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## Efficiency, Fairness, and Common Sense: The Case for One Action as to Percentage of Fault in Comparative Negligence Jurisdictions That Have Abolished or Modified Joint and Several Liability

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# NOTES

## Efficiency, Fairness, and Common Sense: The Case for One Action as to Percentage of Fault in Comparative Negligence Jurisdictions That Have Abolished or Modified Joint and Several Liability

I.	INTRODUCTION .....	740
II.	THE ADVENT OF COMPARATIVE FAULT AND THE DEMISE OF JOINT AND SEVERAL LIABILITY.....	742
A.	<i>From Contributory Negligence to Comparative Negligence</i> .....	742
B.	<i>From Joint Liability to Comparative Fault</i> .....	743
C.	<i>A Procedural Comparison of Comparative Fault and Joint Liability</i> .....	748
III.	THE PROBLEM OF INEFFICIENT BEHAVIOR BY PLAINTIFFS IN COMPARATIVE NEGLIGENCE JURISDICTIONS WITH MODIFIED JOINT LIABILITY .....	749
A.	<i>A Description of the Problem</i> .....	749
B.	<i>The Split among the Courts</i> .....	753
1.	Court Rationales for Barring Successive Suits .....	754
a.	<i>The Entire Controversy Doctrine</i> ....	754
b.	<i>Collateral Estoppel</i> .....	755
c.	<i>Statutory Interpretation: Implying a One-Action Rule</i> .....	757
2.	Court Rationales Allowing Successive Suits .....	759
a.	<i>Statutory Interpretation: Finding No One-Action Rule</i> .....	759

	<i>b. Issues Not Precluded</i> .....	760
	<i>C. The Need for Legislative and Judicial Action</i> .....	761
IV.	A MANDATE FOR ONE ACTION AS TO FAULT.....	762
	<i>A. Justification of One Action</i> .....	762
	1. Recapturing Efficiency .....	763
	2. Retaining Fairness .....	764
	3. Reducing Inconsistency .....	766
	<i>B. Legislatures and Courts Should Enforce</i> <i>a One-Action Rule</i> .....	767
V.	CONCLUSION .....	769

## I. INTRODUCTION

Plaintiffs are the masters of their own actions.<sup>1</sup> They decide when, where, and whom to sue. Although the law has evolved in ways that limit a plaintiff's procedural choices,<sup>2</sup> plaintiffs enjoy a growing number of situations in which they can recover, and an increase in the number of possible defendants.<sup>3</sup> For example, governmental tort liability statutes, while limiting procedural choices, now allow plaintiffs to sue government entities.<sup>4</sup> Modern jurisdictional rules give courts a wider reach and thus enable plaintiffs to reach more defendants in one action.<sup>5</sup> Perhaps most

1. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 398-99 (1987).

2. For example, statutes of limitations have replaced common law concepts such as laches, more rigidly defining when a suit can be brought. See James D. Ghiardi, *Computing Time in Tort Statutes of Limitation*, 64 Marq. L. Rev. 575, 575 (1987).

In addition, jurisdictional rules have circumscribed the fora in which suits can be brought. Forum non conveniens and due process still restrain jurisdiction, despite the loosening of restrictions that followed the Supreme Court's decision in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). *International Shoe* made possible a "parade of new and much broader state 'long arm' statutes, which authorize the courts of a state to exercise personal jurisdiction over nonresidents in a variety of circumstances." Peter G. McAllen, *Deference to the Plaintiff in Forum Non Conveniens*, 13 S. Ill. U. L. J. 191, 192 n.1 (1989). These state long-arm statutes are vital in enabling plaintiffs to join all possible defendants in one action under comparative fault as this Note argues should be required. For a discussion of the history of state court jurisdiction, see Robert A. Lusardi, *Nationwide Service of Process: Due Process Limitations on the Power of the Sovereign*, 33 Vill. L. Rev. 1, 24-32 (1988).

3. See Philip D. Oliver, *One Is Enough: A Proposed Bar of the Injured Employee's Cause of Action Against a Third Party*, 58 Fordham L. Rev. 117, 127-28 (1989) (noting the increase in vulnerability for defendants in strict liability).

4. See, for example, Cal. Gov't Code §§ 810 et seq. (1970 & Supp. 1995). See also Jon L. Craig, ed., 1 *Civil Actions Against State and Local Government*, §§ 3.4-3.6 at 182-96 (Shepard's, 2d ed. 1992).

5. Howard P. Fink, *Indispensable Parties and the Proposed Amendment to Federal Rule 19*, 74 Yale L. J. 403, 436-37 (1965). The joinder reforms enacted under the Federal Rules of Civil Procedure and adopted in large measure by the states have greatly expanded the scope of the modern lawsuit. Richard D. Freer, *Rethinking Compulsory Joinder*, 60 N.Y.U. L. Rev. 1061,

importantly, a plaintiff's own negligence no longer bars recovery in most jurisdictions.<sup>6</sup> The advent of comparative negligence has enabled many more plaintiffs to win judgments.

Another recent development in tort law that has greatly affected plaintiffs and defendants alike is the rejection of joint and several liability.<sup>7</sup> The past decade has seen a marked increase in the number of states that have either abolished or modified the joint liability rule<sup>8</sup> and replaced it with some form of comparative fault.<sup>9</sup>

Under a joint liability regime, plaintiffs could sue a single defendant and still obtain a full recovery.<sup>10</sup> Under comparative fault, however, a plaintiff may have the opportunity to sue defendants in separate, consecutive actions, keeping a defendant in reserve as a hedge against a bad result in the first case.<sup>11</sup> This possibility creates inefficiencies that do not exist in joint liability regimes.

This Note identifies the barriers and disincentives to sue all defendants in one action in a comparative fault jurisdiction, the costs associated with these disincentives, and a possible solution in the form of a one-action rule for systems of comparative negligence without joint and several liability. Part II of this Note reviews the developments of the doctrines of comparative negligence and comparative fault and the corresponding demise of contributory negligence and joint liability. In addition, Part II notes the procedural differences in a joint liability regime and one employing comparative fault.<sup>12</sup> Part

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1065-67 (1985). Joint and several liability was formulated in a time when these modern procedural tools were unavailable. See text accompanying notes 35-39.

6. To date, forty-six states have adopted some form of comparative negligence by statute or judicial proceeding. See Victor E. Schwartz, *Comparative Negligence* § 1-1 at 4 (Michie, 1994). See also *id.* § 1-1 at 2 (observing: "The march of comparative negligence turned into a parade . . .").

7. *Id.* § 15-4 at 308-12.

8. *Id.* § 15-4 at 308-09.

9. For purposes of this Note, the terms "comparative fault" and "comparative negligence" have distinct meanings. See *Schneider National Inc. v. Holland Hitch Co.*, 843 P.2d 561, 566 n.4 (Wyo. 1992). As noted by the *Schneider National* court:

"Comparative negligence" defines the doctrinal change created by the legislative adoption . . . of principles limiting the effect of contributory negligence and measuring negligence in percentage terms for the purpose of reducing the plaintiff's recovery in proportion to the percentage of negligence attributed to that actor. Wyo. Stat. § 1-1-109(a), (b) and (c). "Comparative fault" principles apportion damage recovery among multiple or joint tortfeasors according to the percentage of fault attributed to those actors after reduction for the plaintiff's percentage of negligence. Wyo. Stat. § 1-1-109(d).

*Id.* "Comparative negligence," thus defined, replaces contributory negligence, and "comparative fault" replaces joint liability.

10. See text accompanying notes 52-55.

11. See Part III.A.

12. See note 9 for the distinction between comparative negligence and comparative fault.

III illustrates the possibilities for inefficient plaintiff behavior created by the modification of joint liability. Part III also observes that some courts have not stopped multiple litigation, despite their recognition of the inefficiencies of strategic behavior by plaintiffs. Part IV argues that comparative fault systems should, therefore, contain mandatory joinder provisions to combine the procedural efficiency of joint liability with the substantive fairness of comparative fault.

## II. THE ADVENT OF COMPARATIVE FAULT AND THE DEMISE OF JOINT AND SEVERAL LIABILITY

### A. *From Contributory Negligence to Comparative Negligence*

In 1950 only five jurisdictions in the United States applied comparative negligence to most negligence cases.<sup>13</sup> By 1995, forty-six states had adopted comparative negligence by either legislative or judicial action.<sup>14</sup> This move toward comparative negligence has been defined as a reaction against the harsh results of the contributory negligence defense available at common law.<sup>15</sup> Contributory negligence foreclosed recovery for any plaintiff who was negligent, even if that negligence was slight in comparison to the defendant's. Comparative negligence reformed this system by allowing a plaintiff to recover damages in proportion to the fault of the defendants.

The first states to adopt comparative negligence generally did so by legislative action.<sup>16</sup> In states where the legislature had not acted, courts generally felt constrained to continue to follow the rule of contributory negligence,<sup>17</sup> although many courts believed that the contributory negligence defense produced unfair results and was of dubious legal pedigree.<sup>18</sup> A breakthrough in the judicial adoption of

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13. Schwartz, *Comparative Negligence* § 1-1 at 2 (cited in note 6).

14. *Id.* § 1-1 at 4.

15. *Id.* § 1.2 (noting, however, that there is "ample evidence that comparative negligence preceded contributory negligence in point of time"). See generally Gary T. Schwartz, *Contributory and Comparative Negligence: A Reappraisal*, 87 Yale L. J. 697 (1978) (concluding comparative negligence is preferable for both economic and equitable reasons).

16. Georgia adopted a system of comparative negligence for railroad workers by statute in 1860. See Ga. Code Ann. § 46-8-291; Ga. Code Ann. § 94-703. Mississippi legislatively adopted comparative negligence for all actions in 1910. See Miss. Code Ann. § 11-7-15. See generally Schwartz, *Comparative Negligence* § 1-4 at 12-18.

17. See, for example, *Maki v. Frelk*, 40 Ill.2d 193, 239 N.E.2d 445 (1968). See generally Schwartz, *Comparative Negligence* § 1-5(b), (c) at 21-24 (summarizing cases).

18. See, for example, *Rossmann v. La Grega*, 28 N.Y.2d 300, 270 N.E.2d 313, 317 (1971) (describing contributory negligence as "a legal concept that created an artificial dichotomy that

comparative negligence occurred in the mid-1970s when the supreme courts of Florida<sup>19</sup> and California<sup>20</sup> instituted the doctrine. Since then, ten more states have judicially adopted comparative negligence.<sup>21</sup>

Typically, following the adoption of comparative negligence by the courts, state legislatures codified the doctrine during the wave of tort-law reform that swept the nation in the 1980s.<sup>22</sup> Thus, in retrospect, the reluctance of the courts to make significant steps toward reform in the area of tort law was not justified. No legislature has reversed a state supreme court decision instituting comparative negligence. Rather, the legislatures have stepped in and codified the principle in question, allowing for more efficient and uniform implementation.

### B. From Joint Liability to Comparative Fault

As state legislatures began to reform the tort system, they faced questions that the (often judicial) decision to move to compara-

persisted all through the nineteenth century and is slowly yielding now to the persistent arguments of its critics that it is at once unfair and not well founded in legal principle"). Nevertheless, the court in *Rossman* refused to implement comparative negligence, finding it unnecessary on the facts of that case. The court noted that Dean Prosser had spoken of contributory negligence, in his famous phrase, as the "chronic invalid who will not die." *Id.* at 316 (quoting William Lloyd Prosser, *Handbook of the Law of Torts* 428 (West, 3d ed. 1964)). For further understanding of the criticisms leveled against contributory negligence in the academic literature, see generally Charles L. B. Lowndes, *Contributory Negligence*, 22 *Georgetown L. J.* 674, 709 (1934) (cited in *Rossman* and calling contributory negligence "unjust and illogical"); Albert Averbach, *Comparative Negligence Legislation: A Cure for our Congested Courts*, 19 *Albany L. Rev.* 4 (1955); Kenneth P. Grubb, *Observations on Comparative Negligence*, 23 *Ohio Bar* 237 (1950); John J. Haugh, *Comparative Negligence: A Reform Long Overdue*, 49 *Or. L. Rev.* 38 (1969).

19. *Hoffman v. Jones*, 280 S.2d 431, 436 (Fla. 1973) (reasoning that "[l]egislative action could, of course, be taken, but we abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule" (emphasis deleted)) (quoting *Gates v. Foley*, 247 S.2d 40, 43 (Fla. 1971)).

20. *Nga Li v. Yellow Cab Co. of California*, 13 Cal. 3d 804, 532 P.2d 1226 (1975). The California court abrogated contributory negligence despite the fact that it had been statutorily enacted in 1872. Schwartz, *Comparative Negligence* § 1-5(e) at 28 (cited in note 6).

21. *Kaatz v. State*, 540 P.2d 1037 (Alaska, 1975); *Placek v. Sterling Heights*, 405 Mich. 638, 275 N.W.2d 511 (1979); *Bradley v. Appalachian Power Co.*, 163 W.Va. 332, 256 S.E.2d 879 (1979); *Scott v. Rizzo*, 96 N.M. 682, 634 P.2d 1234 (1981); *Alvis v. Ribar*, 85 Ill. 2d 1, 421 N.E.2d 886 (1981); *Goetzman v. Wichern*, 327 N.W.2d 742 (Iowa 1982); *Gustafson v. Benda*, 661 S.W.2d 11 (Mo. 1983); *Hilen v. Hays*, 673 S.W.2d 713 (Ky. 1984); *Nelson v. Concrete Supply Co.*, 303 S.C. 243, 399 S.E.2d 783 (1991); *McIntyre v. Balentinc*, 833 S.W.2d 52 (Tenn. 1992).

22. See Appendix A of Schwartz, *Comparative Negligence* (cited in note 6) (cataloging the adoption of comparative negligence by the various states). For examples of statutory enactments that followed judicial adoption, see Alaska Stat. § 09.17.040 to .900 (1993); Cal. Civ. Code § 1431.2 (West Supp. 1995); Fla. Stat. § 768.81 (West Supp. 1995); Ill. Ann. Stat. ch. 735, §§ 5/2-1107.1, 5/2-1116 (Smith-Hurd 1992); Ky. Rev. Stat. § 411.182 (1992).

tive negligence generally left unresolved.<sup>23</sup> Many state legislatures simply enacted comparative negligence using broad language and left the details up to the courts.<sup>24</sup> Increasingly, however, legislatures have become more activist in dealing with the collateral issues involved in a comparative negligence system.<sup>25</sup> One of the areas in which legislatures have been most active is in deciding whether or not to modify or abolish the doctrine of joint and several liability. By 1995, thirty-four of the forty-five comparative fault jurisdictions had amended their law on joint and several liability by legislative action.<sup>26</sup>

All comparative fault systems attempt to balance two conflicting objectives. One is that each person involved in an action be liable only in proportion to his or her share of the total fault.<sup>27</sup> The other is that full compensation be awarded to injured plaintiffs.<sup>28</sup> These competing goals represent conflicting values and cannot both be given priority by any given system.<sup>29</sup>

23. These issues included the continued viability of joint and several liability, whether a large proportion of fault would still preclude recovery by a plaintiff, and the apportionment of fault to nonparties. Schwartz, *Comparative Negligence* § 2-3 at 41-52.

24. *Id.* § 2-3 (b) at 43.

25. See *id.*

26. See Alaska Stat. § 9.17.080; Ariz. Rev. Stat. Ann. § 12-2506 (West 1994); Cal. Civ. Code §§ 1431-1431.5 (West Supp. 1995); Colo. Rev. Stat. § 13-21-111.5 (West 1989 & Supp. 1994); Conn. Gen. Stat. Ann. § 52-572h (West 1991 & Supp. 1994); Fla. Stat. Ann. § 768.81 (3)-(5) (West Supp. 1995); Ga. Code Ann. § 51-12-33 (Michie Supp. 1994); Hawaii Rev. Stat. § 663-10.9 (1988 & Supp. 1994); Idaho Code § 6-803 (1990 & Supp. 1994); Ill. Ann. Stat. § 5/2-1117 to -1118 (Smith-Hurd 1992); Ind. Code Ann. § 34-4-33-5 (West 1986); Iowa Code Ann. § 668.4 (West 1987); Kan. Stat. Ann. § 60-258a (1983); La. Civ. Code Ann. § 2324 (West Supp. 1995); Mich. Comp. Laws Ann. § 600.6304 (West 1987 & Supp. 1994); Minn. Stat. Ann. § 604.02 (West 1988 & Supp. 1995); Mo. Ann. Stat. § 537.067 (Vernon 1988); Mont. Code Ann. § 27-1-703 (1993); Nev. Rev. Stat. § 41.141 (1986 & Supp. 1993); N.H. Rev. Stat. Ann. § 507:7-e (Equity Supp. 1994); N.J. Stat. Ann. § 2A:15-5.2 to -5.4 (West Supp. 1994); N.M. Stat. Ann. § 41-3A-1 (1989); N.Y. Civ. Prac. L. & R. Law 1601-1602 (McKinney Supp. 1995); N.D. Cent. Code § 32-03.2-02 (Supp. 1993); Ohio Rev. Code Ann. § 2307.31-32 (Baldwin 1993); Or. Rev. Stat. § 18.485 (1988); S.D. Cod. Laws § 15-8-15.1 (Supp. 1994); Tex. Civ. Prac. & Rem. Code Ann. § 33.013 (Vernon Supp. 1995); Utah Code Ann. § 78-27-40 (1992 & Supp. 1994); 12 Vt. Stat. Ann. § 1036 (Equity Supp. 1994); Wash. Rev. Code Ann. § 4.22.070 (West 1988 & Supp. 1995); Wyo. Stat. § 1-1-109(d) (1988 & Supp. 1994). Two other jurisdictions accomplished the same result by judicial decision. See *Boyles v. Oklahoma Natural Gas Co.*, 619 P.2d 613 (Okla. 1980); *McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn. 1992).

27. Leonard E. Eilbacher, *Nonparty Tortfeasors in Indiana: The Early Cases*, 21 Ind. L. Rev. 413, 413 (1988). Professor Eilbacher calls apportioned liability the cornerstone principal of comparative fault. To the extent that state legislatures have written statutes that give this goal priority over compensation, proportionality has become the primary function of tort law. This Note both advocates such an emphasis and assumes that it is the normative situation in the majority of states.

28. W. Page Keeton, et al., eds., *Prosser and Keeton on the Law of Torts* § 4 at 20 (West, 5th ed. 1984) (student ed.).

29. Eilbacher, 21 Ind. L. Rev. at 413 (cited in note 27) (observing that "[t]he fairness of any system of comparative fault . . . is in the eye of the beholder").

Allocating the fault of nonparties in tort cases, especially when they are insolvent, is at the center of the debate on joint and several liability.<sup>30</sup> The presence of an insolvent party generally means either that an injured plaintiff receives less than full compensation, or that solvent defendants are liable for an amount greater than their proportional fault. In jurisdictions retaining joint and several liability, the burden of insolvency falls upon the party defendants who are forced to pay the full amount of the plaintiff's injuries, regardless of the proportion of their fault.<sup>31</sup> In a jurisdiction that has abolished joint and several liability, this burden falls on the plaintiff.<sup>32</sup> These two positions represent the extremes. Some jurisdictions have reached a middle position by allocating the share of an insolvent tortfeasor among all parties, including the plaintiff, in proportion to their relative fault.<sup>33</sup> However, the modern trend away from joint liability is still inherently a choice of proportional fault and, therefore, fairness for defendants over full compensation for plaintiffs.<sup>34</sup>

Joint and several liability was instituted under very different circumstances than exist today.<sup>35</sup> First, at the time joint and several liability developed, contributory negligence completely barred recovery;<sup>36</sup> only innocent plaintiffs could recover. Comparing the tortfeasor to the innocent plaintiff, it did not seem unfair that the guilty party bear the risk of other insolvent, immune, unreachable, or unknown defendants. Secondly, it was widely believed that juries were incapa-

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30. *Id.* at 414.

31. Supporters of joint liability justify this burden on defendants because they were one of the "but for" causes of the plaintiff's injury. Richard W. Wright, *Allocating Liability Among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure*, 21 U.C. Davis L. Rev. 1141, 1152-53 (1988).

32. See, for example, Ind. Code Ann. § 34-4-33-7 (West 1986) (abolishing contribution). Under this scheme, the party defendants must pay only the portion of the total judgment that relates to their comparative fault. In sole-tortfeasor cases, the burden of an insolvent defendant would fall on the plaintiff exclusively. Some commentators have argued that there is no principled basis for shifting that risk in multiple-defendant cases. Carol A. Mutter, *Moving to Comparative Negligence in an Era of Tort Reform: Decisions for Tennessee*, 57 Tenn. L. Rev. 199, 313 (1990).

33. Minnesota, for example, reallocates among all parties including the plaintiff. Minn. Stat. Ann. § 604.02 (2). In comparison, Connecticut reallocates only among defendants. Conn. Gen. Stat. Ann. § 52-572h(g).

34. This shift has been justified in part as a quid pro quo for the abolition of contributory negligence. Mutter, 57 Tenn. L. Rev. at 319 (cited in note 32). Professor Mutter argues that "most of these legislative modifications lack intellectual rigor; they are truly the product of political give-and-take. Nonetheless, they represent a consensus that joint and several liability should not coexist equally with comparative fault." *Id.* at 318.

35. See Warren Freedman, *Joint and Several Liability: Allocation of Risk and Apportionment of Damages* 7 (Butterworth, 1987) (describing common law limitations on joinder).

36. Mutter, 57 Tenn. L. Rev. at 306 (cited in note 32).



ble of apportioning fault among several defendants.<sup>37</sup> The advent of comparative fault has undercut the first rationale<sup>38</sup> and rests upon the converse of the second.<sup>39</sup>

The very basis of comparative negligence is that the relative fault of individual actors can be determined and that each actor should be held responsible for that degree of fault.<sup>40</sup> The basic fairness concerns that led to the demise of contributory negligence also militate against the continued use of joint and several liability.<sup>41</sup> If it is unjust for a plaintiff who is ten percent negligent to recover nothing, it is equally unacceptable to require a defendant who is ten percent at fault to pay the entire recovery, especially when the plaintiff's fault is greater. Many statutes that have modified, but retained, some form of joint liability recognize this inequity and hold a defendant jointly liable only if the defendant's fault is relatively large in comparison to the plaintiff's fault.<sup>42</sup>

The inequities that can result from retaining pure joint and several liability in comparative negligence jurisdictions are illustrated in many cases, one of which is *Dunham v. Kampman*.<sup>43</sup> In *Dunham* a husband and wife, while riding a motorcycle, collided with an auto-

37. *Id.*

38. *Id.* at 306-07. However, some jurisdictions retain joint and several liability for defendants whose negligence is great. See, for example, N.J. Stat. Ann. § 2A:15-5.3a. In these jurisdictions, the defendant usually retains a right of contribution. See, for example, N.J. Stat. Ann. § 2A:15-5.3e. Other jurisdictions still follow joint and several liability when the plaintiff's negligence is minimal or nonexistent. See, for example, Tex. Civ. Prac. & Rem. Code Ann. § 33.013 (b)(2) and (c)(1). In addition, joint and several liability is often retained for intentional torts. See, for example, N.M. Stat. Ann. § 41-3A-1 (C)(1).

39. Damon Ball, *A Reexamination of Joint and Several Liability Under a Comparative Negligence System*, 18 St. Mary's L. J. 891, 898 (1987). Ball notes that:

Comparative negligence recognizes the ability of a court to determine and apportion damages in relation to the harm caused. Joint and several liability, in contrast, presumes the inability of the judiciary to divide fault among parties. To continue to hold multiple defendants liable for the total amount of damage, when a mechanism for apportioning damages is available, contravenes fundamental fairness.

*Id.*

40. *Id.* at 898 (arguing that since comparative negligence allows for the division of fault, "the law of joint and several liability must be repudiated and each defendant held accountable only for the percentage of damages found by the trier of fact to have been caused by his conduct").

41. See Victor E. Schwartz and Liberty Mahshigian, *A Permanent Solution for Product Liability Crises: Uniform Federal Tort Law Standards*, 64 Denver U. L. Rev. 685, 699 (1988) (advocating the abolition of joint and several liability in favor of proportional fault). But see John W. Wade, *Should Joint and Several Liability of Multiple Tortfeasors be Abolished?*, 10 Am. J. Trial Advoc. 193, 193 (1986) (supporting the continued use of joint and several liability).

42. See note 38.

43. 547 P.2d 263 (Colo. App. 1976), *aff'd en banc*, 560 P.2d 91 (Colo. 1977). Colorado has since abolished joint liability for defendants in a negligence action and substituted comparative fault. Colo. Rev. Stat. § 13-21-111.5 (1).

mobile.<sup>44</sup> In the following suit, the jury found the husband, who drove the motorcycle, to be ninety-nine percent at fault and the automobile driver one percent at fault.<sup>45</sup> Although Colorado's comparative negligence statute prevented the husband from recovering damages from the defendant, operation of joint and several liability required the defendant to compensate the wife for the entire amount of her injuries because her husband was immune from liability.<sup>46</sup>

Much of the drive to modify joint and several liability resulted from a perceived insurance "crisis" in tort law.<sup>47</sup> Local governments, often targeted as "deep-pocket" defendants with relatively low comparative fault,<sup>48</sup> cited joint and several liability as a cause for increasing taxes and decreasing services.<sup>49</sup> The call for tort reform, based on this perceived crisis, overwhelmed state legislatures across the nation in the mid-1980s.<sup>50</sup> Many state legislatures responded with wide-ranging abolition and modification of the joint and several liability rule.<sup>51</sup>

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44. 547 P.2d at 265.

45. *Id.*

46. *Id.*

47. Larry Pressler and Kevin V. Schieffer, *Joint and Several Liability: A Case for Reform*, 64 *Denver U. L. Rev.* 651, 654 (1988).

48. *Id.* at 654-55 (collecting examples of municipal liability for "passive" negligence leading to large recoveries because of joint liability with a more culpable "active" tortfeasor).

49. *Id.* at 654 (citing National Institute of Municipal Law Officers, *Report of the Committee on Municipal Tort Liability* 35-38 (Oct. 1984)).

50. *Id.* at 656-69.

51. *Id.* Critics have since argued that the state legislative reforms in the area of joint and several liability were the product of misunderstanding and confusion. Others disagree. Professors Richard W. Wright and Aaron D. Twerski, for example, carried on a running debate on the merits of these reforms in the *University of California at Davis Law Review*. See generally Richard W. Wright, *Allocating Liability Among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure*, 21 *U.C. Davis L. Rev.* 1141 (1988); Aaron D. Twerski, *The Joint Tortfeasor Legislative Revolt: A Rational Response to the Critics*, 22 *U.C. Davis L. Rev.* 1125 (1989); Richard W. Wright, *Throwing Out the Baby with the Bathwater: A Reply to Professor Twerski*, 22 *U.C. Davis L. Rev.* 1147 (1989); Aaron D. Twerski, *The Baby Swallowed the Bathwater: A Rejoinder to Professor Wright*, 22 *U.C. Davis L. Rev.* 1161 (1989).

Professor Twerski contends that the state legislatures that modified, and sometimes abolished, joint and several liability were not confused, nor did they ignore the question of who should bear the risk of an insolvent defendant. Twerski, 22 *U.C. Davis L. Rev.* at 1129. But see Mutter, 57 *Tenn. L. Rev.* at 318 (cited in note 32) (stating that "these legislative modifications lack[ed] intellectual rigor"). Rather, the legislatures' decisions reflected an honest attempt to strike a fair balance between plaintiffs and defendants in tort cases. Twerski, 22 *U.C. Davis L. Rev.* at 1130-32.

According to Professor Twerski, two considerations motivated these reforms. First, legislatures believed that joint and several liability served to compound unfairness that existed in the tort system. *Id.* at 1132. Secondly, legislatures identified as a real problem what Professor Twerski calls "institutionally immune" defendants that force plaintiffs to sue "deep pockets" to obtain a full recovery. *Id.* at 1132-33.

*C. A Procedural Comparison of Comparative Fault  
and Joint Liability*

The rise of comparative fault and the demise of joint and several liability have significantly altered the dynamics of an action in which there are at least two party defendants possibly at fault. Under joint and several liability, a plaintiff may choose to sue only one defendant, usually the so-called deep-pocket, and recover all her damages from that party.<sup>52</sup> The defendant would institute an action for contribution against the other tortfeasors, assuming a right of contribution existed in the jurisdiction.<sup>53</sup> The method of determining the amount of money each co-tortfeasor owed in contribution varied, but generally involved dividing the amount of the judgment into equal shares on a pro-rata basis.<sup>54</sup> In jurisdictions that have adopted comparative fault and retained joint and several liability, the preferred method is to require contribution based on the relative findings of fault in the original action.<sup>55</sup> In either situation, the party defendants are responsible for collecting from all nonparty co-tortfeasors and bear the risk of nonrecovery.

In jurisdictions that have abolished joint and several liability, however, the burden of collecting from each separate tortfeasor falls upon the plaintiff. Each defendant is responsible to the plaintiff only for its share of the total damages as apportioned by the findings of comparative fault.<sup>56</sup> This shifted burden removes one incentive for the plaintiff to sue only the deep pocket. However, it creates new troublesome incentives that tort-reform statutes have not addressed.<sup>57</sup>

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52. For legislative recognition of this phenomenon, see Cal. Civ. Code § 1431.1(a), which states:

The legal doctrine of joint and several liability, also known as "the deep pocket rule", has resulted in a system of inequity and injustice that has threatened financial bankruptcy of local governments, other public agencies, private individuals and businesses and has resulted in higher prices for goods and services to the public and in higher taxes to the taxpayers.

53. See, for example, Uniform Contribution Among Tortfeasors Act, 12 U.L.A. 63 (1955).

54. *Id.* § 2 at 87.

55. This method assumes the nonjoined tortfeasors' fault was adjudicated in the first action. Some states allow judgments to determine only the fault of parties to the suit. See, for example, Ohio Rev. Code Ann. § 2315.19(B)(4) (1994). See generally Schwartz, *Comparative Negligence* § 15-5(a) at 313-16 (cited in note 6). In these jurisdictions, a defendant must attempt to join any co-tortfeasors.

56. See, for example, Utah Code Ann. § 78-27-40 (stating that "the maximum amount for which a defendant may be liable to any person seeking recovery is that percentage or proportion of the damages equivalent to the percentage or proportion of fault attributed to that defendant. No defendant is entitled to contribution from any other person").

57. Two states, Oklahoma and Tennessee, have amended their doctrines of joint and several liability through common law rather than by statute. See *Boyles v. Oklahoma Natural*

### III. THE PROBLEM OF INEFFICIENT BEHAVIOR BY PLAINTIFFS IN COMPARATIVE NEGLIGENCE JURISDICTIONS WITH MODIFIED JOINT LIABILITY

#### A. A Description of the Problem

Changes in the law of joint and several liability have created new opportunities for inefficient plaintiff behavior.<sup>58</sup> With joint and several liability, a plaintiff needed to bring only one action to recover her full damages. The defendant was then responsible for a second action to obtain contribution from nonjoined parties.<sup>59</sup> Under joint and several liability, joinder rules allowed defendants to join any potentially liable party that was not initially joined by the plaintiff as a third-party defendant to the original action.<sup>60</sup> As a result, for all practical purposes, all litigation occurred efficiently in one case. This

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*Gas Co.*, 619 P.2d 613, 616-17 (Okla. 1980) (holding that a comparative fault statute does not replace joint and several liability when the plaintiff is nonnegligent) and *McIntyre v. Balentine*, 833 S.W.2d 52, 58 (Tenn. 1992) (adopting comparative fault and rendering joint and several liability obsolete). The Tennessee Supreme Court has recently reaffirmed its holding in *McIntyre*. See *Bervoets v. Hardy Ralls Pontiac-Olds, Inc.*, 891 S.W.2d 905, 907 (Tenn. 1994) (stating that *McIntyre* indeed abolished joint and several liability, but did not abolish contribution). To date efficiency concerns have been addressed by the courts and not the legislatures. This Note calls for judicial and legislative action in this context. See Part IV.B.

58. One possible solution to this behavior would be to retain joint and several liability, thereby making multiple actions by the claimant moot. This option should be rejected for the same reasons comparative fault has been enacted. This Note assumes that the reinstatement of joint and several liability is neither a realistic possibility nor a sound policy choice. For a defense of joint and several liability in the context of statutory construction, see James J. Scheske, Comment, *The Reform of Joint and Several Liability Theory: A Survey of State Approaches*, 54 J. Air L. & Comm. 627 (1988).

59. See, for example, Tenn. Code Ann. §§ 29-11-101 to -106 (1980), Tennessee's version of the Uniform Contribution Among Tortfeasors Act. A version of the act has been adopted in 19 states. Uniform Contribution Among Tortfeasors Act, 12 U.L.A. 80, 80 (West Supp. 1994). Of course, a defendant may fail in its attempt to recover in a second action. See Richard D. Freer, *Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court's Role in Defining the Litigative Unit*, 50 U. Pitt. L. Rev. 809, 830 (1989) (noting the harm of underinclusive joinder to a defendant who is unable to recover from a jointly liable tortfeasor in a separate action).

60. See, for example, F.R.C.P. 14. If the party whom the defendant wished to join was not subject to the jurisdiction of the court, the defendant was forced to initiate a second action for contribution in another jurisdiction. This situation necessitated a new trial on the merits because the contribution defendant could not be bound by the judgment in the first case.

If an unknown party had been at fault along with a named defendant, the defendant would shoulder the entire burden of the judgment under joint liability. Without joint liability, an empty chair defense may be available to the defendant to place liability on an absent party. If fault is attributed to an unknown party, the plaintiff and the named defendants usually bear the burden of the nonrecovery in proportion to their relative fault. See note 33.

process conserved judicial resources and eliminated the danger of inconsistent judgments.<sup>61</sup>

Without joint and several liability, a plaintiff may choose to bring two or more separate actions to obtain full compensation for her injuries.<sup>62</sup> A plaintiff may bring separate actions for purely strategic purposes. That is, a plaintiff may keep a defendant in reserve so that if the first trial did not result in a sufficient judgment, she would have a second chance at a satisfactory recovery.<sup>63</sup> This strategy is even more tempting in a jurisdiction that follows the Uniform Comparative Fault Act, which mandates that only the fault of the present party defendants can be at issue in a case.<sup>64</sup> In either situation, the plaintiff

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61. Inconsistent judgments lead to an inefficient allocation of deterrence. See text accompanying notes 179-81. This Note uses the term inefficiency to refer both to this misallocation of deterrence and to the waste of judicial resources inherent when plaintiffs are allowed to maintain two separate actions for the same injury.

62. Such a result would most frequently occur when one defendant is a government entity and the second is a private party who has a right to jury trial under a state constitution. Again, the result is judicial inefficiency and the possibility of inconsistent judgments. This problem could be eliminated if the comparative negligence statute made government entities subject to the mandatory joinder requirements this Note suggests. Government entities would then be subject to jury determinations of their liability, percentage of fault, and damage valuations. Governments have resisted subjecting themselves to jury trials because they believe that juries too willingly set high damage figures and assess high percentages of fault to "deep pocket" defendants. These beliefs have not been proven. In fact, the evidence is very ambiguous as to whether judges or juries are preferable to "deep pockets." See generally Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. Pa. L. Rev. 1147 (1992). Even if juries pose a danger to the public fisc in adjudicating the government's liability, state legislatures could impose damage caps on the amount that can be recovered from government entities in a tort case. See, for example, Wis. Stat. Ann. § 893.80(3) (West 1983) (creating a \$50,000 cap on damages recoverable from governmental agencies). With or without damage caps, this situation is preferable to requiring two separate actions.

63. The plaintiff is the only party who has a motive to "hide" a potentially liable party. Defendants always have incentive to join any party they believe to be negligent in an effort to reduce the amount of their own comparative fault. See Part III.B.

64. Uniform Model Comparative Fault Act § 2(a), 12 U.L.A. 42 (1977). A party who has been released from liability by operation of some kind of immunity may also have fault apportioned by the court. The comment explains why the drafters took this position:

The limitation to parties to the action means ignoring other persons who may have been at fault with regard to the particular injury but who have not been joined as parties. This is a deliberate decision. It cannot be told with certainty whether that person was actually at fault or what amount of fault should be attributed to him, or whether he will ever be sued, or whether the statute of limitations will run on him, etc. An attempt to settle these matters in a suit to which he is not a party would not be binding on him.

Both plaintiff and defendants will have significant incentive for joining defendants who may be liable. The more parties joined whose fault contributed to injury, the smaller the percentage of fault allocated to each of the other parties, whether plaintiff or defendant.

Id. at 50 (West Supp. 1994).

This line of reasoning makes two assumptions: first, that the plaintiff has a reason to have her percentage of fault lowered; and second, that the defendant knows the identity of all parties who are possibly at fault. The first assumption does not hold true when applied to a completely innocent plaintiff. As noted above, plaintiffs have more motive for strategic behavior than the

has an incentive to sue one party, often the “deep pocket,” first and reserve other defendants for possible future actions involving the same injury.<sup>65</sup>

This practice occurs despite the fact that the majority of states have adopted so-called “mandatory joinder” provisions based on Rule 19 of the Federal Rules of Civil Procedure.<sup>66</sup> Federal Rule 19 and its state progeny mandate the joinder of persons required for a “just adjudication” of the case<sup>67</sup> and require the plaintiff to identify all such nonjoined parties in the complaint. The rule does not, however, address the sanction for failure to identify nonjoined, but potentially liable, parties in the complaint.<sup>68</sup> This Note argues that states should

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drafters of the act conceived. Therefore, the one solution for both inefficient behavior by plaintiffs and fault apportionment to nonparties is to eliminate nonparties through mandatory joinder. To be sure, mandatory joinder would not eliminate all nonparties, such as unknown actors or those who cannot be joined for procedural or jurisdictional reasons. In these situations, the party defendants should be allowed to use an “empty chair” defense. Otherwise, the principal goal of comparative fault, proportional liability, would not be achieved.

65. Plaintiffs have this incentive especially if, even apart from the issue of solvency, juries are in fact more likely to find liability, or a higher percentage of fault, in the case of a “deep pocket.” See note 62. Even if the plaintiff does not consciously anticipate a second action, an adverse result in the first action may cause the plaintiff to consider other potentially liable parties. These actions will tend to involve product liability claims because the statute of limitations for these claims is longer than that of other torts. See *Kathios v. General Motors Corp.*, 862 F.2d 944 (1st Cir. 1988), as an example of this behavior. *Kathios* is discussed in detail in Part III.B. See also note 101 (discussing the role that statutes of limitations may play in plaintiff's actions).

66. Thirty-four states have provisions modeled closely on the federal rule, and many are identical. See Ala. R. Civ. P. 19; Alaska R. Civ. P. 19; Ariz. St. R. Civ. P. 19; Arkansas R. Civ. P. 19; Cal. Civ. P. Code § 389 (West 1973); Colo. R. Civ. P. 19; Del. Super. Ct. Civ. R. 19; Ga. Code Ann. § 9-11-19 (Michie 1993); Hawaii R. Civ. P. 19; Idaho R. Civ. P. 19; Ind. R. Trial P. 19; Kan. Stat. Ann. §§ 60-202, 60-219 (1994); Ky. R. Civ. P. 19.01-.03; Me. R. Civ. P. 19; Mass. R. Civ. P. 19; Minn. R. Civ. P. 19.01-.04; Mont. Code Ann. § 25-20, Rule 19 (1993); Nev. R. Civ. P. 19; N.J. Rules of General Application R. 4:28-1; N.M. D.Ct. R. Civ. P. 1-019; N.Y. Civ. P. L. & R. Law § 1001 (McKinney 1976); N.D. R. Civ. P. 19; Ohio R. Civ. P. 19; 12 Okla. Stat. Ann. § 2019 (West 1993); S.C. R. Civ. P. 19; S.D. Cod. Laws § 15-6-19 (1984); Tenn. R. Civ. P. 19.01-.04; Tex. R. Civ. P. 39; Utah R. Civ. P. 19; Vt. R. Civ. P. 19; Wash. Civ. R. 19; W.Va. R. Civ. P. 19; Wyo. R. Civ. P. 19.

67. Rule 19 requires joinder when the joinder will not deprive the court of jurisdiction and:

in the person's absence complete relief cannot be accorded among those already parties, or [ ] the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

F.R.C.P. 19(a).

68. The rule states that a “pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons [required for just adjudication] who are not joined, and the reasons why they are not joined.” *Id.* at 19(c). The rule empowers a court to dismiss an action when an indispensable person is not joined. *Id.* at 19(b). One of the factors considered in dismissal is future prejudice to the absent person if the suit is allowed to proceed. *Id.* at 19(b),

make the failure to join potentially liable persons a bar to future actions.

A plaintiff's ability to bring multiple actions in comparative fault regimes has resulted in a loss of efficiency. The Supreme Court has noted the obvious inefficiency that results when a defendant is forced to litigate the merits of a case that a plaintiff has lost in previous litigation.<sup>69</sup> In a comparative fault context, plaintiffs may "lose" when the result of the first trial leaves them with either no recovery or with less recovery than they believe justified.<sup>70</sup> In *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*,<sup>71</sup> the Court strongly criticized the possibility of multiple actions when it noted that allowing serial litigation against successive defendants represents a lack of discipline or interest by the courts and encourages plaintiffs to pursue inappropriate strategies.<sup>72</sup> This same inefficiency occurs when a plaintiff sues multiple tortfeasors, voluntarily or involuntarily, in serial actions involving the same or new theories of liability.

Joint and several liability schemes that allowed for the joinder of third-party defendants gave defendants incentives to join all potentially liable parties.<sup>73</sup> Controversies were litigated efficiently in one action. The shift to comparative fault removed these incentives because henceforth defendants were liable only for their share of the plaintiff's injury. The loss of this efficiency-enhancing aspect of joint and several liability cannot be an intended result of tort reform. As discussed in sub-Part B below, there is a split among courts about whether to bar serial suits. This Note, thus, proposes barring successive suits, a solution that would recapture the efficiency of the

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advisory committee's note. Courts have considered this factor in barring excessive suits, but not because of a failure to follow the dictate of Rule 19. See notes 94 and 167.

69. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 329 (1971). Concerns about efficiency become more paramount as the form of litigation becomes more complex. See Julia Christine Bunting, Recent Development, *Ashley v. Abbott Laboratories: Reconfiguring the Personal Jurisdiction Analysis in Mass Tort Litigation*, 47 Vand. L. Rev. 189, 230-32 (1994) (discussing judicial economy and efficiency in the context of jurisdiction in mass tort litigation).

70. See Part III.B (discussing cases in which plaintiffs initiated second suits).

71. 402 U.S. 313.

72. *Id.* at 329 (quoting *Kerotest Manufacturing Co. v. C-O-Two Co.*, 342 U.S. 180, 185 (1952)). Specifically the Court stated:

[p]ermitting repeated litigation of the same issue as long as the supply of unrelated defendants holds out reflects either the aura of the gaming table or "a lack of discipline and of disinterestedness on the part of the lower courts, hardly a worthy or wise basis for fashioning rules of procedure."

*Id.*

73. Virtually all jurisdictions allowed such joinder under provisions similar to the F.R.C.P. See note 66.

joint and several liability system without compromising the substantive gains achieved through comparative fault.

*B. The Split among the Courts*

The issue that most often confronts courts facing multiple actions is whether doctrines akin to *res judicata* or claim preclusion bar a plaintiff from bringing a second claim against a new defendant.<sup>74</sup> Courts that have barred successive suits have relied on several theories to preclude them, including the entire controversy doctrine,<sup>75</sup> collateral estoppel,<sup>76</sup> and statutory interpretation.<sup>77</sup> These courts have held that the inefficiencies and inequities of allowing multiple actions counsel against allowing such actions. In contrast, courts refusing to implement a ban on successive actions have done so because they did not believe that such a ban was within the spirit of the comparative fault statute,<sup>78</sup> because the fault of the plaintiff relative to the defendant in the second action was not compared in the first case,<sup>79</sup> and because different standards would govern a second case alleging a different cause of action.<sup>80</sup>

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74. See, for example, *Cogdell v. Hospital Center at Orange*, 116 N.J. 7, 560 A.2d 1169, 1171-72 (1989) (stating that the issue was whether the plaintiff's failure to join potential defendants in her first action operated as a bar to suing those parties in a second action). No court has barred a second action based on failure to join or identify a nonparty under "mandatory" joinder provisions similar to F.R.C.P. 19. See notes 66-68 and accompanying text.

75. See Part III.B.1.a.

76. See Part III.B.1.b.

77. See Part III.B.1.c.

78. See, for example, *Selchert v. State*, 420 N.W.2d 816, 820 (Iowa 1988) (stating that procedural rules requiring the joinder of all claims and all parties in a single action "may carry evils worse than the problem to which they are addressed"); Part III.B.2.a.

79. See, for example, *O'Conner v. State*, 70 N.Y.2d 914, 519 N.E.2d 302, 303 (1987) (finding collateral estoppel inapplicable when comparative negligence was not litigated in the prior proceeding); *Drescher v. Hoffman Motors Corp.*, 585 F. Supp. 555, 558 (D. Conn. 1984) (refusing to apply, under Connecticut law, the doctrine of collateral estoppel in a personal injury action against an automobile distributor when the first suit had established that the plaintiff was negligent as compared with the owner of the car, but not as compared with the distributor). See Part III.B.2.b.

80. See, for example, *Drescher*, 585 F. Supp. at 558 (noting that the issues to be decided in the plaintiff's second suit "either arise under different facts or are to be decided under different legal standards than the facts and issues of the first case").



## 1. Court Rationales for Barring Successive Suits

### a. *The Entire Controversy Doctrine*

In *Cogdell v. Hospital Center at Orange*,<sup>81</sup> the New Jersey Supreme Court applied that state's unique entire controversy doctrine<sup>82</sup> in determining that a plaintiff must join all possible defendants in one action or lose the chance to recover in subsequent actions against non-joined parties.<sup>83</sup> In *Cogdell*, the plaintiff delivered a baby through emergency Cesarean section at the defendant hospital.<sup>84</sup> The baby suffered permanent injury during or shortly after the birth.<sup>85</sup> The plaintiff sued both her obstetrician and the emergency room physician for malpractice.<sup>86</sup> Although the parties settled during jury deliberations, the jury returned a verdict for the defendants, thus negating the settlement.<sup>87</sup> The plaintiff appealed the issue of the preclusive effect of the settlement to the New Jersey Supreme Court, but the appeal was denied.<sup>88</sup>

While the appeal was pending, the plaintiff commenced a second action against the hospital, claiming negligent delay in the commencement of the operation.<sup>89</sup> The hospital moved to dismiss, assert-

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81. 560 A.2d 1169 (1989).

82. The entire controversy doctrine is a common-law doctrine, to which New Jersey has accorded constitutional status. N.J. Const., Art. 6, § 2, para. 4. The doctrine has continued to evolve since its constitutional codification in 1947 so that now it is "a mandatory rule for the joinder of virtually all causes, claims, and defenses relating to a controversy between the parties engaged in litigation." *Cogdell*, 560 A.2d at 1173. See also *Jones v. Holvey*, 29 F.3d 828, 830 (3d Cir. 1994) (describing the state of the law of res judicata, or claim preclusion, in New Jersey). The question addressed in *Cogdell* was whether the doctrine barred a second independent action against a party not joined in an earlier action based on the same occurrence. *Cogdell*, 560 A.2d at 1171-72. The *Cogdell* court stated:

[T]he entire controversy doctrine appropriately encompasses the mandatory joinder of parties. Accordingly, we now hold that to the extent possible courts must determine an entire controversy in a single judicial proceeding and that such a determination necessarily embraces not only joinder of related claims between the parties but also joinder of all persons who have a material interest in the controversy.

*Id.* at 1178. See also *DiTrollo v. Antiles*, 276 N.J. Super. 234, 647 A.2d 1318, 1324-25 (1994) (discussing the limits of the entire controversy doctrine after *Cogdell*). For a discussion of the origins of the doctrine see Kevin Haverty, Note, *The Entire Controversy Doctrine in New Jersey and the Nominal Party Exception: When is the Entire Controversy Not the Entire Controversy?*, 23 Rutgers L. J. 341, 344-49 (1992).

83. 560 A.2d at 1178-79.

84. *Id.* at 1169.

85. *Id.*

86. *Id.*

87. *Id.* at 1169-70.

88. *Id.* at 1170.

89. *Id.*

ing that New Jersey's entire controversy doctrine barred a subsequent independent action against it.<sup>90</sup>

The *Cogdell* court concluded that the joinder of parties was mandatory under the entire controversy doctrine.<sup>91</sup> The court cited several factors in its decision, including judicial economy and avoidance of waste, efficiency and reduction of delay, fairness to the parties, and the need to adjudicate all claims in one action.<sup>92</sup> The court also justified its decision by reference to the litigation explosion burdening judicial resources.<sup>93</sup> Finally, the Court noted that although the hospital was not involved in the first action, its ability to defend by pointing to the doctors' role in the plaintiff's injuries had been severely compromised by the first action.<sup>94</sup> The court noted that, under the facts of *Cogdell*, a second action would be a wasteful and inefficient reprise of the first suit.<sup>95</sup>

The plaintiff in *Cogdell* knew long before trial that the hospital staff had been slow to assemble for the procedure and that the defendant-physicians considered this delay to be a factor in the injury to the child.<sup>96</sup> The plaintiff instituted the second suit because of her dissatisfaction with the outcome of the first trial.

#### *b. Collateral Estoppel*

In *Kathios v. General Motors Corporation*,<sup>97</sup> the First Circuit Court of Appeals dismissed the plaintiff's product liability claim against the defendant because plaintiff had a full and fair opportunity to litigate the issues in the first trial. Kathios was a passenger in an automobile involved in a single-car accident following a drinking spree by all the occupants.<sup>98</sup> Kathios settled with the driver and with one bar at which they drank, but his dram-shop action against a sec-

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90. *Id.*

91. *Id.* at 1178.

92. *Id.* at 1173 (quoting 2 State of New Jersey Constitutional Convention of 1947, Committee on the Judiciary Report § II(J) 1187 (1947)).

93. *Id.* at 1177.

94. *Id.* at 1178 (noting that although "technically the [defendant in the second action's] interests were not determined in the earlier action, they do not now have the same opportunity to persuade a jury that will be determining their liability that the former defendants are to be blamed").

95. *Id.* Specifically, the court stated: a "second lawsuit, though technically separate and independent, is in truth not much more than a re-run of the earlier lawsuit. The waste and inefficiency are obvious." *Id.*

96. *Id.*

97. 862 F.2d 944 (1st Cir. 1988).

98. *Id.* at 945.

ond bar went to trial.<sup>99</sup> Although he presented evidence of damages in excess of \$800,000, the jury returned a verdict for \$275,000, and his motion for additur was denied.<sup>100</sup> Two years later, Kathios instituted a second suit against the manufacturer of the car, General Motors, on a product liability theory.<sup>101</sup>

The *Kathios* court found that the issues in the second case, such as damages and comparative negligence of the plaintiff, were identical to those in the first case.<sup>102</sup> The court observed that the plaintiff's attempt to relitigate the cause of his injuries was a manifestly inefficient waste of judicial resources and, therefore, could not be allowed.<sup>103</sup> Because Kathios could offer no new evidence apart from his attempt to proceed under a new theory of liability, the court of

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99. *Id.*

100. *Id.* The general verdict was presumably reduced under New Hampshire's comparative fault statute. *Id.* at 945 n.1.

101. *Id.* at 945. If plaintiffs are tempted to institute second actions based on dissatisfaction with the results of an earlier suit, in many cases the plaintiff's second action will rely on a theory of liability more attenuated than that of the first action and with a statute of limitations period long enough that the second action is still viable after the first has ended. When the second action is based on strict liability, some courts refuse to employ comparative negligence concepts. See, for example, *Drescher*, 585 F. Supp. at 558 (D. Conn. 1984) (holding that because different standards apply to a strict liability action than to a negligence action, a second action, based on strict liability, was not barred when the first action was based solely on negligence).

For a discussion of the issues involved in applying comparative fault in strict-liability cases, see generally Annotation, *Applicability of Comparative Negligence Doctrine to Actions Based on Strict Liability in Tort*, 9 A.L.R. 4th 633 (1982) (collecting cases); Mark E. Roszkowski and Robert A. Prentice, *Reconciling Comparative Negligence and Strict Liability: A Public Policy Analysis*, 33 St. Louis U. L. J. 19 (1988) (arguing that comparative negligence should be applied in strict-liability cases only in selective instances when it does not undermine the underlying rationale of strict liability); John Cirace, *A Theory of Negligence and Products Liability*, 66 St. John's L. Rev. 1 (1992) (arguing that negligence standards should be applied to design defect and defective-warning cases, but not to mismanufactured-products cases); Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 Yale L. J. 353 (1988) (proposing true strict liability with contributory negligence as a complete defense); Lisa M. Ginoza and Curtis B.K. Yuen, Note, *Armstrong v. Cione and Hao v. Owens-Illinois: Applying Pure Comparative Negligence Principles to Strict Products Liability Actions*, 10 U. Haw. L. Rev. 393 (1988) (analyzing Hawaii's adoption of a pure form of comparative negligence for product liability claims and its impact on other tort doctrines); Richard A. Mincer, Case Comment, *Comparative Negligence Torts—Phillips v. Duro-Last Roofing, Inc.: Strictly Speaking, Comparative Negligence Principles Must Be Applied to Strict Liability Actions In Some States*, 23 Mem. St. U. L. Rev. 209 (1992) (analyzing Wyoming Supreme Court decision holding that Wyoming's comparative negligence statute, Wyo. Stat. § 1-1-109, did not apply to strict liability actions); Shannon J. Skinner, Recent Development, *Products Liability—Washington Refuses to Allow Comparative Negligence to Reduce a Strict Liability Award—Seay v. Chrysler Corp.*, 56 Wash. L. Rev. 307 (1981) (criticizing the Washington Supreme Court's decision refusing to allow a plaintiff's negligence to diminish a strict-liability award).

102. *Kathios*, 862 F.2d at 946, 948.

103. *Id.* at 951 (holding that "[c]oncerns relating to judicial economy also militate against allowing plaintiffs to litigate their cases over and over, against one defendant at a time").

appeals held that Kathios could not maintain a second cause of action against General Motors.<sup>104</sup>

Kathios argued that he should be allowed to relitigate the issue of his comparative negligence as regards each individual defendant in a new action.<sup>105</sup> The court found that such repeated litigation would waste judicial resources<sup>106</sup> and would put defendants in an unfair and untenable position because, unless the negligence of all possible parties is considered in one action, a defendant might be forced to pay a judgment that is not in proportion to the defendant's percentage of fault.<sup>107</sup> The court hypothesized that a plaintiff who was ten percent negligent could sue a defendant who was also ten percent negligent and recover fifty percent of her damages.<sup>108</sup> The court deemed this result unacceptable as against public policy and as antithetical to the goals of New Hampshire's comparative fault statute.<sup>109</sup>

*c. Statutory Interpretation: Implying a One-Action Rule*

While the First Circuit Court of Appeals and the New Jersey Supreme Court relied on judicial doctrines to bar successive actions, the Kansas Supreme Court relied on its interpretation of the Kansas Comparative Fault Act<sup>110</sup> to preclude successive actions as to fault in tort cases.<sup>111</sup> The Kansas Supreme Court interpreted this "one-action

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104. *Id.*

105. *Id.* at 950.

106. *Id.* at 951.

107. *Id.* at 950-51.

108. *Id.* The court reasoned:

If, as appellant suggests, a plaintiff's negligence is to be calculated only in relation to that of the particular respondent(s) whom he elects to sue, then a plaintiff who was, say, 10% negligent, could sue a defendant who was likewise 10% negligent and recover 50% of his damages. Even if a plaintiff's overall recovery is capped at 100% of actual damages, the upshot remains badly skewed. As a leading text recognizes, "failure to consider the negligence of all tortfeasors, whether parties or not, prejudices the joined defendants who are thus required to bear a greater portion of the plaintiff's loss than is attributable to their fault."

*Id.* (quoting W. Page Keeton, et al., eds., *Prosser and Keeton on the Law of Torts* 475-76 (West, 5th ed. 1984)).

109. *Id.* at 951. The court stated that the outcome of its hypothetical is antithetic to the objective of New Hampshire's comparative negligence statute, which is "to allocate more equitably the responsibility for injuries due to negligent conduct on the part of parties on both sides of a lawsuit." *Id.* (quoting *Hurley v. Public Service Co.*, 123 N.H. 750, 465 A.2d 1217, 1221 (1983)).

110. Kan. Stat. Ann. § 60-258a (1992).

111. See *Eurich v. Alkire*, 224 Kan. 236, 579 P.2d 1207, 1208-09 (1978). Specifically, the Kansas Supreme Court stated:

rule" in *Albertson v. Volkswagenwerk Aktiengesellschaft*.<sup>112</sup> In *Albertson*, a case similar to *Kathios v. General Motors*,<sup>113</sup> the plaintiff was involved in an automobile accident and sued the driver of the other vehicle first.<sup>114</sup> That trial resulted in a determination of sixty percent fault to the defendant and forty percent to the plaintiff.<sup>115</sup> Subsequently, Albertson filed a second suit in federal district court against Volkswagen, alleging strict liability for a defective product.<sup>116</sup> After the defendant moved for summary judgment, the district court certified the question of whether this second action was allowed under Kansas law to the Kansas Supreme Court.<sup>117</sup>

The Kansas court held that the second action was barred by the finding of comparative fault in the first trial.<sup>118</sup> The court reasoned that the first comparative fault action apportioned all possible fault, both of parties and nonparties, that led to the plaintiff's injury.<sup>119</sup> There being no fault remaining to apportion to the defendant in the second case, the plaintiff was not allowed to bring a second action.<sup>120</sup>

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Looking to the historical background of the enactment, the circumstances attending its passage, and the purpose to be accomplished by the act . . . we believe it was the intent of the legislature to fully and finally litigate all causes of action and claims for damage arising out of any act of negligence subject to K.S.A. 60-258a. The provision for determining the percentage of causal negligence against each person involved in a negligence action contemplates that the rights and liabilities of each person should be determined in one action. Because all issues of liability are determined in one action there can be no reasonable argument that the issues should be relitigated. Likewise, there is no reasonable argument for the proposition that a claim for damage arising out of one collision or occurrence should not be presented at the time negligence is originally determined.

Id.  
 112. 230 Kan. 368, 634 P.2d 1127 (1981).  
 113. See Part III.B.1.b.  
 114. 634 P.2d at 1128.  
 115. Id.  
 116. Id.  
 117. Id. at 1128-29. Specifically, the district court asked:  
 Having once obtained a satisfied judgment for a portion of his injuries in a comparative negligence action, may a plaintiff bring an action to recover damages for the remaining portion of his injuries against a defendant not a party to the first action, such second action being based on strict liability in tort?

Id.  
 118. Id. at 1132.  
 119. Id.  
 120. Id. The court stated:  
 Albertson's injuries were allegedly caused by a combination of the collision and the lack of crashworthiness of the vehicle in which he rode. They resulted from one occurrence. Albertson's total injuries were evaluated by the jury and determined to be \$275,000. Albertson was found responsible for 40% of his own injuries; 60% were caused by others. . . . The action is over. Volkswagen could have been sued in state court but plaintiff chose not to join the corporation for strategic reasons. Albertson is bound by that decision. Under the doctrine of comparative fault all parties to an occurrence must have their fault determined in one action, even though some parties cannot be formally

## 2. Court Rationales Allowing Successive Suits

### a. Statutory Interpretation: Finding No One-Action Rule

Not every court that has considered the matter, however, has concluded that its state's comparative negligence statute requires joinder of all parties in one action.<sup>121</sup> In *Selchert v. State*,<sup>122</sup> the Iowa Supreme Court determined that Iowa's statute did not require mandatory joinder. The court held that, under Iowa law, the prior action did not collaterally estop the plaintiff from bringing a second claim against a new defendant.<sup>123</sup> According to the court, only the fault of the parties to the first action had been determined in the previous suit, and, therefore, the defendant's argument that there was no longer any fault to allocate in the second action failed.<sup>124</sup> The court indicated an appreciation for the modern trend toward one-action rules, but strictly interpreted the Iowa statutes as prohibiting this result.<sup>125</sup> Although the defendant asked the court to follow the lead of *Albertson*, the Iowa court refused to do so, holding that the implementation of a one-action rule would require an act of the legislature.<sup>126</sup> The Iowa Supreme Court's refusal to enforce a one-action rule without explicit authorization from the legislature illustrates the danger of legislative silence on this issue.

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joined or held legally responsible. Those not joined as parties or for determination of fault escape liability.

Id.

121. See David Polin, Annotation, *Comparative Negligence: Judgment Allocating Fault in Action Against Less Than All Potential Defendants as Precluding Subsequent Action Against Parties Not Sued in Original Action*, 4 A.L.R. 5th 753, 764-71 (1992) (collecting cases which have held that all fault need not be determined in a single comparative-fault action).

122. 420 N.W.2d 816 (Iowa 1988).

123. Id. at 819-21.

124. Id. at 819-20.

125. Id. at 820.

126. Id. Specifically the court said:

Like Kansas, our court has recognized that "the modern and enlightened trend is to combine in one action for trial all claims and actions involving several persons in a single incident." But, unlike our colleagues in Kansas, we are unwilling to rewrite our comparative fault act or rules of procedure to achieve this noble objective.

Id. (quoting *Hyde v. Buckalew*, 393 N.W.2d 800, 804 (Iowa 1986)). The court also noted that there are commentators who question the wisdom of one-action rules. Id. at 820-21 (citing John C. McCoid, *A Single Package for Multi-Party Disputes*, 28 Stan. L. Rev. 707, 728 (1976)).

*b. Issues Not Precluded*

Some courts have also refused to apply the judicial doctrines of *res judicata* and collateral estoppel to preclude subsequent actions. Rather, they have allowed the second suit to go forward because the first trial did not involve the second defendant, nor did it resolve issues relating to the second defendant's fault.

For example, in *O'Connor v. State*<sup>127</sup> the plaintiff's decedent was killed by a bicyclist while crossing a street on property owned by the state.<sup>128</sup> In a previous action, the plaintiff had sued the bicyclist and others involved in the time trials in which the bicyclist was participating.<sup>129</sup> In that action, the jury found the plaintiff's decedent sixty percent at fault.<sup>130</sup> The plaintiff then sued the state, which had allowed the use of the property for the time trials.<sup>131</sup>

The New York Court of Appeals rejected the state's argument that collateral estoppel barred re litigation of the comparative negligence of the decedent.<sup>132</sup> The court reasoned that the relative negligence between the decedent and the state was not at issue in the first case.<sup>133</sup>

In the second action the state and the decedent were each found to be fifty percent at fault.<sup>134</sup> The court allowed the state to contest the amount of damages found in the first case, but the plaintiff was estopped from claiming damages in excess of those found in the first case.<sup>135</sup> The result was that the decedent was found sixty percent at fault in relation to the bicyclist, fifty percent at fault in relation to the state, and the amount of damages sustained by the decedent was found to be different in each case. Such a result leads to confusion and inefficiency, and erodes confidence in the accuracy of the legal system by allowing multiple percentages of fault and multiple findings of the amount of damages, which should, in theory, be impossible.

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127. 70 N.Y.2d 914, 519 N.E.2d 302 (1987).

128. *Id.* at 302.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 303.

133. *Id.* The court also noted that the state could not have been a party to the first case, which involved a jury trial. Therefore, "claimant never had a full and fair opportunity to litigate decedent's comparative negligence in relationship to the State." *Id.* See note 62 for an argument that states should subject themselves to jury trials to avoid this result.

134. 519 N.E.2d at 303.

135. *O'Connor v. State*, 126 A.D.2d 120, 512 N.Y.S.2d 536, 540 (1987) (lower court decision). The state did succeed in reducing the amount of damages. *Id.*

Similarly, in *Drescher v. Hoffman Motors Corporation*,<sup>136</sup> a federal district court refused to find issues relating to the second suit precluded by the first suit. In *Drescher*, the plaintiff was an automotive salesman and technician who sold, installed, and repaired electronic devices designed to start an automobile by remote control.<sup>137</sup> While servicing a device that he had previously sold, Drescher was injured when the car on which he was working accidentally started and struck him.<sup>138</sup> In his suit against the owner of the car, the Girard Motor Sales Company, Inc., on whose premises he was working, the jury found Drescher to be eighty percent at fault for his injuries.<sup>139</sup> Following the unsuccessful conclusion of this first action, Drescher sued Hoffman Motors, the distributor of the car, on theories of negligence in both design and warning, breach of implied warranty, and strict tort liability.<sup>140</sup>

The district court rejected Hoffman Motors's collateral estoppel argument that all issues material to Drescher's action against it had been litigated in the previous suit.<sup>141</sup> As did the court in *O'Connor*, the court reasoned that Drescher's negligence in relation to Hoffman Motors had not been at issue in the first case.<sup>142</sup> Further, the court found that Drescher's failure to join Hoffman Motors in the earlier case did not justify disallowing the second action altogether.<sup>143</sup>

### C. *The Need for Legislative and Judicial Action*

As these cases illustrate, courts have reached inconsistent results when deciding whether to bar successive suits involving the same occurrence. Courts have interpreted similar comparative fault statutes in inconsistent ways. For example, the statute which the Kansas Supreme Court interpreted in *Albertson* to mandate a one-action rule is not substantially different from the Iowa statute which

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136. 585 F. Supp. 555 (D. Conn. 1984).

137. *Id.* at 556.

138. *Id.*

139. *Id.* Because Drescher was comparatively more culpable than the defendant, Connecticut's comparative fault statutes precluded recovery. *Id.*

140. *Id.*

141. *Id.* at 557-58. Specifically, Hoffman claimed that Drescher's negligent misuse of the product had been conclusively established in the first action. *Id.* at 558.

142. *Id.* at 558.

143. *Id.* at 558 n.1 (referring to such a result as "draconian"). The court noted that the failure to join Hoffman Motors in the earlier action may have been a reasonable mistake. *Id.* This possibility led the court to refuse Hoffman Motors' defense.



was found not to support such a rule in *Selchert*.<sup>144</sup> Moreover, a court that agrees with the policy goal of combining all actions in one trial, as did the *Selchert* court, may be unwilling to enforce such a rule absent clear legislative authorization.<sup>145</sup> Thus, state legislatures should expressly provide that all defendants must be joined in one action and that subsequent actions will be barred.

However, even without express legislative authorization, the decisions in *Cogdell*, *Kathios*, and *Albertson* are justifiable.<sup>146</sup> Before the modification of joint and several liability, the system fostered efficiency.<sup>147</sup> A court should readily assume that the legislature, in adopting comparative fault, did not intend to create the inefficiencies attendant to serial suits.

Courts cannot remain unwilling to assume that the legislatures only inadvertently eliminated the efficiencies of joint and several liability. Absent express legislative authorization, a court should look to the doctrines of collateral estoppel and res judicata to preclude the inefficient results of serial suits in comparative fault jurisdictions.

#### IV. A MANDATE FOR ONE ACTION AS TO FAULT

##### A. *Justification of One Action*

A rule requiring plaintiffs to join all possible defendants in a single action would serve the goals of efficiency, fairness, and consistency of judgments in comparative fault jurisdictions. That is, a one-action rule would recapture the inherent efficiency of joint liability systems, retain the fairness of comparative fault, and reduce the chance for inconsistent judgments, which undermine confidence in the judicial system. This Part discusses each of these policy goals in turn.

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144. Compare Kan. Stat. Ann. § 60-258a with Iowa Code Ann. § 668. The Kansas statute simply provides that defendants may join other parties whom they believe are at fault. Kan. Stat. Ann. § 60-258a(c).

145. See *Selchert*, 420 N.W.2d at 820.

146. See Part IV.A. Although many courts were reluctant to institute comparative negligence unilaterally because they thought the legislature *should* authorize such a sweeping change in the law, as regards successive suits, the courts are reluctant to act because they believe the legislatures *have not*. The history of comparative negligence shows, however, that the legislatures respect the decisions of the courts in this area. See Part II.A. In addition, it is unlikely that by adopting comparative fault, the legislatures intended to impose inefficiencies on the courts.

147. See text accompanying notes 68-70.

### 1. Recapturing Efficiency

Almost everyone agrees there is too much litigation.<sup>148</sup> While we might disagree as to the best course of action to decrease the load on courts, we should at least be able to agree that duplicative litigation wastes scarce judicial resources<sup>149</sup> and should be eliminated.<sup>150</sup> As Professors James and Hazard have observed, the inefficiency and inconsistency involved in multiple suits is easily avoidable.<sup>151</sup>

As detailed above,<sup>152</sup> the shift to comparative fault inadvertently decreased judicial efficiency by encouraging strategic behavior on the part of plaintiffs. By eliminating the evils of one opportunity for strategic behavior, the selective suing of deep pockets, state legislatures unwittingly created another, allowing plaintiffs to litigate fault twice against separate defendants.

Some commentators have suggested that joinder rules should be expanded to enable courts to take a more active role in avoiding duplicative litigation.<sup>153</sup> Multiple litigation should never occur simply because of joinder deficiencies.<sup>154</sup> Duplicative litigation is especially troubling when it results from a conscious choice by plaintiffs to increase the likelihood and amount of their recovery. Though some would leave joinder to the discretion of parties in the belief that they have incentive enough to create efficiency,<sup>155</sup> such choices should be

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148. See Freer, 50 U. Pitt. L. Rev. at 810 (cited in note 59) (stating that most observers agree there is too much litigation, specifically duplicative litigation).

149. McCoid, 28 Stan. L. Rev. at 707 (cited in note 126). But see Elinor P. Schroeder, *Relitigation of Common Issues: The Failure of Nonparty Preclusion and an Alternative Proposal*, 67 Iowa L. Rev. 917, 954-58 (1982) (questioning the impact of relitigation on efficiency).

150. Freer, 50 U. Pitt. L. Rev. at 811 (cited in note 59).

151. Fleming James and Geoffrey C. Hazard, Jr., *Civil Procedure* § 10.24 at 582 (Little, Brown, 3d ed. 1985). Specifically, they argue:

There is simply no reason why a multiple-claim, multiple-party controversy arising within the United States should not be submissible to a single tribunal for a consistent adjudication of the various claims and liabilities. Failure in this objective has the consequences of multiplying and prolonging litigation, multiplying private and public legal costs, and bringing the system of justice into unnecessary disrepute.

Id.

152. See Part III.A.

153. See, for example, Freer, 50 U. Pitt. L. Rev. at 813 (cited in note 59).

154. Luther L. McDougal III, *Judicial Jurisdiction: From a Contacts to an Interest Analysis*, 35 Vand. L. Rev. 1, 24 (1982) (arguing that only in rare cases should due process require multiple litigation over similar factual issues).

155. See, for example, Uniform Model Comparative Fault Act § 2(a), 12 U.L.A. at 50, comment (cited in note 64) (enacting this policy choice).

removed from parties who are likely to engage in strategic behavior that places undue strains on judicial resources.<sup>156</sup>

Preclusion of relitigation is particularly justified when a plaintiff initiates a second suit against a defendant whom she could have joined in the first action, but was either held in reserve<sup>157</sup> or was sought out following an unsuccessful result in the first case.<sup>158</sup> In addition to decreasing the total volume of suits, requiring plaintiffs to join all possible defendants in one action would provide quicker and more streamlined litigation.<sup>159</sup>

Mandatory joinder may cause plaintiffs to join defendants whom they would not initially sue under the present system,<sup>160</sup> but courts can dispose of unfounded claims relatively early in the litigation.<sup>161</sup> If a party whom the plaintiff otherwise would not have joined is found liable, the outcome serves efficiency because it better serves the deterrence goal of the tort system by introducing a deterrent to an at-fault party who otherwise would not have been identified.

## 2. Retaining Fairness

Courts and legislatures adopted and codified comparative fault in the place of joint liability because they believed the results under comparative fault were more just.<sup>162</sup> Any modification or interpretation of this fault system should reinforce this choice. As discussed above, legislatures that adopted some form of comparative fault valued the goal of fairness to defendants over that of full recovery for plaintiffs.<sup>163</sup> Joint liability, while it produced an efficient system, did not produce a fair one.

More inclusive joinder reinforces this policy choice in favor of greater fairness.<sup>164</sup> Determining all fault in a single action by requir-

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156. McCoid, 28 Stan. L. Rev. at 714 (cited in note 126) (stating that "the presence of competing values requires a weighing process that, in the hands of one whose decision is colored by self-interest, may be highly suspect").

157. As in *Cogdell*. See Part III.B.1.

158. As in *Kathios*. See Part III.B.2.

159. Freer, 50 U. Pitt. L. Rev. at 814 (cited in note 59).

160. *Id.* A plaintiff such as *Kathios* might, for example, be tempted to sue General Motors as a matter of course whenever an accident occurs involving one of GM's vehicles. See also McCoid, 28 Stan. L. Rev. at 728 (cited in note 126).

161. This would be accomplished on a motion for dismissal based on failure to state a claim, see, for example, Tenn. R. Civ. P. 12.02(6), or for summary judgment, see, for example, Tenn. R. Civ. P. 56.02.

162. Twerski, *The Joint Tortfeasor*, 22 U.C. Davis L. Rev. at 1130-32 (cited in note 51).

163. See note 27.

164. Freer, 50 U. Pitt. L. Rev. at 814 (cited in note 59).

ing the plaintiff to join all possible parties would protect second defendants from the harm that may result if the litigation goes forward in their absence.<sup>165</sup> The defendants in serial cases would face severe disadvantages if they were forced to defend themselves in a jurisdiction that allows only the fault of the parties to be at issue.<sup>166</sup> It would also protect plaintiffs in jurisdictions where the fault of nonparties can be considered by preventing the defendants from “whipsawing” the plaintiff through an empty chair defense.<sup>167</sup>

Because it creates the possibility of inconsistent judgments,<sup>168</sup> multiple litigation can force defendants to pay a greater share of the plaintiff's damages than they would have if the fault of all parties were determined in one action.<sup>169</sup> Yet, legislatures adopted comparative fault to eliminate this very result.<sup>170</sup> A rule of mandatory joinder would better serve the policy choice made by the legislatures in adopting comparative fault.<sup>171</sup>

Defendants to second suits also often become the victims of desperate plaintiffs who feel that their action against the party primarily (if not solely) responsible for their injury resulted in an unacceptable judgment.<sup>172</sup> In these second suits, plaintiffs often rely on attenuated causes of action that may not have been appropriate in the first case.<sup>173</sup> Strategic use of successive suits unfairly and inefficiently

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165. *Id.* See also *Cogdell*, 560 A.2d at 1178 (explaining that the second defendant will not have the same ability to convince the jury that the first defendant was at fault).

166. See note 64. In this situation, the following scenario could develop: The first jury could find the plaintiff to be 50% at fault and the defendant 50%. In the second suit this previous holding would have no preclusive effect since each case by definition compares only the fault of the parties to the suit. Thus, if the second jury found the plaintiff and defendant equally at fault, the plaintiff would recover 100% of her damages (50% from each defendant) while being found 50% at fault in each case. This possibility illustrates the need for the so-called “empty chair” defense. The result becomes even more confusing if the two juries are allowed to find a different measure of damages. See, for example, *O'Connor*, 512 N.Y.S.2d at 540 (allowing this result).

167. *Freer*, 50 U. Pitt. L. Rev. at 824 (cited in note 59) (also noting that plaintiffs would avoid statute of limitation problems by suing all possible defendants at once and would reduce the need to make determinations about the defendants' relative culpability and their ability to pay at an early stage in the litigation).

168. See Part IV.A.3.

169. For example, if the two cases posited in the hypothetical in note 166 were tried together, the plaintiff and both defendants would likely have been found 33% at fault each. When the suits are tried separately, each defendant overpays by 17%, and the result creates over-deterrence, which, in turn, produces inefficiency. Even in jurisdictions allowing an empty chair defense, unfairness to one party may result. See text accompanying notes 179-80.

170. See Part II.B.

171. See note 51.

172. See, for example, *Kathios*, 862 F.2d 944, discussed in Part III.B.1.b.

173. Again, *Kathios* is a clear example. Packaging claims into one action would encourage plaintiffs to bring claims that they might not otherwise assert. *Freer*, 50 U. Pitt. L. Rev. at 814 (cited in note 59). If these causes of action are truly attenuated, then courts will dismiss them

forces serial defendants into the role of insuring the plaintiff against unsatisfactory recovery.

### 3. Reducing Inconsistency

A final justification for a one-action rule to determine fault is the avoidance of inconsistent judgments. Courts and commentators have become increasingly vocal in their concerns over the effect inconsistent judgments have on public confidence in the integrity of the judicial system.<sup>174</sup>

Inconsistent judgments from multiple suits involving a single occurrence with multiple party defendants can harm any of the parties to the suits, including the plaintiff. To take an example from Professor McCoid's article on inconsistent judgments, if a single non-negligent plaintiff, B, who should recover from A or C, proceeds against A and C serially, it is possible that B will recover from neither, solely because of A's and C's use of the empty chair defense in their independent suits.<sup>175</sup> One might argue that when plaintiffs choose to proceed in this manner for strategic purposes, they take the risk of nonrecovery.<sup>176</sup> This scenario seems particularly unjust, however, when the plaintiff is completely innocent and can satisfactorily prove both damages and A's or C's liability. The result of mandatory joinder would, therefore, protect plaintiffs.

Although the possibility that a plaintiff might lose both cases may encourage plaintiffs to join all parties voluntarily,<sup>177</sup> a one-action rule would prevent plaintiffs from seeking out defendants who might be liable on different and often attenuated theories once a first trial has ended in an unsatisfactory result.<sup>178</sup> Legislatures and courts should expressly preclude this result by denying plaintiffs this choice.

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on the defendant's motion for summary judgment. If these causes of action prove sustainable, then the tort goal of deterrence is more efficiently served because plaintiffs could pursue claims that would not have otherwise been brought.

174. See, for example, *Vennerberg Farms, Inc. v. IGF Ins. Co.*, 405 N.W.2d 810, 814 (Iowa 1987) (noting that the purpose of the doctrine of judicial estoppel is "to protect the integrity of the judicial process by preventing intentional inconsistency"); *State v. Bell*, 55 N.J. 239, 260 A.2d 849, 854 (1970) (stating that "the integrity of the courts" required the resolution of two inconsistent convictions). See also McCoid, 28 Stan. L. Rev. at 707 (cited in note 126).

175. John C. McCoid II, *Inconsistent Judgments*, 48 Wash. & Lee L. Rev. 487, 507 (1991).

176. This situation could arise, and often does, when the plaintiff is forced to proceed in two actions if, for example, both defendants were not amenable to service of process in the same jurisdiction or if one defendant was a governmental entity and the other was a private party. See note 62.

177. McCoid, 48 Wash. & Lee L. Rev. at 508 (cited in note 175).

178. As in *Kathios*, 862 F.2d 944, Part III.B.1.b.

Serial suits with inconsistent results also disrupt the dual tort goals of deterrence and compensation. If the plaintiff, B, sues A and C serially, and in the first case, *B v. A*, A is found to be forty percent at fault and C, a nonparty, sixty percent at fault, B recovers forty percent of her damages from A.<sup>179</sup> If in the second action, *B v. C*, A, now the nonparty, is found to be twenty percent at fault and C eighty percent, B will recover only sixty percent of her damages from C, constituting full compensation. These inconsistent judgments necessarily mean, however, that either A has overpaid or C has underpaid, depending on whether the adjudication of fault was correct in the first or second case. This result fails to serve the deterrence function of tort law because one party has been overdeterred and one party underdeterred.<sup>180</sup>

Harm to the compensatory goal of tort law is illustrated by a third situation in which the nonparty is found to be mostly at fault in each case. Assume, for example, that in *B v. A*, A is found to be twenty percent at fault and C, the nonparty, is found to be eighty percent at fault. Then, in *B v. C*, C is found to be twenty percent at fault and the nonparty, A, is found to be eighty percent at fault. This situation serves neither the compensatory nor the deterrent goals of the tort system. The plaintiff has underrecovered by sixty percent, and one or both defendants have been underdeterred by an equal percentage.

### *B. Legislatures and Courts Should Enforce a One-Action Rule*

As detailed above, a one-action rule would improve procedural efficiency, promote fairness to all parties involved in the incident leading to the suit, and reduce inconsistent judgments, which undermine both public confidence in the courts and the tort goals of deterrence and compensation. State legislatures should, therefore, enact statutes allowing plaintiffs to pursue only one action per incident and barring any further action by the plaintiff. To allow the state courts

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179. This hypothetical assumes that the fault of nonparties is considered in the action. If it is not (as it would not be in a Uniform Comparative Fault jurisdiction), the result would be de facto joint liability since A's liability, in the absence of another defendant, would be one hundred percent. C's fault would never be determined. Such a result would be efficient only if C was, in fact, without fault.

180. But see McCoid, 48 Wash. & Lee L. Rev. at 510 (cited in note 175) (stating that "[w]hen liability is cumulative but independent . . . it seems to me that inconsistency presents no problem per se"). Professor McCoid, however, fails to take account of the inefficient allocation of deterrence.

to reach all possible defendants, the statutes may need to grant broader jurisdictional authority as well.<sup>181</sup>

The Kansas comparative fault statute provides a possible starting point in constructing such a law.<sup>182</sup> The Kansas statute provides for the joinder of additional parties on the motion of a named defendant.<sup>183</sup> The plaintiff must accept the joinder.<sup>184</sup> Plaintiffs, however, may be in a better position than defendants to identify all potentially liable parties<sup>185</sup> and are the only party with an incentive not to join possibly negligent parties.<sup>186</sup>

To be effective, state statutes should provide for more than the mere joinder of all parties. They should also make explicit what the Kansas Supreme Court found implicit in Kansas' joinder provision, that all causes of action arising out of a single occurrence or transaction should be litigated in one action.<sup>187</sup> Subsequent litigation should be strictly prohibited.

Absent express provisions in their comparative fault statutes authorizing a one-action rule, courts should take judicial notice of the inefficiencies created by serial litigation and invoke the doctrines of collateral estoppel and res judicata to prevent plaintiffs from engaging in strategic and inefficient behavior. Courts should read comparative fault statutes as an effort on the part of the legislatures to increase fairness and efficiency. In light of such a reading, courts need not shrink from application of judicially created remedies to enforce fair and efficient litigation. The courts in many states enacted comparative fault by judicial action, without waiting for the legislatures

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181. See *id.* at 492-93 (advocating congressional adoption of nationwide service of process for a wider variety of claims).

182. Kan. Stat. Ann. § 60-258a(c) provides:

On motion of any party against whom a claim is asserted for negligence resulting in death, personal injury, property damage or economic loss, any other person whose causal negligence is claimed to have contributed to such death, personal injury, property damage or economic loss, shall be joined as an additional party to the action.

Kansas' one-action rule was based on the interpretation of this section. See *Eurich*, 579 P.2d at 1208-09.

183. Kan. Stat. Ann. § 60-258a(c). The ability to join all possible defendants in one forum enables a court to exercise authority over the entire controversy, thereby promoting judicial efficiency. *McDougal*, 35 Vand. L. Rev. at 37 (cited in note 154).

184. Kan. Stat. Ann. § 60-258a(c).

185. To the extent that defendants know of a party who may be at fault of whom the plaintiff is ignorant, the defendants will always seek joinder in order to decrease their own exposure to liability.

186. See note 63.

187. *Eurich*, 579 P.2d at 1208. Because the act allows for cross-claims, the Kansas decision bars *all* parties to a comparative negligence action from bringing a later claim that arose out of the incident. *Id.* at 1209.

to act. The same can and should be done in the area of one-action rules.

## V. CONCLUSION

Under joint and several liability, plaintiffs recovered the entire amount of their damages in one action. Jurisdictions that either modified or abolished joint liability inadvertently discarded an effective tool for guaranteeing procedural efficiency, fair adjudication of claims, and consistent judgments. Simply put, the shift to comparative fault removed the incentives for defendants to join other potentially liable parties without placing comparable incentives on plaintiffs. Thus, the comparative fault statutes create the possibility of serial suits involving the same occurrence.

Plaintiffs have discovered this weakness and exploit it by using multiple actions to increase their recoveries. The results are both inefficient and unfair to defendants. However, the efficiency of a joint liability system is not inexorably lost in a comparative fault regime. It can be recaptured. It should be recaptured. Requiring plaintiffs to join in one action all potentially liable persons serves the same goals that led to the adoption of comparative fault. A system that requires plaintiffs to litigate their claims in one action would promote efficiency, fairness, and consistency, goals that are becoming increasingly important in a litigious society.

Courts are justified in using judicially created preclusion doctrines or statutory interpretation to reach this outcome on their own, but such a result leaves the ultimate discretion to preclude a serial suit in the hands of the courts on a case-by-case basis. When a court will not preclude successive suits involving the same occurrence because of a perceived need to defer to the legislature, state legislatures should recast their comparative fault statutes to provide for a system in which a plaintiff can and must sue all parties in one action.

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