Contribution in South Carolina--Venturing into Uncharted Waters

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CONTRIBUTION IN SOUTH CAROLINA—VENTURING INTO UNCHARTED WATERS

ROBERT H. BRUNSON*

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I. INTRODUCTION

In most American jurisdictions each tortfeasor whose acts or omissions combine with those of other tortfeasors to cause an indivisible harm may be held jointly and severally liable for the entire damage. The doctrine of joint and several liability thus allows a plaintiff to elect whether to sue one or all of the joint tortfeasors. In either case, the plaintiff can recover the entire loss. If a plaintiff chooses to sue more than one of the tortfeasors and receives a judgment against them, each defendant is individually liable for the whole judgment. Thus, even though the plaintiff is entitled to only one total recovery, the plaintiff can select which tortfeasors to sue and who must pay the judgment. If a defendant is forced to pay more than his or her actual share of the liability, the defendant has no recourse against the other

1. See infra notes 122-23 and accompanying text (discussing jurisdictions which have abolished or limited joint and several liability).


3. Id. at 328-30.
tortfeasors unless the jurisdiction affords defendants a right of contribution.4

Contribution has been defined as "the right enjoyed by a person who is jointly liable with others and has paid more than his proper share in discharge of the joint liability, to force them to reimburse him to the extent of their liability." Contribution is typically viewed as "an equitable doctrine based on principles of fundamental justice." Nevertheless, early courts developed a general rule against contribution which was followed by the great majority of American courts until the 1970s.7 The common-law rule prohibiting contribution is more a mistake of history than a well-reasoned legal principle,8 however, and has received severe criticism in the last half century9 for its "lack of sense and justice."10 Consequently, the overwhelming majority of jurisdictions now allow some form of contribution.11

Until 1988, South Carolina followed the old common-law rule prohibiting contribution among joint tortfeasors.12 The South Carolina Supreme Court clearly defined the pre-1988 state of the law of contribution in Brown v. Southern Railway Co.,13 stating, "the rule of law [in South Carolina] is that one of the two joint wrongdoers can have no contribution from the other."14 Thus, in South Carolina, a joint tortfeasor could have been required to pay an entire judgment while other tortfeasors paid nothing.15 In 1988, however, the South Carolina General Assembly enacted the South Carolina Uniform Contribution

4. See infra notes 112-35 and accompanying text.
6. Vickers Petroleum Co. v. Biffle, 239 F.2d 602, 606 (10th Cir. 1956) (citing Worthington v. Keely, 64 Colo. 91, 170 P. 194 (1917)).
7. See infra notes 17-50 and accompanying text; Prosser & Keeton, supra note 2, § 50, at 336-37.
8. See infra notes 17-50 and accompanying text; see also Restatement of Restitution § 102 comment a (1936) ("The rule . . . which denies contribution to one of two negligent persons . . . is explainable only on historical grounds.").
10. Id. at 337.
11. See infra notes 101-123 and accompanying text.
14. Id. at 152, 96 S.E. at 704.
15. As stated by the South Carolina Supreme Court in Adcox: "Under the law of this State, one injured by the actionable negligence of two or more joint tort-feasors may elect that party or parties whom he will sue and may pursue the collection of judgment procured against any one or more of the judgment debtors." 258 S.C. at 338, 188 S.E.2d at 789 (quoting Travelers Ins. Co. v. Allstate Ins. Co., 249 S.C. 592, 598, 155 S.E.2d 591, 594 (1967)).
Among Tortfeasors Act,\textsuperscript{16} which abrogated the rule against contribution. This Article will discuss the context in which this Act was implemented and the prominent issues surrounding application of the Act in South Carolina.

\textbf{A. Historical Development of the No Contribution Rule}

\textit{Merryweather v. Nixan}\textsuperscript{17} is uniformly cited as the origin of the rule barring contribution among joint tortfeasors.\textsuperscript{18} The scant report of this case indicates that it arose from an action for trover brought against two joint tortfeasors. The two defendants must have acted in concert because they were joined at a time when joinder was not allowed unless the defendants acted as one in inflicting the damage.\textsuperscript{19} The trial resulted in a joint judgment against the defendants. The plaintiff, however, levied the judgment against only one of the tortfeasors—Merryweather. Merryweather subsequently brought an action seeking "contribution of a moiety"\textsuperscript{20} from the other defendant. At trial Nixan obtained a nonsuit, and on appeal Lord Kenyon stated that "there could be no doubt but that the nonsuit was proper: that he had never before heard of such an action having been brought, where the former recovery was for a tort . . . ."\textsuperscript{21}

Later courts seized on the holding of \textit{Merryweather} and developed the rule that denies contribution in both negligence and intentional tort cases.\textsuperscript{22} Initially, the \textit{Merryweather} rule was limited to intentional torts. Trover, the conduct in question in \textit{Merryweather}, was considered an intentional tort.\textsuperscript{23} In fact, at the time of the \textit{Merryweather} decision, the word "tort" was used to refer only to intentional or willful acts.\textsuperscript{24} Consequently, many authorities did not view \textit{Merryweather} as creating a rule against contribution, but as creating an exception to the general rule allowing contribution among joint tortfeasors.\textsuperscript{25} In denying contribution among intentional tortfeasors, the courts reasoned that they

\begin{itemize}
\item \textsuperscript{17} 101 Eng. Rep. 1337 (K.B. 1799).
\item \textsuperscript{18} See Restatement (Second) of Torts § 886A comment a (1977); Prosser & Keeton, supra note 2, § 50, at 336-37.
\item \textsuperscript{19} Prosser & Keeton, supra note 2, § 50, at 336-37.
\item \textsuperscript{20} Merryweather, 101 Eng. Rep. at 1337.
\item \textsuperscript{21} Id.
\item \textsuperscript{22} See Leflar, Contribution and Indemnity Between Tortfeasors, 81 U. Pa. L. Rev. 130, 130 (1932).
\item \textsuperscript{23} See Prosser & Keeton, supra note 2, § 50, at 336.
\item \textsuperscript{24} See Reath, Contribution Between Persons Jointly Charged for Negligence — Merryweather v. Nixan, 12 Harv. L. Rev. 176, 178 (1898).
\item \textsuperscript{25} See id. at 177, 182-83.
\end{itemize}
should not assist deliberate wrongdoers in settling their disputes.\textsuperscript{26}

English law reflects this reasoning and has never denied contribution in cases of "mere vicarious liability, negligence, accident, mistake, or other unintentional breaches of the law."\textsuperscript{27} Similarly, in early American cases, the common-law rule prohibiting contribution was applied exclusively to cases of intentional or willful misconduct.\textsuperscript{28} Subtle changes in the construction of terms and the liberalization of procedural rules, however, resulted in inadvertent application of the "no contribution" rule in mere negligence cases as well.\textsuperscript{29}

For example, under early common law the term "joint tortfeasor" referred only to those parties who acted intentionally and in concert with a common purpose to carry out a joint enterprise.\textsuperscript{30} Strict joinder rules allowed the plaintiff to sue, in one action, only those tortfeasors who had acted in concert, that is, joint tortfeasors.\textsuperscript{31} Each of these defendants was then held jointly and severally liable under the theory that a defendant who acted intentionally and concertedly with another to commit a wrong should be viewed as the sole wrongdoer,\textsuperscript{32} and thus individually responsible for all the wrongful conduct.\textsuperscript{33} Since the judiciary generally believed that it should not settle disputes between tortfeasors who acted intentionally and concertedly, the rule denying contribution among joint tortfeasors arose.\textsuperscript{34}

Conversely, when the defendants acted independently, even if their actions combined to cause a single injury, the plaintiff generally was required to maintain a separate suit against each defendant.\textsuperscript{35} The separate trials presumably produced verdicts against the defendants which reflected their individual degrees of fault.\textsuperscript{36} Accordingly, contribution was not viewed as necessary among these defendants.

In the United States, early courts generally followed the English rules of strict joinder.\textsuperscript{37} Enactment of the 1848 New York Field Code of Procedure and similar legislation in other states, however, substantially liberalized the procedural rules.\textsuperscript{38} These new rules permitted

\begin{footnotesize}
\begin{enumerate}
\item 26. Id. at 186-87 (quoting Bailey v. Bussing, 28 Conn. 455 (1859)).
\item 27. Frosser & Keeton, supra note 2, § 50, at 337.
\item 28. Id.
\item 29. See Restatement (Second) of Torts § 886A comment a (1977).
\item 30. See Frosser & Keeton, supra note 2, § 46, at 322-23 (citing Sir John Heydon's Case, 77 Eng. Rep. 1150 (K.B. 1613)).
\item 31. See id.
\item 32. See id.
\item 33. Heydon's Case, 77 Eng. Rep. at 1151.
\item 34. See Frosser & Keeton, supra note 2, § 50, at 337.
\item 35. See id. § 47, at 325-27.
\item 36. See id.
\item 37. See id. at 325.
\item 38. See id. at 325.
\end{enumerate}
\end{footnotesize}
joinder of defendants who acted independently to cause the same damage. Thus, joinder of defendants who were concurrently negligent became available. Consequently, the courts began to apply the doctrine of joint and several liability to negligent tort defendants who acted concurrently to cause the same damage.

The resulting confusion was further intensified by the American rule requiring one verdict in a case in which several defendants were joined in a single action. The "one verdict" rule originated from principles of strict joinder, which had allowed only tortfeasors who had acted in concert to be joined in the same action. The rationale for the rule stemmed from the application of joint and several liability: since each defendant who acted intentionally and in concert with another was liable for the entire judgment, separate judgments were not necessary. Courts widely believed that it was impossible for a jury to apportion damages when defendants had acted concertedly. As was the case with joint and several liability, however, these rationales disappeared over time, and the courts continued to adhere to the one verdict rule, even when concurrently negligent tortfeasors were joined in the same action.

The use of the term "joint tortfeasor" to include concurrently negligent tortfeasors and the application of the one verdict rule when those tortfeasors were joined in the same action resulted in inadvertent application of joint and several liability to concurrently negligent tortfeasors. Consequently, most courts continued to apply the rule barring contribution among wrongdoers who were jointly and severally liable, even though the rule had come to include concurrently negligent tortfeasors. Unfortunately, the origin of the rule that courts should not aid wrongdoers who act intentionally and in concert was "lost in sight" when the rule was extended to include negligent tortfeasors.

39. See id. at 325-26.
40. See id. at 326.
41. Id. § 47, at 328-29.
42. See id.
43. Id. at 329.
45. PROSSER & KEETON, supra note 2, § 47, at 329.
46. See id.
47. See id.; see also Union Stock Yards Co. v. Chicago, Burlington, & Quincy R.R., 196 U.S. 217 (1905) (first American case to extend no contribution rule to tortfeasors who were merely negligent).
48. PROSSER & KEETON, § 50, at 337.
49. Id.
50. See id. In addition, at the time of Merryweather, the term "tort" was limited to willful and intentional wrongs. See Reath, supra note 24, at 178. The broadening of the definition of "tort" to include negligent acts also has been cited as a reason for the exten-
B. Distinguishing Contribution From Indemnity

1. Common Law Indemnity

Indemnity has been defined as "only an extreme form of contribution," and the terms "indemnity" and "contribution" are often used interchangeably. Nevertheless, significant substantive differences separate the two. First, contribution is applicable when multiple tortfeasors are responsible for a single injury and one of the tortfeasors pays more than his proper share in discharge of the common liability. The tortfeasor who has paid more than his share may seek contribution from the other tortfeasors to the extent of his overpayment. Thus, contribution results in allocating the loss among tortfeasors according to the proportionate share of the liability attributable to each. Indemnity, on the other hand, is applicable when one person discharges a liability "which, as between himself and the other, should have been discharged by the other." The major difference between indemnity and contribution, then, is that indemnity shifts the entire loss to another party, while contribution distributes the loss among several responsible parties.

Interestingly, indemnity was limited in Merryweather v. Nixan to cases in which the indemnitee was not guilty of obvious wrong. Indemnity, however, unlike contribution, was not limited in its application. Indeed, courts have been much less prone to reject a claim of indemnity, even when the claim is based on the same policy grounds as
those offered to support contribution. 58

The most common form of indemnity arises in contract, 59 either under express indemnity provisions 60 or by implication from general contractual relationships. 61 Indemnity also may arise "by operation of law to prevent a result which is regarded as unjust or unsatisfactory." 62 The latter type of indemnity, known as implied or equitable indemnity, is based upon "a legal fiction founded not upon the parties' intent, express or implied, but upon justice, equity and the doctrine of unjust enrichment." 63

Under early common law, implied indemnity was limited to situations in which the parties had a pre-existing relationship. 64 In these situations an indemnitee free from any personal wrongdoing could nonetheless be held liable because the pre-existing relationship between the defendants allowed imputation of the indemnitee's wrongful conduct to the indemnitee. 65 Thus, a right of indemnity generally has been recognized in the following situations:

[W]here an employer is vicariously liable for the tort of a servant or an independent contractor; or an innocent partner or carrier is held liable for the acts of another, or the owner of an automobile for the conduct of the driver. Likewise one who is directed or employed by another to do an act not manifestly wrong, or is induced to act by the misrepresentations of the other, is entitled to indemnity for recovery by a third party. 66

58. Id. The authors write:

Although the ancient specious argument that the courts will not aid one tortfeasor against another because no one should be permitted to found a cause of action on one's own wrong, would appear to apply quite as fully to indemnity as to contribution, the courts have been much more disposed to reject it where indemnity is involved.

Id. (footnote omitted).

59. See id.; see also Furnish, Distributing Tort Liability: Contribution and Indemnity in Iowa, IOWA L. REV. 31 (1966) (analyzing contribution and indemnity in terms of contract principles); Leflar, supra note 22 (analyzing contribution and indemnity among tortfeasors); Sherk, Common Law Indemnity Among Joint Tortfeasors, 7 ARIZ. L. REV. 59 (1965) (analyzing contribution and indemnity among tortfeasors).

60. See generally PROSSER & KEETON, supra note 2, § 51, at 341 (discussing indemnity based on contract principles).


62. PROSSER & KEETON, supra note 2, § 51, at 341.


64. Id. at 254-55.

65. PROSSER & KEETON, supra note 2, § 51, at 341-42.

66. Id. (footnotes omitted).
Over time, however, many courts have expanded the doctrine of implied indemnity and, in certain situations, have allowed indemnity in favor of parties who are not free from fault. For example, courts have granted retailers or users of goods indemnity against suppliers found liable in strict liability or warranty for a defective product, even though the retailer or user may have also been negligent to some extent. Additionally, at least one court has granted indemnity to a building owner who negligently relied upon a contractor to make repairs or improvements.

In granting indemnity to negligent parties, some jurisdictions have distinguished between tortfeasors who are “passively” or “secondarily” liable and those who are “actively” or “primarily” liable. The New York Court of Appeals stated the rule as follows:

Where several tort-feasors are involved an implied contract of indemnity arises in favor of the wrongdoer who has been guilty of passive negligence, if there be such, against the one who has been actively negligent. The actively negligent tort-feasor is considered the primary or principal wrongdoer and is held responsible for his negligent act not only to the person directly injured thereby, but also to any other person indirectly harmed by being cast in damages by operation of law for the wrongful act.

In reaction to the strict rules against contribution, many courts have extended indemnity to include negligent indemnities. These courts have found a right of total indemnity in situations in which contribution was justified, but was prohibited by the law of the jurisdiction. Consequently, these courts have based their decisions on general equitable principles which have made it difficult, if not impossible, to

67. See id. at 342-43.
70. See, e.g., Bond v. Otis Elevator Co., 388 S.W.2d 681 (Tex. 1965).
72. McFall, 304 N.Y. at 328, 107 N.E.2d at 471.
determine "when indemnity will be allowed and when it will not." 74 Affording a right of contribution in these cases, as opposed to applying rules of indemnity based on ambiguous equitable justifications, would increase uniformity.

2. Indemnity in South Carolina

The law of indemnity in South Carolina has evolved in a manner similar to other jurisdictions. South Carolina has long accepted "[t]he general rule . . . that there can be no indemnity among mere joint tort-feasors." 75 Nevertheless, South Carolina, like other jurisdictions, has applied indemnity in a variety of situations, including cases involving joint tortfeasors. 76

Courts in South Carolina have always upheld valid indemnity provisions in contracts. 77 Furthermore, South Carolina has recognized a right of indemnity in the absence of an express contractual provision when "'one person is compelled to pay damages because of negligence imputed to him as the result of a tort committed by another . . . .'" 78 South Carolina courts have held that an employer who is held liable for the torts of an employee under the doctrine of respondeat superior has a right of indemnity against the employee. 79 In addition, a party who employs an independent contractor has a right of indemnity for liability imputed to the party because of the independent contractor's negligence. 80

An indemnitee has no right of indemnity, however, if the indemnitee was personally at fault, separate from any negligence imputed to

74. PROSSER & KEETON, supra note 2, § 51, at 343.
hkim.\textsuperscript{81} Furthermore, in \textit{Atlantic Coast Line Railroad v. Whetstone}\textsuperscript{82} the supreme court stated that it would not distinguish between passive and active negligence to allow for contribution in favor of the passive tortfeasor:

The \textit{ratio decidendi} of cases granting indemnity has frequently been expressed in such general terms as that . . . the negligence of the indemnitee was merely passive as compared to the negligence of the indemnitor which was active . . . . It would seem that such [a] general proposition[] . . . will not serve as [an] adequate standard[] to determine whether or not a tort-feasor guilty of ordinary negligence may recover indemnity against a tort-feasor guilty of gross negligence.\textsuperscript{83}

Even though the decision in \textit{Whetstone} appeared to reject the active-passive distinction in determining whether a right of indemnity exists,\textsuperscript{84} two recent cases indicate that South Carolina courts may overlook the negligence of an indemnitee when allowing indemnity would further justice.\textsuperscript{85} These cases appear to be almost a tacit acceptance of the active-passive rule.

\textbf{C. Justifications for the "No Contribution" Rule}

Although the general rule prohibiting contribution among joint tortfeasors is more readily traced to misinterpretations of precedent\textsuperscript{86} than to adoption of well-reasoned legal principles, proponents of the rule offer several rationales to support its continued application. Each of these arguments, however, is either inapplicable in modern tort law or outweighed by the potential injustice created by the rule.

\textsuperscript{81} See \textit{Atlantic Coast Line R.R.}, 243 S.C. at 70, 132 S.E.2d at 176; Addy, 257 S.C. at 34, 183 S.E.2d at 710.
\textsuperscript{82} 243 S.C. 61, 132 S.E.2d 172 (1963).
\textsuperscript{83} \textit{Id.} at 70, 132 S.E.2d at 176 (citations omitted).
\textsuperscript{84} See \textit{Utilities Constr. Co.}, 244 S.C. at 87-88, 135 S.E.2d at 616-17 (construing \textit{Whetstone} as rejecting the active-passive distinction in determining whether a right of indemnity exists).
\textsuperscript{85} See McCain Mfg. Corp. v. Rockwell Int'l Corp., 695 F.2d 803 (4th Cir. 1982) (court applying South Carolina law, allowed plaintiff-sellers claim for indemnity against machine manufacturer after seller paid judgment for negligence, saying any negligence on part of seller was merely passive); Stuck v. Pioneer Logging Mach., Inc., 279 S.C. 22, 24-25, 301 S.E.2d 552, 553 (1983) (court distinguished this case from other indemnity cases denying relief to a negligent party on basis that the buyer of the vehicle and the seller were not joint tortfeasors and granted buyer a right of indemnity against seller, even though buyer was negligent in failing to inspect vehicle for defects). \textit{See generally} Gray & Catt, \textit{The Law of Indemnity in South Carolina}, 41 S.C.L. Rev. 605, 613-14 (1980) (discussing McCain and Stuck as they relate to the status of the active-passive rule in South Carolina).
\textsuperscript{86} See supra notes 17-50 and accompanying text.
1. The No Contribution Rule Has a Deterrent Effect

The traditional argument proferred in support of the rule against contribution is that allowing contribution would dilute the deterrent and punitive effect of tort liability. Some courts fear that allowing contribution would encourage misconduct because tortfeasors could act irresponsibly, secure in the knowledge that they ultimately would be liable only for a portion of the resulting award.

The deterrent argument is persuasive, however, only to the extent that tort law is intended to be punitive in effect. Therefore, it has little application in actions that allege negligence and are intended to provide compensation. Professor Bohlen recognized that, for the rule against contribution to have a deterrent effect, the following three elements must exist: (1) the tortfeasor must know that his actions may expose him to liability; (2) the tortfeasor must know that if injury results it is partly due to another's misconduct; and (3) the tortfeasor must be aware of the rule denying contribution. None of these requirements are likely to be met by a tortfeasor who is merely negligent. Thus, as stated by the Court of Appeals for the District of Columbia in rejecting the deterrent rationale: "To believe that the rule of no contribution will tend to make a careless person careful . . . seems to us wholly fanciful."

In addition, since certainty rather than severity of sanction may be more important in deterring misconduct, the no contribution rule actually may encourage wrongful conduct in certain situations. For example, a wrongdoer may be more predisposed to act if he knows that the victim would likely seek recovery against a more affluent tortfeasor.

2. Courts Should Not Assist Wrongdoers in Settling Their Disputes

Another argument often used to justify denying contribution is that the courts should not waste time and resources to assist wrongdoers in settling their disputes. The purpose of the court system, how-

87. See Bohlen, supra note 73, at 557-69; Leflar, supra note 22, at 133-34.
88. See Peck v. Ellis, 2 Johns. Ch. 131, 137 (N.Y. Ch. 1816).
89. See Bohlen, supra note 73, at 558.
90. See id.
93. See Leflar, supra note 22, at 133-34.
94. See Atlantic Coast Line R.R. v. Whetstone, 243 S.C. 61, 68, 132 S.E.2d 172, 175 (1962) ("[A]s between joint tortfeasors there is no right of contribution or indemnity,
ever, is to administer justice. "Justice[, in turn,] involves the principle of equality, which is violated if, when several parties are involved in the same fault, one alone bears the total loss." The inequality created by the no contribution rule becomes even more obvious when one considers that the plaintiff is more likely to select a defendant based on comparative wealth rather than comparative culpability.

3. The No Contribution Rule Creates Effective Loss Distribution

A third rationale offered for the rule against contribution is that it keeps wealthy defendants and liability insurers from shifting loss to poorer or uninsured parties, thus creating effective loss distribution. This rationale is questionable, however, because of the inequality and resulting injustice created by basing liability on relative wealth rather than relative culpability. In addition, this rationale has no application to cases in which the tortfeasors are equally able to pay. Furthermore, because the no contribution rule does not prevent the injured party from seeking compensation from the less affluent tortfeasor, the loss distribution effect is eliminated.

D. Present State of Contribution in the United States

In the United States the great majority of jurisdictions have recognized that the rule denying contribution among joint tortfeasors was not well founded and, therefore, have abrogated the common-law doctrine. The main inroad has been by legislative enactment. Seventeen states have adopted a version of the Uniform Contribution Among Tortfeasors Act. Another five states have broader contribution stat-

the rule being premised on the doctrine that the Courts are not open to wrongdoers to assist them in adjusting the burdens of their misconduct, and that the law will not lend its aid to one who founds his cause of action on a delict."); RESTATEMENT (SECOND) OF TORTS, § 886A comment a (1979); Leflar, supra note 22, at 134-35.

96. See Bohlen, supra note 73, at 558.
97. Prosser & Keeton, supra note 2, § 50, at 337-38. If the "loss allocation" argument is deemed to have merit, then the approach of North Carolina, denying only insurance companies the right to seek contribution, should be adopted. See Lumbermen's Mut. Casualty Co. v. United States Fidelity & Guar. Co., 211 N.C. 13, 188 S.E. 634 (1936).
98. Comment, supra note 71, at 215.
99. Id.
100. Id.
utes which provide for contribution, but leave most questions for the courts.\textsuperscript{102} Three states have incorporated contribution into their comparative fault statutes,\textsuperscript{103} and in Michigan the legislature passed a contribution statute\textsuperscript{104} after the Supreme Court of Michigan judicially adopted comparative fault.\textsuperscript{105}

Maine\textsuperscript{106} and Iowa\textsuperscript{107} were the first states to adopt contribution judicially. Illinois,\textsuperscript{108} Missouri,\textsuperscript{109} New York,\textsuperscript{110} and the District of Columbia\textsuperscript{111} also apply judicially accepted contribution.\textsuperscript{112} Statutes allowing pro rata contribution in California\textsuperscript{113} and West Virginia\textsuperscript{114} have been subsequently voided by judicial adoption of contribution based on proportionate fault.

The following states do not recognize a right of contribution: Ala-
bama,^{116} Connecticut,^{116} Indiana,^{117} Kansas,^{118} New Hampshire,^{119} Vermont,^{120} and Oklahoma.^{121} In Kansas, New Hampshire, Vermont, and Indiana,^{122} however, the issue of contribution does not arise because these states have abolished joint and several liability. A plaintiff in these states can collect only the portion of liability individually assessed against a tortfeasor; therefore, contribution is not needed. Similarly, the doctrine of joint and several liability has been limited in Oklahoma.^{123}

II. APPLYING CONTRIBUTION IN SOUTH CAROLINA

In 1939, the National Conference of Commissioners on Uniform State Laws drafted the first Uniform Contribution Among Tortfeasors Act.^{124} The Uniform Act was revised in 1955,^{125} and by 1988 seventeen states had adopted some version of it.^{126} Adding to that number, South Carolina adopted the 1955 Uniform Act with few changes.^{127}

The South Carolina Uniform Act provides for contribution when two or more persons become jointly and severally liable in tort for the same injury to person or property, "even though judgment has not been recovered against all or any of them."^{128} Under the Act, tortfeasors pay a pro rata share, regardless of each party's relative de-

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118. See infra text accompanying note 122.

119. See id.

120. See id.


123. Limited application of joint and several liability applies only to cases in which the damages cannot be apportioned or in which plaintiff is not at fault. See Boyles v. Oklahoma Natural Gas Co., 619 P.2d 613 (Okla. 1980); Laubach v. Morgan, 588 P.2d 1071 (Okla. 1978).

124. UNIF. CONTRIBUTION AMONG TORTFEASORS ACT, 12 U.L.A. 57 (1939) (revised 1955) [hereinafter UNIF. ACT (1939)].

125. UNIF. CONTRIBUTION AMONG TORTFEASORS ACT, 12 U.L.A. 63 (hereinafter UNIF. ACT (1955)).

126. See supra note 101 and accompanying text.


degree of fault.\(^{129}\) Recovery from other tortfeasors is limited to the excess of actual payment over the paying tortfeasor’s pro rata share of liability.\(^{128}\) The South Carolina Act provides for a limited right of contribution to recover a portion of an out-of-pocket settlement, but the settlement must first extinguish the liability of another tortfeasor.\(^{131}\) Finally, the Uniform Act expressly excludes intentional, willful, or wanton acts from coverage.\(^{132}\)

In the first decision to discuss application of the South Carolina Uniform Act, the federal district court in *Lightner v. Duke Power Co.*\(^{133}\) held that the Act did not apply to a claim for contribution based on a tort that occurred before the effective date of the Act. The court noted that the "Act became effective on April 5, 1988, and ‘applies to those causes of action arising or accruing on or after the effective date of th[e] act.’"\(^{134}\) The court held that

>a right to contribution, and hence a cause of action for contribution, arises when the underlying tort giving rise to a common liability occurs. This inchoate right matures into a complete and enforceable right of action only after a tortfeasor pays more than his pro rata share of the judgment.\(^{135}\)

Noting the past reluctance of South Carolina courts to apply an act retroactively when inchoate rights would be affected,\(^{136}\) the court refused to apply the Contribution Act to an action based on an underlying tort that occurred before the effective date of the Act. The decision in *Lightner* is in accord with the view of most states that have considered retroactive application of contribution statutes.\(^{137}\) Furthermore,


\(^{134}\) Id. at 1314 (quoting South Carolina Contribution Among Tortfeasors Act, 1988 S.C. Acts 432, § 10 (1988)).

\(^{135}\) Id. at 1316.

\(^{136}\) Id. at 1316. The court referred to the South Carolina Supreme Court’s ruling in Schall v. Sturm, Ruger Co., 278 S.C. 646, 300 S.E.2d 735 (1983), in which the court refused to apply the South Carolina strict liability statute retroactively, even though only inchoate rights would be affected.

Lightner appears to reflect the view that the South Carolina Supreme Court would take on the issue.\(^{138}\)

A. Measuring Contribution Shares

Under the South Carolina Act\(^{139}\) and in most jurisdictions allowing contribution,\(^{140}\) damages are apportioned equally among the tortfeasors, making each tortfeasor liable for a pro rata share. Under this “equality is equity”\(^{141}\) rule, relative degrees of fault are not considered. Presumably, a principal rationale underlying the rule is that apportioning fault would place a difficult and unnecessary burden on the courts. Thus, to determine the contribution shares, a court simply divides the judgment or settlement giving rise to the claim of contribution by the total number of tortfeasors.\(^{142}\)

Nevertheless, potential injustice can result from the pro rata share approach. In Bielski v. Schulze\(^{143}\) the jury found the party seeking contribution to be ninety-five percent at fault and the other party only five percent at fault.\(^{144}\) The trial court, however, felt bound to follow the existing law of the state requiring equal share apportionment and allowed the plaintiff to recover fifty percent of the judgment from the party who was only five percent at fault.\(^{145}\) Recognizing the injustice created by application of the pro rata share rule, the Wisconsin Supreme Court reduced the contribution recovery to five percent of the damage claim, stating:

If the doctrine is to do equity, there is no reason in logic or in natural justice why the shares of common liability of joint tortfeasors should not be translated into the percentage of the causal negligence which contributed to the injury. This is merely a refinement of the equitable principle.\(^{146}\)

Accordingly, a growing minority of jurisdictions have begun to apportion liability on the basis of relative fault, following reasoning simi-
lar to that employed by the court in Bielski.\footnote{147} Jurisdictions that apply comparative fault generally apply comparative contribution principles as well.\footnote{148} Thus, as jurisdictions become more familiar with the application of comparative fault, comparative contribution, which is based essentially on the same equitable principles, may also gain greater acceptance.

Another concern involving the apportionment of contribution is how to calculate contribution shares when one of the tortfeasors is insolvent or outside the jurisdiction of the court assessing the liability.\footnote{149} In this situation there are basically two methods of calculating contribution shares—the "equitable rule" and the "legal rule."\footnote{150} Under the equitable rule, the paying tortfeasors divide the nonpaying tortfeasor's share equally among themselves and add the sum to their own shares.\footnote{151} Under the legal rule, the tortfeasor against whom the judgment plaintiff executes his judgment must assume the nonpaying tortfeasor's share.\footnote{152} In other words, he cannot seek contribution from the other tortfeasors for the share of the nonpaying tortfeasor.

The legal rule has one redeeming quality: if the nonpaying tortfeasor becomes solvent or comes within the jurisdiction, the rule requires only one suit to recover contribution from him.\footnote{153} Nevertheless, the inequities produced by the legal rule within the doctrine of contribution, a remedy based on equity, have induced almost universal application of the equitable rule.\footnote{154}

\section*{B. Treatment of Intentional Tortfeasors}

As noted earlier, Merryweather \textit{v. Nixan},\footnote{155} the English case credited with giving rise to the common-law rule denying contribution among joint tortfeasors, actually denied contribution only to inten-

\footnote{148. See \textit{supra} notes 103-05 and accompanying text.}
\footnote{149. Comment, \textit{supra} note 71, at 233-34 n.118.}
\footnote{150. \textit{Id.}}
\footnote{151. \textit{Id.}}
\footnote{152. \textit{Id.}}
\footnote{153. \textit{Id.}}
\footnote{154. See \textit{id.}}
\footnote{155. 101 Eng. Rep. 1337 (K.B. 1799).}
tional wrongdoers.\textsuperscript{156} Jurisdictions in the United States that now per-
mit contribution among negligent tortfeasors have attempted to pre-
serve the original rationale of \textit{Merryweather} \textsuperscript{157} by denying contribution
when the underlying tort was intentional or when there was a violation
of the law.\textsuperscript{158} For example, the South Carolina Act provides that
"[t]here is no right of contribution in favor of any tortfeasor who has
intentionally caused or contributed to the injury or wrongful death."\textsuperscript{159} Some courts have even held that no right of contribution exists under the
Uniform Act when the conduct of the tortfeasors was aggravated
negligence.\textsuperscript{160}

Substantial authority supports the opposing argument that the equ-
itable policies which form the basis for allowing contribution among
negligent tortfeasors apply equally well to intentional tortfeasors.\textsuperscript{161} In
fact, neither the English contribution act\textsuperscript{162} nor the 1939 Uniform
Act\textsuperscript{163} distinguish between negligent and intentional torts in allowing
contribution.

One rationale given for extending contribution to intentional
tortfeasors is that not every tort labeled "intentional" constitutes a moral wrong.\textsuperscript{164} For example, the Restatement (Second) of Torts pro-
vides that "[t]here is no right of contribution in favor of any tortfeasor
who has intentionally caused the harm."\textsuperscript{165} The Restatement drafters
recognized, however, that situations exist in which a right of contribu-
tion should be granted to an "intentional" tortfeasor. Addressing the
rule against contribution for intentional tortfeasors, the drafters wrote:

This rule has been modified, however, to permit contribution in favor
of one who is charged with a purely technical tort without any real
intent to do harm, as in the case of one who has intentionally entered
the land of another and so become liable for trespass in the innocent
belief that the land is his own. On the same basis, one who has be-

\begin{itemize}
\item \textsuperscript{156} See \textit{supra} notes 22-25 and accompanying text.
\item \textsuperscript{157} See \textit{RESTATEMENT (SECOND) OF TORTS} § 886A comment j (1979).
\item \textsuperscript{158} See, e.g., Carriers Ins. Exch. v. Truck Ins. Exch., 310 F.2d 653 (4th Cir. 1962)
(applying Virginia law); Nettles v. Alexander, 169 Ark. 380, 275 S.W. 708 (1925); Best v.
Yerkes, 247 Iowa 800, 77 N.W.2d 23 (1956).
\item \textsuperscript{159} See S.C. Code Ann. § 15-33-20(C) (Law. Co-op. Supp. 1988); see also \textit{UNIF. ACT}
(1955), supra note 125, § 1(c), at 63 (containing a bracketed section not in the South
Carolina version imposing a "wilfully and wantonly" requirement after the word
"intentionally").
\item \textsuperscript{160} See, e.g., Hardware Mut. Casualty Co. v. Danberry, 234 Minn. 391, 48 N.W.2d
567 (1951); Zurn v. Whatley, 213 Wis. 365, 251 N.W. 435 (1933).
\item \textsuperscript{161} See \textit{Leflar}, supra note 22, at 144-46.
\item \textsuperscript{162} See \textit{Married Women & Tortfeasors Act}, 1935, 25 & 26 Geo. 5, ch. 30, § 6.
\item \textsuperscript{163} \textit{UNIF. ACT} (1939), \textit{supra} note 124.
\item \textsuperscript{164} See \textit{RESTATEMENT (SECOND) OF TORTS} § 886A comment j (1979).
\item \textsuperscript{165} Id. § 886A(3).
\end{itemize}
come liable for conversion by reason of his bona fide purchase of stolen goods may be allowed contribution.

It is not enough for application of the rule . . . that the tortfeasor seeking contribution has intentionally violated a statute, as by driving at a speed in excess of the statutory limit or parking next to a fireplug, if his conduct is not intended to do harm to anyone.166

The Restatement drafters reason that contribution should be denied only when conscious and deliberate intent to do harm is an element of the underlying tort.167 In support of this approach, the drafters argued that the rationale that courts should not aid a deliberate wrongdoer only applies in cases in which the tortfeasor intended to harm the victim.168 Likewise, the deterrence rationale for denying contribution applies only when the harm is intentional.169 Some commentators would go further, however, and allow contribution when both tortfeasors act deliberately. These commentators apparently reason that when both tortfeasors are equally culpable, no reason exists to deny contribution.170 Additionally, the drafters argued that when the actual harm exceeds the harm intended, a limited right of contribution should be permitted.171

Regardless of the view taken toward intentional torts, however, contribution should be allowed only when the judgment is granted for the acts of multiple tortfeasors. Contribution clearly should not be allowed for punitive damages intended for an individual tortfeasor.172

C. Procedures for Enforcing Contribution

The Contribution Among Tortfeasors Act does not clearly delineate the procedures for enforcing the new substantive right to contribution. Unlike the 1939 Uniform Act, the 1955 version does not expressly provide for impleading contribution defendants or for cross-claims among defendants who are parties to the plaintiff's action on the underlying claim. The legislature further confused matters by adding two sentences to the Act which are foreign both to the uniform acts and to contribution legislation in other states. Thus, determining when a claim for contribution may be brought remains a task for the courts in

166. Id. § 886A comment j.
167. See id.
168. See id.
169. See supra notes 87-93 and accompanying text.
170. See Comment, supra note 71, at 231-32.
171. Id. at 232.
South Carolina.

The 1939 Act made extensive provisions for third-party practice,\footnote{173 See Unif. Act (1939), \textit{supra} note 124, § 7, at 58. Section 7 of the 1939 Uniform} Provided:

(1) Before answering, a defendant seeking contribution in a tort action may move ex parte or, after answering, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable as a joint tortfeasor to him or to the plaintiff for all or part of the plaintiff's claim against him. If the motion is granted and the summons and complaint are served, the person so served, hereinafter called the third-party defendant, shall make his defense to the complaint of the plaintiff and to the third-party complaint in the same manner as defenses are made by an original defendant to an original complaint. The third-party plaintiff has to the plaintiff's claim. The plaintiff shall amend his pleadings to assert against the third-party defendant any claim which the plaintiff might have asserted against the third-party defendant had he been joined originally as a defendant. The third-party defendant is bound by the adjudication of the third-party plaintiff's liability to the plaintiff as well as of his own liability to the plaintiff and to the third-party plaintiff. A third-party defendant may proceed under this Section against any person not a party to the action who is or may be liable as a joint tortfeasor to him or to the third-party plaintiff for all or part of the claim made in the action against the third-party defendants.

(2) When a counterclaim is asserted against a plaintiff he may cause a third party to be brought in under circumstances which under this Section would entitle a defendant to do so.

(3) A pleader may either (a) state as a cross-claim against a co-party any claim that the co-party is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant; or (b) move for judgment for contribution against any other joint judgment debtor, where in a single action a judgment has been entered against joint tortfeasors one of whom has discharged the judgment by payment or has paid more than his pro rata share thereof. If relief can be obtained as provided in this Subsection no independent action shall be maintained to enforce the claim for contribution.

(4) The court may render such judgments, one or more in number, as may be suitable under the provisions of this Act.

(5) As among joint tortfeasors against whom a judgment has been entered in a single action, the provisions of Section 2, Subsection (4) or this Act apply only if the issue of the proportionate fault is litigated between them by cross-complaint in that action.

\textit{Id.} This section of the Uniform Act is similar in concept and language to the third-party practice provisions of the South Carolina Rules of Civil Procedure (SCRCP) and the Federal Rules of Civil Procedure (FRCP). \textit{See} S.C.R. Civ. P. 14; FED. R. Civ. P. 14. One notable difference between the 1939 Act and the federal and state rules is that under the 1939 Act the adjudication of the original defendant's liability to the original plaintiff is binding upon the third-party defendant, while the SCRCP and FRCP provide that the plaintiff "may" amend his pleadings to assert a claim against the third-party defendant. \textit{Cf. Larson Mach., Inc. v. Wallace, 268 Ark. 192, 600 S.W.2d 1 (1980)} (noting that under the 1939 Act the third-party plaintiff is automatically bound by judgment imposed on the original defendant).
but the Commissioners, deferring to the established procedures in the states, deleted this provision from the 1955 Act.\textsuperscript{174} Of the states adopting the 1955 Act, only North Carolina has added an express provision relating to third-party practice or cross-claims.\textsuperscript{176} South Carolina has not expressly provided for third-party practice in the Act, but instead added to the enforcement provisions two sentences which question the propriety of efforts to adjudicate contribution claims among defendants to the plaintiff's underlying action or efforts to add third-party defendants not sued originally by the plaintiff.

South Carolina Code section 15-38-40 implements the Uniform Act's enforcement procedures. The initial subsection provides, in a verbatim adoption of the uniform language, that a tortfeasor may bring a separate contribution action against a co-tortfeasor. Under this provision, "[w]hether 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."\textsuperscript{176} This provision is consistent with practice in both state and federal court because procedural rules of impleader and cross-claims are permissive rather than mandatory and, therefore, do not preclude separate actions for contribution.\textsuperscript{177}

\textsuperscript{174} The Commissioners' comment to the 1955 Act states that "[n]o provision for impleading and cross-complaints among joint tortfeasors in the original action prior to trial on plaintiff's claims are included. This is left to the established procedure in the several states." \textit{Unif. Act} (1955), \textit{supra} note 125, § 3 commissioners' comment to subsection (b), at 89.

\textsuperscript{175} The North Carolina Contribution Act provides:
If there is no judgment for the injury or wrongful death against the tort-feasor seeking contribution, his right of contribution is barred unless he has either
(1) Discharged by payment the common liability within the statute of limitations period applicable to claimant's right of action against him and has commenced his action for contribution within one year after payment,
(2) Agreed while action is pending against him to discharge the common liability and has within one year after the agreement paid the liability and commenced his action for contribution, or
(3) While action is pending against him, joined the other tort-feasors as third-party defendants for the purpose of contribution.
N.C. \textit{Gen. Stat.} § 1B-3(d) (1983). This provision is identical to the Uniform Act and to South Carolina's version, except for the addition of subsection (3).
If the South Carolina courts allow third-party practice under the Act, the North Carolina decisions addressing related issues should prove a helpful resource.

\textsuperscript{176} S.C. \textit{Code Ann.} § 15-38-40(A) (Law. Co-op. Supp. 1989). "This simply announces the rather obvious proposition that the remedy of contribution may always be enforced in a separate action and need not be enforced in the action establishing liability for the tort, even where the case has gone to judgment." \textit{Unif. Act} (1955), \textit{supra} note 125, § 3 commissioners' comment to subsection (a), at 89.

\textsuperscript{177} Maloney Concrete Co. v. D.C. Transit Sys., Inc., 241 Md. 420, 216 A.2d 895 (Ct.
Section 15-38-40(B), however, contains a curious departure from the Uniform Act and versions of the Act implemented in other states. Both section 15-38-40(B) and the Uniform Act begin with the following sentence: "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." The South Carolina General Assembly, however, added the following two sentences to subsection (B):

Provided, however, contribution may not be enforced in the action until the issue of liability and resulting damages against the defendant or defendants named in the action is determined. Once the issue of liability has been resolved, subject to Section 15-38-20(B), a defendant has the right to seek contribution against any judgment defendant and other persons who were not made parties to the action.

The meaning of these two sentences is not self-evident. Nonetheless, the construction given them will determine whether the Act is a workable means of equitably spreading the burden of liability or whether the Act itself is so burdensome and expensive for defendants to apply that those intended to benefit from it will be discouraged from using it.

The two sentences could be interpreted to limit contribution to separate actions, eliminating impleader and cross-claim devices for determining rights among tortfeasors prior to a plaintiff's judgment against one or more defendants. The sentences require determination of liability and damages before contribution may be "enforced" or before a defendant has "the right to seek" contribution. The legislature probably added the sentences to the legislation at the insistence of those who feared that the Act would allow defendants, through third-party practice, to raise significantly the level of complexity and expense for plaintiffs by adding defendants to the action. The doctrinal justification for prohibiting a defendant from bringing claims against other tortfeasors is that "there is no cause of action whatsoever [for contribution] until a tortfeasor has paid more than his or her pro rata share of a judgment. Therefore, there can be no cause of action until such time as that occurs."

The arguments against allowing cross-claims and third-party prac-

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tice under the Contribution Act, however, are not persuasive. These devices do not increase significantly the plaintiff's burden or pose doctrinal inconsistencies. In fact, they greatly improve judicial economy. First, using cross-claims or impleader under either the state or federal rule does not increase the plaintiff's burden in litigation enough to justify proscription of their use. If a defendant is allowed to bring in additional parties alleged to be either solely or jointly liable for the plaintiff's damages, then the plaintiff must make new decisions based on the presence of the new parties. The plaintiff must decide whether to assert claims against the third-party defendant and whether to adjust his trial strategy based upon the defendant/third-party plaintiff's likely defense that the damages were caused by the third-party defendant.

Several factors, however, mitigate the burdens associated with these decisions. Initially, if a plaintiff's damages were arguably caused at least in part by a third party, the defendant will likely contend that the third party (not present in the suit) was an intervening cause of the plaintiff's damages. In such a case the plaintiff will have a more onerous task of countering the defendant's argument on this issue than if the third party had been impleaded. The principal difference is that a plaintiff's burden is increased in the absence of a third party because demonstrating that the third party did not cause the damages becomes solely the plaintiff's responsibility. If the defendant were allowed under Rule 14(a) to implead, then the third party could shoulder much, if not all, of the responsibility for demonstrating that he did not intervene to cause the plaintiff's damages.

Having a third party in court as an additional adversary to the defendant can, therefore, actually alleviate the cost and complexity of the plaintiff's case. The plaintiff, of course, can choose to assert claims against the third-party defendant under the permissive provisions of Rule 14(a). A plaintiff who chooses to such assert claims surely would not protest inclusion of the additional defendant. Furthermore, in some cases a plaintiff may not even be aware of the existence of a third-party defendant prior to initiating the original action.

In addition to the practical considerations that mitigate the increased burden on plaintiffs, the rules of procedure also provide formal means to prevent defendants from abusing third-party practice in con-

181. Rule 14(a) provides in part:
The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13.

FED. R. CIV. P. 14(a); S.C.R. CIV. P. 14(a).
tribution actions. In *Nikolous v. Superior Court* the Arizona Supreme Court considered a plaintiff’s argument that “a plaintiff must have the unfettered right to maintain a lawsuit as he or she sees fit, without the confusion, complications, delays, costs and litigation burdens inherent in the proposed use of Rule 14(a).” The court rejected the plaintiff’s argument and allowed impleader because the trial court retains discretion under the rule to strike or sever the third-party claim. The *Nikolous* court stated:

> We suggest that the trial court consider the nature of the evidence, the merits and probable success of the proposed third-party action, the need of the defendants and the benefit to the judicial system in resolving liability and contribution issues in one action. Balanced against this is the plaintiff’s need to manage the risks of delay, of confusing the jury, and the additional procedural and financial burden to the plaintiff if his narrow choice of defendants is expanded by a shotgun blast of contribution claims. The final decision must be a balance of these and similar competing practical and equitable considerations. Thus, the trial court’s rulings in this area necessarily require the exercise of discretion.

Both federal and state courts applying Rule 14(a) in the context of South Carolina’s Contribution Act would be authorized to use discretion similar to that suggested in *Nikolous* to alleviate any potential unfairness to plaintiffs.

This same level of discretion also seems appropriate under other rules relating to cross-claims and joinder of parties. For instance, under

183. Id. at 259, 756 P.2d at 928.
184. Rule 14(a) provides in part that “[a]ny party may move to strike the third-party claim, or for its severance or separate trial.” Fed. R. Civ. P. 14(a); S.C.R. Civ. P. 14(a). This motion may be made even if the party was added within ten days of the answer without the necessity for leave of court. See H. Lightsey & J. Flanagan, South Carolina Civil Procedure 233 (1985). The purpose of the rule “is to protect the original litigants from prejudiced [sic] cause [sic] by the joinder of parties and claims and the harm may not appear until later in the litigation.” Id. (citing 6 C. Wright & A. Miller, Federal Practice and Procedure § 1460 (1971)).
186. The official comment to the federal rule provides:

> After the third-party defendant is brought in, the court has discretion to strike the third-party claim if it is obviously unmeritorious and can only delay or prejudice the disposition of the plaintiff’s claim, or to sever the third-party claim or accord it separate trial if confusion or prejudice would otherwise result. This discretion, applicable not merely to the cases covered by the amendment where the third-party defendant is brought in without leave, but to all impleaders under the rule, is emphasized in the next-to-last sentence of the subdivision . . . .

Fed. R. Civ. P. 14(a) advisory committee notes.
Rule 13(g), which is identical under both state and federal procedure, a defendant may state a claim arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein [...] including a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.\footnote{187}

In addition to the judicial discretion permitted by Rule 13(g), Rule 13(i) refers to Rule 42(b) Separate Trials, which gives the Court the power to order separate trials on any cross or counterclaim or issue therein in the interests of efficiency, convenience or to avoid prejudice to the existing parties. This Rule also refers to Rule 54(b), Judgment Upon Multiple Claims or Involving Multiple Parties, and authorizes separate judgments in the severed actions.\footnote{188}

These rules provide an ample basis for a court to exercise the discretion necessary to prevent a plaintiff from becoming enmeshed in "a web of litigation and cross-litigation spun by the defendant."\footnote{189}

Allowing defendants to litigate contribution claims, whether by means of impleader, joinder or cross-claim, simultaneously with the plaintiff's action against them also avoids creating an enigma for courts charged with resolving rights that have not fully vested. Those opposing simultaneous consideration of a contribution claim with the main cause of action insist that resolution of the contribution claim prior to a defendant's payment of more than a pro rata share of a common liability is premature and improper. Resolution of contingent or inchoate rights to contribution under these circumstances, however, is an established practice in other states and expressly contemplated by both the federal and state rules of procedure. Moreover, it is consistent with contribution law.

Virtually all courts in other jurisdictions that have adopted the 1955 Uniform Act have found that their rules of procedure permit litigation of contribution claims in the plaintiff's action, even if asserted prior to payment of a judgment.\footnote{190} In Florida, for instance, the con-

\footnote{187. \textit{Fed. R. Civ. P.} 13(g); S.C.R. Civ. P. 13(g). Interestingly, the principal commentators on the South Carolina Rules of Civil Procedure note that cross-claims for contribution are permitted and that such claims may be contingent. \textit{See} H. Lightsey \& J. Flanagan, \textit{supra} note 184, at 255. This comment, however, was written prior to the adoption of the Contribution Act and does not relate to the specific language of the Act addressing cross-claims and third-party practice.}

\footnote{188. H. Lightsey \& J. Flanagan, \textit{supra} note 184, at 257.}

\footnote{189. Nikolous, 157 Ariz. at 259, 756 P.2d at 928.}

\footnote{190. \textit{See}, e.g., Thornton v. Town of Hull, 515 F. Supp. 715 (D. Mass. 1981); Niko-
bution act also provides that “[w]hen a judgment has been entered in an action against two or more tortfeasors . . . contribution may be enforced in that action by judgment in favor of one against other judgment defendants . . . .”191 Florida’s state rules of procedure also include a provision identical to the Federal and South Carolina text of Rule 14(a).192 In *New Hampshire Insurance Co. v. Petrik*193 the Florida district court of appeal for the first district noted that the contribution statute allows a separate action for contribution but “does not state that contribution must be enforced by separate action.”194 Accordingly, the court held that the defendant in that action could bring a third-party action against an alleged joint tortfeasor. The court observed:

Since the establishment of procedure is peculiarly a judicial function and because of the implicit logic that the same jury which assesses recovery for the plaintiff should also assess against whom such recovery is made, the third party action for contribution against a party not made a defendant by the plaintiff is not prohibited as a matter of law as found by the trial court.195

Allowing a defendant to use impleader, joinder and cross-claims to assert contribution claims in a plaintiff’s action is a more sensible approach because it maximizes judicial economy and efficiency. In *Markey v. Skog*,196 an opinion often cited as a basis for allowing third-party practice to assert contribution claims, the Superior Court of New Jersey set forth the judicial economy rationale:

The ascertainment [sic] by codefendants in a negligence action of a right of contribution *inter sese* and the right of a defendant to implead a joint tortfeasor by a third-party complaint before plaintiff’s cause of action has been reduced to a judgment are merely devices of procedural convenience afforded by the rules of practice. Thus, although a defendant is not necessarily bound to proceed against joint tortfeasors in the

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194. *Id.* at 49.

195. *Id.* at 50; see also Christiani v. Popovich, 363 So. 2d 2, 10 (Fla. Dist. Ct. App. 1978) (cross-claims also permitted to litigate contribution issues in plaintiff’s lawsuit), cert. denied, 389 So. 2d 1179 (Fla. 1980).

same action in which plaintiff seeks to establish his (defendant's) liability, he ordinarily will, nevertheless, do so because a single action is the most orderly and logical manner in which proof of common liability can be established—and it is, of course, common liability which is the substantive basis of the right of contribution.\textsuperscript{197}

The Arizona Supreme Court in \textit{Nikolous v. Superior Court}\textsuperscript{198} used a similar analysis in holding that contribution claims fall within the purview of Rule 14(a). The plaintiff in \textit{Nikolous} contended that, "because the cause of action for contribution does not really exist before a tortfeasor pays more than its prorata [sic] share, and defendants have not yet paid any share, defendants have no contribution rights to assert in a third-party action."\textsuperscript{199} The court was not persuaded, stating:

\begin{quote}
The fact that the right of contribution might not exist or become enforceable by direct action until payment of more than the pro rata share of liability does not conflict with the language or intent of Rule 14(a) . . .

. . . . Rule 14(a) was designed to promote the interests of judicial economy and efficiency by permitting the procedural assertion of just such contingent or inchoate claims. It is precisely this type of consolidated proceeding which is "the most orderly and logical method" to establish the common liability which is the substantive basis of the right of contribution.\textsuperscript{200}
\end{quote}

Without question, Rule 14(a) is a proper vehicle for litigating contribution claims. In \textit{Lightner v. Duke Power Co.},\textsuperscript{201} the first decision to construe the South Carolina Contribution Among Tortfeasors Act, a federal district court defined the nature of a contribution right prior to entry or payment of judgment. The court stated:

[A] right to contribution, and hence a cause of action for contribution,
arises when the underlying tort giving rise to a common liability occurs. This inchoate right matures into a complete and enforceable right of action only after a tortfeasor pays more than his pro rata share of the judgment. . . . Thus, the inchoate right accrues when the common liability arises, but the remedy is not available until a tortfeasor pays more than his share of the judgment.\footnote{202}

Furthermore, the Fourth Circuit Court of Appeals has held that Rule 14 was created to facilitate the trial of inchoate claims. In Glen Falls Indemnity Co. v. Atlantic Building Corp.\footnote{203} the Fourth Circuit addressed the propriety of asserting similar actions under Rule 14. The court held:

Rule 14 was designed to . . . enable the rights of an indemnitee against an indemnitor and the rights of the latter against a wrongdoer to be finally settled in one and the same suit. It is generally held that it is no obstacle to a third party action that the liability, if any, of the third party defendant can be established only after that of the original defendant and after the satisfaction of the plaintiff’s claim, where subrogation is the basis of the claim.\footnote{204}

The court explained the rationale for its liberal construction of Rule 14(a) in American Export Lines v. Revel,\footnote{205} stating:

The purpose of third-party procedure is to prevent circuity of action by drawing into one proceeding all parties who may become ultimately liable, so that they may therein assert and have a determination of their various claims inter sese. This is intended to save time and cost of duplicating evidence and to obtain consistent results from identical or similar evidence, as well as to avoid the serious handicap of a time lag between a judgment against the original defendant and a judgment in his favor against the third-party defendant.\footnote{206}

Rule 14(a) has proved an effective device for asserting contribution claims in other jurisdictions, even when multiple parties are alleged to be liable to the plaintiff on various theories. In Pitcavage v. Mastercraft Boat Co.\footnote{207} a Pennsylvania district court allowed a defend-

\footnotesize{202. Id. at 1316.} 
\footnotesize{203. 199 F.2d 60 (4th Cir. 1952).} 
\footnotesize{204. Id. at 63. As noted earlier, the South Carolina version of Rule 14(A) is identical to the federal rule. Although no South Carolina decisions have interpreted the scope of Rule 14, commentators have observed that the rule reverses prior holdings that causes of action cannot be maintained until they accrue. See H. Lightsey \& J. Flanagan, supra note 184, at 259 (citing Smart v. Charleston Mobile Homes, Inc., 269 S.C. 588, 239 S.E.2d 78 (1977), as a decision no longer effective after adoption of Rule 14 in South Carolina).} 
\footnotesize{205. 262 F.2d 122 (4th Cir. 1968), aff’d, 266 F.2d 82 (4th Cir. 1989).} 
\footnotesize{206. Id. at 124-25.} 
\footnotesize{207. 632 F. Supp. 842 (M.D. Pa. 1985).}
ant in a products liability action to assert a third-party action against users of the product to establish that the users' negligence made them jointly and severally liable with the manufacturer of the product. The court noted:

In the present case, the third-party defendants may be liable to Mastercraft for contribution if it is later determined that the third-party defendants "contributed" to the accident. It is not necessary that the third-party defendants be automatically liable for all or part of plaintiffs' claim. Impleader is proper if under some construction of facts which might be adduced at trial, recovery by the third-party plaintiff would be possible.

Pitcavage also demonstrates how a court may deal with a plaintiff's contention that impleader confuses the issues at trial. In Pitcavage the plaintiffs opposed the impleader, arguing that permitting it would prejudice their case against the original defendants. The court rejected this argument, however, stating:

Plaintiffs contend that they should be able to proceed with their case without having a legal issue, which should not be considered by the jury, becoming a potential obstacle to recovery. . . . The issue of the third-party defendants' negligence may bear on the causation question in plaintiffs' case, and, in any event, can be effectively separated from the legal issues in the main case by use of proper jury instructions. Plaintiffs' interpretation of Rule 14 would require separate suits anytime different legal standards apply to the main case and the third-party suit. "Rule 14 should be liberally construed to effectuate its intended purpose of accomplishing in one proceeding the adjudication of the rights of all persons concerned in the controversy and to prevent the necessity of trying several related claims in different lawsuits."

Because much of the same testimony and evidence would have been required to resolve the various claims, the court allowed use of impleader.

Allowing contribution claims to be litigated simultaneously with the plaintiff's action is also consistent with the underlying purpose for allowing contribution in South Carolina. Prior to adoption of the Contribution Act in South Carolina, plaintiffs could choose their defendants. The Uniform Act is designed in part to limit the plaintiff's

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208. For further discussion of this decision and of problems associated with contribution among tortfeasors liable under different theories, see infra notes 250-77 and accompanying text.


210. Id. at 848 (citations and footnotes omitted).

choice.\textsuperscript{212} Interpretations of the Act which displace this objective inevitably undermine full implementation of the Act's equitable goals.\textsuperscript{213} In weighing the plaintiff's concerns that occasional defendants will abuse the privilege afforded under both the Act and rules of procedure, the interests of judicial economy and fairness tilt the scales decisively against a broad proscription of litigating contribution claims along with the plaintiff's claims.

Section 15-38-40(B)\textsuperscript{214} of South Carolina's Contribution Act should be viewed against the backdrop of decisions in other states implementing language borrowed from the Uniform Act. As previously noted, those states almost unanimously allow third-party practice under the Act.\textsuperscript{215} Accordingly, the first sentence added by the South Carolina legislature to the uniform language should be interpreted merely to mean that the right of contribution is inchoate until liability and damages are determined and one tortfeasor pays more than his pro rata share. The last sentence should be construed as nothing more than a restatement of section 15-38-40(A), with the added reference to the possibility of seeking contribution from nonparties to the original action.\textsuperscript{216}

D. Parties Entitled to Contribution

Regardless of the procedure used to assert an alleged right of contribution, contribution claimants must establish the requisite relationship between themselves and the alleged joint tortfeasor. The Act provides that "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, there is a right of contribution among them . . . .\textsuperscript{192}217 The Act also refers in three places to the "common liability" among the tortfeasors.\textsuperscript{218} The 1955 Act is different from the 1939 Act which used and defined "joint tortfeasors" in referring to the parties among

\textsuperscript{212} See Unif. Act (1955), supra note 125, commissioners' prefatory note, at 59.
\textsuperscript{213} For a full discussion of the plaintiff's choice rule in the context of statutes of limitations issues under the Act, see infra notes 313-15 and accompanying text.
\textsuperscript{215} See cases cited in supra note 190.
\textsuperscript{216} See H. Lightsey & J. Flanagan, supra note 184, at 259.
\textsuperscript{217} S.C. Code Ann. § 15-38-20(A) (Law. Co-op. Supp. 1989). This language is taken directly from the 1955 Uniform Act. See Unif. Act (1955), supra note 125, § 1(a), at 63. "By posing joint and several liability as alternatives . . . the statute apparently does not require joint action by tortfeasors as long as there is a common injury that gives rise to at least several liability." Coffey, Contribution Among Joint Tortfeasors: A Florida Case Law Survey and Analysis, 35 Univ. Miami L. Rev. 971, 975 (1981).
whom a right of contribution exists. The Commissioners changed the language used in this section of the Act, however, to accommodate those states in which "joint tortfeasors" has a special procedural meaning, and the change does not seem to signal a difference in the nature of common liability required to bring parties within the Act. Thus, those interpreting this section of the Act should not be deterred from looking to those states that have adopted the 1939 Act rather than the 1955 Act.

The starting point for determining the class of tortfeasors who share a right of contribution is the law of South Carolina concerning joint and several liability prior to enactment of the Contribution Act. This section of the Article will set forth the principles of joint and several liability as established under the common law of South Carolina. In addition, this section will explore several issues regarding the limits of joint and several liability that have arisen in other jurisdictions in which a right of contribution has been recognized.

1. Joint and Several Liability in South Carolina

South Carolina has long recognized the concept of joint and several liability, and from the earliest decisions applying the concept the courts have focused on the indivisibility of injury caused by more than one tortfeasor, rather than the unity or concert of the tortfeasors' conduct. In Matthews v. Seaboard Air Line Railway the South Carolina Supreme Court considered the nature of liability of three railroad company defendants in an action for wrongful death. The plaintiff alleged that the defendants' joint negligence led to the decedent's death from injuries he suffered when he fell into an excavation created to allow the three defendant companies' tracks to intersect and bypass each other. Accepting this argument, the court held that the defendants each had a duty to place some protective measures around the excavation. The

219. The 1939 Act provides that "the term 'joint tortfeasors' means two or more persons jointly or severally liable in tort for the same injury to person or property . . . ." Unif. Act (1939), supra note 124, § 1, at 57.

220. Unif. Act (1955), supra note 125, § 1 commissioners' comment to subsection (a), at 63. The commissioners' comment to the 1955 Act states:

This combines the provisions of Sections 1 and 2 of the 1939 Act. The definition of "joint tortfeasors" and the term itself have been eliminated. There are still a few jurisdictions in which those who act independently and not in concert, as for example two colliding automobile drivers, cannot always be joined as defendants in the same action. In these jurisdictions the tendency is to use "joint tortfeasors" to refer only to those who can be joined. The term is not indispensable to the Act, and the change in meaning might perhaps be confusing in those states.

221. 67 S.C. 499, '46 S.E. 335 (1903).
court defined joint and several liability as follows:

"If two or more persons owe to another the same duty, and by their common neglect of that duty, he is injured, doubtless, the tort is joint, and upon well settled principles each, any, or all of the tortfeasors may be held. But when each of two or more persons owe to another a separate duty, which each wrongfully neglects to perform, then, although the duties were diverse and disconnected, and the neglect of each was without concert, if such several neglects concurred and united together in causing injury, the tort is equally joint, and the tortfeasors are subject to a like liability."\(^{222}\)

Similarly, in *Pendelton v. Columbia Railway, Gas & Electric Co.*\(^{223}\) the supreme court considered a plaintiff's claim for personal injuries brought against a railroad company and an automobile driver. The plaintiff alleged that the defendant railway company negligently discharged him from one of its cars in the middle of the street and the defendant driver subsequently struck him with his automobile. The court defined joint and several liability in much the same terms as the *Matthews* court, stating:

That a single injury, which is the proximate result of the separate and independent acts of negligence of two or more parties, subjects the tort-feasors, even in the absence of community of design or concert of action, to a liability which is both joint and several, is a proposition recognized and approved in this state and supported by the great weight of authority elsewhere.\(^{224}\)

The court further held that a plaintiff proceeding against more than one defendant still had only one cause of action that could be asserted either jointly against the defendants in a single action or separately in different actions, even if a defendant had breached more than one duty owed to the plaintiff.\(^{225}\)

\(^{222}\) Id. at 514-15, 46 S.E. at 340 (quoting *Matthews v. R.R. Co.*, 22 L.R.A. 262 (N.J. 1893)).

\(^{223}\) 133 S.C. 326, 131 S.E. 265 (1926).

\(^{224}\) Id. at 331, 131 S.E. at 267.

\(^{225}\) See id. at 331-34, 131 S.E. at 267-68. The primary issue in *Pendelton* was whether the plaintiff in a suit against multiple defendants could be forced to declare whether his claims were against the defendants jointly or separately. The court held that the plaintiff could not sue the defendants severally in a single action. *Id.* at 335; 131 S.C. at 268. If the plaintiff joined two defendants in a single action, then the plaintiff's cause of action necessarily was against the defendants "jointly." The court observed:

Neither the fact that the complaint in the case at bar sets out in separate paragraphs the separate acts of negligence of each defendant which are alleged to have caused the single injury complained of, nor the fact that the negligent acts are alleged to have been committed by two separate and independent parties, make of the complaint one which states more than one cause of action in
The South Carolina Supreme Court re-emphasized the nature of the injury and rejected a focus on the source of the duties breached in *Meddin v. Southern Railway*. In *Meddin* a purchaser of perishable goods sued the shipper of the goods and the railway carrier as joint tortfeasors for failing to ship the goods in sufficient ice to prevent spoilage. The plaintiff alleged that the two defendants breached a variety of duties, including various Public Service Commission regulations applicable to shippers and common carriers. The carrier sought a demurrer to the complaint against it on the grounds that "no joint cause of action in tort [was] stated in the complaint, but that several causes of action not arising out of the same transactions [had] been improperly united." The court held:

[W]here the negligence of a shipper in its violation of the tariff rules and regulations combines and concurs, as a proximate cause of the injury sustained by the owner, with the negligence of a common carrier in the performance of its legal duties relating to the protection and preservation of a carload of perishable food products, each of them is liable in tort, and they may be joined in a suit against them as joint tort-feasors.

Thus, the South Carolina definition of joint and several liability pre-dating enactment of the contribution statute is consistent with the statute’s pronouncement that a contribution claimant must be liable for the “same injury” or the “same wrongful death.” Accordingly, courts determine who is a joint tortfeasor within the Act based upon the nature of the injury rather than on the degree of concert among the tortfeasors, the similarity of duties owed the plaintiff by the tortfeasors, or the time lapse between the tortious conduct of the

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The plaintiff expressly alleges that the separate acts of negligence attributed to each of the defendants concurred and cooperated to produce the result—the injury complained of. Having elected to sue the two defendants in one action, and having alleged that the acts of each concurred in causing his injury—the only theory upon which he was entitled to sue both in one action—he must recover, if at all, upon the theory of joint liability, and not that of separate causes of action predicated upon the several liability of the two defendants. *Id.* at 334-35, 131 S.E. at 268; accord *Halsey v. Minnesota-South Carolina Land & Timber Co.*, 174 S.C. 97, 177 S.E. 29 (1934); *Martin v. Hines*, 150 S.C. 210, 147 S.E. 870 (1929); *McKenzie v. Southern Ry.*, 113 S.C. 453, 102 S.E. 514 (1920); cf. *Christiansen v. Campbell*, 285 S.C. 164, 166, 328 S.E.2d 351, 353 (Ct. App. 1985) ("[O]ne injured by the wrongful act of two or more joint tort-feasors may elect either to sue each tort-feasor separately or to join them as parties defendant in a single action.").

227. *Id.* at 166, 62 S.E.2d at 113.
228. *Id.* at 167, 62 S.E.2d at 113.
tortfeasors, the task of interpreting the scope of the statute becomes simpler for the courts and more predictable for litigants.\(^{230}\)

2. Problems with Successive Tortfeasors

Identifying and analyzing the potential obstacles that could upset the determination of which tortfeasors become jointly and severally liable for the same injury is an imposing task, even if the focus remains upon the singularity of the injury rather than upon the nature of the actors' conduct. Difficulties are likely to emerge, for example, when an initial tortfeasor causes an injury and a subsequent tortfeasor aggravates that injury. Even before adoption of contribution, South Carolina recognized the majority rule that "the intervening negligence of a third

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230. In several Florida decisions, the appellate courts have engrafted upon their contribution statute, which contains the same language as the South Carolina and Uniform Acts regarding joint and several liability, requirements not contained in the statute. In Leesburg Hosp. Ass'n v. Carter, 321 So. 2d 433 (Fla. Dist. Ct. App. 1975), the plaintiff sued a hospital for malpractice and the hospital filed a third-party claim against the treating physician. The court allowed the contribution claim to proceed, but observed in dicta that the defendants' conduct must have occurred within a certain time period, even though the court did not require "split-second timing." Id. at 435. In VTN Consol. Inc. v. Coastal Eng'g Assocs., 341 So. 2d 226 (Fla. Dist. Ct. App. 1976), cert. denied, 345 So. 2d 428 (Fla. 1977), the court applied the time requirement to preclude a contribution claim. The plaintiff developer sued a surveyor who had prepared maps on a project and the surveyor sought to implead the engineers who had used the maps.

The court examined the relationship between the conduct of the surveyor and the engineers, not the commonality of injury caused by their separate acts. The court stated that "the claim for contribution must be related to the original cause of action—it must arise out of the same transaction or series of transactions." Apparently focusing on the fact that the topographical maps were prepared two years before the engineers allegedly misused them, the court held that they were not part of the same series of transactions. The Second District thus appears to have engrafted a transactional, or time-proximity, test upon a statutory standard that ostensibly could have been met by merely showing the "same injury." Coffey, supra note 217, at 976 (footnotes omitted) (quoting VTN Consol. Inc., 341 So.2d at 228-29).

A Florida district court of appeal in Touche Ross & Co. v. Sun Bank, 366 So. 2d 465 (Fla. Dist. Ct. App.), cert. denied, 378 So.2d 360 (Fla. 1979), refused to allow an accounting firm sued for not detecting an embezzlement from asserting a contribution claim against a bank for wrongfully honoring embezzlement checks. The court held that the accounting firm and the bank were not "exposed to [the plaintiff hospital] under the same set of circumstances." Id. at 467. Under these decisions, the Florida statute apparently requires not only that two tortfeasors cause the "same injury," but also that they act within a reasonably related time frame. Attaching such requirements as prerequisites to finding persons jointly and severally liable under a contribution act does not make sense. For a more complete discussion of these and other decisions interpreting this section of the Florida Contribution Act, see Coffey, supra note 217.
person will not excuse the original wrongdoer if such intervention ought to have been foreseen in the exercise of due care."\(^{231}\) Thus, if a tortfeasor causes an injury which subsequently is aggravated by a physician, the tortfeasor remains liable for the original injury and for the aggravation despite the physician’s intervention in the chain of causation.\(^{232}\)

The pertinent question, of course, is not whether the initial tortfeasor is liable for all of the damages to the plaintiff on proximate cause grounds, but whether the physician is liable for contribution to the initial tortfeasor. Although judicial decisions analyze the issue differently, the results are notably consistent. As a general rule, an initial tortfeasor cannot obtain contribution from a subsequently negligent treating physician.\(^ {233}\) While the reasons for this rule vary from case to


\(^{232}\) Id. In Graham an opthalmologist put eye drops into the eyes of a patient without warning the patient that blurriness would result. The patient fell and injured her hip. When a surgeon placed a pin in her hip it became infected. The court held the opthalmologist liable for the entire damages, including those resulting from the infected hip. The court noted:

It has been held in South Carolina that the negligence of an attending physician is reasonably foreseeable. The general rule is that if an injured person uses ordinary care in selecting a physician for treatment of his injury, the law regards the aggravation of the injury resulting from the negligent act of the physician as part of the immediate and direct damages which naturally flow from the original injury.

\(^{233}\) See, e.g., Reese v. AMF-Whitely, 420 F. Supp. 985, 989 (D. Neb. 1976) (Defendant manufacturer could not obtain contribution from physician because negligent medical care is foreseeable risk; however, “[t]he doctrine of subrogation has been applied in successive tortfeasor cases when the original wrongdoer has paid damages attributable not only to his own wrong but to the subsequent aggravation of injuries by the successive tortfeasor.”); Albertson’s, Inc. v. Adams, 473 So. 2d 231 (Fla. Dist. Ct. App. 1985) (pharmacists who gave incorrect prescription to patient could not obtain contribution from physician who failed to detect symptoms of incorrect medication because physician was at most a subsequent tortfeasor); Rudeck v. Wright, 218 Mont. 41, 709 P.2d 621 (1985) (surgeon who left sponge in patient not allowed to seek contribution from radiologist who failed to notice sponge in x-rays); Bost v. Metcalfe, 219 N.C. 607, 14 S.E.2d 648 (1941) (active tortfeasor who caused original injury cannot obtain contribution from merely passive tortfeasor doctor who negligently treated injuries); Fisher v. Milwaukee Elec. Ry. & Light Co., 173 Wis. 57, 180 N.W. 269 (1920) (railroad company not allowed contribution from doctor who aggravated injury caused to plaintiff by railroad; railroad was, however, subrogated to plaintiff’s cause of action against doctor). See generally Annotation, Right of Tortfeasor Initially Causing Injury to Recover Indemnity or Contribution From Medical Attendant Causing New Injury or Aggravating Injury in Course of Treatment, 8 A.L.R.3d 639 (1966 & Supp. 1989) (original tortfeasor and physician who causes subsequent injury generally are not considered joint tortfeasors and physician will not be liable under theory of contribution).
case, the Pennsylvania Superior Court in *Harka v. Nabati*\(^{234}\) set forth the typical analysis supporting the conclusion that a negligent doctor is not jointly and severally liable with an initial tortfeasor. The court stated:

"The acts of the original wrongdoer and the negligent physician are severable as to time, neither having the opportunity to guard against the other's acts, and each breaching a different duty owed to the injured plaintiff. While they are two active tortfeasors they are not acting 'jointly' when using that term in the strict sense."\(^{235}\)

Pennsylvania, however, uses a very strict definition of joint and several liability. Of the numerous factors a court could consider in determining if tortfeasors are jointly and severally liable, the *Harka* court used them all. Prosser and Keeton list the panoply of tests proposed for determining whether tortfeasors are jointly and severally liable as the following:

[T]he identity of a cause of action against each of two or more defendants; the existence of a common, or like, duty; whether the same evidence will support an action against each; the single, indivisible nature of the injury to the plaintiffs; identity of the facts as to time, place or result; whether the injury is direct and immediate, rather than consequential; responsibility of the defendants for the same injuria, as distinguished from the same damnum.\(^{236}\)

The court in *Harka* listed these factors to consider in making a determination of joint and several liability.\(^{237}\) This approach is narrow, unpredictable, and inevitably leads into the quagmire of case-by-case analysis.

The factors used in *Harka*, and to a greater or lesser degree in other states, should not be used to determine who will receive and who will make contribution. First, the identity of the cause of action against the two tortfeasors, the overlap of evidence necessary to prove the liability of the defendants, and the identity of facts as to time, place or result are all factors more properly considered in determining the best procedure for hearing a contribution claim, not in determining if a substantive right exists between the parties.\(^{238}\) For instance, a plaintiff's


\(^{235}\) Id. at 622, 487 A.2d at 434 (quoting Lasprogata v. Qualls, 263 Pa. Super. 174, 179, 397 A.2d 803, 805 (1979)).

\(^{236}\) Prosser & Keeton, *supra* note 2, at 322 n.2. Interestingly, Prosser and Keeton list these factors in the context of demonstrating the confusing variety of tests that various states use in deciding when parties are jointly and severally liable.

\(^{237}\) 337 Pa. Super. at 662, 487 A.2d at 434.

\(^{238}\) For a full discussion of procedural aspects of adjudicating contribution claims, see *supra* notes 173-216 and accompanying text.
cause of action against a negligent automobile driver is distinct from his cause of action against a doctor whose malpractice aggravated the injury. Proof of the plaintiff's claim against the driver of a second automobile who the plaintiff claims caused the initial injury will not require proof of the same facts or application of the same law as proof of a claim against the doctor. If, for this reason, the possibility exists that the plaintiff's case against the second driver will be prejudiced by the second driver's presentation of evidence regarding the doctor's malpractice, then the plaintiff would move for separate trials pursuant to either the federal or state rules. These procedural considerations can be accommodated under modern civil practice and do not justify rejecting the contribution claimant's substantive right to contribution.

The severability of the tortfeasors' conduct in terms of time is also not a valid consideration in determining if the parties have contribution rights. If their conduct was separated by such a period of time that it creates confusion in presentation of the issues to a single jury, the problem is purely procedural and can be addressed as suggested above under the rules of civil procedure. If the lapse in time between the conduct of the tortfeasors poses a problem in presentation of evidence, then the party prejudiced should seek relief under a statute of limitations or laches, rather than under the law of joint and several liability. The policy considerations underlying the prejudice flowing from a party's delay in bringing an action share no identity with the policies behind establishing joint and several liability under the Contribution Act. Furthermore, confusing the two only flusters the pursuit of equity under the Act.

The remaining considerations set forth by Prosser and Keeton and

239. A South Carolina federal district court decision interpreting the Contribution Act recently discussed the nature of a cause of action, stating:
A "cause of action" in South Carolina is defined as "a legal wrong threatened or committed against the complaining party." State v. Piedmont & N. Ry., 186 S.C. 49, 194 S.E. 631, 633 (1938) (citation omitted). It is composed of three parts—"a right in the plaintiff, a correlative duty or obligation resting on the defendant, and some act or omission done by the latter in violation of the right." Skalowski v. Joe Fisher, Inc., 152 S.C. 108, 149 S.E. 340, 344 (1929) (citation omitted). The court in Skalowski further stated that "[t]he cause of action is the right claimed or wrong suffered by the plaintiff on the one hand, and the duty or delict of the defendant on the other, and these appear by the facts of each separate case." Id. (citation omitted).

240. If the second driver impaled the doctor, then the plaintiff would move to strike the defendant's claim against the doctor or to sever the claim against the doctor pursuant to Rule 14(a). See Fed. R. Civ. P. 14(a); S. C. R. Civ. P. 14(a). Other applicable federal and state rules are Rule 42(b) (separate trials) and Rule 54(b) (judgment upon multiple claims or involving multiple parties).
applied in *Harka* concern the indivisibility of the injury to the plaintiff—the only criterion for joint and several liability mentioned in the Uniform Act, the basic test of joint and several liability preceding the Act in South Carolina, and the only concern unique to the analysis of whether the tortfeasors should share the burden of liability for the wrong. When more than one tortfeasor is alleged to be responsible for an injury, the following three possibilities exist for assigning liability:

1. One tortfeasor is only technically liable for the other's wrong and should therefore receive indemnification for any liability attributed to him; or
2. the two tortfeasors caused separate, apportionable injuries to the plaintiff and should be separately liable; or
3. the two tortfeasors proximately caused the same injury and should each have a right of contribution from the other.

Of these three possibilities, apportionment is the most difficult to apply. Apportionment is a doctrine consistent with both indemnity and contribution and available to fill the gaps between the two. When contribution is inappropriate because two or more tortfeasors are not jointly liable for an injury that is indivisible and indemnity is unavailable because neither of the tortfeasors is without fault, then the court should be allowed to assess against the defendants the portion of damages caused by each.242

Apportionment is not entirely foreign to South Carolina. In *Rourk v. Selvey*243 the South Carolina Supreme Court considered whether apportionment was appropriate in an automobile collision case in which the parties were jointly and severally liable. The court stated that "for many years the bench and bar of this state have assumed that apportionment of damages among joint tortfeasors, according to the jury's

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241. For a more complete discussion of the principles of indemnification in South Carolina, see supra notes 75-85 and accompanying text.

242. See PROSSER & KEETON, supra note 2, § 52, at 345. Prosser and Keeton offer the following justification:

Where a factual basis can be found for some rough practical apportionment, which limits a defendant's liability to that part of the harm of which that defendant's conduct has been a cause in fact, it is likely that the apportionment will be made. Where no such basis can be found, the courts generally hold the defendant for the entire loss, notwithstanding the fact that other causes have contributed to it.

The distinction is one between injuries which are reasonably capable of being separated and injuries which are not. . . . There will be obvious difficulties of proof as to the apportionment of certain elements of damages, such as physical and mental suffering and medical expenses, but such difficulties are not insuperable, and it is better to attempt some rough division than to hold one defendant for the wound inflicted by the other.

view of the degree of their culpability, is allowable under our law." The court correctly ruled that apportionment was not proper in Rourk because the injury was caused by a "single impact" and the damages were "indivisible." Distinguishing Bevin v. Liguard, a decision in which apportionment was permitted, the Rourk court stated:

The action [in Bevin] was for beating the plaintiff in his dwelling house and for damage to the dwelling and furnishings. Plaintiff's injuries did not, as here, flow from a single impact. It does not appear that some rough approximation of the damage done by each defendant was, as here, impossible. The allowance of apportionment is not unusual where such an approximation may reasonably be made.

On the basis of this language, it is arguable that apportionment of di-

244. Id. at 29, 164 S.E.2d at 910. Actually, the court misstated the problem. "Culpability" is not an issue in apportionment because it is a question of fault. Apportionment concerns the divisibility of injury, not the degree of fault.

245. Id. at 34, 164 S.E.2d at 913.

246. Id. at 35, 164 S.E.2d at 914. The basis for the ruling in Rourke is disputable, but the basis for the holding asserted here is, at least, a fair reading of the case. In South Carolina Ins. Co. v. James C. Greene & Co., 290 S.C. 171, 348 S.E.2d 617 (Ct. App. 1986), the South Carolina Court of Appeals interpreted Rourk to mean that "the courts will not undertake to apportion damages among the various persons whose negligence concurred to cause the plaintiff's injury." Id. at 176, 348 S.E.2d at 620. This sentence does not clearly support the view of Rourk asserted here, nor does it contradict it. The court in South Carolina Ins. could have meant that apportionment is not available to joint tortfeasors responsible for an indivisible injury, which is consistent with this Article's view, or, conversely, it could have meant that apportionment is not available under any circumstance.

247. 3 S.C.L. (1 Brev.) 503 (1805).


Under common law rules, when two or more persons act independently to cause a single harm for which there is a reasonable basis of apportionment according to the contribution of each, each is held liable only for the portion of harm that he causes. When such persons cause a single and indivisible harm, however, they are held liable jointly and severally for the entire harm.

Id. at 172 (citations omitted). The Monsanto court adopted the apportionment rule of the Restatement (Second) of Torts, which provides:

(1) Damages for harm are to be apportioned among two or more causes where
   (a) there are distinct harms, or
   (b) there is a reasonable basis for determining the contribution of each
      cause to a single harm.

(2) Damages for any other harm cannot be apportioned among two or more
    causes.

visible damages among several tortfeasors should be made when the tortfeasors are barred from seeking indemnity or contribution.249

3. Problems Created When Defendants Are Liable Under Different Theories

Several jurisdictions that have adopted a version of the Uniform Act have considered whether a tortfeasor liable to a plaintiff for negligence can obtain contribution from a tortfeasor liable under a strict liability theory. Courts in most states that have adopted either the 1939 or 1955 Uniform Act have held that even if liability of two defendants is based on different theories, they may be liable to one another for contribution.250 Some courts, however, have refused to recognize that tortfeasors liable under different theories can obtain contribution from one another.251

Courts that have refused to allow contribution among defendants whose liability to the plaintiff is dependent upon different theories hold that contribution is inappropriate because the liability of the de-

249. Another interesting possibility is equitable subrogation. In Reese v. AMF-Whitely, 420 F. Supp. 985 (D. Neb. 1976), a minor was injured when a gym bar he was using collapsed. The minor’s father sued the gym bar manufacturer. The manufacturer then sought contribution from the installer of the gym bar and the doctor who was alleged to have negligently treated the injured minor. The court held that even if the physician who treated the minor were negligent, he was not a joint tortfeasor with the manufacturer and no contribution was available. The court held that negligent medical care could be viewed as a foreseeable risk arising from the original tortfeasor’s actions. The court further held, however, that if the doctor had been negligent, the defendant manufacturer was subrogated to any claim that the plaintiff would have for malpractice against the physician. The court stated, “[t]he doctrine of subrogation has been applied in successive tortfeasor cases when the original wrongdoer has paid damages attributable not only to his own wrong but to the subsequent aggravation of injuries by the successive tortfeasor.” Id. at 989.


fendants is "not on the same legal plane."252 In Svetz v. Land Tool Co.,253 however, the Superior Court of Pennsylvania rejected this notion. In Svetz the plaintiff brought a wrongful death action against the manufacturer of an allegedly defective motorcycle helmet whose defects were claimed to have contributed to the decedent's death. The manufacturer denied liability and joined as additional defendants a second motorcyclist who was racing with the decedent at the time of the accident and a tavern keeper who allegedly had served the decedent alcohol while he was already intoxicated. The trial court "held joinder improper because plaintiff's claim against the appellant-manufacturer was based on principles of strict liability; whereas, the appellant-manufacturer's claim for contribution from the additional defendants was based on negligence."254

On appeal, the superior court noted that the contribution act was based on principles of equity and that its purposes would be better served by allowing the contribution action to proceed. The court held:

The focus of the Uniform Act is on the relationship existing between tortfeasors rather than the manner in which several tortfeasors have been held liable to an injured claimant. In Puller v. Puller, 380 Pa. 219, 221, 110 A.2d 175, 177 (1955), the Supreme Court observed that "contribution is not a recovery for the tort [committed against the plaintiff,] but the enforcement of an equitable duty to share liability for the wrong done." Thus, a tortfeasor's right to receive contribution from a joint tortfeasor derives not from his liability to the claimant but rather from the equitable principle that once the joint liability of several tortfeasors has been determined, it would be unfair to impose the financial burden of the plaintiff's loss on one tortfeasor to the exclusion of the other. It matters not on which theory a tortfeasor has been held responsible for the tort committed against the plaintiff. So long as the party seeking contribution has paid in excess of his or her share of liability, it would be inequitable under the Act to deny that party's right to contribution from a second tortfeasor who also contributed to the plaintiff's injury.255

In South Carolina, the most compelling argument for allowing contribution in this situation is that joint and several liability both under the Act and prior to its adoption revolves around the indivisibility of the injury to the plaintiff, not the nature of the tortfeasors' wrong.256

To determine if parties are jointly and severally liable the court does

254. Id. at 237, 513 A.2d at 406-07.
255. Id. at 238, 513 A.2d at 407 (citations omitted).
256. See supra notes 221-30 and accompanying text.
not look to the duty breached, but to the injury caused.\textsuperscript{257} Thus, courts in other jurisdictions have found common liability for contribution purposes between tortfeasors whose liability arises by breaches of duties established under different statutes.\textsuperscript{258} The Supreme Court of Massachusetts in \textit{Wolfe v. Ford Motor Co.}\textsuperscript{259} upheld a contribution claim asserted by a defendant against a co-defendant even though they were liable under different theories because the Contribution Act's "concern is with joint liability in tort for the same injury, not with whether such joint liability is based on the same theory."\textsuperscript{260} The same approach should allow contribution in similar circumstances under the South Carolina Contribution Among Tortfeasors Act.

Procedurally, a contribution action brought by a defendant liable to the plaintiff under one theory against a tortfeasor liable under a different theory should be allowed through impleader.\textsuperscript{261} In \textit{Pitcavage v. Mastercraft Boat Co.}\textsuperscript{262} the plaintiff sued the manufacturers of two boats that collided alleging that the boats were negligently manufactured and that the manufacturers were liable under negligence, strict liability, and breach of warranty. Mastercraft, one of the original defendants, filed a third-party action against the operators of the boats, alleging that their negligence contributed to the accident. The court held that the third-party complaint was a proper mechanism for asserting a contribution action, even if the theory of liability asserted against the third-party defendants differed from the theory asserted against the original defendant. The court held that "[f]or purposes of Rule 14, it is immaterial that the liability of the third party is not identical to or rests on a different theory than that underlying plaintiffs' claim."\textsuperscript{263}

\textsuperscript{257} See id.
\textsuperscript{259} 386 Mass. 95, 434 N.E.2d 1008 (1982).
\textsuperscript{260} Id. at 100, 434 N.E.2d at 1011.
\textsuperscript{261} Whether impleader is proper under the South Carolina Act is a separate question discussed at supra notes 173-216 and accompanying text.
\textsuperscript{262} 632 F. Supp. 842 (M.D. Pa. 1985). For further discussion of this decision, see supra notes 207-09 and accompanying text.
\textsuperscript{263} Id. at 846-47. For a full discussion of procedural means of asserting a contribution action, see supra notes 173-216 and accompanying text.
4. Problems Created When a Contribution Defendant Is Immune to Direct Action

An additional problem in establishing the common liability required under the Contribution Act arises when a contribution defendant could not have been sued directly by the plaintiff because it has a special immunity. The issue thus becomes whether the party protected by the immunity can be jointly and severally liable for an injury for which it could not be solely liable. In states that recognize an interspousal immunity or a parent-child immunity, for example, this issue arises when an alleged tortfeasor seeks contribution from a party who, because of the immunity, could not be sued by the plaintiff directly.

Most courts addressing the issue of interspousal and parental immunities have concluded that a tortfeasor cannot maintain a contribution action against a person protected by the immunity in question. The typical, though certainly not the only, rationale for prohibiting contribution from protected persons is the absence of common liability required for contribution. In Welter v. Curry, the Arkansas Supreme Court rejected a contribution claim asserted against a minor plaintiff’s parents, stating:

It seems to be well settled that there is no right to contribution under


265. 260 Ark. 287, 539 S.W.2d 264 (1976).
the act from one who is not liable in tort to the injured person . . . ,
and the injured party must have a possible remedy against both the
party seeking contribution and the party from whom it is sought. It is
clear that these minor plaintiffs had no remedy against their
parents.\footnote{266}

The rule against allowing contribution in cases in which family im-
munity exists, however, is not unanimous. Pennsylvania, the "original
dissenter,"\footnote{267} has long refused to shield family members from contribu-
tion actions asserted by tortfeasors. In \textit{Puller v. Puller}\footnote{268} the Pennsyl-
vania Supreme Court observed:

Whatever may be the law in the majority of other jurisdictions, . . . it
is established in our own State that a tort-feasor has a right of contribu-
tion against a joint tort-feasor even though the judgment creditor
may be the latter's spouse, parent, or minor child; in other words, a
tort-feasor may recover such contribution even though, for some rea-
son, the plaintiff who has obtained a judgment against both of them
is precluded from enforcing liability thereunder against the joint tort-
feasor. The theory is that as between the two tort-feasors the contribu-
tion is not a recovery for the tort but the enforcement of an equita-
ble duty to share liability for the wrong done.\footnote{269}

Several states have followed Pennsylvania's lead in rejecting spousal or
parental immunity as a bar to contribution actions.\footnote{270} Moreover, some
commentators have argued that barring contribution from persons pro-
tected by these immunities undermines the policies underlying the
right of contribution.\footnote{271}

\footnote{266. \textit{Id.} at 298, 539 S.W.2d at 271 (citation omitted).}
\footnote{267. See Note, \textit{Contribution Among Joint Tortfeasors When One Tortfeasor En-
joys Special Defense Against Action By the Injured Party}, 52 \textit{Cornell L.Q.} 407, 408
(1967).}
\footnote{268. 380 Pa. 219, 110 A.2d 175 (1955).}
\footnote{269. \textit{Id.} at 221, 110 A.2d at 177 (citations omitted).}
\footnote{270. The following decisions have held that interspousal immunity does not bar a
right of contribution: Winter \textit{v. Econ Prod., Ltd.}, 433 F. Supp. 742 (E.D. La. 1976); Jo-
3d 1074, 430 N.E.2d 236 (1981); Bedell \textit{v. Reagan}, 159 Me. 292, 192 A.2d 24 (1963);

The following decisions have held that parental immunity does not bar a right of
contribution: Perchell \textit{v. District of Columbia}, 444 F.2d 997 (D.C. Cir. 1971); Chinos Vil-
105 Ill. App. 3d 965, 435 N.E.2d 221 (1982); Walker \textit{v. Milton}, 263 La. 555, 268 So. 2d
654 (1972); Restifo \textit{v. McDonald}, 426 Pa. 5, 230 A.2d 199 (1967); Bishop \textit{v. Nielson}, 632

271. See, e.g., Hertz, \textit{The Tort Triangle: Contribution From Defendants Whom
Plaintiffs Cannot Sue}, 32 M. L. Rev. 83 (1980); Note, supra note 267; Note, \textit{Immunity to
Although South Carolina does not recognize interspousal\textsuperscript{272} or a parental\textsuperscript{273} immunity in tort actions, it does provide statutory immunity for employers in a tort action brought by employees for injuries received in the scope of employment.\textsuperscript{274} Courts in other jurisdictions overwhelmingly hold that a tortfeasor cannot obtain contribution from an employer shielded from an employee's direct suit.\textsuperscript{276} South Carolina,

\textit{Direct Action: Is It a Defense to a Contribution Claim?}, 52 U. COLO. L. REV. 151 (1980). Hertz summarizes the case against allowing an immunity to interfere with a right of contribution, stating:

\[ \text{While contribution is based on the claiming tortfeasor's discharge of a common obligation to the plaintiff, the definition of this obligation should not depend on the plaintiff's ability to enforce legal liability against both tortfeasors. Rather, contribution rests on broader notions of fairness in the division of the burden of damages between persons participating in tortious acts or omissions which result in injury to the plaintiff. Where the protected tortfeasor enjoys a defense against the plaintiff, the court should resolve the conflict between the equitable basis of contribution and the purposes underlying the protected tortfeasor's defense against the plaintiff.} \]

\[ \text{Hertz, supra, at 83-84.} \]


\[ \text{274. S.C. Code Ann. § 42-1-540 (Law. Co-op. 1976) ("The rights and remedies granted by this Title to an employee... exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin as against his employer, at common law or otherwise, on account of such injury, loss of service or death.").} \]

however, has an express provision in its Workers' Compensation Act under which an injured employee's claim against a third party may be reduced by the amount of compensation paid by the employer under the Workers' Compensation Act.276 This provision further states that "the third person's right to enforce such contribution against the employer should thereupon be satisfied."277

E. Statute of Limitations Issues

The Uniform Act has spawned considerable litigation regarding statutes of limitations issues. Because the South Carolina Contribution Act is virtually identical to the Uniform Act, decisions from other jurisdictions addressing statute of limitations issues under the Act provide a useful guide for determining the course that South Carolina courts are likely to follow. Additionally, many of the common-law contribution decisions of other jurisdictions offer a framework for analyzing the South Carolina Act.

1. Limitations of Actions Under the South Carolina Act

The South Carolina Act traces the language of the Uniform Act in its provisions providing for a limitations period. Section 15-38-40(C) states: "If there is a judgment for the injury or wrongful death against the tortfeasor seeking contribution, any separate action by him to enforce contribution must be commenced within one year after the judgment has become final by lapse of time for appeal or after appellate review."278 The one-year limitations provision in subsection (C) for contribution claimants against whom a judgment has become final represents a compromise279 between starting the statute of limitations period when a contribution claimant has paid more than his pro rata share of the common liability280 and starting the limitations period at various times after the judgment became final.


277. Id.
279. UNIF. ACT (1955), supra note 125, § 3 commissioners' comment to subsection (a), at 90.
280. Numerous courts have held that the statute of limitations period does not begin until actual payment of a judgment by a contribution claimant. See, e.g., Travelers Ins. Co. v. Feld Car & Truck Leasing Corp., 517 F. Supp. 1132 (D. Kan. 1981); Bradford
when judgment is merely entered.\textsuperscript{281} The rationale for not beginning the statute of limitations period until judgment is actually paid is that a statute of limitations period cannot begin to run until a claimant has accrued a right to seek contribution. This right, even under the South Carolina Contribution Act, does not exist until a tortfeasor "has paid more than his pro rata share of the common liability."\textsuperscript{282} To begin the statute of limitations before a tortfeasor pays more than its share of a judgment would, in essence, punish a party for sitting on rights he has not yet acquired. Thus, triggering this statute upon payment is consistent with the traditional view that contribution is a separate cause of action and with the notion that a limitations period is designed in part to punish those who fail to exercise accrued rights within a reasonable time.

In addition to fostering doctrinal consistency, this view protects the contribution claimant from potential unfairness resulting from the statute's expiration prior to payment of the judgment. If a claimant must pay a judgment before bringing a contribution action, then the claimant's ability to trigger contribution rights and thereby avoid running afoul of the limitations depends on whether the claimant can pay the judgment shortly after becoming liable for it. If, for example, a party is sued and becomes liable for a judgment, the party's inability to discharge the judgment for a year would defeat the right to receive contribution if a six-month statute of limitations were to begin running upon entry of judgment.\textsuperscript{283}


\textsuperscript{283} The commissioners' comments to the Uniform Act note that a primary reason for not restricting the limitations period to six months from the date of judgment was that the short period would "restrict the right to contribution to those who can raise the money to pay off the judgment immediately." Unif. Act (1955), supra note 125, § 3 commissioners' comment to subsection (C), at 89.
On the other hand, starting the limitations period upon actual payment undermines the very purpose of a time limitation, which is to protect potential defendants by shielding them from extended periods of uncertainty concerning exposure to suit, by supporting acts (including the disposal of evidence) done in reasonable reliance upon potential plaintiffs' inaction and especially by preventing the institution of lawsuits at times when defendants would be disadvantaged due to their inability to obtain evidence to support their defenses.

By triggering the contribution limitations period upon payment, a court would allow a tortfeasor to prejudice a co-tortfeasor by refusing to make payment for an extended period of time after entry of the judgment.

The Uniform Act's compromise, which South Carolina adopted, protects the tortfeasor held liable by providing a one-year period after final judgment in which to commence an enforcement action. The Act, therefore, gives the claimant a reasonable period in which to pay the judgment, thus triggering the claimant's rights under the Act, without unduly prejudicing co-tortfeasors who may be held liable for their pro rata shares of the judgment.

2. Limitations Period Applicable to a Contribution Action

If a plaintiff brings suit promptly and a defendant seeks contribution immediately thereafter, the limitation period of the Act does not pose difficulties. Very often, however, the statute of limitations for the plaintiff's underlying cause of action against a contribution defendant will have expired long before the contribution action is initiated. A contribution defendant will then maintain that contribution is barred by the limitations period applicable to that specific wrong. Courts interpreting both common-law and statutory contribution, however, generally have held that a contribution action does not have to be brought within the limitations period applicable to the underlying action.

284. The Commissioners for the 1955 Uniform Act addressed this criticism of the 1939 Uniform Act, stating:

Where there is a short statute of limitations, as in most malpractice cases and in some states as to all personal injuries, this extension defeats the whole purpose of the short statute, by adding the time necessary to bring the first suit to judgment, and an additional period for the contribution suit.

Id.


287. See, e.g., ITT Rayonier, Inc. v. Southeastern Maritime Co., 620 F.2d 512 (5th...
Most courts addressing this issue begin with the premise that an action for contribution is a separate action between two or more tortfeasors that is triggered when one tortfeasor is required to pay more than his fair share of the liability, not when the act giving rise to the underlying liability occurs. Accordingly, a separate statute of limitations for co-tortfeasors seeking contribution makes sense. One commentator expressed the following rationale for providing a separate cause of action and a separate statute of limitations for contribution actions:

In one respect, tortfeasor plaintiffs are less deserving than victim plaintiffs. They are ex hypothesi wrongdoers attempting to shift the losses they have caused, not victims attempting to obtain compensation for harm caused by tortfeasors. . . . Nevertheless, tortfeasor plaintiffs who desire contribution labor under a disadvantage that victim plaintiffs do not: the inability to commence an action without having been sued by (or settled with) a third-party (the victim). Furthermore, contribution defendants are definitely entitled to the benefit of one period of limitation—that applying to causes of action for contribution—and may not deserve the benefits of a second limitation—that applying to the victims' actions for damages. One can at least decide that the hardship of being denied contribution outweighs the hardship of being sued after the limitation period applicable to the victim's claim has expired.

. . . .

. . . Fairness to plaintiffs requires that they be given a reasonable opportunity to sue before time runs out. This opportunity is unavailable to tortfeasors sued by victims at the end of a limitation period unless the running of the statute of limitations on the victims' causes of action does not have the effect of barring contribution.288

The general rule providing for a separate statute of limitations for contribution actions that, in essence, overrides a statute of limitations for

actions on the original injury has been adapted to many different situations. The rule applies as well in third-party contribution actions as it does in contribution actions brought after entry or collection of judgment.

3. When Limitations Periods Collide: How to Apply the Contribution Act

Application of the contribution statute of limitations becomes difficult when the statute of limitations on the plaintiff's original claim against the contribution defendant expired before the plaintiff initiated his original action against the contribution claimant. The issue is whether the contribution claimant can recover contribution from a co-tortfeasor who is protected from a suit by the original plaintiff because the statute of limitations on that action has expired.

A situation in which two defendants are alleged to be jointly liable for the same injury, but are protected by statutes of limitations of differing lengths is not uncommon. It often arises, for example, when one defendant is a governmental entity. The limitations periods are often different, as well, when the plaintiff sues one of the defendants under a statutory cause of action with a specified time in which the action must be commenced. Many statutes also provide different limitation periods for actions brought under different theories of recovery. In South Carolina, for example, the legislature has provided a

289. In a comprehensive law review article, Professor Kutner has identified 14 hypothetical cases in which contribution statutes of limitations could conflict with other statutes of limitations or notice requirements. This article is a helpful reference for determining the outcome of a fact-specific scenario. See Kutner, supra note 285, at 206-65.


291. See e.g., Showell Indus., 409 So. 2d 78 (action filed after expiration of statute of limitations for claims against the state or its political subdivisions); All Points Constr. Co., 566 S.W.2d 171 (action brought after expiration of statute of limitations applicable to claims against the Commonwealth).


wide variety of limitations periods for different actions, depending upon the type of action and category of defendant.294

a. Fulfilling the Common Liability Requirement

When differing limitations periods exist, the threshold question is whether the contribution defendant falls within the joint and several liability requirement of the statute. The rule is now settled that the Contribution Act’s requirement of joint and several liability is fulfilled if co-tortfeasors are jointly liable at the time the plaintiff’s cause of action accrues. Even if one of the defendants is no longer liable directly to the plaintiff, that defendant may still be liable to pay contribution. An Arkansas federal district court addressed this issue in Schott v. Colonial Baking Co.295 The plaintiff in Schott alleged that two defendants were jointly and severally liable in negligence for causing injury to the plaintiff. The district court dismissed the plaintiff’s action against one of the defendants because service of process was not properly executed during the three-year statute of limitations period applicable to negligence actions.296 The remaining defendant then sought contribution from the dismissed defendant in a third-party action. The third-party defendant contended, however, that, since the original plaintiff’s action against it had been dismissed, it was no longer directly liable to the plaintiff and, therefore, could not be subject to “common liability” with the third-party plaintiff.297

The court refused to dismiss the contribution action. The court noted, by analogy, that if the plaintiff had executed a valid release of the third-party defendant, the third-party defendant would nevertheless be liable for contribution to the third-party plaintiff. This would be true even though, by virtue of the release, the original plaintiff would have had no claim against the third-party defendant. The court continued:

There is little difference, if any, in permitting a plaintiff to select the defendant whom he might desire to collect from by intentionally or unintentionally forfeiting his right of action against one of the joint tort-feasors, as the plaintiff has done in the instant case, and in permitting a plaintiff to select the defendant by releasing his cause of action against another defendant. Stated differently, plaintiff’s action in allowing the statute of limitations to run as against the third party

296. Id. at 18.
297. Id. at 16.
defendants . . . was the equivalent of executing a release to the third party defendants and should not prevent the third party plaintiff from exercising its right of contribution.\(^{298}\)

The court in City of Kingsport v. SCM Corp.\(^{299}\) reached the same holding under similar facts. In City of Kingsport the plaintiff sued two defendants alleging that they were jointly and severally liable for the same harm. Because the action was instituted after the three-year statute of limitations had expired, the court dismissed one of the defendants. The other defendant, however, could not avail itself of the statute of limitations bar because it had induced the plaintiff into delaying the initiation of the lawsuit. The remaining defendant then initiated a third-party action seeking contribution from the dismissed defendant.\(^{300}\) The third-party defendant contended that it could not be held liable for contribution because the statute of limitations barred any action against it by the plaintiff, and that the remaining defendant’s waiver of the statute of limitations was personal to that defendant and could not operate to permit a third-party contribution action against the dismissed defendant. The district court rejected the third-party defendant’s argument and held that the common liability requirement in a contribution action is relevant only to the time when the original plaintiff’s claim arose.\(^{301}\)

Courts holding that the common liability inquiry should be limited to the time when the plaintiff’s cause of action arose distinguish accrual of the “right to contribution” and the accrual of a contribution “cause of action.” The right to contribution arises at the commission of a joint tort and cannot be defeated by a plaintiff’s release of one defendant or by the expiration of the statute of limitations relating to one defendant. A contribution cause of action arises either when judgment is entered against one defendant or when one defendant pays more than his fair share of the common liability.\(^{302}\) In Godfrey v. Tidewater Power Co.\(^{303}\) the court noted that common liability must exist as a “condition precedent to contribution, but it is not essential that it

\(^{298}\) Id. at 23. The court in Godfrey v. Tidewater Power Co., 223 N.C. 647, 27 S.E.2d 736 (1943), drew a similar analogy, stating, “Indeed, the right of contribution may be enforced after liability to the injured person or his representative has been extinguished by the payment of the judgment and its transfer to a trustee for the benefit of the paying judgment debtor.” Id. at 649, 27 S.E.2d at 737.


\(^{300}\) Id. at 97-98.

\(^{301}\) Id. at 100.

\(^{302}\) See supra notes 280-81 and accompanying text. This distinction also has been applied in considering retroactive application of the Act. See Lightner v. Duke Power Co., 719 F. Supp. 1310 (D.S.C. 1989).

\(^{303}\) 223 N.C. 647, 27 S.E.2d 736 (1943).
should continue to subsist, or be kept alive, against all of the joint tortfeasors." The court further noted:

The right accrues when judgment is obtained in an action arising out of a joint tort. From this it follows that a contingent or inchoate right to enforce contribution arises to each defendant tort-feasor at the time of the institution of the action to recover on the joint tort. As long then as the plaintiff's right to recover in such suit remains undetermined, the contingent or inchoate right of each defendant tort-feasor to enforce contribution continues and, on rendition of judgment in favor of the plaintiff, this right matures into a cause of action. Thus, it is rooted in and springs from the plaintiff's suit and projects itself beyond that suit, but is not dependent on the plaintiff's continued right to sue all the joint tort-feasors.

b. Preserving the Contribution Action Prior to Accrual

Courts holding that the right to contribution does not die when the plaintiff's underlying cause of action becomes barred by a statute of limitations are conceptually consistent with the holdings of many courts that an action for contribution cannot expire before it is born. The case most often cited for this proposition is Keleket X-ray Corp. v. United States. In Keleket the plaintiff sued the United States and a private party. A three-year statute of limitations was applicable to suits between private parties, but a two-year statute of limitations applied to suits against the United States. The plaintiff brought his action after two years but before the three year period had expired. The district court dismissed the plaintiff's claims against the United States. The private party defendant brought a third-party claim against the United States for contribution, which the district court dismissed.

The issue on appeal was whether the district court properly dis-

304. Id. at 649, 27 S.E.2d at 737.
305. Id. at 649-50, 27 S.E.2d at 738 (citation omitted).
306. The South Carolina Contribution Statute, like the Uniform Act, does not entirely resolve the dilemma of allowing a right to expire before it accrues. The statute provides for a one-year contribution limitations period when a judgment becomes final. S.C. Code Ann. § 15-38-40(C) (Law. Co-op. Supp. 1989). The actual right to contribution, however, does not accrue until a tortfeasor "has paid more than his pro-rata share of the common liability." Id. § 15-38-20(B). Thus, a contribution claimant who does not pay more than his share of a judgment within one year of when it becomes final will have lost the right before it accrued. This provision of the statute, as noted earlier, effects a compromise necessary to prevent a contribution claimant from prejudicing a contribution defendant by delaying payment of a judgment for an extended period of time. See supra notes 278-86 and accompanying text.
308. Id. at 168.
missed the private party defendant’s third-party claim against United States. The district court had held that a defendant may recover contribution from a joint tortfeasor only if the joint tortfeasor is directly liable to the injured party. It held that, because the statute of limitations for bringing an action against the United States had expired at the time the private party defendant sought to recover indemnity from the United States, the United States was not directly liable to the injured party. 309 It could not, therefore, be held liable for contribution to the private party defendant. 310 The court of appeals rejected the reasoning of the district court and held that the private party defendant’s claim to contribution “did not accrue before [that party] had been sued by [the plaintiff].” 311 The court noted that it knew of “no reason why the law should let action or inaction of the injured party defeat a claim to contribution.” 312

c. Controlling the Plaintiff’s Choice of Defendant

In addressing the potential effect that a plaintiff could have on a future action between joint tortfeasors, the court in Keleket strikes the note that brings harmony to the cases addressing this issue. The harmony lies in the rejection of a plaintiff’s right to choose the defendant from whom he will collect a judgment. Prior to the adoption of a right of contribution in South Carolina, for example, plaintiffs had the explicit right to elect whom they would sue. 312 Allowing the plaintiff to retain this right would undermine the intent of the Contribution Act to provide a fair allocation of liability among joint tortfeasors. 314 If the

309. Id. at 169.
310. Id.
311. Id. at 169. Of course, in most jurisdictions a claim to contribution arises upon either entry of judgment or payment of more than one’s pro rata share of the liability. See supra notes 280-81 and accompanying text.
312. Keleket, 275 F.2d at 169.
314. In a prefatory note to the 1955 Uniform Act, the commissioners stated:

Under the existing law an injured person may select whom he wishes to sue from among those jointly liable to him for an injury. He need not sue all. He may settle out of court or he may sue all and collect the full amount of the judgment from one. Under the prevailing law rule there is no recourse by one who voluntarily pays or who is forced to pay the common liability, against the others who are equally liable to the injured party but who have escaped payment.

This act would distribute the burden of responsibility equitable among those who are jointly liable and thus avoid the injustice often resulting under the common law.

Unif. Act (1955), supra note 125, commissioners’ prefatory note, at 59; see also Commonwealth v. All Points Constr. Co., 566 S.W.2d 171, 173 (Ky. Ct. App. 1977) (starting

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Kelekhet court had held, for example, that the third-party action was barred by the statute of limitations for actions against government entities, the plaintiff could effectively release the government defendant by waiting until after the shorter limitation periods had run to initiate the original action. The right of the remaining defendant to receive contribution from the government would then be defeated.315

d. Reconciling Inconsistencies in Legislative Intent

As the above discussion demonstrates, legislative intent is often

contribution statute of limitations not from time of commission of tort, but from time of payment). The All Points Constr. court's rationale was "to prevent an injured party from foreclosing a tortfeasor's right of contribution by waiting to bring his action until just before the statute of limitations ran on his claim, leaving the tortfeasor helpless to save his right of contribution." Id. at 173. The Michigan Supreme Court in Sziber v. Stout, 419 Mich. 514, 358 N.W.2d 330 (1984), also refused to allow the contribution statute of limitations to be manipulated by the plaintiff's time of filing suit, stating:

to hold otherwise would ... effectively permit a plaintiff to choose which of several possible defendants would bear the entire burden of paying a judgment simply by filing his lawsuit before the expiration of the three-year statute of limitations applicable to private tortfeasors, but after expiration of the two-year statute applicable to governmental units, and would thereby substantially limit the effectiveness of the contribution statute.

Id. at 536, 358 N.W.2d at 339.

315. The right to contribution could also be defeated if both defendants were subject to the same statute of limitations on the original action and the plaintiff waited until just before the statute expired to bring an action. In such a case, the defendant sued would not have time to assert his contribution right before it was lost. See All Points Constr., 566 S.W.2d at 173; Kutner, supra note 285, at 213-14. Additionally, the problem of allowing a plaintiff to choose his defendant is not limited to plaintiffs who consciously avoid suing a certain defendant. See, e.g., City of Kingsport v. SCM Corp., 429 F. Supp. 96 (E.D. Tenn. 1976) (plaintiff sued two defendants after statute of limitations had expired, but court held one defendant had waived the bar); Schott v. Colonial Baking Co., 111 F. Supp. 13 (W.D. Ark. 1953) (plaintiff sued two defendants within the limitations period, but service of one was not proper and was not made proper within the limitations period). Although plaintiffs often have strategic or jurisdictional reasons for keeping a certain defendant out of litigation, more typically the omission would arise from accident, rather than calculation. See Kutner, supra note 285, at 213-14. As stated by Professor Kutner:

Given the inevitable lapse of time before [a defendant] can commence third-party proceedings for contribution—particularly if Victim can commence an action by means other than actual service of process upon [the defendant]—last-minute commencement of Victim’s suit will deprive [that defendant] of the opportunity to obtain contribution. Perhaps few victims commence suit with the purpose of depriving defendants of contribution, but ‘eleventh-hour' tort actions are so common that the objects of the contribution statutes would be substantially frustrated if the effect were to foreclose the remedy of contribution.

Id.
used to prevent a statute of limitations for an underlying action from undermining the effectiveness of contribution. Legislative intent, however, also has been used to prevent a contribution statute from undermining the effectiveness of a limitations period for a certain cause of action or class of defendant. In Hartford Fire Insurance Co. v. Architectural Management, Inc.\textsuperscript{316} the Illinois Court of Appeals used the legislative intent behind a construction law statute of limitations to preclude an otherwise timely contribution action. In that case the plaintiff brought a suit alleging construction defects within the twelve-year limitations period prescribed by the statute. After expiration of the twelve-year period, one of the defendants asserted a third-party complaint for contribution against several contribution defendants. The third-party defendants contended that even though the limitations period for a contribution action had not yet begun to run, the contribution action should, nonetheless, be dismissed because it was brought after expiration of the twelve-year period applicable to construction lawsuits. The lower court dismissed the third-party defendants, and the court of appeals affirmed.\textsuperscript{317}

The court of appeals conducted a lengthy analysis of the legislative intent behind the construction law statute of limitations. The court noted that during debates over the construction law statute, its opponents specifically noted that the bill would preclude indemnity actions brought by building owners against architects or construction companies responsible for construction defects. The court held that the purpose of the legislation was "to protect persons involved in the design and construction of buildings from potentially unlimited liability . . . .\textsuperscript{318} The court stated:

Excepting contribution actions from the purview of [the construction law statute of limitations] could in many instances result in the contravention of this stated purpose—as can easily be seen from the following example proffered by [the contribution defendant]. Assuming that within 10 years after the renovation of an 80-year-old building, an injury occurs which is determined to have been caused by the combination of latent original and newly discovered renovation design defects, although the plaintiff could not bring a direct action against the original architect by reason of [the construction law statute], under [the contribution claimant's] reasoning the renovation architect would, despite the passage of approximately 90 years, nevertheless be able to bring a contribution action against him as a joint tortfeasor. However unlikely such a situation might seem, the fact that it is pos-

\textsuperscript{317} Id. at 521, 511 N.E.2d at 710.
\textsuperscript{318} Id. at 519, 511 N.E.2d at 709.
sible illustrates the fundamental flaw in [the contribution claimant's] reasoning.\textsuperscript{319}

To accept the reasoning of Hartford Fire is to reject the concept that contribution is a separate action between different parties than those involved in the underlying action. The reasoning of this case also runs afoul of the contribution statute's purpose: to prevent a plaintiff from choosing its defendant.\textsuperscript{320} The same reasoning could support precluding a contribution action after expiration of a short statute of limitations provided for a governmental entity or for a special class of defendants, or after expiration of a limitations period applicable to a multitude of different statutory torts. Thus, although the Hartford Fire court dealt with the specific language of the construction-law statute at issue, its holding arguably has broader implications.

The fundamental fallacy of the Hartford Fire court is that it confused the cause of action based on contribution with a cause of action based on the construction law statute. The court failed to recognize a contribution action as separate from the lawsuit over the construction defect. The Contribution Act, however, is intended to create an equitable cause of action to prevent unfairness to one tortfeasor held liable for more than his fair share of damages that accrue from a factual setting entirely separate from the contribution claim.

In Rowland v. Skaggs Cos.\textsuperscript{321} the Supreme Court of Missouri, addressing the effect that the expiration of a medical malpractice statute of limitations should have on a later contribution action, recognized that the contribution lawsuit was separate from actions filed pursuant to the medical malpractice statute. The court stated that the medical malpractice statute protected providers of health care against stale claims from health care consumers, but did not prevent a fair apportionment of damages among co-tortfeasors. The court stated:

It makes no difference that the claim for contribution arises ancillary to a suit subject to [the medical malpractice statute]. By definition, a suit for contribution among tortfeasors must arise from some underlying tort action. Both our decisions and decisions from other jurisdictions demonstrate that this does not alter the independent nature of

\textsuperscript{319} Id. at 519-20, 511 N.E.2d at 709. The Hartford Fire hypothetical, though extreme, underscores the tension that inevitably develops between contribution statutes of limitations and statutes of limitations for other causes of action. Often, a contribution action will be brought within the limitations period prescribed for such a suit, but after the limitations period on the other underlying cause of action has expired. In such a case the contribution defendant will be forced to defend an action based on conduct that occurred many years before. In several ways, this undermines the policies that underlie statutes of limitations. See supra notes 284-85 and accompanying text.

\textsuperscript{320} See supra text accompanying notes 313-15.

\textsuperscript{321} 666 S.W.2d 770 (Mo. 1984).
the cause of action for contribution. We are not persuaded the legislature contemplated subjecting to [the medical malpractice statute] suits which, while arising from the same factual setting as a suit governed by the statute, are substantively distinguishable from the actions for damages enumerated by the statute.\(^{322}\)

The holding in *Rowland* represents the better view because it is more consistent with the general principles of contribution law. Accordingly, this rule should prevail under South Carolina's contribution statute, along with a candid recognition that, in enacting the statute, the legislature intended to expose tortfeasors to longer periods of liability for actions among themselves than to actions between a victim and a tortfeasor. Despite its recognition that allowing a contribution action many years after expiration of the statute of limitations for the Illinois Dram Shop Act would inconvenience many tortfeasors, a federal district court in an Illinois case, *Al-Hazmi v. City of Waukegan*,\(^{323}\) held:

> [The Illinois] legislature has spoken in unambiguous terms in the Contribution Act [in setting a two-year limitation period for actions under that Act], and it has spoken long after it created the cause of action under the Dram Shop Act. Perhaps it is anomalous that a party may be vulnerable to liability in contribution to a fellow wrongdoer far longer than to the party whom it has wronged, but that anomaly is no greater in dram shop cases than in ordinary tort cases—and most importantly it is an anomaly the Illinois General Assembly has chosen to create.\(^{324}\)

To hold otherwise would require a court to venture away from the rules defining the nature of a contribution action and would engender useless and costly litigation over which statutes of limitations should supersede the contribution statute of limitations.

**F. The Effects of Settlement on the Right to Contribution**

The effect of a settlement between a plaintiff and one or more jointly liable tortfeasors has presented some of the most difficult issues in the area of contribution.\(^{325}\) South Carolina Code sections 15-38-

\(^{322}\) *Id.* at 774; accord *Commonwealth v. All Points Constr. Co.*, 566 S.W.2d 171 (Ky. Ct. App. 1977)(statute of limitations applying to actions against government did not prevail over contribution statute of limitations). The court in *All Points Constr.* stated that “[f]ar from doing violence to legislative design, this approach avoids imputing to the legislature the illogical intent to cut off a right of action before it accrues.” *Id.* at 173.


\(^{324}\) *Id.* at 1446.

20(D)\textsuperscript{326} and 15-38-50\textsuperscript{327} set forth the rules regarding contribution when a settlement occurs. Section 15-38-20(D) deals with the settling tortfeasor’s right contribution from the nonsettling co-tortfeasors, and section 15-38-50 addresses the effect on co-tortfeasors of the settling tortfeasor’s release or covenant not to sue. The two primary issues that have arisen in the settlement area, both which are addressed in the South Carolina Act, are the following: (1) whether the nonsettling tortfeasors are entitled to contribution from the settling tortfeasor who paid less than a pro rata share; and (2) whether the settling tortfeasor is entitled to contribution from the nonsettling tortfeasors.

I. Nonsettling Tortfeasors’ Right to Contribution from the Settling Tortfeasor

Since settling tortfeasors sometimes pay less than their actual share of liability, the drafters of the Uniform Act had to determine who should bear the loss of the difference between settling tortfeasors’ share of liability and the amount they actually paid. As a means of distributing this loss, the Act could have contained any one of three options.\textsuperscript{328} The first option, which saddles the settling defendant with the loss, reduces the plaintiff’s total claim by the amount of the settlement and allows the nonsettling tortfeasors to seek contribution from the settling tortfeasor in the amount that his share exceeds the settlement amount.\textsuperscript{329} A second approach places the loss on the nonsettling

\textsuperscript{327} Id. § 15-38-50.
\textsuperscript{328} Restatement (Second) of Torts § 886A comment m (1977); see Comment, Contribution and the Distribution of Loss Among Tortfeasors, 25 Am. U.L. Rev. 203, 237 (1975).

This method of loss distribution, adopted by the 1939 version of the Uniform Act, see Unif. Act (1939), supra note 124, §§ 4-5, at 59-60, assures the injured plaintiff full recovery and apportions liability according to each joint tortfeasor’s fair share. Moreover, this approach seems to protect nonsettling tortfeasors from a collusive or discriminatory settlement that might result if the plaintiff could release a tortfeasor, thereby precluding any action for contribution against that tortfeasor. See Unif. Act (1955), supra note 125, § 4 commissioners’ comment to subsection (b), at 99. This rationale assumes that the plaintiff may release one tortfeasor from paying a fair share of liability, while penalizing another out of sympathy or spite, or because it may be easier to collect from one defendant than the other. Id. Further, this policy seems to limit the opportunity for collusion between the plaintiff and the released tortfeasor, or among the other remaining tortfeasors. Id. Reports from states adopting this policy, however, indicate that, in fact, problems of collusion and discrimination remain. Id. The drafters of the 1955 Act noted:

In most three-party cases two parties join hands against a third, and this oc-
defendant by reducing the total claim by the amount paid in settle-
ment and denying contribution from the settling tortfeasor.\textsuperscript{330} The third option shifts the loss to the plaintiff by reducing the claim against the nonsettling tortfeasor by the released tortfeasor's pro rata share.\textsuperscript{331}

curs even when the case goes to trial against both defendants. "Gentlemen's agreements" are still made among lawyers, and the formal release is not at all essential to them. If the plaintiff wishes to discriminate as to the defendants, the 1939 provision does not prevent him from doing so.

\textit{Id.}

Another drawback to this approach is that it inhibits settlement. Defendants have no incentive to settle because they continue to be liable for contribution from another action in which they will have no part. Also, under the 1939 Act, plaintiffs are required to reduce the damages by the pro rata share of the released tortfeasor. See \textit{Unif. Act} (1939), \textit{supra} note 124, §§ 4-5, at 57-58. Plaintiffs may wish to avoid such a release because they have no way of knowing in advance of judgment what they are giving up. Furthermore, plaintiffs often settle with one tortfeasor rather than the other with the hope that they will get more from the nonsettling party. \textit{Unif. Act} (1955), \textit{supra} note 125, § 4 commission's comment to subsection (b), at 99.


331. For cases applying this rule, see Theobald v. Angelos, 44 N.J. 223, 208 A.2d 129 (1965); Bartels v. City of Williston, 276 N.W.2d 113 (N.D. 1979). This method of loss distribution is employed by the Uniform Comparative Fault Act. See \textit{Unif. Comparative Fault Act} § 6, 12 U.L.A. 52 (Supp. 1989); see also Comment, \textit{Torts—The Right to Contribution and the One Satisfaction Rule: Credit for Settlement by Co-Defendant}, 21 RUTGERS L. REV. 130 (1966); Note, \textit{Settlement With One Joint Tortfeasor Bars Recovery Against Others of the Settling Tortfeasor's Proportionate Share of Damages}, 19 SW. L.J. 650 (1965). Under this approach, when a plaintiff settles with a tortfeasor, the release reduces the claim against the other tortfeasors by at least the amount of the settling tortfeasor's share of liability. For example, if the plaintiff settles with a tortfeasor who would be responsible for one-third of the liability, his recovery against the remaining two tortfeasors is limited to two-thirds of the total claim. No contribution is needed because the released tortfeasor's share already has been subtracted from the amount the nonsettling tortfeasors owe. The 1939 Act provides this alternative if a clause is inserted in the release reducing the recoverable damages by the pro rata share of the released tortfeasor. See \textit{Unif. Act} (1939), \textit{supra} note 124, § 5, at 58. This approach also may be taken without the necessity of providing for it in the release. See Comment, \textit{supra} note 328, at 241 n.145. For examples of this, see Martello v. Hawley, 300 F.2d 721 (D.C. Cir. 1962); McKenna v. Austin, 134 F.2d 659 (D.C. Cir. 1943); Harvey v. Travelers Ins. Co., 163 So. 2d 915 (La. Ct. App. 1964); Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 110 A.2d 24 (1964); Garrison v. Navajo Freight Lines, Inc., 74 N.M. 238, 392 P.2d 580 (1964).

One criticism of this method of loss distribution is that plaintiffs are denied full recovery for their injuries. See Comment, \textit{supra} note 71, at 241. This argument is rebuttable, however, since each plaintiff has made the decision to settle and thus voluntarily has borne the risk. The nonsettling defendants should not be forced to assume an increased share merely because of the plaintiff's bad decision. The plaintiff, in other words,
The 1939 Act adopted the first of these alternatives, but because it tended to discourage settlements, the 1955 Act discarded that approach in favor of the second option.\(^{332}\) This approach, codified at South Carolina Code section 15-38-50,\(^{333}\) promotes settlement by releasing the settling defendant from further liability even if the defendant paid less than a fair share. The plaintiff can release a tortfeasor and still recover the remaining loss from the nonsettling tortfeasors regardless of the settlement amount, as long as the agreement was made in good faith.\(^{334}\)

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should have estimated the likelihood of success at trial before settling by considering such factors "as the probability of any recovery, the probable size of the released party's share and size of the verdict, and the cost of the litigation." \textit{Id.} at 242 n.148. Consequently, the plaintiff—instead of a nonsettling tortfeasor who had no part in the decision—should bear any loss of the settlement.

Another criticism of this alternative is that it may discourage settlement in jurisdictions, like South Carolina, which apportion damages in equal shares, rather than according to degree of fault. For example, plaintiff \(P\) may be injured by the concurrent negligence of tortfeasors \(A\) and \(B\): \(A\) is 90\% negligent and \(B\) is 10\% negligent. \(P\) may attempt to settle the case with \(B\) against whom \(P\) has a weak case because of \(B\)'s relatively small amount of negligence. In order to protect against loss, \(P\) will need to seek a settlement approximating \(B\)'s 50\% pro rata share. \(B\), on the other hand, probably will not agree to settle, in hopes of escaping all liability by litigating the controversy and convincing the court of \(B\)'s absence of negligence.

Settlement with tortfeasor \(A\) is just as unlikely. \(P\) will try to settle with \(A\) for nearly the entire claim because \(P\) cannot afford to gamble one-half of the claim on a dubious recovery from \(B\). Conversely, \(A\) hopes \(B\) will be found at fault, which would reduce \(A\)'s liability from 90\% to 50\%. Turck, supra note 95, at 31-32. In jurisdictions in which damages are apportioned on the basis of fault, these problems do not arise. Since settlement with \(B\) only reduces his later claim against \(A\) by 10\%, \(P\) would negotiate with \(B\) only for that amount—thus improving chances that \(B\) would agree to a settlement. Similarly, settlement with \(A\) for nearly the entire claim would be possible because \(A\)'s claim probably would not be reduced significantly by \(B\)'s part in the injury. \textit{Id.}

332. The comments to the 1955 Act state that "[t]he effect of Section 5 of the 1939 Act has been to discourage settlements in joint tort cases, by making it impossible for one tortfeasor alone to take a release and close the file." \textit{Unif. Act} (1955), \textit{supra} note 125, § 4 commissioners' comment to subsection (b), at 99.

333. This section provides:

When a release or a covenant not to sue or not to enforce judgment is given in good faith to one or two or more persons liable in tort for the same injury or the same wrongful death:

1. it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others 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; and

2. it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.


334. For a more thorough discussion of the good faith standard, see \textit{infra} text ac-
On the other hand, the second alternative produces the same inequities that existed before contribution was allowed. Nevertheless, the justification for adopting this approach seems to be that the judicial economy resulting from settlement outweighs these inequities.

None of the three alternatives is perfect. The 1955 Contribution Act enacted in South Carolina, however, furthers a significant goal: settlement and judicial economy are encouraged without depriving full recovery to the injured plaintiff. Concededly, nonsettling tortfeasors are exposed to greater liability than their pro rata shares. By raising the stakes when a defendant is stubbornly unwilling to settle, however, the Act is likely to result in overall improved fairness to the parties.

2. "Good Faith" Requirement for Release or Covenant Not to Sue

Section 4 of the 1955 Act, codified at South Carolina Code section 15-38-50, provides that when a settling tortfeasor receives in "good faith" from the plaintiff a release or a covenant not to sue or not to enforce judgment, the plaintiff's claim against the nonsettling tortfeasors is reduced by "any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater." Under this section, the most significant controversy probably will arise when the settlement amount is substantially less

ecompanying notes 336-57.
335. This alternative has been sharply criticized because of the inequities it produces. As one commentator notes:
This is not a solution at all; it frustrates the very purpose of contribution, sacrificing the interests of justice and equity for mere expedience. Even the benefit gained in encouraging settlements is of little value when only one party is released from the litigation. For a trial may still be required and the burden on both the plaintiff and the courts will be essentially the same regardless of the number of defendants remaining in the suit. This scheme is inferior to both of the alternative methods employed to reconcile settlement to the right of contribution.

Comment, supra note 328, at 241.
336. UNIF. ACT (1955), supra note 125, § 4, at 98.
338. S.C. CODE ANN. § 15-38-50(1) (Law. Co-op. Supp. 1989). Arguably, since the nonsettling tortfeasor has contributed to the plaintiff's injury, the plaintiff should be favored over the nonsettling tortfeasor by reducing the nonsettling tortfeasor's share of liability by the lesser of these two amounts or by forcing the nonsettling tortfeasor to choose between the two amounts prior to submitting the case to the jury. See Herndon & Israel, supra note 140, at 71. The South Carolina statute, however, precludes this proposal, placing the entire risk of loss on the nonsettling tortfeasor. This viewpoint acknowledges that the plaintiff has taken a chance by settling and that the nonsettling tortfeasor should not bear the loss of the plaintiff's bad gamble. Id.
than a verdict returned against one or more nonsettling tortfeasors. According to the commissioners' comments, section 4 gives the court the right in these circumstances to determine whether the settlement between the plaintiff and the tortfeasor was collusive, and if so, to deny discharge to the settling defendant.\textsuperscript{339} To recover contribution from the settling defendant, the tortfeasor seeking contribution, therefore, must allege that the settlement was not in good faith.\textsuperscript{340}

The Uniform Act does not establish a procedure for determining when a settlement agreement is entered into in good faith. The California Code of Civil Procedure, however, provides a procedure that allows a party to seek a court order determining whether a settlement or a proposed settlement is in good faith.\textsuperscript{341} A tortfeasor understandably will want to be assured in advance that his settlement is in good faith and therefore safe from later claims for contribution. Likewise, the settling tortfeasor may wish to make such a determination a condition of the settlement agreement.\textsuperscript{342}

Although heavily litigated in other jurisdictions, the good faith issue rarely arises in states that have adopted the 1955 Act.\textsuperscript{343} Thus, no bright-line rule has emerged from these cases. Instead, good faith depends on the particular facts of each case. In Sobik Sandwich Shops, Inc. v. Davis\textsuperscript{344} the Florida District Court of Appeal found good faith lacking in an agreement that was contingent upon whether the tortfeasors appealed the judgment. The court stated:

[\textit{W}e believe that [the Contribution Act] prevents a claimant from arbitrarily deciding how much each tortfeasor will pay on the basis of which tortfeasor has been more cooperative with claimant. There must be some reasonable basis for the amount of the settlement with the tortfeasors beyond the claimant's express desire to have those who appeal pay and those who do not appeal be relieved of

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\item \textsuperscript{339} \textit{Unif. Act} (1955), \textit{supra} note 125, § 4 commissioners' comment to subsection (b), at 99.
\item \textsuperscript{340} \textit{See}, e.g., K Mart Corp. v. Chairs, Inc., 506 So. 2d 7, 10 (Fla. Dist. Ct. App. 1987) (awarding summary judgment against party seeking contribution from settling tortfeasors because party failed to allege lack of good faith).
\item \textsuperscript{342} \textit{See} Roberts, \textit{supra} note 341, at 845.
\item \textsuperscript{344} 371 So. 2d 709 (Fla. Dist. Ct. App. 1979).
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As Sobik indicates, the good faith inquiry is not limited merely to the amount of money paid in settlement of a claim. The court may well look to other elements of fairness. For example, Floran v. Louisville & Nashville Railroad (In re Waverly Accident of Feb. 22-24, 1978) concerned an action brought by a widow whose husband was killed when a railroad car containing gas ruptured as a result of a derailment. The tortfeasor-railroad company negotiated a settlement with the widow that required her to surrender a great measure of control over settlement negotiations with other defendants. The court noted that the Uniform Act Commissioners pointed to collusion as the "prime motivator of the good faith clause," but the court added that "the language of the clause is far broader. Lack of good faith encompasses many kinds of behavior. . . . When profit is involved, the ingenuity of man spawns limitless varieties of unfairness. Thus, formulation of a precise definition of good faith is neither possible nor practicable."

The Waverly Accident court held that the purpose of the good faith clause is to aid the twin statutory objectives of equitable sharing of the burden of compensating the plaintiff and encouraging settlement. In determining that the agreement did not meet the good faith standard, the court conceded that the amount of money paid to the plaintiff was fair and, thus, met the first objective. Nevertheless, the court held that both objectives must be met and that the agreement failed to encourage settlement, stating: "[I]t would not advance the broader policy of encouraging plaintiffs to settle their entire claims with all tortfeasors, to reduce litigation, and to ease the burden on the court." Thus, Waverly Accident provides a clear warning to settling tortfeasors that neither collusion nor the amount paid is the only test that they must meet in order to avoid liability for contribution to non-

345. Id. at 711-12.
347. The settlement imposed, inter alia, the following terms: (1) the widow could not settle with any single defendant for less than a specified amount without the railroad's approval; and (2) she could not settle for more than such amount unless the railroad was willing to assume one-half of the responsibility of a guaranteed provision under which she was would recover $100,000 if she pursued her claims against both the railroad and one or more of the co-tortfeasors. Id. at 2-3.
348. Id. at 4.
349. Id. (quoting River Garden Farms, Inc. v. Superior Court, 26 Cal. App. 3d 986, 103 Cal. Rptr. 498 (1972)) (ellipsis in original).
350. The defendant-railroad paid $33,333.33 for the release. The court noted the impossibility of determining in advance of trial what proportion the defendant should pay. "Because of this very unpredictability, however, the court would be inclined to hold that the amount of settlement is fair and sufficient." Id.
351. Id. at 5.
settling tortfeasors.

California, whose courts have construed the good faith requirement more often and more thoroughly than any other jurisdiction, includes in its statute a provision virtually identical to South Carolina Code section 15-38-50. Early California contribution cases adopted a test that judged the good faith of a settlement agreement solely on the basis of the amount paid in consideration of release. If the value paid was within the reasonable range of the plaintiff's potential recovery, then it was deemed to have been made in good faith. Later decisions, however, established an approach de-emphasizing the amount paid in settlement, focusing instead on the existence of collusion or tortious intent on the part of the plaintiff and the settling defendant. California has returned, however, to a modified version of the earlier "reasonable range" test: the settlement is in good faith only if the settlement amount is within the reasonable range of the settling tortfeasor's proportionate share of comparative liability for the plaintiff's injuries. The court in Tech-Bilt, Inc. v. Woodward-Clyde & As-


Where a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment is given in good faith before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort -

(a) It shall not discharge any other such tortfeasor from liability unless its terms so provide, but it shall reduce the claims against the others in the amount stipulated by the release, the dismissal or the covenant, or in the amount of the consideration paid for it whichever is the greater; and

(b) It shall discharge the tortfeasor to whom it is given from all liability for any contribution to any other tortfeasors.

Id. (emphasis added).


354. See Roberts, supra note 341, at 854. For cases focusing on amount of settlement, see American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978); River Garden Farms, 26 Cal. App. 3d at 996, 103 Cal. Rptr. at 505 ("The price of a settlement is the prime badge of its good or bad faith.").

355. See Roberts, supra note 341, at 854. For an example of a case espousing this policy, see Ford Motor Co. v. Schultz, 147 Cal. App. 3d 941, 195 Cal. Rptr. 470 (1983). This rule has been criticized for its inequities, however. Professor Roberts, for example, notes:

Step by step, the appellate courts have moved away from a meaningful interpretation of the "good faith" concept. The cases built one upon the next, often incorporating dicta from previous cases that made sense in the context of the prior case but was inapplicable to the case at hand. Each case in turn established its own dicta to be followed by subsequent cases to the point that the courts now feel bound by a rule that they acknowledge provides inequitable results.

Roberts, supra note 341, at 855.

356. See, e.g., Tech-Bilt, Inc. v. Woodward-Clyde & Assocs., 38 Cal. 3d 488, 499, 698
soc. listed several factors to be considered in determining good faith, including:

a rough approximation of plaintiffs' total recovery and the settlor's proportionate liability, the amount paid in settlement, the allocation of settlement proceeds among plaintiffs, and a recognition that a settlor should pay less in settlement than he would if he were found liable after a trial. Other relevant considerations include the financial conditions and insurance policy limits of settling defendants, as well as the existence of collusion, fraud, or tortious conduct aimed to injure the interests of nonsettling defendants. Finally, practical considerations obviously require that the evaluation be made on the basis of information available at the time of settlement.$357$

The test resulting from these considerations is not without problems. For instance, an exception should be made for the relatively insolvent, uninsured, or underinsured tortfeasor.$358$ Because these classes of defendants obviously will have a severely diminished ability to pay, a disproportionately low settlement figure often will be reasonable, even though it is disproportionate to the liability caused by their conduct.

3. **Settling Tortfeasors' Right to Contribution from a Nonsettling Tortfeasor**

Another, and perhaps more difficult, issue is whether a tortfeasor who has settled with the plaintiff should be entitled to contribution from nonsettling tortfeasors.$359$ Section 15-38-20(D)$360$ of the South Carolina Contribution Act follows the course established in the 1939 Uniform Act$361$ and retained by the 1955 revised version.$362$ The South Carolina Act provides:

A tortfeasor who enters into a settlement with a claimant is not enti-

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357. Id. at 499, 698 P.2d at 166-67, 213 Cal. Rptr. at 263 (citation omitted).  
359. See W. Prosser, *supra* note 325, at 308.  
titled 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.\textsuperscript{363}

Thus, the following two requirements must be established before a settling tortfeasor may recover contribution from a nonsettling defendant: (1) the settlement agreement must extinguish the nonsettling tortfeasor's liability; and (2) the settlement amount must be reasonable. The settling tortfeasor seeking contribution from an alleged co-tortfeasor whose liability is extinguished by the settlement must plead and prove that the co-tortfeasor is jointly negligent\textsuperscript{364} and that the settlement amount was not in excess of what is reasonable. Generally a settling tortfeasor establishes a \textit{prima facia} case by showing common liability, proving that the settlement was made, and showing its amount.\textsuperscript{365} The burden then shifts to the co-tortfeasor to show "the nonexistence of any fact essential or necessary to establish that he was liable at the time to the injured person, or \textit{he may show that the amount paid by the settlement was not paid in good faith or was unreasonable or excessive.}\textsuperscript{366}

Since few jurisdictions that have adopted the 1955 Act have been faced with the issue of reasonableness of the settlement, South Carolina courts are left with little guidance in this area. The South Carolina courts might, however, follow the test advocate\textsuperscript{367}d by a Florida District Court of Appeal in \textit{Home Insurance Co. v. Advance Machine Co.},\textsuperscript{367} which looked to non-1955 Act cases dealing with the reasonableness of

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\item[365.] See 18 Am. Jur. 2d Contribution § 127 (1985); see also Consolidated Coach Corp. v. Burge, 245 Ky. 631, 54 S.W.2d 16 (1932) (\textit{prima facie} right to contribution against a joint tortfeasor existed when compromise and settlement was made in good faith for reasonable amount with few of the injured parties).
\item[367.] The use of the reasonableness test indicates a greater concern with the amount of the settlement in relation to the liability, rather than with the collusiveness of the parties in reaching the agreement. Section 15-38-50, however, attaches a good faith requirement to settlement agreements that limit a nonsettling tortfeasors right to obtain contribution from a settling tortfeasor. See supra notes 336-58 and accompanying text. As noted earlier, courts interpreting section 15-38-50 look beyond the amount of the settlement in ascertaining if the settlement was in good faith. See supra notes 344-58 and accompanying text. By contrast, the language of section 15-38-20, on its face, seems to support a more objective test of the settlement as opposed to an examination of the motivations behind it.
\item[367.] 443 So. 2d 165 (Fla. Dist. Ct. App. 1983).
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\end{footnotesize}
settlement.\textsuperscript{368} In Home Insurance the Florida court considered the validity of a settlement agreement challenged on reasonableness grounds. The nonsettling tortfeasor urged that the issue of reasonableness was to be determined on the basis of objective factors only.

The court agreed that objective factors were to be included in the test, but stated that the test is what a "reasonably prudent person in the position of the defendant would have settled for on the merits of plaintiff's claim."\textsuperscript{369} Thus, only certain objective factors—such as the extent of the plaintiff's injuries, his past, present, and future medical expenses, his age and ability to work—should be considered.\textsuperscript{370} On the other hand, the opinion also sanctioned the weighing of certain subjective factors—such as degree of certainty of the tortfeasor's probable liability, the risk of going to trial, and the chances of the jury verdict exceeding the settlement offer.\textsuperscript{371} Although the Act does not state what result follows a finding that the settlement amount was unreasonable, the Home Insurance court held that if the co-tortfeasor successfully proves that the settlement amount was unreasonable or excessive, his liability for contribution is reduced to a pro rata share of the amount that a jury would find reasonable.\textsuperscript{372}

The Uniform Act's provision regarding a settling tortfeasor's right to contribution from a nonsettling tortfeasor is designed to encourage settlement and to treat fairly the plaintiff as well as settling and nonsettling tortfeasors. The commissioners' comment to this provision states:

\begin{quote}
The policy of the Act is to encourage rather than discourage settlements. The tortfeasor who settles removes himself entirely from the case so far as contribution is concerned if he is able and chooses to buy his peace for less than the entire liability. If he discharges the entire obligation it is only fair to give him contribution from those whose liability he has discharged. Since the settlement must be reasonable it follows that the question of total liability to the injured party may be litigated in the contribution action.\textsuperscript{373}
\end{quote}

This provision, however, raises several troubling issues. For example, if a settling tortfeasor obtains contribution from a nonsettling tortfeasor, the nonsettling tortfeasor may have no input into the settle-

\textsuperscript{368} See Stevens v. East West Towing Co., 470 F. Supp. 484 (E.D. La. 1979), rev'd on other grounds, 649 F.2d 1104 (5th Cir. 1981); Miller v. Shugart, 316 N.W.2d 729 (Minn. 1982).

\textsuperscript{369} Home Ins., 443 So. 2d at 168 (quoting Miller, 316 N.W.2d at 735).

\textsuperscript{370} Id.

\textsuperscript{371} Id. at 168-69.

\textsuperscript{372} Id. at 168; see Young v. Steinberg, 53 N.J. 252, 255, 250 A.2d 13, 14-15 (1969).

\textsuperscript{373} UNIF. ACT (1955), supra note 125, § 1 commissioners' comment to subsection (d), at 65.
ment, strongly oppose it, and yet still be held liable for a share. Consequently, some jurisdictions limit contribution to cases in which a joint judgment, which fixes both liability and amount, has been entered.\textsuperscript{374} In some situations, limiting the right to contribution to judgment defendants produces the same inequities that resulted from the no-contribution rule.\textsuperscript{376} This limitation also may discourage settlement. For example, under the third alternative discussed above, the plaintiff's claim against the nonsettling tortfeasor normally will be reduced by the settling defendant's share of liability. On the other hand, if the settlement amount is greater than the settling tortfeasor's share, most jurisdictions reduce the plaintiff's claim against the remaining tortfeasor by the actual amount of settlement in order to prevent a windfall to the tort victim.\textsuperscript{378} Under this scenario, the nonsettling tortfeasors clearly benefit by the settlement. To deny the settling tortfeasor contribution in this situation would be as inequitable as denying contribution to a tortfeasor who pays more than his share of a judgment. Moreover, a tortfeasor may be wary of entering into a settlement agreement which requires payment of more than the tortfeasor's fair share of liability.

III. Conclusion

The right to contribution now exists in South Carolina, but many questions of interpretation remain. The courts and practitioners must determine the procedures by which the right can be asserted, as well as the parties who are subject to and entitled to the right. In resolving these issues, the courts should bear in mind the underlying purposes of the Act, and should learn from the interpretations of the Act in other jurisdictions.


\textsuperscript{375} See supra note 15 and accompanying text.

\textsuperscript{376} See, e.g., Snowden v. D.C. Transit Sys., Inc., 454 F.2d 1047 (D.C. Cir. 1971); McKenna v. Austin, 134 F.2d 659, 665-66 (D.C. Cir. 1943); Garrison v. Navajo Freight Lines, Inc., 74 N.M. 238, 392 P.2d 580 (1964). In Snowden the court set forth the policy behind this rule: "A cardinal principle of law is that in absence of punitive damages a plaintiff can recover no more than the loss actually suffered. . . . The purpose of this rule—prevention of unjust enrichment—has been invoked by this court on several occasions." Snowden, 454 F.2d at 1048.