

CONTRIBUTION UNDER THE FEDERAL SECURITIES LAWS

I. INTRODUCTION

The continuing expansion of liability under the federal securities laws, and the substantial damages awarded to successful plaintiffs,¹ have spawned a proliferation of private damage suits.² In turn, increasing numbers of defendants have filed cross-claims and third-party claims to eliminate or minimize their liabilities.³ Until recently, insurance⁴ and indemnification clauses⁵ have been the favored means by which poten-

1. When the claims of numerous defendants are joined in a class action, the amounts can be enormous. *See, e.g.,* Gould v. American-Hawaiian S.S. Co., 387 F. Supp. 163 (D. Del. 1974); Gould v. American Hawaiian S.S. Co., 362 F. Supp. 771, 778 (D. Del. 1973) (plaintiff class received \$4,000,000 settlement from some defendants plus judgment for over \$2,000,000 against other defendants); Lyons v. Marrud, Inc., [1972-1973 Transfer Binder] CCH FED. SEC. L. REP. ¶ 93,525 (S.D.N.Y. 1972) (plaintiff class settled with certain defendants for \$1,094,000, representing 25 percent of the class' maximum possible recovery). To assure collection of their potentially large judgments, plaintiffs often join numerous parties as defendants. *E.g.,* Carpenter v. Hall, 311 F. Supp. 1099, 1103 (S.D. Tex. 1970) (93 named defendants).

2. Kroll, *Some Reflections on Indemnification Provisions and S.E.C. Liability Insurance in the Light of BarChris and Globus*, 24 BUS. LAW. 681 (1969) (address at the ABA National Institute on "The BarChris Case: Prospectus Liability," Sept. 27-28, 1968); Ruder, *Multiple Defendants in Securities Law Fraud Cases: Aiding and Abetting, Conspiracy, In Pari Delicto, Indemnification, and Contribution*, 120 U. PA. L. REV. 597, 598 (1972) [hereinafter cited as Ruder].

3. There were two reported decisions in the 1940's involving third-party claims for indemnity or contribution: Miller v. Hano, 8 F.R.D. 67 (E.D. Pa. 1947) and Metzger v. Breeze Corps., 37 F. Supp. 693 (D.N.J. 1941); one unreported decision in the 1950's: Forbush v. Van Alstyne, Noel & Co., Civil No. 48-757 (S.D.N.Y., June 26, 1952), summarized in 3 L. LOSS, SECURITIES REGULATION 1739 n.178 (2d ed. 1961) [hereinafter cited as LOSS]; and one in the early 1960's: Handel-Maatschappij H. Albert De Bary & Co., N.V. v. Faradyne Electronics Corp., 37 F.R.D. 357 (S.D.N.Y. 1964) (third-party complaint). Recently, however, there have been numerous decisions involving either third-party claims or cross-claims: *e.g.,* Thomas v. Duralite Co., 386 F. Supp. 698 (D.N.J. 1974) (cross-claim); Lyons v. Marrud, Inc., 46 F.R.D. 451 (S.D.N.Y. 1968) (both cross-claim and third-party complaint).

4. *See* Kroll, *supra* note 2, at 685.

5. *See* Globus v. Law Research Serv., Inc., 418 F.2d 1276, 1287 n.14 (2d Cir. 1969), *cert. denied*, 397 U.S. 913 (1970) (issuer-underwriter indemnification agreement); Freund & Hacker, *Cutting up the Humble Pie: A Practical Approach to Apportioning Litigation Among Underwriters*, 48 ST. JOHN'S L. REV. 461, 472 (1974) [hereinafter cited as Freund & Hacker] (cross-indemnification agreements between issuers

tial defendants sought to protect themselves against excessive liability. But insurance has become increasingly expensive and difficult to obtain,⁶ while the courts have declined on public policy grounds to enforce indemnification agreements.⁷ Consequently, defendants and potential defendants are re-examining the common law⁸ and statutory⁹ concept of contribution and its relation to federal securities liability.

Except for underwriter liabilities,¹⁰ this recent interest has focused on the right to contribution absent prior agreement, rather than agreements to distribute potential liabilities.¹¹ It is not uncommon today for a single securities case to include several cross-claims or third-party claims for contribution.¹² Yet the paucity of precedent in this area of federal securities law¹³ has given the courts little guidance for dealing with such claims. Courts cannot analogize to legal analysis of contribution claims in other federal actions; except for admiralty,¹⁴ no such body of law exists.¹⁵ Nor is there a unified state approach to which the

and underwriters); Kroll, *supra* note 2, at 684-85 (cross-indemnification agreements between corporate officers and directors).

6. See, e.g., Applebaum & McDowell, *Indemnification Against Securities Acts Liabilities*, 27 Bus. LAW. 131, 137 (Special Issue 1972) (address by Mr. McDowell at the ABA National Institute on "Officers' and Directors' Responsibilities and Liabilities," Oct. 22, 1971).

7. See notes 96-109 *infra* and accompanying text.

8. See notes 36-53 *infra* and accompanying text.

9. See notes 54-87 *infra* and accompanying text.

10. To distribute potential underwriter liabilities among all the underwriters of a public offering, contribution provisions have been included in recent agreements among the underwriters. See Freund & Hacker 480. For a detailed proposed contribution provision allocating the risks of litigation among underwriters, see *id.* 485-95.

11. The usual arena for contesting the contribution right today is the courtroom in which a securities suit is pending.

12. E.g., *B & B Inv. Club v. Kleinert's, Inc.*, 391 F. Supp. 720, 724 (E.D. Pa. 1975); *Gould v. American-Hawaiian S.S. Co.*, 387 F. Supp. 163, 166 (D. Del. 1974). Ordinarily, these claims appear in conjunction with alternative claims for indemnification. See, e.g., *Katz v. Realty Equities Corp.*, 521 F.2d 1354 (2d Cir. 1975).

13. See Freund & Hacker 474; Ruder 649.

14. The admiralty rule of equal division of damages in collision cases was adopted by the Supreme Court in *The Catharine*, 58 U.S. (17 How.) 170, 175 (1854), and extended to noncollision cases in *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974). In *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975), the Supreme Court replaced the equal division of damages rule in collision cases with a rule requiring allocation of damages among the parties according to their proportionate faults. See generally Villareal, *Halcyon to Ryan to Weyerhauser to Cooper—Where Do We Go from Here?*, 6 J. MARITIME L. & COM. 593 (1975).

15. Some cases flatly state that there is no right of contribution between tortfeasors under federal common law. E.g., *Goldlawr, Inc. v. Shubert*, 276 F.2d 614, 616 (3d Cir.

courts can turn.¹⁶ The absence of precedents, however, leaves federal courts relatively free to choose contribution rules adapted to the securities setting. To explore some of these rules and the problems they raise in the special field of securities law, this Note will examine the history of contribution under federal securities law, the relationship between contribution and indemnity, and the procedural problems encountered in computing and allocating contribution shares.

II. HISTORICAL BACKGROUND OF CONTRIBUTION UNDER THE FEDERAL SECURITIES LAWS

A. *The Contribution Provisions*

Both the Securities Act of 1933 (Securities Act)¹⁷ and the Securities Exchange Act of 1934 (Exchange Act)¹⁸ contain express provisions for contribution. It is noteworthy that these provisions appear in the liability sections under which Congress envisaged joint liability by multiple defendants.¹⁹ Thus, section 11 of the Securities Act²⁰ subjects numerous persons to potential liability for a single registration statement; subsection (f) grants a right of contribution to those who are found liable for payments under the section:

[E]very person who becomes liable to make any payment under this section may recover contribution as in cases of contract from any person who, if sued separately, would have been liable to make the same

1960); *Sabre Shipping Corp. v. American President Lines*, 298 F. Supp. 1339, 1343-44 (S.D.N.Y. 1969). *But see Kohr v. Allegheny Airlines, Inc.*, 504 F.2d 400, 403 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975) (federal rule allows contribution for mid-air collision). The Federal Tort Claims Act, 28 U.S.C. § 2671-80 (1970), has not created any federal contribution law because the legislative history demonstrated a clear intent that state contribution rules should govern the rights and liabilities of the United States. Note, *Toward a Workable Rule of Contribution in the Federal Courts*, 65 COLUM. L. REV. 123, 135 (1965). Under § 4 of the Clayton Act, 15 U.S.C. § 15 (1970), courts have refused to allow contribution among co-conspirators for payments in private antitrust suits. *Goldlawr, Inc. v. Shubert*, *supra*; *Sabre Shipping Corp. v. American President Lines*, *supra*. In the latter case, the court rejected an analogy to contribution rights under the securities laws. *Id.* at 1345. See generally Slain, *Risk Distribution and Treble Damages: Insurance and Contribution*, 45 N.Y.U.L. REV. 263, 292-309 (1970); Note, *Globus: A Prolific Generator of Nice Questions*, 33 OHIO ST. L.J. 898, 914-17 (1972).

16. See Slain, *supra* note 15, at 304-05.

17. 15 U.S.C. §§ 77a-aa (1970).

18. 15 U.S.C. §§ 78a-jj (1970).

19. See 3 Loss 1739-40 n.178.

20. 15 U.S.C. § 77k (1970).

payment, unless the person who has become liable was, and the other was not, guilty of fraudulent misrepresentation.²¹

Sections 9(e)²² and 18(b)²³ of the Exchange Act provide similar rights to those who become liable under sections 9²⁴ and 18²⁵ respectively.²⁶ The legislative history of these sections provides little interpretive guidance beyond establishing that the person from whom contribution is sought need not have been a party to the original suit.²⁷ The English

21. *Id.* § 77k(f).

22. 15 U.S.C. § 78i(e) (1970):

Every person who becomes liable to make any payment under this subsection may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment.

23. *Id.* § 78r(b). For all practical purposes the provision is identical with § 9(e), *quoted in note 22 supra.*

24. 15 U.S.C. § 78i (1970). Section 9 imposes liability for manipulation of securities registered on the exchanges.

25. *Id.* § 78r. Section 18 imposes liability for misleading statements in documents filed under the Exchange Act.

26. Under the express language of § 11(e), a person guilty of fraudulent misrepresentation cannot recover contribution from any person not guilty of such conduct. This language is omitted from §§ 9(e) and 18(b), undoubtedly due to the difference in culpability between actions violating §§ 9 and 18 and actions prohibited by § 11. While § 11 contemplates liability for mere negligence in failing to meet the reasonable investigation standard, §§ 9 and 18 do not. Section 9(e) holds liable only those persons who "willfully" participate in the prohibited actions; section 18(a) allows a defense by any person acting in good faith without knowledge of the falsity or misleading character of a statement. For an early discussion of the standard of conduct required for liability under § 18, see Comment, *Civil Liability for Misstatements in Documents Filed under Securities Act and Securities Exchange Act*, 44 *YALE L.J.* 456, 474-75 (1935). If the phrase "fraudulent misrepresentation" in § 11(f) is interpreted to require scienter, meaning something more than mere negligence, every person held liable under §§ 9 or 18 of the Exchange Act will be guilty of "fraudulent misrepresentation." Thus, including such language in §§ 9(e) and 18(b) would make the contribution provisions meaningless; no one held liable under §§ 9 or 18 would be able to recover contribution.

27. See H.R. REP. NO. 1383, 73d Cong., 2d Sess. 21 (1934); S. REP. NO. 792, 73d Cong., 2d Sess. 13, 18, 21 (1934). This seems fairly clear from the contribution provisions themselves, especially the Exchange Act provisions. In cases not involving contribution under the express contribution provisions, however, third-party defendants continue to argue otherwise. They contend that, if not joined as defendants in the main action, they cannot be held liable as joint tortfeasors and therefore are not liable for contribution. See, e.g., *Getter v. R.G. Dickinson & Co.*, 366 F. Supp. 559, 569 (S.D. Iowa 1973) (rejecting such contention). This contention derives chiefly from the requirement of some states that a plaintiff must obtain a joint judgment against joint tortfeasors in order for one tortfeasor to enforce contribution against another. For an example of a federal court using this state rule to defeat a contribution claim against third-party defendants in a securities case, see *State Mut. Life Assur. Co. of America v. Peat, Marwick, Mitchell & Co.*, 49 F.R.D. 202, 212 (S.D.N.Y. 1969). But see notes 177-83 *infra* and accompanying text.

contribution cases decided under the Companies Act of 1929²⁸ and its predecessors²⁹ are significantly more helpful, since section 11 was closely modeled³⁰ on the contribution provision contained in the English act.³¹ The contribution provisions under the Securities Act, the Exchange Act, and the Companies Act of 1929 all contain the phrase "may recover contribution as in cases of contract." Because the civil liabilities provided in the securities acts are tort liabilities³² and because at common law no right to contribution existed among tortfeasors,³³ the inclusion of this phrase is important. The "obvious purpose was to avoid the ordinary policy against contribution among joint tortfeasors"³⁴ To determine just how and when contribution may be obtained under the federal securities law, construction of this phrase is necessary, considering both the English decisions under the Companies Act and the common law as it existed in 1933.³⁵

28. 19 & 20 Geo. 5, c. 23.

29. See notes 54-71 *infra* and accompanying text.

30. H.R. REP. No. 85, 73d Cong., 1st Sess. 9 (1933). See 3 Loss 1683.

31. Companies Act of 1929, 19 & 20 Geo. 5, c. 23, pt. II, § 37(3):

Every person who . . . becomes liable to make any payment under this section may recover contribution, as in cases of contract, from any other person who, if sued separately, would have been liable to make the same payment, unless the person who has become so liable was, and that other person was not, guilty of fraudulent misrepresentation.

This provision, however, applies only to directors and those who have authorized the issue of the prospectus, while § 11(f) applies to a broader group of persons. See Barnett, *The Securities Act of 1933 and the British Companies Act*, 13 HARV. BUS. REV. 1, 11 (1934).

32. See 7 HALSBURY, LAWS OF ENGLAND *Companies* § 259 n.2 (4th ed. 1974). In the Companies Act of 1947, 10 & 11 Geo. 6, c. 47, § 65(4), the English repealed the right to recover contribution under § 37(3) of the Companies Act of 1929 and substituted the right to contribution applicable in other tort actions. See Law Reform (Married Women and Tortfeasors) Act of 1935, 25 & 26 Geo. 5, c. 30, pt. II, § 6.

33. See notes 44-47 *infra* and accompanying text.

34. 3 Loss 1737. In *Gerson v. Simpson*, [1903] 2 K.B. 197, 200, the Court of Appeal stated:

[W]ith reference to this particular class of tort, and to this class of persons . . . who have issued a prospectus as in the present case, the ordinary rule that there shall be no contribution between tortfeasors shall not apply, but the rights of the parties shall be treated as though it were a question of contract, and not of tort.

The Court of Appeal was interpreting § 5 of the Directors' Liability Act of 1890, 53 & 54 Vict., c. 64, the predecessor of the contribution provision in the Companies Act of 1929.

35. See Douglas & Bates, *The Federal Securities Act of 1933*, 43 YALE L.J. 171, 178 (1933).

B. *Contribution as It Existed in 1933*

1. *The Common Law*

Contribution is an equitable doctrine based on the principle that a person who discharges a liability that he shares with another should not bear the sole burden of payment.³⁶ Thus, if *A* and *B* are both liable for a \$1000 debt that *B* pays, *B* should recover from *A* at least part of the payment. This right arises not from any express or implied contract but from the "relations of the parties as persons liable for the same debt."³⁷ It is an inchoate right, ripening into a cause of action when one party pays more than his share of a common burden.³⁸

Courts have often confused contribution with indemnity. Indemnity means a shifting of the entire loss to another who, for equitable reasons, should pay alone. Contribution, however, means a sharing of the loss.³⁹ Ordinarily, the loss is shared equally among all solvent parties subject to a common liability,⁴⁰ although the parties can by contract

36. *Dering v. Earl of Winchelsea*, 29 Eng. Rep. 1184, 1185 (Ch. 1787); see *Jones v. Schramm*, 436 F.2d 899, 900 (D.C. Cir. 1970).

37. *Shepherd v. Bray*, [1906] 2 Ch. 235, 253, *rev'd and dismissed on motion of parties*, [1907] 2 Ch. 571; see *Dering v. Earl of Winchelsea*, 29 Eng. Rep. 1184, 1185 (Ch. 1787); 2 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 345, at 763 (3d ed. W. Jaeger 1959) [hereinafter cited as WILLISTON].

38. See *Prisbrey v. Noble*, 505 F.2d 170, 176 (10th Cir. 1974); *Albert v. Dietz*, 283 F. Supp. 854, 857 (D. Hawaii 1968); 2 WILLISTON § 345, at 773-75; Gregory, *Contribution Among Tortfeasors: A Uniform Practice*, 13 Wis. L. REV. 365, 380-83 (1938). *But cf.* *Kahn v. Urania Lumber Co.*, 103 So. 2d 476, 478-80 (La. Ct. App. 1958). The statute of limitations for the contribution claim generally runs from the date of payment. See 18 AM. JUR. 2d *Contribution* § 93 (1965).

39. See *George's Radio v. Capital Transit Co.*, 126 F.2d 219, 222 (D.C. Cir. 1942); W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 51, at 310 (4th ed. 1971) [hereinafter cited as PROSSER]; Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130, 146 (1932). Some authorities also distinguish between the concepts on the basis that the indemnity right springs from an express or implied contract. See, e.g., *Thomas v. Malco Refineries*, 214 F.2d 884, 885 (10th Cir. 1954); 2 WILLISTON § 345, at 767. See generally *RESTATEMENT OF RESTITUTION* §§ 76, 81, 86, 89-102 and *Comments* (1937). For an introduction to the concept of "partial indemnification," see *Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

40. In equity one who paid the whole debt could normally recover a proportionate share from each person who was (1) liable when the contribution relation arose, (2) solvent when payment was made, and (3) present in the jurisdiction. At law the number of persons originally liable was the only consideration in determining the aliquot shares; thus a person who paid the whole debt could not recover anything on a share allocable to one who was insolvent. See 8 HALSBURY, *LAW OF ENGLAND Contract* § 403 (3d ed. 1954); PROSSER § 50, at 310; Gregory, *supra* note 38, at 372. In England the equity rule is now also applied at law. Supreme Court of Judicature (Consolidation)

vary the contribution share.⁴¹

Equity courts developed the contribution doctrine for co-sureties,⁴² but both courts of equity and of law have applied the doctrine whenever one party has discharged a common liability.⁴³ Tort law has been an exception. The English refused to permit contribution to an intentional tortfeasor;⁴⁴ American courts also denied contribution to negligent tortfeasors.⁴⁵ The rationale for this exception was that courts should not mediate disputes between wrongdoers.⁴⁶ Moreover, the knowledge that a tortfeasor cannot share his liability with others equally negligent might deter misconduct. Commentators have consistently rejected these reasons, especially when applied to negligent tortfeasors.⁴⁷ Some Ameri-

Act of 1925, 15 & 16 Geo. 5, c. 49, § 44. In some United States jurisdictions the equity rule is also applied at law. 2 WILLISTON § 345, at 778; see RESTATEMENT OF RESTITUTION § 85, comments e, h (1937). Contribution need not be apportioned equally, however, if the parties have differing interests, responsibilities, or faults. See text accompanying notes 270, 297-313 *infra*. If the potential contributor was originally liable, he need not be liable for the common debt at the time contribution is sought. Thus, contribution can be obtained although the statute of limitations has run on the original claim in favor of one defendant, but not another, or even if the original claim did not survive the tortfeasor's death. RESTATEMENT OF RESTITUTION § 81, comment g (1937); *id.* § 83; see *Shepherd v. Bray*, [1906] 2 Ch. 235, *rev'd and dismissed on motion of parties*, [1907] 2 Ch. 571.

Contribution is sometimes said to be based on subrogation, the one who pays being substituted as the obligee. The contribution claimant cannot be enforcing the obligee's rights since the obligee has been fully satisfied; he may, however, be enforcing similar rights. See 4 A. CORBIN, CONTRACTS § 935, at 763 (1951) [hereinafter cited as CORBIN]. Similarly, it is difficult to see how an obligor can be subrogated to a claim that the obligee himself could no longer enforce even if unsatisfied, as in the statute of limitations and nonsurvival cases above. Courts generally view the right to contribution as an inchoate right based on discharge of a common liability, see note 38 *supra* and accompanying text, but the courts' results are not always consistent with this theory, as in cases of interspousal immunity and the effects of partial settlements. See generally *Turck, Contribution Between Tortfeasors in American and German Law—A Comparative Study*, 41 TUL. L. REV. 1, 13-14, 17-23 (1966).

41. See *Batard v. Hawes*, 118 Eng. Rep. 775 (Q.B. 1853); 1 S. WILLISTON, THE LAW OF CONTRACTS § 345, at 666 (1st ed. 1920).

42. See 14 HALSBURY, LAWS OF ENGLAND *Equity* § 935 (3d ed. 1956); *cf.* 4 CORBIN § 931, at 739.

43. See 14 HALSBURY, *supra* note 42 § 934; 2 WILLISTON § 345, at 762-65.

44. The leading case denying contribution among tortfeasors is *Merryweather v. Nixan*, 101 Eng. Rep. 1337 (K.B. 1799). Because that case involved intentional joint tortfeasors, subsequent English courts felt free to permit contribution in favor of non-intentional tortfeasors. See 37 HALSBURY, LAWS OF ENGLAND *Tort* § 247, at 137 n.(z) (3d ed. 1962); PROSSER § 50, at 305-06.

45. See PROSSER § 50, at 306; RESTATEMENT OF RESTITUTION § 102 (1937).

46. See *Leflar*, *supra* note 39, at 133-34.

47. See PROSSER § 50, at 307; *Bohlen, Contribution and Indemnity Between Tort-*

can courts, reacting to the harsh, no-contribution-among-tortfeasors rule, developed special indemnity rules to allow a "passive" tortfeasor to recover indemnity from an "active" tortfeasor.⁴⁸ Although elusive and difficult to apply,⁴⁹ these rules reflected a general view of the inequity that the strict rule permitted; a plaintiff's whim in choosing a defendant could subject a relatively innocent tortfeasor to complete liability, while immunizing the tortfeasor chiefly at fault.⁵⁰

These stopgaps, however, could not deal with situations in which the faults were approximately equal.⁵¹ To remedy the injustice of requiring one to pay when in fairness others should also pay, a number of state legislatures and courts modified the strict rule against contribution among tortfeasors.⁵² But in 1933 when the Securities Act was adopted, most states still permitted contribution among tortfeasors only after a joint judgment, and plaintiff was not required to sue all those potentially liable to him. Thus, the problem remained; either plaintiff's whim or collusion with a potential defendant could preclude contribution.⁵³

feasors, 21 CORNELL L.Q. 552, 557-60 (1936); Leflar, *supra* note 39, at 133-34; Turck, *supra* note 40, at 9-11; Comment, *Contribution and the Distribution of Loss Among Tortfeasors*, 25 AM. U.L. REV. 203, 211-16 (1975).

48. *E.g.*, *Sargent v. Interstate Bakeries, Inc.*, 86 Ill. App. 2d 187, 197, 229 N.E.2d 769, 774 (1967); *see* Comment, *supra* note 47, at 209-11. Indemnity is traditionally given when there is an express agreement or when the conduct of one person is imputed to another (as under the doctrine of respondeat superior); the special indemnity rules governing all other circumstances developed directly from the restrictions on the right to contribution. *Id.* at 211. Some courts have devised an active-passive negligence test, which is a type of misfeasance-nonfeasance test. *See, e.g.*, *King v. Timber Structures, Inc.*, 240 Cal. App. 2d 178, 49 Cal. Rptr. 414 (1966). Others, using the same active-passive terms, refer to a difference in the quality or character of the negligence or in the degree of culpability. *See, e.g.*, *Sargent v. Interstate Bakeries, Inc.*, *supra* at 197-202, 229 N.E.2d at 774-76. Some courts prefer the phrase "primary versus secondary negligence" to "active versus passive negligence." *See, e.g.*, *Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 147, 282 N.E.2d 288, 291, 331 N.Y.S.2d 382, 386 (1972). Still others allow indemnity if the parties are not *in pari delicto*. *See* Leflar, *supra* note 39, at 156. *See generally* Ruder 652-54.

49. *See, e.g.*, *Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 147-48, 282 N.E.2d 288, 291-92, 331 N.Y.S.2d 382, 386-87 (1972); Leflar, *supra* note 39, at 155-58; Ruder 643-54.

50. *See* Comment, *supra* note 47, at 215-16; *cf.* *Sargent v. Interstate Bakeries, Inc.*, 86 Ill. App. 2d 187, 229 N.E.2d 769 (1967).

51. If the faults were equal, indemnity would not lie under any of the theories. *See* note 48 *supra*.

52. By 1932, 12 state legislatures had modified the rule by statute; in three other states the courts had modified the rule. Leflar, *supra* note 39, at 141, 144-45 n.66 (citing and discussing the statutes).

53. *See id.* at 144-45 n.66.

2. *The English Development of Contribution in the Securities Area*

When the English Parliament enacted the Directors' Liability Act of 1890,⁵⁴ it avoided the vagaries of contribution rules by permitting corporate directors held liable for false statements in a prospectus to recover contribution "as in cases of contract."⁵⁵ Thus, a director held liable for making or acquiescing in a false statement, even if guilty of fraud, could recover contribution from those co-directors who would also have been liable under the Act had they been sued.⁵⁶ While the legislative history of the Directors' Liability Act does not explain the preference for contribution as in contract rather than as in tort, the reasons can be surmised. The law was a response to *Derry v. Peek*,⁵⁷ which exposed the inability of the common law deceit action to impose liability on directors for false or misleading prospectuses.⁵⁸ Thus, Parliament provided the investor with a new cause of action against the directors and promoters of a company issuing a prospectus.⁵⁹ The investor needed merely to show that, relying on the prospectus, he had purchased stock in the company and had sustained loss or damage because the prospectus contained one or more false statements.⁶⁰ Any director or promoter who could not prove that he had reasonable grounds for believing that each of the false statements was true was liable to compensate the investor for his loss.⁶¹ The Act served a dual

54. 53 & 54 Vict., c. 64.

55. *Id.* § 5:

Every person who by reason of his being a director . . . has become liable to make any payment under the provisions of this Act, shall be entitled to recover contribution, as in cases of contract, from any other person who, if sued separately, would have been liable to make the same payment.

56. *See* Gerson v. Simpson, [1903] 2 K.B. 197, 199-200 (C.A.).

57. 14 App. Cas. 337 (1889).

58. *See* H. CHERRINGTON, *THE INVESTOR AND THE SECURITIES ACT 89 (1942)*; 1 LOSS 6; 3 LOSS 1432, 1683; 346 PARL. DEB., H.C. (3d ser.) 570-71 (1890).

59. *See* Directors' Liability Act of 1890, 53 & 54 Vict., c. 64, § 3.

60. *Id.* § 3(1).

61. *See id.* § 3(1)(a); H. CHERRINGTON, *supra* note 58, at 89-90. The requirement that defendant shoulder the burden of proving reasonable grounds for believing the prospectus to be true engendered considerable debate in Parliament. *See, e.g.*, 346 PARL. DEB., H.C. (3d ser.) 581-82, 597, 604 (1890); 347 PARL. DEB., H.L. (3d ser.) 1864-68, 1871-79 (1890). The promoter or director had a lesser burden when the statements were based on expert testimony or official reports; he had only to prove that the untrue statement fairly represented the statement made by the expert or in the official report. *See* Directors' Liability Act of 1890, 53 & 54 Vict., c. 64, § 3(1)(b)-(c). The investor could still recover, however, if he could show that the promoter or director "had no rea-

purpose. First, it subjected to liability those figurehead directors who knew nothing of the corporation's business affairs, but whose names lent prestige to the prospectus.⁶² Such liability would not only provide more financially responsible defendants but also discourage these persons from becoming directors, while assuring that those who did would be diligent in ascertaining the truth of statements in the prospectus.⁶³ Second, the Act more fairly allocated the burden of protecting potential investors. Such protection was the primary goal of the Act;⁶⁴ in fairness, a single director should not pay the entire judgment because he was the sole director named as defendant or subjected to judgment. By providing for contribution as in contract, Parliament allowed a director, regardless of his own fault,⁶⁵ to recover contribution from any other director who would have been liable to make the same payment had he been sued separately.⁶⁶ In 1907, the contribution

sonable ground to believe that the person making the statement . . . was competent to make it . . ." *Id.* § 3(1)(b).

62. See, e.g., 346 PARL. DEB., H.C. (3d ser.) 569-71, 581-83, 587, 591-94 (1890); 345 PARL. DEB., H.C. (3d ser.) 616, 1249-50 (1890). Such directors were called "guinea-pig directors." See 1 LOSS 19; 346 PARL. DEB., *supra* at 587.

63. See 346 PARL. DEB., H.C. (3d ser.) 591-93 (1890); 347 PARL. DEB., H.L. (3d ser.) 1874 (1890); cf. 346 PARL. DEB., *supra* at 583, 587. The directors did not, however, have an affirmative obligation to test each statement in the prospectus for accuracy. See H. CHERRINGTON, *supra* note 58, at 90.

64. See 346 PARL. DEB., H.C. (3d ser.) 575-76 (1890); cf. 345 PARL. DEB., H.C. (3d ser.) 1267 (1890).

65. It should be noted that in 1890, the situations in which a wrongdoer could otherwise obtain contribution were rather unclear, especially when the torts were committed in a corporate context. See T. COOLEY, *THE ELEMENTS OF TORTS* 42-44 (1895); N. LINDLEY, *A TREATISE ON THE LAW OF PARTNERSHIP, INCLUDING ITS APPLICATION TO COMPANIES* 771-74 (4th ed. 1881).

66. See Directors' Liability Act of 1890, 53 & 54 Vict., c. 64 § 5, *quoted in note 55 supra*. The Directors' Liability Act imposed liability on directors and promoters only for injuries caused to investors by untrue prospectus statements. When Parliament enacted the Companies Act of 1900, 63 & 64 Vict., c. 48, it prescribed elaborate content requirements for prospectuses in § 10(1), but provided no express right of contribution with respect to any liabilities that might be incurred for violation. See *id.* § 10. An amendment that would have provided a contribution right was proposed by Sydney Gedge in the House of Commons, but was defeated 97 to 42. 87 PARL. DEB., H.C. (4th ser.) 89-92 (1900). Mr. Gedge found it inconsistent that a contribution right existed under the Directors' Liability Act when "an untrue statement had been made and a great wrong had resulted" but not under the Companies Act of 1900 "[w]hen a director concurred in omitting to comply with some of the intricate requirements . . . in regard to the issue of the prospectus . . ." *Id.* at 204. The Companies Act of 1900, however, gave broad defenses to any liability incurred for violation of the Act's prospectus requirements—the director needed only prove that he was unaware of the matter not disclosed or that the noncompliance was due to "an honest mistake of fact on his part."

provision was amended to preclude a director guilty of fraudulent misrepresentation from recovering contribution from a director who was not.⁶⁷ The amendment implicitly recognized, however, that a director guilty of fraudulent misrepresentation could obtain contribution from those directors who were equally culpable.

By the time Congress passed the 1933 Securities Act, Parliament had consolidated the various English Companies Acts into the Companies Act of 1929.⁶⁸ The 1929 Act incorporated essentially the same contribution provision⁶⁹ as the Directors' Liability Act of 1890,⁷⁰ limited to directors' liabilities for untrue statements in prospectuses.⁷¹ In contrast, section 11 of the federal Securities Act included all persons signing the registration statement, the directors of the issuer, the issuers, the experts and the underwriters.⁷² To distribute fairly the large risk among all

Companies Act of 1900, 63 & 64 Vict., c. 48, § 10(7). In addition, the Act contained no express private damages section, only criminal penalties for anyone willfully making a false statement in a report or document required by the Act. *See id.* § 28. Thus, an investor could recover damages only by a common law action or, if the prospectus contained a false statement, by suit under § 3 of the Directors' Liability Act of 1890. Had the statute contained a specific liability-to-investors section, it seems likely that a contribution provision would have been included.

In the Companies Act of 1907, 7 Edw. 7, c. 50, Parliament further developed the disclosure policy of the Companies Act of 1900, and included numerous penalty clauses for violations. Because of the harshness of some of the provisions and the fear that severe punishment for negligence might drive away the "good men" and leave "directors of an inferior class" in their place, *see* 171 PARL. DEB., H.L. (4th ser.) 172 (1907), Parliament provided a relief clause in § 32 of the 1907 Act. This clause gave the courts express power to grant partial or complete relief to directors liable "for negligence or breach of trust" but who had "acted honestly and reasonably, and ought fairly to be excused . . ." Companies Act of 1907, 7 Edw. 7, c. 50, § 32. The House of Commons expressly rejected, however, a provision that would have extended a similar power to the courts in cases of "honest oversight, inadvertence, or error of judgment," *see* 181 PARL. DEB., H.C. (4th ser.) 892 (1907), finding that the first relief provision was sufficient to "give all reasonable protection to the directors." *Id.* at 900. *See generally id.* at 892-900. A provision similar to § 32 is now contained in the Companies Act of 1948, 11 & 12 Geo. 6, c. 38, § 448. *See* J. CHARLESWORTH, COMPANY LAW 195 (8th ed. 1965); 5 HALSBURY, STATUTES OF ENGLAND 427, General Note (3d ed. 1968).

67. *See* Companies Act of 1907, 7 Edw. 7, c. 50, § 33. Without such an addition, it seems clear that the right to contribution would have been allowed without regard to relative culpability. *See* Gerson v. Simpson, [1903] 2 K.B. 197, 199-200 (C.A.).

68. 19 & 20 Geo. 5, c. 23.

69. *Id.* pt. II, § 37(3), *quoted in note 31 supra*.

70. 53 & 54 Vict., c. 64, § 5, *quoted in note 55 supra*. The 1929 Act provision contained the 1907 amendments. *See note 67 supra* and accompanying text.

71. *See* Companies Act of 1929, 19 & 20 Geo. 5, c. 23, pt. II, § 37.

72. Promoters were also liable for false prospectuses. *See id.*; 3 Loss 1722-23; Barnett, *supra* note 31, at 11-15.

those potentially liable, a right of contribution was essential. Absent an express provision, the strict American common law would probably have denied contribution to negligent and intentional violators⁷³ of section 11.⁷⁴

C. Contribution Since 1933

Since 1933, a number of states have modified their contribution rules;⁷⁵ two uniform contribution acts have been recommended to the states;⁷⁶ and the English have granted tortfeasors a statutory contribution right based on equity and responsibility for injury.⁷⁷ The 1939 Uniform Contribution Among Tortfeasors Act permits contribution among jointly or severally liable tortfeasors,⁷⁸ including an optional provision permitting allocation of damages according to fault.⁷⁹ The 1955 Uniform Contribution Among Tortfeasors Act rejects the optional provision and expressly restricts the contribution right to nonintentional tortfeasors.⁸⁰ Neither Uniform Act has in fact created much uniformi-

73. See notes 45-47 *supra* and accompanying text.

74. See Ruder 649. Section 11 provides all those potentially liable for misstatements, except the issuer, with certain defenses termed "due diligence defenses." Although a negligence standard and a "due diligence defense" standard do not necessarily coincide, a person who cannot establish due diligence with regard to an untrue statement will normally be negligent in his "duty" to uncover false statements or in his common law duty of care. For a thorough discussion of the standards of diligence and care required by § 11, see Folk, *Civil Liabilities Under the Federal Securities Acts: The BarChris Case*, 55 VA. L. REV. 1 (1969).

75. Compare RESTATEMENT (SECOND) OF TORTS § 886A, comment a at 199 & Explanatory Note, comment a at 204-05 (Tent. Draft No. 16, 1970) and Comment, *Contribution Among Joint Tortfeasors*, 44 TEX. L. REV. 326 & nn.4, 5 (1965) with note 52 *supra*.

76. The National Conference of Commissioners on Uniform State Laws recommended the first Uniform Contribution Among Tortfeasors Act in 1939. Because the Commissioners found that this proposed Act had not created uniformity, they withdrew the Act in 1955, substituting a substantially revised version, the 1955 Uniform Contribution Among Tortfeasors Act. See UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT, Prefatory Note (1955). The uniform acts with their notes and official comments are reprinted in 12 U.L.A. 57-107 (master ed. 1975).

77. Law Reform (Married Women and Tortfeasors) Act of 1935, 25 & 26 Geo. 5, c. 30, § 6. See generally 37 HALSBURY, LAWS OF ENGLAND *Tort* §§ 247-49 (3d ed. 1962, Supp. 1975). This provision applies to tortfeasors in general. In 1947, Parliament substituted this general contribution right for that contained in the Companies Act of 1929. See note 32 *supra*; notes 320-22 *infra* and accompanying text.

78. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT §§ 1, 2(1) (1939 version).

79. *Id.* § 2(4). See Gregory, *supra* note 38, at 374-75.

80. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT §§ 1(c), 2 (1955 version); see Turck, *supra* note 40, at 20 & n.121. Note that § 1(c) contains an optional phrase that would expressly preclude contribution among reckless tortfeasors as well.

ty; heterogeneity remains the rule.⁸¹

Despite, or perhaps because of, the enduring common law rule, the drafters of the Uniform Securities Act⁸² included the express provision: "There is contribution as in cases of contract among the several persons so liable."⁸³ The dispositive factor for contribution is not the degree of fault or identification as defendant, but initial liability under the Act. Once this is determined, the person must look to state law to determine when contribution is permitted in contracts cases and the exact nature of the action. Of the 34 jurisdictions that have adopted the Uniform Securities Act in whole or in major part,⁸⁴ 26 included the contribution provision as it appeared in the Act,⁸⁵ and five included other contribu-

81. *Uniform Laws Annotated* lists only ten states that have adopted in substance and retained the 1939 version and six states that have adopted in substance the 1955 version. 12 U.L.A. 62, 66-67 (master ed. 1975).

82. The National Conference of Commissioners on Uniform State Laws approved the Uniform Securities Act on Aug. 25, 1956. UNIFORM SECURITIES ACT, Comment to Title. The Uniform Securities Act is reprinted with the official comments in L. LOSS & E. COWETT, *BLUE SKY LAW* (1958); 7 U.L.A. 691-795 (master ed. 1970); 1 *BLUE SKY L. REP.* ¶ 4901-53 (1971).

83. UNIFORM SECURITIES ACT § 410(b). The Official Comment contains only a one-sentence explanation of why this provision was included: "The last sentence, with reference to contribution, is a safeguard to avoid the common law rule which prohibits contribution among joint tortfeasors." UNIFORM SECURITIES ACT § 410(b), Comment. The provision was modeled after the federal contribution provisions. See text accompanying note 34 *supra*. The uniform provision differs, however, in that it is located in a single section with all the civil liability provisions. Since no implied causes of action can be created by the Act, there will be no occasion to imply a contribution right under another provision of the Act. See UNIFORM SECURITIES ACT § 410(h). This is hardly the case under the federal securities laws. See generally notes 134-61 *infra* and accompanying text.

84. The 34 jurisdictions include 32 states, the District of Columbia, and Puerto Rico. 1 *BLUE SKY L. REP.* ¶ 4901 (Dec. 1975).

85. ALASKA STAT. § 45.55.220(c) (1962); ARK. STAT. ANN. § 67-1256(b) (1966); COLO. REV. STAT. ANN. § 11-51-125(2) (1973); DEL. CODE ANN. tit. 6, § 7323(b) (1974); D.C. CODE ANN. § 2-2413(b) (1973); IND. CODE § 23-2-1-19(b) (Burns Supp. 1975); KAN. STAT. ANN. § 17-1268(b) (1974); KY. REV. STAT. ANN. § 292.480(2) (1971); MD. CORP. & ASSOC. CODE ANN. § 11-703(c)(2) (1975); MASS. ANN. LAWS ch. 110A, § 410(b) (1975); MICH. STAT. ANN. § 19.776(410)(b) (1975); MINN. STAT. ANN. § 80A.23 Subd. 3 (Supp. 1976); MO. REV. STAT. § 409.411(b) (1969); NEB. REV. STAT. § 8-1118(2) (1974); NEV. REV. STAT. § 90.200(2) (1975); N.J. STAT. ANN. § 49:3-71(b) (1970); N.C. GEN. STAT. § 78A.56(c) (1975); OKLA. STAT. ANN. tit. 71, § 408(b) (Supp. 1975); P.R. LAWS ANN. tit. 10, § 890(b) (Supp. 1974); S.C. CODE ANN. § 62-310 (1962); UTAH CODE ANN. § 61-1-22(2) (1968); VA. CODE ANN. § 13.1-539(b) (1973); WASH. REV. CODE ANN. § 21.20.430 (Supp. 1976); W. VA. CODE ANN. § 32-4-410(b) (1975); WIS. STAT. ANN. § 551.59(4) (Spec. Pamphlet 1975); WYO. STAT. ANN. § 17-117.22(b) (1965).

tion provisions.⁸⁶ Five of the 18 states that have not yet adopted the Uniform Securities Act permit contribution in their securities laws.⁸⁷

86. Two states used the Uniform Act language, but omitted the phrase "as in cases of contract" from their contribution provisions. IDAHO CODE § 30-1446(2) (1967); MONT. REV. CODES ANN. § 15-2022(2) (1967). Oregon's provision is worded differently, but to similar effect. ORE. REV. STAT. § 59.115(3) (1973) ("Any person held liable under this section shall be entitled to contribution from those jointly and severally liable with him"). The Iowa statute restricts the right of contribution by providing that a "person whose willful violation . . . has given rise to any civil liability" may not recover contribution from any "person guilty merely of a negligent violation." Iowa Uniform Securities Act, House File 825, § 503.2 (July 18, 1975) (1975 IOWA LEGIS. SERV. 519). The statute also provides a right of indemnification against certain willful violators. *Id.* Pennsylvania's provision is similar except that the right of contribution is expressly "based upon each person's proportionate share of the total liability" and the right of indemnification is limited to corporations. PA. STAT. ANN. tit. 70, § 1-503(b) (Supp. 1975). Three states included no contribution provision in statutes modeled on the Uniform Securities Act: ALA. CODE tit. 53, § 45(b) (Cum. Supp. 1973) (subsection (b) is exactly like Uniform Securities Act § 410(b) except that the contribution sentence is omitted); HAWAII REV. STAT. § 485-20 (1968) (civil remedies section is substantially different from Uniform Securities Act § 410); N.M. STAT. ANN. § 48-18-31 (1966) (same).

87. Of the five states, three have liability sections based on the Uniform Securities Act § 410(b) and include a similar contribution provision. CONN. GEN. STAT. REV. § 36-346(b) (1975); GA. CODE ANN. § 97-114(b) (1976); LA. REV. STAT. ANN. § 51:715B (Supp. 1976). California's provision is similar to Pennsylvania's, *discussed in* note 86, in that it provides a right "based upon each person's proportionate share of the total liability," prevents willful violators from recovering contribution from negligent violators, and allows corporations a right of indemnification against certain willful violators. CAL. CORP. CODE § 25505 (Deering Supp. 1975). California is the only state, however, to include in its securities act a statute of limitations designed expressly for contribution actions: "one year after final judgment based upon the liability for which the right of . . . contribution exists." *Id.* § 25508 (also applicable to right of indemnification). The Ohio contribution provision is unique in providing that a director who pays a judgment based on liability for a false prospectus statement is *subrogated* to the plaintiff's rights; he can then recover contribution against fellow directors who would also be individually liable under the same liability section. OHIO REV. CODE ANN. § 1707.41 (1964); *cf.* note 40 *supra* (subrogation theory).

Of the 13 states that have adopted neither the Uniform Securities Act nor express contribution provisions in their securities acts, seven specify persons who are jointly and severally liable to the purchaser, thus permitting easy application of an implied contribution right or a statutory provision for contribution among tortfeasors. ARIZ. REV. STAT. ANN. § 44-2003 (1967) (also provides for liability to a seller); FLA. STAT. ANN. § 517.21(1) (Supp. 1975); ILL. ANN. STAT. ch. 121½, § 137.13 (Smith-Hurd Supp. 1975); N.D. CENT. CODE § 10-04-17 (1960); S.D. COMPILED LAWS ANN. § 47-31-133 (1967); TENN. CODE ANN. § 48-1645 (1964); VT. STAT. ANN. tit. 9, § 4225 (1971). Two states impose liability in certain circumstances, without reference to whether it is joint or several. ME. REV. STAT. ANN. tit. 32, § 881 (Supp. Pamphlet 1973); TEX. REV. CIV. STAT. ANN. art. 581-33 (1964). Mississippi's sole civil liability provision is recovery on the bond required of investment companies for the sale of securities. MISS. CODE

Virtually no court has found occasion to interpret any of the contribution provisions.

III. INDEMNIFICATION TO SHIFT SECURITIES LAW LIABILITIES

A. *Indemnity Agreements*

Until recently, the interest in contribution was minimal since persons subject to civil liability under the securities laws could completely shift such liabilities through indemnity agreements.⁸⁸ Unless contrary to public policy, such agreements are generally enforceable despite the culpability of the indemnitee.⁸⁹ Indemnification agreements thus commonly accompanied the registration requirements of the Securities Act.⁹⁰ Typically, the underwriter and the issuer each agreed to indemnify the other for liabilities arising from its own acts or omissions.⁹¹ In the 1940's, when many states began to permit corporations to indemnify

ANN. § 75-71-25 (1972). Three states do not expressly authorize private damage suits in their securities acts, prescribing only criminal penalties and fines. N.H. REV. STAT. ANN. § 421:40 (Supp. 1975) (criminal penalty section); N.Y. GEN. BUS. LAW § 339-a (McKinney 1968) (making false statements with intent to deceive is a misdemeanor); R.I. GEN. LAWS ANN. § 7-11-24 (Supp. 1974) (criminal penalty section). New York courts have implied a private right of action under the New York section. *See Barnes v. Peat, Marwick, Mitchell & Co.*, 69 Misc. 2d 1068, 332 N.Y.S.2d 281 (Sup. Ct. 1972), *modified on other grounds*, 42 App. Div. 2d 15, 344 N.Y.S.2d 645 (1973).

88. Indemnity agreements generally provide that the indemnitor is liable to reimburse the indemnitee for all expenses incurred with respect to specified claims and liabilities asserted against the indemnitee. Many agreements limit this right according to the indemnitee's culpability. Thus, for example, a clause may preclude indemnification when the liability arises from willful misfeasance or, occasionally, from negligent conduct.

89. *See* 37 HALSBURY, LAWS OF ENGLAND *Tort* § 250 (3d ed. 1962); *cf.* RESTATEMENT OF RESTITUTION § 88, Comment c (1937).

90. *See* Barnett, *supra* note 31, at 15. Copies of all material contracts must be filed with the registration statement. Securities Act § 7, 15 U.S.C. § 77g (1970); Schedule A(24), (28), (30), 15 U.S.C. §§ 77aa(24), (28), (30) (1970). The registration forms under the Securities Act also provide that the registrant must state the effect of any provision under which a director or officer is to be indemnified for any liability incurred in his official capacity. *E.g.*, Securities Act Form S-1, Item 29, *reprinted in* 2 CCH FED. SEC. L. REP. ¶ 8260 (1970).

91. Under the standard underwriter-issuer agreement, the underwriter is responsible only for the information it furnishes, and the issuer is responsible for all other information. *See* 3 LOSS 1834-35; Note, *Indemnification of Underwriters and Section 11 of the Securities Act of 1933*, 72 YALE L.J. 406 (1962). For an example of a clause in which the issuer agrees to indemnify the underwriter, see *Globus v. Law Research Serv., Inc.*, 418 F.2d 1276, 1287 n.14 (2d Cir. 1969), *cert. denied*, 397 U.S. 913 (1970).

officers and directors, indemnification of corporate officials against securities liability became widespread.⁹² The Securities and Exchange Commission took the position that indemnification of corporate officers was contrary to public policy,⁹³ but did not object on public policy

92. See 3 Loss 1829-30. For discussion of the state statutes, see Bishop, *Sitting Ducks and Decoy Ducks: New Trends in the Indemnification of Corporate Directors and Officers*, 77 YALE L.J. 1078, 1078-85 (1968); Brook, *Directors' Indemnification and Liability Insurance*, 21 N.Y.L.F. 1, 2-22 (1975); Klink, Chalif, Bishop & Arsht, *Liabilities Which Can Be Covered Under State Statutes and Corporate By-Laws*, 27 BUS. LAW. 109, 110-28 (Special Issue 1972) (separate addresses at the ABA National Institute on "Officers' and Directors' Responsibilities and Liabilities," Oct. 22, 1971); Sebring, *Recent Legislative Changes in the Law of Indemnification of Directors, Officers and Others*, 23 BUS. LAW. 95, 95-110 (1967).

93. In a 1957 note to rule 460, the Commission formally enunciated its opposition to registrant's indemnifying their directors, officers, and controlling persons against Securities Act liabilities. 17 C.F.R. § 230.460 n.(a), (b) (1975); see 1 Loss 280. The Commission indicated it would refuse to accelerate the registration statement unless (1) the registrant obtained a waiver of those indemnification benefits from its directors, officers, and controlling persons, or (2) it included in its registration statement a disclosure that such indemnification might be unenforceable on public policy grounds and that it would submit the question to a court if a director, officer, or controlling person asserted a claim for indemnification against liabilities arising under the Securities Act (except with respect to expenses incurred for a successful defense). These waivers or undertakings must be filed with the registration statement, but need not appear in the prospectus. For answers to Form S-1, Item 29, *supra* note 90, that the Commission has accepted, see 2 CCH FED. SEC. L. REP. ¶ 8260 (1970). For those registrants that do not request acceleration, a statement disclosing the possible invalidity of indemnification provisions must be included in the prospectus. SEC Securities Act Release No. 4936(46) (Dec. 9, 1968). See Minerals Consol., Inc., 39 S.E.C. 470, 475 (1959) (finding registration statement deficient for failure to make such disclosure).

Still unclear are the legal consequences of such an undertaking to submit indemnification questions to a court. For example, the court in *Feit v. Leasco Data Processing Equip. Corp.*, 332 F. Supp. 544 (E.D.N.Y. 1971), held Leasco and three of its directors jointly and severally liable for violations of § 11. After the judgment and pursuant to its undertaking, Leasco asked the court whether it could pay the full amount of the judgment itself and not seek contribution from the directors held liable. The SEC, invited to submit a memorandum, objected that the failure to seek contribution was indirectly the same as paying indemnity and "to allow directors to avoid the consequences of their lack of diligence by indemnification from the issuer . . . would frustrate the Congressional purpose." BNA SEC. REG. & L. REP. No. 135, at A-6 (Jan. 19, 1972) (summary of SEC memorandum and arguments).

The Leasco directors "ultimately contributed relatively small amounts." Freund & Hacker, *supra* note 5, at 472 n.67. The undertaking clause was also directly involved in *Cannon v. Texas Gulf Sulphur Co.*, 55 F.R.D. 308 (S.D.N.Y. 1972). The settlement specifically provided that the individual defendants waived any rights of indemnification from Texas Gulf for amounts paid in settlement and for expenses. *Id.* at 314-15. See also Comment, *Indemnification of Directors for Section 11 Liability*, 48 TEX. L. REV. 661, 669 n.47, 670 (1970) (insignificant coercive effect of rule 460).

grounds to other agreements, such as the standard underwriter-issuer agreement.⁹⁴

B. *Reaction of the Courts*

1. *Globus I and its Progeny*

Until 1968, courts looked to the relevant state corporate or common law to determine indemnity rights, ignoring the implications of federal securities law.⁹⁵ The decision in *Globus v. Law Research Service, Inc. (Globus I)*⁹⁶ severely jolted the complacency with which underwriters, accountants, directors, and officers had viewed indemnity agreements. *Globus I* refused on grounds of federal public policy to enforce an indemnity agreement between an issuer and underwriter. A jury found that the underwriter, the issuer, and the issuer's president had violated

94. See 3 Loss 1834-35. Although the Commission has never objected to these agreements, courts have recently held such agreements unenforceable by underwriters, analogizing the underwriters to the controlling persons whose indemnification by the corporations is against public policy. *E.g.*, *Globus v. Law Research Serv., Inc.*, 418 F.2d 1276, 1288 (2d Cir. 1969), *cert. denied*, 397 U.S. 913 (1970); see 17 C.F.R. § 230.460 n.(a), (b) (1975); 3 H. BLOOMENTHAL, *SECURITIES AND FEDERAL CORPORATE LAW* § 8.29 [2], at 8-86 (1974) [hereinafter cited as BLOOMENTHAL]; Note, *supra* note 91, at 407, 411. The Commission similarly has not objected to the indemnity agreements made with underwriters by selling shareholders. See 3 Loss 1834; *cf.* *Lyons v. Marrud, Inc.*, 46 F.R.D. 451, 453 (S.D.N.Y. 1968). Because underwriter indemnity agreements made by a controlling shareholder in a secondary distribution are similar to those made by the corporation, it seems likely that courts will also hold these agreements unenforceable on public policy grounds.

Since 1928, the English have prohibited indemnity agreements by companies in favor of directors or auditors when the directors or auditors are guilty of negligence or breach of trust with respect to the company. For discussion of the relevant English history, see 3 Loss 1831 n.490; Note, *supra* note 91, at 411 n.38 (1962). See also J. CHARLES-WORTH, *supra* note 66, at 194-95.

95. See, *e.g.*, *Handel-Maatschappij H. Albert De Bary & Co., N.V. v. Faradyne Electronics Corp.*, 37 F.R.D. 357 (S.D.N.Y. 1964) (issuer seeking indemnity from its underwriter); *Behar v. Savard*, 21 F.R.D. 367, 370 (S.D.N.Y. 1958) (partners in a brokerage partnership seeking indemnity from a salesman employee). In both cases, the courts refused to dismiss third-party indemnity claims because, under New York law, a principal held liable for the conduct of his agent could recover indemnity from the agent. Neither case involved an indemnity agreement.

96. 287 F. Supp. 188, 199 (S.D.N.Y. 1968), *aff'd in part and rev'd in part*, 418 F.2d 1276 (2d Cir. 1969), *cert. denied*, 397 U.S. 913 (1970). The term "*Globus I*" will refer to this set of proceedings. The term "*Globus II*" will refer to the subsequent proceedings in which the defendant underwriter sought contribution from the other defendants. *Globus v. Law Research Serv., Inc.*, 318 F. Supp. 955 (S.D.N.Y. 1970), *aff'd per curiam*, 442 F.2d 1346 (2d Cir.), *cert. denied*, 404 U.S. 941 (1971).

the federal securities law by circulating a misleading advertisement of a stock sale.⁹⁷ The district court then voided the indemnity agreement on which the underwriter sought to escape liability. The Second Circuit, affirming that ruling,⁹⁸ restricted its holding to persons who "committed a sin graver than ordinary negligence;"⁹⁹ but the rationale extended much further.¹⁰⁰ Civil liabilities were "designed not so much to compensate the defrauded purchaser as"¹⁰¹ to encourage diligent investigation and compliance with the Securities Act. Therefore, reasoned the court, to allow an underwriter with actual knowledge of misstatements to recover indemnity from a slightly "more liable" issuer would substantially impede the federal objective of full disclosure; the underwriter would lack financial incentive for a diligent independent investigation.¹⁰²

Courts thereafter examined indemnification in light of federal policy and regularly denied indemnity claims. Of the reported securities cases that considered the indemnity issue in preliminary proceedings, only one court held that an indemnification agreement was properly asserted.¹⁰³ Other courts either denied leave to file such a claim,¹⁰⁴ denied

97. The jury found that all three parties had violated § 17(a) of the Securities Act, 15 U.S.C. § 77q(a) (1970), and § 10(b) of the Exchange Act, 15 U.S.C. § 78j(b) (1970), and that the underwriter had also violated § 12(2) of the Securities Act, 15 U.S.C. § 77i(s) (1970), and § 15(c) of the Exchange Act, 15 U.S.C. § 78o(c) (1970).

98. *Globus v. Law Research Serv., Inc.*, 418 F.2d 1276 (2d Cir. 1969), *cert. denied*, 397 U.S. 913 (1970) (affirming district court in all respects except punitive damage award).

99. 418 F.2d at 1288.

100. *See Odette v. Shearson, Hammill & Co.*, 394 F. Supp. 946, 956 (S.D.N.Y. 1975); 3A BLOOMENTAL § 8.27[2], at 8-87.

101. 418 F.2d at 1288. Although the suit was not brought under § 11 of the Securities Act because the offering was made pursuant to Regulation A, 17 C.F.R. §§ 230.251-.262 (1975), the court nevertheless analogized to the policies behind § 11. *See* 418 F.2d at 1279, 1288.

102. 418 F.2d at 1288-89; *see* 3 Loss 1831; Dooley, *The Effects of Civil Liability on Investment Banking and the New Issues Markets*, 58 VA. L. REV. 776, 809 (1972); Landis, *The Legislative History of the Securities Act of 1933*, 28 GEO. WASH. L. REV. 29, 35 (1959); Note, *Indemnification of Directors: The Problems Posed by Federal Securities and Antitrust Legislation*, 76 HARV. L. REV. 1403, 1418-21 (1963); Note, *supra* note 91, at 409-11. For an economic social-cost analysis of the balancing of liability risks against the costs of verifying information for securities offerings, *see* Dooley, *supra* at 835-36.

103. *Carpenter v. Hall*, 311 F. Supp. 1099 (S.D. Tex. 1970). *But cf.* *Katz v. Realty Equities Corp.*, 521 F.2d 1354 (2d Cir. 1975) (in consolidating 17 private securities cases for pretrial purposes, court stated that all defendants would be deemed to have asserted cross-claims for indemnification and contribution against all other defendants). In *Carpenter*, the reorganization trustee brought action on behalf of Westec Corp. to obtain restitution of the amounts he paid in compromising the securities claims asserted

indemnity based solely on the pleadings,¹⁰⁵ or deferred the decision

against Westec because of the wrongful conduct of Westec's agents and employees. The trustee contended that although Westec was liable for the wrong, Westec could nevertheless seek indemnity under Texas law from other defendants who had aided and exploited the wrongful conduct of Westec's agents and employees because those defendants were more culpable than Westec. 311 F. Supp. at 1105-06, 1113. Accepting this argument and finding that under Texas indemnity principles the trustee stepped into the "shoes of the defrauded" investors, the court dismissed all arguments that such indemnity was against public policy and permitted the trustee to assert the investors' claims under § 10(b) of the Exchange Act, 15 U.S.C. § 78j(b) (1970), to the extent of the amounts paid in compromise. See 311 F. Supp. at 1105, 1113. By virtue of these subrogated or assigned claims, the trustee was permitted to act as representative of a class of injured investors. In addition, the trustee asserted damage claims for direct injuries to the corporation.

The *Carpenter* court upheld an indemnity agreement because the corporation, being "less responsible," *id.* at 1106, was not *in pari delicto* with the defendants. For discussion of use of the *in pari delicto* defense in securities cases, see *James v. DuBreuil*, 500 F.2d 155 (5th Cir. 1974); *Ruder* 659-65. The *Carpenter* court's reasoning is unpersuasive. As a controlling person under § 20(a) of the 1934 Act, 15 U.S.C. § 78t (1970), the corporation is equally liable with its agents for the latter's fraudulent activities, a result no different than the common law of respondeat superior. The corporation can surely recover indemnity from its agents for damages paid by the corporation but occasioned by the agent's misdeeds. See *Thomas v. Duralite Co.*, 386 F. Supp. 698 (D.N.J. 1974); *deHaas v. Empire Petroleum Co.*, 286 F. Supp. 809, 816 (D. Colo. 1968); Note, *Corporate Indemnification for 10b-5 Violations*, 70 COLUM. L. REV. 504 (1970); *cf.*, *e.g.*, CAL. CORP. CODE § 25505 (*Deering Supp.* 1975). When the corporation seeks indemnity from persons whose actions are not imputed to the corporation, however, it should succeed only if there is a substantial difference in degree of fault between the indemnitor and the corporate agents. If the corporate agents are themselves liable under § 10(b), that difference should not be great. *Cf.* *Herzfeld v. Laventhol, Krekstein, Horwath & Horwath*, 378 F. Supp. 112, 136-38 (S.D.N.Y. 1974) (when corporate underwriter and accounting firm were equally culpable, underwriter could not assert § 10(b) claim as assignee of purchasers against accountants). At any rate, the court should have specifically addressed the federal securities policies affected by the indemnity claim. Whatever the status of that claim under state law, the federal policies remain the same. The trustee also asserted a claim for contribution which the court ignored beyond noting that it was barred. *Id.* at 1106.

104. *State Mut. Life Assur. Co. of America v. Peat, Marwick, Mitchell & Co.*, 49 F.R.D. 202 (S.D.N.Y. 1969) (third-party complaint for indemnity and contribution struck on the basis of New York law).

105. *Madigan, Inc. v. Goodman*, 498 F.2d 233, 237-38 (7th Cir. 1974) (group could not seek indemnity on theory inconsistent with theory on which the group itself was alleged to be liable); *Odette v. Shearson, Hammill & Co.*, 394 F. Supp. 946, 955-57 (S.D.N.Y. 1975) (if broker-dealer is found liable under any of the securities fraud sections of § 12(2) of the Securities Act, the level of guilt would be too great to recover indemnity for such liabilities); *Alexander & Baldwin, Inc. v. Peat, Marwick, Mitchell & Co.*, 385 F. Supp. 230 (S.D.N.Y. 1974) (accountant could not recover indemnity from issuer for § 10(b) liability); *Tucker v. Arthur Andersen & Co.*, [1973-1974 Transfer Binder] CCH FED. SEC. L. REP. ¶ 94,544 (S.D.N.Y. 1974) (when alleged that defendant accountant had actual knowledge of falsity of statements it certified, accountant

while noting that such relief was unlikely.¹⁰⁶

The results after trial depended on the liability of the indemnitee and, if liable, on the culpability of the indemnifier. Thus, one court permitted a corporation to recover from officers motivated by private gain whose fraudulent conduct had been imputed to the corporation.¹⁰⁷ Another court required an unsuccessful corporate plaintiff to indemnify a defendant accountant exonerated at trial and, as a faithful corporate servant, entitled to indemnification under the corporate charter. But the corporation's president, also exonerated, was not entitled to indemnity, since the action from which the lawsuit arose had been taken for his private benefit.¹⁰⁸ Three other courts emphatically denied indemnifica-

could not seek full indemnity from others who allegedly failed to disclose true facts to accountant); *State Mut. Life Assur. Co. of America v. Arthur Andersen & Co.*, [1973-1974 Transfer Binder] CCH FED. SEC. L. REP. ¶ 94,543 (S.D.N.Y. 1972) (companion case to *Tucker*). *But cf.* *State Mut. Life Assur. of America v. Arthur Andersen & Co.*, 65 F.R.D. 518 (S.D.N.Y. 1975) (subsequent pretrial proceedings in *State Mutual* case in which third-party complaint asking for contribution or indemnity was filed without discussion of propriety of indemnity).

106. *Muth v. Dechert, Price & Rhoads*, 391 F. Supp. 935 (E.D. Pa. 1975) (lawyers and accountants seeking indemnity from a number of individuals and corporation); *B & B Inv. Club v. Kleinert's, Inc.*, 391 F. Supp. 720 (E.D. Pa. 1975) (accountant and issuer seeking indemnity from selling shareholder); *State Mut. Life Assur. Co. of America v. Arthur Andersen & Co.*, 63 F.R.D. 389, 393 (S.D.N.Y. 1974) (counterclaim to accountant's third-party claim) (opinion sets forth the procedural maze of cross-claims, counterclaims, and third-party claims for indemnification or contribution filed up to that point in *State Mutual* action); *Getter v. R.G. Dickinson & Co.*, 366 F. Supp. 559, 569 (S.D. Iowa 1973) (broker-dealer seeking indemnity from issuer, issuer's directors, and accounting firm); *Sherlee Land v. Commonwealth United Corp.*, [1972-1973 Transfer Binder] CCH FED. SEC. L. REP. ¶ 93,749, at 93,274 (S.D.N.Y. 1973) (accountant seeking indemnity from issuer and issuer's directors).

107. *Thomas v. Duralite Co.*, 386 F. Supp. 698 (D.N.J. 1974). Because the officers committed the unauthorized acts constituting the § 10(b) violation in order to benefit themselves, there was a breach of fiduciary duty to the corporation. *See also deHaas v. Empire Petroleum Co.*, 286 F. Supp. 809, 816 (D. Colo. 1968); Note, *supra* note 103.

108. *Koch Indus., Inc. v. Vosko*, 494 F.2d 713 (10th Cir. 1974). Vosko, the president of Atlas Petroleum, sold that corporation to Koch. Koch unsuccessfully sued both Vosko and an accounting firm for fraud and Securities Act violations in the sale. Because Vosko was not acting in his official capacity when he sold Atlas, that corporation's charter did not grant him indemnification. The accountant, however, had made a report at the request of Atlas, and there was no finding that the report was negligently prepared. Atlas' charter did allow the accountant to recover indemnity; the indemnitor would have to be Koch which had taken over the liabilities of Atlas. The state law governing each corporation permitted such an award; federal policy had no objection to the award of legal fees for a successful defense. Consequently, Koch was required to indemnify the accountant.

tion.¹⁰⁹ In each, the indemnity claimants' liability for securities violations depended on either their own tortious conduct or conduct imputed to them from sources other than the indemnifiers.

2. *Consideration of Federal Policy Interests*

In all but two¹¹⁰ of the cases decided after *Globus I*, the courts carefully considered federal securities policy in determining the propriety of indemnification relief. State law was relevant in determining individual right to indemnity,¹¹¹ and corporate power to indemnify,¹¹² but both were subject to the overriding demands of federal securities law. In short, the enforceability of an indemnity claim became a matter primarily of federal rather than state law.¹¹³

Courts usually engaged in a limited fault analysis. Thus, in cases of imputed liability, as in the principal-agent relation, courts permitted recovery from the one whose conduct was imputed, at least if the agent was acting to benefit himself.¹¹⁴ When both parties to an indemnity

109. *Wassel v. Eglowsky*, 399 F. Supp. 1330, 1366 (D. Md. 1975) (neither corporate transfer agent nor corporate counsel were "significantly more responsible" for plaintiff's injuries than were defendants who sold stock to plaintiff); *Gould v. American-Hawaiian S.S. Co.*, 387 F. Supp. 163, 168 (D. Del. 1974) (in addition to corporation's liability for proxy violations as a principal responsible for actions of its agents, corporation also liable on its own account and therefore neither agent nor corporation could recover indemnity from the other); *Herzfeld v. Laventhol, Krekstein, Horwath & Horwath*, 378 F. Supp. 112, 135 (S.D.N.Y. 1974) (accountant could not recover indemnity from underwriter when both chargeable with knowing participation in the fraudulent misconduct).

110. *Carpenter v. Hall*, 311 F. Supp. 1099 (S.D. Tex. 1970), *discussed in note 103 supra*; *State Mut. Life Assur. Co. of America v. Peat, Marwick, Mitchell & Co.*, 49 F.R.D. 202 (S.D.N.Y. 1969) (striking indemnity claim under New York law).

111. *See State Mut. Life Assur. Co. of America v. Peat, Marwick, Mitchell & Co.*, 49 F.R.D. 202, 212 (S.D.N.Y. 1969). *But see State Mut. Life Assur. Co. of America v. Arthur Andersen & Co.*, [1973-1974 Transfer Binder] CCH FED. SEC. L. REP. ¶ 94,543, at 95,867 (S.D.N.Y. 1972); *cf. Odette v. Shearson, Hammill & Co.*, 394 F. Supp. 946, 954 n.9 (S.D.N.Y. 1975). *See also Kohr v. Allegheny Airlines, Inc.*, 504 F.2d 400, 403-05 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975) (contribution and indemnity with respect to mid-air plane collisions should be determined under federal common law).

112. *See Koch Indus., Inc. v. Vosko*, 494 F.2d 713, 725 (10th Cir. 1974); text accompanying note 92 *supra*.

113. *See Globus v. Law Research Serv., Inc.*, 418 F.2d 1276, 1288-89 (2d Cir. 1969), *cert. denied*, 397 U.S. 913 (1970); *Getter v. R.G. Dickinson & Co.*, 366 F. Supp. 559, 569 (S.D. Iowa 1973).

114. *See note 107 supra*; *cf. Handel-Maatschappij H. Albert De Bary & Co., N.V. v. Faradyne Electronics Corp.*, 37 F.R.D. 357 (S.D.N.Y. 1964). Because a corporation "can be liable for fraud only through the conduct of its agents," *Thomas v. Duralite*

claim were equally culpable, courts uniformly denied indemnity.¹¹⁵ Should the degree of fault diverge significantly, however, the courts would face more difficult problems. For example, should a negligent indemnity claimant recover from a person guilty of intentional fraud?¹¹⁶ The relevant purposes of the securities laws must provide the yardstick; but since the various liability sections have differing purposes, each section requires a separate determination.¹¹⁷

Thus, the court in *Gould v. American-Hawaiian Steamship Co.*,¹¹⁸ relying on the regulatory purposes of section 14(a) of the Exchange Act,¹¹⁹ denied indemnity to any person violating the section. The court refused to consider relative culpabilities, emphasizing that section 14(a) is designed to protect "the interest of informed corporate suffrage" and "only a realistic possibility of liability for damages will encourage due diligence by those who solicit proxies."¹²⁰ The section penalizes negli-

Co., 386 F. Supp. 698, 728 (D.N.J. 1974), this indemnity situation will frequently arise when a corporation is held liable under § 17(a) of the Securities Act, 15 U.S.C. § 77q (a) (1970), or § 10(b) of the Exchange Act, 15 U.S.C. § 78j(b) (1970). A corporation, however, could be directly liable under §§ 11 and 12 of the Securities Act, 15 U.S.C. §§ 77k, l (1970), and § 14(a) of the Exchange Act, 15 U.S.C. § 78n(a) (1970). These direct liabilities would not present the same possibilities for indemnity as the vicarious liabilities. See *Gould v. American-Hawaiian S.S. Co.*, 387 F. Supp. 163, 168 (D. Del. 1974) (§ 14(a) liability).

115. See, e.g., *Wassel v. Eglowsky*, 399 F. Supp. 1330, 1366 (D. Md. 1975).

116. A number of courts have adverted to this problem. See, e.g., *Odette v. Shearson, Hammill & Co.*, 394 F. Supp. 946, 954-57 (S.D.N.Y. 1975); *Getter v. R.G. Dickinson & Co.*, 366 F. Supp. 559, 569 (S.D. Iowa 1973). See generally *Ruder*, *supra* note 2, at 651-59. Courts may have a tendency to find the parties equally culpable, especially when both parties know of the misstatement or misconduct. For example, in *Globus I*, the jury awarded the underwriter an indemnity against the other defendants and assessed a smaller amount of punitive damages against the underwriter than against the issuer's president. *Globus v. Law Research Serv., Inc.*, 418 F.2d 1276, 1279 (2d Cir. 1969), *cert. denied*, 397 U.S. 913 (1970). Thus, the jury apparently found the underwriter less culpable than the other defendants. *Globus v. Law Research Serv., Inc.*, 287 F. Supp. 188, 199 (S.D.N.Y. 1968). Both the district court, *see id.* at 198-99, and the court of appeals, *see* 418 F.2d at 1289, were unimpressed with the argument that the issuer's agents were "active" wrongdoers while the underwriter was only a "passive" tortfeasor. When presented with a claim for contribution, the district court found the parties equally culpable. *Globus v. Law Research Serv., Inc.*, 318 F. Supp. 955, 957 (S.D.N.Y. 1970), *aff'd per curiam*, 442 F.2d 1346 (2d Cir.), *cert. denied*, 404 U.S. 941 (1971).

117. Cf. ALI FED. SEC. CODE § 1418(e)(3), (4), Comments 2, 3 (Tent. Draft No. 2, 1973).

118. 387 F. Supp. 163 (D. Del. 1974).

119. 15 U.S.C. § 78n(a) (1970).

120. 387 F. Supp. at 168.

gent conduct, a congressional objective that would be thwarted if negligent persons could recover from those more culpable.¹²¹

Sections 11 and 12(2) of the Securities Act¹²² also encourage diligent investigation by punishing negligent conduct. One court has already held that "[i]ndemnification must . . . be denied to encourage the reasonable care required by" section 12(2);¹²³ a similar analysis would deny indemnity for section 11 liabilities.¹²⁴ The antifraud sections of the securities acts¹²⁵ present different questions. To maximize deterrence of deliberate deception, some courts have assumed that persons guilty of such deception should indemnify others substantially less culpable.¹²⁶ Other courts have reasoned that the level of culpability necessary to attach liability under the antifraud sections is so great that indemnity is never proper.¹²⁷

Regardless of the outcome in a particular case, however, it is clear that an indemnity agreement provides no effective protection for defendants held liable for damages under the securities acts. Insurance is a partial answer, though often difficult and expensive to obtain.¹²⁸ More-

121. *Id.* at 167-68; see *Gould v. American Hawaiian S.S. Co.*, 351 F. Supp. 853, 858-65 (D. Del. 1972) (extensive discussion of negligence standard for § 14(a) private damages liability).

122. 15 U.S.C. §§ 77k, l(2) (1970).

123. *Odette v. Shearson, Hammill & Co.*, 394 F. Supp. 946, 957 (S.D.N.Y. 1975) (defendant not allowed to pursue claim for indemnification against potential § 12(2) liability).

124. See *Globus v. Law Research Serv., Inc.*, 418 F.2d 1276, 1288-89 (2d Cir. 1969), *cert. denied*, 397 U.S. 913 (1970); 3 Loss 1831; Note, *supra* note 91.

125. Securities Act § 17(a), 15 U.S.C. § 77q(a) (1970); Exchange Act §§ 10(b), 15(c), 15 U.S.C. §§ 78j(b), 78o(c) (1970).

126. See *Gould v. American-Hawaiian S.S. Co.*, 387 F. Supp. 163, 167 (D. Del. 1974).

127. See *Odette v. Shearson, Hammill & Co.*, 394 F. Supp. 946, 955-56 (S.D.N.Y. 1975).

128. Kroll, *supra* note 2, at 685. Two basic types of insurance are available: the blanket policy, which covers all liabilities asserted against the insured except those specifically excluded, and the specific-issue policy, which covers securities liabilities arising from a specific registration statement. Corporations, when permitted by state law, usually purchase blanket policies that protect the corporation and its officers and directors from liability when acting in their official capacity. See BLOOMENTHAL § 8.27[3], at 8-87. See generally Bishop, *supra* note 92, at 1086-90 (with respect to Delaware law); Klink, Chalif, Bishop & Arshat, *supra* note 92, at 114-15, 121-30. Underwriters also purchase this type of policy, but it is "almost impossible" for them to obtain new ones. Applebaum & McDowell, *supra* note 6, at 137. For a description of a typical blanket policy, see Kroll, *supra* note 2. See also Brook, *supra* note 92, at 33-39. For a description of the typical specific-issue liability policy, see BLOOMENTHAL § 8.27[3], at 8-88 to 8-90.

over, insurance may not cover liabilities under all the securities sections; the policy may have a large deductible and insufficient limits; or the insured's adjudged culpability may be too great to qualify for benefits.¹²⁹ Finally, insurance policies, like indemnity agreements, may ultimately be declared void as against the public policy of securities laws.¹³⁰

IV. DEVELOPMENT OF IMPLIED FEDERAL RIGHTS OF CONTRIBUTION UNDER THE SECURITIES LAWS

Prior indemnity agreements and liability insurance are thus increasingly inadequate means of protecting the typical defendant in a securities suit. While an indemnification claim may commonly be filed,¹³¹ the hope that the court will shift the entire liability to another is often unrealistic. A defendant who deliberately deceives a stock purchaser cannot expect to recover indemnity. A court may, however, allow a partial sharing of the judgment with another person guilty of fraudulent misconduct. A party "too culpable to be entitled to indemnification . . . may nevertheless be entitled to contribution."¹³² Under some

129. See generally BLOOMENTHAL § 8.27[3]; Hinsey, Delancey, Stahl & Kramer, *What Existing D & O Policies Cover*, 27 BUS. LAW. 147 (Special Issue 1972) (separate addresses at the ABA National Institute on "Officers' and Directors' Responsibilities and Liabilities," Oct. 22, 1971); Kroll, *supra* note 2, at 685-88.

130. The SEC has not yet asserted this argument, distinguishing insurance from indemnification on the basis of the source of payment and the possibility that the insurer will deny liability. See BNA SEC. REG. & L. REP. No. 135, at A-7 (Jan. 19, 1972). Commentators are generally apprehensive about insurance because it thwarts the federal policy of encouraging diligent investigations, but have difficulty in rejecting it completely. They suggest that insurance policies as written possess some deterrent value or could be rewritten to provide more. See Bishop, *supra* note 92, at 1090-1103 (would allow insurance only against ordinary negligence of directors and officers in general corporate policy); Klink, Chalif, Bishop & Arshat, *supra* note 92, at 122-30 (addresses by Prof. Bishop and Mr. Arshat); Kroll, *supra* note 2, at 687-92, 714; Note, *Indemnification of Directors: The Problems Posed by Federal Securities and Antitrust Legislation*, *supra* note 102, at 1427-30; Note, *supra* note 91, at 412. In defense of the propriety of corporations purchasing insurance coverage for themselves and their directors, see Brook, *supra* note 92, at 22-29.

131. Even if defendant is insured, he may file an indemnity claim to recover his deductible or, at the request of the insurance carrier, to recover the latter's loss. Because the carrier is usually subrogated to the rights of the insured, the insurer could also bring a claim after the insured is adjudged liable to the plaintiff and damages have been paid to discharge the liability. See generally BLOOMENTHAL § 8.27[3], at 8-89; Applebaum & McDowell, *supra* note 6, at 137-38.

132. *Madigan, Inc. v. Goodman*, 498 F.2d 233, 238 (7th Cir. 1974). For example, § 9(e) of the Exchange Act, 15 U.S.C. § 78i(e) (1970), subjects to civil liability only

sections, such as section 11 of the Securities Act, a defendant guilty of fraudulent misrepresentation may not recover contribution from a person not guilty of fraudulent misrepresentation;¹³³ but the average defendant has a good chance of obtaining contribution from someone.

Ten years ago the likelihood would have been remote. Only section 11 of the Securities Act and sections 9 and 18 of the Exchange Act¹³⁴ expressly permit contribution, and defendants were seldom held liable under these sections.¹³⁵ Thus, if state law denied contribution to a tortfeasor, a defendant could recover contribution only if a federal right were implied. The basis for such an implication was the contribution clause in those sections under which Congress expected multiple defendants to be held liable; if other sections also generated multiple liability, courts could reasonably imply a right to contribution in those sections also.¹³⁶ The first federal court to rule on this theory, in 1965, rejected the implied federal right to contribution.¹³⁷ Three years later, the court in *deHaas v. Empire Petroleum Co.*¹³⁸ reached the opposite conclusion, implying a federal right to contribution under section 10(b) of the Exchange Act¹³⁹ on the basis of the multiple liability theory.¹⁴⁰ In

those persons who *willfully* participate in certain prohibited manipulative acts; yet, the section expressly provides for contribution.

133. See Securities Act § 11(f), 15 U.S.C. § 77k(f) (1970), *quoted in text* accompanying note 21 *supra*.

134. See notes 21-26 *supra* and accompanying text.

135. See 3 Loss 1721, 1748, 1753 & n.228 (2d ed. 1961, Supp. 1969).

136. See note 19 *supra* and accompanying text.

137. *Shea v. Ungar*, [1964-1966 Transfer Binder] CCH FED. SEC. L. REP. ¶ 91,558 (S.D.N.Y. 1965). Plaintiff's suit was based on § 17(a) of the Securities Act, 15 U.S.C. § 77q(a) (1970), and § 10(b) of the Exchange Act, 15 U.S.C. § 78j(b) (1970). The defendant attempted to implead others who were allegedly jointly and severally liable with him to plaintiff under the controlling persons liability section. Securities Act § 15, 15 U.S.C. § 77o (1970); Exchange Act § 20(a), 15 U.S.C. § 78t(a) (1970). The court found that § 17(a) and § 10(b) created no contribution rights and that the controlling persons sections did not permit contribution between controlling persons. Therefore, the third-party defendants were not liable to the defendant for any part of plaintiff's claim and could not be impleaded. The court also found that New York law did not allow contribution.

In 1966 the court in *Johns Hopkins Univ. v. Hutton*, [1966-1967 Transfer Binder] CCH FED. SEC. L. REP. ¶ 91,810, at 95,761, (D. Md. 1966), avoided ruling on the implied contribution question by denying, on other grounds, leave to file the third-party complaint.

138. 286 F. Supp. 809 (D. Colo. 1968).

139. 15 U.S.C. § 78j(b) (1970). The defendants had impleaded a third party asking for indemnity and the third-party defendant had moved for dismissal of the third-party complaint. Although the court determined that the defendant would not be entitled to

1969, a third federal court specifically rejected the *deHaas* reasoning since the Supreme Court disfavored "judicial attempts to fashion new rules of contribution" without an explicit Congressional sanction, absent in section 10(b).¹⁴¹

The case of *Globus v. Law Research Service, Inc. (Globus II)*¹⁴² again provided the seminal analysis of postjudgment proceedings after *Globus I* had found the underwriter, the issuer, and the issuer's president liable for violating section 17(a) of the Securities Act¹⁴³ and section 10(b) of the Exchange Act.¹⁴⁴ *Globus I* refused to enforce an indemnity agreement as contrary to public policy.¹⁴⁵ The underwriter then paid the full amount of the judgment and sought contribution from the issuer and its president. On their refusal the underwriter moved for a judgment assessing each for one-third of the amount recovered by plaintiffs, plus interest.¹⁴⁶

In an opinion adopted by the Second Circuit, the trial court granted the motion, based exclusively on federal law.¹⁴⁷ The court relied on three major arguments. First, it noted the "general drift of the law . . . toward the allowance of contribution among" tortfeasors.¹⁴⁸ Second, the court found the explicit contribution provisions in the specific liability sections a persuasive analogy.¹⁴⁹ Finally, and most critically,

indemnification under any construction of the facts, it nevertheless held that the third-party complaint stated a claim for contribution. 286 F. Supp. at 815.

140. 286 F. Supp. at 815-16.

141. *State Mut. Life Assur. Co. of America v. Peat, Marwick, Mitchell & Co.*, 49 F.R.D. 202, 213 (S.D.N.Y. 1969). The district court was referring to a Supreme Court maritime case, *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 285 (1952), which has since been considerably limited by *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1975). See also Note, *Globus: A Prolific Generator of Nice Questions*, *supra* note 15, at 915-16 (courts misread *Halcyon* when they cite it for proposition that federal law denies contribution between tortfeasors). The court in *State Mutual* was also concerned that the New York contribution rules precluded contribution because plaintiff had not joined the third-party defendants as defendants and that the third-party defendants were judgment proof.

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

143. 15 U.S.C. § 77q(a) (1970).

144. See notes 96 & 97 *supra* and accompanying text.

145. See text accompanying notes 97-102 *supra*.

146. 318 F. Supp. at 957.

147. See *id.* at 958 n.2.

148. *Id.* at 957.

149. *Id.* at 958. The court quoted *deHaas v. Empire Petroleum Co.* and analogized to the specific liability provisions of the securities acts; permitting contribution under

an implied right to contribution would "encourage diligence, investigation and compliance with the requirements of the statute by exposing issuers and underwriters to the substantial hazard of liability for compensatory damages."¹⁵⁰ Indemnity would allow guilty parties to escape payment and thus "dilute the deterrent impact of the securities laws;"¹⁵¹ contribution would prevent such dilution,¹⁵² since guilty parties could not "effectively nullify their 'liability for compensatory damages' by leaving the whole of the burden to the more prompt and diligent party with which they have been cast in joint and several liability."¹⁵³ Thus, the court implied a right of contribution for liabilities under sections 10(b) and 17(a), a right which it applied in this case when all defendants were "equally culpable and equally responsible"¹⁵⁴ but only one had paid the full judgment.

Globus II marked the turning point in securities contribution litigation. In every later case courts have implied a federal right to contribution.¹⁵⁵ Commentators, by analogy to the contribution provision in

the implied liability provisions was "simply a pertinent application of the general principle that the two statutes are to be administered *in pari materia*." *Id.* at 958. *But cf.* McClure v. Borne Chem. Co., 292 F.2d 824, 836-37 (3d Cir. 1961) (refusing to imply into § 10(b) the discretionary undertaking for costs of § 18(a) of the Exchange Act, 15 U.S.C. § 78r(a) (1970), a specific liability provision). *See generally* Note, *Globus: A Prolific Generator of Nice Questions*, *supra* note 15, at 918-20.

150. 318 F. Supp. at 958, quoting *Globus v. Law Research Serv., Inc.*, 418 F.2d 1276, 1289 (2d Cir. 1969).

151. 318 F. Supp. at 958.

152. *Id.*; accord, *Herzfeld v. Laventhol, Krekstein, Horwath & Horwath*, 378 F. Supp. 112, 135 (S.D.N.Y. 1974).

153. 318 F. Supp. at 958.

154. *Id.* at 957.

155. *See, e.g.*, *Wassel v. Eglowsky*, 399 F. Supp. 1330, 1365-70 (D. Md. 1975) (Securities Act § 12(1), 15 U.S.C. § 77l(1) (1970)); *Odette v. Shearson, Hammill & Co.*, 394 F. Supp. 946, 958 (S.D.N.Y. 1975) (Securities Act §§ 12(2), 17(a), 15 U.S.C. §§ 77l(2), 77q(a) (1970); Exchange Act §§ 10(b), 15(c), 15 U.S.C. §§ 78j(b), 78o(c) (1970)); *Gould v. American-Hawaiian S.S. Co.*, 387 F. Supp. 163, 169 (D. Del. 1974) (Exchange Act § 14(a), 15 U.S.C. § 78n(a) (1970)); *Sherlee Land v. Commonwealth United Corp.*, [1972-1973 Transfer Binder] CCH FED. SEC. L. REP. ¶ 93,749, at 93,274 (S.D.N.Y. 1973) (Securities Act § 17(a), 15 U.S.C. § 77q(a) (1970); Exchange Act §§ 10(b), 14(a), 15 U.S.C. §§ 78j(b), 78n(a) (1970)). In 1933, it was uncertain whether those liable as controlling persons under § 15 of the Securities Act, 15 U.S.C. § 77o (1970), had a right to contribution under § 11(f). *Douglas & Bates*, *supra* note 35, at 179. It now seems fairly clear that controlling persons would have such a right, at least to the extent that the controlled person has such a right. *But cf.* *Shea v. Ungar*, [1964-1966 Transfer Binder] CCH FED. SEC. L. REP. ¶ 91,558, at 95,108 (S.D.N.Y. 1965) (pre-*Globus II*). Since contribution rights are being implied into the primary lia-

section 11 of the Securities Act,¹⁵⁶ assumed that persons guilty of fraud could not recover contribution from a person not guilty of fraud.¹⁵⁷ *Gould v. American-Hawaiian Steamship Co.*¹⁵⁸ suggests a contrary conclusion. Although *Gould* denied indemnity to anyone violating section 14(a) of the Exchange Act, the court found contribution available,¹⁵⁹ specifically noting that section 14(a) reaches both negligent and "deliberately deceptive conduct."¹⁶⁰ The court carefully avoided weighing culpabilities to determine either the availability or the amount of contribution. This suggests the court might have allowed some form of contribution even if defendants' culpability had varied significantly.¹⁶¹

V. PROCEDURES FOR ASSERTING A CONTRIBUTION CLAIM

Procedurally, there are a number of ways to claim contribution: by cross-claim,¹⁶² by third-party claim,¹⁶³ by separate action,¹⁶⁴ or by

bility sections, the rights presumably will also be implied directly into the controlling persons sections when necessary.

156. See notes 21 & 26 *supra* and accompanying text.

157. See, e.g., BLOOMENTHAL § 8.27[1], at 8-82 to -83.

158. See text accompanying notes 118-21 *supra*.

159. 387 F. Supp. 163, 169 (D. Del. 1974).

160. *Id.* at 167.

161. Such a case would seem to be well suited for awarding contribution according to comparative faults. See text accompanying note 319 *infra*.

162. FED. R. CIV. P. 13(g). The counterclaim procedure is also appropriate under a liberal reading of FED. R. CIV. P. 13 & 14. See *Lynch v. Sperry Rand Corp.*, 62 F.R.D. 78, 90 (S.D.N.Y. 1973). The courts, however, have reached conflicting results. Because a contribution claim is generally not mature when asserted as an ancillary claim, see text accompanying note 38 *supra* and notes 184-86 *infra*, and because only the cross-claim and third-party claim provisions expressly allow unmatured claims, some courts have refused to allow contribution claims to be raised as counterclaims. See 3 J. MOORE, FEDERAL PRACTICE ¶ 13.34, at 13-820 to -821 (2d ed. 1974) [hereinafter cited as MOORE]. For an example of the maze of counterclaims, cross-claims, and third-party claims for contribution that can result in securities cases, see *State Mut. Life Assur. Co. of America v. Arthur Andersen & Co.*, 63 F.R.D. 389, 391-92 (S.D.N.Y. 1974). Occasionally, a series of claims for indemnity or contribution may result in a circle of liability, with a plaintiff being assessed contribution on his own judgment recovery. See *Alexander & Baldwin, Inc. v. Peat, Marwick, Mitchell & Co.*, 385 F. Supp. 240, 244 n.2 (S.D.N.Y. 1974).

163. FED. R. CIV. P. 14(a). If defendants prevail in the main action, the third-party claim for contribution becomes moot. *Branham v. Material Systems Corp.*, 354 F. Supp. 1048 (S.D. Fla. 1973). Since all third-party claims and cross-claims are permissive, a party may assert his claim in a separate action. See *Union Paving Co. v. Thomas*, 9 F.R.D. 612, 613 (E.D. Pa. 1949). It is not clear, however, whether a contribution counterclaim is compulsory or permissive. Traditionally, a claim for contribution did not mature until a party had paid more than his share of a common liability. See note 38 *supra* and accompanying text. FED. R. CIV. P. 14(a) and 13(g) accelerate the time

motion.¹⁶⁵ The underwriters in *Globus II* sought contribution by post-

when this contribution claim can be brought, but the claim itself remains contingent until the common liability has been paid. See 3 MOORE ¶ 14.08. Because technically the pleader has no contribution claim against any opposing party "at the time of serving the pleading," FED. R. CIV. P. 13(a), the claim cannot be compulsory. Cf. 3 MOORE ¶ 14.14, at 14-336. But cf. *Lynch v. Sperry Rand Corp.*, 62 F.R.D. 78, 90 (S.D.N.Y. 1973). See also *Universal Underwriters Ins. Co. v. Security Indus., Inc.*, 391 F. Supp. 326, 329 (W.D. Wash. 1974) (indemnity claim); note 162 *supra*.

Michigan procedure in effect makes contribution claims compulsory. MICH. STAT. ANN. § 27A.2925 (1962); see *In re Lady D*, 416 F.2d 454, 455 (6th Cir. 1969).

Parties will generally wish to assert their contribution claims in the same action that adjudicates their own liability. When large numbers of defendants are involved in the same action, however, it may be more practical to withhold potential contribution claims until after the underlying liabilities have been adjudged. See, e.g., *Goldsmith v. Pyramid Communications, Inc.*, 362 F. Supp. 694, 695 (S.D.N.Y. 1973) (44 defendants, united in interest with respect to plaintiff's claim, agreed to withhold their contribution and indemnity claims during the main litigation).

164. See *Union Paving Co. v. Thomas*, 9 F.R.D. 612 (E.D. Pa. 1949); BLOOMENTAL § 8.27[1], at 8-81.

165. See *Globus v. Law Research Serv., Inc.*, 318 F. Supp. 955, 958 (S.D.N.Y. 1970), *aff'd per curiam*, 442 F.2d 1346 (2d Cir.), *cert. denied*, 404 U.S. 941 (1971). The English also use this method, entering the motion for contribution at the end of a plaintiff's action. See 11 HALSBURY, LAWS OF ENGLAND *Damages* § 511, at 316 (3d ed. 1955).

The claim for contribution can also be submitted to arbitration, which may be required in controversies between members of the New York Stock Exchange or members of the American Stock Exchange. See NYSE CONST. art. 8, § 1, 2 CCH NYSE GUIDE ¶ 1351 (1972); AMEX CONST. art. 8, § 1, 2 CCH AMEX GUIDE ¶ 9062 (1975); Freund & Hacker, *supra* note 5, at 476-77. In *Brown v. Gilligan, Will & Co.*, 287 F. Supp. 766 (S.D.N.Y. 1968), the court stayed a fourth-party action for indemnity until the matter had been submitted to arbitration. The original complaint involved numerous violations of the Securities and Exchange Acts and the causes of action in the fourth-party complaint, like those in the third-party complaint, paralleled those in the original complaint. *Id.* at 768. Nevertheless, because the fourth-party action was a controversy between two broker-dealer members of the American Stock Exchange and arose in connection with their business, the court enforced the agreement to arbitrate implicit in the AMEX Constitution. *Id.* at 768-69, 776. Since the fourth-party action sought indemnity, the court stayed arbitration pending determination of the original and third-party claims. *Id.* at 776. This right to arbitration may be waived by filing counterclaims or responsive pleadings without asserting the right or by taking "advantage of judicial discovery procedures not available in arbitration," to the prejudice of the other party. *Liggett & Myers, Inc. v. Bloomfield*, 380 F. Supp. 1044, 1047-48 (S.D.N.Y. 1974).

The court in *Liggett* also stated that the defendant could not "be compelled to arbitrate his 10b-5 claim." *Id.* at 1046 n.8, *citing* *Wilko v. Swan*, 346 U.S. 427 (1953). It is not clear from the opinion, however, whether the defendant was asserting his own claim under SEC rule 10b-5, 17 C.F.R. § 240.10b-5 (1975), or whether he was simply asserting that the third-party defendant was also liable under rule 10b-5 for plaintiff's injury. In the latter situation, the contribution claim is not a 10b-5 claim; inclusion

judgment motion. This method requires a prior judgment that all parties to the motion are liable for the plaintiff's injury,¹⁶⁶ so that the motion raises no new factual issues. The court must ignore other persons potentially liable for plaintiff's injury but whose liabilities have not been adjudicated.¹⁶⁷ Only a separate action can subject persons with "unadjudicated liabilities" to judgment. The separate action, the traditional method for claiming contribution, is brought after the claimant has paid more than his fair share of plaintiff's claim.¹⁶⁸ For example, if the injured party settles without litigation, those who have paid can enforce a right to contribution by bringing an action against a third party who unjustifiably refuses to contribute to the settlement.¹⁶⁹ Absent any pending action, a separate suit is necessary.¹⁷⁰ If, however, the injured person litigates his claim, defendants are seldom disposed to postpone the contribution claims. A second trial after plaintiff's judgment has been paid will entail substantial added expense and delay, and may result in inconsistent verdicts based on similar or even identical evidence.¹⁷¹ Thus, a defendant will generally want to litigate his potential right of contribution in the same proceeding in which his underlying

of such claims in agreements to arbitrate would not seem to contravene the teaching of *Wilko v. Swan*.

166. See *Globus v. Law Research Serv., Inc.*, 318 F. Supp. 955, 958 (S.D.N.Y. 1970), *aff'd per curiam*, 442 F.2d 1346 (2d Cir.), *cert. denied*, 404 U.S. 941 (1971). Note that a party need not be held directly liable to the plaintiff, but can be held liable for the plaintiff's injury in a third-party action. See, e.g., *Liggett & Myers, Inc. v. Bloomfield*, 380 F. Supp. 1044, 1046 (S.D.N.Y. 1974).

167. See *Globus v. Law Research Serv., Inc.*, 318 F. Supp. 955, 958 (S.D.N.Y. 1970), *aff'd per curiam*, 442 F.2d 1346 (2d Cir.), *cert. denied*, 404 U.S. 941 (1971). The English reach a similar result. See *Maxfield v. Llewellyn*, [1961] 3 All. E.R. 95, 96-97 (C.A.).

168. See 2 WILLISTON § 345, at 776-77.

169. See text accompanying note 208 *infra*; notes 207-08 *infra*.

170. Once the injured person brings suit, however, even if his claims are settled, the action remains pending until all claims, including claims for contribution, have been formally decided or dismissed by the court. See, e.g., *Kohr v. Allegheny Airlines, Inc.*, 504 F.2d 400 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975) (nonsecurities case in which all plaintiffs' claims settled but settling defendants' claims for contribution remained for trial). In cases of partial settlement, the action naturally remains pending. See, e.g., *Gould v. American-Hawaiian S.S. Co.*, 387 F. Supp. 163, 165-66 (D. Del. 1974).

171. See *State Mut. Life Assur. Co. of America v. Arthur Andersen & Co.*, 63 F.R.D. 389, 392-93 (S.D.N.Y. 1974) (prejudice of separate trial within a consolidated action); *Metzger v. Breeze Corps.*, 37 F. Supp. 693, 695 (D.N.J. 1941). For an example of the hardship caused by failure to use the third-party procedure, see *Alabama Great S. R.R. v. Allied Chem. Corp.*, 501 F.2d 94 (5th Cir. 1974), *aff'd en banc per curiam*, 509 F.2d 539 (5th Cir. 1975) (nonsecurities case).

liability to the plaintiff is determined.¹⁷²

This contribution claim may take the form of a cross-claim against a person already named as a defendant in the main action,¹⁷³ a third-party claim if against a person not party to the main action,¹⁷⁴ or a counter-claim if against an opposing party.¹⁷⁵ The cross-claim raises the fewest conceptual problems. Both parties to the contribution claim are defendants in the main action; their liabilities to the plaintiff will be determined together; and a joint judgment will be entered if both are

172. Occasionally, though especially when there are large numbers of defendants, it may be more practical to postpone potential contribution claims until the liabilities of the various defendants to the plaintiffs have been determined. *See, e.g.,* Goldsmith v. Pyramid Communications, Inc., 362 F. Supp. 694, 695 (S.D.N.Y. 1973).

173. FED. R. CIV. P. 13(g). *See* note 162 *supra*.

174. In certain instances, a contribution claim against persons not already parties in the original action may also be made by cross-claim under FED. R. CIV. P. 13(h) if the presence of the additional persons is necessary for granting complete relief on the cross-claim. *See* Connell v. Bernstein-Macauley, Inc., 67 F.R.D. 111, 115-16 (S.D.N.Y. 1975).

Note that the liberal venue and extraterritorial personal process provisions contained in the securities acts are applicable to third-party claims for contribution because such claims are "action[s] to enforce any liability or duty created by" the acts. Securities Act § 22(a), 15 U.S.C. § 77v(a) (1970); Exchange Act § 27, 15 U.S.C. § 78aa (1970). Claims for contribution fit this description in several ways. First, they are actions directly to enforce a duty to contribute, a duty expressly created by or implied under the securities acts. *See* Lyons v. Marrud, Inc., 46 F.R.D. 451, 455 (S.D.N.Y. 1968) (referring to § 11(f) of Securities Act). Second, they are actions indirectly to enforce a liability to an injured plaintiff, a liability created by the securities acts. *Cf. id.* (claim under indemnity agreement).

If the third-party action does not meet either the liberal venue requirements of the securities acts or another superseding venue provision, venue may nevertheless be proper on an ancillary venue theory. In other words, if the venue in the underlying action is proper, no independent basis for venue is required for the third-party action. *See* Odette v. Shearson, Hammill & Co., 394 F. Supp. 946 (S.D.N.Y. 1975) (theory used to withstand venue attack based on venue provisions of National Bank Act). Ancillary subject matter jurisdiction and ancillary venue do not automatically confer personal jurisdiction over a third-party defendant. *See* Wassel v. Eglowsky, 399 F. Supp. 1330, 1369 (D. Md. 1975); Miller v. Hano, 8 F.R.D. 67, 69 (E.D. Pa. 1947). Nationwide personal service may be extended to ancillary contribution claims, however, on a theory that the third-party defendant could have been served with process if joined as a defendant in the underlying action or simply on a theory that the contribution claim is so closely identified with the underlying claim that nationwide service is necessary to promote the judicial economy and convenience policies behind § 22 of the Securities Act and § 27 of the Exchange Act. *See* Lyons v. Marrud, Inc., *supra* at 455-56 (indemnity claim); Miller v. Hano, *supra* at 71 (same); *cf.* Wassel v. Eglowsky, *supra* (contribution claims).

175. Courts disagree on whether a right to contribution may be asserted by counter-claim. *See* note 162 *supra*.

held jointly and severally liable. A joint judgment previously carried special significance as a condition precedent under some statutes for a contribution right among tortfeasors.¹⁷⁶ If the contribution right is based on such a statute, defendants can claim contribution only from co-defendants originally sued by the plaintiff. Absent such joinder, a joint judgment is impossible, and no right to contribution can arise.¹⁷⁷

It is now clear that contribution under the federal securities law does not require a joint judgment,¹⁷⁸ although some litigants have contended that *Globus II* imposed such a rule.¹⁷⁹ In that case the jury had found all parties to the contribution motion jointly and severally liable to the plaintiff, and the court declined to consider the liability of several other persons not parties to the original suit, stating that they were "not liable under the judgment as joint tortfeasors."¹⁸⁰ The courts have since rejected this contention.¹⁸¹ Potential contributors must at some time be adjudged jointly or severally liable for plaintiff's injury, but a third-party action can render such a decision as well as the original action.¹⁸² A

176. See Annot., 11 A.L.R.2d 228, 233-36 (1950); Comment, *supra* note 47, at 222-23; text accompanying note 53 *supra*.

177. See *Altman v. Liberty Equities Corp.*, 54 F.R.D. 620, 624 (S.D.N.Y. 1972); *State Mut. Life Assur. Co. of America v. Peat, Marwick, Mitchell & Co.*, 49 F.R.D. 202, 212 (S.D.N.Y. 1969); 3 MOORE ¶ 14.11. Note that in states requiring a joint judgment a cross-claim for contribution will also fail if one of two co-defendants settles with the plaintiff prior to judgment. See *Altman v. Liberty Equities Corp.*, *supra*. New York was long known for its joint judgment requirement, which was effectively eliminated by the Court of Appeals in *Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972). Since that time, the New York legislature has amended its contribution statutes (largely to codify *Dole v. Dow Chem. Co.*) and the joint judgment requirement has disappeared. N.Y. CIV. PRAC. LAW §§ 1401-03 (McKinney Supp. 1975), formerly ch. 388, § 5, [1964] N.Y. Laws 1256.

178. See cases cited in note 179 *infra*. Two other cases specifically considered and rejected the contrary precedent provided by *State Mut. Life Assur. Co. of America v. Peat, Marwick, Mitchell & Co.*, 49 F.R.D. 202, 212 (S.D.N.Y. 1969); *Herzfeld v. Lavenhol, Krekstein, Horwath & Horwath*, 378 F. Supp. 112, 135 (S.D.N.Y. 1974); *State Mut. Life Assur. Co. of America v. Arthur Andersen & Co.*, [1973-1974 Transfer Binder] CCH FED. SEC. L. REP. ¶ 94,543, at 95,867 (S.D.N.Y. 1972).

179. Third-party defendants have made this argument in several cases. See, e.g., *Liggett & Myers, Inc. v. Bloomfield*, 380 F. Supp. 1044, 1046 (S.D.N.Y. 1974); *Getter v. R.G. Dickinson & Co.*, 366 F. Supp. 559, 569 (S.D. Iowa 1973).

180. 318 F. Supp. at 958.

181. See cases cited note 178 *supra*.

182. See *Liggett & Myers, Inc. v. Bloomfield*, 380 F. Supp. 1044, 1046 (S.D.N.Y. 1974); *Getter v. R.G. Dickinson & Co.*, 366 F. Supp. 559, 569 (S.D. Iowa 1973). Although courts in *Globus*, *Getter* and *Liggett* spoke of contribution parties as joint tortfeasors, the essence of a right to contribution does not lie in a joint tort or joint negligence but in a common liability to the injured person for the same damages, irrespective

contrary result would unfairly prevent defendants from recovering contribution from parties equally guilty but not originally sued by plaintiff, while simultaneously weakening the enforcement policies of the securities acts by permitting some violators to escape liability.¹⁸³

In both cross-claim and third-party actions, a party claiming contribution asserts a right not technically in existence, since payment of a disproportionate share of a common liability is a prerequisite to contribution.¹⁸⁴ This accelerated consideration of the contribution claim, however, permits a single action to resolve both initial liability and subsequent contribution, thereby avoiding duplicative judicial proceedings and inconsistent results.¹⁸⁵

The increase in judicial efficiency has its costs. First, it creates problems in deciding when the statute of limitations begins to run on a contribution claim. The traditional view is that the statute does not run until the right accrues, which, depending on the state, is when the person seeking contribution pays a disproportionate share of the underlying claim, when that underlying claim is discharged,¹⁸⁶ or when judgment is entered on that claim.¹⁸⁷ According to this view, the statute will not even have begun to run when the cross-claim or third-party claim is filed.¹⁸⁸

of the ground on which each person's liability rests. See *Guillard v. Niagara Machine & Tool Works*, 488 F.2d 20, 22 (8th Cir. 1973); *Chicago, R.I. & Pac. R.R. v. Chicago & N.W. Ry.*, 280 F.2d 110, 115 (8th Cir. 1960). The courts may have been using "joint tortfeasors" in the broad sense of all persons jointly or severally liable to the same person for the same harm without regard to whether the tortfeasors acted in concert. See RESTATEMENT (SECOND) OF TORTS § 886A(1), Comment b at 199 (Tent. Draft No. 16, 1970); UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT §§ 1, 2(1) (1939 version). See also UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 1(a) (1955 version) (permitting contribution among persons "jointly or severally liable in tort for the same injury").

183. See cases cited in note 179 *supra*.

184. See note 38 *supra* and accompanying text.

185. See, e.g., *Herzfeld v. Laventhol, Krekstein, Horwath & Horwath*, 378 F. Supp. 112, 135 (S.D.N.Y. 1974); *Metzger v. Breeze Corps.*, 37 F. Supp. 693, 695 (D.N.J. 1941); cf. *Lyons v. Marrud, Inc.*, 46 F.R.D. 451, 453 (S.D.N.Y. 1968) (indemnity). The counterclaim similarly accelerates the time when contribution claims can be brought. See generally 3 MOORE ¶ 14.08.

186. See Annot., 57 A.L.R.3d 867, 875-77 (1974); note 38 *supra* and accompanying text. Note that the statute of limitations applicable to the underlying claim is irrelevant. See Annot., *supra*.

187. See UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 3(c) (1955 version); Annot., *supra* note 186, at 880-81.

188. There may be a statute of limitations problem if numerous suits have been brought, based on a single series of events. For instance, an underwriter subjected to

The second cost of including the contribution issue in the original action by means of cross-claim, counterclaim, or third-party claim is an increase in the complexity of the litigation. Juries may be unable to comprehend the added issues raised by contribution in already complicated factual situations.¹⁸⁹ A partial solution is to consolidate the claims at the pleading stage, thus allowing coordinated pretrial discovery, then order separate trials on some of the issues.¹⁹⁰ Separate trials, however, encounter the deficiencies of separate suits: "needless repetition of the same evidence"¹⁹¹ and severe prejudice to a contribution claimant subjected to differing verdicts on the same facts.¹⁹² Thus, in one securities case the court refused, despite a confusing array of claims, to order a separate trial of a complaint by the original plaintiff against a third-party defendant; separate trials would have "severely prejudiced" that third-party defendant "in a bona fide claim for contribution."¹⁹³

The statute of limitations problem assumes greater importance when the contribution claim is the subject of a separate action. The difficulty

several suits arising from the same misleading prospectus may quickly settle one suit. If he is later sued by a different plaintiff, he may wish to cross-claim for contribution toward his settlement with the first plaintiff. If the interval between the two suits is lengthy, the statute may have run before the cross-claim can be filed. The counterclaim of the third-party defendant in *Herzfeld v. Laventhol, Krekstein, Horwath & Horwath*, 378 F. Supp. 112, 136 (S.D.N.Y. 1974), might have presented such a situation had the third-party defendant sought contribution for amounts paid in settlement of § 10(b) claims against it rather than suing under § 10(b) as an assignee of the original purchasers.

189. *Sherlee Land v. Commonwealth United Corp.*, [1972-1973 Transfer Binder] CCH FED. SEC. L. REP. ¶ 93,749, at 93,275 (S.D.N.Y. 1973); *Johns Hopkins Univ. v. Hutton*, [1966-1967 Transfer Binder] CCH FED. SEC. L. REP. ¶ 91,810, at 95,761 (D. Md. 1966); *cf.* *State Mut. Life Assur. Co. of America v. Arthur Andersen & Co.*, 63 F.R.D. 389, 392 (S.D.N.Y. 1974).

190. FED. R. CIV. P. 42(b); *see, e.g.*, *Sherlee Land v. Commonwealth United Corp.*, [1972-1973 Transfer Binder] CCH FED. SEC. L. REP. ¶ 93,749, at 93,274-75 (S.D.N.Y. 1973). *But cf.* *Johns Hopkins Univ. v. Hutton*, [1966-1967 Transfer Binder] CCH FED. SEC. L. REP. ¶ 91,810, at 95,761 (D. Md. 1966). *See also In re Four Seasons Securities Laws Litigation*, 361 F. Supp. 636 (Jud. Pan. Multi. Lit. 1973) (power of judicial panel on multidistrict litigation to transfer a third-party claim or the entire action to another district for coordination and consolidation of pretrial proceedings with other actions pending in transferee district). Consolidated pretrial proceedings can also be ordered for separate actions to promote efficiency. *See, e.g.*, *Katz v. Realty Equities Corp.*, 521 F.2d 1354 (2d Cir. 1975) (17 private securities cases consolidated for pretrial proceedings).

191. *State Mut. Life Assur. Co. of America v. Arthur Andersen & Co.*, 63 F.R.D. 389, 392 (S.D.N.Y. 1974).

192. *See id.* at 393-94.

193. *Id.* at 394.

is deciding what limitations period applies. Although few courts have considered the issue, it seems clear that the limitations provisions contained in the securities acts do not apply to contribution actions. Even section 13 of the Securities Act, covering all liabilities created under sections 11 and 12,¹⁹⁴ has been held inapplicable to a contribution claim brought under section 11(f) of the Securities Act.¹⁹⁵

Absent a federal limitations period, the courts will probably look to statutes applicable to similar state claims,¹⁹⁶ a reference employed in private actions brought under section 10(b) of the Exchange Act.¹⁹⁷ Since most states lack a statute of limitations specific to contribution,

194. Securities Act § 13, 15 U.S.C. § 77m (1970). Section 13 requires that § 11 actions be brought "within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence" and "[i]n no event . . . more than three years after the security was bona fide offered to the public."

195. Section 11(f) is quoted in text accompanying note 21 *supra*. In *Lyons v. Mar-rud, Inc.*, [1967-1969 Transfer Binder] CCH FED. SEC. L. REP. ¶ 92,307, at 97,456-57 (S.D.N.Y. 1968), third-party plaintiffs sought contribution under § 11(f). The court, however, spoke of contribution in terms of subrogation to the rights of the obligee (there, plaintiff). As long as the primary action under § 11 was "timely brought," the derivative right of contribution would not be barred by § 13 and could be adjudicated in the same lawsuit. *Id.* at 97,457. The opinion in *Metzger v. Breeze Corps.*, 37 F. Supp. 693 (D.N.J. 1941), although poorly reasoned, also declined to dismiss a contribution claim under § 11(f) that was untimely under § 13. *See* 3 Loss 1739-40. In *Madigan, Inc. v. Goodman*, 498 F.2d 233 (7th Cir. 1974), the court refused to dismiss a claim for contribution and indemnity for damages sought by a defrauded investor in a separate action. The plaintiff in *Madigan* had no mature contribution claim; not yet held liable to the investor, *Madigan* would be ineligible for *any* contribution if the investor's initial allegations were proved. The court recognized, however, that the original action might produce a result appropriate for contribution or indemnity. Were the contribution action dismissed, therefore, "unresolved statute of limitations issues" might subsequently bar a meritorious claim. *Id.* at 238.

Specific statutes of limitations in state securities laws may be similarly inapplicable to contribution claims for amounts paid in discharging state securities liabilities. *Cf.* *United Pac. Ins. Co. v. Standford*, 486 F.2d 556 (9th Cir. 1973) (in action by securities dealer against his surety to recover on "blue-sky bond" that all dealers were required by state law to post, Oregon securities statute of limitations held inapplicable because dealer's liability had already been reduced to judgment and because bond constituted a contract governed by statute of limitations for contracts).

196. *See* *Klein v. Shields & Co.*, 470 F.2d 1344, 1346 (2d Cir. 1972); 2 MOORE ¶ 3.07[2] (2d ed. 1975); 3 MOORE ¶ 14.09 (2d ed. 1974).

197. *See* *deHaas v. Empire Petroleum Co.*, 435 F.2d 1223, 1225-26 (10th Cir. 1970). There are numerous commentaries on the statutes of limitations applicable to private § 10(b) and rule 10b-5 actions. *See, e.g.,* *Bateman & Keith, Statutes of Limitations Applicable to Private Acts Under SEC Rule 10b-5: Complexity in Need of Reform*, 39 MO. L. REV. 165, 171 (1974).

courts use the period applicable to implied contracts, reasoning that contribution is a form of implied contract.¹⁹⁸ That period, however, is usually lengthy; it combines with the traditional rule on when the statute begins to run to effectively foreclose any reliance on the statute of limitations to preclude stale claims.¹⁹⁹

The equitable doctrine of laches is a more effective device, at least for cross-claim and third-party claims. The court has discretion to refuse to hear these claims;²⁰⁰ unexcused delay in filing such a motion is a common ground for its rejection.²⁰¹ Since the expense and delay attendant on a separate suit makes cross-claims or third-party claims preferable alternatives,²⁰² the danger of stale securities contribution claims is probably insignificant.

198. *E.g.*, *State Farm Mut. Auto Ins. Co. v. Schara*, 56 Wis. 2d 262, 201 N.W.2d 758 (1972); *see* *Annot.*, 57 A.L.R.3d 927, 931 (1974). Courts have long stated that contribution is based on an implied promise of each party to pay his share of a common liability, especially a contract liability. *See, e.g.*, *Batard v. Hawes*, 118 Eng. Rep. 775, 778 (Q.B. 1853). It is more difficult to imply a promise by a tortfeasor to contribute, although the promise may be implied by law on a theory of unjust enrichment. *See* *Leflar*, *supra* note 39, at 136-37; *Comment*, *supra* note 47, at 217-18.

199. If the statute does not begin to run until the original claim is resolved, claimants can sue for contribution over a long period. Yet it would obviously be unfair for the statute of limitations to terminate a claimant's right to contribution before his original liability is established. The 1955 version of the Uniform Contribution Among Tortfeasors Act § 3(c), (d) creates a one-year statute of limitations for contribution actions, commencing with the date of final judgment against the tortfeasor seeking contribution or, if no final judgment, the date the tortfeasor paid the common liability, provided he paid within a prescribed period. The statute of limitations is most likely to arise in a separate action. The statute might successfully be invoked if defendant settles part of the securities claims against him and then does not claim contribution for the amount paid until, after years of pretrial discovery and appeals, all of the parties' securities liabilities have been determined. *See* note 188 *supra*.

200. *See* *B & B Inv. Club v. Kleinert's, Inc.*, 391 F. Supp. 720, 725 (E.D. Pa. 1975); 3 MOORE ¶ 14.05.

201. *See* *Connell v. Bernstein-Macauley, Inc.*, 67 F.R.D. 111, 116-17 (S.D.N.Y. 1975); *Johns Hopkins Univ. v. Hutton*, [1966-1967 Transfer Binder] CCH FED. SEC. L. REP. ¶ 91,810, at 95,761 (D. Md. 1966); *cf.* *Sherlee Land v. Commonwealth United Corp.*, [1972-1973 Transfer Binder] CCH FED. SEC. L. REP. ¶ 93,749, at 93,274 (S.D.N.Y. 1973) (filing of claims permitted where delay partially due to court).

202. *See* *Lyons v. Marrud, Inc.*, 46 F.R.D. 451, 456 (S.D.N.Y. 1968); 3 MOORE ¶ 14.06; *cf.* *Herzfeld v. Laventhol, Kreckstein, Horwath & Horwath*, 378 F. Supp. 112, 135 (S.D.N.Y. 1974). A separate suit is not always undesirable, however, especially when a large number of defendants are involved. Thus, 44 defendants in *Goldsmith v. Pyramid Communications, Inc.*, 362 F. Supp. 694, 695 (S.D.N.Y. 1973), appeared together represented by a single law firm. They agreed to withhold potential cross-indemnity, and contribution claims and to toll the statute of limitations for these claims.

VI. CONTRIBUTION WHEN THERE IS A SETTLEMENT

Many securities cases never reach trial because the parties settle their claims during the long pretrial period.²⁰³ Settlements often do not resolve all claims; some defendants refuse to settle and the plaintiff releases only the settling defendants, retaining his claims against the nonsettling defendants.²⁰⁴ In such cases, plaintiff must decide whether to continue or dismiss the suit against nonsettling as well as settling defendants. The choice depends heavily on the financial rewards of continued litigation.²⁰⁵ If plaintiff's added cost in continuing the suit is not significantly less than the anticipated recovery, dismissal is likely. But if the unrecovered damages are large, plaintiff will pursue his action against the nonsettling defendants.²⁰⁶ Either prospect poses serious problems of contribution.²⁰⁷

The source of the problem is not the lack of a trial and judgment, for

203. See, e.g., *Blank v. Talley Indus., Inc.*, 64 F.R.D. 125 (S.D.N.Y. 1974) (class action settlement); *Cannon v. Texas Gulf Sulphur Co.*, 55 F.R.D. 308 (S.D.N.Y. 1972). Although some believe that § 29(a) of the Exchange Act, 15 U.S.C. § 78cc(a) (1970), makes any final settlement of securities claims void as a matter of law, the general view is that § 29(a) proscribes only settlements that allow continuing violations or waive future violation claims, not settlement of matured claims. See *Korn v. Franchard Corp.*, 388 F. Supp. 1326 (S.D.N.Y. 1975).

204. The once-universal rule that release of one wrongdoer automatically released all others liable for the same wrong has been abandoned in most states. See Comment, *supra* note 47, at 237-38. See also cases cited in note 248 *infra* (federal law versus state law question on effect of release).

205. See Freund & Hacker, *supra* note 5, at 477.

206. See, e.g., *Gould v. American Hawaiian S.S. Co.*, 362 F. Supp. 771 (D. Del. 1973); *Lyons v. Marrud, Inc.*, [1972-1973 Transfer Binder] CCH FED. SEC. L. REP. ¶ 93,525 (S.D.N.Y. 1972).

207. If a settlement is signed by all parties, there should be no contribution problem because the settlement will normally provide the amount to be paid by each person; if it does not, the settlement amount would represent a joint contract obligation of all the defendants. If one defendant paid more than his share, he could recover contribution from the other defendants simply by proving that they were jointly liable with him under the terms of the settlement agreement.

To obtain contribution from a person not a party to a settlement agreement, the claimant must establish the liability of the contribution defendant to the injured party, his own liability to the injured party, and the reasonableness of the settlement amount. See Freund & Hacker 477 n.91; Gregory, *supra* note 38, at 386, 391; Comment, *supra* note 47, at 223-24. It is important that the contribution claimant's settlement not be considered a voluntary payment. See *Alabama Great S. R.R. v. Allied Chem. Corp.*, 501 F.2d 94 (5th Cir. 1974), *aff'd en banc per curiam*, 509 F.2d 539 (5th Cir. 1975); 1 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 10.2, at 718 (1956). *But cf.* *Kohr v. Allegheny Airlines, Inc.*, 504 F.2d 400, 405 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975) (court determination that settlement amount is reasonable is sufficient).

generally those are not prerequisite to a contribution recovery;²⁰⁸ it is the absence of a discharge of a common liability of contribution claimant and potential contributor.²⁰⁹ If *C* has a \$1500 claim against both *A* and *B*, which *B* settles in full for \$1200, *B* can recover contribution from *A* because his payment discharged *A*'s liability as well as his own. The difficulty arises when *B*'s payment does not legally discharge *A*'s liability. *C* may then proceed against *A* for the rest of his claim. If he chooses not to pursue his claim against *A*, *B*'s payment has in effect extinguished the \$1500 common liability. In such a case, *B* should be able to recover contribution from *A*.²¹⁰

If *C* does pursue his claim against *A*, *B* cannot in most states recover contribution;²¹¹ legally, *A* has received no benefit from the settlement. Since plaintiff can recover only the amount of his injury, however,²¹² *A* may acquire practical benefit from the settlement. If *C* obtains a \$1500

208. See UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 1(a) (1955 version); UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT §§ 1, 2(1) (1939 version); RESTATEMENT (SECOND) OF TORTS § 886A(1) (Tent. Draft No. 16, 1970). Some states, however, make judgments a condition precedent—notably those states requiring joint judgments. See note 176 *supra* and accompanying text. Other states require only a judgment, not a joint judgment, which may be satisfied by a court order, entered upon a settlement, dismissing the claim with prejudice. See *Traveler's Ins. Co. v. United States*, 283 F. Supp. 14, 25-31 (S.D. Tex. 1968) (Texas law).

209. See UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 1(d) (1955 version); UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 2(2) (1939 version); RESTATEMENT (SECOND) OF TORTS § 886A(2) (Tent. Draft No. 16, 1970); Gregory, *supra* note 38, at 391.

210. Cf. Freund & Hacker, *supra* note 5, at 477. There is little case law on this point, perhaps because *C* would normally agree to accept the \$1000 as full payment if he did not intend to pursue the claim against *A*. Even if *C* is undecided, *B* could preserve a contribution right by providing that the settlement agreement would release both *A* and *B* from liability if *C* did not pursue his claim against *A* within a fixed period of time. Should *C* obtain a small settlement from *A*, say \$50, in lieu of pursuing the action, the question becomes more difficult. If such a result is foreseeable, *B* should preserve contribution rights against *A* by paying a slightly higher amount in settlement and discharging the liability of both *A* and *B*.

211. E.g., N.Y. CIV. PRAC. LAW § 1401 (McKinney Supp. 1975); N.Y. GEN. OBLIG. LAW § 15-108(c) (McKinney Supp. 1975); UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 1(d) (1955 version); UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 2(3) (1939 version); Gregory, *supra* note 38, at 391; Thode, *Comparative Negligence, Contribution Among Tortfeasors, and the Effect of a Release—A Triple Play by the Utah Legislature*, 1973 UTAH L. REV. 406, 429-30.

212. See *Gould v. American-Hawaiian S.S. Co.*, 387 F. Supp. 163, 170 (D. Del. 1974); Comment, *supra* note 47, at 243-44 & nn.150-52. Although punitive damages, if recoverable, are added to the amount of injury, those persons claiming under the Exchange Act are restricted to recovery of "actual damages." Exchange Act § 28(a), 15 U.S.C. § 77bb(a) (1970).

judgment against *A*, *B*'s \$1000 settlement payment will in most states be credited against the judgment.²¹³ *A*'s liability is thus limited to \$500, considerably less than his share if *A* and *B* were equally responsible for *C*'s injury. Nonetheless, the general view prevents *B* from recovering contribution since the settlement did not discharge *A*'s liability.

The settlement does, of course, save the expense of further litigation.²¹⁴ To the extent the excess payment represents simply a desire to buy one's peace, the inability to recover contribution is not inequitable. But the litigious defendant always has the potential of a windfall. The public policy in favor of settlement²¹⁵ is hardly encouraged by enriching the defendant who goes to trial at the expense of the settling party. Settlement is necessarily a speculative bargain; yet, equitable principles would dictate that parties should recoup windfall gains which their settlement has provided to other defendants.²¹⁶

In *Gould v. American-Hawaiian Steamship Co.*,²¹⁷ after plaintiffs obtained judgment, the settling defendants attempted to recover contribution. The court apparently accepted the principle of such contribution in proper circumstances but denied contribution since the claimants had not persuasively shown they had assumed a disproportionate burden.²¹⁸

213. This is the result under both uniform acts. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 4(a) (1955 version); UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 4 (1939 version). There is disagreement whether the amount credited should be the amount paid or the pro rata share of the settling party. See *Rose v. Associated Anesthesiologists*, 501 F.2d 806, 810 (D.C. Cir. 1974); RESTATEMENT (SECOND) OF TORTS § 885(3), comment e (Tent. Draft No. 16, 1970); Comment, *supra* note 47, at 243-45; Note, *Settlement in Joint Tort Cases*, 18 STAN. L. REV. 486 (1966).

214. See J. McLaughlin, Supplementary Practice Commentary (1974) to N.Y. CIV. PRAC. LAW § 1401 (McKinney Supp. 1975) and Practice Commentary (1974) to N.Y. GEN. OBLIG. LAW § 15-108 (McKinney Supp. 1975).

215. See, e.g., *Altman v. Liberty Equities Corp.*, 54 F.R.D. 620, 624-25 (S.D.N.Y. 1972).

216. *But cf.* *Rose v. Associated Anesthesiologists*, 501 F.2d 806, 810 n.10 (D.C. Cir. 1974) (malpractice suit in which settlement agreement protected settling defendants from risk of contribution liability and therefore settling defendants could not equitably obtain contribution from nonsettling defendants when settlement amount turned out to be greater than their proportionate share). What is equitable is not always so clear. If both *A* and *B* were equally responsible and both had litigated their defenses and had been adjudged liable to *C*, equal shares might be an equitable result. But, when *A* has incurred litigation expenses while *B* has incurred a lesser amount in settlement costs, perhaps these amounts should be considered.

217. 387 F. Supp. 163 (D. Del. 1974).

218. *Id.* at 171-72. One difficulty is proof of plaintiff's total damages if the judgment reflects a lesser amount. Thus, in *Gould* the court found that the plaintiff class's total

Whether federal courts will permit a settling defendant to recover contribution from a nonsettling defendant may depend on the parties' rights when the situation is reversed and the latter has paid a disproportionate share. The terms of the release given to the settling party may be dispositive of those rights. Under the 1939 Uniform Contribution Among Tortfeasors Act, a settlement does not release a co-defendant from liability for contribution unless it expressly provides that plaintiff's claims against remaining defendant are reduced by the settling party's proportionate share of the damages.²¹⁹ Absent such a provision, plaintiff's damages are reduced by the amount stipulated or the amount actually paid for the release, whichever is greater, and the settling party remains liable for contribution.²²⁰ In contrast, the 1955 Uniform Contribution Among Tortfeasors Act provides that a release "given in good faith" automatically terminates the defendant's liability for contribution to any other tortfeasor.²²¹ These persons remain liable to the plaintiff for the full amount of his damages, less the amount stipulated in the release or the amount actually paid.²²² An intermediate approach would automatically reduce plaintiff's claim by the released defendant's proportionate share of the damages, regardless of the amount paid.²²³ Thus, if C

damages had not been established and that, had all defendants remained in the trial, additional damages might have been awarded. *Id.* Awards of prejudgment interest and attorneys' fees further cloud the question. Another, perhaps more difficult, problem is proof that the settlement exceeded the proportionate share of the settling defendants. The court in *Gould* did not feel that equitable considerations required decision on which theory of damages applied to the settling defendants. *Id.* That was the settling defendants' burden; they must produce "persuasive evidence that, in light of the judgment . . . the amount expended . . . in settlement [was] in excess of [their] appropriate share." *Id.* at 172.

219. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 5 (1939 version); see Gregory, *supra* note 38, at 392-93; cf. UTAH CODE ANN. § 78-27-43 (Supp. 1975), discussed in Thode, *supra* note 211, at 431-33 (containing additional requirement that proportionate fault issue be litigated between defendants in order to relieve settling defendant from contribution liability).

220. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT §§ 4, 5 (1939 version).

221. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 4(b) (1955 version).

222. *Id.*

223. This rule has been followed in the District of Columbia, Louisiana, New Jersey and Texas. See Turck, *supra* note 40, at 23, 31-32; Note, *supra* note 213, at 487-88, 492-93; Comment, *supra* note 75, at 335-40. See also Rose v. Associated Anesthesiologists, 501 F.2d 806 (D.C. Cir. 1974) (when settlement amount in malpractice case was greater than settling defendants' proportionate share and nonsettling defendant was found solely liable for plaintiff's injury, nonsettling defendant allowed credit for settlement payment to extent of settling defendants' proportionate share). The proportionate shares in these four states are usually determined by dividing the total amount of the

settle with *B*, whose proportionate share is \$750, *C*'s claims against all other defendants would be reduced by \$750 even if *C* received but \$500 from *B*. This approach obviates any need for contribution since non-settling defendants would never pay more than their proportionate share of the common liability.

Each approach has flaws. The 1939 Act serves the equitable principles of contribution while allowing plaintiff to recover his full claim,²²⁴ but at the price of discouraging settlements by not fully releasing settling defendants.²²⁵ The 1955 Act, on the other hand, promotes settlements,²²⁶ but has met considerable resistance from commentators who find it unfair to nonsettling defendants and productive of collusive settlements.²²⁷ The third approach subjects no defendant to more than his proportionate share of damages, and guarantees a complete release to those who settle; the victim, however, is the original plaintiff who cannot collect his full claim unless all defendants pay their proportionate share. The third approach is probably the most equitable to all parties since the only one not fully protected, the plaintiff, can recover his full damages by refusing to settle and proceeding to trial. Most pretrial settlements award less than full damages to plaintiff; the lower recovery is offset by the certainty of immediate payment.²²⁸

injury by the number of tortfeasors, but this reduction method can also be used with other methods of determining contribution shares. For example, a reduction method based on comparative fault has been judicially adopted in Wisconsin, *see Pierringer v. Hoyer*, 21 Wis. 2d 182, 191-93, 124 N.W.2d 106, 111-12 (1963), and also in the Virgin Islands, *see Gomes v. Brodhurst*, 394 F.2d 465, 468-69 (3d Cir. 1967); Slain, *supra* note 15, at 315. New York has by statute adopted a somewhat similar method, providing for reduction by a settling defendant's "equitable share." N.Y. GEN. OBLIG. LAW § 15-108(a) (McKinney Supp. 1975); *see* N.Y. STATE JUDICIAL CONFERENCE, REPORT ON CIVIL PRACTICE LAW AND RULES A-30 to -33 (1974), *reprinted in* MCKINNEY'S SESSION LAW NEWS OF NEW YORK, March 10, 1974.

224. *See* Gregory, *supra* note 38, at 392-93; Note, *supra* note 213, at 492.

225. *See* Comment, *supra* note 47, at 239-40; Note, *supra* note 213, at 492.

226. *See* UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 4, Commissioners' Note subsection (b) (1955 version); Thode, *supra* note 211, at 433.

227. *See, e.g.,* Comment, *supra* note 47, at 240-41; Note, *supra* note 213, at 492; *cf.* Slain, *supra* note 15, at 313-15 (1939 Act provision preferable for a federal contribution rule in antitrust private suits). *But see* Comment, *supra* note 75, at 341-42. To prevent collusive settlements, the 1955 Act requires that the release must be given "in good faith" in order for the release to discharge contribution liability. Lack of good faith, however, may be difficult to prove. *See* Turck, *supra* note 40, at 31-32. *But cf.* Comment, *supra* note 75, at 340-41. Few states have adopted the 1955 Act. *See* Coccia, *Getting Others to Assume or Share the Loss: A Discussion of Indemnity and Contribution*, 17 TRIAL LAW. GUIDE 179, 188 n.5 (1973).

228. *See* Comment, *supra* note 47, at 241-42. Most courts will reduce plaintiff's

Each approach strikes a different balance between the inconsistent goals of encouraging settlements, allowing full recovery, and achieving an equitable distribution of liability. In personal injury claims the primary goal is affording plaintiff a full and speedy recovery. Since clogged state court dockets may prevent a speedy jury trial, the 1955 Act encourages settlements in personal injury claims.²²⁹ The uneven distribution of liability among settling and nonsettling defendants is less important than assuring prompt payment of a plaintiff's hospital and medical bills. Compensating an injured plaintiff is not necessarily the primary goal of securities law. Rather, its goal is regulatory: to promote enforcement, to deter negligence, and generally "to encourage diligence, investigation and compliance"²³⁰ with the statutory requirements "by providing a penalty for those who fail in their duties."²³¹ Exposing those persons responsible for a securities violation "to the substantial hazard of liability for compensatory damages"²³² furthers this purpose. Compensating a defrauded investor is a means to that end, but the distribution of damages is as important as compensation.²³³ Thus, a particular contribution approach appropriate for personal injury claims may incorrectly balance securities law goals.

In recent years, several federal courts have considered the effect of a partial settlement in a securities case on a nonsettling defendant's right to contribution from the settling defendant. None have accepted the proposition that a settlement can absolutely bar a nonsettling defendant's right to contribution. In *Altman v. Liberty Equities Corp.*,²³⁴ the court expressly disapproved a proposed partial settlement between the plaintiff class and three defendants which barred the nine nonsettling defendants from prosecuting indemnity or contribution claims against

claim against nonsettling defendants by the amount of the settling defendants' payment, in order to prevent double recovery. *Id.* at 243-44. *But see* *Rose v. Associated Anesthesiologists*, 501 F.2d 806 (D.C. Cir. 1974).

229. *See* *Slain*, *supra* note 15, at 313-14; *cf.* UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 4, Commissioners' Comment (1955 version).

230. *Globus v. Law Research Serv., Inc.*, 418 F.2d 1276, 1289 (2d Cir. 1969), *cert. denied*, 397 U.S. 913 (1970).

231. *Id.* at 1288.

232. *Id.* at 1289.

233. *Gould v. American-Hawaiian S.S. Co.*, 387 F. Supp. 163, 168 (D. Del. 1974) (paraphrase) (court discussing purposes of Exchange Act § 14(a)). "[T]he Securities Act is more concerned with prevention than cure." *Globus v. Law Research Serv., Inc.*, 418 F.2d 1276, 1289 (2d Cir. 1969), *cert. denied*, 397 U.S. 913 (1970).

234. 54 F.R.D. 620 (S.D.N.Y. 1972).

the settling defendants.²³⁵ The court recognized that its decision was contrary to the general policy favoring settlement,²³⁶ and it thought the settlement fair and reasonable to the plaintiff class.²³⁷ The court nonetheless believed that the clear federal right to contribution in securities cases potentially available to the nonsettling defendants could not be justly barred at an early stage in the litigation.²³⁸

Gould presented the same issue at a later stage after damages had been assessed at trial against the nonsettling defendants.²³⁹ Both the settling and the nonsettling defendants claimed contribution from each other. Since the court found neither group entitled to recover, it avoided the issue, simply terming the question "perplexing."²⁴⁰ The same issue arises if plaintiffs separately sue two groups of defendants on the same basic claim, then settle part or all of one suit. If defendants in the second suit join parties to the first as third-party defendants and claim contribution, those who have settled may raise their settlement as a bar. Federal courts have so far rejected this defense in securities cases, holding in one case that defendants without notice of settlement in

235. *Id.* at 625. See also *Wainwright v. Kraftco Corp.*, 53 F.R.D. 78 (N.D. Ga. 1971). In *Wainwright*, an antitrust action, the court also refused to approve a class action settlement conditional on a court order that the settling defendant not be liable for contribution to the nonsettling defendants. The court concluded that it lacked authority under FED. R. CIV. P. 23(e) to issue such a declaration in a class action settlement; furthermore, a declaration of rights about a contingent contribution claim would be an advisory opinion. *Id.* The *Altman* court disagreed with both grounds. It thought Rule 23 inapplicable to contribution, while finding that the nonsettling defendants' potential right to contribution was substantial enough to warrant adjudication. See 54 F.R.D. at 623, 625.

236. 54 F.R.D. at 625. The parties reaching the settlement contended that the 1955 Uniform Contribution Among Tortfeasors Act represented the modern approach, but the court noted that the Act did not "apply to breaches of trust or of other fiduciary obligation." UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 1(g) (1955 version). Since the court viewed 10b-5 violations as breaches of trust, it found the "modern policy" inapposite. 54 F.R.D. at 624.

237. 54 F.R.D. at 622-23. The settlement paid more than 25 percent of all known claims of the class, and the nine nonsettling defendants remained liable for the balance. *Id.* at 622.

238. *Id.* at 625. The court observed that if all parties eventually settled, "different considerations" would apply; the court would then approve a settlement provision barring contribution. *Id.* This statement may have reflected the general view that a settling defendant cannot recover contribution from one whose liability is not extinguished by the settlement, see note 211 *supra* and accompanying text, or the court may have considered that the nonsettling defendants would not later agree voluntarily to pay an amount greater than their proportionate share of the total damages.

239. 387 F. Supp. at 166, 169-71.

240. *Id.* at 171 n.21.

another lawsuit cannot thereby be prejudiced,²⁴¹ and in another that local law preserved the contribution right.²⁴²

The latter case, *Alexander & Baldwin, Inc. v. Peat, Marwick, Mitchell & Co.*,²⁴³ is the only case to resolve the settlement issue by state law. In *Alexander & Baldwin*, the settlement provided that New York law was to govern,²⁴⁴ and the court applied that law without considering the prospect that federal law might control.²⁴⁵ But if the right to contribution in a federal securities case is a creature of federal law, as *Alexander & Baldwin* expressly recognized,²⁴⁶ federal law should also determine the effect of settlement on that right. The *Altman* court recognized this proposition:

[F]ederal law is or should be controlling [on issues of [contribution] Both *Globus* and *deHaas* make it clear that this right to contribution is federal and principles of state law regarding contribution ordinarily are not to be considered²⁴⁷

The effect of a settlement and release on contribution forms part of the content of that right.²⁴⁸ To have that right barred by state law without

241. *Muth v. Dechert, Price & Rhoads*, 391 F. Supp. 935, 939 (E.D. Pa. 1975). In the first lawsuit, the settlement was expressly without prejudice to the cross-claims of the nonsettling defendants. *Id.* Logically, then, persons not even parties to the first suit should not be prejudiced by the settlement.

242. *Alexander & Baldwin, Inc. v. Peat, Marwick, Mitchell & Co.*, 385 F. Supp. 230, 239-40 (S.D.N.Y. 1974).

243. 385 F. Supp. 230 (S.D.N.Y. 1974).

244. *Id.* at 233, 239.

245. *Id.* at 239-40. Even under New York law, the case is anomalous. Before 1972 New York did not preserve contribution rights against a settling defendant, a system it reinstated for all releases executed after September 1, 1974. See *Short v. Thygiessen*, 82 Misc. 2d 786, 370 N.Y.S.2d 451 (Sup. Ct. 1975); N.Y. GEN. OBLIG. LAW § 15-108 (McKinney Supp. 1975); N.Y. STATE JUDICIAL CONFERENCE, *supra* note 223, at A-30 to -32. The nonsettling New York defendant need not recover contribution, however, since the new law requires plaintiff to reduce his claim against the nonsettling defendants by the amount stipulated in the release of the settling defendants, the amount actually paid for the release, or the settling defendants' equitable share of the damages—whichever is greater. See N.Y. GEN. OBLIG. LAW § 15-108 (McKinney Supp. 1975); N.Y. STATE JUDICIAL CONFERENCE, *supra* note 223, at A-32; *cf.* note 223 *supra* and accompanying text.

246. 385 F. Supp. at 237-39. Making more noticeable its failure to consider federal law regarding defenses to that right, the court discussed at length the federal policies underlying the contribution right.

247. 54 F.R.D. at 625. See generally *Slain*, *supra* note 15, at 310-16 (antitrust context). For a general discussion of federal law as a determinant of the availability and nature of a contribution remedy, see Note, *Toward a Workable Rule of Contribution in the Federal Courts*, *supra* note 15.

248. See *Slain*, *supra* note 15, at 311. Compare *Stella v. Kaiser*, 221 F.2d 115, 116

regard to federal policies when a partial settlement is effected could both lessen the deterrent impact of the securities laws and frustrate the uniform application of those laws.²⁴⁹ Federal policies here are not ambivalent. They seek to penalize those responsible for a securities violation in order to encourage diligent compliance with statutory requirements.²⁵⁰ Permitting plaintiff to free a defendant from all contribution claims obviously promotes settlements, but the cost in terms of federal policies may be too great. In effect, the result may be the same as when no right of contribution exists and a plaintiff sues only one of several wrongdoers²⁵¹ or collects his judgment from only one of several defendants held liable: plaintiff is allowed to choose arbitrarily who will bear the burden of his loss.²⁵² Just as courts permit contribution to a defendant who alone is named by plaintiff,²⁵³ or who alone pays a joint and several judgment,²⁵⁴ courts are also likely to permit contribution against a settling defendant whenever equity or federal policy so requires.²⁵⁵ That is, if one defendant settles for a disproportionately small figure, he should still be liable for contribution to nonsettling defendants forced to pay more than their share of the total liability. Similarly, a settling party might recover contribution from nonsettling defendants who benefit from the settlement and who would otherwise avoid their share of the total liability.

For the settling party who wants to minimize his exposure to a

(2d Cir.), *cert. denied*, 350 U.S. 835 (1955) (federal law determines whether release of certain persons releases another person as well), *with* Korn v. Franchard Corp., 388 F. Supp. 1326, 1332 n.5 (S.D.N.Y. 1975) (state law apparently determines whether release of three named defendants releases all other defendants).

249. Admittedly, the federal law on contribution in securities cases remains in a confused and evolutionary state. Any attempt, however, to determine which state's law applies to a particular settlement, what the law provides, whether that law binds a nonsettling defendant with no connection to that state, whether the parties to the settlement may choose the law applicable to their settlement, and so forth, would create chaos, both in terms of the parties' planning and federal policies.

250. See text accompanying notes 230-33 *supra*.

251. See text accompanying notes 176-83 *supra*.

252. To the extent, however, that the settlement is the result of arm's-length bargaining and is not unduly favorable to the settling defendant at the nonsettling defendant's expense, the choice is not an arbitrary one made solely by the defendant but a choice dependent on which defendant is willing to negotiate a settlement with the plaintiff.

253. *E.g.*, Liggett & Myers Inc. v. Bloomfield, 380 F. Supp. 1044 (S.D.N.Y. 1974).

254. *E.g.*, Globus Inc. v. Law Research Serv., Inc., 318 F. Supp. 955 (S.D.N.Y. 1970), *aff'd per curiam*, 442 F.2d 1346 (2d Cir.), *cert. denied*, 404 U.S. 941 (1971).

255. *Cf.* Gould v. American-Hawaiian S.S. Co., 387 F. Supp. 163, 170-71 (D. Del. 1974); Altman v. Liberty Equities Corp., 54 F.R.D. 620, 625 (S.D.N.Y. 1972).

contribution claim, several alternatives are available. First, he can attempt to anticipate plaintiff's probable damages and pay his share of those damages in settlement. Given the pitfalls of predicting damages that will be assessed in a securities suit,²⁵⁶ he is unlikely to satisfy either the court or other defendants unless he pays an amount greater than his expected share. Second, he can negotiate a settlement clause that will reduce plaintiff's total claim by a fixed percentage or fraction representing the settling party's proportionate share of the damages.²⁵⁷ If that share is difficult to predict, the settlement could provide that the total claim will be reduced by the settling defendant's proportionate share, whatever it might be.²⁵⁸ Since nonsettling defendants would thus pay no more than their appropriate share of the total liability, no right to contribution would arise.²⁵⁹ Plaintiffs, however, are hesitant to surrender an indefinite amount of their future judgment; hence, this type of settlement is more difficult to negotiate with plaintiffs than the first type in which only the actual payment is credited against a future judgment.²⁶⁰ A variant of the second approach would require the plaintiff to indemnify a settling defendant if the nonsettling defendants recovered

256. In *Gould*, for example, when most of the defendants settled before trial, the court found it unnecessary to determine the plaintiff class' total damages. The court referred generally to other possible measures of damages against the settling defendants, discretionary allowance or disallowance of prejudgment interest, and possible allowance of attorney's fees, then concluded that the plaintiffs had not been overcompensated. 387 F. Supp. at 172. The difficulty in determining the applicable theory of damages, total damages, and the complex legal issues in securities suits may result in a compromise settlement for substantially less than plaintiff could recover were he successful at trial. If such a settlement is only partial, with plaintiffs preserving their claims against the nonsettling defendants, the settlement is unlikely to approach the settling defendant's proportionate share of a maximum recovery; it will reflect instead the uncertainties of the case.

257. See UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 5 (1939 version).

258. The court would first determine the proportionate share of the settling defendant and then credit this amount to the plaintiff's judgment against the nonsettling defendants. This assumes, of course, that the judgment represented the liability common to the settling and nonsettling defendants. If plaintiff has a number of overlapping claims against defendants, only part of which are asserted against all defendants, sorting out the claims to determine a proper credit may be difficult. Cf. *Alexander & Baldwin, Inc. v. Peat, Marwick, Mitchell & Co.*, 385 F. Supp. 230, 240 (S.D.N.Y. 1974) (involving a straight settlement payment without a proportionate share reduction provision).

Rather than an automatic reduction, the settlement may provide that the judgment will be reduced only if the nonsettling defendant obtains an order or judgment for contribution from the settling party. See, e.g., *Rose v. Associated Anesthesiologists*, 501 F.2d 806, 807 & n.2 (D.C. Cir. 1974) (medical malpractice case).

259. See N.Y. STATE JUDICIAL CONFERENCE, *supra* note 223, at A-32.

260. See generally Comment, *supra* note 47, at 241-45.

contribution.²⁶¹ Although the last two alternatives may permit a settling defendant to escape his fair share, the other defendants would not be forced to satisfy the difference; thus, equities between defendants would not require a contribution right against the settling defendant.²⁶²

261. In effect, the agreement to indemnify for contribution recovered from a settling party achieves the same result as a reduction of judgment or claim, with the plaintiff ultimately responsible for the contribution amount. An indemnity clause, however, allows plaintiff more flexibility. If the court orders a lower than expected contribution, or none at all, plaintiff will gain; but if the settlement reduces plaintiff's claims by one-third, the court is likely to follow the reduction, even if it might otherwise find the settling defendant's contributive share to be less. For example, if *A* settles with *B* for \$6000 and ultimately recovers a \$20,000 judgment against *C*, the court has a number of alternatives. It may simply credit the \$6000 to the judgment and award no contribution; *C* would then pay \$14,000 and *A* would recover \$20,000 altogether. Or the court may determine that *B*'s proportionate share is \$8000, credit the \$6000 settlement payment, and award *C* \$2000 in contribution; thus *C* would pay \$14,000 and receive \$2000 contribution for a net payment of \$12,000; *A* would receive \$20,000 but must indemnify *B* for his \$2000 contribution to *C*; thus *A*'s net recovery is \$18,000. Third, if the settlement specifically provides that any judgment against *C* will be reduced by one-half, the court may simply reduce *A*'s judgment by \$10,000 even though it might otherwise find *B*'s proportionate share to be only \$8000; thus *C* would pay \$10,000 and *A* would receive a total of \$16,000. In all cases, *B* would pay \$6000.

The two methods also differ procedurally. For example, under the second alternative, the settling defendant could probably be dropped as a party, despite the objections of the nonsettling defendant, because plaintiff now is the party wishing to minimize the settling defendant's allocable share of the underlying liability. Compare *Mielcarek v. Knights*, 50 App. Div. 2d 122, 375 N.Y.S.2d 922 (1975), with UTAH CODE ANN. § 78-27-43 (Supp. 1975), discussed in *Thode*, *supra* note 211, at 432-33. Under the third alternative, the settling party could probably be joined as a third-party defendant to a claim for contribution. Although plaintiff's interest in minimizing the settling defendant's allocable share is as great as under the second alternative, the nonsettling defendant asserts here a claim for contribution against the settling defendant, who will in turn be indemnified by plaintiff; under the second alternative, the nonsettling defendant asserts a claim against plaintiff for setoff or credit on plaintiff's judgment.

262. The *Altman* court seemed only to consider equities between the parties when it refused to approve a settlement with a clause barring contribution claims. See text accompanying notes 234-38 *supra*. Note, however, that under both the second and third alternatives, the plaintiff must bear the "loss" if the settling defendant pays less than his share. Under the second alternative, plaintiff's claim is reduced by the settling defendant's proportionate share; his loss is the difference between the amount the settling defendant paid and the amount he "should" have paid. Under the third alternative, the loss is the indemnity the plaintiff pays the settling defendant, which is the nonsettling defendant's contribution recovery from the settling defendant. The plaintiff's acceptance of this risk is part of the consideration for the settlement.

For class actions, FED. R. CIV. P. 23(e) requires court approval before any dismissal or compromise. For approval, a settlement must be fair, reasonable and adequate with respect to the plaintiff class. See, e.g., *Lyons v. Marrud, Inc.*, [1972-1973 Transfer Binder] CCH FED. SEC. L. REP. ¶ 93,525 (S.D.N.Y. 1972). In assessing the settlement, the court must consider this risk of loss in conjunction with the rest of the settle-

These two alternatives might also lessen the deterrent impact of the securities laws.²⁶³ But deterrence, although the primary goal of federal securities policy,²⁶⁴ is not the only consideration. Compensating injured plaintiffs is also important both in its own right and as an incentive to sue. The securities laws recognize the autonomy of the victim of a securities violation, requiring him neither to bring suit²⁶⁵ nor demand full compensation. Such considerations counterbalance a negative impact on deterrence that can only be characterized as minimal.²⁶⁶ By settling, defendant has in effect been held liable for, and paid for, his securities violation. If the nonsettling defendant need not pay more than his proportionate share and the settlement is substantial and negotiated at arms length, a court is more likely to uphold the terms under the general public policy favoring settlements than to find the settlement contrary to federal securities policy.

VII. AMOUNT RECOVERABLE IN A CONTRIBUTION CLAIM

To this point this Note has assumed a party held liable for contribution must pay his proportionate share of the underlying liability, but what is a "proportionate share"? The traditional answer is that a tortfeasor must pay his "ratable" or "pro rata" share,²⁶⁷ defined by the dictionary as "proportionately; according to share, interest, or liability of

ment. A provision for setoff of a fixed percentage or an indefinite portion would raise similar problems.

263. The plaintiff's agreement to indemnify a settling defendant against contribution liability differs significantly from a corporation's agreement to indemnify its directors. In the latter, the corporation protects its directors from liability for their negligent or wrongful acts. Such protection allows the directors to avoid penalties and vitiates their *in terrorem* effect, intended to secure compliance with the securities acts. The settlement indemnity clause, however, does not protect the settling defendant from liability for his negligent or wrongful acts. He has already settled this liability, whether or not his payment is ultimately determined to represent his proper share. The indemnity clause transfers to plaintiff the risk that the settlement is insufficient, necessitating contribution—which is different than assuming the underlying liability. Notably, an automatic reduction clause reaches the same result as an indemnity clause. Insurance presents analogous considerations. See note 130 *supra* and accompanying text.

264. See notes 230-33 *supra* and accompanying text.

265. See *Cohen v. Tenney Corp.*, 318 F. Supp. 280, 284 (S.D.N.Y. 1970).

266. A contrary finding would virtually condemn all settlement efforts since a major reason for settling, from a defendant's point of view, is to avoid paying even greater amounts that might be awarded in damages at trial.

267. See, e.g., RESTATEMENT OF RESTITUTION §§ 81, 85 (1937) ("proportionate share"); Gregory, *supra* note 38, at 372; Leflar, *supra* note 39, at 130.

each."²⁶⁸ Contribution law most commonly calculated that share by dividing the total liability by the number of parties liable, each party being apportioned an equal share of the liability.²⁶⁹ Thus, if three tortfeasors are liable to *A* on a \$15,000 claim and *B*, one of the tortfeasors, pays the claim, he can recover \$5000, a pro rata share, from each of the other two. Occasionally "pro rata" in contribution means "according to the interest or benefit," with the party who benefits the most from the transaction that injured the plaintiff paying the most in contribution;²⁷⁰ almost never does it refer to an allocation based on fault.²⁷¹

The equal or according-to-benefit allocations are peculiarly adapted to the business contract cases in which they originated; such allocations are equitable in that context.²⁷² For example, if a director on behalf of the corporation signs a contract later held to be ultra vires, the directors, rather than the corporation, are personally liable for any loss. Since the director presumably acted with the approval or assent of all directors, all are equally responsible for the loss; each must pay an equal share of the damages in contribution if any one director satisfies the entire underlying claim.²⁷³ The English Directors' Liability Act of 1890 logically

268. WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1986 (2d ed. 1951). See also WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1820 (1971) (divided, distributed, or assessed "proportionately according to some exactly calculable factor (as share, liability, period of time)").

269. See, e.g., PROSSER § 50, at 310; Bohlen, *supra* note 47, at 553; Gregory, *supra* note 38, at 372; Leflar, *supra* note 39, at 136, 146; Turck, *supra* note 40, at 20. The maxim is commonly quoted in cases that "equality is equity." See PROSSER, *supra*; Leflar, *supra* at 136. For discussion of the differing methods in equity and at law for determining the number of persons liable to pay contribution, see note 40 *supra*.

270. See RESTATEMENT OF RESTITUTION § 85, comment h (1937); WILLISTON § 345, at 770. Partners generally are liable in contribution in the same proportion that they share in the partnership profits. See UNIFORM PARTNERSHIP ACT § 18(a). Sureties whose liabilities are restricted to fixed amounts contribute in proportion to these amounts. See WILLISTON § 1279.

271. See, e.g., Herzfeld v. Laventhol, Krekstein, Horwath & Horwath, 378 F. Supp. 112, 136 (S.D.N.Y. 1974); UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 2 (1955 version); Ruder, *supra* note 2, at 650. But see UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 2(4) (1939 version).

272. In the contribution-among-sureties cases, there is normally no difference in degree of fault and therefore equal or proportional shares produce an equitable result. Similarly, in a joint undertaking in which a contract is for the benefit of all and all are liable for its breach, equal contribution shares are logical. See Batard v. Hawes, 118 Eng. Rep. 775, 777-78 (Q.B. 1853).

273. The equal liability in contribution assumes that none of the directors received any special pecuniary advantage from the contract. As long as there was common as-

applied the same allocation methods to contribution for misleading prospectus liabilities. The situations were analogous. All directors were presumed to have approved or assented to the prospectus; each would be equally responsible for any misrepresentations. Regardless of the director's knowledge or lack of knowledge of corporate affairs, his status as a director placed him, in the eyes of the new law, on an equal plane with the other directors.²⁷⁴ The federal securities acts, however, subject a much broader and more diverse group of persons to liability for securities violations than did the original English Act. In addition to directors, the issuers, underwriters, dealers, brokers, accountants, other experts, and individual selling shareholders may be held liable for a violation.²⁷⁵

Section 11(f) of the Securities Act, providing for contribution "as in cases of contract" was the first express contribution provision included in the federal securities laws.²⁷⁶ Professors Douglas and Bates, discussing this remedy immediately after Congress adopted the Securities Act, thought "pro rata contribution according to the rules of law and equity [the] only workable rule to apply" to those who had not otherwise resolved their respective liabilities by contract.²⁷⁷ Furthermore,

judged by administrative expediency, this is probably as simple and satisfactory a way to handle the matter as any. To resort to fault, compensation, or extent of participation would be even more confusing.²⁷⁸

Other commentators, relying on these statements as well as on common law contract precedent, have generally assumed that the pro rata method applies in securities cases.²⁷⁹ One federal court has endorsed this view;

sent, it is irrelevant that only part of the directors actually made the contract or did the ultra vires act. See *Ashhurst v. Mason*, L.R. 20 Eq. 225, 234 (1875); F. PALMER, *COMPANY LAW* 221 (14th ed. 1930).

274. For an early application of pro rata contribution to directors for prospectus liability, see *Shepherd v. Bray*, [1906] 2 Ch. 235.

275. See notes 69-72 *supra* and accompanying text (Securities Act § 11 liability).

276. See generally text accompanying notes 17-35 & 68-74 *supra*.

277. Douglas & Bates, *supra* note 35, at 179. These experts anticipated applying the rule only to a "residual group" because others would have expressly contracted their liabilities. Since it has become more difficult to devise liability agreements not objectionable to public policy, express contracts (except perhaps among underwriters) will no longer "take care of most of the cases" as Professors Douglas and Bates had supposed. *Id.* But cf. ALI FED. SEC. CODE § 1418(f)(1) (Tent. Draft No. 2, 1973).

278. Douglas & Bates, *supra* note 35, at 179-80 (footnotes omitted).

279. BLOOMENTHAL § 8.27[1] at 8-81; Ruder 650. Professor Loss accepted this view in reprinting a large segment of the Douglas & Bates discussion, see 3 Loss 1737-39,

since the court expressly found the parties to be equally culpable, however, the contribution shares would have been the same whether assessed pro rata or according to relative fault.²⁸⁰

The pro rata method is not always simple to apply. Some persons may be insolvent; others may not have been joined as parties to the original suit. One party may be liable only vicariously as the principal of a wrongdoing agent. The courts presumably will follow the equity rule of excluding insolvent parties,²⁸¹ and *Globus II* indicates that only those parties whose liabilities have been adjudicated will be considered in apportioning contribution.²⁸² Not so easily decided, however, is the problem of vicarious or secondary liability.²⁸³ The usual contribution rule considers principal and agent as a single unit in determining pro rata shares, at least when that produces an equitable result.²⁸⁴ One court has adopted this approach in a securities case.²⁸⁵ The court found that two parties who had sold stock to plaintiff had acted as a single entity to injure plaintiff,²⁸⁶ while the third party, a lawyer bringing

but later changed his mind. See ALI FED. SEC. CODE § 1418(f)(2) & Comment 2 (Tent. Draft No. 2, 1973), section quoted in note 324 *infra*.

280. Herzfeld v. Laventhol, Krekstein, Horwath & Horwath, 378 F. Supp. 112, 136 (S.D.N.Y. 1974). See also Wassel v. Eglowsky, 399 F. Supp. 1330, 1370 (D. Md. 1975) (contribution normally on a pro rata basis).

281. See Douglas & Bates, *supra* note 35, at 178-79 n.30. For a statement of the equity rule, see note 40 *supra*.

282. 318 F. Supp. at 958.

283. Congress, expanding upon common law agency principles, specifically provided in the securities acts that controlling persons are "liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable." Securities Act § 15, 15 U.S.C. § 77o (1970) and Exchange Act § 20(a), 15 U.S.C. § 78t(a) (1970). Arguably, this language means that a controlling person should be liable only for the contribution share of its controlled person and that the controlling person should not be separately counted for contribution purposes. The result so achieved must be carefully examined, however, in light of federal policies subjecting controlling persons to securities liabilities to encourage their diligence in supervising controlled persons. See generally 3 Loss 1808-11. Counting principals and agents as single entities for contribution purposes will not necessarily provide a fair and equitable apportionment in a given case. Cf. text accompanying notes 288-93 *infra*.

284. See, e.g., RESTATEMENT (SECOND) OF TORTS § 886A, comment h (Tent. Draft No. 16, 1970); Gregory, *supra* note 38, at 375-76; cf. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 2(b) (1955 version) ("if equity requires, the collective liability of some as a group shall constitute a single share").

285. Wassel v. Eglowsky, 399 F. Supp. 1330, 1370 (D. Md. 1975).

286. The court found that although both parties were present at meetings with the plaintiff, one party was the "dominant man" in the relationship between the two parties and therefore the second party's liability was "largely derivative." *Id.* at 1370 & n.76.

about the sale, had acted separately. Thus, for contribution purposes 50 percent of the liability was allocable to each entity.²⁸⁷

The situation was more complex in *Gould*, the defendants being two companies involved in a merger, ten directors of one company, and five shareholders who had received favored treatment.²⁸⁸ After settlements and summary judgments, the trial determined only the liabilities of two shareholders.²⁸⁹ The court held the two shareholders liable under section 14(a) of the Exchange Act and ordered them to disgorge part of the excess premiums obtained.²⁹⁰ In their contribution claim against the settling defendants, these shareholders contended (1) that they constituted a single tortfeasor for contribution purposes; (2) that there were twelve tortfeasors in all; and (3) that their contributive share was only one-twelfth of the total damages.²⁹¹ Such allocation would have been inequitable. The two shareholders had alone received over 45 percent of the excess premiums paid to favored shareholders,²⁹² and the securities violation lay in the failure to disclose fully the favored shareholder transactions.²⁹³ On the other hand, permitting the settling defendants to recover contribution according to a benefit-received formula would have been contrary to federal securities policies, allowing full indemnity to those directors and corporations who had not received premiums but whose negligent or intentional nondisclosure made possible the violation.²⁹⁴ Counting separately each party who settled or was held liable at trial would produce an allocation somewhat more equita-

287. *Id.* at 1370-71. Only the first two parties had been named as defendants by the plaintiff and were therefore the only ones liable under the judgment. When such judgment was paid, however, 50 percent could be recovered as contribution from the third party. *Id.*

288. *See Gould v. American Hawaiian S.S. Co.*, 331 F. Supp. 981, 984 (D. Del. 1971).

289. *See Gould v. American Hawaiian S.S. Co.*, 362 F. Supp. 771, 773 (D. Del. 1973). One shareholder was a corporation, the other a retirement plan trust.

290. *Id.* at 775, 778. These shareholders were liable under § 14(a) because, the court found one of the directors of the merging corporation who had approved the proxy statement was their agent. *Id.* at 774-75.

291. *Gould v. American-Hawaiian S.S. Co.*, 387 F. Supp. 163, 170 (D. Del. 1974).

292. *Id.* at 171 n.22.

293. *See Gould v. American Hawaiian S.S. Co.*, 362 F. Supp. 771, 775 (D. Del. 1973); *Gould v. American Hawaiian S.S. Co.*, 331 F. Supp. 981, 986-87, 997 (D. Del. 1971).

294. *See Gould v. American-Hawaiian S.S. Co.*, 387 F. Supp. 163, 171 (D. Del. 1974). If those who received no benefits escaped liability, there would be little inducement for diligent execution of securities laws duties. *See also Douglas & Bates, supra* note 35, at 180 & n.33.

ble and less contrary to securities policy.²⁹⁵ Yet, if damages are assessed on a disgorgement basis and some defendants received much greater benefits than others, an equal allocation of contributive shares seems unfair.²⁹⁶

The modern method of allocating contribution in other areas of the law seems to be based on comparative fault.²⁹⁷ In the past, courts have resisted apportionment according to fault either because courts cannot apportion fault among tortfeasors²⁹⁸ or because the attempt would overburden them.²⁹⁹ The first objection is no longer valid, given the large number of jurisdictions with comparative negligence systems.³⁰⁰ These systems require a judge or jury to determine the relative fault of plaintiff and defendant in order to apportion damages between them.³⁰¹ Similarly, contribution based on comparative fault requires the court or jury to allocate fault between the defendants or the defendants and third-party defendants in order to determine their respective contribution liabilities.³⁰² A pretrial request for apportionment greatly mitigates the overburden problem by allowing judge or jury to consider fault together with other issues in the case.³⁰³

295. The two shareholders and their agent director would be counted as three parties. Since 13 parties had settled, *see* *Gould v. American-Hawaiian S.S. Co.*, 387 F. Supp. 163, 165 n.2 (D. Del. 1974), there would be 16 parties for contribution purposes, each party's fractional share of the total damages being 1/16th. This pro rata method of allocating contribution shares encourages maximum joinder as third-party defendants of all persons potentially liable, since the more persons found liable, the smaller will be the contribution shares of each defendant. *Cf.* *Ruder*, *supra* note 2, at 651.

296. It seems inequitable that a director who merely approves a misleading proxy statement should be liable for the same amount as a person who receives a substantial monetary benefit from the misrepresentation. *Cf.* *Gould v. American-Hawaiian S.S. Co.*, 387 F. Supp. 163, 171 (D. Del. 1974).

297. *See* *Gomes v. Brodhurst*, 394 F.2d 465, 468-69 (3d Cir. 1968) (tort action); *Gregory*, *supra* note 38, at 372-75; *Comment*, *supra* note 47, at 235-36.

298. *See* *Gregory*, *supra* note 38, at 373.

299. *See* *Jones v. Schramm*, 436 F.2d 899, 903 n.11 (D.C. Cir. 1970); *Turck*, *supra* note 40, at 28.

300. *See* *Schwartz*, *Comparative Negligence*, 20 *PRAC. LAW.*, Nov. 1974, at 13, 14; *Woods*, *The New Kansas Comparative Negligence Act—An Idea Whose Time Has Come*, 14 *WASHBURN L.J.* 1, 3 (1975). If determining relative fault is impossible, damages should be equally apportioned. *See* *Turck*, *supra* note 40, at 25; *cf.* *Comment*, *Contribution Among Tortfeasors: The Need for Clarification*, 8 *JOHN MARSHALL J. PRAC. & PROCEDURE* 75, 94-95 (1974).

301. *See generally* *PROSSER* § 67, at 434-39.

302. *See* *N.Y. CIV. PRAC. LAW* § 1402 (McKinney Supp. 1975), *discussed in* *N.Y. STATE JUDICIAL CONFERENCE*, *supra* note 323, at A-25 to -26; *Comment*, *supra* note 47, at 234-36.

303. *See* *N.Y. STATE JUDICIAL CONFERENCE*, *supra* note 223, at A-27.

A recent Supreme Court decision in admiralty,³⁰⁴ replacing equal division of damages in collision cases³⁰⁵ with a rule allocating liability according to degree of fault, is likely to promote comparative fault analysis in securities cases. According to the Court, equal division in admiralty collision cases produces a "reasonably satisfactory result" only when fault is approximately equal,³⁰⁶ and is less likely to induce care than comparative negligence.³⁰⁷ The Court was unimpressed with the argument that an equal damages rule induces settlements through ease of application; "facile application" does not justify inequity.³⁰⁸ While the case itself did not involve contribution,³⁰⁹ it indicates a trend toward equitable apportionment of damages in tort cases, whether between plaintiff and defendant or between defendants.³¹⁰

A system of apportioning contribution by fault may be based on various kinds of "fault." For example, New York's contribution apportionment system is based on the relative culpabilities of the parties,³¹¹

304. *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975).

305. Under the equal division of damages rule, total damages are apportioned equally among all parties "found to be guilty of contributing fault, whatever the relative degree of their fault may have been." *Id.*; *see id.* at 402.

306. *Id.* at 405.

307. *Id.* at 405 n.11.

308. *Id.* at 407-08.

309. The case involved apportionment between the plaintiff vessel owner and the defendant of damages caused to the vessel by the concurrent negligence of both plaintiff and defendant. The district court found that the grounding was 75 percent the fault of the vessel's captain and 25 percent the fault of the Coast Guard for having failed to maintain a breakwater light, but under the equal division of damages rule, it had required each party to bear half the damages. *Id.* at 399-400.

310. *See* sources cited in note 300 *supra*. For a number of years, only four state statutes apportioned contribution by fault—Delaware, Arkansas, Hawaii, and South Dakota. In 1962 Wisconsin adopted the rule by court decision, and a number of state legislatures have recently adopted fault apportionment. *See Bielski v. Schulze*, 16 Wis. 2d 1, 114 N.W.2d 105 (1962); IDAHO CODE § 6-803 (Supp. 1975); N.Y. CIV. PRAC. LAW § 1402 (McKinney Supp. 1975); UTAH CODE ANN. § 78-27-40 (Supp. 1975).

311. N.Y. CIV. PRAC. LAW § 1402 (McKinney Supp. 1975); *see Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972). Wisconsin and the Virgin Islands also apportion contribution by relative culpability. *See Gomes v. Brodhurst*, 394 F.2d 465, 468-69 (3d Cir. 1968); *Bielski v. Schulze*, 16 Wis. 2d 1, 114 N.W.2d 105 (1962). The 1939 UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT in § 2(4) restricts the concept to circumstances in which "there is such a disproportion of fault among joint tortfeasors as to render inequitable an equal distribution among them of the common liability by contribution . . ." The Act thus retains a presumption of equal distribution. *See Thode, supra* note 211, at 426, *discussing* UTAH CODE ANN. § 78-27-40(2) (Supp. 1975).

England's on relative responsibilities of the parties for the damages,³¹² and Germany's on the "circumstances."³¹³ Importing any of these systems into securities litigation requires caution.³¹⁴ Of the three, contribution according to relative culpabilities may provide the least satisfactory solution. First, section 11(f) prohibits anyone guilty of fraudulent misrepresentation from recovering contribution from anyone not so guilty.³¹⁵ Second, once fraud is proven, a court is unlikely to distinguish between an "active" party and a "passive" party or find one party "more liable" than another.³¹⁶ As the court of appeals in *Globus I* noted, proof that an issuer is "more liable" than another defendant will not be difficult;³¹⁷ an issuer is "inevitably closer to the facts."³¹⁸ Such distinctions would produce only less diligence by underwriters, accountants, and directors who are not active participants in particular securities registrations or sales.

This does not mean that apportionment according to culpability may never be appropriate. Perhaps Professor Ruder's standard for allowing an indemnity claim—"when the degrees of fault are substantially different"³¹⁹—would assist in determining when to impose contribution according to relative culpability.

The English provision now applicable to tort liabilities in England, including those under the company laws,³²⁰ requires the court to determine the amount of contribution according to what it finds

to be just and equitable having regard to the extent of that person's responsibility for the damage; and the court shall have power to exempt

312. Law Reform (Married Women and Tortfeasors) Act of 1935, 25 & 26 Geo. 5, c. 30, § 6(2). The section is quoted in part in text accompanying note 321 *infra*.

313. See Turck, *supra* note 40, at 24-25. The general rule of equal apportionment stated in the *German Civil Code* has become the "rare exception." *Id.*

314. The Seventh Circuit, in adopting a federal rule of contribution based on comparative negligence for mid-air collisions, stated no limits on this rule. *Kohr v. Allegheny Airlines, Inc.*, 504 F.2d 400, 405 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975). A single rule of apportionment, applicable to all express or implied federal contribution rights, would seem inappropriate. Cf. Slain, *supra* note 15, at 311-15.

315. See text accompanying note 21 *supra*, quoting § 11(f). See also BLOOMENTHAL, *supra* note 94, § 8.27[1], at 8-82; note 26 *supra*.

316. See note 116 *supra*.

317. *Globus v. Law Research Serv., Inc.*, 418 F.2d 1276, 1288 (2d Cir. 1969), *cert. denied*, 397 U.S. 913 (1970).

318. *Id.*

319. Ruder, *supra* note 2, at 655, 658.

320. Cf. 37 HALSBURY, LAWS OF ENGLAND *Tort* ¶ 247 (3d ed. 1962); F. PALMER, COMPANY LAW 579-80 (20th ed. 1959).

any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity.³²¹

The English courts have experienced some difficulty in articulating the basis for determining "responsibility for the damage," whether it be the relative blameworthiness of the parties, the relative causative effect of their acts or omissions, or simply one of fairness between the parties.³²² Nevertheless, and perhaps because of this difficulty, the statute provides more flexibility than the American relative culpability statutes. In a securities case, for example, "responsibility for the damage" might include consideration of the differing standards of care imposed on various parties in addition to the considerations of blameworthiness, causative effect, and fairness. Professor Loss has incorporated the English approach to contribution in the Federal Securities Code³²³ by making the "relative responsibility of each person for the loss incurred" the major consideration in determining contribution claims.³²⁴ In its present form, however, the section retains all the ambiguities of the English provision.³²⁵ Either the basis for determining "relative respon-

321. Law Reform (Married Women and Tortfeasors) Act of 1935, 25 & 26 Geo. 5, c. 30, § 6(2). The statute, however, does not "render enforceable any agreement for indemnity which would not [otherwise] have been enforceable." *Id.* § 6(4)(c).

322. *See, e.g.*, *Maxfield v. Llewellyn*, [1961] 3 All. E.R. 95, 96 (C.A.) (blameworthiness); *Collins v. Hertfordshire County Council*, [1947] 1 K.B. 598, 624 (extent negligence causal in bringing about damage); *Daniel v. Rickett, Cockerell & Co.*, [1938] 2 K.B. 322, 326 (what is right as between parties, having regard to fair division of responsibility); *cf.* 11 HALSBURY, LAWS OF ENGLAND *Damages* ¶ 513, at 317 (3d ed. 1955). For an application of the English statute to a case in which two groups of defendants had each breached different statutory duties, see *Rippon v. Port of London Authority*, [1940] 1 K.B. 858, 866-67.

323. ALI FED. SEC. CODE § 1418(f)(2) & Comment 2 (Tent. Draft No. 2, 1973).

324. Section 1418(f) provides for allocating the contribution liability by contract and then, in subsection (2):

To the extent that there is no such contract, and on consideration of the relative responsibility of each person for the loss incurred, the judgment in an action for contribution may (A) order any such person to pay to any other such person as much as is determined to be just and equitable by way of contribution, (B) order that the contribution of any such person amount to a complete indemnity, or (C) determine that any such person is not liable to make contribution; but no such person may be ordered to pay more under this subsection than his maximum liability if he had been a defendant in the action giving rise to the action for contribution.

Id. § 1418(f)(2).

325. The Federal Securities Code is still in the preliminary drafting stages. Hopefully, this section will receive further attention before the Code reaches its final drafting stages.

sibility . . . for the loss" should be stated, or the courts should be given plain authority to develop a flexible test.

Gould exemplifies the flexibility required in difficult cases. Although the court ultimately awarded contribution to none of the parties,³²⁶ the basis of the decision was equitable considerations.³²⁷ The court apparently focused on determining the *appropriate* contribution share—what each party equitably should pay considering all circumstances.³²⁸ The court considered premium payments received by some defendants, the equities between the defendants, the damage theories, the partial settlement, and federal policies.³²⁹ While culpability was not considered, there was no evidence that the defendants varied significantly in fault.³³⁰ In contrast, the court in *Globus II* first found the defendants "equally culpable and equally responsible," and then automatically apportioned contribution on an equal pro rata basis.³³¹ Pro rata apportionment, if simple and fair, should be used; when it produces an inequitable result, however, the court should be free to consider other methods.³³²

326. 387 F. Supp. at 171-73.

327. Emphasizing the inherent equitable nature of the contribution doctrine, the court stated that the phrase "as in cases of contract" was meant to avoid common law restrictions on contribution, not "to preclude equitable considerations in awarding contribution in securities cases." *Id.* at 170.

328. So stated, the test sounds similar to the "according to the circumstances" test frequently used in Germany. See note 313 *supra* and accompanying text. Other factors which might appropriately be considered in some cases are financial circumstances of the parties and the presence of insurance—factors certainly considered by the parties in settling.

329. *Gould v. American-Hawaiian S.S. Co.*, 387 F. Supp. 163, 170-72 (D. Del. 1974).

330. *Cf. id.* at 168.

331. 318 F. Supp. at 957-58.

332. Whether the contribution apportionment is for the judge or the jury to determine may depend on the method of apportionment used. When contribution is equal pro rata, there is no factual question for a jury once the liabilities to the injured party have been determined. See, e.g., *Jones v. Schramm*, 436 F.2d 899, 903 n.11 (D.C. Cir. 1970) (contribution appropriately reserved for court determination). If the method is comparative negligence or relative culpability, proportionate fault is a factual question properly decided by a jury. See *Kohr v. Allegheny Airlines, Inc.*, 504 F.2d 400, 405 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975); *Bohlen, supra* note 47, at 568; *Gregory, supra* note 38, at 374. If a settlement is involved, the trier of fact must also determine its reasonableness. See *Kohr v. Allegheny Airlines, Inc., supra*. Under the English statute, the court apportions all contribution, but the Federal Securities Code would normally leave apportionment of comparative fault to the jury. See ALI FED. SEC. CODE § 1417 (f), Comment 3(b) (Tent. Draft No. 2, 1973); *cf. Gregory, supra*. If a complicated case requires weighing factual issues and legal policies, the court is best equipped to re-

Flexibility creates problems of its own. To alleviate the consequent uncertainty of allocation, parties may wish to allocate by contract their contribution shares; they are free to do so if the contracts do not violate public policy.³³³ At present, a provision for full indemnity will normally be unenforceable, as will any provision that encourages lax or negligent conduct regarding securities laws duties. The uncertainty of allocation also suggests settling defendants may have to remain parties to a lawsuit that continues against nonsettling defendants in order to litigate the extent of their faults, responsibilities, and equities, at least if there is a counterclaim for contribution. On the one hand, the presence of the settling defendants may be necessary to allocate fairly the contribution shares.³³⁴ On the other hand, the settling defendants may no longer care how the shares are allocated. If the plaintiff has agreed to indemnify the settling defendants for any contribution they must pay, or has agreed to reduce his claim by the share allocable to the settling defendants, the plaintiff is now the real party in interest.³³⁵ Whether the settling parties must remain in the suit depends on so many still unanswered questions that a general answer is yet impossible. Some of the relevant questions can be listed: Does the settlement terminate

solve the question, especially if no single formula such as culpability or responsibility can determine the outcome. When partial settlements or multiple trials are involved, the jury is even less useful and more inefficient, because it must hear evidence regarding culpability. Cf. *State Mut. Life Assur. Co. of America v. Arthur Andersen & Co.*, 63 F.R.D. 389, 392-94 (S.D.N.Y. 1974).

333. The ALI FED. SEC. CODE § 1418 (f)(1) expressly provides that liable parties "may allocate liability among themselves by contract made either before or after liability is imposed." Allocation of liability among participating underwriters by contract is fairly common—generally in proportion to the underwriting commitment. See Freund & Hacker, *supra* note 5, at 480. See also *id.* at 485-94 (proposed contract provisions). One writer proposes a contractual method for apportioning liabilities under § 11 of the Securities Act in which the total liability would be allocated to each material error according to the market effects of the error; this liability would in turn be allocated among the defendants responsible for that error. Comment, *Section 11 of the Securities Act—A Proposal for Allocating Liability*, 45 WASH. L. REV. 95, 116-27 (1970). Such a contract, although perhaps enforceable, seems infeasible in certainty and ease of application. Arbitrating the allocation of liabilities seems simpler than submitting the errors to investment analysts for market effect determinations; if so, parties would have little use for such a restrictive contract, suited only to § 11 liabilities.

334. See, e.g., UTAH CODE ANN. § 78-27-43(2) (Supp. 1975), criticized in Thode, *supra* note 211, at 432-33 (settling defendant is not released from liability to make contribution unless, among other things, "the issue of proportionate fault is litigated *between joint tort-feasors in the same action*") (emphasis added).

335. See *Mielcarek v. Knights*, 50 App. Div. 2d 122, —, 375 N.Y.S.2d 922, 926-27 (1975); Thode, *supra* note 211, at 432-33.

contribution claims against settling defendants? Does the settlement terminate claims against nonsettling defendants by the settling defendants? What bases or factors will the court consider in allocating contribution shares? Is it relevant which provision of the securities laws was violated? Is the settlement silent on contribution or does it adjust the plaintiff's claim or provide for indemnity in the event of contribution claims? Answering these questions will take time, and even then the answers may vary from court to court, case to case, and defendant to defendant.

VIII. CONCLUSION

While federal courts have become increasingly hostile to claims for indemnification in securities suits, they have simultaneously become receptive to claims for contribution. If the securities acts failed to provide expressly for contribution, the courts have implied such a right. Creating the right, however, is only a first step. How and when the right can be claimed and what amount can be recovered are questions the courts are just beginning to answer. Though state practices provide some guidance, their utility is limited not only by lack of uniformity but also by the differing purpose of contribution in a typical personal injury suit and in a securities suit. The only guidelines in those securities provisions expressly providing a right of contribution is the phrase "may recover contribution as in cases of contract."³³⁶ A narrow reading of this language would limit courts to awarding and apportioning contribution solely as in a contracts case. More likely Congress intended to avoid the common law restrictions on contribution in tort cases and did not intend "to preclude equitable considerations in awarding contribution in securities cases."³³⁷ The most serious problems confronting the courts in resolving contribution claims undoubtedly lie in the area of partial pretrial settlements. The competing considerations of promoting settlements, doing substantial justice to all parties, and fulfilling the goals of federal securities policy are most sharply contradictory in such settlements. The number and magnitude of the unresolved questions in this field argues strongly against the premature appearance of hard and fast rules, and equally strongly in favor of continuing judicial flexibility in contribution claims.

336. See text accompanying notes 21-32 *supra*.

337. *Gould v. American-Hawaiian S.S. Co.*, 387 F. Supp. 163, 170 (D. Del. 1974); see text accompanying notes 32-34 *supra*.