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Stuart R. Schwartz

N. Henry Simpson III

Richard L. Arnold

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# CONTRIBUTION IN PRIVATE ACTIONS UNDER THE FEDERAL ANTITRUST LAWS

by  
*Stuart R. Schwartz,\* N. Henry Simpson, III,\*\**  
*and Richard L. Arnold\*\*\**

## TABLE OF CONTENTS

- I. CONTRIBUTION AT COMMON LAW
  - A. Development of the Right to Contribution
    - Common Law Origins of Contribution
    - Uniform Contribution Among Tortfeasors Act
  - B. The Right to Contribution in Federal Common Law
    - Admiralty Law
    - Federal Aviation Law
    - Federal Securities Laws
- II. CONTRIBUTION UNDER THE ANTITRUST STATUTES
  - A. Joint and Several Liability
  - B. The Right to Contribution for Intentional Torts
    - Contribution for Intentional Violations of Federal Securities Laws
    - Contribution for Intentional Violations of Antitrust Law
  - C. Prognosis for Contribution in Antitrust Cases
- III. APPORTIONMENT OF DAMAGES AND THE EFFECTS OF SETTLEMENT
  - A. Division of Liability
    - Apportionment at Common Law
    - Pro Rata Apportionment
    - Comparative Fault Apportionment
  - B. The Effects of Settlement on Damage Apportionment
    - Settlement in Securities and Admiralty Cases
    - Effects of Settlement in Antitrust Cases
  - C. Insolvent or Absent Defendants
- IV. PROCEDURAL DEVICES FOR ASSERTING THE CONTRIBUTION CLAIM
- V. CONCLUSION

The Eighth Circuit's recent decision of *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*<sup>1</sup> announced for the first time at the federal

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\* B.A., Northwestern University; J.D., Southern Methodist University. Attorney at Law, El Paso, Texas.

\*\* B.A., Southern Methodist University; M.A., University of Chicago; J.D., Southern Methodist University. Attorney at Law, Dallas, Texas.

\*\*\* B.A., J.D., Southern Methodist University. Attorney at Law, Dallas, Texas.

1. 594 F.2d 1179 (8th Cir. 1979). As this Article went to press, the Fifth Circuit announced its decision in *Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc.*, ANTITRUST & TRADE REG. REP. (BNA) No. 936, at F-1 (5th Cir. Oct. 16, 1979), holding that no right of

appellate level that contribution is available between antitrust defendants in private damages actions. Because this decision is a dramatic break with traditional authorities, a conflict among the circuits may be expected to develop on this issue. The decision also raises other unsettled issues, such as the proper method of apportionment of damages and the effects of settlement on damage apportionment. This Article reviews the developments leading to *Professional Beauty Supply* and explores possible treatments of a new rule allowing contribution to antitrust defendants, including methods of apportioning damages, the proper treatment of settlements, the effect of insolvent or absent defendants, and available procedural devices for asserting a contribution claim.

## I. CONTRIBUTION AT COMMON LAW

### A. *Development of the Right to Contribution*

The doctrine of contribution gives the right to one who has discharged a common liability to recover from others who are jointly liable their respective shares of that common obligation.<sup>2</sup> Historically, once a person has been compelled by a legal duty to pay or satisfy more than his fair share of a common burden or obligation, he is entitled to contribution from others jointly liable as long as his liability is not founded upon a malicious or intentional act.<sup>3</sup> Because contribution traces its origin to equity, rather than contract, it serves as a means of assisting in the fair division of loss, thereby preventing injustice.<sup>4</sup> As a consequence, the measure of recovery

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contribution is available to an antitrust defendant under the federal antitrust laws. The court based its decision in large part on the "prevailing economic theory" that the "possibility of imposition of sole liability has an enhanced deterrent effect" on would-be defendants. *Id.* at F-2. The court also rejected arguments that (1) a rule prohibiting contribution would encourage collusion between the plaintiff and one or more potential defendants so as to exclude those defendants from the litigation; (2) denying contribution is inconsistent with the Supreme Court's rejection of *in pari delicto* as a defense to an antitrust action; (3) denial of contribution in an antitrust context is inconsistent with the allowance of contribution under other federal statutes; and (4) denying contribution amounts to a taking of property without fifth amendment due process and equal protection of the laws. *Id.* at F-3. In a partially dissenting opinion, Judge Morgan suggested that contribution be awarded the defendant whose liability is based solely on an unintentional violation of the antitrust laws. *Id.* at F-5.

The decision in *Abraham Construction* appears to be in direct conflict with *Professional Beauty Supply*, thereby ripening for determination by the Supreme Court the issue of whether the right itself is available to antitrust defendants.

2. Gregory, *Contribution Among Tortfeasors: A Uniform Practice*, 13 WIS. L. REV. 365 (1938); Annot., 53 A.L.R.3d 184 (1973). Contribution has also been defined as a payment made by each person having a common interest or liability of his share in the loss suffered or monies paid by one of the parties on behalf of the others in satisfaction of their common obligation. *Fidelity & Cas. Ins. Co. v. Sears, Roebuck & Co.*, 124 Conn. 227, 199 A. 93 (1938).

3. A person who has discharged more than his proportionate share of a joint duty is entitled to contribution from the other or others except where the payor is barred by the wrongful nature of his conduct. RESTATEMENT OF RESTITUTION § 81 (1937).

4. *Vickers Petroleum Co. v. Biffle*, 239 F.2d 602, 606 (10th Cir. 1956). One court went so far as to base contribution on the principle of morality. *Lovrien v. Fitzgerald*, 245 Iowa 1325, 66 N.W.2d 458 (1954). See also RESTATEMENT (SECOND) OF TORTS § 886A, Comment c (1965).

is limited to the amount one obligor has paid in excess of his share, a ratable sum of the loss actually sustained,<sup>5</sup> and no more.<sup>6</sup>

The right to contribution arises long before the right to recover for contribution. While the former is said to arise upon entering into a joint obligation with others that results in liability, the latter is an inchoate right until it arises after the liability has been discharged by one who has paid a greater amount than his pro rata share of the liability.<sup>7</sup> Furthermore, it is not sufficient that the obligor discharge the joint liability of his own free will; there must be a legal duty imposed, either through reasonable settlement and nonsuit or through a judgment, before the discharging obligor can assert his right to contribution.<sup>8</sup>

*Common Law Origins of Contribution.* At common law this general rule of contribution was not followed when the common burden was incurred by joint tortfeasors<sup>9</sup> or wrongdoers, even if the discharging tortfeasor was compelled to discharge more than his share of the liability.<sup>10</sup> The historical precedent responsible for the denial of contribution in tort cases was *Merryweather v. Nixan*,<sup>11</sup> in which the plaintiff, after satisfying a judgment for injuries to a reversionary interest in a mill jointly caused by himself and his codefendant,<sup>12</sup> brought an action for contribution against his co-

5. *Glasscock v. Hamilton*, 62 Tex. 143 (1884); 18 AM. JUR. 2d *Contribution* § 15 (1965).

6. Contribution differs from indemnity. Unlike contribution, the right of indemnity grants one who has been compelled to pay for damages primarily caused by another the right to recover from the other the entire sum paid. The theory underlying indemnity is that the primary obligation is on the person against whom indemnity is sought. Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130, 131 (1932); Annot., 53 A.L.R.3d 184 (1973). Indemnity is most appropriate where there is a preexisting relationship or a primary right between the principal obligor and the person who has previously discharged the obligation. Leflar, *supra*, at 131; Comment, *Contribution Among Joint Tortfeasors*, 44 TEXAS L. REV. 326 (1965). While both contribution and indemnity are suits for reimbursement, indemnity is based primarily upon contract; unless there is an express or implied agreement to impute damages to another, no right to indemnity can exist. It may still be possible, however, to seek contribution from joint obligors without contractual relationships. *Kessel v. Murray*, 197 Iowa 17, 196 N.W. 591 (1924). See also RESTATEMENT OF RESTITUTION § 77 (1937) (a person who has discharged a duty that is owed by him but which, as between himself and another, should have been discharged by the other is entitled to indemnification); RESTATEMENT (SECOND) OF TORTS § 886B (1965).

7. *Allbright Bros., Contractors, Inc. v. Hull-Dobbs Co.*, 209 F.2d 103 (6th Cir. 1953) (Tenn. law). Throughout this Article, pro rata shall refer to the equal division of liability among jointly liable wrongdoers. For example, if there are four joint wrongdoers, each would be liable for one-fourth of the total amount of liability. See RESTATEMENT (SECOND) OF TORTS § 866A(h) (1965).

8. See *Brown & Root, Inc. v. United States*, 198 F.2d 138, 142 (5th Cir. 1952).

9. "Joint tortfeasor" has been defined as two or more persons jointly or severally liable in tort for the same injury to persons or property, whether or not a judgment has been recovered against them. Annot., 53 A.L.R.3d 184 (1973).

10. See, e.g., *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952).

11. 101 Eng. Rep. 1337 (K.B. 1799).

12. Prosser surmises from the "very meagre report of the case" that the judgment was joint and that they had acted in concert since they were joined at a period in history when English courts did not permit joinder on any other basis. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 50 (4th ed. 1971).

wrongdoer. Chief Justice Kenyon affirmed the trial court's nonsuit, stating that "he had never before heard of such an action having been brought, where the former recovery was for a tort."<sup>13</sup>

Although the report of the case is sparse, it is believed that the injuries to the mill were intentionally inflicted.<sup>14</sup> That being true, the case does not, in actuality, state the "general rule" for which is it noted, but rather the exception, which has always been true, that there is no right to contribution where the wrong done was intentional.<sup>15</sup> Later English cases recognized this distinction and permitted contribution among joint tortfeasors as long as the act was unintentional and not malicious.<sup>16</sup> In 1935, the right to contribution in negligent tort actions was finally recognized by statute in England.<sup>17</sup> The earlier American cases also seemed to draw the distinction between intentional and negligent torts, allowing contribution in negligence actions only.<sup>18</sup> This distinction faded, however, and near unanimity was reached quickly among the jurisdictions, denying contribution whether the wrong complained of was intentional or negligent.<sup>19</sup> In fact, the rule of no contribution became so pervasive that for over a century only nine jurisdictions permitted contribution.<sup>20</sup>

13. 101 Eng. Rep. at 1337.

14. Leflar, *supra* note 6, at 130; RESTATEMENT OF RESTITUTION, Introductory Note to Title C, Indemnity and Contribution Between Tortfeasors 385-89 (1937); W. PROSSER, *supra* note 12, § 50. As additional support for the argument that the decision involved an intentional tort, the word "tort" at the time of the decision was used to refer only to intentional actions such as battery and slander. Reath, *Contribution Between Persons Jointly Charged for Negligence—Merryweather v. Nixan*, 12 HARV. L. REV. 176, 178 (1898). Since the word "tort" stands as the basis of the decision, it seems clear that Lord Kenyon based his holding on the fact that the act was intentional.

15. It is singularly unfortunate, and has led to misunderstanding, that Merryweather v. Nixan should have been continually treated as stating the "general rule." As a matter of fact that case states not the rule, but the exception. The general rule is that among persons jointly liable the law applies an assumpsit either for indemnity or contribution, and the exception is that no assumpsit, either express or implied, will be enforced among wilful tortfeasors or wrongdoers.

Reath, *supra* note 14, at 177. See also Leflar, *supra* note 6, at 130.

16. See W. PROSSER, *supra* note 12, § 50, at 306 & nn.41 & 42.

17. Law Reform (Married Women and Tortfeasors) Act, 1935, 25 & 26 Geo. 5, c. 30, § 6(1)(c). The Act provides that a tortfeasor can recover contribution from a joint tortfeasor as long as the joint actions are not wanton.

18. See W. PROSSER, *supra* note 12, § 50, at 306 & nn.45 & 46; Reath, *supra* note 14, at 176.

19. Union Stock Yards Co. v. Chicago B. & Q.R.R., 196 U.S. 217 (1905); see W. PROSSER, *supra* note 12, § 50, at 306 & n.47; Comment, *supra* note 6, at 326; text accompanying notes 55-58 *infra*. An underlying reason for this view may have been the notion in equity courts that one seeking relief must come into court with clean hands. Leflar, *supra* note 6, at 130, citing 1 POMEROY, EQUITY JURISPRUDENCE 737 (4th ed. 1918).

20. Knell v. Feltman, 174 F.2d 662 (D.C. Cir. 1949); George's Radio, Inc. v. Capital Transit Co., 126 F.2d 219 (D.C. Cir. 1942); Wiener v. United Air Lines, 216 F. Supp. 701 (S.D. Cal. 1962) (Nev. law); Best v. Yerkes, 247 Iowa 800, 77 N.W.2d 23 (1956); Quatray v. Wicker, 178 La. 289, 151 So. 208 (1933); Bedell v. Reagan, 159 Me. 292, 192 A.2d 24 (1963); Grothe v. Shaffer, 305 Minn. 17, 232 N.W.2d 227 (1975); Ankeny v. Moffett, 37 Minn. 109, 33 N.W. 320 (1887); Goldman v. Mitchell-Fletcher Co., 292 Pa. 354, 141 A. 231 (1928); Davis v. Broad St. Garage, 191 Tenn. 320, 232 S.W.2d 355 (1950); Ellis v. Chicago & N.W. Ry., 167 Wis. 392, 167 N.W. 1048 (1918). Louisiana, Nevada, Pennsylvania, Tennessee, and Wisconsin have since codified these judicial decisions. See notes 49 & 50 *infra*.

Although Lord Kenyon may have based his decision in *Merryweather v. Nixan*<sup>21</sup> on the lack of precedents in the area of contribution,<sup>22</sup> certain public policy reasons argue for the no-contribution rule. As Leflar<sup>23</sup> saw it, denying a tortfeasor access to the courts operated to punish him for his misconduct and discouraged similar activities.<sup>24</sup> Furthermore, Leflar believed that the rule denying contribution served as a deterrent by instilling a fear of being held accountable for the entire liability, not only his but his cotortfeasors' as well.<sup>25</sup> A third policy ground is that the plaintiff should have the choice of whom to sue; to deny that right would be to eliminate one of the major advantages the plaintiff has.<sup>26</sup>

However slowly, dissatisfaction with the rule denying contribution increased.<sup>27</sup> Scholars debated the advantages and disadvantages of contribution in negligence causes of action.<sup>28</sup> While all agreed that the no-

21. 101 Eng. Rep. 1337 (K.B. 1799).

22. See text accompanying note 13 *supra*.

23. Leflar, *supra* note 6.

24. *Id.* at 133. See also Bohlen, *Contribution and Indemnity Between Tortfeasors*, 21 CORNELL L.Q. 552, 557 (1936).

25. Leflar, *supra* note 6, at 134. Leflar was also concerned that the courts did not have sufficient time to adjudicate disputes concerning transactions that "flout the very law which the courts are asked to administer." *Id.*

26. See, e.g., James, *Contribution Among Joint Tortfeasors: A Pragmatic Criticism*, 54 HARV. L. REV. 1156, 1161 (1941) ("[Allowing contribution] puts the plaintiff at a disadvantage in pre-trial bargaining, where he can no longer play one defendant off against the other, with the fear of each that unless he settles he may have to bear alone the full weight of the verdict."). See also Comment, *supra* note 6, at 326. Leflar has also stated that to deny the plaintiff the right to sue whom he or she chooses might cause some of the joint tortfeasors to collusively influence plaintiff's selection of the unfortunate defendants. Leflar, *supra* note 6, at 137.

27. As Prosser put it:

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

W. PROSSER, *supra* note 12, § 50 at 307 (footnotes omitted).

28. See, e.g., James, *supra* note 26; Gregory, *Contribution Among Joint Tortfeasors: A Defense*, 54 HARV. L. REV. 1170 (1941); James, *Replication*, 54 HARV. L. REV. 1178 (1941); Gregory, *Rejoinder*, 54 HARV. L. REV. 1184 (1941). Professor Fleming James, writing in favor of the "general rule" against contribution, was concerned that granting such a right would make an individual tortfeasor reluctant to settle a claim, knowing he could be forced to return to the action on a claim for contribution if a judgment is subsequently rendered against his cotortfeasor in his absence. As he put it, "a claimant cannot by covenant protect one wrongdoer against contribution claims which might accrue to other wrongdoers." James, *supra* note 26, at 1160. James believed that contribution tended to favor the more affluent defendant at the expense of the poor and weak since, from his study of the cases, it was apparent that an insured individual would always bring an action for contribution in those states that allowed it, although the reverse was not true, for uninsured defendants did not seek contribution as often. *Id.* at 1165-67. It was not only the tortfeasors that concerned James, however. He was also interested in serving the interests of the plaintiff whom he felt would be disadvantaged by being unable to settle unless he or she could reach a settlement with all tortfeasors. *Id.* at 1161. Furthermore, there were numerous tactical advantages why the plaintiff might wish to sue one defendant and not another. To allow the defendant to abrogate that decision would destroy those advantages. James listed popularity of the defendant, confusion of the issues to the jury, and the possibility that the third party defendant

contribution rule should apply when intentional tortfeasors are involved,<sup>29</sup> the minority view granting a right to contribution among joint tortfeasors in unintentional torts gained increasing support,<sup>30</sup> and *Merryweather* began losing its appeal. In certain states, the rule was abrogated by judicial decision;<sup>31</sup> in others, it was changed by statute.<sup>32</sup> Eventually, the trend to allow contribution became so pervasive that *Merryweather* was no longer the general rule. This trend, however, did not change the rule that always existed that contribution could not be enforced between willful or intentional joint tortfeasors.<sup>33</sup>

*Uniform Contribution Among Tortfeasors Act.* To create uniformity among the various state approaches to contribution, the National Conference of Commissioners on Uniform State Laws drafted the first Uniform Contribution Among Tortfeasors Act in 1939.<sup>34</sup> It adopted a uniform approach to the modern trend of permitting contribution among joint tortfeasors.<sup>35</sup> Section 1 of the Uniform Act grants a right to contribution when two or more persons are jointly and severally liable in tort for the same injury to person or damage to property.<sup>36</sup> The right to contribution exists regardless of whether a judgment has been recovered against any or

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could defeat the liability the plaintiff could have otherwise had against the named defendants as three such advantages. *Id.* at 1164-65.

Professor Charles Gregory, who viewed contribution as a "sense of community justice or fairness" countered James's concerns about settlement as justification for endorsing the rule of no contribution by pointing to the recently drafted Uniform Contribution Among Tortfeasors Act (1939 version) as one means of disposing of that problem. The Act provides that settlement discharges the settling tortfeasor from subsequent claims for contribution as long as the remaining liability is reduced by the amount of the settling tortfeasor's proportionate share of the total liability in contribution proceedings. Gregory, *Contribution Among Joint Tortfeasors: A Defense*, 54 HARV. L. REV. 1170, 1172-73 (1941) (citing UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT §§ 4 & 5 (1939 version)).

29. "[T]he common law is settled, and there seems to be no demand for a change—there can be no non-contractual contribution between tortfeasors who knew and intended the tortious consequences of their misconduct." Leflar, *supra* note 6, at 139 (citing *Merryweather v. Nixan*, 101 Eng. Rep. 1337 (K.B. 1799)). See also UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 1(c).

30. Annot., 60 A.L.R.2d 1366 (1958).

31. See, e.g., *Farwell v. Becker*, 129 Ill. 261, 21 N.E. 792 (1889).

32. See, e.g., N.Y. CIVIL PRACTICE ACT § 211-a, quoted in *Hadcock v. Wiggins*, 147 Misc. 252, 263 N.Y.S. 583, 584 (Sup. Ct. Cayuga County 1933); TEX. REV. CIV. STAT. ANN. art. 2212 (Vernon 1925), as cited in *Oats v. Dublin Nat'l Bank*, 127 Tex. 2, 10, 90 S.W.2d 824, 829 (1936).

33. See, e.g., RESTATEMENT (SECOND) OF TORTS § 886A(3), & Comment j (1965).

34. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT (1939 version). One of the early reformers in the field of negligence cases, Professor Gregory served as Reporter for the National Conference of Commissioners on Uniform State Laws during the period within which the Uniform Act was drafted. See note 28 *supra*.

35. The commissioners explained this approach by noting that "[a]ll tortfeasors are not rascals," and articulating a goal of proportionate distribution of the common burden among those tortfeasors upon whom it rests. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT, Commissioners' Prefatory Note (1939 version). In 1955, the draft was revised after the Conference of Commissioners recognized that several states had enacted statutes differing from the language suggested by the 1939 Act. The new Uniform Contribution Among Tortfeasors Act retained the same general purpose, however. *Id.* Commissioners' Prefatory Note.

36. *Id.* § 1(a).

all of the joint tortfeasors, thus allowing for contribution to recover portions of out-of-court settlements.<sup>37</sup> A precondition to recovery, however, requires that the tortfeasor pay more than his pro rata share of the common liability.<sup>38</sup> Moreover, his total contribution recovery is limited to the amount paid by him in excess of his pro rata share.<sup>39</sup>

A difficult question arises, however, when one tortfeasor settles his own liability and receives, in exchange, a release<sup>40</sup> or covenant not to sue<sup>41</sup> from the injured party. First, does the release by the injured party of one tortfeasor bar pursuit of his claim against another tortfeasor? Secondly, does the settlement and release bar the cotortfeasor's right to contribution against the settling tortfeasor, assuming both tortfeasors are found liable?<sup>42</sup> In jurisdictions that barred contribution these questions never arose; the fact that the injured person settled with one of several tortfeasors was immaterial. Once the states began to allow contribution, finding solutions to these problems became imperative.

In answer to the first question, the Uniform Act permits the plaintiff to pursue his action against the nonsettling tortfeasor, notwithstanding the release, unless the release provides otherwise,<sup>43</sup> but the plaintiff's claim against the others is reduced by the greater of the amount stipulated in the release or the covenant or in the amount of consideration paid for it.<sup>44</sup> As to the second question, the release discharges the settling tortfeasor from all liability for contribution to any other tortfeasor.<sup>45</sup>

Aside from these questions, the Uniform Act continues to require that the tortfeasor's satisfaction of the common liability must be the result of a legal duty before it entitles him to contribution from his cotortfeasors.<sup>46</sup> Furthermore, it is not sufficient that the tortfeasor merely settle with the claimant. In order to entitle the settling tortfeasor to contribution, the settlement must extinguish the liability of the other cotortfeasors as well.<sup>47</sup> Moreover, in an attempt to prevent collusion between the settling tortfeasor and the claimant, the Uniform Act requires that the settlement

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37. *Id.*

38. *Id.* § 1(b).

39. *Id.* This section goes on to state that "[N]o tortfeasor is compelled to make contribution beyond his own pro rata share of the entire liability." These rules comport with RESTATEMENT (SECOND) OF TORTS § 886A (1965), discussed in note 53 *infra*.

40. A release is a written contract or agreement by which a disputed claim or right is given up or abandoned to the person against whom the claim exists. Annot., 34 A.L.R.3d 1374 (1970).

41. A covenant not to sue provides that, for consideration, the injured party will not bring suit against settling tortfeasors. Unless otherwise provided, the covenant reserves a cause of action against the nonsettling tortfeasor. See Comment, *supra* note 6, at 335-40.

42. The difficulty inherent in these problems can best be exemplified by noting that the American Law Institute took no position on the subject in its RESTATEMENT (SECOND) OF TORTS § 886A (1965).

43. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 4(a). *Contra*, Annot., 104 A.L.R. 846 (1936); Annot., 50 A.L.R. 1057 (1927). See also Comment, *supra* note 6, at 334.

44. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 4(a).

45. *Id.* § 4(b).

46. *Id.* § 1(a).

47. *Id.* § 1(d).



be reasonable.<sup>48</sup>

Currently, fifteen jurisdictions have enacted the Uniform Act or some variation of it.<sup>49</sup> Other jurisdictions that recognize a right to contribution have chosen not to adopt the Uniform Act, however. Some provide for similar relief through their own legislative enactments,<sup>50</sup> while others have been content to permit the courts to grant the right themselves through changes in the common law.<sup>51</sup> In general, these judicial and statutory rules are similar in that they all provide for contribution if three elements are present: (1) a common liability on the part of the negligent tortfeasors, (2) a compulsory (legal) discharge of this common liability, either by way of judgment or settlement, and (3) the placement of an unequal portion of that common burden upon the party seeking contribution.<sup>52</sup> Once these three elements exist, the right to contribution ripens from an inchoate right to a judicial right.<sup>53</sup>

### B. *The Right to Contribution in Federal Common Law*

While the principle of *Merryweather v. Nixan*<sup>54</sup> may have been abrogated in some state jurisdictions by legislative enactment or judicial

48. *Id.*

49. ALASKA STAT. §§ 09.16.010-.060 (1973); ARK. STAT. ANN. §§ 34-1001 to -1009 (1962); COLO. REV. STAT. §§ 13-50.5-101 to -106 (Cum. Supp. 1978); DEL. CODE ANN. tit. 10, §§ 6301-6308 (1975); FLA. STAT. ANN. § 768.31 (West Supp. 1979); HAWAII REV. STAT. §§ 663-11 to -17 (1976); MD. ANN. CODE art. 50, §§ 16-24 (1972); MASS. ANN. LAWS. ch. 231B, §§ 1-4 (Michie/Law. Co-op 1974); NEV. REV. STAT. §§ 17.215-.325 (1973 & Supp. 1975); N.M. STAT. ANN. §§ 24-1-11 to -18 (1953); N.C. GEN. STAT. §§ 1B-1 to -6 (1969 & Supp. 1977); 42 PA. CONS. STAT. ANN. § 7102(b) (Purdon 1979); R.I. GEN. LAWS §§ 10-6-1 to -11 (1970 & Cum. Supp. 1978); S.D. COMP. LAWS ANN. §§ 15-8-11 to -22 (1967); TENN. CODE ANN. §§ 23-3101 to -3106 (Cum. Supp. 1978).

50. *See, e.g.*, CAL. CIV. PROC. CODE §§ 875-880 (West Supp. 1979); GA. CODE ANN. § 105-2012 (Cum. Supp. 1979); IDAHO CODE §§ 6-803 to -806 (1979); KY. REV. STAT. § 412.030 (1972); LA. CIV. CODE ANN. art. 2203 (West 1952); MICH. COMP. LAWS ANN. §§ 600.2925a-d (Cum. Supp. 1979-1980); MISS. CODE ANN. § 85-5-5 (1972); MO. ANN. STAT. § 537.060 (Vernon 1953); N.J. STAT. ANN. §§ 2A:53A-1 to -5 (West 1952); NEW YORK CIV. PRAC. LAW § 1401-04 (McKinney 1976); N.D. CENT. CODE §§ 32-38-01 to -04 (1976); OHIO REV. CODE ANN. §§ 2307.31-.32 (Page Supp. 1978); OKLA. STAT. ANN. tit. 12, § 832 (West Cum. Supp. 1978-1979); OR. REV. STAT. §§ 18.440-.460 (1977); TEX. REV. CIV. STAT. ANN. arts. 2212, 2212a (Vernon 1971 & Supp. 1978-1979); UTAH CODE ANN. §§ 78-27-39 to -43 (1977); VA. CODE § 8.01-34 (1977); W. VA. CODE § 55-7-13 (1966); WIS. STAT. ANN. §§ 113.01-.11 (1974 & Cum. Supp. 1979-1980); WYO. STAT. §§ 1-1-110 to -113 (1977).

51. *See, e.g.*, *George's Radio, Inc. v. Capital Transit Co.*, 126 F.2d 219 (D.C. Cir. 1942); *Skinner v. Reed-Prentice Div. Package Mach. Co.*, 70 Ill. 2d 1, 374 N.E.2d 437 (1977); *National Farmers Union Property & Cas. Co. v. Nelson*, 260 Iowa 163, 147 N.W.2d 839 (1967); *Best v. Yerkes*, 247 Iowa 800, 77 N.W.2d 23 (1956); *Bedell v. Reagan*, 159 Me. 292, 192 A.2d 24 (1963); *Grothe v. Shaffer*, 305 Minn. 17, 232 N.W.2d 227 (1975); *Ankeny v. Moffett*, 37 Minn. 109, 33 N.W. 320 (1887); *Royal Indem. Co. v. Aetna Cas. & Sur. Co.*, 193 Neb. 752, 229 N.W.2d 183 (1975).

52. *See* Comment, *supra* note 6, at 329-33.

53. *See also* RESTATEMENT (SECOND) OF TORTS § 886A (1965), which grants a right to contribution between unintentional joint tortfeasors regardless of whether a judgment against any of them has been entered. The right arises when one tortfeasor discharges the entire claim for the harm by paying more than his pro rata share of the common liability. There is no right to contribution in favor of one who has made a partial payment of that liability. *Id.* § 886A, Comment f.

54. 101 Eng. Rep. 1337 (K.B. 1799); *see* notes 11-13 *supra* and accompanying text.

changes, the traditional principle denying contribution in tort cases has long been embedded in the federal common law, absent statutory preemption.<sup>55</sup> The Supreme Court first articulated its own no-contribution rule in *Union Stock Yards Co. v. Chicago, Burlington & Quincy Railroad*,<sup>56</sup> in which an injured employee sued a stock yard company after a faulty brake on a railroad car injured him. The plaintiff recovered on the ground that the injuries were caused by the company's negligence in failing to inspect cars within its yard.<sup>57</sup> Following payment of the judgment, the company brought an action seeking contribution from the railroad that owned the faulty car. The Court refused to allow contribution, stating that "the general principle of law is well settled that one of several wrongdoers cannot recover against another wrongdoer, although he may have been compelled to pay all the damages for the wrong done."<sup>58</sup>

*Admiralty Law.* Almost fifty years later, the Court made it clear that it still had no desire to depart from the common law rule against contribution. In *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*<sup>59</sup> the plaintiff brought an action to assert contribution in a noncollision admiralty case.<sup>60</sup> The Court refused to fashion such a rule in the absence of congressional action. While the Court recognized that some dissatisfaction existed with a rule that compelled one tortfeasor to bear the entire burden of a loss not entirely caused by his negligence,<sup>61</sup> it was convinced that "legislative consideration and action can best bring about a fair accommodation of the diverse but related interests of these groups."<sup>62</sup> As Congress had stopped short of creating a right to contribution when it enacted the Longshoremen's and Harbor Workers' Compensation Act,<sup>63</sup> the Court believed that it was inappropriate for it to do so.<sup>64</sup>

The Court retreated somewhat from its position in *Halcyon* when it later permitted contribution in another noncollision admiralty case. In *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*<sup>65</sup> the Court distinguished *Halcyon* and *Atlantic Coast Line Railroad v. Erie Lackawanna Railroad*<sup>66</sup> by noting that the joint tortfeasor against whom contribution was sought in those cases

55. See, e.g., Securities Act of 1933, § 11(f), 15 U.S.C. § 77k(f) (1976); Securities Exchange Act of 1934, §§ 9(e), 18(b), 15 U.S.C. §§ 78i(e), 78r(b) (1976).

56. 196 U.S. 217 (1905).

57. *Id.* at 219.

58. *Id.* at 224.

59. 342 U.S. 282 (1952).

60. As to admiralty actions that involved collision due to the fault of both tortfeasors, admiralty law recognized the doctrine that each is to share equally the damages sustained by each, as well as the damage inflicted upon an innocent third person. See, e.g., *The "North Star,"* 106 U.S. 17 (1882).

61. 342 U.S. at 285.

62. *Id.* at 286. The Court concluded that "it would be unwise to attempt to fashion new judicial rules of contribution" in the absence of congressional action. *Id.* at 285.

63. 33 U.S.C. §§ 901-950 (1976 & Supp. 1970-1977).

64. 342 U.S. at 287; accord, *Atlantic Coast Line R.R. v. Erie Lackawanna R.R.*, 406 U.S. 340 (1972).

65. 417 U.S. 106 (1974).

66. 406 U.S. 340 (1972).

was immune from tort liability under the Longshoremen's and Harbor Workers' Compensation Act.<sup>67</sup> Such was not the case in *Cooper Stevedoring*. There, the injured longshoreman brought an action against owners of a vessel for injuries sustained when he fell into a gap in a pile of crates loaded by Cooper. The owners filed a third-party complaint against Cooper for contribution. Since the Act's limitation-of-liability provision was inapplicable to the facts, the Court followed the previous trend of the Court by liberalizing the application of division of damages in situations in which it was deemed to be "just and proper."<sup>68</sup> It is important to note, however, that the Court has restricted contribution to negligence causes of actions,<sup>69</sup> thus preserving the rule against contribution between intentional wrongdoers.<sup>70</sup> If a deliberate and intentional tort committed by two admiralty tortfeasors caused injury to another, it is doubtful that the Supreme Court would allow contribution.

*Federal Aviation Law.* Admiralty law is not, however, the only area of federal common law that has seen a trend toward contribution. In *Kohr v. Allegheny Airlines, Inc.*<sup>71</sup> the Seventh Circuit permitted contribution in a federal aviation case. Allegheny Airlines and the Federal Aviation Administration (FAA), as cotortfeasors, had agreed on a pro rata formula to be employed in disposing of claims brought on behalf of passengers killed in a midair collision. Three other defendants were not parties to the agreement. After satisfying the first group of passenger claims, both the FAA and Allegheny asserted claims for contribution against the other defendants. The trial court dismissed these third-party complaints.<sup>72</sup> On appeal, the Seventh Circuit permitted Allegheny Airlines and the FAA to assert a right of contribution. Finding federal law applicable,<sup>73</sup> the court deter-

67. 417 U.S. at 109; see 33 U.S.C. § 905 (Supp. 1970-1977). The Act grants immunity to the employer when an employee is injured.

68. 417 U.S. at 110. Professor Leflar notes that admiralty has always been different, fashioning a rule whereby the injured party and the tortfeasor, both negligent, are required to divide the total loss between them equally. He concluded that such a position avoids both the common law rule of no contribution as well as the newer doctrine of contributory negligence. Leflar, *supra* note 6, at 138-39. See generally Staring, *Contribution and Division of Damages in Admiralty and Maritime Cases*, 45 CALIF. L. REV. 304 (1957).

69. See, e.g., *Avondale Shipyards, Inc. v. Vessel Thomas E. Cuffe*, 434 F. Supp. 920, 931 (E.D. La. 1977) (citing *Cooper*, 417 U.S. at 115), in which the court held that contribution under *Cooper* rests upon a finding of concurrent fault.

70. "Under the statutes or apart from them, the tendency has been to continue the original rule that there is no contribution in favor of those who commit intentional torts . . ." W. PROSSER, *supra* note 12, § 50, at 308. The same principle was incorporated into the UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 1(c). See notes 34-53 *supra* and accompanying text. One major exception to this general principle has developed under the Securities Acts. See notes 83, 121-26 *infra* and accompanying text.

71. 504 F.2d 400 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975).

72. *Id.* at 402.

73. 504 F.2d at 403. Notwithstanding the Supreme Court's statement in *Erie R.R. v. Tompkins* that "[t]here is no federal general common law," 304 U.S. 64, 78 (1938), the federal common law still lives in a number of areas. In *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943), the Supreme Court stated that in the absence of a federal statute, "it is for the federal courts to fashion the governing rule according to their own standards." In *Kohr* the Seventh Circuit applied a federal common law right of contribution to an area

mined that a federal rule of contribution and indemnity among joint tortfeasors should control in aviation collision suits and rejected as being "outmoded and entirely unsatisfactory" the argument that favored the old common law rule of no contribution.<sup>74</sup>

*Federal Securities Laws.* Without express statutory authority, courts have similarly fashioned a right to contribution under section 10(b) of the Securities Exchange Act of 1934<sup>75</sup> and rule 10b-5 promulgated thereunder.<sup>76</sup> In *deHaas v. Empire Petroleum Co.*<sup>77</sup> the United States District Court for Colorado noted the express provision for contribution in sections 9(e)<sup>78</sup> and 18(b)<sup>79</sup> of the 1934 Act and concluded that contribution should also be implied when liability is alleged under section 10(b).<sup>80</sup> The position taken in *de Haas* has received support from numerous courts confronted with the same question.<sup>81</sup> These courts have permitted contribution primarily because of their dissatisfaction with the alternative of allowing defendants to escape liability simply because the plaintiff has sued one of the other joint

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perceived to be "the predominant, indeed almost exclusive, interest of the federal government in regulating the affairs of the nation's airways." 504 F.2d at 403. It also found that such a position avoids the application of differing state laws concerning contribution and indemnity and thus eliminates inconsistency of result in similar collision occurrences. *Id.* In reaching this conclusion, the court relied upon both *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292 (1944), and § 1108 of the Federal Aviation Act of 1958, 49 U.S.C. § 1508(a) (1976).

It appears undecided whether a right to contribution exists under title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1976). The courts have permitted certain defendants to counterclaim for contribution against unions that may be partially responsible for alleged sex discrimination. *See, e.g., International Union of Elec. Workers v. Westinghouse Elec. Corp.*, 73 F.R.D. 57 (W.D.N.Y. 1976) (contribution, rather than alignment, is the appropriate procedural device for raising claim to counterclaim); *Grogg v. General Motors Corp.*, 72 F.R.D. 523 (S.D.N.Y. 1976) (counterclaim against union for contribution appropriate). *But see Younger v. Glamorgan Pipe & Foundry Co.*, 418 F. Supp. 743, 797 (W.D. Va. 1976), *vacated on other grounds*, 561 F.2d 563 (4th Cir. 1977) (no federal common law right to contribution under title VII).

74. 504 F.2d at 405 (citing W. PROSSER, *supra* note 12, § 50). The court went a step further by advocating a system of comparative negligence whereby the trier of fact is asked to determine on a percentage basis the degree of negligence of each tortfeasor. *Id.*

75. 15 U.S.C. § 78j (1976).

76. 17 C.F.R. § 240.10b-5 (1978).

77. 286 F. Supp. 809 (D. Colo. 1968), *modified on other grounds*, 435 F.2d 1223 (10th Cir. 1970).

78. 15 U.S.C. § 78i(e) (1976).

79. *Id.* § 78r(b).

80. 286 F. Supp. at 815-16 (citing 3 L. LOSS, SECURITIES REGULATION 1739-40 n.178 (1961)).

81. *McLean v. Alexander*, 449 F. Supp. 1251 (D. Del. 1978), *rev'd on other grounds*, 599 F.2d 1190 (3d Cir. 1979); *Rice v. McDonnell & Co.*, 442 F. Supp. 952, 954 (S.D.N.Y. 1977); *Wassel v. Eglowsky*, 399 F. Supp. 1330 (D. Md. 1975), *aff'd on opinion below*, 542 F.2d 1235 (4th Cir. 1976); *Odette v. Shearson, Hammil & Co.*, 394 F. Supp. 946, 958 (S.D.N.Y. 1975); *Muth v. Dechert, Price & Rhoads*, 391 F. Supp. 935, 939 (E.D. Pa. 1975); *Gould v. American-Hawaiian S.S. Co.*, 387 F. Supp. 163, 169 (D. Del. 1974); *Alexander & Baldwin, Inc. v. Peat, Marwick, Mitchell & Co.*, 385 F. Supp. 230 (S.D.N.Y. 1974); *Liggett & Myers, Inc. v. Bloomfield*, 380 F. Supp. 1044, 1046 (S.D.N.Y. 1974); *Globus, Inc. v. Law Research Serv., Inc. (Globus II)*, 318 F. Supp. 955, 958 (S.D.N.Y. 1970), *aff'd per curiam on opinion below*, 442 F.2d 1346 (2d Cir.), *cert. denied*, 404 U.S. 941 (1971); *see notes 110-27 infra* and accompanying text.

tortfeasors who has subsequently satisfied all of their common liability.<sup>82</sup> The District Court for the Southern District of New York has even held that intentional tortfeasors may obtain contribution from one another for section 10(b) violations.<sup>83</sup>

Only recently have courts considered whether in federal treble damage antitrust actions the old common law rule disallowing contribution should be abandoned in favor of the modern trend in state and other federal cases. Currently, only the Eighth Circuit<sup>84</sup> and the United States District Court for the Eastern District of Arkansas<sup>85</sup> have allowed contribution in antitrust cases. Two other circuits are considering the question.<sup>86</sup> Both of those cases were appealed from decisions that refused to recognize the defendants' right to contribution.<sup>87</sup> Because of the potential conflict developing among the circuits, it is useful to consider the grounds upon which courts have permitted or denied contribution in the antitrust context.

## II. CONTRIBUTION UNDER THE ANTITRUST STATUTES

Violations of the federal antitrust statutes almost inherently involve concerted activity. Accordingly, the resulting principles of joint and several liability have been carefully developed by federal courts, both with respect to the effects of settlement and the calculation of treble damages. Contribution under an antitrust cause of action traditionally has been denied because of the intentional nature of the offense and the absence of statutory authority. Recent developments under the federal securities laws allowing contribution for intentional violations, coupled with the basic purposes of the antitrust statutes, now argue for a new rule permitting contribution.

### A. *Joint and Several Liability*

It has long been recognized that an action based upon sections 1<sup>88</sup> and

82. Fischer, *Contribution in 10b-5 Actions*, 33 BUS. LAW. 1821, 1826-27 (1978).

83. *Alexander & Baldwin, Inc. v. Peat, Marwick, Mitchell & Co.*, 385 F. Supp. 230 (S.D.N.Y. 1974).

84. *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179 (8th Cir. 1979).

85. *Little Rock School Dist. v. Borden, Inc.*, [1980-1] Trade Cas. ¶ 63,059 (E.D. Ark. 1979).

86. *Iowa Beef Processors, Inc. v. Spencer Foods, Inc.*, Nos. 3-77-0780, 3-77-0990 & 3-77-1080 (N.D. Tex. Sept. 1, 1978), *appeal docketed*, No. 78-3346 (5th Cir. Oct. 26, 1978); *Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc.*, No. 75-2820 (E.D. La. Oct. 5, 1977), *appeal docketed*, No. 78-1788 (5th Cir. Apr. 14, 1978); *Olson Farms, Inc. v. Safeway Stores, Inc.*, [1977-2] Trade Cas. ¶ 61,698 (D. Utah), *appeal docketed*, No. 77-2068 (10th Cir. Dec. 20, 1977).

87. The District Court for the Southern District of Texas recently followed the trend among the lower courts to deny the right to contribution. In *In re Corrugated Container Antitrust Litigation*, ANTITRUST & TRADE REG. REP. (BNA) No. 919, at E-1 (S.D. Tex. May 30, 1978), the court denied motions by four corrugated container manufacturers for leave to amend their answers to assert cross-claims for contribution against settling defendants. For a discussion of the case, see note 163 *infra*.

88. "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (1976).

2<sup>89</sup> of the Sherman Act and section 4 of the Clayton Act<sup>90</sup> is founded upon a tort theory of liability.<sup>91</sup> Accordingly, each joint antitrust tortfeasor is jointly and severally liable for antitrust law violations.<sup>92</sup> The plaintiff thus has the privilege of suing only those defendants it wishes while still holding all violators accountable for the entire sum of damages caused by the conspiracy.<sup>93</sup> In *City of Atlanta v. Chattanooga Foundry & Pipe Works*<sup>94</sup> the plaintiff sued two pipe manufacturers to recover for overcharges on sales made by a third member of the conspiracy. In permitting the case against the two manufacturers to proceed without the third conspirator, the Court of Appeals for the Sixth Circuit stated that it was of "no vital significance"<sup>95</sup> that the third corporation was not sued. The court assumed, therefore, that the only limitation the plaintiff faced concerned the amount of damages he could collect from any or all defendant coconspirators. Which defendant the plaintiff recovered from was irrelevant, but he was entitled to only one recovery.<sup>96</sup> If an antitrust plaintiff recovers an item of damages from one coconspirator through a release, he may not recover that same item later from another coconspirator, although each coconspirator remains severally responsible for the unsatisfied amount of

89. "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be guilty of a felony . . ." *Id.* § 2.

90. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

*Id.* § 15.

91. *Solomon v. Houston Corrugated Box Co.*, 526 F.2d 389, 392 n.4 (5th Cir. 1976); *Northwestern Oil Co. v. Socony-Vacuum Oil Co.*, 138 F.2d 967, 970 (7th Cir.), *cert. denied*, 321 U.S. 792 (1943); *Wainwright v. Kraftco Corp.*, 58 F.R.D. 9, 11-12 (N.D. Ga. 1973); *Fagan v. Sunbeam Lighting Co., Inc., Eastern*, 303 F. Supp. 356, 358 (S.D. Ill. 1969).

92. *City of Atlanta v. Chattanooga Foundry & Pipe Works*, 127 F. 23 (6th Cir. 1903), *aff'd*, 203 U.S. 390 (1906); see C. HILLS, *ANTITRUST ADVISOR* 831 (2d ed. 1978); *Developments in the Law—Competitive Torts*, 77 HARV. L. REV. 888, 925-32 (1964). *Contra*, Comment, *Contribution in Private Antitrust Suits*, 63 CORNELL L. REV. 682, 692 (1978). See also *Solomon v. Houston Corrugated Box Co.*, 526 F.2d 389, 392 n.4 (5th Cir. 1976); *Northwestern Oil Co. v. Socony-Vacuum Oil Co.*, 138 F.2d 967, 970 (7th Cir. 1943), *cert. denied*, 321 U.S. 792 (1944); *Sidney Morris & Co. v. National Ass'n of Stationers, Office Outfitters & Mfrs.*, 40 F.2d 620, 624 (1930); *Tondas v. Amateur Hockey Ass'n of the United States*, 438 F. Supp. 310 (S.D.N.Y. 1977); *United States Dental Inst. v. American Ass'n of Orthodontists*, 396 F. Supp. 565, 571 (N.D. Ill. 1975); *Wainwright v. Kraftco Corp.*, 58 F.R.D. 9, 11 (N.D. Ga. 1973); *Washington v. American Pipe & Constr. Co.*, 280 F. Supp. 802 (S.D. Cal. 1968); *Ayers v. Pastime Amusement Co.*, 259 F. Supp. 358, 359 (D.S.C. 1966); *Rector v. Warner Bros. Pictures, Inc.*, 102 F. Supp. 263, 264 (S.D. Cal. 1952); *Farmers Co-Operative Oil Co. v. Socony-Vacuum Oil Co.*, 43 F. Supp. 735, 738 (N.D. Iowa 1942).

93. *Walker Distrib. Co. v. Lucky Lager Brewing Co.*, 323 F.2d 1, 8 (9th Cir. 1963); *Washington v. American Pipe & Constr. Co.*, 280 F. Supp. 802 (S.D. Cal. 1968); see note 28 *supra*, in which James discusses the advantages given a plaintiff in situations where contribution is not allowed.

94. 127 F. 23 (6th Cir. 1903), *aff'd*, 203 U.S. 390 (1906).

95. *Id.* at 25.

96. *Wainwright v. Kraftco Corp.*, 58 F.R.D. 9, 12 (N.D. Ga. 1973).

damages.<sup>97</sup>

In *Flintkote Co. v. Lysfjord*<sup>98</sup> the purchasers of acoustical tile filed suit against both tile contractors and a supplier of tile, alleging a conspiracy to restrain trade and commerce in violation of sections 1 and 2 of the Sherman Act. The contractors entered into a covenant not to sue with the plaintiffs in exchange for \$20,000, and judgment was later taken against the supplier for \$50,000 before trebling damages. The court addressed the question of whether the \$20,000 settlement should be deducted from the actual damages figure of \$50,000 before trebling, or from the \$150,000 award after trebling.<sup>99</sup> The court noted initially that the supplier was jointly and severally liable for the entire sum of damages under the antitrust laws.<sup>100</sup> Secondly, it articulated the well-established principle that the plaintiff's claim is limited to only one full satisfaction.<sup>101</sup> Reasoning that the treble damage provision in section 4 of the Clayton Act was, in effect, a provision for punitive damages,<sup>102</sup> the court concluded that the settlement figure should be deducted from the trebled amount.<sup>103</sup> Since the plaintiff-purchasers would have recovered treble the entire sum of damages had there not been a settlement and a covenant not to sue the other defendant-contractors, the court felt compelled to grant nothing less than "the whole to which they were entitled."<sup>104</sup> The court did not consider, however, the possibility of the supplier's seeking contribution from the settling defendants or the effect such settlement would have on the plaintiff's right to pursue his claim against the nonsettling defendants in a contribution setting. The theory of joint and several liability prevailed and courts and parties for a time did not address those other questions.

### B. *The Right to Contribution for Intentional Torts*

Not only did courts uniformly find antitrust defendants jointly and severally liable for damages caused by a conspiracy between themselves, but they also agreed that there was no such thing as an unintentional violation of the antitrust statutes.<sup>105</sup> There must be some consciousness of commit-

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97. *Id.* (citing *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971)). The district court explained contribution as follows:

[I]f an antitrust plaintiff sues four co-conspirators alleging \$100,000 damages, and during the suit three of the co-conspirators are released upon a total payment of \$50,000, and the jury returns a verdict assessing damages at \$100,000, as a matter of computation the remaining co-conspirator is liable for the entire amount of damages trebled—\$300,000—and his defense of payment will result only in a deduction of \$50,000 from the trebled amount, leaving him with a liability of \$250,000.

98. 246 F.2d 368 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957).

99. 246 F.2d at 397. The first method results in a judgment of \$90,000 ( $[\$50,000 - 20,000] \times 3$ ); the second produces a figure of \$130,000 ( $[\$50,000 \times 3] - 20,000$ ).

100. *Id.*

101. *Id.* at 398.

102. *Id.*, characterizing treble damages as "a unique statutory penalty."

103. *Id.*

104. *Id.*

105. *See, e.g.*, *Solomon v. Houston Corrugated Box Co.*, 526 F.2d 389, 392 n.4 (5th Cir. 1976); *United States Dental Inst. v. American Ass'n of Orthodontists*, 396 F. Supp. 565, 571

ment to a common scheme, some concerted activity, before the defendants can be found liable.<sup>106</sup> This requirement of intent posed a problem for antitrust contribution advocates since it has long been recognized that there is no right to contribution between intentional tortfeasors.<sup>107</sup> This principle was incorporated into the Uniform Contribution Among Tortfeasors Act, which provides that "[t]here is no right of contribution in favor of any tortfeasor who has intentionally [willfully or wantonly] caused or contributed to the injury or wrongful death."<sup>108</sup> It is apparent, therefore, that creation of a federal common law right to contribution under the antitrust statutes will confront courts not only with the task of creating common law to fill a statutory lacuna but also with the fashioning of a rule more liberal than even the modern trend in state and other federal cases.<sup>109</sup>

*Contribution for Intentional Violations of Federal Securities Laws.* Judicial implication of a right to contribution may not be as novel as it first appears. While sections of both the Securities Act of 1933<sup>110</sup> and the Securities Exchange Act of 1934<sup>111</sup> expressly provide for contribution in certain circumstances,<sup>112</sup> the right is also implied in rule 10b-5 actions to prevent defendants from escaping responsibility for losses caused in concert with others simply because the plaintiff sues only the other defendants.<sup>113</sup> This right, however, did not emerge without resistance. In 1968, a

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(N.D. Ill. 1975). One writer has attempted to distinguish intentional and unintentional antitrust violations, relying upon *Sabre Shipping Corp. v. American President Lines, Ltd.*, 298 F. Supp. 1339 (S.D.N.Y. 1969) (see text accompanying notes 128-34 *infra*). The author concluded that only unintentional tortfeasors should be granted a right to contribution under federal common law. Comment, *supra* note 92, at 705. The language of § 1 of the Sherman Act suggests, however, that there cannot be an unintentional violation as § 1:

presents a single concept about common action, not three separate ones: "contract . . . combination or conspiracy" becomes an alliterative compound noun roughly translated to mean "concerted action." There is little need to grapple with issues about the meanings of the particular words of the statutes nor to mark nice distinctions among them.

L. SULLIVAN, ANTITRUST 312 (1977), cited in *Harold Friedman, Inc. v. Kroger Co.*, 581 F.2d 1068, 1072 n.3 (3d Cir. 1978).

106. See, e.g., *Harold Friedman, Inc. v. Kroger Co.*, 581 F.2d 1068, 1072 (3d Cir. 1978).

107. *Merryweather v. Nixan*, 101 Eng. Rep. 1337 (K.B. 1799); see text accompanying notes 11-13 *supra*. See also W. PROSSER, *supra* note 12, § 50, at 308.

108. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 1(c).

109. See RESTATEMENT OF RESTITUTION § 85, title C, at 385 (1937) (antitrust violations are examples of conduct so reprehensible that contribution would not be permitted).

110. 15 U.S.C. §§ 77a-77yy (1976).

111. *Id.* §§ 78a-III.

112. The Securities Act of 1933, § 11(f), 15 U.S.C. § 77k(f) (1976), provides that all defendants guilty of filing a false registration statement who are jointly and severally liable as a consequence of their actions may recover contribution "as in the case of contract" from any co-wrongdoer involved in the same common liability. Such a right does not exist, however, where the one seeking contribution is guilty of fraudulent misrepresentation while the other is not. The Securities Exchange Act of 1934, § 9(e), 15 U.S.C. § 78i(e) (1976), grants a right to contribution to a person liable under the section who, along with other co-wrongdoers, willfully manipulates security prices. The Securities Exchange Act, § 18(b), 15 U.S.C. § 78r(b) (1976), grants a right to contribution to a person who, along with other co-wrongdoers, files a misleading statement with the Securities Exchange Commission.

113. See generally Fischer, *supra* note 82; Comment, *Contribution Under the Federal Se-*



court first recognized in *deHaas v. Empire Petroleum Co.*<sup>114</sup> that an implied right to contribution existed under section 10(b) of the Securities Exchange Act<sup>115</sup> and rule 10b-5<sup>116</sup> promulgated thereunder. In *deHaas* plaintiff stockholders had brought suit for alleged fraud in connection with a merger of three financially unsound corporations. A third-party complaint was then filed against the corporations' attorney who had been responsible for preparing the alleged false proxy solicitations. In a precedential ruling, the district court analogized the judicially implied causes of action to the express provisions in the securities acts that allow contribution and refused to dismiss the third-party complaint.<sup>117</sup> The court stated that "[s]ince the specific liability provisions of the Act provide for contribution, it appears that contribution should be permitted when liability is implied under Section 10(b)."<sup>118</sup>

That logic was rejected, however, in *State Mutual Life Assurance Co. of America v. Peat, Marwick, Mitchell & Co.*<sup>119</sup> Although the court recognized that another district court had allowed contribution in section 10(b) violations, the decision by Judge Tenney refused to follow *deHaas*, on the grounds that the Supreme Court, in *Halcyon*, had disapproved judicial attempts to fashion new rules of contribution in the absence of congressional action.<sup>120</sup> The retreat was short-lived. A year later the same district court,

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*curities Laws*, 1975 WASH. U.L.Q. 1256. It is important to note that some courts, when deciding whether a right to contribution or indemnity exists, have looked solely to federal common law. See, e.g., *Odette v. Shearson, Hammil & Co.*, 394 F. Supp. 946, 954 n.9 (S.D.N.Y. 1975); *Gould v. American-Hawaiian S.S. Co.*, 387 F. Supp. 163, 167 n.7, 168 n.13 (D. Del. 1974); *Globus, Inc. v. Law Research Serv., Inc. (Globus II)*, 318 F. Supp. 955 (S.D.N.Y. 1970), *aff'd per curiam on opinion below*, 442 F.2d 1346 (2d Cir.), *cert. denied*, 404 U.S. 941 (1971).

114. 286 F. Supp. 809 (D. Colo. 1968), *modified on other grounds*, 435 F.2d 1223 (10th Cir. 1970).

115. 15 U.S.C. § 78j(b) (1976).

116. 17 C.F.R. § 240.10b-5 (1978).

117. 286 F. Supp. at 815-16.

118. *Id.* (citing 3 L. LOSS, SECURITIES REGULATION 1739-40 n.178 (1961)). The court, however, would not permit the third-party plaintiff to prevail on a claim for indemnification since the president of the three merged corporations would be in *pari delicto* with the attorney if he were found guilty of fraud on the main complaint. 286 F. Supp. at 815. The court allowed the corporation's claim for indemnity, however, because that guilty relationship would not exist in relation to the corporation, since "[a] corporation is a principal which can be liable for fraud only through the conduct of its agents." *Id.* at 816.

119. 49 F.R.D. 202 (S.D.N.Y. 1969).

120. *Id.* at 212-13 (citing *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 285 (1952); see text accompanying notes 59-64 *supra*). The court also refused to imply a right to indemnity since the defendants' tortious conduct was active and equally culpable. 49 F.R.D. at 212. "With regard to indemnity as between joint tortfeasors, it has been established that a defendant's right to seek indemnification 'depends upon whether the complaint against the primary defendant charges actual fault; sometimes . . . described as 'active' negligence, as opposed to 'passive' negligence . . .'" *Id.* (citing *Collins v. United States*, 221 F. Supp. 356, 357 (S.D.N.Y. 1963)). See also *Globus v. Law Research Serv., Inc. (Globus I)*, 287 F. Supp. 188, 199 (S.D.N.Y. 1968), *aff'd in part & rev'd in part*, 418 F.2d 1276 (2d Cir. 1969), *cert. denied*, 397 U.S. 913 (1970) (on grounds of public policy court refused to enforce indemnity agreement between issuer and underwriter after both were found liable for circulating misleading advertisement concerning sale of securities). It does appear, however, that indemnity is available under the Securities Act where one wrongdoer is significantly more responsible for the injury to the plaintiff than another wrongdoer. See *Gould v.*

through Judge Frankel, concluded that a right to contribution could be implied under the securities acts. In *Globus, Inc. v. Law Research Service, Inc. (Globus II)*<sup>121</sup> a judgment was rendered against an underwriter, issuer, and the issuer's president for violations of section 17(a) of the Securities Act and section 10(b) of the Securities Exchange Act, arising from a misleading advertisement for the sale of securities.<sup>122</sup> After paying the entire judgment, the underwriter moved to recover by way of contribution from other defendants. Noting that "the general drift of the law today is toward the allowance of contribution among joint tortfeasors,"<sup>123</sup> Judge Frankel accepted the language from *deHaas* analogizing section 10(b) to the express contribution provisions in the 1934 Act.<sup>124</sup> Consequently, the right to contribution was extended not only to negligent wrongdoers, but to intentional ones as well. The court reasoned that since the statutory right to contribution included willful acts, there was no reason why the implied right under section 10(b) should be any different.<sup>125</sup> Furthermore, there need not be a judgment rendered before such a right arises;<sup>126</sup> a third-party claim will be sufficient to create the right, although the right will remain inchoate until such time as joint liability is determined.

Numerous courts followed suit in ruling that an implied right to contribution exists under both section 17(a) of the 1933 Act and section 10(b) of the 1934 Act.<sup>127</sup> It became apparent that courts were no longer willing to

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American-Hawaiian S.S. Co., 387 F. Supp. 163, 167 (D. Del. 1974), and cases cited therein. See generally Ruder, *Multiple Defendants In Securities Law Fraud Cases: Aiding and Abetting, Conspiracy, In Pari Delicto, Indemnification, and Contribution*, 120 U. PA. L. REV. 597 (1972).

121. 318 F. Supp. 955 (S.D.N.Y. 1970), *aff'd per curiam on opinion below*, 442 F.2d 1346 (2d Cir.), *cert. denied*, 404 U.S. 941 (1971).

122. See *Globus v. Law Research Serv., Inc. (Globus I)*, 287 F. Supp. 188 (S.D.N.Y. 1968), *aff'd in part & rev'd in part*, 418 F.2d 1276 (2d Cir. 1969), *cert. denied*, 397 U.S. 913 (1970).

123. 318 F. Supp. at 957.

124. See text accompanying notes 114-18 *supra*.

125. 318 F. Supp. at 958 (citing *Globus v. Law Research Serv., Inc. (Globus I)*, 418 F.2d 1276, 1286 (2d Cir. 1969), *cert. denied*, 397 U.S. 913 (1970)).

126. *Liggett & Myers, Inc. v. Bloomfield*, 380 F. Supp. 1044, 1046 (S.D.N.Y. 1974). The mere fact that certain defendants are not named in the original action "should not insulate them from liability for contribution to joint tort-feasors who are sued by an aggrieved party."

127. *Herzfeld v. Laventhol, Krekstein, Horwath & Horwath*, 540 F.2d 27, 38-39 (2d Cir. 1976); *Madigan, Inc. v. Goodman*, 498 F.2d 233, 237-38 (7th Cir. 1974); *Rice v. McDonnell & Co.*, 442 F. Supp. 952, 954 (S.D.N.Y. 1977); *Odette v. Shearson, Hammill & Co.*, 394 F. Supp. 946, 955-57 (S.D.N.Y. 1975); *Muth v. Dechert, Price & Rhoads*, 391 F. Supp. 935 (E.D. Pa. 1975) (prior settlement in related case not bar to contribution); *B & B Inv. Club v. Kleinert's, Inc.*, 391 F. Supp. 720 (E.D. Pa. 1975); *Alexander & Baldwin, Inc. v. Peat, Marwick, Mitchell & Co.*, 385 F. Supp. 230, 238 (S.D.N.Y. 1974) (right to contribution extends to intentional wrongdoers); *Liggett & Myers, Inc. v. Bloomfield*, 380 F. Supp. 1044 (S.D.N.Y. 1974); *Gould v. American-Hawaiian S.S. Co.*, 387 F. Supp. 163, 169 (S.D.N.Y. 1974) (right to contribution in actions arising under § 14(a) of the Securities Exchange Act); *Getter v. R.G. Dickinson & Co.*, 366 F. Supp. 559, 569 (S.D. Iowa 1973); *Sherlee Land v. Commonwealth United Corp.*, [1972-1973 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 93,749 (S.D.N.Y. 1973); *Tucker v. Arthur Andersen & Co.*, [1973-1974 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,544 (S.D.N.Y. 1972); *State Mut. Life Assur. Co. of America v. Arthur Andersen & Co.*, [1973-1974 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,543 (S.D.N.Y. 1972).

follow the policy recommended in *Halycon* to await congressional action on the issue. Instead, they took it upon themselves to fashion the new rule allowing contribution, which they found to be in line with the general trend of the law and a better articulation of the purpose and intent of the securities laws.

*Contribution for Intentional Violations of Antitrust Law.* To date, only one court has granted a right to contribution under the antitrust statutes.<sup>128</sup> All others have maintained the reverential posture requiring congressional mandate for any such change.<sup>129</sup> *Sabre Shipping Corp. v. American President Lines, Ltd.*<sup>130</sup> was the first case to address in any detail the issue of contribution under antitrust law. In *Sabre* the plaintiff settled with certain defendants, who were then dismissed from the lawsuit. The remaining defendants filed a third-party complaint claiming contribution from those who had settled. Assuming that federal law was applicable to the third-party complaint, the court noted the absence of any federal common law case arising out of an intentional tort that allowed contribution.<sup>131</sup> Because Congress did not provide for such a right in the antitrust statutes, while expressly including contribution in the securities statutes, the court concluded that "no such right should be implied."<sup>132</sup> *Sabre*, however, did not acknowledge that courts were then in the process of implying a right to contribution under section 17(a) of the Securities Act and section 10(b) of the Securities Exchange Act.<sup>133</sup> Since the courts have now recognized the right to contribution under securities law, that part of the rationale in *Sabre* that relies on securities law is no longer valid.<sup>134</sup> In essence, the firm

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128. *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179 (8th Cir. 1979); see text accompanying notes 143-62 *infra*. See also *In re Ampicillin Antitrust Litigation*, ANTITRUST & TRADE REG. REP. (BNA) No. 917, at E-1 (D.D.C. May 21, 1979), which suggests that contribution is appropriate to "further rather than hamper the deterrent purposes of the antitrust laws." *Id.* at E-2.

129. See, e.g., *Sabre Shipping Corp. v. American President Lines, Ltd.*, 298 F. Supp. 1339, 1345 (S.D.N.Y. 1969) (citing *Halycon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 285 (1952)). "The immediate inclination of a court would probably be to seize upon the rule against contribution as applied by the majority of the states in the absence of modifying legislation." Corbett, *Apportionment of Damages and Contribution Among Coconspirators in Antitrust Treble Damages Actions*, 31 FORDHAM L. REV. 111, 129 (1962).

130. 298 F. Supp. 1339 (S.D.N.Y. 1969).

131. *Id.* at 1343. "The economic interests with which this Court is concerned primarily are those of the United States, upon whose trade and commerce the effects of the conspiracy are alleged to have fallen." *Id.* The court cited *Sola Elec. Co. v. Jefferson Co.*, 317 U.S. 173, 176 (1942), in which the Supreme Court held that federal law should be applied where issues of substantive law, although not expressly covered by federal statute, are within the scope and nature of the enacted provisions. Such issues must be left to judicial determination, and state law or policy to the contrary must yield. See *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179, 1182 (8th Cir. 1979); *El Camino Glass v. Sunglo Glass Co.*, [1977-1] Trade Cas. ¶ 61,533, at 72,111 n.1 (N.D. Cal. 1976). See also Corbett, *supra* note 129, at 123-28.

132. 298 F. Supp. at 1345. The court did recognize, however, the recent trend toward contribution among the states. *Id.* at 1343 n.1.

133. See notes 121-26 *supra* and accompanying text.

134. The court resurrects the policy argument espoused by James that there would be no settlement if the settling tortfeasor knew he might be forced back into the lawsuit on a claim for contribution. This would not necessarily be so. See generally notes 232-52 *infra* and

stance upon which *Sabre* was premised has been seriously undermined.

In *El Camino Glass v. Sunglo Glass Co.*<sup>135</sup> an antitrust class action charged distributors and manufacturers of auto glass with price fixing. One defendant filed a third-party complaint claiming contribution from the president of another glass company. Relying solely upon *Sabre*, the district court listed similar reasons for not granting such a right: (a) congressional intent to exclude contribution, (b) the plaintiff's need to control the scope of his lawsuit, and (c) the deterrent effect upon settlements that such a right might engender.<sup>136</sup> The court was also concerned that allowing contribution in antitrust cases, already "enormously complex affairs," would create too many procedural obstacles.<sup>137</sup> The court concluded that "on balance the ends of justice will be better served by holding that contribution is not available in an antitrust suit."<sup>138</sup> A year later yet another court was confronted with a claim for contribution in an antitrust context. In *Olson Farms, Inc. v. Safeway Stores, Inc.*<sup>139</sup> a distributor of shell eggs was sued by egg producers for price fixing and conspiracy to monopolize distribution in violation of sections 1 and 2 of the Sherman Act.<sup>140</sup> Judgment was rendered against Olson Farms for nearly two million dollars. Olson satisfied the judgment and then sued its coconspirators, seeking indemnity or, in the alternative, contribution. The court perfunctorily rejected the claim on the ground that the alleged violations were governed "exclusively by the federal antitrust laws and that said laws afford no such remedy."<sup>141</sup> *El Camino Glass* and *Olson Farms* are the typical judicial responses to contribution claims, for every case since *Sabre*, with the exception of *Professional Beauty Supply*, has, in fact, followed the Supreme Court's rationale requiring congressional initiative as a reason for denying contribution. Currently, there are three such cases pending in the circuit courts, all appeals from rulings denying any right to contribution in antitrust suits.<sup>142</sup>

The only court to hold that contribution is available to joint tortfeasors

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accompanying text. It could still be possible to give the plaintiff the "absolute right to settle with some [defendants] and covenant not to continue its suit against them, while reserving its right to continue against the non-settling defendants." 298 F. Supp. at 1346.

135. [1977-1] Trade Cas. ¶ 61,533 (N.D. Cal. 1976).

136. *Id.* at 72,112.

137. *Id.*

138. *Id.*

139. [1977-2] Trade Cas. ¶ 61,698 (D. Utah), *appeal docketed*, No. 77-2068 (10th Cir. Dec. 20, 1977).

140. 15 U.S.C. §§ 1, 2 (1976).

141. [1977-2] Trade Cas. at 72,861. The court, unsure as to which law applied, also looked to Utah's contribution statute. UTAH CODE ANN. § 78-27-39 to -43 (Smith 1977). There too, however, no right existed, since the cause of action arose prior to the effective date of the statute.

142. Iowa Beef Processors, Inc. v. Spencer Foods, Inc., Nos. 3-77-0780, 3-77-0990 & 3-77-1080 (N.D. Tex. Sept. 1, 1978), *appeal docketed*, No. 78-3346 (5th Cir. Oct. 26, 1978); Abraham Constr. Corp. v. Texas Indus., Inc., No. 75-2820 (E.D. La. Oct. 5, 1977), *appeal docketed*, No. 78-1788 (5th Cir. Apr. 14, 1978); Olson Farms, Inc. v. Safeway Stores, Inc., [1977-2] Trade Cas. ¶ 61,698 (D. Utah), *appeal docketed*, No. 77-2068 (10th Cir. Dec. 20, 1977).

in an antitrust action is the Eighth Circuit Court of Appeals in *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*<sup>143</sup> The court split two-to-one in adopting the rule that contribution may be enforced among joint tortfeasors in an antitrust action. Professional, a wholesaler of beauty supplies, brought an action against National, another wholesaler, alleging a conspiracy to share a monopoly with La Maur, a manufacturer of beauty supplies. As a result of the alleged conspiracy, Professional lost the right to sell La Maur products, which constituted a violation of section 2 of the Sherman Act.<sup>144</sup> The district court subsequently granted National permission to file a third-party complaint against La Maur. The complaint alleged that, in the event National was found liable, La Maur, as a joint tortfeasor and coconspirator, should be required to contribute its pro rata share of the damages.<sup>145</sup> The district court dismissed the third-party complaint on the ground that it failed to state a claim upon which relief could be granted,<sup>146</sup> and National appealed.

Stating that "sound policy reasons dictate such a result,"<sup>147</sup> the Eighth Circuit refused to follow the traditional rationale requiring congressional initiative before permitting contribution that had been followed in *Sabre* and *El Camino Glass*.<sup>148</sup> Instead, it found that the reasons advanced by La Maur for denying contribution were unpersuasive. La Maur had initially argued that Congress had intended to exclude contribution when it failed to provide for the right in the antitrust statutes. While the court noted that the antitrust statutes were not intended to be comprehensive, its principal rationale for dismissing the argument was that federal courts have previously implied a right to contribution in other areas of federal statutory interpretation such as securities fraud, aviation collision, and sex discrimination cases.<sup>149</sup> *Halcyon* had, after all, been limited to its facts by *Cooper Stevedoring*,<sup>150</sup> and courts were now adopting a more balanced and equitable approach to fault allocation.

La Maur's second argument was that allowing contribution would interfere with the plaintiff's right to control his own lawsuit.<sup>151</sup> If defendants could implead countless other "joint tortfeasors," the issues involved might become too complicated for a jury to comprehend. The court recognized the potential seriousness of the problem, yet expressed confidence that it could be avoided by judicious use of the trial court's power to sever.<sup>152</sup>

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143. 594 F.2d 1179 (8th Cir. 1979).

144. 15 U.S.C. § 2 (1976).

145. 594 F.2d at 1181. National also asserted a claim for indemnity, alleging that LaMaur was more culpable and, therefore, that National should only be held secondarily liable. *Id.*

146. FED. R. CIV. P. 12(b)(6).

147. 594 F.2d at 1182.

148. *Id.* at 1183; see text accompanying notes 130-38 *supra*.

149. See note 73 *supra*, and text accompanying notes 71-74, 110-27 *supra*.

150. See notes 59-70 *supra* and accompanying text.

151. 594 F.2d at 1184; see note 28 *supra*.

152. 594 F.2d at 1184. Presumably, severance would require the original defendant to bring his suit for contribution once judgment had been rendered against him and after he had personally paid more than his pro rata share of that judgment.

Thirdly, La Maur postulated that allowing contribution would deter settlement, since settling defendants would be wary of subsequently being returned to the controversy on a third-party claim. The court did not respond directly to this argument because the issue was not present in the case,<sup>153</sup> but it did state that courts should be able to fashion a rule that would protect the rights of settling defendants.<sup>154</sup> The fourth argument against contribution was that, since antitrust suits are so enormously complex, it would be unwise to permit the defendant to complicate matters further by raising issues of joint and several liability and contribution. The court offered severance as a partial solution to the problem if necessary, but it also cited to federal securities law cases in which the right to contribution is recognized and in which no serious judicial management problems have arisen.<sup>155</sup> Finally, La Maur argued that a rule that might hold the defendant liable for the entire amount of damages would serve as a greater deterrent than if the joint defendants knew they could share their liability by means of contribution. Rejecting this argument, the court found a more serious problem with the possibility that under a no-contribution rule a defendant could get off "scot free" and thereby completely avoid liability.<sup>156</sup> "This possibility of escaping all liability might cause many to be more willing, rather than less willing, to engage in wrongful activity."<sup>157</sup> This is especially so "where a large or powerful tortfeasor has sufficient economic influence to prevent a plaintiff from including it as a defendant."<sup>158</sup>

The court characterized the central issue as "fairness between the parties."<sup>159</sup> If contribution is intended to distribute a burden equitably between those responsible—between joint tortfeasors—"fairness requires that the right of contribution exist among joint tortfeasors at least under certain circumstances."<sup>160</sup> The possibility of one antitrust defendant's paying the entire judgment while the other defendants completely escaped lia-

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153. This question was presented in *In re Ampicillin Antitrust Litigation*, ANTITRUST & TRADE REG. REP. (BNA) No. 917, at E-1 (D.D.C. May 21, 1979). For a discussion of the case, see notes 257-60 *infra* and accompanying text.

154. 594 F.2d at 1184.

155. *Id.* at 1184-85.

156. *Id.* at 1185.

157. *Id.*

158. *Id.*; see note 28 *supra*. The court was "convinced that the result of automatically prohibiting contribution among antitrust defendants in all circumstances 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.

159. 594 F.2d at 1185.

160. *Id.* The court hedged its decision by permitting the trial court to determine when circumstances allow a defendant to raise a claim for contribution from his joint tortfeasors. The factors considered by Justice White in his concurring opinion in *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968), should be considered by the trial court in determining whether an *in pari delicto* defense should be allowed in an antitrust action. These factors include: (1) the defendants' relative responsibility for originating, negotiating, and implementing the illegal scheme; (2) evidence of who might have been expected to benefit from the illegal conspiracy; (3) evidence that one or more defendants attempted to terminate the scheme but were thwarted; and (4) facts showing who ultimately profited or suffered. *Id.* at 146-47.

bility mandated, in the court's view, that a right to contribution be enforced in the Eighth Circuit, notwithstanding the fact that intentional torts are involved.<sup>161</sup> Since there was a possibility under the evidence presented that Professional could claim a right of contribution against National, the court remanded the case for further proceedings.<sup>162</sup>

### C. *Prognosis for Contribution in Antitrust Cases*

If trends in the law can serve as a valid prognosticator of the future direction of federal common law on specific issues, it seems clear that *Professional Beauty* could be the turning point in the courts' recognition of a right to contribution among antitrust cotortfeasors.<sup>163</sup> Only ten states continue to follow *Merryweather v. Nixan* in disallowing contribution among joint tortfeasors.<sup>164</sup> *Halcyon*<sup>165</sup> no longer stands for the denial of contribution in a noncollision admiralty setting, having been eroded by *Cooper*

161. 594 F.2d at 1186. For support the court cited *Globus II*, which provides a right to contribution for intentional tortfeasors under section 10(b) of the Securities Exchange Act. See notes 121-26 *supra* and accompanying text.

162. The court did not allow Professional to proceed with its claim for indemnity, however. Its concern was that "[t]o allow indemnification would dilute the deterrent impact of the antitrust laws. Only a realistic possibility of liability for damages will encourage compliance with the antitrust laws and will protect the public interest in preserving competition." 594 F.2d at 1186. The court denied indemnity, notwithstanding the fact that "one joint tortfeasor bears greater responsibility for the wrongdoing." *Id.*

163. Recently, in *In re Corrugated Container Antitrust Litigation*, ANTITRUST & TRADE REG. REP. (BNA) No. 919, at E-1 (S.D. Tex. May 30, 1979), motions by four container manufacturers for leave to file amended answers to assert cross-claims for contribution against settling defendants were denied. The litigation was brought against certain manufacturers of corrugated sheet and containers charging them with price fixing in violation of § 1 of the Sherman Act. The separate actions were later consolidated for pretrial purposes. The court subsequently gave preliminary approval to 23 proposed settlement agreements totaling \$308 million, the 23 defendants representing 80% of the market. *Id.* at E-1.

While noting the Eighth Circuit's recent opinion in *Professional Beauty Supply*, the court concluded that, even were contribution to be permitted in the Fifth Circuit, such a right would be inappropriate in this case for two reasons. First, the court noted that defendants would be unwilling to settle the lawsuit if there was a possibility that they could be returned to litigate the same claims against other codefendants. This, the court said, would impede settlements, complicate the issues, and result in an unmanageable trial of the antitrust claims were the defendants free to assert cross-claims and impleader actions against their cotortfeasors. *Id.* Secondly, the court concluded that, because all antitrust claims arise out of intentionally tortious conduct, the deterrent policies of the Sherman and Clayton Acts would best be served by retaining a rule that places the entire liability for injury on any one of the wrongdoers. *Id.*

The court went on, however, to anticipate the appeal of this issue and speculate whether the rule espoused in *Professional Beauty Supply* could become the trend in future litigation. Were that to occur, the court determined that such a rule should not be applied retroactively to this case "where the settling litigants have relied on unvarying past precedent in reaching agreements" with the plaintiffs. *Id.* (citing *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971)). Although the court's inclusion of this tangential point demonstrates its interest in resolving these issues with finality, the possibility remains that, by its comments, the court is impliedly supporting the *Halcyon* approach of preferring congressional action to judicial fiat.

Such a move may indeed be underway. On June 21, 1979, Senator Bayh introduced a bill that would allow contribution in price fixing cases brought under the treble damages provisions of § 4 of the Clayton Act, 15 U.S.C. § 15 (1976). S. 1468, 96th Cong., 1st Sess. (1979).

164. See notes 49-51 *supra* and accompanying text.

165. *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952).

*Stevedoring*<sup>166</sup> and its progeny.<sup>167</sup> A right to contribution has also been applied in aviation collision cases<sup>168</sup> and sex discrimination suits.<sup>169</sup> Most importantly, an implied right to contribution has been found for intentional violations of the federal securities laws.<sup>170</sup> Congressional silence has not proven to be an insurmountable barrier to the development of contribution in any of these cases. The import of *Professional Beauty* is that the Eighth Circuit also rejected the traditional rule of deference to Congress and fashioned a right to contribution in the area of federal antitrust litigation despite the fact that Congress did not explicitly provide for the right.

The purposes of the private antitrust treble damage actions are twofold. First, they serve to deter violators and to deprive them of the fruits of their illegality, and secondly, they compensate victims of antitrust violations for their injuries.<sup>171</sup> This is accomplished through the treble damages provisions of the Clayton Act,<sup>172</sup> which was designed to encourage private enforcement of the antitrust laws by offering generous compensation amounts to those harmed by the proscribed conduct and, simultaneously, to erect a deterrent to those contemplating similar conduct in the future.<sup>173</sup> In deciding whether to provide a right to contribution, it is therefore essential to choose a rule that would best accomplish these ends.

As a hypothetical example to consider the efficacy of contribution as a deterrent, assume a case in which four cotortfeasors have violated antitrust law. The question thus becomes whether a defendant would be deterred more by knowing that he had a one-in-four chance of being forced to pay the entire amount of damages (and a three-in-four chance that he would escape liability completely), or whether a greater deterrent would exist if all four defendants knew that each would, in all likelihood, be forced to pay one-quarter of the judgment. The Eighth Circuit was convinced that the latter situation served as the greater deterrent;<sup>174</sup> the certainty of incurring some liability outweighed the possibility of incurring it all.<sup>175</sup>

This is the better view. If equity and fairness are to be attained, a rule that distributes losses among all culpable defendants in equal shares better serves that purpose. No longer would one defendant, who may have been only tangentially involved in the illegal scheme, be forced to pay the entire judgment.<sup>176</sup> Yet, the deterrent effect of contribution still does not, in it-

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

167. See notes 59-70 *supra* and accompanying text.

168. See notes 71-74 *supra* and accompanying text.

169. See note 73 *supra*.

170. See notes 121-27 *supra* and accompanying text.

171. *Pfizer, Inc. v. Government of India*, 434 U.S. 308 (1978).

172. 15 U.S.C. § 15 (1976).

173. *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 (1972); *Perma Life Muffler, Inc. v. International Parts Corp.*, 392 U.S. 134, 139 (1968); *Shelter Realty Corp. v. Allied Maintenance Corp.*, 75 F.R.D. 34 (S.D.N.Y. 1977).

174. See notes 156-58 *supra* and accompanying text.

175. *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179, 1185 (8th Cir. 1979).

176. Apart from the issue of how to distribute losses, there is also the question of how permitting contribution would affect the plaintiff's control of his lawsuit. The Eighth Circuit



self, definitively answer the question of whether contribution should be allowed. If granting such a right substantially increases litigation problems inherent in its availability, then it may be more equitable to retain the old rule of no contribution for the sake of ease of administration. Two major problems, therefore, that require more exhaustive consideration are the effects of settlement<sup>177</sup> and the methods of apportioning damages. If it can be concluded that a logical, workable method exists to unsnarl these administrative entanglements, it becomes clear that contribution should be permitted in the antitrust context.

### III. APPORTIONMENT OF DAMAGES AND THE EFFECTS OF SETTLEMENT

#### A. *Division of Liability*

Assuming a right to contribution in federal antitrust law, one must next consider the means by which liability is to be apportioned among the joint antitrust conspirators.<sup>178</sup> A basic approach to apportioning liability can be gleaned from common law practice in regard to contribution among joint tortfeasors, including federal common law,<sup>179</sup> since a private antitrust cause of action sounds in tort.<sup>180</sup> Securities and maritime law also bear heavily on the subject. This basic approach to apportionment is complicated, however, by the effects of settlement or nonsettlement, insolvency,

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was not worried by this question. See notes 151-52 *supra* and accompanying text. Since the federal rules provide a means by which the court may make its own determination of inconvenience, prejudice, or confusion of the issues, a trial court has the discretionary power to sever a portion of a lawsuit and order a separate trial. FED. R. CIV. P. 20(b). The question of severance, however, must be balanced against the interest of adjudicating all claims at one time.

177. See *In re Ampicillin Antitrust Litigation*, ANTITRUST & TRADE REG. REP. (BNA) No. 917, at E-1 (D.D.C. May 21, 1979), discussed at notes 257-60 *infra* and accompanying text.

178. Apportionment of liability implies contribution and not indemnification. The prevailing argument against indemnification in antitrust cases is that it would "dilute the deterrent impact of the antitrust laws" by the possibility of shifting liability to only one defendant who acted in concert with one or more codefendants or third-party defendants. *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179, 1186 (8th Cir. 1979). "If indemnification were allowed, those found liable for breach of a statutory obligation might escape liability as effectively as if contribution were denied." *Id.* The exception to this rule is articulated in *Wilshire Oil Co. v. Riffe*, 409 F.2d 1277 (10th Cir. 1969), in which the court allowed a suit brought by a corporation against its officers for indemnification of damages flowing from antitrust violations. The corporation based its claim upon breach of fiduciary duty. Furthermore, indemnification is contrary to public policy when the violators, in *pari delicto*, act against the public interest by committing wrongs "graver than ordinary negligence," such as securities violations. *Professional Beauty*, 594 F.2d at 1186-87 n.9. *Professional Beauty* leaves open the possibility of allowing indemnification based on a pendent state law claim by the defendant's claim alleging tortious interference with business relationships. *Id.* at 1187.

179. While it is established that federal common law governs the issue of whether there is a right to contribution in an antitrust case, see note 131 *supra* and accompanying text, the question of which law to apply in apportioning damages in such an action remains unsettled. *But see Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179, 1182 n.4 (8th Cir. 1979), in which the court, by implication, adopts a federal common law approach to this question. See also Corbett, *supra* note 129, at 128.

180. See note 91 *supra* and accompanying text.

judgment, the absence of certain defendants, and the status of a defendant as a potential or an actual party to the suit.

*Apportionment at Common Law.* In his treatise on torts, Prosser views the apportionment question at common law as "primarily not one of the fact of causation, but of the feasibility and practical convenience of splitting up the total harm into separate parts which may be attributed to each of two or more causes."<sup>181</sup> On the theory that it is better to attempt some rough division than to place the entire burden on one coconspirator, Prosser enumerates what he considers common types of situations where the issue of apportionment may arise. They are (1) suits arising out of concerted action,<sup>182</sup> (2) actions that present questions of vicarious liability,<sup>183</sup> (3) suits arising from a failure to exercise a common duty,<sup>184</sup> (4) actions resulting in a single indivisible result,<sup>185</sup> (5) damage of same kind capable of apportionment,<sup>186</sup> (6) actions arising from successive injuries to the same person or property,<sup>187</sup> (7) actions where there is potential damage reducing the value of the loss,<sup>188</sup> and (8) acts, harmless in themselves, that together cause damage.<sup>189</sup> Analyzing these categories, Prosser discovered that in some "a logical basis can be found for some rough practical apportionment, which limits a defendant's liability to that part of the harm which he has in fact caused . . ."<sup>190</sup> Interestingly, the only categories in which the common law has found a logical basis for apportionment because of divisible liability are categories (5), (6), (7), and (8). In all others, the liability has been joint as to all defendants.<sup>191</sup>

Some of the cases cited as examples by Prosser in his analysis of the eight categories attempt to determine which injury, or portion of injury, was proximately caused by which tortfeasor, or, in the alternative, which tortfeasor bore a comparatively greater share of fault in causing the injury.

181. W. PROSSER, *supra* note 12, § 52, at 313 (footnote omitted).

182. Concerted action entails a joint enterprise and a mutual agency, so that the act of one is the act of all. *Id.* at 314-15.

183. Vicarious liability is premised on agency law. *Id.* at 315.

184. Common duty involves the failure of two or more defendants to perform the same obligation where either one's failure would result in the same injury. *Id.*

185. A single indivisible result is an injury incapable of any sensible division, *e.g.*, death or the complete loss or destruction of a house by fire. *Id.* at 315-17.

186. Damage of same kind capable of apportionment encompasses separate injuries to a single person or property resulting from the separate acts or omissions of two or more persons. *Id.* at 317-20.

187. Successive injuries are "severable in point of time" where neither tortfeasor has any responsibility for the loss caused by the other. *Id.* at 320-21.

188. Potential damage from one cause that reduces the value of the loss inflicted by another is presented where, for example, *A* shoots *B*, killing him instantly, two minutes after *C* has administered to *B* a slow poison certain to cause death. *Id.* at 321-22.

189. Acts harmless in themselves that together cause damage are torts premised on a duty in each defendant to take account of the surrounding circumstances and reasonably ascertainable conduct of other defendants. For example, all defendants may be liable for the pollution of a stream where the impurities traceable to each defendant are harmless, but taken together render the water unfit for use. *Id.* at 322-23.

190. *Id.* at 313. Prosser found that a logical basis for apportionment existed in categories (5), (6), (7), and (8).

191. *Id.* § 50, at 310.

Either analysis is a means to the same end: an assessment of the amount of damages that each wrongdoer will be required to pay. The rules obtained from these common law cases do not present a simple method for apportionment of damages in antitrust cases. Cases of "concerted action" and "single indivisible result" are the most comparable to the modern antitrust private treble damage suit because of the conspiratorial nature of the action. Accordingly, if the sheer weight of these sometimes analogous cases is to govern treatment under the antitrust statutes, liability would be apportioned on a pro rata basis.

Because of the long-standing common law rule barring contribution between intentional tortfeasors, few decisions have considered until recently how contribution among intentional tortfeasors is to be apportioned. As between negligent tortfeasors, the general common law view was that, although the negligence of one tortfeasor might be greater than that of another, the method of apportioning contribution still should be on a strict pro rata basis.<sup>192</sup> A minority of common law cases held to the contrary.<sup>193</sup> For a time, courts seeking to apportion contribution or award indemnification in negligence cases measured the relative liability of each defendant on the basis of an "active-passive" negligence test.<sup>194</sup> Operating on the premise that a "passively" negligent defendant was less culpable than an "actively" negligent one, the test was difficult to apply and, in some instances, unworkable. Hence, it was rejected not long after its formulation.<sup>195</sup> Similarly, an earlier adopted formula apportioning damages in negligence cases on the basis of "gross" negligence on the part of one tortfeasor and "ordinary" negligence on the part of another quickly lost favor with the courts.<sup>196</sup>

Joint tortfeasors acting in concert were, at common law, liable for all injury done, the act of one being deemed the act of all.<sup>197</sup> It followed, then, that there was seldom a logical basis upon which a jury could apportion damages as between such cotortfeasors.<sup>198</sup> Therefore, apportionment of damages usually was not done in the case of joint tortfeasors acting in concert.

Early common law barred a claim against a defendant when the injury complained of resulted from the plaintiff's own contributory negligence. Gradually, however, this rigid common law rule of contributory negligence was relaxed; instead, the courts developed a comparative approach

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192. See *Warner v. Capital Transit Co.*, 162 F. Supp. 253, 255 (D.D.C. 1958).

193. See *Annot.*, 53 A.L.R.3d 184, 198 (1973).

194. See *Nordstrom v. District of Columbia*, 213 F. Supp. 315, 318 (D.D.C.), *rev'd on other grounds*, 327 F.2d 863 (D.C. Cir. 1963).

195. See, e.g., *Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

196. See, e.g., *Bieliski v. Schulze*, 16 Wis. 2d 1, 114 N.W.2d 105 (1962).

197. "[A]ll coming to do an unlawful act, and of one party, the act of one is the act of all of the same party being present." *Sir John Hayden's Case*, 77 Eng. Rep. 1150, 1151 (K.B. 1613) (footnote omitted).

198. Note, *Torts—Liability of Joint Tort-Feasors—Apportionment of Damages Between Joint Tortfeasors by Verdict of Jury*, 14 V.A. L. REV. 677, 682 (1928); W. PROSSER, *supra* note 12, § 52, at 314-15 nn.24-27.

that apportioned causal fault between defendants.<sup>199</sup> Out of a policy of avoiding the harshness of the early common law approach, state statutes were enacted in a majority of jurisdictions permitting a comparative fault analysis between the liability of plaintiff and defendant.<sup>200</sup> In part, therefore, the concept of comparative fault between defendants had its origins in the common law concept of contributory negligence as well as in the state statutes that superseded the common law.<sup>201</sup>

*Pro Rata Apportionment.* Again, the securities laws serve as a good analogy from which to discuss the question of apportionment.<sup>202</sup> Contribution in rule 10b-5 cases has been adjudged most often as a pro rata apportionment, largely because it was favored at common law.<sup>203</sup> The pro rata formula has also been followed because it affords predictability of result and administrative expedience.<sup>204</sup> Moreover, the Securities and Exchange Act of 1934 provides that a defendant may recover contribution "as in cases of contract;"<sup>205</sup> the pro rata method was used in allocating contribution in common law contract cases.<sup>206</sup>

Pro rata contribution is not the sole apportionment rule in securities cases, however. Some courts have fashioned a "benefits conferred" rule that allows the exercise of judicial discretion to apply equity principles in cases of extreme profiting by some violators. This is particularly so where, as in *Gould v. American-Hawaiian Steamship Co.*,<sup>207</sup> the plaintiff obtained from certain defendants, through settlement, a disgorgement of profits acquired through violations of the proxy requirements of section 14(a) of the Securities Exchange Act of 1934.<sup>208</sup> The district court reasoned that to require contribution from settling defendants that never retained those disgorged profits would violate a principle of equity merely to favor the lesser jurisprudential consideration of uniform application of law.<sup>209</sup> In so rul-

199. Annot., 32 A.L.R.3d 463 (1970).

200. See, e.g., ARK. STAT. ANN. § 27-1764 (Supp. 1977); NEB. REV. STAT. § 25-1151 (1975); WIS. STAT. ANN. § 895.045 (West Supp. 1979-1980).

201. Corbett, *supra* note 129, at 118-19.

202. See generally Fischer, *supra* note 82.

203. *Id.* at 1829.

204. *Id.*

205. Securities Exchange Act of 1934, § 9(e), 15 U.S.C. § 78i(e) (1976).

206. See Ruder, *supra* note 120, at 650.

207. 387 F. Supp. 163 (D. Del. 1974), *vacated and remanded on other grounds*, 535 F.2d 761 (3d Cir. 1976).

208. 15 U.S.C. § 78n(a) (1976).

209. The court's rationale was that

Even assuming for purposes of argument that pro rata contribution is generally applicable in securities cases, in these circumstances the Court cannot conclude that the Litton defendants have been required to pay an inequitable share of the liability to the plaintiff class. On the contrary, it could be inequitable to require any of the settling defendants to compensate the Litton defendants for disgorgement of a benefit received by the Litton defendants. Indeed, while several authorities have supported the pro rata measure of contribution in securities cases generally, it has also been recognized that a different result should obtain where damages are assessed under a theory calling for disgorgement of profits.

387 F. Supp. at 170-71 (footnotes omitted).

ing, the court relied in part on principles articulated in *Gomes v. Brodhurst*,<sup>210</sup> a negligence case in which the Third Circuit preferred the fairness of comparative negligence as the measure of contribution.<sup>211</sup> The *Gould* court reasoned that disgorgement of profits is no more difficult administratively than requiring pro rata contribution among defendants, and thus permitted apportionment on that basis.<sup>212</sup>

In *Professional Beauty Supply* the Eighth Circuit adopted "a rule of pro rata contribution except in unusual circumstances," without specifying either what circumstances might call for the application of another rule or what that rule might be.<sup>213</sup> The court found the pro rata approach to be required by both "the administrative difficulties of assessing exact percentages of fault in complicated antitrust actions" and the reduced deterrent value of a comparative fault rule.<sup>214</sup> The reduced deterrent value was seen in the prospect that "under a comparative fault rule some parties may feel they have little to lose in joining in an antitrust violation in a minor capacity."<sup>215</sup> Simply put, the court envisioned too much of an erosion of the deterrent value if the rule of comparative fault contribution were enacted.

One example of the "unusual circumstances" that might qualify as an exception from pro rata apportionment was cited by the court in *Professional Beauty Supply*.<sup>216</sup> *Wassel v. Eglowsky*,<sup>217</sup> a case arising out of a sale of unregistered securities, had presented the question of whether two defendants, Eglowsky and Stillerman, could claim contribution from a third defendant, Goldman, on a fifty-fifty basis, or whether Goldman's pro rata share would be limited to one-third. Finding that the fault of Stillerman, although arising from intentional acts, was largely "derivative," *i.e.*, dependent on Eglowsky's fault, the court "lumped together" the liabilities of Stillerman and Eglowsky to create one entity and apportioned liability equally between that "entity" and Goldman.<sup>218</sup>

210. 394 F.2d 465, 469-70 (3d Cir. 1967).

211. 387 F. Supp. at 171. The *Gould* court noted further that two courts had held that pro rata contribution was proper for those found jointly and severally liable for § 10(b) violations, citing *Herzfeld v. Laventhol, Krekstein, Horwath & Horwath*, 378 F. Supp. 113, 136 (S.D.N.Y. 1974), *aff'd in part, rev'd in part*, 540 F.2d 27 (2d Cir. 1976), and *Globus, Inc. v. Law Research Serv., Inc. (Globus II)*, 318 F. Supp. 955, 958 (S.D.N.Y. 1970), *aff'd per curiam on opinion below*, 442 F.2d 1346 (2d Cir.), *cert. denied*, 404 U.S. 941 (1971). In neither case were damages awarded on a disgorgement theory.

212. 387 F. Supp. at 171.

213. 594 F.2d at 1182 n.4. The opinion does not analyze the merits of the comparative fault approach or variations of it, possibly because the appeal was taken from a dismissal of National Beauty Supply's third-party complaint and no damages had yet been determined or awarded.

214. *Id.*

215. *Id.*

216. *Id.*

217. 399 F. Supp. 1330, 1370-71 (D. Md. 1975), *aff'd on opinion below*, 542 F.2d 1235 (4th Cir. 1976). See also *Feit v. Leasco Data Processing Equip. Corp.*, 332 F. Supp. 544 (E.D.N.Y. 1971) (applying comparative fault principles without discussing the theory).

218. The court cited RESTATEMENT (SECOND) OF TORTS § 886A, Comment h (Tent. Draft No. 16, 1970) as the paradigm for this approach:

*h. Method of apportionment.* The purpose of contribution is to arrive at a proper distribution of the liability among the persons liable. Since it is an

*Comparative Fault Apportionment.* Since damages as a general rule cannot be attributed in precise sums to particular violations by particular defendants, methods of dividing liability more ponderous than pro rata have not been welcome in the courts. Recently, however, taking its lead from *Globus II, Gould*, and perhaps *Wassel*, a court applied principles of comparative fault to apportion contribution in a rule 10b-5 and common law fraud action.<sup>219</sup> *McLean v. Alexander* represents a detailed comparative fault analysis of willful violations and their effects. A purchaser of stock had settled his securities fraud claim against the sellers and had obtained judgment against an accountant. The District Court for Delaware held that the accountant was entitled to contribution from the sellers in an amount proportionate to their fault. In apportioning the damages, the court was forced to choose from (1) a "head count" or per capita approach, whereby the accountant and the four sellers would share liability in the amount of twenty percent each, (2) an "entity" theory, apportioning fifty percent of the liability to the sellers as a group and the remaining fifty percent to the accountant, or (3) some other equitable method.<sup>220</sup> Noting the "vast difference between defendants in the degrees of their wrongdoing,"<sup>221</sup> the court sought to reflect that fact in the apportionment. Since the sellers "personally created the web of deceit which ensnared"<sup>222</sup> both the plaintiff and the accountant, and since the accountant, who committed other violations as well, "recklessly prepared"<sup>223</sup> an audit reflecting misrepresentations, the court adopted a variation on the "entity" approach by assessing the liability of the accountant at ten percent while placing ninety percent of the liability on the more culpable sellers.<sup>224</sup> Allowance was then made to the sellers for amounts paid in settlement.

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equitable remedy, it is traditionally governed by the principles of equity as to what is a proper distribution. Normally, "equality is equity," and all of the tortfeasors who are liable may be expected to end by paying equal shares. Thus if A, B and C are all liable to the plaintiff for the same tort, and A discharges the liability of all by paying \$12,000, he will normally have a right of contribution against B to the extent of \$4,000, and against C for the same amount.

There will, however, be situations in which equitable principles will call for a different distribution. Thus if B is the servant of C, or an independent contractor, and C has become liable only vicariously for the tort of B, it may be proper to hold B and C together for a one-half share of the total liability, rather than one-third each. Again, if the plaintiff suffers harm through the fall of a party wall between two lots, one of which is owned by A, and the other by B, C and D in common, it may be proper to hold B, C and D together liable for one-half, rather than one-quarter each.

219. *McLean v. Alexander*, 449 F. Supp. 1251 (D. Del. 1978), *rev'd on other grounds*, 599 F.2d 1190 (3d Cir. 1979).

220. *Id.* at 1272-73. This "entity" approach is supported by § 2(c) of the Uniform Act, which states that if equity requires, the collective liability of some as a group shall constitute a single share. The comment to § 2 states that the provision arises from the rule that class liability is treated as a single share, especially where it is based on vicarious relationships. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 2, Commissioners' Comment.

221. 449 F. Supp. at 1272.

222. *Id.* at 1276.

223. *Id.*

224. *Id.*

As *McLean* notes, apportionment based on relative culpability is inherently fairer when applied to cases involving both intentional and unintentional torts.<sup>225</sup> This was the view of the draftsmen of the 1955 version of the Uniform Joint Tortfeasors Act,<sup>226</sup> as well as of a commentator writing at the time of its passage.<sup>227</sup> The *McLean* case amplifies the already strong trend in tort law toward comparative fault analysis in apportioning amounts of contribution.<sup>228</sup> If comparative fault analysis becomes a rule of law in other circuits as well, it will call for an exercise of judicial discretion and prudence no less difficult than that required in, for example, the sentencing of criminal defendants in securities or antitrust cases.

The *McLean* opinion adverted to recent commentary that insists that the pro rata rule leads to arbitrary and irrational results while comparative fault, on the other hand, "more directly stimulates deterrence, is only minimally more difficult to administer and most importantly best serves justice."<sup>229</sup> The argument that a comparative fault approach is a greater deterrent assumes that charging the more culpable violator with a relatively greater portion of the total damage award is more prohibitive than pro rata apportionment among many coviolators. Implicit in this argument is the notion that where the more culpable violator has higher exposure to judgment liability, that prospect will give him greater pause concerning the degree, nature, and scope of his violation compared to that of other violators. The obvious counterargument for pro rata apportionment is that it deters at the inception of the violation, in that the less culpable, more passive violator who faces the prospect of sharing liability in an amount greatly disproportionate to his culpability will be discouraged from participation altogether. The pro rata approach retains much of the deterrent value inherent in the rule that entirely prohibits contribution between antitrust violators. Its deterrent value derives from the notion that the "possibility of escaping all liability might cause many to be more willing, rather than less willing, to engage in wrongful activity."<sup>230</sup> On balance, the true deterrent effect of either apportionment rule remains an open question.

*McLean* held that a comparative fault apportionment "is only mini-

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225. *Id.* at 1275.

226. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT, Commissioners' Comment at 87.

227. Gregory, *supra* note 2, at 380.

228. The court found guidance in comparative negligence cases "demonstrating that use of comparative fault provides a workable and flexible tool for the apportionment of damages." 449 F. Supp. at 1274 n.7. The court also relied upon Professor Bromberg: "given the possible complexities of securities violations, their intricate ramifications, and the suability under 10b-5 of relatively remote and insignificant parties, there will be occasions when it is just and reasonable to apportion liability of lesser wrongdoers." 2 A. BROMBERG, SECURITIES LAW: FRAUD § 8.5 (585), at 208.52 (1977).

229. 449 F. Supp. at 1276 (footnote omitted) (citing Note, *The Role of Contribution in Determining Underwriters Liability Under Section 11 of the Securities Act of 1933*, 63 U. VA. L. REV. 79, 96-100 (1977)).

230. *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179, 1185 (8th Cir. 1979).

mally more difficult to administer," asserting that "[f]or ease of administration, one might consider these several factors for consideration when apportioning damages: the defendant's extent of involvement, duration of involvement, knowledge of entire scheme to defraud, intent, extent of his contribution toward causation of the losses and benefit received."<sup>231</sup> While many of these factors cannot be measured precisely, a careful review of such elements is essential if a comparative fault approach is to be administered with any degree of fairness and practicality. The importance of the practicality of a method of apportionment is emphasized when the several approaches to apportionment are tested by the effects of settlement, insolvency, and absence of one or more violators.

### B. *The Effects of Settlement on Damage Apportionment*

A primary question only recently addressed by the courts is whether a settling antitrust defendant will be required to contribute to a judgment entered against an insolvent or absent nonsettling defendant. If, on the one hand, the primary result sought is the encouragement of settlements, then a rule that imposes no further liability for contribution against the settling defendant is desirable, even if it means the plaintiff may not receive full recovery. On the other hand, if the preferred position is to assess a pro rata or comparative share of damages against all joint violators, notwithstanding settlements, the settling defendant should be returned to the action in order to determine both his contribution liability and whether such liability exceeds his previous settlement. These conflicting positions have led to inconsistent approaches by the courts.

*Settlement in Securities and Admiralty Cases.* On this issue, decisions in maritime and securities law again provide the precedents. In *Altman v. Liberty Equities Corp.*,<sup>232</sup> a class action arising under section 10(b) of the Securities Exchange Act, the district court stated that "there can also be no doubt that the non-settling defendants have a right to make cross claims . . . and to seek contribution in cases brought under § 10(b) of the Securities Exchange Act."<sup>233</sup> The court, however, refused to allow the settling parties to provide for a proscription in their agreement, by indemnity or otherwise, against subsequent claims for contribution by nonsettling defendants.<sup>234</sup> In effect, the *Altman* court's refusal to treat a settlement as a

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231. 449 F. Supp. at 1276 n.84.

232. 54 F.R.D. 620 (S.D.N.Y. 1972).

233. *Id.* at 623. For a general discussion of settlement, apportionment, and contribution in securities cases, see Fischer, *supra* note 82. Fischer notes "the implicit holding in *Globus II* that contribution could be asserted through the use of rule 14 impleader against joint tortfeasors who were *not* named in the original action," finding that such a procedure "obviates any requirement of a joint judgment being entered in the original action." *Id.* at 1831 (footnote omitted).

234. The disallowed class action settlement attempted to "bar and permanently enjoin the non-settling defendants from prosecuting against the settling defendants any claim or claim over for indemnification or contribution arising out of the subject matter of this or any related action." 54 F.R.D. at 622.



bar to contribution discouraged later efforts of settlement. Similarly, in *Muth v. Dechert, Price & Rhoads*,<sup>235</sup> a section 10(b) securities case, a district court held that the provisions of a settlement between the plaintiffs and certain defendants in a previous case would not bar a claim for contribution by other defendants in a subsequent action. This holding was based in part on the fact that the defendants claiming contribution had neither been parties to nor received notice of the settlement.

Although a variety of factual patterns may confront the courts in a claim for contribution by a joint tortfeasor, if one cotortfeasor proposes to settle, or has settled, with the plaintiff, such patterns can be classified into two basic categories.<sup>236</sup> First are cases in which a settling defendant, receiving a release from the plaintiff that also preserves the plaintiff's recovery rights against a codefendant, is nevertheless liable for contribution in the absence of a contrary agreement between defendants.<sup>237</sup> Contribution liability in this situation is an amount equal to the settling defendant's proportional fault less the amount he has paid in settlement. Moreover, plaintiff's recovery against the nonsettling defendant is reduced by the amount actually paid by the settling defendant.<sup>238</sup> The Uniform Contribution Among Tortfeasors Act, cited in *Gomes v. Brodhurst*,<sup>239</sup> follows this rule in the event there is no "pro rata reduction" stipulation contained in the settlement agreement.<sup>240</sup>

In the second group are cases holding that a settling defendant who receives a release from the plaintiff, preserving plaintiff's rights against a

235. 391 F. Supp. 935 (E.D. Pa. 1975).

236. *Doyle v. United States*, 441 F. Supp. 701, 710 n.5 (D.S.C. 1977).

237. [T]he usual form of general release . . . will not prevent a plaintiff from suing a [nonsettling] joint tortfeasor. If such a subsequent action were brought against the joint tortfeasor, then it is predictable that the party who thought he purchased his peace . . . will now find himself right back in the litigation as a third-party defendant. The consideration paid is non-refundable and may only be used as a partial affirmative defense in mitigation of plaintiff's damages.

*Alexander & Baldwin, Inc. v. Peat, Marwick, Mitchell & Co.*, 385 F. Supp. 230, 239 (S.D.N.Y. 1974) (quoting Ausubel, *The Impact of New York's Judicially Created Loss Apportionment Amongst Tortfeasors—Dole v. Dow Chemical Co.*, 38 ALBANY L. REV. 155, 169-70 (1974)).

238. Currently pending before the Senate is a bill that would allow contribution in price fixing cases. It provides in part:

A release or a covenant not to sue or not to enforce a judgment received in settlement by one of two or more persons subject to contribution under this section shall not 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.

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

239. 394 F.2d 465 (3d Cir. 1967).

240. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 4; *cf. Simonsen v. Barlo Plastics Co.*, 551 F.2d 469 (1st Cir. 1977) (denying a nonsettling codefendant's right to contribution, although reducing damages by the amount actually paid).

nonsettling codefendant, is not liable for contribution.<sup>241</sup> In these cases, the plaintiff's recovery against the nonsettling defendant is reduced by an amount attributable to the settling defendant's proportional fault.

In *Doyle v. United States*<sup>242</sup> the court chose the second approach and reduced the plaintiff's recovery against the nonsettling defendant by an amount attributable to the settling defendant's proportional fault.<sup>243</sup> The court's rationale in preferring the "reduction by proportional fault approach" is aptly stated:

The better rule, this court feels, is to respect the aleatory nature of the settlement process and to hold both the plaintiff and settling defendant to their gamble. The plaintiff gambles that the amount he receives in settlement plus the amount recoverable from the non-settling defendant will be greater than he could have recovered if he pursued both actions to judgment (i.e., the plaintiff hopes the settling defendant will pay more than what is eventually determined to be his proportional share of the damages). The settling defendant gambles that the amount he pays in settlement is less than he ultimately would be liable to pay, had he gone to judgment. To allow the plaintiff, to, in effect, "void" this bargain and execute against the non-settling defendant for the entire damage award less the amount actually paid in settlement, with a right of cross claim preserved against the settling defendant in favor of the non-settling defendant, runs contrary to

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241. See, e.g., *Luke v. Signal Oil & Gas Co.*, 523 F.2d 1190 (5th Cir. 1975) (applying Louisiana law); *Griffin v. United States*, 500 F.2d 1059 (3d Cir. 1974) (construing wording of release under Pennsylvania law); *Gomes v. Brodhurst*, 394 F.2d 465, 468 (3d Cir. 1967) (discussing several alternatives before deciding a point of Virgin Island's common law); *Fruge v. Damson Drilling Co.*, 423 F. Supp. 1276 (W.D. La. 1976) (maritime law); *Leger v. Drilling Well Control, Inc.*, 69 F.R.D. 358 (W.D. La. 1976) (maritime law). The court in *Doyle v. United States* contrasted the two approaches:

Assume plaintiff is in an accident with defendant (N) and defendant (S). Plaintiff, whose damages are \$100,000.00, is not at fault, while the fault is apportioned at 40% to defendant (N) and 60% to defendant (S). Plaintiff settles with defendant (S) for \$20,000.00. Under theory (a) above, the recovery by the plaintiff against defendant (N) is reduced by the dollar amount—(\$20,000.00)—paid by defendant (S) in settlement. Thus, plaintiff can execute against defendant (N) for \$80,000.00 and defendant (N)—(in the absence of an agreement such as a dismissal of cross claims with prejudice)—can cross claim for contribution against defendant (S) in the amount of \$40,000.00 (i.e., \$60,000.00 attributable to defendant (S)'s negligence less the amount paid by defendant (S) in settlement).

On the other hand, under theory (b), the plaintiff can recover from the defendant (N) only \$40,000.00—that is the total amount of plaintiff's damages (\$100,000.00) reduced by an amount attributable to defendant (S)'s proportional fault (\$60,000.00). Since defendant (N) has had to pay only what he would be liable for due to his own negligence, he has no cross action against defendant (S). [Note that this court is not faced with the correlative question of whether a settling defendant, who, as events later reveal, has paid more than his share of the plaintiff's recovery can enforce contribution against the non-settling defendant. Such a situation would arise in the case above if defendant (S) was found to be anything less than 20% at fault. See, *Castillo Vda Perdomo v. Roger Construction Co.*, 418 F. Supp. 529 (E.D. Penn. 1976)].

441 F. Supp. 701, 710 n.5 (D.S.C. 1977) (emphasis in original).

242. 441 F. Supp. 701 (D.S.C. 1977).

243. *Id.* at 711 n.5 (citing *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975); *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409 (1953)).

logic and to the theory adopted by the Supreme Court in maritime collision cases.<sup>244</sup>

As the *Doyle* court noted, or, in the face of the potentially complex permutations and combinations, was perhaps recommending, codefendants can alter their liability for contribution by contract or other legal action, such as dismissal of a cross-claim with prejudice.<sup>245</sup>

Apportionment between joint tortfeasors, some of whom pay prejudgment settlements greater than their later-adjudged pro rata liability, is determined in some securities cases by the rule enunciated in *Herzfeld v. Laventhol, Krekstein, Horwath & Horwath*.<sup>246</sup> *Herzfeld* held that such a settling defendant, by virtue of his payment in excess of his pro rata share, could no longer be classified as a "joint tortfeasor."<sup>247</sup> Thus, "by the dint of the settlement" the settling tortfeasor could not properly be made a defendant in an action for contribution by the nonsettling tortfeasor. The problem under *Herzfeld*, from the point of view of the settling tortfeasor, is that it is unknown until after a final judgment in the main action whether the settling tortfeasor's payment was greater than his pro rata share of liability.<sup>248</sup> The settling tortfeasor therefore cannot, under the *Herzfeld* rule, be assured that he is no longer a joint tortfeasor and thereby immune to an action for contribution by the nonsettling defendant until the judgment becomes final. Under section 4 of the Uniform Contribution Among Tortfeasors Act, a settling tortfeasor would not have this concern, as that section provides that a release in good faith discharges a tortfeasor from all liability for contribution regardless of whether the release was obtained for a pro rata or greater share of the adjudged liability.<sup>249</sup>

The requirement that a settling tortfeasor assume a pro rata or greater share of the liability in order to be immune to a later action for contribution arises out of a concern that either discrimination by a plaintiff in settling with a cotortfeasor or some collusion between the plaintiff and the settling tortfeasor will operate, under the pro rata rule, to shift unjust portions of liability to a less culpable, nonsettling tortfeasor. Thus, under the pro rata rule, if plaintiff settles with *A*, the most culpable defendant, for \$10,000 and the total amount of damages is later adjudged at \$100,000, *A*'s nonsettling cotortfeasors, *B*, *C*, and *D*, will face a joint liability of \$90,000. The principle applied in *Herzfeld* cures the obvious unfairness inherent in this example by permitting an action against *A* by *B*, *C*, and *D* for contribution according to pro rata share, *i.e.*, for \$30,000 less \$25,000, or \$5,000 each.

In this sense, section 4 of the Uniform Contribution Among Tortfeasors Act perhaps goes too far in encouraging settlements, since it completely

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244. 441 F. Supp. at 711 n.5 (citing *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975)).

245. 441 F. Supp. at 711 (citing *United States v. Immordino*, 534 F.2d 1378 (10th Cir. 1976); *Muth v. Dechert, Price & Rhoads*, 391 F. Supp. 935, 939 (E.D. Pa. 1975)).

246. 540 F.2d 27 (2d Cir. 1976).

247. *Id.* at 39.

248. Fischer, *supra* note 82, at 1832.

249. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 2.

absolves a "good faith" low-settling tortfeasor from contribution liability. While the Act has the advantage of allowing for a pro tanto reduction in the amount an injured party can collect from the nonsettling joint tortfeasors, a plaintiff may abuse the pro rata rule by proceeding against remaining nonsettling defendants who, under the Act, have no action for contribution against the settling defendant.<sup>250</sup> On the other hand, while the *Herzfeld* rule imposes some hardship on a settling cotortfeasor seeking to forecast the total liability, it seems inherently fairer to disadvantage him rather than to burden the nonsettling, less culpable defendants with grossly disproportionate shares of the liability.

The converse of the above problem arises when, prior to judgment, a cotortfeasor settles with the plaintiff for an amount that exceeds his later-adjudged pro rata share. In this situation such a defendant will seek contribution from those defendants who incurred less than pro rata liability. The *Restatement (Second) of Torts* generally prevents such a high-settling defendant from seeking contribution for the amount exceeding a reasonable settlement; the reasonableness of the settlement, however, is left open to inquiry in a suit for contribution.<sup>251</sup> Section 1(d) of the Uniform Act takes the *Restatement* approach and provides that

[a] tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury or wrongful death is not extinguished by the settlement nor in respect to any amount paid in a settlement which is in excess of what was reasonable.<sup>252</sup>

*Effects of Settlement in Antitrust Cases.* Because courts have not until recently recognized a right of contribution in antitrust cases, they have not yet determined contribution rules that take account of settlement. Presumably, the precedents in maritime and securities law will, with some varia-

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250. *Id.* § 4. The Comment to § 4b states that "[i]t seems more important not to discourage settlements than to make an attempt of doubtful effectiveness to prevent discrimination by plaintiffs, or collusion in the suit." While the nonsettling defendants arguably may still assert a claim alleging lack of good faith against the settling parties, that alternative is inefficient in that it increases litigation before the final apportionment of damages between the cotortfeasors. Carried to its extreme, this will approach a comparative fault apportionment.

In New York, a general doctrine of "fairness between the parties" requires that when one tortfeasor settles with an injured party, that injured party should get no more than he bargained for. Hence, a settling party subsequently found liable in a securities case for an amount to be contributed may deduct from his apportioned share of the damages the settlement sum already paid. *Alexander & Baldwin, Inc. v. Peat, Marwick, Mitchell & Co.*, 385 F. Supp. 230, 239 (S.D.N.Y. 1974).

251. RESTATEMENT (SECOND) OF TORTS § 886A, Comment d (1965) states:

In particular, when a tortfeasor without suffering a judgment against him has voluntarily made a settlement with the plaintiff and a payment that exceeds any amount that would be reasonable under the circumstances, he should not be permitted to inflict liability for contribution regarding the excess upon another tortfeasor who has not entered into the same settlement. The reasonableness of the settlement is always open to inquiry in the suit for contribution, and the tortfeasor making it has the burden of establishing the reasonableness of the payment he had made.

252. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 1(d).

tions, be applied in the settlement context—as they have in recognition of the right itself. Nonetheless, a short line of antitrust contribution cases sheds some light on the settlement question.

In *Sabre Shipping Corp. v. American President Lines, Ltd.*<sup>253</sup> the district court refused to allow a nonsettling defendant to assert a claim for contribution and indemnity against its settling codefendant. The *Sabre* decision, however, was based upon the nonexistence of contribution liability itself, rather than upon considerations of the correct application of the rule of contribution to settling and nonsettling codefendants. Most courts have followed the *Sabre* holding and not reached the settlement issue.

In *Olson Farms, Inc. v. Safeway Stores, Inc.*,<sup>254</sup> an action under sections 1 and 2 of the Sherman Act,<sup>255</sup> the damages assessed against Olson Farms amounted to \$2,405,580.30 after trebling, interest, court costs, and attorneys' fees. Olson Farms satisfied the judgment and brought a third-party complaint for contribution against its alleged coconspirators. This complaint was summarily dismissed on the ground that its allegations were without support in the federal antitrust laws. *Professional Beauty Supply*, however, subsequently recognized for the first time a right to contribution, although it still did not address the problem posed by settlements.<sup>256</sup>

More recently, in *In re Ampicillin Antitrust Litigation*<sup>257</sup> a nonsettling codefendant, Bristol-Myers Company, sought contribution from a settling defendant, Beecham Group Limited, by way of cross-action. Primarily because the court saw a potential prejudice to plaintiffs and to Beecham if the contribution claims caused each to lose the benefits of their court-approved settlement, it disallowed Bristol-Myers' contribution claim. The court stated that "it would be less than equitable" to order Beecham to comply with the settlement "while remaining in the case by way of . . . [the] cross claims."<sup>258</sup> Although the court noted that *Professional Beauty Supply* had allowed a third-party complaint for contribution to stand, the court distinguished that case as not dealing with "the problem of a joint tortfeasor who has settled in good faith."<sup>259</sup> Moreover, the *Ampicillin* court interpreted *Professional Beauty Supply* as "limited to certain circumstances in which contribution might further rather than hamper the deterrent purposes of the antitrust laws."<sup>260</sup> The clear implication of *Ampicillin* is that the "certain circumstances" under which the rule permitting contribution will be invoked include (1) those in which an equitable settlement,

253. 298 F. Supp. 1339 (S.D.N.Y. 1969).

254. [1977-2] Trade Cas. ¶ 61,698 (D. Utah 1977), *appeal docketed*, No. 77-2068 (10th Cir. Dec. 20, 1977). *See also* El Camino Glass v. Sunglow Glass Co., [1977-1] Trade Cas. ¶ 61,533 (N.D. Colo. 1970).

255. *See* notes 88 & 89 *supra*.

256. *See* notes 143-62 *supra* and accompanying text.

257. ANTITRUST & TRADE REG. REP. (BNA) No. 917, at E-1 (D.D.C. May 21, 1979).

258. *Id.*

259. *Id.* at E-2.

260. *Id.* *In re Ampicillin* also took account of the untimeliness of Bristol's motion for leave to file cross-claims, noting that it was filed almost nine years after the litigation had commenced and after a partial settlement between Beecham, Bristol-Meyers, and a certain plaintiff class.

already negotiated, would not thereby be precluded and (2) those in which a violator would otherwise altogether escape liability.

This short line of antitrust cases addressing the impact of settlement on contribution fails to take account of antitrust settlements that are non-monetary.<sup>261</sup> Such settlements may include credits extended by a settling codefendant to another party, loans, and agreed business practices that in themselves do not constitute violations. In such cases, from the standpoint of one assessing contribution liability, the problem is how to measure fairly the fiscal value of a specific nonmonetary settlement. Without such a measure, a claim for contribution is not supportable, unless perhaps it includes participation in some aspect of the nonmonetary arrangement. Credits and loans may be readily susceptible to money valuation. On the other hand, agreed business practices such as halting an acquisition, ending an offensive distribution practice, or reinstating a product line are not susceptible in most instances to monetary valuation and, to that extent, are immune to monetary claims for contribution.

### C. *Insolvent or Absent Defendants*

In antitrust cases the impact of insolvency or absence of one or more codefendants is as yet unclear. Again, federal treatment of these situations may follow state common law precedent, which unfortunately varies significantly between jurisdictions. In some jurisdictions, a "pro rata reduction rule" operates to reduce the amount of damages recoverable by a plaintiff who proceeds against nonsettling tortfeasors after he has settled with other tortfeasors. Under this rule, the pro rata share of the settling defendants' liability is determined by dividing the total damages by the number of joint tortfeasors.<sup>262</sup> The amount recoverable by the plaintiff from the nonsettling defendants is then equal to total damages less the pro rata liability of the settling tortfeasors. The obvious unfairness of this approach is that a judgment in an action involving an insolvent defendant who has settled with plaintiff, would preclude plaintiff from recovering against a solvent defendant more than his pro rata share of damages. The plaintiff thus loses the "several" liability of each defendant. A rule that would carve out an exception for insolvency or absence, allowing plaintiff to have his full share of damages from the solvent defendant, less any amount then paid, or paid in the future, by the insolvent defendant would be inherently more fair.

Historically, where one or more co-obligors are insolvent, a court of equity, in the absence of an agreement to the contrary, divided the total lia-

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261. See Halper, *The Unsettling Problems of Settlement in Antitrust Damage Cases*, 32 ANTITRUST L.J. 98 (1966). Halper notes that, "It is sometimes said that the three most important types of consideration involved in settlements are money, money, and money. (Personally, I think undue emphasis is placed on this third factor.)" *Id.* at 101.

262. *Judson v. Peoples Bank & Trust Co.*, 17 N.J. 67, 110 A.2d 24 (1954). See *Martello v. Hawley*, 300 F.2d 721 (D.C. Cir. 1962); *Harvey v. Travelers Ins. Co.*, 163 So. 2d 915 (La. Ct. App. 1964); *Palestine Contractors, Inc. v. Perkins*, 386 S.W.2d 764 (Tex. 1964). See also Comment, *Settlement in Joint Tort Cases*, 18 STAN. L. REV. 486, 487-88 (1966).

bility, including that of the insolvent co-obligor, equally among only the solvent co-obligors.<sup>263</sup> Courts of law, on the other hand, traditionally applied the harsher rule, from the plaintiff's viewpoint, that the insolvency of a co-obligor does not affect the apportionment of damages between all obligors equally.<sup>264</sup> Modern holdings have eliminated this distinction between law and equity so that the equity doctrine now prevails in the case of insolvent defendants.<sup>265</sup> Furthermore, the equity rule apportioning common liability among only the solvent co-obligors has been applied by analogy to a situation in which a defendant co-obligor was absent from the jurisdiction.<sup>266</sup> Accordingly, the total liability was apportioned between the remaining defendants. Generally, however, the insolvency necessary to invoke application of the equity rule must have been determined judicially; without such a determination, the presumption is that all the co-obligors are solvent.<sup>267</sup> Equity decrees have also been drawn so that the rule would operate prospectively, *i.e.*, in the event that one of the judgment-liable co-obligors later becomes solvent.<sup>268</sup>

In *State Mutual Life Assurance Co. of America v. Peat, Marwick, Mitchell & Co.*<sup>269</sup> the court dismissed third-party complaints against obviously judgment-proof "strawmen," citing cases in which defendant employers had sought to implead employee-drivers in collision cases. In striking the complaints, the court reasoned that joinder of the third-party defendants would serve no practical purpose.<sup>270</sup> The basis for this holding is questionable in light of later judicial developments, since it utilized in part the active negligence and passive negligence distinctions in allocating liability between codefendants in a 10b-5 action.<sup>271</sup>

As one commentator has noted, antitrust defendants haunted by the

263. *See, e.g.*, *Easterly v. Barber*, 66 N.Y. 433 (1876); *Austin Road Co. v. Pope*, 147 Tex. 430, 216 S.W.2d 563 (1949); Annot., 64 A.L.R. 213, 224-28 (1930).

264. *See* Annot., 64 A.L.R. 213, 228 (1930).

265. *See, e.g.*, *Hughes v. Boone*, 81 N.C. 204 (1879); *Faurot v. Gates*, 86 Wis. 569, 57 N.W. 294 (1893). *See also* Annot., 64 A.L.R. 213, 234 (1930).

266. *Moody v. Kirkpatrick*, 234 F. Supp. 537 (M.D. Tenn. 1964), in which the court noted that:

The determination of the amount of recovery is somewhat difficult of solution since two distinct rules have been developed for apportioning the common liability where there are insolvent co-obligors. Contribution is of equitable origin but it has long been enforced in courts of law on the basis of an implied contract entered into concurrently with the contract creating the common obligation. . . . Adherence to the concept of an implied contract caused the law courts to develop the rule that each co-obligor is liable only for his aliquot portion of the common debt, no consideration being given to the insolvency of other co-obligors since each impliedly promised to pay only what was at the time his share of the common obligation. . . . The rule in equity, however, based on the maxim that equality is equity, is that the common liability must be apportioned among the solvent co-obligors.

*Id.* at 542 (citations omitted).

267. *See Tucker v. Nicholson*, 12 Cal. 2d 427, 84 P.2d 1045 (1938).

268. *See Jewett v. Maytham*, 64 Misc. 488, 118 N.Y.S. 635 (Sup. Ct. 1909); *Kimball v. Williams*, 51 A.D. 616, 65 N.Y.S. 69 (1900).

269. 49 F.R.D. 202, 213 (S.D.N.Y. 1969).

270. *Id.*

271. *See* text accompanying notes 194-95 *supra*.

spectre of contribution liability after settlement successfully coped with the problem in the electrical-damage price-fixing cases brought by the government and the Tennessee Valley Authority. Unique to the arrangement was the cooperation of the nonsettling defendants who, in exchange for a government stipulation limiting its claims to their sales, agreed to forego any claim for set-off against the settling defendants.<sup>272</sup> Except in the rare cases in which such a trade-off arrangement has apparently equal advantages for the settling and nonsettling parties, the problem of contribution liability after partial settlement will, in the absence of a Uniform Act statute, persist.

The purpose of the courts in dealing with contribution following settlement is not so much to remove uncertainties faced by the parties as it is to remove the resulting unfairness of disproportionately assessed damages. The importance of this simple fairness criterion, especially when it so often conflicts with considerations of practicality or ease of administration, is nowhere more forcefully articulated than in *United States v. Reliable Transfer Co.*<sup>273</sup> In this maritime collision case the Supreme Court overturned the automatic operation of the "divided damages rule," which had required equal apportionment of liability in maritime collision or stranding cases involving mutual fault.<sup>274</sup> Noting that "[p]otential problems of proof in some cases hardly require adherence to an archaic and unfair rule in all cases,"<sup>275</sup> the Court reversed one of the longest standing rules in

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272. Halper, *supra* note 261, at 112, states:

Consequently, a settlement-delaying dilemma can arise in price-fixing cases over plaintiff's interest in claiming against the remaining defendants on sales made by the settling company. The plaintiff wants the tactical advantage of being free to claim damages on all of its purchases; the remaining defendants are faced with the threat of liability disproportionate to their own involvement, and may be induced to settle more promptly or on more favorable terms. . . .

On the other hand, if the settling company's sales are not excluded, it may be faced with a contribution claim by contract, or conceivably (though unlikely) by operation of law, in the event of a later verdict against remaining defendants. It is therefore naturally reluctant to settle and still be exposed to further liability on the claims covered by settlement.

This dilemma may be more imagined than real. In the electrical damage cases brought by the Government and TVA, plaintiffs refused to agree to forego claims on settling companies' sales. The private treble damage litigants, however, did generally agree to such exclusions. Without saying who is right, I note the Government's solution, which provided for it to offer to stipulate with the remaining defendants that it would limit its claims to their sales if they agreed to forego any claim of set-off. For such a procedure to be workable, however, it is obvious that all remaining defendants must enter into such a stipulation.

273. 421 U.S. 397 (1975).

274. *Id.* at 407. The admiralty "divided damages rule," according to the Court, had its origins in art. XIV of the Laws of Oleron, promulgated about A.D. 1150, which provided that in cases of collision between a ship under way and another at anchor, the damages would be divided equally between the owners of the two vessels, so long as the captain and crew of the ship under way swore under oath that the collision was accidental. *Id.* at 401 n.3.

275. *Id.* at 407.



jurisprudence.<sup>276</sup>

We hold that when two or more parties have contributed by their fault to cause property damage in a maritime collision or stranding, liability for such damage is to be allocated among the parties proportionately to the comparative degree of their fault, and that liability for such damages is to be allocated equally only when the parties are equally at fault or when it is not possible fairly to measure the comparative degree of their fault.<sup>277</sup>

Thus, the Supreme Court left it to the lower courts to determine whether in such cases it is *possible* to measure the comparative degrees of fault involved. Following the lead of *Globus II* and *McLean* and its predecessors allowing for comparative fault analysis in cases of intentional wrongdoing, the rule of *Reliable Transfer* might be applied in antitrust cases. Such a general rule would require comparative fault analysis unless the court found that it was not possible to measure degrees of fault. Pro rata apportionment of liability would be utilized when comparative fault analysis is not possible.

From the point of view of counsel attempting to assess exposure of his client in an antitrust action, especially early in the suit, such a rule would make the task even more awesome. Not only must he decide whether it is possible to measure fairly comparative degrees of culpability but also, if so, how the measure must be taken. Under such a rule, counsel should obtain the earliest possible ruling as to which measure applies. That ruling, which in many cases might not be obtainable until the trial is near completion, will have an impact on counsel's settlement recommendation, if any.

#### IV. PROCEDURAL DEVICES FOR ASSERTING THE CONTRIBUTION CLAIM

Assuming that a right to contribution in antitrust cases does exist, the contribution claimant must decide which procedural device to employ to enforce the right. Critical to this decision is at what stage of the litigation the decision is made by a defendant to seek contribution. If the decision is made prior to judgment, two alternatives are available: the impleading of a nonparty under rule 14,<sup>278</sup> or the assertion of a cross-claim against an existing coparty under rule 13(g).<sup>279</sup> A defendant may also wait until after

276. *Id.* at 401 n.3.

277. *Id.* at 411.

278. FED. R. CIV. P. 14(a) states, in part, that a defending party may bring an action against any

person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. . . . A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim . . . .

279. FED. R. CIV. P. 13(g) states:

A pleading may state as a cross-claim any claim by one party against a coparty arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be

judgment to assert a contribution claim; but if he chooses to do so, he is limited to either utilizing a postjudgment motion under rule 59<sup>280</sup> or filing a separate action.<sup>281</sup>

As a general rule, it seems apparent that the most prudent course to follow is for a defendant to assert his contribution claims against all potential defendants at the earliest possible point. Such an early determination is consistent with the general philosophy of the federal rules policy of adjudicating all rights of the parties in a single action.<sup>282</sup> Indeed, the failure to assert the claim at an early stage may give rise, under certain circumstances, to a defense of laches to a late attempt to enforce a contribution right.<sup>283</sup>

In many instances, the appropriate procedure to be utilized is a cross-claim. The propriety of this device is dictated by rule 13(h), which allows the addition of a nonparty to a cross-claim where appropriate.<sup>284</sup> For example, if plaintiff sues *A* and *B*, and *A* desires to seek contribution from *B* and from *C*, an additional nonjoined coconspirator, then *A* should cross-claim against *B* and add *C* as an additional party defendant. Rule 14 impleader, however, would be appropriate when only one party has been named as a defendant, and that party seeks to enforce its contribution right against a nonparty.<sup>285</sup>

As in all other situations where an additional party is added, the pleader must be conscious of jurisdictional and venue considerations. Since by definition the contribution claim arises out of the same transaction or occurrence as the plaintiff's original federal question claim, it is difficult to conceive of a situation where subject matter jurisdiction would present a problem to the antitrust contribution claimant.<sup>286</sup> Additionally, section 22 of the Sherman Act provides that venue over a corporate antitrust defendant is "any district wherein it may be found or transacts business."<sup>287</sup> The same section also provides nationwide service of process over corporate

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liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

*Cf. In re Ampicillin Litigation*, ANTITRUST & TRADE REG. REP. (BNA) No. 917, at E-1 (D.D.C. May 21, 1979) (court denied motion to amend answers to assert cross-claims on ground that motion was not timely).

280. *See* *Globus, Inc. v. Law Research Serv., Inc. (Globus II)*, 318 F. Supp. 955 (S.D.N.Y. 1970), *aff'd per curiam on opinion below*, 442 F.2d 1346 (2d Cir.), *cert. denied*, 404 U.S. 941 (1971).

281. *See* *Southern Md. Oil Co. v. Texas Co.*, 203 F. Supp. 449 (D. Md. 1962).

282. *See generally* *Vestal, Reactive Litigation*, 47 IOWA L. REV. 11 (1961).

283. *See* notes 295-97 *infra* and accompanying text.

284. FED. R. CIV. P. 13(h) states, in part: "Persons other than those made parties to the original action may be made parties to a counter-claim or cross-claim . . . ."

285. *Cf. Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179, 1182 (8th Cir. 1979) (antitrust defendant entitled to pro rata contribution from other joint tortfeasors upon defendant's third-party complaint).

286. Principles of ancillary jurisdiction preserve a federal court's jurisdiction over a cross-claim or third-party claim that would otherwise defeat diversity jurisdiction because of nondiverse opposing parties. *See* 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1436 (1971).

287. 15 U.S.C. § 22 (1976).

defendants.<sup>288</sup>

A difficult conceptual problem is presented with regard to the application of any statutes of limitations. First, one must determine the applicable statute. As a general rule, the statute governing the underlying tort has not been applied to the liability for contribution.<sup>289</sup> Instead, the statute applicable to actions based upon an implied contract or a debt not evidenced by writing has governed.<sup>290</sup>

The governing limitations period is most critical if the contribution claimant chooses to bring a separate action after a determination of liability rather than joining other potential defendants in the original action. For example, if *A* and *B* are jointly liable, but plaintiff has sued only *A*, defendant *A* may still bring an action against *B* after *A* has been adjudicated liable, even though plaintiff's claim against *B* has expired.<sup>291</sup> When the contribution claim is asserted prior to judgment in the primary action, however, the statutes of limitations lose much of their traditional vitality. The limitations period does not begin to run until the action "accrues,"<sup>292</sup> which, for contribution, is the point at which liability for the underlying tort is established.<sup>293</sup> Thus, when a party is named as a cross-claim or third-party defendant in a contribution suit, the statute of limitations has not begun to run,<sup>294</sup> regardless of the posture in which the litigation actually rests.

The difficulties that might arise in a statute of limitations context are typified by the previously discussed *Ampicillin* litigation,<sup>295</sup> in which the court denied leave to assert a cross-claim for contribution.<sup>296</sup> Although never using the term "laches," the court cited the lateness of the claim and the prejudice to the other defendants that would result from allowing the claim to stand.<sup>297</sup> The analysis employed in *Ampicillin* seems to be a more appropriate course for the courts to take than to insist on strict compliance with a particular statute of limitations. Again, one of the critical issues in this area is the treatment of contribution after a partial settlement. A

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288. *Id.* A nonresident individual defendant would presumably be served under the local long-arm jurisdiction statute pursuant to FED. R. CIV. P. 4(e), and the court could assume personal jurisdiction only if the defendant had the requisite minimum contacts with the forum. See *Shaffer v. Heitner*, 433 U.S. 186 (1977); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

289. *Adam v. Vacquier*, 48 F. Supp. 275 (W.D. Pa. 1942).

290. See generally Annot., 57 A.L.R.3d 927 (1974).

291. See *Globig v. Greene & Gust Co.*, 184 F. Supp. 530 (E.D. Wis. 1960).

292. See generally 18 AM. JUR. 2D *Contribution* § 93 (1965).

293. *Id.*

294. Note that both a rule 14 third-party action and a rule 13(g) cross-claim may be brought against a party "who is or may be liable" for "all or part" of the principal obligation (emphasis added).

295. See notes 257-60 *supra* and accompanying text.

296. The contribution claimant had moved to amend its answer under rule 15(a) to assert the cross-claim. The court's denial of such leave was clearly within its discretion. See generally 6 C. WRIGHT & A. MILLER, *supra* note 286, § 1487.

297. Lateness of claims and the resultant prejudice to defendants are the classic elements needed to establish the defense of laches. See *City of Davis v. Coleman*, 521 F.2d 661 (9th Cir. 1975).

broad application of the doctrine of laches could be utilized to deter assertion of late claims for contribution that might otherwise undermine prior settlements or create other prejudice to the parties.

## V. CONCLUSION

The right to contribution, founded in equity, has evolved slowly. In recent years, however, courts have recognized and applied the right with increasing frequency in both maritime and securities law cases. Insofar as specific application of the right is concerned, these two areas of law are the authoritative sources that will determine how the right is applied in private federal antitrust actions. In particular, recent securities law decisions have crossed the threshold between cases involving negligent conduct and those involving intentional misconduct, when *Globus II* allowed a claim for contribution for the first time in a case involving intentional violation of rule 10b-5. Almost nine years later, the right was also allowed by a circuit court in *Professional Beauty Supply*, an antitrust case under the Sherman Act.

Once courts allow the right, they face the question of how to apportion the contribution liability between coviolators. Two approaches are utilized. The first is a pro rata allocation of the liability between the coviolators. The second method entails an analysis of comparative degrees of culpability of the intentional coviolators. Assessment of liability for particular damages under this comparative fault approach to apportionment assumes that it is possible in such cases to measure fairly the comparative degrees of culpability of coviolators. In *Reliable Transfer*, the Supreme Court, doing away with the "divided damages rule" in maritime negligent collision and stranding cases, announced a rule that may be applicable in apportioning contribution liability in private federal antitrust damage actions. The rule would mandate comparative fault analysis except in those cases in which measurement of comparative fault is not possible.

Settlement considerations exacerbate the complexities of allowing the right. Hence, two basic approaches, or variations of them, are taken by the courts. Under one approach, a settling defendant who receives a release from the plaintiff, preserving plaintiff's rights against a codefendant, is liable for contribution in the absence of a contrary agreement between defendants. The contribution liability is an amount equal to settling defendant's proportional fault less the amount he paid in settlement. The plaintiff's recovery against a nonsettling defendant is then reduced by the amount actually paid by the settling defendant. Under the second approach, a settling defendant who receives a release from the plaintiff, preserving plaintiff's rights against a nonsettling codefendant, is not liable for contribution. Here, the plaintiff's recovery against the nonsettling defendant is reduced by whatever amount is attributable to the settling defendant's proportional fault. Nonetheless, the settlement rules themselves remain uncertain. Clearly, a definitive decision by the Supreme Court is needed concerning the availability of contribution, the apportionment of

contribution liability, and the effects of such a rule on settlements in federal antitrust litigation.

#### POSTSCRIPT

After the foregoing portion of this Article went to press, the American Bar Association's Board of Governors authorized the Section of Antitrust Law to communicate the Section's endorsement of draft legislation recognizing a right to contribution. As reported in *Antitrust & Trade Regulation Report* No. 936, at A-8-10 the specific proposal endorsed by the ABA provides that every antitrust defendant against whom a plaintiff alleges wrongful acts or omissions will be subject to claims for contribution. The contribution claim may be made in a separate action or by way of counterclaim, cross-claim, or third party complaint.

Contribution claims would be barred unless filed within one year of service of the complaint or sixty days after the claimant has reasonable notice of its contribution claim, whichever is later. Defendants may mutually agree to toll the limitations period.

All rights of contribution by or against a settling defendant would be barred under the proposal.