

CONTRIBUTION AND INDEMNITY: LEGAL REQUIREMENTS FOR OBTAINING  
RECOVERIES FROM JOINT TORTFEASORS

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## **I. OVERVIEW**

There is a difference between contribution, subrogation and indemnity. Subrogation and indemnity are common law rights and are not allowed for voluntary payments. Contribution between joint tortfeasors, on the other hand, has become a statutory right in most states. Almost all states have developed Joint Tortfeasor Acts that govern the rights of contribution between tortfeasors. Liability payments are generally made subject to either a judgment or a settlement. Most states have held that a defendant has no right to contribution from another co-defendant based on a settlement payment, if that settlement payment does not extinguish the liability of the co-defendant. A few states have based this on the fact that a settlement payment not extinguishing liability of other tortfeasors is a voluntary payment; however, most states make no mention of the volunteer doctrine in connection with the right to contribution. Most states also have held that if a payment has been made based on a judgment, rather than a settlement, the party making the payment is not barred from subsequently seeking contribution from another potentially liable party who was not a party to the litigation.

## **II. LAW OF CONTRIBUTION OF SPECIFIC JURISDICTIONS**

### **A. PENNSYLVANIA**

Pennsylvania law only authorizes contribution among joint tortfeasors. See Kemper Nat'l P&C Cos. v. Smith, 615 A.2d 372, 376-77 (Pa. Super. Ct. 1992) (explaining difference between contribution and indemnity). There is no right to contribution against successive or independent tortfeasors; however, there may be a right to indemnity against such tortfeasors. Id. Contribution is governed by Pa. Cons. Stat. §8324, which sets forth the following: (a) The right of contribution exists among joint tortfeasors. (b) A joint tortfeasor is not entitled to a money judgment for contribution until he has by payment discharged the common liability or paid more

than his pro rata share. (c) A joint tortfeasor who enters into a settlement with the injured person is not entitled to recover contribution from another joint tortfeasor whose liability to the injured person is not extinguished by settlement.

“The fact that a person paid money to settle a claim of an injured party is not a sufficient basis for recovery; the joint tortfeasor relationship must also be established. If the payor is not a tortfeasor, his payment is that of a volunteer and would not support a claim for contribution.”

Slaughter v. Pennsylvania X-Ray Corp., 638 f.2d 639, 642 (3d Cir. 1981). In order for a party to recover contribution, he will have to establish that he and defendant were joint tortfeasors in the original action. Besser Co. v. Paco Corp., 671 F.Supp. 1010, 1014 (E.D. Pa. 1987).

Accordingly, a party must establish the actual liability, rather than simply the potential liability, of himself and the party he is seeking contribution from. Id. In addition, a settling defendant does not have a right to claim contribution against non-settling defendants if it turns out that the settling party paid more than his equitable share. See Charles v. Giant Eagle Markets, 522 A.2d 1 (Pa. 1987) (“the obligation of a tortfeasor as determined by settlement with the plaintiff should not be affected by a subsequent verdict against any of the remaining defendants).

It is undecided whether a settling defendant has the right to seek contribution against a third party who was not a party to the original suit. However, it is clear that a defendant who has had a judgment rendered against him can raise a contribution claim against a third party who was not a party to the original suit. See Knepp v. Harnischhfefer Corp., 1986 U.S. Dist. LEXIS 16627 at \*5 (holding defendant’s right to indemnification or contribution is generally not lost if such parties are not joined as third party defendants).

**B. NEW YORK**

Under New York law, “two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought.” N.Y.C.P.L.R. 14. A cause for contribution can be asserted in a separate action or by cross-claim, counterclaim or third-party claim in a pending action. Id. Consequently, like Pennsylvania, a defendant found liable is not prevented from subsequently seeking contribution from a third party who is not a party to the original suit.

A tortfeasor who has obtained his own release from liability is relieved from liability to any other party for contribution. N.Y. Gen. Oblig. Law § 15-108(b). However, the released tortfeasor also waives his right to receive contribution from any other party. Id. at § 15-108(c). A settling tortfeasor is relieved from liability to any other person for contribution, but in exchange is not entitled to obtain contribution from any other tortfeasor. Gonzalez v. Armac Indus., Ltd., 611 N.E.2d 261, 263 (N.Y. 1993); Orsini v. Kugel, 9 F.3d 1042, 1046 (2d Cir. 1993).

Any payment or settlement prior to judgment is a voluntary payment; however, a tortfeasor who settles after judgment is not a volunteer. Makeun v. New York, 471 N.Y.S.2d 293, 298 (N.Y. App. Div. 1984). Consequently, a settling tortfeasor may be entitled to contribution if he settles after a judgment. See Orsini, 9 F.3d at 1048 (holding bar on contribution did not apply to post-judgment settlement); Lefevre v. New York, 673 N.Y.S.2d 855, 860 (Ct. Cl. 1998) (holding tortfeasor who settles after an award or verdict by trier of fact on liability and damages can recover contribution). But see Makeun, 471 N.Y.S.2d at 294 (holding a tortfeasor who settles after a jury verdict of negligence but prior to an adjudication of damages is not entitled to contribution). In addition, the bar on contribution under §15-108 can

be waived as a part of the settlement. See Mitchell v. New York Hospital, 461 N.E.2d 285, 289-90 (N.Y. 1984) (holding contribution was not barred where settlement was subject to stipulation that settling defendant preserved the right to contribution against third-party defendants).

A settling tortfeasor loses his ability to seek contribution even if it is later determined that he paid more than his share. Orsini, 9 F.3d at 1077; Makeun, 471 N.Y.S.2d at 298. “A tortfeasor who settles with a claimant by paying more than what turns out to have been his equitable share is deemed a volunteer as to the excess,” and therefore cannot seek contribution as to the excess paid. Orsini, 9 F.3d at 1077.

### **C. OHIO**

Ohio law provides for contribution among joint tortfeasors. “If two or more person are jointly and severally liable in tort for the same injury or loss to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them. The right of contribution exists only in favor of a tortfeasor who has paid more than his proportionate share of common liability.” Ohio Rev. Code §2307.31(A). “A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability . . . is not extinguished by the settlement, or in respect to any amount paid in a settlement which is in excess of what is reasonable. Id. at §2307.31(B).

In order to be able to seek contribution from a non-settling party, the settlement must specifically release that party from any future liability. Ohio Rev. Code. §2307.32(F). Beck v. Cianchetti, 439 N.E.2d 417, 420 (Ohio 1982); Hartford Accident and Indem. Co. v. Case Co., 625 F.Supp. 1251, 1255 (S.D. Ohio 1985). A general release of all other parties is not sufficient. Hartford, 625 F.Supp. at 1255. In Hartford, as part of a settlement, there was a release that provided, “this release is intended to and does hereby extinguish any claim which Claimants may

have against any other persons or entities, whether or not identified as a party in the aforementioned lawsuit, for acts damages, or events in question.” The court held that the language of a release did not specifically name or identify the non-settling party, and therefore the settling party could not maintain a contribution action against them. Id.

In Amerisure Cos. v. Statesman Ins. Co., 601 N.E.2d 577, 579 (Ohio Ct. App. 1991), the court held “any sum paid beyond a legal obligation is the act of a mere volunteer, giving rise to no cause of action for contribution.” However, this case involved an insurer that settled a case on behalf of its insured and then sought contribution from other companies that had previously insured the negligent party rather than seeking contribution from an additional tortfeasor. Id. There is no Ohio caselaw discussing the application of the volunteer doctrine to contribution amongst joint tortfeasors.

#### **D. NEW JERSEY**

New Jersey law provides for contribution amongst joint tortfeasors under The Joint Tortfeasors Contribution Act.

Where injury or damage is suffered by any person as a result of the wrongful act, neglect of joint tortfeasors, and the person so suffering injury or damage recovers a money judgment or judgments for such injury or damage against one or more of the joint tortfeasors, either in one action or in separate actions, and any one of the joint tortfeasors pays such judgment in whole or in part, he shall be entitled to recover contribution from the other joint tortfeasor for the excess so paid over his pro rata share.

N.J. Stat. §2A:53A-3. The right to contribution is only enforceable after the tortfeasor seeking it has been legally compelled to pay more than his equitable share of the liability. Polidori v. Kordys, 526 A.2d 230, 232 (N.J. Super. Ct. App. Div. 1987). There must be a judgment against the tortfeasor in order for him to recover contribution. Id.

An ordinary settlement does not trigger contribution rights; however, a suit for contribution based on a settlement that has been elevated to the status of a judgment by formal court proceeding, and which discharges the injured party's claim against a non-settling joint tortfeasor can trigger such rights. Young v. Steinberg, 250 A.2d 13, 14 (N.J. 1969) Polidori, 526 A.2d at 234. In Young, the court held that a settling defendant had a contribution claim against a non-settling defendant based on a consent judgment from the court. 250 A.2d at 14. In Polidori, the court refused to extend the Young doctrine to the situation in which a settlement involved a stipulation of dismissal. 526 A.2d at 234. The court held that the stipulation of dismissal was not the same as a consent order, and therefore not a judgment. Id. Consequently, the settling tortfeasor could not maintain a contribution action against the non-settling tortfeasor. Id.

In Gangemi v. National Health Laboratories, Inc., 701 A.2d 965 (N.J. Sup. Ct. App. Div. 1997), the court held that a settling tortfeasor could maintain a contribution claim against a non-settling tortfeasor where there was a dismissal, the non-settling tortfeasor was not a party to the suit and the statute of limitations barred any subsequent claim against them by the injured party. In so holding, the court elevated form over substance. Id. at 969. The court stated, "we see no difference between a plaintiff's discharge of a direct claim against a non-settling joint tortfeasor and . . . a legal discharge by virtue of the operation of the statute of limitations where no direct claim was made by the plaintiff against the potentially responsible party." Id. The settling party should not be precluded from its right to contribution because plaintiff did not discharge claims which are nevertheless legally barred. Id. The right of contribution amongst joint tortfeasors does not depend upon whether the injured party has instituted suit against all the tortfeasors who may be responsible. Id.

## **E. ILLINOIS**

Illinois law provides for the right of contribution “where 2 or more persons are subject to liability in tort arising out of the same injury . . . even though judgment has not been entered against any or all of them.” 740 Ill. Comp. Stat. 100/2(a). The settling tortfeasor is “not entitled to recover contribution from another tortfeasor whose liability is not extinguished by the settlement. Id. at 100/2(e); Orejel v. York Int’l Corp., 678 N.E.2d 683 (Ill. App. Ct. 1997).

An insurer can recover contribution from a joint tortfeasor where the insurer has settled with a claimant and has obtained a release, given in good faith, that extinguishes both the tort liability of its insured and the liability of another tortfeasor. Perez v. Espinoza, 484 N.E.2d 1232, 1234 (Ill. 1985). Before a settling party can recover for contribution, there must be a judicial determination that the settlement extinguishing liability of the non-settling tortfeasor is, in fact, in good faith. Orejel, 678 N.E.2d at 690. However, the non-settling party does not have a right to have a jury make this determination. Id.

## **III. CONCLUSION**

In order to preserve your company’s rights of contribution or indemnity, it is imperative that the underlying payment, for which reimbursement is being sought, should be structured in such a way as to preserve rights of recovery against other potentially responsible tortfeasors. If payment is being made pursuant to a settlement, it is important that the settlement documents include a general release which will release the potential liability of all joint tortfeasors, and if possible, it is helpful if the settlement documents reflect that the settling tortfeasor has discharged more than his or her pro rata share.

Even when payment is being made pursuant to a judgment, if possible, payment should reflect that contribution claims against responsible joint tortfeasors are being preserved.



For additional information concerning these issues, please feel free to contact:

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