ROGERS, C. J., with whom PALMER, J., joins, concurring and dissenting. The majority concludes that the Appellate Court properly concluded that the defendant Louis A. Lestorti, Jr.,[1] will not be entitled to equitable contribution from the plaintiff, James C. Lestorti, unless he can establish on remand that he paid more than his contributive share of the outstanding debt to Wachovia Bank, N.A. (Wachovia).[2] I disagree. Instead, I would conclude that the defendant was entitled to equitable contribution from the plaintiff for one half of the amount that he paid in satisfaction of the deficiency judgment in the foreclosure action, subject to any defenses that the plaintiff could have raised in that action.

In support of its conclusion that the defendant is entitled to equitable contribution only for amounts paid in excess of his contributive share, the majority relies in part on the Restatement (Third), Suretyship and Guaranty § 55 (1), p. 236 (1996), under which, "[a]s between cosureties for the same underlying obligation, each cosurety is a principal obligor to the extent of its contributive share . . . and a secondary obligor as to the remainder of its duty pursuant to its secondary obligation." Accordingly, a cosurety's right of contribution against the other cosureties does not arise unless it has paid more than its contributive share, and its right to contribution is limited to the amount that is in excess of its contributive share.[3] A number of courts have adopted this view.[4]

Other authorities, however, have recognized that the right to equitable contribution "[is] based upon principles of natural justice, which require that persons under a *common* burden bear responsibility in *equal proportions* and that one party not be required to bear more than his or her just share to the advantage of his or her co-obligors." (Emphasis added.) 18 Am. Jur. 2d 16, Contribution § 6 (2004); see also *Fidelity & Casualty Ins. Co.* v. *Sears, Roebuck & Co.*, 124 Conn. 227, 231–32, 199 A. 93 (1938) (doctrine of equitable contribution is based "upon the equitable principle that those voluntarily assuming a common burden should bear it equally"). In apparent recognition of this principle, the Restatement of Restitution has recognized an exception to the rule that a cosurety is entitled to contribution only when he has paid more than his contributive share when the other coguarantors have been released from their obligation. See Restatement, Restitution § 82, comment (b), p. 370 (1937) ("[i]f the payor secures a full release from the creditor . . . [he] is entitled to contribution although the amount thus paid is less than what was originally his proportionate share"). Presumably, release of the other cosureties is required to prevent

potential double recoveries against them and to avoid multiplicity of proceedings.[5] Cf. *Estate of Dresser* v. *Maine Medical Center*, 960 A.2d 1205, 1209 (Me. 2008) (Mead, J., dissenting) ("necessity of extinguishing liability of non-settling tortfeasors is clear: failure to do so could expose a non-settling tortfeasor to liability on both the underlying claim and the contribution claim").[6] A number of courts have adopted this exception.[7]

The majority concludes that this court previously has adopted the theory expressed in § 55 of the Restatement (Third) of Suretyship and Guaranty, that a coguarantor is entitled to equitable contribution only for amounts paid in excess of its contributive share. In support of this conclusion, it quotes this court's statement in *Waters* v. *Waters*, 110 Conn. 342, 345, 148 A. 326 (1930), that, under Connecticut law, a guarantor's right of contribution from a coguarantor arises only when the guarantor "has paid in excess of *his share of the whole* [*outstanding*] *obligation*." (Emphasis added.) The majority also quotes this court's statement in *Bristol Bank & Trust Co.* v. *Broderick*, 122 Conn. 310, 315, 189 A. 455 (1937), that "[a] guarantor, as between himself and his co-guarantors, is a principal for the portion of the debt which he ought to pay and is a surety [or secondary obligor] for the remainder . . . ." On the basis of these statements, the majority concludes that it is settled under Connecticut law that, "when a coguarantor has made a payment to the creditor in an amount that is *less than his share of the whole outstanding obligation*, he has *no right to contribution* from the other coguarantors." (Emphasis in original.) Even if the majority's interpretation of *Waters* is correct,[8] however, that case simply does not address the situation where a coguarantor has paid less than his contributive share and the obligations of the other coguarantors have been released or discharged by operation of law.

I see no equitable or policy reasons why, if two coguarantors are jointly and severally liable to an obligee, and one coguarantor pays less than his contributive share and the other coguarantor pays nothing because his obligation to the obligee has been discharged by operation of law, we should maintain the legal fiction that the nonpaying coguarantor was not jointly liable for the amount paid for purposes of equitable contribution. Rather, I believe that it is more equitable to allow the paying coguarantor to seek equitable contribution under these circumstances; see *Estate of Dresser* v. *Maine Medical Center*, supra, 960 A.2d 1207–1208 (plaintiff was entitled to contribution from defendant even though injured party's claims against defendant had not been formally released because claims were barred by statute of limitations);[9] provided that the other coguarantor has an opportunity to raise any defenses that he or the paying coguarantor could have raised in an action on the common obligation. See 18 Am. Jur. 2d 100, supra, § 86 ("[s]ince the right to contri-

bution is based on equitable principles, the fact that the plaintiff was guilty of bad faith in defending a suit on the common obligation, whereby the defendant was deprived of opportunity to assert a defense thereto, is a good defense to the action for contribution"). In the present case, the plaintiff's obligations to Wachovia were discharged by operation of General Statutes § 49-1.[10] Accordingly, I would conclude that the defendant was entitled to seek equitable contribution from him even if he paid less than his contributive share.

I concur with the majority's conclusion that we should reverse the judgment of the Appellate Court and remand the case to that court with direction to reverse the judgment of the trial court and to remand the case to the trial court for further proceedings. I disagree, however, that the defendant is entitled to contribution only for the amounts paid in excess of his contributive share of the outstanding debt. Instead, I would conclude that the defendant is entitled to equitable contribution of one half of the $275,000 that he paid to Wachovia in satisfaction of the deficiency claim, subject to any defenses that the plaintiff could have raised in that action.

[1] See footnote 2 of the majority opinion.

[2] The majority also concludes that the Appellate Court improperly concluded that the fact that the plaintiff's debt to Wachovia was discharged as the result of Wachovia's failure to serve the plaintiff in the foreclosure action meant that Wachovia was not entitled to collect from the defendant an amount greater than the defendant's contributive share and, therefore, any payment in excess of that amount was gratuitous. I agree with this conclusion.

[3] "To the extent that, as between themselves, one cosurety is a secondary obligor and the other is a principal obligor, the former has rights of contribution against the latter. The rights of contribution are the same as the rights of a secondary obligor against a principal obligor . . . ." Restatement (Third), supra, § 55 (2), p. 236. "[T]he [principal obligor's] duty to reimburse, like the principal obligor's duty to perform, arises from implied contract. Just as the principal obligor impliedly agrees that it will perform the underlying obligation so that the secondary obligor will not have to perform, the principal obligor also agrees that it will reimburse the secondary obligor to the extent that the secondary obligor does perform, thereby fulfilling all or part of the underlying obligation." Id., § 22, comment (a), p. 94; see also id., § 58, comment (a), p. 248 ("When one cosurety performs beyond its contributive share and receives contribution from another cosurety, the cosureties are in the same position as if the contributing cosurety had performed the secondary obligation to the same extent as its contribution to the performing cosurety. Under the rule of this section, the rights of the contributing cosurety as against the principal obligor are the same as they would be if the contributing cosurety had performed its secondary obligation to the same extent as its contribution.").

[4] See *Exchange Elevator Co.* v. *Marshall*, 147 Neb. 48, 61, 22 N.W.2d 403 (1946) ("[a] party who has made a partial payment is not entitled to contribution, even though the others have paid nothing, until his own payment exceeds his proportionate share of the whole debt, and he is then entitled to collect a proportionate share only of the excess, from each party, the proportionate share in each case being determined by dividing the total sum in question among the number of solvent parties within the jurisdiction of the court" [internal quotation marks omitted]); *Falb* v. *Frankel*, 73 App. Div. 2d 930, 931, 423 N.Y.S.2d 683 (1980) ("[w]here . . . each of two cosureties compromises his own liability for less than one half of the original debt owed to the common creditor but for different amounts, the law gives no right of contribution to the surety paying the greater sum because he merely settled his own obligation and paid nothing in excess of his own debt"); see also *Assets Realization Co.* v. *American Bonding Co.*, 88 Ohio St. 216, 254, 102 N.E. 719 (1913) ("the doctrine of contribution is not founded on contract, but arises from the equitable consideration that persons subject

to a common duty or debt, should contribute equally to the discharge of the duty or debt; and so where one performs the whole duty or pays the debt, *or more than his aliquot part*, each of the others should contribute to him, so as to equalize the discharge of what was a common burthen" [emphasis added; internal quotation marks omitted]); see also *Lex* v. *Selway Steel Corp.*, 203 Iowa 792, 818, 206 N.W. 586 (1927) (same).

[5] In other words, if a coguarantor pays less than his contributive share of an outstanding debt and fails to obtain from the obligee a release of the other coguarantor, and he then obtains contribution from that coguarantor for one half of the amount paid, the nonpaying guarantor could also be required to pay the remainder of the outstanding debt to the creditor, and would then be entitled to seek contribution from the first coguarantor.

[6] The majority states that the sole rationale for the rule requiring a full release from the creditor before allowing a coguarantor who has paid less than his contributive share to seek contribution from another coguarantor is that the paying coguarantor has conferred a benefit on the nonpaying coguarantor. The majority concludes that, because, in the present case, the plaintiff's debt to Wachovia was discharged by operation of law and not as the result of the defendant's payment of the debt, the defendant has conferred no benefit on the plaintiff and, therefore, is not entitled to contribution. I disagree. Because I believe that coguarantors are "under a *common* burden" and generally should "bear responsibility in *equal proportions*" for payments to the obligee; (emphasis added) 18 Am. Jur. 2d 16, supra, § 6; I believe that the best justification for the general rule that a coguarantor cannot seek contribution from the other coguarantors unless he has paid more than his contributive share is the prevention of double recoveries and multiple proceedings. This concern is allayed both when the nonpaying coguarantor has been released as the result of the paying coguarantor's actions and when he has been discharged by operation of law.

The majority points out that under 18 Am. Jur. 2d 16, supra, § 6, a paying coguarantor must show that he has acted " 'to the advantage' " of the nonpaying coguarantor and interprets this to mean that the coguarantor's actions must have reduced or eliminated the nonpaying coguarantor's actual liability to the creditor in order to obtain contribution. I disagree. Just as the majority concludes that, because a nonpaying coguarantor has implicitly agreed that he will reimburse the paying coguarantor for sums paid in excess of the paying coguarantor's equitable share, a coguarantor who has paid more than his contributive share is entitled to contribution even if the nonpaying coguarantor has been discharged, I would conclude that, because a coguarantor has implicitly agreed that he will pay his proportionate share of any amounts that are paid to the creditor under the joint obligation, any payments by other coguarantors are to his " 'advantage' " under 18 Am. Jur. 2d 16, supra, § 6, regardless of whether the creditor could have recovered the amounts from the nonpaying coguarantor.

[7] See *Humphrey* v. *O'Connor*, 940 P.2d 1015, 1020 (Colo. App. 1996) ("[i]f the payor secures a full release from the creditor . . . the payor is entitled to contribution although the amount thus paid is less than what was originally his proportionate share" [internal quotation marks omitted]); *Thomas* v. *Jacobs*, 751 A.2d 732, 734 n.1 (R.I. 2000) ("contribution among co-guarantors [is permitted] when one co-guarantor has paid less than his or her fair share of the debt and has secured a full release from the creditor for any other co-guarantor[s]"); *Sacks* v. *Tavss*, 237 Va. 13, 19, 375 S.E.2d 719 (1989) (cosurety who had paid more on debt than second cosurety, but less than contributive share of original debt, was not entitled to contribution from second cosurety when first cosurety had not secured release for second cosurety); see also *Estate of Dresser* v. *Maine Medical Center*, supra, 960 A.2d 1207–1208 (plaintiff was entitled to contribution from defendant even though injured party's claims against defendant had not been formally released because claims were barred by statute of limitations).

[8] In *Waters*, the plaintiff paid the full amount of a debt for which he and the defendant were jointly and severally liable. *Waters* v. *Waters*, supra, 110 Conn. 344–45. Under these circumstances, the plaintiff's contributive share of the outstanding debt and his proportionate share of the settlement amount were identical. Thus, as used in this court's statement that, "if one debtor is compelled to pay the full amount of the debt, a right of contribution against the other at once arises for the amount he has paid in excess of his share of the whole obligation"; id., 345; the phrase "his share of the whole obligation" could mean either the debtor's contributive share or his proportionate share of the amount paid. The statement does not necessarily imply that when a person has paid *less* than the full amount of the outstanding debt, he is entitled only to equitable contribution for the amount paid in excess of his contributive share.

I recognize that this court's statement in *Bristol Bank & Trust Co.* v. *Broderick*, supra, 122 Conn. 315, that "[a] guarantor, as between himself

and his co-guarantors, is a principal for the portion of the debt which he ought to pay and is a surety for the remainder" supports the majority's interpretation of *Waters*. This statement—which was made well after this court's decision in *Waters*—was dictum, however, and the case has never been cited by this court or the Appellate Court. Accordingly, I do not agree with the majority that the question is clearly settled under Connecticut law.

[9] The majority concludes that *Estate of Dresser* has no relevance to this case because it was a tort case. In my view, however, the principle underlying that case is the same as the principle underlying the exception set forth in comment (b) to § 82 of the Restatement of Restitution: When A has satisfied a liability to B and seeks contribution from C for that payment, A must establish that C has no potential liability to B for the same claim. Under *Estate of Dresser*, that fact can be established either by showing that C has been released from liability or that he has been discharged by operation of law. I see no reason why the same reasoning should not apply in cases involving coguarantors of a note.

[10] General Statutes § 49-1 provides: "The foreclosure of a mortgage is a bar to any further action upon the mortgage debt, note or obligation against the person or persons who are liable for the payment thereof who are made parties to the foreclosure and also against any person or persons upon whom service of process to constitute an action in personam could have been made within this state at the commencement of the foreclosure; but the foreclosure is not a bar to any further action upon the mortgage debt, note or obligation as to any person liable for the payment thereof upon whom service of process to constitute an action in personam could not have been made within this state at the commencement of the foreclosure. The judgment in each such case shall state the names of all persons upon whom service of process has been made as herein provided."

The majority states that there is no reason to decide in the present case whether to adopt an exception to the general rule that a coguarantor must pay more than his contributive share in order to seek contribution because the defendant did not allege a necessary factual premise for the exception, namely, that the plaintiff has been discharged from his debt. The trial court found, however, that the plaintiff's "liability was extinguished by the foreclosure obtained by Wachovia's successor in interest" pursuant to § 49-1. That finding has not been challenged on appeal.