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Claim Splitting in the New World of Several Liability and Personal Jurisdiction

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CLAIM SPLITTING IN THE NEW WORLD OF SEVERAL LIABILITY AND PERSONAL JURISDICTION

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ABSTRACT

General aviation accident litigation has recently become more complicated, with multiple lawsuits filed in multiple venues to litigate the same crash. An informal poll at the Air Law Symposium indicated that a large percentage of the attendees had been involved in such cases.

Two primary forces likely give rise to these multiple lawsuits. First, with the demise of joint and several liability, plaintiffs are often forced to sue more defendants and for defendants to add more third-party defendants. Second, the more rigorous personal jurisdiction standards articulated by the United States Supreme Court in the past decade have tightened both general and specific jurisdiction. As a result, finding a single forum with personal jurisdiction over all parties has become more difficult.

In this environment, many complications can arise for plaintiffs, defendants, and third-party defendants. Deciding what law applies can be a complex problem with a single case in a single forum. It is far more complicated with multiple lawsuits in multiple states. The demise of joint and several liability in most states creates problems, too. When one case is filed in a joint and several state, and others are filed in various several liability states, there can be confusion galore, not only between the joint and several state and the others but also from significant differences in the application of several liability among the several liability states. One state's law may preclude several liability as to product manufacturers, and others may not; some may limit several liability to noneconomic damages or set a threshold percentage

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of fault above which a defendant is still subject to joint and several liability. One state may permit the jury to weigh fault allocated by non-parties; others may require timely pleading of claims of non-party fault or preclude allocation to non-parties altogether. Along with traditional constraints, such as whether a party can pursue multiple lawsuits, the risks of res judicata and taking different positions in different lawsuits are important issues for all parties.

There are ways to minimize duplicative effort, such as using Multidistrict Litigation (MDL) proceedings under 28 U.S.C. § 1407. MDLs can mitigate multiple lawsuits in multiple states but are often slow in resolving cases, and they ordinarily remand the cases to their original fora for trial. State courts lack any method of consolidating cases pending in other states. This Article addresses a variety of possible methods that may help handle these issues, as well as identifying those that are likely to be useless.

Many of these issues have been addressed in other contexts, such as articles about the effect of a particular state's change from joint and several liability to that state's adoption of a form of several liability. However, no single publication identifies the potential complications of litigating multiple lawsuits in multiple states arising from the same accident. The Third Restatement of Torts, Apportionment of Liability, discusses five categories of joint and several or several liability but, understandably, not the other complications of multiple lawsuits. Furthermore, some states' laws have changed since the Restatement was published two decades ago. This Article attempts to help litigators, whether for plaintiffs or defendants, anticipate the issues they may face if multiple lawsuits are filed out of the same crash and attempts to identify the risks and alternatives to be considered.

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I. INTRODUCING OUR NEW WORLD

IMAGINE A GENERAL AVIATION accident case, brought on behalf of a plaintiff domiciled in State A, which occurred in State B, in which a component manufacturer based in State C sells a component to an engine manufacturer in State D, who sells the engine to the aircraft manufacturer in State E, who, in turn, sells an airplane equipped with this engine to a Customer in State F. The customer takes the aircraft to State G for inspection and maintenance at a repair station. No lawsuit has been filed, and the causes of the accident are still uncertain, but there is some legitimate basis to think that each of the above potential defendants might be at fault. Is there a way to bring all the parties into one common venue? How does one decide which state(s) the plaintiff should file the lawsuit(s) in? And how should the defendant(s) respond?

These issues are hardly novel. But the calculation has changed dramatically because of the interaction of two developments in the law: (1) the replacement of joint and several liability with numerous forms of several liability;[1] and (2) the tightening of the due process threshold for personal jurisdiction.[2] Several liability, ever-expanding and evolving since the 1980s, often encourages both sides to add more parties to the litigation.[3] Further, the recent tightening of the standards for personal jurisdiction complicates the parties' efforts to crowd all the parties into a single venue.[4]

Can or should the plaintiff file multiple lawsuits in different states, to ensure that at least one lawsuit—somewhere—will recognize personal jurisdiction and thereby permit a trial and possible recovery against every defendant? Will the courts permit the filing of multiple duplicative lawsuits in multiple venues on behalf of the same *plaintiff* for the same injury? And even if the courts do, and even if the plaintiff prevails, how will each court allocate fault in light of the variations of several liability among the states? This new environment can create serious complications for unprepared plaintiffs and defendants alike. Likewise, it may open new opportunities that other, less-prepared parties ignore at their peril.

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[1] *See* discussion *infra* Section II.A.

[2] *See* discussion *infra* Section II.B.

[3] *See* discussion *infra* Sections II.A.3, II.A.4.

[4] *See* discussion *infra* Section II.B.

Each decision in this hypothetical situation carries serious risks. Plaintiffs now have few, if any, options for choosing a single forum in which all defendants will be subject to personal jurisdiction.[5] Due to several liability rules in many states, plaintiffs face greater risks that their "success" at a trial may shortchange a faultless plaintiff who walks away with only a modest percentage of their compensatory damages.[6] Timothy Loranger of the Baum Hedlund firm articulated plaintiffs' concerns at the 2016 50th Annual SMU Air Law Symposium.[7]

Defendants face similar risks. Wherever the plaintiff files lawsuits, some defendants are likely to challenge personal jurisdiction, and some are likely to succeed. Those who succeed may get off scot-free or merely get sued elsewhere. Others stay behind and, depending on the forum's law, may not be able to allocate fault to those who have obtained dismissals or those who have settled. If some tortfeasors cannot be joined in the same action, the remaining defendants face the risk that they might get stuck defending multiple lawsuits in multiple venues, unable to allocate substantial liability to others. What other tortfeasors have paid in settlement to the plaintiff in other venues may not offset the remaining defendants' exposure because several liability jurisdictions typically eliminate the offset of prior settlements.[8] A clever plaintiff may be able to divide and conquer by picking off the defendants one by one and, with the right case, recover more than 100% of the compensatory damages. For example, a plaintiff could persuade each defendant to settle separately for 50% of the likely total verdict. Then several liability could produce a significantly more generous result than the joint and several system it replaced.

Settling cases may also be complicated when there are multiple lawsuits in multiple states. Settlements have consequences for both the parties who settle and those who do not. Settling defendants want to be certain that they have no remaining obligations, not only in respect to the plaintiff but also vis-à-vis nonsettling defendants or others who might become parties in the future. Non-settling defendants may be significantly affected, de-

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[5] Scott Dodson, *Personal Jurisdiction and Aggregation*, 113 NW. U. L. REV. 1, 32–33 (2018); *see* Bristol-Myers Squibb Co. v. Super. Ct. of Cal., 137 S. Ct. 1773, 1784, 1789 (2017) (Sotomayor, J., dissenting), *rev'g* 377 P.3d 874 (Cal. 2016).

[6] *See generally infra* Appendix A.

[7] Timothy Loranger, Shareholder, Baum Hedlund Aristei & Goldman, Address at the 55th Annual SMU Air Law Symposium (Mar. 31–Apr. 1, 2016).

[8] *See generally infra* Appendix A.

pending on which state's law governs and whether it permits allocation of fault to those who have settled.[9]

A few decades ago, a plaintiff would typically file the general aviation accident crash case described above in one forum—perhaps State A, where the plaintiff resided, or State B, where the crash occurred. Typically, "a plaintiff needed to bring only one action to recover her full damages."[10] Challenges to personal jurisdiction were relatively infrequent. Attempts to challenge personal jurisdiction were usually unsuccessful[11] and, consequently, often not brought at all. A joint and several liability system enabled experienced lawyers on all sides to estimate the verdict value of the single case in a single venue, assess the likelihood of winning or losing, and evaluate the proportionate risk their respective clients faced.

Various types of lawsuits create opportunities to litigate in multiple venues. This is increasingly common in general aviation cases. Polling data[12] from the 55th Annual SMU Air Law Symposium in March 2021 suggested that 75% of respondents had been involved in one or more cases involving multiple lawsuits in multiple states arising from the same general aviation crash.[13] Approximately 45% of the respondents experienced this situation more than three times, and 68% of the respondents noted that they typically represented the defendant.[14]

By its very nature, aviation usually involves interstate or international travel, as well as multiple parties located in a variety of

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[9] *See generally infra* Appendix A.

[10] John Scott Hickman, Note, *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*, 48 VAND. L. REV. 739, 749 (1995).

[11] *See, e.g.*, Petroleum Helicopters, Inc. v. AVCO Corp., 804 F.2d 1367, 1371 (5th Cir. 1986); AVCO Corp. v. Precision Airmotive, Inc., No. Civ.A.3:03-CV-2720-K, 2004 WL 1836959, at *1 (N.D. Tex. Aug. 16, 2004); Hayworth v. Beech Aircraft Corp., 690 F. Supp. 962, 964 (D. Wyo. 1988); W. Helicopters, Inc. v. Rogerson Aircraft Corp., 715 F. Supp. 1486, 1490 (D. Or. 1989); Eason v. Linden Avionics, Inc., 706 F. Supp. 311, 324 (D.N.J. 1989); State *ex rel.* Hydraulic Servocontrols Corp. v. Dale, 657 P.2d 211, 212 (Or. 1982). *But see, e.g.*, Bearry v. Beech Aircraft Corp., 818 F.2d 370, 377 (5th Cir. 1987); Johnson v. Helicopter & Airplane Servs. Corp., 389 F. Supp. 509, 521–22 (D. Md. 1974).

[12] 55th Annual SMU Air Law Symposium Poll, conducted by Jonathan Hoffman, Senior Partner, MB Law Group LLP (Mar. 14–15, 2021) (on file with author). The polling data represents the answers from 64 respondents. This data is not intended to be viewed as a representative sample but rather as illustrative of the commonality of multi-state and multi-party disputes in aviation for attendees of the 55th Annual SMU Air Law Symposium.

[13] *Id.*

[14] *Id.*

locations. Even before the advent of several liability and the tightening of personal jurisdiction standards, aviation lawyers had to consider venue problems and options.[15] However, venue challenges seemed more likely to be addressed via forum non conveniens motions.[16]

This Article begins with a summary of the evolution and current state of several liability and personal jurisdiction. Section II.A summarizes the wide variety of several liability laws in the majority of the fifty states. Several liability is important in these cases because of its role in adding more parties to the lawsuit. Furthermore, each variation of several liability may provide significant risks or rewards in a particular case. For these reasons, Appendix A of this Article summarizes the principal variations of fault allocation in all fifty states and the District of Columbia.

Recent developments in personal jurisdiction law have been the subject of numerous commentaries,[17] but the focus in Section II.B is to relate the effects of personal jurisdiction in multiparty, multivenue litigation while also considering the significance of several liability.

II. WHAT'S CHANGED?

A. Joint & Several and Just Several

1. Joint & Several: All or Nothing

Common law tort claims were typically decided by "the traditional all-or-nothing system of tort responsibility."[18] If a faultless plaintiff proved that a defendant was at fault and caused the injury, the plaintiff obtained a full recovery.[19] A plaintiff could sue two tortfeasors in separate actions and recover 100% of damages from each.[20] A plaintiff guilty of contributory fault, even if mi-

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[15] *See, e.g.*, Piper Aircraft Co. v. Reyno, 454 U.S. 235, 238 (1981); Kern v. Jeppesen Sanderson, Inc., 867 F. Supp. 525, 537 (S.D. Tex. 1994); Myers v. Boeing Co., 794 P.2d 1272, 1274 (Wash. 1990) (en banc).

[16] *See, e.g.*, Piper Aircraft Co. v. Reyno, 454 U.S. 235, 238 (1981); Kern v. Jeppesen Sanderson, Inc., 867 F. Supp. 525, 537 (S.D. Tex. 1994); Myers v. Boeing Co., 794 P.2d 1272, 1274 (Wash. 1990) (en banc).

[17] *See, e.g.*, Philip S. Goldberg, Christopher E. Appel & Victor E. Schwartz, *The U.S. Supreme Court's Personal Jurisdiction Paradigm Shift to End Litigation Tourism*, 14 Duke J. Const. L. & Pub. Pol'y 51 (2019); Michael H. Hoffheimer, *The Stealth Revolution in Personal Jurisdiction*, 70 Fla. L. Rev. 499 (2018); Erwin Chemerinsky, *An Uphill Battle over Jurisdiction*, 53 Trial 58 (2017).

[18] DaFonte v. Up-Right, Inc., 828 P.2d 140, 142 (Cal. 1992).

[19] *See* William L. Prosser, Handbook of the Law of Torts 265 (3d ed. 1964).

[20] Corey v. Havener, 65 N.E. 69, 69 (Mass. 1902).

nuscule, recovered nothing.[21] Traditional joint and several liability rules also barred the defendant from obtaining contribution from more culpable tortfeasors.[22] The common law rule was that one tortfeasor could not recover contribution from another tortfeasor because they were "*in pari delicto*."[23]

2. The Demise of Joint and Several Liability

Comparative fault in lieu of traditional contributory negligence first appeared in tort law in the early twentieth century, under the Federal Employers Liability Act.[24] The State of Wisconsin recognized comparative fault several decades later.[25] But by the 1950s, only five jurisdictions in the United States had recognized comparative fault.[26] Other states had taken smaller steps to mitigate the all-or-nothing stakes of contributory negligence by recognizing common law exceptions, most notably the "last clear chance" rule.[27]

3. Comparative Fault Leads to Several Liability

The movement for states to adopt comparative fault began in the mid-1970s.[28] Plaintiffs would not be deprived of a remedy altogether if they were partially at fault.[29] The Uniform Contribution Among Tortfeasors Act allowed contribution between joint tortfeasors so that a judgment in the plaintiff's favor could be shared among the defendants.[30] Whereas the common law rejected contribution between joint tortfeasors of equal guilt,[31] contribution invoked "the equity doctrine that those who are

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[21] *See* PROSSER, *supra* note 19, at 427.

[22] *Id.* at 273.

[23] *See id.*; *see also* Merryweather v. Nixan, 8 Term. Rep. 186, 101 Eng. Rep. 1337 (K.B. 1799).

[24] Act of April 22, 1908, ch. 149, §3, 35 Stat. 65, 66 (codified as amended at 45 U.S.C. § 53).

[25] WIS. STAT. § 331.045 (effective June 16, 1931) (current version at WIS. STAT. § 895.045 (2021)).

[26] Hickman, *supra* note 10, at 742.

[27] *See, e.g.*, Fuller v. Ill. Cent. R.R., 56 So. 783, 785–86 (Miss. 1911); Kumkumian v. City of New York, 111 N.E. 2d 865, 869 (N.Y. 1953).

[28] Gary T. Schwartz, *Contributory and Comparative Negligence: A Reappraisal*, 87 YALE L.J. 697, 697–98 (1978).

[29] *See id.* at 727; Jonathan Cardi, Note, *Apportioning Responsibility to Immune Nonparties: An Argument Based on Comparative Responsibility and the Proposed Restatement (Third) of Torts*, 82 IOWA L. REV. 1293, 1300 (1997).

[30] *See* Uniform Contribution Among Tortfeasors Act § 1(a) (1955).

[31] RESTATEMENT (FIRST) OF RESTITUTION § 102 (AM. L. INST. 1937).

jointly liable should share the burden equally."[32] Initially, contribution split the liability equally among tortfeasors rather than based on relative percentages of fault, and a tortfeaser could not seek contribution if it had committed an intentional tort.[33]

These rules provided compensation to more plaintiffs than before, but some notable cases forced deep-pocket defendants to pay vastly disproportionate percentages of a judgment even if their fault was *de minimis*.[34] The liberal expansion of tort law in the middle of the twentieth century resulted in significant increases in lawsuits and larger verdicts for plaintiffs, thereby "dismantling no-duty and limited-duty rules and abolishing immunities."[35] The business community reacted with a variety of forms of tort reform starting in the 1970s.[36] In 1986, the American Tort Reform Association (ATRA) was formed with the support of both the medical community and a number of business entities.[37]

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[32] Daniel C. Arnold, Recent Case, *Torts—Contribution—Liability of United States Under Federal Tort Claims Act.*—United States v. Yellow Cab Co. *and* Capital Transit Co. v. United States*, 340 U.S. 543 (1951)*, 30 TEX. L. REV. 529, 529 (1952) (citing Brown & Root, Inc. v. United States, 92 F. Supp. 257 (S.D. Tex. 1950)).

[33] This doctrine is best illustrated in *The Highwayman's Case* (Everet v. Williams, 9 L.Q. REV. 197 (1893)), in which "one robber sought an accounting from another for goods stolen in a joint venture. The court decided the matter by ordering them both beheaded, denying, of course, any right to contribution." Perry J. Radoff, Comment, *Contribution Among Joint Tortfeasors*, 44 TEX. L. REV. 326, 330 (1965).

[34] *See, e.g.*, Dunham v. Kampman, 547 P.2d 263, 266 (Colo. App. 1975), *aff'd en banc*, 560 P.2d 91 (Colo. 1977) (defendant 1% at fault required to pay entire judgment because plaintiff's husband, 99% at fault, was immune from suit); Walt Disney World Co. v. Wood, 515 So. 2d 198, 199 (Fla. 1987) (Disney found 1% at fault but had to pay 86% of judgment); Davis v. O'Brien, 891 P.2d 1307, 1308, 1317–18 (Or. 1995) (en banc) (verdict found non-party 96.5% at fault and defendant 3.5% at fault, defendant had to pay nearly 50%, and the state legislature enacted several liability legislation shortly thereafter); *see* Gregory R. Mowe & Katherine A. McDowell, *Changing the Rules: Tracking Oregon's Trail of "Tort Reform,"* 55 OR. ST. BAR BULL. 17, 20 (1995).

[35] Dominick Vetri, *The Integration of Tort Law Reforms and Liability Insurance Ratemaking in the New Age*, 66 OR. L. REV. 277, 278 (1987). Professor Vetri catalogues numerous examples of these changes. *Id.* at 278 nn.1–4, 279 nn.5–8, 280 nn.9–15, 281 nn.16–19, 282 nn.20–25, 283 n.26.

[36] Scott DeVito & Andrew Jurs, *An Overreaction to a Nonexistent Problem: Empirical Analysis of Tort Reform From the 1980s to 2000s*, 3 STAN. J. COMPLEX LITIG. 62, 69 (2015).

[37] *About*, AM. TORT REFORM ASS'N, https://www.atra.org/about [https://perma.cc/7BUG-VCC8]. Among the issues on which the ATRA lists on its website is "Joint and Several Liability," and the ATRA advocates a "proportionate liability system," in which a "co-defendant that is found by a jury to be 20% responsible for a plaintiff's injury would be required to pay no more than 20% of the entire

Defense-oriented groups argued that if comparative negligence enabled plaintiffs to recover despite their negligence, defendants' liability should also be limited to their relative degrees of fault.[38] And, if plaintiff and defendant were both subject to liability proportionate to their fault, why shouldn't comparative fault involve all tortfeasors, whether parties or not?

> 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. The other is that full compensation be awarded to injured plaintiffs. These competing goals represent conflicting values and cannot both be given priority by any given system.[39]

Consequently, since 1986, a majority of states have recognized several liability in some form.[40] However, the variations are numerous and can have a significant impact on the outcomes of particular cases.[41] "Pure" joint and several liability now applies only in eight states and the District of Columbia, although numerous other states retain joint and several liability in some categories of cases, such as intentional torts, strict liability, economic damages, and where a tortfeasor's fault is judged to be above a prescribed percentage.[42]

4. The Many Flavors of Several Liability

Plaintiffs and defendants who face the prospect of litigating multiple lawsuits in multiple venues arising from the same claim need to understand and appreciate the critical variations by which state law now defines several liability. One should never underestimate the significance of these variations. States may not describe their systems in the same way,[43] but the details of each state's laws are critical for several liability systems. As previ-

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settlement." *Joint and Several Liability*, AM. TORT REFORM ASS'N, https://www.atra.org/issue/joint-several-liability/ [https://perma.cc/3JR2-JPM9].

[38] *See Joint and Several Liability*, AM. TORT REFORM ASS'N, https://www.atra.org/issue/joint-several-liability/ [https://perma.cc/3JR2-JPM9]. *See generally* Michael L. Rustad & Thomas H. Koenig, *Taming the Tort Monster: The American Civil Justice System as a Battleground of Social Theory*, 68 BROOK. L. REV. 1, 69, 72–79, 81–88 (2002).

[39] Hickman, *supra* note 10, at 744 (footnotes omitted).

[40] *See infra* Appendix A.

[41] *See id.*

[42] *See infra* Appendix B (identifying some, but not all, of the variations adopted by the states).

[43] *Id.*; *see also* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT LIAB. § 17 cmt. a (AM L. INST. 2000).

ously pointed out, the changes in allocation law, together with more restrictive personal jurisdiction standards, encourage some plaintiffs to file multiple lawsuits in multiple venues arising from the same claim.[44] Multiple lawsuits may help plaintiffs pursue all tortfeasors, even if some cannot be required to participate in the primary lawsuit. However, unearthing all the nuances of several liability rules in all states is a complex task.

a. Past Resources

As more states adopted several liability in the 1980s and 1990s, numerous law reviews published articles on various aspects of the subject, and as the states experience how several liability works in practice, more articles have appeared.[45] Some articles focus on a specific variable of a particular state's legislation.[46] Some of the earlier articles summarized the variations of each state and may be helpful for a lawyer who seeks to know how

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[44] *Cf.* James P. George, *Parallel Litigation*, 51 BAYLOR L. REV. 769, 773–74 (1999).

[45] *See, e.g.*, Lewis A. Kornhauser & Richard L. Revesz, *Sharing Damages Among Multiple Tortfeasors*, 98 YALE L.J. 831 (1989); Cardi, *supra* note 29; Edward J. Kionka, *Recent Developments in the Law of Joint and Several Liability and the Impact of Plaintiff's Employer's Fault*, 54 LA. L. REV. 1619, 1630 (1994); William Westerbeke, *The Application of Comparative Responsibility to Intentional Tortfeasors and Immune Parties*, 10 KAN. J.L. & PUB. POL'Y 189 (2000); Nancy C. Marcus, *Phantom Parties and Other Practical Problems With the Attempted Abolition of Joint and Several Liability*, 60 ARK. L. REV. 437 (2007); Laura Kingsley Hong & Robert E. Haffke, *Apportioning Liability in Asbestos Litigation: A Review of the Law in Key Jurisdictions*, 26 T.M. COOLEY L. REV. 681 (2009).

[46] *See, e.g.*, Gregory C. Sisk, *Interpretation of the Statutory Modification of Joint and Several Liability: Resisting the Deconstruction of Tort Reform*, 16 U. PUGET SOUND L. REV. 1, 51–52 (1992); Kionka, *supra* note 45, at 1630; Carol A. Mutter, *Moving to Comparative Negligence in an Era of Tort Reform: Decisions for Tennessee*, 57 TENN. L. REV. 199, 272–73 (1990); Robert B. Ireland, III, Comment, *Modified Joint and Several Liability in Mississippi: The Absent Settling Tortfeasor and the Immune Employer*, 70 MISS. L.J. 821 (2000); Hickman, *supra* note 10, at 742; Paul Bargren, Comment, *Joint and Several Liability: Protection for Plaintiffs*, 1994 WIS. L. REV. 453 (1994); Clare Elizabeth Krumlauf, Note, *Ohio's New Modified Joint and Several Liability Laws: A Fair Compromise for Competing Parties and Public Policy Interests*, 53 CLEV. ST. L. REV. 333 (2005–2006); Samuel T. Waddell, Comment, *Examining the Evolution of Nonparty Fault Apportionment in Arkansas: Must a Defendant Pay More Than Its Fair Share?*, 66 ARK. L. REV. 485 (2013); Mike Steenson, *The STAAB Saga: The Nonparty, Joint and Several Liability, and Loss Reallocation in the Minnesota Comparative Fault Act*, 42 MITCHELL HAMLINE L. REV. 1156 (2016); Michael Koty Newman, Note, *The Elephant Not in the Room: Apportionment to Nonparties in Georgia*, 50 GA. L. REV. 669 (2016).

certain states address several liability issues.[47] However, there is no current list of the state-by-state variations of several liability. Nor is there any discussion about how to deal with those variables in the context of the recent, more rigorous standards for personal jurisdiction. This Article provides a current summary of state several liability rules and suggests avenues to deal with pursuing or defending multiple lawsuits in multiple venues—including those that may work and those that are more problematic.

b. Restatement Third

Comments to the Third Restatement of Torts, Apportionment of Liability, summarize five different versions of joint and several or several liability.[48] The Restatement states that "there is currently no majority rule on this question, although joint and several liability has been substantially modified in most jurisdictions both as a result of the adoption of comparative fault and tort reform during the 1980s and 1990s."[49] The Restatement's five tracks are mutually exclusive, but the comments acknowledge that modifications (or differing combinations of some) of them are possible.[50] The Restatement summarizes the five tracks, along with the Reporters' principal comments, as follows:

(1) PURE JOINT AND SEVERAL LIABILITY. Subsidiary issues implicated by this premise include "identifying those who may be submitted to the jury for assignment of a percentage of comparative responsibility and the treatment of claims against an employer who is immune from tort liability because of the exclusive remedy bar of workers' compensation."[51]

(2) PURE SEVERAL LIABILITY. Each party is only liable for its own percentage of fault.[52]

(3) HYBRID JOINT AND SEVERAL LIABILITY FOR INDEPENDENT TORTFEASORS WHO CAUSE AN INDIVISIBLE INJURY. This ap-

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[47] *See, e.g.*, James J. Scheske, Comment, *The Reform of Joint and Several Liability Theory: A Survey of State Approaches*, 54 J. AIR L. & COM. 627, 649–50 (1988); Kionka, *supra* note 45, at 1630–31.

[48] RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT LIAB. § 17 cmt. a (AM L. INST. 2000).

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*

proach "places the risk of a tortfeasor's insolvency on all parties who bear responsibility for the plaintiff's damages, including the plaintiff. An insolvent tortfeasor's comparative share of responsibility is reallocated to the other parties in proportion to their comparative responsibility. A very similar result is obtained by starting with a rule of several liability but then providing for reallocation in the event of insolvency. This approach also addresses which persons should be subject to an assignment of comparative responsibility and the effect of that allocation on the apportionment of liability among the parties."[53] Theoretically, this approach is "the most appealing in that it apportions the risk of insolvency to the remaining parties in the case in proportion to their responsibility, thereby providing an equitable mechanism for coping with insolvency. There may be administrative and practical difficulties with the reallocation provisions" under such an approach.[54]

(4) HYBRID SYSTEM IN WHICH JOINT AND SEVERAL LIABILITY IS IMPOSED ON INDEPENDENT TORTFEASORS WHOSE PERCENTAGE OF COMPARATIVE RESPONSIBILITY EXCEEDS A SPECIFIED THRESHOLD. "Tortfeasors assigned a modest percentage of comparative responsibility below the threshold are severally liable, while those at or above the threshold are jointly and severally liable."[55] This approach "responds to the concern that many tortfeasors whose responsibility for a plaintiff's injury is quite minimal are held liable for the entirety of the recoverable damages under a pure joint-and-several-liability scheme. However, any threshold is an imperfect way to screen out tangential tortfeasors, and often the threshold is set too high (50 percent) to serve this function well. When there are many tortfeasors, this Track does not perform well, as it virtually guarantees that several liability will be imposed, regardless of the role of any given tortfeasor in the plaintiff's injuries. This threshold series also imposes the risk of insolvency on an entirely innocent plaintiff whenever all solvent defendants are below the specified threshold. To the extent that the justification for modifying joint and several liability is

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[53] *Id.*

[54] *Id.*

[55] *Id.*

the adoption of comparative responsibility so that the plaintiff may also be legally culpable, imposing the risk of insolvency on an innocent plaintiff is unwarranted."[56]

(5) HYBRID SYSTEM, IN WHICH THE VARIABLE THAT DETERMINES JOINT AND SEVERAL LIABILITY OR SEVERAL LIABILITY IS THE TYPE OF HARM SUFFERED BY THE PLAINTIFF. Independent tortfeasors are jointly and severally liable for economic damages but severally liable for noneconomic harm. "Apportioning the risk of insolvency in this fashion (i.e., defendants bear it with regard to economic harm and plaintiffs bear it with regard to noneconomic harms) thus treats the recovery of economic loss as more important to a plaintiff. In addition, damages for economic harm, being susceptible to objective proof, are subject to considerably less variance in their determination by the factfinder."[57] "Some critics contend that this Track works an injustice to those who are not wage earners and thereby suffer a greater proportion of noneconomic damages in a lawsuit. Others, including those that focus on deterrence, would also dispute the proposition that noneconomic damages are less important than economic damages. This Track also treats unfairly the plaintiff who is not comparatively responsible for the injury by imposing the risk of insolvency for noneconomic loss on the innocent plaintiff rather than the culpable defendants. Finally, this Track creates some administrative and practical difficulties in its operation."[58]

c. Other Sources: How "Several" is Each Forum?

Although a majority of states have adopted several liability, the variations among the states are significant. In choosing a forum or deciding where to litigate among multiple venues, a particular feature could be critical to a specific party in a specific case. Among the most important variables are as follows:

(1) What categories of conduct are subject to several liability? Some states exclude strict liability, and some exclude intentional torts.

(2) Is several liability allocation limited to parties, or does it include non-parties?

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[56] *Id.*

[57] *Id.*

[58] *Id.*

(3) What categories of non-parties, if any, can be allocated? For example, a state might not permit allocation to a person or company not subject to jurisdiction in the forum. Another might not permit allocation to someone immune from suit.
(4) What, if any, prerequisites exist to assign fault to non-parties? Some states set a deadline for defendants to plead or disclose such non-parties and may include deadlines for plaintiffs or defendants to add them as parties.
(5) Does a defendant lose the right to allocate fault if its percentage of fault is above a prescribed percentage?
(6) Are there rules that permit reallocation if one or more of the defendants cannot pay their share?
(7) How do settlements affect allocation by the remaining parties?[59]

Several sources list state-by-state variations, but none of them are perfect. For example, the Restatement provides a list of the variations and which states have adopted them.[60] However, the Restatement's list was compiled in 2000, and changes have occurred since that time.[61] ATRA, an organization that actively sought to replace joint and several liability, includes on its website the most current list available.[62] ATRA's website lists the states in which joint and several liability was changed or eliminated.[63] However, the site provides little information about the particulars of each state's form of several liability.

d. Current Summary of State-by-State Several Liability

Appendix A to this Article provides a current chart and summaries of the primary rules in several liability states, along with each state's idiosyncrasies. First, Appendix A identifies which states presently adhere to joint and several liability and have adopted some form of several liability. In addition, it identifies the several liability states that (1) permit allocation to non-parties in some form; (2) exclude strict product liability from several liability; (3) impose a threshold for several liability, either of

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[59] *See infra* Appendix A.

[60] *Id.*

[61] *See infra* Appendix A. States which have added joint and several liability rules since 2000, including Arkansas, Florida, Georgia, Massachusetts, Minnesota, Mississippi, Missouri, Nevada, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, West Virginia. *See infra* Appendix A.

[62] *Joint and Several Liability*, *supra* note 37.

[63] *Id.*

the plaintiff's or the defendant's percentage of fault; and (4) permit some type of reallocation in the event a tortfeasor is unable to pay its proportionate share of the judgment. It also provides notes giving further detail about the particular aspects of the states' rules.

However, there are more variables than would fit in Appendix A. Section III.F provides a generalized discussion of these variables, which, in some states, address allocation rules concerning different tortfeasors, including those who (1) are immune from several liability, (2) have settled, (3) committed an intentional tort, as well as those subject to strict liability, and (4) are unidentified, such as the hit-and-run driver in a motor vehicle accident. Time and space prevented their state-by-state inclusion in the chart. Still, any of these variables could be extremely important in a particular case and should be researched if the issue is likely to be significant. It is worth noting that these charts, like their predecessors, are likely to become obsolete because state law may continue to change as time passes.

B. The Effect of the Narrowing of Personal Jurisdiction

Personal jurisdiction is the other issue that has increased the filing of multiple actions. The Supreme Court recognized that the standards for general and specific jurisdiction were ambiguous and rendered a series of decisions over the past decade that clarified many of the ambiguities.[64] As the Court's decisions have helped clarify the law on personal jurisdiction, they have also increased the likelihood of filing multiple lawsuits in multiple venues for the same claim.[65]

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[64] *E.g.*, J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 877 (2011) (plurality opinion) ("The rules and standards for determining when a State does or does not have jurisdiction over an absent party have been unclear because of decades-old questions left open in *Asahi Metal Industry Co. v. Superior Court. of Cal., Solano Cty.*, 480 U.S. 102, 107 . . . (1987)."); Daimler AG v. Bauman, 571 U.S. 117, 134 (2014) ("This Court has not yet addressed whether a foreign corporation may be subjected to a court's general jurisdiction based on the contacts of its in-state subsidiary.").

[65] This Article is not intended to express any opinion about the merits of the Court's decisions concerning personal jurisdiction. Rather, the focus here is solely upon a specific issue that arises now as a consequence of those decisions in conjunction with state several liability laws.

1. General Jurisdiction

The Supreme Court first recognized the distinction between specific and general jurisdiction in the mid-1980s[66] based on a Harvard Law Review article written by two distinguished scholars.[67] One of the cases of that era, *Helicopteros Nacionales*, described the claim as one based on general jurisdiction, and the Court rejected it on that basis without clearly articulating the applicable criteria.[68]

Starting in 2011, the Court articulated more specific criteria for general jurisdiction. A trilogy of cases limited general jurisdiction almost entirely to the state where a company was incorporated and where its principal place of business is located, i.e., where it is "at home."[69] Each of these decisions (and others involving specific jurisdiction) reversed lower courts that had upheld personal jurisdiction.[70] As one article explained, the Court has "redefined the landscape of personal jurisdiction and venue over the past several years to limit where civil litigation can be filed against businesses and other defendants with operations in multiple states."[71]

The Court's requirement is often a benefit to defendants, but not necessarily so, especially for large companies "at home" in plaintiff-friendly locations. For example, Boeing's repeated and frequently unsuccessful efforts to remove cases from state court or out of town altogether since moving its headquarters to Chicago.[72]

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[66] *E.g.*, Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 nn.8–9 (1984); *see also* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472, 473 n.15 (1985).

[67] Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966).

[68] *Helicopteros Nacionales*, 466 U.S. at 418–19; *see also* Lea Brilmayer, Jennifer Haverkamp & Buck Logan, *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 744 (1988) ("Although the *Helicopteros* Court clearly suggested that some contacts count for general jurisdiction while others do not, the opinion itself offers no explicit guidance for distinguishing between them.").

[69] Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011); *Daimler AG*, 571 U.S. at 119; BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549, 1554 (2017).

[70] *Goodyear Dunlop Tires Operations*, 564 U.S. at 931, *rev'g* 681 S.E.2d 382 (N.C. Ct. App. 2009); *Daimler AG*, 571 U.S. at 142, *rev'g* 644 F.3d 909 (9th Cir. 2011); *BNSF Ry. Co.*, 137 S. Ct. at 1560, *rev'g* 2016 MT 126, 383 Mont. 417, 373 P.3d 1 (Mont. 2016).

[71] Goldberg, Appel & Schwartz, *supra* note 17, at 51.

[72] *See, e.g.*, Brokaw v. Boeing Co., 137 F. Supp. 3d 1082, 1088 (N.D. Ill. 2015) (removal by co-defendant remanded); Vivas v. Boeing Co., 486 F. Supp. 2d 726, 728 (N.D. Ill. 2007); Er v. Boeing Co., No. 10 C 6662, 2010 WL 4659547, at *1

2. Specific Jurisdiction

For decades, the Court's division over the criteria for personal jurisdiction was especially problematic in product liability cases. In the first such case, *World-Wide Volkswagen Corp. v. Woodson*, the Court's opinion toyed with the concept of the "stream of commerce" in dicta but never explicitly accepted or rejected it or defined its limitations.[73] *World-Wide Volkswagen* predated the Court's articulation of general and specific jurisdiction. The closest the Court came to accepting a "stream of commerce" theory was in a concurring opinion in *Asahi Metal Industry Co. v. Superior Court of California*,[74] but the majority of the Court did not accept this theory.[75] As a result, the lower courts split, some recognizing a liberal stream of commerce version of personal jurisdiction and others requiring something more.[76] Neither *World-Wide Volkswagen* nor *Asahi* addressed a claim by an injured consumer against a manufacturer. The former involved a claim

(N.D. Ill. Nov. 8, 2010), *aff'd sub nom.* Koral v. Boeing Co., 628 F.3d 945 (7th Cir. 2011); Nolan L. Grp. v. Boeing Co., No. 09 C 8056, 2010 WL 1253970, at *1 (N.D. Ill. Mar. 24, 2010); Saavedra v. Boeing Co., 464 F. Supp. 2d 770, 770 (N.D. Ill. 2006); Lie v. Boeing Co., 311 F. Supp. 2d 725, 726 (N.D. Ill. 2004); Torrez v. Jeppesen Sanderson, Inc., No. 13 C 825, 2013 WL 5325454, at *1 (N.D. Ill. Sept. 18, 2013); Jinhua Yang v. Boeing Co., No. 13 C 6846, 2013 WL 6633075, at *1 (N.D. Ill. Dec. 16, 2013), *rev'd sub nom.* Lu Junhong v. Boeing Co., 792 F.3d 805 (7th Cir. 2015); Bennett v. S.W. Airlines Co., 493 F.3d 762, 763 (7th Cir. 2007) (per curiam) (removal by co-defendant, Southwest Airlines); Alemayehu v. Boeing Co., No. 10 C 3147, 2010 WL 3328278, at *3 (N.D. Ill. Aug. 18, 2010); Sabatino v. Boeing Corp., No. 09 C 1551, 2009 WL 1635670, at *1 (N.D. Ill. June 5, 2009); Glein v. Boeing Co., No. 10-452, 2010 WL 2608284, at *1 (S.D. Ill. June 25, 2010); Wong *ex rel.* Leung Yuen Man v. Boeing Co., No. 02 C 7865, 2003 WL 22078379, at *1 (N.D. Ill. Sept. 8, 2003); Katonah v. USAir, Inc., 876 F. Supp. 984, 985 (N.D. Ill. 1995); Bennett v. S.W. Airlines Co., 484 F.3d 907, 912 (7th Cir. 2007).

[73] *Id.* at 297–98.

[74] 480 U.S. 102, 117 (1987) (Brennan, J., concurring).

[75] *See id.* at 104 ("O'CONNOR, J., announced the judgment of the Court and delivered the opinion for a unanimous Court with respect to Part I, the opinion of the Court with respect to Part II-B, in which REHNQUIST, C.J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined, and an opinion with respect to Parts II-A and III, in which REHNQUIST, C.J., and POWELL and SCALIA, JJ., joined. BRENNAN, J., filed an opinion concurring in part and concurring in the judgment, in which WHITE, MARSHALL, and BLACKMUN, JJ., joined, *post*, p. 480 U. S. 116. STEVENS, J., filed an opinion concurring in part and concurring in the judgment, in which WHITE and BLACKMUN, JJ., joined, *post*, p. 480 U. S. 121.").

[76] *Compare* Barone v. Rich Bros. Interstate Display Fireworks Co., 25 F.3d 610, 613–15 (8th Cir. 1994) (adopting Justice Brennan's stream-of-commerce test), *with* Bridgeport Music, Inc. v. Still N The Water Publ'g, 327 F.3d 472, 479–80 (6th Cir. 2003) (adopting Justice O'Connor's "stream of commerce 'plus'" test).

brought by an injured consumer against a regional distributor;[77] the latter involved an indemnity claim between two foreign manufacturers after settling with the plaintiff.[78]

Nearly a quarter-century after the *Asahi* stalemate, the Court granted certiorari in a conventional product liability case, *J. McIntyre Machinery, Ltd. v. Nicastro*.[79] The Court's plurality in *J. McIntyre* explicitly acknowledged the stalemate in *Asahi*, stating that the rules and standards for determining state jurisdiction over an absent party "have been unclear because of decades-old questions left open in *Asahi* . . . ."[80] The lack of clarity arising from *Asahi*, for the most part, resulted from its statement of the relation between jurisdiction and the "stream of commerce."[81] The Court reversed the New Jersey Supreme Court and held that the state court lacked personal jurisdiction over the defendant.[82] But the Court again failed to produce a majority opinion.[83] "The academic community met the *Nicastro* decision with almost unanimous disapproval, decrying the Court's inability to resolve the stream of commerce theory in particular and to articulate a coherent theory of personal jurisdiction in general."[84]

Things have changed dramatically since that time. From 2011 to 2020, and after leaving personal jurisdiction "largely un-

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[77] *World-Wide Volkswagen Corp.*, 444 U.S. at 288.

[78] *Asahi Metal Indus. Co.*, 480 U.S. at 106.

[79] 564 U.S. 873, 877–78 (2011) (plurality opinion).

[80] *Id.* at 877.

[81] *Id.* at 881.

[82] *Id.* at 887.

[83] *See id.* at 876 ("Justice KENNEDY announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, Justice SCALIA, and Justice THOMAS join.").

[84] Robin J. Effron, *Letting the Perfect Become the Enemy of the Good: The Relatedness Problem in Personal Jurisdiction*, 16 LEWIS & CLARK L. REV. 867, 868, 868 n.3 (2012) (emphasis added) (citing Patrick J. Borchers, J. McIntyre Machinery, Goodyear, *and the Incoherence of the Minimum Contacts Test*, 44 CREIGHTON L. REV. 1245, 1245 (2011) ("The Supreme Court performed miserably. Its opinion in *J. McIntyre* . . . is a disaster.")); Allan Ides, *Foreword: A Critical Appraisal of the Supreme Court's Decision in* J. McIntyre Machinery, Ltd. v. Nicastro, 45 LOY. L.A. L. REV. 341, 344–46, 358–62, 367–69, 386–87 (2012) (The opinions "exacerbated rather than ameliorated the doctrinal confusion."); Todd David Peterson, *The Timing of Minimum Contacts After* Goodyear *and* McIntyre, 80 GEO. WASH. L. REV. 202, 241–42 (2011) ("[T]he cases may serve to increase the confusion of the lower courts about the requirements for establishing both general and specific jurisdiction."); Adam N. Steinman, *The Lay of the Land: Examining the Three Opinions in* J. McIntyre Machinery, Ltd. v. Nicastro, 63 S.C. L. REV. 481, 515 (2012) (calling the "lack of a majority opinion" in *Nicastro* "disappointing")).

changed for almost seventy years,"[85] the Court reviewed six such cases, cases which some critics complain "significantly narrowed general and specific jurisdiction,"[86] constituted a "stealth revolution" that is "changing the shape of litigation,"[87] and "dramatically changed the law."[88]

In each such recent case, the Court reversed lower courts' general and specific personal jurisdiction assertions.[89] The Court appears to have signaled its narrowing of the standards for specific jurisdiction by recharacterizing it as "case-linked" jurisdiction.[90] As it recently stated in *Bristol-Myers Squibb Co. v. Superior Court of California*, case-linked jurisdiction "is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction."[91] Absent such a connection, "specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State."[92]

However, on March 25, 2021, the Court rendered a decision to uphold personal jurisdiction.[93] It is notable because the Court had not decided a personal jurisdiction case for the plaintiff for over two decades. The Court decided two cases, on appeals from the state courts in Montana and Minnesota, with similar facts. In both cases, a car was sold in a different state and subsequently re-sold to someone who brought it to the forum jurisdiction where the injury-causing accident occurred.[94] Ford argued that the forum had no jurisdiction over it because Ford

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[85] Goldberg, Appel & Schwartz, *supra* note 17, at 52.

[86] Chemerinsky, *supra* note 17, at 58.

[87] Hoffheimer, *supra* note 17, at 501, 505.

[88] Michael Vitiello, *Reflections on Hoffheimer's* The Stealth Revolution in Personal Jurisdiction, 70 FLA. L. REV. F. 31, 31 (2018).

[89] *See* BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549, 1560 (2017), *rev'g* 2016 MT 126, 383 Mont. 417, 373 P.3d 1 (Mont. 2016); Bristol-Myers Squibb Co. v. Super. Ct. of Cal., 137 S. Ct. 1773, 1784 (2017), *rev'g* 377 P.3d 874 (Cal. 2016); Walden v. Fiore, 571 U.S. 277, 282 (2014), *rev'g* 688 F.3d 558 (9th Cir. 2012); Daimler AG v. Bauman, 571 U.S. 117, 142 (2014), *rev'g* 644 F.3d 909 (9th Cir. 2011).

[90] Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011).

[91] 137 S. Ct. at 1780. There is uncertainty as to whether the Court's phrase, "adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction," was intended to clarify, if not alter, the Court's earlier phrase, that required a showing that the claim "arise[s] out of or relate[s] to," activities in or directed at the forum. *Compare Bristol-Myers*, 137 S. Ct. at 1780, *with* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472–73 (1985) (citing Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984)).

[92] *Bristol-Myers*, 137 S. Ct. at 1781.

[93] Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1032 (2021).

[94] *Id.* at 1023.

had not designed, manufactured, or sold the specific car at issue in the forum jurisdiction.[95]

The Court repeatedly highlighted Ford's ubiquitous contacts with the forum states, including voluminous sales of the very models of vehicles at issue in the respective cases.[96] The Court recounted that "Ford had systematically served a market in [the forum states] for *the very vehicles* that the plaintiffs allege malfunctioned and injured them in those States."[97] The fact that Ford had sold the same models of the vehicles at issue many times in the forum states was a consistent drumbeat throughout the opinion.[98] The Court strongly implied that the opinion was limited to the facts before the Court.[99] Time will tell whether and to what degree lower courts will apply this decision.

Overall, the tightening of jurisdictional standards in cases involving multiple defendants acting in different states increases the probability that some defendants will successfully challenge personal jurisdiction. Likewise, it increases the likelihood that plaintiffs will file multiple complaints in multiple courts to preserve their claims against all defendants, even if some defendants are not subject to suit in the same forum as the rest.

III. SURVIVING THE NEW WORLD

This new environment requires litigators to adjust how they handle cases with multiple defendants based in multiple states. This Article discusses some of their options below.

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[95] *Id.*

[96] *See, e.g.*, *id.* at 1022–23, 1028.

[97] *Id.* at 1028 (emphasis added).

[98] *Id.* at 1022 ("Ford did substantial business in the State—among other things, advertising, selling, and servicing the model of vehicle the suit claims is defective."); *see also id.* at 1024, 1027–28, 1030, 1032.

[99] *Id.* at 1022 ("[A] state court held that it had jurisdiction over Ford Motor Company in a products-liability suit stemming from a car accident. The accident happened in the State where suit was brought. The victim was one of the State's residents. And Ford did substantial business in the State—among other things, advertising, selling, and servicing the model of vehicle the suit claims is defective. Still, Ford contends that jurisdiction is improper because the particular car involved in the crash was not first sold in the forum State, nor was it designed or manufactured there. We reject that argument. *When a company like Ford serves a market for a product in a State and that product causes injury in the State to one of its residents, the State's courts may entertain the resulting suit.*") (emphasis added); *see also id.* at 1028 ("Contrast a case, which we do not address, in which Ford marketed the models in only a different State or region.").

A. SUE WHO?

The Restatement suggests that:

> [t]here is much attraction to the basic proposition that a plaintiff should sue all responsible tortfeasors in a single suit and that defendants should join all other parties they claim to be liable in some respect for the plaintiff's injuries. Allocating responsibility once for an indivisible injury suffered by the plaintiff, in a single proceeding involving all responsible parties, has the advantage of efficiency and avoiding administrative difficulties involved in multiple assessments of responsibility for the same injury.[100]

The rise of several liability increases the risk that a plaintiff who sues only one of the multiple potential defendants could have her recovery reduced by the negligence of non-parties. But the tightening of personal jurisdiction means that if the plaintiff drags more defendants into one court, the likelihood increases that one or more of the defendants will challenge personal jurisdiction—and prevail. The Restatement's comments predate the Supreme Court's clarifications of the standards for personal jurisdiction, which make it more difficult to join all responsible parties in one forum.

These standards pose challenges for defendants, too. Defendants need to consider which other parties should be added and whether the venue permits allocation to non-parties or limits allocation to parties. Moreover, adding defendants may increase the likelihood that some new parties may hurt more than help in the trial. In any event, parties needs to consider how the additional parties are likely to affect the allocation of fault, whether local law has deadlines for either adding third parties or identifying and disclosing non-party tortfeasors, and other variables.[101]

B. HOW MANY LAWSUITS?

Why should a plaintiff file multiple lawsuits, arising from the same accident in multiple venues? A justification is to prevent a substantial percentage of the fault from being assigned to non-

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[100] RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT LIAB. § 10 cmt. f (AM. L. INST. 2000) (citing cases in which courts have held that "a plaintiff who had previously sued and recovered from one defendant could not sue another defendant for the same accident and injuries that were involved in the first suit"); *see also* David C. Zuckerbrot, *Mandatory Joinder of Parties: The Wave of the Future?*, 43 RUTGERS L. REV. 53, 61–62 (1990) (explaining some of the strategical reasons that bear on a claimant's decision whether to join additional potentially liable parties)).

[101] *See infra* Appendix A.

parties and thus reduce the plaintiff's recovery. As a result, defendants who do not have a basis for contesting personal jurisdiction may also have a problem if state law does not allow them to allocate fault to non-parties. However, if a plaintiff is deciding whether to file multiple lawsuits or a defendant is deciding whether to challenge jurisdiction or add third-party defendants, it is imperative to identify the critical target defendants and determine where they are subject to personal jurisdiction as early as possible. What are the pros and cons of one defendant seeking and obtaining dismissal of the lawsuit in State A while defending itself in State B?[102] It is crucial to consider (1) the applicable statutes of limitations; (2) statutes of repose; (3) which states' statutes toll the statute of limitations or give additional time if a defendant is dismissed for lack of jurisdiction; and (4) the practical differences in the several and joint and several rules in each actual or potential forum.

The chart in Appendix A and figures in Appendix B provide current information about the principal allocation rules of each state. In addition, Section III.F below identifies additional variables that plaintiffs and defendants should consider. Any one of these issues may be significant to a plaintiff or a defendant in a particular case.

C. Some of the Potholes

There are various ways multiple lawsuits can produce unintended consequences and, in some situations, significant rewards. Unfortunately, many of these are difficult to predict until after the plaintiff has filed multiple complaints or one or more defendants have sought or obtained a dismissal from the first lawsuit. In any event, a plaintiff's decision whether to file multiple lawsuits, or a defendant's antidote of seeking a dismissal for lack of personal jurisdiction, is a critical decision, and counsel should consider—and reconsider—the possible options and their consequences. Although this Article does not discuss all variables, hopefully, those summarized by state in Appendix A, and those discussed generally in Section III.F below, will be a good starting point and help identify other issues worth consideration.

As discussed in Section III.D.2 below, the ideal way to avoid the problems described in this Article is for the parties to agree

[102] We could add States C and above, but the analysis provided here would likely apply to those situations.

upon a common forum that all parties can live with. If the parties can agree on that objective, the related aspects of making the selected forum work are relatively straightforward. One or more of the alternative solutions discussed below might work in some cases but, other than constructive collaboration, there does not appear to be a one size fits all solution for all such cases.

1. State-to-State Differences in Fault Allocation

When a party litigates the same case in multiple venues, some venues will likely have adopted several liability, while others will follow joint and several liability.[103] Moreover, as described above, venues A and B might both recognize several liability, but the differences between them could be highly significant. In addition, one should not overlook the additional fact that States A and B (and others) are likely to have differences on a wide range of other legal issues aside from allocation of fault.[104] It is important to recognize the significant differences as part of the plaintiff's decision whether to file multiple lawsuits and the defendant's decision whether to challenge personal jurisdiction, possibly identify non-parties, identify the state rules governing whether their fault can be allocated, and, if so, the time limits and procedures that dictate how it is done. These variables should also help litigants decide whether they would rather litigate in State A or State B. For example,

a. State A has *pure* several liability;[105] State B does not allow allocation to non-parties or settled parties.

Assume that a defendant is virtually certain to get a dismissal from State A for lack of personal jurisdiction but is subject to personal jurisdiction in State B. Should the defendant file the motion? If successful, and the defendant ends up litigating in

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[103] *See infra* Appendix A (listing the states that retain joint and several liability). Some of the several liability states also retain joint and several in particular circumstances. The footnotes should help the reader easily find the applicable law in each state.

[104] *See infra* Appendix C (providing a preliminary checklist of other issues to consider when deciding whether it would be better to litigate in State A, B, or elsewhere). Undoubtedly, there are additional issues that should be considered in a given case.

[105] "Pure several liability" is intended to describe state laws that allow allocation to *all* persons or entities whose fault contributed to the injury, even if they are immune to suit, have already settled, are not identified, are beyond the reach of personal jurisdiction or otherwise.

State B, they will probably be unable to allocate fault to the other defendants in State A who settled or went to trial. The defendant might get a setoff for whatever they paid; they might not. But if all other defendants litigated or settled in State A, the remaining defendant in state B could wind up liable for 100% of the claim, despite what other defendants paid in State A.

- Same State A and B as above: If the defendant has no basis for allocating fault to a non-party, the settling parties paid significant amounts to settle, and State B allows a setoff for prior settlements, State B might be very favorable to the defendant.
- Another variant of the same example: Suppose a pilot or the pilot's estate brings a claim but loses in State A. The jury decides that the pilot was 100% at fault. The defendant in State B might obtain a dismissal based on res judicata or collateral estoppel because, at least in some jurisdictions, the plaintiff is bound by the result in the State A trial.
- Conversely, if the jury in State A found that the non-party *defendant* was 100% at fault, that defendant would probably not be bound by such a judgment in State B because it was rendered in a forum where that defendant was not a participant. Courts are typically "bound by *Hansberry v. Lee*'s famous maxim that '[i]t is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party.'"[106]

Note that there are myriad variables like these, depending upon the applicable states' allocation rules,[107] the specific circumstances of the particular case, and the status of the plaintiff and the defendant(s) in the subsequent trials.

2. Appeals

What happens if someone appeals a decision in the first trial? The appeal might involve important issues that affect the second trial. What are the ramifications if the judgment in State A is reversed on appeal? In any event, someone might ask the judge in State B to stay the proceedings pending the outcome of the

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[106] Alexandra Bursak, Note, *Preclusions*, 91 N.Y.U. L. REV. 1651, 1653 (2016) (citing Hansberry v. Lee, 311 U.S. 32, 40 (1940)); *see also* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 & n.7 (1979).

[107] *See infra* Appendix A.

appeal of a court in State A. The client who "succeeded" in obtaining a dismissal in State A—and perhaps might have done well there—may well either have the case lingering in State B for years or be forced to take it to trial before a final judgment is rendered in State A. Even if the issue in State A is irrelevant to the party sitting in State B, the delay could prevent the entry of a final judgment and thereby adversely affect the proceeding in State B.

3. The First Trial's Effects on Subsequent Trials

Pursuing a claim in multiple lawsuits can backfire. There is a risk of a party presenting testimony and arguments in the first trial inconsistent with what that party submits in the second trial. Federal Rule of Civil Procedure 8(d)(3) entitles a party to make separate claims or defenses regardless of inconsistency, subject to the constraints of Federal Rule of Civil Procedure 11.[108] Federal courts have interpreted this rule to permit a party to make allegations in a subsequent action inconsistent with the allegations it made in the first.[109]

However, the right to allege inconsistent positions does not insulate the party—or its witnesses—from being attacked in front of the jury for doing so. "The inconsistent statements may be evidentiary as admissions—convincing, persuasive or of little weight, . . . but in and of themselves, they will not conclude a party as a matter of law."[110] In some cases, judicial estoppel may bar such inconsistent testimony in the subsequent proceeding altogether. Judicial estoppel "prevents a party from asserting a factual position in a legal proceeding that is contrary to a position previously taken by [that party] in a prior legal proceeding."[111] The federal courts unanimously agree that judicial estoppel applies if the prior assertion results in the court's adoption of that party's position but are split as to whether a settle-

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[108] FED. R. CIV. P. 8(d)(3); *see* FED. R. CIV. P. 11.

[109] *See, e.g.*, Peterson v. McGladrey & Pullen, LLP, 676 F.3d 594, 597 (7th Cir. 2012).

[110] 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1283 (3d ed. 2002) (quoting Parkinson v. California Co., 233 F.2d 432, 438 (10th Cir. 1956)); *see also* Sheesley v. The Cessna Aircraft Co., No. Civ 02-4185, 2006 WL 1084103, at *40 (D.S.D. Apr. 20, 2006) (citing FED. R. EVID. 611(b), 801(d)).

[111] Robinson v. Concentra Health Servs., Inc., 781 F.3d 42, 45 (2d Cir. 2015) (alteration in original) (quoting Bates v. Long Island R.R. Co., 997 F.2d 1028, 1037 (2d Cir. 1993)).

ment in the first proceeding is the "equivalent to winning a judgment for purposes of applying judicial estoppel."[112]

Other complications can arise if the parties fail to coordinate their activities in the various cases early on. Ideally, the parties should confer and develop a protocol to avoid unnecessary, duplicative discovery and how and whether documents and depositions in one forum, as well as product inspections, can be used in the other forum. The parties must be aware of differences in state procedures and rules (e.g., limits on the number or scope of document requests or the length of depositions) and similar issues. And they should also be aware that some discovery in one venue might be irrelevant or even inappropriate in another.

Absent an agreed protocol, initiating discovery in all venues could invite a defendant to move to stay discovery in a venue where it is moving to dismiss for lack of personal jurisdiction. The court has discretion whether to permit jurisdictional discovery and, in federal court, such a request for discovery can be denied if the plaintiff has failed to "present factual allegations that suggested with reasonable particularity the possible existence of the requisite minimum contacts."[113] Furthermore, a court has discretion to stay consideration of a motion to dismiss for lack of personal jurisdiction "to allow the parties additional time to engage in discovery relevant to the jurisdictional issue when there is some basis for believing that would be fruitful."[114] Jurisdictional discovery might properly be limited to the case in which personal jurisdiction is at issue, because it may involve sensitive financial or business information relevant only to personal jurisdiction. However, the parties also must be aware of the risk that the courts where the subsequent cases are pending may not wish to wait for the conclusion of the previous case(s), let alone the additional delay if there are appeals.

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[112] Occidental Fire & Cas. Co. v. Soczynski, 765 F.3d 931, 936 n.4 (8th Cir. 2014) (quoting Rissetto v. Plumbers and Steamfitters Loc. 343, 94 F.3d 597, 604–05 (9th Cir. 1996)); Commonwealth Ins. Co. v. Titan Tire Corp., 398 F.3d 879, 887 (7th Cir. 2004) (concluding that a "favorable settlement . . . may be sufficient to show that the party to be estopped prevailed in the prior case regardless of whether a judicial decision was obtained").

[113] Fatouros v. Lambrakis, 627 F. App'x 84, 88 (3d Cir. 2015) (citing Toys "R" Us, Inc. v. Step Two, S.A., 318 F.3d 446, 456 (3d Cir. 2003)); *see also* Second Amend. Found. v. U.S. Conf. of Mayors, 274 F.3d 521, 525 (D.C. Cir. 2001) ("To get discovery, however, one must ask for it.").

[114] 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1067.6 (4th ed. 2008).

4. Time, Effort, and Costs

The cost of trying multiple trials over the same crash can be extremely time-consuming and expensive for all parties. However, a plaintiff likely carries a greater burden than an insurer or large company. Trying multiple trials may be the only way for a plaintiff to obtain personal jurisdiction over every defendant. But doing so can give rise to a variety of other problems. Adding multiple defendants in the blind can be an unforced error unless it is necessary to avoid a statute of limitations or repose. Parties can avoid wasting valuable time and expenses battling over personal jurisdiction by conducting an early and thorough product inspection to eliminate unnecessary parties. Early product inspection can also help a plaintiff avoid unnecessary jurisdiction motions brought by defendants who have no liability exposure. It may be more difficult to motivate some defendants to retain experts early and participate in inspections. Still, given litigation costs, there are practical reasons to rule out unnecessary parties and establish a clear and legitimate basis for liability against others.

D. Consider Federal Court

Assuming diversity or a federal question exists, plaintiffs could file, or defendants could remove, such cases to federal court. Federal courts are better suited to handle multiparty disputes and have tools to manage multiple lawsuits filed in multiple states, such as multidistrict litigation and a generous venue statute.[115] Most likely, the impediment is a lack of diversity or subject matter jurisdiction.

1. 28 U.S.C. § 1407: Multidistrict Litigation (MDL)

28 U.S.C. § 1407 empowers the judicial panel on multidistrict litigation (JPML) to transfer related cases to a single district for pretrial proceedings or coordinate such cases.[116] The multidistrict litigation (MDL) statute is designed to deal with "civil actions involving one or more common questions of fact [that] are pending in different districts" by authorizing coordinated or consolidated pretrial proceedings.[117] The MDL statute is a tool commonly used in airline disaster litigation but far less so in smaller, general aviation cases. It can provide a method to liti-

[115] 28 U.S.C. §§ 1407(a)–(b), 1404(a).
[116] *Id.* § 1407(a)–(b).
[117] *Id.* § 1407(a).

gate multiple cases in different federal courts arising from the same claim. The MDL statute's two biggest shortcomings are that MDLs (1) are not designed to conduct trials and (2) can be painfully slow.[118]

There can be other impediments to MDLs as well. If a movant files a Section 1407 motion to "circumvent [the] obstacles of personal jurisdiction," such conduct is a "compelling reason for denying the requested transfer."[119] Furthermore, the JPML looks to see if alternate solutions can avoid the necessity for an MDL transfer.[120] For example, suitable alternatives to a Section 1407 transfer are often available to minimize duplicative discovery: Notices for a particular deposition can be served in multiple pending actions, thereby making a deposition available in each action; the parties can enter a stipulation that any discovery relevant to more than one action may be used in all those actions; and any party can seek orders from the various courts directing the parties to coordinate their pretrial efforts.[121] Moreover, the parties may seek stays of some of the actions pending the outcome of another.[122]

2. 28 U.S.C. § 1404: Change of Venue Statute

The venue statute, 28 U.S.C. § 1404, provides an effective substitute for the need to pursue multiple lawsuits in multiple venues because it allows cases to be transferred "[f]or the convenience of parties and witnesses, in the interest of justice."[123] The statute permits a transfer to "any district or division to which all parties have consented."[124] Moreover, once the cases are transferred to one venue, the court has broad power to "join for hearing or trial any or all matters at issue in the ac-

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[118] *See* Delaventura v. Columbia Acorn Trust, 417 F. Supp. 2d 147, 150 (D. Mass. 2006).

[119] *In re* Highway Accident Near Rockville, Conn., on Dec. 30, 1972, 388 F. Supp. 574, 576 (J.P.M.L. 1975); *see also In re* Klein, 923 F. Supp. 2d 1373, 1374 (J.P.M.L. 2013).

[120] *See* Order Denying Transfer, MDL No. 2868 (2018).

[121] *In re* Com. Lighting Prods., Inc. Cont. Litig., 415 F. Supp. 392, 393 (J.P.M.L. 1976).

[122] *In re* Eli Lilly & Co. (Cephalexin Monohydrate) Pat. Litig., 446 F. Supp. 242, 244 (J.P.M.L. 1978).

[123] 28 U.S.C. § 1404(a).

[124] *Id.*

tions[,]" or "consolidate the actions[,]" or "issue any other orders to avoid unnecessary cost or delay."[125]

Personal jurisdiction, unlike subject matter jurisdiction,[126] can be waived.[127] Consequently, if the parties want to try all the cases in the same court, they can do so, even if that court does not have personal jurisdiction over one or more parties.

Federal courts have employed both MDL assignment and venue consolidation as tools used in the same case.[128] After all, the MDL process is solely designed for pretrial purposes, not to try cases.[129] While a transfer under 28 U.S.C. § 1407 for pretrial purposes "can streamline litigation, thereby benefitting the parties and the courts, transfer under Section 1404(a) for all purposes should be attempted, where appropriate."[130] As the JPML stated, "Section 1404 transfer is typically advantageous because it 'is for all purposes, including trial. For this reason, transfer under Section 1404(a)—where appropriate—can result in a more streamlined action, without the procedural necessity of remand to the transferor court that is required under Section 1407.'"[131]

Any venue transfer or MDL can and should be sought early in the litigation. The JPML has rejected requests for MDL status because "[t]he relatively advanced status of the [pending case] also weighs against centralization."[132] The Federal Rules allow litigants to raise the issue early in the lawsuit(s).[133] Federal Rule of Civil Procedure 26(f) requires the parties to confer about how the litigation should be handled.[134] Although Rule 26(f) conferences are often cursory and limited to scheduling, the Federal Rules give the parties far more latitude. Indeed, the Rule 26(f) conference ordinarily leads to a Rule 16 conference

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[125] Hall v. Hall, 138 S. Ct. 1118, 1124 (2018) (quoting FED. R. CIV. P. 42(a)(1)–(3)).

[126] Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006).

[127] FED. R. CIV. P. 12(b)(2), (h)(1).

[128] *In re* Air Crash Disaster Near Chi., Ill., on May 25, 1979, 476 F. Supp. 445, 450 (J.P.M.L. 1979).

[129] *Id.* at 448.

[130] *In re* Air Crash Over Hudson River Near N.Y.C., N.Y., on Aug. 8, 2009, 716 F. Supp. 2d 1360, 1360 (J.P.M.L. 2010); *cf. In re* Air Crash Near Islamabad, Pak., on July 28, 2010, 777 F. Supp. 2d 1352, 1353 (J.P.M.L. 2011).

[131] *In re* Fresh and Process Potatoes Antitrust Litig., MDL No. 2186, 2016 WL 2991150, at *1 (J.P.M.L. Apr. 7, 2016).

[132] *In re* Helicopter Crash Near Savannah, Ga., on Jan. 15, 2014, 178 F. Supp. 3d 1372, 1373 (J.P.M.L. 2016).

[133] FED. R. CIV. P. 26(f).

[134] FED. R. CIV. P. 26(f).

with the court,[135] in which the court has considerable flexibility, *inter alia*, for "adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems[.]"[136] Agreeing to consolidate lawsuits into one venue under Section 1404(a) does not obligate the transferee court to apply its law to all cases filed elsewhere. Instead, "the tranferee district court must be obligated to apply the state law that would have been applied if there had been no change of venue."[137]

3. Secondary Rules

a. Supplemental Jurisdiction

At first, one might assume that joining all potential defendants in one federal court trial would be permissible via the supplemental jurisdiction provisions of 28 U.S.C. § 1367 added in 1990.[138] After all, supplemental jurisdiction under Section 1367 was intended to eliminate the confusion of various case-law concepts, including pendent jurisdiction (or "pendent claim"),[139] pendent-party jurisdiction,[140] and ancillary jurisdiction.[141] Con-

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[135] *Id.* 26(f)(3)(F), 26(f)(4).

[136] *Id.* 16(c)(2)(L).

[137] Van Dusen v. Barrack, 376 U.S. 612, 639 (1964); *In re* Takata Airbag Prods. Liab. Litig., 24 F. Supp. 3d 1266, 1292 (S.D. Fla. 2021).

[138] *See* 28 U.S.C. § 1367(a).

[139] *See* United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966). Pendent jurisdiction arises when the plaintiff asserts both a federal law claim and a state law claim under the same facts, but in which the parties lack diversity.

[140] Aldinger v. Howard, 427 U.S. 1, 14 (1976) ("The situation with respect to the joining of a new party, however, strikes us as being both factually and legally different from the situation facing the Court in Gibbs and its predecessors. From a purely factual point of view, it is one thing to authorize two parties, already present in federal court by virtue of a case over which the court has jurisdiction, to litigate in addition to their federal claim a state-law claim over which there is no independent basis of federal jurisdiction. But it is quite another thing to permit a plaintiff, who has asserted a claim against one defendant with respect to which there is federal jurisdiction, to join an entirely different defendant on the basis of a state-law claim over which there is no independent basis of federal jurisdiction, simply because his claim against the first defendant and his claim against the second defendant 'derive from a common nucleus of operative fact.'") (quoting *United Mine Workers*, 383 U.S. at 725), *superseded by statute*, 28 U.S.C. 1367, *as recognized in* Alexander by Alexander v. Goldome Credit Corp., 772 F. Supp. 1217, 1221 n.8 (M.D. Ala. 1991).

[141] Ancillary jurisdiction "encompassed only additional claims that were closely related to the original action that conferred federal jurisdiction on the district court. The defendant's or third party's claims had to be factually similar to and

gress's enactment of the statute in 1990 was in response to the Supreme Court's decision the previous year that rejected the court-created doctrine of pendent-party jurisdiction.[142] However, 28 U.S.C. § 1367(b) specifically precludes the use of supplemental jurisdiction when subject matter jurisdiction is based solely on diversity.[143] For this reason, Section 1367(b) is not a pathway to circumvent diversity jurisdiction under 28 U.S.C. § 1332. Still, it can be important and helpful when claims arise out of a federal question under 28 U.S.C. § 1331.

b. Joinder

Federal Rule of Civil Procedure 19(a)(1)(A) requires joinder if "in that person's absence, the court cannot accord complete relief among existing parties . . ."[144] Federal Rule of Civil Procedure 19(a)(1)(B) requires joinder if the absent person "claims an interest relating to the subject of the action" and their absence may "as a practical matter impair or impede the person's ability to protect the interest" or "leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest."[145] In many states, the jury might allocate fault to the non-party. Therefore, a non-party's absence could reduce the plaintiff's recovery without a binding judgment against the non-party. Conversely, in states where the jury can only allocate fault to parties, the absence of the non-party could result in greater liability for defendants, thereby undermining the objective of several liability to limit each party to its percentage of responsibility. Superficially, one would think that Rule 19 would at least permit, and

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logically dependent on the claims raised in plaintiff's complaint." Patrick D. Murphy, *A Federal Practitioner's Guide to Supplemental Jurisdiction Under 28 U.S.C. § 1367*, 78 MARQ. L. REV. 973, 978–79 (1995) (footnote omitted); *see also* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 377 (1978) ("It is not unreasonable to assume that, in generally requiring complete diversity, Congress did not intend to confine the jurisdiction of federal courts so inflexibly that they are unable to protect legal rights or effectively to resolve an entire, logically entwined lawsuit. Those practical needs are the basis of the doctrine of ancillary jurisdiction. But neither the convenience of litigants nor considerations of judicial economy can suffice to justify extension of the doctrine of ancillary jurisdiction to a plaintiff's cause of action against a citizen of the same State in a diversity case.").

[142] Murphy, *supra* note 141, at 974, 1000; *see also* Darren J. Gold, Note, *Supplemental Jurisdiction over Claims by Plaintiffs in Diversity Cases: Making Sense of 28 U.S.C. § 1367(b)*, 93 MICH. L. REV. 2133, 2145 (1995).

[143] 28 U.S.C. §§ 1367(b), 1332.

[144] FED. R. CIV. P. 19(a)(1)(A).

[145] *Id.* 19(a)(1)(B).

perhaps require, joinder of non-parties who should share the risk of liability.

However, other provisions render Rule 19 unlikely to apply for the same reasons as supplemental jurisdiction. Required joinder is conditioned on the premise that the joinder "will not deprive the court of subject-matter jurisdiction . . . ."[146] "If a joined party objects to venue and the joinder would make venue improper, the court must dismiss that party."[147]

As mentioned previously, Section 1367 (the supplemental jurisdiction statute) also shuts the door to using joinder to circumvent diversity jurisdiction requirements.[148] Section 1367 specifically precludes the use of any of the joinder rules if such joinder would be inconsistent with the requirements of the diversity statute.[149] So permissive joinder under Federal Rule of Civil Procedure 20 will fail in cases where complete diversity is lacking.

Nor do joinder rules circumvent personal jurisdiction. Even if there is no diversity problem, limitations on personal jurisdiction also limit joinder under Rule 19(b), based on the court's consideration of whether joinder of the party is not "feasible."[150] Courts have held that joinder is not feasible when the absentee is not subject to personal jurisdiction.[151]

4. National Personal Jurisdiction . . . Maybe Someday . . .

While state courts do not have a mechanism to consolidate related lawsuits in other states, it remains an open question whether Congress could authorize federal courts to exercise national personal jurisdiction. The plurality opinion of the Supreme Court in *J. McIntyre Mach., Ltd. v. Nicastro* suggests that Congress could empower federal district courts to handle cases when no single state court can but in which one or more de-

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146 *Id.* 19(a)(1).

147 *Id.* 19(a)(3).

148 28 U.S.C. § 1367(b).

149 *See id.* The statute also specifies Rules 14 and 24 of the Federal Rules of Civil Procedure.

150 FED. R. CIV. P. 19(b).

151 EEOC v. Peabody W. Coal Co., 400 F.3d 774, 779 (9th Cir. 2005) (first citing FED. R. CIV. P. 19(a); and then citing Tick v. Cohen, 787 F.2d 1490, 1493 (11th Cir. 1986)); Keweenaw Bay Indian Cmty. v. Michigan, 11 F.3d 1341, 1345–46 (6th Cir. 1993) (quoting Local 670, United Rubber Workers v. Int'l Union, 822 F.2d 613, 618 (6th Cir. 1897)); Maldonado-Viñas v. Nat'l W. Life Ins. Co., 862 F.3d 118, 122–23 (1st Cir. 2017); *see also* 7 WRIGHT & MILLER, *supra* note 110, § 1607.

fendants has a national presence.[152] The rationale was that the due process limitations on state courts arise from the Fourteenth Amendment,[153] whereas due process limitations on federal courts arise from the due process clause of the Fifth Amendment.[154] The Court's plurality opinion states:

> It may be that, assuming it were otherwise empowered to legislate on the subject, the Congress could authorize the exercise of jurisdiction in appropriate courts. That circumstance is not presented in this case, however, and it is neither necessary nor appropriate to address here any constitutional concerns that might be attendant to that exercise of power. . . . Nor is it necessary to determine what substantive law might apply were Congress to authorize jurisdiction in a federal court in New Jersey. . . . ("The issue is personal jurisdiction, not choice of law"). A sovereign's legislative authority to regulate conduct may present considerations different from those presented by its authority to subject a defendant to judgment in its courts. Here the question concerns the authority of a New Jersey state court to exercise jurisdiction, so it is petitioner's purposeful contacts with New Jersey, not with the United States, that alone are relevant.[155]

Academia has debated whether the Fifth Amendment permits Congress—or even the courts—to authorize national personal jurisdiction over defendants with significant contacts with the United States as a whole.[156] At present, this is an unlikely option for a litigant in the absence of additional congressional action. However, there are a few situations in which the courts can apply national personal jurisdiction under existing law.[157] In addition, other possible avenues should be considered as possible means to join all defendants in a single proceeding for purposes of several liability, such as supplemental jurisdiction[158] and the joinder rules.[159] However, at present, each of these procedures

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[152] 564 U.S. 873, 885–86 (2011) (plurality opinion).

[153] *See id.* at 873–74.

[154] *See id.* at 884.

[155] *Id.* at 885–86 (citations omitted).

[156] *E.g.*, Jonathan Remy Nash, *National Personal Jurisdiction*, 68 EMORY L.J. 509, 525 (2019); Patrick J. Borchers, *Extending Federal Rule of Civil Procedure 4(K)(2): A Way to (Partially) Clean Up the Personal Jurisdiction Mess*, 67 AM. U. L. REV. 413, 417 (2017) ("Although the Supreme Court has never ruled on the issue, most lower courts and other authorities are of the opinion that some variant of the 'national contacts' test applies to cases under the Fifth Amendment.").

[157] Nash, *supra* note 156, at 534.

[158] 28 U.S.C. § 1367.

[159] FED. R. CIV. P. 19–20.

has limitations that are likely to preclude them as a simple solution.

It has been over a decade since the *Nicastro* plurality suggested national jurisdiction, and Congress has yet to accept the invitation.

E. Defendant's Options

Defendants have options for countering multiple lawsuits brought on behalf of the same plaintiff.

1. Move to Dismiss Duplicative Lawsuits

If a plaintiff files multiple lawsuits against the same parties in multiple courts, can the defendant dismiss all but one of them for reasons other than lack of personal jurisdiction? Even if the defendants could obtain dismissals, should they?

At common law, a party could file a plea of abatement to object to duplicative complaints.[160] Courts have the power to dismiss or stay a lawsuit because another action is pending. Although the Federal Rules of Civil Procedure did not include multiple lawsuits as a basis for dismissal under Federal Rule of Civil Procedure 12(1), federal courts have the authority to use their discretion to consider abatement of the duplicative claims.[161] In an environment where defendants have a stronger basis to challenge personal jurisdiction, one would assume that the filing of multiple lawsuits when facing jurisdictional challenges and several liability issues would dissuade most judges from dismissing multiple lawsuits filed for those reasons.

There is a split of authority about whether a plaintiff can bring multiple actions arising from the same accident. In 1995, John Scott Hickman wrote an article thoroughly addressing the subject and opining that courts should limit litigants to one action to determine the percentages of fault in the absence of joint and several liability.[162] He cited various cases that preclude multiple actions based upon the entire controversy doctrine, collateral estoppel, and statutory interpretation mandating a

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[160] *See, e.g.*, P. H. Vartanian, Annotation, *Stay of Civil Proceedings Pending Determination of Action in Another State or Country*, 19 A.L.R. 2d 301 § 1 (1951).

[161] *See, e.g.*, 5C Wright & Miller, *supra* note 110, § 1360, n.11 (citing Int'l Ass'n of Entrepreneurs of Am. v. Angoff, 58 F.3d 1266 (8th Cir. 1995)); Ellison Framing, Inc. v. Zurich Am. Ins. Co., 805 F. Supp. 2d 1006, 1012 (E.D. Cal. 2011).

[162] Hickman, *supra* note 10, *passim*.

one-action rule.[163] Other courts have rendered contrary decisions, for example, by reasoning that the second action was not barred because it was brought against a different defendant or raised issues not included in the first lawsuit.[164]

Hickman advocated a rule that would require all defendants to be involved in a single trial to serve the goals of "efficiency, fairness, and consistency of judgments in comparative fault jurisdictions."[165] His practical solution, offered in 1995, may not be achievable today in light of current personal jurisdiction standards. Short of a disaster that spawns an MDL proceeding, or reliance on the venue statute discussed above,[166] a rule that would require all defendants to be in a single trial appears to be the only mechanism to consolidate lawsuits pending in multiple states and try them together. Using federal court for this purpose depends upon whether there is subject-matter jurisdiction over the parties and a willingness of the parties to litigate in federal court.

Even though the tightening of personal jurisdiction standards is likely to encourage defendants to contest personal jurisdiction in each forum, is it worthwhile to do so? For some defendants, definitely so. For example, a defendant with limited resources or one whose liability is minimal or nonexistent should usually challenge personal jurisdiction if they can. But other defendants should be more cautious. There are two primary shortcomings to winning a motion to dismiss duplicative lawsuits: (1) that, despite multiple lawsuits, none would have all parties present; and (2) although clients invariably appreciate a defense lawyer who obtains early dismissals from lawsuits, dismissals based on personal jurisdiction do not automatically get the client off the hook. A dismissal based on personal jurisdiction, by definition, is without prejudice.[167]

Consequently, before challenging personal jurisdiction, a defendant should consider: (1) whether the motion, if granted, will result in the end of the case for that defendant or simply give rise to litigation in another forum; and (2) whether the alternate venues are likely to be better or worse than where the present lawsuit was filed. For example, the courts where the de-

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[163] *Id.* at 753–58.

[164] *Id.* at 759–61.

[165] *Id.* at 762.

[166] 28 U.S.C. § 1404.

[167] *E.g.*, Hollander v. Sandoz Pharm. Corp., 289 F.3d 1193, 1216–17 (10th Cir. 2002); Posner v. Essex Ins. Co., 178 F.3d 1209, 1221 (11th Cir. 1999).

fendant is "at home" may be more troublesome than the court where the lawsuits are filed.[168] The cost of challenging personal jurisdiction may include far more than the motion papers and oral argument. The plaintiff may seek jurisdictional discovery, which could be expensive and time-consuming, either in producing voluminous and sensitive commercial information or filing additional motions objecting to the scope of the discovery sought. Consequently, obtaining dismissals in four out of five lawsuits may ultimately cost more than not challenging at all.

Furthermore, although Congress and the Supreme Court have limited the avenues for personal jurisdiction, some lower courts seem more reluctant to toss aside precedent that predates and are inconsistent with the Court's recent decisions.[169] Therefore, in deciding to dismiss a case based on personal jurisdiction, it is essential to consider the potential time and cost of appeals and the risk that, at the end of the appellate process, the client may still have to endure the cost of litigating the merits of the case.

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[168] Consider Boeing, which is now "at home" in Chicago, which has long been identified by the ATRA as a "judicial hellhole." *See* AM. TORT REFORM FOUND., *Judicial Hellholes 2010/2011* (2010), https://www.judicialhellholes.org/cook-county-illinois_2010-11/ [perma.cc/BS4U-8K8J]. Although it can attempt to escape via forum non conveniens, Boeing should have no basis to challenge personal jurisdiction in its "home."

[169] *Compare, e.g.*, Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 2019 MT 115, ¶ 21, 395 Mont. 478, 443 P.3d 407 (Mont. 2019), *aff'd*, 141 S. Ct. 1017 (2021) (finding jurisdiction over Ford involving a vehicle that was sold in Washington, resold ten years later and registered in Montana) ("Where a company first designed, manufactured, or sold a vehicle is immaterial to the personal jurisdiction inquiry . . .), *and* Bandemer v. Ford Motor Co., 931 N.W.2d 744, 753 (Minn. 2019), *aff'd*, 141 S. Ct. 1017 (2021) (Ford "argues that '[n]o part of Ford's allegedly tortious conduct—designing, manufacturing, warrantying, or warning about the 1994 Crown Victoria—occurred in Minnesota.' Those contacts are only those that cause the claim, though. As we explained above, the requirements of due process are met so long as Ford's contacts *relate* to the claim.") (alteration in original), *with* Brown v. Ford Motor Co., 347 F. Supp. 3d 1347, 1350 (N.D. Ga. 2018) ("Ford's 'continuous activity of some sorts within [Georgia] is not enough to support the demand that the corporation be amenable to suits unrelated to that activity.'") (alteration in original) (citation omitted), *and* Pitts v. Ford Motor Co., 127 F. Supp. 3d 676, 686 (S.D. Miss. 2015) (finding no specific personal jurisdiction over Ford in Mississippi where the plaintiffs purchased their vehicle in Texas and crashed in Mississippi because there was no "meaningful connection" between the claims and Ford's Mississippi contacts).

2. Res Judicata/Collateral Estoppel

A defendant's victory in the first trial may give rise to res judicata or collateral estoppel challenges against the plaintiff in the second trial.[170] However, a plaintiff's victory in the first trial would probably not justify res judicata or collateral estoppel in the second trial against a defendant who was not a party in the first.[171]

For example, suppose the plaintiff's decedent was the pilot. Plaintiff's first trial is against the engine manufacturer, and the second trial is against the fixed-base operator (FBO) who performed maintenance on the engine. The forum permits the jury verdict to assess the fault of non-parties as well as the parties. The plaintiff alleges that an engine failure caused the crash. The manufacturer argues that the crash was caused solely by pilot error. Further, suppose that the first trial is exclusively against the manufacturer because the court had granted the FBO's motion to dismiss for lack of personal jurisdiction. The jury renders a verdict for the manufacturer. Even though the verdict form listed the FBO and the manufacturer, the jury found the pilot 100% at fault. In all likelihood, res judicata or collateral estoppel would probably result in a dismissal of the second trial because the first court found that the pilot was 100% at fault.[172]

Conversely, suppose under the same facts, the jury in the first case concludes that the non-party FBO was 100% at fault. The manufacturer has prevailed, but the plaintiff is unlikely to be able to invoke res judicata or collateral estoppel over the FBO if it was not a party to the trial.[173]

F. Known Unknowns of Several Liability Laws

If multiple lawsuits are filed in multiple states that have adopted several liability, the state laws are unlikely to be the same. Any single difference may be extremely important in any given case, as shown in the variations provided in Appendix A. The most significant additional variations concern which categories of tortfeasors are subject to allocation of fault (e.g., whether

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[170] *See* discussion *supra* Section III.C.1.

[171] *See* discussion *supra* Section III.C.1.

[172] *Cf.* Bowen v. United States, 570 F.2d 1311, 1323 (7th Cir. 1978) (National Transportation Safety Board decision in enforcement hearing precluded plaintiff from relitigating the issue of whether he violated the safety regulations by flying his aircraft into known icing conditions, an issue that had been finally determined adversely to him in the administrative proceeding.).

[173] *See* discussion *supra* Section III.C.1

it includes those who are immune, who have settled, whose tortious conduct was intentional, and who are unknown or unidentified actors) and whether they must be added to the lawsuit as a prerequisite to allocation. Not all these variations are in Appendix A, so they are discussed below.

1. Immunity

Some, but not all, several liability state laws preclude allocation of fault to persons or entities who are immune from suit. The most common immunity from suit arises from the exclusivity provision of most workers' compensation statutes.[174] Among the other categories of immunity are "sovereign immunity, diplomatic immunity, parental immunity, interspousal immunity, charitable immunity, the immunity of government officials, and the immunity of municipal corporations."[175]

Moreover, there is ambiguity about what "immune" means in this context. Some kinds of immunity, either by statute or common law, preclude liability even though the actor "may have committed a tort, but by reason of a statutory or common law designation based on public policy, the defendant cannot be held liable for the tort."[176] Other kinds of immunity may be regarded as "nominal immunity." For example, someone who owed no duty or did not breach any existing duty might be regarded as having "nominal immunity."[177] In some states, such a person may not have any allocable "share" of responsibility to others.[178] The Restatement's "C" series "reflects the current majority rule in several-liability jurisdictions by stating that 'the plaintiff, each defendant, and each other identified person[ ] whose tortious conduct was a legal cause of the plaintiff's damages for which several liability is imposed are submitted to the fact finder for an assignment of a percentage of comparative responsibility.' Thus, in the C series, the plaintiff bears the cost of tortious insolvent or immune persons, and the defendant is spared from liability in excess of its responsibility."[179]

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[174] *See, e.g.*, Ireland, *supra* note 46, at 822–24.

[175] Cardi, *supra* note 29, at 1295.

[176] *Id.* (footnote omitted).

[177] *Id.* at 1296.

[178] *Id.*

[179] *Id.* at 1308 (alteration in original) (footnotes omitted).

2. Settlements

If the plaintiff settled with one person and obtained a judgment against another in traditional joint and several liability jurisdictions, there is typically no basis to compare their relative fault.[180] Instead, the judgment would be offset by the amount the plaintiff already obtained in the settlement.[181] But if a defendant's settlement seemed unfairly cheap, then things could get messy. If A was 99% at fault but only had a $25,000 liability insurance policy and no other assets, defendant B, who was 1% at fault, would have to pay the entire amount of damages and only receive a credit for the $25,000 previously paid.[182] This conundrum was a major reason states switched to several liability.[183] Most several liability states—but not all—would only impose 1% of the total damages on B (e.g., his proportionate share of the fault). Not all states follow this pattern, so it is important to know the rule in each forum. Moreover, if there is a difference between the rule in the state where A settled and where B was found to be 1% at fault, the parties may need to brief the choice-of-law issue to determine which state's allocation rules apply. Furthermore, if a plaintiff has filed in multiple states, the standards by which a settlement is approved may vary. Even if the parties all agree where they want to see court approval, another state's law may also require its own approval. This is especially likely in cases involving minors and incapacitated persons, either as parties or beneficiaries.[184]

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[180] WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP, JOINT AND SEVERAL LIABILITY 50-STATE SURVEY, 4 (2013), https://www.wilsonelser.com/writable/files/Legal_Analysis/50_state-survey-joint-and-several-liability_mm4.pdf [https://perma.cc/A7UC-BQNN].

[181] *See generally id.*

[182] Section 885(3) of the Second Restatement of Torts states that the non-settling party is entitled to a credit for the payment of the settling tortfeasor. *See* RESTATEMENT (SECOND) OF TORTS § 885(3) (AM. L. INST. 1979). This provision was replaced by § 16 of the Third Restatement of Torts, which suggests a "comparative share" rule, in which the allocation to the settling party is based on the factfinder's percentages of comparative fault rather than the amount of the settlement. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT LIAB. § 16 (AM. L. INST. 2000).

[183] *See generally* James J. Scheske, *The Reform of Joint and Several Liability Theory: A Survey of State Approaches*, 54 J. AIR L. & COM. 627 (1988).

[184] For example, the State of Washington requires approval of such settlements in every settlement of such a claim, whether filed in court or not, and, if a claim was filed in court, requires a hearing in that county to approve the settlement. Wash. Super. Ct. Spec. P. R. 98.16W(a).

Although several liability statutes are generally assumed to favor defendants, plaintiffs can use several liability to their advantage too. For example, unlike joint and several jurisdictions, most several liability states have replaced the traditional rule that allowed non-settling parties to offset money the plaintiff obtained from prior settlements and protect non-settling parties by ensuring that they will only be held liable for their percentage of fault.[185] If the plaintiff can pick off defendants, one by one, it may be possible to recover more than 100% of the value of the claim because there are no setoffs.[186] The plaintiff has to persuade multiple defendants that their percentage of exposure is greater than they think. As more defendants settle out, those remaining defendants receive no offset and may pay more because they risk exposure to the entire verdict. However, if four defendants are each persuaded to settle for 50% of the likely verdict, several liability works to the plaintiff's benefit.

Typically, states with joint and several liability may mitigate the all-or-nothing consequences via contribution statutes or common law indemnity. By contrast, those remedies are sometimes eliminated or rendered irrelevant in several liability jurisdictions.[187]

3. Intentional and Strict Liability Tortfeasors

Most several liability states exclude allocation of the fault of intentional tortfeasors, and a smaller number exclude strict liability.[188] However, a "growing minority of states" now permit the finder of fact to consider all misdeeds of other parties and nonparties on the rationale that doing so "ensure[s] that no party . . . pay[s] more than its 'fair share' of the fault."[189] Excluding intentional misconduct makes little sense because it provides more protection for those guilty of deliberate misconduct

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[185] WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP, *supra* note 180, at 3.

[186] *E.g.*, Petrolane Inc. v. Robles, 154 P.3d 1014, 1019–20 (Alaska 2007) ("[T]he rule against double recovery is grounded in joint and several liability.").

[187] *Cf.* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT LIAB. § 23 cmt. f (AM. L. INST. 2000); *see also* Lasley v. Combined Transp., Inc., 261 P.3d 1215, 1227 (Or. 2011) (en banc) (contribution statutes still remain but "circumstances in which a defendant will pay more than its proportional share and, therefore, have a reason to seek contribution from a codefendant will be quite limited"). Also, "a common-law indemnity claim is inconsistent with that statutory scheme and is not justified." Eclectic Inv., LLC v. Patterson, 354 P.3d 678, 680 (Or. 2015) (en banc).

[188] Ellen M. Bublick, *The End Game of Tort Reform: Comparative Apportionment and Intentional Torts*, 78 NOTRE DAME L. REV. 355, 372 n.59 (2003).

[189] *Id.* at 370–71, 379.

than inadvertent errors.[190] Likewise, it makes little sense to refuse to allow a product manufacturer to allocate fault to a third party's negligence if the basis of the manufacturer's liability is strict liability, whose liability is therefore not based on negligent conduct at all.

4. Unknown and Unidentifiable Actors

Consider hit and run auto collisions, or imagine an aircraft is severely damaged overnight by persons unknown while parked at a remote, privately owned airport. An investigation fails to identify the perpetrator. If the airport was negligent, the airplane owner could recover the entire damages from the airport in a joint and several liability state. In a several liability state, the answer varies from state to state. One state might permit the fault of everyone to be considered, including the unidentified culprit, or it might limit the allocation to parties—including those added by the defendant—in which case the airport owner would not be able to reduce its liability by allocating to the vandals. Or, the state law might allow the defendant to find and name other tortfeasors and then give the plaintiff a prescribed period to amend and add and serve those parties.[191]

IV. THE RECOMMENDED SOLUTION: NEGOTIATE A FORUM ALL PARTIES CAN ACCEPT

It behooves plaintiffs and defendants alike to try to agree upon a common forum, if possible. As pointed out above, if the lawsuits are filed in federal courts, an agreement among the parties empowers the judge(s) to transfer the cases to a single venue pursuant to 28 U.S.C. § 1404, so that the cases themselves can be consolidated for a single trial. Understandably, it may be difficult to reach a consensus, and one contrarian can sabotage a constructive solution. Defendants might view the plaintiffs' favorite forum choice as a "judicial hellhole" in which defendants fear that they won't get a fair trial. Conversely, plaintiffs might

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[190] *See id.* at 359–60 (discussing Brandon v. Cnty. of Richardson, 624 N.W.2d 604 (Neb. 2000)); *see also, e.g.*, Shin v. Sunriver Prep. Sch., Inc., 111 P.3d 762, 778 (Or. Ct. App. 2005) (in which the court interpreted the state's comparative fault statute to preclude intentional fault. It thereby held a negligent boarding school 100% at fault for the sexual assault of a female student by her father, who visited her despite knowledge of his prior sexual abuse of his daughter).

[191] In addition, some several liability states might permit allocation to nonparties but disallow allocation to a tortfeasor w hose misconduct was intentional. *See* discussion *supra* Section III.F.3.

believe that the defendants' preferred forum could be one in which no plaintiff has a chance. If the parties cannot reach a consensus, they might consider mediating that narrow issue.[192]

Litigators and judges need to understand where we are in order to succeed in this environment. The dangers of overlooking the differences in allocation rules from state to state, which differences make a real difference in a particular case, how to avoid the surprises that could drastically alter a plaintiff's recovery or a defendant's exposure, and what options are available and whether they work to the client's benefit.

[192] In addition to trying to agree upon a forum for all parties, they might also address other related issues, such as: (1) dismissal of all other lawsuits pending elsewhere (and no others to be filed); (2) an early deadline for adding new parties; (3) dropping any motions to dismiss based on personal jurisdiction, service of process and similar issues; (4) coordination of discovery and scheduling among all pending cases; and (5) consider whether to try for a consensus as to choice of law.

APPENDIX A

State	Pure Joint & Several	Several	Non-Parties' Fault Included	Strict Product Liability Excluded	Fault Percentage Threshold	Reallocation Allowed if Portion Uncollectable
Alabama	X[193]					
Alaska[194]		X[195]				
Arizona		X[196]	Yes[197]	No		
Arkansas		X[198]	Yes[199]	No[200]		
California		X[201]		Yes[202]		
Colorado		X[203]	Yes[204]			

[193] Nelson Brothers, Inc. v. Busby, 513 So. 2d 1015, 1017 (Ala. 1987).

[194] Allocation "to each claimant, defendant, third-party defendant, person who has been released from liability, or other person responsible for the damages unless the person was identified as a potentially responsible person, the person is not a person protected from a civil action under AS 09.10.055 . . . ." ALASKA STAT. § 09.17.080(a)(2) (2021). Non-parties are "parties [that] had a sufficient opportunity to join that person in the action but chose not to . . . ." *Id.*

[195] *Id.* § 09.17.080(d); Sowinski v. Walker, 198 P.3d 1134, 1149–50 (Alaska 2008).

[196] ARIZ. REV. STAT. ANN. § 12-2506(A) (2021); Young v. Beck, 251 P.3d 380, 383 (Ariz. 2011) (en banc).

[197] Including the fault of employers. Twin City Fire Ins. Co. v. Leija, 422 P.3d 1033, 1036 (Ariz. 2018). Fault can be allocated to settled parties and anyone at fault "regardless of whether the person was, or could have been, named as a party to the suit." ARIZ. REV. STAT. ANN. § 12-2506(B).

[198] ARK. CODE ANN. § 16-55-201(a)–(b) (2021); Corn v. Farmers Ins. Co., 430 S.W.3d 655, 659 (Ark. 2013).

[199] Includes fault of all persons or entities. Johnson v. Rockwell Automation, Inc., 308 S.W.3d 135, 140 (Ark. 2009) (quoting ARK. CODE ANN. § 16-55-202(a)).

[200] *See* ARK. CODE ANN. § 16-116-101.

[201] Joint and several liability solely for economic damages, and several liability for non-economic damages. CAL. CIV. CODE § 1431.2(a) (West 2021). "Nothing contained in this measure is intended, in any way, to alter the law of immunity." *Id.* § 1431.3.

[202] Split of authority on whether and when joint and several liability still applies to strict liability claims. *Compare* Romine v. Johnson Controls, Inc., 169 Cal. Rptr. 3d 208, 226 (Cal. Ct. App. 2014) ("[C]ourts held that Proposition 51 does not apply in a strict products liability action when a single defective product produced a single injury to the plaintiff. That is, all the defendants in the stream of commerce of that single product remain jointly and severally liable."), *with* Bigler-Engler v. Breg, Inc., 213 Cal. Rptr. 3d 82, 124 (Cal. Ct. App. 2017) ("The repeated judicial application of the term 'comparative fault' to claims and proceedings involving strict products liability strongly suggests, if it does not prove, that the voters intended the term [in Proposition 51] (or must be deemed to have intended it) to encompass such claims.") (alteration in original).

[203] COLO. REV. STAT. § 13-21-111.5(1) (2021).

[204] Ninety days for the plaintiff to add non-party after the defendant gives notice of non-party fault. *Id.* § 13-21-111.5(3)(b); Redden v. SCI Colo. Funeral

Connecticut		X[205]		Yes[206]		X[207]
Delaware	X[208]					
D.C.	X[209]					
Florida		X[210]	Yes[211]	No		
Georgia		X[212]	Yes[213]			
Hawaii		X[214]		Yes[215]		
Idaho		X[216]	Yes[217]			
Illinois	X[218]					
Indiana		X[219]	Yes[220]			
Iowa		X[221]			X[222]	

Servs., Inc., 38 P.3d 75, 80 (Colo. 2001) (en banc) (quoting COLO. REV. STAT. § 13-21-111.5(3)(b)).

[205] CONN. GEN. STAT. § 52-572h(c) (2021).

[206] Applies only to negligence claims, and not strict liability claims. Roma v. Daisy Mfg. Co., 775 F. Supp. 41, 42 (D. Conn. 1991).

[207] CONN. GEN. STAT. § 52-572h(g)(1) (one year after final judgment).

[208] Conaty v. Cath. Diocese of Wilmington, Inc., No. 08C-05-050, 2011 WL 2297712, at *1 (Del. Super. Ct. May 19, 2011); Campbell v. Robinson, No. 06C-05-176, 2007 WL 1765558, at *2 (Del. Super. Ct. June 19, 2007).

[209] R. & G. Orthopedic Appliances & Prosthetics, Inc. v. Curtin, 596 A.2d 530, 544 (D.C. 1991).

[210] FLA. STAT. § 768.81(3) (2021); Brown & Brown, Inc. v. Gelsomino, 262 So. 3d 755, 758 (Fla. Dist. Ct. App. 2018).

[211] The defendant must plead the fault of any non-party. FLA. STAT. § 768.81(3)(a)(1).

[212] GA. CODE ANN. § 51-12-33(b) (2021); Martin v. Six Flags Over Georgia II, L.P., 801 S.E.2d 24, 36 (Ga. 2017) (quoting GA. CODE ANN. § 51-12-33(b)).

[213] GA. CODE ANN. § 51-12-33(c).

[214] *See* HAW. REV. STAT. § 663-31(a) (2020); Ozaki v. Ass'n of Apartment Owners of Discovery Bay, 954 P.2d 644, 647 (Haw. 1998).

[215] Only applies in actions that sound entirely in negligence. *Ozaki*, 954 P.2d at 648.

[216] IDAHO CODE § 6-803(3) (2021); Horner v. Sani-Top, Inc., 141 P.3d 1099, 1104 (Idaho 2006).

[217] Can allocate to employers. *See* Runcorn v. Shearer Lumber Prods., Inc., 690 P.2d 324, 330–31 (Idaho 1984).

[218] *See* Antonicelli v. Rodriguez, 104 N.E.3d 1211, 1216 (Ill. 2018).

[219] IND. CODE § 34-51-2-8(b)(1) (2021); Ind. Dep't of Ins. v. Everhart, 960 N.E.2d 129, 138 (Ind. 2012).

[220] IND. CODE § 34-51-2-8(b)(1). Setoff of amount paid by settlement offsets a defendant's liability only if the defendant asserts a non-party defense against the settling party. R.L. McCoy, Inc. v. Jack, 772 N.E.2d 987, 991 (Ind. 2002).

[221] IOWA CODE § 668.4 (2021). Joint and several liability does not apply to defendants found to be less than 50% of the total fault; any defendant found to bear 50% or more of fault is only jointly and severally liable for economic damages. *Id.*; *see also* Reilly v. Anderson, 727 N.W.2d 102, 113 (Iowa 2006).

[222] IOWA CODE § 668.4.

Kansas		X[223]	No[224]			
Kentucky		X[225]	Yes[226]	No[227]		
Louisiana		X[228]	Yes[229]			
Maine	X[230]			No[231]	X[232]	
Maryland	X[233]					
Massachusetts		X[234]	No[235]			
Michigan		X[236]	No[237]	No[238]		X[239]
Minnesota		X[240]			X[241]	X[242]
Mississippi		X[243]	Yes[244]	No		
Missouri		X[245]	No		X[246]	

[223] KAN. STAT. ANN. § 60-258a(d) (2020); *see* Watco Cos. v. Campbell, 371 P.3d 360, 366 (Kan. Ct. App. 2016); Simmons v. Porter, 312 P.3d 345, 351 (Kan. 2013).

[224] *See* KAN. STAT. ANN. § 60-258a(c) (on motion of any party at fault, any nonparty at fault must be joined as an additional party).

[225] KY. REV. STAT. ANN. § 411.182(1)(b) (West 2021).

[226] *See id.* § 411.182(4).

[227] Owens Corning Fiberglas Corp. v. Parrish, 58 S.W.3d 467, 474 (Ky. 2001).

[228] LA. CIV. CODE ANN. art. 2323 (2021).

[229] Fault is allocated "regardless of whether the person is a party to the action or a nonparty, and regardless of the person's insolvency, ability to pay, [or] immunity by statute . . . ." *Id.* art. 2323(A); *see also* Keith v. U.S. Fid. & Guar. Co., 694 So. 2d 180, 182 (La. 1997).

[230] ME. STAT. tit. 14, § 156 (2021).

[231] The jury may compare the conduct of seller with that of the plaintiff, other than that based on failure to discover the defect. Hinton v. Outboard Marine Corp., 828 F. Supp. 2d 366, 382 (D. Me. 2011).

[232] Plaintiff cannot recover if equally at fault. ME. REV. STAT. ANN. tit. 14, § 156.

[233] Carter v. Wallace & Gale Asbestos Settlement Tr., 96 A.3d 147, 159 (Md. 2014).

[234] MASS. GEN. LAWS ch. 231, § 85 (2021). *But see* Shantigar Found. v. Bear Mountain Builders, 804 N.E.2d 324, 333 (Mass. 2004) ("Under our current system of joint and several liability, a plaintiff injured by more than one tortfeasor may sue any or all of them for her full damages.").

[235] Can only allocate among parties to the lawsuit. MASS. GEN. LAWS ch. 231, § 85; *Shantigar*, 804 N.E.2d at 332.

[236] MICH. COMP. LAWS ANN. § 600.6304(4) (2021).

[237] *Id.* § 600.6304(1)(b).

[238] *Id.* § 600.6304(8).

[239] *Id.* § 600.6304(6)(b).

[240] MINN. STAT. § 604.02(1) (2020).

[241] "[P]ersons are jointly and severally liable for the whole award" if the person's fault "is greater than 50 percent . . . ." *Id.*

[242] *Id.* § 604.02(2) (within one year after judgment).

[243] MISS. CODE ANN. § 85-5-7(5) (2021).

[244] Includes fault by immune tortfeasors. *Id.*

[245] MO. REV. STAT. § 537.067(2) (2020).

[246] Joint and several liability applies to a defendant if that defendant is 51% or more at fault. Millentree v. Tent Rest. Operations, Inc., 618 F. Supp. 2d 1072, 1074 (W.D. Mo. 2009).

Montana		X[247]	No[248]		X[249]	X[250]
Nebraska		X[251]		Yes[252]		
Nevada		X[253]	No	Yes[254]		
New Hampshire		X[255]			X[256]	X[257]
New Jersey		X[258]	No		X[259]	
New Mexico		X[260]	Yes[261]	Yes[262]		
New York		X[263]	Yes[264]	No[265]	X[266]	
North Carolina	X[267]			No		

[247] MONT. CODE ANN. § 27-1-703(1)–(2) (2019).

[248] *Id.* § 27-1-703(4); Metro Aviation, Inc. v. United States, 305 P.3d 832, 836 (Mont. 2013).

[249] Several but not joint liability applies to any defendant determined to be 50% or less at fault. MONT. CODE ANN. § 27-1-703(2).

[250] *Id.* § 27-1-703(5).

[251] Several liability for non-economic damages; joint and several liability for economic damages. NEB. REV. STAT. § 25-21,185.10 (2020).

[252] Strict liability remains joint and several. *See* Shipler v. Gen. Motors Corp., 710 N.W.2d 807, 843 (Neb. 2006).

[253] NEV. REV. STAT. § 41.141(4) (2020); Café Moda, LLC v. Palma, 272 P.3d 137, 140 (Nev. 2012).

[254] Several liability does not apply for strict liability, intentional torts, or injury arising from a product manufactured, distributed, sold, or used in Nevada. NEV. REV. STAT. § 41.141(5)(a), (b), (e).

[255] N.H. REV. STAT. ANN. § 507:7-e(I)(a) (2021); DeBenedetto v. CLD Consulting Eng'rs, Inc., 903 A.2d 969, 975 (N.H. 2006). Several liability applies to any defendant who is less than 50% at fault. N.H. REV. STAT. ANN. § 507:7-e(I)(b).

[256] Non-settling defendant entitled to a credit for the settlement unless there is a finding of "minimal fault." Tiberghein v. B.R. Jones Roofing Co., 931 A.2d 1223, 1227 (N.H. 2007).

[257] N.H. REV. STAT. ANN. § 507:7-e(III).

[258] N.J. STAT. ANN. § 2A:15-5.1 to -5.3 (West 2021).

[259] Several liability unless that party is 60% or more responsible for the total damages. *Id.* § 2A:15-5.3(a), (c). If a jury assigns a percentage of fault to a settling defendant, it operates as a credit against the plaintiff's recovery. Rowe v. Bell & Gossett Co., 218 A.3d 784, 789 (N.J. 2019).

[260] N.M. STAT. ANN. § 41-3A-1(A) (2021). Except for persons strictly liable for the manufacture and sale of a defective product and several other narrow exceptions. *Id.* § 41-3A-1(C).

[261] *See id.* § 41-3A-1(B).

[262] *See id.* § 41-3A-1(C)(3).

[263] N.Y. C.P.L.R. § 1601(1) (McKinney 2021).

[264] The fault of any non-party shall not be considered in determining liability if unable to obtain jurisdiction over such person. *See id.* Several liability solely for non-economic damages and solely in personal injury claims. *See id.* § 1602 (listing 14 exceptions, including "any person held liable in a product liability action where the manufacturer of the product is not a party to the action" due to lack of personal jurisdiction).

[265] *But see id.* § 1602(10).

[266] Several liability for a defendant that is 50% or less at fault. *Id.* § 1601(1).

[267] Hairston v. Alexander Tank & Equip. Co., 311 S.E.2d 559, 565–66 (N.C. 1984).

North Dakota		X[268]	Yes[269]	No		
Ohio		X[270]	Yes[271]		X[272]	
Oklahoma		X[273]	Yes[274]	Yes[275]		
Oregon		X[276]	No		X[277]	X[278]
Pennsylvania[279]		X[280]		No[281]	X[282]	
Rhode Island	X[283]					
South Carolina		X[284]	Yes[285]		X[286]	

[268] N.D. CENT. CODE § 32-03.2-02 (2021).

[269] *Id.*

[270] OHIO REV. CODE ANN. § 2307.22(B) (West 2021).

[271] The percentage of fault includes persons from whom the plaintiff did not seek recovery. *Id.* § 2307.23(A)(2).

[272] Joint and several liability for economic loss for the defendant that is more than 50% at fault. *Id.* § 2307.22(A)(1).

[273] OKLA. STAT. tit. 23, § 15(A) (2020).

[274] Paul v. N. L. Indus., Inc., 624 P.2d 68, 69–70 (Okla. 1980); Bode v. Clark Equip. Co., 719 P.2d 824, 827 (Okla. 1986).

[275] Loos v. Saint-Gobain Abrasives, Inc., No. CIV-15-411, 2016 WL 5017335, at *5 (W.D. Okla. Sept. 19, 2016). But the amount of damages under a claim of negligence against a manufacturer of a defective product can be allocated. *Id.*

[276] OR. REV. STAT. § 31.610(1) (2019).

[277] Any damages allowed shall be diminished in proportion to the percentage of fault attributable to the claimant. *Id.* § 31.600(1).

[278] *Id.* § 31.610(3)–(4). One year after final judgment, unless the defendant's fault is less than the plaintiff's or more than 25%.

[279] If a claim is settled with a *pro tanto* release, the verdict is setoff in the dollar amount of the consideration paid by the settling tortfeasor to the plaintiff. Taylor v. Solberg, 778 A.2d 664, 666 n.1 (Pa. 2001). Where the *pro rata* setoff method is used, the verdict is reduced by the settling defendant's proportionate share of the verdict. *Id.*

[280] 42 PA. CONS. STAT. § 7102(a.1)(1) (2021). Joint and several liability applies to intentional torts or if the defendant is more than 60% at fault. *Id.* § 7102 (a.1)(3).

[281] *Id.* § 7102(a.1)(1).

[282] *Id.* § 7102(a).

[283] Calise v. Hidden Valley Condo. Ass'n, 773 A.2d 834, 840 (R.I. 2001) (quoting Roberts-Robertson v. Lombardi, 598 A.2d 1380, 1381 (R.I.1991) (per curiam)).

[284] Several liability applies to any defendant who is less than 50% at fault. S.C. CODE ANN. § 15-38-15(A) (2020).

[285] Other than a defendant whose conduct is willful, wanton, reckless, grossly negligent, or intentional or involves the use, sale, or possession of alcohol or the illicit use, sale, or possession of drugs, a defendant can assert that a non-party contributed to the alleged injury or damages and may be liable for any or all of the damages. *Id.* v15-38-15(D)–(F).

[286] Joint and several liability does not apply to any defendant whose conduct is less than 50% of the total fault of all defendants and plaintiff. *Id.* § 15-38-15(A).

South Dakota		X[287]	Yes[288]	No	X[289]	
Tennessee		X[290]	Yes[291]	Yes[292]		
Texas		X[293]	Yes[294]	No	X[295]	X[296]
Utah		X[297]	Yes[298]		X[299]	
Vermont		X[300]				
Virginia	X[301]					

[287] S.D. CODIFIED LAWS §§ 15-8-15.1 (2021). A modified form of several liability applies such that a party less than 50% at fault under joint and several liability may not be liable for more than twice its percentage of fault.

[288] *See id.* § 15-8-15.2.

[289] *Id.* § 15-8-15.1.

[290] McIntyre v. Balentine, 833 S.W.2d 52, 58 (Tenn. 1992); *see also* McNabb v. Highways, Inc., 98 S.W.3d 649, 656 (Tenn. 2003).

[291] Plaintiff can add non-parties as parties to the case even if the statute of limitations has run if the plaintiff files an amended pleading within ninety days of the answer alleging such non-party's fault. TENN. CODE ANN. § 20-1-119(a) (2021).

[292] Strict liability remains joint and several. Owens v. Truckstops of Am., 915 S.W.2d 420, 432 (Tenn. 1996) ("[J]oint and several liability against parties in the chain of distribution of a product is essential to the theory of strict products liability.").

[293] TEX. CIV. PRAC. & REM. CODE ANN. §§ 33.011(4), 33.013(a).

[294] Those subject to a "percentage of responsibility" include "each claimant, each defendant, each settling person, or each responsible third party . . . ." *Id.* § 33.011.

[295] Joint and several liability applies to a defendant who is more than 50% at fault. *Id.* § 33.013(b)(1).

[296] *Id.* § 33.015(c). If a liable defendant does not pay its proportion, the remaining defendants who are jointly and severally liable must contribute based on their respective percentages of responsibility.

[297] UTAH CODE ANN. § 78B-5-818(3), -819 (West 2021).

[298] Non-parties at fault can be on the verdict form, and fault can be allocated to the "empty chair" when identified appropriately and timely. *Id.* § 78B-5-818(2); *see also* Utah R. Civ. P. 9(l) (Allocation of fault). Utah's legislature made these restrictions in response to the decision in *Field v. Boyer Co., L.C.*, 952 P.2d 1078, 1080–81 (Utah 1998), which limited allocation to non-parties. Many thanks to Edward Havas for his contribution at the Air Law Symposium to this entry.

[299] UTAH CODE ANN. § 78B-5-818(2). A plaintiff may recover only from any defendant or group of defendants whose fault, combined with the fault of persons immune from suit and nonparties to whom fault is allocated, exceeds the fault of the person seeking recovery.

[300] Where the plaintiff is comparatively negligent, and recovery is allowed against more than one defendant, each defendant is liable only for his percentage of the negligence attributed to all defendants against whom recovery is allowed. VT. STAT. ANN. tit. 12, § 1036 (2021).

[301] When two or more tortfeasors cause a single indivisible injury to a third party and "it is impossible to determine in what proportion each contributed to the injury," then an individual tortfeasor can be held liable for the entire injury. Dickenson v. Tabb, 156 S.E.2d 795, 801 (Va. 1967); Gross v. Shearson Lehman Bros. Holdings, Inc., 43 F. App'x 672, 677 (4th Cir. 2002) (unpublished) (per curiam).

Washington		X[302]	Yes[303]			
West Virginia		X[304]				X[305]
Wisconsin		X[306]	No	Yes[307]	X[308]	
Wyoming		X[309]	Yes[310]	No		

[302] WASH. REV. CODE § 4.22.070 (2021). Joint and several liability applies if the plaintiff was not at fault. *Id.* § 4.22.070(1)(b).

[303] The total fault is allocated from the plaintiff, defendants, third-party defendants, entities released by the plaintiff, entities with any other individual defense against the plaintiff, and entities immune from liability to the plaintiff. *Id.* § 4.22.070(1). However, defendant(s) may not allocate fault to those immune from the suit, including immune employers. Edgar v. City of Tacoma, 919 P.2d 1236, 1242 (Wash. 1996) (en banc).

[304] W. VA. CODE § 55-7-13c(a) (2021).

[305] *Id.* § 55-7-13c(d). The plaintiff may reallocate uncollectable amounts against other parties found to be liable if sought "not later than one year after judgment becomes final through lapse of time for appeal or through exhaustion of appeal, whichever occurs later . . . ."

[306] The liability of a defendant who is less than 51% at fault is limited to the percentage of the total causal negligence attributed to that person. WIS. STAT. § 895.045(1) (2021).

[307] Several liability applies to negligence but does not apply to strict product liability claims. Fuchsgruber v. Custom Accessories, Inc., 628 N.W.2d 833, 836 (Wis. 2001).

[308] Joint and several liability applies to a defendant who is 51% or more at fault. WIS. STAT. § 895.045(1).

[309] WYO. STAT. ANN. § 1-1-109(e) (2021).

[310] Erdelyi v. Lott, 326 P.3d 165, 175–76 (Wyo. 2014).

APPENDIX B

Figure 1

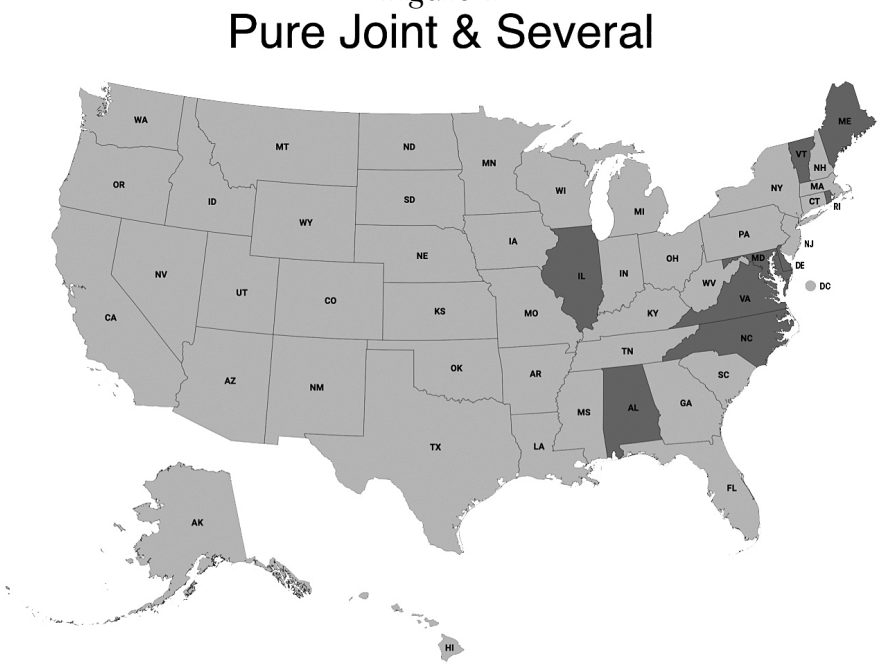


Figure 2

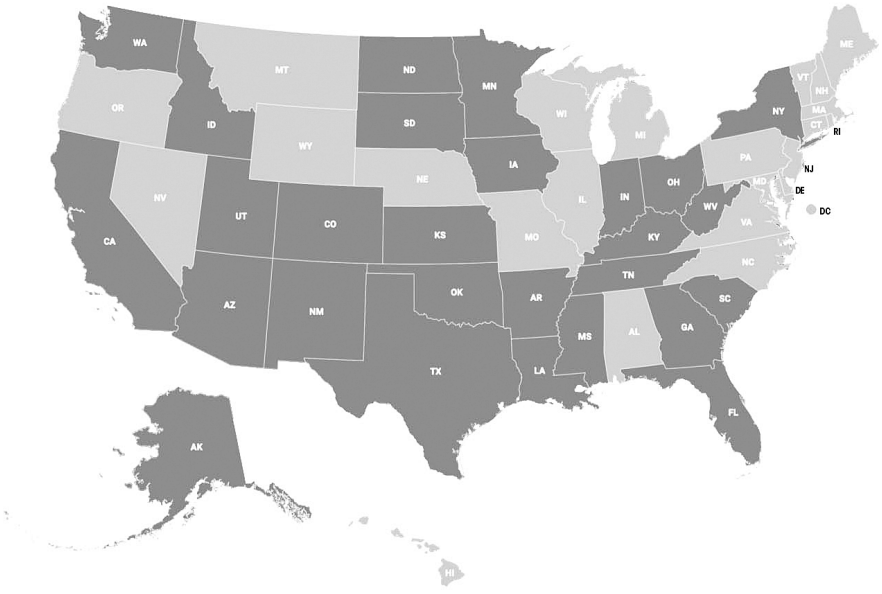


Figure 3

Strict Product Liability Excluded

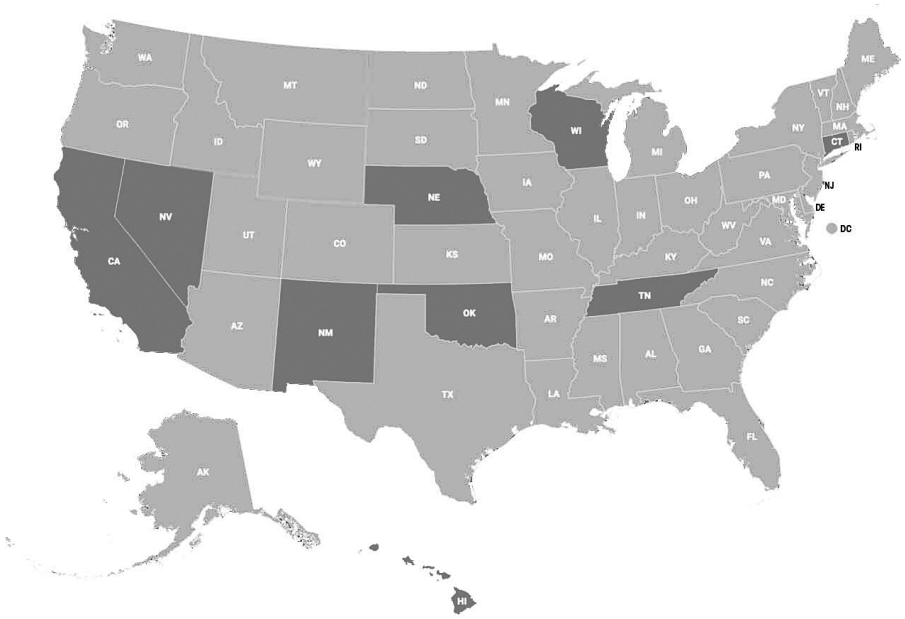


Figure 4

Fault Percentage Threshold

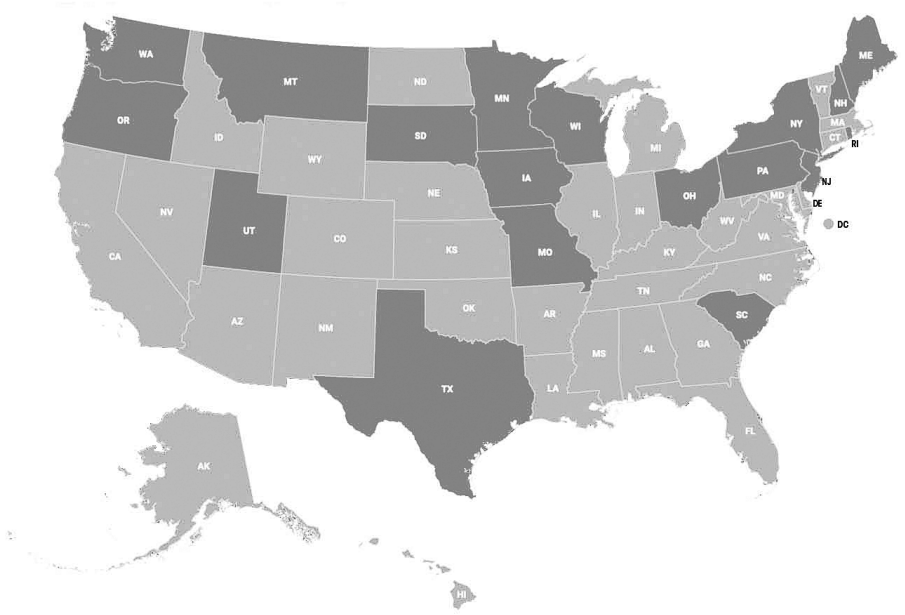
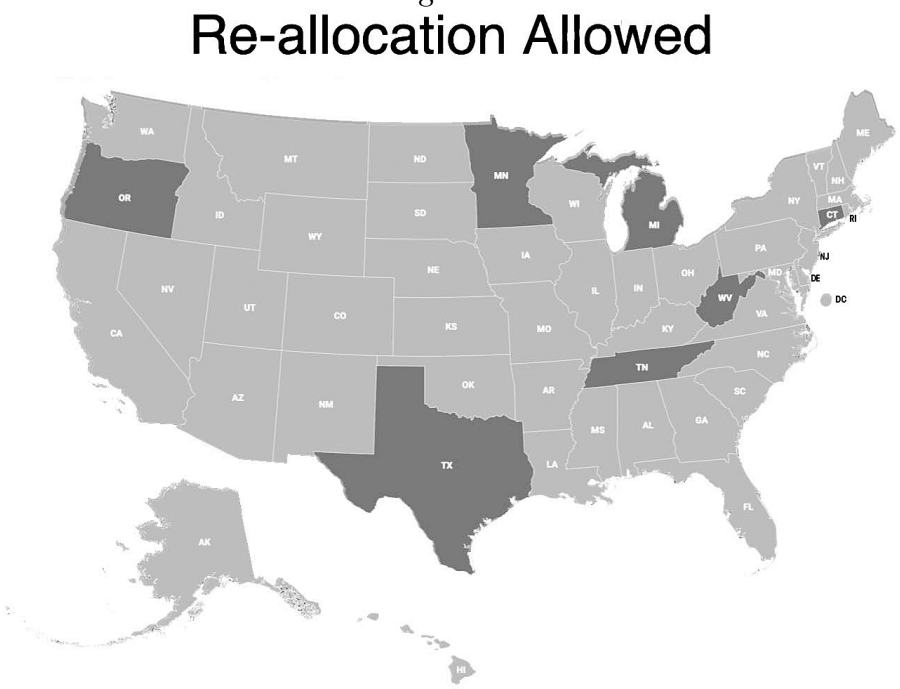


Figure 5


Re-allocation Allowed
WA
OR
CA
ID
NV
MT
WY
UT
AZ
CO
NM
ND
SD
NE
KS
OK
TX
MN
IA
MO
AR
LA
WI
IL
MS
MI
IN
KY
TN
AL
OH
WV
GA
FL
SC
NC
VA
PA
NY
MD
DE
NJ
CT
RI
MA
VT
NH
ME
DC
AK
HI

APPENDIX C

A. A Modest Forum Shopping List

When considering the pursuit or defense of multiple lawsuits involving the same parties in multiple jurisdictions, counsel should consider a broader range of issues likely to vary in each potential venue, in addition to the specific items discussed in this Article. Because some lawyers have limited experience litigating in other states, this Article offers a checklist of some topics that may require review or analysis as to each potential venue. These topics can be important for a variety of reasons, such as (1) helping to decide the pros and cons of the various jurisdictions, (2) whether to challenge jurisdiction or venue, (3) how to prepare for litigation in a particular venue, (4) identifying issues on which choice of law will be critical, and (5) anticipating how the allocation of fault will be treated in each forum, and the consequences of variations among the states in which the lawsuits might be, or have already been, filed.

B. A Preliminary Outline for Each Forum
Please Adapt to Address the Specifics of Each Case

I. Law
   - A. Significant Differences in Tort Law
   - B. Choice of Law Rules
   - C. Statutes of Limitation
   - D. Statutes of Repose
   - E. Malfunction/Res Ipsa Loquitor
   - F. Substantive Legal Standards: e.g., in a product liability action: Is the forum a consumer expectations or risk-utility jurisdiction?
   - G. Known Unknowns: e.g., is a key legal issue in limbo, or is the appellate court in limbo?
     1. "It is essential for the bench and bar to recognize that the test we articulate today is not intended as a rigid formula to be offered to the jury in all situations."[311]
     2. "We agree that evidence related to risk-utility balancing, which may include proof that a practicable and feasible design alternative was available, will not *always* be necessary to prove that a product's design is defective and unreasonably dangerous, *i.e.*, that

[311] Tincher v. Omega Flex, Inc., 104 A.3d 328, 408 (Pa. 2014).

the product failed to meet ordinary consumer expectations. However, because the parties did not dispute that evidence related to risk-utility balancing was necessary in this case, we leave for another day the question under what circumstances ORS 30.920 requires a plaintiff to support a product liability design-defect claim with evidence related to risk-utility balancing of the kind discussed above."[312]

3. How judges are selected
4. Any recent drastic changes in judges (and their philosophies) in certain states, e.g., Florida, Pennsylvania, California

H. Affirmative Defenses Available/Unavailable?
1. Comparative Fault
2. Third-Party Fault
3. Assumption of Risks
4. Modification/Misuse of Product
5. Spoliation

I. Allocation of Fault
1. Several?
2. Effect of Settlements on Unsettled Claims
3. Non-Parties
4. Defendant Who Can't Pay

J. Evidence
1. Expert Testimony Criteria—*Daubert*? Rigorous?
2. Treatment of OSI Evidence
3. Product Alteration
4. Post-Accident Remedial Measures in Product Liability Case

II. Trial
A. Length of Time to Trial
B. Quality of Judges
C. Education/Biases of Jurors
D. Jury Selection Process
E. Verdict—Unanimous/Less Rigorous

III. Damages
A. What's awarded—e.g., wrongful death?
B. Pre-death Pain & Suffering
C. Damages Caps
D. Punitive Damages Rules/Procedures

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[312] McCathern v. Toyota Motor Corp., 23 P.3d 320, 331–32 (Or. 2001).