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PRODUCTS LIABILITY—NON-CONTRACTUAL INDEMNITY—THE EFFECT OF THE ACTIVE-PASSIVE NEGLIGENCE THEORY IN MISSOURI

I. Indemnity and Contribution in Missouri

At common law a tortfeasor who discharged a liability owed to an injured third party could not seek to recoup any of the loss from any person alleged to be partially or fully responsible for the injury. In short, there was no right of contribution or indemnification between joint tortfeasors at common law. 1 Today, this inflexible rule has been abrogated; and it is generally accepted that under proper circumstances, a tortfeasor may seek contribution or indemnification from another who may also be liable for the same wrong. 2

It is important to distinguish between contribution and indemnification. While both doctrines are based on equitable principles, each is different in application and effect. Contribution distributes the loss among tortfeasors who are in pari delicto 3 by requiring each to pay his pro rata share. 4 In Missouri the right to contribution is granted by statute, but

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1. One reason is that the common law would not allow a tortfeasor to bring an action based on his own misconduct. Note, The Joint Tort-Feasor in Missouri, 25 Wash. U.L.Q. 572 (1940). For other reasons, see Note, Toward a Workable Rule of Contribution in the Federal Courts, 65 Colum. L. Rev. 123 (1965).


3. See Note, The Joint Tort-Feasor in Missouri, 25 Wash. U.L.Q. 572 (1940). The doctrines of contribution and indemnity were developed in an attempt to achieve fairness: "[T]he obligation to indemnity is not a consensual one; it is based altogether upon the law's notion—inspired by an equitable background—of what is fair and proper between the parties." Leflar, supra note 2, at 146-47. The doctrines are consistent with the fault principle of tort law. Meriam & Thornton, Indemnity Between Tortfeasors: An Evolving Doctrine in the New York Court of Appeals, 25 N.Y.U.L. Rev. 845 (1950).

4. Tortfeasors in pari delicto—i.e., persons equally culpable—are precluded from asserting a claim for indemnity. See note 15 and accompanying text infra.

5. W. Prosser, Handbook of the Law of Torts § 103 (4th ed. 1971);
is limited to situations where a judgment has been rendered against joint tortfeasors in a single action. Thus, a tortfeasor's right to contribution in Missouri is conditioned upon the injured party bringing suit and obtaining a judgment against two or more tortfeasors. Because nothing in the statute requires a plaintiff to bring an action against multiple defendants, a tortfeasor's right to contribution in Missouri rests in the hands of the injured party.

The theory of indemnification allows a tortfeasor who has been compelled to discharge a liability to shift the entire loss to another who in fairness should bear it. Non-contractual indemnity is based on principles of restitution or unjust enrichment—the notion that a person is unjustly enriched when another discharges a liability which arose from the former's unlawful conduct. In such instances, the law implies a contractual obligation.

6. Section 537.060, RSMo 1969 provides:

Defendants in a judgment founded on an action for the redress of a private wrong shall be subject to contribution, and all other consequences of such judgment, in the same manner and to the same extent as defendants in a judgment in an action founded on contract. It shall be lawful for all persons having a claim or cause of action against two or more joint tortfeasors or wrongdoers to compound, settle with, and discharge any and every one or more of said joint tortfeasors or wrongdoers for such sum as such person or persons may see fit, and to release him or them from all further liability to such person or persons for such tort or wrong, without impairing the right of such person or persons to demand and collect the balance of said claim or cause of action from the other joint tortfeasors or wrongdoers against whom such person or persons have such claim or cause of action, and not so released.

The statute gives a right to contribution only when a judgment has been rendered against joint tortfeasors. Crouch v. Tourtelot, 350 S.W.2d 799 (Mo. En Banc 1961). A joint judgment makes a prima facie case of contribution, but contribution may be denied based on the law of indemnity, resulting in one judgment debtor bearing the entire loss. Hays-Fendler Const. Co. v. Trarloc Invest. Co., 521 S.W.2d 171 (Mo. App., D. St. L., 1975).

7. See State ex rel. Cunningham v. Haid, 328 Mo. 208, 212, 40 S.W.2d 1048, 1050 (1931):
The statute relating to contribution, referred to in the opinion, creates rights and obligations as between defendants in a judgment founded upon an action for tort. It imposes no duty whatever upon the plaintiff with respect thereto. It neither requires plaintiff to bring his action against all of the joint-tortfeasors, nor does it require him to obtain a valid judgment against all whom he does elect to sue.

8. It has been questioned whether such a result is fair. See Note, The Joint Tort-Feasor in Missouri, 25 Wash. U.L.Q. 572, 589 (1940):
It seems anomalous that contribution, a remedy for the promotion of justice and equity between joint tortfeasors, should be thus dependent on the personal whim of the injured party.

A person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity from the other, unless the payor is barred by the wrongful nature of his conduct.

10. See Restatement (Second) of Torts, § 886 B, comment c (Tentative Draft No. 18, 1972):
The basis for indemnity is restitution, and the concept that one person is unjustly enriched at the expense of another when the other discharges
gation on the party unjustly enriched to indemnify the other who suffered the loss and thereby achieve a fair result between the parties.\textsuperscript{11}

Missouri courts have recognized three situations in which non-contractual indemnification between tortfeasors is allowed: (1) where one party was held liable because of a legal relationship with the person actually causing the wrong; (2) where liability was based on some “positive rule of common or statutory law”; and (3) where the person discharging the liability had merely failed to discover and correct a dangerous condition.\textsuperscript{12}

The tortfeaster allowed indemnity in these situations is said to have been "constructively," "derivatively," or "secondarily" liable compared to the "primary" liability of the indemnitee.\textsuperscript{13}

The right of non-contractual indemnification is foreclosed on a showing that both tortfeasors actually participated in the wrong—i.e., are \textit{in pari delicto}.\textsuperscript{14} Tortfeasors \textit{in pari delicto} are only entitled to contribution, and in Missouri must meet the requirements of the contribution statute.\textsuperscript{15}

Unlike contribution, the right of indemnification in Missouri is not governed by statute nor conditioned on an injured party obtaining a judgment against multiple tortfeasors.\textsuperscript{16} It is therefore important to determine the circumstances in which a tortfeaster in Missouri may assert liability which it should be his responsibility to pay. . . . This has not been always clearly recognized by the courts, and they have usually granted indemnity . . . without reference to a pervading principle. . . .

The principle of indemnity was invoked to circumvent the inflexible rule against contribution at common law. Comment, \textit{Toward a Workable Rule of Contribution in the Federal Courts}, 65 Colum. L. Rev. 128 (1965).

11. An implied contract arises between the tortfeasors that imposes the obligation to indemnify on the tortfeaster who should bear the ultimate liability. 41 Am. Jur. 2d Indemnity \S 19 (1968); Leflar, \textit{supra} note 2. The tortfeaster discharging the liability must have been legally obligated to do so; tortfeasers unable to demonstrate the legal obligation are deemed "volunteers" and cannot maintain an action for indemnity. \textit{See}, e.g., Southwest Mississippi Elect. Power Ass'n v. Harragill, 254 Miss. 460, 182 So. 2d 220 (1966).

12. The three situations were recognized without elaboration in Kansas City Southern Ry. v. Payway Feed Mills, Inc., 338 S.W.2d 1, 9 (Mo. 1960), and further explained in Wright, \textit{Procedure—Third Party Practice—Non-Contractual Indemnification}, 28 Mo. L. Rev. 307, 309 (1963). Agency relationships fall into the first category, and liability imposed on a person by statute for actions of another would fit into the second category. The third situation, the failure to discover a dangerous condition, is the classic example of passive negligence. While the third situation is often phrased as a "failure to discover or correct a dangerous condition," "discover and correct" is more accurate because mere knowledge of the dangerous condition has been equated with active negligence. \textit{See} note 45 and accompanying text, \textit{infra}.


the right of non-contractual indemnification and thereby shift the entire loss to another.\textsuperscript{17} This article will discuss the right to assert claims for non-contractual indemnification in products liability cases in Missouri,\textsuperscript{18} and how that right is affected by the active-passive negligence indemnity theory.\textsuperscript{19}

\section*{II. The Active-Passive Negligence Indemnity Theory}

A general discussion of the active-passive negligence theory is important to understand its impact on the right to indemnification in the products liability area. It appears that this theory is an outgrowth of primary-secondary liability, described in part I, supra.\textsuperscript{20} The fundamental principle of the active-passive negligence indemnity theory is that a tortfeasor who is passively negligent may recover indemnity from a tortfeasor who is actively negligent.\textsuperscript{21} The problem involves distinguishing between conduct which constitutes active negligence and conduct which constitutes merely passive negligence. One Missouri court has stated:

\begin{quote}
[T]he principle of indemnity applies where one party creates the condition which causes injury and the other does not join therein but is exposed to liability on account of it. The negligence of the party responsible for the dangerous condition is active and primary while the negligence of the other is passive and secondary.\textsuperscript{22}
\end{quote}

This distinction is based on the character of the negligence and not on a difference in the degree of negligence between tortfeasors in pari delicto.\textsuperscript{23}

\begin{thebibliography}{99}
\bibitem{17} Claims for indemnity may be sought in the original action brought by the injured party as a cross-claim, counter claim, or third party petition. FRUMER & FRIEDMAN, \textit{Products Liability} § 44.05 (1975). For a discussion of third party practice and indemnity in Missouri, see Wright, \textit{Procedure--Third Party Practice--Non-Contractual Indemnification}, 28 Mo. L. Rev. 307 (1963).

\bibitem{18} To what extent the right to indemnity may be affected by contractual provision for indemnity is beyond the scope of this article. See generally Annot., supra note 5, at § 8 (c).

\bibitem{19} For discussions of the active-passive negligence indemnity theory in general, see Meriam & Thornton, \textit{supra} note 3; Leflar, \textit{supra} note 2; Davis, \textit{supra} note 2; Enis, \textit{Civil Procedure--The Active-Passive Negligence Indemnity Theory,} 30 Mo. L. Rev. 624 (1965).


\bibitem{21} See McFall v. Compagnie Maritime Belge, 304 N.Y. 314, 107 N.E.2d 463 (1952) (implying that a passively negligent tortfeasor can also recover indemnity from another also passively negligent).

\bibitem{22} State \textit{ex rel.} Laclede Gas Co. v. Godfrey, 468 S.W.2d 698, 698 (St. L. Mo. App. 1971). The active-passive terminology as applied in an indemnity situation should not be confused with the active-passive negligence that describes conduct in connection with landowner liability with respect to persons injured on the premises. See Enis, \textit{Civil Procedure--The Active-Passive Negligence Indemnity Theory,} 30 Mo. L. Rev. 624, 625 n.11 (1965).

\bibitem{23} \textit{See}, e.g., Crouch v. Tortelot, 350 S.W.2d 799, 806 (Mo. En Banc 1961); Builders Supply Co. v. McCabe, 366 Pa. 322, 325-26, 77 A.2d 368, 370 (1951). The doctrine of last clear chance does not apply to active-passive negligence indemnity situations in Missouri. Union Elect. Co. v. Magary, 373 S.W.2d 16 (Mo. 1963).
\end{thebibliography}
The most common situation occurs when one tortfeasor has created the danger to the injured party, and the other has merely failed to discover the danger and remedy it.24 It is active negligence to create the dangerous condition, but passive negligence to fail to discover and remedy it.25

The earliest cases that allowed indemnity based on the different characterization of negligence between tortfeasors involved the liability of municipalities for injuries which occurred on streets and sidewalks, when the municipality had not created the dangerous condition.26 In such cases, the municipality was subject to liability based on its general duty to keep streets and sidewalks safe and was entitled to indemnification from the landowner or other tortfeasor who had created the danger to the plaintiff. The negligence of the municipality was the failure to discover and remedy the dangerous condition (passive negligence), and indemnity was allowed against the tortfeasor who had actively created the dangerous condition.27

The right of indemnification based on the active-passive dichotomy was later extended to cases involving landowners who were held liable for injuries caused by dangerous conditions on their property.28 The landowner was entitled to indemnity from a person who had created the condition if the landowner's negligence consisted only of the negligent failure to discover and remedy the condition.29 The same reasoning was applied to contractors held liable for injuries caused by the active negligence of subcontractors.30 It soon became apparent that the right of indemnification was not to be limited to particular fact situations, but extended to all cases where one person was held liable for the injuries caused by the active negligence of another.31

24. See W. PROSSER, supra note 5, at § 51.
25. See, e.g., Kansas City Southern Ry. v. Payway Feed Mills, Inc. 338 S.W.2d 1, 9 (Mo. 1969). The court approved the following jury instructions:
   "The jury is instructed that the terms passive or secondary negligence mean . . . a failure to discover or correct a defect or to remedy a dangerous condition caused by the act of another who is primarily responsible. The jury is further instructed that the terms active and primary negligence mean the act of creating a dangerous condition which under all other facts and circumstances present is likely to cause injury to others.
27. See authorities cited note 26 supra.
28. Comment, supra note 26, at 784.
29. Id. See Western Cas. & Surety Co. v. Shell Oil Co., 413 S.W.2d 550 (St. L. Mo. App. 1967).
31. Comment, supra note 26. See also Meriam & Thornton, supra note 3, at 558:
[I]t can be stated that the indemnity principle is a broad one which apparently has application to any situation in which there is such a significant factual disparity between the delinquency of one tortfeasor.
The active-passive negligence indemnity theory can be easily expounded, but the application of the theory to particular fact situations has been difficult. This is because the terms "active" and "passive" are only expressions of the conclusion that, under the facts presented, equity requires the ultimate liability to fall on the person who "ought" to bear it. While it is difficult to predict how the equities should balance in any given case, some general observations can be made that may help the practitioner determine whether indemnity is available under the active-passive negligence theory.

To recover indemnity under this theory, a tortfeasor must allege and prove: (1) he is guilty only of passive negligence—i.e., has not participated in the wrong; and (2) the prospective indemnitor is guilty of active negligence—i.e., created the dangerous condition.

If the claim for indemnity is sought by way of counterclaim, crossclaim, or impleader, the court, after a motion to dismiss the indemnity petition, must scan both the allegations of plaintiff's petition and the petition filed against the prospective indemnitor. If there is any possibility that the necessary allocation of active and passive fault could be established by evidence presented at trial, the indemnity petition should not be dismissed. Once the evidence has been presented, the court should look to the instructions upon which the jury will base its verdict. If plaintiff submits his case against the tortfeasor-indemnitee based on a theory of active negligence, the indemnity petition should be dismissed. If, how-

and the delinquency of another as to persuade the court to call one's wrongdoing "passive" and the other's "active." Missouri courts have only recently adopted the active-passive negligence terminology. The evolution of the doctrine in Missouri is traced in Enis, *The Active-Passive Negligence Indemnity Theory*, 30 Mo. L. Rev. 624 (1965).


[I]t should be clear that the "passive-active negligence" standard—a test which can depend on the manner of expression of a fact situation, and which is inherently unsuited to certain types of indemnity cases, is not a helpful key to the indemnity tangle.

See also Note, *Indemnity Among Tortfeasors in New York*, 39 Cornell L.Q. 484, 499 (1954): "[T]he words active and passive negligence must be understood as names for findings of fact and not as rules in themselves."


35. *See* State ex rel. Laclede Gas Co. v. Godfrey, 468 S.W.2d 693, 697 (St. L. Mo. App. 1971):

To determine whether a case for indemnity exists we look to the allegations of the plaintiff's . . . petition and the third-party petition. If from those allegations some possibility of liability over appears, the third-party petition should be permitted.

It is important that the tortfeasor's petition state a case for indemnity and not merely assert a defense to the plaintiff's claim. *See* Johnson v. California Spray-Chemical Co., 382 S.W.2d 630 (Mo. 1962).

36. Active negligence bars the right to indemnity. 42 C.J.S. *Indemnity* §§ 21, 27 (1944).
ever, plaintiff submits on passive negligence or multiple theories of active and passive negligence, the jury could render a verdict based on passive negligence, and therefore the tortfeasor should be allowed to submit to the jury his claim for indemnity against the prospective indemnitor.

Similarly, if indemnity is sought in a separate action based on a judgment paid by the tortfeasor, the action should be dismissed if it is shown that the verdict rendered in the original action established the indemnitee's active negligence. If, however, the court in the indemnity action finds that the original verdict could have been based on passive negligence, the tortfeasor should be allowed to prove the active negligence of another and recover indemnity. While the determination of active or passive negligence is ordinarily left to the trier of fact, the interpretation of verdicts is a matter of law to be decided by the court. Settlements and verdicts based on res ipsa loquitur do not establish the character of the negligence of a tortfeasor.

The classic example of passive negligence is the failure to discover and remedy a dangerous condition. To what extent further participation in the wrong amounts to active negligence and forecloses the right to indemnity is not always clear. Mere motion does not turn passive conduct into active negligence, but conduct which violates a statute appears to be per se active negligence. Having knowledge of the dangerous condi-

37: See, e.g., Hofstra v. Schriber, 475 S.W.2d 44 (Mo. 1972).
38. Kansas City Southern Ry. v. Payway Feed Mills, Inc., 338 S.W.2d 1 (Mo. 1960); McFall v. Compagnie Maritime Belge, 304 N.Y. 314, 107 N.E.2d 463 (1952). See Meltzer v. Temple Estates, 203 Misc. 602, 605, 116 N.Y.S.2d 546, 549 (Sup. Ct. 1952), stating that if the question of active-passive negligence is clear, the court will decide the issue as a matter of law, but when "there is room for a reasonable difference of opinion concerning the comparative culpability of joint tortfeasors, the question of liability will be given to the trier or triers of facts."
40. Allied Mutual Cas. Corp. v. General Motors Corp., 279 F.2d 485 (10th Cir. 1960); Western Cas. & Surety Co. v. Shell Oil Co., 413 S.W.2d 550 (St. L. Mo. App. 1967).
41. A joint judgment based on res ipsa loquitur does not establish the character of the negligence as between the tortfeasors. Crystal Tire Co. v. Home Service Oil Co., 525 S.W.2d 317 (Mo. En Banc 1975). But see State ex rel. Siegel v. McLaughlin, 315 S.W.2d 499, 504 (St. L. Mo. App. 1958) ("the permissible inferences of negligence under that doctrine and the circumstances pleaded would be active and concurrent negligence"). The fact that tortfeasors are sued jointly does not establish that the tortfeasors were in pari delicto. See Sisco v. Nu Process Brake Engineers, Inc., 462 S.W.2d 658 (Mo. 1971).
43. See Kansas City Southern Ry. v. Payway Feed Mills, Inc., 338 S.W.2d 1 (Mo. 1960).
tion and not remedying it,\textsuperscript{45} or negligently remedying it,\textsuperscript{46} constitutes active negligence; but a tortfeasor with knowledge who delegates the duty to remedy the condition to another is entitled to indemnity from the other who fails to remedy it.\textsuperscript{47} Active negligence can be an act of omission as well as commission,\textsuperscript{48} but it has been said that an act of commission cannot be passive negligence.\textsuperscript{46} The following Missouri cases will serve to illustrate these principles.

\textit{Kansas City Southern Ry. v. Payway Feed Mills, Inc.}\textsuperscript{60} has been cited as the first Missouri decision to utilize expressly the active-passive negligence terminology in connection with a claim for indemnity.\textsuperscript{61} A railroad settled a claim based on the Federal Employers' Liability Act by paying $15,000 to a switchman who had been injured when a railroad car collided with a moveable loading dock. The railroad's liability had been predicated on negligence in failing to provide a safe place to work. The railroad company sued and recovered indemnity from the owner of the loading dock, alleging active negligence in placing the dock too close to the railroad tracks. The owner had charged that the railroad could have discovered and remedied the danger, and that its failure to do so coupled with the movement of the railroad car constituted active negligence. Thus, the railroad was alleged to be in pari delicto with the owner and therefore unable to assert a claim for indemnity.\textsuperscript{52} The Missouri Supreme Court affirmed, holding that the failure to discover and remedy a danger-


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


\textsuperscript{47} \textit{See} McDonnell Aircraft Corp. \textit{v. Hartman-Hanks-Walsh Painting Co.}, 323 S.W.2d 788 (Mo. 1959).

\textsuperscript{48} \textit{See} Schipper \textit{v. Lockheed Aircraft Corp.}, 278 F. Supp. 743, 745 (S.D.N.Y. 1968) ("Acts of omission as well as commission may constitute active negligence."). An act of omission would be a failure to warn when there is a duty to warn of the dangerous condition. \textit{See} McDonnell Aircraft Corp. \textit{v. Hartman-Hanks-Walsh Painting Co.}, 323 S.W.2d 788 (Mo. 1959).


\textsuperscript{50} 338 S.W.2d 1 (Mo. 1960).


\textsuperscript{52} 338 S.W.2d at 8.
ous condition is a "classic example" of passive negligence, and that the "mere motion" of the railroad car did not establish active negligence by the railroad.

In *Western Cas. & Surety Co. v. Shell Oil Co.*, two teen-age girls were injured in an explosion that occurred when one lit a match in the restroom of a service station. An employee of Shell had been unloading gasoline which caused dangerous fumes to accumulate in the restroom. The girls brought an action against Shell and the service station operator, who leased the station from Shell. Both Shell and the operator's insurer settled the suit, and the operator's insurer brought a suit for indemnity against Shell. The court stated that although the operator had been charged with active negligence in the petition filed on behalf of the girls, the suit for indemnity was a separate action based on a settlement and therefore the character of the negligence was still to be determined. The court found that the operator had not known about the danger and that Shell was actively negligent in constructing ventilation pipes in close proximity to the building at such height as to allow dangerous fumes to accumulate when gas was unloaded. The court also found Shell actively negligent in failing to warn the operator of the danger, and Shell's employee actively negligent in discharging two grades of gasoline at once, thereby creating the dangerous accumulation of fumes. The insurance company prevailed on its claim for indemnity.

In *Hofstra v. Schriber*, plaintiff brought an action for indemnity against an owner of a truck which had stalled on a highway, causing injury to a motorist. The motorist had recovered a judgment against plaintiff, who had been the driver of the truck at the time it stalled. Plaintiff alleged that the owner had negligently installed an unclean auxiliary tank and failed to warn plaintiff about its condition. Plaintiff alleged it was this active negligence that had caused the truck to stall and injure the motorist. The trial court granted the owner's motion for summary judgment, and plaintiff appealed. The Missouri Supreme Court found that

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53. Id. at 6. See also *Restatement of Restitution* § 95 (1937).
54. Id. at 8.
55. 413 S.W.2d 550 (St. L. Mo. App. 1967).
56. Id. at 555.
57. There was some evidence that the operator had noticed the fumes accumulating around the restrooms but had done nothing to remedy the situation. This would have constituted actual knowledge of the dangerous condition and would have barred indemnity. See note 45 and accompanying text supra. The court stated that section 88 of the *Restatement of Restitution* allows judicial discretion to determine whether behavior of a tortfeasor bars indemnity, and that the operator in this case had been passively negligent. 413 S.W.2d at 556-57. That section reads as follows:

A person who has discharged a tort claim to which he and another were subject . . . (b) is barred from restitution if his tort involved seriously wrongful conduct.

The comment to (b) states "It is a matter for judicial discretion to determine whether an act is so seriously wrongful as to bar restitution under the particular circumstances."

58. 475 S.W.2d 44 (Mo. 1972).
the verdict against plaintiff had been based on plaintiff's negligence in allowing a stalled vehicle to remain on a traveled portion of the highway and that such conduct constituted active negligence. The plaintiff argued that the verdict was based on a mere failure to discover the condition that caused the truck to stall, but the court stated that the interpretation of verdicts was a matter of law to be decided by the court, and plaintiff's active negligence foreclosed his right to indemnification.59

The active-passive negligence indemnity theory has been often criticized60 and expressly rejected in some jurisdictions.61 While its validity as a method of achieving equity between tortfeasors may be questioned, it remains well-entrenched in Missouri jurisprudence.

III. INDEMNITY IN THE PRODUCTS LIABILITY AREA

Products liability claims can be predicated on three theories of recovery—negligence, breach of warranty, and strict liability.62 Similarly, claims for indemnity in the products area may be based on any of these three theories.63 Each theory involves different elements of proof, and not all of the theories are applicable in every case.64 The theory of recovery utilized by the injured party against a tortfeasor often dictates the theory on which is based the claim for indemnity; however, a claim for indemnification may be predicated on the other theories.65 In any event, the

59. Id. at 46-47.
60. It would seem that if the confusion that has arisen by attempting to fit cases into bare cubicles of easy nomenclature is to be alleviated, it can be done only by realizing that no rule really governs in the field of indemnity.

Comment, supra note 26, at 787. See also Meriam & Thornton, supra note 3; Davis, supra note 2.
61. See Dole v. Dow Chem. Co., 30 N.Y.2d 143, 381 N.Y.S.2d 382, 282 N.E.2d 288 (1972), discussed in part IV infra. Texas courts have adopted a theory based on the duties owed one tortfeasor to the other, allowing a tortfeasor who has not breached a duty owed to another tortfeasor indemnity if the latter has breached a duty owed to the former, although both have breached a duty owed a third person. The Texas test has not successfully eliminated the confusion in indemnity cases. See Hodges, Contribution and Indemnity Among Tortfeasors, 26 TEXAS L. REV. 150 (1947).
63. See Sisco v. Nu Process Brake Engineers, Inc., 462 S.W.2d 658 (Mo. 1971) (indemnity petition could be construed to embrace all three theories of recovery).
64. For example, a wholesaler or other middleman would not be sued on a negligence theory because he normally has no duty to inspect the product. In such a case, the indemnity action would need to be predicated on a warranty theory. See 3 FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 44.02[3] [a] (1975); Continental Cas. Co. v. Belknap Hardware & Mfg. Co., 281 S.W.2d 914 (Ky. 1955).
65. The claim that the injured party asserts against the tortfeasor will often involve the same underlying facts and legal issues the tortfeasor would be required to prove in his case for indemnity. Thus, the tortfeasor often predicates his claim for indemnity on the same legal theory utilized by the injured party. See 3 FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 44.03[5] (1975). But the tortfeasor could predicate his indemnity claim on another theory. See, e.g., Sisco v. Nu Process Brake Engineers, Inc., 462 S.W.2d 658 (Mo. 1971).
tortfeasor-indemnitee should attempt to assert his claim for indemnity in the suit brought against him by the injured party in order to avoid relitigating the same issues against the prospective indemnitir in a separate action.66

This comment will not attempt to determine the theory of recovery which a tortfeasor should employ when seeking indemnity in a products liability case. What will be examined is the effect of the active-passive negligence theory on a tortfeasor's right of indemnification when the tortfeasor's own liability is predicated on negligence, breach of warranty, and strict liability.

A. The Indemnitee Liable in Negligence

It is beneficial for the purposes of analysis to divide prospective indemnitees into two classes: manufacturers of products which cause injury and non-manufacturers—e.g., purchasers, users, and sellers of products held liable for injuries caused by the products. Manufacturers are a disfavored class in actions for indemnity.67 Most courts view the creation of a defective product as active negligence, which prevents a manufacturer from seeking indemnity from a tortfeasor who may also be responsible for injury caused by the product.68 Thus, a manufacturer has been denied indemnity from another manufacturer whose product contributed to the injury.69 A manufacturer's claim for indemnity asserted against purchasers or users of a product is usually denied.70 One exception71 to this strict

66. This can be done to a prospective indemnitor not already a party to the suit by either "vouching in" or impleading the tortfeasor, and this will save the indemnitee time and money. Wright, Procedure—Third Party Practice—Non-Contractual Indemnification, 28 Mo. L. Rev. 307, 308 (1969); Annot., 28 A.L.R.3d 943 at § 2[b] (1969).
70. See 3 FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 44.02[3] [d] (1975); Annot., 28 A.L.R.3d 943 at § 10 (1969).
71. Another exception may exist if a manufacturer has delegated the duty to inspect the product manufactured to another and the other fails to discover the defective product that causes the injury. See Guarnieri v. Kewanee-Ross Corp., 270 F.2d 575 (2d Cir. 1959) (dictum). This would parallel results in non-products cases. See note 47 and accompanying text supra. However, it is of questionable validity given the unfavorable view courts have toward manufacturers in indemnity cases.
view is that indemnity is allowed when a manufacturer seeks indemnity from a manufacturer of a component part,72 if the injury was caused by a defect in the component part.73 The strict view disfavoring indemnification for a manufacturer in no way affects the manufacturer's right to assert defenses which may establish no negligence and therefore no liability to the injured party.74

In Johnson v. California Spray-Chemical Co.,75 improperly packaged chemicals leaked, resulting in loss of sight by a freight handler. He brought an action against the manufacturer of the chemicals, alleging that the chemicals were improperly manufactured and packaged, and that the manufacturer had failed to warn about the possibility of leakage. The manufacturer filed a third-party petition seeking indemnity from the transportation company in charge of loading the chemicals, asserting that any liability it suffered would result solely from the negligence of the transportation company. Upon sustaining a motion to dismiss the third-party petition, the court held that because the manufacturer was charged with active negligence, there could be no right to indemnity. The court also found that the manufacturer's assertion against the transportation company was in effect an assertion of a defense to the plaintiff's action and not a basis for a claim of indemnification.76

In Feinstein v. Edward Livingston & Sons, Inc.77 plaintiff was injured at a car wash establishment following an explosion of a machine which contained a defective "accumulator." Plaintiff sued the car wash establishment alleging a breach of warranty and negligence in manufacturing, assembling, inspecting, and supplying a defective car wash system. Defendant filed a third-party petition seeking indemnity from the manufacturer of the component accumulator. The trial court dismissed the third-party petition, and defendant appealed. The Missouri Supreme Court reversed and held that the allegations of plaintiff's petition and the third-party petition demonstrated that relief could be granted for defendant against

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72. See generally 3 Frumer & Friedman, PRODUCTS LIABILITY § 44.02[3][e] (1975).
75. 362 S.W.2d 630 (Mo. 1962).
76. Ordinarily, if there is any possibility that the right to indemnity could be established at trial, the petition for indemnity should not be dismissed. See notes 34-35 and accompanying text supra. However, because manufacturers are categorized as per se actively negligent tortfeasors, courts are inclined to dismiss manufacturers' indemnity petitions because there would be no possibility of establishing a right to indemnity at trial. See Johnson v. California Spray-Chemical Co., 362 S.W.2d 630 (Mo. 1962); Lewis v. Amchem Products, Inc., 510 S.W.2d 46 (Mo. App., D. Spr. 1974). Cf. State ex rel. Laclede Gas Co. v. Godfrey, 468 S.W.2d 695 (St. L. Mo. App. 1971) (trial court erred in dismissing non-manufacturer's third-party petition for indemnity because the right to indemnity may be established at trial).
77. 457 S.W.2d 789 (Mo. 1970).
the manufacturer. The court found that plaintiff's petition embraced theories of active and passive negligence, and if plaintiff submitted his case against defendant on a passive negligence theory, defendant could submit his claim for indemnity.78

A more recent case demonstrates the strict view courts take toward a manufacturer asserting a claim for indemnity. In Lewis v. Amchem Products, Inc.79 farmers sued the manufacturer of a chemical which ruined crops after the fields were sprayed with it by a crop duster. The trial court dismissed the manufacturer's third-party petition against the crop duster, and the manufacturer appealed. The court found that the plaintiffs' allegations charged the manufacturer with active negligence, and affirmed the dismissal of the third-party petition. The court held that the manufacturer's third-party petition did no more than assert a defense to the plaintiffs' claim and was not a basis for an indemnity claim.80

Johnson, Feinstein, and Lewis illustrate that the negligence of manufacturers is almost always deemed active negligence, except where a manufacturer seeks indemnity from one who has supplied him with a defective component part.81 Thus, in the majority of cases, manufacturers are foreclosed from asserting a claim for indemnity.

When a non-manufacturer is charged with negligence in a products liability case, his right to recover indemnity from the supplier of the product will depend on the general considerations of the active-passive negligence theory, as discussed in part II, supra. A retailer who sells a defective product82 or an installer of a defective chattel83 without knowledge of the defect is merely passively negligent and entitled to indemnity from the actively negligent manufacturer of the item. Purchasers (including

78. The court stated:
The allegations of the two petitions, when taken and considered liberally together, and given all intendments favorable to the statement of a claim for indemnity . . . stated a claim upon which relief could be granted. . . .

475 S.W.2d at 793. It seems clear, however, that if plaintiff's petition had embraced only an allegation of active negligence, the third-party petition would have been dismissed. See Kemach v. American Airlines, Inc., 226 N.Y.S.2d 595 (Sup. Ct. 1962).

79. 510 S.W.2d 46 (Mo. App., D. Spr. 1974).

80. The court recognized the principle of section 76 of the Restatement of Restitution, quoted note 9 supra. 510 S.W.2d at 49.

81. But see cases cited note 68 supra, allowing a manufacturer to prove a case of passive negligence against persons other than suppliers of defective component parts. Such cases are against the weight of authority in products liability indemnity cases.

82. See, e.g., Woods v. Juvenile Shoe Corp., 361 S.W.2d 694 (Mo. 1962).

employers) or users of defective products which cause injury to third persons are entitled to indemnity from suppliers or manufacturers of such products, provided that the purchasers or users were without knowledge of the defect and did not actively participate in the wrong.\textsuperscript{84} While non-manufacturer suppliers are entitled to indemnity from their suppliers, attempts to recover indemnity from purchasers or users of the products are treated like indemnity actions brought by manufacturers and are generally unsuccessful.\textsuperscript{85}

Thus, in \textit{Woods v. Juvenile Shoe Corp.}\textsuperscript{86} a retailer was held liable to a customer injured by a tack that protruded into the wearing surface of a shoe. The retailer was allowed indemnity from the manufacturer of the shoe based on the active-passive negligence theory, because the retailer was only passively negligent in failing to discover the defect in the shoe. Similarly, in \textit{Sisco v. Nu Process Brake Engineers, Inc.}\textsuperscript{87} an installer of a defective power cluster that caused injury to a truck driver was allowed to maintain an indemnity action against the supplier of the power cluster, recovery to be granted on a showing that the unit was installed as was supplied. In \textit{Simon v. Kansas Rug Co.}\textsuperscript{88} a user of a rug cleaner that caused personal injury was entitled to implead the supplier of a dangerous chemical.

It is clear that showing knowledge of the dangerous condition or active participation in the wrong on the part of a non-manufacturer will preclude such persons from asserting a claim for indemnity. Such a showing constitutes active negligence and places the prospective indemnitee \textit{in pari delicto} with the creator of the dangerous condition.\textsuperscript{89} Thus, an injured third party who recovers from a non-manufacturer and proves active negligence will preclude a later action by the non-manufacturer for indemnity against the manufacturer of a defective product. It may be questioned whether such a result is equitable.\textsuperscript{90}


\textsuperscript{86} \textit{Id}.; 361 S.W.2d 694 (Mo. 1962).

\textsuperscript{87} 462 S.W.2d 658 (Mo. 1971).

\textsuperscript{88} 460 S.W.2d 596 (Mo. 1970). The court recognized the principle of section 93 (1) of the Restatement of Restitution:

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

\textsuperscript{89} S.W.2d at 599.

\textsuperscript{90} See generally 3 FRUMER \& FRIEDMAN, PRODUCTS LIABILITY § 44.04 (1975).

To illustrate the inequities which may result from the application of
A tortfeasor held liable for negligence may assert a claim for indemnity based on a warranty theory. Doing so requires the indemnitee to prove a case in warranty and subjects him to all applicable defenses. But the right of indemnification based on warranty is still determined by the active-passive negligence theory. A tortfeasor's active negligence precludes his claim for indemnity from one who has breached a warranty owed the tortfeasor. Stated conversely, only a tortfeasor guilty of passive negligence may recover on an indemnity claim predicated on a breach of warranty.

An early Missouri case applied the principle of the active-passive negligence theory to an indemnity action based on breach of warranty. In *Busch & Latta Paint Co. v. Woermann Const. Co.* plaintiff paint company asked defendant construction company to build a scaffold, to be used

the active-passive negligence indemnity theory, consider the following fact situation. A manufacturer of a dangerous product sells the product to an employer, and gives the employer instructions regarding the proper use of the product. The employer assigns an employee to use the product but fails to instruct the employee about the proper precautions to be taken when using the product. The employee suffers injury from using the product. If the manufacturer is sued, its negligence in creating the dangerous product is active negligence and will preclude the manufacturer from seeking indemnity from the employer. On the other hand (assuming no workmen's compensation act), if the employee sues the employer for failing to warn the employee of the danger, the fact that the employer knew about the danger would preclude the employer from seeking indemnity from the manufacturer of the dangerous product. Thus, in this situation, where the ultimate liability will fall depends on which tortfeasor the employee elects to sue.

A fair result could be obtained by allowing contribution between the employer and manufacturer, thereby requiring each to bear its own responsibility for the injury. See *Dole v. Dow Chemical Co.*, 30 N.Y.2d 143, 381 N.Y.S.2d 382, 316 N.E.2d 288 (1972), discussed in part IV infra. But in Missouri, the right to contribution which is essential to the only fair result in this situation, is subject to the requirements of a statute. See note 6 and accompanying text supra.


95. See *Busch & Latta Paint Co. v. Woermann Const. Co.*, 310 Mo. 419, 276 S.W. 614 (1925); *United Pacific Ins. Co. v. Balcrank, Inc.*, 175 Ohio St. 267, 193 N.E.2d 920 (1963). See also cases allowing recovery of indemnity by a tortfeasor held liable on a warranty theory from their suppliers based on the same warranty, discussed in part III, section B infra.

by plaintiff’s employees while painting the interior of a building. The defendant built the scaffold, using nails instead of bolts in its construction. The scaffold gave way and injured paint company employees, who settled with plaintiff and defendant for their injuries. Plaintiff then sought indemnity from the construction company, based on a breach of an implied warranty of fitness. The court found plaintiff had relied on the expert skills of defendant in constructing the scaffold and had failed to inspect the scaffold and discover its dangerous propensity. The court implied that active negligence of the plaintiff, if it existed, would bar the claim for indemnity:

The plaintiff’s negligence, for which its employees had a right to recover, was a failure to inspect the scaffold and be sure it was safe. . . . The defendant’s negligence was in manufacturing and furnishing for a specific purpose a structure which was unfit when defendant was bound to know whether it was suitable for such purpose. . . . It follows that the defendant in this case was primarily liable for injuries caused by the defects in the scaffold.97

Plaintiff was allowed indemnity from the defendant based on a breach of warranty.

_Rekab, Inc. v. Frank Hrubetz & Co., Inc._98 demonstrates that an indemnitee’s knowledge of the dangerous condition bars indemnity based on a breach of warranty. Plaintiff was an operator of an amusement park and defendant had manufactured and supplied a ride which had collapsed causing injuries to patrons. Plaintiff settled with the patrons and brought an action for indemnity based upon a breach of warranty. Evidence disclosed that defendant manufacturer had warned plaintiff of the dangerous condition of the ride, but plaintiff had not remedied it. The court held that plaintiff had knowledge of the defect and therefore could not assert a claim for indemnity.99

The effect of the active-passive negligence theory on a tortfeasor’s right of indemnification based on a theory of strict liability will be considered in subsection C, infra.

**B. The Indemnitee Liable in Warranty**

Normally, a tortfeasor held liable on a warranty theory predicates a claim for indemnity on a warranty theory.100 The general rule is that

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97. 310 Mo. at 439; 276 S.W. at 619.
100. Theoretically, the indemnity action could also be brought on a negligence theory, but this is seldom done. 3 _Frumer & Friedman, Products Liability_ § 44.08[6] (1975). In this regard, one case had indicated that breach of an express warranty is active negligence, whereas breach of an implied warranty is passive negligence. Sylvestri v. Warner & Swasey Co., 398 F.2d 598 (2d Cir. 1968). In any event, it seems unlikely that a seller of a product would be able
“a retailer or other seller suffering and paying a judgment against him by an injured person in a warranty action is entitled to indemnity from a manufacturer [or other seller] who sold the product to him with a similar warranty.”\textsuperscript{101} It has been suggested in such cases that the active-passive negligence theory is not applicable,\textsuperscript{102} but an argument could be made that selling a chattel with knowledge of its defectiveness should preclude indemnity in this situation.\textsuperscript{103}

Indemnity is often sought based on a warranty theory by every seller in the distributive chain. This results in the manufacturer bearing the ultimate liability for injuries caused by defects in the product.\textsuperscript{104} In \textit{Safeway Stores, Inc. v. L.D. Schreiber Cheese Co.}\textsuperscript{105} plaintiff-retailer brought an action against a wholesaler to recover for damages incurred from consumer claims based on the sale of contaminated cheese. The wholesaler impled a manufacturer of the cheese and sought indemnity. The evidence demonstrated that the cheese was contaminated prior to delivery to the wholesaler. The court held that section 400.2-314, RSMo 1969,\textsuperscript{108} entitled the wholesaler to recover indemnity, as well as attorneys' fees, from the manufacturer as proper “consequential damages” resulting from the breach of warranty.

C. Strict Liability and the Right of Indemnification

A tortfeasor found strictly liable may assert an indemnity claim against another based on strict liability.\textsuperscript{107} The doctrine of strict liability imposes liability on tortfeasors without a determination of negligence.\textsuperscript{108} Thus, it has been held that when a tortfeasor asserts a claim for indemnity based on a strict liability theory, the question of active or passive negligence is not present.\textsuperscript{109} However, when a tortfeasor found strictly liable to assert a claim for indemnity against a purchaser or user of the product. See \textit{Gilbert v. Barouch}, 10 App. Div. 2d 984, 202 N.Y.S.2d 429 (Sup. Ct. 1960) (breach of duty of reasonable care by sellers of dangerous products is active negligence). Indemnity has been sought by tortfeasors held liable on a warranty theory on the basis of strict liability. See, e.g., \textit{Penker Const. Co. v. Finley}, 485 S.W.2d 244 (Ky. 1972).

101. \textit{3 Frumer \& Friedman, Products Liability} § 44.03[1], at 15-45 (1975).


103. \textit{See note 45 and accompanying text supra.}

104. \textit{See, e.g., Texas Motorcoaches v. A.C.F. Motors Co.}, 154 F.2d 91 (3d Cir. 1946); \textit{Hellenbrand v. Bowan}, 16 Wis. 2d 264, 114 N.W.2d 418 (1962).


106. Section 400.2-314, RSMo 1969, is based on the Uniform Commercial Code and sets forth the elements of an implied warranty of merchantability.


109. \textit{See Texaco Inc. v. McGrew Lumber Co.}, 117 Ill. App. 2d 351, 358, 254 N.E.2d 584, 588 (1969): [This] manifest[s] a strong public policy that rests upon the dist...
seeks indemnity based on other theories, the result reflects notions of the active-passive negligence theory.

Like manufacturers subject to the active-passive negligence theory, manufacturers in strict liability cases are disfavored indemnitees. Manufacturers found strictly liable cannot assert a claim for indemnity against anyone except another manufacturer which supplied a defective component part. The prohibition is based on a policy that requires creators of defective products to bear the ultimate responsibility for injuries produced. The fact that a purchaser or user may have contributed to the injury is not a basis upon which a manufacturer may predicate a claim for indemnity, although misuse of a product is a recognized defense in a strict liability action.

Most of the cases which have considered the impact of strict liability on a manufacturer's right of indemnification have arisen in Illinois. In Burke v. Sky Climber, Inc. a widow sued the manufacturer of a scaffold which had collapsed, killing her husband. The suit was based on both strict liability and negligence. The manufacturer filed a third-party petition seeking indemnity from the employer of the decedent, alleging that

bution of the economic burden in the most socially desirable manner, even to the extent of ignoring the indemnitee's fault.

Query whether allowing an actively negligent tortfeasor to recover indemnity on a strict liability theory violates the spirit of the law of indemnity. See note 94 supra.

110. See notes 72-73 and accompanying text supra. Manufacturers held strictly liable are in effect treated as actively negligent tortfeasors, and thus are foreclosed from seeking indemnity from purchasers or users of products. See, e.g., Burke v. Sky Climber, Inc., 13 Ill. App. 3d 498, 301 N.E.2d 41 (1973). However, claims predicated on strict liability may be asserted against sellers of products, and thus a manufacturer held strictly liable could assert an indemnity claim based on a strict liability against one who supplied him with a defective chattel. See Liberty Mutual Ins. Co. v. Williams Mach. & Tool Co., 21 Ill. App. 3d 510, 316 N.E.2d 255 (1974).

111. See Burke v. Sky Climber, Inc., 13 Ill. App. 3d 498, 504-05, 301 N.E.2d 41, 46 (1973);

Sky Climber is the manufacturer and distributor of this product and therefore presumably the one who reaped the profits from its manufacture. Hence, the ultimate liability, if there be one because of a defective or unreasonably dangerous condition of the product when it left the manufacturer's possession, should rest upon Sky Climber as creator of the product.

112. Misuse of the product can be proved as a defense to strict liability actions. See, e.g., Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 261 N.E.2d 305 (1970); Noel, Defective Products: Abnormal Use, Contributory Negligence, and Assumption of the Risk, 25 Vand. L. Rev. 93 (1972). However, it has been held that the intervening acts of another may not be used by the manufacturer as a basis for an indemnity action. See Kuziw v. Lake Eng. Co., 398 F. Supp. 961, 963 (N.D. Ill. 1975):

Defendant manufacturer may allege that the intervening act of another party or plaintiff himself was the proximate cause of the injury complained of. It is not, however, a basis upon which a third party user may be brought into the action. Indemnity is not obtainable in strict liability cases as against the user.


it had instructed the employer on the proper care and maintenance of the product, and through actively negligent conduct the employer had made the scaffold dangerous. The court dismissed the third-party petition for two reasons. The first was that where a manufacturer is being sued, "it follows necessarily that the basis of the liability would be the active creation of the defect in the process of manufacture."\(^\text{114}\) The second was based on a policy that requires creators of defective products to bear the "ultimate liability" for resultant injuries.\(^\text{115}\) The decision was affirmed on appeal.\(^\text{116}\)

In *Kossifos v. Louden Mach. Co.*,\(^\text{117}\) plaintiff sued a manufacturer on a strict liability theory for injuries caused by one of the manufacturer's products which had been installed by the plaintiff's employer. The issue was whether a manufacturer was entitled to indemnity from an intermediate tortfeasor based on the active-passive negligence theory. The court in strong language answered in the negative:

In the instant case [the manufacturer] seeks to use the [active-passive negligence] exception against [the employer]. But the exception applies only where the two tortfeasors are tortfeasors owing to their respective negligence, because the theory essentially involves a comparing of negligences to determine the more causative fault of the same type. Here, however, [the manufacturer's] potential liability is not based on negligence, and the theory is therefore inapplicable. The theory of "active-passive negligence" is not applicable to compare apples with oranges.\(^\text{118}\)

The court declared that strict liability is "a more serious tort than the tort of ordinary negligence"\(^\text{119}\) and recognized the policy of allowing the creator of the defective product to bear the ultimate liability.\(^\text{120}\) The language of the *Kossifos* court indicates a strong policy that manufacturers should bear the ultimate responsibility for injuries caused by defective products.

\(^{114}\) Id. at 503, 301 N.E.2d at 45.

\(^{115}\) See note 11 supra.

\(^{116}\) Burke v. Sky Climber, Inc., 57 Ill. 2d 542, 316 N.E.2d 516 (1974). The Illinois Supreme Court did not conclusively answer the question whether a manufacturer could ever assert a claim for indemnity based on the active-passive negligence indemnity theory. But subsequent cases that have considered the issue have held that manufacturers cannot, based on the nature of strict liability and on the general policy that does not allow a manufacturer to seek indemnity from subsequent users or purchasers. See Kuziw v. Lake Eng'r Co., 398 F. Supp. 961 (N.D. Ill. 1975); Stanfield v. Medalist Industries, Inc., 17 Ill. App.3d 996, 309 N.E.2d 104 (1974).


\(^{118}\) Id. at 593, 317 N.E.2d at 752.

\(^{119}\) Id. at 598, 317 N.E.2d at 753.

\(^{120}\) Id. at 592; 317 N.E.2d at 752-53. While the court determined that the manufacturer could not seek indemnity on the active-passive negligence indemnity theory against a subsequent user, it left open the question whether a claim for indemnity could be asserted on the basis of "misuse" of the product. Id. at 592, 317 N.E.2d at 753. Subsequent cases have said that a claim of misuse is merely a defense and not a basis for an indemnity claim. Kuziw v. Lake Eng'r Co., 398 F. Supp. 961 (N.D. Ill. 1975); Stanfield v. Medalist Indus., Inc., 17 Ill. App. 3d 996, 309 N.E.2d 104 (1974).
Non-manufacturers held liable on a strict liability theory may assert indemnity claims based on strict liability against their suppliers. The negligence of users and assemblers of products will not be considered in a claim for indemnity based on a manufacturer's strict liability.

If the language of the Kossifos court is followed, non-manufacturing suppliers, as well as manufacturing suppliers, of chattels sued on strict liability would be unable to assert a defense based on the active-passive negligence theory against prospective indemnitees. An actively negligent tortfeasor would be able to recover indemnity based on wrongs in which he participated by showing defectiveness of a product. Such a result clearly violates the policy of fairness courts have tried to foster through the doctrine of indemnity.

IV. NEW YORK ABANDONS THE ACTIVE-PASSIVE NEGLIGENCE THEORY OF INDEMNIFICATION

The New York Court of Appeals had an opportunity to reexamine the active-passive negligence indemnity theory in Dole v. Dow Chemical Co. A widow sued Dow, a manufacturer of chemicals, after her husband died from breathing poisonous fumes. The employer of the decedent has used a chemical to fumigate a storage bin and then directed decedent to clean the room. Decedent died shortly thereafter. Plaintiff alleged that Dow was negligent in failing to warn of the danger and to instruct in the safe use of the chemical. Dow impleaded decedent's employer and sought indemnity, asserting that Dow had adequately warned the employer by


124. Two courts have compared "apples with oranges," however, when strict liability was asserted against a retailer. One court denied an actively negligent tortfeasor indemnity from the retailer, Schuster v. Steedley, 406 S.W.2d 387 (Ky. 1966), and the second court allowed a retailer held liable in strict liability to recover indemnification from an actively negligent installer. Mixter v. Mack Trucks, Inc., 224 Pa. Super. 313, 308 A.2d 139 (1973). These cases demonstrate the different views courts take toward non-manufacturer suppliers. The dissent in Mixter stated that finding a tortfeasor strictly liable says nothing about the character of negligence when indemnity is sought:

While the burden of showing negligence is eliminated, this does not mean that a seller of a defective product is necessarily without fault or free of negligence. While the degree of proof is lessened as between the plaintiff and the seller-defendant, such is not the case as between the seller and a third party defendant seeking indemnity.

224 Pa. Super. at 324, 308 A.2d at 145 (dissenting opinion).

125. Nothing would prevent a manufacturer from seeking contribution from a tortfeasor who contributed to the injury. See, e.g., Chamberlain v. Carborundum Co., 485 F.2d 31 (3d Cir. 1973). But that right in Missouri is a statutory one and therefore a limited one. See notes 6-7 and accompanying text supra.

labeling the chemical and furnishing supplemental materials, and that the employer was actively negligent in failing to follow the instructions and take precautionary measures. The trial court dismissed the third-party petition because the manufacturer had been charged with active negligence.

The New York Court of Appeals agreed that the active-passive negligence indemnity theory dictated that the indemnity petition be dismissed. But the court said that the persistent criticism of the active-passive negligence theory required the court to reexamine the concept. The court said that the purpose of indemnification is to achieve fairness between the parties, a result not always achieved under the active-passive negligence theory:

[T]he policy problem involves more than terminology. If indemnity is allowed at all among joint tortfeasors, the important resulting question is how ultimate responsibility should be distributed. There are situations when the facts would warrant what Dow here seeks—passing on to [the employer] all responsibility that may be imposed on Dow for negligence, a traditional full indemnity. There are circumstances where the facts would not, by the same test of fairness, warrant passing on to a third party any of the liability imposed. There are circumstances which would justify apportionment of responsibility between third-party plaintiff and third-party defendant, in effect a partial indemnity.127

The court declared that the evolution of the active-passive negligence theory and the New York contribution statute128 indicated a judicial and legislative intent to abrogate the inflexible prohibition against indemnity that existed at common law. To further that intent and achieve fairness between the parties, the court adopted an apportioning process based on the relative fault of the parties:

[W]here a third party is found to have been responsible for a part, but not all, of the negligence for which a defendant is cast in damages, the responsibility for that part is recoverable by the prime defendant against the third party.129

The court declared that the apportionment of fault between tortfeasors is a function of the jury, and the trial court was given discretion to combine the tortfeasor's action with the original action or try it separately.130

New York under Dole has become a jurisdiction which allows tort-

127. Id. at 147, 331 N.Y.S.2d at 386, 282 N.E.2d at 291.

128. N.Y. Civ. Prac. § 1401 (McKinney 1972). This statute contains the same limitations as the contribution statute in Missouri, and thus would have required a joint judgment before the manufacturer could seek to recoup any of the loss. The Dole decision permits contribution where the facts require it to achieve justice between the parties. See Coons v. Washington Mirror Works, 344 F. Supp. 653 (S.D.N.Y. 1972).


130. The decision of the trial judge should be based on fairness: "Whether the causes are tried together or separately would rest in the court's discretion, according to the requirements of fairness in the judicial management of the case."
feasors contribution based on relative fault.\textsuperscript{131} Since \textit{Dole}, contribution has been allowed between a negligent tortfeasor and one who had breached a warranty\textsuperscript{132} and will undoubtedly be extended to encompass tortfeasors held strictly liable.\textsuperscript{133} Tortfeasors in New York can now expect to bear their share of responsibility to injured third persons. Whether a tortfeasor can recover full indemnity from another will be determined through a fault weighing process by a jury.\textsuperscript{134}

\textbf{V. Conclusion}

The doctrine of indemnification is based on the concept of restitution. Its purpose is to achieve fairness between parties responsible to aggrieved third persons. The active-passive negligence indemnity theory evolved as an attempt to adjust the equities between tortfeasors. However, the application of the theory often does not result in a fair allocation of loss between tortfeasors. Therefore, Missouri courts should adopt the \textit{Dole} approach and allow contribution between tortfeasors without requiring that they be subject to a joint judgment.\textsuperscript{135} A jury could then allocate

\begin{itemize}
\item \textsuperscript{131} The rule of \textit{Dole} has been extended to cases other than those involving products liability. \textit{See Annot.}, 53 A.L.R.3d 184 (1973). For a general discussion of the \textit{Dole} decision, see 3 \textsc{Frumer \& Friedman}, \textit{Products Liability} \S 44.02[4] (1975).
\item \textsuperscript{132} \textit{Coins v. Washington Mirror Works, Inc.}, 344 F. Supp. 658, 658 (S.D.N.Y. 1972) (the court said the \textit{Dole} rationale is "primarily interested in equitably apportioning the responsibility for wrong-doing between the jointly liable wrong-doers.").
\item \textsuperscript{133} \textit{Cf. Chamberlain v. Carborundum Co.}, 485 F.2d 31 (3d Cir. 1973). One commentator states that strict liability of the manufacturer is justified because of the control a manufacturer has on the product it puts into the stream of commerce, but suggests that a manufacturer should be allowed to recoup some of its loss from intervening tortfeasors over which it has no control and which have contributed to the injury. Zaremski, \textit{Expansion of Third Party Recovery: Common Law Indemnity, Contribution or ?} 1975 \textit{Ill. B. J.} 684 (1975).
\item \textsuperscript{134} Full indemnity would still be possible under proper circumstances. \textit{See 3 Frumer \& Friedman, Products Liability} \S 44.02[4] (1975).
\item \textsuperscript{135} One commentator has stated that allowing the impleading of a tortfeasor for contribution purposes would violate the legislative intent of the Missouri contribution statute. Icenogle, \textit{Contribution in Missouri Between Tort-Feasors: How Affected by Third-Party Practice, Cross-Claims, and Consolidation of Actions}, 13 Mo. L. Rev. 223, 224 (1948). But nothing could prevent the Missouri courts from applying the rationale of the \textit{Dole} court by recognizing the statute as an attempt by the legislature to achieve a just result between the parties and furthering that intent by allowing contribution between tortfeasors without the requirement of a joint judgment. Allowing liability to be distributed on the basis of relative fault is the trend in American jurisprudence. \textit{See Annot.}, 53 A.L.R.3d 184 (1973); Zaremski, supra note 133. Moreover, Missouri courts have recognized that fairness between tortfeasors is the purpose of contribution:

\textit{The doctrine of contribution is not founded on contract, but is based on the principle that equality of burden as to a common right is equity, and that whenever there is a common right the burden is also common.}

\textit{Commercial Union Ins. Co. v. Farmer's Mut. Ins. Co.}, 457 S.W.2d 224, 226 (St. L. Mo. App. 1970). It must be realized that the active-passive negligence indemnity theory is not a formula that can achieve fairness in all actions between tortfeasors. The right to seek recoupment of loss "should be capable of development to meet perceived requirements for just solutions in questions involving multiple tortfeasors." \textit{Gertz v. Campbell}, 55 Ill. 2d 84, 89, 302 N.E.2d 40, 43 (1973).
\end{itemize}

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