51. DeBrue v. Frank, 213 Wis. 280, ___, 251 N.W.2d 494, 496 (1933).

52. *Id.*

53. *Id.*

guage of the Wisconsin case, the Virginia court relied heavily on the most celebrated of the "substantive" cases, *Distefano v. Lamborn*,[54] which ruled that the draftsman of the Uniform Contribution Among Joint Tortfeasors Act[55] intended the right to be substantive. Upon examination of more recent authority, however, the *Shiflet* court's reliance on *Lamborn* seems to be misplaced. For example, the Delaware Supreme Court severely criticized the *Lamborn* decision seven years after the case was originally handed down.[56] Similarly, the Colorado Supreme Court, in *Coniaris v. Vail Associates, Inc.*,[57] found the *Lamborn* reasoning erroneous, observing that "[a] claim for contribution is an action separate and distinct from the underlying tort. The rights and obligations of the tortfeasors flow, not from the tort, but from the judgment or settlement itself."[58]

The *Coniaris* reasoning is in line with the common law rule that each tortfeasor is liable for the "entire damage done."[59] This rule has led to well-reasoned opinions concerning contribution in various jurisdictions.[60] For example, the Florida Supreme Court, in *Village of El Portal v. City of Miami Shores*,[61] noted:

> The Uniform Contribution Among Tort-Feasors Act does not affect any vested rights of tortfeasors or create any new obligations in respect to their tort liability. Since the common tort liability was enforceable against all or any of the joint offenders at the election of the injured party, section 768.31, by altering the common law rule of no contribution, does not increase the liability of any of the participants in the offense. The statute merely lessens the ultimate liability of each tortfeasor by providing an equitable distribution of the common burden . . . . The statute simply changes the form of

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54. 46 Del. 195, 81 A.2d 675 (Super. Ct. 1951).

55. For a discussion of the application of the 1955 Uniform Contribution Among Joint Tortfeasors Act, see *infra* note 89.

56. Halifax Chick Express Inc. v. Young, 50 Del. 596, ____, 137 A.2d 743, 744-45 (1958). The Delaware Superior Court affirmed this view later in Perez v. Shortline, Inc., 231 A.2d 642 (Del. Super. Ct. 1967), ruling that "[t]he discharge of common liability and not the commission of the tort gives rise to the right of contribution." *Id.* at 644 (quoting Halifax Chick Express, Inc. v. Young, 50 Del. at ____, 137 A.2d at 744).

Note that the *Lamborn* court, in reaching its decision, cited the 1924 Virginia case, Norfolk & So. R.R. v. Beskin, 140 Va. 744, 125 S.E. 678 (1924) (adopting the proposition that the cause of action for contribution arose at the time of the accident).

57. 196 Colo. 392, 586 P.2d 224 (1978).

58. *Coniaris*, 196 Colo. at ____, 586 P.2d at 225.

59. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 46, at 291 (4th ed. 1971).

60. *See, e.g.*, Layne v. United States, 460 F.2d 409 (9th Cir. 1972) (applying Alaska law); Duncan v. Schuster-Graham Homes, Inc., 196 Colo. 441, 578 P.2d 637 (1978); Village of El Portal v. City of Miami Shores, 362 So.2d 275 (Fla. 1978); First Nat'l Bank v. Steel, 136 Mich. 588, 99 N.W. 786 (1904); Pennsylvania Greyhound Lines, Inc. v. Rosenthal, 14 N.J. 372, 102 A.2d 587 (1954); Duescher v. Commerano, 256 N.Y. 328, 176 N.E. 412 (1931); Smith v. Fenner, 399 Pa. 633, 161 A.2d 150 (1960).

61. 362 So.2d 275.

the remedy without impairing substantial rights.[62]

The *Shiftlet* court completely overlooked this common law rule when it determined that the enactment of section 8.01-35.1 increases the liability of each joint tortfeasor. The *Shiflet* court reasoned that the defendant, Eller, "would be liable ultimately for only one-half of the . . . [plaintiff's] judgment."[63] The *Shiflet* court implicitly concludes that an "equitable, inchoate right . . ." is the same as a substantive right for purposes of section 8.01-1.[64] The number of cases adopting the view that the right of contribution prior to judgment or settlement is a substantive right is scant.[65] Presently, only two jurisdictions, Georgia and Tennessee, continue to adhere to this view after enactment of contribution statutes in their respective states. A critical analysis of the decisions in these two states is helpful in analyzing the current Virginia position.[66]

VI. The Georgia and Tennessee Exceptions

Georgia and Tennessee have consistently ruled that a release or covenant not to sue statute affects substantive rights and may not be applied retroactively.[67]

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62. *Id.* at 278. The California court in Augustus v. Bean, 56 Cal. 2d 270, 363 P.2d 873, 14 Cal. Rptr. 641 (1961), echoed the Florida decision, saying:

> As of the time of the accident a person did not have a vested right at common law to avoid paying for the consequences of his negligence merely because there were other tortfeasors involved. After the entry of a judgment against the joint tortfeasors, each of them was liable in full until the judgment was satisfied, and, if the plaintiff chose to collect from one to the exclusion of another, this was a matter of chance rather than the result of a right which became fixed as of the time of the accident. Contribution statutes, if applied where an accident antedates their enactment, do not retroactively increase the liability existing at the time of the injury but merely provide a method by which the liability of each of the tortfeasors may be limited to his pro rata share of the judgment.

Id. at ____, 363 P.2d at 874-75, 14 Cal. Rptr. at 642-43; *see also* Smith v. Fenner, 399 Pa. at ____, 161 A.2d at 155.

63. *Shiflet*, 228 Va. at ____, 1 V.L.R. at 138.

64. *Id.* at ____, 1 V.L.R. at 136-37.

65. Commercial Casualty Ins. Co. v. Leonard, 210 Ark. 575, 196 S.W.2d 919 (1946); F. H. Ross & Co. v. White, 224 Ga. 324, 161 S.E.2d 857 (1968); Klaas v. Continental So. Lines, 225 Miss. 94, 82 So. 2d 705 (1955); Bargeon v. Seashore Transp. Co., 196 N.C. 776, 147 S.E. 299 (1929); Massey v. Sullivan County, 225 Tenn. 132, 464 S.W.2d 548 (1971).

66. *See infra* notes 67-98 and accompanying text.

67. For Georgia cases, see Zimmermans, Inc. v. McDonough Const. Co., 240 Ga. 317, 240 S.E.2d 864 (1977); Smith v. McLendon, 142 Ga. App. 608, 236 S.E.2d 692 (1977). For Tennessee cases, see 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).

A. *Georgia*

The law in Georgia concerning releases is similar to the law in Virginia before 1979. It is still the rule in Georgia that the release of one joint tortfeasor operates to release all joint tortfeasors.[68] However, before the amendment of the contribution statute in Georgia,[69] and the enactment of the covenant not to sue statute in Virginia,[70] the contribution and settlement laws of the two states differed greatly.[71]

In Georgia, prior to 1972, settlement by one tortfeasor did not give rise to the right of contribution from other joint tortfeasors.[72] Under the old law, "[b]efore a claim . . . can arise under [Georgia] Code Ann. § 105-2012 it must appear that a judgment . . . has been entered . . . against the tortfeasor who claims contribution because of the payment made."[73]

In Virginia, prior to 1979, the right to contribution could be enforced when a compromise settlement, rather than a judgment, had been reached.[74] The tortfeasor against whom contribution was sought had only the right to challenge on the grounds that the compromise settlement was "unreasonable, excessive, made in bad faith, or that he was not concurrently negligent, or that his negligence was not a proximate cause of the

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68. Zimmermans, Inc. v. McDonough Const. Co., 240 Ga. 317, 240 S.E.2d 864 (1977); Smith v. McLendon, 142 Ga. App. 608, 236 S.E.2d 692 (1977).

69. GA. CODE ANN. § 105-2012 (Cum. Supp. 1977). Prior to 1972, the statute read: "(1) Where the tortious act does not involve moral turpitude, contribution among several trespassers may be enforced just as if they had been jointly sued. (2) If judgment is entered jointly against several trespassers, and is paid off by one, the others shall be liable to him for contribution." *Id.* Since 1972, the statute has read as follows:

> (a) Where a tortious act does not involve moral turpitude, contribution among several trespassers may be enforced just as if an action had been brought against them jointly. Without the necessity of being charged by action or judgment, the right of a joint trespasser to contribution from another or other shall continue unabated and shall not be lost or prejudiced by compromise and settlement of a claim or claims for injury to person or property or for wrongful death and release therefrom.(b) If judgment is entered jointly against several trespassers and is paid off by one of them, the others shall be liable to him for contribution.(c) Without the necessity of being charged by an action or judgment, the right of indemnity, express or implied, from another or others shall continue unabated and shall not be lost or prejudiced by compromise and settlement of a claim or claims for injury to person or property or for wrongful death and release therefrom.

Id. § 51-12-32 (1982).

70. VA. CODE ANN. § 8.01-35.1 (Repl. Vol. 1984).

71. *Compare* Hangar Cab Co. v. City of Atlanta, 122 Ga. App. 661, 178 S.E.2d 292 (1970) *with* Nationwide Mut. Ins. Co. v. Jewel Tea Co., 202 Va. 527, 118 S.E.2d 646 (1961).

72. *Hangar Cab*, 122 Ga. App. at ____, 178 S.E.2d at 293.

73. *Id.* at ____, 178 S.E.2d at 293-94 (citations omitted).

74. Nationwide Mut. Ins. Co. v. Jewel Tea Co., 202 Va. 527, 531, 118 S.E.2d 646, 648 (1970). This line of reasoning was premised on the notion that the right of contribution arises "when" payment is made by one tortfeasor. *Id.* at 532, 118 S.E.2d at 649.

injuries compromised . . . ."[75]

In 1972, Georgia amended its contribution statute to state that "[w]ithout the necessity of being charged by suit or judgment, the right of contribution from another or others shall continue unabated and shall not be lost or prejudiced by compromise or settlement . . . ."[76] Subsequent Georgia cases applying this statute quote a pre-amendment case[77] to find that the right of contribution is a substantive right, fixed at the time of injury, so that the law in effect at the time of settlement has no bearing on the case.[78]

B. *Tennessee*[79]

Before the present Tennessee covenant not to sue statute became effective, Tennessee law provided that a covenant not to sue released only the covenanting party, and that no amount received was credited to the judgment against the other joint tortfeasor.[80] In effect, a plaintiff could still recover the full amount against the non-settling tortfeasor.[81] In 1979 Tennessee adopted the 1955 Uniform Act, which allowed consideration paid for the release to be credited to a later judgment.[82] The enactment of this statute provided a policy of contribution where none had previously existed.

C. *Differences in Virginia*

In Virginia, before enactment of its covenant not to sue statute, an injured party could not release a tortfeasor without releasing all tortfeasors.[83] The 1979 statute provided that unless the express terms of the agreement stipulated otherwise, a covenant not to sue would release only the settling tortfeasor.[84] The remaining liability of the non-settling tortfeasor would be credited with the consideration received for the cove-

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75. *Id.* at 531, 118 S.E.2d at 648 (citation omitted).

76. GA. CODE ANN. § 105-2012 (Cum. Supp. 1981).

77. F. H. Ross & Co. v. White, 224 Ga. 324, 161 S.E.2d 857 (1968).

78. *See* Enger v. Erwin, 245 Ga. 753, 754, 267 S.E.2d 25, 26 (1980); Southern Ry. v. A.O. Smith Corp., 134 Ga. App. 219, ____, 213 S.E.2d 903, 905 (1975).

79. For a good review of the distinction between the development of Tennessee and Virginia law concerning the right to contribution as a substantive or procedural right, see Comment, *The Covenant Not to Sue: Virginia's Effort to Bury The Common Law Rule the Regarding the Release of Joint Tortfeasors*, 14 U. RICH. L. REV. 809, 830-31 (1980).

80. *Id.* at 830.

81. *Id.*

82. TENN. CODE ANN. § 23-3105 (Cum. Supp. 1979) (current version at TENN. CODE ANN. § 29-11-105 (Repl. Vol. 1980)).

83. *See supra* notes 6 & 7 and accompanying text.

84. VA. CODE ANN. § 8.01-35.1 (Repl. Vol. 1984).

nant not to sue.[85] The court in *Dillon v. Potomac Hospital Corp.*[86] noted that the statute does not disturb the right of contribution, it merely provides for a "more streamlined method of computing contribution."[87] Before the enactment of the statute, a tortfeasor was required to pay the plaintiff, then seek contribution from fellow tortfeasors. Now, "§ 8.01-35.1 simply allows the amount of the judgment to be reduced by what the plaintiff has already received as compensation."[88] In this respect, the "equitable policy" of contribution is upheld by the statute.

In addition to preserving the "policy" behind contribution, section 8.01-35.1 greatly encourages settlement.[89] Public policy in Virginia also favors settlement.[90] Though the reduction of later monetary judgments against non-settling tortfeasors promotes settlement, there is still some argument as to whether the reduction should be made on a *pro tanto* or *pro rata* basis.[91] Most jurisdictions have made the reduction on a *pro*

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85. *Id.* § 8.01-35.1(A)(1).

86. No. 10472, memorandum op. (Cir. Ct. Prince William County, Va. Jan. 4, 1984).

87. *Id.* at 4.

88. *Id.*

89. VA. CODE ANN. § 8.01-35.1(A)(1) & (2) echoes § 4 of the 1955 Uniform Contribution Among Tortfeasors Act. By preventing a non-settling tortfeasor from receiving any contribution from a settling tortfeasor, such sections have been credited with greatly encouraging settlements. The Commissioner's Comment to § 4 of the 1955 Uniform Act demonstrates that this is a primary goal of § 4, and one of the main reasons for its replacement of § 5 of the 1939 Uniform Act. The Comment observes that § 5 of the 1939 Act discouraged rather than promoted settlements by providing:

> [T]hat a release of any tortfeasor should not release him from liability for contribution unless it expressly provided for a reduction "to the extent of the pro rata share of the released tortfeasor" of the injured person's recoverable damages. This provision has been one of the chief causes for complaint where the Act has been adopted, and one of the main objections to its adoption.

UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 4, Commissioner's Comment, 12 U.L.A. 98-99 (1955) [hereinafter cited as 1955 UNIFORM ACT].

Moreover, the Commissioner's Comments observe that § 5 of the 1939 Uniform Act discouraged settlements for two reasons. First:

> Plaintiff's attorneys . . . refuse to accept any release which contains the provision reducing the damages "to the extent of the pro rata share of the released tortfeasor," because they have no way of knowing what they are giving up. The "pro rata share" cannot be determined in advance of judgment against the other tortfeasors . . . . [Furthermore], [n]o defendant wants to settle when he remains open to contribution in an uncertain amount, to be determined on the basis of a judgment against another in a suit to which he will not be a party.

Id.

90. Crandell v. United States, 703 F.2d 74, 75 (4th Cir. 1983); 4A MICHIE'S JUR. *Compromise & Settlement* § 4 (Supp. 1984).

91. The 1955 Uniform Act remarks that the idea underlying the *pro rata* reduction provision in the 1939 Uniform Act was that a *pro tanto* reduction would provide too much opportunity for collusive settlements. 1955 UNIFORM ACT, *supra* note 89, at 99. This fear was expressed in the dissenting opinion to Theobald v. Angelos, 44 N.J. 228, 208 A.2d 129 (1964): "[If] the injured party is required to credit only the amount received in settlement . . . he may be tempted to make collusive settlements." *Id.* at ____, 208 A.2d at 137 (Fran-

tanto basis.[92] Only those jurisdictions adopting the 1939 Uniform Act have opted for a *pro rata* reduction.[93]

The basis of the "*pro tanto* versus *pro rata*" debate lies in the fact that contribution is an equitable remedy. Allowing a credit to be made against a later judgment reflects this equitable policy. The Virginia statute[94] and the 1955 Uniform Act allow a *pro tanto* reduction. In so doing, they both provide a non-settling tortfeasor with a type of *quid pro quo* by reducing the total amount of liability in exchange for taking away the right to sue for contribution.

In *Carr v. United States*[95] the Fourth Circuit Court of Appeals held that it is not necessary that some new benefit be created as a *quid pro quo* when the legislature abolishes a previously held right.[96] Nonetheless,

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ces, J., dissenting in part) (quoting Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 92, 110 A.2d 24, 36 (1954)).

The Commissioner's Comments in the 1955 Uniform Act note, however, that "[r]eports from the state [sic] where the [1939] Act is adopted appear to agree that it has accomplished nothing in preventing collusion." 1955 UNIFORM ACT, *supra* note 89, at 99.

92. *See, e.g.*, McGee v. Cessna Aircraft Co., 82 Cal. App. 3d 1005, 1022, 147 Cal. Rptr. 694, 704 (1978); Sobotta v. Vogel, 37 Mich. App. 59, ____, 194 N.W.2d 564, 566 (1971); Wheeler v. Denton, 9 N.C. App. 167, ____, 175 S.E.2d 769, 771 (1970); Levi v. Montgomery, 120 N.W.2d 383, 389 (N.D. 1963).

93. *See, e.g.*, Smith v. Fenner, 399 Pa. 633, ____, 161 A.2d 150, 155 (1960). The most prolific arguments concerning *pro tanto* versus *pro rata* reduction can be found in the New Jersey decisions, Tino v. Stout, 90 N.J. Super. 395, 217 A.2d 885 (1966) and Theobald v. Angelos, 44 N.J. 228, 208 A.2d 129. The majority in *Tino* gave the following statement:

> There is a strong policy in favor of settlement. A contribution law should provide the maximum room for settlements with a minimum of unfairness. An uninsured and impecunious tortfeasor would rarely settle for less than his *pro rata* share of the judgment unless he knew he was protected from claims by joint tortfeasors as to subsequent payments by the latter.

Tino , 90 N.J. Super. at ____, 217 A.2d at 886.

The dissenting opinion in *Tino*, advocating a *pro tanto* reduction, remarked that "to hold that the liability of a defendant who has paid his *pro rata* share of a judgment is automatically discharged by acceptance of less than a *pro rata* share from a co-defendant will inevitably discourage settlements and keep much litigation alive which would otherwise be terminated." *Id.* at ____, 217 A.2d at 887 (Labrecque, J., dissenting).

This argument is not very persuasive as is noted in the 1955 UNIFORM ACT, *supra* note 89, at 99. The Commissioners of the Uniform Act are not alone. One commentator, refuting the reasoning in the *Tino* dissent, observed:

> 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 falls on the party who was [not] willing to settle.

Comment, *supra* note 79, at 825.

94. VA. CODE ANN. § 8.01-35.1 (Repl. Vol. 1984).

95. 422 F.2d 1007 (4th Cir. 1970).

96. *Id.* at 1010 (citing Silver v. Silver, 280 U.S. 117, 122 (1929)). *Carr* involved an alleged unconstitutional abrogation of a government employee's common law right of action against a fellow employee. The court held that the statute at issue was an adequate *quid pro quo*

the court seemed to support the *quid pro quo* theory, justifying the legislative action in dicta by stating that Congress had "provided an adequate *quid pro quo* for the common law cause of action it had abolished."[97] The court in *Dillon v. Potomac Hospital Corp.* apparently adopted this latter reasoning. The court observed that "[w]hile . . . [reduction] may alter the proportional share each tortfeasor will ultimately contribute, it has been held that statutes which merely alter the potential amount of recovery are not unconstitutional."[98]

VII. The Nature of the Right of Contribution

A. *Cause of Action versus Right of Action*: Carickhoff's *First Mistake*

An early Virginia case, *Norfolk & Southern Railroad v. Beskin*,[99] espouses the view that the right of contribution exists from the time the tort occurs.[100] This line of reasoning was adopted by the *Carickhoff* court, although no reference is made to *Beskin*.[101] The *Carickhoff* court followed the proposition, propounded in *Nationwide Mutual Insurance Co. v. Minnifield*,[102] that a distinction should be made between the right to contribution and the right to *institute a suit to compel contribution*.[103]

The *Carickhoff* court utilized the *Minnifield* distinction, yet disregarded the holding of the *Minnifield* court that the right to contribution arose only upon payment by one tortfeasor.[104] A recent Virginia Supreme Court case ameliorates the confusion evidenced by the *Carickhoff* court.

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since it provided protection against liability which appellant might otherwise incur.

97. *Id.* at 1010-11.

98. *Dillon*, memorandum op. at 4 (citing Karl v. Bryant Air Conditioning Co., 705 F.2d 164, 172 (6th Cir. 1983)).

99. 140 Va. 744, 125 S.E. 678 (1924).

100. *Id.* at 747, 125 S.E. at 679.

101. Carickhoff v. Badger-Northland, Inc., 562 F. Supp. 160, 165 (W.D. Va. 1983).

102. 213 Va. 797, 196 S.E.2d 75 (1973).

103. The *Minnifield* court stated "[m]oreover, there is a valid distinction between the accrual of the equitable, inchoate right to contribution that arises at the time of jointly negligent acts and the maturation of the right to recover contribution that arises only after payment of an unequally large share of the common obligation." *Id.* at 799, 196 S.E.2d at 77 (citing Ainsworth v. Berg, 253 Wis. 438, 445, 34 N.W.2d 790, 793 (1948)). The Delaware Superior Court in Distefano v. Lamborn, 46 Del. 195, 81 A.2d 675 (Super. Ct. 1951), found that the draftsmen of the Uniform Contribution Among Tortfeasors Act of 1939 stated that the right of contribution is substantive. "The first subsection of the second section creates a right of contribution as a matter of substantive law amongst those who are jointly liable for injuries to the person or property of another." *Id.* at ____, 81 A.2d at 678 (quoting Gregory, *Discussion of Contribution Among Tortfeasors Act*, 16 A.L.I. Proc. 348 (1939)). The court went on to state: "We must distinguish between the right to contribution and the right to institute suit to compel contribution." *Id.* at ____, 81 A.2d at 679 (citing DeBrue v. Frank, 213 Wis. 280, 251 N.W. 494 (1933)).

104. *Carickhoff*, 562 F. Supp. at 163 (quoting *Minnifield*, 213 Va. at 798, 196 S.E.2d at 76).

This case, *First Virginia Bank-Colonial v. Baker*,[105] distinguishes between a "cause of action" and a "right of action": "A right of action is the right to presently enforce a cause of action—a remedial right affording redress for the infringement of a legal right belonging to some definite person; a cause of action is the operative facts which give rise to such right of action."[106]

Although the *Shiflet* court equates the equitable, inchoate right of contribution with a cause of action and a substantive right,[107] it does acknowledge that there is a distinction between a cause of action and a right of action.[108] Since section 8.01-35.1(D) was not in effect when the release in *Shiflet* was entered into, the court's sole focus was on the substantive versus procedural issue.[109] The release in *Carickhoff*, however, was entered into after section 8.01-35.1(D) became effective.[110] Accordingly, the *Carickhoff* court's focus should properly be on whether the right of contribution had accrued prior to enactment of section 8.01-35.1(D).

The logic of the *Carickhoff* decision rests upon the premise that Virginia Code section 8.01-35.1 eliminates the cause of action of contribution. The court concluded that retroactive application of the statute would violate a right which *accrued* at the time of the accident. The very language found in the decision, however, tends to demonstrate the fallacy of this premise. The court determined "that a retroactive application of *Va. Code* 8.01-35.1 would entirely take away [the defendant's] *right to sue* . . . for contribution."[111] It follows that, by taking away the right to sue, the statute merely removes the right to presently enforce a cause of action, not the cause of action itself.

The *Carickhoff* court further confuses the important distinction between a right of action and a cause of action when it quotes an earlier case, stating that "it found no logic in the Virginia cases [which] hold that no cause of action for contribution exists prior to payment."[112] The Virginia case to which the *Carickhoff* court referred, *Nationwide Mutual Insurance Co. v. Jewel Tea Co.*,[113] involved a right of action, not a cause of action. *Jewel Tea* does not state that the cause of action does not exist

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105. 225 Va. 72, 301 S.E.2d 8 (1983).

106. *Id.* at 81, 301 S.E.2d at 13.

107. Shiflet v. Eller, 228 Va. ____, ____,1 V.L.R. 131, 136-37 (1984).

108. *Id.*

109. *See supra* notes 45-50 and accompanying text.

110. The release in *Carickhoff* was entered into on May 8, 1982. *Carickhoff*, 562 F. Supp. at 162. Virginia Code section 8.01-35.1(D) became effective on April 1, 1982. 1982 Va. Acts. 196.

111. *Carickhoff*, 562 F. Supp. at 164-65 (emphasis added).

112. *Id.* at 163-64 (quoting Rambone v. Critzer, 548 F. Supp. 660, 662 n.1 (W.D. Va. 1982)).

113. 202 Va. 527, 118 S.E.2d 646 (1961).

prior to payment; rather it states that "[t]he *right of action* arises upon payment or discharge of the obligation."[114]

Finally, the *Carickhoff* court, in attempting to determine when a party's right to contribution arises, notes that "Virginia case law . . . [provides] no unambiguous or unequivocal answer."[115] A careful review of the Virginia cases, however, reveals that there are at least seven cases decided by the Virginia Supreme Court,[116] and at least three cases decided by the federal district courts applying Virginia law,[117] which hold or imply that the right to contribution does not arise until payment by one joint tortfeasor has been made. Only one Virginia decision holds to the contrary.[118]

B. *The Due Process Argument*: Carickhoff's *Second Mistake*—Shiflet's *Blind Adoption*

The *Shiflet* court, in dicta, cites *Carickhoff* for the proposition that the retroactive application of a statute that affects a "substantive" right would violate the defendant's "due process" rights.[119] Generally, however, the due process rights that may not be affected by retroactive legislation are contractual rights and vested interests.[120] The *Shiflet* court goes to great lengths to distinguish substantive rights from vested rights, arguing that substantive rights "are included within that part of the law dealing with the creation of duties, rights, and obligations, as opposed to proce-

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114. *Id.* at 532, 118 S.E.2d at 649. In Rambone v. Critzer, 548 F. Supp. 660, the court attempts to explain its "no logic" finding with the following statement:

> If no cause of action for contribution exists prior to payment then, if payment is not made . . . until after the applicable statute of limitations has run . . . on any claim the plaintiff may have against the third party defendant, then the defendant will never have a right to contribution from a joint tort-feasor.

Id. at 662 n.1. A more careful reading of *Jewel Tea* reveals that the court stated, "[t]he right of action arises upon payment or discharge of the obligation, and it is then that the statute of limitations begins to run." *Jewel Tea*, 202 Va. at 532, 118 S.E.2d at 649.

115. *Carickhoff*, 562 F. Supp. at 163.

116. *Minnifield*, 213 Va. 797, 196 S.E.2d 75; Bartlett v. Roberts Recapping, Inc., 207 Va. 789, 153 S.E.2d 193 (1967); *Jewel Tea*, 202 Va. 527, 118 S.E.2d 646; Van Winckel v. Carter, 198 Va. 550, 95 S.E.2d 148 (1956); Wiley N. Jackson Co. v. City of Norfolk, 197 Va. 62, 87 S.E.2d 781 (1955) (contribution in contracts action); McKay v. Citizens Rapid Transit Co., 190 Va. 851, 59 S.E.2d 121 (1950); Houston v. Bain, 170 Va. 378, 196 S.E. 657 (1938); *see also infra* note 125 and accompanying text.

117. Laws v. Spain, 312 F. Supp. 315 (E.D. Va. 1970); Brooks v. Brown, 307 F. Supp. 907 (E.D. Va. 1969); North River Ins. Co. v. Davis, 274 F. Supp. 146 (W.D. Va. 1967); *see also infra* note 125 and accompanying text.

118. *Beskin*, 140 Va. 744, 125 S.E. 678.

119. Shiflet v. Eller, 228 Va. ___, ___, 1 V.L.R. 131, 137 (1984) (citing Carickhoff v. Badger-Northland, Inc., 562 F. Supp. 160, 164 (W.D. Va. 1983) and Duffy v. Hartsock, 187 Va. 406, 416, 46 S.E.2d 570, 575 (1948)).

120. Duffy v. Hartsock, 187 Va. at 417, 46 S.E. at 574-75.

dural or remedial law . . . ."[121] This reasoning may be sound, but both *Shiflet* and *Carickhoff* make a significant error when they cite *Duffy v. Hartsock*[122] for the proposition that due process rights would be affected by retroactive application of section 8.01-35.1. The *Duffy* court addressed the due process issue raised when there is impairment of contractual rights and vested interests, not substantive rights.[123] Both *Carickhoff* and *Shiflet* borrow the *Duffy* reasoning but freely substitute the words "substantive right" for "vested rights."

In a very real sense, the consitutional issue of whether or not section 8.01-35.1 can be applied retroactively hinges upon a determination of whether or not the "right" of contribution is vested or inchoate. As noted earlier in this article, the *Shiflet* court correctly did not discuss this issue because of the governing Virginia statute at the time.[124]

The *Carickhoff* decision cannot be allowed to escape scrutiny on this point. The *Carickhoff* court argued that the right to sue for contribution arises at the time of the accident and is substantive. But if the right of action is considered the "right to presently enforce a cause of action,"[125] there can be no right of action for contribution until payment by one

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121. *Shiflet*, 228 at ____, 1 V.L.R. at 135 (citing BLACK'S LAW DICTIONARY 1281 (5th ed. 1979)). The court follows with a quotation from Joseph v. Lowery, 261 Or. 545, 550, 495 P.2d 273, 276 (1972), stating that "[w]hile all vested rights may be considered substantive . . . it does not necessarily follow that the only subject matter that is considered to be substantive is that which relates to vested rights." *Shiflet*, 228 Va. at ____, 1 V.L.R. at 135.

122. 187 Va. 406, 46 S.E.2d 570 (1948). *Duffy* is cited by both the *Shiflet* court, *Shiflet*, 228 Va. at ____, 1 V.L.R. at 137, and the *Carickhoff* court, *Carickhoff*, 562 F. Supp. at 164.

123. *Duffy*, 187 Va. at 416, 46 S.E.2d at 575.

124. *See supra* notes 43-50 and accompanying text.

125. First Virginia Bank-Colonial v. Baker, 225 Va. 72, 81, 301 S.E.2d 8, 13 (1983); *see also* Lowe v. Spain, 312 F. Supp. 315, 318 (E.D. Va. 1970) ("The right to contribution arises when one joint tort-feasor has paid a claim for which the other joint tortfeasor is liable."); Brooks v. Brown, 307 F. Supp. 907, 909-10 (E.D. Va. 1969) (right is substantive "when, and only when, one tortfeasor has paid a claim for which they both are liable" (cite omitted)); North River Ins. Co. v. Davis, 274 F. Supp. 146, 149 (W.D. Va. 1967) ("[R]ight of contribution arises only when one of the joint tortfeasors has paid a claim for which the other wrongdoer is also liable."), *aff'd*, 392 F.2d 571 (4th Cir. 1968); Nationwide Mutual Ins. Co. v. Minnifield, 213 Va. 797, 798, 196 S.E.2d 75, 76 (1973) ("[R]ight of contribution arises only when one tortfeasor has paid or settled a claim for which other wrongdoers are also liable."); Bartlett v. Roberts Recapping, Inc., 207 Va. 789, 793, 153 S.E.2d 193, 196 (1967) ("right arises only when one tortfeasor has paid or settled a claim for which other wrongdoers are also liable"); Nationwide Mutual Ins. Co. v. Jewel Tea Co., 202 Va. 527, 532, 118 S.E.2d 646, 649 (1961) (Contribution "is a right that is given by statute and arises when, and only when, one tortfeasor has paid a claim for which they both are liable."); Van Winckel v. Carter, 198 Va. 550, 556, 95 S.E.2d 148, 152 (1956) ("The right to contribution becomes complete and enforceable upon the payment or discharge of the common obligation."); McKay v. Citizens Rapid Transit Co., 190 Va. 851, 857, 95 S.E.2d 121, 122 (1950) (indemnitor's cause of action does not arise until payment made to the injured party); Houston v. Bain, 170 Va. 378, 390, 196 S.E. 657, 662 (1938) ("to enforce contribution the payment must have been made by one obligated to pay the whole").

tortfeasor. The *Carickhoff* court's decision is based upon the premise that the right to sue for contribution is comparable to a vested property right or contractual right.[126] The right of action for contribution, however, could more accurately be compared to rights like dower and curtesy. Certainly, the rights of dower and curtesy arise upon marriage but are not vested until the death of one of the spouses.[127] The United States Supreme Court, in *Simons v. Miami Beach First National Bank*,[128] held that, under Florida law, an *ex parte* divorce could cut off the inchoate dower rights without violating a wife's due process rights.[129] Similarly, the Virginia Supreme Court has stated that "[t]he General Assembly may alter or abolish the contingent right of dower without doing violence to either the State or Federal Constitutions because it is not a vested right."[130]

In 1979, the Attorney General of Virginia addressed the issue of whether the right of contribution is a vested right.[131] The Attorney General saw no objection to the retroactive application of section 8.01-35.1 because, in his opinion, the right did not vest until payment was made.[132] The opinion referred to Virginia Code section 1-16[133] and *Hurdle & Foelack v. Prinz & Meihm*[134] and advised that a statute, such as section 8.01-35.1, which restricted "the remedy by which a claim could be pursued was not equivalent to affecting the claims themselves . . . ."[135]

VIII. CONCLUSION

Since the recent decision in *Shiflet*, additional cases concerning the interpretation of Virginia Code section 8.01-35.1 and its retroactive applica-

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126. *Carickhoff*, 562 F. Supp. at 164-65.

127. Wilson v. Wilson, 195 Va. 1060, 81 S.E.2d 605 (1954). The *Wilson* court stated that "the wife's right of dower is merely inchoate; it is a contingent possibility and not a vested right." *Id.* *See also* Turner v. Turner, 185 Va. 505, 39 S.E.2d 299 (1946), where the court gave the following explanation:

> It cannot be doubted that an inchoate or contingent right of dower is a valid right or interest . . . . But it emanates from and is solely dependent upon the beneficial ownership of the husband. The right of dower is consummated and raised to the dignity of an estate in land by the death of the husband. Before then and while coverture continues, the wife's right of dower is merely inchoate; it is a contingent possibility and not a vested right . . . . She has neither an estate nor a right of action . . . .

Turner, 185 Va. at 510, 39 S.E.2d at 302 (citations omitted).

128. 381 U.S. 81 (1965).

129. *Id.* at 85-86.

130. *Turner*, 185 Va. at 511, 39 S.E.2d at 302.

131. 1978-79 Op. Att'y Gen. 247 (1979).

132. *Id.*

133. VA. CODE ANN. § 1-16 (Repl. Vol. 1979). For a more complete discussion of this section, see *supra* notes 37-41 and accompanying text.

134. 218 Va. 134, 235 S.E.2d 354 (1977).

135. 1978-79 Op. Att'y Gen. at 249.

tion are ripe for adjudication by the Virginia Supreme Court.[136] The court has determined that this section does not apply to releases and covenants not to sue entered into prior to enactment of subsection D. In cases such as *Dillon* where a release or covenant not to sue is entered into after 1982, the Virginia Supreme Court should look with disfavor upon the decision in *Carickhoff v. Badger-Northland, Inc.*[137] and instead follow its own reasoning in *First Virginia Bank-Colonial v. Baker*.[138] The debate over the legal distinction between the right of contribution and the cause of action for contribution provides an opportunity for application of the *First Virginia Bank-Colonial* rule. It should be determined that Virginia Code section 8.01-35.1(D) does not extinguish the cause of action of contribution any more than a statute of limitations extinguishes a cause of action.[139] It merely extinguishes the right to enforce the cause of action for contribution as of the date of release of settlement. Consistent with the application of section 8.01-35.1, as amended, covenants not to sue and releases entered into by one joint tortfeasor after enactment of subsection D should not operate to release all joint tortfeasors.

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136. The Virginia Supreme Court has recently heard a case involving this statute. However, the decision did not concern the retroactive portion of § 8.01-35.1. *See* Hayman v. Patio Prod., Inc., 226 Va. 482, 311 S.E.2d 752 (1984).

137. 562 F. Supp. 160 (W.D. Va. 1983).

138. 225 Va. 72, 301 S.E.2d 8 (1983). *See also supra* note 107 and accompanying text.

139. W. Bryson, Handbook on Virginia Civil Procedure 163-64 (1983). The author notes that "the right or obligation [in a contract action] is not taken away by the statute [of limitations]; only the remedy is barred." *Id.* at 164.