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## CONTRIBUTION IN CIVIL ANTITRUST LITIGATION: THE EMERGING CONSENSUS IN LEGAL LITERATURE

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### I. Introduction

The United States Supreme Court recently has agreed to consider the issue of whether contribution among multiple defendants and coconspirators should be allowed in private civil antitrust litigation.<sup>1</sup> Three circuit courts of appeal recently have handed down decisions on the issue of contribution and the result has been disagreement over whether such a right exists or should exist in antitrust law.<sup>2</sup> Legal com-

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<sup>1</sup> *Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc.*, 604 F.2d 897 (5th Cir. 1979), *cert. granted sub nom. Texas Indus., Inc. v. Radcliff Materials, Inc.*, 49 U.S.L.W. 3332 (November, 1980). The case most likely will be decided in late spring or early summer of this year. Previously the Court granted a writ of certiorari to the Fifth Circuit on another antitrust contribution case, but the petition was later dismissed. *In re Corrugated Container Antitrust Litigation*, 84 F.R.D. 40 (E.D. Tex. 1979), *aff'd*, 606 F.2d 319 (5th Cir., 1979), *cert. dismissed*, 49 U.S.L.W. 3288 (1980). The Fifth Circuit in the *Corrugated Container* case affirmed the district court's denial of contribution by an order entered without an opinion two weeks after the panel handed down its decision in *Abraham*. Thus, the majority and dissenting views in *Abraham* represent the Fifth Circuit's only expressed reasoning on the issue of antitrust contribution.

In *Abraham*, the plaintiff filed an antitrust complaint seeking damages allegedly resulting from price-fixing between the defendant, Texas Industries, Inc., (TI) and unnamed coconspirators. During discovery proceedings, Texas Industries allegedly first learned the identity of its "coconspirators" and filed a third-party complaint against them seeking contribution in the event it was found liable. The third-party defendants filed motions to dismiss, which the district court granted on the ground that no right of contribution exists under federal antitrust law. Texas Industries appealed, contending, *inter alia*, that antitrust policy supports a rule allowing contribution in all cases. Alternatively, TI argued that since it was not more culpable than the third-party defendants, equity should allow contribution, in this particular case. In support of the latter proposition, Texas Industries specifically argued that the Supreme Court's partial rejection of the *in pari delicto* defense in antitrust

mentators have responded to these developments with a spate of "solutions" to the problem containing proposals for and against contribution.<sup>3</sup> This article will survey the current status of the literature expressing these opinions. Then, assuming the establishment of such a right in antitrust law, the article will examine the issues raised by the alternative forms of contribution proposed by courts and commentators and the limited consensus that has emerged.

The Sherman Act<sup>4</sup> and the Clayton Act<sup>5</sup> are silent about the nature of liability among antitrust coconspirators, but subsequent litigation has established that like joint tortfeasors, those acting in concert to violate the antitrust laws are jointly and severally liable.<sup>6</sup> Consistent with tort

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actions, *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 140 (1968), should preclude the purported application of equity principles to deny contribution in this case. 604 F.2d at 901-902. The Fifth Circuit panel affirmed the district court's order, holding that no right of contribution exists in any case. Judge Morgan concurred in part and dissented in part, contending that although intentional violators of the antitrust laws should be denied contribution, he favored a "limited contribution rule" that "would not force a defendant guilty of no conscious wrongdoing to bear total responsibility for the sins of many." 604 F.2d at 908. Judge Morgan's opinion neither cites *Perma Life Mufflers* nor indicates specifically how a trial court should deal with the several issues arising if some form of contribution is allowed.

<sup>2</sup> Compare *Olson Farms, Inc. v. Safeway Stores, Inc.*, [1979-2] TRADE CAS. ¶ 62,995 (10th Cir. 1979) (contribution denied); and *Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc.*, 604 F.2d 897 (5th Cir. 1979) (contribution denied) with *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179 (8th Cir. 1979) (contribution allowed).

<sup>3</sup> Corbett, *Apportionment of Damages and Contribution Among Coconspirators in Antitrust Treble Damages Actions*, 31 FORDHAM L. REV. 111 (1962); Heininger, *After the Brawl is Over—Settlements, Contribution (?) and Taxes*, 12 ANTITRUST BULL. 169 (1967); Jacobson, *Contribution Among Antitrust Defendants: A Necessary Solution to a Recurring Problem*, 32 U. FLA. L. REV. 217 (1980); Paul, *Contribution and Indemnification Among Antitrust Coconspirators Revisited*, 41 FORDHAM L. REV. 67 (1972); Schwartz, Simpson & Arnold, *Contribution in Private Actions Under the Federal Antitrust Laws*, 33 S.W.L.J. 779 (1979); Sellers, *Contribution in Antitrust Damages Actions*, 24 VILL. L. REV. 829 (1979); Slain, *Risk Distribution and Treble Damages: Insurance and Contribution*, 45 N.Y.U. L. REV. 263 (1979); Note, *Contribution Among Antitrust Violators*, 29 CATH. U. L. REV. 669 (1980); Note, *Contribution in Private Antitrust Suits*, 63 CORNELL L. REV. 682 (1978); Note, *Contribution in Private Antitrust Actions*, 93 HARV. L. REV. 1540 (1980); Note, *Contribution Among Private Antitrust Conspirators*, 10 MEMPHIS S.U. L. REV. 342 (1980); Note, *Contribution and Antitrust Policy*, 78 MICH. L. REV. 890 (1980); *Recent Developments, Contribution Among Antitrust Defendants*, 33 VAND. L. REV. 979 (1980). Note, *A Case Against Contribution in Antitrust*, 58 TEX. L. REV. 961 (1980).

<sup>4</sup> 15 U.S.C. §§ 1-7 (1976).

<sup>5</sup> 15 U.S.C. §§ 12-27 (1976).

<sup>6</sup> When tortfeasors act in concert, damages are not apportioned. A single judgment is returned and each defendant is responsible for all damages. See W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 47 (4th ed. 1971) [hereinafter cited as PROSSER]. Similarly, multiple defendants in antitrust are jointly and severally liable. *Solomon v. Houston Corrugated Box Co.*, 526 F.2d 389, 392 (5th Cir. 1976); *Wainwright v. Kraftco Corp.*, 58 F.R.D. 9, 11-12 (N.D. Ga. 1973); *American Steel Co. v. American Steel & Wire Co.*, 244 F. 300, 303 (D. Mass. 1916). The plaintiff may enforce his judgment against any defendant. *Morgan v. United States*, 81 U.S. (14 Wall.) 531, 534 (1871). The *Morgan* doctrine governs claims for contribution in antitrust litigation as well as general tort law.

principles, courts have preserved the right of antitrust plaintiffs to sue any number or combination of coconspirators. If named defendants are not allowed to implead unnamed coconspirators, the result is a somewhat arbitrary imposition of liability unrelated to antitrust policy and basic principles of equity. Even when all conspirators are included in a plaintiff's complaint, the use of "whip-saw tactics" and "settlement coercion" may induce defendants to settle out of court for disproportionately high or low sums and expose non-settling defendants to extraordinary liability.<sup>7</sup> The obvious remedy for this situation is the establishment of a right of contribution among multiple defendants, original and impleaded, in civil antitrust litigation.

The recent emergence of contribution as a major issue in antitrust litigation is the product of a number of factors. More cases today involve successful allegations of unlawful combinations and conspiracies where a right of contribution is more likely to be asserted, and this trend will continue.<sup>8</sup> Damages in a single case have exceeded one billion

<sup>7</sup> See text accompanying notes 95-112 *infra*.

<sup>8</sup> Before 1939, only thirteen treble damages actions under the Sherman Act were successful. See, e.g., *Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. 235 (1929); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927). One hundred fifty-seven civil antitrust cases were filed in the federal district courts from 1890 until 1939. Guilfoil, *Damage Determination in Private Antitrust Suits*, 42 NOTRE DAME LAW. 647, 647 n.1 (1967). Thus the successful claims represent less than 9% of all private antitrust actions. Cf. 18 U. CHI. L. REV. 130, 138 (1950) (contending that 175 antitrust claims were filed between 1890 and 1939 resulting in seven percent success rate). Since 1939, the rate of success has increased steadily until, today, a plaintiff's chance of recovering treble damages is substantial. From 1952 to 1959 the percentage of successful civil cases was 100% higher than the period 1890-1939. Bicks, *The Department of Justice and Private Treble Damages Actions*, 4 ANTITRUST BULL. 11 (1959).

The sheer number of cases filed under the Sherman Act has increased drastically in the last several years. Only eight private antitrust cases were commenced in 1937. [1940] ANN. REP. OF THE ADMIN. OFFICE OF THE U.S. COURTS 71. In 1960, 228 antitrust claims were filed, and in 1970, 877 cases were begun. [1970] ANN. REP. OF THE ADMIN. OFFICE OF THE U.S. COURTS 130. This trend shows no sign of abating: in 1978 alone, 1435 claims were filed in the United States district courts. [1978] ANN. REP. OF THE ADMIN. OFFICE OF THE U.S. COURTS 312.

In this increased number of cases the finder of fact is given broad discretion to infer the existence of a conspiracy:

Indeed, the members of the [Federal Trade] Commission appear to take the position that mere identity of action—such as charging the same price—is sufficient to sustain its conclusion that there has been an illegal conspiracy.

Certainly the trend of these decisions is to eliminate the fundamental distinction between innocence and guilt which has so long been an integral part of the statute's interpretation.

Wood, *The Supreme Court and a Changing Antitrust Concept*, 97 U. PA. L. REV. 309-44 (1949). See, e.g., *American Tobacco Co. v. United States*, 328 U.S. 781 (1946). Where the existence of a conspiracy is inferred or discovered, defendants are jointly and severally liable, each responsible for the full amount of judgment. See note 3 *supra*. This increasing incidence of joint and several liability increases the probability of defendants seeking contribution. Slain, *Risk Distribution and Treble Damages: Insurance and Contribution*, 45 N.Y.U. L. REV. 263, 267-69 (1970). Not coincidentally, the few cases and commentaries on point all have appeared within the past 24 years.

dollars,<sup>9</sup> and plaintiffs have recovered more in the last three years than in the previous half century.<sup>10</sup> As awards in antitrust litigation continue to skyrocket, more defendants will seek contribution.

Although most courts agree that federal law controls the present controversy,<sup>11</sup> federal precedent for contribution is weak.<sup>12</sup> Courts and commentators in favor of contribution argue that such a right would not unduly burden prospective plaintiffs, inhibit out of court settlements, or reduce the deterrent effect of the antitrust laws.<sup>13</sup> Opponents of contribution agree that these issues are crucial to a decision on contribution but take the contrary view that each factor militates against the establishment of such a right. In other words, contribution would not allow plaintiff to control his own case, would be contrary to policies of judicial economy, and would lessen the deterrent to antitrust violations.<sup>14</sup>

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The earliest cases to address the issue of contribution never reached the ultimate question of whether the right existed in antitrust law. In *Webster Motor Car Co. v. Zell Motor Co.*, 234 F.2d 616, 619 (4th Cir. 1956), the court implied a right of contribution from Maryland law. The issue was rendered moot, however, when the judgments against the defendants was eventually overturned on the merits. *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F.2d 418, 421 (D.C. Cir., 1957), *cert. denied*, 355 U.S. 822 (1957). The Fourth Circuit opinion in *Webster* was the first statement by a federal court on the specific issue of contribution in antitrust law. It was followed by dicta in two other cases, *Goldlawr, Inc. v. Shubert*, 276 F.2d 614, 616-17 (3d Cir. 1960) and *Kohn v. Teleprompter Corp.* [1958] TRADE CAS. (CCH) ¶ 69,013 (S.D.N.Y. 1958). In both cases the defendants were found not to be jointly and severally liable. The damages awards were therefore apportioned without contribution claims.

<sup>9</sup> *In re Corrugated Container Antitrust Litigation*, [1979] TRADE CAS. (CCH) ¶ 62,689, at 77,879 (S.D. Tex. 1979).

<sup>10</sup> SENATE COMM. ON THE JUDICIARY, REPORT ON THE ANTITRUST EQUAL ENFORCEMENT ACT OF 1979, S. REP. NO. 96-428, 96th Cong., 1st Sess. 11 (1979) [hereinafter cited as S. REP. NO. 96-428]. Reasons for the drastic increase in antitrust judgments include the revisions of the Federal Rules of Civil Procedure which have allowed plaintiffs to vigorously prosecute the modern class action, with its commensurately high judgments. See FED. R. CIV. P. 23.

<sup>11</sup> See *Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc.*, 604 F.2d 897, 901 & n. 7 (5th Cir. 1979); *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.* 594 F.2d 1179, 1182 n. 3 (8th Cir. 1979).

<sup>12</sup> *Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc.*, 604 F.2d 897, 901-03 (5th Cir. 1979); *Professional Beauty Supply, Inc.*, 594 F.2d 1179, 1182 (8th Cir. 1979).

<sup>13</sup> See *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179, 1184 (8th Cir. 1979); Corbett, *Apportionment of Damages and Contribution Among Coconspirators in Antitrust Treble Damage Actions*, 31 FORDHAM L. REV. 111, 136-38 (1962); Jacobson, *Contribution Among Antitrust Defendants: A Necessary Solution to a Recurring Problem*, 32 U. FLA. L. REV. 217, 238-39 (1980); Slain, *Risk Distribution and Treble Damages: Insurance and Contribution*, 45 N.Y.U. L. REV. 263, 310-11 (1970); Note, *Contribution in Private Antitrust Suits*, 63 CORNELL L. REV. 682, 698-703 (1978); Note, *Contribution and Antitrust Policy*, 78 MICH. L. REV. 890, 910-17 (1980); Note, *Contribution Among Private Antitrust Conspirators*, 10 MEMPHIS S.U. L. REV. 342, 357-67 (1980).

<sup>14</sup> *Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc.*, 604 F.2d 897, 901-02, 905-06 (5th Cir., 1979); Heininger, *After the Brawl is Over: Settlements, Contribution (?) and Taxes*, 12 ANTITRUST BULL. 169, 178 (1967); Sellers, *Contribution in Antitrust Damage Ac-*

## II. The Trend Toward Contribution in Certain Non-Antitrust Contexts

Because the Sherman Act and the Clayton Act neither prescribe nor deny contribution in civil litigation, the common law development of contribution is of central importance.<sup>15</sup> The first recorded reference to con-

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tions, 24 VILL. L. REV. 829, 866 (1979); Note, *A Case Against Contribution in Antitrust*, 58 TEX. L. REV. 961, 982-86 (1980).

<sup>15</sup> Reliance upon common law developments in resolving the contribution issue is reinforced by the substantial connections between the antitrust laws and common law tort principles. To a great extent the Sherman Act still overlaps with causes of action in tort. Under common law, the activities of middlemen and monopolists were often found unlawful. Restraints of trade, if not ancillary to a permissible contract, were also actionable. See P. AREEDA, *ANTITRUST ANALYSIS* 40-42 (2d ed. 1974) [hereinafter cited as AREEDA]; Letwin, *Congress and the Sherman Antitrust Law, 1887-1890*, 23 U. CHI. L. REV. 221, 240-43 (1956); Letwin, *The English Common Law Concerning Monopolies*, 21 U. CHI. L. REV. 355, 379 (1954). But the overlap is not complete. See, e.g., *Cote v. Murphy*, 159 Pa. 420, 421, 28 A. 190, 191 (1894) (dictum) (restraint of trade held lawful under common law tort doctrines, but actionable under the Sherman Act).

Furthermore, Sherman Act damages actions continue to bear a marked resemblance to common law predecessors, retaining the traditional notions of causation and foreseeability. Antitrust law has borrowed from tort law the rule of direct causation. The rule of direct causation is best known for the English case of *In re Polemis and Furness, Withy & Co.*, [1921] 3 K.B. 560, where the unforeseeable loss of a ship was held actionable. The same test has been used in several antitrust cases. See e.g., *SCM Corp. v. Radio Corp. of Am.*, 407 F.2d 166, 171 (2d Cir. 1969), *cert. denied*, 395 U.S. 943 (1969); *International Rys. of Central Am. v. United Brands Co.*, 358 F. Supp. 1363, 1369 (S.D.N.Y. 1973), *aff'd*, 532 F.2d 231 (2d Cir. 1976), *cert. denied*, 429 U.S. 835 (1976). Furthermore, the Supreme Court has imposed a direct injury requirement, along with notions of privity, in order to limit the class of plaintiffs in private antitrust litigation. See *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 741-44 (1977); see generally Newman, *Limiting the Antitrust Damage Suit: The Emergence of a Policy Against Complex Litigation*, 23 N.Y.L.S. L. REV. 253 (1977).

Although the most recent test of liability and standing in antitrust law has been characterized as the "target area" test, most courts equate the requirement to one of reasonable foreseeability, the standard used in modern tort law. Compare *Mulvey v. Samuel Goldwyn Prod.*, 433 F.2d 1073, 1075 n.3 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971); *Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190, 220 (9th Cir.) *cert. denied*, 379 U.S. 880 (1964) with RESTATEMENT (SECOND) OF TORTS § 435 (1977). Other courts have characterized the target area requirement as one of proximate cause, thus implying the reasonable foreseeability rule of tort law. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 760 (1977) (Brennan, J., dissenting); *Package Closure Corp. v. Sealright Co.*, 141 F.2d 972, 979 (2d Cir. 1944). See generally Whiting, *The Injury and Causation Elements of a Private Antitrust Action*, 21 A.B.A. ANTITRUST L. J. 341 (1962). The substantial factor and material cause test of tort law has also been applied in antitrust litigation. Compare *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 700 (1962); and *Bigelow v. R.K.O. Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946) with RESTATEMENT (SECOND) OF TORTS § 433 (1977).

A finding of negligence per se in tort law requires that the plaintiff be within the class of persons or interests the statute was intended to protect, and the plaintiff's injury must be of the type the statute was intended to prevent. PROSSER, *supra* note 6, § 36. Courts have applied similar requirements in antitrust cases. Compare *Malamud v. Sinclair Oil Corp.*, 521 F.2d 1142, 1151 (6th Cir. 1975) (class of interests); and *Billy Baxter, Inc. v. Coca-Cola Co.*, 431 F.2d 183, 187 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971) (type of injury) with RESTATEMENT (SECOND) OF TORTS § 286 (1977). See also *Kavanagh v. New York, O. & W. Ry. Co.*, 196 App. Div. 385, 386, 187 N.Y.S. 859, 860 (1921), *aff'd*, 233 N.Y. 597, 135 N.E. 933 (1922).

tribution is found in the English case of *Merryweather v. Nixan*<sup>16</sup> where concurrent tortfeasors were found to be jointly and severally liable for an intentional offense. Ruling on the defendant's request that his fellow wrongdoer pay a portion of the damages, the court reasoned that such an equitable right should not be accorded to those violating the law, and denied contribution, establishing what is widely known as the common law rule.<sup>17</sup> The subsequent application of this rule in cases of intentional torts was unquestioned.<sup>18</sup> In cases of unintentional torts, however, many jurisdictions have considered lesser degrees of culpability a basis upon which to distinguish *Merryweather* and have established a limited right of contribution.<sup>19</sup> Thus, two contradictory rules exist at common law: one denying contribution in all cases, the other allowing it in cases of unintentional wrongdoers.

In deciding two maritime cases, the Supreme Court reinforced this bifurcated approach. In *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*<sup>20</sup> the Court, by purporting to invoke federal common law, refused to allow contribution, despite the unintentional nature of the defendant's acts.<sup>21</sup> The named defendant in *Halcyon* was sued for negligence and attempted to implead the plaintiff's employer for alleged concurrent negligence. The Court denied contribution, reasoning that in noncollision maritime cases contribution had no basis in federal common law, and the Congress has not seen fit to establish a statutory right.<sup>22</sup> The Court did not indicate that the mere negligence of the parties involved was a relevant consideration. In *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*<sup>23</sup> the Supreme Court resorted to ancient maritime doctrines and allowed contribution when a longshoreman's injuries resulted from the concurrent negligence of a shipowner and a prior stevedoring company.<sup>24</sup> The Court extended the ancient maritime right of contribution to non-collision claims and distinguished *Halcyon* on the ground that the third party

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This strong analogy with tort law was clear to the Ninth Circuit when it declared that it was "not aware of any principle of law which requires private monopolists to be treated in any different fashion than other tortfeasors. . . ." *Suckow Borax Mines Consol. v. Borax Consol. Ltd.*, 185 F.2d 196, 208 (9th Cir. 1950), *cert. denied*, 340 U.S. 943 (1951). The overlap between common law tort offenses and the statutorily proscribed activities of the antitrust laws indicates that the same notions of equity which have prompted the increased allowance of contribution in tort law also militate in favor of the establishment of such a right in antitrust litigation.

<sup>16</sup> [1777] 8 Term. Rep. 186, 101 Eng. Rep. 1337.

<sup>17</sup> *Id.*

<sup>18</sup> *See, e.g.*, *Everet v. Williams*, Ex. 1725, reported in 9 L.Q. Rev. 197 (1893).

<sup>19</sup> *See, e.g.*, *Hillen v. I.C.I.*, [1934] 1 K.B. 455; *Burrows v. Rhodes*, [1890] 1 Q.B. 816.

<sup>20</sup> 342 U.S. 282 (1951).

<sup>21</sup> *Id.* at 285. The court cited *Union Stockyards Co. v. Chicago B. & Q.R. Co.*, 196 U.S. 217, 224 (1905) for the proposition that federal common law did not allow contribution.

<sup>22</sup> 342 U.S. at 284-85.

<sup>23</sup> 417 U.S. 106 (1973).

<sup>24</sup> *Id.* at 110.

defendant was the employer of the plaintiff and thus immune from direct tort liability by virtue of the Longshoremen's and Harbor Worker's Compensation Act.<sup>25</sup> The Court reasoned that Congress had preempted any consideration of the contribution issue where an employment relation existed,<sup>26</sup> and therefore judicial resolution of the question in *Halcyon* was improper. Since no similar complication existed in *Cooper Stevedoring*, the Court allowed contribution between negligent parties.

Despite the apparently equivocal nature of federal precedent on this issue,<sup>27</sup> the trend today is in the direction of allowing contribution as a general matter. The English long ago reversed the *Merryweather* holding by enacting a statutory right of contribution,<sup>28</sup> and the states are almost unanimous in their support of contribution in tort law.<sup>29</sup> Some federal courts have exercised their prerogative in cases of federal question jurisdiction by allowing contribution.<sup>30</sup>

Furthermore, the distinction between intentional and unintentional wrongdoers in permitting contribution, always difficult to apply, is eroding. The English now allow contribution in all cases<sup>31</sup> and as many as eighteen states permit intentional tortfeasors to press claims for contribution against joint wrongdoers.<sup>32</sup> Some federal courts also have discarded the distinction, thereby allowing contribution where the unlawful acts of a defendant are intentional.<sup>33</sup> When the Eighth Circuit decided to allow contribution in the context of unintentional violations of the Sherman Act,<sup>34</sup> the court stated, in dictum, that the deterrence

<sup>25</sup> *Id.* at 110-112.

<sup>26</sup> *Id.*

<sup>27</sup> Compare *Atlantic Coast Line R.R. Co. v. Erie Lackawanna R.R. Co.*, 406 U.S. 340, 340 (1972) (contribution denied); and *Mendez v. State Marine Lines, Inc.*, 421 F.2d 851, 852 (3d Cir.), *cert. denied*, 398 U.S. 959 (1970) (same); with *Moran Towing Corp. v. M. A. Gammino Constr. Co.*, 409 F.2d 917, 920 (1st Cir. 1979) (contribution allowed); and *Crain Bros. v. Wieman Ward Co.*, 223 F.2d 256, 258 (3d Cir. 1955) (same).

<sup>28</sup> Law Reform Act of 1935, 25 & 26 Geo. 5 c.30.

<sup>29</sup> State jurisdictions were at one time uniformly opposed to contribution of any form, and some still are. See, e.g., *Consolidated Pipe and Supply Co., Inc. v. Stockham Valves and Fittings, Inc.*, 365 So.2d 968, 970 (Ala. 1978). The trend today, however, is clearly in the direction of allowing contribution. See *Scammon v. City of Saco*, 247 A.2d 108, 112 (Me. 1968) (discussing this trend).

<sup>30</sup> See, e.g., *Heizer Corp. v. Ross*, 601 F.2d 330, 333-34 (7th Cir. 1979); *Gomes v. Brodhurst*, 394 F.2d 465, 467 (3d Cir. 1968); *Knell v. Feltman*, 174 F.2d 662, 664-65 (D.C. Ci 1949).

<sup>31</sup> S. REP. NO. 96-428, *supra* note 10, at 13.

<sup>32</sup> *Id.*; see, e.g., *Judson v. Peoples Bank and Trust Co.*, 17 N.J. 67, 92, 93, 110 A.2d 24, 36 (1954).

<sup>33</sup> See, e.g., *Herzfeld v. Laventhal, Krekstein, Horwath & Horwath*, 378 F. Supp. 112, 135 (S.D.N.Y. 1974), *modified*, 540 F.2d 27 (2d Cir. 1976); *Tucker v. Arthur Andersen & Co.*, [1973-74 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,543, at 95,868 (S.D.N.Y. 1972); *Globus, Inc. v. Law Research Service, Inc.*, 318 F. Supp. 955, 958 (S.D.N.Y. 1970), *aff'd*, 442 F.2d 1346 (2d Cir.), *cert. denied*, 404 U.S. 94 (1971).

<sup>34</sup> *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179, 1184 (8th Cir., 1979).



policy of the antitrust law also dictated a right of contribution among intentional violators.<sup>35</sup>

Although federal decisions can be found which either allow or deny contribution,<sup>36</sup> the majority rule in the federal courts denies the right in all cases,<sup>37</sup> and the great weight of federal precedent still supports this view.<sup>38</sup> Consequently, the no-contribution rule has been used in virtually every antitrust suit where the issue has arisen.<sup>39</sup> In *El Camino Glass v. Sunglo Glass*<sup>40</sup> and *Sabre Shipping v. American President Lines*,<sup>41</sup> district courts denied defendants the right to seek contribution from alleged coconspirators in civil antitrust litigation. The holdings in these

<sup>35</sup> The Eighth Circuit proposed that the right of contribution be conferred on a case-by-case basis with the equitable criteria set forth by Justice White in *Perma-life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 146-47 (1968), acting as the relevant factors. *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 524 F.2d 1179, 1185 (8th Cir. 1979) (dictum).

<sup>36</sup> See note 27 *supra*.

<sup>37</sup> See, e.g., *Union Stockyards Co. v. Chicago B. & Q.R. Co.*, 196 U.S. 217, 228 (1905); *Goldlawr, Inc. v. Shubert*, 276 F.2d 614, 616-17 (3d Cir. 1960). See Halper, *The Unsettling Problems of Settlement in Antitrust Damage Cases*, 32 A.B.A. ANTITRUST L. J. 98, 111-12 (1966); Heininger, *After the Brawl is Over: Settlements, Contribution (?) and Taxes*, 12 ANTITRUST BULL. 127, 176-77 (1966); Slain, *Risk Determination and Treble Damages: Insurance and Contribution*, 45 N.Y.U. L. REV. 263, 305 (1970).

<sup>38</sup> *Baughman v. Cooper-Jarrett, Inc.*, 391 F. Supp. 671, 678 n.3 (W.D. Pa. 1975), *aff'd and modified on other grounds*, 530 F.2d 529 (3d Cir.), *cert. denied*, 429 U.S. 825 (1976); *Wainwright v. Kraftco Corp.*, 58 F.R.D. 9, 12 (N.D. Ga. 1973); *State of Washington v. American Pipe & Constr. Co.*, 280 F. Supp. 802, 804-05 (W.D. Wash.), *mandamus denied sub nom. American Pipe and Constr. Co. v. Pence*, 393 F.2d 568 (9th Cir.), *cert. denied*, 393 U.S. 842 (1968). *But see Chevalier v. Baird Savings Assn.*, 72 F.R.D. 140, 145 n.6 (E.D. Pa. 1976).

<sup>39</sup> Although policy considerations are of primary concern in antitrust litigation, federal common law nevertheless has had substantial effect on the decisions of federal courts concerning contribution in antitrust law.

A federal court sitting in a non-diversity case such as this does not sit as a local tribunal. In some cases it may see fit for special reasons to give the law of a particular state highly persuasive or even controlling effect, but in the last analysis its decision turns upon the law of the United States, not that of any state. Federal law is no judicial chameleon changing complexion to match that of each state wherein lawsuits happen to be commenced because of the accidents of service of process and of the application of venue statutes. It is found in the federal Constitution, statutes, or common law. Federal common law implements the federal constitution and statutes, and is conditioned by them. *Within these limits, federal courts are free to apply the traditional common law technique of decision and to draw upon sources of the common law in cases such as the present.*

C. WRIGHT, *HANDBOOK OF THE LAW OF FEDERAL COURTS* 283-84 (3d ed., 1976), (quoting *D'oench, Duhn & Co., Inc. v. F.D.I.C.*, 315 U.S. 447, 471-72 (1942) (emphasis added)). See Slain, *Risk Determination and Treble Damages: Insurance and Contribution*, 45 N.Y.U. L. REV. 263, 315 (1970).

<sup>40</sup> [1977] TRADE CAS. (CCH) ¶ 61,533 (N.D. Cal. 1976).

<sup>41</sup> 298 F. Supp. 1339 (S.D.N.Y.), *cert. denied*, 407 F.2d 173 (2d Cir.), *cert. denied*, 395 U.S. 922 (1969). It should be noted that *Sabre Shipping* involved intentional wrongdoers seeking contribution from parties that had already settled out of court.

and other antitrust cases are consistent with the generally accepted rule of no contribution in the federal courts.

Other than the perceived desire to reduce or simplify litigation and thus promote judicial economy, there is little justification for the traditional federal preference of no contribution.<sup>42</sup> The contrary rule allowing contribution is the product of considerably more judicial thought and refinement. As previously observed, England, where the rule against contribution began, and the vast majority of state jurisdictions now reject the no contribution rule. As will be discussed in the next section, the federal courts have increasingly allowed contribution in the context of certain statutory tort litigation. Furthermore, several state courts dismiss the distinction between wrongdoers based on intent. Such a distinction is especially inappropriate in antitrust law, where the Supreme Court has expressly allowed plaintiffs with "unclean hands" to collect damages.<sup>43</sup> Consistent with this policy, intentional violators of the antitrust laws should be allowed to seek contribution despite their "unclean hands."

### III. Contribution in Antitrust Law: A Review of the General Policy Considerations

Although judicial precedent plays a role in federal question issues such as antitrust,<sup>44</sup> courts often are influenced by policy goals in determining when to chart new lines of decision. The cases endorsing the federal common law rule<sup>45</sup> and the exceptions to it<sup>46</sup> provide convenient judicial hatracks on which courts can hang their decisions, but case law rarely has fixed content where there is no statutory underpinning for such authority. Contribution is allowed or denied to the extent that courts perceive it as consistent with the overriding policy objectives of the Sherman Act or of the federal judiciary in general. As will be discussed at greater length in the next section, the courts' principal consideration in assessing the contribution issue has been the impact on the

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<sup>42</sup> Moreover, on at least one occasion the Supreme Court has warned against uncritically applying common law doctrines to antitrust cases. *Perma-Life Mufflers, Inc. v. International Parts, Inc.*, 392 U.S. 134, 138 (1968).

<sup>43</sup> *Id.*

<sup>44</sup> See note 39 *supra*. Nonfederal precedent can be instructive, but it is well established that issues in antitrust law are controlled by federal decisions. *Sola Electric Co. v. Jefferson Co.*, 317 U.S. 173, 176 (1942); Corbett, *Apportionment of Damages and Contribution Among Coconspirators in Antitrust Treble Damage Actions*, 31 *FORDHAM L. REV.* 111, 124 (1962). But see *Webster Motor Car Co. v. Zell Motor Car Co.*, 234 F.2d 616, 619 (4th Cir. 1956); *Olson Farms, Inc. v. Safeway Stores, Inc.*, [1977-2] *TRADE CAS. (CCH)* ¶ 61,698, at 72,861 (D. Utah 1977), *aff'd*, [1979-2] *TRADE CAS.* ¶ 62,995 (10th Cir., 1979) (implying that state law, if existent, would be controlling); Slain, *Risk Distribution and Treble Damages: Insurance and Contribution*, 45 *N.Y.U. L. REV.* 263, 299 (1970).

<sup>45</sup> See text accompanying notes 20-22 & 27 *supra*.

<sup>46</sup> See text accompanying notes 23-37 *supra*.

deterrence of antitrust violations and the related concern of encouraging continued private enforcement of the antitrust laws. Similar policy concerns evident in certain federal legislation have prompted the courts to allow contribution in private litigation arising under that legislation.<sup>47</sup>

As Congress' provision for mandatory trebling of damages demonstrates, the deterrence of anticompetitive conduct is a prominent policy objective behind the Sherman Act.<sup>48</sup> There are two competing

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<sup>47</sup> An analogous example of policy-oriented rule-making is in the area of securities law where contribution is allowed among multiple wrongdoers. Although the Securities Act of 1933, 15 U.S.C. §§ 77a-77m (1976), and the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78hh (1976) include express provisions for contribution among defendants, the rule is limited to specific violations of the securities laws. 15 U.S.C. § 77k(f) (1976) (submission of false securities registration statement); 15 U.S.C. § 78(i) (1976) (manipulation of security prices); 15 U.S.C. § 78r(b) (1976) (misleading statements). Over the years, however, courts have extended this rule to violations where express provision has not been made for contribution. The courts argue that by expressly including a right of contribution in some sections Congress implied the right of contribution generally throughout the securities laws. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 196-97 (1976); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730 (1975); *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 150-54 (1972). The limited precedent for contribution in federal courts, as well as the express provision for contribution in some securities laws, have proved ample support for these decisions, but in almost every instance the courts have bolstered their holdings with strong policy justifications. The crucial factor in these cases has been the deterrence policy of the securities laws. *See Heizer Corp. v. Ross*, 601 F.2d 330, 332-33 (7th Cir. 1979); *Liggett & Myers, Inc. v. Bloomfield*, 380 F. Supp. 1044, 1046 (S.D.N.Y. 1974); *State Mutual Life Assurance Co. of Am. v. Arthur Andersen & Co.*, [1973-74] FED. SEC. L. REP. (CCH) ¶94,542 (S.D.N.Y. 1972). The deterrence policy is such a powerful consideration that courts have held it to justify a right of contribution in cases where violations of the securities laws are intentional. *See, e.g., Herzfeld v. Laventhol, Krekstein, Horwath & Horwath*, 378 F. Supp. 112, 135 (S.D.N.Y. 1974), *modified*, 540 F.2d 27 (2d Cir. 1976).

In patent law, the policy of deterring patent infringement requires that contribution be allowed. Federal courts exercise original jurisdiction over patent infringement cases, 28 U.S.C. § 1338(a) (1976), and defendants in patent cases, like those in antitrust suits, are liable for treble damages. Unlike antitrust law, however, this extraordinary remedy is afforded only at the court's discretion. 35 U.S.C. § 284 (1976). The Patent Act does not call for a right of contribution among multiple defendants and case law on the issue is meager, but it appears that the courts have created such a right. *See Baut v. Pethick Constr. Co.*, 262 F. Supp. 350, 363 (M.D. Pa. 1966).

Surprisingly the policy of judicial economy has caused the allowance of contribution in private litigation regarding civil rights violations. Congress has established a private cause of action where a plaintiff is harmed by a conspiracy to interfere with his rights. 42 U.S.C. § 1985 (1976). Although as in antitrust law there is no specific provision for a right of contribution, contribution has been allowed in almost every instance. *Northwest Airlines, Inc. v. Transport Workers*, 87 Lab. Cas. (CCH) ¶ 33, 832 (D.C. Cir. 1979) (by implication); *Communications Workers v. Illinois Bell Tel. Co.*, 16 Fair Empl. Prac. Cas. 1494, 1495 (N.D. Ill. 1973); *Osborne v. McCall Printing Co.*, 4 Emp. Prac. Dec. ¶ 7757, at 5922 (S.D. Ohio 1972). *See also Glus v. G.C. Murphy Co.*, 562 F.2d 880, 884 (3d Cir. 1977). The Civil Rights Act goal of "prompt administrative review" is controlling on the issue of contribution, and this requirement of judicial economy dictates that such a right be permitted. *Northwest Airlines, Inc. v. Transport Workers*, 87 Lab. Cas. (CCH) ¶ 33,832 (D.C. Cir. 1979).

<sup>48</sup> *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 427 (1955); *Semke v. Enid Auto.*

views on what effect a right of contribution would have on the goal of deterrence. One view originates from the alleged risk-averse nature of corporate behavior. As it has come to be known, the "risk-averse" theory contends that American businessmen contemplating anti-competitive behavior are more likely to risk the greater probability of a small judgment than the smaller possibility of a large adverse judgment.<sup>49</sup> A potential antitrust defendant with such a preference would obviously be more deterred by the prospect of sole liability for a disproportionate and inequitably large judgment. A right of contribution would tend to spread the trebled damages among several conspirators, and the risk-averse businessman would therefore be less likely deterred from antitrust violations by a rule allowing contribution.

The alternative view, which is widely accepted by courts in the area of securities law,<sup>50</sup> suggests that contribution increases the deterrent effect of civil damages. The argument is predicated on the assumption that allocating damages deters antitrust violations by spreading the risk of punishment, including the costs of litigation, throughout the ranks of a conspiracy. This theory implies that American businessmen are so-called "risk-preferers." In other words, potential antitrust violators are less deterred by the small chance that they will be named by a plaintiff with no recourse against coconspirators than by the more likely chance of being impleaded themselves and incurring a smaller judgment liability. Under this view, the increased chance of paying some amount of damages, no matter what amount, reinforces the deterrent effect of the antitrust laws.

On its face, neither the risk-averse nor the risk-preference argument is inherently persuasive,<sup>51</sup> but other factors indicate that in antitrust law

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Dealers Ass'n, 456 F.2d 1361, 1370 (10th Cir. 1972); *Clark Oil Co. v. Phillips Petroleum Co.*, 148 F.2d 580, 582 (8th Cir.), *cert. denied*, 326 U.S. 734 (1945). It is debatable whether or not treble damages are an adequate deterrent. See Parker, *The Deterrent Effect of Private Treble Damage Suits: Fact or Fantasy*, 3 N.M. L. REV. 286, 293 (1973).

<sup>49</sup> Several economists maintain that businessmen today are risk averse and would simply regard a small judgment as a cost of doing business. See, e.g., K. ELZINGA & W. BREIT, *THE ANTITRUST PENALTIES: A STUDY IN LAW AND ECONOMICS* 120-27 (1976). See also Note, *Contribution in Private Antitrust Suits*, 63 CORNELL L. REV. 682, 702 (1978).

<sup>50</sup> See note 47 *supra*.

<sup>51</sup> In *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179 (8th Cir. 1979), Judge Hanson commented that "the arguments on either side of the deterrence question are inconclusive and as a result I find deterrence of potential violators insufficient as a basis on which to predicate a new rule permitting contribution." *Id.* at 1189 (Hanson, J., dissenting in part). In *Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc.*, 604 F.2d 897 (5th Cir., 1979), Judge Morgan made a similar analysis but with different results: "the arguments on either side of the deterrence question are at best inconclusive . . . The deterrence argument, therefore, is an inadequate reason for rejecting a rule designed to achieve fairness. . . ." *Id.* at 907 (Morgan, J., dissenting in part). These sentiments, however, are limited to the risk-averse and risk-preference theories. Further considerations strongly suggest that after sufficient publicity, a rule allowing contribution would, in fact, reinforce the deterrent effect of treble damages. See text accompanying notes 52-54 *infra*.

the risk-preference theory might be more accurate. Foremost is the present trend in antitrust judgments.<sup>52</sup> Damage awards can be so large today after trebling and allowing for attorneys fees that although divided among several defendants a judgment will nevertheless be an adequate, if somewhat lessened, deterrent for the great majority of American businesses. Deterrence in this context seems particularly likely when one considers that most businesses are still run by privately held corporations or proprietorships. For these small businesses, there is often no practical difference between liability of ten million or 100 million dollars. Moreover, once any business is found liable in one private action, the spotlight is on it; the odds dramatically increase that such a business will become involved in additional lawsuits brought by different plaintiffs, such as state or local governments acting *parens patriae*. Furthermore, the very nature of the Sherman Act's damages provision has ensured adequate deterrence for many years despite multiple defendants. Proponents of the original treble damages provision understood that coconspirators were to be jointly liable, and the division of damages among named defendants precipitated by such joint liability may have been presumed.<sup>53</sup> If apportionment of damages resulted in an inadequate deterrent, Congress would have either expressly denied joint liability or provided for four-fold or five-fold damages. The conscious choice of treble damages<sup>54</sup> was probably made with the possibility of apportionment in mind. The resulting amount of judgment liability is generally so high that the exact value of a

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<sup>52</sup> See text accompanying notes 9 & 10 *supra*.

<sup>53</sup> See note 6 *supra*.

<sup>54</sup> The legislative history of the Sherman Act offers clear evidence that the Congress' decision to provide for treble damages was a conscious and reasoned choice. The first draft of the Act, presented to the Senate on August 14, 1888, called for double damages. S. 3445, 50th Cong., 1st Sess. (1888). The bill was introduced by Senator Sherman and subsequently referred to the Committee on Finance. In the Committee's report to the full Senate on September 11, 1888, the provision for a civil remedy was given its own section (§ 2), and only compensatory, or single damages, was called for. The subject of antitrust legislation was not taken up by the Senate again until December 4, 1889, when Senator Sherman's bill, as reported by the Committee was reintroduced. S. 1, 51st Cong., 1st Sess. (1889). The bill was again referred to the Committee on Finance, but with different results. The committee reversed itself and changed § 2 to provide for double damages, in effect returning to the language of Senator Sherman's original proposal. The Senate took no action on the bill; instead, it was referred to the Judiciary Committee, generally recognized as antagonistic toward antitrust legislation, by a floor vote of 31 to 28. 21 CONG. REC. 2610 (1890) (remarks of Sen. Vance). To the surprise of all concerned, the bill was reported to the Senate floor on April 2, 1890 with substantial changes. The provision for a private cause of action, which was changed to § 7 called for treble damages. This version remained unchanged and was enacted into law. See 1 THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 13-60, 63-277 (E. Kintner ed. 1978).

The Senate did not carelessly impose an arbitrary amount of damages. Treble damages are extraordinary, and the progressive changes in Senator Sherman's bill indicate that they were chosen only after lengthy deliberation and, undoubtedly, after consideration of possible joint liability and apportioned damages.

single defendant's judgment share has little to do with deterrent effect. Because of treble damages and the recent skyrocketing of antitrust judgments, deterrence is instead a function of the fact of liability itself. Contribution drastically increases the probability that a smaller coconspirator will eventually be held liable for a still extraordinarily large but not disproportionate share of any judgment, and thus promotes the deterrence policy of antitrust law.

The public relations concerns of a corporation also make a deterrence argument in favor of contribution more persuasive. The large, highly visible corporation which might otherwise be able to charge off a multimillion dollar judgment as a cost of doing business equivalent to, for example, complying with antipollution laws, suffers immediate, non-monetary loss upon a finding of liability because of adverse publicity regardless of the actual amount of judgment. Moreover, while normally the pattern is that private litigation follows Justice Department criminal enforcement, sometimes that pattern is reversed; government prosecutors occasionally are persuaded to institute a felony grand jury investigation after private actions have been filed. Thus business management, mindful of the impact of being labelled a lawbreaker upon success in winning government contracts and cooperation in other areas, and also mindful of the potential of subsequent derivative litigation and its costs, may be less concerned about being the *only* defendant in an antitrust suit than about being found liable in the first place.

A second, related policy factor is the promotion of private enforcement of the Sherman Act.<sup>55</sup> The Justice Department does not have the resources to prosecute most antitrust violations; therefore any judicial or legislative modification of the civil remedy in antitrust law must be compatible with the policy of encouraging private suits. Many courts have considered contribution antithetical to the continued vigor or private enforcement.<sup>56</sup> When a court allows contribution, the plaintiff may be faced with a large class of defendants and theoretically might have to combat a potentially "overwhelming" wealth of legal resources. In addition, by injecting the right of contribution into the antitrust forum, antitrust litigation—already hampered by the complexity of the legal issues involved and the voluminous amount of evidence

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<sup>55</sup> *Westinghouse Elec. Corp. v. City of Burlington*, 351 F.2d 762, 764 (D.C. Cir. 1965); *Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 214 F.2d 891, 893 (5th Cir. 1954), *cert. denied*, 348 U.S. 912 (1955). See Wham, *Antitrust Treble-Damage Suits: The Government's Chief Aid in Enforcement*, 40 A.B.A.J. 1061 (1954).

<sup>56</sup> See, e.g., *Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc.*, 604 F.2d 897, 903 (5th Cir. 1979); *El Camino Glass v. Sunglo Glass Co.*, [1977-1] TRADE CAS. (CCH) ¶ 61,533, at 72,111 (N.D. Cal. 1976); *In re Corrugated Container Antitrust Litigation* [1979-1] TRADE CAS. ¶ 62,689 (S.D. Tex. 1979). See generally Blecher & Woodhead, *Small Prospects for Shrinking the Big Antitrust Case by Procedural Reform*, 11 LOY. L. A. L. REV. 513 (1978).

presented—will be further confounded by the addition of yet another potentially complex legal question. Depending on the form of contribution adopted, courts would require a determination of the liability of the impleaded defendants, the right to contribution in a given instance,<sup>57</sup> and the correct apportionment of damages among culpable parties.

Although these concerns about the impact of contribution on private enforcement are serious, they may not in practice withstand analysis. First, a plaintiff does not have to allow contribution to become an issue at his stage of the trial. If new parties are impleaded, the plaintiff can continue to focus his attention upon the liability of the original defendants and his own damages. If the case succeeds, the plaintiff will be awarded full damages regardless of the presence of other defendants. To a great degree, complication of a case is caused when the plaintiff directs his attention to impleaded parties, a task that should be left to the original defendants in a separate trial or phase of the trial. Second, the burden of proving or disproving the new issues necessitated by contribution rests with the defendants. The questions of intent and apportionment of damages should be argued separately by the defendants and impleaded third parties, as they were in the *Abraham* case. The plaintiff, unless he chooses to defeat the joining of new defendants,<sup>58</sup> need not be concerned with these new issues.<sup>59</sup>

Remaining doubts about the negative impact of contribution on private enforcement should be dispelled by the procedural tools at the disposal of federal courts. In order to preserve the manageability of the plaintiff's case, courts may exercise discretionary power under the provision in the Federal Rules of Civil Procedure<sup>60</sup> which allows a judge to separate trials when litigation becomes too complex.<sup>61</sup> If necessary,

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<sup>57</sup> Consideration of individual contribution claims would be necessary only if the right of contribution were limited to a certain class of defendants. See text accompanying notes 63-82 *infra*.

<sup>58</sup> In *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179 (8th Cir. 1979), where contribution was allowed, the plaintiff made no objection to the impleading of a third party. *Id.* at 1184. When contribution is allowed and impleading is attempted, a plaintiff may be aided in his case by those defendants who, to prove the appropriateness of impleading and contribution, concede facts suggesting the existence of concerted action and anticompetitive understandings among third parties. This might be particularly true in a consumer price-fixing suit against retailers. If the plaintiff had no evidence of a manufacturer's participation in the retailer's pricing combination, he would be precluded from naming the manufacturer as a defendant. See *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 740-41 (1977). The retailer named as a defendant, however, might very well decide to become, in effect, a plaintiff's witness by impleading the manufacturer and demonstrating that the price-fixing combination was vertical as well as horizontal. Certainly the awareness of such a possibility should deter manufacturers from coercing resale price maintenance schemes.

<sup>59</sup> S. REP. No. 96-428, *supra* note 10, at 3.

<sup>60</sup> FED. R. CIV. P. 42(a).

<sup>61</sup> The court also has the power to deny a third party claim if its potentially adverse effect on the trial is obvious. *In re Ampicillin Antitrust Litigation*, 82 F.R.D. 647, 649 (D.C.

separation of trials can preserve the plaintiff's right to a fair and effective forum, and continue to provide strong incentive for private suits.

Allowing contribution would not only preserve private enforcement of the antitrust laws, but also would multiply the impact of and publicity given to private enforcement resulting from a single complaint. When a single conspirator is named as defendant in a complaint, contribution could cause a domino effect throughout the ranks of the unlawful combination, each defendant impleading coconspirators, perhaps effectively turning "state's evidence," in an attempt to reduce potential judgment liability. Thus a single private action is more likely to impose civil penalties on a greater number of wrongdoers and thereby deter offenders.

#### IV. Proposed Rule of Contribution: The Issues Raised

The same considerations of equity which have caused the increased allowance of contribution in tort law dictate its acceptance in antitrust law. Furthermore, contribution will increase the deterrence effect of civil suits and will magnify the level of enforcement achieved by private litigation. A number of commentators have addressed the issue of contribution in antitrust law, and the consensus of these proposals suggests that a right of contribution is preferable to the present state of affairs.<sup>62</sup>

Simply to say that contribution should be allowed is inadequate, however. Courts (or Congress) must be prepared to fashion a rule of contribution which is the most compatible with antitrust policy, private enforcement, and the charge of equity. The resolution of three primary issues will determine the form of contribution and related judicial procedure most appropriate to antitrust law. First, contribution may be made available only to a limited class of defendants, much as the com-

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Cir. 1979); *Connell v. Bernstein-Macauley, Inc.*, 67 F.R.D. 111, 115-16 (S.D.N.Y. 1975) See A.B.A. SECTION ON ANTITRUST LAW, RESOLUTIONS AND REPORT ON PROPOSED AMENDMENT OF THE CLAYTON ACT TO PERMIT CONTRIBUTION IN DAMAGE ACTIONS BROUGHT THEREUNDER 6 (August 17, 1979) [hereinafter cited as A.B.A. REPORT].

<sup>62</sup> See Corbett, *Apportionment of Damages and Contribution Among Conspirators in Antitrust Treble Damage Actions*, 31 FORDHAM L. REV. 111, 137 (1962); Jacobson, *Contribution Among Antitrust Defendants: A Necessary Solution to a Recurring Problem*, 32 U. FLA. L. REV. 217 (1980); Slain, *Risk Distribution and Treble Damages: Insurance and Contribution*, 45 N.Y.U.L. REV. 263, 310-11 (1970); Note, *Contribution in Private Antitrust Suits*, 63 CORNELL L. REV. 682, 703-05 (1978); Note, *Contribution in Private Antitrust Actions*, 93 HARV. L. REV. 1540, 1559-60 (1980); Note, *Contribution Among Private Antitrust Conspirators*, 10 MEMPHIS S. U. L. REV. 342, 375-76 (1980); Note, *Contribution and Antitrust Policy*, 78 MICH. L. REV. 890, 923-26 (1980); *Recent Developments, Contribution Among Antitrust Defendants*, 33 VAND. L. REV. 979, 980-81 (1980). Surprisingly, the Solicitor General in January of this year submitted an *amicus curiae* brief to the Supreme Court in *Abraham* opposing contribution. The brief takes the somewhat eccentric position that the courts have no power to order contribution. See Heininger, *After the Brawl is Over—Settlements, Contribution (?) and Taxes*, 12 ANTITRUST BULL. 169, 177 (1967); Sellers, *Contribution in Antitrust Damage Actions*, 24 VILL. L. REV. 829, 851 (1979); Note, *A Case Against Contribution in Antitrust*, 58 TEX. L. REV. 961, 986-87 (1980).



mon law rule eventually limited the right to unintentional wrongdoers. Second, by protecting all conspirators settling out of court from impleader or subsequent suit, limitations can be imposed on the class of third parties against whom a right of contribution could otherwise be exercised. Third, once it is determined whether contribution will be allowed in a particular instance, a court must decide how damages will be apportioned among defendants.

#### A. *Limiting the Right of Contribution*

A right of contribution theoretically could be limited to "unintentional" violations of antitrust law in a manner consistent with the first common law right of impleader,<sup>63</sup> but every antitrust violation, civil and criminal, includes an ostensible requirement of some degree of intent.<sup>64</sup> This requirement indicates that antitrust violations are roughly

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<sup>63</sup> See text accompanying note 19 *supra*. Contribution has traditionally been denied intentional wrongdoers based upon the oversimplified premise that equity should not be accorded to willful violators of the law. See, e.g., *George's Radio, Inc. v. Capitol Transit Co.*, 126 F.2d 219, 221 (D.C. Cir. 1942). This premise is questionable. In any area of law where contribution is not allowed, equally culpable coconspirators are unjustly enriched. Judge Morgan, in *Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc.*, 604 F.2d 897 (5th Cir. 1979), a decision currently under a review by the Supreme Court, would allow contribution, but only for "unintentional violators," when there was no "conscious wrongdoing." *Id.* at 906, 908. Thus, a middle ground position plainly is among the more available alternatives for the Court. Moreover, the Eighth Circuit's landmark decision in *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179 (8th Cir. 1979) is not plainly inconsistent with Judge Morgan's dissent, since it allowed contribution on a case-by-case basis determined on equity grounds as suggested in the several opinions in *Perma Life Mufflers, Inc., v. International Parts Corp.*, 392 U.S. 134, 139, 146, 151 (1968). See 594 F.2d at 1185. Thus, if the Court in *Abraham* chooses simply to be as consistent as possible with its own precedent, notwithstanding the ambiguity of *Perma Life Mufflers*, it will reverse and remand, citing *Perma-Life Mufflers* and Judge Morgan's dissent.

<sup>64</sup> See L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 51 (1977) [hereinafter cited as SULLIVAN] (requirement of intent in cases of attempt or conspiracy to monopolize). Cf. *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 n.13 (1978) (civil antitrust violations, unlike criminal violations, do not require proof of anticompetitive interest). In *Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc.*, 604 F.2d 897 (5th Cir. 1979), the dissent read *Gypsum* as suggesting that a defendant "may incur *civil* liability for an unintentional violation of the antitrust laws." *Id.* at 906 n.1 (Morgan, J., dissenting). This interpretation, however, is not particularly helpful. Many antitrust violators could claim with some validity that they did not knowingly violate the law, given the generality of the Sherman Act and the uncertainty of ultimate appellate court resolution. That is no more than noting that many common law tortfeasors—even "intentional" tortfeasors—do not act in such a way as to deliberately incur ultimate liability. However, some degree of intent is inherent in the antitrust definition of agreement, conspiracy, and the concept of concerted action; a defendant cannot be said to have violated § 1 of the Sherman Act without evidence that he knowingly agreed to engage in particular conduct which, as its object, restrained trade. See Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655 (1962). Thus the court in *Abraham* hopefully will do more than simply refer to and adopt the virtually unintelligible *Perma Life Mufflers* "standard."

analogous to intentional torts,<sup>65</sup> and poses obvious problems for a rule of contribution available only to unintentional violators. On the other hand, some courts have displayed a willingness to effectively eliminate intent as an integral part of civil antitrust violations by analogizing such offenses to strict liability torts.<sup>66</sup> Whether "actual" intent is a requirement for civil antitrust liability is unclear and the resulting confusion makes the traditional common law distinction an unsatisfactory basis upon which to limit a right of contribution. Obviously, courts holding that intent is *ipso facto* a part of any antitrust violation would never allow contribution.

Although the traditional factor of intent is a confusing and unacceptable basis for restricting contribution, the common law tradition of limiting the right in some fashion has spawned as many as six alternatives for distinguishing between defendants on the basis of criteria that attempt to gauge culpability: (1) general intent and specific intent; (2) actual intent and inferred intent; (3) liability based on intent and liability based on the doctrine of conscious parallelism; (4) violations based on the *per se* doctrine and violations based on the rule of reason; (5) criminal violations and violations that allegedly would not sustain criminal conviction; and (6) specifically prescribed antitrust offenses. Each of these proposals has a different effect upon the scope of the proposed right of contribution.

In a rule based on the distinction between general and specific intent, the requirement of some form of intent for a finding of liability would be strictly enforced; the issue of contribution would depend on whether the intent was perceived to be general or specific. In theory, where a defendant simply intends to improve economic position through certain acts, the unforeseeable result of which is anticompetitive, for ex-

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<sup>65</sup> See *Olson Farms, Inc. v. Safeway Stores, Inc.*, [1979-2] TRADE CAS. ¶ 62,995, at 79,701 n.8 (10th Cir. 1979); *International Rys. of Cent. Am. v. United Brands Co.*, 358 F. Supp. 1363, 1372 (S.D.N.Y. 1973), *aff'd*, 532 F.2d 231 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976).

<sup>66</sup> See, e.g., *El Camino Glass v. Sunglo Glass Co.*, [1977-1] TRADE CAS. (CCH) ¶ 61,533, at 72,112 (N.D. Cal. 1976); *Rex Chainbelt, Inc. v. Harco Prod., Inc.* 512 F.2d 993, 1006-07 (9th Cir.), *cert. denied*, 423 U.S. 831 (1975); *Hoopes v. Union Oil Co. of Cal.*, 374 F.2d 480, 485 (9th Cir. 1967); *Twentieth Century-Fox Film Corp. v. Goldwyn*, 328 F.2d 190, 220 (9th Cir.), *cert. denied*, 379 U.S. 880 (1964). This potential liability for unintentional acts was recognized long before the present debate over contribution. U.S. DEPT. OF JUSTICE, REPORT OF ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 350 (1955) (decriminalization of unintentional violations); Wham, *Antitrust Treble-Damage Suits: The Government's Chief Aid in Enforcement*, 40 A.B.A.J. 1061, 1062 (1954) (discussing H.R. 4597, 83d Cong., 2d Sess. (1954), which would have made treble damages discretionary in cases of unintentional violations).

Where contribution is allowed, the defendant's strict liability is not generally a bar to third party claims. *Chamberlain v. Carborendum Co.*, 485 F.2d 31, 34 (3d Cir. 1973); *Skinner v. Reed-Prentice Div., Package Mach. Co.*, 70 Ill.2d 1, 13, 374 N.E.2d 437, 442-43 (1978); *Busch v. Busch Constr., Inc.*, 262 N.W.2d 377, 394 (Minn. 1977). *But see Wojciechowski v. Long-Airdox Div. of Marmon Group, Inc.*, 488 F.2d 1111, 1116-17 (3d Cir. 1973).

ample, intent is general. Only where a defendant "knowingly" gains unfair advantage over competitors or consumers is intent said to be specific and contribution denied. The view taken by courts which allow findings of liability in the absence of intent,<sup>67</sup> however, is logically inconsistent with a contribution scheme which makes no provision whatsoever for totally unintentional violations.

Another method for distinguishing between defendants is based on the alleged distinction between actual and inferred intent. Only where intent is inferred from anti-competitive effect,<sup>68</sup> instead of proven directly, would contribution be allowed. This proposed limitation produces the same logical inconsistencies that the distinction between general and specific intent poses and grants or disallows contribution on the basis of the plaintiff's evidence and defendants' skill at covering their tracks concerning motive. Furthermore, under such a rule the court would be left with the difficult task of instructing a jury to determine liability on the basis of inferred intent but disallow contribution if it found actual intent. A similar distinction is made in securities law<sup>69</sup> and patent law,<sup>70</sup> but other than its use in these areas there is nothing to recommend the adoption of this scheme in antitrust law where the jury's ability to cope with complex cases has already been stretched to the limit.

The doctrine of conscious parallelism arguably imposes liability upon a "combination" where there is no express plan to gain an unlawful economic advantage, but the conscious response of each party to the price moves of competitors *de facto* stabilizes prices.<sup>71</sup> Insofar as this application of the Sherman Act requires no proof of joint intent or premeditation, only defendants found liable under the doctrine of conscious parallelism would be accorded a right of contribution because of their lesser degree of culpability. The doctrine is not widely used, however, and the reluctance of courts to find liability on the basis of conscious parallelism<sup>72</sup> would necessarily and severely restrict the availability of contribution, making the proposed distinction a *de facto* prohibition against contribution.

Although the rare use of conscious parallelism makes it an unrealistic index of culpability, there is a long tradition in antitrust law of

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<sup>67</sup> See note 66 *supra*. Judge Morgan's dissent in *Abraham*, which invoked the term "conscious wrongdoer," primarily was based upon a common law distinction between general and specific intent. 604 F.2d at 907. Of the six distinctions proposed above, the general/specific dichotomy, although obviously difficult to apply, would make the most sense if contribution is not to be allowed in all cases.

<sup>68</sup> See, e.g., *United States v. Container Corp.*, 393 U.S. 333, 337 (1969).

<sup>69</sup> See, *S.E.C. v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1101-02 (2d Cir. 1972); *Myzel v. Fields*, 386 F.2d 718, 747 (8th Cir. 1967), *cert. denied*, 390 U.S. 951 (1968).

<sup>70</sup> See *Esco Corp. v. Tru-Rol Co.*, 178 U.S.P.Q. 332 (D. Md. 1973).

<sup>71</sup> See *AREEDA*, *supra* note 15, at 293-322; *SULLIVAN*, *supra* note 64, § 110.

<sup>72</sup> See e.g., *Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 541 (1954).

differing proof requirements. Consistent with this tradition, the two major bases of liability, the *per se* doctrine and the rule of reason, have been suggested as criteria for the allowance of contribution.<sup>73</sup> The rule of reason imposes liability only if the violation in question is unreasonable; defendants found liable for offenses where the *per se* doctrine applies are not given a similar opportunity to justify their acts because of the inherent culpability of defendants violating certain antitrust laws and the patent illegality of those offenses.<sup>74</sup> Only where defendants are found liable under the *per se* doctrine would contribution be denied. To make a right of contribution depend only on the particular offense the plaintiff has complained of, or the ultimate holding of an appellate court, however, is completely arbitrary. For example, a willful vertical conspiracy to allocate geographic retail markets with the underlying intent of stabilizing prices, although anticompetitive, would be found unlawful under the rule of reason and not the *per se* doctrine because *some* geographic market allocations are in fact reasonable.<sup>75</sup> Defendants in such a conspiracy, despite their high degree of culpability, would be accorded a right on contribution denied to those guilty of similarly indefensible conduct under the *per se* doctrine.

Contribution could be limited to defendants liable for "non-criminal" antitrust violations<sup>76</sup> in one of two ways. First, contribution could be denied only in cases where there has been a previous criminal conviction for antitrust violations. Such a rule would impose an extraordinarily narrow limitation on the right of contribution because the number of criminal antitrust cases is relatively insignificant.<sup>77</sup> Second, contribution could be denied in civil cases where the court purports to find all elements of a "criminal" offense regardless of whether criminal prosecution occurs. In addition to the obvious fact that the Sherman Act does not distinguish between civil and criminal violations, serious doubts exist about a court's ability to conduct what would otherwise amount to simultaneous civil and criminal trials.

Finally, contribution could be limited to prescribed antitrust offenses. The United States Senate has considered a bill<sup>78</sup> which would allow contribution only in cases of price fixing conspiracies. Again, this type of limitation fails to fairly reflect the purpose of the first common law limitation on contribution, and instead substitutes arbitrary restric-

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<sup>73</sup> U.S. DEPT. OF JUSTICE, Testimony of J. Shenefield, Asst. Attorney General, Antitrust Division, Before the Senate Subcommittee on Antitrust, Monopoly and Business Rights, June 8, 1979 [hereinafter cited as Shenefield Testimony].

<sup>74</sup> See SULLIVAN, *supra* note 64, §§ 65-67.

<sup>75</sup> See, e.g., *Sandura Co. v. F.T.C.*, 339 F.2d 847 (6th Cir. 1964).

<sup>76</sup> Shenefield Testimony, *supra* note 73, at 10.

<sup>77</sup> In 1976, 1,555 civil antitrust cases were filed in United States district courts while only 19 criminal violations were charged. [1976] ANN. REP. OF THE ADMIN. OFFICE OF THE U.S. COURTS 294, 347.

<sup>78</sup> S. 1468, 96th Cong., 1st Sess. (1979).

tions for a rule that has traditionally denied an equitable right to highly culpable parties.

One federal circuit court of appeals and at least eight legal commentators have addressed the issue of limiting contribution. The Eighth Circuit, as well as two legal commentators, would provide the right of contribution at the undefined discretion of the court.<sup>79</sup> Others have suggested that a similar case-by-case determination be made, using the combined criteria of intent, criminality, and *per se* violations,<sup>80</sup> or alternatively, the criteria of intent and the tortious nature of alleged violations.<sup>81</sup> Four commentators have discarded all limitations and would extend the right of contribution to all antitrust coconspirators.<sup>82</sup> The last view, therefore, represents the consensus of recent proposals.

### B. Apportionment of Damages

One of the greatest potential problems for the allowance of contribution is the establishment of a workable formula for computing judgment shares. Courts in all areas of law have struggled with the question of whether damages should be apportioned by a simple, predictable method or by a subjective process that would equitably reflect the relative fault of each defendant. These traditional approaches to the apportionment issue have developed into two basic alternatives: per capita contribution and comparative contribution.

1. *Per Capita Contribution*—Per capita<sup>83</sup> contribution divides damages equally among all guilty parties without regard to relative culpability, and is the simplest and surest rule for allocating damages. The predictability of per capita contribution promotes the general policy of judicial economy by encouraging out-of-court settlements. If the prospective judgment share of a defendant can be estimated with some degree of accuracy, as is the case with per capita contribution, bargain-

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<sup>79</sup> *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179, 1186 (8th Cir. 1979); Note, *Contribution Among Private Antitrust Conspirators*, 10 MEMPHIS S.U. L. REV. 342, 375-76 (1980); Note, *Contribution and Antitrust Policy*, 78 MICH. L. REV. 890, 923-26 (1980).

<sup>80</sup> Note, *Contribution Among Antitrust Violators*, 29 CATH. U.L. REV. 669, 675-76 (1980).

<sup>81</sup> Note, *Contribution in Private Antitrust Suits*, 63 CORNELL L. REV. 682, 703-05 (1978).

<sup>82</sup> A.B.A. REPORT, *supra* note 61, at 6; Jacobson, *Contribution Among Antitrust Defendants: A Necessary Solution to a Recurring Problem*, 32 U. FLA. L. REV. 217, 233 (1980); Note, *Contribution in Private Antitrust Actions*, 93 HARV. L. REV. 1540, 1560 (1980); *Recent Developments, Contribution Among Antitrust Defendants*, 33 VAND. L. REV. 979, 995 (1980).

<sup>83</sup> The term "pro rata" has been used almost exclusively by authorities dealing with the issue of antitrust contribution, instead of the phrase "per capita." Per capita means to "share and share alike," BLACK'S LAW DICTIONARY 1022 (5th ed. 1979), while pro rata means that damages are allocated "[p]roportionally; according to a certain rate, percentage, or proportion. According to measure, interest or liability." *Id.* at 1098. Per capita is the more accurate language and is used throughout this article.

ing for a release from liability is more likely to end successfully in an out of court settlement.<sup>84</sup> The vast majority of jurisdictions allowing contribution in tort law have adopted the per capita rule,<sup>85</sup> but in antitrust cases where the relative size of defendant corporations may substantially differ, imposing the same financial liability on each may have undesirable social policy consequences and may be in a certain sense inequitable. As noted above, the judgment liability that is hardly noticed by an industry giant may force smaller conspirators into bankruptcy.

2. *Comparative Contribution*—Comparative contribution divides damages among coconspirators on the basis of relative fault.<sup>86</sup> This analysis includes evaluations of relative causation, relative size, and relative culpability or profits attributable to the violation and allocates to each defendant a percentage of the judgment equal to the proportion of fault assigned. The result is a more equitable division of damages. Larger corporations, by virtue of their higher volume of sales, normally would be assigned a greater proportion of fault, but more active and culpable or profitable participation in a conspiracy by smaller defendants could require an adjustment of judgment allocation. The interplay of these factors (size, causation, and culpability) is necessarily a subjective analysis, and herein lies the major drawback of comparative contribution. Under a rule based on relative fault, judge or jury is faced with the problem of determining the exact percentage of fault to be assigned each defendant, and most courts are not willing to engage in such speculation.<sup>87</sup>

In many antitrust cases the problem of subjectivity can be solved by the use of an objective rule of comparative benefit. Under this rule, an

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<sup>84</sup> A.B.A. REPORT, *supra* note 61, at 2-6 (minority).

<sup>85</sup> When contribution is sought in tort law, damages are traditionally apportioned among joint wrongdoers on a per capita basis. *See, e.g.,* Early Settlers Ins. Co. v. Schweid, 221 A.2d 920, 923 (D.C. 1966); Hutcherson v. Slate, 105 W. Va. 184, 190, 142 S.E. 444, 446 (1928); Mulderig v. St. Louis K.C. & C.R. Co., 116 Mo. App. 655, 94 S.W. 801, 802 (1906). In cases where federal courts have apportioned damages, it has been almost exclusively on a per capita basis. *See, e.g.,* In Re Seaboard Shipping Corp., 449 F.2d 132, 138-39 (2d Cir. 1971), *cert. denied*, 406 U.S. 949 (1972). Even if a jury returns a judgment apportioned among defendants on the basis of relative fault, such an allocation is generally ignored. *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.* 342 U.S. 282, 284-87 (1952). Several states that retain per capita contribution anomalously allocate damages between plaintiff and defendant according to relative fault by allowing the defense of comparative negligence in tort cases. *See, e.g.,* Southern States, Inc. v. Thomason, 128 Ga. App. 667, 197 S.E.2d 429 (1973).

<sup>86</sup> Comparative contribution is used rarely in tort law. The first Uniform Act allowed proportional allocation of damages among defendants based on "relative degrees of fault." UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 2(4) (1939). Three states, Arkansas, Hawaii, and South Dakota, still adhere to the substance of its provisions. 12 U.L.A. 57-62. The second Uniform Act substituted per capita contribution for the older provision. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 2 (as revised, 1955). Six states, Alaska, Massachusetts, Nevada, North Carolina, North Dakota, and Tennessee, have adopted the revised act which represents the dominant view in tort law. 12 U.L.A. 57-62.

<sup>87</sup> *See* note 85 *supra*.

allocation of fault is made on the basis of each defendant's market share of the goods in question.<sup>88</sup> An assumption that the cause of the plaintiff's injury, as well as the benefit to each defendant, is proportional to the dollar volume of sales is implicit in such a rule. This objective system is particularly appropriate in cases of horizontal conspiracy because all defendants are engaged in business at the same level of production, and market share fairly reflects the relative benefit inuring to each conspirator and the relative degree of causation attributable to each.

The relative size or market share of a defendant also arguably serves as an index of ability to pay damages. If judgment shares are commensurate with each defendant's ability to pay, the probability of the plaintiff realizing full and trebled compensation for damages will be enhanced, and injured parties will be encouraged to bring private antitrust suits.

Not only is comparative contribution more equitable and an encouragement to private enforcement by civil litigants, but its use in antitrust law is especially appropriate. Increasing the judgment liability of larger corporations deters unlawful combinations generally because in almost any industry the power necessary to fix prices profitably or restrain trade is impossible to achieve without the participation of at least one of the more dominant competitors. Thus the deterrence policy of antitrust law demands that punishment of market dominant violators be of the highest priority.

Twelve proposals have been made on the issue of apportioning damages among multiple defendants. The Eighth Circuit has handed down a decision mandating per capita contribution.<sup>89</sup> One commentator has concurred in this view, citing reasons of simplicity and predictability as controlling factors.<sup>90</sup> Five proposals have advocated a combination of per capita contribution and comparative contribution. Two would apply a market share analysis in cases of horizontal conspiracies, and the per capita rule in cases of vertical conspiracies,<sup>91</sup> while three proposals

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<sup>88</sup> See, e.g., S. 1468, 96th Cong., 1st Sess. (1979). See also Heinger, *After the Brawl is Over—Settlements, Contribution (?) and Taxes*, 12 ANTITRUST BULL. 127, 178-79 (1967); Slain, *Risk Distribution and Treble Damages: Insurance and Contribution*, 45 N.Y.U.L. REV. 263, 312 (1970). The Antitrust Law Section of the A.B.A. has proposed that damages be allocated on the basis of "relative responsibility." A.B.A. REPORT *supra* note 61, at 11. Although it applies to a broader range of antitrust violations than the Senate proposal, the A.B.A. Report preserves the concept of a market share analysis where applicable. *Id.* at 3, 15.

<sup>89</sup> *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.* 594 F.2d 1179, 1182 n.4 (8th Cir. 1979).

<sup>90</sup> Corbett, *Apportionment of Damages and Contribution Among Coconspirators in Antitrust Treble Damage Actions*, 31 FORDHAM L. REV. 111, 138-39 (1962).

<sup>91</sup> Jacobson, *Contribution Among Antitrust Defendants: A Necessary Solution to a Recurring Problem*, 32 U. FLA. L. REV. 217, 242-43 (1980); Note *Contributions in Private Antitrust Actions*, 93 HARV. L. REV. 1540, 1560 (1980). Professor Jacobson's proposal advocates the application of a market share analysis in horizontal conspiracies and the

would simply leave the decision to the court on a case-by-case basis.<sup>92</sup>

Five of the twelve proposals advocate some form of comparative contribution in all cases. Two commentators indicate that a subjective rule of relative fault would best serve antitrust litigation.<sup>93</sup> The remaining three proposals adopt a rule using the relative market share of co-conspirators to apportion damages.<sup>94</sup> Although there is no agreement on the particular method for apportioning damages, a clear majority of proposals advocate comparative contribution in at least some cases, while only two proposals choose per capita contribution under all circumstances.

### C. *Settling Parties*

One aspect of antitrust law currently rife with abuse is the treatment of out-of-court settlements.<sup>95</sup> Contribution against settling parties is denied even by courts that otherwise allow contribution.<sup>96</sup> Parties settling out of court are liable only for the amount paid in consideration for a release; those not settling are responsible for the balance of the judgment.<sup>97</sup> Because parties settling out-of-court typically do so for an

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establishment of a rebuttable presumption of per capita liability in vertical conspiracies. The Harvard proposal would employ a similar rule of comparative contribution in horizontal conspiracies, and in specified vertical conspiracies would apply the per capita rule. No provision is made in this second proposal for other unspecified vertical conspiracies.

<sup>92</sup> Note, *Contribution Among Antitrust Violators*, 29 CATH. U. L. REV. 669, 689 (1980); Note, *Contribution Among Private Antitrust Conspirators*, 10 MEMPHIS S.U. L. REV. 342, 375-76 (1980); Note, *Contribution and Antitrust Policy*, 78 MICH. L. REV. 890, 923-26 (1980).

<sup>93</sup> A.B.A. REPORT, *supra* note 61, at 11; Sellers, *Contribution in Antitrust Damage Actions*, 24 VILL. L. REV. 829, 852 (1979).

<sup>94</sup> S. 1468, 96th Cong., 1st Sess. (1979); Heininger, *After the Brawl is Over—Settlements, Contribution (?) and Taxes*, 12 ANTITRUST BULL. 127, 179 (1967); Slain, *Risk Distribution and Treble Damages: Insurance and Contribution*, 45 N.Y.U. L. REV. 263, 312 (1970).

<sup>95</sup> The question of releases and covenants not to sue in antitrust law is within the exclusive jurisdiction of federal courts. *Miami Parts & Spring, Inc. v. Champion Spark Plug Co.*, 402 F.2d 83, 84 (5th Cir. 1968). At one time, the federal courts subscribed to the unity of release rule which precluded any further litigation after an out-of-court settlement with a single coconspirator. *Twentieth Century-Fox Film Corp. v. Winchester Drive-In Theatre*, 351 F.2d 925, 929 (9th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966). Today, the intent of the parties to the release is controlling, and the unity of release rule is rarely followed. *See Aro Mfg. Co. v. Convertible Top Replacement Co.* 377 U.S. 476, 501 (1964).

<sup>96</sup> *See, e.g., Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179, 1184 (8th Cir. 1979).

<sup>97</sup> *See, e.g., Gomes v. Brodhurst*, 394 F.2d 465, 468 (3d Cir. 1967). The consideration paid for a release from liability is deducted from the judgment only when contribution would otherwise be allowed (*i.e.*, when the defendants are jointly and severally liable). *Shenefield Testimony, supra* note 73, at 20-21. The amount is deducted only after the damages have been trebled. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 348 (1971); *Carpa, Inc. v. Ward Foods, Inc.*, 536 F.2d 39, 55 (5th Cir. 1976); *Olson Farms, Inc. v. Safeway Stores, Inc.* [1977-2] TRADE CAS. ¶ 61,698, at 72,861 (D. Utah 1977), *aff'd*, [1979-2] TRADE CAS. ¶ 62,995 (10th Cir. 1979). The courts have assumed that the settling party bargains for a



amount below their anticipated judgment share, those not settling are required to make up the difference by paying more than what their judgment share would have been had no parties settled. Illustrative of this system is the simple hypothetical involving a plaintiff, a defendant, and an equally culpable unnamed coconspirator. If the plaintiff releases the third party from liability for \$40, and is awarded a \$100 judgment against the defendant, the defendant is denied contribution and is liable to the plaintiff for \$60.<sup>98</sup> In any event, resolution of the settlement issue requires that the burden of the settlors' bargain be placed alternatively on non-settling defendants, settling third parties, or plaintiffs.

1. *Burden of Settlement on the Defendant*—The burden of the settlor's bargain can be put on non-settling defendants by a rule that denies contribution against parties to a release agreement.<sup>99</sup> This alternative represents no change from the present situation and preserves the most inequitable features of the no contribution rule: settlement coercion through the use of what are commonly known as "whipsaw tactics." When antitrust suits encompass entire industries, as is common today, defendants are numerous, and plaintiffs can initially afford to offer bargain settlements. Bargain settlements typically offer a defendant the opportunity to settle out of court for a fraction of anticipated judgment liability, but each of these agreements increase the prospective liability of remaining defendants until the price of settlement becomes much higher than the cost of an appropriate judgment share.<sup>100</sup> For example, if five defendants are jointly responsible for \$100 in damages, a single bargain settlement of \$5 raises the anticipated judgment liability of each remaining defendant from an appropriate judgment share of \$20 to \$23.75. Another \$5 settlement raises anticipated judgment liability to \$30 for each remaining defendant.<sup>101</sup> The plaintiff, therefore, is in a position to demand comparatively high sums in return for a release from

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release with the possibility of treble damages in mind. Furthermore, because private suits and out of court settlements are encouraged by trebling damages before any deduction is made, awards are increased, and the policies of deterrence, private enforcement, and judicial economy are served. *Flintkote Co. v. Lysjford*, 246 F.2d 368, 397-98 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957).

<sup>98</sup> The example employs the per capita rule of contribution or assumes that each defendant is allocated equal fault under a comparative contribution rule.

<sup>99</sup> The trend in tort law is toward a denial of contribution which puts the burden of settlement on the defendant. See PROSSER, *supra* note 6, § 50, at 310 n. 83; 18 AM. JUR. 2d, *Contribution* § 52, at 78 n.20 & 79 n.1 (1965).

<sup>100</sup> The concept of calculation of the nonsettling defendant's damage liability, crucial to any understanding of the issue of settling parties, can be thought of as a party's theoretical judgment liability. The speculative amount presumes no out-of-court settlements and the apportionment of damages into appropriate and equitable judgment shares among joint conspirators. Hereinafter this concept is referred to as the appropriate judgment share.

<sup>101</sup> A recent example of settlement coercion is described in S. REP. NO. 96-428, *supra* note 10.

liability because for the last remaining defendants an adverse judgment may lead to financial ruin.<sup>102</sup>

Authorities supporting the full protection of settling coconspirators claim that the denial of contribution encourages out of court settlements and promotes the policy of judicial economy.<sup>103</sup> The parties to an out of court settlement generally profit at the expense of nonsettling defendants, and because the denial of contribution makes such agreements inviolable, plaintiffs are encouraged to offer settlements and defendants are encouraged to accept them.

A careful examination of settlement coercion, however, reveals that this argument is fallacious. Although the vast majority of antitrust cases are settled out of court<sup>104</sup> and private extrajudicial agreements are an indispensable part of antitrust litigation, many of these settlements occur in single defendant nonconspiracy cases where contribution is not an issue and the incentive to settle is unaffected by such a right. Furthermore, when civil litigation is based on a conspiracy theory, most out of court agreements are either bargain settlements, coerced settlements, or further attempts to isolate a single defendant against whom the possibility of full treble damages can be preserved. Although this technique results in a large number of discrete settlement agreements and a significant reduction in the number of defendants, the number of individual cases remains constant and the extent to which judicial economy is served by these settlements is questionable.

2. *Burden of Settlement on the Settling Third Party*—If the burden of the settlor's bargain is placed on the settling third party by allowing contribution, the settlor is liable: (a) to the defendant for the difference between an appropriate judgment share and the amount actually paid in consideration for release; and (b) to the plaintiff for agreed upon settlement payments.<sup>105</sup> Assuming again that a plaintiff secures a \$100 judgment and a \$40 out of court settlement, under this rule the defendant is liable to the plaintiff for \$60 and has a right of contribution against the settling third party for \$10.<sup>106</sup> The rule allowing contribution against settling defendants thus makes each coconspirator liable for an appropriate judgment share and effectively nullifies the third party's private bargain with the plaintiff.

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<sup>102</sup> See text accompanying notes 3 & 4 *supra*.

<sup>103</sup> A.B.A. REPORT, *supra* note 61, at 6.

<sup>104</sup> Ninety-five percent of all antitrust litigation ends in some form of extrajudicial settlement. *Id.* at 5.

<sup>105</sup> Although the present trend is to the contrary, see note 99 *supra*, state courts in the past generally held in tort cases that the fact of settlement was no bar to claims of contribution against a party to a release. PROSSER, *supra* note 6, § 50, at 309 n.81. Conversely, this rule also preserved the right of a third party, who inadvertently settled out-of-court for more than the actual amount of liability, to sue for contribution from the plaintiff. 18 AM. JUR. 2d *Contribution* § 52 at 77, n. 18 & 19 (1965).

<sup>106</sup> See note 98 *supra*.

This proposal prevents settlement coercion and whipsaw tactics since the nonsettling defendant is never liable for more than a fair share of the judgment but also creates a strong disincentive to any out of court settlements. A defendant is liable for the same amount whether he comes to terms with the plaintiff or submits to the judgment of the court. Furthermore, if the plaintiff is unsuccessful in court, the settling third party nevertheless suffers the financial loss of a bona fide release agreement. Thus, a third party has nothing to gain and everything to lose by entering into a release agreement.

3. *Burden of Settlement on the Plaintiff*—The issue of contribution has traditionally been a conflict of interest between the defendant and the settling third party, and tort law likewise offers the choice of putting the burden of settlement on these two parties.<sup>107</sup> However, another alternative, not commonly used in tort law, is also possible: putting the burden of the settlor's bargain on the plaintiff by denying contribution against settling third parties and making nonsettling defendants liable only for their appropriate judgment share. Under this third proposal, if a plaintiff secures a \$100 judgment and a \$40 out of court settlement, the court computes the defendant's appropriate judgment share at \$50.<sup>108</sup> The defendant is liable for this amount and the third party remains liable for the agreed upon \$40. The plaintiff realizes \$90 of the \$100 judgment. Because release payments are generally less than anticipated liability, an out-of-court settlement under this proposal virtually ensures that a settling plaintiff will ultimately receive less than full treble damages. This fact may discourage plaintiffs from settling out of court, but the disincentive is only minimal. If the plaintiff is successful at trial, a bona fide out-of-court agreement would reduce total recovery only slightly. If the plaintiff is unsuccessful in court, a settlement would mean the difference between the price brought by an execution of release and nothing at all. Therefore, considerable motivation to settle out of court would still exist for the plaintiff, and the proposed rule would preserve the third party's incentive to settle as well.

Placing the burden of the settlor's bargain on the plaintiff only creates a disincentive to bargain settlements and coerced settlements, neither of which is a desirable means to the end of judicial economy. Good faith agreements as insurance against adverse judgments and as a positive step toward the elimination of litigation costs would not be affected. Placing the burden of settlement on the plaintiff would also en-

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<sup>107</sup> The first Uniform Act preserved the defendant's right of contribution against settling third parties. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 5 (1939). Three states, Arkansas, Hawaii, and South Dakota, still adhere to the substance of the 1939 Act. 12 U.L.A. 57-62. The second Uniform Act denied any right of contribution against settling third parties. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 4(b) (as revised, 1955). Six states, Alaska, Massachusetts, Nevada, North Carolina, North Dakota, and Tennessee have adopted the revised act which represents the dominant view in tort law. 12 U.L.A. 57-62. See notes 99 and 105 *supra*.

<sup>108</sup> See note 98 *supra*.

sure that no defendant is ever liable for more than an appropriate judgment share.

Ten proposals for resolution of the problem of settling parties have been made by various legal commentators. Only one proposal advocates, by implication, that the burden of settlement should be on the settling third party.<sup>109</sup> A second proposal would preserve the present rule in antitrust law, placing the burden of the settlor's bargain on the defendant.<sup>110</sup> A third commentator advocates a prohibition of contribution against settling third parties, thus implying that the burden of settlement should remain on the defendant or be placed on the plaintiff.<sup>111</sup> Two proposals simply leave the issue of settling parties to the discretion of the court.<sup>112</sup> The five remaining proposals unequivocally advocate placing the burden of settlement on the plaintiff.<sup>113</sup>

## V. Conclusion

The charge of equity suggests that contribution be allowed in all antitrust cases, regardless of a post-hoc subjective characterization of the defendants' culpability or intent. A prerequisite for the application of any rule of contribution is that the joint wrong-doers or co-conspirators be *in pari delicto*; therefore, by denying contribution, courts allow parties just as culpable as the defendant to escape punishment and remain undeterred. This unjust enrichment occurs whether violations are intentional or unintentional. Furthermore, the more specific charge of antitrust policy supports contribution because allowing contribution on balance promotes deterrence and private enforcement. Attempts to limit any right of contribution by distinguishing among defendants or co-conspirators would only add questions of fact to already complex litigation. Contribution thus should be the right of all coconspirators, regardless of culpability.

These same considerations support the implementation of comparative contribution, with the burden of proof upon those defendants seeking to compel contribution. Market share analyses and other objec-

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<sup>109</sup> *Recent Developments, Contribution Among Antitrust Defendants*, 33 VAND. L. REV. 979, 995 (1980). The author proposes that a right of contribution be allowed against settling coconspirators, thus implying, paradoxically, that the burden of the settlor's bargain be placed on the settlor. See text accompanying notes 105 & 106 *supra*.

<sup>110</sup> Note, *Contribution Among Antitrust Violators*, 29 CATH. U. L. REV. 669, 691-94 (1980).

<sup>111</sup> Sellers, *Contribution in Antitrust Damage Actions*, 24 VILL. L. REV. 829, 866 (1979).

<sup>112</sup> Note, *Contribution Among Private Antitrust Conspirators*, 10 MEMPHIS S.U. L. REV. 342, 375-76 (1980); Note, *Contribution and Antitrust Policy*, 78 MICH. L. REV. 890, 923-26 (1980).

<sup>113</sup> S. 1468, 96th Cong., 1st Sess. (1979); A.B.A. REPORT, *supra* note 61, at 8; Jacobson, *Contribution Among Antitrust Defendants: A Necessary Solution to a Recurring Problem*, 32 U. FLA. L. REV. 217, 233, 242-43 (1980); Slain, *Risk Distribution and Treble Damages: Insurance and Contribution*, 45 N.Y.U. L. REV. 263, 314-15 (1970); Note, *Contribution in Private Antitrust Actions*, 93 HARV L. REV. 1540, 1559-61 (1980).

tive criteria submitted by such defendants could prove determinative in some cases, but courts should not hesitate to allocate judgment liability on the basis of relative fault and responsibility for the illegal conduct in question. The drawbacks of this more subjective method are outweighed by the more equitable division of damages, the promotion of private enforcement, and the increase of deterrent effect.

Finally, by putting the burden of any settlement on the plaintiff, an objectionable aspect of private antitrust litigation—whipsaw tactics of negotiated settlements—would be ended, with only minor impact on the deterrence and private enforcement policies. Either of the other alternatives (*i.e.*, putting the burden of settlement on the defendant or the settlor) has less acceptable consequences.

After discounting the factor of deference to perceived judicial economy, the federal circuit court decisions and the legal commentary, taken as a whole are not inconsistent with these conclusions. The majority of positions concerning antitrust contribution favor a broad, unlimited right of contribution, administered on a comparative basis in some if not all cases, which denies contribution against settling parties but limits the liability of named defendants to an appropriate judgment share. The Supreme Court and perhaps Congress soon will consider the question of contribution in antitrust law and must choose between the most recent circuit court decisions, which deny the right, and what otherwise appears to be an emerging consensus in favor of a broad right of contribution.

APPENDIX  
CONTRIBUTION PROPOSALS IN CIVIL ANTITRUST LITIGATION  
(by year of proposal)

PROPOSAL	CONTRIBUTION? yes	LIMITATION ON THE RIGHT OF CONTRIBUTION	APPORTIONMENT OF DAMAGES	SETTLING PARTIES
1. Corbett, Fordham Law Review (1962) <sup>114</sup>	yes	N/A	per capita	N/A
2. Heininger, Anti- trust Bulletin (1967) <sup>115</sup>	no	N/A	market share	N/A
3. Slain, N.Y.U. Law Review (1970) <sup>116</sup>	yes	N/A	market share	burden of settlement on plaintiff
4. Cornell Law Review (1978) <sup>117</sup>	yes	two criteria, in- tent and the tortious nature of the offense, are determinative	N/A	N/A
5. 8th Circuit (1978) <sup>118</sup>	yes	case-by case determination using <i>Perma-Life Mufflers</i> criteria	per capita	N/A

<sup>114</sup> Corbett, *Apportionment of Damages and Contribution Among Coconspirators in Antitrust Treble Damage Actions*, 31 *FORDHAM L. REV.* 111, 137-39 (1962).

<sup>115</sup> Heininger, *After the Brawl in Over: Settlements, Contribution (?) and Taxes*, 12 *ANTITRUST BULL.* 127, 177-179 (1967).

<sup>116</sup> Slain, *Risk Distribution and Treble Damages: Insurance and Contribution*, 45 *N.Y.U. L. REV.* 263, 310-15 (1970).

<sup>117</sup> Note, *Contribution in Private Antitrust Suits*, 63 *CORNELL L. REV.* 682, 703-05 (1980).

<sup>118</sup> *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179, 1182 n.4, 1186 (8th Cir. 1979).

APPENDIX  
CONTRIBUTION PROPOSALS IN CIVIL ANTI-TRUST LITIGATION  
(by year of proposal)

PROPOSAL	CONTRIBUTION?	LIMITATION ON THE RIGHT OF CONTRIBUTION	APPORTIONMENT OF DAMAGES	SETTLING PARTIES
6. 5th Circuit (1979) <sup>119</sup>	no	N/A	N/A	N/A
7. 10th Circuit (1979) <sup>120</sup>	no	N/A	N/A	N/A
8. S. 1468 (1979) <sup>121</sup>	yes	price-fixing conspiracies only	market share	burden of settlement on plaintiff
9. A.B.A. Report (1979) <sup>122</sup>	yes	none	relative fault	burden of settlement on plaintiff
10. Sellers, Villanova Law Review (1979) <sup>123</sup>	no	N/A	relative fault	burden of settlement on plaintiff or nonsettling defendant
11. Catholic Law Review (1980) <sup>124</sup>	N/A	case-by-case determination using criteria of intent, criminality, and <i>per se</i> violations	case-by-case determination	burden of settlement on the nonsettling defendant

<sup>119</sup> Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d 897 (5th Cir. 1979).

<sup>120</sup> Olson Farms, Inc. v. Safeway Stores, Inc., [1979-2] TRADE CAS ¶ 62,995 (10th Cir. 1979).

<sup>121</sup> S. 1468, 96th Cong., 1st Sess. (1979).

<sup>122</sup> A.B.A. REPORT, *supra* note 61, at 6.

<sup>123</sup> Sellers, *Contribution in Antitrust Damage Actions*, 24 VILL. L. REV. 829, 851-52, 866 (1979).

<sup>124</sup> Note, *Contribution Among Antitrust Violators*, 29 CATH. U. L. REV. 669, 696, 671, 689, 691-94 (1980).

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PROPOSAL	CONTRIBUTION?	LIMITATION ON THE RIGHT OF CONTRIBUTION	APPORTIONMENT OF DAMAGES	SETTLING PARTIES
12. Vanderbilt Law Review (1980) <sup>125</sup>	yes	none	N/A	advocates right of contribution against settling parties, thus implying that burden of settlement should be on the settling third party
13. Harvard Law Review (1980) <sup>126</sup>	yes	none	horizontal conspiracies: market share; specified vertical conspiracies: per capita	burden of settlement on plaintiff
14. Jacobson, U. Fla. Law Review (1980) <sup>127</sup>	yes	none	horizontal conspiracies: market share; vertical conspiracies: pre-emption of per capita liability	burden of settlement on plaintiff

<sup>125</sup> *Recent Developments, Contribution Among Antitrust Defendants*, 33 VAND. L. REV. 979, 980-81, 995, 998 (1980).

<sup>126</sup> Note, *Contribution in Private Antitrust Actions*, 93 HARV. L. REV. 1540, 1559-61 (1980).

<sup>127</sup> Jacobson, *Contribution Among Antitrust Defendants: A Necessary Solution to a Recurring Problem*, 32 U. FLA. L. REV. 217, 238, 242-43 (1980).



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PROPOSAL	CONTRIBUTION?	LIMITATION ON THE RIGHT OF CONTRIBUTION	APPORTIONMENT OF DAMAGES	SETTLING PARTIES
15. Michigan Law Review (1980) <sup>128</sup>	yes	case-by-case determination	case-by-case determination	case-by-case determination
16. Memphis State U. Law Review (1980) <sup>129</sup>	yes	case-by-case determination	case-by-case determination	case-by-case determination
17. Texas Law Review (1980) <sup>130</sup>	no	N/A	N/A	N/A

<sup>128</sup> Note, *Contribution and Antitrust Policy*, 78 MICH. L. REV. 890, 923-26 (1980).

<sup>129</sup> Note, *Contribution Among Private Antitrust Conspirators*, 10 MEMPHIS S.U. L. REV. 342, 375-76 (1980).

<sup>130</sup> Note, *A Case Against Contribution in Antitrust*, 58 TEX. L. REV. 961, 980-86 (1980).