

2013

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### Recommended Citation

Jaran Moten, *One-Action in More States: The Propriety of Expanding the Kansas One-Action Rule into Other Jurisdictions*, 90 WASH. U. L. REV. 1751 (2013).

Available at: <http://digitalcommons.law.wustl.edu/lawreview/vol90/iss6/5>

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# ONE-ACTION IN MORE STATES: THE PROPRIETY OF EXPANDING THE KANSAS ONE-ACTION RULE INTO OTHER JURISDICTIONS

## I. INTRODUCTION

Most second-year law students who have completed an introductory course on civil procedure can explain the doctrines of issue and claim preclusion—collectively known as *res judicata*—with some proficiency.<sup>1</sup> By successfully invoking either doctrine, one can avoid having to defend against a prolonged and expensive lawsuit. A defendant who fails to meet the elements of either probably will not be able to preclude a plaintiff's action.<sup>2</sup> This is not the case in Kansas. The one-action rule in Kansas prohibits a plaintiff from securing a comparative fault determination and then suing other defendants for injuries arising from negligence related to the same transaction.<sup>3</sup> Developed through a string of judicial

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1. Issue preclusion is often referred to as collateral estoppel. In this Note, the two terms will be used interchangeably. The common elements of issue preclusion are (1) an identical issue of fact or of law (2) that was actually litigated and determined in a previous suit (3) resulting in a valid and final judgment (4) to which the determined issue was essential. See STEPHEN C. YEAZELL, CIVIL PROCEDURE 694 (7th ed. 2008). Claim preclusion prevents a plaintiff from suing the same defendant again for damages arising from the same transaction that was the subject of the earlier suit. *Id.* at 668. The “same transaction” standard is not used by all jurisdictions, and even among those that apply this standard, the requirements may differ. For purposes of this Note, this explanation is sufficient. See *id.* at 674 n.2 (explaining the difference between transactional tests and narrower ones, and discussing the potential relevance of the use of “claim” in *res judicata* statutes as opposed to “cause of action”).

2. Many states do have compulsory joinder statutes for “indispensable parties.” See, e.g., COLO. R. CIV. P. 19; MO. SUP. CT. R. 52.04(a). The Missouri rule states:

A person shall be joined in the action if: (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant.

*Id.* Subsection (b) of this rule permits the court to “determine whether in equity and good conscience the action should proceed among the parties before it or should be dismissed, the absent party being thus regarded as indispensable,” when the absent party meeting the requirements of subsection (a) cannot be joined. *Id.* Such compulsory joinder rules usually operate to compel a party to join in litigation before its conclusion, and I can find no examples of them being used to preclude subsequent suits based on prior adjudication.

3. See *infra* notes 41–46 and accompanying text. It is true that in certain circumstances the same result could be accomplished through the application of issue preclusion to comparative negligence actions. See, e.g., *Kathios v. Gen. Motors Corp.*, 862 F.2d 944 (1st Cir. 1988). *Kathios* held that, since a prior suit determined plaintiff's total damages and his percentage of fault, the plaintiff was precluded from pursuing a subsequent recovery from another negligent defendant. *Id.* at 950–51. The court reasoned that New Hampshire law required the plaintiff's negligence to be compared against that of all

interpretations of the Kansas comparative negligence statute,<sup>4</sup> the rule has since been embraced by the legislature and has enjoyed consistent support in Kansas courts.<sup>5</sup>

If the Kansas one-action rule furthers all of its justificatory principles—judicial economy, fairness, and consistency, to name a few<sup>6</sup>—why have the courts and, ostensibly, legislatures of other states refused to follow Kansas’s lead and adopt an identical rule? This Note will begin by providing a brief history of the one-action rule, from its (mostly) judicially created origins to its explicit approval by the Kansas legislature.<sup>7</sup> It will also examine the current status of the doctrine in Kansas, including recent modifications and clarifications.<sup>8</sup> The following part will discuss the rule’s failure to expand into other jurisdictions that have expressly considered its rationale and implications.<sup>9</sup> The concluding part will analyze the justifications for both supporting and opposing the expansion of the one-action rule<sup>10</sup> and provide possible reasons that the rule has not caught on the way some commentators think it should have.<sup>11</sup> Ultimately, this Note proposes that, at least from a theoretical standpoint, the one-action rule provides an element of fairness that might otherwise be missing from comparative negligence law.<sup>12</sup> But the practical uncertainties underlying the rule’s application might justify most jurisdictions’ hesitance to adopt something substantially similar. The rule’s practical implications should be investigated so that sufficient information exists for jurisdictions to make informed decisions regarding its adoption.<sup>13</sup>

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the defendants, so the issue of plaintiff’s comparative negligence was indeed identical in the prior case. *Id.* at 949–50. However, section 2(a) of the Uniform Model Comparative Fault Act provides that “only the fault of the present party defendants can be at issue in a case.” 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, 750 (1995) (citing Uniform Model Comparative Fault Act § 2(a), 12 U.L.A. 42 (1977)). This means that jurisdictions that have adopted the Uniform Model Comparative Fault Act will not be able to follow the reasoning of *Kathios*.

4. See *infra* note 29.

5. See *infra* Part II.

6. See Hickman, *supra* note 3, at 763–68.

7. See *infra* Part II.A–B.

8. See *infra* Part II.C.

9. See *infra* Part III.

10. See *infra* Part IV.

11. See Hickman, *supra* note 3, at 768–69.

12. See *infra* Part V.

13. See *infra* Part V.

## II. HISTORY: FROM CONTRIBUTORY NEGLIGENCE TO COMPARATIVE NEGLIGENCE DETERMINED IN ONE-ACTION

### A. *The Old Rule: Contributory Negligence*

The Kansas Supreme Court reaffirmed the old contributory negligence rule in the late nineteenth century case of *Union Pacific Railroad Co. v. Adams*.<sup>14</sup> There, the court explained that “where the plaintiff seeks to recover for injuries on the ground of defendant’s negligence, . . . if the ordinary negligence of the plaintiff directly or proximately contributed to his injury, he cannot recover.”<sup>15</sup> The only exception to this rule arose when “the [plaintiff’s] injury was intentionally and wantonly caused by the defendant.”<sup>16</sup> In *Adams*, the plaintiff’s contributory negligence barred her from recovering damages after she sustained injuries from being thrown from a wagon that was struck by a train.<sup>17</sup> The court held that the plaintiff failed to exercise ordinary care by not stopping and looking for the train.<sup>18</sup> When the plaintiff argued that she could not have seen the train coming due to the contour of the landscape and obstructions blocking the view, the court concluded ordinary care would have entailed stopping and listening for the coming train, which could have prevented the collision.<sup>19</sup>

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14. 6 P. 529 (Kan. 1885).

15. *Id.* at 530. The vast majority of cases that applied the “total bar” contributory negligence rule in Kansas specifically phrased the rule in terms of automobile accidents, absent any indication that it was meant to be restricted to that context. *See, e.g.,* *Sheeley Baking Co. v. Suddarth*, 241 P.2d 496, 499 (Kan. 1952) (“[I]t must be conceded that a plaintiff’s contributory negligence will bar recovery in an action to recover damages sustained in a collision between two automobiles and that a demurrer to evidence should be sustained where his contributory negligence clearly appears therefrom.”); *Most v. Holthaus*, 227 P.2d 144, 147 (Kan. 1951) (“That a plaintiff’s negligence, or his contributory negligence, will bar him from recovery in an action for damages sustained in an automobile casualty . . . cannot be questioned.”).

16. *Adams*, 6 P. at 530. In *Frazier v. Cities Serv. Oil Co.*, 157 P.2d 822, 829 (Kan. 1945), the Kansas Supreme Court analyzed the relevant precedent to conclude that “wanton conduct or wantonness comes between negligence on the one hand and wilful [sic] or malicious misconduct on the other.” The *Adams* court’s use of “intentionally *and* wantonly,” then, is probably more accurately interpreted as “intentionally *or* wantonly.” *See Adams*, 6 P. at 530.

17. *Adams*, 6 P. at 529.

18. *Id.* at 531–32.

19. *Id.*; *accord* *Leavenworth Lawrence & Galveston R.R. Co. v. Rice*, 10 Kan. 426, 430 (1872). In *Leavenworth*, a train approaching an intersection failed to ring a bell or blow a whistle to signal to potential travelers ahead that it was coming, and the plaintiff was subsequently injured by the train. *See id.* at 428, 434. Overturning the lower court’s ruling that the defendant’s failure gave the plaintiff the right to assume no train was coming, the court held, “[t]he failure to ring the bell by the defendant gave no warrant to the plaintiff to relax her own vigilance in crossing the track, nor did it release her from the duty of using all her senses as a prudent person to avoid injury.” *Id.* at 430. “She was bound still to use her eyes, though no sound from the coming train reached her ears.” *Id.*

While the “total bar” rule of *Adams* was still being applied into the mid-twentieth century, the Kansas Supreme Court, in another line of decisions, had begun to temper the harsh results of the rule in certain cases much earlier.<sup>20</sup> It did so primarily by emphasizing the proximate cause requirement for a plaintiff’s actions to effectively preclude recovery under the doctrine of contributory negligence.<sup>21</sup> In *Union Pacific Railway Co. v. Henry*,<sup>22</sup> the defendant challenged a jury instruction permitting the plaintiff to recover for injuries resulting from the defendant’s negligence, even if the plaintiff was guilty of contributory negligence, as long as the plaintiff’s “negligence was slight, and did not contribute directly to cause the injuries complained of.”<sup>23</sup> The court upheld the jury instruction, holding that, under the circumstances of the case, “[s]light negligence on the part of the driver . . . would not relieve the defendant from liability.”<sup>24</sup> In the earlier case of *Sawyer v. Sauer*,<sup>25</sup> the Kansas Supreme Court made explicit the difference between the Kansas rule and the rule followed by other states that did not allow for a slightly negligent plaintiff to recover against a negligent defendant:<sup>26</sup>

It is true, some of the New York decisions say that any negligence on the part of the plaintiff will defeat a recovery; but these courts reject the idea of degrees of negligence, and hold that if one does that which ordinarily prudent men would have done, he is guilty of no negligence, so that they in fact announce no different doctrine. In this state we recognize the different degrees of negligence, and therefore the instruction is in this respect properly worded. The law does not regard the remote causes of an injury. It is enough to determine the proximate causes.<sup>27</sup>

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20. For a more thorough analysis of the early cases drawing the empathy of the Kansas Supreme Court with respect to plaintiffs whose causes of action were barred due to contributory negligence, see Stephen B. Angermayer & Tammy M. Martin, *Kansas Comparative Negligence Law—An Operational Analysis*, 27 WASHBURN L.J. 340, 342–43 (1988).

21. *Id.*

22. 14 P. 1 (Kan. 1887).

23. *Id.* at 3.

24. *Id.*; accord Kan. Pac. Ry. Co. v. Pointer, 14 Kan. 37, 50 (1874) (“It is settled in this state that where the negligence of the plaintiff is but slight, or only remotely contributing to the injury, it will not defeat a recovery.”). *But cf.* Goodloe v. Jo-Mar Dairies Co., 185 P.2d 158, 166 (Kan. 1947) (holding that “a plaintiff’s negligence, or his contributory negligence, will bar him from recovery” with no mention of a distinction between slight and ordinary negligence).

25. 10 Kan. 466 (1872).

26. *Id.* at 472.

27. *Id.* (citations omitted).

Thus, the Kansas Supreme Court was aware long ago of the potential harsh consequences of barring recovery to all negligent plaintiffs, and sought to prevent this consequence by excluding slight or remote negligence from that which is the proximate cause of an injury.<sup>28</sup>

*B. The Kansas Comparative Negligence Statute*

In 1974, the Kansas legislature officially replaced contributory negligence with comparative negligence with the passage of section 60-258a.<sup>29</sup> The statute provides, in relevant portion:

(a) The contributory negligence of any party in a civil action shall not bar such party or such party's legal representative from recovering damages for negligence resulting in death, personal injury, property damage or economic loss, if such party's negligence was less than the causal negligence of the party or parties against whom claim for recovery is made, but the award of damages to any party in such action shall be diminished in proportion to the amount of negligence attributed to such party.<sup>30</sup>

But subsequent sections of the statute did more than repeal the somewhat strict contributory negligence rule. The following sections of the statute have been interpreted as creating the one-action rule, which bars a plaintiff who has secured a comparative negligence determination against one or more defendants from bringing a subsequent negligence action against other defendants for injuries arising from the same transaction:

(b) Where the comparative negligence of the parties in any such action is an issue, the jury shall return special verdicts . . . determining the percentage of negligence attributable to each of the parties, and determining the total amount of damages sustained by each of the claimants . . . .

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28. *Id.*

29. *See* KAN. STAT. ANN. § 60-258a (West 2009). The enactment of the Kansas statute apparently coincided with a nationwide trend away from contributory negligence and toward comparative negligence. *See* Hickman, *supra* note 3, at 742 ("In 1950 only five jurisdictions in the United States applied comparative negligence to most negligence cases. By 1995, forty-six states had adopted comparative negligence by either legislative or judicial action. This move toward comparative negligence has been defined as a reaction against the harsh results of the contributory negligence defense available at common law.").

30. KAN. STAT. ANN. § 60-258a(a). As shown from the text of the statute, the Kansas rule permitted recovery in any case in which the plaintiff's negligence was less than that of the defendant.

(c) On motion of any party against whom a claim is asserted for negligence resulting in [injury], any other person whose causal negligence is claimed to have contributed to such [injury], shall be joined as an additional party to the action.

(d) Where the comparative negligence of the parties . . . is an issue and recovery is allowed against more than one party, each such party [is] liable for that portion of the total dollar amount awarded as damages to any claimant in the proportion that the amount of such party's causal negligence bears to the amount of the causal negligence attributed to all parties against whom such recovery is allowed.<sup>31</sup>

Among the first cases to interpret the new Kansas statute was *Brown v. Keill*,<sup>32</sup> which provided for computation of the comparative negligence of nonparties to an action in order to ensure consistent fault apportionment.<sup>33</sup> There, the Kansas Supreme Court acknowledged the dual purposes of the statute—"the abolition of contributory negligence as a bar to recovery" and "to provide for the awarding of damages on the basis of comparative negligence."<sup>34</sup> In *Brown*, the court explained that "under the Kansas law as it existed prior to statutory comparative negligence a plaintiff could choose his tort-feasor and a defendant had no right to bring in another joint tort-feasor to plaintiff's action."<sup>35</sup> The opinion goes on to explain that, before the statute, a plaintiff could effectively recover damages completely disproportionate to a defendant's negligence by strategically choosing which defendants to sue, and further, from which to collect.<sup>36</sup> After "reviewing the court decisions in other states" and concluding that "no other state has the exact combination of provisions as does Kansas," the court in *Brown* found it necessary to construe the statute pursuant to the perceived legislative intent.<sup>37</sup> It concluded that the legislature intended the

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31. § 60-258a(b)-(d).

32. 580 P.2d 867 (Kan. 1978).

33. *Id.* at 876.

34. *Id.* at 870. These purposes seem to fall roughly in line with the split mentioned previously in the text, with the former being a function of subsection (a) and the latter coming from subsections (b), (c), and (d).

35. *Id.*

36. *Id.* For a more in-depth analysis of opportunistic plaintiffs' behavior under the old joint and several liability rules, see Hickman, *supra* note 3, at 743-47.

37. 580 P.2d at 871. The main contention at issue in the court's interpretation was whether the statute meant to limit fault apportionment to parties present at trial, or to allow the negligence of all potentially negligent parties, whether joined or absent, to be compared. The ambiguity arises from the language in subsection (d) referring to "parties against whom . . . recovery is allowed," in contrast with the language in subsection (a) referring to each party being liable in proportion to its negligence. *Id.* at

statute “to impose individual liability for damages based on the proportionate fault of all parties to the occurrence which gave rise to the injuries and damages even though one or more parties cannot be joined formally as a litigant or be held legally responsible for his or her proportionate fault.”<sup>38</sup> Thus, nonparties to an action could have their negligence determined under the statute so long as their negligence “gave rise to the injuries and damages” being sued for in the action.<sup>39</sup>

Four days after *Brown*, the Kansas Supreme Court decided *Eurich v. Alkire*.<sup>40</sup> There, the court made explicit the preclusive effect of failing to join a potential responsible party in a comparative negligence action.<sup>41</sup> Expanding upon its interpretation of the statute in light of its recent analysis of the legislature’s intent, the court held:

[W]e believe it was the intent of the legislature to fully and finally litigate all causes of action and claims for damage arising out of any act of negligence subject to K.S.A. 60-258a. The provision for determining the percentage of causal negligence against each person involved in a negligence action contemplates that the rights and liabilities of each person should be determined in one action. Because all issues of liability are determined in one action there can be no reasonable argument that the issues should be relitigated.<sup>42</sup>

The court went on to explain that this holding meant that any party named in a negligence action that failed to join or cross-claim against another potentially negligent defendant was “forever barred” from a subsequent comparative negligence action.<sup>43</sup> In *Eurich*, the driver and passenger of an automobile had been sued for negligence, and the victim secured a fault attribution of 40 percent to Eurich and 60 percent to Alkire, with a damage award of \$50,000.<sup>44</sup> Before the conclusion of the case, Eurich filed a claim

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874–75; see also KAN. STAT. ANN. § 60-258a(a), (d) (West 2009). The problem is that an unnamed party whose negligence contributed to a plaintiff’s injuries would necessarily result in a violation of one of these clauses: either its fault would not be apportioned, and it would *not* be held liable in proportion to its negligence, or the fault of a party against whom recovery is *not* permitted would be determined.

38. *Brown*, 580 P.2d at 876.

39. *Id.* While it is apparent from the discussion in *Brown* and the language in the statute, it is perhaps worth noting that the subsequent case of *Kennedy v. City of Sawyer*, 618 P.2d 788, 797 (Kan. 1980), explicitly cited *Brown* as holding that “the concept of joint and several liability between joint tortfeasors which previously existed in this State no longer applies in comparative negligence actions.”

40. 579 P.2d 1207 (Kan. 1978).

41. *Id.* at 1208–09.

42. *Id.*

43. *Id.* at 1209.

44. *Id.* at 1208.

against Alkire for damages from the same occurrence.<sup>45</sup> The court held that Eurich's suit was barred because he failed to cross-claim against Alkire in the previous suit. It reasoned that allowing the subsequent action against Alkire would violate the legislature's intent "to fully and finally litigate all issues and liability arising out of a single collision or occurrence" in one action.<sup>46</sup>

In *Kennedy v. City of Sawyer*,<sup>47</sup> the Kansas Supreme Court extended the application of the Kansas comparative negligence statute to cases involving imputed negligence—strict liability and implied warranty in products liability.<sup>48</sup> It reasoned that cases might arise involving both common law negligence and strict liability or implied warranty claims, all arising from the same injury.<sup>49</sup> Keeping in line with the "equitable policy" of "assessing proportionate liability based upon comparative degrees of causation," the court decided to apply section 60-258a to these situations.<sup>50</sup>

The Kansas Supreme Court decision *Albertson v. Volkswagenwerk Aktiengesellschaft*<sup>51</sup> detailed the preclusive effect of prior comparative negligence determinations based on different types of claims, namely common law negligence and strict liability, as permitted by *Kennedy*. After an automobile collision between Glynn Albertson and Vernon Travis, Albertson sued Travis for negligence.<sup>52</sup> The jury found damages of \$275,000 and attributed 40 percent fault to Albertson and 60 percent to Travis, leaving Albertson with a judgment of \$165,000.<sup>53</sup> Albertson then sued Volkswagen for damages arising from the same accident under a products liability theory.<sup>54</sup> The district court judge hearing the case used collateral estoppel to bar relitigation of the damage award, but permitted relitigation of fault attribution because he believed the fault of different

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45. *Id.*

46. *Id.* at 1208–09.

47. 618 P.2d 788 (Kan. 1980).

48. *Id.* at 798. *Kennedy* also addressed the effect of a settlement between the plaintiff and one of several negligent defendants on the settling tortfeasor's right to indemnity in light of the statute's abolition of joint and several liability. *See id.* at 802–04. It concluded that to avoid the deterrence of reasonable settlements, settling tortfeasors were still entitled to indemnity in accordance with the factfinder's determination of fault and damages. *Id.* The settling defendant has the same obligation under § 60-258a to use subsection (c) "to bring into the action all tortfeasors against whom comparative liability through indemnity is sought." *Id.* at 803.

49. *Id.* at 796–97.

50. *Id.* at 797.

51. 634 P.2d 1127 (Kan. 1981).

52. *Id.* at 1128.

53. *Id.* at 1128–29.

54. *Id.* at 1128.

parties was a separate issue.<sup>55</sup> The Kansas Supreme Court held on review that there was no need for the doctrine of collateral estoppel because “the doctrine of comparative fault [was] dispositive.”<sup>56</sup> It reasoned that there was one occurrence from which Albertson sustained the injury at the base of both suits—the collision. Thus, the comparative negligence statute, as it had been interpreted over time, clearly barred the subsequent comparative negligence determination sought by Albertson after the conclusion of a prior negligence action arising from the same collision.<sup>57</sup> In so holding, the court, in line with *Kennedy*, expressly rejected Albertson’s claim that the distinction between a strict liability action and a common law negligence action was significant for determining the applicability of the one action rule. It explained that “strict liability in tort does have a fault basis, therefore subjecting it to comparison with other fault concepts.”<sup>58</sup> Noting that this approach would “prevent a multiplicity of [law]suits,”<sup>59</sup> the court stated that even those parties that “cannot be formally joined or held legally responsible” must be considered in the fault determination or they will “escape liability.”<sup>60</sup>

### C. Current Status: Limiting the One-Action Rule

In the years since *Albertson*, Kansas courts have limited the one-action rule to a very specific set of circumstances. One such limit is expressed in *Mathis v. TG & Y*,<sup>61</sup> in which the Kansas Supreme Court refused to apply the one-action rule to preclude a plaintiff’s suit where his previous suit had not resulted in a comparative fault determination.<sup>62</sup> After citing *Eurich* as expressing “the intent of the legislature to fully and finally litigate in a single action all causes of actions and claims for damages arising out of any act of negligence,” the court denied use of the rule to the defendant

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55. *Id.* at 1129. The issue of damages being barred from relitigation meant that the most Albertson could recover from the subsequent suit against Volkswagen would have been \$110,000, depending on the amount of damages attributed to each Albertson and Volkswagen in the second suit. *Id.*

56. *Id.*

57. *Id.* at 1132.

58. *Id.* at 1131.

59. *Id.*

60. *Id.* at 1132.

61. 751 P.2d 136 (Kan. 1988). In *Mathis*, the plaintiff filed successive lawsuits against different groups of defendants for injuries arising from the same occurrence (being hit on the head by door closure while leaving a store, leading to tinnitus and hearing loss). *Id.* at 136–37. With the first lawsuit still pending, the plaintiff settled with the parties to the second lawsuit, and it was consequently dismissed with prejudice. *Id.*

62. *Id.* at 139.

even though the plaintiff had filed and concluded a separate negligence action based on the same alleged injury.<sup>63</sup> *Mathis* thus exemplifies the principle that it is insufficient that a plaintiff brought a previous action based on comparative fault; rather, it is necessary that an actual determination of the relative percentages of fault be determined in the prior action in order for a defendant to enjoy the preclusive effect of the one-action rule.<sup>64</sup> This principle was made even more explicit in *Mick v. Mani*,<sup>65</sup> where the court cited *Mathis*, among other cases, for the proposition that “a plaintiff may pursue separate actions against tortfeasors where there has been no judicial determination of comparative fault. Thus, the exceptions to the one-action rule arise when there has been no prior judicial determination of fault.”<sup>66</sup>

Kansas courts have also refused application of the comparative negligence statute to cases involving breach of express warranty, despite its aforementioned extension into cases involving breach of implied warranty. In *Broce-O'Dell Concrete Products, Inc. v. Mel Jarvis Construction Co., Inc.*,<sup>67</sup> the Kansas Court of Appeals held that, because a plaintiff in a suit based on breach of express warranty is not required to prove either negligence or some specific defect, it is proper to refuse application of the comparative negligence statute to these cases even though the statute does apply in implied warranty cases.<sup>68</sup> The court explained that an exception might arise if the alleged breach of express

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63. *Id.*

64. *Id.* The court explained that “[a]fter an adjudication of comparative fault, no party should be afforded a second opportunity to litigate percentages of causal negligence. K.S.A. 60-258a certainly contemplates one action in which comparative fault is determined.” *Id.* (emphasis added).

65. 766 P.2d 147 (Kan. 1988). *Mick* involved a rather complicated scenario. The plaintiff, Mick, was injured while working on a drilling rig, and Mani, along with other doctors, treated him for his injuries. *Id.* at 148. First, Mick sued all allegedly negligent parties whose negligence contributed to the initial accident, and then he sued the doctors who treated him for injuries stemming from medical malpractice. *Id.* Eventually, all parties to the first action were dismissed (some due to settlement agreements), except for Bethlehem Steel, and Mani was the only remaining defendant in the subsequent action. *Id.* While the action against Mani was pending, Bethlehem Steel secured a verdict finding no fault on its behalf. *Id.* When Mani moved for summary judgment based on the one-action rule, the court first reiterated the principle that a prior judicial determination of fault was necessary to preclude a subsequent suit, but then held that a finding of no fault on behalf of a defendant is indeed a comparative fault determination. *Id.* at 148–49, 156–57. It therefore affirmed the summary judgment in favor of Mani. See also *Childs ex rel. Harvey v. Williams*, 757 P.2d 302, 304 (Kan. 1988) (“We held in *Mathis* that each plaintiff must be allowed a trial judicially determining comparative fault, regardless of whether the plaintiff had the opportunity to do so earlier in one action.”) (emphasis added).

66. *Mick*, 766 P.2d at 156. This limitation was recently endorsed in *Dodge City Implement, Inc. v. Bd. of Cnty. Comm'rs*, 205 P.3d 1265 (Kan. 2009).

67. 634 P.2d 1142 (Kan. Ct. App. 1981).

68. *Id.* at 1145.

warranty caused “death, personal injury or physical damage to property,” given their specific mention in the statute, but “[i]f the result [of the breach] is simple economic loss, liability and damages are governed by breach of contract principles.”<sup>69</sup> In so holding, the court also noted that, even in implied warranty cases, there had to be death, personal injury, or physical property damage to invoke the comparative negligence statute.<sup>70</sup> The statute’s exclusion of situations involving purely economic loss continued until it was amended in 1987 to specifically apply to situations involving economic injury.<sup>71</sup>

Although the history of the one-action rule shows that it is essentially a judicially created doctrine, when the Kansas legislature amended the statute in 2010, the Judicial Council Civil Code Advisory Committee noted that the “changes in this section [were] intended to be stylistic only.”<sup>72</sup> Thus, “[i]nterpretations of K.S.A. 60-258a prior to 2010 . . . should remain authoritative.”<sup>73</sup> The one-action rule, therefore, remains valid today.

### III. TREATMENT OF THE ONE-ACTION RULE AND SIMILAR PROCEDURAL RESTRAINTS BY COURTS OF OTHER STATES

When given the opportunity to consider their own comparative negligence laws in relation to the Kansas one-action rule and the potential to construe similar statutes as creating such a rule, courts in other jurisdictions have differed drastically in their approaches. For example, Iowa has a comparative negligence statute providing for compulsory joinder of indispensable parties, but its courts have refused to treat the failure to join potentially negligent parties in an earlier suit as preclusive. In *Selchert v. State*,<sup>74</sup> the Supreme Court of Iowa sought to answer a relatively simple question: “Does Iowa’s comparative fault act require joinder of all potential defendants in one action?”<sup>75</sup> After the car in which Selchert was riding went off the road and struck a pole, she sued the owner of the vehicle, the driver at the time of the accident, and an alleged dramshop.<sup>76</sup> Selchert secured a fault determination of 75 percent against

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69. *Id.*

70. *Id.*

71. *See* *Wichita Fed. Sav. & Loan Ass’n v. Black*, 781 P.2d 707, 720 (Kan. 1989).

72. 4 KAN. CODE OF CIV. PROC. ANNO. § 60-258a (2011).

73. *Id.*

74. 420 N.W.2d 816 (Iowa 1988).

75. *Id.* at 817.

76. *Id.*

the driver of the vehicle, while the other 25 percent was attributed to Selchert.<sup>77</sup> The trial court also found damages “in excess of \$1.6 million.”<sup>78</sup> Selchert then commenced an action against the state and city in which the accident occurred, as well as the power company that owned the telephone pole, for their alleged negligence contributing to her injuries.<sup>79</sup> The Iowa Supreme Court first rejected the lower court’s conclusion that the defendants should have been joined as “indispensable parties” to the prior litigation and that the plaintiff’s failure to do so precluded a subsequent suit.<sup>80</sup> It then entertained the defendants’ contention that it should “follow the lead of the Kansas Supreme Court” and establish a one-action rule to further the “perceived legislative intent to fully and finally litigate, in one action, all the rights and liabilities of every person involved in a tort action.”<sup>81</sup> In refusing to interpret its joinder rule as mandatory rather than permissive (thereby refusing to adopt a one-action rule like that of Kansas),<sup>82</sup> the court expressed its commitment to separation of powers principles:

Like Kansas, our court has recognized that ‘the modern and enlightened trend is to combine in one action for trial all claims and actions involving several persons in a single incident.’ But, unlike our colleagues in Kansas, we are unwilling to rewrite our comparative fault act or rules of procedure to achieve this noble objective. Had our legislature intended to include in the section 668.2 definition of ‘party’ all those persons involved in an occurrence, whether or not named as a claimant or defendant, it

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77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 818–19. The “indispensable parties” rule comes from Iowa Rule of Civil Procedure 1.234(2), which describes a party as indispensable if “the party’s interest is not severable, and the party’s absence will prevent the court from rendering any judgment between the parties before it; or if notwithstanding the party’s absence the party’s interest would necessarily be inequitably affected by a judgment rendered between those before the court.” IOWA R. CIV. P. 1.234(2). The *Selchert* court held that the parties to the subsequent action were not indispensable because “[n]othing about the interests of [those parties] prevented the prior court from rendering judgment on Selchert’s claim against the driver, vehicle owner or dramshop. The fact that those allocations of fault may affect or even complicate the apportionment of fault in the [subsequent] action does not make the defendants’ interests incapable of severance or inequitably affected.” *Selchert*, 420 N.W.2d at 819.

81. *Id.* at 820.

82. The joinder rule at issue was former IOWA R. CIV. P. 24 which stated: “Any number of defendants *may be joined* in one action which asserts against them, jointly, severally or in the alternative, any right to relief in respect of, or arising out of the same transaction, occurrence, or series of transactions or occurrences, when any question of law or fact common to all of them is presented or involved.” *Id.* at 819.

could easily have done so. Likewise, we perceive no movement to amend our rules of procedure pertaining to joinder of claims and parties.<sup>83</sup>

The court then went on to explain that its opinion should not be read as encouraging the legislature to adopt a one-action rule to preclude suits like Selchert's.<sup>84</sup> Thus, Selchert was allowed to proceed with her subsequent suit.<sup>85</sup>

The Supreme Court of Tennessee went the opposite direction in *Samuelson v. McMurtry*,<sup>86</sup> affirming the existence of a one-action rule for comparative negligence actions in Tennessee.<sup>87</sup> One of the doctors named as a defendant in a medical negligence case was dismissed by the trial court *sua sponte*, and the plaintiff went on to secure a comparative negligence determination of 51 percent against one of the remaining defendants (with the other 49 percent being attributed to the deceased).<sup>88</sup> Relying on Rule 8.03 of the Tennessee Rules of Civil Procedure,<sup>89</sup> in addition to section § 20-1-119 of the state code,<sup>90</sup> the court stated the rule in Tennessee that “where the separate, independent negligent acts of more than one tortfeasor combine to cause a single, indivisible injury, all tortfeasors must be joined in the same action, unless joinder is specifically prohibited by law.”<sup>91</sup> In that case, this meant that the plaintiff's failure to

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83. *Selchert*, 420 N.W.2d at 820 (quoting *Hyde v. Buckalew*, 393 N.W.2d 800, 804 (Iowa 1986)).

84. *Id.* at 820–21.

85. *Id.* at 821. The court noted that the plaintiff bringing successive actions in situations like Selchert's is the one that has to “bear the expense of multiple suits in order to satisfy her claim to full recovery. . . .” *Id.*

86. 962 S.W.2d 473 (Tenn. 1998).

87. *Id.* at 475–76.

88. *Id.* at 474. *Samuelson* involved a wrongful death action brought by the father of the deceased, so the injured party and the plaintiff were not the same. *Id.*

89. The rule provides, in relevant part: “In pleading to a preceding pleading, a party shall set forth affirmatively facts in short and plain terms relied upon to constitute . . . comparative fault (including the identity or description of any other alleged tortfeasors) . . .” TENN. R. CIV. P. 8.03.

90. Section 20-1-119(a) provides, in relevant part: “In civil actions where comparative fault is or becomes an issue, if a defendant . . . alleges in an answer or amended answer to the original or amended complaint that a person not a party to the suit caused or contributed to the injury or damage for which the plaintiff seeks recovery, and if the plaintiff's cause or causes of action against that person would be barred by any applicable statute of limitations but for the operation of this section, the plaintiff may . . . either: (1) Amend the complaint to add the person as a defendant pursuant to TENN. R. CIV. P. 15 and cause process to be issued for that person; or (2) Institute a separate action against that person . . .” TENN. CODE ANN. § 20-1-119 (2009).

91. *Samuelson*, 962 S.W.2d at 476. While it is not readily apparent from the text of the two rules that a plaintiff's failure to join a potential defendant in a negligence action would preclude a subsequent action against that defendant, the court explained that this conclusion is the product of a line of decisions interpreting those rules and applying them to principles of comparative negligence.

appeal the dismissal of one of the doctors precluded him from pursuing the dismissed party in a separate suit.<sup>92</sup> Acknowledging that this amounted to “[t]he trial court’s errors depriv[ing] the plaintiff of the right to proceed against the [dismissed] defendant,” the court explained that this result was warranted because “[t]he defendants other than [the one that was dismissed] were deprived of an opportunity to have fault apportioned against [the dismissed defendant].”<sup>93</sup> Thus, the Tennessee Supreme Court reasoned that considerations of fairness weigh in favor of a one-action rule, even in a situation where the plaintiff’s mistake was not in failing to join, but rather in failing to appeal an erroneous dismissal.<sup>94</sup>

The only other state to have had a similar preclusion rule is New Jersey.<sup>95</sup> Broader than the one-action rule, New Jersey’s “entire controversy doctrine” was expanded greatly by its Supreme Court decision in *Cogdell v. Hospital Center at Orange*.<sup>96</sup> While the original doctrine precluded claims and defenses that could have been asserted in previous suits from being brought subsequently, the court in *Cogdell* extended this preclusive effect to *parties* that could have been included in prior litigation:

We thus conclude that the entire controversy doctrine appropriately encompasses the mandatory joinder of parties. Accordingly, we now hold that to the extent possible courts must determine an entire controversy in a single judicial proceeding and

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*Id.* at 475–76 (citing *Owens v. Truckstops of Am.*, 915 S.W.2d 420, 428 (Tenn. 1996); *Volz v. Ledes*, 895 S.W.2d 677, 680 (Tenn. 1995); *Ridings v. Ralph M. Parsons Co.*, 914 S.W.2d 79, 83 (Tenn. 1996)). Although the language quoted here seems to indicate that the one-action rule would apply to all tort actions involving multiple tortfeasors responsible for injuries arising from the same occurrence, the *Samuelson* court noted that *Turner v. Jordan*, 957 S.W.2d 815 (Tenn. 1997), restricted the rule to negligent tortfeasors only. *Samuelson*, 962 S.W.2d at 476 n.1.

92. *Samuelson*, 962 S.W.2d at 476.

93. *Id.*

94. *Id.* at 475–76.

95. The conclusion that no other state has such a rule is supported by a relatively recent law review note surveying the various types of preclusion law available to potential defendants. See Hickman, *supra* note 3. While the note failed to mention Tennessee’s preclusion rule as an exception to the general rule (along with Kansas and, at one time, New Jersey), the timing of the note in relation to the judicial development of the Tennessee rule might account for this apparent discrepancy. Either way, it is safe to say that the one-action rule is not an available preclusion tool in most jurisdictions. See also Howard M. Erichson, *Of Horror Stories and Happy Endings: The Rise and Fall of Preclusion-Based Compulsory Party Joinder Under the New Jersey Entire Controversy Doctrine*, 9 SETON HALL CONST. L.J. 757, 760 (1999). (“Only one other jurisdiction [besides New Jersey] has attempted preclusion-based compulsory party joinder of any sort. In Kansas, a statutory ‘one-action rule’ precludes claims against parties who were not joined in an earlier proceeding involving a comparative negligence determination.”).

96. 560 A.2d 1169 (N.J. 1989).

that such a determination necessarily embraces not only joinder of related claims between the parties but also joinder of all persons who have a material interest in the controversy.

Therefore, the current Rule on party-joinder must be amended to require mandatory joinder of parties consistent with our explication of the entire controversy doctrine.<sup>97</sup>

The mandatory party joinder component of the entire controversy doctrine was eliminated by amendments to the New Jersey court rules in 1998.<sup>98</sup> This was largely the result of a line of cases yielding apparently inequitable results from the application of the newly broadened doctrine.<sup>99</sup> Thus, Kansas and Tennessee appear to be the only jurisdictions that currently apply a one-action rule to preclude subsequent suits by a plaintiff who has already secured a comparative fault determination in a negligence action.

#### IV. ANALYSIS

Support for the one-action rule is commonly justified by reference to notions of judicial economy, fundamental fairness, and the integrity of the judicial system.<sup>100</sup> Arguments based in each principle are quite logical. Judicial economy is accomplished by avoiding lawsuits that would be allowed to proceed but for their preclusion under the doctrine.<sup>101</sup> Fundamental fairness can be said to result from the impossibility of strategically selecting defendants based not on their actual fault, but on the depth of their pockets, under the one-action rule.<sup>102</sup> The integrity of the judicial system is protected in a similar manner: the preclusive effect of the one-action rule ensures one cohesive resolution to a situation involving interconnected liabilities, preventing the sorts of logical inconsistencies and repeated consideration of comingled issues that might result from an

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97. *Id.* at 1178.

98. See N.J. Ct. R. 4:30A (“Non-joinder of *claims* required to be joined by the entire controversy doctrine shall result in the preclusion of the omitted claims to the extent required by the entire controversy doctrine . . .”) (emphasis added); see also Erichson, *supra* note 95, at 768–69.

99. Erichson, *supra* note 95, at 764–69. For the cases that, according to Erichson, played a major role in motivating the amendment to the doctrine, see *Circle Chevrolet Co. v. Giordano, Halleran & Ciesla*, 662 A.2d 509 (N.J. 1995) and *Mortgagelinq Corp. v. Commonwealth Land Title Insurance Co.*, 662 A.2d 536 (N.J. 1995).

100. See, e.g., Richard D. Freer, *Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court’s Role in Defining the Litigative Unit*, 50 U. PITT. L. REV. 809 (1989); Hickman, *supra* note 3.

101. See *infra* Part IV.A.

102. See *infra* Part IV.B.

alternative doctrine.<sup>103</sup> This part examines these purported benefits of the one-action rule from the positions of both supporters and opponents and will then turn to the rule's possible expansion into other jurisdictions.

### A. *Judicial Economy*

The argument for the one-action rule from a concern for judicial economy is not difficult to grasp. It seems intuitive that precluding more lawsuits, under most circumstances, would automatically conserve judicial resources. Indeed, even the *Selchert* court characterized the one-action rule as a “method[] of achieving judicial economy.”<sup>104</sup> The United States Supreme Court has also repeatedly cited the “scarce judicial resources” of today's litigious society.<sup>105</sup> John Scott Hickman explains that the concern for judicial economy is addressed by the one-action rule because it eliminates the incentive for a plaintiff to hold off on suing one or more potential defendants.<sup>106</sup> In a system allowing successive suits, plaintiffs have good reason to strategically select which defendants they sue and in what order.<sup>107</sup> Even if *res judicata* applied to preclude a subsequent suit (as in *Kathios*),<sup>108</sup> resources are expended in determining the preclusive nature of the first suit under the doctrine of *res judicata*, especially if the doctrine's applicability depends on the jurisdiction in which the action is brought. The simplicity of a one-action rule would probably be more effective at preventing the subsequent suit from being brought at all, let alone making its way through the court system to a determination on

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103. The integrity of the judicial system is essentially protected as fundamental fairness and finality are accomplished. Thus, it is more of an overarching concern that is residually addressed through achieving those other objectives. See Freer, *supra* note 100, at 814 (“The avoidance of inconsistent judgments fosters public faith in the administration of justice.”).

104. *Selchert v. State*, 420 N.W.2d 816, 820 (Iowa 1988).

105. See, e.g., *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080 (2011) (“Courts should think carefully before expending scarce judicial resources to resolve difficult and novel questions of constitutional or statutory interpretation that will have no effect on the outcome of the case.”) (internal quotes omitted); *Pearson v. Callahan*, 555 U.S. 223, 236 (2009); *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 411 (1971) (“Judicial resources, I am well aware, are increasingly scarce these days.”). Professor Richard Freer noted the consequences of today's judicial inefficiency:

Backlogs are epidemic, and we have seen the rise of bureaucratic justice to help handle the deluge. Despite the unprecedented recent increase in the number of federal judgeships, judges represent barely five percent of the federal judiciary's payroll. They are supported by an increasingly large phalanx of assistants—magistrates, law clerks, law student “interns”—to whom they are forced to delegate greater responsibilities. Still, even with all this help, the federal courts seem in danger of losing control of their dockets.

Freer, *supra* note 100, at 810–11.

106. Hickman, *supra* note 3, at 763–64.

107. *Id.* at 750.

108. *Kathios v. Gen. Motors Corp.*, 862 F.2d 944, 950–51 (1st Cir. 1988).

appeal. It is difficult to perceive a reasonable counterargument to the assertion that the one-action rule, in theory, serves the objective of conserving judicial resources by preventing repetitive and avoidable lawsuits arising from the same injury.

### B. Fairness

Like the argument in favor of a one-action rule to promote judicial efficiency, the argument based on fairness is quite intuitive. In most comparative negligence actions, the resulting fault determination attributes a total of 100 percent to the parties present.<sup>109</sup> Thus, it would unfairly advantage a plaintiff to subsequently secure an inconsistent fault determination against other defendants, even if the issue of damages was precluded from relitigation.<sup>110</sup> In order to be logically consistent, the percentage attributed to the second group of defendants must reduce either the plaintiff's fault attribution or that of the defendant(s) to the previous action. If it reduced the plaintiff's fault, it would undermine the jury's determination of the plaintiff's contributory negligence in the first action.<sup>111</sup> If it operated to reduce the fault of the prior defendants, the jury's determination (and the finality of the judicial system) would again be challenged, except now the plaintiff is potentially able to recover from multiple defendants in excess of their total amount of fault.<sup>112</sup>

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109. While the Kansas Supreme Court in *Brown v. Keill*, 580 P.2d 867, 876 (Kan. 1978), specifically held that the fault of nonparties could be compared if their negligence "gave rise to the injuries and damage" at issue in the case, I can find no cases, even in Kansas, in which the fault of nonparty defendants was compared, resulting in a determination of less than 100 percent to those present.

110. See Hickman, *supra* note 3, at 766–67.

111. See *id.*

112. An example may provide clarification. Suppose Alicia is injured while riding in a car with Brian. Brian had been holding his cell phone while driving due to a lapse in functionality of the hands-free calling system in his car, and was not able to navigate an unusually tight left turn with one hand. Instead, he drove off the road into a ditch. Alicia sued both Brian and the car manufacturer, who also manufactures the hands-free system in the vehicle, for negligence. The jury is instructed to determine the comparative negligence of the three parties with a total of one hundred percent being apportioned, as well as the total amount of damages resulting from Alicia's injuries. It finds damages of \$100,000 and attributes 20 percent fault to Alicia, 50 percent to Brian, and 30 percent to the manufacturer. Immediately thereafter, Alicia learns that the intersection may have been negligently designed and that the municipality in which the accident occurred and the engineering firm responsible for designing the intersection were potential defendants in her suit. Suppose Alicia were allowed to bring a subsequent action to hold the municipality and the engineering firm proportionately responsible for their negligence. How could their fault be determined without either (a) reducing the proportionate fault of Alicia, Brian, or the manufacturer, determined in the previous action, or (b) allowing a subsequent adjudication which would result in more than 100 percent of total fault or total damages of more than \$100,000? Essentially, either the finality of the jury's determination in the previous action must be sacrificed, or the subsequent action must result in a logical inconsistency.

Alternatively, requiring the later court to look to the prior adjudication to apportion financial responsibility further burdens judicial resources that are already limited.

Furthermore, even if the fault of a nonparty defendant is apportioned in an action, that determination is unlikely to have any bearing on the defendant's responsibility in a subsequent action (if such an action is permitted).<sup>113</sup> Thus, the possibility of subsequent action to secure a complete determination of the fault of all responsible parties is either unfair to an unsuspecting plaintiff who is then precluded from securing a proportionate recovery, or unfair to defendants who must bear the risk of paying the plaintiff more than their fair share of damages.

Despite accounting for many of these concerns, Richard Freer stops short of advocating a system of preclusive joinder requirements, such as the one-action rule.<sup>114</sup> Instead, he argues that the interests of fairness and judicial economy justify a modification of current compulsory joinder rules, simultaneously giving courts more discretion and expanding their power to compel joinder of parties whose presence would ensure the achievement of “overall resolution of the entire dispute between all interested persons—parties and absentees alike.”<sup>115</sup> Freer believes this system will sufficiently account for plaintiffs' due process rights where “[t]he plaintiff is entitled to due process, to a fair and convenient forum,

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113. Fault apportioned to a nonparty defendant is unlikely to bear on a subsequent proceeding at least in part because of due process concerns. *See* Freer, *supra* note 100, at 819–20. Allowing a court to determine the financial liability of a defendant that was not joined in the action to defend itself probably runs afoul of the prohibition of depriving one of property without due process of law. Thus, even if the fault of nonparty defendants were allowed to be taken into account for comparative negligence apportionment, it is highly likely that either (1) the determination would have no bearing on the actual liabilities of that defendant and would only serve to disadvantage a plaintiff by essentially allowing the responsibilities of those defendants present to be reduced according to the fault attributed to the absent defendant; or (2) in a less-likely alternative, the plaintiff would have to bring a subsequent action (assuming such were permissible) against the defendant who was absent from the prior suit, but whose negligence was nonetheless determined therein, and secure a judgment for an amount consistent with the percentage that was essentially “set-aside” in the previous action. For example, if Alicia (from footnote 112) realized the possibility of holding the municipality accountable for the negligently constructed intersection, a court that allowed the apportionment of the negligence of nonparty defendants could also attribute a portion of fault to the engineering firm despite its absence from the suit. (Although such an absence seems illogical and highly impractical, it must be assumed for a discussion of the apportionment of fault of nonparties to the action.) If Alicia were allowed to then sue the engineering firm, and the previous suit were to have any preclusive effect (due to *res judicata* or otherwise), the comparative negligence of Brian and the car manufacturer should remain undisturbed. Thus, assuming the prior court found the engineering firm's negligence to be 20 percent responsible for Alicia's injuries, it would result in a logical inconsistency (*i.e.*, an apportionment of greater than 100 percent total fault) for a subsequent suit to find any greater responsibility in the firm's negligence.

114. Freer, *supra* note 100, at 840.

115. *Id.* at 839.

but has no right to exclusive possession of center stage regardless of the consequences on scarce judicial resources.”<sup>116</sup> He warns against the adoption of a hard-and-fast rule that eliminates the discretion of the judiciary:

Accordingly, I do not propose a “legal vacuum cleaner” to sweep all potential parties automatically into a single proceeding. The threat of multiple actions should not compel joinder, but should compel *consideration* of joinder. I favor empowering the district court to assess *ex ante* the possible effects of duplicative litigation—not only on the absentee or parties, but on the availability of a scarce societal resource—in considering whether to compel packaging.<sup>117</sup>

Thus, Freer’s recommendation would seemingly permit—or even encourage—joinder of parties, regardless of the type of action, if such joinder is equitable and promotes judicial economy. However, he stops short of advocating a blanket policy for eliminating subsequent suits where a prior one has already concluded. Put differently, Freer’s proposal is forward-looking in the sense that it seeks to avoid inefficiency by ensuring the full adjudication of all claims in the first suit, while the one-action rule is backward-looking in that it precludes a plaintiff who has already made an inefficient decision from burdening the system with the effects of that decision.<sup>118</sup>

In an article addressing the issue of repetitious litigation, John McCoid supported Freer’s approach over the one-action rule.<sup>119</sup> McCoid explained the appeal of the forward-looking approach as follows:

While it is tempting to seek to package litigation into a single suit by means of preclusive devices, provision of the opportunity to be heard guaranteed by due process argues that an inclusive device ordinarily is superior. Moreover, because a policy against multiplicity is not the only value at stake in cases of multiparty litigation centering on a single transaction, an inclusive device that

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116. *Id.* at 833.

117. *Id.* at 840. Freer’s article identified the widespread recognition of a need for legislative action to further the interest of judicial economy: “Increasing numbers of observers agree that the damage caused by duplicative litigation is serious enough to warrant extraordinary congressional action.” *Id.* at 850. However, Freer thought that “[w]hile congressional action will help, it is important to remember that most packaging problems can be addressed without it.” *Id.* at 851.

118. *Id.* at 840–51.

119. John C. McCoid, *A Single Package for Multiparty Disputes*, 28 STAN. L. REV. 707 (1976).

permits weighing of competing values at the outset is highly desirable. Mandatory joinder offers both kinds of advantages, along with the power of courts to insist upon it when the parties are indifferent or even opposed to it.<sup>120</sup>

Noting that “[t]he remedy is sometimes worse than the disease,” McCoid, similarly to Freer, urged caution in the conclusion of his essay.<sup>121</sup> However he did express that “[f]urther experimentation in all three directions [(*res judicata*, joinder, and consolidation)] by courts alert to [their potential] dangers . . . seems desirable.”<sup>122</sup>

## V. PROPOSAL

McCoid is correct that experimentation is necessary to determine which method of achieving judicial efficiency is preferable, but the situation does not necessarily present a purely dichotomous relationship between alternatives. More discretion for the judiciary to compel joinder of necessary parties seems appropriate.<sup>123</sup> “Necessary,” for the sake of determining which parties can be joined by such a process, should be defined broadly to include protecting the interests of nonparties to the action, as suggested by Freer.<sup>124</sup> But determining comparative negligence in one action would seem to always be provided by such a rule. So a special mandate for comparative negligence determinations does not seem excessive.<sup>125</sup> The broadening and strengthening of mandatory joinder

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120. *Id.* at 728. This is the language relied upon by the *Selchert* court in support of its position against encouraging the legislature to adopt a one-action rule. *See Selchert v. State*, 420 N.W.2d 816, 820–21 (Iowa 1988). It is worth noting, however, that McCoid also did not advocate the complete inaction of the *Selchert* court. The court is correct that McCoid suggests “that a cautious approach to the multiplicity problem should be urged.” *Id.* at 821. But his article specifically encourages strengthening the doctrine of mandatory joinder, and the court’s opinion, along with its reluctance to advocate a one-action rule, completely failed to encourage the legislature to address the problem of piecemeal adjudication of injuries arising from the same occurrence. *See id.* at 820–21; McCoid, *supra* note 119, at 724–28.

121. McCoid, *supra* note 119, at 728.

122. *Id.* The potential dangers mentioned by McCoid include the “assertion of claims that otherwise would never be litigated,” the deterrence of settlements, and increased expenses of parties to litigation. *Id.*

123. *See supra* notes 115–17 and accompanying text.

124. *See supra* note 112 and accompanying text. For the purpose of establishing guidelines for the court’s broad authority to compel joinder, “necessary” has been used interchangeably with terms such as “indispensable” and “interested.” Freer, *supra* note 100, at 838–39.

125. Comparative negligence actions would seem to specifically entail the compulsory joinder of all possible negligent parties, especially under the broad definition of “necessary parties” proposed above. It seems impossible to envision a situation in which a party whose negligence may have contributed to the injuries of the plaintiff in a comparative negligence action would not be deemed necessary to a final and just adjudication of the matter at hand. At the very least, the joinder of that

would supplement the increased efficiency resulting from a one-action rule.<sup>126</sup> Maintaining (or adopting, in states other than Kansas) the preclusive consequence of any failure to include a necessary party, supplemented by this additional discretion and ability of judges and parties to compel the joinder of interested nonparties, would more adequately ensure that the one-action rule did not allow nonparties to escape responsibility.<sup>127</sup> Efficiency and fairness would theoretically be best served by the adoption of both broad compulsory joinder and a one-action rule.<sup>128</sup>

One possible problem with such a system involves potentially negligent parties either unknown or unknowable to the plaintiff at the time of the comparative negligence action.<sup>129</sup> Take, for example, a plaintiff in a comparative negligence action injured in a car wreck, with fault apportioned between the car manufacturer, the driver, and the plaintiff (a passenger in the wrecked car). Suppose also that this plaintiff had realized the potential fault of the municipality in constructing and maintaining a negligently designed intersection and joined them in the action. But suppose this plaintiff failed to consider the comparative negligence of the engineering firm responsible for designing the intersection, and the firm's negligence was not considered in the prior action, where 100 percent of fault was attributed. Assuming the municipality had an interest in not compelling the joinder of the engineering firm in the action,<sup>130</sup> and that the two individuals (the plaintiff-passenger and the defendant-driver of the vehicle) had no reason to know that the city hired an outside engineering

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party would be necessary to ensure that the other defendants in the action are not inappropriately burdened with financial responsibility for injuries caused by others. Additionally, many defendants are unable to financially satisfy judgments against them, so it would often also be in the plaintiff's interest to ensure that such parties are present in the action to have their fault determined and financial responsibility attributed accordingly. Thus, a preclusion-based compulsory joinder rule would likely add little other than a bright-line requirement to a system of compulsory party joinder broadly applicable to situations involving potential repetitive litigation arising from a single transaction or occurrence.

126. Freer, *supra* note 100, at 844.

127. *Id.*

128. See *supra* Parts IV.A–B and text accompanying notes 124–27.

129. McCoid touches on this concern in his discussion of the due process considerations underlying preclusion-based compulsory joinder. See McCoid, *supra* note 119, at 728.

130. Admittedly, it is difficult to envision a situation in which a municipality would rather face greater potential liability than compel the joinder of another responsible party whose negligence would likely reduce the financial responsibility of the municipality. However, one can think of situations in which a defendant and an absent party with potential responsibility have such a relationship that it would make strategic sense for the party to the action to exclude, or at least fail to actively include, the absent party. One such situation would likely arise with corporate defendants in parent-subsidiary relationships with other potential defendants. Surely there are other situations in which a defendant, although facing liability, would strategically choose not to compel the joinder of another potential defendant.

firm for designing intersections, the resulting inability of the plaintiff to hold the engineering firm responsible for its negligence allows the firm to escape liability due to the plaintiff's ignorance.<sup>131</sup> This exemplifies the concern that a preclusion-based system of compulsory joinder for comparative negligence actions might unfairly benefit strategic and intelligent parties that are somehow able to hide their existence from the plaintiff and any adverse defendants until the conclusion of the first suit.<sup>132</sup>

The possibility that a preclusion-based system would allow such manipulation and avoidance of responsibility is indeed problematic.<sup>133</sup> Under such a system, a defendant would essentially be free to openly admit its negligence contributing to an individual's injuries so long as the individual has already secured a comparative negligence determination against other defendants relating to the same injuries. However, due to the remoteness of this possibility and the rarity of cases in which it will actually arise,<sup>134</sup> the countervailing considerations of efficiency, fairness,

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131. There is a reasonable argument that the failure of this system to account for the engineering firm's proportionate responsibility for injuries partially resulting from its negligence is not a significant issue because the plaintiff has theoretically achieved full recovery from the other negligent parties, and the only party whose negligence would have likely been reduced by that of the engineering firm would have been the municipality. Thus, the strategic (or other) failure of the municipality to compel the joinder of a party whose existence and responsibility it was well aware of results in its increased liability, and nothing fundamentally unfair has resulted. (That the municipality is the party whose comparative negligence would have been reduced by that of the engineering firm seems to be a logical assumption in light of the lack of any relationship between its negligence and that of any other party and the relatedness of the negligence of the firm and the municipality in designing and constructing the roadway.) Because the plaintiff has achieved a recovery proportionate to the total fault of all other negligent parties, and the defendants have suffered only to the extent of their own negligence and that of those parties whose existence and responsibility they were probably aware of, no real unfairness has resulted, says the argument. However, there are other considerations that undermine the insignificance of holding each party proportionately responsible. For example, many municipalities have set maximum limits on their tort liabilities, so the seemingly innocuous substitution of the engineering firm's comparative negligence and that of the municipality becomes potentially devastating to a plaintiff with injuries far in excess of the statutory damage cap for municipal liability. Furthermore, there is a more theoretical problem with substitutions of liability. A common assumption of the civil judicial system is that it exists to hold parties responsible, not merely to ensure fair compensation to plaintiffs for their injuries by any means necessary. Thus, one might say that it is problematic for the system to be indifferent to whether plaintiffs secure judgments against the correct party based truly on proportion of fault.

132. *Cf. Drescher v. Hoffman Motors Corp.*, 585 F. Supp. 555, 558 n.1 (D. Conn. 1984) (permitting a successive suit to proceed based in part on the fact that the plaintiff's failure to join the defendant in the prior action was a "reasonable mistake").

133. *See supra* note 131.

134. The situations in which a potential defendant would escape liability due to its negligence being attributed to a party defendant are likely those in which the party defendant knew or should have known of the presence of the potential defendant and its possible responsibility. Thus, the proposed system puts the onus on the party best able to identify and compel the joinder of a potentially responsible party who has not been joined in the action, and any failure to do so probably only works to the detriment of that party. It is possible that situations exist in which the plaintiff itself would bear

finality, and logical consistency likely outweigh any concern for the craftiness of particularly clever, irresponsible defendants.<sup>135</sup> Thus, it becomes important to assess whether such considerations are actually realized through the adoption of a one-action rule, or if they are purely theoretical consequences of the doctrine that are unlikely to occur.<sup>136</sup>

The most glaring issue in the debate over the propriety of the expansion (or continuation) of the one-action rule is the lack of studies or statistics showing any actual increased efficiency due to the adoption of these and similar rules.<sup>137</sup> This paucity of information is striking in light of the frequency with which judicial efficiency and the scarcity of judicial resources are cited in contemporary legal writing.<sup>138</sup> Such an absence of data partially justifies the caution urged by McCoid and Freer.<sup>139</sup> But if a lack of information continues to motivate a lack of action, progress with regard to the efficiency of the judicial system seems impossible: the lack of data will continue to foster a fear of experimentation, and the lack of experimentation will significantly stifle any efforts toward broad-scale data collection. Consequently, I agree with McCoid that cautious experimentation is necessary.<sup>140</sup> I disagree, however, about the level of caution that is appropriate under the circumstances. The type of caution that I would urge pertains to the implementation of any system of compulsory party joinder. Ideally, the adoption of such a significant procedural doctrine would not cause individuals who happened to be plaintiffs during the transitional period to be unfairly disadvantaged. Ensuring fairness during the period immediately following the adoption of a compulsory joinder rule with broad judicial discretion would not seem to be problematic. Because the judiciary would be encouraged to join any “necessary” parties to the litigation (broadly defined) in order to achieve full and fair resolution of all potential claims and liabilities,<sup>141</sup> it is likely that the operation of this rule would have immediate positive results with

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the burden of such an oversight (or strategic omission), but again, such situations are probably rare and exceptional.

135. See Hickman, *supra* note 3, at 769.

136. For an argument that preclusion-based compulsory joinder has the opposite of its intended effects, albeit when implemented in a more extreme form, see Erichson, *supra* note 95, at 769–74.

137. The *Selchert* court alluded to its concern for the lack of any concrete support for the purported benefits of a one-action rule in recognizing “the real possibility that such methods of achieving judicial economy may carry evils worse than the problem to which they are addressed.” *Selchert v. State*, 420 N.W.2d 816, 820 (Iowa 1988).

138. See *supra* Part IV.

139. See *supra* note 121 and accompanying text.

140. See *supra* note 121 and accompanying text.

141. See text accompanying note 124; Freer, *supra* note 100, at 838–39.

respect to judicial efficiency without harmful collateral effects. The preclusive consequences of a failure to join parties in comparative negligence actions, however, could be potentially damaging in the absence of widespread notice that such a rule has been adopted and some amount of guidance regarding the outer boundaries of its applicability and operation.<sup>142</sup> In order to avoid as many problematic circumstances as possible, I propose that a state adopting a preclusive system of enforcing mandatory joinder, such as the Kansas one-action rule, should expressly look to interpretations of the rule that have been developed over time in Kansas.<sup>143</sup> Permitting litigants (and potential litigants) to look to the case law that has developed since the inception of the rule in Kansas would eliminate much of the guesswork that might otherwise accompany the adoption of such a significant change in doctrine. Such guesswork could result in unnecessary harm to unsuspecting plaintiffs. Furthermore, following Kansas case law in this regard would promote judicial efficiency by eliminating much of the “experimental” litigation required to establish a set of guidelines for the enforcement of a significant new procedural doctrine.<sup>144</sup>

Unlike the argument based on judicial economy, the argument in favor of a one-action rule (or an analogue thereto) based on consistency and the integrity of the judicial system needs no evidentiary support.<sup>145</sup> The fact that there can be no more than 100 percent total fault for any given injury is necessarily true, and a judicial system should not be permitted to render judgment in violation of logical necessities. To the extent that fundamental fairness (as distinguished from the actual achievement of fair results for a particular set of parties) is a legitimate and desirable end of our judicial

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142. The relative significance of the fundamental unfairness that can be said to result from the lack of notice of substantive or procedural legal doctrines should not be overstated. If notice of such limitations were a relevant consideration in determining the equity of such doctrines, widespread doubt as to the propriety of most procedural limitations would necessarily follow. For example, statutes of limitations, almost by necessity, operate without regard to an individual’s knowledge of their existence or applicability. An alternative system would provide that one must consciously forfeit a claim by failing to exercise one’s legal rights within a statutory period of which one had actual awareness. This would render statutes of limitations almost obsolete, save for circumstances in which a plaintiff has no intention of seeking relief in court (or probably by settlement, given that the prospect of allowing the defendant to avoid litigation is often a powerful bargaining tool). Thus, our legal system seems entirely comfortable bestowing upon lawyers the responsibility to learn, understand, and abide by such procedural limitations and allowing noncompliance to preclude the bringing of claims despite the practical effects (*i.e.*, the absolute preclusion of a judicial remedy) on the plaintiffs themselves.

143. *See supra* Part II.

144. *Cf.* Erichson, *supra* note 95, at 772–73 (explaining that the New Jersey “entire controversy doctrine” increased litigation, and thus decreased efficiency, in part by creating “too much ancillary litigation” related to determining the doctrines applicability).

145. *See supra* Part IV.

system, a one-action rule would promote fundamental fairness by ensuring logical consistency.<sup>146</sup>

The implementation of a one-action rule should not only rely on considerations of fairness in principle; it is also relevant that the doctrine actually achieve just results for the parties whose rights and liabilities it would directly affect.<sup>147</sup> This means that any jurisdiction that adopts such a rule should pay close attention to the consequences of its enactment on litigants, rather than focusing complete attention on the achievement of judicial efficiency and fundamental fairness. Here, supplementing the one-action rule with a broad, discretionary compulsory joinder rule proves significant.<sup>148</sup> If parties and judges are not allowed to compel the inclusion of all negligent parties, judicially efficient and fundamentally fair results might often be achieved by sacrificing the injured party's opportunity to bring about a just resolution.<sup>149</sup> If, for example, several responsible parties were allowed to escape liability through tactfully avoiding the first action brought by a plaintiff, the result would be the avoidance of repetitive litigation and the apportionment of fault totaling 100 percent. Thus, judicial economy and fundamental fairness would be promoted.<sup>150</sup> But, for the plaintiff, there would have been a complete lack of justice. While it is possible that the plaintiff might still receive compensation totaling the amount of fault attributed to defendants in the action, and while such compensation might accurately reflect the total amount to which the plaintiff is entitled,<sup>151</sup> the inability to hold particular negligent parties

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146. See *supra* Part IV.B. The distinction between fundamental fairness and fair results for a particular set of individuals is not meant to suggest the judicial system should subordinate one principle to the other. Rather, it is intended to emphasize that the two are distinct objectives and that only the former is the subject of this particular sub-argument. Fundamental fairness, in this context, refers to the idea that the legal system seeks to achieve resolutions that are fair *in the abstract*. Hence, whether or not it would be fair to a particular plaintiff who has obtained a comparative negligence apportionment of 100 percent to then be allowed to pursue a negligent party that was absent from the first action is immaterial to the idea of fundamental fairness. In the abstract, it is illogical and impermissible to attribute anything over 100 percent total fault for a particular occurrence, so the subsequent suit should be barred by a consideration of fundamental fairness. This is not to say that other considerations are automatically ignored once fundamental fairness is considered. Indeed, the discussions of judicial economy and the practical effects of a one-action rule are included as a testament to the opposite: fundamental fairness is but one relevant consideration to be weighed in determining the propriety of widespread adoption of a preclusion-based mandatory joinder doctrine.

147. McCoid alluded to the possibility that such procedural rules, resting as they may be on sound principles, might carry practical dangers that justify their absence. McCoid, *supra* note 119, at 728.

148. See *supra* notes 123–28 and accompanying text.

149. See *supra* notes 123–24 and accompanying text.

150. See *supra* Part IV.

151. See *supra* note 131 and accompanying text. Theoretically, it makes sense to assume that the negligence of an absent potential defendant would be attributed to a present defendant rather than to the plaintiff, and that the failure of one defendant to compel the joinder of another would harm only

proportionately accountable is unfortunate. And the idea that total compensation would, in most cases, accurately reflect the fault of all parties other than the plaintiff is probably inaccurate.<sup>152</sup>

## VI. CONCLUSION

The Kansas one-action rule provides a feasible model for preclusion-based mandatory party joinder in comparative negligence actions, but it also has its shortcomings.<sup>153</sup> If courts are determined to take seriously the oft-cited concern for judicial efficiency and the preservation of court resources,<sup>154</sup> a system of ensuring the adjudication of all potential claims in one-action should not be confined solely to comparative negligence actions.<sup>155</sup> Instead, courts should adopt compulsory joinder rules with broad judicial discretion for joining parties whose potential liability would prevent duplicative future litigation. Such rules should extend beyond comparative negligence actions to maximize their effects on judicial efficiency. Further, courts should be actively encouraged to utilize their discretion in this regard. This will help ensure both maximal operation of the rule and minimal preclusion of comparative negligence actions in which potential defendants were left out of prior fault attributions (the

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that defendant whose oversight (or strategic exclusion) resulted in the absence. This assumption rests on a particular set of circumstances that is not always present. It is plausible that there are cases in which the absent party's negligence is more apparently connected to the conduct of the plaintiff, yet a defendant in the action is better positioned than the plaintiff to know of the existence and potential responsibility of the absent party. Furthermore, it is probably a mistake to assume such rigid and mechanical operation of the factfinder in comparative negligence actions. Take, for example, another variation of the hypothetical situation in footnote 112 above. Alicia, after being injured while riding in a car during a wreck, sues Brian (the driver) and the car manufacturer for negligence. She secures a fault apportionment of 30 percent to the manufacturer, 50 percent to Brian, and 20 percent to herself. If, instead, Alicia had known of the potential responsibility of the municipality for the negligently designed and constructed intersection at which the wreck occurred and joined in the action the municipality and the engineering firm responsible for the intersection, can it be said with much confidence that the negligence attributed to these additional parties would not have resulted in a smaller percentage attributed to Alicia? Logically, it would seem that the dangerous intersection would reduce Brian's relative fault for the wreck, given that his driving is most apparently connected to the relative safety of the roadway. But, in practice, it is entirely reasonable to assume that the effect of including the municipality and the engineering firm in the fault attribution would have significantly less-predictable effects, and that a failure to join these parties in the action might substantially impair the equity of the final resolution.

152. Consider also the effect on particular defendants whose proportionate negligence might have been reduced by the inclusion of other responsible parties, but who may be in the best position (even relative to other defendants) to know of the existence or conduct of such absent parties.

153. *See supra* Parts IV–V.

154. *See supra* Part IV.A.

155. *See supra* Part V.

latter being critical to the practical fairness of such a preclusive doctrine).<sup>156</sup>

The cautious implementation of discretionary compulsory joinder and systematic preclusion of repetitive litigation should not end the pursuit of the fairness, efficiency, and integrity of the judicial system through the final adjudication of groups of related claims. It is essential that jurisdictions remain open to modification and extension of such doctrines in order to ascertain which versions of various procedural policies are best able to achieve these objectives.<sup>157</sup> But perhaps even more important than modification and extension is the need to examine such doctrines and their effects on both the systems in which they operate and the parties they directly affect.<sup>158</sup> The lack of statistics regarding the effects of rules established to promote judicial efficiency stands in stark contrast to the abundance of complaints and cries for such rules.<sup>159</sup> A significant element of my proposal thus suggests that proponents of adopting policies to achieve the objectives described herein take significant steps toward including actual benefits and observations of the consequences of these policies. Until such data is available, informed predictions based on more solid observations (rather than mere conjecture and principle) should suffice as adequate support for their adoption, especially absent evidence suggesting that the intended effects would not be realized or that adverse effects would result from their enactment.

The Kansas one-action rule is a good example of the sort of bold experimentation necessary to actually address the numerous problems resulting from repetitive and inconsistent comparative fault determinations.<sup>160</sup> It appears to operate equitably, especially given the widespread awareness of the rule in Kansas and the predictability provided by the abundance of case law interpreting and modifying the rule, as well as the legislature's express acceptance of the doctrine as enforced by the judiciary.<sup>161</sup> It is highly unlikely that a plaintiff's attorney in that state will be blindsided by the rule, which forces attorneys to consider the best interests of the system along with those of a client at the outset of litigation and through the course of adjudication—the ideal situation being

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156. *See supra* Part V.

157. *See supra* note 122 and accompanying text.

158. *See supra* text accompanying notes 137–40.

159. *See supra* text accompanying notes 137–40.

160. *See supra* Part IV.

161. *See supra* Part II.B–C.

sought in much legal scholarship on the issue.<sup>162</sup> Supplementing this rule with the revised compulsory joinder requirements and adopting both rules in other jurisdictions will likely increase judicial efficiency, and will increase fairness by avoiding inconsistencies and logical anomalies in the judicial system.<sup>163</sup> In the meantime, interested scholars as well as legislatures should take up the task of determining whether efficiency is indeed increased through such policies. Any undesirable consequences on individual litigants should also be documented and scrutinized. While it is surely desirable to preserve and protect the integrity and resources of the system, the interests of individual litigants and ground-level fairness should not be completely subordinated to the broad-view systemic improvement. If positive results on both counts do not follow from the proposed changes, courts and legislatures should experiment with other options to ensure the retirement of the oft-lamented status quo.<sup>164</sup>

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162. See, e.g., Hickman, *supra* note 3, at 769 (“[T]he shift to comparative fault removed the incentives for defendants to join other potentially liable parties without placing comparable incentives on plaintiffs. . . . Plaintiffs have discovered this weakness and exploit it by using multiple actions to increase their recoveries. The results are both inefficient and unfair to defendants.”).

163. See *supra* Part V.

164. An immediately apparent alternative might be to adopt the broadened version of compulsory party joinder, but without the preclusive effects of the one-action rule. This would not achieve judicial efficiency to the same degree as the enactment of the preclusive rule, but it could be formulated to allow independent judicial review of situations involving parties who were left out of previous litigation, but whose liabilities could have been determined therein to preserve judicial resources and ensure consistency. Supplemented by *res judicata*, such a doctrine would be a step in the right direction, but to a significantly lesser degree than one supplemented by a preclusive effect on future claims.

\* J.D. (2013), Washington University School of Law; B.A. (2010), University of Kansas. Many thanks to the *Law Review* editors for their assistance. Special thanks to my mother, Margueritte, and grandmother, Othello, for their unwavering support.