A Survey of the Law of Non-Contractual Indemnity and Contribution

Compiled by the Products Liability Group of the Primerus Defense Institute

International Society of Primerus Law Firms

April 2015

Primerus

The World's Finest Law Firms

A Survey of the Law of Non-Contractual Indemnity and Contribution

Compiled by the Products Liability Group of the Primerus Defense Institute

International Society of Primerus Law Firms

Executive Committee

Raymond Lyons, Jr., Chair
Lipe Lyons Murphy Nahrstadt & Pontikis, Ltd. | *Chicago, Illinois* | *www.lipelyons.com*

Brian A. Comer, Vice Chair
Collins & Lacy, P.C. | *Columbia, South Carolina* | *www.collinsandlacy.com*

Jeremy J. Cook, Industry Liaison Chair
Downs ♦ Stanford, P.C. | *Dallas, Texas* | *www.downsstandford.com*

Michael J. Vetter Sr., Member Involvement and Outreach
Spicer Rudstrom, PLLC | *Nashville, Tennessee* | *www.spicerfirm.com*

Leo Daly, Member at Large
Grogan Graffam, P.C. | *Pittsburgh, Pennsylvania* | *www.grograngraffam.com*

James B. Carlson, Member at Large
Christian & Small LLP | *Birmingham, Alabama* | *www.csattorneys.com*

Dane J. Bitterlin, Member at Large
Neil, Dymott, Frank, McFall & Trexler APLC | *San Diego, California* | *www.neildymott.com*

April 2015

Primerus
The World's Finest Law Firms

A Survey of the Law of Non-Contractual Indemnity and Contribution

By Raymond Lyons, Jr.

Lipe Lyons Murphy Nahrstadt & Pontikis, Ltd.
Chicago, Illinois

Tel: 312.448.6230
Fax: 312.726.2273

Email: rl@lipelyons.com
www.lipelyons.com

Introduction

This survey of law has been prepared by the Products Liability Group of the Primerus International Society of Law Firms, Defense Institute and replaces the earlier April 2012 survey. Although our focus is the defense of products liability litigation, this survey of law applies generally to any company that finds itself the target of litigation in jurisdictions throughout the United States.

The purpose of this compendium is to provide a general reference source regarding the applicable law in each state on issues related to the allocation of fault as between defendants and non-parties in a products liability case in circumstances where there is no contract dealing with the issue. It is not intended to be a comprehensive discussion of the law in each jurisdiction, but simply to provide easy reference to the basic rules within each state. An awareness of the issues and applicable law may promote greater cooperation and cost saving arrangements that also increase the potential for a successful defense of all involved.

Whether a company is the designer, manufacturer, distributor, wholesaler, or retailer of a completed product or a component part, it will inevitably find itself the recipient of an invitation to defend itself in court in a products liability lawsuit. The expenses incurred in the defense of lawsuits seeking compensation for personal injury or property damage are often staggering - even when the defense is ultimately successful.

Some products, by their very nature, are the subject of an enormous amount of litigation throughout the country. Oftentimes, manufacturers, distributors, and retailers find themselves named in lawsuits with the same group of defendants. Sometimes these parties have defined their respective liabilities through contractual indemnity provisions. However, it is not unusual in a profit driven economy for a company to enter into transactions without addressing potential liability issues up front. Even when the legal department tries to have indemnity matters handled contractually, problems arise in reaching agreement as to how liability will be allocated between the parties. In such cases, the parties more often than not will move forward with the transaction, expecting to work things out later - if and when litigation rears its ugly head. Unfortunately, it is generally too late at that point as no one is willing to take on the prospect of a large adverse judgment alone.

Primerus
The World's Finest Law Firms

A Survey of the Law of Non-Contractual Indemnity and Contribution

When there is no contract defining the respective rights and obligations between the various parties involved in a products liability lawsuit, the lawyers must look to the law of the jurisdiction in which the case is pending to determine what the possibilities are for liability shifting under that state's statutory scheme and/or judicial decisions. It is important that an understanding of the applicable law be developed early in the litigation. The law must be analyzed to ascertain:

- Is there a statutory basis for indemnity or for the recovery of costs and fees? If so, does the company have a basis for asserting a claim under the statute? Is the company subject to a statutory claim by another party?
- Where there is no applicable statute addressing indemnity between parties, what is the case law that defines the respective rights and obligations of the parties?
- What are the risks/benefits of not accepting a tender of defense? When does it make sense for the company to assume the defense of another party?
- Should the defense of the company be tendered to another party or a non-party? How can another party be convinced to take over the defense of the company?
- How can the indemnity issues be best handled between the defendants without assisting the plaintiff in establishing liability?

The answers to these questions are often not clear. However, by giving these issues attention early in the litigation, it is possible that parties can reach agreement as to the handling of the defense of multiple parties in a more cost effective and cooperative manner.

The indemnity issues are different in cases where there are additional defendants who are not involved with the product aspect of the case. While there will generally be no potential for tendering one's defense to such a party, there may still be the potential for equitable indemnity or contribution based on allocation of fault. This prospect can work to the benefit or detriment of a company under the circumstances of a particular case. Strategic decisions relating to trial and/or settlement can be affected by the potential for liability to a co-defendant or vice versa. The manner in which the law of offset applies to a settlement also complicates the analysis.

Even a cursory review of the variations in the laws of different states affecting a party's potential liability exposure and related rights to indemnity or contribution should lead to the consideration of eliminating the undesirable results through contractual arrangements. While it is not the purpose of this survey of the law to provide a guide to negotiating and drafting agreements that allocate risk and responsibility, we believe a few general thoughts on the subject are appropriate.

A written agreement dealing with the obligations of parties to a transaction in the event of litigation can go a long way toward eliminating the undesirable and inequitable results if left to the statutory or case law in the jurisdiction where suit is filed. If a written agreement addresses the respective obligations between parties, that agreement will generally control the handling of issues related to the duty of one party to provide a defense and/or indemnify the other. However, standard terms and conditions in quotes, purchase orders and similar documents are often conflicting and the determination of which, if either, will control is rarely certain. An arms length negotiated agreement will eliminate the problems posed by conflicting standard terms and provide more predictability. Of course, negotiating such an agreement can be a challenge in itself.

There are a number of factors that will affect the negotiations, not the least of which is the relative bargaining strengths of the parties. Other factors affecting negotiations include the likelihood of claims and litigation involving the product(s), the potential severity of the injuries or damages related to the use of the product(s), the availability of alternative sources for the product(s), etc. There are a number of issues to be addressed that can be stumbling blocks to successfully negotiating an agreement. Such issues include, but are not limited to:

- Conditions under which one party must indemnify the other.
- Circumstances under which one party must provide a defense for the other.
- How recalls will be handled and who will pay the costs.
- Type of insurance coverage and limits.
- Method for resolving disputes arising under the agreement.
- Personal jurisdiction, venue and choice of law.

Sometimes the party with the stronger bargaining position will overreach and find itself regretting its insistence on provisions that seemed advantageous when negotiating the agreement. These problems are magnified when there are claims directed against a specific component of a product as well as claims directed at the product as a whole, such as a failure to warn. An agreement that requires the other party to provide a defense can result in loss of control over the defense strategy, positions taken inconsistent with the defense of other cases involving the company, inability to control the settlement process, and an overall poor defense of the product.

The members of the Primerus International Society of Law Firms, Defense Institute, are not only uniquely qualified to defend products liability lawsuits, but are also able to assist in the negotiation and drafting of agreements addressing duties to defend and indemnify and related issues. Such agreements can be beneficial in commercial relationships between manufacturers of components and completed products and between manufacturers, distributors, and retailers. A complete listing of the members can be found on the Primerus International Society of Law Firms located at www.primerus.com/primerus-pdi.htm.

Alabama

By Robert E. Cooper

Christian & Small LLP
Birmingham, Alabama

Tel: 205.250.6608
Fax: 205.328.7234

Email: recooper@csattorneys.com
www.csattorneys.com

Allocation of Fault

In Alabama, contributory negligence serves as a complete bar to recovery for simple negligence. A claimant's proximate contributory negligence bars recovery completely, notwithstanding a showing of negligence on the part of the defendant.[1] Contributory negligence, which is not a defense to acts of wantonness,[2] is defined as negligence on the part of the plaintiff that proximately contributes to his or her injury.[3] Contributory negligence is an affirmative defense and must be pled. The defendant has the burden of proof.[4] While the question of contributory negligence is normally a jury question, where "the facts are such that all reasonable persons must reach the same conclusion," contributory negligence may be found as a matter of law.[5]

The effect of contributory negligence has been ameliorated to some extent in that Alabama recognizes the "sudden emergency" and "last clear chance" doctrines. Under the sudden emergency doctrine, a person who – without fault of his own – is faced with a sudden emergency is held to the standard of care of a reasonably prudent person under the same or similar circumstances.[6] Referred to in Alabama as "the last clear chance doctrine" and at times discussed as "subsequent negligence," this principle permits recovery when the plaintiff was in a perilous position and the defendant, with knowledge of the peril, "failed to use reasonable and ordinary care in avoiding the accident" thereby causing injury to the plaintiff.[7] Alabama also recognizes assumption of risk as an affirmative defense. Under this principle, a plaintiff who voluntarily assumes a risk of harm arising from the negligent or reckless conduct of a defendant cannot recover for such harm.[8]

While the pure form of contributory negligence is the minority view, it is not expected that the Alabama Supreme Court will judicially alter the doctrine. Several years ago, the Alabama Supreme Court was presented with a direct challenge to the concept of pure contributory negligence. After extensive briefing and extended oral argument, the Alabama Supreme Court held:

> We have heard hours of oral argument; we have read numerous briefs; we have studied cases from other jurisdictions and law review articles; and in numerous conferences we have discussed in depth this issue and

Alabama

> all of the ramifications surrounding such a change. After this exhaustive study and these lengthy deliberations, the majority of this Court, for various reasons, has decided that we should not abandon the doctrine of contributory negligence, which has been the law in Alabama for approximately 162 years.[9]

With regard to joint and several liability, Alabama law does not permit apportionment of damages where there is joint liability. "In Alabama, damages are not apportioned among joint tortfeasors; instead, joint tortfeasors are jointly and severally liable for the ***entire*** amount of damages awarded."[10] As such, a judgment can be satisfied from one, all or any combination of the defendants. Satisfaction of the judgment by one joint tortfeasor discharges the other tortfeasors from liability.[11]

Indemnification

A claim of indemnity seeks to transfer the entire loss sustained by a plaintiff from one tortfeasor, who has been ordered to pay the loss, to another who is culpable.[12] Generally, under Alabama law, joint tortfeasors may not obtain contribution or indemnity from each other.[13]

Alabama has recognized a few instances in which indemnity may be permitted. First, where there is an express agreement or contract between the parties that clearly indicates an intention to indemnify, the indemnitor clearly understands the agreement, and there is no evidence of disproportionate bargaining power on the part of the indemnitee.[14] Second, a joint tortfeasor may claim indemnity where he has been held liable either (a) "constructively, without fault, for a tort of another party" or (b) "directly, for the party's own fault, when another party's fault actually caused the harm."[15] Further, "the alleged indemnitee may recover from another party that has breached a duty owed to the indemnitee."[16]

Third, in some situations involving a fiduciary relationship, such as master/servant, principal/agent or employer/employee, Alabama recognizes a limited common law right of indemnification.[17] In these circumstances, where a joint wrongdoer is not guilty of any fault other than that based upon his or her status as a principal, master or employer, he has a right to seek indemnification from the party actually (or perhaps) actively causing the injury.[18]

Contribution

Since 1933, Alabama law has been well-settled that joint tortfeasors are not entitled to contribution from one another and that, subject to limited exceptions, joint tortfeasors are not entitled to indemnity from one another.[19]

Perhaps the most cogent illustration of this principle is contained in the case of *Consolidated Pipe and Supply Co., Inc. v. Stockham Valves and Fittings, Inc.*.[20] The widows of two men who were killed by the explosion of an underground steam valve while working for Alabama Power Company filed suit against the valve's manufacturer (Stockham Valves & Fittings), the intermediate distributor (Louisiana Valves and Fittings) and the local distributor (Consolidated Pipe and Supply). Consolidated cross-claimed against Stockham and Louisiana, and Louisiana cross-claimed against Stockham for indemnity in event that they were held liable to plaintiffs.

The trial court directed verdicts in favor of Stockham and Louisiana on Consolidated's cross claim and in favor of Stockham on Louisiana's cross claim against it. The Alabama Supreme Court held that the defendant distributors did not come under any exception to rule prohibiting contribution among joint tortfeasors and that they had no right to indemnity. "To permit appellants to prevail on this appeal would be to permit that which cannot be done directly to be done indirectly: contribution between tortfeasors."[21]

Alabama

Parties have sought to utilize third-party practice as a vehicle to secure contribution, but to no avail. In a recent case, *Ex parte Stenum Hospital*,[22] some artful defendants again tried to use third party practice as a method to circumvent this aspect of Alabama law. In February 2007, Elizabeth Duncan slipped and fell on a wet tile floor at Madison Square Mall in Huntsville. Duncan and her husband sued Madison Square and the entities that manage the mall and provide security or housekeeping services. The Duncans alleged that she sustained a fracture to her left patella and "aggravated and/or sustained injuries to her spine, including her neck and back." The Duncans claimed that Elizabeth became partially paralyzed after she underwent disk-replacement surgery at Stenum, a German hospital.

The mall defendants filed a third-party complaint against Stenum and related entities and alleged claims of medical malpractice, fraud, negligence per se, breach of contract, abandonment of contract, abandonment of professional relationship, battery, the tort of outrage, and lack of informed consent. In the prayer for relief in the third-party complaint, the mall parties requested (1) that the hospital parties be required to reimburse Madison Square for any damages awarded to the Plaintiffs; (2) that the hospital parties be found liable for all damages incurred by the mall parties as a result of the hospital parties' conduct; and (3) that the hospital parties be required to reimburse the mall parties for fees, costs, and expenses incurred in having to defend against the Duncans' claims and in having to file a third-party complaint because of the hospital parties' alleged misconduct.

Following the trial court's denial of their motion to dismiss, the hospital entities' filed a petition for writ of mandamus. The Alabama Supreme Court granted the writ and directed the trial court to vacate its order and to enter an order dismissing the third-party complaint.

The court held that the claims asserted in the mall parties' third-party complaint are all claims against the hospital parties that only the Duncans could assert. In reaching its decision, the Stenum court relied on the Committee Comments to Ala. R. Civ. P. 14:[23]

> Rule 14, Ala. R. Civ. P. is entirely procedural in nature and will not affect substantive rights. It does not establish a right of reimbursement, indemnity nor contribution, but merely provides a procedure for the enforcement of such rights where they are given by the substantive law. For example, negligent joint tortfeasors do not have a right of contribution against each other in Alabama. Thus ***if a plaintiff sues one of two negligent joint tortfeasors, the one sued cannot implead the other under Rule 14***, for he has no substantive right against the other.[24]

The *Stenum* court went on to hold that, "[t]he fact that the mall parties request 'reimbursement' from the hospital parties in their prayer for relief in the third-party complaint does not transform the mall parties' third-party action into one for indemnity. The third-party complaint does not seek either contractual indemnification or indemnification resulting from a circumstance where the mall parties are entitled to stand in the shoes of the Duncans. The mall parties' third-party complaint alleging medical malpractice and other related claims against the hospital parties has the effect of tendering to the Duncans defendants they have elected not to sue, an impermissible use of third-party practice."[25]

Finally, citing *Mallory S.S.Co. v. Druhan* as support, defendants may attempt to seek contribution based upon an "active versus passive" negligence distinction.[26] These efforts have been futile in products liability cases as in the Consolidated Pipe case previously discussed.

Alabama

1 *Hannah v. Gregg, Bland & Berry, Inc.*, 840 So. 2d 839, 860 (Ala. 2002).

2 *Yamaha Motor Company v. Thornton*, 579 So.2d 619, 624 (Ala.1991) and *Golden v. McCurry*, 392 So. 2d 815, 817 (Ala. 1980).

3 *Cooper v. Bishop Freeman Co.*, 495 So. 2d 559, 563 (Ala. 1986).

4 *Aplin v. Tew*, 839 So. 2d 635, 635 (Ala. 2002); *Yamaha Motor Company v. Thornton*, 579 So.2d 619 (Ala.1991).

5 *Serio v. Merrell*, 941 So. 2d 960, 964 (Ala. 2006).

6 *Tillis Trucking Co. v. Moses*, 748 So. 2d 874, 885 (Ala. 1999).

7 *Zaharavich v. Clingerman*, 529 So.2d 978 (Ala.1988); *Baker v. Helms*, 527 So. 2d 1241, 1244 (Ala. 1988); *Dees v. Guilley*, 339 So.2d 1000 (Ala.1976).

8 *H.R.H. Metals, Inc. v. Miller*, 833 So. 2d 18, 26-27 (Ala. 2002)(noting that assumption of the risk is a form of contributory negligence and listing the elements to be proven by the defendant); *Ex parte Barran*, 730 So. 2d 203 (Ala. 1998) (adopting RESTATEMENT (SECOND) OF TORTS § 496A (1965)). The difference between assumption of the risk and contributory negligence is that contributory negligence is a matter of some fault or departure from the standard of reasonable conduct, and assumption of the risk involves an intelligent decision to confront the danger. *Sprouse v. Belcher Oil Co.*, 577 So. 2d 443, 444 (Ala. 1991). "Assumption of the risk proceeds from the injured person's acts; awareness of the risk. Furthermore, the plaintiff's state of mind is determined by the subjective standard, whereas with contributory negligence the court uses the objective standard. The fact finder looks at whether the plaintiff knew of the risk, not whether he should have know of it." *Spence v. Southern Pine Electric Corp.*, 643 So.2d 970, 971-972 (Ala. 1994).

9 *Williams v. Delta International Mach. Corp.*, 619 So.2d 1330, 1332 (Ala.1993).

10 *Matkin v. Smith*, 643 So. 2d 949, 951 (Ala. 1994) (emphasis added).

11 *Id.*

12 *Sherman Concrete Pipe Mach., Inc. v. Gadsden Concrete & Metal Pipe Co.*, 335 So. 2d 125 (Ala. 1976).

13 Parker Towing Co v. Triangle Aggregates, Inc., 2013 Ala. LEXIS 177, at *18 (Dec. 13, 2013); *Consolidated Pipe & Supply Co. v. Stockham Valves & Fittings, Inc.*, 365 So. 2d 968, 971 (Ala. 1978).

14 *Industrial Tile, Inc. v. Stewart*, 388 So. 2d 171, 175 (Ala. 1980) (citing Eley v. Brunner-Lay S. Corp., 266 So. 2d 276 (Ala. 1972)); *see also Holcim (US), Inc. v. Ohio Cas. Ins. Co.*, 38 So. 3d 722, 727 (Ala. 2009).

15 M. Roberts and G. Cusimano, ALABAMA TORT LAW § 36.05 (4th ed. 2004) (citing Phelps & Johnson, Indemnity Actions in Alabama Products Liability Cases, 34 ALA. L. REV. 23, 44-46 (1983)); *see also Mallory S.S. Co. v. Druhan*, 84 So. 2d 1313 (Ala. 1993).

16 *Id.*

17 *See e.g., Line v. Ventura*, 38 So. 3d 1 (Ala. 2009), *Ex parte Athens-Limestone Hosp.*, 858 So. 2d 960 (Ala. 2003).

18 *Criglar v. Salac*, 438 So. 2d 1375 (Ala. 1983).

19 *Gobble v. Bradford*, 226 Ala. 517, 147 So. 619 (1933).

20 *Consolidated Pipe and Supply Co., Inc. v. Stockham Valves and Fittings, Inc.*, 365 So.2d 968 (Ala. 1978).

21 *Id.* at 971.

22 *Ex parte Stenum Hosp.*, 81 So. 3d 314 (Ala. 2011).

23 *Quality Homes Co. v. Sears, Roebuck & Co.*, 496 So.2d 1, 1–2 (Ala.1986).

24 *Stenum Hosp.*, 81 So. 3d at 318 (emphasis in original).

25 *Stenum Hosp.*, 81 So. 3d at 319.

26 *Mallory S.S. Co. v. Druhan*, 17 Ala.App. 365, 84 So. 874 (1920).

Alaska

By Patrick Kurkoski

Mitchell, Lang & Smith, LLP
Portland, Oregon

Updated by Thomas A. Matthews

Matthews & Zahare, PC
Anchorage, Alaska

Tel: 888.796.2925
Fax: 907.276.8955

Email: tom.matthews@matthewszahare.com
www.mzlawoffice.com

Allocation of Fault

Generally, Alaska, through AS 09.17.080, has adopted a pure several liability tort scheme in which judgment is entered against each person liable in accordance with his or her percentage of fault. *Sowinski v. Walker*, 198 P.3d 1134, 1150 (Alaska 2008). This statutory scheme replaced Alaska's earlier joint and several liability system of tort liability.

Alaska follows the pure comparative negligence doctrine.[1] Comparative fault in Alaska is not a defense to liability, but will reduce any award in favor of the injured party by his percentage of fault.[2] Thus, for example, a plaintiff found to be 50 percent at fault will have his damages reduced by 50 percent. Even a plaintiff found 90 percent at fault could still recover 10 percent of his damages from the defendant.

Comparative negligence principles apply in strict products liability actions.[3] The comparative fault of the plaintiff in a product liability action is to be considered by the trier of fact, and failure to instruct the jury on comparative fault in appropriate cases is reversible error.[4] Plaintiff's comparative fault in a products liability case is generally available in two specific instances – when the knowing misuse of a product is a proximate cause of the injury or the plaintiff has assumed the risk with knowledge of the defect in the product.[5] The Alaska Supreme Court has recognized that assumption of the risk is subsumed within the concept of comparative negligence.[6] The defendant has the burden of proving the plaintiff's actual knowledge of the product's defect.[7] Evidence of a plaintiff's ordinary negligence may also constitute comparative fault in products liability.[8]

In actions involving the fault of more than one tortfeasor, the court is required to enter judgment against each party liable on the basis of several liability in accordance with that party's percentage of fault.[9] However, the court may not consider the fault of persons who are not named parties to the lawsuit.[10] In order to allocate fault to non-parties, a defendant must generally bring the non-party into the lawsuit through equitable apportionment.[11]

The court may allocate fault to non-parties if the person has been identified as potentially responsible, but the person is outside the jurisdiction of the court, or is precluded from being joined in the suit by a rule of law.[12]

Alaska

This rule is significant in that fault may be apportioned to an immune employer otherwise protected by the worker's compensation bar, or governments protected by sovereign immunity. However, assessment of fault to a person who is not a party may only be used as a measure for accurately determining the percentages of fault of named parties. Fault assessment against a person who is not a party does not subject that person to civil liability in that action, and may not be used as evidence of civil liability in another action.[13]

Fault is allocated based upon the nature of the conduct of each person found to be at fault and the extent of the causal relation between the conduct of that person and the damages sustained. The jury is asked to determine the percentage of fault allocated to each party and the total amount of damages. The court then enters judgment based upon the allocated percentages of fault. Because joint and several liability has been abolished in Alaska, each party is only liable for its own percentage of fault. A party may only be held liable for its own percentage of fault, although vicarious liability still exists in certain circumstances (for example employer / employee relationships).

Fault is defined by statute to include negligent, reckless and intentional conduct, and strict liability.[14] Thus, a manufacturer held strictly liable for selling a defective product may have its fault compared to the independent negligence of an installer or retailer, and to a comparatively negligent plaintiff.

In some instances, it may be permissible to apportion specific items of damage. For example, in a crashworthiness case, the defendant manufacturer may seek to apportion damages based on evidence that the defect was not responsible for all the damages, but only for enhancing the injury.[15] Similarly, where a plaintiff fails to wear a seatbelt, the defendant may introduce that fact as evidence of comparative fault.[16]

Non-Contractual Indemnity and Contribution

A defendant may, as a third-party plaintiff, pursue a claim for "allocation of fault" in order to ensure that all potentially responsible parties are before the court for fault allocation purposes.[17] The claim is one for equitable apportionment.[18] So long as the original claim against the defendant is timely asserted, the statute of limitations will not bar a claim for equitable apportionment, and judgment may be entered in favor of the plaintiff if fault is allocated.[19]

A product manufacturer must indemnify and defend the supplier of a defective product when the supplier is without fault.[20] "A supplier entitled to indemnity may be a retailer, a lessor, or even a manufacturer who incorporates an already defective component part into its product."[21] An innocent supplier who is forced to pay an injured plaintiff may pursue a separate claim against the manufacturer for implied indemnity. However, the party seeking indemnity must still prove the manufacturer sold a defective product.[22] The innocent supplier may also recover full reasonable attorney's fees and costs from the manufacturer even when the party claiming injury is unsuccessful at trial.[23]

Contribution among tortfeasors was eliminated by voter initiative in 1989. In the same initiative, Alaska abolished the system of joint and several liability which previously held each tortfeasor fully liable for the injured party's damages.[24] Alaska now has a system of pure several liability, in which a plaintiff "[can] only recover from each tortfeasor in the proportion that his fault played to the total fault of all the persons and entities at fault including the plaintiff herself."[25]

However, two decades after the voter initiatives completely changed the Alaska tort system, the Alaska Supreme court recognized a "common law right of contribution" based upon proportional fault.[26] This area of law is still unsettled and developing in light of Alaska's repeal of statutory contribution rights.

Alaska

Statute of Limitations and Statute of Repose

Generally, the Alaska statute of limitations for torts, personal injuries, and for injury to personal property is two years from the date of injury.[27] The statute of limitations for a wrongful death claim also is two years.[28] The Alaska Supreme Court has applied the six year statute of limitation[29] applicable to waste and trespass upon real property to an action for damage to real property.[30]

In an action to recover for damages for personal injuries resulting from an alleged breach of warranty in the sale of goods, the four-year statute of limitations provided by the Uniform Commercial Code applies.[31] Finally, there is a statute of repose which requires that all claims for personal injury, death, or property damage, be brought within ten years of the last act alleged to have caused the damages.[32]

For claims involving a minor, the statute of limitations is tolled until the minor reaches the age of majority.[33] However, the Alaska 10-year statute of repose[34] may bar the minor's claim before the child reaches the age of majority.[35]

Alaska has adopted the discovery rule in determining when the statute of limitations begins to run. The statute of limitations does not begin to run until the claimant discovers, or reasonably should have discovered, the existence of all elements essential to the cause of action.[36] If a party fraudulently conceals from a plaintiff the existence of a cause of action, he may be estopped to plead the statute of limitations if the plaintiff delays in bringing the suit is occasioned by reliance on the false or fraudulent representations.[37]

Effect of Settlement

Because of Alaska's several liability laws, a settlement by one liable party does not become a setoff to damages for other parties who proceed to trial.[38] Each party is only liable for its own percentage of fault. Even if a settling party pays more than its ultimate percentage of fault, any "windfall" benefits the injured plaintiff, and not the defendant who proceeds to trial.[39]

1 *Kaatz v. State*, 540 P.2d 1037 (Alaska 1975).
2 AS 09.17.060.
3 *Butaud v Suburban Marine & Sporting Goods, Inc.*, 555 P.2d 42 (Alaska 1976).
4 *General Motors corp. v Farnsworth*, 965 P.2d. 1209 (Alaska 1998).
5 *General Motors Corp. v. Farnsworth*, 965 P.2d 1209, 1215 (Alaska 1998) (comparative negligence principles not limited to cases in which the plaintiff uses the product with knowledge of its defective condition, but also extends to misuse of the product, when misuse is a proximate cause of the injury).
6 *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871, 888 n.57 (Alaska 1979).
7 *Brinkerhoff v Swearingen Aviation Corp.*, 663 P.2d 937 (Alaska 1983).
8 *Smith v Ingersoll-Rand*, 14 P.3d 990 (Alaska 2000).
9 AS 09.17.080(d).
10 *Benner v. Wichman*, 874 P.2d 949, 958 (Alaska 1994).
11 ***Id***.
12 AS 09.17.080(a) (as amended).
13 AS 09.17.080(c) (as amended).
14 AS 09.17.900.
15 *General Motors Corporation v Farnsworth*, 965 P.2d 1209 (Alaska 1998).
16 *Hutchins v Schwartz*, 724 P.2d 1194 (Alaska 1986).
17 Alaska Rule of Civil Procedure 14(c).
18 *Benner v Wichman*, 874 P.2d 949 (Alaska 1994).
19 *Alaska General Alarm, Inc. v Grinnell*, 1 P.3d 98 (Alaska 2000).
20 *Palmer G. Lewis Cos. v ARCO Chemical Co.*, 904 P.2d 1210 (Alaska 1995).
21 ***Id***.
22 ***Id***.
23 ***Id***.
24 *Robinson v. Alaska Properties and Inv., Inc.*, 878 F. Supp. 1318, 1321 (D. Alaska 1995); *Benner v. Wichman*, 874 P.2d 949, 955 (Alaska 1994).
25 *Robinson*, 878 F. Supp. at 1321; AS 09.17.080.
26 *McLaughlin v. Hughes, Thorseness*, 137 P.3d 267, 276 (Alaska 2006) (recognizing common law contribution based upon proportional fault); *See also General Motors Corp. v. Farnsworth*, 965 P.2d 1209, 1218 n.11 (Alaska 1998)("A jury which holds a defendant liable for all of the plaintiff's damages under an apportionment instruction is still free to allocate fault to other wrongdoers from whom the car manufacturer [defendant] can seek contribution."); Restatement of Torts (Third) – Apportionment §23 comment c (a severally liable person might sometimes be liable for the same indivisible injury caused another severally liable person; such a person may be entitled to contribution). Some states term such contribution partial equitable indemnity. Restatement of Torts (Third) – Apportionment §23, reporter's note a.
27 AS 09.10.070.
28 AS 09.55.580.
29 AS 09.10.050
30 *State Farm Fire & Cas. Co. v. White-Rodgers Corp.*, 77 P.3d 729, 731-32 (Alaska 2003).
31 AS 45.02.725; *Sinka v. Northern Commercial Co.*, 491 P.2d 116 (Alaska 1971).
32 AS 09.10.055.
33 AS 09.10.140(a).
34 AS 09.10.055.
35 *See Sands v. Green*, 156 P.3d 1130, 1137 (Alaska 2007) (Eastaugh, J. dissenting).
36 *Mine Safety Appliances v. Stiles*, 756 P.2d 288 (Alaska 1988).
37 *Chiei v. Stern*, 561 P.2d 1216 (Alaska 1977).
38 *Turner v Municapality of Anchorage*, 171 P.3d 180, 188 (Alaska 2007)
39 *Petrolane Inc. v Robles*, 154 P.3d. 1014 (Alaska 2007).

Arizona

By Wendi A. Sorensen & Casey S. Blais

Burch & Cracchiolo, P.A.
Phoenix, Arizona

Tel: 602.274.7611
Fax: 602.234.0341

Email: wsorensen@bcattorneys.com
Email: cblais@bcattorneys.com
www.bcattorneys.com

Allocation of Fault

In 1987, the Arizona Legislature amended the Uniform Contributions Among Tortfeasors Act [UCATA] to virtually eliminate joint and several liability. As a result of these changes, Arizona now follows the rule of pure comparative negligence, except in cases involving (1) concert of action, (2) vicarious liability, or (3) actions relating to injured railroad workers.[1] ARS § 12-2506 (D) contains the overarching summary of the rule:

> The liability of each defendant is several only and not joint, except [when]:
>
> 1. Both the party and the other person were acting in concert.
>
> 2. The other person was acting as an agent or servant of the party.
>
> 3. The party's liability for the fault of another person arises out of a duty created by the federal employers' liability act, 45 United States Code section 51.

Absent these special circumstances, therefore, each defendant is liable "only for the amount of damages allocated to that defendant in direct proportion to that defendant's percentage of fault."[2] This is the case even when one defendant has a duty to prevent another defendant from causing harm.[3]

Perhaps even more significant is the pronouncement that liability will be apportioned to all actors, whether or not they are parties, or could be parties to the lawsuit. A.R.S. §12-2506(B) provides:

> In assessing percentages of fault the trier of fact shall consider the fault of all persons who contributed to the alleged injury, death or damage to property, regardless of whether the person was, or could have been, named as a party to the suit. Negligence or fault of the nonparty may be considered if the plaintiff entered into a settlement agreement with the nonparty or if the defending party gives notice before trial, in accordance with the requirements established by court will, that a non-party was wholly or partially at fault. Assessments of percentages of fault for non-parties are used only

Arizona

> as a vehicle for accurately determining the fault of the named parties. Assessments of fault against nonparties does not subject any nonparty to liability in this or any other action, and it may not be introduced as evidence of liability in any action.[4]

Counterclaims and cross-claims are not offset against each other. Rather, they are treated as separate and independent claims for purposes of A.R.S. §12-2501 et seq.[5]

A careful reading of the foregoing section makes it plain that the Arizona Legislature calls for juries to make the final determination regarding percentages of fault. This is actually based on the Arizona Constitution. Article 18 section 5 of the Constitution provides that "The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury." This language is mirrored in A.R.S. §12-2505(A):

> The defense of contributory negligence or of assumption of risk is in all cases a question of fact and shall at all times be left to the jury. If the jury applies either defense, the claimant's action is not barred, but the full damages shall be reduced in proportion to the relative degree of the claimant's fault which is a proximate cause of the injury or death, if any.[6]

Therefore, even if comparative negligence or assumption of the risk is clear from the facts of the case, a summary judgment motion will never be granted on these issues, as they are always issues for the jury.

The notification required by A.R.S. §12-2506(B) regarding nonparties potentially at fault for a plaintiff's injuries is contained in Arizona Rules of Civil Procedure, Rule 26(b)(5). The relevant provision requires any party (usually a defendant) to file a notice within 150 days after he files his answer that he intends to argue that a nonparty to the case is at fault:

> Any party who alleges pursuant to A.R.S. §12-2506(B) that a person or intensity not currently or formerly named as a party was wholly or partially at fault in causing any personal injury, property damage or wrongful death for which damages are sought in the action shall provide the identity, location and the facts supporting the claimed liability of such nonparty within one hundred fifty (150) days after the filing of that party's answer. The trier of fact shall not be permitted to allocate or apportion any percentage of fault to any non-party whose identity is not disclosed in accordance with the requirements of this subsection except upon written agreement of the parties or upon motion establishing good cause, reasonable diligence, and lack of unfair prejudice to other parties.[7]

In 2007, the Arizona Supreme Court answered the question of whether comparative fault applies in strict products liability actions. It ruled that comparative fault applies in all tort actions, including those involving strict products liability.[8] This was a significant case, because prior to this ruling, the uniform understanding of strict products liability was that anyone within the chain of manufacture or distribution was strictly liable for all damages. This was particularly important in a situation in which one of the manufacturers or distributors of the offending product was not a party to the lawsuit.

Now, a jury will be invited to apportion liability to each entity in the chain of manufacture based on its own individual liability. Theoretically, a seller can have either no responsibility at all for plaintiff's injuries because he simply passed along the product in the chain of distribution, or he could have responsibility for simply passing along the product if he knew the product to be defective.

One significant caveat should be noted. A.R.S. §12-2505(A) provides "there is no right of comparative negligence in favor of any claimant who has intentionally, willfully or wantonly caused or contributed to the injury or wrongful death." As such, comparative negligence may not apply if a manufacture or distributor willfully or wantonly produced or distributed a dangerous product.

Indemnification

Arizona's products liability law is statutory and is contained in A.R.S. §12-681 et seq. The common law right to indemnification is presumed, and the case of *Busy Bee Buffet v. Ferrell*, 82 Ariz 192, 310 P.2d 817 (1957) is the most significant case in which it is addressed in the context of Arizona law. In it, the Arizona Supreme Court held that where a member of the partnership opened and left

unguarded a trapdoor located in the narrow passageway of the premises in which the partnership was a co-tenant, and the invitee of the other co-tenant corporation was injured in a fall through the trap door, the partner became primarily liable for injury even though the corporation owed a duty to the invitee to keep passageway reasonably safe for his use in making the delivery was secondarily liable.

The consequences for failing to accept a tender of defense are statutory, and they are contained in A.R.S. §12-684:

> In any product liability action where the manufacturer refuses to accept the tender of defense from the seller, the manufacturer shall indemnify the seller for any judgment rendered against the seller and shall also reimburse the seller for reasonable attorney's fees and costs incurred by the seller in defending such action, unless either paragraph 1 or 2 applies:
>
> 1. The seller had knowledge of the defect in the product.
>
> 2. The seller altered, modified or installed the product, and such alteration, modification or installation was a substantial cause of the incident giving rise to the action, was not authorized or requested by the manufacturer, and was not performed in compliance with the directions or specifications of the manufacturer.[9]

Contribution

In practice, when a case goes forward against less than all of the "at fault" entities, a jury will be invited to apportion liability against all allegedly at fault entities, whether or not present, assuming the foregoing notice requirements have been met. This is particularly relevant in situations in which one or more parties has settled. In that situation, the remaining defendants have the burden of proving the fault of the settling parties.

Take for example a situation in which two of the three defendants have settled and the case goes forward against the unfortunate "last man standing." The final defendant must argue that the two former defendants are either entirely or largely at fault, and will ask the jury to apportion fault against those settling defendants. The plaintiff in this situation, who may have already recovered the majority of his damages from the settling defendants, will argue that this remaining defendant is significantly at fault, thus having the possibility of recovering more than 100 percent of his damages. On the other hand, if the remaining defendant is successful at "pointing the finger" at the settling defendants, he may be able to exculpate himself from liability either largely or entirely, thus reducing the plaintiff's overall damages award. For this reason, the plaintiff's attorney will sometimes settle with several of the defendants and leave one "last man standing" for trial, but will only do so if he can create a situation in which his client will have a likelihood of a windfall. When a party's lack of liability has been determined by a court in a motion for summary judgment, the remaining parties cannot argue that the dismissed party is either entirely or partially at fault.

Similarly, "there is no right of contribution in favor of any tortfeasor whom the trier of fact finds has intentionally, willfully or wantonly caused or contributed to the injury or wrongful death."[10]

1 A.R.S. §12-2506.
2 A.R.S. §12-2506(A). *Nasteway v. City of Tempe*, 184 Ariz 374, 909 P.2d 441 (App. 1995).
3 *Nasteway v. City of Tempe*, 184 Ariz. 341, 909 P.2d 441 (App. 1995).
4 A.R.S. §12-2506(B).
5 A.R.S. §12-2507.
6 A.R.S. §12-2505(A).
7 Arizona Rules of Civil Procedure, Rule 26(b)(5).
8 *State Farm Insurance Companies v. Premier Manufacturers Systems, Inc.*, 217 Ariz. 222, 172 P.3d 410 (2007).
9 A.R.S. §12-684(A).
10 A.R.S. §12-2501(C).

Arkansas

By Jeffery C. Lewis & J. Dennis Chambers

Atchley, Russell, Waldrop & Hlavinka, L.L.P.
Texarkana, Texas

Tel: 903.792.8246
Fax: 903.792.5801

Email: jlewis@arwhlaw.com
Email: dchambers@arwhlaw.com
www.arwhlaw.com

Allocation of Fault

In any action for personal injury, wrongful death, or property damage, fault may be allocated among all parties to the action.[1] Generally, the fault of the claiming party reduces the damages by that percentage of fault attributed to the claiming party. If the fault of the claiming party is more than or equal to the fault of the other party, the claiming party is not entitled to recover damages.[2] The word "fault" is defined broadly to include "any act, omission, conduct, risk assumed, breach of warranty, or breach of any legal duty which is a proximate cause of any damages sustained by any party."[3]

In Arkansas, many cases are submitted on a general verdict. Generally, submitting interrogatories to the jury to determine fault is a matter that is within the discretion of the court. When the issue of comparative fault is submitted to the jury by an interrogatory,[4] "counsel for the parties shall be permitted to argue to the jury the effect of an answer to any interrogatory." In some instances, a general verdict is used to determine which parties are at fault, and then the jury is given interrogatories to determine the allocation of fault among those parties who were found to be at fault.

Legislative efforts regarding nonparty allocation of fault have been subject to constitutional attacks. A 2003 statute that would have allowed for allocation of fault to nonparties was held unconstitutional by the Arkansas Supreme Court.[5]

Joint And Several Liability

In any action for personal injury, medical injury, property damage, or wrongful death, there is no joint and several liability; rather, "the liability of each defendant for compensatory or punitive damages shall be several only and shall not be joint."[6] The maximum recoverable against a defendant is determined by multiplying the total amount of the damages recoverable by the plaintiff by the percentage of each defendant's fault.[7] However, for those defendants found to be more than ten percent at fault, there is a procedure by which plaintiffs can petition the court for an increase of the several defendants' percentages to offset the effect of any judgment against an insolvent defendant.[8]

Arkansas

Non-Contractual Indemnity/Contribution

The Arkansas Rules of Civil Procedure are essentially identical to the Federal Rules of Civil Procedure with respect to compulsory counterclaims against plaintiffs (or counter-plaintiffs, etc).[9] Claims for indemnity against third parties who are not joint tortfeasors (such as contractual indemnity claims) may be brought by separate action, but that right of action does not arise until a claim or judgment is paid.[10]

The right of contribution among all tortfeasors exists under the Uniform Contribution Among Tortfeasors Act.[11] A joint tortfeasor is not entitled to a money judgment for contribution until he has by payment either (1) discharged the common liability, or (2) paid more than his pro rata share of said liability.[12] Thus, the three-year statute of limitations for such actions does not begin to run until such an amount has actually been paid.[13] However, the statute provides that a defendant may, at his option, join a third party defendant in the original proceeding filed by plaintiff on a claim for contribution.[14]

Employers who are covered by worker's compensation insurance are not subject to contribution for injuries to their employees that occur in the course and scope of employment.[15] An employer may contract to indemnify a third-party tortfeasor for injury to its employee, however.[16]

Release and Effect on Contribution

In 2013, the legislature rewrote statutory provisions pertaining to an injured person's release of a joint tortfeasor to preserve in certain respects the remaining joint tortfeasor's contribution rights and to entitle the remaining defendants at trial to a fact finding of a released joint tortfeasor's pro rata share of responsibility. A release by the injured person of one joint tortfeasor, whether before or after judgment, does not discharge the other joint tortfeasors unless the release so provides.[17] A release by the injured person of a joint tortfeasor does not relieve the released tortfeasor from liability to make contribution to another joint tortfeasor unless the release is given before the right of the other joint tortfeasor to secure a money judgment for contribution has accrued and provides for a reduction, to the extent of the pro rata share of the released joint tortfeasor, of the injured person's damages recoverable against all other joint tortfeasors.[18]

When the injured person releases a joint tortfeasor, the injured person's damages recoverable against all the other joint tortfeasors shall be reduced by the greatest of the following: (1) the amount of the consideration paid for the release; (2) the pro rata share of the released joint tortfeasor's responsibility for the injured person's damages; or (3) any amount or proportion by which the release provides that the total claim shall be reduced.[19] When the injured person releases a joint tortfeasor, the remaining defendants are entitled to a determination by the finder of fact of the released joint tortsfeasor's pro rata share of responsibility for the injured person's damages.[20]

Miscellaneous Statutory Indemnity Provisions

A supplier who is not the manufacturer of a defective product is entitled to indemnity from the manufacturer for damages arising from the supplying of that product.[21] The owners of high voltage utility lines are entitled to indemnity for damages incurred as a result of violations of certain statutes relating to work performed in the area of those lines.[22]

1 Ark. Code Ann. § 16-64-122.
2 *Id.* at § 16-64-122(b).
3 *Id.* at § 16-64-122 (c).
4 *Id.* at § 16-64-122 (d).
5 *Johnson v. Rockwell Automation*, 2009 Ark. 241, 308 S.W.3d 135 (2009). For a more detailed treatment of nonparty allocation of fault, see Samuel T. Waddell, "Examining the Evolution of Nonparty Fault Apportionment in Arkansas: Must a Defendant Pay More Than Its Fair Share?" 66 Ark. L. Rev. 485 (2013).
6 Ark. Code Ann. § 16-55-201(a).
7 *Id.* at § 16-55-201(c).
8 *Id.* at § 16-55-203.
9 *Id.* at § 16-64-122.
10 *In re Air Disaster at Little Rock, Arkansas on June 1, 1999*, 125 F.Supp.2d 357 (E.D. Ark. 2000).
11 Ark. Code Ann. §§ 16-61-201, et seq.
12 *Id.* at § 16-61-202.
13 *Heinemann v. Hallum*, 365 Ark. 600, 232 S.W.3d 420 (2006).
14 Id. at § 16-61-207.
15 *C & L Rural Electric Cooperative v Kincaid*, 221 Ark. 450, 256 S.W.2d 337 (1953).
16 *Id.*
17 Ark. Code Ann. § 16-61-204(a).
18 *Id.* at § 16-61-204(b).
19 *Id.* at § 16-61-204(c).
20 *Id.* at § 16-61-204(d).
21 *Id.* at § 16-116-107.
22 *Id.* at § 11-5-305. (This is not intended to disclose all indemnity provisions of the Uniform Commercial Code.)

California

By Patrick "Rick" Quinlivan

Rick C. Quinlivan, Attorney at Law
Quinlivan Mediation Services
Colorado Springs, Colorado

Tel: 719.559.2932

Email: rick@pcqes.com
www.quinlivanmediationservices.com

Updated by Tamara L. Glaser

Neil, Dymott, Frank, McFall & Trexler APLC
San Diego, California

Tel: 619.238.1712
Fax: 619.238.1562

Email: tglaser@neildymott.com
www.neildymott.com

Allocation of Fault

In general, fault may be allocated in a verdict or judgment to any person or entity as to whom there is evidence to support a finding of fault under applicable law whether or not the person or entity is a plaintiff, defendant or non-party.[1] Even a party who is immune from liability may be included among those whose fault is evaluated for purposes of apportionment.[2] However, fault may not be allocated at trial to a former defendant who has obtained summary judgment if the summary judgment was based on a determination that the defendant was without fault.[3] The trier of fact must determine from the evidence and arguments presented which persons and/or entities were at fault and allocate to each found to be at fault a percentage of the fault such that the total of fault allocated equals 100 percent. The apportionment of fault applies to defendants whose fault lies in strict liability as well as for those whose liability is based in negligence.[4] Comparative fault also applies to parties whose tortuous conduct was successive rather than concurrent.[5]

If the plaintiff is found at fault, plaintiff's recovery is reduced by the percentage of fault allocated to the plaintiff.[6] This reduction applies whether the action is based in negligence or strict liability.[7]

When a plaintiff claims both economic and non-economic damages, the trier of fact must make a separate finding as to the amount of damages to be awarded in each category. Each defendant who is found liable to the plaintiff is jointly and severally liable for 100 percent of the economic damages less that amount attributable to the fault of the plaintiff. Economic damages are defined as those damages that can be verified objectively such as medical expenses, loss of earnings, funeral and burial expenses, cost of services, etc.[8] Each defendant who is found liable to the plaintiff is severally liable only for that portion of the noneconomic damages attributable to the percentage of fault allocated to that defendant. Noneconomic damages are those that are subjective in nature, including pain and suffering, emotional distress, loss of consortium, etc. However, where multiple defendants in the chain of distribution of a product are strictly liable to the plaintiff, they are still jointly and

Primerus
The World's Finest Law Firms

severally liable to the plaintiff even for the noneconomic damages. The defendants are nevertheless entitled to an apportionment of fault for purposes of determining equitable indemnity rights.[9]

Non-Contractual Indemnity/Contribution

An action to enforce equitable rights to indemnity or contribution may be brought in the form of a cross-complaint filed in the plaintiff's action. The cross-complaint may be brought against those not named in the plaintiff's complaint as well as against those who are defendants in the main action.[10] The right of equitable indemnity may also be enforced through a separate action if a defendant has been required to pay more than its proportionate share of the damages.[11] If not brought in the same action, the claim must be brought within two (2) years of the date the party seeking indemnity paid all or a portion of the damages awarded.[12]

If the plaintiff was injured while using a product in the course and scope of employment, the plaintiff's remedy against the employer is generally limited to workers' compensation benefits.[13] A defendant may not obtain equitable indemnity from the employer, but may obtain an offset to defeat the employer's lien.[14] The judgment for the injured plaintiff employee is reduced by an amount attributable to the employer's fault, up to the amount of workers' compensation benefits paid. If the fault allocated to the employer results in a reduction of the plaintiff's recovery by an amount equal to or greater than the benefits paid, the employer is not entitled to recover anything through a lien or by way of intervention. If the amount of the benefits paid is greater than the employer's share of fault, the employer may recoup the excess amount.[15]

A plaintiff injured on a power press may sue the employer if the injury is proximately caused by the employer's knowing removal of or knowing failure to install a point of operation guard provided by or required by the manufacturer and the removal or failure to install was specifically authorized by the employer under conditions known by the employer to create a probability of serious injury or death. However, the right of a defendant to obtain indemnity or contribution from the employer is limited to the situation where the plaintiff obtains a judgment against the employer and the employer fails to pay its portion of the judgment.[16]

Statutes Affecting Indemnity and Contribution Rights

Where judgment is entered against two or more defendants, there is a statutory right of contribution among them.[17] This right is enforced only after one of the liable defendants has paid more than its pro rata share of the judgment and recovery is limited to the excess amount paid. The right to contribution is not based on principals of apportionment. Rather, it is based on equal contributions among those found liable. The law relating to contribution rights is rarely applied since the development of concepts of comparative fault. The law of contribution does not impair a party's right of indemnity and there is no right of contribution between defendants where one is entitled to indemnity from the other.[18]

For consumer products, a retail seller has a statutory right to indemnity from the manufacturer. Every sale of consumer goods that are sold at retail in California shall be accompanied by the manufacturer's and the retail seller's implied warranty that the goods are merchantable. The retail seller shall have a right of indemnity against the manufacturer in the amount of any liability the retailer may have for breach of this warranty.[19]

If a party is successful on a claim for equitable indemnity, a court after reviewing the evidence in the principal case may award attorney's fees to the successful party. Before making such an award, the court must find that [1] the prevailing party has been required to act in its interest by bringing an action against or defending an action by a third person, [2] that the party from whom indemnity was sought was properly notified of the demand to bring the action or provide the defense and did not avail itself of the opportunity to do so and [3] that the trier of fact determined that the successful party was without fault in the principal case or had a final judgment entered in its favor granting a summary judgment, a nonsuit, or a directed verdict.[20]

California

Effect of Settlement on Indemnity Rights

A defendant may avoid liability for non-contractual indemnity or contribution if it enters into a settlement with the plaintiff as long as the settlement is determined to have been entered into in good faith.[21] However, the procedure for obtaining a good faith settlement is not available if the terms of the settlement are subject to a confidentiality agreement.[22] The settling defendant may file a motion requesting a finding that the settlement was entered in good faith. In determining whether the settlement was in good faith so as to bar claims by non-settling defendants for contribution or indemnity, the court considers, among other things, plaintiff's total recovery and the settling party's proportionate liability, the amount paid in settlement, a recognition that a settling defendant should pay less in settlement than if found liable at trial, the settling party's financial condition and insurance policy limits, and the existence of collusion, fraud or tortious conduct.[23]

Instead of filing a motion, the settling defendant may give notice of the settlement to all parties setting forth the terms of the settlement. Any party claiming that the settlement was not in good faith may file a motion within the prescribed time period after service of the notice challenging the good faith of the settlement. If no such motion is filed, the court will enter an order finding the settlement was entered into in good faith and barring any claim for equitable indemnity or contribution. This procedure is not available if the terms of the settlement are confidential.[24]

The protection provided to a settling party applies in matters involving breach of contract claims as well as tort claims. A co-obligor under a contract may settle with the plaintiff and eliminate the right of another party obligated under the contract to obtain contribution from the settling party if the settlement is entered into in good faith.[25] However, if multiple parties are sued in an action that includes breach of warranty claims, a settlement by one party will not bar an indemnity claim by another party unless both are obligated under the same warranty. For example, where the manufacturer of a recreational vehicle and the manufacturer of the engine are sued on separate warranties, settlement by one will not bar the indemnity claim of the other.[26] The same holds true when two or more insurance carriers have coverage for the same event since the obligations of each arise from separate contracts.[27]

The settling defendant may seek indemnity in a separate action against another party.[28] The settling defendant must establish the reasonableness of the settlement and the fault of the party from whom indemnity is being sought. However, the settling defendant is not obligated to prove its own fault in order to recover in such an action.[29] Action for implied contractual indemnity by one settling defendant against another party can be barred if the latter later settles with the plaintiff and obtains a good faith settlement determination; however, a good faith settlement order does not bar a non-settling tortfeasor from asserting an indemnification claim against the settling defendants based on an express contract.[30]

A party may settle with the plaintiff even in the absence of a determination by the court that the settlement was entered into in good faith, but it does so with the risk that it will be required to remain in the case on a cross-complaint for implied indemnity. A good faith settlement will not bar a contractual indemnity claim.[31] In addition, a determination that a settlement was entered into in good faith will not necessarily be binding on a later joined party if the later joined party seeking indemnity against the settling party can establish that it has substantial liability exposure and that its relationship to the matter was known or should have been known by the settling party. The settling party may again seek to establish the good faith of its settlement and the burden will be on the non-settling party to establish the lack of good faith.[32]

The courts have construed the word "tortfeasor" as used in the code to mean each separate person or entity that may have liability even if it is only vicarious. Where both the principal and agent are sued, a settlement by plaintiff with one does not preclude the plaintiff from proceeding against the other if the release does not specifically apply to both.[33] The same holds true if both the parent company and subsidiary are sued under an alter ego theory.[34]

California

The remaining defendant(s) following settlement by a former defendant are entitled to an offset against any judgment rendered against the non-settling defendant(s). The settlement should be allocated between economic and non-economic damages in the same proportion as the verdict or judgment rendered in favor of the plaintiff at trial. However, this issue has not been fully addressed by the courts.

Where a defendant has obtained a good faith settlement or a defendant who is found partially at fault is insolvent, the liability and thus the responsibility for payment of the economic damages will be apportioned according to the degree of fault of the remaining solvent defendants.[35] The solvent defendants, however, still pay only their proportionate share of the noneconomic damages. If a settling defendant paid more in settlement than its proportionate share of the damages as determined by the apportionment of fault at trial, the remaining defendants will receive the benefit of the overpayment.[36]

1 *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 607 (1978); *Paragon Real Estate Group of San Francisco, Inc. v. Hansen*, 179 Cal. App. 4th 177, 182 (2009).
2 *Collins v. Plant Insulation Co.*, 185 Cal. App. 4th 260 (2010).
3 California Code of Civil Procedure § 437c(l).
4 *Safeway Stores, Inc. v. Nest-Kart*, 21 Cal. 3d 322 (1978).
5 *Blecker v. Wolbert*, 167 Cal. App. 3d 1195 (1985).
6 *Li v. Yellow Cab Co.*, 13 Cal. 3d 804 (1975).
7 *Daly v. General Motors Corp.*, 20 Cal. 3d 725 (1978).
8 California Civil Code § 1431.2; *Evangelatos v. Superior Court*, 44 Cal. 3d 1188 (1988).
9 *Bostick v. Flex Equip. Co., Inc.*, 147 Cal. App. 4th 80 (2007).
10 *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578 (1978).
11 *Evangelatos v. Superior Court*, 44 Cal. 3d 1188 (1988).
12 California Code of Civil Procedure § 339; *American States Ins. Co. v. National Fire Ins. Co. of Hartford*, 202 Cal. App. 4th 692 (2011).
13 California Labor Code § 3864.
14 *Witt v. Jackson*, 57 Cal. 2d 57, 71 (1961).
15 *DaFonte v. Up-Right, Inc.*, 2 Cal. 4th 593 (1992).
16 California Labor Code § 4558.
17 California Code of Civil Procedure § 875.
18 California Code of Civil Procedure § 875(f); *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578 (1978).
19 California Civil Code § 1792.
20 California Code of Civil Procedure § 1021.6.
21 California Code of Civil Procedure § 877.6(a)(1).
22 California Code of Civil Procedure § 877.6(a)(2).
23 *Tech-Bilt, Inc. v. Woodward-Clyde & Assoc.*, 38 Cal. 3d 488, 499 (1985).
24 California Code of Civil Procedure § 877.6(a)(2).
25 California Code of Civil Procedure § 877.
26 *Tiffin Motor Homes, Inc. v. Superior Court*, 202 Cal. App. 4th 24 (2011).
27 *Herrick Corp. v. Canadian Insurance Co.*, 29 Cal. App. 4th 753 (1994).
28 *Sears, Roebuck & Co. v. International Harvester Co.*, 82 Cal. App. 3d 492 (1978).
29 *Mullin Lumber Co. v. Chandler*, 185 Cal. App.3d 1127 (1986).
30 *Interstate Fire and Cas. Ins. Co. v. Cleveland Wrecking Co.*, 182 Cal. App. 4th 23, 32-34 (2010).
31 California Code of Civil Procedure § 877(c); *C.L. Peck Contractors v. Superior Court*, 159 Cal. App. 3d 828 (1984).
32 *Mayhugh v. County of Orange*, 141 Cal. App. 3d 763 (1983).
33 *Ritter v. Technicolor Corp.*, 27 Cal. App. 3d 152 (1972).
34 *Mesler v. Bragg Management Co.*, 39 Cal. 3d 290 (1985).
35 *Paradise Valley Hospital v. Schlossman*, 143 Cal. App. 3d 87 (1983).
36 *Bracket v. State of California*, 180 Cal. App.3d 1171 (1986).

Colorado

By Muliha A. Khan

Zupkus & Angell, P.C.
Denver, Colorado

Tel: 303.894.8948
Fax: 303.894.0104

Email: mkhan@zalaw.com
www.zalaw.com

Allocation of Fault

Colorado adopted a comparative negligent statute in 1971.[1] Pursuant to this statute, contributory negligence does not bar recovery in a negligence action unless the plaintiff is 50% or more negligent.[2] Additionally, "any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person for whose injury, damage, or death recovery is made."[3] The comparative negligence statute "was intended to ameliorate the harsh common law rule which barred a contributorily negligent plaintiff from any recovery."[4] In cases filed after July 1, 1986, the negligence of a nonparty may be considered in determining allocation of fault.[5]

Under the comparative negligence statute, for example, if plaintiff obtains a judgment for damages of $100 with no comparative negligence, then plaintiff will recover the full $100. If plaintiff is found to be 30% negligent, plaintiff will only recover $70. If plaintiff is found to be 50% negligent, plaintiff will recover nothing.

Colorado's comparative negligence statute does not apply to product liability actions.[6] Instead, the Product Liability Action statute applies to such cases. Pursuant to this special statute, comparative fault is used as a measure of damages in personal injury actions.[7] In other words, the fault of the person bringing the product liability action shall not bar recovery. However, if a product is defective and "both the defective product and the injured person's conduct contributed to the injury underlying plaintiff's claim, then the plaintiff's recovery must be reduced by a percentage representing the amount of fault attributable to his own conduct."[8] The pure comparative negligence provision of the Colorado product liability statute applies to both actions based on negligence and strict liability.[9] However, only "manufacturers," as defined under the statute, can be sued for strict liability.[10]

Non-Contractual Indemnity/Contribution

Indemnity and contribution are two distinct and separate theories of recovery. Indemnity "is grounded in the legal principle that one joint tortfeasor, as indemnitor, may owe a duty of care to another joint tortfeasor, which duty is unrelated to any duty of care owed by the tortfeasors to the injured party."[11] Contribution, on the other hand, "is based on the equitable notion that one tortfeasor should not be

Colorado

required to pay sums to an injured party in excess of that tortfeasor's proportionate share of the responsibility for the injuries."[12]

Until 1977, joint tortfeasors in Colorado had a right of common law indemnity among themselves. However, with the adoption of the Uniform Contribution Among Tortfeasors Act[13] ("UCATA"), recovery under a theory of common law indemnity became limited to circumstances "where the party seeking indemnity is vicariously liable or is without fault…."[14]

The prohibition against contribution among joint tortfeasors was abolished with the adoption of the UCATA. Under this new law, contribution among joint tortfeasors was authorized based on degrees of relative fault.[15]

Statutes Affecting Indemnity and Contribution Rights

In addition to the UCATA, the Workers' Compensation Act of Colorado[16] plays an important role in indemnity and contribution rights in Colorado. A defendant manufacturer will often try and recover from plaintiff's employer by filing claims of indemnity and/or contribution. However, "[t]he Colorado Supreme Court has repeatedly and consistently held that indemnity actions by a manufacturer against an employer, who has paid an injured employee workmen's compensation, are barred."[17]

Additionally, the Workers' Compensation Act of Colorado immunizes an employer from tort liability to a covered employee.[18] Therefore, pursuant to the UCATA, the employer cannot be "jointly liable in tort" for purposes of triggering a right of contribution.[19] For example, in a case where an individual sued a steel joist manufacturer, the court held that such manufacturer was prohibited from seeking contribution from plaintiff's employer, as the employer had already paid workmen's compensation.[20]

Effect of Settlement on Indemnity Rights

As discussed above, Colorado has adopted the UCATA.[21] Pursuant to this statute, a joint tortfeasor is not entitled to contribution from a second joint tortfeasor who has settled with the claimant.[22] Such law was formulated to encourage settlement.[23]

While settling with the claimant insulates a tortfeasor from contribution to other tortfeasors, such rule does not apply when joint tortfeasors are not "liable in tort for the same injury."[24] Similarly, where a tortfeasor pays the claimant the full amount of settlement in exchange for a release to all persons liable in tort for the same injury, such settling tortfeasor can still seek contribution from non-settling, joint tortfeasors.[25]

In an auto accident case, plaintiff passengers sued driver and her employer.[26] Driver settled with plaintiffs. Driver and employer were not considered joint tortfeasors under the UCATA. Thus, the driver's indemnity action against the employer was not barred under the UCATA.[27]

Pursuant to the UCATA, settlement for purposes of barring contribution from tortfeasors must be "given in good faith."[28] A party "challenging the good faith of a settlement otherwise barring a claim for contribution has the burden of establishing that the settlement was collusive"[29]

1 C.R.S. § 13-21-111 *et seq*.
2 C.R.S. § 13-21-111(1) (2015).
3 *Id*.
4 *Nat'l Farmers Union Prop. & Cas. Co. v. Frackelton*, 662 P.2d 1056, 1058 (Colo. 1983) (citing *Mountain Mobile Mix v. Gifford*, 660 P.2d 883 (S. Ct. 1983); *Montgomery Elevator Co. v. Gordon*, 619 P.2d 66 (Colo. 1980)).
5 C.R.S. § 13-21-111.5(3)(a) (2015).
6 C.R.S. § 13-21-406(4) (2015).
7 C.R.S. § 13-21-406(1).
8 *States v. R.D. Werner Co. Inc.*, 799 P.2d 427, 430 (Colo. App. 1990); C.R.S. § 13-21-406(1).
9 *Carter v. Unit Rig & Equip. Co.*, 908 F.2d 1483, 1487 (10th Cir. 1990); *see also* C.R.S. § 13-21-406(1).
10 C.R.S. § 13-21-402(1).
11 *Brochner v. W. Ins. Co.*, 724 P.2d 1293, 1295 (Colo. 1986) (footnote omitted) (citing ***Ringsby Truck Lines, Inc. v. Bradfield***, 193 Colo. 151, 563 P.2d 939 (1977)).
12 *Brochner*, 724 P.2d at 1295.
13 C.R.S § 13-50.5-101 *et seq*.
14 *Brochner*, 724 P.2d at 1298, n. 6.
15 C.R.S § 13-50.5-103; *see Brochner*, 724 P.2d at 1297.
16 C.R.S § 8-40-101 *et seq*.
17 *Hammond v. Kolberg*, 542 F.Supp. 662, 662-63 (D. Colo. 1982) (citing *Hilzer v. McDonald*, 454 P.2d 928 (Colo. 1969); *Holly Sugar Corp. v. Union Supply Co.*, 572 P.2d 148 (Colo. 1977)).
18 *Hammond*, 542 F.Supp. at 663.
19 C.R.S § 13-50.5-102(1).
20 *Tex-Ark Joist Co. v. Deer and Gruenewald Constr. Co.*, 749 P.2d 431, 433 (Colo. 1988).
21 C.R.S § 13-50.5-101 *et seq*.
22 C.R.S. § 13-50.5-105(1)(b).
23 *Kussman v. Denver*, 706 P.2d 776, 781 (Colo. 1985).
24 C.R.S. § 13-50.5-105(1); *see Panther v. Raybestos-Manhattan, Inc.*, 701 P.2d 145, 146 (Colo. App. 1985) (ruling that C.R.S. § 13-50.5-105(1) was inapplicable, as plaintiff was not suffering from a single injury caused by two or more defendants but from a manifestation of multiple injurious exposures to asbestos resulting from multiple but independent torts).
25 *Miller v. Jarrell*, 684 P.2d 954, 956-57 (Colo. App. 1984).
26 *Serna v. Kingston Enters.*, 72 P.3d 376, 378 (Colo. App. 2002).
27 *Id*. at 380.
28 C.R.S. § 13-50.5-105(1).
29 *Stubbs v. Copper Mountain, Inc.*, 862 P.2d 978, 984 (Colo. App. 1993).

Connecticut

By Frank J. Szilagyi

Szilagyi & Daly
Hartford, Connecticut

Tel: 860.541.5502
Fax: 860.471.8392

Email: fszilagyi@sdctlawfirm.com
www.sdctlawfirm.com

Allocation of Fault

In any claim made under the Connecticut Product Liability Act, the comparative responsibility of, or attributed to, the claimant, shall not bar recovery but shall diminish the award of compensatory damages proportionately, according the measure of responsibility attributed to the claimant.[1]

Each of the liable defendants is liable only for that portion of the plaintiff's net award for which it is responsible, and thus, under such a system, a plaintiff who is 70 percent responsible would nonetheless recover 30 percent of his proven damages, and each liable defendant would be responsible for its proportional share of that 30 percent.[2]

In determining the percentage of responsibility, the trier or fact shall consider, on a comparative basis, both the nature and quality of the conduct of the party.[3] The court shall determine the award for each claimant according to these findings and shall enter judgment against parties liable on the basis of the common law joint and several liability of joint tortfeasors.[4] The judgment shall also specify the proportionate amount of damages allocated against each party liable, according to the percentage of responsibility established for each party.[5]

A product seller may implead any third party who is or may be liable for all or part of the claimant's claim, if such third party defendant is served with the third party complaint within one year from the date the cause of action is returned to court.[6] Presently, there is a conflict in the Superior Court as to whether the time limitation set forth in General Statutes § 52–577a(b) should be regarded as jurisdictional, rather than procedural, and thus can be raised on a motion to dismiss,[7] although the majority of courts have held that the time limitation is procedural because it does not create a right of action in the products liability context.[8]

Contribution

If a judgment has been rendered, any action for contribution must be brought within one year after the judgment becomes final.[9] If no judgment has been rendered, the person bringing the action for contribution either must have (1) discharged by payment the common liability within the period of the statute of limitations applicable to the right of action of the claimant against him and commenced the action for contribution within one year after payment, or (2) agreed while action was pending to discharge the common liability,

Connecticut

and, within one year after the agreement, have paid the liability and brought an action for contribution.[10]

These preconditions to the initiation of a contribution action apply only where the party elects to pursue an independent cause of action for contribution rather than impleading the prospectively liable third party.[11]

A non-settling defendant cannot bring an action for contribution against a defendant who did settle; under the comparative fault rule, the finder of fact has to determine the percentage of plaintiff's harm attributable to the settling defendant, multiply that percentage by the judgment against the non-settling defendant, and the deduct the resulting amount from the judgment.[12]

Indemnification

With respect to indemnification claims, the Connecticut Supreme Court has held that where all the potential defendants are parties to the litigation, the common law indemnification principals have been abrogated in product liability actions by virtue of the provisions of Connecticut General Statutes §52-572o(b).[13]

One year later, the Connecticut Supreme Court held that "common law indemnification continues as a viable cause of action in the context of product liability claims and that the comparative responsibility principles that serve as its foundation do not bar a later determination of liability as between an indemnitee and indemnitor."[14]

In this light, "there is a split of authority in the lower courts as to whether or not common-law principles of indemnification are abrogated by the Products Liability Act."[15]

The majority of Superior Court decisions have adopted *Kyrtatas* prohibiting indemnification suits in situations where the third party defendants are also first party defendants in the case.[16] These courts reason that the Connecticut Supreme Court was aware of its previous holding in *Kyrtatas*, and intended its decision in Malerba to distinguish, but not overrule, *Kyrtatas*.[17] Accordingly, *Malerba* provides for common-law indemnification "as a viable cause of action in the context of product liability claims"; but not under the circumstances that existed in *Kyrtatas*, where both the indemnitee and indemnitor are first party defendants to the case.[18]

More specifically, *Kyrtatas* prohibits cross-claims for indemnification between co-defendants in products liability cases, whereas *Malerba* permits indemnification actions against impleaded third-party defendants.[19]

Parties may bring claims for contractual indemnification.[20]

1 Connecticut General Statutes §52-572o(a).
2 *Barry v. Qualified Steel Products*, 280 Conn. 1 (2006).
3 Connecticut General Statutes §52-572o(c).
4 Connecticut General Statutes §52-572o(d).
5 *Id.*
6 Connecticut General Statutes §52-577a(b).
7 *Pina v. Metalcraft of Mayville, Inc.*, CV116024842S, 2014 WL 818635 (Conn. Super. Ct. Feb. 3, 2014)
8 *Garrity v. First & Last Tavern, Inc.*, MMXCV106002820S, 2012 WL 1511401 (Conn. Super. Ct. Apr. 10, 2012)
9 Connecticut General Statutes §52-572o(e).
10 *Id.*
11 *Malerba v. Cessna Aircraft Co.*, 210 Conn. 189 (1989).
12 *Stefano v. Smith*, 705 F. Supp. 733 (D. Conn. 1989).
13 *Kyrtatas v. Stop & Shop, Inc.*, 205 Conn. 694 (1988).
14 *Malerba v. Cessna Aircraft Co.*, 210 Conn. 189, 198-99 (1989).
15 *Mateo v. Pereira*, Superior Court, Judicial district of Hartford, Docket No. CV–07–5012193–S (December 7, 2009, Aurigemma, J.) (48 Conn. L. Rptr. 418, 419).
16 *Dionne v. Raymours Furniture Co., Inc.*, CV126016725, 2014 WL 660399 (Conn. Super. Ct. Jan. 16, 2014)
17 See *Mateo v. Pereira, supra*, 48 Conn. L. Rptr. at 420 ("*Malerba* did not overrule *Kyrtatas* ... The holdings are not inconsistent." [Citation omitted.]).
18 *Dionne v. Raymours Furniture Co., Inc.*, CV126016725, 2014 WL 660399 (Conn. Super. Ct. Jan. 16, 2014) [Citation omitted]
19 *Brown v. Koch Maschinenbau GMBH*, 3:10-CV-449 JCH, 2010 WL 4365668 (D. Conn. Oct. 27, 2010)
20 *Bakker v. Brave Industries, Inc.*, 48 Conn. Supp. 70 (2002).

Delaware

By David W. Zizik

Zizik Professional Corporation
Westwood, Massachusetts

Tel: 781.320.5401
Fax: 781.658.2532

Email: dzizik@ziziklaw.com
www.ziziklaw.com

Allocation of Fault

Delaware follows a comparative negligence framework, whereby a plaintiff may recover damages if he or she was not more than fifty percent at fault.[1] In addition, a plaintiff's recovery will be reduced by the percentage of his or her own negligence.[2] If the plaintiff's negligence is greater than the negligence of the total number of defendants, the plaintiff is completely barred from recovery under the comparative negligence statute.[3]

Contribution and Indemnity

Contribution by joint tortfeasors in Delaware is governed by the Uniform Contribution Among Tortfeasors Law.[4] For a tortfeasor to be entitled to contribution from another tortfeasor for contributing to the injury of a third party, the injured third person must have an enforceable cause of action against the person seeking contribution and the person against whom contribution is sought.[5]

The Delaware courts have recognized a right to indemnity arising out of contract, and have also recognized indemnity based on equitable grounds.[6] Further, the Uniform Contribution Among Tortfeasors Law explicitly states that it does not impair any right to indemnity.[7] In addition, a third-party tortfeasor may bring a claim for indemnification against the injured party's employer for the employer's breach of express or implied contract with the third-party tortfeasor to perform in a careful, prudent manner, but only if the employer's breach of such duty was the actual cause of the employee's injury.[8]

Effect of Settlement

A release by the injured person of one joint tortfeasor, whether before or after judgment, does not discharge the other tortfeasor unless the release so provides, but it does reduce the claim against the other tortfeasors in the amount of the consideration paid for the release, or in any amount

Delaware

or proportion by which the release provides that the total claim shall be reduced, if greater than the consideration paid.[9] In addition, because Delaware recognizes the collateral source rule, the liability of joint tortfeasors is not reduced by settlement agreements between the plaintiff and non-joint tortfeasors.[10] The Uniform Contribution Among Tortfeasors Law provides a settling defendant with protection from potential claims for contribution from other joint tortfeasors.[11]

1 DEL. CODE ANN. tit. 10, § 8132 (West 2014).
2 *Id.*
3 *Id.*
4 DEL. CODE ANN. tit. 10, §§ 6301-08 (West 2014).
5 *Rigsby v. Tyre*, 380 A.2d 1371, 1373 (Del. Super. Ct. 1977).
6 *Ins. Co. of N. Am. v. Waterhouse*, 424 A.2d 675, 678 (Del. Super. Ct. 1980).
7 DEL. CODE ANN. tit. 10, § 6305.
8 *SW (Del.), Inc. v. Am. Consumers Indus., Inc.*, 450 A.2d 887, 888 (Del. 1982).
9 DEL. CODE ANN. tit. 10, § 6304(a).
10 *Med. Ctr. of Del., Inc. v. Mullins*, 637 A.2d 6, 9-10 (Del. 1994). The theory behind the collateral source rule is that "a tortfeasor has no interest in, and therefore no right to benefit from, monies received by the injured person from sources unconnected with the [tortfeasor]." *Yarrington v. Thornburg*, 205 A.2d 1, 2 (Del. 1964). Further, a tortfeasor has "no right to any mitigation of damages because of payments or compensation received by the injured person from an independent source." *Id.*
11 DEL. CODE ANN. tit. 10, § 6304(b) (West 2014); *Med. Ctr. of Del., Inc.*, 637 A.2d at 7.

District of Columbia

By Matthew W. Carlson

Thompson O'Donnell, LLP
Washington, DC

Tel: 202.289.1133
Fax: 202.289.0275

Email: mwc@tomnh.com
www.thompson-odonnell.com

Allocation of Fault

The District of Columbia recognizes contributory negligence as a defense to tort actions. The plaintiff's contributory negligence is a complete defense to an action for negligence.[1] However, the doctrine of "last clear chance" abates that doctrine if there is a separate opportunity on defendant's part to avoid the injury separate from and subsequent to the original negligence.[2]

The District of Columbia has not adopted comparative negligence; rather, it is a joint and several liability jurisdiction. Therefore, any defendant whose negligence proximately causes plaintiff's injuries will be held responsible for all of plaintiff's compensatory damages.[3]

Non-Contractual Indemnity

The District of Columbia recognizes implied indemnification.[4] When an obligation to indemnify is implied, it is based on the law's notion of what is fair and proper between the parties.[5] Implied indemnity is generally restricted to circumstances where the indemnitee's conduct was not as blameworthy as the indemnitor's conduct.[6] For indemnity implied in law, "the obligation is based on variations in the relative degrees of fault of joint tortfeasors, and the assumption that when the parties are not in pari delicto, the traditional view that no wrongdoer may recover from another may compel inequitable and harsh results."[7]

A duty to indemnify may also be implied out of a relationship between the parties to prevent a result which is unjust or unsatisfactory.[8] This is based on the theory that if one tortfeasor breaches a duty owed to another and that breach causes injury, the breaching tortfeasor should compensate the other.[9] In order to establish the right to this particular type of implied indemnity, the obligation must arise out of a specific duty of a defined nature — separate from the injury to the plaintiff — which is owed to the third party and there must also be a special legal relationship between the tortfeasors."[10]

In the products liability context, a manufacturer has an implied duty to a seller to indemnify him where the manufacturer provides a defective product and the seller's liability stems solely from failure to discover the defect.[11]

District of Columbia

Where joint tortfeasors are guilty of active negligence and their negligence concurs in causing the injury, none is entitled to indemnity against the others.[12] Additionally, implied indemnity is not available for liabilities arising out of an intentional tort.[13]

Indemnity involves shifting the entire loss from one who has paid it to another who would be unjustly enriched at the indemnitee's expense by the indemnitee's discharge of the obligation.[14] Because of this, in order to seek implied indemnification, the party seeking indemnification must have discharged the liability for the party against whom indemnity is being sought.[15]

The District of Columbia has no statute addressing indemnification.

Contribution

The right to contribution between tortfeasors does not arise unless there is joint liability to the injured person.[16] The right to contribution from joint tortfeasors is in equal shares regardless of the relative fault.[17] The fact that the negligence of one tortfeasor may be greater than that of another does not change the method of equally apportioning contribution because District of Columbia law does not recognize degrees of negligence.[18]

Therefore, joint tortfeasors that pay more than their pro rata (proportionate) share have a right of contribution against the other tortfeasors.[19]

Effect of Settlement on Indemnity and Contribution Rights

A settling defendant has bought its peace and is not liable for contribution or indemnity to non-settling parties.[20]

If a settling defendant is judicially determined to be a joint tortfeasor or there is a stipulation of joint tortfeasor status between the plaintiff and the settling party, the non-settling defendant is entitled to a pro rata (proportionate) credit against the verdict.[21] If the settling defendant is not determined to be a joint tortfeasor, the non-settling defendant is entitled to a pro tanto (dollar-for-dollar) credit against the verdict in the amount of the settlement.[22] In this scenario, it does not matter that plaintiff may actually recover more than the amount of the verdict.[23] If a non-settling tortfeasor wishes to attempt to establish that the settling tortfeasor is a joint tortfeasor, it may be done through a cross-claim or a special jury verdict request.[24]

1 *National Health Labs v. Ahmadi*, 596 A.2d 555 (D.C. 1991).
2 *Felton v. Wagner*, 5/2 A.2d 291 (D.C. 1986).
3 *Myco Inc. v. Super Concrete Co.*, 565 A.2d 293 (D.C. 1989); *Remeikis v. Boss & Phelps' Inc.*, 4/9 A.2d 986 (D.C. 1980).
4 *Myco Inc. v. Super Concrete Co.*, 565 A.2d 293 (D.C.1/989).
5 *Id.*
6 *District of Columbia v. Washington Hosp. Center*, 722 A.2d 332 (D.C. 1998).
7 *Quadrangle Development Corp. v. Otis Elevator Co.* 748 A.2d 432 (D.C. 2000) (citations omitted).
8 *Myco' Inc. v. Super Concrete Co.' Inc.*, 565 A.2d at 297.
9 *Id.* at 298.
10 *Id.* at 299 n. 8.
11 *Park v. Forman Bros.' Inc.*, 785 F.Supp. 1029 (D.D.C. /992); *See East Penn Manufacturing Co. v. Pineda*, 578 A.2d 1113, 1127 (D.C. 1990).
12 *R. & G. Orthopedic Appliances and Prosthetics' Inc. v. Curtin*, 596 A.2d 530, 547-48
13 *First American Corp. v. Al-Nahyan*, 948 F.Supp. 1107 (D.D.C.1/996); Early Settlers Ins. Co., 221 A.2d at 923.
14 *R. & G. Orthopedic Appliances and Prosthetics' Inc. v. Curtain*, 596 A.2d at 544.
15 *District of Columbia v. Washington Hosp. Center*, 722 A.2d at 341.
16 *Liberty Mutual Ins. Co. v. District of Columbia*, 3/6 A.2d 871, 873 n.2 (D.C. 1974).
17 *District of Columbia v. Washington Hosp. Ctr.*, 722 A.2d 332, 336 (D.C. 1998).
18 *Id.* at 336 (*quoting Early Settlers Ins. Co. v. Schweid*, 221 A.2d 920, 923 (D.C.1966)); *Early Settlers Ins. Co. v. Schweid*, 221 A.2d 920, 923 (D.C. 1966).
19 *See Berg v. Footer*, 673 A.2d /244 (D.C. 1996).
20 *Martello v. Hawley*, 300 F.2d 72/, 722 (D.C. Cir. 1962); *Washington Hospital Center*, 579 A..2d 177/
21 *Paul v. Bier*, 758 A.2d 40, 45 (D.C. 2000).
22 *See Berg v. Footer*, 673 A.2d 1244, 1248-49 (D.C. 1996).
23 *Id.* at 1257.
24 *Id.* at 1250, n. 9.

Florida

By Luis E. Viera

Ogden & Sullivan, P.A.
Tampa, Florida

Tel: 813.223.5111
Fax: 813.229.2336

Email: lviera@ogdensullivan.com
www.ogdensullivan.com

Allocation of Fault

Florida fully abolished joint and several liability in 2006 with that year's amendments to §768.81, the state's comparative fault statute.[1] In so doing, the legislature specifically found inter alia that the doctrine led to unfair results in a products liability context.[2] The legislature revised §768.81 to ensure that fault is apportioned among all responsible parties.[3]

Trial courts are now instructed to allocate fault in products liability actions among all parties who contributed to the accident.[4] This includes the fault of the plaintiff.[5] It also includes the fault of any nonparty defendants.[6] To place fault on a nonparty, a defendant must affirmatively plead and prove the nonparty's liability by a preponderance of the evidence.[7] Nonparty tortfeasors are commonly referred to as "*Fabre* Defendants" due to *Fabre v. Marin*,[8] one of Florida's first major cases to analyze the legislative shift away from joint and several liability which began in the late 1980's.[9] Fault is allocated at trial via an itemized verdict form.[10]

The jury is instructed to assign a percentage of fault for all parties it finds contributed to the loss, including the plaintiff and any *Fabre Defendants*.[11] Fault may be allocated to a nonparty even if the entity enjoys immunity from suit.[12] A nonparty *intentional* tortfeasor, however, is not allowable on the verdict form.[13]

If applicable, the jury must then assign values for economic, noneconomic, and punitive damages.[14] Future economic damages may be awarded where those damages are "reasonably certain" to occur.[15] This does not require the finding of a permanent injury.[16]

Defendants are entitled to a statutory post-trial right of setoff from all collateral sources which have been paid to compensate the plaintiff for their injury.[17] The purpose of the statute is to prevent double recovery.[18] Typical setoffs include insurance payments, Social Security benefits, and private health care plan benefits.[19]

Where a plaintiff has received settlement proceeds from other defendants, those proceeds operate as a setoff to defendants found liable at trial only as to economic damages.[20] If the plaintiff is ultimately awarded both economic and noneconomic damages, the settlement proceeds are applied proportionally in accord with the jury's award.[21] This is done to prevent collusion between a plaintiff and settling defendant.[22]

Florida

If a settling defendant is placed on a verdict form as a *Fabre* Defendant, and the jury later finds that they were totally without fault, that settlement amount cannot be applied as a setoff to any amount owed by the at-fault defendants.[23]

Non Contractual Indemnity

Common law indemnity in Florida is governed by the rule established in the landmark case of *Houdaille Industries v. Edwards*.[24] In determining whether common law indemnity will lie, the party seeking indemnity must plead and prove the following:

1. That it is wholly without fault;
2. That the party against whom indemnity is sought is guilty of negligence; and
3. That there exists a special relationship between the parties which would make the party seeking indemnity only vicariously, constructively, derivatively, or technically liable for the wrongful acts of the party against whom indemnity is sought.[25]

There are several important ramifications of each prong in a products liability context. First, the defendant seeking indemnity must be *entirely* without fault. Merely selling a product which contains a latent defect does not constitute any "fault," however.[26] An otherwise innocent seller in the chain of distribution is therefore afforded a right of indemnity against an appropriate indemnitor. Second, the party against whom indemnity is sought must be negligent in some manner; indemnity cannot be obtained from an equally guilty-free entity in the chain of distribution.[27] This can create a practical problem in a situation where, for example, the only party guilty of negligence is judgment-proof or located in a foreign jurisdiction over which the parties cannot (or will not) obtain local jurisdiction.[28] If the plaintiff opts only to sue a single local defendant, that defendant cannot seek indemnity from any other guiltless local parties.[29]

Instead, the unfortunate party defendant must plead and prove *Fabre* Defendants as discussed above.

Finally, a special relationship must exist between the parties whereby the party seeking indemnity is only vicariously, constructively, derivatively, or technically liable to the plaintiff. The classic example of such a relationship is employer-employee. Under the doctrine of *respondeat* superior, a wholly without fault employer is nonetheless entirely liable for its employee's negligence.[30] The employer is then allowed a common law right of indemnity against its tortfeasor-employee.[31]

Independent contractors, however, do not maintain the requisite "special relationship" to give rise to any indemnity.[32] This is the rule as a matter of law.[33] In some instances the question may therefore turn to whether the relationship was one of principal-agent or independent contractor. In Florida, the primary factor in such a consideration is the right of control the purported principal maintains over the purported agent.[34] If there is any legal doubt as to whether the relationship is one of agency or independent contractor for indemnity purposes, the inquiry is resolved by the jury as a question of fact.[35]

The above principles apply even after a party has settled and then seeks indemnity from another party, proceeding as a plaintiff in a subsequent action.[36] In addition to proving the three *Houdaille* prongs, such a plaintiff must also prove that the settlement was reasonable.[37]

There is a statutory right of contribution among tortfeasors pursuant to §768.31. That statute allows one joint tortfeasor who has paid greater than its fair share of fault to recover the amount paid in excess of its proportionate fault from the other joint tortfeasor(s), so long as no tortfeasor is made to pay more than its share of fault.[38] The statute also specifically states that it has no effect on any existing indemnity obligations which may exist between the parties.[39] However, due to the 2006 amendments to §768.81 as discussed above, the practical applications of this statute have recently gone into limbo. *T&S Enterprises Handicap Accessibility, Inc. v. Wink Industrial Maintenance & Repair, Inc.*,[40] a 2009 intermediate Florida appellate decision, specifically holds that contribution is no longer a valid cause of action between tortfeasors in a third party context. It reasons that, given a defendant's ability to

Florida

apportion fault to a *Fabre* Defendant, a cause of action for contribution is no longer necessary.[41] Instead, a defendant who seeks to place blame with a nonparty is left to either affirmatively plead the fault of a *Fabre* Defendant or hope the plaintiff names the nonparty as a direct defendant.[42]

At least three federal district courts have followed Wink in dismissing third party contribution actions.[43] Because contribution has traditionally been a third party cause of action prior to the amendments to §768.81, its practical legal viability moving forward is unclear.[44]

Unlike contribution, which arises out of statute, Florida continues to recognize equitable subrogation as an alternative means for a party who has paid on a claim to recover from another party who is at fault.[45] It is available as a remedy to prevent unjust enrichment.[46]

Equitable subrogation is applied where a party has discharged the obligations of another and steps into the shoes of that obligor, assuming their rights and priorities.[47] One prerequisite to bringing an equitable subrogation claim is that the party who made the initial payment must have been protecting some right or interest of its own and must not have been acting as a mere volunteer.[48]

As with any claim in equity, the general rule is that a plaintiff can only state a cause of action for equitable subrogation where there is no adequate remedy at law.[49] It therefore should only be invoked as a last resort.

The rules differ somewhat where a defective product becomes installed as a structural improvement to real property.[50] In fact, Florida courts do not recognize structural improvements as "products" for purposes of products liability actions at all.[51]

The most significant impact of this rule is that the principles of strict liability do not apply to defective products which have been incorporated into real estate.[52] A key exception is where the plaintiff brings an action directly against the manufacturer of a defective product.[53]

Under the general rule, however, no right of common law indemnity exists against a contractor who installed a latently defective product,[54] as Florida does not impose a duty to inspect a product for latent defects.[55] Nor does any common law indemnity exist between a general contractor and its subcontractor(s).[56]

In fact, it appears that no action can be maintained directly against a contractor-installer of a latently defective product except under limited circumstances; namely, where the contractor knew or should have known of the defect, or where the product is "inherently dangerous."[57]

1 2006 Fla. Sess. Law Serv. Ch. 2006-6 (H.B. 145); all statutory references herein shall refer to the Florida Statutes (2011) unless otherwise noted.
2 Laws 2011, c. 2011-215 §2.
3 *Id.*
4 §768.81(3)(b).
5 §768.81(2).
6 §738.81(3)(a)(1).
7 *Id.*; *Honeywell Intern., Inc. v. Guilder*, 23 So.3d 867, 870 (Fla. 3d DCA 2009); *Lagueux v. Union Carbide Corp.*, 861 So.2d 87 (Fla. 4th DCA 2003).
8 623 So.2d 1182 (Fla. 1993) abrogated in part by *Wells v. Tallahassee Memorial Regional Medical Center, Inc.*, 659 So.2d 249 (Fla. 1995).
9 *See generally, e.g.*, 1988 Fla. Sess. Law Serv. 88-1 ("Medical Incidents – Quality Assurance and Tort Reform").
10 *E.g., Burns Intern. Sec. Services of Fla. v. Philadelphia Indem. Ins. Co.*, 899 So.2d 361 (Fla. 4th DCA 2005).
11 *E.g., id.*
12 *Y.H. Investments, Inc. v. Godales*, 690 So.2d 1273, 1277 (Fla. 1997) *approving Allied-Signal, Inc. v. Fox*, 623 So.2d 1180 (Fla. 1993).
13 *Merrill Crossing Assocs. v. McDonald*, 705 So.2d 560 (Fla. 1997); *Burns Intern. Sec. Services of Fla.*, 899 So.2d at 366; *La Costa Beach Club Resort Condo. Ass'n v. Carioti*, 37 So. 3d 303 (Fla. 4th DCA 2010).
14 §768.77(1)(a-c).
15 *Auto-Owners Ins. Co. v. Tompkins*, 651 So.2d 89, 91 (Fla. 1995).
16 *Id.*
17 §768.76. *State Farm Mut. Auto Ins. Co. v. Swindoll*, 89 So. 3d 246 (Fla. Dist. Ct. App. 3d Dist. 2011).
18 *Jones v. Martin Electronics, Inc.*, 932 So.2d 1100, 1108 (Fla. 2006).
19 §768.76(2)(a)(1-4).
20 *D'Angelo v. Fitzmaurice*, 863 So.2d 311, 312 (Fla. 2003); *Terry Plumbing & Home Services, Inc. v. Berry*, 900 So.2d 581, 586 (Fla. 3d DCA 2004).
21 *Wells*, 659 So.2d at 254; *Berry*, 900 So.2d at 586-87.
22 *Wells*, 659 So.2d at 254.
23 *Gouty v. Schnepel*, 795 So.2d 959, 961 (Fla. 2001).
24 *Tsafatinos v. Family Dollar Stores of Fla.*, 116 So. 3d 576 (Fla. Dist. Ct. App. 2d Dist. 2013)

Florida

25 *Id*. at 492 (emphasis added).
26 *K-Mart Corp. v. Chairs, Inc.*, 506 So.2d 7, 9 (Fla. 5th DCA 1987) (holding that a retailer has no duty to inspect a product for latent defects); *Dayton Tire & Rubber Co. v. Davis*, 348 So.2d 575, 582 (Fla. 1st DCA 1977) (same) quashed on other grounds, 358 So.2d 1339 (Fla. 1978); *Diplomat Props., L.P. v. Technoglass, LLC*, 114 So. 3d 357 (Fla. Dist. Ct. App. 4th Dist. 2013); *see also Carter v. Hector Supply Co.*, 128 So.2d 390 (Fla.1961).
27 *Costco Wholesale Corp. v. Tampa Wholesale Liquor Co., Inc.*, 573 So.2d 347 (Fla. 2d DCA 1990) (specifically declining to follow the New Jersey approach given *Houdaille*).
28 *See generally, id*.
29 *Id*.
30 *Hartford Acc. & Indem. Co. v. Kellman*, 375 So.2d 26, 30 (Fla. 3d DCA 1979).
31 *Id*.
32 *Paul N. Howard Co. v. Affholder, Inc.*, 701 So.2d 402, 404 (Fla. 5th DCA 1997).
33 *Id*.
34 *Madison v. Midyette*, 541 So.2d 1315 (Fla. 1st DCA 1989), approved, 559 So.2d 1126 (Fla. 1990).
35 *Dade County School Bd. v. Radio Station WQBA*, 731 So.2d 638, 642 (Fla. 1999); *Del Pilar v. DHL Global Customer Solutions (USA), Inc.*, 993 So.2d 142 (Fla. 1st DCA 2008).
36 *In re Masonite Corp. Hardboard Siding Product Liability Litigation*, 21 F.Supp.2d 593, 604 (E.D.La. 1998) (applying Florida law).
37 *Metropolitan Dade County v. Fla. Aviation Fueling Co.*, 578 So.2d 296, 298 (Fla. 1st DCA 1991).
38 §768.31.
39 §768.31(f).
40 11 So.3d 411 (Fla. 2d DCA 2009) & *see: Tsafatinos v. Family Dollar* Stores of Fla., 116 So. 3d 576 (Fla. Dist. Ct. App. 2d Dist. 2013).
41 *Id*. at 412.
42 *Id*.
43 *See Zurich Am. Ins. Co. v. Hi-Mar Specialty Chemicals, LLC*, 2010 WL 298392, 08-80255-CIV, *4 (S.D.Fla. 2010); *Mendez-Garcia v. Galaxie Corp.*, 2011 WL 5358658, 8:10-cv-788, *4 (M.D.Fla. 2010); *Zazula v. Kimpton Hotels and Restaurants, LLC*, 2011 WL 1656872, 10-21381-CIV, *2 (S.D.Fla. 2010).
44 *See Nationwide Mut. Ins. Co. v. Fouts*, 323 So.2d 593 (Fla. 2d DCA 1975) & *T&S Enters. Handicap Accessibility v. Wink Indus. Main. & Repair*, 11 So. 3d 411 (Fla. Dist. Ct. App. 2d Dist. 2009).
45 *Benchwarmers, Inc. v. Gorin*, 689 So.2d 1197 (Fla. 4th DCA 1997).
46 *Id*.
47 *Kala Investments, Inc. v. Sklar*, 538 So.2d 909 (Fla. 3d DCA 1989).
48 *Id*.
49 *McNorton v. Pan Am. Bank of Orlando, N.A.*, 387 So.2d 393, 399 (Fla. 5th DCA 1980).
50 *See Plaza v. Fisher Development, Inc.*, 971 So.2d 918 (Fla. 3d DCA 2007).
51 *Id.; Fed. Ins. Co. v. Bonded Lightening Protection Systems, Inc.*, 2008 WL 5111260 at *4-5 (S.D.Fla. 2008).
52 *Easterday v. Masiello*, 518 So.2d 260, 261 (Fla. 1988) ("It has long been recognized that the doctrine of strict products liability does not apply to structural improvements to real estate"); *Plaza*, 971 So.2d 918; *Pamperin v. Interlake Cos.*, Inc., 634 So.2d 1137 (Fla. 1st DCA 1994) ("structural improvements to real property are generally not considered products for purposes of products liability actions"); *Jackson v. L.A.W. Contracting Corp.*, 481 So.2d 1290, 1291 (Fla. 5th DCA 1986).
53 *Jackson*, 481 So.2d at 1291.
54 *Id*. at 1292.
55 *See* n. 26, *supra*.
56 *Affholder*, 701 So.2d at 404 ("The relationship between Howard and Affholder is that of general contractor (Howard) subcontracting with subcontractor/independent contractor (Affholder), and nothing more") *but see 14250 Realty Assocs., Ltd. v. Weddle Bros. Constr. Co.*, 8:07-cv-788, 2008 WL 4853635, *2 (M.D.Fla. 2008) (recognizing *Affholder* but distinguishing on specific language of contracts at issue in denying motion to dismiss common law indemnity count).
57 *Bennett v. Centerline Homes, Inc.*, 2010 WL 4530348 at 2 (Fla. Cir. Ct. March 18, 2011) (Kelley, J.) (citing Carter, 128 So.2d 390, and *Ryan v. Atlantic Fertilizer & Chem. Co.*, 515 So.2d 324 (Fla. 3d DCA 1987)); *Tampa Drug Co. v. Wait*, 103 So.2d 603, 608 (Fla. 1958) (defining "inherently dangerous" as a product which is "burdened with a latent danger which derives from the very nature of the article itself").

Georgia

By George R. Hall & Brooks K. Hudson

Hull Barrett, PC
Augusta, Georgia & Evans, Georgia & Aiken, South Carolina

Tel: 706.722.4481 | Fax: 706.722.9779 (Augusta)

Tel: 706.722.4481 | Fax: 706.650.0925 (Evans)

Tel: 803.648.4213 | Fax: 803.648.2601 (Aiken)

Email: Ghall@HullBarrett.com
Email: Bhudson@HullBarrett.com
www.hullbarrett.com

Allocation of Fault

In 2005, the Georgia General Assembly passed Senate Bill 3, commencing far-reaching legislative changes in Georgia's civil justice system. Many provisions of this so-called "Tort Reform Act" are applicable to the majority of civil cases regardless of the nature of the claim, and would certainly have bearing on product liability law. Unfortunately, due to the recent date of this law, governing authority is still sparse, and many scholars are in disagreement over the ramifications the new law will have going forward. As it relates to contribution, the law purports to abolish joint and several liability, thereby rendering contribution obsolete in the traditional sense. Most scholars agree with this presumption, but there is a minority faction that believes the opposite to be true.[1] The Courts are beginning to mold the law into shape through recent decisions, but a lot of questions still remain unanswered.

Some of the major changes ushered in by Senate Bill 3(SB3) concern allocation of fault. To understand how the law has changed in this area, one has to look to the changes made to O.C.G.A. § 51-12-31 and O.C.G.A. § 51-12-33.

O.C.G.A. § 51-12-31 states as follows:

> Except as provided in Code Section 51-12-33, where an action is brought jointly against several persons, the plaintiff may recover damages for an injury caused by any of the defendants against only the defendant or defendants liable for the injury. In its verdict, the jury may specify the particular damages to be recovered of each defendant. Judgment in such a case must be entered severally.

This section essentially eliminates the longstanding legal principle of joint and several liability in Georgia. The statute now provides that in actions against joint tortfeasors, the plaintiff may recover damages for injuries caused by any of the defendants only if they are found to be liable for the injury. The jury may then apportion the particular damages to be recovered from each defendant, and the judgment must be entered severally as to each defendant found to be liable.

The other revolutionary change in in this area of the law, comes in the remodeling of O.C.G.A. § 51-12-33.

Georgia

This statute adds a multitude of alterations that in essence eliminate contribution in a multi-defendant setting where there is injury to a person or property, but only if the trier of fact has apportioned the damages.[2]

First of all, the statute aids in establishing guidelines pertaining to comparative negligence. The statute continues the existing rule in Georgia that if a plaintiff is found to be some degree at fault for an alleged injury to person or property, the trier of fact will determine the plaintiff's percentage of fault, and the Judge will then reduce the award to the Plaintiff accordingly. It is also important to note, that if the plaintiff is found to be 50% or more at fault, any recovery is barred by law.[3]

Next, the statute established apportionment where more than one party is at fault for an alleged injury to person or property. The statue abrogated common law apportionment, eliminating it as a separate cause of action.[4] It was unclear until a recent decision by the Georgia Court of Appeals whether apportionment should be limited only to cases where the plaintiff was some degree at fault. The Court of Appeals opined:

> where damages are to be awarded in an action brought against more than one person for injury to person or property – whether or not such damages must be reduced pursuant to O.C.G.A. § 51-12-33(a) – the trier of fact 'shall . . . apportion its award of damages among the persons who are liable according to the percentage of fault of each person.' Had the legislature intended for subsection (b) of O.C.G.A. § 51-12-33 to be triggered only upon a reduction of damages pursuant to subsection (a) of that Code section, it could have so stated; but it did not impose any such prerequisite.[5]

The remaining sections of O.C.G.A. § 51-12-33 are entirely new sections added to the statute by SB 3. Section (c) allows for the trier of fact to consider the fault of all persons or entities who contributed to plaintiff's injuries, regardless if the person or entity "was, or could have been, named as a party to the suit."[6] Section (d) expands the role of nonparties for consideration by the trier of fact by mandating that "negligence or fault of a nonparty shall be considered" if the plaintiff enters into a settlement agreement with the nonparty or if the defendant gives notice to plaintiff at least 120 days before trial that a nonparty was partially or wholly at fault.[7] One final pertinent piece to this new legislation is that it findings of fault against a non-party cannot be used to subject a nonparty to liability and cannot be used as evidence in a subsequent lawsuit.[8]

Contribution

a. O.C.G.A. § 51-22-32

Another statute that must be mentioned when discussing contribution is O.C.G.A. § 51-22-32. This statute was left unchanged by SB3, and reads as follows:

> (a) Except as provided in Code Section 51-12-33, where a tortious act does not involve moral turpitude, contribution among several trespassers may be enforced just as if an action had been brought against them jointly. Without the necessity of being charged by action or judgment, the right of a joint trespasser to contribution from another or others shall continue unabated and shall not be lost or prejudiced by compromise and settlement of a claim or claims for injury to person or property or for wrongful death and release therefrom.
>
> (b) If judgment is entered jointly against several trespassers and is paid off by one of them, the others shall be liable to him for contribution.
>
> (c) Without the necessity of being charged by an action or judgment, the right of indemnity, express or implied, from another or others shall continue unabated and shall not be lost or prejudiced by compromise and settlement of a claim or claims for injury to person or property or for wrongful death and release therefrom.

This statute led some scholars to reason that joint liability, and therefore contribution, is still prevalent even when read in conjunction with the new law. Michael Wells, Carter Chair in Tort and Insurance law at the University of Georgia, wrote in a 2005 article that "Another feature of the statute bears on whether it should be interpreted as abolishing joint liability. Nothing was done to O.C.G.A. §

Georgia

51-12-32, the section in between [the two statutes mentioned above]. That statute as interpreted by the Georgia Supreme court, authorizes, 'pro rata' contribution among joint tortfeasors. This provision would be a nullity if there was no joint liability." Fortunately, since this article was published in 2005, some recent decisions by the courts have helped to clarify the apparent dichotomy between the seemingly conflicting statutes.

b. Caselaw

Courts have recently provided some clarity on the seemingly unclear issue of contribution. In *McReynolds v. Krebs*, the Court of Appeals ruled that when apportionment is required, there is no right of contribution or set-off.[9] In *McReynolds*, plaintiff was seriously injured in a motor vehicle accident. Plaintiff alleged her injuries were due to defendant driver's negligence, and further compounded by a manufacturing defect in her vehicle. Prior to trial, plaintiff entered into a settlement agreement with the manufacturer, and defendant attempted to argue he was entitled to either contribution from the manufacturer or setoff in the amount of the settlement. The Court disagreed, reasoning that: "Subsection (b) [of O.C.G.A. § 51-12-33] provides that when apportionment is required by the Code section, the defendants have no right of contribution… We see no basis for a set-off given that the statute requires each liable party to pay its own percentage share of fault and [defendant] presented no evidence regarding [manufacturer's] fault."[10] The Georgia Supreme Court upheld the Appellate Court's ruling in a recent decision on March 23, 2012, holding "that in applying § 51-12-33, the trier of fact must 'apportion its award of damages among the persons who are liable according to the percentage of fault of each person' even if the plaintiff is not at fault for the injuries or damages claimed."[11]

This is not to say that contribution is entirely extinguished under the new laws, but it does appear that it would not be applicable in a products liability setting where there are multiple defendants involved. The Georgia Court of Appeals has ruled that O.C.G.A. § 51-12-33 is not applicable to actions that do not involve injuries to persons or property, which seems to suggest that contribution would be available in certain situations.[12] This goes hand in hand with the language of O.C.G.A. § 51-12-32 discussed above. Also, it would appear that contribution would still be available for a single defendant who settles a case or receives a plaintiff's verdict. The defendant would then have the right to pursue an action for contribution against a third party who may be jointly liable. This issue was discussed by the Court in a footnote of a recent case, where the Court reasoned:

> However, *see, e.g., Murray v. Patel*, 304 Ga. App. 253, 255 (2) (2010) (rejecting argument that, given 2005 amendment to OCGA § 51-12-33 (b), the right of contribution no longer exists under Georgia law). In addition, Cavalier Convenience and Ken's Supermarkets have each responded that OCGA § "51-12-32, retaining the right of a tortfeasor to contribution, would continue to be applicable in instances where one party claimed liable resolves the plaintiff's entire claim by way of settlement and then pursues an action for contribution against others claimed to be responsible.[13]

Since the new laws are in their infancy, there is still much to be determined. It is important to note that some of these recent decisions are currently on certiorari to the Supreme Court, so some of the decisions discussed above are subject to change. For now, it appears the role of contribution in Georgia has been minimized where there are multiple defendants, but it is still clearly applicable in certain situations.

Indemnity

Indemnity in Georgia is defined as "the obligation or duty resting on one person to make good any loss or damage another has incurred or may occur by acting at his request or for his benefit.[14] " The duty to indemnify can materialize through express or implied contract "or may arise by operation of law, independently of contract."[15] Therefore, in the absence of an express contract of indemnity," if one person is compelled to pay damages because of [liability] imputed to him as the result of a tort committed by another,

Georgia

he may maintain an action over for indemnity against the person whose wrong has thus been imputed to him."[16] However, a claim for common law indemnity based on allegations that the parties are joint tortfeasors will fail, where no allegations of imputed negligence or vicarious liability are made.[17]

The right to indemnity does not hinge on the existence of a legal proceeding. O.C.G.A. § 51-12-32 recognizes the continuing existence of the right of indemnity against a joint tortfeasor who has been released from liability, where there is no judgment at all in the underlying suit, and even where there is no underlying suit filed. "Thus, the right of [indemnity] arises out of, but exists separately from, the rights present in the underlying suit."[18]

Courts do not favor contracts that indemnify a party against the consequences of its own negligence, but have consistently stated that they will uphold such an agreement if it is "expressed plainly, clearly, and unequivocally, in sufficient words."[19] Due to the nature of such agreements, the courts will strictly construe any such agreement.[20]

1 Michael L. Wells, "Joint Liability Rules," in Georgia's New Battleground: Five Georgia Law Professors Examine the State's New Tort Legislation, 39 Ga. Law Advocate (No. 2) 14, 18.
2 In *Zurich American Ins. Co. v. Heard*, 321 Ga. App. 325, 330 (2013), the Georgia Court of Appeals interpreted the statute based on its plain language, and held it did not abolish the right of contribution between settling joint tortfeasors when there was no apportionment of damages by a trier of fact.
3 O.C.G.A. § 51-22-33(a)
4 *Dist. Owners Ass'n, Inc. v. AMEC Envtl. & Infrastructure, Inc.*, 322 Ga. App. 713, 717 (2013), cert. denied (Nov. 4, 2013).
5 *Cavalier Convenience v. Sarvis, et al.*, 305 Ga. App. 141 at 145 (2010).
6 O.C.G.A. § 51-22-33(c)
7 O.C.G.A. § 51-22-33(c)
8 O.C.G.A. § 51-22-33(f)
9 307 Ga. App. 220 (2010)
10 *Id* at 217.
11 *McReynolds v. Krebs*, Supreme Court of Georgia, Case No: S11G0638 (March 23, 2012).
12 *City of Atlanta v. Benator et al.*, 310 Ga. App. 597 (2011)
13 *Cavalier Convenience, Inc. v. Sarvis, et al.* 305 Ga. App. 141 at 146, footnote 21 (2010).
14 *Bohannon v. Southern Ry. Co.*, 97 Ga. App. 849.
15 *Satilla Community Service Board v. Satilla Health Service, Inc. et al*, 251 Ga. App. 881 at 887 (2001), citing Central of Ga. Ry. Co. v. Macon Ry. & Light Co., 9 Ga. App. 628, 631 (1911).
16 *United States Shoe Corp., v. Jones*, 149 Ga. App. 595, 598 (1979).
17 *Dist. Owners Ass'n, Inc. v. AMEC Envtl. & Infrastructure, Inc.*, 322 Ga. App. 713, 716 (2013), cert. denied (Nov. 4, 2013).
18 *State Farm Fire & Cas. Co. v. Am. Hardware Mut. Ins. Co.*, 224 Ga. App. 789, 794 (1997).
19 *Seaboard C. L. R.R. Co. v. Freight Delivery Service, Inc.*, 133 Ga. App. 92, 94 (1974). See the following cases for examples of indemnity clauses insuring against one's on negligence that have been upheld by Georgia Courts: *Robert & Co. Associates v. Pinkerton & Laws Co.*, 120 Ga. App. 29 (169 SE2d 360); Gough v. Lessley, 119 Ga. App. 275 (166 SE2d 893); *Kraft Foods v. Disheroon*, 118 Ga. App. 632 (165 SE2d 189); *Dowman-Dozier Mfg. Co. v. Central of Ga. R. Co.*, 29 Ga. App. 187,
20 *Binswanger Glass Co. v. Beers Constr. Co.*, 141 Ga. App. 715, 717 (1977).

Hawaii

By Lois H. Yamaguchi

Roeca Luria Hiraoka LLP
Honolulu, Hawaii

Tel: 808.538.7500
Fax: 808.521.9648

Email: lyamaguchi@rlhlaw.com
www.rlhlaw.com

Allocation of Fault

Under Hawaii's modified comparative negligence statute, a plaintiff's recovery in negligence is either barred or reduced by the percentage of fault attributable to him.[1] If, for example, a plaintiff's negligence is greater than the aggregate negligence of the defendants, his recovery will be barred.[2] Otherwise, a plaintiff's recovery will be reduced by the degree of his own negligence.[3] Haw.Rev.Stat. § 663-31 applies only to a plaintiff's contributory negligence and does not operate as a bar to recovery under other liability theories.[4]

By contract, Hawaii law applies the doctrine of pure comparative fault to personal injury cases sounding in strict products liability.[5] Because warranty claims for personal injury are governed by strict liability principles, Hawaii law also applies pure comparative fault to actions in tort for breach of express and implied warranty.[6] Under pure comparative fault principles, a plaintiff's negligence reduces, but does not bar his product liability claim, even where his degree of fault may be greater than that of the defendant(s).[7] Thus, where the plaintiff is found to be negligent, pure comparative fault will apply to reduce, but not bar his recovery in tort actions for strict liability, and breach of express and/or implied warranty, if any.[8]

By statute, joint and several liability applies in cases involving, inter alia, the recovery of economic damages against joint tortfeasors in actions involving injury or death or persons[9], and the recovery of economic and non-economic damages against joint tortfeasors in actions involving, e.g., (C) toxic and asbestos-related torts or (E) strict and products liability torts.[10] Under joint and several liability, "the person who has been harmed can sue and recover from both wrongdoers or from either one of the wrongdoers (if he or she goes after both of them, he or she does not, however, receive double compensation)"[11]

In general, the "trial court has complete discretion whether to utilize a special or general verdict and to decide on the form of the verdict as well as the interrogatories submitted to the jury provided that the questions asked are adequate to obtain a jury determination of all factual issues essential to judgment."[12]

Hawaii

Typically, where a plaintiff seeks both economic and non-economic damages, (s)he will advocate for a special verdict form which requires the trier of fact to make a separate aware as to each category or sub-category thereof. Generally, joint tortfeasors or those who are "subject to suit" for the same injury to person or property, may be included on a verdict form for purposes of apportionment of fault at trial.[13] Non-parties can qualify as joint tortfeasors under Hawaii's

Uniform Contribution Among Tortfeasors Act and be included on a special verdict form, in the trial's court's sound discretion.[14] For example, the parents of an injured child qualify as joint tortfeasors against whom fault can be apportioned, where the injured child could enforce liability against them.[15] Conversely, where liability cannot be enforced against a particular person or entity, he/she/it is neither a joint tortfeasor, nor subject to allocation of fault at trial.[16]

A trial court's discretion to include a non-party joint tortfeasor on the verdict form for purposes of apportionment of fault, is dependent upon the presence of special circumstances and/or whether the party seeking such inclusion preserved its right to litigate the issue of proportionate fault by pleading. [17] That is, "although a trial court has discretion to include, or to decline to include, a non-party on a special verdict form, it does not, as a matter of law, have the authority to include a non-party who has not been brought into the case" by way of appropriate pleading.[18] Where, for instance, the non-party has not been appropriately brought into the case, its exclusion from the verdict form is mandated as a matter of law.[19]

Contribution

Hawaii's Uniform Contribution Among Tortfeasors Act (UCATA), codified at Haw.Rev.Stat. §§ 663-11 through 663-17 defines "joint tortfeasors" as "two or more persons jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them.[20] For purposes of Haw.Rev.Stat. § 663-11, "liable means subject to suit or liable in a court of law or equity.[21] While a right of contribution exists among joint tortfeasors, a joint tortfeasor is not entitled to judgment for contribution until he has discharged the common liability or paid more than his pro rata share thereof.[22] Moreover, a joint tortfeasor which fails to timely cross-claim against another, can lose its right to seek contribution or to have the relative degrees of fault of the joint tortfeasors considered in determining their pro rata shares.[23] It is thus standard litigation practice in Hawaii, for defending parties to preserve their rights to contribution and indemnity (whether contractual or non-contractual), by asserting cross-claims, third-party claims and/or counterclaims in a tort action - usually simultaneously with the filing of their answers to the plaintiff's complaint. This is so in both products liability cases and other tort cases.

Non Contractual Indemnity

Generally, a claim for indemnity is founded upon either an express contract or some common law duty existing or implied between the indemnitor and indemnitee, such as an implied duty to indemnify, a special relationship, or principles of active/passive or primary/secondary negligence or fault.[24] Federal courts in Hawaii have noted that equitable indemnity can arise "where the indemnitee has been held absolutely liable for the acts of another, e.g., where liability is based solely on respondeat superior, abailor-bailee relationship, or ownership of property (for injury resulting from a dangerous condition created by a third party).[25] Those courts have also recognized that equitable indemnity (aka tort indemnity) may apply where the indemnitor is actively, primarily or originally at fault, while the indemnitee is merely passive, secondarily or impliedly at fault or "where the indemnitee has without fault or only through passive negligence failed to discover a dangerous condition created by the indemnitor.[26]

In Hawaii, "a settlement given in good faith shall: (1) not discharge the non-settling joint tortfeasors from liability, unless its terms so provide; but (2) reduce the claims against the non-settling joint tortfeasors in the amount stipulated in the settlement or in the amount of the consideration paid for it, whichever is greater; and (3) discharge the settling tortfeasor from all liability for any contribution to the non-settling joint tortfeasors.[27] A non-settling defendant is not prohibited from putting on an empty chair defense at trial, or from introducing evidence that someone or something other than the non-settling defendant, caused the injury

Hawaii

complained of. Rather, a non-settling defendant at trial is permitted to point to the settling defendant as the cause of the accident or injuries complained of,[28] even where the settling defendant obtained a good faith settlement finding.[29] The non-settling defendant cannot, however, seek contribution from parties which have secured a good faith settlement determination by the court because as a matter of law, a good faith settlement finding by the court will discharge the settling party to whom it is given, "from all liability for any contribution to any joint tortfeasor or co-obligor.[30] In addition, a good faith determination by the court will (1) bar any further claims against the settling joint tortfeasor (except those based on a written indemnity agreement); and (2) result in dismissal of all cross-claims against the settling joint tortfeasor (except those based on a written indemnity agreement).[31]

Notwithstanding Hawaii's good faith statute, a joint tortfeasor may settle with a plaintiff without securing a good faith determination by the trial court. In that instance, any cross-claims or third-party claims for contribution and non-contractual indemnity against it would not be dismissed as a matter of law and the settling party could be required to remain in the case to litigate them.[32]

1 Haw. Rev. Stat. § 663-31.
2 Haw. Rev. Stat. § 663-31(a).
3 Haw. Rev. Stat. § 663-31(a).
4 See *Ozaki v. AOAO Discovery Bay*, 87 Hawaii 265, 270, 954 F.2d 644, 649 (1998).
5 *Armstrong v. Clone*, 69 Haw. 176, 180-83, 738 P.2d 79, 82-83 (1987).
6 *Torres v. Northwest Engineering Co.*, 86 Hawaii 383, 400, 949 P.2d 1004, 1021 (1997), *citing Larsen v. Pacesetter Systems, Inc*, 74 Haw. 1, 837 P.2d 1273 (1992); see Hawaii's Uniform Commercial Code, codified at Haw. Rev. Stat. §§ 490: 2-101, et seq.
7 Hao v. Owens-Illinois, Inc., 69 Haw. 231, 236, 738 P.2d 416, 419 (1987).
8 See *Torres v. Northwest Engineering Co.*, 86 Hawaii 383, 399-400, 949 P.2d 1004, 1020-21 (1997).
9 See Haw. Rev. Stat. § 663-10.9(1).
10 See Haw. Rev. Stat. § 663-10.9(2).
11 *State v. Ogan*, 2009 WL 2003224, * (Hawaii App. 2009), citing *Doe Parents No. 1 v. State, Dep't of Educ.*, 100 Hawai'i 34, 95, 58 P.3d 545, 606 (2002) (Acoba, J., concurring).
12 *Kato v. Funari*, 118 Hawaii 375, 380-81, 191 P.3d 1052, 1057-58 (2008), but see, *Moyle v. Y.Y. Hyup Shin Corp.*, 118 Hawaii 385, 400, 191 P.3d 1062, 1077 (2008).
13 See Haw. Rev. Stat. § 663-11; see *Gump v. Wal-Mart Stores, Inc*, 93 Hawaii 428, 446, 5 P.3d 418, 436 (App.1999) ("Gump I"), *overruled on other grds*, 93 Hawaii 417, 5 P.3d 407 (2000) ("Gump II").
14 *See Gump II*, 93 Hawaii at 422, 5 P.3d at 412.
15 See *Petersen v. City & County of Honolulu*, 51 Haw. 484, 485-86, 462 P.2d 1007, 1008 (1969).
16 See, e.g., *Doe Parents v. State Dept. of Education*, 100 Hawaii, 34, 87 n.50, 58 P.3d 545, 598 n.50 (2002) (defendant dismissed with prejudice can no longer be liabile in tort and is not a joint tortfeasor); Ozaki v. AOAO Discovery Bay, 87 Hawaii 265, 270-71 n. 5, 954 P.2d 644, 649-50 n.5 (1998) (defendant in whose favor judgment is entered cannot be jointly or severally liable for plaintiff's injuries and is not a joint tortfeasor). But see *Adams v. Yokooji*, 126 Hawai'i 420, 426, 271 P.3d 1179, 1185 (App.2012) (nothing in the good faith settlement law bars a non-settling defendant from challenging causation at trial, even if that entails introducing evidence of a settling defendant's fault).
17 *Moyle v. Y.Y. Hyup Shin Corp.*, 118 Hawaii 385, 398, 191 P.3d 1062, 1075 (2008).
18 *Id*. (internal quotes omitted).
19 *Id*.
20 Haw. Rev. Stat. § 663-11.
21 *See Gump I*, 93 Hawaii at 446, 5 P.3d at 436, overruled on other grds, 93 Hawaii 417, 5 P.3d 407 (2000) ("Gump II").
22 Haw. Rev. Stat. § 663-12.
23 *See Gump II*, 93 Hawaii at 422, 5 P.3d at 412 (by failing to preserve its rights pursuant to Haw. Rev. Stat. §§ 663-12 and 663-17(c) via cross-claim, non-settling defendant lost its right to seek contribution or apportionment of fault at trial).
24 *Kamali v. Hawn. Electric Co.*, 54 Haw. 153, 159-60, 504 P.2d 861, 865-66 (1972); see *Troyer v. Adam*, 102 Hawaii 399, 411, 77 P.3d 83, 95 (2003) (noting that only contracts involving co-obligors, could implicate obligations of equitable contribution or indemnity).
25 *In re Asbestos Case* 603 F.Supp. 599, 606-07 (D. Haw. 1984); see also, *SCD RMA, LLC v. Farsighted Enters., Inc*, 591 F.Supp.2d 1141, 1146-47 (D.Haw. 2008) (indemnity can be imposed when "two persons are liable in tort to a third person for the same harm and one of them discharges the liability of both").
26 *In re Asbestos Case*, 603 F.Supp. at 606.
27 *Troyer v. Adams*, 102 Hawaii at 403, 77 P.3d at 87, citing Haw Rev. Stat. § 663-15.5.
28 *Adams v. Yokooji*, 126 Hawaii at 426-428, 271 P.3d at 1185-87.
29 *Id*.
30 *Id*.; Haw. Rev. Stat. § 663-15.5(a)(3).
31 Haw. Rev. Stat. § 663-15.5(d).
32 See Haw. Rev. Stat. § 663-15.5(a)(3) (finding of good faith settlement discharges the settling defendant from liability for contribution to any joint tortfeasor or co-obligor); Haw.Rev.Stat §663-15.5(d)(2) (good faith determination results in dismissal of all cross-claims against settling joint tortfeasor or co-obligor, except those based on a written indemnity agreement).

Idaho

By Jason C. Palmer

Bradshaw, Fowler, Proctor & Fairgrave, P.C.
Des Moines, Iowa

Tel: 515.243.4191
Fax: 515.246.5808

Email: palmer.jason@bradshawlaw.com
www.bradshawlaw.com

Updated by William D. Kelly & Raymond Lyons, Jr.

Lipe Lyons Murphy Nahrstadt & Pontikis, Ltd.
Chicago, Illinois

Tel: 312.448.6230
Fax: 312.726.2273

Email: wdk@lipelyons.com
Email: rl@lipelyons.com
www.lipelyons.com

Allocation of Fault

In enacting Idaho's Products Liability Act of 1980 (IPLA), Idaho Code sections 6-1401 to 6-1410, the Idaho "legislature adopted the same scheme of comparative responsibility for products liability actions as it had enacted in 1971 in Idaho Code section 6-801, the comparative negligence statute."[1] Because the interpretation of comparative responsibility for products liability is essentially that of the Idaho Supreme Court's interpretation of Idaho Code section 6-801, the analysis of comparative fault issues pertaining to product liability essentially collapse into analysis of how Idaho courts treat fault allocation in negligence. Therefore, for example, since Idaho Code section 6-801 requires "all negligent actors contributing to the causation of any accident or injuries to be listed on the jury verdict form, whether or not they are parties to the action," through "[r]eason and consistency in statutory interpretation, products liability cases based on strict liability should be treated the same."[2] Thus, in relation to product liability cases, "[i]n determining whether or not to include additional parties on the verdict form, the question is not whether a judgment would or could be rendered against that person, but whether or not this conduct or his product caused or contributed to the accident and injuries."[3]

In 1971 the Idaho legislature enacted Chapter 8, Title 6, of the Idaho Code, providing for the comparison "of contributory negligence between parties on a percentage basis…"[4] Then when the Idaho Supreme Court adopted strict liability in 1973, it was held that 'contributory negligence in the sense of misuse of the product, or in the sense of voluntarily and unreasonably proceeding in the face of a known danger are good defenses to strict liability.'[5] The necessity and rationale for "comparing the contributory negligence of one party with the strict liability of a defendant" is contained within the "well-reasoned" analysis by the Federal District Court of Idaho in *Sun Valley Airlines, Inc. v. Avco-Lycoming Corp.*, 411 F.Supp. 598, 603 (1976).[6]

The court in Sun Valley held:

> The rationale of comparative negligence was meant to apply as well in a products liability action, such that misuse may not be an absolute bar to recovery. Applying Idaho's comparative negligence statute in this way is consistent with the policy underlying strict products liability, namely the spreading of loss to manufacturers

Idaho

> who are best able to absorb it. Upon a finding of blameworthy conduct, the jury in this case was asked, consistent with Idaho law, to assign a percentage to the causative conduct of the parties to this lawsuit.[7]

Following the *Sun Valley* decision, in *Odenwalt v. Zaring*, 102 Idaho 1, 624 P.2d 383 (1980), the Idaho Supreme Court "was faced with a specific issue of interpretation of the comparative negligence statute," Idaho Code section 6-801. The court stated that section 6-801, since it was "virtually identical to the Wisconsin comparative negligence statute in effect" when the Idaho legislature enacted section 6-801," "will be presumed to be adopted with the prior construction placed upon it by the courts" in Wisconsin.[8]

The Wisconsin Supreme Court in Dippel v. Sciano, 155 N.W.2d 55 (Wis. 1967), prior to Idaho's enactment of Idaho Code section 6-801, "had already construed its comparative negligence statute as being equally applicable to the theory of strict liability as well as the theory of negligence, just as the United States District Court for Idaho held in the Sun Valley case."[9] Accordingly, the Idaho Supreme Court followed the *Sun Valley* ruling and held, "comparative responsibility or comparative causation in strict liability cases [are] consistent with, and indeed probably mandated by the prior interpretation placed upon the Wisconsin version of Idaho Code section 6-801, which the Idaho legislature adopted."[10]

The Idaho Code sections 6-801 (Comparative negligence or comparative responsibility) and 6-802 (Verdict giving percentage of negligence attributable to each party) "envision apportionment where there is negligence attributable to the person recovering."[11] Without doubt, in Idaho's scheme of comparative responsibility, it is not only the plaintiff's and named defendant's fault that are in issue, when apportioning negligence, a jury must have the opportunity to consider the negligence of all parties to the transaction, whether or not they be parties to the lawsuit and whether or not they can be liable to the plaintiff or to the other tortfeasors either by operation of law or because of a prior release.[12] Idaho courts' rationale for adopting such a rule is that true apportionment cannot be achieved unless that apportionment includes all tortfeasors guilty of causal negligence either causing or contributing to the occurrence in question, whether or not they are parties to the case.[13]

Prior to a non-party being placed on the verdict form for an apportionment of negligence, however, there must be in existence "a plausible contribution to negligent causation" of that non-party.[14] Therefore, the *initial inquiry* into whether or not a non-party's conduct contributed to bringing about the injury, thus making it proper for the non-party to be placed on the verdict form for attributing negligence/fault, *lies with the court*.[15] After the initial inquiry and "[o]nce culpability, blameworthiness, or some form of fault is determined by the trier of fact to have occurred, then the labels denoting the 'quality' of the act or omission, whether it be strict liability, negligence, negligence per se, etc., becomes unimportant. *Thus, the underlying issue in each case is to analyze and compare the causal conduct of each party, regardless of its label.*"[16]

In light of Idaho's adoption of comparative negligence, interchangeably termed comparative responsibility, it is a jury question as to whether the warning provided on a product is adequate under the circumstances.[17] "Where there is substantial competent evidence that a manufacturer may have inadequately warned potential users of a danger or defect the user's percentage of comparative negligence will determine the reduction in the plaintiff's damages to the extent that the plaintiff did not act as an ordinary reasonably prudent person under the circumstances."[18]

Since the adoption of comparative negligence in Idaho, "the assumption of risk defense as an absolute bar to recovery has been eliminated."[19] Although assumption of risk is not a defense as an absolute bar to recovery, it is still applicable as a defense in light of the IPLA sections on comparative responsibility and conduct affecting comparative responsibility.[20]

A specific provision of the IPLA, Idaho Code section 6–1404, provides the requisite analysis for determining comparative responsibility and whether the plaintiff's own conduct shall act as a bar to recovery:

> Comparative responsibility shall not bar recovery in an action by any person or his legal representative to recover damages for product liability resulting in death or injury to person or property, if such responsibility was not as great as the responsibility of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of responsibility attributable to the person recovering.

Idaho

The IPLA goes on to list "conduct affecting comparative responsibility" in the next section, Idaho Code section 6-1405. The list includes the following defenses: (1) Failure to observe an obvious defective condition; (2) Use of a product with a known defective condition; (3) Misuse of a product; and (4) Alteration or modification of a product.[21] Therefore, as an example, "while Idaho Code section 6-1404 states that comparative negligence shall not be a bar to recover personal injuries, its application is limited to instances where the plaintiff's responsibility for his injuries is less than that of the manufacturer."[22] Idaho Code section 6-1405 "sets out an objective test" to determine to what extent the plaintiff's conduct alters the defendant's liability.[23]

As already noted, the Idaho Supreme Court adopted its comparative responsibility analysis for Iowa Code sections 6-1404 and 6-1405, IPLA sections on comparative responsibility and conduct affecting comparative responsibility, from Idaho courts' prior analysis stemming from the comparative negligence statute, Idaho Code section 6-801.[24] Because the analysis of whether Idaho Code sections 6-1404 and 6-1405 allow for the inquiry of nonparty's liability for fault allocation directly comes from the comparative negligence statute, where the cause of action is not based in negligence or not based on the premises of tort law, the inquiry into a non-party's fault is substantially limited.[25] For example, in determining whether Idaho law entitles a defendant to a jury instruction regarding a non-party's comparative negligence, the Ninth Circuit determined that, since the facts in issue involved a breach of warranty claim and because negligence is not a defense to liability for breach of a warranty claim, a jury instruction on the non-party's comparative negligence or including the non-party to the verdict form would be improper.[26] Idaho law allows "the defenses of misuse of a product or assumption of the risk to reduce or deny a plaintiff's recovery for breach of warranty, but [it] otherwise [denies] negligence as a defense."[27]

Contribution

"Contribution is available only when a party has paid more than its pro rata share of a judgment."[28] Contribution "is governed by Idaho Code § 6-803(3), by which the Idaho legislature largely abrogated the common law doctrine of joint and several liability for joint tortfeasors. That statute provides that in most circumstances: The negligence or comparative responsibility of each [tortfeasor] party is to be compared individually to the negligence or comparative responsibility of the person recovering. Judgment against each such party shall be entered in an amount equal to each party's proportionate share of the total damages awarded.[29]

"Under this subsection of [Idaho Code section] 6-803, in most cases a defendant who has been found liable to the plaintiff for a tort bears liability only for that defendant's proportionate share of the total damages, and the plaintiff may not recover from one defendant for the share of damages allocable to the fault of another defendant or nonparty tortfeasor."[30] In order to be held jointly and severally liable, the two liable parties would have to have been "acting in concert," which the [Idaho Code subsection 6-803(5)] defines as pursing a common plan or design which results in the commission of an intentional or reckless tortious act.[31] Idaho Code subsection 6-803(5) "preserves the common law doctrine of joint and several liability with respect to an employer's respondent superior liability. That subsection provides: 'A party shall be jointly and severally liable for the fault of another person or entity or for payment of the proportionate share of another party . . . when a person was acting as an agent or servant of another party."[32] However, "[b]ecause this subsection preserves joint liability only when one tortfeasor 'was acting as an agent or servant of another party,' it has no application in cases . . . where the employee's tortious act was outside the scope of the employment." [33]

Idaho Code subsection 6-803(3) "requires the comparison of not only parties' negligence but of their 'negligence or comparative responsibility,' thus allowing for apportionment of fault other than that arising from negligence.[34] "In addition, subsection (4) defines 'joint tortfeasor' as one (1) of two (2) or more persons jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them."[35] This definition "refers to anyone who is liable `in tort,'" and "is not limited to persons who are [merely] liable in negligence."[36] The [Idaho] Supreme Court noted that this definition of a joint tortfeasor is exceedingly broad and goes beyond the traditional meaning of the term.'"[37] So broad that, even if a

Idaho

joint tortfeasor's "conduct can be properly characterized as intentional rather than negligent, his name may be included on the special verdict form for purposes of apportionment of responsibility.[38]

"A joint tortfeasor who enters into a settlement with the injured person is entitled to recover contribution from another joint tortfeasor whose liability to the injured person is extinguished by the settlement."[39] "[N]either a covenant not to sue nor a release can operate to discharge the joint tortfeasors from liability, thus allowing contribution to be recovered, unless the agreement contains specific language to that effect."[40] Once a plaintiff discharges a defendant from liability for the plaintiff's injuries and obtains a release, a joint tortfeasor, still remaining in the case "is entitled to proceed under [Idaho Code section] 6-803 for contribution from [the released party.]"[41] But, the remaining party in the action may not recover from the released party "unless he establishes that [the released party] shares a common liability for [the plaintiff's] injuries."[42]

Indemnity

There are three prima facie elements of indemnity under Idaho law: "(1) an indemnity relationship, (2) actual liability of an indemnitee to the third party, and (3) a reasonable settlement amount."[43] Therefore, "there is no right of indemnification in Idaho unless the indemnitee has been held liable to pay damages to a third party."[44] However, where one acting in good faith, makes enters into a settlement under a reasonable belief that it is necessary to his protection, he will not be denied equitable indemnity, regardless of the fact he was not held liable to pay damages.[45] However, "[i]t is inherent in this rule that a party otherwise entitled to indemnity may recover a settlement amount to the extent it is reasonable. Otherwise, the mere unreasonableness of the settlement would destroy the right to indemnity."[46]

The issues product liability summon with regards to indemnity generally involve two or more parties that exerted some aspect of control regarding the defective product. Under Idaho law of indemnity, "[a] retailer found liable to a third party has a right of indemnity against a manufacturer where the article or product sold was defective because of the manufacturer's culpability."[47] The product liability cases involving a retailer's right to indemnity against a manufacturer, "present three potential situations. In situation A, both the retailer and the manufacturer are found to be liable to the plaintiff by the trier-of-fact. In situation B, the trier-of-fact finds the retailer free of fault, but the manufacturer is found liable. In situation C, the trier-of-fact finds neither the retailer nor the manufacturer to be at fault."[48]

Even in those cases where both the manufacturer and retailer are found not liable to the plaintiff, the retailer may receive indemnification from the manufacturer for attorney fees and costs expended solely in defense of the claims which were directed against the manufacturer.[49] Therefore, pursuant to Idaho law, "the general rule is that in an indemnity action there is no right to recover attorney fees incurred for defending against the indemnitee's own fault."[50] The issue before the Idaho Supreme Court in Borchard was whether a manufacturer was obligated to indemnify a retailer for costs and attorney fees incurred by the retailer in defending itself against a buyer's products liability claim. The court discussed three potential situations, of which situation B (the trier-of-fact finds the retailer free of fault, but the manufacturer is found liable) is analogous to the scenario presented in Borchard The court said:

> In situation B where the manufacturer is found liable by the trier-of-fact, but the retailer is not, the manufacturer should be liable for all of the retailer's attorney fees and defense costs except as to the defense of those allegations which were directed only against the retailer. The retailer must bear its own costs in defending itself against claims which allege that it was at fault, even if the trier-of- fact absolves the retailer of liability.[51]

Clearly, the court in Borchard recognized that the right to recover attorney fees and defense costs should be limited. The indemnitee is entitled to recover only those fees and costs not primarily directed toward defending against allegations of its own fault or active negligence.[52]

Idaho

1 *Vannoy v. Uniroyal Tire Co.*, 111 Idaho 536, 543, 726 P.2d
2 *Id.* (citations omitted); *see also Henderson v. Cominco American, Inc.*, 95 Idaho 690, 518 P.2d 873 (1973) (holding the applicability of comparative responsibility in actions based on negligence is "applicable to products liability actions based on negligence").
3 *Vannoy*, 726 P.2d at 660.
4 *Id.* at 652.
5 *Id.* at 652-53 (citing *Shields v. Morton Chemical Co.*, 95 Idaho 674, 677, 5/8 P.2d 857, 860 (1974)).
6 *Sun Valley Airlines, Inc. v. Avco-Lycoming Corp.*, 411 F.Supp.598, 603 (1976)
7 *Id.*
8 *Id.* at 653 (citations omitted).
9 *Id.*
10 *Id.*
11 *Hickman v. Fraternal Order of Eagles' Boise No. 115*, 114 Idaho 545, 547-48, 758 P.2d 704, 706-07 (1988).
12 *Id.* (quoting *Connar v. West Shore Equipment of Milwaukee, Inc.*, 68 Wis. 2d 42, 227 N.W.2d 660, 662 (1975)).
13 *Id.* (quoting *Pocatello Ind. Park Co. v. Steel West' Inc.*, 101 Idaho 783, 787, 621 P.2d 399, 403 (1980)); see also *Van Brunt v. Stoddard*, 136 Idaho 681, 687, 39 P.3d 621, 627 (2001); *Smallwood v. Dick*, 114 Idaho 860, 866, 761 P.2d 1212, 1218 (1988) (holding "in a comparative negligence case, in which the verdict form directs the negligence attributed to the plaintiff and the defendant add up to 100%, the absence of the other potentially responsible individuals or companies would affect the comparative negligence of the defendant and the plaintiff necessary to determine the named defendant's liability").
14 *Hickman* 758 P.2d at 706.
15 See *Van Brunt*, 39 P.3d at 627 (analyzing whether a non-party actor's conduct was in contributing factor in bringing about the plaintiff's injuries); see also *Hickman, Hickman*, 756 P.2d at 706 (defining "contributory negligence" as "negligence which contributes to the accident, that is negligence having a causal connection with it and but for which the accident would not have occurred"); *Jones v. Crawforth*, 147 Idaho 11, 18, 205 P.3d 660, 667 (2009) (holding that since the party attempting to include other non-named parties to the verdict form in a medical malpractice case failed to produce any expert testimony demonstrating either of the entities' actions fell below the applicable standard of care, these non-parties were rightfully excluded from the verdict form); *Munns v. Swift Transp. Co, Inc.*, 138 Idaho 108, 112, 58 P.3d 92, 96 (2002) (holding that since evidence showed "the conduct of an unnamed, unknown party may have" contributed to the incident causing the plaintiff's injuries, "the jury should have decided the negligence and comparative fault of that party" (emphasis added)).
16 *Vannoy*, 726 P.2d at 654 (quoting *Sun Valley Airlines v. Avco- Lycoming Corp.*, 411 F. Supp. 598, 603 n. 5. (1976). (emphasis supplied)); see also *Quick v. Crane*, 111 Idaho 759, 780, 727 P.2d 1187, 1209 (1986) (holding evidence is not admissible to establish contributory negligence where there is a lack of connection between the act that increased the harm, like not wearing a seatbelt, and the occurrence of the incident, like a car accident, nor can a defendant diminish the consequences of his negligence merely by the plaintiff's failure to anticipate that negligence, i.e., neglecting to wear a seatbelt).
17 *Tuttle v. Sudenga Industries, Inc.*, 125 Idaho 145, 151, 868 P.2d 473, 479 (1994) (holding it was improper for the trial court "to acknowledge the likely defects of the warnings and yet hold as a matter of law that such warnings could not be the proximate cause of" the plaintiff's injuries).
18 *Watson v. Navistar Intern. Transp. Corp.*, 121 Idaho 643, 662, 827 P.2d 656, 675 (1992).
19 *Id.*
20 I.C. §§ 6-1404 and 6-1405.
21 196, I.C. 6-1404.
21 *Id.*
22 *Puckett v. Oakfabco, Inc.*, 132 Idaho 816, 823, 979 F.2d 1174, 1182 (1999).
23 *Id.*
24 I.C. § 6-1401 ("The previous existing applicable law of this state on product liability is modified only to the extent set forth in this act); see *Vannoy*, 726 P.2d at 654 ("Nothing in the products liability act modifies the approved and required practice of comparing the responsibility of all alleged tortfeasors on a special verdict form, whether or not those alleged tortfeasors are parties to the action."); see also id. at 654 (stating that while the Idaho Supreme Court has "never considered the practice in a specific products liability action based solely on the theory of strict liability, the policies underlying the practice of attributing responsibility to every alleged tortfeasor, whether or not a party to the action, are equally applicable to products liability actions based upon strict liability as well as actions based on negligence or other tort theories").
25 *Millenkamp v. Davisco Foods Intern, Inc.*, 562 F.3d 971, 975-76 (9th Cir. 2009).
26 *Id.* at 975.
27 *Id.*
28 *Burgess v. Salmon River Canal Co., Ltd.*, 119 Idaho 299, 309, 805 P.2d 1223, 1233 (1991) (citing *Masters v. State*, 105 Idaho 197, 668 P.2d 73 (1983); I.C. § 6-803(1)).
29 *Rausch v. Pocatello Lumber Co., Inc.*, 135 Idaho 80, 88, 14 P.3d 1074, 1082 (Ct. App. 2000) (citing *Hughes v. State*, 129 Idaho 558, 563, 929 P.2d 120, 125 (1996); *LeGall v. Lewis County*, 129 Idaho 182, 184-85, 923 P.2d 427, 429-30 (1996)).
30 *Id.*
31 *Athay v. Stacey*, 16 Idaho 407, 422, 16 P.3d 325, 340 (2008) (quoting I.C. §6-803).
32 *Rausch*, 14.3d at 182.
33 *Id.*
34 *Id.*
35 *Id.*
36 *Id.*
37 *Id.* (quoting *Holve v. Draper*, 95 Idaho 193, 195, 505 P.2d 1265, 1267 (1973)).
38 *Id.*
39 *Brockman Mobile Home Sales v. Lee*, 98 Idaho 530, 532, 567 P.2d 1281, 1283 (1977) (citing Idaho Code § 6-803(2)).
40 *Id.*. (citing *Holve v. Draper*, 95 Idaho 193, 505 P.2d 1265 (1973)).
41 *Id.*
42 *Id.*; see also Idaho Code § 6-803(4) (further citations omitted); see also id. (In order to establish common liability for plaintiff's injuries, the remaining defendant may be required to establish the released party "acted with gross negligence, or intentionally, or while intoxicated").
43 *Chenery v. Agri-Lines Corp.*, 115 Idaho 281, 285, 766 P.2d 751, 755 (1988).
44 *Weston v. Glove Slicing Mach. Co.*, 621 F.2d 344, 347 (9th Cir. 1980).
45 *Chenery*, 766 P.2d at 755.
46 *Weaver v. Searle Bros.*, 129 Idaho 497, 500, 927 P.2d 887, 890 (1996).
47 *Borchard v. Wefco, Inc.*, 112 Idaho 555, 558, 733 P.2d 776, 779 (1987). For an analysis of Idaho law involving situations that may alter indemnification rights of parties in a products liability cause of action, see *Harris, Inc. v. Foxhollow Const. & Trucking' Inc.*, 151 Idaho 761, 264 P.3d 400 (2011) (commercial transactions and the UCC sections on indemnification); *R. W. Beck & Associates' Inc. v. Job Line Const., Inc.*, 122 Idaho 92, 831 P.2d 560 (1992) (agreements involving construction contract indemnity).
48 *Borchard*, 733 P.2d at 779.
49 *Id.* at 780.
50 *Chenery*, 766 P.2d at 758.
51 *Borchard*, 733 P.2d at 779.
52 *Id.*

Illinois

By Edward A. DeVries & Raymond Lyons, Jr.

Lipe Lyons Murphy Nahrstadt & Pontikis, Ltd.
Chicago, Illinois

Tel: 312.448.6230
Fax: 312.726.2273

Email: ead@lipelyons.com
Email: rl@lipelyons.com
www.lipelyons.com

Allocation of Fault

Illinois allows joint and several liability among tortfeasors in a modified comparative fault regime.[1] If the plaintiff's percentage of fault, as determined by the trier of fact, is 50% or less, the plaintiff will recover damages, reduced by its percentage of the total fault.[2] If the plaintiff is found to be more than 50% at fault for the injury, the plaintiff is barred from recovery.[3] The magic number for fault apportionment among defendants is less than 25%, because any defendant whose fault is less than 25% of the total fault attributable to the plaintiff, the other defendants, and any third-party defendant who could have been sued by the plaintiff (except the plaintiff's employer), is only severally liable for all non-medically related damages.[4] A defendant whose fault is 25% or greater of the fault allocated to the plaintiff, the defendants sued by the plaintiff, and any third-party defendants (except the plaintiff's employer), however, is jointly and severally liable for all damages.[5] All defendants in a negligence or strict liability suit are liable for past and future medical damages, regardless of their respective percentages of fault. The Illinois Supreme Court has held that settling defendants are not to be excluded from apportionment of fault for the purpose of the 25% calculation, and therefore should not be included on jury verdict forms.[6]

Contribution and Implied Indemnity

Under Illinois law, the right of contribution and the right of non-contractual or implied indemnity are separate and distinct concepts, the former a statutory construct and the latter a creature of the common law.[7] Contribution exists to distribute liability among joint tortfeasors according to each tortfeasors' respective share of the total fault.[8] It contemplates situations where each tortfeasor has contributed to the plaintiff's loss or injury in some way. On the other hand, indemnity allows one tortfeasor to shift the entire loss to another tortfeasor, whether by express or implied contract.[9] Implied indemnity is allowed only when the party seeking indemnity is completely without fault, or blameless.[10] Claims for either contribution or indemnity are made via a third party action, cross-claim or counterclaim, whereby additional defendants are brought into the underlying lawsuit, for purposes of judicial economy and efficiency.[11]

Primerus
The World's Finest Law Firms

Illinois

The Contribution Among Joint Tortfeasors Act ("Contribution Act") abolished the doctrine of "equitable implied indemnity," which was a judicially created proxy for contribution applied in tort cases.[12] However, implied indemnity based on quasi-contractual principles remained viable.[13] Thus, implied indemnity is available in tort where the indemnitee's liability is solely derivative, or where a principal is vicariously liable for the conduct of an agent or for the non-delegable acts of an independent contractor.[14] Although they are similar, indemnity and contribution are mutually exclusive remedies for allocating a plaintiff's damages among joint tortfeasors.[15]

Contribution

The Contribution Act permits, where two or more persons are subject to liability in tort arising out of the same injury, a right of contribution among them even though judgment has not been entered against any or all of them.[16] The party seeking contribution may recover only that amount which exceeds its pro rata share of the common liability.[17] A party seeking contribution must assert a claim by counterclaim, cross-claim, or third party claim during the pendency of an underlying suit, if one is pending.[18]

Joint tortfeasors need not be found liable on the same theory of liability to maintain an action for contribution, so long as all are simply liable in tort.[19] The tortfeasors also need not be jointly and severally liable for all of the plaintiff's injuries.[20] An employer's immunity will limit, but not bar, the extent of contribution liability, as the employer's contribution liability cannot exceed its statutory worker's compensation liability.[21] However, a party may waive the worker's compensation limit, and potentially make it liable for unlimited contribution.[22] No right of contribution exists in favor of the intentional tortfeasor.[23]

Implied Indemnity

In Illinois implied, or common law, indemnity is available to a tortfeasor whose liability is vicariously imposed by law rather than culpability of conduct.[24] The law thus allows a defendant who satisfied a judgment for which it and another tortfeasor are jointly and severally liable to recover from the other tortfeasor the entire amount the defendant was obligated to pay.[25] The doctrine is based on quasi-contract principles and it recognizes that the law may derivatively impose liability upon a blameless party (the indemnitee) through another's conduct (the indemnitor) who actually caused the plaintiff's injury.[26] In the circumstance, the law will imply and recognize a promise by the indemnitor to make good the loss incurred by the indemnitee.[27]

A defendant entitled to bring an implied indemnity action has a choice of filing a third-party complaint, cross-claim or counterclaim against a party who may be liable to indemnify him as part of the original action, or of waiting until the original action is over and filing a separate action for indemnity if he is found liable.[28] In order to state a cause of action for implied indemnity, a third-party complaint, counterclaim or cross-claim must allege (1) a "pre-tort relationship" between the indemnitee and the indemnitor; (2) a qualitative distinction between the conduct of the indemnitee and the indemnitor; and (3) that the indemnitee is free from fault in the underlying action.[29] Examples of pre-tort relationships include: attorney and client; lessor and lessee; employer and employee; owner and lessee; master and servant; agent and principal; and city and contractor.[30]

Statute of Repose & Statute of Limitation

The product liability statute of repose, whereby an action must be commenced within 12 years of the first possession by a seller or 10 years of first possession to the user or consumer of the product, whichever expires earlier, also applies to product liability contribution claims.[31]

The applicable statute of limitation for contribution and indemnity claims provides that, where no underlying action seeking recovery has been filed by a claimant, an action for con-tribution or indemnity by a defendant/third-party plaintiff must be filed within two years of settlement payment discharging liability to the claimant.[32] Where an underlying action has been filed by a claimant, a defendant/third-party plaintiff must file its contribution or indemnity action within two years of being served with process in the underlying action, or within two years from the time the defendant/third-party plaintiff knew or should have reasonably known of the act or omission giving rise to the indemnity action, whichever expires later.[33]

Illinois

Effect of Settlement on Contribution & Indemnity Rights

A defendant's "good faith" settlement with the plaintiff will serve to discharge it from contribution liability to other defendants.[34] The settlement reduces the recovery on any claim against the others to the extent of any amount stated in the settlement agreement.[35] In reviewing a settlement for determination of good faith, the court will look at all the circumstances surrounding the settlement.[36] A settling party seeking discharge from contribution liability bears the initial burden of making a preliminary showing of good faith, but once a preliminary showing is made, the burden of proof on the issue of good faith of the settlor shifts to the party who claims that the settlement was not made in good faith or was collusive.[37] A party challenging the good faith nature of a settlement agreement must prove by a preponderance of the evidence that the settlement was not made in good faith.[38]

A tortfeasor who settles in good faith with a claimant is not entitled to contribution from any joint tortfeasors whose liability to the claimant is not also extinguished by the same settlement.[39] In order to extinguish the liability of the other tortfeasors to the claimant, such tortfeasors must be specifically identified in the settlement agreement.[40] This requirement of specific identification can be satisfied by the designation of a class of persons, however, such as a company's "agents, servants or employees."[41]

Unlike other jurisdictions, settlement of a claim in Illinois between a plaintiff and a defendant may serve to bar the settling defendant from seeking implied indemnity.[42] Where a settlement between a plaintiff and a defendant who later seeks indemnity is substantial, the court may find it was made to avoid an adverse finding or fault.[43] In such situations, the settlement implicitly establishes fault, and a party which is not blameless has no right to implied indemnity.[44] This rule typically does not become an issue in the products liability context due to the Illinois distributor statute, which provides that a non-manufacturer defendant, such as a distributor or retailer, may be dismissed from a strict product liability action if that defendant certifies the correct identity of the manufacturer of the product which allegedly caused the injury and that it was not involved in the design or manufacture of the allegedly defective product, did not create the alleged defect, and had no knowledge of the alleged defect. The distributor statute only applies to products liability based on strict liability.[45]

Finally, in vicarious liability cases where a plaintiff brings a respondeat superior claim against a principal and its agent, and the agent settles the case, the settlement between the agent and the plaintiff extinguishes the principal's vicarious liability to the plaintiff by operation of law.[46] This rule operates to eliminate the need for the principal to bring an implied indemnity action against its agent and applies regardless of whether the plaintiffs' covenant not to sue the agent expressly reserves a right to seek recovery from principal.[47]

Illinois

1 735 ILL. COMP. STAT. 5/2-1117
2 735 ILL. COMP. STAT. 5/2-1116
3 *Id.*
4 735 ILL. COMP. STAT. 5/2-1117
5 *Id.*
6 *Ready v. United/Goedocke Services, Inc.*, 905 N.E.2d 725, 733 (Ill. 2008).
7 *C.F. Dixon v. Chicago & North Western Transportation Co.*, 601 N.E.2d 704, 708 (Ill. 1992); *Kerschner v. Weiss & Co.*, 667 N.E.2d 1351, 1355 (Ill. Ct. App. 1996)
8 *Id.*
9 *Id.*
10 *See Frazer v. A.F. Munsterman, Inc.*, 527 N.E.2d 1248, 1255 (Ill. 1988); *Kerschner*, 667 N.E.2d at 1355.
11 735 ILL. COMP. STAT. 5/2-406(b); *Kercshner*, 667 N.E.2d at 1355.
12 *See American Nat. Bank and Trust Co. v. Columbus-Cuneo-Cabrini Medical Center*, 609 N.E.2d 285, 287 (Ill. 1992); Frazer, 527 N.E.2d at 1254-55.
13 *See American Nat. Bank and Trust Co.*, 609 N.E.2d at 288; *Frazer*, 527 N.E.2d at 1254-55.
14 *Id.*
15 *See, e.g., Home Ins. Co. v. Cincinnati Ins. Co.*, 821 N.E.2d 269 (Ill. 2004); *Herington v. J.S. Alberici Const. Co., Inc.*, 639 N.E.2d 907 (Ill. Ct. App. 1994).
16 740 ILL. COMP. STAT. 100/2(a).
17 *Id.* at §§ 100/2(b), 5.
18 *Id.* at § 100/5; *Harshman v. DePhillips*, 844 N.E.2d 941, 949-50 (Ill. 2006); *Laue v. Leifheit*, 473 N.E.2d 939, 941-42 (Ill. 1985).
19 *J.J. Case Co. v. McCartin-McAuliffe Plumbing & Heating, Inc.*, 516 N.E.2d 260, 267 (Ill. 1987).
20 *Mayhew Steel Products, Inc. v. Hirschfelder*, 501 N.E.2d 904, 906 (Ill. Ct. App. 1986); *see also Burke v. 12 Rothschild's Liquor Mart, Inc.*, 593 N.E.2d 522, 525-26 (Ill. 1992).
21 *Kotecki v. Cyclops Welding Corp.*, 585 N.E.2d 1023, 1027-28 (Ill. 1991).
22 *Virginia Sur. Co., Inc. v. Northern Ins. Company of New York*, 866 N.E.2d 149, 160 (Ill. 2007).
23 *Gerill Corp. v. Jack I. Hargrove Builders, Inc.*, 538 N.E.2d 530, 542 (Ill. 1989).
24 *Travelers Cas. & Sur. Co. v. Bowman*, 893 N.E.2d 583 (Ill. 2008).
25 *Frazer*, 527 N.E.2d at 1251.
26 *Kerschner*, 667 N.E.2d at 1355; *see also American Nat. Bank and Trust Co.*, 609 N.E.2d at 287.
27 *Id.*
28 *Kercshner*, 667 N.E.2d at 1355, *see also* 735 ILL. COMP. STAT. 5/2-406(b).
29 *See Frazer*, 527 N.E.2d at 1251-52, citing *Van Slambrouck v. Economy Baler Co.*, 475 N.E.2d 867, 870 (Ill. 1985).
30 *See e.g. Blasczak v. Union Tank Car. Co.*, 184 N.E.2d 808 (Ill. 1962) (lessee and lessor); *Kerschner*, 667 N.E.2d at 1356) (attorney and client relationship); *Embree v. Gormley*, 199 N.E.2d 250, 253 (Ill. Ct. App. 1964) (master and servant relationship); *Gulf, M. & O. R. Co. v. Arthur Dixon Transfer Co.*, 98 N.E.2d 783, 785 (Ill. Ct. App. 1951) (city and contractor relationship); *see also Jinwoong, Inc. v. Jinwoong, Inc.*, 310 F.3d 962, 965 (7th Cir. 2002) (finding that a pre-tort relationship is required for implied indemnity under Illinois law).
31 740 ILL. CODE STAT. 5/13-213(b); *Thompson v. Walters*, 565 N.E.2d 1385, 1387-88 (Ill. Ct. App. 1990).
32 740 ILL. CODE STAT. 5/13-204(a).
33 *Id.* at § 5/13-204(b).
34 *Id.* at § 100/2(d).
35 *Id.* at § 100/2(c).
36 *Wilson v. Hoffman Group, Inc.*, 546 N.E.2d 524, 527, 529 (Ill. 1989).
37 *See e.g. Johnson v. United Airlines*, 784 N.E.2d 812, 818 (Ill. 2003); *Hoffman Group, Inc.*, 546 N.E.2d at 529; *see also Miranda v. Walsh Group, Ltd.*, 997 N.E.2d 895, 899 (Ill. Ct. App. 2013) (finding that, at minimum, the parties must show the existence of a legally valid settlement agreement). *But see Cianci v. Safeco Ins. Co. of Illinois*, 826 N.E.2d 548, 562-63 (requiring evidentiary hearing to determine fairness and reasonableness of settlement amounts).
38 *Johnson v. United Airlines*, 784 N.E.2d 812, 818 (Ill. 2003).
39 740 ILL. COMP. STAT. 100/2(e).
40 *Alsup v. Firestone Tire & Rubber Co.*, 461 N.E.2d 361, 364 (Ill. 1984); *see also* 740 ILL. COMP. STAT. 100/2(c).
41 *Farmers Auto, Ins. Ass'n v. Wroblewski*, 887 N.E.2d 916, 924 (Ill. Ct. App. 2008).
42 *See Thatcher v. Commonwealth Edison Co.*, 527 N.E.2d 1261, 1263 (Ill. 1988) (denying indemnity in case where party entered into settlement agreement).
43 *Id.*; *Kemner v. Norfolk & Western R.R. Corp.*, 544 N.E.2d 124, 127 (Ill. Ct. App. 1989).
44 *South Side Trust and Savings Bank of Peoria v. Mitsubishi Heavy Industries, Ltd.*, 927 N.E.2d 179, 186 (Ill. Ct. App. 2010). An argument could be made that this rule runs contrary to the general rule promoting settlement of claims. *See generally Miranda*, 997 N.E.2d at 899 (stating that public policy strongly favors resolution of claims).
45 See 735 ILL. COMP. STAT. 5/2-621; *Whelchel v. Briggs & Stratton Corp*, 850 F.Supp.2d 926, 937 (N.D. Ill. 2012) (applying Illinois law).
46 *American National Bank & Trust Co.*, 609 N.E.2d at 289-90.
47 *Id.*; *Gibbs v. Top Gun Delivery and Moving Services, Inc.*, 928 N.E.2d 503, 508-09 (Ill. Ct. App. 2010).

Indiana

By Edward A. DeVries & Raymond Lyons, Jr.

Lipe Lyons Murphy Nahrstadt & Pontikis, Ltd.
Chicago, Illinois

Tel: 312.448.6230
Fax: 312.726.2273

Email: ead@lipelyons.com
Email: rl@lipelyons.com
www.lipelyons.com

Allocation of Fault

In Indiana tort claims (not involving claims against governmental defendants), fault allocation and contribution are controlled by the Indiana Comparative Fault Act[1] and the Product Liability Act.[2] The Product Liability Act applies to all product actions regardless of the theory under which the claim is brought.

Contribution is not allowed between joint tortfeasors in both negligence and product liability cases.[3] In exchange, the old rule of joint and several liability was abdicated and is no longer permitted in tort.[4] Therefore, a tort defendant cannot be found liable for more than its pro-rata share of fault in Indiana.[5]

Fault is allocated between all who caused or contributed to harm, including non-parties named by a defendant in an affirmative defense.[6] A non-party must be identified because they are included by name in the verdict forms.[7] A defendant that is dismissed pursuant to settlement may subsequently be named by a remaining defendant in a non-party affirmative defense,[8] but only if an objection is made at the time of dismissal.[9]

In cases involving a single defendant, or two defendants that can be treated as one defendant under the law, the jury assesses the fault of the plaintiff, the defendant, and any non-party defendant.[10] If the fault of the plaintiff is greater than 50% of the total fault involved, the plaintiff is barred from recovery; if the fault of the plaintiff is not greater than 50%, the judgment is entered against the defendant only for its percentage of the total fault.[11]

In cases involving two or more defendants, the jury assesses the fault of the plaintiff, defendants, and nonparties pursuant to similar statutes.[12] If the fault of the plaintiff is greater than 50% of the total fault involved, the plaintiff is barred from recovery; if the fault of the plaintiff is not greater than 50%, the judgment is entered against each defendant only for their percentage of the total fault.[13]

Subrogation claims or other claims or liens on recovery arising out of the payment of medical expenses or other benefits are reduced in proportion to the original claimant's recovery.[14] Those subrogation claims or similar liens are subject to such a reduction when full recovery is not obtained due to the comparative fault of the claimant or uncollectibility for any reason.[15]

Primerus
The World's Finest Law Firms

Indiana

Non-contractual common law indemnity

Common law indemnity, or implied indemnity, is available as a remedy in Indiana despite the general rule prohibiting contribution among joint tortfeasors so long as the claimant is without fault.[16] Both the Indiana Comparative Fault Act and the Product Liability Act expressly state that they do not affect any right to indemnification.[17] Indiana law supports and will enforce clear contractual indemnity provisions even where the indemnitee is not completely free of fault, but in the absence of such an express contractual or statutory obligation, indemnification is only available where the claimant is without fault and has been compelled to pay damages because of the wrongful conduct of another.[18] The statute of limitations for an indemnity claim does not run until the indemnitee's liability is determined and thus may have a different statutory deadline than the underlying cause of action.[19] Implied indemnity may still be sought where an underlying case settled, but the indemnitee must still prove the indemnitor's liability and that the indemnitee is free of fault.[20] Despite the fact that the indemnity cause of action does not actually accrue until the indemnitee has been compelled to pay damages, a common law indemnity claim may be asserted in an underlying action before the underlying liability or amount of damages has been fixed.[21]

1 IND. CODE § 34-51-2-1 et seq.
2 IND. CODE § 34-20-1-1 et seq.
3 IND. CODE §§ 34-51-2-12, 34-20-7-1; *Coca-Cola Bottling Co.-Goshen, Ind. V. Vendo Co.*, 455 N.E.2d 370, 372-73 (Ind. Ct. App. 1983).
4 IND. CODE §§ 34-20-7-1, 34-51-2-8; *Santelli v. Rahmatullah*, 993 N.E.2d 167, 177 (holding that abrogation of joint and several liability applies to both negligence and intentional torts). *But see Indiana Dept. of Ins. V. Everhart*, 960 N.E.2d 129 (Ind. 2012) (finding that joint and several liability still applies to medical malpractice claims);
5 *Id.*
6 IND. CODE §§ 34-51-2-8, 34-51-2-14.
7 IND. CODE §§ 34-51-2-7, 34-51-2-8, 34-51-2-11.
8 *Koziol v. Vojvoda*, II, 662 N.E.2d 985 (Ind. Ct. App. 1996).
9 *Compare Rausch v. Reinhold*, 716 N.E.2d 993 (Ind. Ct. App. 1999) (requiring that remaining defendant raise an objection prior to a parties dismissal); *with Pier 1 Imports (U.S.), Inc. v. Acadia Merrillville Realty, L.P.*, 991 N.E.2d 965 (holding that a party is not required to emphatically state an intent to name a party in its objection).
10 IND. CODE §§ 34-51-2-7, 34-20-8-1.
11 *Id.*
12 IND. CODE §§ 34-51-2-8, 34-20-8-1.
13 *Id.*
14 IND. CODE § 34-51-2-19.
15 *Id.*; *State Farm Ins. Co. v. Young*, 985 N.E.2d 764, 767 (Ind. Ct. App. 2013).
16 *Ind.-Marian C. Pub. Library v. Charlier Clark & Linard, P.C.*, 929 N.E.2d 838 (Ind. Ct. App. 2010).
17 IND. CODE § 34-51-2-12; Ind. Code 34-20-9-1.
18 *Indianapolis Power & Light Co. v. Brad Snodgrass, Inc.*, 578 N.E.2d 669 (Ind. 1991).
19 *Coca-Cola Bottling Co.-Goshen, Ind.*, 455 N.E.2d at 375.
20 *See Four Winns, Inc. v. Cincinnati Insurance Company, Inc.*, 471 N.E.2d 1187 (Ind. Ct. App. 1984) (holding that implied indemnity could be sought against a manufacturer by the seller of a product, but only if the manufacturer's liability is proved and if the seller was not at fault).
21 IND. TR. R. 14; *see also Coca-Cola Bottling Co.-Goshen, Ind.*, 455 N.E.2d 370 (considering dispositive motions on both the underlying claim and third-party indemnification claim).

Iowa

By Jason Palmer

Bradshaw, Fowler, Proctor & Fairgrave, P.C.
Des Moines, Iowa

Tel: 515.243.4191
Fax: 515.246.5808

Email: palmer.jason@bradshawlaw.com
www.bradshawlaw.com

Updated by George W. Appleby

Carney & Appleby, PLC
Des Moines, Iowa

Tel: 515.282.6803
Fax: 515.282.4700

Email: appleby@carneyappleby.com
www.carneyappleby.com

Allocation of Fault

Iowa's comparative fault statute, Iowa Code section 668.1, unlike many other states' comparative fault statutes, which apply comparative fault concepts only in cases involving negligence, "expressly states that the fault of other parties is to be compared in cases of negligence, recklessness, and strict liability."[1] Further, in determining the percentages of fault, the Iowa legislature in Iowa Code section 668.3(3) expressly provided that "the trier of fact shall consider both the nature of the conduct of each party and the extent of the casual relation between the conduct and the damages claimed."[2] Following sections 668.1 and 668.3(3), thus, for the jury or trier fact to even consider conduct for allocating fault, that conduct must be that of a party to the action.[3]

The comparative fault statute defines "Party" to include a claimant, a person named as defendant, a person released pursuant to Iowa Code section 668.7 (i.e. a person who has settled or agreed to a covenant not to sue), and a third-party defendant.[4] Even in the recognition that a clear public policy would be furthered by applying comparative fault to a nonparty, Iowa courts have strictly construed this statute to adhere to the legislative intent.[5]

Iowa courts have repeatedly interpreted Iowa Code sections 668.2 and 668.3 to preclude allocation of fault to all nonparties.[6] A defendant that has been dismissed by the plaintiff is no longer a party to the lawsuit. And when that party is dismissed without a corresponding release pursuant to Iowa Code section 668.7, regardless of the actual fault that party may have had in the injury to the plaintiff, the jury is "precluded from allocating fault" to that dismissed party under Iowa's comparative fault statute.[7]

A third-party defendant for the purpose of meeting the definition of "Party" "means a third-party defendant whose fault toward the claimant is an issue either in the original action or in the third-party action."[8] But, "only parties whose fault toward the claimant is an issue should be included in the total aggregate of causal fault;" thus, "[t]he fault of parties toward the claimant which has not been placed in issue cannot be considered."[9] It is therefore "improper to bring parties into an action for purposes of ascertaining their degree of fault in the absence of some claim for affirmative relief against those parties."[10]

Iowa

Where "a defendant or third-party defendant has a special defense to the plaintiff's claim, that party's fault is not to be considered in the allocation of aggregate causal fault by the trier of fact."[11] This tenet has not been restricted to situations where there is a lack of causal fault on the part of the third party— "[i]t also applies when [the third] party has a special defense to the plaintiff's claim, irrespective of fault."[12] This special defense can occur in a number of situations, for example it occurs where a special defense of the third-party defendant is based on the exclusive-remedy provisions of the workers' compensation laws[13] and where defendants base a special defense on the rule that no action may be brought between a deprived spouse and an injured spouse inter se for loss of consortium[14].

Comparative fault analysis does not in and of itself "determine if a defendant is liable;" it does, however, "determine the relative liability as between the named defendants."[15] For example, even if the court were to allow the apportionment of fault against a third-party defendant for the sole purpose of the party-defendant's cross-claim, no fault can be allocated to the third-party defendant unless the plaintiff has a viable claim against the third-party defendant.[16]

"The requirement that a third-party defendant's fault may not be considered in the apportionment of aggregate fault unless the plaintiff has a viable claim against that party is not a mere mechanical rule. It is based on policy considerations arising in the application of [Iowa Code] chapter 668."[17] For example, "the presence of a third-party defendant in an action may siphon off a portion of aggregate fault from the defendant against whom the plaintiff is claiming. This can result in the plaintiff receiving a lesser recovery than if the third-party defendant were not in the case."[18] In enhanced injury cases, there is another argument that an exception to the application of comparative fault principles has support on public policy grounds, but given the breadth of the language of Iowa's comparative fault act and the Iowa Supreme Court's insistence on applying the term "party" strictly and narrowly, "the [Iowa] legislature has not provided for such an exception."[19]

A bankruptcy would be such a special defense that would render the plaintiff "unable to protect themselves from fault-siphoning," because, "[u]nder the bankruptcy court's order [the plaintiff] would have no possibility of obtaining an enforceable judgment against" the party protected by the bankruptcy.[20] And, even though "the inability to allocate fault to a codefendant… may indeed be harsh and unjust,… the potential insolvency of a codefendant should be borne by the solvent defendants, not the plaintiffs."[21]

Finally, in actions brought under Iowa Code Chapter 668, a "Party" is only jointly and severally liable if the "Party" is found to bear fifty-percent or more of the total fault assigned to all parties. However, a defendant found to bear fifty percent or more of fault shall only be jointly and severally liable for economic damages and not for any noneconomic damages.[22]

Contractual, Non-Contractual, or Implied

Contractual Indemnity/Contribution "Iowa Code section 668 does not directly address the question of indemnity."[23] Iowa Code section 668.5(1), however, does require that in order for contribution to be in issue, there must be common law liability for the claimant.[24]

Contribution rests on the principle that parties subject to liability at common law should contribute equally to the discharge of liability. Two or more persons must be liable to the injured party for the same damage, although liability may rest on different grounds or theories.[25]

"Some time ago, the Iowa Supreme Court distinguished between claims for "contribution" and "indemnity" as follows:

> Contribution is based on concurrent negligence of the parties toward the injured party and requires common liability. There are several different reasons for permitting indemnity: (1) express contract; (2) vicarious liability (respondeat superior or the statutory liability imposed on the owners of automobiles); (3) breach of an independent duty running from the employer to the third party; [and] (4) active (primary) as opposed to passive (secondary) negligence. The right of indemnity in the first three instances is based upon the relationship between the employer and the third party.
>
> Only in those instances in which the party passively negligent has been allowed indemnity from the party actively negligent, do you have a situation in which indemnity is only an extreme form of contribution. Such cases involve concurrent negligence (of different degrees) of the tort-feasors toward the injured party.[26]

Iowa

"Indemnification is a form of restitution" that "shifts the entire liability or blame from one legally responsible party to another."[27] The Iowa Supreme Court refers "to implied contractual indemnity as including indemnity claims (other than express indemnity) arising out of contractual relations" and refers to the term "equitable indemnity" to denote "distinctly different indemnity claims" that result from the "noncontractual legal relationships between the indemnitor and the indemnitee."[28]

Indemnity based on express contract, vicarious liability, or breach of an independent duty centers "on the relationship between the indemnitor and indemnitee."[29] "In contrast indemnity based on the active-passive negligence dichotomy focuses on the relationship between the injured party on the one hand and the indemnitor and indemnitee on the other."[30] Because of this contrast, "indemnity based on active-passive negligence has been called "an extreme form of contribution."[31]

Because a contribution claim relies solely on the negligence of the actor, "a contribution claim by a third-party against the employer of the injured person is entirely barred by the "exclusive remedy" provision of the Iowa Workers' Compensation Act," Iowa Code section 85.20.[32] Further, then all but the "active passive negligence" indemnity justification for allowing indemnity are not barred by the exclusive remedy provision of the Iowa Workers' Compensation Act, section 85.20, because the other three grounds are not based on "common liability."[33]

The Iowa Supreme Court has "couched [its] implied contractual indemnity doctrine in terms of an "independent duty," stating that an implied contractual duty to indemnify may arise from a contractual relationship that lacks an express obligation to indemnify where there are "independent duties" in the contract to justify the implication."[34] The "independent duties" that justify such an implication "arise in the context of implied contractual indemnity when the contract implies 'a mutual intent to indemnify the liability or loss resulting from a breach of the duty.'"[35] Thus, "where circumstances require that a party to an agreement 'ought to act as if he had made such a promise, even though nobody actually thought of it or used words to express it,'" an implied contractual duty to indemnify is proper.[36]

It is not necessary that a party seeking indemnity under a theory of implied contractual indemnity be blameless in connection with the incident. For example, in *Iowa Power & Light Co. v. Abild Construction Co.*, where an employer company who was negligent toward its own employee was still able to recover on an implied contractual indemnity theory where the indemnitor breached its contractual obligation to notify the employer of construction activity around power lines.[37] The issue presented in an implied contractual indemnity case, thus, "is whether a duty arising from the contract has been violated and, if so, what damages flow directly from breach of that duty."[38]

"[A] party who seeks to establish a right to indemnity in an independent action must normally plead and prove it was liable to the injured party" because "indemnity involves the shifting of responsibility of liability for loss from one who is legally responsible to another."[39] "Normally, a judgment in the underlying action will establish the essential liability to pursue indemnification;" however, "a settlement does not constitute an adjudication of the issues of negligence with the injured party and des not, by itself, bar further adjudication on the merits of a claim against another party."[40] For an indemnitee who settles the underlying claim to recover for indemnification, "the indemnitee "must establish the existence of its liability to the injured party[,]… the settlement was reasonable, and that the indemnitor had a duty to indemnify the indemnitee."[41]

Equitable indemnity "is a murky doctrine based on notions of fairness and justice."[42] Unlike the case where implied contractual indemnity is in issue, because equitable indemnity arises from noncontractual obligations, "[w]hen equitable indemnity is involved, the intention of the parties to indemnify… is not relevant."[43] Because of this, "the law imposes indemnity due to the relationship of the parties and the underlying loss regardless of intention."[44]

The Iowa Supreme Court long ago "eliminated the privity requirement in products liability cases raising a breach-of-implied-warranty claim."[45] However, the claims that may be brought by a purchaser are not without limits. One example of this limitation is in regards to equitable indemnity. The Iowa Supreme Court has held "that a nonprivity purchaser may recover "direct economic loss" for breaches of implied warranties under the U.C.C.," but the court has repeatedly

Iowa

held that because "[i]t would be illogical for indemnity based upon independent duties established by implied U.C.C. warranties to provide greater substantive relieft than would be available in a direct action under the U.C.C.… a remote purchaser of goods cannot recover "consequential economic loss" from a vendor under an equitable indemnity theory."[46]

1 *Jahn v. Hyundai Motor Co.*, 773 N.W.2d 550, 560 (Iowa 2009) (citing Coker v. Abell–Howe Co., 491 N.W.2d 143, 147 (Iowa 1992) (emphasis added); *see also Buechel v. Five Star Quality Care, Inc.*, 745 N.W.2d 732, 735 (Iowa 2008) (citing Iowa Code § 668.1) (holding Iowa's comparative fault statute to include claims based upon, not only theories of negligence but also "those rooted in strict liability, such as products liability claims").
2 IOWA CODE § 668.3(3) (2011) (emphasis added).
3 *Buechel*, 745 N.W.2d at 735 (citing *Spaur v. Owens-Corning Fiberglass Corp.*, 510 N.W.2d 854, 863 (Iowa 1994)) (holding Iowa's "comparative fault statute precludes fault-sharing with a defendant not party to the suit").
4 Iowa Code § 668.2.
5 See *Baker v. City of Ottumwa*, 560 N.W.2d 578, 584 (Iowa 1997) (holding Iowa's comparative fault statute makes no allowance for drawing a distinction between "fault" and "liability" in order to alleviate the disadvantage a defendant faces for not being able to "siphon off" some portion of the fault for the plaintiff's injuries); *see also Fell v. Kewanee Farm Equipment Co., A Div. of Allied Prods.*, 457 N.W.2d 911, 922–23 (Iowa 1990) (Here is an illustration of the Iowa courts' faithful approach to the strict definition of "party" in Iowa Code § 668.2: Plaintiff was injured by farm machinery. She sued the manufacturer for strict liability and the owner of the machinery for negligence. The machinery owner, as a third-party plaintiff, sued the husband of the plaintiff to seek relief. Subsequently, the plaintiff prior to trial settled with the machinery owner, and the machinery owner and the husband were released from the lawsuit. The manufacturer attempted to get the husband's name on the special verdict form, as a party against whom the jury could apportion fault. However, the release was between the plaintiff and machinery owner. The manufacturer did not file a third-party action against the husband. The Iowa Supreme Court concluded since the husband was dismissed without being a party to the release, Iowa Code section 668.7 did not apply.)
6 *See Selchert v. State*, 420 N.W.2d 816, 819 (Iowa 1988). For examples of cases where the Iowa Supreme Court has precluded allocation of fault to nonparties based on their strict definition of "party" *see Baldwin v. City of Waterloo*, 372 N.W.2d 486 (Iowa 1985) (nonparty was unidentified); *see Payne Plumbing & Heating Co. v. Bob McKiness Excavating & Grading, Inc.*, 382 N.W.2d 156 (Iowa 1986) (dismissed prior to trial); *see Peterson v. Pittman*, 391 N.W.2d 235 (Iowa 1986) (known parties to an occurrence from whom no relief was sought); *see Renze Hybrids Inc. v. Shell Oil Co.*, 418 N.W.2d 634 (Iowa 1988) (acts of God).
7 *Spaur*, 510 N.W.2d at 862 (recognizing where there was no evidence of a document of release or an exchange of a settlement between the plaintiff and the discharged defendant, the court was unable to label the discharged party a "party" to the lawsuit for purposes of fault allocation).
8 *Kragel v. Wal-Mart Stores, Inc.*, 537 N.W.2d 699, 706 (Iowa 1995) (citing Reese v. Werts Corp., 379 N.W.2d 1, 6 (Iowa 1985)).
9 *Id.* (citing *Schwennen v. Abell*, 430 N.W.2d 98, 102 (Iowa 1988).
10 *Pepper v. Star Equipment, Ltd.*, 484 N.W.2d 156, 157 (Iowa 1992) (citing *Peterson v. Pittman*, 391 N.W.2d 235, 238 (Iowa 1986)) (holding that a defendant in a products liability action could not implead, for the purpose of fault apportionment, a third-party defendant protected against a personal judgment by federal bankruptcy law).
11 *Id.* at 158 (citing Schwennen, 430 N.W.2d 98; Reese, 379 N.W.2d 1).
12 *Id.* at 158.
13 *Schwennen*, 430 N.W.2d 98.
14 *Reese*, 379 N.W.2d 1.
15 *Buechel*, 745 N.W.2d at 735.
16 *Spaur*, 510 N.W.2d at 863.
17 *Pepper*, 484 N.W.2d at 158.
18 *Id.*; *see also Spaur*, 510 N.W.2d at 863 (recognizing that under Iowa Code section 668.4, "imposing joint and several liability, a slight difference in fault allocation may produce a substantial difference in recover").
19 *Jahn*, 773 N.W.2d at 560.
20 *Spaur*, 510 N.W.2d at 863.
21 *Id.*
22 Iowa Code § 668.4.
23 *Rees v. Dallas Cnty.*, 342 N.W.2d 503, 506 (Iowa 1985).
24 *See Estate of Ryan v. Heritage Trails Assocs., Inc.*, 745 N.W.2d 724, 726 (Iowa 2008) (Iowa Code § 614.1.(2)(a), statute of repose section for products liability, did not do away with common liability requirement of Iowa Code § 668.5(1) for contribution claims in product liability actions); *Chicago Cent. & Pac. R. Co. v. Union Pac. R. Co.*, 558 N.W.2d 711 (Iowa 1997) (common liability criterion was unaffected by Iowa Code § 668.5).
25 *See State Dept. of Human Servs. ex rel. Palmer v. Unisys Corp.*, 637 N.W.2d 142 (Iowa 2001).
26 *Cochran v. Gehrke Const.*, 235 F. Supp. 2d 991, 998 (N.D. Iowa 2002) (citations omitted).
27 *Wells Dairy, Inc. v. Am. Indus. Refrigeration, Inc.*, 762 N.W.2d 463, 469 (Iowa 2009) (citations omitted).
28 *Id.* at 470.
29 *Rees*, 342 N.W.2d at 505.
30 *Id.* at 506.
31 *Id.* at 506.
32 *Cochran*, 235 F. Supp. 2d at 999 (citations omitted).
33 *Id.*; *see Rees*, 342 N.W.2d at 506 (stating it would be against the statutory scheme of chapter 668 to allow indemnity based on active-passive negligence in the absence of common liability).
34 *Wells Dairy, Inc.*, 762 N.W.2d at 470 (citing *McNally & Nimergood v. Neumann-Kiewit Constructors, Inc.*, 648 N.W.2d 564, 573 (Iowa 2002)).
35 *Id.* (quoting *McNally & Nimergood*, 648 N.W.2d at 573).
36 *Id.* (quoting *Woodruff Constr. Co. v. Barrick Roofers, Inc.*, 406 N.W.2d 783, 785 (Iowa 1987)).
37 *Iowa Power & Light Co. v. Abild Construction Co.*, 144 N.W.2d 303, 317 (Iowa 1966).
38 *Id.*
39 *McNally & Nimergood*, 648 N.W.2d at 574.
40 *Id.* at 574–75.
41 *Id.* at 575 (citing *Ke-Wash Co. v. Stauffer Chem. Co.*, 177 N.W.2d 5, 11 (Iowa 1970)).
42 *Wells Dairy, Inc.*, 762 N.W.2d at 471.
43 *Id.*
44 *Id.*
45 *Id.* at 476 (citing *State Farm Mut. Auto. Ins. Co. v. Anderson-Wever, Inc.*, 110 N.W.2d 449, 456 (Iowa 1961)).
46 v (citations omitted) ("Direct economic loss is the difference between the value of goods as warranted and the value of goods actually delivered, while consequential economic losses includes all losses caused by the defective product.")

Kansas

By J. Dennis Chambers

Atchley, Russell, Waldrop & Hlavinka, L.L.P.
Texarkana, Texas

Tel: 903.792.8246
Fax: 903.792.5801

Email: dchambers@arwhlaw.com
www.arwhlaw.com

Updated by David W. Steed

Klenda Austerman LLC
Wichita, Kansas

Tel: 316.267.0331
Fax: 316.267.0333

Email: dsteed@klendalaw.com
www.klendalaw.com

Allocation of Fault

Kansas courts apply comparative negligence principles for product liability claims.[1] Generally, a trier of fact may allocate fault to any party or non-party whom it deems bore some culpability for causing the injury underlying the claim at issue.[2] Non-parties that are otherwise exempt from liability, e.g. an employer protected by the Workers Compensation Act, must be considered by the trier of fact to properly apportion fault among the responsible parties.[3] Non-party and phantom defendants are permitted under Kansas law.

Non-Contractual Indemnity/Contribution

Kansas recognizes the equitable remedies of comparative implied indemnity and contribution among tortfeasors.[4] The concept of comparative implied indemnity arises from a manufacturer's implied warranty of fitness for a product, and allows a defendant to seek contribution from responsible parties according to their percentage of comparative fault. "In order to prevail on a claim for partial indemnity or contribution against a third-party defendant, the settlor must show it actually paid damages on behalf of that third party. If the third party was never at risk of having to pay for its own damages, the settlor cannot show it benefitted the third-party defendant, and the value of its contribution claim is zero.[5] Courts have expressly limited comparative implied indemnity to cases involving indemnification among those in the chain of distribution of a product.[6] This holding restrains a defendant from pursuing indemnity against parties not in the chain of distribution who happen to be joint tortfeasors. Further, a claim of indemnity against a manufacturer is barred when the damages resulted from the seller's own failure or refusal to repair the defective goods.[7]

Statutes Affecting Indemnity and Contribution Rights

The right to seek and obtain indemnity in the products liability context is a right expressly reserved by statute in Kansas.[8]

Primerus
The World's Finest Law Firms

Kansas

Effect of Settlement on Indemnity Rights

Settlement in and of itself does not affect the settlor's ability to seek indemnity from fellow tortfeasors.[9] Upholding this proposition, Kansas courts have "recognized that one defendant can settle with the plaintiff and remove himself from the action without foreclosing the plaintiffs options to later pursue other non-settling defendants for their proportionate responsibility.[10] Although claims for equitable contribution sound in contract and unjust enrichment, the relationship between multiple guarantors is governed by the more specific laws of contribution.[11]

1 *Black v. Hieb's Enterprises, Inc.*, 805 F.2d 360 (10th Cir. (Kan.) 1986). See also K.S.A. § 60-258a (2011).
2 *Id.*
3 *Scales v. St. Louis-San Francisco Ry. Co.*, 582 P.2d 300, 307 (Kan. App. 1978).
4 *Schaefer v. Horizon Building Corp.*, 985 P.2d 723 (Kan. App. 1999), Teapak, Inc. v. Learned, 699 P.2d 35, 40 (1985) ("The concept of contribution among tortfeasors arises from equitable origins—a person partially causing injury to another but paying for all of the injury should be entitled to contribution thereon from another person causing part of the injury.").
5 *Id.*
6 *Dodge City Implement, Inc. v. Board of County Com'rs of County of Barber*, 165 P.3d 1060, 1069 (Kan. App. 2007). See also Blackburn, Inc. v. Harnischfeger Corp., 773 F. Supp. 296, 299 (D. Kan. 1991) (acknowledging that claim for comparative implied indemnity was limited to parties in manufacturer's chain of distribution and supply or parties in which explicit contract for indemnification or contribution was formed).
7 *Black v. Don Schmid Motor, Inc.*, 657 P.2d 517, 529 (1983).
8 K.S.A. § 60-3303(b)(2)(C).
9 *Dodge City Implement, Inc. v. Board of County Com'rs of County of Barber*, 165 P.3d 1060, 1068 (Kan. App. 2007).
10 *Ellis v. Union Pac. R. Co.*, 643 P.2d 158, 186 (1982).
11 *Uhlman v. Richardson*, 48Kan. App. 2d 1, 287 P.3d 287 (2012).

Kentucky

By Barry M. Miller

Fowler Bell PLLC
Lexington, Kentucky & Louisville, Kentucky

Tel: 859.252.6700 (Lexington)
Fax: 859.255.3735 (Lexington)

Email: BMiller@FowlerLaw.com
www.fowlerlaw.com

Allocation of Fault

For purposes of allocating fault in products liability actions, Kentucky has adopted the principle of pure comparative fault.[1] This principle applies to the fault of any party to the action, and requires apportionment of fault in all tort actions involving the fault of more than one party.[2] Thus, the plaintiff's own negligence no longer acts as a complete bar to recovery, but is considered instead, under the principle of comparative fault.

In products liability actions, the allocation of fault is statutorily limited to those who actively assert claims offensively or defensively as parties in the litigation, and to those who have settled by release or agreement.[3] Although the statute requires the trier of fact to consider the conduct of "each party at fault," that phrase has been interpreted to apply to only the named parties and those who have settled prior to litigation, not the world at large.[4] Therefore, a non-settling non-party cannot be included in an apportionment instruction.[5] It is the responsibility of the parties to the litigation, and not that of the court, to include all necessary parties. A defendant who believes additional parties are at fault may use either Kentucky Civil Rule (CR) 14.01 to act as a third party plaintiff, or assert cross-claims under CR 13.07 to allege that other parties are eligible for fault allocation.[6]

The mere fact that a party has sued or has settled does not permit fact-finder to allocate a portion of the total fault to that party; rather, fault may only be apportioned among those against whom the evidence of liability was sufficient to allow submission of fault to the jury.[7] As to the alleged tortfeasors who do not participate in the actual trial (usually because of a prior settlement), the burden shifts to the participating defendant to try to reduce its own liability by proving that the "empty-chair" defendant is also liable.[8] Further, although the "empty-chair" defendant would not actually be held liable in the trial for the fault apportioned to it, as that defendant would not technically be on trial, a participating defendant must still prove liability on the part of the "empty-chair" defendant to whom it seeks to shift some of the blame.[9]

Kentucky

Contribution and Indemnity

Commonly, defendants in products liability actions file third-party complaints seeking contribution, indemnity, or both. While these two concepts represent separate and distinct remedies under Kentucky law, they may both be asserted in the original action through cross-claims or third-party complaints.[10]

Contribution

The right to contribution arises when two or more joint tortfeasors are guilty of concurrent negligence that is of substantially the same character, which converges to harm the plaintiff.[11] When this situation arises, the tortfeasors are said to be in part delicto (equal in fault).[12] Under the traditional common law approach, each joint tortfeasor was jointly and severally liable for a plaintiff's indivisible injury; however, current case law has defined liability among joint tortfeasors in negligence cases to be several only.[13] Therefore, upon a finding of fault, the fact finder then apportions the specific share of liability to each tortfeasor regardless of whether each party was joined in the original complaint or by a third-party complaint.[14] The liability of each joint tortfeasor is limited by the extent of his fault.[15] This common law evolution is codified in KRS § 411.182, which lays out the procedural requirements for determining the respective liability for joint tortfeasors, including those involved in products liability actions.[16]

Indemnity

Unlike the right to contribution, the right to indemnity remains a common law remedy. It is available to one who has been exposed to liability because of the wrongful act of another when the parties' fault is not in pari delicto.[17] Stated in other terms, the common law right to indemnity is available to one exposed to liability because of the wrongful acts of another who is not equally liable.[18] Kentucky has rejected the analysis of indemnity claims by "reasoning backwards" from abstract labels such as "active/passive" negligence, or "primary/secondary" negligence.[19] Instead, non-contractual indemnity should be determined by the equitable principles of restitution.[20]

Indemnity cases fall into two classes under Kentucky law:

- Where the party claiming indemnity is guilty of only technical or constructive fault (e.g. respondeat superior); or
- Where both parties are at fault, but not in the same fault, and the party from whom indemnity is claimed was the primary cause of injury.[21]

Kentucky courts have recognized that the Kentucky apportionment statute does not abolish the common law right to indemnity where a party is only constructively or secondarily liable to the plaintiff.[22] This reflects the equitable notion that when two or more joint tortfeasors cause injury to anther, the more culpable tortfeasor should bear the entire cost of the injury.[23] Therefore, a party may seek indemnity any time more than one party has been found liable and the party seeking indemnity is not in a position of equal fault for the plaintiff's claims.[24] Moreover, a party may be afforded complete indemnity upon a finding that its liability is secondary and arose from a party whose actions were the "primary cause" of the injury.[25]

In addition to the option to assert a claim for indemnity in the original action, claims for indemnity may be maintained in a separate action, so long as they are commenced within the five-year period of limitations set forth by KRS § 413.120(7). Kentucky courts have recognized five years as the proper statute of limitations for common law indemnity claims because the action has been characterized as one for the restitution of damages one was forced to pay another, and which were entirely or primarily caused by the party against whom the indemnity is sought.[26]

Kentucky

Settlement

Under the comparative fault statute, a settlement that releases a tortfeasor "shall discharge that person from all liability for contribution…."[27] If the plaintiff's claims proceed to trial against remaining defendants, the jury must apportion fault among all parties and released persons, with the "claim of the releasing person against other persons… reduced by the amount of the released persons' equitable share of the obligation."[28] However, apportionment does not affect the common law right of indemnity.[29] Thus, it appears that Kentucky law currently permits a claim for indemnity by one tortfeasor against a settling tortfeasor, which must be supported by evidence that the released tortfeasor was the more culpable of the two.[30] This position was upheld over a forceful dissent that argued that the adoption of comparative fault should obviate indemnity.[31]

1 KRS § 411.182(1); *Owens Corning Fiberglass Corp. v. Parrish*, 58 S.W.3d 467, 474 (Ky. 2001).
2 *Id*.
3 KRS § 411.182(4); *Jones v. Stern*, 168 S.W.3d 419, 423 (Ky.App.2005) (quoting *Baker v. Webb*, 883 S.W.2d 898 (Ky.App. 1994); See also *Owens Corning Fiberglas Corp. v. Parrish* (Trial Court properly allowed jury to apportion fault to one victim's employer who had settled the victim's asbestos related workers' compensation claim before trial.)
4 *Id*.
5 *Id*.
6 Ky. R. Civ. P. 13.07; *Baker v. Webb* at 900; *Degener v. Hall Contracting Corp.*, 27 S.W.3d 775, 779 (Ky. 2000).
7 *Morgan v. Scott*, 291 S.W.3d 622, 634-635 (Ky. 2009).
8 *Owens Corning Fiberglas Corp.* at 482 n.5.
9 *Id*.
10 *Asher v. Unarco Material Handling, Inc.*, 2007 U.S. Dist. LEXIS 76850, *7 (E.D. Ky. Oct. 16, 2007); *Degener* at 780.
11 *Degener* at 778.
12 *Id*.
13 *Asher* at *9.
14 *Degener* at 779.
15 *Id*.
16 *Id*., KRS § 411.182.
17 *Degener* at 780.
18 *York v. Petzl Am., Inc.*, 353 S.W.3d 349, 354-355 (Ky. App. 2009).
19 *Crime Fighters Patrol v. Hiles*, 740 S.W.2d 936, 938 (Ky. 1987).
20 *Id*., 939-940.
21 *Degener, supra*, at 778. *U.S. Specialty Ins. Co. v. U.S. ex rel. E.A. Biggs of Kentucky, LLC,* 2014 WL 24177, *2 (W.D.Ky., Jan. 22, 2014) (dismissing an indemnity claim under Fed.R.Civ.P. 12(b)(6) for failure to allege facts fitting into either type of indemnity cases).
22 *Id*.; *Ahser v. Unarco* at *8.
23 *Asher* at *10.
24 *Thompson v. The Budd Co.*, 199 F.3d 799, 807 (6th Cir. 1999).
25 *York v. Petzl* at 355; Radcliff v. Jackson, 766 S.W.2d 63, 69 (quoting *Louisville and Jefferson County Air Board v. Porter, Ky*, 397 S.W.2d 146, 168 (Ky. 1965).
26 *Degener* at 781; KRS § 413.120(7) ("an action for injury to the rights of the plaintiff, not arising on contract and not otherwise enumerated.").
27 *KRS § 411.182(4).*
28 *Id*.
29 *Degener* at 780-781.
30 *Id*.
31 *Id*. at 785, dissent of Justice Keller.

Louisiana

By Sidney W. Degan, III & Micah A. Gautreaux

Degan, Blanchard & Nash
Baton Rouge, Louisiana & New Orleans, Louisiana

Tel: 225.610.1110 (Baton Rouge)
Fax: 225.610.1220 (Baton Rouge)

Tel: 504.529.3333 (New Orleans)
Fax: 504.529.3337 (New Orleans)

Email: mgautreaux@degan.com
www.degan.com

Product Liability Claims In Louisiana

Discussing any aspect of product liability claims in Louisiana first requires recognizing that such claims are governed by a specific statutory regime. Passed in 1988, the Louisiana Products Liability Act, La. R.S. 9:2800.51, et. seq. ("LPLA"), provides the "exclusive theories" of recovery against manufacturers of allegedly faulty products and their insurers.[1] Although the LPLA only covers claims against the "manufacturer" of a "product,"[2] the LPLA's definition of "manufacturer" is expansive. Specifically, the term refers to, "a person or entity that is in the business of manufacturing a product for placement into trade or commerce."[3] Persons that refurbish, design, and/or re-label products as their own may also be encompassed by this definition.[4]

Once it is determined that the LPLA governs a claim, a plaintiff has the burden of proof and must overcome several hurdles to recover damages.[5] First, the claimant must be able to show the product was "unreasonably dangerous" either:

1) In construction or composition;

2) In design;

3) Due to an inadequate warning; or

4) Due to nonconformity of the product to an express warranty.[6]

Each of these four theories is subject to its own section in the LPLA and its own line of caselaw.[7]

Second, and assuming the plaintiff is able to establish the product was "unreasonably dangerous" in one of these four ways, he/she must next show that the "unreasonably dangerous" characteristic complained of was the cause-in-fact and proximate cause of the damages at issue.[8] This requires a plaintiff to establish a causative link between the actions of the manufacturer and the injury-causing product.[9]

Last, and in addition to the "unreasonably dangerous" and causation requirements, the claimant must establish the alleged injuries arose from a "reasonably anticipated use" of the product. This requirement is intended to limit liability so that a manufacturer is not held accountable for every use of a product.[10] The applicable LPLA definition is, "a use or handling of a product that the product's manufacturer should reasonably expect of an ordinary person in the same or similar circumstances."[11]

Louisiana

Allocation of Fault

Louisiana law has seen significant changes over the years in the area of fault allocation. As a result of significant reforms, Louisiana now recognizes that more than one party can contribute to a plaintiff's alleged injuries; this recognition constitutes a substantive shift in Louisiana law away from solidary liability.[12] A pure "comparative fault" system has now been established under which a defendant may no longer be held liable for more than his/her/its own degree of fault.[13]

The primary code article dealing with fault allocation in Louisiana is La. C.C. art. 2323, which states:

A. In any action for damages where a person suffers injury, death, or loss, the degree or percentage of fault of all persons causing or contributing to the injury, death, or loss shall be determined, regardless of whether the person is a party to the action or a nonparty, and regardless of the person's insolvency, ability to pay, immunity by statute, including but not limited to the provisions of R.S. 23:1032, or that the other person's identity is not known or reasonably ascertainable. If a person suffers injury, death, or loss as the result partly of his own negligence and partly as a result of the fault of another person or persons, the amount of damages recoverable shall be reduced in proportion to the degree or percentage of negligence attributable to the person suffering the injury, death, or loss.

B. The provisions of Paragraph A shall apply to any claim for recovery of damages for injury, death, or loss asserted under any law or legal doctrine or theory of liability, regardless of the basis of liability.

C. Notwithstanding the provisions of Paragraphs A and B, if a person suffers injury, death, or loss as a result partly of his own negligence and partly as a result of the fault of an intentional tortfeasor, his claim for recovery of damages shall not be reduced.

It should be noted that La. C.C. arts. 2324, 2324.1, and 2324.2 work in tandem with article 2323 to supplement the comparative fault regime.

In determining fault percentages, Louisiana courts must consider both the nature of each party's conduct and the extent of the causal connection between the conduct and the alleged damages.[14] With respect to the nature of the parties' conduct, certain primary factors (sometimes called the "*Watson* factors") may influence the degree of fault assigned, including:

1) Whether the conduct resulted from inadvertence or involved an awareness of the danger;

2) How great a risk was created by the conduct;

3) The significance of what was sought by the conduct;

4) The capacities of the actor, whether superior or inferior; and

5) Any extenuating circumstances which might require the actor to proceed in haste without proper thought.[15]

Other concepts, such as who had the last clear chance to avoid the injury, the actual fault/negligent conduct, and the harm incurred by the plaintiff, may also be relevant considerations.[16]

Non-Contractual Indemnity/Contribution

In *Dumas v. La. DOTD*,[17] the Louisiana Supreme Court stated that Louisiana's comparative fault regime precludes joint tortfeasors from asserting non-contract based claims for contribution against each other. The Court's rationale was that since the comparative fault law prohibits a defendant from being liable for more than his/her/its own degree of fault, a situation should never arise in which one defendant has paid for the liability of another. To rephrase, there is no need for a non-contract based right of contribution among joint tortfeasors without the existence of solidary liability. In reaching its decision, the Court stated:

> With the advent of this new policy [*i.e.*, the comparative fault regime] the right of contribution among solidary tortfeasors also disappeared since it is no longer necessary in light of the abolishment of solidarity. The legislature has struck a new balance in favor of known, present and solvent tortfeasors instead of the previous priority that fully compensated injured victims.[18]

Louisiana

Statutes Involving Indemnity and Contribution Rights

As noted above, product liability claims in Louisiana are governed by the LPLA, and the primary code article dealing with fault allocation in Louisiana is La. C.C. art. 2323. More generally, though, there are additional statutes which impact indemnity and contribution rights with respect to specific types of claims. With construction defect claims, for example, there is a specific peremptive statute that works to bar all claims, whether based on contract, tort, or third-party liability, after five (5) years.[19] Another prominent example involves the oilfield industry and the Louisiana Oilfield Anti-Indemnity Act ("LOIA"), which is codified as La. R.S. 9:2780(B).

These issues aside, it is worth noting that even where a contract is used as a basis to assert contribution claims among joint tortfeasors in Louisiana, such allegations may be premature until there has been an assessment of fault and/or a payment of costs. In *Suire v. Lafayette City-Parish Consolidated Government*,[20] for example, the Louisiana Supreme Court held that contractual defense and indemnity claims are premature until the underlying litigation is resolved. The Louisiana Third Circuit Court of Appeal reviewed *Suire in Bates v. Alexandria Mall I, LLC*,[21] adopted its rationale, and used it to affirm a lower court's dismissal of a third-party plaintiff's contractual defense and indemnity claims. Similarly, the Louisiana Fifth Circuit Court of Appeal (the "Fifth Circuit") analyzed *Suire in Gentry v. West Jefferson Medical Center*.[22] There, the Fifth Circuit stated that Suire, "…held unambiguously that **any claim** under an indemnity-defense clause in a contract **is premature** until the indemnitee has actually made payment or sustained loss."[23] (emphasis added).

Impact of Settlement on Indemnity Rights

Again, La. C.C. art. 2323(A) states that, "…the degree or percentage of fault of all persons causing or contributing to the injury, death, or loss **shall** be determined…." (emphasis added). The mandatory "shall" shows a court's obligation to assign a percentage of fault to each potentially responsible party regardless of whether any settlement agreements have been executed.

Notably, the word "settlement" does not appear in article 2323's text, which states fault percentages must be assigned, "…regardless of whether the person is a party to the action or a nonparty, and regardless of the person's insolvency, ability to pay, immunity by statute … or that the other person's identity is not known or reasonably ascertainable." Although many Louisiana attorneys and courts may view article 2323's mandate as overriding any settlement agreement provisions to the contrary, we do note this is a novel issue which has not yet been specifically addressed by the Louisiana Supreme Court. Further, Louisiana courts do view contracts as establishing the "law" between the persons who are parties to the contract.

1 1 La. R.S. 9:2800.52 and 9:2800.53(4).
2 La. R.S. 9:2800.52 and La. R.S. 9:2800.54(A).
3 La. R.S. 9:2800.53(1).
4 *Id*.
5 La. R.S. 9:2800.54(D).
6 La. R.S. 9:2800.54(A) and (B).
7 *See*, La. R.S. 9:2800.54(B)(1)-(4).
8 La. R.S. 9:2800.54(A).
9 *Jefferson v. Lead Indus. Ass'n., Inc.*, 106 F.3d 1245, 1247 (5th Cir. 1997).
10 *Butz v. Lynch*, 99-1070 and 99-1071 (La.App. 1 Cir. 6/23/00), 762 So.2d 1214, 1218 (citing cases).
11 La. R.S. 9:2800.53(7).
12 *Aucoin v. La. DOTD*, 97-1938 (La. 04/24/98), 712 So.2d 62, 67 (superseded by statute on other grounds).
13 *Scott v. Pyles*, 99-1775 (La.App. 1 Cir. 10/25/00), 770 So.2d 492, 500 (citing Campbell v. La. Dep't of Transp. & Dev., 94-1052 (La. 1/17/95), 648 So.2d 898, 902).
14 *Toston v. Pardon*, 03-1747 (La. 04/23/04), 874 So.2d 791, 803 (quoting Watson v. State Farm Fire & Cas. Ins. Co., 469 So.2d 967, 974 (La. 1985)).
15 *Toston*, 874 So.2d at 803 (quoting Watson, 469 So.2d at 974).
16 *Id*.
17 2002-0563 (La. 10/15/02), 828 So.2d 530.
18 *Id* at 538.
19 La. R.S. 9:2772.
20 04-1459 (La. 04/12/05), 907 So.2d 37.
21 09-361 (La.App. 3 Cir. 10/07/09), 20 So.3d 1207.
22 05-687 (La.App. 5 Cir. 02/27/06), 925 So.2d 661.
23 *Id* at 662.

Maine

By David W. Zizik

Zizik Professional Corporation
Westwood, Massachusetts

Tel: 781.320.5401
Fax: 781.658.2532

Email: dzizik@ziziklaw.com
www.ziziklaw.com

Allocation of Fault

In case involving multiple defendants, each defendant is jointly and severally liable to the plaintiff for the full amount of the plaintiff's damages.[1] Any defendant has the right, through special interrogatories, to request of the jury the percentage of fault contributed by each defendant.[2] If the plaintiff's negligence is found to be less than the negligence of the defendant(s), then the plaintiff's award may be reduced to reflect his or her share of fault.[3]

Contribution and Indemnity

In Maine, joint tortfeasors are jointly and severally liable for all of the plaintiff's damages and have an equitable right to contribution from other joint tortfeasors.[4] Maine does not find indemnity clauses to be against public policy and states that they can be inserted into contracts to find a party harmless for the damages due to negligence.[5] The Maine courts construe such indemnity clauses very strictly against extending indemnification to an indemnitee for its own negligence.[6] Further, the Court has stated that anything less than an explicit statement unequivocally manifesting a mutual intent to indemnify against an indemnitee's own negligence will not be sufficient under Maine law to create an obligation to do so.[7]

Effect of Settlement

If a defendant is released by the plaintiff under an agreement that also prevents the plaintiff from collecting from the remaining defendant(s) that portion of damages that was attributable to the released defendant's share of responsibility, there are certain rules that apply.[8] To apportion responsibility in the pending action for claims that were included in a settlement and presented at trial, a finding on the issue of the released and defendant's liability binds all parties to the suit.[9] Such a finding does not have a binding effect in other actions relating to other damage claims.[10]

Maine

1 ME. REV.STAT.ANN. tit. 14, §156 (2013).
2 *Id.*
3 *Id.* Further, when the damages are recoverable subject to such a reduction, the court shall instruct the jury to find two amounts of damages: the amount of damages if the claimant had not been at fault and the amount of damages reduced by the plaintiff's share in the responsibility for the damages. Id.
4 *Roberts v. Am. Chain & Cable Co.*, 259 A.2d 43, 48 (Me. 1969).
5 *See Emery Waterhouse Co. v. Lea*, 467 A.2d 986, 993 (Me. 1983).
6 *Id.* Such indemnity clauses are, "with virtual unanimity," looked upon with disfavor by the courts. *Id.*
7 *Burns & Roe, Inc. v. Cent. Me. Power Co.*, 659 F.Supp. 141, 143-44 (D. Me. 1987); *see Emery Waterhouse Co.*, 467 A.2d at 993.
8 ME.REV.STAT.ANN. tit. 14, §156 (2013). The general rule is that the released defendant is entitled to be dismissed with prejudice from the case and the dismissal bars all related claims for contribution assertable by the remaining parties against the released defendant. *Id.* Nevertheless, the trial court must preserve for the remaining parties a fair opportunity to adjudicate the liability of the released and dismissed defendant, namely allowing the remaining parties to conduct discovery against the released defendant and invoking evidentiary rules at trial as if the released defendant were still a party. *Id.*
9 *Id.*
10 *Id.*

Maryland

By Matthew W. Carlson

Thompson O'Donnell, LLP
Washington, DC

Tel: 202.289.1133
Fax: 202.289.0275

Email: MWC@tomnh.com
www.thompson-odonnell.com

Allocation of Fault

Maryland is a joint and several liability jurisdiction. This means that any defendant whose negligence proximately causes plaintiff's injuries will be held responsible for all of any judgment.[1]

Contribution

Maryland has adopted the Uniform Contribution Among Tortfeasors Act (MUCJTA) which provides a right of contribution among joint tortfeasors.[2] To obtain a right of contribution, the parties must share a common liability and the party seeking contribution must have paid, under legal compulsion, more than its share of the common liability.[3]

MUCJTA provides that a release of the settling defendant eliminates any right to contribution by a non-settling tortfeasor, but only if the release provides for a reduction, to the extent of the pro rata share of the released tortfeasor, of plaintiff's damages recoverable against all tortfeasors.[4] If the release also provides that the settling defendant is a joint tortfeasor (a "joint tortfeasor release") this automatically entitles the nonsettling defendant to a pro rata credit.

If the release does not provide these elements, then the release is called a "Swigert Release." A Swigert Release allows non-settling defendants to claim a pro-rata credit against any judgment for any of the settling defendants which are found to be a joint tortfeasor.[5] The issue of a settling defendant's negligence and proximate cause are presented at trial with the non-settling defendant bearing the burden to establish the negligence and proximate cause. If the non-settling defendant cannot make such a showing, it receives no credit for the settlement. MUCJTA does not affect indemnification rights.[6]

Non-Contractual Indemnity

Maryland recognizes implied indemnity when there are circumstances that evidence a special relationship between the parties or when the facts show the parties intended that one party was to bear the responsibility.[7]

Maryland also recognizes implied indemnity in tort when one tortfeasor's wrongful conduct is significantly different from that of another tortfeasor.[8] A tortfeasor is entitled to indemnification when its actions, although negligent, are

Maryland

considered to be passive/secondary to those of the primary tortfeasor.[9] In other words, when there is a disparity between the levels of fault of each tortfeasor that produces an unjust result, and the less culpable tortfeasor, said to be passively or secondarily negligent, pays or is held liable for damages which are properly attributable to the conduct of the more culpable co-defendant, who is primarily or actively negligent, this right to implied indemnity exists.[10]

By way of example, a tortfeasor that fails to inspect and discover a defect in a product manufactured by another tortfeasor may have a right of indemnification against the manufacturer.[11] Other examples of when implied indemnity in tort may exist are when a tortfeasor is vicariously liable for the conduct of another, fails to discover a defect in a chattel supplied by another, or fails to discover a defect in work performed by another.[12]

One who is guilty of active negligence cannot obtain tort indemnification.[13]

1 *Harrison v. Montgomery County Bd. of Educ.*, 295 Md. 442, 463, 456 A.2d 894, 904-05 (1983); Md. Code, Cts. & Jud. Proc. §3-1401.
2 Md. Cts. & Jud. Proc. Code §§3-1401 et seq.
3 *Ennis v. Donovan*, 222 Md. 536, 539-40, 161 A.2d 698 (1960), overruled on other grounds; *Lusby v. Lusby*, 283 Md. 334, 390 A.2d 77 (1978); *Baltimore Transit Co. v. State, to Use of Schriefer*, 183 Md. 674, 679, 39 A.2d 858 (1944); *Associated Transport v. Bonoumo*, 191 Md. 442, 447, 62 A.2d 281 (1948).
4 Md. Cts. & Jud. Proc. Code §3-1405.
5 *Swigert v. Welk* 213 Md. 613, 133 A.2d 428 (1957).
6 Md. Cts. & Jud. Proc. Code §3-1406.
7 *MCIC, Inc. v. Zenobia*, 86 Md. App. 456, 587 A.2d 531 (1991), rev'd on other grounds 325 Md. 420, 60/ A.2d 633 (1992); *Hanscome v. Perry*, 75 Md. App. 605, 542 A.2d 421 (1988).
8 *Hartford Acc. And Indem. Co. v. Scarlett Harbor Associates Ltd. Partnership*, 109 Md. App. 217, 674 A.2d 106 (1996) judgment aff'd, 346 Md. 122, 695 A.2d 153 (1997).
9 *Bd. of Trs. of the Balt. County Comty. Colls. v. RTKL Assocs. Inc.*, 80 Md. App. 45, 559 A.2d 805, 811 (1989) cert. dismissed 319 Md. 274, 572 A.2d 167 (1990).
10 *Hanscome v. Perry*, 75 Md. App. 605, 615, 542 A.2d 421 (1988) (citations omitted).
11 *Jennings v. United States*, 374 F.2d 983, 987 n. 7 (4th Cir. 1967).
12 *Max 's of Camden Yards v. A.C. Beverage*, 913 A.2d 654, 659 (Md. App. 2006).
13 *Franklin v. Morrison*, 711 A.2d 177, 187 (Md. 1998).

Massachusetts

By David W. Zizik

Zizik Professional Corporation
Westwood, Massachusetts

Tel: 781.320.5401
Fax: 781.658.2532

Email: dzizik@ziziklaw.com
www.ziziklaw.com

Allocation of Fault

Massachusetts has adopted a modified comparative negligence framework by statute.[1] Each tortfeasor is liable for contribution to the extent of his or her own pro rata share of the entire liability.[2] This means that each defendant is liable in proportion to total number of defendants rather than the tortfeasor's relative degree of fault. If the negligence of the plaintiff is fifty percent or less, his or her recovery is reduced pro rata, and if his or her negligence is greater than fifty percent, the plaintiff's recovery is barred.

Under Massachusetts law, when two or more joint tortfeasors contribute to an injury, they are jointly and severally liable.[3] In this situation, a plaintiff can recover the entire judgment against any one of the defendants. A defendant who pays more than his pro rata share may seek contribution against the other responsible defendants.[4]

Contribution and Indemnity

In Massachusetts, there is no contribution where a right to indemnity exists, so the two remedies are considered to be mutually exclusive. The Courts view the doctrines of contribution and indemnity as two different concepts that address separate needs.[5] On the one hand, the concept of indemnity under common law "respond[s] to a specific need in the law of torts: how to fully compensate an injury caused by the act of a single tortfeasor."[6] The concept of contribution, on the other hand, responds to how to compensate a victim for the acts of more than one tortfeasor and how to balance the rights and obligations of the different tortfeasors against one another.[7] The general rule in Massachusetts is that there is no right to indemnification between joint tortfeasors.[8]

Indemnity in Products Liability Cases

With regard to products liability cases and indemnification, plaintiffs will often bring claims against the retailer and the manufacturer of a product. The retailer can then bring a common-law indemnity claim against the manufacturer. A party may seek indemnification against a tortfeasor if that party did not join in the negligent act, "but is exposed to derivative or vicarious liability for the wrongful act of another."[9] Common-law indemnity also applies to a situation where a claim is brought against a retailer for selling a defectively manufactured or designed product. "If

Massachusetts

a manufacturer supplies a defective product to a retailer, who sells it to a customer, who recovers from the retailer for an injury incurred, the retailer may recover in indemnity against the manufacturer…."[10] For the indemnification to occur, the retailer must not have been independently negligent, so as to create a joint-tortfeasor scenario, as this would essentially negate the indemnification. If a party in a products liability case in Massachusetts is seeking indemnification from another party, the other party should be joined pursuant to chapter 106, section 2-607(5)(a) of the Massachusetts General Laws.[11] This provision allows the purchaser of goods to give the retailer written notice of the litigation and essentially bind the seller to the facts that may be determined in the underlying action.

Additionally, in Massachusetts, "[t]he retailer or distributor who has acted merely as a conduit for the product and has not altered it or otherwise acted in a manner that contributed to the injuries may then normally sue the manufacturer of the defective product for indemnification."[12]

Effect of Settlement

If a joint tortfeasor enters into a good-faith settlement, it is discharged from all liability for contribution to any other tortfeasor, and the plaintiff's claim is reduced by the greater of the settlement amount or the consideration paid for settlement.[13] If the entire common liability is discharged through settlement, the settling party or parties may seek pro rata contribution from any non-settling tortfeasors, as long as the settlement amount exceeds his, her, or their own share of the liability.[14] If a settling party obtains a release of his or her own liability, he or she is not liable for contribution to the other tortfeasors, whose liability will remain unaffected by the release.[15]

1 MASS. GEN. LAWS ANN. ch. 231, § 85 (West 2014).
2 MASS. GEN. LAWS ANN. ch. 231B, § 2 (West 2014). Equity could also require that the collective liability of a group constitutes a single share. Ch. 231B, § 2.
3 Corey v. Havener, 65 N.E. 69, 69 (Mass. 1902); *see also* Proctor v. Dillon, 129 N.E. 365, 271 (Mass. 1920) ("It is a general and familiar principle of the common law that in cases of tort, where two or more are liable for the same cause of action, they are liable severally as well as jointly, and if one is sued alone the entire damages may be recovered against him."; Feneff v. Boston & M. R. R., 82 N.E. 705, 707 (Mass. 1907); Mitchell v. Hastings & Koch Enters., Inc., 647 N.E.2d 78, 85 (Mass. App. Ct. 1995).
4 Ch. 231B, § 1(b). Contribution may be enforced by separate action. Ch. 231B, § 3(a).
5 Elias v. Unisys Corp., 573 N.E.2d 946, 948 (Mass. 1991).
6 *Id*. (quoting Mamalis v. Atlas Van Lines, 528 A.2d 198, 200 (Pa. Super. Ct. 1987), aff'd, 560 A.2d 1380 (Pa. 1989)).
7 *Id*. (quoting *Mamalis*, 528 A.2d at 201).
8 Rathburn v. W. Mass. Elec. Co., 479 N.E.2d 1383, 1385 (Mass. 1985).
9 Stewart v. Roy Bros., Inc., 265 N.E.2d 357, 365 (Mass. 1970).
10 RESTATEMENT (SECOND) OF TORTS § 886B cmt. c (1979); Fireside Motors, Inc. v. Nissan Motor Corp., 479 N.E.2d 1386, 1389 (Mass. 1985) (quoting *Restatement*).
11 MASS. GEN. LAWS ANN. ch. 106, § 2-607(5)(a) (West 2014).
12 Mitchell v. Stop & Shop Cos., 672 N.E.2d 544, 545 (Mass. App. Ct. 1996).
13 MASS. GEN. LAWS ANN. ch. 231B, § 4 (West 2014).
14 Ch. 231B, § 1(b).
15 Ch. 231B, § 4.

Michigan

By Carole D. Bos

Bos & Glazier, P.L.C.
Grand Rapids, Michigan

Tel: 616.458.6814
Fax: 616.459.8614

Email: cbos@bosglazier.com
www.bosglazier.com

Allocation of Fault

In a product liability action, fault must be allocated to each person who is at fault, regardless of whether that person is, or could be, a party to the action.[1] Non-parties owing a duty to an injured plaintiff can be named a non-party at fault, even if entitled to immunity under Michigan law.[2] The fact finder must determine which parties were at fault and allocate to each a percentage of fault until the total fault allocated equals 100%. Assessment of percentages of fault for nonparties is only used to calculate the fault of named parties, does not subject the nonparty to liability, and shall not be introduced as evidence of liability in another action.[3]

A person or entity can be a party to a product liability action if it was involved in the "production of a product" which caused a plaintiff's death or injury.[4] Production of a product includes those which manufacture, construct, design, formulate, develop standards, prepare, process, assemble, inspect, test, list, certify, warn, instruct, market, sell, advertise, package, or label.[5] A product liability claim can be brought against a vast number of people and/or entities associated with a product. But nonmanufacturing sellers can be liable only if they were independently negligent or breached an express or implied warranty.[6]

Michigan applies the law of comparative negligence. If a plaintiff is found at fault, the fault can be allocated to the plaintiff and recovery is reduced by his or her comparative fault.[7] Under this type of analysis, if a plaintiff's negligence contributed to the event which led to an injury or death, the fact finder must assign a percentage of fault to the plaintiff. The court will then reduce any damages awarded to the plaintiff by the plaintiff's percentage of fault. Pure comparative negligence was intended to apply to all product liability actions so that a plaintiff's negligence proportionately diminishes the recovery of damages for both negligence and breach of warranty cases.[8] The defendant, as the party alleging comparative negligence, carries the burden of proof on the issue.[9]

If fault is allocated to a plaintiff, and the plaintiff's percentage of fault is greater than the aggregate fault allocated to the other parties (including non-parties), the court will reduce an award of economic damages by the plaintiff's percentage of fault, but a plaintiff's recovery for noneconomic damages is not permitted.[10]

Primerus
The World's Finest Law Firms

Michigan

Non-Contractual Indemnity/Contribution

In 1995, the Michigan legislature enacted tort reform legislation which altered the law of joint and several liability in Michigan, including the concept of contribution. Joint liability was eliminated in a product liability case, and liability is now several only.[11] Because joint and several liability determines the availability of contribution under M.C.L. 600.2956, the elimination of joint liability in product liability cases limits the right to contribution. Under the tort reform legislation, where each party bears only its percentage share of total damages, a party generally will not have overpaid its share of liability and there is no need for contribution.

Indemnity is distinct from contribution because it shifts the entire loss from the party forced to pay to the party who should have paid. Michigan recognizes common-law indemnity.[12] Common-law indemnity is generally only available where a party's liability arises vicariously or by operation of law. Michigan law provides that a party who is personally free from fault but is found to be vicariously liable for the fault of another is entitled to indemnity from the one at fault.[13] The person seeking indemnification under common-law indemnity must be free from any active negligence.[14]

Costs and attorney fees in an underlying product liability action may be recovered in common-law indemnity actions. However, costs and attorney fees incurred in an action to establish indemnity rights may not be recovered.[15]

Statutes Affecting Indemnity and Contribution Rights

Contribution in Michigan is governed by M.C.L. 600.2925a – 600.2925d. Although the statute was not repealed, the 1995 tort reform legislation affected contribution rights in product liability cases because it eliminated joint liability. Liability of each defendant in a product liability case was limited to "several only" and "not joint."[16] Therefore, tort reform greatly reduced the role of contribution in Michigan for product liability claims.

The Michigan contribution statute, M.C.L. 600.2925a – 600.2925d, does not have an effect on principles of indemnity.[17] The Michigan product liability statute, M.C.L. 600.2945, et seq., does not address the matter of common-law indemnity. Further, Michigan law of indemnity is unaffected by the law of comparative negligence.[18]

Effect of Settlement on Indemnity Rights

Any settlement between a products-liability plaintiff and a defendant would not operate to discharge a non-settling defendant's claim for indemnification.[19]

1 M.C.L. 600.2957; M.C.L. 600.6304; *See Rodriguez v. ASE Industries, Inc.*, 275 Mich. App. 8, 20-21, 738 N.W.2d 238 (2007)
2 *See Schmeling v. Whitty*, Nos. 292190, 292740, 2011 WL 520539 (Mich. App. Feb. 15, 2011)
3 M.C.L. 600.2957
4 M.C.L. 600.2945(h)
5 *See* M.C.L. 600.2945(i)
6 M.C.L. 600.2947(6); *See Konstantinov v. Findlay Ford Lincoln Mercury*, 619 F. Supp. 2d 326, 332 (E.D. Mich. 2008)
7 M.C.L. 600.2959
8 *See In re Certified Questions from U.S. Court of Appeals for the Sixth Circuit*, 416 Mich. 558, 331 N.W.2d 456 (1982)
9 M.C.L. 600.2960
10 M.C.L. 600.2959
11 M.C.L. 600.2956; M.C.L. 600.6304(4)
12 *Paul v. Bogle*, 193 Mich. App. 479, 484 N.W.2d 728 (1992).
13 *See Conkright v. Ballantyne of Omaha, Inc.*, 496 F. Supp. 147, 151 (W.D. Mich. 1980)
14 See Paul v. Bogle, 193 Mich. App. 479, 484 N.W.2d 728 (1992)
15 *Hartman v. Century Truss Co.*, 132 Mich. App. 661, 347 N.W.2d 777(1984); *Warren v. McLouth Steel Corp.*, 111 Mich. App. 496, 314 N.W.2d 666 (1981)
16 M.C.L. 600.2956; M.C.L. 600.6304(4)
17 *See Conkright v. Ballantyne of Omaha, Inc.*, 496 F. Supp. 147, 151 (W.D. Mich. 1980)
18 *See Conkright v. Ballantyne of Omaha, Inc.*, 496 F. Supp. 147, 151 (W.D. Mich. 1980)
19 *See Conkright v. Ballantyne of Omaha, Inc.*, 496 F. Supp. 147 (W.D. Mich. 1980)

Minnesota

By Lance D. Meyer & Dale O. Thornsjo

O'Meara, Leer, Wagner & Kohl, P.A.
Minneapolis, Minnesota

Tel: 952.831.6544
Fax: 952.831.1869

Email: LDMeyer@OLWKLaw.com
Email: DOThornsjo@OLWKLaw.com
www.olwklaw.com

Allocation of Fault

There is no basis for allocating fault in a products liability lawsuit unless it is first determined there is a single, indivisible injury or harm caused by two or more defendants who act jointly, concurrently, or successively in causing the injury or harm.[1] If a plaintiff's injuries or harm is divisible, there is no basis for allocating fault because any injuries or harm can be clearly separated and attributed to one of the defendants.[2] Once a court determines that an injury or harm is indivisible, the Minnesota Comparative Fault Act—Minn. Stat. § 604.01 .02—governs allocation of fault among the parties and non-parties,[3] including allocation to the plaintiff.[4]

Under Minn. Stat. § 604.01, fault is defined as "acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability."[5] In addition to strict liability and negligence, fault includes, but is not limited to, breach of warranty, unreasonable assumption of risk, misuse of a product, unreasonable failure to avoid an injury or to mitigate damages, and complicity.[6] Fault may be allocated to any person, including a plaintiff, but a plaintiff's contributory fault will not bar recovery so long as the plaintiff's contributory fault is not greater than the fault of the person against whom recovery is sought.[7] If a plaintiff is found to be at fault, however, the court must reduce any damages in proportion to the fault.[8]

Minnesota's Comparative Fault Act was amended in 2003 to state that all persons besides the plaintiff are severally liable for any damage award unless otherwise provided by statute.[9] If severally liable, each person's contribution to the damage award is based on the person's percentage of fault, as determined by the jury.[10] There are four statutorily recognized exceptions to this rule where parties will be found jointly and severally liable for the entire award less any fault allocated to the plaintiff:

(1) a person whose fault is greater than 50 percent;

(2) two or more persons who act in a common scheme or plan that results in injury;

(3) a person who commits an intentional tort; and

(4) a person whose liability arises under a number of specific environmental statutes.[11]

Minnesota

"[W]hether 'two or more persons are severally liable' for purposes of section 604.02, sub-division 1, is determined at the time the tort was committed and not at the time of judgment in a civil action arising from the tort."[12]

In *Staab v. Diocese of St. Cloud (Staab I)*, the Minnesota Supreme Court held that the word "persons" not only means "parties to the lawsuit" but also extends to the "parties to the transaction."[13] According to the court, "section 604.02 applies whenever multiple tortfeasors act to cause an indivisible harm to a victim, regardless of how many of those tortfeasors are named as parties in a lawsuit arising from that tort."[14] Since the jury in *Staab I* found the appellant tortfeasor to be 50 percent negligent and a non-party tortfeasor to be 50 percent negligent, the court held that the appellant tortfeasor was severally liable and thus only responsible for 50 percent of the plaintiff's damages.[15] Although ***Staab I*** is a non-products liability case, it is significant because the term "person" is similarly utilized in Minn. Stat. § 604.02, subd. 3, which governs reallocation in products liability cases.

In order to determine whether a plaintiff's fault is greater than the fault of a defendant in a products liability action, the court will consider whether the fault of multiple defendants are to be aggregated to then be compared to the plaintiff's percentage of fault.[16] The defendants' fault will not be aggregated to then be compared to the plaintiff's percentage of fault absent proof of an economic joint venture between the defendants.[17] Fault will not be aggregated if the duties owed are separate and distinct.[18]

Prior to the 2003 Amendments, entities in the chain of manufacture and distribution were jointly and severally liable for all fault attributed to all parties in the chain.[19] Strict liability holds a faultless seller jointly and severally liable for the causal fault of the manufacturer and requires the faultless seller to seek and recover indemnity from the defect-causing party in the product's chain of distribution.[20] The chain of manufacture and distribution is the vertically integrated chain consisting of the product producer, the product wholesaler, and the product retailer, all of which work together to bring a product to market; the chain does not include entities horizontally involved in the same industry such as competing product makers.[21]

While not specifically yet determined, one treatise states that the 2003 Amendments do not alter the rule that all entities in the chain of manufacture and distribution are jointly and severally liable for all fault attributed to all parties in the chain.[22] Prior to the 2003 Amendments, the court of appeals held in *Marcon v. Kmart Corp*. that Minn. Stat. § 604.02, subd. 3 overrode the 15 percent cap on liability contained in subdivision 1.[23] Following the 2003 Amendments, there is a similar argument that "subdivision 3 should now override the greater than 50 percent joint and several liability cutoff."[24]

In the event an amount is uncollectable from a person in the chain of manufacture and distribution in a products liability action, the uncollectable amount is reallocated among all other persons in the chain of manufacture and distribution, but not among the claimant or others outside of the chain.[25] However, if the fault originally allocated to a person in the chain of manufacture and distribution is less than the plaintiff's fault, the person will not be reallocated any additional fault and will be liable only for the percentage of fault originally allocated.[26]

The above principles are illustrated in *Marcon*, where the court found the manufacturer of a sled 100 percent at fault, the retailer 0 percent at fault, and the claimant 0 percent at fault, for injuries stemming from inadequate warnings or instructions on a sled.[27] Because the manufacturer was bankrupt and the retailer's fault was not less than the claimant's fault the retailer was held liable for 100 percent of the claimant's damages.[28] In so ruling, the court stated:

> Although a non-manufacturer defendant in a strict liability action can be absolved of its strict liability for injuries caused by a product defect over which it had no control, it cannot be absolved (and therefore remains strictly liable) if the manufacturer of that defective product is unable to satisfy the judgment [and its liability is not less than the claimants].[29]

If all or part of a party's apportioned share of liability is uncollectible, and the party is outside the chain of manufacture and distribution, the uncollectable amount may be subject to reallocation among all other at-fault parties, including the plaintiff, according to their respective percentages of fault.[30] On remand following *Staab I*, the district court and Minnesota Court of Appeals held that the plain language of Minn. Stat. § 604.02, subd. 2 does not require joint and several liability as a prerequisite to reallocation.[31] The Minnesota Supreme Court disagreed, holding instead in *Staab II* that a party found to be severally

Minnesota

liable under Minn. Stat. § 604.02, subd. 1, cannot be ordered to contribute more than that party's equitable share of the total damages award under the reallocation-of-damages provision of Minn. Stat. § 604.02, subd. 2.[32] Combined, *Staab I* and *Staab II* verify that (1) an at-fault party need not be involved in the case in order for the jury to consider its fault, (2) the general rule of several liability applies even when there is only one defendant in the case, and (3) a severally liable party is never obligated to pay more than its equitable share of an award, including by reallocation. A party whose liability is reallocated remains subject to contribution and any continuing liability to the claimant on the judgment.[33]

As noted above, Minnesota's current Comparative Fault Act is the result of legislative amendments to the Act in 2003. Claims arising from events occurring prior to the enactments of the 2003 Amendments are analyzed under the following default "joint and several" liability rule:

> When two or more persons are jointly liable, contributions to awards shall be in proportion to the percentage of fault attributable to each, except that each is jointly and severally liable for the whole award. Except [that]…a person whose fault is 15 percent or less is liable for a percentage of the whole award no greater than four times the percentage of fault.

The collectability reallocation in products liability cases between persons in the chain of manufacture and distribution rule is the same for pre-2003 events as under the current Act.[34]

Non-Contractual Indemnity and Contribution

Once fault is allocated between defendants in a products liability lawsuit, a defendant may be entitled to non-contractual indemnity or con-tribution. Non-contractual indemnity and con-tribution are equitable, common-law remedies used "to secure restitution and fair apportionment of loss among those whose activities combine to produce injury."[35] The two remedies are distinct, however, in that indemnity shifts the entire loss from one culpable wrongdoer to another, while contribution merely reallocates the responsibility for damages between culpable parties where one party pays more than his fair share.[36] Despite being jointly and severally liable for the causal fault of a manufacturer, a faultless seller is entitled to indemnity from the defect-causing party in the product's chain of distribution.[37]

In Minnesota, there are four recognized situations in which one joint tortfeasor may obtain indemnification from another joint tortfeasor:

(1) Where the one seeking indemnity has only a derivative or vicarious liability for damage caused by the one sought to be charged;

(2) Where the one seeking indemnity has incurred liability by action at the direction, in the interest of, and in reliance upon the one sought to be charged;

(3) Where the one seeking indemnity has incurred liability because of a breach of duty owed to him by the one sought to be charged; and

(4) Where there is an express contract between the parties containing an explicit undertaking to reimburse for liability of the character involved.[38]

Alternatively, a claim for contribution hinges on the presence of two elements: (1) common liability, and (2) payment of more than one's equitable share.[39] "It is joint *liability*, rather than joint or concurring *negligence*, which determines the right of contribution."[40] "Contribution is appropriate where there is a common liability among the parties, whereas indemnity is appropriate where one party has a primary or greater liability or duty which justly requires him to bear the whole of the burden as between the parties."[41]

There is not one single, precise definition of common liability, however. Common liability does not depend solely on whether or not a plaintiff can enforce recovery against two or more defendants.[42] Common liability is created at the time the tort is committed, and thus, a plaintiff may be prevented from recovering by a number of procedural defenses, such as release, statute of limitations, and lack of notice, which do not go to the merits of the case.[43] However, it has been established that "when the nonliability of one of the codefendants is established in the original action there can be no right to contribution for the reason that there is no common liability."[44]

Regardless, "when one tortfeasor has paid or is about to pay more than his equitable share of damages to an injured party, he has an interest in obtaining indemnity or

Minnesota

contribution."[45] A claim for contribution does not accrue until "the person entitled to the contribution has sustained damage by paying more than his fair share of the joint obligation," and a claim for indemnity does not accrue until "liability has been incurred" by the person seeking indemnity.[46] But a joint tortfeasor need not wait until it has made the actual payment and liability has been fixed to bring an indemnity or contribution claim and instead may institute a third-party action in conjunction with the original claim pursuant to Minn. R. Civ. P. 14.01.[47] Alternatively, a joint tortfeasor may enforce its rights to equitable indemnity or contribution in a separate action as long as it is brought within the applicable statute of limitation.[48]

A party that is successful on its non-contractual indemnity claim may seek attorney fees from the indemnitee if the following conditions are met:

> If a party is obliged to defend against the act of another, against whom he has a remedy over, and defends solely and exclusively the act of such other party, and is compelled to defend no misfeasance of his own, he may notify such party of the pendency of the suit and may call upon him to defend it; if he fails to defend, then, if liable over, he is liable not only for the amount of damages recovered, but for all reasonable and necessary expenses incurred in such defense. Only in such case is there a right to recover such expenses.[49]

Statutes Affecting Indemnity and Contribution Rights

The Minnesota Workers' Compensation Act and Minnesota common law may apply to limit non-contractual indemnification or contribution rights in situations where an employee's injuries arise out of and are in the course of their employment, and a party other than the employer is liable, at least in part, for damages. In situations where fault can be allocated between a non-employer tortfeasor and an employer-tortfeasor, the non-employer tortfeasor has certain non-contractual indemnity and contribution rights, but these rights are contrary to the exclusive remedy provisions of the Workers' Compensation Act.[50] Therefore, the Minnesota Supreme Court limited the non-employer tortfeasor's contribution right against the employer-tortfeasor to an amount proportional to the employer's percentage of fault, not to exceed the employer's total workers' compensation liability to the plaintiff.[51] The Minnesota legislature has since codified a non-employer's contribution rights back against the employer.[52] If a plaintiff decides to settle all claims against a third-party tortfeasor outside the Workers' Compensation Act, an employer maintains the right to assert a subrogation claim against the tortfeasor up to the lesser of the benefits paid and payable or the amount of the jury verdict, reduced by the percentage attributed to the employer's fault.[53]

The Minnesota Court of Appeals has held that Minn. Stat. § 604.02 does not apply to limit a third-party tortfeasor's liability "where the third-party tortfeasor seeks contribution from a negligent employer who is exclusively liable under workers' compensation law."[54] The court of appeals reasoned that "[s]ince workmen's compensation statutes provide that the obligations thereunder are the only liability of the employer to the employee, or his representatives, there is no common liability involving the employer and third party in such situations; and therefore, there is no ground for allowing contribution."[55] However, a recent Minnesota federal district court case suggests that the long-standing rule recognized in Decker may no longer be tenable following the 2003 Amendment to the allocation of damages statute and the Minnesota Supreme Court's decision in *Staab I*.[56] Applying section 604.02 and *Staab I*, the court in *Gaudreault v. Elite Line Servs., LLC* held that if a jury finds that a third-party tortfeasor and an employer each bear a share of the fault for bringing about an indivisible injury to an employee, the third-party tortfeasor will be jointly and severally liable for paying the entire award—less any portion of fault that may be assigned to the employee and less any workers' compensation benefits paid and payable to the employee by the employer that are duplicative—only if the third-party tortfeasor is found to be more than 50% at fault.[57]

Minn. Stat. § 544.41 limits the liability of nonmanufacturers under certain circumstances in the products liability context and thus may interfere with an entity's non-contractual indemnification or contribution right.[58] A nonmanufacturer may file an affidavit certifying the correct identity of the manufacturer and ultimately is entitled to a dismissal of the strict liability claims asserted against it, so long as it did not (1) exercise significant control over the design or manufacture of the product or provide instructions or warnings to the manufacturer relative

to the alleged defect, (2) have actual knowledge of the defect, or (3) create the defect.[59] Generally, strict liability claims asserted against an innocent nonmanufacturer will not be dismissed until a complaint is filed against the manufacturer; further, the strict liability claim can be reinstated against an innocent nonmanufacturer at any time that the injured party "cannot maintain an action against the manufacturer because the manufacturer no longer exists, is insolvent, is not subject to jurisdiction, or cannot be sued."[60] Notwithstanding the general rule, "it may be within the court's discretion to dismiss before completion of these procedures; for instance, when a plaintiff fails to demonstrate due diligence in filing a complaint against the certified manufacturer."[61]

Section 544.41 further states that the statute shall not be construed "to affect the right of any person to seek and obtain indemnity or contribution."[62] As a result, although Minn. Stat. § 544.41 may serve to limit a nonmanufacturer's liability in the products liability context, it does not create a statutory right to indemnity or contribution, or otherwise affect a party's common law rights to the same.

Effect of Settlement on Indemnity & Contribution Rights

In Minnesota, a plaintiff's settlement with less than all defendants in a multi-party products liability lawsuit can impact indemnity and contribution rights between settling and non-settling defendants. When a plaintiff and tortfeasor enter into what is commonly known as a "Pierringer" release, the settling tortfeasor is dismissed with prejudice from the lawsuit, and all cross-claims for contribution and indemnity between the settling party and the remaining defendants are also dismissed,[63] as long as the release contains the following basic elements:

(1) The settlement agreement releases the settling defendant from the action and only discharges a part of the cause of action equal to the part attributable to the settling defendants' causal negligence;

(2) The remainder of plaintiff's causes of action against the nonsettling defendants are expressly reserved; and

(3) Plaintiff agrees to indemnify the settling defendant from any claims of contribution [or indemnity or both] made by the nonsettling parties, and further agrees to satisfy any judgment obtained from the nonsettling defendants to the extent the settling defendants have been released.[64]

The plaintiff's agreement to indemnify the settling defendants from any claims of contribution or indemnity is "the indispensable characteristic of the Pierringer release because it protects the nonsettling defendant from having to pay more than its share of liability"[65] and the settling defendant from having to pay more than what it agreed to pay through the Pierringer release.[66] As a result, the legal effect of a Pierringer release is that each defendant pays only its proportionate share of liability, whether it settles or not, making any claims for contribution and indemnity between settling and nonsettling defendants moot.[67]

Unlike some jurisdictions that provide a nonsettling tortfeasor with a pro tanto offset for any settlement entered into by the plaintiff with another tortfeasor, the offset in Minnesota is entirely based on the settling tortfeasor's proportionate share of liability (fault).[68] Further, a Pierringer release eliminates a non-settling defendant's claims for contribution because it assures that the non-settling tortfeasor will not pay more than its fair share of the yet-to-be-determined plaintiff's award once fault is apportioned between any non-settling and settling tortfeasors by the jury.[69] However, in order to establish the settling tortfeasor's share of the entire liability, the settling tortfeasor's fault and extent of the entire fault must be presented to and determined by the jury, now by the non-settling tortfeasor instead of the plaintiff.[70]

Similarly, a Pierringer release technically also cuts off a non-settling defendant's right to indemnity against a settling tortfeasor as the plaintiff has, in effect, assumed that obligation.[71] As a result, by entering into a Pierringer release with a party who may be obligated to indemnify a non-settling party, the plaintiff may be barred from collecting on an award if the indemnity obligation is established by the non-settling party.[72]

Minnesota

1 *Mitchell v. Volkswagenwerk*, 669 F.2d 1199, 1206 (8th Cir. 1982) (citing *Mathews v. Mills*, 178 N.W.2d 841, 844 (Minn. 1970)).
2 *Id*.
3 *Hosley v. Armstrong Cork Co.*, 383 N.W.2d 289, 293 (Minn. 1986) (noting fault is apportionable to persons, including non-parties).
4 The Act was amended in 2003, and these materials address application of the 2003 amendments to the Act. Events occurring prior to the 2003 Amendments' enactment which give rise to liability are governed by older versions of the Act, and are not addressed in these materials.
5 Minn. Stat. § 604.01, subd. 1a.
6 *Id*.
7 *Id*. at subd. 1.
8 *Id*.
9 Minn. Stat. § 604.02, subd. 1.
10 *Id*.
11 *Id*. Each of the four exceptions are discussed in detail by Michael K. Steenson in the law review article, *Joint and Several Liability in Minnesota: The 2003 Model*, 30 Wm. Mitchell L. Rev. 845, 862-82 (2004). Professor Steenson also discusses two additional exceptions not specifically included in Minn. Stat. § 604.02, subd. 1: (1) two or more defendants who are in the chain of manufacture and distribution (based on section 604.02, subd. 3), and (2) two or more defendants who are in a relationship such that the fault of one is imputed to the other (e.g., where one defendant is vicariously liable for the fault of the other). Id. at 875-85.
12 *Staab v. Diocese of St. Cloud*, 813 N.W.2d 68, 75, 77 (Minn. 2012) (Staab I).
13 813 N.W.2d at 75-77.
14 *Id*. at 77.
15 *Id*. at 71, 80.
16 S*ee Cambern v. Sioux Tools, Inc.*, 323 N.W.2d 795, 798-800 (Minn. 1982) (considering whether two defendants' fault should be aggregated in applying Minnesota's Comparative Fault Statute).
17 *Id*. at 798 (citing *Krengel v. Midwest Automatic Photo, Inc.*, 295 Minn. 200, 208-09, 203 N.W.2d 841, 846-47 (1973)). See also *Erickson v. Whirlpool Corp.*, 731 F.Supp. 1426, 1428 (D. Minn. 1990) (noting, as a general rule, the fault of multiple defendants is not to be aggregated pursuant to the comparative fault statute and that the sole exception is the joint adventure or joint enterprise exception).
18 *Cambern*, 323 N.W.2d at 798.
19 *See In re Shigellosis Litigation*, 647 N.W.2d 1, 5-6 (Minn. Ct. App. 2002).
20 *Id*. at 6.
21 *Tester v. Am. Standard, Inc.*, 590 N.W.2d 679, 680-81 (Minn. Ct. App. 1999).
22 *See* 27 Minn. Prac., Products Liability Law § 7.13 (2011).
23 573 N.W.2d 728, 732 (1998).
24 27 Minn. Prac., Products Liability Law § 7.13 (citing *Fuchsgruber v. Custom Accessories, Inc.*, 628 N.W.2d 833, 838–39 (Wis. 2001) (holding that by the 1995 amendment to Wisconsin comparative negligence statute limiting joint and several liability to defendants 51 percent or more negligent, the legislature did not intend to alter existing products liability law)). *But see Staab*, 813 N.W.2d at 78 (holding that "the 2003 amendments to [Minn. Stat. § 604.02, subd. 1(1)-(4)] clearly indicate the Legislature's intent to limit joint and several liability to the four circumstances enumerated in the exception clause, and *to apply the rule of several liability in all other circumstances*" (emphasis added)).
25 Minn. Stat. § 604.02, subd. 3.
26 *Id*.; *see also* 27 Minn. Prac., Products Liability Law § 7.14 (2011) (noting application of subdivision 3 makes "defendants in the chain who are less at fault than the plaintiff liable to the plaintiff, although their liability [is] limited to their percentage of fault").
27 573 N.W.2d at 729-30.
28 *Id*. at 731.
29 *Id*.; *see also* Minn. Stat. 604.02, subd. 3 (providing that a person whose fault is less than that of a claimant is liable to the claimant only for that portion of the judgment which represents the percentage of fault attributable to the person whose fault is less).
30 Minn. Stat. § 604.02, subd. 2.
31 *See Staab v. Diocese of St. Cloud*, 853 N.W.2d 713, 715 (Minn. 2014) (Staab II); *see also O'Brien v. Dombeck*, 823 N.W.2d 895, 900 (Minn. App. 2012) (holding previously that reallocation is permitted whenever a party's equitable share of the obligation is uncollectable, regardless of whether the party is severally, or jointly and severally, liable).
32 *Staab II*, 853 N.W.2d at 715. The supreme court's decision in *Staab II* does not alter the court of appeals' determination, based on *Staab I*, that a non-party, whose fault is submitted to the jury and who is found by the jury to be at fault, is a "party" whose share of the "obligation" can be reallocated pursuant to subdivision 2 even if a judgment has not been entered against the non-party whose share is to be reallocated. See *Staab v. Diocese of St. Cloud*, 830 N.W.2d 40, 44-45 (Minn. Ct. App. 2013), *overruled on other grounds*, 853 N.W.2d 713 (Minn. 2014)..
33 Minn. Stat. § 604.02, subd. 2.
34 Minn. Stat. § 604.02, subd. 3.
35 *Lambertson v. Cincinnati Corp.*, 257 N.W.2d 679, 685 (Minn. 1977).
36 *Engvall v. Soo Line Railroad Co.*, 632 N.W.2d 560, 571 (Minn. 2001).
37 *See In re Shigellosis Litigation*, 647 N.W.2d at 6 (citing *Farr v. Armstrong Rubber Co.*, 288 Minn. 83, 96-97, 179 N.W.2d 64, 72 (1970)).
38 *Engvall*, 632 N.W.2d at 571.
39 *Lambertson*, 257 N.W.2d at 685.
40 *Horton by Horton v. Orbeth, Inc.*, 342 N.W.2d 112, 114 (Minn. 1984).
41 *Lambertson*, 257 N.W.2d at 686.
42 *Horton*, 342 N.W.2d at 114.
43 *Spitzack v. Schumacher*, 241 N.W.2d 641, 643 (Minn. 1976). Under such situations, it is a factor extrinsic to the tort itself, by which a defendant avoids liability, and thus, a defendant does not avoid a finding of common liability. *Horton*, 342 N.W.2d at 114.
44 *Spitzack*, 241 N.W.2d at 644.
45 *Lambertson*, 257 N.W.2d at 686.
46 *Calder v. City of Crystal*, 318 N.W.2d 838, 841 (Minn. 1982).
47 *See Rice Lake Contracting Corp. v. Rust Env't and Infrastructure, Inc.*, 616 N.W.2d 288, 291 (Minn. Ct. App. 2000) (indemnity); *Radmacher v. Cardinal*, 117 N.W.2d 738, 740 (Minn. 1962) (contribution).
48 Minn. Stat. § 541.05, subd. 1; *see Metro. Prop. & Cas. Ins. Co. v. Metro. Transit Com'n*, 538 N.W.2d 692, 694 (Minn. 1995) (affirming the 6-year statute of limitations in Minn. Stat. § 541.05, subd.1 controlled indemnity claim).
49 *Jack Frost, Inc. v. Engineered Bldg. Components Co., Inc.*, 304 N.W.2d 346, 352-53 (Minn. 1981).
50 Minn. Stat. § 176.031 provides that the liability of an employer to its employee under the Workers' Compensation Act "is exclusive and in the place of any other liability to such employee."
51 *Lambertson*, 257 N.W.2d at 689. In Minnesota, "[i]f an employee elects to receive benefits from his or her employer, the employer has a right of indemnity against any third-party tortfeasor whose action may have contributed to the employee's injury," and therefore, the third-party tortfeasor's contribution claim "is essentially an equitable set-off against the employer's recovery of workers' compensation benefits paid from the third-party tortfeasor." *Conwed Corp. v. Union Carbide Corp.*, 443 F.3d 1032, 1039 (8th Cir. 2006) (citing Minn. Stat. § 176.061, subd. 3 (third-party liability statute)).
52 Minn. Stat. §176.061, subd. 11.
53 *Conwed Corp.*, 443 F.3d at 1040-41.

Minnesota

54 *Decker v. Brunkow*, 557 N.W.2d 360, 361-62 (Minn. Ct. App. 1996).
55 *Id*. at 362 (quoting *Lambertson*, 312 Minn. at 128, 257 N.W.2d at 688).
56 *See Gaudreault v. Elite Line Servs.*, LLC, 22 F. Supp. 2d 966 (D. Minn. 2014).
57 *Id*. at 981.
58 Minn. Stat. § 544.41—Minnesota's seller's exception statute—tempers the harsh effect of strict liability by permitting dismissal of strict liability claims against a seller of a defective product who certifies the correct identity of the manufacturer, while ensuring that a person injured by a defective product can recover from a viable source. *In re Shigellosis Litigation*, 647 N.W.2d at 6.
59 Minn. Stat. § 544.41, subds. 1-3.
60 *See In re Shigellosis Litigation*, 647 N.W.2d 1, 6-7 (Minn. Ct. App. 2002).
61 *Id*. at 7.
62 *Id*. at subd. 4.
63 *Rambaum v. Swisher*, 435 N.W.2d 19, 22 (Minn. 1989); *Alumax Mill Products, Inc. v. Congress Financial Corp.*, 912 F.2d 996, 1010 (8th Cir. 1990). See Frey v. Snelgrove, 269 N.W.2d 918 (Minn. 1978) (adopting the use of "*Pierringer*" Releases as originally recognized in *Pierringer v. Hoger*, 21 Wis.2d 182, 124 N.W.2d 106 (1963)).
64 Alumax Mill Products, Inc., 912 F.2d at 1008 (quoting Frey, 269 N.W.2d at 920).
65 *Hoffmann v. Wiltscheck*, 411 N.W.2d 923, 925 (Minn. Ct. App. 1987) (*citing Frey*, 269 N.W.2d at 921).
66 *Bunce v. A.P.I., Inc.*, 696 N.W.2d 852, 856 (Minn. Ct. App. 2005).
67 While true in cases involving one settling defendant and one nonsettling defendant, the Minnesota Supreme Court has held that joint and several liability is not necessarily destroyed by a *Pierringer* release in cases involving more than one nonsettling defendant. *See Hosley v. Armstrong Cork Co.*, 383 N.W.2d 289, 292 (Minn. 1986) (holding that a waiver of joint and several liability does not result from the plaintiff's settlement with some defendants through *Pierringer* releases). In *Hosley*, the court concluded that two or more nonsettling defendants can still be jointly and severally liable for the entire award but conceded that the nonsettling defendants would not be required to pay the plaintiff for that portion of the award attributed to the settling defendants. See *Id*. at 292, 294 n. 4.
68 *Id*. at 856.
69 *Rambaum*, 435 N.W.2d at 22.
70 *Bunce*, 696 N.W.2d at 856.
71 *Hoffmann*, 411 N.W.2d at 926.
72 *Id*.

Mississippi

By C. Stephen Stack, Jr.

Watson & Jones, P.A.
Jackson, Mississippi

Tel: 601.939.8900
Fax: 601.932.4400

Email: sstack@wjpalaw.com
www.watsonjoneslaw.com

Allocation of Fault

In general, fault may be allocated in a verdict or judgment to any person or entity as to whom there is evidence to support a finding of fault under applicable law whether or not the person or entity is a plaintiff, defendant or non-party.[1] Even a party who is immune from liability and those defendants who have settled may be included among those whose fault is evaluated for purposes of apportionment.[2] The trier of fact must determine from the evidence and arguments presented which persons and/or entities were at fault and allocate to each found to be at fault a percentage of the fault such that the total of fault allocated equals 100%. The apportionment of fault applies to "an act or omission of a person which is a proximate cause of injury or death to another person or persons, damages to property, tangible or intangible, or economic injury, including, but not limited to, negligence, malpractice, strict liability, absolute liability or failure to warn."[3]

If the plaintiff is found at fault, plaintiff's recovery is reduced by the percentage of fault allocated to the plaintiff.[4] This reduction applies whether the action is based in negligence or strict liability.[5] Under the statute governing the allocation of fault among joint tortfeasors, when an employee or agent has wrongfully or negligently caused injury to another, the percentage of fault of the employee/agent must be assigned to the employer or principal. The employee/agent and the employer/principal are to be treated as one defendant in assessing percentage of fault for the negligence or wrongdoing by the employee/agent.[6]

In actions where intentional wrongdoing and negligence contribute to causation of an injury, the jury may not apportion the responsibility between the intentional wrongdoer and one who was negligent when the intentional wrongdoer and the one who was negligent are not joined in the same action.[7] Consequently, the defendant who is negligent is liable for all of the damages to the plaintiff, even if a co-tortfeasor committed an intentionally wrongful act.[8] Miss. Code Ann. §85-5-7 allows for the allocation of responsibility between those participants who are found at fault, but fault, as defined in the statute, excludes intentional wrongdoing.[9]

How the courts will proceed in dealing with allocation of liability in cases where both the willful and at-fault parties

Mississippi

are joined has not been decided.[10] The problem would appear to be a thorny one since the statute dealing with apportionment of liability does not appear to address this issue.[11]

Persons who deliberately act together in a common plan to commit a tortious act are jointly and severally liable, but such persons have a right of contribution from their fellow defendants acting in concert.[12] Presumably, but not yet a settled matter, defendants who act with specific wrongful intent, may have their liability apportioned among themselves in determining their responsibility among themselves.[13] The statute does not expressly state how contribution is to be determined. However, such defendants remain jointly and severally liable to the plaintiff.[14] In the absence of a common plan to commit a tortious act, each defendant who is found liable to the plaintiff is severally liable only for the amount of damages allocated to him in direct proportion to his percentage of fault.[15] Although not specifically addressed by the Mississippi Supreme Court since the passage of Miss. Code Ann. § 85-5-7, the Court has intimated in dicta that the Fifth Circuit was correct in its Erie guess that the amount of damages apportioned to a non-settling defendant is not reduced by a settlement by another defendant where there is no joint and several liability under the statute.[16] A settlement credit, however, remains proper in instances where defendants are found to have deliberately acted together in a common plan to commit a tortious act and otherwise remain jointly and severally liable.[17]

Contribution

Two critical prerequisites are generally necessary for the invocation of non-contractual implied indemnity in Mississippi: (1) The damages which the claimant seeks to shift are imposed upon him as a result of some legal obligation to the injured person; and (2) it must appear that the claimant did not actively or affirmatively participate in the wrong.[18] There is generally no right of indemnity between joint tortfeasors. However, the implied common law indemnity cause of action provides a narrow exception to this rule, allowing a joint tortfeasor to recover from another joint tortfeasor if the tortfeasor asserting indemnity was not guilty of any active negligence.[19]

Contribution among joint tortfeasors is unavailable absent a joint judgment against the tortfeasors, and, unlike in most states, contribution (and thus, impleader based upon contribution) among joint tortfeasors is seriously limited under Mississippi law.[20] A non-settling defendant has no right of contribution against a settling defendant.[21] However, with Mississippi's abolishment of joint and several liability (with the exception of those who consciously and deliberately pursue a common plan or design to commit a tortious act, or actively take part in it), a defendant is only liable for that percentage of fault assessed to it and therefore the need for contribution is rare.

Non-contractual Indemnity

A third-party tortfeasor found liable for damages to a worker who has suffered an injury covered under the Mississippi Workers' Compensation Law may not receive indemnity from the worker's employer on a tort theory even if the third party has evidence that the employer is negligent.[22] Inasmuch as the injured worker may not sue the employer/carrier in tort for damages arising out of a workers' compensation injury,[23] when sued or joined by a third party, the employer does not lose the tort immunity that it has earned.[24] If there is an express contract for indemnification between the third-party and the employer, however, Mississippi courts generally will enforce those agreements.[25] Such agreements nevertheless are subject to public policy considerations and statutory proscriptions against certain contracts containing covenants to indemnify or hold harmless another person from that person's own negligence.[26]

Under Mississippi's product liability statute, the manufacturer of a product who is found liable for a defective product is required to indemnify a product seller for the costs of litigation, any reasonable expenses, reasonable attorney's fees and any damages awarded by the trier of fact unless: (1) the seller exercised substantial control over that aspect of the design, testing, manufacture, packaging or labeling of the product that caused the harm for which recovery of damages is sought; (2) the seller altered or modified the product, and the alteration or modification was a substantial factor in causing the harm for which recovery of damages is sought; (3) the seller had actual knowledge

Mississippi

of the defective condition of the product at the time he supplied same; or (4) the seller made an express factual representation about the aspect of the product which caused the harm for which recovery of damages is sought.[27] A seller of a product is not liable unless it meets one of these same criteria, and the statute states specifically that: "It is the intent of this section to immunize innocent sellers who are not actively negligent, but instead are mere conduits of a product."[28]

1 *Estate of Hunter v. General Motors Corp.*, 729 So.2d /264 (Miss. 1999); *Mack Trucks, Inc. v. Tackett*, 841 So.2d 1107 (Miss. 2003)
2 *Estate of Hunter v. General Motors Corp.*, 729 So.2d /264 (Miss. 1999); *Mack Trucks, Inc. v. Tackett*, 841 So.2d 1107,1113-16 (Miss. 2003)
3 Miss. Code Ann. §85-5-7
4 Miss. Code Ann. §11-7-.15; City of Jackson v. Copeland, 490 So.2d 834, 838-39 (Miss. 1986)
5 Horton v. American Tobacco Co., 667 So.2d 1289 (Miss. 1995)
6 Miss. Code Ann. §85-5-7(2)
7 *Dawson v. Townsend & Sons, Inc.*, 735 So. 2d 1131,1133, 1141 (Miss. Ct. App. 1999)
8 *Dawson v. Townsend & Sons, Inc.*, 735 So. 2d 1131, 1133, 1142 (Miss. Ct. App. 1999)
9 Miss. Code Ann. §85-5-7(2)
10 *Dawson v. Townsend & Sons, Inc.*, 735 So. 2d 1131, 1133, 1142 (Miss. Ct. App. 1999)
11 *Dawson v. Townsend & Sons, Inc.*, 735 So. 2d 1131, 1133, 1142 (Miss. Ct. App. 1999)
12 Miss. Code Ann. §85-5-7(4)
13 *Dawson v. Townsend & Sons, Inc.*, 735 So. 2d 1131, 1133, 1142 (Miss. Ct. App. 1999) (dicta)
14 MSPRAC-ENC §16:35
15 Miss. Code Ann. §85-5-7(2)
16 ***Pickering v. Industria Masina I Traktora (IMT)***, 740 So.2d 836, 841 (Miss. 1999); *Krieser v. Hobbs*, 166 F.3d 736, 745 (5th Cir. 1999)
17 *Brown v. North Jackson Nissan' Inc.*, 856 So.2d 692, 697-98 (Miss. Ct. App. 2003)
18 *J.B. Hunt Transport, Inc. v. Forrest General Hosp.*, 34 So.3d 1171, 1173-74 (Miss. 20/0)
19 *J.B. Hunt Transport, Inc. v. Forrest General Hosp.*, 34 So.3d 1171, 1174 (Miss. 20/0)
20 *Estate of Hunter v. General Motors Corp.*, 729 So.2d 1264, 1275 (Miss. 1999)
21 *Estate of Hunter v. General Motors Corp.*, 729 So.2d 1264, 1275 (Miss. 1999) ; *Robles By and Through Robles v. Gollott and Sons Transfer and Storage, Inc.*, 697 So.2d 383, 386 (Miss. 1997)
22 *Williams v. Ludlow Corp.*, 806 F. Supp. 101 (S.D. Miss. 1992); *Smith Petroleum Service' Inc. v. Monsanto Chemical Co.*, 420 F.2d 1103, 13 Fed. R. Serv. 2d 725 (5th Cir. 1970)
23 Miss. Code Ann. § 71-3-9 (Workers' Comp Exclusive liability)
24 *Smith Petroleum Service, Inc. v. Monsanto Chemical Co.*, 420 F.2d 1103, 13 Fed. R. Serv. 2d 725 (5th Cir. 1970)
25 *Lorenzen v. South Central Bell Telephone Co.*, 546 F. Supp. 694 (S.D. Miss. 1982)
26 See, e.g., Miss. Code Ann. §31-5-41 ("With respect to all public or private contracts or agreements, for the construction, alteration, repair or maintenance of buildings, structures, highway bridges, viaducts, water, sewer or gas distribution systems, or other work dealing with construction, or for any moving, demolition or excavation connected therewith, every covenant, promise and/or agreement contained therein to indemnify or hold harmless another person from that person's own negligence is void as against public policy and wholly unenforceable."); *Entergy Mississippi, Inc. v. Burdette Gin Co.*, 726 So.2d 1202 (Miss. 1998) (Power company's attempt to contractually hold itself harmless for its own negligence void as against public policy).
27 Miss. Code Ann. §11-1-63(g)(i)
28 Miss. Code Ann. §11-1-63(h)

Missouri

By Susan M. Dimond

Wuestling & James, L.C.
St. Louis, Missouri

Tel: 314.421.6500
Fax: 314.421.5556

Email: dimond@wuestlingandjames.com
www.wuestlingandjames.com

Allocation of Fault

In 1983 Missouri adopted a comprehensive system of comparative fault.[1] Under this system, the jury decides the issues of relative fault and assesses appropriate percentages.[2] Since the apportionment of fault and damages is factual by nature, the rationale between the comparative fault system is that the jury should be as fully informed as possible in order to determine the relative fault of the parties.[3]

In 1987, Section 537.765 abolished contributory fault as a complete bar to plaintiff's recovery in a products liability action and established that the doctrine of comparative fault would apply in such cases. Section 537.765 (2) also permits a defendant to plead and prove the fault of the plaintiff as an affirmative defense but any fault chargeable to the plaintiff shall diminish proportionately the amount awarded as compensatory damages but shall not bar recovery. The rule in Missouri is that, for the purpose of determining comparative fault, "fault is only to be apportioned among those at trial."[4]

In Missouri, tortfeasors are jointly and severally liable for the harm caused to a plaintiff. Thus, for joint and several liability to apply, the fact finder has to find that two or more defendants were negligent and that the negligence of each contributed to the plaintiff's injury. With respect to joint and several liability, R.S.Mo. § 537.067.1 provides, "[i]n all tort actions for damages, if a defendant is found to bear fifty-one percent or more of fault, then such defendant shall be jointly and severally liable for the amount of the judgment rendered against the defendants. If a defendant is found to bear less than fifty-one percent of fault, then the defendant shall only be responsible for the percentage of the judgment for which the defendant is determined to be responsible by the trier of fact."[5] An exception to this is that a party is responsible for the fault of another defendant or for payment of the proportionate share of another defendant.[6]

To invoke joint and several liability, there must be two or more defendants—the joint aspect—whose negligence contributed to the plaintiff's injury—the several aspect. The defendants shall only be severally liable for the percentage of punitive damages for fault which is attributed to such defendant by the trier of fact.[7] "The injured party may sue all or any of the joint or concurrent tortfeasors and obtain a judgment against all or any of them.[8] When an injured

Missouri

plaintiff enters into a settlement agreement "with one of the joint tortfeasors for a portion of the injuries, the injured person still retains her cause for action against the other tortfeasors and recovery may be had for the balance of the injury.[9] In all tort actions, no party may disclose the impact of the joint and several liability statute to the trier of fact.[10]

Joint and several liability is recognized in Missouri to allocate the financial burden of harm among the parties at fault in causing the plaintiff's injuries. "Joint or concurrent tortfeasors are severally, as well as jointly, answerable to the injured party for the full amount of the injuries.[11]

Contribution

A plaintiff may sue all or any of the joint or concurrent tortfeasors and obtain a judgment against all or any of them. When one of multiple tortfeasors satisfies the judgment, that tortfeasor has the right to contribution from the other tortfeasors in proportion to the negligence of each individual tortfeasor.[12] A prerequisite for a contribution claim to be valid is that both the party seeking contribution and the defendant against whom contribution is sought must be tortfeasors that are originally liable to the plaintiff.[12]

In the leading case Missouri Pacific Railroad Co. v. Whitehead & Kales Co., the Missouri Supreme Court adopted a contribution system which imposes liability on each tortfeasor proportionate to its negligence.[14] The rationale for a contribution system in allocating liability among negligent tortfeasors is that, since each party has been negligent and each party's negligence has harmed plaintiff, the "foundation ... principle of fairness" requires that each defendant should share liability to the extent of his responsibility.[15]

Because the same policy considerations exist in both product liability claims and negligence claims, in Missouri there is "no distinction between products liability claims and negligence claims insofar as the right to contribution ... is concerned."[16]

Non-contractual Indemnity

Noncontractual indemnity actions in Missouri may arise in three situations. The first situation is when the indemnitee has discharged a duty that is owed by the indemnitee but, between the indemnitee and another, the duty should have been discharged by the other. Therefore, if the other does not reimburse the indemnitee, the other is unjustly enriched.[17]

Thus, an action for common law indemnity, an obligation implied in law, requires proof of the following elements: (1) the discharge of an obligation by the plaintiff; (2) the obligation discharged by the plaintiff is identical to an obligation owed by the defendant; and, (3) the discharge of the obligation by the plaintiff is under such circumstances that the obligation should have been discharged by the defendant, and defendant will be unjustly enriched if the defendant does not reimburse the plaintiff to the extent that the defendant's liability has been discharged.[18]

In cases of noncontractual indemnity, demand for indemnification from the indemnitor is a prerequisite to recovery by the indemnitee for sums paid to settle the underlying claim against the indemnitee. Once a demand is made on the indemnitor to defend the litigation against the indemnitee, and the demand is refused, the indemnitee may settle the claim in good faith and proceed against the indemnitor, without having to demonstrate the indemnitee's liability.[19]

An indemnitee whose actions do not in fact discharge any duty owed by the indemnitor to a third person, or whose actions in fact are not taken under any duty owed by the indemnitee to the third person, cannot seek common law or noncontractual indemnity. On the other hand, if an indemnitee has suffered a judgment, the claim for indemnity is ripe for adjudication notwithstanding the pendency of an appeal.[20]

The second situation occurs when the parties are liable in tort and one joint tortfeasor seeks contribution from the other to the extent of that other's apportioned fault, or an initial tortfeasor seeks indemnity against a subsequent tortfeasor.[21] When indemnity is claimed between joint or successive tortfeasors, the indemnitee must plead at a minimum that if it is liable to the injured party, then the indemnitor is liable to the indemnitee. Absent negligence on the part of the indemnitee, there is no right to indemnity.[22] A claimant seeking noncontractual indemnity from an alleged joint or successive tortfeasor must also plead and prove the alleged indemnitor's negligence.[23]

The third situation arises out of statute in the context of a worker's compensation.[24]

In the products liability tort context, an indemnity claim by a "downstream seller" in the stream of commerce

Missouri

can be barred by operation of statute.[25] Under the statute, a defendant whose liability is based solely on his status as a seller in the stream of commerce may be dismissed from a products liability claim of which another defendant, including the manufacturer or distributor, is properly before the court and from whom total recovery may be had for plaintiff's claim.[26] Thus, the statute acts as a bar to a subsequent claim for indemnity or contribution, if the "downstream seller" timely asserts the statute to secure a dismissal of the claim in the original action.

Statutory Provisions Affecting Indemnity and Contribution

The Missouri legislature has enacted a number of statutes concerning contribution, joint and several liability, and products liability. Some of these statutes are consistent with the development of the common law, others evidence significant decisions of public policy by the legislature.[27]

Section 537.060, RSMo (2000), provides that defendants in a judgment for a private wrong are subject to contribution, but that

> [w]hen an agreement by release, covenant not to sue or not to enforce a judgment is given in good faith to one of two or more persons ... such agreement shall not discharge any of the other tort-feasors for the damage unless the terms of the agreement so provide; however such agreement shall reduce the claim by the stipulated amount of the agreement, or in the amount of consideration paid, whichever is greater. The agreement shall discharge the tort-feasor to whom it is given from all liability for contribution or noncontractual indemnity....

Section 537.067, RSMo (2000), provides in "all tort actions for damages, in which fault is not assessed to the plaintiff, the defendants shall be jointly and severally liable for the amount of the judgement rendered against such defendants."

Section 537.762, RSMo (2000), provides that "[a] defendant whose liability is based solely on his status as a seller in the stream of commerce may be dismissed from a products liability claim" so long as the defendant shows (1) that "another defendant, including the manufacturer, is properly before the court," and (2) that "total recovery may be had for plaintiff's claim" from the other defendants. Section 537.762.1, 2. A defendant may move for dismissal "within the time for filing an answer or other responsive pleading". Section 537.762.3. The statute allows the parties sixty days to conduct discovery on the issues raised in the motion and accompanying affidavit. Any party may move for a hearing on the motion to dismiss under section 537.762.5. Any dismissal pursuant to section 537.762 is interlocutory and may be set aside for good cause until final judgment is rendered in the case. Section 537.762.7.

Section 537.765.1, RSMo (2000), provides that "[c] ontributory fault, as a complete bar to plaintiff's recovery in a products liability claim, is abolished. The doctrine of pure comparative fault shall apply to products liability claims as provided in this section." Section 537.765.2 provides "[d] efendant may plead and prove the fault of the plaintiff as an affirmative defense. Any fault chargeable to the plaintiff shall diminish proportionately the amount awarded as compensatory damages but shall not bar recovery."

Settlement/Measure of Damages

As discussed above, Section 537.060 provides, among other things, that a settling tortfeasor shall be discharged from all liability for contribution or noncontractual indemnity to any other tortfeasor as long as the settlement was in good faith and regardless of whether the underlying claims involve product liability or negligence, or whether the settling tortfeasor committed active or passive negligence.[28] Indeed, the settling party need not even be a party to the litigation (if any) in order to be protected by Section 537.060.[29]

Under Missouri law, the five-year statute of limitation for a joint tortfeasor's suit for indemnity begins to run at the time of settlement, and not at the time of the original accident.[30] In cases of noncontractual indemnity in the tort context, the indemnitee's recovery will be limited to that proportion of the plaintiff's loss that was caused by the indemnitor. Thus, where a plaintiff recovers a judgment against joint tortfeasors and there is a cross-claim for indemnity, the jury will be instructed to apportion fault according to comparative fault principles between or among the tortfeasors. A tortfeasor who satisfies more than that tortfeasor's proportionate share of the judgment may have an action or judgment against the co-defendant to the extent of the percentage of fault apportioned to that co-defendant.[31]

Missouri

It is also worth noting that the "net outlay" rule is applicable to recovery on contractual indemnity claims, also applies in some non-contractual indemnity situations.[32] This concept was discussed in Major v. Frontenac Industries, Inc., 899 S.W.2d 895 (Mo. Ct. App. E.D. /995). In the Frontenac case, the plaintiff had brought a products liability action against a distributor who filed a third-party noncontractual indemnity claim against the manufacturer. The distributor then entered into a "Mary Carter" agreement with the plaintiff. This agreement obligated the distributor to pay to the plaintiff a total of $51,000. The case went to trial and the distributor was realigned as a plaintiff. The jury returned a verdict for $455,000. On post-trial motions, the trial court entered a judgment on the indemnity claim for $51,000. This was affirmed, applying the rule of Restatement of Restitution, § 80 (1937).

1 *Gustafson v. Benda*, 661 S.W.2d // (Mo. banc. 1983).
2 *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104 (Mo. banc. 1996).
3 *Id*.
4 *Jensen v. ARA Servs.' Inc.*, 736 S.W.2d 374, 377 (Mo. banc. 1987).
5 *See Wagner v. Bindex Intern., Inc.*, 368S,W.3d 340 (Mo. Ct. App. 2012).
6 *Id*.
7 R.S.Mo. § 537.067.2.
8 *Gramex Corp. v. Green Supply' Inc.*, 89 S.W.3d 432, 430 (Mo. banc. 2002) (quoting *Berry v. Kansas City Pub. Serv. Co.*, 121 S.W.2d 825, 833 (Mo. banc. 1938)).
9 *Id*.
10 R.S.Mo. § 537.067.3.
11 *Smith v. Coffey*, 37 S.W.3d 797, 799 (Mo. banc. 2001).
12 *Gramex Corp. v. Green Supply' Inc.*, 89 S.W.3d at 440.
13 *Id*. at 442.
14 *Missouri Pacific Railroad Co. v. Whitehead & Kales Co.*, 566 S.W.2d 466 at 472.
15 *Id*.
16 *Lowe v. Norfolk & W. Ry. Co.*, 753 S.W.2d 891, 895 (Mo. banc. 1988).
17 *State ex rel. Manchester Ins. & Indem. Co. v. Moss*, 522 S.W.2d 772 (Mo. banc. 1975); see also Beeler v. Martin, 306 S.W.3d 108, 111 n.4 (Mo. Ct. App. 2010) (noting the distinction between contribution and indemnity outside the tort context).
18 *Id*.; *Chouteau Development Co.' LLC v. Sinclair Marketing, Inc.*, 200 S.W.3d 68 (Mo. Ct. App. 2006) (describing this category of indemnity as "equitable indemnity").
19 *Stephenson v. First Missouri Corp.*, 861 S.W.2d 651 (Mo. Ct. App. 1993).
20 *Fast v. Marston*, 282 S.W.3d 346 (Mo. banc. 2009).
21 *Gramex Corp. v. Green Supply, Inc.*, 89 S.W.3d 432; *Missouri Pac. R. Co. v. Whitehead & Kales Co.*, 566 S.W.2d 466 (Mo. banc. 1978).
22 *Id*.; *Travelers Prop. Cas. Co. of Am. V. Manitowoc Co.*, 389 S.W.3d 174 (Mo. 2013).
23 *Asher v. Broadway-Valentine Center, Inc.*, 691 S.W.2d 478 (Mo. Ct. App. W.D. 1985).
24 R.S.Mo. § 287.040; *Thornsberry v. Thornsberry Investments, Inc.*, 295 S.W.3d 583 (Mo. Ct. App. S.D. 2009).
25 R.S.Mo. § 537.762.
26 *Id*.
27 *Gramex Corp. v. Green Supply' Inc.*, 89 S.W.3d at 440-41.
28 *Lowe v. Norfolk and Western Ry. Co.*, 753 S.W.2d at 895.
29 *State ex rel. Curators of University of Missouri v. Moorhouse*, 181 S.W.3d 621, 625 (Mo. Ct. App. 2006).
30 *Federated Mut. Ins. Co. v. Gray*, 475 F.Sup. 679 (E.D. Mo. 1979); see also *Kneilbert Clinic, LLC v. Smith*, 2007 WL: 956634 (E.D. Mo. 2007).
31 R.S. Mo. § 537.065; see *State ex rel. Tarrasch v. Crow*, 622 S.W.2d 928 (Mo. Banc. 1981).
32 *Major v. Frontenac Industries, Inc.*, 899 S.W.2d 895 (Mo. Ct. App. 1995).

Montana

By Logan M. Wells

Collins & Lacy, P.C.
Columbia, South Carolina

Tel: 803.256.2660
Fax: 803.771.4484

Email: lwells@collinsandlacy.com
www.collinsandlacy.com

Allocation of Fault

Under Montana's statutory contributory negligence scheme, contributory fault does not bar recovery in an action by a person or a person's legal representative to recover tort damages for death of a person or injury to a person or property if the contributory fault was not greater than the fault of the defendant or the combined fault of all defendants and nonparties. However, damages must be diminished in proportion to the percentage of fault attributable to the recovering party.[1] Therefore, if the combined negligence of the defendant(s) and nonparties, if any, is fifty percent or greater, then the plaintiff is entitled to recover damages from the defendant(s) with the amount reduced in direct proportion to the plaintiff's own negligence.[2]

Generally, under Montana law, contributory negligence is not a defense to the liability of a seller, based on strict liability in tort, for personal injury or property damage caused by a defectively manufactured or defectively designed product. However, a seller named as a defendant in a strict liability action may assert the following affirmative defenses against the user or consumer, the legal representative of the user or consumer, or any person claiming damages by reason of injury to the user or consumer: (a) the user or consumer of the product discovered the defect or the defect was open and obvious and the user or consumer unreasonably made use of the product and was injured by it; and (b) the product was unreasonably misused by the user or consumer and the misuse caused or contributed to the injury.[3] The aforementioned affirmative defenses are applied in accordance with the principles of comparative negligence set forth in Mont. Code Ann. § 27-1-102.[4]

For purposes of determining the percentage of liability attributable to each party whose action contributed to the injury complained of, the trier of fact must consider the negligence of the claimant, injured person, defendants, and third-party defendants.[5] The liability of persons released from liability by the claimant and persons with whom the claimant has settled must also be considered by the trier of fact.[6] Comparison of fault with other nonparties is prohibited.[7]

In order for the issue of apportionment to be presented to the jury, the defendant(s) must first establish that the claimant's injury is divisible. In the absence of proof

Montana

that an injury is divisible, the defendants are jointly and severally liable for the plaintiff's entire injury pursuant to the indivisible injury rule.[8] The single indivisible injury rule can apply even though there is no concert of action between the defendants.[9]

Generally, in cases where there are multiple defendants, if the negligence of a party to an action is an issue, each party against whom recovery may be allowed is jointly and severally liable for the amount that may be awarded to the claimant.[10] However, a party whose negligence is determined to be fifty percent (50%) or less of the combined negligence of all persons to whom fault may be apportioned is severally liable only and is responsible only for the percentage of negligence attributable to that party,[11] except a party may be jointly liable for all damages caused by the negligence of another if both acted in concert in contributing to the claimant's damages or if one party acted as an agent of the other.[12] The remaining parties are jointly and severally liable for the total less the percentage attributable to the claimant and to any person with whom the claimant has settled or whom the plaintiff has released from liability.[13] Apportionment of fault is properly considered even where the claimant proceeds under a claim of negligence per se.[14] Montana law does not allow the allocation of damages in proportion to the amount of fault in the case of intentional torts.[15]

Indemnity and Contribution

In Montana, the right to indemnity is an equitable principle, while the right to contribution is established by statute.[16] Indemnity and contribution are similar in that the essential purpose of both is the intent to shift one's losses to another[17]; however the concepts differ from each other in that indemnity shifts the entire loss from the one who has been required to pay it to the one who should bear the loss, whereas contribution distributes loss among joint tortfeasors by requiring each to pay his or her proportionate share of the negligence that caused the plaintiff's injuries.[18] The remedies of indemnity and contribution are mutually exclusive because indemnity is an all-or-nothing proposition, representing in effect total contribution.[19]

The right to indemnity is an equitable principle based on the general theory that one compelled to pay for damages caused by another should be able to seek recovery from that party.[20] The party compelled to pay for the negligent act of another generally is not entitled to indemnity, however, where both parties are negligent.[21] A person or entity in the chain of distribution of a defective product, held liable for injuries sustained by the user of that product, has a right to maintain an action for indemnification against the manufacturer of the defective product.[22] In order to recover its loss, however, the person or entity must ultimately prove the necessary elements of a strict products liability action.[23]

As noted above, the right to contribution is established by statute.[24] Generally, under Montana's statutory contributory negligence scheme, each party against whom recovery may be allowed has the right of contribution from any other person whose negligence may have contributed as a proximate cause to the injury complained of.[25] On motion of a party against whom a claim is asserted for negligence resulting in death or injury to person or property, such person may be joined as an additional party to the action.[26] If for any reason all or part of the contribution from a party liable for contribution cannot be obtained, each of the other parties shall contribute a proportional part of the unpaid portion of the noncontributing party's share and may obtain judgment in a pending or subsequent action for contribution from the noncontributing party.[27] A party found to be fifty percent (50%) or less negligent for the injury complained of is liable for contribution only up to the percentage of negligence attributed to that party.[28]

The amount of contribution a defendant is liable for may also be affected by offset. In an action arising from bodily injury or death when the total award against all defendants is in excess of $50,000 and the plaintiff will be fully compensated for the plaintiff's damages, exclusive of court costs and attorney fees, a plaintiff's recovery must be reduced by any amount paid or payable from a collateral source[29] that does not have a subrogation right.[30] Following the jury's determination of its award without consideration of any collateral sources, the amount of offset is determined by the trial judge at a hearing and upon separate submission of evidence relevant to the existence and amount of collateral sources.[31] For there to be a factual basis to support a trial court's offset against general damages recovery, a jury verdict must set out in line-item form what portion of the award is attributable to items subject to collateral source offsets.[32] The defendants have the burden of proving the right to a collateral source offset.[33]

Montana

Effect of Settlement and Release

Generally, a release or covenant not to sue given to one of two or more persons liable in tort for the same injury, death, damage, or loss (1) does not discharge any other tortfeasor from liability for that tortfeasor's several pro rata share of liability for the injury death, damage, or loss unless the release or covenant not to sue provides otherwise; (2) reduces the aggregate claim against the other tortfeasors to the extent of any percentage of fault attributed by the trier of fact under Mont. Code Ann. § 27-1-703; and (3) discharges the tortfeasor to whom it is given from all liability for contribution.[34] Similarly, a settlement by one tortfeasor precludes claims for indemnity against the settling tortfeasor, irrespective of the nature of the underlying tort claim.[35]

With regard to contribution, in an action based on negligence, a defendant may assert as an affirmative defense that the damages of the claimant were caused in full or in part by a person with whom the claimant has settled or whom the claimant has released from liability.[36] A defendant who alleges that a person released by the claimant or with whom the claimant has settled is at fault in the matter has the burden of proving: (i) the negligence of the person whom the claimant has released or with whom the claimant has settled; (ii) any standard of care applicable to the person whom the claimant released or with whom the claimant settled; and (iii) that the negligence of the person whom the claimant has released or with whom the claimant has settled was a contributing cause under the law applicable to the matter.[37] A release of settlement entered into by a claimant constitutes an assumption of the liability, if any, allocated to the settled or released person.[38]

In determining the percentage of liability attributable to persons who are parties to the action, the jury is required to consider the negligence of persons released from liability by the claimant or with whom the claimant has settled.[39] The claim of the releasing or settling claimant against other persons is reduced by the percentage of the released or settled person's equitable share of the obligation.[40] A finding of negligence of a person with whom the claimant has settled or who has been released from liability by the claimant is not a presumptive or conclusive finding as to that person for purposes of a prior or subsequent action involving that person.[41]

1 Mont Code Ann. § 27-1-702; *see Payne v. Knutson*, 99 P.3d 200 (Mont. 2004) (Jurors were not required to apportion negligence between defendant sellers of antique tractor after finding that buyer was more than fifty percent (50%) negligent with respect to tractor accident that caused buyer's death; regardless of each defendant's negligence, they could not be liable for buyer's death, and idea that apportioning each defendant's negligence would result in buyer being found less than fifty percent (50%) negligent was speculative.).
2 *Peterson v. St. Paul Fire & Marine Ins. Co.*, 239 P.3d 904 (Mont. 2010); *Larchick v. Diocese of Great Falls Billings*, 208 P.3d 836 (Mont. 2009); *Giambra v. Kelsey*, 162 P.3d 134 (Mont. 2007).
3 Mont. Code Ann. § 27-1-719(5).
4 Mont. Code Ann. § 27-1-719(6).
5 Mont. Code Ann. § 27-1-703(4).
6 *Id.*
7 Mont. Code Ann. § 27-1-703(6)(c); *Faulconbridge v. State*, 142 P.3d 777 (Mont. 2006); *Truman v. Mont. Eleventh Judicial Dist. Court*, 68 P.3d 654 (Mont. 2003); *see also Bell v. Glock, Inc.*, 92 F.Supp.2d 1067 (D. Mont. 2000) (Under Montana law, handgun manufacturer could no apportion liability for death of bystander in products liability action with unnamed third parties.).
8 *Truman v. Mont. Eleventh Judicial Dist. Court*, 68 P.3d 654 (Mont. 2003); *Armstrong v. Gondeiro*, 15 P.3d 386 (Mont. 2000); *Azure v. City of Billings*, 596 P.2d 460 (Mont. 1979).
9 *Truman v. Mont. Eleventh Judicial Dist. Court*, 68 P.3d 654 (Mont. 2003); *Armstrong v. Gondeiro*, 15 P.3d 386 (Mont. 2000); *Azure v. City of Billings*, 596 P.2d 460 (Mont. 1979).
10 Mont. Code Ann. § 27-1-703(1).
11 Mont. Code Ann. § 27-1-703(2).
12 Mont. Code Ann. § 27-1-703(3).
13 Mont. Code Ann. § 27-1-703(2).
14 *Giambra v. Kelsey*, 162 P.3d 134 (Mont. 2007).
15 *Ammondson v Northwestern Corp.*, 220 P.3d 1 (Mont. 2009).
16 *State Farm Fire & Cas. Co. v. Bush Hog, LLC*, 219 P.3d 1249 (Mont. 2009); *Durden v. Hydro Flame Corp.*, 983 P.2d 943 (Mont. 1999).
17 *State Farm Fire & Cas. Co. v. Bush Hog, LLC*, 219 P.3d 1249 (Mont. 2009); ***Judd v. Burlington N. & Santa Fe Ry.***, 186 P.3d 214 (Mont. 2008); *Durden v. Hydro Flame Corp.*, 983 P.2d 943 (Mont. 1999).
18 *State Farm Fire & Cas. Co. v. Bush Hog, LLC*, 219 P.3d 1249 (Mont. 2009); *Durden v. Hydro Flame Corp.*, 983 P.2d 943 (Mont. 1999).
19 *State Farm Fire & Cas. Co. v. Bush Hog, LLC*, 219 P.3d 1249 (Mont. 2009); *Durden v. Hydro Flame Corp.*, 983 P.2d 943 (Mont. 1999); *State ex rel. Deere & Co. v. Dist. Court*, 730 P.2d 396 (Mont. 1986).
20 *State Farm Fire & Cas. Co. v. Bush Hog, LLC*, 219 P.3d 1249 (Mont. 2009); *Crone v. Crone*, 77 P.3d 167 (Mont. 2003); *Durden v. Hydro Flame Corp.*, 983 P.2d 943 (Mont. 1999); *see also* Mont. Code Ann. § 28-11-301.
21 *State v. Butte-Silver Bow Cnty.*, 220 P.3d 1115 (Mont. 2009); *Poulsen v. Treasure State Indus., Inc.*, 626 P.2d 822 (Mont. 1981); *see Iowa Mfg. Co. v. Joy Mfg. Co.*, 669 P.2d 1057 (Mont. 1983) (Where warrantee is supplied defective good which constitutes breach of warranty on part of supplier, but warrantee's subsequent conduct proximately causes injury to third party, then warrantee is not merely passively at fault and loses his right to indemnity.).
22 *State Farm Fire & Cas. Co. v. Bush Hog, LLC*, 219 P.3d 1249 (Mont. 2009); *Jones v. Aero-Chem Corp.*, 680 F.Supp. 338 (D. Mont. 1987).
23 *Jones v. Aero-Chem Corp.*, 680 F.Supp. 338 (D. Mont. 1987).
24 *See* Mont. Code Ann. § 27-1-703.
25 Mont. Code Ann. § 27-1-703(1).
26 Mont. Code Ann. § 27-1-703(4).
27 Mont. Code Ann. § 27-1-703(5).
28 *Id.*

Montana

29 Mont. Code Ann. § 27-1-307(1) ("Collateral source" is defined as "a payment for something that is later included in a tort award and that is made to or for the benefit of a plaintiff or is otherwise available to the plaintiff: (a) for medical expenses and disability payments under the federal Social Security Act, any federal, state, or local income disability act, or any other public program; (b) under any health, sickness, or income disability insurance or automobile accident insurance that provides health benefits or income disability coverage, and any other similar insurance benefits available to the plaintiff, except life insurance; (c) under any contract or agreement of any person, group, organization, partnership, or corporation to provide, pay for, or reimburse the costs of hospital, medical, dental, or other health care services, except gifts or gratuitous contributions or assistance; (d) any contractual or voluntary wage continuation plan provided by an employer or other system intended to provide wages during a period of disability; and (e) any other source, except the assets of the plaintiff or of the plaintiff's immediate family if the plaintiff is obligated to repay a member of the plaintiff's immediate family.").
30 Mont. Code Ann. § 27-1-308(1).
31 Mont. Code Ann. § 27-1-308(3).
32 *Stevens v. Novartis Pharms.Corp.*, 247 P.3d 244 (Mont. 2010).
33 *Shilhanek v. D-2 Trucking, Inc.*, 994 P.2d 1105 (Mont. 2000).
34 Mont. Code Ann. § 27-1-704.
35 *Durden v. Hydro Flame Corp.*, 983 P.2d 943 (Mont. 1999).
36 Mont. Code Ann. § 27-1-703(6)(a), (f).
37 Mont. Code Ann. § 27-1-703(6)(e).
38 Mont. Code Ann. § 27-1-703(6)(d).
39 Mont. Code Ann. § 27-1-703(6)(b).
40 Mont. Code Ann. § 27-1-703(6)(d); Mont. Code Ann. § 27-1-704(2).
41 Mont. Code Ann. § 27-1-703(6)(d).

Nebraska

By Jeremy Cook

Downs ♦ Stanford, P.C.
Austin, Texas & Dallas, Texas

Tel: 512.891.7771 (Austin)
Fax: 512.891.7772 (Austin)

Tel: 214.748.7900 (Dallas)
Fax: 214.748.4530 (Dallas)

Email: jcook@downsstanford.com
www.downsstanford.com

Allocation of Fault

A. Negligence Cases

In cases in which contributory negligence is a defense, i.e., negligence or negligent manufacture cases, fault is apportioned among the plaintiff, all defendants and any settling party. A plaintiff's recovery is reduced by his percentage of fault and will be barred altogether if his fault equals or exceeds the fault of all "parties against whom recovery is sought." Interestingly, the jury is to be advised of the effect of their apportionment, but, according to the Eighth Circuit, only when the plaintiff's contributory fault is at issue. Fault cannot be apportioned against parties who were never part of a suit or have been dismissed before the case is submitted to the jury for determination.

By statute, when more than one defendant is found liable, each liable defendant is both jointly and severally liable for the plaintiff's economic damages, but only severally liable for his proportionate share of the non-economic damages. If, however, multiple defendants act as part of a "common enterprise or plan" or act "in concert" and thereby harm the plaintiff, each is jointly and severally liable for all of the plaintiff's damages, barring any reduction for the plaintiff's contributory fault. Liable defendants do not receive a dollar-for-dollar *(pro tanto)* credit for monies the plaintiff achieves through settlements, but instead benefit from a reduction of the economic damages (for which the liable defendant is jointly liable) in proportion to the settling party's percentage of fault *(pro rata)*.

B. Strict Liability Cases

For strict product liability claims, the defendant is not entitled to an apportionment that includes the plaintiff's contributory negligence or a co-defendant's comparative negligence, but is entitled to an apportionment that includes the plaintiff's assumption of the risk or misuse of the product. The Supreme Court of Nebraska has not yet decided whether a third party's misuse of the product is also an affirmative defense for which the defendant may seek an apportionment of fault, but in its 2000 opinion in *Jameson v. Liquid Controls Corp.* it did take note of the fact that other jurisdictions had already recognized third-party misuse as an affirmative defense, perhaps indicating that it would do the same if the issue was squarely presented to it.

Nebraska

Defendants in strict products liability cases are entitled to settlement credits, even where the settling party's fault has not been established. Such credits, however, are limited to dollar-for-dollar *(pro tanto)* credits. Where a strictly liable manufacturer's product and the negligence of another person both cause an indivisible injury, each is held jointly and severally liable for all of the plaintiff's damages.

Contribution

In Nebraska, contribution claims concerning tort actions have been afforded by the common law since 1975. There is no legislation governing them. A joint tortfeasor, except one whose conduct was intentional, may recover contribution provided that he meets the following elements:

1) There is a common liability among the party seeking contribution and the party against whom contribution is sought;

2) The party seeking contribution paid more than his pro rata share of the common liability;

3) The party seeking contribution extinguished the liability of the party from whom contribution is sought; and

4) If the liability was extinguished by settlement, the amount of the settlement was reasonable.

Importantly, a joint tortfeasor who settles with the plaintiff, but does not extinguish the liability of another tortfeasor, has no right to contribution from the other tortfeasor, but is no longer subject to any claims for contribution.

Of note, in *Strong v. Nebraska Nat'l Gas Co.*, the United States District Court for the District of Nebraska acknowledged a manufacturer's right to seek contribution from a negligent co-tortfeasor. Even though the *Strong* opinion does not indicate whether the manufacturers in that case were pursued by the plaintiffs for negligence claims, strict liability claims, or both, there appears to be no preclusion for a strictly liable manufacturer to obtain contribution from a joint tortfeasor.

A joint tortfeasor may pursue a contribution claim against any party against whom the plaintiff has obtained a judgment as well as any party whose liability "remains to be fixed." Thus, the contribution claim can be brought in the plaintiff's action or in a subsequent action. As to subsequent actions, the Supreme Court of Nebraska has not specifically addressed the issue of which statute of limitations applies to contribution claims in the tort context. In a contract case, *Cepel v. Smallcomb*, the supreme court concluded that a contribution claim was "in effect, an action at law upon an implied contract" and was, therefore, governed by the limitations period set forth in Neb. Rev. Stat. § 25-206, which states, "an action upon a contract, not in writing, express or implied … can only be brought within four years." It is unknown whether *Cepel*'s reasoning will extend to apply Section 25-206 to contribution claims in the tort context.

Of note to product litigants, Neb. Rev. Stat § 25-224(3) states that Nebraska's four-year statute of limitations and ten-year statute of repose for product liability actions "shall not be applicable to indemnity or contribution actions brought by a manufacturer or seller of a product against a person who is or may be liable to such manufacturer or seller for all or any portion of any judgment rendered against a manufacturer or seller." Given the lack of clear direction from the Supreme Court of Nebraska as to the limitations period applicable to tort contribution claims, the cautious practitioner will advise his or her client to raise any contribution claims within the underlying case, where possible.

Non-Contractual Indemnity

Nebraska provides non-contractual indemnity "when one party is compelled to pay money which in justice another ought to pay, or has agreed to pay, unless the party making the payment is barred by the wrongful nature of his conduct." "[I]t is generally recognized that the party seeking indemnification must have been free of any wrongdoing, and its liability vicariously imposed." Thus, Nebraska observes the oft-titled "active v. passive negligence" test for determining whether a party is entitled to indemnity, and restricts a party who is independently liable to the plaintiff to seeking contribution from other active tortfeasors.

Non-contractual indemnity is permitted in product liability cases. For example, in *City of Wood River v. Geer-Melkus Construction Co.*, the Supreme Court of Nebraska allowed the construction company to pursue a third-party

Nebraska

indemnity claim against the manufacturer of the aeration system the construction company had installed in the City's irreparable waste water treatment facility. Interestingly, under Nebraska law, indemnity is unnecessary for sellers or lessors who are not involved in the manufacturer of the subject product, because, by statute, "[n]o product liability action based on the doctrine of strict liability in tort shall be commenced or maintained against any seller or lessor of a product which is alleged to contain or possess a defective condition unreasonably dangerous to the buyer, user, or consumer unless the seller or lessor is also the manufacturer of the product or the part thereof claimed to be defective."

The Supreme Court of Nebraska has not decided the applicable statute of limitations for indemnity claims. It has, however, recognized that neither the four-year statute of limitations applicable to product liability claims nor the four-year statute of limitations for contract and warranty claims arising under Section 2-275 of the U.C.C. applies to indemnity claims arising out of product liability actions. Most importantly, the Supreme Court has repeatedly held that a claim for indemnity does not accrue until the indemnitee suffers a loss or damage, thereby recognizing a party's right to bring an indemnity claim after a judgment has been entered against it. Here, again, given the lack of clarity as to the applicable statute of limitations for indemnity claims, the cautious practitioner will advise his or her client to file a third-party indemnity claim within the underlying action, where possible.

1 *See generally*, Neb. Rev. St. § 25-21,185.07 - .11.
2 Neb. Rev. St. § 25-21.185.09. It has not been decided whether the phrase "parties against whom recovery is sought" will be interpreted so that a plaintiff's recovery will be barred where the plaintiff's negligence exceeds that of all defendants but is less than the combined negligence of all defendants and settling parties, e.g., plaintiff's fault is 30%, defendant's fault is 20% and settling party's fault is 50%.
3 Neb. Rev. St. § 25-21.185.09.
4 *Sherman v. Winco Fireworks, Inc.*, 532 F.3d 709, 720-21 (8th Cir. 2008)(Nebraska law).
5 *Maxwell v. Montey*, 631 N.W.2d 455, 461-63 (Neb. 2001).
6 Nev. Rev. St. § 25-21.185.10.
7 *Id.*
8 *Tadros v. City of Omaha*, 735 N.W.2d 377 (Neb. 2007).
9 *Rahmig v. Mosley Machinery Co.*, 412 N.W.2d 56, 74 (Neb. 1987).
10 *Shipler v. GM*, 710 N.W.2d 807, 824-832 (Neb. 2006).
11 *See Jameson v. Liquid Controls Corp.*, 618 N.W.2d 637, 646 (Neb. 2000).
12 *Id.* at 644-45.
13 *Id.*
14 *Shipler v. GM*, 710 N.W.2d 807, 824-832 (Neb. 2006).
15 *Royal Indem. Co. v. Aetna Cas. & Surety Co.*, 229 N.W.2d 183 (Neb. 1975).
16 *Nebraska Plastics, Inc. v. Holland Colors America, Inc.*, 408 F.3d 410, 420 (8th Cir. 2005)(Nebraska law).
17 *Powell v. Montagne*, 765 N.W.2d 496 (Neb. 2009).
18 *Id.* at 504.
19 476 F.Supp. at 1173-74.
20 *Maxwell*, 631 N.W.2d at 463.
21 *Strong v. Nebraska Natural Gas Co.*, 476 F.Supp. 1170, 1174 (D. Neb. 1979).
22 *Cepel v. Smallcomb*, 628 N.W.2d 654, 659-60 (Neb. 2001).
23 Neb. Rev. Stat. § 25-224(3).
24 *Warner v. Reagan Buick, Inc.*, 483 N.W.2d 764, 771 (Neb. 1992).
25 *City of Wood River v. Geer-Melkus Constr. Co.*, 444 N.W.2d 305, 311 (Neb. 1989).
26 *See Warner*, 483 N.W.2d at 771.
27 *Morrison Enterprises, LLC v. Dravo Corp.*, 2009 WL 4330224, No. 4:08CV3142, at *13 (D. Neb. 2009).
28 *City of Wood River*, 444 N.W.2d at 305.
29 Neb. Rev. Stat. § 25-21,181; *see Kudlacek v. Fiat S.p.A.*, 509 N.W.2d 603, 616-17 (Neb. 1994) (affirming directed verdict for domestic distributor of subject automobile where plaintiffs presented no evidence that domestic distributor participated in the manufacturer of the automobile).
30 *City of Wood River*, 179 N.W.2d at 309-12.
31 *Kocsis v. Harrison*, 543 N.W.2d 164, 169 (Neb. 1996)(citing *City of Wood River v. Geer-Melkus Constr. Co.*, 179 N.W.2d 305 (Neb. 1989)).

Nevada

By David L. Barron & Joshua A. Sliker

Barron & Pruitt, LLP
North Las Vegas, Nevada

Tel: 702.870.3940
Fax: 702.870.3950

Email: dbarron@lvnvlaw.com
Email: jsliker@lvnvlaw.com
www.barronpruitt.com

Allocation of Fault

In Nevada, fault in a negligence-based lawsuit is statutorily allocated between a plaintiff and one or more defendants.

Unlike states whose judiciaries abolished the old, "all or nothing" common law rule of "contributory" negligence (disallowing a plaintiff any recovery if he or she is found to have negligently caused his or her own injury)[1], the Nevada Legislature passed a so-called "greater than" comparative negligence statute.[2] In simplest terms, if the fact-finder determines that a plaintiff's fault is "greater than" that of a defendant, or the combined negligence of multiple defendants, the plaintiff is precluded from any recovery.[3] Nevada's comparative negligence statute also abolishes two or more defendants' joint and several liability where a plaintiff's "comparative negligence is asserted as a defense."[4] But before this rule of "several liability only" for multiple defendants can apply the defense of comparative negligence must have some basis in fact.[5]

To illustrate these principles, assume a plaintiff, P, has sued two defendants, A and B, for a single injury received in a traffic accident. P gets a $100 verdict, and is found 51% negligent; the jury finds A's and B's respective degrees of negligence are 40% and 9%. Under Nevada's "greater than" statute, P gets nothing—his negligence of 51% is "greater than" the combined 49% negligence of the defendants.

Assume the same $100 verdict, but instead of a 51% comparative negligence finding, P's negligence is only 50%. The jury then assesses A as 40% negligent, and assigns defendant B with remaining 10% of the entire liability. Since this was clearly a case where comparative negligence was appropriately asserted as a defense, A is responsible for his 40% of the total liability and B is responsible for his 10%. P of course was found 50% responsible for his own injuries, and that 50% of the $100 verdict (i.e. $50) is unrecoverable by him.

The foregoing shows how fault—as determined by the fact-finder—is allocated in the run-of–the-mill Nevada negligence case. But after the allocation is made, P still has to enforce his judgment. Under the common law rule of "joint and several liability," the net $50 verdict (now reduced to a judgment) would be treated as a single obligation that P could enforce against either A or B as

Nevada

judgment debtors. But for our purposes assume next that A is judgment-proof, though B can easily pay their combined obligations totaling $50. Under principles of "joint and several liability," P could recover the full $50 from the cash-flush B. But since A and B are only "severally" responsible for their respective obligations, P can collect only $10 from B (representing his 10% of fault); B has no legal obligation to pay anything on A's behalf (and vice versa).

The preceding discussion is mechanical in its simplicity. But as we all know—nothing's that simple (why else would we need lawyers?). And in fact, the Nevada comparative negligence statute carves out exceptions to "several liability" for multiple defendants in certain types of cases including recoveries based on:

- Strict liability
- Toxic torts
- Intentional torts
- Concerted action by multiple defendants
- Product liability[6]

But what happens when one judgment-defendant is entitled to rely on the "several liability" rule, but another defendant is not? Frankly, the text of the comparative negligence statute doesn't come close to addressing the issue and it took a recent Nevada Supreme Court decision to clarify the ambiguity.[7]

Returning to our three litigants—P, A and B—P has gotten his $100 verdict, but this time he was intentionally attacked by defendant A at defendant B's restaurant. The jury finds P not to have been at fault, but that B was 20% negligent in not protecting him. The attacker, A, had no specific percentage attached to his liability—after all, as an intentional tortfeasor he's absolutely responsible for all of P's damages—and under the statutory exception for intentional tort listed above, A is jointly and severally responsible for the entire $100 judgment.

A of course is impecunious (and in prison), but B has plenty of money to pay the $100 judgment. P now attempts to enforce the full judgment against B, whom P contends is responsible for paying its entirety. P's theory for B owing all the judgment amount is that: 1) the comparative negligence statute only speaks in terms of allocating "negligence"; 2) P himself was not found comparatively negligent; and 3 irrespective of the 20% "negligence" attributed to B, there in reality was no negligence to apportion so B is jointly and severally liable for the whole judgment. B's response essentially is that the comparative negligence statute—and jury verdict— already apportioned the loss, leaving him severally liable for only 20% of the judgment.

The foregoing scenario is based on the Nevada Supreme Court's March 2012 decision in *Café Moda v. Palma*. The *Café Moda* court in substance found when the comparative negligence statute speaks in terms of "negligence" it should be read to mean "fault."[8] And if the jury assesses a defendant with a percentage of "negligence" it effectively is assigning a degree of the entire fault, and leaving that defendant severally liable for only that proportion of a judgment attributed to him on the verdict form.[9]

Café Moda, however, is of no benefit to defendants whose liability is not fault-based, such as intentional wrong- doers; toxic polluters; or product liability defendants. In fact Nevada law is well-settled that a plaintiff's "comparative negligence" or "fault" (using *Café Moda*'s verbiage) is no defense to allegations of strict liability in tort for damage caused by an "unreasonably dangerous" product.[10]

But what about a case beyond the scope of *Café Moda*, where a "negligence" defendant might contend that there should be a place on the verdict form to assess the negligence of a "non-party at fault"—that is, a party who has responsibility for the plaintiff's damages, but never was—or no longer is—a party to the lawsuit?

Nevada of course allows a defendant to take full advantage of the so-called "empty chair" argument: that the "real" culpable party is absent from the case, and the jury should take the omission into account when assessing liability among the existing parties.[11] The "empty chair" argument aside, it is unlikely Nevada will any time soon accept the notion of a "non-party at fault" as the concept is understood in other states. Instead, *Café Moda* probably represents the outer limits of what our state Supreme Court will allow in allocating fault based on a plaintiff's case-in-chief. And this in turn leads us to the following discussion concerning Nevada's law of third-party practice and the "defendant vs. defendant" remedies of equitable indemnity and contribution.

Nevada

Third-party claims; Indemnity; and Contribution

Nevada historically adhered to the common law rule that where two or more parties were in pari delicto—that is, their combined actions caused a single injury—neither was entitled to the court's assistance in allocating the loss between them. Said differently, Nevada courts were hostile to the notion of contribution "among tortfeasors"[12] and would not permit non-contractual indemnity between two or more parties who were both at fault for a single loss.[13]

Next, while Nevada has long accepted the validity of indemnity contracts, non-contractual, "equitable" indemnity—the shifting of an entire legal responsibility from one party to another party, who in fairness should pay it instead—was most frequently limited to cases of *respondeat superior* and other forms of vicarious liability based upon a relationship between the would-be indemnitee and indemnitor.[14] But even in cases where there were such close relationships that implied-at-law indemnity could apply, if a party seeking indemnity had stand-alone responsibility for the loss, he too was in *pari delicto*, with no access to the court's equitable power to compel another "active" wrong-doer to reimburse payment for the injury.

As a corollary to those strict rules regarding no contribution and limited opportunity for indemnity, even if there were another party responsible for a plaintiff's injuries whom the plaintiff had not sued, an existing defendant was powerless compel the plaintiff to amend and include that party in the plaintiff's case in chief.[15] And as we have already seen, Nevada does not permit the liability of a "non-party at fault" to be considered on a verdict form.

But even defendants have rights, and a defendant with an equitable indemnity claim clearly has an interest in having indemnity questions litigated as expeditiously as possible. Modern procedural rules, including those—like Nevada's—fashioned after the Federal Rules of Civil Procedure, allow defendants (and even plaintiffs who have become counter-defendants) to "implead" third parties into an action. Whether "impleader" is done as a "matter of right" in the earliest pleading stages, or done later by leave of court, theories against "third-party defendants" in their purest form tend to be based on either 1) a contract in which the third-party defendant agreed to pay the plaintiff's loss;[16] or 2) on the equitable notion that it would be unfair for the defendant/third-party claimant to be unable to shift the loss to another party.

While Nevada had the procedural mechanism of third-party practice (and cross-claims between existing defendants) to resolve indemnity claims in a single lawsuit[17], Nevada defendants had no right to seek contribution from one another until 1973, when the State Legislature adopted the *Uniform Contribution Among Tortfeasors Act* (Rev. 1955).[18]

The right of contribution created in 1973 was a pro rata distribution—in other words an equal division of a common liability among "persons [who are] jointly and severally liable in tort for the same injury to person or property or for the same wrongful death…even though judgment has not been recovered against all or any of them."[19] In fact, the strict proration contemplated by the *Uniform Contribution Act* was underscored by verbiage that "[i]n determining the pro rata shares of the tortfeasors in the entire liability…their relative degrees of fault shall not be considered[.]"[20]

But in 1979 the Nevada Legislature did an about-face on pro rata contribution and amended the Act to base "contribution" between "joint and several" tortfeasors on their "equitable share[s] of the common liability." As the statutory remedy now exists:

- Contribution exists between two or more persons "jointly and severally liable in tort…for the same injury"
- Contribution is not dependent on a judgment having first been entered
- The right to contribution does not arise until the party seeking it has paid "more than his share of the common liability, and his total recovery is limited to the amount paid by him in excess of his equitable share"
- A settling torfeasor is not entitled to contribution if he has not also extinguished the liability of the party from whom contribution is sought[21]

Nevada

Where the foregoing criteria have been met, the right of contribution is enforceable by either:

- A separate lawsuit, whether or not a judgment has been entered, within a year of paying the claim, or
- Post-judgment motion practice[22]

Of course defendants asserting rights of contribution will often do so by way of cross-claims, effectively litigating the "equitable shares" of their "common liability" in the plaintiff's lawsuit. But should a judgment be entered in the plaintiff's action, Nevada's *Uniform Contribution Act* provides for it to have *res judicata* effect regarding contribution rights of the defendants:

> The judgment of the court in determining the liability of the several defendants to the claimant for an injury or wrongful death shall be binding as among such defendants in determining their right to contribution.[23]

Although Nevada's contribution practice has proven effective in spreading losses among several defendants based on equitable principals, there is still a place in Nevada's jurisprudence for "at-law" indemnity that shifts an entire loss from one defendant to another.[24] In addition to indemnity based on a vicarious liability, full equitable indemnity remains a viable theory, for example, where a "downstream" distributor of a defective product demands that the "upstream" manufacturer defend and indemnify him in a product liability action, or where a manufacturer has included a defective component in a finished product, thereby making the product "unreasonably dangerous" and causing a plaintiff's injury.[25]

Effect of Settlement on Indemnity and Contribution Rights

Because one or more defendants in a multi-party lawsuit will often find it advantageous to "buy peace" through a settlement, the Uniform Contribution Act creates a way for that to occur and cut off later claims of equitable—that is, non-contractual—indemnity, or contribution.[26] The statute pertinently provides when a release or covenant not to execute is given "in good faith to one or more persons liable in tort for the same injury or wrongful death":

- The release or covenant does not discharge any other tortfeasors (unless its terms provide otherwise), but
- The claim against the "non-settling" defendants is reduced against them "to the extent of any amount stipulated [in the settlement], or the consideration paid for it, whichever is greater"[27]

Since the statute speaks in terms of "good faith," Nevada practice now usually includes the "settling" defendant filing a "motion for determination of good faith settlement." Although a finding of "settlement in good faith" is typical, such a finding is by no means automatic: it is a discretionary ruling and the trial court must look to factors pertinent to the case to show that its discretion was indeed exercised.[28] When a settlement is found to have been in good faith the amount of the settlement is applied to the plaintiff's recovery, and serves as a set-off to any further recovery against the non-settling parties.[29]

A word should be given to Nevada's adaptation of the Uniform Joint Obligations Act.[30] This statute has been raised by non-settling defendants to contend that a "general release"—which does not reserve rights to proceed against non-settling parties—extinguishes claims against all existing and potential defendants.[31] While this argument has had some success, the Nevada Supreme Court has most recently held the scope of a release, and those whom the document was actually intended to discharge, is a factual determination, and that evidence outside the document can be considered in establishing the intent of the parties to the agreem[ent.32]

Nevada

1 See e.g. Li v. Yellow Cab Co, 532 P.2d 1226 (Cal. 1975) (abolishing contributory negligence and replacing it with "pure" comparative fault whereby a plaintiff's own negligence serves as a set-off, but does not preclude recovery).
2 NRS 41.141
3 *Id*., sub. 4.
4 *Id*. sub. 1
5 See Buck by Buck v. Greyhound Lines, Inc., 105 Nev. 756, 783 P.2d 437 (1989) (statute requiring several liability in an action in which "contributory negligence may be asserted as defense" did not apply to injured, infant passengers of a stalled car struck by a bus; thus, defendants' liability to the children was joint and several in an action by the children and others since the statute's "several liability" feature applied only if contributory negligence could be asserted as bona fide issue in a case). Compare, Café Moda v. Palma Moda v. Palma, 128 Nev., P.3d (Nev. Adv. Op. No. 7, decided March 1, 2012), discussed in the text.
6 *Id*. sub. 5.
7 Café Moda v. Palma, supra.
8 129 Nev. Adv. Op. No. 7 at p.9.
9 *Id*.
10 Young's Machine Co. v. Long, 100 Nev. 692, 692 P.2d 24 (1984) (strict liability in tort for injuries caused by defective products is not a fault-based liability; therefore the state's comparative negligence statute provides no defense); cf. Hill v. Chaparral Boats, Inc., 2011 WL 5009413 (Nev. 2011; unpublished decision) (plaintiff's comparative negligence is a defense under maritime law to a claim of strict liability in tort).
11 Banks ex rel. Banks v. Sunrise Hosp., 120 Nev. 822, 845, 102 P.3d 52, 68 (2004) (nothing in NRS 41.141 "prohibits a party defendant from attempting to establish that either no negligence occurred or that the entire responsibility for a plaintiff's injuries rests with nonparties, including those who have separately settled their liabilities with the plaintiff").
12 Reid v. Royal Ins. Co., 80 Nev. 137, 142, 390 P.2d 45, 47 (1964).
13 *Id*., 80 Nev. at 143, 390 P.2d at 48.
14 *Id*., 80 Nev. at 141, 390 P.2d at 47.
15 *Id*.
16 While not specifically within the scope of this discussion, the Nevada Supreme Court has recently accepted the so-called "express negligence" rule in the interpretation of indemnity agreements. Nevada now requires a party seeking to be indemnified for its own negligence to express that intent in the language of the indemnity contract. Reyburn Lawn & Landscape Designers, Inc. v. Plaster Development Co., Inc, 127 Nev., 255 P.3d 268, 274 (2011) ("contracts purporting to indemnify a party against its own negligence will only be enforced if they clearly express such an intent"; "a general provision indemnifying the indemnitee "against any and all claims," standing alone, is not sufficient"); see also George L. Brown Insurance v. Star Insurance Co., 126 Nev., 237 P.3d 92, 97 (2010).
17 See NRCP 14 (a) and 13 (g).
18 NRS 17.225, et seq.
19 12 Uniform Laws Annot. at 63.
20 *Id*., p. 87.
21 NRS 17.225.
22 NRS 17.285.
23 *Id*., sub. 5.
24 See e.g. The Doctors Co. v. Vincent, 120 Nev. 644, 651, 98 P.3d 681, 686 (2004).
25 See e.g. Black & Decker, 105 Nev. 344, 775 P.2d 698 (1989); Piedmont Equip. Co. v. Eberhard Mfg., 99 Nev. 523, 665 P.2d 256 (1983) (complete indemnity requires that the indemnified party not only be protected from the plaintiff's claim, but that attorney's fees and defense costs incurred from the time of the tender be paid by the indemnitor).
26 NRS 17.245.
27 *Id*.
28 Velsicol Chemical Corp. v. Davidson, 107 Nev. 356, 811 P.2d 561 (1991).
29 NRS 17.245, sub 1 (a).
30 NRS 101.010, et seq.
31 NRS 101.060; Whittlesea v. Farmers, 86 Nev. 347, 469 P.2d 57 (1970).
32 Russ v. General Motors, 111 Nev. 1431, 906 P.2d 718 (1995).

New Hampshire

By David W. Zizik

Zizik Professional Corporation
Westwood, Massachusetts

Tel: 781.320.5401
Fax: 781.658.2532

Email: dzizik@ziziklaw.com
www.ziziklaw.com

Allocation of Fault

A plaintiff may recover only if the plaintiff's fault is not greater than that of the defendant, or when there are multiple defendants, not more than the total fault of the defendants. A plaintiff who is fifty percent or less at fault can recover damages, but only in proportion to the amount of defendant's harm.[1]

In addition, New Hampshire applies a theory of modified joint and several liability. In accordance with the relevant statute, in all actions the court shall enter judgment against each party liable on the basis of joint and several liability, but any party less than fifty percent liable is only severally liable, not jointly.[2] In all cases where the parties are found to have knowingly pursued or taken an active part in a common plan or design resulting in harm, judgment will be granted against the parties on the basis of joint and several liability.[3]

Contribution and Indemnity in Products Liability Cases

New Hampshire has adopted a statute that provides for contribution among joint tortfeasors.[4] Under this statute, a right of contribution exists between two or more persons who are jointly and severally liable for the same indivisible claim, or otherwise liable for the same injury or harm.[5] New Hampshire has recognized the right to indemnification by non-negligent sellers against upstream sellers and/or manufacturers.[6]

Effect of Settlement

Contribution is not available to a person who enters into a settlement with a claimant unless the settlement extinguishes the liability of the person from whom contribution is sought, and then, only to the extent that the amount paid in settlement was reasonable.[7] Further, the New Hampshire Supreme Court has held that section 507:7-h of the New Hampshire Revised Statutes entitles a non-settling tortfeasor to a reduction in the amount of the judgment equal to the consideration the plaintiff received from a good-faith settlement with one of the multiple tortfeasors.[8] This reduction applies to arbitration awards because the court found that the language of the statute was not limited to court proceedings.[9]

New Hampshire

1 N.H. REV. STAT. ANN. § 507:7-d (2014). For instance, in *Ocasio v. Federal Express Corp.*, Federal Express was found responsible for four percent of plaintiff's $1,445,700 damages, thus it was responsible for approximately $58,000. 33 A.2d 1139, 1152 (N.H. 2011). Notably, plaintiff's fault (6%) was found to be *greater* than Federal Express's fault (4%), but less than the aggregate amount of all responsible parties, which was ninety-four percent (USPS, who was not a party to the law suit, was found ninety percent responsible). *Id.* New Hampshire law requires the aggregation of the defendants' fault to determine whether plaintiff's recovery is barred. § 507:7-d.
2 § 507:7-e.
3 *Id.*
4 § 507:7-f.
5 *Id.*
6 Consol. Util. Equip. Servs., Inc. v. Emhart Mfg. Corp., 123 N.H. 258, 261 (1983) (holding possible to obtain indemnification against another where liability derivative or imputed by law).
7 § 507:7-f (2014).
8 Tiberghein v. B.R. Jones Roofing Co., 931 A.2d 1223, 1227 (N.H. 2007).
9 *Id.* at 1226-27.

New Jersey

By Thomas Paschos

Thomas Paschos & Associates, P.C.
Haddonfield, New Jersey

Tel: 856.354.1900
Fax: 856.354.6040

Email: tpaschos@paschoslaw.com
www.paschoslaw.com

Allocation of Fault

Products liability actions are governed by New Jersey's Product's Liability Act.[1] Under products liability law, privity between the injured party and the defendant is not required. When a person is injured by an allegedly defective product, he will often bring an action against all entities within the product's chain of distribution.

New Jersey's Joint Tortfeasors Contribution Law[2], establishes a right of contribution among joint tortfeasors[3], when the injury or damage is suffered by any person as a result of the wrongful act, neglect or default of joint tortfeasors.[4] When that has occurred, a joint tortfeasor can recover contribution from another tortfeasor for any excess paid in satisfaction of a judgment over his pro rata share.[5] A joint tortfeasor's recovery is limited under the Contribution Law to any excess paid over "his pro rata share."[6] In this respect it is important to note the effect of the Joint Tortfeasors Contribution Law on the Comparative Negligence Act.[7]

The New Jersey Comparative Negligence Act provides that the percentage of each party's fault must be found and "(a)ny party who is so compelled to pay more than such party's percentage share may seek contribution from the other joint tortfeasors."[8] The Act allows a plaintiff to recover the full amount of damages from any joint tortfeasor determined to be 60% or more responsible for the total damages.[9] In the alternative, any party found to be less than 60% responsible for the total damages is only responsible for the percentage of damages attributable to that party.[10] In the event a party is required to pay more than his share of the damage award in accordance with the Joint Tortfeasors Act, he/she may seek contribution from the other joint tortfeasors for the excess over his/her pro rata share.[11]

In many products liability cases, contributory negligence is not a defense to a strict liability action.[12] However, products liability plaintiffs' conduct that cannot be considered under comparative fault in New Jersey may in some cases be considered instead for causal apportionment of damages. For example, in one automobile crashworthiness case, the New Jersey Appellate Division recognized that the causal apportionment doctrine is distinct from New Jersey case law that generally holds a products liability

New Jersey

plaintiff's conduct is irrelevant in terms of comparative fault.[13] In another case, the Appellate Court affirmed causal apportionment of a decedent's death between cigarette smoking and exposure to defendants' asbestos.[14]

Non-Contractual Indemnity / Contribution

In the absence of an express agreement, allocation of the risk of loss between the parties in the chain of distribution is achieved through common-law indemnity, an equitable doctrine that allows a court to shift the cost from one tortfeaser to another.[15] One principle of common-law indemnity shifts the cost of liability from one who is constructively or vicariously liable to the tortfeasor who is primarily liable.[16] A corollary to this principle is that one who is primarily at fault may not obtain indemnity from another tortfeasor.[17] Consistent with this principle, actions by retailers against manufacturers have been recognized in New Jersey.[18]

As in most states, there must be a finding that the indemnitor is liable to the plaintiff in order for the distributor or seller to recover indemnity. Absent a contract to the contrary, a manufacturer must indemnify its downstream seller "only if its own conduct toward the injured party was tortious, *e.g.*, if it produced a defective product that caused injury, and thus exposed the seller to liability."[19] A set of facts might arise in which the party at the end of the distributive chain will be a better risk-bearer than a party higher in the chain. However, as a general rule, indemnification should follow the chain of distribution in the absence of a contractual provision to the contrary.[20]

Statutes Affecting Indemnity / Contribution

In addition to New Jersey's Product's Liability Act[21], Joint Tortfeasors Contribution Law[22], and the Comparative Negligence Act[23], there are several other statutes relevant to product liability actions involving indemnity/contribution.

Limitations / Entire Controversy

In most states, a statute defines the time within which a defendant in a product liability case must bring an indemnity claim. However, in New Jersey, common law dictates when the limitations period for indemnity claims accrues. Generally, it is not until an indemnitee has made a payment that any arguable right to indemnification may arise.[24] However, there are some exceptions to the general rule in products liability cases. For example, New Jersey recognizes the "entire controversy" doctrine.[25] The rule requires, as a general matter, that all aspects of the controversy between those who are parties to the litigation be included in a single action. New Jersey applies the entire-controversy doctrine to contribution and indemnification claims in product liability cases.

New Jersey Rules[26] govern the procedure for making a cross-claim for contribution or indemnity against a co-party in a suit. The rules consider the entire controversy doctrine and require defendants to assert any cross-claims for contribution and indemnity which they may have against any other party in the action itself despite the fact that the cause of action for contribution and indemnity does not technically accrue until payment of the judgment by that defendant.[27]

"Vouching In"

Although the principles of the entire controversy doctrine apply to upstream (and possibly downstream) claims for indemnity in products liability cases, New Jersey recognizes the "vouching-in" procedure as a satisfactory substitute for party-joinder if the required notice is given to the supplier pursuant to the relevant New Jersey statue, *N.J.S.A.* 12A:2-607(5)(a).[28] *N.J.S.A.* 12A:2-607(5)(a) is a provision of the Uniform Commercial Code that allows a buyer to "vouch in" sellers when the buyer is sued for a product defect by a third party and permits the buyer to bind the seller to the factual determinations in the action when the seller declines to defend the buyer. Essentially, "vouching-in" is a means by which one entity in the chain of distribution notifies another entity via correspondence (instead of formal pleadings and service of process) that the second party is obligated to assume the defense of and indemnify the first party against any judgment. If the notice states that the second party may come in and defend and that if that party does not do so he will be bound in any action against him by any determination of fact common to the two litigations, then unless the second party after seasonable receipt of the notice does come in and defend, he is so bound.[29]

Retailer (Product Seller) Immunity Act

The Retailer Immunity Act may affect the chain of those who will be subject to indemnification/contribution. The retailer immunity provisions in the Products Liability Act provides

New Jersey

an exception to the principle of imposing strict liability upon all entities in the chain of distribution, exempting only those whose exclusive role is to make the finished, packaged and labeled product available to consumers.[30] Under the Retailers Immunity Act, if the seller files an affidavit identifying the manufacturer, the seller is relieved of all strict liability claims by the plaintiff.[31] The affidavit must be filed and provided to the plaintiff as soon as the identity of the manufacturer becomes known to the seller. If the plaintiff does not voluntarily dismiss the seller, the court would likely grant a motion for summary judgment if the requirements of the statute are strictly adhered to.

The statute provides for a few exceptions where a retailer will not be found exempt from strict liability. If the identity of the manufacturer is incorrect, the manufacturer has no known agents in the United States, or the manufacturer is bankrupt or has no attachable assets, the seller remains strictly liable.[32] Also, if the seller exercised significant control over the design, manufacturer, packaging or labeling of the product, and the control exercised was somehow related to the defect that caused plaintiff's injuries, the seller remains strictly liable.[33] Finally, if the plaintiff can prove that the seller created the defect or knew or should have known of the defect, the seller will remain strictly liable.[34]

Effect of Settlement on Indemnity Rights

Often when one or more tortfeasor makes a pretrial agreement to pay off her share of the damages awarded to the plaintiff, the settlements occur prior to a determination of each tortfeasor's relative liability. The issue then becomes how the settlement impacts the relative share of the liability of the remaining defendants to the plaintiff.

The New Jersey Supreme Court has held that a release, by way of settlement, of the primary or active tortfeasor does not automatically preclude a plaintiff from proceeding against the secondary or passive tortfeasor on a theory of strict liability. The finality of the release depends upon the intent of the parties in executing the release.[35] The effect on the plaintiff of a joint tortfeasor's settlement will depend upon the percentage of fault found against him. When one defendant settles, the remaining co-defendant or co-defendants are chargeable with the total verdict less that attributable to the settling defendant's percentage share.[36] While settlement extinguishes a tortfeasor's right to contribution under Joint Tortfeasors Contribution Law,[37] a settling tortfeasor may still be required to indemnify against the vicarious liability of a secondary tortfeasor.[38] New Jersey allows indemnification for settlement payments, but requires the indemnitee to demonstrate that: a) the indemnitee's claims are based on a valid, pre-existing indemnitor/indemnitee relationship; b) the indemnitee faced potential liability for the claims underlying the settlement; and c) the settlement amount was reasonable.[39]

1 N.J.S.A. 2A:58C-1, *et seq.*
2 N.J.S.A. 2A:53A-1
3 N.J.S.A. 2A:53A-2
4 N.J.S.A. 2A:53A-3
5 *Id.*
6 *Id.*
7 N.J.S.A. 2A:15-5.1, *et seq*
8 N.J.S.A. 2A:15-5.3
9 N.J.S.A. 2A:15-5.3(a)
10 N.J.S.A. 2A:15-5.3(c)
11 N.J.S.A. 2A:53A-3
12 *Johansen v. Makita U.S.A., Inc.*, 128 N.J. 86 (1992); *Devaney v. Sarno*, 125 N.J. Super. 414 (App. Div. 1973).
13 *Poliseno v. General Motors Corp.*, 328 N.J. Super. 41 (App. Div. 2000).
14 *Dafler v. Raymark Industries, Inc.*, 259 N.J. Super. 17 (App. Div. 1992).
15 *Promaulayko v. Johns Manville Sales Corp.*, 166 N.J. 505 (1989).
16 *Adler's Quality Bakery, Inc. v. Gaseteria, Inc.*, 32 N.J. 55 (1960).
17 *Cartel Capital Corp. v. Fireco of New Jersey*, 81 N.J. 548 (1980)
18 *Id.*
19 *Cent. Motor Parts Corp. v. E.I DuPont deNemours & Co.*, 251 N.J. Super. 5 (App. Div. 1991)
20 *Promaulayko v. Johns Manville Sales Corp., supra.*
21 N.J.S.A. 2A:58C-1 *et seq.*
22 N.J.S.A. 2A:53A-1
23 N.J.S.A. 2A:15-5.1, *et seq*
24 *Holloway v. State*, 125 N.J. 386 (1991)
25 New Jersey Rule 4:30A
26 R. 4:7-5
27 *Harley Davidson Motor Co., Inc. v. Advance Die Casting, Inc.*, 150 N.J. 489, 498 (1997); Rule 4:7-5(b).
28 *Id.* at 500
28 U.C.C. § 2-607(5)(a) (2013).
30 N.J.S.A. 2A:58C-8, 2A:58C-9; Smith v. Alza Corp., 400 N.J. Super. 529 (App. Div. 2008).
31 N.J.S.A. 2A:58C-9.
32 N.J.S.A. 2A:58C-9(c)(1)-(3).
33 N.J.S.A. 2A:58C-9(d)(1).
34 N.J.S.A. 2A:58C-9(d)(2)-(3).
35 *Cartel Capital Corp,* 81 N.J. 548 (1980).
36 *Id.*
37 *Nilson v. Moskal,* 70 N.J. Super. 389 (App. Div. 1961)
38 *Central Motor Parts Corp.*, 251 N.J.Super. 5
39 *Id.*

New Mexico

By Michael A. Miller

Mitchell, Lang & Smith, LLP
Portland, Oregon

Updated by Nathan H. Mann & Harriett J. Hickman

Gallagher, Casados & Mann, P.C.
Albuquerque, New Mexico

Tel: 505.243.7848
Fax: 505.764.0153

Email: nmann@gcmlegal.com
Email: hhickman@gcmlegal.com
www.gcmlegal.com

Allocation of Fault

In New Mexico, damages are to be apportioned on the basis of fault. The jury is to determine the fault of all participants in an incident, regardless of whether they are parties to the litigation.[1] New Mexico has also generally abolished the doctrine of joint and several liability, with exceptions for intentional torts, vicarious liability, products liability, and any situations not covered by any of the foregoing and having a sound basis in public policy.[2] Thus, each tortfeasor will be held liable only for its share of damages in proportion to the comparative fault assigned by the fact finder.[3]

The jury is to determine the comparative fault of all participants to an occurrence, including the plaintiff and non-parties. A plaintiff has a duty to exercise ordinary care for his safety and the safety of his property.[4] A "plaintiff's negligence is [also] a partial defense to a products liability claim in that the percentage of plaintiff's fault, due to negligence, reduces the amount of damages that plaintiff may recover."[5]

Contribution

The right of contribution among joint tortfeasors is governed by the Uniform Contribution Among Tortfeasors Act.[6] A joint tortfeasor is entitled to contribution if he has discharged a common liability to an injured person or paid more than his pro rata share[7]. A joint tortfeasor's pro rata share "shall be the portion of the total dollar amount awarded as damages to the plaintiff that is equal to the ratio of each joint tortfeasors's percentage of fault attributed to all joint tortfeasors."[8]

A joint tortfeasor who enters into a settlement agreement with an injured person is entitled to contribution from other joint tortfeasors if their liability to the injured party is extinguished by the settlement.[9] "A release by the injured person of one joint tortfeasor… does not discharge the other tortfeasors unless the release so provides[.]"[10] However, the claim against the other tortfeasors is reduced by the amount of consideration paid for the release.[11]

New Mexico

Non-Contractual Indemnity

Indemnification in New Mexico is governed by the doctrines of traditional indemnification, also referred to as common-law indemnification, and proportional indemnification. This system ensures liability among tortfeasors will be apportioned according to fault in almost every instance and regardless of plaintiff's choice of remedy.

Traditional Indemnification

Traditional indemnification is a common-law right that grants to one party who is held liable an all-or-nothing right of recovery from another third party.[12] "Under traditional indemnification, the person who has been held liable for another's wrongdoing is granted an all-or-nothing right of recovery from a third party, such as the primary wrongdoer."[13] Traditional indemnification applies in negligence, breach of warranty, and strict liability cases where the indemnitee is in the chain of supply of a product.[14]

"The purpose of traditional indemnification is to allow a party who has been held liable without active fault to seek recovery from one who was actively at fault. Thus the right to indemnification involves whether the conduct of the indemnitee seeking indemnification was passive and not active or in *pari delicto*[15] with the indemnitor."[16]

The New Mexico courts have defined "active" and "passive" conduct. Active conduct occurs when "an indemnitee has personally participated in an affirmative act of negligence, was connected with negligent acts or omissions by knowledge or acquiescence, or has failed to perform a precise duty which the indemnitee has agreed to perform."[17] Passive conduct occurs when a party is only the retailer in the chain of distribution of a product, or "when the party seeking indemnification fails to discover and remedy a dangerous situation created by the negligence or wrongdoing of another."[18]

The purpose of strict liability is to provide an injured party with damages without having to prove negligence. Thus, the passive/active tests do not apply in strict liability cases when determining the liability to a *victim*.[19] However, the active/passive principles do apply in product liability cases to shift liability from one who is not at fault to one who is at fault.[20] "Therefore, in all strict liability cases, the conduct of the party seeking traditional indemnification must have been passive before that party may recover full indemnification from the manufacturer of a defective product."[21]

Proportional Indemnification

Because New Mexico adopted a system of comparative fault, the New Mexico Supreme Court in Vista Hills also adopted the "doctrine of proportional indemnification under which a defendant *who is otherwise denied apportionment of fault* may seek partial recovery from another at fault."[22] Proportional indemnification establishes an equitable system in which all parties are held liable for damages in proportion to their respective fault. However, proportional indemnification only applies in limited circumstances since New Mexico already "apportions fault among joint tortfeasors through [its] doctrines of comparative fault and several liability and through the Uniform Contribution Among Tortfeasors Act, NMSA 1978, §§ 41-3-1 to 8."[23] Thus, proportional indemnification allows defendants to recover from a third-party for the portion of a plaintiff's loss which the third-party's conduct caused, even when the law does not apportion fault amongst tortfeasors under a theory of comparative fault.[24] For instance, since actions for negligence are governed by comparative fault, which apportions fault among tortfeasors, traditional indemnity principles apply, because each tortfeasor is liable only for his or her share of the fault and will never pay more damages than his or her share. On the other hand, if a plaintiff chooses to sue under breach of contract, a defendant should be able to seek proportional indemnification for that percentage of fault attributable to another.[25]

Therefore, proportional indemnification will apply only when an indemnitee has been found liable for full damages on a third-party claim, and contribution or some other form of proration of fault among tortfeasors is not available.[26] By adopting proportional indemnification, the Court filled a "void in the overall picture that contemplates proration of liability among all those at fault."[27]

The statute of limitations for an indemnification claim begins to run from the date of payment of an underlying claim, judgment, or settlement by the party seeking indemnity.[28]

New Mexico

1 See Bartlett v. New Mexico Welding Supply, Inc., 98 N.M. 152, 646 P.2d 579 (N.M. Ct. App. 1982)
2 N.M. Stat. Ann. §41-3 A-1
3 Otero v. Jordan Restaurant Enterprises, 119 N. M. 721, 895 P.2d 243 (N.M. Ct. App. 1995)
4 See Jaramillo v. Fisher Controls Co., Inc., 102 N.M. 614, 626, 698 P.2d 887, 899 (N.M. Ct. App. 1985)
5 Marchese v. Warner Communications, Inc., 100 N.M. 313, 317, 670 P.2d 113, 117 (N.M. Ct. App. 1983)
6 N.M. Stat. Ann. §§41-3-1 to 41-3-8
7 N.M. Stat. Ann. § 41-3-2 (B)
8 N.M. Stat. Ann. § 41-3-2 (D)
9 N.M. Stat. Ann § 41-3-2 (C)
10 N.M. Stat. Ann § 41-3-4
11 N.M. Stat. Ann § 41-3-4
12 In re Consolidated Vista Hills Retaining Wall Litigation, 119 N.M. 542, 545, 893 P.2d 438, 441 (1995) ("Vista Hills")
13 Safeway v. Rooter, 297 P.3d 347, 353 (2012) (internal quotations and citations omitted)
14 Vista Hills, 119 N.M. at 546, 893 P.2d at 442
15 When the parties to a legal controversy are in pari delicto, neither can obtain affirmative relief from the court, since both are at equal fault or of equal guilt.
16 Id. (footnote added)
17 Vista Hills, 119 N.M. at 547, 893 P.2d at 443 (internal quotations and citations omitted)
18 Id. (citations omitted)
19 Vista Hills, 119 N.M. at 549, 893 P.2d at 445
20 Id.
21 Id.
22 Vista Hills, 119 N.M. at 552, 893 P.2d at 448 (emphasis added)
23 Id.
24 Lopez v. American Baler Co., 2013 WL 4782155, *13 (D.New Mexico, Aug. 12, 2013) (internal quotations and citations omitted)
25 Id., at *15 (internal quotations and citations omitted)
26 Id.
27 Vista Hills, 119 N.M. 542, 553, 893 P.2d 438, 449
28 Budget Rent-A-Car Systems, Inc. v. Bridgestone Firestone North American Tire, LLC, 145 N.M. 623, 630, 203 P.3d 154, 161 (N.M. Ct. App. 2008)(citations omitted)

New York

By Frederick C. Johs

Lewis Johs Avallone Aviles L.L.P.
New York, New York & Islandia, New York

Tel: 212.233.7195 (New York)
Fax: 212.233.7196 (New York)

Tel: 631.755.0101 (Islandia)
Fax: 631.755.0117 (Islandia)

Email: fcjohs@lewisjohs.com
www.lewisjohs.com

Allocation of Fault

As a practical matter, a jury is instructed to give a "special verdict" at the conclusion of nearly every personal injury trial in New York. A "special verdict" allows the jury to answer several questions as to the apportionment of fault of the parties.[1] The jury must find that there is a total of 100% liability against one, some, or all of those who are at fault for plaintiff's injuries. Even if the defendants are found to be liable under strict products liability theory, the jury still must apportion fault between the parties.[2] If a plaintiff is found to be at least partially at fault, the award is reduced by the percentage of fault allocated to the plaintiff by the jury.[3] As with apportionment among defendants, the fact that a claim sounds in strict liability does not preclude the jury from apportioning fault to a plaintiff.[4]

Under New York Law, all personal injury juries must provide an itemized verdict as to damages.[5] The itemized verdict must break down the damages award as to past and future pain and suffering, past and future medical expenses, and other past and future economic damages.[6] As discussed in more detail below, the itemized verdict as to damages has a direct impact on the responsibilities of the defendants to compensate plaintiff.

While the jury may apportion differing percentages of fault between the defendants and plaintiff, the doctrine of joint and several liability makes it possible for one defendant to bear the responsibility for paying the entire amount of the judgment. Under the common-law, personal injury defendants were jointly and severally liable to the plaintiff.[7] Thus, plaintiff could seek to recover 100% of the damages award from one defendant, even though that defendant was found to be less than 100% at fault.[8] New York's Legislature enacted Article 16 of the Civil Practice Law and Rules to modify the common-law rules.[9]

Under Article16 of the Civil Practice Law and Rules, defendants are not jointly and severally liable for plaintiff's non-economic damages.[10] The common-law rule still applies as to plaintiff's economic damages.[11] Furthermore, the common-law rule on joint and several liability still applies as to all defendants in the following instances:

- The defendant is found to be 50% or more at fault for plaintiff's injuries;[12]

New York

- The other person at fault for plaintiff's injury is not a party to the action, provided that plaintiff exercised due diligence in attempting to make that person a party to the action;[13]
- If the other party at fault is plaintiff's employer, when plaintiff did not suffer a "grave injury;"[14]
- In a products liability action, where the manufacturer cannot be subject to the jurisdiction of the courts of the State of New York.[15]

Contribution

The purpose of joint and several liability is to ensure that plaintiff is made whole, even if it means collecting more than a defendant's proportionate share of liability from one defendant. The other side of the coin is a claim against the defendant who pays more than his share against the non¬paying defendant for contribution. In practice, however, if a paying defendant is unable to pay his proportionate share of liability to a plaintiff, it is likely that the non¬paying defendant would be unable to satisfy a judgment for contribution.

A claim for contribution can be asserted by the defendants, against each other, as cross-claims or third-party actions during the plaintiff's personal injury action.[16] A defendant can also wait until after he has paid more than his proportionate share to the plaintiff.[17] The six year statute of limitations for contribution does not begin to run until a defendant pays more than his proportionate share of the award.[18]

In some products liability cases, contribution can be used to add the employer of an employee who is injured while using a product during his employment, as a third-party defendant. As a general rule, a New York employer cannot be subject to liability for a plaintiff's personal injuries or for contribution asserted by a defendant who is sued by the employee.[19] There is, however, an exception to this rule when the plaintiff suffers a "grave injury."[20] A "grave injury" is defined as "death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability.[21] If the plaintiff suffers a "grave injury" as a result of the use of a product, the products liability defendants can commence a third-party action against the plaintiff's employer for contribution.[22]

Common-Law Indemnity

The difference between indemnification and contribution has been the subject of many cases. In summary, New York's highest court has distinguished the two doctrines as follows:

> Basically, in contribution the loss is distributed among tort-feasors [sic], by requiring the joint tort-feasors [sic] to pay a proportionate share of the loss to one who has discharged their joint liability, while in indemnity the party held legally liable shifts the entire loss to another.[23]

There are two ways to obtain indemnity. One is through contract. The other is an implied duty to indemnify another. In New York, this implied duty is referred to as common-law indemnity. "Common-law indemnification requires proof not only that the proposed indemnitor's negligence contributed to the accident, but also the party seeking indemnity was free from negligence."[24] Thus, if a retailer or distributor is found liable to a plaintiff solely because of the strict products liability doctrine, that retailer or distributer can seek common-law indemnification from the manufacturer or other parties who were actively negligent in the manufacturing or design of the product.[25] This could protect the parties who are solely liable by operation of law from having to pay any portion of the plaintiff's damages. Common-law indemnification also allows the defendant to recoup its legal fees, costs, and disbursements incurred in defending against plaintiff's claims.[26]

New York

Effect of Settlement

A settlement between a plaintiff and a defendant has no impact on any common-law indemnity claims that may have been asserted against the settling defendant.[27] Settlement, however, can have a dramatic impact on plaintiff's recovery against the remaining defendants, and any cross-claims for contribution.

If a plaintiff settles with one tortfeasor, for any amount exceeding $1, the plaintiff's claims against that defendant are extinguished. The co-defendant's claims for contribution are extinguished as well.[28] The matter will proceed to trial, and the jury will be allowed to determine the proportionate fault of all parties, including the defendant that settled its claims with plaintiff. The plaintiff's award is then reduced by the greater amount of that defendant's proportionate share of fault or the amount of money that the settling defendant paid plaintiff.[29] For example, if one of two defendants settles with plaintiff for $500,000, and a jury determines that the settling defendant was 90% at fault and plaintiff's damages were $1 million, the remaining defendant would only have to pay plaintiff $100,000.

While a settlement extinguishes any contribution claims between defendants, it does not prevent the non-settling defendant from continuing to seek indemnification from the settling defendant.[30] If the remaining defendant can show that it was not actively negligent for plaintiff's injuries, it can still seek common-law indemnification from the settling defendant.[31]

1 CPLR § 4111
2 *Opera v. Hyva, Inc.*, 86 A.D.2d 373, 450 N.Y.S.2d 615 (4th Dep't 1982)
3 CPLR § 1411
4 *Lopez v. Precision Papers' Inc.*, 107 A.D.2d 667, 484 N.Y.S.2d 585 (2d Dep't 1985)
5 CPLR § 411(e)
6 *Id.*
7 *Rangolan v. County of Nassau*, 96 N.Y.2d 42, 46, 725 N.Y.S.2d 611, 615 (2001)
8 *Id.*
9 *Id.*
10 CPLR § 1601(1)
11 *Id.*
12 *Id.*
13 *Id.*
14 *Id.*
15 CPLR § 1602(10)
16 CPLR § 1403
17 *Id.*
18 *Blum v. Good Humor Corp.*, 57 A.D.2d 911, 394 N.Y.S.2d 894 (2d Dep't 1977)
19 Worker's Compensation Law § 11
20 *Id.*
21 *Id.*
22 *Id.*
23 *Rosado v. Proctor & Schwartz, Inc.*, 66 N.Y.2d 21, 23-24, 494 N.Y.S.2d 851, 853 (1985)
24 *Martins v. Little 40 Worth Associates, Inc.*, 72 A.D.3d 483, 484, 899 N.Y.S2d 30, 32 (1st Dep't 2010)
25 *Godoy v. Amabaster of Miami, Inc.*, 302 A.D.2d 57, 754 N.Y.S.2d 301 (2d Dep't 2003)
26 *Chapel v. Mitchell*, 84 N.Y.2d 345, 618 N.Y.S.2d 626 (1994)
27 *Glasser v. M. Fortunoff of Westbury Corp.*, 71 N.Y.2d 643, 529 N.Y.S.2d 59 (1988)
28 General Obligations Law § 15-108
29.*Id.*
30 *Godoy, supra*
31 *Id.*

North Carolina

By J. Mathew Little

Teague Campbell Dennis & Gorham, L.L.P.
Raleigh, North Carolina

Tel: 919.873.0166
Fax: 919.873.1814

Email: mlittle@teaguecampbell.com
www.teaguecampbell.com

By Brian A. Comer

Collins & Lacy, P.C.
Columbia, South Carolina

Tel: 803.256.2660
Fax: 803.771.4484

Email: bcomer@collinsandlacy.com
www.collinsandlacy.com

Allocation of Fault

A. Contributory Negligence in Product Liability Litigation

Unlike many states, in North Carolina there is no strict liability in tort for product liability actions.[1] Instead, a negligence standard is applicable. Further, the North Carolina statutory scheme allows for the affirmative defense of contributory negligence.[2] Whereas a comparative negligence system provides for allocation of fault between the plaintiffs and defendants, in a contributory negligence state, plaintiff's own negligence will bar his action.[3]

The contributory negligence standard applicable to product liability actions is codified in N.C. Gen. Stat. § 99B-4 (1)-(3), which states:

> No manufacturer or seller shall be held liable in any product liability action if:
>
> (1) The use of the product giving rise to the product liability action was contrary to any express and adequate instructions or warnings delivered with, appearing on, or attached to the product or on its original container or wrapping, if the user knew or with the exercise of reasonable and diligent care should have known of such instructions or warnings; or
>
> (2) The user knew of or discovered a defect or dangerous condition of the product that was inconsistent with the safe use of the product, and then unreasonably and voluntarily exposed himself or herself to the danger, and was injured by or caused injury with that product; or
>
> (3) The claimant failed to exercise reasonable care under the circumstances in the use of the product, and such failure was a proximate cause of the occurrence that caused the injury or damage complained of.

Case law has specified that aside from codifying the general doctrine of contributory negligence, § 99B-4 "sets out or explains more specialized fact patterns which would amount to contributory negligence in a products liability action."[4]

North Carolina

B. Joint and Several Liability and the Statutory Right to Contribution

Where an action is not dismissed and only the named defendants are found to be at fault, they are jointly and severally liable to the plaintiff for damages. If a judgment is entered against "two or more persons or corporations, who are jointly and severally liable for its payment either as joint obligors or joint tort-feasors," and one party pays the entirety of the judgment, North Carolina provides a statutory means for that party to recover funds expended in excess of its pro rata share.[5] The paying party must make an entry on the judgment docket and include "a notation of the preservation of the right of contribution," which will preserve his lien for contribution from the other judgment debtors.[6] In the event that the parties disagree as to their pro rata shares of the liability, dissenters may make a motion for hearing on the matter.[7]

C. Bringing a Separate Action for Contribution

If judgment is entered against a tortfeasor who intends to seek contribution, N.C. Gen. Stat. § 1B-3(c) provides the option to pursue a separate action to enforce contribution. This action must be commenced within one year after the judgment has become final, either by lapse of time for appeal or entry of final judgment by the trial court.[8]

Statutory Contribution and Common-Law Indemnification in North Carolina

A. Contribution

Under North Carolina law, the right to contribution arises "where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death…even though judgment has not been recovered against all or any of them."[9] Where no judgment has been entered, a tortfeasor's right to contribution is barred unless he has: (1) paid the entirety of the liability and commenced an action for contribution within one year of payment; (2) agreed to pay the entirety of the liability within one year, and commenced an action for contribution within one year of the agreement; (3) joined the other prospective tort-feasors as third-party defendants.[10]

In any case, each tortfeasor is only required to pay his pro rata share and can recover against the others any amount paid in excess of that share.[11] In order to prove entitlement to contribution, a joint tortfeasor must show that the party from whom he seeks contribution was also negligent.[12]

"A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury or wrongful death has not been extinguished[.]"[13] In simpler terms, a party pursuing contribution cannot do so until a settlement releasing all parties has been obtained.[14] Notably, however, pursuant to N.C. Gen. Stat. § 1B-4(1)-(2), where a release is given by a plaintiff to a defendant, it discharges that party from liability for contribution to any other tortfeasor.[15]

B. Indemnification

Unlike the right to contribution, which is statutory, indemnification in North Carolina is grounded in common law. As a general rule, there is no right to indemnification where defendants are in *pari delectico* (both at fault); in such a case, the remedy of one tortfeasor against another is found within the statutory scheme of contribution.[16]

In North Carolina, a party's rights to indemnity only arise from one of three bases: (1) an express contract; (2) a contract implied-in-fact; or (3) a contract implied-in-law.[17] Although not the focus of the compendium, it is worth mentioning that North Carolina courts address express indemnification in the context of a contractual indemnity clause, defined to be a "contractual provision in which one party agrees to answer for any specified or unspecified liability or harm that the other party might incur."[18] Express indemnity provisions are strictly construed against the party seeking indemnity.[19]

As to non-contractual indemnification, North Carolina courts have stated that indemnification arising from a contract implied-in-fact "stems from the existence of a binding contract between two parties that necessarily implies the right."[20] Courts look to the conduct and words of the parties and the circumstances under which the contract is formed in determining whether there is indemnity implied-in-fact.[21] Historically, courts have declined to find a contract implied-in-fact in the context of independent contractor relationships where "both parties are well

North Carolina

equipped to negotiate and bargain for such provisions."[22]

Another type of non-contractual indemnification, termed implied-in-law, is a "discrete legal fiction" that arises from an underlying tort, where "a passive tort-feasor pays the judgment owed by an active tort-feasor to the injured third party."[23] Typically called active-passive negligence, such a situation occurs where

> (1) the two parties are jointly and severally liable to the plaintiff; and (2) either (a) one has been passively negligent but is exposed to liability through the active negligence of the other or (b) one alone has done the act which produced the injury but the other is derivatively liable for the negligence of the former.[24]

As an example, indemnity implied-in-law would arise where an employer pays for the wrongs of its employee as a result of derivative liability arising from the employment relationship. The employer could then recover from the employee what it paid to the plaintiff.

Effect of Settlement on Indemnity Rights

There is some case law in North Carolina suggesting that indemnity will not be available where a tortfeasor pays an excessive, unreasonable settlement amount before attempting to seek indemnification.[25] Termed a "voluntary payment," such logic has been used in workers' compensation cases, but recent case law has indicated that the argument could also be applied in a civil liability setting.[26] This area of law may develop as North Carolina defendants attempt to argue against their obligation to indemnify others for unreasonable settlement amounts.

1 N.C. Gen. Stat. § 99B-1.1 (2011) (Stating, in its entirety, that "[t]here shall be no strict liability in tort in product liability actions.")
2 N.C. Gen. Stat. § 1A-1, Rule 8 (2011); N.C. Gen. Stat. § 99B-4 (1)-(3) (2011).
3 *See Nicholson v. Am. Safety Utility Corp.*, 346 N.C. 767, 488 S.E.2d 240 (1997).
4 *Champs Convenience Stores, Inc. v. United Chem. Co.*, 329 N.C. 446, 453, 406 S.E.2d 856, 860 (1991).
5 N.C. Gen. Stat. § 1B-7(a)-(b) (2011).
6 *Id.*
7 N.C. Gen. Stat. § 1B-7(c) (2011).
8 N.C. Gen. Stat. § 1B-3(c) (2011).
9 N.C. Gen. Stat. § 1B-1(a) (2011).
10 N.C. Gen. Stat. §1B-3(d)(1)-(3) (2011). Case law has indicated that (d)(3) should be read to provide for a three-year statute of limitations for the re-filing of contribution claims. *Safety Mut. Cas. Corp. v. Spears*, 104 N.C. App. 467, 409 S.E.2d 736 (1991).
11 N.C. Gen. Stat. § 1B-1(b) (2011).
12 *Nationwide Mut. Ins. Co. v Weeks-Allen Motor Co., Inc.*, 18 N.C. App. 689, 694, 198 S.E.2d 88, 91 (1973).
13 N.C. Gen. Stat. § 1B-1(d) (2011).
14 *See generally King v. Humphrey*, 88 N.C. App. 143, 145-46, 362 S.E.2d 614, 615 (1987) (noting that "since contribution among joint tort-feasors is a purely statutory remedy, its enforcement must be in accord with the statute's provisions.")
15 N.C. Gen. Stat. § 1B-4(2) (2011).
16 *Edwards v. J.C. Hamill and Coastal Refrigeration Co., Inc.*, 262 N.C. 528, 531, 138 S.E.2d 151, 153 (1964) (noting both the general rule and highlighting exceptions, including the scenario of passive-active negligence).
17 *Kaleel Builders, Inc. v. Kent Ashby*, 161 N.C. App. 34, 38, 587 S.E.2d 470, 474 (2003).
18 *Vecellio & Grogan, Inc. v. Piedmont Drilling & Blasting, Inc.*, 183 N.C. App. 66, 72, 644 S.E.2d 16, 20 (2007).
19 *Hoisington v. ZT-Winston-Salem Assoc.*, 133 N.C. App. 485, 516 S.E.2d 176 (1999). Notably, N.C. Gen. Stat. § 22B-1 (2011) prohibits some types of express indemnity agreements in construction contracts as void and against public policy. However, the statute allows a promisor to agree to indemnify a promisee for acts and damages resulting solely from the promisor's negligence. *See Int'l Paper Co. v. Corporex Constructors, Inc.*, 96 N.C. App. 312, 315, 385 S.E.2d 553, 555 (1989) (noting that "[t]he indemnity provisions to which G.S. § 22B-1 apply are those construction indemnity provisions which attempt to hold one party responsible for the negligence of another.")
20 *Kaleel*, 161 N.C. App. at 38, 587 S.E.2d at 474.
21 *Id.*
22 *Schenkel and Schultz, Inc. v. Fox and Assocs.*, 180 N.C. App. 257, 267, 636 S.E.2d 835, 842 (2006).
23 *Kaleel*, 161 N.C. App. at 39, 587 S.E.2d at 474.
24 *Edwards*, 262 N.C. at 531, 138 S.E.2d at 153.
25 *One Beacon Ins. Co. v. United Merch. Corp.*, 700 S.E.2d 121, 125, 2010 N.C. App. LEXIS 1958 (2010) (*quoting City of Wilmington v. N.C. Natural Gas Corp.*, 117 N.C. App. 244, 250, 450 S.E.2d 573, 577 (1994) (citations omitted)).
26 *Id.*; *Bridgestone/Firestone, Inc. v. Ogden Plant Maint. Co. of N.C.*, 144 N.C.App. 503, 548 S.E.2d 807 (2001).

North Dakota

By Raymond Lyons, Jr.

Lipe Lyons Murphy Nahrstadt & Pontikis, Ltd.
Chicago, Illinois

Tel: 312.448.6230
Fax: 312.726.2273

Email: rl@lipelyons.com
www.lipelyons.com

Allocation of Fault

The fact-finder may compare the fault of any person or entity who is not plaintiff's employer, whether or not a party to the action, who contributed to the injury at issue in a lawsuit.[1] North Dakota enacted tort reform legislation in the late 1980s, which abolished joint liability for concurrent tortfeasors, unless tortfeasors act "in concert in committing a tortious act or aid or encourage the act, or ratif[y] or adopt[] the act for their benefit," in which case the tortfeasors are jointly liable for all damages attributable to their combined percentage of fault.[2] For all other concurrent tortfeasors, liability is merely several. Thus, each tortfeasor is liable only for the amount of fault specifically allocated to it. The fact-finder is to make separate special verdicts which determine the amount of damages and percentage of fault attributable to each person, whether or not a party, who contributed to the plaintiff's injury.[3]

Contribution & Non-Contractual Indemnity

Because multiple tortfeasors cannot be found jointly liable, contribution is only available to tortfeasors who act in concert and thereby trigger joint and several liability.[4] In cases involving claims of products liability and negligence where a plaintiff elects not to sue all potential tortfeasors, and where the non-sued potential tortfeasors did not act in concert with, aid, encourage, ratify, or adopt the act of a defendant, North Dakota law precludes a third party action by a defendant against a non-sued potential tortfeasor.[5] The North Dakota Supreme Court has explained that when "liability of a concurrent tortfeasor is statutorily directed to be several, that directive precludes liability of the tortfeasor for more than a percentage share of the damages, and precludes a claim for contribution between concurrent tortfeasors."[6] There is no right to contribution as to intentional torts.[7] Generally, there is a one year statute of limitations period following a judgment for injury or wrongful death against a tortfeasor, in which time that tortfeasor must file a separate action for contribution.[8]

In product liability actions, non-contractual indemnification is permitted by common law.[9] Because implied indemnity is an equitable doctrine not amenable to hard and fast rules, courts carefully examine both parties' conduct in light of general notions of justice rather than use strict standards.[10] There are two bases for implied

North Dakota

indemnity, contract and tort.[11] In the "implied contract" (or "implied in fact") theory of indemnity, an implied right to indemnification may be based on the special nature of a contractual relationship between parties.[12] "Implied in law" indemnity, the tort-based right to indemnification, is found when there is a great disparity in the fault of two tortfeasors, and one of the tortfeasors has paid for a loss that was primarily the responsibility of the other.[13] The implied in law theory of indemnification does not require that the party seeking indemnification be completely blameless. Because the apportionment of fault is a question of fact for the jury to resolve at trial, whether an implied right of indemnification exists is resolved post-trial by the court.[14] Implied indemnity claims must be brought within six years of the date the claim has accrued.[15]

Effect of Settlement on Contribution & Indemnity Rights

A tortfeasor who settles with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the claim is not extinguished by the settlement, nor is it entitled to recover in contribution any amount paid in a settlement which is in excess of what was reasonable.[16] A liability insurer, who by payment has discharged in full or in part the liability of a tortfeasor and has thereby discharged in full its obligation as the tortfeasor's insurer, is subrogated to the tortfeasor's right of contribution to the extent of the amount it has paid in excess of the tortfeasor's pro rata share of the common liability.[17]

When a settlement agreement is given in good faith to a tortfeasor, the agreement discharges that tortfeasor from liability to the plaintiff and from contribution from other tortfeasors.[18] The settlement does not discharge any concurrent tortfeasors from liability to the plaintiff unless the terms so provide.[19] However, the terms of release may be general, such as a release applicable to "all other persons who are or might be liable."[20] A release or covenant not to sue will reduce the claim against remaining tortfeasors to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater.[21] It should be noted that the provisions relating to the effect of settlement on contribution are now rarely litigated, in light of North Dakota's tort reform legislation abolishing joint liability for concurrent tortfeasors.

Generally, an indemnitee who settles a claim before judgment must prove that it was not a volunteer, but was actually liable, in order to recover indemnity.[22] There is, however, an exception to this rule: a party acting in good faith in making payment under a reasonable belief that it is necessary to his protection is entitled to indemnity, even though it later becomes clear that, in fact, there was no interest to protect.[23] This rule serves the North Dakota public policy favoring settlement of litigation.[24] A settling defendant who seeks implied indemnity is also able to show it is not a volunteer, where the defense of an action brought by the injured third party is tendered to the indemnitor and the indemnitor refuses to defend and indemnify. Thereafter, a good faith settlement by the indemnitee is sufficient to establish that the damages were paid as a result of a legal obligation.[25]

1 N.D.C.C. § 32-38-01.
2 N.D.C.C. § 32-38-01 and 32-38-02.
3 N.D.C.C. § 32-38-02; *see also Target Stores, a Div. of Dayton Hudson Corp. v. Automated Maint. Services, Inc.*, 492 N.W.2d 899, 902 (N.D. 1992) ("[R]esponsibility for tort damages [must] be separately allocated among concurrent tortfeasors on a percentage basis …").
4 N.D.C.C. § 32-38-01, et seq.
5 *Target Stores v. Automated Maintenance Services, Inc.*, 492 N.W.2d at 901.
6 *Id.* at 903.
7 N.D.C.C. § 32-03-01(3)
8 N.D.C.C. § 32-38-03(3)
9 *Herman v. Gen. Irrigation Co.*, 247 N.W.2d 472, 479 (N.D. 1976).
10 *Grinnell Mut. Reinsurance Co. v. Ctr. Mut. Ins. Co.*, 658 N.W.2d 363, 378 (N.D. 2003).
11 *Mann v. Zabolotny*, 615 N.W.2d 526, 528-29 (N.D. 2000) (quoting *Peoples' Democratic Republic of Yemen v. Goodpasture, Inc.*, 782 F.2d 346, 351 (2d Cir.1986)).
12 *Id.*
13 *Id.*
14 *Campbell v. BNSF Ry. Co.*, 756 F. Supp. 2d 1109, 1113 (D.N.D. 2010) (applying North Dakota law).
15 N.D.C.C. § 28-01-16(1); *see also Johnson v. Haugland*, 303 N.W.2d 533, 543 (N.D. 1981).
16 N.D.C.C. § 32-38-01(4).
17 N.D.C.C. § 32-38-01(5).
18 N.D.C.C. § 32-38-04.
19 *Id.*
20 *Hepper v. Adams County, N.D.*, 133 F.3d 1094, 1096 (8th Cir. 1998) (applying North Dakota law).
21 N.D.C.C. § 32-38-04.
22 *Grinnell Mut. Reinsurance Co.*, 658 N.W.2d at 378.
23 *Id.*
24 *Id.*
25 *Id.*

Ohio

By Kevin M. Norchi

Norchi Forbes, LLC
Cleveland, Ohio

Tel: 216.514.9500
Fax: 216.514.4304

Email: kmn@norchilaw.com
www.norchilaw.com

Allocation of Fault

Pursuant to O.R.C. §2307.23(A), the fact-finder, whether a judge or a jury, determines the percentage of tortious conduct that is attributable to the plaintiff and to each party against whom the plaintiff seeks recovery. Additionally, the fact-finder must also consider the percentage of tortious conduct that can be attributed to parties against whom the plaintiff does not seek recovery.[1] The sum of these totals must equal one hundred percent.[2]

The defendant must assert an affirmative defense that a specific percentage of the tortious conduct is attributable to one or more persons from whom the plaintiff does not seek recovery.[3] This affirmative defense may be raised at any time before the trial of the action.[4]

Affirmative defenses are found in O.R.C. §2307.23 (relating to a non-party's percentage of tortious conduct) and in O.R.C. §2315.32 (covering contributory fault). In addition, under O.R.C. §2307.711, express or implied assumption of risk can be asserted by a defendant as an affirmative defense to a products liability claim, except in the case of intentional tort claims. The assertion of an express or implied assumption of risk as an affirmative defense is a useful tool because if the assumption of risk is determined to be a direct and proximate cause of harm for which claimant seeks recovery, the express or implied assumption of risk defense is a complete bar to recovery. If implied assumption of risk is asserted as a defense when there is a products liability claim against a supplier, contributory fault is applicable under O.R.C. §2315.32.

Joint and several liability is determined pursuant to O.R.C. §2307.22. For economic losses, when there are two or more defendants which have each been apportioned 50% or less of the tortious conduct, each defendant shall be liable for its proportionate share of compensatory damages that represents economic loss.[5] If a defendant is apportioned 50% or more of the tortious conduct, then the defendant is jointly and severally liable in tort for all compensatory damages representing economic loss.[6] A defendant who is found to be less than 50% at fault shall be liable to the plaintiff for the defendant's proportionate share of compensatory damages that represent economic loss.[7] For non-economic losses, each defendant is liable for their proportionate share of the compensatory damages that represent non-economic loss.[8]

Ohio

Contribution

While there is no right of indemnification between joint tortfeasors or between concurrent tortfeasors where there is a concurrent breach of independent duties, there is a right of contribution.[9] The right of contribution exists in favor of a tortfeasor who has paid more than that tortfeasor's share of the common liability.[10] A tortfeasor cannot be compelled to contribute beyond that tortfeasor's own proportionate share of the common liability.[11]

If a tortfeasor has settled with a claimant, the tortfeasor cannot be entitled to contribution from another tortfeasor whose liability was not extinguished by the settlement.[12] Contribution does not impair any existing right to indemnity.[13] This means that if a tortfeasor is owed indemnity from another, the right of the indemnity obligee is for indemnity and not for contribution. Likewise, the indemnity obligor is not entitled to contribution from the obligee related to any part of the indemnity obligation.[14]

Proportionate shares of liability are based on the relative degrees of legal responsibility of the tortfeasors.[15] However, equity may require that a group of tortfeasors be assessed a single share.[16]

Under O.R.C. §2307.26, contribution may be enforced by motion if there is a judgment imposing joint and several liability. If there is no judgment, contribution is not allowed unless either of these applies:

A) The tortfeasor has been discharged from liability by payment within the statute of limitations and the action is commenced within a year after the payment; or

B) The tortfeasor has agreed while the action is pending against the tortfeasor to discharge their common liability and has paid within one year of the agreement and commenced the action for contribution.

Non-Contractual Indemnity

The source for non-contractual right of indemnity for innocent suppliers is found in O.R.C. §2307.78.[17] An obligation to indemnify another for the liability incurred by that person arises when the person seeking indemnification did not commit the act constituting the tort but became liable because of a legal duty to the injured party, usually based upon the relationship of the person secondarily liable with the person primarily liable. A negligent-free supplier of a product can become secondarily liable for injury resulting from a defect created by the manufacturer under certain circumstances set forth in O.R.C. §2307.78. This statute creates strict liability to passive sellers of a product when no remedy at law exists against the manufacturer; for instance, if the manufacturer of that product is not subject to judicial process in Ohio or the manufacturer is insolvent.[18] In these instances, the passive seller who is secondarily liable can pursue an implied indemnification claim against the manufacturer who is primarily liable for the injuries caused by its defective product.

A non-contractual indemnity claim in a products liability case is subject to a four year statute of limitations under O.R.C. §2305.09(D). Under Ohio law, an indemnity action by a party that is secondarily liable can be filed upon the resolution of the plaintiff's case against the person or persons primarily liable.[19] A cause of action based on an implied contract of indemnity accrues when the party seeking indemnity suffers a loss, not when that party incurs liability.[20] In an action where the plaintiff names both the person primarily liable (the manufacturer) and the person secondarily liable (the supplier), the party who is secondarily liable can file a cross-claim against the party primarily liable. If a plaintiff chooses only to name the secondarily liable supplier in a product liability claim,

Ohio

the supplier can file a third-party complaint against the manufacturer in accordance with the requirements of the Ohio Civil Rules of Procedure. Filing a cross-claim or third party complaint in the same action against the manufacturer who is primarily liable may often be the best approach for a supplier in order to avoid conflicting judgments and the possibility of re-litigating the liability issue. This approach may also be preferable so that the manufacturer is bound by the liability determination made in the original action brought by the plaintiff.

1 O.R.C. §2307.23(A)(2).
2 O.R.C. §2307.23(B).
3 O.R.C. §2307.23(C).
4 *Id*.
5 O.R.C. §2307.22(B).
6 O.R.C. §2307.22(A)(1).
7 O.R.C. §2307.22(A)(2).
8 O.R.C. §2307.22(C).
9 *Niemann v. Post Industries, Inc.*, (1991), 68 Ohio App. 3d 392.
10 O.R.C. §2307.25(A).
11 *Id*.
12 O.R.C. §2307.25(B).
13 O.R.C. §2307.25(D).
14 *Id*.
15 O..R.C. §2307.25(F).
16 *Id*.
17 *Convention Center Inn. Ltd. v. Dow Chemical Company*, (1990), 70 Ohio App.3d 243, 247 ("[O]ne party must be 'chargeable' for the wrongful act of another as a prerequisite for indemnity... Derivative liability is imposed upon the suppliers of defective products by statute").
18 O.R.C. § 2307.78(B)(1) & (2).
19 *Comer v. Risko*, (2005), 106 Ohio St. 3d 185, 192. *Maryland Cas. Co. v. Frederick Co.*, (1944), 142 Ohio St. 605.
20 *Firemen's Ins. Co. v. Antol*, (1984), 14 Ohio App. 3d 428, 430.

Oklahoma

By Amy S. Fischer

Foliart Huff Ottaway & Bottom
Oklahoma City, Oklahoma

Tel: 405.232.4633
Fax: 405.232.3462

Email: amyfischer@oklahomacounsel.com
www.oklahomacounsel.com

Allocation of Fault

Fault may be allocated among "any persons, firms or corporations" causing the alleged injury to the plaintiff.[1] This includes non-parties, sometimes referred to as "phantom" or "ghost" tortfeasors, such as an employer who is immune from suit under workers' compensation statutes.[2] A ghost tortfeasor with whom the plaintiff has settled may also be apportioned a percentage of fault by the jury, but the non-settling defendants receive a set-off for the dollar amount of the settlement, rather than a reduction in proportion to the ghost tortfeasor's percentage of fault.[3] A plaintiff's fault is also part of the apportionment, and the amount of the recovery is diminished in proportion to such contributory negligence.[4] Recovery is completely barred if the plaintiff's negligence exceeds the combined negligence of any person's, firms, or corporations causing the damage, i.e., if the plaintiff's negligence makes up at least 51% of the apportionment.[5]

It is important to note that comparative fault is not a defense to a strict products liability claim, and no amount of contributory negligence on the part of the plaintiff will reduce or bar a verdict against a defendant based on that theory.[6] This is not to say that manufacturers and suppliers of products are complete insurers of the consumers they serve. A plaintiff must still prove causation in a products case, so it may be argued that the cause of an injury was some conduct on the part of the plaintiff rather than a defect in the product.[7] Misuse of the product and voluntary assumption of the risk of a known defect are recognized defenses to products liability claims and act as a complete bar if proven.[8]

For civil actions accruing after November 1, 2011, Oklahoma has abolished joint and several liability in cases based upon fault and not arising out of contract.[9] Thus, in negligence cases, each joint tortfeasor is only liable for the amount of damages allocated to it. For actions accruing between November 1, 2009 and November 1, 2011, a joint tortfeasor may be jointly and severally liable for damages if the percentage of fault allocation to that tortfeasor is greater than 50% or if the tortfeasor acted with willful or wanton conduct or with reckless disregard for the consequences of the conduct.[10] In strict products liability cases, which are not based on fault, any defendant is jointly and severally liable for the full amount of damages, and because comparative

Oklahoma

fault is not a defense to strict products liability, the verdict or judgment is not diminished by any contributory negligence on the part of the plaintiff.[11] As discussed below, however, a seller of a defective product found liable for an injury caused by such product does have a right to indemnity from the manufacturer under Oklahoma law.[12]

Contribution

Oklahoma adopted the Uniform Contribution Among Tortfeasors Act in 1978.[13] The Act recognizes a right of contribution among joint tortfeasors who cause the same injury to a plaintiff where one of the tortfeasors has paid more than their pro rata share of the common liability.[14] No right of contribution exists if it is determined that the amount paid for by the tortfeasor in settlement (or judgment) is not greater than its proportion of fault,[15] or if the tortfeasor seeking contribution has intentionally caused or contributed to the alleged injury.[16] The total recovery by a tortfeasor seeking contribution under the Act is limited to the amount paid in excess of their pro rata share of the common liability, and no tortfeasor will be compelled to make contribution beyond that share.[17] A liability insurer who pays on behalf of a tortfeasor is subrogated to the tortfeasor's right of contribution but only to the extent of the amount paid in excess of the tortfeasor's pro rata share of the liability.[18] The right of contribution under the Act does not apply to breaches of trust or of other fiduciary obligation,[19] and it does not impair any right of indemnity under existing law.[20]

Under Oklahoma's version of the Uniform Contribution Among Tortfeasors Act, a tortfeasor who enters into a settlement is not entitled to recover contribution from another tortfeasor whose liability is not extinguished by the settlement.[21] No contribution is available if the amount paid in settlement was unreasonable or if the settlement was entered into in bad faith. The fact that a settling party denies liability for an underlying claim does not, by judicial estoppels or waiver, prevent that party from seeking contribution from a joint tortfeasor if the settlement was made in good faith and it extinguishes the joint tortfeasor's liability.[22] When a release, covenant not to sue, or similar agreement is executed by one of the joint tortfeasors liable for the same injury to a plaintiff, it does not discharge any other tortfeasor from liability unless the other tortfeasor is specifically named in the agreement, but it does reduce the claim against the other tortfeasors to the extent of the amount stipulated in the release or the amount of consideration paid for it, whichever is greater.[23] Thus, the verdict is reduced as to any non-settling joint tortfeasors in the amount paid by any settling tortfeasor, not by the settling tortfeasor's pro rata share of liability.[24]

An alleged tortfeasor defending against a contribution claim may assert, among other defenses, that it had no liability to the plaintiff or that the settlement was unreasonable.[25] Oklahoma's recently enacted statutory cap on non-economic damages may provide a new basis for asserting that a settlement was unreasonable.[26]

A claim for contribution not arising out of a contract can be asserted in the form of a permissive counterclaim, a cross-claim, a third-party claim, or a separate cause of action.[27] A contribution cause of action does not accrue, and therefore the start of the limitations period does not begin to run, until payment of the underlying claim through settlement or judgment.[28] However, the fact that the cause of action does not accrue until payment of a judgment or a settlement does not bar the earliest assertion of the claim for contribution.[29]

Non-Contractual Indemnity

Oklahoma also recognizes a right to non-contractual indemnity in favor of the seller of a product against the manufacturer.[30] A manufacturer must indemnify and hold harmless a seller of its product against a loss arising out of a product liability action.[31] "Loss" includes reasonable damages, court costs and a reasonable attorney fee.[32] This duty to indemnify exists so long as the loss is not caused by the seller's negligence, intentional misconduct, or other act or omission, such as the negligent modification or alteration of the product.[33] A wholesale distributor or retail seller is considered a "seller" for purposes of the statutory indemnity even if they partially or completely assemble the product, so long as such assembly is carried out in conformity with the manufacturer's instructions.[34] In order to seek indemnification under Section 832.1, a seller must give reasonable notice of the underlying claim

Oklahoma

to the manufacturer, unless the manufacturer has been served as a party or otherwise has actual knowledge of the action against the indemnitee.[35] The manufacturer's duty to indemnify applies without regard to the manner in which the action is concluded and is in addition to any other duty to indemnify.[36] Also, nothing in the indemnity statute requires a plaintiff in a product liability action to dismiss a defendant seller who has a right to indemnity from a product manufacturer.[37]

A claim for indemnity not arising out of contract can be asserted in the form of a permissive counterclaim, a cross claim, a third-party claim, or a separate cause of action.[38] The statute of limitations applicable to such an action is generally that governing contract actions, not torts, because the right is based upon a contract implied by law, or quasi-contract.[39] It is important to note than an indemnity cause of action does not accrue, and therefore the start of the limitations period does not begin to run, until payment of the underlying claim by the indemnitee through settlement or judgment.[40] However, as with contribution claims, the fact that the cause of action does not accrue until payment of a judgment or a settlement does not bar the earlier assertion of the claim for contribution or indemnity.[41]

Oklahoma also allows a product seller who settles a claim to seek indemnity from the manufacturer. The seller must only show that there was "potential liability" for the underlying claim, and that it gave the manufacturer sufficient notice of the claim to allow the "indemnitor with the opportunity to approve the settlement, participate in the settlement negotiations, or assume the defense of the underlying claim."[42]

1 *Bode v. Clark Equipment Co.*, 719 P.2d 824, 826-28 (Okla. 1986), citing 23 O.S. § 13; *see also, Gaither v. City of Tulsa*, 664 P.2d 1026, 1029 (Okla. 1983); Paul v. N.L. Industries, Inc., 624 P.2d 68 (Okla. 1980).
2 *Id.*
3 P*rice v. Southwestern Bell Telephone Co.*, 812 P.2d 1355 (Okla. 1991); 12 O.S. § 832(H)
4 23 O.S. § 14
5 23 O.S. § 13
6 *Kirkland v. General Motors Corp.*, 521 P.2d 1353, 1366-67 (Okla. 1974)
7 *Id.*
8 *Id.*
9 23 O.S. § 15 (2011)
10 23 O.S.§ 15 (2009)
11 8 Okla. Prac., Products Liability Law § 3.8 (2010 ed.)
12 12 O.S. § 832.1
13 12 O.S. § 832
14 12 O.S. § 832(A)-(B)
15 *Nat'l Union Fire Ins. Co. v. A.A.R. Western Skyways, Inc.*, 992 F.2d 282 (10th Cir. 1993) (applying Oklahoma law)
16 12 O.S. § 832(C)
17 12 O.S. § 832(B)
18 12 O.S. § 832(E)
19 12 O.S. § 832(G)
20 12 O.S. § 832(F)
21 12 O.S. § 832(D)
22 *Barringer v. Baptist Healthcare of Oklahoma*, 22 P.3d 695 (Okla. 2001)
23 23 O.S. § 832(H)
24 *Price v. Southwestern Bell Telephone Co.*, 812 P.2d 1355 (Okla. 1991); 12 O.S. § 832(H)
25 *Id.* at 698
26 For personal injury cases filed after November 1, 2011, Oklahoma now limits non-economic damages to $350,000.00, regardless of the number of parties against whom the action is brought. 23 O.S. § 61.2. A tortfeasor from whom contribution is sought could assert that a settlement was unreasonable if the amount was in excess of the economic damages plus $350,000.00.
27 *Okla. Gas & Elec. Co. v. District Court, Fifteenth Judicial District, Cherokee County*, 784 P.2d 61, 66 (Okla. 1989)
28 *Id.*
29 *Okla. Gas. & Elec. Co.*, 784 P.2d at 66
30 12 O.S. § 832.1
31 12 O.S. § 832.1(A)
32 12 O.S. § 832.1(B), (G)
33 12 O.S. § 832.1(A)
34 12 O.S. § 832(D)
35 12 O.S. § 832.1(F)
36 12 O.S. § 832.1(E)
37 12 O.S. § 832.1(H)
38 *Okla. Gas & Elec. Co. v. District Court, Fifteenth Judicial District, Cherokee County*, 784 P.2d 61, 66 (Okla. 1989).
39 8 Okla. Prac., Product Liability Law § 9:3 (2010 ed.)
40 *Id.*
41 *Okla. Gas & Elec. Co.*, 784 P.2d at 66
42 *Caterpillar Inc. v. Trinity Industries, Inc.*, 134 P.3d 881 (Okla. Civ. App. 2006); 12 O.S. § 832.1(F)

Oregon

By Christie Moilanen

Mitchell, Lang & Smith, LLP
Portland, Oregon

Updated by D. Jeffrey Burnham

Johnson, Graffe, Keay, Moniz & Wick, LLP
Seattle, Washington & Tacoma, Washington

Tel: 206.223.4770 | Fax: 206.386.7344 (Seattle)

Tel: 253.572.5323 | Fax: 253.572.5413 (Tacoma)

Email: djburnham@jgkmw.com
www.jgkmw.com

Allocation of Fault

Oregon is a modified comparative negligence state. If a plaintiff's share of combined fault exceeds 50%, the plaintiff cannot recover.[1] Otherwise, any damages are diminished by the percentage of fault attributable to plaintiff. A defendant must allege comparative fault as an affirmative defense.[2] Comparison of fault applies in both strict products liability and common law negligence claims.[3] Of course, intentional misconduct is not fault subject to apportionment between defendants or between plaintiff and defendant.[4]

A products liability claim may be based on multiple theories, including strict liability, negligence, recklessness, fraud, and breach of warranty.[5] A strict liability claim under ORS 30.920 applies only to one "who sells or leases any product."[6] However, the kind of comparative fault that can be considered by the jury in a products liability case differs between strict liability and negligence. In order to claim comparative fault in a strict products liability claim, defendant must prove the plaintiff unreasonably misused the product or the plaintiff knew of the dangerous defect and used the product anyway. "The kind of unobservant, inattentive, ignorant, or awkward failure to discover or to guard against the defect that goes toward making the product" unreasonably dangerous is not considered for comparative fault purposes in a strict products liability case.[7] In a products liability claim alleging negligent conduct, the defendant can introduce evidence of comparative fault as in a simple negligence action.[8]

ORS 31.600 generally governs how fault will be apportioned among parties and non-parties, including settling parties. The trier of fact compares the fault of the plaintiff, named defendants, third-party defendants who are liable in tort to plaintiff, and any settled party. However, there is no comparison of fault of any person who is immune from liability to plaintiff, who is not subject to the jurisdiction of the court, or against whom the claim is barred by a statute of limitations or ultimate repose.[9]

A defendant who files a third-party complaint or who alleges that a party who settled with plaintiff is at fault has the burden of proof in establishing the fault of the third-party defendant or settled party, and that such fault was a contributing cause to the plaintiff's damages.

A party may defend a claim by alleging the injury or death was the sole and exclusive fault of a person who is not a party in the matter, but fault is not apportioned to non-parties.

Oregon

Oregon law states that the liability of each defendant for damages awarded to plaintiff as several only.[10] However, Oregon is truly a joint and several liability state, as there is joint liability when another at-fault party's share of damages is determined to be uncollectible.[11] Within one year of a judgment's entry, the court must determine whether all or part of a party's share of the judgment is uncollectible. If the court determines that all or part of any party's share is uncollectible, the court reallocates any uncollectible share among the other parties. The reallocation is made according to each party's respective percentage of fault.[12]

There is a caveat: a party's share is not reapportioned if plaintiff's comparative fault percentage is equal to or greater than that party's percentage or if that party's percentage is less than 25% of the total. The reallocation statute does not affect a party's right to contribution from the insolvent party.

Regarding settlement credits, each party's share of the total damages is based on the percentage of fault attributed to that party, with no reduction for amounts paid in settlement.[13] In other words, any offset for a settlement is based upon the percentage of fault attributed to the settling party, not on the amount actually paid in settlement by that party. There are limited exceptions to the offset rule for certain claims, such as asbestos, where the conduct of the at-fault party typically occurred prior to the enacting of Oregon's tort reform laws in 1995.

Contribution

As noted above, Oregon's joint and several liability scheme eliminates contribution in many claims. However, contribution still exists.[14]

Oregon's contribution statute provides for contribution in any circumstance where two or more parties become jointly or severally liable in tort to plaintiff. However, the right to contribution exists only when one tortfeasor has paid more than his or her proportional share of the common liability.[15]

The contribution statute provides that, "where two or more persons become jointly or severally liable in tort for the same injury to person or property," there exists a right of contribution "in favor of a tortfeasor who has paid more than a proportional share of the common liability."[16] The statute restricts the ability of a settling party to obtain contribution from non-settling parties. Under ORS 31.800(3), "[a] tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury or wrongful death is not extinguished by the settlement nor in respect to any amount paid in a settlement which is in excess of what is reasonable."[17]

"Whether or not judgment has been entered in an action against two or more tortfeasors for the same injury or wrongful death, contribution may be enforced by separate action. Where a judgment has been entered in an action against two or more tortfeasors for the same injury or wrongful death, contribution may be enforced in that action by judgment in favor of one against other judgment defendants by motion upon notice to all parties to the action."[18] This contribution statute does not impair any right of indemnity under existing law, however. "Where one tortfeasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution, and the indemnity obligor is not entitled to contribution from the obligee for any portion of the indemnity obligation."[19]

Non-Contractual Indemnity

In Oregon, non-contractual indemnity is based on common law. For common law indemnity, a party must prove that (1) it discharged a legal obligation owed to a third party; (2) the defendant was also liable to the third party; and (3) as between the claimant and the defendant, the obligation should be discharged by the latter. This last requirement means that, "although the claimant must have been legally liable to the injured third-party, his liability must have been 'secondary' or his fault merely 'passive,' while that of the defendant must have been 'active' or 'primary.'"[20]

A defendant in an indemnity claim cannot defend by simply contending that the relative liability of the parties was already adjudicated in the prior action. The parties to a settlement or judgment are not bound by its terms in any subsequent controversy so long as they were not adversaries in the underlying action.

Defendants in product liability actions may include manufacturers, distributors, sellers, or lessors.[21] Sellers or distributors can seek indemnity against the manufacturer, or otherwise up the chain under common law indemnity (an "upward stream of commerce" liability theory).

Oregon

1 ORS 31.600
2 ORCP 19B
3 ORS 31.600
4 *Shin v. Sunriver Preparatory School, Inc.*, 199 Or. App. 352, 111 P.3d 762 (2005)
5 ORS 30.920(4)
6 *Two Two v. Fujitec America, Inc.*, 256 Or. App. 784, 305 P.3d 132 (2013)
7 *Sandford v. Chev. Div. Gen. Motors*, 292 Or. 590, 642 P.2d 624 (1982)
8 ORS 31.600
9 ORS 30.920(4)
10 ORS 31.610
11 ORS 31.610(3)
12 ORS 31.610
13 ORS 31.610(3)
14 *Lasley v. Combined Transport, Inc.*, 351 Or. 1, 261 P.3d 1215 (2011)
15 ORS 31.800(2)
16 ORS 31.800(1), (2)
17 *Marton v. Ater Const. Co.*, 256 Or. App. 554, 302 P.3d 1198 (2013)
18 ORS 31.810(1), (2)
19 ORS 31.800(5); *see Marton v. Ater Const. Co.*, 256 Or. App. 554, 302 P.3d 1198 (2013)(fn.3)
20 I*rvin Yacht Sales, Inc. v. Carver Boat Corp.*, 98 Or. App. 195, at 197, 778 P.2d 982 (1989), citing *Fulton Ins. v. White Motor Corp.*, 261 Or. 806, 210, 493 P.2d 138 (1972) (overruled on other grounds)
21 ORS 31.900

Pennsylvania

By Thomas J. Wagner & Donna M. Crothamel

The Law Offices of Thomas J. Wagner, LLC
Philadelphia, Pennsylvania

Tel: 215.790.0761
Fax: 215.790.0762

Email: tjwagner@wagnerlaw.net
Email: dcrothamel@wagnerlaw.net
www.wagnerlaw.net

Allocation of Fault

In Pennsylvania, all suppliers in the chain of distribution of a defective product (retailers, partmakers, assemblers, owners, seller, lessors, etc.) are potentially liable to an ultimate user injured by the defect.[1] Fault is apportioned equally among the identified tortfeasors who are held jointly and severally liable to the injured plaintiff.[2] Liability in causes of action accruing on or after June 28, 2011 is governed by Pennsylvania's Fair Share Act which provides, with limited exceptions, that each defendant found less than 60% liable is deemed liable for only its causal portion of the verdict. In this regard, the Act permits the jury to consider the liability of non-parties who previously settled with the plaintiff. Causes of action accruing prior to June 28, 2011 are subject to the previous joint and several law in Pennsylvania which held each joint tortfeasor liable for the entire verdict regardless of its individual percentage of liability.[3] Under either version of the law, a single joint tortfeasor's recourse for paying more than its proportionate share of damages is to seek indemnity and/or contribution from the nonpaying joint tortfeasors.[4] Both remedies are available against a co-defendant and/or a non-party and may be asserted by way of Counterclaim, Crossclaim, Rule 2252(d) Joinder, or a separate action in assumpsit.[5] The statute of limitations for filing an action for indemnification/contribution is two years and begins to run once a joint tortfeasor is required to pay more than its proportionate share of damages.[6] Neither remedy may be asserted against the injured party's employer because Pennsylvania's Workers' Compensation Act bars such actions unless they fall within a limited exception.[7]

Non-Contractual/Common Law Indemnity

Common law indemnity is an equitable remedy which shifts the entire loss from one defendant to another. It is a device used to allow entities that are secondarily or vicariously liable to shift responsibility to those who are primarily liable. Factors to consider when determining whether indemnity is available are active or passive negligence and knowledge of or opportunity to discover or prevent the harm at issue. In chain of distribution cases, Pennsylvania Courts have relied on Section 95 of the Restatement of Restitution:

Pennsylvania

> Where a person has become liable with another for harm caused to a third person because of his negligent failure to make safe a dangerous condition of land or chattels, which was created by the misconduct of the other or which, as between the two, it was the other's duty to make safe, he is entitled to restitution from the other for expenditures properly made in the discharge of such liability.[8]

The Courts also rely on Section 93(1):

> Where a person has supplied to another a chattel which because of the supplier's negligence or other fault is dangerously defective for the use for which it is supplied and both have become liable in that to a third person injured by such use, the supplier is under a duty to indemnify the other for expenditures properly made in discharge of the claim of the third person, if the other used or disposed of the chattel in reliance upon the supplier's case and if, as between the two, such a reliance was justifiable.

When analyzing these Sections, the Courts view trade relations realistically and focus on the opportunity to discover or actual knowledge of the defective condition, as well as the relative burdens of correcting or preventing the defect. They also review the facts of the case, including trade custom, relative expertise, and practicality.[9]

Whenever there is a potential right to indemnity, notice of the underlying claim should be promptly provided to the potential indemnitor. Lack of notice does not negate the right to indemnity, but it does change the burden of proof because the alleged indemnitor was deprived of the ability to participate in the underlying action.[10] In such cases, the indemnitee will be charged with the burden of justifying his payment of damages by establishing against the indemnitor practically the same evidence as was relied on by the plaintiff in the underlying action to establish the liability of the party seeking indemnity and the damages claimed by the plaintiff.[11]

Contribution

The right of contribution is an equitable doctrine that is governed by statute.[12] Pennsylvania's Uniform Contribution Among Tortfeasors Act ("UCAT Act") provides that:

> A joint tortfeasor who has discharged more than his pro rata share of a common liability may seek contribution from any other tortfeasor who contributed to the loss.[13]

Contribution is permitted regardless of the theory of liability asserted by the plaintiff and can be pursued in cases where one joint tortfeasor was found liable in negligence and another was found liable in strict products liability.[14]

Once contribution is granted, the issue arises of how to apportion damages amongst the contributing tortfeasors. A preferred method of apportionment is by special jury interrogatories.[15] Because special jury interrogatories are not always presented and are not applicable in cases that settle, the UCAT Act addresses two types of apportionment, common liability and pro rata share liability. Common liability results in each tortfeasor having an undivided responsibility for the total amount of damages. Pro rata share liability apportions responsibility for the damages according to the equitable share of responsibility for the harm attributable to each tortfeasor so that each tortfeasor is liable for only that portion of the damages it is considered to have caused.[16] When enforcing a party's right to contribution in strict liability cases, Pennsylvania Courts have applied the concept of 'comparative contribution.' a theory founded on factual determination of percentage of liability which appears to provide a fairer, more equitable result and apportions each tortfeasor its pro rata share of liability for the injured party's damages.[17]

Effect of Settlement on Right to Indemnity/Contribution

Right to Indemnity

The right to indemnity exists regardless of whether the party seeking indemnity has a judgment entered against it or it voluntarily settles the claim. Voluntary settlements do not affect one's right to indemnity, but they do alter the degree of proof needed in order to establish the right to indemnity.[18] When a case settles, the record is not sufficient to establish a claim for indemnity. Thus, an alleged indemnitor is entitled to a trial by jury establishing liability in the first instance and whether indemnity is owed, and it must be established that the party seeking indemnity was itself legally liable and subject to being compelled to satisfy the claim.[19] The party seeking indemnity must also prove that the actual settlement was fair and reasonable.[20] In this regard, the opinion of

Pennsylvania

counsel for the party seeking indemnity is never sufficient to establish that the settlement was reasonable or advisable. Furthermore, a verdict is considered only prima facie evidence as to the damages or other facts adjudicated.[21] This burden of proof is imposed even in those cases where the potential indemnitor was provided notice of the underlying claim prior to settlement.[22]

Right to Contribution

The UCAT Act dictates the effect of a release on non-settling tortfeasors subject to contribution and the method for computing the appropriate set-off for the settlement payment. The Act provides that the Release can set forth the amount or proportion by which the total claim shall be reduced so long as the set-off amount is greater than the actual settlement payment. The Release can also discharge the non-settling tortfeasors by including language to that effect. In the event the Release is silent on the set-off calculation, the method defaults to a pro tanto set-off.[23] The Release must, however, release the non-settling tortfeasor from liability to the underlying plaintiff. A claim for contribution cannot be made against a tortfeasor who chooses to litigate its liability to the plaintiff.[24]

A pro tanto set-off reduces the verdict by the amount of consideration actually paid by the settling tortfeasor. The alternative method of calculation is a pro rata set-off which reduces the amount owed by the non-settling tortfeasor by the amount of the settling defendant's apportioned share of the verdict.[25] When determining the appropriate set-off, Pennsylvania Courts are mindful of the potential for a windfall to the underlying plaintiff or the non-settling tortfeasor. In such situations, the Courts have determined that the plaintiff should benefit and apply the pro rata set-off method to ensure that the non-settling tortfeasor will not enjoy a set-off that would lower its out-of-pocket expense below its own allocated share of the liability.[26] Thus, when a settlement payment exceeds the amount of the verdict, contribution is still available to the settling tortfeasor in the event the settling joint tortfeasor paid more than his pro rata share of the damages. Otherwise, the non-settling tortfeasor would receive a windfall. The Courts reason that the settlement agreement may more accurately measure the tortfeasors' obligation than does the verdict.[27] When there are numerous joint tortfeasors subject to contribution, the applicable set-off method can be different for each.[28]

1 *Moran v. G. & W.H. Corson, Inc.*, 586 A.2d 416, 427 (Pa. Super. 1991) (Citations omitted).
2 *Baker v. AC & S, Inc.*, 755 A.2d 664, 669 (Pa. 2000), *reconsideration den'd*, 2000 Pa. LEXIS 1861 (Pa. Aug. 7, 2000) (Citations omitted). *See also, Schmidt v. Boardman Company*, 11 A.3d 924, 938, 952-53 (Pa. 2011) (Citations omitted); *McMeekin v. Harry M. Stevens, Inc.*, 530 A.2d 462, 465 (Pa. 1987) (Citations omitted), *appeal den'd, Harry M. Stevens, Inc. v. Douglas Furniture Corp. and McMeekin v. Harry M. Stevens, Inc.*, 541 A.2d 746 (1988).
3 2011 Pa. S.B. 1131.
4 *Baker*, at 669 (*citing*, 42 Pa.C.S. § 7102; 42 Pa.C.S. §§ 8324© and 8327); *Moran*, at 427 (Citations omitted).
5 *Moran*, at 427 (Citations omitted); Pa. R.C.P. No. 1031; Pa. R.C.P. 1031.1; Pa. R.C.P. No. 2252(d). *See also, McMeekin*, at 469 (Citations omitted).
6 *See, Kitchen v. Grampian Borough*, 219 A.2d 685 (Pa. 1966); 42 Pa.C.S. § 4424. *See also, F.J. Schindler Equip. Co. v. The Raymond Co.*, 418 A.2d 533 (Pa. Super. 1980); Moran, at 427.
7 *See, Gresik v. PA Partners*, L.P., 33 A.3d 594 (Pa. 2011); *Heath v. Church's Fried Chicken, Inc.*, 546 A.2d 1120 (Pa. 1988); *Heckendorn v. Evans Products Co.*, 465 A.2d 609 (Pa. 1983); *Callender v. Goodyear Tire and Rubber Co.*, 564 A.2d 180 (Pa. Super. 1989).
8 *Moran*, at 427 (Citations omitted). *See also*, Restatement of Restitution § 95.
9 *Moran*, at 428 (Citations omitted).
10 *Cleveland Osteopathic Hosp., Inc. v. Nash*, 43 Pa. D. & C.2d 623 (1967) (Citations omitted).
11 *Martinique Shoes, Inc. v. N.Y. Progressive Wood Heel Co.*, 217 A.2d 781, 783 (1966), *allocatur den'd*, (Citations omitted).
12 *McMeekin*, at 465 (Citations omitted).
13 *Id. See also*, 42 Pa. C.S. § 8324(b).
14 *McMeekin*, at 465 (Citations omitted).
15 *McMeekin*, at 469.
16 *McMeekin*, at 467 (Citations omitted).
17 *McMeekin*, at 466-69 (Citations omitted).
18 *Martinique*, at 783(Citations omitted).
19 *Id.* (Citations omitted).
20 *Nash*, at 625 (*citing, Orth v. Consumers Gas Co.*, 124 Atl. 296 (Pa.).
21 *Id.*, at 626 (Citations omitted).
22 *Id.* (Citations omitted).
23 *Baker*, at 667 (*citing*, 42 Pa.C.S. § 8326).
24 Baker, at 670 (*citing, Walton v. Avco Corp.*, 610 A.2d 454 (Pa. 1992)).
25 *Id.*, at 667-68 (Citations omitted).
26 *Baker*, at 670 (*citing, Charles v. Giant Eagle*, 522 A.2d 1 (Pa. 1987)).
27 *Moran*, at 422 (*quoting, Giant Eagle Markets, supra*).
28 *Baker*, at 672.

Rhode Island

By David W. Zizik

Zizik Professional Corporation
Westwood, Massachusetts

Tel: 781.320.5401
Fax: 781.658.2532

Email: dzizik@ziziklaw.com
www.ziziklaw.com

Allocation of Fault

In Rhode Island, pure comparative negligence is applied in tort actions.[1] The amount of damages that can be recovered will be reduced in proportion to the amount of negligence attributed to the plaintiff.[2]

Joint tortfeasors must have acted together to create the injuries of the plaintiff or they must otherwise be liable for each other's conduct in Rhode Island.[3] This joint liability means that each defendant is liable for the entire amount of the damages to the plaintiff.[4] Pro rata shares are determined by the number of tortfeasors and their relative degrees of fault.[5]

Contribution and Indemnity in Rhode Island

Rhode Island, for the most part, has adopted the 1939 version of the Uniform Contribution Among Joint Tortfeasors Act.[6] Under this Act in Rhode Island, there exists a right of contribution among joint tortfeasors, but the relative degree of fault of each must be used to determine pro rata shares of the damages.[7] This pro rata calculation only applies to rights of contribution.

To successfully assert indemnity in Rhode Island, the prospective indemnitee must prove: (1) that the party seeking indemnity is liable to a third party; (2) the prospective indemnitor is liable to third party; and (3) between the prospective indemnitee and indemnitor, the obligation ought to be discharged by the indemnitor.[8] "Indemnity can only be obtained when the liability of the claimant is solely constructive or derivative and only when the prospective indemnitor's wrongful acts have caused such liability to be imposed."[9]

A claim for indemnity, according to the Rhode Island courts, can rest in contract, express or implied, or in equity.[10] On one hand, in *Roy v. Star Chopper Co.*, the court held that a third-party defendant employer could be held liable to a defendant manufacturer for injuries sustained by the plaintiff, where the jury could find the employer explicitly or impliedly contracted with the manufacturer to install safety guards on the machine that injured the plaintiff.[11] On the other hand, in *Helgerson v. Mammoth Mart, Inc.*, the court found that a retailer of ammunition could theoretically be indemnified by a customer who purchased the ammunition and injured the plaintiff.[12]

Primerus
The World's Finest Law Firms

Rhode Island

According to Rhode Island law, the Contribution Among Joint Tortfeasors Act preserves the rights of indemnity between multiple actors liable for another individual's injuries, but it does not define the rights of indemnity.[13] In a relevant case dealing with this issue, the court has found that equitable indemnity, different from proportionate recovery, allows complete reimbursement to a party who was personally without fault, but who was legally compelled to pay damages on account of another who is the "active and primary" cause of the injury.[14]

Effect of Settlement

The Contribution Among Joint Tortfeasors Act governs the effect of a release of one joint tortfeasor on the liability of the other tortfeasors.[15] Under the statute, a release by the injured person of one joint tortfeasor, whether before or after judgment, does not discharge the other tortfeasors unless the release so provides, but it does reduce the claim against the other tortfeasors in the amount of the consideration paid for the release, or in any amount of proportion by which the release provides the total claim shall be reduced, whichever is greater.[16] Additionally, a release by the injured person of one joint tortfeasor does not relieve that person from liability to make contribution to another joint tortfeasor, unless the release is given before the right of the other tortfeasor to secure a money judgment for contribution has accrued and provides for a reduction of the injured person's damages.[17]

A joint tortfeasor who enters into a settlement with the injured person is not entitled to recover contribution from another joint tortfeasor whose liability to the injured party is not extinguished by the settlement.[18]

1 R.I. GEN. LAWS ANN. § 9-20-4 (West 2013).
2 *Id.*
3 Wilson v. Krasnoff, 560 A.2d 335, 339-41 (R.I. 1989). In determining whether defendants are joint tortfeasors, the analysis should be broken down into two parts: whether the parties are "liable in tort" and whether they were "engaged in common wrongs." *Id.* at 339; *see* R.I. GEN. LAWS ANN. § 10-6-2 (West 2013) ("'[J]oint tortfeasors' means two (2) or more persons jointly or severally liable in tort for the same injury to person or property . . . ."). "Liable in tort" means the party contributed to another's injury. Zarella v. Miller, 217 A.2d 673, 675 (R.I. 1966). In determining whether an occurrence is a "common wrong," two important factors to consider are the time at which each party acted and whether a party had the ability to guard against the negligence of the other. *Wilson*, 560 A.2d at 340.
4 § 10-6-2. Rhode Island, however, rejects the rule allowing plaintiffs to bring suit against a tortfeasor and obtain full satisfaction from that tortfeasor if there are additional tortfeasors who subsequently aggravated the injury (i.e. medical malpractice). *Wilson*, 560 A.2d at 340 ("[T]his rule as being inherently unsound . . . . as such [subsequent aggravation] is an independent intervening cause.").
5 § 10-6-3.
6 § 10-6-1 to -11.
7 *Id.*
8 Muldowney v. Weatherking Prods., Inc., 509 A.2d 441, 443-44 (R.I. 1986).
9 *Id.* at 444.
10 Helgerson v. Mammoth Mart, Inc., 335 A.2d 339, 441 (R.I. 1975) ("Although the right to indemnity traditionally arose from a contract, express or implied, modern law indicates a trend to allow indemnity on the basis of equity, for example, where one person is exposed to liability by the wrongful act of another in which he does not join.").
11 584 F.2d 1124, 1132 (1st Cir. 1978).
12 *Helgerson*, 335 A.2d at 441-42 (hypothesizing third-party purchaser of ammunition's act possibly "active and primary cause of the plaintiff's injury").
13 R.I. GEN. LAWS ANN. § 10-6-9 (West 2013).
14 *Hawkins v. Gadoury*, 713 A.2d 799, 803 (R.I. 1998).
15 § 10-6-7.
16 *Id.*
17 § 10-6-8.
18 § 10-6-5.

South Carolina

By Brian A. Comer

Collins & Lacy, P.C.
Columbia, South Carolina

Tel: 803.256.2660
Fax: 803.771.4484

Email: bcomer@collinsandlacy.com
www.collinsandlacy.com

Allocation of Fault

South Carolina adopted comparative negligence in 1991 in *Nelson v. Concrete Supply Co.*, 303 S.C. 243, 245, 399 S.E.2d 783, 784 (1991). For all causes of action arising after July 1, 1991, the courts apply the "not greater than" version of comparative negligence. As explained by the South Carolina Supreme Court:

> [A] plaintiff in a negligence action may recover damages if his or her negligence is not greater than that of the defendant. The amount of the plaintiff's recovery shall be reduced in proportion to the amount of his or her negligence. If there is more than one defendant, the plaintiff's negligence shall be compared to the combined negligence of all defendants.[1]

Because of the adoption of comparative negligence, the doctrine of assumption of risk is no longer recognized as a complete defense for negligence causes of action that arose or accrued after November 9, 1998.[2]

With regard to joint and several liability, South Carolina modified its law on July 1, 2005 to adapt its joint and several liability law to its adoption of comparative negligence. In the Uniform Contribution Among Tortfeasors Act ("UCATA"), S.C. Code § 15-38-15(A) sets forth that if two or more defendants cause an indivisible injury to a plaintiff, the individual defendants are not jointly and severally liable if they are found to be less than fifty percent at fault for the plaintiff's damages. A defendant is only liable for the damage he caused individually if he is less than fifty percent at fault, but he is jointly and severally liable for all of the plaintiff's damages if he is greater than fifty percent at fault.[3]

Pursuant to UCATA, the jury (or the court if there is no jury) specifies the amount of damages and determines the percentage of the plaintiff's fault.[4] Upon motion of at least one defendant, the defendants for the same indivisible injury, death, or damage to property will argue for their percentage allocation of fault.[5] No new evidence is admitted during this oral argument, and the total fault apportioned between the plaintiff and any co-defendants must total 100 percent.[6] Any setoff (discussed *infra*) from any settlement received from potential tortfeasors is apportioned according to each defendant's determined percentage of liability.[7] Significantly, the statutory provisions on joint and several liability do no apply to a defendant whose actions are

South Carolina

willful, wanton, reckless, grossly negligent, or intentional.[8] Furthermore, UCATA is not applicable to governmental entities.[9] The South Carolina Tort Claims Act is the sole and exclusive remedy for any tort involving a governmental entity or agent.[10]

After the 2005 reform, there is some confusion as to how to deal with allocation of fault for non-parties. As set forth above, S.C. Code § 15-38-15(C) provides a relatively straightforward process for allocating fault between the plaintiff and any parties. However, S.C. Code § 15-38-15(D) indicates that a defendant "retain[s] the right to assert that another potential tortfeasor, *whether or not a party*, contributed to the alleged injury or damages and/or may be liable for any or all of the damages alleged by any other party." (Emphasis added). Because these sections seem to contradict each other, it is unclear whether South Carolina courts will allocate fault to a non-party. South Carolina practitioners frequently address this contradiction by joining any potential tortfeasor in the action so that fault can be allocated, instead of risking non-allocation to a non-party.

Equitable (Non-Contractual) Indemnity

South Carolina has long recognized the principle of equitable (non-contractual) indemnification.[11] Generally, a party may maintain an equitable indemnification action if he was compelled to pay damages because of negligence imputed to him as a result of the tortious act of another.[12] In such cases, the right to indemnity is implied by operation of law and as a matter of equity.[13] Courts have allowed equitable indemnity in cases of imputed fault or where a "special relationship" exists between the party seeking indemnification ("indeminitee") and the party alleged to be liable for the imputed fault ("indemnitor").[14] The action can be asserted as a cross-claim between co-defendants during the litigation, as a third-party claim against a non-party, or as a subsequent action.[15] The statute of limitations for an indemnity action generally runs from the time judgment is entered against a defendant.[16]

For a party to recover under a theory of equitable indemnification, the indemnitee must prove (1) the indemnitor was liable for causing the plaintiff's damages, (2) the indemnitee was exonerated from any liability for those damages, and (3) the indemnitee suffered damages as a result of the plaintiff's claims against it, which were eventually proven to be the fault of the indemnitor.[17] The indemnitee must be "innocent."[18] If the indemnitee also has personal negligence in causing the injury, then there is no right of recovery.[19] A mere attempt to avoid causing injury does not excuse the indemnitee from fault.[20] "The most important requirement for the finding of equitable indemnity is that the party seeking to be indemnified is adjudged without fault and the indemnifying party is the one at fault.[21] The rationale is that the actions of the wrongdoer have involved the innocent party in litigation and have caused the party to incur expenses to protect his interest.[22]

Allegations contained in the injured party's Complaint are not determinative of whether a party has a right to indemnity.[23] There must be an adjudication of fault.[24] If there is no adjudication, then the requirements are not satisfied. This provides an alleged tortfeasor with the argument that a special verdict form is necessary in order to determine and preserve the indemnitee's rights against the indemnitor. Furthermore, if a party settles during trial and the settlement agreement includes no language concerning allocation of fault (or includes language that there is no admission of liability), then the indemnitee will likely have a difficult time fulfilling the requirements for equitable indemnification.[25] There must be an evidentiary basis for the indemnitee's claim that he is without fault.[26]

With regard to the "special relationship" that must exist between the parties, South Carolina courts have held that the relationship between a contractor and subcontractor supports a claim for equitable indemnification.[27] A building owner who hires a contractor to do work – and the contractor's work results in injury/damage that subjects the owner to litigation – also satisfies the special relationship requirement.[28] However, if this relationship is too far removed or too attenuated, the special relationship contemplated by South Carolina jurisprudence is not present.[29]

There is no right of indemnity between mere joint tortfeasors under South Carolina law.[30] Joint tortfeasors are parties who act together in committing a wrong, or whose acts (if independent of each other) unite in causing a single injury. Stated differently, joint tortfeasors are two or more persons jointly or severally liable for the same injury to person or property.[31] "Parties that have no legal relation to one another and who owe the same duty of care to the injured party share a common liability and are joint

South Carolina

tortfeasors without a right of indemnity between them."[32] Determining whether parties are joint tortfeasors requires a review of the factual evidence.[33]

The lack of indemnity between joint tortfeasors is significant in the context of products liability action. South Carolina's courts have held that where parties owe the same duty of care and have no legal relationship to one another, then they are joint tortfeasors and have a common liability without a right of indemnity.[34] For example, South Carolina's strict liability statute makes each party in the chain of distribution (e.g., manufacturer, distributor, retailer) liable for sale of a defective product.[35] Therefore, if a plaintiff is injured by a product and sues a party in the chain of distribution, there is no right of indemnification between the parties in the chain of distribution.[36] Each party has a common duty and common liability to the ultimate consumer under the strict liability statute, making them joint tortfeasors. Conversely, if a party-defendant's use of a product plays a role in causing injury to a plaintiff (independent of any fault of the alleged tortfeasor), then the product seller may be liable for indemnification.[37]

Equitable indemnification allows recovery of any costs which are reasonably necessary to defend the litigation or otherwise protect the innocent party's interests.[38] The cost of settling a case is recoverable (1) if the settlement is bona fide, without fraud or collusion by the parties, (2) if, under the circumstances, the decision to settle is a reasonable means of protecting the innocent party's interest, and (3) the amount of the settlement is reasonable in light of the third-party's estimated damages and risk, and the extent of the defendant's exposure if the case goes to trial.[39] In such cases, the party seeking indemnification is not required to prove the injured party's actual liability to recover the amount paid in settlement so long as he proves he was potentially liable to the injured party.[40]

Contribution

South Carolina's contribution law is codified in UCATA at S.C. Code §§ 15-38-10 to 15-38-70. Under UCATA, contribution is permitted once a tortfeasor pays more than his pro rata share of a judgment.[41] If two or more persons are jointly or severally liable in tort for the same injury or wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.[42] The right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share of the common liability, and the total recovery is limited to the amount paid by the tortfeasor in excess of his pro rata share. No tortfeasor is compelled to contribute beyond his pro rata share of the entire liability.[43] There is no right of contribution in favor of a tortfeasor who intentionally caused or contributed to the injury or wrongful death.[44] UCATA's provisions also do not impair any right of indemnity under existing law.[45]

The right to contribution does not arise prior to payment.[46] Therefore, South Carolina courts have held that a party-defendant can implead a third-party on an indemnification claim, but not on a contribution claim.[47] The contribution claim is not ripe until after there has been payment to the plaintiff. However, in the South Carolina federal district court, a contribution action may be brought before an alleged joint tortfeasor has actually more than his pro rata share of a claim.[48] If contribution is sought from a joint tortfeasor who is not included in the suit brought by the plaintiff, then the tortfeasor who seeks contribution must assert the right of contribution against the other joint tortfeasors in a separate action.[49] The separate action must be brought within one year of the plaintiff's judgment or the payment of a valid claim.[50]

South Carolina has three statutorily prescribed factors for determining the pro rata shares of tortfeasors based on the entire liability paid. These factors are:

(i) their relative degrees of fault shall *not* be considered;

(ii) if equity requires, the collective liability of some as a group shall constitute a single share; and

(iii) principles of equity applicable to contribution generally shall apply.[51]

These factors reflect the factors set forth in the 1955 version (revised) of Section 2 of the Uniform Contribution Among Tortfeasors Act. See Restatement (3d) Torts: Apportionment of Liability § 23, Contribution, Reporter's Notes to Comment e (proportionate shares). Fault for the whole must be divided according to shares or groups *without* taking into account actual levels of fault. That is, one party

South Carolina

of two joint tortfeasors who is only one percent negligent may be required to pay fifty percent of the damages paid to the plaintiff.

The creation of comparative negligence or comparative fault changed the way the majority of jurisdictions that have adopted the comparative responsibility theory calculate contribution. "Now the overwhelming majority of jurisdictions calculate each person's share according to percentages of responsibility." Restatement (3d) Torts: Apportionment of Liability § 23, Contribution, Reporter's Notes to Comment e (proportionate shares). This change is also reflected in the Third Restatement of Torts, Section 23(b), which states: "A person entitled to recover contribution may recover no more than the amount paid to the plaintiff in excess of the person's comparative share of responsibility." Restatement; **see also Id**.

As discussed *supra*, South Carolina adopted a modified comparative fault scheme for causes of action arising on or after July 1, 1991 and modified its joint and several liability law for actions arising or accruing after July 1, 2005. However, South Carolina has *not* likewise modified its contribution statute or adopted the corresponding Third Restatement of Torts. Therefore, for actions arising prior to July 1, 2005, allocation of fault (consistent with S.C. Code Ann. § 15-38-30(1)) was not considered.[52] However, for actions arising after July 1, 2005, S.C. Code § 15-38-15(A) suggests that a "less than fifty percent" at-fault tortfeasor "shall only be liable for that percentage of the indivisible damages determined by the jury."

A dismissal with prejudice by a plaintiff of a party-defendant extinguishes any right of contribution of a co-defendant.[53] "The dismissal operates as adjudication on the merits terminating the action and concluding the rights of the parties."[54] In such cases, a party does not have a right of contribution against the dismissed co-defendant because the co-defendant did not share in any "common liability."[55]

With regard to a settling tortfeasor, "[a] tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury or wrongful death is not extinguished by the settlement nor in respect to any amount paid in a settlement which is in excess of what was reasonable."[56] Moreover, a settlement with the plaintiff discharges the settling tortfeasors from all liability for contribution to any other tortfeasor.[57] Instead, UCATA codifies a right to setoff for the non-settling tortfeasor.[58] When two or more persons are liable in tort for the same injury, a release, a covenant not to sue, or a covenant not to enforce judgment does not discharge other tortfeasors from liability unless its terms so provide. Instead, a set-off is required, and a plaintiff's settlement with one tortfeasor reduces the plaintiff's claim against the other non-settling tortfeasors.[59]

1 *Nelson*, 303 S.C. at 245, 399 S.E.2d at 784.
2 *Davenport v. Cotton Hope Plantation Horizontal Prop. Regime*, 333 S.C. 71, 87, 508 S.E.2d 565, 573-74 (1998).
3 S.C. Code § 15-38-15(A).
4 *Id*. at § 15-38-15(B)-(C).
5 *Id*. at § 15-38-15(C)(3).
6 *Id*. at § 15-38-15(C)(3) and (C)(3)(b).
7 *Id*. at § 15-38-15(E).
8 *Id*. at § 15-38-15(F).
9 *Id*. at § 15-38-65.
10 *Id*. at § 15-38-65.
11 *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 60, 518 S.E.2d 301, 305 (Ct. App. 1999) ("Indemnity is that form of compensation in which a first party is liable to pay a second party of a loss or damage the second party incurs to a third party.") (citing *Town of Winnsboro v. Wiedeman-Singleton, Inc.*, 303 S.C. 52, 56, 398 S.E.2d 500, 502 (Ct. App. 1990), aff'd, 307 S.C. 128, 414 S.E.2d (1992)).
12 *Vermeer*, 336 S.C. at 60, 518 S.E.2d at 305; *Columbia/CSA-HS Greater Columbia Healthcare Sys., LP v. South Carolina Medical Malpractice Joint Underwriting Association*, 394 S.C. 68, 72, 713 S.E.2d 639, 641 (Ct. App. 2011).
13 *Vermeer*, 336 S.C. at 60, 518 S.E.2d at 305.
14 *Id*.
15 *See* South Carolina Rules of Civil Procedure 13(g), 14(a). *See also Columbia/CSA-HS Greater Columbia Healthcare Sys., LP v. South Carolina Medical Malpractice Liability Joint Underwriting Ass'n*, 394 S.C. 69, 713 S.E.2d 639 (2011) (involving subsequent action).
16 *First General Services of Charleston, Inc. v. Miller*, 314 S.C. 439, 444, 445 S.E.2d 446, 449 (1994).
17 *Vermeer*, 336 S.C. at 63, 518 S.E.2d at 307.
18 *Id*; *see also Stuck v. Pioneer Logging Machinery, Inc.*, 279 S.C. 22, 301 S.E.2d 552 (1983) ("According to equitable principles, a right of indemnity exists whenever the relation between the parties is such that either in law or in equity there is an obligation on one party to indemnify the other, as where one person exposed to liability by the wrongful act of another *in which he does not join*.") (emphasis added).
19 *Vermeer*, 336 S.C. at 63, 518 S.E.2d at 307.
20 *Inglese v. Beal*, 403 S.C. 290, 303, 742 S.E.2d 687, 694 (2013).
21 *Id*.
22 *Id*. at 60, 518 S.E.2d at 305.
23 *Id*. at 64, 518 S.E.2d at 307 (citing *Griffin v. Van Norman*, 302 S.C. 520, 522, 397 S.E.2d 378, 379 (Ct. App. 1990)).
24 *Walterboro Community Hosp. v. Meacher*, 392 S.C. 479, 485, 709 S.E.2d 71, 74 (Ct. App. 2010).
25 *See, e.g., id*. (holding that settlement during trial that did not include adjudication of fault precluded action for equitable indemnification).
26 *Id*. at 487-89, 709 S.E.2d at 75-76.

South Carolina

27 *Rock Hill Tel. Co., Inc. v. Globe Communications, Inc.*, 363 S.C. 385, 389, 611 S.E.2d 235, 237 (2005) (citing *First Gen. Servs. of Charleston, Inc.*, 314 S.C. at 442, 445 S.E.2d at 448 (1994); T*own of Winnsboro v. Wiedeman-Singleton, Inc.*, 303 S.C. 52, 398 S.E.2d 500 (Ct. App. 1990), aff'd, 307 S.C. 128, 131, 414 S.E.2d 118, 120 (1992))
28 *Addy v. Bolton*, 257 S.C. 28, 183 S.E.2d 708 (1972).
29 *Rock Hill Tel. Co.*, 363 S.C. at 390, 611 S.E.2d at 237 (holding that special relationship was not present where action for equitable indemnification was between utility and subcontractor who had been retained by intermediary independent contractor).
30 *Vermeer*, 336 S.C. at 64, 518 S.E.2d at 307 (citing *Scott v. Fruehauf Corp.*, 302 S.C. 364, 396 S.E.2d 354 (1990); *Stuck v. Pioneer Logging Machinery, Inc.*, 279 S.C. 22, 301 S.E.2d 552 (1983); *Atlantic Coast Line R.R. v. Whetstone*, 243 S.C. 61, 132 S.E.2d 172 (1963)).
31 *Vermeer*, 336 S.C. at 64, 518 S.E.2d at 307 (citing Black's Law Dictionary 839 (6th ed. 1990).
32 *Id*.
33 *Id*.
34 *Scott*, 302 S.C. at 371, 396 S.E.2d at 358.
35 *Vermeer*, 336 S.C. at 65, 518 S.E.2d at 307-08 (citing to S.C. Code § 15-73-10 (1977)).
36 *See, e.g., Scott v. Fruehauf Corp.*, 302 S.C. 364, 396 S.E.2d 354 (1990) (holding there was no right of indemnity between co-defendants involved in distribution of a defective wheel assembly that exploded and injured plaintiff because both co-defendants shared common liability under South Carolina's strict liability law).
37 *See, e.g., Stuck v. Pioneer Logging Machinery, Inc.*, 279 S.C. 22, 301 S.E.2d 552 (1983) (holding that purchaser of mechanical harvesting machine had right of indemnity against seller in case where harvesting machine was mounted on truck, caused purchaser to lose control of truck, and ultimately caused injury to passengers in oncoming vehicle).
38 *Vermeer*, 336 S.C. at 60, 518 S.E.2d at 305.
39 *See, e.g., Otis Elevator, Inc. v. Hardin Constr. Group*, 316 S.C. 292, 450 S.E.2d 41 (1994); *Griffin v. Van Norman*, 302 S.C. 520, 397 S.E.2d 378 (Ct. App. 1990);
40 Otis Elevator, Inc., 316 S.C. at 296-97, 450 S.E.2d at 44.
41 S.C. Code § 15-38-20.
42 *Id*. at § 15-38-20(A).
43 *Id*. at § 15-38-20(B).
44 *Id*. at § 15-38-20(C).
45 *Id*. at § 15-38-20(F).
46 *First General Services of Charleston, Inc.*, 314 S.C. at 444, 445 S.E.2d at 448). *See also* S.C. Code § 15-38-20(B) ("The right of contribution exists only in favor of a tortfesor who has paid more than his pro rate share of the common liability . . . .") (emphasis added).
47 *Id*.
48 In *Brown v. Shredex, Inc.*, 69 F. Supp. 2d 764, 768 (D.S.C. 1999), the court allowed a defendant to implead a non-party under Rule 14 although the defendant had not paid any money to the plaintiff. The court acknowledged that South Carolina law under *First General Services, Inc. v. Miller* and other cases would hold differently. However, the federal district court decided that federal procedural law trumped the procedural law of the South Carolina contribution statute, and a defendant may bring contribution claim before a payment has been made. *Id*. at 769.
49 S.C. Code § 15-38-40(A).
50 *Id*. at § 15-38-40(D).
51 *Id*. at. § 15-38-30 (emphasis added).
52 *See, e.g., Branham v. Ford Motor Co.*, 390 S.C. 203, 236, 701 S.E.2d 5, 22 (2010) ("The 2005 amendment to the Act provides that a "less than fifty percent" at-fault defendant "shall only be liable for that percentage of the indivisible damages determined by the jury." S.C.Code Ann. § 15–38–15(A) (Supp.2008). A provision applicable in 2001 provided that "[i]n determining the pro rata shares of tortfeasors in the entire liability ... [,] their relative degrees of fault shall not be considered.").
53 *Vermeer*, 336 S.C. at 68-69, 518 S.E.2d at 309-10.
54 *Id*. at 69, 518 S.E.2d at 309.
55 *Id*. at 68-69, 518 S.E.2d at 309-10.
56 S.C. Code § 15-38-20(D).
57 *Id*. at § 15-38-50.
58 *Id*.
59 *Id*.

South Dakota

By Amy S. Fischer

Foliart Huff Ottaway & Bottom
Oklahoma City, Oklahoma

Tel: 405.232.4633
Fax: 405.232.3462

Email: amyfischer@oklahomacounsel.com
www.oklahomacounsel.com

Allocation of Fault

According to South Dakota law, every person is responsible for injury to the person, property or rights of another caused by his willful acts or caused by his want of ordinary care or skill.[1] This general rule is subject to the defense of contributory negligence.[2] In South Dakota, the fact that the plaintiff may have been guilty of contributory negligence does not bar recovery so long as the contributory negligence of the plaintiff is less than the negligence of the defendant.[3] In cases of contributory negligence, the recovery of the plaintiff is reduced in proportion to the negligence attributed to the plaintiff.[4] The determination of whether the contributory negligence of the plaintiff was slight in comparison with the negligence of the defendant shall be made without disclosing any determination of percentage of plaintiff's fault by special interrogatory.[5] Under this statute, the plaintiff's negligence is compared with the negligence of the defendant, not with "the ordinarily prudent person."[6]

To determine whether a plaintiff's negligence is more than slight, the test is to compare the plaintiff's negligence with the negligence of all defendants. "Slight," with regard to "negligence," was previously defined by the court as "small of its kind or in amount; scanty; meager."[7] In *Wood v. City of Crooks*, 1997 SD 20, 559 N.W.2d 558, 560 (1997), the Court held as a matter of law that the 30% contributory negligence attributed to the plaintiff was more than slight.

Indemnity/Contribution

Indemnity is a remedial measure which is invoked to secure the right of the first party to be reimbursed by the second party for the discharge of a liability which, as between the parties, should equitably be discharged by the second party.[8] The principle of indemnification is often confused with the similar principle of contribution. "Contribution requires the parties to share the liability or burden, whereas indemnity requires one party to reimburse the other entirely. Contribution is appropriate where there is a common liability among the parties, whereas indemnity is proper where one party has a greater liability or duty which justly requires him to bear the whole of the burden as between the parties."[9] In South Dakota, indemnity is an "all-or-nothing" proposition.[10] To be entitled to indemnity, one must show "a proportionate absence of contributing negligence on his part."[11] The result of such a showing is to shift the entire liability to the party

South Dakota

against whom indemnity is sought.[12] Thus, indemnity is not a means by which a portion of liability, comparative with the proportion of fault, can be shifted to another party. "[A] joint tortfeasor may recover indemnity where he has only an imputed or vicarious liability for damage caused by the other tortfeasor."[13]

Statutes Affecting Indemnity and Contribution Rights

There is a statutory right of contribution in South Dakota.[14] However, a joint tortfeasor is not entitled to a money judgment for contribution until he has by payment discharged the common liability or paid more than his pro rata share thereof.[15] By statute, the liability amongst joint tortfeasors is determined by pro rata shares if there is a disproportion of fault amongst them.[16] South Dakota statutes limit the contribution of any party found to be less than fifty percent liable to an amount equal to twice the percentage of fault allocated to that defendant.[17]

Effect of Settlement of Joint Tortfeasor

According to South Dakota law, a joint tortfeasor who enters into a settlement with an injured person is not entitled to recover contribution from another joint tortfeasor whose liability to the injured person is not extinguished by the settlement.[18] Also, the recovery by the plaintiff against one joint tortfeasor does not discharge the liability of the other joint tortfeasers.[19]

The release of one joint tortfeasor by an injured party does not release any other joint tortfeasor, unless the release specifies that the other party is being released.[20] The release of one party does entitle any remaining joint tortfeasor to a credit for any amounts paid.[21] A release does not relieve liability to make contribution to another joint tortfeasor unless the release is given before the right of the other joint tortfeasor to secure a money judgment for contribution has accrued and provides for a reduction to the extent of the pro rata share of the released tortfeasor, of the injured person's damages recoverable against all other joint tortfeasors.[22] South Dakota statutes also provide that no indemnity rights are impaired by the provisions regarding contribution by joint tortfeasors.[23]

1 *See* S.D. Codified Laws § 20-9-1.
2 *Id.*
3 S.D. Codified Laws § 20-9-2.
4 *Id.*
5 *Id.*
6 *Musilek v. Stober*, 434 N.W.2d 765, 768 (S.D.1989).
7 *Friese v. Gulbrandson*, 69 S.D. 179, 189, 8 N.W.2d 438, 442 (1943). *See also Nugent v. Quam*, 82 S.D. 583, 600, 152 N.W.2d 371, 380 (1967) ("The contributory negligence of the plaintiff was not small in amount or of little importance or insignificant or unsubstantial or inconsiderable, that is to say, it was not slight in comparison with the negligence of the defendant").
8 *Parker v. Stetson-Ross Machine Company, Inc.*, 427 F.Supp. 249, 251 (D.S.D.1977).
9 *Degen v. Bayman*, 86 S.D. 598, 602-603, 200 N.W.2d 134, 136 (1972). *See also Ebert v. Fort Pierre Moose Lodge No. 1813*, 312 N.W.2d 119, 123 (S.D. 1981).
10 *Highway Construction Co. v. Moses*, 483 F.2d 812, 817 (8th Cir. 1973).
11 *Degen v. Bayman*, 86 S.D. 598, 200 N.W.2d 134, 137 (1972).
12 *Id.* at 136; *Hendrickson v. Minnesota Power & Light Co.*, 258 Minn. 368, 104 N.W.2d 843 (1960).
13 *Id.* at 137.
14 S.D. Codified Laws § 15-8-12.
15 S.D. Codified Laws § 15-8-13.
16 S.D. Codified Laws § 15-8-15.
17 S.D. Codified Laws § 15-8-15.1.
18 S.D. Codified Laws § 15-8-14.
19 S.D. Codified Laws § 15-8-16.
20 S.D. Codified Laws § 15-8-17.
21 *Id.*
22 S.D. Codified Laws § 15-8-18.
23 S.D. Codified Laws § 15-8-19.

Tennessee

By Michael J. Vetter, Sr.

Spicer Rudstrom, PLLC
Nashville, Tennessee & Chattanooga, Tennessee & Memphis, Tennessee

Tel: 615.259.9080 | Fax: 615.259.1522 (Nashville)

Tel: 423.756.0262 | Fax: 423.756.8489 (Chattanooga)

Tel: 901.523.1333 | Fax: 901.526.0213 (Memphis)

Email: mjv@spicerfirm.com
www.spicerfirm.com

Allocation of Fault

Since the Tennessee Supreme Court decision in *McIntyre v. Balentine*[1], Tennessee has been a "modified comparative fault" state. If the plaintiff is found to be 50% or more at fault, there is no recovery. If the plaintiff is found to be less than 50% at fault, the non-parties and defendant(s) are apportioned their percentages of fault. In all cases, the sum total of the percentages of fault apportioned to the plaintiff, non-parties, and the defendant(s) must equal 100%.

Pursuant to the Tennessee Code, if a defendant alleges fault against a non-party, the plaintiff has an additional 90 days to sue the non-party and bring them into the suit or file a separate suit.[2] The operation of this code section appears to allow defendants to be added to a case after the statute of limitations has run.

In Tennessee, the plaintiff does not recover for his or her percentage of fault or for a non-party's fault. In addition, each defendant is generally only responsible for its percentage of fault and the corresponding portion of the verdict, unless there is a specific basis for joint liability, such as agency, a contractual obligation, or a statutory basis for joint liability.

The following discussion of the status of Tennessee joint and severability law is from the Tennessee Supreme Court:

> During the past fourteen years, this Court has reaffirmed its holding that the doctrine of joint and several liability, as it existed prior to 1992, is obsolete. Ali v. Fisher, 145 S.W.3d 557, 561 (Tenn. 2004); Carroll v. Whitney, 29 S.W.3d 14, 16 (Tenn. 2000); Sherer v. Linginfelter, 29 S.W.3d 451, 455 (Tenn. 2000). At the same time, however, we have determined that the doctrine remains viable in several well-defined circumstances. We approved joint and several liability for defendants in the chain of distribution of a product in a products liability action. Owens v. Truckstops of Am., 915 S.W.2d 420, 433 (Tenn. 1996). We determined that the doctrine of joint and several liability was not obsolete in cases involving injury caused by multiple defendants who have breached a common duty. Resolution Trust Corp. v. Block, 924 S.W.2d 354, 355, 357 (Tenn. 1996). We have likewise approved the application of the doctrine in cases wherein the plaintiff's injury was caused by the concerted actions of the defendants. Gen. Elec. Co. v. Process Control Co., 969 S.W.2d 914, 916 (Tenn. 1998).

Tennessee

> To the extent that the doctrine of vicarious liability can be considered a species of joint and several liability, we have held that the adoption of comparative fault in McIntyre v. Balentine did not undermine the continuing viability of various vicarious liability doctrines, including the family purpose doctrine, Camper v. Minor, 915 S.W.2d 437, 447-48 (Tenn. 1995), "respondeat superior, or similar circumstance where liability is vicarious due to an agency-type relationship between the active, or actual wrongdoer and the one who is vicariously responsible." Browder v. Morris, 975 S.W.2d 308, 311-12 (Tenn. 1998). Finally, vicariously responsible." Browder v. Morris, 975 S.W.2d 308, 311-12 (Tenn. 1998). Finally, we determined that tortfeasors who have a duty to protect others from the foreseeable intentional acts of third persons are jointly and severally liable with the third person for the injuries caused by the third person's intentional acts. Limbaugh v. Coffee Med. Ctr., 59 S.W.3d 73, 87 (Tenn. 2001); White v. Lawrence, 975 S.W.2d 525, 531 (Tenn. 1998); Turner v. Jordan, 957 S.W.2d 815, 823 (Tenn. 1997).[3]

There are various statutes of limitations that may be applicable to a products liability claim. The potentially applicable statutes of limitations begin with one year for a basic negligence claim and can potentially extend to up to 25 years for a breast implant claim. The time periods are also linked to the purchase date of the product, the anticipated useful life of the product, and when the injured party knew or should have known of the injury. Several of the potentially applicable statutes of limitations are referenced within Tennessee Code Annotated Section 29-28-103.

In Tennessee, a product liability claim "… includes all actions brought for or on account of personal injury, death or property damage caused by or resulting from the manufacture, construction, design, formula, preparation, assembly, testing, service, warning, instruction, marketing, packaging or labeling of any product."[4]

The claim can be based upon one or more of the causes of action, "… strict liability in tort; negligence; breach of warranty, express or implied; breach of or failure to discharge a duty to warn or instruct, whether negligent, or innocent; misrepresentation, concealment, or nondisclosure, whether negligent, or innocent; or under any other substantive legal theory in tort or contract whatsoever…."[5]

In addition to making a claim against the manufacturer, a plaintiff can potentially make a claim against the seller of a product if there is a warranty given, if the seller was involved in the design, testing, or manufacture of the product, or if the manufacturer is insolvent and/or not subject to service and the Tennessee Long arm statute.[6] In essence, the consumer or purchaser is likely going to have recourse against someone subject to the jurisdiction of the Tennessee Courts if there is an injury allegedly caused by a product in Tennessee.

The claimant in a products liability case must prove that the product was defectively manufactured, designed, or warranted when it left the hands of the manufacturer, seller, or party providing the warranty, as the case may be.[7] A plaintiff may claim that a product was defective or unreasonably dangerous, which under Tennessee law means that it is unsafe "for normal or anticipatable handling and consumption" or "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics, or that the product because of its dangerous condition would not be put on the market by a reasonably prudent manufacturer or seller, assuming that the manufacturer or seller knew of its dangerous condition."[8]

There are, however, numerous defenses available, and the plaintiff must specifically demonstrate the condition of the product when it left the manufacturer and show that there was not a subsequent alteration or modification of the product.[9] Further, the product is to be evaluated related to the conditions and technology available at the time of manufacture and not compared to more current and later technology.[10]

The Tennessee Code also recognizes a rebuttable presumption in favor of the seller and manufacturer if the product complies with state or federal regulations related to the product, and there are special rules applicable to medical devices.[11] Tennessee also recognizes a claim for failure to warn, as well as a defense of an adequate warning.[12]

As indicated above, Tennessee is a "modified comparative fault" state that allows fault to be apportioned to named parties and non-parties. In addition to the above and other potential defenses, questions often arise related to the proximate cause and cause in fact of the plaintiff's injuries and a defendant's ability to assert fault against the plaintiff's employer.

Tennessee

Tennessee does not allow fault to be apportioned to an employer that provides or is liable for worker's compensation benefits. Tennessee Code Annotated Section 50-6-108 makes the receipt of worker's compensation benefits the employee's exclusive right to compensation against the employer and makes the employer generally immune against further claims. However, the statute does not void contractual indemnity claims against the employer.

The problem created by the employer's immunity is that it does not fit well with the theory of modified comparative fault and the effort to make each party responsible for its own fault. The exclusive remedy rule and the immunity of the employer create a conflict. How can the employer be immune and potentially be apportioned fault? In addition, an employer that pays worker's compensation benefits has a statutory subrogation lien in Tennessee if the injured worker makes a third party recovery and so an immune party has a subrogation claim.

The Courts had to deal with this conflict by potentially withholding critical evidence from a jury due to the employer's immunity, with the plaintiff not being able to recover for the portion of fault attributed to the employer, and with the employee having to pay the employer's subrogation claim. In dealing with the situation, Tennessee Courts created an all or nothing exception related to employer immunity and have discussed "proximate cause" and "cause in fact" and the evidence that is allowed to be presented to a jury.

While a jury is not allowed to apportion fault to the employer, the jury is allowed to consider and determine whether the employer is the cause in fact or sole cause in fact of the plaintiff's injuries and whether there should be an award made to the claimant. In essence, the defendant is allowed to inform the jury of the employer's actions and the jury can then determine whether the employer's actions preclude recovery.

In one case discussing the situation, the Tennessee Supreme Court Stated as follows:

> This Court has noted the distinction between these two terms as follows: Cause in fact refers to the cause and effect relationship between the defendant's tortious conduct and the plaintiff's injury or loss. Thus, cause in fact deals with the "but for" consequences of an act. The defendant's conduct is a cause of the event if the event would not have occurred but for that conduct.
>
> In contrast, proximate cause, or legal cause, concerns a determination of whether legal liability should be imposed where cause in fact has been established. Proximate or legal cause is a policy [**52] decision made by the legislature or the courts to deny liability for otherwise actionable conduct based on considerations of logic, common sense, policy, precedent and "our more or less inadequately expressed ideas of what justice demands or of what is administratively possible and convenient. "Snyder v. LTG Lufttechnische GmbH, 955 S.W.2d 252, 256 n. 6 (Tenn. 1997) (citations omitted). To enable a jury to determine whether an employer's actions may have been the cause in fact of the plaintiff's injury, evidence showing what happened to the product leading up to the plaintiff's injury must be permitted. Otherwise, the manufacturer or seller will be effectively precluded from the defense that the product was not defective when it left the manufacturer's or seller's control. Snyder, 955 S.W.2d at 256. As we also noted in Snyder, if the rule were different, "the defendant[] would be restricted from presenting evidence that the plaintiff's employer altered, changed, or improperly maintained the [product]." Id. n. 7.[13]

The current Tennessee Pattern Jury Instruction on the issues is as follows:

> 3.63 CONSIDERING EMPLOYER'S CONDUCT - PRODUCTS LIABILITY CASES
>
> You may assess fault against one or more of the following parties: _____. You may not assess fault against the employer. The law provides that plaintiff may not sue the employer in this type of case and the defendants cannot ask that fault be assigned to the employer. You may, however, consider the evidence you have seen and heard about the employer's conduct in determining whether the defendant's conduct was a cause of the plaintiff's (injury) (death). Conduct of an employer that contributes to cause an injury does not prohibit you from assessing fault against a defendant unless the employer's conduct was the sole cause of the plaintiff's injuries. If you find the defendant at fault you may not consider the employer's conduct to determine the degree of fault of the defendant.[14]

Tennessee

Indemnity and Contribution Rights

In many product liability cases, there are written contracts and agreements between the manufacturer, the distributors, and the seller. In addition, there are also generally both express and implied warranties that may apply. Each of these contracts and agreements provides a potential basis for a claim of indemnity and for a potential joint liability obligation.

In addition, under Tennessee law, a suit against the seller of a product is not supposed to be commenced or maintained unless Tennessee Code Annotated Section 29-28-106 applies and either the seller was involved in the design or manufacture of the product, altered the product, gave a warranty, the manufacturer is not subject to Tennessee jurisdiction, or the manufacturer has been declared judicially insolvent. Most of the time, however, the plaintiff files suit against the seller, the manufacturer, and any others in the chain of distribution and then the parties' obligations are litigated.

In the event that there is joint tort-feasor liability, there may be contractual claims for indemnity based upon the written agreements between the parties. However, Tennessee Code Annotated Sections 29-11-102 and 29-11-104 discuss Tennessee's law on potential rights to contribution among joint tortfeasors where two or more persons are liable in tort for the same injury.

In part, Tennessee Code Annotated Section 29-11-102 states:

> (a) Except as otherwise provided in this chapter where two (2) or more persons are jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them; but no right of contribution shall exist where, by virtue of intrafamily immunity, immunity under the workers' compensation laws of the state of Tennessee, or like immunity, a claimant is barred from maintaining a tort action for injury or wrongful death against the party from whom contribution is sought.
>
> (b) The right of contribution exists only in favor of a tort-feasor who has paid more than the proportionate share of the shared liability between two (2) or more tort-feasors for the same injury or wrongful death, in accordance with the procedure set out in § 29-11-104, and the tort-feasor's total recovery is limited to the amount paid by the tort-feasor in excess of this proportionate share.[15]

Effect of Settlement by Joint Tortfeasor

In simple terms, Tennessee negligence law apportions fault to each party and, therefore, there is no contribution among tortfeasors unless there is a basis for joint liability. As such, in a negligence claim, even if there is a settlement by one party, it will not impact the other parties, because each party is assessed only its portion of fault and damages. Whether a plaintiff makes a good settlement or a bad settlement with a co-defendant does not generally matter to the other defendants, because that settled party and any responsible non-parties will still be on the verdict form at trial, and the plaintiff, all defendants, and any responsible non-parties will be apportioned fault. Thereafter, each defendant will owe only its individual percentage of fault and that percentage of the overall damages. If one of the other co-defendants settled for too little, it does not change what the remaining defendant(s) owe. Similarly, if one of the other co-defendants settled for too much, it does not change what the remaining defendant(s) owe.

Issues relating to contribution or the settlements of other parties can arise when there is a potential for joint liability, such as when the principles of agency or joint strict liability apply. In such instances, the jury apportions fault and damages to the group as though it is a single defendant. The jointly liable parties would then each owe the plaintiff whatever damages were jointly awarded. The jointly liable parties could then agree on how to divide/pay what was owed jointly to the plaintiff, or make claims for indemnity and contribution among themselves based upon their contractual relationships and as is discussed by the statute set forth above.

The Tennessee Civil Justice Act of 2011

In 2011, Tennessee enacted tort reform under the Tennessee Civil Justice Act, which became effective October 1, 2011. This Act prohibits the seller of a product other than a manufacturer from being liable for punitive damages, unless (1) the seller exercised substantial control over the aspect of the design, testing, manufacturer, or packaging or labeling of the product; (2) the seller altered or modified the product and the alteration was a substantial factor in

Tennessee

causing the harm; and (3) the seller had actual knowledge of the defective condition. Consequently, if this burden is met, absent certain exceptions, punitive damages are capped at the greater of two times the compensatory damages or $500,000.[16]

Punitive damages cannot be awarded in a civil action involving a drug or device if the drug or device which allegedly caused the claimant's harm: (1) was manufactured and labeled in relevant and material respects in accordance with the terms of approval issued by the Food and Drug Administration (F.D.A); and (2) was an over-the-counter drug or device marketed pursuant to applicable federal regulations. However these exceptions do not apply if the defendant withheld from the F.D.A. information known to be material and relevant to the harm suffered by the claimant or misrepresented information to the F.D.A.[17]

Additionally, a manufacturer or seller, other than a manufacturer of a drug or device, cannot be liable for exemplary or punitive damages if: (1) the product was designed, manufactured, packaged, labeled, sold or represented in relevant and material respects in accordance with the terms of approval; and (2) the product was in compliance with State or U.S. regulatory or statutory authority. However, the foregoing exceptions do not apply if the claimant establishes that the manufacturer or seller sold the product after the effective date of an order of a governmental agency that ordered the removal of the product from the market or withdrew approval of the product or in violation of applicable regulations, withheld or misrepresented to the government agency information material to the approval and that information is relevant to the harm.[18]

1 833 S.W.2d 52 (Tenn. 1992).
2 Tennessee Code Annotated Section 20-1-119.
3 *Banks v. Elks Club Pride of Tenn.*, 301 S.W.3d 214, 219-220 (Tenn. 2010).
4 Tennessee Code Annotated Section 29-28-102(6).
5 Tennessee Code Annotated Section 29-28-102(6).
6 Tennessee Code Annotated Section 29-28-106.
7 Tennessee Code Annotated Section 29-28-108.
8 Tennessee Code Annotated Section 29-28-102.
9 Tennessee Code Annotated Section 29-28-108.
10 Tennessee Code Annotated Section 29-28-105.
11 Tennessee Code Annotated Section 29-28-104.
12 Tennessee Code Annotated Section 29-28-105(d).
13 *Nye v. Bayer Cropscience, Inc.*, 347 S.W.3d 686, 704-705 (Tenn. S. Ct. 2011).
14 Tennessee Pattern Jury Instruction - Civil - 3.63.
15 Tennessee Code Annotated Section 29-11-102.
16 Tennessee Code Annotated Section 29-39-104(a) and (c).
17 Tennessee Code Annotated Section 29-39-104(d).
18 Tennessee Code Annotated Section 29-39-104(a) and (e).

Texas

By Jeremy J. Cook

Downs ♦ Stanford, P.C.
Austin, Texas & Dallas, Texas

Tel: 512.891.7771 (Austin)
Fax: 512.891.7772 (Austin)

Tel: 214.748.7900 (Dallas)
Fax: 214.748.4530 (Dallas)

Email: jcook@downsstanford.com
www.downsstanford.com

Allocation of Fault

In Texas, the apportionment of fault is governed by a host of statutes contained in Chapter 33 of the Texas Civil Practice and Remedies Code. In 2003, the Legislature amended Chapter 33 as part of a "sweeping" tort reform movement. The amended chapter applies to all actions filed after June 30, 2003.

Defendants are able to submit an apportionment question to the jury seeking an apportionment of fault among each claimant, each defendant, any settling person and any designated responsible third party, but only if the pleadings and evidence raise the issue of each person's liability.[1] A plaintiff's recovery is reduced by his percentage of fault,[2] and is barred altogether if his fault exceeds 50%.[3]

In all cases except those involving medical malpractice claims, a liable defendant is entitled to a settlement credit in the dollar-for-dollar amount of the sum of all settlements paid to the plaintiff (*pro tanto*).[4] In medical malpractice cases, a defendant is able to elect between a dollar-for-dollar credit or a percentage credit (reducing the plaintiff's recovery by the percentage equal to the sum of each settling person's percentage of responsibility; thus, *pro rata*),[5] but the defendant must do so prior to the submission of the case to the jury, and any conflicting elections among the defendants results in the application of the dollar-for-dollar credit.[6] In a dollar-for-dollar credit scenario, the credit merely places a cap on the plaintiff's recovery, and, therefore, it does not always result in a reduction of what the non-settling defendant will pay.[7] For example, if a jury awards $100,000 to the plaintiff and finds 15% fault against the non-settling defendant and 85% against settling defendants, who paid a total of $50,000 in settlements to the plaintiff, the non-settling defendant must pay its full $15,000 or 15% share of the damages, because the settlement credit will not reduce the plaintiff's total allowable recovery to beneath the non-settling defendant's amount owed.[8]

A defendant is liable only for his percentage of responsibility.[9] If, however, a defendant's fault exceeds 50%, or he acted with specific intent to harm others, acted in concert with another person and violated certain provisions of the Penal Code, thereby harming the plaintiff, he is also jointly liable for all of the damages sustained by the plaintiff, barring any reduction for the plaintiff's fault or settlement credits.[10]

Texas

A defendant may move the court for a designation of a responsible third party against whom an apportionment of fault can be made.[11] In 2003, the Legislature amended the statutory definition of "responsible third party" to include "any person who is alleged to have caused or contributed to causing… the harm… by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity that violates an applicable legal standard, or by any combination of these."[12] The amendment opened designations to persons not subject to the court's personal jurisdiction, persons whom the plaintiff could not sue (e.g., employers protected by the Worker's Compensation exclusive remedy), and insolvent/bankrupt persons. The statute precludes, however, the designation of any product seller entitled to indemnity under the Texas Products Liability Act.[13]

Procedurally, the motion must be filed before the 60th day before trial, absent good cause shown.[14] A plaintiff seeking to avoid the designation must object within 15 days of the motion being served, and establish that the defendant failed to plead sufficient facts in the motion as to the third party's alleged responsibility,[15] or, after an adequate time for discovery has lapsed, move to strike the designation on the basis that there is no evidence to support the defendant's allegations against the third party.[16] Importantly, the filing or granting of the motion does not impose liability on the third party, nor can it be used in any other proceeding.[17]

Of special import, Texas allows the designation of unknown responsible third parties, but only when the third party's conduct was criminal.[18] In addition to filing a timely motion, a defendant seeking to designate an unknown responsible third party must also, within 60 days after filing its original answer, amend its answer to allege the third party's criminal conduct and set forth all identifying characteristics of the unknown person.[19] Thus, as soon as possible in each case, counsel should determine whether the criminal conduct of an unknown third party might be involved and, if so, amend the answer to meet the statute.

As to cases commenced before September 1, 2011, the third party can be designated after the statute of limitations has run against it, and, worse yet, the plaintiff can then join the third party to the suit, notwithstanding that the limitations period has run.[20] For all actions filed on or after September 1, 2011, a defendant may obtain the designation of a responsible third party against whom the statute of limitations has run, but only if the defendant has timely disclosed that the third party may be designated.[21] Unlike before, however, a responsible third party cannot be joined to the suit after the limitations period has expired.[22]

Contribution

Contribution in tort cases is afforded by statute in Texas. A defendant who is jointly and severally liable to the plaintiff and pays an amount to the plaintiff greater than his percentage of responsibility has a right of contribution against the other liable defendants to the extent that they have not paid their percentages of responsibility.[23] There is no right of contribution, however, against a settling party,[24] and a settling party has no right to pursue contribution against any other party.[25]

Under the contribution statutes, a defendant may file his claim for contribution in the plaintiff's case against a "contribution defendant"; that is, any party "from whom any party seeks contribution with respect to any portion of damages for which that party may be liable, but from whom the claimant seeks no relief at the time of the submission."[26] When a contribution defendant is involved, i.e., the plaintiff does not amend its pleadings to add claims directly against the contribution defendant, there must be two separate apportionment inquiries submitted to the jury – one that seeks an apportionment among each claimant, each defendant, any settling party and any designated responsible third party; and another one that seeks apportionment only among each defendant and each contribution defendant.[27]

There is a split of authority as to whether a defendant against whom a judgment is obtained may file a subsequent or separate contribution action. Unfortunately, the Supreme Court of Texas has not decided this issue, but it has given an indication as to how it would hold if the issue was to be squarely presented to it. *In Ingersoll-Rand Co. v. Valero Energy Corp.*, the supreme court noted that the injury on which a contribution claim might be based does not arise until some liability is established by the rendering of a judgment.[29] Given the lack of clarity on this issue, the cautious practitioner will advise his or her client to bring its contribution claims within the claimant's case, where possible.

Texas

Non-Contractual Indemnity

Non-contractual (common law) indemnity is available in Texas in only very limited circumstances.[30] The Dallas Court of Appeals recently noted that, "Common law indemnity survives in Texas only in products liability actions to protect an innocent retailer in the chain of distribution and in negligence actions to protect a defendant whose liability is purely vicarious in nature."[31]

As to common law indemnity in the products liability context, such claims are wholly unnecessary, if not imprudent to assert, because in 1993 the Legislature enacted a statutory scheme providing indemnity to innocent sellers that shifts the burden of proof from the seller to the manufacturer. Common law indemnity requires the seller to establish that the manufacturer is liable or potentially liable to the plaintiff for the alleged product defect, and the manufacturer's liability must be "adjudicated or admitted."[32] Under Section 82.002 of the Texas Civil Practice and Remedies Code, a manufacturer now has a statutory duty to "indemnify and hold harmless a seller against loss arising out of a products liability action, except for any loss caused by the seller's [conduct] for which the seller is independently liable," and the manufacturer can only avoid the duty to indemnify by proving the seller's independent liability to the plaintiff.[33] One court of appeals has concluded that the new statutory duty is "fundamental policy in Texas."[34]

The statutory duty applies "without regard to the manner in which the underlying action is concluded," whether by judgment, settlement or dismissal.[35] Relying on this language from the statute, the Supreme Court of Texas held that the duty is triggered by the plaintiff's pleadings rather than by proof, and, on that reasoning, held that a manufacturer must indemnify a seller even when the seller did not actually sell the product in question.[36] The supreme court rejected, however, the argument that the underlying pleadings should also trigger the exception to the duty and held that a manufacturer must prove that the seller's conduct caused the seller's loss.[37]

In cases involving component part manufacturers and finished product manufacturers, the Supreme Court of Texas has held that each owes the statutory duty of indemnification to the other, such that if both are proven to be independently liable to the claimant then both claims fail, and if both are proven to be innocent, the statutory duties offset one another and neither will recover.[38] Given that the underlying pleadings trigger the duty, component part manufacturers and finished product manufacturers have litigated the issue of whether the component part or the finished product was at issue in the underlying action. In *GM v. Hudiburg Chevrolet, Inc.*, the Supreme Court of Texas held that for a component part manufacturer to be subject to the duty to indemnify, the underlying pleadings must "fairly allege" a defect in the component part itself and not merely a defect in the finished product of which the component was part.[39]

A seller that prevails on a claim for statutory indemnity is entitled to recover its entire loss from the underlying action – including attorneys' fees, court costs, litigation expenses and "reasonable damages" such as a settlement[40] – and its attorneys' fees, court costs, litigation expenses and any "reasonable damages" incurred in seeking to enforce its indemnification rights.[41]

There is no express statute of limitations for a statutory indemnity claim, and no appellate decision has commented on the subject. It is clear, however, from the statute's language that the indemnity claim can be brought after the underlying action has concluded.[42] Given that no other statute of limitations governs such claims, the four-year residual limitations statute probably applies.[43]

Texas

1 TEX. CIV. PRAC. & REM. CODE § 33.003(a).
2 *Id*. at 33.012(a).
3 *Id*. at § 33.001.
4 *Id*. at § 33.012 (b).
5 *Id*. at § 33.013(c).
6 *Id*. at § 33.012(d).
7 *Roberts v. Williamson*, 111 S.W.3d 113, 122-23 (Tex. 2003).
8 *Id*.
9 TEX. CIV. PRAC. & REM. CODE § 33.013(a).
10 *Id*. at § 33.013(b).
11 *Id*. at § 33.004(a).
12 *Id*. at § 33.011(6).
13 *Id*.
14 *Id*. at § 33.004(a).
15 *Id*. at § 33.004(f) & (g).
16 *Id*. at § 33.004(l).
17 *Id*. at § 33.004(i).
18 *Id*. at § 33.004(j).
19 *Id*.
20 *Id*. at § 33.004(e)(repealed by H.B. 274, §5.02, 82d Leg., eff. Sept. 1, 2011).
21 *Id*. at § 33.004(d).
22 *Id*. at § 33.004(e)(repealed by H.B. 274, §5.02, 82d Leg., eff. Sept. 1, 2011).
23 *Id*. at 33.015(a).
24 *Id*. at 33.015(d).
25 *Int'l Proteins Corp. v. Ralston-Purina Co.*, 744 S.W.2d 932 (Tex. 1988).
26 *Id*. at 33.016(a) & (b).
27 *Id*. at 33.016(c) & (d).
28 *Compare, Casa Ford, Inc. v. Ford Motor Co.*, 951 S.W.2d 865, 875 (Tex.App.—Texarkana 1997, pet. denied)(holding that a postjudgment contribution suit cannot be brought against a third party who was not a party to the original suit), with, In re Martin, 147 S.W.3d 453, 459-60 (Tex.App.—Beaumont 2004, orig. proceeding)(disagreeing with Casa Ford and asserting that there is no preclusion of a postjudgment contribution suit against a third party who was not a party to the original suit).
29 997 S.W.2d 203, 208 (Tex. 1999).
30 *Affordable Power, LP v. Buckeye Ventures, Inc.*, 347 S.W.3d 825, 833 (Tex.App.—Dallas 2001, no pet.).
31 *Id*.
32 *GM v. Hudiburg Chevrolet, Inc.*, 199 S.W.3d 249, 255-56 (Tex. 2006)
33 *Id*.
34 *Panatrol Corp. v. Emerson Elec. Co.*, 163 S.W.3d 182, 189 (Tex.App.—San Antonio 2005, no pet.).
35 TEX. CIV. PRAC. & REM. CODE § 82.002(e)(1).
36 *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 867 (Tex. 1999).
37 *Meritor Automotive, Inc. v. Ruan Leasing Co.*, 44 S.W.3d 86 (Tex. 2001).
38 *Hudiburg Chevrolet, Inc.*, 199 S.W.3d at 256-57.
39 *Id*. at 257.
40 TEX. CIV. PRAC. & REM. CODE § 82.002(b).
41 *Id*. at § 82.002(g).
42 *Id*. at § 82.002(e)(1)("The duty to indemnify… applies without regard to the manner in which the action is concluded.").
43 *Id*. at § 16.051.

Utah

By Laura H. Tanner

Winder & Counsel, PC
Salt Lake City, Utah

Tel: 801.322.2222
Fax: 801.322.2282

Email: ltanner@winderfirm.com
www.winderfirm.com

Allocation of Fault

Utah is a strict comparative negligence state. In general, a person seeking recovery may recover from any defendant or group of defendants whose fault, combined with the fault of persons immune from suit and non-parties to whom fault is allocated, exceeds the fault for the person seeking recovery.[1] A plaintiff may recover as long as the plaintiff's fault is less than the combined fault of all others that contributed to the injury, that is, less than fifty percent.[2] If the plaintiff's share of fault exceeds defendants', plaintiff recovers nothing.[3] Fault may be allocated against any person or entity determined by the fact finder to be at fault, whether that person or entity is a plaintiff, defendant, non-party, or a party immune from suit.[4] Parties immune from suit are defined by statute as an employer, immune from suit by virtue of the Workers Compensation Act, and a governmental entity or employee.[5] While a party who is immune from suit may be included among those whose fault is evaluated for purposes of apportionment, such apportionment does not subject an immune party to liability, it merely ensures no party is held liable for an amount of damages in excess of the amount attributable to that particular defendant.[6] However, under Utah law, if a trial court rules as a matter of law that a codefendant bears no liability, the fact finder may not consider that party when apportioning fault.[7]

In the products liability context, where the faults of both the plaintiff, through misuse, and the defendant, due to the defect, have united as concurrent proximate causes of an injury, both faults are to be considered in determining the relative burden each should bear for the injury they have caused.[8] In addition, fault apportionment applies to defendants in strict liability as well as those based in negligence in determining the amount of damages attributable to each.[9]

A trial court may, and when requested by any party, shall direct the jury, if any, to find separate special verdicts determining the total amount of damages sustained and the percentage of proportion of fault attributable to each person seeking recovery, to each defendant, to any person immune from suit, and to any other person who contributed to the alleged injury.[10] If the combined percentage or proportion of fault attributed to all persons immune from suit is less than 40%, the trial court shall reduce that percentage or proportion of fault to zero, and reallocate that percentage or

Utah

proportion of fault to the remaining parties for whom fault was initially attributed in proportion to the percentage of fault initially attributed to each by the fact finder.[11] After this reallocation, cumulative fault should equal 100%, with the persons immune from suit being allocated no fault.[12]

Generally, under Utah's comparative fault system, the doctrine of assumption of risk is no longer recognized as a total bar to recovery.[13] However, Utah has enacted a statutory exception to its comparative negligence statutes providing that a skier cannot recover from a ski area operator for injuries attributable to the inherent risks of skiing.[14] Inherent risks of skiing refer to those dangers or conditions which are an integral part of the sport of skiing, and can include, among other things, changing weather conditions, variations in terrain, and collisions with objects or other skiers.[15]

A release given by a person seeking recovery to one or more defendants does not discharge any other defendant unless the release so provides.[16] In order to apply to any other defendant, the release must contain language either naming the defendant or identifying the defendant with some degree of specificity in order to discharge that defendant from liability.[17]

Non-Contractual Indemnity/Contribution

Utah law is very clear in requiring all parties, other than those immune from suit, to whom fault could be allocated to be joined in the action. Each defendant in a negligence lawsuit is required to file a cross-claim against every other defendant, and, in turn answer the cross-claims of every other defendant simply to preserve the right to argue comparative fault.[18] A party cannot bring a subsequent apportionment action against a non-party, as that would be tantamount to a claim for contribution, which has been abolished in Utah.[19] Further, a defendant cannot seek allocation of fault to a non-party, but must name that person by means of a third party complaint.[20] Defendants wishing to have their fault compared with non-parties must join such nonparties or bear the burden if such people cannot be joined.[21] A defendant's right to oppose a co-defendant's motion for summary judgment is lost as well unless the defendant has filed a cross claim for apportionment.[22] A failure by defendant to file a claim for apportionment in the initial tort litigation may prevent that party from ever seeking a comparison of fault with those of another tortfeasor.[23] Thus, cross-claims between codefendants for comparative fault purposes become mandatory, even despite the general rule that cross claims are permissive may be brought in subsequent actions.[24]

As with other jurisdictions, if a plaintiff was injured while using a product in the course and scope of employment, the plaintiff's remedy against the employer is generally limited to workers' compensation benefits.[25] An employer's proportionate fault must be determined even though the employer is immune from suit under the Worker's Compensation Act.[26] Such apportionment does not subject the employer to liability, but merely ensures that no party is held liable for the amount of damages in excess of the amount of fault attributable to it.[27] The Workers Compensation Act, however, does not preclude the employee injured in the course of his employment from suing negligent third parties for damages.[28] Neither does the Act prohibit an employee from suing an employer, and losing statutory immunity from suit, for injuries resulting from the willful or intentional tortious act of an employer or a fellow employee.[29]

Indemnity and Contribution Rights

Pursuant to Utah statute, there is no joint and several liability, and no defendant is entitled to contribution from any other person.[30] Specifically, the maximum amount for which a defendant may be liable to any person seeking recovery is that percentage or proportion of the damages equivalent to the percentage or proportion of fault attributable to that defendant.[31] Because the Utah legislature eliminated joint and several liability through the Utah Liability Reform Act, recovery of damages under the Product Liability Act are proportionate to the percentage of fault attributable to each defendant as well.[32]

Because suits for contribution have been banned pursuant to Utah law, in the consumer products context, a passive seller cannot be apportioned the strict liability attributable to a manufacturer.[33] The strict liability "fault" in such matters lies solely with the manufacturer and cannot be apportioned both to the passive seller and the manufacturer.[34] Unlike other states which explicitly prohibit strict liability and other causes of action against passive sellers unless the product manufacturer is unreachable or unable to satisfy judgment,[35] Utah has no such explicit statutory exclusion.[36] However, to the extent strict liability is

Utah

alleged, the manufacturer is named as a party, and there are no other bases of fault for the passive seller, i.e. negligence, an action may not be maintained against passive seller.[37]

Effect of Settlement

Because of Utah's strict adherence to allocation of fault, and lack of any need for contribution or indemnification determinations, settlement with one or more defendants has little effect on the rights of a party to recover or on the remaining defendants to an action. A person seeking recovery may recover from any defendant or group of defendants whose fault, combined with the fault of persons immune from suit and nonparties to whom fault is allocated exceeds the fault of the person seeking recovery.[38] The fact finder may allocate fault to any person for whom there is a factual and legal basis to allocate fault.[39] Parties may seek to settle claims against certain defendants without jeopardizing their claims against others. Where a defendant or defendants are dismissed through settlement prior to trial, it is appropriate for the trial court to determine, or instruct the jury to determine, whether the original defendants were negligent and the appropriate allocation of fault to these nonparties.[40] The remaining defendants would be liable only to their portion of the damages attributable to their proportion of fault as in any other case. Utah law does not contemplate reimbursement or recalculation of settlement amounts paid should the fact finder ultimately find the settling defendant's proportion of fault would potentially result in a lower damages payment.

Where a plaintiff and one or more defendants in a multi-defendant action enter into a settlement agreement, the parties must promptly notify the court and the other parties of the agreement and its terms.[41] Where the action is tried to a jury, the court shall, upon the motion of a party, disclose the existence and basic content of the agreement to the jury unless the court finds such disclosure will create a substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.[42] The purpose of such instruction goes not to the question of liability, but rather only to inform the jury the resulting change in adversarial alignment of the parties could be considered in evaluating the credibility of testimony.[43]

1 UTAH CODE ANN. §78B-5-81.
2 *Nixon v. Salt Lake City Corp.*, 898 P.2d 265 (Utah 1995)
3 *Interwest Const. v. Palrrer*, 923 P.2d 1350 (Utah 1994)
4 Id. *See also Field v. Boyer Co., L.C.*, 952 P.2d 1078 (Utah 1998)
5 UTAH CODE ANN. § 78B-5-817
6 *Sullivan v. Scoular Grain Co. of Utah*, 853 P.2d 877 (Utah 1993)
7 *National Service Industries' Inc. v. B.W. Norton Mfg. Co., Inc.*, 937 P.2d 551 (Utah Ct. App. 1997)
8 *Mulherin v. Ingersoll-Rand Co.*, 628 P.2d 1301, 1303 (Utah 1981)
9 Id. at 1304. *See also Sanns v. Butterfield Ford*. 94 P.3d 301, 306 (Utah Ct. App. 2004).
10 UTAH CODE ANN. § 78B-5-819
11 *Id*.
12 *Id*.
13 *Hale v. Beckstead*, 116 P.3d 263 (Utah 2005)
14 UTAH CODE ANN. § 78B-4-403
15 UTAH CODE ANN. § 78B-4-402
16 UTAH CODE ANN. § 78B-5-822
17 *Child v. Newsorr*, 892 P.2d 9, 12 (Utah 1995)
18 *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Queen Carpet Corp.*, 5 F.Supp.2d 1246 (D.Utah. 1998) (applying Utah law)
19 *Nat'l Ser. Indus. V B.W. Norton Mfg. Co.*, 937 P.2d 551, 555-56 (Utah Ct. App. 1997)
20 *Field v. Boyer Co., LC*, 952 P.2d 1078, 1082 (Utah 1998)
21 *Id*.
22 P*acker v. National Serv. Indus., Inc.*, 909 P.2d 1277, 1278 (Utah Ct. App. 1996)
23 *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Queen Carpet Corp.*, 5 F.Supp.2d 1246, 1251 (D. Utah 1998) (applying Utah law)
24 UTAH RULES CIVIL PROCEDURE 13(f). *See also Nat'l. Serv. Indus., Inc. v. B.W. Norton Mfg. Co., Inc.*, 937 P.2d 551, 556 (Utah Ct. App. 1997)
25 UTAH CODE ANN. § 34A-2-105.
26 *Sullivan v. Scoular Grain Co. of Utah*, 853 P.2d 877 (Utah 1993)
27 *Id. See also Erickson v. Salt Lake City Corp.*, 858 P.2d 995 (Utah 1993)
28 *Shell Oil Co. v. Brinkerhoff-Signal Drilling Co.*, 658 P.2d 1187, 1191 (Utah 1983)
29 *Sheppick v. Albertsons, Inc.*, 922 P.2d 769, 773-74 (Utah 1996)
30 UTAH CODE ANN. § 78B-5-820
31 *Id*.
32 *Yirak v. Dan's Supermarkets, Inc.*, 188 P.3d 487 (Utah 2008)
33 *Sanns v. Butterfield Ford*, 94 P.3d 301, 307 (Utah Ct. App. 2004)
34 *Id*.
35 *See e.g.*, IDAHO CODE § [6-1407] 6-1307 (4) (a) (b) (2004) (stating seller liable if manufacturer's not subject to service of process or is insolvent).
36 *Sanns v. Butterfield Ford*, 94 P.3d 301, 306 (Utah Ct. App. 2004)
37 *Id*. at 307.
38 UTAH CODE ANN. § 78B-5-818
30 *Id*.
40 *Richardson v. Navistar Inter. Trans. Corp.*, 8 P.3d 263, 265 (Utah 2000) manufacturer's not subject to service of process or is insolvent).
41 *Slusher v. Ospital*, 777 P.2d 437, 444 (Utah 1989)
42 *Id*. (citation omitted)
43 *Id*. at 442, fn. 9.

Vermont

By David W. Zizik

Zizik Professional Corporation
Westwood, Massachusetts

Tel: 781.320.5401
Fax: 781.658.2532

Email: dzizik@ziziklaw.com
www.ziziklaw.com

Allocation of Fault

Under Vermont's modified comparative negligence statute, contributory negligence shall not bar recovery in an action by any plaintiff to recover damages for negligence, if the negligence was not greater than the causal total negligence of the defendant.[1] If the plaintiff is more than fifty percent at fault, recovery is barred. The damages will be diminished by a general verdict in proportion to the amount of negligence attributed to the plaintiff.[2] Where there is recovery allowed against more than one defendant, each defendant is liable for the proportion of the total dollar amount awarded as damages, calculated as the ratio of the total amount of his or her causal negligence to the amount of causal negligence attributed to all defendants against whom recovery is allowed.[3]

Contribution and Indemnity in Vermont

In Vermont, there is no right of contribution among joint tortfeasors, so each defendant is responsible for its proportionate share of the defendants' collective liability, so long as the collective liability of the defendants exceeds the plaintiff's negligence.[4]

Also, under Vermont law, a right to indemnity exists by implication or through an express agreement. According to the Vermont Supreme Court, "[a]n obligation of indemnity has been imposed where the relationship of the parties is such that the obligations of the alleged indemnitor extend not only to the injured person, but also to the indemnitee."[5] The law imposes no implicit obligation upon the purchaser of a product to indemnify the manufacturer.[6] The Vermont Supreme Court goes on further to state, "under Vermont law, one is not entitled to indemnity from a joint tortfeasor merely because one may be free from negligence, or another is more at fault."[7]

1 Vt. Stat. Ann. tit. 12, § 1036 (2012).
2 *Id.*
3 *Id.*
4 *Howard v. Spafford*, 321 A.2d 74, 74-75 (Vt. 1974).
5 *Hiltz v. John Deere Indus. Equip. Co.*, 497 A.2d 748, 751 (Vt. 1985) (1985) (citing Morris v. American Motors Corp., 459 A.2d 968, 974 (Vt. 1983)).
6 *Id.*
7 *Id.*

Virginia

By William F. Demarest, III

Goodman Allen & Filetti, PLLC
Glen Allen, Virginia

Tel: 804.346.0600
Fax: 804.346.5954

Email: wdemarest@goodmanallen.com
www.goodmanallen.com

Allocation of Fault

In Virginia, if separate and independent acts of negligence of two parties directly cause a single indivisible injury to a third person, either or both wrongdoers are responsible for the whole injury.[1] Thus, in determining the liability of a person whose concurrent negligence results in such an injury, comparative degrees of negligence shall not be considered and both wrongdoers are equally liable irrespective whether one may have contributed in a greater degree to the injury.[2]

When there are multiple, divisible injuries covered by a compromise settlement, the finder of fact is required to attempt an allocation of the amount in contribution a wrongdoer must pay for his negligent act or acts causing one or more of those divisible injuries.[3]

At common law, a plaintiff's release of one tortfeasor released all joint tortfeasors.[4] Virginia has since amended the common law rule by statute so that a plaintiff may settle selectively with some tortfeasors without forfeiting remedies against others under certain specific conditions.[5]

Such a release or covenant not to sue may be binding even if there is only an oral or written agreement to later memorialize a formal release or covenant not to sue, as long as the parties intended that the terms agreed on should merely be put into form.[6] However, if an oral or written agreement is made "subject to" the execution of a formal release or convent not to sue, the release or covenant not to sue would be unenforceable if no formal release or covenant not to sue has been executed.[7]

Any amount recovered against any or all of the other tortfeasors will be reduced by the greater of the amount stipulated by the release or covenant not to sue or the amount of consideration paid, whichever is greater.[8]

Under Virginia law, contributory negligence is a complete bar to recovery on a negligence claim (but not a claim of breach of warranty).[9] Negligence is not compared between the parties to reduce recovery.[10] The test is not whether the plaintiff actually knew of the danger confronting him, but whether in the exercise of reasonable care he should have known he was in a situation of peril.[11] The standard is an objective one, i.e., whether the plaintiff acted for his own safety as a reasonable person would have acted under similar circumstances.[12]

Virginia

Contribution

The right to contribution is based on the equitable principle that where two or more persons are subject to a common burden it shall be borne equally.[13] A right of contribution against a joint tortfeasor lies when one wrongdoer has paid or settled a claim not involving moral turpitude for which other wrongdoers also are liable.[14]

However, before contribution may be had it is essential that a cause of action by the person injured lie against the alleged wrongdoer from whom contribution is sought.[15] While contribution will lie if the injured party's cause of action is not presently enforceable but was enforceable at some time in the past, contribution is unavailable if the injured party never had an enforceable cause of action against the target of the contribution claim.[16]

The party seeking contribution has the burden of proving that the concurring negligence of the remaining tortfeasors was a proximate cause of the injury for which damages were paid.[17] The remaining tortfeasors may present defenses in a contribution action, including that the settling tortfeasor was not negligent, that the remaining tortfeasors were not concurrently negligent with the settling tortfeasor, that that remaining tortfeasors' negligence was not a proximate cause of the damages compromised, or that the settlement agreement was unreasonable, excessive, or made in bad faith.[18]

A tortfeasor who enters into a release or covenant not to sue with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury, property damage or wrongful death is not extinguished by the release or covenant not to sue.[19] Application of this law is not limited to specific "joint tortfeasors," but also to those vicariously liable as employers, masters, and principals.[20] However, a settling tortfeasor can seek contribution from other tortfeasors who were also released.[21] The settling tortfeasor cannot recover any amount paid by him that is in excess of what was reasonable.[22]

Non-Contractual Indemnity

Indemnity is distinguishable from contribution in that contribution springs from the equitable theory that where there is a common burden, as between joint tortfeasors, there should be a common right, while indemnity springs from an express or implied contract.[23] While indemnity is traditionally based in contract, the Supreme Court of Virginia has recognized that claims for indemnity may arise in non-contractual cases.[24] For example, an implied warranty of merchantability would suffice to create an implied contract for indemnity.[25] Nevertheless, a defendant's active negligence precludes a claim of indemnification.[26]

Equitable indemnification arises when a party without personal fault is nevertheless legally liable for damages caused by the negligence of another; the innocent party is allowed to recover from the negligent actor the amounts paid to discharge the liability.[27] A prerequisite to recovery based on equitable indemnification is the initial determination that the negligence of another person caused the damage.[28] Further, it is uniformly held that there can be no recovery on an indemnity obligation where there has been no actual loss or damage.[29]

A defendant may recover attorneys' fees from a third party that breached a duty owed if the defendant was required to act in the protection of its interests by bringing or defending an action against a plaintiff.[30]

The two-year statute of limitations for personal injury actions is distinct from the three-year limitations period for contribution actions, based upon implied contracts.[31] Actions for contribution or indemnification do not accrue until after the contributee or indemnitee has paid or discharged the obligation.[32]

Virginia

1 *Sullivan v. Robertson Drug Co.*, 639 S.E.2d 250, 255 (Va. 2007) (citing *Maroulis v. Elliott*, 151 S.E.2d 339, 345 (Va. 1966)); *Murray v. Smithson*, 48 S.E.2d 239, 241 (Va. 1948).
2 *Sullivan*, 639 S.E.2d at 255 (citing *Maroulis*, 151 S.E.2d at 344); *Van Roy v. Whitescarver*, 89 S.E.2d 346, 352 (Va. 1955).
3 *Sullivan*, 639 S.E.2d at 255; *Tzewell Oil Co. v. United Virginia Bank*, 413 S.E.2d 611, 622 (Va. 1992).
4 *Fairfax Hosp. Sys. V. Nevitt*, 457 S.E.2d 10, 12 (Va. 1995) (quoting *Wright v. Orlowski*, 235 S.E.2d 349, 352 (Va. 1977).
5 Va. Code §8.01-35.1; *Nevitt*, 457 S.E.2d at 12.
6 *Golding v. Floyd*, 539 S.E.2d 735, 737 (Va. 2001) (quoting *Snyder-Falkinham v. Stockburger*, 457 S.E.2d 36, 41 (Va. 1995)).
7 *Golding* 539 S.E.2d at 737 (Va. 2001) (citing *Boisseau v. Fuller*, 30 S.E. 457, 458 (Va. 1898)).
8 Va. Code §8.01-35.1(A)(1).
9 *Smith v. Va. Elec. & Power Co.*, 129 S.E.2d 655, 659 (Va. 1963); *Ford Motor Co. v. Bartholomew*, 297 S.E.2d 675, 680-681 (Va. 1982) and Jones v. Ford Motor Co., 559 S.E.2d 592, 605 (Va. 2002) (citing *Wood v. Bass Pro Shops*, 462 S.E.2d 101, 103 (Va. 1995)).
10 *Litchford v. Hancock*, 352 S.E.2d 335, 337 (Va. 1987).
11 *Reed v. Carlyle & Martin, Inc.*, 202 S.E.2d 874, 876, cert. denied, 419 U.S. 859 (Va. 1974).
12 *Hoar v. Great E. Resort Mgmt.*, 506 S.E.2d 777, 787 (Va. 1998).
13 *Sullivan*, 639 S.E.2d at 255; *Jewel Tea Co.*, 118 S.E.2d at 646.
14 Sullivan, 639 S.E.2d at 255 (citing *Nationwide Mut. Ins. V. v. Minnifield*, 196 S.E.2d 75, 76 (Va. 1973)); See also Va. Code §8.01-34.
15 V*a. Elec. & Power Co. v. Wilson*, 277 S.E.2d 149, 150 (Va. 1981).
16 *Pulte Home Corp. v. Parex, Inc.*, 579 S.E.2d 188, 194 (Va. 2003) (citing *Gemco-Ware, Inc. v. Rongene Mold & Plastics Corp.*, 360 S.E.2d 342, 344 (Va. 1987)).
17 *Sullivan*, 639 S.E.2d at 255 (citing *Jewel Tea Co.*, 118 S.,E.2d at 649).
18 *Id*. at 255 (citing *Jewel Tea Co.*, 118 S.,E.2d at 649 (Va. 1961)).
19 Va. Code §8.01-35.1(B).
20 *Thurston Metals & Supply Co. v. Taylor*, 339 S.E.2d 538 (Va. 1986).
21 *Sullivan*, 639 S.E.2d at 256; Va. Code §8.01-35.1.
22 *Sullivan*, 639 S.E.2d at 256.
23 *Whittle v. Timesavers, Inc.*, 614 F. Supp. 115, 118 (W.D. Va. 1985) (citing *Moretz v. General Electric Company*, 170 F. Supp. 698, 704 (W.D.Va. 1959)).
24 *Philip Morris, Inc. v. Emerson*, 368 S.E.2d 268, 285 (Va. 1988).
25 *Whittle*, 614 F. Supp. at 118.
26 *Emerson*, 368 S.E.2d at 285.
27 *Carr v. Home Ins. Co.*, 463 S.E.2d 457, 458 (Va. 1995) (citing *Maryland Casualty Co. v. Aetna Casualty & Surety Co.*, 60 S.E.2d 876, 879 (Va. 1950); *McLaughlin v. Siegel*, 185 S.E. 873, 874 (Va. 1936)).
28 *Carr*, 463 S.E.2d at 458.
29 *Richmond v. Branch*, 137 S.E.2d 882, 886 (Va. 1964).
30 *RML Corp v. Lincoln Window Prods.*, 67 Va. Cir. 545, 567 (Va. Cir. Ct. 2004) (citing *Patel v. Anand, L.L.C.*, 564 S.E.2d 140, 144 (Va. 2002); *Prospect Development Co. v. Bershader*, 515 S.E.2d 291, 301 (Va. 1999); *Fidelity Nat'l Ins. Co. v. Southern Heritage Ins.*, 512 S.E.2d 553, 557-58 (Va. 1999); *Owen v. Shelton*, 277 S.E.2d 189, 192 (Va. 1981); *Hiss v. Friedberg*, 112 S.E.2d 871, 875-76 (Va. 1960)).
31 *Gemco-Ware*, 360 S.E.2d at 345; See also Va. Code §8.01-243(A); See also Va. Code §8.01-246(4).
32 Va. Code §8.01-249(5)

Washington

By D. Jeffrey Burnham

Johnson, Graffe, Keay, Moniz & Wick, LLP
Seattle, Washington & Tacoma, Washington

Tel: 206.223.4770
Fax: 206.386.7344

Tel: 253.572.5323
Fax: 253.572.5413

Email: djburnham@jgkmw.com
www.jgkmw.com

Allocation of Fault

Washington is a comparative fault state, and a plaintiff's damages thus may be reduced by his or her percentage of fault.[1] Moreover, parties may claim allocation to parties and to non-parties at fault.

Washington has generally abolished joint and several liability.[2] Negligent tort-feasors are thus proportionately liable only for their share of the total fault. Joint and several liability is applied against defendants "against whom judgment is entered" only when there is a judgment (1) where the plaintiff was not at fault; (2) at-fault parties were acting in concert; or (3) the tort-feasor was an agent of the defendant.[3] In addition, if the cause of action relates to "hazardous substances or solid waste disposal sites", defendants can be held jointly and severally liable.[4] A defendant who claims a non-party is at fault may raise an "empty chair" defense, and fault may be allocated to the non-party at trial. A plaintiff may not recover the percentage of fault assigned to that non-party by the trier of fact.[5] The "empty chair" burden of proof lies with the defendant asserting it.

A defendant who is jointly and severally liable may seek contribution from other liable parties. (see *Non-Contractual Contribution section*, below)

Negligent defendants, even if jointly and severally liable, are not liable for damages from intentional acts or omissions of any other party.[6] Damages resulting from intentional actions must be segregated by the trier of fact.[7] Even where damages arising from negligence and intentional actions are virtually inseparable (such as abuse or failure to report the abuse[8]), the trier of fact must keep them separate (not allocate fault).[9]

The contributory fault of a claimant diminishes the amount he or she is awarded, but does not bar recovery.[10] In determining whether a person has contributory negligence, the inquiry is whether that person failed to use ordinary care or acted as a reasonably careful person would have under the existing facts or circumstances.[11] Contributory negligence and comparative fault is ordinarily a question of fact.[12]

Washington courts have been careful not to limit the applica¬tion of comparative fault.[13] Indeed, the language of RCW 4.22.070(1) is broad, applying to "all actions involving

Washington

fault of more than one entity." However, allocation of fault extends to non-immune entities only; a trier of fact is not permitted to allocate fault to immune entities.[14]

Non-Contractual Contribution

Generally, Washington allows only limited contribution actions. First, it has abolished common law indemnity, replacing it with a right of contribution based upon comparative fault.[15] An action to enforce equitable rights to contribution may be brought in the form of a cross-complaint filed in the plaintiff's action or in a separate action (within one year).

However, contribution is only permissible among defendants "against whom judgment is entered" and who are jointly and severally liable.[16] RCW 4.22.040 states that a settling employer may seek contribution from its tort-feasor employee.[17] The courts have carefully excluded settling defendants' consumer protection act claims that seek recovery from after another tort-feasor, because they are simply contribution claims in disguise. Absent a contractual indemnity, contribution claims are not allowed for settling defendants.[18] An indemnity action accrues, however, when a party seeking indemnity pays or "is legally adjudged obligated to pay" damages to a third party, and where a legal duty exists between non-joint tortfeasors.[19]

If a claimant was injured while using a product within the scope of his employment, the plaintiff's remedy against his employer is exclusively limited to workers' compensation benefits.[20] The judgment for the injured plaintiff/employee is reduced by the employer's comparative fault, up to the amount of workers' compensation benefits paid.[21]

The Washington Supreme Court has noted, regarding tender requirements, that "the insurer who seeks contribution does not sit in the place of the insured and cannot tender a claim to the other insurer." Rather, "if the insured has not tendered a claim to an insurer prior to settlement or the end of trial, the other insurers cannot recover in equitable contribution against that insurer."

Statutes Affecting Indemnity and Contribution Rights

RCW 4.22.040(3) states: "The common law right of indemnity between active and passive tort feasors is abolished…." Rather, per RCW 4.22.040(1), "[a] right of contribution exists between or among two or more persons who are jointly and severally liable upon the same indivisible claim for the same injury, death or harm, whether or not judgment has been recovered against all or any of them." If settlement extinguishes the claim and is reasonable, contribution may be pursued against a non-settling party.[23] Further effects of settlement, and the lack of release for non-settling parties, is found in RCW 4.22.060 (see below). The statute of limitations is one year from date of judgment or settlement, per RCW 4.22.050.

Significantly, "fault" does not include intentional tort-feasors. Rather, the legislature has defined it as "acts or omissions, including misuse of a product, that are in any measure negligent or reckless toward the person or property of the actor or oth¬ers, or that subject a person to strict tort liability or liability on a product liabil¬ity claim."[24] Thus, Washington requires allocation of fault in any tort case in which "fault" is alleged, includ¬ing product liability cases.[25] Joint and several liability, as well as allocation, however, does not apply to an intentional tort-feasor; such defendants cannot seek allocation of fault or contribution from negligent tort-feasors.[26]

The statute (RCW 4.22, *et seq*.) discharging all liability for contribution (after release, covenant not to sue, covenant not to enforce judgment, or a similar agreement entered into by a claimant and a person liable) extinguishes any implied contractual indemnity obligation of a settling defendant. The legislative intent is to release settling defendants from further liability.[27]

Washington

Effect of Settlement on Contribution Rights

RCW 4.22.060(2) releases a settling defendant from all indemnity and contribution liability, with the sole exception of contractual indemnity. The effect of settlement begins with the statutory provision protecting both the settling party (consistent with Washington's legislative and judicial encouragement of settlements), and the non-settling party (by allowing notice to all parties and reasonableness hearings), if necessary:

> (1) A party prior to entering into a release, covenant not to sue, covenant not to enforce judgment, or similar agreement with a claimant shall give five days' written notice of such intent to all other parties…. The notice shall contain a copy of the proposed agreement. A hearing shall be held on the issue of the reasonableness of the amount to be paid with all parties afforded an opportunity to present evidence…
>
> (2) A [settlement] entered into by a claimant and a person liable discharges that person from all liability for contribution, but it does not discharge any other persons liable upon the same claim unless it so provides. However, the claim of the releasing person against other persons is reduced by the amount paid….
>
> (3) A determination that the amount paid for a [settlement] was unreasonable shall not affect the validity of the agreement between the released and releasing persons nor shall any adjustment be made in the amount paid between the parties to the agreement.

RCW 4.22.060. The courts have made it clear, however, that the offset allowed by RCW 4.22.060 applies only to jointly and severally liable defendants.[28] Because the non-settling defendant is not liable in any way for the settling defendant's share (no joint and several liability), the non-settling defendant is not entitled to any offset or contribution. Id. Thus, if the case goes to trial, he must properly plead and assert an "empty chair" against the settling defendant to attempt to reduce his share of damages.[29]

1 *Smith v. Fourre*, 71 Wash. App. 304, 858 P.2d 276 (1993).
2 RCW 4.22.070(1).
3 *Yong Tao v. Heng Bin Li*, 140 Wash. App. 825, 166 P.3d (2008).
4 RCW 4.22.070(3)(a); *Coulter v. Asten Group, Inc.*, 135 Wash. App. 613, 146 P.3d 444 (2006).
5 RCW 4.22.070.
6 RCW 4.22.070(1)(b).
7 T*egman v. Accident & Medical Investigations, Inc.*, 150 Wn.2d 102, 75 P.3d 497 (2003).
8 *Doe v. Corporation of President of Church of Jesus Christ of Latter-day Saints*, 141 Wash. App. 407, 167 P.3d 1193 (2007).
9 *Rollins v. King County Metro Transit*, 148 Wash. App. 370, 199 P.3d 499 (2009) (approving a jury instruction to assist the jury in such segregation of damages).
10 RCW 4.22.005.
11 *Huston v. First Church of God*, 46 Wash. App. 740, 732 P.2d 173 (1987).
12 *Baughn v. Malone*, 33 Wash. App. 592, 656 P.2d 1118 (1983).
13 *Hiner v. Bridgestone/Firestone*, 138 Wn.2d 248, 978 P.2d 505 (1999).
14 *Edgar v. City of Tacoma*, 129 Wn.2d 621, 919 p.2d 1236 (1996).
15 RCW 4.22.040; *Sabey v. Howard Johnson & Co.*, 101 Wash. App. 575, 588-89, 5 P.3d 730 (2000). Implied indemnity claims are allowed, however, when advertising or other statements create warranties. *Central Washington Refrigeration, Inc. v. Barbee*, 133 Wn.2d 509, 946 P.2d 760 (1997).
16 *Kottler v. State*, 136 Wn.2d 437, 963 P.2d 834 (1998) (settling parties may not seek contribution from other parties).
17 *Kirk v. Moe*, 114 Wn.2d 550, 789 P.2d 84 (1990).
18 *Toste v. Durham Bates Agencies, Inc.*, 116 Wash. App. 516, 67 P.3d 506 (2003); *Washington State Physicians Ins. Exch. v. Fisons*, 122 Wn.2d 299, 858 P.2d 1054 (1993).
19 *Sabey v. Howard Johnson & Co.*, 101 Wash. App. 575, 5 P.3d 730 (2000).
20 RCW 51.04.010; *Minton v. Ralston Purina, Co.*, 146 Wn.2d 385, 47 P.3d 556 (2002).
21 *Clark v. Pacificcorp*, 118 Wn.2d 167, 822 P.2d 162 (1991).
22 *Mutual of Enumclaw Ins. V. USF Ins.*, 164 Wash.2d 411, 421, 191 P.3d 866 (2008).
23 RCW 4.22.040(2).
24 RCW 4.22.015.
25 *Lundberg v. All-Pure Chem. Co.*, 55 Wash. App. 181, 777 P.2d 15 (1989) ("The defense of contributory fault applies to product liability claims in the same way that it applies to other cases").
26 *Tegman v. Accident & Medical Investigations, Inc.*, 150 Wn.2d 102, 75 P.3d 497 (2003).
27 *Toste v. Durham & Bates Agencies, Inc.*, 116 Wash. App. 516, 67 P.3d 506 (2003).
28 *Waite v. Morisette*, 68 Wash. App. 521, 843 P.2d 1121 (1993).
29 *Adcox v. Children's Orthopedic Hospital*, 123 Wn.2d 15, 864 P.2d 921 (1993).

West Virginia

By William F. Demarest, III

Goodman Allen & Filetti, PLLC
Glen Allen, Virginia

Tel: 804.346.0600
Fax: 804.346.5954

Email: wdemarest@goodmanallen.com
www.goodmanallen.com

Allocation of Fault

West Virginia has established a three step process the jury makes in allocating fault among the various parties. First, the jury must determine whether the defendants in the case are liable to the plaintiff and state the gross amount of damages for the plaintiff.[1] A defendant's negligence need only be one of the efficient causes of the plaintiff's injuries, not the sole cause.[2]

Second, the jury must determine whether the plaintiff's percentage of contributory negligence bars recovery.[3] West Virginia has adopted the doctrine of comparative negligence– "a party is not barred from recovering damages in a tort action so long as his negligence or fault does not equal or exceed the combined negligence or fault of the other parties involved in the accident."[4] Product liability law in West Virginia is based upon strict liability[5]; however, the affirmative defense of comparative contributory negligence is available in strict liability, but cannot be based upon a failure to discover or guard against the product's defect.[6]

The plaintiff's contributory negligence must be compared to the negligence of all tortfeasors who contributed to the accident, not just the named defendants.[7] The jury considers the fault of the joint tortfeasors as a whole and does not at this point make a comparison of the individual defendant's negligence.[8] If the plaintiff's negligence or fault does not equal or exceed that of the other tortfeasors, the trial court will then reduce the damages award by the amount of the plaintiff's percent of fault.[9]

West Virginia has repeatedly reinforced and emphasized that defendants are jointly and severally liable. Therefore, the plaintiff can elect to sue one or more of the joint tortfeasors and seek payment after judgment from any of the defendants who is able to pay, regardless of that defendant's degree of fault.[10]

Contribution

The third step the jury may make is to determine the degree of fault of the individual defendants for purposes of comparative contribution.[11] However, "[t]he right of comparative contribution is not automatic but must be requested by one of the defendants."[12] Absent a defendant's request for comparative contribution, all defendants found

West Virginia

liable to the plaintiff share in the total judgment on a pro rata basis.[13] Thus, a jury does not always enter into this third step in allocating fault.

"Contribution is the right of one who owes a joint obligation to call upon his fellow obligors to reimburse him if compelled to pay more than his proportionate share of the obligation."[14] The right to contribution arises any time one tortfeasor pays or if found liable will pay more than its percentage of fault.[15] Contribution is not limited to cases of joint negligence but arises whenever tortfeasors share a common obligation to plaintiff, regardless of the theory of liability.[16] A defendant's right to seek contribution does not alter the plaintiff's right to joint and several liability against the defendants.[17]

West Virginia recognizes a statutory right of contribution[18] and an "inchoate right to contribution".[19] A statutory right to contribution arises only among parties found jointly liable in a judgment. An inchoate right to contribution arises when a joint tortfeasor is not a party to the action. A defendant exercises its inchoate right to contribution by "implead[ing] one [a third party] who is or may be liabile to him for all or part of the plaintiff's claim" under Rule 14 of the West Virginia Rules of Civil Procedure.[20] The Supreme Court of Appeals of West Virginia has expressly held that a tortfeasor "may not pursue a separate cause of action against a joint tortfeasor for contribution after judgment has been rendered in the underlying case, when that joint tortfeasor was not a party in the underlying case and the defendant did not file a third-party claim pursuant to Rule 14(a) of the West Virginia Rules of Civil Procedure."[21] Because a defendant's exercise of a right to contribution requires impleading a party into a single action, if a tortfeasor enters into a settlement with the injured party, it cannot subsequently seek contribution in a separate action.[22] The impleading party may assert any theory of liability against the impleaded party that the plaintiff could have asserted.[23]

West Virginia recognizes comparative contribution between tortfeasors based upon their relative degrees of fault or negligence.[24] In order to allocate the damages between the joint tortfeasors, a defendant must request "special interrogatories pursuant to Rule 49(b) of the West Virginia Rules of Civil Procedure."[25] Obviously, if a defendant is not guilty of primary negligence, it is not liable for contribution.[26] While the defendant can have the jury allocate its degree of fault, it cannot have a jury determine what portion of the plaintiff's injuries were caused by its wrongdoing.[27]

If a tortfeasor enters into a settlement with the plaintiff prior to judgment, the tortfeasor will ordinarily be relieved of liability to the other tortfeasors for contribution. However, the settlement must be made in good faith and the amount of the settlement must be disclosed to the trial court.[28] The disclosure of the amount of the settlement does not require disclosure of the settling party's identity.[29] A non-settling party wishing to challenge the settlement has the burden of showing the settlement was not made in good faith by "clear and convincing evidence."[30] That is because settlements "are presumptively made in good faith."[31] In determining whether a settlement was made in good faith, "the chief consideration is whether the settlement arrangement substantially impaired the remaining defendants from receiving a fair trial."[32] Only upon a showing of corrupt intent (e.g., collusion, dishonesty, fraud, or other tortious conduct) by the settling plaintiff and tortfeasor, will a settlement be found to lack good faith.[33] The Supreme Court of Appeals of West Virginia has provided four factors relevant to the determination of whether a settlement was made in good faith: 1) the amount of the settlement in comparison to the potential liability of the settling tortfeasor at the time of settlement; 2) whether the settlement is supported by consideration; 3) whether the motivation was to single out a non-settling defendant or defendants for wrongful tactical gain; and 4) whether there is a relationship between the settling parties that is naturally conducive to collusion (e.g., familial or employment relationships).[34]

While the settling tortfeasor is relieved from liability for contribution, the non-settling defendants are entitled to a credit against the the damage award (i.e., a reduction) in the amount of the settlement on a dollar-for-dollar (pro tanto) basis.[35]

West Virginia Workmen's Compensation Act provides a limited immunity to employers who subscribe into the system.[36] When an employer is immune from liability

West Virginia

under the Act, it is also likely immune from liability for contribution.[37] However, when the claim against the employer is based upon the "deliberate intent" exception to the immunity statute, a third party may maintain an action for contribution against the employer.[38]

Non-contractual Indemnity

West Virginia also recognizes a right of implied indemnity.[39] The right of indemnity arises when one party is primarily liable but a second party has been held liable with the first.[40] However the right of implied indemnity is limited to parties without fault.[41] West Virginia has specifically recognized a right of implied indemnity in a seller of a defective product against the manufacturer.[42] The Supreme Court of Appeals has specifically noted that "the manufacturer is often the culpable tortfeasor as a result of conduct associated with designing or manufacturing a defective product."[43]

The right of implied indemnity between a manufacturer and seller can be limited by contract, so long as the limitations are not "unconscionable".[44] A disclaimer or limitation is unconscionable if it "shock[s] the conscience and confound[s] the judgment of any man of common sense."[45] Additionally, where a business agreement requires one party to bear all the business losses while splitting profits equally, the agreement was held unconscionable.[46]

Like an action for contribution, an action for indemnification can be brought before or after judgment. If the indemnitor was not a party to the original suit and judgment, the indemnitee must provide notice to the indemnitor prior to judgment in order to bind the indemnitor to the original judgment.[47] The better option for seeking indemnification is Rule 14 impleader, which will bind the impleaded party to the original judgment.[48]

Unlike in an action for contribution, a good faith settlement between the plaintiff and the primarily responsible party, like the manufacturer, does not extinguish the right of the non-settling party, like the seller, to assert implied indemnity, if its liability was not predicated on its independent fault or negligence.[49] While the Supreme Court of Appeals of West Virginia initially suggested that "a settlement by a plaintiff with the manufacturing defendant solely responsible for the defective product covers all damages caused by that product and extinguishes any right of the plaintiff to pursue others in the chain of distribution"[50], it ultimately determined that settlement with a manufacturer does not have the effect of releasing a retailer.[51] The Court stated "[a] primary wrongdoer enters [settlement] agreements at the peril of being later held to respond again in an indemnification action brought against him by the vicarious wrongdoer."[52]

West Virginia has not determined whether the Workmen's Compensation Act immunity bars a valid claim for express or implied indemnity. However, it has suggested that would not.[53]

Neither the West Virginia Code nor the Supreme Court of Appeals of West Virginia have explicitly addressed the statute of limitations applicable to a claim for implied indemnity. Therefore, the statute of limitations for bringing a separate action for indemnification is likely two years after entry of an adverse judgment.[54]

1 Bradley v. Appalachian Power Co., 256 S.E.2d 879, 885-86 (W.Va. 1979).
2 Long v. City of Weirton, 214 S.E.2d 832, 843 (W.Va. 1975).
3 King v. Kayak Manufacturing Corp., 387 S.E.2d 511, 514 (W.Va. 1989).
4 Bradley, 256 S.E.2d at 885. See also Star Furniture Co. v. Pulaski Furniture Co., 297 S.E.2d 854, 861 (W.Va. 1982) ("In mathematical terms, the plaintiff, in order to recover, cannot be more than 49 percent negligent.").
5 Morningstar v. Black and Decker Manufacturing Co., 253 S.E.2d 666, 683 (W.Va. 1979): [T]he general test for establishing strict liability in tort is whether the involved product is defective in the sense that it is not reasonably safe for its intended use. The standard of reasonable safeness is determined not by the particular manufacturer, but by what a reasonably prudent manufacturer's standards should have been at the time the product was made.
6 Star Furniture Co., 297 S.E.2d at 863. Likewise, the affirmative defense of assumption of risk is available in strict liability actions, but only if it satisfies the principles of comparative contributory negligence. King, 387 S.E.2d at 517. The defense of assumption of risk in West Virginia requires a showing that the plaintiff continues to use the product will "full appreciation" of the defect. Morningstar, 253 S.E.2d at 684.
7 Bowman v. Barnes, 282 S.E.2d 613, 621 (W.Va. 1981).
8 King, 387 S.E.2d at 514.
9 Bradley, 256 S.E.2d at 886.
10 Kodym v. Frazier, 412 S.E.2d 219, 222-23 (W.Va. 1991).
11 King, 387 S.E.2d at 515.
12 Id.
13 Sitzes v. Anchor Motor Freight, Inc., 289 S.E.2d 679, 688 (W.Va. 1982).
14 Dunn v. Kanawha County Board of Ed., 459 S.E.2d 151, 155 (W.Va. 1995).
15 Sitzes, 289 S.E.2d at 689 n.23.
16 Bd. of Educ. v. Zando, Martin & Milstead, Inc., 390 S.E.2d 796, 802 (W.Va. 1990).
17 King, 387 S.E.2d at 515.
18 W. Va. Code 55-7-13 (1923): "Where a judgment is rendered in an action ex delicto against several persons jointly, and satisfaction of a judgment is made by any one or more of such persons, the other shall be liable to contribution to the same extent as if the judgment were upon an action ex contractu."
19 Haynes v. City of Nitro, 240 S.E.2d 544, 549 (W.Va. 1977).

West Virginia

20 Hill v. Joseph T. Ryerson & Son, Inc., 268 S.E.2d 296, 302 (1980).
21 Howell v. Luckey, 518 S.E.2d 873, 877 (1999).
22 Lombard Can., Ltd. v. Johnson, 618 S.E.2d 446, 451 (2005).
23 Syndenstricker v. Unipunch, 288 S.E.2d 511, 518 (1982).
24 Sitzes, 289 S.E.2d at 688
25 Id. This same procedure – requesting special interrogatories – is used under both the statutory right of contribution after judgment and the inchoate right of contribution before judgment. Id. at 688 n. 20.
26 King, 387 S.E.2d at 514.
27 Kodym, 412 S.E.2d at 224.
28 Smith v. Monongahela Power Co., 429 S.E.2d 643, 648 (W.Va. 1993).
29 Cline v. White, 393 S.E.2d 923, 927 (W.Va. 1990).
30 Smith, 429 S.E.2d at 652.
31 Id. at 651-52.
32 Zando, 390 S.E.2d at 804-05.
33 Smith, 429 S.E.2d at 652.
34 Id.
35 Bradley, 256 S.E.2d at 886-87.
36 See W.Va. Code § 23-2-6 ("Any employer subject to this chapter who subscribes and pays into the workers' compensation fund the premiums provided by this chapter or who elects to make direct payments of compensation as provided in this section is not liable to respond in damages at common law or by statute for the injury or death of any employee, however occurring, after so subscribing or electing, and during any period in which the employer is not in default in the payment of the premiums or direct payments and has complied fully with all other provisions of this chapter.").
37 Belcher v. J.H. Gletcher & Co., 498 F.Supp. 629, 631 (S.D.W.Va. 1980).
38 Syndenstricker, 288 S.E.2d at 517. See W.Va. Code § 23-4-2.
39 Hill, 268 S.E.2d at 301.
40 Dunn, 459 S.E.2d at 158.
41 Id.
42 Hill, 268 S.E.2d at 301.
43 Dunn, 459 S.E.2d at 157.
44 Hill, 268 S.E.2d at 306. See also W.Va. Code 46-2-719(3) ("Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.").
45 Hill, 268 S.E.2d at 306 n. 8 (quoting Billups v. Montenegro Reihms Music Co., 70 S.E. 779, 780 (W.Va. 1911)).
46 Summers v. Ort, 163 S.E. 854 (W.Va. 1932).
47 Hill, 268 S.E.2d at 301-02.
48 Id. at 302.
49 Dunn, 459 S.E.2d at 158.
50 Id.
51 Woodrum v. Johnson, 559 S.E.2d 908, 915 (W.Va. 2001) (citing Cartel Capital Corp. v. Fireco of New Jersey, 410 A.2d 674, 680 (1980)).
52 Id. at 917 (quoting Van Cleave v. Gamboni Const. Co., 706 P.2d 845, 848 (1985))
53 Syndenstricker, 288 S.E.2d at 516 n. 4.
54 W.Va. Code § 88-2-12: "Every personal action for which no limitation is otherwise prescribed shall be brought: (a) Within two years next after the right to bring the same shall have accrued, if it be for damage to property . *See Hensel Phelps Constr. Co. v. Davis & Burton Contrs., Inc.*, 2013 U.S. Dist. LEXIS 22207, @ *8-10 (D. W.Va. Feb. 19, 2013).

Wisconsin

By Jeremy T. Burton & Raymond Lyons, Jr.

Lipe Lyons Murphy Nahrstadt & Pontikis, Ltd.
Chicago, Illinois

Tel: 312.448.6230
Fax: 312.726.2273

Email: jtb@lipelyons.com
Email: rl@lipelyons.com
www.lipelyons.com

Allocation of Fault

In January 2011, Wisconsin enacted sweeping tort reform legislation applicable to all cases filed on or after February 1, 2011.[1] The legislation limited certain noneconomic damages,[2] limited punitive damages,[3] allowed sanctions for filing claims in bad faith,[4] eliminated joint liability for most defendants in a strict liability claims,[5] provided a. seller and distributor defense,[6] and added a host of other defenses including intoxication of the plaintiff, compliance with standards, and misuse.[7] This article does not attempt to cover all facets and nuances of the new law, but addresses how some of the changes might impact allocation of fault, contribution, and indemnity. As the Seventh Circuit has noted, some areas of Wisconsin product liability law are "not exactly a model of clarity,"[8] and some questions remain unanswered.

A. Negligence Cases

For cases filed both before and after the enactment of the 2011 tort reform legislation, Wisconsin has a comparative negligence scheme in which the plaintiff's contributory negligence only bars recovery from a particular defendant if the plaintiff's share of fault exceeds the negligence of the person against whom recovery is sought.[9] Otherwise, the plaintiff's share of negligence proportionally diminishes his recovery.[10] In negligence actions with multiple defendants, the jury compares the plaintiff's negligence to the negligence of each defendant rather than the combined negligence of the defendants.[11] The comparative negligence statute provides in pertinent part:

> The negligence of the plaintiff shall be measured separately against the negligence of each person found to be causally negligent. The liability of each person found to be causally negligent whose percentage of causal negligence is less than 51% is limited to the percentage of the total causal negligence attributed to that person. A person found to be causally negligent whose percentage of causal negligence is 51% or more shall be jointly and severally liable for the damages allowed.[12]

In effect, a plaintiff whose fault exceeds 50% may never recover because his fault will always surpass any particular defendant's fault. A plaintiff with less than 50% fault may also be totally barred from recovery if the plaintiff's fault

Wisconsin

exceeds the fault of each of the defendants. A defendant whose share of causal negligence is 51% or more is jointly liable for all recoverable damages.[13] Wisconsin law also imposes joint liability among defendants acting in a common scheme or plan.[14] Defendants cannot be jointly liable for punitive damages.[15]

Consider a negligence action in which the plaintiff was 10% at fault for his injury, Defendant 1 was 5% at fault, and Defendant 2 was 85% at fault. The plaintiff may not recover from Defendant 1, but may recover from Defendant 2. Defendant 2 being 51% or more at fault is responsible for the entirety of the plaintiff's damages after reduction for the plaintiff's comparative negligence.

B. Strict Liability Cases

While a negligence action weighs the plaintiff's negligence against the negligence of each defendant, a strict products product liability claim apportions the comparative negligence of the plaintiff against the defective condition of the product.[16] The comparison is not plaintiff-against defendants but plaintiff-against-product.[17] If the share of the plaintiff's injuries caused by the plaintiff's own negligence exceeds the share of injuries attributable to the defective condition of the product, the plaintiff cannot recover in strict liability from any defendant.[18] A plaintiff whose negligence was more than 50% responsible for his injuries cannot recover in strict liability, while a plaintiff whose negligence caused less than 50% of his injuries will have his strict liability recovery proportionally diminished.[19] – Id.

For actions filed prior to February 1, 2011, all strictly liable defendants are jointly liable to the plaintiff, although they may have contribution rights amongst each other.[19]

Cases filed on or after February 1, 2011 involve a two-step apportionment of fault process.[20] First, the jury "determines the percentage of causal responsibility of each product defendant for the defective condition of the product," which must total 100%.[21] Although strict liability is not predicated on the defendant's fault or negligence,[22] the jury must assign a percentage to each defendant for causing the defect.

As no published court opinions have addressed the new statute, some questions are unanswered. For example, in a manufacturing-defect-suit in which a manufacturer no longer exists or is not amenable to jurisdiction, how is the jury to allocate the responsibility for the defective condition between the seller and wholesaler or distributor? How does a non-designer, non-manufacturer have "causal responsibility. . . for the defective condition of the product?" The new statute does not define "causal responsibility." It does however denote a few circumstances where a seller or distributor can be liable pursuant to strict liability. As a starting point, a seller or distributor is not liable unless a manufacturer would be liable. Wi.Stat. § 895.047(2)(1). When a seller or distributor has contractually assumed a manufacturer's duty to manufacture, design or provide warnings or instructions for the product, the seller or distributor can be held liable. Wi.Stat. § 895.047(2)(1). A seller or distributor can also be held liable when a manufacturer and its insurer are not subject to service or that a plaintiff will not be able to enforce a judgment against a manufacturer or its insurer. Wi.Stat. § 895.047(2)(a)(1) and (2).

For the second step, the judge then multiplies the percentage of "causal responsibility" assigned to each defendant by the percentage of fault attributed to the defective product to determine the "individual product defendant's percentage of responsibility for the damages of the injured party."[23] The apportionment statute provides, after determining the plaintiff's share of fault and the causal responsibility of each defendant:

> The judge shall then multiply that percentage of causal responsibility of each product defendant for the defective condition of the product by the percentage of causal responsibility for the injury to the person attributed to the defective product. The result is the individual product defendant's percentage of responsibility for the damages to the injured party.[24]

If a strict liability defendant is 51% or more responsible for the plaintiff's damages (after multiplying the fault of the product by the causal responsibility of the defendant), that defendant is jointly liable for all the plaintiff's damages.[25] A defendant whose responsibility for the plaintiff's damages is less than 51% is severally liable only for his percentage of responsibility.[26] For example, if the defective product was 90% responsible for the plaintiff's injuries, and the product seller is 10% causally responsible for the product's defective condition, the seller is liable for 9% of the plaintiff's damages.

Wisconsin

Contribution

Wisconsin was one of the first states to recognize a common law right of contribution between joint tortfeasors.[27] The 2011 tort reform legislation did not change the common law right of contribution.

A successful claim for contribution requires (1) both parties must be joint tortfeasors, (2) both parties must have common liability to the same person because of their status as tortfeasors, and (3) one such party must have borne an unequal proportion of the common burden.[28] Parties found jointly liable may seek contribution from one another.[29] Contribution is available in products liability claims based on negligence and those based upon strict liability.[30]

The right of contribution accrues upon payment, and the contribution action must be filed within one year.[31]

Contribution operates neatly in a single-theory context. When, for example, the plaintiff is 5% at fault, Defendant 1 is 55% at fault, and Defendant 2 is 40% at fault, and the plaintiff recovers fully (95% of the plaintiff's damages) from jointly liable Defendant 1, Defendant 2 may be ordered to contribute his 40% liability to Defendant 1.

When the plaintiff proceeds under alternative theories of recovery,[32] contribution is thornier. Under the prior statutory regime, in which all strict liability defendants were jointly liable to the plaintiff, the jury assessed the contribution rights of the defendants.[33] To determine contribution rights, the question on the model special verdict form asks: "Assuming the total conduct by defendants involved to be 100%, what percentage, if any, do you attribute to" each defendant?[34] Aside from lacking a definition of "conduct by the defendants" and lacking any link between "conduct" and the plaintiff's injury, the special verdict form creates another problem. The percentage assigned to each defendant for contribution in strict liability would not be the same as the percentage of fault assigned in negligence. In negligence, the fault of the plaintiffs and all defendants must equal 100%. In strict liability the defendants' "conduct" (and not the plaintiff's) must add to 100%. A defendant could potentially be subject to joint liability under one theory but not under another. How would contribution rights be determined?

The Wisconsin Supreme Court has refused to offer guidance, leaving the matter of submission of multiple theories to the discretion of the trial judge on a case by case basis.[35] Given the absence of law, the model civil jury instructions suggest that in a case involving both strict liability claims and negligence claims, practitioners should look to a 1977 Marquette Law Review article, "Special Verdict Formulation in Wisconsin."[36] The article suggests that the jury should determine whether the plaintiff has proved strict first. If he has, then the jury need not reach negligence. If he has not, then the jury should determine whether the plaintiff is entitled to recovery under negligence.[37] But the Wisconsin Supreme Court expressly rejected adopting such a method as a matter of law in all cases.[38] The proposed solution is not workable in all instances. What if the only negligent defendant cannot satisfy the judgment, but other strictly liable defendants would be able to satisfy the judgment? Many Wisconsin trial courts have elected to submit both strict liability and negligence questions to the jury.[39]

Furthermore, no model jury instructions or special verdict form exists for the new allocation of "causal responsibility" among the strict liability defendants. Again, there is no guarantee that a jury would assign the same share of fault in negligence to a particular defendant as that defendant's "causal responsibility" in strict liability.

Non-Contractual Indemnity

Unlike contribution where liability is shared, indemnity shifts the entire loss from one person who has been compelled to pay to another who should bear the loss.[40] Indemnification is an equitable principle that can apply in the absence of a contract.[41] Wisconsin courts have consistently (and confusingly) pronounced that equitable indemnification requires (1) the payment of damages and (2) the lack of liability.[42] But it is the liability that required the payment of damages. A better description for the requirement of equitable indemnity is: "one person is exposed to liability by the wrongful act of another in which he does not join."[43]

A mere volunteer is not entitled to equitable indemnity.[44] Someone faced with potential liability who pays a claim, for example to buy financial peace, is not a volunteer.[45] A party may not assert an equitable indemnification claim against the employer of an injured party, as the Workers' Compensation Act limits the employer's liability.[46]

In the negligence context, indemnification is only appropriate where the potential indemnitor is 100 percent negligent and the indemnitee is free of negligence.[47] The

Wisconsin

parties need not be joint tortfeasors, and similarly there is no requirement for common liability.[48]

In strict liability, Wisconsin permits upstream indemnity. Interestingly, Wisconsin law notes that the court "shall dismiss a product seller or distributor as a defendant" after the "claimant proves by a preponderance of the evidence that neither the manufacturer nor its insurer is subject to service of process within the state" if "the manufacturer or its insurer submit itself to the jurisdiction of the court in which the suit is pending." Wi.Stat. § 895.047(2)(b). In a case not involving indemnity, the Wisconsin Supreme Court has stated without citation: "Although a seller may be held strictly liable for damages resulting from a defective product, a seller who has neither created nor assumed the risk of loss associated with the use of a defective product is entitled to indemnity from the manufacturer."[49] A Wisconsin appellate court drawing an analogy has said, "Just as a seller who has neither created nor assumed the risk of loss from the use of a defective product is entitled to indemnity from the manufacturer," the seller of a component part that was substantially altered is not strictly liable?[50] One Wisconsin appellate court has come to a contrary conclusion in a non-precedential opinion, finding a strict liability defendant is negligent per se, and therefore entitled only to contribution but not indemnity,[51] but that court mistakenly compared strict liability and negligence, which the Wisconsin Supreme Court has called "comparing apples and oranges."[52] The authors of this section believe Wisconsin would permit a strictly liable seller to seek equitable indemnification from a manufacturer.

Unlike a contribution claim, an action for equitable indemnification does not accrue when payment is made.[53] Instead, an equitable indemnity claim is subject to the same limitation period applicable to the underlying tort for which indemnification is sought.[54] When the injured plaintiff's claim has expired, no party responsible to that injured plaintiff has a right of equitable indemnification.[55]

Effect of Settlement on Contribution and Indemnity Rights

The fact of a settlement with the plaintiff does not prohibit contribution claims against the settling party. The "common liability" requirement for contribution is measured at the time the plaintiff sustains damages and is not extinguished by a settlement with the plaintiff.[56] However, a settling defendant may protect itself by entering into a so-called "*Pierringer* release."

A *Pierringer* release operates to impute onto the settling plaintiff whatever liability in contribution the settling defendant may have to non-settling defendants.[57] The plaintiff retains his claims against any non-settling defendants.[58] The jury is asked to assess the fault (or now in strict liability, causal responsibility) of the plaintiff, the remaining defendants, and any settled defendant?[59] The plaintiff's verdict is reduced by his own negligence and the fault of the settled defendant.[60] As a result, the release bars contribution actions that non-settling defendants might assert against the settling defendant.[61] A *Pierringer* release also bars claims for indemnification against a settling defendant.[62]

Entering into a *Pierringer* release, as opposed to a general release or a covenant not to sue, leads to distinct consequences.[63] A *Pierringer* release provides the highest level of certainty and protection for a settling defendant, allowing a defendant to buy its peace.[64] But in doing so, the settling defendant gives up its own rights to seek contribution or indemnification and therefore assumes the possible risk of paying too much in settlement.[65]

A covenant not to sue, also called a "Loy release," preserves the plaintiff's entire cause of action against the non-settling joint tortfeasors, including that portion attributable to the settling tortfeasor's negligence.[66] A covenant not to sue is not a satisfaction of a portion of a plaintiff's cause of action, but is merely an agreement to discharge the settling joint tortfeasor with a reservation of rights of the full cause of action against the non-settling joint tortfeasor.[67] As a result, a covenant not to sue does not extinguish a non-settling joint tortfeasor's contribution or indemnification rights, while a *Pierringer* release does.[68] Nor does a covenant not to sue affect the settling party's right to seek contribution or indemnification for the amounts it paid.[69] The purpose of a Loy release generally is to allow a defendant's primary insurer to settle while retaining the plaintiff's rights against any excess insurers and other parties.[70]

Wisconsin

1 2011 Wis. Act 2.
2 Wis. Stat. § 893.555.
3 Wis. Stat. § 895.043(6).
4 Wis. Stat. § 895.044.
5 Wis. Stat. § 895.045(3).
6 Wis. Stat. § 895.047(2).
7 Wis. Stat. § 895.047(3).
8 *Insolia v. Philip Morris Inc.*, 216 F.3d 596, 603 (7th Cir. 2000).
9 Wis. Stat. § 895.045(1).
10 *Id.*
11 *Fuchsgruber v. Custom Accessories, Inc.*, 2001 WI 81, ¶ 13, 628 N.W.2d 833, 838.
12 Wis. Stat. § 895.045(1).
13 *Id.*
14 Wis. Stat. § 895.045(2).
15 Wis. Stat. § 895.043(5).
16 Wis. Stat. § 895.045(3)(a); *Fuchsgruber*, 2001 WI 81, ¶ 20; Wis. JI-Civil 3290.
17 *Fuchsgruber*, 2001 WI 81, ¶ 20.
18 Wis. Stat. § 895.045(3)(b).
19 *See Fuchsgruber*, 2001 WI 81 ¶ 15, 20; *Indus. Risk Insurers v. American Eng'g Testing, Inc.*, 2009 WI App 62, ¶¶ 26-28, 769 N.W.2d 82, 90-91.
20 Wis. 2011 Act 2 § 45(5).
21 Wis. Stat. § 895.045(3)(d).
22 *See St. Clare Hosp. of Monroe, Wis. v. Schmidt, Garden, Erickson, Inc.*, 437 N.W.2d 228, 758-59 (Wis. Ct. App. 1989).
23 Wis. Stat. § 895.045(3)(d).
24 *Id.*
25 *Id.*
26 *Id.* If the plaintiff's fault is less than the fault of the product, such that recovery is not barred, the fact that the plaintiff's responsibility exceeds that of an individual defendant does not bar the plaintiff's recovery. Wis. Stat. § 895.045(e).
27 *See Farmers Mut. Auto. Ins. Co. v. Milwaukee Auto. Ins. Co.*, 99 N.W.2d 746, 748 (Wis. 1959).
28 *Fire Ins. Exchange v. Cincinnati Ins. Co.*, 2000 WI App 82, ¶ 8, 610 N.W.2d 98, 103; *Gen. Accident Ins. Co. of America v. Schoendorf & Sorgi*, 549 N.W.2d 429, 431-32 (Wis. 1996).
29 *State Farm Mut. Auto. Ins. Co. v. Schara*, 201 N.W.2d 758, 760 (Wis. 1972)
30 *See Fire Ins. Exchange v. Cincinnati Ins. Co.*, 2000 WI App 82, ¶ 8, 610 N.W.2d 98, 103 (citing *City of Franklin v. Badger Ford Truck Sales, Inc.*, 207 N.W.2d 866, 871 (Wis. 1973)).
31 Wis. Stat. § 893.92.
32 A plaintiff may submit both negligence and strict liability claims to the jury where the facts warrant it. *See Howes v. Deere & Co.*, 238 N.W.2d 76, 79 (Wis. 1976); Insolia, 216 F.3d at 605.
33 Wis. JI-Civil 3290.
34 *Id.*
35 *See Howes*, 238 N.W.2d at 79.
36 Wis. JI-Civil 3290 (citing *John A. Decker, Special Verdict Formulation in Wisconsin*, 60 Marq. L. Rev. 201, 273-279, 290-95 (1977)).
37 Decker, 60 Marq. L. Rev. at 290.
38 *Howes*, 238 N.W.2d at 79.
39 *See Giese v. Montgomery Ward, Inc.*, 331 N.W.2d 585, 589 (Wis. 1983); *Beacon Bowl, Inc. v. Wis. Elec. Power Co.*, 501 N.W.2d 788, 799 (Wis. 1993); ***Morden v. Continental AG***, 611 N.W.2d 659, 679-80 (Wis. 2000).
40 *Brown v. LaChance*, 477 N.W.2d 296, 302 (Wis. 1991).
41 T*eacher Retirement Sys. of Tex. v. Badger XVI L.P.*, 556 N.W.2d 415, 421 (Wis. Ct. App. 1996).
42 *See, e.g., id.; Brown*, 477 N.W.2d at 302; *Begalke v. Sterling Truck Corp.*, 480 F.Supp.2d 1146, 1156 (W.D. Wis. 2007).
43 *See Estate of Kriefall v. Sizzler USA Fanchise, Inc.*, 2011 WI App 101, ¶ 76, 801 N.W.2d 781, 818, review granted by 2011 WI 100, 806 N.W.2d 637.
44 *Estate of Kriefall*, 2011 WI App 101, ¶ 80.
45 *Id.*
46 *Grede Foundries, Inc. v. Price Erecting Co.*, 157 N.W.2d 559, 561 (Wis. 1968).
47 *See Perkins v. Worzala*, 31 Wis.2d 634, 638 (Wis. 1966).
48 *Id.*
49 *Kemp v. Miller*, 453 N.W.2d 872, 879 (Wis. 1990).
50 *Westphal v. E.I. du Pont de Nemours & Co., Inc.*, 531 N.W.2d 386, 390 (Wis. Ct. App. 1995).
51 *Scribner v. Milton Granquist Co.*, 461 N.W.2d 449 (Wis. Ct. App. 1990) (Table).
52 *Greiten v. La Dow*, 235 N.W.2d 677, 686 (Wis. 1975); *see also St. Clare Hosp.*, 437 N.W.2d at 232 (explaining that strict liability is not negligence per se).
53 *Schoendorf & Sorgi*, 549 N.W.2d at 434.
54 *Id.*
55 *Id.*
56 *Teacher Retirement Sys.*, 556 N.W.2d at 420-21; Wis. Stat. § 885.285(3).
57 *Indus. Risk Ins. v. American Eng'g Testing, Inc.*, 2009 WI App 62, ¶ 20 (citing *Pierringer v. Hoger*, 124 N.W.2d 106, 112 (Wis. 1963)).
58 *Id.*
59 *Pierringer v. Hoger*, 124 N.W.2d 106, 112 (Wis. 1963).
60 *Id.*
61 *American Eng'g Testing*, 2009 WI App 62, ¶ 20.
62 *Fleming v. Threshermen's Mut. Ins. Co.*, 388 N.W.2d 908, 911 (Wis. 1986).
63 *Unigard Ins. Co. v. Ins. Co. of N. Am.*, 516 N.W.2d 762, 765-66 (Wis. Ct. App. 1994).
64 *Id.*
65 *Id.*
66 *Brandner by Brandner v. Allstate Ins. Co.*, 512 N.W.2d 753, 761 (Wis. 1994).
67 *Imark Indus., Inc. v. Arthur Young & Co.*, 436 N.W.2d 311, 318 (Wis. 1989).
68 *Id.; Brandner*, 512 N.W.2d at 761.
69 *Unigard Ins. Co.*, 516 N.W.2d at 765-66.
70 *Loy v. Bunderson*, 320 N.W.2d 175, 179 (Wis. 1982).

Wyoming

By Brian A. Comer

Collins & Lacy, P.C.
Columbia, South Carolina

Tel: 803.256.2660
Fax: 803.771.4484

Email: bcomer@collinsandlacy.com
www.collinsandlacy.com

Allocation of Fault

Wyoming first adopted a comparative negligence scheme in 1973, providing for a plaintiff's recovery only where the plaintiff's negligence "was not as great as the negligence of the party against whom recovery was sought."[1] In 1986, the Wyoming Legislature amended the comparative negligence statute to allow a plaintiff to recover from a defendant as long as the plaintiff was no more than 50 percent at fault.[2] Additionally, prior to the 1986 amendments, the statute provided only for comparing a plaintiff's negligence to an individual defendant's negligence for purposes of determining fault. With the amendments, the analysis shifted to comparing a plaintiff's negligence to that of all tortfeasors collectively, rather than individually.[3] Under the amended statute, "a plaintiff who is 10 percent at fault may recover from a defendant who is only 5 percent at fault, since the plaintiff's percentage of fault is less than 50 percent of the total."[4]

In 1994, the Wyoming Legislature amended the comparative negligence statute for a second time and renamed the statute "Comparative Fault."[5] The current statute provides:

b) Contributory fault shall not bar a recovery in an action by any claimant or the claimant's legal representative to recover damages for wrongful death or injury to person or property, if the contributory fault of the claimant is not more than fifty percent (50%) of the total fault of all actors. Any damages allowed shall be diminished in proportion to the amount of fault attributed to the claimant.

(c) Whether or not the claimant is free of fault, the court shall:

(i) If a jury trial:

(A) Direct the jury to determine the total amount of damages sustained by the claimant without regard to the percentage of fault attributed to the claimant, and the percentage of fault attributable to each actor; and

(B) Inform the jury of the consequences of its determination of the percentage of fault.

Wyoming

(ii) If a trial before the court without jury, make special findings of fact, determining the total amount of damages sustained by the claimant without regard to the percentage of fault attributed to the claimant, and the percentage of fault attributable to each actor.

(d) The court shall reduce the amount of damages determined under subsection (c) of this section in proportion to the percentage of fault attributed to the claimant and enter judgment against each defendant in the amount determined under subsection (e) of this section.

(e) Each defendant is liable only to the extent of that defendant's proportion of the total fault determined under paragraph (c)(i) or (ii) of this section.[6]

Prior to the 1986 amendments discussed *supra*, Wyoming law provided for joint and several liability amount joint tortfeasors. Under the old law, "all parties liable were jointly obligated for the total damage and each party was individually obligated to pay the total damage."[7] However, with the 1004 adoption of the comparative fault principles at Wyo. Stat. § 1-1-109, the Wyoming legislature abolished joint and several liability.

Contribution

When the Wyoming legislature abolished joint and several liability in 1986, it also repealed Wyo. Stat. § 1-1-110(b), which established a right of contribution among tortfeasors. According to the Wyoming Supreme Court, "[w]ith the amendment of W.S. 1-1-109(d), W.S. 1-1-110(b) providing for contribution was repealed and for good reason, for after joint and several liability was abolished, no tortfeasor would ever pay more than his proportionate share of a judgment. Therefore, there would never be a need for contribution or for credit upon a judgment."[8]

Non-Contractual Indemnity

The right to non-contractual indemnity was recognized in Wyoming as early as 1926.[9] In *Miller v. New York Oil*,[10] the Wyoming Supreme Court upheld a landlord's right to indemnity against a natural gas company after the landlord's tenant died from carbon dioxide poisoning. The court, citing Massachusetts law, stated the controlling principle of indemnity as follows:

> When two parties, acting together, commit an illegal or wrongful act, the party who is held responsible in damages for the act cannot have indemnity or contribution from the other, because both are equally culpable, or particeps criminis, and the damage results from their joint offense. This rule does not apply when one does the act or creates the nuisance, and the other does not join therein, but is thereby exposed to liability and suffers damage. He may recover from the party whose wrongful act has thus exposed him. In such case the parties are not in pari delicto to each other, though as to third persons either may be held liable.[11]

The adoption of a new comparative fault system by the Wyoming legislature in 1986,[12] along with the repeal of contribution provisions and elimination of joint and several liability, raised the issue of whether indemnity principles still applied in Wyoming. In *Schneider National Inc. v. Holland Hitch Co.*,[13] the Wyoming Supreme Court addressed several certified questions from the United States Court of Appeals for the Tenth Circuit regarding the availability of indemnity for actions premised on tort liability following the repeal of contribution. The court ruled a cause of action for indemnity still existed in Wyoming but clarified the form of indemnity and its current availability.[14]

The court discussed the three classifications for indemnity actions: (1) express indemnity;[15] (2) implied contractual indemnity, also known as implied in fact indemnity[16]; and (3) equitable implied indemnity, also known as implied in law indemnity or common law indemnity. The court specifically analyzed equitable implied indemnity, defining this type of indemnity as being "created by a relationship implied in law between the person seeking indemnity and the person from whom indemnity is sought for a negligent or tortious act."[17] The court adopted the Restatement of Torts (Second) § 886(B) (1979) as the new standard for equitable implied indemnity in Wyoming in light of the new comparative fault principles. Specifically:

> 1) If two persons are liable in tort to a third person for the same harm and one of them discharges the liability

Wyoming

of both, he is entitled to indemnity from the other if the other would be unjustly enriched at his expense by the discharge of the liability.

(2) Instances in which indemnity is granted under this principle include the following:

(a) The indemnitee was liable only vicariously for the conduct of the indemnitor;

(b) The indemnitee acted pursuant to directions of the indemnitor and reasonably believed the directions to be lawful;

(c) The indemnitee was induced to act by a misrepresentation on the part of the indemnitor, upon which he justifiably relied;

(d) The indemnitor supplied a defective chattel or performed defective work upon land or buildings as a result of which both were liable to the third person, and the indemnitee innocently or negligently failed to discover the defect;

(e) The indemnitor created a dangerous condition of land or chattels as a result of which both were liable to the third person, and the indemnitee innocently or negligently failed to discover the defect;

(f) The indemnitor was under a duty to the indemnitee to protect him against the liability to the third person.[18]

In sum, under the theory adopted in *Schneider*, in order to state a third-party claim for equitable indemnity implied under Wyoming law, a third-party plaintiff must allege "(1) an independent relationship with the third-party defendant; (2) negligent breach by the third-party defendant of the duty created by the independent relationship; (3) under circumstances falling within the situations addressed in Restatement Torts (Second) § 886(B)(2); and (4) that the breach of the duty to third-party plaintiff contributed to cause the injuries and damage to the original plaintiff."[19]

Actions for equitable implied indemnity under the Restatement may be premised on negligence, strict liability or breach of warranty. However, the Wyoming Court held "[t]he nature of the indemnity relief available will differ depending on the theory of liability expressed."[20] The court went on to define and distinguish the availability of indemnity under each type of action.

A. Negligence Claims

The court adopted a system of comparative partial indemnity for actions premised on negligence, holding "indemnity liability is to be allocated among the parties proportionately to their comparative degree of fault in actions for equitable implied indemnity premised on the negligent breach of a duty between the indemnitor and the indemnitee."[21] The court explained that the prior distinction under Wyoming law between "active" and "passive" negligence, while no longer controlling, should still be a factor considered by the jury in assigning the percentage of fault between the parties.[22] Under the Schneider analysis, any award for partial indemnity would be "a proportion of the total sum paid by the third-party plaintiff to the original plaintiff corresponding to the degree of fault of the third-party defendant."[23] With this approach, the court shifted the focus from the percentage of fault between all of the actors to "a comparison of fault between the third-party plaintiff and the third-party defendant premised on an independent duty."[24]

B. Strict Liability Claims

In analyzing indemnity for actions premised on strict liability claims, the Wyoming court again adopted the Restatement of Torts (Second) § 886(B) (1979). Pursuant to the Restatement, "indemnity is available from the supplier of a defective product when the product failure makes both the indemnitee and the indemnitor liable to a third person and the indemnitee innocently or negligently failed to discover the defect."[25] "Indemnity, under strict liability, is not based on fault but rather allocates the risk of loss to the party best able to control the loss and distribute it."[26] For public policy reasons, Wyoming law only allows for indemnity actions under strict liability to shift 100 percent of the liability to the "cheapest cost avoider," allocating the "risk of loss to the actor in the best position to either insure against the loss or spread the loss among all consumers of the product."[27]

In claims for strict liability, the Schneider court held assumption of the risk acts as a complete bar to indemnity recovery.[28] Further, "[m]isuse of a product by using it

Wyoming

for an unintended or unforeseeable purpose would also bar indemnity as it bars recovery under strict liability."[29] Although assumption of the risk and product misuse bar indemnity recovery, the court held "the failure to discover and correct a latent defect does not bar indemnity recovery in an action premised on strict liability."[30]

C. Breach of Warranty Claims

Wyoming recognizes by statute causes of action for breach of both express[33] and implied warranties.[32] The same rules that apply to indemnity recovery under strict liability in tort apply equally to indemnity actions stemming from breach of warranty claims.[33] Defenses include assumption of the risk and misuse of the product.[34] "Successful actions for equitable implied indemnity premised on a breach of warranty shift 100 percent of the liability to the indemnitor."[35]

Effect of Settlement on Indemnity Rights

In the case of equitable implied indemnity based on negligence, the Wyoming Supreme Court imposes on a settling tortfeasor "some special burdens as the party seeking indemnity."[37] Specifically, the court requires the party seeking indemnity ("indemnitee") "to establish that the settlement was made in good faith to discharge a potential or actual liability." Additionally, "[w]ithout a judicial determination of liability, the [indemnitee] also has to prove that the wrongful conduct of the party from whom indemnity is sought created the claim against the indemnitee."[38]

Under Wyo. Stat. § 1-1-119, "a release given to one person who is liable in tort does not discharge the other tortfeasors unless the release language specifically states that they are to be released."[39] Therefore, a settlement agreement and release, unless specifically provided within the language of the agreement, does not preclude a settling party from seeking indemnification.

1 James W. Owens, Jr., *The Availability of Indemnity in Tort Actions Involving the Wyoming Comparative Negligence Statute—Multiple Parties Cause Multiple Problems*, 29 Land & Water L. Rev. 253, 254 (1994) (citing Wyo. Stat. § 1-7.2 (1975)(amended 1986).
2 *Id*. at 255.
3 Christopher M. Brown & Kirk A. Morgan, *Consideration of Intentional Torts in Fault Allocation: Disarming the Duty to Protect Against Intentional Conduct, 2* WYO. L. REV. 483, 506-07 (2002).
4 *Owens, supra* note 1, at 255.
5 *Brown, supra* note 3, at 507.
6 Wyo. Stat. § 1-1-109(b)-(e)(1994).
7 *Haderlie v. Sondgeroth*, 866 P.2d 703, 708 (Wyo. 1993).
8 *Id*.
9 See Miller v. New York Oil, 243 P. 118 (Wyo. 1926).
10 *Id*.
11 *Id*. at 121 (citing *Gray v. Boston Gas Light Co.*, 114 Mass. 149, 154 (Mass. 1873)).
12 *See* section 1, *supra*.
13 843 P.2d 561 (Wyo. 1992).
14 *Id*. at 570-71 (explaining "in holding that a right to indemnity is preserved, we are not saying that the right exists in the same form as it did prior to the adoption of comparative negligence and particularly comparative fault").
15 *Id*. at 573 ("Express indemnity is derived from the specific language of a contract.") (citations omitted).
16 *Id*. ("Implied contractual indemnity … stems from the relationship, contractual or legal, implied between the parties.").
17 *Id*.
18 *Id*. at 576 (quoting Rest. of Torts (Second) § 886(B)(1979)).
19 *Diamond Surface, Inc. v. Cleveland*, 963 P.2d 996, 1003 (Wyo. 1998).
20 *Schneider, supra* note 13, 843 P.2d at 576.
21 *Id*. at 578.
22 *Id*. at 578-79.
23 *Id*. at 579.
24 *Diamond Surface, supra* note 19, 963 P.2d at 1003.
25 *Schneider, supra* note 13, 843 P.2d at 581.
26 Sherri L. Sweers & Thomas B. Quinn, *The Law of Indemnity in Wyoming: Unravelling the Confusion*, 31 LAND & WATER L. REV. 811, 817 (1996).
27 *Schneider, supra* note 13, 843 P.2d at 583 (internal citations and quotations omitted); *but see Sweers, supra* note 26, at 818 ("Since the comparative fault statute was amended [to allow for comparative fault in actions for strict liability and breach of warranty], the Wyoming Supreme Court has not addressed whether partial indemnity applies to equitable implied indemnity cases involving claims for strict liability and breach of warranty.").
28 *Schneider* , 843 P.2d at 582.
29 *Id*.
30 *Id*. at 583.
31 *See* Wyo. Stat. § 34.1-2-313 (1991).
32 *See* Wyo. Stat. § 34.1-2-314 (1991) (outlining the implied warranty of merchantability) and Wyo. Stat. § 34.1-2-315 (setting forth the implied warranty of fitness for a particular purpose).
33 *Schneider*, 843 P.2d at 587.
34 *Id*.
35 *Id*.
36 *Id*. at 579.
37 *Id*.
38 *Id*. at 580 (citations omitted) (acknowledging the wrongful conduct component "can prove especially difficult").
39 *Rudy v. Bossard*, 997 P.2d 480, 486 (Wyo. 2000).