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

Compiled by the Product Liability Group of the Primerus Defense Institute

International Society of Primerus Law Firms

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

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

Because of the adoption of comparative negligence, the doctrine of assumption of risk is no longer recognized as a complete defense for negligence causes of action that arose or accrued after November 9, 1998.2

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

Pursuant to UCATA, the jury (or the court if there is no jury) specifies the amount of damages and determines the percentage of the plaintiff’s fault.4 Upon motion of at least one defendant, the defendants for the same indivisible injury, death, or damage to property will argue for their percentage allocation of fault.5 No new evidence is admitted during this oral argument, and the total fault apportioned between the plaintiff and any co-defendants must total 100 percent.6 Any setoff (discussed *infra*) from any settlement received from potential tortfeasors is apportioned according to each defendant’s determined percentage of liability.7 Significantly, the statutory provisions on joint and several liability do no apply to a defendant whose actions are willful, wanton, reckless, grossly negligent, or intentional.8 Furthermore, UCATA is not applicable to governmental...
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entities.9 The South Carolina Tort Claims Act is the sole and exclusive remedy for any tort involving a governmental entity or agent.10

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

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

For a party to recover under a theory of equitable indemnification, the indemnitee must prove (1) the indemnitor was liable for causing the plaintiff’s damages, (2) the indemnitee was exonerated from any liability for those damages, and (3) the indemnitee suffered damages as a result of the plaintiff’s claims against it, which were eventually proven to be the fault of the indemnitor.17 The indemnitee must be “innocent.”18 If the indemnitee also has personal negligence in causing the injury, then there is no right of recovery.19 “The most important requirement for the finding of equitable indemnity is that the party seeking to be indemnified is adjudged without fault and the indemnifying party is the one at fault.20 The rationale is that the actions of the wrongdoer have involved the innocent party in litigation and have caused the party to incur expenses to protect his interest.21

Allegations contained in the injured party’s Complaint are not determinative of whether a party has a right to indemnity.22 There must be an adjudication of fault.23 If there is no adjudication, then the requirements are not satisfied. This provides an alleged tortfeasor with the argument that a special verdict form is necessary in order to determine and preserve the indemnitee’s rights against the indemnitor. Furthermore, if a party settles during trial and the settlement agreement includes no language concerning allocation of fault (or includes language that there is no admission of liability), then the indemnitee will likely have a difficult time fulfilling the requirements for equitable indemnification.24 There must be an evidentiary basis for the indemnitee’s claim that he is without fault.25

With regard to the “special relationship” that must exist between the parties, South Carolina courts have held that the relationship between a contractor and subcontractor supports a claim for equitable indemnification.26 A building owner who hires a contractor to do work – and the contractor’s work results in injury/damage that subjects the owner to litigation – also satisfies the special relationship requirement.27 However, if this relationship is too far removed or too attenuated, the special relationship contemplated by South Carolina jurisprudence is not present.28

There is no right of indemnity between mere joint tortfeasors under South Carolina law.29 Joint tortfeasors are parties who act together in committing a wrong, or whose acts (if independent of each other) unite in causing a single injury. Stated differently, joint tortfeasors are two or more persons jointly or severally liable for the same injury to person or property.30 “Parties that have no legal relation to one another and who owe the same duty of care to the injured party share a common liability and are joint tortfeasors without a right of indemnity between them.”31 Determining whether parties are joint tortfeasors requires a review of the factual evidence.32
The lack of indemnity between joint tortfeasors is significant in the context of products liability action. South Carolina’s courts have held that where parties owe the same duty of care and have no legal relationship to one another, then they are joint tortfeasors and have a common liability without a right of indemnity. For example, South Carolina’s strict liability statute makes each party in the chain of distribution (e.g., manufacturer, distributor, retailer) liable for sale of a defective product. Therefore, if a plaintiff is injured by a product and sues a party in the chain of distribution, there is no right of indemnification between the parties in the chain of distribution. Each party has a common duty and common liability to the ultimate consumer under the strict liability statute, making them joint tortfeasors. Conversely, if a party-defendant’s use of a product plays a role in causing injury to a plaintiff (independent of any fault of the alleged tortfeasor), then the product seller may be liable for indemnification.

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

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

The right to contribution does not arise prior to payment. Therefore, South Carolina courts have held that a party-defendant can implead a third-party on an indemnification claim, but not on a contribution claim. The contribution claim is not ripe until after there has been payment to the plaintiff. However, in the South Carolina federal district court, a contribution action may be brought before an alleged joint tortfeasor has actually more than his pro rata share of a claim. If contribution is sought from a joint tortfeasor who is not included in the suit brought by the plaintiff, then the tortfeasor who seeks contribution must assert the right of contribution against the other joint tortfeasors in a separate action. The separate action must be brought within one year of the plaintiff’s judgment or the payment of a valid claim. South Carolina has three statutorily prescribed factors for determining the pro rata shares of tortfeasors based on the entire liability paid. These factors are:

(i) their relative degrees of fault shall not be considered;
(ii) if equity requires, the collective liability of some as a group shall constitute a single share; and
(iii) principles of equity applicable to contribution generally shall apply.

These factors reflect the factors set forth in the 1955 version (revised) of Section 2 of the Uniform Contribution Among Tortfeasors Act. See Restatement (3d) Torts: Apportionment of Liability § 23, Contribution, Reporter’s Notes to Comment e (proportionate shares). Fault for the whole must be divided according to shares or groups without taking into account actual levels of fault. That is, one party of two joint tortfeasors who is only one percent negligent may be required to pay fifty percent of the damages paid to the plaintiff.

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

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

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

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

1 Nelson, 303 S.C. at 245, 399 S.E.2d at 784.
4 Id. at § 15-38-15(B)-(C).
5 Id. at § 15-38-15(C)(3).
6 Id. at § 15-38-15(C)(3) and (C)(3)(b).
7 Id. at § 15-38-15(E).
8 Id. at § 15-38-15(F).
9 Id. at § 15-38-65.
10 Id. at § 15-38-65.
11 Vermeer Carolina’s, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 60, 518 S.E.2d 301, 305 (Ct. App. 1999) (“Indemnity is that form of compensation in which a first party is liable to pay a second party of a loss or damage the second party incurs to a third party.”) (citing Town of Winnsboro v. Wiedeman-Singleton, Inc., 303 S.C. 52, 56, 398 S.E.2d 500, 502 (Ct. App. 1990), aff’d, 307 S.C. 128, 414 S.E.2d (1992)).
13 Vermeer, 336 S.C. at 60, 518 S.E.2d at 305.
14 Id.
17 Vermeer, 336 S.C. at 63, 518 S.E.2d at 307.
18 Id; see also Stuck v. Pioneer Logging Machinery, Inc., 279 S.C. 22, 301 S.E.2d 552 (1983) (“According to equitable principles, a right of indemnity exists whenever the relation between the parties is such that either in law or in equity there is an obligation on one party to indemnify the other, as where one person exposed to liability by the wrongful act of another in which he does not join.”) (emphasis added).
19 Vermeer, 336 S.C. at 63, 518 S.E.2d at 307.
20 Id.
21 Id. at 60, 518 S.E.2d at 305.
22 Id. at 64, 518 S.E.2d at 307 (citing Griffin v. Van Norman, 302 S.C. 520, 522, 397 S.E.2d 378, 379 (Ct. App. 1990)).
24 See, e.g., id. (holding that settlement during trial that did not include adjudication of fault precluded action for equitable indemnification).
25 Id. at 487-89, 709 S.E.2d at 75-76.
28 Rock Hill Tel. Co., Inc. at 390, 611 S.E.2d at 237 (holding that special relationship was not present where action for equitable indemnification was between utility and subcontractor who had been retained by intermediary independent contractor).
31 Id.
32 Id.
33 Scott, 302 S.C. at 371, 396 S.E.2d at 358.
34 Vermeer, 336 S.C. at 65, 518 S.E.2d at 307-08 (citing to S.C. Code § 15-73-10 (1977)).
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35 See, e.g., Scott v. Fruehauf Corp., 302 S.C. 364, 396 S.E.2d 354 (1990) (holding there was no right of indemnity between co-defendants involved in distribution of a defective wheel assembly that exploded and injured plaintiff because both co-defendants shared common liability under South Carolina’s strict liability law).

36 See, e.g., Stuck v. Pioneer Logging Machinery, Inc., 279 S.C. 22, 301 S.E.2d 552 (1983) (holding that purchaser of mechanical harvesting machine had right of indemnity against seller in case where harvesting machine was mounted on truck, caused purchaser to lose control of truck, and ultimately caused injury to passengers in oncoming vehicle).

37 Vermeer, 336 S.C. at 60, 518 S.E.2d at 305.


39 Otis Elevator, Inc., 316 S.C. at 296-97, 450 S.E.2d at 44.


41 Id. at § 15–38–20(A).

42 Id. at § 15–38–20(B).

43 Id. at § 15–38–20(C).

44 Id. at § 15–38–20(F).

45 First General Services of Charleston, Inc., 314 S.C. at 444, 445 S.E.2d at 448. See also S.C. Code § 15–38–20(B) (“The right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share of the common liability . . . .”) (emphasis added).

46 Id.

47 In Brown v. Shredex, Inc., 69 F. Supp. 2d 764, 766 (D.S.C. 1999), the court allowed a defendant to implead a non-party under Rule 14 although the defendant had not paid any money to the plaintiff. The court acknowledged that South Carolina law under First General Services, Inc. v. Miller and other cases would hold differently. However, the federal district court decided that federal procedural law trumped the procedural law of the South Carolina contribution statute, and a defendant may bring contribution claim before a payment has been made. Id. at 769.


49 Id. at § 15–38–40(D).

50 Id. at § 15–38–30 (emphasis added).


52 Vermeer, 336 S.C. at 68-69, 518 S.E.2d at 309-10.

53 Id. at 69, 518 S.E.2d at 309.

54 Id. at 64-69, 518 S.E.2d at 309-10.


56 Id. at § 15–38–50.

57 Id.

58 Id.