

# state of the art

EXPLORING THE CHANGING FACE OF PRODUCT LIABILITY

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**IMPORTANT ISSUE:** *This case has consequences that affect several of Secret Wardle's practice groups.*

## Michigan Supreme Court Holds A Settling Defendant May Pursue An Action for Contribution Despite The 1995 Tort Reform Legislation's Abolition of Joint Liability

By Bruce A. Truex and John H. Cowley, Jr.

On March 8, 2005 the Michigan Supreme Court held that despite the 1995 Tort Reform Legislation's abolition of joint liability, a settling defendant's right to pursue a contribution action still exists under certain circumstances. *Gerling Konzern Allgemeine Versicherungs AG v. Lawson*, \_\_\_ Mich \_\_\_, \_\_\_ NW2d \_\_\_ (2005).

In *Gerling*, three vehicles were involved in an accident which caused injuries to two passengers in one car. The injured plaintiffs sued the owner of the second vehicle, the University of Michigan, but did not sue the owner or driver of the third vehicle, American Beauty and Lawson. The University's insurer, Gerling, reached a settlement with the plaintiffs prior to trial. After the settlement, Gerling filed a contribution action against American Beauty and Lawson pursuant to MCL 600.2925a-d.

The defendants in the contribution action moved for summary disposition arguing that the Tort Reform Acts of 1995 abrogated the contribution cause of action by eliminating joint and several liability in certain tort actions. The trial court denied defendant's motion for summary disposition. The Court of Appeals reversed the trial court holding that: 1) plaintiff's contribution action was barred as a result of the elimination of joint and several liability and 2) where liability is only several, each tortfeasor is required to pay only his percentage of fault.

The Supreme Court, in a 4 to 2 decision (one Justice concurred with the majority result and a portion of the majority reasoning), reversed the Court of Appeals and reinstated Gerling's contribution action against Lawson and American Beauty.

The court stated that the 1995 tort reform legislation rendered most claims for contribution unnecessary in personal injury accidents (as well as wrongful death and property claims). However, that did not mean that it precluded every type of contribution claim.

### SECRET WARDLE NOTES:

Just because a settling defendant may proceed with a contribution action does not mean that it will prevail. The settling defendant must still establish that the non-settling defendant is at fault in the accident; the degree of the non-settling defendant's fault; and that the settling defendant paid more than its pro rata share; and the non-settling tortfeasor paid less than its pro rata share of the entire liability. In making that determination the court will consider the fault of the settling defendant, non-settling defendant and non-party tortfeasors.

In deciding whether to settle a case a defendant must consider the likelihood of collecting a contribution judgment from the non-settling defendant. If the non-settling defendant has a high percentage of fault but limited insurance coverage or assets, it may be wiser to litigate the fault of the parties and apportion a high percentage of fault to the non-settling defendant than to obtain a large judgment that can't be collected.

This decision will also allow a "deep pocket" defendant to avoid the uncertainties of a jury verdict by settling the case for more than its pro rata share, thereby limiting its exposure with the possibility of obtaining repayment from non-settling tortfeasors. Where one of the tortfeasors has immunity from suit, it may

## CONTINUED...

Noting that a tortfeasor had a right to settle a claim and pursue contribution even before the 1995 legislation, the court held that the 1995 tort reform legislation preserved the right of a severally liable settling tortfeasor to bring an action for contribution. The court's decision was bolstered by the fact that the legislature did not repeal the contribution statute.

The right to contribution exists among non-intentional wrongdoers who share a common liability. Common liability exists among tortfeasors who are responsible for an accident which produces a single indivisible injury to a person or property or for the same wrongful death. Unless a severally liable tortfeasor shares a "common liability" with other tortfeasors, he has no right to contribution. A tortfeasor may seek contribution only if he has paid more than his share of the "common liability."

A settling tortfeasor is entitled to recover contribution from another tortfeasor if in addition to paying more than his pro rata share of the common liability the following circumstances exist:

- 1) The liability of the non-settling tortfeasor was extinguished by the settlement (he was released);
- 2) A reasonable effort was made to notify the non-settling tortfeasor of the pendency of the settlement negotiations;
- 3) The non-settling tortfeasor was given a reasonable opportunity to participate in the settlement negotiations;
- 4) The settlement was made in good faith.

be difficult for the settling defendant to recover a significant amount of contribution from the non-settling defendant. For example, in an action where the settling defendant and non-settling defendant were equally at fault and the plaintiff's employer was protected by the exclusive remedy of the workman's compensation statute, the employer's fault will be considered in determining whether the non-settling defendant paid less than its pro rata share. If the settling defendant and non-settling defendant were each 10% at fault and the employer was 80% at fault and the settling defendant paid \$100,000 to settle the case, the settling defendant's and non-settling defendant's pro rata shares would be \$10,000 each. Although the settling defendant paid \$90,000 more than its share, the non-settling defendant would only have to pay \$10,000 contribution.

A release or covenant not to sue given in good faith will discharge the person to whom it is given from all liability for contribution. Therefore, in minimal liability cases with the potential for a codefendant to file a contribution claim, consideration should be given to negotiating a modest settlement with the plaintiff. The settlement would extinguish all future claims for contribution brought by any codefendants.

## CONTACT US

### **Farmington Hills**

30903 Northwestern Highway, P.O. Box 3040  
Farmington Hills, MI 48333-3040  
Tel: 248-851-9500 Fax: 248-851-2158

### **Mt. Clemens**

94 Macomb Place, Mt. Clemens, MI 48043-5651  
Tel: 586-465-7180 Fax: 586-465-0673

### **Lansing**

6639 Centurion Drive, Ste. 130, Lansing, MI 48917  
Tel: 517-886-1224 Fax: 517-886-9284

### **Grand Rapids**

1550 East Beltline, S.E., Ste. 305, Grand Rapids, MI 49506-4361  
Tel: 616-285-0143 Fax: 616-285-0145

### **Champaign, IL**

2919 Crossing Court, Ste. 11, Champaign, IL 61822-6183  
Tel: 217-378-8002 Fax: 217-378-8003

[www.secrestwardle.com](http://www.secrestwardle.com)

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## CONTRIBUTORS

### **Products Liability Practice Group Chair**

Robert B. Holt

### **Editor**

Carina Carlesimo

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