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RELEASE OF JOINT TORTFEASORS: USE OF THE PIERRINGER RELEASE IN MINNESOTA

By John E. Simonett

Although the law favors the settlement of lawsuits, Minnesota attorneys encounter difficult problems when drafting a document that releases a single joint tortfeasor from the action. The Wisconsin Supreme Court has upheld a unique device, called a Pierringer release, which solves these problems. While Minnesota practitioners are using this device frequently, the Minnesota Supreme Court has yet to endorse the Pierringer release. In this article, Mr. John Simonett explains that existing Minnesota law and policy support the validity of the Pierringer release. In addition, he sets forth the limitations of this release and provides some helpful practical considerations for attorneys who are contemplating its use.

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I. INTRODUCTION

A plaintiff and a joint tortfeasor wish to settle a lawsuit. They have agreed to terms, but hesitate to conclude their bargain even though the law favors settlements. The plaintiff in settling with one joint tortfeasor does not want to run afoul of the rule that a release of one joint tortfeasor releases all colleagues in tort; plaintiff wishes to continue his suit against the non-settling joint tortfeasors. At the same time, the defendant who desires to settle wants to be quit of the lawsuit; he does not want to make his payment and still remain exposed to claims of contribution from the non-settling joint tortfeasors. The non-settling defendants, of course, would like to keep the settling defendant in the lawsuit. In trying to negotiate a settlement, this hazard, says Prosser, “has perhaps given more difficulty than any other problem.”

Available settlement devices, such as the loan receipt, the

2. A “loan receipt” is a settlement device, by which the settling defendant loans a specific sum of money, without interest, to the plaintiff. The plaintiff promises to repay the loan from any judgment obtained against the non-settling defendant. The plaintiff is not obligated to repay the loan from any portion of a judgment which exceeds the amount of the loan. The plaintiff also agrees to pursue his claim against the non-settling defendant. See, e.g., Reese v. Chicago, B. & Q.R.R., 55 Ill. 2d 356, 358, 303 N.E.2d 382, 383-84 (1973).
“high-low” agreement,\(^3\) and the covenant not to sue,\(^4\) have not worked well. While they allow plaintiffs to settle piecemeal with joint tortfeasors, they provide no protection to the settling joint tortfeasor against future claims of contribution.\(^5\) In recent years, however, the Minnesota trial bar has been using with increasing frequency a simple and ingenious device called the *Pierringer* release, named after a 1963 Wisconsin Supreme Court decision,\(^6\) to solve the problem. In its simplest form, the *Pierringer* release (1) releases the settling defendant from the lawsuit and discharges a part of the cause of action equal to that part attributable to the settling joint tortfeasor’s causal negligence, (2) reserves “the balance of the whole cause of action” against the non-settling joint tortfeasors, and (3) contains an agreement whereby the plaintiff indemnifies the settling defendant from any claims of contribution made by the non-settling parties and agrees to satisfy any judgment he obtains from the non-settling tortfeasors to the extent the settling tortfeasor has been released.\(^7\)

The *Pierringer* release reflects a modern common law approach to the problem of releases in situations of joint tort liability where liability may be apportioned. Giving effect to the intent of the parties to a settlement, it provides complete relief to a released joint tortfeasor. Just as important, it does not affect adversely

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3. A “high-low agreement” is a settlement device, by which a plaintiff and defendant agree to set minimum and maximum limits on the ultimate award regardless of the jury’s decision. The defendant pays the minimum sum to the plaintiff at the time of settlement. See Finz, *A Trial Where Both Sides Win*, 59 JUDICATURE 41, 42 (1975); Robinson, *High-Low Arbitration — A Settlement Technique*, 11 FORUM 476, 476-77 (1976). The parties may also agree to submit to an arbitrator who would award damages within the agreed limits. See Robinson, supra at 477, 483.

4. A covenant not to sue is an agreement entered into by the plaintiff and a settling joint tortfeasor, whereby the plaintiff agrees not to commence or continue to prosecute any action based upon the claim in dispute in return for a specified sum of money. See, e.g., Gronquist v. Olson, 242 Minn. 119, 121, 64 N.W.2d 159, 161-62 (1954); Joyce v. Massachusetts Real Estate Co., 173 Minn. 310, 311-12, 217 N.W. 337, 338 (1928); Musolf v. Duluth Edison Elec. Co., 108 Minn. 369, 377, 122 N.W. 499, 502 (1909). A covenant need not reserve the right to sue other joint tortfeasors for that right to remain effective. But the reservation of such a right is important in determining whether the parties intended the right to exist or whether they intended to settle the claim entirely and release the other joint tortfeasors from the action. See Joyce v. Massachusetts Real Estate Co., 173 Minn. 310, 313-14, 217 N.W. 337, 338-39 (1928). Contra, Musolf v. Duluth Edison Elec. Co., 108 Minn. 369, 375-76, 122 N.W. 499, 502 (1909) (“reservation of the right to sue other joint tortfeasors is obviously necessary to a covenant not to sue”). For a discussion of the distinction between a covenant and a release, see text accompanying notes 49-60 infra.

5. See text accompanying notes 66-72 infra.


7. See id. at 184-85, 124 N.W.2d at 108. See notes 32-33 infra and accompanying text.
the legal or equitable rights of the non-settling parties. In fact, in some cases, the Pierringer release may place the non-settling joint tortfeasors in a better position than they would have been absent the release.

Strangely enough, the validity of the Pierringer release has not been directly considered by the Minnesota Supreme Court, but the use of the device in Minnesota has been acknowledged by the court. Moreover, the effect of the Pierringer release on the conduct of the trial is still in the experimental stage. Notwithstanding the lack of express judicial sanction of the Pierringer release by the Minnesota Supreme Court, conditions are favorable in Minnesota for the adoption of this settlement device. Both Minnesota and Wisconsin allow contribution among negligent joint tortfeasors. Thus, there is a need for a settlement method which will cut off the contribution liability of a settling joint tortfeasor. Like Wisconsin, Minnesota has a comparative negligence scheme and utilizes the special verdict form — both of which facilitate the operation of the Pierringer-type release.

This article will trace the development of the Pierringer release in Wisconsin and will analyze the release, reconciling it with existing Minnesota law and policy. In discussing the validity of this release in Minnesota, the law in three areas — release of joint tortfeasors, contribution, and indemnity — will be examined. The possible limitations of the release, especially in the areas of indemnity and strict products liability, will be considered. Finally,

8. See Nebben v. Kosmalski, _____ Minn. _____ n. 239 N.W.2d 234, 236 n.1 (1976) (court solely made reference that parties had settled by using a Pierringer release). The Eighth Circuit, in a case where Minnesota law was applied, indicated that a "Pierringer type release" could have been used by the parties, but the court did not elaborate on this point. See Riske v. Truck Ins. Exch., 490 F.2d 1079, 1087 (8th Cir. 1974). For a more detailed discussion of Riske, see text accompanying notes 39-41 infra.


the article will mention several procedural considerations and some practical and tactical advantages and disadvantages to potential users of the device.

II. DEVELOPMENT OF THE PIERRINGER RELEASE IN WISCONSIN

A survey of the Wisconsin case law prior to Pierringer is essential to a full appreciation of the ingenuity of the release and its legal bases. Two Wisconsin cases prefigure Pierringer. The first is Heimbach v. Hagen, decided in 1957, when contribution among joint tortfeasors in Wisconsin was based on the equality of contribution doctrine. Under this doctrine, contribution among negligent joint tortfeasors is to be apportioned on a pro rata basis. In Heimbach, the plaintiff, injured in an automobile accident involving two vehicles, settled with her host driver for $7,500, giving a covenant not to sue and a release that stated her "claims and causes of action" were satisfied on the host driver's behalf "to the extent of one half (1/2) thereof." The plaintiff also agreed to indemnify and hold the releasee harmless from all further liability and to satisfy, on the releasee's behalf to the extent of the releasee's liability, any judgment in plaintiff's favor against the non-settling tortfeasor. The effect of the release was that the plaintiff settled fifty percent of the action and retained only fifty percent to assert against the other joint tortfeasor. Plaintiff then sued the other driver, who, in turn, impounded the host driver. The host driver set up the release as a defense.

The sole issue on appeal was whether the release was effective to bar the non-settling defendant's right to contribution from the

12. 1 Wis. 2d 294, 83 N.W.2d 710 (1957).
13. See, e.g., White v. Johnson, 272 Minn. 363, 367, 137 N.W.2d 674, 677 (1965); Wedel v. Klein, 229 Wis. 419, 425, 282 N.W. 606, 609 (1938); W. PROSSER, supra note 1, at § 50, at 310. The doctrine is "based on the maxim that equality is equity." E.g., Van Brunt v. Gordon, 53 Minn. 227, 230, 54 N.W. 1118, 1118 (1893) (Mitchell, J.).
14. 1 Wis. 2d at 295, 83 N.W.2d at 711 (emphasis deleted). The release given by the plaintiff in Heimbach provided in part:
This is a release of the persons herein specifically designated only. They are released and discharged to the extent of their liability, if any, for contribution, and said claims and causes of action are credited and satisfied on their behalf to the extent of one half (1/2) thereof. I covenant not to sue any of the parties herein released. I also agree to indemnify and save them harmless from all further liability . . ., arising because of my said injuries and damages and, if necessary in order to save them so harmless, to satisfy on their behalf and to such extent only any judgment in my favor.

Id. (emphasis deleted).
15. Id. at 296, 83 N.W.2d at 712.
host driver. The Wisconsin Supreme Court ordered the lower court to grant summary judgment in favor of the host driver. The non-settling defendant argued that if denied contribution from the host driver, she might be compelled to pay more than one-half of the plaintiff's recovery if the case went to a verdict and that this would run afoul of the equality of contribution doctrine. The court dismissed this argument, noting correctly that even if the non-settling party was forced to pay one-half of the judgment, the equality of contribution doctrine would not be violated because she would "not have paid more than one half of plaintiff's damages, nor more than [she] would have paid had there been no settlement . . . ." Thus, the preservation of the "purely theoretical right to contribution which they could never exercise" would be useless and the court therefore held that the release had extinguished the host driver's liability for contribution.

Then, in 1962, came the second case, Bielski v. Schulze, at a time when Wisconsin had a comparative negligence statute. But the statute provided only for a comparison of negligence between a plaintiff and a defendant and not for a comparison between defendants, and the equality of contribution doctrine was still used to apportion liability for an award between defendants. In Bielski, the Wisconsin Supreme Court struck down the old com-

16. Id. at 295, 83 N.W.2d at 712.
17. In other words, if the jury awarded plaintiff $20,000, the non-settling tortfeasor would be required to pay $10,000, while the settling host driver only paid $7,500. Thus, the non-settling party argued that she should be able to maintain a contribution claim for $1,250 against the settling party "so that ultimately each party will pay $8,750, or one half of plaintiff's total cash recovery of $17,500." Id. at 297, 83 N.W.2d at 712.
18. Id. at 297, 83 N.W.2d at 712-13.
19. Id. at 297, 83 N.W.2d at 712. The Wisconsin Supreme Court distinguished the release in Heimbach from the device used in State Farm Mut. Auto. Ins. Co. v. Continental Cas. Co., 264 Wis. 493, 59 N.W.2d 425 (1953). In State Farm, the covenant not to sue preserved the claimant's right to collect her full damages, less the amount settled for, against the non-settling tortfeasor. The court held that the right to contribution was not extinguished. But, in Heimbach, contribution was cut off because the plaintiff limited her recovery against the non-settling party to exactly what the non-settling party ultimately would pay, even if contribution could have been sought from the settling defendant. See 1 Wis. 2d at 298, 83 N.W.2d at 713.
20. See 1 Wis. 2d at 299, 83 N.W.2d at 713.
21. 16 Wis. 2d 1, 114 N.W.2d 105 (1962).
23. See id.
mon law equality of contribution doctrine. In its stead, the court adopted the rule that the contribution liability of tortfeasors should be proportionate to the percentage of causal negligence attributable to each.25

This was a sensible solution, in keeping with the equitable basis on which contribution has always been based, namely, that each wrongdoer pay his fair share only.26 Respondent argued such a solution would complicate the use of covenants not to sue, because the demise of the equality of contribution doctrine would make it impossible to determine the percentage of a defendant's liability in advance of a jury verdict.27 Rejecting this argument, the Wisconsin Supreme Court observed that "[t]he law relating to releases and covenants not to sue is admittedly complex and confusing but this is hardly a reason for keeping the present rule."28 The court suggested that:

[i]n order for a plaintiff to give a release and covenant which will protect the settling tort-feasor from a claim of contribution, the plaintiff must agree to satisfy such percentage of the judgment he ultimately recovers as the settling tort-feasor's causal negligence is determined to be of all the causal negligence of all the co-tort-feasors.29

The Wisconsin trial bar was not long in acting upon this suggestion, because the next year came *Pierringer v. Hoger.*30 Plaintiff, Pierringer, was injured in an explosion and sued six defendants.

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25. Thus, if the jury awarded plaintiff $25,000 and found two defendants 95% and 5% negligent, respectively, the less negligent tortfeasor is liable for only five percent of $25,000 while the other tortfeasor is liable for 95% of the award. But under the equality doctrine, each would have been liable for 50% of the award, or $12,500. *See* 16 Wis. 2d at 9, 114 N.W.2d at 109.


Of course, this solution is not always fair and equitable. If the defendant in *Bielski*, who was deemed by the jury to be 95% negligent, was uninsured and financially irresponsible, then the party who was only five percent negligent would have to pay the entire award. The Wisconsin Supreme Court acknowledged the problem but offered the law of averages as solace in lieu of a solution, stating that "on the law of averages, as many uninsured and under-insured tortfeasors will be on one side of the line as on the other." 16 Wis. 2d at 14, 114 N.W.2d at 111. Perhaps a better rationale would be that as between an innocent injured plaintiff and a five percent insured tortfeasor, it is better public policy for the five percent tortfeasor to pay 100%.

27. *See* 16 Wis. 2d at 12, 114 N.W.2d at 111.

28. *Id.* at 13, 114 N.W.2d at 111.

29. *Id.*

30. 21 Wis. 2d 182, 124 N.W.2d 106 (1963).
Prior to the trial, all the defendants settled with the plaintiff except one, Greisch. Based upon all the releases they had obtained from Pierringer, the defendants who had settled moved to dismiss Greisch's cross-claims for contribution against them and also moved to dismiss their own cross-claims for contribution against Greisch.\textsuperscript{31} The trial court granted the motions and Greisch appealed.

The release which Pierringer had given was a formidable document, verbose and turgid with legalese\textsuperscript{32} typical of cautious counsel venturing into uncharted waters. But, essentially, it provided that:

1. Plaintiff releases defendant $A$ (in Pierringer, actually defendants $A_1$ through $A_5$) and that part of plaintiff's cause of action for which $A$'s percentage of causal negligence (as determined by subsequent trial or by other means) would make $A$ liable;
2. Plaintiff reserves "the balance of the whole cause of action" against defendant $B$; and
3. Plaintiff agrees to indemnify $A$ against any claim of contribution made by $B$ and to satisfy any judgment plaintiff obtains against $B$ to the extent $A$ has been released.\textsuperscript{33}

\textsuperscript{31} Id. at 183, 124 N.W.2d at 107.

\textsuperscript{32} The releases given by Pierringer provided, in part, that the plaintiff:

- does hereby credit and satisfy that portion of the total amount of damages of the undersigned . . . which has been caused by the negligence, if any, of such of the settling parties hereto as may hereafter be determined to be the case in the further trial or other disposition of this or any other action . . . .

The release further provided that the plaintiff:

- does hereby release and discharge, that fraction and portion and percentage of his total causes of action and claim for damages against all parties . . . which shall hereafter, by further trial or other disposition of this or any other action be determined to be the sum of the portions or fractions or percentages of causal negligence for which any or all of the settling parties hereto are found to be liable . . . .

The plaintiff also reserved all rights to "the balance of the whole cause of action of the undersigned against the said Mathias Greisch" and also indemnified the settling parties for any amount they might be liable for in contribution to the non-settling party. Finally, the plaintiff agreed to satisfy any judgment he recovered for the full cause of action against the non-settling party to the extent of that part of the cause of action which was released. \textit{Id.} at 184-85, 124 N.W.2d at 108.

\textsuperscript{33} A typical Pierringer would, essentially, provide: (1) plaintiff releases defendant Brown to the extent Brown, by his percentage of causal negligence or other causal conduct as may be subsequently determined, is liable to plaintiff; (2) plaintiff reserves the remainder of his causes of action against defendants Smith and Jones; (3) plaintiff agrees to indemnify Brown against any claims of contribution made against him by defendants Smith and Jones and to save Brown harmless from such claims; (4) plaintiff will dismiss with prejudice his causes of action against Brown and will support Brown's motions to
The Wisconsin Supreme Court upheld the release and affirmed the trial court's dismissal of the cross-claims for contribution.

The court stated that the document signed by Pierringer was more than a covenant not to sue; it was a release of part of the cause of action and a reservation of the balance against the remaining tortfeasor — similar to the release upheld in Heimbach. The court could find no reason why this piecemeal settlement could not be made. Thus, in spite of Greisch's contention that he could not be barred by an agreement to which he was not a party, the court held, applying the Heimbach rule, that the release effectively barred the non-settling tortfeasor's right to contribution. Greisch's further objection that the release could not come within the Heimbach rule "because no satisfaction of a definite percentage or portion of the cause of action can be stated in the release" prior to a verdict was also dismissed. The court harkened back to the observation made in Bielski that comparison of negligence among joint tortfeasors would present no obstacle in drafting such a release. True, Pierringer had settled with the other defendants for that part of his damages attributable to their causal negligence without the parties knowing what that allocation might prove to be; nevertheless, whatever it might prove to be, the parties had settled it. The non-settling tortfeasor had no cause to complain, for after all he was relieved from paying any more than what his share might prove to be.

In short, the Wisconsin Supreme Court in Pierringer applied the rationale of Heimbach even though the intervening Bielski case thrust the concept of comparative negligence into the analysis. The adoption of comparative negligence among tortfeasors presents no obstacle in drafting a release and a plaintiff can extinguish a non-settling defendant's right to contribution by agreeing to satisfy, as to that defendant, the portion of the judgment released.

34. See 21 Wis. 2d at 188-89, 124 N.W.2d at 110.
35. See id. at 189, 124 N.W.2d at 110. See text accompanying note 29 supra.
36. See id. at 193, 124 N.W.2d at 112. The court also observed that Pierringer, in his cause of action reserved against Greisch, should amend his complaint to set out the settlement and that if Pierringer failed to do so, or even if he did, Greisch could amend his answer "to set forth the facts of the release and such other pertinent matter." Id. at 192-93, 124 N.W.2d at 112.
37. Pierringer was subsequently affirmed in Peiffer v. Allstate Ins. Co., 51 Wis. 2d 329, 187 N.W.2d 182 (1971). In Peiffer, plaintiff was a passenger in a car which collided with
Although the Pierringer release has been determined to be a valid device for settlement in Wisconsin, its validity under existing Minnesota law needs to be explored.

III. THE VALIDITY OF THE PIERRINGER RELEASE IN MINNESOTA

A. Status of the Pierringer Release in Minnesota

To date the Minnesota Supreme Court has not had the opportunity to determine the validity of the Pierringer release. The release, however, was recently given a cursory acknowledgment by the Minnesota Supreme Court and has been used and accepted at the trial court level. The most noteworthy reference to Pierringer as it might apply in Minnesota is found in Riske v. Truck Insurance Exchange, a case decided by the United States Court of Appeals for the Eighth Circuit which applied Minnesota law. Plaintiff brought an action against an insurance company for bad faith refusal to settle within the policy limits. During a prior personal injury trial, plaintiff had offered to settle with one defendant. His insurer refused, pointing out, among other things, that such a settlement would not have protected its insured because he would still have been exposed to a claim for contribution from the other remaining defendant. The Eighth Circuit rejected this argument, observing that “a proper type of release could have been worked out. In fact, during the trial of this case [insurer’s] counsel indicated that a proper type of release was...”

The Wisconsin Supreme Court held that this interpretation of the release was correct. The release was said to have released all liability on the part of the settling tortfeasor including any future liability for contribution or direct liability to the plaintiff. Id. at 335, 187 N.W.2d at 185. No payment above “the percentage attributable to the nonsettling tort-feasor” can be had, so no basis for contribution exists. Id. at 335-36, 187 N.W.2d at 185. Plain enough. To hold otherwise would mean a releasee’s total liability exposure remains unchanged except for entitlement to a credit “for an advance payment on eventual possible liability.” The court said it was not about to “chill” out of court settlements, which should, on the contrary, be encouraged. See id. at 337-38, 187 N.W.2d at 186.

38. See Nebben v. Kosmalski, --- Minn. ---, --- n. ---, 239 N.W.2d 234, 236 n.1 (1976) (court made reference that parties had settled by using a Pierringer release).
39. 490 F.2d 1079 (8th Cir. 1974).
40. See id. at 1087.
known as a 'Pierringer type release.' No comment was made as to whether or not Minnesota law recognizes such a release.

Nonetheless, conditions in Minnesota are favorable to the adoption of Pierringer, since the release was designed to operate in a jurisdiction which has comparative negligence to apportion liability between defendants, uses the special verdict form, and allows contribution between joint tortfeasors. Like Wisconsin, Minnesota has all these prerequisites. But to determine the ultimate validity of the Pierringer release in Minnesota, a study must be made of legal concepts in three areas—releases, contribution, and indemnity.

B. Release of a Joint Tortfeasor — The Plaintiff’s Concern

By its terms, the Pierringer device releases the settling joint tortfeasor from liability, settles a part of the cause of action equal to that part for which the settlor is liable, and reserves the balance of the whole cause of action against the non-settling joint tortfeasors. Thus, its viability for plaintiffs in Minnesota depends upon whether the release is an improper splitting of a cause of action and whether the release of one joint tortfeasor releases all joint tortfeasors. In other words, can a plaintiff release and fully discharge a portion of his cause of action against one joint tortfeasor and reserve the balance against another? Wisconsin says yes, and this is the crux of the Pierringer release.

1. Splitting a Cause of Action

A plaintiff, of course, cannot split a single cause of action; one recovery, though it is for only a part of the damages actually sustained, bars any other future action. The giving of a

41. Id. The issue arose in a similar fashion in Augustin v. General Acc. Fire & Life Assur. Corp., 283 F.2d 82 (7th Cir. 1960). This was a bad faith excess exposure case against an automobile insurer, which claimed it could not accept the settlement demand of the plaintiff because of the danger of contribution to the cotortfeasors. Id. at 84. The Seventh Circuit, applying Wisconsin law, rejected the argument, pointing out that a Pierringer-type release could have been used. Id. at 84-85. The court relied upon Heimbach v. Hagen, 1 Wis. 2d 294, 83 N.W.2d 710 (1957), the predecessor of Pierringer.

42. See notes 9-11 supra and accompanying text.

43. See note 32 supra.

44. See text accompanying notes 30-37 supra.

45. E.g., King v. Chicago, M. & St. P. Ry., 80 Minn. 83, 86, 82 N.W. 1113, 1113 (1900); see, e.g., Hayward v. State Farm Mut. Auto. Ins. Co., 212 Minn. 500, 503, 4 N.W.2d 316, 318 (1942); Myhra v. Park, 193 Minn. 290, 295-96, 258 N.W. 515, 518 (1935); Vinesec v. Great N. Ry., 136 Minn. 96, 100, 161 N.W. 494, 496 (1917).
Pierringer release, however, is not the splitting of a cause of action. The rule is directed at protecting a single defendant from more than one lawsuit, and joint tortfeasors, not a single defendant, are involved in a Pierringer situation. Because there are multiple defendants, settling part of the cause of action with one is not splitting the cause of action as to the others. A Pierringer release creates no danger of a second suit being brought against either the settling tortfeasor or the non-settling tortfeasor.

2. Release of One Releases All

There would seem to be no remaining reason why plaintiff cannot make a piecemeal settlement by discharging one joint tortfeasor, provided plaintiff can avoid the rule in Minnesota that a release of one joint tortfeasor operates as a release of all joint tortfeasors. A release is said to extinguish and satisfy the cause of action. Since the rule that a release of one releases all is harsh, most jurisdictions have either abolished the rule because of its archaic rationale or have construed the so-called release


47. For after all, plaintiff can satisfy his claim piecemeal against different defendants after he has a judgment against them. See Minn. Stat. § 548.19 (1976). See also Note, Contribution and Indemnity Among Tortfeasors in Minnesota, 37 Minn. L. Rev. 470 (1953).


49. See, e.g., 1 F. Harper & F. James, The Law of Torts § 10.1, at 711 (1956). It has been recognized, however, that a tortfeasor may choose to settle plaintiff's entire cause of action for a release and then sue the non-settling tortfeasor for contribution. See, e.g., Samuelson v. Chicago, R.I. & Psc. R.R., 287 Minn. 264, 268, 178 N.W.2d 620, 624 (1970).

50. See, e.g., W. Prosser, supra note 1, at § 49, at 302-03. The rule developed out of several concepts. First, at common law, a plaintiff had but a single cause of action against those jointly liable for his injury. See, e.g., Cocke v. Jennor, 80 Eng. Rep. 214, 215 (K.B. 1432). On this single cause of action, all tortfeasors who acted in concert to cause injury to the plaintiff were jointly and severally liable. See id. This single recovery could be obtained from any one joint tortfeasor or from all joint tortfeasors. See id. Because a release is a surrender by a plaintiff of his cause of action against a joint tortfeasor, the release of any joint tortfeasor released all because the release extinguished the cause of action upon which the liability of all joint tortfeasors was based. See id.; W. Prosser, supra at § 49, at 301. American courts failed to distinguish between a release and a satisfaction. A release may be given for either an adequate or inadequate consideration, whereas a satisfaction is "an acceptance of full compensation for the injury." W. Prosser, supra at § 49, at 301. Thus, courts in this country continued to apply the rule without
as a covenant not to sue.\textsuperscript{51} The Minnesota Supreme Court has held that the giving of a covenant not to sue to one joint tortfeasor leaves claimant the right to sue the others.\textsuperscript{52} Unlike the release, the covenant not to sue does not satisfy or extinguish the cause of action; it is simply an agreement “not to enforce an existing cause of action against the party to the agreement.”\textsuperscript{53} While it may operate as a “release” between the parties, it does not release a claim against the other joint tortfeasors not joining in the agreement.\textsuperscript{54} The claimant is free to pursue the underlying cause of action against remaining joint tortfeasors.

The Minnesota Supreme Court has looked with favor on covenants not to sue, commenting that they “are an accepted method of relieving a party from the hazards, and the courts from the burdens, involved in common-law litigation.”\textsuperscript{55} Indeed, the Minnesota court has done more than merely foster covenants not to sue. In \textit{Gronquist v. Olson},\textsuperscript{56} the court said the form of the release is immaterial and that the distinction between a release and a covenant is “entirely artificial.” This language may serve to confuse. The court was referring apparently to the artificiality of what label is attached to a settlement instrument and not to a total abolition of the rule that the release of one releases all.\textsuperscript{57} Instead of looking to what the parties name their settlement instrument, the \textit{Gronquist} court said it would look to the intention of the parties.\textsuperscript{58} The court held that the “release of one releases all” rule will not operate against a plaintiff unless the release instrument demonstrates an intention of the parties to release all,

looking to the adequacy of the compensation received. \textit{Id.}

Second, the original concept of “joint tortfeasors” was based on joint enterprise or conspiracy to cause an injury. See \textit{id.}, § 46, at 291. But with the adoption of liberal procedural joinder rules, merely concurrent tortfeasors could be joined, see \textit{id.}, § 47, at 294, and “joined” and “joint” became confused, see \textit{id.} at 298. See generally Havighurst, \textit{The Effect of a Settlement With One Co-obligor Upon the Obligations of the Others}, 45 \textit{CORNELL L. REV.} 1 (1959); Comment, \textit{Release to One Tort-feasor Held Not to Bar Suit Against Others Liable for Same Injury}, 63 \textit{COLUM. L. REV.} 1142 (1963).

51. See \textit{W. Prosser, supra} note 1, at § 49, at 303.
52. See, \textit{e.g.}, \textit{Joyce v. Massachusetts Real Estate Co.}, 173 Minn. 310, 313, 217 N.W. 337, 338 (1929).
53. \textit{Gronquist v. Olson}, 242 Minn. 119, 125, 64 N.W.2d 159, 164 (1954).
54. \textit{Id.}
56. 242 Minn. 119, 126, 64 N.W.2d 159, 164 (1954).
57. \textit{See id.} Thus, in a post-\textit{Gronquist} case, the Minnesota Supreme Court applied the “release of one releases all” rule. \textit{See Holmgren v. Heisick}, 287 Minn. 386, 391, 178 N.W.2d 854, 858 (1970).
58. \textit{See} 242 Minn. at 128, 64 N.W.2d at 165.
or unless the injured party has received such full compensation that he is no longer entitled to maintain the action;\(^{59}\) but the rule will not operate where there is no such intention and full compensation has not been paid.\(^{60}\)

This makes sense. "Liability in tort is several as well as joint";\(^{61}\) each joint tortfeasor is liable for the whole.\(^{62}\) A plaintiff harms only himself by releasing a joint tortfeasor from his several liability and the other joint tortfeasors are not harmed because the covenant not to sue does not abolish liability for the whole.\(^{63}\) The settling tortfeasor continues to be liable for contribution even though he is discharged, by virtue of the covenant not to sue, from the several portion of his liability.\(^{64}\) This problem and *Pierringer*’s solution to it is discussed in the next section. The non-settling joint tortfeasor has no cause to complain. Rather than being prejudiced by the settlement, says the *Gronquist* court, he has benefited, "for he is entitled to have the amount of the judgment reduced by the amount paid by his co-tort-feasor."\(^{65}\) Consequently, well-established Minnesota law meets the first need for a *Pierringer* release, namely, that the plaintiff may settle his claim piecemeal with joint tortfeasors.

\section*{C. Contribution Among Joint Tortfeasors — The Settling Defendant’s Concern}

*Gronquist* solves only part of our problem. The trouble is that while the covenant not to sue allows a plaintiff to settle piece-meal, it does not afford complete relief to the settling tortfeasor nor does it relieve the trial court’s docket, because Minnesota recognizes the right of contribution among negligent joint tortfeasors.

\begin{itemize}
\item \(^{59}\) *Id.* This is also Prosser’s view. See W. *Prosser*, supra note 1, at § 49, at 304. Indeed, Prosser says if one considers statutory as well as common law, this is now the rule in two-thirds of the states in this country. *Id.*
\item \(^{60}\) See 242 Minn. at 128, 64 N.W.2d at 165.
\item \(^{61}\) *E.g.*, 242 Minn. at 126, 64 N.W.2d at 164; see *Minn. Stat.* § 604.01(1) (1976) ("when there are two or more persons who are jointly liable . . . each shall remain jointly and severally liable for the whole award"). This is true whether the tortfeasors act together or separately. See, *e.g.*, 242 Minn. at 126, 64 N.W.2d at 164; Wrabek v. Suchomel, 145 Minn. 468, 473, 177 N.W. 764, 766 (1920).
\item \(^{62}\) See, *e.g.*, 242 Minn. at 126, 64 N.W.2d at 164.
\item \(^{63}\) See *id.* at 128, 64 N.W.2d at 165-66.
\item \(^{64}\) But, in *Gronquist*, the court held that contribution was barred because the tort committed was intentional. See *id.* at 129, 64 N.W.2d at 166. The rule that no right of contribution exists in a situation of intentional tort was established in the early Minnesota law. See *Warren v. Westrup*, 44 Minn. 237, 239, 46 N.W. 347, 348 (1890).
\item \(^{65}\) 242 Minn. at 128, 64 N.W.2d at 166.
\end{itemize}
The joint tortfeasor who is not a party to the covenant is therefore free to bring in the settling joint tortfeasor as a third-party defendant on a contribution claim, at least where the releasee "settled by a payment of less than his share." Gronquist stopped short of holding that a plaintiff may actually "release" (in its strict sense) a part of his cause of action. Had the settling joint tortfeasor received a true "release", then he would have been completely discharged from the action and no claim of contribution could be brought against him. Gronquist merely held that the settling defendant was discharged pro tanto from liability. In other words, the amount paid by the settling joint tortfeasor for his "release" was no more than a dollar-for-dollar credit that he could have asserted against a contribution claim had one arisen. This aspect of the covenant not to sue is its cardinal shortcoming.

66. See, e.g., Grothe v. Shaffer, Minn. 232 N.W.2d 227, 232 (1975); Ankeny v. Moffett, 37 Minn. 109, 110, 33 N.W. 320, 320 (1887).
68. See, e.g., UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 4(b) (1955 version).
69. 242 Minn. at 128, 64 N.W.2d at 165.
70. It was to solve this problem that the UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT adopted the provision that the release discharges the one to whom it is given from all liability for contribution. See UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 4(b) (1955 version). Minnesota, however, has not adopted the Uniform Act nor any other statute protecting a settling joint tortfeasor from contribution.

The original version of the Act generally provided to the contrary, see UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 5 (1939 version), as follows:

A release by the injured person of one joint tortfeasor does not relieve him from liability to make contribution to another joint tortfeasor unless the release is given before the right of the other tortfeasor to secure a money judgment for contribution has accrued, and provides for a reduction, to the extent of the pro rata share of the released tortfeasor, of the injured person's damages recoverable against all the other tortfeasors.

The reason given by the commissioners for the adoption of the original rule was a fear that "an injured person, acting in collusion with or out of sympathy for one of the tortfeasors, [could] relieve him from the obligation to contribute to the other tortfeasors by releasing him." UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT, Commissioner's Note § 5 (1939 version). But the 1939 provision was later said to be "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, Commissioner's Note § 4(b) (1955 version). The commissioners stated that where the Act was adopted the provision...
Some parties have tried to deal with the problem by combining a covenant not to sue with an indemnity agreement. Here the covenanting tortfeasor elicits a promise that the plaintiff will indemnify him for any payment he may be compelled to make as contribution to his codefendants. This solution still falls short, because the settling tortfeasor remains vulnerable to a third-party action for contribution. The settling defendant remains a party to the lawsuit because he must defend himself against contribution claims, even though (and most likely unknown to the jury) he has plaintiff's promise to indemnify him for those claims.

Since the covenant not to sue still has its flaws, even when coupled with the indemnity agreement, it becomes apparent that the Pierringer release provides the only adequate solution. Under Pierringer, the settling joint tortfeasor is dismissed completely from the action and only parties with true adversary interests are left to litigate the issues, one of which, in comparative negligence jurisdictions, is the degree of liability of the absent settling tortfeasor.

Under existing Minnesota law, however, a settling joint tortfeasor is liable for contribution if he settles for "less than his

"accomplished nothing in preventing collusion" and discouraged settlements "by making it impossible for one tortfeasor alone to take a release and close the file." See id.

The 1955 revision further provides that "[a] tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution 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." UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 1(d) (1955 version).

71. This type of indemnity clause, of course, is different from an agreement, used in some releases, in which the plaintiff agrees to indemnify the settling joint tortfeasor for damages caused by plaintiff's breach of the covenants. Because a settling tortfeasor may proceed directly against the plaintiff for damages for breach of covenant, the omission of this latter type of indemnity clause does not leave the settling tortfeasor without a remedy. See Pellett v. Sonotone Corp., 26 Cal. 2d 705, 712, 160 P.2d 783, 787 (1945).

72. Of course, this problem exists only in those states where the right to contribution exists and where the current UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT has not been adopted. See note 70 supra.

73. In fact, the Pierringer-type release also appears to be preferable to the statutory approach taken in those jurisdictions that have adopted the current version of the UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT. See note 70 supra. This version of the Act immunizes the settling tortfeasors against contribution claims regardless of the amount paid for the release, unless the release is given in bad faith. See UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 4 (1955 version). Thus, if the parties in good faith settle for less than the amount for which the settling joint tortfeasor is deemed subsequently liable, the non-settling party will be burdened with paying more than his share of liability.

74. See notes 127-30 infra and accompanying text.
share." It is necessary to take a close look at *Employers Mutual Casualty Co. v. Chicago, St. Paul, Minneapolis & Omaha Railway*, a leading Minnesota case on contribution among joint tortfeasors, which established this rule. The case involved an automobile-railroad crossing accident. The injured passenger in the auto sued the driver and the railroad. The railroad paid the passenger $6,000 for a covenant not to sue. Subsequently, the auto insurer paid the passenger $5,000 for a full release. The auto insurer brought an action for contribution against the railroad, claiming it was entitled to be reimbursed one-half of the $5,000 settlement. The Minnesota Supreme Court held the railroad was entitled to credit for the $6,000 paid and dismissed the claim for contribution. The court held the $6,000 paid to be "a pro tanto reduction of [the railroad's] eventual liability for contribution." Then the court said "[t]he rule adopted will protect the person who settles for his share; yet it will leave him subject to claims for contribution in those cases where he settled by a payment of less than his share." In other words, the claim for contribution continues to exist, says *Employers Mutual*, but only in those circumstances where the non-settling tortfeasor would be liable for more than his fair share. But what is a joint tortfeasor's share?

*Employers Mutual*, like *Heimbach*, arose prior to comparative negligence between joint tortfeasors. Joint tortfeasors were thus liable for contribution equally, and plaintiff's recovery was divided equally among the responsible parties. Both *Heimbach* and *Employers Mutual* applied the equality formula and denied contribution because the settling parties had not paid less than their respective shares. Minnesota's comparative negligence statute, however, following Wisconsin case law, now provides that

75. See *Employers Mut. Cas. Co. v. Chicago, St. P., Mpls. & O. Ry.*, 235 Minn. 304, 314, 50 N.W.2d 689, 695 (1951); cf. *Merrimac Mining Co. v. Gross*, 216 Minn. 244, 249, 12 N.W.2d 506, 509 (1943) (co-obligor on contract who pays "more than his share" entitled to contribution); MINN. STAT. § 548.19 (1976) (procedural statute allowing judgment debtor who pays "more than his proper share" to continue the judgment "for the purpose of compelling contribution").

76. 235 Minn. 304, 50 N.W.2d 689 (1951).
77. Id. at 314, 50 N.W.2d at 695 (emphasis added).
78. See id. at 310, 50 N.W.2d at 693.
79. See cases cited in note 13 supra.
80. See 1 Wis. 2d at 297, 83 N.W.2d at 712-13.
81. See 235 Minn. at 314, 50 N.W.2d at 695.
82. Bielski v. Schulze, 16 Wis. 2d 1, 114 N.W.2d 105 (1962). For a detailed discussion of Bielski, see notes 21-29 supra and accompanying text.
where joint liability exists "contributions to awards shall be in proportion to the percentage of negligence attributable to each, provided, however, that each shall remain jointly and severally liable for the whole award." So a formula exists for determining each joint tortfeasor's contribution to plaintiff's recovery. Each is liable for that part of the award which is his percentage of causal negligence as determined by the trier of fact.

The Pierringer release is based on this formula and does not conflict with the rule laid down in Employers Mutual for two reasons. First, Pierringer releases a joint tortfeasor from that part of the cause of action for which his percentage of causal negligence, as determined by subsequent trial or other means, makes him liable. While at the time of settlement, the parties do not know how much the jury will award nor how it will allocate negligence, the formula for such a determination is known and the parties settle on the basis of a known formula. Under the equality of contribution doctrine, the concept of "share" of liability necessitated a comparison of the number of dollars paid toward recovery by the settling and non-settling tortfeasors. The dollar amount paid for a Pierringer, however, is immaterial, because a settling joint tortfeasor settles for his share of liability using the comparative negligence formula. The settling tortfeasor who uses a Pierringer release does not settle for less than his share, but precisely for his share — no less.

Second, the Employers Mutual rule, requiring a payment of at least one's share to avoid liability for contribution, apparently is based on the rationale that if a settling tortfeasor settles for less than his share, the non-settling party is unfairly required to pay more than his own share. Under Pierringer, the non-settling party will never pay more than his share, because his exposure is limited to his own percentage of causal negligence—exactly his share—attributed to him at trial. The potential problem of being liable for more than one's share, raised in Employers Mutual, is thus avoided.

83. MINN. STAT. § 604.01(1) (1976) (emphasis added).
84. See text accompanying note 33 supra.
85. See, e.g., Employers Mut. Cas. Co. v. Chicago, St. P., Mpls. & O. Ry., 235 Minn. 304, 314, 50 N.W.2d 689, 695 (1951); Heimbach v. Hagen, 1 Wis. 2d 294, 297, 83 N.W.2d 710, 712 (1957).
86. See 21 Wis. 2d at 193, 124 N.W.2d at 112.
D. Impact of the Release Upon the Non-Settling Tortfeasor — The Non-Settling Defendant's Concern

Although the policy of the law is to encourage settlements, courts disfavor settlement devices which prejudice the rights of third parties, such as the non-settling party. What the non-settling tortfeasor finds disquieting (one is tempted to say unsettling) is that the *Pierringer* release is made without his consent, perhaps over his objection, and yet he is bound by it. Actually he is not "bound" by the agreement, for he is free to litigate his own liability and can be liable for no more than that. But he may find the *Pierringer* release, particularly if confronted with it shortly before or during trial, to affect adversely his trial or settlement strategy. The short answer to this complaint, however, is that the course of a trial, like true love, never runs smooth and a defendant's disappointment in a codefendant settling with the plaintiff is not grounds for upsetting that settlement.

The non-settling tortfeasor may be viewed as a donee third-party contract beneficiary to the *Pierringer* release. The plaintiff, in consideration of the payment to him by the settling tortfeasor, confers a "gift" on the non-settling tortfeasor, a gift which the donee may wish to disclaim but a gift which he might as well (indeed, better) take, namely, plaintiff's promise to satisfy any judgment against him for no more than his percentage of negligence. Thus, while the non-settling tortfeasor finds himself in a lonely position, still his liability will be no more than what it should be. He is relieved from any exposure to pay more than his fair share of the verdict.

Neither can the indemnity agreement portion of the *Pierringer* release be attacked successfully by the non-settling party. The plaintiff, by executing a *Pierringer* release, agrees to indemnify

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89. *See* Pierringer v. Hoger, 21 Wis. 2d 182, 193, 124 N.W.2d 106, 112 (1963) ("nonsettling defendant should only be [liable] for that percentage of negligence allocated to him by the findings or the verdict").

90. *See* Johnson v. Heintz, 73 Wis. 2d 286, 297, 299, 243 N.W.2d 815, 823, 824 (1974) ("Unfortunate effects from a viewpoint of trial tactics . . . do not constitute a legally cognizable bar to the release").

91. *See* Restatement of Contracts § 137 (1932).
the settling tortfeasor for any sum he would be required to pay on any judgment against him for contribution in favor of the non-settling tortfeasor and to satisfy any judgment plaintiff recovers against the non-settling tortfeasor to the extent of the fraction of the cause of action released. In other words, by so indemnifying, plaintiff keeps any several liability he has against the non-settling tortfeasor, but he indirectly releases the non-settling tortfeasor from any joint liability for that part of the jury's award attributable to the settling tortfeasor's negligence.

The court in Pierringer noted that these indemnity provisions were "second-line protection" for the releasees in the event that the provisions discharging the releasees and their share of the cause of action were found later to be ineffective. Because the court honored the discharge provisions, it turned out that the indemnity provisions were unnecessary. Yet the court was quite correct in observing that there are difficult problems inherent in drafting a tort release and inclusion of an indemnity provision is thus not unwise.

There is no legal reason why the indemnity provisions of the Pierringer-type release should not be upheld. Indemnity agreements are generally upheld if not contrary to public policy. Here, the agreement is openly made, is given for an adequate consideration, and is in furtherance of the public policy so often announced by the courts to encourage settlements. The Pierringer release does not offend any public policy and thus can be distinguished from the somewhat discredited "Mary Carter Agreement," which is kept secret from everyone and corrupts the adversary nature of the trial.

92. See text accompanying note 33 supra.
93. See 21 Wis. 2d at 185, 124 N.W.2d at 108.
94. See id. at 193, 124 N.W.2d at 112.
95. See id. at 185, 124 N.W.2d at 108.
98. See Booth v. Mary Carter Paint Co., 202 So. 2d 8 (Fla. Dist. Ct. App. 1967). The "Mary Carter Agreement" has been used in Florida, where contribution is not allowed between joint tortfeasors. See, e.g., Westinghouse Elec. Corp. v. J.C. Penney Co., 166 So. 2d 211, 214 (Fla. Dist. Ct. App. 1964). In a "Mary Carter Agreement," the plaintiff and one of the defendants agree that (1) the contracting defendant guarantees plaintiff a specific sum if plaintiff loses the case or recovers less than a certain sum; (2) the contracting defendant's maximum liability may be reduced if the liability of a codefendant is
The *Pierringer* release may place the non-settling tortfeasor at a tactical disadvantage, but this does not taint the release's validity. By allowing the plaintiff to settle with one defendant, the plaintiff is better able to finance his lawsuit against the non-settling party. This, however, is nothing new and no more debilitating to the release than it is to plaintiff's pocketbook. Also, the non-settling tortfeasor finds himself no longer able to cross-examine the settling tortfeasor as an adverse party. The settling tortfeasor may or may not be adverse but he very definitely is no longer a party, and so must be called as the non-settling tortfeasor's own witness.99 The Wisconsin Supreme Court found this hazard to the non-settling party to be an insufficient reason for striking down a *Pierringer*-type release.100 On the other hand, the

increased; and (3) the contracting defendant stays active in the trial as a party but the agreement is kept secret. 202 So. 2d at 9-10.

Later Florida court decisions have held that such secret agreements border on collusion, can mislead judges and juries, and may be relevant evidence bearing on the credibility of witnesses having an interest in the litigation. See, e.g., Ward v. Ochoa, 284 So. 2d 385, 387 (Fla. 1973). While such agreements apparently have not been completely disallowed, Florida has held they must be disclosed prior to trial and they are admissible in evidence. See, e.g., Maule Indus., Inc. v. Rountree, 284 So. 2d 389, 390 (Fla. 1973); Ward v. Ochoa, 284 So. 2d 385, 387 (Fla. 1973); General Portland Land Dev. Co. v. Stevens, 291 So. 2d 250, 251 (Fla. Dist. Ct. App. 1974).

The sharpest criticism of these types of agreements is the Nevada Supreme Court's decision of Lum v. Stinnett, 87 Nev. 402, 488 P.2d 347 (1971). The court reversed a judgment against a defendant in a medical malpractice suit, where, during trial, two codefendants made a secret agreement with plaintiff to guarantee plaintiff $20,000 but the agreeing defendants would have to pay nothing if the verdict against the third defendant was for more than $20,000. The court characterized the agreement as unethical and "inimical to true adversary process" and said that it amounted to champerty and maintenance. See id. at 410-11, 488 P.2d at 352.

An interesting case is Degen v. Bayman, 86 S.D. 598, 200 N.W.2d 134 (1972). Plaintiff, injured in a boating accident, sued the boat operator and the boat manufacturer. The boat operator settled with plaintiff for $65,000 and reserved his claim for indemnity against the boat manufacturer. The trial court directed that no mention of the settlement be made to the jury. In final argument, counsel for defendant boat operator argued for a substantial verdict for plaintiff. The South Dakota Supreme Court reversed plaintiff's verdict because the settlement was "used as a collusive advantage" to deny the remaining defendant a fair trial. See id. at 608, 200 N.W.2d at 139.


100. Indeed, in Heimbach v. Hagen, 1 Wis. 2d 294, 299, 83 N.W.2d 710, 713 (1957), the non-settling defendant argued against the validity of the release on grounds it deprived him of his right to treat the settling tortfeasor as an adverse party. The court rejected the argument.
non-settling tortfeasor may have an advantage in that the negligence of the settling tortfeasor, even though no longer a party, is submitted on special verdict to the jury. He can attempt to place the blame for the tort on the settling tortfeasor who is no longer defending himself, except to the extent plaintiff's counsel indirectly assumes his defense.

In short, the Pierringer release is not so prejudicial to the non-settling tortfeasor's interests as to warrant its invalidity. The benefits to the non-settling party, as well as to the settling parties, outweigh what little real or imagined harm there might be.

E. Summary

The Pierringer release involves only the application of legal concepts already well-established in Minnesota law. It enables the plaintiff to settle his case piecemeal without running afoul of the rule that the release of one releases all. The defendant is discharged from the necessity of defending against the claims of the plaintiff and the contribution claim of the non-settling tortfeasor. Protected from the possibility of paying an amount of damages larger than the amount for which he is liable, the non-settling tortfeasor has no cause to complain. There should be no problem with the validity of the Pierringer release in Minnesota.

IV. THE Pierringer RELEASE IN INDEMNITY AND NON-NEGLIGENCE COMMON LIABILITY SITUATIONS — THE POSSIBLE LIMITATIONS OF THE Pierringer RELEASE

To settle piecemeal one must be able to define the pieces. This is easily done in the case of comparative negligence. But in situations, like indemnity, the law has usually precluded loss allocation among multiple tortfeasors; in other situations, like strict liability, where the common liability of the joint tortfeasors is not based on negligence, the law has not yet worked out a theory of loss allocation. The Pierringer release in its traditional form is thus ineffective. But, even here, a release can be designed to operate in these situations, if common liability exists. More-

101. See notes 127-30 infra and accompanying text.
102. In a non-comparative negligence jurisdiction, the equality of contribution doctrine makes this task even easier because the liability of each joint tortfeasor is determined by dividing the award by the number of joint tortfeasors. See text accompanying note 13 supra.
103. Common liability is one of the requisite elements of contribution. See, e.g., Lunderberg v. Bierman, 241 Minn. 349, 362-63, 63 N.W.2d 355, 364 (1954). A Pierringer release
over, the full indemnity rule has recently been subjected to erosion.

A. Indemnity

The Pierringer release relates solely to situations where a contribution claim is brought against the settling tortfeasor. If the non-settling tortfeasor has a cross-claim for full indemnity, instead of or in addition to a claim for contribution, against his codefendants, the traditional Pierringer release will not protect the settling tortfeasor from the cross-claim for indemnity. This is because the Pierringer release, like all releases, is only valid if the non-settling party is not thereby prejudiced.\textsuperscript{104} Full indemnity shifts the entire loss from a tortfeasor who is secondarily liable to a tortfeasor who is primarily liable.\textsuperscript{105} If all the tortfeasors are commonly liable to the plaintiff, and the non-settling tortfeasor is only secondarily liable to the plaintiff and thus is entitled to indemnification by the settling tortfeasor, then the agreement between the plaintiff and the settling defendant should not be allowed to cut off the non-settling tortfeasor's right to indemnity against the settling defendant. This would greatly prejudice the non-settling tortfeasor. So, unless the claim for indemnity is vulnerable to a motion for summary judgment, the settling defendant will have to remain in the lawsuit and defend himself against the indemnity claim. Any contribution claims against the

\textsuperscript{104} See note 88 supra and accompanying text.

\textsuperscript{105} See, e.g., Hendrickson v. Minnesota Power & Light Co., 258 Minn. 368, 371, 104 N.W.2d 843, 847 (1960).

Indemnity does not involve a comparison of fault. The entire loss is shifted to another party whenever considerations of equity and fairness so warrant. See id. at 370-71, 104 N.W.2d at 847. In Hendrickson, the court summarized five exceptional circumstances in which indemnity will lie. They are: (1) where one defendant is only vicariously liable; (2) where one defendant has incurred liability by acting at the direction of, in the interests of, or in reliance on the other; (3) where one defendant has incurred liability because of a breach of duty owed him by another; (4) where one defendant merely failed to discover or prevent the misconduct of another; and (5) where an express contract exists between the defendants. Id. at 372-73, 104 N.W.2d at 848. However, the fourth ground for indemnity has recently been overruled by the court. See Tolbert v. Gerber Indus., Inc., Minn. , 255 N.W.2d 382 (1977).
settling tortfeasor, of course, would be dismissed.\textsuperscript{106}

The basic \textit{Pierringer} release might be modified to solve the problem of protecting the non-settling party, at least in common liability indemnity situations,\textsuperscript{107} although only by increasing the risks of settlement to the plaintiff. A modified \textit{Pierringer} could provide that the plaintiff agrees not only to indemnify the settling tortfeasor against any contribution claims, but also to indemnify the settling party against any indemnity claims brought against him by the non-settling party. In addition, the plaintiff would agree to satisfy any judgment plaintiff obtains against the non-settling party if it turns out that the non-settling party is entitled to indemnity from the settling party. This arrangement would allow the settling party, notwithstanding an indemnity claim against him, to be dismissed from the lawsuit.

This modification is based on the same rationale as the \textit{Pierringer} case itself. If the non-settling party is not liable for any more than the "share" for which he subsequently has been deemed liable, the release is valid.\textsuperscript{108} If the non-settling tortfeasor is deemed to be only secondarily liable and entitled to full indemnity from the settling tortfeasor, his primary liability is zero while he is secondarily liable for the full award. The modified \textit{Pierringer} would cut off plaintiff's right to recover from the settling indemnitor and would hold the non-settling indemnitee harmless from his secondary liability. Since plaintiff bars himself from collecting any money he might be awarded against a non-settling tortfeasor who successfully establishes his right to indemnity against the settling tortfeasor, it is unlikely a modified \textit{Pierringer} would enjoy a very extensive use.

However, recent case law, including that in Minnesota, has

\textsuperscript{106} See text accompanying notes 120-21 \textit{infra}.

\textsuperscript{107} While common liability is a necessary element of contribution, common liability is not required to maintain a claim for indemnity. See Hillman v. Ellingson, 298 Minn. 346, 348, 215 N.W.2d 810, 812 (1974), \textit{overruled on other grounds}, Tolbert v. Gerber Indus., Inc., ____ Minn., 255 N.W.2d 362 (1977).

However, even if the \textit{Pierringer} release can be modified to operate in indemnity situations, such a release will be useful only in common liability indemnity situations. For instance, a \textit{Pierringer} settlement with an employer in a worker's compensation third-party action, where the third-party is seeking indemnity from the employer, would be to no avail. The employer is present in the lawsuit only because he has been brought into the suit by the third-party tortfeasor (not by the plaintiff-employee) who is seeking contribution or indemnity, or both, from the employer. The plaintiff thus has nothing to settle with the employer in the tort action. The employee's claims against the employer are based on a separate action under the worker's compensation statute.

seen the emergence of a "comparative indemnity" approach to replace traditional "all or nothing" indemnity. The significance of this development is to expand the situations in which a Pierringer release can be used. Now, in certain indemnity situations, the Pierringer can be used the same as for contribution claims based on comparative negligence. This new development began with the landmark case of Dole v. Dow Chemical Co., which arose before New York adopted a comparative negligence statute. There the New York Court of Appeals refused to apply the "active-passive" test for indemnity and held "there must necessarily be an apportionment of responsibility in negligence between these parties"—in other words, a kind of "comparative responsibility" test in lieu of the "active-passive" formula.

In Tolbert v. Gerber Industries, Inc., decided in April 1977, the Minnesota Supreme Court (5 to 4) adopted the Dole approach. No longer in Minnesota will full indemnity apply to "active-passive" or "primary-secondary" misconduct. Indemnity here, said the court, is too much of a "blunt instrument" for allocating responsibility; instead responsibility will be based on "relative fault," using the comparative negligence formula to be applied by the jury. The Pierringer is designed to work in this very situation.

Complete indemnity still applies in vicarious liability situations in Minnesota. There would not seem, however, to be any incentive for plaintiff to give defendant A a Pierringer release so as to continue his lawsuit against defendant B alone, if B's exposure is solely vicarious and depends on A being found negligent. To give A a Pierringer release in that situation is also to release B. On the other hand, if B's status as a true vicarious indemnittee is in dispute, plaintiff might chance giving A a modified Pierringer and hope to recover from B by showing B's liability is not vicarious. Tolbert still leaves open in Minnesota, especially in view of the dissents, whether or not "comparative responsibility" will be extended to strict liability and breach of warranty and mixed dramshop and negligent tort cases.

B. Products Liability

Perhaps the most fertile ground for breeding multiple party
defendants is the products liability case, in which liability, quite often, may be based on a combination of negligence, strict liability, and breach of warranty. Theoretically, a strict liability case involves a series of indemnity actions, whereby a plaintiff will sue multiple defendants but each defendant will usually bring indemnity claims against their codefendants who are higher up the product manufacturing and distribution ladder.\(^{112}\) Thus, unless a modified *Pierringer* is used, the release will not be effective in dismissing the indemnity claims.

An additional problem is encountered in a strict products liability case. Read literally, the Minnesota comparative negligence statute only allows a comparison of negligence between defendants and not a comparison of fault imposed by strict liability.\(^ {113}\) Thus, if one tortfeasor is liable to the plaintiff on a negligence theory and the other on a strict liability theory, or both are strictly liable to the plaintiff, the comparative negligence statute arguably would not be operative. Thus, each tortfeasor would be liable pro rata, under the doctrine of equality of contribution, to the plaintiff for the amount of the award.\(^ {114}\) Because *Pierringer* operates in a comparative negligence context, a *Pierringer* release would not be proper. The *Heimbach* release, however, would appear to be effective. It was on the doctrine of equality of contribution that the *Heimbach* release was designed to operate.

Nevertheless, the apportionment of non-negligent liability might be forthcoming. Various approaches for the apportionment of non-negligence are currently being advanced by courts and commentators. Wisconsin, for example, allows a comparison between negligence and strict liability.\(^ {115}\) Undeterred by the theoretical difficulty of comparing "fault" liability with "faultless"

\(^{112}\) See *Farr v. Armstrong Rubber Co.*, 288 Minn. 83, 96-97, 179 N.W.2d 64, 72 (1970).

\(^{113}\) See MINN. STAT. § 604.01(1) (1977) (statute repeatedly refers to "negligence").

\(^{114}\) Similarly, the Minnesota Civil Damage Act, MINN. STAT. § 340.95 (1976), is a strict liability statute. If two liquor establishments are liable under the Act for plaintiff's injuries, the equality of contribution doctrine is operative. See *Skaja v. Andrews Hotel Co.*, 281 Minn. 417, 424, 161 N.W.2d 657, 661 (1968). Thus, the *Heimbach* release would appear to be effective in a pure dram shop situation.

\(^{115}\) See *Dippel v. Sciano*, 37 Wis. 2d 443, 462, 155 N.W.2d 55, 65 (1967). The Wisconsin Supreme Court reasoned that strict liability in tort is really negligence per se for the purpose of applying the comparative negligence statute. *Id.* The concept of "comparative cause" was reaffirmed in *City of Franklin v. Badger Ford Truck Sales, Inc.*, 58 Wis. 2d 641, 652-54, 207 N.W.2d 866, 871-72 (1973).
liability, the Wisconsin Supreme Court adopted a kind of "comparative cause" scheme which compares causal conduct. Commentators in Minnesota also have suggested recently that the Minnesota comparative negligence statute should be expanded to a "comparative cause" or "comparative fault" statute so as to operate on all the diverse theories of tort liability recognized by modern courts, and the Tolbert decision plainly leans in this direction.

Suffice it to say that views regarding loss allocation are presently in a fluid state. But in view of the overwhelming acceptance of comparative negligence by modern courts and legislatures, the development of means for allocation of liability in cases utilizing other theories of tort recovery seems inevitable.

V. SOME PROCEDURAL CONSIDERATIONS

When the settling tortfeasor goes home, some questions of trial procedure remain for those parties in the lawsuit. It is not clear if Minnesota will solve these problems in the same manner as Wisconsin apparently has. But Wisconsin precedent, embodying a common sense approach, undoubtedly will be persuasive because Minnesota has tended to follow Wisconsin's lead in the area of joint liability for tort.

A. Removing the Releasee From the Suit

In Wisconsin, when the Pierringer settlement is made, either the settling tortfeasor or the plaintiff may move for a dismissal of all claims asserted between the plaintiff and the settling tortfeasor and all contribution claims between the settling tortfeasor

118. For a list of jurisdictions that have adopted comparative negligence, see Note, A Reappraisal of Contributory Fault in Strict Products Liability Law, 2 WM. MITCHELL L. REV. 235, 247 n.109 (1976).
119. The Minnesota comparative negligence statute, MINN. STAT. § 604.01(1) (1976), was based on the Wisconsin statute, WIS. STAT. ANN. § 895.045 (West Supp. 1976-1977), and case law, Bielski v. Schulze, 16 Wis. 2d 1, 114 N.W.2d 105 (1962). See Olson v. Hartwig, 288 Minn. 375, 377, 180 N.W.2d 870, 872 (1970). The Minnesota Supreme Court stated that it would adopt generally the pre-Minnesota enactment interpretations of the Wisconsin Act by the Wisconsin Supreme Court when construing the Minnesota Act. See id.
and the non-settling tortfeasors. These motions should be granted and, barring any cross-claims for indemnity against the releasee which survive a motion for summary judgment, the settling tortfeasor can quit the action.

Beyond this, the dismissal of the releasee from the suit, in most instances, provides no difficulty, because a Pierringer settlement usually is made between a plaintiff and a joint tortfeasor who is brought into the action by the plaintiff — the exact situation upon which the Pierringer case was based. However, one recent Wisconsin post-Pierringer case, Johnson v. Heintz, presented a somewhat unique situation where a defendant in a multiple-automobile accident case brought a third-party action against two parties for contribution. Plaintiff did not seek recovery directly from the two third-party defendants. For vague reasons, one of the third-party defendant insurers settled with plaintiff by obtaining a Pierringer. The settling insurer was then dismissed from the lawsuit. The third-party plaintiffs, the sole defendants to the main action, argued that the insurer could not be dismissed from the suit following the settlement without their consent, because the plaintiff had no claim against the insurer and the third-party plaintiff was the only party who made claims against the settling insurer. The third-party plaintiffs argued that they should have the sole control over whether the settling parties should be dismissed from the contribution claim in this instance.

The Wisconsin Supreme Court held that the dismissal of the settling party was error, but was not prejudicial because “the defect did not cause cognizable harms” to the non-settling party. In so doing, the court mentioned that Pierringer allowed a settling party to be dismissed from claims of contribution only because the release satisfies the underlying claim between a plaintiff and a defendant brought into a suit by the plaintiff and also because a Pierringer release sufficiently protects the non-settling defendant so that a claim for contribution is unnecessary to protect his rights. In Johnson, however, the harm to the non-settling party was merely surprise over the settlement and a more complicated

120. See Pierringer v. Hoger, 21 Wis. 2d 182, 192-93, 124 N.W.2d 106, 112 (1963).
121. Of course, if a modified Pierringer is used, the indemnity claim should be dismissed also. See notes 107-08 supra and accompanying text.
122. See Johnson v. Heintz, 73 Wis. 2d 286, 294-95, 243 N.W.2d 815, 822 (1976).
123. 73 Wis. 2d 286, 243 N.W.2d 815 (1976).
124. See id. at 297, 243 N.W.2d at 823.
125. See id. at 295, 243 N.W.2d at 822.
Surely a claim does not have to be in suit before it can be released. Plaintiff in the *Johnson* case was certainly able to give the third party defendant an effective *Pierringer* release even though plaintiff had not chosen to bring the third party defendant into the lawsuit and had not asserted a claim against him. The trial court's dismissal of the third party defendant from the lawsuit seems correct, provided that the defendant is still allowed to have his absent third party defendant's liability submitted to the jury.

**B. Submission of the Releasee's Liability to the Jury**

While the releasee who takes a *Pierringer* will in most instances be dismissed from the lawsuit, whether his negligence should be submitted to the jury is a separate question. In the *Pierringer* case, the court stated that both parties are entitled to have the non-settling tortfeasor's negligence submitted to the jury. The Wisconsin Supreme Court has even stated that it is prejudicial error to the non-settling defendants to omit the negligence of the settling parties from the special verdict. It is essential to deter-

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126. See id. at 299, 243 N.W.2d at 824. Also important to this result was the fact that the settling parties could have taken “the proper procedural steps to place themselves in a direct adversary position where the appellants could not raise artificial objections to a settlement . . . .” See id. The settling insurer was not made a party to the plaintiff’s action because of the statute of limitations. The court stated that the plaintiff and the insurer could easily have circumvented this problem by the plaintiff suing the insurance company and the company declining to raise the statute of limitations as a defense. *Id.* at 298-99, 243 N.W.2d at 824.

127. 21 Wis. 2d at 192, 124 N.W.2d at 112.

128. See *Payne v. Bilco Co.*, 54 Wis. 2d 424, 431, 195 N.W.2d 641, 645 (1972). In *Payne*, plaintiff injured his right arm in a defective door and sued five defendants. Prior to trial, plaintiff settled with three defendants for *Pierringer* releases and went to the jury as to the two remaining defendants. Plaintiff declined to dismiss the three *Pierringer* defendants at the start of the trial and when, at the close of the testimony, he moved to dismiss them, the motion was denied. The jury found plaintiff more negligent than the two non-settling defendants.

On appeal, the Wisconsin Supreme Court held it was immaterial that plaintiff's motion to dismiss was not granted because it still would have been necessary to name the three *Pierringer* defendants in the special verdict so that a proper comparison of negligence would be obtained.

In another case, *Nolan v. Venus Ford, Inc.*, 64 Wis. 2d 215, 218 N.W.2d 507 (1974), the Wisconsin Supreme Court dealt with the related issue of the order of the special verdict interrogatories. In *Nolan*, plaintiff was disappointed in the verdict after having settled with two defendants for *Pierringer* releases and claimed error on appeal because the trial court submitted a verdict form which inquired first as to the negligence of the two defend-
mine the exact amount of the non-settling tortfeasor’s several liability, and to do this the negligence of the absent tortfeasor must be submitted to the jury.129 This rule should be used in Minnesota also and apparently is the procedure currently followed in this state in actions involving comparative negligence.130

C. Disclosure of Settlement in Court

Since the court rules on motions to dismiss the releasee, the court needs to know about the settlement. But what should the jury be told?

1. Fact of the Release

Pierringer says the parties remaining in the lawsuit are entitled at least to plead “the facts of the release and such other pertinent matter so that the issues are clearly drawn.”131 The trial court needs this information and the jury should be entitled to know there has been a settlement and release if for no other reason than to explain the settling tortfeasor’s conspicuous absence from the court room. Under the new Minnesota Rules of Evidence, the fact of a Pierringer settlement would be admissible when “the evi-

ants who had settled and lastly as to the negligence of the non-settling defendant. When the jury found the first two defendants negligent and absolved the last defendant, plaintiff appealed on the grounds the negligence question of the non-settling defendant was not given “its due prominence.” The court was not impressed, observing “that [it] is not necessarily true in a verdict or in a court opinion” that what is said first is the most important. Id. at 228, 218 N.W.2d at 513.

129. Not only must the negligence of the remaining parties and the settling parties go to the jury, but a request may be made to submit the negligence of any actor to the jury no matter how slight the actor’s contribution to the injury may be. See Johnson v. Heintz, 73 Wis. 2d 286, 303, 243 N.W.2d 815, 826 (1976). In Conner v. West Shore Equip., 68 Wis. 2d 42, 227 N.W.2d 660 (1975), it was held not to be error to have included an employer’s negligence as a jury issue even though the employer was not a party and immune from tort. The Conner court stated that the only question which must be answered affirmatively before submitting a person’s negligence to the jury is: “Is there evidence of conduct which, if believed by the jury, would constitute negligence on the part of the person or other legal entity inquired about.” Id. at 45, 227 N.W.2d at 662.

130. See 4 MINNESOTA PRACTICE, JURY INSTRUCTION GUIDES, JIG II, 148S, Comment at 131 (2d ed. 1974) (citing the Wisconsin practice of submitting the conduct of a non-party to the jury). In Bender v. Wallace-Murray Co., 432 F.2d 50 (8th Cir. 1970), plaintiff appealed on the grounds the trial court had failed to submit the issues of negligence of two defendants with which he had settled at the beginning of trial for releases under the South Dakota Uniform Contribution Among Tortfeasors Act. The jury had found no negligence as to the non-settling tortfeasor. The court of appeals held this made the issue on appeal moot and declined to render an advisory opinion on South Dakota law “as to the pro rata handling of damages.” Id. at 51.

131. 21 Wis. 2d at 193, 124 N.W.2d at 112.
vidence is offered for [a] purpose, such as proving bias or prejudice of a witness . . . ."'32 A similar rule of evidence has been adopted in Wisconsin133 and in Johnson v. Heintz the Wisconsin Supreme Court recently held that the trial court should allow the fact of a Pierringer settlement to be presented to the fact-finder.134

It should be kept in mind that the Minnesota comparative negligence statute provides that "[e]xcept in an action in which settlement and release has been pleaded as a defense, any settlement . . . shall be inadmissible in evidence on the trial of any legal action."135 The Pierringer settlement and release should be pleaded and so made admissible.

2. Price of the Release

Whether the jury should be told the amount of the settlement is another question. The Minnesota comparative negligence statute that makes a settlement and release, which has been pleaded as a defense, admissible136 might be broadly construed to encompass the admissibility of both the fact and the amount of settlement. In a dram shop action, the Minnesota court held that a defendant had the right to show the jury the payment previously recovered by plaintiffs in a prior tort action to establish that the plaintiff had already been fully compensated for his injury.137 This case might be analogous enough to a settlement situation so to compel disclosure of the price of the release.

Yet telling the jury the amount paid may be highly prejudicial. This issue was addressed in the Wisconsin case of Johnson v. Heintz.138 While holding that the fact of the Pierringer settlement should be made available to the jury, the Johnson court rejected the argument that the details of the settlement, including the

132. MINN. R. EVID. 408 (effective July 1, 1977). This rule is taken from FED. R. EVID. 408. The Minnesota rule provides in pertinent part:

Evidence of (1) furnishing . . . or (2) accepting . . . , a valuable consideration in compromising . . . a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. . . . This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

133. WIS. STAT. ANN. § 904.08 (West 1975).

134. See 73 Wis. 2d at 300, 243 N.W.2d at 825.

135. MINN. STAT. § 604.01(4) (1976).

136. Id.


138. 73 Wis. 2d 296, 243 N.W.2d 815 (1976).
amount paid for the release, could be offered into evidence.\textsuperscript{139} The
court's holding was based on a Wisconsin rule of evidence\textsuperscript{140} which
contains almost the exact language found in Minnesota's new
rules of evidence.\textsuperscript{141}

Furthermore, the South Dakota Supreme Court has said flatly,
in pointing to the risk of undue influence that the disclosure of
the amount of settlement could have on the jury deliberations,
"[w]e can visualize no circumstances where the amount in-
volved in a release or covenant need be disclosed to the jury."\textsuperscript{142}
The South Dakota Supreme Court feared that a "nuisance settle-
ment" with one defendant could be used by the non-settling tort-
feasor to "downgrade a plaintiff's claim" and a large settlement
could be used by the non-settling party to contend that "the
releasee was the party responsible for the injury, had paid the
damages, and that [the non-settling party] should be excul-
pated."\textsuperscript{143} This, the court said, "would tend to discourage settle-
ments."\textsuperscript{144} The court left the issue of whether the jury should be
told about the fact of settlement to the discretion of the trial
court, pointing out the trial court should disclose this fact where
non-disclosure would jeopardize a fair trial.\textsuperscript{145}

In addition, under the Minnesota Rules of Civil Procedure for
the District Courts, the court ordinarily informs the jury of the
effect of its answers to the percentage of negligence question and
permits counsel to comment thereon.\textsuperscript{146} Under this license, with

\begin{itemize}
  \item \textsuperscript{139} See id. at 300, 243 N.W.2d at 825.
  \item \textsuperscript{140} Wis. Stat. Ann. § 904.08 (West 1975).
  \item \textsuperscript{141} See note 132 supra.
  \item \textsuperscript{142} Degen v. Bayman, 86 S.D. 598, 607, 200 N.W.2d 134, 139 (1972).
  \item \textsuperscript{143} Id. at 606, 200 N.W.2d at 138.
  \item \textsuperscript{144} Id.
  \item \textsuperscript{145} See id. at 607, 200 N.W.2d at 139. In Degen, the trial judge ordered the parties
not to mention the settlement at trial. Because the settlement instrument did not dis-
charge the settling party from the lawsuit and the settling party also had a pecuniary
interest in shifting liability to the non-settling defendant rather than the plaintiff,
the attorney for the settling defendant made favorable statements to the jury regarding
the plaintiff's case. The court held that this was an instance where the court should have
allowed the fact of settlement to be submitted to the jury to halt the "collusive advantage"
and "to let the adversary process put the issues in perspective." Id. at 608, 200 N.W.2d
at 139.
  \item \textsuperscript{146} Minn. R. Civ. P. 49.01(2) (1977). This provision provides:

    In actions involving [comparative negligence], the court shall inform the jury
    of the effect of its answers to the percentage of negligence question and shall
    permit counsel to comment thereon, unless the court is of the opinion that
doubtful or unresolved questions of law, or complex issues of law or fact are
involved, which may render such instruction or comment erroneous, misleading
or confusing to the jury.
\end{itemize}
the jury knowing the amount paid for the release, it would not be difficult for enterprising counsel to suggest percentages and amounts which would completely distort the jury's proper deliberations.

Moreover—and this is the real answer—the amount paid for a Pierringer release is entirely irrelevant to the issues before the jury, that of negligence, percentage of negligence, and total damages. The price paid for a release is a bargain struck between the parties based on what they think a jury will do. What the parties think a jury will do and what the jury actually does are two different things and the former should not be permitted to contaminate the latter.147

3. Summary

Perhaps the best rule is that the extent of disclosure to the jury of the terms of the settlement rests in the sound discretion of the trial court, depending upon the particular circumstances of the case, but that the amount paid for the Pierringer is to be withheld.

VI. SOME TACTICAL CONSIDERATIONS

The Pierringer release is a valuable device which may provide benefits to the plaintiff, the settling defendant, and the non-settling defendant, as well as to society, by aiding settlement and shortening the trial docket. While the use of the Pierringer from a standpoint of legal validity seems clear enough, the practical consequences which result from its use are many and varied and need to be thought through for each case.

A. Considerations for the Plaintiff

For plaintiff, the advantages of a Pierringer release are that he is assured of at least a partial recovery without trial and he is free to concentrate his effort against the non-settling defendant. He must balance these advantages against the fact that the jury will know he has settled with one defendant who is no longer in the case,148 and he must calculate that the amount the jury will award and the percentage of negligence it will place on the non-settling defendant will justify settling with the one defendant.

148. See text accompanying notes 131-47 supra.
Ordinarily, unless the sum paid for the *Pierringer* is large, plaintiff will be inclined to settle only with what appear to be peripheral defendants and keep his cause of action against a target defendant. If the plaintiff misjudges the situation and releases a defendant, who, it turns out, is liable for a substantial portion of the judgment, that share of recovery is lost to the plaintiff because a non-settling defendant is responsible only for his own share of fault. Where it appears comparative fault among the parties is highest with the defendant who can least pay and the lowest with the defendant who can best pay, plaintiff's counsel, keeping in mind that a *Pierringer* destroys joint liability and preserves only the several liability of the non-settlers, may well be disinclined to use the release.

Finally, care should be used in wording the agreement. A document is not to be "construed as a release and discharge [of the entire obligation] unless such is the plain import of the language used." The important point is to express clearly in the settlement agreement the intention to settle only part of the cause of action and to preserve the remainder against the non-settlers. Even if the intention is not clear from the instrument itself, the court has allowed parol evidence, to the effect that the non-settling tortfeasors are not released, to be received into evidence to vary the terms of written instruments that use an unqualified release. This exception to the parol evidence rule is justified by

149. The Wisconsin Supreme Court, in deciding to base contribution on percentage of negligence instead of the number of active tortfeasors in the lawsuit, commented that "[u]nder the new rule, a defendant whose potential causal negligence is greater than 50% should be more willing to contribute a greater amount to a settlement than formerly. The defendant only slightly negligent should still settle for a sum in proportion to his fault in order to avoid the cost of litigation." Bielski v. Schulze, 16 Wis. 2d 1, 12-13, 114 N.W.2d 105, 111 (1962).

150. See *Pierringer v. Hoger*, 21 Wis. 2d 182, 193, 124 N.W.2d 106, 112 (1963) ("nonsettling defendant should only be [liable] for that percentage of negligence allocated to him by the findings or the verdict").

151. Joyce v. Massachusetts Real Estate Co., 173 Minn. 310, 313, 217 N.W. 337, 338 (1928); see, e.g., Gronquist v. Olson, 242 Minn. 119, 125, 64 N.W.2d 159, 164 (1954) ("true intentions of the parties . . . can be gathered from the four corners of the instrument"); Musolf v. Duluth Edison Elec. Co., 108 Minn. 369, 376, 122 N.W. 499, 502 (1909).

152. See Couillard v. Charles T. Miller Hosp., Inc., 253 Minn. 418, 428, 92 N.W.2d 96, 103 (1958). Prior to *Couillard*, the court held in Benesh v. Garvais, 221 Minn. 1, 5, 20 N.W.2d 532, 534 (1945), and Smith v. Mann, 184 Minn. 485, 488, 239 N.W. 223, 224 (1931), that parol evidence could not be introduced to prove that a party was never fully compensated and did not intend to release a claim arising out of injuries caused by a subsequent tortfeasor where both the releasee and the subsequent tortfeasor were both liable. The *Couillard* court expressly overruled *Benesh* and *Smith*. 253 Minn. at 428, 92 N.W.2d at
the court on the ground that the party against whom the parol evidence is introduced (a non-settling joint tortfeasor) is not a party to the contract modified by parol and therefore may not challenge the evidence. 153

B. Considerations for the Settling Joint Tortfeasor

For the settling tortfeasor, the advantages are that he has a settlement and can go home. Not only has he settled plaintiff's claim but he has settled any cross-claims for contribution and, consequently, he saves any further time, trouble, or expense. 154 He cannot be impleaded back into the suit as a third-party defendant. He may still, however, be called by one of the remaining parties as a witness.

The exit of the settling defendant from the case presents the anomalous situation of having a person's conduct argued to and determined by the jury even though that person is not a party in the trial and is not represented by counsel. Of course, the Pierringer releasee ordinarily will not care, because a finding of his negligence will not affect him financially. No judgment can be entered against him. While the situation is unique, it seems unlikely that any finding of negligence against the absent defendant would be deemed an estoppel by verdict in any later related litigation. 155 The settling tortfeasor may, however, be disturbed

103. In so doing, the court reviewed several cases, including Gronquist, which, according to the court, emphasized "that the intent of the parties to a release must be considered and that the express language of a release is not alone controlling." Id. at 424, 92 N.W.2d at 100. The Couillard court also stated that for the purpose of admitting parol evidence with respect to a release, no distinction between joint tortfeasors and subsequent tortfeasors should be made, id. at 427, 92 N.W.2d at 102, and that parol evidence should be allowed "to show the true nature and extent of the release." Id. Nevertheless, the burden is on the plaintiff to demonstrate that the release was not received for full compensation. Id. at 428, 92 N.W.2d at 103.


154. See text accompanying notes 120-21 supra.

155. Ordinarily parties must be the same or in privity with each other for res judicata to apply. E.g., McMenomy v. Ryden, 276 Minn. 55, 58, 148 N.W.2d 804, 807 (1967). But in Spitzack v. Schumacher, ___ Minn. ___, 241 N.W.2d 641 (1976), plaintiff first tried his death case against the negligent auto driver and lost. Plaintiff then sued his dram shop case and the dram shop impleaded the auto driver, claiming the right to relitigate the auto driver's negligence, since the dram shop owner had not been a party to the first action. The supreme court dismissed the third-party complaint, stating it would be unfair to force the auto driver to relitigate his liability, especially where the dram shop was not involved in the facts of the auto accident itself, the negligence of plaintiff was overwhelming, and there was "no evidence of collusion or any other special circumstance." Justice Kelley,
that the jury's verdict affects his reputation, either of his person or his product. Where this is so, his counsel should carefully explain all consequences of such a settlement, pointing out that the trial goes on without him but with his name involved. Perhaps the possibility that he will be called as a witness and thus will have an opportunity to be heard to protect his name will cause him to perceive that he is sufficiently protected.

C. Effect Upon a Liability Insurer

As we have already seen, the Pierringer release may be used to put pressure on a liability insurer to settle. Prior to Pierringer, an insurer, without being accused of bad faith, could reject a demand for settlement on the ground that it would still leave its insured exposed to contribution claims from codefendants. But if plaintiff's counsel couples his settlement demand with the offer of a Pierringer release, the insurer has one less reason for rejecting plaintiff's demand and its exposure to a bad faith excess policy limits claim is increased.

D. Summary

These are practical considerations, of course, that trial counsel will point out to a client who is deciding whether or not to settle. But once considered, the parties are free to make their bargain, apply the Truman Doctrine, and hope for the best.

concurring, pointed out the dram shop carrier had full notice and opportunity to appear in the first trial (where he had been impleaded but then got a severance) but chose not to, but if such notice and opportunity had not been given, he would have allowed the auto driver's negligence to be relitigated.

A tortfeasor, who buys his way out of a lawsuit with a Pierringer and whose percentage of negligence is then determined in his absence, may well find that he cannot rely on a favorable jury finding in some subsequent action. On the other hand, if the jury finding is unfavorable, the non-settling tortfeasor might contend such a finding creates an estoppel by verdict since his codefendant had waived his opportunity to appear in the first trial. Chances are the Pierringer will be considered a "special circumstance" that ordinarily will vitiate any estoppel by verdict.

156. See notes 39-41 supra and accompanying text.


158. As President Truman said: "If you've done the best you can — if you have done what you have to do — there is no use worrying about it because nothing can change it. . . . You can't think about how it would be . . . if you had done another thing. You have to decide." M. MILLER, Plain Speaking: An Oral Biography of Harry S. Truman 201 (1973). Dean Acheson is also quoted as saying: "I incline to go along with Winston Churchill, who said that among the deficiencies of hindsight is that while we know the
VII. CONCLUSION

As tort litigation becomes more complex, both in terms of theories of recovery and increasing numbers of defendants, the need also grows, if cases are to be disposed of short of trial, for new methods of settlement. The recent evolution of the law on apportioning liability for tort, enabling the parties to sort out their respective risk exposures—such as the device of comparative negligence and the blurring of the lines between contribution and indemnity—has helped in the effort to devise new forms of settlement techniques.

The Pierringer release is a good example of the common law working out its own problems. Taking legal concepts on hand and applying them with common sense, a method of settlement has been fashioned which facilitates disposition of litigation in an economical and fair manner.

EDITOR’S NOTE: Two cases relating to the effect of settlements with joint tortfeasors were recently decided by the Minnesota Supreme Court: Pacific Indemnity Co. v. Thomson-Yaeger, Inc., No. 45761 (1976) (Minn. Sup. Ct. Sept. 16, 1977); Luxenburg v. Can-Tex. Industries, No. 46867 (Minn. Sup. Ct. Aug. 19, 1977). The decisions appear to be consistent with the views expressed in this Article and are indicative of the fluidity of this entire area of law.

consequences of what was done, we do not know the consequences of some other course that was not followed." Id. at 387. For an excuse for the insertion of this footnote, see The Footnote as Excursion and Diversion, 55 A.B.A.J. 1141 (1969).