

Liability for Construction Defects That Result from Multiple Causes

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I. Introduction—Multiple Causation Cases and the Problem of Apportionment

When a structural failure or other construction defect causes harm, what caused the defect and who should bear responsibility are not always apparent. Investigations ensue, and the usual suspects—inadequate design, incompetent construction, material failure, etc. are examined. Experts opine, blame is cast, responsibility is often denied, and so litigation begins. Initially, counsel for the parties tend to be preoccupied with insurance defense and coverage issues. This article sets aside the insurance issues and focuses on another fundamental legal quandary that frequently challenges both plaintiffs and defendants in a defect case: the possibility of multiple causes and its corollary that multiple parties might be held liable.

Many defendants assume at the beginning of a case that only one defendant will ultimately be found liable. Some plaintiffs join in that assumption. In some instances, investigation confirms that a failure had only one cause and that therefore only one party should be responsible. In some cases litigation and trial similarly point to only one true cause of a failure and a single party who should bear responsibility. Then the injured party, say the owner, (for the most part this article assumes the owner is the injured party and is the plaintiff, although other project participants and other third parties can be harmed by construction defects) can confidently proceed to seek damages from that one responsible party.

In some cases, however, and perhaps most cases, it is not so clear that a failure results from a single cause, or that it results from a single breach of duty by a single party. The causes of a failure are often disputed by the potentially responsible parties, who thereupon deny liability and in some instances blame others,

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including perhaps the injured party. An injured party's own investigators might conclude that a failure resulted from multiple causes attributable to multiple parties. A bad design can be poorly constructed with defective materials. A roof can collapse because of undersized posts and improperly attached beams. A plaintiff's expert might conclude that multiple project participants breached their contractual and professional duties, and that conduct of those several defendants contributed to the failure. The injured party must then decide whether to sue multiple defendants, or at least take steps to reserve its rights against multiple potentially liable parties. For lack of a better working term, this type of case is referred to as a "multiple causation" case.

This article begs the reader to shake off the notion that in every defect case there is ultimately a single cause of failure and a single liable party. When the trier of fact concludes that multiple defendants are liable for a defect, counsel, the judge and the jury will all face a complex problem: how to apportion damages for the harm done among the parties? The challenge is to harmonize the need for fair, efficient and equitable apportionment of fault in multi-party defect cases with the freedom of the parties to contract for specific allocations of risk and responsibility for damages.¹ Also, it is important to recognize that any legal scheme for apportionment will have an effect on contract negotiations, settlement negotiations and litigation strategy.

The apportionment quandary deepens when a construction failure or defect results solely in economic damages, bringing economic loss rules to bear. In a number of jurisdictions, economic loss rules will limit a plaintiff's options to breach of contract claims against parties in direct privity of contract with the plaintiff. In those jurisdictions, the plaintiff's claims must typically be based on breaches of different contracts, and most third-party claims will be based on some form of express or implied contractual indemnity. In other jurisdictions, the plaintiff might be permitted to bring negligence or other tort claims against parties not in privity of contract with the plaintiff. Even in jurisdictions allowing negligence claims for economic damages against parties not in privity of contract, the plaintiff often is not allowed to maintain negligence claims against defendants with whom the plaintiff did have a contract. In those jurisdictions, the plaintiff may assert a mixture of contract and tort claims.

¹Although this article focuses on defect cases, the underlying problems similarly arise in other types of contract cases involving multiple causation, such as concurrent delay cases. The Bussel article discussed below actually focuses on concurrent delay.

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If multiple defendants are held liable, they face the challenge of apportioning fault, or perhaps more practically, apportioning the damages awarded to the plaintiff. The law governing apportionment in negligence cases (seeking compensation for bodily injury or property damage) is well developed, but that is not true where multiple defendants are held liable for breaches of contract or a mixture of contract and tort defaults. The *Restatement (Third) of Torts: Apportionment of Liability* (2012), a monumental summary of the topic in tort law, in its Introduction describes the core issues surrounding apportionment as follows:

- (1) the legal effects of different types of a plaintiff's conduct, such as a plaintiff's intentional self-injury, a plaintiff's negligence, and a plaintiff's voluntarily assuming a risk;
- (2) joint and several liability;
- (3) apportionment of damages by causation; and
- (4) contribution and indemnity.

These "core issues" can also be viewed as opportunities a defendant has to avoid ultimate liability for plaintiff's damages when others are also liable. For example, the defendant can attempt to prove that the plaintiff's damages are divisible, allocating precise amounts of damages to different defendants based on who actually caused the damages. A defendant can also attempt to allocate some fault to the plaintiff, perhaps even arguing to avoid liability to the plaintiff altogether. If multiple defendants are held liable, each defendant may have equitable or statutory rights to indemnity or contribution.

If all of a plaintiff's claims are based on negligence, the defendants probably will have, in addition to their cross claims and third party claims for indemnity, claims for contribution, or the right to seek a comparative fault verdict. If, however, the claims are all based on breach of contract, or if they are based on a mixture of contract and negligence, the quandary for the defendants deepens. As discussed below, contribution and comparative fault are not usually available in breach of contract cases or in cases where any single claim arises out of breach of contract. Joint tortfeasors might by law be held jointly and severally liable for damages. Co-obligors on the same contract might by law be held jointly and severally liable for damages.² But obligors on separate contracts are not necessarily "joint" obligors. Obligors on separate contracts, not in privity with one another, are unlikely to have recourse to express or implied indemnity. So

²See Restatement (Second) Contracts § 289, and the discussion in Section IV.C. of this article.

if a successful plaintiff in a multiple causation case elects to execute on its judgment against one of the liable defendants and recovers one hundred percent of its damages from that one liable defendant, how is that defendant to recoup some of those damages from the other liable defendants?

II. Plaintiff's Burden of Proof

In a multiple causation case, the plaintiff (e.g., a project owner) generally bears the burden of proving that breaches of duties owed by other parties contributed in a substantial way to the subject defect or failure. The plaintiff also will have to prove the damages caused by the defendants' breaches. It does not necessarily follow, however, that the plaintiff must prove the percentage or portion of responsibility that each separate defendant should bear.

In negligence cases, the plaintiff must prove that negligent errors or omissions amounting to breaches by the defendants were a "substantial factor" in bringing about the failure at the structure.³ The plaintiff also must prove that the breach caused damages, and it must prove the amount with reasonable certainty. This burden applies to all of the claims against the defendants, regardless of whether their duty to the plaintiff is based on tort obligations, professional obligations or contractual obligations.

What the plaintiff is not required to do, however, is apportion or allocate damages among those defendants whom the jury finds to have caused the failure. Under the *Restatement (Second) of Torts*, if the plaintiff can prove that a breach of duty by each defendant was a substantial cause of a "single harm," specifically the failure at the structure, and there is no reasonable basis for determining the contribution of each cause to the failure of the structure, then the burden of proof to show that the harm can somehow be apportioned among the defendants shifts to the defendants. Section 433B describes the burden of proof on apportionment:

(1) Except as stated in Subsections (2) and (3), the burden of proof that the tortious conduct of the defendant has caused the harm to the plaintiff is upon the plaintiff.

(2) Where the tortious conduct of two or more actors has combined to bring about harm to the plaintiff, and one or more of the actors seeks to limit his liability on the ground that the harm

³See, e.g., Restatement Second, Torts § 431 ("The actor's negligent conduct is a legal cause of harm to another if (a) his conduct is a substantial factor in bringing about the harm.").

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is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor.

(3) Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm.

As stated in the Restatement (Second) of Torts § 433B at Comment d.:

The reason for the exceptional rule placing the burden of proof as to apportionment upon the defendant or defendants is the injustice of allowing a proved wrongdoer who has in fact caused harm to the plaintiff to escape liability merely because the harm which he has inflicted has combined with similar harm inflicted by other wrongdoers, and the nature of the harm itself has made it necessary that evidence be produced before it can be apportioned. In such a case the defendant may justly be required to assume the burden of producing that evidence, or if he is not able to do so, of bearing the full responsibility. As between the proved tortfeasor who has clearly caused some harm, and the entirely innocent plaintiff, any hardship due to lack of evidence as to the extent of the harm caused should fall upon the former.

Shifting the burden on apportionment to the defendants does not mean the plaintiff is entitled to multiple recoveries of the same damages.⁴ It does, however, often mean that the plaintiff can proceed to recover the judgment from any defendant the plaintiff chooses until the judgment is satisfied in full. As discussed below, the only recourse of the defendants, faced with liability for the plaintiff's indivisible harm and damages, is to plead comparative fault, contribution or indemnity and pursue reimbursement from the other liable parties.

The *Restatement (Second) of Contracts* does not directly address apportionment of liability among several defendants for harm caused by breaches of separate contracts. *Corbin on Contracts* has this to say on the subject of multiple causation:

The plaintiff's total injury may have been the result of many factors in addition to the defendant's tort or breach of contract. In such a case must the defendant pay damages equivalent to the total harm

⁴See, e.g., *Lexton-Ancira Real Estate Fund, 1972 v. Heller*, 826 P.2d 819, 823 (Colo. 1992) ("Generally, a plaintiff may not receive a double recovery for the same wrong."); *Crider & Crider, Inc. v. Downen*, 873 N.E.2d 1115, 1119 (Ind. Ct. App. 2007) ("The law disfavors a windfall or a double recovery."); Am. Jur. 2d, *Damages* § 32 ("A plaintiff may not receive a double recovery for the same injuries or losses arising from the same conduct or wrong."); Am. Jur. 2d, *Damages* § 52 ("an injured party cannot recover twice for the same breach").

suffered? Generally the answer is, Yes, even though there were contributing factors other than the defendant's own conduct . . .

Must the plaintiff show the proportionate part played by the defendant's breach of contract among all the contributing factors causing the injury, and must the loss be segregated proportionately? To these questions the answer is generally, No. In order to establish liability the plaintiff must show that the defendant's breach was "a substantial factor" in causing the injury.⁵

The language in *Corbin* suggests that once a plaintiff shows that a breach of contract by a defendant was a "substantial factor" causing a structural failure, even if breaches of contract by other defendants were also substantial factors causing the structural failure, and proves the resulting damages, the plaintiff has met its burden. If the plaintiff meets this burden as to several defendants, the court could enter judgment for the total damages against each of the several defendants.⁶

III. Sources of Duty and the Economic Loss Rules

A thorough discussion of the "economic loss rules"⁷ is beyond the scope of this article, but to make sense of the potential outcomes in a multiple causation case, and to foreshadow the apportionment quandary faced by defendants, it is important to understand that the duties owed by some defendants could arise from contracts while the duties of others may be based on tort principles, such as negligence, professional negligence and non-contractual product liability. If multiple defendants are ultimately held liable for a defect or failure, their rights among and against one another will depend in part on whether their liability is based on breach of contract or tort. To some extent plaintiffs control whether they bring claims for breach of contract, negligence, or other grounds. Strategic considerations aside, a plaintiff's claims against multiple defendants might depend on how the jurisdiction applies economic loss rules.

⁵11 Joseph M. Perillo, *Corbin on Contracts Damages* § 55.9 (Rev. Ed. 2005) (referencing the Restatement (Second) of Torts § 439 regarding multiple causation).

⁶See *Havens Steel Co. v. Randolph Engineering Co.*, 613 F. Supp. 514 (W.D. Mo. 1985), judgment aff'd, 813 F.2d 186, 22 Fed. R. Evid. Serv. 1206 (8th Cir. 1987) (involving multiple causation in a delay case).

⁷See Bruner & O'Connor on Construction Law §§ 17:88 to 17:99; Leslie O'Neal-Coble et al., *Construction Damages and Remedies*, Chapter 9, 267-303 (2d Ed., 2013); Olthoff, *If You Don't Know Where You're Going, You'll End Up Somewhere Else: Applicability of Comparative Fault Principles In Purely Economic Loss Cases*, 49 *Drake L. Rev.* 589 (2001).

**A. Physical Loss (Bodily Injury, Property Damage)
Contrasted with Economic Loss**

If the harm caused by a failure consists of bodily injury or property damage, the injured party is likely to be able to sue the potentially responsible parties in tort for negligence or perhaps some form of strict liability. The defendant may be held liable for negligence that causes harm even if the defendant was acting pursuant to a contractual obligation when the injury occurred.

The law imposes upon every person who enters upon an active course of conduct the positive duty to exercise ordinary care to protect others from harm and calls a violation of that duty negligence. The duty to protect others from harm arises whenever one person is by circumstances placed in such a position towards another that anyone of ordinary sense who thinks will at once recognize that if he does not use ordinary care and skill in his own conduct with regard to those circumstances, he will cause danger of injury to the person or property of the other.⁸

For instance, an architect, in the performance of his contract with its employer, is required to exercise the ability, skill, and care customarily used by architects upon such projects.⁹ Where breach of such a contract results in foreseeable injury to a third party, the designer can be sued and held liable for professional negligence in all states, unless the damages are considered to be “economic” damages. In situations where the injured party is seeking damages for bodily injury or property damage to property other than the work itself, whether the plaintiff and defendant are in privity of contract is not a factor. That a defendant was acting pursuant to a contract when the injury occurred does not preclude a negligence claim for the injury caused by the defendant.¹⁰ “An omission to perform a contract obligation is never a tort, however, unless that omission is also the omission

⁸Davidson and Jones, Inc. v. New Hanover County, 41 N.C. App. 661, 666, 255 S.E.2d 580, 584 (1979) (internal citations omitted). *See also* Council v. Dickerson’s, Inc., 233 N.C. 472, 474–75, 64 S.E.2d 551, 553 (1951) (quoting Prosser on Torts, section 33). North Carolina began questioning the economic loss rule in the context of professional liability many years ago, and there is extensive case law on the subject.

⁹Am. Jur. 2d, Architects § 9.

¹⁰*See, e. g.*, Council v. Dickerson’s, Inc., 233 N.C. 472, 64 S.E.2d 551 (1951). *See also* McKinney Drilling Co. v. Nello L. Teer Co., 38 N.C. App. 472, 248 S.E.2d 444 (1978). *See generally* Tort Liability of Project Architect or Engineer for Economic Damages Suffered by Contractor or Subcontractor, 61 A.L.R.6th 445.

of a legal duty.”¹¹ Straightforward joint and several liability with contribution among tortfeasors or comparative fault should apply, along with perhaps some contractual indemnity rights among the defendants in privity of contract with one another.

The more difficult cases are those where the harm resulting from multiple causes is not bodily injury or physical damage to property other than the work under the contract, but instead is purely economic in nature, such as cost overruns due to rework or delays. Some courts even consider failure of the work that is the subject of the contract to be in the nature of economic damages, even though a failure of the work itself can constitute physical damage of a dramatic sort. These courts reason that the failure of the work itself, as the subject matter of the contract, is covered by the contract and the warranty provisions in the contract, and so is economic in nature. When losses are economic in nature and presumably have been or could have been covered by the contract or contracts negotiated by the parties on the construction project, the courts look exclusively to contract rights and remedies to compensate injured parties. This “economic loss” rule takes different forms, depending on privity of contract. A plaintiff who is in privity of contract with the defendant or defendants will have rights and remedies, but generally only under the terms of the contract. A plaintiff who is not in privity of contract with a defendant might or might not have a claim for economic damages, depending on the jurisdiction.

B. Economic Loss Rule One: Privity of Contract

If the injured party in a defect case is an owner or a prime contractor, the injured party quite likely will have claims against defendants with whom it is in privity of contract. If the injured party suffers only economic damages, the economic loss rules can constrain the claims and pleadings. For instance, in some jurisdictions a plaintiff who is in privity of contract with a defendant may not sue that defendant in tort (generally the attempted claim is for negligence) to recover economic damages arising out of the transactions and occurrences covered by the contract. A defendant might contend that a plaintiff may not maintain a negligence action against its contractor for the contractor’s negligent failure to properly perform the terms of the contract when the owner’s

¹¹*Council*, 233 N.C. at 475, 64 S.E.2d at 553. See also *Franceschi v. De Tord*, 71 F.2d 95, 99 (C.C.A. 1st Cir. 1934); *Dustin v. Curtis*, 74 N.H. 266, 67 A. 220, 222 (1907); *Dice’s Adm’r v. Zweigart’s Adm’r*, 161 Ky. 646, 171 S.W. 195, 197 (1914).

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resulting injury is damage to the subject matter of the contract.¹² So, for example, an owner who suffers harm because of a structural defect might have a breach of contract claim against the general contractor, and a breach of contract claim (a contractual malpractice claim) against the prime architect or engineer, but no true claim for negligence against either of them.

It is important not to confuse the source of the duty and the standard of care. The design professional's liability might be based on breach of contract notwithstanding the professional negligence standard of care. The standard of care to which design professionals are held is essentially the same regardless of whether they have an express contract with the plaintiff. Absent an agreement to meet some higher standard of care, "[a] civil engineer is required to exercise 'that degree of care which a . . . civil engineer of ordinary skill and prudence would exercise under similar circumstances, and if he fails in this respect and his negligence causes injury, he will be liable for that injury.'"¹³ In other words, even when a design professional has an express contract, the standard of care to which the design professional is held by law is a professional negligence standard.¹⁴ The plaintiff's burden of proof is to show that the defendant failed to meet this

¹²*North Carolina State Ports Authority v. Lloyd A. Fry Roofing Co.*, 294 N.C. 73, 83, 240 S.E.2d 345, 351 (1978) (rejected on other grounds by, *Trustees of Rowan Technical College v. J. Hyatt Hammond Associates, Inc.*, 313 N.C. 230, 328 S.E.2d 274, 24 Ed. Law Rep. 549 (1985)). *See also* *Anderson Elec. v. Ledbetter Erection Corp.*, 115 Ill. 2d 146, 149, 104 Ill. Dec. 689, 503 N.E.2d 246, 247 (1986) ("[T]here can be no recovery in tort solely for economic losses."); *Spillman v. American Homes of Mocksville, Inc.*, 108 N.C. App. 63, 65, 422 S.E.2d 740, 741–42 (1992) ("a tort action does not lie against a party to a contract who simply fails to properly perform the terms of the contract . . . when the injury resulting from the breach is damage to the subject matter of the contract"); *Atherton Condominium Apartment-Owners Ass'n Bd. of Directors v. Blume Development Co.*, 115 Wash. 2d 506, 526, 799 P.2d 250, 262 (1990) (en banc) (no recovery in negligence for economic damages caused by faulty construction, despite privity) (citing *Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wash. 2d 406, 745 P.2d 1284 (1987)).

¹³*Associated Indus. Contractors, Inc. v. Fleming Engineering, Inc.*, 162 N.C. App. 405, 410, 590 S.E.2d 866, 870 (2004), decision aff'd, 359 N.C. 296, 608 S.E.2d 757 (2005) (quoting *Davidson and Jones, Inc. v. New Hanover County*, 41 N.C. App. 661, 668, 255 S.E.2d 580, 585 (1979)). *See also* *Raburn and Associates v. Burgundy Oaks L.L.C.*, 875 So. 2d 119, 122 (La. Ct. App. 2d Cir. 2004), writ denied, 883 So. 2d 993 (La. 2004) ("An engineer owes a duty to exercise the degree of professional care and skill customarily employed by others of his profession in the same general area."); *Department of Transp. v. Mikell*, 229 Ga. App. 54, 58, 493 S.E.2d 219, 222 (1997).

¹⁴*Sylva Engineering Corp. v. Kaya*, 2013 WL 1748754, *3 (Tex. App. Austin 2013) ("[N]egligence is, by definition, conduct that falls below the applicable

professional standard, regardless of whether the defendant had an express contract with the plaintiff.

Setting aside the standard of care, a prime design professional is in privity of contract with its client and can be sued by its client for economic damages. On one level, involving proof at trial, the client probably is not going to be concerned about whether the claim is denominated a breach of contract or negligence. The characterization of the claim can have repercussions, however. Foremost, if the jurisdiction does not permit claims for negligence against those with whom a plaintiff is in privity of contract, the claim must allege breach of contract or it will be subject to dismissal. On the other hand, professional liability policies attempt to remove or exclude contractually assumed liability from coverage. Knowing that about professional liability insurance, a plaintiff might be tempted to bring a claim for negligence. Also, if the plaintiff can sue other potentially liable parties, not in privity of contract, for negligence, it will be simpler for the several defendants to apportion fault using tort concepts such as contribution. This prospect might appear advantageous to the plaintiff. Given that the standard of care applicable to designers is a negligence standard, and that professional liability insurance does not cover contractually assumed strict liabilities, and given other possible incentives for plaintiffs to bring negligence rather than breach of contract claims, it is no wonder there is confusion in the case law about the true nature, contract or tort, of claims against design professionals.

In some jurisdictions, as noted above, a plaintiff may only recover economic damages from a defendant with whom the plaintiff is in privity of contract. In those jurisdictions, actions by owners for building defects will be limited to claims against prime design professionals and prime contractors. In these jurisdictions, those claims must allege breach of contract or risk dismissal. In other jurisdictions and in some cases, however, it is possible to sue one's design professional for professional negligence, notwithstanding privity of contract. For example, the North Carolina Supreme Court in *Ports Authority* created an exception to the privity rule that would permit the owner (or "promisee") to maintain a negligence action against its contractor (or "promisor") where "[t]he injury, proximately caused by the promisor's negligent, or willful, act or omission in the performance of its contract, was loss of or damage to the promisee's property, which

standard of care, and thus 'by averring that the licensed or registered professional's conduct is negligent, the affiant is necessarily opining that the complained-of conduct did not meet the applicable standard of care.'").

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was the subject of the contract, *the promisor being charged by law, as a matter of public policy, with the duty to use care in the safeguarding of the property from harm*, as in the case of a common carrier, an innkeeper or other bailee.”¹⁵ This “public policy” exception might apply where an owner has a contract with a licensed design professional, and the negligent failure to properly perform the contract results in a loss that threatens public health, safety or welfare. Other North Carolina decisions support this result. For example, in *Associated Indus. Contractors, Inc. v. Fleming Engineering, Inc.*, the court allowed a general contractor to maintain a negligence action against its land surveyor subcontractor, despite there being a contract between the two.¹⁶ The North Carolina Court of Appeals later relied on *Fleming Engineering*, in an unpublished opinion, to conclude that “[a]n engineer may be held liable in tort for breach of professional duty, even if its work is pursuant to a contract with the injured party and the injury suffered is to property which is the subject matter of the contract.”¹⁷

Even in those jurisdictions that discourage negligence claims for economic damages by a plaintiff in privity of contract with the defendant, the courts might allow a claim for negligent misrepresentation. “The tort of negligent misrepresentation occurs when a party justifiably relies to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care.”¹⁸ Section 552 of the Restatement (Second) of Torts, entitled “Information Negligently Supplied for the Guidance of Others,” provides:

(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon

¹⁵North Carolina State Ports Authority v. Lloyd A. Fry Roofing Co., 294 N.C. 73, 82, 240 S.E.2d 345, 350–51 (1978) (rejected on other grounds by, Trustees of Rowan Technical College v. J. Hyatt Hammond Associates, Inc., 313 N.C. 230, 328 S.E.2d 274, 24 Ed. Law Rep. 549 (1985)) (emphasis added).

¹⁶Associated Indus. Contractors, Inc. v. Fleming Engineering, Inc., 162 N.C. App. 405, 413, 590 S.E.2d 866, 872 (2004), decision aff’d, 359 N.C. 296, 608 S.E.2d 757 (2005).

¹⁷PVC, Inc. v. McKim & Creed, P.A., 188 N.C. App. 632, 656 S.E.2d 16 (2008) (emphasis added).

¹⁸Raritan River Steel Co. v. Cherry, Bekaert & Holland, 322 N.C. 200, 206, 367 S.E.2d 609, 612 (1988) (adopting the standard set forth in the Restatement (Second) of Torts § 552 as authority for negligent misrepresentation).

the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

(2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

(3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

Comment f to § 552 further explains that:

The care and competence that the supplier of information for the guidance of others is required under the rule stated in this Section to exercise in order that the information given may be correct, must be exercised in the following particulars. If the matter is one that requires investigation, the supplier of the information must exercise reasonable care and competence to ascertain the facts on which his statement is based. He must exercise the competence reasonably expected of one in his business or professional position in drawing inferences from facts not stated in the information. He must exercise reasonable care and competence in communicating the information so that it may be understood by the recipient, since the proper performance of the other two duties would be of no value if the information accurately obtained was so communicated as to be misleading.¹⁹

Whether a claim for negligent misrepresentation will be allowed by parties to a contract depends upon the jurisdiction. There appear to be two predominant views on this subject. "One view is that the contractual relationship controls, and parties are not permitted to assert actions in tort in an attempt to circumvent the bargain they agreed upon."²⁰ "The second view assumes that an action in tort is permissible, and that the parol evidence rule

¹⁹See also *U.S. for Use and Benefit of Los Angeles Testing Laboratory v. Rogers & Rogers*, 161 F. Supp. 132 (S.D. Cal. 1958).

²⁰*Snyder v. Lovercheck*, 992 P.2d 1079, 1087 (Wyo. 1999). See also *Rio Grande Jewelers Supply, Inc. v. Data General Corp.*, 1984-NMSC-094, 101 N.M. 798, 689 P.2d 1269, 39 U.C.C. Rep. Serv. 871 (1984); *Isler v. Texas Oil & Gas Corp.*, 749 F.2d 22 (10th Cir. 1984); *Ford Motor Credit Co., Suburban Ford*, 237 Kan. 195, 699 P.2d 992 (1985), *cert. denied*, 474 U.S. 995, 106 S. Ct. 409, 88 L.Ed.2d 360 (1985).

does not apply, and, therefore, the action may be maintained.”²¹

C. Economic Loss Rule Two: No Privity of Contract

When there is no contract between an injured party and a potentially responsible party, in some jurisdictions the economic loss rule can completely preclude a claim against that potentially responsible party for economic damages.²² For example, an injured owner might not be able to maintain a direct tort claim against a consulting engineer, subcontractor or material supplier, even if that contractually remote party caused the harm. In those jurisdictions, claims for economic damages in a construction defect case are essentially all going to be claims for breach of contract. Contract claims against the prime contractor or prime design professional might save the owner, but woe can befall the owner if those prime contracting parties are judgment proof or have otherwise limited or impaired their indemnity rights against their negligent subcontractors and sub-consultants.

In some states, the designer may be sued by a third party for negligence if the breach of professional duties results in foreseeable harm,²³ economic or otherwise, to persons so situated by their economic relations, and community of interests as to impose a duty of due care. Liability arises from the negligent breach of a common law duty of care flowing from the parties’ working relationship. Accordingly, in those states a design professional,

²¹*Snyder*, 992 P.2d at 1087. See also *Formento v. Encanto Business Park*, 154 Ariz. 495, 744 P.2d 22 (Ct. App. Div. 2 1987), opinion supplemented, (Aug. 4, 1987); *Keller v. A.O. Smith Harvestore Products, Inc.*, 819 P.2d 69, Prod. Liab. Rep. (CCH) P 12969, 15 U.C.C. Rep. Serv. 2d 733 (Colo. 1991); *Gilliland v. Elmwood Properties*, 301 S.C. 295, 391 S.E.2d 577 (1990); *Stamp v. Honest Abe Log Homes, Inc.*, 804 S.W.2d 455 (Tenn. Ct. App. 1990); *Leslie O’Neal-Coble et al., Construction Damages and Remedies*, 290 (2d Ed., 2013).

²²See, e.g., *Sensenbrenner v. Rust, Orling & Neale, Architects, Inc.*, 236 Va. 419, 374 S.E.2d 55 (1988) (homeowner’s action against pool subcontractor and architect dismissed for lack of privity); *Bryant Elec. Co., Inc. v. City of Fredericksburg*, 762 F.2d 1192 (4th Cir. 1985) (there is no cause of action for a contractor to recover against an engineer for economic loss in the absence of privity under Virginia law). By contrast with other jurisdictions, Virginia is notably strict in its privity requirement for all professionals.

²³See, e.g., *Consult Urban Renewal Dev. Corp. v. T.R. Arnold & Assoc., Inc.*, 2009 WL 1969083 (D.N.J. 2009) (economic loss rule does not apply here, as where two parties negotiated an inspection contract and were, or should have been, aware that third parties would be relying on the services provided; the court looked to the foreseeability of injury to others); *Coburn v. Lenox Homes, Inc.*, 173 Conn. 567, 575, 378 A.2d 599, 602 (1977) (“Liability will be imposed, however, only if it is foreseeable that the contractor’s work, if negligently done, may cause damage to the property or injury to persons living on or using the premises.”).

even in the absence of privity of contract, may be sued by a general contractor or the subcontractors working on a construction project for economic loss foreseeably resulting from breach of an architect's common law duty of care in the performance of its contract with the owner.²⁴ Strictly speaking, such a cause of action is not grounded on negligent performance of the architects' contract with the owner, but it instead arises out of an independent duty not to cause harm to third parties.²⁵

In those jurisdictions the injured party might assert a mix of contract and negligence claims. The defendants would then likely assert a mix of indemnity and contribution claims. Such a case assures that the jury instructions will be challenging for counsel and the judge, to say the least.

If it comes to pass once and for all that privity of contract is not required to successfully pursue a claim for economic damages in a construction defect case, and the border between contract and negligence dissolves, and if it also comes to pass that defendants severally liable for a single harm and the ensuing economic damages can utilize comparative fault or uniform contribution principles to apportion fault, what then is the remaining purpose of contractual indemnity provisions, and what is the remaining utility of other contractual risk allocation techniques, such as limitations or caps on liability? A carefully negotiated indemnity clause could simply be circumvented by asserting a claim for contribution. A plaintiff not in privity of contract who could nevertheless sue a consulting engineer or subcontractor could easily argue that caps on liability are not applicable to the plaintiff.

One of the leading cases that allowed a contractor to seek economic damages against an architect absent privity of contract

²⁴*Beacon Residential Community Assn. v. Skidmore, Owings & Merrill LLP*, 59 Cal. 4th 568, 173 Cal. Rptr. 3d 752, 327 P.3d 850 (2014) (claims allowed by condominium homeowners against architect, where no privity exists, because architect's work was intended to benefit the homeowners living in the residential units and it was foreseeable that the homeowners would be among the class of persons harmed by the negligently designed units).

²⁵*See, e. g.*, *U.S. for Use and Benefit of Los Angeles Testing Laboratory v. Rogers & Rogers*, 161 F. Supp. 132 (S.D. Cal. 1958); *Normoyle-Berg & Associates, Inc. v. Village of Deer Creek*, 39 Ill. App. 3d 744, 350 N.E.2d 559 (3d Dist. 1976); *A. R. Moyer, Inc. v. Graham*, 285 So. 2d 397, 65 A.L.R.3d 238 (Fla. 1973); *McKinney Drilling Co. v. Nello L. Teer Co.*, 38 N.C. App. 472, 248 S.E.2d 444 (1978); *Detweiler Bros., Inc. v. John Graham & Co.*, 412 F. Supp. 416 (E.D. Wash. 1976). *See generally* *Tort Liability of Project Architect or Engineer for Economic Damages Suffered by Contractor or Subcontractor*, 61 A.L.R.6th 445. *See also* *Am. Jur. 2d, Negligence* § 49.

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was *United States ex rel. Los Angeles Testing Laboratory v. Rogers & Rogers*.²⁶ In often-quoted language, the court said:

Considerations of reason and policy impel the conclusion that the position and authority of a supervising architect are such that he ought to labor under a duty to the prime contractor to supervise the project with due care under the circumstances, even though his sole contractual relationship is with the owner, here the United States. Altogether too much control over the contractor necessarily rests in the hands of the supervising architect for him not to be placed under a duty imposed by law to perform without negligence his functions as they affect the contractor. The power of the architect to stop the work alone is tantamount to a power of economic life or death over the contractor. It is only just that such authority, exercised in such a relationship, carry commensurate legal responsibility.²⁷

North Carolina law has also long recognized claims for economic losses due to professional negligence in the absence of privity of contract. The “incidental fact of the existence” of a contract between two parties does not negate a duty of care to those not a party to the contract.²⁸ The primary basis for imposing such a duty of care is whether harm from the design professional’s conduct is foreseeable as judged by (1) the economic relationship between the design professional and the plaintiff and (2) the community of interests between the parties.²⁹ Echoing *Rogers, Shoffner* discussed the importance of extending duties of care among the various members of a project team:

Each of the various participants must, to some degree, rely upon the professional performance of the other and each therefore has the responsibility of performing the task with due care. Clearly, the incidental fact of the existence of the contract between the architect and the property owner should not negative the responsibility for the architect when he enters upon a course of affirmative conduct which may be expected to effect [sic] the interest of third parties.³⁰

Likewise, in *Davidson & Jones, Inc. v. County of New Hanover*,³¹ the North Carolina Court of Appeals abolished privity of contract

²⁶U.S. for Use and Benefit of Los Angeles Testing Laboratory v. Rogers & Rogers, 161 F. Supp. 132 (S.D. Cal. 1958).

²⁷*Rogers*, 161 F. Supp. at 135-36.

²⁸*Shoffner Industries, Inc. v. W. B. Lloyd Const. Co.*, 42 N.C. App. 259, 271, 257 S.E.2d 50, 58 (1979) (quoting Prosser, *Torts* 4th Ed. § 93, p. 622).

²⁹*Shoffner Indus.*, 42 N.C. App. at 271, 257 S.E.2d at 58.

³⁰*Shoffner Indus.*, 42 N.C. App. at 272, 257 S.E.2d at 59.

³¹*Davidson and Jones, Inc. v. New Hanover County*, 41 N.C. App. 661, 255 S.E.2d 580 (1979).

as a requirement for a contractor to bring a negligence action against a design professional. The court's reasoning was grounded in an expansion of traditional negligence principles, basing the duty of care on the foreseeability of harm. Applying negligence principles to instances in which a design professional negligently breaches a contract, the court announced the following rule:

Where breach of such contract results in foreseeable injury, economic or otherwise, to persons so situated by their economic relations, and community of interests as to impose a duty of care, we know of no reason why an architect cannot be held liable for such injury. Liability arises from negligent breach of a common law duty of care flowing from the parties' working relationship.³²

In eliminating privity of contract as a condition of recovery, the court further stated: "a complete binding contract between the parties is not a prerequisite to a duty to use care in one's actions in connection with an economic relationship, nor is it a prerequisite to suit by a contractor against an architect."³³

As *Davidson & Jones* explained:

A surveyor or civil engineer is required to exercise that degree of care which a surveyor or civil engineer of ordinary skill and prudence would exercise under similar circumstances, and if he fails in this respect and his negligence causes injury, he will be liable for that injury. Such liability is based on negligence, and lack of privity of contract does not render Soil and Material Engineers, Inc. immune from liability to the general contractor or the subcontractors for damages proximately resulting from submitting a bid or conducting work in reliance on negligently prepared soil test reports.³⁴

Since the *Davidson & Jones* decision, North Carolina has expanded the parties to whom a design professional owes a duty of care. Most cases have imposed a duty of care on the design professional³⁵ based solely on the factors of (1) the parties' eco-

³²*Davidson & Jones*, 41 N.C. App. at 667, 255 S.E.2d at 584.

³³*Davidson & Jones*, 41 N.C. App. at 666, 255 S.E.2d at 584.

³⁴*Davidson & Jones*, 41 N.C. App. at 668, 255 S.E.2d at 585.

³⁵Only one North Carolina case in the last thirty years has determined that a design professional did not owe a duty of care to a contractor. In *RCDI Const., Inc. v. Spaceplan/Architecture, Planning & Interiors, P.A.*, 148 F. Supp. 2d 607 (W.D. N.C. 2001), *aff'd*, 29 Fed. Appx. 120 (4th Cir. 2002) the contractor filed suit alleging negligence and the defendant architect moved for judgment on the pleadings which the trial court granted. In granting judgment on the pleadings in favor of the architect, the federal district court was primarily persuaded by the lack of nexus between the contractor and the architect, determining that the architect did not exercise "control or supervision over the

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conomic relations, and (2) their community of interests.³⁶ In *Browning v. Maurice B. Levien & Co., P.C.*,³⁷ the court permitted limited partners in a real estate development company to bring suit in negligence against an architect retained by the project's lender to supervise construction of an apartment complex. Determining that the defendants owed a duty to the limited partners, the court said: "when the defendants undertook to perform services for the bank, it could be reasonably foreseen that the owners of the property . . . might rely on the certification of the defendants."³⁸

Plaintiffs." 148 F.Supp.2d at 621. The lack of reliance by the contractor on any information provided by the architect was also decisive.

³⁶See *Ellis-Don Const., Inc. v. HKS, Inc.*, 353 F. Supp. 2d 603 (M.D. N.C. 2004); *Pompano Masonry Corp. v. HDR Architecture, Inc.*, 165 N.C. App. 401, 598 S.E.2d 608, 189 Ed. Law Rep. 913 (2004); *Kaleel Builders, Inc. v. Ashby*, 161 N.C. App. 34, 587 S.E.2d 470 (2003).

³⁷*Browning v. Maurice B. Levien & Co.*, 44 N.C. App. 701, 262 S.E.2d 355 (1980).

³⁸*Browning*, 44 N.C. App. at 705, 262 S.E.2d at 358. See also *Roland A. Wilson and Associates v. Forty-O-Four Grand Corp.*, 246 N.W.2d 922, 925 (Iowa 1976); *Bell v. Jones*, 523 A.2d 982, 994–95 (D.C. 1986) ("[A] person who engages the services of a professional surveyor or architect has the right to rely on the latter's superior knowledge and skill and to expect that such professionals will fulfill the duty of reasonable diligence, skill, and ability. More specifically, when a surveyor or architect undertakes to certify that something has been done or not done, or done in a certain way, the client has a right to rely on the professional knowledge and skill of the surveyor or architect in making that certification. The surveyor's or architect's duty of reasonable care to the client is breached when such a certification is negligently made, and if that breach results in injury to the client, he or she may recover damages.") (internal quotes omitted); *Hobbs v. Florida First Nat. Bank of Jacksonville*, 406 So. 2d 63, 64 (Fla. 1st DCA 1981), dismissed, 412 So. 2d 466 (Fla. 1982) (involving a construction loan, the complaint alleged that the engineer's negligence, in performing inspections and rendering reports on work completed, caused the mortgagee to overpay loan proceeds to the developer-mortgagor; Florida appeals court held that it was reasonably foreseeable that the mortgagee would rely on the certifications and that negligent certification could, therefore, injure the mortgagee); *General Trading Corp. v. Burnup & Sims, Inc.*, 12 V.I. 204, 523 F.2d 98 (3d Cir. 1975) (landowner may recover damages from architect when delay in construction of building resulted from architect's negligent certification of faulty construction work); *Hutchinson v. Dubeau*, 161 Ga. App. 65, 66, 289 S.E.2d 4, 5 (1982) (architect who certified the accuracy of a plat "in plain English" may be held liable to "purchasers damaged by reasonable reliance upon the plat"); *Newton Inv. Co. v. Barnard & Burk, Inc.*, 220 So. 2d 822, 824 (Miss. 1969) ("An engineer or architect may be held liable for negligence in the improper issuance of cost or progress certificates.").

Similarly, in *Quail Hollow East Condominium Association v. Donald J. Scholz Co.*,³⁹ the Court of Appeals permitted a homeowner's association to sue an architect retained by the general contractor as a subconsultant because "it is evident that plaintiff's members fall within the range of potential plaintiffs contemplated by our earlier decisions abolishing the privity requirement."⁴⁰ The court went on to state:

The primary question raised by this appeal is whether a homeowner's association may sue an architect for the negligent design and preparation of plans and specifications and the negligent supervision of construction of a condominium complex where there exists no contractual privity between the architect and the homeowner's association. Recently becoming an area of enormous concern within the legal community, the scope of liability of an architect for the negligent performance of his professional duties has undergone considerable expansion. This broadening of scope has been seen principally in the relaxation of the traditional requisite of contractual privity. As a general proposition of the law of torts, it is settled that, under certain circumstances, one who undertakes to render services to another which he should recognize as necessary for the protection of a third person, or his property, is subject to liability to the third person for injuries resulting from his failure to exercise reasonable care in such undertaking.⁴¹

North Carolina also provides an example of a claim by an owner against a remote material manufacturer. In *Olympic Products Co. v. Roof Systems, Inc.*,⁴² the plaintiff was the owner of a manufacturing plant. The owner contracted with a contractor to install a new roof for the plant. The contractor, in turn, contracted with the manufacturer of the roofing material to direct the specifications for and inspect the contractor's installation of the roof. After a portion of the roof collapsed, the owner sued the manufacturer for professional negligence in failing to properly inspect the contractor's installation of the roof and sought damages for the cost of the repair to the roof and lost profits. The trial court directed a verdict against the owner on its negligence claim against the manufacturer. The Court of Appeals reversed, notwithstanding the owner's lack of privity of contract with the manufacturer.

³⁹*Quail Hollow East Condominium Ass'n v. Donald J. Scholz Co.*, 47 N.C. App. 518, 268 S.E.2d 12 (1980).

⁴⁰*Quail Hollow*, 47 N.C. App. at 525, 268 S.E.2d at 17.

⁴¹*Quail Hollow*, 47 N.C. App. at 521-22, 268 S.E.2d at 15 (citing Restatement Second, Torts § 324A; W. Prosser, Handbook of the Law of Torts § 93 (4th ed. 1971)).

⁴²*Olympic Products Co., A Div. of Cone Mills Corp. v. Roof Systems, Inc.*, 88 N.C. App. 315, 363 S.E.2d 367 (1988).

In California, architect liability to third parties is not limited to personal injury; it also extends to property damage. In *Beacon Residential Community Ass'n v. Skidmore, Owings & Merrill, LLP*,⁴³ the plaintiff condominium owners association brought an action against the developer and architectural firm alleging that defects made the homes uninhabitable for portions of the year due to high temperatures. The architect designed a condominium project for the developer and due to the mild Bay Area climate, the project design did not include an air conditioning system for the individual condominium units. The plaintiffs alleged that the glazing specified by the architect caused high internal temperatures that caused some units to be uninhabitable on warm days. The issue was whether the architect could be liable for claims from a third party with which it did not have a contract. The court held that the allegations were sufficient, if proven, to establish that the defendants owed a duty of care to the homeowners.⁴⁴

IV. Defendants' Burden of Proof

To summarize the foregoing digression into the economic loss rules, depending on the jurisdiction a plaintiff in a structural defect case might have claims against multiple parties, some based on claims of breach of contract, others based on claims of negligence, all for a single indivisible harm. Furthermore, if the plaintiff can prove that some breach of duty by each defendant was a substantial factor contributing to the harm, the plaintiff can generally recover all of its damages from any of the several defendants. Finally, the plaintiff need not prove how properly to apportion fault among the several defendants.

The proposition that a plaintiff need not apportion fault or damages can be unsettling for defendants, to say the least. As discussed above, in many cases it would be impossible for the plaintiff in a defect case to "apportion" fault or damages, because of the indivisible nature of the harm caused. Another reason for imposing the burden of apportionment on the defendants is that, generally speaking, the plaintiff is not privy to the legal and contractual relationships between the various defendants. It follows that if multiple defendants are held jointly and/or severally liable for the same damages, the plaintiff can proceed to recover all of the plaintiff's damages from any of the defendants. It is then up to the defendants to work out apportionment of the damages, either by agreement, during the case-in-chief, or in a

⁴³*Beacon Residential Community Assn. v. Skidmore, Owings & Merrill LLP*, 59 Cal. 4th 568, 173 Cal. Rptr. 3d 752, 327 P.3d 850 (2014).

⁴⁴*Beacon Residential*, 59 Cal. 4th at 585, 173 Cal. Rptr. 3d at 765.

subsequent legal proceeding. Defendants who wish to avoid a subsequent proceeding may be well advised to assert cross-claims that could lay a foundation for claiming equitable contribution if the plaintiff calls on them to pay a disproportionate share of the damage award.

What, then, are the multiple defendants left to do—how can they apportion damages and/or recover against each other? Under current law, the answer depends to a large extent on the type of claims brought by the plaintiff, such as breach of contract or negligence, and whether different defendants were held liable under different theories. For example, imagine the plaintiff is an owner who entered into multiple separate contracts for work on a project; an owner-contractor contract, an owner-designer contract, and an owner-engineer contract. Further, imagine the contractor, designer, and engineer have no contracts with each other. The contractor, designer, and engineer all breach their respective contracts with the owner, causing one indivisible injury to the project. Now imagine the owner also sued a subcontractor for negligence (in a jurisdiction allowing such a claim), and prevailed against that defendant as well. Now imagine the owner successfully collects one hundred percent of its damages from the contractor. Fairness demands that the contractor be reimbursed in part by the other defendants, but how? The options available to the contractor might include some sort of indemnity, contribution, or comparative fault.

A. Apportionment Based on Causation

Section 433 of the *Restatement (Second) of Torts* addresses apportionment of harm among multiple causes in negligence cases. Fundamentally, of course, the burden of proof is on the plaintiff to show that negligent conduct of a defendant caused harm to the plaintiff. The *Restatement* also recognizes that some injuries or harms are divisible in nature. Those cases might involve multiple defendants, and possibly separate breach of contract and negligence claims, with each defendant separately liable for separate discrete defects so that apportionment is possible. The *Restatement (Second) of Torts* summarizes the rule this way:

- (1) Damages for harm are to be apportioned among two or more causes where
 - (a) there are distinct harms, or
 - (b) there is a reasonable basis for determining the contribution of each cause to a single harm.

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(2) Damages for any other harm cannot be apportioned among two or more causes.⁴⁵

In short, in some cases, it might be possible to apportion fault or damages, based on a finding that the harms caused are divisible.⁴⁶ In a case where the harms are divisible, the defendants would be entitled to introduce evidence supporting some apportionment of liability. Even if the harm is divisible, however, the plaintiff should not have the burden to apportion fault among the several defendants.

In other cases, the harm might be so indivisible that there is no basis for apportionment.

Certain kinds of harm, by their very nature, are normally incapable of any logical, reasonable, or practical divisionBy far the greater number of personal injuries, and of harms to tangible property, are thus normally single and indivisible. Where two or more causes combine to produce such a single result, incapable of division on any logical or reasonable basis, and each is a substantial factor in bringing about the harm, the courts have refused to make an arbitrary apportionment for its own sake, and each of the causes is charged with responsibility for the entire harm.⁴⁷

Restatement (Second) of Torts goes on to describe the burden of proof on apportionment:

(1) Except as stated in Subsections (2) and (3), the burden of proof that the tortious conduct of the defendant has caused the harm to the plaintiff is upon the plaintiff.

(2) Where the tortious conduct of two or more actors has combined to bring about harm to the plaintiff, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor.

(3) Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it,

⁴⁵Restatement Second, Torts § 433A.

⁴⁶*See, e.g.,* Housing Authority of City of Milwaukee v. Barrientos Designs & Consulting, L.L.C., 2006 WI App 203, 296 Wis. 2d 744, 749, 724 N.W.2d 395, 398 (Ct. App. 2006) (Noting that where the Housing Authority entered into contracts with the architect and the contractor and the resulting injury was roof problems, the damages could be separated out between the two companies because “each defendant had separate duties and responsibilities, and consequently, a jury could determine which part of the total damages to attribute to each party.”).

⁴⁷Restatement Second, Torts § 433A, comment i.

the burden is upon each such actor to prove that he has not caused the harm.⁴⁸

The *Restatement (Third) of Torts: Apportionment of Liability* took these apportionment principles further, in recognition of the impact of comparative fault laws in most states. In cases where the plaintiff claims bodily injury or property damage and all claims are in tort, these Restatements provide considerable guidance for counsel regarding the burden of proof on apportionment.

As is true of negligence, the law of contracts recognizes that multiple causation is possible. The plaintiff must prove that a breach of contract by each defendant was a substantial contributing to the harm suffered. As discussed earlier in the context of the plaintiff's burden of proof, the plaintiff must prove the damages suffered as a result of the harm. As with negligence, however, the plaintiff does not have to apportion fault or damages. If the plaintiff can prove that these breaches of contract were a "substantial factor" in causing indivisible damage to the structure, the plaintiff would be entitled to a verdict of full damages from each of the breaching parties, although it could only receive one recovery.⁴⁹

B. Attribution of Fault to Other Parties-Comparative Fault, Contributory Negligence and Avoidable Consequences

The first impulse of the defendants in a defect case might be to cast blame on the plaintiff or the other defendants. Blaming the other defendants might be a natural impulse, but it will not help a defendant appreciably if the defendant is shown to have contributed to the harm and the jurisdiction does not allow the court to assess comparative fault among defendants. Blaming the victim might be a risky trial strategy, but again it might not even be an available strategy.

At least four states plus the District of Columbia still adhere to the doctrine of pure contributory negligence,⁵⁰ meaning that no matter what percentage plaintiff may be at fault, any fault on

⁴⁸Restatement Second, Torts § 433B.

⁴⁹11 Corbin on Contracts, *supra* note 5, at § 55.9.

⁵⁰Best, Impediments to Reasonable Tort Reform: Lessons From The Adoption Of Comparative Negligence, 40 Ind. L. Rev. 1 (2007) (The following states have not adopted comparative negligence and continue to utilize contributory negligence: Alabama, Maryland, North Carolina, Virginia, and the District of Columbia.).

behalf of the plaintiff is a complete bar to recovery.⁵¹ In one such state, North Carolina, contributory negligence is not a defense to a breach of contract claim; contributory negligence lies in tort.⁵² Other jurisdictions provide similar support for the rule that contributory negligence is not an appropriate defense to a breach of contract claim.⁵³ Although a Missouri court looking to early North Carolina case law found no support for a complete bar to recovery, it did find that the defense of contributory negligence in a contract action mitigates against the alleged damages.”⁵⁴

⁵¹See Harrison Ford Hagg, *Slightly-Gross: South Dakota’s Addiction to a Bad Comparative Negligence Law and the Need for Change*, 59 S.D. L. Rev. 139, 144 (2014) (“The King’s Bench in England formulated the doctrine [of contributory negligence] in the 1809 case of *Butterfield v. Forrester*. In this case, the King’s Bench denied Butterfield relief from an incident in which Butterfield was thrown from his horse after striking a pole left by Forrester next to the road. The court reasoned that although Forrester was negligent for leaving the pole adjacent to the road, Butterfield was also negligent—i.e. contributorily negligent—by riding too fast and failing to avoid the pole. In his opinion, Lord Ellenborough held Butterfield could not and should not recover because he failed to use ordinary care. Thus, because Butterfield failed to use ordinary care, the court established the doctrine of contributory negligence, which acts as a complete bar to a plaintiff’s recovery. The rule promulgated in *Butterfield* spread to the United States in the 1820s and remained the dominant rule throughout the nineteenth century and into the twentieth century . . .”).

⁵²See *Bullock v. Bullock*, 204 N.C. App. 210, 694 S.E.2d 523 (2010) (unpublished opinion) (“As contributory negligence is not a defense to a breach of contract action, the trial court did not err in not submitting the issues of Plaintiff’s contributory negligence to the jury.”); *West Const. Co. v. Atlantic Coast Line Ry. Co.*, 185 N.C. 43, 116 S.E. 3, 5 (1923) (“[I]t is held that, while in cases of tort if the plaintiff is guilty of contributory negligence the law forbids recovery, still this principle ordinarily does not apply where a breach of contract is a factor in the production of the injury.”); *Steelcase, Inc. v. Lilly Co., Inc.*, 93 N.C. App. 697, 701, 379 S.E.2d 40, 43 (1989) (“Where, as in this case, a plaintiff is able to convince a trier of fact that it has suffered damages flowing from the failure of a defendant to meet direct and express contractual obligations, the defense of contributory negligence has no application to that claim.”).

⁵³See *Fortier v. Dona Anna Plaza Partners*, 747 F.2d 1324, 1337, 17 Fed. R. Evid. Serv. 612 (10th Cir. 1984) (“contributory negligence has no place in contract and fraud actions”); *Fresno Air Service v. Wood*, 232 Cal. App. 2d 801, 807, 43 Cal. Rptr. 276, 279 (5th Dist. 1965) (“Assumption of risk and contributory negligence . . . are not applicable as theories of law and defenses to actions . . . for breach of contract.”); *Rotman v. Hirsch*, 199 N.W.2d 53, 56, 55 A.L.R.3d 658 (Iowa 1972) (“contributory negligence would not be available as a defense to an action on contract.”); *Haysville U.S.D. No. 261 v. GAF Corp.*, 233 Kan. 635, 643, 666 P.2d 192, 199, 12 Ed. Law Rep. 957 (1983).

⁵⁴*American Mortg. Inv. Co. v. Hardin-Stockton Corp.*, 671 S.W.2d 283, 291 (Mo. Ct. App. W.D. 1984) (“Where the action is brought for breach of contract, and that is established, contributory negligence is not allowed to defeat the ac-

An injured plaintiff, whether the case is in tort or contract, must exercise reasonable care and diligence to avoid or lessen the consequences of the defendants' wrong. "This rule is known as the doctrine of avoidable consequences or the duty to minimize damages."⁵⁵ Failure to minimize damages does not bar the remedy; rather, it goes only to the amount of damages recoverable.⁵⁶

The duty placed on an injured party to mitigate its damages is well established, and has been described this way:

In an action for tort committed or breach of contract without excuse, it is a well settled rule of law that the party who is wronged is required to use due care to minimize the loss The burden is on defendant of showing mitigation of damages. Therefore, while the duty is imposed upon the injured party to use ordinary care and prudence to minimize his damages, nevertheless the burden is upon the injuring party to offer evidence tending to show breach of duty or failure to exercise the requisite degree of care and prudence to reduce and minimize the loss complained of.⁵⁷

One distinction between avoidable consequences and contributory negligence is that they occur, if at all, at different times.⁵⁸

Contributory negligence occurs either before or at the time of the wrongful act or omission of the defendant. On the other hand, the avoidable consequences generally arise after the wrongful act of the defendant. That is, damages may flow from the wrongful act or omission of the defendant, and if some of these damages could rea-

tion in toto, but the negligence of the claimant contributing to the injury is to be properly considered as to the issue of damages." (quoting *Elam v. Smithdeal Realty & Ins. Co.*, 182 N.C. 599, 109 S.E. 632, 634, 18 A.L.R. 1210 (1921)).

⁵⁵*Miller v. Miller*, 273 N.C. 228, 239, 160 S.E.2d 65, 74 (1968).

⁵⁶*Miller*, 273 N.C. at 239, 160 S.E.2d at 74.

⁵⁷*Thermal Design, Inc. v. M & M Builders, Inc.*, 207 N.C. App. 79, 89, 698 S.E.2d 516, 523–24 (2010). *See also* *Harris & Harris Const. Co. v. Crain & Denbo, Inc.*, 256 N.C. 110, 122, 123 S.E.2d 590, 599 (1962); *Pompano Masonry Corp. v. HDR Architecture, Inc.*, 165 N.C. App. 401, 411, 598 S.E.2d 608, 614, 189 Ed. Law Rep. 913 (2004); *LeBlanc v. Stan Weber and Associates*, 638 So. 2d 463, 465 (La. Ct. App. 5th Cir. 1994) ("The duty to mitigate damages exists in both tort and contract law."); *Bass v. Equity Residential Holdings, LLC*, 849 N.W.2d 87, 92 (Minn. Ct. App. 2014) ("Generally, the party alleging a loss because of a tort or breach of contract has a duty to mitigate damages."); *Shaffer v. Debbas*, 17 Cal. App. 4th 33, 41, 21 Cal. Rptr. 2d 110, 114 (4th Dist. 1993), as modified, (July 13, 1993) ("A plaintiff who suffers damage as a result of either a breach of contract or a tort has a duty to take reasonable steps to mitigate those damages and will not be able to recover for any losses which could have been thus avoided."); *Walker v. Transamerica Title Ins. Co., Inc.*, 65 Wash. App. 399, 405, 828 P.2d 621, 625 n.6 (Div. 2 1992) (comparing Restatement (Second) of Torts § 918 with Restatement (Second) of Contracts § 350, "The doctrine of mitigation of damages applies in both tort and contract cases.").

⁵⁸*Miller v. Miller*, 273 N.C. 228, 239, 160 S.E.2d 65, 74 (1968).

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sonably have been avoided by the plaintiff, then the doctrine of avoidable consequences prevents the avoidable damages from being added to the amount of damages recoverable.⁵⁹

“Generally, the reasonableness of mitigation efforts depends upon the facts and circumstances of the particular case and is a jury question except in the clearest of cases.”⁶⁰

Avoidance of damages should not be equated with apportionment of fault. Proof that the plaintiff could have reasonably avoided some damages might reduce the liability of the defendants, but it does nothing to apportion fault for the recoverable damages. In any event, the defendants’ quandary, how to apportion liability among one another, would remain.

In comparative fault states, the defendants can attempt to convince the trier of fact to allocate some fault to the plaintiff, and apportion fault among the defendants. Comparative fault might well solve the defendants’ quandary in a wholly negligence case, but comparative fault is not a likely solution in a case involving claims of breach of contract. “The use of the comparative negligence theory is not proper in breach of contract actions.”⁶¹ In some jurisdictions comparative fault is not even applied in tort cases where the plaintiff is seeking economic damages.⁶² Nevertheless, some commentators, after acknowledging the prevailing rule that comparative fault does not apply in contract actions, disagree with the rule and advocate the application of comparative fault principles in multiple causation breach

⁵⁹ *Miller*, 273 N.C. at 239, 160 S.E.2d at 74.

⁶⁰ *Smith v. Martin*, 124 N.C. App. 592, 600, 478 S.E.2d 228, 233 (1996).

⁶¹ *Haysville U.S.D. No. 261 v. GAF Corp.*, 233 Kan. 635, 643, 666 P.2d 192, 199, 12 Ed. Law Rep. 957 (1983). *See also* *Broce-O’Dell Concrete Products, Inc. v. Mel Jarvis Const. Co., Inc.*, 6 Kan. App. 2d 757, 759–60, 634 P.2d 1142, 1145, 32 U.C.C. Rep. Serv. 762 (1981) (“It is well settled that contributory negligence is no defense to a breach of contract.”); *Lee v. Andrews*, 204 Mont. 527, 531, 667 P.2d 919, 921 (1983) (finding use of “comparative negligence principles” in a contract case to be erroneous); *Strong Const., Inc. v. City of Torrington*, 2011 WY 82, 255 P.3d 903 (Wyo. 2011) (rejecting contractor’s argument to adopt the principles of comparative fault in a breach of contract claim). *But see* *Lesmeister v. Dilly*, 330 N.W.2d 95, 103 (Minn. 1983) (Noting that the court suggested it could apportion damages to the plaintiff, stating “[u]nreasonable failure to mitigate damages is ‘fault’ which can be apportioned under the comparative fault statute.” This statement by the court in *Lesmeister* does not seem to be consistent with the summary of the law in *Corbin*, but is somewhat consistent with other cases on mitigation of damages discussed further below.).

⁶² *See generally the discussion in* Olthoff, *If You Don’t Know Where You’re Going, You’ll End Up Somewhere Else: Applicability of Comparative Fault Principles In Purely Economic Loss Cases*, 49 *Drake L. Rev.* 589 (2001).

of contract cases.⁶³ These comparative fault advocates emphasize the unfairness to defendants under older common law contribution rules. Advocates also argue that the prospect of comparative fault for contract breaches would lead to more efficient and reliable incentives and risk allocation in contracting.⁶⁴

In their article advocating comparative fault in contract cases, Fisk and Fisk present a particularly intriguing thesis. They venture the proposition that the parties can, through their contracts, provide for comparative fault in the event of a defect case, and they go on to suggest the AIA contract documents do just that:

No matter whether the owner sued the architect or whether the owner sued the contractor, in either situation and under certain facts, the provisions in A201 entail a comparative causation analysis whereby fault should be apportioned between the architect and the contractor, and the owner should be compensated by the architect or the contractor in accordance with each party's percentage of fault.⁶⁵

Fisk and Fisk describe the carefully balanced allocation of responsibilities between the architect and the contractor in the AIA documents, focusing on AIA Document B141 and AIA Document A201.⁶⁶ In particular, they focus on the architect's obligation to visit the site, observe the work, and report any observed deficiencies to the owner, and on the contractor's obligation to study the drawings and specifications and notify the owner of any obvious deficiencies in the design. Fisk and Fisk recognize that under these clauses, at least, it is possible for both the contractor and the architect to have independent liability for a single defect. They discuss the limits on the contractor's responsibility for design, and the limits on the architect's responsibility for means and methods. They then make this leap:

These provisions further evidence the intention of the parties to employ a comparative causation analysis in determining contract damages. Furthermore, neither the architect nor the contractor is

⁶³See, e.g., Olthoff, *supra* note 62; Porat, A Comparative Fault Defense in Contract Law, 107 Mich. L. Rev. 1397 (2009); Fisk and Fisk, Comparative Contract Fault: Using the AIA Documents to Apportion Contract Damages, 26-SPG Construction Law. 23 (Spring 2006).

⁶⁴See, e.g., Olthoff, *supra* note 62; Porat, *supra* note 639; Fisk, *supra* note 63.

⁶⁵Fisk, *supra* note 63, at 26.

⁶⁶Fisk, *supra* note 63. Given the date of their article, Fisk and Fisk focus on the 1997 edition of the AIA documents. Their points should, however, remain equally applicable under the AIA 2007 documents.

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attempting to disclaim liability for its own fault. With respect to the use of the AIA documents, total liability should be apportioned between the parties. One should be held responsible for the respective failure to detect the defect in construction or design, and the other should be held responsible for causing the defect to exist. Both a judge and a jury are fully capable of making such an apportionment.⁶⁷

It is not necessarily true, however, that the AIA documents require the court to apply comparative fault principles to apportion fault between an architect and a contractor. Admittedly the AIA documents strive to “apportion” responsibilities and duties, as described by Fisk and Fisk, but that is not necessarily the same thing as apportioning fault or damages. A court could believe itself constrained to follow the rules disallowing apportionment in contract cases, and hold the architect and the contractor severally liable of the same indivisible harm. The careful delineation of responsibilities in the contracts would enable and facilitate the application of comparative fault, however, and that seems to be real point in the article by Fisk and Fisk.

The intriguing question is whether the parties on a construction project even may, by contract, require apportionment of fault in a defect case. Theoretically that approach might have some appeal. It would certainly be a challenge, however, to negotiate and execute a series of contracts between multiple parties that assure consistent application of comparative fault principles. Such a scheme would address the two main concerns about comparative fault in contract cases, however: first, that a defendant should not be held jointly liable with another defendant for breach of that other defendant’s contract, unless the first defendant is a co-obligor on the contract, and second, that it would be almost impossible to insinuate comparative fault into contract cases without conflicting with “the very essence of the contractual arrangement, which is to enable the parties to rely on the contract and plan for the future accordingly.”⁶⁸ To some extent, these concerns could be addressed in a “Collaborative

⁶⁷Fisk, *supra* note 63, at 28.

⁶⁸Fisk, *supra* note 63, at 25, citing CTTI Priesmeyer, Inc. v. K & O Ltd. Partnership, 164 S.W.3d 675, 685 (Tex. App. Austin 2005); Field v. Boyer Co., L.C., 952 P.2d 1078, 1087 (Utah 1998). *See also* Ariel Porat, Contributory Negligence in Contract Law: Toward a Principled Approach, 28 U. Brit. Colum. L. Rev. 141, 143 (1994).

Project Delivery”⁶⁹ or “Integrated Project Delivery”⁷⁰ contract. The risk sharing contemplated by these multi-party contracts implies, at least, shared liability for defects and rework. Unless everyone with some responsibility for the integrity of the work is a party to the contract, however, including sub-consultants, subcontractors and material suppliers, a multi-party contract will be an imperfect tool for apportioning fault for a defect caused in part by those non-parties to the agreement.

C. Joint, Several, and Joint and Several Liability

All is not lost if the liable defendants are unable to apportion fault based on causation principles or comparative fault. They might still have recourse against one another for reimbursement of any sums paid to the plaintiff to satisfy a judgment. Most of the jurisprudence on the topic applies to the situation where the defendants are held jointly and severally liable for negligence. “[A] concurrent tortfeasor is liable for the whole of an indivisible injury whenever his negligence is a proximate cause of that injury.”⁷¹ Joint and several liability permits an injured party “to obtain full recovery for his injuries even when one or more of the responsible parties do not have the financial resources to cover their liability.”⁷² In that situation, the law allows the joint tortfeasors to seek contribution from one another as a matter of law.⁷³

There is a distinction between ‘joint liability’ and ‘joint and severally liable’ which has been described as follows:

“Joint liability” exists when two or more parties together are liable to a third party. Its special feature is that a joint obligor who is

⁶⁹This nomenclature is used in Consensus Docs 300-Collaborative Agreement (2007).

⁷⁰This nomenclature is used in AIA Document C191-2009, and related documents.

⁷¹*American Motorcycle Assn. v. Superior Court*, 20 Cal. 3d 578, 588, 146 Cal. Rptr. 182, 578 P.2d 899, 905 (1978).

⁷²*American Motorcycle Ass’n*, 20 Cal. 3d at 590, 578 P.2d at 906. The rule in *American Motorcycle* has been altered by statute in cases involving “non-economic” damages, which includes damages such as pain and suffering and emotional distress. The rule still appears to apply to “economic” damages, including most direct costs. See *Henry v. Superior Court*, 160 Cal. App. 4th 440, 72 Cal. Rptr. 3d 808 (2d Dist. 2008) discussing Cal. Civ. Code § 1431.2.

⁷³*Kottler v. State*, 136 Wash. 2d 437, 442, 963 P.2d 834, 837 (1998) (“Contribution is conditioned on the existence of joint and several liability because absent such common joint and several liability one party will have no duty to pay another’s liability for damages and, thus, no cause for subsequent reimbursement.”). See also *Minnesota Pipe and Equipment Co. v. Ameron Intern. Corp.*, 938 F. Supp. 2d 862 (D. Minn. 2013).

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sued has the right to insist that the plaintiff join all co-obligors. If parties are “jointly and severally liable,” each is fully responsible for the liability or obligation at issue, but a plaintiff may sue any or all of them in one suit at his or her option. But all parties who are jointly and severally liable need not be joined in a lawsuit.⁷⁴

When a claim against multiple defendants arises out of one contract, warranty, bond or guaranty, their liability will also likely be joint and several. “[W]here two or more parties to a contract promise the same performance to the same promisee, each is bound for the *full performance* thereof, whether his duty is joint, several, or joint and several.”⁷⁵ The liability arises out of the same contract, and so they are co-obligors on the contract.⁷⁶

However, the liability of several different defendants for the same injury is not necessarily joint liability. “A contract is several where two or more parties to a contract promise separate performances, to be rendered respectively by each of them, or where each of them makes only a separate promise that the same performance will be rendered, the contract is several.”⁷⁷ If claims against multiple defendants are based on breaches of separate, multiple contracts, it is not technically correct to characterize their liability as joint liability. Nevertheless, if a court finds multiple defendants liable on separate contracts for an indivisible harm, the plaintiff can seek to recover the amount of the judgment from any of the defendants, and the burden shifts to the defendants to apportion fault among themselves. In the law of torts, where liability is considered joint liability and contribution is available, ample guidance exists as to how to apportion damages. In the law of contracts, however, guidance is often lacking.

⁷⁴Hartford Acc. and Indem. Co. v. Scarlett Harbor Associates Ltd. Partnership, 109 Md. App. 217, 267, 674 A.2d 106, 130 (1996), judgment *aff'd*, 346 Md. 122, 695 A.2d 153 (1997) (internal citations omitted). *See also* Staab v. Diocese of St. Cloud, 853 N.W.2d 713 (Minn. 2014).

⁷⁵Converse v. James, 89 Haw. 461, 470, 974 P.2d 1051, 1060 (Ct. App. 1997), as amended, (Jan. 28, 1998) and as amended, (Apr. 13, 1999) (emphasis in original).

⁷⁶Co-obligors on the same contract can be held jointly and severally liable, as can guarantors and sureties on a single contract. For a general discussion *see* Restatement (Second) of Contracts § 289(2) (“Where two or more parties to a contract promise the same performance to the same promisee, they incur only a joint duty unless an intention is manifested to create several duties or joint and several duties.”).

⁷⁷C.J.S. Contracts § 468.

1. Torts

In the law of torts, the possibility of concurring negligence has long been recognized.⁷⁸ For example, in *Darroch v. Johnson*,⁷⁹ the court explained:

There may be one or more proximate causes of an injury. These may originate from separate and distinct sources or agencies operating independently of each other, yet if they join and concur in producing the result complained of, the author of each cause would be liable for the damages inflicted, and action may be brought against any one or all as joint tort-feasors.⁸⁰

Other jurisdictions have recognized the same rule. “Concurring negligence consists of the negligence of two or more persons concurring, not necessarily in point of time, but in point of consequence in producing a single indivisible injury.”⁸¹ “[W]hen an injury is caused by the concurring negligence of two or more parties, each is liable to the injured to the same extent as though it had been caused by any one of the several alone. Such acts of concurring negligence give rise to joint and several liability, and there need be no common duty, common design or concerted action.”⁸²

⁷⁸*Tilley v. Broward Hosp. Dist.*, 458 So. 2d 817, 818 (Fla. 4th DCA 1984) (“‘Concurring’ refers to negligence occurring ‘at the same time’ as another possible cause[.]”); *Bell v. Campbell*, 434 S.W.2d 117, 122 (Tex. 1968) (“concurrent negligence or a concurrent act . . . co-operates with the still persisting original act in bringing about the injury”); *Skipper v. Hartley*, 242 S.C. 221, 224, 130 S.E.2d 486, 488, 13 A.L.R.3d 426 (1963) (“Negligence need not be the sole cause of injury in order to impose liability, but need only be a ‘proximate concurring cause,’ which is a cause so efficient in causation that but for it the injury would not have occurred, even though one of several concurring causes may not have been reasonably anticipated.”).

⁷⁹*Darroch v. Johnson*, 250 N.C. 307, 108 S.E.2d 589 (1959).

⁸⁰*Darroch*, 250 N.C. at 313, 108 S.E.2d at 593. *See also* *Kodym v. Frazier*, 186 W. Va. 221, 224, 412 S.E.2d 219, 222 (1991) (“We have long recognized a rule of joint and several liability for plaintiffs. This means that where the plaintiff is injured by the concurrent negligence of several defendants, the plaintiff may elect to sue one or more of them.”).

⁸¹*Garbe v. Halloran*, 150 Ohio St. 476, 481, 38 Ohio Op. 325, 83 N.E.2d 217, 221 (1948). *See also* *Missouri Motor Distributing Co. v. Barker*, 1935 OK 9, 170 Okla. 183, 39 P.2d 544, 545 (1935) (“[W]here original negligence continues and exists up to time of injury, concurrent negligence of third person causing injury is not independent act of negligence, but two concurring acts of negligence will be held to be proximate cause of injury.”).

⁸²*De La Concha v. Pinero*, 104 So. 2d 25, 28 (Fla. 1958). This article does not address intentional torts in detail, and the rules governing apportionment generally and contribution in particular can vary from jurisdiction to

2. Breach of Contract

In large part because of the economic loss rules, one can easily imagine a case where the plaintiff's claims against multiple defendants are all based on breaches of contract. For instance, an owner might sue its general contractor and also sue the prime design professional. If an economic loss rule prevents economic damage claims against subcontractors and subconsultants not in privity with the owner, the prime contractor and prime design professional could be the only defendants (although those defendants might opt to implead their subcontractors on indemnity claims).

When the claims against the prime design professional and prime contractor are based on breach of contract, the liability of the general contractor and the designer is not truly joint liability:

In the law of torts, if the wrongful acts of others were also contributing factors, they and the defendant are sometimes regarded as 'joint tortfeasors,' each one is liable for the whole loss or harm. In the contract field, however, if the acts of others who are not joint obligors (whether wrongful or not) are contributing factors, those others are not thereby joined with the defendant as having committed the breach of contract.⁸³

The doctrine of joint and several liability, though typically

jurisdiction. There are parallels, however. In *Moses v. Town of Morganton*, 192 N.C. 102, 133 S.E. 421 (1926), plaintiff-landowners sued three defendants, a shoe company that had polluted a creek above the landowners' premises, the Town of Morganton that had discharged sewage into the creek, and a power company that had erected a structure in a river below the landowners' property causing the water in the creek to back up into the property, alleging that "[t]he unlawful and wrongful acts of the three aforesaid defendants, singly and jointly, contribut[ed] to and form[ed] a dangerous and destructive nuisance in said stream, to the great impairment of the value of the property of plaintiffs and to the destruction of the peace and safety in the use of said property by plaintiffs for human habitation." 133 S.E. at 423. In upholding the landowners' damages claim for joint and several liability against all three defendants, the Court said: "If parties, although acting independently know, or have reasonable ground to believe, that their independent acts, combining with the independent acts of others, will create a result that will become a nuisance, and they do so causing damage, they become as it were joint wrongdoers *ab initio*, and are liable as joint tort-feasors. Where all have knowledge of the independent acts that create the result and continue the independent acts with knowledge, this *ipso facto* creates a concert of action and makes a common design or purpose. *Any other position, from the facts and circumstances of the case would make plaintiffs practically remediless*, although there *is* a nuisance which all jointly concurred in and contributed to, that is alleged made the plaintiffs' land valueless, and but for such joinder the injury would not have occurred." *Moses*, 133 S.E. at 423 (emphasis added).

⁸³11 Corbin on Contracts, *supra* note 5, at § 55.9.

discussed and applied in negligence cases, arguably need not be limited to negligence claims or be dependent for its operation on any particular type of cause of action or mixture of different causes of action brought against multiple defendants. Whether a claim is cast as a tort or a breach of contract, a substantially similar proximate cause concept, the “substantial factor” test, must be met to establish liability for damage. Also, the plaintiff’s principal remedy for the alleged wrongdoing of each of the defendants is the same regardless of whether the plaintiff’s claims are in breach of contract or negligence, *i.e.*, the cost of repair of the structure.⁸⁴ Generally speaking, however, as summarized in *Corbin*, if claims are based on multiple separate contracts, or a mixture of tort and contract, or even claims for indivisible harm, it is inappropriate to impose joint and several liability on the defendants as a group.⁸⁵

This general rule is contradicted by a few cases. For example, in *Lesmeister v. Dilly*,⁸⁶ the Minnesota Supreme Court heard an appeal from a decision in a case involving defective construction of a building. In the course of reviewing a judgment on a jury verdict, the Supreme Court held that:

Where A and B owe contract duties to C under separate contracts, and each breaches independently, and it is not reasonably possible to make a division of the damage caused by the separate breaches closely related in point of time, the breaching parties, even though they acted independently, are jointly and severally liable.⁸⁷

In *Mayor and City Council of Columbus, Mississippi v. Clark-Dietz and Associates-Engineers, Inc.*,⁸⁸ a levee failed in part because the design of a slurry wall was changed during construction. The owner sued its contractor and engineer for breach of contract. The contractor counterclaimed for costs incurred to deal with design errors by the engineer, and filed a cross claim against the engineer alleging negligent design and inspection of the work. The court found in favor of the owner on part of its claim against the contractor. The court also found that

⁸⁴See, *e.g.*, *City of Charlotte v. Skidmore, Owings and Merrill*, 103 N.C. App. 667, 407 S.E.2d 571 (1991).

⁸⁵11 *Corbin on Contracts*, *supra* note 5, at § 55.9.

⁸⁶*Lesmeister v. Dilly*, 330 N.W.2d 95 (Minn. 1983).

⁸⁷*Lesmeister*, 330 N.W.2d at 102 (clarifying the court’s holding in *Northern Petrochemical Co. v. Thorsen & Thorshov, Inc.*, 297 Minn. 118, 211 N.W.2d 159 (1973)).

⁸⁸*Mayor and City Council of City of Columbus, Miss. v. Clark-Dietz and Associates-Engineers, Inc.*, 550 F. Supp. 610 (N.D. Miss. 1982).

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the engineer had breached its professional standard of care, and held the owner and the engineer jointly and severally liable to the contractor for the contractor's extra costs. In other words, the court held that an owner, liable for breach of contract, and an engineer, liable for professional negligence, could be held jointly and severally liable to a contractor.⁸⁹ It was the owner's burden to seek indemnification from the engineer, which the owner successfully recovered.

In *Fulk v. Piedmont Music Center*,⁹⁰ a salesman sued three different business entities for commissions allegedly earned under a verbal employment contract with the three companies. The trial court entered a judgment against all three defendants without dividing or apportioning liability among the defendants. The defendants appealed. Among other issues, they argued that "because North Carolina law does not allow for contribution from other defendants held jointly liable in contract, they are prejudiced by the trial court's applying joint and several liability to this case."⁹¹ The North Carolina Court of Appeals disagreed, and held that where the claims arose out of the same transaction, occurrence, or series of transactions or occurrences, and the claims contain questions of law and fact common to all of the defendants, it was within the trial court's discretion to hold the defendants jointly and severally liable, even where the claims were based on breaches of contract.⁹²

The Restatements of Torts do not address contract disputes, but they do provide useful policy discussions and phraseology. The *Restatement (Third) of Torts: Apportionment of Liability* acknowledges the potential that it could apply to contract cases:

The policy considerations for apportioning liability reflected in this Restatement are possibly applicable to cases involving injuries other than personal injury or physical damage to tangible property. On the other hand, those cases may also involve special policy considerations. In light of these competing considerations, this Restatement sometimes may be referred to by analogy in suits for purely nontangible economic loss caused by breach of contract or

⁸⁹*Mayor & City Council of Columbus, Mississippi*, 550 F. Supp. at 627.

⁹⁰*Fulk v. Piedmont Music Center*, 138 N.C. App. 425, 531 S.E.2d 476 (2000).

⁹¹*Fulk*, 138 N.C. App. at 428, 531 S.E.2d at 478.

⁹²*Fulk*, 138 N.C. App. at 429, 531 S.E.2d at 478-79. In *Fulk*, the three employers had interlocking ownership, which could have been one factor influencing the Court's decision to impose joint and several liability.

warranty, fraud, misrepresentation, nonmedical professional malpractice, or, where recognized, negligence . . .⁹³

To the extent the Restatements of Torts deal with burden of proof on the plaintiff, they seem to apply by analogy to breach of contract cases. It is not so clear, however, that those Restatements provide any comfort to defendants trying to apportion liability for breach of separate contracts among themselves. Certainly, defendants have recourse against other judgment debtors in a tort case. To the extent the claims by the plaintiff for economic damages are based on negligence and liability is joint and several, contribution among the tortfeasors should be available, not to mention comparative fault in comparative fault states. The predicament of the defendants is more troubling if their liability is based on breach of separate contracts. Their liability might not be joint and several as in classic negligence law. Furthermore, other tort concepts might not provide a mechanism to apportion liability.

D. Uniform Contribution Among Joint Tortfeasors

If multiple defendants are held jointly and severally liable for negligence and there is no verdict establishing comparative fault, most states provide for uniform contribution among tortfeasors, with the result that apportionment of damages is automatic. Assuming all of the claims by the plaintiff were negligence claims, defendants held jointly and severally liable can resort to these contribution laws to apportion fault.⁹⁴ In some states, the uniform contribution statutes provide that damages are shared pro rata or according to some fixed ratio.⁹⁵ In some comparative fault

⁹³Restatement Third, Torts: Apportionment of Liability § 1, comment e.

⁹⁴*See, e.g.*, PAM Transport v. Freightliner Corp., 182 Ariz. 132, 133, 893 P.2d 1295, 1296 (1995) (“A.R.S. § 12-2501 permits contribution to joint tortfeasors who have paid more than their pro rata shares of liability for an injury.”); Kottler v. State, 136 Wash. 2d 437, 448, 963 P.2d 834, 840 (1998) (“Contribution still exists, but only to the extent there is joint and several liability.”).

⁹⁵Truszewski v. Outboard Motor Marine Corp., 292 Ill. App. 3d 558, 561, 226 Ill. Dec. 537, 685 N.E.2d 992, 994 (1st Dist. 1997) (“[T]he Contribution Act . . . provides a remedy for an entity that has paid more than its pro rata share of the common liability by allowing it to seek contribution from a fellow joint tortfeasor who has not paid his pro rata share of the common liability.”); Dunn v. Praiss, 139 N.J. 564, 575, 656 A.2d 413, 419, 51 A.L.R.5th 799 (1995) (“The [Joint Tortfeasors Contribution Law] provides that if any one of the joint tortfeasors pays a judgment to an injured person, that tortfeasor is entitled to recover contribution from the other joint tortfeasors ‘for the excess so paid over his pro rata share.’”); Zeller v. Cantu, 395 Mass. 76, 86, 478 N.E.2d 930, 935, Prod. Liab. Rep. (CCH) P 10604 (1985) (“While recognizing that strong policy

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states, the liability of the defendants can be apportioned according to prevailing comparative fault principles.⁹⁶

If, however, the defendants are found liable for breach of contract, or a mixture of breach of contract and negligence, contribution might not provide relief.⁹⁷ For instance, in North Carolina, the Uniform Contribution Among Tortfeasors Act⁹⁸ governs the statutory right of contribution.⁹⁹ This statute has been adopted in other jurisdictions.¹⁰⁰ Contribution under the statute is limited to contribution among tortfeasors, so no right of action of contribution will lie among multiple defendants to a breach of contract claim. “By the clear language of the statute, a defendant is not entitled to contribution for a claim against him in contract.”¹⁰¹ “Under this statute, there is no right to contribution from one who is not a joint tort-feasor.”¹⁰² The right of contribu-

considerations favor apportionment on the basis of comparative fault, we are not empowered to enact such a change in our laws. We therefore affirm the judgment below ordering Cantu to pay a pro rata contribution . . .”).

⁹⁶*Dumas v. State ex rel. Dept. of Culture, Recreation & Tourism*, 828 So. 2d 530, 537 (La. 2002) (“Each tortfeasor shall not be liable for more than his degree of fault and shall not be solidarily liable with any other person for damages attributable to the fault of that other person.”); *Brown v. Keill*, 224 Kan. 195, 203, 580 P.2d 867, 873–74 (1978) (“The legislature intended to equate recovery and duty to pay to degree of fault.”). *See generally* Comment Note.—Contribution or Indemnity Between Joint Tortfeasors on Basis of Relative Fault, 53 A.L.R.3d 184.

⁹⁷*See generally* Bruner & O’Connor on Construction Law § 19:34 (2014).

⁹⁸N.C. Gen. Stat. Ann. § 1B-1.

⁹⁹*Kaleel Builders, Inc. v. Ashby*, 161 N.C. App. 34, 587 S.E.2d 470 (2003).

¹⁰⁰*See, e.g.*, *Spence v. Julian*, 201 Md. App. 562, 30 A.3d 220 (2011), cert. granted, 424 Md. 628, 37 A.3d 317 (2012) and cert. granted, 424 Md. 628, 37 A.3d 317 (2012) and aff’d, 429 Md. 348, 56 A.3d 147 (2012); *Scalf v. Payne*, 266 Ark. 231, 583 S.W.2d 51 (1979); *Hawkins v. Gadoury*, 713 A.2d 799 (R.I. 1998); *Liberty Mut. Ins. Co. v. General Motors Corp.*, 65 Haw. 428, 653 P.2d 96 (1982); *Paoli v. Shor*, 345 So. 2d 789 (Fla. 4th DCA 1977), decision approved, 353 So. 2d 825 (Fla. 1977); *Verni ex rel. Burstein v. Harry M. Stevens, Inc.*, 387 N.J. Super. 160, 903 A.2d 475 (App. Div. 2006); *Robertson v. McCarte*, 13 Mass. App. Ct. 441, 433 N.E.2d 1262 (1982); *State, ex rel., Deere & Co. v. District Court of Fifth Judicial Dist. of State, In and For Beaverhead County*, 224 Mont. 384, 396, 730 P.2d 396, 404 (1986) (“Among states covered by the Pacific Reporter, New Mexico, Nevada, Hawaii, Alaska, Wyoming, Colorado, and Arizona have adopted the Uniform Contribution Among Joint Tortfeasors Act . . .”).

¹⁰¹*Holland v. Edgerton*, 85 N.C. App. 567, 571, 355 S.E.2d 514, 517 (1987).

¹⁰²*Land v. Tall House Bldg. Co.*, 165 N.C. App. 880, 883, 602 S.E.2d 1, 3 (2004).

tion is applicable only between joint tortfeasors.¹⁰³ A joint tortfeasor, as defined by the North Carolina Supreme Court, is when parties whose negligent or wrongful acts are united in time or circumstance such that the two separate acts concur to cause a single injury to a third party.¹⁰⁴ The Uniform Contribution Among Tortfeasors Act permits contribution among joint tortfeasors where two or more persons become jointly or severally liable in tort.¹⁰⁵ The Uniform Contribution Among Tortfeasors Act prohibits any consideration of degree of fault among the joint tortfeasors.¹⁰⁶

In *Kaleel Builders, Inc. v. Ashby* the general contractor brought a breach of contract action against its subcontractors and the architect to recover contribution if found liable to homeowners in the construction of a house.¹⁰⁷ The general contractor and the architect were each directly in contract with the owner. The *Kaleel* court, applying North Carolina's prohibition on negligence claims for economic damages against a defendant with whom the plaintiff is in privity of contract, set forth in *Ports Authority v. Fry Roofing Co.*,¹⁰⁸ stated "[o]rdinarily, a breach of contract does not give rise to a tort action by the promisee against the promisor."¹⁰⁹ In *Kaleel*, the architect and the general contractor were each in privity with the owner; therefore, the court held

¹⁰³*Roseboro Ford, Inc. v. Bass*, 77 N.C. App. 363, 335 S.E.2d 214 (1985). *See also* *Wampanoag Group, LLC v. Iacoi*, 68 A.3d 519, 522 (R.I. 2013) ("The UCAJTA recognizes a right of contribution between joint tortfeasors if they are both liable in tort to the original plaintiff and their respective wrongful conduct caused the 'same injury' to the original plaintiff.").

¹⁰⁴*State Farm Mut. Auto. Ins. Co. v. Holland*, 324 N.C. 466, 470, 380 S.E.2d 100, 103 (1989). *See also* *Eckels v. Klieger*, 205 Pa. Super. 526, 531, 210 A.2d 899, 901 (1965) ("That Act applies only to joint tortfeasors and defines the term 'joint tortfeasors' as 'two or more persons jointly or severally liable in tort for the same injury.'").

¹⁰⁵N.C. Gen. Stat. Ann. § 1B-1. *See also* *Com., Dept. of Transp. v. Popovich to Use of Aetna Cas. and Sur. Co.*, 117 Pa. Commw. 14, 17, 542 A.2d 1056, 1057 (1988), order aff'd, 522 Pa. 508, 564 A.2d 159 (1989) ("The Uniform Act provides that a joint tortfeasor who has discharged the common liability or more than his pro rata share, may seek contribution from any other tortfeasor.").

¹⁰⁶N.C. Gen. Stat. Ann. § 1B-2.

¹⁰⁷*Kaleel Builders, Inc. v. Ashby*, 161 N.C. App. 34, 587 S.E.2d 470 (2003).

¹⁰⁸*See* *North Carolina State Ports Authority v. Lloyd A. Fry Roofing Co.*, 294 N.C. 73, 240 S.E.2d 345 (1978) (rejected on other grounds by, *Trustees of Rowan Technical College v. J. Hyatt Hammond Associates, Inc.*, 313 N.C. 230, 328 S.E.2d 274, 24 Ed. Law Rep. 549 (1985)).

¹⁰⁹*Kaleel*, 161 N.C. App. at 42, 587 S.E.2d at 476. *See also* *Skouras v. Brut Productions, Inc.*, 45 A.D.2d 646, 647, 360 N.Y.S.2d 811, 813 (1st Dep't 1974)

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that performance under the contract governs and there was no injury sounding in tort from either the architect or the general contractor to the owner. The court found that the general contractor and the architect were not joint tortfeasors and consequently the general contractor had no statutory right of contribution from the architect.¹¹⁰ The court went on:

Therefore, by clear language of the statute, plaintiff [general contractor] is not entitled to contribution for a claim [against him] sounding only in contract. Without a tort, there can be no tort-feasor; and without a tort-feasor, there can be no right to contribution under the UCATA. Thus, as a matter of law, plaintiff states no claim that could entitle it to any future right to contribution from defendant subcontractors and the trial court's dismissal was proper.¹¹¹

Recall in this connection, however, the earlier discussion about professional negligence, and whether professional negligence is true negligence or a standard of care whenever a contract relationship exists between the professional and the plaintiff. In *PVC, Inc. v. McKim & Creed, P.A.*,¹¹² the developer of a hotel had separate contracts with an architect and a post-tensioning engineer (as engineer for a "post-tensioning system" for the structure). The architect in turn contracted with a consulting structural engineer as the engineer of record. The consulting structural engineer, apparently recognizing that it had responsibilities in connection with the post-tensioning system, further subcontracted the post-tensioning part of its work to yet another firm. The post-tensioning system failed, and the developer sued its post-tensioning engineer (for breach of contract and negligence) and the architect's consulting engineer (for negligence). The post-tensioning engineer filed a third-party claim against the consulting engineer's subcontractor for contribution. The post-tensioning engineer and the architect's consulting engineer settled with the developer, after which the post-tensioning engineer proceeded with its claim against the consulting engineer's subcontractor for contribution. The subcontractor

("As a general rule, a breach of contract does not give rise to a tort action."); *ServiceMaster Co., L.P. v. Martin*, 252 Ga. App. 751, 757, 556 S.E.2d 517, 523 (2001) ("Any breach of contract must arise from the contract, and does not give rise to an action for tort, whether or not such breach was negligent or willful.").

¹¹⁰*Kaleel*, 161 N.C. App. at 46, 587 S.E.2d at 478.

¹¹¹*Kaleel*, 161 N.C. App. at 43, 587 S.E.2d at 477 (internal citations omitted).

¹¹²*PVC, Inc. v. McKim & Creed, P.A.*, 188 N.C. App. 632, 656 S.E.2d 16 (2008).

argued that the post-tensioning engineer was not entitled to contribution, because contribution is only available to joint tortfeasors, and the post-tensioning engineer could not be a joint tortfeasor because it had a contract with the developer.¹¹³ The court disagreed, holding that the post-tensioning engineer, as a professional engineer, could be liable to the developer in both contract and tort. Although the *PVC* court did not expressly state that professional engineers qualify for the “public policy” exception to the economic loss rule, it recognized that the enumeration of exceptions in *Ports Authority*¹¹⁴ is “not all inclusive.”¹¹⁵

Other jurisdictions are similar to North Carolina in that they do not recognize a right to contribution in a breach of contract case.¹¹⁶ In contrast with the foregoing jurisdictions, West Virginia jurisprudence favors bringing together all claims regarding li-

¹¹³*PVC, Inc. v. McKim & Creed, P.A.*, 188 N.C. App. 632, 656 S.E.2d 16 (2008).

¹¹⁴*North Carolina State Ports Authority v. Lloyd A. Fry Roofing Co.*, 294 N.C. 73, 240 S.E.2d 345 (1978) (rejected on other grounds by, *Trustees of Rowan Technical College v. J. Hyatt Hammond Associates, Inc.*, 313 N.C. 230, 328 S.E.2d 274, 24 Ed. Law Rep. 549 (1985)).

¹¹⁵*PVC, Inc. v. McKim & Creed, P.A.*, 188 N.C. App. 632, 656 S.E.2d 16 (2008) (quoting *Ports Authority*, 294 N.C. at 82-83, 240 S.E.2d at 351).

¹¹⁶*See Kemper National P & C Companies v. Smith*, 419 Pa. Super. 295, 309, 615 A.2d 372, 380 (1992) (“Pennsylvania only authorizes contribution among joint tortfeasors.”); N.Y. Civ. Prac. Law and Rules § 1401 (noting that the wording of the statute itself limits contribution to tort liability, not contract); *Board of Educ. of Hudson City School Dist. v. Sargent, Webster, Crenshaw & Folley*, 71 N.Y.2d 21, 28, 523 N.Y.S.2d 475, 517 N.E.2d 1360, 1364, 44 Ed. Law Rep. 552 (1987) (“We find nothing in the legislative history or the common-law evolution of the statute on which to base a conclusion that CPLR 1401 [New York’s Contribution Statute] was intended to apply in respect to a pure breach of contract action such as would permit contribution between two contracting parties whose only potential liability to the plaintiff is for the contractual benefit of the bargain.”); *Republic Nat. Bank of New York v. Zimmcor U.S.A. Corp.*, 181 A.D.2d 533, 534, 581 N.Y.S.2d 40, 41 (1st Dep’t 1992) (“In particular, [Defendant] was not deprived of any statutory or common-law right to contribution, since the only cognizable claims here relate to breach of contract and thus no right to contribution could be established under these circumstances.”); *Giordano v. Morgan*, 197 Ill. App. 3d 543, 548, 143 Ill. Dec. 875, 554 N.E.2d 810, 813 (2d Dist. 1990) (“If the parties are not subject to liability in tort for the plaintiff’s injuries at issue in the underlying action, there is no right of contribution between those parties.”); *Tiffin Motorhomes, Inc. v. Superior Court*, 202 Cal. App. 4th 24, 33, 136 Cal. Rptr. 3d 693, 700 (4th Dist. 2011) (“Where defendants are not obligors on the same contract, their obligations to the plaintiffs may differ; they will not necessarily (and in fact will rarely) have caused the same harm to the plaintiffs. Each will, however, be liable for the contract damages stemming from the breach of the contract into which that defendant entered. These obligations are neither ‘joint’ nor ‘joint and several’

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ability and damages into one trial on any theory of liability that could have been brought by the injured plaintiff.¹¹⁷

[T]he right of inchoate contribution is not confined only to cases of joint negligence. Instead, it arises under any theory of liability which results in a common obligation to the plaintiff. Where, as here, the plaintiff seeks damages for a breach of contractual obligations, the named defendant is entitled to assert claims for contribution against other parties liable to the plaintiff for the same injury even though the defendant was not a party to the contract between the plaintiff and the other parties.¹¹⁸

A right of contribution may exist in Wisconsin if it is not reasonably possible to make a division of the damages caused by multiple contract breaches.¹¹⁹ Minnesota will apply joint and several liability to multiple breaches of contract that cause an indivisible injury.¹²⁰

and, therefore, do not give rise to any right of contribution (Civ. Code, § 1432) because no defendant can be ordered to pay more than the amount of damages attributable to his own breach.”); *Richardson Associates v. Lincoln-Devore, Inc.*, 806 P.2d 790, 810 (Wyo. 1991) (“What this court clearly indicated in application of the statutory contribution among the joint tort-feasors process only applies to tort based liabilities and not, as in this case, divergent contractual responsibilities in a building construction.”); *CBI NA-CON, Inc. v. UOP Inc.*, 961 S.W.2d 336, 341 (Tex. App. Houston 1st Dist. 1997) (“Every breach of contract should not become a tort action, particularly where no consumers are involved and there is no fraud or personal injury, but only economic injury arising out of the very duties imposed by the contract. A breach of contract claim is not a basis for contribution under chapter 33 of the Texas Civil Practice and Remedies Code.”); *J-McDaniel Const. Co., Inc. v. Dale E. Peters Plumbing Ltd.*, 2014 Ark. 282, 436 S.W.3d 458, 464 (2014) (“Under the Uniform Contribution Among Tortfeasors Act (‘UCATA’), . . . which was adopted in 1941, a right to contribution exists among joint tortfeasors . . . ‘Joint tortfeasors’ are defined as two or more persons who are jointly or severally liable in tort for the same injury.”).

¹¹⁷*See Board of Educ. of McDowell County v. Zando, Martin & Milstead, Inc.*, 182 W. Va. 597, 602, 390 S.E.2d 796, 801, 59 Ed. Law Rep. 1179 (1990) (“The right to contribution arises when persons having a common obligation, either in contract or tort, are sued on that obligation and one party is forced to pay more than his pro tanto share of the obligation.”) (quoting *Sydenstricker v. Unipunch Products, Inc.*, 169 W. Va. 440, 288 S.E.2d 511 (1982)).

¹¹⁸*Bd. of Ed. of McDowell County*, 182 W.Va. at 603, 390 S.E.2d at 802.

¹¹⁹*See Housing Authority of City of Milwaukee v. Barrientos Designs & Consulting, L.L.C.*, 2006 WI App 203, 296 Wis. 2d 744, 749, 724 N.W.2d 395, 398 (Ct. App. 2006) (“As the trial court observed, each defendant had separate duties and responsibilities, and consequently, a jury could determine which part of the total damages to attribute to each party.”).

¹²⁰*See Lesmeister v. Dilly*, 330 N.W.2d 95, 102 (Minn. 1983) (clarifying the court’s holding in *Northern Petrochemical Co. v. Thorsen & Thorshov, Inc.*, 297 Minn. 118, 211 N.W.2d 159 (1973)).

E. Common Law Contribution and Indemnity

Contribution and indemnity are remedies generally based on restitution and, although having a common basis in equity, they differ in the way they provide relief to defendants. “Contribution is the remedy securing the right of one who has discharged more than his fair share of a common liability or burden to recover from another who is also liable the proportionate share which the other should pay or bear.”¹²¹ “Contribution rests upon principles of equity.”¹²² On the other hand, indemnity is “the remedy securing the right of a person to recover reimbursement from another for the discharge of a liability which, as between himself and the other, should have been discharged by the other.”¹²³ “Indemnity is generally said to rest upon contract, either express or implied.”¹²⁴ In other words, contribution distributes liability according to each tortfeasor’s percentage of relative fault; whereas indemnity allows one tortfeasor to shift the entire loss to another tortfeasor.¹²⁵ Indemnity is tied to the principle of fairness. Learned Hand once described indemnity as “an extreme form of contribution.”¹²⁶ In some states, the defendants might be able assert equitable, or common law, contribution rights.¹²⁷

1. Contribution

The general rule of common law contribution is that “one who is compelled to satisfy, or pay more than his just share of such common burden or obligation, is entitled to contribution from the others to obtain from them payment of their respective shares.”¹²⁸ “Contribution was generally allowed at common law except that no contribution could be had between tort-feasors and

¹²¹*Hendrickson v. Minnesota Power & Light Co.*, 258 Minn. 368, 370, 104 N.W.2d 843, 846 (1960) (overruled in part on other grounds by, *Tolbert v. Gerber Industries, Inc.*, 255 N.W.2d 362 (Minn. 1977)).

¹²²*Hendrickson*, 258 Minn. at 370, 104 N.W.2d at 846.

¹²³*Hendrickson*, 258 Minn. at 370, 104 N.W.2d at 846.

¹²⁴*Hendrickson*, 258 Minn. at 370, 104 N.W.2d at 846.

¹²⁵*Dixon v. Chicago and North Western Transp. Co.*, 151 Ill. 2d 108, 118, 176 Ill. Dec. 6, 601 N.E.2d 704, 708–09, *Prod. Liab. Rep. (CCH) P 13318* (1992).

¹²⁶*Slattery v. Marra Bros.*, 186 F.2d 134, 138, 1951 A.M.C. 183 (2d Cir. 1951).

¹²⁷*See, e.g., Holcomb v. Holcomb*, 70 N.C. App. 471, 320 S.E.2d 12 (1984); *Celotex Corp. v. Campbell Roofing and Metal Works, Inc.*, 352 So. 2d 1316 (Miss. 1977); *Hammons v. Ehney*, 924 S.W.2d 843 (Mo. 1996).

¹²⁸*Celotex Corp.*, 352 So.2d at 1318.

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wrongdoers.”¹²⁹ It was considered against public policy for a defendant in a tort case to either implead a third party whom he alleged to be liable with himself, or to bring an action against a joint tortfeasor after judgment to recover a proportionate amount paid to the injured party based on a theory of contribution.¹³⁰ However, where a claim for common law contribution is based purely on economic loss, it is generally not available.¹³¹ When the Uniform Contribution Among Joint Tortfeasors Act was enacted, it created a right that did not previously exist, the right among joint tortfeasors to contribution.¹³²

In a few states, the Uniform Contribution Among Joint Tortfeasors Act did not abolish common law contribution. In *Holcomb v. Holcomb*,¹³³ the court stated that:

The provisions [of the general statutes] that concern joint tortfeasors, then, were added to create a right of contribution not conferred by the common law, and not to destroy by implication common law rights already in existence. At no point did any prior version of the contribution statute, nor does the modern version, expressly or impliedly eliminate the equitable contribution action. Rather, equitable contribution has continued as an independent action, separate from the summary proceedings set out in statute preserving the judgment.

We are unconvinced that anything on the face of G.S. 1B-7, or in its

¹²⁹*Celotex Corp.*, 352 So.2d at 1318 (“This exception to the general rule allowing contribution was first enunciated in 1799 in the case of *Merryweather v. Nixan*, 1799 WL 743 (K.B. 1799). However, in England the exception to the rule was abolished in 1935 by the Law Reform Act which provides that a tort-feasor may recover contribution from any other tort-feasor who is, or would, if sued, have been liable in respect of the same damage, whether as a joint tort-feasor or otherwise.”).

¹³⁰*Green Bus Lines, Inc. v. Consolidated Mut. Ins. Co.*, 74 A.D.2d 136, 148, 426 N.Y.S.2d 981, 989–90 (2d Dep’t 1980). *See also* *Hammons v. Ehney*, 924 S.W.2d 843, 847 (Mo. 1996) (“Historically, Missouri enforced contribution between co-debtors, but not between joint tort-feasors, assuming that by relieving a person committing a tortious act from full responsibility courts would encourage these acts.”); *Fidelity & Cas. Co. of New York v. Chapman*, 167 Or. 661, 664-65, 120 P.2d 223, 225 (1941) (absent statute, there can be no contribution among joint tortfeasors because “no man can make his own misconduct the ground for action in his favor”).

¹³¹*Children’s Corner Learning Center v. A. Miranda Contracting Corp.*, 64 A.D.3d 318, 323, 879 N.Y.S.2d 418, 421 (1st Dep’t 2009).

¹³²*Holcomb v. Holcomb*, 70 N.C. App. 471, 473, 320 S.E.2d 12, 14 (1984). *See also* 18 Am. Jur. 2d, Contribution § 40 *Retroactive Application of Statutes* (for discussion of how various states handle the application of the Uniform Contribution Among Joint Tortfeasors Act as it relates to the timing of both liability and judgment).

¹³³*Holcomb*, 70 N.C. App. at 473, 320 S.E.2d at 14.

history, indicates that the General Assembly intended to eliminate the plaintiff's right to seek equitable contribution.¹³⁴

In Mississippi, “[c]ontribution is allowable by the common law if the action is considered contractual and by statute if considered tort.”¹³⁵ Arguably in states that have retained common law contribution, it might provide some relief to multiple defendants in a contract action. However, with the enactment of the Uniform Contribution Among Joint Tortfeasors Act, contribution may not lie if the parties are not tortfeasors as defined by the statute.¹³⁶

2. Indemnity

So, can indemnity help the general contractor, the designer and the engineer when the owner obtains a judgment against one, or all, for indivisible injury? Some states still hold that the contribution act did not abolish common law implied indemnity.¹³⁷ “A party’s right to indemnity may be based on one of the following: 1) an express contract; 2) a contract implied-in-fact; or 3) equitable concepts arising from the tort theory of indemnity, often referred to as a contract implied-in-law.”¹³⁸

a. Express Contractual Indemnity

Indemnity clauses written so that they benefit third parties could conceivably provide a co-defendant with legal recourse against another co-defendant. “An indemnity agreement is to be interpreted according to the language and contents of the contract as well as the intention of the parties as indicated by the contract.”¹³⁹ “A party’s right to indemnity based on an express contract arises out of an indemnity clause specifically set out in a

¹³⁴*Holcomb*, 70 N.C. App. at 473-74, 320 S.E.2d at 14.

¹³⁵*Celotex Corp. v. Campbell Roofing and Metal Works, Inc.*, 352 So. 2d 1316, 1318 (Miss. 1977).

¹³⁶1 Comparative Negligence Manual § 9:2 (3d ed) (2014).

¹³⁷*See, e.g., American Nat. Bank and Trust Co. v. Columbus-Cuneo-Cabrini Medical Center*, 154 Ill. 2d 347, 353, 181 Ill. Dec. 917, 609 N.E.2d 285, 288 (1992) (“This court has before indicated its disagreement with the conclusion that the Contribution Act abolished all forms of common law implied indemnity.”).

¹³⁸*Terry’s Floor Fashions, Inc. v. Georgia-Pacific Corp.*, 36 U.C.C. Rep. Serv. 2d 680 (E.D. N.C. 1998). *See also Pulte Home Corp. v. Parex, Inc.*, 403 Md. 367, 942 A.2d 722, 65 U.C.C. Rep. Serv. 2d 430 (2008).

¹³⁹*Myers Building Industries, Ltd. v. Interface Technology, Inc.*, 13 Cal. App. 4th 949, 968, 17 Cal. Rptr. 2d 242, 253–54 (2d Dist. 1993), as modified on denial of reh’g, (Mar. 26, 1993). *See also Grubb & Ellis Management Services, Inc. v. 407417 B.C., L.L.C.*, 213 Ariz. 83, 86, 138 P.3d 1210, 1213 (Ct. App. Div. 1 2006) (“Furthermore, indemnity provisions ‘are strictly construed and gener-

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contract as part of the bargained-for exchange.”¹⁴⁰ “An indemnitee can recover contractual indemnity for his or her own legally culpable conduct only if the contract is clear on that point. If the contract is otherwise clear, it need not contain specific words, such as ‘negligence’ or ‘fault.’”¹⁴¹

The indemnity provision in the standard American Institute of Architects General Conditions of the Contract for Construction illustrates this point:

§ 3.18 INDEMNIFICATION

§ 3.18.1 To the fullest extent permitted by law the Contractor shall indemnify and hold harmless the Owner, Architect, Architect’s consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys’ fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.¹⁴²

A California court analyzing the AIA contract provision held: “A clause which contains the words “indemnify” and “hold harmless” is an indemnity clause which generally obligates the indemnitor to reimburse the indemnitee for any damages the indemnitee becomes obligated to pay third persons. Indemnification agreements ordinarily relate to third-party claims.”¹⁴³

In a situation where the owner sues the contractor and the architect for a building defect, the architect might well invoke

ally will not protect an indemnitee against its own negligence unless the indemnitor’s obligation to do so is expressed in clear and unequivocal ‘terms.’”

¹⁴⁰Carl v. State, 192 N.C. App. 544, 557, 665 S.E.2d 787, 797–98 (2008).

¹⁴¹Restatement (Third) of Torts: Apportionment of Liability § 22, comment f (2012).

¹⁴²AIA Document A201-2007, General Conditions of the Contract for Construction. *See also* Fisk, R. Fisk, Comparative Contract Fault: Using the AIA Documents to Apportion Contract Damages, 26-SPG Construction Law. 23 (Spring 2006) (for a discussion on apportioning liability using the AIA documents).

¹⁴³Myers Building Industries, Ltd. v. Interface Technology, Inc., 13 Cal. App. 4th 949, 969, 17 Cal. Rptr. 2d 242, 254 (2d Dist. 1993), as modified on denial of reh’g, (Mar. 26, 1993) (internal citations omitted). *See also* Jalapenos, LLC v. GRC General Contractor, Inc., 2007 PA Super 391, 939 A.2d 925, 932 (2007).

the foregoing clause and argue that if a breach by the contractor is a substantial contributing factor in the owner's loss, the contractor should pay all of the damages. If the owner's claim is for breach of contract, and seeks economic damages, the AIA clause quoted above probably would not provide the architect with recourse against the contractor, insofar as the AIA clause is limited to claims for "bodily injury, sickness, disease or death, or . . . injury to or destruction of tangible property (other than the work itself)." Nevertheless, one can conceive of an indemnity clause that protects other potential defendants against claims for economic damages. In an increasing number of jurisdictions, however, indemnity clauses that require an indemnitor to indemnify an indemnitee against the indemnitee's own negligence have been declared unenforceable as a matter of public policy.¹⁴⁴

b. Indemnity Implied-in-Fact

Indemnity may be implied-in-fact based on an implied contract theory, where there is no express contract provision.¹⁴⁵ "Contractual indemnity that is implied-in-fact suggests the existence of a binding contract between two parties that fairly implies the right to indemnity."¹⁴⁶

A right of indemnity implied-in-fact stems from the existence of a binding contract between two parties that necessarily implies the right. The implication is derived from the relationship between the parties, circumstances of the parties' conduct, and that the creation of the indemnitor/indemnitee relationship is derivative of the contracting parties' intended agreement.¹⁴⁷

"As to a contract implied-in-fact, to determine if a right to indemnity exists, 'we look to the parties' relationship and its surrounding circumstances.'"¹⁴⁸ "In the context of independent contractor relationships, a right of indemnity under a contract implied-in-fact is inappropriate where, as here, both parties are

¹⁴⁴See Gwyn and Davis, Fifty-State Survey of Anti-Indemnity Statutes and Related Case Law, 23-SUM Construction Law. 26 (Summer 2003).

¹⁴⁵Quadrangle Development Corp. v. Otis Elevator Co., 748 A.2d 432, 435 (D.C. 2000).

¹⁴⁶Terry's Floor Fashions, Inc. v. Georgia-Pacific Corp., 36 U.C.C. Rep. Serv. 2d 680 (E.D. N.C. 1998).

¹⁴⁷Carl v. State, 192 N.C. App. 544, 558, 665 S.E.2d 787, 798 (2008).

¹⁴⁸Schenkel & Shultz, Inc. v. Hermon F. Fox & Associates, P.C., 180 N.C. App. 257, 267, 636 S.E.2d 835, 842 (2006), aff'd, 362 N.C. 269, 658 S.E.2d 918 (2008).

well equipped to negotiate and bargain for such provisions.”¹⁴⁹ Many states hold that implied contractual indemnity cannot be created where there is no express or implied contractual relationship.¹⁵⁰ In order to find indemnity implied-in-fact, courts will generally look to the relationship of the parties to determine if there is some special relationship; and “the mere relationship between vendor and vendee does not, of itself, suffice to produce an implied contractual right of indemnification”¹⁵¹

c. Indemnity Implied-in-Law

“In ‘implied-in-law,’ or ‘equitable indemnity,’ the obligation is based on variations in the relative degrees of fault of joint tortfeasors, and the assumption that when the parties are not *in pari delicto*, the traditional view that no wrongdoer may recover from another may compel inequitable and harsh results.”¹⁵²

[A] right of indemnity exists whenever the relation between the parties is such that either in law or in equity there is an obligation on one party to indemnify the other, as where one person is exposed

¹⁴⁹*Schenkel & Shultz*, 180 N.C. App. at 267, 636 S.E.2d at 842.

¹⁵⁰*See Richardson Associates v. Lincoln-Devore, Inc.*, 806 P.2d 790, 812 (Wyo. 1991) (“implied indemnity cannot be created where there is no express or implied contractual relationship”); *Hanscome v. Perry*, 75 Md. App. 605, 615, 542 A.2d 421, 426, 7 U.C.C. Rep. Serv. 2d 1516 (1988) (“a contractual right to indemnification will only be implied when there are unique special factors demonstrating that the parties intended that the would-be indemnitor bear the ultimate responsibility . . . or when there is a generally recognized special relationship between the parties.”); *McClish v. Niagara Mach. and Tool Works*, 266 F. Supp. 987, 989 (S.D. Ind. 1967) (“The right to indemnity and the corresponding obligation to indemnify generally spring from contract, express or implied, and in the absence of an express or implied contract a right to indemnity generally does not exist.”).

¹⁵¹*Hanscome v. Perry*, 75 Md. App. 605, 616, 542 A.2d 421, 426, 7 U.C.C. Rep. Serv. 2d 1516 (1988). *See also Parks v. U.S.*, 784 F.2d 20, 25, 1987 A.M.C. 83, 4 Fed. R. Serv. 3d 568 (1st Cir. 1986) (“A contractual right to indemnity may be implied when there are ‘unique special factors demonstrating that the parties intended that the would-be indemnitor bear the ultimate responsibility for the plaintiff’s safety, or when there is a generally recognized special relationship between the parties.’”).

¹⁵²*Quadrangle Development Corp. v. Otis Elevator Co.*, 748 A.2d 432, 435 (D.C. 2000). *See also Schneider Nat., Inc. v. Holland Hitch Co.*, 843 P.2d 561, 578 (Wyo. 1992) (“We hold that indemnity liability is to be allocated among the parties proportionately to their comparative degree of fault in actions for equitable implied indemnity premised on the negligent breach of a duty between the indemnitor and the indemnitee.”).

to liability by the wrongful act of another in which he does not join.¹⁵³

“For indemnification implied-in-law, more an equitable remedy than an action in and of itself, North Carolina law requires there be an underlying injury sounding in tort.”¹⁵⁴ “The North Carolina Supreme Court has held that the right to indemnity by operation of law arises out of a tort claim against two alleged joint tortfeasors.”¹⁵⁵ “Thus, to successfully assert a right to indemnity based on a contract implied-in-law, a party must be able to prove each of the elements of an underlying tort such as negligence, *i.e.*, one that arises from a contract implied-in-law.”¹⁵⁶ “A claim of defense arising out of tort concepts, such as indemnity, is not available where the claim of the plaintiff is premised upon contract.”¹⁵⁷

“It must be remembered that indemnity is an all or nothing proposition damage-wise, and hence should be an all or nothing proposition fault-wise. Apportionment of damages is not contemplated by it. That is the function of contribution.”¹⁵⁸

F. An Argument Against Apportionment

The foregoing discussion assumes, mainly in the cause of fairness, that in multiple causation cases some mechanism for apportioning liability is desirable. A provocative alternative was detailed in a law review article by Professor Daniel Bussel in 1995.¹⁵⁹ Professor Bussel coined what he called the “one-party rule.” In short, this rule would require the court to identify the

¹⁵³Rock Hill Telephone Co., Inc. v. Globe Communications, Inc., 363 S.C. 385, 389, 611 S.E.2d 235, 237 (2005).

¹⁵⁴Kaleel Builders, Inc. v. Ashby, 161 N.C. App. 34, 41, 587 S.E.2d 470, 475 (2003).

¹⁵⁵Terry’s Floor Fashions, Inc. v. Georgia-Pacific Corp., 36 U.C.C. Rep. Serv. 2d 680 (E.D. N.C. 1998). *See also* Franklin v. Morrison, 350 Md. 144, 154, 711 A.2d 177, 182 (1998) (“Indemnity between persons liable for a tort falls within this type of case . . . We shall call this form of indemnity ‘tort’ indemnity.”).

¹⁵⁶Schenkel & Shultz, Inc. v. Hermon F. Fox & Associates, P.C., 180 N.C. App. 257, 268, 636 S.E.2d 835, 843 (2006), *aff’d*, 362 N.C. 269, 658 S.E.2d 918 (2008).

¹⁵⁷Richardson Associates v. Lincoln-Devore, Inc., 806 P.2d 790, 814 (Wyo. 1991).

¹⁵⁸J.B. Hunt Transport, Inc. v. Forrest General Hosp., 34 So. 3d 1171, 1175 (Miss. 2010).

¹⁵⁹Bussel, Liability for Concurrent Breach of Contract, 73 Wash. U. L.Q. 97 (1995). A vote of support for Bussel’s alternative can be found in Steven J. Jager and Coreen R. Ferencz, Construction Defects—Apportionment of Liability, 44 No. 12 DRI for Def. 44 (2002).

defendant most responsible for the greatest damages to the plaintiff, and hold that defendant solely liable, excusing all others.

Bussel suggested there are four “plausible solutions to allocating losses occasioned by concurrent breaches of contract.”¹⁶⁰ Paraphrasing, his solutions are:

- Excuse all of the defendants
- “Import” and apply tort notions of joint and several liability
- Impose apportioned, several liability, similar to comparative fault or
- Apply the “one-party rule.”¹⁶¹

In a clear and thoughtful discussion, Bussel explains how one might justify excusing all of the defendants, but he then rejects that option as unfair. He then identifies many of the problems inherent in any scheme intended to apportion fault in a contract case. One problem is the sheer complexity of apportionment in contract cases based on tort principles, much of which is described above. Bussel also argues that apportionment introduces incentives in the dispute resolution process that can lead to inefficient and unfair results, in particular favoring plaintiffs and more culpable defendants over less-culpable defendants. More generally, Bussel argues that tort principles are inherently inconsistent with contract principles, particularly in regard to damages and traditional limits on damages. Those include both common law damage limits, such as limits on consequential damages, and limits stipulated by the parties, such as liquidated damages. Bussel resists the trend towards application of joint and several liability and any type of apportioned liability in contract cases.

Bussel does identify some of the problems with his “one-party rule.” Fundamentally, he acknowledges that “[t]he one-party rule does require that a court evaluate the comparative responsibility of the defendants and judge which party ought to be held liable and which excused.”¹⁶² He acknowledges that this is not a “trivial burden,” but he insists it is preferable to apportionment using tort principles. He also acknowledges that courts applying the

¹⁶⁰ At this point we should note that in his article Bussel focused primarily on concurrent liability for liquidated damages for delay, although he does cite other examples of how the “one-party rule” might work. The tort concepts he criticizes might make more sense in a defect case, but note his discussion of *Employers Ins. of Wausau v. Suwannee River Spa Lines, Inc.*, 866 F.2d 752, 1990 A.M.C. 447, 8 U.C.C. Rep. Serv. 2d 659 (5th Cir. 1989).

¹⁶¹ Bussel, *supra* note 159, at 97.

¹⁶² Bussel, *supra* note 159, at 135.

rule would have to deal with partial settlements, and the possibility of inconsistent verdicts if plaintiffs are forced to litigate with defendants in different jurisdictions. Notwithstanding these concerns, all of which Bussel considers more manageable than apportionment, he suggests that courts select one defendant to be held liable for the compensable damages, and then excuse the other defendants, utilizing the following criteria:

- The timing of the breaches
- The relative gravity of the breaches
- The relative size of the contracts
- The relative culpability of the breaching parties
- The relative harm avoidance costs of the parties
- The relative cost savings of the breaching parties from non-performance¹⁶³

In the end, Bussel expresses relief that the “line between contract and tort remains meaningful.”¹⁶⁴ Perhaps that is still true.

V. Conclusion

The following scenario is possible and plausible in a multi-party construction defect case. A plaintiff may contend that breaches of duty by more than one party were substantial factors contributing to the defect. Confronted with various economic loss rules, the plaintiff may elect to sue some defendants for breach of contract, while suing others (e.g., those not in privity of contract) for negligence. A court or arbitrator may hold multiple defendants liable to the plaintiff. If the plaintiff has no obligation to apportion fault (as it often the case), the defendants are left to find some fair way to share responsibility for the harm caused to the plaintiff. Such allocation may occur in a subsequent legal action or by way of cross-claims in plaintiff’s action.

Comparative fault rules may not apply to the extent the plaintiff recovers for breach of contract. Similarly, statutory contribution rules may not apply to the contract-based claims. It is likely that some of the defendants will not be in privity of contract with each other, in which case economic loss rules may deprive those defendants of rights against each other under indemnity agreements. Some authority suggests that equitable remedies such as common law contribution or indemnity implied by law might be available to settle the liabilities among the defendants, but those authorities are few and far between and somewhat antiquated.

¹⁶³Bussel, *supra* note 159, at 139, and discussion at 126–130.

¹⁶⁴Bussel, *supra* note 159, at 143.

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The purpose of this article was to frame a problem, not to advocate a rule. Unfortunately, the limited case law does not even allow one to identify any clear trends in the law governing apportionment in contract cases. If ongoing weakening of economic loss rules is a trend, however, and the distinction between negligence and breach of contract in defect cases is blurring, that could change the shape of the problem. As noted earlier, some commentators have advocated some form of comparative fault in contract cases. If the law ultimately allows contribution or comparative fault in breach of contract cases, apportionment of fault both at trial and after judgment will be greatly enabled. If that is the trend, however, one might ask what it means for various techniques used to allocate risk in express contracts, such as indemnity agreements and limitations on liability. For example, a limitation of liability in a design professional's contract with an owner might not provide much protection if the owner successfully sues the general contractor for a defect and the general contractor in turn successfully sues the design professional for contribution. One might also ask, as have several commentators, how different apportionment rules would affect litigation strategy and settlement negotiations. It is probably true that perfectly fair, commercially efficient outcomes cannot be guaranteed by the civil justice system, but if we aspire to those goals, the rules governing apportionment in defect cases should receive some attention.