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Implied Contractual Indemnity: An Infirm Doctrine Whose Time Has Passed

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IMPLIED CONTRACTUAL INDEMNITY: AN INFIRM DOCTRINE WHOSE TIME HAS PASSED

The city of Downtown contracted Dan's Sidewalk Service to maintain the sidewalks along Mainstreet. The contract entered into between Downtown and Dan, provided the following:

> *Clause one: Dan's Sidewalk Service agrees to sweep the sidewalks on both sides of Mainstreet in Downtown every evening.*
>
> *Clause two: Downtown agrees to pay Dan's Sidewalk Service $50 per day to sweep the sidewalks.*

One evening, Dan, too tired to sweep both sides of Mainstreet, only cleared the street's north side. The next morning, Patty, walking along the south side of Mainstreet, tripped on some debris, causing her to break her leg.

Patty sues both Downtown and Dan for negligence. Patty's theory against Downtown is that as owner of the sidewalk, the city owed her a duty to make the sidewalk safe for pedestrians. Patty's theory against Dan is that his contractual relationship with Downtown created a duty on his part to maintain a safe sidewalk.

Downtown believes that Dan is responsible for Patty's injury and files two cross-complaints. Each cross-complaint is designed to shift some of the responsibility to Dan for Patty's injury. The first cross-complaint seeks contribution. Downtown claims that if both the city and Dan are found liable to Patty, Downtown is only responsible for paying its proportional damages. The second cross-complaint is for implied contractual indemnity. Downtown argues that the court should imply a duty on the part of Dan to indemnify Downtown for any damages Downtown is required to pay. Before the cross-complaints are litigated, Dan settles with Patty.

Dan may now seek to dismiss Downtown's two cross-complaints under California Civil Procedure Code section 877.6(c).[1] *If a court determines*

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1. CAL. CIV. PROC. CODE § 877.6(c) (West 1980 & Supp. 1989). This provision reads: "A determination by the court that the settlement was made in good faith shall bar any other joint tortfeasor or co-obligor from any further claims against the settling tortfeasor or co-obligor for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault." *Id.* The same is true under New York law. N.Y. GEN. OBLIG. LAW § 15-108 (McKinney 1978). The New York law provides:

> (a) Effect of release of or covenant not to sue tortfeasors. When a release or a covenant not to sue or not to enforce a judgment is given to one of two or more persons liable or claimed to be liable in tort for the same injury, or the same wrongful death, it does not discharge any of the other tortfeasors from liability for the injury

that Dan's settlement with Patty is in "good faith" it will dismiss Downtown's cross-complaint for contribution.[2] *However, whether the statute applies to a claim for implied contractual indemnity is uncertain.*[3] *The uncertainty regarding the effect of this settlement-bar*[4] *statute is one example of the problems caused by the troublesome doctrine of implied contractual indemnity.*

I. STATEMENT OF THE PROBLEM

The issues raised by this hypothetical reflect the current uncertainty regarding implied contractual indemnity law. This uncertainty is a result of a conflict between historical views of indemnity and the more modern trend toward contribution[5] and comparative indemnity.[6] The conflict is played out most frequently among multiple defendants, each seeking to shift responsibility to another.

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or wrongful death unless its terms expressly so provide, but it reduces the claim of the releasor against the other tortfeasors to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, or in the amount of the released tortfeasor's equitable share of the damages under article fourteen of the civil practice law and rules, whichever is the greatest.

(b) Release of tortfeasor. A release given in good faith by the injured person to one tortfeasor as provided in subdivision (a) relieves him from liability to any other person for contribution as provided in article fourteen of the civil practice law and rules.

(c) Waiver of contribution. A tortfeasor who has obtained his own release from liability shall not be entitled to contribution from any other person.

Id.

2. CAL. CIV. PROC. CODE § 877.6(c). This Comment does not address the issue of what constitutes a "good faith" settlement.

3. *See* Bear Creek Planning Comm. v. Title Ins. & Trust Co., 164 Cal. App. 3d 1227, 211 Cal. Rptr. 172 (1985); County of Los Angeles v. Superior Court, 155 Cal. App. 3d 798, 202 Cal. Rptr. 444 (1984). *Contra* Stratton v. Peat, Marwick, Mitchell & Co., 190 Cal. App. 3d 286, 235 Cal. Rptr. 374 (1987); IRM Corp. v. Carlson, 179 Cal. App. 3d 94, 224 Cal. Rptr. 438 (1986). Note, while California law is unclear on this point, under New York law, the implied contractual indemnity claim will survive the settlement. *See* McDermott v. City of New York, 50 N.Y.2d 211, 406 N.E.2d 460, 428 N.Y.S.2d 643 (1980); Riviello v. Waldron, 47 N.Y.2d 297, 391 N.E.2d 1278, 418 N.Y.S.2d 300 (1979); Rock v. Reed-Prentice Div. of Package Mach. Co., 39 N.Y.2d 34, 346 N.E.2d 520, 382 N.Y.S.2d 720 (1976).

4. The term "settlement-bar statute" is not a term of art. In this Comment, it is used to describe a statute that immunizes a settling defendant from indemnity claims brought by non-settling defendants. In other words, under the applicable statute, the effect of a settlement by one defendant is to bar other defendants from seeking indemnity from the settling defendant.

5. Contribution is a modern statutory scheme which allocates liability among defendants most often on a pro-rata basis. W. KEETON, PROSSER AND KEETON ON TORTS § 50, at 336-41 (5th ed. 1984). See *infra* notes 22-27 and accompanying text for a discussion of contribution and comparative indemnity.

6. Comparative indemnity is a judicial modification of contribution which allocates liability among defendants according to their proportional liability for plaintiff's injury. American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 583, 578 P.2d 899, 902, 146 Cal. Rptr. 182, 185 (1978). See *infra* notes 22-27 and accompanying text for a discussion of contribution and comparative indemnity.

At common law, courts refused to apportion liability among defendants based on their degree of responsibility to the plaintiff.[7] Indemnity was considered an "all or nothing proposition" completely shifting liability to one defendant.[8] The modern approach of comparative indemnity allows courts to assign liability among defendants based on their proportional responsibility for an injury.[9] Yet, despite the emergence of contribution and comparative indemnity, many indemnity theories continue to complicate this area of the law, some working a total shift of responsibility, others apportioning it.[10] Specifically, the continued use of implied contractual indemnity not only allows courts to unfairly allocate liability among defendants, but it also serves to thwart the efficient operation of statutes such as the settlement-bar statutes described in the hypothetical.[11]

This Comment makes two basic arguments. First, the doctrine of implied contractual indemnity should be abandoned as a tool for allocating liability among defendants. Second, implied contractual indemnity should not be used to avoid settlement-bar statutes. In support of these arguments, this Comment focuses on California and New York law.[12]

There are two levels of analysis that underlie the arguments in this Comment. First, implied contractual indemnity is a doctrine that has developed without clear elements or parameters. As a result, the doctrine is ill-defined. In addition, the modern contribution schemes render

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7. *See* W. KEETON, *supra* note 5, § 50, at 336-37 (5th ed. 1984); Note, *Contribution and Indemnity in California*, 57 CALIF. L. REV. 490, 493-94 (1969).

8. American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 591, 578 P.2d 899, 909, 146 Cal. Rptr. 182, 190 (1978).

9. For a general discussion of contribution, see W. KEETON, *supra* note 5, § 50, at 336-41 (5th ed. 1984).

10. *See infra* notes 13-19 and accompanying text.

11. *See* CAL. CIV. PROC. CODE § 877.6(c) (West 1980 & Supp. 1989); N.Y. GEN. OBLIG. LAW § 15-108 (McKinney 1978).

12. New York and California are examined because they both have played a significant role in the development of implied contractual indemnity, and they both have considered the effect of implied contractual indemnity on settlement-bar statutes. For the development of implied contractual indemnity in California, see Bear Creek Planning Comm. v. Title Ins. & Trust Co., 164 Cal. App. 3d 1227, 211 Cal. Rptr. 172 (1985); County of Los Angeles v. Superior Court, 155 Cal. App. 3d 798, 202 Cal. Rptr. 444 (1984). *Contra* Stratton v. Peat, Marwick, Mitchell & Co., 190 Cal. App. 3d 286, 235 Cal. Rptr. 374 (1987); IRM Corp. v. Carlson, 179 Cal. App. 3d 94, 224 Cal. Rptr. 438 (1986). For the development of implied contractual indemnity in New York, see McDermott v. City of New York, 50 N.Y.2d 211, 406 N.E.2d 460, 428 N.Y.S.2d 643 (1980); Riviello v. Waldron, 47 N.Y.2d 297, 391 N.E.2d 1278, 418 N.Y.S.2d 300 (1979); Rock v. Reed-Prentice Div. of Package Mach. Co., 39 N.Y.2d 34, 346 N.E.2d 520, 382 N.Y.S.2d 720 (1976). New York and California have taken differing positions regarding the effect of the doctrine of such settlement-bar statutes on implied contractual indemnity. *See supra* text accompanying note 3.

implied contractual indemnity obsolete. Second, the application of implied contractual indemnity is inconsistent with contract law. The doctrine unfairly allocates risk without allowing for adequate consideration of the parties' intent. Finally, the doctrine unreasonably expands the scope of foreseeable damages for breaches of contract.

II. BACKGROUND

In order to provide a frame of reference for addressing these arguments, this section briefly overviews a number of essential concepts. These concepts include: traditional types of indemnity; contribution and comparative indemnity; the policy concerns relevant in understanding implied contractual indemnity; and settlement-bar statutes.

A. Traditional Types of Indemnity

There are three types of traditional indemnity: express indemnity, equitable indemnity and implied contractual indemnity. Express indemnity refers to a contractual relationship where one party expressly agrees to indemnify another for any loss that the other suffers.[13] Thus, in the hypothetical, if Dan had expressly agreed to indemnify Downtown for any loss that Downtown might suffer due to Dan's failure to properly sweep the sidewalks, the two would have entered into an express indemnity agreement.[14]

Equitable indemnity is a doctrine that allows courts to shift liability to a party who they believe is most responsible for an injury.[15] Unlike express indemnity, equitable indemnity does not require a contractual relationship between the parties.[16] In *Herrero v. Atkinson*,[17] a California court described equitable indemnity as follows:

> [T]he duty to indemnify may arise, and indemnity may be allowed in those fact situations where in equity and good conscience the burden of the judgment should be shifted from the shoulders of the person seeking indemnity to the one from whom indemnity is sought. The right depends upon the principle that everyone is responsible for the consequences of his own wrong, and if others have been compelled to pay damages which ought to have been paid by the wrongdoer, they may recover from him. Thus the determination of whether or not

13. See W. KEETON, *supra* note 5, § 51 for a general discussion of indemnity.
14. This Comment does not focus on express indemnity provisions.
15. Herrero v. Atkinson, 227 Cal. App. 2d 69, 74, 38 Cal. Rptr. 490, 493 (1964).
16. *Id.*
17. 227 Cal. App. 2d 69, 38 Cal. Rptr. 490 (1964).

> indemnity should be allowed must of necessity depend upon the facts of each case.[18]

In the hypothetical, a court might decide that, based on the relationship between Dan and Downtown, Dan should bear the responsibility for Patty's injury. Thus, even though the land owner Downtown is arguably liable for some portion of Patty's injury, by employing equitable indemnity the court would shift the entire burden of payment to Dan.[19]

Implied contractual indemnity is premised on the notion that a contract to perform a service contains an implied promise that the services will be performed in a proper manner.[20] From this promise, the courts imply an obligation to indemnify the promisee for any foreseeable damages resulting from improper performance of the contract.[21] In the hypothetical, the reasoning would apply as follows: Dan agreed to maintain the sidewalks for Downtown. In agreeing to perform that service, Dan impliedly promised to complete the job in a workmanlike manner and to indemnify Downtown for any liability it incurs due to Dan's improper performance. Thus, when Dan failed to maintain the sidewalk, Downtown became entitled to indemnity from Dan for any liability to Patty it may incur due to Dan's breach of the implied promise.

Of particular concern in this Comment are equitable indemnity and implied contractual indemnity. Although they are distinct concepts, as described above, the Analysis section of this Comment argues that they are often confused by the courts. While implied contractual indemnity is considered a contract doctrine, it is often applied so that it resembles the tort doctrine of equitable indemnity. The effect is that courts are able to allocate liability purely on equitable principles while at the same time clothing their analysis in contract law. This Comment argues that this effect significantly undermines the integrity of contract law.

B. Comparative Indemnity

Contribution and comparative indemnity, much like the traditional indemnity theories, both allocate liability among multiple defendants. Contribution, a statutory doctrine, allocates liability among defendants

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18. *Id.* at 74, 38 Cal. Rptr. at 493. Where a state has adopted comparative equitable indemnity, the doctrine of total equitable indemnity is no longer necessary as a tool for allocating liability. *Id.* As the very purpose of a comparative equitable indemnity scheme is to allow a court to allocate risk among defendants based on their respective culpability for an injury, total equitable indemnity is no longer "equitable." *Id.*

19. *Id.*

20. Bear Creek Planning Comm. v. Title Ins. & Trust Co., 164 Cal. App. 3d 1227, 1237, 211 Cal. Rptr. 172, 178 (1985).

21. *See* Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp., 350 U.S. 124, 133 (1956).

on a pro-rata basis.[22] In other words, the total damages are divided by the total number of defendants, each paying an equal share.[23] Comparative indemnity,[24] an equitable judge-made doctrine, apportions liability based on proportional responsibility for an injury.[25] Moreover, this judicially created indemnity in both California and New York, overrides the state's statutory contribution scheme.[26] Thus, when using comparative indemnity, a judge will allocate liability to a defendant based on his or her respective responsibility for the plaintiff's injury.[27] This Comment focuses on comparative indemnity which has rendered implied contractual indemnity an obsolete tool in allocating liability among defendants. In the hypothetical, the damages would be apportioned between Downtown and Dan based on their respective degrees of responsibility for Patty's injury.

C. The Policies of Freedom of Contract and Providing Relief to Injured Parties

Because the doctrine of implied contractual indemnity allows courts to imply an indemnity term into a contract, it necessarily has implications regarding freedom of contract. The parties may not have intended that their agreement contain an indemnity provision. An important policy behind the law of contracts is that people should be able to freely assign risks.[28] The implication of such a policy is that courts should be

22. *See* W. KEETON, *supra* note 5, § 50, at 340.

23. *Id.*

24. This Comment uses the term "comparative indemnity" or "comparative equitable indemnity" to refer to the modern formulation of the same name *or* as it is alternately and incorrectly, referred to, "equitable comparative contribution."

25. American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 598, 578 P.2d 899, 911, 146 Cal. Rptr 182, 194-95 (1978).

26. *Id.* at 597-607, 578 P.2d at 912-18, 146 Cal. Rptr. at 195-201. California adopted comparative indemnity with the decision in *American Motorcycle*; New York adopted comparative indemnity in Dole v. Dow Chem. Co., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

27. *American Motorcycle*, 20 Cal. 3d at 598, 578 P.2d at 911, 146 Cal. Rptr. at 194-95.

28. *See* Morta v. Korea Ins. Corp., 840 F.2d 1452 (9th Cir. 1988):

> Despite recent cynicism, sanctity of contract remains an important civilizing concept . . . . It embodies some very important ideas about the nature of human existence and about personal rights and responsibilities: that people have the right, within the scope of what is lawful, to fix their legal relationships by private agreement; that the future is inherently unknowable and that individuals have different visions of what it may bring; that people find it useful to resolve uncertainty by "mak[ing] their own agreement and thus designat[ing] the extent of the peace being purchased." . . . that courts will respect the agreements people reach and resolve disputes thereunder according to objective principles that do not favor one class of litigant over another; and that enforcement of these agreements will not be held hostage to delay, uncertainty, the cost of litigation or the generosity of juries.

Id. at 1460 (quoting Bernstein v. Kapneck, 290 Md. 452, 459, 430 A.2d 602, 606 (1981)).

reluctant to assign a risk to a party that has not been clearly assumed in a contract. In other words, when an event happens that a court believes was foreseeable to the parties, and the parties do not address it in their contract, the court should treat the risk as being assumed.[29] In the context of implied contractual indemnity, the argument is that if the parties did not provide for indemnity in the face of a third-party claim, then the risk of such suit can be said to be assumed. Thus, the court should not imply an indemnity agreement.

However, courts are motivated by policy concerns other than the sanctity of contract.[30] Courts prefer to provide maximum relief to an injured party, and to allocate the liability for that injury to the most deserving defendant.[31] This Comment argues that in balancing these conflicting policies, the courts have undermined freedom of contract;[32] moreover, they have unreasonably expanded the scope of foreseeable contract damages.[33]

D. Settlement-bar Statutes

As described in the hypothetical, settlement-bar statutes provide im-

29. *See* Lloyd v. Murphy, 25 Cal. 2d 48, 54, 153 P.2d 47, 50 (1944), in which Chief Justice Traynor stated: "If it was forseeable [that] there should have been provision for it in the contract, . . . the absence of such a provision gives rise to the inference that the risk was assumed."

30. *See* Sears, Roebuck & Co. v. International Harvester Co., 82 Cal. App. 3d 492, 496, 147 Cal. Rptr. 262, 264 (1978).

31. *Id.* There are three policies that are frequently considered in the analysis of indemnity rules as they relate to settlements. "First, . . . maximization of recovery to the injured party for the amount of his injury to the extent fault of others has contributed to it . . . . Second is encouragement of settlement of the injured party's claim . . . . Third is the equitable apportionment of liability among the tortfeasors." *Id.* While the *Sears* court argued that these policies should be considered in the hierarchical order listed above, the California Supreme Court disagrees. *See* Abbot Ford, Inc. v. Superior Court, 43 Cal. 3d 858, 872 n.15, 741 P.2d 124, 133 n.15, 239 Cal. Rptr. 626, 635 n.15 (1987), where the California Supreme Court rejected the idea that these policies should be considered in any particular order of priority. The *Abbot Ford* court reasoned that each policy will vary in importance based on the context of a particular case. *Id.* The court noted:

> Although several Court of Appeal opinions have suggested that there is an established "hierarchy" or "priority" to the various public policy objectives in this area that can be applied in all contexts . . . our decisions have never embraced any such mechanical hierarchical approach. Instead, we have generally attempted to harmonize the competing public policies, taking into account the specific context in which the potential conflict between the various policies appears. Accordingly, the fact that we have determined, in one setting, that a particular goal should properly give way to another objective, does not mean that the goal that prevailed should always "trump" the competing objective when a conflict arises between the two in a different setting.

Id.

32. *See infra* notes 181-203 and accompanying text.

33. *See infra* notes 181-203 and accompanying text.

munity from co-defendant claims for contribution and comparative indemnity to a defendant who settles with a plaintiff.[34] A central purpose of these statutes is to encourage quick settlements, providing the plaintiff with relief for his or her injuries.[35] The theory is that if a defendant knows that he or she will have immunity from other defendants, then he or she will be encouraged to settle.[36]

Implied contractual indemnity poses a problem for defendants who seek the certainty of a settlement-bar statute. Since neither the California nor New York statutes expressly provide immunity from implied contractual indemnity claims,[37] a settling defendant cannot be sure that he or she will not be subject to future litigation. Settlement-bar statutes should be amended to include implied contractual indemnity claims.[38] This would lead to increased settlements because defendants would be confident that settlement would free them from future litigation.

III. ANALYSIS

There are two analytical justifications for abandoning implied contractual indemnity. First, an analysis of the origins of implied contractual indemnity reveals that the doctrine is inconsistent with modern comparative indemnity schemes. Second, an examination of the applications of implied contractual indemnity shows that the doctrine runs counter to traditional notions of contract law by unreasonably tampering with the parties' allocation of risk and by excessively expanding the scope of foreseeable damages for breach of contract.

A. Historical Development of Implied Contractual Indemnity

This section explores the development of implied contractual indemnity at both the state and federal levels.[39] The analysis particularly fo-

34. *See* CAL. CIV. PROC. CODE § 877.6(c) (West 1980 & Supp. 1989); N.Y. GEN. OBLIG. LAW § 15-108 (McKinney 1978).

35. *See supra* note 31 and accompanying text.

36. *American Motorcycle*, 20 Cal. 3d at 603, 578 P.2d at 915, 146 Cal. Rptr. at 198. The court notes:

> As amici point out, section 877 creates significant incentives for both tortfeasors and injured plaintiffs to settle lawsuits: the tortfeasor who enters into a good faith settlement is discharged from any liability for contribution to any other tortfeasor, and the plaintiff's ultimate award against any other tortfeasor is diminished only by the actual amount of the settlement rather than by the settling tortfeasor's pro-rata share of the judgment.

Id.

37. *See supra* note 1.

38. See *infra* notes 362-69 and accompanying text for this Comment's recommendations.

39. It is necessary to look at federal law when studying implied contractual indemnity. Through its admiralty jurisdiction, the Supreme Court of the United States has played a signif-

cuses on the effect that the introduction of comparative indemnity has had on the doctrine in California and New York. In addition, this analysis demonstrates that implied contractual indemnity did not grow out of clear contract doctrine, but rather, was developed by the courts as a tool to resolve inequitable situations.[40] This analysis shows that the adoption of comparative indemnity in California and New York has rendered implied contractual indemnity obsolete.

1. Early development of a duty to indemnify implied from contract

At common law, joint tortfeasors were unable to seek indemnity or contribution from each other.[41] This rule had its origin in *Merryweather v. Nixan*,[42] an English case which involved joint intentional conduct.[43] Early American and English cases restricted *Merryweather* to its facts and barred contribution for intentional conduct cases; however, twentieth-century courts applied the bar against contribution to cases involving joint tortfeasors liable for negligence.[44] The rationale behind the law's bar against contribution was that courts ought not "make relative value judgments of degrees of culpability among wrongdoers."[45] Despite this rationale, courts developed exceptions to the bar against contribution by using indemnity law.[46]

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icant role in the development of implied contractual indemnity. *See* Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp., 350 U.S. 124 (1956).

40. *See infra* notes 41-86 and accompanying text.

41. *See* W. KEETON, *supra* note 5, § 50; Note, *supra* note 7, at 493-94.

42. 8 Term. Rep. 186, 101 Eng. Rep. 1337 (K.B. 1799). This decision is noted in Note, *supra* note 7 at 493.

43. *See id.* at 494-95.

44. *See id.* Note, *supra* note 7. It was not until 1957 that California modified the common-law bar to contribution among tortfeasors with the enactment of sections 875-880 of the California Civil Procedure Code. CAL. CIV. PROC. CODE. §§ 875-880 (West 1980 and Supp. 1988).

45. Dole v. Dow Chem. Co., 30 N.Y.2d 143, 147, 282 N.E.2d 288, 291, 331 N.Y.S.2d 382, 385 (1972).

46. *See* Zapico v. Bucyrus-Erie Co., 579 F.2d 714, 718-19 (2d Cir. 1978) (discussing the development of indemnity law). The exceptions to the traditional bar to contribution fall into two general categories: those based on tort law and those based on contract law. *See also* Annotation, *Contribution or Indemnity Between Joint Tort-feasors Where Injury to Third Person Results from Violation of a Duty Which One Tort-feasor Owes to Other*, 140 A.L.R. 1306 (1942). The following are the more generally accepted exceptions to the bar to contribution among joint tortfeasors:

> [W]here the parties acted in good faith in ignorance of the facts rendering their conduct tortious, and such ignorance was not superinduced by their own fault or negligence . . . . or where the claimant neither had knowledge nor was chargeable with knowledge that his act was wrongful . . . or where the tort liability of which satisfaction had been made for which contribution was sought was not the result of a culpable act or omission of the party seeking relief, but of a purely imputed wrong or one committed by another which exposed him to liability of a constructive or a derivative

One of these indemnity-based exceptions provides the theoretical underpinnings for what is now implied contractual indemnity.[47] A number of courts have found that where two parties are jointly responsible for injuring a third person, and one of the two negligent parties owed a duty to the other negligent party, that duty formed the basis of a claim for indemnity.[48] For example, in *Seaboard Air Line Railway Co. v. American District Electric Protective Co.*,[49] Seaboard Air Line Railway (Seaboard) hired American District Electric Protective (American) to operate a signal system.[50] An employee of Seaboard was injured when American negligently allowed a signal system wire to hang down knocking the employee off a freight car.[51]

The injured employee sued his employer, Seaboard, and recovered $4112.50.[52] Seaboard then sued American, alleging that American was liable to it for these damages.[53] Although the court noted the traditional common-law rule barring contribution among joint tortfeasors, the court

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> nature . . . or where the claimant was not in *pari delicto* with the defendant, although he was delinquent as to the third party injured . . . or where defendant did the act or created the nuisance but the plaintiff did not join with him, but was thereby exposed to liability . . . .

Id.

47. *Id.* at 1306-07. As one commentator stated:

> To these exceptions to the application of the general rule, the courts in a few cases have added another exception to the effect that where the injury which resulted to a third person, as to whom both of the parties were negligent or guilty of a wrongful act, arose from a violation by the defendant of a duty owing by him to the plaintiff, or that where the defendant was a wrongdoer to the plaintiff but the plaintiff was not a wrongdoer to the defendant, although both were liable to the person injured, the plaintiff may recover contribution or indemnity, as the case may be, from the defendant notwithstanding the fact that his negligence also contributed to the third person's injury.

Id. at 1306-07.

48. *See* Burris v. American Chicle Co., 120 F.2d 218 (2d Cir. 1941); Seaboard Air Line Ry. Co. v. American Dist. Elec. Protective Co., 106 Fla. 330, 143 So. 316 (1932); McFall v. Compagnie Maritime Belge (Lloyd Royal) S.A., 304 N.Y. 314, 107 N.E. 463 (1952); Phoenix Bridge Co. v. Creem, 102 A.D. 354, 92 N.Y.S. 855 (1905). While a number of courts in a variety of jurisdictions began to use an implied contractual duty to indemnify and in effect allow contribution, "[t]he cases expressly basing the decision allowing contribution or indemnity upon the ground of a breach by the defendant of a duty owing by him the plaintiff are rare." Annotation, *supra* note 46, at 1307. In addition, even cases that base their decision to allow indemnity exclusively upon the breach of a contractual duty tend to treat indemnity more like a tort issue rather than a contract issue. *See Burris*, *Seaboard*, *McFall*, and *Phoenix*. Thus, implied contractual indemnity was initially used to circumvent the common-law bar to contribution. Annotation, *supra* note 46 at 1306-07.

49. 106 Fla. 330, 143 So. 316 (1932).

50. *Id.* at 331, 143 So. at 316.

51. *Id.*

52. *Id.*

53. *Id.*

also ruled that an exception existed to the common-law rule.[54] The court determined that where a duty is owed by one tortfeasor to another, and the violation of that duty is the primary cause of the injury, the underlying duty may form the basis of a claim for indemnity.[55]

Analyzing this exception, the court recognized that the contract obligated American to "maintain" and "operate" the signal system.[56] This duty formed the basis for allowing Seaboard to prevail in its indemnity action against American.[57]

The *Seaboard* court did not clearly articulate the doctrine of implied contractual indemnity. The court used the contract to establish the duty, yet it spoke of the indemnity claim itself as a tort action:

> But the negligence of the signal company, in breaching its duty not to let the wire sag to the injury of the railroad company's servants for which the railroad company might become liable, gave rise to the *tort* action by the railroad company, not for the breach of duty which the signal company owed the injured railroad employee, but for a breach of the duty which the signal company owed the railroad company under the contractual relationship which had been brought into existence between them.[58]

Thus, the *Seaboard* court did not view the implied duty to indemnify as requiring any sort of contract analysis. The court did not examine any prior negotiations of the parties nor did it carefully examine the language of the agreement itself to determine whether the parties agreed to allocate the duty of indemnity to American. Instead, the court used the contract to establish what can only be described as a quasi-tort duty of contribution. Essentially, the *Seaboard* court used the contract-based duty to avoid the common-law bar to contribution.

New York also early recognized a right of indemnity based on a contractual relationship. In *Phoenix Bridge Co. v. Creem*,[59] a railroad company hired Phoenix Bridge Company (Phoenix) to build an extension to an elevated railroad.[60] Phoenix subcontracted to Creem, who negligently left a heap of stones on a sidewalk which caused a pedestrian to trip.[61] The pedestrian sued Phoenix and recovered; Phoenix then sued

54. *Id.*
55. *Id.*
56. *Id.* at 330, 143 So. at 316.
57. *Id.* at 330, 143 So. at 317.
58. *Id.* at 331, 143 So. at 317 (emphasis added).
59. 102 A.D. 354, 92 N.Y.S. 855 (1905).
60. *Id.*
61. *Id.* at 355, 92 N.Y.S. at 855-56.

Creem seeking indemnity.[62] The court allowed the indemnity claim, reasoning that Phoenix was entitled to rely upon Creem to properly discharge the duty created by their contract.[63]

There are a number of interesting elements to the *Phoenix* decision. First, as in *Seaboard*, the *Phoenix* court did not examine the contract in detail, except to note that the agreement contained no express indemnity provision.[64] The court perfunctorily noted that, "as between themselves, the Phoenix was entitled to rely upon the Creem to discharge the duty because of their contractual relations."[65] Second, as in *Seaboard*, the court's analysis of the issues was more akin to a tort analysis than a contract analysis.[66] The *Phoenix* court cited earlier New York cases for the proposition that "the law implies for the circumstances an agreement to indemnify."[67] However, the language cited by the court does not reveal the contract theory upon which its holding is based, but rather provides a tort/equity rationale for its decision. The court stated that, "the right to indemnity rests upon the principle that everyone is responsible for the consequences of his own wrong, and, if another person has been compelled to pay the damages which the wrongdoer should have paid, the latter becomes liable to the former."[68]

Both *Phoenix* and *Seaboard* reflect the thinking of the early courts that articulated a theory of implied contractual indemnity.[69] The courts did not ground their reasoning in contract law; rather, they took a quasi-tort approach.[70] The use of the contract merely appears to be a device to

62. *Id.*, 92 N.Y.S. at 856.

63. *Id.*, 92 N.Y.S. at 856-57.

64. *Id.*, 92 N.Y.S. at 856.

65. *Id.*

66. *Id.*, 92 N.Y.S. at 856-57.

67. *Id.* at 356, 92 N.Y.S. at 857 (citing Dunn v. Uvalde Asphalt Paving Co., 175 N.Y. 214, 217, 67 N.E. 439, 439 (1903)); *see also* Oceanic Steam Nav. Co. v. Compania Transatlantic Espanola, 134 N.Y. 461, 31 N.E. 987 (1892); Village of Port Jervis v. First Nat'l Bank, 96 N.Y. 550 (1884).

68. *Id.* (citing Dunn v. Uvalde Asphalt Paving Co., 175 N.Y. 214, 217, 67 N.E. 439, 439 (1903)). The court in *Phoenix* also discussed the relationship between the exception based on duty, and the exception based on a claim by a party that his or her liability is purely derivative and that he or she is not guilty of any culpable act. *Id.*, 92 N.Y.S. at 856. The court noted that although Phoenix did not actively create the condition that injured the pedestrian, Phoenix had an affirmative duty to see that the street remained reasonably safe because the work necessarily created a dangerous condition on the street. *Id.* Despite this reasoning, the court ruled that because of the contractual duty owed by Creem, Phoenix "could only be deprived of the right of indemnity by proof that it did in fact *participate* in some manner in the omission, beyond its mere failure to perform the duty imposed on both by the law." *Id.*, 92 N.Y.S. at 856-57 (emphasis added).

69. *See generally* Annotation, *supra* note 36, at 1306-12.

70. *Phoenix*, 102 A.D. at 354, 92 N.Y.S. at 855; *Seaboard*, 106 Fla. at 330, 143 So. at 316.

avoid the harshness of the bar to contribution. Although these cases may have been equitably decided, they lead to the creation of a doctrine—implied contractual indemnity—that is superfluous if contribution is available among multiple tortfeasors. Specifically, later courts have ignored that these decisions reflected an attempt by courts to avoid what was perceived to be the harsh effect of the bar to contribution.[71] This erroneous line of interpretation is exemplified by the development of implied contractual indemnity in California. Before examining the California cases in detail, an examination of a very significant United States Supreme Court decision is necessary.

Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.[72] was the first major case in which the Supreme Court held that a promise to perform a task includes the duty to carry out the task properly.[73] The Court held that where a breach of the promisor's duty subjects the promisee to liability toward third persons, the promisee is entitled to indemnification.[74] In *Ryan*, an employee of Ryan Stevedoring Company (Company) was injured while unloading rolls of pulpboard from a ship owned by Pan-Atlantic Steamship Corporation (Pan-Atlantic).[75] One of the rolls broke loose and injured the employee.[76] The employee sued Pan-Atlantic alleging that it had failed to provide him with a safe place to work, and the employee recovered $75,000 from Pan-Atlantic.[77]

Subsequently, Pan-Atlantic sought indemnity from the Company on the theory that the employee's injuries were "solely attributable to the negligent manner in which [the Company] . . . had stowed the rolls of pulp."[78] The Company and Pan-Atlantic had not entered into an express indemnity agreement.[79] At the time of trial, federal law did not recognize contribution among tortfeasors as a theory of shifting liability.[80] The Supreme Court, however, reversed the district court.[81] In requiring the Company to indemnify Pan-Atlantic, the Court reasoned:

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71. *See, e.g.*, Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp., 350 U.S. 124, 133 (1956); Bear Creek Planning Comm. v. Title Ins. & Trust Co., 164 Cal. App. 3d 1227, 211 Cal. Rptr. 172 (1985).

72. 350 U.S. 124 (1956).

73. *Id.* at 133. *Ryan* cites no United States Supreme Court cases in support of its implication of a duty to indemnify.

74. *Id.* at 133.

75. *Id.* at 126.

76. *Id.*

77. *Id.* at 127.

78. *Id.*

79. *Id.* at 132.

80. *Id.* at 128.

81. *Id.* at 135.

> The shipowner here holds [the Company's] uncontroverted agreement to perform all of the shipowner's stevedoring operations at the time and place where the cargo in question was loaded. That agreement necessarily includes [the Company's] obligation not only to stow the pulp rolls, but to stow them properly and safely. Competency and safety of stowage are inescapable elements of the service undertaken. This obligation is not a quasi-contractual obligation implied in law or arising out of a noncontractual relationship. It is of the essence of [the Company's] stevedoring contract.[82]

Thus, *Ryan* firmly established in federal law the doctrine of implied contractual indemnity.[83] *Ryan* was followed two years later by the Court's decision in *Weyerhaeuser Steamship Co. v. Nacirema Co.*,[84] which also involved a contract for stevedoring services.[85] Once again, the Court ruled that a contract to perform a service contained an implied obligation to indemnify.[86] Thus, in the span of only two years, the Court clearly established the doctrine of implied contractual indemnity.

2. Implied contractual indemnity in California

a. development

Implied contractual indemnity has evolved in California as if it were grounded in contract law not tort law.[87] As a result, courts have frequently relied on the doctrine to avoid what they perceive as inequitable situations and to avoid the immunity created by settlement-bar statutes, which apply to torts.[88]

The seminal implied contractual indemnity case in California is *San Francisco Unified School District v. California Building Co.*[89] *In San Francisco Unified*, California Building Maintenance Company (Com-

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82. *Id.* at 133.

83. *Ryan* also played a significant role in the development of the doctrine in California. The court in San Francisco Unified School Dist. v. California Building Co., 162 Cal. App. 2d 434, 328 P.2d 785 (1958), the case establishing the doctrine in California, relied heavily on *Ryan*. *Id.* at 446-48, 328 P.2d at 793-94.

84. 355 U.S. 563 (1958).

85. *Id.* at 564.

86. *Id.* at 565.

87. *Bear Creek*, 164 Cal. App. 3d at 1237, 211 Cal. Rptr. at 178.

88. *Id.*

89. 162 Cal. App. 2d 434, 328 P.2d 785 (1958). In *San Francisco Unified*, the court cited no California cases to support its reasoning on implied contractual indemnity. Instead, the court reviewed authorities from other jurisdictions and noted that "[t]here are quite a number of cases permitting the third party to recover under such circumstances from the one who breached the contract, even in the absence of an express contract of indemnification. The

pany) had a contract with the city of San Francisco to wash the windows of certain public buildings.[90] Richard Dubay, an employee of the Company, was injured when he fell while washing the windows at Galileo High School.[91] Dubay successfully brought suit against the San Francisco School District alleging that the School District had failed to provide him a safe place to work.[92] After paying Dubay's judgment, the School District brought a *breach of contract* action against the Company on the theory that "the [company] permitted Dubay to wash the window in question without adequate safety equipment and in a manner in direct violation of the terms of its contract with the school district."[93]

The court carefully reviewed the text of the contract and concluded that the Company had breached its contract with the School District by permitting its employees to work in a dangerous manner.[94] After reviewing cases from other jurisdictions,[95] the court held that the Company's breach of the contract created an implied duty to indemnify the School District.[96] That California still barred contribution among tortfeasors when *San Francisco Unified* was decided, is important to note.[97]

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precise theory upon which recovery is permitted in such cases is not too clear." *Id.* at 440, 328 P.2d at 789. *See* cases cited *infra* note 95.

90. *Id.* at 435, 328 P.2d at 786.

91. *Id.*

92. *Id.*

93. *Id.* at 436, 328 P.2d at 786.

94. *Id.* at 436-37, 328 P.2d at 787. The court's analysis of the contract was as follows:

> The contract contains several provisions here relevant. It required the maintenance company to "furnish all labor, materials, and equipment necessary to perform in a first-class manner the work outlined." It also provided that in school buildings all exterior windows should be "cleaned inside and outside." Of particular importance is the specific provision that: "In all schools that have Hauser window sashes, step-ladders must be used from inside."

Id.

95. In its analysis of the status of implied contractual indemnity, the *San Francisco Unified* court cited the following cases: Wheyerhauser S.S. Co. v. Nacirema Operating Co., 355 U.S. 563 (1958) (breach by stevedore of contract to load ship); Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956) (breach by stevedore of contract to load ship); Otis Elevator Co. v. Maryland Casualty Co., 95 Colo. 99, 33 P.2d 974 (1934) (breach by elevator maintenance company of contract to install and keep elevator); Seaboard Air Line Ry. Co. v. American Dist. Elec. Protective Co., 106 Fla. 330, 143 So. 316 (1932) (breach of contract to maintain signal system causing injury to railroad employee); Busch & Latta Paint Co. v. Woermann Constr. Co., 310 Mo. 419, 276 S.W. 614 (1925) (in breach of a contract to build scaffold, court found that party who is only vicariously liable may seek indemnity from culpable party); Phoenix Bridge Co. v. Creem, 102 A.D. 354, 92 N.Y.S. 855 (1905) (breach of contract to build bridge extension). *San Francisco Unified*, 162 Cal. App. 2d at 444-46, 328 P.2d at 792-93.

96. *Id.* at 448-49, 328 P.2d at 794.

97. The court in *San Francisco Unified* applied the common-law rule that barred contribution among tortfeasors. *San Francisco Unified*, 162 Cal. App. 2d at 443-44, 328 P.2d at 791. The court stated: "Both parties agree that on the date of the injury to Dubay—February 6,

San Francisco Unified exemplifies that in California the courts avoided the bar to contribution through a breach of contract analysis.[98] While courts in other jurisdictions had taken a more quasi-tort approach, the California courts were quite clear that they were implying the duty to indemnify out of the parties contractual relationship.[99] It is equally clear that the parties may not have bargained over the allocation of the implied duty.

b. the effect of comparative indemnity on implied contractual indemnity in California

In 1957, the California legislature enacted several statutes providing limited contribution rights among tortfeasors.[100] While the stated purpose of these statutes was to "lessen the harshness of [the common-law bar to contribution],"[101] they did not provide for the apportionment of liability based on the respective fault of each defendant;[102] rather, the statutes apportioned liability on a pro-rata basis.[103] For example, if a plaintiff won a $100,000 judgment against two defendants, each was responsible for $50,000. Even if one defendant was ninety percent responsible for the plaintiff's injuries, he or she was only liable for fifty percent of the judgment.[104] Thus, this limited contribution scheme did not allow courts to allocate liability based on the respective fault of each defendant.

From 1957 until 1978, the California courts struggled with a variety of indemnity theories to apportion liability to more culpable defendants.[105] Often courts faced a dilemma. Under the contribution statutes, courts were limited to splitting a judgment in half between two joint tortfeasors, even if one was substantially more responsible than the other for the plaintiff's injury.[106] At the same time, common-law indemnity—equitable or implied contractual—worked a total shift of liability from

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1952—the law in California was that there was no right of contribution between joint tortfeasors." *Id.* at 443, 328 P.2d at 791.

98. *San Francisco Unified*, 162 Cal. App. 2d at 448-49, 328 P.2d at 794.

99. *See* cases cited in *supra* note 95.

100. Act of Sept. 11, 1957, ch. 1700, § 1, 1957 Cal. Stat. 3076, 3076-77 (codified at CAL. CIV. PROC. CODE §§ 875-880 (West 1980 & Supp 1989)) (superseded by American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978)).

101. See American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 601 n.7, 578 P.2d 899, 914 n.7, 146 Cal. Rptr. 182, 197 n.7 (1978) for a discusion of the rationale behind the 1957 statute.

102. *Id.* at 600-01, 578 P.2d at 914, 146 Cal. Rptr. at 196.

103. CAL. CIV. PROC. CODE § 876 (West 1980).

104. *Id.*

105. *American Motorcycle*, 20 Cal. 3d at 594, 578 P.2d at 909, 146 Cal. Rptr. at 192. *See* cases cited *supra* note 98.

106. CAL. CIV. PROC. CODE § 876.

one defendant to the other.[107] Thus, applying either the contribution statutes or an indemnity theory potentially would lead to a result harsher than if no shifting of liability were effected.[108]

The two formulations the courts most frequently applied were equitable indemnity and implied contractual indemnity. Equitable indemnity required the courts to look at all the facts and circumstances of a particular case and shift liability to the most culpable tortfeasor.[109] Clearly a highly discretional doctrine, its application frequently lead to the harsh, inequitable result of one tortfeasor being liable for a total judgment.

During the twenty-year period, the courts also used implied contractual indemnity in attempting to fairly place liability among tortfeasors.[110] After *San Francisco Unified School District v. California Building Co.*,[111] discussed above, a number of courts applied the theory to shift liability when a contract existed between the litigants; however, the courts often failed to articulate clearly the theoretical bases of their decisions.[112] *Alisal Sanitary District v. Kennedy*[113] is illustrative. In *Alisal*, a city entered into a contract with Kennedy providing for Kennedy to perform engineering work on sewers.[114] Kennedy was allegedly negligent in performing the work that lead to the spillage of sewage onto private property adjacent to the City owned property.[115] The owners of the adjacent property sued the City on a nuisance theory and recovered damages.[116] *Alisal* involved the city's suit against Kennedy for indemnity.[117]

The California Court of Appeal held that the City had successfully stated a cause of action in implied contractual indemnity.[118] The court

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107. *American Motorcycle*, 20 Cal. 3d at 591, 578 P.2d at 909, 146 Cal. Rptr. at 190.

108. The California Supreme Court in *American Mototcycle* observed that during this period California courts "struggled to find some linguistic formulation that would provide an appropriate test for determining when the relative culpability of the parties [was] sufficiently disparate to warrant placing the entire loss on one party and completely absolving the other." *Id.*

109. *See supra* notes 13-21 and accompanying text.

110. *See, e.g.*, People ex rel. Dep't of Pub. Works v. Daly City Scavenger Co., 19 Cal. App. 3d 277, 96 Cal. Rptr. 669 (1971); Aerojet Gen. Corp. v. D. Zelinsky & Sons, 249 Cal. App. 2d 604, 57 Cal. Rptr. 701 (1967).

111. 162 Cal. App. 2d 434, 328 P.2d 785 (1958). *See supra* notes 87-99 and accompanying text.

112. Bear Creek Planning Comm. v. Title Ins. & Trust Co., 164 Cal. App. 3d 1227, 1238, 211 Cal. Rptr. 172, 179 (1985).

113. 180 Cal. App. 2d 69, 4 Cal. Rptr. 379 (1960).

114. *Id.* at 72, 4 Cal. Rptr. at 381.

115. *Id.*

116. *Id.*

117. *Id.* at 73, 4 Cal. Rptr. at 382.

118. *Id.* at 79, 4 Cal. Rptr. at 386. The court noted:

The gist of the complaint is the defendant's breach of its obligation to perform the

relied on several cases where courts had implied the claim from a contract existing between defendants.[119] Confusingly, however, the court also found that the facts were sufficient for a cause of action in equitable indemnity, citing numerous cases focusing on the relationship of the defendants, rather than on the terms of the contract between them.[120] The court ultimately stood on its contractual analysis, at the same time bolstering its conclusion by focusing on the relationship between the City and Kennedy.[121]

The *Alisal* decision exemplifies that courts did not analyze implied contractual indemnity as a doctrine distinct from equitable indemnity.[122]

> engineering work in the skillful, expert, and careful manner they had represented they were capable of doing and the plaintiff's reliance on defendants' judgment and knowledge in matters in which the latter were experts. Such an obligation carries with it an implied agreement to indemnify and to discharge forseeable damages resulting to the plaintiff from the defendants' negligent performance.

Id.

119. The court in *Alisal* cited to the following cases: Weyerhaeuser S.S. Co. v. Nacirema Operating Co., 355 U.S. 563 (1958); Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956); San Francisco Unified School Dist. v. California Bldg. Maintenance Co., 162 Cal. App. 2d 434, 328 P.2d 785 (1958). *Alisal*, 180 Cal. App. 2d at 78, 4 Cal. Rptr. at 385.

120. For example, the court in *Alisal* cited Busch & Latta Paint Co. v. Woermann Constr. Co., 310 Mo. 419, 276 S.W. 614 (1925). *Alisal*, 180 Cal. App. 2d at 78, 4 Cal. Rptr. at 385. The reasoning in *Busch* referred to the approach for equitable indemnity among joint tortfeasors, not implied contractual indemnity. *Busch*, 310 Mo. at 422, 276 S.W. at 619-20. The *Busch* court stated:

> In all cases where one party creates the condition which causes the injury, and the other does not join therein, but is exposed to liability, and suffers damages on account of it, the rule that one of two joint tort-feasors cannot maintain an action against the other for indemnity does not apply.

Id. at 422, 276 S.W. at 619.

The *Alisal* court also cited City and County of San Francisco v. Ho Sing, 51 Cal. 2d 127, 330 P.2d 802 (1958). In *Ho Sing*, a pedestrian was injured on a public sidewalk; he sued the city and Ho Sing, an abutting landowner, and recovered. *Id.* at 128-29, 330 P.2d at 803. The city sought indemnity from Ho Sing. *Id.* at 129, 330 P.2d at 803. The court in *Ho Sing* allowed the claim; its reasoning is described in *Alisal*:

> The court recognized that where a landowner makes an unusual use of the public streets for his own benefit, with the express or implied permission of the city, such permission carries with it the implied condition that the landowner will exercise due care for the safety of the public and that it will hold the city harmless for any damages occasioned by the lack of due care.

Alisal, 180 Cal. App. 2d at 77, 4 Cal. Rptr. at 384.

It is clear from these two exerpts that neither the *Busch* nor *Ho Sing* courts based its decision to indemnify on a contract theory. Nevertheless, the court in *Alisal* relied on these decisions in support of its holding. *Id.* at 79, 4 Cal. Rptr. at 386.

121. *Id.*

122. *See also* Gardner v. Murphy, 54 Cal. App. 3d 164, 126 Cal. Rptr. 302 (1975); Niles v. City of San Rafael, 42 Cal. App. 3d 230, 116 Cal. Rptr. 733 (1974); Kerr Chems., Inc. v. Crown Cork & Seal Co., 21 Cal. App. 3d 1010, 99 Cal. Rptr. 162 (1971); Pearson Ford Co. v. Ford Motor Co., 273 Cal. App. 2d 269, 78 Cal. Rptr. 279 (1969); Aerojet Gen. Corp. v. D. Zelinsky & Sons, 249 Cal. App. 2d 604, 57 Cal. Rptr. 701 (1967); Herrero v. Atkinson, 227

Instead, courts used the doctrine as a tool to equitably shift liability under the guise of contract law.[123] As a result of focusing on the parties' relationship rather than the terms of their contract, the courts ignored the manner in which the parties had agreed to allocate risk.[124]

1978 brought *American Motorcycle Association v. Superior Court*[125] and a radical change in California contribution and indemnity law. In *American Motorcycle*, the California Supreme Court adopted a rule of *comparative* indemnity, under which liability may be apportioned among joint tortfeasors proportionate to their respective degrees of culpability.[126] The facts of *American Motorcycle* provide a good example. There, a boy participating in a cross-country motorcycle race for novices, sustained severe injuries during the race.[127] The boy sued the organizers of the race for negligently designing, managing and supervising the race; the organizers then filed a cross-complaint for proportionate indemnity against the boy's parents for negligent supervision of the child.[128] Under comparative indemnity, if the trial court had found that the organizers were ninety percent responsible for the boy's injury and the parents ten percent, liability would have been allocated accordingly.[129]

The *American Motorcycle* court was careful to reconcile its recognition of comparative indemnity with 1957 contribution statutes.[130] The court stated that both the terms of the statutes and their legislative history indicated that the statutes' pro-rata contribution formula was subordinate to equitable rights of indemnity.[131] Thus, comparative equitable indemnity supplanted contribution in California.

Given that *American Motorcycle* allows courts to allocate liability based on proportionate responsiblity for an injury, it is clear that the need for total equitable indemnity is gone. Therefore, the same should be true for implied contractual indemnity. Implied contractual indemnity is

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Cal. App. 2d 69, 38 Cal. Rptr. 490 (1964); Cahill Bros. Inc. v. Clementina Co., 208 Cal. App. 2d 367, 25 Cal. Rptr. 301 (1962).

123. San Francisco Unified School Dist. v. California Bldg. Co., 162 Cal. App. 2d 434, 448-49, 328 P.2d 785, 794 (1958).

124. *Id.*

125. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).

126. *Id.* at 582, 578 P.2d at 902, 146 Cal. Rptr. at 185.

127. *Id.* at 584, 578 P.2d at 902, 146 Cal. Rptr. at 185.

128. *Id.* at 584-85, 578 P.2d at 903, 146 Cal. Rptr. at 186.

129. In *American Motorcycle* the trial court denied the defendants leave to file complaint because California did not recognize comparative indemnity; the court of appeal granted a preemptory writ of mandate; the supreme court granted review and then issued a writ of mandate to the trial court to allow the cross-complaint and proceed consistently with the opinion. *Id.* at 586, 578 P.2d at 903, 146 Cal. Rptr. at 186.

130. *Id.* at 598-604, 578 P.2d at 912-16, 146 Cal. Rptr. at 195-99.

131. *Id.* at 599-607, 578 P.2d at 912-18, 146 Cal. Rptr. at 195-201.

not grounded in contract law, but rather, is really just a sub-species of equitable indemnity.[132] It is an equitable tool clothed in contract law. Since equitable indemnity was eradicated by the adoption of comparative equitable indemnity, so too should be implied contractual indemnity.[133]

3. The effect of comparative indemnity on implied contractual indemnity in New York

New York courts have been less willing to hold that the adoption of comparative indemnity means that implied contractual indemnity is no longer a viable doctrine.[134] In *Dole v. Dow Chemical Co.*,[135] New York abandoned equitable indemnity for the first time and permitted comparative indemnity among joint tortfeasors. Prior to *Dole*, the development of indemnity rules in New York was very similar to California. In 1928, New York adopted Section 211 of the Civil Practice Act which provided limited contribution on a pro-rata basis.[136] In addition, like California, New York also developed equitable indemnity principles to shift loss among defendants.[137]

Like California, New York has now abandoned total equitable indemnity and adopted a system of comparative indemnity.[138] At the same time, New York has retained the rights of parties to establish indemnity arrangements among themselves which will override the court's apportionment of liability.[139] The issue in New York thus becomes whether implied contractual indemnity is an equitable doctrine rendered useless by the adoption of comparative indemnity, or whether implied contractual indemnity actually represents the efforts of parties to allocate risk.

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132. *See* Stratton v. Peat, Marwick, Mitchell & Co., 190 Cal. App. 3d 286, 235 Cal. Rptr. 374 (1987); *see also* IRM Corp. v. Carlson, 179 Cal. App. 3d 94, 224 Cal. Rptr. 438 (1986); Kramer v. Cedu Found. Inc., 93 Cal. App. 3d 1, 155 Cal. Rptr. 552 (1979).

133. *See infra* note 219 and accompanying text.

134. McDermott v. City of New York, 50 N.Y.2d 211, 406 N.E.2d 460, 428 N.Y.S.2d 643 (1980); Riviello v. Waldron, 47 N.Y.2d 297, 391 N.E.2d 1278, 418 N.Y.S.2d 300 (1979); Rock v. Reed-Prentice Div. of Package Mach. Co., 39 N.Y.2d 34, 346 N.E.2d 520, 382 N.Y.S.2d.720 (1976).

135. 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

136. N.Y. CIV. PRAC. L & R, ch. 308 (Consol. 1928). This rule was similar to the 1958 California statute discussed *supra* notes 65-66 and accompanying text. Like the California rule, the New York statute provided contribution only on a pro-rata basis and did not apportion loss based on the relative liability of the defendants. *See* Board of Educ. v. Sargent, 71 N.Y.2d 21, 26, 517 N.E.2d 1360, 1363, 523 N.Y.S.2d 475, 477 (1987). In addition, the statute only applied to defendants sued by the plaintiff; thus those defendants who were never sued by the plaintiff could not be required to contribute to the judgment. *Id.*

137. *See McDermott*, 50 N.Y.2d at 214, 406 N.E.2d at 462, 428 N.Y.S.2d at 645-46 (1980).

138. Dole v. Dow Chem. Co., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972). See *supra* notes 125-33 for a discussion of *American Motorcycle.*

139. *See McDermott*, 50 N.Y.2d at 214, 406 N.E.2d at 462, 428 N.Y.S.2d at 645-46 (1980).

The New York courts consistently hold that there is a clear distinction between implied contractual indemnity and comparative indemnity.[140] However, the language often used to describe implied contractual indemnity closely resembles California's old equitable indemnity doctrine which allocates liability based on the relationship of the parties.[141] The New York courts speak of "placing the obligation [to indemnify] where in equity it belongs."[142] Specifically, New York has often used "unjust enrichment" as the theoretical basis for implying a quasi-contractual indemnity promise.[143] The courts argue that "where payment by one person is compelled, which another should have made[,] . . . a contract to reimburse or [indemnify] is implied by law."[144] These views indicate that implied contractual indemnity as a tool used by courts to allocate risk as they see fit; the views do not indicate that the courts are overriding the doctrine of comparative indemnity because the parties have expressly contracted for indemnity. Under New York law, as under California law, implied contractual indemnity should no longer be recognized as a viable doctrine.

4. California and New York law compared

New York case law consistently finds that implied contractual indemnity is distinct from comparative indemnity and therefore survives the *Dole* decision.[145] The California courts, on the other hand, have formed into two schools about whether implied contractual indemnity has survived the recognition of comparative indemnity.[146] One school holds that implied contractual indemnity has been subsumed in compar-

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140. *See id.*

141. *See id.* In fact, under New York law, there appears to be no clear distinction between total equitable indemnity and implied contractual indemnity. *Id.* Generally, when courts apply implied contractual indemnity they looked to the contractual obligations between the parties and conclude that those obligations create an implied duty to indemnify for foreseeable liabilities to third parties. *See* Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124, 133 (1956). However, the New York rule appears to use an implied contract as a vehicle for implementing their equitable indemnity principles. *See, e.g.*, Dunn v. Uvalde Asphalt Paving Co., 175 N.Y. 214, 217-18, 67 N.E. 439, 441 (1903); Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola, 134 N.Y. 461, 465-68, 31 N.E. 987, 989 (1892). Given this blurring of the two theories it would seem that New York has no need for total equitable indemnity with the adoption of comparative indemnity.

142. *McDermott*, 50 N.Y.2d at 214, 406 N.E.2d at 462, 428 N.Y.S.2d at 646; *see also Dunn*, 175 N.Y. at 217-18, 67 N.E. at 439 (1903); *Oceanic Steam*, 134 N.Y. at 465-68, 31 N.E. at 987.

143. *McDermott*, 50 N.Y.2d at 214, 406 N.E.2d at 462, 428 N.Y.S.2d at 646.

144. Brown v. Rosenbaum, 287 N.Y. 510, 518-19, 41 N.E.2d 77, 81 (1942); *see also Dunn*, 175 N.Y. at 217-18, 67 N.E. at 439.

145. *See McDermott*, 50 N.Y.2d at 214, 406 N.E.2d at 462, 428 N.Y.S.2d at 646.

146. *See id.*

ative indemnity.[147] These decisions note that a central purpose in the *American Motorcycle* decision was the avoidance of the harsh results of the all-or-nothing effect of the total equitable indemnity doctrines.[148] In *Kramer v. Cedu Foundation, Inc.*,[149] for example, the court of appeal stated that the inability of California courts to formulate a fair system of apportioning loss led to the decision in *American Motorcycle*.[150] According to the *Kramer* court, by rejecting equitable indemnity the supreme court in *American Motorcycle* also rejected implied contractual indemnity.[151] In other words, *Kramer* interpreted *American Motorcycle* as representing a rejection of the harsh effects of indemnity, whether it is called equitable indemnity or implied contractual indemnity.[152]

The other view in California mirrors the New York approach to implied contractual indemnity, arguing that it is theoretically distinct from equitable indemnity and consequently was not subsumed by the *American Motorcycle* comparative indemnity rule.[153] For example, in *Bear Creek Planning Committee v. Title Insurance & Trust Co.*,[154] the court argued that:

> The right to implied *contractual* indemnity rests upon entirely different grounds [than does the right to equitable indemnity]. Where the right of implied indemnity arises from a contractual relationship between the indemnitor and the indemnitee, it is predicated upon the indemnitor's breach of such contract, the rationale of the cases being that a contract under which the indemnitor undertook to do work or perform services necessarily implied an obligation to do the work involved in a proper manner and to discharge foreseeable damages resulting from improper performance absent any participation by the indemnitee in the wrongful act precluding recovery.[155]

147. *See* IRM Corp. v. Carlson, 179 Cal. App. 3d 94, 224 Cal. Rptr. 438 (1986); Kramer v. Cedu Found., Inc., 93 Cal. App. 3d 1, 155 Cal. Rptr. 552 (1979).

148. *See Kramer*, 93 Cal. App. 3d at 12-13, 155 Cal. Rptr. at 558.

149. 93 Cal. App. 3d 1, 155 Cal. Rptr. 552 (1979).

150. *Id.* at 12-13, 155 Cal. Rptr. at 558 (citing American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978)).

151. *Id.*

152. *Id.*

153. *See, e.g.*, County of Los Angeles v. Superior Court, 155 Cal. App. 3d 798, 202 Cal. Rptr. 444 (1984); Bear Creek Planning Comm. v. Title Ins. & Trust Co., 164 Cal. App. 3d 1227, 211 Cal. Rptr. 172 (1985). For a detailed discussion of *Bear Creek* see *infra* notes 195-203. *See also* Great West. Furniture Co. v. Porter Corp., 238 Cal. App. 2d 502, 48 Cal. Rptr. 76 (1965) (finding that implied contractual indemnity is theoretically different from implied indemnity).

154. 164 Cal. App. 3d 1227, 211 Cal. Rptr. 172 (1985).

155. *Id.* at 1237, 211 Cal. Rptr. at 178 (emphasis in original).

Thus, some California courts adhere to the position that implied contractual indemnity is theoretically distinct from and has survived the modern law of comparative equitable indemnity.[156] However, as the next section reveals, even assuming that implied contractual indemnity is a distinct doctrine, it is theoretically infirm as a contract doctrine and should be abandoned on that basis.

B. Implied Contractual Indemnity and Contract Principles

Implied contractual indemnity is inconsistent with modern contract law for several reasons. These reasons relate to the elements required to establish a cause of action for implied contractual indemnity. Elements generally necessary for a party to state a cause of action for implied contractual indemnity include: a contract, a foreseeable injury, and minimal participation in perpetrating the wrong.

There are several problems with the application of these elements. First, the type of contract that will support a claim for implied contractual indemnity is unclear. Second, implied contractual indemnity unreasonably expands the scope of foreseeable damages for breach of contract. Third, because implied contractual indemnity is so intimately tied to equitable indemnity, whether a party may lose his or her right to indemnity through some participation in the injury is unclear. These problems are examined in the following analysis.

1. Types of contracts from which indemnity may be implied

There are several types of contracts from which a claim for implied contractual indemnity may arise. If there is no contract, then liability is apportioned according to each defendant's respective responsibility for the injury to the plaintiff under a contribution statute or comparative equitable indemnity.[157]

a. express or implied contract

The first issue is whether the contract must be express or whether it may be implied. In other words, in a situation where a court finds it equitable to imply a contract between two parties, will such an implied contract in turn support an implied indemnity claim? California requires that there be express contractual language before a duty to indemnify

156. *See County of Los Angeles*, 155 Cal. App. 3d at 803, 202 Cal. Rptr. at 447; *Bear Creek*, 164 Cal. App. 3d at 1237, 211 Cal. Rptr. at 178.

157. *See supra* notes 22-27 and accompanying text.

will be implied.[158] Thus, in California, the court must look at the language of the contract to determine if it supports requiring one party to indemnify another.

In contrast, in New York, an implied contract might support an implied duty to indemnify.[159] As previously noted, the New York approach to indemnity is a blend of California's "equitable indemnity" and "implied contractual indemnity."[160] New York courts use an "unjust enrichment" analysis to determine whether one party is unfairly shouldering the burden of liability; a court may create a quasi-contract, shifting the burden to the party the court believes should carry the burden.[161]

Thus, the New York and California approaches are markedly different. In shifting liability, New York's "unjust enrichment" approach focuses on the status and relationship of the parties.[162] Thus, a contract may be one element in the analysis. However, in California, the focus is on the contract itself, and the issue is whether it is appropriate to imply an indemnity obligation to one party based on the language of the contract.[163]

b. the effect of express indemnity provisions

A second issue that arises in the contract element is what effect express indemnity provisions have on the willingness of courts to imply further duties to indemnify. It is a general rule of contract interpretation

158. E.L. White, Inc. v. City of Huntington Beach, 21 Cal. 3d 497, 506-07, 579 P.2d 505, 510, 146 Cal. Rptr. 614, 619 (1978) ("The obligation of indemnity . . . [f]irst . . . may arise by virtue of express contractual language . . . . Second it may find its source in equitable considerations brought into play . . . by *contractual language not specifically dealing with indemnification* . . . .") (emphasis in original). California's approach continues to mirror the rule in Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp., 350 U.S. 124, 133 (1956). The *Ryan* Court looked at the respective obligations and determined that it was fair to imply into their contract the duty of the stevadore to indemnify the shipowner. *Id.* This approach is analytically similar to the "omitted term" analysis, which holds that it is appropriate for a court to imply a term into a contract when a dispute arises for which the contract provides no answer. *See generally* E. FARNSWORTH, CONTRACTS §§ 7.15-.16 (1982).

159. *See* McDermott v. City of New York, 50 N.Y.2d 211, 214, 406 N.E.2d 460, 462, 428 N.Y.S.2d 643, 646 (1980).

160. The New York approach does not seem to fall within the "omitted term" analysis described by Professor Farnsworth; *see* E. FARNSWORTH, *supra* note 158, § 7.15, at 451-52; the New York approach does not imply a term into an existing contract. Rather, it uses the theory of an implied contract to allocate the liability to the party where the court believes it is most equitable. *See* McDermott v. City of New York, 50 N.Y.2d 211, 214, 406 N.E.2d 460, 462, 428 N.Y.S.2d 643, 646 (1980).

161. *See id.* at 214, 406 N.E.2d at 462, 428 N.Y.S.2d at 646.

162. *See id.*

163. San Francisco Unified School Dist. v. California Bldg. Co., 162 Cal. App. 2d 434, 436-37, 328 P.2d 785, 787 (1958).

that if a contract speaks to a particular issue, what is said in the contract will be viewed as the parties' full intent regarding that issue.[164] Accordingly, this rule has been applied in the case of express indemnity agreements. In *County of Alameda v. Southern Pacific Co.*,[165] the court found that:

> Where parties have entered into written engagements which industriously express the obligations which each is to assume, the courts should be reluctant to enlarge them by implication as to important matters. The presumption is that having expressed some they have express all of the conditions by which they intended to be bound.[166]

This rule is not without exception, especially in the area of implied contractual indemnity.[167] After noting the general rule of contract interpretation as described above, the California Supreme Court stated in *E.L. White, Inc. v. City of Huntington Beach,*[168] that "[w]hen . . . the duty established by contract is by the terms and conditions of its creation inapplicable to the particular factual setting before the court, the equitable principles of implied indemnity may indeed come into play."[169]

This exception was used in *People ex rel. Department of Public Works v. Daly City Scavenger Co.*[170] In *Daly*, the City, after closing off a portion of a highway executed a contract allowing a scavenger company to enter the enclosed area.[171] The company expressly agreed to indemnify the city for damages paid to anyone who was injured using the enclosed area within the purposes of the agreement.[172] The company further agreed *not* to indemnify the city for any injuries to a person using the enclosed area for his or her own purposes.[173] The company subsequently erected a chain barrier outside the enclosed area.[174] When two persons, using the road for their own purposes, were killed colliding with the barrier, the city sought indemnity from the company.[175] The court

164. *See* E. FARNSWORTH, *supra* note 158, § 7.3.

165. 55 Cal. 2d 479, 360 P.2d 327, 11 Cal. Rptr. 751 (1961).

166. *Id.* at 488, 360 P.2d at 333, 11 Cal. Rptr. at 757 (quoting Foley v. Euless, 214 Cal. 506, 512, 6 P.2d 956, 958 (1931)); *see also* Loyalton Elec. Light Co. v. California Co., 22 Cal. App. 75, 77, 133 P. 323, 324 (1913).

167. *E.L. White*, 21 Cal. 3d at 510, 579 P.2d at 513, 146 Cal. Rptr. at 622.

168. 21 Cal. 3d 497, 579 P.2d 505, 146 Cal. Rptr. 614 (1978).

169. *Id.* at 508, 579 P.2d at 511-12, 146 Cal. Rptr. at 620-21.

170. 19 Cal. App. 3d 277, 96 Cal. Rptr. 669 (1971).

171. *Id.* at 279-80, 96 Cal. Rptr. at 670.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*, 96 Cal. Rptr. at 670-71.

ruled that the express indemnity provision clearly did not apply, since the injured people had been using the road for their own purposes.[176] However, the court also ruled that because the accident did not occur within the enclosed area, the express indemnity provision did not necessarily preempt other implied or equitable indemnity rights that the city might have.[177]

The analysis of whether an express indemnity provision will preempt any rights to implied contractual indemnity appears to involve three steps.[178] First, the court must determine the scope of the express indemnity provision. Second, the court must examine the act that caused liability to determine if it falls outside the scope of the indemnity provision. Third, if the court determines that, "the scope of the express indemnity clause agreed to by the parties did not extend to the circumstances which subsequently arose and led to liability,"[179] then the express clause will not preempt a party's rights to implied indemnity.

This approach necessarily provides a court with wide discretion. It would be theoretically possible for a court to conclude that the scope of an indemnity agreement included all rights of indemnity. Such an interpretation would preempt any implied rights arising from the contract.

In California, an interpretation that strictly limits indemnity rights to the scope of an express provision would be consistent with California's adoption of comparative indemnity. Implied contractual indemnity by definition is a harsh doctrine. When a court grants this type of indemnity, it shifts the entire liability from one party to another.[180] Thus, absent an express provision, courts should not resort to implied contractual indemnity now that comparative indemnity can be used to apportion liability among tortfeasors.

2. Foreseeability

When a court infers a duty to indemnify from a contract silent on the point, it unwarrantedly expands the narrow scope of the contract doctrine of foreseeability of damages by adding in expansive notions of foreseeability in tort liability. Normally, an aggrieved party to a contract is entitled only to general damages and to damages that the parties at the time of contracting contemplate could foreseeably flow from a breach—

176. *Id.*, 96 Cal. Rptr. at 671.
177. *Id.* at 281, 96 Cal. Rptr. at 671.
178. *Id.*; *E.L. White*, 21 Cal. 3d at 508, 579 P.2d at 511-12, 146 Cal. Rptr. at 620-21.
179. *E.L. White*, 21 Cal. 3d at 510, 579 P.2d at 513, 146 Cal. Rptr. at 622.
180. American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 591, 578 P.2d 899, 909, 146 Cal. Rptr. 182, 190 (1978).

"consequential damages."[181] This foreseeability-of-damages concept is more limited in scope than the foreseeability doctrine of liability in tort. In tort, foreseeability is not constrained by what the person involved could be said to have contemplated, but rather by the legal constructs of "duty" and "proximate cause."[182]

The "foreseeable damages" doctrine could be applied to the typical case of implied contractual indemnity; the foreseeable damages are the non-breaching party's potential liability to a third party. Assume *A* contracts with *B* so that *B* must perform a task. In performing the task, *B* injures *C*. Later, *C* sues *A* and recovers. If *C*'s suit against *A* is determined to be a foreseeable result of *B*'s improper performance of the contract, then the amount *A* has been required to pay *C* is a damage which *A* may recover from *B*. However, courts do not treat this situation as an ordinary damages issue. Instead, when this situation arises, courts often imply a *duty* on the part of *B* to completely indemnify *A*.[183]

Implying a duty to indemnify is significantly different from viewing the breach from a pure damages perspective. Under the damages perspective, a court must determine specifically whether the damage was foreseeable. However, if a court uses implied contractual indemnity, it in effect begins by defining the damages as foreseeable. Thus, implying a duty to indemnify broadens the traditional, limited contract view of foreseeability.[184]

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181. *See* E. FARNSWORTH, *supra* note 158, § 12.14, at 874. The Restatement (Second) of Contracts defines the scope of contract damages as follows: "Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made." RESTATEMENT (SECOND) OF CONTRACTS § 351(1) (1981). Professor Farnsworth summarizes the elements of foreseeabilty as follows:

> In spite of the vagueness of the concept of foreseeability, a few general propositions can be asserted with some assurance. First, foreseeability is to be determined as of the time of the making of the contract and is unaffected by events subsequent to that time. The question is not what was foreseeable at the time of the breach, but what was foreseeable at the time of contracting. Second, what must be foreseeable is only that the loss would result if the breach occurred. There is no requirement that the breach itself or the particular way that the loss came about be foreseeable. Third, it is foreseeability only by the party in breach that is determinative. . . . Fourth, forseeability has an objective character. A contracting party takes the risk not only of those consequences that he actually did foresee, but also of those that he ought reasonably to have foreseen. Fifth, the loss need only have been foreseeable as a probable, as opposed to a necessary or certain, result of the breach. The mere circumstance that some loss was foreseeable, however, may not suffice to impose liability for a type of loss that was so unusual as not to be foreseeable.

E. FARNSWORTH, *supra* note 158, § 12.14, at 877-78 (footnotes omitted).

182. W. KEETON, *supra* note 5, §§ 41-44.

183. *See Ryan*, 350 U.S. at 133; *San Francisco Unified*, 162 Cal. App. 2d at 436-37, 328 P.2d at 787.

184. This section of the Comment focuses on the effect implying indemnity has on foreseeabilty. However, there are many other areas where creating the implied duty to indem-

For example, in *Weyerhaeuser Steamship Co. v. Nacirema Co.*,[185] a shipowner (Weyerhaeuser) hired Nacirema to provide stevedoring services.[186] A longshoreman employed by Nacirema was injured while unloading a ship owned by Weyerhaeuser when a piece of lumber fell from a temporary winch shelter designed to protect the winch driver from the elements.[187] The longshoreman sued and recovered a judgment from Weyerhaeuser.[188] Weyerhaeuser sought indemnity from Nacirema, relying on the following contract language: Nacirema agrees, "to faithfully furnish such stevedoring services as may be required," and to provide all necessary labor and supervision for "the proper and efficient conduct of the work."[189] Relying on *Ryan*, Weyerhaeuser argued that the breach of the contract had caused the injury and that the resulting liability was "foreseeable."[190]

Unlike in *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*,[191] where the worker had been injured by handling cargo, an act specifically contemplated within the contract, the longshoreman in *Weyerhaeuser* was injured by equipment incidental to the performance of the contract—the falling piece of lumber.[192] Even though the injury to the longshoreman in *Weyerhaeuser* was caused by equipment merely incidental to the actual performance of the contract, the court ruled that Nacirema

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nify has an impact. First, manufacturing an indemnity obligation has allowed courts to circumvent statutes that would have otherwise barred a simple damages action. *See Ryan*, 350 U.S. at 133. Second, creating the implied indemnity has provided courts with greater freedom to manipulate the respective liabilities of the parties without having to justify their actions based on how the parties may have contractually allocated the risk of loss among themselves. *See* Seaboard Air Line Ry. Co. v. American Dist. Elec. Protective Co., 106 Fla. 330, 143 So. 316 (1932); Busch & Latta Paint Co. v. Woermann Constr. Co., 310 Mo. 419, 276 S.W. 614 (1925); Phoenix Bridge Co. v. Creem, 102 A.D. 354, 92 N.Y.S. 855 (1905). While this manipulation may have been justified when courts were without any vehicle for apportioning liability according to fault, it is unjustified where states allow comparative indemnity. It is clearly more consistent with traditional contract law to view the *A*, *B* and *C* situation as one involving consequential damages rather than one involving the implication of an indemnity duty.

185. 355 U.S. 563 (1958). *Weyerhaeuser* was decided by the Supreme Court two years after its landmark decision in Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp., 350 U.S. 124 (1956).

186. *Weyerhaeuser*, 355 U.S. at 564.

187. *Id.* at 565-66.

188. *Id.* at 565.

189. *Id.*

190. *Id.* (citing Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp., 350 U.S. 124 (1956)).

191. 350 U.S 124 (1956). In *Ryan*, the worker was injured when rolls of pulp which had been improperly stowed broke loose and struck him. *Ryan*, 350 U.S. at 126. *See also supra* notes 72-83 and accompanying text.

192. *Weyerhaeuser*, 355 U.S. at 566-67.

could have foreseen Weyerhaeuser's liability.[193]

The *Weyerhaeuser* Court could have approached this case from a pure "consequential damages" perspective and reached the same conclusion. However, by implying a duty to indemnify, the Court took a broader view of foreseeability of damages and included injuries caused by incidental equipment within that scope.[194] Thus, *Weyerhaeuser* moves implied contractual indemnity closer to a tort liability standard of foreseeability of harm.

The California Court of Appeal in *Bear Creek Planning Committee v. Title Insurance & Trust Co.*,[195] unabashadely used a tort concept of foreseeability of harm in defining the scope of damages for a party that had breached a contract.[196] In *Bear Creek*, the plaintiff, a homeowner's association (Association) charged with the responsibility of overseeing and enforcing the covenants, conditions and restrictions (CC & R's) for a housing division near Lake Tahoe,[197] sought indemnity from a title insurance company (Company).[198] A homeowner in the development began building a structure in violation of the CC & R's.[199] When the Association attempted to stop the homeowner from completing the structure, the homeowner sued for slander of title and recovered judgment.[200] Apparently, the Company hired by the Association had failed to record the restrictions.[201]

The Association sought implied contractual indemnity from the Company.[202] In its analysis of foreseeability, the court discussed notions of tort, not contract:

> Tort principles do come into play in the sense of foreseeability in that the indemnitor's breach of contract must foreseeably result in the indemnitee being liable for damages to the injured third party. . . .
>
> The trial court herein found [the Company] was contractually bound to record the CC & Rs . . . and breached this contract when it failed to do so. The damage suffered by [the Homeowners Association] in being found liable for slander of

193. *Id.* at 566-68.
194. *Id.*
195. 164 Cal. App. 3d 1227, 211 Cal. Rptr. 172 (1985).
196. *Id.* at 1240-41, 211 Cal. Rptr. at 180-81.
197. *Id.* at 1233, 211 Cal. Rptr. at 176.
198. *Id.* at 1235, 211 Cal. Rptr. at 177.
199. *Id.* at 1234, 211 Cal. Rptr. at 176.
200. *Id.* at 1235, 211 Cal. Rptr. at 177.
201. *Id.*
202. *Id.* at 1236, 211 Cal. Rptr. at 177.

> title was clearly a foreseeable result of this breach. . . . In [bringing the action against the homeowner for building the structure] the [Association] was fulfilling its own obligations on the contract. Accordingly, it was foreseeable that [the Association] would attempt to enforce the CC & Rs and thereby be exposed to liability for falsely disparaging the [homeowner's] title.[203]

The *Bear Creek* court's creation of a chain of causation as a test for foreseeability shows that courts use implied contractual indemnity to avoid the traditional limits on consequential damages. Simply put, if the *Bear Creek* court had been limited to traditional notions of contract damages, it would have had to examine the language of the contract to determine whether the injury was within the scope of foreseeability. However, under the implied contractual indemnity approach, the court is able to use a much more expanded tort-based view of foreseeability.

3. The degree of participation in the injury by the party seeking indemnity

During the twenty years between the adoption of contribution in California and the decision in *American Motorcycle*, California courts applying total equitable indemnity often assigned liability by distinguishing between "active" negligence and "passive" negligence.[204] In *Atchison, Topeka & Santa Fe Railroad Co. v. Lan Franco*,[205] the court described the confusing number of approaches as follows:

> The cases are not always helpful in determining whether equitable indemnity lies. The test[s] utilized in applying the doctrine are vague. Some authorities characterize the negligence of the indemnitor as 'active,' 'primary,' or 'positive,' and the negligence of the indemnitee as 'passive,' 'secondary,' or 'negative,'. . . . Other authorities indicate that the application of the doctrine depends on whether the claimant's liability is 'primary,' 'secondary,' or 'derivative.'. . . These formulations have

203. *Id.* at 1240-41, 211 Cal. Rptr. at 180-81.

204. American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 594, 578 P.2d 899, 909, 146 Cal. Rptr. 182, 192 (1978); *see also* Gardner v. Murphy, 54 Cal. App. 3d 164, 126 Cal. Rptr. 302 (1975); Niles v. City of San Rafael, 42 Cal. App. 3d 230, 116 Cal. Rptr. 733 (1974); Kerr Chems., Inc. v. Crown Cork & Seal Co., 21 Cal. App. 3d 1010, 99 Cal. Rptr. 162 (1971); Pearson Ford Co. v. Ford Motor Co., 273 Cal. App. 2d 269, 78 Cal. Rptr. 279 (1969); Aerojet Gen. Corp. v. D. Zelinsky & Sons, 249 Cal. App. 2d 604, 57 Cal. Rptr. 701 (1967); Herrero v. Atkinson, 227 Cal. App. 2d 69, 38 Cal. Rptr. 490 (1964); Cahill Bros. Inc. v. Clementina Co., 208 Cal. App. 2d 367, 25 Cal. Rptr. 301 (1962).

205. 267 Cal. App. 2d 881, 73 Cal. Rptr. 660 (1968).

> been criticized as being artificial and as lacking the objective criteria desirable for predictability in the law.[206]

Although the *American Motorcycle* court abandoned these approaches when it superceded total equitable indemnity with comparative equitable indemnity,[207] the formulations still can play a part in the analysis of implied contractual indemnity.[208] In *Bear Creek* the court summed up the current status of the "active," "passive," rules with respect to implied contractual indemnity:

> The degree of an indemnitee's participation in the indemnitor's wrong may be sufficient to preclude recovery on the implied contract theory . . . . A mere finding of negligence on the part of the indemnitee in the underlying action does not per se preclude recovery from the indemnitor on implied contract as the duties owing from the indemnitee to the injured party are not necessarily the same as the duties owing from the indemnitor to the indemnitee.[209]

Thus, some courts still try to draw the same fine line that created so much confusion in the area of equitable indemnity. The difficulty with equitable indemnity was that once the line was drawn and indemnity was allowed, the burden of the judgment shifted entirely. Therefore, deciding where to draw the line was a difficult task. This holds true for implied contractual indemnity as well. It is very difficult to determine at what point a party to a contract participates sufficiently in creating an injury such that the implied duty to indemnify should or should not be implied.

4. Summary

Implied contractual indemnity should be abandoned as a tool for allocating the risk of loss among parties to a lawsuit. It has failed as a device to efficiently and fairly allocate loss.[210] Furthermore, there already exist two means of allocating loss which can readily replace implied contractual indemnity. First, if implied contractual indemnity is simply thought of as a form of equitable indemnity,[211] loss can be allo-

206. *Id.* at 886, 73 Cal. Rptr at 664 (citations omitted).

207. *American Motorcycle*, 20 Cal. 3d at 598, 578 P.2d at 912, 146 Cal. Rptr. at 195.

208. *See* Cahill Bros., Inc. v. Clementina Co., 208 Cal. App. 2d 367, 25 Cal. Rptr. 301 (1962).

209. *Bear Creek*, 164 Cal. App. 3d at 1241, 211 Cal. Rptr. at 181.

210. *See supra* notes 181-203 and accompanying text.

211. *See, e.g.*, IRM Corp. v. Carlson, 179 Cal. App. 3d 94, 224 Cal. Rptr. 438 (1986); Kramer v. Cedu Found. Inc., 93 Cal. App. 3d 1, 155 Cal. Rptr. 552 (1979).

cated under the *American Motorcycle Association v. Superior Court*[212] or *Dole v. Dow Chemical Co.*[213] comparative indemnity schemes. Second, if a party has been forced to pay damages that can be described as "foreseeable" under traditional contract "expectancy" notions, then that party can seek to recover under a simple breach of contract action.[214] With these legal tools at the court's disposal, implied contractual indemnity should be abandoned as a means of allocating risk.

C. *Implied Contractual Indemnity and Settlement-bar Statutes*

1. Present law

Implied contractual indemnity evolved as a way for courts to avoid what they perceived as the harsh effects of the historical bar to contribution among tortfeasors.[215] With the adoption of comparative indemnity in California,[216] it would seem that the need for implied contractual indemnity has evaporated. However, just as implied contractual indemnity was used to avoid the contribution bar, it is currently used to avoid California's "good faith" settlement-bar statute.[217] California Civil Procedure Code section 877.6(c) was adopted almost immediately after the decision in *American Motorcycle*.[218] The California Legislature sought to codify the notion in *American Motorcycle* that suggested that if one multiple defendant settled with the plaintiff, the settling defendant would be immunized from indemnity claims brought by the non-settling defendants.[219] Civil Procedure Code section 877.6(c) provides:

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212. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).

213. 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

214. *See supra* note 181 and accompanying text.

215. *See supra* notes 41-86 and accompanying text.

216. American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).

217. CAL. CIV. PROC. CODE § 877.6(c) (West 1980 & Supp. 1989).

218. Act of July 17, 1980, ch. 562, § 1, 1980 Cal. Stat. 1549 (codified at CAL. CIV. PROC. CODE § 877.6(c) (West 1980 & Supp. 1989)).

219. The court in *American Motorcycle* noted that,

> while we recognize that section 877, by its terms, releases a settling tortfeasor only from liability for contribution and not partial indemnity, we conclude that from a realistic perspective the legislative policy underlying the provision dictates that a tortfeasor who has entered into a "good faith" settlement . . . with the plaintiff must also be discharged from any claim for *partial or comparative indemnity that may be pressed by a concurrent tortfeasor.*

American Motorcycle, 20 Cal. 3d at 604, 578 P.2d at 915, 146 Cal. Rptr. at 198 (emphasis added).

It is interesting to note that the language used by the court in *American Motorcycle* does not say that claims for implied contractual indemnity are barred by a "good faith" settlement. However, in a recent decision, the court did not feel constrained by the language in *American Motorcycle* in holding that claims for "total equitable indemnity" were barred by a good faith

> A determination by the court that the settlement was made in *good faith* shall bar any other joint tortfeasor or co-obligor from any further claims against the settling tortfeasor or co-obligor for *equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault.*[220]

Since the language of the statute does not mention implied contractual indemnity, a number of cases have found that a "good faith" settlement does not protect a settling defendant against claims for implied contractual indemnity.[221] For example, in *County of Los Angeles v. Superior Court*,[222] a construction company hired to build a medical center sued the County and the architect to recover lost costs caused by delays in completing the project.[223] The company alleged that the County had provided inaccurate and defective plans and that the architect was negligent in their preparation. The company had based its bid on the plans.[224] The County filed a cross-complaint against the architect for implied contractual indemnity, arguing that any liability it had was the result of the architect's negligence.[225]

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settlement under section 877.6(c). Far W. Fin. Corp. v. D & S Co., 46 Cal. 3d 796, 817, 760 P.2d 399, 413, 251 Cal. Rptr. 202, 216 (1988). Before the issue was settled whether a claim for total equitable indemnity survived a good faith settlement under section 877.6, there had been considerable disagreement among the California Courts of Appeal. A number of cases held that a section 877.6 "good faith" settlement barred a "total equitable indemnity" claim. *See* Horton v. Superior Court, 194 Cal. App. 3d 735, 238 Cal. Rptr. 467 (1987); Standard Pac. of San Diego v. N.A. Baxter Corp., 176 Cal. App. 3d 577, 222 Cal. Rptr. 106 (1987); IRM Corp. v. Carlson, 179 Cal. App. 3d 94, 224 Cal. Rptr. 438 (1986); Torres v. Union Pac. R.R. Co., 157 Cal. App. 3d 499, 203 Cal. Rptr. 825 (1984); Lopez v. Blecher, 143 Cal. App. 3d 736, 192 Cal. Rptr. 190 (1983); Turcon Constr., Inc. v. Norton-Villiers, Ltd., 139 Cal. App. 3d 280, 188 Cal. Rptr. 580 (1983); Kohn v. Superior Court, 142 Cal. App. 3d 323, 191 Cal. Rptr. 78 (1983); City of Sacramento v. Gemsch Inv. Co., 115 Cal. App. 3d 869, 171 Cal. Rptr. 764 (1981). On the other hand, a number of cases held that a section 877.6 "good faith" settlement did not bar a "total equitable indemnity" claim. *See* Tulco, Inc. v. Narmco Materials, Inc., 191 Cal. App. 3d 116, 236 Cal. Rptr. 224 (1987); Angelus Assoc. v. Neonex Leisure Prod., Inc., 167 Cal. App. 3d 532, 213 Cal. Rptr. 403 (1985); Huizar v. Abex Corp., 156 Cal. App. 3d 534, 203 Cal. Rptr. 47 (1984); E.L. White, Inc. v. City of Huntington Beach, 138 Cal. App. 3d 366, 187 Cal. Rptr. 879 (1982).

220. CAL. CIV. PROC. CODE § 877.6(c) (emphasis added).

221. *See, e.g.*, Bear Creek Planning Comm. v. Title Ins. & Trust Co., 164 Cal. App. 3d 1227, 211 Cal. Rptr. 172 (1985); County of Los Angeles v. Superior Court, 155 Cal. App. 3d 798, 202 Cal. Rptr. 444 (1984). *Contra* Stratton v. Peat, Marwick, Mitchell & Co., 190 Cal. App. 3d 286, 235 Cal. Rptr. 374 (1987); *IRM Corp.*, 179 Cal. App. 3d at 94, 224 Cal. Rptr. at 438.

222. 155 Cal. App. 3d 798, 202 Cal. Rptr. 444 (1984).

223. *Id.* at 800, 202 Cal. Rptr. at 445.

224. *Id.*

225. *Id.*, 202 Cal. Rptr. at 445-46.

After settling with the company, the architect sought to dismiss the County's cross-complaint on the theory that it was barred by section 877.6(c).[226] The court held that the County's cross-complaint was not barred by section 877.6(c) because the County was not a joint tortfeasor, and thus, did not fall within the scope of section 877.6(c).[227] More importantly, the court held that "sections [877 and 877.6(c)] do not operate to bar otherwise valid claims for express or implied indemnity arising out of a contractual relationship."[228]

An entirely different view has been expressed in other California decisions.[229] For example, in *Stratton v. Peat, Marwick, Mitchell & Co.*,[230] McPhails, Inc. (Buyer) contracted with Stratton (Seller) to buy Seller's appliance store.[231] Prior to the sale, the parties jointly hired Peat, Marwick, Mitchell & Co. (PMM) to assess the financial position of the store.[232] Three days before the agreement was executed, PMM discovered new information indicating that the appliance store was less valuable than originally thought.[233] As a result, the Buyer sued the Seller for breach of the sales contract, fraud and misrepresentation; the Buyer also sued PMM over the amount owed for accounting services.[234]

The Seller filed a cross-complaint against PMM seeking indemnity for any liability that the Seller might have to the Buyer.[235] The Seller's theory was that any misrepresentations made were due to PMM's incorrect assessment of the store's financial position.[236] PMM settled with the Buyer and sought to dismiss the Seller's cross-complaint under section 877.6(c).[237] The Seller argued that its indemnity cross-complaint was not barred, in that it was for implied contractual indemnity.[238] The court disagreed and held that implied contractual indemnity is subsumed within partial equitable indemnity as defined by section 877.6(c), and ruled that the Seller's cross-complaint should be dismissed.[239]

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226. *Id.* at 801, 202 Cal. Rptr. at 446.
227. *Id.* at 803, 202 Cal. Rptr. at 447.
228. *Id.*
229. *See Stratton*, 190 Cal. App. 3d at 292, 235 Cal. Rptr. at 377; *see also IRM Corp.*, 179 Cal. App. 3d at 108-09, 224 Cal. Rptr. at 446 (1986); Kramer v. Cedu Found., Inc. 93 Cal. App. 3d 1, 155 Cal. Rptr. 552 (1979).
230. 190 Cal. App. 3d 286, 235 Cal. Rptr. 374 (1987).
231. *Id.* at 288, 235 Cal. Rptr. at 375.
232. *Id.* at 289, 235 Cal. Rptr. at 375.
233. *Id.*
234. *Id.* at 288, 289, 235 Cal. Rptr. at 374, 375.
235. *Id.*, 235 Cal. Rptr at 375.
236. *Id.* at 289, 235 Cal. Rptr. at 375.
237. *Id.*
238. *Id.* at 291, 235 Cal. Rptr at 376.
239. *Id.* at 292, 235 Cal. Rptr at 377.

The difference in the reasoning used by the *Stratton* and *County of Los Angeles* courts is reflective of that previously described in this Comment.[240] In *County of Los Angeles*, the court focused on the contract between the two defendants, the County and the architect, as the basis for the duty to indemnify.[241] The court furthermore reasoned that an examination of the purpose and history behind section 877.6(c) revealed that the rule was not intended to bar claims for implied contractual indemnity.[242] The *Stratton* court argued that implied contractual indemnity is merely a form of equitable indemnity and is subject to the guidelines of *American Motorcycle*.[243]

This Comment argues that the *Stratton* view—that implied contractual indemnity falls within the holding of *American Motorcycle*—is correct. As demonstrated above, implied contractual indemnity should be considered by courts to have been subsumed under the doctrine of comparative indemnity.[244] The *County of Los Angeles* view, based on the belief that implied contractual indemnity is theoretically distinct from comparative indemnity, is erroneous.

2. Bay Development, Ltd. v. Superior Court

The Supreme Court of California has granted review in *Bay Development, Ltd. v. Superior Court*.[245] *Bay Development* presents the court with an opportunity to definitively resolve the implied contractual indemnity issues in California—whether implied contractual indemnity has survived *American Motorcycle* and whether the settlement-bar statutes apply to implied contractual indemnity. The court of appeal decision is not published. *Bay Development* concerns a dispute over property known as the Mission Village Condominium Project.[246] Home Capital Corporation (Home) purchased the project before 1978 and began rehabilitation

240. *See supra* notes 181-203 and accompanying text.

241. *County of Los Angeles*, 155 Cal. App. 3d at 802-03, 202 Cal. Rptr. at 446-47. The analysis offered by the court was:

> In summary, all damages allegedly suffered by TGI flow from the alleged defects in Architect's plans. County's liability to TGI for those defects is necessarily based on its contract with TGI by which it undertook to provide TGI with proper plans.
>
> Since Architect, by reason of its contract with County, undertook to provide plans free of defects, its failure to do so provides a basis for shifting County's entire liability to Architect.

Id. at 803, 202 Cal. Rptr. at 447.

242. *Id.*, 202 Cal. Rptr. at 447-48.

243. *Stratton*, 190 Cal. App. 3d at 291-92, 235 Cal. Rptr. at 376-77.

244. *See supra* notes 181-203 and accompanying text.

245. Bay Dev. Ltd. v. Superior Court, S000888 (Cal. Sup. Ct. filed May 8, 1987).

246. Brief for Petitioner, App. at 6, Bay Dev. Ltd. v. Superior Court, S000888 (Cal. Sup. Ct. filed May 8, 1987).

and legal proceedings to convert the project from apartments into condominiums.[247] As part of this process, Home obtained a report from the California Department of Real Estate (DRE) which described the project as having 365 parking spaces.[248] Subsequently, Home sold the complex to Bay Development, which actually converted the complex into a condominium development.[249] Before Bay Development sold any units to the public, it obtained a second report from DRE indicating that the project had 365 parking spaces.[250] However, the actual number of parking spaces was only 326.[251]

The underlying lawsuit was brought by two sets of plaintiffs, the Mission Village Condominium Association and a class of persons consisting of all original purchasers of condominiums in the project.[252] These plaintiffs alleged that they suffered substantial damage from the dimunition in the value of their property due to the parking shortage.[253] Specifically, they contended that Home originated and that Bay Development continued the misrepresentation regarding the availability of parking in the project.[254]

After the original action was filed, a number of cross-actions ensued.[255] The most relevant to this discussion was Bay Development's cross-complaint against Home for equitable and implied contractual indemnity. After these cross-complaints had been filed, Home settled with the plaintiffs.[256] Home sought to dismiss Bay Development's implied contractual indemnity cross-complaint on the theory that, under section 877.6(c), it was immune from any indemnity actions.[257] Bay Development, however, had cross-complained for implied contractual indemnity. Bay Development, however, claimed that implied contractual indemnity was not barred by section 877.6.[258]

The issues raised in *Bay Development* are the same as in *Bear Creek*

247. *Id.*
248. *Id.*
249. *Id.*
250. *Id.* at 7.
251. *Id.*
252. *Id.* at 2. The court treated these two sets of plaintiffs as having substantially the same interests. *Id.* at 19. For the purposes of this Comment they will be referred to as simply "plaintiffs."
253. *Id.* at 7.
254. *Id.* at 7-8.
255. *Id.* at 3.
256. *Id.* at 4.
257. *Id.*
258. *Id.*

Planning Committee v. Title Insurance & Trust Co.,[259] *County of Los Angeles* and *Stratton*. Should a duty to indemnify be implied from a contract *or* should the relationship be analyzed using traditional contract doctrines? Even if such a duty should be implied, does it justify overriding the policy of encouraging settlements inherent in section 877.6(c)? Based on the analysis in this Comment, the answers to these questions are as follows: First, implied contractual indemnity is not grounded in contract law and thus, it does not make sense to imply a duty to indemnify from a contract;[260] and second, since the parties have not clearly expressed their intent to shift the risk of loss, the policy laid out in section 877.6(c) of the Code of Civil Procedure of encouraging settlement should prevail.[261]

Based on the reasoning advanced in this Comment, the California Supreme Court should decide *Bay Development* in favor of Home. The court should hold that a duty to indemnify should not be implied from a contract; rather, any recovery should be calculated as consequential damages.

IV. PROPOSAL

All jurisdictions should enact legislation to eliminate implied contractual indemnity or at the very least, encompass the doctrine within the reach of settlement-bar statutes. This section proposes specific legislation to that end in both California and New York.

A. California

To avoid any ambiguities ensuing from the impending *Bay Development, Ltd. v. Superior Court*[262] decision, the California legislature should amend the settlement-bar statute, Code of Civil Procedure section 877.6(c), to provide:

> A determination by the court that the settlement was made in good faith shall bar any other joint tortfeasor or co-obligor from any further claims against the settling tortfeasor or co-obligor for equitable comparative contribution, *implied contractual indemnity*, or partial or comparative indemnity, based on comparative negligence or comparative fault.[263]

By so amending the statute, it will become clear that claims for implied

259. 164 Cal. App. 3d 1227, 211 Cal. Rptr. 172 (1985).
260. *See supra* notes 41-85 and accompanying text.
261. *See supra* notes 181-203 and accompanying text.
262. Bay Dev. Ltd. v. Superior Court, S000888 (Cal. Sup. Ct. filed May 8, 1987).
263. The proposed language tracks the language of current section 877.6(c) verbatim, ex-

contractual indemnity will not survive a good faith settlement. Thus, a defendant can settle with a plaintiff with the assurance that he or she will not be subject to future litigation on the same claim. With such knowledge, defendants will be encouraged to settle, thus providing plaintiffs with a speedier recovery.

B. New York

Like California, New York should amend its settlement-bar statute to bar claims for implied contractual indemnity.[264] Section 15-108(b) of the New York General Obligations Law provides: "A release given in good faith by the injured person to one tortfeasor as provided in subdivision (a) relieves him from liability to any other person for contribution as provided in article fourteen of the civil practice law and rules."[265] The word "contribution" in this statute has been interpreted by the New York courts to exclude implied contractual indemnity.[266] Thus, claims for implied contractual indemnity are not barred by the statute. Unlike California, the New York case law is undivided on the meaning of this statute.

The New York General Obligations Code should be amended to read:

> A release given in good faith by the injured person to one tortfeasor as provided in subdivision (a) relieves him from liability to any other person for contribution *or for implied contractual indemnity* as provided in article fourteen of the civil practice law and rules.[267]

V. CONCLUSION

The doctrine of implied contractual indemnity is obsolete. California and New York, among other states, now permit comparative equita-

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cept for the addition of the reference to "implied contractual indemnity." *See* CAL. CIV. PROC. CODE § 877.6(c) (West Supp. 1989) (as amended by Author).

264. N.Y. GEN. OBLIG. LAW § 15-108 (MCKINNEY 1978). See *supra* text accompanying note 1 for text of statute.

265. N.Y. GEN. OBLIG. LAW § 15-108(B).

266. *See* McDermott v. City of New York, 50 N.Y.2d 211, 406 N.E.2d 460, 428 N.Y.S.2d 643 (1980); Riviello v. Waldron, 47 N.Y.2d 297, 391 N.E.2d 1278, 418 N.Y.S.2d 300 (1979); Rock v. Reed-Prentice Div. of Package Mach. Co., 39 N.Y.2d 34, 346 N.E.2d 520, 382 N.Y.S.2d 720 (1976).

267. The proposed language tracks the language of current section 15-108(b) verbatim, except for the addition of the reference to "implied contractual indemnity." *See* N.Y. GEN. OBLIG. LAW § 15-108(b) (as amended by Author).

ble indemnity among multiple tortfeasors.[268] A judgment due to a plaintiff by a group of defendants can be allocated among the defendants according to their respective degrees of fault.[269] Thus, under modern tort law, there is no need for courts to use implied contractual indemnity to allocate liability to a defendant.

Moreover, under contract law, any of the damages that can be recovered by implied contractual indemnity can be recovered as expectancy damages. Thus, implied contractual indemnity is unnecessary as a matter of tort *or* contract law.

Both California and New York should take the first step toward eliminating implied contractual indemnity by amending their respective settlement-bar statutes to bar implied contractual indemnity claims against settling defendants. Furthermore, all jurisdictions that allow comparative indemnity should legislatively eliminate implied contractual indemnity.

*Jeremy J.F. Gray**

268. American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 591, 578 P.2d 899, 909, 146 Cal. Rptr. 182, 190 (1978); Dole v. Dow Chem. Co., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

269. *See supra* notes 22-27 and accompanying text.

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