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LIABILITY FOR CONCURRENT BREACH OF CONTRACT

DANIEL J. BUSSEL*

I. INTRODUCTION

If A and B perform independent concurrent acts of negligence each sufficient to injure C, who suffers an indivisible harm as a result, traditionally C can collect damages from either A or B, as C chooses.[1] If A pays a disproportionate share of C's damages, then A may assert rights of contribution to compel B to reimburse A up to B's proportional share of C's damages.

If A and B independently concurrently breach contracts, each breach being sufficient to injure C, who suffers an indivisible harm as a result, ought the same rules apply?

In the absence of a specific agreement of the parties,[2] there are four plausible solutions to allocating losses occasioned by concurrent breach of contract. One might:

1) excuse both breaches on the ground that in each case the other breach is a supervening cause of the plaintiff's harm;
2) import tort notions of joint and several liability;
3) impose apportioned (several but not joint) liability; or
4) identify the more responsible breacher, hold it for the full damages and excuse the other.

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1. Tort joint and several liability rules apply not only to tortfeasors whose acts are sufficient causes, but also in the far more common case of necessary, but not sufficient, causes of indivisible harms. This Article focuses on the case of multiple sufficient causes, sometimes referred to as the problem of "alternative causes." H.L.A. HART & TONY HONORE, CAUSATION IN THE LAW 249-53 (2d ed. 1985). As discussed *infra* notes 42-53, there is considerable variation in tort rules of contribution. Moreover, traditional joint and several liability in tort has recently been limited in a variety of ways in many American jurisdictions. *See infra* notes 58-62 and accompanying text. Pending federal legislation would preempt state joint and several liability rules for noneconomic damages in all cases affecting interstate commerce. H.R. 956, 104th Cong., 1st Sess. § 202 (1995) (a bill to enact the Common Sense Product Liability and Legal Reform Act of 1995).

2. *See infra* notes 9-15 and accompanying text.

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Each of these solutions is flawed, but I suggest that the fourth alternative, which I refer to as the "one-party rule," is, on balance, the least flawed, and, moreover, is logically connected to established contract law doctrine concerning supervening events.

I was led to the problem of concurrent breach by a 1986 decision of the United States Court of Appeals for the Ninth Circuit, *California & Hawaiian Sugar Co. v. Sun Ship, Inc.*[3] The *C&H* case, reminiscent of an earlier Fifth Circuit case,[4] raises the problem of concurrent breach in the context of interlocking construction contracts that independently provide for liquidated damages against each contractor in the event of delay. Because I examine concurrent breach initially in the context of this liquidated damages case, the analysis is necessarily intertwined with unique aspects of liquidated damages.

The basic analysis, however, is ultimately applicable to the more general case of concurrent breach as well. Several reported cases, generally involving construction contracts or shipping contracts, raise similar issues outside the context of stipulated damages.[5] Although I have not tested the

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3. 794 F.2d 1433 (9th Cir. 1986), *amended and reh'g denied,* 811 F.2d 1264, *cert. denied,* 484 U.S. 871 (1987).

4. Massman Construction Co. v. City Council of Greenville, 147 F.2d 925 (5th Cir. 1945) (holding liquidated damage clause for delay in completion of bridge unenforceable on account of neighboring state's failure to timely complete adjoining road).

5. *See, e.g., In re* Merritt Logan Inc., 901 F.2d 349 (3d Cir. 1990) (imposing joint and several liability for damages to supermarket operator (including lost profits) on account of concurrent breaches of warranty and acts of negligence by vendor, manufacturer and installer of defective refrigeration equipment); Employers Ins. of Wausau v. Suwanee River Spa Lines, 866 F.2d 752 (5th Cir. 1989) (declining to reach issue of proper allocation of liability between the defendants, including question of joint and several liability, when an improperly mated tug-barge sank off the Azores and improper mating constituted independent breaches of separate contracts by the shipbuilder and the naval supervisor); Ingersoll Milling Mach. Co. v. M/V *Bodena*, 829 F.2d 293 (2d Cir. 1987) (holding freight forwarder who was obliged to obtain "clean bill" of lading and carrier who was obliged to stow cargo below deck jointly and severally liable for damage to cargo stowed on deck pursuant to nonconforming bill of lading); L.R. Foy Constr. Co. v. Fidelity & Deposit Co. of Md., Civ. A. No. 86-2136, 1988 U.S. Dist. LEXIS 2842 (D. Kan. Mar. 14, 1988) (rejecting joint and several liability for breaches of independent implied contracts but finding that nonsettling defendant nevertheless entitled to *pro tanto* set-off of settling defendant's cash payments on FED. R. CIV. P. 60(b) motion); Alabama Football, Inc. v. Greenwood, 452 F. Supp. 1191 (W.D. Pa. 1978) (excusing professional football player from performance under contract with team because of prior termination of franchise by league); Turfmasters, Inc. v. Tri-County Tree & Turf, Inc., No. 12166, 1991 Ohio App. LEXIS 1143 (Mar. 21, 1991) (finding no joint and several liability for independent breaches of separate contracts); Coke v. Brunswick-Balke-Collender Co., 258 N.W. 257 (Mich. 1935) (finding no joint liability for independent breaches by separate defendants that combined to cause warping of bowling alleys; "[t]he danger that plaintiff may not recover in separate actions because the defendant in each suit successfully may cast the blame on the other does not outweigh the difficulty in the single action of attaining justice . . . ."); Northern

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one-party rule by an in-depth application to each of these cases, the rule can at least be plausibly applied to these cases as well.[6] In addition, parallels can be readily drawn to lines of cases involving concurrent breaches of contractual and noncontractual duties in the collective bargaining area,[7] and tortious interference with contractual relations.[8]

This Article proposes an appropriate "default" rule. In the event that the

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Petrochemical Co. v. Thorsen & Thorshov, Inc., 211 N.W.2d 159 (Minn. 1973) (holding single injury rule creates joint and several liability for concurrent breach) (see discussion *infra* text accompanying notes 34-40); Lithia Lumber Co. v. Lamb, 443 P.2d 647 (Or. 1968) (finding no joint and several liability for independent breaches of separate contracts); Campbell County Bd. of Educ. v. Brownlee-Kesterson, Inc., 677 S.W.2d 457 (Tenn. Ct. App. 1984) (holding architect, general contractor, and subcontractors jointly and severally liable for contract breaches resulting in leaky roof).

6. *See infra* text accompanying notes 130-37.

7. Vaca v. Sipes, 386 U.S. 171 (1967), and Bowen v. United States Postal Service, 459 U.S. 212 (1983), are leading cases involving concurrent breach of an employment contract by the employer and of the duty of fair representation by the labor union. *Bowen* holds that in such "hybrid" cases, the breach of the duty of fair representation ordinarily cuts off the employer's liability for breach of contract. Thus, the contract damage claim of a unionized employee against his employer for wrongful termination is limited to the point when the union, had it not breached the duty of fair representation, would have been able to win reinstatement of the employee. This rule has the effect of placing all the liability for damages during the period of concurrent breach on the union. Cases following *Bowen* find the union and the employer jointly and severally liable when the union, in addition to breaching the duty of fair representation, also colludes with the employer in the employer's initial breach of contract. *See, e.g.*, Aguinaga v. United Food & Commercial Workers Int'l Union, 993 F.2d 1463, 1474-75 (10th Cir. 1993); Bennett v. Local Union No. 66, Glass & Allied Workers Int'l Union, 958 F.2d 1429, 1140-41 (7th Cir. 1992); Allen v. Allied Plant Maintenance Co., 881 F.2d 291, 299 (6th Cir. 1989).

Thus, somewhat counterintuitively, when the *union* is more heavily implicated in the wrongful conduct, the *employer* has greater liability. Of course, this line of cases explicitly relies on federal labor policy, not ordinary principles of contract law. *Bowen*, 459 U.S. at 220 ("[A] collective bargaining agreement is much more than traditional common law employment terminable at will. Rather, it is an agreement creating relationships and interests under the federal common law of labor policy."). But these results are consistent with my suggestion that the appropriate result is joint liability for joint breach of a single obligation, but one-party liability (placed on the more responsible party) for concurrent breach of independent obligations. *Bowen* is criticized in 5 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 999, at 26 (Supp. 1994) ("[*Bowen*'s] holding must be seen as, at best, unfortunate.").

8. Some courts hold the tortious interferer jointly and severally liable with the contract breacher. *See, e.g.*, Marcus, Stowell & Beye Gov't Sec. v. Jefferson Inv. Corp., 797 F.2d 227, 233 (5th Cir. 1986); Stauffer v. Fredericksburg Ramada, Inc., 411 F. Supp. 1136, 1139 (E.D. Va. 1976) (finding basis for imposing joint and several liability is breacher's participation in the tort, not liability on the contract); Designs for Vision, Inc. v. Amedas, Inc., 632 So. 2d 614, 614 (Fla. Dist. Ct. App. 1994); Ross v. Holton, 640 S.W.2d 166, 173 (Mo. Ct. App. 1982); Armendariz v. Mora, 553 S.W.2d 400, 406 (Tex. Civ. App.), *writ refused n.r.e.* (1977); Worrie v. Boze, 95 S.E.2d 192, 198 (Va. 1956). *But see* Applied Equip. v. Litton Saudi Arabia, Ltd., 869 P.2d 454, 459 (Cal. 1994) (holding that contract breacher is not jointly and severally liable with tortious interferer); Hunter v. Board of Trustees of Broadlawns Medical Ctr., 481 N.W.2d 510, 519 (Iowa 1992) (imposing several liability only).

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parties themselves allocate liability for concurrent breach,[9] ordinary contract law principles call for enforcement of that allocation.

An extensive literature concerning contractual default rules exists in the legal academic journals.[10] The fountainhead, of course, is the "Coase Theorem," which holds that in a world of perfect information, economically rational parties, competitive markets and zero transaction costs, default rules are irrelevant in the sense that any clear rule will lead to the same (efficient) allocation of resources so long as the parties remain free to bargain around the rule.[11] More broadly, and with both more and less insight, Justice Brandeis observed that "in most matters it is more important that the applicable rule of law be settled than that it be settled right."[12]

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9. I do not know how frequently parties expressly provide for concurrent breach scenarios in their contracts. Concurrent breach is a remote possibility that occurs in complex permutations that are difficult to anticipate. I presume parties frequently do not incur the costs of negotiating and specifying such contingencies. I do note that standard form government contracts do provide that intervening breach by another contractor may excuse performance, a standard provision consistent with the rule this Article advocates. For example, the standard federal default provision for a fixed price contract reads:

> The Contractor's right to proceed shall not be terminated nor the Contractor charged with damages under this clause, if—
>
> (1) The delay in completing the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include (i) acts of God or of the public enemy, (ii) acts of the Government in either its sovereign or contractual capacity, *(iii) acts of another Contractor in the performance of a contract with the Government* . . . .

48 C.F.R. § 52.249-10(b) (1994) (emphasis added).

10. Recent legal scholarship in the area includes: Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989); Lucian A. Bebchuk & Steven Shavell, *Information and the Scope of Liability for Breach of Contract: The Rule of* Hadley v. Baxendale, 7 J.L. ECON. & ORGANIZATION 284 (1991); Jules L. Coleman et al., *A Bargaining Theory Approach to Default Provisions and Disclosure Rules in Contract Law*, 12 HARV. J.L. & PUB. POL'Y 639 (1989); Richard Craswell, *Contract Law, Default Rules and the Philosophy of Promising*, 88 MICH. L. REV. 489 (1989); Jason Scott Johnston, *Strategic Bargaining and the Economic Theory of Contract Default Rules*, 100 YALE L.J. 615 (1990); Robert E. Scott, *A Relational Theory of Default Rules for Commercial Contracts*, 19 J. LEGAL STUD. 597 (1990); *Symposium on Default Rules and Contractual Consent*, 3 S. CAL. INTERDISCIPLINARY L.J. 1 (1993) (articles by Professors Ayres, Feinman, Burton, Patterson, Johnston, and Schwartz).

11. Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2-6 (1960). Professor Lawson criticizes law-and-economics scholars for claiming to show "efficiency" when, at best, their models demonstrate "social wealth maximization." Gary Lawson, *Efficiency and Individualism*, 42 DUKE L.J. 53, 78 (1992). I adopt the, perhaps imprecise, convention of using efficiency to mean social wealth maximization. Wealth-maximizing solutions may not always be the most rational—or the most just—from the point of view of either society or individuals. Nevertheless, in the commercial contract arena I deal with, wealth maximizing is, in my view, almost always a relevant consideration, and often decisive.

12. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting); *see also* Payne v. Tennessee, 501 U.S. 808, 827-28 (1991) (explaining that settled rules are especially

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All of the Coase Theorem's premises are, to some degree, counterfactual. Accordingly, choosing good default rules does generally matter. Scholars following on Coase's insight first focused on the highly unrealistic "zero transaction costs" assumption. There is a significant body of work attempting to formulate default rules that would have been agreed to by most parties, on the assumption that such default rules mimic in most cases the efficient result that the Theorem posits would have been achieved but for transaction costs.[13]

Later work questions whether the "hypothetical agreement" construct always leads to the most efficient default rule. The Coase Theorem assumes not only zero transaction costs, but also competitive markets, rational actors and perfect information. Professors Ayres and Gertner have shown that choosing a default rule based on hypothetical agreements of most parties may not be efficient when information asymmetries and market power exist (as to some degree they invariably do).[14] Ayres and Gertner argue that where systematic informational asymmetry and market power exist, lawmakers should construct "information forcing" default rules that bring us closer to the economists' perfect world, even when such rules would not be those agreed to by most parties.[15]

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important in areas of law affecting contract rights because of reliance interests).

13. *See, e.g.* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 15 (4th ed. 1992); Ayres & Gertner, *supra* note 10, at 89-90; Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1433-34 (1989).

14. Ian Ayres & Robert Gertner, *Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules*, 101 YALE L.J. 729, 759-62 (1992); *see also* Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 885-94 (1992); Johnston, *supra* note 10.

15. Ayres & Gertner, *supra* note 14, at 762-66 (using *Hadley v. Baxendale* as an example—shipper and carrier would agree to an inefficient rule on recoverability of consequential damages if shipper had private information and carrier had market power). Earlier work by Ayres and Gertner showed that under certain circumstances lawmakers should select default rules that are easier to bargain around even if they would not be the rules most parties would ultimately agree upon. Ayres & Gertner, *supra* note 10 In addition, scholars debate the distributional consequences of legal rules in a world of zero transaction costs. Some deduce from the assumptions of the Coase Theorem that legal rules are not only irrelevant to how resources are used, but also irrelevant to the distribution of wealth. RONALD H. COASE, THE FIRM, THE MARKET, AND THE LAW 170-73 (1988); George J. Stigler, *Two Notes on the Coase Theorem*, 99 YALE L.J. 631, 632-633 (1989). A consensus, however, seems to have developed that there may be some "wealth effect" associated with entitlements created by legal rules in favor of the beneficiary of the rule. Harold Demsetz, *Wealth Distribution and the Ownership of Rights*, 1 J. LEGAL STUD. 223, 226 (1972); Robert C. Ellickson, *The Case for Coase and Against "Coaseanism,"* 99 YALE L.J. 611, 625-626 (1989). Under certain restrictive assumptions, the "wealth effect" may preclude efficient bargaining around the default rule. *Id.* at 625-26. In cases involving contractual presumptions, there ought (in theory) be no "wealth effect" to legal default rules because the entitlement cannot preexist the mutual agreement of the parties. John J. Donohue, *Diverting the Coasean River: Incentive Schemes To Reduce Unemployment Spells*, 99 YALE L.J. 549, 568 (1989). There is no

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In the abstract, in cases of concurrent breach I have no reason to assume that one or another of the parties has greater market power or that information asymmetries systematically favor defendants over plaintiffs, or vice versa. And so I retreat to the position of advocating a clear rule susceptible of judicial administration that in most cases generates efficient results. To the extent that concurrent breach recurs in circumstances of systematic informational asymmetry and market power, a different analysis, sensitive to these factors, may be needed.

II. THE CONCURRENT BREACH PROBLEM

The facts and decision of *California & Hawaiian Sugar Co. v. Sun Ship, Inc.*[16] provide a useful vehicle for discussing the problem of concurrent breaches independently constituting sufficient but not necessary causes.[17] C&H Sugar Co., a giant sugar cooperative owned by fourteen Hawaiian sugar plantations, annually transported and refined roughly one million tons of Hawaiian raw sugar cane. C&H harvested seventy percent of its cane between April and October. Hawaiian refining and storage capacities were sufficiently limited that a failure to promptly transport the crop to California during this peak period would result in substantial portions of the crop rotting in Hawaii.

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apparent reason for the parties to mutually agree to redistribute wealth between themselves, and there is no entitlement in this setting forcing such redistribution in the absence of agreement. An interesting experiment involving mock collective bargaining among law students nevertheless found a statistically significant wealth effect associated with contractual presumptions. Stewart Schwab, *A Coasean Experiment on Contract Presumptions*, 17 J. LEGAL STUD. 237, 254-56 (1988). Whether sophisticated repeat players bargaining in the real world are similarly likely to "irrationally" agree to redistribute wealth on the basis of contractual presumptions is unknown. *Id.* at 256. For my purposes, I assume no wealth effect associated with the default rule under consideration in this Article.

16. 794 F.2d 1433 (9th Cir. 1986), *amended and reh'g denied*, 811 F.2d 1264, *cert. denied*, 484 U.S. 871 (1987).

17. Several other cases raise the "alternative cause" problem (of which concurrent breach is a subset) in the context of the enforceability of liquidated damage clauses. The authorities divide upon whether to view intervening causes such as another's breach as cutting off liability in such situations. *Compare* Massman Constr. Co. v. City Council of Greenville, 147 F.2d 925, 928 (5th Cir. 1945) (holding liquidated damage clause for delay in completion of bridge unenforceable on account of neighboring state's failure to timely complete connecting road) *and* Northwest Fixture Co. v. Kilbourne & Clark Co., 128 F. 256, 261 (9th Cir. 1904) (holding liquidated damage clause unenforceable because intervening bankruptcy would have resulted in loss attributed to breach) *with* Southwest Eng'g v. United States, 341 F.2d 998, 1002 (8th Cir. 1965) (enforcing liquidated damage clause against contractor even though construction delays resulted in no actual damages) *and* Krauss v. Greenbarg, 137 F.2d 569, 571-72 (3d Cir. 1943) (enforcing liquidated damage clause against supplier notwithstanding potential intervening causes of delay) *and* McCarthy v. Tally, 297 P.2d 981 (Cal. 1956) (enforcing liquidated damage clause notwithstanding no damages on account of seasonal closure of hotel).

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In 1979, C&H received notice from its principal carrier, Matson Navigation Co., that Matson would terminate its shipping services effective January 1981. Matson's withdrawal sent C&H scurrying to obtain additional shipping capacity to handle the April-October 1981 harvest period.

In late 1979, C&H entered into two contracts. Defendant Sun Ship Inc. contracted to build a large oceangoing barge to C&H's specifications for $25,405,000. Sun was to deliver the barge by June 30, 1981. Liquidated damages for late delivery were set at $17,000 per day. Concurrently, Halter Marine, Inc. contracted with C&H to build an oceangoing tug boat, designed to be uniquely compatible with the Sun-built barge, for $20,350,000. Halter was to deliver the tug by April 30, 1981 to Sun, where under C&H's direction, the tug and barge would be integrated into one oceangoing vessel capable of transporting C&H's sugar between Hawaii and California on or before the June 30, 1981 deadline. The Halter contract set liquidated damages for late delivery at $10,000 per day.

Neither Halter nor Sun performed on time. Sun's barge was completed March 16, 1982. Halter's tug was completed July 15, 1982. C&H found alternate shipping during the 1981 peak season and no sugar rotted, though the court found that C&H incurred net expenses of roughly $368,000 in making alternative arrangements. C&H nevertheless sought liquidated damages from both contractors in the full amount stipulated in their respective contracts. Halter settled; Sun litigated.

Sun argued that the liquidated damages provision was unenforceable as a penalty. Sun's late delivery of the barge caused no harm because the barge was useless without the specially designed tug that was not available until *after* Sun in fact completed the barge. Relying on section 356 of the *Restatement (Second) of Contracts*, Sun argued that because no loss in fact occurred by reason of the breach, the liquidated damage provision was unenforceable as a matter of law.

The Ninth Circuit, applying Pennsylvania law,[18] rejected Sun's position and awarded C&H $4,403,000 in liquidated damages. The Ninth Circuit recognized that Pennsylvania followed section 356 of the *Restatement (Second)* in denying enforcement of liquidated damages clauses in situations where, though the breach was a sufficient cause of the harm suffered by the plaintiff, the harm would have been suffered in any case by

18. 794 F.2d at 1434. Sun was a Pennsylvania corporation, and the contract provided for construction by Pennsylvania law. *Id.*

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reason of sufficient independent causes.[19] But the court held that this doctrine was limited to situations where the defaulting contractor was alone in its default. Otherwise, "the continued default of both parties would operate to take each of them off the hook. That cannot be the law."[20] The court

> conclude[d], therefore, that in this case of concurrent causation each defaulting contractor is liable for the breach and for the substantial damages which the joint breach occasions. Sun is a substantial cause of the damages flowing from the lack of the integrated tug; Sun cannot be absolved by the absence of the tug.[21]

I question the Ninth Circuit's liquidated damage analysis on a number of levels. Traditionally (as the court acknowledged), there are two independent bases for invalidating a liquidated damage clause: (1) the stipulated damages are greatly disproportionate to ascertainable actual damages;[22] *or*

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19. RESTATEMENT (SECOND) OF CONTRACTS § 356 cmt. b (1981) ("If, to take an extreme case, it is clear that no loss at all has occurred, a provision fixing a substantial sum as damages is unenforceable."); *id.* § 356 illus. 4 (stating that liquidated damage clause is unenforceable where contractor's delay in completing construction causes no harm in light of failure to obtain operating permit until after construction complete). The *Restatement* view is not universally held. Cases divide on the enforceability of liquidated damage clauses when there are no actual damages. For cases contrary to the *Restatement*, see Southwest Eng'g Co. v. United States, 341 F.2d 998, 1002 (8th Cir. 1965) (enforcing liquidated damages clause on account of construction delays although no actual damages occasioned by delays); Bethlehem Steel Corp. v. City of Chicago, 350 F.2d 649 (7th Cir. 1965) (enforcing liquidated damages clause in favor of project owner on account of subcontractor's delay although final project completed on time); McCarthy v. Tally, 297 P.2d 981, 987 (Cal. 1956) (enforcing liquidated damage clause on account of hotel closure although closure took place in off-season and resulted in no lost revenues). *See infra* note 22.

20. 794 F.2d at 1437.

21. *Id.* at 1437-48.

22. Many question whether actual harm should be relevant to the validity of a liquidated damage clause (although there is substantial authority so holding). Ian R. Macneil, *Power of Contract and Agreed Remedies*, 47 CORNELL L.Q. 495, 504-09 (1962); Justin Sweet, *Liquidated Damages in California*, 60 CAL. L. REV. 84, 138-39 (1972) ("[W]hen directly faced with the question, most American courts will not *knowingly* enforce a liquidated damage clause where there is no actual damage."). *But see* Southwest Eng'g Co. v. United States, 341 F.2d 998, 1002 (8th Cir. 1965) (enforcing liquidated damages clause notwithstanding injured party's stipulation that it suffered no actual damages); Frick Co. v. Rubel Corp., 62 F.2d 765, 767-68 (2d Cir. 1933) (L. Hand, J.) (discussing relevance of actual damages to validity of liquidated damage clause). Actual harm will almost always vary, often substantially, from reasonable pre-estimates in situations where harm is by hypothesis difficult to ascertain. CHARLES T. MCCORMICK, DAMAGES §§ 149-150 (1935). Both the Uniform Commercial Code (UCC) and the *Restatements of Contracts*, though somewhat ambivalent, are generally thought to codify the traditional position that actual harm as well as anticipated harm are relevant in assessing the reasonableness of liquidated damage clauses. U.C.C. § 2-718 (1990); RESTATEMENT (SECOND) OF CONTRACTS § 356 (1981) ("Damages for breach by any party may be

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(2) the stipulated damages are not a reasonable pre-estimate of hard to ascertain anticipated damages.[23] In *C&H*, the clause seems to fail *both* grounds: on the face of it, the stipulated damages are greatly disproportionate to the actual harm calculated by the Ninth Circuit,[24] and they do not seem to be a genuine pre-estimate of anticipated harm.[25]

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liquidated in the agreement but only at an amount that is reasonable in light of the anticipated or actual loss . . . ."); RESTATEMENT OF CONTRACTS § 339 (1932). Neither authority expressly deals with the troublesome problem of the clause that is reasonably related to anticipated harms that do not in fact occur. Corbin's position is that "[t]he probable injury that the parties had reason to foresee is a fact that largely determines the question whether they made a genuine pre-estimate of that injury; but the justice and equity of enforcement depend also upon the amount of injury that has actually occurred." 5 CORBIN, *supra* note 7, § 1063; *see also* 3 DAN B. DOBBS, LAW OF REMEDIES § 12.9(1)-(5), at 245-70 (2d ed. 1993); Roy R. Anderson, *Liquidated Damages Under the Uniform Commercial Code*, 41 SW. L.J. 1083 (1988). The American Bar Association recommends amending the UCC to establish that satisfaction of the reasonable estimate test alone is sufficient to support a liquidated damages clause. *An Appraisal of the March 1, 1990 Preliminary Report of the UCC Article 2 Study Group*, 16 DEL. J. CORP. L. 981, 1239-44 (1991).

23. 5 CORBIN, *supra* note 7, §§ 1059-1060 (1964); Macneil, *supra* note 22, at 501-04 (1962).

24. The Ninth Circuit evaded the great disproportionality issue through inapt reliance on Clydebank Eng'g & Shipbuilding Co. v. Yzquierdo y Castaneda, 1905 App. Cas. 6 (H.L.). In *Clydebank*, a British shipbuilder was found liable for liquidated damages on account of late delivery of four destroyers to the Spanish Navy around the time of the Spanish-American War. The shipbuilder objected that the clause was an unlawful penalty because Spain could not prove actual damages. The House of Lords found that the shipbuilder's position as to Spain's damages unreasonably called for an inquiry into the "whole administration of the Spanish Navy," *id.* at 11, an inquiry it refused to undertake:

> The loss sustained by a belligerent, or an intending belligerent, owing to a contractor's failure to furnish timeously warships or munitions of war, does not admit of precise proof or calculation; and it would be preposterous to expect that conflicting evidence of naval or military experts should be taken as to the probable effect on the suppression of the rebellion in Cuba or on the war with America of the defenders' delay in completing and delivering those torpedo-boat destroyers.

Id. at 20. Because actual damages were, as anticipated, impossible to ascertain in fact, the House of Lords upheld as reasonable the attempt to liquidate them in advance at 67,500 pounds sterling.

In *C&H*, however, there is nothing speculative about whether or not C&H's expectancy interest was impaired by Sun's breach. Had Sun performed, C&H would have been in exactly the same position of having to arrange alternate shipping for lack of a functional vessel. In *C&H*, though one might have reasonably anticipated great difficulty in ascertaining damages, in fact the damages were readily ascertainable and the actual amount was $0 (or perhaps as much as $368,000 in incidental damages as calculated by the court), while the stipulated amount exceeded $4 million. 794 F.2d at 1438.

25. The Ninth Circuit claimed that the *C&H* clause was intended as a reasonable estimate of actual harms to be suffered by nondelivery of the barge. 794 F.2d at 1438. This seems dubious given the structure of the transaction. Nondelivery of either barge or tug could reasonably be expected to occasion the same amount of harm. Either part appears to be useless without the other and substitutes were equally unavailable in either case. Yet liquidated damages were fixed in one contract at $10,000 per day and in the other at $17,000 per day. This suggests that C&H negotiated in each case for a clause calling for a sufficiently high penalty in light of the value of each contract to secure timely performance regardless of actual harm (an unlawful penalty clause), not to estimate and liquidate actual damages in

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I have nothing special to add to the abundant literature on the enforceability of liquidated damage clauses,[26] nor do I wish to relitigate the *C&H* court's decision on this issue on the facts of that case, notwithstanding my doubts about the court's application of traditional liquidated damages doctrine. As a broad policy matter, I agree with those who question whether courts should police "penalty clauses" in commercial contracts, negotiated between sophisticated parties of relatively equal bargaining strength.[27] Accordingly, even though I believe that the clause in *C&H* operates as a penalty clause, not liquidated damages, as a policy matter, I nevertheless agree with the Ninth Circuit's decision to enforce it.

More interesting, however, is the court's intuition,[28] which I share, that somehow, between Halter and Sun, C&H should be made whole, that each firm's breach cannot excuse the other from liability for its own independent breach. That intuition is, of course, entirely independent of the existence of the liquidated damages clause. Assuming no such clause, the court would still have to confront (and would presumably resolve in the same way) the question of whether Halter's concurrent breach excused Sun from liability for actual damages and vice versa. Unfortunately, the *C&H* court assumes that the only solutions to the concurrent breach problem are an

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advance (a valid liquidated damage clause). Of course, this is only one possibility suggested by the structure of the transaction. Perhaps $17,000 per day is the reasonable estimate, the parties never contemplated concurrent breach causing damages to accrue at $27,000 per day, and Halter bargained for the $10,000 per day figure in its contract as a limitation on liability. Finally, the flat per diem nature of the clause seems poorly calculated to serve as an estimate of actual damages given the seasonal nature of C&H's business. Surely, damages could not reasonably be anticipated to accrue at the same rate in June, the height of the shipping season, as in say December, when C&H did not need the vessel to transport cane. *Cf.* Lake River Corp. v. Carborundum Co., 769 F.2d 1284, 1292 (7th Cir. 1985) (holding minimum guarantee clause constitutes a penalty because formula is invariant to gravity of breach: "it is apparent from the face of the contract that the damages provided for by the 'liquidated damages' clause are grossly disproportionate to any probable loss and penalize some breaches much more heavily than others regardless of relative cost").

26. *See, e.g.*, 5 CORBIN, *supra* note 7, §§ 1054-1075 (1964 & Supp. 1994); 3 DOBBS, *supra* note 22, § 12.9(1)-(5) (2d ed. 1993); Anderson, *supra* note 22; Kenneth W. Clarkson et al., *Liquidated Damages v. Penalties: Sense or Nonsense?*, 1978 WIS. L. REV. 351; Charles J. Goetz & Robert E. Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and Theory of Efficient Breach*, 77 COLUM. L. REV. 554 (1977); Macneil, *supra* note 22; Sweet, *supra* note 22.

27. Lake River Corp. v. Carborundum Co., 769 F.2d 1284, 1289 (7th Cir. 1985) (Posner, J.) ("On this view the refusal to enforce penalty clauses is (at best) paternalistic—and it seems odd that courts should display parental solicitude for large corporations."); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 4.10 (4th ed. 1992); Clarkson et al., *supra* note 26; Goetz & Scott, *supra* note 26, at 592.

28. Intuition, not rationale. The court simply asserts that the contrary result "cannot be the law." 794 F.2d at 1437.

https://openscholarship.wustl.edu/law_lawreview/vol73/iss1/2

unelaborated version of joint and several liability or no liability at all. This is a false dichotomy.

Leaving all losses on the injured plaintiff by authorizing mutual exculpation by the breachers is, I concede, unacceptable on basic fairness grounds. The fact that there are two breachers, not one, is no reason to leave the innocent plaintiff without any compensation. And permitting mutual exculpation would encourage promisors under several interlocking contracts to collude in breaching those contracts whenever disadvantageous, even in circumstances where the gains from performance to the promisee exceed the joint losses of the promisors—a highly inefficient result.

But the joint liability solution adopted by the court is not the only alternative, nor is it the best available. The Ninth Circuit failed to think through the implications of importing tort notions of joint liability for concurrent breach of independent contracts. Joint liability raises troublesome issues that are mitigated by adopting rules of apportioned several liability or by placing all liability on the more responsible party. After elaborating and criticizing the joint liability solution adopted by the Ninth Circuit, I suggest that placing all the liability on the more responsible party is the best of a set of imperfect solutions, one that, incidently, also fits in best with existing doctrine. I conclude by applying that solution to *C&H* and to other concurrent breach cases at the end of this Article.

III. PRINCIPLES OF JOINT AND SEVERAL LIABILITY, CONTRIBUTION AND CONCURRENT CAUSATION

C&H holds that in the situation of concurrent breach "each defaulting contractor is liable for the breach and for the substantial damages which the joint breach occasions."[29] This formulation raises many more questions than it answers, questions that the Ninth Circuit was able to ignore because of the fortuity of the liquidated damage clause.

Traditionally, contract law doctrine did not create joint liability for independent breaches of separate contracts.[30] Several contracts cases

29. *Id.*

30. There are ancient joint and joint and several liability doctrines for co-obligors. At common law, when two or more parties together promised a particular performance, they were co-obligors of but one promise and jointly liable for breach. Promisees suing to enforce such a promise were subject to significant substantive and procedural obstacles. Among the more onerous hurdles: joint obligors had to be sued in a single action, release of one obligor released all, and the death of a joint obligor released his estate from any obligation. Most of these unfortunate consequences could be avoided by making the obligation expressly "joint and several." Thus the rules for suing on a joint obligation became a minor inconvenience for sophisticated promisees but a major trap for those who inadvertently omitted

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considering the matter (including all such cases before 1970) seem quite definitely to reject the possibility.[31]

Tort law, on the other hand, has long-standing and elaborate doctrines of joint and several liability. A few modern contract cases,[32] in addition to *C&H Sugar Co.*, have begun the process of borrowing joint and several liability principles from tort law.[33] But the borrowing has been done ad hoc and without any sensitivity to the effect of these principles on established contracts doctrine or the complexity of apportioning liability in these circumstances.

For example, in a few construction cases, the Minnesota Supreme Court has applied the "single injury rule" of tort law to concurrent breach of contract cases and imposed joint and several liability. In *Northern Petrochemical Co. v. Thorsen & Thorshov, Inc.*,[34] the plaintiff wished to construct a manufacturing facility on its property. The architect, relying on negligent structural engineering work, designed the building to follow the

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the magic words.

Joint obligations are now deemed "joint and several" by statute in most American jurisdictions. With respect to joint and several obligations, co-obligors may each individually be sued for the breach, and each obligor ordinarily has rights to indemnity or contribution from its co-obligors. Modern suretyship law and modern civil procedure have superseded most of the remaining common law baggage surrounding joint and joint and several obligations. For extensive commentary and criticism concerning the common law rules of joint and joint and several liability for co-obligors, see 4 CORBIN, *supra* note 7, §§ 923-941 (1964).

31. 5 CORBIN, *supra* note 7, § 999 n.21 (1964). Comparing tort joint and several liability, Corbin writes: "In the contract field, however, if the acts of others whether wrongful or not are contributing factors, those others are not thereby joined with the defendant as having committed the breach of contract." *Id. See* L.R. Foy Constr. Co. v. Fidelity & Deposit Co., Civ. A. No. 86-2136, 1988 U.S. Dist. LEXIS 2842, at *8 (D. Kan. Mar. 14, 1988) (holding that there is no joint and several liability in contract actions); Board of Educ. v. Sargent, Webster, Crenshaw & Folley, 517 N.E.2d 1360 (N.Y. 1987) (holding that there was no contribution between those who breach independent contracts and cause unitary harm); Turfmasters, Inc. v. Tri-County Tree & Turf, Inc., No. 12166, 1991 Ohio App. LEXIS 1143, at *7 (Mar. 21, 1991) (holding that there is no joint and several liability in contract actions); Coke v. Brunswick-Balke-Collender Co., 258 N.W. 257, 258 (Mich. 1935) (same); Lithia Lumber Co. v. Lamb, 443 P.2d 647, 649 (Or. 1968) (holding that there is no joint and several liability in contract actions unless expressly or impliedly specified by the contract).

32. *See supra* note 5 and accompanying text.

33. Professor Gilmore observed twenty years ago that "speaking descriptively, we might say that what is happening is that 'contract' is being reabsorbed into the mainstream of 'tort.'" GRANT GILMORE, THE DEATH OF CONTRACT 87 (1974). Notwithstanding certain tendencies in this direction identified by Gilmore (and others), his report of the death of contract seems to have been exaggerated. E. Allan Farnsworth, *Developments in Contract Law During the 1980s: The Top Ten*, 41 CASE W. RES. L. REV. 203, 221-22 (1990) (arguing that "the liberal application of third party beneficiary doctrine actually caused contract to invade tort"); Richard E. Speidel, *An Essay on the Reported Death and Continued Vitality of Contract*, 27 STAN. L. REV. 1161 (1975).

34. 211 N.W.2d 159, 163 (Minn. 1973).

https://openscholarship.wustl.edu/law_lawreview/vol73/iss1/2

contour of the land. The architect's design proved defective, in that a key structural wall failed against lateral movement from the hill upon which the building was constructed. Moreover, the general contractor improperly prepared the site in compacting the fill and pouring the concrete pad. Both the contractor's and the architect's failures to exercise reasonable care in their work gave rise to what the Minnesota court characterized as "negligent breaches of contractual obligations."[35]

The plaintiff undertook expensive rehabilitative work and the project was substantially delayed by the failure of the structural wall and the need to redo the contractor's site preparation work. Some of the additional work was specifically attributed to site preparation and some to the failure of the wall, but a portion of the rehabilitative work went to fix both defects. Moreover, the delay damages were entirely indivisible, because, even had the wall not failed, the need to recompact soils and repour concrete still would have delayed the project, and vice versa. The Minnesota court, relying entirely on tort authorities,[36] imposed joint and several liability on the architect and contractor.[37]

Later, the Minnesota Supreme Court felt compelled to clarify that *Northern Petrochemical* had not created a new tort[38]—"negligent breach of contract"—but rather, had imported joint and several liability into contracts doctrine in the case of joint breaches of independent contracts combining to cause an indivisible harm, at least when the breaches are not "intentional."[39] Minnesota has never established, however, exactly what the rule of contribution amongst the breaching parties is, except to make clear that in no case do comparative fault principles apply.[40]

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35. *Id.* at 167. This formulation seemed to anticipate the (much-criticized) California case J'Aire Corp. v. Gregory, 598 P.2d 60 (Cal. 1979) (finding tort liability for "negligent interference with prospective business advantage" growing out of contractual relations). Subsequent California decisions have sharply limited *J'Aire*. *See* Foley v. Interactive Data Corp., 765 P.2d 373 (Cal. 1988) (declining to make tort remedies available for bad faith termination of employment contract); Seaman's Direct Buying Svc. v. Standard Oil Co., 686 P.2d 1158, 1166-67 (Cal. 1984) (suggesting caution in extending tort remedies to commercial contract context).

36. The *Northern Petrochemical* court relied principally on Matthews v. Mills, 178 N.W.2d 841 (Minn. 1970) (involving multiple automobile collisions) and the RESTATEMENT (SECOND) OF TORTS § 433(b)(2) (1977) (listing considerations in determining whether negligent conduct "is a substantial factor in bringing about harm.").

37. 211 N.W.2d at 167.

38. *See supra* note 35.

39. Lesmeister v. Dilly, 330 N.W.2d 95, 102 & n.6 (Minn. 1983).

40. *Id.* at 101; *see also* Mike's Fixtures, Inc. v. Bombard's Access Floor Sys., 354 N.W.2d 837 (Minn. Ct. App. 1984) (holding that the Minnesota comparative fault statute does not apply to contract cases).

Washington University Open Scholarship

Similarly, the few other courts that impose joint and several liability for breach of independent contracts have, in the absence of liquidated damage clauses, naturally fallen into adopting tort principles of joint and several liability in dealing with concurrent breach scenarios.[41]

Accordingly, one can predict that the Ninth Circuit would look to tort law to give specific meaning to its rule of joint liability for concurrent breach. A brief sketch of those doctrines, and their policy rationales and implications, demonstrates that, however appropriate those doctrines may be in tort law, they are poorly suited for incorporation into existing contract law.

A. Joint and Several Liability

The following discussion relies heavily on Professors Kornhauser and Revesz' recent work on joint and several liability settlement strategy.[42] Under joint and several liability, the injured plaintiff may recover full damages from each defendant found jointly and severally liable, subject to the restriction that the plaintiff can only receive one satisfaction of its judgment taking into account all collections from all defendants. Joint and several liability generally applies in tort when different actors' negligence combines to cause an "indivisible" harm.[43]

Holding each negligent actor liable for all the damages caused by all the negligent actors substantively distinguishes joint and several liability from several liability. Under several liability, each actor is liable for only its proportionate share of the damages, usually its percentage fault. The plaintiff's right to sue each tortfeasor separately, or not at all, or all together, distinguishes joint and several liability procedurally from joint

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41. Ingersoll Milling Mach. Co. v. M/V *Bodena*, 829 F.2d 293 (2d Cir. 1987) (relying on tort authorities to impose joint and several liability for breach of freight forwarding and shipping contracts requiring below-deck stowage of goods); *cf. In re* Merritt Logan, Inc., 901 F.2d 349, 364-65 (3d Cir. 1990) (imposing joint and several liability on breach of warranty and negligence claims).

42. Lewis A. Kornhauser & Richard L. Revesz, *Settlements Under Joint and Several Liability*, 68 N.Y.U. L. REV. 427, 435-44 (1993) [hereinafter Kornhauser & Revesz, *Settlements*]. Other related work by Kornhauser & Revesz includes: *Sharing Damages Among Multiple Tortfeasors*, 98 YALE L.J. 831 (1989); *Apportioning Damages Among Potentially Insolvent Actors*, 19 J. LEGAL STUD. 617 (1990); and *Sequential Decisions by a Single Tortfeasor*, 20 J. LEGAL STUD. 363 (1991).

43. RESTATEMENT (SECOND) OF TORTS § 433A(2) (1977) (providing joint and several liability where damages cannot be apportioned among two or more causes); *see id.* cmt. i ("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.").

https://openscholarship.wustl.edu/law_lawreview/vol73/iss1/2

liability. Under joint liability, all the defendants must be sued together and their liability adjudicated in one action.[44]

B. Contribution

The rule of joint and several liability is only the first step in allocating tort liability. Joint and several liability gives the plaintiff discretion initially to allocate liability among tortfeasors as plaintiff wishes. But the rule only addresses the allocation question between plaintiff and the tortfeasors as a class. Rules of contribution then must be worked out to allocate that liability amongst the tortfeasors. Kornhauser and Revesz identify six choices, all of which courts and legislatures make in different permutations to produce various common law and statutory contribution schemes:

1) Contribution or no contribution.
2) How to apportion the liability (the "sharing rule").
3) How to account for settlements and collections (the "set-off rule").
4) Contribution rights retained by settling defendants.
5) Nonsettling parties' contribution rights against settling defendants.
6) Protections for nonsettling defendants against "sweetheart settlements."[45]

These choices are not completely independent of one another. Of course if one allows liability to rest wherever the plaintiff chooses (i.e., "no contribution"), no other choices are necessary.[46] Moreover, although not logically compelled, one would expect that the nature of protections afforded nonsettlers varies with the nature of the set-off rule, the scope of settlers' contribution rights, and nonsettlers' own contribution rights. Still, many plausible permutations are possible, and, indeed, exist in various jurisdictions and areas of substantive law.

Assuming some sort of contribution amongst defendants requires us to consider whether: the sharing rule is by equal shares or by comparative

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44. *See supra* note 30.

45. Kornhauser & Revesz, *Settlements*, *supra* note 42, at 432-33.

46. No contribution was the rule at common law. Merryweather v. Nixan, 8 Term Rep. 186, 101 Eng. Rep. 1337 (1799); Union Stock Yards Co. v. Chicago, B. & Q. R.R., 196 U.S. 217 (1905). Since South Carolina's 1988 adoption of the 1955 Revised Uniform Contribution Among Tortfeasors Act [hereinafter "UCATA"], S.C. CODE ANN. §§ 15-38-10 to -70 (Law. Co-op. Supp. 1993), apparently only Alabama, albeit with "some exceptions," persists in the common law approach of no contribution. *See* J.C. Bradford & Co. v. Calhoun, 612 So. 2d 396, 398 (Ala. 1992); Northwest Airlines, Inc. v. Transport Workers' Union, 451 U.S. 77, 87 & nn.16-17 (1981) (50-state survey of contribution rules).

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fault;[47] the set-off rule is *pro tanto* or by proportionate share;[48] settling defendants may be compelled to contribute to nonsettling defendants[49] and may demand contribution from nonsettling defendants;[50] nonsettling defendants have procedural protections against settlements that unfairly prejudice them.[51]

All of these choices have important strategic implications that affect the litigation and settlement strategies of both plaintiff and defendants. Choosing wisely among the various alternatives requires a remarkably well-developed intuition for game theory on the part of lawmakers and judges. No "one size fits all" rule will minimize strategic behavior problems, because the strategic implications change depending upon (among other things) the relative size of transaction costs and the degree of correlation

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47. RESTATEMENT (SECOND) OF TORTS § 886A cmt. h (1977); UCATA § 1(b), 12 U.L.A. 63 (1975) (allowing for pro-rata contribution only); *cf.* UNIF. COMPARATIVE FAULT ACT § 4, 12 U.L.A. 42 (Supp. 1994) [hereinafter UCFA] (comparative contribution statute designed to replace UCATA in comparative fault states).

48. *Pro tanto* set-offs reduce nonsettling defendants' liability by the amount of the settlement. Proportionate share set-offs reduce nonsettling defendants' liability by the settling defendant's proportionate share of the liability, as subsequently determined by the factfinder under either *pro rata* or comparative fault rules. The proportionate share may be greater or less than the settlement amount, depending on how favorable the negotiated settlement was. Both rules have their advocates: UCATA § 4(a), 12 U.L.A. 98 (1975) (*pro tanto* rule); *cf.* UCFA § 6, 12 U.L.A. 57 (Supp. 1994) (proportionate share rule); RESTATEMENT (SECOND) OF TORTS § 886A (1977) (describing both rules but endorsing neither).

49. Establishing the contribution rights of nonsettling defendants against settling parties has proved especially difficult. Three viable alternatives, each with serious drawbacks, contend (1) contribution from all settling parties (settling defendant bears risk of disproportionately small settlement); (2) no contribution from good faith settling parties subject to pro tanto set-off (nonsettling defendant bears risk of disproportionately small settlement); (3) no contribution from good faith settling parties subject to proportionate share set-off (plaintiff bears risk of disproportionately small settlement). At different points the National Commissioners on Uniform State Laws have sought to codify each alternative. The Restatement (Second) of Torts in apparent frustration at the lack of consensus refused to take a position. RESTATEMENT (SECOND) OF TORTS § 886A, caveat & cmt. m(1)-(2) (1977). UCATA and the UCFA provide for differing forms of contribution protection for the settling defendant. UCATA § 4(b), 12 U.L.A. 98 (1975); UCFA § 6, 12 U.L.A. 57 (Supp. 1994).

50. Under the *Restatement (Second) of Torts*, the UCATA, and the UCFA, a settling defendant can seek contribution only if the plaintiff's claim against the other defendants is extinguished by the settlement. *See* RESTATEMENT (SECOND) OF TORTS § 886A cmt. f (1977); UCATA § 1(d) (1955), 12 U.L.A. 63 (1975); UCFA § 4(b), 12 U.L.A. 54 (Supp. 1994). *But see* 42 U.S.C. § 9613(f)(3)(B) (1988) (authorizing contribution under CERCLA in favor of parties settling with the United States or a State absent extinction of the claim). *See infra* note 125.

51. UCATA § 4, 12 U.L.A. 98 (1975) (requiring good faith); *see also* CAL. CIV. PROC. CODE § 877 (West 1980) (imposing a good faith settlement procedure); N.Y. GEN. OBLIGATIONS LAW § 15-108 (McKinney 1989) (same). *But see supra* note 49.

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of each defendant's liability with each other defendant's liability.[52] And of course no one has, and courts are unlikely to obtain, the empirical information necessary to determine the appropriate choice.[53]

Kornhauser and Revesz' work suggests that such remarkable intuition is rare. The most common joint liability regimes have perverse settlement characteristics.[54] In settlement negotiations, plaintiffs may be able to play off defendants against one another to extract substantially more than the expected value of the damage claim.[55] Joint and several liability may discourage settlements altogether or may encourage plaintiffs to settle cheaply with the more culpable defendant and then litigate with the less culpable.[56] Even when the rules encourage settlement with all defendants, more culpable defendants often fare better than less culpable ones.[57]

Intuition is not altogether lacking, however, or perhaps experience has laid bare some of the flaws of joint and several liability. Politically, joint and several liability in tort is under attack as unjustly enriching plaintiffs and more culpable defendants at the expense of less culpable defendants. In California, traditional joint and several liability has been limited for pain and suffering and similar types of damages.[58] Several states have partially

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52. Kornhauser & Revesz, *Settlements*, *supra* note 42, at 492-93; *see also* William L. Landes & Richard A. Posner, *Joint and Multiple Tortfeasors: An Economic Analysis*, 9 J. LEG. STUD. 517 (1980).

53. *Cf.* Kornhauser & Revesz, *Settlements*, *supra* note 42, at 492-93 (suggesting that administrative agencies might be able to gather and analyze such data).

54. Kornhauser and Revesz assume that the majority common law rule allows contribution allocated in proportional shares, and *pro tanto* set-off. Settling defendants are usually given settlement protection, subject to good-faith hearings to protect nonsettling defendants from collusive or grossly unfair settlements. Settling defendants ordinarily may not compel contribution from nonsettlers absent extinction of the plaintiff's claim. *Id.* at 447-48.

55. *Id.* at 448-57.

56. Sweetheart settlement with the more culpable party becomes the plaintiff's best strategy under joint and several liability rules as the plaintiff's probabilities of success against each defendant approach perfect correlation. *Id.* at 453-57. Kornhauser & Revesz note that courts that criticize joint and several liability with *pro tanto* set-offs on this ground appear to assume mistakenly that perfect correlation is the general case. *Id.* at 490 & n.201 (critiquing Donovan v. Robbins, 752 F.2d 1170, 1181 (7th Cir. 1984)).

57. Kornhauser & Revesz, *Settlements*, *supra* note 42, at 447-57.

58. CAL. CIV. CODE §§ 1431-1431.5 (West 1988) (Fair Responsibility Act of 1986). The California Supreme Court has also created several-only tort liability in "market-share" products liability cases. Brown v. Superior Court, 751 P.2d 470 (Cal. 1988). Similar reforms have been enacted by such major jurisdictions as Florida, Illinois, New York and Ohio. *See* FLA. STAT. ANN. § 768.81(3) (West 1987); ILL. REV. STAT. ch. 735, para. 1117 (1991), as amended by Civil Justice Reform Amendments of 1995, 1995 Ill. Legis. Serv. 89-7 (West); N.Y. CIV. PRAC. L. & R. 1600 (McKinney Supp. 1994); OHIO REV. CODE ANN. § 2315.19 (Anderson 1991).

Washington University Open Scholarship

or wholly abolished joint and several liability by statute.[59] Increasingly, judges have raised similar concerns.[60] In academic circles, a large body of work criticizes joint and several liability, though of course not without dissent and much qualification.[61] The federal government is now poised to enter the fray: the House of Representatives recently passed the Common Sense Product Liability and Legal Reform Act of 1995. Section 202 of the proposed legislation preempts state joint and several liability rules for noneconomic harms in cases affecting interstate commerce.[62]

C. *Concurrent Causation in Tort*

Tort law also has grappled with the problem of allocating responsibility among multiple sufficient but not necessary causes.[63] The classic example

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59. ARIZ. REV. STAT. ANN. § 12-2506 (1994); COLO. REV. STAT. § 13-21-111.5 (1989 & Supp. 1994); IDAHO CODE § 6-803(3) (1990); IND. CODE § 34-4-33-4 (1986); KAN. STAT. ANN. § 60-258a(d) (1994); N.D. CENT. CODE §§ 32-03.2-02 to 32-03.2-03 (Supp. 1993); UTAH CODE ANN. § 78-27-40 (1987); VT. STAT. ANN. tit. 12, § 1036 (1974 & Supp. 1994); WYO. STAT. § 1-1-109 (1988 & Supp. 1994). *See also* ALASKA STAT. § 09.17.080 (1994) (limiting defendant's joint and several liability to twice the percentage of fault); S.D. CODIFIED LAWS ANN. §§ 15-8-15.1-.2 (Supp. 1994) (same); MISS. CODE ANN. § 85-5-7 (1972) (imposing joint and several liability only to the extent necessary for the injured party to recover 50% of their damages, and several liability thereafter); IOWA CODE § 668.4 (1987) (imposing joint and several liability for defendants that are more than 50% responsible only); MONT. CODE ANN. § 27-1-703(2) (1993) (same).

60. *See, e.g.*, McDermott, Inc. v. AmClyde & River Don Castings, Ltd., 114 S. Ct. 1461 (1994) (concerning contribution under maritime tort law); Musick, Peeler & Garrett v. Employers Ins., 113 S. Ct. 2085 (1993) (contribution under Securities Exchange Act of 1934); Franklin v. Kaypro Corp., 884 F.2d 1222, 1229-32 (9th Cir. 1989) (contribution under Securities Exchange Act of 1934), *cert. denied*, 498 U.S. 890 (1990); Singer v. Olympia Brewing Co., 878 F.2d 596, 599-601 (2d Cir. 1989), *cert. denied*, 493 U.S. 1024 (1990) (same); Donovan v. Robbins, 752 F.2d 1170, 1181 (7th Cir. 1984) (contribution under ERISA); *see also* Kornhauser & Revesz, *Settlements*, *supra* note 42, at 481-91 (discussing case law).

61. In addition to Kornhauser and Revesz, discussed extensively *supra* notes 42-57, academic critics of joint and several liability include Landes & Posner, *supra* note 52, and Aaron D. Twerski, *The Joint Tortfeasor Legislative Revolt: A Rational Response to the Critics*, 22 U.C. DAVIS L. REV. 1125 (1989). *But see* Richard W. Wright, *Allocating Liability Among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability*, 21 U.C. DAVIS L. REV. 1141 (1988).

62. H.R. 956, 104th Cong., 1st Sess. §§ 202 & 401 (1995) (a bill to enact the Common Sense Product Liability and Legal Reform Act of 1995).

63. There is a huge academic literature dealing with causation problems in tort law. A sampling includes: HART & HONORE, *supra* note 1, at 130-307; ROBERT E. KEETON, LEGAL CAUSE IN THE LAW OF TORTS (1963); Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69 (1975); Steven Shavell, *An Analysis of Causation and the Scope of Liability in the Law of Torts*, 9 J. LEGAL STUD. 463 (1980); Ernest J. Weinrib, *A Step Forward in Factual Causation*, 38 MOD. L. REV. 518 (1975); Richard W. Wright, *Causation in Tort Law*, 73 CAL. L. REV. 1735 (1985); *Symposium on Causation in the Law of Torts*, 63 CHI.-KENT L. REV. 397 (1987) (articles by Rizzo, Weinrib, Coleman, Thomson, Moore, Cooter, Wright, Kelman, Schwartz, and Epstein).

https://openscholarship.wustl.edu/law_lawreview/vol73/iss1/2

is that of two fires each sufficient to destroy particular property. If both fires are negligently set and combine to destroy the property, the authorities agree that joint and several liability is the appropriate solution.[64] If one fire is negligently set and the other arises from an innocent cause, the older authority seems to leave the loss on the plaintiff,[65] while the more modern cases (and the *Restatement (Second) of Torts*) hold the negligent party fully liable for the property damage.[66]

Defenders of joint and several liability for concurrent torts have relied on four sets of arguments. First, as between an injured plaintiff and a negligent defendant, neither of whom can be blamed for a co-defendant's insolvency, justice requires that the insolvency risk be borne by the defendant.[67] Second, the harm compensated for in tort—personal injury primarily—ought to be systematically somewhat "overdeterred," since money damages are highly imperfect compensation for such injuries. Third, redistributive justice concerns systematically weigh in favor of fully compensating tort victims. Fourth, tortfeasors are generally in a better

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64. *See* Anderson v. Minneapolis St. P. & S. Ste. M. Ry., 179 N.W. 45, 49 (Minn. 1920); *see also* Seckerson v. Sinclair 140 N.W. 239, 244 (N.D. 1913); RESTATEMENT (SECOND) OF TORTS § 432(2) & illus. 3 (1977).

65. Robert J. Peaslee, *Multiple Causation and Damage*, 47 HARV. L. REV. 1127, 1129 (1934); *see* Cook v. Minneapolis, St. P. & S. Ste. M. Ry., 74 N.W. 561 (Wis. 1898).

66. RESTATEMENT (SECOND) OF TORTS § 432(2) & illus. 4; *see also* Kingston v. Chicago & N. W. Ry., 211 N.W. 913, 915 (Wis. 1926) (limiting *Cook* by allocating burden to defendant to prove innocent origin of the other fire); Charles E. Carpenter, *Concurrent Causation*, 83 U. PA. L. REV. 941, 943 (1935). Another classic alternative cause case is Corey v. Havener, 65 N.E. 69 (Mass. 1902), where two motorcyclists concurrently passed a horse that, startled by the noise, threw its rider. Although the noise from either motorcycle alone would have been sufficient to startle the horse the court held both motorcyclists liable.

67. The introduction of comparative negligence doctrine into tort law weakens but arguably does not destroy the power of this argument. Wright, *supra* note 61, at 1153-57. Professor Marc A. Franklin observed in commenting upon this Article that the moral case for joint and several liability in tort depends largely on insolvency risk allocation between an *innocent* plaintiff and *culpable* defendants. Until the introduction of comparative negligence in the 1970s, all plaintiffs who established liability were necessarily deemed to be legally not at fault. In such cases, joint and several liability (with or without contribution) seems readily defensible on this "innocent plaintiff-culpable defendants" ground. Comparative negligence allowed faulty plaintiffs to collect some portion of their damages as well. The internal logic of comparative negligence is in serious tension with that of joint and several liability, for in a comparative negligence case we must apportion the third-party insolvency risk between two culpable parties. There is no obvious reason to prefer a culpable plaintiff to a culpable defendant. This tension may account in large measure for recent retreats from joint and several liability. *See supra* notes 58-62 and accompanying text. A culpable plaintiff has little moral claim to collect from each defendant more than that defendant's own proportionate share of the damages. Indeed until the introduction of comparative negligence such a plaintiff had no claim at all. But recent reforms generally have not been limited to cases involving culpable plaintiffs. Thus, interestingly, the expansion of liability in favor of culpable plaintiffs through comparative negligence may have had the unintended consequence of limiting innocent plaintiffs' common law rights against culpable defendants.

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position to spread losses than tort victims.[68]

Whether these considerations, individually or collectively, outweigh joint and several liability's complex and sometimes perverse effects on litigation and settlement strategy in the tort context is beyond the scope of this Article.[69] I do claim, however, that none of these rationales apply in the context of concurrent breach of contract.

First, as for allocating insolvency risk, tort differs from contract. Tort victims ordinarily do not choose their tortfeasors and cannot be said to have voluntarily assumed the risk of any given tortfeasor's insolvency. Of course, tortfeasors do not generally choose their co-defendants in advance either. But as between an injured plaintiff and a negligent defendant, neither of whom has bargained for the risk, it seems reasonable to many courts and some commentators to allocate insolvency losses to the culpable party.[70]

Parties to a contract, on the other hand, do choose one another. They implicitly and necessarily assume the risk that the counterparty will not be able to perform because of insolvency. As between a plaintiff who voluntarily assumed the insolvency risk and a co-defendant who did not, it seems reasonable to allocate the insolvency losses to the plaintiff.

Second, with respect to the nature of the harms, tort ordinarily addresses personal injury.[71] Courts traditionally have viewed property damage as analogous to personal injury and allowed tort recovery for such harms.[72] But courts have only reluctantly, and sporadically, compensated tort victims

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68. Recent tort scholarship apparently agrees that modern tort law relies on loss distribution rationales, but suggests such reliance is inappropriate. *See* George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1534-38 (1987) (describing loss distribution objectives of modern tort law); Gary T. Schwartz, *The Beginning and the End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 634-47 (1992) (critiquing Priest but admitting that courts were driven to expand tort liability in part "because of [judges'] perception that those rules could achieve at least a substantial measure of loss distribution").

69. A leading defender of the joint and several liability regime in tort is Professor Wright. *See* Wright, *supra* note 61. Wright's view is critiqued in Twerski, *supra* note 61. For Wright's reply and Twerski's rejoinder, see Richard W. Wright, *Throwing Out the Baby with the Bathwater*, 22 U.C. DAVIS L. REV. 1147 (1989); Aaron D. Twerski, *The Baby Swallowed the Bathwater: A Rejoinder to Professor Wright*, 22 U.C. DAVIS L. REV. 1161 (1989).

70. *But see supra* note 67.

71. *See* Richard L. Abel, *Should Tort Law Protect Property Against Accidental Loss?*, 23 SAN DIEGO L. REV. 79, 80-83 (1986); Robert L. Rabin, *Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment*, 37 STAN. L. REV. 1513, 1517 (1985).

72. Gary T. Schwartz, *Economic Loss in American Tort Law: The Examples of* J'Aire *and of Products Liability*, 23 SAN DIEGO L. REV. 37, 51-52 (1986); *see, e.g.*, Seely v. White Motor Co., 403 P.2d 145, 152 (Cal. 1965) (holding property damage recoverable in strict products liability).

https://openscholarship.wustl.edu/law_lawreview/vol73/iss1/2

for consequential economic loss unrelated to personal injuries.[73]

Taking personal injury as the core and property damage as the periphery of the interests that tort protects leads naturally to generous compensation of injured plaintiffs. Our law embodies the widely shared intuitions that personal injury is a greater intrusion than physical destruction of an individual's property and that property destruction is worse than "mere" economic loss.[74] Joint and several liability in tort is consistent with this bias since the interest being protected is freedom from personal injury or property damage.

Contract law on the other hand, at its core, is about economic loss, not personal injury or destruction of property. The basic contract remedy, expectancy damages, awards the injured party the financial equivalent of performance.[75] To the extent that one subscribes to the intuition that compensating "mere" economic loss is less important than compensating personal injury or the physical destruction of property, joint and several liability is less appealing in contract than in tort.

As for redistributive justice, one can plausibly assert (at least in some classes of cases) that tortfeasors (and their insurance carriers) are both wealthier than the typical tort victim and in a better position to spread

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73. *Seely*, 403 P.2d at 151 (prohibiting products liability recovery for mere economic losses); *see* Abel, *supra* note 71, at 101-02 (citing numerous traditional examples of tort limitations on recovery of economic losses); Rabin, *supra* note 71, at 1513, 1534 (noting "sustained reluctance of the courts to extend liability for economic loss"). Attorney and accountant malpractice is one tort area where economic loss predominates. But here courts have been especially leery of the ripple effects of economic losses and the risks of disproportionate liability. *See* Ultramares Corp. v. Touche, 174 N.E. 441, 444 (N.Y. 1931) ("If liability for negligence exists, a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries may expose accountants to an indeterminate amount for an indeterminate time to an indeterminate class."); Bily v. Arthur Young & Co., 834 P.2d 745, 747 (Cal. 1992) (limiting auditors' liability to third parties for negligent misrepresentations).

74. Sullivan v. Dunham, 55 N.E. 923, 924 (N.Y. 1900) ("The safety of the person is more sacred than the safety of property."); *Seely*, 403 P.2d at 152 (distinguishing between economic loss and property damage); Employers Ins. v. Suwanee River Spa Lines, 866 F.2d 752, 763 (5th Cir. 1989) ("As in East River [S.S. Corp. v. Transamerica Delaval Inc., 476 U.S. 858 (1986)] the damage alleged here is purely economic. Thus the public policy concerns which underpin the imposition of a duty in tort—the need to provide consumers with greater protections from personal injury and property damage than is afforded by warranty or contract—are not implicated."); Spring Motors Distrib. v. Ford Motor Co., 489 A.2d 660, 672 (N.J. 1985) ("Generally speaking, tort principles, such as negligence, are better suited for resolving claims involving unanticipated physical injury, particularly those arising out of an accident. Contract principles, on the other hand, are generally more appropriate for determining claims for consequential damages . . . . "). This intuition is stronger and more universal and seems morally and intellectually sounder as to personal injury than as between property damage and economic loss. Abel, *supra* note 71.

75. RESTATEMENT (SECOND) OF CONTRACTS § 347 (1981); 5 CORBIN, *supra* note 7, § 992 (1964); E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 12.8 (2d ed. 1990).

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losses (although the prevalence and relatively low cost of first-party insurance suggests otherwise).[76] There is no reason to think this difference in wealth and loss spreading capacity, even if it exists in tort cases, systematically favors defendants in commercial contract litigation.

D. Concurrent Causation in Contract

Contract law generally fails to struggle explicitly with issues of causation.[77] Indeed, the claim that the defendant is ordinarily responsible for the harm caused by its breach is highly imprecise.

Take a simple case: Seller (S) agrees to sell one widget to Buyer (B) for $1, delivery to B in 30 days; the market price increases to $3 by the delivery date; S fails to deliver. Without question, B's contract damages are $2, but it is quite inaccurate to say that S caused B to suffer $2 in harm.

In the first place, the "harm" is to assumed prospective economic advantage; B has not suffered actual property losses or personal injuries. B is probably in no worse position than it was before entering the contract, and B is only possibly worse off compared to how it might have been had the breach not occurred.[78] In calculating the damages, B is not required to show that the widget actually would have been resold for $3 or that B actually paid $3 to acquire another widget.

Secondly, the contract allocates risks of losses that neither party "causes." Assuming a competitive market structure, no act or omission of either S or B affects the market price of widgets. But by agreeing to a fixed price forward contract, S assumes the risk of an increase in market price and B of a decline. Much more central to contract law than identifying who or what caused the harm is identifying which party assumed the risk of the harm.

Finally, courts are much more likely to limit liability for indirect or "consequential" harms in contract cases even when causation is clear. Even if B can show that S's failure to make prompt delivery of the widget caused a plant shutdown or property losses from fire or whatever, S is not responsible in contract even though such indirect damages might well be considered within the scope of "proximate cause" if they resulted from

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76. GUIDO CALABRESI, THE COSTS OF ACCIDENTS (1970); Schwartz, *supra* note 68, at 689-99 (1992) (explaining courts' current retreat from expanding tort liability in part as the result of the judicial and academic realization that defendants may not be the superior loss spreaders they were once thought to be).

77. HART & HONORE, *supra* note 1, at 308.

78. Measured at the moment of breach, B does lose a $2 profit. But looking only at the moment of breach may be artificial. When the dust finally settles, based on future events and their impact on the widget market, S's breach may prove to have been the best thing that could have happened to B.

https://openscholarship.wustl.edu/law_lawreview/vol73/iss1/2

tortious conduct. Recoverable damages, it is said, are limited to those within the contemplation of the parties at the time of contracting.

These various considerations get melded into the question of "causation," the resolution of which is determined by the "substantial factor" analysis:

> In all cases involving problems of 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 order to establish liability the plaintiff must show that the defendant's breach was "a substantial factor" in causing the injury.[79]

Given the marginality of causal concepts in determining the scope of contract damages, it is no surprise that little doctrine concerns compensation for harms caused by concurrent breaches of contract. What little doctrine there is suggests that the liability of each party is determined independently of the other.[80] Even in *C&H*, notwithstanding the court's rhetoric concerning joint liability, Sun's liability is ultimately fixed by reference to the terms of the Sun contract alone.

IV. THE JOINT AND SEVERAL LIABILITY SOLUTION

A. *Analysis of Joint and Several Liability in Concurrent Breach*

I have already suggested many of the flaws with a joint liability approach to cases involving concurrent breach of contract. To collect and supplement those points here:

1. *Complexity*

Joint and several liability implies elaborating a complex body of law dealing with the nature and amount of contribution rights. The task is difficult and the doctrine would have to be built up from scratch because no preexisting contracts doctrine or applicable statute exists, and the tort rules are both uncertain and vary substantially across the United States.[81]

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79. 5 CORBIN, *supra* note 7, § 999; *see also* William Inglis & Sons Baking Co. v. Continental Baking Co., 942 F.2d 1332, 1339-40 (9th Cir. 1991); Krauss v. Greenbarg, 137 F.2d 569, 572 (3d Cir. 1943); Nelson v. Lake Canal Co., 644 P.2d 55, 59 (Colo. 1981); Bruckman v. Parliament Escrow Corp., 235 Cal. Rptr. 813, 820 (Ct. App. 1987); Reiman Assoc. Inc. v. R/A Advertising Inc., 322, 306 N.W.2d 292, 301 (Wis. 1981).

80. 5 CORBIN, *supra* note 7, § 999 & n.21 (comparing tort joint and several liability to contract rules); *supra* notes 30-31 and accompanying text. *But cf. supra* notes 5, 34-41 and accompanying text (discussing cases that extend tort joint and several liability to contract).

81. *See supra* notes 42-53 and accompanying text.

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Thus, it is by no means clear how to choose a workable scheme, or indeed that any scheme would produce efficient results. Questions that arise from the facts of *C&H* provide examples of the difficulty and complexity of the task: How should liability be apportioned between Halter and Sun? Are each jointly and severally liable for the $27,000 per day in liquidated damages? Should their liability be allocated by comparative fault or pro rata shares? Should their percentage fault be multiplied by the aggregate liquidated damages or only the damages each party agreed to? Would Halter as settling defendant have a right of contribution against Sun? Could Sun demand contribution from Halter if Halter's settlement were less than its proportionate liability under whatever allocation rule were chosen? Does Halter's settlement reduce Sun's liability by either Halter's proportionate share or *pro tanto*? These questions have no easy or obvious answers.

2. *Strategic Behavior*

Joint liability in many factual settings leads to strategic behavior that complicates the settlement and litigation of cases and tends to favor plaintiffs and more culpable defendants and to disadvantage less culpable defendants.[82] To illustrate on a highly stylized version of the *C&H* facts, assume (i) no liquidated damages; (ii) no transaction or litigation costs; (iii) an aggregate harm of $100; (iv) a 50% probability of C&H prevailing against Halter and Sun; (v) if C&H prevails, Halter's proportionate share is 70%; (vi) if C&H prevails, Sun's proportionate share is 30%; (vii) C&H's probability of prevailing against Halter is perfectly correlated with C&H's probability of prevailing against Sun; (viii) judgments against both defendants are fully collectible; and (ix) settlements are accounted for by *pro tanto* set-offs.

In the absence of joint and several liability, the case should settle for $50, the expected value of the claim. With joint and several liability, C&H should be able to induce Halter to settle for $35 (70% of $50, the expected

82. Litigation and settlement realities in particular cases may swamp the theoretical strategic incentives discussed in this section. For example, a plaintiff may prefer to litigate against a more culpable party rather than the less culpable even in circumstances where settlement with the more culpable party should otherwise create a surplus, because a jury may assess more generous compensatory or even punitive damages against such a party or be more likely to find liability. Or very high litigation costs might induce settlements even in circumstances where joint and several liability should discourage settlement. Possibly perverse strategic incentives, therefore, are only one consideration in determining whether to adopt joint and several liability, and are not decisive in and of themselves. Nevertheless, the peculiar incentives and distortions created by joint and several liability should be taken into account in assessing whether to extend the doctrine.

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value of the claim). Sun now faces a claim with an expected value of $32.50 (50% chance of being responsible for the remaining $65). C&H therefore, should be able to extract an aggregate of up to $67.50 from both defendants by strategically playing them off against one another, a strategy that works most directly against Sun, the less culpable of the two parties.[83] The Kornhauser and Revesz analysis suggests that this problem is greater when the defendants' liabilities are correlated and less to the extent their liabilities are independent.[84] The degree of correlation depends on the particular facts of each case, but it is reasonable to assume that liability of parties under interrelated but independent contracts would rarely be perfectly correlated or perfectly independent.

On the other hand, as the liabilities of the parties approach perfect independence, joint and several liability can discourage settlement altogether. Assume that (i) C&H suffers $100 in damages; (ii) Halter has a 40% probability of prevailing against C&H; (iii) Sun has a 60% probability of prevailing against C&H; (iv) if both Sun and Halter are liable, each is responsible for 50% of the damages; (v) if only one defendant is liable, it is responsible for 100% of the damages; (vi) the 40% and 60% probabilities are perfectly independent; (vii) no transaction or litigation costs; (viii) judgments against both defendants are fully collectible; and (ix) settlements are accounted for by proportionate share set-offs.

Under these assumptions, in litigation C&H has a 24% probability of no award and a 76% probability of winning $100 from either or both defendants for an aggregate expected value of $76. Halter in litigation has a 40% chance of no damages, a 24% chance of $50, and a 36% chance of $100, for an aggregate expected liability of $48. Sun in litigation has a 60% chance of no damages, a 24% chance of $50, and 16% chance of $100, for an aggregate expected liability of $28.

Settlement should not occur on these facts. Suppose C&H attempts to settle first with Sun. In settlement, given its expected liability, Sun will settle for up to $28. This leaves C&H with a 60% probability of winning $50 from Halter, or an expected value of only $30. C&H can realize only $58 in settlement by settling first with Sun. Since C&H expects $76 from litigation, C&H will not settle. Assume alternatively that C&H attempts to settle first with Halter. In settlement, given its expected liability, Halter will settle for up to $48. This leaves C&H with a 40% probability of winning

83. Settling first with Sun is an inferior strategy. C&H could extract only (i) $15 from Sun (30% of $50) and (ii) $42.50 from Halter (50% of $85), for a total of $57.50.

84. Kornhauser & Revesz, *Settlements*, *supra* note 42, at 453-57.

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$50 from Sun, or an expected value of only $20. C&H can realize only $68 by settling first with Halter. Again, C&H can not realize as much in settlement as it expects in litigation.[85]

Kornhauser and Revesz show that this settlement-discouraging effect of joint and several liability is more pronounced as (i) transaction and litigation costs decline; (ii) the disparity in the probabilities of plaintiff prevailing against the various defendants increases; and (iii) the correlation of those probabilities decreases.[86]

3. *Tort Rationales Inapplicable*

Traditional factors that cause courts to create generous compensation principles from the point of view of plaintiffs in tort do not apply in contract. Tort concerns itself primarily with personal injury and secondarily with property damage. Contract concerns itself primarily with economic harms. Tort plaintiffs ordinarily do not choose their tortfeasors and so it seems unjust to lay the risk of one defendant's insolvency on the plaintiff. Contract plaintiffs do choose the parties with whom they contract and the risk of insolvency is necessarily assumed when the relationship is created. Unlike in tort, in contract there is no particular reason to assume that asymmetries in wealth and loss spreading capacity systematically favor defendants.[87] Taking our exemplary case, *C&H*, (i) the harm is economic, not personal injury or property damage; (ii) C&H, the plaintiff, is likely to have undertaken a credit analysis of Halter and Sun before entering into the contracts and would have been imprudent not to have done so; and (iii) C&H is large and wealthy and in a position to insure against and spread losses as well as mitigate them.

4. *Inefficiency*

Joint and several liability creates perverse economic incentives, also well illustrated by *C&H*. Imagine the likely scenario that Sun knows that Halter will be late, and that there will be no tug until July 1982. Under the court's decision, Sun nevertheless must complete a useless barge on time, presumably at greater cost, or suffer liquidated damages at the rate of

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85. This settlement-discouraging effect would be mitigated but not eliminated if a *pro tanto* set-off rule applied. Under such a rule, C&H on these assumptions could extract up to $71.20 in settlements by settling first with Halter. (The upper bound would be $68.80 if C&H settled first with Sun.) In either event, the expected settlement value is still less than the $76 C&H expects from litigation.

86. *Id.* at 449-53.

87. *See supra* notes 67-76 and accompanying text.

https://openscholarship.wustl.edu/law_lawreview/vol73/iss1/2

$17,000 per day. Rushing to complete the barge on time may disrupt production schedules for other ships, require overtime and additional materials costs, and cause other economic losses. Sun should bear such costs only to the extent that C&H receives a gain from prompt performance that exceeds the amount of such losses. Imposing such costs on Sun without any gain to C&H creates economic waste.[88]

5. Inconsistency with Traditional Remedial Limits

Joint liability is inconsistent with such basic contract principles as the expectancy measure of damages and the rule of *Hadley v. Baxendale*.[89] Expectancy damages are measured by the scope of the promise being enforced.[90] The remedy for breach, i.e., the expectancy, will vary depending on the nature of the specific promise. Independent contracts with separate promises may create very different expectancies. Indeed, *C&H* illustrates the problem nicely. Although the harm C&H suffered was unitary, the liquidated damages under the Sun contract were $17,000 per day while the liquidated damages under the Halter agreement were $10,000 per day and each firm promised different completion dates.

With respect to *Hadley*, the settled law is that liability is fixed by reference to that which is in the fair contemplation of the parties at the time of contracting as the likely harm from breach.[91] What might have been within the fair contemplation of one jointly and severally liable party might not have been within the contemplation of the other. Accordingly, allocating responsibility for consequential damages raises issues in contract

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88. Professor Anderson notes the potential for windfall gains in favor of C&H Sugar Co. under the Ninth Circuit's ruling. Anderson, *supra* note 22, at 1097 (criticizing *C&H*). The windfall gain is incident to inefficient imposition of cumulative liquidated damage remedies in excess of actual damages in cases of concurrent breach. This windfall gain seems symptomatic of the underlying efficiency problem.

89. 9 Ex. 341, 156 Eng. Rep. 145 (1854).

90. Justice Holmes wrote:

> When a man makes a contract, he incurs, by force of the law, a liability to damages, unless a certain promised event comes to pass. But unlike the case of torts, as the contract is by mutual consent, the parties themselves, expressly or by implication, fix the rule by which the damages are to be measured.

Globe Refining v. Landa Cotton Oil Co., 190 U.S. 540, 543 (1902). *See generally* FARNSWORTH, *supra* note 75, § 12.1.

91. 5 CORBIN, *supra* note 7, §§ 1007-1008 (discussing *Hadley*). No contract case has engendered more commentary than *Hadley v. Baxendale*. Some recent examples: Melvin A. Eisenberg, *The Principle of* Hadley v. Baxendale, 80 CAL. L. REV. 563 (1992); Bebchuk & Shavell, *supra* note 10; Richard A. Epstein, *Beyond Foreseeability: Consequential Damages in the Law of Contract*, 18 J. LEGAL STUD. 105, 138 (1989).

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that simply do not arise in tort. Are we to apportion the liability based on each jointly liable party's liability for such damages under *Hadley*, a complex and novel inquiry? Or are we to sacrifice the *Hadley* rule on the altar of joint and several liability as well?

B. *Joint and Several Liability Is Not a Workable Solution to Concurrent Breach Cases*

In sum, working out a regime of joint liability for concurrent breaches is a complex task. The reasons that justify the joint and several liability regime in tort in general do not apply in contract. But the disadvantages of overdeterrence and strategic behavior that give rise to criticism of the tort regime arise in contract as well. Importing the tort notions would create perverse economic incentives on prebreach behavior. And finally, such notions appear to be inconsistent with long-standing, well-understood and apparently well-functioning contract doctrines governing remedies. For these reasons, I find it relatively easy to reject joint and several liability as a solution to *C&H*, or, more generally, to the problem of concurrent breach of contract.

V. THE APPORTIONED LIABILITY ALTERNATIVE

An obvious alternative to the flawed joint and several liability solution is several liability. Several states, and more recently the Congress, responding to the perceived flaws of joint and several liability rules, have moved in this direction in the tort area.[92] With respect to concurrent breaches, one might allocate percentages of liability to particular defendants, calculating damages by reference to each defendant's individual agreement, multiplying the damage number by the appropriate percentage, and entering judgment for that amount.

Such a rule would render contribution rules unnecessary and would eliminate most of the strategic behavior associated with joint and several liability. Since each defendant would be responsible only for its percentage of damages as calculated in accordance with the terms of its contract, each defendant's expected liability on the plaintiff's claim should be independent of other defendants' litigation or settlement decisions. But apportioned liability has disadvantages of its own.

For one thing, as with joint and several liability, apportioned liability is complex and difficult to administer judicially. Determining that there has

92. *See supra* notes 58-62 and accompanying text.

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been a breach is comparatively easy. Assigning specific percentages of liability to multiple breaches that join together to cause a unitary harm is on its face an enterprise of dubious validity and great complexity. The bases for determining such an apportionment are entirely nonobvious and would undoubtedly require false precision in the weighing of uncommensurable factors. Assigning degrees of comparative fault in tort has of course become commonplace,[93] over similar objections.[94] But the task here would involve assigning precise percentages of responsibility against strictly liable parties, not assigning comparative fault, and would require simultaneous computations of multiple damage figures under various contracts. It is difficult enough for juries to apply the expectancy damage measure and *Hadley v. Baxendale*. Demanding that they juggle such doctrines among multiple defendants and calculate varying percentages of liability is to invite arbitrariness and inconsistency.

Secondly, it is unclear how one ought to apply an apportioned liability rule in one context where concurrent breach tends to get litigated—liquidated damages cases. Assume Sun is deemed 40% responsible for nondelivery of the complete tug-barge. C&H is entitled to aggregate liquidated damages of $27,000 per day—$17,000 per day under the Sun contract and $10,000 per day under the Halter contract. Should the judgment against Sun be for $17,000 per day (the liquidated amount under its contract), $10,800 per day (40% of the total amount of liquidated damages), or $6800 per day (40% of the liquidated amount under its contract)? On the one hand, liquidated damage clauses are meant to pretermit a damage calculation and allow courts to simply assess the liquidated amount upon a finding of liability. On the other hand, there is little point to undertaking a complex apportionment of liability if damages are to be simply the stipulated amount, not apportioned between the parties.[95] And courts have apportioned liquidated damage amounts in other

93. Comparative fault has (overwhelmingly) been the majority American rule since the mid-1970s. *See* Gary T. Schwartz, *Contributory and Comparative Negligence: A Reappraisal*, 87 YALE L.J. 697, 697-98 (1978).

94. *Compare, e.g.*, WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 67, at 438 (4th ed. 1971) (suggesting that administrative problems of apportioning fault were insuperable) *and* Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972) *with* Schwartz, *supra* note 93 (arguing that upon reappraisal, comparative negligence is superior to contributory negligence).

95. Of course if, as seems entirely sensible (and entirely inconsistent with the case law, *see supra* note 27 and accompanying text) one were to abandon the penalty doctrine, then one could simply assess the liquidated amount upon a finding of breach without more. The problem occurs only when the penalty doctrine and *C&H* joint liability coexist.

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contexts.[96]

Thirdly, such a rule would create the risk of inconsistent verdicts. Liberal modern joinder rules make separate proceedings unlikely. Jurisdictional problems and inconsistent forum selection clauses in different contracts, however, could force plaintiffs to proceed in multiple actions. One can have little confidence that any two factfinders will assign consistent percentages of fault.

Finally, the efficiency problem with joint and several liability rules in the concurrent breach context is mitigated but not eliminated.[97] Again using a stylized version of the *C&H* facts as a foil, assume Sun knows of Halter's breach and can perform but only at high cost. Even taking the apportioned liability rule to hold Sun responsible only for a reduced damage award based on the factfinder's ex post assessment of its percentage of responsibility,[98] so long as the expected damage award exceeds the increased cost of performance, Sun will be induced to incur additional costs that will not benefit C&H in light of Halter's concurrent default.

VI. THE ONE-PARTY RULE

I suggest that holding only one concurrent breacher responsible for all the damages as calculated in accordance with its contract, and excusing the others, is superior to both joint and several liability and several liability as a solution to the problem of allocating liability for concurrent breaches. This rule rests easily with well-established doctrines in contracts relating to supervening causes and remedies. Moreover, this "one-party" rule is more judicially administrable and has fewer perverse side effects than the alternatives. It amounts to a rough and imperfect justice, but justice nevertheless.[99] Moreover, this rule generally permits efficient breaches to

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96. E.C. Ernst, Inc. v. Manhattan Constr. Co., 551 F.2d 1026, 1038-39 (5th Cir. 1977) (apportioning liquidated damages), *cert. denied*, 434 U.S. 1067 (1978); Aetna Casualty & Sur. Co. v. Butte-Meade Sanitary Water Dist., 500 F. Supp. 193 (D.S.D. 1980) (apportioning damages among bonding company, contractor and owner); Nomellini Constr. Co. v. Dep't of Water Resources, 96 Cal. Rptr. 682, 685 (Ct. App. 1971) (apportioning fault under liquidated damages clause in public works contract); Baldwin v. National Safe Depository Corp., 697 P.2d 587 (Wash. Ct. App. 1985) (apportioning liquidated damages under lease notwithstanding breaches by both lessor and lessee and "entire" (i.e., unapportioned) rent clause).

97. *See supra* text accompanying note 88.

98. That is, assume the court does not simply assess the liquidated amount in the Sun contract upon a finding of unexcused nonperformance by Sun whatever its relative responsibility. *See supra* note 95.

99. On the soundness of a "rough justice" approach to tort law, see Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?* 42 UCLA L. REV. 377, 379 (1994):

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occur without further negotiation or litigation costs.[100] Finally, by taking into account the gravity, timing and reasons for contractual defaults, the one-party rule minimizes opportunities for destructive forms of strategic behavior.[101]

A. Describing the One-Party Rule

As a general matter, I do not think it possible to specify in advance a bright-line rule for determining which of several breaching parties ought to bear responsibility for the damages resulting from concurrent breach. As in determining comparative fault in tort, specific facts and context are crucial.[102] Possibly decisive factors would include:

1) The timing of the breaches. A prior breach in a related contract may render subsequent performance by a second party futile or even harmful. The first breaching party is (other things being equal) more responsible.

> [This analysis] suggests that legal economists de-emphasize their efforts to fine-tune liability rules in order to achieve perfect deterrence. Given the imprecision in the processes by which tort liability affects behavior, these efforts at fine-tuning, though intellectually challenging, are likely to be socially irrelevant.

100. The theory of efficient breach, rooted in the Holmesian notion that a contract creates no more than an option in the promisor to perform or pay damages, OLIVER WENDELL HOLMES, JR., THE COMMON LAW 234 (Mark D. Howe ed., 1963) (1881), has fallen in and out of favor with law-and-economics analysts. *Compare* POSNER, *supra* note 13, at 128-30 *with* Daniel Friedman, *The Efficient Breach Fallacy*, 18 J. LEGAL STUD. 1 (1989) (critiquing efficient breach theory). Certainly existing legal rules, if not sound economic analysis, seem to encourage "efficient breaches." Even critics of efficient breach theory acknowledge that the theory is most plausible in scenarios like *C&H* where compelled performance may result in social waste as well as lost profits for the promisor. Friedman, *supra*, at 8-13.

101. Professor Grady, building on tort cases involving fires set by sparks from passing trains, has focused on framing liability rules that are sensitive to the timing of acts of negligence and contributory negligence when strategic behavior is likely. *See* Mark F. Grady, *Common Law Control of Strategic Behavior: Railroad Sparks and the Farmer*, 17 J. LEGAL STUD. 15 (1988). Grady plausibly suggests that in most tort cases strategic behavior is scarce because the victim's acts or omissions are not apparent to the injurer, and vice versa, until time to strategically modify one's behavior is short. *Id.* at 31-40. Multiple interlocking contracts, however, offer opportunities for strategic behavior, as parties are likely to know of and have time to react to third party defaults even if they cannot control them. Grady's analysis suggests that in such contexts close attention to the timing and sequence of parties' acts is important to achieving efficient results. *Id.*

102. Professor Wright explains:

> When there is more than one responsible cause of a particular injury, the comparative responsibility of each cause depends on a number of factors: the level of the risk that was created, the objective foreseeability and reasonableness of the risk, the actual awareness of the risk, the 'remoteness' of the causal connection between the risk and the injury, and the policies that underlie the various categories of tortious behavior. These factors govern the determination of comparative responsibility, not according to any detailed formula but rather through rational common sense judgment . . . .

Wright, *supra* note 61, at 1144-45.

Washington University Open Scholarship

2) The relative gravity of the breaches in terms of how substantial the defect in performance is. The party committing the greater breach is more responsible.
3) The relative size and value of the contracts. The party to the larger contract is more responsible.
4) The relative culpability of the breachers. The willful or bad faith breacher is more responsible than the negligent one who in turn is more responsible than the innocent one.[103]
5) The relative harm-avoidance costs of the parties. Liability for damages is more appropriately placed on the defendant positioned to avoid, or mitigate, plaintiff's damages at least cost.
6) Each defendant's savings from breach. The greater a particular defendant's relative savings from nonperformance, the more efficient and just it is to impose the full liability for damages upon it. The party most benefiting from nonperformance ought to bear the cost of nonperformance.

The weight to be placed on these factors must vary with context. In many circumstances, sequence may be critical.[104] Where defendants' cost savings associated with nonperformance are ascertainable and diverge widely, this factor is apt to be decisive for it allocates benefits and burdens to the same party. In other cases, great disproportion in the relative size of the contracts or the gravity of the breaches or the culpability of the breaching parties or harm-avoidance costs may dictate that the liability be imposed on a particular party.

Multifactor balancing tests with shifting and undetermined weights on the factors are not self-executing. Determining which is the more responsible party in a particular case may not be obvious. Nevertheless, such tests are characteristic of the common law and far more complex balances have been

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103. Great caution must be used in relying on this factor. Efficient breaches are necessarily and appropriately deliberate. Nevertheless, where the efficiency implications are not clear it may be appropriate to take into account the mental state of the breacher in apportioning liability. Doctrines of bad faith breach and material breach presently incorporate such a factor. *See, e.g.*, Seaman's Direct Buying Svc., Inc. v. Standard Oil Co., 686 P.2d 1158 (Cal. 1984) (imposing tort liability for bad faith denial of existence of contract); RESTATEMENT (SECOND) OF CONTRACTS §§ 241-242 (1981) (factors relating to materiality include the extent to which breaching party departs from standards of good faith).

104. Tort scholarship has increasingly focused on the importance of sequence and timing in shaping efficient liability rules. *See* George B. Assaf, *The Shape of Reaction Functions and the Efficiency of Liability Rules: A Correction*, 13 J. LEGAL STUD. 101 (1984); Richard A. Epstein, *The Temporal Dimension in Tort Law*, 53 U. CHI. L. REV. 1175 (1986) (examining "doctrinal choices that contain within them an implicit choice of proper temporal dimensions"); Grady, *supra* note 101; Steven Shavell, *Torts in Which Victim and Injurer Act Sequentially*, 26 J.L. & ECON. 589 (1983).

https://openscholarship.wustl.edu/law_lawreview/vol73/iss1/2

routinely drawn by judges and juries for centuries.[105] Such tests are particularly well suited to an infrequently litigated problem that arises in highly variant situations. Concurrent breach is such an area. I will not anticipate here the many possible permutations of concurrent breach resulting in a unitary harm that even my limited imagination can conjure up. As such cases arise they can be resolved in accordance with these principles as these principles take color and texture from the particular facts.

One recurring fact pattern, however, involves multiple unexcused delays under interlocking construction contracts. In this context, the sequence of the breaches, relative cost savings and the relative length of the delays should generally be decisive. If the overall project's completion is inevitably delayed by one party's late performance, to that extent subsequent contractors ought be excused from wasteful timely performance. When performances are sequential, the party that first causes the inevitable delay is the responsible party. With respect to concurrent performances, the party that delays most is the responsible party. By so placing the liability, all parties are generally encouraged to complete their work on the most efficient basis given their knowledge of the status of the scheduled completion of interlocking performances and their incremental completion costs for prompt performance. Where the relative cost savings of the defendants diverge significantly this factor ought to be taken into account. Misplacing liability on a party with only modest savings from nonperformance may result in socially wasteful performance.[106]

After describing how the one-party rule fits in the framework of existing doctrine and some of its policy implications, I conclude by applying the rule to a variety of fact situations suggested in the case law.

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105. A few random examples include: RESTATEMENT (SECOND) OF CONTRACTS §§ 241-242 (1981) (material breach); Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965) (unconscionability); Penn Centr. Transp. Co. v. New York City, 438 U.S. 104 (1978) (regulatory takings); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) (punitive damages under Alabama law); 17 U.S.C. § 107 (1988) (fair use of copyrighted material); *see also* Christopher R. Leslie, *Achieving Efficiency Through Collusion: A Market Failure Defense To Horizontal Price-Fixing*, 81 CAL. L. REV. 243, 286 (1993) ("In cutting through gray areas, bright line rules necessarily entail some over- and under-inclusion. Efficient behavior is inevitably deterred and sometimes punished. Bright line tests are merely rules of convenience which remove judges' discretion. Moreover, while line drawing is difficult and complex, courts engage in balancing all the time; that is what judges are supposed to do.") (citations omitted).

106. *See infra* note 123.

Washington University Open Scholarship

B. *Doctrinal Framework*

1. *Supervening Causes*

Impossibility, impracticability, frustration of purpose, and mistake are, under a variety of circumstances, grounds for relief from contractual obligation.[107] Section 261 of the *Restatement (Second) of Contracts* provides:

> Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or circumstances indicate the contrary.[108]

Certain events such as death,[109] acts of God, war, revolution, destruction of the subject matter of the contract,[110] and intervening government action prohibiting performance[111] are commonly considered events "the non-occurrence of which" are assumed by the parties. The common law approach is to determine whether there is a reason to allocate the risk of such an event to one party or the other. Perhaps the risk is expressly

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107. Good overviews of the excuse doctrines include: JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS §§ 112-116 (3d ed. 1990); GILMORE, *supra* note 33, at 35-90 (1974); 6 CORBIN, *supra* note 7, §§ 1320-1372. The leading American case in this area is probably still Transatlantic Fin. Corp. v. United States, 363 F.2d 312 (D.C. Cir. 1966) (costly detour around Cape of Good Hope because of closure of Suez Canal by war no excuse for carrier). The ancient English rule gave little scope for excuse. Parradine v. Jane, Aleyn 26, 82 Eng. Rep. 897 (K.B. 1647) (invasion and occupation of lands by Prince Rupert did not excuse tenant's obligation to pay rent). By the mid-nineteenth century, the English courts had retreated from this strict position. Taylor v. Caldwell, 3 B. & S. 826, 122 Eng. Rep. 309 (K.B. 1863) (destruction of music hall by fire excuses obligation to rent hall). Doctrines of excuse were expanded beyond physical impossibility of performance to frustration of purpose in the celebrated coronation cases. Krell v. Henry, 2 K.B. 740 (C.A. 1903); Chandler v. Webster, 1 K.B. 493 (1904).

108. RESTATEMENT (SECOND) OF CONTRACTS § 261 (1981). Similarly, with respect to the obligations under sale of goods contracts, the Uniform Commercial Code provides:

> Delay in delivery or non-delivery . . . is not a breach of [seller's] duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic government regulation or order whether or not it later proves to be invalid.

U.C.C. § 2-615(a) (1990); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 265 (1981) (regarding discharge by supervening frustration).

109. RESTATEMENT (SECOND) OF CONTRACTS § 262 (1981).

110. *Id.* § 263.

111. *Id.* § 264.

https://openscholarship.wustl.edu/law_lawreview/vol73/iss1/2

allocated in the contract itself. If not, perhaps custom or ordinary rules of contract interpretation would impliedly place the risk on one or another party.[112] Absent express or implied assignment of the risk by contract, courts may determine that one or another of the parties created the risk or could have avoided the risk and is therefore "at fault,"[113] or is a superior risk bearer for some other reason.[114] In the absence of any such bases for allocating the risk, the common law,[115] with rare exceptions,[116] treats such supervening events as simply terminating the remaining obligations of the contract.[117]

2. *Anticipatory Repudiation*

Related doctrine deals with the problem of fixing a remedy in cases of anticipatory breach or repudiation. If events transpire after repudiation but before final judgment that would have excused performance or lessened damages had there been no repudiation, then such events are taken into consideration in calculating damages. The leading statement of the principle, as in so many areas, is that of Judge Learned Hand:

> It is, indeed, one of the consequences of the doctrine of anticipatory breach that, if damages are assessed before the time of performance has expired, the court must take the chance of forecasting the future as best it can. That does

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112. Under the RESTATEMENT (SECOND) OF CONTRACTS § 261 (1981), performance is excused by the supervening event "unless the language or the circumstances indicate the contrary."

113. Under the RESTATEMENT (SECOND) OF CONTRACTS § 261 (1981), excuse is available only when "a party's performance is made impracticable *without his fault*" (emphasis added). *See also* 6 CORBIN, *supra* note 7, § 1329; Canadian Indus. Alcohol Co. v. Dunbar Molasses Co., 179 N.E. 383, 384 (N.Y. 1932) (Cardozo, C.J.) (no excuse where "[defendant] has wholly failed to relieve itself of the imputation of contributory fault").

114. Transatlantic Fin. Corp. v. United States, 363 F.2d 312 (D.C. Cir. 1966) (assigning risk of costly detour to carrier rather than shipper); *see also* Richard A. Posner & Andrew M. Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83 (1977).

115. Civil law systems are much more willing to adjust the obligations of contracts on account of unforeseen supervening events. RENE DAVID, ENGLISH LAW AND FRENCH LAW: A COMPARISON IN SUBSTANCE 120-22 (1980).

116. The most celebrated exception is Aluminum Co. of Am. v. Essex Group, Inc., 499 F. Supp. 53 (W.D. Pa. 1980), where a federal district court reformed the price terms of a long-term aluminum supply agreement in light of vast increases in energy prices.

117. *See* Andrew Kull, *Mistake, Frustration, and the Windfall Principle of Contract Remedies*, 43 HASTINGS L.J. 1 (1991) (arguing that "a wide range of cases arising in the various contexts of mutual mistake and frustration suggests that the characteristic response of [common law] courts is to confirm the parties in *statu quo*, granting relief to neither."); *see also* Oneal v. Colton Consol. School Dist. No. 306, 557 P.2d 11, 13 (Wash. Ct. App. 1976) (finding teacher's supervening illness excuses both teacher's obligation to teach and school board's obligation to pay salary and benefits).

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> not mean that it will ignore what has happened, when the period of performance has already expired. Damages never do more than restore the injured party to the position he would have been in, had the promisor performed; this is not a rule peculiar to anticipatory breach, though that is an instance. Hence it is always an answer, in that or other similar situations, to show that, had the contract continued, the promisee would not have been entitled to the performance, though he was apparently so entitled when the promisor disabled himself or repudiated.[118]

The principle that damages can be limited by subsequent supervening events is obviously related to the doctrine of excuse by supervening event. For example, in *Model Vending, Inc. v. Stanisci*,[119] the plaintiff leased vending machines to a bowling alley operator. The bowling alley operator breached the lease. The court found that the plaintiff's damages for lost rentals were limited to rentals that accrued up until the subsequent destruction of the bowling alley by fire. Had there been no breach, undoubtedly, the court on these same facts would have found the fire a supervening event that excused the bowling alley from further performance. Thus a supervening event that would have provided defendant an excuse for nonperformance becomes a limitation on plaintiff's remedy for breach.

An additional wrinkle bringing us closer to the *C&H* situation is added by a case such as *Massman Construction Co. v. City Council of Greenville*.[120] In *Massman*, the Fifth Circuit held that damages for delay in construction of a bridge were not available because of the failure of a

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118. New York Trust Co. v. Island Oil & Trans. Corp., 34 F.2d 653, 654 (2d Cir. 1929). The *Restatement (Second) of Contracts* similarly provides:

> Effect of Subsequent Events on Duty to Pay Damages
>
> (1) A party's duty to pay damages for total breach by repudiation is discharged if it appears after the breach that there would have been a total failure by the injured party to perform his return promise.
>
> (2) A party's duty to pay damages for total breach by repudiation is discharged if it appears after the breach that the duty that he repudiated would have been discharged by impracticability or frustration before any breach by non-performance.

RESTATEMENT (SECOND) OF CONTRACTS § 254 (1981). Other commonly cited authorities for this principle include: Hodes v. Hoffman Int'l Corp., 280 F. Supp. 252 (S.D.N.Y. 1968) (deeming seller's bankruptcy a supervening event limiting breaching buyer's damages); Fratelli Pantanella, S.A. v. Int'l Commercial Corp., 89 N.Y.S.2d 736 (Sup. Ct. 1949) (holding that government denial of export license constituted supervening event excusing seller from damages for seller's prior repudiation); Hochster v. De La Tour, 2 Ellis & Bl. 678, 118 Eng. Rep. 922 (Q.B. 1853). *But see* Papaioannou v. Scirocco Supper Club, Inc., 349 N.Y.S.2d 590, 591 (N.Y. App. Term 1973) (refusing to reduce employee's damage award for wrongful breach of employment contract on account of employee's supervening disability on ground that "no man shall take advantage of his own wrong").

119. 180 A.2d 393 (N.J. Super. Ct. Law Div. 1962).

120. 147 F.2d 925, 927 (5th Cir. 1945).

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state government to timely complete an adjoining road. Here the supervening event, failure of the state to complete the road, while outside the control of both parties, directly burdened the plaintiff, yet the court held the event limited the defendant's liability for damages.

C. *Doctrinal Analysis of the One-Party Rule*

The "one-party rule" for allocating liability for concurrent breaches of contract is not controlled by the impossibility or repudiation cases. In *C&H*, for example, I should not be understood to suggest that Sun's obligations under its contract are terminated by the intervening breach of Halter as the doctrines of excuse generally provide or that Sun's delays amount to a repudiation of its obligations. Nevertheless, the "one-party rule" can reside comfortably within this set of doctrines. With respect to each defendant, courts can continue to apply the "substantial factor" test for determining liability and measure the scope of liability with reference to each individual contract. It is only a small step further (and in no way inconsistent with the case law) to hold that another party's unexcused breach of contract *may be* an event the nonoccurrence of which was a basic assumption of the parties and the occurrence of which operates to frustrate the principal purpose of the contract and limit the damages available on account of breach.

In the absence of express conditions in the contract, ordinarily the parties assume that contractually bound third parties will render the interlocking performances essential to achieve the purposes of the contract. Absent special circumstances suggesting otherwise, it is fair to assign the risk of unanticipated third-party breach of another essential contract to promisee rather than promisor. Promisee, not promisor, after all is the party who formed the contractual arrangement with the third party. Nor (again, absent special circumstances) is there any reason to attribute fault or superior risk bearing or risk avoidance to either party with respect to a third-party breach.[121] Accordingly, the doctrine excusing breach on account of supervening event seems to extend easily to cover such situations.

The only special gloss is the sharp definition of that contingency so as to avoid the specter of mutual exculpation. Frustration arising by another's breach should only be recognized when the other party's breach is more serious than that of the defendant asserting excuse. Because excuse is

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121. 6 CORBIN, *supra* note 7, § 1329 at 346 ("[Impossibility] does not excuse a promisor from his contractual duty if he himself wilfully brought it about, or if he could have foreseen and avoided it by the exercise of reasonable diligence and efficiency."); *see also supra* note 113 and accompanying text.

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available only to the party with the lesser breach, mutual exculpation and resulting failure to compensate is not available.

Even this special gloss is consistent with supervening event doctrine, which in determining whether excuse should be available places heavy emphasis on the magnitude of the change in circumstances and the centrality of the assumed nonoccurrence of the putative supervening event to the contractual relationship.[122]

D. *Policy Analysis of the One-Party Rule*

1. *Avoids Flaws of Joint Liability*

The one-party rule avoids most of the pitfalls of joint liability. Complex rules of contribution do not need to be worked out. The complex strategic implications of joint liability rules become moot. The one-party rule allows courts to enforce traditional remedial limitations on contract recovery. Because each defendant's liability is bottomed only on its own contract, ordinary expectancy damages, subject to the well-understood and well-developed certainty, foreseeability and mitigation doctrines, are readily applicable.

Moreover, the one-party rule lessens the risk of economic waste associated with compelling performance that will be of no value to the plaintiff because of the other defendant's breach. In fixing liability on the party who commits the graver breach, both parties are given a proper incentive to perform, or, at least, to commit the lesser rather than the greater breach.

To return a moment to *C&H*, if Sun and Halter are both running late in completing their respective segments of the tug-barge, the whole liability will lie on the party who finishes last. Under this scenario, at no point does either party have an incentive (other than the unobjectionable one of cost savings that exceed C&H's damages) to engage in harmful delay, as the costs of all delay will be visited upon the firm that delays most. On the other hand, neither party has any incentive to engage in costly but futile

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122. MURRAY, *supra* note 107, § 112 at 641-42 (3d ed. 1990). Professor Corbin wrote:

> As a general rule, every contractor must carry the risk of frustration of his hopes and expectations when subsequent events cause a decline in value of that for which he bargained. . . . In a comparatively small number of cases, it has been held that a contractor does not carry the risk of a catastrophic collapse of value. In such case it is found that the contractor did not in fact assume the risk and that the circumstances are so extraordinary that justice requires that he should not be compelled to carry it.

6 CORBIN, *supra* note 7, § 1328.

https://openscholarship.wustl.edu/law_lawreview/vol73/iss1/2

timely performance. Because each firm is strongly motivated to finish first, prompt-as-commercially-practicable performance, but not waste, is encouraged.[123]

2. Full Compensation

Furthermore, under the one-party rule, the plaintiff will receive full compensation from the party committing the more serious breach, subject only to an insolvency risk that plaintiff had full opportunity to evaluate in advance and accepted. And the defendant committing the more serious breach hardly has cause to complain, even if its breach is only slightly greater. After all, this defendant is only being compelled to pay damages that are the natural and foreseeable consequence of its own unexcused failure to perform. It is only being denied the windfall of excuse to which it had no entitlement.

3. A Few Pitfalls

The 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. While I acknowledge that this is not a trivial burden, it is far less complex than the task we commonly assign to tort juries of assessing comparative faults of plaintiff and defendants. The one-party rule demands a simple election of which defendant is the most responsible, not the assignment of specific percentages of liability amongst all the parties. I note further that, at least in construction delay cases, the question of which party delayed more seems readily susceptible of judicial

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123. An important qualification to this analysis is the special case where the aggregate of Sun and Halter's savings from late performance exceeds C&H's damages, but neither party's savings alone exceeds C&H's damages discounted by the probability of that defendant being held liable. Put another way, the objective of minimizing total social costs may require breach, but each defendant's internal profit maximization function may require performance if that defendant bears all damages and the damages exceed the cost of performance to it. The efficient rule under these circumstances allocates damages in proportion to each defendant's cost savings. In the imagined world of zero transaction costs the two defendants would bargain around the one-party rule and achieve the efficient result by jointly breaching and sharing the damages. Indeed the clarity and stringency of the one-party rule may facilitate such Coasean bargains even in the special case where the one-party rule fails to achieve efficient results. Ayres & Gertner, *supra* note 10; *see also supra* note 15 and accompanying text. Moreover, cost savings from delayed performance are apt to be difficult to determine in many cases. Since such allocation is unnecessary to achieve efficient results in most cases, may introduce perverse economic incentives in others, and is generally cumbersome to administer, I do not suggest that it should be the general procedure. *See* discussion of hypothetical apportioned liability rule *supra* notes 92-98 and accompanying text. Nevertheless, if a court is confronted with a clear example of this special case, allocation by cost savings is a plausible response.

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determination.

A further complication is accounting for prior settlements. If plaintiff settles first with the more responsible party and then loses the litigation against the less responsible party, obviously plaintiff receives no more than the settlement amount. If plaintiff settles with the less responsible party and then prevails against the more responsible party, can it collect the full amount of his damages and retain the prior settlement also?[124] Or are the damages reduced by the amount of the settlement? Because the one-party rule is based on the presumption that all the liability should rest on the more responsible party, I suggest that judgment should be rendered only for the reduced amount and the settling defendant should retain a right of reimbursement or indemnification against the more responsible party. Such a rule might carry the added benefit of encouraging settlements, if a good faith settling defendant could obtain protection from indemnification claims that a losing litigant could not. But this result, while generally consistent with the rights of settling defendants with rights of indemnity in tort,[125] and supported by the logic of the one-party rule itself, is not supported by

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124. The court in L. R. Foy Constr. Co. v. Fidelity & Deposit Co. of Md., Civ. A. No. 86-2136, 1988 U.S. Dist. LEXIS 2842 (D. Kan. Mar. 14, 1988), allowed a partial *pro tanto* set-off in this situation, notwithstanding its application of the traditional rule of no joint and several liability in contract cases.

125. Such a rule would be consistent with older doctrines of tort-indemnity, pursuant to which courts permitted one joint tortfeasor to recover monies paid to the plaintiff on account of joint injury from another more culpable joint tortfeasor, without first extinguishing the plaintiff's claim completely. *Compare* RESTATEMENT (SECOND) OF TORTS § 886B (1977) (indemnity) *with id.* § 886A (contribution). Judge Learned Hand wrote:

> Such cases may perhaps be accounted for as lenient exceptions to the doctrine that there can be no contribution between joint tortfeasors, for indemnity is only an extreme form of contribution. When both are liable to the same person for a single joint wrong, and contribution *stricti juris* is impossible, the temptation is strong if the faults differ greatly in gravity, to throw the whole loss on the more guilty of the two.

Slattery v. Marra Bros. Inc., 186 F.2d 134, 138 (2d Cir.), *cert. denied*, 341 U.S. 915 (1951). The introduction of contribution and comparative fault has greatly reduced the importance of tort indemnity. *See* RESTATEMENT (SECOND) OF TORTS § 886B cmts. l & m (1977) (forecasting the decline of indemnity doctrines). The one-party rule advocated in this Article, however, revives the forces driving the development of tort-indemnity in concurrent breach cases.

Although contribution in favor of settling parties is generally unavailable in tort absent extinction of plaintiff's claim, *id.* § 886A(2) & cmt. f, the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), in an apparent effort to foster settlements, permits settling parties to retain contribution rights against other "potentially responsible parties." 42 U.S.C. § 9613(f)(3)(B) (1988). Consistent with the text of the statute, some courts have limited the scope of this provision to settlements that involve a government party. *See, e.g.*, Amland Properties Corp. v. Aluminum Co. of Am., 808 F. Supp. 1187, 1197-99 (D.N.J. 1992), *aff'd*, 31 F.3d 1170 (3d Cir. 1994); *see also supra* note 50.

https://openscholarship.wustl.edu/law_lawreview/vol73/iss1/2

contract precedent, and there may be difficulties in administering such a rule and accounting for settlements.

Of course the one-party rule has other negative features as well. For example, what of the case of two defendants between whom the factfinder cannot determine which is more responsible? I assume by the lack of reported cases raising this scenario that it is an unlikely one, that concurrent breach causing a unitary harm is rare enough, and that when it happens one can usually assign greater responsibility to one or another party. Certainly when the nature of the breach is delayed performance rather than nonperformance it should generally be possible to compare the amount of delay occasioned by each party. But in the rare instance where it is not possible, liability apportioned equally seems the most plausible alternative consistent with the goal of compensating injured plaintiffs and deterring breach.[126]

The one-party rule also raises a possibility of inconsistent verdicts. Under modern permissive joinder rules and third-party defendant practice,[127] it should usually be possible to adjudicate all the parties' rights and liabilities in a single proceeding. In those cases where it is not (as, for example, where the contracts have inconsistent forum selection clauses), a plaintiff's judgment obtained under the one-party rule in one proceeding should preclude plaintiff from collecting against a second defendant in a later proceeding.[128] Plaintiff, however, would bear the risk in proceeding separately of losing both times on inconsistent findings with respect to which defendant is more responsible. Plaintiffs, of course, can largely prevent this outcome by proceeding against all defendants in a single action, but this may not always be feasible.

Finally, while the one-party rule reduces opportunities for strategic behavior compared to joint and several liability or a rule permitting mutual exculpation of defendants, it does not eliminate such opportunities. If a

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126. Compare the discussion of Employers Insurance of Wausau v. Suwanee River Spa Lines, Inc., 866 F.2d 752 (5th Cir. 1989), *infra* text accompanying notes 136-37.

127. *See, e.g.*, FED. R. CIV. P. 13(h) (joinder of additional parties), 14 (third party practice), 18 (joinder of claims and remedies), 19 (joinder of persons needed for just adjudication), 20 (permissive joinder of parties), & 21 (misjoinder and nonjoinder of parties) (1994).

128. This should be true simply as a matter of contract damage theory. If plaintiff has already been fully compensated for its harm, it cannot show damages in its claim against the second defendant. Even if this were not so, presumably courts would not (and should not) permit plaintiff double recoveries obtained through inconsistent litigation positions, either through application of collateral estoppel doctrines, *see* RESTATEMENT (SECOND) OF JUDGMENTS § 29 (1982), and FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE § 11.25 (4th ed. 1992), or through equitable judicial estoppel principles.

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judgment against one of the defendants is less collectible (given insolvency or jurisdictional or practical collection problems), collusion among litigants is a risk.

One possibility is for defendants to collude in placing the liability on the "weaker" defendant. Since the plaintiff's judgment against the weaker defendant is worth less, if the more responsible stronger defendant can somehow compensate the weaker defendant in a way that is invisible to or uncontrollable by the legal system, it might induce the weaker defendant to "take a dive." This scenario raises difficult coordination problems. A device must be found for compensating the weaker defendant for allowing judgment to be taken against it. Of course, the plaintiff has every incentive to resist this strategy, and there can be no guarantee among the defendants that the litigation against the stronger defendant will not result in a plaintiff's judgment in any event. Moreover, the strategy can easily backfire. If the collusion is detected, the stronger defendant is setting itself up for possible "bad-faith" tort claims.

A more likely scenario is for the plaintiff and the weaker defendant to collude in placing the liability on the less responsible stronger defendant. Coordination is easier here, for the plaintiff can effectively guarantee the weaker defendant that, if it cooperates, the plaintiff will not take judgment against it. And we do observe such alliances taking place in tort litigation, especially where there is joint and several liability. Of course, given the winner-take-all aspect of the one-party rule, there is less incentive to engage in this behavior than under joint and several liability. Plaintiff runs a serious risk of losing in the litigation against the stronger defendant if plaintiff must prove not only that the stronger party breached the contract, but also that as between it and the weaker defendant, it was more responsible for the plaintiff's harm. Accordingly, plaintiff might well receive no more than its "sweetheart settlement" from the weaker defendant. As the relative responsibility of the stronger party and the collection risk associated with the weaker party increase, this strategy may nevertheless become attractive.

While the one-party rule is therefore flawed, its flaws appear to manifest themselves only in particular variants of an already unusual problem. The flaws of the alternatives, joint and several liability, apportioned liability, and mutual exculpation, manifest themselves whenever the issue of concurrent breach arises.

https://openscholarship.wustl.edu/law_lawreview/vol73/iss1/2

VII. CONCLUSION: APPLYING THE ONE-PARTY RULE

I conclude by showing how I might apply the one-party rule to a variety of stylized fact situations drawn from selected concurrent breach cases. These hypothetical applications of the rule are provided only to illustrate how one might go about ascertaining which of several defendants is the responsible one. I wish to emphasize that I have not done an in-depth study of the records of the cases from which these hypotheticals are drawn. These cases were not litigated with the one-party rule in mind and so the records are likely insufficiently developed to reach a definitive conclusion in any event. Although I realize that other factors may be relevant (or even decisive) in particular cases, I limit the analysis here to the following factors:[129]

1. The timing of the breaches.
2. The relative gravity of the breaches.
3. The relative size of the contracts.
4. The relative culpability of the breaching parties.
5. The relative harm avoidance costs of the parties.
6. The relative cost savings of the breaching parties from nonperformance.

A. C&H Sugar Co. v. Sun Ship, Inc.[130]

The facts of this case are set forth above.[131] Halter is the more responsible party. Halter's performance was due first and so its lateness constituted the first breach. Not only did Halter breach first, but also it was responsible for the longer delay, ultimately not completing its work until three months after Sun had finished. Halter's longer delay suggests that prompt performance would have been more burdensome for it and that, therefore, it realized greater savings from delay. The two contracts were of comparable size and there is no evidence of bad faith on the part of either defendant or any reason to suspect that either defendant could have avoided the plaintiff's harm without the other's performance. Holding Sun liable in this case creates perverse economic incentives. Assume Sun knows of Halter's breach, and that there will be no tug until July 1982. Unless

129. *See supra* notes 102-06 and accompanying text.

130. 794 F.2d 1433 (9th Cir. 1986), *amended and reh'g denied,* 811 F.2d 1264, *cert. denied,* 484 U.S. 871 (1987).

131. *See supra* text accompanying notes 16-21.

Washington University Open Scholarship

excused, Sun nevertheless must complete a useless barge on time, presumably at significantly increased cost, or suffer liquidated damages at the rate of $17,000 per day. Rushing to complete the barge on time may mean disruption of production schedules for other ships, overtime and additional materials costs, and other economic losses. Sun should be forced by its promise to bear such costs only to the extent that C&H receives a gain from prompt performance that exceeds the amount of such losses. To impose such costs on Sun without any resulting gain to C&H amounts to economic waste.

B. Northern Petrochemical Co. v. Thorsen & Thorshov, Inc.[132]

The facts of this case are set out above.[133] The architect's failure to perform its design contract in workmanlike manner occurred first and predestined expensive rehabilitative work. The magnitude of the defects in performance by both architect and contractor appear equally substantial in light of each party's contractual obligation. The contracts are of equal scope but the value of the services under the construction contract were likely greater than under the architect's agreement. Neither breach appears to have been deliberate or malicious nor does either breach seem calculated to capture specific cost savings. Both parties were in a position to minimize further harm by noting the defects in the other's performance in a timely fashion, but neither party did so. The architect had explicit supervisory obligations over the contractor, but not vice versa. Under these circumstances it seems most plausible to find the architect the more responsible party.

C. Alabama Football, Inc. v. Greenwood[134]

L.C. Greenwood, a professional football player, signed a three-year employment contract with the Birmingham franchise of the World Football League. Both the team and the league were start-up enterprises with serious financial problems, though those of the Birmingham team manifested themselves more quickly. After Birmingham's first season, suppliers began pressuring the team, and the league terminated the franchise agreement, wrongfully in the team's view. Greenwood then repudiated his obligations under his employment agreement and continued working for the NFL's

132. 211 N.W. 2d 159 (Minn. 1973).
133. *See supra* text accompanying notes 34-37.
134. 452 F. Supp. 1191 (W.D. Pa. 1978).

https://openscholarship.wustl.edu/law_lawreview/vol73/iss1/2

Pittsburgh Steelers. The combination of the team's weak financial condition, its suppliers' actions, the league's termination of the franchise agreement, and Greenwood's repudiation resulted in the Birmingham team's failure as a business.

The league's prior breach of the franchise agreement should provide an excuse for Greenwood's repudiation. The timing of the breaches suggests that the most efficient course was for Mr. Greenwood to repudiate. Certainly compelling Mr. Greenwood to sit out the coming football season on the chance that the Birmingham team might survive the league's purported termination seems socially wasteful. While both breaches amounted to total breaches in the sense that both the league and Mr. Greenwood expressed an intention to permanently withhold all future performances on substantially unperformed agreements, the franchise agreement was more central to the enterprise and of substantially larger scope and value. Moreover, the league seems likely to be in a position to minimize the harm to the team; Mr. Greenwood could only minimize the harm to himself by obtaining alternative employment. The league may have realized cost savings by terminating the Birmingham franchise; Greenwood did not.

D. Ingersoll Milling Machine Co. v. M/V *Bodena*[135]

The plaintiff, Ingersoll Milling, manufactured in the United States specialized industrial equipment valued at $2 million for a motor-car company in Korea, Hyundai International, Inc. J.E. Bernard & Co. served as the freight forwarding agent for the equipment; Taiwan International Line, Ltd., the time-charterer of the M/V *Bodena*, was the carrier.

Taiwan International orally agreed with Ingersoll Milling to ship the equipment stowed below deck. Bernard agreed to handle the documentation for the shipment on behalf of Ingersoll Milling, including the obtaining of "clean" bills of lading. Taiwan International breached its oral agreement by stowing the Ingersoll Milling cargo on deck. Bernard breached its obligation to obtain clean bills of lading by accepting bills from Taiwan International noting "on deck" stowage. The cargo was seriously damaged en route to Korea by exposure to the elements resulting from on-deck stowage.

Taiwan International is the more responsible party here. The scope and nature of the performance Taiwan owed Ingersoll was much greater and

135. 829 F.2d 293 (2d Cir. 1987).

Washington University Open Scholarship

more directly responsible for Ingersoll's harm than Bernard's ministerial role. Subsequent to the concurrent breaches, only Taiwan, not Bernard, could have mitigated Ingersoll's damages by taking measures in transit to protect the goods from storm damage. Although Bernard might have had a last chance to prevent the harm by properly inspecting and rejecting the nonconforming bills, the facts suggested that the boat had (literally) already sailed. Bernard's breach seems entirely inadvertent, Taiwan's knowing and deliberate and perhaps calculated to achieve specific cost savings by increasing the vessel's carrying capacity.

E. Employers Insurance of Wausau v. Suwanee River Spa Lines, Inc.[136]

I include this case brief, lest I be accused of avoiding the possibility of difficult applications of the one-party rule. The *Oxy Producer* was an integrated tug-barge freighter designed for Occidental Petroleum Corporation for the purpose of hauling superphosphoric acid to the Soviet Union. The tug-barge sank in high seas off the Azores when the linkage between the tug and barge failed. The trial court found that the cause of the failure was improper mating of the vessels. Hvide Shipping, Inc. was the supervisor of the design and construction of the vessel; Avondale Shipyards, Inc., the shipbuilder. Avondale performed the improper mating under the supervision of Hvide.

Both firms were expert and heavily engaged in this major project. Either could have and should have spotted the flaw. Both apparently acted inadvertently rather than consciously seeking cost savings. And there seems little basis for asserting that efficiency concerns are best met by placing the liability on one party or the other. Custom in the industry does not seem to allocate the responsibility specifically to one of the parties. Perhaps if the parties had litigated the case with the one-party rule in mind, facts would have been developed to suggest which firm was more responsible. But on the face of the appellate opinion, the most plausible response to this case may well be to simply allocate responsibility fifty-fifty.[137]

VIII. AN AFTERWORD

I hope to have persuaded you that another's "more responsible" intervening breach of contract ought to cut off liability for breach of

136. 866 F.2d 752 (5th Cir. 1989).
137. *See supra* text accompanying note 126.

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contract, rather than result in joint and several liability for both breaching parties. I will burden you now with two larger observations this work has suggested to me, without attempting to prove or even affirm my own unqualified belief in them.

First, one can rely on and incrementally expand doctrine to reach sensible results. I do not find it merely incidental to my argument that the body of impracticability doctrine developed in the contract case law leads to a result that at least in my view is superior on a policy basis to the result generated by borrowing of doctrine developed in case law outside contracts. "It is revolting to have no better reason for a rule of law than so it was laid down in the time of Henry IV."[138] But in thinking through what rule of law makes sense under the circumstances, due consideration of long-standing doctrine developed in the area is almost always valuable and sometimes sufficient to lead one to the correct result.

Second, the line between contract and tort remains meaningful, largely because of the different nature of the harms each body of law addresses. The differences between economic harms and personal injuries call for different remedial schemes. If so, the unification of contract and tort law into the general theory of civil liability once envisioned and predicted by Professor Gilmore,[139] has, thankfully, eluded us.

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138. OLIVER WENDELL HOLMES, JR., THE PATH OF THE LAW, *in* COLLECTED LEGAL PAPERS 167, 187 (1920).

139. *See supra* note 33.

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