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Contribution Among Antitrust Violators: Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.

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Contribution Among Antitrust Violators: *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*[1]—The Court of Appeals for the Eighth Circuit recently decided in *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.* whether contribution was available, under any circumstances, to an antitrust defendant. The case arose out of a suit commenced by one wholesaler of cosmetic supplies against a competitor for conspiring to monopolize a cosmetics market in violation of Section 2 of the Sherman Act.[2] The plaintiff, Professional, alleged that defendant National had demanded an exclusive dealership contract from a manufacturer of beauty supplies, La Maur, Inc., and that National's demands had caused Professional to be terminated as a La Maur dealer.[3] During the initial stages of discovery, National filed a third party complaint alleging that La Maur had been at least partially responsible for Professional's termination.[4] Therefore, National argued, it was entitled to contribution from La Maur in the event it was found liable to Professional.[5]

The district court dismissed the third party complaint, holding as a matter of law that contribution was unavailable to National,[6] and National appealed. The Court of Appeals for the Eighth Circuit reversed and HELD that, at least under some circumstances, an antitrust defendant should be entitled to contribution from those co-conspirators not sued by the plaintiff.[7] The *Professional* court stressed that its concern for fairness between the parties was the deciding factor in its decision.[8] Furthermore, the court stated that such a rule need not adversely affect antitrust policy.[9] The court therefore felt free to fashion a new remedy based on what it called "sense and justice."[10]

The *Professional* decision represents an abrupt break from the few cases discussing the issue of contribution among antitrust defendants. Prior to *Pro-*

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

[2] *Id.* at 1181. Additionally, the plaintiff made a claim under Minnesota antitrust law, and also alleged that the defendant had tortiously interfered with its business relationship with La Maur, Inc., a manufacturer of beauty supplies.

[3] *Id.* at 1180-81.

[4] *Id.* at 1181. On appeal, National stated that during discovery it became apparent that Professional's entire claim was based on the alleged *joint* wrongdoing of La Maur and National.

[5] It was National's theory that since it had no control over La Maur's termination of Professional, La Maur should be treated as the primary actor involved in the alleged antitrust violation, and that National could be at most secondarily liable to Professional. Thus, in addition to a claim for contribution, National argued that it was entitled to indemnification from La Maur. The circuit court treated the indemnification issue relatively cursorily, holding that it was not available to an antitrust defendant. *Id.* at 1186. In summary, the court reasoned that permitting a wrongdoer to escape loss entirely by shifting liability to another party under the concept of indemnification would result in the same unfairness as would the denial of contribution. *Id.* A full treatment of the indemnification issue in this casenote would not be appropriate.

[6] *Id.* at 1181. This was the court of appeals' conclusion; the district court's order dismissing the third party complaint was not accompanied by an opinion.

[7] *Id.* at 1182.

[8] *Id.* at 1185.

[9] *Id.* at 1185.

[10] *Id.* at 1185-86.

fessional, no other federal court had recognized an antitrust defendant's right to contribution.[11] This casenote will examine the *Professional* decision and evaluate the policy considerations underlying extension of the contribution remedy to antitrust defendants. First, the article will present the rationale of contribution generally. The policy arguments supporting and opposing contribution will be isolated and the remedy's specific application to the antitrust area will be examined. Second, the casenote will analyze the opinions presented by the majority and dissent in *Professional*. Here, the casenote will scrutinize the reasoning of the judges and compare it with the approach recently taken by other courts of appeals. It will be submitted that the rule extending contribution to antitrust defendants adopted in *Professional* appropriately applies equitable standards without sacrificing the principles underlying the antitrust statutes. Finally, alternative considerations which support the *Professional* rule will be explored. These suggestions should be considered in any future legislative or judicial scrutiny of the extension of the contribution remedy to antitrust defendants.[12]

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[11] Before the *Professional* decision, the question of contribution in antitrust cases had been rarely considered. *See* Corbett, *Apportionment of Damages and Contribution Among Co-conspirators in Antitrust Treble Damage Actions*, 31 FORDHAM L. REV. 111 (1962) [hereinafter cited as Corbett]. The author reasoned that the dearth of case law was attributable to the tendency of most antitrust defendants to settle their respective obligations among themselves. The author also suggested that most plaintiffs join as many defendants as may be expected to be liable so that the defendants themselves need not bring any additional parties into the action. *Id.* at 111.

Professional discussed the prior federal law on the contribution in antitrust issue, and mentioned only one court of appeals case, Goldlawr, Inc. v. Shubert, 276 F.2d 614, 616 (3d Cir. 1960) which had, in *dictum*, followed the traditional rule. The *Professional* court also cited the four district court opinions which had decided the issue, all of them holding there was no right of contribution in antitrust cases. Olson Farms, Inc. v. Safeway Stores, Inc. [1977-2] Trade Cas. ¶ 61,698 (D. Utah 1977); Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., No. 75-2820 (E.D. La. Oct. 5, 1977) (unpublished); El Camino Glass v. Sunglo Glass Co., [1977-1] Trade Cas. ¶ 61,533 (N.D. Cal. 1976); and Sabre Shipping Corp. v. American President Lines, Ltd., 298 F. Supp. 1339 (S.D.N.Y. 1969). Other district courts have approved the no contribution rule in *dictum*. *See, e.g.*, Baughman v. Cooper-Jarrett, Inc., 391 F. Supp. 671 (W.D. Pa. 1975), *aff'd in part, rev'd in part*, 530 F.2d 529 (3d Cir.), *cert. denied*, 429 U.S. 825 (1976) ("We should note at this point that [the defendant] is not presenting a claim for contribution against its two alleged co-conspirators. In fact, this antitrust action is governed by federal common law under which there is no right of contribution for intentional torts." *Id.* at 698 n.3.); Wainwright v. Kraftco Corp., 58 F.R.D. 9, 11-12 (N.D. Ga. 1973) (arguably by implication); Washington v. American Pipe & Constr. Co., 280 F. Supp. 802, 804-05 (S.D. Cal. 1968) (arguably by implication). *But see* Chevalier v. Baird Sav. Ass'n, 72 F.R.D. 140, 145 n.6 (E.D. Pa. 1978) (*dictum*).

[12] It appears that the Supreme Court will be deciding the contribution issue during the current term. As this casenote went to press, the Supreme Court granted review in Texas Indus., Inc. v. Radcliff Materials, Inc., No. 79-1144, 49 U.S.L.W. 3321 (Nov. 4, 1980). The decision below in *Texas Industries*, Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d 897 (5th Cir. 1979), which held that antitrust defendants have no right to contribution, is discussed *infra* in section III of this casenote.

I. The Rationale of Contribution

A. *Generally*

Contribution involves the distribution of losses among tortfeasors by requiring each to pay a share of the damages.[13] Thus, if one tortfeasor is made liable for more than his proportionate share of the plaintiff's damages, he may seek contribution from joint tortfeasors for a portion of the damages.[14] A claim of contribution by one tortfeasor against another is premised on a concern for fairness between wrongdoers; if they are jointly responsible for the harm, then they should share the burden of liability. One federal court recently offered the following rationale for allowing contribution:

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[13] Procedurally, this may be done in one of three ways: (1) after judgment has been entered against one joint tortfeasor, he may bring a separate action for contribution against a joint tortfeasor; (2) before judgment, a joint tortfeasor may implead a joint tortfeasor for contribution; and (3) a joint tortfeasor may counterclaim for contribution against a joint tortfeasor named as a co-defendant by the plaintiff. *See* Hodges, *Contribution and Indemnity among Tortfeasors,* 26 Tex. L. Rev. 150, 166-68 (1947) [hereinafter cited as Hodges]. *Cf.* ABA Antitrust Section's model legislation allowing contribution to antitrust violators without regard to procedural niceties, *reprinted in* 936 Antitrust & Trade Reg. Rep. E-1, E-3 (BNA) (October 25, 1979).

[14] "For example, if defendant A has been found liable to the plaintiff in the amount of $10,000, he could recover against B, who was also a tortfeasor, in the amount of $5,000." Hodges, *supra* note 13, at 150-51.

There are at least two views regarding the proper division of the total liability when contribution is allowed. Some courts have determined that liability should be shared on a per capita basis, with each joint tortfeasor contributing the same amount regardless of relative culpability. *See* Herzfield v. Laventhol, Krekstein, Horwath & Horwath, 378 F. Supp. 112, 136 & n.58 (S.D.N.Y. 1974), *aff'd in part, rev'd in part,* 540 F.2d 27 (2d Cir. 1976); Globus, Inc. v. Law Research Serv., Inc., 318 F. Supp. 955, 958 (S.D.N.Y. 1970), *aff'd,* 442 F.2d 1346 (2d Cir.), *cert. denied,* 404 U.S. 941 (1971). The chief advantage of such a rule is its simplicity, yet it may lead to unfair results when the joint tortfeasors are not equally to blame. For this reason, other authorities have criticized the per capita approach, and have suggested that liability be shared according to the comparative fault for the plaintiff's damages. *See* Kohr v. Allegheny Airlines, 504 F.2d 400, 405 (7th Cir. 1974), *cert. denied,* 421 U.S. 978 (1975); Gomes v. Brodhurst, 394 F.2d 465, 469-70 (3d Cir. 1968). *See also* Uniform Comparative Fault Act (1977).

The ABA's Antitrust Section has suggested an approach similar to comparative fault as part of its model legislation permitting contribution in antitrust cases. The section advocates that damages be apportioned on the basis of relative responsibility for the plaintiff's damages, a flexible concept encompassing the impact of a defendant's acts as well as culpability. 936 Antitrust & Trade Reg. Rep. E-1, E-4 (October 25, 1979).

Support for a relative fault rule has been expressed by the Supreme Court in another context. In United States v. Reliable Transfer Co., 421 U.S. 397 (1975), an admiralty case, the Court stated:

> It is no longer apparent, if it ever was, that this Solomonic division of damages serves to achieve even rough justice. An equal division of damages is a reasonably satisfactory result only where each vessel's fault is approximately equal and each vessel thus assumes a share of the collision damages in proportion to its share of the blame, or where proportionate degrees of fault cannot be measured and determined on a rational basis. The rule produces palpably unfair results in every other case.

Id. at 405.

> The governing principle of contribution throughout has been that one of two or more joint wrongdoers should not be required to pay more than his share of a common burden, or to put it another way, that no obligor should be unjustly benefited at the expense of another.[15]

Contribution thus prevents one defendant from shouldering the entire burden of a judgment alone and insures that other culpable parties do not escape liability entirely.[16]

The benefits of contribution stem largely from the limit which it effects on a plaintiff's ability to control the identity of the person or persons who will pay his damages. Without contribution, the plaintiff's decision regarding which joint tortfeasors will be named as defendants is tantamount to a final determination of who will bear this burden. Hence, the plaintiff has complete and arbitrary control over the incidence of damages. For example, a plaintiff could decide to sue one joint tortfeasor out of spite, preferring to saddle him with the burden of satisfying the entire claim,[17] or a plaintiff might sue one joint tortfeasor because of his superior ability to pay a judgment.[18] Alternatively, a plaintiff's decision to sue a particular defendant and not others could be the result of a collusive agreement between the plaintiff and the potential defendants.[19] In none of these examples is the plaintiff's determination to sue or not based on the defendant's culpability. Rather, without contribution, a plaintiff is armed with the arbitrary power of choosing defendants, and therefore imposing potential liability, on whatever basis he desires. Contribution among joint tortfeasors prevents a plaintiff from exercising such control; a defendant joint tortfeasor may seek contribution from all joint tortfeasors regardless of whether they were sued originally by the plaintiff, and will undoubtedly do so to reduce his own liability.

Despite its apparent equitable merit, the contribution remedy has been criticized. Opponents of contribution have focused on the enhanced deterrence which abolition of contribution would arguably effect.[20] They have

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[15] Gould v. American-Hawaiian S.S. Co., 387 F. Supp. 163, 170 (D. Del. 1974), *vacated on other grounds*, 535 F.2d 761 (3d Cir. 1976).

[16] For a general discussion of contribution see W. PROSSER, LAW OF TORTS § 50, at 307 (4th ed. 1971); Bohlen, *Contribution and Indemnity Between Tortfeasors*, 21 CORNELL L.Q. 552 (1936) [hereinafter cited as Bohlen]; Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130 (1932) [hereinafter cited as Leflar]; Comment, *Contribution Among Joint Tortfeasors*, 44 TEX. L. REV. 326 (1965) [hereinafter cited as Comment].

[17] *See* Gomes v. Brodhurst, 394 F.2d 465, 467-68 & n.1 (3d Cir. 1968).

[18] *See* Olson Farms, Inc. v. Safeway Stores, Inc., [1979-2] Trade Cas. ¶ 62,995 (10th Cir. 1979) (dissenting opinion), *rehearing en banc granted*, December 27, 1979.

[19] Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d at 1185. See also the discussion of the abuses of the no contribution rule, at text at notes 106-09 *infra*.

[20] Another argument against contribution, which has sometimes been mentioned by courts and commentators, is that wrongdoers, especially those who have acted intentionally, should not be able to avail themselves of legal relief in order to lessen the burden of damages which they have caused. *See, e.g.*, Fidelity & Cas. Co. v. Christenson, 183 Minn. 182, 184, 236 N.W. 618, 619 (1931); Gulf, Colo. & S.F. Ry. v. Galves-

reasoned that a tortfeasor will be deterred from wrongdoing if he knows that he can be forced to bear the entire burden of the judgment himself.[21] Primarily because of this concern for deterrence, the traditional federal common law rule has been that contribution is prohibited between concurrent wrongdoers.[22] There is, however, a modern trend toward the broader availability of contribution.[23] Modern courts have recognized that, at least in the case of unintentional wrongdoing, the deterrence argument makes little sense. Unless the parties actually contemplate an intentional wrongful act, whether contribution subsequently is available to them will have no effect on the likelihood of wrongdoing.[24] Accordingly, the lower federal courts increasingly have rejected the traditional rule, and recognize the contribution principle in a variety of areas.[25]

Some jurisdictions, by statute, have gone even further than the judiciary in recognizing the right to contribution. Eighteen states have statutes allowing contribution to *intentional* tortfeasors.[26] These states evidently were persuaded that the advantages of contribution outweighed the potential harm to deterrence. Also of significance, a similar number of states have established a statutory right to contribution among unintentional tortfeasors, bringing to 37

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ton, H. & S. A. Ry., 83 Tex. 509, 515, 18 S.W. 956, 958 (1892); Comment, *Contribution and Indemnity Among Joint Tortfeasors,* 33 TENN. L. REV. 184, 199 (1966); Bohlen, *supra* note 16 at 557; Leflar, *supra* note 16, at 134; Comment, *supra* note 16, at 329-30.

[21] W. PROSSER, LAW OF TORTS § 50, at 307 (4th ed. 1971).

[22] Union Stock Yards Co. v. Chicago, Burlington & Quincy R.R. Co., 196 U.S. 217, 227-28 (1905). *See also* citations at note 16 *supra.*

[23] Globus, Inc. v. Law Research Serv. Inc., 318 F. Supp. 955, 957 (S.D.N.Y. 1970), *aff'd,* 442 F.2d 1346 (2d Cir. 1971), *cert. denied,* 404 U.S. 941 (1971).

[24] The early English law recognized this, and disallowed contribution only among unintentional wrongdoers. *See* Merryweather v. Nixan, 8 Term. Rep. 186, 101 Eng. Rep. 1337 (K.B. 1799); Adamson v. Jarvis, 4 Bing. 66, 130 Eng. Rep. 693 (1827). The American courts, however, lost sight of the distinction between intentional and unintentional tortfeasors, and flatly prohibited the remedy. *See* Union Stock Yards Co. v. Chicago, Burlington & Quincy R.R. Co., 196 U.S. 217, 227-28 (1905); Ruder, *Multiple Defendants in Securities Law Fraud Cases: Aiding and Abetting, Conspiracy, In Pari Delicto, Indemnification, and Contribution,* 120 U. PA. L. REV. 597, 647-48 (1972).

[25] "Departing from the rugged flintiness of traditional common law, the general drift of the law today is toward the allowance of contribution among joint tortfeasors." Globus, Inc. v. Law Research Serv., Inc., 318 F. Supp. 955, 957 (S.D.N.Y. 1970). *See also* Heizer Corp. v. Ross, 601 F.2d 330 (7th Cir. 1979) (contribution allowed in securities case); Kohr v. Allegheny Airlines, Inc., 504 F.2d 400 (7th Cir. 1974), *cert. denied,* 421 U.S. 978 (1975) (contribution available in aviation collisions); Gomes v. Brodhurst, 394 F.2d 465 (3d Cir. 1968) (contribution allowed in ordinary negligence case); Knell v. Feltman, 174 F.2d 662 (D.C. Cir. 1949) (contribution allowed in ordinary negligence case); Alexander & Baldwin, Inc. v. Peat, Marwick, Mitchell & Co., 385 F. Supp. 230 (S.D.N.Y. 1974) (contribution allowed in securities case). Still, few courts have been willing to judicially extend the availability of contribution to intentional tortfeasors. The exceptions have been in the federal securities area. See note 74 *infra.*

[26] Seventeen states have statutes that are silent on the issue of whether contribution applies when the tort is intentional, and New York specifically allows contribution for intentional tortfeasors. It would appear that in these states an intentional tortfeasor could obtain contribution. S. REP. NO. 96-428, Antitrust Equal Enforcement Act of 1979, 96th Cong., 1st Sess., *reprinted in* 942 ANTITRUST & TRADE REG. REP. 1, 5 (BNA) (December 6, 1979).

the total number of states which recognize by statute some form of contribution.[27]

The Supreme Court's decisions on the contribution issue parallel the trend elsewhere toward its availability. Since the 1950's, the Court has heard two cases, both in admiralty, involving the availability of the contribution remedy. In the first, it was denied. In a similar case decided 20 years later, the Court allowed contribution.

In *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*,[28] decided in 1952, an employee of Haenn was injured on board Halcyon's ship while making repairs. The employee sued Halcyon for negligence, and Halcyon impleaded Haenn as a third party defendant. The Court did not allow Halcyon's claim for contribution, reasoning that no right of contribution existed at common law, and that in the absence of congressional action it would be unwise to fashion a new judicial rule of contribution.[29] The Court also noted that the third party defendant in *Halcyon* was immune to suit from the original plaintiff by way of a workman's compensation act.[30] Thus, the purpose of the act would be defeated if contribution were allowed.[31]

In *Cooper Stevedoring Co., Inc. v. Fritz Kopke, Inc.*,[32] which, like *Halcyon*, concerned the availability of contribution in a non-collision maritime action for personal injuries, no workman's compensation act was involved. The Court allowed contribution in *Cooper*, and limited the *Halcyon* holding to cases where the tortfeasor against whom contribution is sought is immune from liability by statute.[33] No such bar against contribution existed on the facts of *Cooper*. The Court stated:

> Unlike the injured worker in *Halcyon*, [the injured plaintiff] was not an employee of Cooper and could have proceeded against either the Vessel [the defendant] or Cooper [the third party defendant] or both of them to recover full damages for his injury. Had [he] done so, either or both of the defendants could have been held responsible for all or part of the damages. Since [he] could have elected to make Cooper bear its share of the damages caused by its negligence, we see no reason why the Vessel should not be accorded the same right.[34]

The *Cooper* decision thus limits *Halcyon* to its particular facts. The Court suggested in *Cooper* that unless countervailing considerations are present, it

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[27] *Id. See also* Note, *Contribution in Private Antitrust Suits*, 63 CORNELL L. REV. 682, 698 (1978) [hereinafter cited as Cornell Note].

[28] 342 U.S. 282 (1952).

[29] *Id.* at 285.

[30] The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905 (1976), prescribes that liability under the Act shall be exclusive, and in place of all other liability of the employer to the employee.

[31] 342 U.S. at 286 & n.12.

[32] 417 U.S. 106 (1974).

[33] *Id.* at 109-11.

[34] *Id.* at 113.

would allow a defendant to seek contribution from joint tortfeasors, at least in the admiralty context. The result of *Cooper,* at minimum, is a recognition by the Supreme Court that contribution may be permitted among joint tortfeasors where appropriate.[35]

B. *Contribution in Antitrust Cases*

The federal antitrust statutes provide no express right of contribution. Moreover, because antitrust actions sound in tort,[36] it was established until recently that an antitrust violator, under the principle of joint and several liability, was considered liable for damages attributable both to his anticompetitive conduct and for damages caused by all co-conspirators.[37] Under the trebling provisions of the Clayton Act,[38] an antitrust defendant thus faced possible liability for three times the amount of damages caused by all the defendants combined. Clearly, the no contribution rule carried the potential for extreme penalties for antitrust violators.

The argument against allowing contribution in antitrust cases is based on the concern that it may adversely affect antitrust enforcement in two ways. First, it is possible that the deterrent effect of a private treble damages action[39] might be reduced if contribution were allowed. Deterrence of anticompetitive conduct is based upon "potential liability running into millions of dollars," which provides the chief "[incentive] to 'voluntary' compliance with the law."[40] The concept of sharing damages would appear to be in conflict with this rationale. Contribution would prevent the possibility that an antitrust violator could be forced to bear the entire burden of a judgment, thus ameliorat-

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[35] The following language from *Cooper* illustrates the Court's view:

> [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.

417 U.S. at 111.

[36] Courts have uniformly treated private antitrust suits as tort actions. Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d 897, 900 n.5 (5th Cir. 1979). *But see* Cornell Note, *supra* note 27, at 692-97, where the author argued that civil antitrust actions are more closely akin to actions in quasi-contract.

[37] *See, e.g.,* El Camino Glass v. Sunglo Glass Co., [1977-1] Trade Cas. ¶ 61,533 (N.D. Cal. 1976); Sabre Shipping Corp. v. American President Lines, Ltd., 298 F. Supp. 1339 (S.D.N.Y. 1969). *Contra,* Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179 (8th Cir. 1979).

[38] Section 4 of the Clayton Act provides that private antitrust plaintiffs may recover treble their actual damages as well as costs and attorney's fees. 15 U.S.C. § 15 (1976).

[39] The importance of the treble damage action is magnified by the fact that the only other means of private enforcement available to a plaintiff is an action for an injunction authorized by Section 16 of the Clayton Act, 15 U.S.C. § 26 (1976).

[40] L. SCHWARTZ & J. FLYNN, ANTITRUST AND REGULATORY ALTERNATIVES 24 (5th ed. 1977). *See also* 1 *Hearings on The Antitrust Improvements Act of 1975 before the Sen. Subcomm. on Antitrust & Monopoly,* 94th Cong., 1st Sess. 385 (1975) (table of major recent antitrust awards to private plaintiffs), *reprinted in* L. SCHWARTZ & J. FLYNN, *supra,* at 24.

ing the treble penalty. A potential violator might be more likely to engage in illegal activity knowing that, if he is sued individually, he could seek contribution from his co-conspirators.[41]

The second negative effect of contribution, which is more acute in the antitrust area than in the usual tort case, is the probability that it would further complicate already complex lawsuits and discourage private actions. In *Illinois Brick Co. v. Illinois*,[42] the Supreme Court suggested that it considered the complexity of antitrust litigation to be a major concern.[43] *Illinois Brick* presented a standing issue, with the Court holding that only direct purchasers from a price-fixer have standing to bring the action.[44] One of the reasons for the Court's view was its fear that suits brought by indirect purchasers would result in overly complex antitrust trials.[45] The Court referred to the effect complexity could be expected to have on the plaintiff's costs, and concluded that in light of the "longstanding policy of encouraging vigorous private enforcement of the antitrust laws,"[46] the methods of enforcement should be limited so as to prevent undue complexity.[47] The same concerns are applicable relative to contribution. The introduction of additional parties into antitrust litigation will almost always result in increased cost and delay to the plaintiff.

The complication of lawsuits caused by contribution could adversely affect the congressional policy of encouraging private antitrust actions[48] in another way. It has been suggested that allowing an antitrust plaintiff to bring an action against the party or parties he chooses enhances the attractiveness of the suit.[49] If contribution were allowed, a plaintiff would lose the ability to limit the suit to particular parties, and a defendant seeking contribution from joint tortfeasors could change the character of the plaintiff's original action. It is possible that the lawsuit could escalate out of the plaintiff's control, thereby discouraging private enforcement.[50]

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[41] This reasoning is merely an echo of the argument used against allowing contribution in ordinary tort actions, namely that it will reduce deterrence. See text at note 21 *supra*.

[42] 431 U.S. 720 (1977).

[43] *See id.*, at 745.

[44] *Id.* at 746.

[45] *Id.* at 743 n.27.

[46] *Id.* at 745.

[47] *Id. See also* Hawaii v. Standard Oil of Cal., 405 U.S. 251, 262 (1972); Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968) (private suits a "bulwark" of antitrust enforcement).

[48] Individuals were first given the right to bring actions for damages caused by antitrust violations under Section 7 of the Sherman Act, which was conceived of as a remedy for "[t]he people of the United States as individuals." 21 CONG. REC. 1767-68 (1890) (remarks of Senator George). See also note 47 *supra*.

[49] Sabre Shipping Corp. v. American President Lines, Ltd., 298 F. Supp. 1339, 1346 (S.D.N.Y. 1969).

[50] There is obvious merit in the argument that without contribution a plaintiff may exercise more effective control over his action. Such control, however, is the very source of the unfairness of the no contribution rule. See text at notes 17-19 *supra*. No plaintiff, notwithstanding the positive collateral effects of the no contribution rule, should have the opportunity to dispense justice on whatever basis he desires.

Of the cases which have decided the contribution issue in an antitrust context, only two did more than invoke the traditional rule barring contribution. Both of these courts, because of their concern that contribution might reduce antitrust deterrence and discourage private suits, rejected making contribution available to antitrust defendants. The first case to directly consider the issue was *Sabre Shipping Corp. v. American President Lines, Ltd.*,[51] which involved an alleged price-fixing conspiracy among maritime firms. The plaintiff settled with certain co-conspirators, and a non-settling defendant sought to implead the settling parties for contribution. The court dismissed the third party complaint, reasoning that if a defendant could implead all other co-conspirators, control over the lawsuit would be taken out of the plaintiff's hands. The court believed that the plaintiff should be allowed to sue only those defendants it chose in order to fully carry out the statutory purpose of the antitrust laws.[52]

The second district court decision, *El Camino Glass v. Sunglo Glass Co.*,[53] also refused to allow contribution to an antitrust defendant. *El Camino* concluded that allowing contribution would be inconsistent with antitrust policy. The court reasoned first that the congressional policy in favor of private antitrust suits would be undermined if a plaintiff could not control the scope of the lawsuit by determining the parties.[54] Second, the court believed that the deterrent effect of the antitrust laws might be harmed if a defendant could redistribute the cost of an antitrust violation.[55] While the court conceded that there were persuasive arguments in favor of contribution, it believed justice would be better served if it was unavailable in an antitrust case.[56]

II. *Professional Beauty Supply, Inc.*

A. *Majority Opinion*

Although existing precedent and significant policy reasons conflicted with the judicial extension of contribution into the antitrust area, the Eighth Circuit adopted an approach in *Professional* which balanced the equities served by contribution against the potential harm to antitrust policy. The *Professional* court was convinced that contribution would not necessarily interfere with antitrust enforcement. Furthermore, the court believed that the availability of contribution would prevent serious injustice to antitrust defendants. To support its unprecedented holding, the *Professional* majority relied upon the Su-

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[51] 298 F. Supp. 1339 (S.D.N.Y. 1969).

[52] *Id.* at 1346. The *Sabre Shipping* court reasoned:

> If one or two defendants sued by a plaintiff . . . could turn around and implead all other persons directly and indirectly involved in the alleged conspiracy, it could well spell death to the plaintiff's suit and thus thwart the statutory purpose. Plaintiff's choice to sue those of the defendants it considers most culpable or most capable of making him whole would be totally nullified, and control of his action would be taken out of his hands.

Id.

[53] [1977-1] Trade Cas. ¶ 61,533 (N.D. Cal. 1976).

[54] *Id.* at 72,112.

[55] *Id.*

[56] *Id.*

preme Court's reasoning in *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*,[57] that contribution may be allowed in appropriate cases without express direction from Congress.[58] The court also drew support from other federal court decisions allowing contribution under various circumstances.[59]

At the outset of its discussion, the court disposed of the argument that Congress intended that contribution be unavailable to antitrust violators. Although it is true that the antitrust acts contain no provision for contribution, the *Professional* court was not persuaded that the silence of Congress should be read as indicating an intent to deny contribution to antitrust defendants.[60] Given the absence of any clear expression by Congress, the court considered the issue to be a matter of conjecture.[61]

Next, contrary to the views expressed in the earlier cases which had considered the contribution issue, the *Professional* court did not believe that the availability of contribution would discourage private antitrust suits. The court noted that a district court has the power to control any action by severing issues and parties, if the need arises, under Fed. R. Civ. P. 42(b).[62] If the addition of other parties to the action threatened to disrupt or overcomplicate the lawsuit, a plaintiff could resort to the remedies made available by Rule 42(b). The court observed that, on the facts before it, the plaintiff apparently perceived no danger from the third-party complaint, and had made no objection to the addition of La Maur as a third-party defendant.[63]

Finally, the court considered the argument that contribution would interfere with the deterrent effect of the treble damage action. The court conceded that the possibility of being held liable for the full amount of an antitrust recovery represents a substantial deterrent to anticompetitive behavior. Nonetheless, the *Professional* court believed that the question of deterrence cut both ways, and that on balance the allowance of contribution provided a more significant deterrent.[64] This view was based on the court's observations that if only one tortfeasor is made liable, all other joint tortfeasors necessarily go "scot free,"[65] and that a large or powerful tortfeasor might be able to influ-

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[57] 417 U.S. 106 (1974).

[58] The *Professional* court quoted the text of note 35 from *Cooper*, 594 F.2d at 1183.

[59] 594 F.2d at 1184. The *Professional* court cited many of the decisions appearing in note 25.

[60] *Id.* at 1183-84.

[61] As the *Professional* court saw the matter, arguing for the proposition that Congress intended to exclude contribution in antitrust cases were: first, that Congress had provided for contribution in the Securities Acts, *see* 15 U.S.C. § 77k(f) (1976); 15 U.S.C. § 78i(e) (1976); 15 U.S.C. § 78r(b) (1976), but made no such provision in the antitrust laws, and second, that Congress had not acted in the face of the longstanding rule that contribution is not available in antitrust cases.

The majority believed that those arguments were effectively countered by, first, the fact that the antitrust statutes are not comprehensive or exclusive, and second, that the contribution issue was raised so infrequently as to make congressional consideration unlikely. *Id.*

[62] *Id.* at 1184-85.

[63] *Id.* at 1184.

[64] *Id.* at 1185.

[65] *Id. See* Corbett, *supra* note 11, at 137.

ence a plaintiff not to name it as a defendant. The court's notion was that the deterrent effect of the antitrust laws may be reduced because a tortfeasor knows there is a chance he may escape all responsibility and liability for an antitrust violation. What made this possibility even more offensive, from the court's viewpoint, was that a defendant may be able to use economic influence to achieve such a result. The court noted that this was exactly what the defendant National claimed to have happened.[66] The majority concluded that by automatically prohibiting contribution among antitrust defendants in all circumstances, a significant number of violators would be allowed to escape liability for their wrongdoing, thereby undermining the policy of the antitrust laws.[67]

The majority did not go so far as to hold contribution available to all defendants regardless of the nature of their conduct. Rather, the court rejected only the fixed rule that automatically prohibited contribution in *all* cases.[68] The court held that the availability of contribution was subject to a district court's discretion after consideration of all the circumstances of the case.[69] To guide a district court's inquiry, the majority cited Justice White's concurring opinion in *Perma Life Mufflers, Inc. v. International Parts Corp.*,[70] which described factors of importance in considering whether an *in pari delicto* defense was available to an antitrust defendant.[71] There Justice White wrote:

> [F]acts as to the relative responsibility for originating, negotiating, and implementing the scheme; evidence as to who might reasonably have been expected to benefit from the provision or conduct making the scheme illegal . . .; proof of whether one party attempted to terminate the arrangement and encountered resistance or countermeasures from the other; facts showing who ultimately profited or suffered from the arrangement.[72]

Thus, the court contemplated a close examination of a defendant's behavior and the circumstances surrounding the violation, before a trial court made contribution available. The court concluded by observing that contribution in favor of the defendant National was possible at this stage of the proceedings, and that the district court had erred in dismissing National's third party complaint.[73] While the *Professional* majority held that contribution was not available irrespective of a particular defendant's behavior, the court chose not to

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[66] 594 F.2d at 1185. As part of its brief, National submitted excerpts of depositions taken of one of the principals of Professional which indicated that both La Maur and National were perceived as wrongdoers by Professional, and that the reason La Maur was not sued originally was because Professional was getting La Maur's line of products back. Brief for Appellant at 7.

[67] 594 F.2d at 1185.

[68] *Id.* at 1186.

[69] *Id.*

[70] 392 U.S. 134 (1968).

[71] 594 F.2d at 1186 n.8.

[72] Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. at 146-47.

[73] 594 F.2d at 1186.

make a clean distinction between intentional and unintentional violations. To do so, in the court's view, would decrease the deterrent effect of the antitrust laws. The court was persuaded that even intentional violators should be able to obtain contribution to insure that other violators would not escape liability.[74]

B. *Dissent*

The *Professional* opinion was decided over a strong dissent,[75] wherein Judge Hanson criticized the majority's decision to make contribution available to an intentional wrongdoer. The dissent noted that the trend in favor of contribution had extended, generally speaking, only to negligent tortfeasors. Because the defendant, National, would have to be found to have violated the antitrust laws intentionally before it could be found liable, Judge Hanson reasoned that National was in a poor position to complain of the unfairness of being held solely liable for the antitrust violation.[76]

The *Professional* dissent also expressed the familiar concern that the deterrent effect of the antitrust laws would be diminished by a rule allowing contribution, and also suggested that a plaintiff might be unable to maintain control over his lawsuit if defendants could implead other parties for contribution.[77] Finally, Judge Hanson believed that the court should have awaited Congressional directive on this issue, especially in the absence of strong policy reasons in favor of contribution.[78]

III. A Comparison of *Professional* with Other Approaches

The vitality of the *Professional* decision in future antitrust litigation has been cast into doubt by two subsequent circuit court decisions which declined to follow *Professional's* lead. The Court of Appeals for the Fifth Circuit considered the contribution issue in *Wilson P. Abraham Construction Corp. v. Texas Industries, Inc.*,[79] and held that no right of contribution is available to an antitrust defendant.[80] More recently, in *Olson Farms, Inc. v. Safeway Stores, Inc.*,[81]

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[74] *Id.* In favor of the proposition that contribution should be available to intentional as well as unintentional antitrust violators, the *Professional* court cited securities cases which had allowed contribution to intentional wrongdoers. Odette v. Shearson, Hammill & Co., 394 F. Supp. 946, 958 (S.D.N.Y. 1975); Alexander & Baldwin, Inc. v. Peat, Marwick, Mitchell & Co., 385 F. Supp. 230, 238 (S.D.N.Y. 1974); Globus, Inc. v. Law Research Serv., Inc., 318 F. Supp. 955 (S.D.N.Y. 1970).

[75] Judge Hanson concurred with the majority's decision to deny indemnity to National. Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d at 1188.

[76] *Id.* at 1188-89.

[77] *Id.* at 1189-90.

[78] *Id.* at 1190. The argument that contribution should be made available to antitrust defendants by Congress, if at all, is supported by the observation that the majority of jurisdictions which permit contribution have done so by statute.

[79] 604 F.2d 897 (5th Cir. 1979).

[80] *Id.* at 899.

[81] [1979-2] Trade Cas. ¶ 62,995 (10th Cir. 1979), *rehearing en banc granted*, December 27, 1979.

the Court of Appeals for the Tenth Circuit also declined to change the prevailing rule.

The original suit in *Abraham* was brought against a single defendant for damages arising out of an alleged price-fixing scheme involving other co-conspirators who were not sued by the plaintiff.[82] The defendant, Texas Industries, filed a third party complaint against these co-conspirators seeking contribution.[83] The case was presented to the Fifth Circuit after the district court dismissed the defendant's third party complaint.

The court in *Abraham* focused on the effect which a rule allowing contribution could be expected to have on deterring anticompetitive business behavior. The court rejected the contention made successfully in *Professional* that allowing contribution would enhance the deterrent effect of the antitrust laws.[84] On the contrary, the court sided with the traditional view that the no contribution rule best promoted deterrence, and drew upon "prevailing economic theory"[85] that business managers are more likely to be deterred by the slight chance of a large loss to support its decision.[86] The court concluded, in a split decision, that antitrust policy would be better served by denying contribution to an antitrust defendant, and accordingly refused to allow contribution to Texas Industries.[87]

The *Olson Farms* decision was notable for its unwillingness to grapple with the difficulties of accommodating contribution to antitrust policy. In *Olson Farms*, the plaintiff, having already satisfied a judgment against it for conspiring in violation of Sections 1 and 2 of the Sherman Act,[88] sought a declara-

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[82] 604 F.2d at 899. The defendant and others were allegedly involved in a conspiracy to raise and stabilize the price of concrete in the New Orleans area. The plaintiff commenced the action in the United States District Court for the Eastern District of Louisiana.

[83] *Id.*

[84] *Id.* at 901. The defendant, Texas Industries, made the argument that had been accepted in *Professional*, *i.e.*, that the possibility of escaping all liability under the no contribution rule might cause many potential violators to be more willing to engage in wrongful activity.

[85] *Id.*

[86] The Court noted:

> Economists have argued that business managers, particularly in larger organizations, are generally "risk averse"—that is, they are deterred more by the slight prospect of a large loss than by the strong prospect of a small loss. If this hypothesis is correct, application of the rule denying contribution should inhibit those managers who are aware of the rule from participating in unlawful group activity. Although the rule decreases the likelihood that an individual participant will be held liable, it increases the size of the potential liability.

Id. at 901 n.8, *quoting* Cornell Note, *supra* note 27, at 702. *See also* K. ELZINGA & W. BREITT, THE ANTITRUST PENALTIES 120-29 (1976).

[87] 604 F.2d at 905-06. The dissent in *Abraham*, noting the trend toward allowing contribution to unintentional tortfeasors, would have allowed contribution in the case of an unintentional antitrust violator.

[88] The jury found that Olson Farms had violated both Sections 1 and 2 of the Sherman Act which prohibit price-fixing and monopolization, respectively. [1979-2] Trade Cas. at 79,700 & n.4.

tory judgment that it was entitled to contribution against several of its co-conspirators.[89] The plaintiff, Olson Farms, alleged that without contribution its co-conspirators would be unjustly enriched by the amount of the antitrust judgment against Olson Farms which was attributable to their acts.[90] The district court dismissed the complaint for contribution, and Olson Farms appealed.

In discussing the plaintiff's claim for contribution, the court of appeals emphasized that it believed Congress would be better able to decide the complex policy question of allowing contribution in antitrust actions. The court was unsure of the effects contribution would have on antitrust enforcement, and without Congressional direction it declined to change the prevailing rule.[91] In a 2-1 decision, the Tenth Circuit panel affirmed the district court's dismissal of Olson Farms' complaint.[92]

The decision of the *Abraham* and *Olson Farms* courts not to allow contribution to an antitrust defendant can be best explained by the attitude toward the contribution remedy reflected in the courts' opinions. Discussion of the increased equities obtained by a rule allowing contribution was nonexistent in *Abraham* and *Olson Farms*. In contrast, a recognition of the equitable need for contribution was the starting point in *Professional*. The *Professional* court then engaged in a balancing process. The contribution principle, which achieves fairness among antitrust defendants by allowing the damages caused by an anticompetitive conspiracy to be assessed against all parties to the illegal

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[89] *Olson Farms* is a prime example of the extreme inequity possible under the no contribution rule. Olson Farms' claim for contribution against its co-conspirators arose out of a scheme engaged in by Olson Farms and the defendants that lowered the wholesale price the conspirators were to pay certain egg producers for their eggs. Initially, fourteen egg producers brought an action against Olson Farms and one other co-conspirator, Oakdell Egg Farms, Inc. Injunctive relief was later granted against Oakdell, leaving Olson Farms, under the principle of joint and several liability, liable for the full amount of the damages caused by all the conspirators together.

Although Olson Farms was allegedly responsible for less than 1/8 of the claimed damages, or $99,656, by way of the trebling provisions of the antitrust laws, plus attorneys' fees, costs and interest, Olson Farms eventually satisfied a judgment in excess of $2.4 million, or almost 25 times the amount of damages it had caused to the original plaintiffs. See table below stating the claimed damages attributable to each defendant and Olson Farms.

Egg Buyer	*Claimed Damages*
Safeway Stores, Inc.	$ 271,129
Egg Products Co.	197,618
Snow White Egg Co.	157,052
Countryside Farms, Inc. and Gusto Marketing Systems, Inc.	119,961
Olson Farms, Inc.	99,656

Id. at 79,700.

[90] *Id.*

[91] *Id.* at 79,704. The *Olson Farms* majority opinion was in agreement with the *Professional* dissent on this point.

[92] *Id.*

scheme, was weighed against two essential aspects of federal antitrust policy—the effective deterrence of anticompetitive behavior and the continued attractiveness of the private action as a method of antitrust enforcement.

Neither the *Abraham* nor *Olson Farms* court expressed a desire to allow contribution to an antitrust defendant. The majority in *Abraham*, unlike their counterparts deciding *Professional*, disparaged any consideration of "fairness between the parties."[93] For example, the *Abraham* court noted in relation to allowing contribution to unintentional antitrust violators: "[W]e refuse to distort the antitrust laws in order to remedy a problematic inequity."[94] It is evident that the court was not concerned that an antitrust defendant might have to pay exorbitant damages unfairly. No mention is made by the *Abraham* court of the considerable equitable arguments in favor of a rule allowing contribution. The Tenth Circuit court, likewise, was indifferent to the heavy burden that was imposed on Olson Farms as a result of the no contribution rule.[95]

Unlike the Eighth Circuit in *Professional*, which had conceded that allowing contribution might hinder antitrust enforcement[96] and applied a balancing test, the Fifth and Tenth Circuits evaluated claims that antitrust policy is actually promoted by allowing contribution.[97] Their analysis involved putting the no contribution rule head-to-head with a rule allowing contribution to see which one better promotes antitrust policy.[98] By approaching the issue in this way, the *Abraham* and *Olson Farms* courts ignored the injustice which can result to a defendant if contribution is barred. Whereas a no contribution rule may be more effective in terms of purely promoting antitrust policy, the critical question for the courts should be: given the substantial fairness gained by making contribution available to antitrust defendants, to what extent does contribution infringe on the objectives of antitrust policy? The *Professional* court engaged in such an analysis, which yielded the answer that, if carefully managed, contribution need not have an adverse effect on antitrust policy. The other two courts short-circuited their reasoning by failing to weigh the advantages of the contribution remedy, and thus dictated the outcome of their decisions.

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[93] Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d at 1185.

[94] 604 F.2d at 906.

[95] See note 89 *supra*.

[96] The *Professional* court stated that the "question of deterrence cuts both ways," 594 F.2d at 1185, and observed at various points in its opinion that the potentially negative effects of allowing contribution to antitrust defendants could be controlled by the exercise of district court discretion. *Id.* at 1184-85.

[97] The following language in the *Professional* opinion may have prompted the *Abraham* and *Olson Farms* courts to approach the problem in this way: "We are convinced that the result of automatically prohibiting contribution . . . would be to allow a significant number of antitrust violators to escape liability for their wrongdoing and thereby undermine the policy of the antitrust laws." 594 F.2d at 1185.

[98] Similarly, Sabre Shipping Corp. v. American President Lines, Ltd., 298 F. Supp. 1339 (S.D.N.Y. 1969), decided the contribution issue without recognizing the more equitable treatment received by antitrust defendants under a rule allowing contribution.

IV. Evaluation

The contribution rule propounded by the Eighth Circuit in *Professional* prevents an instigator of an anticompetitive scheme, or a defendant who stood to gain the majority of the benefits thereunder, from obtaining contribution.[99] At the same time, however, the court's rule extends the contribution remedy to intentional antitrust violators. This middle ground position, between allowing contribution to all antitrust defendants and allowing contribution to unintentional violators only, strikes an optimal balance between the increased equity gained by contribution and the need to retain the maximum deterrent effect of the antitrust laws for flagrant offenders. If *any* defendant, no matter how wilful or flagrant, could obtain contribution, the deterrent effect of the treble damages might be decreased. Moreover it would simply be unfair, in some cases, to allow a defendant to decrease its liability by impleading less culpable parties. Under the *Professional* rule, a district court may prevent such undesirable results by limiting the availability of contribution to cases where it was satisfied only relatively blameless parties would benefit.

As part of the same standard, the *Professional* majority would permit intentional violators to obtain contribution. Judge Hanson criticized this part of the majority's decision in his dissent to *Professional,* where he observed that the trend in favor of contribution has still generally adhered to the rule that intentional wrongdoers should not be permitted contribution.[100] Notwithstanding this criticism, there are two practical reasons for the majority's view. First, a civil violation of the antitrust laws may be established by proof of either an unlawful purpose or an anticompetitive effect.[101] Thus, the nature of a plaintiff's proof may determine whether the defendant is viewed as an intentional or unintentional violator. The availability of contribution should not depend on the manner in which a private suitor attempts to establish civil liability under the antitrust laws. Second, the issue of intent in antitrust cases historically has been a matter of difficulty.[102] Unlike the simple bright-line distinction that can be made between negligent and intentional wrongdoers in ordinary tort actions, distinguishing between intentional and unintentional antitrust violators is a difficult task. The practical effect of attempting such a distinction would inject an additional difficult issue into antitrust litigation.

Instead of focusing on the intentional/unintentional dichotomy, the *Professional* rule emphasizes the circumstances of each case. Under the majority's rationale, contribution would be available to an intentional violator, but not to

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[99] See the discussion of Justice White's considerations in *Perma Life* in text at notes 68-72 *supra.*

[100] *See* W. Prosser, Law of Torts, § 50, at 308 (4th ed. 1971).

[101] United States v. Container Corp., 393 U.S. 333, 337 (1969) (civil case). Whereas intent is a necessary element of a criminal antitrust offense, civil liability may arise for unintentional violations. United States v. U.S. Gypsum Co., 438 U.S. 422 n.13 (1978); Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc. 604 F.2d at 906 n.1 (dissenting opinion).

[102] *See, e.g.,* L. Sullivan, Antitrust §§ 33-39, at 94-105 (1977). The author discusses three distinct theories of intent to monopolize.

a wilful or flagrant violator. By retaining the no contribution rule for these offenders, the court's approach is defensible in terms of antitrust policy, yet it also takes practical account of the fact that the question of an antitrust violator's intent may be difficult to answer.

The facts of *Professional* illustrate the sense of the majority's approach. On one hand, if contribution was automatically unavailable to an intentional antitrust violator, then the alleged co-conspirator, La Maur, would be allowed to go scot free while National, an alleged intentional wrongdoer, faced possible treble damages. This result would obtain despite La Maur's alleged equal responsibility for the plaintiff's damages. On the other hand, if the district court made contribution available to National, La Maur would be brought into the action to face liability, thereby promoting antitrust policy, while National escaped sole liability. Contribution in such a case would benefit a non-flagrant violator, but not at the expense of antitrust goals.

Apart from the particular rule of contribution established by *Professional*, the reasonableness of which has been demonstrated above, was the court's revolutionary decision to allow contribution to antitrust defendants in any form. While the court itself chose to rest this part of its decision primarily on the compelling logic of the contribution remedy, three other considerations provide support for the court's decision to discard the fixed no contribution rule in antitrust cases. First, the prevailing no contribution rule is susceptible to abuse.[103] Second, contribution may actually promote deterrence—an argument that some courts in the securities area have espoused.[104] Third, the ABA and a Congressional Committee have recognized, subsequent to *Professional*, the merit of allowing contribution to antitrust defendants.[105]

The prevailing rule barring contribution among antitrust defendants can be used by both antitrust violators and private plaintiffs to subvert the policy and intent of the antitrust statutes. An antitrust violator with muscle in the business arena is in a formidable bargaining position under the no contribution rule. Because the rule barring contribution grants a plaintiff the arbitrary power of choosing which violator to make liable, a plaintiff is particularly susceptible to the influence of a well-situated defendant, who could avoid liability by promising a continuing business relationship in the future. Thus, a large corporation could not only instigate an anticompetitive scheme which included other companies,[106] it could then reap the benefits of such a scheme without penalty if it could convince a plaintiff to sue the co-conspirators, instead of it, to collect damages. The plaintiff would have strong incentive to accept such an offer, losing nothing in terms of recovery. Simultaneously, it would eliminate a strong opponent from the litigation, thus increasing the probability of actually winning the lawsuit and collecting damages.[107]

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[103] See text at notes 106-09 *infra*.

[104] See text at notes 110-19 *infra*.

[105] See text at notes 120-22 *infra*.

[106] *E.g.*, in Perma Life Mufflers Inc. v. International Parts Corp., 392 U.S. 134 (1968), a large corporate defendant instigated a price-fixing scheme which involved its franchisees.

[107] *See* Olson Farms, Inc. v. Safeway Stores, Inc., [1979-2] Trade Cas. at 79,706 (dissenting opinion). The dissenting judge suggested that this may have been the

Similarly, private plaintiffs have been able to use the no contribution rule, together with the principle of joint and several liability, to extract settlement offers from defendants who would prefer to go to trial, but who cannot risk massive liability based on the sales or activities of other defendants, who either settled earlier or were left unsued.[108] Under the prevailing view, each time a defendant settles for less than his proportionate share of the damages, the amount of the eventual judgment is reduced only by the amount of the settlement, not by the settling defendant's proportionate share of the total liability.[109] Thus, the non-settling defendants' share of the total remaining liability increases. Furthermore, the longer a defendant resists settlement, the greater his risk of being held liable for damages far in excess of his proportionate liability. A defendant who steadfastly maintains his innocence thus may be forced to settle, thereby subverting the judicial process and the antitrust laws.

The policy of deterring anticompetitive behavior also supports the *Professional* rule. In contrast to previously held views, a strong argument can be made that contribution may actually promote the deterrence of anticompetitive conduct.[110] Consonant with the view taken in *Professional,* courts decid-

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reason that Olson Farms was sued, and Safeway Stores, Inc. (a larger corporation) and others were left unsued.

[108] The problem regarding settlement was summarized in S. REP. No. 96-428, *reprinted in* 942 ANTITRUST & TRADE REG. REP. 2 (BNA) (Special Supp.) (December 6, 1979):

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

Id.

[109] In contrast, the first district court to interpret the *Professional* decision in the settlement context, Little Rock School Dist. v. Borden, Inc., Nos. LR-76-C-41, LR-C-77-126 and LR-C-77-108 (E.D. Ark. October 1, 1979), *discussed in* 937 ANTITRUST & TRADE REG. REP. A-40–A-41 (BNA) (November 1, 1979), indicated that, under *Professional,* a settling defendant's sales would be eliminated from the litigation. Consequently, the *Little Rock* court released the non-settling defendants from liability for the settling defendant's actions. *See also* S. 1468 *reprinted in* 942 ANTITRUST & TRADE REG. REP. 2-3 (BNA) (Special Supp.) (December 6, 1979), which in the event of partial settlement, would reduce the amount of the plaintiff's claim against non-settling defendants by the greater of the amount stipulated by the release or covenant, the amount paid by the settling party in consideration for the release, or treble the actual damages attributable to the settling party's sales or purchases of goods or services.

[110] Corbett, *supra* note 11, at 140; and Cornell Note, *supra* note 27. Corbett made the following argument in his 1962 article:

> Not only would the existence of rights of contribution remove to a great extent the possibility of escaping liability entirely, . . . but it would, in a sense, 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.
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> The availability of contribution . . . would not only be equitable as among the conspirators, but should insure a fuller enforcement of the antitrust laws without appreciably lessening the punitive effect of treble damage liability.

Corbett, *supra* note 11, at 137 & 140.

ing the contribution issue in the securities area have perceived the redistribution of liability as a means of enhancing deterrence.[111] Facing the question of whether to permit contribution in a case involving a section of the federal securities law which did not provide expressly for contribution, the court in *Alexander & Baldwin, Inc. v. Peat, Marwick, Mitchell & Co.*[112] stated:

> Because of the deterrent policy of the securities laws, even intentional tortfeasors may obtain contribution so that other tortfeasors will not escape liability. This purpose will be served if defendant tortfeasors are allowed to implead any other tortfeasor involved in the fraud.[113]

This view has been echoed by other courts in securities cases where there was no right to contribution by statute.[114]

The securities cases provide a useful analogy to the contribution question in the antitrust area. Although courts have been prone to distinguish antitrust and securities cases on the basis of Congressional intent to allow contribution *vel non*, as a practical matter, cases brought under the securities laws are similar to antitrust cases. Both types of cases have a tendency to become large and complex.[115] More importantly, the securities and antitrust laws were enacted for related reasons—the antitrust statutes to protect the public from anticompetitive business practices,[116] while the securities laws had the general purpose of protecting investors against fraudulent business practices.[117] Thus, if contribution is perceived as actually promoting the regulatory purpose of the securities laws, it is hard to see how it could have a different result in the antitrust area. The judicial implication of a right to contribution in antitrust cases, viewed in this way, is consistent with the statutory purpose and goals of the antitrust laws.[118] The treble damages provided for in antitrust actions make this conclusion even more likely. Because damages are trebled, the size of the judgment should be large enough to represent substantial deterrence to

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[111] *E.g.*, Heizer Corp. v. Ross, 601 F.2d 330, 332 (7th Cir. 1979); Gould v. American-Hawaiian S.S. Co., 387 F. Supp. 163, 169 (D. Del. 1974); and Globus, Inc. v. Law Research Serv., Inc., 318 F. Supp. 955, 958 (S.D.N.Y. 1970).

[112] 385 F. Supp. 230 (S.D.N.Y. 1974).

[113] *Id.* at 238.

[114] See note 111 *supra*.

[115] Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d at 1184-85.

[116] For a discussion of the general purpose of the antitrust statutes see L. SULLIVAN, ANTITRUST § 3 at 14 (1977); H. THORELLI, THE FEDERAL ANTITRUST POLICY 226-32 (1955) [hereinafter cited as THORELLI].

[117] The report of the Senate Committee on Banking and Currency stated that "the purpose of [the Securities Act of 1933] is to protect the investing public and honest business." S. REP. No. 47, 73d Cong., 1st Sess. 1. (1933).

[118] THORELLI, *supra* note 116, emphasizes that Congress enacted the antitrust laws to preserve competition. The increase in the number of parties facing liability under the antitrust laws, a collateral effect of contribution, would enhance efforts to enforce the antitrust laws against all violators. Thus, contribution may help insure a more competitive economy.

any antitrust defendant, even if liability were allocated among the co-conspirators.[119]

Scholars and antitrust practitioners also support a contribution rule which parallels the result reached in *Professional.* Prompted by the Eighth Circuit's decision in *Professional,* the ABA's Antitrust Section has recommended model legislation which would make contribution available to all antitrust violators.[120] The section was impressed by the manifest unfairness of the no contribution rule, and felt that any advantages in reduced court costs and simplified litigation could not justify its retention.[121] For similar reasons, the Senate Committee on the Judiciary has approved a bill, S. 1468, which would allow contribution in price fixing cases.[122] The approval of the contribution remedy by the ABA and the Judiciary Committee buttresses the *Professional* decision in two ways. First, neither the Judiciary Committee nor the ABA indicated that the availability of contribution should depend on an antitrust violator's intent. Thus, the *Professional* court's decision to make contribution available to intentional and unintentional violators alike draws support from these two groups. In fact the Judiciary Committee and the ABA go even farther than *Professional,* which circumscribed the availability of the remedy by placing it within the court's discretion. Second, the argument made consistently by proponents of the no contribution rule throughout the litigation on this issue that Congress intended to deny contribution in the antitrust area, collapses under the support for contribution voiced by the Senate Committee. Although the *Professional* court was itself unconvinced by the congressional intent argument even before the introduction of S. 1468, other decisions denying contribution, especially *Olson Farms* and the earlier *El Camino* decision, relied heavily on this argument for support. The approval of the contribution remedy by the Senate Committee should henceforth effectively counter any such contention.

CONCLUSION

The contribution rule adopted by the Eighth Circuit in *Professional* achieves fairness for an antitrust defendant without conflicting with antitrust principles. The *Professional* decision yields a number of positive effects. First, it eliminates the automatic rule barring contribution in all antitrust cases, thereby preventing the inequity of allowing one tortfeasor to shoulder the judgment alone while other violators escape liability altogether. The abuse of the no contribution rule by antitrust violators and plaintiffs is also eliminated.

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[119] Olson Farms, Inc. v. Safeway Stores, Inc., [1979-2] Trade Cas. at 79,707 (dissenting opinion), *citing* DOBBS, LAW OF REMEDIES, § 10.6 at 704 (1973): "[s]ince damages are trebled, there is quite a sufficient quantum of liability to punish . . . [all wrongdoers] by forcing them to share the liability."

[120] The Antitrust Section's report is reprinted in 936 ANTITRUST & TRADE REG. REP. E-1 (BNA) (October 25, 1979).

[121] *Id.* at E-2.

[122] S. REP. NO. 96-428, Antitrust Equal Enforcement Act of 1979, 96th Cong., 1st Sess. (1979), *reprinted in* 942 ANTITRUST & TRADE REG. REP. I (BNA) (Special Supp.) (December 6, 1979).

Second, by allowing contribution, the deterrent effect of the antitrust laws may actually be enhanced because more violators will be brought into actions to face liability. Third, *Professional's* limitation on the availability of contribution by placing it within the district court's discretion prevents flagrant offenders from taking advantage of the remedy. The deterrent effect gained by statutory treble damages remains unchanged for these violators. Because the *Professional* rule thus represents a careful balance of the contribution doctrine and antitrust principles, it is preferable to the rigid approach of the other circuits in *Abraham* and *Olson Farms*.

C. Scott Stevenson