

Effect of a Settlement With One Co-Obligor Upon the Obligations of the Others

Harold C. Havighurst

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

Recommended Citation

Harold C. Havighurst, *Effect of a Settlement With One Co-Obligor Upon the Obligations of the Others*, 45 Cornell L. Rev. 1 (1959)
Available at: <http://scholarship.law.cornell.edu/clr/vol45/iss1/1>

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

CORNELL LAW QUARTERLY

VOLUME 45

FALL, 1959

NUMBER 1

THE EFFECT OF A SETTLEMENT WITH ONE CO-OBLIGOR UPON THE OBLIGATIONS OF THE OTHERS*

Harold C. Havighurst†

It has long been the general rule that where a number of obligors are liable on the same obligation, the release of one releases all. This applies both to co-debtors and to joint tortfeasors.¹ Although here and there one may find favorable comment upon the rule,² textwriters, without notable exception, have expressed the view that the reasons given for it have been inadequate,³ and it has been subjected at times to severe criticism in judicial opinions.⁴ It appears as a survival from an older day when the law for the most part was less concerned, as we think, about giving effect to the intentions of the parties and less sensitive to

* For research assistance in the preparation of this article the author is indebted to Ronald W. Ruther, Student, Northwestern University School of Law.

† See Contributors' Section, Masthead, p. 83, for biographical data.

¹ Although the term "obligor" is sometimes thought of as referring to a debtor as distinguished from a tortfeasor, it will be used in this article to refer to both.

The cases are very numerous. A few which are recent or which may be considered representative are here cited. Co-debtors: *United States v. Wainer*, 211 F.2d 669 (7th Cir. 1954) (applying "common law" to joint and several tax liability); *Clark v. Mallory*, 185 Ill. 227, 56 N.E. 1099 (1900); *Perry v. Oliver*, 317 Mass. 538, 59 N.E.2d 192 (1945); *Wade v. Tapp*, 285 P.2d 377 (Okla. 1955); *North Pacific Mortgage Co. v. Krewson*, 129 Wash. 239, 224 Pac. 566 (1924). Tortfeasors: *Bee v. Cooper*, 217 Cal. 96, 17 P.2d 740 (1932); *Reid v. Lowden*, 192 La. 811, 189 So. 286 (1939); *Milks v. McIver*, 264 N.Y. 267, 190 N.E. 487 (1934); *King v. Powell*, 220 N.C. 511, 17 S.E.2d 659 (1941); *Smith v. Thompson*, 210 N.C. 672, 188 S.E. 395 (1936); *First National Bank v. Bank of Waverly*, 170 Va. 496, 197 S.E. 462 (1938); *Cocke v. Jennor*, Hob. 66 (1614).

A voluntary dismissal with prejudice has the same effect as a release: *Wallner v. Chicago Consol. Traction Co.*, 245 Ill. 148, 91 N.E. 1053 (1910). This is not the effect if the dismissal is without prejudice: *Lewis v. Johnson*, 12 Cal. 2d 558, 86 P.2d 99 (1939); *Apley Estates Co., Ltd. v. De Bernales* (1947) Ch. Div. 217 (stay of proceedings).

² *Haney v. Cheatham*, 8 Wash. 2d 310, 111 P.2d 1003, 1006 (1941); *McBride v. Scott*, 132 Mich. 176, 182, 93 N.W. 243, 245 (1903). The rule as applied to release of tort claims has now been abolished in Michigan by statute; see *infra* note 6.

³ 4 Corbin, *Contracts* § 931 (1951); 2 Williston, *Contracts* § 334; (Williston & Thompson rev. ed. 1936); 1 Harper and James, *Law of Torts*, § 10.1 (1956); Prosser, *Law of Torts*, § 46 (2d ed. 1955). See also Wigmore, "Release to One Joint Tortfeasor," 17 Ill. L. Rev. 563 (1923), and Note, 13 Cornell L.Q. 473 (1928).

⁴ In addition to cases definitely discarding the rule, *infra* note 7, see *Aiken v. Insull*, 122 F.2d 746, 751 (7th Cir. 1941) cert. den., 315 U.S. 806 (1942); *Dwy v. Connecticut Co.*, 89 Conn. 74, 92 Atl. 883, 890 (1915) (concurring opinion); *Black v. Martin*, 88 Mont. 256, 266-269, 292 Pac. 577, 580-581 (1930); *Apley Estates Co. Ltd. v. De Bernales* (1947) Ch. Div. 217, 221.

considerations of fairness in the administration of justice.⁵ Unquestionably there is here a pit into which the legally uninformed have often fallen and into which even lawyers insufficiently careful or practicing by ear have occasionally stumbled to the downfall of a client.

It is possible that this ancient inheritance is on its way out. In more than a third of the states changes applicable to co-debtors have been made by statute, and in a number the rule as applied to the release of joint tortfeasors has been abolished.⁶ In some jurisdictions also by judicial decision it has been modified to relieve its rigor and to save the unwary from the pit.⁷

Yet the rule seems to have some vitality. Over the centuries the great majority of the courts have continued to follow the older holdings and, in spite of the inroads mentioned above, they still constitute an active element in our jurisprudence. To the movement away from the rule, which is in large part attributable to the influence of the text-writers, there is considerable resistance. And this cannot easily be accounted for as the result of a blind adherence to precedent. As Holmes said in a familiar passage, "the law is administered by able and experienced men". They not only "know too much to sacrifice good sense to a syllogism" but they also know too much to continue indefinitely to be

⁵ Cf. Jacobs, J. in *Breen v. Peck*, 28 N.J. 351, 356, 146 A.2d 665, 668 (1958): "The rule was evolved when metaphysics rather than justice was the dominant factor and obviously tends to defeat the fair expectations and intentions of the parties to the release"

⁶ Statutes usually apply to the release of either contract or tort claims, not to both. The following abolish or modify the rule as applied to the release of debts: Cal. Civ. Code, § 1543 (exception for "guarantors"); Col. Rev. Stat. 1953, § 76-1-2 (to be taken as payment of proportionate share of release); Gen. Stat. of Conn. § 52-142 (1958); Gen. Stat. of Kan. §§ 56-203, 56-205 (1949); Mich. Stat. Ann., §§ 20.133, 20.135; Minn. Stat. Ann., § 548.21 (given effect of payment of "equal share of debt"); Miss. Code § 334 (1942); Vernon's Ann. Mo. Stat., § 431.150; Rev. Code of Mont. §§ 8107, 8108 (1947), (operates as payment equal to proportionate interest of debtor discharged); Baldwin's Ohio Rev. Code, §§ 1779.10, 1779.11; Gen. Laws of R.I. 1956, §§ 7-12-9, 7-12-10; Code of S.C. § 11-253 (1952); S. Dak. Code of 1939, § 47.0242 (exception for guarantors); Vt. Stat. Ann., § 5054; Code of Va., § 11-10. The rule as applied to tortfeasors has been changed by the following statutes: Mich. Stat. Ann. § 27.1683(2) (Cum. Supp. 1957); Vernon's Ann. Mo. Stat., § 537.060; W. Va. Code of 1955, § 5481. The 1939 Uniform Contribution Among Tortfeasors Act, § 4, also abolishes the common law rule. This Act was passed in Arkansas, Delaware, Hawaii, Maryland, New Mexico, Pennsylvania, Rhode Island and South Dakota. For statutory citations see 9 Un. Laws Ann. p. 230. The Revised Act of 1955 contains essentially the same provision. It has been enacted in North Dakota. See 9 Un. Laws Ann., 1958 Pocket Part, p. 19.

The Model Joint Obligations Act, § 5, provides that the release of a co-obligor discharges others only for the amount for which the releasor was the principal debtor. This Act is law in Hawaii, Nevada, New York, Utah and Wisconsin. See 9B Un. Acts. Ann. (1957) p. 227. It applies to both contract and tort obligations. In respect of the latter, its language, if taken literally, would abolish the rule where there is no right of contribution. But it has been held not to have this effect. *Greenhalch v. Shell Oil Co.*, 78 F.2d 942 (10th Cir. 1935). See also *Rector, Church Wardens of St. James Church v. City of New York*, 261 App. Div. 614, 26 N.Y.S.2d 762 (2d Dep't 1941).

⁷ *McKenna v. Austin*, 77 U.S. App. D.C. 228, 134 F.2d 659 (1943); *Gronquist v. Olson*, 242 Minn. 119, 64 N.W.2d 159 (1954); *Breen v. Peck*, 28 N.J. 351, 146 A.2d 665 (1958).

influenced by an empty shell of legal doctrine which bears no relation to values which they find acceptable. One suspects that there may be underlying policies which provide some nourishment for the old rule. We propose therefore to examine the reasons which have been advanced in its support and the limitations upon its operation to see if there is anything in it that ought to be salvaged.

REASONS GIVEN FOR THE RULE

The reasons will be discussed under the following headings: (1) the construction of the instrument against the releasor; (2) the limitation of the claimant to one satisfaction; (3) the difficulties presented by the right of contribution; and (4) the unitary character of the obligation.

The Construction of the Instrument Against the Releasor

A passage in Littleton, commented upon by Coke, states, in effect, that if two men commit a trespass, a release by deed to one releases also the other. Coke points out that the trespass may be regarded as joint and several, but the release of one trespasser releases all because the deed of the injured party "shall be taken most strongly against himself".⁸ Thus he bases the rule upon the old principle of construction that a deed is to be construed against the grantor.⁹

It will be noted that both Littleton and Coke emphasize that the release is by deed, and this presumably has reference to the technical release under seal. It is doubtful, however, whether even in Coke's time this was widely understood as the reason for the rule, and other expressions of that period indicate that its operation was not limited to release by deed.¹⁰ Be that as it may, although a few modern cases refer to the passage mentioned,¹¹ there is little disposition to accept this as the rationale. The release is no longer looked upon as a deed but as an informal contract, and there is no principle of construction applicable to contracts which requires an interpretation operating most strongly against the releasor. There is, to be sure, a principle of contract law under which an instrument is construed against the party responsible for its drafting,¹² but since releases are usually drafted by releasees,

⁸ Coke, Commentary upon Littleton (§ 376) 232 a.

⁹ 2 Devlin, Law of Real Property and Deeds (§ 848), (3d ed. 1911).

¹⁰ Notes to later editions of Coke on Littleton include references to early cases where a release in law or a retraxit was held to have the same effect as a release by deed. See also Cheetham v. Ward, 1 Bos. & P. 630 (1797). There was a period when the rule was regarded as applicable only to technical releases under seal; but this is no longer true.

² Williston, Contracts § 333A (Williston & Thompson rev. ed. 1936).

¹¹ See Dwy v. Connecticut Co., 89 Conn. 74, 78, 92 Atl. 883, 884 (1915), and cases there cited.

¹² Restatement, Contracts § 236(d) (1932).

if this principle is applied, it would more often than not require the opposite result. Coke's reason therefore is of no service today.

Limitation of the Claimant to One Satisfaction

The ground stated in the early English cases, and repeated again and again in modern opinions, is that a claimant is entitled to only one satisfaction.¹³ On its face this appears to be an unsound reason. For when a claim is liquidated, a release may be given for less than the full amount, and there is consequently less than complete satisfaction. If the claim is unliquidated, the settlement is most often below the claimant's evaluation, and it cannot be known whether there has been complete satisfaction until there has been a determination by court or jury of its value. Consequently, it would appear that if amounts paid in settlement to one obligor are credited upon the claim and suit permitted against one or more co-obligors only for the balance, there is no possibility of more than one satisfaction.

Nevertheless, although the courts seldom spell it out, the point is significant in that the claimant who may look to several persons for his recovery has a great advantage if he is permitted to settle with one and preserve his rights against others. This is indeed hardly perceptible when the claim actually goes to judgment against one of the co-obligors, for then it can be known that it is a valid claim and, if it was unliquidated, the amount has then been fixed. But the advantage is apparent when account is taken of the fact that if the claimant, after settling a disputed claim with one co-obligor, may sue others, he is in a position to make successive settlements with all of them.¹⁴

To simplify, suppose that C has a disputed claim for \$200 against D, E, and F, who are solvent joint and several obligors, and that if the question should be litigated C has a 50% chance of recovering this amount. If there were only one obligor, \$100 would represent a fair settlement. There being three, however, each one of whom is liable for the full amount, C may threaten action against D and presumably settle for \$100; if amounts paid in settlement are credited on the claim, C would then be able to settle with E for \$50 and later with F for \$25, for a total of \$175. If the claim were litigated, C might recover \$200 or he might recover nothing. But as an unlitigated claim, on the assumptions made, it would seem to be worth only \$100. When C obtains that amount from D, he has in a sense received satisfaction, and when he

¹³ *Cocke v. Jennor*, Hob. 66 (1614). Practically all of the cases cited in note 1 give this as the reason.

¹⁴ Cf. *McBride v. Scott*, supra note 2 where it is said at p. 182 that to permit the saving of the right against other tortfeasors "would open the door for the plaintiff in any case to acquire by successive settlements more than just compensation."

is paid additional amounts by E and F, he is in this sense obtaining more than satisfaction. It is believed that this is the sense in which the courts are using the term when in support of the rule they say that the claimant is entitled to only one satisfaction.

Even when thus explained, to be sure, the reason given may not be convincing. The highly simplified illustration presented above, in the attempt to explain what the courts may have in mind, does not afford a realistic picture of what actually happens when claimants are free to make separate successive deals with a number of obligors. There are many other factors affecting settlements. Where contribution rights are recognized, the pressure on a single obligor whose liability is in whole or in part secondary is reduced since, if co-obligors are solvent, the ultimate amount he will be out of pocket as a result of a judgment against him for the full amount will be less. In the case of tort obligations, of course, most jurisdictions do not as a general rule permit contribution, and this consideration would not apply. But in all instances where there are co-obligors, since the expense and uncertainty of litigation provide pressures on the claimant, the fact that he may be able without suit to obtain more in settlement with others tends to induce him to take less from any particular obligor.

Nevertheless, it is apparent that the reason has more validity than is commonly attributed to it in treatises which deal with the subject. Even with the limitations above noted, it appears that a claimant who is entitled to look to a number of obligors for the payment of his claim has an advantage beyond the benefit that comes from having the financial responsibility of all. And it is at least a conceivable view that he should not be in a position in successive settlements with the respective co-obligors to receive more than he would be able to obtain from a single solvent obligor.¹⁵

Difficulties Presented by the Right of Contribution

In addition to the reasons given in the older cases, the modern opinions have in a number of instances referred to the difficulties presented in connection with rights of contribution which arise when, after the release of one co-obligor for less than the whole amount of the claim, another is required to pay the balance.¹⁶ There can be no doubt that this situa-

¹⁵ Upon this view of the reason for the rule it is apparent that there is no necessary relation between the effect of a release of a single co-obligor and the effect of a judgment against him. Consequently, if this reason has any validity, there would be no basis for the Comment to § 123 of the Contracts Restatement, suggesting the desirability of giving the same effect to a release as to a judgment.

¹⁶ *North v. Wakefield*, 13 Q.B. 536, 541 (1849); *Nevill's Case*, L.R. 6 Ch. 43, 47 (1870); *Ex parte Good*, L.R. 5 Ch. Div. 46, 55 (1877). In this last case the reason was stated by the Chief Judge in bankruptcy. The Court of Appeal affirmed on the ground that the

tion does create problems. If co-obligors are principal and surety and after settlement with the principal debtor the surety is required to pay more, he has a right of contribution, which, if enforced, will result in the necessity of further payment by the principal debtor. This would appear to be a hardship upon the principal debtor who must undoubtedly have cherished the thought that the amount paid in settlement was all that was required of him in order to rid himself of the claim. There is a similar hardship upon an obligor who, as against co-obligors, is liable for an aliquot part, if he settles for less than his part and is later called upon to respond in contribution. These hardships are, of course, avoided when the rule is applied that the release of one co-obligor releases all.

Whatever the strength of this consideration in its bearing upon the desirability of the rule, it is obvious that it has not been the controlling reason for it, since the rule has been applied with perhaps the greatest rigor in the case of tort claims and in jurisdictions where there is no right of contribution.

The Unitary Character of the Obligation

The final reason appears to have proper application only to obligors who are jointly bound as distinguished from those who are bound jointly and severally. The reason is wholly of an intellectual character, stemming from the nature of a joint obligation. The thought is that, since in an action upon a joint obligation all obligors must be joined, if one has been released the action cannot proceed. Or, looking at the matter in a slightly different way, it may be said that under a joint obligation there is no separate cause of action against a single obligor. There appears to be nothing by way of policy or common sense to support this reason.

The result undoubtedly follows from the technical conception of the joint obligation and this is of medieval origin. But to support the rule under consideration, the earlier writers and cases, as we have seen, do not rely upon this reasoning. Although it is perhaps implicit in some of the older opinions which reify the obligation and look upon the release as an extinguisher,¹⁷ definite expression of the thought is hard to find prior to *Duck v. Mayeu*¹⁸ decided in 1892. The opinion in this case regards a tort as creating a "joint" liability and explains the rule on the ground that the cause of action is "one and indivisible".

release was not under seal. See supra note 10. Jessel, M.R., in the course of the argument made this interesting observation: "It is very dangerous for modern judges to endeavor to find modern reasons for these old rules" (p. 57).

¹⁷ Cf. *Lacy v. Kynaston*, 12 Mod. 415 (1701), where the court wrestled with the question whether, since a covenant not to sue was the basis for a plea in bar, it should be given the same effect as a release in respect of the discharge of co-obligors.

¹⁸ 2 Q.B. 511 (1892).

In the Restatement of Contracts the limitations upon the application of the rule rest upon this intellectual figment. The distinction is sharply drawn between the joint obligation on the one hand and the joint and several obligation on the other. A release of a promisor who is liable on a joint and several promise is said to discharge only the joint duty of the other obligors.¹⁹ This is in contrast to the Restatement of Torts which does not use the terms joint or several and states that when a number of tort-feasors are liable for the same harm, the release of one, in the absence of a reservation of rights, discharges the others.²⁰

The way in which the Restatement of Contracts deals with the matter is to be explained, no doubt, by the fact that amid the confusions and anomalies of the law on the subject, this approach is the only one which yields a logical basis for some kind of harmony. This is achieved, however, only by the recognition of a distinction which can be justified only upon a metaphysical ground. To say that the rule applies when the obligation is joint, but not when it is joint and several, is as devoid of practical sense as any assertion for which support can be found in the law books.

There is, nevertheless, a pragmatic basis upon which the Restatement position could be defended. This becomes apparent when account is taken of the fact that statutes in many states now provide that all joint obligations are to be regarded as joint and several,²¹ and the joint obligation is of little importance anywhere today. Consequently, the practical effect of acceptance of the Restatement's position would simply be to change the common law rule in almost all instances where it would otherwise apply. This may have been the purpose of its framers. And it is possible that in the course of time some results may be observed.²²

COVENANT NOT TO SUE

Account must now be taken of the distinction between a release and a covenant not to sue. Although to prevent circuitry such a covenant is recognized as a defense in an action against the covenantee and for this purpose is the equivalent of a release, it has not been treated as so equivalent when it is interposed as a defense in an action against co-

¹⁹ Restatement, Contracts § 123 (1932). The section adds "except in the cases and to the extent required by the law of suretyship".

²⁰ Restatement, Torts § 885 (1939).

²¹ See Williston, Contracts § 336 (Williston & Thompson rev. ed. 1936).

²² The Restatement view was followed in *Singer v. Ritter*, 167 Pa. Super. 154, 74 A.2d 520 (1950). See also *Tinkham v. Wright*, 163 S.W. 615 (Tex. Civ. App. 1914) and *Krbel v. Krbel*, 84 Neb. 160, 120 N.W. 935 (1909).

obligors. A covenant not to sue given by one obligor does not as a general rule prevent suit against the others.²³

Why this is true is not made clear in the early cases. No doubt the conception was that the release had the effect of extinguishing the obligation whereas the covenant did not. Furthermore, if, as a matter of construction, the benefit of the covenant had been extended to obligors other than the covenantee himself, the other obligors would be the beneficiaries of a contract to which they were not parties. And although the well-known case of *Dutton v. Poole*²⁴ indicates a view of a contract for the benefit of a third person in the seventeenth century that was more enlightened than the English law on the subject today, the report of that case affords ample evidence that this was not a familiar conception to the legal thought of an earlier period when the distinction in respect of the release and the covenant not to sue was established.

Nevertheless, insofar as any reasons given then or later for the rule in respect of releases may be identified with considerations of policy, it must be recognized that every one is just as applicable whether the instrument used to formalize the settlement is a covenant not to sue or a release. For if the rule is grounded upon the fear that a claimant might otherwise through successive settlements obtain more than he would be able to obtain in settlement with a single solvent obligor, it does not serve its purpose so long as the claimant may have this advantage if he will see to it that each settlement is evidenced by an instrument containing only a covenant not to sue unaccompanied by any language of release. Also, the possibility of hardship arising from the subsequent enforcement of contribution rights against an obligor who has settled is equally present when the instrument used is a covenant not to sue.

In view of the undoubted fact that the policies suggested in the reasons given may thus easily be evaded, it might be thought that these policies can have no part in explaining either why the rule came into being or

²³ *Caruso v. City of Chicago*, 305 Ill. App. 571, 27 N.E.2d 545 (1940); *Bedwell v. De Bolt*, 221 Ind. 600, 50 N.E.2d 875 (1943); *Haney & Campbell Mfg. Co. v. Adaza Co-op. Creamery Co.*, 108 Iowa 313, 79 N.W. 79 (1899); *Matheson v. O'Kane*, 211 Mass. 91, 97 N.E. 638 (1912); *Burke v. Burnham*, 97 N.H. 203, 84 A.2d 918 (1952); *Apley Estates Co., Ltd. v. De Bernales*, Ch. Div. 217 (1947); *Hutton v. Eyre*, 6 Taunt. 289 (1815); *Lacy v. Kynaston*, 12 Mod. 415 (1701). A covenant may be so broadly worded as to effect the release of other co-obligors: *Shaw v. Crissey*, 182 Misc. 27, 43 N.Y.S.2d 237 (Sup. Ct. Saratoga County 1943). A covenant not to enforce a judgment given to one co-obligor has no more effect upon the obligations of others than a covenant not to sue: *Barnett v. Conklin*, 268 Fed. 177 (8th Cir. 1920) cert. den. 255 U.S. 570 (1921); *Pellett v. Sonotone Corp.*, 26 Cal. 2d 705, 160 P.2d 783 (1945); *Gillette Motor Transport Co. v. Whitfield*, 186 S.W.2d 90 (Tex. Civ. App. 1945).

Such a covenant is commonly used to evidence a settlement entered into after action has been instituted, since a dismissal by consent with prejudice is usually held to have the same effect as a release. See note 1, *supra*. On the question of the effect of such a covenant without disclosure, see discussion *infra* p. 18.

²⁴ 2 Levinz 210 (1677).

why it has demonstrated some capacity to survive. Yet considering the rather haphazard way in which doctrine is established and maintained under a system that is primarily one of case law, the fact that there is a ready avenue of evasion does not necessarily mean that these policies have not been significant.

In the first place, although the rule can be evaded, it is obvious that either because of the bar's frailty or the claimant's lack of foresight, the evasion has not always been accomplished. In spite of the fact that a claimant who has any thought of seeking successive settlements, if he is properly advised, will insist that the instrument he executes evidencing a settlement with one obligor takes the form of a covenant not to sue, there are numerous reported cases which reveal instances in which he actually did execute a release in this situation and the rule was applied.

But it may be asked—if the survival of the rule is to be accounted for by underlying policies, why have not these same policies dictated the extension to co-obligors of the benefit of the covenant not to sue? The answer, it is believed, is to be found in the delicate balance of considerations for and against the discharge of others. Contending for recognition here is always the principle that the intent of the parties should control, and in most instances it is either the clear or at least the probable intent to preserve rights against co-obligors. The apparent harshness of the result when clear intent is defeated would no doubt have long ago driven the rule out of the common law were it not for the policies mentioned. But these policies have not been strong enough to generate a comparable intention-defeating rule for covenants not to sue. A few decisions are to be found where the learning of the past apparently was not brought to bear upon the judicial consciousness and the "rule" was applied although the instrument involved was plainly nothing more than a covenant.²⁵ For the most part, however, the policies being in balance, courts have been content to let the form of the instrument determine the result. Actually, when parties are in a position to obtain legal advice, the attitude of the judges and the accepted view of the profession is not unfavorable to the notion that a party who receives good technical advice should fare better in the courts than one whose adviser has failed him.

RELEASE WITH RESERVATION OF RIGHTS

When in a release rights are reserved against co-obligors, a difference is recognized in some jurisdictions between contract and tort claims.

²⁵ *Goldstein v. Gilbert*, 125 W. Va. 250, 23 S.E.2d 606 (1942) (applying Virginia law); *Smith v. Roydhouse, Arey & Co.*, 244 Pa. 474, 90 Atl. 919 (1914). It is to be noted that Pennsylvania has now adopted the Uniform Contribution Among Tortfeasors Act, which effects a change in the law on the subject. See *supra* note 6.

In the case of co-debtors substantially all courts give effect to the reservation and the rule does not apply. This, it is obvious, would not be the result if the implications of the rationale based upon the unitary character of the obligation were rigidly adhered to. Even under the theory of the Contracts Restatement a joint obligation, as distinguished from one that is joint and several, would be extinguished and the reservation could have no effect. Here, however, the intention is made clear on the face of the instrument, and the English cases from an early period have taken the view that in order to carry out the intention a qualified release should be treated as a covenant not to sue.²⁶ Once this transformation is accomplished, the principles applicable to the covenant not to sue apply, the obligation is not extinguished and the instrument is not regarded as evidencing a satisfaction.²⁷

Many of the jurisdictions in the United States, however, have not been willing to recognize this transformation when the claim released is a tort claim.²⁸ They have said that the release is the equivalent of satisfaction and the reservation is consequently repugnant and ineffective. Yet the same courts will give effect to the reservation when a contract obligation is involved, even though as far as this method of reasoning is concerned there is no difference between tort and contract. The distinction must be attributed to the underlying policy considerations. The fear that the claimant through successive settlements with co-obligors may obtain an undue advantage appears to be stronger when the claim is in tort.

THE EFFECT OF THE SURETYSHIP RELATION

In the case of joint and several debtors there is always some relation of suretyship. Either one of them is the principal debtor and the others are sureties, or each one is a principal debtor for some portion of the obligation and a surety as to the balance. In tort, in a number of jurisdictions where the right of contribution among tortfeasors is recognized, the relationship is substantially the same as in the case of joint

²⁶ *Solly v. Forbes*, 2 Brod. & B. 38 (1820); *Thompson v. Lack*, 3 C.B. 540 (1846).

²⁷ *Parmelee v. Lawrence*, 44 Ill. 405 (1867); *Snyder v. Miller*, 216 Ind. 143, 22 N.E.2d 985 (1939); *Dodson v. Continental Supply Co.*, 175 Okla. 587, 53 P.2d 582 (1935); *Johnson v. Stewart*, 1 Wash. 2d 439, 96 P.2d 473 (1939).

²⁸ *Aiken v. Insull*, 122 F.2d 746 (7th Cir. 1941) cert. den., 315 U.S. 806 (1941) (Illinois law); *Bittner v. Little*, 168 F. Supp. 30 (E.D. Pa. 1959); *Bee v. Cooper*, 217 Cal. 96, 17 P.2d 740 (1932); *Ducey v. Patterson*, 37 Colo. 216, 86 Pac. 109 (1906); *Roper v. Florida Public Utilities Co.*, 131 Fla. 709, 179 So. 904 (1938); *Bland v. Warwickshire Corp.*, 160 Va. 131, 168 S.E. 443 (1933); *Abb v. Northern Pacific Ry.*, 28 Wash. 428, 68 Pac. 954 (1902).

A substantial number of jurisdictions give effect to the reservation in tort cases: *Carey v. Bilby*, 129 Fed. 203 (8th Cir. 1904); *Dwy v. Connecticut Co.*, 89 Conn. 74, 92 Atl. 883 (1915); *Black v. Martin*, 88 Mont. 256, 292 Pac. 577 (1930); *Gilbert v. Finch*, 173 N.Y. 455, 66 N.E. 133 (1903).

or joint and several debtors. Also, in a situation where liability rests upon an employer by reason of *respondeat superior*, the right of indemnity against the agent who has committed the tort produces a relation comparable to that of principal and surety, the employer being, of course, the "surety". Other such instances are presented by cases involving injuries from defective sidewalks or from the operations of a municipal contractor where the abutting owners and contractors respectively have the primary liability and the municipality occupies the position of a surety.²⁹

As suggested earlier, certain equitable considerations arising out of the surety relation have been thought to lend some support to the rule. Whether or not such considerations have been significant in accounting for the rule's survival, they have provided the basis for exceptions both to the rule which effects the discharge of co-obligors when a release is given to one, and to the rule under which rights against co-obligors are preserved when a covenant not to sue has been given.

It is held that if the co-obligor released is a surety, the rule does not operate to discharge the principal obligor.³⁰ This must of course be the result if the rule rests upon the inequity of permitting a releasee to be deprived of the benefit of his release through the subsequent assertion of a right of contribution; for there would never be any such right against a surety releasee. If, however, the emphasis is placed upon the unitary character of the obligation and the extinguishing effect of the release, there would be no basis for an exception here. Furthermore, the possibility that the claimant might obtain an undue amount by successive settlements would seem to be just as great when the surety is released first as in any other case of successive settlements. Indeed if a surety is solvent—and a surety is supposed to have that virtue—it would seem that a claimant could be expected to obtain the full value of a doubtful claim in the initial settlement. It is probable, however, that in most instances where the creditor settles a claim with a surety the principal obligor is insolvent, and thus it is seldom that a claimant actually succeeds in obtaining an undue advantage.

²⁹ For example, see *Herron v. Youngstown*, 136 Ohio St. 190, 24 N.E.2d 708 (1940); *Nixon v. City of Chicago*, 212 Ill. App. 365 (1918). In some states, however, the municipality is primarily liable for injuries caused by defective public sidewalks. See *Town of Antlers v. Benson*, 247 F.2d 437 (10th Cir. 1957).

³⁰ *Austin-Western Road Mach. Co. v. Spencer*, 187 Miss. 388, 193 So. 336 (1940); *Mumford v. Solomon*, 8 Ga. App. 286, 68 S.E. 1075 (1910); *McIlhenny Co. v. Blum*, 68 Tex. 197, 4 S.W. 367 (1887). The release of the master does not release the servant: *Wright v. McCord*, 205 Ala. 122, 88 So. 150 (1920); *Losito v. Kruse*, 136 Ohio St. 183, 24 N.E.2d 705 (1940).

The Uniform Joint Obligation Act provides for the release of other obligors only to the extent that the obligor released is primarily liable. See *supra* note 6. Note also the California and South Dakota statutes.

The other exception has to do with the effect of covenants not to sue. As earlier indicated, such a covenant does not, as a rule, prevent a subsequent action against co-obligors. But when a claimant, knowing of the surety relation, gives to a principal obligor a covenant not to sue and then seeks additional recovery from a surety, the view is that the latter has a defense.³¹ It has been suggested that the reason for this is to prevent possible prejudice to the surety.³² This may be well-founded in instances where the right of subrogation is involved, if the surety who seeks subrogation succeeds to the right of the creditor burdened with all the defenses to which it is subject. But contribution is usually a sufficient remedy, and it is moreover not entirely clear that the equitable defense provided by the covenant, which could be asserted against the creditor, would be available against a subrogated surety.³³

The more satisfactory reason for the exception is the one mentioned as supporting the rule with reference to releases—i.e. the hardship upon the principal obligor which would come about if the surety, being required to respond, should subsequently enforce a claim for contribution. Even though the construction of the covenant may be somewhat strained, there appears to be ample justification for extending its benefit to the surety in order that its benefit to the released principal obligor should not be nullified. This was the ground advanced in *Karcher v. Burbank*,³⁴ a well reasoned case holding that the principal was discharged by a covenant not to sue given to an agent in the settlement of a tort claim.

As also noted in connection with the discussion of the reasons for the rule, the possibility of the same type of hardship is present, though in less degree, in any case of a settlement effectively reserving rights against co-obligors where the right of contribution exists and as among themselves the liability is equal.³⁵ The logic of the view that a surety is

³¹ *Karcher v. Burbank*, 303 Mass. 303, 21 N.E.2d 542 (1939); *Bello v. City of Cleveland*, 106 Ohio St. 94, 138 N.E. 526 (1922). See also *Casper National Bank v. Jones*, — Wyo. —, 329 P.2d 1077 (1958) and *Kirby v. Taylor*, 6 Johns. Ch. (N.Y.) 242, 252 (1822). It has sometimes been thought, though it would seem erroneously, that if the surety is not discharged when the principal debtor is released, the surety would have no right of contribution. See *Losito v. Kruse*, 136 Ohio St. 183, 24 N.E.2d 705 (1940); *Ward v. Fleming*, 18 Ga. App. 128, 88 S.E. 899 (1916).

³² See 2 Williston, *Contracts* § 339 (Williston & Thompson rev. ed. 1936).

³³ Cf. *Restatement, Security* § 122, Comment on Clause (b) (1941): "Since the release (with reservation of rights) was regarded as only a covenant not to sue, even the surety's right of subrogation was technically reserved."

³⁴ 303 Mass. 303, 21 N.E.2d 542 (1939).

³⁵ The Uniform Contribution Among Tortfeasors Act (1955) avoids any harshness in this respect by providing in § 4(b) that a release or covenant given in good faith to one tortfeasor (which under § 4b does not affect rights against others) discharges the tortfeasor to whom it is given from all liability for contribution. 9 Un. Laws Ann. 1958 Pocket Part, p. 25. This represents a change from the 1939 Uniform Act and was made in order to facilitate settlements.

released when the claimant gives to the principal obligor a covenant not to sue would here require that each co-obligor, other than the covenantee, be discharged to the extent that he is a surety for the covenantee. This was suggested as one solution of the hardship problem in *McKenna v. Austin*,³⁶ presently to be discussed in its bearing upon the status of the rule in respect of releases generally. It is also to be noted that many statutes, including the Model Joint Obligation Act, in changing the rule applicable to releases so that all co-obligors are not necessarily discharged, provide in effect that a release given to one co-obligor discharges that part of the respective obligations of others for which the obligor released was primarily liable.³⁷

Although co-obligors have properly been held to be discharged by a covenant not to sue to the extent that the releasor is chargeable with knowledge that their obligations are secondary, courts are divided upon the question whether this is the result when the covenant is accompanied by a reservation of rights.³⁸ Hardship upon the obligor who has settled is also a possibility here, but courts which hold that co-obligors are not discharged say that when there is an express reservation the principal obligor should anticipate that he might later be required to pay more by reason of his duty to respond to a claim for contribution.

This is, perhaps, not an entirely satisfactory basis for a distinction in view of the fact that, whatever the law on the point is determined to be, one who receives proper legal advice can obtain protection in any case and one who does not is likely to suffer. Yet there is good reason, as a practical matter, at least in the case of debts, for leaving some method by which rights against a surety can be preserved. Otherwise a creditor who would like to settle with an obligor of doubtful financial responsibility for less than the whole amount owed would find it impossible to do so without the loss of his right against the surety. This would constitute a great handicap to the working out of composition agreements.³⁹ When the principal obligor is insolvent or execution proof, he will, of course, seldom be subjected to actual suffering by the subsequent accrual of the right of contribution, since in all probability it will never be asserted.

³⁶ 77 U.S. App. D.C. 228, 134 F.2d 659 (1943).

³⁷ See supra note 6.

³⁸ The reservation of rights is effective to preserve rights against a surety: Restatement, Security § 122(b) (1941); *Louisville Times Co. v. Lancaster*, 142 Ky. 122, 133 S.W. 1155 (1911); *Boucher v. Thomsen*, 328 Mich. 312, 43 N.W.2d 866 (1950); *Price v. Barker & Clark*, 4 El. & Bl. 760 (1855). The reservation is not effective: *Brown v. Louisburg*, 126 N.C. 701, 36 S.E. 166 (1900); *Hillyer v. East Cleveland*, 155 Ohio St. 552, 99 N.E.2d 772 (1951). A number of cases dealing with tort liability are collected in Annot., 20 A.L.R.2d 1044.

³⁹ Cf. Restatement, Security § 122 Comment (d) (1941).

THE IMPORTANCE OF THE NATURE OF THE SETTLEMENT

In recent years a number of courts have recognized the artificiality of the distinction between the release and the covenant not to sue. As a result less importance has been attached to the technical character of the instrument, and the attempt has been made to make the effect upon the obligation of co-obligors turn to some extent upon the nature of the settlement with one obligor who has been released. It is conceived that there may be a purchase of peace which does not purport to satisfy the claim, and the outcome in a subsequent action against a co-obligor may depend upon the determination as to whether the settlement falls within this category.

The desire to get away from artificiality, however, has led different courts in opposite directions. One view, favorable to plaintiffs, was expounded by Justice Rutledge while a member of the United States Court of Appeals for the District of Columbia. In *McKenna v. Austin*,⁴⁰ there had been a collision between an automobile and a taxicab in which plaintiff was a passenger. The taxicab owners had settled with plaintiff for \$3,000. Although the instrument evidencing the settlement had been phrased primarily as a covenant not to sue and had also included a reservation of rights, the draftsman had added words stating that it was intended as a complete discharge of the taxicab owners, thus bringing it within the category of a release. In plaintiff's action against the owners of the automobile, in order to hold that the court below was in error in granting defendant's motion for summary judgment, it was only necessary to decide that the reservation of rights was effective. The court, however, took the occasion to state that it is immaterial whether the instrument was a release or a covenant not to sue, that in either case other obligors will not be released if this was not the intention of the parties, that the nature of the prior settlement can be taken into account to determine whether it was intended as full satisfaction or merely as the "best obtainable compromise", but the presumption is against full satisfaction and discharge.

Thus, the decision entirely abolishes the ancient rule.⁴¹ It is said that "it is anomalous, . . . unjust in its consequences, and should be laid to rest". The question is made one of intention, and a heavy burden is placed upon the defendant to show an intention that other obligors should be released. Although the principle was announced in a tort case, it is plainly applicable also to contract claims.

⁴⁰ *Supra* note 36.

⁴¹ Substantially in accord are the views expressed in *Gronquist v. Olson*, 242 Minn. 119, 64 N.W.2d 159 (1954) and *Breen v. Peck*, 28 N.J. 351, 146 A.2d 665 (1958). In *United States ex rel. Marcus v. Hess*, 60 F. Supp. 333 (W.D. Pa. 1945), *aff'd*, 154 F.2d 291 (3rd Cir. 1946), it is said that the federal rule is in accord with *McKenna v. Austin*.

Another view—favorable to defendants—is set forth in *Haney v. Cheatham*.⁴² Curiously enough—and yet not so curiously either in view of the common judicial habit of resorting to legal fictions—the court here in terms preserves the distinction between the “release” and the “covenant not to sue”. It is stated that the former accomplishes the discharge of co-obligors whereas the latter does not, but the language of the instrument is not regarded as controlling on the point, at least if it is phrased as a covenant not to sue. Thus an instrument so phrased may be a “release” if it appears that the settlement with the one tortfeasor was reasonably compensatory. In the actual case, the settlement for \$1,000 was regarded as meeting this requirement. The opinion is unsatisfactory in some respects as there are actually several grounds of decision not clearly differentiated,⁴³ and the court’s attitude toward some of the basic questions is not made entirely clear. It would seem, however, that the court is far more concerned with policy than with intention. The old rule is called “a salutary rule of law”. It is plain that an express reservation of rights would be ineffective. The only departure from the majority holdings is to apply the rule to covenants not to sue as well as to releases, unless the settlement was not reasonably compensatory. On the other hand, if language of release is used, apparently the nature of the settlement is unimportant, and other tortfeasors are in all instances released.

These two cases, although representing different points of view, are alike in that they both take some account of the circumstances of the settlement. This is contrary to the method followed in most jurisdictions where, except for cases involving the surety relation, the courts in determining the effect of the instrument upon the obligation of co-obligors refuse to consider anything other than the language which appears on its face.

Thus, we have a problem of the extent to which particular language on the basis of a policy determination is to be regarded as open to explanation. Although not always recognized as such, it is plain that in this area there are differences of degree. An explanatory comment in the

⁴² 8 Wash. 2d 310, 111 P.2d 1003 (1941).

⁴³ The opinion seems to say at one point that if the instrument states that the covenant not to sue may be pleaded as a defense, it is a release, irrespective of the nature of the settlement. To understand another ground it is necessary to note that the action had been brought originally against both tortfeasors who will be designated as Cheatham and Shafer, and Shafer had filed a cross-complaint against Cheatham. After the plaintiff settled with Cheatham, the case was tried and the jury returned two verdicts in favor of Shafer—one against plaintiff and the other against Cheatham on the cross-complaint. The court states that the instruction concerning the effect of the release upon plaintiff’s claim against Shafer was immaterial since the jury found, apparently on the cross-complaint, that Shafer was not negligent.

Restatement of Contracts asserts that rules of law "giving a fixed meaning to particular words limit in varying degrees the liberty of showing a different meaning by the application of ordinary standards of interpretation", and that this "diminution of liberty may vary from almost entire deprivation to almost perfect freedom".⁴⁴ It appears that the boundaries of this freedom in respect of any particular rule are, for the most part, delineated by the kinds of circumstances which will be considered as bearing upon the effect of the language.

Basically of course the problem is one of balancing the desire to avoid artificiality and harshness of result in individual cases with the interests of certainty and ease of administration. The more facts admitted to be relevant, the greater the burden upon the process of judging. In the matter of the effect of releases and covenants not to sue, only a few courts have admitted evidence of what was said in negotiation as a source from which intention may be gathered.⁴⁵ But though the consideration of additional facts is limited to the nature of the settlement, a wide opportunity for individualization is opened up and greater effort is called for. The bonus for the effort, as above suggested, is the minimization of artificial distinctions; and there is increasing judicial acceptance of the view that the bonus is worth the effort.

But if evidence is to be admitted bearing upon the nature of the settlement, the question is presented as to what circumstances are to be deemed relevant upon the issue of whether the claimant has obtained satisfaction. In the cases, the only inquiry seems to have been with respect to the adequacy of the amount paid to compensate for injuries received. If the amount is reduced because of doubt concerning the releasee's liability, the thought seems to be that the claimant has not received satisfaction but has merely sold peace. This is particularly true of the reasoning of cases like *McKenna v. Austin*⁴⁶ which have taken the view most favorable to claimants.

The thought makes sense in the case of a tort claim, where the prospect of establishing the liability of the party with whom the settlement was made was less than the prospect of establishing the liability of others.⁴⁷ But it does not follow that the chance of establishing liability should

⁴⁴ Restatement, Contracts § 234, Comment c (1932).

⁴⁵ See 4 Corbin, Contracts, § 934 (1951). Cf. Restatement, Contracts, § 122 (1932): ". . . a written discharge cannot be varied by an accompanying oral statement or agreement that rights against other promisors are reserved." It is said in the comment that this result is required by the parol evidence rule. See also *Reid v. Lowden*, 192 La. 811, 189 So. 286 (1939).

⁴⁶ *Supra* note 36.

⁴⁷ It is to be noted that many courts hold that the rule is inapplicable if the releasee was in fact not liable. See *Yellow Cab Co. v. Bradin*, 172 Md. 388, 191 Atl. 717 (1937); 2 Williston, Contracts § 338 (Williston & Thompson rev. ed. 1936).

never be taken into account. If the issue of liability is the same for all co-obligors, as it usually is in the case of contract claims and as it sometimes is in the case of tort claims, the policy of minimizing the advantage to the claimant to be obtained by successive settlements requires that the adequacy of the initial settlement be determined with reference to the issue of liability as well as with reference to the amount of the anticipated recovery. This would also be true in the case of tort claims where settlement has been made with a tortfeasor whose liability is at least equally as clear as that of the others.

The question whether the initial settlement is to be regarded as "satisfaction" is often a difficult one. Although the amount paid to the claimant viewed in the light of the merits of the claim might provide the basis for its determination, yet the admission of evidence concerning other circumstances which may explain why the claimant was induced to accept less than a fair settlement would frequently be of assistance to the trier of fact in resolving the matter. One reason would be because the obligor who has settled is of questionable financial responsibility and it is therefore uncertain that a judgment against him could be collected. Since the number of cases taking into account the nature of the settlement are so few, it is not surprising that, up to the present time, no instances have been found where the court regarded such an explanation as relevant. But there can be no question that this factor very often accounts for the inadequacy of the amount paid in an initial settlement with one co-obligor.

There are also other situations in which the claimant may be induced to take less than an amount which is reasonably compensatory. One of these involves the liquidated and undisputed debt. The cases afford instances where a creditor, trusting in the willingness of all co-debtors to pay their respective shares of the obligation, has released one or more upon the payment of the part for which the releasee was primarily liable.⁴⁸ When the old rule has operated in this situation to prevent recovery against others, it has achieved its maximum harshness. It may be noted that unless the release was under seal, this could not have happened under the old common law because of the rule that part payment of a liquidated and undisputed claim was not a sufficient consideration for the release.⁴⁹ But it has come about under various exceptions to the consideration rule.

⁴⁸ Illustrative are *North Pacific Mortgage Co. v. Krewson*, 129 Wash. 239, 224 Pac. 566 (1924); *Monett State Bank v. Rathers*, 317 Mo. 890, 297 S.W. 45 (1927); *Line v. Nelson*, 38 N.J.L. 358 (1876).

⁴⁹ See Havighurst, "Problems Concerning Settlement Agreements," 53 Nw. U.L. Rev. 283, 291-294 (1958).

Another possibility is that the claimant by reason of a business or personal relation with one of the co-obligors should as a favor settle with him for a nominal amount, preferring to obtain substantial recovery from a less favored obligor. This presumably will not work to the ultimate advantage of the preferred obligor if there is a right of contribution. But there might be some reason for it in the case of a tort claim involving several tortfeasors in jurisdictions recognizing no right of contribution. Although the claimant, if he so chooses, may favor any one obligor by seeking full recovery from others (and this could be done without giving a release or a covenant not to sue), yet he might wish to do so as a means of dramatizing his generous purpose or to insure that in the event of his death no claim would be made by his estate against the favored tortfeasor.

It is probable that there are not very many settlements where the amount paid is little or nothing because of the claimant's generous disposition toward the co-obligor released, yet if there should be, no policy seems to stand as an impediment to permitting the reservation of rights against co-obligors.

Perhaps a more frequent motivation for entering into a settlement for a nominal amount with one co-obligor is the claimant's desire to obtain his favorable testimony in an action against another. This is not ordinarily the strategy called for in prosecuting a tort claim where several tortfeasors acting independently contribute to an injury, since in such a case it is most often advantageous to the claimant to join them as defendants in the hope that self-interest will prompt each one to testify against the other. Furthermore, this purpose would seem to be beset with an obstacle wherever there is a right of contribution, since a co-obligor who is aware of his responsibilities in this respect, though no longer liable to the claimant, will not make a good witness for him in view of the fact that he still has an interest in defending the claim. It is nevertheless possible that settlements with one co-obligor are occasionally so motivated even though there is a right of contribution.⁵⁰ And in any event, in a jurisdiction recognizing no right of contribution among tortfeasors where the anticipated defense is one common to all, it might be quite helpful to the claimant to have a well disposed witness who, under the shield of a settlement, is free to give testimony damaging to a co-obligor although it should constitute an admission of his own fault.

The possibility that such a motivation may account for a settlement with one co-obligor poses difficult questions. If a settlement of this

⁵⁰ Cf. facts of *Pellett v. Sonotone Corporation*, 26 Cal. 2d 705, 160 P.2d 783 (1945).

kind is disclosed it is probably unobjectionable. If the fact appears at the trial the court or jury is in a position properly to evaluate the testimony. But if it is concealed and particularly if the co-obligor is made a party defendant, his testimony, appearing in the light of an admission, would be most damaging to the defense and would constitute a fraud upon the court. There is, of course, no way of knowing how often successful frauds of this kind are perpetrated.

The question is as to what the consequences of such a settlement should be in the instances when it is entered into collusively with the intention of concealing it from other co-obligors and the court, but it is discovered before trial. This was the situation in *Pellett v. Sonotone Corporation*.⁵¹ Here one of the defendants was a dentist who had been employed by Sonotone, the other defendant, to make a cast for an ear tip to be used with a hearing aid sold to the plaintiff. In the making of the cast some materials were left in plaintiff's ear producing the injury for which recovery was sought. Plaintiff claimed independent negligence by Sonotone in giving instructions to the dentist and also asserted the liability of Sonotone under the doctrine of *respondeat superior*. After the action was brought, plaintiff for five dollars, gave to the dentist a covenant not to levy execution under any judgment that might be obtained against him. It was provided that the dentist defendant should continue to defend the action and should not file the agreement. Later, however, plaintiff's counsel disclosed it. Defendant Sonotone then contended that the covenant had the effect of discharging it from liability.

The Supreme Court of California held that the covenant not to levy execution was similar to a covenant not to sue and did not discharge the other co-obligor. The opinion points out that in view of disclosure before trial no harm had been done and that the validity of the agreement between the parties was not in issue. There is a strong dissent by Justices Traynor and Edwards. Although they place some stress upon the recital in the agreement that plaintiff was satisfied that the dentist was not culpable, the opinion also states that "fraud would be encouraged if it were held that such an agreement has no effect upon the principal's liability".

This reasoning is applicable to all agreements which contemplate the concealment of a settlement in order to work a fraud upon the court. It is undoubtedly sound. When the chance of success in such an improper course is so great, the penalty to be visited in the event of discovery should be severe. Merely to hold the agreement invalid as between the parties would provide no effective deterrent.

⁵¹ *Supra* note 50.

If it be assumed that all of the purposes and circumstances surrounding the initial settlement above discussed are relevant in ascertaining the intention of the parties, the question remains as to how far they should be taken into account in giving effect to policies which may override the express language of the instrument. We have already noted a number of instances in which co-obligors have been held to be discharged even in the face of a reservation of rights. If such a course is to be followed, the nature of the settlement undoubtedly throws light upon the problem and the consideration of its purpose would make possible a more effective and discriminating implementation of the underlying policies.

Certainly, if co-obligors are to be discharged because of the collusive character of the agreement, a reservation of rights should have no effect. Also, if there is a question of discharging a surety because of a settlement with the principal obligor with a reservation of rights, the rule should not be hard and fast, one way or the other, but the result should depend upon whether the circumstances indicate that giving effect to the reservation would be apt to work a hardship upon the releasee by reason of the subsequent accrual of a right of contribution. But with respect to the policy of limiting the claimant to one satisfaction, there is considerable doubt as to whether it is desirable to consider the nature of the settlement as a ground for over-riding an express reservation of rights. For here another important policy must be considered. The question is whether it is possible to deprive the claimant of a certain method of reserving rights against co-obligors without unduly discouraging settlements.

FACILITATION OF SETTLEMENTS

It goes without saying that a strong policy dictates the encouragement of settlements. To the extent that it is possible without too great a sacrifice of other basic values, the law should be molded in such a way as to make it easy for contending parties to reach agreement.

In the consideration of this question it is first to be noted that when the claimant may look to more than one solvent obligor for satisfaction of an obligation in dispute, there is a somewhat better chance of avoiding litigation than when there is only one. The reasons for this are closely related to, if not identical with, the reasons earlier given to show why the claimant who is in a position to make successive settlements with a number of co-obligors has an advantage. There is, in short, a multiplication of pressures upon obligors to make payment without any diminution of the pressure upon the claimant to take what is available without undergoing the burden of a lawsuit.

This increase in the total pressure upon obligors is probably a factor even when there are effective rights of contribution. For although as a result of such rights there may be a hope of passing on to others all or part of the burden of paying a judgment, the possibility that an obligor may be held initially for the full amount of the claim and the uncertainty and effort involved in realizing what he may clearly be entitled to receive by way of contribution tends to induce him to pay more to be rid of a claim than he would be impelled to pay if his obligation were limited to the portion for which he is primarily liable.⁵²

It has previously been suggested that a policy against giving the claimant the advantage which he enjoys when he is in a position to make successive settlements accounts, in part, for the willingness of courts in the face of a probable intention otherwise to hold that co-obligors are discharged by a release to one. If, however, it is true that this advantage to the claimant promotes ease of settlement, then it is apparent that such a policy can never be made fully effective without at the same time making settlements more difficult.

Actually in most jurisdictions, since for anyone informed on the law there is a certain method for preserving rights against co-obligors, the law neither fully effectuates such a policy nor does it discourage settlements. It is only through occasional inadvertence or inadequacy of legal knowledge that the policy is to some extent achieved.

The only real limitation upon the preservation of rights is afforded when, as in *Haney v. Cheatham*,⁵³ the court, regardless of the form of the instrument, looks beyond it and refuses to permit an action against co-obligors if a settlement has been made with one which is reasonably compensatory. This does effectuate the policy against allowing undue advantage to the claimant and leaves no door open for its circumvention. But if this is the law, it appears that settlements would in some degree be impeded. A claimant obviously can afford to take less in settlement with one co-obligor if he can be sure of his right to pursue others in the hope of obtaining an additional amount. But if in a subsequent action against another there is a possibility that, even if rights have been expressly reserved, he may be defeated on the ground that the initial settlement was reasonably compensatory, he may be reluctant to enter into it.⁵⁴

⁵² In general, however, it cannot be doubted that it is more difficult to arrive at settlements with co-obligors successively if rights of contribution are recognized. See James, "Contribution Among Joint Tortfeasors: A Pragmatic Criticism," 54 Harv. L. Rev. 1156 (1941). The Uniform Contribution Among Tortfeasors Act (1955) limits the right of contribution in order to avoid discouraging settlements. See supra note 35.

⁵³ Supra note 36.

⁵⁴ In a letter to the author, George V. Powell, Esq., a leading member of the Washington bar, states, "As a practical matter, the state of the law in this jurisdiction has prevented claimants from making successive settlements with a number of joint tortfeasors."

In view of this discouraging effect upon settlements, it is probable that few courts will go as far as the Washington court in its determined effort to implement fully the policy which underlies the ancient rule. With the exception of the release or covenant given to an obligor primarily liable and the secret covenant entered into for the purpose of deceiving the court concerning the interest of a witness in the litigation, some certain method will doubtless be left open for preserving rights against co-obligors. As between two conflicting policies, the encouragement of settlements appears to be the more important.

BURDEN OF PROOF

The law as stated in cases like *McKenna v. Austin*⁵⁵ has the merit of abolishing artificial distinctions and avoiding the pitfall so often and so properly deplored. Also, in taking some account of the nature of the settlement when there is no reservation of rights and leaving the way open for a discharge of all co-obligors when one of them has made a payment accepted as full satisfaction, the view expressed in these cases preserves a vestige of the underlying policy. But the burden placed upon the co-obligor not a party to the settlement to establish full satisfaction is such a heavy one that there is little practical difference between this view and one that would simply abolish the old rule and permit an action against a co-obligor in every instance where the intent to release him was not expressed in the instrument.

In order to preserve as much of the underlying policy as is possible without unduly impeding settlements, it is desirable to place upon the claimant the burden of proving the partial character of the settlement and the circumstances accounting for it. This should be the rule respecting the burden of proof in every instance where there is no express reservation of rights, whether the instrument takes the form of a release or of a covenant not to sue. Thus, the advantage to be obtained by successive settlements would be subjected to some limitation. Only by an express reservation of rights could the advantage be achieved, and it is at least possible that when the co-obligor released is made aware of the fact that an effort will be made to obtain an additional amount from others, he is provided with some additional bargaining power.

The view that the burden of proof is upon the claimant in this respect has some support.⁵⁶ If this burden is made applicable in the case of a covenant not to sue as well as in the case of an instrument containing the language of release, the policy underlying the old rule would seem

⁵⁵ Supra note 36.

⁵⁶ See Prosser, *Torts* 246 (2d ed. 1955). Cf. *Breen v. Peck*, 28 N.J. 351, 367, 146 A.2d 665, 674 (1958).

to be achieved in perhaps an even fuller measure than in jurisdictions which adhere to the older law on the subject.

CONCLUSION

It is apparent that in most jurisdictions the law applicable to settlements with co-obligors is in an unsatisfactory state. As is true in the case of all questions of the effect of a legal writing, the ascertainment of intent is mingled with policy considerations. Yet here these considerations are obscured by the application of principles of ancient origin resting upon an uncertain basis, and the balance between conflicting objectives has been so close that there is little indication of any consistent and determined effort to effectuate any policy. If some results are to be accounted for by a feeling that a claimant should not be entitled to the advantage that comes from being in a position to make successive settlements with a number of co-obligors and others by considerations of hardship which might result from the subsequent assertion of the right of contribution, it must be admitted that the older law has set no barriers to such outcomes but has provided only pitfalls which can be circumvented by anyone who is careful to obtain good legal advice.

In this situation it is therefore not surprising to observe a trend toward the removal of all impediments in the way of the claimant who desires to make successive settlements. This change has the virtue of eliminating artificial distinctions and avoiding hardship to the claimant. Yet when carried too far, it results in the complete abandonment of underlying policies which, though imperfectly implemented in the older law, do rest upon a substantial basis.

A way is open, however, to achieve the desirable objectives without the complete surrender of these policies. And a number of courts have embarked upon it. Certainly the distinction between the release and the covenant not to sue should be discarded. If there is no reservation of rights, a settlement with one co-obligor should discharge the others unless the claimant is able to establish that the purpose and circumstance of the settlement indicate that it was partial and that no unjust consequences would follow from his retention of the right to pursue others.

In order to avoid an impeding effect upon settlements, the admission of evidence concerning surrounding circumstances should doubtless be limited when there is an express reservation of rights. Such a reservation should stand unless it can be shown that there was a collusive agreement designed to work a fraud upon the court or that the attempt was made to reserve rights against a surety under circumstances where the subsequent assertion of a right of contribution would result in hardship to the releasee.

Such a solution, particularly when there is no reservation of rights, takes into account facts outside the instrument, and thus an element of uncertainty is introduced that theoretically is not present when the effect of an instrument is determined entirely by language on its face. But the number of cases under the old law indicates that the incongruities which it has perpetuated have themselves encouraged litigation. The remolding of ancient principles in such a way as to preserve in a measure the underlying policies and at the same time give to them a more discriminating implementation would avoid this source of litigation and in general accomplish a substantial improvement in this small but important area of our jurisprudence.