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Contribution Among Antitrust Violators: A Question of Legal Process

C. Douglas Floyd*

The statutory scheme of the federal antitrust laws expressly provides for a variety of remedies in both government and private actions, including criminal penalties,¹ civil actions by the United States for injunction and damages,² private actions for treble damages and injunctive relief,³ and actions "parens patriae" by state attorneys general seeking damages sustained on behalf of natural persons residing in the state.⁴ Unlike the federal securities acts, however,⁵ the remedial provisions of the antitrust laws contain no authorization for those held liable for damages on account of violations of the antitrust laws to seek contribution from others who allegedly are jointly liable for the same wrong.

Until recently, the courts had uniformly held or assumed that no right to contribution existed under the federal antitrust laws.⁶ This was in accordance with the long-standing federal common law rule announced in *Union Stock Yards Co. v. Chicago, Burlington and Quincy Railroad*⁷ 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."⁸ But in 1979, antitrust defendants, inspired in part by what they perceived as a growing "trend" in the federal

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1. 15 U.S.C. §§ 1, 2 (1976).

2. *Id.* §§ 15(a), 25.

3. *Id.* §§ 15, 26.

4. *Id.* § 15c-15h.

5. *Id.* §§ 77k(f), 78i(e), 78r(b).

6. See, e.g., *El Camino Glass v. Sunglow Glass Co.*, 1977-1 Trade Cas. ¶ 72,110 (N.D. Cal. 1976); *Sabre Shipping Corp. v. American President Lines, Ltd.*, 298 F. Supp. 1339, 1343-44 (S.D.N.Y. 1969); *Goldlawr, Inc. v. Schubert*, 276 F.2d 614, 616-17 (3d Cir. 1960) (dictum).

7. 196 U.S. 217 (1905).

8. *Id.* at 224.

courts toward allowing contribution among defendants in a variety of contexts, made new efforts to establish a right to contribution under the antitrust laws as a matter of federal common law. These efforts resulted in conflicting decisions on the question in the Fifth, Eighth, and Tenth Circuits, and a renewal of scholarly criticism and interest.⁹

By virtue of the grant of certiorari to review the Fifth Circuit's decision in *Wilson P. Abraham Construction Corp. v. Texas Industries, Inc.*,¹⁰ which declined to create a new federal common-law right of antitrust contribution, this important question of legal process and judicial administration is now destined for decision by the United States Supreme Court. It is the thesis of this Article, contrary to the general view of the commentary to date, that when that Court does have occasion to hear and decide the issue, it should reaffirm the long-standing rule that there is no common-law right of contribution under the federal antitrust laws. It should do so because the considerations of equity and fairness that constitute the primary basis for a contribution right are far less compelling in the context of price-fixing and other conspiratorial violations of the antitrust laws than in the cases of negligence and strict liability in tort, where such rights have previously been recognized (primarily by legislative enactment). Of equal importance, the creation of a right of contribution could so impair the policies of deterrence and compensation underlying the scheme of private antitrust remedies enacted by the Congress that only a far clearer showing of injustice than has yet been forthcoming would support the intrusion of the judiciary into the sphere of distribution of damages in an-

9. *Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc.*, 604 F.2d 897 (5th Cir. 1979); *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179 (8th Cir. 1979); *Olson Farms, Inc. v. Safeway Stores, Inc.*, 1979-2 Trade Cas. ¶ 76,699 (10th Cir. 1979) (petition for rehearing en banc granted Dec. 27, 1979). See generally Littman & Van Buskirk, *The "Dogmas" of Antitrust Actions: A New Perspective*, 24 ANTITRUST BULL. 687 (1979); Schwartz, Simpson & Arnold, *Contribution in Private Actions Under the Federal Antitrust Laws*, 33 S.W.L.J. 779 (1979); Note, *Contribution in Private Antitrust Suits*, 63 CORNELL L. REV. 682 (1978); Note, *Contribution Among Private Antitrust Actions*, 93 HARV. L. REV. 1540 (1980); Note, *Contribution Among Private Antitrust Conspirators*, 10 MEM. ST. U.L. REV. 342 (1980). For earlier commentary, see Corbett, *Apportionment of Damages and Contribution Among Coconspirators in Antitrust Treble Damage Actions*, 31 FORDHAM L. REV. 111 (1962); Paul, *Contribution and Indemnification Among Antitrust Coconspirators Revisited*, 41 FORDHAM L. REV. 67 (1972).

10. 604 F.2d 897 (5th Cir. 1979), cert. granted sub nom. *Texas Indus., Inc. v. Radcliffe Materials, Inc.*, 49 U.S.L.W. 3321 (Oct. 31, 1980).

titrust cases, which has to date been the province of the legislative branch.

I. THE CONFLICTING DECISIONS IN THE COURTS OF APPEALS
AND RECENT PROPOSALS FOR LEGISLATION

In *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*,¹¹ the United States Court of Appeals for the Eighth Circuit became the first federal court to recognize a right of contribution among antitrust violators. Professional, a wholesaler of beauty supplies, alleged that National, another wholesaler, had induced Professional's manufacturer-supplier, La Maur, Inc., to terminate its relationship with Professional and grant National an exclusive dealership for La Maur's products in Minnesota. National's conduct was alleged to constitute a monopolization or an attempt to monopolize in violation of section 2 of the Sherman Act.¹² National filed a third-party complaint against La Maur alleging that La Maur had solicited National to become a distributor of La Maur's products, and that in the event National were held liable to Professional, it would be entitled to contribution from La Maur for at least one-half of any ultimate recovery. The district court granted La Maur's motion to dismiss the third-party complaint for failure to state a claim upon which relief could be granted.

A divided panel of the United States Court of Appeals for the Eighth Circuit reversed the district court's dismissal of the third-party complaint. A majority of the panel held "that under certain circumstances an antitrust defendant may be entitled to pro rata contribution from other joint tortfeasors."¹³ The majority reviewed at length the various policy reasons that have been advanced in opposition to the judicial creation of a right of contribution under the antitrust laws¹⁴ and concluded that none of these arguments outweighed what the court viewed as the dispositive factor: "The deciding factor in our decision is fairness between the parties. We conclude that fairness requires that the right of contribution exist among joint tortfeasors at least under

11. 594 F.2d 1179 (8th Cir. 1979).

12. *Id.* at 1181. Professional also asserted pendent state-law claims.

13. *Id.* at 1182 (footnotes omitted).

14. These policy reasons included, among others, the question of congressional intent, the danger of unduly complicating antitrust litigation, the fear of deterring settlements under the antitrust laws, and the diminution of the deterrent effect of the private treble damages remedy.

certain circumstances."¹⁵

In *Wilson P. Abraham Construction Corp. v. Texas Industries, Inc.*,¹⁶ a divided panel of the Fifth Circuit reached the opposite conclusion. The Fifth Circuit majority believed that judicial recognition of a right of contribution among antitrust violators, particularly intentional violators, might frustrate the deterrent effect of the antitrust laws by unduly complicating antitrust litigation and by permitting a violator to spread his losses among a large number of defendants.¹⁷ The majority reasoned that "a rule prohibiting contribution among antitrust coconspirators not only does not frustrate deterrence but may very well enhance the statutes' deterrent effect by preventing a defendant from cutting its losses,"¹⁸ and that judicial recognition of a right of contribution "may open a Pandora's box of procedural problems, against which district court discretion may prove a palliation."¹⁹ Although the court recognized "reasonable contrary arguments" it concluded:

In this area of interstitial lawmaking, however, to forge a new rule with questionable benefits and such possible detriments is a bad practice. Those aggrieved by this decision always have recourse to Congress, a forum better suited to evaluation of the competing interests and policies involved.²⁰

In *Westvaco Corp. v. Adams Extract Co.*,²¹ a different Fifth Circuit panel applied that circuit's *Abraham Construction* decision to deny any right of contribution in favor of nonsettling defendants against other defendants in the same action who had settled the plaintiffs' claims against them.

Finally, in *Olson Farms, Inc. v. Safeway Stores, Inc.*,²² the Tenth Circuit, in yet another divided panel opinion, concluded with respect to the competing policies involved: "[I]t can be seen that there are strong offsetting arguments over the contribution issue. We regard as mere speculation the forecast that, if the

15. 594 F.2d at 1185.

16. 604 F.2d 897 (5th Cir. 1979).

17. *Id.* at 900-05. In *Abraham Construction*, the defendants, alleged price-fixers, sought to file third party complaints against alleged coconspirators not named as defendants.

18. *Id.* at 903 (footnote omitted).

19. *Id.* at 906.

20. *Id.*

21. No. 79-2439 (5th Cir. Oct. 30, 1979) (unpublished opinion), *cert. granted*, 100 S. Ct. 3008 (1980), *cert. dismissed*, 49 U.S.L.W. 3288 (Sup. Ct. 1980).

22. 1979-2 Trade Cas. ¶ 79,699 (10th Cir. 1979).

question were presented, Congress would include a right to contribution as part of the antitrust laws."²³ The majority reasoned that questions regarding the effect such a new right would have on the workability and fairness of the statutory private treble damage remedy were not suited to judicial resolution:

Before entering such a complex policy thicket, but recognizing a possible exception in the case of an unintentional violator, we believe this court should await a clear signal, at least, from the legislative branch of our government on the matter. Certainly, the Congress, assisted by the resources of the executive branch, is in a far superior and more appropriate position to gauge the impact on observance and enforcement of the antitrust laws from contribution and its various facets of implementation.²⁴

On June 16, 1980, the United States Supreme Court granted certiorari in the Fifth Circuit *Westvaco* case, presumably for the purpose of resolving the conflict in the circuits.²⁵ The question presented by the petition for certiorari was "[w]hether defendants in antitrust cases may assert rights of contribution."²⁶ The petitioners in *Westvaco* were three of thirty-seven corrugated container manufacturers who were named defendants in consolidated class-action antitrust treble damage complaints alleging a nationwide conspiracy to fix, raise, maintain, and stabilize the

23. *Id.* at 79,703.

24. *Id.* at 79,703-04 (footnote omitted). In the *Olson Farms* case, Olson, was sued by fourteen egg producers which alleged that it had engaged in a conspiracy to fix the prices paid the producers for their eggs at an artificially low level in violation of section 1 of the Sherman Act, and that it had conspired to monopolize the distribution of eggs in violation of section 2 of that act. Olson Farms' alleged conspirators were not identified by the complaint, but the evidence at trial tended to establish that some ninety percent of the sales of eggs for which damages were sought from Olson had not been sales to Olson, but had been sales to the other alleged conspirators. *Id.* at 79,700. Unlike the defendants in the *Professional Beauty Supply* and *Abraham Construction* cases, Olson made no effort to file third party complaints against the other alleged conspirators in the original antitrust action, but proceeded to trial alone. The jury returned a verdict against Olson under sections 1 and 2 of the Sherman Act, and assessed damages, which, after trebling, amounted to almost \$2 million. The decision was later affirmed by the United States Court of Appeals for the Tenth Circuit. *Cackling Acres, Inc. v. Olson Farms, Inc.*, 541 F.2d 242 (10th Cir. 1976). In *Olson Farms*, it was only after the entry of judgment on the jury verdict against it in the original antitrust case that Olson determined to seek contribution through an independent action in the United States District Court for the District of Utah against five asserted coconspirators on account of whose purchases of eggs damages had allegedly been assessed against Olson in the first trial.

25. 100 S. Ct. 3008 (1980).

26. *Petition for Writ of Certiorari at 2, Westvaco Corp. v. Adams Extract Co.*, 100 S. Ct. 3008 (1980).

prices of corrugated containers and sheets.²⁷ Certain class representatives estimated treble damages to be as high as \$5.9 billion. Following certification, more than twenty of the defendants settled plaintiffs' claims against them for sums aggregating in excess of \$300 million. The three petitioners in the *Westvaco* case, however, did not settle. Faced with joint and several liability alleged to be in excess of five billion dollars, they instead sought to file contribution cross-claims against the settling defendants, together with an affirmative defense alleging that plaintiffs' claim should be reduced in an amount fairly allocable to the settling defendants' conduct ("claim reduction").²⁸ The district court denied the motions to assert contribution cross-claims and claim reduction defenses. The court of appeals affirmed as to contribution, but held that the order with respect to petitioners' claim reduction defense was not immediately appealable because no Rule 54(b) certificate had been entered with respect to it.

The petition for certiorari was based on petitioners' claim that they faced "unfair settlement coercion" as a result of their exposure to joint and several liability for the entire damages to the class. They claimed that "the pressures created by the enormous damage exposure resulted in an unprecedented five-week settlement 'stampede'" and that "with each successive settlement during the stampede, plaintiffs demanded and received amounts at a higher rate than prior settlements without regard to the merits of their claims. . . . Plaintiffs were able to escalate their settlement demands because in the absence of contribution the exposure faced by each nonsettling defendant is increased with each successive settlement."²⁹

The grant of certiorari in the *Westvaco* case was peculiar. Virtually all authorities are now in agreement that it is inappropriate to allow contribution against a settling defendant even under statutes expressly providing for a right of contribution. Although the *Westvaco* petitioners could have made a substantial argument with respect to their defense of claim reduction on account of the settlements, that issue was not before the Supreme Court since it was not subject to appeal to the Fifth Circuit and therefore was not passed upon by that court. Accordingly, *Westvaco* provided a poor occasion for passing upon the

27. *Id.* at 2-3.

28. *Id.* at 4-5.

29. *Id.* at 3-4.

contribution issue, for it was unlikely that the Supreme Court would have recognized a right of contribution against settling defendants, particularly where that right would have represented a radical departure from existing law which would have been retroactively applied to upset legitimate expectations of the settling defendants that they had bought their peace.³⁰

These concerns became moot, however, when, subsequent to the grant of certiorari in *Westvaco*, the three nonsettling petitioners themselves settled the actions against them. The Supreme Court then granted respondents' motions to dismiss the writ of certiorari on the ground that the circumstances on which the petitions had been based were fundamentally altered, and because petitioners, as settling defendants, no longer claimed that contribution from settlors should be available.³¹ As previously noted, however, the Court thereupon granted certiorari to review the Fifth Circuit's *Abraham Construction* decision, which at this writing is pending before the Court for oral argument and decision in the spring of 1981.³² That decision squarely presents the antitrust contribution issue free of the complexities engendered by the immediate presence of settlements.

The settlement issue cannot be ignored, however, because, as I will point out, much of the debate regarding the creation of a new right of antitrust contribution centers around its impact on the workability and fairness of the antitrust settlement process. Despite its other shortcomings, the *Westvaco* case at least would have had the virtue of focusing the Supreme Court's attention on that fact. We may hope that the implications of its *Abraham Construction* decision for the settlement process will

30. See *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). Moreover, as pointed out in the brief of certain respondents in opposition to the petition:

Petitioners . . . argue the financial hardships faced by several small settling defendants who are asserted to be marginally profitable . . . Yet, it is these very same settling defendants who would be most injured by a rule permitting contribution. If contribution were permitted, these settling defendants, who, according to Petitioners, have been "coerced["] or driven to the edge of bankruptcy, would be forced to pay just that much more! Thus it is contribution which in this context could be used by larger nonsettling defendants as a coercive anticompetitive device to drive their smaller competitors out of the marketplace.

Brief of Respondents-Plaintiffs in Opposition to Petition for Writ of Certiorari at 11 (footnote omitted).

31. 49 U.S.L.W. 3288 (Oct. 20, 1980).

32. 604 F.2d 897 (5th Cir. 1979), cert. granted sub nom. *Texas Indus., Inc. v. Radcliffe Materials, Inc.*, 49 U.S.L.W. 3321 (Oct. 31, 1980).

not escape the Court's attention.

Interest in the antitrust contribution issue has also been heightened by proposals for legislation dealing both with the basic right of contribution itself and with the corollary of mandatory reduction of plaintiffs' claims against nonsettling defendants on account of damages fairly attributable to the settling defendants. On July 9, 1979, Senator Bayh introduced S. 1468, which would provide for the first time a statutory right of contribution limited to price-fixing actions only, with the contribution shares among defendants determined "according to the damages attributable to each such person's sales or purchases of goods or services."³³ Contribution could be asserted on behalf of both settling and nonsettling defendants, whether by cross-claim, counter-claim, or third-party claim in the original antitrust action, or by separate action after judgment. In accordance with the prevailing view, a tortfeasor settling in good faith would be discharged from all liability of contribution, but the plaintiffs' claims against the remaining defendants would be automatically reduced by the greatest of the amount of consideration paid for the settlement, the amount stipulated therein, or "treble the actual damages attributable to the settling person's sales or purchases of goods or services."³⁴ The statute would apply prospectively only to actions commenced after the date of its enactment.

The American Bar Association Section of Antitrust Law has also drafted proposed contribution legislation. Unlike Senator Bayh's proposal, it would not be limited to price-fixing actions, but would apply to any antitrust violation. The contribution share would be determined, not on the basis of the defendants' sales or purchases, but instead "in accordance with the relative responsibility of each party for the damages awarded in the main action."³⁵ Presumably this contemplates some assessment of relative fault as well as impact on the plaintiff. Contribution is barred both in favor of and against settling tortfeasors, but the plaintiff's rights against the nonsettlers are subject to mandatory reduction in accordance with the settlers' contribution shares determined in accordance with their "relative re-

33. S. 1468, 96th Cong., 1st Sess. § 4I(a) (1979).

34. *Id.* §§ 4I(b)-4I(c).

35. AMERICAN BAR ASSOCIATION, REPORT OF SECTION OF ANTITRUST LAW WITH LEGISLATIVE RECOMMENDATION 11 (1979) [hereinafter cited as REPORT OF SECTION OF ANTITRUST LAW].

sponsibility," or, in the alternative, plaintiff may elect to "remove" the settlors' acts from his theory of liability.³⁶

II. CONTRIBUTION UNDER THE ANTITRUST LAWS AS A QUESTION OF POLICY

The courts and commentators have identified several primary issues of policy relevant to the determination whether to recognize a right of contribution under the antitrust laws. They are (1) the impact of such a right on the deterrent effect of the private treble damages remedy; (2) the closely related question of whether such a right would frustrate the purposes of the congressionally created treble damage remedy by additionally complicating antitrust litigation which is already exceedingly complex, and which imposes a very substantial burden both on federal courts and on litigants; (3) the effect of such a right on the settlement of antitrust cases; and, (4) the question whether considerations of fairness and equity support the creation of a right of contribution among antitrust conspirators. None of these questions are susceptible of easy resolution.

A. Deterrence

In the *Professional Beauty Supply* decision, which judicially created a right of contribution under the antitrust laws for the first time, the Eighth Circuit majority rejected arguments that such a decision would decrease the deterrent effect of the private treble damage remedy. The court concluded that "the question of deterrence actually cuts both ways and on balance a rule allowing contribution is actually a greater deterrent."³⁷ The panel majority believed that the rule denying contribution necessarily meant that other coconspirators might go "scot free," and stated, "This possibility of escaping all liability might cause many to be more willing rather than less willing, to engage in wrongful activity."³⁸ The majority also noted that a powerful and culpable antitrust violator, particularly one that has contin-

36. The ABA's proposed statute also provides a statute of limitations for contribution claims requiring that they be filed within one year of the date of service of original complaint or within 60 days after the contribution claimant is on notice of his potential liability based on damages caused in whole or in part by the acts or omissions of another, or, in any event, within 60 days after the entry of final judgment in the district court. *Id.* at 10.

37. 594 F.2d at 1185.

38. *Id.*

uing business dealings with the plaintiff, might be in a position to exert its economic influence to ensure that it was never sued, thus casting the entire burden of liability on less culpable parties.³⁹ In sum, "to deny contribution would be to dilute the deterrent effect of the antitrust laws, since a participant in an antitrust violation could escape all responsibility for its wrongdoing."⁴⁰

Similarly, the Report of the Committee on the Judiciary on S. 1468 concluded that there would be no reduction of deterrence through creation of a right to contribution, on the theory that "treble damages is a significant penalty, even for a company's proportionate share attributable to participation in a price-fixing conspiracy,"⁴¹ and argued that under the present law the biggest and most culpable defendants often obtain discounted or "bargain" settlements and thus pay much less than their fair share of liability.⁴²

There would appear to be little basis logically or empirically for the conclusion that creating a right of contribution would *enhance* the deterrent effect of the private treble damage remedy. Although it is true that, after the fact, the rule against contribution may permit an antitrust violator who has not been sued by an injured plaintiff to escape liability altogether, there would be no way for such a defendant to predict that eventuality in advance. The deterrent effect of the treble damage remedy must be assessed at the time the forbidden conduct is undertaken, not with an *ex post facto* view of where liability ultimately happened to come to rest.

Moreover, there is little reason to fear that private, treble damage plaintiffs will deliberately exclude large or culpable defendants from their action, leaving "innocent" small companies to bear the entire burden of liability. An injured plaintiff would be most likely to select the most culpable and financially responsible defendant for his lawsuit in order to enhance the chances both of a determination of liability and of the ultimate recovery of damages.⁴³

39. *Id.*

40. *Id.*

41. S. REP. NO. 428, 96th Cong., 1st Sess. 18 (1979) [hereinafter cited as SENATE REPORT].

42. *Id.*

43. See REPORT OF SECTION OF ANTITRUST LAW, *supra* note 35, at 6.

In *Abraham Construction*,⁴⁴ the court concluded, contrary to the reasoning of *Professional Beauty Supply*, that the “very possibility of imposition of sole liability has an enhanced deterrent effect.”⁴⁵ The court referred to economic studies tending to establish that managers of large organizations are “risk averse” and are therefore deterred more by the “slight prospect of a large loss than by the strong prospect of a small loss.”⁴⁶ And the court recognized that deterrence should be determined before, not after the fact: “[D]eterrence does not suffer if contribution is denied since a real threat of liability exists for all participants in the illegal scheme—any one of them could have been selected as the defendant in the plaintiff’s action.”⁴⁷

In his testimony on Senator Bayh’s proposed contribution legislation, the Assistant Attorney General for the Antitrust Division summarized the conflicting empirical possibilities and expressed his concern about the impact of a contribution right on the workability and deterrent effect of the private treble damage remedy:

Permitting contribution in antitrust cases could have either of two consequences for deterrence resulting from private treble damage actions. It could increase the deterrent effect by making it more likely that all members of an antitrust conspiracy will be sued by somebody—either by the plaintiff or by a defendant seeking contribution—or it could decrease the deterrent effect by both lowering each antitrust conspirator’s potential liability and allowing each conspirator to assess more fully in advance his full potential exposure, thereby making the cost-benefit analysis of whether to enter into an antitrust violation more predictable. I am not able to say that one of these possible effects will predominate in all antitrust cases under all possible circumstances; nobody could. But I think we should

44. 604 F.2d 897 (5th Cir. 1979).

45. *Id.* at 901.

46. *Id.* at 901 n.8.

47. *Id.* at 903 n.11. The *Abraham Construction* majority concluded that even in the case of “unintentional” violators of the antitrust laws, the rule denying contribution might enhance the deterrent effect of the treble damage remedy because

even businesses of the purest motives necessarily steer wide of any conduct the effects of which may violate the law, in the knowledge that full, trebled damages possibly await even an unintentional transgression. Allowing contribution may diminish this prophylactic, chilling effect by reducing the threatening specter of sole liability. Businesses may be encouraged to risk anticompetitive conduct secure in the knowledge that proof of illegal purpose is often impossible and that liability for illegal effects will be dissipated.

Id. at 905.

look closely at whether contribution would weaken antitrust deterrence where it is needed most, in conspiracies to fix prices.

....

I think the point here is that I am not certain whether conclusions regarding contribution and deterrence developed in other areas of the law can be readily applied to all types of conspiratorial conduct found in antitrust cases.⁴⁸

In fashioning a new right of contribution in antitrust cases, the *Professional Beauty Supply* majority relied in part on the Supreme Court's opinion in *Perma Mufflers v. International Parts Corp.*,⁴⁹ which held that the common-law defense of *in pari delicto* may not be applied routinely to bar persons injured by an antitrust violation from recovery because they have themselves participated in the alleged antitrust violation.⁵⁰ The *Professional Beauty Supply* court reasoned that contribution should be allowed in antitrust cases because in *Perma Mufflers* "the Supreme Court cautioned against broad application of common-law doctrines to prevent recovery if such application will defeat important public purposes."⁵¹ The *Professional Beauty Supply* court was convinced that "the result of automatically

48. *Hearings on S. 1468 Before the Subcomm. on Antitrust, Monopoly and Business Rights of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 27-28 (1979) (prepared statement of John Shenefield) [hereinafter cited as *Hearings*].

Two recent advocates of the judicial creation of a right of contribution have criticized the view that, *ex ante*, antitrust deterrence may be increased by the prospect that the entire burden of joint and several liability may fall upon a single defendant, on the ground that "severity alone has not been accepted as a modern theory of deterrence" and that "to the extent that severity of the sanction is important, Congress has determined that antitrust sanctions shall be criminal punishments, treble damage actions, equitable relief, and attorneys' fees for the successful private plaintiff. . . . Judicial increase of these severities is gratuitous, and is not justified on a theory of deterrence." Littman & Van Buskirk, *supra* note 9, at 744 (emphasis added). They argue that they "do not accept the notion that the innocent should be oppressed in order that the guilty may suffer." *Id.* at 745. But these observations seem somewhat wide of the problem at hand. The question is not one of "judicial increase" of the penalties that Congress has provided. The courts have concluded that Congress intended for the traditional rule of joint and several liability to be applicable to the private treble damage remedy. Thus, the question more appropriately is whether the courts should undertake the process of lessening the severity of the remedies that Congress has provided. Similarly, there is no question here of oppressing the "innocent." The issue is whether a party who has been adjudicated by a jury's verdict to be an antitrust conspirator should be entitled to spread his loss among his co-wrongdoers.

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

50. *Id.* at 138-40.

51. 594 F.2d at 1185.

prohibiting contribution among antitrust defendants . . . would be to allow a significant number of antitrust violators to escape liability for their wrongdoing and thereby undermine the policy of the antitrust laws."⁵²

This analysis, however, overlooks the fundamental distinction between the issue in *Perma Mufflers* and the question of creation of a right of contribution. In *Perma Mufflers*, the plaintiffs were Midas Muffler dealers who charged in their complaint that their franchisor had conspired with its parent corporation and other defendants to require the dealers to purchase their supplies exclusively from the defendants, to prevent them from selling outside designated territories, and to fix resale prices.⁵³ There was thus no question that the plaintiffs fell within the terms of section 4 of the Clayton Act which provides that "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue [to] recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."⁵⁴ An antitrust coconspirator, however, is not an injured purchaser or consumer of goods or services who possesses a cause of action under section 4 of the Clayton Act.⁵⁵ It is an antitrust violator whose conduct has caused such damages to others. The holding of *Perma Mufflers*, that the federal courts should not import from other areas of the law "broad common-law barriers to relief" to preclude a right of action that the Congress has expressly conferred, hardly impels the conclusion that the federal courts should import new common-law doctrines to create a right of recovery where Congress has failed to do so.⁵⁶

52. *Id.*

53. 392 U.S. at 137.

54. 15 U.S.C. § 15 (1976).

55. See *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262, 265 (1972).

56. There is another reason why the *Perma Mufflers* case provides little support to the conclusion that the federal courts should create a general right of contribution in antitrust cases. Even if an antitrust coconspirator did possess a right of action under § 4 of the Clayton Act, a majority of the court in *Perma Mufflers* made it clear that an active antitrust violator is barred from any recovery under the antitrust laws. Justice Black's opinion noted that under the facts of that case, the participation of the plaintiffs in the alleged violation through their signature on the Midas Dealer Agreement "was not voluntary in any meaningful sense," 392 U.S. at 139, and that "once it is shown that the plaintiff did not aggressively support and further the monopolistic scheme . . . his understandable attempts to make the best of a bad situation should not be a ground for completely denying him the right to recover *which the antitrust acts give him.*" *Id.* at 140 (emphasis added). Justice White's concurring opinion noted that recovery should be denied where plaintiff and defendant "bear substantially equal responsibility for injury

On balance, the arguments on the deterrence point are inconclusive. As illustrated by the diametrically opposed conclusions on this issue in *Abraham Construction* and *Professional Beauty Supply*, the courts that have considered the matter have been in no position to determine empirically the effects on antitrust deterrence of continuing the current prohibition against contribution or of fashioning a new rule of contribution. And if the courts were to create a new right of antitrust contribution, they would be in no position to analyze empirically the different effects that various possible contribution rules would have. Such questions would appear more suitable for resolution by the legislative than by the judicial process.

B. Complexity of Antitrust Litigation

A concern closely related to the deterrence issue in the debate over creation of a right of antitrust contribution has been its impact in making what is already exceedingly complex and burdensome litigation even more complex and burdensome. Massive antitrust cases have already created problems of judicial administration in our federal courts. This has become an era of nationwide class actions under Rule 23 in which parties are seeking damages aggregating in the millions and even billions of dollars. As two commentators have recently noted:

Private antitrust class action complaints filed on behalf of thousands of purchasers, naming as defendants most of the manufacturers in an entire industry, have now become common. They allege in very general terms that the defendants conspired to fix, raise, maintain or stabilize prices; that the conspiracy caused injury and damages to the class over a pe-

resulting to one of them." *Id.* at 146. Justice Fortas stated that "[i]f the fault of the parties is reasonably within the same scale, . . . then the doctrine should bar recovery." *Id.* at 147 (Fortas, J., concurring). Justice Marshall said, "I cannot agree that the public interest requires that a plaintiff who has actively sought to bring about illegal restraints on competition for his own benefit be permitted to demand redress . . ." *Id.* at 151 (Marshall, J., concurring). And Justices Harlan and Stewart, concurring in part and dissenting in part, concluded that "when a person suffers losses as a result of activities the law forbade him to engage in, I see no reason why the law should award him treble damages from his fellow offenders." *Id.* at 154 (emphasis in original). Decisions subsequent to *Perma Mufflers* in the courts of appeals have concluded that only plaintiffs who do not bear a substantially equal responsibility for establishing an illegal scheme may recover under authority of that decision. See, e.g., *Premier Elec. Constr. Co. v. Miller-Davis Co.*, 422 F.2d 1132, 1138 (7th Cir.), cert. denied, 400 U.S. 828 (1970). See also *South-East Coal Co. v. Consolidation Coal Co.*, 434 F.2d 767 (6th Cir. 1970), cert. denied, 402 U.S. 983 (1971).

riod of 10 to 20 years The damage theory of such complaints is frequently that defendants' conduct increased prices by "X" percent . . . on all sales by all manufacturers in the entire industry, including those of nonconspirators. Therefore, it is claimed that as the sales of the entire industry were approximately \$1,000,000,000 a year, the treble damage claim per year is \$90,000,000 or \$900,000,000 for 10 years, and \$1,800,000,000 for 20 years!⁵⁷

In such circumstances, litigation is inevitably burdensome and drawn out. Discovery is open-ended and expensive. And although the plight of defendants surely deserves attention, one cannot turn a blind eye to the difficulties that the judicial creation of a new right of contribution may pose to the accomplishment of the primary objectives of the private treble damage action, which are to promote compensation for injured victims of antitrust violations and to deter those violations.⁵⁸

The potential for further complicating already exceedingly complex litigation is raised by Rules 13 and 14 of the Federal Rules of Civil Procedure. If a new rule of contribution is fashioned under the federal antitrust laws, then defendants seeking contribution will routinely file Rule 13 cross-claims, thereby introducing new issues to be resolved in the action. Moreover, Rule 14 provides,

At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him.⁵⁹

Thus, the ability of the plaintiff to select a particularly

57. Littman & Van Buskirk, *supra* note 9, at 688.

58. These concerns were recently expressed by the Assistant Attorney General for the Antitrust Division of the Department of Justice in hearings on Senator Bayh's proposed contribution legislation. He observed:

Certainly, we would not want to adopt any rules that could substantially interfere with the enforcement function presently being performed by private treble damage actions. We need to examine any effects contribution may have with respect to complexity of antitrust litigation, antitrust deterrence, and incentives for both plaintiffs and defendants in antitrust cases to settle their disputes short of litigation. We need to fully appreciate not just the possible benefits, but also the possible costs, of contribution as a concept in antitrust litigation and particularly of the variety of rules and procedures which could govern contribution in antitrust litigation.

Hearings, supra note 48, at 26.

59. FED. R. CIV. P. 14(a).

large, financially responsible and culpable defendant or defendants, and to limit its claim against them, or conversely, to seek recovery from a party of approximately equal financial resources to its own, would be severely circumscribed by any proposal for contribution. The *Professional Beauty Supply* majority was cognizant of the danger that allowing contribution might interfere with the plaintiff's ability to maintain control of his lawsuit. It observed that the

fear expressed, *which is indeed a legitimate one*, is that a defendant may attempt to complicate the issues and confuse the jury by impleading numerous third-party defendants or fundamentally alter the lawsuit by impleading a third-party defendant with financial resources far superior to the plaintiff or the original defendant.⁶⁰

However, the majority concluded that these problems could be resolved through the power of the court to sever for separate trial the issues raised by any contribution cross-claims or third-party complaints.⁶¹

Severing third-party contribution claims for separate trial would, however, impose very substantial new burdens on the federal courts arising from the basic due process requirement that a party may not be subjected to liability as the result of a judgment in an action to which he was not a party. Thus, if a court should determine to sever third-party defendants for a separate trial of the contribution claims, those defendants could not be bound by any judgment imposing liability in the original action. In order to obtain contribution, the defendants in the original action would be forced to undertake a complete retrial of the allegations of the original antitrust complaint, this time with themselves as plaintiffs, seeking to establish before a new jury that they were liable to the original plaintiffs, and that the new third-party defendants were jointly liable for the same violations.⁶² Moreover, this retrial of the underlying antitrust allegations would in many cases occur on stale evidence long after the expiration of the congressionally prescribed four-year statute of limitations for the commencement of the original antitrust ac-

60. 594 F.2d at 1184 (emphasis added); *accord, id.* at 1190 (Hanson, J., dissenting in part).

61. *Id.*

62. *See, e.g.,* W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 309 (4th ed. 1971).

tion.⁶³ The prospect of such duplicative retrials of massive and complex litigation would deter district courts from using severance to remedy the adverse effect of a new contribution right on a private plaintiff's control of his action.

Much the same problem would be created if the defendants in the original action choose not to implead others potentially liable as coconspirators in order to seek contribution from them in the underlying antitrust action, but instead wait until after the rendition of judgment and then file an independent action in federal district court seeking contribution on account of the judgment already entered and paid by them.⁶⁴

It would be one thing to permit contribution among the defendants who are all impleaded and parties to the original antitrust action. But the ability of antitrust defendants to maintain successive retrials of the original antitrust complaint in an attempt to spread their losses, whether as a result of a severance or the failure of plaintiffs to join some potentially liable parties as defendants in the original action, should be a matter for serious concern. Nevertheless, as reflected by the provisions of the Uniform Contribution Among Tortfeasors Act, the Uniform Comparative Fault Act, and the Restatement, Second, of Torts,⁶⁵ it is generally accepted in ordinary tort cases that a party who has been held liable for damages is entitled to maintain a successive and independent action for contribution, and is not required to implead all potential contribution defendants in the underlying tort action. That being true, if the federal courts were to create a right of contribution among antitrust defendants as a matter of federal common law, they would no doubt be reluctant entirely to preclude such successive actions and to require all contribution claims to be resolved together with the primary claim, particularly in light of the provisions of the federal rules permitting severance and separate trials.

If a rule permitting successive independent actions for con-

63. 15 U.S.C. § 15(b) (1976).

64. Federal jurisdiction over such an action would be based on 28 U.S.C. §§ 1331 and 1337. This was the situation in the Tenth Circuit *Olson Farms* case, in which Olson, having already been held liable for a judgment of over two million dollars, sought contribution from five alleged coconspirators who it contended had sold some ninety percent of the eggs for which it had paid damages, but who had not been named as conspirators in the original complaint.

65. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 3(a) (1955 version); UNIFORM COMPARATIVE FAULT ACT § 4(a); RESTATEMENT (SECOND) OF TORTS § 886A, Comment i (1977).

tribution were adopted by the Congress, it would appear a clear candidate for the "judicial impact statement" forcefully advocated by Chief Justice Burger in recent years, for it would thrust a whole new category of complex federal litigation on the federal courts.⁶⁶ In this light, it would seem somewhat incongruous for the courts on their own initiative to fashion such a new category of antitrust litigation as a matter of federal common law. For, as the Supreme Court emphasized in *Illinois Brick Co. v. Illinois*,⁶⁷ in declining to recognize a right of action on behalf of "indirect" purchasers, "considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation."⁶⁸ The Court cautioned against the creation of new rules of liability in the antitrust field that would "add whole new dimensions of complexity to treble-damage suits and seriously undermine their effectiveness."⁶⁹

Persuasive evidence of the potential for unacceptably complicating antitrust litigation lies in the fact that every district judge who has independently considered the question, including those sitting on the recent appellate panels, has expressed that view. The remarks of the district court in denying motions to assert contribution claims in the *Westvaco* case are typical:

Further complications to the efficient management of a suit such as this would arise from the processing of the many possible cross-claims and impleader actions and from the fact that joint defense efforts, with their savings in court, staff, and attorney time, would be hindered or deterred altogether. The court has recently completed the trial of *United States of America v. International Paper, et al.* and *United States of America v. Boise Cascade, et al.*; those cases involved the prosecution of nine defendants with well-coordinated joint defense efforts. The trial lasted approximately fifteen weeks. It is difficult to judicially foresee how these cases, with the class and opt-out plaintiffs and thirty-seven defendants asserting cross-claims against each other, could be managed. Liberal use of severance would be required for trial, and that would lead to the consumption of courts' time in duplicative efforts. It seems to the court that a policy of allowing contribution would complicate litigation procedurally, frustrate settlements, and in-

66. See Burger, *The State of the Federal Judiciary—1972*, 58 A.B.A. J. 1049, 1050 (1972).

67. 431 U.S. 720 (1977).

68. *Id.* at 736.

69. *Id.* at 737.

hibit joint defense efforts to such an extent that this type of litigation would be virtually impossible to manage.⁷⁰

C. The Effect of Contribution on Settlement

One of the most difficult questions posed by any contribution rule is the effect it would have on the workability and fairness of the settlement process in antitrust litigation. These questions arise in the context of determining whether contribution should be allowed both against an alleged antitrust violator who has settled with the plaintiff, and in favor of such a settling defendant, and if so, in what circumstances.

1. Contribution against settling antitrust defendants

The history of judicial and legislative efforts to deal with the thorny question of contribution against settling defendants is a tortuous one. Under the 1939 version of the Uniform Contribution Among Tortfeasors Act, the plaintiff's claim against non-settling defendants was reduced only by the amount of the settlement or the amount stipulated in the settlement, but the settlor was not relieved from liability for contribution to nonsettling defendants unless the settlement provided for a reduction of damages recoverable against the other tortfeasors in an amount equal to the settlor's pro rata share.⁷¹ That provision was subject to substantial criticism, however.

The idea underlying the 1939 provision was that the plaintiff should not be permitted to release one tortfeasor from his fair share of liability and mulct another instead, from motives of sympathy or spite . . . and that the release from contribution affords too much opportunity for collusion between the plaintiff and the released tortfeasor against the one not released.⁷²

However, reports from states in which the Act was adopted "appear to agree that it has accomplished nothing in preventing collusion" and "[t]he effect of Section 5 of the 1939 Act has been to discourage settlements in joint tort cases, by making it impossi-

70. Petition for Writ of Certiorari app. C, at 3, *Westvaco Corp. v. Adams Extract Co.*, 100 S. Ct. 3008 (1980).

71. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT §§ 4-5 (1939 version). The "pro rata" share was determined by dividing the total judgment by the number of tortfeasors.

72. *Id.* § 4, Commissioners' comment on subsection (b) (1955 version).

ble for one tortfeasor alone to take a release and close the file."⁷³ This was said to result from the fact that "no defendant wants to settle when he remains open to contribution in an uncertain amount, to be determined on the basis of a judgment against another in a suit to which he will not be a party."⁷⁴

Accordingly, the Act was amended in 1955 to provide that a good faith settlement completely discharged a settling tortfeasor from liability for contribution, even if the settlement did not provide for a pro rata reduction of the damages that might be collected from other defendants.⁷⁵ The commissioners for the 1955 Act expressed the view that it was "more important not to discourage settlements than to make an attempt of doubtful effectiveness to prevent discrimination by plaintiffs, or collusion in the suit."⁷⁶

As indicated, however, the 1955 rule was subject to question on the ground that it might lead to collusive settlements, and because it appeared to be inconsistent with the primary equitable objectives of the right of contribution. For this reason, a number of common-law courts adopted the view, mainly in the context of fashioning subsidiary rules within the framework of a state contribution statute, that settlement should discharge a settling tortfeasor from all liability for contribution, but that the plaintiff's claim against the other potential defendants should be reduced in the amount of the settlor's "pro rata share" of damages.⁷⁷

With few exceptions, courts adopting some variant of the pro rata reduction rule in the exercise of their law-making power have operated within the framework of a statutory contribution scheme enacted by a state legislature; such decisions do not necessarily suggest complete judicial freedom to fashion new rights of contribution in the absence of legislative guidance. An exception, however, is *Gomes v. Brodhurst*,⁷⁸ in which the court of appeals, in a negligence case arising under the law of the Virgin

73. *Id.*

74. *Id.*

75. *Id.* § 4 (1955 version).

76. *Id.* Commissioners' comment on subsection (b).

77. See generally Note, *Settlement in Joint Tort Cases*, 18 STAN. L. REV. 486 (1966). There is a substantial question whether under the "pro rata reduction" rule the settlor's "pro rata" share by which plaintiff's claims against the other defendants is diminished should be measured on a "per capita," proportionate fault, or market share basis.

78. 394 F.2d 465 (3d Cir. 1968).

Islands, adopted a form of the pro rata reduction rule as a corollary to its conclusion that the courts of the Virgin Islands, if presented with the question, would permit a right of contribution among joint tortfeasors in the absence of contribution legislation.⁷⁹ The primary impetus for the court's dictum on the contribution issue thus arose from the perceived necessity to insulate settling tort defendants from contribution to other defendants subsequently held liable to the plaintiff. The court reasoned that "voluntary settlements are to be encouraged and a rule permitting contribution under such circumstances would not work to that end" because the defendant would "have a positive incentive to stand trial and actively participate in his defense in order to minimize his liability."⁸⁰ In the court's view, only a pro rata reduction rule would ensure an "equitable distribution of liability for joint fault and yet [encourage] out-of-court settlements."⁸¹

If a rule of contribution were adopted either by statute or as a matter of federal common law under the antitrust laws, then it would seem to follow either that the nonsettling defendants should be entitled to contribution against the settlers as provided by the 1939 Uniform Contribution Among Tortfeasors Act, or, in the alternative, if such contribution were precluded, that there should be a mandatory claim reduction in some amount calculated to remove a fair portion of liability attributable to the settlers from the case. It would be logically inconsistent to recognize a right of contribution in nonsettlement cases, but to preserve a settling plaintiff's full right of recovery against nonsettling defendants without any right of contribution against the settling defendants. Indeed, a primary impetus for the introduction of S. 1468 providing for contribution in price-fixing cases was the view that some form of claim reduction is desirable in the settlement context because existing law creates unfair "settlement pressure" against nonsettling defendants, particularly in large

79. *Id.* at 467-68.

80. *Id.* at 468.

81. *Id.* The court declined, however, to adopt a rule automatically reducing the plaintiff's claim on a "per capita" basis, depending on the ratio of the number of settling tortfeasors to the total number of tortfeasors involved, in favor of a reduction based on "the extent of [the] negligence." The court believed that the "fairness of such a system is evident," but it was troubled by whether "its implementation will serve to encourage or discourage settlement prior to trial" because "a plaintiff, unable to know with any certainty before verdict the extent of his recovery, will be reluctant to discharge one or more of several tortfeasors from liability." *Id.* at 468-69.

class action antitrust litigation in which potential damages can run into the hundreds of millions or even billions of dollars.⁸² It is claimed that because only the settlement amount is carved out of ultimate recovery against nonsettling defendants under existing rules, the "exposure" of the nonsettlers increases with each settlement, thereby increasing the pressure on nonsettlers. Plaintiffs' counsel are said to demand a certain amount per percentage point of market share, which they escalate with each successive settlement round without regard to the merits of their claims against any particular settling defendant.⁸³ In the view of the proponents of S. 1468,

the effect of this open-ended liability on a smaller defendant who wishes to defend its innocence is to drive it into settlement, even if it believes that the risk of its being found liable is small

The result is to allow plaintiff's counsel to settle relatively inexpensively with . . . some defendants (usually the large and most responsible or those who want out as quickly as possible) and force the remaining defendants (often those who have the best case or are in the poorest financial position—usually the smaller companies) to settle at a higher rate rather than run the risk of huge liability for not only their own damages but also for the damages of those who opted out early and cheaply.

S. 1468 will end the abuse of these "whipsaw tactics" by relieving a defendant of the liability attributable to the defendants who settle.⁸⁴

To the extent that it exists, the existence of such "settlement pressure" would appear to be primarily attributable to the basic rule of joint and several liability of each antitrust conspirator for all damages caused by the conspiracy. Mandatory claim reduction seems inconsistent with that principle, for it requires a pro rata reduction of recovery rights no matter how small a part of his damages a plaintiff obtains in settlement. Moreover, the empirical evidence on this alleged strategy is far from conclu-

82. See SENATE REPORT, *supra* note 41, at 2-3, 13-17, 19.

83. [A] plaintiff's settlement strategy is often implemented by announcing that a "discount" will be given to quick settlers, based on the multiplication of an arbitrary dollar figure per "market share" by the defendant's share of sales. Once the initial settlements are achieved, the price of later settlements increases, because the number of remaining defendants decreases with each settlement.

Littman & Van Buskirk, *supra* note 9, at 689-90.

84. SENATE REPORT, *supra* note 41, at 2.

sive. Senators Metzenbaum and Kennedy in their supplemental views on S. 1468 noted that "the availability of contribution may well reduce the risk of damage liability for businessmen considering entering a price-fixing conspiracy,"⁸⁵ that "as a general rule, contribution is denied to intentional wrongdoers,"⁸⁶ that "mandatory claim reduction represents a step back from the long-established principle of joint and several liability,"⁸⁷ and that in their view,

We have been presented with absolutely no evidence that the larger, more "culpable" defendants routinely settle price-fixing suits early in the litigation. Neither have we seen any evidence demonstrating that small defendants are ultimately forced to settle against their will for unreasonable amounts because of earlier settlements by larger defendants.⁸⁸

85. *Id.* at 31.

86. *Id.*

87. *Id.* at 36.

88. *Id.* at 37 (footnote omitted). The primary example of alleged unfair settlement pressure or "coercion" advanced by proponents of S. 1468 was that of the Green Bay Packaging Company, named as a defendant in the *Corrugated* class-action litigation. According to the hearings testimony, Green Bay Packaging had a net worth of approximately \$70,000,000, annual sales of \$125,000,000, almost 1,800 employees, and an after tax net income of \$8.5 million in 1977. It manufactured corrugated boxes and had approximately 1.5 percent of the sales of the industry. Following a federal grand jury investigation of alleged price-fixing in the industry, a grand jury returned a number of indictments. Green Bay Packaging was not indicted.

In the hearings on S. 1468, the chairman of the board of the company claimed that "none of our employees were named as co-conspirators by the Justice Department attorneys conducting the criminal trial." *Hearings, supra* note 48, at 33. He testified that although a number of companies, including some of those indicted, settled early in the civil proceedings for relatively low amounts per percentage point of market share, Green Bay Packaging initially determined that there was no reason to settle because it was innocent. It was not until over 80 percent of the defendants in the private treble damage action had entered into settlements with the class plaintiffs that Green Bay first realized that it was facing a potential damage exposure for the sales of the entire industry. At that juncture, however, the plaintiffs declined to settle except on terms more onerous than those offered to companies that had bought their peace early in the litigation. Green Bay determined that the risk of liability was too great and threatened to impair its credit standing, and therefore that it could not afford to litigate its innocence. *Id.* at 32-39.

The facts relating to the Green Bay settlement are subject to dispute. One of plaintiffs' counsel in the *Corrugated* litigation advised the subcommittee that although Green Bay Packaging itself was not indicted, it "was named as a co-conspirator in the Bill of Particulars filed by the Justice Department in the criminal litigation" and "[e]ven of its officers and employees . . . were also named by the government as co-conspirators." *Id.* at 188-89. He also pointed out that Green Bay was among the last of the defendants to settle, that it was not required to pay cash as had the other settling defendants, but a promissory note payable two years later, and that Green Bay had paid significantly less than a number of defendants that had settled earlier and less, indeed, than the average

It seems unlikely that plaintiffs' counsel would deliberately pursue a strategy of settling with larger, more culpable, and more financially responsible defendants at bargain rates in order that they might preserve their claims against innocent defendants who would be unable to discharge a jury verdict against them in any event. The more serious concern is that the settlement strategy employed by plaintiffs' counsel has operated in practice to permit larger and more culpable defendants to settle early, leaving smaller and innocent ones facing liability for an entire industry in a nationwide class action suit as a result. Whether this has in fact been the case is an empirical matter peculiarly subject to legislative, rather than judicial determination.

There is, moreover, another perspective that raises a basic question whether the adoption of any claim reduction rule in the antitrust field as a corollary to a right of contribution among antitrust defendants would be consistent with the deterrence and compensation objectives of the private treble damage remedy. One view suggests that the modern class action has created a form of "legalized blackmail" that unfairly disadvantages antitrust and other class-action defendants. And indeed, if it were generally true that plaintiffs use "whipsaw" settlement tactics to force antitrust defendants to settle for reasons unrelated to the merits of the case, there would be reason for serious concern. Others believe, however, that antitrust litigation, involving as it does complex issues, extensive discovery, and defendants with substantial financial resources, which in many cases may outweigh those of any single plaintiff, may become a "war of attrition" in which the defendants may ultimately avoid any judicial determination of liability by taxing the plaintiffs' resources to the point that they are willing to settle for an amount far below their potential damage recovery. From this perspective, class-action antitrust litigation has merely served to redress the balance of power between the plaintiffs and defendants in complex litigation. These differing viewpoints were sharply reflected in the hearings on S. 1468, with representatives of the defense bar strongly advocating the legislative creation of a right of contribution in price-fixing cases, and representatives of the plaintiffs'

settlement amount. *Id.* at 189-90. It also appeared that Green Bay Packaging's liability for contribution in favor of the settling defendants, had S. 1468 been the law and had it chosen not to settle, would have exceeded the amount it paid in settlement of plaintiffs' claims. *Id.* at 190.

bar stridently opposing it.⁸⁹

The issues of settlement and contribution under the anti-trust laws must be viewed in this larger context. Thus, although current rules of liability may in some cases lead to unfair settlement pressure, the ability of antitrust plaintiffs to obtain early settlements with some defendants may provide them with the resources necessary to continue the lawsuit against the others.⁹⁰ In addition, the settlement process provides plaintiffs with an avenue of obtaining meaningful recovery commensurate with the defendants' fault short of full-scale litigation. Their ability to circumvent long, burdensome, and expensive litigation not only significantly benefits the judicial system, but also may enhance the deterrent effect of the private treble damage remedy. But under a regime of mandatory claim reduction, the incentive of plaintiffs to enter such settlements would be reduced because they would be surrendering an undetermined but potentially significant part of their claim against the other defendants. As Senators Kennedy and Metzenbaum observed in their Supplemental Views on S. 1468:

S. 1468 substantially reduces the plaintiffs' incentive to settle early in the litigation at an amount which the small company with a large market share can afford. Under the law as it now stands, the individual liabilities of the nonsettling price-fixers is reduced only by the amount of the plaintiffs' settlement with the small company unless the plaintiffs agree to a larger deduction. S. 1468, however, forces the plaintiffs to give up a part of their claim which may far exceed any amount that the small company can reasonably afford. As Mr. Shapiro pointed out [in the hearings], "No plaintiff in his right mind is going to settle with a defendant with a small net worth and a large market share if by so doing he is going to take 30 or 40 or 50 percent of the market out of the case." . . . And Mr. Shenefield [Assistant Attorney General, Antitrust Division] observed that "even defendants who desperately want to reach a compromise settlement may find plaintiffs reluctant to enter into settlement agreements from fear of losing an unknown portion of their potential recovery."⁹¹

In an earlier review of this subject, the author concluded

89. Compare *Hearings*, *supra* note 48, at 63-87, 110-22 with *id.* at 49-63, 91-110.

90. See SENATE REPORT, *supra* note 41, at 40 (supplemental views of Senators Metzenbaum and Kennedy).

91. *Id.* at 38.

that in the context of ordinary negligence litigation, the pro rata reduction rule offered the best resolution of competing policies because, although it might discourage partial settlements of litigation, it would not undermine the most relevant settlement goal of encouraging entirety of settlement.⁹² Although partial settlements may be "an economic way of life, often yielding high rewards" to the plaintiffs' bar,⁹³ such settlements do not prevent actions against the others and "the adjudicative system may thus be burdened with the case whenever the settlement is not entire. A greater economy is apparent when the plaintiff settles his entire cause of action by negotiating collectively with all the tortfeasors, and entirety is therefore the more desirable settlement goal."⁹⁴ Nonetheless, in the antitrust field, the private treble damage remedy serves an important deterrent as well as compensatory function, and it is imperative that the rules adopted not undermine the effectiveness of this remedy as a practical matter by unduly diminishing the bargaining power of plaintiffs versus antitrust defendants. And unless significant pressure for partial settlement exists, entirety of settlement may be only a hypothetical possibility.

If a contribution rule were created under the antitrust laws, coupled with mandatory claim reduction, a number of difficult subsidiary questions would remain, primarily concerning how the mandatory reduction should be computed. As the impetus for contribution rests primarily on the ground of "fairness" among wrongdoers, it would seem to follow that some form of comparative fault analysis should provide the general rule.⁹⁵ But this would interject yet another exceedingly complex factual determination, the allocation of fault among the violators, into antitrust litigation either in the initial action or in a subsequent independent suit for contribution. Moreover, contribution on the basis of comparative fault has been criticized on the ground that it would deter both plaintiffs and defendants from settling—plaintiffs because, despite the settlement, they would be forced to litigate the fault of the settling defendants in their action against the nonsettlers; and defendants because they would

92. See Note, *Settlement in Joint Tort Cases*, 18 STAN. L. REV. 486, 488-89, 493 (1967).

93. *Id.* at 489.

94. *Id.*

95. See UNIFORM COMPARATIVE FAULT ACT § 4. See also *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975).

be unable to avoid the judicial determination of their liability, in an action to which they were not parties, that might encourage other potential lawsuits.⁹⁶

In the *Professional Beauty Supply* case, the majority of the court adopted "a rule of pro rata contribution except in unusual circumstances"⁹⁷ because of "the administrative difficulties of assessing exact percentages of fault in complicated antitrust actions" and because the court believed that "a rule of pro rata contribution will serve as a more effective deterrent to antitrust violations."⁹⁸ But this analysis would seem itself to disregard what the *Professional Beauty Supply* majority declared to be the "deciding factor" in its decision, namely "fairness between the parties."⁹⁹ If the "pro rata share" be determined, as the *Professional Beauty Supply* majority apparently assumed, on a "per capita" basis, then obviously the contribution share would bear no necessary or even close relationship either to the fault or to the economic benefits realized by the contribution defendant. This difficulty could be ameliorated to some degree by determining the "pro rata share" on the basis of the market share of the settling defendant or by the "actual damages attributable to the settling person's sales or purchases of goods or services" as proposed in S. 1468, but again, these measures, although perhaps proportionate to the "benefits" supposedly realized by the conspirator, bear no necessary relationship to its fault and degree of involvement in the conspiracy, which would seem to be necessary considerations in any rule grounded primarily on considerations of fairness.

2. Contribution on behalf of settling antitrust defendants

An issue generally ignored in the commentary is whether contribution should be available *in favor of* an antitrust violator that has voluntarily settled the action against it without any judicial determination of its liability. This is the situation in a companion to the Tenth Circuit *Olson Farms* case, in which the original antitrust plaintiffs had commenced a "follow-on" action against Olson, seeking damages for the alleged continuation of

96. See Note, *Contribution in Private Antitrust Actions*, 93 HARV. L. REV. 1540, 1555 (1980).

97. 594 F.2d at 1182 n.4.

98. *Id.*

99. *Id.* at 1185.

the conspiracy for which they had previously recovered judgment. Olson filed cross-claims against the other defendants in the follow-on action, and a third-party complaint against an alleged coconspirator not named as a defendant by the plaintiffs. The district court dismissed Olson's cross-claims and a third-party complaint.¹⁰⁰ Following the entry of judgment, however, Olson Farms settled the action of the antitrust plaintiffs against it with the result that it avoided any judicial determination of its liability. Olson nonetheless maintained on appeal that it was entitled to contribution on account of the settlement amount that it had negotiated with the plaintiffs, both against other alleged coconspirators who themselves had settled with the antitrust plaintiffs, and against the third-party defendant, who had not.¹⁰¹

Although a minority of state statutes do not permit contribution unless a joint judgment has been entered against the alleged tortfeasors,¹⁰² the prevailing view expressed by the Uniform Contribution Among Tortfeasors Act is that contribution is available on account of a settlement payment.¹⁰³ There is substantial reason to question whether this rule, which arose in negligence actions, should be uncritically extended to the antitrust area even if a right of contribution otherwise existed. As illustrated by the second *Olson* case, such a rule would mean that even though the only plaintiff possessing a cause of action under section 4 of the Clayton Act had entirely settled an antitrust action against the defendants, thereby removing the burden of the action from the federal courts, an antitrust conspirator who voluntarily entered such a settlement would nevertheless be permitted to assume the garb of a plaintiff and maintain a contribution action based on the same allegations. Moreover, because no judicial determination of liability was ever made in the underlying antitrust action against the settling defendant, it would be necessary, despite the settlement, for the settling defendant as contribution plaintiff to litigate the entire antitrust case, proving with competent evidence both that it was liable in fact

100. *Cackling Acres v. Olson Farms, Inc.*, No. C-75-472 (D. Utah Dec. 19, 1977) (order dismissing cross-claims and third-party complaint).

101. *Olson Farms, Inc. v. Countryside Farms, Inc.*, No. 78-1773 (10th Cir. Nov. 8, 1979).

102. See generally *Sabre Shipping Corp. v. American President Lines, Ltd.*, 298 F. Supp. 1339, 1343 n.1 (S.D.N.Y. 1969); W. PROSSER, *supra* note 62, at 308-09.

103. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 1(a) (1955 version).

to the antitrust plaintiff and that the alleged contribution defendants were its coconspirators.¹⁰⁴ The contribution plaintiff would also be required to prove that the amount of its settlement was reasonable in light of its potential damage exposure and the risk of an adverse jury verdict,¹⁰⁵ an exceedingly difficult process under any circumstances.¹⁰⁶

D. "Fairness" Among Antitrust Violators: The Relevance of Intent

A primary impetus for creating a right of contribution under the antitrust laws has arisen from allegations that existing rules of joint and several liability create "unfair settlement pressure." As previously discussed, resolution of this argument turns primarily on empirical determinations and legislative policy judgments. In addition, however, advocates of contribution have contended that even in a litigated case, considerations of fairness favor creation of a right of contribution and outweigh whatever harm might arise from the standpoint of decreasing deterrence, discouraging settlement, or increasing the complexity of antitrust litigation. The *Professional Beauty Supply* majority stated that "the deciding factor in our decision is fairness between the parties" and that "[t]here is an obvious lack of sense and justice in a rule which permits the entire burden of restitution of a loss for which two parties are responsible to be placed upon one alone because of the plaintiff's whim or spite,

104. "[A] compromiser must sustain the burden of proof . . . as to his own liability to the original plaintiff" and "the contribution defendant must be a tortfeasor, and originally liable to the plaintiff." W. PROSSER, *supra* note 62, at 309. See, e.g., *W. D. Rubright Co. v. International Harvester Co.*, 358 F. Supp. 1388, 1392 (W.D. Pa. 1973) (Pennsylvania statute).

105. See W. PROSSER, *supra* note 62, at 309.

106. The district court in the contribution action would also be forced to determine whether the release of the contribution plaintiff had the effect of releasing all of the alleged contribution defendants from liability to the plaintiffs. If the settlement did not have that effect, it is generally accepted that the contribution plaintiff conferred no "benefit" on the alleged contribution defendants sufficient to entitle it to force them to share the amount of its settlement. See, e.g., *Allbright Bros., Contractors v. Hull-Dobbs Co.*, 209 F.2d 103 (6th Cir. 1953) (Arkansas statute); *Brenham v. Southern Pacific Co.*, 328 F. Supp. 119 (W.D. La. 1971) (Louisiana statute), *aff'd*, 469 F.2d 1095 (5th Cir. 1972), *cert. denied*, 409 U.S. 1061 (1972); UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT, § 1(d) (1955 version); 1 F. HARPER & F. JAMES, *THE LAW OF TORTS* 719 (1956). Whether the release had that effect is a matter of federal law which requires a detailed inquiry into the intent of the parties. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 342-47 (1971).

or his collusion with the other wrongdoer."¹⁰⁷

This language should be contrasted with that of Professor Prosser, its unacknowledged source, who more accurately states the shared community perception of equity among wrongdoers. What Prosser actually said was:

There is obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were equally, *unintentionally* responsible, to be shouldered onto one alone, according to the accident of . . . the plaintiff's whim or spite, or his collusion with the other wrongdoer

. . . .¹⁰⁸

Beginning with the Restatement of Restitution in 1937, and carrying on through the 1939 and 1955 versions of the Uniform Contribution Among Tortfeasors Act, the 1977 Uniform Comparative Fault Act, and the Restatement, Second, of Torts, it has been generally accepted, even in jurisdictions permitting contribution by statute, that considerations of fairness do not require permitting an intentional wrongdoer to relieve himself of a portion of the damages for which he is otherwise jointly and severally responsible. For example, section 1(c) of the 1955 Uniform Contribution Among Tortfeasors Act provides: "There is no right of contribution in favor of any tortfeasor who has intentionally . . . caused or contributed to the injury or wrongful death."¹⁰⁹ The Restatement, Second, of Torts provides: "There is no right of contribution in favor of any tortfeasor who has intentionally caused the harm."¹¹⁰ The comments to the Restatement note that "contribution is a remedy that developed in equity"¹¹¹ and that

*[I]n the absence of statute, the courts have adhered to the original English rule that no right of contribution arises in favor of one who has intentionally caused harm to another. The basis of the rule is the old one that the courts will not aid one who has deliberately done harm, so that no man can be permitted to found a cause of action on his own intentional tort.*¹¹²

107. 594 F.2d at 1185-86.

108. W. PROSSER, *supra* note 62, at 307 (emphasis added) (footnote omitted).

109. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 1(c) (1955 version).

110. RESTATEMENT (SECOND) OF TORTS § 886A(3) (1977).

111. *Id.* Comment c.

112. *Id.* Comment j (emphasis added). The Restatement notes that the rule "has been modified . . . to permit contribution in favor of one who is charged with a purely

The Restatement applies the same rule to reckless conduct, which "usually approaches the degree of moral blame attached to intentional harm, since the defendant deliberately inflicts a highly unreasonable risk of harm upon others in conscious disregard of it."¹¹³ In the brief amicus curiae for the United States urging the grant of certiorari in the *Westvaco* case, the Solicitor General recognized that the considerations of equity and fairness that have prompted state legislatures to enact statutes providing for apportionment of damages in negligence cases cannot be transported to require such apportionment among antitrust conspirators.¹¹⁴

In the face of these strong expressions that contribution is inappropriate in the case of intentional wrongdoers, advocates of contribution have urged that most antitrust violations do not involve intent to cause harm of a nature that would preclude the assistance of a court of equity,¹¹⁵ to the extent of contending that "[e]ven in cases of so-called per se liability, intent to cause harm is not necessary for the violation" and that "[a] principle excluding contribution, based on intent to cause harm, would . . . allow contribution in most antitrust cases."¹¹⁶

This analysis is subject to serious question. Conspiracies and attempts to monopolize in violation of section 2 of the Sherman Act require a finding of a specific intent to monopolize as a precondition of liability.¹¹⁷ This was the situation in the Tenth Circuit *Olson Farms* case, for example, in which Olson, which sought contribution, had been subjected to liability in the un-

technical tort" such as "one who has become liable for conversion by reason of his bona fide purchase of stolen goods . . ." *Id.* This qualification would not appear to be relevant to the question of contribution in favor of an antitrust conspirator.

113. *Id.* Comment k. Similarly, the Commissioners' Comment to the Uniform Comparative Fault Act (apparently not yet adopted by any state) points out that "[t]he Act does not include intentional torts." 12 UNIFORM LAWS ANNOTATED, Comment to § 1 (1980 Supp.). Some proponents of contribution have apparently overlooked this limitation. See Littman & Van Buskirk, *supra* note 9, at 738, 750 & n.185.

114. "While we recognize that contribution arguably may enhance fairness in some circumstances, we do not regard as in itself unfair the principle of joint and several liability for the consequences of concerted intentional misconduct—which is the general rule for both criminal and tort liability in our legal system." Brief for the United States as Amicus Curiae at 15, *Westvaco Corp. v. Adams Extract Co.*, 100 S. Ct. 3008 (1980).

115. *E.g.*, Littman & Van Buskirk, *supra* note 9, at 751.

116. *Id.* at 752-53.

117. *Salco Corp. v. General Motors Corp.*, Buick Motor Div., 517 F.2d 567, 576 (10th Cir. 1975) ("specific intent to monopolize is the heart of a conspiracy charge"); REPORT OF SECTION ANTITRUST LAW, *supra* note 35, at 59-63 (1979); E. KINTNER, AN ANTITRUST PRIMER 108-09 (2d ed. 1973).

derlying antitrust action on the basis of evidence of blatant anticompetitive conduct.¹¹⁸ Moreover, beyond antitrust violations requiring a finding of specific intent, a wide range of the most prevalent private treble damage actions allege per se violations of the antitrust laws such as price fixing. To argue that "[t]he parties to such conduct . . . may not intend to cause harm"¹¹⁹ disregards the nature of the per se antitrust violation. There is no analogy between such conduct, which under accepted norms of commercial behavior does carry with it substantial moral turpitude, and technical violations of a statute such as "driving at a speed in excess of the statutory limit or parking next to a fire plug"¹²⁰ in which contribution may be appropriate.

In *United States v. United States Gypsum Co.*,¹²¹ the United States Supreme Court considered the state of mind required to sustain a criminal violation of the antitrust laws. *Gypsum* did not involve a per se violation of the antitrust laws such as an agreement to fix prices, but an agreement within the "rule of reason" to exchange price information, allegedly for the purpose of assuring compliance with the "meeting competition" defense of section 2(b) of the Robinson-Patman Act. The Supreme Court held that proof of a criminal violation of the antitrust

118. As the court of appeals stated in affirming the judgment against Olson on account of which contribution was sought:

In the instant case, the plaintiffs did not rely on price parallelism alone to prove that Olson Farms and its alleged conspirators forced downward the price paid to Utah-Idaho egg producers. There was other evidence, which the jury apparently chose to believe, that representatives of Olson Farms and its co-conspirators had numerous meetings at Harman's Cafe, and that in addition thereto, there were constant telephone calls between the various conspirators, all in furtherance of the conspiracy to peg egg prices in the Utah-Idaho area.

Cackling Acres, Inc. v. Olson Farms, Inc., 541 F.2d 242, 245 (10th Cir. 1976).

The trial court had instructed the jury that it could find Olson Farms liable as a conspirator only if it determined that Olson had intentionally entered into a conspiracy to fix prices: "[A]cceptance of [an agreement to restrain trade] must be conscious and intentional"; and "it must be shown that . . . the members [of the conspiracy] came to a mutual understanding to accomplish a common and unlawful plan." Record at 7366-67. The trial court further instructed on plaintiffs' conspiracy to monopolize claim that the *Cackling Acres* plaintiffs were required to prove that Olson conspired "with the specific intent . . . to acquire or exercise monopoly power." *Id.* at 7379 (emphasis added). See also *id.* at 7383, 7387-88. Judge Holloway, although dissenting from the Tenth Circuit's denial of contribution in the *Olson Farms* case, acknowledged: "I agree that at this juncture Olson Farms must be considered an intentional wrongdoer" and that "we must regard Olson Farms as an intentional wrongdoer since conspiracy and attempt [to monopolize] both require a finding of specific intent." 1979-2 Trade Cas. at 79,706 n.3.

119. Littman & Van Buskirk, *supra* note 9, at 752.

120. RESTATEMENT (SECOND) OF TORTS § 886A, Comment j (1977).

121. 438 U.S. 422 (1978).

laws requires evidence that the illegal agreement was taken either with the specific intent of producing anticompetitive effects, or with knowledge that such effects were substantially certain to occur, for "[i]n either circumstance, the defendants are consciously behaving in a way the law prohibits, and such conduct is a fitting object of criminal punishment."¹²² The Court appeared to draw a distinction between criminal violations, which require such proof of "mens rea," and civil violations, which do not.¹²³

Gypsum suggests that some rule of reason violations may indeed expose conspirators to civil liability even though they thought they were doing nothing wrong and had no intent to cause harm. Such an analysis has no applicability to a conspiracy to fix prices or to commit some other per se violation of the antitrust laws. As pointed out in a leading post-*Gypsum* decision, "the mere existence of a price-fixing agreement establishes a defendant's illegal purpose."¹²⁴ Thus, in order to sustain a criminal conviction for price fixing, no proof of intent, beyond the intent to fix prices, is required.¹²⁵

The Supreme Court's concern [in *Gypsum*] with those who unwittingly violate the antitrust laws has no place here. Here, defendants have fixed prices, "probably the clearest violation of the antitrust laws and the one most obnoxious to the underlying policy of free competition." The act of agreeing to fix prices is in itself illegal; the criminal act is the agreement.¹²⁶

The possibility remains that the interests of fairness would require the fashioning of a contribution rule that would permit contribution to "unintentional" antitrust violators while denying it to those who commit per se violations of the antitrust laws or act with the specific intent to restrain trade. In the *Olson Farms* case, the Tenth Circuit suggested the possibility of an exception in the case of an "unintentional violator."¹²⁷ In the *Abraham Construction* case, however, the Fifth Circuit majority declined to endorse such a distinction on the grounds that it would open

122. *Id.* at 445.

123. *Id.* at 443 n.19.

124. *United States v. Gillen*, 599 F.2d 541, 545 (3d Cir. 1979).

125. *Id.* (footnote omitted). *Accord*, *United States v. Continental Group, Inc.*, 603 F.2d 444 (3d Cir. 1979); *United States v. Brighton Bldg. & Maintenance Co.*, 598 F.2d 1101 (7th Cir. 1979). *See also* *United States v. Foley*, 598 F.2d 1323 (4th Cir. 1979).

126. 599 F.2d at 545.

127. 1979-2 Trade Cas. at 79,704.

a "Pandora's box" of procedural complexities and could impair the deterrent function of the private treble damage remedy.¹²⁸

Even assuming that inequity may occur in a particular case . . . we believe that creating a contribution right for an unintentional violator may inimically affect the implementation of the antitrust laws. The possible detriments that can be envisioned make this an inappropriate case for the exercise of our power to shape the federal common law.¹²⁹

Although the argument for contribution based on fairness in the case of a truly unintentional violator—if such a case were to arise—is not without substance, it is of interest to note, in assessing the prevalence of this situation, that all four of the leading decisions on this question in the courts of appeals (*Professional Beauty Supply*, *Abraham Construction*, *Westvaco*, and *Olson Farms*) involved allegations of a conspiracy to fix prices, or violations requiring a finding of specific intent, or both. It is also clear that making the availability of contribution contingent on the absence of intent would add substantial additional complications to already exceedingly complex private treble damage actions by creating a major issue regarding the state of mind and degree of culpability of the various defendants.¹³⁰ Moreover, such a rule would necessarily create considerable uncertainty about when contribution might be available, thus undermining the certainty necessary to make rational settlement decisions.¹³¹

128. 604 F.2d at 905-06.

129. *Id.* at 905.

130. See Note, *Contribution in Private Antitrust Actions*, 93 HARV. L. REV. 1540, 1555-56 (1980).

131. The *Professional Beauty Supply* majority was also influenced by allegations in National's third-party complaint that La Maur had solicited National to become its distributor and that National had no responsibility for La Maur's decision to terminate the plaintiff. 594 F.2d at 1181. The court of appeals noted the possibility that a "large or powerful tortfeasor" with "sufficient economic influence to prevent a plaintiff from including it as a defendant" could escape liability entirely. *Id.* at 1185. Similarly, Judge Holloway dissenting in the Tenth Circuit's decision in *Olson Farms*, although acknowledging that the "record . . . does not deal with the motives and circumstances of the bringing of this antitrust suit" pointed out the possibility of "a plaintiff deliberately choosing to sue a less formidable, but financially responsible defendant, and avoiding litigation with other equally culpable parties." 1979-2 Trade Cas. at 79,706. There is little if any empirical evidence to support such conjecture, and such a strategy would appear in the ordinary case to be counter to the incentive of a private plaintiff to include those defendants most culpable and most financially responsible in its action.

III. THE ROLE OF THE JUDICIARY IN FASHIONING RIGHTS OF CONTRIBUTION WITHIN A STATUTORY FRAMEWORK OF PRIMARY LIABILITY

A. *Contribution in Negligence and Securities Act Cases*

The *Professional Beauty Supply* majority and other advocates of contribution have emphasized a perceived "trend" toward the allowance of contribution among joint wrongdoers in support of their suggestion that a new right of contribution should be fashioned under the antitrust laws.¹³² Although such a "trend" undoubtedly exists, closer analysis of the circumstances in which it has manifested itself is required if it is to be placed in perspective and its limitations understood.

Proponents of contribution have relied on a small minority of decisions that have judicially implied a right of contribution among joint tortfeasors in negligence cases.¹³³ With one exception,¹³⁴ those decisions arose under state law, and thus did not purport to call into question the long-standing rule of the *Union Stock Yards* case denying a right of contribution as a matter of federal common law. More fundamentally, the cases cited were all negligence cases. This limitation is explicit in the case going furthest to fashion a new judicial rule of contribution as a matter of federal common law, *Kohr v. Allegheny Airlines, Inc.*¹³⁵ *Kohr* involved consolidated wrongful death and property damage suits arising out of a mid-air collision that were commenced under diversity and Federal Tort Claims Act jurisdiction. Defendants United States and Allegheny settled and then sought contribution and indemnity from the other defendants. The district court ruled that, under the applicable law of Indiana, no such right of contribution existed. The court of appeals reversed on the ground that the district court had erred in applying Indiana law to the cross-claims and third-party complaints for indemnity and contribution, and instead held that "there should be a federal law of contribution and indemnity governing mid-air collisions such as the one here" because of the "predominant, indeed

132. 594 F.2d at 1184. See also Littman & Van Buskirk, *supra* note 9, at 749; REPORT OF SECTION OF ANTITRUST LAW, *supra* note 35, at 4-5; SENATE REPORT, *supra* note 41, at 4-9.

133. See e.g., *Kohr v. Allegheny Airlines, Inc.*, 504 F.2d 400 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975); *Gomes v. Broadhurst*, 394 F.2d 465 (3d Cir. 1967); *Knell v. Feltman*, 174 F.2d 662 (D.C. Cir. 1949).

134. See *Kohr v. Allegheny Airlines*, 504 F.2d 400, 401 (7th Cir. 1974).

135. 504 F.2d 400 (7th Cir. 1974).

almost exclusive, interest of the federal government in regulating the affairs of the nation's airways."¹³⁶ The court's holding was expressly limited to the fashioning of a rule permitting contribution and indemnity among *unintentional* wrongdoers:

We reject as being outmoded and entirely unsatisfactory, the contention that the federal rule should be one of "no contribution." We agree that "[t]here is an obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were equally, *unintentionally* responsible, to be shouldered on to one alone"¹³⁷

Considerations of fairness and equity are far clearer in the negligence area than in the case of antitrust violations. Moreover, the development of rights and remedies in negligence actions has long been the peculiar province of common-law courts, save only as their creativeness may be restrained by legislative enactment. In contrast, the prescription of rights and remedies under the antitrust laws has fundamentally been the province of Congress, and the judiciary must therefore exercise its law-making powers with some care to avoid undercutting the primary legislative policies expressed by the statutory remedial scheme of the antitrust laws.¹³⁸

Proponents of contribution have also relied upon decisions permitting contribution among joint violators of the Securities Act of 1933 and the Securities Exchange Act of 1934, even where the violations were intentional.¹³⁹ They argue that such decisions "granted contribution rights even under sections of the Securities Act which did not contain explicit provisions for such rights."¹⁴⁰ The *Professional Beauty Supply* majority cited a

136. *Id.* at 403. In view of the settled principle that state substantive law applies both in diversity actions and in actions arising under the Federal Tort Claims Act, one might question the court's holding as a matter of substantive law.

137. *Id.* at 405 (emphasis added).

138. Some commentators have also noted that in England the common-law rule, unlike the rule of the *Union Stock Yards* case in the United States, denied contribution only to willful or conscious wrongdoers, and that by virtue of the Law Reform (Married Women and Tortfeasors) Act of 1935 even that limitation is no longer applied, and contribution is permitted among joint tortfeasors "where damage is suffered by any person as a result of a tort (whether a crime or not)." Littman & Van Buskirk, *supra* note 9, at 736-37 (quoting 25-26 Geo. 5, c. 30 (1935); SALMOND ON TORTS 445 (17th ed. 1977)). There has been no corresponding statutory expansion of rights of contribution in the United States.

139. See generally, SENATE REPORT, *supra* note 41, at 7-9; REPORT OF SECTION OF ANTITRUST LAW, *supra* note 35, at 4-5; Littman & Van Buskirk, *supra* note 9, at 742-43.

140. Littman & Van Buskirk, *supra* note 9, at 742 (footnote omitted).

number of the securities act cases in support of its conclusion that "federal courts have been willing to formulate rules for contribution in other areas of the law without express congressional direction."¹⁴¹

This analysis overlooks the fact that several sections of the securities acts in which Congress created an express private right of action for damages also include a provision for contribution among defendants without regard to their culpability. For example, section 11 of the Securities Act of 1933 provides: "All or any one or more of the persons specified in subsection (a) of this section shall be jointly and severally liable, and every person who becomes liable to make any payment under this section may recover contribution"¹⁴² Substantially identical language appears in the provisions of the Securities Exchange Act of 1934 dealing with the manipulation of security prices¹⁴³ and misleading statements.¹⁴⁴ There are no comparable provisions expressly authorizing contribution among defendants held jointly liable for violations of section 10(b) of the Securities Exchange Act of 1934 and section 17(a) of the Securities Act of 1933, but the reason for this is obvious: Congress provided no express private right of action for damages under such provisions. Not having done so, it could hardly be expected to have authorized contribution with respect to a remedy that it did not create. The courts would appear to have been on solid ground as a matter of congressional intent and legal process in determining that in such cases where securities act damage liability to private parties was judicially implied, a right of contribution should be permitted by analogy to those express private rights of action that the Congress did create.¹⁴⁵

B. Contribution in Admiralty Cases

The need for caution against uncritical extension "by analogy" of decisions in other areas of the law, which are concerned with other questions, and involve different policy considerations, is also illustrated by the admiralty cases cited by proponents of the judicial creation of a right of contribution under the anti-

141. 594 F.2d at 1184 (footnote omitted).

142. 15 U.S.C. § 77k(f) (1976).

143. *Id.* § 78i(e).

144. *Id.* § 78r(b).

145. *See deHaas v. Empire Petroleum Co.*, 286 F. Supp. 809, 815-16 (D. Colo. 1968).

trust laws. Notwithstanding the settled rule of the *Union Stock Yards* case, which denies any right of contribution as a matter of federal common law, federal courts sitting in admiralty have from the beginning followed a rule permitting contribution in maritime cases. In *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*,¹⁴⁶ the United States Supreme Court pointed out that

Where two vessels collide due to the fault of both, it is established *admiralty* doctrine that the mutual wrongdoers shall share equally the damages sustained by each, as well as personal injury and property damage inflicted on innocent third parties. This *maritime* rule is of ancient origin and has been applied in many cases¹⁴⁷

The Court made clear that this "admiralty doctrine of ancient lineage"¹⁴⁸ was distinct from the general federal common-law rule denying contribution among wrongdoers: "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." [citing the *Union Stock Yards* case].¹⁴⁹ Noting that the common-law rule had provoked both criticism and defense, the Court observed in *Halcyon* that "to some extent courts exercising jurisdiction in maritime affairs have felt freer than common-law courts in fashioning rules, and we would feel free to do so here if wholly convinced that it would best serve the ends of justice."¹⁵⁰ In the circumstances of *Halcyon*, however, the court declined to permit a right of contribution.

Halcyon Lines had hired *Haenn Ship Corporation* to repair *Halcyon's* ship. *Haenn's* employee was injured on the ship while making the repairs, and the employee sued *Halcyon*, claiming that his injuries were caused by its negligence and the unseaworthiness of its vessel. *Halcyon* sought contribution from *Haenn*. The jury concluded that *Haenn* was 75 percent responsible and *Halcyon* 25 percent responsible. Under the Longshoremen's and Harbor Workers' Compensation Act, *Haenn* was liable without fault to its employee for his injuries. The Act further provided

146. 342 U.S. 282 (1952).

147. *Id.* at 284 (emphasis added) (footnote omitted).

148. *Cooper Stevedoring Co., Inc. v. Fritz Kopke, Inc.*, 417 U.S. 106, 110 (1974).

149. 342 U.S. at 285 (citing *Union Stock Yards Co. v. Chicago, B. & Q. R.R.*, 196 U.S. 217, 224 (1905)).

150. *Id.* (footnote omitted).

that "the liability of an employer prescribed . . . shall be exclusive and in place of all other liability of such employer to the employee . . . at law or in admiralty on account of such injury or death" ¹⁵¹ Haenn had argued that the Harbor Workers' Act provided its exclusive liability, "thereby preventing a third party from having any right of contribution against an employer under the Act in cases where the joint negligence of a third party and the employer injure an employee covered by the Act." ¹⁵² The Supreme Court found it unnecessary to decide this question because it concluded on independent grounds 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." ¹⁵³

The bases for the Supreme Court's conclusion were (1) that Congress had pre-empted the question of rights and remedies in the area of maritime personal injuries in non-collision cases by enacting a complex system of statutes in the area, and (2) that the questions presented were not within the judicial competence. The Court stated:

Congress has already enacted much legislation in the area of maritime personal injuries. For example, under the Harbor Workers' Act Congress has made fault unimportant . . . ; Congress has made further inroads on traditional court law by abolition of the defenses of contributory negligence and assumption of risk The Harbor Workers' Act in turn must be integrated with other acts such as the Jones Act Many groups of persons with varying interests are vitally concerned with the proper functioning and administration of all these Acts as an integrated whole. We think that legislative consideration and action can best bring about a fair accommodation of the diverse but related interests of these groups. The legislative process is peculiarly adapted to determine which of the many possible solutions to this problem would be most beneficial in the long run. ¹⁵⁴

Advocates of the creation of a right of contribution under the antitrust laws have contended that *Halcyon* was "in effect confined . . . to cases where the extension of the admiralty rule would conflict with a clearly expressed statutory rule making an-

151. *Id.* at 286 n.12.

152. *Id.*

153. *Id.* at 285.

154. *Id.* at 285-86 (emphasis added) (footnote omitted).

other remedy exclusive"¹⁵⁵ by the later decision of the Supreme Court in *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*¹⁵⁶ In that action, a vessel owned by Kopke was loaded by petitioner Cooper Stevedoring Company in Mobile, Alabama, and then proceeded to Houston where another stevedore was employed to load additional cargo. A Houston longshoreman engaged in this task fell between a gap in the crates that had been loaded in Mobile and injured himself. He sued the vessel in admiralty and the vessel in turn sought recovery over from Cooper alleging that any negligence or unseaworthiness was the result of its activities.

The district court concluded that the loading of the original cargo had created an unseaworthy condition and that Cooper had been negligent. Accordingly, the court divided damages equally between the vessel and Cooper. The United States Supreme Court rejected Cooper's contention based on *Halcyon* that there could be no award of contribution against it. It observed that "despite the occasional breadth of its dictum"¹⁵⁷ the *Halcyon* opinion should be read against the historical backdrop of the "admiralty doctrine of ancient lineage" which "provides that the mutual wrongdoers shall share equally in damages sustained by each."¹⁵⁸ The *Cooper* Court noted that "since the employee [in *Halcyon*] was covered by the Longshoremen's and Harbor Workers' Compensation Act . . . he was prohibited from suing his employer Haenn."¹⁵⁹ It was the *Cooper* Court's view that the *Halcyon* Court

took cognizance of the apparent trade-off in the Act between the employer's limitation of liability and the abrogation in favor of the employee of common-law doctrines of contributory negligence and assumption of risk. . . . Confronted with the possibility that any workable rule of contribution might be inconsistent with the balance struck by Congress in the Harbor Workers' Act between the interests of carriers, employers, employees, and their respective insurers, we refrained from allowing contribution in the circumstances of that case.¹⁶⁰

In contrast, the employee in *Cooper* was not an employee either of the vessel or of Cooper, and "on the facts of this case, then,

155. Littman & Van Buskirk, *supra* note 9, at 740.

156. 417 U.S. 106 (1974).

157. *Id.* at 111.

158. *Id.* at 110.

159. *Id.* at 111.

160. *Id.* at 112.

. . . *no countervailing considerations detract from the well-established maritime rule allowing contribution between joint tortfeasors.*"¹⁶¹

It is going too far to say that after *Cooper, Halcyon* means only that federal courts should refrain on their own initiative from creating common-law rights of contribution in cases in which Congress has expressly legislated a statutory immunity. *Cooper* rested fundamentally on the historic maritime doctrine permitting contribution, and held that in an *admiralty* case resting on allegations of unseaworthiness and negligence, it saw no reason to depart from that "well-established maritime rule allowing contribution between joint tortfeasors" absent some indication of inconsistency with the policies underlying legislation in the area.¹⁶²

In the context of the antitrust laws, however, the question is not whether a court should depart from a well-established rule permitting contribution, but whether it should *adhere* to the long-standing federal common-law rule denying contribution in the absence of legislation on the question, and moreover, whether it should do so in a context where arguments based on the principle of fairness are far from compelling and turn in significant part on empirical and legislative facts. In addition, there is substantial reason to question whether the existence of such a right would be consistent with the deterrence and compensation objectives underlying the private treble damage remedy. In that context, the *Halcyon* Court's concerns about upsetting the balance among competing interests established by Congress and its conclusion "that the legislative process is peculiarly adapted to determine which of the many possible solutions to this problem would be most beneficial in the long run" has continuing relevance.¹⁶³

161. *Id.* at 113 (emphasis added).

162. *Id.*

163. In *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975), the Supreme Court abrogated the traditional admiralty rule of equal division of damages in maritime collision cases, initially announced over 120 years before. The respondent had urged that "creation of a new rule of damages in maritime collision cases is a task for Congress and not for this Court." *Id.* at 409 (footnote omitted). The Court responded, "the Judiciary has traditionally taken the lead in formulating flexible and fair remedies in the law maritime, and 'Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law.'" *Id.* (emphasis added). *Reliable Transfer* was thus a case in which the Court exercised its recognized primacy as lawgiver in a field in which the development of remedial law had traditionally been the province of the courts, to

C. *The Relevance of Cases Dealing with the Implication of Private Rights of Action for Damages*

In *Hawaii v. Standard Oil Co. of California*,¹⁶⁴ the Supreme Court considered whether section 4 of the Clayton Act authorized a state to sue for damages for injuries to its "general economy" allegedly attributable to violations of the antitrust laws. It concluded that such authorization did not exist. After reviewing the history of actions by states as *parens patriae* on behalf of their citizens,¹⁶⁵ the Court pointed out that "[t]he question in this case is not whether Hawaii may maintain its lawsuit on behalf of its citizens, but rather whether the injury for which it seeks to recover is compensable under § 4 of the Clayton Act."¹⁶⁶ It held that it was not because the injury claimed was not to the "business or property" of the state within the meaning of section 4 and thus did not fall within the language of the congressional remedial grant, which provides:

At the very least, if the latter type of injury [to the state's economy] is to be compensable under the antitrust laws, we should insist upon a clear expression of a congressional purpose to make it so, and no such expression is to be found in § 4 of the Clayton Act.¹⁶⁷

To recognize a right of antitrust contribution would be to go well beyond the express rights of action for damages that Congress has provided in section 4 of the Clayton Act and to fashion a new private right of action in favor, not of a person injured in his business and property, but of a conspirator whose conduct has caused such injury.

Although the United States Supreme Court has, where a

abrogate a rule that it itself had announced in an earlier decision, in circumstances where the rule had met with almost uniform condemnation and the United States was the only major maritime nation in which it continued to be followed. Far different considerations apply under the statutory scheme of the antitrust laws. *Cf. Edmonds v. Campagne Generale Transatlantique*, 443 U.S. 256 (1979), which declined to extend the *Reliable Transfer* principle of division of damages based on comparative fault to an action by an injured longshoreman against a shipowner, on the ground that "here we deal with an interface of statutory and judge-made law." 443 U.S. at 272. Although the *Edmonds* court was concerned primarily with possible impairment of congressional reliance on an existing rule, its analysis equally counsels caution in creating new common law rights that could impair the policies underlying remedies that Congress has provided.

164. 405 U.S. 251 (1972).

165. *Id.* at 257-59.

166. *Id.* at 259.

167. *Id.* at 264.

right of action is based on an alleged constitutional violation, freely implied a private damage remedy,¹⁶⁸ it has been much more restrictive where the construction of a statute is involved. In *Davis v. Passman*,¹⁶⁹ the Court pointed out that "the question of who may enforce a *statutory* right is fundamentally different from the question of who may enforce a right that is protected by the Constitution." Furthermore, the Court stated that "statutory rights and obligations are established by Congress, and it is entirely appropriate for Congress, in creating these rights and obligations, to determine in addition who may enforce them and in what manner."¹⁷⁰ In *Cort v. Ash*,¹⁷¹ the Supreme Court, in the course of an opinion holding that there was no private damage remedy against corporate directors under a criminal statute prohibiting certain political contributions, articulated the now familiar four-part standard for the implication of a private right of action:

First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted" Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States¹⁷²

Even if all of the very serious doubts concerning whether allowing a right of contribution would be "consistent with the underlying purposes of the legislative scheme" could be resolved, an attempt to imply such a right under the *Cort* standards would normally flounder because the proposed contribution plaintiff would not be "one of the class for whose *especial* benefit the statute was enacted."¹⁷³ To the extent that the impetus to

168. See, e.g., *Carlson v. Green*, 100 S.Ct. 1468 (1980) (eighth amendment); *Davis v. Passman*, 442 U.S. 228 (1979) (damage action based on sex discrimination in violation of the fifth amendment); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (fourth amendment).

169. 442 U.S. 228 (1979).

170. *Id.* at 241 (emphasis in original).

171. 422 U.S. 66 (1975).

172. *Id.* at 78 (citations omitted) (emphasis in original).

173. One may question whether the flexible *Cort* analysis does not state a considerably more liberal view on the propriety of implying a private damage remedy than is presently held by a majority of the Court. In *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979), for example, the Court held that customers of brokerage firms required to file

recognize a right of contribution under the antitrust laws rests on a perceived need for additional "deterrence" to further the "private attorney general" objective of the treble damage remedy, these decisions would appear to be controlling. On the other hand, much of the impetus for the implication of a right of contribution under the antitrust laws rests on a perception of the need to assure "fairness between the parties." In this context, the *Cort* analysis is not fully applicable, for the question is not one of judicially implying a remedy as an adjunct of a primary duty already statutorily prescribed, but of whether the judiciary should, in the first instance, imply an underlying primary duty among wrongdoers themselves.

In *Northwest Airlines v. Transport Workers Union*,¹⁷⁴ the Court of Appeals for the District of Columbia Circuit implicitly recognized the limited utility of the *Cort* analysis in the contribution context, holding that the "first prong" of the *Cort* test (whether the plaintiff was "one of the class for whose *especial* benefit the statute was enacted") was inapposite.¹⁷⁵ The plaintiff, representing a class of Northwest's female cabin attendants, recovered damages against the airline employer for violations of the Equal Pay Act of 1963 and title VII of the Civil Rights Act

certain financial reports with regulatory agencies had no implied private right of action for damages based upon misstatements in such reports. Justice Rehnquist for the Court noted that "once again, we are called upon to decide whether a private remedy is implicit in a statute not expressly providing one. During this Term alone, we have been asked to undertake this task no fewer than five times in cases in which we have granted certiorari." *Id.* at 562 (footnote omitted). The message of caution to the courts of appeals is unmistakable. Reversing the court of appeals which had implied such a right of action upon the basis of *Cort v. Ash*, Justice Rehnquist admonished, *inter alia*, that "implying a private right of action on the basis of congressional silence is a hazardous enterprise, at best" and that

where, as here, the plain language of the [statute] weighs against implication of a private remedy, the fact that there is no suggestion whatsoever in the legislative history that § 17(a) may give rise to suits for damages reinforces our decision not to find such a right of action implicit within the section.

Id. at 571-72. Moreover, he noted that the statutory provision question was "flanked by provisions of the 1934 Act that explicitly grant private causes of action . . . Obviously, then, when Congress wished to provide a private damages remedy, it knew how to do so and did so expressly." *Id.* In conclusion, "the central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action." *Id.* at 575.

174. 606 F.2d 1350 (D.C. Cir. 1979), *cert. granted*, 100 S.Ct. 3008 (June 16, 1980). The Supreme Court directed that *Northwest Airlines* be set for argument in tandem with the *Westvaco* case. As previously noted, the writ of certiorari in *Westvaco* has now been dismissed.

175. *Id.* at 1354.

of 1964.¹⁷⁶ After the entry of judgment, Northwest commenced a separate action against the bargaining representatives of its employees alleging that the discrimination in question had resulted from the collective bargaining agreement between Northwest and the unions.¹⁷⁷ The district court held that there was no right of contribution under the Equal Pay Act, but that the federal common law provided a basis for a claim of contribution under title VII of the Civil Rights Act of 1964.¹⁷⁸

The court of appeals affirmed as to the Equal Pay Act. The court reasoned that the existence of a right of contribution should turn on whether the plaintiff in the underlying action could have held either of the two defendants liable, in which case a right of contribution would normally be recognized, but that "if, on the other hand, one of the defendants is protected from suit by the plaintiff, it will also [generally] be protected from contribution."¹⁷⁹ Because Congress had explicitly provided for a private right of action for damages against the employer but not the union under the Equal Pay Act, the court of appeals concluded that "this statutory protection would certainly be frustrated by a declaration that an *employer* could recover from a union, once that employer had been found liable to its employees."¹⁸⁰

Thus, the deciding factor for the court of appeals in *Northwest* was the "third prong of the *Cort* test—consistency with the legislative scheme."¹⁸¹ As previously suggested in this article, the consistency of a contribution right with the compensation and deterrence objectives of the private treble damage remedy under the antitrust laws is open to very serious doubt.

D. *The Interstitial Lawmaking Role of the Judiciary under the Antitrust Laws*

In the *Professional Beauty Supply* case, the Eighth Circuit observed that:

the antitrust statutes are not purported to be comprehensive

176. *Id.* at 1352.

177. *Id.*

178. *Id.* at 1352-53.

179. *Id.* at 1354.

180. *Id.* at 1355. The court of appeals declined to reach the question of contribution under title VII of the Civil Rights Act of 1964, but remanded for consideration of the union's defense based on laches. *Id.* at 1356.

181. *Id.* at 1355.

and, possibly as a result, courts have not been prone to await congressional action to resolve many of the questions left unanswered by these statutes, such as the nature of the cause of action, apportionment of judgments, assignment, survival and limitations.¹⁸²

It is of course true that the federal courts have done much to fill in the interstices of the antitrust laws, both as to their substantive meaning and as to procedural detail. As the Supreme Court recently observed in *United States Gypsum Co.*, the Sherman Act, does not "precisely identify" the conduct which it proscribes, but contains "generalized definitions" of the conduct prohibited.¹⁸³ Liability is determined with reference to "open-ended and fact-specific standards like the 'rule of reason'" and the Act "has been construed to have a 'generality and adaptability comparable to that found to be desirable in constitutional provisions.'" ¹⁸⁴ For this reason,

The Sherman Act may be seen not as a prohibition of any specific conduct but as a general authority to do what common law courts usually do: to use certain customary techniques of judicial reasoning, to consider the reasoning and results of other common law courts, and to develop, refine, and innovate in the dynamic common law tradition.¹⁸⁵

Both the broad terms and the legislative history of the Sherman Act support the implication of a broad delegation of Congressional authority to the judiciary to define the substantive reach of that Act. No such implied delegation may fairly be read into the detailed legislative prescription of antitrust remedies.

Federal courts have also necessarily had to resolve questions of procedural detail under the antitrust laws absent any express congressional guidance. Such judicial law-making is illustrated by *Zenith Radio Corp. v. Hazeltine Research, Inc.*,¹⁸⁶ in which the Supreme Court adopted as a matter of federal common law the rule that the release of one tortfeasor should not be held to release the others unless it was intended to do so.¹⁸⁷ The Court

182. 594 F.2d at 1183.

183. 438 U.S. 422, 438 (1978).

184. *Id.* at 438-39 (quoting *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359-60 (1933)).

185. P. AREEDA, *ANTITRUST ANALYSIS* 46 (2d ed. 1974).

186. 401 U.S. 321 (1971).

187. *Id.* at 342-46.

declined to follow the "ancient common-law rule" that a release of one released all others jointly liable regardless of intent because it viewed a rule adhering to the intent of the parties as the "most consistent with the aims and purposes of the treble-damage remedy under the antitrust laws."¹⁸⁸

As the *Zenith* Court implicitly recognized, the federal courts would be abdicating the judicial function if they were to take the position that they could give no answers to the myriads of procedural issues that arise in the course of the administration of the antitrust laws except those with which Congress failed to deal. For this reason, the courts have perceived that even though the basic outlines and policies of those laws, both substantive and procedural, must be resolved in the first instance by Congress, the judicial branch must be free to work out the details in the individual case to comport, to the best of their ability, with the aims and purposes of the antitrust laws and remedies that Congress has provided. To acknowledge that general role, however, does little to resolve the specific issue under consideration which is whether, applying "customary techniques of judicial reasoning" and having an eye to the "aims and purposes of the treble-damage remedy," the courts should depart from the existing common law to fashion a new right of contribution. In *Zenith*, proper policy from the standpoint of equity was apparent to the Court; there was no argument that the rule adopted concerning the effect of a release of one of several antitrust conspirators might undermine the effectiveness of the private treble damage remedy. Resolution of the antitrust contribution issue is much more difficult.

For essentially the same reasons, the recent decision of the Third Circuit in *Glus v. G. C. Murphy Co.*,¹⁸⁹ fashioning a federal common law right of contribution in favor of an employer held liable for sex discrimination in violation of title VII against the unions that had agreed to the terms of an allegedly illegal collective bargaining agreement, is not persuasive authority for judicial creation of a right of contribution under the federal antitrust laws. Although there is no reason to gainsay that court's recognition of the ability of federal courts to fashion law within the interstices of a statutory scheme *in appropriate circumstances*, none of the authorities cited in *Glus* dealt with situa-

188. *Id.* at 346.

189. 629 F.2d 248 (3d Cir. 1980).

tions closely analogous to that under consideration here. Thus, the antitrust contribution question is not one of fashioning a private right of action to enforce a primary statutory duty where the appropriate legislative materials indicate that such private enforcement would effectuate congressional intent.¹⁹⁰ It is one of creating the primary duty itself where there is no suggestion of any congressional intent to do so. Nor does the question involve an implied delegation of judicial lawmaking authority such as that determined by the United States Supreme Court to be implicit in the broad jurisdictional grant that was the subject of *Textile Workers Union v. Lincoln Mills*,¹⁹¹ or in the substantive prohibitions of the antitrust laws themselves. This is not a case of a broadly phrased grant of jurisdictional or substantive power, but of the absence of any such delegation.

The *Glus* court recognized that it would be inappropriate, in any case, to fashion a contribution right unless it could at least be concluded that such a right would implement congressional intent.¹⁹² In *Glus*, the court of appeals believed that the express terms of title VII "reflect a statutory policy that the responsibility for monetary relief should be borne by *both* unions and employers to the extent that they are responsible for violations of Title VII,"¹⁹³ and further that a right of contribution would promote the conciliation objectives of the Act.¹⁹⁴ In contrast, the courts have construed the liability provisions of the Clayton Act to embody the historic principle of joint and several liability, by which any one of several coconspirators may be held liable for all damages caused by the conspiracy, and a contribution right would raise severe impediments to settlement in antitrust actions. It is also significant that violations of title VII may be based entirely on discriminatory impact without any showing of intent to discriminate,¹⁹⁵ whereas many prevalent violations of the antitrust laws such as price-fixing do involve intentional and culpable misconduct as to which an equitable right of contribution would be inappropriate.

There is, in sum, no basis on which to conclude that a right of contribution would effectuate, and substantial reason to be-

190. *See id.* at 255.

191. 353 U.S. 448 (1957).

192. 629 F.2d at 255.

193. *Id.* at 256 (emphasis added).

194. *Id.*

195. *Washington v. Davis*, 426 U.S. 229, 247-48 (1976).

lieve that it could impair, the congressional purposes underlying the private, treble-damage remedy in antitrust cases.¹⁹⁶

IV. CONCLUSION

It is inappropriate to expect Congress to resolve every problem of substantive and procedural detail that arises under the antitrust laws or any scheme of statutory liability. Therefore, it is generally recognized that the federal judiciary has an important role in fashioning federal common law where the terms of the governing statute are silent. But the exercise of that role, with its potential for impairing the primary policies that Congress has prescribed, calls for a more cautious and discriminating approach to the raw materials of judicial decision than was adopted by the majority opinion in the *Professional Beauty Supply* case.

In arguing for a right of contribution based on considerations of "fairness," the *Professional Beauty* court should have given greater weight to the fact that the existing federal common law denies any general right of contribution, and that contribution rights, whether of legislative or judicial origin, have arisen primarily in the areas of negligence or unseaworthiness, areas which do not provide an apt analogy to antitrust violations. There has been no general recognition that considerations of fairness and justice require that intentional wrongdoers such as antitrust price-fixers be entitled to spread their losses.

A court should also bear in mind that perhaps the strongest impetus for recognition of a right of antitrust contribution is the claim that the existing statutory provision of joint and several liability, particularly in the class action context, by creating multi-million dollar damage exposure, creates "unfair settlement

196. In *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972), cited by the *Glus* majority, 629 F.2d at 253, the primary issue was whether federal rather than state law should be applied in resolving a claim that the pollution of interstate waters had created a public nuisance. The Court's conclusion that federal law should apply was based on prior cases within its original jurisdiction dealing with water disputes between states, in which the application of the law of either of the contending states would have been inappropriate. *Id.* at 101-07. There was no claim that the application of public nuisance principles would be inconsistent with federal statutes in the area. To the contrary, the Court concluded that such actions were within a savings clause of the Federal Water Pollution Control Act. *Id.* at 104.

In contrast, there is no dispute that the antitrust contribution issue must be governed by federal rather than state law. But there are very substantial reasons to question whether abandoning the long-standing federal common-law rule precluding contribution would undermine the remedies that Congress has provided in the antitrust laws.

pressure," and that the judiciary should guard against this alleged pressure by creating a species of "mandatory claim reduction" as a corollary of an underlying contribution right. Such claim reduction, however, would seem inconsistent with the joint and several liability that Congress has provided. And of equal importance, the validity of the argument that unfair settlement pressure is a serious problem turns largely on questions of empirical fact and legislative policy judgments which the federal courts are ill equipped to make.

In addition, it would be inappropriate for a court to fashion a new right of contribution under the antitrust laws as a matter of federal common law unless it were able to say with considerably more assurance than would appear to be warranted that such a right would not be inconsistent with the primary deterrent and compensatory policies underlying the private, treble-damage remedy that Congress has expressly provided.