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Contribution Among Antitrust Violators

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CONTRIBUTION AMONG ANTITRUST VIOLATORS

The private treble damage antitrust suit[1] is a widely used and increasingly important method of enforcing federal antitrust laws.[2] Antitrust violators subject to such actions are jointly and severally liable for treble damages.[3] Under a rule of joint and several liability, a plaintiff may sue or enforce a judgment against one of several jointly liable parties and recover from it alone three times the damages attributable to the illegal acts of all the parties. Although individual violators may limit their liability by settling with the plaintiff prior to judgment, the plaintiff may still collect from any nonsettling defendants three times the damages attributable to both settlers and nonsettlers less only the dollar amount of any settlement payments it has received.[4] Thus, whenever one violator settles with the plaintiff for a sum less than three times the damages attributable to its own acts, each remaining defendant faces an increased risk that it will be forced to bear more than its proportionate share of the damages.[5]

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1. Section 4 of the Clayton Act, 15 U.S.C. § 15 (1976), creates a private cause of action for any person injured in his business or property by a violation of antitrust laws and provides for the recovery of treble damages as well as costs and attorney's fees.

2. Over 7,000 private antitrust cases were filed in federal district courts in the period from 1960 to 1972. In 1972 alone, 1,299 private cases were filed, an increase of 29.5% over the number filed in 1971. ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 254 & n.1 (1975) [hereinafter cited as ANTITRUST DEVELOPMENTS]. The Supreme Court has noted that "Congress has expressed its belief that private antitrust litigation is one of the surest weapons for effective enforcement of antitrust laws . . . ." Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 318 (1965).

3. *See* Solomon v. Houston Corrugated Box Co., 526 F.2d 389, 392 n.4 (5th Cir. 1976); Washington v. American Pipe & Constr. Co., 280 F. Supp. 802, 804 (S.D. Cal. 1968). In antitrust litigation, which may involve a nation-wide class of plaintiffs and an industry-wide conspiracy, damages assessed against a sole defendant can exceed one billion dollars under this rule. *See, e.g., In re* Corrugated Container Antitrust Litigation, [1979] 2 TRADE REG. REP. (CCH) ¶ 62,689 (S.D. Tex.), *aff'd mem.*, 606 F.2d 319 (5th Cir. 1979) (liability of nonsettling defendants estimated at $600 million to $3 billion, not including attorney's fees).

4. *See* Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 348 (1971); Flintkote Co. v. Lysfjord, 246 F.2d 368, 397-98 (9th Cir. 1957).

5. The risk of disproportionate liability increases in two ways. Since the defendants are jointly and severally liable, the plaintiff may elect to enforce the entire judgment against only one of them. Thus, as the pool of nonsettling defendants decreases, each faces a greater risk that it alone will bear the entire burden of compensation. In addition, even if the nonsettling defendants pay equal shares, the amount of each one's share will increase whenever one of them settles for less than its proportionate share. For example, if four defendants faced a total liability of $1,000,000 ($250,000 per defendant if equally divided), and one settled for $100,000, the equal share for each of the remaining three defendants would increase from $250,000 to $300,000.

The combination of this settlement practice and joint and several liability has been criticized as being unfair in two ways. First, one or a few jointly liable violators may be forced to bear the entire burden of paying treble damages while the others escape all liability.[6] Second, faced with an increased risk of liability as some violators settle, innocent defendants may eventually be forced to pay large settlement sums rather than risk liability for damages caused by the settlers.[7] The doctrine of contribution would alleviate these inequities among antitrust violators by permitting defendants who have paid more than their share of an injured party's losses to recoup the amount of their overpayments from those jointly liable wrongdoers who have paid less than their share.[8] In this way, contribution would limit the liability of each violator to its own share of the damages and reduce the pressure for settlement in antitrust actions.

Until recently, no federal circuit court had ruled on whether defendants in treble damage antitrust actions were entitled to contribution from other jointly liable parties, and the few federal district courts that had addressed this issue had dismissed the claims for contribution.[9] In *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*,[10] however, the United States Court of Appeals for the Eighth Circuit held that, in appropriate circumstances, defendants in antitrust actions may be entitled to contribution from other joint tortfeasors.[11] As a result of this decision, there has

6. *See, e.g.*, Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1185-86 (8th Cir. 1979).

7. *See, e.g., Antitrust Equal Enforcement Act: Hearings on S. 1468 Before the Subcomm. on Antitrust, Monopoly, and Business Rights of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 66-70 (1979) (prepared statement of Donald G. Kempf, Jr.) [hereinafter cited as *Hearings on S. 1468*].

8. For a general discussion of contribution among tortfeasors, see W. PROSSER, LAW OF TORTS § 50 (4th ed. 1971). *See also* notes 16-31 and accompanying text *infra*.

9. *See, e.g., In re* Beef Antitrust Litigation, J.P.M.D.L. No. 248 (N.D. Tex. Sept. 1, 1978); Olson Farms, Inc. v. Safeway Stores, Inc., [1977] 2 Trade Cas. ¶ 61,698 (D. Utah 1977), *aff'd*, [1979] 2 TRADE REG. REP. (CCH) ¶ 62,995 (10th Cir. 1979); Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., No. 75-2820 (E.D. La. Oct. 5, 1977), *aff'd*, 604 F.2d 897 (5th Cir. 1979); El Camino Glass v. Sunglo Glass Co., [1977] 1 Trade Cas. ¶ 61,533 (N.D. Cal. 1976); Sabre Shipping Corp. v. American Presidential Lines, Ltd., 298 F. Supp. 1339 (S.D.N.Y. 1969). The district courts in *Olson Farms*, *Abraham Construction*, and *In re Beef* gave little justification for their dismissal of the contribution claims. The district courts in *El Camino Glass* and *Sabre Shipping* briefly discussed the merits of the contribution issue but based their denials of contribution primarily on the conclusions that rights of antitrust violators were governed by federal law which did not recognize contribution among tortfeasors and that Congress intended to deny contribution to antitrust violators. For a general discussion of these two cases, see Note, *Contribution in Private Antitrust Suits*, 63 CORNELL L. REV. 682, 683-87 (1978).

10. 594 F.2d 1179 (8th Cir. 1979).

11. *Id.* at 1186. Courts and commentators have usually characterized private antitrust

been a renewed interest in this issue in both the legal community and in Congress.[12] Recently in *Wilson P. Abraham Construction Corp. v. Texas Industries, Inc.*[13] a second federal circuit court addressed the contribution issue and held that violators of antitrust laws are never entitled to contribution.[14] A limited application of contribution has also been proposed in Congress. Senator Birch Bayh recently introduced a bill, S. 1468,[15] which would permit contribution among antitrust violators involved in price-fixing agreements.

This Note discusses contribution among antitrust violators in light of the arguments raised in *Professional Beauty Supply*, *Abraham Construction*, and the testimony during the hearings on S. 1468. After considering various methods of implementing contribution in antitrust litigation and their potential effects on the goals of antitrust laws, the Note concludes that contribution would be inappropriate in antitrust actions unless settling violators would avoid liability for contribution and the doctrine were limited to less culpable violators through a case-by-case eligibility determination.

I. CONTRIBUTION AMONG TORTFEASORS: STRIKING AN ACCOMMODATION

Based on the early English case of *Merryweather v. Nixan*,[16] at one time

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suits as tort actions. *See, e.g.*, Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d 897, 901 n.5 (5th Cir. 1979). *See also* Corbett, *Apportionment of Damages and Contribution Among Coconspirators in Antitrust Treble Damage Actions*, 31 FORDHAM L. REV. 111, 114 (1962). *But see* Note, *supra* note 9, at 692-97 (article written before *Professional Beauty Supply*, suggesting that some antitrust actions are based on a theory of implied contract and therefore contribution should be allowed as in contract law).

12. Since *Professional Beauty Supply*, several district courts have denied claims for contribution. *See In re* Fine Paper Antitrust Litigation, J.P.M.D.L. No. 323 (E.D. Pa. Aug. 5, 1979); Hedges Enterprise v. Continental Group, Inc., [1979] 1 TRADE REG. REP. (CCH) ¶ 62,717 (E.D. Pa. 1979); *In re* Corrugated Container Antitrust Litigation, [1979] 1 TRADE REG. REP. (CCH) ¶ 62,689 (S.D. Tex.), *aff'd mem.*, 606 F.2d 319 (5th Cir. 1979); *In re* Ampicillin Antitrust Litigation, J.P.M.D.L. No. 50 (D.D.C. May 21, 1979); Alabama v. Blue Bird Body Co., No. 75-23-N (M.D. Ala. May 19, 1979). The contribution issue has also been raised before a district court in the Eighth Circuit with regard to a proposed settlement agreement. *See* Little Rock School Dist. v. Borden, Inc., Nos. 76-C-41, 77-C-126 (E.D. Ark. June 29, 1979).

13. 604 F.2d 897 (5th Cir. 1979).

14. *Id.* at 899.

15. S. 1468, 96th Cong., 1st Sess., 125 CONG. REC. 8931 (1979). The text and an explanation of this bill appear in S. REP. NO. 428, 96th Cong., 1st Sess. 3-5, 20-24, *reprinted in* [1979] ANTITRUST & TRADE REG. REP. (BNA) No. 942, at 1-2, 8-9 (Special Supp.).

16. 101 Eng. Rep. 1337 (1799). In *Merryweather*, the court denied contribution to an intentional joint tortfeasor upon whom the entire judgment had been levied. *Id.* While the case has been cited as authority for denying contribution to both unintentional and intentional tortfeasors, most commentators view the holding as limited to intentional tortfeasors. *See* W. PROSSER, *supra* note 8, § 50.

the majority of American jurisdictions denied contribution to all tortfeasors.[17] More recently, however, a substantial majority of the states have adopted the contribution doctrine either by statute or, in a few instances, by judicial decision.[18] The impetus behind this trend has been the perceived unfairness of the rule of joint and several liability that permits an injured party to collect all of its damages from one of several tortfeasors while the other wrongdoers avoid all liability for their tortious acts.[19] The implementation of this equitable doctrine in tort law, however, has required the accommodation of the often conflicting interests of fairness to the litigating parties, judicial economy, and promotion of the settlement process. Seeking to reconcile these interests, the majority of jurisdictions allowing contribution have denied its application to intentional tortfeasors[20] and have formulated other diverse rules limiting the scope of this doctrine.[21] Three different uniform acts addressing the effect of settlement on the right to contribution illustrate the difficulty of accommodating these interests.[22]

Sections 4 and 5 of the 1939 version of the Uniform Contribution Among Tortfeasors Act provide that a tortfeasor who settles with the injured party extinguishes its liability to that party but remains liable to nonsettling joint tortfeasors for contribution. Thus, regardless of settlement, the burden of compensating the injured party is distributed among all joint

17. *See* W. PROSSER, *supra* note 8, § 50.

18. The District of Columbia and 37 states now recognize some form of contribution among tortfeasors. *See* Note, *supra* note 9, at 698 n.87 (citing statutes in 31 jurisdictions and cases adopting contribution in seven others). *See also* UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT (prefatory note); RESTATEMENT (SECOND) OF TORTS § 886A, comment a (1977); W. PROSSER, *supra* note 8, § 50.

19. *See* W. PROSSER, *supra* note 8, § 50.

20. *See* RESTATEMENT (SECOND) OF TORTS § 886A, Comment a (1977).

21. For a discussion of some of these rules, see notes 22-28 and accompanying text *infra*.

22. UNIFORM COMPARATIVE FAULT ACT § 4 (1977 version); UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 1 (1955 version); UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT §§ 4, 5 (1939 version) [hereinafter cited as 1955 ACT and 1939 ACT respectively]. The formulation of a satisfactory settlement rule has been a particularly difficult problem in allowing contribution among joint tortfeasors. Although the American Law Institute has endorsed this doctrine generally, it has characterized all methods of handling settlement under the doctrine of contribution as unsatisfactory. RESTATEMENT (SECOND) OF TORTS § 886A Caveat, Comment m (1977). In contrast to the conflicting positions in the uniform acts over the rights of nonsettling tortfeasors to obtain contribution from settling tortfeasors, each uniform act has similar provisions allowing a settling tortfeasor to obtain contribution from nonsettling tortfeasors if it pays a reasonable amount for the release of all the joint wrongdoers from liability. *See* UNIFORM COMPARATIVE FAULT ACT § 4; 1955 ACT, *supra*, § 4; 1939 ACT, *supra*, § 2(3).

tortfeasors according to the share of damages allocable to each one.[23] The 1939 Act also allows an injured party to gain full compensation for its losses by recovering from the nonsettling defendants the full amount of its damages less only the amount of any settlement payments it has already received.[24] Under these provisions, however, there is little incentive for joint tortfeasors to enter into a settlement agreement because they can avoid neither liability for contribution nor the possibility of further litigation by settling with the injured party.

Seeking to encourage out-of-court settlements, the National Conference of Commissioners on Uniform State Laws adopted a second approach in the 1955 version of the Uniform Contribution Among Tortfeasors Act.[25] Section 4 of the 1955 Act provides that tortfeasors who settle in good faith with the injured party extinguish their liability to nonsettling tortfeasors for contribution. Since it permits tortfeasors to discharge all liability and avoid further litigation by settling in good faith, the Act protects the incentive for defendants to reach settlement agreements with the plaintiff. The 1955 Act further provides that, upon settlement with one of the tortfeasors, the claim of the injured party is reduced by only the greater of the amount received by it for releasing the settling tortfeasor from liability or the amount stipulated in the settlement agreement.[26] Therefore, absent the discharge of a greater portion of its claim by settlement stipulation, the injured party can recover all of its losses in the form of settlement payments plus the judgment against the nonsettling defendants.

The 1955 Act, however, has one serious drawback. Since tortfeasors will generally settle for less than their proportionate share of the liability and injured parties are usually unwilling to discharge a greater portion of their claim than the amount received in settlement, the burden of compensating the injured party often shifts from those wrongdoers who settle to those who do not. The 1955 settlement rule may thus defeat the primary purpose of contribution; namely, the equitable distribution of the burden of paying damages among all jointly liable parties.

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23. As an exception to the general rule, a tortfeasor can avoid contributive liability if the injured party agrees to a *pro rata* reduction of its claim. 1939 ACT, *supra* note 22, § 5. Plaintiffs' attorneys, however, have not usually been willing to agree to reductions of claims. *See* 1955 ACT, *supra* note 22, § 4, Comment. The states which have adopted or partially adopted either the 1939 or 1955 version of the Act are listed in NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 258 (1978) [hereinafter cited as UNIFORM LAW HANDBOOK]. Citations to the state statutes adopting the Acts appear in 12 U.L.A. 57 (1979 Supp.).

24. 1939 ACT, *supra* note 22, § 5.

25. *See* 1955 ACT, *supra* note 22, § 4, Comment.

26. 1955 ACT, *supra* note 22, § 4.

The Uniform Comparative Fault Act, adopted by the National Conference of Commissioners on Uniform State Laws in 1977, avoids the shifting of the payment burden from settling to nonsettling tortfeasors by adopting yet a third approach to the settlement issue.[27] Section 6 of this Act provides that upon settlement with one tortfeasor, the injured party's claim against other tortfeasors is automatically reduced by the amount of the released tortfeasor's equitable share of the joint obligation.[28] Accordingly, a settlement between the injured party and one tortfeasor cannot shift the burden of paying for the injured party's losses from settling to nonsettling tortfeasors. Section 6 further provides that, upon settlement with the plaintiff a tortfeasor is not liable for contribution, thereby protecting the tortfeasor's incentive for settlement. Under the automatic reduction of claim provision, however, the injured party will not be fully reimbursed for its losses unless it receives a settlement payment at least as great as the dollar amount of the settler's share of the damages. The injured party usually cannot accurately determine this share prior to litigation and therefore may be unaware of the amount it is sacrificing upon settlement. Moreover,

27. UNIFORM COMPARATIVE FAULT ACT. This act is designed for use by states which recognize the principles of comparative fault between a plaintiff and a defendant in tort actions. It does not supersede the 1955 version of the Uniform Contribution Among Tortfeasors Act which is still recommended for use by states that do not apportion fault between the opposing parties. *See id.* (prefatory note). As of August 1978, no state had adopted this Act. UNIFORM LAW HANDBOOK, *supra* note 23, at 258.

28. Two computation methods are commonly used to determine a tortfeasor's equitable share of the obligation — a *pro rata* method and a comparative method. RESTATEMENT (SECOND) OF TORTS § 886 A, Comment n (1977). The *pro rata* method distributes the burden equally among the jointly liable tortfeasors. *Id.* The main advantage of this method is its simplicity — each defendant's liability is calculated by dividing the total amount of damages by the number of jointly liable defendants. The *pro rata* method, however, works to the disadvantage of tortfeasors who have caused only a small portion of a plaintiff's losses but must pay the same amount as more culpable parties. The comparative method, on the other hand, allows a more equitable distribution of the burden by apportioning the obligation among the tortfeasors according to a prior determination of relative fault. The Uniform Comparative Fault Act provides for the computation of contributive shares by the comparative method. The Uniform Contribution Among Tortfeasors Act, however, provides that the contributive shares of joint tortfeasors shall be computed by the *pro rata* method without consideration of relative fault. Under either act, the shares may be increased if one or more of the jointly liable parties is insolvent or beyond the jurisdiction of the court. UNIFORM COMPARATIVE FAULT ACT § 6, Comment, Illustration 10; 1955 ACT *supra* note 22, § 2, Comment. Technically, the provision of the Uniform Comparative Fault Act which reduces the plaintiff's claim upon settlement with a defendant is not contribution. Contribution entitles a tortfeasor who has paid more than his share of the damages to gain reimbursement from other jointly liable parties. *See* W. PROSSER *supra* note 8, § 50. Reduction of a plaintiff's claim upon settlement, on the other hand, ensures that the nonsettling defendants will not have to pay any of the damages allocable to the settlers. In either case, however, the net result is to limit the liability of the joint wrongdoers to each one's share of a damage award.

since its claim is automatically reduced by the settling tortfeasors' shares of the obligation, the injured party must litigate the portion of its losses attributable to these wrongdoers to protect its claim against any nonsettlers. Thus, this rule may disadvantage injured parties and deter them from settling.

The difficulty of accommodating competing interests has not deterred the majority of states from adopting contribution in tort law.[29] Nonetheless, in most states the legislature, not the courts, has made the contribution decision,[30] and the necessity of weighing competing interests in making this decision may explain the initial reluctance of federal district courts to adopt this doctrine in antitrust law without express or implied legislative approval.[31]

A. Professional Beauty Supply: An Emphasis on Equity

The absence of legislative approval did not deter the court in *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*[32] from holding that antitrust violators may be entitled to contribution. In that case, a wholesaler of cosmetic products, Professional Beauty Supply ("Professional"), named a competitor, National Beauty Supply ("National"), as the sole defendant in a complaint charging an attempt or conspiracy to monopolize a part of trade or commerce[33] in violation of section 2 of the Sherman Act.[34] The complaint alleged that National's demand that La Maur, a manufacturer of beauty supplies, grant National an exclusive dealership had resulted in the termination of Professional as a dealer in La Maur products.[35] National, in turn, filed a third-party complaint claiming that if it were found liable to Professional for damages, it was entitled to contribution from La Maur.[36] The district court granted La Maur's motion for dismissal of this complaint for failure to state a claim upon which relief could be granted.[37]

In a split decision, the Eighth Circuit reversed the dismissal of the contribution claim, holding that, in appropriate circumstances, joint tortfeasors in federal antitrust actions may be entitled to *pro rata* contribu-

29. *See* note 18 *supra*.
30. *See* W. PROSSER *supra* note 8, § 50. *See also* note 18 *supra*.
31. *See* note 9 and accompanying text *supra*.
32. 594 F.2d 1179 (8th Cir. 1979).
33. *Id.* at 1181.
34. 15 U.S.C. § 2 (1976).
35. 594 F.2d at 1181.
36. *Id.*
37. *Id.* The lower court filed no memorandum with its order of dismissal but directed the entry of a final judgment pursuant to FED. R. CIV. P. 54(b).

tion among themselves.[38] The court did not specify what constituted appropriate circumstances, leaving this decision for case-by-case determination by the trier of fact.[39] Relying primarily on the equitable arguments for contribution traditionally advanced in tort law, the court, in language almost identical to that used by Dean Prosser, stated: "There 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, or his collusion with the other wrongdoer."[40] The court further reasoned that allowing contribution in antitrust actions would enhance the deterrent effect of the antitrust laws.[41] While recognizing that the possibility of one party being held solely liable for treble damages might deter potential violators, the majority noted that, whenever one of several violators bore this entire burden, the others would avoid any liability for their illegal acts.[42] The court stated that the possibility of going "scot free" could cause many parties "to be more willing . . . to engage in wrongful activity."[43] In the court's view, this result seemed particularly likely in instances when a powerful tortfeasor could use its economic power to prevent a plaintiff from naming it as a defendant.[44] On balance, the court concluded that contribution would ensure that all violators bore a portion of the damages, thus enhancing the deterrent effect of antitrust statutes.[45] This perceived deterrence led the court to state that "even intentional tortfeasors may obtain

38. 594 F.2d at 1182. The original complaint also charged that National's acts violated Minnesota antitrust laws and constituted a tortious interference with Professional's business relationship with La Maur. *Id.* at 1181. In addition, if found liable on any of Professional's claims, National sought contribution under the state antitrust laws as well as indemnification under federal and state laws. *Id.* The court affirmed the dismissal of its indemnification claims under federal law, reasoning that to allow indemnification would permit federal antitrust violators to avoid all liability for their illegal acts, thereby decreasing the deterrent value of antitrust actions. *Id.* at 1185-87. The court remanded the contribution and indemnification claims under state law, concluding that National might be able to prove facts which would support these claims. *Id.* at 1187-88. For an explanation of *pro rata* contribution, see note 28 *supra*.

39. 594 F.2d at 1186.

40. *Id.* at 1185-86. This is almost a direct quote from Dean Prosser who, discussing the rationale for contribution in tort law, stated: "There is an obvious lack of sense and justice in a rule which permits the entire burden for 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, spite, or collusion with the other wrongdoer. . . ." W. PROSSER, *supra* note 8, § 50, at 307.

41. 594 F.2d at 1185.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

contribution so that [other] tortfeasors will not escape liability."[46]

The court summarily rejected other policy arguments against contribution in antitrust actions. Although the issue of contribution from settling tortfeasors was not directly before it, the court noted that, in an appropriate case, the judiciary "should be able to fashion a rule of contribution which will protect the rights of settling defendants."[47] The court also considered the dangers of increased complexity and the plaintiff's loss of control over its case engendered by a defendant's impleading of multiple parties to seek contribution. Acknowledging that these were serious concerns, the court nonetheless expressed confidence in the ability of district court judges to avoid these problems by severing parties and issues where necessary.[48] Dissenting in part, Judge Hanson, however, stressed that even if district court judges could alleviate these problems through their severance powers, the mere possibility of increased complexity could have a chilling effect on an injured party's incentive to bring a meritorious action.[49] He therefore concluded that the adoption of contribution was inappropriate under federal antitrust laws.[50]

The scope of the holding in *Professional Beauty Supply* is unclear. Since the court expressly stated that even intentional violators may be entitled to contribution and left the decision to the trier of fact, the holding provides authority for allowing contribution in every private antitrust action.[51] Notably, however, the *Professional Beauty Supply* court did not rule that contribution was necessarily appropriate in the case before it; it only held that, since contribution was possibly appropriate, the district court erred in dismissing the contribution claim as a matter of law. Moreover, the third party complaint asserted a contribution claim against an unnamed, nonset-

46. *Id.* at 1186.

47. *Id.* at 1184.

48. *Id.* at 1184-85. The court also rebutted the arguments raised in earlier district court decisions that Congress intended to deny the right to contribution to antitrust violators and that there is no right to contribution among tortfeasors under federal common law which governs the rights of parties in federal antitrust litigation. *Id.* at 1182-83. *See also* note 9 *supra*.

49. *Id.* at 1189-90. Possible procedures for determining contributive liability are discussed at notes 103-12 and accompanying text *infra*.

50. *Id.* at 1190. Judge Hanson also considered the adoption of contribution particularly inappropriate since the original complaint alleged an intentional violation of antitrust laws. *Id.* at 1189-90.

51. One district court judge in the Eighth Circuit has apparently adopted this view. *See* Letter from Thomas Eisele, Chief Judge of the United States District Court for the Eastern District of Arkansas, to the parties in Little Rock School Dist. v. Borden, Inc., Nos. 76-C-41, C-77-126, and C-77-108 (Oct. 1, 1979) [hereinafter cited as Letter from Judge Eisele]. For a brief discussion of this case and Judge Eisele's letter, see notes 135-39 and accompanying text *infra*.

tling party. Thus, the holding may be construed as merely recognizing the possibility that, in a limited number of circumstances, a defendant may be entitled to contribution from nonsettling violators.[52]

B. Abraham Construction: Fears of Decreased Deterrence and Added Complexity

In *Wilson P. Abraham Construction Corp. v. Texas Industries, Inc.*[53] the Fifth Circuit rejected even a narrow construction of *Professional Beauty Supply*, holding that under federal laws antitrust violators never have a right to contribution.[54] In *Abraham Construction*, the Wilson P. Abraham Construction Corporation (Abraham) brought a treble damage action naming Texas Industries (Texas) as the sole defendant and alleging that Texas and certain unnamed coconspirators had conspired to raise and stabilize the price of ready-mix concrete in the New Orleans area[55] in violation of section 1 of the Sherman Act.[56] Texas filed a third-party complaint against three of the unnamed coconspirators, seeking contribution should it be found liable to Abraham for damages.[57] The district court granted the third-party defendants' motion to dismiss for failure to state a claim upon which relief could be granted.[58]

On appeal, the court, in a split decision, affirmed the dismissal of the third-party complaint, holding that there is no right of contribution under federal antitrust laws.[59] Although the court stated that it had carefully considered the arguments in the majority's opinion in *Professional Beauty Supply*,[60] a thorough discussion of the equitable arguments that had formed the basis for that court's holding is noticeably absent from the *Abraham Construction* opinion. Instead, the court emphasized the possible adverse effects that contribution might have on the implementation of antitrust statutes. The court identified two areas of particular concern. First,

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52. Distinguishing *Professional Beauty Supply* on its facts, district judges outside the Eighth Circuit have dismissed claims for contribution. *See, e.g., In re* Fine Paper Antitrust Litigation, J.P.M.D.L. No. 323, slip op. at 3 (E.D. Pa. Aug. 5, 1979) (settling defendants outside the scope of *Professional Beauty Supply*); *In re* Ampicillin Litigation, J.P.M.D.L. No. 50, slip op. at 6 (E.D. Pa. May 21, 1979) (*Professional Beauty Supply* only applicable where contribution would further deterrent effect of antitrust laws by preventing violators not named as defendants from avoiding all liability for their acts).

53. 604 F.2d 897 (5th Cir. 1979).

54. *Id.* at 899.

55. *Id.*

56. 15 U.S.C. § 1 (1976).

57. 604 F.2d at 899.

58. *Id.*

59. *Id.*

60. *Id.* at 900.

it noted that, according to prevailing economic theory, the slight prospect of a large loss is a greater deterrent to action by businessmen than the strong prospect of a small loss.[61] Thus, the court concluded that the possible imposition of sole liability on one of many jointly and severally liable violators without contribution strengthened the deterrent value of treble damage actions.[62] Second, the court feared that the use of severance power was inadequate to combat the potential multiplication of issues and parties stemming from the impleading of numerous third-party contribution defendants.[63] Citing Judge Hanson's dissent in *Professional Beauty Supply*, the court reasoned that the mere possibility of the district court's prudent exercise of discretionary severance power was insufficient to counteract the chilling effect that potential added complexity would have on an injured party's incentive to bring a meritorious action.[64]

The court viewed these arguments against contribution as applying with equal force to both intentional and unintentional antitrust violators. While recognizing that imposition of sole liability on an unintentional violator might seem harsh, the court stated that drawing a distinction between intentional and unintentional violators would be a distortion of antitrust laws unjustified by a "problematic inequity."[65] In closing, the court indicated that its holding was subject to reasonable contrary arguments but stated that Congress was a more appropriate forum for evaluating the

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61. *Id.* at 901. *See also* K. ELZINGA & W. BREITT, THE ANTITRUST PENALTIES 120-29 (1976); Note, *supra* note 9, at 702-03.

62. 604 F.2d at 901.

63. *Id.* at 905. *See also* notes 106-12 and accompanying text *infra*.

64. 604 F.2d at 905. Texas Industries also argued that the denial of contribution was inconsistent with the Supreme Court's rejection in Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 140 (1968), of the *in pari delicto* defense in antitrust actions. The *in pari delicto* defense bars the plaintiff from bringing an action where it shares with the defendant a similar responsibility for its own injury. *Id.* at 138. The *Abraham Construction* court noted that the partial rejection of the *in pari delicto* defense in *Perma Life* would enhance the deterrent effect of antitrust actions by increasing the pool of potential private plaintiffs and was therefore consistent with the denial of contribution. 604 F.2d at 902-03. The court also rejected arguments that the denial of contribution violated the doctrines of due process and equal protection, noting that a rule of joint and several liability was rationally related to the congressional objective of deterring antitrust violations. *Id.* at 903-05.

65. *Id.* at 906. Judge Morgan, dissenting in part, noted the trend toward contribution among unintentional tortfeasors and concluded that, in the interest of fairness, unintentional antitrust violators should be extended this right. *Id.* at 906-07 (Morgan, J., dissenting in part). Moreover, he found the majority's deterrence arguments inconclusive, particularly with respect to those unintentional violators who do not realize they are violating the law. *Id.* at 907. Finally, in view of the power of trial judges to sever trials whenever a plaintiff is prejudiced by a defendant's expansion of his suit, he doubted that injured parties would be discouraged from bringing treble damage actions. *Id.* at 908.

competing interests and policies involved.[66]

C. S. 1468: A Specific Proposal

The recent introduction of S. 1468 presents the first legislative attempt to address the issue of contribution in antitrust actions. This bill would effectively limit the liability of each antitrust violator involved in a price-fixing agreement[67] to three times the actual damages attributable to its own sales and purchases. Section 4I(b) of the bill provides that, upon settlement with any jointly liable price-fixer, the claim of the injured party must be reduced by the greatest of the settlement payments, the amount stipulated in the release, or three times the actual damages attributable to the sales or purchases of the settling violator.[68] While providing that settling violators extinguish their liability for contribution claims,[69] the bill would allow the assertion of contribution claims among nonsettling violators in either the

66. *Id.* at 906. In Olson Farms, Inc. v. Safeway Stores, Inc., [1979] 2 TRADE REG. REP. (CCH) ¶ 62,995 (10th Cir. 1979), a split decision handed down after *Abraham Construction*, a second United States Court of Appeals concluded that no right to contribution exists among joint antitrust violators under federal antitrust statutes or under federal common law and that Congress did not intend such a right in antitrust actions. *Id.* at 79,700-02. This rationale harks back to early district court decisions on this issue. *See* note 9 *supra*. The court also reviewed the arguments raised in *Professional Beauty Supply* as well as in *Abraham Construction* and concluded that "[b]efore entering such a complex policy thicket, . . . this court should await a clear signal, at least, from the legislative branch of our government on the matter." [1979] 2 TRADE REG. REP. (CCH) at 79,702-04.

67. An agreement, combination, or conspiracy with the purpose or effect of raising, depressing, or stabilizing prices is a *per se* unreasonable restraint of trade in violation of § 1 of the Sherman Act, 15 U.S.C. § 1 (1976). *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224-28, 224 n.59 (1940). The "rule of reason," under which the factfinder weighs all the circumstances of a case to determine whether a restrictive practice is an unreasonable restraint of trade, is the prevailing standard of analysis under § 1 of the Sherman Act. *See* Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49 (1977). *Per se* violations, however, are conclusively presumed to be unreasonable because of their manifestly anticompetitive effect. *Id.* at 49-50. In addition to incurring civil liability, violators of § 1 of the Sherman Act are subject to criminal penalties for a felony offense. 15 U.S.C. § 1 (1976). *See generally* Garvey, *The Sherman Act and the Vicious Will: Developing Standards for Criminal Intent in Sherman Act Prosecutions*, 29 CATH. U.L. REV. 389 (1980). S. 1468 is limited to price-fixers; it would not apply to other antitrust violators.

68. The provisions of the bill would apply to both private and *parens patriae* treble damage actions brought under §§ 4(b) and (c) of the Clayton Act, 15 U.S.C. § 15b-c (1976), as well as civil actions brought by the United States for single damages under § 4a of the Clayton Act, 15 U.S.C. § 15a (1976). S. 1468, § 4I(a), 96th Cong., 1st Sess., 125 CONG. REC. 8931 (1979). In single damage actions, the actual damages would not be trebled in reducing a plaintiff's claim. *Id.* Technically, the claim reduction provision of S. 1468 is not contribution but rather an alternative method of limiting the liability of joint tortfeasors. *See* note 28 *supra*.

69. S. 1468, § 4I(c), 96th Cong., 1st Sess. 125 CONG. REC. 8931 (1979).

plaintiff's original suit or a subsequent action.[70]

Proponents of S. 1468 argue that it's liability limiting provisions are necessary to relieve the coercive pressure to settle that presently exists in price-fixing actions.[71] Since only the dollar amount of settlement payments is deducted from a later treble damage judgment against nonsettling defendants, there is an increased risk of disproportionate liability for nonsettling defendants whenever a jointly liable violator settles for an amount less than its share of the damages.[72] Supporters of S. 1468 contend that often larger and more culpable defendants are anxious to settle and reach early, inexpensive settlement agreements with the plaintiffs for amounts far less than their share of the damages.[73] Then, as the remaining defendants' exposure to liability increases,[74] plaintiffs will insist on more expensive settlement terms.[75] This increased risk of liability exerts pressure on the smaller nonsettling defendants who, convinced of their innocence or relative lack of culpability, initially resisted settlement.[76] Eventually, these smaller and possibly innocent defendants may enter into settlement agreements on the more expensive terms offered to late settlers rather than risk an unfavorable judgment for treble damages and the possible loss of bank financing caused by exposure to extensive liability.[77] Thus, by limiting the liability of violators, S. 1468 presumably would benefit the smaller and less culpable defendants disadvantaged by the present liability and settlement rules.

Proponents of S. 1468 also claim that it would have only minimal adverse effects on the implementation of antitrust laws. During the hearings on the bill, they argued that, even without the possibility of sole liability, the high risks involved in fully litigating the cases provide adequate incentives for both plaintiffs and defendants to settle.[78] Moreover, by providing that contribution claims could be asserted in either the original or a subse-

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70. Since the right to contribution pertains only to tortfeasors who share a common liability, a determination of joint liability either in the plaintiff's original action or a separate contribution action is necessary. *See* W. PROSSER *supra* note 8, § 50.

71. *See, e.g., Hearings on S. 1468, supra* note 7, at 45-46, 66-68 (prepared statements of Thomas R. Long and Donald G. Kempf, Jr.); Letter from Senator Bayh to Members of the United States Senate (Aug. 8, 1979).

72. *See* notes 3-5 and accompanying text *supra*.

73. *See, e.g., Hearings on S. 1468, supra* note 7, at 45-46, 66-68, 127-31 (prepared statements of Thomas R. Long, Donald Kempf, Jr., and George Kress).

74. *See* notes 3-5 and accompanying text *supra*.

75. *See, e.g., Hearings on S. 1468, supra* note 7, at 45-46, 66-68, 127-31 (prepared statements of Thomas R. Long, Donald Kempf, Jr., and George Kress).

76. *Id.*

77. *Id.*

78. *See, e.g., Hearings on S. 1468, supra* note 7, at 121 (prepared statement of Don T. Hibner, Jr.).

quent action, the bill theoretically would permit adequate judicial control over the problems associated with the impleading of numerous third-party defendants.[79]

II. Contribution in Antitrust Actions: Equity and Federal Antitrust Policy

The conflicting decisions in *Professional Beauty Supply* and *Abraham Construction* rest more on intuitive value judgments than reasoned analysis. This suggests that resolution of the contribution issue requires a balancing of its anticipated equitable benefits against its potential adverse effects on antitrust policy. In *Professional Beauty Supply*, the court's perception of the unfairness of joint and several liability led to the adoption of contribution without more than summary attention to its possible adverse impact on the implementation of antitrust laws.[80] Conversely, in *Abraham Construction*, fear of adverse effects caused the court to reject contribution in antitrust actions without a careful consideration of its possible equitable benefits.[81] A closer examination of the equitable arguments favoring contribution and the possible methods for effectuating the doctrine in antitrust litigation will describe the parameters within which this issue should be decided.

A. The Equitable Arguments

A major factor influencing the court's decision in *Professional Beauty Supply* was its perception of the unfairness of allowing the entire burden of restitution to be placed on one of several joint tortfeasors merely because of the plaintiff's whim, spite, or collusion with the other violators.[82] The weight of this argument, however, varies according to the deliberateness and the nature of the wrongdoer's act. Although it may appear unjust to place the entire burden of compensation on one of several unintentional tortfeasors, an individual who purposefully injures another seems less deserving of ameliorative consideration. For this reason, contribution in tort law is usually denied to intentional tortfeasors.[83] In *Professional Beauty Supply*, however, the court found that both intentional and unintentional antitrust violators may be entitled to contribution.[84] One reason why the

79. *See* S. Rep. No. 428, 96th Cong., 1st Sess., *reprinted in* [1979] Antitrust & Trade Reg. Rep. (BNA), No. 942 at 7-8 (Special Supp.).

80. *See* notes 38-48 and accompanying text *supra*.

81. *See* notes 59-66 and accompanying text *supra*.

82. *See* note 40 and accompanying text *supra*.

83. *See* notes 20-21 and accompanying text *supra*.

84. 594 F.2d at 1186.

court did not restrict contribution to unintentional violators may have been the practical difficulties in fashioning a workable rule to distinguish intentional and unintentional violators in antitrust law. Although the distinction between intentional and unintentional acts is fairly clear in tort law,[85] this distinction in antitrust law is rather clouded. For example, a participant in an agreement which has either the purpose or effect of raising prices may incur civil liability for price-fixing.[86] Thus, whether a price-fixer should be classified as an intentional or unintentional antitrust violator may depend on the evidence in a given case rather than the type of offense. It appears, therefore, that limiting contribution to unintentional antitrust violators would require either a revised statutory definition of antitrust violations or the determination of eligibility for contribution on a case-by-case basis.

While the court in *Professional Beauty Supply* emphasized the benefits of contribution to antitrust violators, proponents of S. 1468 argue that contribution is necessary mainly to protect innocent or less culpable defendants in price-fixing cases. Supporters of the proposed legislation argue that the tendency of the more culpable and economically powerful defendants to seek early settlements with the plaintiffs on relatively inexpensive terms creates coercive pressure which forces less culpable and even innocent defendants to settle on the more costly terms offered later in the litigation.[87] There is little evidence, however, to support this view,[88] and it seems inconsistent with sound litigation strategy. First, plaintiffs are usually reluctant to jeopardize their recovery by settling with those violators with the financial ability to pay large judgments while litigating against financially weaker violators.[89] Similarly, plaintiffs would normally be unwilling to undergo the expense of litigating a claim against a party it knew or suspected to be innocent since the chances for a favorable outcome would be slight. In fact, it is not unusual for plaintiffs to offer less expensive settlement terms to less culpable or financially sound defendants.[90] Moreover,

85. *See* W. PROSSER, *supra* note 8, §§ 7, 28.

86. *See* Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d 897, 906 n.1 (5th Cir. 1979) (Morgan, J., dissenting in part). *See also* note 67 *supra*.

87. *See, e.g., Hearings on S. 1468, supra* note 7, at 44-45, 120-21 (prepared statements of George Kress and Don T. Hibner, Jr.). *See also* notes 3-5 and accompanying text *supra*.

88. John Shenefield, the Assistant United States Attorney General in charge of the Antitrust Division of the Justice Department, testified at the hearings on S. 1468 that he recalled no evidence of this problem being presented during his tenure as chairman of the National Commission for Review of Antitrust Laws. *Hearings on S. 1468, supra* note 7, at 6.

89. *Id.* at 29 (prepared statement of John Shenefield).

90. Mr. Harold Kohn, attorney for the plaintiffs in the *Folding Carton* antitrust litigation, testified that defendant Georgia-Pacific settled for $500,000 while earlier settling defendants had paid over $25,000,000. He stated that the reason the plaintiffs settled with

while the price of settlement may be higher for many late settlers, plaintiffs often offer less expensive early settlement terms to all defendants.[91] Thus, defendants who refuse to settle until pressured by the predictable increase in exposure to liability may be penalized by their own errors in judgment rather than by the plaintiffs' design.

Although putatively designed for the benefit of innocent or less culpable defendants, by automatically reducing the plaintiffs' claims by the amount of any settling violator's share of the joint obligation, S. 1468 would eliminate the settlement pressure not only for innocent but also for the most culpable parties. Such a broad remedy is inappropriate if the true purpose of the bill is to protect less culpable or innocent antitrust defendants. If, on the other hand, the bill is also designed to protect intentional and criminal violators of antitrust laws,[92] one can question whether these violators deserve such protection. Nonetheless, to the extent that less culpable defendants are presently forced to enter into unjust settlement agreements, there is strong justification for a narrower remedy which would benefit only these defendants. Thus, while a broad rule of contribution may be inappropriate, this doctrine might be justified if its benefits were restricted to less culpable antitrust defendants through a case-by-case eligibility determination.

B. Policy Considerations and Methods for Applying Contribution in Antitrust Actions

Before adopting the doctrine of contribution in antitrust litigation, as in tort law, careful consideration must be given to several factors, including fairness to the parties, the promotion of settlements, and judicial economy. The special role of the private antitrust action as a mechanism for enforcing federal law, however, adds yet another dimension to the analysis. The

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Georgia-Pacific on relatively inexpensive terms was their belief that they had a weak case against the defendant. *Hearings on S. 1468, supra* note 7, at 108. Similarly, in the *Corrugated Container* litigation, the plaintiffs settled with some financially weak defendants on relatively inexpensive terms. A chart listing the market shares, net income, net working capital, and terms of settling and nonsettling defendants in the *Corrugated Container* case illustrates that the settlement terms were not necessarily more expensive for late settlers. In particular, Consolidated Packaging Corporation, one of the financially weaker defendants, settled for $.18 million per percentage point share of the market, while financially stronger and earlier settling defendants had paid from 4 to $6.5 million per percentage point share of the market for release by the plaintiffs. *Id.* at 181-84.

91. *See, e.g.*, Alabama v. Blue Bird Body Co., No. 75-23-N, slip op. at 4 (M.D. Ala. May 19, 1979).

92. S. 1468 is limited in scope to members of a price-fixing agreement. Price-fixing, however, is a *per se* violation of antitrust law, subject to criminal penalties, and often intentional. *See* note 67 *supra*.

treble damage provision of section 4 of the Clayton Act[93] serves both as a special incentive to "private attorneys general"[94] to instigate litigation and as a deterrent to potential antitrust violators.[95] Since it is impossible for the government to detect every violation of the antitrust laws, the deterrent effect of private suits is critical to achieving the goal of free and unfettered competition.[96] Although the courts in *Professional Beauty Supply* and *Abraham Construction* both recognized this point, they differed in their views concerning the effect of contribution on the deterrent value of private antitrust suits. The *Professional Beauty Supply* court concluded that the distribution of liability among the violators through contribution would be more likely to dissuade a potential violator from engaging in anticompetitive behavior than the risk of bearing sole liability for jointly caused damages.[97] This conclusion is warranted when an economically powerful violator has foreknowledge that the party who will be injured by its illegal acts will not name it as a defendant in a later suit.[98] Past experience, however, suggests that such foreknowledge is rare. More often, injured parties are overinclusive rather than underinclusive in naming defendants.[99] Moreover, if without contribution a violator can use its economic power to prevent an injured party from naming it as a defendant, with contribution the same violator might be able to force the injured party to forego bringing an action at all since only in this way could the violator avoid contributive liability. The net result of contribution in such circumstances would be the avoidance of liability by all the violators and a lessening of the deterrent value of antitrust actions.

The *Abraham Construction* court's conclusion that the possibility of sole liability for a treble damage judgment provides a greater deterrent than the increased possibility of liability for smaller amounts appears to be valid.[100] As noted by the court, this conclusion is consistent with the prevailing economic theory that businessmen are generally adverse to risks.[101] Moreover, proponents of S. 1468 inadvertently lent support to this theory by arguing that even a slight risk of sole liability for extensive damages may

93. 15 U.S.C. § 15 (1976).
94. Hawaii v. Standard Oil Co., 405 U.S. 251, 262 (1972).
95. Illinois Brick Co. v. Illinois, 431 U.S. 720, 746 (1977).
96. *See* Fortner v. United States Steel Corp., 394 U.S. 495, 502 (1969).
97. 594 F.2d at 1185. *See also* notes 41-45 and accompanying text *supra*.
98. 594 F.2d at 1185.
99. *See Hearings on S. 1468, supra* note 7, at 67 (prepared testimony of Donald G. Kempf, Jr.).
100. 604 F.2d at 901. *See also* notes 61-62 and accompanying text *supra*.
101. 604 F.2d at 901.

force an innocent defendant to settle with the plaintiff.[102]

The deterrent effect of private antitrust actions, however, depends not only on a potential violator's perception of risk but also on the incentives for injured parties to bring suit. Although the prospect of recovering treble damages is a strong incentive for instigating an antitrust action, it is not the only factor considered by plaintiffs before instituting litigation. Prospective plaintiffs must also consider the cost of litigation and the probability of success. Thus, the anticipated complexity of litigation and ease of obtaining settlement are important factors in the decisionmaking process. Accordingly, if contribution in treble damage actions would markedly increase the complexity of antitrust litigation or the difficulty of obtaining settlement, it would lessen the incentive for and deterrent value of private antitrust actions.

1. Procedures for Determining Liability

The extent to which contribution would add to the complexity of antitrust litigation and deter parties from settlement depends in large measure upon what rules might be adopted for defining the effect of settlement,[103] computating contributive shares,[104] and determining joint liability.[105] A consideration of the tort law procedures for determining joint liability illustrates some of the potential problems of implementing contribution in complex antitrust litigation. Joint liability, a prerequisite to contribution, may be determined either in the plaintiff's action or a separate action.[106] In *In re Corrugated Container Antitrust Litigation*,[107] a post-*Professional Beauty Supply* decision, Judge Singleton denied the motions of some of the fourteen nonsettling defendants to amend their answers to assert cross-claims for contribution against the twenty-three defendants who had previously settled with the plaintiff class.[108] As the court noted, it would be

102. One proponent of S. 1468 impliedly admitted that joint and several liability without contribution is a deterrent to potential antitrust violators, but contended that the sanctions of treble damages, fines, and jail terms in antitrust laws were by themselves sufficient to deter violations. *Hearings on S. 1468, supra* note 7, at 120 (prepared statement of Don T. Hibner, Jr.).

103. *See* notes 23-28 and accompanying text *supra*.

104. *See* note 28 *supra*.

105. *See* note 70 *supra*.

106. *Id.*

107. [1979] 2 TRADE REG. REP. (CCH) ¶ 62,689 (S.D. Tex.), *aff'd mem.*, 606 F.2d 319 (5th Cir. 1979). This case was often cited in the hearings on S. 1468. Two persons who testified in favor of the bill, George Kress (the owner of a late settling defendant company) and Thomas Long (the attorney for a nonsettling defendant company which asserted contribution claims), were directly involved in the litigation.

108. *Id.* at 77,879.

virtually impossible to manage antitrust litigation "with the class and opt-out plaintiffs and thirty-seven defendants asserting cross-claims against each other."[109] In a case such as *Corrugated Container*, the added complexity resulting from contribution claims would cause the plaintiffs to lose control over their case, confuse the trier of fact, and make the litigation far more costly and time-consuming for the parties and the courts. Thus, plaintiffs would be reluctant to institute litigation, and the deterrent value of private antitrust actions would be diminished.

Many of the problems which might result from the assertion of multiple contribution claims in a plaintiff's original action would not be eliminated by determining joint liability in a separate action. The period from the commencement of a private antitrust action until its final disposition at trial often exceeds five years.[110] If separate contribution actions were equally time-consuming, the duplicative efforts of relitigating several of the issues presented in the original action would place a great burden on the resources of the courts and the parties. In addition, the running of the statute of limitations could preclude a later contribution action. To protect a defendant's right to contribution, the Uniform Contribution Among Tortfeasors Act provides a one year statute of limitations for separate contribution actions which does not start to run until after payment of the judgment in the original action.[111] In effect, this rule extends the statutory period of liability for tortfeasors not named in the original action. If an antitrust defendant were allowed to file a separate contribution action within one year of the payment of the judgment in the original case, an alleged violator not named in the original action could conceivably be forced to defend itself for the first time in a contribution action commencing ten or more years after its alleged illegal behavior.[112] The passage of

109. *Id.*

110. NATIONAL COMMISSION FOR REVIEW OF ANTITRUST LAWS AND PROCEDURES, REPORT TO THE PRESIDENT 15 n.1 (1979) [hereinafter cited as ANTITRUST COMMISSION REPORT]. According to the 1977 figures of the Administrative Office of the United States Courts, the median time period from filing a complaint to final disposition of private antitrust actions that went to trial was 44 months; 10% of these cases took longer than 68 months. *Id.*

111. 1955 ACT, *supra* note 22, § 3.

112. The statute of limitations for private antitrust actions under federal law is four years. 15 U.S.C. § 15 (1976). Assuming an action is commenced at the end of this four-year period, and adding five years for disposition plus one more year for the commencement of a contribution action, an alleged joint violator not named in the original action could be forced to defend against an antitrust violation for the first time 10 years after its occurrence. This problem could be compounded if the private action followed a government criminal action which, under 15 U.S.C. § 16(b) (1976), tolls the statute of limitations on private actions.

so long a period of time could substantially impair the ability of a defendant in such an action to obtain the accurate information regarding an alleged offense necessary for the preparation of an adequate defense.

2. Computation of Contributive Shares

The complexity of much antitrust litigation would also augment the difficulties which arise in computing contributive shares. In tort law, contributive shares are either divided equally among the jointly liable parties under the *pro rata* method of computation or apportioned among the parties according to their relative fault under a comparative method.[113] The difficulty of apportioning fault and allocating damages increases as the number of defendants increases. Apportionment of fault and damages among the thirty-seven defendants in *Corrugated Container*, for example, might be an impossible task. The mechanical allocation of damages according to market share under the provisions of S. 1468[114] seems simpler than assigning degrees of culpability. Nonetheless, the bill would require a market share allocation of damages in every price-fixing case that went to trial, thereby substantially increasing the complexity of litigation involving numerous parties.[115]

Cognizant of the potential difficulty of apportioning damages on a comparative basis among several defendants, the court in *Professional Beauty Supply* adopted a *pro rata* method for computing contributive shares.[116] This method, in a case such as *Corrugated Container*, would also have serious drawbacks. The estimated amount of treble damages in that case was one billion dollars,[117] and the sales of the thirty-seven defendants ranged from .375% to 8.56% of the relevant market.[118] If a billion dollar damage award were apportioned according to market share, the company with the smallest share of the market would pay $3.75 million while the company

113. *See* note 28 *supra*.

114. *See* notes 67-70 and accompanying text *supra*. The claim reduction provisions of S. 1468 have been criticized as being without precedent in law. *See* REP. NO. 428, 96th Cong. 1st Sess. 36, *reprinted in* [1979] ANTITRUST & TRADE REG. REP. (BNA), No. 942 at 12 (Special Supp.). *See also* note 27 *supra*.

115. Pursuant to § 4I(a)-(c) of this bill, a computation of the amount of damages attributable to each jointly liable violator, whether named as a defendant or not, would be necessary either to determine the amount of contribution due from each one or the amount by which the plaintiff's claim should be reduced as a result of settlement with some of the violators.

116. 594 F.2d at 1182 & n.4. The *pro rata* method is discussed at note 28 *supra*.

117. *See In re* Corrugated Container Antitrust Litigation, [1979] 2 TRADE REG. REP. (CCH) ¶ 62,689, at 77,879 (S.D. Tex.), *aff'd mem.*, 606 F.2d 319 (5th Cir.1979). Treble damage estimates ranged from $600 million to over $3 billion. *Id.*

118. *Hearings on S. 1468*, *supra* note 7, at 181-84.

with the largest share would pay $85.6 million. If these damages were apportioned equally among thirty-seven defendants pursuant to a *pro rata* method of computation, each company would have to pay approximately thirty million dollars. Thus, compared to a market share allocation of damages, the *pro rata* method would permit the company with the largest market share to avoid approximately fifty-five million dollars in damages while forcing the company with the smallest market share to pay approximately twenty-six million dollars in additional damages. Damages so distributed through contribution could make the larger companies more willing to violate antitrust laws since they would avoid much of the liability attributable to their own illegal acts. At the same time, the disproportionate payment burden placed on smaller companies under this method could conceivably force them out of business, thereby lessening competition in the relevant market.[119] Consequently, both methods of apportioning shares of contribution could have a substantial detrimental impact on federal antitrust policy.

Not all antitrust actions, however, are as complex as the *Corrugated Container* litigation. In a case such as *Professional Beauty Supply*, for example, the choice of procedures for determining contributive liability and computing contributive shares would not have serious antitrust consequences. In such a situation, the possible adverse effects of contribution on antitrust policy become less compelling reasons for the denial of contribution. If the right to contribution were determined on the case-by-case basis adopted in *Professional Beauty Supply*, presumably these adverse effects would be a factor in the decision to allow contribution and the election of a method for applying this doctrine in the most equitable manner.[120]

3. Settlement Rules

While a consideration of the diverse rules for determining joint liability and computing contributive shares is essential to an assessment of whether antitrust violators should be entitled to contribution, the ultimate resolu-

119. In *Professional Beauty Supply*, the court argued that the *pro rata* method might strengthen the deterrent value of antitrust laws since, under the comparative fault method, parties who had participated in an illegal scheme in a minor capacity would feel they had little to lose. 594 F. 2d at 1182 n.4. Compared with the potential adverse effects of the *pro rata* method, however, deterrence of minor violators seems relatively unimportant.

120. As an alternative to S. 1468, Senators Kennedy and Metzenbaum have suggested that the following sentence be added to §§ 4, 4A, and 4C of the Clayton Act, 15 U.S.C. §§ 15, 15A, and 15C (1976): "Nothing in this section shall be construed to bar contribution among persons found liable for damages under antitrust laws." S. REP. No. 428, 96th Cong., 1st Sess. 14, *reprinted in* [1979] ANTITRUST & TRADE REG. REP. (BNA) No. 942, at 14 (Special Supp.). The added sentence would allow the judiciary to apply contribution in a limited number of antitrust suits on a case-by-case basis. *Id.* at 13-14.

tion of this issue will probably depend on the ability of the courts or the legislature to fashion appropriate settlement rules.[121] A settlement rule modeled after the 1939 version of the Uniform Contribution Among Tortfeasors Act[122] would allow nonsettling defendants to limit their liability by obtaining contribution from settling defendants and thereby eliminating the coercive pressure for settlement that presently exists in antitrust actions. Under such a rule, however, antitrust defendants would have little incentive to settle since they might still be liable for contribution and forced to litigate contribution claims. This lack of incentive for violators to settle would also have a significant effect on injured parties. Since few defendants would be apt to settle if not assured of avoiding further liability and litigation, plaintiffs could often anticipate not only lengthy litigation but also a substantial number of defendants. The perception of these obstacles could dissuade injured parties from bringing meritorious actions, thereby lessening the deterrent value of private antitrust suits.

In addition to this indirect anticompetitive effect, permitting contribution claims against settling defendants could have a direct anticompetitive effect. Theoretically, a greater number of competitors results in increased competition, lower prices for consumers, and correspondingly lower profit margins for producers.[123] Thus, in order to ensure competitive pricing plaintiffs, who are often customers of the defendants in an antitrust action, will usually want the defendants to remain in business after settlement or the payment of damages. Consequently, plaintiffs may be willing to tailor their settlement terms to a given defendant's ability to pay.[124] On the other hand, codefendants are often competitors and therefore have a motive for driving one another out of business in order to lessen competition and increase profit margins. Permitting nonsettling defendants to obtain contribution from settling defendants would provide financially sounder defendants with a legal means of achieving this objective whenever some settlers lacked the ability to pay their contributive shares of a damage award. Applied in combination with a *pro rata* method of computing con-

121. The settlement issue has been called the Achilles heel of *Professional Beauty Supply*. *See* Alabama v. Blue Bird Body Co., No. 75-23-N, slip op. at 3 (M.D. Ala. May 19, 1979). The settlement issue was also the major area of concern among those who testified at the hearings on S. 1468. *See generally Hearings on S. 1468*, *supra* note 7.

122. *See* note 23 and accompanying text *supra*.

123. *See generally* P. AREEDA, ANTITRUST ANALYSIS §§ 107-12 (2d ed. 1974).

124. *See* Brief for Defendant Coleman in Support of Partial Settlement at 12, Brief for Plaintiffs in Support of Partial Settlement at 10-12, Little Rock School Dist. v. Borden, Nos. 76-C-41, 77-C-126 (parties to proposed settlement agreement claimed that continued financial viability of settling defendant primary consideration in negotiations). *See also* notes 89-90 and accompanying text *supra*.

tributive shares, which usually works to the disadvantage of smaller defendants,[125] this settlement rule could be an especially effective weapon for bankrupting competitors.

In contrast to the settlement provisions of the 1939 Uniform Act, S. 1468 protects defendants' incentive to settle by providing that defendants who settle extinguish liability for contribution claims.[126] By further providing for contribution among nonsettling defendants and the automatic reduction of the plaintiff's claim upon settlement by the amount of any settling defendant's share of the damages, S. 1468 would also effectively limit each defendant's liability to three times the damages attributable only to its own sales or purchases. The bill would therefore eliminate much of the coercive pressure for settlement that presently exists in antitrust litigation.[127] There is some doubt, however, that the bill would substantially benefit the innocent and financially weaker defendants for whom it is putatively designed. George Kress, the owner of a relatively small company that reached a settlement agreement with the plaintiffs in *Corrugated Container*, testified that even if its exposure to liability had been limited to three times the damage attributable to its market share, his company would have been forced to settle to avoid the loss of bank financing.[128] On the other hand, the liability limiting provisions of S. 1468 would benefit financially stronger and possibly more culpable defendants. Some coercive pressure may be necessary to induce these defendants to settle. Since antitrust defendants pay no prejudgment interest on treble damages,[129] a defendant can, in effect, borrow money at no interest by undergoing protracted litigation rather than reaching an early settlement agreement with the injured party. Furthermore, just as innocent defendants face a possibility of being held liable for damages, it is possible that culpable defendants who litigate may be adjudged not liable. Thus, unless the sum of the settlement amount plus anticipated interest were considerably less than the total of the treble damages attributable to its own sales and purchases plus estimated litigation costs, financially stronger defendants presumably would be unwilling to settle. Plaintiffs, therefore, could anticipate either lengthy and costly litigation or the recovery of less than the amount of damages to which they are entitled. This prospect could weaken the incen-

125. *See* note 119 and accompanying text *supra*.

126. *See* note 68 and accompanying text *supra*.

127. *See* notes 67-70 and accompanying text *supra*.

128. *Hearings on S. 1468, supra* note 7, at 43.

129. Prejudgment interest has generally not been allowed in treble damage actions. *See* TWA, Inc. v. Hughes, 449 F.2d 51, 80 (2d Cir. 1971), *rev'd on other grounds*, 409 U.S. 363 (1973).

tive to bring private antitrust actions and, as a result, the deterrent effect of antitrust actions.

Although some defendants would have little to gain from the settlement provisions of S. 1468, plaintiffs would have a disincentive for settlement. It would be difficult for plaintiffs to ascertain the proportionate share of their losses attributable to a given violator's illegal acts, an amount by which their claim would be automatically reduced upon settlement. Moreover, even with full knowledge of each defendant's proportionate share, plaintiffs would face a dilemma whenever a defendant did not have the financial ability to pay its proportionate share of damages. In such a situation, the plaintiff could either settle with a financially weak defendant, thereby sacrificing part of its claim, or it could seek full recovery by refusing to settle, thus subjecting the defendant to the possibility of bankruptcy.[130] If the financially weak defendant were an important source of supply or a vigorous competitor, neither alternative would be attractive to the plaintiff.

Contributing to the anticompetitive impact of the automatic reduction of claim provision of S. 1468 is the burden placed on the plaintiffs to litigate the extent of liability of any settling violators in order to protect their claims against any nonsettlers.[131] At trial, the nonsettling defendants could reduce the ultimate judgment by presenting evidence that most of the plaintiffs' losses were attributable to the settlers. Since antitrust defendants charged with price-fixing are often coconspirators, the possibility of collusion among settling and nonsettling defendants to achieve such a result is substantial. Furthermore, in major antitrust actions involving several defendants, the necessity of litigating the proportionate shares of liability of settling defendants would markedly increase the complexity and costs of the suit, weakening both the incentive for injured parties to sue and the deterrent effect of antitrust actions.

Since the reduction of claim provisions of S. 1468 would effectively limit the liability of each defendant to three times the actual damages attributable to its own acts, the bill could also have a more direct antideterrent effect. A potential violator could estimate with reasonable accuracy the extent of its liability for a contemplated violation, an amount usually no greater than three times the benefit derived from the violation.[132] Com-

130. Even if plaintiffs collected their judgment from only financially stronger defendants, these defendants could force financially weaker nonsettling violators to pay a proportionate share of the damage award by asserting contribution claims against them under § 4I(a) of S. 1468.

131. *See* text accompanying note 28 *supra*.

132. Subsection 4I(d) of S. 1468 provides that defendants are jointly and severally liable.

paring this estimate and an assessment of the risk of detection with the anticipated benefit, it could decide whether the contemplated violation would be in the company's economic self-interest.[133]

It has been suggested that the problems associated with settlement rules that reduce the injured party's claim or allow the assertion of contribution claims against settling defendants could be eliminated by determining whether a given antitrust violator was entitled to contribution on the case-by-case basis espoused in *Professional Beauty Supply*.[134] Since neither plaintiffs nor defendants can know what they will gain or lose by settlement under *ad hoc* adjudication, however, both may be deterred from settlement. In *Little Rock School District v. Borden, Inc.*,[135] an antitrust action now pending before a district court within the Eighth Circuit, the plaintiff class members and one of the defendants sought to eliminate this uncertainty by conditioning a proposed settlement agreement on the occurrence of one of the following four alternatives: a ruling by the court that the settling defendant was not liable to the nonsettling defendants for contribution; an agreement by the plaintiffs to indemnify the settling defendant for any contribution claims; the release of the settling defendant from contributive liability by all the nonsettling defendants; or a ruling by the court or an agreement by the plaintiffs that would reduce the plaintiffs' claims by an amount sufficient to eliminate any contribution claims against the settling defendant.[136] The nonsettling defendants in *Borden* were not willing to release the prospective settling defendant from possible contributive liability. Apparently recognizing the implications of a case-by-case approach to contribution, one of the nonsettling defendants argued

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In terms of the amount of damages ultimately payable by a given defendant, this provision would usually have no effect since other provisions in the bill effectively limit each violator's liability to three times the damages attributable to its sales and purchases. *See* notes 67-70 and accompanying text *supra*. If one of the jointly liable violators were insolvent, however, the others would be responsible for paying the damages attributable to the insolvent violator. *See* S. REP. NO. 428, 96th Cong., 1st Sess. 24, *reprinted in* [1979] ANTITRUST & TRADE REG. REP. (BNA) No. 942, at 9 (Special Supp.).

133. John Shenefield, the Assistant Attorney General in charge of the Antitrust Division, viewed the possible use of such risk-benefit analysis as a significant danger if S. 1468 were adopted. *See Hearings on S. 1468*, *supra* note 7, at 27. There is evidence that businessmen have used this type of analysis in deciding whether to enter an illegal price-fixing agreement. *See* ANTITRUST DEVELOPMENTS, *supra* note 2, Supp. 2 & n.3 (citing BUS. WEEK 48 (June 2, 1975), quoting admissions by businessmen that criminal fines were a small price to pay for the profits derived from price-fixing).

134. 594 F.2d at 1186.

135. Nos. 76-C-41, 77-C-126 (E.D. Ark. June 29, 1979).

136. Proposed Settlement Agreement between Plaintiffs and Defendant Colemen Dairies, Inc., Little Rock School Dist. v. Borden, Inc., Nos. 76-C-41, 77-C-126 (E.D. Ark. June 29, 1979).

that, before the court approved the settlement, a hearing was necessary to determine whether settling defendants were entitled to contribution.[137] Although the court did not hold such a hearing and did not actually determine whether contribution was appropriate in the case, it noted that *Professional Beauty Supply* had established that there may be such a right among antitrust violators within the Eighth Circuit. The court concluded that, in light of *Professional Beauty Supply*'s mandate that the judiciary formulate rules to protect the rights of settling defendants, the only viable proposed alternative was to reduce the claim of the plaintiff class upon settlement.[138] The settling parties were apparently unwilling to accept such terms but ultimately gained tentative judicial approval of the settlement proposal after the plaintiffs agreed to indemnify the settler for contribution claims.[139]

As *Borden* illustrates, determining the liability of settling defendants for contribution on a case-by-case basis requires either the unlikely voluntary relinquishment of rights by some of the parties or a hearing and possible appeal each time a settlement is proposed. Each party remaining in the action would have a stake in the outcome of such hearings. Thus, if settling defendants were still liable for contribution, a case-by-case determination of contributive rights would either deter settlement or place a substantial burden on the courts, injured parties, and relatively blameless as well as culpable defendants.

C. A Limited Right to Contribution

The settlement rule of the 1955 version of the Uniform Contribution Among Tortfeasors Act[140] would avoid the disincentive to settlement and the anticompetitive effect of the other settlement procedures. Under this rule, which parallels the current procedure in antitrust litigation,[141] defendants who settle in good faith extinguish their liability for contribution. Since the court in *Professional Beauty Supply* reserved the formulation of specific settlement rules for later decisions,[142] it is possible that the Eighth

137. Brief of Defendant Foremost-McKesson Pertaining to Proposed Settlement Agreement Between Plaintiffs and Defendant Colemen Dairy, Inc., Little Rock School Dist. v. Borden, Inc., Nos. 76-C-41, 77-C-126 (E.D. Ark. June 29, 1979).

138. Letter from Judge Eisele note 51 *supra*.

139. Telephone conversation with the Clerk of the Court for the District Court in the Eastern District of Arkansas (December 21, 1979).

140. *See* notes 25-26 and accompanying text *supra*.

141. *See* Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 348 (1971); Flintkote Co. v. Lysfjord, 246 F.2d 368, 397-98 (9th Cir. 1957). There is no requirement of good faith, however, under the present settlement procedures in antitrust litigation.

142. 594 F.2d at 1184. As an example of a rule which would protect the rights of settling

Circuit and courts following that precedent will adopt such a rule. Although this rule would limit the scope of contribution to the nonsettling defendants, it would not completely eliminate contribution among antitrust violators. In a factual situation similar to the one alleged in *Professional Beauty Supply*, a named defendant could still obtain contribution from unnamed coviolators.

Limiting the scope of contributions to nonsettling defendants is still subject to the criticisms of the present settlement rule — it allows the shifting of the burden of compensating plaintiffs from settling to nonsettling defendants and creates undue coercive pressure for settlement.[143] Ease of settlement, it is argued, is not sufficient justification for a rule which permits such inequity. The judiciary, however, already has tools other than contribution at its disposal to prevent an unjust shifting of the burden of compensating injured parties. The Federal Rules of Civil Procedure presently require judicial approval of proposed settlement agreements in class action litigation.[144] If judicial approval of settlement agreements were required in all treble damage antitrust litigation, and if judges carefully scrutinized proposed settlement agreements to ensure that the parties had exercised good faith, much of the potential inequity of the present settlement rule in antitrust litigation could be obviated. Furthermore, the flexibility of such a rule would allow judges to protect innocent and financially weaker defendants without causing undue detriment to injured parties and the goals of antitrust laws. If needed, additional protection could be provided for innocent defendants by enacting legislation creating sanctions for a plaintiff's institution of sham antitrust litigation.[145]

An additional benefit of limiting contribution to nonsettlers would be that a case-by-case determination of whether contribution was appropriate could then be used to further restrict the benefits of contribution to only deserving parties without causing many of the problems such a determination would entail under a broader rule applying contribution to settling as well as nonsettling violators.[146] Although the contribution issue would still be contested, litigation would be less frequent than under a broader rule since contribution would only be an issue in the rare situations where

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defendants, the court cited Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 348 (1971), which sets forth the settlement rule currently used in antitrust litigation. *Id.*

143. *See* notes 71-77 and accompanying text *supra*.

144. FED. R. CIV. P. 23(e).

145. *See Hearings on S. 1468, supra* note 7, at 29 (prepared statement of John Shenefield).

146. *See* notes 134-39 and accompanying text *supra*.

plaintiffs failed to name all potentially liable parties as defendants.[147] Moreover, in appropriate circumstances, the court could consider the contribution claim in a separate action so that no additional burden would be placed on the plaintiff. Finally, the court could initially limit the issue in such a hearing to the moral turpitude of the defendant asserting the contribution claims.

III. CONCLUSION

The equitable arguments raised in *Professional Beauty Supply* and rejected in *Abraham Construction* are not sufficiently compelling to justify a broad rule of contribution such as the one proposed in S. 1468. Since equity must serve not only participants in an illegal agreement but also innocent parties injured by such an agreement, the promotion of a fairer distribution of the burden of paying damages among persons guilty of intentional, criminal, and *per se* violations of antitrust statutes is not justified if it is achieved at the expense of the goals of antitrust laws. Regardless of the method used to apply this doctrine, a broad rule of contribution in complex litigation would almost certainly have an adverse effect on the rights of injured parties and the interests furthered by antitrust laws. Even a case-by-case definition of the scope of the doctrine, if applicable to settling parties, would hinder the settlement process and adversely affect antitrust policy. Closer judicial supervision of settlement rather than contribution may more effectively minimize the coercive pressure for settlement now present in antitrust litigation.

As an exception to a general rule barring contribution, however, a limited right of contribution among only nonsettling violators may be justified. A case-by-case determination could be used to effectuate such a limited rule of contribution in litigation where it would benefit relatively blameless defendants without causing undue harm to injured parties or antitrust goals. Thus, the holding in *Professional Beauty Supply*, if narrowly construed, may further the interests of equity without detracting from the effectiveness of antitrust laws.

Sandy deLone

147. *See* note 99 and accompanying text *supra*. Although plaintiffs generally name all potentially liable parties, *Professional Beauty Supply, Abraham Construction*, and Olson Farms, Inc. v. Safeway Stores, Inc., [1979] 2 TRADE REG. REP. (CCH) ¶ 62,995 (10th Cir. 1979), to date the only antitrust contribution cases decided by federal courts of appeals, all involved the assertion of contribution claims against unnamed, nonsettling defendants.