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CONTRIBUTION AND INDEMNIFICATION AMONG ANTITRUST COCONSPIRATORS REVISITED

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I. INTRODUCTION

AN article appearing in the *Fordham Law Review* in 1962 entitled "Apportionment of Damages and Contribution Among Coconspirators in Antitrust Treble Damage Actions"[1] began as follows:

> The title of this article may be misleading because it implies that law exists on the subject, whereas to the writer's knowledge, at least with respect to the question of contribution, there is not a single decision in point.[2]

It is the purpose of this article to review and analyze the decisions which have been rendered over the past decade on the subject of apportionment of damages among antitrust coconspirators.

The question of the rights and liabilities of alleged or adjudged antitrust coconspirators, both among themselves and against coconspirators who have not been joined, is of much greater significance today than in 1962. The increased antitrust activity in the early 1960's was but a prelude to the tremendous volume of private antitrust treble damage activity that would characterize the late 1960's and early 1970's. In addition, the courts have greatly expanded the concept of who is a possible coconspirator in an antitrust situation.[3] Finally, the growing popularity

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1. Corbett, Apportionment of Damages and Contribution among Coconspirators in Antitrust Treble Damage Actions, 31 Fordham L. Rev. 111 (1962) [hereinafter cited as Corbett].

2. Id.

3. Perhaps the most famous (or infamous) example of the expansion of this concept is Mr. Justice White's footnote 6 in Albrecht v. Herald Co., 390 U.S. 145, 150 (1968). In this case, a customer solicitation service which had won over the plaintiff-newspaper carrier's customers, and the newspaper carrier which had replaced the plaintiff were found to be antitrust coconspirators with the Herald Company, a newspaper publishing firm. Justice White thereupon commented that an even wider range of coconspirators could conceivably be implicated: "Petitioner's original complaint broadly asserted an illegal combination under § 1 of the Sherman Act. Under Parke, Davis [United States v. Parke, Davis & Co., 362 U.S. 29 (1960)] petitioner could have claimed a combination between respondent and himself, at least as of the day he unwillingly complied with respondent's advertised price. Likewise, he might successfully have claimed that respondent had combined with other carriers because the firmly enforced policy applied to all carriers, most of whom acquiesced in it. See

of antitrust treble damage class actions is sure to encourage the naming of a greater number of alleged coconspirators in order to assure the capability of the defendants to pay the vast amount of damages generally sought in such cases, and to enhance the possibilities of a settlement.

Unfortunately, the last decade has produced very little judicial guidance concerning contribution or indemnification[4] among antitrust coconspirators. There have been only two federal court decisions on point—the first in the Southern District of New York in *Sabre Shipping Corp. v. American President Lines, Ltd.*,[5] and the second in the Tenth Circuit Court of Appeals in *Wilshire Oil Co. v. Riffe*.[6] However, these decisions are highly relevant: *Sabre Shipping* ruled *against contribution* among antitrust coconspirators, while *Wilshire Oil* is the only federal court decision *permitting indemnification* among antitrust coconspirators. Since they are the only federal court decisions concerning allocation of damages among antitrust coconspirators, *Sabre Shipping* and *Wilshire Oil* must be carefully analyzed in terms of the recovery possibilities they may offer one antitrust coconspirator as against another. In light of the court's denial of contribution in *Sabre Shipping*, the possibilities for indemnification among antitrust coconspirators must be given particular attention.

United States v. Arnold, Schwinn & Co., 388 U.S. 365, 372 (1967). These additional claims, however, appear to have been abandoned by petitioner when he amended his complaint in the trial court.

"Petitioner's amended complaint did allege a combination between respondent and petitioner's customers. Because of our disposition of this case it is unnecessary to pass on this claim. It was not, however, a frivolous contention. See Federal Trade Commission v. Beech-Nut Packing Co., 257 U.S. 441 (1922); Girardi v. Gates Rubber Co. Sales Div., Inc., 325 F.2d 196 (9th Cir. 1963); Graham v. Triangle Publications, Inc., 233 F. Supp. 825 (E.D. Pa. 1964), aff'd per curiam, 344 F.2d 775 (3d Cir. 1965)." 390 U.S. at 150 n.6.

The Supreme Court subsequently ratified this liberal approach toward proving antitrust conspiracies in Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968):

"In any event each petitioner can clearly charge a combination between Midas and himself, as of the day he unwillingly complied with the restrictive franchise agreements, Albrecht v. Herald Co., 390 U.S. 145, 150, n.6 (1968); Simpson v. Union Oil Co., [377 U.S. 13 (1964)] or between Midas and other franchise dealers, whose acquiescence in Midas' firmly enforced restraints was induced by 'the communicated danger of termination,' United States v. Arnold, Schwinn & Co., 388 U.S. 365, 372 (1967); United States v. Parke, Davis & Co. 362 U.S. 29 (1960)." 392 U.S. at 142.

4. Contribution and indemnification are two different concepts. The majority of common law courts have not allowed contribution, i.e., the division of damages between joint tortfeasors. However they have, on occasion, permitted indemnification, i.e., shifting the entire loss in order to fasten "the ultimate liability upon the one whose wrong has been primarily responsible for the injury sustained." Union Stock Yards Co. v. Chicago, B. & Q.R.R., 196 U.S. 217, 227 (1905). See notes 7-10 infra and accompanying text.

5. 298 F. Supp. 1339 (S.D.N.Y. 1969).

6. 409 F.2d 1277 (10th Cir. 1969).

II. The Sabre Shipping Decision

The 1962 article posed two fundamental questions which had not then been resolved by the courts in a claim for contribution between antitrust treble damage defendants:

1. Is state law or federal law to apply in determining whether or not contribution should be permitted?

2. If federal law is applicable, what is that law to be? There were several possibilities:

(a) The majority common law rule which completely barred any claim to contribution among joint tortfeasors;[7]

(b) the minority common law rule which barred only intentional joint tortfeasors from contribution;[8]

(c) a rule allocating responsibility in some fashion among intentional and unintentional joint tortfeasors, such as found in state contribution statutes[9] and the Uniform Contribution Among Tortfeasors Act.[10]

Sabre Shipping was the first and remains the only federal decision to have considered directly and to have answered these questions. It held that federal common law is to be applied, and that this law is that there is no contribution whatsoever among alleged antitrust coconspirators.

The complaint in *Sabre Shipping* charged that approximately thirty-eight ocean shipping conference members had participated in a price fixing conspiracy in violation of Sections 1 and 2 of the Sherman Anti-Trust Act.[11] Specifically, Sabre Shipping Lines alleged that the defendant conference members had concertedly reduced rates under the authority of certain foreign shipping conferences and had thereby destroyed the plaintiff's shipping business. Subsequent to the filing of Sabre's complaint, twenty-five of the defendants settled with Sabre and entered into a covenant not to sue. The complaint against these twenty-five defendants was dismissed without prejudice. Five of the remaining defendants, after moving unsuccessfully for summary judgment, filed a third party complaint against seventeen of the settling defendants. The third party complaint alleged that any liability arising from Sabre's claim would be

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7. See Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282 (1952). See generally Corbett, supra note 1, at 129-32.

8. See Merryweather v. Nixan, 101 Eng. Rep. 1337 (K.B. 1799); Bailey v. Bussing, 28 Conn. 455 (1859); Nickerson v. Wheeler, 118 Mass. 295 (1875). See generally Corbett, supra note 1, at 132-34.

9. See, e.g., N.Y. C.P.L.R. § 1401 (McKinney 1963). See generally Corbett, supra note 1, at 134-36.

10. 9 Uniform Laws Ann. 233 (1957). See generally Corbett, supra note 1, at 134-36.

11. 15 U.S.C. §§ 1-2 (1970).

joint as between the third party plaintiffs and defendants, and requested contribution or indemnification in the event of a finding of liability. The third party defendants moved for summary judgment.

Both the third party plaintiffs and defendants apparently agreed that the court should find federal and not state law to be applicable, but disagreed as to what the federal law, both as to contribution and indemnification, was or should be. The third party plaintiffs asserted three basic arguments: first, that in the absence of federal statutory and case law, the court should formulate a uniform federal law in keeping with other federal statutes which expressly provide for contribution,[12] federal local law as fashioned for the District of Columbia,[13] and the trend in state statutory law to favor contribution;[14] second, that since the third party plaintiffs were not *in pari delicto* with the third party defendants, they should be indemnified by the third party defendants in the event of a finding of liability; third, that the third party defendants had agreed in a shipping conference agreement, to which all the original defendants were parties, to share liability among all conference members for acts done in compliance with the agreement. In sum, the third party plaintiffs claimed that as a matter of federal antitrust law they were entitled to contribution from their alleged coconspirators, and that both as a matter of federal antitrust law and common law contractual obligation, they were entitled to indemnification.[15]

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12. "There is no provision in the antitrust statutes providing for contribution, but the third party plaintiffs urge that the fact that such a provision is found in the Securities Act of 1933 and 1934 should lead this Court to hold that, in the absence of statute, such a right should be recognized as support for allowing contribution among antitrust conspirators." 298 F. Supp. at 1345 (citation omitted).

13. "Finally, they would have us adopt and follow decisions emanating from the District Court in Washington, D. C., particularly Knell v. Feltman, 85 U.S. App. D.C. 22, 174 F.2d 662 [(D.C. Cir. 1949)], which limiting the Merryweather rule to intentional torts, held to the rule adopted in 1942 for the District Court that as between two unintentional wrongdoers, that is, two defendants found to be negligent whose negligence contributed to plaintiff's harm, there could be contribution without the need for a joint judgment against them." Id.

14. "The trend of state law appears to be in favor of having all wrongdoers contribute financially to a recovery. Twenty-three (23) states have legislation favoring contribution in varying degrees; six of them, including New York, limit contribution to joint judgment defendants while the others have adopted in whole or in part the Uniform Contribution Among Joint Tort Feasors Act." Id. at 1343 n.1.

15. It is to be noted that the third party plaintiffs' crossclaim, while based in part on federal antitrust law, did not allege a violation of the antitrust laws by the third party defendants which damaged them directly, and for which they sought treble damages. Rather, they claimed that if the plaintiff established its claim for treble damages under the antitrust laws, then the third party defendants were liable in whole or in part for these damages.

The third party defendants contended that federal common law did not permit contribution and that this was the law that should be applied, regardless of state law. Secondly, they argued that the third party plaintiffs' claim for indemnification under federal antitrust law must fail because the claim, resting on a theory of a passive tortfeasor claiming against an active tortfeasor, would not lie when joint wrongdoing was alleged. Finally, they argued that indemnification under the shipping conference agreement should not be allowed as a matter of public policy and as a matter of contract law.

The court quickly disposed of any doubts as to whether state or federal law was applicable. It determined that the relevant economic interests before the court, and the basis of its jurisdiction, were federal. Moreover, the respective rights of the defendants among themselves were in question because a federal statute had condemned certain acts as unlawful. Accordingly, federal law was to be applied.[16]

The court then considered the question of what the federal law on contribution was or should be:

> In the United States, the federal common law rule, not limited to intentional torts, emerges from Union Stockyards Co. v. Chicago, B. & Q.R.R. Co., 196 U.S. 217, 25 S. Ct. 226, 49 L.Ed. 453 (1905), which holds that, as between two defendants in pari delicto, contribution or indemnity would not lie at the suit of the defendant who had been sued individually, had been found actively negligent, and had paid the judgment. The reason given was that contribution or indemnity lies only in those cases where the defendant sued is found to be only passively negligent.[17]

The court then observed that the United States Supreme Court had never modified its holding in *Union Stock Yards* even when the opportunity was present to fashion its own federal rule on contribution.[18] The court

Cf. United States v. Scophony Corp. of America, 69 F. Supp. 666 (S.D.N.Y. 1946), rev'd on other grounds, 333 U.S. 795 (1948), in which Scophony Corporation, named as a coconspirator with several other defendants, cross-claimed for treble damages against these defendants alleging antitrust violations injuring it arising out of the same subject matter as the government's complaint. See also Old Homestead Bread Co. v. Continental Baking Co., 47 F.R.D. 560 (D. Colo. 1969) (permitting antitrust treble damage crossclaim by alleged antitrust coconspirator against other alleged defendant coconspirators); Borden Co. v. Sylk, 42 F.R.D. 429 (E.D. Pa. 1967) (allowing antitrust crossclaim for treble damages under the Robinson-Patman Act in a suit brought originally to collect on promissory notes).

16. 298 F. Supp. at 1343-44. The Supreme Court appears to have buttressed the court's conclusion that federal law should be applied when in Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971), it assumed that the question of whether the release of one antitrust defendant released his coconspirators was a matter to be determined under federal law without reference to a particular state's rule on releases.

17. 298 F. Supp. at 1343-44.

18. "Almost fifty years after the Union Stock Yards case, in Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282, the Court made it clear that it had no intention

pointed out that the Supreme Court has recognized indemnification as being possible under the federal common law, while contribution remained completely barred by the Court.[19]

The court ruled that not only were all considerations of contribution to be excluded from the third party plaintiffs' complaint, but all considerations of indemnification (apart from the contract claim) were also to be excluded:

> [Indemnification] cannot be applied to the claim here for it is charged that all the defendants acted as joint conspirators under the one agreement and there can be no independent duty owed from one to the other. The legal considerations underlying indemnity find no room for application to co-conspirators who act as agents for one another and are particeps criminis.[20]

The court found no merit in the third party plaintiffs' arguments in favor of contribution. As to the argument that federal statutes expressly permitting contribution, such as the Securities Acts of 1933 and 1934, lent support to recognizing contribution where the federal statute was silent, the court rather viewed Congressional silence in the antitrust area as an indication that contribution was to be excluded. The court also pointed out that a rule such as that applied in the District of Columbia

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of departing from the common law rule against contribution with the following language:

> In the absence of legislation, courts exercising a common-law jurisdiction have generally held that they cannot on their own initiative create an enforceable right of contribution as between joint tortfeasors.
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> . . . .
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> We have concluded that it would be unwise to attempt to fashion new judicial rules of contribution and that the solution of this problem should await congressional action." Id. at 1344 (citations omitted).

19. "What the Court has done in the interests of justice in federal maritime law where the shipowner is . . . held liable without fault, is to permit impleader of the stevedore on the theory not of contribution but of indemnity, much as that discussed in the Union Stock Yards case. The claim recognized is that of an independent wrong done by the impleaded defendant, not to plaintiff but to the defendant sued, arising out of a breach of a contract for services to be rendered by the third party defendant and a concomitant right on the part of the third party defendant to counterclaim. This was the holding of Federal Marine Terminals, Inc. v. Shipping Co., 394 U.S. 404, in language which shows how deep-rooted in our jurisprudence is the common law rule against contribution: 'This holding is in no wise a departure from our decisions in Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282, that we would not "fashion new judicial rules of contribution" between the shipowner and the stevedoring contractor as joint tortfeasors. Marine Terminals is not seeking contribution. It is not asking Burnside to share responsibility for their joint negligence with respect to McNeill. Rather the counterclaim seeks recovery of the full amount of Marine Terminals' liability under the Act to McNeill's representative; and it is founded not on Burnside Shipping's wrong to McNeill but on its independent wrong to Marine Terminals.'" Id. (emphasis deleted) (citations omitted).

20. Id. at 1345 (citation omitted).

courts allowing contribution among unintentional joint tortfeasors was not only inappropriate in the *Sabre Shipping* situation, which involved alleged intentional wrongdoing, but also inconsistent with the rulings of the Supreme Court.[21] It concluded:

> If the Supreme Court was reluctant to depart from the rule as between unintentional tortfeasors, . . . how presumptuous it would be for this Court to do so for the benefit of intentional wrongdoers, whose acts are so severly castigated by Congress, to the point of providing criminal sanctions including imprisonment. Congress is well aware of the state trend toward contribution; it must be presumed to have good reason for not modifying the common law rule, application of which does no violence to Congressional intent. The private antitrust suit serves an important public purpose of presenting "an ever present threat to deter anyone contemplating business behavior in violation of the antitrust laws." If one or two defendants sued by a plaintiff, who alleges in this case it has been driven out of business, could turn around and implead all other persons directly and indirectly involved in the alleged conspiracy, it could well spell death to the plaintiff's suit and thus thwart the statutory purpose. Plaintiff's choice to sue those of the defendants it considers most culpable or most capable of making him whole would be totally nullified, and control of his action would be taken out of his hands. It would operate to prevent his receiving prompt recovery since no defendant would settle with him if he was to find himself back in the suit as a third party defendant.
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> We conclude that, even though plaintiff had originally sued all defendants as joint tortfeasors, it had the absolute right to settle with some of them and covenant not to continue its suit against them, while reserving its right to continue against the non-settling defendants.[22]

Although the court dismissed the third party plaintiffs' claim to indemnification as a matter of antitrust law, it declined to dismiss their claim for indemnification based upon the third party defendants' participation in the shipping conference agreement, and ruled that the ultimate merits of this contract claim should await final determination of Sabre's antitrust claims.[23]

III. The Sabre Shipping Decision Analyzed

A. *Contribution*

Obviously, the *Sabre Shipping* decision will give little comfort to an alleged antitrust coconspirator who may consider impleading, or cross-claiming against, another coconspirator for contribution or indemnification. There appears to be no way to read the court's decision except as denying

21. Id. at 1346.

22. Id. (citation omitted). The Supreme Court's holding in Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 347 (1971), that "a party releases only those other parties whom he intends to release" would appear to be consistent with the district court's emphasis on a plaintiff's freedom to settle. However, it should be noted that the Supreme Court did not deal with the separate issues of contribution and indemnification in Zenith.

23. 298 F. Supp. at 1347.

contribution in all circumstances—whether the plaintiff has chosen to name all coconspirators as defendants or not. This holding may present some significant and perhaps harsh consequences for an alleged antitrust coconspirator. For example, consider the plight of a distributor who is a party to a vertical price-fixing or tie-in arrangement which has been forced upon him by a manufacturer, coupled with the presence of an injured and litigious competitor who has decided to sue.[24] Under *Sabre Shipping*, the extent of the distributor's liability and his very financial existence may well rest on such vagaries as how many defendants the competitor chooses to name, the financial condition of the particular defendants named, the basis on which the competitor may settle with some defendants, or simply, on where jurisdiction or venue is proper. In our example, if both the distributor and the manufacturer are named as defendants, and jurisdiction and venue are proper, and the manufacturer is financially sound, fortune has, to some extent, smiled on the distributor. Since both the manufacturer and the distributor have been named as codefendants and will share damages in the event of a finding of liability, contribution is not a relevant concern, except in the event of settlement between the manufacturer and the competitor.[25] However, if the manufacturer is not named as a defendant because of jurisdiction, venue, the distributor's financial resources, the manufacturer's lack thereof, or any number of reasons, the distributor may be in a very unfortunate position. Under the *Sabre* holding, he may be forced to pay the competitor's entire treble damage claim, plus the competitor's attorneys' fees, without any opportunity of seeking contribution from the manufacturer. While it is true that the Supreme Court's holding in *Perma Life Mufflers, Inc. v. International Parts Corp.*[26] may permit the distributor to sue the manufacturer for triple *his* damages arising from the antitrust violation, there is no precedent for his claiming (in his antitrust suit against the manufacturer)

24. Coercion is not necessarily a defense to a charge of antitrust conspiracy. For example, the Supreme Court stated in United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948):

"There is some suggestion on this as well as on other phases of the cases that large exhibitors with whom defendants dealt fathered the illegal practices and forced them onto the defendants. But as the District Court observed, that circumstance if true does not help the defendant. For acquiescence in an illegal scheme is as much a violation of the Sherman Act as the creation and promotion of one." Id. at 161.

See also Perma Life Mufflers v. International Parts Corp., 392 U.S. 134 (1968); Albrecht v. Herald Co., 390 U.S. 145 (1968); Flintkote v. Lysfjord, 246 F.2d 368 (9th Cir. 1957); United States v. General Elec. Co., 82 F. Supp. 753 (D.N.J. 1949).

25. If the manufacturer and the competitor settle, the burden of the distributor is alleviated to the extent that the settlement amount is credited against plaintiff's claimed damages. See E. Timberlake, Federal Treble Damage Antitrust Actions 364 (1965).

26. 392 U.S. 134 (1968).

that his injury includes his treble damage payments to the competitor.[27] Indeed, it is not inconceivable that the distributor has benefited financially from the restrictive arrangement, and has no damages at all to claim in an antitrust suit against the manufacturer.

B. *Indemnification*

If *Sabre Shipping* is eventually followed by other federal courts[28] and contribution is barred among antitrust coconspirators, indemnification may be the only remaining legal basis for apportioning damages among antitrust coconspirators.

The court in *Sabre Shipping* distinguished between indemnification among coconspirators sought on a theory of independent duty owed from one coconspirator to another, and indemnification among coconspirators claimed under the antitrust laws. The court did not dismiss the third party plaintiffs' claim for indemnification based on contractual liability arising from the shipping conference agreement.[29] It did deny their claim for indemnification under the antitrust laws, however, ruling that "no independent duty owed from one to the other" because they had intentionally acted as coconspirators under the agreement.[30] The court did not make it clear whether indemnification claimed under the antitrust laws should be barred in all circumstances or only under such facts as alleged in *Sabre Shipping*. Is indemnification still possible under the antitrust laws where coercion by a coconspirator is alleged, or if an alleged coconspirator can demonstrate at trial that he, as opposed to other coconspirators, did not intentionally violate the antitrust laws? There are indications in the *Sabre Shipping* opinion that the court may not have intended to bar indemnification absolutely and was addressing itself only to the facts in the case before it.

One indication is that the court's ruling on indemnification is stated in terms of *Sabre Shipping's* complaint, which alleged intentional joint wrongdoing by all defendants. A second indication is that the court cites

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27. Possibly one reason for a lack of precedent, other than the novelty of the issue, is that the distributor's participation in the conspiracy may act as a supervening factor between the manufacturer's antitrust violation and the distributor's antitrust claim for damages paid to the competitor. That is, a direct causal connection between manufacturer's antitrust violation and the distributor's liability to the competitor may be difficult to establish.

28. Sabre Shipping has not been cited in a reported federal court decision. However, this most likely reflects not a criticism of the decision as much as the infrequent occurrence of these issues.

29. 298 F. Supp. at 1345. See text accompanying note 23 supra.

30. 298 F. Supp. at 1345. See text accompanying note 20 supra.

the district court's decision in *deHaas v. Empire Petroleum Co.*,[31] for the proposition that there could be no indemnification among antitrust coconspirators alleged to be *in pari delicto*. However, the court in *deHaas* expressly held that there could be indemnification under the Securities and Exchange Act of 1934[32] where liability for participation in an illegal scheme attached only by operation of law:

> Empire's third-party complaint stands on a different footing. A corporation is a principal which can be liable for fraud only through the conduct of its agents. Since Empire's liability would attach only through operation of law, an unfavorable verdict on the main complaint would not bar it from seeking indemnification from those officers and directors who directly participated in the fraud. The motion for summary judgment to dismiss Empire's claim for indemnification will be denied.[33]

An additional indication that the court's decision was intended to be limited to cases involving alleged intentional joint wrongdoing is that its discussion of the development of federal common law on indemnification does permit indemnification in certain instances. As discussed above,[34] the court relies primarily on the Supreme Court's decision in *Union Stock Yards*[35] for its statement of the federal common law. *Union Stock Yards* states in relevant part:

> [T]he general principle of law is well settled that one of several wrongdoers cannot recover against another wrongdoer, although he may have been compelled to pay all the damages for the wrong done. In many instances, however, cases have been taken out of this general rule, and it has been held inoperative *in order that the ultimate loss may be visited upon the principal wrongdoer*, who is made to respond for all the damages, *where one less culpable*, although legally liable to third persons, may escape the payment of damages assessed against him by putting the ultimate loss upon the *one principally responsible for the injury done.*[36]
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> . . . .
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> Other cases might be cited, which are applications of the exception engrafted upon

31. 286 F. Supp. 809 (D. Colo. 1968), modified on other grounds, 435 F.2d 1223 (10th Cir. 1970).

32. 15 U.S.C. §§ 78a-78hh-1 (1970).

33. 286 F. Supp. at 816, citing Handel-Mastschappij H. Albert De Bary & Co., NV v. Faradyne Elec. Corp., 37 F.R.D. 357 (S.D.N.Y. 1964). The Handel-Mastschappij case is an interesting one. The District Court for the Southern District of New York denied a third party defendant's motion to dismiss a third party complaint seeking indemnification where the third party defendant, an underwriter, passed on as current an outdated prospectus of the defendant without the defendant's authorization:

" 'Thus where the parties are not in pari delicto as where a principal is liable by operation of law for the affirmative tortious conduct of his agent the former is entitled to indemnification from the latter and may implead said agent as a party who is or may be liable over to him.' " Id. at 359 (citation omitted).

34. See text accompanying note 17 supra.

35. Union Stockyards Co. v. Chicago, B. & Q.R.R., 196 U.S. 217 (1905).

36. Id. at 224 (emphasis added).

the general rule of non-contribution among wrongdoers, *holding that the law will inquire into the facts of a case of the character shown with a view to fastening the ultimate liability upon the one whose wrong has been primarily responsible for the injury sustained.*[37]

Moreover, as noted above,[38] the district court relied on the Supreme Court's adherence to the *Union Stock Yards* holding as set forth in its subsequent maritime law decisions, *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*[39] and *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*[40] The court in *Sabre Shipping* expressly recognized that these decisions, while barring contribution, clearly allowed for indemnification, at least in the instance where the shipowner had been held liable without fault.[41]

From the viewpoint of the issue of indemnification among antitrust coconspirators, it is unfortunate that the court did not clarify the circumstances in which it would recognize the possibility of indemnification. In the final analysis, perhaps all that can be said definitely of the *Sabre Shipping* decision is: (1) it left open the possibility of indemnification among antitrust coconspirators based on a contractual obligation independent of the antitrust claim asserted; and (2) an argument can be made that the decision did not eliminate indemnification under every circumstance as a matter of antitrust law and that indemnification in instances other than intentional joint antitrust violations is possible. Because of the court's lack of clarity, the *Sabre Shipping* opinion may not be persuasive in subsequent decisions on the issue of indemnification among antitrust coconspirators. If this proves to be true and the *Sabre Shipping* decision is discounted on the issue of indemnification, the *Wilshire Oil* decision[42] may be our only guide. *Wilshire Oil* holds quite clearly that, at least in one instance, indemnification is possible among antitrust coconspirators.

IV. The Wilshire Oil Decision

As discussed above, the court in *Sabre Shipping* declined to dismiss the third party plaintiffs' claim for indemnification based on the shipping conference agreement, and ruled that the ultimate merits of this contract claim should await final determination of Sabre's antitrust claims. Thus,

37. Id. at 227 (emphasis added).
38. See notes 18 & 19 supra and accompanying text.
39. 342 U.S. 282 (1952).
40. 394 U.S. 404 (1969).
41. 298 F. Supp. at 1344.
42. Wilshire Oil Co. v. Riffe, 409 F.2d 1277 (10th Cir. 1969).

the *Sabre Shipping* decision can be read as recognizing the possibility of indemnification where a claim for indemnification is based on a legal principle independent of the antitrust laws. Such a reading would appear to be supported by the Tenth Circuit's decision in *Wilshire Oil.* This case involved a claim for indemnification based on an obligation other than under the antitrust laws. The court held that such a claim for indemnification could properly lie, even as between antitrust coconspirators.

The essential facts of the *Wilshire Oil* decision are as follows:

The Wilshire Oil Company of Texas (Wilshire) incurred various penalties, damages and expenses in conjunction with criminal and civil antitrust suits filed against it as the result of its Riffe Petroleum Division's conspiracy to fix the prices of asphalt. These penalties, damages and expenses included a fine paid pursuant to a nolo contendere plea, settlement payments in a civil action, and attorneys' fees and expenses incurred in these criminal and civil antitrust actions. Wilshire then sued Masterson, one of Riffe's salesmen, and various other employees for indemnification.

Wilshire claimed that the unauthorized price-fixing activities of Masterson and the other employees were breaches of the fiduciary duty owed to Wilshire, and were the sole cause for Wilshire's incurring liability. As the Kansas district court summed up Wilshire's claim: "In effect, Wilshire claims that it unknowingly and innocently bought an on-going conspiracy when it acquired Riffe Petroleum Company."[43]

As damages, Wilshire claimed all amounts which it had paid in satisfaction of any judgments, fines and settlements, and all expenses attributable to those actions.

Masterson moved to dismiss the complaint for failure to state a claim upon which relief could be granted. The district court granted the motion[44] on the basis that it would violate general public policy and frustrate the purposes of the antitrust laws to permit indemnification:

> Success by this plaintiff in the present action would mean that the nineteen other criminal defendants who pleaded nolo contendere to the same charges could seek out some of their corporate officers and agents, and escape effective criminal punishment. To sanction this would defeat one of the basic purposes of the antitrust laws.
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> . . . [T]he conclusion is inevitable that the punishment assessed or possibly to be assessed against Wilshire must be borne by the corporation as such, without benefit of exoneration or indemnity, and that it was not the intent of Congress that a corporation

43. No. KC-2716 (D. Kan., Feb. 16, 1968), aff'd in part and rev'd in part, 409 F.2d 1277 (10th Cir. 1969).

44. Wilshire's claim against two other employees was dismissed by the district court for lack of jurisdiction. The district court was affirmed by the court of appeals on this decision. 409 F.2d at 1279-81.

should, in effect, escape punishment for violation of the antitrust laws by later recovering from its agents any fines or criminal recoveries assessed against it.[45]

The Tenth Circuit Court of Appeals unanimously overturned the district court's decision and held that Wilshire could seek indemnification against Masterson for all actual damages and expenses claimed.[46] The court repudiated the district court's assumption that to permit indemnification would frustrate the purposes of the antitrust laws:

> [I]t is essential to appreciate the specific theory upon which this claim is based. The liability of the employee is premised upon a breach of the fiduciary duty owed to the corporation. The fact that this breach of duty is sought to be demonstrated by referring to an antitrust violation does not operate to convert the suit into one arising under antitrust laws . . . . There is therefore no occasion to gauge appellant's remedial rights by the statutory penalties either in the sense of being concerned with treble damages or with the exclusivity or preemption of those rights by the antitrust laws. It follows that the fact that antitrust remedies have been provided by statute does not deprive Wilshire of its traditional common law right to recover for injuries occasioned by errant employees.[47]

V. The Wilshire Oil Decision and Indemnification Among Antitrust Coconspirators Analyzed

It could be argued that the *Wilshire Oil* decision related only to a unique fact pattern involving purely vicarious liability as between a corporation and an employee. However, there appears to be no reason to give the decision such a narrow reading, provided that an independent duty owed by one coconspirator to another, and its breach resulting in liability, can be demonstrated. A breach of fiduciary duty as alleged in *Wilshire Oil*, a breach of a contractual obligation, as alleged in *Sabre Shipping*, or the breach of any duty or obligation which resulted in one alleged coconspirator having to pay an antitrust judgment should be grounds for seeking indemnification.

Of course, a broad reading of the *Wilshire Oil* decision would be appropriate only in cases where the granting of indemnification would be consistent, or at least not inconsistent, with the purposes of the antitrust laws. This is an obvious prerequisite, but unfortunately, one that is difficult to deal with. Neither the antitrust statutes themselves, nor their legislative history, mention indemnification among coconspirators. Moreover, judicial guidance on the matter has been sparse and far from clear. Fundamental to the *Wilshire Oil* decision is a recognition by the court of appeals that granting indemnification among antitrust coconspirators does

45. No. KC-2716 (D. Kan. Feb. 16, 1968).
46. 409 F.2d at 1283-84.
47. Id. at 1284 (citations omitted).

not necessarily violate the spirit and objectives of the federal antitrust laws.[48] On the other hand, the Supreme Court, in its 1968 decision in *Perma Life Mufflers, Inc. v. International Parts Corp.*,[49] emphasized that the public interest and statutory aim of deterring antitrust violations and enforcing the antitrust laws are of paramount importance, and are to override considerations of individual equities as between antitrust coconspirators.[50]

In *Perma Life Muffler*, the court held that a treble damage plaintiff, who may have some culpability as to an arrangement in violation of the antitrust laws, is not barred by the doctrine of *in pari delicto* from bringing suit against a more reprehensible coconspirator.[51] The rationale behind the *Perma Life* decision, as expressed by the Court, was that antitrust suits are to be encouraged, even though the prospective plaintiff may be reprehensible to some degree, and even though a successful suit may result in windfall profits for the plaintiff.[52]

Although by analogy the *Perma Life* decision provides some guidance on the issue of indemnification between antitrust coconspirators of varying degrees of culpability, the question of the consistency of indemnification with the objectives of the antitrust laws is far from answered. Substantial arguments can be raised in support of either side of this issue.

These arguments can perhaps best be illustrated from the viewpoint of our hypothetical distributor.[53] Recall that this distributor was coerced or pressured by the manufacturer to maintain resale prices or to purchase a less desireable product of the manufacturer in order to obtain the product he wanted in the first place. Suppose that the distributor now faces an antitrust suit by the manufacturer's competitor, either alone or with the manufacturer as codefendant. As noted above, if the distributor alone has been sued, he faces the possibility of paying all of the plaintiff's damages plus attorneys' fees. If both the distributor and the manufacturer are sued, the distributor may be held liable for at least half of the award to the plaintiff. Accordingly, the distributor may seriously consider cross-claiming against or impleading the manufacturer for indemnification.

In support of his claim for indemnification, the distributor would certainly offer proof that he is not an intentional coconspirator,[54] or not the

48. See id.

49. 392 U.S. 134 (1968).

50. Id. at 138-39.

51. Id. at 139.

52. Id.

53. See notes 24-27 supra and accompanying text.

54. See Sabre Shipping Corp. v. American President Lines, 298 F. Supp. 1339, 1345 (S.D.N.Y. 1969); text accompanying note 20 supra.

one "primarily responsible for the injury sustained."[55] In accordance with the *Wilshire Oil* holding, the distributor could also argue that a duty or obligation owed to him, other than under the antitrust laws, had been breached by the manufacturer. The disposition of this issue would, of course, depend on the facts of the case, unless the court chose simply to recognize that the manufacturer breached his duty not to pressure or coerce the distributor into a violation of the antitrust laws.

Would it be inconsistent with the objectives of the antitrust laws to grant indemnification to the distributor? As discussed above,[56] the Supreme Court ruled in *Perma Life Muffler* that the more culpable antitrust coconspirator should be made to bear the burden of liability for antitrust violations.[57] Moreover, the deterrent purposes of the antitrust laws[58] would certainly be served if the manufacturer had to face the possibility that he may be found liable for damages not only in an antitrust suit brought by the distributor, but also through indemnification of the distributor for the treble antitrust damages he may have paid. It could also be argued that, without a right of indemnification, the distributor could incur antitrust liability which could be enormously and perhaps unjustly greater than the damages he might claim against the manufacturer in his own antitrust suit. There is also the practical consideration that if the distributor is forced to pay treble damages plus attorneys' fees to the competitor, whether shared with the manufacturer or not, he may be deprived of the economic wherewithal to launch his own antitrust suit against the manufacturer.

From the viewpoint of aiding government enforcement of the antitrust laws, the distributor would appear to have a much greater incentive to report the manufacturer's antitrust violations to the government, or to testify on the government's behalf concerning the illegal scheme, if he had the assurance that he could seek indemnification in treble damage private actions which might arise as a result of his disclosure of the conspiracy. This reasoning is consistent with the apparent tendency of government enforcement authorities to prosecute the more active and responsible participants in an antitrust conspiracy rather than prosecuting every theoretical coconspirator.

Finally, it is arguable that the distributor is not necessarily excluded from the group which the antitrust laws were designed to protect. To some extent, the distributor is a victim of the antitrust violation in that the manufacturer has coerced him to enter into the illegal scheme.[59]

55. See Union Stockyards Co. v. Chicago, B. & Q.R.R., 196 U.S. 217, 227 (1905).

56. See text accompanying notes 49-52 supra.

57. 392 U.S. at 138-39.

58. See id. at 139; Flintkote Co. v. Lysfjord, 246 F.2d 368 (9th Cir. 1957).

59. The Eighth Circuit Court of Appeals in Johnson v. J. H. Yost Lumber Co., 117

On the other hand, it is possible that a cross-claim or impleader based on the distributor's claim for indemnification could interfere with the plaintiff's right to retain control of his antitrust suit. The importance of this right was emphasized by the district court in *Sabre Shipping*.[60] However, it must be remembered that the *Sabre Shipping* court did acknowledge the possibility of indemnification under the contractual obligations of the shipping conference agreement, and was willing to entertain this claim pending a determination of the validity of the plaintiff's claim.

A second argument against indemnification is that barring the distributor from being indemnified could create a substantial deterrent to his entering into arrangements that are illegal under the antitrust laws. Generally speaking, however, it would seem more important to create such a deterrent with respect to the more culpable party, in this case, the manufacturer.

Perhaps more persuasive is the argument that indemnifying the distributor would relieve him of liability for his acquiescence in the illegal arrangement. Indeed, not only would he be relieved of liability, but under *Perma Life Muffler* the possibility is open that he may reap windfall profits in a treble damage suit against the manufacturer.[61] Moreover, it could be argued that denying the distributor indemnification in the suit by the manufacturer's competitor is consistent with the spirit of *Perma Life Muffler* in that, unindemnified, the distributor would have more incentive to commence his own antitrust suit against the manufacturer in an attempt to alleviate some of the liability he may have incurred in the competitor's suit.

VI. Conclusion

The article appearing in this Law Review in 1962 noted that perhaps one explanation for the complete lack of authority in the area of contribution and indemnification among antitrust coconspirators was that most treble damage codefendants tend to agree upon their respective liabilities among

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F.2d 53 (8th Cir. 1941) indicates that a party coerced by coconspirators into acting in accordance with the conspiracy is to be treated as a victim and not a beneficiary of the restrictions imposed on him:

"The combination and conspiracy charged . . . was a combination to deflect the natural course of trade. Such a combination is not only an unlawful invasion of the rights of the parties at whom the concert of action is aimed, but also of the parties who are to be coerced into refusing business relations with them." Id. at 61.

60. 298 F. Supp. at 1346.

61. 392 U.S. at 139.

themselves.[62] The *Sabre Shipping* and *Wilshire Oil* cases illustrate two instances over the past ten years in which such liability could not be settled among alleged or adjudged coconspirators without raising the issues of contribution and indemnification before a federal court. To be sure, two instances over a decade is a very small number. However, the increasing number of private treble damage actions make it quite likely that, in the absence of legislation, the courts will face these issues more frequently in the future.

It must be recognized that a complicated legal issue raised only twice over a decade is not the stuff of which readily forthcoming legislation is made. Thus, it is highly likely that the next federal court to be confronted with the issue of contribution, or more likely, indemnification, among antitrust coconspirators will have only *Sabre Shipping* and *Wilshire Oil* as precedent. Likewise, the antitrust attorney may well have only these two decisions as guidelines, and will continue to face an extremely difficult problem in advising a client named as an antitrust coconspirator of his rights vis-à-vis other alleged coconspirators.

As to contribution, it is difficult from the standpoint of legal analysis to fault the district court's opinion in *Sabre Shipping* barring contribution as a matter of federal common law. Nevertheless, it will still be difficult for an attorney to explain to a client why one coconspirator, particularly a coconspirator who may be less responsible for an antitrust violation than others, may be forced to shoulder the entire burden of triple damage liability without recourse to contribution from his more reprehensible coconspirators.

One significant result of the *Sabre Shipping* ban on contribution may be an emphasis by defendants' attorneys, and perhaps by other federal courts, on the possibilities of indemnification. It is submitted that, while the arguments against indemnification set forth above do merit consideration, it should be recognized that attempts to allocate liability among antitrust coconspirators are not necessarily inconsistent with the objectives of the antitrust laws. The seemingly unjust possibility that one coconspirator will be required to pay a much greater amount in damages to an injured third party than he could claim against the coconspirator who coerced him into the illegal conduct should be reduced by allowing indemnification. To avoid the possibility that a less culpable coconspirator could collect indemnification *plus* windfall profits in his own antitrust suit against a coconspirator, perhaps an indemnified coconspirator should be barred from initiating a triple damage suit if he claims indemnification. He would thereby be compelled to elect the remedy which would most redound to his benefit,

62. Corbett, supra note 1, at 111.

while the coconspirator would still feel the bite of having to pay for his antitrust violation.

The *Sabre Shipping* and *Wilshire Oil* decisions can be read as permitting indemnification at least where it is founded on an obligation or duty other than under the antitrust laws. Predicating indemnification on such an independent legal duty or obligation may well serve to establish rational boundaries to a coconspirator's claim for indemnification rather than permit automatic indemnity under the antitrust laws. *Sabre Shipping* does not answer, and *Wilshire Oil* did not consider, the question of whether indemnification is ever possible as a matter of federal antitrust law. However, there seems to be little reason why a judge or jury could not evaluate the various degrees of culpability among defendant antitrust coconspirators, when such a judge or jury is expected, under *Perma Life Muffler*, to make this same type of evaluation when a coconspirator sues another coconspirator under the antitrust laws.