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Contribution Among Antitrust Defendants: A Necessary Solution to a Recurring Problem

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CONTRIBUTION AMONG ANTITRUST DEFENDANTS: A NECESSARY SOLUTION TO A RECURRING PROBLEM

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The most important decision of 1979 in the field of antitrust was *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*[1] For the first time in the long history of the Sherman Act,[2] a court recognized a right of contribution in antitrust treble damage actions. The impact of *Professional Beauty* on the antitrust bar was widespread and immediate. In treble damage actions almost everywhere, defendants began filing cross-claims, third-party complaints and separate actions for contribution.

Prior to the decision in *Professional Beauty*, no appellate court had ruled on whether contribution was available in antitrust cases.[3] The few district courts that had passed on the issue had ruled that no right to contribution existed[4] and, apparently, most litigants had assumed the question was settled.[5] Since *Professional Beauty*, however, four circuit court panels[6] and several more

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1. 594 F.2d 1179 (8th Cir. 1979).

2. 15 U.S.C. §§ 1-8 (1976) (original version at ch. 647, §§ 1-8, 26 Stat. 209 (1890)).

3. The courts in Goldlawr, Inc. v. Shubert, 276 F.2d 614, 616 (3d Cir. 1960) and Webster Motor Car Co. v. Zell Motor Car Co., 234 F.2d 616, 619 (4th Cir. 1956) had offered dicta on the question. The *Goldlawr* court commented that contribution would not be available; however, the *Webster* court indicated that defendants would be liable for contribution.

4. Iowa Beef Processors, Inc. v. Spencer Foods, Inc., M.D.L. No. 248 (N.D. Tex. September 1, 1978) (unreported), *aff'd sub nom. In re* Beef Indus. Antitrust Litigation, 607 F.2d 167 (5th Cir. 1979), *petition for cert. filed sub nom.* Iowa Beef Processors, Inc. v. Meat Price Investigators Ass'n, 48 U.S.L.W. 3538 (U.S. February 6, 1980) (No. 79-1214); Olson Farms, Inc. v. Safeway Stores, Inc., 1977-2 Trade Cas. ¶ 61,698 (D. Utah 1977), *aff'd*, 1979-2 Trade Cas. ¶ 62,995 (10th Cir. 1979), *rehearing en banc granted*, (10th Cir. December 27, 1979); Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., No. 75-2820 (E.D. La. October 5, 1977) (unreported), *aff'd*, 604 F.2d 897 (5th Cir. 1979), *petition for cert. filed sub nom.* Texas Indus., Inc. v. Radcliff Materials, Inc., 48 U.S.L.W. 3490 (U.S. January 24, 1980) (No. 79-1144); El Camino Glass v. Sunglo Glass Co., 1977-1 Trade Cas. ¶ 61,533 (N.D. Cal. 1976); Labbee v. William Wrigley Co., No. 4029 (W.D. Wash. December 20, 1974) (unreported); Sabre Shipping Corp. v. American President Lines, Ltd., 298 F. Supp. 1339 (S.D.N.Y. 1969).

Two other district courts had addressed the question in dicta. Chevalier v. Baird Savings Ass'n, 72 F.R.D. 140, 145 & n.6 (E.D. Pa. 1976) (contribution available); Baughman v. Cooper-Jarrett, Inc., 391 F. Supp. 671, 678 n.3 (W.D. Pa. 1975), *aff'd in part, rev'd in part on other grounds*, 530 F.2d 529 (3d Cir.) (contribution not available), *cert. denied*, 429 U.S. 825 (1976). *See also* Wainwright v. Kraftco Corp., 58 F.R.D. 9, 11-12 (N.D. Ga. 1973); Washington v. American Pipe & Constr. Co., 280 F. Supp. 802, 804-05 (W.D. Wash. 1968).

5. The only three law review articles on the topic previous to *Professional Beauty* had advocated contribution. 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); Note, *Contribution in Private Antitrust Suits*, 63 CORNELL L. REV. 682 (1978).

6. *In re* Beef Indus. Antitrust Litigation, 607 F.2d 167, 183 (5th Cir. 1979), *petition for cert. filed sub nom.* Iowa Beef Processors, Inc. v. Meat Price Investigators Ass'n, 48 U.S.L.W.

district courts[7] have ruled on contribution-related issues. In addition, numerous articles on the topic have been written,[8] legislation has been introduced in Congress,[9] an alternative legislative solution[10] has been proposed by the Section of Antitrust Law of the American Bar Association, and the Supreme Court has granted certiorari to review the question.[11]

The antitrust treble damage action has existed since 1890[12] and it has been clear from the beginning that damage liability for antitrust violations is joint and several because a treble damage action is an action in tort.[13] Why, then, was so little attention paid to the contribution question until 1979?

3538 (U.S. February 6, 1980) (No. 79-1214); Olson Farms, Inc. v. Safeway Stores, Inc., 1979-2 Trade Cas. ¶ 62,995 (10th Cir. 1979), *rehearing en banc granted*, (10th Cir. December 27, 1979); *In re* Corrugated Container Antitrust Litigation, 606 F.2d 319 (5th Cir. 1979), *cert. granted sub nom.* Westvaco Corp. v. Adams Extract Co., 48 U.S.L.W. 3813 (U.S. June 16, 1980) (No. 79-972); Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d 897 (5th Cir. 1979), *petition for cert. filed sub nom.* Texas Indus., Inc. v. Radcliff Materials, Inc., 48 U.S.L.W. 3490 (U.S. January 24, 1980) (No. 79-1144).

7. Little Rock School Dist. v. Borden, Inc., 1980-1 Trade Cas. ¶ 63,059 (E.D. Ark. 1979); *In re* Fine Paper Antitrust Litigation, M.D.L. No. 323 (E.D. Pa. August 3, 1979) (unreported); Alabama v. Blue Bird Body Co., No. 75-23-N (M.D. Ala. May 18, 1979) (unreported), *appeal docketed*, No. 79-2667 (5th Cir. July 26, 1979); Hedges Enterprises v. Continental Group, Inc., 1979-1 Trade Cas. ¶ 62,717 (E.D. Pa. 1979); *In re* Corrugated Container Litigation, 1979-1 Trade Cas. ¶ 62,689 (S.D. Tex. 1979), *aff'd mem.*, 606 F.2d 319 (5th Cir. 1979), *cert. granted sub nom.* Westvaco Corp. v. Adams Extract Co., 48 U.S.L.W. 3813 (U.S. June 16, 1980) (No. 79-972); *In re* Ampicillin Antitrust Litigation, 82 F.R.D. 647 (D.D.C. 1979); *In re* Eastern Sugar Antitrust Litigation, M.D.L. No. 201A (E.D. Pa. April 2, 1979) (unreported); *In re* Folding Carton Antitrust Litigation, M.D.L. No. 250 (N.D. Ill. March 30, 1979) (unreported). *See also* Florida Power Corp. v. Granlund, 1979-2 Trade Cas. ¶ 62,781, at 78,495 (M.D. Fla. 1979).

8. *E.g.*, Axinn, *Antitrust Legislation by 96th Congress*, N.Y.L.J., July 17, 1979, at 1; Brown, *Contribution Among Joint Tortfeasors*, N.Y.L.J., July 10, 1979, at 1; Hibner, *Contribution Among Joint Tort-feasors in Antitrust Cases*, 2 ABA ANTITRUST SECTION 1 (1979); Izard & Miller, *High Price-fixing Awards Require Abolition of Joint, Several Liability*, NAT'L L.J., August 27, 1979, at 22; Lempert, *Storm Brews on Antitrust Contribution*, Legal Times of Washington, June 4, 1979, at 1; Littman & Van Buskirk, *The "Dogmas" of Antitrust Actions: A New Perspective*, 24 ANTITRUST BULL. 687 (1979); Rhodes, *Professional Beauty and the Beast: Contribution in Antitrust Litigation*, 61 CHICAGO B. REC. 11 (1979); Schwartz, Simpson & Arnold, *Contribution in Private Actions Under the Federal Antitrust Laws*, 33 SW. L.J. 780 (1979); Sellers, *Contribution in Antitrust Damage Actions*, 24 VILL. L. REV. 829 (1979); Note, *Contribution in Private Antitrust Actions*, 93 HARV. L. REV. 1540 (1980); 33 VAND. L. REV. 979 (1980).

9. S. 1468, 96th Cong., 1st Sess. (1979). This bill, known as the Antitrust Equal Enforcement Act of 1979, was originally introduced by Senator Bayh (D.-Ind.) as a proposed amendment to the Antitrust Procedural Improvements Act of 1979, S. 390, 96th Cong., 1st Sess. (1979).

10. American Bar Association, Section of Antitrust Law, *Report on Contribution with Legislative Recommendation*, 936 ANTITRUST & TRADE REG. REP. (BNA) A-8, E-1 (October 25, 1979) [hereinafter cited as *Section Proposal*]; *see* Pollack, *Chairman's Report*, 2 ABA ANTITRUST SECTION 18-19 (1979).

11. Westvaco Corp. v. Adams Extract Co., 48 U.S.L.W. 3813 (U.S. June 16, 1980) (No. 79-972).

12. The private treble damage action was originally section 7 of the Sherman Act. Act of July 2, 1890, ch. 647, § 7, 26 Stat. 209. The current version is section 4 of the Clayton Act. 15 U.S.C. § 15 (1976).

13. *See, e.g.*, Chattanooga Foundry & Pipe Works v. Atlanta, 203 U.S. 390, 397 (1906);

Until recently, treble damage actions were rare; not until the *Electrical Equipment Cases* in the early 1960's did the private treble damage antitrust action become significant.[14] Since that time, treble damage actions have become increasingly pervasive.[15] Of even greater impact was the 1966 amendment to Rule 23 of the Federal Rules of Civil Procedure,[16] which transformed the class action from a mere permissive joinder device into a rule operating under "the same principle [as] the Book-of-the-Month Club — the principle that unless a member affirmatively 'opts' out, then he's 'in.' "[17] As a result, class action defendants now face potentially massive liability.

For example, each defendant found guilty of a conspiracy to fix prices may be liable not only for the overcharge to an entire class on its own sales, but also for the overcharges on its coconspirators' sales and even, it has been argued, on the sales of non-defendant, non-conspirators under the "umbrella" theory of damages.[18] In addition, plaintiffs in treble damage cases almost invariably seek to toll the statute of limitations[19] by alleging, for example, that the defendants "fraudulently concealed"[20] the conspiracy's existence. Consequently, the damage

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Dextone Co. v. Building Trades Council, 60 F.2d 47, 48-49 (2d Cir. 1932); Wainwright v. Kraftco Corp., 58 F.R.D. 9, 11-12 (N.D. Ga. 1973); Washington v. American Pipe & Constr. Co., 280 F. Supp. 802, 804-05 (S.D. Cal. 1968); E. TIMBERLAKE, FEDERAL TREBLE DAMAGE ANTITRUST ACTIONS 352-63 (1965). *But see* Littman & Van Buskirk, *supra* note 8, at 719-35; Izard & Miller, *supra* note 8, *passim*.

14. *See Hearings on S. 1468 Before the Subcomm. on Antitrust, Monopoly and Business Rights of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 45, 120-21 (1979) (statements of Thomas R. Long and Don T. Hibner, Jr.) [hereinafter cited as *Senate Hearings*]; C. BANE, THE ELECTRICAL EQUIPMENT CONSPIRACIES: THE TREBLE DAMAGE ACTIONS 381-83 (1973); Hoffman, *Proof of Damages in Private Litigation*, 36 A.B.A. ANTITRUST L.J. 151, 167 (1967). Only 157 treble damage actions were recorded in the years 1899-1939, with only 14 recoveries by plaintiffs, totalling less than $275,000. From 1940 to 1963, there were only 57 recoveries in the 1539 non-electrical equipment treble damage actions. ANTITRUST ADVISOR 682 (rev. ed. 1978); Guilfoil, *Private Enforcement of U.S. Antitrust Law*, 10 ANTITRUST BULL. 747, 750 (1965).

15. "In fiscal year 1978 private parties commenced 1,435 antitrust suits, while the United States instituted only 72." Brief of the United States as *Amicus Curiae* at 25-26, Reiter v. Sonotone Corp., 442 U.S. 330 (1979).

16. FED. R. CIV. P. 23.

17. Pollack, *Introductory Remarks*, 41 A.B.A. ANTITRUST L.J. 230 (1972). *See generally* S. REP. No. 428, 96th Cong., 1st Sess. 11 (1979) [hereinafter cited as S. REP. No. 428]. It should be noted that, when the Sherman Act was passed, there was no class action rule. It is unlikely that the Congress of 1890 ever contemplated the impact of treble damage recoveries on a classwide basis.

18. *See In re* Beef Indus. Antitrust Litigation, 600 F.2d 1148, 1166 n.24 (5th Cir. 1979); Wall Prods. Co. v. National Gypsum Co., 357 F. Supp. 832, 840 (N.D. Cal. 1973); Washington v. American Pipe & Constr. Co., 280 F. Supp. 802, 804-07 (S.D. Cal. 1968). According to the *Washington* court, damages could be recovered for the sales of non-conspirators if plaintiffs could prove that the "conspiracy raised the general price level in the market, and that non-conspirators sold their product under this umbrella at higher prices than would have prevailed absent the illegal activity." *Id.* at 805. *Contra*, Mid-West Paper Prods. Co. v. Continental Group, Inc., 596 F.2d 573, 580-87 (3d Cir. 1979).

19. 15 U.S.C. § 15b (1976).

20. *See, e.g.*, Kansas City, Missouri v. Federal Pac. Elec. Co., 310 F.2d 271 (8th Cir. 1962), *cert. denied*, 371 U.S. 912 (1963). The statute of limitations may also be tolled by reason of a prior, related government action, 15 U.S.C. § 16(i)(1976), or for other reasons, *e.g.*, Mt. Hood Stages, Inc. v. Greyhound Corp., 1980-1 Trade Cas. ¶ 63,206 (9th Cir. 1980).

periods in antitrust cases potentially extend over many years.[21] With class-wide liability, compounded by the *parens patriae* provisions of the Clayton Act[22] and the increasing involvement in antitrust damage cases by state attorneys-general,[23] liability in many cases for just single damages would be enormous. Yet damages in private antitrust actions are *trebled* and defendants are also liable for the plaintiffs' attorneys' fees.[24] Consequently, the potential liability facing many antitrust defendants is truly staggering. A case in point is the *Plywood Antitrust Litigation*,[25] in which a jury recently rendered a verdict approving a damage formula which, if upheld, could result in the imposition of "the first $1 billion judgment in history" against the three defendants that chose not to settle.[26] The *Plywood* verdict made it graphically clear to antitrust litigants that, even for an innocent defendant, the downside risk of trying a treble damage action is so great that the case frequently must be settled, even at an otherwise unrealistic price.[27]

Existing rules against contribution further magnify the impact of treble damage liability, as illustrated by the following hypothetical:

> Class plaintiffs sue 20 defendants for price-fixing, alleging a cumulative overcharge of $1 billion. Nineteen defendants, with a total of 95 percent of industry sales, settle for an aggregate $300 million. The remaining defendant, believing in its innocence, goes to trial and loses. The damages proved are $3 billion — $1 billion, trebled. Of this total, the remaining defendant can deduct only the $300 million recovered by plaintiffs in settlement, leaving an actual liability of $2.7 billion for a defendant with just five percent of industry sales.[28]

In this hypothetical, the sales of the 19 settling defendants were not deducted from the plaintiffs' damage claims even though the plaintiffs obtained $300 million in settlement of those claims. Had there been a rule of contribution requiring deduction of the settling defendants' sales, the non-settling de-

21. For example, in Hanover Shoe Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 495-502 (1968), the damage period was 16 years.

22. 15 U.S.C. §§ 15c-15h (1976).

23. *See, e.g.*, 861 ANTITRUST & TRADE REG. REP. (BNA) D-1, D-2 (April 27, 1978).

24. 15 U.S.C. § 15 (1976).

25. 1979-1 Trade Cas. ¶ 62,459 (E.D. La. 1978).

26. Beckwith, *Plywood Antitrust Case: Study in Streamlining*, Legal Times of Washington, November 27, 1978, at 1. Others have estimated that the damages may exceed $1.5 billion. *See* S. REP. No. 428, *supra* note 17, at 11.

27. *See* Lempert, *Panic Aided Record Box Settlements*, Legal Times of Washington, May 7, 1979, at 1, 4. When the Federal Trade Commission considered the *Plywood* matter, it found only an "unfair method of competition," not a price-fixing conspiracy; even this limited ruling was reversed on appeal. Boise Cascade Corp., 91 F.T.C. 1, 102 (1978), *rev'd*, 1980-2 Trade Cas. ¶ 63,323 (9th Cir. 1980). Moreover, the trial attorney for the plaintiffs in the treble damage action offered to settle the case — during the trial — for a total of $8 million.

28. Under the rule of Flintkote Co. v. Lysfjord, 246 F.2d 368, 397-98 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957), damages are trebled before amounts recovered in settlement are deducted. *See also* Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 348 (1971); Baughman v. Cooper-Jarrett, Inc., 530 F.2d 529, 533 (3d Cir.), *cert. denied*, 429 U.S. 825 (1976). The hypothetical described above is illustrated in cartoon form in *Senate Hearings*, *supra* note 14, at 204-06.

fendant's liability would have been $150 million[29] — a considerable sum indeed, but not nearly so devastating as $2.7 billion.

The genuine threat of massive damage liability, vividly illustrated by the *Plywood* verdict and magnified by existing rules forbidding contribution, resulted in what have been aptly described as "coerced" settlements[30] in the *Corrugated Container Antitrust Litigation*.[31] The *Corrugated* settlements, announced shortly after the Eighth Circuit's *Professional Beauty* decision, have in turn sparked the recent widespread interest in the contribution question.[32]

The *Corrugated* litigation had its genesis in a grand jury investigation that resulted in indictments of 14 companies and 26 individuals for price-fixing.[33] As a result of the investigation, some 40 class actions were brought naming 37 companies as defendants. The first settling defendant paid $500,000 per percentage point of its market share to the plaintiffs. The second settling defendant, which had the industry's second largest market share, 8.3 percent, paid $1 million per point, and the proportionate rate to remaining defendants escalated considerably. By March 1979, about 20 defendants had settled for amounts as high as $6.5 million per point. One small, unindicted, defendant was forced to settle for $3.25 million per point — $5.6 million — while vigorously asserting its innocence. This defendant had to settle because the earlier settlements had dramatically heightened its potential liability: several of the defendants had settled for relatively smaller sums, relieving them of any further liability but leaving their sales still in the case as a basis for damages. The small defendant, at the time it settled, believed that it was facing a potential $5 billion liability, not to mention considerable litigation expenses if it went to trial.[34] Some other unindicted defendants settled for amounts as high as $4 million per point. Another defendant was acquitted in the Justice Department's criminal action, but paid $27.4 million in settlement, $6.5 million per point, again due to the *in terrorem* effect of its potential liability for three times the entire industry's damages.[35]

Although the *Corrugated* settlements are the most widely-publicized examples of coerced settlements, *Corrugated* is far from an isolated case,[36] and the contribution question is potentially present in all Sherman Act conspiracy cases. In every case in which joint conduct is involved, each alleged conspirator

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29. In the hypothetical, the same result would be obtained under a system of pro rata contribution. See text accompanying notes 182-95 *infra*.

30. *Senate Hearings*, *supra* note 14, at 35; *see* Lempert, *supra* note 27, at 1, 4.

31. 1979-1 Trade Cas. ¶ 62,690 (S.D. Tex. 1979).

32. *See, e.g.*, S. REP. No. 428, *supra* note 17, at 14-16; *Senate Hearings*, *supra* note 14, at 32-48, 126-36, 155-71, 179-84, 188-94, 201, 207-09; Lempert, *supra* note 8, at 1, 4.

33. United States v. International Paper Co., [1978-79 Transfer Binder] 4 TRADE REG. REP. (CCH) ¶ 45,078 (1978) (Case nos. 2621-22). Many of the defendants pleaded *nolo contendere*; those that did not, however, were acquitted in the criminal trial.

34. S. REP. No. 428, *supra* note 17, at 14-16; Petitioner's Brief for Certiorari at 3-4, Westvaco Corp. v. Adams Extract Co., 48 U.S.L.W. 3813 (U.S. June 16, 1980) (No. 79-972). The amounts obtained in the various settlements and the defendants' market shares are set forth in *Senate Hearings*, *supra* note 14, at 181-84.

35. Lempert, *supra* note 27, at 1.

36. *See, e.g.*, S. REP. No. 428, *supra* note 17, at 16; *Senate Hearings*, *supra* note 14, at 71-72, 121 (statements of Robert P. Taylor and Don T. Hibner, Jr.).

may be severally liable for the entire amount of the joint liability. The problem is a recurring one.

This article will analyze the decisional law of contribution in antitrust cases, the various arguments for and against antitrust contribution, and the two major legislative proposals.[37] The primary conclusion drawn from this analysis is that contribution should be permitted in antitrust cases. Contribution should not be permitted, however, against defendants that have settled. Rather, settlements should result in reduction of the plaintiff's claim by the amount of the settling defendant's contributive share. Contribution need not unduly complicate antitrust cases as its opponents fear; procedural rules can be formulated to permit both contribution and claim reduction with minimal disruption to the judicial system while still furthering the goals of the antitrust laws.

THE CASE LAW

The Experience in Non-Antitrust Cases

The first case to consider the contribution issue was *Merryweather v. Nixan*,[38] a conversion action in which the King's Bench, per Lord Kenyon, refused to allow a joint judgment defendant, who had satisfied the plaintiff's entire claim, to obtain "contribution of a moiety" from his co-defendant. The basis of the ruling was the doctrine that no man should be allowed to base an action on his own intentional wrong.[39]

The subsequent development of the rule was noted in a comment to the *Restatement (Second) of Torts:*

> When, in the United States, the codes of civil procedure and modified common law procedure permitted joinder of defendants who were merely negligent, the defendants came to be called "joint tortfeasors" and the reason for the rule against contribution was lost to sight. For a long time the great majority of the American jurisdictions adopted a fixed rule that there could be no contribution between those who were liable in tort for the same harm, even when it was negligently inflicted. This was gradually modified, in a number of states, to permit contribution in favor of a tortfeasor who was not personally at fault, as in the case of a master held vicariously liable for the tort of his servant.[40]

In 1905, during the reign of *Swift v. Tyson*,[41] the United States Supreme

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37. See notes 9 & 10 and accompanying text, *supra*.

38. 8 Term. Rep. 186, 101 Eng. Rep. 1337 (K.B. 1799).

39. *See* W. PROSSER, LAW OF TORTS § 50 (4th ed. 1971). The origin of the rule forbidding the maintenance of an action founded on one's own deliberate wrong was the *Highwayman's Case*. Everet v. Williams, 9 L.Q. Rev. 197 (Ex. 1725). As described by Prosser: "This was a suit by one highwayman against another for an accounting of their plunder. The bill was dismissed with costs to be paid by the defendant; the plaintiff's solicitors were attached and fined fifty pounds each for contempt. Both plaintiff and defendant were hanged. In short, contribution was not allowed." W. PROSSER, *supra*, at 305 n.40.

40. RESTATEMENT (SECOND) OF TORTS § 886A, Comment a, at 337-38 (1977); *see* Knell v. Feltman, 174 F.2d 662, 666 (D.C. Cir. 1949).

41. 41 U.S. (16 Pet.) 1 (1842), *overruled*, Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

Court adopted the modified *Merryweather* rule in a diversity case, *Union Stock Yards Co. v. Chicago, B. & C.R. Co.*[42] Blurring the distinction between indemnity and contribution,[43] Justice Day's opinion recognized an exception to the general rule against contribution. The exception provided that the law will fasten "the ultimate liability upon the one whose wrong has been primarily responsible for the injury sustained";[44] but where the parties' conduct was "of the same character," there could be no indemnity or contribution.[45]

The high-water mark for the rule against contribution was reached in a 1952 admiralty decision. *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*[46] was a non-collision case[47] in which an employee of Haenn sustained injuries while repairing a Halcyon vessel. Under applicable workmen's compensation legislation, the employee could not sue Haenn directly. He therefore sued Halcyon, which then impleaded Haenn. Justice Black held that Halcyon's third-party complaint should have been dismissed:

> 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. This judicial attitude has provoked protest on the ground that it is inequitable to compel one tortfeasor to bear the entire burden of a loss which has been caused in part by the negligence of someone else. Others have defended the policy of common-law courts in refusing to fashion rules of contribution. 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.
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> We have concluded that it would be unwise to attempt to fashion

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42. 196 U.S. 217 (1905).

43. The concepts of indemnification and contribution are analytically distinct. "Indemnification, unlike contribution, permits a wrongdoer to escape loss by shifting his entire responsibility to another party." Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1186 (8th Cir. 1979); *see* Zapico v. Bucyrus-Erie Co., 579 F.2d 714, 718-19 (2d Cir. 1978). Despite the conflict in the circuits on the question of contribution, the courts have agreed — and properly so — that indemnification may not be obtained in antitrust cases. *E.g.*, Olson Farms, Inc. v. Safeway Stores, Inc., 1979-2 Trade Cas. ¶ 62,995, at 79,704-05 (10th Cir. 1979), *rehearing en banc granted*, (10th Cir. Dec. 27, 1979); Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d at 1186-87. *But cf.* Wilshire Oil Co. v. Riffe, 409 F.2d 1277 (10th Cir. 1969) (corporation entitled to indemnification from its own officials who caused it to commit an antitrust violation).

44. 196 U.S. at 227. Several other cases have recognized a distinction between "active" and "passive" negligence. *E.g.*, Slattery v. Marra Bros., 186 F.2d 134, 138 (5th Cir.), *cert. denied*, 341 U.S. 915 (1951). *But cf.* Dole v. Dow Chem. Co., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972) (overruling this distinction and adopting for New York a rule of apportionment of damages based on comparative fault).

45. 196 U.S. at 228. The Court left open the question whether contribution is available when both defendants are sued jointly. *Id.* at 223; *see* Sabre Shipping Corp. v. American President Lines, Ltd., 298 F. Supp. 1339, 1344 (S.D.N.Y. 1969).

46. 342 U.S. 282 (1952).

47. In collision cases, admiralty has permitted the division of damages for over 800 years, going back to the Laws of Oleron, art. XIV (c. 1150). *See* 4 R. MARSDEN, BRITISH SHIPPING LAWS 140-41 (11th ed. 1961). *See also Exodus* 21:35.

new judicial rules of contribution and that the solution of this problem should await congressional action.[48]

Halcyon appeared to stand for a broad rule against contribution in the absence of legislation. But *Halcyon* has not endured. Its reach was sharply circumscribed by a unanimous Supreme Court in *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*,[49] a 1974 admiralty decision which limited *Halcyon* to its facts. In *Cooper*, a longshoreman fell and injured his back when he stepped into a gap between palletized crates concealed by corrugated paper. The stevedoring company, Cooper, had loaded the crates while the vessel was docked at another port. The longshoreman sued the vessel, which filed a third-party complaint against Cooper. Unlike the situation in *Halcyon*, Cooper would not have been immune from a direct suit by the plaintiff since the plaintiff was not a Cooper employee. The Supreme Court held that *Halcyon* applies only when the party from whom contribution is sought is immune from suit. Justice Marshall's opinion emphasized the benefits of a rule favoring contribution:

> The interests of safety dictate that where two parties "are both in fault, they should bear the damage equally, to make them more careful." . . . And a "more equal distribution of justice" can best be achieved by ameliorating the common-law rule against contribution which permits a plaintiff to force one of two wrongdoers to bear the entire loss, though the other may have been equally or more to blame.[50]

As the Court noted in *Cooper*, admiralty courts have been more liberal than common law courts in fashioning contribution rules.[51] However, the common law courts have also expressed dissatisfaction with the *Merryweather* rule, and modern cases have far more often than not allowed contribution. By the time of the *Halcyon* decision, nine American jurisdictions had already judicially abandoned the rule against contribution in negligence cases.[52] For example, in *George's Radio, Inc. v. Capital Transit Co.*,[53] the District of Columbia Court of Appeals held that the rule barring contribution in all cases "is not sustainable upon any fair basis of reasoning, is wrong, and should be overruled."[54] As of 1978, the Uniform Contribution Among Joint Tortfeasors Act[55] had been adopted in 19 states, and 18 other states had adopted other legislation also overruling the common law rule against contribution.[56] By 1979, the Supreme Court was able to say that the *general rule* is that concurrent tortfeasors are

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48. 342 U.S. at 285 (footnotes omitted).
49. 417 U.S. 106 (1974). Justice Stewart did not participate in the decision.
50. *Id.* at 111, *quoting* The Alabama, 92 U.S. 695, 697 (1876) *and* The Max Morris, 137 U.S. 1, 14 (1890).
51. 417 U.S. at 110.
52. The cases are collected in W. PROSSER, *supra* note 39, at 306-07 nn.48-56.
53. 126 F.2d 219 (D.C. Cir. 1942).
54. *Id.* at 220.
55. UNIFORM CONTRIBUTION AMONG JOINT TORTFEASORS ACT (1939) (revised 1955).
56. The various statutes are collected in S. REP. No. 428, *supra* note 17, at 12.

entitled to contribution.[57] Even in England, the *Merryweather* rule has been overruled by statute.[58]

Many of the jurisdictions that abandoned the common law rule have permitted contribution only for those not guilty of intentional torts.[59] Those jurisdictions have adhered to the underlying rationale of *Merryweather* "that the courts will not aid one who had deliberately done harm, so that no man can be permitted to found a cause of action on his own intentional tort."[60] Other jurisdictions, however, have permitted contribution even for intentional tortfeasors.[61] The latter seems to be the better view because a cause of action for contribution is not based on one's own wrong. It is essentially an action in quasi-contract, based upon the payment to the plaintiff of more than one's share of the judgment.[62]

Recent federal court decisions tend to allow contribution, even for intentional torts. For example, several courts[63] have permitted claims for contribution in anti-discrimination actions under the Civil Rights Act of 1964.[64] Even in complex fraud actions under the federal securities laws, the courts have found an implied right to contribution.[65] Although certain provisions of the securities laws expressly provide for contribution,[66] no express provision governs implied private actions under section 10(b) of the Securities and Exchange Act of 1934[67] and SEC rule 10b-5 promulgated thereunder,[68] violations of which are intentional torts.[69] As one court noted, it is "[b]ecause of the deterrent policy of the securities laws" that even intentional tortfeasors can obtain contribution in 10b-5 actions; in this way, it can be assured "that the other tortfeasors will not escape liability."[70]

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57. Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 260-61 n.8 (1979); RESTATEMENT (SECOND) OF TORTS § 886A & Comment a (1977).

58. The Law Reform (Married Women and Tortfeasors) Act, 1935, 25 & 26 Geo. 5, c. 30.

59. *See, e.g.*, Kohr v. Allegheny Airlines, Inc., 504 F.2d 400, 405 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975); Knell v. Feltman, 174 F.2d 662, 664 (D.C. Cir. 1949); Younger v. Glamorgan Pipe & Foundry Co., 418 F. Supp. 743, 797 (W.D. Va. 1976) (Virginia law), *vacated*, 561 F.2d 563 (4th Cir. 1977); UNIFORM CONTRIBUTION AMONG JOINT TORTFEASORS ACT § 1(c) (1955).

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

61. *See, e.g.*, Judson v. People Bank & Trust Co., 17 N.J. 67, 91, 110 A.2d 24, 36 (1954); Primoff v. Duell, 85 Misc. 2d 1047, 1051, 381 N.Y.S.2d 947, 950 (Sup. Ct. 1976).

62. *See, e.g.*, State Farm Mut. Automobile Ins. Co. v. Schara, 56 Wis. 2d 262, 201 N.W.2d 758 (1972).

63. *See, e.g.*, International Union of Elec., Radio & Mach. Workers v. Westinghouse Elec. Corp., 73 F.R.D. 57, 59 (W.D.N.Y. 1976); Lynch v. Sperry Rand Corp., 62 F.R.D. 78, 89-90 (S.D.N.Y. 1973). *But see* Younger v. Glamorgan Pipe & Foundry Co., 418 F. Supp. 743, 797 (W.D. Va. 1976) (applying Virginia law, under which there is no contribution for intentional tortfeasors), *vacated*, 561 F.2d 563 (4th Cir. 1977).

64. 42 U.S.C. § 2000e *et seq.* (1976).

65. The leading case is Globus, Inc. v. Law Research Servs., Inc., 318 F. Supp. 955 (S.D.N.Y. 1970), *aff'd per curiam*, 442 F.2d 1346 (2d Cir.), *cert. denied*, 404 U.S. 941 (1971).

66. 15 U.S.C. §§ 77k(f), 78i(e), 78r(b) (1976).

67. 15 U.S.C. § 78j(b) (1976).

68. 17 C.F.R. § 240.10b-5 (1977).

69. Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976).

70. Alexander & Baldwin, Inc. v. Peat, Marwick, Mitchell & Co., 385 F. Supp. 230, 238

Antitrust Contribution Decisions

The Choice of Law Problem

The initial question arising in antitrust contribution cases is whether to apply state or federal law. The courts have never given this question the attention it merits although they have almost invariably reached the correct result — federal law applies.[71] As the Supreme Court held in *Sola Electric Co. v. Jefferson Electric Co.*:[72]

> When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield.[73]

Courts have usually assumed that this statement provides the complete answer to the question. Properly viewed, however, *Sola* states only the first part of a two-stage analysis. Whether contribution is available in antitrust cases is indeed a federal question, but the federal question itself may be resolved either by formulating a uniform federal common law rule or by allowing state rules to apply.[74] For example, prior to the 1955 enactment of a uniform statute of limitations in federal antitrust cases,[75] the statute of the forum state applied.[76]

Because antitrust cases frequently involve a multiplicity of both plaintiffs

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(S.D.N.Y. 1974). *Accord*, Heizer Corp. v. Ross, 601 F.2d 330, 332-33 (7th Cir. 1979); Odette v. Shearson, Hammill & Co., 394 F. Supp. 946, 958 (S.D.N.Y. 1975); Gould v. American-Hawaiian S.S. Co., 387 F. Supp. 163, 169 (D. Del. 1974), *vacated on other grounds*, 535 F.2d 761 (3d Cir. 1976). *See generally* Fischer, *Contribution in 10b-5 Actions*, 33 BUS. LAW. 1821 (1978).

71. Olson Farms, Inc. v. Safeway Stores, Inc., 1979-2 Trade Cas. ¶ 61,698, at 79,700 n.5 (10th Cir. 1979), *rehearing en banc granted*, (10th Cir. Dec. 27, 1979); Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d 897, 901 (5th Cir. 1979), *petition for cert. filed sub nom.* Texas Indus., Inc. v. Radcliff Materials, Inc., 48 U.S.L.W. 3490 (U.S. January 24, 1980) (No. 79-1144); Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1182 n.3; Goldlawr, Inc. v. Shubert, 276 F.2d 614, 616 (3d Cir. 1960) (dictum); El Camino Glass v. Sunglo Glass Co., 1977-1 Trade Cas. ¶ 61,533, at 72,000 n.1 (N.D. Cal. 1976); Sabre Shipping Corp. v. American President Lines, Inc., 298 F. Supp. 1339, 1343 (S.D.N.Y. 1969). *But see* Webster Motor Car Co. v. Zell Motor Car Co., 234 F.2d 616, 619 (4th Cir. 1956). (dictum).

72. 317 U.S. 173 (1942).

73. *Id.* at 176.

74. *See* Clearfield Trust Co. v. United States, 318 U.S. 363, 366-67 (1943); Royal Indem. Co. v. United States, 313 U.S. 289 (1941); Seaboard Air Line Ry. v. Kenney, 240 U.S. 489 (1916); P. HART & H. WECHSLER, THE FEDERAL COURTS & THE FEDERAL SYSTEM 470-71 (2d ed. 1973); Friendly, *In Praise of* Erie — *And of the New Federal Common Law*, 39 N.Y.U.L. REV. 383, 410 (1964); Note, *The Role of State Law in Federal Antitrust Treble Damage Actions*, 75 HARV. L. REV. 1395 (1962). *Compare, e.g.*, Three Rivers Motors Co. v. Ford Motor Co., 522 F.2d 885, 889 (3d Cir. 1975) *with* Stella v. Kaiser, 221 F.2d 115 (2d Cir.), *cert. denied*, 350 U.S. 835 (1955).

75. 15 U.S.C. § 15b (1976) (original version at ch. 283, § 1, 69 Stat. 283 (1955)).

76. *E.g.*, Chattanooga Foundry & Pipe Works v. Atlanta, 203 U.S. 390, 397-99 (1906); Winkler-Koch Eng'r Co. v. Universal Oil Prods. Co., 100 F. Supp. 15, 28-29 (S.D.N.Y. 1951).

and defendants — frequently from many different states — a uniform federal common law rule should govern the contribution question. State contribution laws vary markedly and reference to state law would result in considerable confusion and continuous forum shopping.[77] Particularly in light of the many significant antitrust cases that become multidistrict proceedings, it seems especially appropriate to have a uniform federal rule of contribution.[78]

The Question of Contribution

Apart from conflicting dicta in two circuit court decisions,[79] no court ever addressed the question of contribution in antitrust cases until 1969 in *Sabre Shipping Corp. v. American President Lines, Ltd.*[80] The *Sabre Shipping* court ordered dismissal of a third-party complaint filed against 14 settling defendants by a number of nonsettling defendants. Judge Ryan's opinion relied primarily on *Halcyon* and *Union Stock Yards* and, because of the absence of legislation, presumed a congressional intent to preclude contribution. The court also expressed the view that allowing the settling defendants to be brought back into the case would discourage settlements and take control of the action out of the plaintiff's hands.[81]

The contribution question was not addressed in a reported case, apart from more conflicting dicta, for another seven years.[82] The 1976 case of *El Camino Glass v. Sunglo Glass Co.*[83] involved an effort by the defendants to implead the president and co-owner of the plaintiff in a related case. The court acknowledged that the arguments for contribution in favor of unintentional violators were persuasive, but dismissed the third-party complaint nevertheless, reasoning that "intent [should] remain irrelevant to an antitrust action."[84] Additionally, the court "believe[d] that the deterrent effect of the antitrust laws may be increased by not permitting defendants to redistribute the cost of an antitrust violation."[85]

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77. *See* Response in Support of Petition for Certiorari at 3 n.4, Westvaco Corp. v. Adams Extract Co., 48 U.S.L.W. 3813 (U.S. June 16, 1980) (No. 79-972).

78. *See* Corbett, *supra* note 5, at 123-28; Sellers, *supra* note 8, at 833-43; *cf.* Fischer, *supra* note 70, at 1827-29 (advocating uniform federal rule of contribution in securities cases).

A separate question is whether to permit the assertion of state law claims for contribution either in state court or in federal court under pendent or diversity jurisdiction. If such claims were allowed, any uniformity in the federal law of contribution would be destroyed. Accordingly, state contribution laws should not apply to claims arising out of liability under the federal antitrust laws. *See* Corbett, *supra* note 5, at 136; *cf.* Flood v. Kuhn, 407 U.S. 258, 284 (1972) (holding state antitrust laws inapplicable to the business of baseball).

79. See note 3 *supra.*

80. 298 F. Supp. 1339 (S.D.N.Y. 1969).

81. *Id.* at 1346.

82. See note 4 *supra.* An unreported 1974 order denied contribution. Labbee v. William Wrigley Co., No. 74-4029 (W.D. Wash. December 20, 1974).

83. 1977-1 Trade Cas. ¶ 61,533 (N.D. Cal. 1976).

84. *Id.* at 72,112.

85. *Id.* The court also relied on the policy against taking control of the action from the plaintiff, commenting that severance of the third-party complaint was "an uncertain and inadequate remedy." *Id.*

The third reported ruling on contribution in antitrust cases was *Olson Farms, Inc. v. Safeway Stores, Inc.*[86] in 1977. In a prior case brought by 14 egg producers, Olson and several other egg buyers were alleged to have conspired to depress the price of eggs, yet Olson was the sole defendant named in the suit.[87] Only $99,656 of the damages was attributable to Olson's purchases and only eleven percent of plaintiffs' sales was made to Olson. Nevertheless, Olson was compelled to satisfy the plaintiffs' entire judgment, which exceeded $2.4 million, representing treble damages for the conduct of all the egg buyers, plus attorneys' fees, costs and interest.[88] None of the other conspirators had to pay a dime. The brief opinion denying Olson's claim for contribution offered no insight into the district court's reasoning.

The next reported decision was *Professional Beauty*.[89] This was a dealer termination case brought only against National, the dealer that had been substituted for the plaintiff. The supplier and alleged coconspirator, La Maur, was not sued — apparently because it was persuaded to renew the plaintiff's franchise. The district court dismissed National's third-party complaint against La Maur and National appealed. The Eighth Circuit reversed. The majority opinion noted that, in light of *Cooper*, the reliance on *Halcyon* in prior decisions had been misplaced and that the federal courts could indeed fashion rules of contribution in the absence of congressional direction.[90] As to whether the policy of deterrence is served best by prohibiting contribution, the court concluded that "the question of deterrence actually cuts both ways and on balance a rule allowing contribution is actually a greater deterrent" because it prevents additional antitrust violators from escaping liability entirely.[91] The court also pointed out that proper case management by the district courts would alleviate any additional complications that contribution might cause. The court held that the overriding consideration was "fairness between the parties," which required a rule allowing contribution, "at least under certain circumstances."[92]

86. 1977-2 Trade Cas. ¶ 61,698 (D. Utah 1977), *aff'd*, 1979-2 Trade Cas. ¶ 62,995 (10th Cir. 1979), *rehearing en banc granted*, (10th Cir. December 27, 1979). An unreported decision, Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., No. 75-2820 (E.D. La. October 5, 1977), *aff'd*, 604 F.2d 897 (5th Cir. 1979), *petition for cert. filed sub nom.* Texas Indus., Inc. v. Radcliff Materials, Inc., 48 U.S.L.W. 3490 (U.S. January 24, 1980) (No. 79-1144), denied contribution three weeks prior to the *Olson Farms* decision.

87. Cackling Acres, Inc. v. Olson Farms, Inc., 541 F.2d 242 (10th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977).

88. 1979-2 Trade Cas. at 79,700 & n.3.

89. 594 F.2d 1179 (8th Cir. 1979). Prior to *Professional Beauty*, another district court denied a claim for contribution in an unreported decision. Iowa Beef Processors, Inc. v. Spencer Foods, Inc., M.D.L. No. 248 (N.D. Tex. September 1, 1978), *aff'd sub nom. In re* Beef Indus. Antitrust Litigation, 607 F.2d 167 (5th Cir. 1979), *petition for cert. filed sub nom.* Iowa Beef Processors, Inc. v. Meat Price Investigators Ass'n, 48 U.S.L.W. 3538 (U.S. February 6, 1980) (No. 79-1214).

90. 594 F.2d at 1183.

91. *Id.* at 1184-85.

92. *Id.* at 1185. The court did "not hold that contribution is available to all violators of the antitrust laws, regardless of the flagrancy of the conduct of the party seeking contribution." Rather, the decision to allow or deny contribution should be based on "all the circumstances of the case . . . ." *Id.* at 1186.

The first reported decision[93] to consider *Professional Beauty* was *In re Ampicillin Antitrust Litigation*,[94] where the district court denied leave to assert a claim for contribution against two settling defendants. The opinion distinguished *Professional Beauty* on the ground that it did not concern contribution against settling defendants, and adhered to *Sabre Shipping*, *Olson Farms* and *El Camino Glass*.[95]

The next case was *Corrugated*. There the court acknowledged that, because of the "coercive impact" of the rule against contribution, "[e]ven a defendant relatively certain of a judgment in his favor must have serious doubts about risking such exposure by going to trial,"[96] but nevertheless denied the nonsettling defendants' motions to assert claims for contribution against the settling defendants. The court reasoned that, with respect to intentional torts, deterrence would be better furthered by a rule against contribution. More importantly, in the court's view, "a policy of allowing contribution would complicate litigation procedurally, frustrate settlements and inhibit joint defense efforts . . . ."[97] After *Corrugated*, a Pennsylvania district court ruled against contribution in *Hedges Enterprises v. Continental Group, Inc.*,[98] in a curt pretrial order.[99]

In October 1979, the Fifth Circuit became the second appellate court to consider the contribution question. In *Wilson P. Abraham Construction Corp. v. Texas Industries, Inc.*,[100] a divided panel held that no right of contribution was available. In this case, Abraham had sued Texas Industries for price fixing, alleging a conspiracy between it and certain unnamed coconspirators. Discovery

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District Judge Hanson dissented, arguing that contribution should not be allowed in favor of intentional tortfeasors, particularly in light of "the potential for confusion, delay, and complexity inherent in permitting antitrust defendants to implead other antitrust violators . . . ." *Id.* at 1190 (Hanson, J. dissenting). It is, perhaps, the fear of such complications that explains why every district judge who has considered the question has refused to permit the assertion of claims for contribution in antitrust cases.

93. After *Professional Beauty*, claims for contribution were disallowed in two unreported cases. *In re* Eastern Sugar Antitrust Litigation, M.D.L. No. 201A (E.D. Pa. April 2, 1979); *In re* Folding Carton Antitrust Litigation, M.D.L. No. 250 (N.D. Ill. March 30, 1979). In the *Sugar* case, defendant Armstar Corp.'s motion for leave to amend its answer was denied as untimely, *see In re* Cessna Distributorship Antitrust Litigation, 532 F.2d 64 (8th Cir. 1976); no view on the merits was expressed.

94. 82 F.R.D. 647 (D.D.C. 1979).

95. *Id.* at 650.

96. *In re* Corrugated Container Antitrust Litigation, 1979-1 Trade Cas. at 77,879.

97. *Id.* at 77,879-80.

98. 1979-1 Trade Cas. ¶ 62,717 (E.D. Pa. 1979).

99. Subsequent to *Hedges*, another judge in the Eastern District of Pennsylvania granted a motion filed by various settling defendants to dismiss claims for contribution that had been asserted against them. In the court's view, contribution would unfairly upset existing settlements and "would also inhibit further settlements from among the remaining defendants." *In re* Fine Paper Antitrust Litigation, M.D.L. No. 323, at 3 (E.D. Pa. August 3, 1979) (unreported). Contribution against settling defendants was also denied in Alabama v. Blue Bird Body Co., No. 75-23-N (M.D. Ala. May 18, 1979) (unreported), *appeal docketed*, No. 79-2667 (5th Cir. July 26, 1979).

100. 604 F.2d 897 (5th Cir. 1979). Petitions for rehearing and rehearing *en banc* were denied on November 29, 1979. A petition for certiorari was filed January 24, 1980. Texas Indus., Inc. v. Radcliff Materials, Inc., 48 U.S.L.W. 3490 (U.S. January 24, 1980) (No. 79-1144).

revealed the names of the coconspirators and Texas Industries filed a third-party complaint against them. The district court dismissed the third-party complaint and, on appeal, the Fifth Circuit affirmed. The majority opinion made it clear that Congress' failure to legislate a right of contribution did not give rise to the presumption that it intended to deny one.[101] Rather, the court's decision was premised on its view that a rule against contribution operates as the more effective deterrent and that the arguments advanced by Texas Industries were insufficient "to discard an established rule of law . . . ."[102] Dissenting in part, one judge urged recognition of a right to contribution for unintentional violators, pointing out that deterrence is less relevant to unintentional torts.[103]

As of this writing, the most recent decision on the question is *Olson Farms, Inc. v. Safeway Stores, Inc.*,[104] in which a Tenth Circuit panel affirmed the Utah district court decision discussed above.[105] Acknowledging the "strong, offsetting arguments over the contribution issue," the court concluded that it "should await a clear signal, at least, from the legislative branch" prior to creating the procedural complications that might arise if a right to contribution were allowed. However, the court "recogniz[ed] a possible exception in the case of an unintentional violator . . . ."[106] Judge Holloway dissented, saying that "the result of imposing the entire treble damages liability on one defendant while denying him any right to seek contribution from others jointly involved in the wrong, is too extreme for me."[107]

The conflict in the cases will soon be resolved. On June 16, 1980, the Supreme Court granted certiorari in the *Corrugated* case, and will apparently decide once and for all whether contribution should be permitted in antitrust cases.[108]

THE POLICY

Arguments Against Contribution

The arguments advanced against contribution can be grouped into five

101. 604 F.2d at 900.

102. *Id.* at 903, 906.

103. *Id.* at 907 (Morgan, J., dissenting). The majority rejected this approach, primarily on the ground that the additional complexities resulting from contribution could have a "chilling effect" on plaintiffs' incentives to maintain antitrust suits. *Id.* at 905-06, *citing* Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d at 1190 (Hanson, J., dissenting).

Two additional Fifth Circuit panels have ruled against contribution, citing *Abraham Construction* as controlling. *In re* Beef Indus. Antitrust Litigation, 607 F.2d 167, 183 (5th Cir. 1979), *petition for cert. filed sub nom.* Iowa Beef Processors, Inc. v. Meat Price Investigators Ass'n, 48 U.S.L.W. 3538 (U.S. February 6, 1980) (No. 79-1214); *In re* Corrugated Container Antitrust Litigation, 606 F.2d 319 (5th Cir. 1979), *cert. granted sub nom.* Westvaco Corp. v. Adams Extract Co., 48 U.S.L.W. 3813 (U.S. June 16, 1980) (No. 79-972).

104. 1979-2 Trade Cas. ¶ 62,995 (10th Cir. 1979).

105. See text accompanying notes 86-88 *supra.*

106. 1979-2 Trade Cas. at 79,703-04.

107. *Id.* at 79,707 (Holloway, J., dissenting).

108. Westvaco Corp. v. Adams Extract Co., 48 U.S.L.W. 3813 (U.S. June 16, 1980) (No. 79-972).

broad categories: (1) that the courts should await congressional action rather than abandon the common law rule; (2) that contribution should at least be denied to intentional violators; (3) that preclusion of contribution better serves to deter antitrust violations; (4) that contribution would seriously complicate already complex antitrust litigation and might deter private treble damage suits; and (5) that contribution would discourage settlements.

Legislative Solution Preferable

Probably the least substantial of the arguments against contribution is that the courts should not abandon the common law rule but, rather, should wait for Congress to act.[109] The rule that the common law governs in the absence of legislation is based on presumed congressional intent.[110] However, it has always been the judiciary's function to fill in the interstices of federal statutory schemes. "Federal legislation, on the whole, has been conceived and drafted on an *ad hoc* basis to accomplish limited objectives."[111] Therefore, as the *Abraham Construction* court acknowledged, the lack of congressional action does not indicate any intent to deny contribution under the antitrust laws: "It is more likely that this narrow question, although a matter of some importance, never occurred to the drafters of the legislation. Our task, therefore, is to guess what Congress 'would have intended on a point not present to its mind, if the point had been present.' "[112] Particularly with respect to the antitrust laws, where the "courts have not been prone to await congressional action to resolve many of the questions left unanswered by these statutes,"[113] outdated common law rules should not be allowed to prevail over common justice.[114]

A closely related argument for retaining existing rules against contribution in the absence of legislation lies in the doctrine of *stare decisis*. Because blind adherence to precedent can produce extremely inequitable results,[115] *stare decisis* should prevail against strong competing considerations only where those

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109. This argument is presented, for example, in Brief of Respondents-Plaintiffs Opposing Certiorari, Westvaco Corp. v. Adams Extract Co., 48 U.S.L.W. 3813 (U.S. June 16, 1980) (No. 79-972).

110. *See, e.g.*, Sabre Shipping Corp. v. American President Lines, Ltd., 298 F. Supp. 1339, 1345-46 (S.D.N.Y. 1969).

111. P. HART & H. WECHSLER, *supra* note 74, at 470-71.

112. 604 F.2d at 900-01, *quoting* B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 15 (1949); *accord*, Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d at 1183-84.

113. Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d at 1183. *See* Appalachian Coals, Inc. v. United States, 288 U.S. 344, 360 (1933) (antitrust laws have a "generality and adaptability comparable to that found to be desirable in constitutional provisions").

114. Corbett, *supra* note 5, at 130; *see* Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 346 (1971). In *Zenith*, the Court abandoned the common law rule that a release extinguishes a cause of action even as against nonparties to the release and held that, in antitrust cases, the intent of the parties to the release should govern. *See also* Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 138 (1968) (common law *in pari delicto* defense held inapplicable in federal antitrust cases).

115. *Compare* Flood v. Kuhn, 407 U.S. 258 (1972) *with* Radovitch v. National Football League, 352 U.S. 445 (1957).

who would be affected by a different rule have relied on the existing rule to their detriment.[116] In the absence of detrimental reliance, courts should not hesitate to correct obsolete rules.[117] The only parties that may have acted in reliance on existing prohibitions of contribution are plaintiffs and defendants that have negotiated settlements in pending cases. There should be no contribution against settling defendants in any event.[118] With respect to plaintiffs, most settlement agreements in pending cases are likely to have considered the possibility that the courts would allow contribution.[119] For the rare plaintiff that would be unfairly prejudiced by retroactive application of a decision permitting contribution, such a rule might be applied only prospectively.[120] As to future cases, however, there can be no prospective detrimental reliance and *stare decisis* considerations should be disregarded altogether.

Congressional action, although probably desirable, should not be awaited. The legislation currently pending in Congress leaves to the courts the development of appropriate rules concerning contribution in all cases not involving price-fixing.[121] Further, experience with the statutory scheme in admiralty demonstrates that a statutory solution alone can never resolve all the issues involved, but rather frequently creates as many questions as it answers.[122] The most persuasive fact is that the unfairness caused by the existing no-contribution rule persists now. Legislative change takes time and sometimes never comes. The courts should not stand idly by while an injustice of their own creation continues to wreak further havoc.

Intentional Tortfeasors

It has been suggested that if the rule foreclosing contribution is to be abandoned, it only be for unintentional torts, *i.e.*, that the courts retreat to the original common law rule prohibiting intentional tortfeasors from obtaining contribution.[123] While this view has some appeal, it has serious drawbacks.

Intent is not an essential element of an antitrust violation. Rather, "in a civil action under the Sherman Act, liability may be established by proof of *either* an unlawful purpose or an anticompetitive effect."[124] If proof or disproof of an unlawful intent were required in antitrust cases, an unwarranted additional complexity would be introduced.[125] Corporate intent is frequently very

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116. *See* Flood v. Kuhn, 407 U.S. 258, 286 (1972) (Burger, C.J., concurring).

117. *See, e.g.*, Blonder-Tongue Labs., Inc. v. University of Ill. Foundation, 402 U.S. 313 (1971); Boys Markets, Inc. v. Retail Clerks Union, 398 U.S. 235, 241 (1970).

118. See text accompanying notes 148-167 *infra*.

119. *See In re* Corrugated Container Antitrust Litigation, 1980-1 Trade Cas. ¶ 63,163, at 77,790 (S.D. Tex. 1979).

120. *See, e.g.*, Chevron Oil Co. v. Huson, 404 U.S. 97 (1971).

121. S. REP. No. 428, *supra* note 17, at 12.

122. *See generally* Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256 (1979).

123. *See, e.g.*, Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d at 906-07 (dissenting opinion); S. REP. No. 428, *supra* note 17, at 35-36 (supplemental views).

124. McLain v. Real Estate Bd., 100 S. Ct. 502, 509 (1980) (emphasis in original).

125. *E.g.*, El Camino Glass v. Sunglo Glass Co., 1977-1 Trade Cas. at 72,112.

difficult to establish,[126] and the formulation of rules to decide what kind of intent bars contribution and what kind does not would be equally difficult.

More fundamentally, no distinction based on intent is relevant to the basic reason why contribution should be permitted, *i.e.*, fairness. Olson Farms, for example, may have had a thoroughly evil intent when it agreed with Safeway and its other coconspirators to reduce the price of the eggs they bought. But is it fair to compel Olson Farms to pay three times the damage caused by the entire conspiracy when it was responsible for only eleven percent? Clearly not. Neither Olson Farms' intent nor Safeway's is relevant to the question of fairness. With increasing frequency, the courts that have abandoned the common law rule against contribution in non-antitrust cases have done so even for intentional torts.[127] The reasons advanced for reversing that trend in antitrust cases are not persuasive.[128]

Deterrence

One of the primary arguments against contribution is that it would detract from the deterrent purpose of the treble damage remedy — that the threat of being forced to pay three times the damages caused by the entire conspiracy is the most effective deterrent to those contemplating business behavior of dubious antitrust legality.[129] As the Eighth Circuit noted in *Professional Beauty*, however, "the question of deterrence actually cuts both ways . . . ."[130] It has been pointed out that:

> The absence of contribution can operate to the advantage of equally guilty conspirators by permitting them to go "scot-free." What the punitive burden loses in terms of the risk of its concentration on a few larger coconspirators, it would certainly gain through diffusion over a larger number of violators. Not only would the existence of rights of contribution remove to a great extent the possibility of escaping liability entirely, . . . [it would also] add vigor to the enforcement of the antitrust laws by allowing the conspirators themselves to ensure that all those participating in the unlawful action are appropriately penalized.[131]

Similar considerations were expressed by the Supreme Court in *Perma Life Mufflers Inc. v. International Parts Corp.*,[132] which substantially curtailed the application of the *in pari delicto* defense in antitrust cases. The Court noted that a plaintiff that has participated in a conspiracy "may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition."[133] Courts in admiralty[134]

126. *See, e.g.*, Corbett, *supra* note 5, at 132-34.

127. See text accompanying notes 63-70 *supra*.

128. *See Section Proposal, supra* note 10, at E-2.

129. *E.g.*, Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d at 901.

130. 594 F.2d at 1185.

131. Corbett, *supra* note 5, at 137; *see* Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d at 1185 (the "possibility of escaping all liability might cause many to be more willing . . . to engage in wrongful activity").

132. 392 U.S. 134 (1968).

133. *Id.* at 139.

134. See text accompanying note 50 *supra*.

and securities[135] cases have also expressed the view that the cause of deterrence is better served by assuring that all guilty parties will be made to account.

Even if to some extent the policy of deterrence is better served by denying contribution, the potential for over-deterrence should also be recognized. Even with contribution, treble damage exposure in class action litigation is a substantial deterrent.[136] And the best deterrent of all, the very real threat of jail terms for price-fixers and other defendants as a result of stepped-up Justice Department criminal enforcement efforts,[137] is in no way affected by contribution. On the other hand, as the Supreme Court pointed out in *United States v. United States Gypsum Co.*,[138] "the behavior proscribed by the [Sherman] Act is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct."[139] The Court noted that the antitrust laws are statutes of strict liability and said that "where the conduct proscribed is difficult to distinguish from conduct permitted and indeed encouraged, . . . the excessive caution spawned by a regime of strict liability will not necessarily redound to the public's benefit."[140] Thus, the rule against contribution can in some cases over-penalize arguably pro-competitive conduct. The potential for over-deterrence would seem to be especially acute in maximum price-fixing cases and in buyer-conspiracy price-fixing cases, such as *Olson Farms*, where the effect of the violation may well be to lower prices to consumers.

Although deterrence is a primary concern underlying the treble damage remedy, it is difficult and perhaps impossible to ascertain whether deterrence militates in favor or against contribution. For that reason, the deterrence factor should not be dispositive either way.

Complexity

An often-expressed fear is that contribution would further complicate antitrust litigation, making it more difficult for the courts to manage and discouraging plaintiffs from maintaining suits. As then-Assistant Attorney General John Shenefield put it:

> Contribution may present a real risk of increasing the complexity of private antitrust litigation. Defendants joined as parties to antitrust litigation by other defendants for the purpose of determining contribution rights may also contest the plaintiff's right to relief; this situation could expand discovery, distort the plaintiff's case, and possibly overwhelm the plaintiff by expanding the scope of the litigation.[141]

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135. See text accompanying note 70 *supra*.

136. S. REP. No. 428, *supra* note 17, at 18.

137. *See* Address by Sanford M. Litvack, New York State Bar Association, Antitrust Section, Annual Meeting (January 23, 1980).

138. 438 U.S. 422 (1978).

139. *Id.* at 440-41.

140. *Id.* at 441-42 n.17.

141. Letter from John H. Shenefield to Howard M. Metzenbaum 2 (May 14, 1979); *accord, e.g., In re* Corrugated Container Antitrust Litigation, 1979-1 Trade Cas. at 77,879-80; Sabre

These concerns are greatly exaggerated.

In the typical complex price-fixing class action, plaintiffs almost invariably join all conceivable parties, so there will be no additional parties for the defendants to bring in. In *Corrugated,* for example, the government indicted fourteen corporations; the class action plaintiffs sued thirty-seven.[142] Thus, "[s]ince it is common practice for an antitrust plaintiff to join as many defendants as may reasonably be expected to be liable, with a view to ensuring full recovery, it is difficult to see how this burden would be increased by permitting contribution."[143] Additionally, efforts by defendants to complicate litigation by impleading other alleged coconspirators can aid plaintiffs by allowing damages to be recovered that would otherwise have avoided detection. Even those industry participants who somehow avoid being named as defendants will usually be subjected to discovery. Thus contribution would not expand discovery. More fundamentally, the prospect of treble damages plus attorneys' fees and costs provides a tremendous incentive to sue, and the number of treble damage actions filed each year is enormous.[144] The likelihood that contribution will deter the filing of treble damage actions is so small that it can be disregarded altogether.

In the rare case where contribution has the potential to complicate the action so as to jeopardize the plaintiff's chances for recovering, the Federal Rules of Civil Procedure give the courts ample powers to prevent such a result. Courts can require separate actions for contribution by denying permission to implead,[145] and they can require severance and separate trials with respect to the contribution claims.[146] Securities fraud cases, in which contribution is permitted, are frequently as complex as antitrust cases, yet the courts have been able to deal satisfactorily with the problems there,[147] indicating that concerns about further complicating antitrust litigation are insufficient to justify the unfairness that exists when contribution is denied.

Discouraging Settlement

Opponents of contribution have charged that if contribution were allowed, incentives to settle would be substantially reduced. They argue that allowing contribution against defendants who have settled "would operate to prevent [the plaintiff from] receiving prompt recovery since no defendant would settle with him if he was [sic] to find himself back in the suit as a third party de-

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Shipping Corp. v. American President Lines, Ltd., 298 F. Supp. 1339, 1346 (S.D.N.Y. 1969); *see also* Illinois Brick Co. v. Illinois, 431 U.S. 720, 737-44 (1977).

142. See text accompanying note 34 *supra.*

143. Corbett, *supra* note 5, at 111, *quoted in* S. REP. No. 428, *supra* note 17, at 20.

144. See note 15 *supra.*

145. Fed. R. Civ. P. 14(b); Connell v. Bernstein-Macauley, Inc., 67 F.R.D. 111 (S.D.N.Y. 1975).

146. Fed. R. Civ. P. 42(b). *See* Olson Farms, Inc. v. Safeway Stores, Inc., 1979-2 Trade Cas. at 79,706 (Holloway, J. dissenting); Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d at 1184; S. REP. No. 428, *supra* note 17, at 20; *Section Proposal, supra* note 10, at E-2.

147. *See generally* Fischer, *supra* note 70.

fendant."[148] All the leading advocates of contribution in antitrust cases have recognized the validity of this objection, and have agreed that contribution should not be permitted against defendants who have settled in good faith. Settlements are too important in private antitrust litigation to allow a rule that would seriously deter them.[149]

The proponents and opponents of antitrust contribution differ most on whether contribution should be accompanied by mandatory claim reduction, as provided in both the proposed Antitrust Equal Enforcement Act reported by the Senate Judiciary Committee[150] and the legislation proposed by the Section of Antitrust Law of the American Bar Association.[151] Although there are many different methods of mandatory claim reduction, the basic concept is a simple one – that when a plaintiff settles with one defendant, the plaintiff's claim against the remaining defendants is reduced prior to trebling by the amount of damages attributable to the settling defendant. Under existing law, the remaining defendants are still liable for the damages attributable to the settling defendant, with a defense of payment only to the extent of the amount obtained in settlement – after trebling.[152] In the view of contribution advocates, mandatory claim reduction is an essential aspect of any contribution proposal.

> This provision is . . . essential to make a contribution statute work fairly. The provision addresses the problem of innocent defendants facing increasingly larger liability claims as the more culpable defendants settle. While we do not think it is sound policy to permit parties who go to trial to claim contribution from settling parties, some mechanism is needed to protect the remaining defendants from facing liability for a plaintiff's claims against those with whom he has settled which exceed the amount of the settlement.[153]

The opposition to mandatory claim reduction is based primarily on a belief that plaintiffs would not be willing to settle with one defendant for an amount that would reduce the total amount of their recovery, and, thus, that settlements would be deterred.[154] It is also argued that mandatory claim reduction

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148. Sabre Shipping Corp. v. American President Lines, Ltd., 298 F. Supp. at 1346; *accord, e.g., In re* Fine Paper Antitrust Litigation, M.D.L. No. 323, at 3 (E.D. Pa. August 3, 1979); Letter from John H. Shenefield, *supra* note 141, at 2.

149. *See* Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d at 1184, and authorities there cited; S. REP. No. 428, *supra* note 17, at 24; *Section Proposal, supra* note 10, at E-3; *cf.* Sellers, *supra* note 8. *See also* Luke v. Signal Oil & Gas Co., 523 F.2d 1190 (5th Cir. 1975); Fischer, *supra* note 70, at 1831-36; Gregory, *Contribution Among Joint Tortfeasors: A Defense*, 54 HARV. L. REV. 1170, 1172-73 (1941).

150. S. 1468, 96th Cong., 1st Sess. (1979). The bill was passed by a voice vote on July 31, 1979, 925 ANTITRUST & TRADE REG. REP. (BNA) A-4 (August 2, 1979), and was reported November 27, 1979. S. REP. No. 428, *supra* note 17. No action has been scheduled in the House of Representatives as of this writing.

151. *Section Proposal, supra* note 10.

152. *See* S. REP. No. 428, *supra* note 17, at 21; notes 28-29 and accompanying text, *supra*.

153. *Section Proposal, supra* note 10, at E-4.

154. *Hearings, supra* note 14, at 110; Brief of Respondents-Plaintiffs Opposing Certiorari at 6 n.3, Westvaco Corp. v. Adams Extract Co., 48 U.S.L.W. 3813 (U.S. June 16, 1980) (No. 79-972); *see* S. REP. No. 428, *supra* note 17, at 36-40 (supplemental views).

would effect a de facto elimination of joint and several liability.[155] Neither objection withstands analysis.

The argument that mandatory claim reduction will deter settlements is belied by experience. In some antitrust cases, the defendants have entered into "sharing agreements." These agreements typically obligate the defendants to include in any settlement a provision reducing the plaintiff's recoverable damages by an amount equal to the settling defendant's contributive share. Plaintiffs and defendants have successfully negotiated such carve-out settlements in major antitrust cases.[156] It is true that under mandatory claim reduction, a settlement will reduce the plaintiff's ultimate recovery by the difference between the settling defendant's contributive share and the amount of the settlement. Yet the purpose of every settlement is to compromise the plaintiff's otherwise uncertain claim in return for a reduced, but certain, payment. A settlement is simply a sale of part of the plaintiff's damage claim.[157]

Mandatory claim reduction and similar provisions have worked successfully in non-antitrust cases for many years. Some jurisdictions have adopted this solution by statute,[158] others have done so by judicial decision,[159] and the courts have not had any difficulty with it.[160] The carve-out solution has not deterred fair settlements,[161] or eliminated joint and several liability.[162] Rather, claim reduction is "consistent with the long-standing policy considerations underlying any system of contribution: the encouragement of voluntary settlements, the equitable distribution of liability among joint tortfeasors, and the elimination or minimization of collusion."[163]

Without mandatory claim reduction, there is no incentive for plaintiffs to obtain a fair amount in settlement from those defendants that choose to settle

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155. *E.g.*, S. REP. No. 428, *supra* note 17, at 36 (supplemental views); Izard & Miller, *supra* note 8, at 22-23.

156. *See, e.g.*, Little Rock School Dist. v. Borden, Inc., 1980-1 Trade Cas. ¶ 63,059 (E.D. Ark. 1979); *In re* Cement & Concrete Antitrust Litigation, M.D.L. No. 296 (D. Ariz. July 31, 1979), *discussed in* 927 ANTITRUST & TRADE REG. REP. (BNA) A-1 (August 16, 1979); S. REP. No. 428, *supra* note 17, 25; *Hearings, supra* note 14, at 121 (statement of Don T. Hibner, Jr.).

157. *See* Martello v. Hawley, 300 F.2d 721, 724 (D.C. Cir. 1962).

158. *E.g.*, N.Y. GEN. OBL. L. § 15-108(a) (McKinney 1978); *see* UNIFORM COMPARATIVE FAULT ACT § 6 (1977).

159. *E.g.*, Brightheart v. McKay, 420 F.2d 242 (D.C. Cir. 1969); Gomes v. Brodhurst, 394 F.2d 465, 468 (3d Cir. 1967); Martello v. Hawley, 300 F.2d 721 (D.C. Cir. 1962); Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 110 A.2d 24 (1954) (Brennan, J.).

160. *See, e.g.*, Leger v. Drilling Well Control, Inc., 592 F.2d 1246 (5th Cir. 1979); Kassman v. American Univ., 546 F.2d 1029, 1033 n.24 (D.C. Cir. 1976); Doyle v. United States, 441 F. Supp. 701, 710-13 & n.5 (D.S.C. 1977).

161. *See* United States v. Reliable Transfer Co., 421 U.S. 397, 408 n.13 (1975) (discussing comparative negligence experience).

162. The main purpose of joint and several liability is to assure that the plaintiff is able to recover his judgment. *E.g.*, Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 275 n.2 (1979) (Blackmun, J., dissenting). Yet the plaintiff recovers his entire judgment whether or not contribution is permitted. If a defendant, by reason of insolvency or unavailability, is unable to pay his contributive share, the loss is borne by the codefendants, who must make up the difference. *See, e.g.*, Moody v. Bass, 357 F.2d 730 (6th Cir. 1966); Judson v. Peoples Bank & Trust Co., 25 N.J. 17, 134 A.2d 761 (1957).

163. Gomes v. Brodhurst, 394 F.2d 465, 467 (3d Cir. 1967).

early; plaintiffs can still collect treble their total damages from the defendants that remain. As more and more defendants settle, those who remain face increasingly greater liability and are forced to abandon their defense, however meritorious it may be.[164] Yet in the meantime, the plaintiffs have given up nothing. Contribution with mandatory claim reduction will only deter inadequate settlements made early in a case. Such settlements often involve the more culpable defendants, and escalate the potential liability for the defendants that prefer to remain innocent until proven guilty.[165] Fair settlements will not be affected.

The ultimate answer to the argument that contribution will deter settlements was given by a unanimous Supreme Court in *United States v. Reliable Transfer Co.*:[166]

> But even if this argument were more persuasive than it is, it could hardly be accepted. For, at bottom, it asks us to continue the operation of an archaic rule because its facile application out of court yields quick, though inequitable, settlements, and relieves the courts of some litigation. Congestion in the courts cannot justify a legal rule that produces unjust results in litigation simply to encourage speedy out-of-court accommodations.[167]

Reasons Contribution Should Be Allowed

The basic reason for recognizing a right of contribution in antitrust cases is a simple one. The lack of contribution is quintessentially unfair. It is unfair to allow plaintiffs to single out one defendant to satisfy the liability of many. It is unfair to compel a single defendant to pay treble damages for an entire industry's liability. And it is unfair to force a defendant to abandon its defense and settle simply because of the coercive impact of earlier settlements with more culpable parties. In its petition for certiorari in the *Corrugated* case, Westvaco Corporation correctly argued that "coercion, intimidation and blackmail should never be countenanced. The right to trial may be rendered meaningless by a system which forces defendants to settle cases at exorbitant levels without regard to the merits."[168]

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164. As one witness testified in the hearings on S. 1468, his company's potential liability was so large in relation to its net worth that its "borrowing power was voided . . . ." *Senate Hearings, supra* note 14, at 43-45 (statement of George Kress).

165. *See, e.g., Senate Hearings, supra* note 14, at 78 (statement of Donald G. Kempf).

According to some witnesses, discounted settlements can aid small defendants, for example, those with large market shares in industries where much larger and financially able defendants also compete. It is argued that such discounted settlements would not occur with mandatory claim reduction based, for example, on market share. *See, e.g., id.* at 52-53 (testimony of David Shapiro). Yet, as the committee report on S. 1468 put it: "[T]his situation would seem to arise very infrequently . . . and it was never made clear in any event why the damage recovery should not relate to the damages caused by, rather than the size of, the defendant." S. REP. No. 428, *supra* note 17, at 19.

166. 421 U.S. 397 (1975).

167. *Id.* at 408.

168. Petitioner's Brief for Certiorari at 13, Westvaco Corp. v. Adams Extract Co., 48 U.S.L.W. 3813 (U.S. June 16, 1980) (No. 79-972). The risk of liability for an innocent de-

The treble damage action is not an end in itself, but should be construed to give effect to its central purpose of furthering the policies of the antitrust laws. The denial of contribution does damage to antitrust enforcement. When a law is administered inequitably, respect for the law itself can be lost. And compliance with a disrespected law can be difficult to achieve. Moreover, the denial of contribution conflicts with the policy of punishing wrongdoers, a central purpose of the treble damage action. In both *Abraham Construction* and *Olson Farms*, the rulings denying contribution allow equally guilty coconspirators to escape all damage liability for their conduct. Yet, as the Supreme Court recently held in *Pfizer, Inc. v. India*,[169] the treble damage statute should be construed to assure that violators cannot avoid punishment for their illegal actions.[170]

The rule against contribution should be abandoned for, as the *Professional Beauty* court put it: "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."[171]

THE PROCEDURE

A fair and efficient contribution system requires workable procedural rules. Four of the most important questions are: (a) the manner in which claims for contribution should be asserted; (b) the statute of limitations applicable to contribution claims; (c) the persons against whom contribution can be sought; and (d) the appropriate measure of contribution.

Manner in Which to Assert Claims

Contribution advocates generally agree that claims for contribution should be allowed as counterclaims, third-party claims, cross-claims or in separate actions.[172] Ideally, all claims for contribution should be resolved together with the question of liability in the main action. However, it is important to allow the courts flexibility so that they can prevent defendants from unduly complicating a plaintiff's case with claims for contribution. Therefore, in proper cases, courts should be able to require severance of contribution claims.[173]

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fendant is heightened by the complexity of antitrust cases and the concomitant confusion that can affect a jury's verdict. *See, e.g.*, ILC Peripherals Leasing Corp. v. International Bus. Mach. Corp., 458 F. Supp. 423 (N.D. Cal. 1978); Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59 (S.D.N.Y. 1978). This risk may be further heightened by the rule that, once the existence of a conspiracy is proved; only "slight evidence" is needed to connect additional participants. *See, e.g.*, United States v. Consolidated Packaging Corp., 575 F.2d 117, 126 (7th Cir. 1978).

169. 434 U.S. 308 (1978).

170. *Id.* at 314. Additionally, the rule against contribution can serve to increase economic concentration. In some cases, plaintiffs have elected to recover from relatively small defendants, forcing those companies to leave the field and allowing their larger rivals to dominate. *See Senate Hearings, supra* note 14, at 121 (statement of Don T. Hibner, Jr.).

171. 594 F.2d at 1185-86 (borrowing heavily from W. PROSSER, *supra* note 39, at 307).

172. *See* S. 1468, 96th Cong., 1st Sess. (1979); *Section Proposal, supra* note 10, at E-3; UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 3(a) (1955).

173. See text accompanying notes 143-146 *supra*.

Separate actions for contribution should also be permitted, for example, in cases where the person against whom contribution is sought is not within the jurisdiction of the court in which the main action is being litigated.[174]

Applicable Statute of Limitations

The general rule in jurisdictions allowing contribution is that the cause of action for contribution does not accrue at the time of the underlying tort; rather, the statute of limitations begins to run when the party claiming contribution has in fact paid more than his contributive share.[175] The ABA Section of Antitrust Law, however, has proposed that, in general, a claim for contribution must be filed within one year after filing the underlying complaint.[176] The Antitrust Section's proposal is based on a belief:

> that it is desirable to require claims for contribution to be filed as soon as possible after they are apparent . . . . Permitting a defendant routinely to file a contribution claim at any time during the pendency of the plaintiff's action or thereafter could prejudice any new party from whom contribution is sought, particularly after the basis for liability and the formula for damages have been established.[177]

This concern is real, but it nevertheless seems insufficient to justify such an untested and extreme departure from the procedure that has worked well in the many jurisdictions where contribution has existed for some time. In the great majority of cases, third parties would be brought in at an early time, certainly before liability is established; otherwise, the original defendant would incur the expense of proving anew the third-party's complicity and run the risk of a failure of proof.

The practical effect of the Antitrust Section's proposal would be to make contribution an issue in every Sherman Act case, except for the few based solely on unilateral conduct. The contribution claims would have to be filed or be forever lost. This seems unnecessary; where the question of contribution can be avoided, it should be.[178]

The problem of having to extend the time within which the new parties

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174. *Section Proposal, supra* note 10, at E-3.

175. *E.g.*, Globig v. Greene & Gust Co., 184 F. Supp. 530 (E.D. Wis. 1960); Markey v. Skog, 129 N.J. Super. 192, 322 A.2d 513 (1974); Bay Ridge Air Rights, Inc. v. State, 44 N.Y.2d 49, 375 N.E.2d 29, 404 N.Y.S.2d 73 (1978).

176. *Section Proposal, supra* note 10, at E-3. The proposed statute reads: "Claims for contribution will be barred unless they are filed (i) within one year of the date of service of the original complaint giving rise to potential liability, or (ii) within sixty (60) days after the claimant for contribution receives reasonable notice of his liability or potential liability based in whole or in part upon damages caused by the wrongful acts or omission of another, whichever date occurs later. Notwithstanding the foregoing, claims for contribution shall be barred unless they are filed within sixty (60) days after the entry of final judgment by the district court awarding damages against a prospective claimant for contribution." *Id.*

177. *Id.*

178. The Antitrust Section itself pointed out that the defendants should be allowed sufficient time to try to negotiate a sharing agreement before being required to file contribution claims. *Id.*

may be sued is unavoidable.[179] An appropriate legislative solution seems to be the one adopted in section 3(c) of the Uniform Contribution Among Tortfeasors Act,[180] which requires the contribution action to be brought within one year of the final judgment in the original action. If the courts adopt a contribution rule in the absence of congressional legislation, it seems clear that state statutes of limitation will be applicable.[181] In those states which have adopted the Uniform Contribution Among Tortfeasors Act, the applicable limitations period would be as stated above. Most of the other states that allow contribution use the statute of limitations applicable to implied contracts, under which the cause of action similarly accrues at the time the party claiming contribution has paid more than his contributive share.[182] This seems to be the appropriate statute to apply in those states where contribution is not allowed.

Persons From Whom Contribution May Be Sought

The Antitrust Section has proposed that "[c]ontribution rights may be claimed only against those persons for whose wrongful acts or omissions plaintiff seeks to recover damages from one or more defendants."[183] Under this proposal, contribution could be claimed against non-defendants only if the plaintiff relies on their conduct as part of his damage theory.[184] This proposal seems sound because defendants should not be allowed to unduly complicate a plaintiff's case by bringing in parties whose conduct is not relevant to the plaintiff's theory. Yet, the Antitrust Section's proposal seems to imply that contribution may not be claimed against a non-defendant non-conspirator whose sales are included in the plaintiff's damage case under an "umbrella" theory.[185] However, by including their sales in the damage theory, the plaintiff has put the non-conspirators' conduct in issue. Defendants should be allowed the opportunity to prove that such "non-conspirators" in fact participated in the conspiracy and that, therefore, the "non-conspirators" should bear their part of the damage burden. Absent such a provision, the door to collusion between the plaintiff and the "non-conspirators" would be wide open. The plaintiff and the "non-conspirator" could settle for an unfairly low amount and the "non-conspirator" could escape all liability by being designated a "non-conspirator" by the plaintiff. Naturally, if the non-conspirators' guilt could

179. *See* Commissioner's Comment, UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 3(c) (1955).

180. *Id.*

181. *See* Note, *supra* note 74, at 1399-1400; text accompanying note 76 *supra.*

182. *See* Blum v. Good Humor Corp., 57 App. Div. 2d 911, 394 N.Y.S.2d 894 (2d Dep't 1977); State Farm Mut. Auto. Ins. Co. v. Schara, 56 Wis. 2d 262, 201 N.W.2d 758 (1972).

183. *Section Proposal, supra* note 10, at E-3.

184. "Thus, in a horizontal price fixing case, where the plaintiff offers a damage schedule based upon purchases from a nondefendant co-conspirator, contribution could be claimed from that nondefendant. Similarly, where plaintiff claims injury from an unlawful vertical arrangement between a defendant and a nondefendant, contribution against the nondefendant could be sought by the defendant." *Id.*

185. See note 18 and accompanying text, *supra.* The problem does not arise if the umbrella theory is rejected, as it was as a matter of law by the Third Circuit in Mid-West Paper Prods. Co. v. Continental Group, Inc. 596 F.2d 573, 580-87 (3d Cir. 1979).

not be established at trial, they would be liable neither for contribution nor to the plaintiff; only actual conspirators would be liable for the damages.

There is general agreement that contribution should not be allowed against settling defendants and that there should be mandatory claim reduction to discourage unfair settlements.[186] However, there is an apparent difference between the Antitrust Section and Senate Judiciary Committee proposals as to whether contribution should be allowed against defendants that do not settle in good faith.[187] With mandatory claim reduction, the incentive for plaintiffs to enter into unfair settlements should be removed and it seems unlikely that parties would enter into bad faith settlements. Additionally, it might be inappropriate to invite litigation on the question by explicitly legislating an exception to the sound policy of encouraging "a party to settle a case once and for all."[188] Nevertheless, there should be an implicit exception for bad faith settlements. For the very rare case in which mandatory claim reduction fails in its objective of ending unfair settlements, or in which sharing agreements are not entered into,[189] the courts should not be foreclosed from taking appropriate action. A bad faith settlement should be regarded as a fraud on the court and should be subject to the same rules as other judgments procured by fraud.[190] However, the courts should be skeptical of claims of bad faith and should further the important policy of encouraging settlements by disposing of unfounded claims summarily.

Appropriate Measure of Contribution

The widest area of disagreement among contribution advocates concerns the determination of contributive shares. The ABA Antitrust Section has opted for equitable shares based on the parties' relative responsibility for the damages;[191] the *Professional Beauty* court chose pro rata shares;[192] and the proposed Antitrust Equal Enforcement Act, which would apply only in horizontal price-fixing cases, would base the contributive shares primarily on the defendants' purchases or sales.[193] A preferable method is: (a) in cases where the defendants

186. See text accompanying notes 150-167 *supra*. Similarly, settling defendants should not be allowed to seek contribution. *See Section Propsal, supra* note 10, at E-3 to E-4.

187. *Compare* S. REP. No. 428, *supra* note 17, at 24 (bad faith exception) *with Section Proposal, supra* note 10, at E-3 to E-4 (no bad faith exception).

188. *Section Proposal, supra* note 10, at E-3. The Antitrust Section proposes a requirement that settling defendants, to avail themselves of the protection against claims for contribution, notify all parties of the settlement agreement within 60 days of its execution. *Id.* This seems to be a sound requirement that would lead to more informed planning for parties on both sides.

189. The provisions of both S. 1468 and the Section Proposal would be superseded by any sharing agreements the parties choose to enter. This seems clearly appropriate.

190. *See, e.g.*, Hazel-Atlas Glass Co. v. Hartford-Empire Co., 332 U.S. 238 (1944); RESTATEMENT (SECOND) OF JUDGMENTS § 118 (Tent. Draft No. 6, 1979).

191. *Section Proposal, supra* note 10, at E-3, E-4.

192. 594 F.2d at 1182 & n.4.

193. S. REP. No. 428, *supra* note 17, at 21-24. The text of the proposed provision is as follows: "A release or a covenant not to sue or not to enforce a judgment received in settlement by one or two or more persons subject to contribution under this section shall not

stand in a horizontal relationship and the plaintiff's damages are based on purchases from or sales to any of the defendants, contributive shares should be measured on the basis of the defendants' purchases or sales; (b) in all other cases, it should be presumed that a pro rata measure will apply; however, this presumption may be rebutted by a showing of extreme unfairness, in which case contribution should be determined on the basis of relative responsibility. This suggestion has the advantages of each of the three other proposals, while avoiding their more serious drawbacks. The proposed pro rata/sales-based rule would eliminate the specter of undue complexity without sacrificing the flexibility necessary to avoid inequitable results. Its application would thus be both predictable and fair.

The Antitrust Section proposal of equitable shares based on relative responsibility for damages is similar to the relative fault standard adopted by some jurisdictions for negligence cases.[194] The Section's explanation for its proposal is that:

> [i]n many antitrust cases . . . , and particularly those involving intentional price fixing, relative fault may be difficult to assess. The standard proposed by the Section is more flexible and looks to impact as well as culpability. Thus, it will permit the court to adopt a measure of contribution appropriate to each type of case. In price fixing cases, for example, where a plaintiff's damages are calculated on the basis of sales, "relative responsibility" would normally be measured by a given defendant's impact upon the plaintiff, i.e., by his sales in dollars or in units, taking into account the amount of overcharge, but also taking into account the extensiveness of the violation, its duration, the transactions affected, etc. In other cases, where relative sales to the plaintiff would not be appropriate or even relevant, the standard we propose would permit the use of relative culpability or fault, if appropriate, as the measure adopted by the court. The Section considered and rejected, at least as a firm rule for all cases, the "per capita" rule used in the *Professional Beauty Supply* case on its particular facts. Although such a rule is simple of application, it does not provide the flexibility needed to achieve the fairness which we believe is required of a contribution rule in antitrust cases.[195]

The Section's proposal has many benefits and in actual application it might not differ too substantially from the pro rata/sales-based rule proposed here. Nevertheless, it should be rejected. The proposal's central drawback lies in the very same flexibility that commends it. Predictability of result is crucial if

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discharge any other persons from liability unless its terms expressly so provide. The court shall reduce the claim of the person giving the release or covenant against other persons subject to liability by the greatest of: (1) any amount stipulated by the release or covenant, (2) the amount of consideration paid for it, or (3) treble the actual damages attributable to the settling person's sales or purchases of goods or services. Under item (3) above, actual damages shall not be trebled in proceedings under section 4A of this Act." *Id.*

194. *E.g.*, Kohr v. Allegheny Airlines, Inc. 504 F.2d 400, 405 (7th Cir. 1974); Gomes v. Brodhurst, 394 F.2d 465, 469-70 (3d. Cir. 1967); N.Y.C.P.L.R. § 1402 (McKinney 1976). The Supreme Court has recently adopted this measure in admiralty cases, overruling a long line of cases. United States v. Reliable Transfer Co., 421 U.S. 397, 405-11 (1975).

195. *Section Proposal, supra* note 10, at E-4.

contribution is to work, and it cannot adequately be achieved under the Section's proposal. Settlements would be far more difficult to reach if the plaintiff could not predict what he would be surrendering in return for the payment he would be receiving from the settling defendant. The Section's open-ended standard would only be justified if fairness could not be achieved by more predictable means, but such means are available.

The pro rata or per capita standard proposed in *Professional Beauty* has worked successfully in complex securities litigation,[196] and has been adopted in the Uniform Contribution Among Tortfeasors Act.[197] This rule's central advantages are predictability of result and ease of administrative application. Yet it is not as inflexible as it seems, and criticism on that basis is not altogether justified.

As the pro rata rule is applied in many jurisdictions, and as it should be applied here, "if equity requires, the collective liability of some as a group shall constitute a single share . . . [and] principles of equity applicable to contribution generally shall apply."[198] Under this kind of provision, for example, the liability of a corporation and its officers would be treated as a single unit. And, in a situation where one manufacturer conspired with two dealers to boycott another manufacturer, it might be provided that half of the liability be borne by the manufacturer and one-quarter each by the two dealers. The pro rata rule would seem to be especially appropriate in vertical conspiracy cases, as well as other cases where it would be extremely difficult to determine relative responsibility.[199]

Despite its benefits, in some cases the pro rata rule would work extremely inequitable results. For that reason, if a defendant can demonstrate that the pro rata measure would result in extreme unfairness, the courts should be empowered to allocate contributive shares on the basis of relative responsibility.[200] The burden of proof on such a defendant, however, should be a heavy one so as to discourage litigation and promote one of the central purposes of the pro rata rule, *i.e.*, predictability of result. Furthermore, the pro rata rule should not be applicable in horizontal conspiracy cases in which a sales-based formula could apply. In those cases, an equitable and predictable rule is available without recourse to the cruder pro rata system.

The sales-based formula of S. 1468, the proposed Antitrust Equal Enforcement Act,[201] is ideal for application in price-fixing and other cases where the

196. *See* Fischer, *supra* note 70, at 1836-40.

197. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 2 (1955). *See also* W. PROSSER, *supra* note 39, at 310.

198. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 2 (1955). *See also* Wassel v. Eglowsky, 399 F. Supp. 1330, 1370 (D. Md. 1975), *aff'd per curiam*, 542 F.2d 1235 (4th Cir. 1976); Larsen v. Minneapolis Gas Co., 282 Minn. 135, 163 N.W.2d 755 (1968); W. PROSSER, *supra* note 39, at 310; Fischer, *supra* note 70, at 1836-40. *See generally* Corbett, *supra* note 5, at 138-39.

199. *Cf.* S. REP. No. 428, *supra* note 17, at 30 & n.2 (separate views).

200. *See* McLean v. Alexander, 449 F. Supp. 1251, 1272 (D. Del. 1978), *rev'd on other grounds*, 599 F.2d 1190 (3d. Cir. 1979). For example, the pro rata rule might be inapplicable in a vertical group boycott case where a marginal conspirator participated only in response to threats of termination.

201. S. 1468, 96th Cong., 1st Sess. (1979).

defendants' relationship is horizontal and the plaintiff is a purchaser or seller.[202] Under S. 1468, the amount of the mandatory claim reduction carve-out is the larger of the amount provided for in the setlement agreement (or the amount actually paid) or "treble the actual damages attributable to the settling person's sales or purchases of goods or services."[203] In most cases, S. 1468 would reduce a plaintiff's damage claim after settlement by the percentage amount of the settling defendant's market share. For example, assume that a group of plaintiffs sued three defendants for $1,000,000 in trebled damages and settled with one defendant for $50,000. If the settling defendant's sales to the plaintiffs represented thirty percent of their purchases, plaintiffs' damage claim would be reduced by $300,000 to $700,000.[204] This method of allocating damages is equitable, predictable and easy to administer.

Under S. 1468, if a defendant entered or exited the conspiracy on dates different from the other conspirators, its contributive share would be determined accordingly.[205] Assume, for example, that one company enters into a preexisting conspiracy and participates for only one year; the company's contributive share would include only its sales for the one year. Such a provision could open the door to collusive settlements.[206] To avoid this possibility, it should be provided that when a settlement agreement purports to be based on a defendant's participation in the conspiracy for a period less than its entire duration, the carve-out amount must include all that defendant's sales or purchases, including the time during which the defendant was not in the conspiracy.[207]

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202. Indeed, the main drawback of S. 1468 is that it applies *only* to price-fixing cases; in all other kinds of cases, it would leave it to the courts to decide whether contribution should be available at all. S. REP. No. 428, *supra* note 17, at 12.

203. S. 1468, 96th Cong., 1st Sess. (1979).

204. Note that under S. 1468, the carve-out is based solely on the defendant's own sales to the plaintiff. For example, assume that a plaintiff who purchased from only two dedendants sued three defendants, seeking $10,000 in trebled damages. If the plaintiff settled for $100 with the defendant from which he did not purchase, the amount of the claim reduction would only be $100 irrespective of the settling defendant's market share. S. REP No. 428, *supra* note 17, at 22-23. In most class action cases, however, this distinction will make no difference because the class members will have purchased from all defendants.

205. *Id.* at 22. The *Section Proposal*, *supra* note 10, at E-4, would include a similar provision.

206. For example, the plaintiff might settle with one defendant at a low rate and claim a low carve-out amount by contending that the settling defendant was in the conspiracy only for a short period. The plaintiff might still seek damages for the settling defendant's nonconspiratorial sales based on an "umbrella" theory. The problem does not arise if the "umbrella" theory is rejected. See notes 18 & 185 *supra*.

207. This reasoning might be criticized on the ground that it would compel short-term participants in a conspiracy to pay higher amounts to settle than warranted by their conduct. The view here, however, is that the danger of collusive settlements outweighs the danger of unfairly penalizing short-term participants. No solution is perfectly satisfactory and, in the absence of any contribution rule, short-term participants remain liable for all the damages caused for the duration of the conspiracy. Dextone Co. v. Building Trades Council, 60 F.2d 47, 48 (2d Cir. 1932).

Conclusion

Despite the debate over the procedural rules needed to eliminate the objections of contribution's opponents, the central point should not be lost. There is no room for a rule that fosters collusion and intimidation in a judicial system that prides itself on its fairness. To restore justice to an area from which it has been absent and to better the administration of the antitrust laws, the right to contribution should be recognized.