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Compulsory Contribution Claims: Promoting Judicial Efficiency While Sacrificing Standards of Justice

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Comments

Compulsory Contribution Claims: Promoting Judicial Efficiency While Sacrificing Standards of Justice

I. INTRODUCTION

Contribution is a means of allocating financial responsibility among defendants who are liable for a tortious injury.[1] Under contribution principles, each defendant must pay damages in an amount relative to his degree of fault.[2] Illinois courts first recognized the right to contribution in 1978 in *Skinner v. Reed-Prentice Division Package Machinery Co.*[3] One year later, the Illinois Legislature codified this decision in the Contribution Among Joint Tortfeasors Act (the "Contribution Act")[4]. In 1984, the Illinois

1. Comment, *Contribution in Missouri — Procedure and Defenses Under the New Rule*, 44 MO. L. REV. 691, 691 (1979).

2. ILL. REV. STAT. ch. 70, para. 303 (1987).

3. 70 Ill. 2d 1, 374 N.E.2d 437 (1977), *modified*, 70 Ill. 2d 16, 374 N.E.2d 444, *cert. denied sub nom.*, Hinckley Plastic, Inc. v. Reed-Prentice Div. Package Mach. Co., 436 U.S. 946 (1978) (manufacturer of a defective product that was responsible for the plaintiff's injury under strict liability could obtain contribution from the plaintiff's negligent employer because the employer's negligence was a contributing cause of the plaintiff's injury). *See infra* notes 26-29 and accompanying text.

4. ILL. REV. STAT. ch. 70, paras. 301-305 (1987). The Contribution Act states in pertinent part:

§ 2. Right of Contribution.

(a) Except as otherwise provided in this Act, where 2 or more persons are subject to liability in tort arising out of the same injury to person or property, or the same wrongful death, there is a right of contribution among them, even though judgment has not been entered against any or all of them.

(b) The right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share. No tortfeasor is liable to make contribution beyond his own pro rata share of the common liability.

. . . .

§ 3. Amount of Contribution.

The pro rata share of each tortfeasor shall be determined in accordance with his relative culpability . . . .

. . . .

§ 5. Enforcement.

Supreme Court held in *Laue v. Leifheit*[5] that section 5 of the Contribution Act requires a defendant to assert a contribution claim during the original action.[6] The *Laue* court stated that this requirement would prevent multiplicity of suits and inconsistent verdicts.[7]

This Comment discusses the ramifications of requiring a defendant to assert a claim for contribution during the initial proceeding.[8] First, this Comment examines how the assertion of contribution claims during the initial proceeding promotes judicial economy by encouraging settlements and preventing duplication of evidence.[9] It then discusses how requiring the assertion of contribution rights as a compulsory third-party claim or counterclaim (hereinafter referred to collectively as "compulsory contribution claim") ensures fairness by protecting the original defendant from inconsistent verdicts and by providing earlier repose for third-party defendants.[10] This Comment also considers the undesirable ramifications of compulsory contribution claims and the various attempts to minimize these adverse effects.[11] This Comment concludes that the advantages of compulsory contribution claims outweigh the disadvantages.[12] Finally, this Comment will make several recommendations: (1) that severance be used as a last resort to prevent jury confusion;[13] (2) that courts which lack subject matter jurisdiction over certain contribution claims extend their jurisdiction to encompass these claims, rather than allow defendants to assert

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A cause of action 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.

Id.

5. 105 Ill. 2d 191, 473 N.E.2d 939 (1984). *See infra* text accompanying notes 34-45.

6. *Laue*, 105 Ill. 2d at 196, 473 N.E.2d at 942; ILL. REV. STAT. ch. 70, para. 305 (1987). For the legislative history of the Contribution Act, see SENATE DEBATES, 81st Ill. Gen. Assem., card 0022, row 6, cols. 13-14 through row 7, cols. 1-2 (May 14, 1979) (although the debates portray a legislative intent to codify the judicial decision that established a right to contribution, the debates do not resolve whether the legislature intended that contribution claims would be compulsory third-party procedures). *See also* Doyle v. Rhodes, 101 Ill. 2d 1, 461 N.E.2d 382 (1984) (majority concluding legislature codified entire *Skinner* decision, dissent arguing that no such intent evidenced by debates).

At least three other states also require the assertion of a contribution claim in the original action. *See, e.g.*, ARK. STAT. ANN. § 34-1007(3) (1962); DEL. CODE ANN. tit. 10, § 6306(b) (1975); HAW. REV. STAT. § 663-17(b) (1976).

7. *Laue*, 105 Ill. 2d at 196-97, 473 N.E.2d at 942.

8. *See infra* notes 46-103 and accompanying text.

9. *See infra* notes 46-57 and accompanying text.

10. *See infra* notes 58-75 and accompanying text.

11. *See infra* notes 76-103 and accompanying text.

12. *See infra* notes 104-07 and accompanying text.

13. *See infra* notes 108-30 and accompanying text.

these claims in later proceedings;[14] and (3) that the Illinois Legislature amend the Contribution Act to ensure a more equitable treatment of nonsettling tortfeasors.[15]

II. History of Contribution in Illinois

Under common law, no right to contribution existed among joint tortfeasors.[16] This common law rule originated in the English case of *Merryweather v. Nixan*.[17] The rule against contribution reflected the policy that the courts should not assist wrongdoers in shifting their losses to another tortfeasor.[18] Under the rule against contribution, any one of several defendants could be held liable for the entire harm suffered by the plaintiff. Thus, a plaintiff could obtain full compensation from a single tortfeasor who was only slightly negligent, while a more culpable defendant avoided completely the burden of liability.[19]

Because of its harsh nature, commentators often criticized the rule against contribution as unjust.[20] Gradually, the courts developed various doctrines to mitigate the rule's harshness.[21] For example, some courts developed the doctrine of implied indemnity. This doctrine permitted a passively negligent defendant to shift the entire burden of liability to another tortfeasor if the tortfeasor was actively negligent.[22] Similarly, the loan receipt doctrine permitted the allocation of damages among multiple tortfeasors.[23]

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14. *See infra* notes 131-38 and accompanying text.

15. *See infra* notes 139-50 and accompanying text.

16. Myse, *The Problem of the Insolvent Contributor*, 60 Marq. L. Rev. 891, 892 (1977).

17. 8 T.R. 186, 101 Eng. Rep. 1337 (K.B. 1799). *See* Myse, *supra* note 16, at 892.

18. Lawler, *Contribution, Indemnity and Settlements: A Conflict in Policy*, 74 Ill. B.J. 74, 75 (1985).

19. *Id.* at 74.

20. Note, *Tort Law — Contribution: Determining A Basis For the Culpability of Dram Shops, Hopkins v. Powers*, 11 S. Ill. L.J. 427, 429 (1987).

21. *Id.*

22. *Id.* The doctrine of implied indemnity made a qualitative distinction between the negligence of the co-defendants. *See* Lawler, *supra* note 18, at 75. *See also* Carver v. Grossman, 55 Ill. 2d 507, 305 N.E.2d 161 (1973); Muhlbauer v. Kruzel, 39 Ill. 2d 226, 234 N.E.2d 790 (1968).

23. Note, *supra* note 20, at 429. For a further discussion, see Comment, *The Co-Existence of Loan Receipt Agreements and Contribution in Illinois*, 12 Loy. U. Chi. L.J. 751, 754 (1981). A loan receipt agreement comprises an agreement between the plaintiff and less than all the joint tortfeasors, whereby the agreeing joint tortfeasors make an interest free loan to the plaintiff. *Id.* If the judgment is equal to or greater than the amount of the loan, the plaintiff must repay the loan in full. *Id.* The Illinois Supreme Court first examined loan receipt agreements in Reese v. Chicago, Burlington & Quincy R.R., 55 Ill. 2d 356, 303 N.E.2d 382 (1973). In *Reese*, an employee injured by a crane filed suit against his employer and the manufacturer of the crane. *Id.* at 357-58, 303

Commentators, however, also criticized the doctrine of implied indemnity because its application often lead to unpredictable results.[24] Moreover, although the loan receipt doctrine prevented one defendant from bearing all the liability, the imposition of liability disproportionate to fault still occurred.[25]

In recognition of the shortcomings of the doctrines of implied indemnity and loan receipts, the Illinois Supreme Court abolished the rule against contribution in *Skinner v. Reed-Prentice Division Package Machinery Co.*[26] The *Skinner* court considered the historical basis and the modern ramifications of the prohibition against contribution among tortfeasors.[27] The court determined that the rationale for prohibiting contribution, the withholding of judicial resources from intentional wrongdoers who wished to pass on liability, was no longer persuasive in an age when "tortfeasor" refers to not only an intentional tortfeasor, but also a negligent or strictly liable tortfeasor.[28] The *Skinner* court therefore held that equitable principles require the allocation of liability among tortfeasors in proportion to their relative degrees of culpability.[29]

Subsequently, the Illinois Legislature codified the *Skinner* hold-

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N.E.2d at 383-84. In exchange for an interest free loan of $57,000 from the employer, the employee agreed to repay the loan from any judgment received from manufacturer. *Id.* The Illinois Supreme Court upheld the terms of the loan receipt agreement. *Id.* at 363-64, 303 N.E.2d at 386-87.

24. Lawler, *supra* note 18, at 75. This unpredictability resulted from the Illinois courts' failure to provide a workable definition of implied indemnity. *Id.* For a further discussion, see Bua, *Third Party Practice in Illinois: Express and Implied Indemnity*, 25 DE PAUL L. REV. 287 (1976).

25. Comment, *supra* note 23, at 769.

26. 70 Ill. 2d 1, 374 N.E.2d 437 (1977), *modified*, 70 Ill. 2d 16, 374 N.E.2d 444, *cert. denied sub nom.*, Hinckley Plastic, Inc. v. Reed-Prentice Div. Package Mach. Co., 436 U.S. 946 (1978). The plaintiff in *Skinner* was injured on the job by a machine that malfunctioned. *Id.* at 4-5, 374 N.E.2d at 438. The plaintiff filed suit against the manufacturer. *Id.* The manufacturer sought contribution from the plaintiff's negligent employer. *Id.*

27. *Id.* at 11-13, 374 N.E.2d at 441-42. The *Skinner* court acknowledged that courts had used loan receipt agreements and the doctrine of implied indemnity to mitigate the inequitable consequences of the rule against contribution. *Id.* at 11-12, 374 N.E.2d at 441.

28. *Id.* at 12-13, 374 N.E.2d at 442. The *Skinner* court noted that Merryweather v. Nixan, 8 T.R. 186, 101 Eng. Rep. 1337 (K.B. 1799), stands for the principle that contribution is prohibited only among intentional tortfeasors. *Skinner*, 70 Ill. 2d at 7-8, 374 N.E.2d at 439-40 (citing Reath, *Contribution Between Persons Jointly Charged for Negligence — Merryweather v. Nixan*, 12 HARV. L. REV. 176, 177-78 (1898)). Also, the *Skinner* court recognized that the rule against contribution does not promote judicial economy because a determination of the qualitative distinction between the culpability of two defendants is as consuming of judicial resources as the allocation of liability based on fault. *Id.* at 13, 374 N.E.2d at 442.

29. *Skinner*, 70 Ill. 2d at 14, 374 N.E.2d at 442.

ing by enacting the Contribution Act.[30] The Contribution Act does not destroy a plaintiff's right to obtain full compensation for an injury from any particular defendant.[31] The Contribution Act merely permits a defendant to obtain contribution from third parties who are partially responsible for a plaintiff's injuries. In many cases, a defendant can obtain contribution from a joint tortfeasor even though that tortfeasor could not be held directly liable for the plaintiff's injury.[32] This aspect of a defendant's right to contribution results from the Illinois Supreme Court's interpretation of the statutory requirement that the party from whom contribution is sought be "subject to liability in tort."[33]

The Contribution Act does not specify whether a defendant can assert a claim for contribution after his liability has been adjudicated. In *Laue v. Leifheit*,[34] however, the Illinois Supreme Court held that section 5 of the Contribution Act requires a defendant to assert a contribution claim during the "original action."[35] In *Laue*,

30. ILL. REV. STAT. ch. 70, paras. 301-05 (1987).

31. ILL. REV. STAT. ch. 70, para. 304 (1987). Section 304 provides that "[a] plaintiff's right to recover the full amount of his judgment from any one or more defendants subject to liability in tort for the same injury to person or property, or for wrongful death is not affected by the provisions of this Act." *Id.*

32. *See, e.g.*, Aimone v. Walgreens Co., 601 F. Supp. 507 (N.D. Ill. 1985) (a defendant can obtain contribution from the plaintiff's parent even though the plaintiff could not sue his parent because of the doctrine of parental immunity); Scott & Fetzer Co. v. Montgomery Ward & Co., 112 Ill. 2d 378, 493 N.E.2d 1022 (1986) (contribution from a joint tortfeasor is not barred by a contract between joint tortfeasors that precludes direct tort claims by one tortfeasor against another); Doyle v. Rhodes, 101 Ill. 2d 1, 461 N.E.2d 382 (1984) (a defendant was entitled to contribution from the plaintiff's employer as a joint tortfeasor though the Workers' Compensation Act prohibits a direct suit by the employee against the employer); Stephens v. McBride, 97 Ill. 2d 515, 455 N.E.2d 54 (1983) (a defendant may receive contribution from a municipality, which was a joint tortfeasor, even if the plaintiff's failure to give the municipality the required statutory notice barred the plaintiff's claim against the municipality). *But see* Hopkins v. Powers, 113 Ill. 2d 206, 497 N.E.2d 757 (1986) (a defendant's contribution claim against the tavern that sold the liquor responsible for his intoxication was denied because dram shop liability is not based on fault); Lietsch v. Allen, 173 Ill. App. 3d 516, 527 N.E.2d 978 (3d Dist. 1988) (a defendant cannot obtain contribution from the city for the negligent acts of city employees because, under the Tort Immunity Act, a plaintiff could not recover from a city unless a city employee was guilty of willful and wanton misconduct); Stephens v. Cozadd, 159 Ill. App. 3d 452, 512 N.E.2d 812 (3d Dist. 1987) (the state's sovereign immunity barred a contribution action asserted against a public official in a circuit court).

For a further discussion on contribution under the Liquor Control Act, see Note, *supra* note 20.

33. ILL. REV. STAT. ch. 70, para. 302(a) (1987). Section 302(a) states that "where 2 or more persons *are subject to liability in tort* arising out of the same injury . . . there is a right of contribution among them." *Id.* (emphasis added).

34. 105 Ill. 2d 191, 473 N.E.2d 939 (1985).

35. *Id.* at 196, 473 N.E.2d at 942. The "original action" is the initial litigation "in which the issues of liability are to be determined." Carter v. Chicago & Illinois Midland

the plaintiff, a truck driver, brought an action for contribution against a motorist for damages recovered by the motorist's passengers.[36] The contribution claim in *Laue* stemmed from a prior action brought by the motorist and her four passengers.[37] These original plaintiffs were injured during a collision with the truck driver.[38] All of these plaintiffs obtained compensatory damages from the truck driver.[39] The motorist's recovery, however, was reduced by thirty-three percent because of her comparative negligence in causing the accident.[40]

Following the judgment in the original action, the truck driver asserted a claim for contribution against the motorist for thirty-three percent of the damages paid to the four passengers in the original suit.[41] The circuit court granted the truck driver's motion for judgment on the pleadings, and the appellate court held that the contribution claim could be brought under the Contribution Act.[42] On review, the Illinois Supreme Court held that the truck driver's contribution claim was barred because section 5 clearly requires that when an action is pending,[43] as in this case, the defendant can assert the contribution claim only during the original action.[44] In addition to examining the statutory language, the

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Ry., 140 Ill. App. 3d 25, 28, 487 N.E.2d 1267, 1270 (4th Dist. 1986), *cert. denied*, 119 Ill. 2d 296, 518 N.E.2d 1031 (1988). The *Carter* court held that a contribution claim filed during a retrial on damages was not asserted during the original action and, therefore, was barred by section 5 of the Contribution Act. *Id.* at 27-29, 478 N.E.2d at 1269-70.

36. *Laue*, 105 Ill. 2d at 193, 473 N.E.2d at 940.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 193-94, 473 N.E.2d at 940.

41. *Id.* at 194, 473 N.E.2d at 940.

42. *Id.* at 193, 473 N.E.2d at 940. At the appellate level, the motorist argued, *inter alia*, that the Contribution Act precluded the contribution claim and that the doctrine of collateral estoppel did not bar litigation of the motorist's liability. *Id.* at 194, 473 N.E.2d at 940. The appellate court did not agree that the contribution claim was precluded. *Id.* The appellate court, however, held that the motorist was improperly barred from litigating the issue of her liability because the motorist's liability "in tort" had not been demonstrated. *Id.* at 194-95, 473 N.E.2d at 940-41.

43. If no action is pending, a contribution claim can be raised in a "separate action before or after payment." *Id.* at 196, 473 N.E.2d at 941 (citing Tisoncik v. Szczepankiewicz, 113 Ill. App. 3d 240, 245, 446 N.E.2d 1271, 1275 (1st Dist. 1983)).

44. *Id.* (citing ILL. REV. STAT. ch. 70, para. 305 (1987)). *See also* FED. R. CIV. P. 13(a) (mandates the assertion of a counterclaim "if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim"). The underlying goal of compulsory counterclaims is "to prevent multiplicity of action and to achieve resolution in a single lawsuit of all duplicates arising out of common matters." Note, *The Application of Federal Rule of Civil Procedure 13(a) in McDonald's Corp. v. Levine*, 14 LOY. U. CHI. L.J. 857, 859 (1983) (citing Southern Constr. Co. v. Pickard, 371 U.S. 57,

court noted strong public policy reasons for compulsory contribution claims:

> 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 in an already crowded court system and the possibility of inconsistent verdicts. Requiring the parties to litigate the matter in one suit will also save court time and attorney fees.[45]

III. THE RAMIFICATIONS OF COMPULSORY CLAIMS FOR CONTRIBUTION

A. The Advantages of Compulsory Contribution Claims

1. Judicial Economy

Illinois courts favor dispute resolution through settlements because settlements eliminate the need to initiate or continue litigation, which promotes judicial economy.[46] Requiring a defendant to assert his contribution claim in the initial proceeding encourages settlements.[47] Under the Contribution Act, if less than all the defendants settle with the plaintiff, the plaintiff's recovery is reduced by the amounts obtained through settlements.[48] Thus, if one defendant settles while another defendant does not, it is possible that the nonsettling defendant may be responsible for paying an amount that exceeds his proportional liability based on fault.[49] Moreover,

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60 (1962)). *But see* ILL. REV. STAT. ch. 110, para. 2-608(a) (1987) (does not provide for compulsory counterclaims).

45. *Laue*, 105 Ill. 2d at 196-97, 473 N.E.2d at 942.

46. *See* Rakowski v. Lucente, 104 Ill. 2d 317, 325, 472 N.E.2d 791, 795 (1984) ("[a]s a matter of public policy the settlement of claims should be encouraged").

47. *See infra* text accompanying notes 48-50.

48. ILL. REV. STAT. ch. 70, para. 302(c)-(e) (1987). Sections 302(c)-(e) provide as follows:

> (c) When a release or covenant not to sue or not enforce judgment is given in good faith to one or more persons liable in tort arising out of the same injury or the same wrongful death, it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide but it reduces the recovery on any claim against the others to the extent of any amount stated in the release or the covenant, or in the amount of the consideration actually paid for it, whichever is greater.
>
> (d) The tortfeasor who settles with a claimant pursuant to paragraph (c) is discharged from all liability for any contribution to any other tortfeasor.
>
> (e) A tortfeasor who settles with a claimant pursuant to paragraph (c) is not entitled to recover contribution from another tortfeasor whose liability is not extinguished by the settlement.

Id.

49. O'Leary, *Good Faith Settlement and Release Agreements under the Illinois Contribution Act*, 73 ILL. B.J. 82, 84 (1984).

a defendant who fails to participate in the settlement negotiations risks being the sole defendant in a complex and costly proceeding.[50] Thus, requiring the joinder of all potentially liable parties in a pending action provides significant incentives for the defendants to settle with the plaintiff.

In addition to encouraging settlements, compulsory contribution claims promote judicial economy by minimizing the duplication of proceedings.[51] A defendant who brings a contribution claim has the burden of proving two things.[52] First, the defendant must prove the potential contributing defendant's liability.[53] Second, he must establish the degree of the contributing defendant's fault, thereby setting the percentage of contribution to which the defendant is entitled.[54]

The potential contributing defendant, seeking to minimize his share of the common liability, must produce evidence similar in nature to the evidence used by the original plaintiff to establish the original defendant's liability.[55] Thus, the triers-of-fact considering the contribution action and the original action review substantially the same evidence.[56] Having the same tribunal determine both the original defendant's liability and each contributing defendant's percentage of the common liability prevents this duplicate review of evidence.[57] Thus, requiring the assertion of contribution claims during the original proceeding conserves judicial resources.

2. Fairness

In addition to promoting judicial economy, compulsory contribution claims ensure fairness by protecting the original defendant from inconsistent verdicts.[58] Usually, the doctrine of collateral es-

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50. *Id.*

51. *See* Muhlbauer v. Kruzel, 39 Ill. 2d 226, 229, 234 N.E.2d 790, 792 (1968) (the objective of third-party actions is "to save the time and cost of a reduplication of evidence").

52. Horan, *Contribution in Illinois: Skinner v. Reed-Prentice and Senate Bill 308*, 61 CHI. B. REC. 331, 340 (1980).

53. *Id.*

54. *Id.*

55. Appel & Michael, *Contribution Among Joint Tortfeasors in Illinois: An Opportunity for Legislative and Judicial Cooperation*, 10 LOY. U. CHI. L.J. 169, 202 (1979) (advocating that the Illinois Legislature should enact "a comprehensive statute governing contribution among joint tortfeasors" in response to the judicial decision that established a right to contribution).

56. *Id.*

57. Horan, *supra* note 52, at 340.

58. *See infra* notes 59-66 and accompanying text. Inconsistent verdicts are not only inequitable, but also undesirable from the vantage point of the judiciary and society as a

toppel protects a defendant from inconsistent verdicts. The objective of collateral estoppel is to prohibit relitigation of issues of fact and law that have been determined judicially.[59] The doctrine of collateral estoppel, however, binds only those individuals who were parties to the original action.[60] Thus, if the defendant asserts a contribution claim after the initial proceedings to which the potential contributing defendant was not a party, collateral estoppel does not apply to bar relitigation on the issue of common liability.[61]

Relitigation of liability creates the potential for inconsistent judgments.[62] During the interim between the judgment against the original defendant and the subsequent litigation of the contribution claim, the evidence could be destroyed or the memories of the witnesses could fade.[63] If the evidence does change, the original defendant could be found liable in the first action, but a culpable third-party defendant could be found not liable in a subsequent proceeding.[64] Moreover, because different tribunals would weigh the evidence, inconsistent results could occur even if identical or substantially similar evidence is presented.[65] Requiring the assertion of a contribution claim during the initial proceeding protects

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whole. Inconsistent judgments weaken the authority and effectiveness of the courts; this weakness, in turn, undermines the "law's utility as a stabilizing social influence." Comment, *Nonparties and Preclusion by Judgment: The Privity Rule Reconsidered*, 56 CALIF. L. REV. 1098, 1099 (1968) (arguing that substantial commonality of interest between the nonparty and the party should be the standard used to determine the binding effect of a prior judgment upon a nonparty).

For a further discussion of the impact of judicial inconsistency upon the prestige of the courts, see Vestal, *Rationale of Preclusion*, 9 ST. LOUIS U.L.J. 29, 33-34 (1964) (stating that the promotion of judicial efficiency and judicial consistency and the protection of prior litigants from harassment justify preclusion by judgment).

59. 1B J. MOORE, J. LUCAS, & T. CURRIER, MOORE'S FEDERAL PRACTICE ¶ 441(2) (2d ed. 1988).

60. *Id.* at 724-25. *See also* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 n.7 (1979) (binding a party by a judgment without affording an opportunity to be heard would violate the due process requirements of the United States Constitution).

61. Comment, *supra* note 1, at 708. *See also* Horan, *supra* note 52, at 340.

62. Vestal, *supra* note 58, at 33 ("[i]f one hypothesizes a situation wherein law suits or issues can be tried more than once . . . [t]he possibility of inconsistent judgments is obvious").

63. Comment, *supra* note 1, at 713.

64. *See supra* notes 62-63 and accompanying text.

65. Schroeder, *Relitigation of Common Issues: The Failure of Nonparty Preclusion and an Alternative Proposal*, 67 IOWA L. REV. 917, 942-43 (1982) (proposing intrastate transfers and consolidation procedures for common-issue cases rather than preclusion of nonparties, to reduce the caseloads of state courts). The most significant cause of inconsistent verdicts is the wide discretion juries have in determining factual issues. *Id.* This discretion prevents ascertaining whether a particular jury based its verdict on logic or emotion. *Id.* Other factors which contribute to inconsistent verdicts include the posture in which the case is tried, the identity of the parties, and the composition of the jury. *Id.*

the original defendant from such inconsistent verdicts.[66] Thus, compulsory contribution claims promote fairness.

Compulsory contribution claims further promote fairness by protecting potential contributing defendants from prolonged exposure to liability.[67] Prior to *Laue*, the limitations period for contribution claims began running upon the adjudication of liability or upon the payment of a settlement by the defendant.[68] The statute ran for two years.[69] Based on the five-year limitation period for a tort injury in Illinois,[70] a person potentially subject to liability for contribution could have remained vulnerable to a contribution claim for over a decade after the plaintiff was injured.[71] After the *Laue* court interpreted the Contribution Act to require that a claim for contribution be asserted during the initial proceeding,[72] a potential contribution defendant acquires repose as soon as liability has been adjudicated.[73] Thus, a defendant still can assert a contribution claim against a joint tortfeasor even though an action by the plaintiff against the joint tortfeasor would be time barred.[74] The treatment of contribution claims as compulsory claims, however, enables a person subject to liability for contribution to obtain repose two years earlier.[75]

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66. *See supra* notes 58-65 and accompanying text.

67. *See infra* notes 68-75 and accompanying text.

68. Locke, *Use of Foreign Statutes of Limitations in Illinois: An Analysis of Statutory and Judicial Technique*, 34 DE PAUL L. REV. 409, 439 n.129 (1985).

69. ILL. REV. STAT. ch. 110, para. 13-204 (1987). Paragraph 13-204 provides that "[n]o action for contribution among joint tortfeasors shall be commenced with respect to any payment made in excess of a party's pro rata share more than 2 years after the party seeking contribution has made such payment towards discharge of his or her liability." *Id.* The *Laue* holding limited the applicability of this paragraph to situations in which no suit initiated by the injured party is pending. Laue v. Leifheit, 105 Ill. 2d 191, 196, 473 N.E.2d 939, 941 (1984) (citing Tisoncik v. Szczepankiewicz, 113 Ill. App. 3d 240, 245, 446 N.E.2d 1271, 1275 (1st Dist. 1983)).

70. ILL. REV. STAT. ch. 110, para. 13-205 (1987). Paragraph 13-205 states that "all civil actions . . . shall be commenced within 5 years next after the cause of action accrued." *Id.*

71. For example, prior to *Laue*, if a plaintiff filed an action four years after he was injured, and if judgment was not entered until five years after the suit was filed, potential third-party defendants would have remained vulnerable to contribution claims for eleven years after the tortious conduct occurred.

72. *See supra* text accompanying notes 34-45.

73. *Id.* Thus, after *Laue*, if a plaintiff files an action four years after being injured, and if the judgment is not entered until five years after the filing, potential third-party defendants will remain vulnerable to contribution claims for only nine years after the occurrence of the tortious conduct. *See supra* note 71.

74. *See supra* note 73 and accompanying text.

75. *See supra* notes 68-74 and accompanying text.

B. Undesirable Ramifications of Compulsory Contribution Claims

1. Potential for Jury Confusion

Requiring the assertion of contribution claims during the original adjudication of liability promotes fairness and judicial efficiency.[76] As the number of litigants increases, however, so does the possibility of jury confusion.[77] Any such confusion of the fact finder intolerably leads to unjust results.[78] Also, jury confusion can lead to mistrials and reversals, which would frustrate the goal of judicial economy.[79] Because the complexity, and hence the jury confusion, stems from the compulsory joinder of potential contributing defendants, logic would appear to suggest severance[80] of the

76. *See supra* notes 46-75 and accompanying text.

77. Comment, *The Right to a Jury Trial in Complex Civil Litigation*, 92 HARV. L. REV. 898, 899 (1979) ("[in] multiparty suits, there may be so many claims, counterclaims, and cross-claims, predicated on differing, yet interdependent legal grounds and requiring separate, yet related proof as to defy the ability of jurors to organize the evidence coherently in order to reach a rational verdict") [hereinafter *Jury Trial*]. *See also* Comment, *Preclusion of Absent Disputants to Compel Intervention*, 79 COLUM. L. REV. 1551, 1568-69 (1979) (advocating that the preclusion of claimants who had been offered an opportunity to be heard is a "promising avenue of reform").

Commentators argue that litigants in complex civil litigation are denied a jury composed of a fair cross-section of the community because prospective jurors with significant commercial responsibilities often are excused from serving at lengthy trials. *See, e.g.*, Comment, *The Right to Trial by Jury in Complex Litigation*, 20 WM. & MARY L. REV. 329, 351 (1978).

78. "To afford merely the opportunity to present evidence and argument in a forum unable to comprehend them is a mockery of the judicial process." Kirkham, *Problems of Complex Civil Litigation (An addendum to "Complex Civil Litigation — Have Good Intentions Gone Awry?")*, 83 F.R.D. 497, 529 (1979).

Jury competency has been debated by numerous commentators. *Compare* Schroeder, *Religitation of Common Issues: The Failure of Nonparty Preclusion and an Alternative Proposal*, 67 IOWA L. REV. 917, 942-43 (1982) *with* P. DIPERNA, JURIES ON TRIAL: FACES OF AMERICAN JUSTICE (1984). *See also* Broeder, *The Functions of the Jury: Facts or Fictions?*, 21 U. CHI. L. REV. 386 (1954); Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power*, 56 TEX. L. REV. 47 (1977).

This Comment assumes the competence of juries in traditional two-party civil litigation and focuses on ways to ensure that this competency survives the complexity of multiparty litigation.

79. Woods, *Some Observations on Contribution and Indemnity*, 38 ARK. L. REV. 44, 70 (1984).

80. Illinois law allows severance "as an aid to convenience, whenever it can be done without prejudice to a substantial right." ILL. REV. STAT. ch. 110, para. 2-1006 (1987). In Illinois, the trial court has discretion to sever an action involving multiple defendants, and the severance order will not be reversed unless an abuse of discretion is shown. Woodward v. Mettille, 81 Ill. App. 3d 168, 400 N.E.2d 934 (3d Dist. 1980). For a further discussion of severance in multiparty actions in Illinois, see Tone & Eovaldi, *Separation of Trials and Appeals in Multiparty Actions*, 1967 U. ILL. L.F. 224 (1967).

Under federal law, the district judge has the authority to sever a third-party claim "if confusion or prejudice would otherwise result." Thompson v. United Artists Theatre

action into less complex parts.[81] Nevertheless, severance is inconsistent with the underlying objective of compulsory contribution — to maximize judicial resources.[82] Because severance offers an imperfect solution to the increased potential for jury confusion, a trial judge must weigh the desirability of the adjudication of all issues in a single proceeding against the possibility that a single trial will become unmanageable.[83]

2. Potential Forfeiture of a Contribution Claim

A second undesirable ramification of compulsory contribution claims is the creation of the potential for forfeiture of a contribution claim.[84] Forfeiture could occur when the court adjudicating liability lacks subject matter jurisdiction over the contribution claim because another court has exclusive jurisdiction.[85] To avoid such an injustice, however, the Illinois Appellate Court for the Fifth District formulated an exception to the Contribution Act in *Welch v. Stocks*.[86] The *Welch* court affirmed the dismissal of the defendant's third-party action for contribution from the state because the circuit court lacked subject matter jurisdiction over such

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Circuit, Inc., 43 F.R.D 197, 201 (S.D.N.Y. 1967) (quoting FED. R. CIV. P. 14, advisory committee note to 1963 amendment).

81. MANUAL FOR COMPLEX LITIGATION § 21.632 (2d ed. 1985). *See also* Appel & Michael, *supra* note 55, at 199.

82. *See* Palmer v. Mitchell, 57 Ill. App. 2d 160, 166, 206 N.E.2d 776, 779 (1st Dist. 1965) ("[s]everance of these causes was clearly inconsistent with the policy and purpose of [third party procedures,] which is to avoid a multiplicity of suits").

83. Note, *Developments in the Law — Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874, 877 (1958). For a further discussion and analysis, see *infra* notes 108-30 and accompanying text.

84. *See* Byron v. Village of Lyons, 148 Ill. App. 3d 1057, 500 N.E.2d 499 (1st Dist. 1986) (third-party contribution claims against the State were dismissed, because the circuit court lacked subject matter jurisdiction).

85. *Id.* In 1962, the Illinois Constitution of 1870 was amended to provide that "[t]he Circuit Court shall have unlimited original jurisdiction of all justiciable matters, and such powers of review of administrative action as may be provided by law." ILL. CONST. of 1870, art. VI, § 9. Notwithstanding this grant of general jurisdiction to the circuit courts, the Court of Claims has exclusive jurisdiction over certain claims against the State of Illinois. *See* ILL. REV. STAT. ch. 37, para. 439.8(a)-(f) (1987). The Illinois General Assembly acquired authority to confer exclusive jurisdiction over actions against the state to the Court of Claims under the 1970 Illinois Constitution which provides: "[e]xcept as the General Assembly may provide by law, sovereign immunity in this State is abolished". ILL. CONST. art. XIII, § 4.

86. 152 Ill. App. 3d 1, 503 N.E.2d 1079 (5th Dist.), *appeal denied*, 114 Ill. 2d 559, 508 N.E.2d 737 (1987). *See also* Filippini & Racette, *State & Local Government*, 19 LOY. U. CHI. L.J. 691, 705 (1988). In *Welch*, the plaintiff sued county officials, and the county officials filed a claim for contribution against the state. *Welch*, 152 Ill. App. 3d at 3, 503 N.E.2d at 1080. This third-party procedure was dismissed for lack of jurisdiction. *Id.* at 4-5, 503 N.E.2d at 1081.

a claim. The *Welch* court, however, recognized that the defendant could subsequently assert his claim for contribution in a separate action in the Court of Claims, which possessed the appropriate subject matter jurisdiction.[87] Thus, although the treatment of contribution claims as compulsory third-party procedures has created a possibility of complete preclusion of a contribution claim, this judicially created exception to compulsory contribution claims may have resolved the problem.[88]

3. Collusion Between the Original Plaintiff and the Original Defendant

Another undesirable ramification of compulsory contribution claims is the increased potential for collusion caused by bringing all the potentially liable parties into the litigation.[89] One form of collusion could involve an agreement between the plaintiff and the original defendant whereby the defendant fails to raise an affirmative defense to the plaintiff's prima facia case, and the plaintiff presents evidence which portrays the third-party defendant as the more culpable tortfeasor. Section 2-406(b) of the Illinois Code of Civil Procedure, however, prevents this form of collusion by allowing a third-party defendant to assert any defense that a third-party plaintiff has to the original plaintiff.[90] Thus, although compulsory contribution claims promote multiparty actions which, in turn, increase the potential for collusion, a previously existing rule of civil procedure has minimized this possibility of collusion.[91]

4. Collusion Between the Plaintiff and the Settling Defendant

The Contribution Act provides that, if less than all defendants settle with a plaintiff, the plaintiff's recovery from the nonsettling

87. *Welch*, 152 Ill. App. 3d at 4-5, 503 N.E.2d at 1081.

88. *See supra* notes 84-87 and accompanying text. For an alternative solution to the problem posed in *Welch*, see *infra* notes 131-38 and accompanying text.

89. *See* Hill, *Illinois Trial Practice and Procedure*, THIRD PARTY PRACTICE 4-11 (IICLE 1984) (the possibility of secretive agreements is an inherent problem in multiparty actions).

90. ILL. REV. STAT. ch. 110, para. 2-406(b) (1987). Paragraph 2-406(b) states that "[t]he third-party defendant may assert any defenses which he or she has to the third-party complaint or which the third-party plaintiff has to the plaintiff's claim." *Id.*

A third-party defendant is allowed to use the defenses available to the original defendant in order to preclude the possibility of saddling a third-party defendant with any inadequacies of the original defendant's defense of the underlying claim. Reading and Reference Materials of the 35th Annual Meeting of the Illinois Judicial Conference 36 (Sept. 7-9, 1988) (citing Jenner, Tone & Martin, *Historical and Practice Notes*, ILL. ANN. STAT. ch. 110, para. 2-406 (Smith-Hurd 1983)).

91. *See supra* notes 89-90 and accompanying text.

defendants is reduced by the amount of settlement or the amount actually paid, whichever is greater.[92] Reducing the plaintiff's judgment by the amount of settlement protects the plaintiff from a low settlement because the plaintiff can collect the balance of the judgment from other defendants.[93] This situation, however, lends itself to collusive settlements because a plaintiff knowingly could agree to a low settlement in return for some benefit unrelated to a just recovery for damages.[94] For example, a plaintiff could agree to a low settlement from a defendant whose testimony would be unfavorable[95], who is a friend or relative, or who is partially insolvent.[96] Also, a plaintiff could accept a low settlement in exchange for favorable testimony or for some other benefit in addition to the settlement.[97]

The Contribution Act provides two mechanisms to minimize collusion. The Contribution Act states that the amount by which the judgment is to be reduced is that "amount stated in the release or the covenant, or the amount of the consideration actually paid for it, whichever is greater."[98] Thus, if the nonsettlor can show that the amount paid by the settling defendant to the plaintiff exceeded the amount required by the settlement, the plaintiff's recovery from the nonsettling defendant will be reduced by the amount actually paid by the settling defendant.[99]

Additionally, the Contribution Act discourages collusion by requiring settlors to act in good faith.[100] Thus, a nonsettlor who suspects that a settlement resulted from collusion can challenge the settlement on the basis of good faith.[101] Nevertheless, the defendant's burden of proof in establishing bad faith negotiations is oner-

92. ILL. REV. STAT. ch. 70, para. 302(c) (1987). For the language of this statute, see *supra* note 48.

93. Gordon & Crowley, *Indemnity Issues in Settlement of Multi-Party Actions in Comparative Negligence Jurisdictions*, 48 INS. COUNS. J. 457, 459 (1981) (advocating a system that precludes good faith challenges to settlements and the right to contribution between defendants).

94. Comment, *Comparative Negligence, Multiple Parties, and Settlements*, 65 CALIF. L. REV. 1264, 1280 (1977).

95. Gordon & Crowley, *supra* note 93, at 459.

96. Comment, *supra* note 94, at 1280.

97. *Id.*

98. ILL. REV. STAT. ch. 70, para. 302(c) (1987).

99. *Id.*

100. *Id.*

101. Any assertion that a settlement is invalid must be demonstrated by clear and convincing evidence. O'Connor v. Pinto Trucking Serv., Inc., 149 Ill. App. 3d 911, 915, 501 N.E.2d 263, 267 (1st Dist. 1986); Wasmund v. Metropolitan Sanitary Dist., 135 Ill. App. 3d 926, 928, 482 N.E.2d 351, 353 (1st Dist. 1985).

ous.[102] Thus, the treatment of a contribution claim as a compulsory procedure increases the potential for collusive settlements, and the settlement policy of the Contribution Act does not adequately protect the nonsettling defendant.[103]

IV. ANALYSIS

As indicated above, requiring the assertion of claims for contribution during the initial proceeding offers both advantages and disadvantages. As an advantage, this requirement promotes judicial economy by encouraging settlements and preventing duplication of evidence.[104] Also, equity favors compulsory contribution claims because they provide earlier repose for third-party defendants and protect the original defendant from inconsistent verdicts.[105] Moreover, although many undesirable ramifications of compulsory contribution claims exist, other rules of civil procedure and judicially created exceptions to the Contribution Act have minimized the effect of many of these ramifications.[106]

Thus, compulsory contribution claims reflect a sound policy because the compulsory joinder of such claims promotes judicial efficiency with a minimal sacrifice of justice.[107] Three issues inherent

102. *See* Bryant v. Perry, 154 Ill. App. 3d 790, 504 N.E.2d 1245 (2d Dist. 1986) (court upheld settlement between a daughter, the plaintiff, and her mother, a third-party defendant, despite allegations that the familial relationship between settling parties and the fact that the amount of settlement was significantly lower than both the estimated value of the case and the maximum insurance coverage gave rise to an inference of collusion); Lowe v. Norfolk & Western Ry. Co., 124 Ill. App. 3d 80, 463 N.E.2d 792 (5th Dist. 1984) (court upheld settlement between the plaintiff-employee and the defendant-manufacturer despite the defendant-employer's argument that the plaintiff's receipt of a tactical advantage by removing one of the defendants showed bad faith; the defendant-employer alleged that the settlement was not proportional to the relative degree of fault and that the settlement was unreasonably low based on the evidence). For a further discussion, see Perona & Murphy, *Good Faith Settlement Under the Contribution Act: Do Trial Courts Have Too Much Discretion?*, 20 LOY. U. CHI. L.J. 961 (1989).

103. *See supra* notes 92-102 and accompanying text. For a further discussion and analysis, see *infra* notes 139-50 and accompanying text.

104. *See supra* notes 46-57 and accompanying text.

105. *See supra* notes 58-75 and accompanying text.

106. *See supra* notes 76-103 and accompanying text.

107. For a discussion of the elements of an analysis of system fairness, see Newman, *Rethinking Fairness: Perspectives on the Litigation Process*, 94 YALE L.J. 1643 (1985). Judge Newman argues, *inter alia*, that:

> Fairness of system is not some abstraction competing against the flesh and blood of fairness of outcome. Fairness of system reflects the aggregate impact of the litigation process upon the lives of all actual and potential litigants. It is concerned with the money each person is obliged to spend to achieve an outcome, with the time each person must invest until an outcome is reached, and with losses uncompensated because the litigation process is rightly perceived as involving too much time and money to justify its use.

in this policy, however, merit further analysis: (1) what alternatives should a judge consider when deciding whether to sever a multiparty action in order to avoid jury confusion; (2) whether a more desirable means exists to avoid complete preclusion of a contribution claim when a court other than the court adjudicating liability has exclusive jurisdiction over the contribution claim; and (3) what changes should be made to the settlement policy of the Contribution Act in order to ensure adequate protection from collusion to the nonsettling defendant?

As previously noted, the compulsory joinder of contribution claims increases the potential for jury confusion.[108] When adding parties results in conceptual difficulties for the fact finder, an obvious solution would be to sever the action into less complex parts.[109] The potential for jury confusion, however, can be minimized through methods other than severance.[110] For example, the judge can reduce the size of the multiparty case by requiring that the attorneys "make every attempt to narrow, simplify, and clarify the issues to be litigated."[111] Also, the judge can promote stipulations of facts and can restrict testimony to the disputed issues.[112] Finally, the judge can designate one or two attorneys as "lead counsels" for both the original and potential contributing defendants.[113] These attorneys would be given primary responsibility for presenting objections and examining the witnesses.[114] Attorneys for the other defendants could supplement the work of the lead counsels only on matters not previously covered by the lead counsels.[115]

In addition to reducing the size of a multiparty case, the judge can minimize the risk of jury confusion due to multiple contribution claims by facilitating the jurors' understanding of the evidence. For instance, the judge can allow the jury to take notes[116]

Id. at 1652.

108. *See supra* note 77 and accompanying text.

109. *See supra* notes 80-81 and accompanying text.

110. *See infra* notes 111-25 and accompanying text. Recall that severance is contrary to the objectives of compulsory joinder of claims for contribution — promoting judicial economy and preventing inconsistent verdicts. *See supra* notes 46-66 and accompanying text.

111. Note, *Preserving the Right to Jury Trial in Complex Civil Cases*, 32 STAN. L. REV. 99, 116 (1979).

112. *Id.*

113. MANUAL FOR COMPLEX LITIGATION § 22.22 (2d ed. 1985).

114. *Id.*

115. *Id.*

116. Comment, *The Right to Trial by Jury in Complex Litigation*, 20 WM. & MARY L. REV. 329, 354 (1978).

and to retire with the trial transcripts,[117] and the judge can encourage the use of visual aides, scientific polls, and computer analysis of raw data.[118] Also, the judge may minimize the jury's conceptual difficulties by specifying the order in which the issues must be presented,[119] providing instructions both before and after the trial,[120] outlining for the jury the analytical process which the jury should employ,[121] and using special verdicts.[122] Finally, the trial judge could adopt bifurcated hearings.[123] Depending on the degree of complexity, the jury could determine the issues of the original defendant's liability and the third-party defendant's liability under separate instructions,[124] or the same jury could resolve the liability issues in successive trials.[125]

Should the trial judge determine that despite the available judicial tools, the risk of jury confusion outweighs the benefits of adjudicating all issues in one proceeding, the judge retains the option of severing the action. Severance of a multiparty action could be accomplished by having different tribunals determine the issues of liability and damages[126] or the issues of liability and agency.[127] Nevertheless, if prejudice to a litigant would result from the adjudication of liability in a single tribunal, a court could sever the primary liability issues from the contributory liability issues.[128] Although numerous procedural devices are available, the responsi-

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117. *Id.*

118. Note, *supra* note 111, at 116.

119. *Id.*

120. *Jury Trial, supra* note 77, at 915.

121. *Id.*

122. Note, *supra* note 111, at 118.

123. Appel & Michael, *supra* note 55, at 199-200.

124. *Id.*

125. *Id.* Any adjournment before the trial resumes should be as brief as possible to minimize the possibility that jurors would forget the evidence and the risk of juror disqualification or unavailability. MANUAL FOR COMPLEX LITIGATION § 21.632 n.192 (2d ed. 1985).

126. MANUAL FOR COMPLEX LITIGATION § 21.632 n.185 (2d ed. 1985). Using different tribunals would allow for the adjudication of issues involving common evidence while preserving noncommon issues for subsequent determination. *Id.*

127. *See, e.g.*, Rossano v. Blue Plate Foods, Inc., 314 F.2d 174 (5th Cir.), *cert. denied*, 375 U.S. 866 (1963).

128. *See, e.g.*, Klavine v. Hair, 29 Ill. App. 3d 483, 331 N.E.2d 355 (3d Dist. 1975). In *Klavine*, the decedent was killed in an automobile accident. *Id.* at 484-85, 331 N.E.2d at 356. The decedent's estate brought suit for wrongful death against the motorist and the automobile owner. *Id.* at 485, 331 N.E.2d at 356. During the trial, certain evidence was held inadmissible against the motorist, but admissible against the automobile owner. *Id.* at 488, 331 N.E.2d at 359. The trial judge granted a motion for severance. *Id.* The appellate court upheld the order for severance because a "limiting instruction to the jury might not [have been] sufficient to avoid prejudice to [the] defendant." *Id.*

bility of preventing an unfair verdict due to jury confusion weighs heavily on the trial judge.[129] If, notwithstanding his efforts, the trial judge determines that the jury verdict is irrational, he can grant a judgment notwithstanding the verdict or a new trial.[130]

In addition to jury confusion, the compulsory joinder of contribution claims could cause the forfeiture of a contribution claim.[131] As discussed above, the possibility of forfeiture arises when a court, other than the court adjudicating liability, has exclusive jurisdiction over the contribution claim.[132] The court in *Welch v. Stocks*[133] resolved this problem by allowing the original defendant to assert his claim for contribution in a subsequent proceeding.[134] This judicially created exception to compulsory contribution, however, frustrates the underlying goals of judicial economy and the promotion of fairness.

The treatment of compulsory counterclaims under the federal system illustrates an alternative approach to resolving the jurisdictional dilemma presented in *Welch*. Failure to assert compulsory counterclaims under rule 13(a) of the Federal Rules of Civil Procedure,[135] like compulsory contribution claims in Illinois, results in preclusion.[136] Under the federal scheme, if a litigant who is prop-

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129. Arguably, a fourth alternative to avoid prejudice due to jury confusion would require the trial judge to deny the motion for a jury trial on the grounds that the due process clause of the fifth amendment limits the seventh amendment right to a jury trial. *See, e.g.*, Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069, 1086 (3d Cir. 1980) ("we find the most reasonable accommodation between the requirements of the fifth and seventh amendments to be a denial of jury trial when a jury will not be able to perform its task of rational decision making with a reasonable understanding of the evidence and the relevant legal standards"). For a further discussion, see Arnold, *A Historical Inquiry into the Right to Trial by Jury in Complex Civil Litigation*, 128 U. PA. L. REV. 829 (1980); Devlin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment*, 80 COLUM. L. REV. 43 (1980); Comment, *Complex Civil Litigation: Reconciling the Demands of Due Process with the Right to Trial by Jury*, 42 U. PITT. L. REV. 693 (1981).

130. J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE 540-41 (1985).

131. *See supra* notes 84-85 and accompanying text.

132. *Id.*

133. 152 Ill. App. 3d. 1, 503 N.E.2d 1079 (5th Dist.), *appeal denied*, 114 Ill. 2d 559, 508 N.E.2d 737 (1987). For a discussion of this case, see *supra* notes 84-88 and accompanying text.

134. *Welch*, 152 Ill. App. 3d at 4-5, 503 N.E.2d at 1081.

135. FED. R. CIV. P. 13(a) provides in pertinent part:

> A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

Id.

136. J. FRIEDENTHAL, M. KANE & A. MILLER, *supra* note 130, at 350-51.

erly before the court asserts a compulsory counterclaim over which the court lacks subject matter jurisdiction, the judicially developed concept of ancillary jurisdiction provides that the court requires no independent jurisdictional grounds to hear the compulsory counterclaim.[137] In essence, the federal courts have extended their ordinarily strictly limited subject matter jurisdiction to facilitate compulsory counterclaims.[138]

Likewise, the *Welch* court could have extended its subject matter jurisdiction to embrace the contribution claim, rather than directing the defendant to assert the claim in a later proceeding. By drawing on the concept of ancillary jurisdiction, the *Welch* court would have furthered, rather than frustrated, the goal of maximizing judicial resources and promoting fairness, which compulsory contribution claims are designed to achieve.

The final undesirable ramification of compulsory contribution that merits further analysis is the increased potential for collusive settlements. Compulsory contribution promotes settlements,[139] but does not adequately protect the nonsettling defendant from collusion,[140] thereby increasing the potential for collusion.[141] The Contribution Act provides some protection to the nonsettling defendant by requiring good faith negotiations and that any judgment for the plaintiff be reduced by the amount stated in the settlement or by the amount actually paid, whichever is greater.[142] Since the codification of the right to contribution, however, only one reported Illinois appellate opinion has upheld a successful good faith challenge to a settlement.[143] Thus, the nonsettling defendant remains vulnerable to collusion because a plaintiff cannot be hurt by a low settlement[144] and because good faith challenges generally are ineffective.[145]

A better method for protecting a nonsettling defendant from collusion requires reducing the plaintiff's judgment by the settlor's

137. 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1444 (1st ed. 1971).

138. *Id.*

139. *See supra* notes 46-50 and accompanying text.

140. *See supra* notes 92-103 and accompanying text.

141. *See supra* note 103 and accompanying text.

142. *See supra* notes 98-102 and accompanying text.

143. For a discussion of Illinois cases that have adjudicated the issue of whether a settlement was a good faith settlement under the Contribution Act, see Perona & Murphy, *Good Faith Settlement Under the Contribution Act: Do Trial Courts Have Too Much Discretion?*, 20 LOY. U. CHI. L.J. 961 (1989).

144. *See supra* notes 93-97 and accompanying text.

145. *See supra* note 102 and accompanying text.

proportional share of fault, rather than by the amount of settlement.[146] This method would compel the plaintiff to obtain a fair settlement with all of the potentially liable persons.[147] Also, this method would reduce a joint tortfeasor's incentive to settle because a nonsettling defendant no longer could be held liable for an amount in excess of that nonsettling defendant's proportional liability based on fault.[148] The incentive for these defendants to settle, however, would not be reduced unreasonably because the fear of being the sole defendant in a lengthy and expensive trial would remain.[149] Most importantly, the nonsettling defendant would no longer be vulnerable to collusion, because a settlement between a co-defendant and the plaintiff would no longer determine the nonsettling defendant's portion of the liability.[150]

V. CONCLUSION

The compulsory joinder of contribution claims is advantageous because it promotes fairness and judicial efficiency. Moreover, numerous undesirable consequences to compulsory contribution claims have been resolved. Nevertheless, other undesirable ramifications remain. In order to fully minimize the potential for jury confusion, this Comment recommends that the trial judge employ various judicial tools to enhance the jury's conceptual understanding of the multiparty action. If these measures are insufficient, the trial judge should sever the liability issues from the other issues or, as a last resort, sever the issue of the original defendant's liability

146. Fleming, *Report to the Joint Committee of the California Legislature on Tort Liability on the Problems Associated with American Motorcycle Association v. Superior Court*, 30 HASTINGS L.J. 1465, 1496 (1979). New York law exemplifies a contribution statute that offsets the plaintiff's recovery by the settlor's proportional share of fault. N.Y. CONTRIBUTION § 1401 (McKinney 1978) (incorporating N.Y. GEN. OBLIG. § 15-107 (McKinney 1978)). This statutory scheme provides that the plaintiff's judgment will be reduced by the amount stated in the release, the amount of consideration paid, or "the amount of the released tortfeasor's equitable share of damages," whichever is the greatest. *Id.*

Under the comparative negligence statutes of Utah and Wyoming, a plaintiff can hold each defendant liable for only that defendant's proportional share of fault. UTAH CODE ANN. § 78-27-38 (1987); WYO. STAT. § 1-1-109 (1988). These statutory schemes have the same effect as a settlement policy that reduces the plaintiff's recovery by the settlor's proportional share of fault because under both schemes a plaintiff cannot recover from a defendant an amount that exceeds that defendant's proportional share of fault.

147. Fleming, *supra* note 146, at 1496.

148. *See supra* notes 48-49 and accompanying text.

149. *See supra* note 50 and accompanying text.

150. For a discussion of an alternative method for ensuring adequate protection from collusive settlements, see Perona & Murphy, *Good Faith Settlement Under the Contribution Act: Do Trial Courts Have Too Much Discretion?*, 20 LOY. U. CHI. L.J. 961 (1989).

from the issue of the third party's liability. Also, this Comment suggests that the court in *Welch v. Stocks*,[151] could have adhered more closely to the underlying objectives of compulsory joinder of claims for contribution by extending its subject matter jurisdiction, instead of carving out an exception to the doctrine of compulsory contribution claims.

Finally, because requiring the assertion of contribution claims during the adjudication of liability both promotes settlements and increases the potential for collusion, the settlement policy of the Contribution Act does not adequately protect the nonsettling defendant from a collusive settlement. However, reducing the plaintiff's judgment by the settling defendant's proportional liability based on fault, rather than by the amount of settlement, would adequately protect a nonsettling defendant from a collusive settlement. The Illinois Legislature should amend the Contribution Act to minimize fully the undesirable ramifications of compulsory contribution.

BRIGITTE M. VON WEISS

151. 152 Ill. App. 3d 1, 503 N.E.2d 1079 (5th Dist.), *appeal denied*, 114 Ill. 2d 59, 508 N.E.2d 737 (1987). For a discussion of this case, see *supra* notes 84-88 and accompanying text.