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# Gathering Related Litigation in Illinois\*

Thomas M. Mengler\*\*

## I. INTRODUCTION

Until recently, the procedures available in Illinois state courts for combining related claims and consolidating related litigation were grossly inadequate. Illinois courts, for example, had no mechanism for consolidating related cases filed in different judicial circuits. Illinois procedure provided no means by which a litigant could have a case transferred from one judicial circuit to another on grounds of convenience. Illinois had no compulsory counterclaim rule.

Since 1981, however, the Illinois Supreme Court — arguably by judicial fiat — has been transforming Illinois' gathering procedures. In 1981, the court in *Horn v. Rincker*<sup>1</sup> exercised its supervisory powers under the Illinois Constitution to consolidate three related cases filed in three different judicial circuits. Two years later, the court in *Torres v. Walsh*<sup>2</sup> modified the 400-year-old common law doctrine of forum non conveniens to permit intrastate, intercircuit transfer. Finally, in 1984, in *Laue v. Leifheit*,<sup>3</sup> the court held, contrary to the language of section 5 of the Contribution Among Joint Tortfeasors Act, that contribution claims among joint tortfeasors must be filed in the plaintiff's original action.

The Illinois Supreme Court's ambitious foray is a laudable attempt to reform Illinois joinder and consolidation law. Any procedural system that prides itself on efficient adjudication should provide effective mechanisms for making the transaction the item of litigation.<sup>4</sup> Indeed, at a time when multiple, related litigation is

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1. 84 Ill. 2d 139, 417 N.E.2d 1329 (1981).

2. 98 Ill. 2d 338, 456 N.E.2d 601 (1983).

3. 105 Ill. 2d 191, 473 N.E.2d 939 (1984).

4. See, e.g., Hazard, *Forms of Action Under the Federal Rules of Civil Procedure*, 63 NOTRE DAME L. REV. 628 (1988) (the Federal Rules of Civil Procedure embody the

increasingly more common<sup>5</sup> and court dockets are more clogged,<sup>6</sup> efficient adjudication demands effective gathering.

Although the Illinois Supreme Court's efforts in this area are praiseworthy, they are insufficient. Except on the issue of contribution among joint tortfeasors, Illinois still lacks a compulsory counterclaim rule. Moreover, although *Horn* provides a procedure by which litigants can petition the Illinois Supreme Court to consolidate related cases, that mechanism is inadequate because of its extraordinary nature. Any consolidation technique that depends on discretionary review by an already-overtaxed supreme court is destined inevitably to underutilization. Additional reform of Illinois' joinder and consolidation mechanisms is still necessary and must result from legislative reform of the Illinois Code of Civil Procedure or from formal rulemaking by the Illinois Supreme Court. Either approach would be preferable to the Illinois Supreme Court's reform by discrete decisionmaking.

Part I of this Article describes the joinder, consolidation, and transfer procedures available in Illinois prior to *Horn*, *Torres*, and *Laue*. In effect, Part I describes the procedural landscape from which the Illinois Supreme Court has been moving incrementally over the last eight years. Part II describes and critically evaluates the procedures made available by these three decisions. Together, Parts I and II provide a complete picture of the procedures currently available in Illinois for gathering related claims or litigation. In Part III, the Article broadly outlines some modest proposals for reforming Illinois procedure, which will ensure that the entire transaction or occurrence more frequently will become the item of litigation in a single Illinois court. Those reforms include a compulsory counterclaim rule and an intercircuit consolidation procedure similar to the federal Multidistrict Litigation Act.<sup>7</sup> These proposals, while neither new nor radical, are significant. They

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premise "that the unit of litigation should be the transaction as it occurred in the out-of-court world").

5. See, e.g., American Law Institute, Preliminary Study of Complex Litigation 1 (Mar. 31, 1987) [hereinafter ALI Complex Litigation Study] ("Over the past quarter century, courts in the United States have witnessed an explosion of what loosely has been labelled 'complex litigation.'").

6. See, e.g., Illinois Division of Planning, Research, and Special Projects, Administrative Office of the Illinois Courts, Circuit Court Calendar Management, January to September 1988, at 1-5 (1989) [hereinafter Illinois Calendar Management Study] (establishing that 79% of all Illinois civil jury cases over \$15,000 in value are backlogged).

7. Multidistrict Litigation Act of 1968, Pub. L. No. 90-296, § I, 82 Stat. 109 (codified at 28 U.S.C. § 1407).

would allow Illinois procedure to employ the gathering devices that federal courts routinely have been employing for several years.

## II. THE LANDSCAPE BEFORE *HORN*, *TORRES*, AND *LAUE*

It would be inaccurate to suggest that, prior to 1981, Illinois procedural law actually discouraged use of the transaction or occurrence as the unit of litigation. The Code of Civil Procedure<sup>8</sup> and common law doctrine then and now provide several mechanisms for concentrating related claims in one forum. These mechanisms, however, are grossly inadequate. The following sections describe these mechanisms and reveal their limitations.

### A. Joinder

In most respects, the Illinois Code of Civil Procedure tracks the Federal Rules of Civil Procedure on permissive joinder. Like the Federal Rules, Illinois procedure provides that all claims between opposing parties may be asserted in a single action.<sup>9</sup> Illinois procedure permits the joinder in a single action of all plaintiffs who have claims arising out of the same transaction<sup>10</sup> and of all defendants against whom a claim is asserted arising out of the same transaction.<sup>11</sup> Like the Federal Rules, the Illinois Code of Civil Procedure provides for intervention,<sup>12</sup> interpleader,<sup>13</sup> impleader,<sup>14</sup> and class actions.<sup>15</sup>

As with permissive joinder, Illinois procedure also tracks federal law on compulsory joinder. The Illinois rule on res judicata requires a claimant to assert in the single action all rights and grounds of relief arising out of the same transaction.<sup>16</sup> The Illinois provision on necessary and indispensable parties, section 405 of the Illinois Code,<sup>17</sup> is similar to rule 19 of the Federal Rules. Section 405 requires claimants to join all persons who have an interest in

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8. ILL. REV. STAT. ch. 110, para. 1-101 (1987).

9. Compare FED. R. CIV. P. 18(a) with ILL. REV. STAT. ch. 110, para. 2-614(a) (1987).

10. ILL. REV. STAT. ch. 110, para. 2-404 (1987).

11. ILL. REV. STAT. ch. 110, para. 2-405 (1987).

12. ILL. REV. STAT. ch. 110, para. 2-408 (1987).

13. ILL. REV. STAT. ch. 110, para. 2-409 (1987).

14. ILL. REV. STAT. ch. 110, para. 2-406 (1987).

15. ILL. REV. STAT. ch. 110, paras. 2-801 to 2-806 (1987).

16. See, e.g., *Spiller v. Continental Tube Co.*, 95 Ill. 2d 423, 432, 447 N.E.2d 834, 838 (1983) (res judicata extends "not only to questions which were actually litigated but also to all questions which could have been raised or determined").

17. ILL. REV. STAT. ch. 110, para. 2-405 (1987).

the subject matter of the suit and whose interests may be impaired or impeded if they are not joined.

The Illinois Code, however, differs substantially from the Federal Rules in the area of counterclaims. Illinois permits, but does not require, counterclaims when they arise out of the same events as the plaintiff's complaint.<sup>18</sup> By allowing the defendant to choose when and where it will bring its factually related claim against the plaintiff,<sup>19</sup> the Illinois Code encourages the kind of duplication that it seeks to discourage by its permissive joinder rules.

### B. *Statutory Consolidation*

The Illinois Code provides a very modest device for consolidating factually and legally related lawsuits. Section 2-1006 of the Code states that "actions pending in the same court may be consolidated, as an aid to convenience, whenever it can be done without prejudice to a substantial right."<sup>20</sup> The circuit court may order consolidation for pretrial purposes alone, or for both pretrial and trial purposes.<sup>21</sup> The test for determining if consolidation is proper is whether the cases "contain common questions of law and fact, which could and should have readily been determined at the same time."<sup>22</sup> Stated pragmatically, the question may be framed: Does it make sense, taking into account judicial economy and fairness to the parties, to consolidate these cases for discovery? Does it make sense to try these cases together?

Section 2-1006, however, cannot be employed to consolidate related litigation filed throughout the state. In *Horn*, the Illinois Supreme Court held that the language of section 2-1006 — "pending in the same court" — precludes intercircuit consolidation.<sup>23</sup> The *Horn* court held that a circuit court lacked the authority to consolidate cases "pending in three different counties, in three dif-

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18. Compare FED. R. CIV. P. 13 with ILL. REV. STAT. ch. 110, para. 2-608 (1987).

19. See ILL. REV. STAT. ch. 110, para. 2-608 (1987) (historical and practice notes). "However, in contrast to Rule 13(a) of the Federal Rules of Civil Procedure . . . it does not require that a defendant immediately assert his rights by way of counterclaim if it would be inconvenient or strategically inadvisable." *Id.*

20. ILL. REV. STAT. ch. 110, para. 2-1006 (1987).

21. The power to consolidate only for pretrial purposes is implicit in the circuit court's severance power, also authorized under section 2-1006.

22. *Clare v. Fredman*, 59 Ill. 2d 20, 28, 319 N.E.2d 18, 22 (1974) (reversing trial court's refusal to consolidate landlord's forcible entry action with tenants' class action against the same landlord for injunctive relief preventing the landlord from evicting them).

23. *Horn*, 84 Ill. 2d at 147, 417 N.E.2d at 1333.

ferent circuits, and, consequently, in three different courts.”<sup>24</sup> Thus, statutory consolidation, by itself, is an imperfect gathering device which is unable to reach across circuits.

### C. *Dismissal or Stay of Proceedings*

An Illinois court can sometimes avoid duplicative litigation by dismissing the suit or by staying its hand. Section 2-619(a)(3) of the Illinois Code authorizes a court to dismiss an action on grounds that “there is another action pending between the same parties for the same cause.”<sup>25</sup> The Illinois Supreme Court has interpreted that section to allow a court for the same reasons to stay, rather than to dismiss, proceedings.<sup>26</sup> The provision requires that the parties in both actions be identical or in privity with each other,<sup>27</sup> and that the actions seek relief arising out of the same state of facts or identical transaction or occurrence.<sup>28</sup> Typically, section 2-619(a)(3) is a first-in-time rule.<sup>29</sup> However, even if the provision’s requirements are met and the other suit was filed first, the trial court has discretion to proceed with the action on grounds of convenience or when the earlier action is filed in a different jurisdiction.<sup>30</sup>

As interpreted, section 2-619(a)(3) is a relatively ineffective gathering device. There are two significant limitations. First, a trial court may grant a motion to dismiss or stay only if plaintiffs and defendants are essentially identical in the pending cases. The decision in *People v. Gitchoff*<sup>31</sup> exemplifies this requirement. *Gitchoff* was a mass tort case involving the devastating explosion of a railroad tank car. The explosion injured or killed several people and produced nine lawsuits. Six were filed in Macon County; one was filed in Cook County; one was filed in Madison County; and one

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24. *Id.* For a discussion of the facts and holding of *Horn*, see *infra* notes 46-54 and accompanying text.

25. ILL. REV. STAT. ch. 110, para. 2-619(a)(3) (1987).

26. See *People ex rel. Dept. of Public Aid v. Santos*, 92 Ill. 2d 120, 440 N.E.2d 876 (1982).

27. *Baker v. Salomon*, 31 Ill. App. 3d 278, 334 N.E.2d 313 (1st Dist. 1975); ILL. REV. STAT. ch. 110, para. 2-619(a)(3) (1987) (historical and practice notes) (“real touchstone of the inquiry whether there is sufficient similarity of parties is prejudice to the parties”).

28. *Skolnick v. Martin*, 32 Ill. 2d 55, 203 N.E.2d 428 (1964) (construing identical statutory predecessor of section 2-619(a)(3)).

29. See *A.E. Staley Mfg. Co. v. Swift & Co.*, 84 Ill. 2d 245, 252, 419 N.E.2d 23, 26-27 (1981) (holding first-in-time status is not “determinative”). For a discussion of *Swift*, see *infra* notes 35-41 and accompanying text.

30. *A.E. Staley Mfg. Co.*, 84 Ill. 2d at 251-53, 419 N.E.2d at 27-28.

31. 65 Ill. 2d 249, 357 N.E.2d 534 (1976).

was filed in federal district court in Alton. The defendants in the nine lawsuits were all common, but the plaintiffs were not. Accordingly, the Illinois Supreme Court held that the procedure of dismissing or staying under section 2-619(a)(3) could not be utilized because the nine pending actions did not involve the "same parties."<sup>32</sup> *Gitchoff* indicates that a section 2-619(a)(3) dismissal or stay is not appropriate when pending actions have common defendants and arise out of the same occurrence, but do not have common plaintiffs.

Second, section 2-619(a)(3) arguably does not permit a court to dismiss reactive litigation. A reactive suit is one filed by the named defendant in a pending action that arises out of the same transaction as stated in the pending action.<sup>33</sup> Because reactive litigation would amount to a counterclaim in the pending action, a court's dismissal of reactive litigation under section 2-619(a)(3) would undermine legislative intent by turning the Code's permissive counterclaim rule into a compulsory rule.<sup>34</sup>

The Illinois Supreme Court, though not holding that dismissal of reactive litigation is always inappropriate, has cautioned against its routine dismissal in *A.E. Staley Mfg. Co. v. Swift & Co.*<sup>35</sup> In *Staley*, Swift and Staley entered into an agreement in which Staley purchased from Swift a soybean-processing plant in Des Moines, Iowa.<sup>36</sup> At the time of the purchase, the plant was still under construction. Under the agreement's terms, Swift was obliged to complete the plant's construction. Subsequently, the deal soured and Swift filed suit against Staley in Iowa state court.<sup>37</sup> Swift sought recovery of money retained by Staley to secure construction of the plant.

The same day, but one hour later, Staley sued Swift in Illinois circuit court, seeking damages for Swift's failure to complete the

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32. The Illinois Supreme Court in *Gitchoff* permitted a circuit court to consolidate two actions filed in different circuits, not because such consolidation is statutorily authorized, but because the circuit judge in the other circuit had refused to comply with the first judge's consolidation order. *Id.* at 257, 357 N.E.2d at 538-39; *see also Horn*, 84 Ill. 2d at 146-47, 417 N.E.2d at 1333.

33. R. MARCUS & E. SHERMAN, *COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE* 148 (West 1985).

34. The historical and practice notes to the counterclaim rule, section 2-608, underline the legislature's intent that section 2-608 "does not require that a defendant immediately assert his rights by way of counterclaim if it would be inconvenient or strategically inadvisable." ILL. REV. STAT. ch. 110, para. 2-608 (1987) (historical and practice notes).

35. 84 Ill. 2d 245, 419 N.E.2d 23 (1981).

36. *Id.* at 247, 419 N.E.2d at 24.

37. *Id.* at 248, 419 N.E.2d at 24.

plant.<sup>38</sup> Swift then moved to dismiss or stay Staley's Illinois action. On appeal, the Illinois Supreme Court rejected Swift's contention that section 2-619(a)(3) was a per se first-in-time rule, compelling the Illinois circuit court to dismiss Staley's suit on grounds that a related suit between the same parties had been filed first, one hour earlier.<sup>39</sup> The court reasoned that "dismissal of Staley's action would force it to seek the relief it desires by way of counterclaim in Swift's Iowa action. It is not clear that such a course is required under Iowa procedural rules, yet a ruling here against Staley would create such a rule *de facto*."<sup>40</sup>

By its holding, the Illinois Supreme Court suggested that employing section 2-619(a)(3) to create indirectly a compulsory counterclaim rule in Illinois would undermine the Illinois General Assembly's intent with respect to its permissive counterclaim rule, section 2-608.<sup>41</sup> Therefore, *Staley* arguably stands for the proposition that duplicative litigation filed by the plaintiff in the pending action may be stayed or dismissed, but not reactive litigation filed later by the defendant in the pending action.

#### D. *Transfer of Venue and Forum Non Conveniens*

The Illinois Code of Civil Procedure contains no provision for transfer on grounds of convenience similar to the federal transfer provision. The Code provides for transfer of venue to another circuit only in two circumstances. First, pursuant to section 2-106, a court in one circuit must transfer a case to another circuit if venue is not proper in the first circuit.<sup>42</sup> Second, pursuant to section 2-1001, the court may transfer a case to a convenient county when a litigant fears that he or she will not receive a fair trial in the court in which the action is pending. Transfer is proper when either "the inhabitants of the county [are] prejudiced against him or her . . . or his or her attorney, or the adverse party has an undue influence over the minds of the inhabitants."<sup>43</sup> In neither of these two circumstances is transfer permitted solely or even primarily on grounds of convenience or judicial efficiency. The Illinois Code does not provide any means by which a circuit court can achieve efficiencies by transferring a case to a circuit of proper venue, where other related litigation is pending.

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38. *Id.*

39. *Id.* at 252-53, 419 N.E.2d at 26-27.

40. *Id.* at 253, 419 N.E.2d at 27.

41. *See also* *People v. Santos*, 92 Ill. 2d 120, 126, 440 N.E.2d 876, 878-79 (1982).

42. ILL. REV. STAT. ch. 110, para. 2-106(a) (1987).

43. ILL. REV. STAT. ch. 110, para. 2-1001 (1987).



Prior to the *Horn* and *Torres* decisions, the only procedure that occasionally could achieve the same result was the common law doctrine of *forum non conveniens*. As understood by Illinois courts prior to *Torres*, that doctrine permitted a court to dismiss, but not to transfer, a case on grounds of convenience.<sup>44</sup> The first court might dismiss a case on grounds that there was a second circuit of proper venue where other related litigation was pending, hoping that the plaintiff would file his or her action in the more convenient circuit. The desired result, however, was not always the only alternative. The plaintiff could just as easily file his or her action in a third court of proper venue, perhaps one more convenient than the first court, where no related litigation was pending. The optimal result, while sometimes achievable, was contingent on the number of alternative places of proper venue, the cooperation of plaintiffs, and the cooperation of circuit judges.<sup>45</sup>

Thus, before the Illinois Supreme Court began in 1981 to transform Illinois joinder and consolidation procedures, Illinois circuit courts lacked the tools to gather related litigation into one forum. By favoring a litigant's choice of forum over judicial economy, Illinois procedure promoted the waste of judicial and litigant resources.

### III. THE SUPREME COURT'S REFORM EFFORTS

Beginning in 1981 and culminating in 1984, the supreme court by means of three decisions converted Illinois procedure from an inefficient system for processing related claims to a moderately ef-

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44. See *Torres v. Walsh*, 98 Ill. 2d 338, 456 N.E.2d 601 (1983).

45. Although not itself a gathering procedure, the doctrine of collateral estoppel also can be employed to combat the problem of serial, related litigation. Since Illinois has abandoned the mutuality doctrine, see *Illinois State Chamber of Commerce v. Pollution Control*, 18 Ill. 2d 1, 398 N.E.2d 9 (1979), a litigant who was not a party in the original action, under certain circumstances, can prevent a second litigant who was a party to the first action from relitigating an issue already decided against the second litigant. *Mohn v. International Vermiculite Co.*, 147 Ill. App. 3d 717, 498 N.E.2d 375 (4th Dist. 1986). In particular, offensive use of collateral estoppel could be effective in preventing the relitigation of common issues in the situation in which a large number of persons are injured under similar circumstances by the same defendant. See ALI Complex Litigation Study, *supra* note 5, at 72.

Like the other procedures already discussed, however, this use of collateral estoppel has its limitations too. First, it does not prevent the duplication of pretrial proceedings *prior* to the first verdict against defendant. Second, many judges and commentators are reluctant to estop a defendant from litigating in several later cases because one early verdict — perhaps an aberration — went against the defendant. See *id.*; Currie, *Mutuality of Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281 (1967).

fective one. The following discussion explains the holdings of these three decisions and critically evaluates them.

A. *Horn v. Rincker*<sup>46</sup>

In *Horn*, a three vehicle collision led to three suits in three different counties: St. Clair; Madison; and Shelby. Because venue was proper in all three counties, transfer pursuant to section 2-106 of the Code was unavailable.<sup>47</sup> Because the cases were not pending in the "same court," they could not be consolidated under section 2-1006.<sup>48</sup> Finally, none of the three courts could dismiss or stay proceedings under section 2-619(a)(3) — and thereby indirectly compel the parties to file their suits in the same county — because the three actions, although arising out of the same transaction, did not involve the same parties.<sup>49</sup> The Illinois Code, therefore, provided no means by which a circuit judge could consolidate the three cases for pretrial and trial.

The Illinois Supreme Court, however, was not so easily deterred. Invoking its general administrative and supervisory authority granted by article VI, section 16 of the Illinois Constitution,<sup>50</sup> the court ordered the St. Clair County and Madison County cases transferred to Shelby County and consolidated with the case pending in that court.<sup>51</sup> Article VI, section 16 provides the supreme court with "[g]eneral administrative and supervisory authority over all courts." That article also provides the constitutional basis for the supreme court's concurrent power, along with the Illinois General Assembly, to promulgate rules of procedure for the Illinois courts.<sup>52</sup> In *Horn*, the court interpreted article VI, section 16 to permit it to regulate practice and procedure by appellate decision, as well as by formal rule.

Thus, *Horn* established a procedure for consolidating related cases filed in different judicial circuits. As the court explained, a litigant can seek intercircuit consolidation by filing an original petition with the Illinois Supreme Court.<sup>53</sup> The Illinois Supreme

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46. 84 Ill. 2d 139, 417 N.E.2d 1329 (1981).

47. *Id.* at 145-46, 417 N.E.2d at 1332-33.

48. *Id.* at 146-48, 417 N.E.2d at 1333.

49. *See supra* text accompanying notes 31-32.

50. ILL. CONST. art. VI, § 16.

51. *Horn*, 84 Ill. 2d at 151, 417 N.E.2d at 1334.

52. *People v. Capoldi*, 37 Ill. 2d 11, 16, 225 N.E.2d 634, 637, (1967); ILL. CONST. art. VI, § 16 (constitutional commentary) ("The Supreme Court has recognized that the General Assembly may act, where it was at least arguable that the court has inherent rule making power, if the Court has not acted.")

53. *Horn*, 84 Ill. 2d at 142, 417 N.E.2d at 1331.

Court's authority is discretionary on two levels. First, the Illinois Supreme Court can refuse to consider the petition. Second, even if it agrees to consider the petition, the supreme court can refuse to grant the petition.<sup>54</sup>

Because *Horn* decided only one consolidation petition, it leaves unanswered several questions about the new procedure. First, it is unclear under what circumstances the Illinois Supreme Court will consolidate cases under its supervisory powers. The *Horn* court found that the factors relevant to a forum non conveniens dismissal were also "helpful in deciding whether to exercise our supervisory powers and in what manner."<sup>55</sup> Having emphasized factors of convenience, the court easily found that the three cases should be consolidated because "the parties, most of the witnesses, proofs, and the accident itself are local to Shelby County."<sup>56</sup>

But is application of the forum non conveniens factors only "helpful," not determinative? By its comment that those factors would be helpful in deciding "in what manner" to exercise its supervisory powers, the court implied that it contemplated other consolidation orders in which convenience would not be dispositive. For example, if the court were to consolidate only for discovery purposes, concern about a consolidation order's inconvenience to parties and witnesses might cut against consolidation, but possibly be overridden or displaced by concern about judicial economy.

The *Horn* decision thus raises a second question: whether the supreme court's remarks signalled that it would entertain consolidation petitions only for pretrial purposes. *Horn* itself provides no clear answer. The *Horn* court consolidated the three cases for both pretrial and trial purposes and left to the Shelby County circuit judge the discretion to "sever for trial so many or such parts of these consolidated cases as it deems necessary."<sup>57</sup>

Since the *Horn* decision, however, the Illinois Supreme Court has given further indication that it will consolidate for discovery purposes. In at least one unreported order, the court has consolidated cases only for common discovery. In *In re Salmonella Litigation*,<sup>58</sup> the Illinois Supreme Court consolidated before one Cook

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54. *Id.* at 152, 417 N.E.2d at 1335-36 (Goldenhersh, C.J., dissenting) ("I opposed the granting of leave to file the original petition and am of the opinion that it should now be dismissed.").

55. *Id.* at 150, 417 N.E.2d at 1335.

56. *Id.*

57. *Id.* at 151, 417 N.E.2d at 1335.

58. No. 61974 (Ill. Sup. Ct. June 27, 1985) (order granting consolidation for pretrial discovery); *In re Salmonella Litigation*, No. 63629 (Ill. Sup. Ct. June 30, 1986) (order

County circuit judge all salmonella cases pending in the Illinois state court system. After the common discovery was completed, each case was remanded to the circuit court in which it was originally filed. Presumably, the Illinois Supreme Court in the salmonella cases found the convenience factors "helpful" in deciding whether to consolidate; but, because many of the cases had been filed in the circuits where the plaintiffs resided, the overriding concern that motivated the court must have been judicial economy, not convenience to the parties.

By suggesting in *Horn* that it might consolidate cases for limited purposes only — and by doing so in the salmonella litigation — the Illinois Supreme Court has created a number of other potential problems. Will it entertain a petition to reverse an earlier decision to consolidate cases for trial on grounds that discovery conducted subsequent to the consolidation order has revealed no efficiency in trying the cases together? If the supreme court consolidates factually related cases in one circuit court only for pretrial purposes, as in the salmonella litigation, may the transferee court sua sponte transfer the cases to itself for trial, invoking the forum non conveniens doctrine of *Torres*?<sup>59</sup> These and other questions remain open and are the inevitable result of creating a consolidation procedure through a single written opinion.

Perhaps the most troubling problem is that *Horn*'s utility as a consolidation procedure itself is questionable. It would seem doubtful that the Illinois Supreme Court would routinely entertain consolidation petitions. Chief Justice Goldenhersh's dissent in *Horn* detailed some of the possible horrors the decision had produced.<sup>60</sup> He commented:

The end result of this opinion, is that this court will of necessity be required to entertain original actions with wholly inadequate records . . . . With the numbers and types of cases pending before us, I respectfully submit this court is far too busy to spend its

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directing consolidated discovery); see also *Schomber v. Jewel Cos.*, 614 F. Supp. 210 (N.D. Ill. 1985) (description of procedural moves by the Illinois Supreme Court).

59. Federal courts routinely transfer cases to themselves for trial that have been transferred to them initially for pretrial purposes. See, e.g., *In re Fine Paper Antitrust Litig.*, 685 F.2d 810, 819-20 (3d Cir. 1982), cert. denied, 459 U.S. 1156 (1983); *Pfizer, Inc. v. Lord*, 447 F.2d 122, 124-25 (2d Cir. 1971); see also Trangsrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779, 804-06 (1984); Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts*, 78 F.R.D. 575, 581 (1978); Comment, *The Judicial Panel and the Conduct of Multidistrict Litigation*, 87 HARV. L. REV. 1001, 1001-02 (1974).

60. *Horn*, 84 Ill. 2d at 152, 417 N.E.2d at 1335 (Goldenhersh, C.J., dissenting).

time refereeing races to the courthouse.<sup>61</sup>

Chief Justice Goldenhersh's nightmare has not yet materialized, and perhaps never will. By the Illinois Supreme Court Clerk's estimate, only a handful or fewer petitions for *Horn* consolidation have been filed with the Illinois Supreme Court since 1981.<sup>62</sup> It is hard to explain why there have been so few petitions. One conceivable answer, of course, is that *Horn* is an unnecessary development. Perhaps Illinois courts are not presented frequently enough with multiple related litigation to require the application of the *Horn* decision. Alternately, even if related litigation is frequently dispersed among different Illinois circuits, perhaps Illinois litigants are not interested in consolidation. But the claim that inter-circuit consolidation is unnecessary in Illinois strikes a dissonant chord. Chief Justice Goldenhersh himself emphasized that multiple actions arising out of the same transaction are "not new in the annals of the State."<sup>63</sup> Moreover, the frequent use by litigants in the federal system of multidistrict consolidation procedures<sup>64</sup> suggests that if consolidation procedures are readily available, they will be employed.

A more plausible reason for Illinois litigants' infrequent resort to *Horn* consolidation is its discretionary status. A litigant who seeks inter-circuit consolidation must first obtain permission from the Illinois Supreme Court for leave to file an original petition. There is the aura of the extraordinary in this procedure similar to obtaining a writ of mandamus. Litigants may have perceived that in deciding *Horn*, the Illinois Supreme Court did not want to invest its limited resources in hearing numerous consolidation petitions.<sup>65</sup> In the minds of Illinois lawyers, *Horn* thus may have died a sorry death as soon as it was born because of its discretionary nature.

### B. *Torres v. Walsh*<sup>66</sup>

In *Torres*, the Illinois Supreme Court finally decided that the doctrine of forum non conveniens could be invoked when the more

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61. *Id.* at 153, 417 N.E.2d at 1336 (Goldenhersh, C.J., dissenting).

62. Telephone conversation with Juleann Hornyak, Clerk of the Illinois Supreme Court (Mar. 2, 1989).

63. *Horn*, 84 Ill. 2d at 152, 417 N.E.2d at 1336 (Goldenhersh, C.J., dissenting).

64. See Howard, *A Guide to Multidistrict Litigation*, 124 F.R.D. 479, 480 (1989) (statistics showing that 10,200 actions have been transferred since 1968); Weigel, *supra* note 59; Comment, *supra* note 59.

65. Another plausible explanation for *Horn*'s disuse is that Illinois litigants simply do not know about *Horn*.

66. 98 Ill. 2d 338, 456 N.E.2d 601 (1983).

convenient forum is another Illinois judicial district.<sup>67</sup> The *Torres* court also held that a circuit court has authority under the doctrine to transfer a case from one Illinois judicial circuit to another when venue is proper in the second county and the second county is more convenient.<sup>68</sup> In so holding, the court created a transfer procedure identical to the federal procedure without the necessity either of legislative enactment or rulemaking.

*Torres* involved a garden variety car crash in Sangamon County. The plaintiffs, Elias and Celia Torres, filed their suit in Cook County. The defendants then moved to transfer the case to Sangamon County on convenience grounds, and the Cook County judge ordered the transfer.<sup>69</sup> The plaintiffs then petitioned the Illinois Supreme Court seeking a writ of mandamus. In deciding that the circuit court had authority to transfer under forum non conveniens, the Illinois Supreme Court took a strictly historical approach. The doctrine of forum non conveniens, the Illinois Supreme Court explained, originated in the common law of England, "which Illinois adopted as it existed prior to the fourth year of James the First" — in 1606.<sup>70</sup> The court then examined a handful of English cases and found that when an "impartial trial could not be obtained the court of the King's Bench had the authority to transfer the trial to the next adjoining county."<sup>71</sup> Because English common law had acknowledged a transfer mechanism, the court reasoned, the right to transfer is also contained in the Illinois doctrine of forum non conveniens.

*Torres* is remarkable for at least two reasons. First, the earliest English case cited by the *Torres* court for the authority to transfer was decided almost 100 years after "the fourth year of James the First."<sup>72</sup> Thus, the English common law that Illinois adopted by legislative act<sup>73</sup> did not embody a right to transfer on grounds of convenience. Second, because of the flimsiness of its legal argument, *Torres* can only be seen as a radical reform of Illinois procedure, which destroyed "in one stroke" the Illinois Legislature's history of unwavering deference to plaintiff's choice of forum.<sup>74</sup>

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67. *Id.* at 351, 456 N.E.2d at 607.

68. *Id.*

69. *Id.* at 342-43, 456 N.E.2d at 603.

70. *Id.* at 347, 456 N.E.2d at 605. *See also id.* at 355, 456 N.E.2d at 609 (Goldenhersh, C.J., dissenting) (noting that the fourth year of James the First's reign occurred in 1606).

71. *Id.* at 348, 456 N.E.2d at 606.

72. *Id.* at 347-48, 456 N.E.2d at 605-06.

73. ILL. REV. STAT. ch. 1, para. 801 (1987).

74. *Torres*, 98 Ill. 2d at 355, 456 N.E.2d at 609 (Goldenhersh, C.J., dissenting).

Four years later, the Illinois Supreme Court tacitly acknowledged that *Torres* was in fact a new rule masquerading as doctrinal interpretation when it codified the *Torres* decision in Supreme Court Rule 187.

By themselves, *Torres* and Supreme Court Rule 187 do not provide for gathering related claims and litigation into one suit. Combined with section 2-1006 consolidation,<sup>75</sup> however, litigants occasionally can employ *Torres* and rule 187 to consolidate related litigation. A defendant might be able to consolidate two related cases filed in different districts without having to petition the supreme court for the extraordinary relief of *Horn*. The defendant first would have to move successfully on grounds of convenience to transfer one of the cases to the circuit court in which the second case was filed. Then the defendant would have to move successfully to consolidate the cases under section 2-1006.

This combined use of statutory consolidation and forum non conveniens in order to combine related litigation, however, is probably unworkable. As the *Torres* court explained, unless the balance of convenience strongly favors the defendant, "the plaintiff should be able to exercise his statutory right to choose his forum."<sup>76</sup> Thus, the defendant must bear the heavy burden of persuading a circuit court that jointly "the availability of an alternative forum, the access to sources of proof, the accessibility of witnesses, the relative advantages and obstacles to obtaining a fair trial, the congestion of the court dockets, and the convenience of the parties" point overwhelmingly in the direction of the defendant's forum choice.<sup>77</sup> Avoiding duplicative litigation is only one of a variety of factors pertinent to a forum non conveniens determination. Moreover, when the defendant is faced with defending several related cases and those cases are filed in more than two judicial circuits, a defendant will be hard-pressed to get all the cases transferred to one court. Under these circumstances, in order to achieve the fullest degree of judicial economy, the defendant must bear the even heavier burden of persuading a number of judges in different circuits to transfer their cases to the same circuit.<sup>78</sup>

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75. See *supra* notes 20-24 and accompanying text.

76. *Torres*, 98 Ill. 2d at 351, 456 N.E.2d at 607.

77. *Id.*

78. ALI Complex Litigation Study, *supra* note 5, at 89; Trangsrud, *supra* note 59, at 802-03 ("This approach has proven of little value in achieving the consolidation of mass tort cases in a single venue because it requires the unanimous cooperation of all transferor judges to effect complete consolidation.").

C. *Laue v. Leifheit*<sup>79</sup>

Section 5 of the Contribution Among Joint Tortfeasors Act<sup>80</sup> provides that a claim for contribution among joint tortfeasors “may be asserted by a separate action before or after payment, by counterclaim or by third-party complaint in a pending action.” On its face, section 5 appears to present the contribution claimant with the option either to raise his or her claim in the plaintiff’s original action or to defer any attempt to enforce the claim until after resolution of the plaintiff’s original claim.<sup>81</sup> But in *Laue*, the supreme court construed section 5 to require the contribution claimant to assert his or her claim by counterclaim or third-party claim in the plaintiff’s original action.<sup>82</sup> If the contribution claim is not asserted there, it is waived.

In construing section 5, the Illinois Supreme Court claimed simply to be analyzing the plain language of section 5.<sup>83</sup> On its face, that claim is dubious because the language of section 5 points in the opposite direction. The court appears instead to have been driven by concerns of judicial economy. Indeed, the court moved briskly, if not nimbly, from its assertion that the language of section 5 is plain to a policy discussion: “One jury should decide both the liability to the plaintiff and the percentages of liability among the defendants, so as to avoid a multiplicity of lawsuits and the possibility of inconsistent verdicts.”<sup>84</sup>

There are other countervailing policies that the *Laue* court chose to ignore or discount. For example, the court disregarded or discounted the general assembly’s countervailing intent as expressed in the permissive counterclaim rule, section 2-608 of the Code, and rejected the policy arguments of the contribution claimant in *Laue*.<sup>85</sup> In giving no weight to the intent underlying the permissive counterclaim rule, the Illinois Supreme Court ignored that section’s policy of providing defendants a forum choice “if it would be inconvenient or strategically inadvisable” to assert the counter-

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79. 105 Ill. 2d 191, 473 N.E.2d 939 (1984).

80. ILL. REV. STAT. ch. 70, para. 305 (1989).

81. See *Laue*, 105 Ill. 2d at 198, 473 N.E.2d at 942 (Ryan, C.J., dissenting) (“This section plainly establishes three ways in which a cause of action for contribution may be asserted.”).

82. *Id.* at 196, 473 N.E.2d at 941.

83. *Id.* “We believe it is clear from the statutory language . . . that if there is a pending action . . . then the party seeking contribution must assert a claim by counterclaim or by third-party claim.” *Id.*

84. *Id.* at 196-97, 473 N.E.2d at 942.

85. See *id.* at 199, 473 N.E.2d at 943 (Ryan, C.J., dissenting) (emphasizing the policies of section 2-608 of the Code of Civil Procedure).



claim in plaintiff's action.<sup>86</sup> In rejecting defendant Laue's contentions, the Illinois Supreme Court discounted the joint tortfeasors' strategic interests in presenting a united front on liability before the jury in the plaintiff's original action, and in litigating the contribution issue only later when the tortfeasors' adverse positions would not prejudice their interests.<sup>87</sup>

Although *Laue* rejected the policies of section 2-608, it does not modify the permissive nature of counterclaims under Illinois law except with respect to contribution claims. The irony of the *Laue* decision is that it makes contribution counterclaims mandatory when the defendants' strategic interests for deferring their counterclaims — presenting a united front on liability — are greatest. Otherwise, however, *Laue* leaves intact the permissive status of other counterclaims where the defendant's strategic interests for deferring are typically only that the defendant wants its own forum. Thus, *Laue* logically opens the door to modifying the Illinois Code's counterclaim rule in accord with rule 13 of the Federal Rules of Civil Procedure.

#### IV. TWO PROPOSALS FOR REFORM

As indicated previously, Illinois joinder and consolidation procedures form a crazy quilt of mostly legislative devices that leave Illinois procedure grossly inadequate to make the transaction the unit of litigation in a single forum. Despite the Illinois Supreme Court's recent ambitious attempts to create an efficient adjudication system, more needs to be done. The previous discussions suggest that two reforms are particularly necessary. First, as the reasoning of *Laue* itself implies, an Illinois compulsory counterclaim rule modeled after rule 13 of the Federal Rules is long overdue. Second, the *Horn* decision needs to be modified to place intercircuit consolidation on equal footing with other Illinois joinder and consolidation devices.

##### A. *Compulsory Counterclaim Rule*

So late in the day, it should go without saying that a procedural system that values the transaction as the litigation unit should have a compulsory counterclaim rule that mirrors federal rule 13.<sup>88</sup> The

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86. ILL. REV. STAT. ch. 110, para. 2-608 (1987) (historical and practice notes).

87. See *Tisoncik v. Szczepankiewicz*, 113 Ill. App. 3d 240, 245-46, 446 N.E.2d 1271, 1275 (1st Dist. 1983) (discussing but rejecting the strategic interests of the joint tortfeasor defendants).

88. See FED. R. CIV.P. 13(a). "A pleading shall state as a counterclaim any claim

*Laue* court clearly expressed the policy reasons for such a rule by emphasizing that the values of judicial economy override a defendant's forum choice when the plaintiff's forum choice is acceptable.<sup>89</sup> Although forum shopping opportunities will always exist in our legal system, legal doctrine should not affirmatively enhance those opportunities, particularly when balanced against litigation efficiency.<sup>90</sup>

Other factors also support the argument for a compulsory counterclaim rule. At present, the Illinois judicial system may be suffering from the costs of its own gathering inefficiency. A September 1988 study of civil case backlog in Illinois circuit courts indicates that seventy-nine percent of all civil jury cases claiming damages of \$15,000 or more exceeded American Bar Association time standards for resolution.<sup>91</sup> While a variety of factors contribute to case backlog — including docket load and ineffective case management — one of those factors surely is the Illinois Code's sanction of duplicative litigation.

Moreover, without a compulsory counterclaim rule, an Illinois plaintiff can occasionally compel a defendant to file a claim arising out of the same transaction as a counterclaim. The *Laue* decision itself accomplishes that result for contribution claims. In addition, Supreme Court Rule 187 and statutory consolidation allows the plaintiff in the original action to seek transfer of the defendant's reactive litigation to the original forum, and then to consolidate the reactive litigation with the original claim.<sup>92</sup> Finally, through *Horn* consolidation, the plaintiff can seek the same result. Thus, procedures for compelling a defendant to raise a counterclaim already exist, although, with the exception of *Laue*, these devices are generally ineffective. A compulsory counterclaim rule would replace these inadequate procedures with an efficient device.

### B. Intercircuit Consolidation

As shown above, the *Horn* consolidation procedure has limited utility. The solution to *Horn* is not to turn back the clock and renounce the decision, but to develop an intercircuit consolidation

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which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the same transaction or occurrence that is the subject matter of the opposing party's claim . . . ." *Id.*

89. See *supra* text accompanying notes 84-87.

90. See Mengler, *Consent Decree Paradigms: Models Without Meaning*, 29 B.C.L. REV. 291, 312 (1988).

91. Illinois Calendar Management Study, *supra* note 6, at 1-5.

92. See *supra* text accompanying notes 75-78.

procedure that promotes the judicial economies of *Horn* without unduly burdening the Illinois Supreme Court. Intercircuit consolidation of multiple related litigation can produce efficiencies for all those involved in the litigation.<sup>93</sup> By avoiding duplication, consolidation can produce significant savings for the judicial system and litigants common to all or most of the actions. Additionally, consolidation can produce economies of scale for someone who is a party in only one of the actions if that party coordinates pretrial and trial activity with other parties on the same side of the suit. Finally, witnesses can also benefit through consolidation by being deposed or testifying only once, not several times in several locations.

To be sure, there are plausible objections. One objection is that the most judicially efficient forum may nonetheless be an inconvenient one for some of the litigants. Plaintiffs who reside in and file their cases in Madison County may face significant hardships in litigating, whether at the pretrial or trial stage, in Cook County. This concern, however, can be mitigated by making pretrial consolidation turn on the convenience of parties and witnesses, as well as the efficient conduct of such actions.<sup>94</sup> Thus, in deciding whether and where to consolidate, both convenience and efficiency should be paramount considerations.<sup>95</sup> In effect, the factors pertinent to transfer under Supreme Court Rule 187 would also be pertinent to intercourt consolidation.

A second objection derives from a plaintiff's fear that she may lose control over her claim if it is consolidated with other related litigation.<sup>96</sup> This problem will arise, of course, only when numerous cases are consolidated — mass tort litigation, for example — not when only a few cases are consolidated, as in *Horn*. In the mass tort consolidation, the transferee court typically will be compelled to exercise control over the numerous cases, with their numerous lawyers, by appointing liaison or lead counsel to represent the common litigants in their common oral and written presentations.<sup>97</sup> Without liaison counsel, the efficiencies of consolidation may be drowned in a sea of duplicative motions and discovery. Plaintiffs, however, are sometimes wary of liaison counsel arrange-

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93. See, e.g., Comment, *supra* note 59, at 1003.

94. See Multidistrict Litigation Act of 1968, 28 U.S.C. § 1407(a) (1982).

95. In consolidating for pretrial purposes, however, a court need not transfer cases only to places of proper venue. See Comment, *supra* note 59, at 1011-12.

96. See Trangsrud, *supra* note 59, at 820-22.

97. See, e.g., *MacAlister v. Guterma*, 263 F.2d 65 (2d Cir. 1958); MANUAL FOR COMPLEX LITIGATION § 20.22 (2d ed. 1985).

ments because they fear they may be turning over their claims to a stranger. But a sensitive circuit judge can account for this concern about loss of individual control by making clear to all litigants that by allowing liaison counsel to undertake matters common to the consolidated group, the individual litigants waive no rights to present issues unique to their cases or to conduct particularized discovery.<sup>98</sup> In a mass tort case, for example, this sensitivity would include allowing each plaintiff to conduct and manage the damages part of her trial.

A third objection is that intercircuit consolidation will diminish a plaintiff's forum-shopping opportunities. Because there are significant differences in jury awards among Illinois circuits,<sup>99</sup> an individual plaintiff often seeks to file his or her case in the highest-award circuit that Illinois venue laws permit.<sup>100</sup> A plausible argument can be made that consolidation for trial in the interests of efficiency unfairly overrides this tactical consideration. The short answer to this concern is that the Illinois Supreme Court, by providing for transfer on convenience grounds in *Torres* and Supreme Court Rule 187, has already indicated its view that convenience and judicial economy sometimes may trump the plaintiff's forum choice. An intercircuit consolidation rule would be consistent with that view. As a structural matter, the Illinois procedural system should not and, as exemplified in rule 187, does not exist systematically to promote a plaintiff's best shot at a high damage award.<sup>101</sup>

A final objection to intercircuit consolidation is its potentially burdensome impact on counties with few judges and sizeable dockets. Judges in these counties might be overwhelmed by the consolidation in their courts of a substantial number of related civil cases originally filed elsewhere. There are two ways by which an Illinois Judicial Panel could accommodate this problem. One is by instructing the panel to consider as a factor in its decision the ability of a circuit court to handle the consolidated cases along with its other criminal and civil cases. A second way is by exercising the Illinois Supreme Court's authority under article VI, section 16 of the Illinois Constitution to "assign a Judge temporarily to any

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98. See, e.g., *MacAlister*, 263 F.2d at 68; MANUAL FOR COMPLEX LITIGATION § 20.222 (2d ed. 1985).

99. See, e.g., *Baker v. Burlington N. R.R.*, 149 Ill. App. 3d 674, 683, 500 N.E.2d 1113, 1120 (5th Dist. 1986) (Jones, J., dissenting) (plaintiff "has taken in deliberate fashion what has become a well-worn path carved by plaintiffs en route to filing their cases in Madison County").

100. See *Trangsrud*, *supra* note 59, at 820.

101. *But see id.*

court."<sup>102</sup> To the extent that a circuit court, given its limited resources and existing docket, could not handle a group of consolidated cases, an Illinois Judicial Panel (if delegated the authority by the Illinois Supreme Court), or the supreme court itself, could assign a judge from another circuit to handle the consolidated cases.

None of the foregoing objections therefore weighs against adopting an Illinois intercircuit consolidation. Given the efficiencies that can be achieved, Illinois should adopt a consolidation procedure essentially modeled after the federal Multidistrict Litigation Act.<sup>103</sup> That Act created the Judicial Panel on Multidistrict Litigation. The Panel, comprised of seven district or appellate judges appointed by the Chief Justice of the Supreme Court,<sup>104</sup> is authorized to transfer civil actions pending in different districts and involving common factual questions to one district judge for consolidated pretrial proceedings. The Panel may do so when transfer and consolidation "will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions."<sup>105</sup> The Act also requires that the transferee judge, at or before completion of pretrial discovery, remand each separate action to the district in which it originated, "unless it shall have been previously terminated."<sup>106</sup>

The federal Multidistrict Litigation Act would solve both of *Horn's* inadequacies: *Horn's* extraordinary status and the potential burdens it places on the Illinois Supreme Court. Under an Illinois intercircuit consolidation rule, an Illinois Judicial Panel would hear *all* petitions for transfer and consolidation, thereby resolving the problem of *Horn's* discretionary status. Further, the Judicial Panel would be comprised of circuit and appellate judges experienced with the problems of complex litigation, thereby relieving the Illinois Supreme Court of the burden of considering original petitions for consolidation.

If an Illinois procedure were exactly modeled after the federal provision, it would permit the Panel to consolidate only for pretrial purposes. In passing the federal act, Congress took the position that the federal Judicial Panel would be in a good position to evaluate the efficiencies of consolidating common discovery, but would not be properly positioned to evaluate consolidation for trial.<sup>107</sup>

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102. ILL. CONST. art. VI, § 16.

103. 28 U.S.C. § 1407 (1982).

104. 28 U.S.C. § 1407(d) (1982).

105. 28 U.S.C. § 1407(a) (1982).

106. *Id.*

107. See Trangsrud, *supra* note 59, at 805-08.

Moreover, Congress believed that pretrial consolidation achieved efficiencies without unduly interfering with the plaintiff's choice of forum, which might result from consolidation for trial.<sup>108</sup> Nonetheless, as the federal Multidistrict Litigation Act ultimately has been interpreted, the transferee court often retains the consolidated cases for trial following pretrial transfer by the Judicial Panel. The transferee court sometimes has transferred the cases to its own court for trial pursuant to the federal analogue of the doctrine of *forum non conveniens*.<sup>109</sup>

Accordingly, the drafters of an Illinois consolidation rule would need to consider whether the language should authorize consolidation for all purposes, or only for pretrial purposes. An ideal rule would provide for both options. There are obviously cases — the salmonella litigation is one example — that are appropriate for pretrial consolidation, but not for trial consolidation. Sometimes the efficiencies of coordinated discovery override any inconvenience to the litigants. But those same efficiencies might not be present for a consolidated trial; the individual questions of law or fact present in each case might predominate over the common questions. Alternatively, the efficiencies of a consolidated trial might not override the unfairness of compelling parties to litigate in an inconvenient forum. Indeed, the forum appropriate for pretrial consolidation might not even be a place of proper venue for some of the consolidated actions. Thus, it makes sense to draft a procedure allowing, when appropriate, for pretrial consolidation only. But it is obviously sometimes efficient to consolidate for both pretrial and trial purposes. The consolidated *Horn* cases are perfect examples: a three car collision producing three lawsuits in three different counties. No sensible single judicial system would permit these three cases to proceed to trial separately.

The drafters of an Illinois rule would have to decide who determines whether cases consolidated for pretrial should also be tried together. Should the Illinois Judicial Panel or the transferee judge make this decision? Here too the established federal approach provides a sensible answer. While it is arguable that a Judicial Panel, experienced in consolidation questions, would be more able generally to make the decision,<sup>110</sup> the transferee judge usually will be in a better position to decide the issue in a particular case. The trans-

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108. *Id.*

109. *See supra* note 59 and accompanying text.

110. ALI Complex Litigation Study, *supra* note 5, at 90; Comment, *supra* note 59, at 1037-40.

feree judge, after conducting coordinated discovery and pretrial, has become closely connected with the factual and legal issues in each case. The transferee judge therefore is better qualified than the Judicial Panel to determine whether these particular cases should be consolidated for trial or remanded to the original circuit court for trial.<sup>111</sup>

### C. Reform by Legislative Act or Supreme Court Rule?

A final question to consider is whether the Illinois General Assembly or the Illinois Supreme Court should undertake procedural reform. It is now well-settled that the Illinois Supreme Court and the Illinois General Assembly possess concurrent power to regulate practice and procedure in the Illinois courts.<sup>112</sup> The supreme court's power, derived from article VI, section 16 of the constitution, is preeminent.<sup>113</sup> The general assembly may act on a procedural issue, as it has done in the Code of Civil Procedure, only if the Illinois Supreme Court has not acted.<sup>114</sup> When a supreme court rule and a legislative provision conflict, the supreme court rule takes precedence over the statute.<sup>115</sup>

Accordingly, either the general assembly could enact or the supreme court could promulgate a compulsory counterclaim rule and an intercircuit consolidation procedure.<sup>116</sup> Under the current climate, given the Illinois Supreme Court's recent activity, systematic reform of Illinois' gathering mechanisms more likely will result from supreme court rulemaking, not from legislative enactment. Moreover, the Illinois General Assembly's conduct in procedural revision in recent years stands in sharp contrast to the court's recent innovations by appellate decision. In 1982, the general assembly revised without reforming the Illinois Code of Civil Procedure.<sup>117</sup> In many instances, the 1982 Code clearly values the

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111. ALI Complex Litigation Study, *supra* note 5, at 90-91.

112. *People v. Capoldi*, 37 Ill. 2d 11, 16, 225 N.E.2d 634, 637 (1967); ILL. CONST. art. VI, § 16 (constitutional commentary).

113. *People v. Jackson*, 69 Ill. 2d 252, 371 N.E.2d 602 (1977); ILL. CONST. art. VI, § 16 (constitutional commentary).

114. *People v. Capoldi*, 37 Ill. 2d 11, 225 N.E.2d 634 (1967); ILL. CONST. art. VI, § 16 (constitutional commentary).

115. *People v. Jackson*, 69 Ill. 2d 252, 371 N.E.2d 602 (1977).

116. One might contest whether the Illinois Supreme Court is authorized to create a judicial consolidation panel — in effect, a new court. Article VI, section 16, however, explicitly authorizes the supreme court to "assign a Judge temporarily to any court." Presumably, that power would include the power to authorize the supreme court to assign a handful of circuit or appellate judges the duty of hearing consolidation petitions for a limited time period.

117. See Jenner, Tone, & Martin, *History, Source and Effect of the Civil Practice Law*,

individual litigant's interest in conducting litigation in the forum of choice over the often inconsistent value of efficient adjudication.<sup>118</sup>

Should the supreme court nonetheless defer to the democratic process and await procedural reform by the general assembly? There is no good reason for such deference. Indeed, given the Illinois Constitution's grant to the supreme court of preeminent, administrative, and supervisory authority over all Illinois courts, arguably any deference to the general assembly would amount to an abdication by the Illinois Supreme Court of its constitutional responsibilities. One might just as well ask instead whether the general assembly should defer to the Illinois Supreme Court's superior authority. But given the Illinois Supreme Court's clear signals in *Horn*, *Torres*, and *Laue*, the legislature, in passing a compulsory counterclaim rule and providing for a judicial consolidation panel, should have no fear of intruding in the supreme court's business. Indeed, for fifty years or more, the Illinois General Assembly and the Illinois Supreme Court have shared concurrent power over Illinois practice and procedure. One of them should implement the reforms proposed in this Article.

#### V. CONCLUSION

The innovations of *Horn*, *Torres*, and *Laue* launched Illinois into the mainstream of consolidation reform. But there are other steps to take. The Illinois General Assembly or the Illinois Supreme Court should continue Illinois' development of effective procedures for gathering related litigation into one forum.

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reprinted in ILL. ANN. STAT. ch. 110, at xxxii (Smith-Hurd 1983) (1982 revision made no substantive changes in procedure law).

118. See *supra* notes 9-45 and accompanying text.



