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Warren F. Schwartz

Severance*—A Means of Minimizing the Role of Burden and Expense in Determining the Outcome of Litigation

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Professor Schwartz discusses the policy considerations attendant upon the use of severance as a means of achieving economy in litigation. He rejects the notion that severance should not be used because it precludes "tempering" of the substantive law by judge or jury by reference to the "equities" of the entire controversy. Finally, the author proposes a statute which implements his resolution of the policy issues.

I. Introduction

The problem of minimizing the burden and expense of litigation without sacrificing the benefits derived from an informed resolution of controversies is central to the continuing reappraisal of our procedural system. There is general agreement that, expense and burden aside, full exploration of the relevant facts in advance, a trial where the witnesses actually appear and give testimony, and the fashioning of rules of law with reference to the particularized trial record are all concomitants of a legal process well conceived to achieve a just resolution of controversies.[1] It seems clear then that the burden and expense of litigation cannot be alleviated by any fundamental limitation on the scope of discovery, nor by substituting, in a significant number of instances, summary determination for disposition by trial. It is equally clear, however, that the very thoroughness and care which we strive to achieve create a risk that litigation may become a completely impractical method of resolving the vast majority of disputes which arise.

* The word "severance" is often used to mean that the issues selected for separate treatment become the subject of a new action with separate docket, judgment, etc. Here all that is meant is that the issues are selected for prior and separate trial.

** Associate Professor of Law, University of Texas School of Law.

1. White Motor v. United States, 372 U.S. 253 (1963), in which the Court refused to determine on a motion for summary judgment whether certain vertical restraints were illegal per se under the antitrust laws. Similarly in Essex Universal Corp. v. Yates, 305 F.2d 572, 579 (2d Cir. 1962), the court reversed an award of summary judgment for defendant on the ground that the contract that was sought to be enforced was an illegal sale of corporate control. Because of the many policy factors bearing on the issue, the court stressed the necessity of a "more instructive" record. A number of factors, the most important of which are the necd to assess credibility by reference to demeanor at trial and the normative element in the negligence standard, have combined to make summary judgment very rarely available in personal injury litigation. *See* J. Weinstein, H. Korn & A. Miller, New York Practice ¶ 3212.03 (1966).

One possible approach which has received increasing attention is the use of severance.[2] This idea is simple enough—the relevance of certain issues is dependent upon the resolution of others. If there is a substantial question concerning the issues upon whose resolution the relevance of the others depends, attention should be directed to these issues while holding the others in abeyance, thus perhaps avoiding the necessity of litigating the dependent issues. At the same time the complete litigation process from discovery through trial can be brought to bear on the potentially dispositive or delimiting issues.

The use of severance to this end poses essentially two questions:

(1) Is the benefit derived from the saving which may be achieved outweighed by the detriment which may result from duplication of effort in the event that the first trial is not dispositive?

(2) Even if the balance of considerations, from the viewpoint of efficiency, dictates severance, should severance be avoided because neither judge nor jury can properly determine the limited issues without hearing the entire case?

The discussion of severance has centered on the second of these questions. It is urged that judge and particularly jury are more than neutral fact-finders; consequently they must be apprised of the entire litigation so that they can "temper"[3] the substantive law by applying their notions of equity. This concept underlies threshold

2. This purpose of severance should be distinguished from other purposes which underlie its use. These are: (1) The desire to avoid unduly protracted and complicated trials. *See In re* Texas City Disaster Litigation, 197 F.2d 771 (5th Cir. 1952), *aff'd sub nom.* Dalehite v. United States, 346 U.S. 15 (1953); Moss v. Associated Transp., Inc., 33 F.R.D. 335 (E.D. Tenn. 1963), *aff'd*, 344 F.2d 23 (6th Cir. 1965). (2) The desire to avoid prejudice. *Compare* Bowie v. Sorrell, 113 F. Supp. 373 (W.D. Va. 1953), *rev'd on other grounds*, 209 F.2d 49 (4th Cir. 1953) (dictum approving severance), *with* Larsen v. Powell, 16 F.R.D. 322 (D. Colo. 1954) (rejecting contention that jury knowledge of insurance was prejudicial). (3) The desire to keep legal and equitable issues separate. *E.g.*, Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962); Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959); S.D. CODE § 33.1303 (Supp. 1960); WIS. STAT. ANN. § 270.08 (1957); The economy factor has been isolated for two reasons: (1) the other considerations may be neutral and severance is nevertheless justified, and (2) these other considerations never militate against severance justified by considerations of economy. It may be, however, that in a close case from the economy vantage point these added factors could justify severance.

3. This phrase is adopted from Professor Weinstein who was apparently the first to raise the objection that severance was an impermissible regulation of matters of "substance" by the federal courts in diversity cases. After arguing that severance of liability and damage issues in personal injury cases is a matter of "substance," principally because it interferes with the common practice of rendering compromise verdicts in lieu of applying the rules of contributory negligence, Professor Weinstein distinguishes and approves the use of severance with respect to defenses such as release on the ground that: "Most of these ancillary issues involve precise dispositive questions which can be relatively easily answered and in which the jury's power to temper the law is minimal [footnotes omitted]." Weinstein, *Routine Bifurcation of Jury Negligence Trials: An Example of the Questionable Use of Rule Making Power*, 14 VAND. L. REV. 831, 843 (1961).

objections to severance as (1) a denial of the constitutional right to trial by jury, and (2) an impermissible regulation of substantive matters by federal courts in diversity cases where the state rule forbids severance. Where severance was not permissible at common law, it is argued that a trial of all issues with the attendant opportunity for "tempering" forms an indispensable part of the right to trial by jury. Similarly if "tempering" (as in the case of juries compromising contributory negligence questions by diminishing damage awards) forms an essential part of the state law, it is a "substantive" matter beyond the power of federal courts to alter by directing severance. With very few exceptions, these arguments have been consistently rejected. However, they have been given some indirect support by the recent amendment to Federal Rule 42(b) (the principal federal rule authorizing severance).[4] This amendment apparently stops short of unqualified approval of severance in the interests of economy because the draftsmen thought these objections were of sufficient weight to preclude a clear-cut legislative decision at the present time.[5] In any event, a policy question remains: Do we want decisions by fact-finders on limited and theoretically dispositive issues when they are unaware of the essential nature of the controversy?

Determining when severance is justified from the vantage point of its effect on the outcome of particular litigation has received very little explicit attention. The commentators who have evaluated severance have adopted the alleviation of calendar congestion as the principal end served by severance.[6] They have, therefore, turned their attention to the overall saving of litigation effort resulting from a regular practice of severance, and have amassed impres-

4. FED. R. CIV. P. 12(d), which specifies certain defenses which can be preliminarily determined, provides the second principal source.

5. *See* text accompanying notes 30 and 31 *infra.*

6. Zeisel & Callahan, *Split Trials and Time Saving: A Statistical Analysis,* 76 HARV. L. REV. 1606 (1963). This article makes an elaborate statistical analysis of overall time saving, in part responding to Professor Weinstein's suggestions that the possibilities of economy had been exaggerated. Other commentators limit their consideration to the question of severing liability and damage issues in personal injury cases and do not focus on the effect of severance on the critical decisions affecting possible compromise. *See* Brault, *The Issues of Liability and of Damages in Tort Cases Should Not Be Separated for the Purposes of Trial,* ABA INS. NEG. & COMPENSATION SEC. 274 (1960); Committee of State Courts of Superior Jurisdiction of the Association of the Bar of the City of New York, *Separate Trials of the Issues of Liability and Damages in Personal Injury Actions,* 20 RECORD OF N.Y.C.B.A. 659 (1965); Vogel, *The Issues of Liability and of Damages in Tort Cases Should be Separated for the Purposes of Trial,* ABA INS. NEG. & COMPENSATION SEC. 265 (1960); Note, *Separation of Issues of Liability and Damages in Personal Injury Cases: An Attempt to Combat Congestion by Rule of Court,* 46 IOWA L. REV. 815 (1961); Note, *Separate Trials on Liability and Damages in "Routine Cases": A Legal Analysis,* 46 MINN. L. REV. 1059 (1962).

sive evidence that such saving can be achieved.[7] This approach, however, neglects the qualitative question of the likely effect of severance on the result of a particular case. This question must not be ignored. Inferior justice is too high a price to pay for expedition and economy.[8] However, an expanded use of severance is possible without impairing the judicial process; indeed it can be justified as substantially improving the quality of justice administered by minimizing the role of cost and burden in determining the outcome of litigation. The desirability of severance in a particular case should be measured by the likelihood that it will achieve this end.

Therefore, this article is divided into two main parts. First, it is assumed that the controlling question is how severance affects the likely outcome of litigation by altering the normal incidence of expense and burden. Then the article examines the question of whether there are overriding considerations (particularly the need for "tempering" by reference to the entire controversy) which require that severance be withheld even if dictated by considerations of economy.

II. SEVERANCE AS A MEANS OF ACHIEVING ECONOMY

A. *The Present Law*

1. *The Formal Dimension.*—In most jurisdictions there are no formal limitations on the type of issues which can be severed. Rule 42(b) of the Federal Rules of Civil Procedure and similar state provisions[9]

7. Zeisel & Callahan, *supra* note 6, at 1624, conclude that a net saving of 20% of litigation time has been achieved by the practice employed in the Northern District of Illinois of routinely severing liability and damage issues in personal injury actions. Alleviation of calendar congestion was the principal ground for adoption of the practice. The reasons leading to the enactment of the Northern District of Illinois Rule are thoroughly explored in O'Donnell v. Watson Bros. Transp. Co., 183 F. Supp. 577, 581-88 (N.D. Ill. 1960). *See also* Vogel, *supra* note 6, at 269; Note, MINN. L. REV., *supra* note 6. In support of this rule, the court noted the desirability of confining the effects of jury sympathy and restricting the possibility of compromise verdicts through severance. *See* O'Donnell v. Watson Bros. Transp. Co., *supra* at 581, 585.

8. Professor Wright is highly critical of the fact that the effect on the quality of justice administered has not been taken into account in the evaluation of the Northern District of Illinois practice. Wright, *The Federal Courts—a Century After Appomattox*, 52 A.B.A.J. 742, 747 (1966).

9. *See, e.g.*, ARIZ. R. CIV. P. 42(b) (only state having already enacted the recent amendment to Rule 42(b)); MD. R. CIV. P. 501; MINN. R. CIV. P. 42.02. California has a statute which varies in wording but is equally broad. CAL. CIV. PROC. CODE § 1048 (West 1955). Illinois has the same provision. ILL. CIV. PRAC. ACT § 51 (1956). Some states either have no statutory severance provision (Alaska, Arkansas, Georgia, Hawaii, Idaho, Indiana, Mississippi, Nebraska, New Hampshire, Ohio, Oregon, Rhode Island and Virginia), or one limited to multiple claims or multiple party situations. ALA. EQ. R. 15 (multiple claims for "multifariousness"); CONN. CEN. STAT. ANN. § 52-97 (1960) (multiple claims; legal and equitable claims), 38 MASS. GEN. LAWS ANN. ch. 231, § 4 (1959) (severance of persons joined as severally liable on contracts); N.C. GEN. STAT. § 1-179 (1953); OKLA. STAT. ANN. tit. 12, § 558 (1960); S.C. CODE § 10-1202 (1962) (severance of claims against multiple defendants); S.D. CODE §

authorize severance of "any claim, crossclaim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues." Every type of issue has been severed. Thus, liability issues (as distinct from the question of damages),[10] a wide variety of affirmative defenses,[11] and

33.1305 (Supp. 1960) (severance in multiparty litigation); WIS. STAT. ANN. § 270.08 (1957) (severance of claims against multiple defendants). Some courts have severed and tried certain potentially dispositive issues first without express statutory authorization. Robertson v. Ephraim, 18 Tex. 118 (1856) (domicile of defendant on which jurisdiction depended); Charron v. Northwestern Fuel Co., 143 Wis. 437, 128 N.W. 75 (1910) (release). The only case that has been found denying severance on the ground of lack of statutory authority arose in Texas, which has a rule substantially identical with the federal rule. *See* Iley v. Hughes, 158 Tex. 362, 311 S.W.2d 648 (1958) (strong dictum).

10. As has been indicated this is the general practice authorized by Rule 21 of the Rules of Northern District of Illinois. *See* Note, IOWA L. REV., *supra* note 6. Other federal cases following the same practice without benefit of a specific rule include: Nettles v. General Accident Fire & Life Assur. Corp., 234 F.2d 243, 247 (5th Cir. 1956) (personal injury action in which several cases consolidated for trial on liability issues); Swofford v. B & W, Inc., 34 F.R.D. 15 (S.D. Tex. 1963), *aff'd*, 336 F.2d 406 (5th Cir. 1964), *cert. denied*, 379 U.S. 962 (1965) (protracted patent infringement action); Moss v. Associated Transp., Inc., 33 F.R.D. 335 (E.D. Tenn. 1963), *aff'd*, 344 F.2d 23 (6th Cir. 1965) (necessary adjunct to consolidation of several cases arising out of single occurrence for trial since damage issues of various claimants were essentially unrelated); Hahn v. Woodlyn Fire Co. No. 1, 32 F.R.D. 429 (E.D. Pa. 1963) (personal injury action in which court concluded that "plaintiffs themselves evidence little assurance on the liability issues"); Fischer & Porter Co. v. Sheffield Corp., 31 F.R.D. 534 (D. Del. 1962) (protracted patent case); Richenbacher Transp., Inc. v. Pennsylvania R.R., 3 F.R.D. 202 (S.D.N.Y. 1942) (proof of damages extremely complex, plaintiff seeks severance). State cases reveal the same practice. Mellone v. Lewis, 233 Cal. App. 2d 4, 43 Cal. Rptr. 412 (Dist. Ct. App. 1965); Vander Gar v. Pitts, 166 So. 2d 837 (Fla. Dist. Ct. App. 1964); Mercado v. City of New York, 25 App. Div. 2d 75, 265 N.Y.S.2d 834 (1966); Hacker v. City, 25 App. Div. 2d 35, 266 N.Y.S.2d 194 (1966); Brown v. General Motors Corp., 67 Wash. 2d 278, 407 P.2d 461 (1965). *But cf.* Peasley v. Quinn, 373 Mich. 222, 128 N.W.2d 515 (1964) (indicating approval only of a very limited use); Iley v. Hughes, 158 Tex. 362, 311 S.W.2d 648 (1958) (strong dictum disapproving the practice).

11. These include: Release, Winchester Drive-in Theatre, Inc. v. Twentieth Century-Fox Film Corp., 35 F.R.D. 141 (N.D. Cal. 1964). Statute of limitations, Taxim v. Food Fair Stores, Inc., 24 F.R.D. 457 (E.D. Pa. 1959); Drake v. Ming Chi Shek, 155 F. Supp. 345 (D.N.J. 1957). Res judicata, Monand v. Paramount Pictures Distrib. Co., 6 F.R.D. 222 (D. Mass. 1946). Laches, The Seven-Up Co. v. O-So Grape Co., 177 F. Supp. 91 (S.D. Ill. 1959) (trademark action in which factual issues relevant to laches question were quite complex). Existence of contract complying with statute of frauds, Cauister Co. v. National Can Corp., 3 F.R.D. 279 (D. Del. 1943). Tort Claims Act exemption for "damages from or by flood or flood waters;" Huffmaster v. United States, 186 F. Supp. 120 (N.D. Cal. 1960). Realignment of parties to defeat diversity jurisdiction, Carr v. Beverly Hills Corp., 237 F.2d 323 (9th Cir. 1956), *rev'd on other grounds*, 354 U.S. 917 (1957). Estoppel to contest patent by reason of violation of license agreement, Air King Prods. Co. v. Hazeltine Research, Inc., 10 F.R.D. 381 (E.D.N.Y. 1950). Whether infringement of patent had been asserted upon which justiciability of declaratory judgment action turned, Temp-Resisto Corp. v. Glatt, 18 F.R.D. 148 (D.N.J. 1955). "File wrapper estoppel" in patent case, Aldridge v. General Motors Corp., 178 F. Supp. 839 (S.D. Cal. 1959). Public use or sale in patent case, Cataphote Corp. v. DeSoto Chem. Coatings, Inc., 235 F. Supp. 931 (N.D. Cal. 1964), *aff'd*, 356 F.2d 24 (9th Cir. 1966). Affirmative defenses severed for prior determi-

parts of a plaintiff's case have all been severed for early trial.[12] In fact, severance has never been denied on the ground that the nature of the issue precludes its use.

There also is no limitation as to the stage at which severance can be invoked. Although generally not sought until trial, it has sometimes been employed quite early.[13] Its effectiveness in the latter case has also been greatly enhanced when the severance order is coupled with a stay of all discovery and pre-trial proceedings other than with respect to the issues severed for prior determination.[14]

2. *The Standard for Balancing Potential Saving with Potential Duplication.*—The most critical factor in defining the scope of permissible severance is the standard applied in determining when potential saving outweighs potential duplication. The cases have not adequately articulated that standard. The most frequent statement of the rule, originally formulated by Professor Moore, obscures the problem by stating, in effect, that any factual overlap between the issues sought to be severed and the remaining issues precludes severance. Under this formulation, "A separate trial should not be granted in a case [where severance of a potentially dispositive defense is sought] unless the issue is clearly severable from the other issues in the case and does not involve the same evidence."[15]

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nation in state courts include: Release, Burton v. Niagara Mohawk Power Corp., 280 App. Div. 356, 113 N.Y.S.2d 483 (1952); Legare v. Urso, 216 A.2d 506 (R.I. 1966) (strong dictum approving practice). Res judicata, Cardy v. Cardy, 14 App. Div. 2d 735, 220 N.Y.S.2d 99 (1961). Statute of limitations, Cardy v. Cardy, *supra.* Reformation, Winthrop Prods. Corp. v. Damsky, 279 App. Div. 775, 109 N.Y.S.2d 283 (1952). Duress, Perlman v. Cohen, 68 N.Y.S.2d 882 (App. T. 1947). *See generally* Note, *Separate Trial of a Claim or Issue in Modern Pleading: Rule 42(b) of the Federal Rules of Civil Practice,* 39 MINN. L. REV. 743, 755 (1955).

12. *E.g.*, Rossano v. Blue Plate Foods, Inc., 314 F.2d 174 (5th Cir. 1963) (question of agency relationship between defendant and driver of vehicle in personal injury action).

13. Fisher & Porter Co. v. Sheffield Corp., 31 F.R.D. 534, 539 (D. Del. 1962); Huffmaster v. United States, 186 F. Supp. 120 (N.D. Cal. 1960); Momand v. Paramount Pictures Distrib. Co., 6 F.R.D. 222 (D. Mass. 1946).

14. Seven-Up Co. v. O-So Grape Co., 177 F. Supp. 91 (S.D. Ill. 1959); Fisher & Porter Co. v. Sheffield Corp., 31 F.R.D. 534 (D. Del. 1962); Momand v. Paramount Pictures Distrib. Co., 6 F.R.D. 222 (D. Mass. 1946); Canister Co. v. National Can Co., 3 F.R.D. 279 (D. Del. 1943).

15. 5 J. MOORE, FEDERAL PRACTICE ¶ 42.03, at 1217 (2d ed. 1964). The results of the cases cited by Professor Moore do not clearly support so stringent a rule. *Cf.* Winkler v. New York Evening Journal, Inc., 32 F. Supp. 810 (E.D.N.Y. 1940), where the court did refuse to sever at plaintiff's request the issue of whether publication had been accompanied by proper trademark notice, stating this issue was "an integral part of plaintiff's affirmative case." *Id.* at 812. The case does not make it clear, however, how much evidence relating to the remaining issues would bave to be offered for the disposition of the limited issue. Woburn Degreasing Co. v. Spencer Kellogg & Sons, 37 F. Supp. 311 (W.D.N.Y. 1941), although stating the restrictive language, actually allowed severance of the issues of validity and infringement in a patent action. In Suffin v. Springer, 1 F.R.D. 245, 246 (S.D.N.Y. 1940), the court denied severance of

Theoretically under this rule one would never reach the problem of balancing since any risk of duplication would be enough to preclude severance. It is clear, however, that many courts depart from this rule and sever where substantial potential saving may be achieved despite the existence of significant evidentiary overlap. It is difficult to imagine any case in which a subsequent damage hearing will not require proof of at least a substantial part of the facts upon which liability was predicated. In addition, a number of affirmative defenses have been severed despite a substantial factual overlap with the merits.[16] In the cases that grant severance despite a significant factual overlap little attention is paid to the risk of duplication[17] and consequently no effort is made to minimize it. In other cases, however, the courts deny severance because of the existence of substantial potential duplication without taking account of the potential saving which may also be present. Thus when exemplary damages may be awarded, depending upon the jury's assessment of the gravity of defendant's fault, severance has been denied because the damage jury would have to rehear all the liability evidence.[18] Similarly, when because of a casualty problem the damage jury will have to hear the liability evidence[19] or when evidence of injury relevant to a release issue will have to be repeated on the merits[20] severance has been denied.

The present law with respect to severance may be summarized as conferring broad discretion on the trial judge concerning the issues

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the issue of fraud as inducing a release because the issue cannot be heard "without the introduction of proof pertinent to other issues." Although the opinion is not clear this may well have been a case in which the misrepresentations relied on to avoid the release were with respect to the claim allegedly released and forming the subject matter of the action. In such a situation the fraud issue would turn in large part on the actual facts concerning the claims so that the entire action would have to be tried preliminarily for its bearing on the limited fraud issue.

16. *See* Locke v. Atchison T. & S.F. Ry., 309 F.2d 811 (10th Cir. 1962); Cataphote Corp. v. DeSoto Chem. Coatings, Inc., 235 F. Supp. 931 (N.D. Cal. 1964); Huffmaster v. United States, 186 F. Supp. 120 (N.D. Cal. 1960); Shoreham Village, Inc. v. Bush Constr. Co., 185 F. Supp. 534 (E.D. Pa. 1960); Seven-Up Co. v. O-So Grape Co., 177 F. Supp. 91 (S.D. Ill. 1959).

17. When the risk is explicitly noted it is simply characterized as insignificant. Cataphote Corp. v. DeSoto Chem. Coatings, Inc., 235 F. Supp. 931 (N.D. Cal. 1964), *aff'd*, 356 F.2d 24 (9th Cir. 1966) (substantial factual overlap); Bernardo v. Bethlehem Steel Co., 200 F. Supp. 534, 536 (S.D.N.Y. 1961), *aff'd*, 314 F.2d 604 (2d Cir. 1963). Another factor explaining the apparently small weight sometimes assigned the risk of duplication is the court's strong guess that the first hearing will be dispositive. Courts directing severance frequently comment on the apparent strength of the position of the party seeking severance. *E.g.*, Hahn v. Woodlyn Fire Co., No. 1, 32 F.R.D. 429, 431 (E.D. Pa. 1963) ("plaintiffs themselves evidence little assurance on the liability issues").

18. United Air Lines, Inc. v. Wiener, 286 F.2d 302 (9th Cir. 1961), *cert. denied*, 366 U.S. 924 (1961).

19. Culley v. City, 25 App. Div. 2d 519, 267 N.Y.S.2d 282 (1966).

20. Grissom v. Union Pac. R.R., 14 F.R.D. 263, 265 (D. Colo. 1953).

which may be severed, the point in the litigation at which severance may be invoked, and the ancillary orders in aid of severance which may be issued. It is defective, however, in failing to articulate the standard by which considerations of economy are to be measured. Morerover, the courts have not responded to the necessity of balancing the potential economy of a prior dispositive hearing against the inevitable duplication if the hearing is not dispostive.

B. *The Basic Policy Issues*

In order to frame the governing standard, it is necessary to consider the conflict between the possible economy achieved by severance and the possible impairment of the quality of justice caused by duplication.

The initial premise is that litigation should be determined either by application of the governing substantive law or by compromise based upon factors which are socially desirable. If the parties agree in their assessments of the merits and wish to reach a compromise reflecting those assessments rather than incur the necessary risk and expense of litigation, there is no reason (absent an overriding social interest in the outcome)[21] to prevent their doing so. Moreover, such factors as the possibility of providing plaintiff benefit without the defendant's suffering commensurate detriment may cause the parties to prefer settlement to litigation. In these cases compromise is desirable, and the saving of judicial time and energy provides additional justification. However, when cost and burden are the operative factors causing a party to accept a compromise which he regards as fundamentally unjust, the litigation system has seriously failed. The court's participation in achieving such a result in the name of clearing calendars is even more deplorable.

The justification of severance lies in the increased ability of a party to afford litigation and consequently, in the diminished importance of cost and burden in negotiating compromises. The easiest example is the case of a defendant who believes he has a meritorious defense. If he can obtain a prompt determination, without first being subjected to the cost and burden of discovery, other pretrial proceedings, and an overall trial with respect to all issues, then it will be possible to have his position vindicated through litigation. However, if his defense will be heard only as part of an overall trial preceded by

21. Some settlements are submitted for approval. *See* Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 225 F. Supp. 331 (N.D. Ill. 1963), *aff'd*, 335 F.2d 203 (7th Cir. 1964) (compromise of treble damage action under the antitrust laws); Burge v. City & County of San Francisco, 41 Cal. App. 2d 608, 262 P.2d 6 (1953) (exemplifying practice of obtaining court approval of compromise in action brought on behalf of infant); FED. R. CIV. P. 23 (requiring approval of compromises in class actions).

discovery and other pretrial proceedings on all issues, he may have no choice except to compromise, despite his absolute conviction that ultimately his defense would be sustained. Consequently, the content of that compromise could depend very much on defendant's appraisal of the total cost in litigating all issues to a conclusion.

Although perhaps less common, similar benefit can be afforded a plaintiff as, for example, in the instance where the plaintiff himself is concerned that his claim may be totally defective in one respect. In such an instance a plaintiff would want to obtain a determination before investing the necessary time and money to establish his entire case.[22] Here, by directing severance and separate trial, defendant is denied the compromise leverage of the expense plaintiff will have to incur before resolving his uncertainty.

Severance may be beneficial to plaintiff in another more fundamental respect. If he is proceeding on alternative theories and wishes them kept together through the preliminary stages, he may gain a real advantage if one of the theories (and perhaps such defenses as may be relevant to it) is severed for early trial, and all other proceedings are stayed. There seems to be no precedent for severance in this situation. One such case, however, would seem to be the common situation in which a plaintiff, aggrieved by a sale of securities, is proceeding on the theories that (1) the securities were not registered,[23] (2) the sale was unlawful under the various fraud analogues contained in the Securities Act of 1933 and the Securities and Exchange Act of 1934,[24] and (3) common law fraud. Although the claim of the sale of unregistered securities may involve substantial issues of fact precluding summary judgment, such as whether there was a "distribution" or "public offering"[25] or whether the sale occurred within the one-year limitation period,[26] these issues are nevertheless substantially less complicated than the question of fraud or its statutory analogues. If plaintiff can limit discovery to the claim of a sale of unregistered securities and can obtain an immediate trial on that issue without incurring the expense of exploring and trying the fraud issues, the saving in time and effort can be substantial. This case may perhaps rep-

22. Rickenbacher Transp., Inc. v. Pennsylvania R.R., 3 F.R.D. 202 (S.D.N.Y. 1942) (plaintiff moved for prior trial of liability where proof of damages extremely expensive and complex); Tudor v. Leslie, 35 F. Supp. 969 (D. Mass. 1940) (plaintiff moves for prior determination of citizenship issue on whieh diversity jurisdiction depends); Williams v. Donyluk, 66 N.Y.S.2d 242 (Sup. Ct. 1946), *appeal dismissed*, 90 N.Y.S.2d 125 (App. Div. 1949) (plaintiff moved for separate trial of reformation defense).

23. Securities Act of 1933, §§ 5, 12(1), 15 U.S.C. §§ 77e, 77*L* (1964).

24. Securities Act of 1933, §§ 11(a), 12(2), 17(a), 15 U.S.C. §§ 77k, 77*L*, 77q (1964); Securities Exchange Act of 1934, § 10(b)(5), 15 U.S.C. § 78j (1964).

25. Seeurities Act of 1933, § 4, 15 U.S.C. 77d (1964).

26. Securities Act of 1933, § 13, 15 U.S.C. § 77m (1964). Athas v. Day, 186 F. Supp. 385, 388 (D. Colo. 1960), illustrates the factual issues involved in this question.

resent a particular instance of a class of cases of real and growing significance. When a remedy which is fashioned upon generalized risk distribution and an older remedy which is predicated upon a conception of fault continue to exist side by side, severance and prior trial of the simple theory may often be appropriate. Implied warranty and negligence claims in product liability cases appear to be another example of this phenomenon.

It should be noted that the approach advocated in this article will not always be consistent with the purpose of alleviating calendar congestion. It may be that severance will permit a party, who might otherwise settle to avoid the expense of the overall litigation, to choose instead to litigate limited issues. If this happens, the result should be applauded regardless of the consequences to the state of the calendar. However, fewer compromises will not necessarily result since many factors work to produce compromises. Severance only affects one of these factors—cost and burden—and, of course, it by no means completely eliminates cost and burden as a factor causing compromise.

The discussion so far has dealt with the benefits of severance both in achieving less costly litigation and in promoting compromises more responsive to the parties' evaluations of the merits. The focus has been on the effect of the possibility of a limited dispositive trial on the conduct of the litigants. But one must also consider the possible consequences of the entire litigation becoming more burdensome if the first trial is not dispositive.

The proposed statute (discussed in part II (c) seeks to minimize this risk. In any event, even if some duplication of effort occurs, it is not an important factor mitigating against the use of severance because the possibility of greater overall cost does not seem to be a significant factor in compromise deliberations. A party evaluating his compromise position in the face of an order severing limited, potentially dispositive issues is likely to concentrate on the probable outcome of the first trial rather than on the possible overall increase in cost if the trial is not dispositive. When the first trial is not dispositive, its outcome is a far more significant factor than the possibility of greater overall cost, because the winner has survived and has eliminated some very troublesome contentions. He is, therefore, not unduly troubled about the overall greater expense. The loser has had a chance to prevail on limited issues, and his defeat is considerably more important to him than the greater overall cost of the litigation. However, in contrast, the potential saving from severance manifests itself at precisely the time when the overall cost factor might well play a predominant role in the parties' compromise deliberations.

In sum, then, it seems that whenever there are potentially dispositive or delimiting issues whose resolution requires the consideration

of a substantially narrower factual record than would a determination of all the issues posed, severance and early trial is warranted so that the potential cost of litigating all issues is eliminated as a predominant factor in shaping a compromise. As a secondary consideration only, severance may also serve to alleviate calendar congestion.

C. *The Proposed Solution*

The proposed statute that follows proceeds from this basic policy consideration and is designed to achieve the following related objectives:

(1) The standard of substantial potential saving is articulated in practical terms. Although the formulation accords with the result actually reached in a great many cases, it serves to emphasize the practical ends which can be accomplished through severance and to dispel the confusion created by the restrictive statements contained in many of the authorities.

(2) By making specific the availability of a stay of all proceedings other than with respect to the severed issues, the statute emphasizes that the severance device can be a means of achieving economy not only with respect to the trial iself but also with respect to the protracted pre-trial proceedings which now form so large a part of the total litigation burden. Although this result is also supported by authority, the instances in which severance has been accompanied by a stay of discovery have been infrequent, and there may be some lack of awareness on the part of the bar that such a result can be achieved.

(3) In the event that there is a significant potential duplication as well as a substantial possible saving, the court can attempt to realize the benefits of the saving while minimizing the detrimental consequences of potential duplication. This is accomplished by permitting the court to condition the grant of the severance motion upon the moving party's waiver of trial by jury. The other party, who is confronted with the possibility of having to participate in a proceeding which is potentially longer by reason of severance, thus has the option of avoiding that added burden by joining in the waiver of jury trial.[27] The case may be tried in segments before a judge who need not rehear the evidence offered at the first hearing which may also be relevant to issues litigated at the second hearing.

The court is also provided with the alternative of directing severance, but with a trial of all issues before a single jury. This alternative has the disadvantage of precluding a stay of discovery proceedings, for if a case is to be tried consecutively in segments before the

27. However, it should be noted that if one of several parties having a common position on a severed issue refuses to waive jury trial, the option is not available to the others.

same jury, the entire matter must be ready for trial at the same time. It is therefore not possible to conclude the first hearing and then engage in discovery with respect to the second hearing only if it should prove necessary. If, however, the saving from the stay of all pre-trial proceedings other than with respect to the severed issues is not a major factor, the court may adopt this alternative so as to avoid the necessity of putting the party objecting to severance in the position of having to choose between a potentially longer proceeding and waiver of trial by jury. However, neither alternative imposes an undue burden upon the parties.

The proposed statute is as follows:

> (A) At any time any party may move for an order directing that: (1) any issue or issues be severed; (2) all proceedings except those relating to the severed issue or issues be stayed until the completion of the trial of the severed issue or issues; (3) only certain pretrial proceedings shall be had with respect to the severed issue or issues; (4) the severed issue or issues shall be tried promptly after the completion of such pretrial proceedings; and (5) the parties shall take such other action as the Court may deem appropriate to expedite the conduct of such proceedings as may be necessary to bring the action to a conclusion.
>
> (B) Severance shall be directed and appropriate, implementing relief, authorized under subparagraph (A), shall be granted if the Court decides: (1) that all proceedings, including trial, with respect to the severed issue or issues will be substantially less protracted than all such proceedings with respect to the entire action; and (2) that there is a substantial possibility that the severed issue or issues will be determined so as (a) to be dispositive of the entire action, or (b) to limit substantially the issues remaining to be determined.
>
> (C) In the event that there is signficant duplication between the proof that will be adduced in the trial of the severed issues and that which will have to be adduced if the remaining issues are tried, the Court may: (1) condition the grant of the motion on the moving party waiving his right to trial by jury on all issues and upon such waiver, and, with the consent of all other parties otherwise entitled to trial by jury, direct that a single judge shall sit for all purposes in the action, or (2) direct that all proceedings preliminary to trial shall be completed and first the severed issues and then, if necessary, the remaining issues be tried to a single jury.

Notwithstanding the overriding considerations discussed below, this statute provides a sound resolution of the policy issues underlying the severance question. These competing considerations will now be discussed.

III. Possible Overriding Considerations

As previously indicated, the basic idea that severance is undesirable because it deprives judge and jury of the opportunity to "temper" the substantive law, underlies the objections to severance as a deprivation of right to trial by jury and as an improper intrusion into matters of state substantive law in diversity cases where state law would preclude severance. Beyond this, any jurisdiction which desires to preserve the "tempering" function is certainly free to do so as a matter of policy.

Both the jury trial objection[28] and the federal intrusion objection[29] have been unanimously rejected by the federal courts. The majority of state courts have likewise rejected the jury trial objection.[30] As a matter of precedent then, the matter appears to be well settled. The

28. Moss v. Associated Transp., Inc., 344 F.2d 23 (6th Cir. 1965); Swofford v. B & W, Inc., 336 F.2d 406 (5th Cir. 1964), *cert. denied*, 379 U.S. 962 (1965); Hosie v. Chicago & N.W. Ry., 282 F.2d 639 (7th Cir. 1960), *cert. denied*, 365 U.S. 814 (1961); O'Donnell v. Watson Bros. Transp. Co., 183 F. Supp. 577 (N.D. Ill. 1960). *See* United Air Lines, Inc. v. Wiener, 286 F.2d 302 (9th Cir. 1961), *cert. denied*, 366 U.S. 924 (1961). Two courts have expressly left open the question of whether trial to separate juries might be a deprivation of the right to jury trial. Hosie v. Chicago & N.W. Ry., *supra* at 642; Moss v. Associated Transp., Inc., *supra* at 26. *But see* O'Donnell v. Watson Bros. Transp. Co., *supra* at 585, expressly sustaining the practice and 2 W. Barron & A. Holtzoff, Federal Practice and Procedure § 943, at 191 (Wright ed. 1961), taking the same view.

29. Moss v. Associated Transp., Inc., 344 F.2d 23 (6th Cir. 1965); Lumbermens Mutual Cas. Co. v. Bell, 289 F.2d 124 (5th Cir. 1961).

30. Knight v. Calvert Fire Ins. Co., 268 S.W.2d 53 (Mo. Ct. App. 1954); Smith v. Western Pac. Ry., 144 App. Div. 180, 128 N.Y.S. 966 (1911), *aff'd*, 203 N.Y. 499, 96 N.E. 1106 (1911); Legare v. Urso, 216 A.2d 506 (R.I. 1966) (*semble*); Brown v. General Motors Corp., 67 Wash. 2d 278, 407 P.2d 461 (1965); *see* Raggenbuck v. Suhrmann, 7 Utah 2d 327, 325 P.2d 258 (1958). A number of states which employ severance have not explicitly passed on the jury trial objection. *See* cases cited notes 10 & 11 *supra*. *Contra*, Harbison v. Briggs Bros. Paint Mfg. Co., 209 Tenn. 534, 354 S.W.2d 464 (1962); Winters v. Floyd, 51 Tenn. App. 298, 367, S.W.2d 288 (1962). Texas, although permitting severance in many instances, has adopted, on non-constitutional grounds, a general rule against severance of liability and damage issues in personal injury actions. Iley v. Hughes, 158 Tex. 362, 311 S.W.2d 648 (1958). Peasley v. Quinn, 373 Mich. 222, 128 N.W.2d 515 (1964), rejects the constitutional objection but adopts a strong general policy similar to the Texas view. Swofford v. Glaze, 206 Ga. 574, 57 S.E.2d 823 (1950), holding it error to try separately a release defense likewise does not refer to the constitutional objection, but appears to reflect a general policy against severance. The state cases upholding against constitutional attack reversal and retrial limited to certain issues also support the constitutionality of the severance practice. Adams v. Hildebrand, 51 Cal. App. 2d 117, 124 P.2d 80 (1942); Yazoo & M.V.R. Co. v. Scott, 108 Miss. 871, 67 So. 491 (1915); Robinson v. Payne, 99 N.J.L. 135, 122 A. 882 (1923).

question has, however, assumed new importance by the apparent recognition of these objections by the Advisory Committee on the Federal Rules:—The question is at least of sufficient weight to preclude a clear legislative rejection at the present time. As part of the unification of admiralty and civil procedure that marked the recent amendment to the Federal Rules, a single rule on severance for admiralty and other civil cases was formulated. The draft was prepared by the Admiralty Committee and was designed to approve the admiralty practice of regularly severing liability and damage issues (coupled with the availability of interlocutory review from the liability ruling). At the insistence of the Advisory Committee on Civil Rules, however, the amendment was carefully couched so as to take no position with respect to severance in civil actions.[31] The committee cites as explanation for its reluctance to deal decisively with the severance question an article by Professor Weinstein which is highly critical of the practice of customarily severing liability and damage issues in personal injury actions. His criticism was based principally on the ground that the jury's role in "tempering" the avowed tort principles forms an essential part of the state "substantive" law which must be applied in diversity cases.[32] Presumably the committee did not intend to adopt Professor Weinstein's theoretical position since, if it had, *no* rule should have been enacted for diversity cases and the matter left entirely to state law. What apparently did move the committee was the underlying policy argument advanced by Professor Weinstein—that the jury's "tempering" role must be preserved. This interpretation is confirmed by an article recently published by a member of the Advisory Committee who took strong issue with the wisdom of severing liability and damage issues in personal injury actions because of its effect on the verdicts rendered. Apparently the number of instances where the jury found no liability increased, presumably because jury sympathy was not aroused by the evidence of plaintiff's injuries.[33]

The Advisory Committee notwithstanding, it seems that the cases rejecting the two objections are sound both as a matter of authority and policy. The principle is well settled that the constitutional right to trial by jury does not require the preservation of the precise form of common law trial so long as the role of the jury is retained in deciding all issues of fact.[34] Moreover this principle has been applied by

31. Notes of Advisory Committee, FED. R. CIV. P. 42(b), 28 U.S.C.A. (Supp. 1966).

32. Weinstein, *supra* note 3.

33. Wright, *supra* note 8.

34. *See* cases sustaining summary judgment procedure collected in 6 J. MOORE, FEDERAL PRACTICE ¶ 56.06 (2d ed. 1965). In *Ex parte* Peterson, 253 U.S. 300, 309-10 (1920), the Court said: "The command of the Seventh Amendment that 'the right

the Supreme Court to reject a jury trial objection in the closely analogous case of reversal and direction of a partial new trial.[35] In addition, the practice of trying all issues at a single trial before a single jury was by no means the only one employed at common law.[36] Finally, there is a lack of any evidence indicating that the tempering function of the jury was ever advanced by a common law court as a ground for deciding how to order the trial of issues.

Although the question is somewhat more difficult, it is submitted that the cases denying the objection of federal intrusion into state substantive law are likewise correct. However, the notion should be rejected that the matter can be simply disposed of on the ground that regulation of the function of the jury is entirely a matter of federal law under the federal constitutional requirement of trial by jury. *Herron v. Southern Pacific Co.*,[37] could be read to go this far. However, several factors cast doubt on whether such a sweeping generalization was the real basis of decision. First, *Herron* was a pre-*Erie* case whose validity is impaired to the extent it relied on the *Swift v. Tyson*[38] view of the federal courts' role in determining governing substantive law in diversity cases. Second, in *Herron* the federal constitutional provision was not neutral since depriving a party of the right to a directed verdict was regarded as a violation of the seventh amendment.[39] Third, interpreting *Herron* in *Byrd v. Blue Ridge Elec. Co-op.*,[40] the Court considered the state interest in having the matter decided by a judge and concluded that there was

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of trial by jury shall be preserved' does not require that old forms of practice and procedure be retained . . . . New deviees may be used to adapt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice." *See* James, *Right to a Jury Trial in Civil Actions*, 72 YALE L.J. 655 (1963), demonstrating that the availability of jury trial at common law did not reflect only or even principally a judgment as to the desirability of disposing of the case in this manner. A whole host of historical factors were operative in determining legal and equitable jurisdiction.

35. Gasoline Prod. Co. v. Champlin Ref. Co., 283 U.S. 494 (1931); followed in Thompson v. Camp, 167 F.2d 733 (6th Cir.), *cert. denied*, 335 U.S. 824 (1948).

36. Issues of fact raised by pleas in abatement (where tempering could have been important) were tried separately at common law. Moreover, the defendant could obtain a trial of the issues relevant to the plea in abatement only on pain of relying solely on the defense. Greer v. Young, 120 Ill. 184, 190, 11 N.E. 167, 170 (1887); Jericho v. Underhill, 67 Vt. 85, 30 A. 690 (1894); B. SHIPMAN, ON COMMON LAW PLEADING 402 (3d ed. 1923). The equity practice, insofar as it provided for a separate trial and foreclosure of defendant if unsuccessful, was the same. Kennedy v. Creswell, 101 U.S. 641, 644 (1879).

37. 283 U.S. 91 (1931). *Herron* held that a federal judge in a diversity case could direct a verdict on the ground that contributory negligence was established as a matter of law notwithstanding a state constitutional provision requiring the issue to go to the jury.

38. 41 U.S. (16 Pet.) 1 (1842).

39. The Court cited the earlier case of Capital Traction Co. v. Hof, 174 U.S. 1 (1899).

40. 356 U.S. 525 (1958).

"nothing to suggest that this rule [leaving the issue in question to the judge] was announced as an integral part of the special relationship created by the state statute."[41] Presumably, then, if the state jury practice was a fundamental part of the regulatory scheme, its adoption by the federal court might be required, at least absent an overriding federal concern. Such concern would not be present simply because the role of a jury was involved.

The Court was, of course, confronted with the *Dice*[42] case which held that a state court enforcing a right created by the Federal Employers' Liability Act must afford a jury trial on the issue of whether a release had been obtained by fraud because the right to trial by jury was considered "a substantial part of the rights accorded by the Act." Thus, the possibility of a legislative designation of a right to trial by jury (not even explicit in *Dice*) being characterized as "substantive" in the context of Federal-state choice of law was treated by the Court as a real one with which it had to deal.

It is submitted that if the state rule denying severance were a significant part of the state's regulation of the activity in question, and that interest outweighed the federal interest in severance, then state law might well have to apply.[43] This would certainly be conceivable if the state practice gave the jury more power and did not offend any principle embodied in the seventh amendment.

However, state decisions denying severance do not rest on the ground that the tempering function is an essential part of the regulatory scheme. The most difficult case is admittedly the personal injury action where it may indeed be true that the jury reflects doubt on liability by compromising on damages. Legislatures may have relied on this practice as ameliorating the severity of the contributory negligence rule. It may also be true that this is an unarticulated premise explaining some of the cases which deny severance. However, unless the state is prepared to adopt a clearly stated rule, there seems to be no necessity for federal court speculation concerning unexpressed state policy. Moreover, the articulated state grounds are procedural either in the classic sense (that is, a single trial is a simpler and more comprehensible[44] means of resolving a dispute) or in the historical

41. *Id.* at 538. Subsequent cases have re-emphasized that *Byrd* rests on the judgment that the state choice in assigning the issue to judge rather than jury was not an essential part of the regulatory scheme. Magenau v. Aetna Freight Lines, Inc., 360 U.S. 273, 278 (1959) (state practice left question of "employee" status upon which workman's compensation coverage depended to judge); Empire State Ins. Co. v. Chafetz, 302 F.2d 828, 830 n.4 (5th Cir. 1962) (applied state practice assigning determination of attorney's fees to judge).

42. Dice v. Akron, C. & Y. R.R., 342 U.S. 359 (1952).

43. *See* Empire State Ins. Co. v. Chafetz, 302 F.2d 828 (5th Cir. 1962).

44. This is the rationale of the Texas view coupled with an anomaly which might be created since partial new trials are not permitted. Iley v. Hughes, 158 Tex. 362, 311 S.W.2d 648 (1958).

sense (that is, the particular type of severance in question did not exist at common law).[45]

On the other hand, the federal interest is considerable. While a right to the most economical justice may not be afforded by the Constitution, it is certainly a matter of genuine importance. Moreover, secondary interests may be involved. Simplicity and comprehensibility as well as freedom from prejudice may also be achieved when severance is directed. Indeed the very tempering concept (assuming the wisdom of giving effect to this extra-legal discretion) is essentially inconsistent with the avowed traditional role of judge and jury in deciding a controversy.[46]

The recent *Hanna*[47] case, in which a new test of determining when the Federal Rules rather than state law is to be applied, clearly struck a balance, emphasizing the importance of the federal interest in making the federal courts a forum well conceived to reach a just result. The Court stated that a Federal Rule will be sustained if it regulates matters which "are rationally capable of classification as either [substantive or procedural]." Clearly, under this view there is warrant for granting the federal courts freedom to devise their own severance rules to the end of providing economical and informed dispositions of controversies.

Having disposed of the suggested doctrinal compulsions to honor the tempering function, all that remains is the resolution of the question as an open choice of policy. This writer's decision is an easy one. A legal system can and should, through legislative reform and enlightened judicial decision, strive to fashion substantive rules that are responsive to all significant policy considerations present in a particular case. Neither judge nor jury should function as a source of *ad hoc* normative judgments, which depart from the result dictated by the substantive law. If a matter is relevant under the governing law, it, of course, must be included with the issues severed for early trial. However, it is not necessary that judge or jury be apprised of all the facts in the entire litigation in order to reach a decision which "tempers" substantive law.[48]

What must also be appreciated is that if the tempering objection has any force, it will apply to virtually all cases where considerations of economy warrant severance. So far, those advancing the argument

45. This is the principal reliance of the Tennessee cases cited *supra* note 30.

46. The elimination of this tempering function (characterized as "prejudice" by its critics) was one of the purposes of the Northern District of Illinois Rule providing for severance of liability and damage issues in personal injury actions. O'Donnell v. Watson Bros. Transp. Co., 183 F. Supp. 577, 581, 585 (N.D. Ill. 1960).

47. Hanna v. Plumer, 380 U.S. 460 (1965).

48. *But see* 2 F. HARPER & F. JAMES, TORTS § 15.5, at 894 (1956); 5 J. MOORE, FEDERAL PRACTICE ¶ 49.05, at 2217 (2d ed. 1964).

have limited their attention to the role of the jury in rendering compromise verdicts in personal injury actions. But in every case which is suitable for severance the jury will be asked to give effect to some theoretically controlling policy judgment without hearing the merits. Affirmative defenses such as release, res judicata and the statute of limitations are all based on the idea that general considerations require that recovery be denied without regard to the merits of the particular controversey. Where a plaintiff may invoke the device effectively, it may well be because more remote considerations dictate that he prevail in the particular controversy without inquiry into fault. The liability for sale of unregistered securities referred to earlier is such a case. Sale of unregistered securities may be an entirely innocent act, yet policy dictates that it be actionable and that its possible harsh effect in a particular case not be considered. Jury rebellion at such a rule is certainly not an inconceivable result, especially if the rule is presented in the context of an overall case in which the jury concludes that the defendant has been blameless.

IV. CONCLUSION

There are no doctrinal objections to a flexible and extensive use of severance. The suggested rule seeks to articulate the criteria that should govern so that the device may be used to achieve economy in the litigation process and thus to diminish the importance of cost and burden as determinants of the result reached in litigation.