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Apportionment of Damages versus Statutes of Limitation: The Need for Balance

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APPORTIONMENT OF DAMAGES VERSUS STATUTES OF LIMITATION: THE NEED FOR BALANCE

State ex. rel. General Electric v. Gaertner[1]

In *State ex. rel. General Electric v. Gaertner*, the Missouri Supreme Court addressed whether a defendant in a pending tort action may implead a third-party defendant for contribution even though the statute of limitations for the underlying tort has expired. The court did not resolve the issue of the applicable statute of limitations for contribution under *Missouri Pacific Railroad v. Whitehead & Kales Co.*[2] The *Gaertner* court ultimately held that the right to apportionment of damages established by *Whitehead & Kales* can be exercised by means of impleader of a third-party defendant during the pendency of the underlying suit, even though the underlying statute of limitations has expired.[3] In arriving at its holding, the court stated that the statute of limitations begins to run upon payment by a tortfeasor of more than his or her share of an adverse judgment.[4] The rule enunciated by the court unduly extends the period of potential liability for the contribution defendant.[5] Furthermore, the court's opinion reflects a desire to uphold apportionment of damages under *Whitehead & Kales* at the expense of the protection provided by statutes of limitation.

In July, 1978, Goldes Department Store brought suit against Hussmann Refrigerator Co. for damages from a fire at its St. Louis County store allegedly caused by a defective fluorescent light fixture.[6] The fire occurred in April,

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1. 666 S.W.2d 764 (Mo. 1984) (en banc).

2. 566 S.W.2d 466 (Mo. 1978) (en banc). In *Whitehead & Kales*, the Missouri Supreme Court held that a defendant could implead tortfeasors not sued by a plaintiff-victim in order to determine their relative fault in the same action. *Id.* at 474. Prior to *Whitehead & Kales*, Missouri law provided only a statutory right to contribution between joint judgment debtors. *See* MO. REV. STAT. § 537.060 (1978) (repealed 1983) (*replaced by* MO. REV. STAT. § 537.060 (Supp. 1984)). The *Whitehead & Kales* court created a substantive right to contribution among tortfeasors regardless of their status as joint judgment debtors. *Whitehead & Kales*, 566 S.W.2d at 473-74.

3. 666 S.W.2d at 767.

4. *Id.* at 766.

5. *See infra* notes 49-50 and accompanying text.

6. 666 S.W.2d at 765. The suit was based on a strict liability theory. Hussmann's predecessor had designed, manufactured, supplied and sold the light fixture. *Id.* at 765. Missouri adopted the RESTATEMENT (SECOND) OF TORTS § 402A (1965) rule of strict liability in tort in Keener v. Dayton Elec. Mfg. Co., 445 S.W.2d 362, 364 (Mo. 1969). In his concurring opinion in *Gaertner*, Chief Justice Rendlen expressed concern that *Whitehead & Kales* does not extend to claims based on strict liability. He argued

1974, and Goldes filed suit within the applicable five-year limitations period.[7] Subsequently, in July, 1981, Hussmann commenced a third-party action against General Electric for contribution. Hussmann, relying on *Whitehead & Kales*,[8] alleged that General Electric's design and manufacture of a defective component of the light fixture caused the fire.[9] Hussmann initiated its action two years and three months after expiration of the statute of limitations for the underlying suit.[10]

General Electric filed a motion for summary judgment on the ground that the third-party complaint was barred either by the statute of limitations applicable to the underlying tort claim or by laches.[11] The respondent, Circuit Judge Gary M. Gaertner, denied the motion, after which General Electric filed a petition for a writ of prohibition[12] with the Missouri Supreme Court.[13] The court ultimately held that a third-party action for contribution may be brought during the pendency of the underlying suit, even though the statute of limitations has expired on the underlying tort claim.[14] The court also rejected, with limited analysis, General Electric's assertion of laches by adopting a rule that a third-party defendant cannot assert laches prior to judgment in the underlying action.[15] Additionally, the court relied on the general rule that laches will not bar a suit before the expiration of the time period prescribed in the statute of limitations.[16]

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that *Whitehead & Kales* involved a claim for contribution based on negligence and no Missouri court had ever held that a claim exists for contribution based on strict liability. 666 S.W.2d at 768 (Rendlen, C.J., concurring). Further, if any claim exists, it is a claim for full indemnity rather than contribution, and it can be asserted only where the seller of the defective product had no actual knowledge of the defect. *Id.*

7. *See* MO. REV. STAT. § 516.120(4) (1978). This section provides that an action for injury to the person or rights of another, not arising on contract, should be commenced within five years.

8. 566 S.W.2d 466 (Mo. 1978) (en banc).

9. 666 S.W.2d at 765.

10. Under MO. REV. STAT. § 516.120(4) (1978), Goldes would have been time barred from filing suit after April 28, 1979.

11. 666 S.W.2d at 765.

12. MO. CONST. art. V, § 4.1 states that "[t]he Supreme Court and districts of the Court of Appeals may issue and determine original remedial writs," and thus provides the authority for the court in *Gaertner* to determine the writ of prohibition.

13. 666 S.W.2d at 765. Rendlen's concurring opinion in *Gaertner* argues that the majority ignored State *ex rel.* Morasch v. Kimberlin, 654 S.W.2d 889 (Mo. 1983) (en banc), by considering the merits of General Electric's petition. 666 S.W.2d at 768 (Rendlen, C.J., concurring). In *Morasch*, the court held that prohibition does not lie where the defendant claims the action is barred by the general statute of limitations. Coming within the statute of limitations is merely a condition precedent to establishing the plaintiff's claim and not a restriction on a court's jurisdiction. Prohibition lies to prevent a court from exceeding its jurisdiction. *Morasch*, 654 S.W.2d at 892.

14. 666 S.W.2d at 767.

15. *Id.*

16. *Id.* The court cited Hughes v. Neely, 332 S.W.2d 1 (Mo. 1960), and Milgram v. Jiffy Equip. Co., 362 Mo. 1194, 247 S.W.2d 668 (1952), as authority for this general rule. *See infra* notes 88-91 and accompanying text.

In arriving at its holding, the *Gaertner* court first addressed General Electric's contention that failure to apply the five-year statute applicable to Goldes' tort claim[17] to Hussmann's third-party claim for contribution would circumvent the intent of the statute of limitations.[18] General Electric also contended that under *Whitehead & Kales*, the right to contribution arises from the parties' common liability for the tort.[19] If the five-year statute barred Goldes' tort claim against General Electric, then that statute should also bar any contribution claim arising from a common liability for that tort.[20]

In response to this argument, the court initially reviewed the importance of the *Whitehead & Kales* decision. First, *Whitehead & Kales* created a substantive right to recover contribution from tortfeasors not sued by the plaintiff.[21] Second, the decision permitted a defendant to implead a third-party defendant in the original action under Rule 52.11(a) in order to enforce the right to contribution.[22] The court also pointed out that *Safeway Stores v. City of Raytown*,[23] a decision subsequent to *Whitehead & Kales*, held that the right to contribution can be asserted in a separate action after judgment in the original suit.[24]

The court then rejected General Electric's argument outright and cited four reasons to justify its holding. First and foremost, the court recognized that a claim for contribution is separate and distinct from the underlying tort claim.[25] Although there must be a common liability among the tortfeasors, a claim for contribution does not arise until a tortfeasor pays more than his share of an adverse judgment. Therefore, the statute of limitations begins to run upon payment by the tortfeasor of more than his share of a judgment, and not from the time of injury.[26] Second, the court reasoned that Missouri's im-

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17. *See* MO. REV. STAT. § 516.120(4) (1978); *see also supra* note 7.

18. 666 S.W.2d at 765.

19. *See* 666 S.W.2d at 765; *see also Whitehead & Kales*, 566 S.W.2d at 468 (right to non-contractual indemnity presupposes actionable negligence of both tortfeasors).

20. 666 S.W.2d at 765.

21. 666 S.W.2d at 765; *see also Whitehead & Kales*, 566 S.W.2d at 474 (adopted system of distribution of joint tort liability based on relative fault).

22. 666 S.W.2d at 765; *see also Whitehead & Kales*, 566 S.W.2d at 474 (concurrent or joint tortfeasors not sued by plaintiff may be brought into the action by third-party practice). MO. R. CIV. P. 52.11(a) provides in part:

> At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and petition to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him.

23. 633 S.W.2d 727 (Mo. 1982) (en banc).

24. 666 S.W.2d at 766. The *Gaertner* court stated that it did not have to decide the issue of the applicable statute of limitations in *Safeway* because the underlying statute of limitations had not expired. *Id.*

25. 666 S.W.2d at 766.

26. *Id.* The *Gaertner* court effectively stated the majority rule in the United States. *See* Kutner, *Contribution Among Tortfeasors: The Effect of Statutes of Limitations and Other Time Limitations*, 33 OKLA. L. REV. 203, 233 (1980). The Missouri

pleader rule[27] sets no time limit on the right to commence a third-party suit.[28] Third, the court relied on its holding in *Safeway*[29] and stated that the right to bring a separate suit after judgment "tacitly assumes" the right to bring a third-party action during the pendency of the suit.[30] Finally, the court found support for its holding in the Uniform Comparative Fault Act[31] which provides that a contribution claim may be brought either in the original action or in a separate action[32] commenced within one year of judgment.[33] The court found that this provision of the Uniform Act evidenced an intent to allow third-party suits anytime during the original action, even if the underlying statute of limitations had expired.[34]

In determining when the applicable statute of limitations begins to run in contribution cases, courts must balance the interests of the right to contribution against the purposes of statutes of limitations.[35] Contribution under *Whitehead & Kales* is based on the "principle of fairness" theory[36] and the belief that a tortfeasor should be responsible only for his relative fault.[37] By contrast, statutes of limitation are designed to prevent stale claims and to protect potential defendants from lengthy periods of exposure to possible liability.[38] The protection afforded by statutes of limitation is just as necessary in an action for contribution as it is in the original action, since a party must

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Supreme Court adopted the rule prior to *Whitehead & Kales* in the context of a third-party action for indemnity. *See* Simon v. Kansas City Rug Co., 460 S.W.2d 596, 600 (Mo. 1970) (statute of limitations governing the right to indemnity runs from payment of judgment and not from the commission of the tort).

27. *See* MO. R. CIV. P. 52.11(a); *see also supra* note 22.

28. 666 S.W.2d at 766.

29. *See supra* text accompanying notes 23-24.

30. 666 S.W.2d at 766.

31. In Gustafson v. Benda, 661 S.W.2d 11, 15 (Mo. 1983) (en banc), the Missouri Supreme Court stated that it would look to the Uniform Comparative Fault Act in administering a system of comparative fault.

32. *See* UNIF. COMPARATIVE FAULT ACT § 4(a), 12 U.L.A. 42 (Supp. 1984) which provides:

> A right of contribution exists between or among two or more persons who are jointly and severally liable upon the same indivisible claim for the same injury, death, or harm, whether or not judgment has been recovered against all or any of them. It may be enforced either in the original action or by a separate action brought for that purpose.

33. *See* UNIF. COMPARATIVE FAULT ACT § 5(c), 12 U.L.A. 43 (Supp. 1984) ("If judgment has been rendered, the action for contribution must be commenced within [one year] after the judgment becomes final").

34. 666 S.W.2d at 767.

35. Kutner, *supra* note 26, at 213.

36. The "principle of fairness" theory is taken from J. RAWLES, A THEORY OF JUSTICE 348 (1971) ("in exchange for the opportunity of some undertaking, we each promise all others that we will be liable for all damage which our own negligence in the undertaking has caused"); *see also Whitehead & Kales*, 566 S.W.2d at 474.

37. *Whitehead & Kales*, 566 S.W.2d at 474.

38. 51 AM. JUR. 2d *Limitations of Actions* § 17 (1970).

defend against liability for the tort in either case.[39]

The *Gaertner* court's holding reflects a conscious policy choice, namely that the right to contribution outweighs the protection provided by a statute of limitation.[40] However, in several respects, the court's rationale for its holding weakens under a closer analysis. Statutes of limitation require suit to be commenced within a period of time after the accrual of the cause of action.[41] In contribution actions, the cause of action may accrue at one of three points: at the time of the underlying tort injury,[42] at the time of payment of the judgment of liability of the underlying tort suit,[43] or on the date of the judgment of liability in the underlying tort suit.[44]

If a court determines that the statute of limitations starts to run at the time of the plaintiff's injury, a contribution claim might be barred before the contribution claimant has an opportunity to commence suit. For instance, a plaintiff may file suit just prior to the expiration of the statutory period. Thus, the contribution claimant, as third-party plaintiff, would not have time to commence a contribution suit. To deny contribution based on the actions of the victim produces harsh results since a party cannot bring a contribution claim until the victim initiates suit for the tort.[45]

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39. G. WILLIAMS, JOINT TORTS AND CONTRIBUTORY NEGLIGENCE § 38, at 132 (1951); *see also Safeway*, 633 S.W.2d at 732 (contribution defendant has the same right to perform discovery and present defenses which would have been available in the original action).

40. In other situations, the Missouri Supreme Court has retreated from its decision in *Whitehead & Kales* by refusing to allow contribution in cases involving workers' compensation immunity, parental immunity, spousal immunity, and contractual immunity. *See, e.g.*, Comment, *Problem for Joint Tortfeasors Under* Whitehead & Kales: *The Need for a Duty of Good Faith*, 27 ST. LOUIS U.L.J. 929, 930 (1983).

41. MO. REV. STAT. § 516.100 (1978) provides that "[c]ivil actions . . . can only be commenced within the periods prescribed in the following sections, after the causes of action shall have accrued."

42. The rule that the cause of action for contribution accrues upon injury is generally rejected by courts. *See* Annot., 57 A.L.R.3d 867, 875-76 (1974). However, the rule has been applied in the analogous context of an action by an employer against a third-party who injured an employee, for contribution to a workmen's compensation claim paid by the employer. *See, e.g.*, County of San Diego v. Sanfax Corp., 19 Cal. 3d 862, 880, 140 Cal. Rptr. 638, 646, 568 P.2d 363, 371 (1977) (statute of limitations does not run from the date upon which the employer is ordered to pay worker's compensation benefits but rather it runs from the date of the employee's injury).

43. *See, e.g.*, City of Kingsport v. SCM Corp., 429 F. Supp. 96, 99 (E.D. Tenn. 1976) (statute of limitations does not begin to run until payment made by contribution claimant).

44. *See, e.g.*, Evans v. Lukas, 140 Ga. App. 182, 183, 230 S.E.2d 136, 138 (1976) (cause of action for contribution accrues and statute of limitations runs when judgment of liability entered).

45. *See, e.g.*, Goldsberry v. Frank Glendaniel, Inc., 49 Del. 69, 71, 109 A.2d 405, 408 (1954) (legislature would not create right to contribution and then place it in power of the original plaintiff to decide whether it could be exercised); Roehrig v. City of Louisville, 454 S.W.2d 703, 704 (Ky. 1970) (reason statute of limitations does not run from time of tort injury is so injured party cannot foreclose right to contribution by

One possible solution would be to hold the victim responsible for that portion of damages attributable to the tortfeasor against whom suit is barred.[46] Thus, the tortfeasor sued by the victim would be liable only for his share of fault, while the tortfeasor who the victim did not sue would still benefit from the protection of the statute of limitations. However, this proposal directly contradicts the principle of joint and several liability, which allows the victim to collect the entire judgment from either tortfeasor. The *Whitehead & Kales* court made it clear that the victim's right to collect the entire judgment from one or more tortfeasors was not impaired by its decision.[47]

Gaertner followed the second approach and concluded that the cause of action for contribution accrues at the time of payment of the judgment of liability in the underlying suit.[48] In his concurring opinion, Judge Blackmar argued that fixing the date at payment of judgment unreasonably prolongs the period of potential liability.[49] For example, the rule subjects a party to liability during the limitation period for the tort claim, during the underlying suit by the victim, during the time until the contribution claimant pays the judgment in the underlying suit, and during the limitation period for the contribution claim. Conceivably, the period of potential liability could extend to twenty years.[50] Such a result would ignore the purposes of the statute of limitations, while it would virtually guarantee the right to contribution.

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suing just before statute expires on tort claim).

46. Larson, *A Problem in Contribution: The Tortfeasor with an Individual Defense Against the Injured Party*, 1940 WIS. L. REV. 467, 501-02.

47. *See Whitehead & Kales*, 566 S.W.2d at 474 (plaintiff may sue and collect judgment from any tortfeasor he chooses). Missouri retains joint and several liability even though it has adopted a system of comparative fault. *See* Gustafson v. Benda, 661 S.W.2d 11, 16 (Mo. 1983) (en banc) (right of victim to recover entire judgment against any defendant is not impaired).

48. 666 S.W.2d at 766. For other jurisdictions following this approach, see Trinity Universal Ins. Co. v. State Farm Mut. Auto. Ins. Co., 246 Ark. 1021, 441 S.W.2d 95 (1969); Grothe v. Shaffer, 305 Minn. 17, 232 N.W.2d 227 (1975); Blum v. Good Humor Corp., 57 A.D.2d 911, 395 N.Y.S.2d 894 (1977); McKay v. Citizens Rapid Transit Co., 190 Va. 851, 59 S.E.2d 121 (1950); State Farm Mut. Auto. Ins. Co. v. Schara, 56 Wis. 2d 262, 201 N.W.2d 758 (1972).

49. 666 S.W.2d at 769 (Blackmar, J., concurring); *see also* Appel & Michael, *Contribution Among Tortfeasors in Illinois: An Opportunity for Legislative and Judicial Cooperation*, 10 LOYOLA U. CHI. L.J. 169, 197 (1979); Kutner, *supra* note 26, at 244; Comment, *Tennessee's Contribution Among Tortfeasors Act*, 37 TENN. L. REV. 87, 93 (1969); Note, *Contribution Among Joint Tortfeasors When One Tortfeasor Enjoys a Special Defense Against Action by the Injured Party*, 52 CORNELL L.Q. 407, 414-15 (1967).

50. *Gaertner*, 666 S.W.2d at 769 (Blackmar, J., concurring). For example, the plaintiff might sue defendant just with the five-year limitations period. The suit between plaintiff and defendant might last as long as five years before judgment against defendant is entered. Under MO. R. CIV. P. 74.36, the judgment may be revived by the plaintiff within ten years if it has not yet been satisfied. Once the defendant pays the judgment, his suit for contribution does not have to be filed until just before the end of the limitations period for the contribution claim.

The best rule is the third approach which recognizes that a cause of action for contribution accrues upon judgment in the underlying suit.[51] This approach reduces the period of potential liability for the contribution defendant by eliminating the period from judgment in the underlying suit until that judgment is paid by the party seeking contribution. The opportunity to seek contribution is preserved without unduly extending the exposure to liability for the contribution defendant. A primary criticism of this rule is that while the statute of limitations runs from the date of judgment, recovery for contribution is barred until the contribution claimant has paid more than his share of the judgment.[52] Therefore, the contribution claimant's inability to pay the judgment before the statutory period expires forecloses any right to contribution. Courts can remedy this shortcoming by allowing commencement of the contribution suit prior to payment,[53] by tolling the statute if the contribution defendant is advised of the claimant's intention to seek contribution,[54] or by extending the limitation period in special circumstances.[55]

A fourth alternative is for the cause of action for contribution to accrue at the time the court permits impleader of third parties.[56] Use of discovery procedures should ensure that the contribution claimant is aware of potential third-party defendants.[57] Moreover, bringing the contribution claim at the time im-

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51. *See* Appel & Michael, *supra* note 49, at 197; Kutner, *supra* note 26, at 244. For jurisdictions following this approach, see Evans v. Lukas, 140 Ga. App. 182, 230 S.E.2d 136 (1976); Blue Streak Enters. v. Gulf Coast Marine, Inc., 370 So. 2d 633 (La. Ct. App. 1979); Biddle v. Biddle, 163 N.J. Super. 455, 395 A.2d 218 (1978); Hughes v. Pron, 286 Pa. 419, 429 A.2d 9 (1981).

52. *See* Appel & Michael, *supra* note 49, at 197; Comment, *supra* note 49, at 92-93; Note,*supra* note 49, at 415.

53. Kutner, *supra* note 26, at 245.

54. *Id.*; Note, *supra* note 49, at 415. In Missouri, however, only the disabilities provided by statute are grounds for tolling the statute of limitations. *See* MO. REV. STAT. § 516.170 (Supp. 1984), which provides that if the plaintiff is under any of the following disabilities at the time the cause of action accrues, the statute of limitations is tolled; under twenty-one years of age, mentally incapacitated, imprisoned, or in execution under a sentence of a criminal court for a term less than his natural life; *see also* Neal v. Laclede Gas Co., 517 S.W.2d 716, 719 (Mo. App. 1974) ("statutes of limitations may be suspended or tolled only by specific disabilities or exceptions enacted by the legislature, and courts cannot extend those exceptions").

55. Kutner, *supra* note 26, at 245.

56. *Id.* at 217-18; *see also* Avondale Shipyards v. Vessel Thomas E. Cuffe, 434 F. Supp. 920, 934 (E.D. La. 1977) (court did not specifically recognize this alternative but did state that there are situations where it is unreasonable for contribution claimant to wait until judgment to seek contribution); Blum v. Good Humor Corp., 57 A.D.2d 911, 913, 394 N.Y.S.2d 894, 896 (1977) (laches may bar separate suit brought after settlement when contribution claimant could have brought contribution defendant into underlying action).

57. Kutner, *supra* note 26, at 218 n.61. *See* MO. R. CIV. P. 56.01(b) which provides: "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. . . ." Therefore, under Rule 56.01, a party can discover whether there is any other person who may have contributed to the injury of the plaintiff.

pleader is first allowed avoids the possibility of prejudicial delay to the third-party defendant.[58] However, this alternative has not been followed by courts to any extent.[59]

The *Gaertner* court's reliance on the propositions that the Missouri impleader rule and *Safeway* imply a party's right to bring a contribution action during the pendency of the suit is also flawed. Arguably, the impleader rule and *Safeway* could assume that the statute of limitations for the underlying tort applies to the contribution claim.[60] If so, then contribution claims, whether brought in a separate suit or in a third-party suit, could be brought only before the statutory period for the underlying tort expires. Nothing in the impleader rule evidences an intent to take away the protection of the statute of limitations.[61]

While the court in *Gaertner* indicated that the statute of limitations would run upon payment of the underlying judgment, it did not determine the statutory period.[62] The court's failure to address this issue leaves contribution claimants at a loss to know when, after they have paid a judgment, the statute of limitations expires. Missouri has two statutes of limitation which could be applicable—a five-year statute[63] and a ten-year statute.[64] Both the contract

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58. Kutner, *supra* note 26, at 218. The third-party defendant can defend against liability for the tort on an equal basis with the contribution claimant as far as availability of evidence and witnesses is affected by lapse of time.

59. *See id.* at 232. This approach has not been followed to any extent since most contribution statutes provide that the right to recover contribution is based upon *payment* by a tortfeasor of more than his share of liability. *Id.* at 209 n.26; *see, e.g.*, KAN. STAT. ANN. § 60-2413(b) (1976) (right of contribution among judgment debtors arises out of payment of the judgment); MD. ANN. CODE art. 50 § 17(b) (1979) (not entitled to money judgment for contribution until payment of more than pro rata share of a common liability); TENN. CODE ANN. § 29-11-102(b) (1980) ("right of contribution exists only in favor of a tortfeasor who has paid more than this pro rata share of the common liability").

60. *See* Kutner, *supra* note 26, at 214.

61. The *Safeway* court stated: "Safeway's suit for contribution was filed within three years and one month of the date of the accident which gave rise to the original cause of action. This is well within the applicable five-year statute of limitations." 633 S.W.2d at 732. Following this passage, the *Safeway* court cited MO. REV. STAT. § 516.120(1) (1978), which is the limitations provision for express or implied contracts, obligations, or liabilities. *See id.*; *see also* Note, *A Separate Cause of Action for Contribution Among Joint Tortfeasors*, 49 MO. L. REV. 121, 130 (1984) (*Safeway* applied the five-year statute).

62. 666 S.W.2d at 767.

63. MO. REV. STAT. § 516.120 (1978) provides:

Within five years:

(1) All actions upon contracts, obligations or liabilities, express or implied, except those mentioned in section 516.110, and except upon judgments or decrees of a court of record, and except where a different time is herein limited;

(2) An action upon a liability created by a statute other than a penalty or forfeiture;

(3) An action for trespass on real estate;

and the tort provisions in the five-year statute might apply to an action for contribution.[65] Presumably, the provision in the five-year statute for tort claims[66] would not apply since the court rejected General Electric's argument favoring this statute[67] and stated that there is no provision for contribution claims in the five-year statute.[68]

Some courts have opted for an implied contract statute of limitations.[69] Their rationale is that an action for contribution is based upon an implied contract by a tortfeasor to pay his or her share of the common liability.[70] In *Safeway*, the court referred to the provision in the five-year statute for implied contracts as the applicable statutory period.[71] However, the *Gaertner* court stated that the appropriate limitations period was not decided in *Safeway* because the underlying statute of limitations had not run.[72] The court did not mention the language in *Safeway* which referred to the five-year statute. The *Gaertner* court concluded there was an "absence of any limitation period

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(4) An action for taking, detaining or injuring any goods or chattels, including actions for the recovery of specific personal property, or for any other injury to the person or rights of another, not arising on contract and not herein otherwise enumerated;

(5) An action for relief on the ground of fraud, the cause of action in such case to be deemed not to have accrued until the discovery by the aggrieved party, at any time within ten years, of the facts constituting the fraud.

64. MO. REV. STAT. § 516.110 (1978) provides:

Within ten years:

(1) An action upon any writing, whether sealed or unsealed, for the payment of money or property;

(2) Actions brought on any covenant of warranty contained in any deed of conveyance of land shall be brought within ten years next after there shall have been a final decision against the title of the covenantor in such deed, and actions on any covenant of seizin contained in any such deed shall be brought within ten years after the cause of such actions shall accrue;

(3) Actions for relief, not herein otherwise provided for.

65. MO. REV. STAT. § 516.120(1) covers "[a]ll actions upon contracts, obligations or liabilities, express or implied." MO. REV. STAT. § 516.120(4) covers actions "for any other injury to the person or rights of another, not arising on contract."

66. *See* MO. REV. STAT. § 516.120(4) (1978); *see also supra* text accompanying note 65.

67. *See* 666 S.W.2d at 766.

68. *Id.* at 767.

69. *See, e.g.*, Blum v. Good Humor Corp., 57 A.D.2d 911, 394 N.Y.S.2d 894, 896 (1977) (six-year statute of limitations for implied contracts applies); State Farm Mut. Auto. Ins. Co. v. Schara, 56 Wis. 2d 262, 267, 201 N.W.2d 758, 761 (1972) (six-year statute of limitations for implied contracts applies).

70. *E.g.*, *Blum*, 57 A.D.2d at 911, 394 N.Y.S.2d at 896 (cause of action for contribution is based on fiction of implied contract to reduce inequity of tortfeasor paying more than his share of a judgment); *Schara*, 56 Wis. 2d at 267, 201 N.W.2d at 761 (action for contribution based on implied contract to rectify inequity from tortfeasor paying more than his share of common liability).

71. *Safeway*, 633 S.W.2d at 732; *see supra* note 61 and accompanying text.

72. 666 S.W.2d at 766.

within the terms of § 516.120."[73] This language could indicate that neither the tort nor the implied contract provision of the five-year statute applies to an action for contribution. However, there are still grounds to argue that the implied contract provision does apply. The *Gaertner* court did not actually hold that this provision of the five-year statute is inapplicable, and in the future the court might be persuaded to apply it. When appropriate, an attorney should argue that *Gaertner* never settled the issue and that, in the past, Missouri courts have considered the implied contract statute to be the applicable statute.[74]

The provision in the ten-year statute[75] for "actions for relief, not herein otherwise provided for," could also apply to contribution claims. Judge Blackmar suggests that it would apply due to a lack of any other statute of limitations.[76] If the court did in fact reject the implied contract provision of the five-year statute, then Judge Blackmar is correct and the ten-year statute applies. However, the court clearly favors the one-year period provided for in the Uniform Comparative Fault Act.[77] This is apparent from the court's statement that, in light of the language of the Uniform Comparative Fault Act and the absence of any limitation within the terms of section 516.120, the question of the applicable statute of limitations for contribution claims "may well depend on whether the matter is first presented to the court or the legislature."[78]

General Electric also argued that Hussman's contribution claim was barred by laches.[79] The court rejected this argument in summary fashion, giving two reasons. First, the court stated that laches cannot be asserted prior to judgment in the underlying suit.[80] Second, the court stated that, as a general rule, laches will not bar suit before the applicable statute of limitations has expired.[81]

The basis for the first reason is not clear. Initially, the court states that since it has held that a third-party action may be initiated at any time during the underlying suit, General Electric cannot assert a laches defense prior to judgment in that action.[82] This argument fails to consider that the purpose of

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73. *Id.* at 767.

74. *See Safeway*, 633 S.W.2d at 732; *see also* Allen v. Allen, 364 Mo. 955, 960-61, 270 S.W.2d 33, 37 (1954).

75. *See supra* note 64.

76. 666 S.W.2d at 769 (Blackmar, J., concurring).

77. *See supra* note 33. It is not clear whether the court judicially adopted the Uniform Comparative Fault Act in *Gustafson* or used the Act for guidance only. *Compare Gaertner*, 666 S.W.2d at 770 (Blackmar, J., concurring) (Uniform Act was used to provide guidance and not totally adopted as legislation), *with* Note, *A Separate Cause of Action for Contribution Among Joint Tortfeasors*, 49 MO. L. REV. 121, 133 n.122 (1984) (Missouri first jurisdiction to judicially adopt the Act).

78. 666 S.W.2d at 767-68.

79. 666 S.W.2d at 765.

80. 666 S.W.2d at 767.

81. *Id.*

82. 666 S.W.2d at 767.

laches is to prevent prejudice to the defendant resulting from unreasonable delay by the plaintiff in bringing suit.[83] There could be a situation where the contribution claimant knows of the facts giving rise to the contribution claim and yet sits idly by when he could implead the contribution defendant into the underlying action.[84] For instance, if Hussmann knew of its claim for contribution at the time Goldes filed suit, and yet waited three years before impleading General Electric into the suit, laches might bar the claim if General Electric showed prejudice resulting from the delay.

In enunciating the first reason, the court referred to judgment in the underlying action as the event which "finally fixes the right to contribution."[85] This language contradicts the court's decision that the cause of action for contribution accrues upon payment.[86] If the court is saying that laches cannot be asserted prior to the time the cause of action accrues, it should be consistent with its decision on when the action accrues for purposes of the statute of limitations.

The court's reasoning that laches will not bar suit before the statute of limitations expires seems illogical. Once the statute has expired, suit is barred and the doctrine of laches has no utility.[87] The court cited *Hughes v. Neely*[88] and *Milgram v. Jiffy Equip. Co.*[89] as authority for its second reason for rejecting a laches defense. *Hughes* involved an action to quiet title by a contingent remainderman. The *Hughes* court stated that the statute of limitations does not begin to run until the end of the particular estate and that "in this connection equity follows the law and ordinarily will not hold a party barred by his laches where the statute of limitations has not run."[90] *Milgram* involved an action seeking dissolution of a corporation. The *Milgram* court stated that a court of equity must follow the statutory procedure for dissolution and may not deviate from this procedure.[91] These cases do not adequately support the "general rule" stated in *Gaertner* that laches cannot be asserted prior to the expiration of the statute of limitations. Indeed, most Missouri courts have stated the general rule to be that there is no fixed period in which laches

83. *See* Goodman v. McDonnell Douglas Corp., 606 F.2d 800, 805 (8th Cir. 1979), *cert. denied*, 446 U.S. 913 (1980).

84. *See, e.g.*, Henriquez v. Mission Motor Lines, 72 Misc. 2d 782, 784, 339 N.Y.S.2d 478, 481 (Sup. Ct. 1972) (defendant's counterclaim for contribution made four years after underlying action commenced and after jury had been selected held barred by laches).

85. 666 S.W.2d at 767.

86. 666 S.W.2d at 766; *see supra* note 48 and accompanying text.

87. *See* Kutner *supra*, note 26 at 252; *see also* Ludwig v. Scott, 166 Mo. 142, 143, 65 S.W.2d 1034, 1035 (1933) (statute of limitations bars an action at law and at equity).

88. 332 S.W.2d 1, 6 (Mo. 1960).

89. 362 Mo. 1194, 1200, 247 S.W.2d 668, 676-77 (1952).

90. 232 S.W.2d at 6.

91. 247 S.W.2d at 676-77.

becomes a bar[92] and that the statutory limitation period does not govern but is a factor to be considered.[93]

The *Gaertner* court also expressed some doubt whether the equitable doctrine of laches is applicable to an action for contribution which is "grounded in law."[94] This concern was not the basis of the court's rejection of the laches defense. However, the dicta might be used to completely foreclose the doctrine of laches as a defense in contribution claims. In his concurring opinion, Judge Blackmar argued that equitable considerations should be available to contribution defendants and that the court should not cast doubt upon the availability of laches.[95] Many other jurisdictions have held that a contribution claim is equitable in nature.[96] Indeed, the *Whitehead & Kales* court stressed the "dictates of our common law tradition and the principles of equity embedded therein"[97] when it created the right to contribution.[98] However, after *Gaertner* there is some doubt as to the likelihood of successfully asserting the defense of laches to a contribution claim.

It appears from the tone of the opinion that, in the future, if the Missouri Supreme Court is confronted with a post-judgment suit for contribution, it will adopt the Uniform Comparative Fault Act provision. The *Gaertner* court left the issue for the legislature, but made clear its preference for the Act. Meanwhile, lower courts are left with no definite guidance on the proper statutory period. It is clear that a third-party defendant can be brought into the underlying action at any time in order to apportion relative fault. Therefore, contribution claimants would be wise to use impleader rather than a separate suit to recover contribution. By endorsing the rule that the cause of action for contribution accrues and the statute of limitations starts to run upon payment of an adverse judgment, the *Gaertner* court leaves contribution defendants, in effect, unprotected by a statute of limitations.

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92. *See* Rhodus v. Geatley, 347 Mo. 397, 409, 147 S.W.2d 631, 639 (1941); Tokash v. Workmen's Compensation Comm'n, 346 Mo. 100, 110, 139 S.W.2d 978, 984 (1940); Kimble v. Worth County R-III Bd. of Educ., 669 S.W.2d 949, 954 (Mo. App., W.D. 1984), *cert. denied,* 105 S.Ct. 331 (1984); Keiser v. Wiedmer, 283 S.W.2d 914, 917-18 (Mo App., St. L. 1955).

93. *See Goodman*, 606 F.2d at 805; *Rhodus*, 347 Mo. at 409, 147 S.W.2d at 639; *Keiser*, 283 S.W.2d at 917-18.

94. 666 S.W.2d at 767.

95. 666 S.W.2d at 769 (Blackmar, J., concurring).

96. *See, e.g.*, United States Fidelity & Guar. Co. v. Liberty Mut. Ins. Co., 127 Mich. App. 365, 372, 339 N.W.2d 185, 189 (1983) (contribution is an equitable principle); Bonner v. Arnold, 296 Or. 259, 260, 676 P.2d 290, 291 (1984) (en banc) (contribution is an equitable device); Michigan Millers Mut. Ins. Co. v. United States Fidelity & Guar. Corp., 306 Pa. 88, 89, 452 A.2d 16, 18 (1982) (contribution action may be enforced either at law or in equity).

97. *Whitehead & Kales*, 566 S.W.2d at 472.

98. *See supra* note 21 and accompanying text.