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INTRODUCTION

Pre-trial settlement is a mechanism widely used to avoid needless and drawn out litigation. Pre-trial settlement not only reduces the burden on overcrowded court dockets, but also provides an injured party with a relatively quick source of compensation. Allowing both parties to negotiate a mutually satisfactory solution is often preferable to judicial resolution. The number of pre-trial settlement procedures available is limited only by the ingenuity of the parties' counsel. Indeed, public policy considerations constitute the only constraints on the enforceability of settlement agreements.

In recent years, the Illinois Supreme Court and the Illinois Legislature have endorsed two practices which could potentially play a major role in influencing pre-trial settlements: the use of loan receipt agreements and contribution among joint tortfeasors. Approximately ninety percent of civil litigation is disposed of prior to trial. Traynor, Lawsuits: First Resort or Last?, 1978 UTAH L. Rev. 635-36.

1. Approximately ninety percent of civil litigation is disposed of prior to trial. Traynor, Lawsuits: First Resort or Last?, 1978 UTAH L. Rev. 635-36.

2. Settlements provide prompt compensation for three reasons; they help to avoid (1) the delays associated with obtaining complete discovery before trial; (2) the delays associated with crowded court calendars; and (3) the delays in conducting the trial itself. As one commentator noted, facts "that could be quickly agreed to in dispute-negotiation must be laboriously reconstructed . . ." in court. Eisenberg, Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking, 89 HARV. L. Rev. 637, 657-58 (1976).


7. The Illinois Supreme Court recognized contribution in Skinner v. Reed-Prentice Division Package Machinery Co., 70 Ill. 2d 1, 374 N.E.2d 437 (1977), modified, 70 Ill. 2d 16, 374
though both loan receipt agreements and contribution were originally sanctioned to promote settlement, the public policy considerations underlying these devices are not only dissimilar, but actually conflict. In addition to promoting settlement, contribution among joint tortfeasors insures that the rights of nonagreeing parties are taken into consideration in providing for an equitable distribution of liability. The conflict results from the fact that while loan receipt agreements promote settlement, they do so at the expense of an equitable distribution of liability by taking into account only the interests of the agreeing parties. Consequently, nonagreeing parties are often forced to pay a disproportionate share of damages under the terms of a loan receipt agreement in which they did not participate. Because the use of loan receipt agreements contravenes the policy considerations underlying contribution among joint tortfeasors, the viability of loan receipt agreements as an equitable settlement device must be reexamined following the adoption of contribution in Illinois.

This article will discuss the operation of loan receipt agreements and contribution in Illinois. The policies upon which each is based will also be examined. Finally, the effect of the adoption of contribution on the continued use of loan receipt agreements will be analyzed.

**Loan Receipt Agreements in Illinois**

*Background*

The use of loan receipt agreements as a settlement device first arose in the context of insurance litigation. Although loan receipt

8. See notes 25 through 33 *infra*, and accompanying text.
9. See notes 61 through 91 *infra*, and accompanying text.
10. Specifically, the loan receipt agreement developed as a means of payment between shippers and their insurance carriers. The insurer “loaned” the shipper an amount equal to its loss; the shipper would then bring a cause of action against the carrier, or other liable third party, repaying the insurer out of any recovery. The historic basis for these agreements was explained by the Illinois Supreme Court in Reese v. Chicago, Burlington & Quincy R.R., 55 Ill. 2d 356, 303 N.E.2d 382 (1973): The practice of loaning funds to injured parties prior to an adjudication as to liability originated with marine insurers and become common during the last century. Loan receipts developed as a tactic in the struggle between common carriers and insurers to shift liability for shipping losses to one another. When the carriers
agreements have taken many different forms, all agreements inserted a clause in their bills of lading providing that they would receive the benefit of any insurance procured by the shipper, insurers responded by stipulating that they would not be liable when the carrier was at fault. The insurance policies further prohibited the insured from making any agreement which might affect the insurer's right of action against the carrier. These conflicting provisions led to an unsatisfactory situation wherein a shipper, who was entitled to compensation from either his insurer or the carrier, was without funds until final judicial disposition of his claim against the carrier. Against this background evolved the loan receipt as a device by which insurers would readily put money in the hands of shippers, without compromising their own rights against negligent carriers. It also had the secondary benefit for insurers of preventing subrogation, since suits against the tortfeasors in the insurer's name would seldom be as rewarding as a suit by the injured shipper. This type of arrangement was endorsed by the United States Supreme Court in Luckenboch v. W.J. McCahan Sugar Refining Co. 248 U.S. 139 (1918), as 'consonant both with the needs of commerce and the demands of justice.' Id. at 149. 


11. Several types of settlement devices similar in effect to loan receipt agreements have been recognized in other jurisdictions. These include: sliding scale agreements, "Mary Carter" agreements and "Gallagher" agreements. A sliding scale agreement is defined by the California State Legislature, Cal. Civ. Pro. Code §877.5(b) (1979), as:

An Agreement or covenant between a plaintiff or plaintiffs and one or more, but not all, alleged tortfeasor defendants, where the agreement limits the liability of the agreeing tortfeasor defendants to an amount which is dependent upon the amount of recovery which the plaintiff is able to recover from the nonagreeing defendant or defendants. This includes agreements in the form of a loan from the agreeing tortfeasor defendant to the plaintiff or plaintiffs which is repayable in whole or in part from the recovery against the nonagreeing tortfeasor defendant.

Two common law devices having the same effect as a loan receipt agreement but differing in that payment occurs after judgment are the "Mary Carter Agreement" and the "Gallagher Agreement".


In both of these agreements the agreeing defendant's liability is tied to the amount of the judgment rendered against the nonsettling defendant. For example, in Booth v. Mary Carter Paint Co., 202 So. 2d 8 (Fla. App. 1967), the settling defendant agreed to pay the plaintiff $12,500 if a verdict was rendered against the plaintiff. If a verdict of less than $37,500 was rendered against the other defendants, the settling被告 agreed to make up the difference between the verdict and $37,500 up to $12,500. If a verdict of greater than $37,500 were returned against the other defendants, the agreeing defendant would not have to pay damages.

The effect of these agreements is exactly the same as a loan receipt agreement. The only difference is the time of payment.

For a comparison of these agreements, see Comment, Mary Carter Agreements: Unfair
share three common characteristics. First, the plaintiff enters into an agreement with less than all of the joint tortfeasors. Second, the plaintiff is guaranteed a specified minimum recovery. Third, the agreeing defendant’s liability for damages decreases as the size of the plaintiff’s recovery from the nonagreeing defendants increases.

The most common form of loan receipt agreement, which has been endorsed by the Illinois courts, permits the agreeing defendant to make an interest free loan to the plaintiff. The plaintiff then agrees to repay the loan to the extent that he recovers against the nonagreeing defendants. If the plaintiff is unable to recover a judgment, he is not obligated to repay any of the loaned funds. If, on the other hand, the plaintiff recovers an amount equal to the amount of the loan, he pays the entire amount to the agreeing defendant. If a judgment in excess of the amount of the loan is recovered, the plaintiff pays an amount equal to the amount of the loan to the agreeing defendant and retains the remaining amount of the judgment. Thus, under the terms of an ordinary loan receipt agreement, if the plaintiff recovers a judgment against the nonagreeing defendants in an amount equal to or in excess of the amount of the loan, the agreeing defendant is repaid the full amount of his payment and is completely absolved from liability for damages.

Judicial Recognition of Loan Receipt Agreements

The Illinois Supreme Court first considered loan receipt agreements in *Reese v. Chicago, Burlington & Quincy R.R.* In *Reese*, a railroad employee was fatally struck by a bucket falling from a
crane which was positioned next to the railroad tracks where he was working. After the plaintiff filed suit against the railroad and the manufacturer of the crane, the railroad and the plaintiff entered into a loan receipt agreement. Under the terms of the agreement, the railroad made a $57,000 interest-free loan to the plaintiff and was subsequently dismissed from the suit. The agreement also required the plaintiff to pursue a judgment against the manufacturer of the crane and repay the railroad up to $57,000 of any judgment entered against the manufacturer. In her action against the manufacturer, the plaintiff was awarded a jury verdict of $149,000. The trial court, holding that the agreement between the plaintiff and railroad was a covenant not to sue, stated that the amount of the loan had to be set off against the judgment to prevent double recovery by the plaintiff. The appellate court reversed the trial court's reduction of the verdict, thereby upholding the terms of the agreement. The Illinois Supreme Court affirmed the appellate court's findings in a four to three decision.

The majority opinion in Reese cited three policy reasons for ratifying the loan receipt agreement. First, the court took the view that the loan receipt agreement was a private settlement. The court determined that, although loan receipt agreements indirectly contravened the existing common law rule against contribution,
this concern was outweighed by the desirability of promoting the private settlement of disputes.25 Second, the court believed that loan receipt agreements would have the positive effect of encouraging larger settlement offers from defendants.26 These larger settlement offers would flow from the probable reimbursement of the agreeing defendant by the successful plaintiff.27 Finally, the court believed that such agreements would simplify complex litigation.28

Although the Illinois Supreme Court focused on these three factors, additional advantages to the plaintiff arising from the use of loan receipt agreements should not be overlooked. Because loaning defendants advance larger amounts of money to the plaintiff,29 the plaintiff is better able to meet current expenses30 and to bear the

25.  Id. at 363-64, 303 N.E.2d at 386. At the time of the decision in Reese, the common law bar against contribution was still in effect. To the extent that loan receipt agreements allow the agreeing defendant to be repaid for his settlement, they were thought to violate this rule. See, e.g., Cullen v. Atchison, Topeka & Santa Fe Ry. Co., 211 Kan. 368, 507 P.2d 353 (1973); Tober v. Hampton, 178 Neb. 858, 136 N.W.2d 194 (1965); Monjay v. Evergreen School Dist. No. 114, 13 Wash. App. 654, 537 P.2d 825 (1975).


28.  Reese v. Chicago, Burlington & Quincy R.R. Co., 55 Ill. 2d 356, 364, 303 N.E.2d 382, 386 (1973). The statement is reasonable to the extent that the loaning defendant was passively negligent. If a defendant is passively negligent and the judgment is enforced against him, he has a separate right to seek indemnity against the actively negligent party. See Harris v. Algonquin Ready Mix, Inc., 59 Ill. 2d 445, 322 N.E.2d 58 (1974); Chicago & Illinois Midland Ry. Co. v. Evans Construction Co., 32 Ill. 2d 600, 208 N.E.2d 573 (1965).

If under a loan receipt agreement the agreeing defendant is also the passively negligent party and the judgment is enforced against the actively negligent party, the loan receipt agreement accomplishes the same result as indemnity, without the necessity of a third party action. In this way complex third party litigation is avoided. Scobey, Loan Receipts and Guarantee Agreements, 10 FORUM 1300, 1315 (1975) [hereinafter cited as Scobey].

29.  See note 26 supra and accompanying text.


All members of the bench and bar are aware of and concerned with the fact that an injured party may wait several years while prolonged and varied court battles are waged before actually obtaining redress for the injury ... In situations such as the case at bar, where the death of the decedent leaves a widow with dependent children, the dire need for immediate funds to compensate for the loss of the earnings of the husband and father may be withheld during the period of time when the maintenance and the education of the children is at its greatest need. Thus meaningful compensation is greatly impaired by the sheer passage of time. The willingness of one joint tortfeasor to place a substantial sum of money at the disposal of the damaged party with a possibility of no recoupment is certainly to be encouraged.

Id. at 67.

See also Northern Indiana Public Service Company v. Otis, 250 N.E.2d 378, 392 (Ind.
cost of litigation. The plaintiff is therefore unlikely to be forced into settling for less than the full value of the claim. Furthermore, loan receipt agreements may also provide the plaintiff with the option of keeping the agreeing defendant in the lawsuit. The plaintiff is then able to present the case to the jury with all parties present, thereby preventing the nonsettling defendants from shifting the blame to the absent party.

**Criticalisms of Loan Receipt Agreements**

The policy reasons articulated by the court in *Reese* for ratifying loan receipt agreements have been extensively criticized. One of the bases of the *Reese* opinion is that such agreements encourage private settlements. This consideration ignores the fact that loan receipt agreements are not purely private settlements. Rather, these agreements contemplate the allocation of the agreeing party's liability for damages to a party not in privity to the agree-

31. See *Lageson*, supra note 11, where the author stated:

Another positive effect of such agreements is the making available to the plaintiff funds, or the guarantee of funds, which make it possible to continue litigation. In the absence of such arrangements, many plaintiffs for lack of funds would be prevented from pursuing an otherwise just case, thereby going uncompensated.

32. Among the jurisdictions allowing the agreeing defendant to remain in the lawsuit are: Arizona: Tucson v. Gallagher, 108 Ariz. 140, 493 P.2d 1197, 1199 (1972); Indiana: Northern Indiana Public Service Co. v. Otis, 250 N.E.2d 378, 387 (Ind. App. 1969); Maryland: General Motors Corp. v. Lahocki, 286 Md. 714, 410 A.2d 1039, 1047 (1980) (allowing the defendant to remain where agreement was revealed to the jury); Oregon: Grillo v. Burke's Paint Company, Inc., 275 Or. 421, 551 P.2d 449, 453 (1976) (agreement admissible upon request of nonagreeing defendant); and Texas: General Motors Corp. v. Simmons, 558 S.W.2d 855, 857 (Tex. 1977) (agreeing defendant may be cross-examined about the agreement).


Furthermore, settlement with the nonagreeing defendant is made more difficult by loan receipt agreements. Because the agreeing defendant can only be repaid if the plaintiff recovers an amount equal to or in excess of the amount of the loan, most agreements include a provision requiring the plaintiff to pursue a judgment against the non-agreeing defendants. Indeed, even absent such a provision, the increased leverage the plaintiff gains by having received a guaranteed minimum recovery makes it more difficult for nonagreeing defendants to seek a reasonable settlement. Litigation is therefore actually promoted rather than deterred. Thus, the Illinois Supreme Court's determination that loan receipt agreements encourage private settlements has not been borne out by the experience in Illinois since Reese.

The second rationale in Reese for ratifying loan receipt agreements was to encourage larger settlement offers. Although it is undisputed that loan receipt agreements increase the amount of settlement offers, the motivation behind these increased offers is suspect. The increased funds may be offered simply as a means of escaping litigation and not in recognition of any liability. An innocent defendant might enter into a large loan receipt agreement hoping that the nonagreeing party be held responsible for the entire judgment. Or, as the dissent in Reese points out, loan receipt

35. One commentator pointed out:
A settlement must be fair as well as final if it is to be respected and enforced by the courts. If only two parties are involved in the dispute, any settlement reached by noncoercive means is presumptively fair to both sides. The presence of additional parties destroys this presumption since any two or more parties may enter into an agreement to which they alone are parties. Such a partial settlement clearly cannot in any way bind nonparties, but may adversely affect their rights in a subsequent trial or settlement negotiation.

Collusive Settlements, supra note 3, at 1398.


37. Mary Carter Agreements, supra note 11, at 786.

38. Michael, supra note 27, at 525; Dure, Has the Loan Receipt Agreement Established Reverse Comparative Negligence or Indemnity Among Active Tortfeasors in Illinois, 64 Ill. B.J. 236, 239 (1975).


This argument, however, is not entirely persuasive; plaintiff would probably want the defendant against whom he would have the least difficulty proving negligence to remain at
agreements are undesirable because the most culpable defendant will probably offer the most money to escape liability. In this situation, the less blameworthy defendant risks shouldering the entire judgement.

The court's third reason for upholding the loan receipt agreement was to simplify complex litigation. This rationale is valid to the extent that the loaning defendant is passively negligent. If, however, the loan is made by an actively negligent defendant the litigation is not simplified. A passively negligent non-agreeing defendant who is held responsible for the entire amount of damages under a loan receipt agreement could seek indemnification from the actively negligent loaning defendant. In this situation, the loan receipt agreement not only fails to simplify litigation, but may promote litigation in the form of indemnification actions.

Not only have loan receipt agreements failed to promote the public policy goals cited in Reese, but they have failed to protect the interests of the non-agreeing defendants as well. Provisions in agreements permitting the plaintiff to keep the loaning defendant in the lawsuit have been severely criticized. Although such provisions present a strategic advantage to plaintiff, nonagreeing defendants are prejudiced by the agreeing defendant's interest in seeing the plaintiff obtain a large judgement. Problems encountered trial. See, Viable Settlement Device, supra note 33, at 762-63.

41. See note 28 supra and accompanying text.
42. This argument presumes the contribution statute is not applicable.
43. Michael, supra note 27, at 525.
44. An additional criticism of loan receipt agreements is that they unduly influence the plaintiff in deciding against whom to execute his judgment. Reese v. Chicago, Burlington & Quincy R.R. Co., 55 Ill. 2d 356, 367, 303 N.E.2d 382, 388 (1973) (Shaeffer, dissenting). Inherent in this argument is the belief that the decision ought to be made freely and be based on equitable considerations. Michael, supra note 27, at 528.


While it is true that a loan receipt agreement may encourage litigation by providing funds for the cost of litigation, the same can be said of any partial settlement. Furthermore, the agreeing defendant does not profit from his loan. The most he can expect is to escape liability. Cullen v. Atchison, Topeka & Santa Fe Ry. Co., 211 Kan. 368, 507 P.2d 353 (1973). See also Michael, supra 27, at 525.
45. The agreeing defendant is interested in plaintiff recovering a judgment at least equal
controlling the loaning parties' interest during trial have led most jurisdictions, including Illinois, to require that the agreeing defendant be dismissed prior to trial. Even so, loaning defendants may prejudice nonagreeing defendants by appearing as witnesses. Most jurisdictions have responded to this problem by adopting procedural rules allowing loan receipt agreements to be introduced as evidence of bias. These rules may ultimately discourage the

to the amount of the loan in order that he might recoup his payment. Inclusion of the agreeing defendant as an ostensible party at trial could prejudice the remaining defendants in a number of ways: (1) by demonstrating sympathy towards the plaintiff, making admissions concerning his guilt, recognizing the extent of the plaintiff's injuries, or simply helping the plaintiff fix liability on the other defendant, the agreeing defendant, assuming the position of an actual defendant in the jury's eyes, may unduly influence the outcome of the case. See Mary Carter Agreements, supra note 11, at 779; (2) by not taking an active part in his defense, the nonagreeing parties may take a more active role, leaving the jury with the impression that only the nonagreeing defendants have reason to fear liability. See Collusive Settlements, supra note 3, at 1402; (3) through procedural and evidentiary devices, e.g. voir dire and cross-examination, the agreeing defendant could aid the plaintiff. Mary Carter Agreements, supra note 11, at 792; Collusive Settlements, supra note 3, at 1401; Loan Agreements, supra note 10, at 256.

Some courts, noting that even without a loan receipt agreement defendants often attempt to place blame on other defendants, believe that no unique prejudice is caused by such behavior. See Tucson v. Gallagher, 108 Ariz. 140, 493 P.2d 1197, 1199-1200 (1972); Northern Indiana Public Service Co., 250 N.E.2d 378, 398 (Ind. App. 1969). One commentator noted, however, that while defendants sometimes maintain positions adverse to one another, "never in the absence of some form of a Mary Carter Agreement, will a defendant encourage a jury to award a large judgment." Mary Carter Agreements, supra note 11, at 784.

46. Although the court in Kenny v. Lakewood Eng'ring & Mfg. Co., 85 Ill. App. 3d 790, 407 N.E.2d 551 (1979) allowed an agreeing defendant to be retained as a party, the better rule is that the loaning defendant must be dismissed prior to trial. See, e.g., Gatto v. Walgreen Drug Co., 61 Ill. 2d 513, 523, 337 N.E.2d 23 (1975); Palmer v. Avco Distributing Corp., 75 Ill. App. 3d 598, 606, 394 N.E.2d 480 (1979). One court has stated that allowing the defendant to remain in the case is the equivalent of trying a non-existent controversy. Gatto v. Walgreen Drug Co., 61 Ill. 2d, 513, 523, 337 N.E.2d 23 (1978). Courts have followed this position even when the agreeing defendants' liability remains conditionally at issue. Schell v. Albrecht, 65 Ill. App. 3d 989, 993, 383 N.E.2d 15, 19 (1978).


47. The agreeing defendant may still be needed to describe the facts of the occurrence or the extent of the plaintiff's injuries. In addition, the testimony of the agreeing defendant may be necessary to establish the remaining party's defense. If so, the remaining defendant will probably be precluded from impeaching the credibility of the agreeing defendant. 48. To combat the potential prejudice caused by the agreeing defendant's biased testimony, Illinois courts, like the courts of most other jurisdictions, have held that the agreeing defendant may be impeached concerning his knowledge of such an agreement. See Casson v. Nash, 74 Ill. 2d 164, 169, 384 N.E.2d 365, 367, (1978); Reese v. Chicago, Burlington & Quincy R.R. Co., 55 Ill. 2d 356, 356, 303 N.E.2d 382, 387 (1973). See also Cox v. Kelsey-Hayes Co., 594 P.2d 354, 359, (Okla. 1978); General Motors Corp. v. Simmons, 558 S.W.2d 855, 857 (Tex. 1977); Bedford School District v. Caron Const. Co., 367 A.2d 1051, 1055 (N.H.
use of loan receipt agreements.49

CONTRIBUTION IN ILLINOIS

History of the Common Law Rule

Prior to the Illinois Supreme Court decision in Skinner v. Reed-Prentice Division Package Machinery Company,50 Illinois had followed the common law rule prohibiting contribution among joint tortfeasors.51 Under this common law rule individuals who acted intentionally and in concert to commit a tortious act were considered joint tortfeasors.52 If the plaintiff’s injury was caused by the actions of joint tortfeasors, he was allowed to join all defendants in a single suit.53 If a judgment was rendered in his favor, the plaintiff was permitted to execute the full amount of his judgment against

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49. Introducing the loan receipt agreement reveals the amount of the loan to the jury. Despite a cautionary instruction to ignore the amount of the loan, juries are unable to overlook it. As noted in Deger v. Beyman, 86 S.D. 598, 200 N.W.2d 134 (1972), this discourages settlement in two ways:

If it shows a nominal or “nuisance” settlement with one tortfeasor, it can be used by a joint tortfeasor to downgrade a plaintiff’s claim. If it reveals a substantial payment the nonsettling tortfeasors would likely urge it as proof that the releasee was the party responsible for the injury, had paid the damages, and that they should be exculpated. This would tend to discourage settlements.

Id. at 138.


52. Prosser, supra note 51, at 291.

53. This was the only circumstance under the common law in which the plaintiff was allowed to join defendants in a single suit. Id. at 293.
any of the joint tortfeasors. The defendant against whom the judgment was executed had no legal right to seek contribution from the other joint tortfeasors. This rule was predicated on the notion that an intentional wrongdoer had no right to seek judicial relief from his own wrongdoing.

The adoption of liberalized rules of joinder permitted plaintiffs to join defendants, other than joint tortfeasors, in a single action. Two defendants acting independently and negligently but causing a single concurrent injury could be joined in the same action. Unfortunately, courts continued to disallow contribution notwithstanding the fact that the common law rationale for the rule no longer existed. These defendants were not joint tortfeasors; rather than intentionally acting in concert, these defendants acted independently and negligently to cause a single injury to the plaintiff. The rationale prohibiting contribution was no longer valid and created an historical anomaly causing injustice to defendants who could not seek contribution from co-defendants. Dean Prosser explained this inequity as follows:

There is an obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were equally, unintentionally responsible, to be shouldered onto one alone, according to the accident of a successful levy of execution, the existence of liability insurance, the plaintiff's whim or spite, or his collusion with the other wrongdoer, while the latter goes scott free.

54. Bueler v. Whaler, 70 Ill. 2d 51, 374 N.E.2d 460 (1977). The rationale for this was two-fold. First, the courts felt it was fair to hold each defendant responsible for the others' actions, since each had acted intentionally and in concert with the others. Secondly, the courts felt there was no logical basis for apportioning damages. Prosser, supra note 51, at 291-92.
55. Prosser, supra note 51, at 305.
56. Settling disputes among wrongdoers was deemed to be a waste of judicial time. See generally James, Contribution Among Joint Tortfeasors: A Pragmatic Criticism, 54 Harv. L. Rev. 1156 (1941).
57. Prosser, supra note 51, at 294-95.
58. Id.
60. Although the defendants had been "joined" in a single action, they were not "joint" tortfeasors, as that term was originally employed. Semantics may have contributed to the confusion in the rule's application.
Judicial Approval and Legislative Adoption of Contribution

In recognition of the harsh consequences of the rule prohibiting contribution, the Illinois Supreme Court abolished the common law rule against contribution in *Skinner v. Reed-Prentice Division Package Machinery Company.* *Skinner* involved a third party action for contribution by the manufacturer of an allegedly defective industrial machine against the employer of the plaintiff. The court reviewed the historical basis for the common law rule against contribution and the various devices courts had previously allowed to mitigate the harsh consequences resulting from the rule. In this regard, the court specifically discussed the use of indemnity and loan receipt agreements. The court then considered the sole remaining justification for the rule forbidding contribution among joint tortfeasors — the court's reluctance to expend judicial resources to determine the relative liability of civil wrongdoers. The court stated that this argument was no longer persuasive, however, because courts were already spending time adjudicating claims for indemnity. The court, then replaced the rule prohibit-

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63. As one appellate court commented, "[t]he possibility of inequity is unavoidable until the rule against contribution yields to a more rational approach which will place upon each tortfeasor liability in proportion to his own culpability." Sargent v. Interstate Bakeries, Inc., 86 Ill. App. 2d 187, 202, 229 N.E.2d 769 (1967).

64. 70 Ill. 2d 1, 374 N.E.2d 437 (1977), modified, 70 Ill. 2d 16, 374 N.E.2d 437 (1978).

65. *Id.* at 4-5, 374 N.E.2d at 438.

66. *Id.* at 10-13, 374 N.E.2d at 441-42.


68. In *Skinner v. Reed Prentice Div. Pack. Mach. Co.*, 70 Ill. 2d 1, 12, 374 N.E.2d 437, 441-42 (1977), the court remarked, A technique recently employed by the bar to circumvent the noncontribution rule has been the use of the loan receipt, approved by this court in *Reese v. Chicago, Burlington & Quincy R.R. Co.*, 55 Ill. 2d 356, 303 N.E.2d 382. This, too, involves the application of an all or nothing rule of liability to situations where some fault is attributable to both parties, and also raises other problems.

69. *Id.* at 12-13, 374 N.E.2d at 442.

ing contribution with a form of contribution which appeared to distribute liability based on relative fault.\(^{71}\)

Shortly after *Skinner*, the Illinois legislature enacted a statute providing for contribution among joint tortfeasors.\(^{72}\) Although the statute does not alter the plaintiff’s right to execute his judgment against the defendant of his choice,\(^{73}\) it does provide a different

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71. The court said, "[T]he governing equitable principles require that ultimate liability for plaintiff’s injuries be apportioned on the basis of the relative degree to which the defective product and the employer’s conduct proximately caused them." *Skinner v. Reed-Prentice Div. Pack. Mach. Co.*, 70 Ill. 2d 1, 14, 374 N.E.2d 437, 442 (1977), modified, 70 Ill. 2d 16, 374 N.E.2d 437 (1978). *See Appel and Michael, supra* note 69, at 188-92. The difference between relative fault contribution and pro-rata contribution is that in the former liability is distributed in proportion to the comparative fault of the defendant, while in the latter it is arrived at by dividing the damages by the number of tortfeasors. *Prosser, supra* note 51, at 310.

72. Ill. Rev. Stat. ch. 70, ¶ 301 et seq. (1979). The act provides in relevant part:

¶ 302 (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 that 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.

(c) When a release or covenant not to sue or not to 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.

..."
means of apportioning damages among the culpable defendants. The statute allows only a pro rata apportionment of damages, thus permitting a defendant to seek contribution against another joint tortfeasor only when he has paid more than his equal share of the judgment. In addition the statute allows the defendant against whom judgement has been entered to seek contribution against a settling defendant only if the settlement agreement was not entered into in "good faith." The court must therefore determine whether the plaintiff and the settling defendant entered into a good faith settlement agreement.

**Determination of "Good Faith" Settlements**

The newly-enacted Illinois statute fails to define the term "good faith" settlement. The operative language of the Illinois statute does, however, closely resemble the language in section 4 of the 1955 Uniform Contribution Among Tortfeasors Act. The history of that act and its predecessor, the 1939 Uniform Contribution Among Tortfeasors Act, may be helpful in determining the meaning of the term "good faith" settlement as used in the Illinois statute.

The 1939 Uniform Act did not provide that a defendant who settled in good faith was immune from liability for contribution to a non-settling defendant. Rather, a settling defendant could be insulated from liability for future contribution only if the plaintiff agreed to reduce any judgment rendered against the non-settling defendant. The drafter's intent was to prevent the plaintiff, by whim or collusion, from distorting the equitable sharing of damages among jointly liable defendants. The net result, however,

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75. Id., ¶ 302 (c) & (d).
76. Uniform Contribution Among Tortfeasors Act, § 4 (1955) provides:
   When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death: (a) 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 claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and, (b) It discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.
77. Uniform Contribution Among Tortfeasors Act (1939).
78. Commissioners' Comment, Handbook of the National Conference of Commissioners on Uniform State Laws § 5 (1939) [hereinafter cited as Commissioners' Comment].
79. The Commissioners' Comment stated, "Under (the act), an injured person, acting in
was to eliminate any incentive to settle. Not only were defendants unwilling to settle and remain open to potential liability for contribution, but plaintiffs refused to forfeit a pro rata share of an unknown judgment. 80

Dissatisfaction with the effect of the 1939 Act on settlements led to the passage of the 1955 Uniform Act. While the drafters of the 1955 Act recognized the importance of encouraging settlements, 81 they did not want to insulate every settling defendant from liability for contribution, thereby enabling parties to circumvent the equitable allocation of damages through disproportionate settlements. In order to balance these competing policies, the drafters amended the act to require the parties to reach a good faith settlement before the settling defendant could be insulated from liability for contribution. 82 The 1955 Uniform Act, like the Illinois statute, offers the courts no express guidelines for determining what constitutes a good faith settlement.

The first interpretation of the meaning of “good faith” settlement under a statute similar to the uniform act 83 was River Garden Farms v. Superior Court for County of Yolo. 84 In River Garden, two minor plaintiffs filed actions for their own personal injuries and the wrongful deaths of their parents which resulted from a fire in a home provided to them by their father’s employer. 85 The plaintiffs settled with three of the four defendants for $1,290,000, allocating $800,000 for the wrongful death claims and $490,000 for personal injuries. 86 The remaining defendant argued that because the allocation of settlement money exposed him to disproportionate liability for the more valuable personal injuries

collusion with or out of sympathy for one of the joint tortfeasors, cannot relieve him from the obligation to contribute to the other tortfeasors by releasing him.” 80

80. COMMISSIONERS’ COMMENT to § 4, Uniform Contribution Among Tortfeasors Act (1955).

81. Id. The COMMISSIONERS’ COMMENT to § 4 noted, “[i]t seems more important not to discourage settlements than to make an attempt of doubtful effectiveness to prevent discrimination by plaintiffs, or collusion in the suit.”

82. Id. The COMMISSIONERS’ COMMENT to § 4 stated, “[t]he requirement that the release or covenant be given in good faith gives the court occasion to determine whether the transaction was collusive, and if so there is no discharge.”


85. 26 Cal. App. 3d at 990-91, 103 Cal. Rptr. at 501.

86. Id. at 991-92, 103 Cal. Rptr. at 502.
Loan Receipt Agreements

The court held that the decision as to what constitutes a good faith settlement is a question of fact. It then listed the following considerations to guide courts in making this determination: the risk of victory or defeat, the risk of a high or low verdict, the unknown strengths or weaknesses of the opponent’s case, the inexact appraisal of the elements of damage, the defendant’s solvency, and the amount of insurance available. The court concluded that the good faith clause should be applied to “strike a balance” between the dual statutory objectives of equitable sharing and encouraging settlement, and should not be applied to invalidate a settlement within a reasonable range of the settler’s fair share.

LOAN RECEIPT AGREEMENTS: A GOOD FAITH SETTLEMENT?

The continued viability of loan receipt agreements as a pre-trial settlement device depends upon the court’s determination that such agreements are entered into in good faith. A finding that the agreement was entered into in bad faith would discourage loan receipt agreements by subjecting the agreeing defendants to liability for unknown amounts of contribution. Moreover, the potential for completely escaping liability would be eliminated.

The good faith provision of the contribution statute entails a balancing of the two objectives of contribution: promoting settlements and providing for an equitable apportionment of damages among joint tortfeasors. Loan receipt agreements, however, do

87. This was because the settlement for the wrongful death and personal injuries claims were to be set-off separately against the respective verdicts. Id. at 996, 103 Cal. Rptr. at 505.
88. Id. at 998, 103 Cal. Rptr. at 507.
89. Id. at 997, 103 Cal. Rptr. at 506. The court in Bishop v. Klein, 402 N.E.2d 1365 (Mass. 1980) held that, in addition, courts should consider the time settlement takes place. Holding that a settlement consisting of all of defendant’s assets entered into after the verdict was rendered did not insulate defendant from an action for contribution, the court said: [T]o apply the contribution bar . . . to a settlement reached after judgment . . . would in essence, constitute a reversion to the common law view that an injured party may apportion the loss among joint tortfeasors as he sees fit.
91. Ill. Rev. Stat. ch. 70, ¶ 302 (c) & (d). (1979)
92. The incentives for entering into loan receipt agreements, the potential of avoiding liability completely or being saddled with the entire judgment, would be eliminated. See notes 39-40 supra and accompanying text.
93. See notes 76-90 supra and accompanying text.
not promote either of these goals. Because of the practical realities surrounding their formation, loan receipt agreements neither promote settlements nor provide a dependable means of equitably apportioning damages. \(^{94}\) Furthermore, the very manner in which the agreements function circumvents the contribution statute. \(^{95}\) Thus, recognizing loan receipt agreements as good faith settlements is inconsistent with the intention of the contribution statute. \(^{96}\)

**Loan Receipt Agreements Are Not a Final Settlement**

Loan receipt agreements do not result in final settlements. A loan receipt agreement reached by the parties neither precludes future litigation nor ends the parties' financial interest in the ensuing action. The agreement is merely a private realignment of the parties involved, delaying settlement until the litigation is completed against the nonagreeing defendants.

Not only does the loan receipt agreement forestall final settlement between the agreeing parties, but litigation is actually promoted. First, inclusion of a clause in loan receipt agreements requiring the plaintiff to continue the action against the nonagreeing defendant encourages litigation. \(^{97}\) Second, even absent such a requirement, the plaintiff's bargaining position may be so improved by the agreement that there is little possibility for compromise with the remaining defendants. \(^{98}\) The plaintiff may therefore place disproportionate demands for settlement upon the nonagreeing defendant. Thus, loan receipt agreements often result in the very targeting of the defendants whom the contribution statute sought to protect.

The policy underlying the adoption of contribution is the equitable apportionment of damages. This policy should yield only when confronted with the policy of encouraging private settlements. Therefore because the policy of encouraging private settlement is not furthered by loan receipt agreements courts should strictly enforce the objective of equitably apportioning damages and allow contribution against loaning defendants.

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94. See notes 36-38, supra.
95. See notes 101-02 infra and accompanying text.
96. See notes 103-05 infra and accompanying text.
97. See note 36 supra and accompanying text.
98. See notes 37-38 supra and accompanying text.
Loan Receipt Agreements Do Not Provide for an Equitable Apportionment of Damages

Similarly, loan receipt agreements violate the second statutory objective of contribution by failing to achieve an equitable apportionment of damages. For example under the type of agreement endorsed in Reese, the loaning defendant is repaid every dollar of the judgment up to the amount of the loan. If the verdict is larger than the loan the non-settling defendants may bear the entire burden which, with the adoption of contribution, should rightfully be borne by all the defendants. Thus damages are not apportioned equitably, but are reapportioned according to the whim and desire of the agreeing parties. This is contrary to the rationale supporting contribution among joint tortfeasors.

The only conceivable instance where funds are contributed by both the agreeing defendant and the non-agreeing defendant occurs when the verdict is less than the amount of the loan. This is an unlikely result because the agreeing defendant normally negotiates for a loan approximating the amount the plaintiff is reasonably certain to recover in his subsequent action against the nonagreeing defendant.99 Even if the verdict exceeds the loan, however, there is no equitable apportionment of damages — the non-agreeing defendant still pays the entire judgment and the agreeing defendant only makes payments in addition to the verdict.100 Therefore, loan receipt agreements provide little chance of achieving the equitable apportionment of damages intended by the passage of the contribution statute.

Loan Receipt Agreements Circumvent the Contribution Statute.

The contribution statute provides that defendants entering into good faith settlements with a plaintiff have no right to contribution from other tortfeasors.101 If a loan receipt agreement is recognized as a good faith settlement, the loaning defendant can receive

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99. This fact has been borne out by experience. None of the Illinois cases dealing with a Reese-type loan receipt agreement involved a situation where the amount of the loan exceeded the verdict.

100. In addition, problems would be raised by the plaintiff's receipt of damages exceeding those awarded by the court. See Popovich v. Ram Pipe & Supply Co., 82 Ill. 2d 203, 412 N.E.2d 518 (1980).

101. Ill. Rev. Stat. ch. 70, ¶ 302 (e) (1979), states:

"A tortfeasor who settles with a claimant . . . is not entitled to recover contribution from another tortfeasor whose liability is not extinguished by the settlement."
contribution indirectly from the other joint tortfeasors who later settled with the plaintiff. This frustrates the intention of the contribution statute.

The statutory provision prohibiting settling defendants from seeking contribution is intended to prevent defendants who are not parties to the settlement agreement from being held responsible for an unreasonably large settlement. If a loan receipt agreement is a good faith settlement, the non-agreeing defendant is forced to settle for a share of the amount loaned in order to avoid litigation. This, in effect, allows the plaintiff and agreeing defendant to establish the proper measure of damages and each remaining defendant's share of contribution, thereby imposing an unreasonably large settlement upon a non-agreeing defendant. This circumvents the contribution statute by allowing the agreeing defendant to receive contribution. Moreover, this arrangement permits the parties to the loan receipt agreement to control the nonsettling defendant's share of contribution.

The Future Use of Loan Receipt Agreements

Loan receipt agreements were initially condoned to lessen the harsh consequences of the common law rule prohibiting contribution. When judicial relief was unavailable, they provided one vehicle for privately transferring the burden of damages from one defendant to another. With the adoption of contribution, however, judicial tolerance of loan receipt agreements is no longer necessary.

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102. While there is no express explanation for the provision, the reason historically given for such requirements is to avoid binding nonagreeing parties to unreasonable settlements. PROSSER, supra note 51, at 308.

103. The Illinois Supreme Court, in Skinner v. Reed-Prentice Div. Pack. Mach. Co., 70 Ill. 2d 1, 374 N.E.2d 437 (1977), modified, 70 Ill. 2d 16, 374 N.E.2d 437 (1978), noted that loan receipt agreements had been allowed as one means of circumventing the harsh consequences of contribution. See note 67 supra and accompanying text.

104. See Taylor v. Dirico, 606 P.2d 3, 10-11 (Ariz. 1980) (Gordon, J., specially concurring opinion). Similarly, one commentator has indicated that judicial toleration of the continued use of indemnity actions should come to an end. Widland, Contribution: The End to Active-Passive Indemnity, 69 ILL. B.J. 78 (1980). Widland noted: [T]he Illinois Supreme Court in Skinner and the Illinois Legislature in the Contribution Act have proclaimed that the public policy of Illinois is that liability among tortfeasors will be apportioned according to relative culpability. The vestigial doctrine of active-passive indemnity under which a less liable but still liable party passes on all of its liability to another party clearly contravenes this public policy.

Id. at 80.
Illinois courts should refrain from construing loan receipt agreements as good faith settlements. If the agreements are held to have been entered into in bad faith, agreeing defendants will be required to pay contribution to nonsettling defendants held liable for damages. This would result in a more equitable apportionment of damages in conformity with the Illinois legislature's intent in enacting the Contribution Among Joint Tortfeasors Act. Furthermore, any motive the agreeing defendant may have to encourage the plaintiff to pursue a judgment against the nonagreeing defendants or to provide biased testimony aimed at inflating the plaintiff's recovery would be eliminated.\(^{105}\)

**CONCLUSION**

The Illinois Courts continued approval of loan receipt agreements is inconsistent with the adoption of contribution among joint tortfeasors. Although the use of loan receipt agreements was understandable when the judiciary followed the common law rule prohibiting contribution among joint tortfeasors, it is an inappropriate method of settlement in the current system favoring an equitable apportionment of damages. A settlement device providing an incentive to shift liability to non-agreeing parties cannot co-exist with legislation imposing a duty on settling parties to consider the interest of those non-agreeing parties.

The good faith provision of the Illinois Contribution Act should be invoked to deter the future use of loan receipt agreements. By recognizing loan receipt agreements as bad faith settlements, the use of loan receipt agreements will be discouraged and nonagreeing defendants will be afforded their statutorily provided remedy. In this manner, Illinois' policy of encouraging fair private settlements can best be achieved.

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\(^{105}\) Although no court has been confronted with the issue of how the adoption of contribution affects loan receipt agreements, several courts have discussed the issue in dictum. The Illinois Supreme Court, in a case arising before the effective date of the contribution statute, stated:

[A loan receipt agreement] divorces the risks of the bargaining process from the establishment of a damage figure to the detriment of nonsettling parties. This state has a policy of protecting the financial interest of nonsettling parties in a settlement . . . and this is an appropriate case to implement that policy.

_Palmer v. Avco Distribution Corp., 82 Ill. 2d 211, 412 N.E.2d 959, 966 (1980)._ But see _Friers, Inc. v. Seaboard Coastline R.R. Co., 355 So. 2d 208, 210-11 (Fla. App. 1978)_ (indicating that courts should take a case by case approach in deciding whether a “Mary Carter” agreement was entered into in good faith).