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THE PROBLEM OF THE INSOLVENT CONTRIBUTOR

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The purpose of this article is to consider the problem that arises when a judgment is obtained against several tortfeasors, one of whom is insolvent. While some cases address the question of the insolvent contributor in contract actions, there is virtually no authority treating this problem as it relates to tort judgments. It is the goal of this article to summarize the law of contribution among joint tortfeasors when one of the tortfeasors is insolvent, to consider some of the problems it raises and to propose some procedures for dealing with them.

The problem can be illustrated through a hypothetical example. Assume that the plaintiff recovers a judgment of $100,000 against *A* who is found to be fifty percent negligent, *B* who is found to be thirty percent negligent, and *C* who is found to be twenty percent negligent.

The foregoing hypothetical raises a series of questions. For example, what effect does *A*'s insolvency have on the rights of contribution that exist between *B* and *C*? Should *A*'s share of the damages be borne entirely by *B* who may be solvent and readily amenable to collection? What procedure should be used to determine *A*'s insolvency if that issue is raised? And, finally, what special problems would be created by the adoption of an insolvent contributor's rule?

There are several factors which create the problem being considered in this article: first, there must be three or more tortfeasors; second, one of them must be alleged insolvent and two or more must be solvent; third, the plaintiff must have recovered joint and several damages from one of the solvent tortfeasors; and finally, rights of contribution must exist between the co-tortfeasors.

I. STATE OF THE LAW

There is virtually no authority on the insolvent contributor problem in tort-related contribution actions. This is largely because at common law a wrongdoer could not recover contri-

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bution. It is only within the last century that the right of contribution has been extended to tortfeasors. Therefore, almost all of the cases discussing this problem involve contract actions, generally contracts of surety.

As a basis for this discussion, a brief look at contribution and its evolution is appropriate. Contribution originated in courts of equity.[1] It has, however, become recognized and applied in common-law courts.[2] The right of contribution is founded on fairness and the principle that no one should profit from another's loss when he bears an identical responsibility.[3] The right of contribution prevents a creditor from selecting a particular judgment debtor based upon caprice or favoritism so as to transform a common burden into one of personal oppression. Since contribution is based upon equity and fairness, it is a flexible remedy which will be withheld when its application achieves an inequitable result.[4]

II. CONTRIBUTION TO AND BY JOINT TORTFEASORS

A long-standing principle of Anglo-American law has been that there is no right of contribution among joint tortfeasors. This rule originated with the English case of *Merryweather v. Nixan.*[5] While a growing number of jurisdictions are rejecting the rigid rule of *Merryweather,* contribution among joint tortfeasors was still considered the minority position as of 1964.[6] The principle of law annunciated in *Merryweather* is so firmly established that courts even today are reluctant to depart from it without statutory authorization.[7]

Wisconsin, however, was among the first states to reject the English rule and one of only six jurisdictions to do so by court decision.[8] In *Ellis v. Chicago & Northwestern Railway,*[9] the Wisconsin Supreme Court held that the *Merryweather* rule did not extend to unintentional torts. Indeed, it has since been argued that *Merryweather* itself was not intended to cover un-

1. Kennedy v. Camp, 14 N.J. 390, 102 A.2d 595 (1954).
2. Bushnell v. Bushnell, 77 Wis. 435, 46 N.W. 442 (1890).
3. Rusch v. Korth, 2 Wis. 2d 321, 86 N.W.2d 464 (1957).
4. Trampe v. Wisconsin Tel. Co., 214 Wis. 210, 252 N.W. 675 (1934).
5. 8 T.R. 186, 101 Eng. Rep. 1337 (K.B. 1799).
6. United Air Lines, Inc. v. Wiener, 335 F.2d 379 (9th Cir. 1964).
7. Malkin v. Arundel Corp., 36 F. Supp. 948 (D. Md. 1941).
8. Commissioners Prep. Note, UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT, 12 UNIFORM LAWS ANNOT. 59 [hereinafter cited as Note, ULA].
9. 167 Wis. 392, 167 N.W. 1048 (1918).

intentional wrongs, on the theory that at the time it was decided, the word "torts" only extended to intentional acts.[10] Like most states, Wisconsin has not extended the *Ellis* rule to willful tortfeasors.[11] However, unlike most states, Wisconsin has rejected the long-standing rule refusing contribution to the grossly negligent. The Wisconsin legislature has since codified the right to contribution among tortfeasors by statute.[12] But the Wisconsin statute has been properly described as among those "broad contribution statutes of a rather simple kind, which declare the rights of contribution and leave most questions to the Courts."[13]

Having established that in Wisconsin there is a right of contribution among joint unintentional tortfeasors, it becomes necessary to determine what the rights of the joint tortfeasors are if one of them is insolvent. The answer to this question depends in part on whether the right of contribution is viewed as an equitable right or a legal right.

In contract actions at common law an insolvent co-obligor's share on a contractual obligation was only that proportion of the liability for which he was responsible.[14] If one co-obligor was insolvent, the obligee bore the loss for that portion of the debt which was owed to him. The equitable rule, however, provided that damages be apportioned among the solvent obligors with the insolvent party's share distributed proportionately among the solvent obligors.[15] While the cases annunciating the equitable principle are restricted to contract actions, it seems clear that the rationale of the rule should apply equally to actions sounding in tort. The equitable rule is based upon fairness and the desire to avoid an uneven distribution of liability solely because of the chance selection of one party as the initial payor of a joint and several liability.[16] Courts frequently summed up this position with the incantation that "equity is equality."[17]

10. Knell v. Feltman, 174 F.2d 662 (D. D.C. 1949).

11. Western Cas. & Surety Co. v. Milwaukee Gen. Constr. Co., 213 Wis. 302, 251 N.W. 491 (1933).

12. Bielski v. Schulze, 16 Wis. 2d 1, 114 N.W.2d 105 (1962); *see generally* WIS. STAT. ch. 113 (1973).

13. Note, ULA, *supra* note 8.

14. Annot., 64 A.L.R. 213, 228 (1929).

15. *Id.* at 224; 18 AM. JUR. 2d *Contribution* § 27 n. 13 (1965); 10 S. WILLISTON, CONTRACTS § 1277A (3d ed. 1957).

16. Powell v. Matthis, 26 N.C. 68 (4 Ired. 83), 40 Am. Dec. 427 (1843).

17. *See, e.g.*, Cooper v. Greenberg, 191 Va. 495, 61 S.E.2d 875 (1950).

Equity implies apportioning equally the insolvent's share among the other tortfeasors.

In *Brigden v. Cheever,*[18] a Massachusetts law court attempted to justify its rejection of the equitable rule:

> If it should be attempted to make all the parties who remain solvent liable equally for those who are insolvent in actions for contribution among themselves, it might be very difficult to decide what should constitute such insolvency and how it should be proved. Provision must also be made for a resort to the future effects of such insolvent party; and, in short, it is to be apprehended that such a principle would not be easily applied in courts of common law, and that it would introduce much embarrassment and confusion.[19]

But an early North Carolina case summarized the more prevalent rationale of the common law courts. It reasoned that because courts of law could proceed only on contracts, and not in equity, they dealt with the relationship between co-sureties solely as a function of the contractual agreement of suretyship. If the courts were to have intervened after one co-surety had paid his agreed upon share of the liability and were to have required him to pay an additional amount because of the subsequent insolvency of his co-surety, they would, in effect, have been creating a second contract between the co-sureties. This the courts of law could not do.[20]

In short, the common-law courts felt constrained by the rigid forms of action. The reasoning was that an action for contribution sounded in implied assumpsit. As pointed out in *Trego v. Cunningham:* "The contract implied by law when one becomes a surety is that he engages to contribute his proportion according to the number of sureties, without reference to the solvency or insolvency of either of his co-sureties . . . ."[21] A law court could certainly not imply a new contract based on exigencies not provided for in the implied agreement. Such flexible relief framed to reach a fair result might be appropriate in an equity court, but law could not lightly discard the forms of action. Hence, law rejected the equitable rule.

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18. 10 Mass. 450 (1813), *quoted in* Annot., 64 A.L.R. 213, 229 (1929).

19. *Id.*

20. Powell v. Matthis, 26 N.C. 68, 69 (4 Ired. 83, 85), 40 Am. Dec. 427, 428-29 (1843). *See also* Note, *Aspects of the Right of Contribution Among Tortfeasors,* 33 TEMP. L.Q. 432, 436 (1960).

21. 267 Ill. 367, 373, 108 N.E. 350, 352-53 (1915).

Two observations must be made on the equity/law distinction in order to determine which is the better line of reasoning to apply to tort actions today. First, the basis of the legal rule is rigid adherence to the old causes of action. Modern procedure, of course, rejects such formalism.[22] Adherence to rules which work an unfair result merely for the sake of form is precisely why modern procedural systems have discarded the "causes of action." Second, it is important to note that the legal rule was based entirely on contract theory. This is because when the legal rule was adopted, contribution was not allowed among tortfeasors and was used almost entirely by guarantors and sureties. It is difficult to rationally justify carrying over into modern tort law a rule of law founded on archaic principles of implied contract.

Many courts, displeased with the harshness of the legal rule, rejected it. Some did so expressly.[23] Wisconsin expressly discarded the equity/law distinction in *Faurot v. Gates*[24] and *Boutin v. Ètsell.*[25]

Numerous other cases involving actions at law applied the equitable rule without expressly rejecting the equity/law distinction.[26] In one of the few recent cases discussing and dealing with the equity/law distinction, a federal court liberally construed the plaintiff's complaint so as to hear the case in equity and apply the more acceptable rule.[27] Clearly, the general movement is away from the legal rule. The statement made 100 years ago seems even more true today:

> The distinction in extent of redress between a court of law and a court of equity, in cases where some of the sureties are insolvent, is certainly not based upon any very obvious principle affecting the different jurisdiction. It has the appearance of an arbitrary rule and as such may be expected to gradually disappear in the same way most of its kindred have already done.[28]

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22. FED. R. CIV. P. 2.

23. Van Petten v. Richardson, 68 Mo. 379 (1878); Wetmore & Morse Granite Co. v. Ryle, 93 Vt. 245, 107 A. 109 (1919); Mills v. Hyde, 19 Vt. 59, 46 Am. Dec. 177 (1845).

24. 86 Wis. 569, 57 N.W. 294 (1893).

25. 110 Wis. 276, 85 N.W. 964 (1901).

26. Annot., 64 A.L.R. 213 at 232-33, and cases cited therein.

27. Moody v. Kirkpatrick, 234 F. Supp. 537 (M.D. Tenn. 1964).

28. Van Petten v. Richardson, 68 Mo. 379, 381 (1878) *citing* 1 J. STORY, EQUITY JURISPRUDENCE § 496a (11th ed. 1873).

In the hypothetical example used to introduce this article, an application of the legal rule would require that *B*, the target defendant who is amenable to collection, pay $100,000 and obtain a right of contribution against *A* and *C*. Assuming that a judgment could be collected against *C*, he would be liable for $20,000, but *A*, who is insolvent, cannot contribute to *B*. Consequently, *B* pays $80,000, *C* pays $20,000 and *B* receive an uncollectible judgment for $50,000 against *A*.

Applying principles of equity, however, *B*, who has now paid the full judgment, would have a right to recover from *C* not only the contribution for *C*'s negligence in the amount of twenty percent but a proportionate share of *A*'s liability which *B* cannot recover from *A* because of his insolvency. Therefore, the liability of *C* is not limited to $20,000, but is increased to $40,000 by virtue of his obligation to assume two-fifths of *A*'s liability. *B* would receive a judgment against *A* for $30,000 and *C* would receive a judgment against *A* for $20,000. Implicit in this apportionment of the insolvent judgment debtor's share is application of the comparative contribution rule annunciated in *Bielski v. Schulze*,[29] which requires distribution of damages in direct relation to degrees of causal fault. Hence, since in the hypothetical *B* and *C* were together fifty percent negligent, *B*, who was thirty percent negligent, should bear three-fifths of *A*'s share of the damages and *C*, who was twenty percent negligent, should bear two-fifths.

The *Restatement of Restitution* recognizes the equitable approach to contribution among sureties in section 85 and applies that principle to tort actions in section 86. While the authors of the *Restatement* recognized the legal rule, they found that it failed to provide an adequate remedy, and that equity therefore acquired jurisdiction. It is noteworthy that the *Restatement of Restitution* was published prior to the promulgation of the Federal Rules of Civil Procedure. Perhaps for this reason, it stresses the equity/law distinction, which merger—in state as well as federal law—has rendered of dubious relevance. That same result is achieved in the Uniform Contribution Among Joint Tortfeasors Act which provides: "In determining the pro-rata shares of tort-feasors in the entire liability . . . principles of equity applicable to contribution

29. 16 Wis. 2d 1, 114 N.W.2d 105 (1962).

generally shall apply."[30] In discussing this passage, the Commissioners explain:

> [I]t makes it clear that except as limited by the section, principles of equity shall control. The common situation with which the courts would be concerned here is that involving insolvency of a potential contributor. Suppose that the plaintiff is injured by the negligence of A, B and C. A pays a judgment and C is wholly insolvent. Should A's right to contribution from B amount to one-third of the judgment, or one-half? It has been pointed out that there are difficulties of proof of insolvency, and that the situation requires at least three tortfeasors and will seldom arise. It has also been argued that it is better to let A recover only one-third from B and take his chances on C's insolvency, rather than litigate that issue between A and B, with further suits against C to follow if he turns out later to have any money. The courts in contract contribution cases have dealt satisfactorily with such situations and it is not only difficult but unwise to try to state an express rule dealing with all the equitable situations which may arise.[31]

Adoption of the equitable rule is consistent with—indeed, it is required by —authority existing in the state of Wisconsin. In *Faurot v. Gates*[32] and in *Boutin v. Etsell,*[33] the Wisconsin court expressly rejected the legal rule and adopted the equitable rule as it applies to contract actions. In *Wait v. Pierce*[34] the Wisconsin Supreme Court declared that the nature of the right of contribution in contract actions and tort actions is the same. More recently, the Wisconsin Supreme Court concluded that the "right of contribution is the same irrespective of its origins" and is "not dependent on whether the obligation discharged resulted from contract or tort."[35] Clearly, the equitable rule which Wisconsin has specifically extended to contract actions should apply as well in tort.

Adoption of the equitable rule in tort actions is consistent with the requirements of public policy and Wisconsin's leadership in the development of the law of contribution. Not only

30. 12 UNIFORM LAWS ANNOT. 87, § 2 (1974).
31. *Id.* at 87-88.
32. 86 Wis. 567, 57 N.W. 294 (1893).
33. 110 Wis. 276, 85 N.W. 964 (1901).
34. 191 Wis. 202, 209 N.W. 475 (1926).
35. State Farm Mut. Auto Ins. Co. v. Schara, 56 Wis. 2d 262, 201 N.W.2d 758 (1972).

was Wisconsin one of the first states to reject the archaic rule of *Merryweather v. Nixan*,[36] it has led the way in declaring that contribution should be made in proportion to fault rather than on an equal basis irrespective of fault.[37] In first rejecting the long-standing rule that tortfeasors were never entitled to contribution, the law began a dramatic change to adapt itself to the realities of modern society. The evolution of law continued with the abolition of the nonsensical rule that joint tortfeasors shared equally irrespective of varying degrees of fault. The same policies and considerations which required abandonment of these outmoded doctrines require rejection of an artificial rule which ignores the realities of insolvency. Principles of fairness and justice require application of the equitable rule to joint tortfeasors as fully as those principles apply in actions arising from contract.

III. PROCEDURAL IMPLEMENTATION OF THE INSOLVENT CONTRIBUTOR RULE

Although the substantive law can be stated with some degree of certainty, the procedures used to achieve the required result can be stated with little, if any, confidence. There is virtually no authority that touches on the procedures used to determine insolvency despite the many cases involving sureties which have adopted and applied the insolvent contributor rule. The scant authority that does exist on the subject states that insolvency must be judicially determined.[38]

For the purpose of illustrating the problem, let us assume that in the hypothetical example, *B* has paid the full judgment to the plaintiff, has asserted his right of contribution against *A* and *C*, and has obtained a judgment apportioning the negligence as set forth in the hypothesis. *A* now claims insolvency and *B* wants to secure a judgment against *C* for *C*'s pro-rata share of *A*'s obligation. The question is: what must he do to assert this claim?

To say that *B* must establish *A*'s insolvency in order to increase *C*'s obligation is less of an answer than an invitation to a series of other questions. While it seems clear that there

36. 8 T.R. 186, 101 Eng. Rep. 1337 (K.B. 1799).

37. Bielski v. Schulze, 16 Wis. 2d 1, 114 N.W.2d 105 (1962).

38. Smith v. Burt, 150 Okla. 34, 300 P. 748 (1931); Appleford v. Snake River Mining, Milling and Smelting Co., 122 Wash. 11, 210 P. 26, 29 A.L.R. 268 (1922).

must be a judicial determination of insolvency, how is such a determination to be made? What is the burden of proof? Upon whom does it lie? How, procedurally, is the insolvency issue raised?

One of the most appealing answers to trial courts would be to require a determination of *A*'s insolvency by a bankruptcy court, and to require further that that determination be conclusive upon all parties to the litigation. While it is obvious that the concept of collateral estoppel on the issue of insolvency would have to be asserted against *C*, even though *C* was not a party to the bankruptcy proceeding, the modern trend is toward allowing estoppel notwithstanding a lack of mutuality between the parties.[39]

But a difficult question arises when one examines *C*'s rights in the bankruptcy proceeding itself. While space limitations do not allow a detailed examination of bankruptcy procedures, it seems clear that *C* is limited in his ability to attack an insolvency determination made in a bankruptcy proceeding, particularly if he is not otherwise a creditor of *A*. To allow collateral estoppel when the party against whom it is asserted has so limited an opportunity to challenge the determination seems inappropriate. Moreover, it is quite possible that neither *B* nor *C* would be a party to *A*'s adjudication in bankruptcy if, for example, the adjudication arose from a voluntary bankruptcy or one occurring just prior to the imposition of tort liability. In such a case, not only would there be no mutuality, but neither party in the second suit would be in a position to bind the other. Most importantly, allowing collateral estoppel to be determinative of *A*'s insolvency appears to raise insurmountable due process problems.[40]

Moreover, a determination of bankruptcy, liquidation of the debtor's property and the stigma which may arise from such proceedings could place a needless and unduly harsh burden on *A*, particularly since it is the rights between *B* and *C* that are being determined. While an adjudication of bankruptcy, whether voluntary or involuntary, would be relevant for the consideration of the trial court, this writer suggests that that determination be only evidentiary and that the determi-

39. Bernhard v. Bank of America, 19 Cal. 2d 807, 122 P.2d 892 (1942); B.R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 593 (1967).

40. Wood v. Neenan Astoria Transp. Co., 261 N.Y. 159, 184 N.E. 744 (1933).

nation of insolvency be made by the trial court irrespective of prior adjudication in bankruptcy.

If it is the duty of the trial court to determine whether *A* is insolvent, it becomes necessary to establish the definition of insolvency. The Bankruptcy Act defines insolvency in terms of one's liabilities exceeding one's assets.[41] This definition is commonly known as "balance sheet insolvency."[42] Another definition reflecting a dramatically different concept is "inability insolvency" which is defined as "the inability of a debtor to pay debts as they become due in the usual course of business."[43] The Model Business Corporation Act definition of "insolvent" as contained in the Wisconsin statutes is: "inability of a corporation to pay its debts as they become due in the usual course of its business."[44] While the latter definition was at one time used in the Bankruptcy Act, the balance sheet insolvency definition is currently used by the bankruptcy courts.

It is suggested that a balance sheet insolvency standard should be adopted, although in many cases there may be no practical difference. There is a wealth of authority by virtue of the bankruptcy statutes that can be used to assist the trial courts in making this determination. In addition, it would appear that in a limited number of cases "inability insolvency" may involve a substantially protracted and unnecessarily complex consideration. It is suggested that if the judgment renders *A* insolvent when his liabilities exceed his assets, one need go no further to adjust the rights as they exist between *B* and *C*.

It has been said that defendants in a contribution action are presumed solvent.[45] But since it is the plaintiff in the contribution action (*B* in our hypothetical) who stands to gain by demonstrating that one of the parties is insolvent, it is appropriate that he bear the burden of proving such insolvency. It is note-

41. The Bankruptcy Act provides:

> A person shall be deemed insolvent within the provisions of this title whenever the aggregate of his property exclusive of any property which he may have conveyed, transferred, concealed, removed or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not at a fair valuation, be sufficient in amount to pay his debts.

11 U.S.C. § 1(19).

42. Joslin, *Insolvency in Bankruptcy: A Synthesis,* 38 IND. L.J. 23 (1962).

43. Parker v. First Nat'l Bank, 96 Okla. 70, 220 P. 39 (1923).

44. WIS. STAT. § 180.02(14) (1973).

45. Tucker v. Nicholson, 12 Cal. 2d 427, 84 P.2d 1045 (1938); Williams v. Riehl, 127 Cal. 365, 59 P. 762 (1899).

worthy that in involuntary bankruptcy proceedings, the burden of proof as to insolvency rests on the petitioner.[46] It is true that the information necessary to make such a determination is primarily in the hands of the alleged insolvent. The alleged insolvent, however, is the party with the least at stake in the lawsuit since his ability to pay will not be altered by the determination made as to his insolvency, and in either case a judgment will be issued against him. Since the determination of his status will affect the rights and obligations of others, it is appropriate to place the burden on the party who has the dominant interest in the resolution of the factual issue since this will encourage a full and complete trial of the issue. This procedure was followed in the Canadian case of *Lamb v. North.*[47]

While it seems clear that the plaintiff in a contribution action must bear the burden of going forward and risk of nonpersuasion, the nature of such a proceeding is less obvious. The most important question which arises is whether any of the parties has a right to a jury determination of the insolvency issue. It is a generally stated proposition of law that disputed issues of fact in a contribution action shall be submitted to a jury.[48] But no constitutional provision requires submission of the insolvency question to a jury. Clearly, there is no federal constitutional right to a jury trial on this issue since the seventh amendment has not been applied to the states.[49] Likewise, the Constitution of the State of Wisconsin does not require a jury trial since the Wisconsin Constitution extends the right to jury to "all cases at law."[50] Consequently, the right to jury trial does not extend to equitable actions.[51]

Since the insolvent contributor rule is purely equitable in its inception and in its application, it is clear that a jury trial is not required on the issue of insolvency. In reaching this conclusion, it should be noted that there is a right to jury trial on the issue of insolvency in federal bankruptcy cases. That right, however, is purely statutory and therefore is not compelled in state actions.

46. Syracuse Eng'r Co. v. Haight, 110 F.2d 468 (2d Cir. 1940); *In re* Shulund, 210 F. Supp. 195 (D. Mont. 1962).

47. Lamb v. North, 22 Man. 360, 3 D.L.R. 774 (1912).

48. Adamson v. McKeon, 208 Iowa 949, 225 N.W. 414 (1929).

49. Richie v. Badger State Mut. Cas. Co., 22 Wis. 2d 133, 125 N.W.2d 381 (1964).

50. WIS. CONST., art. I, § 5.

51. Neff v. Barber, 165 Wis. 503, 162 N.W. 667 (1917).

As surely as constitutional law does not prohibit trial by judge on the insolvency issue, policy considerations recommend it. Speed, cost, convenience and flexibility favor trial by judge. Complicated questions of accounting, difficult for a jury to understand, may arise. Allowing a jury trial may require a second impaneling in the same action among the same parties. Importantly, the fate of the alleged insolvent does not hang in the balance as it does in bankruptcy adjudications. Whether or not he is found insolvent, a judgment will be entered against him. Hence, the moderating influence of the jury is not required to determine his financial future. Indeed, a jury trial on this question can be distinguished from virtually all proceedings in which jury trial is allowed. No question of fault is raised as in tort or criminal actions. Nor is it necessary to ascertain damages. The sole question to be determined is the status of a party only peripherally interested in the proceeding. In light of these factors, my conclusion is that trial on the issue of insolvency should be to the judge.[52]

If the issue of insolvency is to be determined by the court, it is also necessary to decide procedurally how and when this should be done. It is clear that the issue of insolvency could be determined by an entirely new action between *B* and *C* brought for the purpose of resolving that issue. I suggest, however, that bringing an entirely new action would involve a substantial and unnecessary delay, increase the cost of litigation to all parties and divide into separate and unrelated lawsuits a single issue which could be determined in the principal action itself. Since the rights of the parties are determined by a judgment issued by the court, there is no reason why those determinations could not include the issue of insolvency and the rights of contribution determined finally by the court at the time the initial judgment is pronounced. In some limited number of cases, the matter may not at that time be ripe for determination and a different method of proceeding may be necessary. In the majority of cases, however, it would seem appropriate to have the issue of insolvency determined in a hearing before the court at the time motions are brought, and thus determine all of the rights between the various tortfeasors.

While the foregoing treatment is designed to analyze the

52. The cases holding that insolvency should be judicially determined support this conclusion. See cases cited *supra* note 24.

insolvent contributor's rule, its application and its procedures, there are a myriad of problems which flow from this rule that have not been treated in this article. One of the most complex of all of the problems regards joint tortfeasors, some of whom have reached settlement with the plaintiff while others have not. This problem is treated in *Judson v. Peoples Bank & Trust Co.*[53] The problem discussed in the *Judson* case is as follows: plaintiff is injured by the negligent conduct of *A, B, C* and *D* who are joint tortfeasors. *B* and *C* settle with the plaintiff for $1,000 apiece. The plaintiff continued his action against *A* and *D* and receives a judgment for $12,000. *D* is found insolvent and the question becomes: "Who is entitled to what?" In *Judson, A* argued that because of *D*'s insolvency the award should have been split only three ways (between *A, B* and *C),* thus rendering *A* liable for only $4,000. The court held, however, that the award should be divided among all four tortfeasors and that *A* was liable for $6,000 (the shares of *A* and *D* together). *A* was thus required to pay both his shares and *D*'s (the insolvent tortfeasor) and received a worthless judgment for $3,000 against *D.* The court rejected *A*'s theory on the ground that it would diminish the plaintiff's recovery merely because of an unanticipated insolvency. The court also emphasized finality of settlement and the preferability of placing the risk of loss on the wrongdoer.

In my opinion, neither *A* nor the court approached the problem correctly. A proper resolution requires, as the court held, that *A* pay the plaintiff the entire $6,000. This would prevent placing the risk of loss on the innocent party; it complies with familiar principles of joint and several liability. However, *A* should then be entitled to recover $1,000 from *B* and $1,000 from *C,* their shares of *D*'s portion of the judgment. Note that *Judson* was decided long before pro-rata apportionment of damages was compelled in Wisconsin by *Bielski v. Schulze.*[54] While this result does impinge on finality of settlements, it is reasonable to conclude that *B* and *C* settled on the basis of their own fault — not on the possibility of having to bear a portion of *D*'s share of the damages. Not only is *A*'s assumption of *D*'s liability a windfall for *B* and *C,* it effectively penalizes *A* for seeking his day in court. The considerations of fairness

53. 25 N.J. 17, 134 A.2d 761 (1957).
54. 16 Wis. 2d 1, 114 N.W.2d 105 (1962).

which underlie the insolvent contributor rule require that the settlement, which was between the plaintiff and *B* and *C*, not preclude *A* from recovering a proportionate share of his unexpected liability from his solvent co-tortfeasors.

The preceding result is recommended based upon a close analysis of what the settling tortfeasors bargained for at the time they made their contribution to the plaintiff in return for a release from the plaintiff for any liability which may have flowed from their conduct. The plaintiff released *B* and *C* in return for payment of $1,000. In the result reached by the New Jersey court in *Judson,* that release effectively barred *A*'s right to seek contribution from *B* and *C* for the insolvent tortfeasor's share. It is suggested that *B* and *C* bargained for a release from liability to the plaintiff in return for the money they have paid. They did not contemplate nor did they bargain for protection from liability in the event any of their fellow tortfeasors became insolvent.

To effect the rule adopted by the New Jersey court is certainly to give finality to settlements. Indeed, it gives much more than was bargained for during the settlement negotiations and effectively penalizes any tortfeasor who desires an adjudication of the rights between the various parties, for he will not only be liable for his share of any damages to which the plaintiff may be entitled but will also be fully and exclusively liable for any share that an insolvent tortfeasor may become obligated to pay.

The failure of the New Jersey court to use the equitable principles achieved a harsh and unfair result for the nonsettling tortfeasor and produced a windfall (giving *B* and *C* something for which they had not bargained) to the settling tortfeasor. The principal rationale relied on for not using equity to avoid that result was the finality of settlements. An examination of the rationale, however, casts grave doubt on its persuasiveness. The settling tortfeasors are getting what they bargained for in the settlement and therefore should not be discouraged from settling. Of equal importance, *B* and *C* have finally settled their obligation to the plaintiff and, while some potential liability may still exist if a co-tortfeasor should become insolvent, the settlement with the plaintiff is as final as under the New Jersey rule. The problem of the settling tortfeasors discussed in *Judson* would exist notwithstanding the nature of the release received. Therefore, whether it be a

Pierringer-type[55] release or a general release from liability, the approach and result should remain unchanged.

A second problem flows from the possibility of changes in the insolvent obligors' financial status. Assume, for example, that our hypothetical Mr. *A* has no assets but expects an inheritance of $50,000 sometime in the future. Because distribution of the insolvent contributor's damages sounds in equity, courts can deal with such contingencies by issuing conditional decrees. Assuming *B* and *C* have contributed a pro-rata portion of *A*'s damages, upon inheritance both should be able to recover from *A*. An interesting example of the application of this principle is *Jewitt v. Maythem*,[56] in which seventeen of nineteen obligors on a note were found insolvent. The two solvent parties paid the obligation and the court fashioned their remedy so as to give them a claim of one-third—not one-nineteenth—of the debt from the next obligor to become solvent. Those obligors were then entitled to one-fourth from the next obligor to become solvent, and so on. Under this principle, the defendants who have already contributed are entitled to divide among themselves the contribution of the next contributor.[57] As *Jewitt* suggests, the conditional decree can be especially important when more than one insolvent tortfeasor is involved in the case.

The conditional decree avoids the proliferation of subsequent trials as insolvent tortfeasors' financial conditions change. More importantly, it can be used to effectively and fairly distribute among the solvent tortfeasors the rights and obligations that arise in each of them.

The rights of joint tortfeasors for contribution and the effect which insolvency has upon those rights is a complex problem which has not received careful treatment. As our society becomes more complex, these questions will become more commonplace. If nothing else, it is hoped that the foregoing discussion will alert the courts and counsel to some of the problems involved in this area of the law. Perhaps, then, as our increasingly complex society generates increasingly complex questions, our legal system will be prepared with answers.

55. Pierringer v. Hoger, 21 Wis. 2d 182, 124 N.W.2d 106 (1963).

56. 64 Misc. 488, 118 N.Y.S. 635 (1909).

57. Mathematically stated, his contribution is $\frac{1}{n+1}$ x the entire award (n = the number of obligors who have already contributed).