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Phantom Parties and Other Practical Problems with the Attempted Abolition of Joint and Several Liability

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I. INTRODUCTION

In the past two decades of legislative changes to state tort laws, the doctrine of joint and several liability has been a frequent target of tort reform efforts. The attempts by some to abolish joint and several liability is a relatively recent phenomenon, and as this article explains, a failed endeavor, in contrast with the long-standing and time-tested common-law doctrine of joint and several liability.

The origins of joint liability can be traced back hundreds of years to its roots in English common law.1 Originally, only those multiple tortfeasors who acted in concert were subject to joint liability, with each tortfeasor potentially held liable for the entire amount of damages.2 Because each tortfeasor could be held fully liable in a single action, the jury was not permitted to apportion damages.3 Joint and several liability for independent tortfeasors not acting in concert also has a lengthy history. The Third Restatement (Third) of Torts: Apportionment of Liability traces the roots of joint and several liability to a 1771 English case holding that even defendants acting independently were subject to joint, rather than several, liability.4 In the early nineteenth century, English common law continued to recognize that concurrent but independently acting wrongdoers could be held liable in separate lawsuits for a plaintiff’s entire loss.5

1. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 46, at 323 n.3 (5th ed. 1984 & Supp. 1988) (tracing joint liability’s roots to a 1613 English case in which a court ruled that several damages could not be established against defendants who had engaged in the same trespass); see also Nancy L. Manzer, Note, 1986 Tort Reform Legislation: A Systematic Evaluation of Caps on Damages and Limitations on Joint and Several Liability, 73 CORNELL L. REV. 628, 644 & n.93 (1988) (tracing joint liability back five hundred years); Frank J. Vandall, A Critique of The Restatement (Third), Apportionment as It Affects Joint and Several Liability, 49 EMORY L.J. 565, 565 (2000) (estimating that joint liability originated 300 years ago).
2. See KEETON ET AL., supra note 1, § 46, at 322-23.
3. Id. § 46, at 323.
5. KEETON ET AL., supra note 1, § 47, at 328-29 & n.35.
From these roots in English common law came joint and several liability as recognized by American courts. Since before the twentieth century, American common law allowed entire liability to be accorded to any or all joint tortfeasors involved in causing an injury, whether acting in concert or not and whether sued jointly or singled out for a separate lawsuit.

Another significant development which facilitated tort claims in America was the twentieth century replacement of contributory negligence principles, which barred recovery by partially negligent plaintiffs, with comparative negligence, which only proportionally reduced their recovery. By 1982, forty states had replaced contributory negligence with a form of comparative negligence. However, joint and several liability remained widely in force, with most states recognizing the coexistence of comparative negligence and joint and several liability. Many states in particular followed the model of the Uniform Contribution Among Tortfeasors Act, which provided for re-apportionment of liability among joint tortfeasors through a right of contribution following an initial damages verdict based on joint and several liability. This combination of joint and several liability and contribution served to ensure both that plaintiffs were compensated fully for their injuries and that defendants retained the ability to apportion responsibility amongst each other.

6. Because of this extension of joint liability principles to those not acting in concert, "joint tortfeasor" has come to mean both those acting independently and in concert under American common law. See Richard W. Wright, The Logic and Fairness of Joint and Several Liability, 23 MEM. ST. U. L. REV. 45, 71 (1992).
7. KEETON ET AL., supra note 1, § 47 at 328-30; see also RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § A18 cmt. a; Vandall, supra note 1, at 566 (citing Carolina, Clinchfield & Ohio Ry. Co. v. Hill, 89 S.E. 902 (Va. 1916)).
8. See KEETON ET AL., supra note 1, § 67, at 471.
9. Id.
11. See Rozenvink v. Faris, 342 N.W.2d 845, 849 (Iowa 1983) ("[O]f the thirty-eight other states that have adopted comparative negligence . . . twenty-nine have completely retained joint and several liability . . . ."); see also KEETON ET AL., supra note 1, § 67 at 475 ("Most jurisdictions which have adopted comparative negligence have retained the common law rule of joint and several liability . . . ."); Manzer, supra note 1, at 635-36 ("When states replaced contributory negligence with comparative negligence, only a minority of states also eliminated joint and several liability." (footnote omitted)).
In recent years, the allocation of responsibility to multiple tortfeasors has been mired with uncertainty and change. The modern “tort reform” movement, which blossomed in the 1980s and encompassed a myriad of modifications to state tort laws, resulted in many states legislating the limitation of joint and several liability in tort actions. The legislation enacted in these states varies greatly, with some states limiting joint and several liability according to the proportionality of the plaintiff’s comparative fault, some by the type of tort action or damages claimed, and others applying several liability through mandatory proportional allocation to most actions involving

13. See generally Mike Steenson, Recent Legislative Responses to the Rule of Joint and Several Liability, 23 TORT & INS. L.J. 482 (1988).

14. See, e.g., ALASKA STAT. § 09.17.080 (Supp. 2006); ARIZ. REV. STAT. §§ 12-2501, 2506 (LexisNexis 2003); ARK. CODE ANN. § 16-55-201 (Repl. 2005); COLO. REV. STAT. § 13-21-111.5 (2005); CONN. GEN. STAT. ANN. § 52-572h, 572o (West 2006); FLA. STAT. § 768.81 (2005); GA. CODE ANN. § 51-12-33 (2006); HAW. REV. STAT. ANN. § 663-10.9 (LexisNexis Supp. 2005); IDAHO CODE ANN. § 6-803 (2004); 735 ILL. COMP. STAT. ANN. 5/2-1117 (West 2006); IND. CODE ANN. § 34-51-2-8 (LexisNexis 2006); IOWA CODE ANN. § 668.4 (West 2006); KAN. STAT. ANN. § 60-258a (2005); KY. REV. STAT. ANN. § 411.182 (2005); LA. CIV. CODE ANN. art. 2323 (1997); MICH. COMP. LAWS ANN. § 600.6304 (West 2000); MINN. STAT. ANN. § 604.02 (West Supp. 2007); MISS. CODE ANN. § 85-5-7 (Supp. 2006); MO. ANN. STAT. § 537.067 (West 2006); MONT. CODE ANN. § 27-1-703 (2006); NEV. REV. STAT. § 41.141 (2005); N.H. REV. STAT. ANN. § 507.7-c (Supp. 2006); N.J. STAT. ANN. § 2A:15-5.3 (West 2000); N.M. STAT. ANN. § 41-3A-1 (Supp. 2003); N.D. CENT. CODE § 32-03-2-02 (1996); OHIO REV. CODE ANN. § 2307.22 (LexisNexis 2005); OKLA. STAT. ANN. tit. 23, § 15 (West Supp. 2007); OR. REV. STAT. § 31.610 (2005); S.C. CODE ANN. § 15-38-15 (2006); S.D. CODIFIED LAWS § 15-8-15.1 (2006); TEX. CIV. PRAC. & REM. CODE ANN. § 33.013 (Vernon 2006); UTAH CODE ANN. §§ 78-27-38 to -40 (2006); WASH. REV. CODE ANN. § 4.22.070 (West Supp. 2007); W. VA. CODE ANN. § 55-7-24 (LexisNexis 2006); WIS. STAT. ANN. § 895.045 (West Supp. 2006); WY. STAT. ANN. § 1-1-109 (2005). This list does not include states that have imposed restrictions on joint and several liability for non-economic or punitive damages only. Further, the list may overstate the number of states limiting joint and several liability to the extent that it includes comparative negligence statutes which may not necessarily be interpreted by each state’s courts as abrogating joint and several liability (for example, see the discussion of Vermont in this article), and states with exceptions with varying degrees of breadth.

15. The third Restatement defines several liability as liability only for a portion of the plaintiff’s damages “that reflect the percentage of comparative responsibility assigned” to a joint tortfeasor. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 11 cmt. a (2000). The reporter's note of this section lists different definitions of several liability but identifies as a common definition liability “only for the proportionate share of plaintiff’s indivisible injury determined by multiplying the comparative responsibility assigned to any defendant by the amount of plaintiff’s damages.” Id. § 11 reporters’ note, cmt. a.
multiple tortfeasors.\textsuperscript{16} Comparative descriptions of the different types of legislation affecting joint and several liability also vary,\textsuperscript{17} and there is no clear majority approach to joint and several liability legislation and its interpretation by the courts.

A number of states have resisted the trend toward modifying joint and several liability. In 2000, the authors of the third Restatement estimated that the District of Columbia and fifteen states still apply joint and several liability.\textsuperscript{18} Since then, five of those states have enacted legislation limiting joint and several liability, but as is generally the case, the legislation in those states did not completely abolish joint and several liability.\textsuperscript{19} Indeed, as this article describes, no state has enacted legislation completely abolishing joint and several liability for all tort claims.

\textsuperscript{16} To some extent, the abundance of legislation limiting joint and several liability has been attributed to the rise of comparative responsibility. See Mark M. Hager, What's (Not!) in a Restatement? ALL Issue-Dodging on Liability Apportionment, 33 CONN. L. REV. 77, 94, 97-98 (2000); see also RESTATMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY §§ C21 cmt. a, D18 cmt. c, E18 cmt. d (2000). However, comparative fault statutes do not necessarily require an abandonment of joint and several liability, as this article explains. See supra note 14; infra Part III.C.4.

\textsuperscript{17} For comparative analyses of the different types of legislation affecting joint and several liability, see generally Steenson supra note 13; Wright, supra note 6, at 82-84. See also ROBERT E. KEETON ET AL., CASES AND MATERIALS ON TORT AND ACCIDENT LAW 381 (3d ed. 1998). The third Restatement describes different state approaches to multiple tortfeasor liability apportionment in terms of five tracks: Track A describes joint and several liability; Track B describes several liability; Track C describes a modified form of joint and several liability in which an unavailable tortfeasor's shares of responsibility is reallocated to all parties, including the plaintiff; Track D describes an approach in which a threshold percentage of fault determines whether joint and several, or just several, liability applies; and Track E describes an approach applying joint and several liability to economic damages but several liability to non-economic damages. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 27 cmt. a (2000). But cf. Vandall, supra note 1, at 565, 570-71, 619-22 (concluding after a detailed criticism of the Restatement's methodology that the Restatement does not accurately describe the current status of the law of apportionment as developed through common law, but is rather "biased tort reform, designed to benefit . . . the defense bar and the insurance industry").

\textsuperscript{18} Namely, Alabama, Arkansas, Delaware, Illinois, Idaho, Maine, Maryland, Massachusetts, North Carolina, Pennsylvania, Rhode Island, South Carolina, South Dakota, Virginia, and West Virginia. Vandall, supra note 1, at 619 n.342. It should be noted that Illinois does, however, restrict joint and several liability for some defendants in torts cases who are less than twenty percent at fault. 735 ILL. COMP. STAT. ANN. 5/2-1117. Furthermore, this list may be incomplete, since other states, like Vermont, may continue to apply joint and several liability judicially after adopting comparative fault.

In addition to revealing that no state has abolished joint and several liability entirely, this article further illustrates that the underlying policy objectives of those seeking to abolish joint and several liability have not been effectuated either. The modern changes to joint and several liability have sparked polarized policy debates between two groups. One group believes that the abolition of joint and several liability is necessary to prevent joint tortfeasors from disproportionately paying damages which were also caused by other defendants or to prevent plaintiffs from strategically targeting “deep pocketed” defendants. A second group believes joint and several liability should be preserved to ensure full damage recovery for tort victims and prevent tort victims from having to bear the burden of damages done to them. This article looks beyond the usual policy debates surrounding joint and several liability abolition legislation, examining more closely the practical problems courts have confronted while interpreting and implementing such legislation. I conclude that the policy interests of neither side of the debate have been served by such abolition attempts, which have created more problems than solved.

In particular, I contend that legislative attempts to abolish joint and several liability have perpetuated and worsened the problem of unfair and inaccurate damage assessments that the legislation was intended to remedy. Both “pure” and modified proportional fault allocation systems intended to replace joint and several liability have created complex and daunting obstacles for courts and litigants. Such hurdles include phantom

20. See Restatement (Third) of Torts: Apportionment of Liability § § D18 reporters’ note, cmt.c, E18 cmt. d.


22. For a comprehensive discussion and rebuttal of the primary arguments made against joint and several liability, see Wright, supra note 6. Wright identifies and responds to four arguments in particular: that joint and several liability (1) requires tortfeasors to pay damages disproportionate to their responsibility or causal role; (2) applies unfairly to minimally responsible “deep pocket” defendants who are thereby required to provide “social insurance” for others’ tortious conduct; (3) conflicts with common law; and (4) conflicts with the principle of comparative responsibility. Id. at 49-50.

23. See, e.g., Id. at 46.
party problems, conflicts of law, inaccurate allocation of damages, and substantial inequities which harm both plaintiffs and defendants. I propose a reinstatement of pure joint and several liability with contribution as the most equitable, viable, and practical approach to multiple tortfeasor damage allocation.

Part II of this article engages in a case study of three states which have enacted legislation widely interpreted as abolishing joint and several liability: Alaska, Kentucky and Vermont. I explore how, once such legislation is enacted, the courts in those states have struggled to interpret the statutes and effectuate their purposes in a coherent and practical manner that does not conflict with other state and federal laws. I suggest that, in light of the unforeseen negative consequences of such legislation, not just for the courts and plaintiffs, but for defendants as well, other states should learn from the lessons these three states offer and reconsider the potential benefits of joint and several liability.

Part III discusses how these problems have been perpetuated on a broader scale. I conclude that attempts to abolish joint and several liability have been unsuccessful in two respects: neither the underlying purposes nor the ultimate abolition goal reflected by legislative joint and several abolition attempts have come to fruition. Instead, joint and several liability abolition attempts have often created substantial and complex implementation problems for courts and corresponding obstacles for litigants. In particular, I describe how proportional allocation systems have forced courts to choose between various flawed approaches by allowing potentially inaccurate and unfair damage awards through "phantom party" allocation under a one-suit rule; allowing multiple suits along with the resulting litigation complexities and costs; or allowing joinder of third-party defendants despite resulting conflicts of laws. I explain that an ironic consequence of adopting several liability is that, while contribution is generally available to defendants under joint and several liability, legislation limiting joint and several liability has often resulted in the abrogation of such contribution remedies, consequently hurting those whom such legislation was supposed to benefit. I address other equitable arguments as well, including the "fairness" arguments of joint and several liability opponents, and identify other ways in which the attempted abrogation of joint and several liability has worked to
the detriment of both plaintiffs and a large number of defendants. Finally, I propose that a return to joint and several liability in conjunction with contribution may most fairly and feasibly accommodate the policy concerns of both sides of the joint and several liability debate in light of the failure of joint and several liability abolition legislation to protect the interests of either.

II. IN THE COURTS: PRACTICAL PROBLEMS WITH JOINT AND SEVERAL LIABILITY ABOLITION

A. Alaska: Conflicts of Laws, Policies, and the Phantom Party Problem

Through the late 1980s, Alaskan common law recognized joint and several liability, even after the judicial adoption of comparative negligence in 1977 and the enactment of the state’s first series of “tort reform” laws in 1986. Alaska also allowed contribution among joint tortfeasors, which one court described as “easing the harshness of the State’s joint and several liability law.” In Carriere v. Cominco Alaska, Inc., the federal district court described the history of tort law changes in Alaska, observing that after 1986, “[n]ot satisfied with the Alaska Legislature’s tort reforms, the Citizens’ Coalition for Tort Reform sponsored an initiative for the purpose of further amending AS 09.17.080(d) so as to do away entirely with any joint liability for tort and to simultaneously repeal the provisions for contribution between joint tortfeasors . . . .”

As a result of the efforts of the Coalition for Tort Reform, the voters of Alaska approved a tort reform initiative which implemented a comparative fault liability system and repealed Alaska’s Uniform Contribution Act in 1988. The initiative, which took effect in 1989, has been interpreted as effectively abolishing joint and several liability for all tort actions in Alaska in favor of several liability. The 1989 amendments to section

25. Id.
28. See Carriere, 823 F. Supp. at 686; see also RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 17 (2000) (describing Alaska as a “several liability”
09.17.080 of the Alaska Code, which already provided for comparative allocations of fault, also repealed the statute’s contribution and joint liability provisions and instead provided:

(a) In all actions involving fault of more than one party to the action, including third-party defendants and persons who have been released under AS 09.16.040, the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating (1) the amount of damages each claimant would be entitled to recover if contributory fault is disregarded; and (2) the percentage of the total fault of all of the parties to each claim that is allocated to each claimant, defendant, third-party defendant, and person who has been released from liability under AS 09.16.040. . . .

(d) The court shall enter judgment against each party liable on the basis of several liability in accordance with that party’s percentage of fault.29

The legislative history underlying the initiative has been described by the Alaska Supreme Court as scant, revealing only that “the initiative’s supporters were concerned almost exclusively with ensuring that defendants would be liable only for their share of fault.”30

The courts in Alaska have encountered substantial problems with the interpretation and implementation of section 09.17.080 of the Alaska Code, particularly with respect to the statute’s application to nonparties. The dilemma they have faced is how to apportion damages accurately where some tortfeasors are absent from the litigation. After nearly two decades of confusion surrounding the issue, as discussed below, the Alaska Supreme Court attempted to resolve the problem by

jurisdiction); James A. Higgins, Oklahoma’s Tort Reform Act: Texas-Style Reform or Texas-Size Compromise?, 57 OKLA. L. REV. 921, 925 & n.43 (2004) (describing Alaska as a state which bans the doctrine of joint and several liability altogether); Andrew R. Klein, Apportionment of Liability in Workplace Injury Cases, 26 BERKELEY J. EMP. & LAB. L. 65, 84 n.90 (2005) (“Sixteen states apply comparative fault and several liability only [including] Alaska . . . .”); Robert Mednick & Jeffrey J. Peck, Proportionality: A Much-Needed Solution to the Accountants’ Legal Liability Crisis, 28 VAL. U. L. REV. 867, 876 (listing Alaska as one of the eight states which as of 1994 had “eliminated joint and several liability entirely, concluding that defendants should at all times be liable in tort actions for their proportionate share of the harm”).
30. McLaughlin, 137 P.3d at 277.
reference to the Uniform Comparative Fault Act of 1977 ("UCFA"). In *McLaughlin v. Lougee*, the court observed that section 09.17.080 was modeled after section 2(a) of the UCFA, the accompanying comment of which indicates that the UCFA's drafters intentionally limited consideration of fault to that of actual parties. The *McLaughlin* court quoted the UCFA comment:

"The limitation to parties to the action means ignoring other persons who may have been at fault with regard to the particular injury but who have not been joined as parties. This is a deliberate decision. It cannot be told with certainty whether that person was actually at fault or what amount of fault should be attributed to him, or whether he will ever be sued, or whether the statute of limitations will run on him, etc. An attempt to settle these matters in a suit to which he is not a party would not be binding on him."  

Consequently, the court held that "[i]n Alaska there is no reduction attributable to the fault of non-parties."  

However, this decision came only after many years of confused and conflicting approaches to nonparty allocation by Alaskan courts. Unlike the *McLaughlin* court, lower courts interpreting the 1989 statute in the immediate aftermath of its enactment did not similarly rely on this guiding language from the UCFA, but rather found themselves quickly embroiled in the resolution of the "empty chair" or "phantom party" problem. Some lower courts in Alaska determined that even though the 1989 statute did not explicitly provide for allocation of fault to nonparty tortfeasors, they would nonetheless apply principles of equitable allocation or indemnity to facilitate joinder of absent parties. Other courts took a different approach and ruled that

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34. Id. at 273.  
35. See *Keeton et al.*, * supra* note 1, § 67, at 475; see also *Hager*, * supra* note 16, at 119-26 (describing what has alternatively been described as the "phantom share" allocation or "empty chair" allocation problem); Robert B Leflar, *The Civil Justice Reform Act and the Empty Chair*, 2003 Ark. L. Notes 67, 67 (2003).  
nonparty allocation was allowed because it was not explicitly prohibited by the statute.\textsuperscript{37}

In addressing this conflict as it existed at the time, the federal district court in the 1993 \textit{Carriere} decision described the statute as “carelessly conceived and enacted,” and “seriously flawed” due to the fact that the statute “tantalizes us by specifically referring to some non-parties as ‘persons who have been released’” but omits reference to any other un-released non-parties.\textsuperscript{38} That omission, the \textit{Carriere} court wrote, is the source of serious procedural problems, evidencing a “statutory gap of substantial import”\textsuperscript{39} to the extent it allows plaintiffs to choose to sue only those with “deep pockets”\textsuperscript{40} despite the modification of joint and several liability. The court explained:

Any reasonably skilled tort lawyer would have recognized the problem flowing from the absence of any mention of whether fault should or should not be allocated to un-released non-parties. One sentence stating the legislative choice of full or limited allocation of fault would have prevented this and all of the other litigation here discussed. The court’s review of the legislative history of AS 09.17.080 (1989) indicates that this fault in section 080 was not perceived.\textsuperscript{41}

The \textit{Carriere} court attempted to resolve the issue by examining statements to the public supporting and opposing the ballot initiative which used the word “person” rather than “party,” and concluded that nonparty damage allocation was intended to be included by the amendment.\textsuperscript{42} The court appeared to be motivated by the statute’s failure to include contribution options for joint tortfeasors, which it bemoaned, comparing the electorate’s decision on this point to the allegory of the emperor with no clothes.

In \textit{Benner v. Wichman}, decided a year later, the Alaska Supreme Court came to a different conclusion and rejected the

\textsuperscript{37} \textit{Id.}
\textsuperscript{38} \textit{Id.} at 684-85.
\textsuperscript{39} \textit{Id.} at 684.
\textsuperscript{40} \textit{Id.}
\textsuperscript{41} \textit{Carriere}, 823 F. Supp. at 685.
\textsuperscript{42} \textit{Id.} at 687.
\textsuperscript{43} \textit{Id.} at 686 & n.8.
Carriere approach as overstating the scope of the initiative.\textsuperscript{44} Instead, the supreme court in Benner focused on the problem of the statutory repeal of contribution and adopted the approach rejected by Carriere: equitable apportionment. Specifically, the Benner court observed that while the new legislation replaced previously existing contribution and indemnity schemes, "\textit{[n]ow that the voters have eliminated contribution through the initiative, equity requires that defendants have an avenue for bringing in others who may be liable to the plaintiff... In the absence of contribution, we hold that equitable apportionment is available as a means of bringing other tortfeasors into the action.}\textsuperscript{45} While recommending joinder through equitable apportionment as a better alternative to absent party allocation, the court recognized problems inherent in creating such a remedy. The court observed, "The new statutory scheme is problematic, given our current civil rules. We are therefore requesting our Standing Advisory Committee on Civil Rules to consider this problem."\textsuperscript{46}

Before the Standing Advisory Committee on Civil Rules had a chance to promulgate changes explicitly allowing defendants to join other absent tortfeasors as third parties, a federal district court weighed in. In Robinson v. Alaska Properties & Investment, Inc., the federal court observed that changes to the state civil rules were being considered.\textsuperscript{47} The court explained that, in the meantime, it would apply Federal Rule of Civil Procedure 14(a), although only "by analogy," to allow apportionment of fault, even while acknowledging that the federal rule might not lend itself to that purpose.\textsuperscript{48} The court also noted that any attempt to accommodate section 09.17.080 of the Alaska Code through Rule 14(a) presents the risk of violating the purpose of the federal rule.\textsuperscript{49} The Robinson court might have been willing to take that risk rather than deny nonparty allocation, but it drew the line at allowing equitable joinder where doing so might conflict with another federal law.\textsuperscript{50}

\begin{itemize}
\item 44. 874 P.2d 949, 956-57 (Alaska 1994).
\item 45. \textit{Id.}
\item 46. \textit{Id.} at 956-57 n.17.
\item 47. 878 F. Supp. 1318, 1322 n.4 (D. Alaska 1995).
\item 48. \textit{Id.} at 1322-23 & nn.3-5.
\item 49. \textit{Id.} at 1323 n.5.
\item 50. \textit{Id.} at 1323.
\end{itemize}
The court described a conflict of law problem that would be created if the absent party joined were the federal government itself, since equitable apportionment in such cases "directly conflicts with the right of the United States to have a judge determine any verdict against it."51 Having observed these problems with conflicting rules and laws resulting from the application of equitable apportionment, the court concluded that "given the uncertainty in the law generally regarding the proper treatment of AS § 09.17.080 and the peculiar problems where the United States is a third party defendant not sued by the plaintiff," it was not "prepared to exercise its discretion" to allow an amended complaint in that case to include an equitable allocation claim against the United States.52

Without resolving these issues, the Robinson court left a parting note explaining that even the enactment of the then-pending proposed rule changes would not fully alleviate conflict of law tensions. Footnote eight of Robinson states:

The Alaska Supreme Court's proposed rule modification (revised rule 14(c)) reaches this result by automatically giving plaintiff a judgment against joined defendants whether she sued them or not. This decision does pose problems where plaintiff ordinarily could not sue the United States without complying with 28 U.S.C. § 2675(a) and also for defendants who cannot be sued by plaintiff because of the statute of limitations, but could be sued by a third party plaintiff alleging a right to equitable apportionment because the claim is alleged to accrue at a later time than an independent claim by plaintiff by analogy to a right to indemnity or contribution. When a claim for equitable apportionment accrues is a question like so many other questions created by the initiative that has yet to be answered.53

Unfortunately, the Alaska Supreme Court's subsequent amendment of Alaska Rule of Civil Procedure 14 to include a procedure by which a defendant may join an absent tortfeasor for apportionment54 did not fully resolve such persisting conflicts of law. For example, a conflict remains between the

51. Id.
53. Id. at 1324 n.8 (citation omitted).
54. See ALASKA R. CIV. P. 14(c).
Alaska rules and the federal rules, because there is no federal version of Rule 14(c). Unlike Alaska’s Rule 14(c), the federal rules continue to allow the joinder of only those third parties who are liable to the third-party plaintiff (that is, the tortfeasor seeking joinder), not just to the plaintiff. Consequently, any Alaskan tort claims that land in federal court may create conflict of law problems for the federal courts, particularly if the federal government is a party.

Additionally, the amendment of Alaska’s procedural rules did not resolve the dilemma of what to do about phantom party allocation. Following the promulgation of Alaska Rule of Civil Procedure 14(c), the Alaska Supreme Court explained in *McLaughlin* that, while the new rule reduces the need for contribution, it does not provide a complete solution since “sometimes, it is not expedient or even possible to implead third-party defendants.” The court further indicated that because Rule 14(c) does not fully resolve such problems, the courts should allow alternative equitable remedies. In particular, the court in *McLaughlin* declined to construe the 1989 statute as abrogating the common law remedy of contribution, ruling that such remedies should still be allowed.

The *McLaughlin* court justified a return to common law contribution, even in face of a new rule which was supposed to alleviate the need for such common law remedies, by explaining that procedural joinder is insufficient because sometimes “the fault of a responsible entity may not be discovered, or understood, in time to join it as a defendant, or a third-party defendant, in the original action.” Furthermore, the court explained, some third-party claims are, “practically speaking, inconsistent with a party’s position in the original action and may serve to undermine it. Other third-party claims may needlessly and unfairly stress a valuable relationship.”

The court also engaged in a substantial discussion of the phantom party problem. *McLaughlin* held that the 1989 statute

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55. FED. R. CIV. P. 14.
57. Id. at 277-79.
58. Id. at 271.
59. Id. at 274.
60. Id.
precludes nonparty allocation, and that in Alaska there is no “one-action” rule requiring all potential causes of fault be considered in a single action. Explaining the desirability of adopting such a one-action rule, under which even phantom defendants are considered in the allocation of damages, the court observed several drawbacks to phantom allocation. For example, “the liability issues in the case against an unjoined defendant may be completely different from those in the original action.”

As much as McLaughlin may have chased away the phantoms of nonparty allocation while reaffirming the importance of contribution, an analysis of that decision, and of other judicial and legislative developments up to that point, may be a purely academic exercise. All the cases discussed thus far, including McLaughlin, only pertained to the interpretation of the 1989 statute.

In 1997, significant changes were enacted yet again to Alaska’s tort laws. The Alaska legislature again amended section 09.17.080 of the Alaska Code as part of an omnibus tort reform package. Most pertinently, the 1997 amendment elevated the problem of nonparty apportionment to a new level. Subsection (a) of the statute explicitly adds new language requiring fact-finders to assign fault percentages not just to all parties to the suit, but also to nonparties who had previously been released or are otherwise “responsible for the damages,” unless the present parties had “sufficient opportunity” to join the nonparties but chose not to do so. The McLaughlin decision, although issued after the 1997 amendments, explicitly did not engage in an interpretation of the statute in its newly-amended form. With this new statutory language allowing allocation of fault to “responsible” nonparties, any clarification previous decisions provided regarding the restrictive reach of the older

61. McLaughlin, 137 P.3d at 273.
62. Id. at 274.
64. ALASKA STAT. § 09.17.080(a) (Supp. 2006).
65. See McLaughlin, 137 P.3d at 270 (“Because the alleged tortious conduct in this case occurred between 1993 and 1995, the 1989 tort reform initiative in effect from 1989 to 1997 governs this case.”).
66. ALASKA STAT. § 09.17.080(a).
statute offers little guidance for the interpretation of the new statute, which resurrects the phantom party and conflict of law problems.

Such new problems resulting from the 1997 amendments were at issue in Evans ex rel. Kutch v. State, an Alaska Supreme Court decision upholding the constitutionality of the omnibus tort reform measures. In Evans, the state supreme court seemed to concede that there was some ambiguity in the new statutory language allowing damages to be allocated to a “potentially responsible person,” without providing a definition of that term. Tossing the ball back to the Standing Advisory Committee on Civil Rules, as the Benner court had eight years earlier, the Evans court explained that any such ambiguity did not rise to the level of unconstitutionality, and that “[o]ur rule-making process will provide further guidance if such guidance is needed.”

Even more significantly, the court in Evans appeared to endorse the “empty chair” approach to allocation it had previously rejected, without explicitly overruling those past decisions in which it had rejected the one-party rule and phantom party allocation. In an about face from those previous decisions, the court approvingly quoted the lower court’s explanation that the empty chair problem is “inevitable” in multi-party tort litigation and ruled that to the extent it may be unfair to plaintiffs, such unfairness is a constitutionally legitimate policy choice made by the legislature.

A case study of Alaska is, in short, a case study of chaos and inconsistency. The original abolition of joint and several liability through the 1989 initiative caused cries of consternation from both federal and state courts regarding the resulting

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67. 56 P.3d at 1048.
68. Id. at 1061.
69. Id.
70. The court did, however, distinguish two Montana Supreme Court cases cited by the plaintiffs in which the Montana court struck down nonparty allocation as unconstitutional. Evans, 56 P.3d at 1062-63 (distinguishing Plumb v. Fourth Jud. Dist. Ct., 927 P.2d 1011 (Mont. 1996); Newville v. State, Dep’t Fin. Servs., 883 P.2d 793 (Mont. 1994)).
72. Evans, 56 P.3d at 1062.
abolition of contribution remedies for defendants.\textsuperscript{73} The consensus ended there, as the courts adopted different approaches in their attempts to replace previously available contribution remedies with various solutions which at times conflicted with procedural rules or federal law (or, as \textit{McLaughlin} suggests, with the statute's very text and purpose). Ironically, the state's 1997 amendment of its joinder rules, an attempt to resolve this conflict, only created additional conflicts for the courts.

It remains to be seen how the 1997 amendments to section 09.17.080 of the Alaska code will be interpreted following \textit{Evans}. However, the new restrictions on joint and several liability are clearly more onerous to plaintiffs than the previous version of the statute. In a recent case interpreting the 1997 statute, for example, the court in \textit{Pederson v. Barnes} explained that the new amendment resulted in Alaska extending several liability to intentional torts and duty-to-protect cases for the first time.\textsuperscript{74}

This holding bodes ominously for plaintiffs such as the one involved in \textit{Kodiak Island Borough v. Roe}.\textsuperscript{75} In that case, a facility for developmentally disabled women hired a man with known mental health and substance abuse problems, and twenty-eight criminal convictions including felony assault, to work in its Crisis Respite Unit, giving him keys to the homes of the women under the facility's care.\textsuperscript{76} The man consequently had sex with and impregnated a resident who was severely developmentally disabled, functioning at the intellectual and social level of a ten to twelve year-old child.\textsuperscript{77} Confronting the issue of whether the 1989 version section 09.17.080 of the Alaska Code allows allocation of fault between negligent (the facility) and intentional (the staff member) tortfeasors, the court held that the jury was properly kept from apportioning damages between the two.\textsuperscript{78} The lower court had granted a motion to prevent such allocation, which would have allowed the facility

\textsuperscript{73} This consensus has significant import, in light of this article's concluding proposal to reinstate contribution along with joint and several liability.

\textsuperscript{74} 139 P.3d 552, 560 (Alaska 2006).

\textsuperscript{75} 63 P.3d 1009 (Alaska 2003).

\textsuperscript{76} \textit{Id.} at 1011.

\textsuperscript{77} \textit{Id.}

\textsuperscript{78} \textit{Id.} at 1011-12.
to try to shift responsibility to the less solvent staff member. The supreme court agreed that under the pre-1997 version of the statute, joint tortfeasors were not allowed to allocate fault to intentional tortfeasors, because the apportionment statutes then in effect did not apply to intentional conduct. Consequently, the court ruled, the facility could be held fully responsible under the older version of the statute for negligently failing to protect its resident from the intentional wrongdoing against her by its staff members.

Problematic implications of this decision arise from the court’s explanation of its decision. The court stated that, had it been applying the new version of the statute, it might have had to come to a different result, because “the 1997 amendment displaced the common law and . . . may now permit an apportionment that is contrary to [the Restatement].” In other words, under the new version of the statute, which has apparently abolished joint and several liability for actions involving intentional as well as negligent tortfeasors, courts may now have to allow apportionment between negligent and intentional tortfeasors in a way that might preclude full recovery to victims of the most egregious, intentional torts. In such cases, negligently acting co-defendants who could have prevented intentional torts of others may no longer be held fully responsible for their negligence, and victims of such intentional torts may have their damages dramatically reduced. The court in Kodiak Island Borough was careful to add in a footnote that “[w]e are not ruling on how this case would be decided under current law, as that question is not before us,” leaving open the possibility that the new version of the statute could have such extreme results for assault and other intentional tort victims in the future.

With this additional issue thrown into the mix along with the other unresolved issues Alaskan courts have faced, Alaska would provide a poor model for other states which might initially be tempted by the deceptive simplicity of the idea of

79. Id. at 1012.
80. Kodiak Island Borough, 63 P.3d at 1013-15.
81. Id. at 1015.
82. Id.
83. Id. at 1015 n.20.
abolishing joint and several liability. Such states would be well-advised to look beneath the surface of the issue and learn from Alaska’s struggles to interpret and implement such legislation in a coherent, consistent, and fair manner. By examining more closely the complex problems created by efforts to abolish joint and several liability, other states could become more cognizant of the pitfalls such attempted abolition creates, not just for courts and tort victims, but for joint tortfeasors seeking fair allocation and contribution remedies as well.

B. Kentucky: Another State’s Response to the Phantom Party Problem

Like Alaska, Kentucky has also enacted a statute which has been interpreted as abolishing joint and several liability.\footnote{See \textit{Reformation (Third) of Torts: Apportionment of Liability} \S\ 17 (describing Kentucky as a “pure” several liability jurisdiction); \textit{see also} Lester Brickman, \textit{Ethical Issues in Asbestos Litigation}, 33 Hofstra L. Rev. 833, 900-01 n.239 (2005) (listing Kentucky as a state which has eliminated joint and several liability); Higgins, \textit{supra} note 28, at 925 n.43 (describing Kentucky as a state which bans the doctrine of joint and several liability altogether); Klein, \textit{supra} note 28, at 84 n.90 (“Sixteen states apply comparative fault and several liability only . . . [including] Kentucky . . . .”); Mednick & Peck, \textit{supra} note 28, at 876 (listing Kentucky as one of the eight states which as of 1994 had "eliminated joint and several liability entirely, concluding that defendants should at all times be liable in tort actions for their proportionate share of the harm.

Finally, like Alaska, Kentucky has wrestled with many of the same problems judicially implementing its comparative negligence statute. This section identifies and explores such interpretation and implementation issues faced by Kentucky courts.

A case study of the struggles of Kentucky courts to interpret and apply the state's comparative negligence statute

prior to the adoption of comparative negligence, and the enactment of KRS 411.182, a defendant was required to cross-claim for contribution against joint tortfeasors pursuant to KRS 412.030 or 454.040. Contemporary apportionment requirements including KRS 411.182 provide that fault in a tort action is automatically subject to apportionment among the parties to the action. This statute renders a cross-claim for contribution, as well as a counterclaim for contributory or comparative negligence, needless.\footnote{\textit{Id.}}
reveals that, particularly in relation to the phantom party problem, the partial abrogation of joint and several liability in Kentucky has resulted in a more confusing allocation of fault system. The statute leaves particularly unclear the matter of which persons may be included in fault apportionment under Kentucky law. Section 411.182 of the Kentucky Code, enacted in 1988, provides in part:

(1) In all tort actions, including products liability actions, involving fault of more than one (1) party to the action, including third-party defendants and persons who have been released under subsection (4) of this section, the court, unless otherwise agreed by all parties, shall instruct the jury to answer interrogatories or, if there is no jury, shall make findings indicating:

(a) The amount of damages each claimant would be entitled to recover if contributory fault is disregarded; and

(b) The percentage of the total fault of all the parties to each claim that is allocated to each claimant, defendant, third-party defendant, and person who has been released from liability under subsection (4) of this section.

(2) In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed.

(3) The court shall determine the award of damages to each claimant in accordance with the findings, subject to any reduction under subsection (4) of this section, and shall determine and state in the judgment each party’s equitable share of the obligation to each claimant in accordance with the respective percentages of fault.\(^{86}\)

While the statute follows the Uniform Comparative Fault Act, it does not include the section of the UCFA which preserves joint and several liability remedies for plaintiffs and contribution remedies for defendants.\(^{87}\)

Joint and several liability did not die a sudden death with the enactment of section 411.182 of the Kentucky Code (if it can

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86. KY. REV. STAT. ANN. § 411.182 (LexisNexis 2005).
even be considered fully dead today), but was limited judicially even before the statute’s enactment. The 1990 Stratton v. Parker Kentucky Supreme Court decision explained that, prior to the statute’s enactment, joint and several liability, along with contribution, had already been abandoned judicially in favor of pure several liability for two reasons: “First, [several liability] tends to encourage settlement of claims, and second, it eliminates any question of contribution because each tort-feasor is assessed only the damage which corresponds to his degree of legal causation of the injury.”

In Degener v. Hall Contracting Corp., the court similarly described section 411.182 of the Kentucky code as “simply a codification of this common law evolution...”

The Restatement identifies Dix & Associates Pipeline Contractors, Inc. v. Key as the case which eliminated joint and several liability through its holding that the adoption of comparative fault required the abolition of joint and several liability. The Restatement further identifies Bass v. Williams as a seminal case in Kentucky. In Bass, an appellate court rejected phantom party allocation, holding that juries may not allocate damages to unidentified parties because such allocation would result in a courtroom “having” many empty chairs belonging to tortfeasors unnamed, and possibly unknown until trial.

However, even before Dix and Bass, the Kentucky courts had issued a number of significant decisions signaling a departure from joint and several liability and coming to different

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88. 793 S.W.2d 817, 819 (Ky. 1990). However, the supreme court described the statute’s purpose in different terms fifteen years later. In Kentucky Farm Bureau Mutual Ins. Co. v. Ryan, 177 S.W.3d 797 (Ky. 2005), the court assessed the legislative intent underlying § 411.182 as “to eliminate, once and for all, joint and several liability and to protect plaintiffs and defendants alike from being penalized for the fault of another,” and to prevent plaintiffs from allocating fault to tortfeasors “far in excess” of their actual liability. Id. at 802.

89. 27 S.W.3d 775, 779 (Ky. 2000).
90. 799 S.W.2d 24, 27 (Ky. 1990).
94. Bass, 839 S.W.2d at 564.
results in the area of phantom party allocation. The doctrine of comparative negligence was first adopted judicially in the 1984 Kentucky Supreme Court *Hilen v. Hays*\(^{95}\) decision. By then, the Kentucky courts had already begun limiting joint and several liability and allowing apportionment against phantom tortfeasors, although the decisions on that point were split. In *Dix*, the Kentucky Supreme Court cited such past cases in describing the demise of joint and several liability and concluded:

The principles announced in *Hilen v. Hays*, which established comparative negligence in Kentucky, and cases which followed it, including *Prudential Life Ins. Co. v. Moody*, supra; *Floyd v. Carlisle Const. Co., Inc.*, and *Stratton v. Parker*, have established that liability among joint tortfeasors in negligence cases is no longer joint and several but is several only.\(^{96}\)

A more detailed history of the devolution of joint and several liability in Kentucky sheds more light on the issues Kentucky courts have confronted, and the conflicts that have arisen in their decisions. In *Nix v. Jordan*, decided in 1976, the Kentucky Supreme Court held that under the law as it then existed, apportionment was allowed among defendants in an action, but could not include parties who had settled.\(^{97}\) However, this decision was overruled by the 1990 *Dix* decision.\(^{98}\) Even before it was explicitly overruled, however, the *Nix* decision conflicted with other decisions by the judiciary, which was split over the issue of absent or settling party allocation. In *Orr v. Coleman*\(^{99}\) and *Floyd v. Carlisle Construction Co.*,\(^{100}\) for example, the state supreme court allowed apportionment to absent parties who had previously settled. The rule *Floyd* articulated for nonparty allocation was that “[i]f there is an active assertion of a claim against joint tortfeasors, and the evidence is sufficient to submit the issue of liability to each, an

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95. 673 S.W.2d 713 (Ky. 1984).
96. *Dix*, 799 S.W.2d at 27 (citations omitted); see also *Degener*, 27 S.W.2d at 779 (“As summarized in *Dix*, liability among joint tortfeasors in negligence cases is no longer joint and several, but is several only.”).
97. 532 S.W.2d 762, 763 (Ky Ct. App. 1975), overruled by *Dix*, 799 S.W.2d at 29.
98. 799 S.W.2d at 29.
100. 758 S.W.2d 430, 432 (Ky. 1988).
apportionment instruction is required whether or not each of the tortfeasors is a party-defendant at the time of trial."101 Without explicitly overruling Nix, the Floyd court went so far as to drop a footnote indicating that a majority of the court was ready to overrule Nix's holding to the extent that Nix did not allow apportionment to those a tortfeasor seeks to join as third-party defendants.102

A year after comparative negligence was judicially adopted but prior to Dix, the court endorsed phantom party allocation to an even greater degree in Prudential Life Ins. Co. v. Moody,103 following the Orr and Floyd approach to nonparty allocation. In that case, the court held that even after parties have been dismissed from a case for any reason, fault can still be apportioned against them and a plaintiff's damage award reduced accordingly.104 However, a year after that decision, the court appeared to limit the holdings of these cases, explaining in Burke Enterprises Inc. v. Mitchell that apportionment is only allowed against parties and settling parties after a jury has found them to be at fault, and suggesting that nonparty allocation may also be denied where the procedural instructions for allocation described in the Orr decision were not explicitly requested.105

Consequently, the question of phantom party allocation existed long before Dix and Bass, and neither case resolved these questions conclusively. Nor did the enactment of section 411.182 of the Kentucky Code resolve the issue.106 A 1994 law review note observes that, even after these developments, Kentucky tort law regarding multiple tortfeasors liability was "far from settled," particularly in the area of nonparty allocation.107 The note, which describes Kentucky law through 1988 as "a hybrid of joint and several liability and apportionment of liability according to fault,"108 explains that

101. Id. at 432.
102. Id. at 432 n.1.
103. 696 S.W.2d 503 (Ky. 1985).
104. Id. at 504.
105. 700 S.W.2d 789, 795-96 (Ky. 1985).
106. See Julie O'Daniel McClellan, Note, Apportioning Liability to Nonparties in Kentucky Tort Actions: A Natural Extension of Comparative Fault or a Phantom Scapegoat for Negligent Defendants?, 82 KY. L.J. 789, 812, 824-25, 834 (1994); KY. REV. STAT. ANN. § 411.182.
107. McClellan, supra note 106, at 794, 833.
108. Id. at 812.
Kentucky courts have faced complex problems and
“encountered a considerable amount of difficulty in applying the
comparative negligence doctrine to situations involving multiple
tortfeasors.”

Since 1988, these problems have persisted, especially the
Scott & Ritter, Inc.*, an appellate court applied Kentucky Rule of
Civil Procedure 14, which mirrors the federal rules in allowing
third-party joinder only where the third-party defendant is
potentially liable to the third-party plaintiff, and consequently
rejected a third-party complaint for contribution as prohibited by
Kentucky’s procedural rules, even after the enactment of section
411.182 of the Kentucky Code. Facing the same issue as
Alaskan courts, the court in *Tucker* addressed the problem in a
novel manner. It included in its analysis a footnote encouraging
defendants to bring third-party claims despite the likelihood the
claims would be dismissed under procedural rules, purely in
order to preserve an “active assertion” of a liability claim against
the missing tortfeasor. The footnote was apparently
motivated by the court’s desire to find a way to continue
allowing contribution to joint tortfeasors, even at the risk of
encouraging frivolous claims, i.e., claims filed despite the
certain knowledge they would be dismissed, and at the risk of
creating “empty chairs” in the courtroom.

*Tucker* was overruled in part, but not on any of the grounds
discussed above, by the Kentucky Supreme Court case *Degener
v. Hall Contracting Corp.* In that case, the supreme court
agreed with *Tucker’s* conclusion that common law contribution

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109. *Id.* at 792.
110. 842 S.W.2d 873, 874 (Ky. Ct. App. 1992), overruled on other grounds,
*Degener*, 27 S.W.3d 775.
111. *Id.* at 874-75 n.5.

Under the apportionment rules set out above, third-party defendants may
often be entitled to dismissal on the grounds that they cannot be liable to the
third-party plaintiff. . . . This does not mean that defendants should not assert
these third-party claims; for if there is never an “active assertion of a claim”
against the third party, liability cannot be apportioned to him. As a
consequence, the defendant might incur liability for damages caused by that
third party. Whether the defendant would then retain his right to an action
against the third party for contribution . . . need not be addressed here.

*Id.* (citations omitted).
112. 27 S.W.3d 775.
remedies have been statutorily abrogated,\textsuperscript{113} without addressing \textit{Tucker}'s proposed solution that defendants file third-party claims for reimbursement despite the likelihood such claims would be dismissed. The court in \textit{Degener} was able to distinguish \textit{Tucker} and avoid the problem of accommodating contribution claims, because the issue it faced was whether common-law claims for indemnity, as opposed to contribution, were precluded by case-law precedent and section 411.182 of the Kentucky code.\textsuperscript{114} \textit{Degener} concluded that, unlike contribution, common law indemnity actions were still available to tortfeasors, only overruling \textit{Tucker} to the extent it might have implied otherwise.\textsuperscript{115} The \textit{Degener} court also managed to sidestep the "empty chair" problem through its disclaimer that, although apportionment and several liability "obviate[] any claim for contribution among joint tortfeasors whose respective liabilities are determined in the original action, we do not address here the viability of a claim for contribution against other joint tortfeasors who were not parties to that action."\textsuperscript{116}

Other Kentucky decisions have addressed the issue of absent party allocation more directly and substantively, while at times arriving at different and apparently conflicting conclusions. In a 2001 decision, \textit{Owens Corning Fiberglas Corp. v. Parrish}, the Kentucky Supreme Court held that section 411.182 of the Kentucky Code "does not require as a prerequisite for apportionment that the settling person be joined as a party to the action."\textsuperscript{117} However, the court added that apportionment does not extend to non-settling nonparties,\textsuperscript{118} and that apportionment may only include such non-parties who have settled out of court if they have first been found to be at fault.\textsuperscript{119} Absent such a finding "[t]he mere fact that a party has been sued or has settled does not permit the factfinder to allocate part of the total fault to that party."\textsuperscript{120} The court discussed the problem with section 411.182's omission of any definition of "fault,"

\begin{itemize}
\item \textsuperscript{113} Id. at 778.
\item \textsuperscript{114} Id. at 776-77.
\item \textsuperscript{115} Id. at 780-81.
\item \textsuperscript{116} Id. at 779 (citations omitted).
\item \textsuperscript{117} 58 S.W.3d 467, 480 (Ky. 2001).
\item \textsuperscript{118} Id. at 471 n.5; accord Baker v. Webb, 883 S.W.2d 898 (Ky. Ct. App. 1994).
\item \textsuperscript{119} Owens, 58 S.W.3d at 471 n.5, 481.
\item \textsuperscript{120} Id. at 471 n.5.
\end{itemize}
which the statute establishes as a prerequisite for apportionment, and concluded that the legislature must have been aware of and consequently acquiesced in the common law definition of fault.\textsuperscript{121} Therefore, according to Owens, the definition of "fault" which establishes a threshold burden for allowing apportionment to non-parties is evidence of "acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to [other tort actions]."\textsuperscript{122}

The Owens decision further explained that this definition of fault must incorporate "[I]legal requirements of causal relation,"\textsuperscript{123} with the evidence establishing "a causal connection between the plaintiff's act or omission and the plaintiff's injury or damages."\textsuperscript{124} This articulation of the threshold requirements for proving fault for purposes of apportionment is in accordance with the court's earlier decisions in Hilen and in DeStock #14, Inc. v. Logsdon\textsuperscript{125} that "damages must be apportioned according to the parties' respective percentages of fault, which are determined by considering 'both the nature of the conduct of each party and the causal relation between the conduct and the damages claimed.'"\textsuperscript{126} However, while requiring that fault, including causality, be established prior to apportionment, the court in Owens did not explain how that fault-based threshold corresponds with the previously articulated "active assertion of a claim" standard for nonparty allocation articulated in Floyd, a test which the supreme court also made passing reference to in Sand Hill Energy, Inc. v. Ford Motor Co.\textsuperscript{127}

The Kentucky Supreme Court has been more consistent in affirming that allocation does not extend to immune parties, but even in this area there is inconsistency in the court's underlying rationales. In both Jefferson County Commonwealth Attorney's Office v. Kaplan\textsuperscript{128} and Lexington-Fayette Urban County

\textsuperscript{121} Id. at 474-75.
\textsuperscript{122} Id. at 473.
\textsuperscript{123} Id.
\textsuperscript{124} Owens, 58 S.W.3d at 475 (quoting UNIF. COMPARATIVE FAULT ACT, § 1(b), 12 U.L.A. 123).
\textsuperscript{125} 993 S.W.2d 952 (Ky. 1999).
\textsuperscript{126} Id. at 958 (quoting Hilen, 673 S.W.2d at 720) (emphasis added).
\textsuperscript{127} 83 S.W.3d 483 (Ky. 2002), rev'd on other grounds, 142 S.W.3d 153 (Ky. 2004).
\textsuperscript{128} 65 S.W.3d 916 (Ky. 2001).
Government v. Smolcic, the court held that allocation does not extend to immune parties. Although Smolcic explicitly followed Kaplan, with the court refusing to overrule the case, the underlying rationales of the two cases' analyses are different in subtle but important ways. In Kaplan, the court eschewed a policy-based interpretation of section 411.182 of the Kentucky Code, criticizing the lower court for improperly basing its decision on policy considerations rather than engaging in statutory construction of the plain language of the statute.

Under that plain language, the supreme court concluded, section 411.182's requirement of allocation to "each party at fault" means only "those parties complying with the statute as named parties to the litigation and those who have settled prior to litigation, not the world at large." This conclusion was attacked as too limited a reading of the statute by the Kaplan dissent, which observed:

Before today, this Court has never interpreted KRS 411.182 to require that a valid claim remain in litigation against a third-party defendant to require apportionment against that third-party defendant. In fact, we have implied exactly the opposite and suggested that third-party complaint practice allows apportionment even after a third-party complaint is dismissed.

While following the holding of Kaplan, the court in Smolcic employed the type of analysis eschewed by the Kaplan majority, basing its decision not on a plain reading of the text, but rather on its reading of the "necessary inferences" of the statute, the underlying policy justifications for immunity, and the legislative intent it concluded was implicit in the statute's lack of explicit language addressing immune parties.

A similar policy-based approach was employed in Kentucky Farm Bureau Mutual Insurance Co. v. Ryan, a decision which may implicitly call into question the precedential

129. 142 S.W.3d 128 (Ky. 2004).
130. Kaplan, 65 S.W.3d at 922; Smolcic, 142 S.W.3d at 134-36.
131. Smolcic, 142 S.W.3d at 134.
132. Kaplan, 65 S.W.3d at 922.
133. Id.
134. Id. at 929 (Keller, J., dissenting).
135. Smolcic, 142 S.W.3d at 135-36.
136. 177 S.W.3d 797, 800 (Ky. 2005).
value of previous decisions on nonparty allocation, along with the meaning and reach of nonparty allocation itself. Specifically, the court in Kentucky Farm Bureau extended the reach of section 411.182 of the Kentucky Code to allow apportionment even to unidentified absent persons who are not subject to personal liability (in that case, an unidentified motorcyclist whose actions contributed to a car accident). To reach that result, the court engaged in a substantive discussion of the purpose of section 411.182, concluding that the statute was intended in part to prevent allocation of fault against tortfeasors "far in excess of" such tortfeasors' liability and that juries should therefore be allowed to allocate damages even to unknown tortfeasors, in order to accommodate the apportionment purposes of comparative negligence.

The court also cited the Owens fault requirement, but in doing so, appeared to reduce the degree of proof required for such fault determinations as a prerequisite for apportionment. While Owens required that "[I]legal requirements of causal relation" must be met to establish fault sufficiently to warrant allocation, the court in Kentucky Farm Bureau paraphrased Owens as requiring that the court make only "a threshold assessment that reasonable jurors could, in fact, determine that an individual was at fault." Consequently, the Kentucky Farm Bureau holding appears to significantly diminish the burden of proof required in a threshold fault determination, while leaving unanswered what type of proof would be required, if not the legal requirements of causation as previously suggested by Owens. If courts allow apportionment of fault to a person whose identity cannot be determined, one might ask, how is such fault to be ascertained with any certainty in those cases, and how far is this principle to be extended?

The dissent in Kentucky Farm Bureau appeared troubled by such questions, and particularly by the inconsistency and conflict created by the majority opinion viewed in contrast with previous decisions by the court. The dissent questioned the precedential support for and logic of allowing apportionment "to

137. Id. at 799-800.
138. Id. at 802-04.
139. Owens, 58 S.W.3d at 473.
140. Kentucky Farm Bureau, 177 S.W.3d at 804 (citing Owens, 58 S.W.3d at 471).
an unknown tortfeasor who is neither before the court, nor subject to personal liability, such as the unknown motorcyclist in this case.\textsuperscript{141} In allowing such apportionment, the dissent charged, the majority opinion inexplicably deviated from the holdings of \textit{Smolcic} and \textit{Kaplan} that

a non-party, non-settling entity, not before the court, and not subject to personal liability, should not be considered for apportionment purposes because such a person is not a "party to the action" as required by KRS 411.182. There is simply no consistent logic between \textit{Smolcic} and the majority's opinion in this case.\textsuperscript{142}

The dissent further charged the majority with effectively:

lower[ing] the standard of service necessary for apportionment. Instead of requiring personal jurisdiction, the majority would now allow apportionment to any unknown, nominal party, constructively served. They argue "fundamental fairness" requires that KFB be permitted to introduce evidence pertaining to the alleged fault of a third-party tortfeasor . . . even though the deceased plaintiffs are not to be accorded the same "fundamental fairness" . . . .\textsuperscript{143}

"Fundamental fairness," the dissent explained, "requires that apportionment not be allowed to such a non-party on the basis of constructive service of process alone."\textsuperscript{144} Confronting the problem of phantoms directly, the dissent charged the majority with allowing unknown "ghosts" to reduce the amount of damages awarded to plaintiffs, which exceeds the reach of the "third-party" or "party to the action" language of section 411.182's text.\textsuperscript{145}

Such questions implicate the broader phantom share allocation problems perpetuated by the \textit{Kentucky Farm Bureau} decision. The majority in \textit{Kentucky Farm Bureau} denied that it was creating an "empty chair" problem by allowing allocation to an anonymous unidentified absent person, arguing that such allocation does not create a "phantom" party situation for

\textsuperscript{141} \textit{Id.} at 804 (Scott, J., dissenting).

\textsuperscript{142} \textit{Id.}

\textsuperscript{143} \textit{Id.} at 806.

\textsuperscript{144} \textit{Id.}

\textsuperscript{145} \textit{Kentucky Farm Bureau}, 177 S.W.3d at 806 (Scott, J., dissenting).
purposes of shifting liability. Nor does apportionment of fault to a tortfeasor who is not an ‘active’ party to the action impose any liability upon him or warrant a judgment against him; it merely determines the percentage of total damages for which he was responsible." It is unclear to what extent this ruling may render void previous requirements of party status or legal causation of fault. The court also fails to explain how allowing apportionment to an unidentifiable person does not perpetuate the "phantom party" or "empty chair" problem; such a person is absent to a degree even more extreme than other phantom parties (such as identified but insolvent or immune parties). The court's argument that apportionment does not impose liability on tortfeasors misses the point that the consequence of such apportionment is to reduce the damages awarded to plaintiffs. With the Kentucky Farm Bureau court conceding elsewhere that the purpose of the statute is to protect both plaintiffs and defendants, its phantom party analysis seems pointedly one-sided in favor of the interests of some tortfeasors and invites more questions than it answers.

In summary, Kentucky has faced substantial problems related to phantom party allocation and other consequences of adopting proportional damage allocation through comparative fault statutes, similar to those faced by Alaska courts. In addition to the statutory interpretation issues already discussed, it is also worth observing that section 411.182 of the Kentucky Code, while apparently imposing several liability for all tort actions, does not necessarily do so. Even the phrase "all tort actions" cannot be interpreted literally, in light of the fact that Kentucky continues to apply joint and several liability in medical negligence actions and in dram shop cases, for example.

More pertinently, both the language of section 411.182 of the Kentucky Code and the case law interpreting that statute

146. Id. at 803 (majority opinion).
147. Id. at 803-04.
148. Id. at 802.
149. See Hilsmeier v. Chapman, 192 S.W.3d 340, 344 (Ky. 2006) (holding that section 411.182 includes intentional tort actions as well as negligence cases).
150. KY. REV. STAT. ANN. § 304.40-290 (LexisNexis 2005); see also Elpers v. Kimbel, 365 S.W.2d 157, 161 (Ky. 1964).
151. See DeStock #14, 993 S.W.2d at 952.
have failed to provide clear answers to the question of nonparty allocation, to define the procedural requirements for meeting the “fault” threshold for apportionment, and to clarify which absent parties may be included in such apportionment. Future decisions may establish with more clarity whether the statute should be strictly interpreted as allowing apportionment only to those named as parties whose fault has been causally linked to the tort victim’s injury, or whether “fault” may be more broadly assigned, even to unidentified nonparties. In the meantime, the status of nonparty allocation and the reach of section 411.182 remain uncomfortably confused.

C. Vermont: The Coexistence of Comparative Fault and Joint and Several Liability

While Vermont, like Alaska and Kentucky, is often described as having completely abolished joint and several liability, that description is inaccurate. This section describes how, contrary to common misunderstandings, Vermont’s courts have continued to allow joint and several liability even after the enactment of a comparative negligence statute.

Title 12, section 1036 of the Vermont Code, enacted in 1969 and amended in 1979, provides:

Contributory negligence shall not bar recovery in an action by any plaintiff, or his legal representative, to recover damages for negligence resulting in death, personal injury or property damage, if the negligence was not greater than the causal total negligence of the defendant or defendants,

152 See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § B18 reporters’ note, cmt. a (describing Vermont as a jurisdiction which abolished joint and several liability by statute and by adoption of comparative fault through VT. STAT. ANN. tit. 12, § 1036); id. at §17 (describing Vermont as a “several liability” jurisdiction); see also Brickman, supra note 84, at 901 n.239 (listing Vermont as a state with “tort reform measures eliminating joint and several liability”); Higgins, supra note 28, at 925 n.43 (describing Vermont as a state which bans the doctrine of joint and several liability altogether); Klein, supra note 28, at 84 n.90 (“Sixteen states apply comparative fault and several liability only . . . [including] Vermont”); Mednick & Peck, supra note 28, at 876 (listing Vermont as one of the eight states which as of 1994 had “eliminated joint and several liability entirely, concluding that defendants should at all times be liable in tort actions for their proportionate share of the harm”); American Tort Reform Association, ATRA Issues: Joint And Several Liability Rule Reform, http://www.atra.org/show/7345 (last visited April 6, 2007) (describing Vermont statute as “totally abolish[ing] joint and several liability”).
but the damage shall be diminished by general verdict in proportion to the amount of negligence attributed to the plaintiff. Where recovery is allowed against more than one defendant, each defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of the amount of his causal negligence to the amount of causal negligence attributed to all defendants against whom recovery is allowed.\textsuperscript{153}

The purpose of the statute has been described as “to establish ‘the ratio of the amount of [a plaintiff’s] causal negligence to the amount of causal negligence attributed to all defendants against whom recovery is allowed.’”\textsuperscript{154} In a case decided five years after the statute’s enactment, \textit{Howard v. Spafford}, the Vermont Supreme Court stated in dicta that while contribution remedies may still exist among joint tortfeasors, “[t]he Vermont statute, as written, does away with joint and several liability among joint tortfeasors held liable in a judgment. They are liable only severally, not jointly . . . .”\textsuperscript{155} However, despite this language from \textit{Howard}, later decisions by the Vermont Supreme Court clearly establish that title 12, section 1036 of the Vermont Code did not, in fact, completely abolish joint and several liability.

A 1975 decision, \textit{Zaleskie v. Joyce}, involved the joint liability of a car dealership and an individual dealer, after the dealer, driving one of the dealership’s cars behind a customer who was taking a test drive of a motorcycle, ran into and killed the customer as a result of both negligent driving and the car’s mechanical failure.\textsuperscript{156} The jury rendered a joint verdict against the defendants, also granting the dealer’s cross-claim against the dealership.\textsuperscript{157} On appeal, the Vermont Supreme Court affirmed the judgment against the defendants but reversed the cross-claim verdict as reflecting the jury’s desire to hold the defendants equally responsible, despite the court’s instruction to grant the

\textsuperscript{153} VT. STAT. ANN. tit. 12, § 1036 (1998). The historical notes accompanying the statute explain that the 1979 amendments “inserted the word ‘total’ between the words ‘causal’ and ‘negligence’ of the defendant; and added the words ‘or defendants’.” VT. STAT. ANN. tit. 12, § 1036, historical notes.


\textsuperscript{155} 321 A.2d 74, 76 (Vt. 1974).

\textsuperscript{156} 333 A.2d 110, 111 (Vt. 1975).

\textsuperscript{157} \textit{Id.}
cross-claim only if the jury found the dealer alone, not both defendants, to be liable.\textsuperscript{158} Most significantly, upon reversing the cross-claim, the supreme court commended the jury’s desire for equity but cited \textit{Howard} in holding that “it is not permissible under the law of this state, which permits a plaintiff to pursue all, or any part, of his recovery from either joint tortfeasor.”\textsuperscript{159} This language was the first indication from the supreme court that title 12, section 1036 of the Vermont Code did not abolish joint and several liability in Vermont.

The Vermont Supreme Court has continued to apply joint and several liability in later cases. In \textit{English v. Myers}, the court engaged in a substantial analysis of the impact of title 12, section 1036 of the Vermont Code on joint and several liability, strongly affirming:

\textit{The legislature has not, as defendants argue, rejected the concept of joint and several liability among co-defendants in favor of apportioning recovery in relation to the relative negligence of the parties. The apportionment required is among joint tortfeasors, and that is not the basis for recovery in the instant action. The assumption implicit in the argument, that the two terms may be equated, is simply not the fact.}\textsuperscript{160}

In other cases as well, the Vermont Supreme Court has affirmed that joint and several liability remains available to plaintiffs in Vermont. In \textit{State v. Therrien}, the court, although deciding the case on other grounds, engaged in a discussion of the meaning of “joint tortfeasor,” and in doing so indicated that Vermont continues to recognize joint tortfeasors as those “who contributed to the claimant’s injury and who may be joined as defendants in the same lawsuit,” in which they may be held jointly and severally liable.\textsuperscript{161} In \textit{Plante v. Johnson}, the court further limited the reach of title 12, section 1036 of the Vermont Code as allowing apportionment among only those parties joined in the same action, and not to those not named as

\textsuperscript{158. \textit{Id.} at 115.}
\textsuperscript{159. \textit{Id.}}
\textsuperscript{160. \textit{English}, 454 A.2d at 254 (emphasis added).}
\textsuperscript{161. 830 A.2d 28, 37 (Vt. 2003).}
defendants by the plaintiff. The court further limited section 1036 as inapplicable to dram shop actions.

Most recently, the court in Levine v. Wyeth addressed its previous decisions interpreting title 12, section 1036 of the Vermont Code and once again affirmed that joint and several liability could still be applied in Vermont. The case largely addressed preemption issues raised in the lawsuit against a drug manufacturer, filed by a woman who suffered severe injuries, including an arm amputation, as a result of a drug injection. However, the court also addressed damage apportionment issues, rejecting Wyeth’s argument that the lower court erroneously failed to apportion damages between it and the health center treating the plaintiff, with whom the plaintiff had settled.

In rejecting Wyeth’s argument that title 12, section 1036 of the Vermont Code should apply to limit its damages, the court reaffirmed the important role joint and several liability continues to play in Vermont, explaining, “[o]ur traditional rule is that multiple tortfeasors are jointly and severally liable . . . [and the] law of this state . . . permits a plaintiff to pursue all, or any part, of his recovery from either joint tortfeasor.” Agreeing that section 1036, if applied, may in some cases limit joint and several liability, the court nonetheless rejected Wyeth’s interpretation that such application of section 1036 is mandatory, or that it extends beyond cases in which plaintiffs affirmatively allege comparative negligence. The Levine decision, consequently, seems to leave it up to the plaintiff whether to seek relief under section 1036, or whether to instead exercise joint and several liability options and single out one tortfeasor for a suit. At the very least, the decision clearly provides that the statute does not completely abrogate joint and several liability, and especially not in cases where a plaintiff has chosen to settle with one tortfeasor, leaving another tortfeasor subject to full liability in a single lawsuit:

163. Id. at 1348.
165. Id. at *1-2, 6-37.
166. Id. at *37, 41-43.
167. Id. at *37-38 (emphasis added) (quoting Zaleskie, 333 A.2d at 115).
168. Id. at *41-43.
Defendant argues that whether or not section 1036 applies, we can depart from our common law and determine that joint and several liability should no longer prevent apportionment among joint tortfeasors when one tortfeasor has settled in a previous action. We decline to do so. In Howard v. Spafford, which also involved an interpretation of § 1036, we expressed our hesitation to depart from the rule precluding contribution among joint tortfeasors, preferring not to “substitute judicial fiat for legislative action.” Among the many reasons cited in Howard for adhering to the common law was the sheer number of alternative schemes adopted by other states. This reasoning applies here as well. 169

This passage from Levine not only affirms the continued existence of joint and several liability in Vermont, but also reveals that the court has explicitly considered and rejected the alternative approaches to comparative fault adopted by other states (such as Alaska and Kentucky).

In conclusion, it is clear that the courts in Vermont have affirmed that its state’s comparative negligence statute does not abrogate joint and several liability, despite the false assumptions of some, including the Restatement authors, that the adoption of that statute abolished joint and several liability. The Vermont Supreme Court’s decisions indicate that in Vermont, the choice lies with (at the very least, fault-free) plaintiffs whether to sue multiple defendants under title 12, section 1036 of the Vermont Code, or whether to settle with all but one defendant, employing common law joint and several liability remedies. In addition to not being an absolute mandate or abrogation of joint and several liability, section 1036 is not applicable to all actions, as seen in Plante. 170 Furthermore, where the statute does apply, joint and several liability principles may continue to apply as well, as seen in Zaleskie. 171

Vermont can provide a viable model for other states seeking to reconcile their comparative fault statutes with joint and several liability. The Vermont decisions illustrate that those states which have legislatively adopted a comparative fault

171. See Zaleskie, 333 A.2d at 115.
statute need not abandon joint and several liability remedies. These cases reveal the erroneous nature of the link some have drawn between the adoption of comparative liability and the abolition of joint and several liability. This "false link"\textsuperscript{172} problem is not unique to Vermont; it has been discussed over the years by several scholars who have made efforts to debunk it.\textsuperscript{173} The final section of this article addresses this issue in broader terms, as it exists beyond Vermont.

III. BROADER APPLICATIONS AND PROPOSED SOLUTION: A RETURN TO JOINT AND SEVERAL LIABILITY WITH CONTRIBUTION

A. Beyond Alaska, Kentucky, and Vermont

The problems discussed thus far are not limited to Alaska, Kentucky, and Vermont, but are a common result of modern efforts to modify joint and several liability. This section addresses in broader terms the issues states seeking to replace joint and several liability with proportional fault allocation must necessarily confront.

1. The Empty Chair/Phantom Party Problem

The phantom party problem faced in Alaska and Kentucky is a problem that any state implementing proportional allocation through joint and several liability must address.\textsuperscript{174} Such states

\textsuperscript{172} See Hager, supra note 16, at 97-98 (explaining that those who conclude that comparative responsibility renders joint and several liability obsolete are guilty of creating a "false symmetry" and "dubious linkage" between two different sets of issues, since "the majority of courts which have ruled on the issue unconstrained by statute have held that comparative responsibility does not require modification of joint and several liability"); Vandall, supra note 1, at 581 (similarly critiquing such linkage, which he describes as an artificial chaining together of comparative liability and joint and several liability, perpetuated in part by the recent Restatement); Richard W. Wright, Allocating Liability Among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure, 21 U.C. DAVIS L. REV. 1141, 1154 (1988) (arguing that opponents of joint and several liability have created a false link between comparative fault with joint and several liability, concealing the fundamental issue of joint and several liability, namely whether the injured plaintiff or the joint tortfeasors should be the ones to bear the risk of apportionment).

\textsuperscript{173} See supra note 172.

\textsuperscript{174} See, e.g., Leflar, supra note 35 (addressing empty chair problem as it exists in Arkansas following that state's general replacement of joint and several liability with proportional several liability).
must resolve whether it is more preferable to require that tort actions involving joint tortfeasors be resolved in a single action allowing phantom share allocation, or instead to allow multiple suits for the same tort claim. Although the Uniform Comparative Fault Act of 1977 provides guidance on this issue, advising states that nonparty allocation cannot be ascertained with certainty and unfairly binds parties not present to defend themselves, some states, along with the Third Restatement itself, have failed to heed the UCFA’s warnings and instead endorsed phantom party allocation, either explicitly or implicitly. The Third Restatement, for example, appears to advocate nonparty allocation as a means of warding off “strategic behavior” by plaintiffs, preventing prejudice against defendants, and lessening “incentives to sue multiple defendants serially rather than in the same action,” which the Restatement contends would create difficulties in coordinating the outcome of multiple suits.

Most strikingly, the Third Restatement includes commentary attacking a Montana Supreme Court decision which held that nonparty allocation violates the due process rights of both the nonparty and the plaintiff. The Restatement describes the *Plumb v. Fourth Judicial District Court* decision as based on four grounds articulated by the court: 1) the effect of apportionment on the nonparty’s reputation; 2) the disproportionate responsibility potentially assigned to an unrepresented nonparty; 3) the unfair burden on the plaintiff to establish the nonparty’s culpability and introduce evidence; and 4) the availability of alternative joinder procedures as a means of including nonparties.

The Restatement commentary attacks this analysis of the court on several grounds, but without reference to any similar critiques from other sources. For example, the commentary describes the court’s conclusions as “obviated by the fact that the plaintiff and defendant have symmetrical and opposing

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178. *Restatement (Third) of Torts: Appportionment of Liability* § B19, reporters’ note, cmt. c; see also *Plumb*, 927 P.2d at 1020.
incentives to present evidence” regarding comparative responsibility. However, this argument by the Restatement commentary fails to address the Plumb court’s underlying rationale that reallocation to plaintiffs disproportionately harms both nonparties and plaintiffs more than defendants:

[W]ithout the opportunity to appear and defend themselves, nonparties are likely to be assigned a disproportionate share of liability, and the [plaintiffs’] recovery is likely to be reduced beyond the degree to which a third party would be found at fault if he, she, or it actually had an opportunity to defend themselves.

After attacking the Plumb decision on other grounds, without describing the court’s underlying analysis, the Restatement commentary concludes, “[s]urely on which party a state decides to place the burden of joining additional parties is not of constitutional dimension. In short, the Plumb court’s arguments about the unconstitutionality of permitting assignment of a share of comparative responsibility to nonparties are not persuasive.” This statement is particularly striking in its polemical and conclusory tone, begging the question of the appropriateness of the Restatement including such a harsh and unitary attack on a supreme court’s constitutional analysis, without exploring the underlying rationale of the court’s decision.

One might also question the Restatement’s describing the purpose of nonparty allocation as being “to enable defendants’ comparative share of responsibility to be determined,” without explaining how nonparty allocation actually effectuates that end. The Restatement makes additional conclusory statements on this point, such as its assertions that the conflicting interests of plaintiffs and defendants “ensur[es] an adversarial presentation of the responsibility of the nonparty,” and that as long as a nonparty is sufficiently identified and discovery can be conducted, the adversary system will result in

179. Restatement (Third) of Torts: Apportionment of Liability § B19, reporters’ note, cmt. c.
180. Plumb, 927 P.2d at 1020.
182. Id. § 11 cmt. a (2000).
183. Id. § B19 cmt. c.
accurate allocations. However, merely identifying a nonparty, and even subjecting the nonparty to discovery, is not equivalent to providing the full protections of the adversary system. Such steps alone do not provide the certainty resulting from the party presence generally required through the adversary process to ensure that defendants are available to provide evidence, answer questions, and otherwise help fact-finders adequately ascertain their alleged fault. In addition, the Restatement’s discussion of nonparty allocation has been criticized for failing to address or resolve the problem of tortfeasors who cannot be joined due to immunity or lack of jurisdictional reach, or to consider that joinder of available co-defendants, where procedurally allowed, may prevent the serial lawsuit problem.

The availability of phantom party allocation may actually dissuade a defendant from formally joining other tortfeasors. The defendants may hope that their absence might result in a greater allocation of damages to nonparties (and, reciprocally, lesser allocation to the present parties) due to the absent parties’ inability to fully avail themselves of the adversary system and defend their interests. If defendants are permitted to choose phantom party allocation over joinder for such purely strategic reasons, the integrity of the adversary system could be threatened and the likelihood of inaccurate damage calculations increased.

As other language in the Restatement indicates, joinder of nonparties is preferable to allocating responsibility in their absence: “Having other persons whose acts or omissions are alleged to have contributed to the plaintiff’s injuries participate as parties should facilitate discovery and assist the factfinder in providing a more accurate apportionment of responsibility among all of those who contributed to the plaintiff’s injuries.” This statement undermines the Restatement’s suggestions elsewhere that a nonparty allocation system is adequate. Phantom party allocation is not a sufficient substitute for a party’s presence throughout the adversarial factfinding proceeding. Party presence is essential for providing the
evidence needed for an accurate allocation of damages, where such allocation occurs. In addition, as the Alaska Supreme Court explained in *McLaughlin*, the issues of liability pertaining to an absent party may be entirely different from those addressed in relation to the original parties.\(^\text{187}\)

Finally, the Restatement acknowledges the hardship that both several liability and nonparty allocation cause to plaintiffs, commenting that those jurisdictions which have rejected nonparty allocation “temper the harsh effects of several liability by shifting some of the burdens and risks back to the defendant.”\(^\text{188}\) While issues of equity are explored more in depth in Part III.C.3 of this article, it is worth mentioning here as well the fairness problems created by nonparty allocation, as acknowledged even by those who generally support the concept.

2. Conflict of Laws: Third Party Joinder Problems

As the Alaska case study illustrates, the modification of joint and several liability also creates problems for courts attempting to replace contribution remedies no longer available under several liability with alternative equitable remedies for defendants. Such courts must contend with federal and state rules which preclude joinder of nonparties and consequently may conflict with court-created alternatives to contribution. In particular, Federal Rule of Civil Procedure 14(a) provides that defending parties, as third-party plaintiffs, may join only those nonparties who are potentially liable “to the third-party plaintiff for all or part of the plaintiff’s claim against the third-party plaintiff,” not just to the original plaintiffs.\(^\text{189}\)

In Alaska and beyond, this federal rule creates a conflict with several liability structures, absent state laws, not just procedural rules, which establish causes of action as between co-defendants and absent tortfeasors. Efforts to rewrite state procedural rules to increase joinder options may not fully resolve these issues, as explained by the federal Alaska District

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\(^{188}\) *Restatement (Third) of Torts: Apportionment of Liability* § B19 cmt. d.

\(^{189}\) *Fed. R. Civ. P.* 14(a).
Court.\textsuperscript{190} The federal courts may not always consider such solutions at the state level to remedy the conflict between federal and state laws.\textsuperscript{191} These conflict of law problems are aggravated in states that impose a one-action rule requiring all parties—including phantom parties—to be joined severally in a single suit, where federal rules clearly preclude such joinder.\textsuperscript{192}

The Restatement acknowledges that in addition to the federal rules' limitation on third-party joinder, some state rules also prohibit third-party joinder on the basis of a third-party defendant's liability to the plaintiff.\textsuperscript{193} The Restatement concludes that in those states, absent state laws allowing contribution claims, many defendants would not be able to join other tortfeasors who may have contributed to a plaintiff's injuries.\textsuperscript{194} Such observations reinforce the desirability of contribution as a remedy which several liability states may currently deny, but which could be resurrected along with joint and several liability. The retention of several liability, in contrast with joint and several liability, creates the risk of leaving defendants without contribution remedies, while also creating the risk of conflicts of laws and procedural rules.

3. Inconsistent Applications

After two decades of legislative limitations on joint and several liability through modern “tort reform” efforts, no state has completely abolished joint and several liability for all tort actions. As the Third Restatement describes, nearly all states continue to impose joint and several liability on intentional tortfeasors, tortfeasors who are vicariously liable, tortfeasors liable for failing to protect a plaintiff from a specific risk on an intentional tort, and tortfeasors acting in concert.\textsuperscript{195}

As discussed in Part II, Vermont, Kentucky, and Alaska are states which have been identified as completely abolishing joint and several liability. However, even in these states exceptions

\begin{thebibliography}{99}
\item[191] See id. at 1323-24.
\item[192] See Restatement (Third) of Torts: Apportionment of Liability § 10, reporters' note, cmt. f (2000).
\item[193] Id. § B19 reporters' note, cmt. c.
\item[194] Id. § B19 reporters' note, cmt. c.
\item[195] Id. §§ 12-15 (2000).
\end{thebibliography}
to joint and several liability abrogation are still recognized, in both tort actions and in other contexts. In Vermont, joint and several liability is still largely available as an alternative to comparative fault allocation. In Kentucky, which has purportedly abolished joint and several liability for all tort actions, statutory and common law still provide that juries may apply joint and several liability in tort actions including medical negligence and dram shop cases. Kentucky also continues to apply joint and several liability in many non-tort contexts as well, imposing joint and several liability for example on those knowingly purporting to act for nonexistent limited liability company, on members of workers’ compensation self-insured groups, and on parties liable for contribution on some negotiable instruments. Similarly, in Alaska, joint and several liability is still applied, for example, to owners and operators of facilities “from which there is a release . . . of a hazardous substance,” and to other non-tort contexts; criminal cases where restitution is imposed on accomplices; licensees who fail to report boxing or wrestling contests as statutorily required; bank directors and officers who have made unlawful loans or acted without certificate authority; actions on contract; uncertified actions as a corporation and unauthorized use of corporate power; insurers on underwriters’ policies; directors of domestic stock or mutual insurers, for illegal dividends; and violations of restrictions on shipping or importing cigarettes.

196. See supra notes 152-73 and accompanying text.
197. KY. REV. STAT. ANN. § 304.40-290 (2005); see also Elpers v. Kimbel, 366 S.W.2d 157, 166-61 (Ky. 1964).
198. See DeStock #14, Inc. v. Logsdon, 993 S.W.2d 952, 955-56 (Ky. 1999).
201. KY. REV. STAT. ANN. § 355.3-116(2) (2005).
202. ALASKA STAT. § 46.03.822(a)(2) (2006).
204. ALASKA STAT. § 05.10.150 (2006).
205. ALASKA STAT. §§ 06.05.265, 06.05.350 (2006).
Similarly, other states which have been identified as completely abolishing joint and several liability, such as Arizona, Louisiana, Michigan, and New Mexico, have not in fact done so, but have also carved out exceptions for various tort actions. Arizona, for example, still applies joint and several liability in cases involving actions in concert or agency. Louisiana still provides exceptions for conspiracy and intentional or willful acts and does not apply several liability in cases involving a combination of negligent and intentional tortfeasors, or in strict liability cases. Michigan still allows joint and several liability for some medical malpractice claims. Michigan’s comparative fault statute further provides that its proportional apportionment provisions are not mandatory, but that parties can agree to apply joint and several liability instead. Finally, New Mexico’s several liability statute explicitly provides that “[t]he doctrine imposing joint and several liability shall apply” to intentional torts, vicarious liability, product defect cases, and “situations not covered by any of the foregoing and having a sound basis in public policy.” In these states, exceptions for other tort actions may also be applied judicially.

Many other states which have legislatively modified joint and several liability have made similar exceptions. In addition to states which only prohibit joint and several liability where a plaintiff surpasses a certain threshold of fault, joint and several liability is most frequently retained by states for cases involving intentional torts or tortfeasors acting in concert. Many states

211. See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 17 (2000) (identifying these states as ones which have adopted “pure” several liability).
216. MICH. COMP. LAWS ANN. § 600.6304(6) (West 2000).
217. MICH. COMP. LAWS ANN. § 600.6304(1).
219. See, e.g., ALA. CODE § 6-11-21 (2005); ARIZ. REV. STAT. § 12-2501, 2506 (LexisNexis 2003); ARK. CODE ANN. § 16-55-201 (Repl. 2005); COLO. REV. STAT. § 13-21-111.5 (2005); FLA. STAT. § 768.81 (Supp. 2007); IDAHO CODE ANN. § 6-803 (2004); MISS. CODE ANN. § 85-5-7 (Supp. 2006); NEB. REV. STAT. § 25-21,185.10 (1995 & Supp. 2004); NEV. REV. STAT. § 41.141 (2005); N.M. STAT. ANN. § 41-3A-1; N.D. CENT. CODE § 32-03.2-02 (1996); OHIO REV. CODE ANN. § 2307.22 to -.23 (LexisNexis 2005); WASH.
also still allow joint and several liability in negligence actions involving, for example, certain products claims, pollution and toxic substances, medical malpractice, agency, or claims for economic or punitive damages.

With many states still applying joint and several liability in a variety of contexts, including and beyond tort actions, it can reasonably be inferred that the value of joint and several liability is still largely recognized, if limited, in specific tort cases. As to the nature of the exceptions themselves, the fact that such exceptions vary largely from state to state raises a critical question: if joint and several liability is still a desirable approach in some cases involving some tort victims, why not in others? Indeed, it often appears that states have arbitrarily selected exceptions for product liability, medical negligence, pollution, and different categories of damages, for example, without explaining why joint and several liability should be retained in those cases but not in others. While common law traditions may support the differentiation between intentional torts and negligence, the conflicting applications of other exceptions by the states seem to be more arbitrary.

Even in states viewed as broadly or completely limiting joint and several liability, the exceptions established statutorily and judicially reveal that even those states continue to see the value of joint and several liability. Why, one might ask of the

REV. CODE ANN. § 4.22.070 (West 2005); see also RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY §§ 12-15.

220. See, e.g., HAW. REV. STAT. ANN. § 663-10.9 (LexisNexis Supp. 2005); IDAHO CODE ANN. § 6-803; 735 ILL. COMP. STAT. ANN. 5/2-1117 (West Supp. 2007); MICH. COMP. LAWS ANN. § 600.6304; N.M. STAT. ANN. § 41-3A-1; N.D. CENT. CODE § 32-03.2-02; WASH. REV. CODE ANN. § 4.22.070; WIS. STAT. ANN. § 895.045 (West 2006).

221. See, e.g., ARIZ. REV. STAT. § 12-2501, 2506; ARK. CODE ANN. § 16-55-201; FLA. STAT. § 768.81; HAW. REV. STAT. ANN. § 663-10.9; IDAHO CODE ANN. § 6-803; 735 ILL. COMP. STAT. 5/2-1117 ANN.; NEV. REV. STAT. § 41.141; N.J. STAT. ANN. 2A:15-5.3 (West 2000); WASH. REV. CODE ANN. § 4.22.070.

222. See, e.g., 735 ILL. COMP. STAT. ANN. 5/2-1117; IND. CODE ANN. § 34-51-2-7 (1998); KY. REV. STAT. ANN. § 304.40-290; MICH. COMP. LAWS ANN. § 600.6304.


224. See, e.g., ALA. CODE § 6-11-21; CAL. CIV. CODE § 1431.2 (2007); HAW. REV. STAT. ANN. § 663-10.9; LA. CIV. CODE ANN. art. 2324 (1997); N.Y. C.P.L.R. § 1601 (McKinney 1997); WIS. STAT. ANN. § 895.043.

225. See supra notes 196-224 and accompanying text.
Alaska legislature, is joint and several liability more desirable in actions involving releases of hazardous substances than in other tort claims involving other large-scale harms? Why, one might ask the Kentucky legislature, single out an exception for medical negligence? What do such exceptions say about the general rule? To the extent that exceptions are deemed important enough to protect some categories of tort victims, it is difficult to fathom a rationale that would not extend such logic to other tort victims.

As a matter of course (and federalist principles), laws necessarily vary from state to state. However, the impressive degree of variance among the states and the internally inconsistent application of joint and several liability within any given state both indicate a lack of consistent policy underlying the partial abrogation of joint and several liability. States which limit joint and several liability appear to select exceptions as a matter of individual and largely undefined policy choices, the logic behind which one can only surmise. As the Restatement has recognized in the context of threshold exceptions, the actual threshold assigned by a state is largely arbitrarily chosen, without any obvious justification for one value over another. The same principle applies to other exceptions applied by states. Any state which cannot explain why it has retained joint and several liability for some categories of claims, if not for all, has by implication conceded the value of joint and several liability, even while arbitrarily depriving its protections to specific classifications of tort victims.

4. The Problem of Accurately Calculating Proportionality

Another general problem that exists for states attempting to allocate damages rather than applying joint and several liability is the overly optimistic assumption that proportionality can be accurately calculated. Prosser and Keeton on the Law of Torts explains:

Certain results, by their very nature, are obviously incapable of any reasonable or practical division. Death is such a result, and so is a broken leg or any single wound,

226. See Restatement (Third) of Torts: Apportionment of Liability § D18 cmt. g (2000).
the destruction of a house by fire, or the sinking of a barge. No ingenuity can suggest anything more than a purely arbitrary apportionment of such harm.227

In such scenarios, which are common among negligence actions, joint liability is a more logical approach to damages than an attempt to allocate responsibility for an indivisible injury. While any given tortfeasor may have owed a distinct duty to a tort victim, the liability itself is not severable in any accurate way, since each tortfeasor has been found fully negligent by that point, and the injury is by definition indivisible.228 Prosser and Keeton on the Law of Torts concludes that in such cases, entire liability makes sense, as it “rests upon the obvious fact that each has contributed to the single result, and that no reasonable division can be made.”229

Over time, courts have observed that the flawed mathematics of proportional fault allocation can result in imprecise damage apportionment.230 The Kentucky Supreme Court observed in Owens that apportionment is particularly problematic in asbestos litigation where both the plaintiffs’ cigarette smoking and exposure to asbestos are significant causes of the plaintiffs’ asbestosis.231 While the Owens court concluded that it was not error in that case to allow such apportionment, it observed that other courts had come to different conclusions due to the impossibility of accurately allocating damages in such circumstances. For example, in Martin v. Owens-Corning Fiberglas Corp., the Pennsylvania

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227. Keeton et al., supra note 1, § 52, at 347 (citations omitted).
228. See id. § 52, at 347, § 65, at 452-53; see also infra Part III.C.3 (discussing the absurdity of calculating a fully negligent defendant to be, for example, only 50% at fault, which is arguably as flawed as calling someone “50% pregnant”).
229. Keeton et al., supra note 1, § 52, at 347. It should be noted that this conclusion contrasts with the Third Restatement’s suggestion that “[c]omparative responsibility provides a different and easier method [than joint and several liability] for apportioning liability among severally liable parties.” Restatement (Third) of Torts: Apportionment of Liability § 11 cmt. b. The Restatement offers this conclusion without further elaboration, failing to explain how a calculation of percentages of damages for indivisible harms is so obviously easier than assigning damages under joint and several liability.
230. For a comprehensive discussion of this problem, see David W. Robertson, Eschewing Ersatz Percentages: A Simplified Vocabulary of Comparative Fault, 45 St. Louis U. L.J. 831 (2001); see also Robinson, 878 F. Supp. at 1322 (“[T]he apportionment of fault is not an exact science . . . .”).
231. Owens-Corning Fiberglas Corp. v. Parrish, 58 S.W.3d 467, 479 (Ky. 2001).
Supreme Court, after observing the conflicting expert testimony in that case regarding the comparative causative effects of smoking and asbestos exposure, reversed the jury’s apportionment, concluding that “any apportionment by the jury in this case was a result of speculation and conjecture and hence, improper.”232 Similarly, Owens observed, the Ninth Circuit has concluded that “[w]hen it is practically impossible to decide which tortfeasors caused the determinate injuries, an injury must be treated as indivisible even if we know that different tortfeasors probably caused different parts of it.”233

Such concessions of the impossibility of accurately apportioning damages in some cases is in accordance with the Second Restatement of Torts, which explains, “[i]f the tortious conduct of two or more persons has contributed to the harm in such a manner that each is a legal cause of it, the liability is not apportioned and each is liable for the entire harm.”234 In addition, as Justice Breyer wrote prior to his service on the U.S. Supreme Court, “assessing ‘comparative fault’ is not so much an exercise in pure mathematics as it is an exercise in [normative] judgment. . . . Nor can one reasonably determine ‘the contribution of each cause’ to the single harm.”235 This is especially the case where the assessment of fault is calculated for nonparties, whose absence from the courtroom makes the determination of proportional responsibility even less certain.

These observations indicate that modified approaches to allocation of damages, such as those based on percentage thresholds, may be premised on a flawed assumption of the infinite powers of mathematics. In contrast with joint and several liability, proportional liability can require juries to perform mathematical contortions in getting an indivisible injury to somehow line up accurately with artificial divisions of damages. This problem of inaccurate or even impossible allocation of responsibility is inherent with comparative fault approaches premised on a flawed theory that responsibility for

233. Owens, 58 S.W.3d at 477-78 n.30 (quoting Kalland v. N. Am. Van Lines, 716 F.2d 570, 573 (9th Cir. 1983)).
234. Id. (quoting RESTATEMENT (SECOND) OF TORTS § 875 cmt. b (1939)).
235. Lyon v. Ranger III, 858 F.2d 22, 26 (1st Cir. 1988).
indivisible injuries can always be subject to proportional division.

B. Solution: Return to Joint and Several Liability with Contribution

Courts and legislatures continue to struggle with balancing the apparently conflicting objectives of protecting defendants from comparatively unfair fault allocation and ensuring that injured plaintiffs receive full compensation for their injuries. Some observers may contend that these conflicting objectives cannot be resolved.\textsuperscript{236} Such a conclusion is unnecessarily pessimistic.

The attempt to eliminate joint and several liability has created more problems for courts and litigants than it has remedied. The very purpose most commonly articulated for abolishing joint and several liability—to ensure a more fair and accurate allocation of responsibility—may, ironically enough, be better effectuated by a return to joint and several liability coupled with contribution remedies than by the attempts so far to abolish joint and several liability. One reason for this is because under several liability, states are forced to choose between two flawed approaches, both of which arguably create injustices for both plaintiffs and defendants. The choice is between: 1) allocating damages to non-parties, which raises the statutory interpretation, conflict of laws, “phantom party/empty chair,” and equity problems discussed in this article; or 2) in the absence of non-party allocation, risking that “the failure to consider the negligence of all tortfeasors, whether parties or not, prejudices the joined defendants,”\textsuperscript{237} and further opens the door to multiple lawsuits where the one-suit rule is rejected along with phantom party allocation. As such, a return to joint and several liability with contribution may be the most equitable approach.

\textsuperscript{236} See, e.g., John Scott Hickman, Note, Efficiency, Fairness, and Common Sense: The Case for One Action as to Percentage of Fault in Comparative Negligence Jurisdictions That Have Abolished or Modified Joint and Several Liability, 48 VAND. L. REV. 739, 744 (1995).

\textsuperscript{237} KEETON ET AL., supra note 1, § 67, at 475-76.
Reinstating pure joint and several liability\textsuperscript{238} could remedy the problems that have surfaced in judicial applications of proportional several liability. A corresponding reinstatement of contribution, allowing joint tortfeasors to seek repayment from other tortfeasors, could more effectively prevent unfair damage awards than several liability, without creating the problems inherent with comparative negligence systems.

Joint and several liability, with contribution, can facilitate full compensation to tort victims, while also restoring the ability of tortfeasors to apportion contribution responsibility amongst themselves. Several liability, in contrast, while perhaps intended to protect defendants at the expense of plaintiffs, ends up harming both by virtue of denying contribution remedies to defendants, while creating substantial litigation hurdles for all litigants.

Joint and several liability with contribution is not a novel concept; it is an approach with solid roots in common law history. Just as joint and several liability was well-established in common law prior to modern tort reform experiments, so too does contribution have a long, if interrupted, history.\textsuperscript{239} American courts began allowing contribution in the early 1800s, while originally limiting contribution to cases involving intentional misconduct.\textsuperscript{240} For nearly a century, courts also limited contribution where it viewed joinder to be an adequate remedy.\textsuperscript{241} However, this limitation faced wide criticism in the 1970s, leading to a brief resurgence of contribution, until it became limited once again as an ironic and presumably unintentional side effect of efforts to abolish joint and several liability.\textsuperscript{242}

\textsuperscript{238} By "pure" joint and several liability, I mean to differentiate joint and several liability with contribution from modified joint and several liability approaches, for example, those that allow reallocation of an insolvent defendant's share of damages to both defendants and plaintiffs. The reasons for proposing pure rather than modified joint and several liability are discussed more in depth in the following section. Furthermore, my proposal of returning to joint and several liability by no means should be read as suggesting that contributory negligence, which has been broadly rejected as unfair and extreme, see Keeton et al., supra note 1, § 67, at 471, should be reinstated as well.

\textsuperscript{239} See Keeton et al., supra note 1, § 50, at 337.

\textsuperscript{240} Id.

\textsuperscript{241} Id.

\textsuperscript{242} Id.
In the twenty-first century, legislatures might do well to reconsider the benefits of joint and several liability. Tort reformers have failed to protect the interests of joint tortfeasors through alternative proportional fault statutes, which have abrogated contribution remedies. In contrast, reinstating joint and several liability would facilitate a return to contribution, serving the interests of both plaintiffs and defendants better than current systems, while alleviating the problems intrinsic with proportional fault allocation. The reinstatement of joint and several liability with contribution would simultaneously protect plaintiffs from being forced to pay for the harms done against them, while also according reciprocal protections to defendants. Such a return to joint and several liability with contribution would achieve a better balance in the protection of litigants’ interests and the integrity of the judicial system.

C. The Feasibility of Implementing Pure Joint and Several Liability with Contribution

1. Why Pure Joint and Several Liability? Problems with Modified and Hybrid Approaches

The Third Restatement has been criticized by some scholars for failing to take a neutral stand on allocation of fault issues by unfairly attacking joint and several liability. However, to be fair, while the Restatement raises concerns about joint and several liability, it also acknowledges the unfairness of a pure several liability scheme. For example, the Restatement explains that “[i]t is difficult to make a compelling argument for either a pure rule of joint and several liability or a pure rule of several liability once comparative responsibility is in place.” The Restatement also explains, “[s]imilar, yet reciprocal unfairness exists in the “B” Track, which employs several liability and imposes these same risks with regard to insolvent and immune parties on plaintiffs.” Furthermore, the Restatement acknowledges, “employing a rule of pure several

243. See generally Vandall, supra note 1; see also Hager, supra note 16, at 83, 94-99.
244. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 10 cmt. a.
245. Id. § A19 reporters’ note, cmt. c (2000).
liability unfairly imposes on the plaintiff all of the share of responsibility attributable to the immune party."  

Rather than pure several liability, the Restatement appears to endorse a model which combines elements of joint and several liability and proportional allocation, if only implicitly. The Restatement adds a disclaimer that the American Law Institute "takes no position on whether joint and several liability, several liability, or some combination of the two should be adopted for independent tortfeasors who cause an indivisible injury." However, that disclaimer loses its force with the Restatement proceeding shortly thereafter to recommend the Track C approach, which combines joint and several liability with comparative reallocation of an unavailable tortfeasor's share of responsibility to both defendants and contributorily negligent plaintiffs. This approach, however, does not mirror that taken by the majority of courts. Courts have generally concluded that contributorily negligent plaintiffs should not be forced to bear the financial burden of unavailable tortfeasors through reallocation, since plaintiffs and defendants are qualitatively different. Such courts recognize that while a tortfeasor's responsibility arises out of an injury it caused to another, in contrast, a plaintiff is not a tortfeasor who caused an injury. The contributory fault of a plaintiff, such courts have concluded, "is of a different quality from that of defendants' negligence, because contributory fault only poses a risk to one's self and not to others." 

Furthermore, if a plaintiff has already been found contributorily negligent, its damages will already have been

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246. Id. § C19 reporters' note, cmts. e, f (2000).
247. Id. § 17 cmt. a (2000). For example, the Restatement favorably describes Track C as "theoretically the most appealing in that it apportions the risk of insolvency to the remaining parties in the case in proportion to their responsibility, thereby providing an equitable mechanism for coping with insolvency," and as the "farest means of handling this problem." Id. § C21 cmt. a (2000).
248. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 17 cmt. a.
249. Id. § C18-21 (2000).
250. See Wright, supra note 6, at 76-77.
251. Id.
252. Id. at 77.
253. Id.
reduced under many states’ comparative negligence statutes. It is not self-evident why the plaintiff should be required to pay additional damages resulting solely from the absence of one of the tortfeasors who caused its injury. Such an additional reduction of the plaintiff’s damages through reallocation does not reflect the plaintiff’s contributory negligence so much as a tortfeasor’s absence due to no fault of the plaintiff.

As the Restatement recognizes in relation to several liability, it is unfair to impose the risk of insolvent and immune parties on plaintiffs. However, the Restatement inexplicably fails to extend this principle beyond the context of several liability and apply it consistently to reallocation as well. Nor does the Restatement explain why a solution which would still allow a victim plaintiff to be part of the reallocation of an insolvent tortfeasor’s share of damages is the most equitable. Rather, it only maintains in a conclusory manner that reallocation of an unavailable tortfeasor’s responsibility to that tortfeasor’s victim is the most fair solution. True fairness, however, demands a more thorough exploration of the equity issues at stake, including the consideration of joint and several liability with contribution among tortfeasors as a viable and potentially more equitable alternative than reallocating damages in a way which forces tort victims to pay for the unavailability of those who injured them.

Other modified or hybrid approaches to joint and several liability apply principles of allocation which are also less than ideal, perpetuating the problems with proportional allocation. The Restatement explains that the popular “threshold” approach:

is an imperfect way to screen out tangential tortfeasors, and often the threshold is set too high (50 percent) to serve this function well. When there are many tortfeasors, this Track does not perform well, as it virtually guarantees that several liability will be imposed, regardless of the role of any given tortfeasor in the plaintiff’s injuries [and] imposes the risk of insolvency on an entirely innocent plaintiff whenever all solvent defendants are below the specified threshold. To

255. See Vandall, supra note 1, at 580-83.
256. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § A19 reporters’ note, cmt. e; Id. § C19 reporters’ note, cmts. e, f.
257. Id. § C21 cmt. a.
the extent that the justification for modifying joint and several liability is the adoption of comparative responsibility so that the plaintiff may also be legally culpable, imposing the risk of insolvency on an innocent plaintiff is unwarranted.\textsuperscript{258}

The Restatement further criticizes threshold systems for imperfectly weeding out "minor" tortfeasors and creating "unfortunate tactical incentives" regarding the joinder of parties and consideration of nonparties, while problematically barring recovery based on a marginal difference in a plaintiff's responsibility.\textsuperscript{259} As the Restatement adds, the actual threshold which is designated in any given state is assigned in a largely arbitrary manner, and it is difficult to justify one value over another.\textsuperscript{260}

As for states which have employed a hybrid approach which selectively applies joint and several liability depending on the type of harm (e.g., economic versus non-economic damages) suffered by the tort victim, these hybrid approaches share the previously mentioned problems with other fault allocation systems, while raising additional concerns as well. As the Restatement observes, hybrid systems which deny joint and several liability to victims of non-economic damages invite criticism on several grounds: such approaches disproportionately harm non-wage-earning plaintiffs whose non-economic damages are proportionally greater, unjustifiably minimize the importance of non-economic damages generally, and undermine the deterrence purposes of damages.\textsuperscript{261} The Restatement also warns that this approach treats plaintiffs who are not comparatively negligent unfairly by imposing an insolvent tortfeasor's responsibility on the tort victim instead of on the culpable defendants, and that it creates "administrative and practical difficulties in its operation."\textsuperscript{262}

Those states which have limited joint and several liability through a modified or hybrid approach face the same problems and issues as those which have attempted to abolish joint and

\textsuperscript{258} Id. § 17 cmt. a.
\textsuperscript{259} Id. § D18 cmt. c.
\textsuperscript{260} Id. § D18 cmt. g.
\textsuperscript{261} \textit{RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY} § 17 cmt. a.
\textsuperscript{262} Id. § 17 cmt. a.
several liability completely—e.g., problems with inaccurate allocation, phantom parties, fairness, and conflicts of laws—while raising implications of inconsistency by acknowledging the importance of preserving joint and several liability in some cases, even while attempting to depart from the doctrine generally. Limiting joint liability through a potentially inaccurate mathematical threshold approach or through negligible distinctions between types of damages or claims raises more questions than it answers. A better solution would be to reinstate pure joint and several liability with contribution, applied consistently by the states.

2. Available Models for Pure Joint and Several Liability with Contribution

States seeking to reinstate joint and several liability with contribution have an abundance of models to follow, beginning with common law models. At common law, there were generally two approaches to allowing contribution after a joint and several liability verdict: the equality rule, under which damages are equally divided among the tortfeasors (i.e., the “pro rata” approach), and comparative contribution, which apportions the damages according to relative degrees of responsibility assigned to each fully negligent party (i.e., the “per capita” approach). 263 While the latter approach may result in some of the problems inherent with proportional allocation, albeit to a lesser degree than several liability, it could serve as a compromise for states willing to reconsider the advantages of joint and several liability while still applying proportional allocation among the defendants once a plaintiff has been awarded its full damages. Under either approach, joint tortfeasors would have more remedies available to them in recovering compensation from other tortfeasors than currently available in several liability states.

In addition to receiving guidance from common law, states may also follow the model of the Uniform Contribution Among Tortfeasors Act, the first section of which provides:

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

(b) The right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share. No tortfeasor is compelled to make contribution beyond his own pro rata share of the entire liability.\(^{264}\)

Section One also contains exceptions precluding contribution rights for intentional and some settling tortfeasors, while preserving certain subrogation and indemnity rights.\(^{265}\)

Finally, other models for joint and several liability with contribution may be found through various state statutes either in force, proposed, or formerly in place in various states. In Montana, for example, the legislature has passed a bill which would take effect if the allocation of fault statute currently in force were rendered unconstitutional. The alternative statute provides that “[e]ach party against whom recovery may be allowed is jointly and severally liable for the amount that may be awarded to the claimant but has the right of contribution from any other person whose negligence may have contributed as a proximate cause to the injury complained of.”\(^{266}\) In addition, even the Third Restatement continues to present contribution as a viable option, describing various scenarios for contribution recovery in one of its sections.\(^{267}\)

3. Answering the Fairness Arguments of Joint and Several Liability Opponents

The most challenging hurdles which states considering reinstating joint and several liability with contribution may face are likely to be political in nature. Regardless of the logic supporting a return to joint and several liability with


\(^{265}\) Unif. Contribution Among Tortfeasors Act § 1(c)-(f), 12 U.L.A. 194.


\(^{267}\) Restatement (Third) of Torts: Apportionment of Liability § 23 (2000).
contribution, opponents may well dig in their heels at any efforts to reinstate joint and several liability, even if contribution remedies for defendants would also be reinstated in the process. While many of the arguments made for and against joint and several liability have already been addressed by this article, this section addresses the policy argument most frequently raised in opposition to joint and several liability: that joint and several liability is unfair to defendants.

One common fairness argument takes the form of the claim that joint and several liability results in disproportionate or unfair determinations of damages in which a “deep pocketed” defendant may end up paying more than a comparatively more culpable but less solvent defendant. Before addressing the “deep pockets” argument specifically, it is important to clarify a false assumption upon which such policy arguments opposing joint and several liability are often based. Any statement or implication that joint and several liability unfairly punishes tortfeasors for harms they did not cause or should not be responsible for is without merit. As the Illinois Supreme Court has explained:

Joint and several liability only applies to injuries for which the defendant herself is fully responsible. She is responsible for the entirety of some injury only if her tortious behavior was an actual and proximate cause of the entire injury. . . . She is not liable for injuries, including separable portions of injuries, to which she did not contribute. She is not liable unless the tortious aspect of her conduct was an actual cause of the injury. Moreover, even then, she is not liable if, for reasons of policy or principle, her connection to the injury is considered too remote or minimal to be “proximate.”

The Restatement similarly states, “[r]eallocation is of damages, not responsibility.”

Consequently, those who argue that joint and several liability unfairly imposes damages on defendants for harm they did not cause create the false inference that any given tortfeasor, once found liable, is only partly negligent simply by virtue of

269. RESTATEMENT (THIRD) OF TORTS: APPOICTIONMENT OF LIABILITY § C21, reporters’ note, cmt. f.
the existence of other negligent parties. Such arguments, Professor Wright has explained

reflect a fundamental confusion between each defendant's *individual full responsibility* for the damage she tortiously caused and the *comparative responsibility percentages* that are obtained by comparing the defendants' individual full responsibilities for the injury. Neither defendant in either of these situations was merely "50% negligent" or "50% responsible." Such statements make as much sense as saying that someone is "50% pregnant." 270

Because joint and several liability only applies to those whose conduct has been found to be fully negligent—i.e., a cause in fact and substantial factor or proximate cause271 of a tort victim’s injury—anything up to 100% liability for 100% negligence is reasonable and, accordingly, fair.272

A similarly misleading way in which such "fairness" arguments are often presented is through the reciprocal contention that several liability is a more accurate way to apportion responsibility. This argument is flawed for the same reasons already discussed, and particularly because proportional several liability does not reflect actual responsibility. It may more aptly be described as a discount coupon given to

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270. Wright, supra note 6, at 56.


272. See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § A18 cmt. c (2000). Additionally, Professor Wright explains that the premise that joint and several liability requires defendants to pay for more damages than they cause or are responsible for is false because:

Joint and several liability only applies to injuries for which the defendant herself is fully responsible. She is responsible for the entirety of some injury only if her tortious behavior was an actual and proximate cause of the entire injury. She is not liable for injuries, including separable portions of injuries, to which she did not contribute. 273

Wright, supra note 6, at 54.
tortfeasors who have been found fully negligent but may nonetheless escape full liability where other tortfeasors, or a contributorily negligent plaintiff, happen to be available for assignment of part of the damages. The availability of relief for multiple tortfeasors through proportional allocation should not be understood as making them any less negligent; it simply makes some of them less financially responsible for their individual negligence than they would otherwise be, due to the existence of other negligent parties.\textsuperscript{273} As a result, several liability creates what has been described as a “tortfest”\textsuperscript{274} effect which “embodies a paradox that the more tortfeasors there are causing a plaintiff’s injury the less answerable each one of them becomes,” and the less likely a plaintiff’s chance of full recovery.\textsuperscript{275} Whatever principles are used to justify the tortfest effect, it defies logic to describe such a reciprocal reduction of responsibility and chances of recovery in accordance with the number of tortfeasors as reflecting principles of fairness.

Consequently, the pertinent inquiry is whether tortfeasors would be allowed to evade responsibility for their wrongdoing by virtue of other parties also being negligent, or whether instead (under joint and several liability) they should remain fully accountable for injuries caused, but with contribution remedies available from other tortfeasors who contributed to the injuries.

As to the “deep pockets” argument, specifically, there is no evidence that plaintiffs are guiltier of employing a “deep pockets” strategy based on likelihood of financial success than defendants when given the opportunity.\textsuperscript{276} For example, the Restatement explains that in states where tortfeasors may employ

\begin{footnotesize}
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\item\textsuperscript{273} As Professor Wright explains, any defendant subjected to joint and several liability must necessarily first be found to be 100% negligent, and a cause of 100% of the injury: “Only when we compare their individual full responsibilities, and assume that they were equally negligent, does it make sense to say that each defendant, when compared to the other, bears 50% of the total comparative responsibility for the injury.” Wright, supra note 6, at 56.
\item\textsuperscript{274} Id. at 57, 59 (citing Product Liability: Hearings on H.R. 2238 Before the Subcomm. on Commerce, Consumer Protection, and Competitiveness of the House Comm. on Energy and Commerce, 100th Cong., 1st Sess. 361, 371-72 (1987) (statement of Professor David R. Smith)).
\item\textsuperscript{275} Hager, supra note 16, at 103-04.
\item\textsuperscript{276} See Wright, supra note 6, at 63-70 (providing additional rebuttal of the “deep pockets” argument).
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third-party joinder options, such joinder options can create “unfortunate tactical incentives” for defendants, allowing defendants to engage in their own “deep pockets” strategic maneuvering.\textsuperscript{277}

As the Alaska federal district court recognized in \textit{Carriere}, carelessly enacted legislation which replaces joint and several liability with comparative negligence, without specifying the role of nonparty allocation, has perpetuated the “deep pockets” problem rather than alleviating it.\textsuperscript{278} Those states which have interpreted their own several liability statutes as abrogating contribution and requiring a one-suit rule precluding future suits against absent parties exacerbate such problems even more. In contrast, reinstating contribution in conjunction with joint and several liability could partially remedy these problems by making recourse available to defendants who believe liability has been disproportionately assigned in comparison with other tortfeasors.

Additionally, the “deep pockets” argument only addresses fairness from the vantage point of comparatively wealthier defendants. While the abolition of joint and several liability may seem fair to a wealthy defendant, such abolition is actually detrimental to the interests of many small business owners and lower-income tortfeasors, who can least afford to be sued. Under joint and several liability, their chances of survival were greater, but under pure several liability they are almost guaranteed to be sued and consequently find themselves searching their comparatively smaller pockets to pay for a damage verdict, including a portion of a wealthy corporate co-defendant’s liability.

In other words, joint and several liability, to the extent it may have allowed some strategic targeting of “deep pocketed” defendants, only burdened comparatively wealthier defendants who could more likely afford to bear a damage award than lower-income tortfeasors. Under joint and several liability, lower-income tortfeasors who can hardly afford a damage verdict might be left alone, especially if the plaintiff considers

\textsuperscript{277} \textit{Restatement (Third) of Torts: Apportionment of Liability § D18 cmt. c.}

them to be less culpable, but under several liability they are virtually guaranteed to be sued. However, under several liability, it is virtually guaranteed that every tortfeasor who can legally be sued will be, including those who cannot financially survive a large damage verdict in comparison with a wealthier corporate co-defendant. As explained earlier, since there is no such thing as a "less than fully negligent" tortfeasor, any damage award up to the 100% that would be awarded in the absence of other negligent parties joining the tortfeasor is fair game.

Consequently, the only legitimate fairness issue that remains in relation to "deep pockets" is the questionable fairness of wealthier defendants having successfully lobbied for several liability, thereby imposing mandatory liability on lower-income defendants who previously might have been left alone. In this respect, the relevant question to ask may be, "unfair to which defendants?"

The fact that several liability has disproportionately affected those defendants who least can afford a damage verdict might warrant cries of unfairness from those who stop to consider that the lobbying efforts of much larger and more financially secure corporations and industries have resulted in increased hardships for smaller companies and individual defendants. As a result of joint and several abolition attempts, "shallow pocketed" defendants must now pay part of the damages caused by wealthier co-defendants regardless of their comparative financial ability to survive a large damages verdict. A "deep pocketed" corporate defendant, comparatively speaking, might hardly blink at having to share a $500,000 damage award, but the smaller business owner who had the misfortune of selling that co-defendant's product, for example, might find itself facing bankruptcy as the result of having to pay a portion of such an award even if its responsibility is determined to be "less" than the more solvent defendant's. Damage awards, after all, are for actual dollars, not percentage of income or financial ability.

In contrast, joint and several liability with contribution better serves the interests of more defendants (if not the deepest pocketed defendants) than several liability. Under several liability, juries are not allowed to base damage allocations on comparative financial hardships such allocations would impose
on the less wealthy defendant. Under joint and several liability, on the other hand, plaintiffs can show some compassion to defendants who cannot afford to be sued, while “deep pocketed” defendants still retain the right to seek contribution from other defendants. All may be fair in love, war, and the allocation of damages to any negligent party, but comparatively lower-income defendants should consider that the abolition of joint and several liability was only intended to benefit the most wealthy of defendants, not all defendants.

As to equitable concerns regarding unavailable tortfeasors, there will always be insolvent, extrajurisdictional, immune, or otherwise unavailable joint tortfeasors whose absences could result in cries of unfairness when contribution is unavailable from them. This problem, however, is not unique to joint liability; contribution is generally unavailable in several liability states, after all. The greater availability of contribution through joint and several liability therefore renders criticisms of its less than absolute availability under joint and several liability without merit. Although abolition of joint and several liability has not remedied the problem of unavailable co-defendants, neither has several liability. Some degree of inequity may result from tortfeasors being insolvent or otherwise unavailable, but, as one scholar explained, “the unfairness is solely a matter among the tortfeasors. The plaintiff is not part of, and is not responsible for, that unfairness; whereas each tortfeasor is individually fully responsible for the plaintiff’s injury.”

In sum, joint and several liability applies only to indivisible harms, so there can be no question of a defendant being unfairly charged for harms it did not cause; a liability verdict only comes after a finding of negligence. Even in cases involving a contributorily negligent plaintiff, each tortfeasor remains a fully legal cause of the tort victim’s injury and damages. Requiring a defendant to pay more for a plaintiff’s

279. Wright, supra note 6, at 72. Another way to look at the problem of the immune defendant in particular is that forcing a plaintiff to bear the cost of such damages “would be an unjustified shifting of the unavailable tortfeasor’s formal or ‘de facto’ immunity to the available tortfeasor who has no such immunity.” Id. at 62.
280. See KEETON ET AL., supra note 1, § 65, at 452-53.
281. See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § C21, reporter’s note, cmt. a (“[E]ven with the plaintiff sharing some fault, each defendant (as
injuries (including an insolvent defendant’s “share” of damages) than the plaintiff is consistent with the general nature of the civil justice system. Defendants are generally expected to compensate plaintiffs for the harm they have caused them; only in recent changes to tort law have plaintiffs been the ones required to compensate the very defendants who caused their injuries. In addition, recent scholarship suggests that joint and several liability in some cases even “better serves the goal of economic efficiency than does a rule that imposes only several liability.”¹²⁸²

Finally, several liability creates more, not fewer, problems for most defendants than joint and several liability. Alternatives to joint and several liability have resulted in complexities and problems which are unfair not just to plaintiffs but to defendants as well. Under several liability, joint tortfeasors do not have a right to assert a contribution claim;²⁸³ similarly, where proportional allocation is imposed under a single-action rule, “[t]hose not joined as parties or for determination of fault escape responsibility.”²⁸⁴ In contrast, under joint and several liability, not only do joint tortfeasors have the same joinder options available to them as allowed under several liability,²⁸⁵ but they additionally may seek contribution from other tortfeasors following the plaintiff’s damage verdict.

Not only do defendants lose their contribution rights when joint and several liability is abandoned, but they are more certain to be sued in the first place, only to face daunting litigation hurdles unique to proportional allocation damage trials. Joint and several liability with contribution increases the chances of reimbursement among co-defendants, while still protecting plaintiffs from further injury by those who harmed them, consequently achieving a better balance than several liability systems.

¹²⁸² See id. § A18, reporters’ note, cmt. d (citing Kornhauser & Revesz, Sharing Damages Among Multiple Tortfeasors, 98 YALE L.J. 831 (1989); Landes & Posner, Joint and Multiple Tortfeasors: An Economic Analysis, 9 J. LEGAL STUD. 517 (1980)).

¹²⁸³ Id. § 11 cmt. c.

¹²⁸⁴ Id. § 10, reporters’ note, cmt. f (quoting Albertson v. Volkswagen Aktiengesellschaft, 634 P.2d 1127, 1132 (Kan. 1981)).

¹²⁸⁵ See id. § A19 cmt. d.
4. Comparative Negligence and Joint and Several Liability: A Complementary Coexistence

An issue illuminated by the Vermont case study but also worth readdressing in broader terms is the false link made by some between the rise of comparative negligence and the abolition of joint and several liability. The premise of the false link is that comparative negligence statutes necessarily abrogate joint and several liability. This premise is unfortunately supported, in part, by language in the Third Restatement which appears to attribute a demise in joint and several liability to the rise of comparative negligence.286 While acknowledging that, by its count, "[a]mong the 46 states that have adopted comparative fault, pure joint and several liability remains in 10 states,"287 the Restatement later creates the misleading implication that only those states that adopt comparative negligence judicially, rather than legislatively, may continue applying joint and several liability. In particular, the Restatement's commentary that "[t]he majority of courts unconstrained by a statute . . . have held that comparative fault does not require modification of joint and several liability"288 fails to add that even states which have enacted comparative negligence statutes may still apply joint and several liability. For example, the Restatement, as previously described, falsely identified Vermont as a state which has abolished joint and several liability, when in fact, Vermont courts explained that its comparative fault statute did no such thing.289

The fallacy of this implied assumption, that the enactment of comparative fault statutes necessarily abrogates joint and several liability, makes even less sense in light of the comments

286. See Restatement (Third) of Torts: Apportionment of Liability § A18 cmt. a (describing joint and several liability as frequently imposed "before the adoption of comparative fault"); id. § C21 reporters’ note, cmt. a.
287. Id. § A18 reporters’ note, cmt. a.
288. Id. § C21 reporters’ note, cmt. a (emphasis added) (citing as examples American Motorcycle Ass’n v. Superior Court, 578 P.2d 899 (Cal. 1978); Coney v. J.L.G. Indus., Inc., 454 N.E.2d 197 (Ill. 1983); Seattle First Nat’l Bank v. Shoreline Concrete Co., 588 P.2d 1308 (Wash. 1978)).
accompanying the Uniform Comparative Fault Act upon which many states’ comparative negligence statutes were modeled. Comments to Section Two of the Act provide, in pertinent part:

*Joint and Several Liability and Equitable Shares of the Obligation.* The common law rule of joint-and-several liability of joint tortfeasors continues to apply under this Act. This is true whether the claimant was contributorily negligent or not. The plaintiff can recover the total amount of his judgment against any defendant who is liable.

The judgment for each claimant also sets forth, however, the equitable share of the total obligation to the claimant for each party, based on his established percentage of fault. This indicates the amount that each party should eventually be responsible for as a result of the rules of contribution. Stated in the judgment itself, it makes the information available to the parties and will normally be a basis for contribution without the need for a court order arising from motion or separate action.290

It is evident from this comment that the UCFA not only establishes that joint and several liability should survive the enactment of comparative liability statutes, but that coupled with contribution, it can also provide an equitable approach to damage awards. Under the UCFA approach to comparative negligence, a plaintiff is still entitled to a full damage award from any one of the tortfeasors; the allocation among tortfeasors is used to measure their contribution remedies as against each other and should not interfere with the original joint and several liability damage award. Consequently, the principles underlying comparative negligence are compatible with joint and several liability. Several courts have concurred with Vermont that the availability of proportional allocation does not necessarily abrogate joint and several liability. The Illinois Supreme Court, for example, explained:

"The feasibility of apportioning fault on a comparative basis does not render an indivisible injury ‘divisible’ for purposes of the joint and several liability rule. A concurrent tortfeasor is liable for the whole of an indivisible injury when his negligence is a proximate cause of that

The mere fact that it may be possible to assign some percentage figure to the relative culpability of one negligent defendant as compared to another does not in any way suggest that each defendant's negligence is not a proximate cause of the entire indivisible injury.\footnote{291}

The Washington Supreme Court specifically confronted the question of "whether comparative negligence necessitates a limitation upon a plaintiff's right to seek full compensation. In short, does comparative negligence dictate that joint and several liability be abandoned?\footnote{292} The court concluded that it does not.\footnote{293} Specifically, the court emphatically ruled that "from the perspective of the recovery rights of the injured party, comparative negligence and the suggested abolition of joint and several liability are completely inconsistent.\footnote{294}

The court reached the conclusion that the abolition of joint and several liability is not compatible with, let alone necessitated by, comparative negligence for numerous reasons. First, it concluded that comparative negligence was enacted in place of contributory negligence to increase, not diminish, the chances of a plaintiff's recovery, and that such protections of a plaintiff's recovery rights are inconsistent with the abolition of joint and several liability.\footnote{295} Second, the court noted the absence of explicit abolition language in its state's comparative negligence statute and concluded:

Had our legislature intended a similar change it could have so provided, but it did not. As Professor Schwartz notes in his treatise on comparative negligence: "The concept of joint and several liability of tort-feasors has been retained under comparative negligence, unless the statute specifically abolishes it, in all states that have been called upon to decide the question."\footnote{296}

\footnote{292. \textit{Seattle First Nat'l Bank}, 588 P.2d at 1313.}
\footnote{293. \textit{Id.}}
\footnote{294. \textit{Id.}}
\footnote{295. \textit{Id.}}
\footnote{296. \textit{Id.} (quoting VICTOR E. SCHWARTZ, COMPARATIVE NEGLIGENCE, § 16.4, at 253 (1st ed. 1974)).}
Third, the court observed that joint and several liability is premised in part upon the indivisibility of harm caused.\textsuperscript{297} Thus, the ability to assign a percentage figure to the fault of multiple tortfeasors "does not render an indivisible injury `divisible' for purposes of joint and several liability . . . [or] detract from the preliminary fact that \textit{each} tort-feasor's conduct was a proximate cause of an entire indivisible injury."\textsuperscript{298} The court added:

Moreover, that the injured party's "fault" is now determined under comparative negligence does not require abolition of the joint and several liability rule. . . . \textit{[I]f} the current rule is abandoned, a completely faultless plaintiff could be forced to bear a portion of the loss if any tortfeasor should prove financially unable to satisfy his proportionate share of the damages. This is incompatible with the compensatory purpose of tort law.

Finally, even when a plaintiff is partially at fault for his own injury, his culpability is not of the same nature as defendant's. A plaintiff's negligence relates to a failure to use due care \textit{for his own protection} whereas a defendant's negligence relates to a failure to use due care \textit{for the safety of others}. While a plaintiff's self-directed negligence may justify reducing his recovery in proportion to his degree of fault, the fact remains that such conduct, unlike that of a negligent defendant, is not tortious.

Consequently, we are not persuaded that this state's recent adoption of comparative negligence compels a change in our recognition of joint and several liability.\textsuperscript{299}

After the rise of comparative responsibility statutes, one commentator has observed, joint and several liability is even more justified, and less unjust, that before. "This is because the maximum exposure of any defendant forced to pay damages is offset by the plaintiff's negligence under comparative responsibility. The burden of paying shares attributable to absent or insolvent defendants is correspondingly less."\textsuperscript{300}

For all these reasons, those states which have enacted comparative negligence laws may continue to allow joint and

\textsuperscript{297} Seattle First Nat'l Bank, 588 P.2d at 1313.
\textsuperscript{298} \textit{Id}.
\textsuperscript{299} \textit{Id.} at 1313-14 (citations omitted).
\textsuperscript{300} Hager, \textit{supra} note 16, at 96.
several liability remedies as well. Comparative negligence and joint and several liability are not mutually exclusive.

IV. CONCLUSION

In a 1990 law review article, one proponent of joint and several liability abolition predicted that "[a]brogating joint and several liability would simplify the tort process and arguably would reduce transaction costs, since contribution would not be needed." Seventeen years later, it is apparent that efforts to abolish joint and several liability have had the opposite effect. The process of determining damages in tort actions has become substantially more complicated as a result of efforts to replace joint and several liability with proportional allocation, resulting in unforeseen complexities which make it difficult for courts to apply the new laws in a coherent and fair manner. Rather than providing an answer to problems related to strategic or multiple lawsuits and unfair damage awards, attempts to abolish joint and several liability have only created more problems in these areas, forcing courts to choose between allowing unfair or inaccurate damage assessments through phantom party allocation, or in the alternative, continuing to allow multiple lawsuits while still denying contribution remedies to defendants.

The struggles of the courts in states which have attempted to abolish joint and several liability legislatively should be considered by other states weighing their options for multiple tortfeasor damages apportionment. As has been described, it is through joint and several liability with contribution, not through the myriad of alternative approaches taken by states in recent years that both plaintiffs and defendants are accorded practically realizable, consistent, and fair protections against unfair damage awards. By returning to joint and several liability with contribution, states can ensure that plaintiffs are fully compensated for their injuries, while still allowing co-defendants to apportion responsibility amongst themselves.

While the Third Restatement has been critiqued in this article for specific flaws and omissions, and criticized by others for alleged biases, it should be applauded for recognizing many of the problems with several liability and with some hybrid

301. Matter, supra note 21, at 319.
approaches to the allocation of damages. It should also be credited for suggesting as the fairest approach one which retains joint and several liability in the initial determination of damages.\textsuperscript{302} However, the Restatement falls short here, in also recommending proportional reallocation to both plaintiffs and defendants, while failing to consider joint and several liability with contribution as a more equitable approach. The Restatement offers no explanation as to why an approach which allows reallocation in a manner that leaves the tort victim potentially paying the bills of unavailable tortfeasors is a better solution than joint and several liability with contribution, which provides protections to both plaintiffs and defendants. Nonetheless, as even the Third Restatement observes, contribution continues to play an important role in the modern era of tort “reformed” states, even in those states without joint and several liability.\textsuperscript{303}

In conclusion, several liability has long been recognized as unfair to plaintiffs, but it is now apparent that it has failed to serve the interests of defendants as well. Several liability precludes contribution remedies for defendants and increases their likelihood of being sued, while failing to present a viable solution to the problem of unavailable tortfeasors or inaccurate apportionment. Thus, joint tortfeasors are no better off—and are arguably worse off—under modern proportional allocation systems than under joint and several liability with contribution.

Considering that no state has been willing or able to completely abandon joint and several liability, and that contribution remains a desirable remedy in the eyes of many defendants and courts, it may be time to question the continued viability of several liability. After two decades of confusion in the courts resulting from failed efforts to abolish joint and several liability or to establish in its place a coherent, effective, and equitable alternative, state legislatures may be well-advised to consider that it may be several liability, not joint and several liability, which is due for abolition. The time is ripe to reconsider joint and several liability with contribution as the most practical and equitable approach to multiple-tortfeasor

\textsuperscript{302} See supra note 248 and accompanying text.

\textsuperscript{303} See \textit{Restatement (Third) of Torts: Apportionment of Liability} § 23 cmt. c, illus. 4, cmt. f (2000).
damage allocation. Several liability has had its chance, and it has failed.