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FOR APPROVAL

**UNIFORM  
APPORTIONMENT OF TORT RESPONSIBILITY ACT**

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**NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS**

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MEETING IN ITS ONE-HUNDRED-AND-ELEVENTH YEAR  
TUCSON, ARIZONA

JULY 26 - AUGUST 2, 2002

**UNIFORM  
APPORTIONMENT OF TORT RESPONSIBILITY ACT**

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By

NATIONAL CONFERENCE OF COMMISSIONERS  
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# UNIFORM APPORTIONMENT OF TORT RESPONSIBILITY ACT

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# **UNIFORM APPORTIONMENT OF TORT RESPONSIBILITY ACT**

## **Prefatory Note**

Apportionment of tort responsibility is a familiar one to the National Conference of Commissioners on Uniform State Laws. In fact, the Conference has promulgated three acts dealing with this subject. The first, denominated the Uniform Contribution Among Joint Tortfeasors Act, was completed in 1939. That Act was superseded by a revised version bearing the same name in 1955. A third version – the Uniform Comparative Fault – Act was promulgated in 1977, but, unlike the 1955 version, it did not supersede its predecessor. Because approximately one-third of the states in the 1970s had not adopted comparative fault, it was decided to leave the Uniform Contribution Among Joint Tortfeasors Act (1955) for possible use by those jurisdictions. However, it was recommended that the other jurisdictions embracing comparative fault adopt the newly promulgated Uniform Comparative Fault Act. Given the state of the law today, this Act is intended to replace both the Uniform Contribution Among Joint Tortfeasors Act (1955) and the Uniform Comparative Fault Act (1977).

## **THE EARLY COMMON LAW AND SUBSEQUENT DEVELOPMENTS**

The Conference's work in this area reflects the somewhat disparate approaches that have brought us to this juncture. At early common law, there was no occasion to apportion tort responsibility, for at least two reasons. First, contributory negligence of the plaintiff was a complete bar and apportionment of responsibility between a plaintiff and defendant was not part of the process. The plaintiff either recovered all of his or her damages or recovered nothing. Second, the rules of procedure would not permit joinder in most tort cases involving multiple tortfeasors unless the defendants had acted in concert. Each tortfeasor had to be sued separately. Moreover, the common law dictated that a claimant prove how much damages each tortfeasor had caused, unless, again, the defendants had acted in concert, the latter situation being the only one giving rise to joint and several liability. The combination of the early rules of procedure and the common law resulted in a situation where a claimant was rarely able to recover against multiple tortfeasors, at least where there were independent acts resulting in indivisible harm. This, of course, has changed in many respects.

Initially, courts broadened the scope of procedural joinder from those situations where multiple defendants had acted in concert to include situations where the defendants were alleged to have a common duty, although, strictly speaking, were not acting in concert. As early as the 1920s, and certainly by World War II, some courts had begun to allow joinder of multiple tortfeasors even though they had engaged in independent acts that did not involve a common duty or had not acted in concert. This move was reflected in and encouraged through the newly adopted Federal Rules of Civil Procedure which became effective in 1938. Once joinder was more freely permitted, the issue of joint and

several liability was bound to be brought into greater relief.

After World War II, it did not take long for the courts to recognize the injustice of the common law rule that required a claimant to prove which defendant caused what damages in those cases where independent acts resulted in indivisible harm. The result of such recognition was to subject multiple tortfeasors to the rule of joint and several liability, not only in concerted action and common duty cases, but in all cases where the conduct of multiple defendants resulted in indivisible harm. In addition, once joint and several liability was more generally recognized, it was only a short time before the courts were petitioned to permit contribution among this newly defined group of joint tortfeasors, something that also had not been allowed earlier when joint and several liability was so restricted.<sup>1</sup> It was largely the refusal of the courts to accede to this request that led to the need for legislation to rectify what one torts scholar observed to be an “obvious lack of sense and justice in a rule that permitted the entire burden of a loss, for which two defendants were equally, unintentionally responsible, to be shouldered onto one alone, according to the accident of a successful levy of execution, the existence of liability insurance, the plaintiff’s whim or spite, or his collusion with the other wrongdoer, while the latter goes scot free.”<sup>2</sup> However, the legislation that ensued varied in many respects.

#### THE LEGISLATIVE RESPONSE AND UNIFORM ACTS

As the developments described above unfolded, the Uniform Laws Conference responded by drafting a uniform law dealing with contribution among joint tortfeasors. This act, which as previously stated was promulgated in 1939, did not attempt to determine when multiple tortfeasors would be held jointly and severally liable. Rather, it took the position that, once multiple tortfeasors were determined to be jointly and severally liable, certain rights of contribution existed, and it addressed how those rights were effected. The Act also attempted to resolve related issues, such as the effect of settlements among those tortfeasors who were subject to joint and several liability. Although this Act was enacted by a number of states, it was so extensively amended in the process that the goal of uniformity was not achieved. Part of the problem was that the 1939 Act contained elaborate provisions addressing procedures for joinder. In addition, it came under criticism with regard to the provisions dealing with the legal effect of a settlement by one joint tortfeasor upon the rights of the plaintiff and the rights of the

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<sup>1</sup>Although the “no right of contribution” rule originated in early English cases involving defendants acting in concert to commit intentional torts, ultimately it was applied more generally in the United States to include all cases of joint and several liability, even where independent, although concurrent, negligence had contributed to a single result. William L. Prosser, *Law of Torts*, 273-74 (3<sup>rd</sup> ed. 1964).

<sup>2</sup>*Id.* at 275.

nonsettling tortfeasors. In the meantime, many states independently passed other legislation that also proved to be problematic. This unsatisfactory situation caused the Conference to take up the subject again in the 1950s.

The Uniform Contribution Among Joint Tortfeasors Act was revised, and ultimately adopted by the Conference in 1955, to bring it into line with what was considered to be more just and equitable solutions to the legal problems arising out of a rule of joint and several liability. However, the rule at that time with regard to contributory negligence acting as a complete bar was still in effect in the overwhelming majority of jurisdictions in the United States. Nonetheless, beginning in the 1960s, and clearly by the 1970s, most American jurisdictions abandoned contributory negligence as a complete bar and were proceeding to adopt some type of comparative fault system. At first, the focus was on comparing a plaintiff's fault with that of the defendant's, but it was only a matter of time before the courts and legislatures began to address the problem of comparing fault among all the parties in situations involving two or more defendants. Since the 1955 Act called for contribution to be based upon a *pro rata* determination, this, among other issues associated with the comparative fault movement, again led the Conference to review the legal situation with regard to contribution among joint tortfeasors. This review culminated in the bifurcated approach contained in the current Conference Acts on the subject.

In 1977 the Conference promulgated the Uniform Comparative Fault Act, which gave the states a choice. If all the parties to the litigation were to be evaluated in terms of fault and that fault compared in determining responsibility for damages, the 1977 act provided a complete replacement for the Uniform Contribution Among Joint Tortfeasors Act (1955). On the other hand, it was decided not to amend the Uniform Contribution Act, but to leave that act for possible use by states that did not adopt the principle of comparative fault.

Suffice it say at this point, the Uniform Comparative Fault Act did not alter the basic rule of joint and several liability where joint tortfeasors acted in concert, breached a common duty, or otherwise were legally responsible for indivisible harm. Although fault was to be compared among all the parties responsible for the harm and assessed accordingly on a percentage basis, joint and several liability was retained. Contribution, however, was to be based upon the percentages assessed among the defendants, not on a *pro rata* basis as was the case under the Uniform Contribution Among Joint Tortfeasors Act (1955). Among other features not contained in the 1955 Act, the Comparative Fault Act provided for reallocation of responsibility in cases where one or more joint tortfeasors were unable to satisfy the damage award assessed and attempted to deal with the set off problem in cases involving counterclaims under the pure comparative fault system. Although the 1977 drafting effort by the Conference, which was chaired by Professor John Wade, provided a state-of-the-art product at that time, much has changed in the interim, particularly with regard to apportionment of tort responsibility. In the

main, what are these changes?

#### DEVELOPMENTS SINCE THE UNIFORM COMPARATIVE FAULT ACT (1977)

In 1977 approximately two-thirds of the states had adopted comparative fault. Today, all but five jurisdictions<sup>3</sup> in the United States have adopted some type of comparative fault system. Of the 46 states that have adopted some form of comparative responsibility, 10 have been by judicial decision and 36 by legislation. Although seven of the 10 states in which comparative responsibility has been *judicially* adopted have opted for a pure scheme (in which a plaintiff who is far more negligent than the defendant may still recover), only six of the 36 states in which comparative responsibility has been *legislatively* adopted have chosen the pure system. A majority of the states that have adopted a comparative responsibility scheme, i.e., 33 out of 46, have chosen a modified scheme. Two-thirds of these--22 out of 33--have chosen a 51 percent threshold, while the other 11 have adopted a 50 percent threshold. Three states have replaced their original pure schemes with modified schemes, and none has gone the other way. Thus, the clear trend has been toward the modified approach, which is in contrast to the Uniform Comparative Fault Act, which employs a pure comparative fault scheme. Moreover, only two states adopted the 1977 Uniform Act, and one of these subsequently repealed it in favor of a modified system.

If this were the end of the story, perhaps there would be no need for the Conference to reenter this field of law, but the story does not end here. Once the great majority of jurisdictions adopted some type of comparative fault system that compared the fault not only of plaintiffs with defendants, but also compared fault among defendants in a multiple tortfeasor situation, inevitably another question arose. In particular, defendants began to question the justice of joint and several liability when it is determined that each defendant in a multiple tortfeasor situation is only responsible for causing a certain percentage of the harm to the claimant. The question became even more acute when defendants pointed out that in many of these cases the claimant had also been assigned a certain percentage of responsibility for the harm that had resulted. Thus, it was not long before legislatures, and even courts, were persuaded to revisit the issue of apportioning responsibility among joint tortfeasors. In doing so, further changes have occurred since 1977.

Many jurisdictions employing comparative fault today have been persuaded to severely limit joint and several liability. In some ways, one might observe that the law in this area has come full circle, as it were, and has returned in large part to the position of the early common law. As a general rule, where defendants have acted in concert, joint and several liability has been retained. In addition, some jurisdictions have retained joint

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<sup>3</sup>The five jurisdictions that have not adopted a comparative responsibility system are the states of Alabama, Maryland, North Carolina, and Virginia and the District of Columbia.

and several liability where multiple defendants have engaged in conduct which results in environmental harm. Beyond these two situations, however, many jurisdictions today in some manner have abolished joint and several liability and, thereby, any necessity to recognize rights of contribution among joint tortfeasors. How has this trend manifested itself?

In those jurisdictions that have not completely abolished joint and several liability outside of the two areas mentioned above (acting in concert and environmental harm), a number of different approaches have been taken to limit joint and several liability. For example, some jurisdictions still permit joint and several liability for economic loss but do not permit it for non-economic loss. Other jurisdictions do not allow a tortfeasor that is determined to be less than a certain percentage at fault, say 20 percentage, to be held jointly and severally liable with other tortfeasors whose individual responsibility is determined to be in excess of that percentage. Still another variation is seen in those jurisdictions that, although initially prohibiting joint and several liability, permit claimants to show that a judgment entered severally against multiple defendants is not capable of being satisfied on that basis. Upon such as showing, a court may be permitted to reallocate the non-paying judgment debtor's obligation to others adjudged responsible for a portion of the harm suffered.<sup>4</sup>

The reallocation process may take one of several forms. For example, it may merely reallocate the non-paying judgment debtor's portion among the remaining judgment debtors. Or, it may take into account any contributory fault on the part of the plaintiff so that the allocation of responsibility itself is revised to take into account the relatively greater responsibility of the claimant once the responsibility of a non-paying judgment debtor is eliminated from the equation.

In addition to the above, other issues have become more acute. For example, the issue of comparing intentional conduct with lesser forms of culpability has received much more attention since the Uniform Comparative Fault Act was promulgated. This includes the possibility of comparing any negligence on the part of a claimant with intentionally caused harm by a defendant, as well as comparing the intentional conduct of one joint tortfeasor with the negligent conduct of other joint tortfeasors. The occasion for these issues to be raised has increased as the courts have expanded tort liability in areas involving an actor's obligation to protect a tort victim from the intentional tortious acts of

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<sup>4</sup>This does not relieve the non-paying judgment debtor from liability to the claimant for the amount not paid, nor does it alter any rights of the paying judgment debtors to seek reimbursement from the nonpaying debtor. However, the claimant may not collect more than the total sum assessed for his or her damages, nor is the non-paying judgment debtor ultimately liable for more than the amount originally assessed as his or her share.



a third party.<sup>5</sup> Present legislation dealing with apportionment of tort responsibility does not always address these issues and, where that is the case, court decisions have been anything but unanimous in resolving the problems. In any event, the apportionment area is much more problematic than it was 25 years ago when the Conference last addressed the subject.

## APPORTIONING TORT RESPONSIBILITY IN THIS ACT

The drafters of the 1977 Comparative Fault Act structured the scope of the Act by defining “fault.” In doing so, the definition had to account for the clear cases in which the Act should apply, strict liability as well as negligence, and also for the fact that in some jurisdictions these causes of action may be disguised by other language, such as breach of warranty.

A second problem was presented by intentional torts. In 1977 the conventional wisdom was that intentional torts and torts based on negligence were so different in kind or nature that they should not be compared. Although the Comparative Fault Act defined fault in a manner that, at least arguably, could include intentional torts, the comments noted that such conduct had not been compared theretofore. Since 1977, several courts have held that in some circumstances contributory negligence may be a defense to an intentional tort. However, it also seems clear that in other circumstances an allegation of contributory negligence would not be permitted as a defense to an intentional tort, e.g., provocative dress in a rape case. Yet, where contributory negligence is a defense, the comparative fault principles should apply. In addition, courts are now more receptive to comparing intentional conduct with that of negligent conduct in multiple tortfeasor situations.

A third problem is that, in some jurisdictions, contributory negligence is not a defense to strict liability. Nonetheless, even if the plaintiff’s fault is not relevant, there is no reason why comparative fault principles should not apply in order to apportion responsibility between multiple defendants regardless of the basis on which they are subject to liability.

To address these problems, one possible alternative would be to draft the current version without attempting to define “fault” generally. This could be done by merely referring to the types of cases that the Act governs, namely (1) those actions seeking damages for personal injury or harm to property that are based on negligence or strict

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<sup>5</sup>For example, it has become common for owners and occupiers of commercial office buildings, shopping centers, transportation sites, hotels, motels and similar facilities, be they private or public in nature, to be subjected to liability for carelessly failing to protect invitees and others on their premises from reasonably foreseeable intentional torts committed by third parties frequenting the areas.

liability and (2) those types of actions to which contributory fault is a legal defense in whole or part. Although this approach would still require that the Act define “contributory fault,” that is more easily accomplished than trying to accommodate all the variations that exist among the various jurisdictions regarding what is meant by “fault” on the part of defendants. In fact, this is the approach taken in this Act in that the scope of the Act is built into the operative language of Section 3 along the lines just indicated. It has the advantage of assuring that negligence and strict liability claims are within the Act, while also making the Act applicable to any other *class of cases* in which a claimant’s fault may be relevant (even if, under the particular facts of the case *sub judice*, the claimant is not at fault). Thus, this draft makes it clear that the Act applies to the core of tort law – negligence and strict liability – while attempting to make it applicable to the less common cases where it also should be applicable.

Finally, there is one other very important issue that had to be resolved. Should the fault of a person that is not a party to the lawsuit be taken into account in attributing responsibility for the claimant’s injury or harm? At one point, the draft took into account the conduct of a “nonparty at fault” but ultimately abandoned it because of the problems in doing so.

First, who is it that should qualify as a “nonparty at fault”? Anyone over whom the court lacks jurisdiction? Or, does it matter that jurisdiction is lacking because the person is, for example, a foreign diplomat or an immune governmental or other entity, as compared to someone upon whom service cannot be perfected because the person is out of the country or whose location is unknown. Second, to qualify as a “nonparty at fault”, does the person have to be identifiable and, if so, in what manner or particulars? Third, a number of the committee members thought that the absence and nonparticipation of such a person, tended to skew the trial process unfairly. Finally, it was noted that a defendant always has the right to seek contribution from any legally responsible person whose fault also contributed to the claimant’s injury or harm and that this right, in most cases, will permit a defendant to join someone who was not already a defendant. Consequently, it was decided to compare fault only among those that are actual parties to the litigation, with one exception. That exception involves someone that would have been a party to the litigation had the claimant not released the person from liability for the injury or harm the person caused to the claimant. Thus, when the Act speaks of a party or parties, it is referring to the actual parties to the litigation and not merely to someone who was involved in the accident that led to the lawsuit. In short, parties and any released person are the only persons whose fault is taken into account in comparing and attributing fault in a case that is governed by the Act.

1                   **UNIFORM APPORTIONMENT OF TORT RESPONSIBILITY ACT**

2

3                   **SECTION 1. SHORT TITLE.** This [Act] may be cited as the Uniform

4 Apportionment of Tort Responsibility Act.

5

6                   **SECTION 2. DEFINITIONS.** In this [Act]:

7                   (1) “Contributory fault” includes contributory negligence, misuse of a product,

8 unreasonable failure to avoid or mitigate harm, and assumption of risk unless the risk is

9 expressly assumed in a legally enforceable release or similar agreement.

10                  (2) "Person" means an individual, corporation, business trust, estate, trust,

11 partnership, limited liability company, association, joint venture, government;

12 governmental subdivision, agency, or instrumentality; public corporation, or any other

13 legal or commercial entity.

14                  (3) “Released person” means a person that would be liable for damages to a

15 claimant for personal injury or harm to property if the person had not been discharged

16 from liability under Section 8 [or 9].

17                  (4) “Responsibility” means, with respect to a claim for damages for personal

18 injury or harm to property, the legal consequences of an act or omission that is the basis

19 for liability or a defense in whole or part.

20                                   **Reporter’s Notes**

21                   As indicated in the prefatory note, no attempt is made in the Act to define “fault,”

22 other than in the term “contributory fault.” This recognizes that the chances of achieving

23 any degree of uniformity on this topic is very problematic, given the different approaches

1 that exist today among the jurisdictions adopting comparative fault. This avoids  
2 arguments over whether strict liability in products cases is a type of “fault,” especially  
3 when some jurisdictions still base liability in this area, either exclusively or alternatively,  
4 on contract law rather than tort law. It also avoids the issue of deciding for all those who  
5 consider adopting the Act whether intentional conduct should be compared with other  
6 forms of fault and, if so, in what situations. The existing approaches taken in this area are  
7 anything but uniform. Thus, an adopting state is free to do as it wishes on these issues.  
8

9 On the other hand, it is desirable to achieve as much uniformity as possible on the  
10 issue of the type of fault that should be attributed to a claimant. This is facilitated by the  
11 fact that a claimant is never barred from recovering on a theory of strict liability, at least  
12 in tort. In fact, there is much more consensus in the United States on what is meant by  
13 “fault” when it comes to a claimant’s conduct. That is reflected in the definition of  
14 “contributory fault” in that a claimant will be barred, either partially or wholly, only when  
15 the claimant could have reasonably avoided injury or harm by altering his or her conduct.  
16 This is true whether avoidance could reasonably have been achieved prior to the initial  
17 injury or harm or thereafter. Yet, the definition of “contributory fault” is not exclusive  
18 and a jurisdiction is free to decide whether a claimant should ever be barred in any  
19 manner when engaged in intentional wrongdoing.  
20

21 The definition of “person” is adopted from the standard language found in the  
22 NCCUSL Drafting Manual.  
23

24 The fault of a person who is not a party to the lawsuit because of a release has to be  
25 taken into account in assessing responsibility among those who remain subject to liability,  
26 as well as that of the claimant. There are two types of released persons. Those who  
27 receive a release from the claimant under Section 8 and those who are immune from tort  
28 liability under workers’ compensation laws but nonetheless have a lien or right of  
29 subrogation when an employee has been injured on the job and has a tort action against a  
30 third party. In this situation, the employer or workers’ compensation insurer is treated  
31 under Section 9 just as if a release had been obtained from the employee when  
32 compensation benefits are paid to that employee.  
33

34 The definition of “responsibility” is an attempt to employ one term throughout the Act  
35 that is neutral on the issue regarding the type of conduct for which liability may be  
36 imposed and which should be compared under the Act. As indicated at the outset of this  
37 comment, an adopting jurisdiction is still free to determine, through judicial decisions or  
38 other legislation, which types of conduct should be compared, be it negligent or  
39 intentional, or that which gives rise to strict liability.  
40  
41

1                   **SECTION 3. EFFECT OF CONTRIBUTORY FAULT.**

2                   (a) Except as otherwise provided in subsection (b), in an action seeking damages  
3                   for personal injury or harm to property based on negligence or strict liability, or on a  
4                   claim for which the claimant may be subject to a defense, in whole or part, based on  
5                   contributory fault, any contributory fault chargeable to the claimant diminishes the  
6                   amount that the claimant otherwise would be entitled to recover as compensatory  
7                   damages for the injury or harm by the percentage of responsibility assigned to the  
8                   claimant pursuant to Section 4.

9                   (b) If the claimant's contributory fault is [equal to or] greater than the combined  
10                  responsibility of all other parties and released persons whose responsibility is determined  
11                  to have caused personal injury to, or harm to property of, the claimant may not recover  
12                  any damages.

13                  (c) In a jury trial, the court shall instruct the jury regarding the legal effect of its  
14                  findings, made pursuant to Section 4, on a claimant's right to recover damages under  
15                  subsection (b).

16                                   **Reporter's Notes**

17                  The Uniform Comparative Fault Act (1977) employed a pure comparative fault  
18                  system. Under that system, an at-fault claimant would be permitted to recover from any  
19                  other party whose fault also caused injury to the claimant, no matter that the claimant  
20                  might be overwhelmingly at fault. For example, if a claimant were found to be 95 percent  
21                  at fault and the defendant only 5 percent at fault, the claimant would be entitled to recover  
22                  5 percent of his or her damages from the defendant. Although it might have appeared that  
23                  most jurisdictions would eventually adopt such a system in 1977, that did not prove to be  
24                  the case. In fact, of those adopting some type of comparative fault, approximately two-  
25                  thirds have chosen what is referred to as a modified comparative fault system.

26                                   Under a modified comparative fault system, depending on how one defines the  
27

1 threshold, at some point a claimant would be completely barred from recovering any  
2 damages, just as under the earlier contributory negligence rule that developed at common  
3 law. However, if a claimant's fault falls short of the threshold, although the claimant  
4 would be entitled to recover damages, those damages would be reduced by the percentage  
5 of fault assessed against the claimant. At the Annual Meeting of NCCUSL in the summer  
6 of 2001, a sense of the house motion was made to indicate that the Conference preferred a  
7 modified rather than a pure comparative fault system. The vote, reflecting what had  
8 already transpired in the various jurisdictions, passed by a margin of 62 to 28.  
9 Consequently, the Drafting Committee has chosen to adopt a modified comparative fault  
10 system. However, in doing so, adopting jurisdictions are given a choice as to the type of  
11 modified plan, as indicated by the brackets in subsection (b).  
12

13 With regard to modified plans, there are two basic types of thresholds. One bars a  
14 claimant from recovering any damages if the claimant's share of fault equals that of the  
15 defendant(s); the other bars a claimant only if the claimant's share is greater than that of  
16 the defendant(s). The current draft provides a choice for those that adopt the modified  
17 plan presented in this Section. If a jurisdiction were to choose an "equal to" threshold,  
18 i.e., where a claimant who is 50 percent or more at fault is precluded from recovering any  
19 damages, the brackets in subsection (b) should be deleted. However, if the jurisdiction  
20 were to choose a "greater than" threshold, i.e., where a claimant would only be precluded  
21 from recovering anything if the claimant's fault exceeded that of the others causing the  
22 injury or harm, then both the brackets and words within should be deleted.  
23

24 As explained in the last paragraph of the prefatory note, actual parties to the lawsuit  
25 and any released person are the only persons whose fault is taken into account in  
26 comparing and attributing fault in a case that is governed by the Act. Consequently,  
27 under subsection (b), a claimant's fault is compared to the combined fault of all the other  
28 parties and any released person whose fault is determined also to have caused the injury  
29 or harm rather than comparing it to the fault of each person who also caused the injury or  
30 harm. Thus, where there is more than one defendant at fault, a claimant may recover part  
31 of the damages suffered even though the claimant's fault may equal or exceed that of a  
32 particular defendant as long as the claimant's fault does not equal or exceed the combined  
33 fault of all defendants and released persons. However, if the adopting jurisdiction prefers  
34 to bar a claimant from recovering against any person whose fault is less than or equal to  
35 that of the claimant, the following language should be substituted in subsection (b):  
36

37 (b) If the claimant's fault is [equal to or] greater than the responsibility of any  
38 other person whose responsibility is determined to have caused the injury or harm, the  
39 claimant is precluded from recovering any damages from that person.  
40

41 If a jurisdiction, however, prefers a pure comparative fault system, such a system  
42 would be compatible with the remainder of this Act. The jurisdiction can adopt a pure  
43 plan by deleting the introductory clause in the first line of subsection (a) of Section 3

1 (that refers to subsection (b)), so that subsection (a) would read:

2  
3 (a) In an action seeking damages for personal injury or harm to property based on  
4 negligence or strict liability or on a cause of action in which a claimant may be  
5 subject to a defense, in whole or part, based on contributory fault, any contributory  
6 fault chargeable to the claimant diminishes the amount that may be awarded as  
7 compensatory damages for the injury or harm in proportion to the percentage of fault  
8 assigned to the claimant pursuant to Section 4.  
9

10 Having deleted the introductory clause in subsection (a), subsection (b) should also be  
11 deleted. The jurisdiction would then have adopted a pure comparative fault system, one  
12 that is entirely compatible with the other provisions in the Act.  
13

14 It should also be noted that the language of this Section, or for that matter any other  
15 Section, does not speak to the types of tort cases that should be governed by the Act.  
16 Presumably the courts would construe the Act to apply to the typical bodily injury,  
17 wrongful death, and property damage cases and probably to cases involving negligent  
18 infliction of emotional distress. Beyond that, each jurisdiction is free to decide if the Act  
19 should apply to defamation, negligent misrepresentation, nuisance, and other types of  
20 torts, including those that require proof of intentional harm. In the same vein, the courts  
21 will have to decide when, if at all, it would be appropriate to compare intentionally  
22 harmful or consciously indifferent conduct with that involving less egregious forms of  
23 culpability, such as negligence and strict liability.  
24

25 Finally, subsection (c) is included so that a jury will not mistakenly conclude that it is  
26 awarding some damages to a claimant when, in fact, the particular jury findings would  
27 preclude any award at all. This type of mistake is most likely to occur in a jurisdiction  
28 that adopts a modified system employing an “equal to” threshold, but it could also occur  
29 in a “greater than” jurisdiction.  
30  
31

#### 32 **SECTION 4. FINDING DAMAGES; ATTRIBUTION OF RESPONSIBILITY.**

33 (a) In an action to recover damages for personal injury or harm to property  
34 involving the responsibility of more than one party or released person, the court shall  
35 instruct the jury to answer special interrogatories or, if there is no jury, make findings:

36 (1) stating the amount of damages that a claimant would be entitled to recover  
37 if any contributory fault were disregarded;

1 (2) stating, as to each claim, the percentage of the total responsibility of all the  
2 parties and released persons attributed to each claimant, defendant, and released person  
3 that caused the injury or harm;

4 (3) regarding whether any of the parties or released persons acted in concert or  
5 with an intent to cause personal injury or harm to property; and

6 (4) any other issue of fact fairly raised by the evidence which is necessary to  
7 make a determination under Section 5 or enter judgment under Section 6.

8 (b) In determining percentages of responsibility, the trier of fact shall consider  
9 both the nature of the conduct of each party and released person determined to be  
10 responsible and the extent of the causal relation between the conduct and the damages  
11 claimed.

12 (c) The court shall determine the extent to which the responsibility of one party,  
13 which is based on the act or omission of another party, warrants that the parties be treated  
14 as a single party for the purpose of submitting interrogatories to the jury or making  
15 findings under subsection (a).

### 16 **Reporter's Notes**

17  
18 The basic structure of this Section is taken from the 1977 Act. The only persons  
19 whose fault is considered are those parties to the action and any persons who have  
20 secured a release from a claimant under Section 8 or who are deemed to have received  
21 such a release under Section 9.

22  
23 In keeping with the usual practices of the Conference, the Act does not adopt any  
24 rules of procedure that determine court practices. Each jurisdiction should follow its own  
25 rules of procedure and court practices in fashioning and submitting the special  
26 interrogatories that are contemplated under this section. In addition, such practices as  
27 bifurcating trials between matters of liability and damages are left to local rules and  
28 practices.



1 Subsection (a)(2), when speaking of the total responsibility of all the parties,  
2 contemplates that the total responsibility should always equal 100 percent. Consequently,  
3 the trier of fact must allocate fault in such a manner that, when so allocated, the sum of  
4 the percentages will total 100 percent.

5  
6 Fact findings under subsection (a)(3) may be necessary to determine whether a joint  
7 and several judgment should be entered under Section 6 or whether the judgment may  
8 only be entered on a several liability basis.

9  
10 Because degrees of fault, whether based on negligence or strict liability, and  
11 proximity of causation are inextricably mixed, in determining the relative responsibility  
12 of the parties, the fact-finder will also give consideration to the relative closeness of the  
13 causal relationship of the liability producing conduct of those responsible and the harm  
14 that was caused. Thus, subsection (b) states an axiom of basic tort law that is applicable  
15 even were the Act silent on the subject. The fact that the Act explicitly states this rule,  
16 however, does not mean that the trier of fact is to make subfindings as to the relationship.  
17 Rather, one finding is to be made with regard to the fault of each party and released  
18 person and that finding is to be expressed as a percentage under subsection (a)(2). As  
19 indicated above, the total of the percentages found must equal 100 percent.

20  
21 Subsection (c) permits the court to treat an employer and employee as one party where  
22 the employer is subject to liability only because of the doctrine of *respondeat superior*.  
23 Other situations that may deserve the same treatment involve vicarious liability under  
24 partnership and other business arrangements, such as a joint enterprise, as well as other  
25 principal and agent relationships. The court may also find it appropriate to treat an owner  
26 and permissive operator of a motor vehicle under “owner consent” statutes as one party.  
27 A manufacturer and retailer of a product would also be possible candidates for such  
28 unitary treatment.

29  
30  
31 **SECTION 5. DETERMINING DAMAGE AWARD; REALLOCATION OF**  
32 **UNCOLLECTIBLE SHARE.**

33 (a) After the trier of fact has made findings pursuant to Section 4, the court shall  
34 determine, in accordance with the percentages of responsibility found, the monetary  
35 amount of any award of damages to a claimant, the amount of the several share for which  
36 each party found liable is responsible, and any amount attributable to a released person.

37 (b) After the court has made its determinations pursuant to subsection (a), a

1 claimant, no later than the time permitted for filing a motion for new trial, may move the  
2 court to determine whether all or part of the amount of the several share for which a party  
3 is liable will not be reasonably collectible. If the court determines based on a  
4 preponderance of the evidence that the party's share will not be reasonably collectible, the  
5 court shall make findings reallocating the uncollectible share severally to the other  
6 parties, including the claimant, and any released person. Reallocation must be made in  
7 the proportion that each party's and released person's respective percentage of  
8 responsibility bears to the total of the percentages of responsibility attributed to the  
9 parties, including the claimant, and any released person but not including the percentage  
10 being reallocated.

11 (c) A party whose liability is reallocated remains liable to a claimant for any  
12 additional share of responsibility allocated to the claimant. A party, to which an  
13 additional share of responsibility is allocated and that discharges that share, has a right of  
14 reimbursement from the party from which the share was reallocated. Upon motion, the  
15 court shall declare the rights and obligations in the judgment entered under Section 6.

16 (d) Reallocation does not make a released person liable for any reallocated share  
17 of responsibility unless the release or other agreement so provides.

18 (e) If a motion for reallocation is filed, any party may conduct discovery regarding  
19 any issue relevant to the motion.

#### 20 **Reporter's Notes**

21 This Section begins by requiring the court to calculate the amount of damages, if any,  
22 a claimant is entitled to recover and the several amount for which each defendant found  
23 liable is responsible. The court is given this responsibility regardless of the fact that the

1 percentage findings under Section 4 may be made by a jury. Normally, the calculations  
2 will be done for the court by the prevailing party and presented to the court for approval  
3 as part of the judgment to be entered under Section 6.  
4

5 In a case involving a released person, whether under Section 8 or 9, the court is also  
6 required under subsection (a) to calculate the amount of money the released person would  
7 have been liable to pay the claimant had there not been a release. The relevance of this  
8 latter calculation is explained in the comment to Section 9. In the event that Section 9 is  
9 not adopted, either as a part of this Act or as an amendment to the workers' compensation  
10 statute, there would be no need to have the court calculate the amount for which a  
11 released person would have been responsible, but there is no harm in having the court do  
12 so. In fact, it may help the parties understand exactly how much money the claimant  
13 would have been entitled to collect from the released person, had there been no release, in  
14 comparison with the amount that the released person actually paid the claimant.  
15

16 Subsection (b) adopts a reallocation provision, as did the 1977 Uniform Act, in the  
17 event that one or more defendants is financially unable to discharge his or her several  
18 share of responsibility. However, any attempt to invoke the reallocation process must be  
19 perfected before the time that a motion for a new trial must be filed in the adopting  
20 jurisdiction.  
21

22 In adopting a reallocation plan, the Drafting Committee decided that it should not  
23 attempt to define when a several share "will not be reasonably collectible" but that the  
24 issue should be left to the courts in the adopting jurisdiction. For example, a court may  
25 decide that, although a judgment might be collectable, it would not be reasonable to do so  
26 if the cost would equal or exceed the proceeds. Also, the Act does not resolve whether  
27 the issue of collect ability should be limited to the situation where the responsible party is  
28 not able to pay because of financial inability or should also include a situation where a  
29 responsible party is partially immune or cannot be legally compelled to discharge the  
30 obligation. An example of the former might include an entity, such as a charity, whose  
31 liability is limited to a certain maximum amount. The latter might include an entity that  
32 is liable only to the extent it carries or is required to carry liability insurance. In any  
33 event, the Section clearly places the burden of proof on the claimant. In that regard,  
34 subsection (e) makes it clear that discovery is available under the general rules of civil  
35 procedure in the adopting state to aid the claimant in discharging this burden. Any party  
36 that is subject to reallocation also may have an interest in conducting discovery on the  
37 issue.  
38

39 It is also worth mentioning that the Act does not prevent a party from bringing a  
40 declaratory judgment action to determine, for example, whether a liability insurance  
41 carrier is legally obligated to pay all or part of any judgment that may be entered. How  
42 and in what manner such an action should proceed is governed by existing rules and other  
43 law in the adopting jurisdiction.

1 Subsection (b) makes it clear that any reallocated shares among two or more  
2 tortfeasors initially must be assigned on a several basis. Whether or not tortfeasors  
3 assessed additional shares under any reallocation ultimately are liable for these shares on  
4 a joint and several basis depends on Section 6.  
5

6 Although it is possible that there could be more litigation, and therefore greater  
7 transaction costs, under a reallocation provision such as is contained in this Section in  
8 comparison with a system that employs joint and several liability, the Drafting Committee  
9 is not convinced that there would be a significant difference. For example, presently it is  
10 common for a claimant in an uninsured motorist case to obtain an affidavit showing the  
11 financial condition of the uninsured motorist. Such affidavits also are obtained in other  
12 situations where the financial condition of a tortfeasor is relevant. The Drafting  
13 Committee believes that in the large majority of cases this type of proof, or at most a  
14 deposition, will suffice to show when a party is insolvent and unable to satisfy the party's  
15 several responsibility under this Act. Nonetheless, even if the transaction costs are  
16 greater, there is an overriding reason why a reallocation system as contained in this Act is  
17 preferable to a system of joint and several liability.  
18

19 There are two major differences between a system of joint and several liability and  
20 reallocation under this Section. Under joint and several liability, the claimant and any  
21 released person do not share any additional burden when a joint tortfeasor is called upon  
22 to pay more than the tortfeasor's fair share. This Section, as explained below, makes the  
23 claimant and any settling person share part of the burden of an insolvent tortfeasor. In  
24 addition, joint and several liability permits a claimant to decide whether a particular joint  
25 tortfeasor has to pay more than the tortfeasor's assigned share and thereby shift the  
26 burden to a joint tortfeasor who pays more than the tortfeasor's assigned share of  
27 responsibility to seek contribution. The reallocation system in this Section places the  
28 burden on the claimant to satisfy a court that one among several joint tortfeasors should  
29 have to pay more than originally assessed, thereby restricting the claimant's right to  
30 choose how the judgment may be satisfied. In deciding which system is best, one should  
31 keep in mind these differences.  
32

33 Reallocation, if granted by the court under this Section, must be among all the parties,  
34 including the claimant, if at fault, and any released person. Where the claimant is also at  
35 fault, this method produces a different result than that under the rule of joint and several  
36 liability. For example, if the fault findings in the original litigation showed that the  
37 claimant was 20 percent at fault and that two defendants were each 40 percent at fault, by  
38 reallocating one of the defendant's percentage share of liability, the claimant would only  
39 be able to recover 66.7 percent of his or her damages from the lone solvent defendant  
40 rather than 80 percent, which would be the case if the defendants were originally  
41 adjudged jointly and severally liable.  
42

43 In other words, under a reallocation system that takes a claimant's fault into account,

1 the claimant ends up with a larger share of fault to shoulder than would be the case under  
2 the rule of joint and several liability. Consider the following hypothetical: Assume that  
3 P, a claimant, sustains \$100,000 in damages and is found to be 40 percent at fault and  
4 defendants A and B are found to be 20 and 40 percent at fault, respectively. If  
5 reallocation is sought because defendant A is insolvent, A's 20 percent share of \$20,000  
6 would be divided among the claimant P and defendant B equally since each was 40  
7 percent at fault with the following result. P's right to recover, which was originally  
8 \$60,000, would be reduced to \$50,000 ( $\$60,000 - (\frac{1}{2} \times \$20,000 = \$10,000)$ ) and B's  
9 responsibility would be increased to \$50,000 ( $\$40,000 + (\frac{1}{2} \times \$20,000 = \$10,000)$ ). Thus,  
10 P's share of responsibility will have been increased from 40 percent to 50 percent while  
11 defendant B's share will have been increased from 40 percent to 50 percent.  
12

13 If there is reallocation, the claimant, as well as any other party to whom an insolvent  
14 party's share of responsibility is shifted, always has the right to seek reimbursement  
15 against the insolvent party, if the opportunity presents itself, to collect any reallocated  
16 share. This right of reimbursement is specifically recognized in subsection (c) of this  
17 Section and assures that the insolvent party still remains liable for the share originally  
18 assessed and, if called upon at some time in the future when financially able to do so,  
19 will have to reimburse those who have been assessed any additional amount through the  
20 reallocation process. So, in the last hypothetical above, if it turns out that some time in  
21 the future defendant A is financially able to discharge his obligation, P is entitled to  
22 recover \$10,000 from A. Defendant B also has the same right.  
23

24 On the other hand, if the claimant is not adjudged at fault, reallocation is limited to  
25 the defendants. For example, assume P is found to have suffered \$200,000 in damages  
26 caused by defendants A, B, and C, who are found to be 20, 40, and 40 percent at fault,  
27 respectively. If defendant B is insolvent, defendant A would be responsible for one-third  
28 of B's share (\$26,640) and defendant C would be responsible for two-thirds (\$53,360).  
29 Thus, after reallocation, A would be liable for a total of \$66,640 and C would be liable  
30 for a total of \$133,360, permitting P to collect the full award of \$200,000. As between A,  
31 B, and C, A has the right to seek reimbursement from B in the amount of \$26,640 and C  
32 has the right to seek reimbursement from B in the amount of \$53,360.  
33

34 Taking into account the fault of a released person for purposes of allocating or  
35 reallocating responsibility to the actual parties does not in fact make the released party  
36 legally liable to pay any damages. In other words, a released party is not made liable for  
37 anything by virtue of being initially assigned a percentage of fault or an additional  
38 percentage upon reallocation. Once released, always released. Subsection (d) makes this  
39 clear.  
40

41 To understand the effect of a release under the reallocation system, in the last  
42 hypothetical above assume that A, instead of being a party defendant, had been released  
43 by P. If that were the case, although A was found to be 20 percent at fault, P would not

1 be able to collect the \$40,000 (.20 x \$200,000) that otherwise would have been owed by  
2 A to P. Moreover, when reallocation takes place because B is insolvent and A's share is  
3 increased to \$66,640, P still will not be able to collect anything from A. However, if it  
4 later develops that B is solvent, P will be able to seek the amount reallocated (\$26,640)  
5 from B to A from B. Thus, a released person also participates in any reallocation for  
6 purposes of determining how much P can collect from the nonreleased solvent  
7 defendants, but that does not make the released person liable for the reallocated amount  
8 unless the release provides otherwise.  
9

10  
11 **SECTION 6. ENTERING JUDGMENT.** After determining an award of damages  
12 to a claimant and the amount of the several share, including any reallocated share, for  
13 which each party found liable is responsible, the court shall enter judgment severally  
14 against each party adjudged liable, except in the following situations:

15 (1) If two or more parties adjudged liable acted in concert or with an intent to  
16 cause personal injury to, or harm to property of, the claimant, the court shall enter  
17 judgment jointly and severally against the parties for their joint share.

18 (2) If a party is adjudged liable for failing to prevent another party from  
19 intentionally causing personal injury to, or harm to property of, the claimant, the court  
20 shall enter judgment jointly and severally against the parties for their combined shares of  
21 responsibility.

22 (3) If a party is adjudged liable for the act or omission of another party under  
23 Section 4(c), the court shall enter judgment jointly and severally against the parties for  
24 their joint share.

25 (4) If a statute of this State, other than this [Act], so requires, the court shall enter  
26 judgment jointly and severally or otherwise conform the judgment to the statute.

## Reporter's Notes

The 1977 Uniform Act provided for a pure comparative fault system and retained joint and several liability. Regardless of whether a jurisdiction were to choose a pure comparative fault system or a modified system, this Section, save only for a few situations, provides for several liability as the general rule. Where parties act intentionally or in concert to harm another, joint and several liability is retained. These were the exceptions to several liability first recognized under the common law.

In addition, the Drafting Committee felt that joint and several liability should be retained where a defendant breaches a duty to protect another person from an intentional tort of a third party. An ever growing body of case law recognizes such a duty in a number of situations today, primarily with regard to the duties of commercial and similar occupiers of land. Owners and operators of hotels, office buildings, shopping centers, and transit facilities, to name but a few, have been held liable for failing to take reasonable precautions to protect invitees and others on their premises from foreseeable intentionally inflicted injuries by others. The Committee felt that the incentives imposed by such rules would be significantly undercut were liability to be apportioned on a several only basis. Nonetheless, several liability would still be the rule where the third party's conduct did not rise to the level of intentionally inflicted harm or such intentional conduct was not reasonably foreseeable. The same is true if the occupier or other person upon whom the duty is imposed is not at fault in failing to protect the person to whom the duty is owed.

As recognized in subsection (c) of Section 4, there are several situations involving vicarious and similar responsibility where a court may decide to treat two or more persons as one entity. In such cases, paragraph (3) of this Section dictates that judgment is to be entered jointly and severally against these persons.

The last exception to several liability recognizes that a number of states have passed legislation that imposes joint and several liability in the area of environmental harm. Thus, if the environmental protection legislation requires joint and several liability, there should be no conflict with this Act.

In adopting several liability as the general rule, the Drafting Committee is mindful that this approach may produce some inequitable situations if one or more joint tortfeasors are not able to satisfy the amount of the judgment entered against them. This is particularly true where a claimant is free from any fault, but it is also true even if the claimant is to some degree at fault in causing his or her own injury or harm. This inequity is address through a system of reallocation which is established in Section 5.

It is not contemplated that the Act will impact the lien laws regarding judgment creditors in an adopting jurisdiction. Nonetheless, an adopting jurisdiction may want to

1 examine such laws to determine if any amendments are necessary, particularly with  
2 regard to rights of judgment creditors created under the reallocation system established in  
3 Section 5. The same type of review also may be warranted with regard to the laws  
4 dealing with postjudgment interest.  
5  
6

7 **SECTION 7. RIGHT OF CONTRIBUTION AND INDEMNITY; THIRD-**  
8 **PARTY ACTION.**

9 (a) Except as otherwise provided in subsection (b), a party that is jointly and  
10 severally liable with one or more other parties under this [Act] has a right of contribution  
11 from another party for any amount the party pays in excess of the several amount for  
12 which the party is responsible. A party against which contribution is sought is not liable  
13 for more than the monetary amount of the party's several share of responsibility  
14 determined pursuant to Section 5.

15 (b) A party that is adjudged liable for the act or omission of another party under  
16 Section 6(3) has a right of indemnification from the other party.

17 (c) A party that is subject to liability for injury to, or harm to property of, a  
18 claimant under this [Act] has a right:

19 (1) to join a person that is also subject to liability to the claimant for all or part  
20 of the same injury or harm if the claimant has not sued the person; and

21 (2) to seek contribution or indemnity, whichever is appropriate, from another  
22 person whose liability is not determined in the proceeding in which the party is adjudged  
23 liable if the other person is responsible for all or part of the claimant's injury or harm.

24 (d) A claim for contribution or indemnity may be asserted in the original action or  
25 in a separate action.



## Reporter's Notes

The basic language in subsection (a) is taken from the 1977 Uniform Comparative Fault Act and would be applicable to situations under the Apportionment of Tort Responsibility Act where joint and several liability is preserved. See Section 6(1).

Subsection (b) recognizes the right of an employer, or any other person held liable purely on the basis of vicarious or similar responsibility, to seek indemnity from the person whose act or omission constituted the basis for imposing such responsibility.

Subsection (c) is designed to explicitly deal with the rights of a defendant in two situations which a court should recognize even if the Act did not speak to the matter. Rather than leave the matter to be divined by the courts, it probably is best to state these rights explicitly, if for no other reason than to preclude any argument that they have been preempted by virtue of the fact that the Act does not, were it to do so, expressly recognize that they should exist. First, since the Act only recognizes joint and several liability in a very limited number of situations where there are multiple persons who are responsible for injury to, or harm to property of, a claimant, only several liability will be imposed in the great majority of these types of cases. Second, the Act does not take account of fault on the part of anyone except those who are actual parties to the litigation and any released person. Third, it may happen that a claimant chooses not to sue all of the potential defendants in a particular case. In this event, a defendant may well want to file a third-party complaint to against a person that has been omitted by the claimant, thereby making the person a party to the proceedings. The defendant (third-party plaintiff) would want to do so in any case where it would be possible to reduce the defendant's (third-party plaintiff's) exposure to liability to the claimant because the trier of fact may attribute some, or possibly all, of the responsibility for the claimant's injury or harm to the third-party defendant. Yet, since the defendants may only be adjudged severally liable, it could be argued, under the Federal Rules of Civil Procedure (see Rule 14) and any similar state rule, that the third-party defendant is not really *liable to* the defendant (third-party plaintiff) for part or all of the claimant's injury or harm. Rather, the third-party defendant is only *liable to* the claimant. Therefore, according to the argument, there would be no basis for the third-party action.

If this argument were to prevail, a claimant could pick and choose among potential defendants and, since the fault of a nonparty would not be considered by the trier of fact under this Act, the defendant or defendants actually sued by the claimant could be held liable for more of the injury or harm than the defendant or defendants actually caused. The most graphic illustration of this dilemma would occur where a claimant is free from fault and chooses to sue only one defendant when there are other persons who are also responsible for the claimant's injury or harm. In that situation, the lone defendant would end up bearing 100 percent of the responsibility.

1 To avoid the unfairness of this result, it was felt that the Act should expressly  
2 recognize the right of a defendant to bring a third-party action against any person who is  
3 also potentially responsible for all or part of the injury or harm that is the subject of the  
4 lawsuit brought by the claimant against one or more but less than all of those who caused  
5 the harm. This is what subsection (c)(1) does.

6  
7 Subsection (c)(2) addresses a related problem and that is the situation where neither  
8 the claimant, nor a defendant who seeks to file a third-party complaint, can obtain  
9 jurisdiction over someone who is responsible for all or part of the harm for which the  
10 claimant has sued the defendant. In this situation, presumably the trial would proceed  
11 against those who are amenable to process and their responsibility would be adjudicated.  
12 However, it is possible again, as explained above, for a defendant or defendants to be  
13 adjudged liable for more than the defendant or defendants caused. This so because the  
14 fault of a nonparty is not considered in a case governed by this Act. Therefore, any  
15 defendant in that situation should have a right to seek contribution or indemnity against  
16 any other person whose responsibility for the injury or harm was not determined in the  
17 proceeding against the defendant. Of course, the defendant would have the burden to  
18 establish that the person from whom contribution or indemnity is sought is also  
19 responsible for the injury or harm attributed the defendant and how much is owed to the  
20 defendant.

21  
22 It would also be possible in the last situation mentioned for the original claimant to  
23 pursue any person who was not a party to the first trial. This Act does not prevent such a  
24 suit, but neither does it attempt to resolve any of the legal issues that might arise in that  
25 situation.

26  
27 The present Section does not govern the situation under Section 5(b) where  
28 reallocation may occur. The rights of the parties to eventually recover from an insolvent  
29 party, who's share of responsibility has been reallocated, are explicitly preserved in  
30 Section 5(c).

### 31 32 33 **SECTION 8. EFFECT OF RELEASE.**

34  
35 (a) A release, covenant not to sue, covenant not to execute a judgment, or similar  
36 agreement by a claimant and person subject to liability discharges the person from  
37 liability to the claimant to the extent provided in the agreement and from liability for  
38 contribution to any other person subject to liability to the claimant for the same injury or  
39 harm. The agreement does not discharge any other person subject to liability upon the

1 same claim unless the agreement so provides.

2 (b) The amount of the claim of the releasing person under subsection (a) against  
3 other persons jointly and severally liable for the same injury or harm for which the  
4 released person would have been liable is reduced by the percentage of responsibility  
5 attributed to the released person pursuant to Section 4.

6 (c) Any claim for contribution or indemnity that a released person would have had  
7 against another person that would have been jointly and severally liable with the released  
8 person is extinguished by the release.

#### 9 **Reporter's Notes**

10  
11 This provision was contained in the Uniform Comparative Fault Act and, although  
12 rewritten here, no substantive change was made. Section 4 specifically contemplates that  
13 any releasing party's fault will be an issue in the continuing litigation between the  
14 claimant and nonreleasing parties. The effect of the release is determined by whatever  
15 share of responsibility is ultimately assessed against the releasing party. The nonreleasing  
16 parties are not responsible for that share.

17  
18 The released person is not only no longer subject to liability to the claimant but, by  
19 virtue of the release, is no longer subject to a claim of contribution by a person who is not  
20 released. By the same token, any claim that a released person would have had against  
21 another person who would have been jointly and severally liable with the released party is  
22 extinguished by the release.  
23

#### 24 **[SECTION 9. REDUCTION OF WORKERS' COMPENSATION LIEN AND** 25 **SUBROGATION RIGHT; NOTICE AND INTERVENTION.**

26 (a) If an employer or workers' compensation insurer asserts a lien or right of  
27 subrogation under [insert citation to workers' compensation statute that provides for an  
28 employer's or workers' compensation insurer's lien or right of subrogation for  
29 compensation benefits paid or payable to an employee when the employee has a tort

1 action for personal injury against a third party], the employer or insurer is deemed to have  
2 had its obligation to the employee for the compensation benefits paid or payable  
3 discharged under Section 8 as if the employer or insurer had received a release, covenant  
4 not to sue, or covenant not to execute a judgment from, or entered a similar agreement  
5 with, the employee. In such a case, any percentage of responsibility that the employer  
6 would have had for the employee's injury, were the employer not immune under the  
7 workers' compensation law, must be determined as that of a released person pursuant to  
8 Section 4 and the lien or right of subrogation is reduced by the monetary amount of the  
9 employer's percentage of responsibility, if any, in the employee's action against the third  
10 party.

11 (b) A party asserting that an employer's or workers' compensation insurer's lien  
12 or right of subrogation should be reduced under subsection (a) because of the employer's  
13 fault shall give notice to the employer or workers' compensation insurer. In that case, the  
14 employer or insurer may intervene in the employee's action for personal injury.]

15 **Legislative Note: If this section is not enacted as part of the Apportionment of Tort**  
16 **Responsibility Act but is enacted as an amendment to the workers' compensation statute, the**  
17 **cross references to Section 8 and to Section 4 in subsection (a) need to be reworded to accurately**  
18 **refer to the respective sections of this Act.**  
19

### 20 **Reporter's Notes**

21  
22 This Section implements a decision of the Drafting Committee to treat an employer's  
23 fault, when the employer is exercising a workers' compensation lien or subrogation right,  
24 as if the employer had obtained a release from the employee for the dollar amount of the  
25 percentage of fault of the employer that contributed to the employee's injury or harm.  
26

27 For example, assume that an employee is injured by X, another motorist, while the  
28 employee is driving a truck for her employer. The employee collects \$30,000 in workers'  
29 compensation benefits from her employer and then files a tort action for her personal  
30 injuries against X. In the trial of the tort action it is determined that X was 80 percent at

1 fault for failing to keep a proper lookout and the employer was 20 percent at fault in  
2 failing to properly maintain the brakes on the truck. In addition, the employee's total  
3 damages are assessed at \$100,000 in the tort action. Since the employer was 20 percent at  
4 fault, its share of responsibility is \$20,000. Thus, under the Act the lien or subrogation  
5 right arising from the payment of the compensation benefits is reduced by \$20,000,  
6 leaving only \$10,000 that may be recouped by the employer or its workers' compensation  
7 carrier from the \$80,000 to be paid by X to the employee. On the other hand, if the  
8 employer had not been at fault at all and the employee had been 20 percent at fault, the  
9 employer or its compensation carrier would be entitled to recoup the full \$30,000 in  
10 compensation benefits from the \$80,000 owed by X the employee.  
11

12 Changing the facts in the above hypothetical yet again, assume that the employer is 20  
13 percent, the employee is 10 percent, and X is 70 percent at fault. If the employee has  
14 received \$30,000 in compensation benefits and the tort damages are found to be  
15 \$100,000, the employer or its compensation carrier is entitled to recoup \$10,000 from the  
16 \$70,000 tort award against X, leaving the employee with a total of \$90,000 (\$30,000 in  
17 compensation benefits plus \$60,000 from the tort award), which is \$10,000 less than her  
18 full tort damages. In short, all those at fault bear some responsibility for the harm.  
19

20 The reason the Section is placed in brackets is because it would not be legally  
21 possible in some states to amend the workers' compensation statute in this manner.  
22 Rather, the amendment would have to be to the workers' compensation statute itself and  
23 not through collateral legislation such as this Act. Even if it were legally possible, a  
24 number of state legislative drafting offices have similar rules that prohibit such indirect  
25 methods of amending statutes. If either situation exists in an adopting state, Section 9  
26 will need to be deleted in this Act and incorporated into an amendment to the workers'  
27 compensation statute. Subsequent Sections of this Act would then need to be renumbered  
28 accordingly.  
29

30 **SECTION 10. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In  
31 applying and construing this Uniform Act, consideration must be given to the need to  
32 promote uniformity of the law with respect to its subject matter among States that enact  
33 it.  
34

1           **SECTION 11. SEVERABILITY CLAUSE.** If any provision of this [Act] or its  
2 application to any person or circumstance is held invalid, the invalidity does not affect  
3 other provisions or applications of this [Act] which can be given effect without the  
4 invalid provision or application, and to this end the provisions of this [Act] are severable.

5  
6           **SECTION 12. APPLICABILITY.** This [Act] applies to actions first filed on or  
7 after its effective date.

8  
9           **SECTION 13. EFFECTIVE DATE.** This [Act] takes effect on ....

10  
11           **SECTION 14. REPEALS.** The following acts and parts of acts are repealed:

12           (1) ....

13           (2) ....

14           (3) ....