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New Developments in the Illinois Law of Contribution Among Joint Tortfeasors

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I. INTRODUCTION

In Illinois, the right of contribution among co-tortfeasors is governed by the Contribution Among Joint Tortfeasors Act ("Contribution Act").[1] Under the Contribution Act, a co-tortfeasor who

1. ILL. REV. STAT. ch. 70, paras. 301-305 (1989). The Contribution Among Joint Tortfeasors Act provides:

301. Application of Act

§ 1. This Act applies to causes of action arising on or after March 1, 1978.

302. Right of contribution

§ 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.

(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.

(f) Anyone who, by payment, has discharged in full or in part the liability of a tortfeasor and has thereby discharged in full his obligation to the tortfeasor, is subrogated to the tortfeasor's right of contribution. This provision does not affect any right of contribution nor any right of subrogation arising from any other relationship.

303. Amount of contribution

§ 3. Amount of Contribution. The pro rata share of each tortfeasor shall be determined in accordance with his relative culpability. However, no person shall be required to contribute to one seeking contribution an amount greater than his pro rata share unless the obligation of one or more of the joint tortfeasors is uncollectible. In that event, the remaining tortfeasors shall share the unpaid portions of the uncollectible obligation in accordance with their pro rata liability.

If equity requires, the collective liability of some as a group shall constitute a single share.

304. Rights of plaintiff unaffected

§ 4. Rights of Plaintiff Unaffected. 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.

305. Enforcement

§ 5. Enforcement. A cause of action for contribution among joint tortfeasors

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has paid (either by settlement or judgment) more than his pro rata share of the common injury may seek pro rata contribution from those co-tortfeasors whose liability in tort has been extinguished.[2] Thus, the tortfeasor who extinguishes another co-tortfeasor's liability is entitled to contribution—a proportional sharing of their responsibility for the common injury. The Contribution Act also provides, however, that a tortfeasor who settles in good faith with the injured party is discharged from his obligation to contribute even if the settling party pays less than his pro rata share.[3] Consequently, a tortfeasor who in good faith discharges its own liability is protected from a subsequent contribution claim by another co-tortfeasor.

This Article is presented in four parts and surveys the recent developments in this important area of law. Part II considers the essential elements of the right of contribution and the effect that an immunity may have on a tortfeasor's liability for contribution. Part III examines various procedural issues related to the filing of contribution actions. Part IV discusses the pre-Contribution Act theories of implied indemnity and equitable apportionment and considers whether they remain viable theories of recovery in light of the Act. Finally, Part V addresses the nature and effect of a good faith settlement and the procedural aspects of the hearing to determine whether a settlement was achieved in good faith.

II. Essential Elements of the Right of Contribution

As a threshold matter, several essential elements must be established for a party to be entitled to contribution. First, the co-tortfeasors must be "liable in tort."[4] Second, the law must recognize "a right of contribution among" the co-tortfeasors.[5] Third, the party seeking contribution must prove that he has extinguished the co-tortfeasor's liability for the common injury.[6] Finally, the party seeking contribution must have paid more than his pro rata share.[7]

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may be asserted by a separate action before or after payment, by counterclaim or by third-party complaint in a pending action.

Id.

2. *Id.* para. 302(b).
3. *Id.* para. 302(c)-(d).
4. *Id.* para. 302(a).
5. *Id.*
6. *Id.* para. 302(b), (e).
7. *Id.* para. 302(b).

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A. Persons Subject to "Liability in Tort"

1. General Tort Liability

The Contribution Act provides that the right of contribution exists when co-tortfeasors are "liable in tort."[8] The Illinois courts have given this requirement an expansive reading, emphasizing that liability in tort is the only prerequisite for recovering contribution under the Act.[9] Nevertheless, various issues arise in interpreting the phrase, "liable in tort," including: (1) whether an employer entitled to immunity in the underlying action by virtue of the Worker's Compensation Act[10] is liable in tort; (2) whether all tortfeasors must be liable on the same theory of liability; (3) whether all tortfeasors must be jointly and severally liable for all of the injured party's damages; (4) whether the breach of a statutorily imposed duty constitutes liability in tort; and (5) whether a tortfeasor is liable for contribution after he has successfully defended against the injured party's claim in the underlying suit on primary liability.

As a general proposition, the question of whether the parties are "liable in tort" depends on the relationship between the injured party and the would-be tortfeasors at the time the injured party's cause of action arises.[11] The theory of liability advanced in the injured party's complaint is not dispositive of the question of whether the third-party defendant could have been liable in tort to the injured party. Instead, the court independently may discern whether the third-party defendant could have been held liable on a duty imposed under law.[12]

In addition, tortfeasors need not be found liable on the same theory of liability, as long as all are liable in tort.[13] Thus, for example, a defendant found liable under a theory of product liability can

8. *Id.* para. 302(a).

9. *See, e.g.*, J.I. Case Co. v. McCartin-McAuliffe, 516 N.E.2d 260, 267 (Ill. 1987) ("[T]here is no requirement that the basis for liability among the contributors be the same . . . [and] there is no requirement that the basis for contribution mirror the theory of recovery asserted in the original action." (citations omitted)).

10. ILL. REV. STAT. ch. 48, paras. 138-138.30 (1989).

11. Doyle v. Rhodes, 461 N.E.2d 382, 386 (Ill. 1984) (" '[L]iability' is determined at the time of the injury out of which the right to contribution arises, and not at the time the action for contribution is brought." (quoting Stephens v. McBride, 455 N.E.2d 54, 57 (Ill. 1983))).

12. Joe & Dan Int'l Corp. v. U.S. Fidelity & Guar. Corp., 533 N.E.2d 912, 918 (Ill. App. Ct. 1st Dist. 1988); *see* Giordano v. Morgan, 554 N.E.2d 810, 814 (Ill. App. Ct. 2d Dist. 1990).

13. *J.I. Case*, 516 N.E.2d at 267.

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pursue a contribution claim premised on negligence.[14]

Similarly, a defendant sued on theories of both tort and contract law may nonetheless seek contribution for tort liability. In *Leaman v. Anderson*,[15] the court held that a settling defendant sued on theories of both tort and contract law may execute a good faith settlement and seek contribution from another, providing that it is not seeking "to pass on liability for an arguably uncontributable (contract) claim."[16]

Importantly, tortfeasors need not be jointly and severally liable for all of the plaintiff's injuries. The operative provision of the Contribution Act states that "[w]here 2 or more persons are subject to liability in tort arising out of *the same injury* to person or property" a right to contribution exists between them.[17] In *Mayhew Steel Products, Inc. v. Hirschfelder*,[18] the court held that the Contribution Act applies to successive tortfeasors who are liable only to the extent that they aggravate the plaintiff's injuries. Thus, in *Mayhew*, the original tortfeasor was permitted to recover against a second tortfeasor who caused successive damage to the injured party.[19] Although the second tortfeasor was not jointly and severally liable for all of the plaintiff's injuries, both tortfeasors were liable to the plaintiff for the injury caused by the second tortfeasor.[20]

Further, a party may be liable in tort to the injured party even though its initial relationship with that individual was founded in contract. In *Cirilo's, Inc. v. Gleeson, Sklar & Sawyers*,[21] the court held that a person is liable in tort to one with whom that person contracted if the basis of liability is the breach of a statutory duty. The *Cirilo* decision, however, was seriously questioned in *People ex rel. Hartigan v. Community Hospital of Evanston*.[22] The court in *Community Hospital of Evanston* questioned whether the mere violation of a statutorily imposed duty constitutes liability in tort for purposes of the Contribution Act.[23] Relying upon *Kinzer v. City of Chicago*,[24] the *Community Hospital of Evanston* court held that

14. *Id.*
15. 526 N.E.2d 639 (Ill. App. Ct. 3d Dist. 1988).
16. *Id.* at 641.
17. ILL. REV. STAT. ch. 70, para. 302(a) (1989) (emphasis added).
18. 501 N.E.2d 904, 906 (Ill. App. Ct. 5th Dist. 1986).
19. *Id.*
20. *Id.*
21. 507 N.E.2d 81, 83 (Ill. App. Ct. 1st Dist. 1987).
22. 545 N.E.2d 226 (Ill. App. Ct. 1st Dist. 1989).
23. *Id.* at 231.
24. 539 N.E.2d 1216 (Ill. 1989).

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breach of a fiduciary duty does not constitute liability in tort under the Contribution Act.[25]

Finally, in *McCombs v. Dexter*,[26] the court held that a defendant who receives a favorable judgment against the plaintiff in the underlying primary litigation is not *subject to liability* and, consequently, not subject to a claim for contribution. The court's rationale was that a defendant who has been found to have no liability to the plaintiff cannot come within the Contribution Act's provision requiring the defendant to be *subject to liability* in tort.[27] The *McCombs* court rejected the argument that the third-party defendant could be "liable in tort" to the injured party on grounds not raised by the losing plaintiff, and held that a favorable judgment against the injured party insulates a co-tortfeasor from contribution.[28] Thus, *McCombs* illustrates that an injured party's incompetence in pleading can potentially defeat a tortfeasor's right to contribution.

2. Statutory Liability

In Illinois, statutory liability for contribution has arisen most notably, with respect to the dramshop and environmental protection statutes. Interestingly, the courts' conclusions regarding liability in these two areas have not been consistent.

a. Dramshop Liability

A recurring issue is whether a tortfeasor has the right to seek contribution from a dramshop. Despite countervailing arguments, courts consistently have denied the right of contribution against a dramshop.[29]

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25. *Community Hosp. of Evanston*, 545 N.E.2d at 230. In assessing the *Community Hosp. of Evanston* decision, one should note that an alternative ground existed to support the result. From what appears in the opinion, the third-party plaintiff was released by virtue of a non-monetary settlement with the injured party. *Id.* at 231. Thus, having incurred no monetary liability, the third-party plaintiff could not demonstrate that he paid more than his pro rata share in order to be discharged. *Id.*

26. 542 N.E.2d 1245, 1247 (Ill. App. Ct. 3d Dist. 1989).

27. *Id.* at 1246. In *McCombs*, the defendant/third-party plaintiff asserted several theories of liability not raised by the original plaintiff. *Id.* at 1245. The third-party plaintiff alleged that "[the defendant c]onstructed, owned, and maintained a building with structural defects which resulted in plaintiff's injuries; and [f]ailed to provide the building with guardrails for the protection of tenants and foreseeable invitees contrary to the requirements of the code and the law." *Id.* at 1246. Thus, arguably the defendant received a favorable judgment only because the original plaintiff failed to raise the more viable claims asserted in the third-party plaintiff's contribution action.

28. *Id.* at 1247.

29. *See, e.g.*, Hopkins v. Powers, 497 N.E.2d 757, 759 (Ill. 1986); Matusak v. Chicago Transit Auth., 520 N.E.2d 925, 929 (Ill. App. Ct. 1st Dist. 1988).

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A dramshop's liability for injuries is *sui generis* and not properly characterized as liability in tort for purposes of the Contribution Act.[30] In *Jodelis v. Harris*,[31] the supreme court rejected the notion that the law imposing liability on dramshops is tortious in nature.[32] The court drew particular support from the fact that dramshops had no common law liability for injuries caused by or to their patrons.[33] Furthermore, the court reasoned that liability in contribution would contravene the intent of the Dramshop Act,[34] which is to define and limit the extent of a dramshop's liability.[35] Accordingly, the law that dramshops will not incur contribution liability seems well settled.[36]

b. Environmental Protection Act Liability

In *People v. Fiorini* and *People v. Brockman*, the Illinois Supreme Court held that a landowner, subject to liability in a suit by the State for violations of the Illinois Environmental Protection Act,[37] could bring a contribution claim against his customers—waste haulers and waste generators—whose waste contributed to the statutory violation.[38] In so holding, the court recognized that statutory liability under certain circumstances may be "liability in tort" for purposes of application of the Contribution Act.[39] The court reasoned that because the State's complaint alleged both stat-

30. *Hopkins*, 497 N.E.2d at 759.

31. 517 N.E.2d 1055 (Ill. 1987). In *Jodelis*, the plaintiff was intoxicated when he was injured by the defendant/third-party plaintiff. *Id.* at 1056. The third-party plaintiff sought contribution from the dramshop the plaintiff had patronized. *Id.*

32. *Id.* at 1057.

33. *Id.* at 1058.

34. ILL. REV. STAT. ch. 43, para. 135 (1989).

35. *Jodelis*, 517 N.E.2d at 1058.

36. The *Jodelis* opinion is consistent with the supreme court's prior decision in Hopkins v. Powers, 497 N.E.2d 757, 759 (Ill. 1986) (holding that dramshop liability arises under the Dramshop Act rather than in tort). In *Hopkins*, the plaintiff, after drinking in a tavern operated by the defendant, drove away in a vehicle owned by another. *Id.* at 758. The plaintiff subsequently had an accident, resulting in personal injury and property damage. *Id.* Unlike *Hopkins*, however, the defendant/third-party plaintiff in *Jodelis* was not the intoxicated individual who tried to circumvent the Dramshop Act by securing benefits denied him under that Act. *Jodelis*, 517 N.E.2d at 1056. Rather, *Jodelis* involved one who complained that the dramshop should share responsibility for the intoxicated party's injuries. *Id.*

In a related matter, the court in Matusak v. Chicago Transit Auth., 520 N.E.2d 925, 928-29 (Ill. App. Ct. 1st Dist. 1988), held that the Dramshop Act does not provide an independent basis for contribution against the dramshop operator.

37. ILL. REV. STAT. ch. 111 1/2, para. 1021 (1989 & Supp. 1990).

38. People v. Fiorini, 574 N.E.2d 612, 621 (Ill. 1991); People v. Brockman, 574 N.E.2d 626, 636 (Ill. 1991). *Fiorini* and *Brockman* were companion cases decided on May 30, 1991.

39. *Brockman*, 574 N.E.2d at 634.

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utory and common law claims, the question before it was whether either basis constituted tortious conduct.[40] The court determined that " 'a tort has been defined as a breach of a noncontractual legal duty owed to the plaintiff, the source of which may be a statute as well as the common law.' "[41] The court also recognized "that while a court will provide a remedy in the form of an action for damages, one important form of remedy for tort may also be an injunction or restitution."[42] The court further observed that "[t]he only requirement is that the availability of these remedies will depend in the first instance upon the possibility that an action for damages could lie for the wrong."[43]

In *People v. Brockman*, the court found that the third-party defendants had a duty not to contaminate the environment and that the State suffered an injury from breach of that duty.[44] The court held that it was irrelevant that the State sought injunctive relief rather than damages, because a violation of the Illinois Environmental Protection Act[45] creates the potential for liability in tort.[46] Therefore, the court concluded that such a violation could satisfy the "subject to liability" element of the Contribution Act and thus serve as a proper basis for a contribution claim.[47]

At first glance, this holding seems irreconcilable with the supreme court dramshop decisions in *Jodelis v. Harris* and *Hopkins v. Powers*,[48] both of which held that dramshop liability, because it is based on a statute, is not "liability in tort" within the meaning of the coverage provision of the Contribution Act.[49] These two sets of holdings—the dramshop decisions of *Jodelis* and *Hopkins* on the one hand and the environmental cases of *Fiorini* and *Brockman* on the other—seem exactly opposite to the ordinary-language interpretations of their respective statutes, i.e., that statutory dramshop liability for damages to a person physically injured by a drunken patron is liability in tort, and that liability for statutory penalties, injunctive relief, and clean up costs in an action brought by the

40. *Id.*

41. *Id.* (quoting Hopkins v. Powers, 497 N.E.2d 757, 760 (Ill. 1986) (Goldenhersh, J., dissenting)).

42. *Id.* (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 1, at 2-3 (5th ed. 1984)).

43. *Id.*

44. *Id.*

45. ILL. REV. STAT. ch. 111 1/2, para. 1021 (1989 & Supp. 1990).

46. *Brockman*, 574 N.E.2d at 634.

47. *Id.*

48. Jodelis v Harris, 517 N.E.2d 1055 (Ill. 1987); Hopkins v. Powers, 497 N.E.2d 757 (Ill. 1986).

49. *See Jodelis*, 517 N.E.2d at 1058; *Hopkins*, 497 N.E.2d at 759; *supra* note 36.

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State is not liability in tort. Moreover, the cases seem flatly inconsistent with each other, although *Fiorini* and *Brockman* were clearly not intended to overrule *Jodelis* and *Hopkins*.

The cases are reconcilable, however, by looking to the implied or inferred intent of the legislature on the contribution question in the statute that imposes liability. In *Jodelis* and *Hopkins*, the court likely assumed that the legislature, when enacting the Dramshop Act, did not intend to allow the drunk driver or a third-party defendant to pass off any of his liability on the dramshop. On the other hand, in *Fiorini*, the court had an explicit legislative action, a recent amendment to the Illinois environmental act,[50] which indicated an intent to allow contribution in such cases.[51] Although the *Fiorini* court held that this amendment could not be applied retroactively, the court's interpretation of the Contribution Act, reaching roughly the same result, may have been influenced by the amendment's clearly-expressed legislative intent.[52]

Thus, in dealing with statutory liability cases in the future, Illinois judges should, consistent with the above decisions, first explore whether there is any implied or inferred legislative intent in the specific statute to allow or preclude a contribution claim. If none exists, the court then may safely examine ordinary criteria—common usage and the understanding of the profession—to determine what is statutory "liability in tort."

3. The Effect of Immunities

A recurring issue in the interpretation of the phrase "liable in tort" is the effect of an immunity that a tortfeasor may invoke against the injured party upon that tortfeasor's liability for contribution. In some instances, courts have held that the immunity bars the right of contribution.

a. Immunities that Bar Contribution Claims

Both the sovereign immunity doctrine and the public official's immunity doctrine have been invoked to bar contribution claims. For example, in *Martin v. Lion Uniform Co.*,[53] the court denied contribution against a municipality, holding that a municipality is

50. 1990 ILL. LAWS 2786-90 (amending ILL. REV. STAT. ch. 111 1/2, para. 1045(b) (1989 & Supp. 1990)).

51. People v. Fiorini, 574 N.E.2d 612, 616 (Ill. 1991).

52. *Id.* at 618.

53. 536 N.E.2d 736, 739-40 (Ill. App. Ct. 1st Dist. 1989). In *Martin*, two firemen sued a builder for injuries suffered while fighting a fire at its building. *Id.* at 736. The builder sought contribution from the firemen's employer, the City of Chicago. *Id.* at 737.

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not subject to liability under the terms of the Act.[54] The court likened the result to *Jodelis v. Harris*[55] and found that the Act was not intended to cover a city's negligence in fire protection.[56] Similarly, the court in *Stephens v. Cozadd*[57] held that the public officials' immunity doctrine bars a contribution claim against a flagman working for the State.

b. Immunities that Do Not Bar Contribution Claims

A parent's common law immunity from liability to his or her child does not bar an action for contribution when the parent's conduct is a concurrent cause of the child's injury.[58] Similarly, a spouse's statutory immunity does not bar a contribution action filed by a tortfeasor against the culpable spouse.[59]

c. An Employer's Immunity Does Not Bar Contribution Claims But Limits the Extent of Contribution Liability

Although an employer is protected from suits by its employees for common law damages actions due to statutory worker's compensation immunity, a defendant manufacturer in a products liability claim may seek contribution from the plaintiff's employer.[60] The supreme court reaffirmed this rule under the Contribution Act in 1984 in *Doyle v. Rhodes*,[61] by holding that the employer was "subject to liability in tort" within the meaning of the Contribution Act's coverage provision because the employer's statutory immunity had to be specifically raised in a common law damage action and that, until it was asserted, the employer was subject to liability

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The court held that a municipality that is not subject to a statutory or common law duty to its firefighters is not liable in tort to a firefighter injured while fighting a fire. *Id.*

54. *Id.* at 743.

55. 517 N.E.2d 1055, 1058 (Ill. 1987).

56. *Martin*, 536 N.E.2d at 739; *see also* McShane v. Chicago Inv. Corp., 546 N.E.2d 660 (Ill. App. Ct. 1st Dist. 1989) (holding that the City could not be reached in contribution for alleged negligent training of its firemen, since direct action would be barred by the Tort Immunity Act).

57. 512 N.E.2d 812 (Ill. App. Ct. 3d Dist. 1987); *see also* Kinzer v. City of Chicago, 539 N.E.2d 1216, 1220 (Ill. 1989) (holding that a municipal employee's breach of fiduciary duty does not constitute liability in tort); Lietsch v. Allen, 527 N.E.2d 978, 981 (Ill. App. Ct. 3d Dist. 1988) (holding that the Tort Immunity Act bars contribution against public employees in the exercise of their judgment and discretion).

58. Hartigan v. Beery, 470 N.E.2d 571, 573 (Ill. App. Ct. 1st Dist. 1984); Larson v. Buschkamp, 435 N.E.2d 221, 226 (Ill. App. Ct. 2d Dist. 1982).

59. Wirth v. City of Highland Park, 430 N.E.2d 236, 242 (Ill. App. Ct. 2d Dist. 1981).

60. Skinner v. Reed-Prentice Div. Package Mach. Co., 374 N.E.2d 437, 443 (Ill. 1977), *cert. denied*, 436 U.S. 946 (1978).

61. 461 N.E.2d 382 (Ill. 1984).

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in tort.[62]

Recently, the Illinois Supreme Court, in *Kotecki v. Cyclops Welding Corp.*,[63] wrote that it was not overruling *Skinner v. Reed-Prentice Division Package Machinery Co.*[64] and *Doyle*,[65] both of which held that employers are liable for contribution regardless of the worker's compensation immunity provision.[66] The *Kotecki* court simply resolved a question that both prior cases left undecided—the *extent* of the employer's contribution liability.[67] On that question, the *Kotecki* court held that an employer's contribution liability cannot exceed the employer's statutory liability under the Worker's Compensation Act.[68] The court reasoned that this limitation on the employer's contribution liability reconciles the policy of the Contribution Act—to allocate liability proportionate to fault—with the competing policy of the Worker's Compensation Act—to provide assured compensation for all work-related injuries in return for limited liability on the part of the employer.[69]

The *Kotecki* holding raises many practical but unresolved questions. First, how does the *Kotecki* limitation work? What does the court mean when it says that the employer's contribution liability cannot exceed its statutory worker's compensation liability? It seems to mean that the employer may be required to pay, in addition to its worker's compensation payment to the employee, an additional amount equal to its worker's compensation liability, as contribution to the contribution plaintiff. Compared to a simple overruling of *Doyle* and *Skinner*, which would provide that *no* contribution would be payable by the employer, the employer under *Kotecki* probably is responsible for an additional amount equal to its worker's compensation liability.

As an alternative interpretation, the *Kotecki* opinion may mean that the worker's compensation payments already paid to the employee count as the employer's contribution share. That interpretation, however, if combined with continued recognition of the compensation lien, would reduce the employee's total compensation below full recovery—a result that the court could not have intended. Under either of these interpretations, however, the

62. *Id.* at 387.
63. 585 N.E.2d 1023 (Ill. 1991).
64. *Skinner*, 374 N.E.2d at 437.
65. *Doyle*, 461 N.E.2d at 382.
66. *Kotecki*, 585 N.E.2d at 1025-26; *Doyle*, 461 N.E.2d at 388; *Skinner*, 374 N.E.2d at 443.
67. *Kotecki*, 585 N.E.2d at 1025.
68. *Id.* at 1027-28.
69. *Id.* at 1028.

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Kotecki limitation is neither an interpretation of the Contribution Act nor an interpretation of the worker's compensation immunity provision, but rather is a judicially-adopted rule specifically designed to reconcile the policies behind the two statutes. Such a judicially-crafted rule means that questions raised by *Kotecki*, like those raised by *Laue v. Leifheit*,[70] are not answerable by means of statutory interpretation.

Will courts apply *Kotecki* retroactively? The opinion assumes the court is not overruling anything. Since, in the court's view, *Kotecki* is not a change in the law, the court may decide to apply the rule retroactively to pending cases. There is a fair argument that retroactive application can be refused to decisions of open questions not clearly foreshadowed by past decisions. That argument might not succeed here, however, because it tends to undermine the court's position that it simply resolved an open question it promised in *Doyle v. Rhodes* to resolve later.

How should the *Kotecki* limitation be imposed? The obvious approach is to ask juries to come back with percentages of fault for the contribution plaintiff and the employer-contribution defendant, to be translated into dollar amounts by the court, which would also impose the limitation. For example, if the jury finds the employer responsible for 50% of the total fault, the primary defendant responsible for 50% of the total fault, total damages of $1,000,000 and compensation liability of $100,000, the court could enter a dollar amount of $100,000 for the employer's contribution share, reallocating $400,000 back to the primary defendant's share, for a total of $900,000 to the primary defendant.

One possible problem with this approach, however, is that it risks reducing the primary defendant's fault below 25%, thus triggering application of the several liability statute,[71] which precludes the court from shifting back to the primary defendant the amount allocated by the jury's percentages to the employer over the worker's compensation liability. This problem might be resolved by saying that the initial jury percentages were not the final percentages, but rather that they were simply steps toward their calculation. Therefore, the ultimate allocation by the court would be the one to which the several liability statute applies. This would require that the court translate the dollar amount of the employer's

70. 473 N.E.2d 939, 941 (Ill. 1984) (holding that a defendant's separate action for contribution was barred because the defendant failed to bring the action in the original suit).

71. ILL. REV. STAT. ch. 110, para. 2-1117 (1989).

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liability, determined under the *Kotecki* cap, back into a percentage of the total liability.

Another unresolved issue raised by *Kotecki* is whether the employer's liability cap is defined by the accrued worker's compensation liability at the time of trial or the accrued plus projected future worker's compensation liability? This question seems to involve the problem of meshing two different systems of compensation—the "one shot" tort system with the continuing compensation system under worker's compensation. One easily could formulate arguments supporting either side. But at bottom, it is not a question of meshing two systems, but rather of the exact location of a partially arbitrary line the supreme court has drawn between two conflicting statutory policies. Unfortunately, the resolution of that question simply depends on the fiat of the Illinois Supreme Court, and it will not be resolved until the supreme court determines what is meant by its limitation to "worker's compensation liability."

B. "A Right of Contribution Among Them"

Courts have denied the right of contribution to some tortfeasors even though these parties have discharged the liability of all other co-tortfeasors. The issues arising in this section concern whether a tortfeasor, guilty of intentional or wilful misconduct, is entitled to contribution, and whether co-tortfeasors who have a pre-existing contractual agreement providing for insurance to cover their tort liability, are barred from contribution.

1. Intentional Tortfeasors

No right of contribution exists on behalf of an intentional tortfeasor.[72] Thus, despite the fact that a party has discharged another co-tortfeasor's liability, the supreme court, in *Gerill Corp. v. Jack L. Hargrove Builders, Inc.*,[73] held that an intentional wrongdoer is not entitled to contribution.[74] Although the Contribution Act is silent on the issue, the *Gerill* court concluded that the legislature did not intend the Act to protect the interests of intentional tortfeasors.[75] The *Gerill* opinion leaves open the question, however, of whether a tortfeasor found guilty of wilful and wanton misconduct might similarly be barred from contribution. This

72. Gerill Corp. v. Jack L. Hargrove Builders, Inc., 538 N.E.2d 530, 542 (Ill.), *cert. denied*, 493 U.S. 894 (1989).

73. *Id.* (specifically overruling Dovin v. Winfield Township, 517 N.E.2d 1119 (Ill. App. Ct. 2d Dist. 1987)).

74. *Id.*

75. *Id.*

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point is noteworthy because the *Gerill* decision specifically refers without adverse comment to *Pipes v. American Logging Tool Corp.*,[76] a case in which the court held that wilful and wanton tortfeasors were entitled to contribution.[77]

In *Carl Sandburg Village Condominium Ass'n, No. 1 v. First Condominium Development Co.*,[78] the court considered the procedural ramifications of a defendant/third-party plaintiff sued in the underlying primary litigation on grounds that would permit recovery on either a finding of intentional or negligent wrongdoing. The court concluded that the defendant/third-party plaintiff's right to contribution depended upon a determination of that party's culpability.[79] The court held that third-party plaintiffs will not have a right to contribution if they are found liable for their intentional acts.[80] Thus, the right of contribution in this instance must await a determination of culpability by the trier of fact.

The question of who is an intentional tortfeasor for purposes of applying the *Gerill* rule may not always have an obvious, simple answer, as the previously discussed cases of *People v. Brockman*[81] and *People v. Fiorini*[82] illustrate. In *Brockman*, the court allowed contribution claims by a landfill operator accused of violating sections 21(d) and (e) of the Illinois Environmental Protection Act,[83] since he caused or allowed special waste to be accepted and disposed of on the site in violation of the requirements of the Act and the solid waste rules adopted by the Illinois Environmental Protection Agency pursuant to the Act.[84] The supreme court reasoned that *Gerill* did not preclude the alleged violator's contribution claim against generators and haulers of the offending solid waste because the alleged violator was not found guilty of intentional conduct nor was such a finding required as an element of the cause of action.[85]

76. 487 N.E.2d 424 (Ill. App. Ct. 5th Dist. 1985). *But see* Bresland v. Ideal Roller & Graphics Co., 501 N.E.2d 830, 839 (Ill. App. Ct. 1st Dist. 1986) (finding that wilful and wanton misconduct bars right of contribution); *see also* Hall v. Archer-Daniels-Midland Co., 524 N.E.2d 586, 592 (Ill. 1988) (holding that a settling tortfeasor is not entitled to contribution for funds properly allocable to the injured party's punitive damage claim).

77. *Gerill*, 538 N.E.2d at 540.

78. 557 N.E.2d 246 (Ill. App. Ct. 1st Dist. 1990).

79. *Id.* at 250.

80. *Id.*

81. 574 N.E.2d 626 (Ill. 1991); *see supra* notes 37-47 and accompanying text.

82. 574 N.E.2d 612 (Ill. 1991).

83. ILL. REV. STAT. ch. 111 1/2, para. 1021(d), (e) (1989 & Supp. 1990).

84. *Brockman*, 574 N.E.2d at 633.

85. *Id.* at 635; *see also Fiorini*, 574 N.E.2d at 623 ("intent is not an element to be proven for a violation under the Act").

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2. Agreements Precluding Contribution: Insurance Policies Procured on Behalf of Co-Tortfeasors

A court will interpret agreements, which provide insurance as part of the parties' bargain, as "providing mutual exculpation."[86] The rationale is that "[t]he parties are deemed to have agreed to look solely to the insurance in the event of loss and not impose liability on the part of the other party."[87] In *Briseno v. Chicago Union Station Co.*,[88] the co-tortfeasors entered into an agreement in which one of the parties procured insurance to protect both parties from tort liability. A tort action arose and the insurance company settled the suit on behalf of one of the insureds.[89] Subsequently, and ostensibly on behalf of the settling tortfeasor, the insurance company brought a contribution action against the co-insured, co-tortfeasor who, parenthetically, paid for the insurance policy.[90] Treating the contribution action as one initiated and controlled by the insurance company, the court ruled that there was no right to contribution because the parties' insurance company fully satisfied their tort liability.[91] The court held that a contribution action in this context was an unconscionable attempt by the insurance company to avoid its contractual liability and a clear instance of the insurance company placing its interest ahead of its insured's interest.[92]

In *Monical v. State Farm Insurance Co.*,[93] the court followed the lead of *Briseno*. The *Monical* court, however, interpreted *Briseno* as holding that the parties' intent regarding the specific agreement to provide insurance was to extinguish any liability between themselves.[94] According to the *Monical* court, *Briseno* did not recognize a general rule of law that any agreement providing insurance as part of the bargain bars one bargaining party from thereafter imposing liability on another for losses envisioned in the agreement to insure.[95] Thus, the *Monical* court would consider a range of specific facts relating to both the transaction and the contribution

86. Briseno v. Chicago Union Station Co., 557 N.E.2d 196, 198 (Ill. App. Ct. 1st Dist. 1990).
87. *Id.* (citing Vandygriff v. Commonwealth Edison Co., 408 N.E.2d 1129, 1132 (Ill. App. Ct. 1st Dist. 1980)).
88. 557 N.E.2d 196, 197 (Ill. App. Ct. 1st Dist. 1990).
89. *Id.*
90. *Id.*
91. *Id.* at 198.
92. *Id.* at 199.
93. 569 N.E.2d 1220 (Ill. App. Ct. 4th Dist. 1991).
94. *Id.* at 1234.
95. *Id.* at 1235.

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claim in determining whether the parties intended to preclude such a claim.[96] In particular, the *Monical* court focused on whether both parties were to be named insureds under the contemplated insurance policy and whether one bargaining party's liability, which it sought to shift in the contribution claim, had been fully indemnified under the agreed-upon insurance policy.[97]

C. Extinguishment of Co-Tortfeasors' Liability

The Contribution Act provides that a settlement given to one tortfeasor does not discharge any of the other tortfeasors from liability "unless its terms so provide."[98] The Act further provides that the right of contribution requires that the claimant extinguish all co-tortfeasors' liability for the common injury.[99] These requirements of the Contribution Act raise additional recurring issues, including: (1) whether the terms of a settlement extinguish the co-tortfeasors' liability; (2) whether an employer whose liability is based solely on respondeat superior is released by operation of law when the injured party and the employee enter into a settlement; (3) whether the employer's worker's compensation benefit claim must be extinguished in order to permit a contribution action against him; and (4) whether the Act distinguishes between tortfeasors who have been "released" and those who have "settled" with the injured party.

1. Extinguishment of Liability in General

Pursuant to section 302(c) of the Contribution Act, a settlement or release does not discharge other tortfeasors from liability unless they are designated by name or otherwise specifically identified. In *Alsup v. Firestone Tire & Rubber Co.*,[100] the Illinois Supreme Court held that an agreement, which in general language released all other tortfeasors, was ineffective as a release of any individuals not specifically named or identified in the agreement. The court observed that the Contribution Act was intended to abrogate the common law rule that release of one tortfeasor released all tortfeasors.[101] Accordingly, after *Alsup*, a release or settlement

96. *Id.*
97. *Id.*
98. ILL. REV. STAT. ch. 70, para. 302(c) (1989); *see supra* note 1 (setting forth the Contribution Act).
99. ILL. REV. STAT. ch. 70, para. 302(e) (1989).
100. 461 N.E.2d 361, 364 (Ill. 1984).
101. *Id.* at 363; *see* Rathke v. Albekier, 536 N.E.2d 864, 865-66 (Ill. App. Ct. 1st Dist. 1989); McNamara v. Shermer, 510 N.E.2d 950, 951 (Ill. App. Ct. 1st Dist. 1987).

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agreement that purports to release certain classes of related tortfeasors may not effectively extinguish liability of members of the identified class unless they are specifically identified by name.[102]

2. Vicarious Liability: Respondeat Superior

When primary liability against an employer is based solely upon the negligence of an employee, one question is whether the employer is released from liability when the injured party settles with the negligent employee.

In *Stewart v. Village of Summit*,[103] the supreme court addressed a covenant not to sue that contained a general reservation of rights to sue all others who might be liable for the injured party's damages. The court rejected the argument that reservation of the right to sue others required that the specific tortfeasors be named in the agreement.[104] The court, however, specifically avoided the question of whether the release of the employee released the vicariously liable employer as a matter of law.[105]

Although avoided by the *Stewart* court, this issue was addressed

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102. *Alsup*, 461 N.E.2d at 364; Stro-Wold Farms v. Finnell, 569 N.E.2d 1156, 1158 (Ill. App. Ct. 4th Dist. 1991), *reaffirming* Pearson Bros. v. Allen, 476 N.E.2d 73 (Ill. App. Ct. 4th Dist. 1985). In *Stro-Wold*, the Otts purchased 83 hogs from Stro-Wold, a partnership, which had purchased the hogs from Zimmerman. *Stro-Wold*, 569 N.E.2d at 1157. Defendant Finnell, a veterinarian, executed an Illinois Health Certificate, which certified that he had inspected these hogs and found them to be free of any infections and free from any contagious or communicable diseases. *Id.* After the hogs were delivered to the Otts, the Otts lost their entire group due to swine dysentery. *Id.* The Otts settled with Stro-Wold and Zimmerman for $100,000, executing a release that discharged them and "their heirs, agents, servants, successors, executors, administrators, and all other persons." *Id.* Stro-Wold and its insurer thereafter brought a contribution claim against Finnell, claiming he was an "agent" of Zimmerman whose liability was discharged by this release. *Id.* The appellate court held that the "agents" designation in the release was not specific enough to release Finnell. *Id.* at 1158. The court held that the release did not effectively discharge Finnell's liability because " 'a release must *specifically* identify the other tortfeasors [released] in order to discharge their liability' " and that the word "agent" in the settlement agreement was not specific enough to satisfy this requirement. *Id.* (quoting *Alsup*, 461 N.E.2d at 364) (emphasis added).

103. 499 N.E.2d 450, 453 (Ill. 1986).

104. *Id.*; *see also* Ledesma v. Cannonball, Inc., 538 N.E.2d 655, 660 (Ill. App. Ct. 1st Dist. 1989) (holding that the plaintiff's covenant not to sue the defendant, which expressly reserved the right to sue the defendant's employer, did not extinguish the employer's potential liability under a theory of respondeat superior).

105. *Stewart*, 499 N.E.2d at 453. The *Stewart* court observed that the principal case fell between two pre-Contribution Act cases. *Id.* at 457. In Holcomb v. Flavin, 216 N.E.2d 811, 813 (Ill. 1966), the court held that a covenant not to sue the employee, which contained no reservation of rights to sue others, released the vicariously liable employer. However, in Edgar County Bank & Trust Co. v. Paris Hosp., Inc., 312 N.E.2d 259, 261 (Ill. 1974), the court concluded that a reservation clause which specifically named the employer did not extinguish the injured party's action against the employer. In *Stewart*, of course, there was a reservation clause, but it did not specifically reserve the plaintiff's

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by both the Second and the Fourth Districts of the Illinois Appellate Court. In *Bristow v. Griffitts Construction Co.*,[106] the Fourth District held that a covenant not to sue an employee released the employer from liability to the injured party. The court reached its decision by first examining whether implied indemnity survived the passage of the Contribution Act.[107] Finding that implied indemnity remained a viable theory of recovery for an employer whose liability is solely derivative, the court concluded that the settling employee would gain nothing by his settlement if he was later required to indemnify his employer for damages paid by the employer to the injured party.[108] Thus, to give substance to the employee's settlement, the court concluded that an agreement that does not expressly reserve the injured party's action against the employer releases the employer from liability.[109]

However, in *Brady v. Prairie Material Sales, Inc.*,[110] the Second District Illinois Appellate Court reached a contrary conclusion. Although the plaintiff in *Brady* signed an agreement with the employee that purported to release all other persons from liability, the court held that unless the terms of the agreement specifically released the employer, the settlement with the employee had no effect on the employer's continued liability.[111] The *Brady* court disagreed with the *Bristow* rationale and based its decision primarily on the notion that section 302(c), as interpreted by *Alsup*, limits the effect of a settlement to those persons specifically named or identified in the agreement.[112]

The split of authority reflected by *Bristow* and *Brady* may prove relatively insignificant in practice. As Justice Morthland noted in his dissent in *Bristow*, few employers are sued only on a theory of vicarious liability.[113] Thus, the *Bristow* holding will be undercut when the plaintiff also sues on a theory of negligent hiring or negligent entrustment.

3. Limited to Liability in Tort

A co-tortfeasor who settles with the plaintiff must extinguish all

claim against the employer. Thus, the *Stewart* decision leaves pointedly unresolved the effect of the Contribution Act on these pre-Act decisions.

106. 488 N.E.2d 332, 338 (Ill. App. Ct. 4th Dist. 1986).
107. *Id.* at 336-37.
108. *Id.* at 338.
109. *Id.*
110. 546 N.E.2d 802, 810 (Ill. App. Ct. 2d Dist. 1989).
111. *Id.*
112. *Id.*
113. *Bristow*, 488 N.E.2d at 338 (Morthland, J., dissenting).

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outstanding tort claims against the other co-tortfeasors in order to seek contribution.[114] In *Hall v. Archer-Daniels-Midland Co.*,[115] the supreme court held that the liability to be extinguished under section 302(e) must have a tort basis. Thus, the court found that the settling party need not extinguish liability to an employer for its worker's compensation benefits.[116]

4. "Release" or "Settles": Synonymous Terms

Although the Contribution Act uses the terms "release" and "settles" in different contexts, the terms are synonymous when assessing the consequences of either a release or a settlement of the underlying claim. In *Brown v. Union Tank Car Co.*,[117] the court rejected the argument that the Contribution Act distinguishes between a tortfeasor who receives a "release" from the injured party and one who "settles" with that party. In *Brown*, a multi-party settlement released one of the tortfeasors under terms that required it to pay nothing to the injured party.[118] The third-party plaintiff argued that, to avoid contribution, a tortfeasor must give the injured party some form of compensation.[119] Turning on a subtle distinction found in the Contribution Act, the argument was that a person may be "released" from liability under section 302(c) and thereby avoid liability to the injured party, but one only avoids contribution under section 302(d) by "settling" with the plaintiff.[120] The unarticulated supposition here was that one "settles" a claim by actually paying for its release. The court rejected this argument, concluding that such an interpretation would frustrate one of the underlying purposes of the Act, which is to encourage finality in settlements.[121]

D. A Party Seeking Contribution Must Pay More Than Its Pro Rata Share

The right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share of the common liability.[122]

114. ILL. REV. STAT. ch. 70, para. 302(e) (1989).
115. 524 N.E.2d 586, 589 (Ill. 1988).
116. *Id.*; *see also* Puckett v. Empire Stove Co., 539 N.E.2d 420, 428 (Ill. App. Ct. 5th Dist. 1989) (stating that joint tortfeasor's liability must be extinguished by the settlement).
117. 554 N.E.2d 595, 597 (Ill. App. Ct. 5th Dist. 1990).
118. *Id.* at 596.
119. *Id.* at 597.
120. *Id.*
121. *Id.*
122. ILL. REV. STAT. ch. 70, para. 302(b) (1989).

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Accordingly, this section examines *when* the tortfeasor has paid more than a fair share of the common liability and considers the tortfeasor's burden of proof on this issue.

1. Calculation and Payment of Pro Rata Share

In the absence of fraud or other tortious conduct, an employer may enter into a settlement with an employee and thereby avoid liability for contribution.[123] Any subsequent tort recovery, however, must be reduced by the value of the worker's compensation lien waived by the employer as part of the settlement.[124]

In *Cleveringa v. J.I. Case Co.*,[125] the plaintiff and his employer entered into a settlement in which the employer waived enforcement of its worker's compensation lien, except with respect to compensation received from one of the nonsettling co-defendants. The court held that such "selective enforcement" of the lien neither evidenced bad faith nor constituted a loan agreement.[126] Further, because the employee was liable to repay the employer from compensation received from the exempted, non-settling defendant, the court would not reduce any judgment rendered by the value of the worker's compensation lien.[127]

In *Schoonover v. International Harvester Co.*,[128] the court considered the effect of a loan receipt agreement which compensated the plaintiff in an amount greater than that received in a jury verdict against a non-settling defendant. The plaintiff entered into a loan receipt agreement whereby he received $300,000 with the understanding that it would be repaid under certain listed conditions.[129] Specifically, the court found that a minimum of $250,000 would be forgiven under the loan.[130] Subsequently, the plaintiff was awarded a verdict of $50,000 and the defendant sought to apply the amount forgiven under the loan to its verdict—in effect, reducing the verdict to zero.[131] The court noted that the Contribution Act works to avoid double recovery and is premised on the notion that the

123. Mallaney v. Dunaway, 533 N.E.2d 1114, 1117 (Ill. App. Ct. 3d Dist. 1988); *see also* Wilson v. Hoffman Group, Inc., 546 N.E.2d 524, 527-29 (Ill. 1989) (discussing the requirement that settlement agreements be made in good faith).

124. *Wilson*, 546 N.E.2d at 532.

125. 549 N.E.2d 877, 878-79 (Ill. App. Ct. 1st Dist. 1989).

126. *Id.* at 880.

127. *Id.*

128. 525 N.E.2d 1041, 1042 (Ill. App. Ct. 1st Dist. 1988).

129. *Id.*

130. *Id.* at 1044.

131. *Id.* at 1043-44.

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plaintiff is entitled to compensation, not to windfall profits.[132] Thus, the court held that a valid loan receipt agreement will be treated like any other settlement amount to the extent that any portion of the loan is unconditionally forgiven.[133] Since the plaintiff received an unconditional loan that exceeded the amount of the verdict, the court reduced the plaintiff's judgment to zero.[134]

2. Pro Rata Share: Procedures Applicable to Trial of Contribution Actions

In *Victory Memorial Hospital Ass'n v. Schmidt, Garden & Erickson*,[135] the court considered the third-party plaintiff's burden of proof in a contribution action. At trial, the defendant/third-party plaintiff proved that the third-party defendant was a co-tortfeasor, but did not prove the specific amount paid to settle the injured party's underlying claim.[136] The third-party plaintiff argued that the jury in the contribution action was merely to assign a percentage of fault to the respective co-tortfeasors.[137] Subsequently, he argued that the court could take notice of the settlement amount and give the third-party plaintiff judgment for that amount which exceeded the third-party plaintiff's pro rata share.[138]

The court in *Victory Memorial* held that the third-party plaintiff must allege and prove the specific amount paid in settlement of the joint tortfeasors' liability and prove the parties' respective pro rata share of the common injury.[139] The court found the case similar to *Houser v. Witt*,[140] in which the court held the third-party plaintiff to have the burden of proving an appropriate allocation between the settlement amounts given a culpable husband and a non-culpable wife.

In *Mallaney v. Dunaway*,[141] the court rejected the argument that a settling tortfeasor's pro rata share should be determined, not by the amount paid to the injured party to settle the underlying claim, but by an independent assessment of the actual damages suffered by the injured party at the hands of the settling tortfeasor. The

132. *Id.* at 1042-43 (citing ILL. REV. STAT. ch. 70, para. 302(c) (1985)).
133. *Id.* at 1044.
134. *Id.* at 1045; *see also* Greco v. Coleman, 531 N.E.2d 46, 50 (Ill. App. Ct. 5th Dist. 1988) (requiring no reduction of the verdict when the entire loan must be repaid).
135. 511 N.E.2d 953, 955-58 (Ill. App. Ct. 2d Dist. 1987).
136. *Id.* at 955.
137. *Id.* at 956.
138. *Id.*
139. *Id.*
140. 443 N.E.2d 725, 727 (Ill. App. Ct. 4th Dist. 1982).
141. 533 N.E.2d 1114, 1116 (Ill. App. Ct. 3d Dist. 1988).

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defendant in contribution attempted to show that the injured party's actual damages exceeded the settlement figure in hopes of showing that the plaintiff in contribution did not pay more than the actual damages caused by his conduct.[142] The court in *Mallaney* rejected this argument, concluding that the parties' respective pro rata shares should be determined by the amount actually paid to the injured party and not by reference to what the injured party might have recovered at trial.[143]

In addition, the supreme court stated in *Hall v. Archer-Daniels-Midland Co.*[144] that the settling parties' allocation of damages as compensation for a particular tort is not binding in a subsequent contribution trial. In *Hall*, the third-party defendant argued that the settlement was, in part, a ruse whereby payment of punitive damages was improperly characterized as compensatory relief.[145] The court held that the plaintiff has the burden of proving that the damages are allocable to the common injury and are not an attempt to shift liability for punitive damages.[146]

III. Procedural Issues Related to the Filing of Contribution Actions

Section 305 of the Contribution Act permits the tortfeasor to raise a claim for contribution either as a counterclaim in the underlying action on primary liability or in an independent action.[147] Part III is presented in five sections and considers the following matters: the timeliness of a contribution action under the Act; the effect of various statutes of repose and limitation on the timeliness of a contribution action; the trial court's authority to order the filing or severance of a contribution action in the underlying action; and various venue considerations pertaining to actions filed against a municipality or against the State of Illinois.

A. Timeliness: Contribution Claim Filed in the Underlying Action on Primary Liability

The Contribution Act has its own statute of limitations, which provides that "an action for contribution among joint tortfeasors . . . with respect to any payment made in excess of a party's pro rata share" must be brought within two years "after the party seek-

142. *Id.* at 1115.
143. *Id.* at 1117.
144. 524 N.E.2d 586, 591-92 (Ill. 1988).
145. *Id.*
146. *Id.*
147. Ill. Rev. Stat. ch. 70, para. 305 (1989).

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ing contribution has made such payment towards discharge of his or her liability."[148] The number of cases this statute governs was greatly reduced, however, by the 1984 Illinois Supreme Court decision *Laue v. Leifheit*.[149] *Laue* interpreted section five of the Contribution Act to require that a party defendant who might have a contribution claim in a pending case *must* assert the claim in that case or be barred from asserting it thereafter.[150] The purpose behind the *Laue* holding was judicial economy—to resolve all questions of responsibility and fault in one proceeding, by one jury.[151] After *Laue*, the only claims specifically governed by the contribution statute of limitations are those claims arising out of settlements of primary claims that have not been the subject of litigation.

Thus, under *Laue*, contribution claims must be asserted during pending litigation.[152] Consistent with the *Illinois Code of Civil Procedure*,[153] courts have ruled that contribution claims should be filed contemporaneously with the party's answer.[154] Thereafter, any amendment that seeks to add a contribution claim may be filed only by leave of the court.[155] The critical limitations question, then, is whether the trial court will grant leave to file a contribution claim after the party's time to file a contribution claim as of right has expired.

On these procedural questions, Illinois appellate courts review trial court decisions under an abuse of discretion standard. The appellate cases—particularly *Long v. Friesland*[156] and *Grimming v. Alton & Southern Railway*[157]—utilize a test that in essence embodies the classic laches standard.[158] This test asks two questions: first, whether the contribution plaintiff-claimant unreasonably delayed the assertion of his claim (in particular, did he have notice of a potential claim);[159] and second, whether that delay prejudiced the contribution defendant.[160] Using these standards, appellate

148. ILL. REV. STAT. ch. 110, para. 13-204 (1989).
149. 473 N.E.2d 939 (Ill. 1984).
150. *Id.* at 941.
151. *Id.* at 942.
152. *Id.* at 941-42.
153. ILL. REV. STAT. ch. 110, para. 2-406(b) (1989).
154. Betkevicius v. Hart, 482 N.E.2d 382, 383 (Ill. App. Ct. 1st Dist. 1985); *see* Lesnak v. City of Waukegan, 484 N.E.2d 1285, 1286 (Ill. App. Ct. 2d Dist. 1985).
155. Long v. Friesland, 532 N.E.2d 914, 925 (Ill. App. Ct. 5th Dist. 1988).
156. *Id.*
157. 562 N.E.2d 1086 (Ill. App. Ct. 5th Dist. 1990).
158. *Grimming*, 562 N.E.2d at 1102; *Long*, 532 N.E.2d at 925.
159. *See Long*, 532 N.E.2d at 925.
160. *See Grimming*, 562 N.E.2d at 1102.

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courts have upheld trial court refusals to allow a contribution claim first asserted on the eve of trial, during trial, or even after trial.[161]

The recent supreme court case of *Winter v. Henry Service Co.*,[162] however, suggests a different test for allowing the filing of contribution claims. In *Winter*, after eight years of discovery and a trial that resulted in a mistrial, the primary defendants asked leave to assert a contribution claim against the plaintiff's father.[163] The supreme court upheld the trial court's refusal to grant leave to file the contribution claim.[164] The supreme court relied solely on the conclusion that the primary defendants had unreasonably delayed the bringing of the contribution claim because they had notice of a possible contribution claim long before the first trial.[165] Nowhere did the court discuss whether the contribution defendant was prejudiced by the unreasonable delay, and in reality, there was little or no prejudice since the plaintiff's entire family was involved, one way or another, in the initial lawsuit.[166] One could argue that the court assumed that an eight-year delay automatically established prejudice, or that the abuse of discretion standard of review allowed the court to assume prejudice, because the trial court could have found prejudice on these facts without abusing its discretion. But the fact remains that the court did not discuss prejudice and did not indicate that prejudice was a factor in determining whether the denial of leave "furthered the ends of justice."[167]

However, given the significance of the leave to file a late contribution claim as a *limitations* question, it seems that the full traditional standard of laches should be applied. The appellate courts have applied this standard correctly; thus, the ambiguities in the *Winter* case should be interpreted liberally so that the holding is consistent with a laches standard. In any event, a trial court using the full laches standard probably will not be reversed on appeal since the standard of review is abuse of discretion.

A second timeliness problem may arise as a result of the decision

161. *See, e.g., id.* at 1096 (upholding the trial court's revocation of a third-party claim filed on the day of trial).

162. 573 N.E.2d 822, 824 (Ill. 1991).

163. *Id.* at 823. In *Winter*, a farm accident caused the injury, and the contribution claim by the product liability defendants asserted negligence in failing to install a protective screen over the drive shaft in a grain auger. *Id.* at 824.

164. *Id.* at 825.

165. *Id.*

166. *Id.* at 824-25.

167. *Id.* at 824.

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in *Henry v. St. John's Hospital*.[168] In *Henry*, the jury returned a verdict allocating 93% of the fault underlying an $8,511,759 damage award to the defendant-contribution plaintiffs and 7% of that fault to the defendants-contribution defendants.[169] While the case was on appeal, the 93%-at-fault contribution plaintiff settled for $3.35 million, and the trial court upheld the settlement as being in good faith.[170] In post-judgment proceedings, the 7%-at-fault defendants were responsible for the remainder of the verdict—$5.51 million in compensation damages and $1.53 million in interest, accruing steadily.[171] The supreme court held that, because the contribution defendants had not filed a contribution counterclaim, they had no contribution claim against the 93%-at-fault contribution plaintiffs.[172] The question of whether the settlement was in good faith was therefore irrelevant, because if there is no contribution claim preserved, it does not matter whether a settlement is in good faith. Thus, since the old rules of joint and several liability apply, a plaintiff with a judgment against two or more joint tortfeasors can still enforce it fully against whichever joint tortfeasor the plaintiff chooses, pursuant to section 304 of the Contribution Act.[173]

The *Henry* decision may provide a justification for contribution defendants' attorneys to file late counterclaims for contribution against contribution plaintiffs. Courts ought to allow these late claims because, by definition, a contribution plaintiff is not prejudiced by a late-filed contribution counterclaim by the contribution defendant, since the issues will be the same in both the claim and the counterclaim.[174]

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168. 563 N.E.2d 410 (Ill. 1990).

169. *Id.* at 412.

170. *Id.* at 412-13.

171. *Id.* at 413. The case was filed before the 1986 several liability statute limited the liability of less-than-25%-at-fault tortfeasors to several liability. *See* ILL. REV. STAT. ch. 110, para. 2-1117 (1989).

172. *Henry*, 563 N.E.2d at 416.

173. ILL. REV. STAT. ch. 70, para. 304 (1989) ("A plaintiff's right to recover the full amount of his judgment . . . is not affected by the provisions of this Act."); *see supra* note 1 (setting forth the Contribution Act).

174. This rationale suggests an alternative resolution of the *Henry* case as well. The 7%-at-fault defendants should have moved for leave to file a late contribution counterclaim after the post-judgment settlement. The court should have granted leave to amend because there was absolutely no prejudice to the counterclaim contribution defendant in the late filing, as the very issues raised by the counterclaim were at issue in the original contribution claim. The supreme court could have invited such a motion, on appeal, and then proceeded to the good faith question. Post-judgment, good faith criteria should be much stricter than pre-judgment good faith criteria, as post-judgment settlements such as the one in *Henry* threaten to undermine the basic purposes of the Contribution Act.

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B. Statutes of Repose and Limitation

A contribution action is time barred when it is not filed within the limitation period established by a statute of repose or limitation designed to protect the third-party defendant. As noted above, a contribution action generally is timely if filed during the pendency of the underlying primary action.

1. Medical Malpractice Statute of Repose

In *Hayes v. Mercy Hospital and Medical Center*,[175] the Illinois Supreme Court held that the statute of repose applicable to medical malpractice actions[176] barred all claims, including those for contribution, not filed within the proscribed limitation period of repose. The court held that the statute's reference to claims "based upon tort, or breach of contract, *or otherwise*" embraced contribution claims and that the legislature intended to protect physicians (and their insurance carriers) from indefinite exposure to malpractice liability.[177] The court rejected the argument that the *Laue* holding and the two-year statute of limitations governing contribution actions[178] superseded the medical malpractice statute of repose.[179] The court reasoned that to exempt contribution actions from the medical statute of repose would substantially thwart the benefits intended to be conferred by the period of repose.[180]

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175. 557 N.E.2d 873, 876-77 (Ill. 1990).

176. ILL. REV. STAT. ch. 110, para. 13-212(a) (1989). Section 13-212(a) provides in pertinent part:

> Except as provided in Section 13-215 of this Act, no action for damages for injury or death against a physician, dentist, registered nurse or hospital duly licensed under the laws of this State, whether based upon tort, or breach of contract, or otherwise, arising out of patient care shall be brought more than 2 years after the date on which the claimant knew, or through the use of reasonable diligence should have known, or received notice in writing of the existence of the injury or death for which damages are sought in the action, whichever of such date occurs first, but in no event shall such action be brought more than 4 years after the date on which occurred the act or omission or occurrence alleged in such action to have been the cause of such injury or death.

Id.

177. *Hayes*, 557 N.E.2d at 877 (emphasis added).

178. ILL. REV. STAT. ch. 110, para. 13-204 (1989).

179. *Hayes*, 557 N.E.2d at 877-78.

180. *Id.* at 878. The *Hayes* decision resolves a split of authority on the issue of the constitutionality of statutes of repose in medical malpractice cases and overrules Antunes v. Samerng Sookhakitch, 537 N.E.2d 333 (Ill. App. Ct. 2d Dist. 1989). In *Antunes*, the third-party plaintiff was joined after the repose period had elapsed. *Id.* at 334. Thus, it was impossible for the third-party plaintiff to file a timely claim if measured by the statute of repose. The court in *Antunes* concluded that it would be fundamentally unfair to allow the plaintiff to join a person as a defendant in the primary action, but deny that same person his right to contribution based solely on when the plaintiff chose to join him as a

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In *Vogt v. Corbett*,[181] the supreme court reaffirmed its *Hayes* holding that third-party actions for contribution against doctors are subject to the medical malpractice statute of repose. The only additional argument raised by the contribution plaintiff in *Vogt* was whether *Hayes* was consistent with the supreme court's earlier decision in *Stephens v. McBride*,[182] which held that the notice requirements of the Local Governmental and Governmental Employees Tort Immunity Act[183] are not applicable to actions for contribution against governmental entities. The notice provision of that Act was not applicable in *Vogt*, and the supreme court easily resolved the purely theoretical inconsistency by pointing out that the notice provisions at issue in *Stephens* were enacted before the recognition of contribution claims in Illinois. Therefore, the notice provisions were not intended to apply to contribution actions, whereas the medical malpractice statute of repose, enacted after recognition of contribution actions, was intended to apply to contribution claims.[184]

In *Roberson v. Belleville Anesthesia Associates, Ltd.*,[185] the appellate court extended the *Hayes* holding to a third-party implied indemnity claim based on a medical malpractice theory. The court reasoned that since an indemnitor is obligated to the injured party for the damages directly resulting from his negligence, an "action for implied indemnity [but not express indemnity] is just as much an action for damages as is an action for contribution under [the statute of repose]."[186]

2. Statute of Repose for Construction Claims

The *Hayes* decision noted that construction-related litigation was covered by a statute of repose[187] similar to that applicable to

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defendant. *Id.* at 337. Ultimately, the *Antunes* court concluded that the statute of repose did not apply to contribution claims; that the legislature did not intend to bar contribution claims under the terms of the statute; and that maintenance of a contribution claim after the period of repose did not negate the benefits of the repose period. *Id.* at 337-38.

181. 563 N.E.2d 447, 449 (Ill. 1990).

182. 455 N.E.2d 54, 58 (Ill. 1983).

183. ILL. REV. STAT. ch. 85, paras. 8-101 to 8-103 (1989).

184. *Vogt*, 563 N.E.2d at 449.

185. 571 N.E.2d 1131, 1133 (Ill. App. Ct. 5th Dist. 1991).

186. *Id.*

187. ILL. REV. STAT. ch. 110, para. 13-214(b) (1989). Section 13-214(b) provides in pertinent part:

> No action based upon tort, contract or otherwise may be brought against any person for an act or omission of such person in the design, planning, supervision, observation or management of construction, or construction of an improvement to real property after 10 years have elapsed from the time of such act

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medical malpractice actions.[188] Moreover, the *Hayes* court noted the trial court's reliance on *Hartford Fire Insurance Co. v. Architectural Management, Inc.*,[189] a case in which the court held that contribution actions involving construction-related litigation must be filed within the periods of limitation contained in the construction claim statute of repose.[190] Thus, given the *Hayes* decision and the similarity in text and legislative history between the medical malpractice and construction claim statutes of repose, there is little doubt that contribution actions growing out of construction-related litigation must be filed consistently with the statute of repose promulgated to protect the construction industry.[191]

3. Statute of Repose for Product Liability Claims

In *Thompson v. Walters*,[192] the court held that the product liability statute of repose[193] applies to product liability contribution claims. The defendants/third-party plaintiffs in *Thompson* made two important arguments. First, they argued that the contribution claim was not a "product liability action" within the meaning of

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> or omission. However, any person who discovers such act or omission prior to expiration of 10 years from the time of such act or omission shall in no event have less than 4 years to bring an action as provided in subsection (a) of this Section.

Id.

188. Hayes v. Mercy Hosp. & Medical Ctr., 557 N.E.2d 873, 874 (Ill. 1990).

189. 511 N.E.2d 706 (Ill. App. Ct. 1st Dist. 1987).

190. *Hayes*, 557 N.E.2d at 874 (citing *Hartford*, 511 N.E.2d at 706).

191. *See* LaSalle Nat'l Bank v. Edward M. Cohon & Assocs., 532 N.E.2d 314, 319 (Ill. App. Ct. 1st Dist. 1988) (holding that an engineering firm's contribution action against a subcontractor was barred by statute of repose).

192. 565 N.E.2d 1385, 1387 (Ill. App. Ct. 4th Dist. 1990). In 1987, the plaintiff in *Thompson* sued defendant landowners for injuries incurred in 1985, allegedly caused by a defect in the defendants' swimming pool. *Id.* at 1386. Defendants then filed a third-party contribution complaint, based on strict liability for the sale of a defective product, against Sears, which had sold the defendants the pool prior to 1964. *Id.* Sears filed a motion to dismiss based on the twelve-year-from-date-of-first-sale or ten-year-from-date-of-sale-to-initial-user statute of repose for product liability actions. *Id.* The trial court denied the motion. *Id.* On interlocutory appeal, the appellate court reversed. *Id.* at 1390.

193. ILL. REV. STAT. ch. 110, para. 13-213 (1989 & Supp. 1990). Section 13-213(b) provides in pertinent part:

> [N]o product liability action based on the doctrine of strict liability in tort shall be commenced except within the applicable limitations period and, in any event, within 12 years from the date of first sale, lease or delivery of possession by a seller or 10 years from the date of first sale, lease or delivery of possession to its initial user, consumer, or other non-seller, whichever period expires earlier, of any product unit that is claimed to have injured or damaged the plaintiff, unless the defendant expressly has warranted or promised the product for a longer period and the action is brought within that period.

Id.

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that term as defined by the special statute of repose.[194] In particular, the defendants/contribution plaintiffs argued that a contribution action is not specifically an action to recover for an injury, since the purpose of contribution is only to apportion liability for tortious conduct among those responsible for an injury.[195] However, the appellate court rejected this argument, pointing out that the statute refers not to any action *for* personal injuries, but to any action "*on account of* personal injuries," and thus obviously covers contribution claims.[196] In interpreting the product liability statute of repose, the *Thompson* court noted the similarities between its purpose and language and the purpose and language of the medical malpractice statute of repose interpreted by the supreme court in *Hayes*. The court quoted the *Hayes* court's argument that a contribution action is an "action for damages" within the meaning of the medical malpractice statute of repose, and concluded that the same reasoning applied in *Thompson* to reject the defendants/contribution plaintiffs' attempted distinction of an action for apportionment of damages from an action for damages.[197]

The second argument of the defendants/third-party plaintiffs in *Thompson* was more persuasive, because it was based on a specific limiting provision in the product liability statute of repose that had no corollary in the medical malpractice statute of repose applied by the court in *Hayes*. Subsection (f) of the product liability statute provides that "[n]othing in this Section shall be construed to create a cause of action or to affect the right of any person to seek and obtain indemnity or contribution."[198] The court decided, however, that this provision did not preclude application of the product liability statute to contribution claims.[199] The court found that a contribution plaintiff urging a time-barred product liability claim has no "right to seek and obtain . . . contribution" within the meaning of subsection (f).[200] The court held that subsection (f) only preserves the right of a product liability defendant, sued on a product

194. ILL. REV. STAT. ch. 110, para. 13-213(a)(3) (1989 & Supp. 1990). Section 13-213(a)(3) states:

> "[P]roduct liability action" means any action based on the doctrine of strict liability in tort brought against the seller of a product on account of personal injury, (including illness, disease, disability and death) or property, economic, or other damage . . . .

Id.

195. *Thompson*, 565 N.E.2d at 1388.

196. *Id.* (quoting ILL. REV. STAT. ch. 110, para. 13-212 (1987)).

197. *Id.* (quoting *Hayes*, 557 N.E.2d at 876).

198. ILL. REV. STAT. ch. 110, para. 13-213(f) (1989 & Supp. 1990).

199. *Thompson*, 565 N.E.2d at 1388-89.

200. *Id.* at 1390.

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liability claim within the statutory period, to assert a contribution claim in the pending action without independent application of the statutory limitation to the contribution claim.[201] The court stated that the defendants/third-party plaintiffs' interpretation of subsection (f) to exempt all product liability contribution claims from the statute of repose would defeat the basic purpose of the statute.[202] That purpose is to completely insulate sellers from the risk of product liability claims asserted for the first time over ten years after the sale to the original user or twelve years after the first sale.[203]

Thus, although the coverage provision is not susceptible to the same interpretation the supreme court gave the medical malpractice statute of repose coverage provision, and despite the specific savings provision, the appellate court in *Thompson v. Walters* held that the statute of repose applied to product liability contribution claims.[204] This result was based primarily on the "certainty purpose" of the statute. Certainty in these areas can be pursued with more or less vigor, however, and the coverage provision of the product liability statute of repose, plus the savings provision, strongly suggest that the legislature did not intend to pursue certainty at the expense of barring otherwise timely contribution claims.

4. Local Government Statute of Limitations

In two companion cases decided on the same day, the Illinois Appellate Court for the Fourth District decided that the special one-year statute of limitations for claims against local government units is not a statute of repose that bars contribution claims asserted more than one year after the plaintiff's primary injury.[205] In *Highland v. Bracken*,[206] the plaintiff, Highland, a passenger on a City of Mattoon firetruck, was injured when the firetruck collided with a car driven by defendant Bracken. After Highland brought suit against Bracken, Bracken filed a contribution claim against the City of Mattoon and one of its employees.[207] These third-party defendants moved for summary judgment on the ground that the contribution action was barred by the one-year local government

201. *Id.* at 1389.
202. *Id.*
203. *Id.* at 1389-90; *see* relevant text of ¶ 13-213(b) quoted *supra* note 193.
204. *Thompson*, 565 N.E.2d at 1390.
205. Bonfield v. Jordan, 560 N.E.2d 412, 415 (Ill. App. Ct. 4th Dist. 1990); Highland v. Bracken, 560 N.E.2d 406, 411 (Ill. App. Ct. 4th Dist. 1990).
206. 560 N.E.2d 406, 407 (Ill. App. Ct. 4th Dist. 1990).
207. *Id.*

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statute of limitations, which provides that actions against a municipality must be filed within one year of the date of the underlying injury.[208]

The *Highland* court found that the statute applies to contribution claims, but held that the one-year period for a contribution claim begins, not on the date the injury was received, but on the date "the [contribution] cause of action accrued."[209] The court defined this date to be either the date payment is made by a joint obligor in excess of its pro rata share or the date the contribution plaintiff is sued, thereby giving notice of the nature and the potential amount of the obligation.[210]

The court distinguished the local government statute of limitations from the medical malpractice statute of repose at issue in *Hayes* on the ground that the local government statute of limitations starts the one-year time period from either the time of the injury or the time the cause of action accrued.[211] The court reasoned:

> This indicates the legislature intended . . . the Immunity Act's statute of limitations to run from either the date the injury occurred or the cause of action accrued. Since the [1986] amendment to the Immunity Act allows this statute to apply to any action based on statute, such as the Contribution Act, this remains consistent with the *Stephens* court's observation that "a contribution action may accrue many years after the accident has occurred."[212]

According to the court, this accrual feature of the Local Government Immunity statute of limitations thus seems to distinguish it from statutes of repose like the one at issue in *Hayes*:

> A statute of repose is essentially different from a statute of limitations, in that a limitations statute is procedural, giving a time limit for bringing a cause of action, with the time beginning when the action has ripened or accrued; while a repose statute is a substantive statute, extinguishing any right of bringing the cause of

208. *Id.*; *see* ILL. REV. STAT. ch. 85, para. 8-101 (1989). Specifically, section 8-101 provides:

> No civil action may be commenced in any court against a local entity or any of its employees for any injury unless it is commenced within one year from the date that the injury was received or the cause of action accrued. For purposes of this Article, the term "civil action" includes any action, whether based upon the common law or statutes or Constitution of this State.

Id.

209. *Highland*, 560 N.E.2d at 408.

210. *Id.* at 409.

211. *Id.* at 410.

212. *Id.* (quoting Stephens v. McBride, 455 N.E.2d 54, 55 (Ill. 1983)).

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action, regardless of whether it has accrued.[213]

In *Bonfield v. Jordan*,[214] the companion case to *Highland*, the court held that the one-year notice requirement in effect at the time of the plaintiff's primary injury did not apply to a contribution action that "accrued" after the notice requirement had been eliminated by the legislature. In reaching this result, the court used the *Highland* accrual test.[215]

C. The Trial Court's Authority to Order the Filing of a Contribution Claim During the Underlying Action on Primary Liability

As noted earlier, the *Laue* decision requires that contribution actions be filed during the pendency of the underlying claim for primary liability.[216] Such a requirement, the supreme court noted, insures that the same trier of fact decides all questions of primary and secondary liability.[217] Although contribution actions may be untimely when raised during or after trial,[218] courts have never addressed the question of whether the trial court has the authority to order the filing of contribution actions by a certain date before trial. Recognizing the potential prejudice that a late-filed contribution action may have on a co-defendant's discovery efforts and trial preparation, these authors suggest that the court's authority to enter pretrial orders regulating the filing of amendments supports the court's authority to limit the time within which contribution actions may be filed.[219]

Despite the desirability of deciding all questions of primary and secondary liability in one trial, the trial court has the authority to sever contribution claims from the underlying action.[220]

D. Contribution Actions Against the State of Illinois

A contribution action against the State of Illinois must be

213. *Id.* at 411.

214. 560 N.E.2d 412, 416 (Ill. App. Ct. 4th Dist. 1990).

215. *Id.* at 415 (citing *Highland*, 560 N.E.2d at 409-10).

216. Laue v. Leifheit, 473 N.E.2d 939, 940 (Ill. 1984); *see supra* notes 149-52 and accompanying text.

217. *Laue*, 473 N.E.2d at 942.

218. *See supra* part III.A.

219. *See* Farnor v. Irmco Corp., 392 N.E.2d 591, 593 (Ill. App. Ct. 1st Dist. 1979) (noting that the trial court has discretion to allow amendments to be filed before final judgment is entered).

220. Ryan v. E.A.I. Constr. Corp., 511 N.E.2d 1244, 1255 (Ill. App. Ct. 1st Dist. 1987).

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brought in the Court of Claims.[221] The Court of Claims Act provides that the Court of Claims has exclusive jurisdiction to hear tort claims against the State.[222]

E. Venue in Contribution Actions Against Municipalities

The *Illinois Code of Civil Procedure* provides that venue in an action against a municipality is proper "in the county in which its principal office is located or in the county in which the transaction or some part thereof occurred out of which the cause of action arose."[223] No reported decision has dealt with the potential conflict between venue provisions applicable to the underlying action for primary liability and this section of the *Code of Civil Procedure* specifically limiting venue in actions against municipalities.[224]

IV. Implied Indemnity and Equitable Apportionment

The common law "no contribution rule," which existed before *Skinner v. Reed-Prentice Division Package Machinery Co.*[225] and the Contribution Act, was harsh and inequitable. Reflecting the historic liberty of the plaintiff to collect all of the judgment from any one of multiple co-tortfeasors, the "no contribution rule" allowed fortunate tortfeasors, not called upon by the plaintiff to pay, to escape all responsibility for the judgment. In essence, a tortfeasor's responsibility to satisfy the judgment depended on the plaintiff's unilateral choice and certainly did not depend upon that particular tortfeasor's culpability. Clearly, Illinois's adoption of the right of contribution alters the relationship between co-tortfeasors. However, even before the acceptance of contribution,

221. International Bureau of Fraud Control v. Clayton, 544 N.E.2d 416, 419 (Ill. App. Ct. 4th Dist. 1989).

222. Ill. Rev. Stat. ch. 37, para. 439.8 (1989 & Supp. 1990); *see also* Welch v. Stocks, 503 N.E.2d 1079 (Ill. App. Ct. 5th Dist. 1987) (holding that the Court of Claims has exclusive jurisdiction over a county's third-party action against the State); Byron v. Village of Lyons, 500 N.E.2d 499 (Ill. App. Ct. 1st Dist. 1986) (holding that the circuit court lacks subject matter jurisdiction to entertain contribution actions against the State).

223. Ill. Rev. Stat. ch. 110, para. 2-103(a) (1989).

224. In resolving this conflict, one might draw a rough analogy between the municipal venue provision and the Court of Claims Act exempting the state from the trial court's general jurisdiction. As noted above, the supreme court has held that the state may be sued for contribution only in the Court of Claims. *International Bureau of Fraud Control*, 544 N.E.2d at 419. A municipality might argue that the same rationale should protect it from suit outside of the proscribed counties. This result, of course, may require that the underlying action and the contribution action be tried in different counties. On the other hand, one might conclude that the legislature did not intend section 2-103(a) to subvert the goals of consistency and judicial economy by requiring such a bifurcated process.

225. 374 N.E.2d 437 (Ill. 1977), *cert. denied*, 436 U.S. 946 (1978).

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Illinois courts sought to ameliorate some of the inequities resulting from the "no contribution rule."

Part IV provides an overview of the pre-Contribution Act theories of implied indemnity and equitable apportionment. The material is presented in four sections: the first examines the historical origins of implied indemnity in tort and quasi-contractual contexts; the second explores the demise of the tort theory of implied indemnity after *Allison v. Shell Oil Co.*;[226] the third argues for the continued viability of the quasi-contractual theory of implied indemnity; and the last part discusses the demise of equitable apportionment in light of the Contribution Act.

A. Quasi-Contractual and Tort Theories

In general, two theories emerged—one in contract, the other in tort—from which exceptions to the no contribution rule later grew. In *Nelson v. Cook*,[227] the Illinois Supreme Court held that in certain contractual relationships, there is an implied promise to indemnify the other for any tort liability that might arise. Thus, an employee or agent who was liable in tort to the injured party was entitled to indemnification from the principal, provided the indemnitee was unaware that its conduct was wrongful.

The second theory providing exceptions to the no contribution rule grew out of tort law. In *Gulf, Mobile & Ohio Railway v. Arthur Dixon Transfer Co.*,[228] the court observed that the no contribution rule worked an injustice when one tortfeasor's conduct was more egregious than the other's. The court stated that "[t]he courts have, therefore had to find a way to do justice within the law so that one guilty of an act of negligence—affirmative, active, primary in its character—will not escape scot-free, leaving another whose fault was only technical or passive to assume complete liability."[229] Despite its recognition of the difficulty in defining the distinction, the *Gulf, Mobile* court concluded that a passive tortfeasor was entitled to indemnification from an active (or more blameworthy) tortfeasor.[230] Thus, the rationale for this doctrine rested solely on the injustice in allowing the active tortfeasor to escape liability.

Unlike the doctrine of contractually-implied indemnification re-

226. 495 N.E.2d 496 (Ill. 1986).
227. 17 Ill. 443, 449 (1856).
228. 98 N.E.2d 783, 788 (Ill. App. Ct. 1st Dist. 1951).
229. *Id.* at 787.
230. *Id.* at 787-88.

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flected in *Nelson*, the active-passive theory of indemnification is not premised upon a pre-existing relationship that gives rise to an implied promise to indemnify the innocent indemnitee. Rather, the *Gulf, Mobile* doctrine seeks to do justice by placing liability upon the most blameworthy tortfeasor. Importantly, both theories shift the entire liability to the disadvantaged tortfeasor; thus, the principal in *Nelson* and the active tortfeasor in *Gulf, Mobile* incurred liability for the entire judgment.

B. Implied Indemnity: Allison v. Shell Oil Co. *and the Demise of the Tort Theory of Indemnification Under the Contribution Act*

In *Allison v. Shell Oil Co.*,[231] the Illinois Supreme Court held that implied indemnity on an active-passive tortfeasor theory was no longer a viable theory after the recognition of the right of contribution among co-tortfeasors. Acknowledging the inequities that justified the recognition of implied indemnity on an active-passive theory, the court reasoned that the doctrine no longer served a valid purpose in light of the Contribution Act.[232] The court specifically noted the absence of logic in permitting a negligent party, albeit passively negligent, to shift completely its responsibility to pay for its wrongful conduct.[233]

The *Allison* court expressly limited its holding to the active-passive component of the doctrine and cautioned that its decision did not reach the broader question of whether the doctrine of implied indemnity on a quasi-contractual theory continued to exist.[234] Thus, the *Allison* court eliminated the tort theory of indemnification reflected in the *Gulf, Mobile* decision, but left unresolved the question of whether the *Nelson* quasi-contractual theory was still viable.

C. Implied Indemnity on a Quasi-Contractual Theory

The Illinois Supreme Court specifically rejected the viability of implied indemnity when the indemnitee is at fault for the injured party's damages.[235] In such a situation, the court concluded that culpable parties are only entitled to contribution under the Act,

231. 495 N.E.2d 496, 500 (Ill. 1986).
232. *Id.* at 501.
233. *Id.*
234. *Id.* at 500.
235. Frazer v. A.F. Munsterman, Inc., 527 N.E.2d 1248, 1256 (Ill. 1988); Thatcher v. Commonwealth Edison Co., 527 N.E.2d 1261, 1263 (Ill. 1988).

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and are not entitled to indemnity.[236] The court, however, left open the prospect that an indemnitee, liable solely on a derivative basis, may be entitled to implied indemnity.[237]

In *Frazer v. A.F. Munsterman, Inc.*,[238] a downstream product distributor was found to have been negligent in failing to inspect the product. In an attempt to shift the liability, the distributor sought implied indemnification from the upstream wholesaler and manufacturer on the grounds of negligence, strict product liability, and breach of the implied warranty of merchantability.[239] The court held that implied indemnity was no longer a viable theory for any co-tortfeasor who was found to have some measure of fault for the plaintiff's injuries.[240] Reconsidering the holding in *Allison*, the *Frazer* court stated that "the fundamental premise for [implied indemnity] is that the indemnitee, although without fault in fact, has been subjected to liability solely because of some legal relationship with the plaintiff or a non-delegable duty arising out of common or statutory law."[241] The court concluded that a judicial finding that the defendant was negligent precludes recovery under the theory of implied indemnity.[242]

However, the *Frazer* opinion noted three parties who might be entitled to implied indemnity: (1) a principal held vicariously liable for the acts of an agent; (2) a principal held vicariously liable for the non-delegable acts of an independent contractor; and (3) a downstream distributor or seller of a product found liable to the injured party but on grounds that do not indicate personal fault.[243]

236. *Frazer*, 527 N.E.2d at 1256; *Thatcher*, 527 N.E.2d at 1263.

237. *Frazer*, 527 N.E.2d at 1255.

238. *Id.*

239. *Id.* at 1249.

240. *Id.* at 1255.

241. *Id.* at 1251-52.

242. *Id.* at 1255; *see* Brown v. Torin Corp., 529 N.E.2d 1077, 1079 (Ill. App. Ct. 1st Dist. 1988).

243. *Frazer*, 527 N.E.2d at 1254-55. The implications of the *Frazer* decision for strict product liability litigation should not be ignored. Justice Ryan's dissent in *Frazer* sees a darker side to the court's decision to deny indemnification to the distributor. Ryan argued that manufacturers will be encouraged by *Frazer* to settle with injured parties so as to defeat contribution to a downstream distributor or seller—a result permitted, if not encouraged, by the *Frazer* decision. *Id.* at 1260 (Ryan, J., dissenting). Thus, the manufacturer who is arguably more responsible for causing the injuries has a clear incentive to settle with the plaintiff and leave the remaining portion of damages to the less culpable downstream defendants. On the issue of culpability, Justice Ryan noted that the distributor had no hand in constructing the defect and is held liable only on a theory of a failure to inspect—a theory which, parenthetically, had never been utilized to defeat a plaintiff's recovery. *Id.* (Ryan, J., dissenting). Thus, the effect of *Frazer*, argued Justice Ryan, is to permit manufacturers to escape the lion's share of liability for their defective products. *Id.* (Ryan, J., dissenting).

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Further, in *Thatcher v. Commonwealth Edison Co.*,[244] decided on the same day as *Frazer*, the court again considered a claim for implied indemnity by a downstream product purchaser. As in *Frazer*, the party seeking indemnification in *Thatcher* was sued in the underlying action on grounds that included both strict liability and negligence.[245] However, unlike *Frazer*, no trier of fact decided the party's culpability because, before trial, the defendants agreed to pay the injured party a substantial sum to settle the claim.[246] Subsequently, the settling party sought implied indemnity from the product's manufacturer.[247] The *Thatcher* court concluded that despite the absence of a judicial finding of fault, the amount of the settlement implicitly established that the underlying claim was settled to avoid an adverse finding of fault.[248] Thus, the court held that implied indemnity was unavailable to a party whose settlement reflects its recognition of fault.[249]

The Second District Illinois Appellate Court in *Diamond v. General Telephone Co. of Illinois*[250] found that a vicarious liability implied indemnity claim would be barred if the plaintiffs' theory of liability in the primary action against the indemnity plaintiff was not based on vicarious liability, even if the indemnity plaintiff was subsequently found by the trier of fact to be not at fault.

In *Diamond*, the plaintiffs' decedents were killed in a freak accident while driving on an interstate highway adjacent to the Diamonds' property.[251] A telephone pole owned by General Telephone Company ("GTE") on the Diamonds' property did not stand straight, but leaned over and was unrestrained by its single guy wire.[252] The telephone cable supported by the pole then

244. 527 N.E.2d 1261 (Ill. 1988).

245. *Id.* at 1262.

246. *Id.*

247. *Id.*

248. *Id.* at 1263.

249. *Id.* In dissent, Justice Miller argued that this type of adverse inference drawn merely from the fact that a party has settled a case runs contrary to the customary view that settlements and offers of settlement are not taken as admissions or acknowledgements of fault. *Id.* at 1264 (Miller, J., dissenting); *see* Kemner v. Norfolk & W. Ry., 544 N.E.2d 124, 127 (Ill. App. Ct. 5th Dist. 1989) ("Because [defendant/indemnity plaintiff] paid the plaintiffs $3,800,000 in settlement of their claims, and because plaintiffs' pleadings alleged specific acts of negligence on behalf of [defendant/indemnity plaintiff], we find that *Thatcher* dictates that an indemnity action cannot be maintained by such a defendant."); *see also* Van Berkum v. Christian, 530 N.E.2d 52, 56-57 (Ill. App. Ct. 1st Dist. 1988) (holding that the defendant's implied indemnity claim was barred because the counts against him alleged fault and the defendant settled with the plaintiff).

250. 569 N.E.2d 1263, 1268-69 (Ill. App. Ct. 2d Dist. 1991).

251. *Id.* at 1265.

252. *Id.*

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sagged over the interstate, at a height of only six to seven feet.[253] A tractor-trailer truck traveling on the interstate hit the sagging cable.[254] The cable pulled taught and broke the leaning pole, which was hurled across the highway into plaintiffs' decedents' van.[255] Plaintiffs sued the Diamonds for negligently plowing their land close to the telephone pole so as to sever the guy wire.[256] Plaintiffs sued GTE in negligence for failing to secure the pole with adequate guy wires, to warn landowners of the location of the guy wires, and to guard the guy wires from damage.[257]

A jury absolved the Diamonds from liability and imposed all the liability on GTE.[258] The Diamonds then brought an implied indemnity claim against GTE for settlement payments in a collateral suit brought by the owner of the semi-trailer company.[259] The trial court rejected the Diamonds' implied indemnity claim.[260] The appellate court affirmed, reasoning that the Diamonds could not have a valid implied indemnity claim based on a vicarious liability theory because they had not been sued on a vicarious liability theory.[261] The court examined the underlying cause and determined that it was based in negligence rather than on any "pretort relationship . . . or any express contractual basis."[262]

In summary, the reasoning and holdings of *Frazer*, *Thatcher*, and *Diamond* suggest that the Illinois courts may be willing to recognize the continuing viability of implied indemnity based on quasi-contractual principles, where one party, wholly innocent of any personal fault, is held liable only because of a derivative or vicarious liability principle. But the indemnity plaintiff must have followed procedures that positively rule out personal fault on its part.

However, the Illinois Appellate Court for the First District recently rejected that position and found that implied indemnity in quasi-contractual principles did not survive adoption of the Contribution Act. In *American National Bank & Trust Co. v. Brans-*

253. *Id.*
254. *Id.*
255. *Id.*
256. *Id.*
257. *Id.*
258. *Id.* at 1266.
259. *Id.*
260. *Id.* at 1264.
261. *Id.* at 1268-69.
262. *Id.* The court recognized the "classic pretort relationships of owner-lessee or lessor-lessee" as giving rise to a duty to indemnify. *Id.* at 1268.

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field,[263] a patient, injured during an operation, sued the surgeon, the anesthesiologist, and the hospital. The claim against the hospital included allegations of both individual fault and vicarious liability for the negligence of the surgeon and the negligence of the anesthesiologist.[264] The plaintiff failed to identify an expert to testify as to individual fault on the part of the hospital.[265] The trial court entered summary judgment for the surgeon.[266] The anesthesiologist settled, and the trial court found the settlement to be in good faith.[267] Therefore, the trial court dismissed the implied indemnity claim by the hospital against the anesthesiologist.[268]

The appellate court upheld this dismissal on two grounds: first, that quasi-contractual implied indemnity did not survive the adoption of contribution based on comparative fault; and second, that the plaintiff's good faith settlement with the anesthesiologist precluded the hospital's implied indemnity claim.[269] The court gave a number of reasons for its conclusion that quasi-contractual implied indemnity did not survive the adoption of contribution based on comparative fault.[270] The most important reason was a practical one—the impossibility of coordinating an implied indemnity system with the contribution system.[271]

The *Bransfield* court isolated a significant problem with the continued recognition of implied indemnity claims after the adoption of the Contribution Act—how can implied indemnity claims be meshed with the statutory contribution system? The court in *Bransfield* was faced with the problem of reconciling the good faith settlement provisions of the Contribution Act with continued recognition of the quasi-contractual implied indemnity claims in vicarious liability situations. If implied indemnity claims against an agent are not barred by the plaintiff's good faith settlement with the agent, then the Contribution Act aim of encouraging settlement is undermined. If, however, implied indemnity claims are barred by the settlement and the plaintiff retains all his legal claims against the principal when the principal is not named in the settle-

263. 576 N.E.2d 1013, 1015 (Ill. App. Ct. 1st Dist.), *appeal granted*, 142 Ill.2d 651 (1991) (Table No. 72521).
264. *Id.*
265. *Id.*
266. *Id.* at 1015-16.
267. *Id.*
268. *Id.* at 1016.
269. *Id.* at 1016-19.
270. *Id.*
271. *Id.* at 1018.

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ment, then settlements seem to defeat the purpose of retaining implied indemnity for vicarious liability altogether.

There is, however, a rational way of reconciling these concerns and accommodating the various policies. Courts could follow the lead of the Fourth District in *Bristow* and give legal effect to a settlement between the plaintiff and the agent that releases any purely vicarious liability claim against the principal. This approach preserves both the settlement-encouragement aim of the Contribution Act and the policy behind implied indemnity. If the principal's claim for implied indemnity is not barred by settlement, then: (1) the plaintiff's and agent's settlement is made meaningless because of the plaintiff's agreement in the settlement to indemnify the agent against any subsequent liability; and (2) the purpose of releasing the defendant for the fixed, clearly-defined cost of settlement and, thus, of encouraging settlements, would be undermined. The proposed rule avoids these undesirable consequences while retaining the desired 100%-0% allocation of implied indemnity for vicarious liability.[272] Under this approach, the result of *Bransfield* is correct. The settlement would not only bar the implied indemnity claim by the hospital, but it also would bar any vicarious liability claim against the hospital.

Although *Frazer* and *Thatcher* give only indirect support for the proposition,[273] there is ample reason to argue that implied indemnity on a quasi-contractual basis was not abolished by the recognition of contribution. The policy considerations that prompted the *Nelson* court to recognize such a right have not been diminished by recognition of the right to contribution among co-tortfeasors. One may still contend that the innocent party, liable only because of another's blameworthy conduct, should be fully indemnified by the wrongdoer. Thus, recognition of the right to contribution should have no effect on the continued viability of implied indemnity in a quasi-contractual context.

The argument for implied indemnity is bolstered further when it

272. In contrast, a settlement between the plaintiff and the principal should be given the effect of releasing the agent from liability to the plaintiff and preserving the defendant's implied indemnity claim against the agent only if the agreement specifically names that agent as a released party. In this situation, the indemnity interest of the principal is indistinguishable from the contribution interests of other parties, and the settlement provisions of the Contribution Act allow the defendant (the principal here) to weigh his interests in the implied indemnity claim, in settling the main claim, and in other economic concerns. There is no reason, therefore, why the Contribution Act resolution should not be adopted fully in a case when the plaintiff settles with the principal.

273. *See* Frazer v. A.F. Munsterman, Inc., 527 N.E.2d 1248, 1251 (Ill. 1988); Thatcher v. Commonwealth Edison Co., 527 N.E.2d 1261, 1263 (Ill. 1988).

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is recognized that contribution between the would-be indemnitee and indemnitor is theoretically ill-suited to the task of addressing the parties in a quasi-contractual context. Contribution is best understood as a means to assign to each tortfeasor liability for his pro rata share of the plaintiff's injuries. Consequently, when one tortfeasor pays more than his fair share, other co-tortfeasors must contribute to make the amount paid equitable. In the quasi-contractual relationship, however, one cannot speak of the indemnitee's pro rata share as somehow distinct from the indemnitor's. The pro rata share for a party who is vicariously liable is that amount charged to its indemnitor. Thus, when the indemnitee is forced to pay for the plaintiff's injuries, the indemnitee's entire payment exceeds its pro rata share of fault for the injuries.

To illustrate the point, if one envisions a "contribution" action between an indemnitee and indemnitor, the only sensible conclusion that can be drawn by the trier of fact is that the indemnitor was 100% at fault for plaintiff's injuries, and the resulting judgment should permit the indemnitee to recoup 100% of the payment made. Thus, any attempt to apply the theory of contribution to a quasi-contractual relationship leads to a result identical to that of implied indemnity.

Yet precisely the opposite argument was accepted by the court in *Hackett v. Equipment Specialists, Inc.*[274] In *Hackett*, the plaintiff sued the manufacturer of an automatic corn husking machine that mangled her arm at work.[275] The manufacturer filed a third-party contribution complaint against the plaintiff's employer.[276] The jury awarded compensatory damages in favor of the plaintiff and against the manufacturer, assessing comparative fault percentages of 45% to the plaintiff for her assumption of the risk and 55% to the manufacturer.[277] In the third-party contribution claim by the manufacturer against the employer, the jury apportioned 100% of the damages to the employer.[278]

The appellate court reversed and remanded for a new trial.[279] It found that the 100% allocation of liability to the employer was erroneous for two reasons.[280] First, in finding the manufacturer

274. 559 N.E.2d 752 (Ill. App. Ct. 1st Dist.), *appeal denied*, 564 N.E.2d 837 (Ill. 1990) (Table No. 70931).

275. *Id.* at 754.

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.* at 762.

280. *Id.* at 761-62.

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55%-at-fault in the primary claim, the jury necessarily found the manufacturer to be an "active tortfeasor" whose fault proximately caused the plaintiff's injuries.[281] The court held that the jury could not thereafter consistently allocate 100% of the fault to the employer in the contribution claim, because the manufacturer was "only entitled to contribution to the extent plaintiff's injury was caused by" the employer and not by the manufacturer.[282]

Second, the court determined that the 100%-0% allocation was equivalent to an indemnity conclusion, which by definition shifts 100% of the liability from the indemnitee to the indemnitor.[283] But the facts in *Hackett* cannot support an implied indemnity claim under the *Doyle v. Rhodes* list of remaining valid implied indemnity claims in product liability cases.[284] This is true because the jury found that the manufacturer's active fault was the proximate cause of plaintiff's injury, and the manufacturer was not found vicariously liable for the fault of another. Therefore, as a matter of law, the jury's 100%-0% allocation was in error.[285]

Hackett is certain to be a controversial decision. One can argue that the court's decision of the question as a matter of law is erroneous because a reasonable jury, assuming that the manufacturer's fault proximately caused the plaintiff's injury, could still conclude that the employer's fault was over 200 times greater, thus leading, after rounding off, to the 100%-0% allocation. The court's only response to this argument came in its response to the manufacturer's reliance on *Pipes v. American Logging Tool Corp.*:[286]

> Defendant also relies on *Pipes* for the principle that the jury can place the loss in proportionate amounts on those whose actions proximately cause the injury without traditional labels characterizing the kind of fault involved. However, even there the jury attributed 10% fault to the employer and 90% fault to the manufacturer of the defective product.[287]

It is not immediately clear, however, why a jury is allowed to make

281. *Id.*

282. *Id.* at 761.

283. *Id.*

284. *Id.* at 761-62 (observing that the right of indemnity or total contribution may exist where "one held liable for failing to correct a dangerous condition may seek full contribution from the party whose conduct was the sole proximate cause of the injury by creating the unreasonably dangerous condition") (citing Doyle v. Rhodes, 461 N.E.2d 382 (Ill. 1984)).

285. *Id.*

286. 487 N.E.2d 424 (Ill. App. Ct. 5th Dist. 1985).

287. *Hackett*, 559 N.E.2d at 762 (citation omitted).

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a 9-to-1 or 99-to-1 comparative fault judgment under the *Pipes* principle but not a 201-to-1 judgment.

The inconsistent verdict problem in *Hackett* may be avoided in all cases when the contribution defendant may be held directly liable to the primary plaintiff. The problem may recur only in cases like *Hackett*, when the contribution defendant is immune from direct liability to the primary plaintiff. In addition, the 100% allocation of liability to the employer in a contribution claim would ordinarily be ruled out by the *Kotecki* limitation on the employer's contribution liability.[288]

D. Equitable Apportionment: Demise of the Concept in Light of the Right to Contribution

Before Illinois recognized the right to contribution, courts permitted an apportionment of damages when a second tortfeasor merely aggravated the injured party's condition by causing a second, severable injury.[289] The original tortfeasor, however, remained liable for both the original and subsequent injuries.[290] Thus, the original tortfeasor was permitted to recover for any payment made for damages that in fact were caused solely by the second tortfeasor's conduct, thereby effecting a pro rata apportionment of liability.[291] In 1986, however, the court in *Mayhew Steel Products, Inc. v. Hirschfelder*[292] held that the Contribution Act abolished the common law concept of equitable apportionment.[293]

V. GOOD FAITH SETTLEMENTS—BARS TO THE RIGHT OF CONTRIBUTION

The Contribution Act provides that a tortfeasor who settles with a claimant pursuant to section 302 is discharged from all liability for any contribution to any other tortfeasor.[294] Part V considers two broad questions concerning good faith settlements: (1) what constitutes a good faith settlement under the Act; and (2) what

288. *See supra* part II.A.3.c.
289. *See* Gertz v. Campbell, 302 N.E.2d 40 (Ill. 1973).
290. *Id.* at 43.
291. *Id.* at 44.
292. 501 N.E.2d 904 (Ill. App. Ct. 5th Dist. 1986).
293. *Id.* at 907; *see also* Cleggett v. Zapianin, 543 N.E.2d 892 (Ill. App. Ct. 1st Dist. 1989) (holding that the Contribution Act extinguishes actions for implied indemnity that might serve to impede settlement and thus interfere with the central purpose of the Act).
294. ILL. REV. STAT. ch. 70, para. 302(e) (1989). Section 302(e) is set forth *supra* note 1.

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process and procedural rights must be accorded the non-settling tortfeasor who seeks to challenge the good faith basis of a settlement.

A. Good Faith Settlements

A settlement executed in good faith discharges the settling party from its obligation to contribute to any other joint tortfeasor.[295] In determining whether an agreement is made in good faith within the meaning of section 302(c), all surrounding circumstances must be considered.[296]

The supreme court and various districts of the appellate court have decided several cases in which the central question was whether the settling party received sufficient consideration to support a finding of good faith. For example, in *Ballweg v. City of Springfield*,[297] the Illinois Supreme Court upheld the settlement of a claim that possibly was barred by a statute of limitations. The court reasoned that while the suit remained outstanding, the parties were free to compromise the claim.[298] Similarly, appellate courts have searched to find that the parties actually sought to dispose of a disputed claim.[299]

In *Wilson v. Hoffman Group, Inc.*,[300] the supreme court returned to the issue of good faith in the context of a settlement between an employee and employer. Recognizing that the employer had an unquestioned right to assert its Worker's Compensation Act immunity[301] in the employee's common law suit for damages, the court nonetheless held that a settlement that released the employer from liability presumptively was not made in bad faith.[302] Relying on its prior rationale in *Ballweg*, the court concluded that the employer had a right to decide whether its interests were better pursued through a defense of the common law suit or its immunity under the Act.[303] Accordingly, if defense of the suit was a permissible option, then settlement of that claim must also be

295. Bank v. R.D. Werner Co., 559 N.E.2d 217 (Ill. App. Ct. 1st. Dist. 1990).
296. Wilson v. Hoffman Group, Inc., 546 N.E.2d 524, 529 (Ill. 1989).
297. 499 N.E.2d 1373, 1380 (Ill. 1986).
298. *Id.*
299. *See* Pritchard v. SwedishAmerican Hosp., 557 N.E.2d 988 (Ill. App. Ct. 2d Dist. 1990); McKanna v. Duo-Fast Corp., 515 N.E.2d 157, 162-63 (Ill. App. Ct. 1st Dist. 1987); O'Connor v. Pinto Trucking Serv. Inc., 501 N.E.2d 263 (Ill. App. Ct. 1st Dist. 1986).
300. 546 N.E.2d 524 (Ill. 1989).
301. ILL. REV. STAT. ch. 48, para. 138.30 (1989).
302. *Wilson*, 546 N.E.2d at 529.
303. *Id.* at 528-29.

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appropriate.[304]

Justice Ryan, dissenting in *Wilson*, argued that the court's ruling sanctioned settlements that function only to defeat the third-party plaintiff's right to contribution.[305] He noted that the employer faced no real liability to the injured employee and further asserted that the settlement could only work to shield the employer from contribution.[306] Justice Ryan's dissent raised questions of whether a settling party should be discharged from contribution when there is no consideration to support the settlement or when the claim against the settling party could not be pursued successfully.[307]

Indeed, one court has sustained a settlement that could only serve to defeat the third-party plaintiff's right to contribution. In *Ellis v. E.W. Bliss & Co.*,[308] cited with approval in *Wilson*,[309] the court approved a settlement even though it was executed after the employer had successfully asserted its worker's compensation immunity in the underlying common law suit.[310] The appellate court found that the settling party's liability for contribution constituted sufficient consideration to support the settlement.[311] The unarticulated premise of the *Ellis* decision seems to be that the injured party need not give the settling party consideration for the settlement and that the only critical requirement is that the settling party gain its release from liability for contribution.

In a similar vein, one court found a good faith settlement when the settling party actually paid nothing. In *Brown v. Union Tank Car Co.*,[312] the employer settled its claim with the injured employee in an agreement which provided that the employer would waive its right to enforce its worker's compensation lien. A simultaneously executed agreement with a co-defendant, however, provided that the employer would be reimbursed for the value of the lien waiver.[313] Thus, the employer settled on terms under which it lost nothing to secure its release. The court rejected the argument that

304. *Id.* at 529. Notably, the *Wilson* decision overruled LeMaster v. Amsted Indus., Inc., 442 N.E.2d 1367 (Ill. App. Ct. 5th Dist. 1982), and resolved the split in authority that existed between *LeMaster* and Dixon v. Northwestern Publishing Co., 520 N.E.2d 932 (Ill. App. Ct. 4th Dist. 1988).

305. *Wilson*, 546 N.E.2d at 532 (Ryan, J., dissenting).

306. *Id.* (Ryan, J., dissenting).

307. *Id.* at 532-33 (Ryan, J., dissenting).

308. 527 N.E.2d 1022 (Ill. App. Ct. 1st Dist. 1988).

309. *Wilson*, 546 N.E.2d at 528-29.

310. *Ellis*, 527 N.E.2d at 1024.

311. *Id.*

312. 554 N.E.2d 595, 595-96 (Ill. App. Ct. 5th Dist. 1990).

313. *Id.*

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the Contribution Act[314] requires a settling party to pay the injured party in order to defeat the third party's right to contribution.[315]

Prompted by the Contribution Act's intent to foster settlements, Illinois appellate courts generally hold that the trial court has wide discretion to determine that a settlement is made in good faith.[316] Accordingly, the trial court may consider both the uncertainty of liability and the speculative nature of the damages sought.[317] Courts have held that a finding of good faith is not negated simply because: (1) the terms of the settlement are advantageous to the released party;[318] (2) the settlement reflects an apparent disproportionate division of liability between the settling and non-settling defendants;[319] (3) the injured party's damages exceed the amount of the settlement;[320] (4) the settlement is very low compared to the damages sought;[321] or (5) the settling parties have a close relationship.[322]

A non-settling party must be protected against collusive settlements, but the Contribution Act does not require that the settlement agreement be measured under a comparative fault analysis.[323] Specifically, courts have rejected reliance upon the "reasonable range" test, which places primary emphasis on whether the settlement was within the range of the settling party's reasonably projected share of liability for the injured party's damages.[324]

In another case addressing the element of good faith, the

314. ILL. REV. STAT. ch. 70, para. 302 (1989).

315. *Brown*, 554 N.E.2d at 597. For further discussion of the *Brown* court's construction of the terms "release" and "settles," see *supra* part II.C.4. *See also* Wasmund v. Metropolitan Sanitary Dist., 482 N.E.2d 351 (Ill. App. Ct. 1st Dist. 1985) (finding a good faith settlement despite the fact that the injured party's insurance paid the funds necessary to settle and release the third-party defendant).

316. *See, e.g.*, *Wasmund*, 482 N.E.2d at 351; Louis J. Perona & Claire Perona Murphy, *Good Faith Settlement Under the Contribution Act: Do Trial Courts Have Too Much Discretion?*, 20 LOY. U. CHI. L.J. 961 (1989).

317. *See* Pritchard v. SwedishAmerican Hosp., 557 N.E.2d 988, 992 (Ill. App. Ct. 2d Dist. 1990); McKanna v. Duo-Fast Corp., 515 N.E.2d 157, 163 (Ill. App. Ct. 1st Dist. 1987).

318. O'Connor v. Pinto Trucking Serv. Inc., 501 N.E.2d 263, 267 (Ill. App. Ct. 1st Dist. 1986).

319. *McKanna*, 515 N.E.2d at 163.

320. Mallaney v. Dunaway, 533 N.E.2d 1114, 1117 (Ill. App. Ct. 3d Dist. 1988).

321. Christmas v. Hughes, 543 N.E.2d 274, 276 (Ill. App. Ct. 1st Dist. 1989).

322. Wasmund v. Metropolitan Sanitary Dist., 482 N.E.2d 351, 354 (Ill. App. Ct. 1st Dist. 1985).

323. Snoddy v. Teepak, Inc., 556 N.E.2d 682, 685 (Ill. App. Ct. 1st Dist. 1990).

324. *Id.*; Ruffino v. Hinze, 537 N.E.2d 871, 874 (Ill. App. Ct. 1st Dist. 1989); *see also* Jachera v. Blake-Lamb Funeral Homes, Inc., 545 N.E.2d 314, 317-18 (Ill. App. Ct. 1st Dist. 1989) (finding the disparity between verdict and settlement not substantial enough to constitute bad faith and that collusion between the parties was not shown).

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supreme court in *Hall v. Archer-Daniels-Midland Co.*[325] stated that an absence of good faith might be shown if the settling party sought contribution from other tortfeasors based on a settlement which did not disclose that a portion of the fund was in reality allocable to punitive damages.[326]

B. Reasonableness of Settlements that Impair Enforcement of an Employer's Worker's Compensation Lien

In *Blagg v. Illinois F.W.D. Truck & Equipment Co.*,[327] the supreme court held that the good faith settlement requirement of the Contribution Act,[328] and the employer's compensation lien protection provision of the Worker's Compensation Act,[329] combined to mandate that a trial court disapprove a settlement structured to avoid the employer's compensation lien.

William Blagg, a volunteer fireman for the Village of Winthrop Harbor, was injured when he was thrown from the rear jumpseat of a firetruck that was responding to an emergency call.[330] Blagg brought an action against the manufacturer of the firetruck and its distributor.[331] Blagg's wife also brought an action for loss of consortium.[332] The manufacturers brought a third-party action for contribution against the Village, which then brought a fourth-party action for contribution against Blagg.[333] The village also filed a petition asserting a worker's compensation lien pursuant to section 5(b) of the Worker's Compensation Act[334] in the amount of $282,251 increasing by $426 each week.[335]

Blagg and his wife agreed to settlements with the manufacturers and their distributor, which allocated $100,000 to the husband for his injuries and $350,000 to the wife for her consortium claim.[336] The trial court held a hearing and determined that the settlements were made in good faith.[337] The appellate court reversed and remanded, holding that the Contribution Act's policy of encouraging

325. 524 N.E.2d 586, 592 (Ill. 1988).
326. *Id.*
327. 572 N.E.2d 920, 927 (Ill. 1991).
328. ILL. REV. STAT. ch. 70, para. 302(c) (1989).
329. ILL. REV. STAT. ch. 48, para. 138.5 (1989).
330. *Blagg*, 572 N.E.2d at 922.
331. *Id.* at 921.
332. *Id.*
333. *Id.*
334. ILL. REV. STAT. ch. 48, para. 138.5(b) (1989).
335. *Blagg*, 572 N.E.2d at 921.
336. *Id.*
337. *Id.* at 922.

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settlements, embodied in a permissive judicial standard for determining whether a settlement is in good faith, does not apply when a settlement may impair the employer's compensation lien.[338] The *Blagg* appellate court held that section 5(b) of the Worker's Compensation Act requires a different judicial test. Specifically, the appellate court reasoned:

> To give effect to section 5(b) in cases where a settlement agreement allocates an award between an employee's claim and the employee's spouse's loss of consortium claim, we hold that a trial court must . . . "closely scrutinize" the settlement to determine whether it is fair and reasonable to all the parties, including the employer holding a worker's compensation lien. This does not mean that a court must insure that the total amount of an employer's lien is paid before it will allow a spouse to recover for loss of consortium, but the court must not allow parties to clearly circumvent the lien by apportioning the bulk of the recovery to the loss of consortium claim. The trial court should consider whether the parties would have allocated the settlement the same way had there not been a worker's compensation lien.[339]

The court applied this test to the facts and found that the agreement did not fairly and reasonably allocate the award between the husband, for his injuries, and the wife, for her loss of consortium.[340] The appellate court viewed the settlement as "an obvious attempt to circumvent the employer's lien" and doubted whether such a settlement would have been reached if not for the worker's compensation lien.[341] The appellate court rejected the settling parties' defense—that the settlement was reasonable because the husband's claim was worth considerably less than the wife's since the husband's claim was subject to reduction for contributory negligence while the wife's independent consortium claim was not.[342] The appellate court held that the wife's consortium claim was derivative and hence subject to reduction on account of the husband's contributory negligence.[343] The appellate court reversed the trial court's decision approving the settlement agreement and remanded the cause for proceedings consistent with its opinion.[344]

On appeal, the Illinois Supreme Court affirmed the judgment of

338. *Id.*

339. Blagg v. Illinois F.W.D. Truck & Equip. Co., 542 N.E.2d 1294, 1299 (Ill. App. Ct. 2d Dist. 1989), *aff'd*, 572 N.E.2d 920 (Ill. 1991) (citations omitted).

340. *Id.* at 1299-1300.

341. *Id.*

342. *Id.* at 1300-02.

343. *Id.* at 1302.

344. *Id.* at 1303.

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the appellate court, in an opinion that generally tracks the reasoning of the appellate court but is less clear on a number of issues.[345] The supreme court's opinion does not set out as clearly the test to be used to judge the settlement allocation, although it seems to have adopted the appellate court's test:

> It is of utmost importance that the trial court protect an employer's lien. When a settlement agreement allocates an award between an employee's claim for personal injuries and a spouse's claim for loss of consortium, the trial court must closely scrutinize the agreement so that an employer's rights are not abused.
>
> In this case, the appellate court found that the settlement agreements did "not fairly and reasonably allocate the award between [the husband] for his injuries and [the wife] for her loss of consortium." The court further noted that the settlements represented an obvious attempt to circumvent the Village's worker's compensation lien, as no part of [the wife's] loss-of-consortium award can be used to reimburse the lien.[346]

Additionally, the supreme court's opinion does not articulate the statutory basis for the test. At the end of its discussion of the settlement agreement, the court concluded that the settlement allocation "does not appear to be in good faith."[347] At an earlier point, however, the court seemed to have adopted the appellate court's reasoning that the test derives, at least in part, from section 5(b) of the Worker's Compensation Act: "In the case at bar the trial court focused almost exclusively on section 2(c) and its requirement of good faith. The trial court virtually ignored section 5(b) of the Worker's Compensation Act."[348]

The supreme court also agreed with the appellate court that the wife's consortium claim was derivative and hence subject to reduction by the husband's contributory negligence.[349] The supreme court stated that this supported the need for another good-faith-settlement hearing rather than, as the appellate court found, further demonstration of the unreasonableness of the settlement allocation.[350] Given the deference the supreme court showed the appellate court's opinion and the supreme court's affirmance of the appellate court's judgment, any ambiguities in the supreme court's opinion should be resolved by reference to the clearer opinion of the appellate court.

345. Blagg v. Illinois F.W.D. Truck & Equip. Co., 572 N.E.2d 920, 931 (Ill. 1991).
346. *Id.* at 924 (quoting *Blagg*, 542 N.E.2d at 1294).
347. *Id.*
348. *Id.* at 923.
349. *Id.* at 927.
350. *Id.*

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Thus, although the supreme court's affirmation of the appellate court decision muddies the waters a bit, by proceeding as if this were a test for whether the settlement was in good faith under the Contribution Act, the supreme court's opinion nevertheless incorporates the appellate court's test and, thus, its statutory basis in the worker's compensation provision. The *Blagg* case should not, therefore, be read as one applying or elaborating good faith settlement requirements under the Contribution Act.

C. Procedure—Hearing on Good Faith Settlement

The trial court may determine whether a settlement was reached in good faith.[351] The Contribution Act does not specify the hearing process to be used in determining the good faith basis of a settlement, however, "once a preliminary showing of good faith has been made, the burden shifts to the party challenging the settlement to establish that it was not made in good faith."[352] If found to be presumptively valid, the party challenging the settlement must prove by clear and convincing evidence that the settlement was the product of collusion, or tortious or other wrongful conduct.[353]

As the Contribution Act does not specify any particular hearing procedure, the trial court has discretion to decide what type of hearing process is necessary to determine good faith.[354] A preliminary showing of good faith may be established by an examination of the pleadings to the extent that they recite the disputed facts, the settlement terms, and the statement of the settling parties that they have voluntarily chosen to settle their disputed claim.[355] The court may permit the challenging party to conduct discovery on the issue of good faith. However, in the absence of a showing of relevance, the challenging party is not entitled to conduct discovery on the basis of the settlement.[356] And finally, the due process rights of the party challenging the settlement are not implicated when the parties settle their claim before the challenging party pays more than

351. Melzer v. Bausch & Lomb, Inc., 549 N.E.2d 817, 820 (Ill. App. Ct. 1st Dist. 1989).

352. Wilson v. Hoffman Group, Inc., 546 N.E.2d 524, 529 (Ill. 1989).

353. Snoddy v. Teepak, Inc., 556 N.E.2d 682, 684 (Ill. App. Ct. 1st Dist. 1990).

354. *Id.*; *Melzer*, 549 N.E.2d at 820; McKanna v. Duo-Fast Corp., 515 N.E.2d 157, 163 (Ill. App. Ct. 1st Dist. 1987).

355. Pritchard v. SwedishAmerican Hosp., 557 N.E.2d 988, 992 (Ill. App. Ct. 2d Dist. 1990); Ruffino v. Hinze, 537 N.E.2d 871, 873 (Ill. App. Ct. 1st Dist. 1989); *see* Lorenz v. Air Illinois, Inc., 522 N.E.2d 1352, 1355 (Ill. App. Ct. 1st Dist. 1988).

356. *Snoddy*, 556 N.E.2d at 684; *Ruffino*, 537 N.E.2d at 873.

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its pro rata share.[357]

VI. CONCLUSION

The supreme court's development of Illinois contribution law necessarily requires further judicial elaboration and clarification. *Laue v. Leifheit* transferred limitations questions from the statutory realm to the judicial realm. *Kotecki* announced a purely judicial compromise of the competing legislative policies behind employers' immunity under the Worker's Compensation Act and the Contribution Act's allocation of liability according to proportionate fault. *Hopkins v. Powers*, *People v. Brockman*, and *Gerill Corp. v. J.L. Hargrove Builders* together suggest that what constitutes "liability in tort" for purposes of the Contribution Act is based on what the court considers to be the relevant policy considerations, and not on what "liability in tort" traditionally meant.

In each of these major areas of contribution law, the Illinois Supreme Court cut the law loose from the language of the Contribution Act and developed it on a case-by-case basis in line with the court's own view of policy. From the court's past performance, it is difficult to predict how the court will decide the highly technical sub-issues in each of these areas. The court's unique blend of statutory and judicial law has created a confusing and uncertain amalgam. The legal profession and the public that it serves must simply stay tuned and await further developments.

357. *Snoddy*, 556 N.E.2d at 685 (stating that there is no protected property right in a contribution claim after the injured party and co-defendant settle).

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