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Sherri L. Sweers

Thomas B. Quinn

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The Law of Indemnity in Wyoming: Unravelling the Confusion

*Sherri L. Sweers & Thomas B. Quinn**

The law of indemnity has become increasingly more complex and the need for clarification is more necessary now than ever. The purpose of this article is to provide Wyoming practitioners with a basic understanding of indemnity. First, this article will define indemnity as it exists in Wyoming today. It will then discuss and analyze the present status of express indemnity, implied contractual indemnity, and implied equitable indemnity. Finally, this article will explain the scope of recoverable damages available under each of these theories and provide strategies for filing an indemnity action.

INDEMNITY DEFINED

Wyoming first recognized a claim for indemnity over seventy years ago.¹ Indemnity allows one who has discharged a common obligation to recover up to the entire amount which has been paid from the party primarily responsible.² The basis for indemnity is rooted in equitable principles of restitution and unjust enrichment³. An action for indemnity is

* Sherri L. Sweers obtained her Juris Doctorate from the University of Wyoming College of Law in 1994, graduating with the Order of the Barristers for her litigation skills. Following law school, she clerked for one year with the Honorable Elizabeth Kail, the Honorable Nancy Guthrie, and the Honorable D. Terry Rogers in the Ninth Judicial District Court of Wyoming. In the fall of 1995, Ms. Sweers joined the law firm of White and Steele, P.C., as an associate. Ms. Sweers is currently working for White and Steele in Denver, Colorado and in the branch office in Cheyenne, Wyoming.

Thomas B. Quinn graduated from the University of Wyoming with a Bachelor of Science in Economics. Following college, he went into private business in northern Wyoming. In the mid-1980s, Mr. Quinn sold his business and attended the University of Wyoming College of Law, receiving his Juris Doctorate in 1988. While in law school, Mr. Quinn was a member of the LAND AND WATER LAW REVIEW staff and a contributing author. Mr. Quinn joined White and Steele in 1988 and has since become a partner of the firm. Mr. Quinn is licensed to practice law in Wyoming and Colorado.

1. Richardson Assocs. v. Lincoln-Devore, Inc., 806 P.2d 790 (Wyo. 1991); Miller v. New York Oil Co., 243 P. 118 (Wyo. 1926).

2. The Wyoming Supreme Court defined *indemnity* in Miller v. New York Oil Co. The Court held:

[w]hen two parties, acting together, commit an illegal or wrongful act, the party who is held responsible in damages for the act cannot have indemnity or contribution from the other, because both are equally culpable, or particeps criminis, and the damage results from their joint offense. This rule does not apply where one does the act or creates the

3. RESTATEMENT (SECOND) OF TORTS § 886B (1979); see *Schneider Nat'l, Inc.*, 843 P.2d at 576.

founded on the idea of shifting liability from a party who has paid damages, but should not have had to bear the burden alone, to another responsible party who otherwise would be unjustly enriched.⁴

For example, if an insurance company settles a claim brought by its insured as a result of an accident which occurred when a defective product was used, the insurer (the indemnitee) may recover indemnity against the manufacturer of that product (the indemnitor) for the entire amount paid to its insured.⁵

Indemnity is the only remaining means by which one party can recoup damage payments from another party who is equally or more responsible for the injured party's damage, making an indemnity action vital to Wyoming practitioners.⁶

STATUS OF INDEMNITY

Today, Wyoming indemnity theories are separated into three general categories: express contractual indemnity; implied contractual indemnity; and equitable implied indemnity.⁷ An analysis of these three indemnity classifica-

4. *Schneider Nat'l, Inc.*, 843 P.2d at 576; RESTATEMENT (SECOND) OF TORTS § 886B cmt. c (1979).

5. The fact that the insurer/indemnitee's liability for which it seeks indemnity is covered by insurance procured by the insurer/indemnitee does not negate the manufacturer/indemnitor's obligation, and such obligation may be enforced by the indemnitee's insurer, as subrogee, where it has paid the claim indemnified against. See generally *Pittsburgh-Des Moines Steel Co. v. American Sur. Co.* of N.Y., 365 F.2d 412 (10th Cir. 1966) (applying Wyoming law).

6. The concept of contribution used to be applicable in Wyoming. Indemnity should not be confused with contribution. Indemnity is a creature of common law, while contribution derived its existence from Wyoming statutory authority. *Schneider Nat'l, Inc.*, 843 P.2d at 570; *Richardson Assocs.*, 806 P.2d at 810; *Convoy Co. v. Dana*, 359 P.2d 885, 886 (Wyo. 1961). However, both are doctrines which are used as tools to reach the same goal: a fair allocation of the ultimate burden of a tort recovery among those legally responsible. *Richardson Assocs.*, 806 P.2d at 811 n.26; Robert G. Werner, *Contribution and Indemnity*, 57 CAL. L. REV. 490, 491 (1969); see also, E. Eugene Davis, *Indemnity Between Negligent Tortfeasors: A Proposed Rationale*, 37 IOWA L. REV. 517, 538 (1952).

Contribution allowed a wrongdoer who was held liable for damages to recover from each of her co-tortfeasors a portion of the total liability she discharged. Unlike indemnity, contribution resulted in an equal sharing of the burden instead of shifting the entire loss from one party to the other. Werner, *supra*, at 491. Contribution is intertwined with the concept of joint and several liability, which requires co-tortfeasors to share equally in the damage award. The Wyoming statutes providing for contribution and joint and several liability were both repealed in 1986. 1986 Wyo. Sess. Laws ch. 24, §§ 1, 2.

7. *Richardson Assocs.*, 806 P.2d at 811-12. The *Richardson* court explained: The obligation of indemnity, which we have defined as "the obligation resting on one party to make good a loss or damage another has incurred" may arise under the law of this state from either of two general sources. First, it may arise by virtue of express contractual language establishing a duty in one party to save another harmless upon the occurrence of

tions will provide an update on Wyoming law on the issue of indemnity.

Express Contractual Indemnity

Express indemnity is derived from specific language of a contract where one party expressly promises to indemnify the other for a particular kind of loss.⁸ The challenges in this area primarily involve contract interpretation. In interpreting an indemnity agreement, generally the court will apply a broad or liberal rule of construction in order to reasonably follow the parties' intent.⁹ Thus, if one company expressly agrees to indemnify another for the negligent acts of itself or its employees, the court will liberally construe the agreement and enforce it if it is determined to be the intent of the parties.

For example, in *Northwinds of Wyoming, Inc. v. Phillips Petroleum Co.*, the petroleum company sought indemnification from the contractors for its liability in a settlement for an underlying wrongful death action of the contractor's employee. In the express agreement between the parties, the contractor agreed to indemnify the company from all claims, liabilities and causes of action resulting directly or indirectly from any acts or omissions of the contractor. The company, which was partially negligent for the wrongful death, sought indemnity for its negligence under the terms of the contract.¹⁰

The Wyoming Supreme Court held that the indemnity clause of the contract must be strictly construed. The language of the indemnity clause did not contain clear and unequivocal terms to indemnify the petroleum company for its own negligence, and, thus, was insufficient to impose liability on the contractor for the company's fault. The contract was held unenforceable to that extent, and the contractor was required to indemnify the petroleum company only for the contractor's liability.¹¹

specified circumstances. Second, it may find its source in *equitable considerations* brought into play *either by contractual language not specifically dealing with indemnification or by the equities of the particular case.*

Id. at 813 (quoting *E.L. White v. City of Huntington Beach*, 579 P.2d 505 (Cal. 1978) (citations omitted) (emphasis in original)).

8. *Richardson Assocs.*, 806 P.2d at 811; *Schneider Nat'l, Inc.*, 843 P.2d at 573; Werner, *supra* note 6, at 492.

9. *Northwinds of Wyoming, Inc. v. Phillips Petroleum Co.*, 779 P.2d 753, 759 (Wyo. 1989).

10. *Northwinds of Wyoming, Inc.*, 779 P.2d at 753.

11. *Id.* at 758. Another issue which arose from that case was whether the contractor had a duty to defend. The rule of strict construction was not applied where indemnity was claimed only for the acts of the indemnitor. Hence, the court was not bound by the "clear and unequivocal rule" applied to the primary issue of the company's entitlement to indemnity for its own negligence. Therefore, applying the broad rule of construction, the court concluded that under the contract the contractor had the duty to defend the company in the underlying action. *Id.* at 759-60; *Cities Serv. Co. v. N. Prod. Co., Inc.*, 705 P.2d 321, 328

Although there are other interpretive issues concerning express indemnity agreements,¹² recent case law has dealt with implied indemnity, where an indemnity contract did not exist.

Implied Contractual Indemnity

Implied contractual indemnity arises where a duty to indemnify may be implied from a contractual relationship between two parties.¹³ Implied contractual indemnity is also known as implied in fact indemnity. It necessarily stems from a contractual relationship between the two parties.¹⁴ Without a

(1985).

12. See, e.g., *Reliance Ins. Co. v. Chevron U.S.A. Inc.*, 713 P.2d 766 (Wyo. 1986); *Cities Serv. Co.*, 705 P.2d at 321; *Pan Am. Petroleum Corp. v. Maddux Well Serv.*, 586 P.2d 1220 (Wyo. 1978); *Mountain Fuel Supply Co. v. Emerson*, 578 P.2d 1351 (1978).

One issue related to express indemnity that the Wyoming Supreme Court has had the opportunity to analyze is the anti-indemnity statute, Wyoming Statute § 30-1-131. Section 30-1-131 provides that any indemnity agreement pertaining to any well for oil, gas or water, or mine for any mineral, which purports to relieve the indemnitee from loss or liability for his own negligence, is against public policy and is void and unenforceable. WYO. STAT. § 30-1-131 (1983). Public policy behind the anti-indemnity statute is twofold: first it provides freedom for persons to contract for legitimate and proper purposes; and second, it encourages safety in the workplace. *Cities Serv. Co.*, 705 P.2d at 329; see also *Mountain Fuel Supply Co.*, 578 P.2d at 1354-56 (holding that the anti-indemnity statute does not violate the equal protection clause of the United States or Wyoming Constitutions).

It is interesting to note that indemnity contracts relating to oil, gas, or water wells are void if the indemnitee seeks indemnification for his own negligence, while in a standard indemnity contract, an indemnitee may obtain indemnity for his own negligence if the contract clearly and unequivocally states those terms. One could argue that the policy for the anti-indemnity statute applies to any indemnity contract which imposes liability on the indemnitor for the indemnitee's own negligence. Logically, the Wyoming Supreme Court or the Wyoming State Legislature should prohibit any indemnity contract from imposing on the indemnitor liability for the indemnitee's own negligence. This would be consistent with comparative fault principles and the notion that a party should only be liable for her share of fault. It would further be consistent with public policy outlined in the anti-indemnity statute for oil, gas and water wells.

Another related issue pertaining to express indemnity is whether the indemnitee may seek indemnification from an employer who contributes to worker's compensation and thus cannot be sued for damages for the same work-related injury. Article 10, section 4 of the Wyoming Constitution states in part:

The right of each employee to compensation from the fund shall be in lieu of and shall take the place of any and all rights of action against any employer contributing as required by law to the fund

WYO. CONST. art. X, § 4. The Wyoming Supreme Court has held that the provisions of Article 10, section 4 did not bar suits against an employer by third parties seeking indemnity where the claim was based upon a contract between the employer and the third party in which the employer agreed to indemnification. *Cities Serv. Co.*, 705 P.2d at 324.

13. The Wyoming Supreme Court explained that implied contractual indemnity is applicable when there is some contractual relationship between the party seeking indemnity and the party against whom indemnity is sought so the latter owes an independent duty to the former. *Schneider Nat'l, Inc.*, 843 P.2d at 573; *Richardson Assocs.*, 806 P.2d at 812; *Pan Am. Petroleum Corp.*, 586 P.2d at 1226; *Vickery v. Reliable Elec. Co.*, 703 F.2d 488, 491 (10th Cir. 1983).

14. *Schneider Nat'l, Inc.*, 843 P.2d at 573 (citation omitted).

contractual relationship between the parties, this theory is inapplicable.¹⁵

Typically, this type of action stems from a breach of contract between the two parties where the indemnitor agreed to perform services. The agreement implied an obligation to do the work in a proper manner and to discharge damages resulting from an improper performance. For example, in *Kemper Architects, P.C. v. McFall, Konkel & Kimball Consulting Engineers, Inc.*,¹⁶ the engineering company built a heating system for the architect of an instructional facility under an oral subcontract. The heating system's failure to meet specifications caused the architect to pay additional costs. The architect sued the engineer for indemnity for the financial settlement he had to pay.¹⁷

In that case, the Wyoming Supreme Court ruled that the defendant engineering firm had an implied contractual duty to indemnify the architect for the engineer's improper work on the system based on the oral subcontract between the two parties. However, the architect had to prove that the engineering firm was negligent in discharging its contractual duty to design the system in order for the court to enforce the duty to indemnify.¹⁸ Accordingly, in Wyoming an implied contractual indemnity action can arise out of an oral agreement between two parties responsible for damages resulting from a negligent act.¹⁹

15. Although this theory is premised on equity and fairness when assigning liability, some type of contractual relationship must exist. *Id.*; see also Werner, *supra* note 6, at 493.

16. 843 P.2d 1178 (Wyo. 1992).

17. *Id.* at 1181. The architect's suit was in the form of a counterclaim. Kemper had withheld payment from the engineer as a result of the additional costs it had incurred. The engineer sued for payment; Kemper answered and counterclaimed for indemnity.

18. *Id.* at 1185. Despite the contractual origin of the indemnity action, the engineer's underlying negligence was at issue. There is a collision between tort and contract doctrines in all cases of this nature. Often a suit for indemnity must employ the law of contracts even though it sounds in tort, especially when express or implied contractual indemnity is involved. See *Pittsburgh-Des Moines Steel Co.*, 365 F.2d at 416.

19. *Kemper Architects*, 843 P.2d at 1181. *Kemper Architects* provides a rough example of implied contractual indemnity. The analysis the court uses to support its decision is confusing. At first glance, the court correctly applies the law for implied contractual indemnity. However, in dicta the court contradicts its previous ruling in *Schneider Nat'l, Inc. v. Holland Hitch Co.* In *Kemper*, the court indirectly talks about active/passive or primary/secondary negligence; in *Schneider*, the Court stated that active/passive negligence plays no role in implied contractual indemnity.

Implied contractual indemnity consists of a contractual relationship between two parties where one party owes a duty, contractual or legal, obligating that party to indemnify the other if the work performed is insufficient. An analysis of active/passive negligence is inappropriate as held in *Schneider* because the issue is not which party was primarily responsible but rather whether the contracting party failed to adequately perform its duty. The holding in *Schneider* is correct and further case law should be consistent with that case.

Moreover, *Miller v. New York Oil Co.*, relied on by the *Kemper* court, represents an analysis based on equitable implied indemnity, not implied contractual indemnity, contrary to the court's explanation in *Kemper*. See *Schneider Nat'l, Inc.*, 843 P.2d at 574. In *Schneider*, the court correctly noted that Mr. Miller and New York Oil had a contractual relationship and, therefore, the *Miller*

The most difficult type of implied indemnity action is when no contractual relationship exists and the right to indemnity is implied based on equitable considerations in a particular situation.

Equitable Implied Indemnity

Equitable implied indemnity arises in the absence of a contract or contractual relationship, but where there are equitable reasons under the circumstances for allowing indemnity. A common example occurs when an employer is held vicariously responsible for the negligence of his employee. The employer is entitled to full indemnification from the employee.²⁰

Equitable implied indemnity actions may be premised on negligence, strict liability, or breach of warranty. The nature of indemnity available will differ depending upon the theory of liability claimed.²¹

In *Schneider National, Inc. v. Holland Hitch Co.*, Wyoming adopted section 886B of the Restatement (Second) of Torts, which defines equitable implied indemnity based on negligence in tort.

If two persons are liable in tort to a third person for the same harm and one of them discharges the liability of both, he is entitled to indemnity from the other if the other would be unjustly enriched at his expense by the discharge of the liability.²²

Wyoming recognizes partial indemnity for equitable implied indemnity actions premised on negligence.²³ Partial indemnity is consistent with the legislative acceptance of comparative fault outlined in section 1-1-109 of the Wyoming Statutes.²⁴ Accordingly, indemnity liability is allocated among the parties proportionately to their comparative degree of fault in actions for equitable implied indemnity. The public policy underlying the

court *could* have treated the action as one for implied contractual indemnity and denied Mr. Miller indemnity. However, the *Miller* court permitted indemnity, based on the theory of equitable implied indemnity. Thus, further analysis of *Miller* in future case law should be consistent with the analysis in *Schneider* (i.e., that indemnity in *Miller* could have and should have been denied on the basis of implied contractual indemnity), and not *Kemper Architects* (i.e., that indemnity in *Miller* was permitted on the basis of implied contractual indemnity).

20. Werner, *supra* note 6, at 493.

21. *Schneider Nat'l, Inc.*, 843 P.2d at 576.

22. RESTATEMENT (SECOND) OF TORTS § 886B (1979); *See also Schneider Nat'l, Inc.*, 843 P.2d at 575-76.

23. *Schneider Nat'l, Inc.*, 843 P.2d at 576.

24. *Id.* The comparative fault provision provides that each defendant is liable only to the extent of her percentage of fault as compared to all other actors whether or not they are parties to the action. WYO. STAT. § 1-1-109(e) (Supp. 1995). The adoption of comparative fault was premised on the abrogation of joint and several liability. *Schneider Nat'l Inc.*, 843 P.2d at 569-70.

theory of partial indemnity is increased safety in the workplace. Each party is responsible for its own activities and liable for damage caused by its own failure to exercise reasonable care in its operations.²⁵

Equitable implied indemnity actions in Wyoming premised on strict product liability in tort are governed by the Restatement (Second) of Torts.²⁶ Specifically, equitable implied indemnity is available from the supplier of a defective product when the product failure makes both the indemnitee and the indemnitor liable to a third person and the indemnitee innocently or negligently failed to discover the defect.²⁷ Indemnity, under strict liability, is not based on fault but rather allocates the risk of loss to the party best able to control the loss and distribute it. At the head of the product distribution chain is the manufacturer. Wyoming has long held that "the manufacturer is the party most likely to indemnify as it is best able to 'bear the cost of defective products and distribute that cost equitably throughout society.'"²⁸

Wyoming also adheres to the right to equitable implied indemnity for claims based on breach of warranty.²⁹ Breach of warranty actions follow precepts which make the seller, in effect, an insurer of his product's safety. An implied warranty for the safety of a product establishes strict liability for the manufacturer and distributors.³⁰ Parallel to its counterpart, strict liability, a product liability suit for breach of warranty is an action based not on fault, but on allocating a risk of loss for policy reasons to the cheapest cost avoider.³¹

Prior to 1994, the doctrine of partial indemnity did not apply in strict liability or breach of warranty cases. The Wyoming Supreme Court's reasoning for this treatment was based on its application of comparative fault to strict liability and breach of warranty in *Phillips v. Duro-Last Roofing, Inc.*³²

25. *Schneider Nat'l., Inc.*, 843 P.2d at 577. It could be argued that partial indemnity was provided in those cases where the anti-indemnity statute prohibited an indemnitee in an oil, gas or water well action from recovering a loss resulting from her own negligence. An indemnitee could be indemnified for the indemnitor's negligent acts but not for its own, hence partial indemnity was applied. The same public policy reasons apply as well. *Id.* (citing *Cities Serv. Co.*, 705 P.2d at 329); see also cases cited *supra* note 12 and accompanying text.

26. RESTATEMENT (SECOND) OF TORTS § 886B(d) (1979).

27. *Schneider Nat'l., Inc.*, 843 P.2d at 580.

28. *Id.* at 581 (citation omitted). This doctrine of shifting loss is not limited to the chain of distribution. The product user and owner or their insurers may be indemnified for a defective product. *Id.*

29. *Id.* at 583.

30. *Id.* at 585-86. The different types of warranties include breach of the implied warranty of merchantability, the breach of an implied warranty of fitness for a particular purpose and the breach of express warranty. *Id.* at 585.

31. *Id.* at 587.

32. *Schneider Nat'l., Inc.*, 843 P.2d at 566-67 (citing *Phillips v. Duro-Last Roofing, Inc.*, 806

Comparative fault principles, similar to partial indemnity principles, were never permissible in either action.³³ The Wyoming Supreme Court stated that the intent of the Wyoming State Legislature when enacting Wyoming's comparative fault statute was to confine comparative fault to actions involving negligence.³⁴ Therefore, actions based on strict liability or breach of warranty were unaffected by comparative fault.³⁵ For policy reasons, indemnity actions under strict liability and breach of warranty were left to shift one hundred percent of the liability to the party in the best position to bear the risk of loss and spread the loss among the consumers of the product. Attempting to remain consistent, the Wyoming Supreme Court ruled that partial indemnity was not applicable in equitable implied indemnity actions based on strict liability or breach of warranty.³⁶

However, in June, 1994, the Wyoming State Legislature amended the comparative fault statute so that comparative fault applies to actions based on strict liability and breach of warranty.³⁷ Therefore, for persons who are injured by defective products on or after July 1, 1994, comparative fault principles will act to reduce the amount of recovery in actions which are based on strict liability or breach of warranty.³⁸

Since the comparative fault statute was amended, the Wyoming Supreme Court has not addressed whether partial indemnity applies to equitable implied indemnity cases involving claims for strict liability and breach of warranty. In order to remain consistent with its previous holding permitting partial indemnity in negligence actions, the court should also permit partial indemnity in strict liability and breach of warranty actions under the revised comparative fault statute, even though this would defeat the policy considerations of risk allocation.³⁹

P.2d 834, 836-37 (Wyo. 1991)).

33. *Schneider Nat'l, Inc.*, 843 P.2d at 566.

34. *Id.* at 567. The Wyoming Supreme Court held that the language of Wyoming Statute § 1-1-109 "limits its operation by referring to 'a recovery in an action . . . to recover damages for negligence.'" *Id.* (quoting WYO. STAT. § 1-1-109(a) (1957)).

35. *Schneider Nat'l, Inc.*, 843 P.2d at 566-67 (citing *Phillips v. Duro-Last Roofing, Inc.*, 806 P.2d at 836-37).

36. *Schneider Nat'l, Inc.*, 843 P.2d at 583, 587. For a more detailed discussion see James R. Owens, *The Availability of Indemnity in Tort Actions Involving the Wyoming Comparative Negligence Statute—Multiple Parties Cause Multiple Problems*, 29 LAND & WATER L. REV. 253 (1994).

37. See WYO. STAT. § 1-1-109(a)(iv) (Supp. 1995). The definition of *fault* includes "acts or omissions, determined to be a proximate cause of death or injury to person or property, that are in any measure negligent, or that subject an actor to strict tort or strict products liability, and includes breach of warranty, assumption of risk and misuse or alteration of a product." *Id.*

38. 1994 Wyo. Sess. Laws ch. 98, §§ 2, 4. Conversely, where the cause of action accrued on or before June 30, 1994, comparative fault principles are not applicable to reduce the amount of recovery in actions based on strict liability or breach of warranty.

39. The Wyoming Supreme Court should further determine whether partial indemnity is avail-

The respective defenses for each underlying claim are applicable in an indemnity action. Comparative negligence is a defense to indemnification founded upon negligence. Therefore, an injured party's own negligence may reduce or bar an indemnity recovery against a negligent defendant.⁴⁰ In strict liability and breach of warranty, the product manufacturer has two primary defenses. The first is assumption of risk. In this situation a discovery of the defective product or appreciation of its danger and continuing use would prevent indemnity recovery. Alternatively, misuse of the product by using it for an unintended or unforeseeable purpose would also bar indemnity.⁴¹ However, the failure of a product user to inspect and discover a defect in a product does not bar indemnity.⁴²

THE EFFECTS ON THE PRACTICE OF LAW IN WYOMING

The Scope of Recovery

Recoverable damages include the actual loss or payment whether derived from judgment or settlement, plus interest.⁴³ However, a settling party incurs some special burdens as the party seeking indemnity. The party seeking indemnity must establish that the settlement was reasonable and made in good faith in order to discharge a liability.⁴⁴ The Wyoming Supreme Court has held that if an indemnitor declines to approve a proposed settlement then the indemnitee is only required to prove a potential liability to the original plaintiff in order to support a claim against the indemnitor for negligence. If there is no opportunity to approve, then the indemnitee must show actual liability to the original plaintiff.⁴⁵ Evidence

able under implied contractual indemnity, which is also founded on principles of equity and fairness. In implied contractual indemnity, an agreement, either oral or written, implies an obligation to do work in a proper manner and to discharge damages resulting from an improper performance. Based on equity, a court therefore permits an individual to be indemnified by a contractor whose performance was improper. However, the indemnitor should not have the burden of paying the entire loss if the indemnitee is partially at fault for the improper performance.

40. Under the theory of comparative negligence, a negligent plaintiff is barred from recovery if her negligence is greater than fifty percent of the defendant's negligence. Otherwise, the plaintiff's recovery is reduced by the percentage of negligence assigned to her conduct. *Schneider Nat'l, Inc.*, 843 P.2d at 568 (citation omitted).

41. *Id.* at 582-83, 587. A seller is not liable when she delivers the product in a safe condition and subsequent mishandling or other causes make it harmful by the time it is consumed. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

42. *Schneider Nat'l, Inc.*, 843 P.2d at 583.

43. *Id.* at 564; *Richardson Assocs. v. Lincoln-Devore, Inc.*, 806 P.2d 790, 811 (Wyo. 1991); *Miller v. New York Oil Co.*, 243 P.2d 118, 119 (Wyo. 1926).

44. *Schneider Nat'l, Inc.*, 843 P.2d at 579; *Northwinds of Wyoming, Inc. v. Phillips Petroleum Co.*, 779 P.2d 753, 755 n.4 (Wyo. 1989); *Pan Am. Petroleum Corp. v. Maddux Well Serv.*, 586 P.2d 1220, 1225 (Wyo. 1979).

45. *Schneider Nat'l, Inc.*, 843 P.2d at 579 (citing *Pan Am. Petroleum Corp.*, 586 P.2d at

demonstrating that a settlement was made in good faith to discharge a potential or actual liability may be contained in the express terms of a release or, alternatively, through a factual determination where the underlying injured party has received full compensation.⁴⁶

An express indemnity action is not limited to liability but may also include recovery for attorneys' fees, costs, and other expenses for the underlying action if expressly provided for in the indemnity agreement.⁴⁷ Thus, an indemnitee may recover reasonable attorneys' fees and reasonable and proper legal costs and expenses which she is compelled to pay as a result of a settlement or defense of the underlying suit. However, absent such written language attorneys' fees and costs are not recoverable.

In actions premised on equitable implied indemnity grounded on negligence the indemnitee is only entitled to recover partial indemnity in excess of its own proportionate fault. Therefore, the Wyoming Supreme Court should permit recovery of a portion of those attorneys' fees and costs incurred from the underlying action if the indemnitee can establish and prove that a portion of its attorneys' fees and costs associated with reaching the settlement or judgment with the injured person was in excess of his fair share.⁴⁸

Filing an Indemnity Action

Where appropriate, express or implied contractual indemnity claims should be filed as cross-claims. All types of indemnity claims may also be filed as third-party claims.⁴⁹ However, resolving all claims in one single action is not always feasible nor practical. One reason to consider an additional indemnity proceeding is that Wyoming has not adopted the "one action rule" limiting a plaintiff's right to sue additional causally responsible parties.⁵⁰ Therefore, a plaintiff who is subject to the restrictions of joinder under

1225).

46. *Harris v. Grizzle*, 599 P.2d 580, 586 (Wyo. 1979).

47. *Northwinds of Wyoming, Inc.*, 779 P.2d at 757; *Pittsburgh-Des Moines Steel Co. v. American Sur. Co. of N.Y.*, 365 F.2d 412, 413 (10th Cir. 1966) (applying Wyoming law).

48. Since it is unresolved whether partial indemnity applies to strict liability or breach of warranty claims in equitable implied indemnity actions after the amendment to comparative fault in 1994, it is unclear whether the indemnitee could be entitled to attorneys' fees and costs upon a similar showing in actions which accrued after the amendment. However, if partial indemnity was applicable under those claims, the indemnitee should receive that portion of attorneys' fees and costs for the underlying action which was in excess of her fair share as well. Moreover, until the courts permit partial indemnity in implied contractual indemnity cases where the indemnitee can make a similar argument, attorneys' fees and costs are not recoverable for implied contractual indemnity claims.

49. Wyo. R. Civ. P. 13, 14.

50. *Schneider Nat'l, Inc.*, 843 P.2d at 579.

Rule 19 of the Wyoming Rules of Civil Procedure⁵¹ may opt to bring an individual action for jurisdictional or strategic motives.⁵²

Settlements are another reason separate proceedings may be desirable. A settling party has the burden of proving the settlement was made in good faith. However, when the indemnitee settles short of a lawsuit, an indemnity claim may be the first filed. Without a judicial determination as to liability, the party seeking indemnity must prove that the wrongful conduct of the party from whom indemnity is sought created the claim against the indemnitee. The standard of proof (potential or actual liability) depends on the indemnitor's participation in the settlement matters.⁵³

When the underlying claim is not settled and is tried on the merits, the indemnitee may file either after the complaint is filed by the injured person or at the conclusion of the trial resulting in a judgment against the indemnitee. However, strategically, a defendant may want to wait until the underlying action is resolved, avoiding another action if liability is not assessed against him.

CONCLUSION

An action for indemnity is founded on the idea of shifting liability from a party who has paid damages, but should not have had to bear the burden alone, to another responsible party. Indemnity in Wyoming is separated into three categories: express contractual indemnity; implied contractual indemnity; and equitable implied indemnity. In equitable implied indemnity actions, partial indemnity is allowed for claims premised on negligence. However, it is undetermined whether partial indemnity applies to strict liability or breach of warranty claims or for actions based on implied contractual indemnity. Filing an indemnity action in a separate proceeding is most desirable although indemnity claims may be in the form of cross-claims or third-party claims.

Indemnity is a necessary tool for Wyoming practitioners. Although indemnity needs to be further refined in Wyoming, under appropriate

51. See WYO. R. CIV. P. 19. When seeking indemnification in a single proceeding, joinder of the party seeking indemnity is a necessary step. Permissive joinder of parties is only permitted if a party's interest in the subject of the action will be impaired or impeded or if the original party to the action will be subject to double or multiple causes of action. Necessary joinder is only granted if the non-party is a necessary or indispensable party to the action. These requirements must be met in order for a non-party (the indemnitee) to seek indemnification from the responsible party (the indemnitor) in a single proceeding.

52. WYO. R. CIV. P. 19.

53. *Id.*; see also text accompanying *supra* notes 47-49.

circumstances it can be used effectively as a means to recover damage payments from one who is at least equally responsible for those damages.