

ALLOCATION OF DAMAGES UNDER THE FEDERAL SECURITIES LAWS

I. INTRODUCTION

Contribution and indemnity are the two most common techniques for distributing judgment and settlement costs among joint violators of the federal securities laws. Contribution, which involves the distribution of costs among jointly liable¹ parties, requires each party to pay a proportionate share of the damages.² By contrast, indemnity shifts the entire loss from one party to another.³ Increasing judicial hostility toward indemnity contracts,⁴ however, has caused a growing number of

1. In order to seek contribution, a party must be liable to the same person for the same harm. F. HARPER & F. JAMES, *THE LAW OF TORTS* § 10.1 (1956); W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 50 (4th ed. 1971); *RESTATEMENT (SECOND) OF TORTS* § 886A (1979). See also *Phillips-Jones Corp. v. Parmley*, 302 U.S. 233, 236 (1937) (“[t]he right to sue for contribution does not depend upon a prior determination that the defendants are liable, because whether they are liable is the matter to be decided in the suit”); *Marrero v. Abraham*, 473 F. Supp. 1271, 1277 (E.D. La. 1979) (actions of joint tortfeasors may be independent as long as both induce the same harm).

2. See W. PROSSER, *supra* note 1, § 50, at 310; *RESTATEMENT OF RESTITUTION* § 81 (1937). The goal of contribution is the equitable distribution of damages among those persons who have jointly caused an identical harm by requiring each to pay his proportionate share. See Fischer, *Contribution in 10b-5 Actions*, 33 *BUS. LAW.* 1821, 1821 (1978).

The theoretical basis of contribution seems to be in doubt. 25 *AM. U.L. REV.* 203, 217-18 (1975). While some cases have suggested that it is based on an implied contract, other cases have suggested quasi-contract as a more appropriate theory to prevent unjust enrichment. *Id.* Two commentators have argued, however, that it makes no difference what basis is accepted as long as the court follows principles of equity and justice and attempts to be fair to all the parties. See Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 *U. PA. L. REV.* 130, 137 (1932); Turck, *Contribution Between Tortfeasors in American and German Law—A Comparative Study*, 41 *TUL. L. REV.* 1, 28 (1966).

3. See *Heizer Corp. v. Ross*, 601 F.2d 330, 331 (7th Cir. 1979); W. PROSSER, *supra* note 1, § 51 at 310; Ruder, *Multiple Defendants in Securities Law Fraud Cases: Aiding and Abetting, Conspiracy, In Pari Delicto, Indemnification, and Contribution*, 120 *U. PA. L. REV.* 597, 647 (1972).

4. See *Globus v. Law Research Serv., Inc.*, 418 F.2d 1276, 1288 (2d Cir. 1969), *cert. denied*, 397 U.S. 913 (1970); Freund & Hacker, *Cutting Up the Humble Pie: A Practical Approach to Apportioning Litigation Risks Among Underwriters*, 48 *ST. JOHN'S L. REV.* 461, 472-73 (1974); Note, *The Role of Contribution in Determining Underwriters' Liability Under Section 11 of the Securities Act of 1933*, 63 *VA. L. REV.* 79, 87 (1977).

The first case to deny enforcement of an indemnity claim in the federal securities area was *Globus v. Law Research Serv., Inc.*, 418 F.2d 1276 (2d Cir. 1969), *cert. denied*, 397 U.S. 913 (1970). The jury in the trial court had found that the issuer, underwriter, and president had knowingly misrepresented the status of a material contract in violation of Section 17(a) of the 1933 Act and Section 10(b) of the 1934 Act. *Id.* at 1278-79. Even though the contract by its terms did not apply to intentional violations, *id.* at 1287, the court based its decision on the broad public

policy grounds of deterrence of securities violations, *id.* at 1289. The court noted that civil liability under the federal securities laws was designed not so much to compensate the injured party as to promote enforcement of the Act and to deter negligence and intentional violations by providing a penalty for those who fail in their duty. *Id. Accord*, *Odette v. Shearson, Hammill & Co.*, 394 F. Supp. 946, 957 (S.D.N.Y. 1975); *Gould v. American-Hawaiian S.S. Co.*, 387 F. Supp. 163, 168 (D. Del. 1974), *vacated on other grounds*, 535 F.2d 761 (3d Cir. 1976); *Alexander & Baldwin, Inc. v. Peat, Marwick, Mitchell & Co.*, 385 F. Supp. 230, 238 (S.D.N.Y. 1974). This is called the *in terrorem* effect of civil liability. *See* 3 L. LOSS, *SECURITIES REGULATION* 1831 (2d ed. 1961).

The *Globus* court also noted three other factors that supported its holding: (1) indemnification of the underwriter by the issuer is particularly suspect because the recovery would ultimately come out of the pockets of the shareholders, the very purchasers who were damaged; (2) it is an established principle that one cannot insure himself against his own reckless or willful misconduct; and (3) 17 C.F.R. § 230.460 (1970) supported its decision. 418 F.2d at 1288-89.

17 C.F.R. § 230.460, comment a (1981) states in part:

Insofar as indemnification for liabilities arising under the Securities Act of 1933 may be permitted to directors, officers and controlling persons of the registrant pursuant to the foregoing provisions, or otherwise, the registrant has been advised that in the opinion of the Securities and Exchange Commission such indemnification is against public policy as expressed in the act and is, therefore, unenforceable.

Id.

Since *Globus*, courts have been viewing indemnity contracts with increasing disfavor. *See* *Heizer Corp. v. Ross*, 601 F.2d 330, 334 (7th Cir. 1979); *Herzfeld v. Laventhol, Krekstein, Horwath & Horwath*, 540 F.2d 27, 38 (2d Cir. 1976); *Madigan, Inc. v. Goodman*, 498 F.2d 233, 237 (7th Cir. 1974); *South Side Bank & Trust Co. v. Walston & Co.*, 425 F.2d 40, 43 (7th Cir. 1970); *Marrero v. Abraham*, 473 F. Supp. 1271, 1275-76 (E.D. La. 1979); *McLean v. Alexander*, 449 F. Supp. 1251, 1267 (D. Del. 1978), *rev'd on other grounds*, 599 F.2d 1190 (3d Cir. 1979); *Odette v. Shearson, Hammill & Co.*, 394 F. Supp. 946, 954 (S.D.N.Y. 1975); *Tucker v. Arthur Andersen & Co.*, [1973-1974 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,544 (S.D.N.Y. 1974); *deHaas v. Empire Petroleum Co.*, 286 F. Supp. 809, 815 (D. Colo. 1968), *aff'd in part and vacated in part*, 435 F.2d 1223 (10th Cir. 1970).

All courts currently deny indemnification to intentional securities violators. *See, e.g.*, *Laventhol, Krekstein, Horwath & Horwath v. Horwitch*, 637 F.2d 672, 676 (9th Cir. 1980), *cert. denied*, 101 S. Ct. 3114 (1981); *Madigan, Inc. v. Goodman*, 498 F.2d 233, 238 (7th Cir. 1974); *South Side Bank & Trust Co. v. Walston & Co.*, 425 F.2d 40, 43 (7th Cir. 1970); *McLean v. Alexander*, 449 F. Supp. 1251, 1266 (D. Del. 1978), *rev'd on other grounds*, 599 F.2d 1190 (3d Cir. 1979); *Herzfeld v. Laventhol, Krekstein, Horwath & Horwath*, 378 F. Supp. 112, 135 (S.D.N.Y. 1974), *aff'd in part and rev'd in part*, 540 F.2d 27 (2d Cir. 1976); *Globus v. Law Research Serv., Inc.*, 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); *deHaas v. Empire Petroleum Co.*, 286 F. Supp. 809, 816 (D. Colo. 1968), *aff'd in part and vacated in part*, 435 F.2d 1223 (10th Cir. 1970).

At present there is a split of authority concerning whether all indemnification contracts or only those that allow an intentional violator to recover indemnity are void as against public policy. *Compare* *South Side Bank & Trust Co. v. Walston*, 425 F.2d 40, 43 (7th Cir. 1970) (all indemnification contracts unenforceable); *Gould v. American-Hawaiian S.S. Co.*, 387 F. Supp. 163, 168 (D. Del. 1974) (same), *vacated on other grounds*, 535 F.2d 761 (3d Cir. 1976) and *State Mut. Life Assurance Co. v. Peat, Marwick, Mitchell & Co.*, 49 F.R.D. 202, 213 (S.D.N.Y. 1969) (same) with *Madigan, Inc. v. Goodman*, 498 F.2d 233, 238 (7th Cir. 1974) (no indemnification of intentional violators); *McLean v. Alexander*, 449 F. Supp. 1251, 1267 (D. Del. 1978) (same), *rev'd on other grounds*, 599 F.2d 1190 (3d Cir. 1979); *Odette v. Shearson, Hammill & Co.*, 394 F. Supp. 946, 954 (S.D.N.Y. 1975) (same); *Muth v. Deckert, Price & Rhoads*, 391 F. Supp. 935, 939 (E.D. Pa. 1975)

courts and commentators to focus on contribution.⁵ Because the con-

(same); *Herzfeld v. Laventhol, Krekstein, Horwath & Horwath*, 378 F. Supp. 112, 135 (S.D.N.Y. 1974) (same), *aff'd in part and rev'd in part*, 540 F.2d 27 (2d Cir. 1976); *Globus v. Law Research Serv., Inc.*, 287 F. Supp. 188, 199 (S.D.N.Y. 1968) (same), *aff'd in part and rev'd in part*, 418 F.2d 1276 (2d Cir. 1969), *cert. denied*, 397 U.S. 913 (1970) and *deHaas v. Empire Petroleum Co.*, 286 F. Supp. 809, 815 (D. Colo. 1968) (same), *aff'd in part and vacated in part*, 435 F.2d 1223 (10th Cir. 1970).

This distinction between intentional and negligent violators has lost much of its importance in Rule 10b-5 actions since the Supreme Court's decision in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976). The Court in *Hochfelder* ruled that scienter (mental state embracing the intent to deceive, manipulate, or defraud) was a necessary element in a Rule 10b-5 action. *Id.* at 212. Thus, present law under Rule 10b-5 precludes any claim for indemnity, because a defendant can now be held liable only if he intentionally violates Rule 10b-5, and all courts are in agreement that intentional wrongdoers cannot obtain indemnity. *See Heizer Corp. v. Ross*, 601 F.2d 330, 334 (7th Cir. 1979) ("[i]n order to be found liable under Rule 10b-5, one must be found to have scienter or intent to defraud and such a person should not get off . . . through indemnification"); *Marrero v. Abraham*, 473 F. Supp. 1271, 1275-76 (E.D. La. 1979) ("[p]resent state of the law under Rule 10b-5 precludes any claim for indemnity . . . [because] Abraham can be held liable to Marrero . . . only if he acted with scienter, the intent to deceive, manipulate, or defraud"); *McLean v. Alexander*, 449 F. Supp. 1251, 1266 n.49 (D. Del. 1978) ("under *Ernst & Ernst v. Hochfelder* . . . active wrongdoing alone gives liability under Rule 10b-5 and consequently Rule 10b-5 is an inappropriate context for application of the principles of indemnification"), *rev'd on other grounds*, 599 F.2d 1190 (3d Cir. 1976).

Some district courts have ruled that recklessness also satisfies the scienter requirement of *Hochfelder*. *See Spectrum Financial Co. v. Marconsult*, 608 F.2d 377, 381 (9th Cir.), *cert. denied*, 446 U.S. 936 (1980); *Mansbach v. Prescott, Ball & Turben*, 598 F.2d 1017, 1024 (6th Cir. 1979); *Nelson v. Serwold*, 576 F.2d 1332, 1337 (9th Cir.), *cert. denied*, 439 U.S. 970 (1978); *Rolf v. Blyth, Eastman, Dillon & Co.*, 570 F.2d 38, 44 (2d Cir.), *cert. denied*, 439 U.S. 1039 (1978); *Coleco Indus., Inc. v. Berman*, 567 F.2d 569, 574 (2d Cir. 1977), *cert. denied*, 439 U.S. 830 (1978); *First Va. Bankshares v. Benson*, 559 F.2d 1307, 1314 (5th Cir. 1977), *cert. denied*, 435 U.S. 952 (1978); *Sundstrand Corp. v. Sun Chemical Corp.*, 553 F.2d 1033, 1039-40 (7th Cir.), *cert. denied*, 434 U.S. 875 (1977).

The Supreme Court in *Aaron v. SEC*, 446 U.S. 680, 691 (1980), held that § 17(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 77q(a) (1976), requires scienter to be present in order to establish a cause of action under § 17(a)(1), but not under § 17(a)(2) or (3). Thus, indemnity is never appropriate under § 17(a)(1), but may be under § 17(a)(2) or (3). Section 17(a), which applies only to sellers, provides:

It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

- (1) to employ any device, scheme, or artifice to defraud, or
- (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
- (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

15 U.S.C. § 77q(a) (1976).

5. *See Fischer, supra* note 2; *Freund & Hacker, supra* note 4; *Ruder, supra* note 3; *Note, supra* note 4; *Note, Contribution Under the Federal Securities Laws*, 1975 WASH. U.L.Q. 1256.

In certain situations, although a party's culpability may preclude indemnity, contribution may

cept of contribution is relatively new in the securities area, courts have not yet developed a uniform approach for determining each party's proportionate share.⁶

Contribution is an equitable doctrine based on the principle that all parties responsible for a wrong should share the financial burden

still be appropriate. *See, e.g., Madigan, Inc. v. Goodman*, 498 F.2d 233, 238 (7th Cir. 1974) (a party "too culpable to be entitled to indemnification . . . may nonetheless be entitled to contribution"); *Nelson v. Quimby Island Reclamation Dist. Facilities Corp.* [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,269, at 96,916-17 (N.D. Cal. 1980) (deterrence policies of securities laws prompt the conclusion that a party should be permitted to receive contribution even if found to be an intentional violator); *Marrero v. Abraham*, 473 F. Supp. 1271, 1277 (E.D. La. 1979) (contribution is appropriate even in the case of the culpable defendant in order to allow for the fair distribution of the damages among the violators); *Odette v. Shearson, Hammill & Co.*, 394 F. Supp. 946, 957-58 (S.D.N.Y. 1975) (deterrence policies of the securities laws that preclude indemnification prompt the conclusion that contribution should be allowed regardless of fault); *Alexander & Baldwin, Inc. v. Peat, Marwick, Mitchell & Co.*, 385 F. Supp. 230, 238 (S.D.N.Y. 1974) ("degree of culpability is not material to the question of whether defendants in a securities fraud case may seek contribution from each other"). *But see Fischer, supra* note 2, at 1827 ("equal culpability may be the *sine qua non* of allowing contribution under the federal securities acts").

The deterrence policies of preventing wrongdoers from escaping all liability are best served by allowing contribution, which requires all parties to share the burden of their actions. *See, e.g., Herzfeld v. Laventhol, Krekstein, Horwath & Horwath*, 540 F.2d 27, 38 (2d Cir. 1976) (denying contribution would dilute the deterrent effect of the securities laws by allowing violators to escape liability for their wrongdoing); *Marrero v. Abraham*, 473 F. Supp. 1271, 1277-78 (E.D. La. 1979) (rule disallowing contribution would make no sense at all in light of deterrence policies of the federal securities laws); *Gould v. American-Hawaiian S.S. Co.*, 387 F. Supp. 163, 169 (D. Del. 1974) ("availability of contribution would tend to insure that all individuals jointly liable for a violation of § 14(a) would have some responsibility for damages"), *vacated on other grounds*, 535 F.2d 761 (3d Cir. 1976); *Alexander & Baldwin, Inc. v. Peat, Marwick, Mitchell & Co.*, 385 F. Supp. 230, 238 (S.D.N.Y. 1974) ("[b]ecause of the deterrent policy of the securities laws, even intentional tortfeasors may obtain contribution so that other tortfeasors will not escape liability"); *Liggett & Myers, Inc. v. Bloomfield*, 380 F. Supp. 1044, 1046 (S.D.N.Y. 1974) (sound policy reasons for allowing contribution are to deter violations of the securities laws and prevent future violations); *Getter v. R.G. Dickinson & Co.*, 366 F. Supp. 559, 569 (S.D. Iowa 1973) ("joint-tortfeasor[s] should be held to contribution to facilitate enforcement of the obligations imposed by the Securities Act").

The only section that precludes a defendant from contribution due to culpability is § 11(f) of the Securities Act of 1933. 15 U.S.C. § 77k(f) (1976).

There are still several American state courts that continue to deny a right to contribution in favor of an intentional tortfeasor. *Huddleston v. Herman & MacLean*, 640 F.2d 534, 557 (5th Cir. 1981). *See W. PROSSER, supra* note 1, § 50, at 308; RESTATEMENT (SECOND) OF TORTS § 886A(3), Comment j (1977).

6. *Compare McLean v. Alexander*, 449 F. Supp. 1251 (D. Del. 1978) (court used a comparative fault allocation), *rev'd on other grounds*, 599 F.2d 1190 (3d Cir. 1979) with *Gould v. American-Hawaiian S.S. Co.*, 387 F. Supp. 163 (D. Del. 1974) (court used a benefits-derived method of allocation), *vacated on other grounds*, 535 F.2d 761 (3d Cir. 1976) and *Herzfeld v. Laventhol, Krekstein, Horwath & Horwath*, 540 F.2d 27 (2d Cir. 1976) (court used a pro rata allocation).

caused by their action.⁷ No one party should bear the sole burden of payment. Rather, all parties should pay the proportionate share of the damages they caused.⁸

Before Congress passed the Securities Act of 1933⁹ and the Securities Exchange Act of 1934,¹⁰ a common law right of contribution among defendants did not exist.¹¹ The securities acts, however, expressly granted a right of contribution in those sections that provided a private right of action.¹² Subsequently, as the federal courts began to recognize implied private rights of action under various antifraud provisions of the securities laws,¹³ litigants urged the courts to imply a right of contribution under these sections.

Although the first court presented with this issue rejected an implied right of contribution,¹⁴ the result was short-lived. The court in *deHaas*

7. W. PROSSER, *supra* note 1, § 50, at 310.

8. Adamski, *Contribution and Settlement in Multiparty Actions Under Rule 10b-5*, 66 IOWA L. REV. 533, 536 (1981); Fischer, *supra* note 2, at 1821; Note, *supra* note 5, at 1261.

9. Securities Act of 1933, 15 U.S.C. §§ 77a-aa (1976).

10. Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-jj (1976).

11. The common-law rule barring contribution originated in the case of *Merryweather v. Nixan*, 8 Term. Rep. 186, 101 Eng. Rep. 1337 (K.B. 1799). Although this case denied contribution only to intentional tortfeasors, early American courts expanded the decision to deny all contribution. See W. PROSSER, *supra* note 1, § 50, at 305-07; Fischer, *supra* note 2, at 1825; Ruder, *supra* note 3, at 647-49.

The Supreme Court acknowledged this rule in *Union Stock Yards Co. v. Chicago, B. & Q. Ry.*, 196 U.S. 217 (1905). The Court stated: "[T]he general principle of law is well settled that one of several wrongdoers cannot recover against another wrongdoer, although he may have been compelled to pay all the damages for the wrong done." *Id.* at 224.

12. Section 9(e) of the Securities Exchange Act of 1934 imposes civil liability on any person who engages in manipulative activities with respect to exchange-listed securities. 15 U.S.C. § 78i(e) (1976). This section provides that "[e]very 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." *Id.*

Section 18 of the Securities Exchange Act of 1934, 15 U.S.C. § 78r (1976), makes a company liable for damages to any person who buys or sells its securities in reliance on a misleading statement contained in any document filed with the Securities and Exchange Commission (SEC). Section 18(b) of the Securities Exchange Act of 1934 provides for a right of contribution similar to that provided by § 9(e) of the 1934 Act. Section 11(f) of the Securities Act of 1933 also grants a right of contribution, but imposes the limitation that a party guilty of fraudulent misrepresentation may not seek contribution from a merely negligent defendant. 15 U.S.C. § 77k(f) (1976).

13. See *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 196-97 (1976) (§ 10(b)); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730 (1975) (§ 10(b)); *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 150-54 (1972) (§ 10(b)); *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 13 n.9 (1971) (§ 10(b)); *J.I. Case Co. v. Borak*, 377 U.S. 426, 430-31 (1964) (§ 14(a)).

14. *Shea v. Ungar* [1964-1966 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 91,558 (S.D.N.Y. 1965). This court refused to depart from the common-law bar against contribution in the absence of express congressional intent. *Id.* at 95,108.

*v. Empire Petroleum Co.*¹⁵ reasoned that because Congress provided for contribution in sections that contain express liability provisions, contribution should also be permitted when the court finds implied liability.¹⁶ The Second Circuit¹⁷ reinforced *deHaas* by affirming the trial court decision in *Globus, Inc. v. Law Research Service, Inc.*¹⁸ The *Globus* trial court reasoned that an implied right of contribution would promote the policy of deterrence by encouraging "diligence, investigation, and compliance."¹⁹ An implied right of contribution is now uniformly recognized under the federal securities laws.²⁰

15. 286 F. Supp. 809 (D. Colo. 1968), *aff'd in part and vacated in part*, 435 F.2d 1223 (10th Cir. 1970).

16. *Id.* at 815-16. Of the seven express civil remedies provided in the Securities Act of 1933 (15 U.S.C. §§ 77k, 77l, 77o (1976)) and the Securities Exchange Act of 1934 (15 U.S.C. §§ 78i, 78p, 78r, 78t (1976)), three provide express rights of contribution: Securities Act of 1933 § 11(f), 15 U.S.C. § 77k(f) (1976); Securities Exchange Act of 1934 § 9(e), 15 U.S.C. § 78i(e) (1976); and Securities Exchange Act of 1934 § 18(b), 15 U.S.C. § 78r(b) (1976). *See* Alexander & Baldwin, *Inc. v. Peat, Marwick, Mitchell & Co.*, 385 F. Supp. 230, 238 (S.D.N.Y. 1974):

There is no express statutory provision for contribution with respect to Sections 10(b) of the 1934 Act, or 17(a) of the 1933 Act, undoubtedly because there is no express right of action under these sections. . . . [T]he policy considerations which persuaded Congress to allow contribution where it granted a private right of action should persuade courts to allow contribution where the courts implied such a right.

17. *Globus v. Law Research Serv., Inc.*, 442 F.2d 1346 (2d Cir.), *cert. denied*, 404 U.S. 941 (1971).

18. 318 F. Supp. 955, 958 (S.D.N.Y. 1970), *aff'd*, 442 F.2d 1346 (2d Cir.), *cert. denied*, 404 U.S. 941 (1971).

19. *Id.* at 958 (quoting *Globus v. Law Research Serv., Inc.*, 418 F.2d 1276, 1289 (2d Cir. 1969), *cert. denied*, 397 U.S. 913 (1970)). The court also noted the general state trend toward contribution and that the granting of contribution in other liability sections provided a persuasive analogy. *Id.* at 956-57.

This court's analysis is consistent with the established approach of the Supreme Court in interpreting the various federal securities provisions as integrated and consistent parts of a single framework. *See* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 206-11 (1976); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 749-54 (1975). *See also* ALI FED. SEC. CODE § 1724 (Proposed Official Draft 1978).

20. *See* Huddleston v. Herman & MacLean, 640 F.2d 534, 556-59 (5th Cir. 1981) (implied right of contribution under § 10(b)); Laventhol, Kreckstein, Horwath & Horwath v. Horwitch, 637 F.2d 672, 676 (9th Cir. 1980) (same), *cert. denied*, 101 S. Ct. 3114 (1981); Heizer Corp. v. Ross, 601 F.2d 330, 333 (7th Cir. 1979) (implied right of contribution under Rule 10b-5 and § 10(b)); *In re* National Student Marketing Litigation, 517 F. Supp. 1345, 1346-48, (D.D.C. 1981) (implied right of contribution under § 10(b)); Stratton Group, Ltd. v. Sprayregen, 466 F. Supp. 1180, 1185 (S.D.N.Y. 1979) (now well settled that implied right of contribution exists under the securities laws); McLean v. Alexander, 449 F. Supp. 1251, 1266-68 (D. Del. 1978) (implied right of contribution under § 10(b)), *rev'd on other grounds*, 599 F.2d 1190 (3d Cir. 1979); Rice v. McDonnell & Co., 442 F. Supp. 952, 954 (S.D.N.Y. 1977) (implied right of contribution under federal securities laws); Wassel v. Eglowsky, 399 F. Supp. 1330, 1367 (D. Md. 1975) (implied right of contribution under § 10(b)), *aff'd*, 542 F.2d 1235 (4th Cir. 1976); Odette v. Shearson, Hammill & Co., 394 F.

Although federal common law governs contribution in actions involving violations of the securities acts,²¹ federal courts nevertheless do

Supp. 946, 958-59 (S.D.N.Y. 1975) (implied right of contribution under §§ 10(b), 12(2), 15(c), and 17(a)); *Muth v. Dechert, Price & Rhoads*, 391 F. Supp. 935, 939 (E.D. Pa. 1975) (implied right of contribution under § 10(b)); *Gould v. American-Hawaiian S.S. Co.*, 387 F. Supp. 163, 167 (D. Del. 1974) (implied right of contribution under § 14(a)), *vacated on other grounds*, 535 F.2d 761 (3d Cir. 1976); *Alexander & Baldwin, Inc. v. Peat, Marwick, Mitchell & Co.*, 385 F. Supp. 230, 238 (S.D.N.Y. 1974) (implied right of contribution under § 10(b)); *Getter v. R.G. Dickinson & Co.*, 366 F. Supp. 559, 569 (S.D. Iowa 1973) (implied right of contribution under §§ 10(b), 12(2), 15(c), and 17(a)); *Altman v. Liberty Equities Corp.*, 54 F.R.D. 620, 623 (S.D.N.Y. 1972) (implied right of action under § 10(b)).

The Supreme Court has not yet spoken on the issue of whether there is an implied right of contribution under the securities acts. *See* cases cited *supra*. However, the Court did expressly decline the opportunity to restrict this expansion of the right of contribution by denying certiorari in a recent Ninth Circuit case. *Frank v. United States Trust Co.*, 101 S. Ct. 3114 (1981), *denying cert. sub nom. to Laventhol, Krekstein, Horwath & Horwath v. Horwath*, 637 F.2d 672 (9th Cir. 1980). This denial has been construed as indicating the Supreme Court's acceptance of the implied right of contribution under the federal securities laws. *In re National Student Marketing Litigation*, 517 F. Supp. 1345, 1346-48 (D.D.C. 1981).

21. *See Huddleston v. Herman & MacLean*, 640 F.2d 534, 557 (5th Cir. 1981); *Alley v. Miramon*, 614 F.2d 1372, 1381 n.18 (5th Cir. 1980); *Heizer Corp. v. Ross*, 601 F.2d 330, 331 (7th Cir. 1979); *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179, 1182 (8th Cir. 1979); *In re National Student Marketing Litigation*, 517 F. Supp. 1345, 1349 (D.D.C. 1981); *McLean v. Alexander*, 449 F. Supp. 1251, 1267 (D. Del. 1978), *rev'd on other grounds*, 599 F.2d 1190 (3d Cir. 1979); *Gould v. American-Hawaiian S.S. Co.*, 387 F. Supp. 163, 167 (D. Del. 1974), *vacated on other grounds*, 535 F.2d 761 (3d Cir. 1976); *Liggett & Meyers, Inc. v. Bloomfield*, 380 F. Supp. 1044, 1046 (S.D.N.Y. 1974); *Altman v. Liberty Equities Corp.*, 54 F.R.D. 620, 625 (S.D.N.Y. 1972); *Globus, Inc. v. Law Research Serv., Inc.*, 318 F. Supp. 955, 958 n.2 (S.D.N.Y.), *aff'd*, 442 F.2d 1346 (2d Cir. 1970), *cert. denied*, 404 U.S. 941 (1971); *deHaas v. Empire Petroleum Co.*, 286 F. Supp. 809, 815-16 (D. Colo. 1968), *aff'd in part and vacated in part*, 435 F.2d 1223 (10th Cir. 1970). *But see Herzfeld v. Laventhol, Krekstein, Horwath & Horwath*, 540 F.2d 27, 38-39 (2d Cir. 1976); *New York Stock Exch., Inc. v. Sloan*, [1980 Transfer Binder] FED. SEC. L. REP. ¶ 97,618, at 98,341-42 (S.D.N.Y.); *Stratton Group, Ltd. v. Sprayregen*, 466 F. Supp. 1180, 1189 (S.D.N.Y. 1979); *State Mut. Life Assurance Co. v. Peat, Marwick, Mitchell & Co.*, 49 F.R.D. 202, 212 (S.D.N.Y. 1969).

This is an exception to the general rule that a court should look to the applicable state statute when determining a third-party defendant's liability for contribution under a federal statute. *Brown v. UAW*, 85 F.R.D. 328, 334 n.1 (W.D. Mich. 1980). *See* 3 L. Loss, *supra* note 4, at 1771-72:

In federally created actions at law "the silence of Congress has been interpreted to mean that it is federal policy to adopt the local law of limitation." This rule is followed even though it often makes the result vary depending upon the state in which the action is brought, and even though, especially under a statute like the 1934 act which provides for a broad choice of venue and nationwide service of process, it permits the plaintiff a considerable amount of forum-shopping.

Id. (footnotes omitted). *See also Fischer, supra* note 2, at 1828:

The position of the several federal courts, which hold that the application of the doctrine of contribution in a 10b-5 case is a matter of federal law, appears to be inconsistent with the general tendency of the federal courts to adopt and apply pertinent state statutes in areas left unprovided for in a federal statutory scheme.

not approach contribution issues uniformly.²² Nonetheless, certain issues almost always arise in cases involving contribution. This Note concentrates on two of the major contribution issues. First, this Note analyzes the effect of settlements on settling and nonsettling joint violators and then suggests an efficient approach to settlement problems that is consistent with the policies of the securities acts. Second, this Note discusses various allocation methods and suggests an approach for a court faced with the problem of allocating a plaintiff's judgment award among joint defendants.

II. EFFECTS OF SETTLEMENTS

Private actions under the federal securities laws are resolved primar-

Courts justify this exception by contending that contribution is an important element in the enforcement of the securities laws and is properly governed by federal law in order to provide uniformity, which is important "in a scheme as comprehensive as the federal regulation of securities." *Marrero v. Abraham*, 473 F. Supp. 1271, 1276 (E.D. La. 1979). *See Heizer Corp. v. Ross*, 601 F.2d 330, 331 (7th Cir. 1979); *Getter v. R.G. Dickinson & Co.*, 366 F. Supp. 559, 569 (S.D. Iowa 1973). *See generally* Fischer, *supra* note 2, at 1828-29.

22. Traditionally, the federal common law did not even recognize a right of contribution. *See Halcyon Lines v. Haenn Shop Ceiling & Refitting Corp.*, 342 U.S. 282, 285 (1952) (refused to fashion a rule of contribution in the absence of specific legislation); *Union Stock Yards Co. v. Chicago, B. & Q. Ry.*, 196 U.S. 217, 224 (1905) ("general principle of law is well settled that one of several wrongdoers cannot recover against another wrongdoer, although he may have been compelled to pay all the damages for the wrong done").

The traditional bar against contribution adopted by the federal courts was justified on three grounds: (1) the effectiveness of discouraging antisocial conduct would be diluted; (2) contribution is an equitable remedy and one should not be able to come into equity with unclean hands; and (3) judicial time and energy should be conserved. *See Bohlen, Contribution and Indemnity Between Tortfeasors*, 21 CORNELL L.Q. 552, 557-60 (1936); Jones, *Contribution Among Tortfeasors*, 11 U. FLA. L. REV. 175 (1958); Leflar, *supra* note 2, at 131-46; Turck, *supra* note 2, at 10.

Now, the courts are split over the question of whether there is a federal common-law right of contribution. *Compare* *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 101 S. Ct. 2061 (1981) (antitrust decision in which Supreme Court denied a federal common-law right to contribution) *and* *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77 (1981) (no federal right of contribution for violations of Title VII of the Civil Rights Act of 1974) *with* *United States v. Reliable Transfer Co.*, 421 U.S. 397, 411 (1975) (contribution allowed in collision admiralty case); *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106, 110 (1974) (contribution allowed in non-collision admiralty cases) *and* *Kohr v. Allegheny Airlines, Inc.*, 504 F.2d 400 (7th Cir. 1974) (federal common law of contribution adopted regarding mid-air collisions). It must be noted, however, that admiralty law is often considered "an historical aberration of the federal common law." Note, *Carve-Out as an Answer to the Contribution Question in Private Antitrust Litigation*, 58 WASH. U.L.Q. 975, 1000 (1980) (citing 1 E. BENEDICT, ON ADMIRALTY § 104 (7th ed. 1974) and G. GILSONER & C. BLACK, THE LAW OF ADMIRALTY 2 (2d ed. 1975)). *See also* Leflar, *supra* note 2, at 138-39 ("[i]n admiralty, the courts have felt free to develop their own rules uncontrolled by the common law decisions").

ily by settlement rather than by trial.²³ In cases involving more than one defendant, however, some of the defendants may settle with the injured party while one or more of the other defendants choose not to settle.²⁴ When this mixture of settling and nonsettling defendants develops, the plaintiff must decide whether to bring action against the remaining nonsettling parties.²⁵ If the plaintiff anticipates a recovery significantly greater than the estimated litigation costs, the claim is pursued.²⁶ If the plaintiff then recovers against the nonsettling defendants, two questions arise: first, whether the nonsettling defendants can seek contribution from the parties who originally settled with the plaintiff; and second, whether the plaintiff's settlement proceeds will have an effect on the judgment awarded the plaintiff against the nonsettling defendants.²⁷

23. See Adamski, *supra* note 8, at 533; Mullaney, *Theories of Measuring Damages in Securities Cases and the Effects of Damages on Liability*, 46 *FORDHAM L. REV.* 277, 277 (1977).

24. See Note, *supra* note 5, at 1292. In some cases the defendants will contest liability or damages and refuse to settle, while in others, the plaintiff will refuse to release certain defendants. *Id.* There also may be nonmonetary factors involved such as time, publicity, or a desire just to return to ordinary business routine. See Freund & Hacker, *supra* note 4, at 477; Note, *supra* note 5, at 1292.

25. If the plaintiff does pursue this claim, the court will have to determine the effect of the settlement on the judgment award. The effect of settlements on the right of contribution is a problem that has plagued courts and commentators in recent years. See Fischer, *supra* note 2, at 1831-36; Freund & Hacker, *supra* note 4, at 492-93; Note, *supra* note 5, at 1292-1303. Cf. Schwartz, Simpson & Arnold, *Contribution in Private Actions Under the Federal Antitrust Laws*, 33 *Sw. L.J.* 779, 809-15 (1979) (addressing the effect of settlement on the right of contribution in antitrust field); Note, *Contribution and Antitrust Policy*, 78 *MICH. L. REV.* 890, 906-10 (1980) (same).

This is also an issue that has plagued the state courts in tort cases. W. PROSSER, *supra* note 1, § 50, at 309-10 states:

The effect of a settlement with the plaintiff by the contribution defendant, in which he received a release or a covenant not to sue, has perhaps given more difficulty than any other problem. The usual holding has been that the defendant so relieved of liability is not released from contribution. There has been much dissatisfaction with this because it becomes impossible for a defendant to settle the case, take a release, and close the file, since the potential for liability is still open. On the other hand, the proposed solution of a pro rata reduction of the amount remaining due discourages plaintiffs from accepting smaller settlements from one defendant. In either case, both parties complain.

Id. (footnotes omitted).

26. See Freund & Hacker, *supra* note 4, at 477; Note, *supra* note 5, at 1292.

27. After a court decides whether to allow contribution, the next step is to determine the effect of the prior settlement on the size of the judgment recoverable by the plaintiff. A court should award damages to make the plaintiff whole, but should not grant him recovery for more than his injury. Securities Exchange Act of 1934 § 28(a), 15 U.S.C. § 78bb(a) (1976), provides in part:

The rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity, but no person permitted to

A. Settlements: Competing Objectives

Courts must balance two competing objectives when determining

maintain a suit for damages under the provisions of this chapter shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of.

See also *McLean v. Alexander*, 449 F. Supp. 1251, 1271 (D. Del. 1978) ("the guiding principle is that the plaintiff is entitled to be made whole but that he may not be able to recover more than his loss"), *rev'd on other grounds*, 599 F.2d 1190 (3d Cir. 1979); *Gould v. American-Hawaiian S.S. Co.*, 387 F. Supp. 163, 172 (D. Del. 1974) (fundamental principle is that a plaintiff may not recover more than his injury in the legal process), *vacated on other grounds*, 535 F.2d 761 (3d Cir. 1976); *Alexander & Baldwin, Inc. v. Peat, Marwick, Mitchell & Co.*, 385 F. Supp. 230, 239-40 (S.D.N.Y. 1974) ("[f]airness between the parties . . . requires that when one tortfeasor settles with an injured party, he should get no more than he bargained for"). Thus, in order to avoid unjustly enriching the plaintiff, the gross judgment should be reduced by at least the amount received in settlement.

The nonsettling defendant, however, still has the burden of demonstrating that the same measure of damages allocated in the settlement would have been applied to the settling defendants if they had been named in the original action. If any part of the settlement award was based on a claim not presented at trial, the part of the award allocated to that claim may not be credited against the judgment award or the settling parties' proportionate share. *See* *McLean v. Alexander*, 449 F. Supp. 1251, 1256 (D. Del.) (claims against the settling parties are derivative in the sense that settling parties are only liable if plaintiff would have prevailed against them in the original action), *rev'd on other grounds*, 599 F.2d 1190 (3d Cir. 1979); *Gould v. American-Hawaiian S.S. Co.*, 387 F. Supp. 163, 172 (D. Del. 1974) (defendants must show that the same measure of damages was used in computing settlement award as well as judgment award), *vacated on other grounds*, 535 F.2d 761 (3d Cir. 1976); *Alexander & Baldwin, Inc. v. Peat, Marwick, Mitchell & Co.*, 385 F. Supp. 230, 239-40 (S.D.N.Y. 1974) (since an undetermined part of a settlement related to a claim in which original defendant was not liable, that part of award cannot be credited against judgment).

See also UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 4 (1939), which states:

A release by the injured person of one joint tortfeasor, whether before or after judgment, does not discharge the other tortfeasors unless the release so provides; but reduces the claim against the other tortfeasors in the amount of the consideration paid for the release, or in any amount or proportion by which the release provides that the total claim shall be reduced, if greater than the consideration paid.

In addition to reducing the judgment award, a court should also reduce the settling party's proportionate share of the damages by the amount he previously paid in settlement. *McLean v. Alexander*, 449 F. Supp. 1251, 1271 (D. Del. 1978) (fairness demands that settling party's share should be reduced by the settlement amount or else settling party in essence will have to pay damages twice), *rev'd on other grounds*, 599 F.2d 1190 (3d Cir. 1979); *Alexander & Baldwin, Inc. v. Peat, Marwick, Mitchell & Co.*, 385 F. Supp. 230, 239-40 (S.D.N.Y. 1974) ("fairness between the parties" requires that the settling defendants should be entitled to deduct from their proportionate share the sum already paid in settlement).

For example, suppose A and B combined to cause C \$100,000 in damages, A and B each being responsible for one-half the harm. Subsequently A settles with C for \$25,000. At trial, C's judgment should be reduced to \$75,000 (\$100,000 minus \$25,000 already received), while A only should be liable for \$25,000 in contribution (\$50,000 proportionate share minus \$25,000 prior payment). This would result in C receiving his full \$100,000 equally from both A and B.

If A's proportionate share was not reduced by his prior payment in settlement of \$25,000, A would have to contribute half of the judgment award, or \$37,500. This would result in A paying

whether to allow the nonsettling defendants the right to obtain contribution from the settling defendant.²⁸ On the one hand, public policy strongly favors settlement in securities suits.²⁹ The motivations for settlement include avoidance of the potential liability,³⁰ limitation of the time expended,³¹ and reduction in the expenses of securities litigation.³² A defendant's desire to settle will be diminished significantly if he knows that a court will force him subsequently to contribute to the nonsettling party.³³

On the other hand, barring contribution from settling defendants may operate to make nonsettling defendants pay a disproportionate share of the damages caused by all—both settling and nonsettling—defendants.³⁴ Denying contribution also increases the possibility of

\$62,500 (\$25,000 + \$37,500), while B would pay only \$37,500. Such a burden on a settling party would significantly deter settlements.

28. See *Laventhol, Krekstein, Horwath & Horwath v. Horwitch*, 637 F.2d 672, 675 (9th Cir. 1980), *cert. denied*, 101 S. Ct. 3114 (1981); *Gomes v. Brodhurst*, 394 F.2d 465, 468-69 (3d Cir. 1967); *McLean v. Alexander*, 449 F. Supp. 1251, 1266 (D. Del. 1978), *rev'd on other grounds*, 599 F.2d 1190 (3d Cir. 1979); *Altman v. Liberty Equities Corp.*, 54 F.R.D. 620, 624-25 (S.D.N.Y. 1972). See generally *W. PROSSER*, *supra* note 1, § 50, at 309-10. See also *Fischer*, *supra* note 2, at 1833 (results in settlement cases should further the competing policies of equitable sharing of costs among the defendants, encouraging settlements, and promoting finality).

29. See, e.g., *Slade v. Shearson, Hammill & Co.*, 79 F.R.D. 309, 312 (S.D.N.Y. 1978); *Stull v. Baker*, 410 F. Supp. 1326, 1332 (S.D.N.Y. 1976); *Feder v. Harrington*, 58 F.R.D. 171, 174 (S.D.N.Y. 1972). See generally *Adamski*, *supra* note 8, at 534; *Fischer*, *supra* note 2, at 1831-36.

30. See, e.g., *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 865 (2d Cir. 1968) (Friendly, J., concurring), *cert. denied*, 404 U.S. 1005 (1971). See generally *Adamski*, *supra* note 8, at 533.

31. See, e.g., *Huddleston v. Herman & MacLean*, 640 F.2d 534 (5th Cir. 1981) (eight years from time of filing suit in district court until appellate court decision); *In re National Student Marketing Litigation*, 517 F. Supp. 1345 (D.D.C. 1981) (11 years).

32. See Note, *supra* note 25, at 913; Note, *Settlement in Joint Tort Cases*, 18 STAN. L. REV. 486, 489 (1966).

33. See *Gomes v. Brodhurst*, 394 F.2d 465, 468 (3d Cir. 1967); *McLean v. Alexander*, 449 F. Supp. 1251, 1266 (D. Del. 1978), *rev'd on other grounds*, 599 F.2d 1190 (3d Cir. 1979); *Altman v. Liberty Equities Corp.*, 54 F.R.D. 620, 624-25 (S.D.N.Y. 1972). The argument has been raised that allowing contribution in settlement cases would undermine the deterrence policies of the securities laws. See, e.g., Note, *supra* note 25, at 910-11. This argument is based on the theory that most potential defendants are adverse to risk and would prefer the certainty of a smaller loss with contribution to the possibility of a larger loss without contribution. *Id.* Compare *McLean v. Alexander*, 449 F. Supp. at 1266 (to deny contribution favors deterrence policies of the Securities Acts), *rev'd on other grounds*, 599 F.2d 1190 (3d Cir. 1979) with *Altman v. Liberty Equities Corp.*, 54 F.R.D. at 624-25 (to allow contribution favors deterrence policies of the Acts).

34. A dramatic example of a defendant bearing losses significantly greater than his proportionate share due to the unavailability of contribution is the antitrust case of *Olson Farms, Inc. v. Safeway Stores, Inc.*, [1979-2] Trade Cas. (CCH) ¶ 79,699 (10th Cir.), in which the nonsettling

collusion between the plaintiff and settling defendants.³⁵ In addition, when one defendant settles in a jurisdiction that habitually denies contribution, the plaintiff can coerce the remaining defendants into accepting unfavorable settlements by subjecting them to increased liability.³⁶

The courts in securities cases routinely hold that contribution is available from the nonsettling defendant.³⁷ And despite objections

party, who was the smallest of all the price-fixers, was sued alone and had to pay 24 times the damages caused by his purchases. *See Note, supra* note 25, at 904.

If a judge believes that a settlement is unfair to one of the potential parties, he should refuse to approve the settlement. *See City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974); *Gould v. American-Hawaiian S.S. Co.*, 387 F. Supp. 163, 172 (D. Del. 1974), *vacated on other grounds*, 535 F.2d 761 (3d Cir. 1975); *Altman v. Liberty Equities Corp.*, 54 F.R.D. 620, 624 (S.D.N.Y. 1972). *See generally Fischer, supra* note 2, at 1834-36.

35. When there is joint and several liability, a plaintiff may sue any violator he desires for whatever reason. *See note 1 supra* and accompanying text. He may consider the convenience of suing that violator, strength of the evidence, financial resources of the violator, special relationships, or even anticompetitive reasons, personal resentment, or bad faith. *See Note, supra* note 25, at 905. Thus, it is possible that a plaintiff may release every other defendant for a small portion of his liability and then proceed against an unfavored defendant for a disproportionate share of the damages.

36. To deny contribution in settlements without crediting the amount of the settlement to the judgment award would lead to the massive coercion techniques often found in antitrust situations. *See ABA, REPORT OF THE SECTION OF ANTITRUST LAW WITH LEGISLATIVE RECOMMENDATIONS 14 (1979) (majority report) [hereinafter cited as ABA MAJORITY REPORT]*. A plaintiff's attorney may threaten to sue a smaller company alone for treble damages attributable to the sales of a much larger defendant. Faced with such a massive liability, a defendant has little choice but to settle. *See id.* Another technique in the antitrust area is known as "whipsawing," in which lawyers for class action plaintiffs negotiate a settlement in stages, charging progressively more for settlement at each stage. *Note, supra* note 25, at 907.

37. *See Huddleston v. Herman & MacLean*, 640 F.2d 534 (5th Cir. 1981); *Laventhol, Krekstein, Horwath & Horwath v. Horwitch*, 637 F.2d 672 (9th Cir. 1980), *cert. denied*, 101 S. Ct. 3114 (1981); *McLean v. Alexander*, 449 F. Supp. 1251 (D. Del. 1978), *rev'd on other grounds*, 599 F.2d 1190 (3d Cir. 1979); *Muth v. Dechert, Price & Rhoads*, 391 F. Supp. 935 (E.D. Pa. 1975); *Alexander & Baldwin, Inc. v. Peat, Marwick, Mitchell & Co.*, 385 F. Supp. 230 (S.D.N.Y. 1974); *Tucker v. Arthur Andersen & Co.*, [1973-1974 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,544 (S.D.N.Y. 1974); *Altman v. Liberty Equities Corp.*, 54 F.R.D. 620 (S.D.N.Y. 1972).

The first court to hold that contribution was available from the settling defendant was *Altman v. Liberty Equities Corp.*, 54 F.R.D. 620 (S.D.N.Y. 1972). The court reasoned that the policies of deterrence and fairness outweighed the judicial policy favoring settlement. *Id.* at 624-25. The court further reasoned that it was well settled that an implied right of contribution existed under § 10(b) and this right should not be denied to a defendant merely because another party had settled with the plaintiff. *Id.* at 625. Accordingly, the court refused to approve a contribution bar contained in the settlement. *Id.* The court clearly indicated, however, that its decision not to approve the contribution bar was based on its own discretion as to what was equitable on these facts and not because it lacked jurisdiction to ratify such a provision. *Id.* This same line of reasoning was expressly adopted three years later in *Muth v. Dechert, Price & Rhoads*, 391 F.

from some commentators,³⁸ recent securities cases continue to allow contribution from settling defendants.³⁹

Supp. 935, 939 (E.D. Pa. 1975), in which the court allowed the original nonsettling defendant to seek contribution from a settling defendant.

In 1978, the court in *McLean v. Alexander*, 449 F. Supp. 1251 (D. Del. 1978), *rev'd on other grounds*, 599 F.2d 1190 (3d Cir. 1979), continued this trend to grant contribution from settling defendants. The court acknowledged the concern that claims against settling defendants might deter settlements and might not adequately deter future violations of the nonsettling defendant if that defendant was sure he could receive contribution in all cases. *Id.* at 1266. The court reasoned, however, that these considerations were "overborne by recognition of possible collusion between settling defendants and plaintiffs and the realization that fundamental fairness demands a sharing by wrongdoers in setting the wrong right." *Id.* at 1266.

38. See *Adamski*, *supra* note 8; Note, *supra* note 25.

39. The Ninth Circuit in *Laventhol, Krekstein, Horwath & Horwath v. Horwitch*, 637 F.2d 672 (9th Cir. 1980), *cert. denied*, 101 S. Ct. 3114 (1981), ignored these recent commentators, *see* note 38 *supra*, and refused to dismiss a cross-claim by a remaining nonsettling defendant for contribution from settling defendants. The court first noted that the securities laws expressly granted a right of contribution from any party that would have been held jointly and severally liable at trial, making no distinction between settling and nonsettling parties. *Id.* at 674-75. The court dismissed the argument that public policy favors settlement, stating that Congress had clearly expressed its preference when it granted a general right of contribution. *Id.* at 675. The court further noted that allowing contribution would enhance the deterrence policies of the securities laws by requiring each violator to pay his proper share of the damages. *Id.*

In 1981, the Fifth Circuit, in *Huddleston v. Herman & MacLean*, 640 F.2d 534 (5th Cir. 1981), reversed a district court decision denying contribution from the settling defendants, while lowering the judgment award against the remaining parties by the amount previously received in settlement. *Id.* at 556. The court reasoned that prohibiting contribution would encourage claims against numerous defendants in the hope that some would settle to avoid the time and expenses of litigation. *Id.* at 558. The amount received in settlement would then be used to finance the continuation of the suit. *Id.* The court noted that the plaintiff could also settle initially for small amounts, subjecting the remaining parties to an increasingly greater share of the total damages. *Id.* This would enable the plaintiff to play one defendant against another in order to force the remaining nonsettling defendants into unfavorable and unjust settlements. *Id.* See also note 27 *supra*.

The last case to address the issue, *In re National Student Marketing Litigation*, 517 F. Supp. 1345 (D.D.C. 1981), continued this trend to allow contribution from the settling defendants. Citing both *Laventhol* and *Huddleston*, the court noted that both the securities laws and the federal rules of civil procedure permitted a nonsettling defendant to enjoin a settling party in order to receive contribution. *Id.* at 1347-48.

The settling party in this case presented two arguments against the allowance of contribution. First, the settling party cited *Herzfeld v. Laventhol, Krekstein, Horwath & Horwath*, 540 F.2d 27 (2d Cir. 1976), in support of its claim that a federal right of contribution does not exist under § 10(b) of the 1934 Act in settlement cases. 517 F. Supp. at 1347. The court responded, however, that *Herzfeld* stood solely for the proposition that a settling party will be liable for contribution only if the amount he paid in settlement was less than his later determined share of the damages. *Id.*

The settling party also argued that no federal right of contribution exists in the first place, and thus none could be implied under § 10(b). *Id.* As support for this second defense, the settling party cited *Texas Ind., Inc. v. Radcliff Materials, Inc.*, 101 S. Ct. 2061 (1981), and *Northwest*

B. *Avoiding Liability for Contribution*

Because liability for contribution will reduce the attractiveness of settlement to a settling defendant, some courts have devised a method to protect a settling party against future financial losses. Recently, a few courts have permitted plaintiffs in securities actions to indemnify the

Airlines, Inc. v. Transport Workers Union, 451 U.S. 77 (1981). The court, however, stated that the defendant's reliance on these two cases was misplaced. 517 F. Supp. at 1346-47. The court noted that the *Texas Industries* case dealt with the Sherman Act, 15 U.S.C. § 1 (1976), and the Clayton Act, 15 U.S.C. § 15 (1976), while the *Northwest Airlines* case dealt with the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1976), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1976). 517 F. Supp. at 1349. Thus, the securities statutes are to be distinguished because Congress has expressly provided for contribution among joint violators of the securities laws. *Id.* See notes 17-23 *supra* and accompanying text. Therefore, because federal cases have consistently recognized the implied right of contribution under the securities laws and the Supreme Court has not yet restricted this trend, the court recognized a federal right of contribution in settlement cases under the securities laws. 517 F. Supp. at 1349. See also notes 15-31 *supra* and accompanying text.

There is some other authority in federal securities cases that a settling party may be absolved from contribution. In *State Mut. Life Assurance Co. v. Peat, Marwick, Mitchell, & Co.*, 49 F.R.D. 202 (S.D.N.Y. 1969), the court denied contribution from a settling defendant because a joint judgment had not been entered against him in the original action. *Id.* at 212. This decision, however, was based on state law and the lack of an implied private right of action under § 10(b). *Id.* Because it is now uniformly recognized that federal law governs in the securities area and that there is an implied right of contribution under the securities laws, this case has little precedential value. See notes 20-21 *supra* and accompanying text.

The court in *Herzfeld v. Laventhol, Krekstein, Horwath & Horwath*, 540 F.2d 27 (2d Cir. 1976), also denied a claim for contribution from settling defendants on the grounds that the settling party had already paid more than his proportionate share. *Id.* at 39. This rationale has been criticized because the settling party will never be sure of potential liability until the judgment is final. Adamski, *supra* note 8, at 546; Schwartz, Simpson & Arnold, *supra* note 25, at 812-13. *Herzfeld* provides little comfort to a defendant considering a partial settlement, because there is no way to predetermine what the court will ultimately establish as his proportionate share of the damages. Thus, the settling party will never be certain of his liability for contribution until the court determines his ultimate liability. See also Adamski, *supra* note 8, at 546.

Under *Herzfeld*, the nonsettling defendant is in a very advantageous position. If the settling party settles for less than his pro rata share, the nonsettling party can cross-claim for contribution of the difference. However, if the settling party settles for more than his pro rata share, the nonsettling party will receive the benefit of his bargain because the settlement payment will reduce the judgment award in a like amount, resulting in a payment by the nonsettling party of less than his pro rata share.

For these reasons, subsequent courts have recognized that *Herzfeld* is a limited exception, applying only when the settling party has paid more than his later determined liability. See *Laventhol, Krekstein, Horwath & Horwath v. Horwitch*, 637 F.2d 672, 675 (9th Cir. 1980), *cert. denied*, 101 S. Ct. 3114 (1981); *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179, 1182 n.4 (8th Cir. 1979); *In re National Student Marketing Litigation*, 517 F. Supp. 1345, 1347 (D.D.C. 1981). See generally Adamski, *supra* note 8, at 545-46.

settling party against liability for future contribution claims.⁴⁰

The operation of this type of indemnity agreement is best illustrated by the following hypothetical example. Plaintiff brings a suit against two defendants for \$100,000. Defendant *X* settles for \$25,000 and plaintiff releases that defendant from the suit, promising to indemnify *X* against any future claims arising out of the suit. The court subsequently finds defendant *Y* liable for a \$75,000 judgment.⁴¹ *Y* in turn sues⁴² defendant *X* for contribution in the amount of \$25,000.⁴³ Defendant *X* is then entitled to collect this \$25,000 from the plaintiff through their indemnity contract.

The first case to uphold the validity of such an agreement was *McLean v. Alexander*.⁴⁴ Although the court acknowledged that indemnification agreements between intentional wrongdoers are void as against public policy,⁴⁵ the court noted that indemnification agreements between plaintiff and defendant were not subject to the same public policy considerations.⁴⁶ This type of indemnification agreement does not

40. *In re National Student Marketing Litigation*, 517 F. Supp. 1345, 1349 (D.D.C. 1981); *Seiffer v. Topsy's Int'l, Inc.*, 80 F.R.D. 272, 277 (D. Kan. 1978); *McLean v. Alexander*, 449 F. Supp. 1251, 1266 (D. Del. 1978), *rev'd on other grounds*, 599 F.2d 1190 (3d Cir. 1979). *See generally* Adamski, *supra* note 8, at 546-47.

41. The amount is \$100,000 in damages less the \$25,000 plaintiff has received from the settlement. *See* note 27 *supra*.

42. It is also possible for the nonsettling party to join the settling party in the original action instead of bringing a separate suit. *See* FED. R. CIV. P. 13(g) & (h). Such a motion also would be beneficial to the settling party because he could cross-claim against the plaintiff to enforce his indemnity claim and therefore eliminate the necessity of bringing a separate suit for enforcement of the indemnification contract. *See id.*

43. *X*'s \$50,000 proportionate share less \$25,000 paid in settlement. *See* note 39 *supra*. Both the settling and nonsettling defendants benefit if the nonsettling defendant joins the settling defendant in the original action. This precludes the need for a separate suit, while forcing the plaintiff to indemnify the settling party immediately for any amount owed in contribution. *See* *McLean v. Alexander*, 449 F. Supp. 1251, 1267-68 (D. Del. 1978), *rev'd on other grounds*, 599 F.2d 1190 (3d Cir. 1979). This will have the same effect as if the nonsettling defendant obtained contribution to pay the gross award and the plaintiff, in turn, indemnified the settling party for the amount he paid in contribution.

44. 449 F. Supp. 1251, 1266 (D. Del. 1978), *rev'd on other grounds*, 599 F.2d 1190 (3d Cir. 1979).

45. *Id.* The court did recognize that there is some authority holding that indemnification contracts may be enforced if the one seeking indemnification is not as culpable as the other party. *Id.* (citing *Muth v. Dechert, Price & Rhoads*, 391 F. Supp. 935 (E.D. Pa. 1975); *Carpenter v. Hall*, 311 F. Supp. 1099 (S.D. Tex. 1970)). Uncertainty remains as to whether all indemnification contracts or just those involving intentional wrongdoers are void as against public policy. *See* note 4 *supra*.

46. 449 F. Supp. at 1266. The court distinguished indemnification contracts between defendants from those between plaintiff and defendant. First, the plaintiff has the free choice to sue any

allow a party to escape liability altogether. Rather, it forces the settling defendant to pay an amount that the plaintiff believes is adequate compensation for the harm caused by that defendant.⁴⁷ Thus the deterrent policies of the securities laws are not undercut.

Although indemnification contracts may lessen the impact of contribution on settling defendants, the settling party may still have to defend itself from the nonsettling party's claim for contribution.⁴⁸ In *In re National Student Marketing Litigation*,⁴⁹ the court refused to dismiss a nonsettling party's cross-claim for contribution against a settling defendant who had previously entered into an indemnity agreement with the plaintiff.⁵⁰ The court noted that the agreement did not and could not affect the rights of any of the nonsettling defendants.⁵¹ Thus, the court forced the settling defendant to defend itself against the contribution claim, even though the plaintiff would indemnify the settling defendant for any contribution judgments the court levied.⁵²

Outside the securities context, some authorities completely deny contribution from the settling defendant. In *Gomes v. Brodhurst*,⁵³ a tort action, the plaintiff entered into a settlement with a defendant one week before trial.⁵⁴ To promote settlement, the court denied contribution from the settling party.⁵⁵ The court was concerned, however, that the plaintiff might release a favored defendant for a disproportionately low amount in order to force the remaining defendants to pay an amount greatly in excess of their proportionate share.⁵⁶ To prevent this poten-

party he desires. Second, if a plaintiff wants to reduce his claim or indemnify a defendant in order to promote a settlement, such a decision should be fully enforced. *Id.*

47. *See id.* at 1266-67.

48. *See In re National Student Marketing Litigation*, 517 F. Supp. 1345 (D.D.C. 1981); *McLean v. Alexander*, 449 F. Supp. 1251 (D. Del. 1978), *rev'd on other grounds*, 599 F.2d 1190 (3d Cir. 1979).

49. 517 F. Supp. 1345 (D.D.C. 1981).

50. *Id.* 1347-49. *See also* *McLean v. Alexander*, 449 F. Supp. 1251, 1267 (D. Del. 1978), *rev'd on other grounds*, 599 F.2d 1190 (3d Cir. 1979).

51. 517 F. Supp. at 1347-49.

52. *Id.* at 1349. *See also* *McLean v. Alexander*, 449 F. Supp. 1251, 1267 (D. Del. 1978), *rev'd on other grounds*, 599 F.2d 1190 (3d Cir. 1979).

53. 394 F.2d 465 (3d Cir. 1967).

54. *Id.* at 466.

55. *Id.* at 468. The court looked for a solution that would further the policy consideration of "the encouragement of voluntary settlements, the equitable distribution of liability among joint tortfeasors, and the elimination or minimization of collusion." *Id.* at 467. The court reasoned that to allow contribution would be to encourage all defendants to stand trial to minimize their losses. *Id.* at 468.

56. *Id.* If the judgment were merely reduced by the amount of the settlement, the plaintiff

tial injustice to the nonsettling parties, the court reduced the plaintiff's recovery by the amount of damages caused by the settling defendant.⁵⁷

This approach has also found some limited acceptance in the legislative area. The Uniform Comparative Fault Act⁵⁸ advocates denial of contribution from a defendant settling in good faith, with reduction of the judgment award by the greater of either the settlement amount or the relative fault of the settling party.⁵⁹ A bill proposed by the Anti-

could settle with favored defendants for nominal amounts and thereby free the settling defendants from any future liability. The plaintiff would still receive full compensation for his injury but primarily at the expense of the nonsettling defendants, who may be forced to pay an amount greatly in excess of their proportionate shares of the damages.

57. *Id.* at 469. For example, if A, B, and C were all equally culpable in causing D's injury and D settled with both A and B, the judgment award would be reduced by two-thirds, regardless of the amount D settled for with A and B. Thus C will only have to pay one-third the original judgment, the same amount he would have had to pay if A and B had not settled. This will promote good faith settlements because the plaintiff will realize that he will permanently lose the difference between the settlement award and the settling party's proportionate share of the damages.

58. UNIFORM COMPARATIVE FAULT ACT § 6 (1977) states:

A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution, but it does not discharge any other persons liable upon the same claim unless it so provides. However, the claim of the releasing person against other persons is reduced by the amount of the released person's equitable share of the obligation, determined in accordance with the provisions of Section 2.

59. *Id.* § 6. In 1955, the Uniform Commission on State Laws recommended that contribution be denied, and urged instead that the judgment award be reduced only by the settlement amount. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 4 (1955) provides:

When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:

(a) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide; but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and,

(b) It discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

While this was an improvement over the 1939 Uniform Contribution Among Tortfeasors Act, which permitted contribution from the settling defendant, this Act still allowed the plaintiff to release favored defendants for nominal sums because the remainder of the award would be recovered in full from the remaining defendants. *See, e.g.,* *Gomes v. Brodhurst*, 394 F.2d 465, 468 (3d Cir. 1967).

The 1977 Uniform Comparative Fault Act § 6 was a response to the problem. *See* UNIFORM COMPARATIVE FAULT ACT § 6, Commissioners' Comment (1977). Under this position, the settling defendant is able to settle and avoid all future litigation, while the nonsettling defendant's liability is reduced by at least the amount the settling party would have been liable for in contribution. However, this position forces the plaintiff to assume the risk that the defendant may settle for an amount less than his proportionate fault, while denying plaintiff the benefit of the bargain if

trust Section of the American Bar Association (ABA bill)⁶⁰ would also deny contribution from the settling defendant,⁶¹ and correspondingly lower the judgment award assessed against the nonsettling defendant by the settling party's proportionate share of the damages.⁶² Both approaches signify the growing reluctance to reduce judgment awards merely by the settlement amount.⁶³

C. *Analysis*

Indemnification contracts between the plaintiff and the settling par-

he settles for an amount greater than the defendant's proportionate fault. This may deter a plaintiff's incentive to settle.

60. ABA MAJORITY REPORT, *supra* note 36, at 9-12.

61. *Id.* at 8-9. Because the proposed legislation would ensure that a settling defendant is free from contribution, settlement by that defendant will be encouraged. *See id.*

62. *Id.* at 11. This bill would allow the plaintiff the option whether to elect to withdraw the claims based upon the acts of the settling defendant or to permit the court to reduce the judgment by the amount for which the settling party would have been liable at trial. *Id.* The Report noted that this provision was essential in order to make a contribution statute work properly. *Id.* at 14. This approach protects the nonsettling defendant from increasing liability and collusion between the plaintiff and settling defendant while it provides the plaintiff the needed certainty required to get the class settlement approved. *Id.* at 14-15.

Another bill recently introduced in Congress also would deny contribution from settling defendants in antitrust matters. S. 1468, 96th Cong., 1st Sess. (1979). This bill, proposed by Senator Bayh, would reduce the plaintiff's claim by the greatest of the amount stipulated by the release, the consideration paid for the release, or the amount of damages attributable to the settling party's shares or purchases. *Id.* § 41(b).

63. An additional problem may arise when a party settles for more than his later determined proportionate share. *See Herzfeld v. Laventhol, Krekstein, Horwath & Horwath*, 540 F.2d 27, 38-39 (2d Cir. 1976). The question then is whether the settling defendant can seek contribution from the nonsettling defendants who actually incurred less than their proportionate share, if the judgment award was reduced by the higher settlement amount. Both the RESTATEMENT (SECOND) OF TORTS § 886A(2) (1978) and the UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 1(d) (1955) hold that contribution only lies in favor of a tortfeasor who discharges the entire claim of a joint tortfeasor and thus refuses such a contribution claim.

Although no case directly addresses this issue, some authority suggests that the result may be different in the securities area. In *Gould v. American-Hawaiian S.S. Co.*, 387 F. Supp. 163 (D. Del. 1974), *vacated on other grounds*, 535 F.2d 761 (3d Cir. 1976), the third-party defendants, who had previously settled, cross-claimed against the original defendants for contribution on a benefits-derived theory. *Id.* at 171. The settling parties argued that because they received no benefits from the transaction, they should recover full contribution from the original defendants who had derived all of the benefits of the illegal sale. *Id.* The court rejected this cross-claim, but did so because the settling parties did not prove that the nonsettling parties were jointly liable for the injury on which the entitlement was based. *Id.* at 171-72. Apparently, the *Gould* court would have allowed contribution by a settling party, if the settlement claim and the claim at trial were identical. *Accord*, RESTATEMENT OF RESTITUTION § 82 (1937).

ties have beneficial aspects.⁶⁴ These contracts further the deterrence policies of the securities laws by requiring each of the culpable parties to bear a portion of the total damages.⁶⁵ These contracts also tend to promote settlement because they absolve the settling defendant from future financial losses.⁶⁶ Finally, indemnification contracts promote good faith settlements because the plaintiff may be forced to pay back any difference between the settlement amount and the amount the court ultimately decides is that settling party's proportionate share of the damages.⁶⁷

These contracts are not, however, the most efficient means of both simultaneously promoting settlements and equitably apportioning losses among the parties. First, because the number of cases involving these agreements is small, settling parties may not be aware of the possibility for such agreements.⁶⁸ Second, some uncertainty exists as to whether the courts will uphold such agreements.⁶⁹ Third, the settling party still may have to incur the time and expense of litigation in defending itself against contribution claims.⁷⁰ Finally, the settling defendant may have to sue to enforce the indemnity agreement.⁷¹

Courts should adopt an approach that both encourages settlements and remains consistent with the deterrence and fairness policies of the securities laws.⁷² The most efficient approach is to absolve the settling party from contribution and then reduce the judgment award against the remaining nonsettling parties by the settling party's proportionate share of the damages.⁷³ Such a method eliminates two steps involved in enforcing indemnity contracts.⁷⁴ This result reduces securities litigation and correspondingly increases judicial expediency. In addition, it frees the settling party from the time and monetary expenses of trial.⁷⁵

64. These contracts are to be distinguished from indemnification contracts between violators of the securities laws. The latter are discussed at note 4 *supra* and accompanying text.

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

66. See notes 40-47 *supra* and accompanying text.

67. See notes 40-52 *supra* and accompanying text.

68. See note 40 *supra* and accompanying text. See also Adamski, *supra* note 8, at 547.

69. See Adamski, *supra* note 8.

70. See notes 48-52 *supra* and accompanying text.

71. See note 42 *supra* and accompanying text.

72. See notes 28-36 *supra* and accompanying text.

73. See notes 54-57 *supra* and accompanying text.

74. See notes 41-43 *supra* and accompanying text.

75. The settling party would still have to participate in the litigation, but only as a witness to help determine what his proportionate share of the damages would have been in order to deter-

Reducing the judgment award by the settling party's proportionate share of the damages is preferable to merely reducing the award by the proceeds obtained in settlement.⁷⁶ Reducing the award by the settling party's proportionate share of the damages will diminish a plaintiff's desire to settle because he can potentially lose the difference between the settling party's actual share of the damages and the amount of the settlement.⁷⁷ Reducing the award merely by the settlement amount, however, will invite collusion and coercion between the settling party and the plaintiff. To reduce the judgment only by the settlement amount will enable a plaintiff to release favored defendants for unreasonably low amounts knowing that he still can collect the remaining amount of damages from the nonsettling defendant at trial.⁷⁸ This method is subject to further criticism because it enables a plaintiff who has settled with one defendant to pressure the other defendants into unfavorable settlements. These nonsettling defendants may be forced to elect settlement rather than risk having to pay a damage award at trial that greatly exceeds their proportionate shares of the damages.⁷⁹

mine by how much the judgment award should be reduced. The adversarial nature of the relationship between the plaintiff and nonsettling defendants should be enough to thwart any possible collusion between the settling defendant and one of the other defendants, *i.e.*, the nonsettling defendant would want the settling defendant to exaggerate his share of the damages in order to reduce the ultimate judgment, while the plaintiff would want the settling defendant to understate his share of the damages in order to increase his ultimate judgment against the nonsettling defendant. Finally, because the nonsettling defendant would have had the burden of showing the settling party's proportionate share if he initiated a contribution claim against him, the nonsettling party should also bear the burden of proof to show how much the judgment should be reduced if contribution is denied.

76. To reduce the judgment award by the settling party's proportionate share is also preferable to reducing the judgment by the greater of the settlement proceeds or the settling party's proportionate share. The latter approach forces the plaintiff to assume the risk that the defendant may settle for an amount less than his proportionate share, while denying a plaintiff the benefit of a bargain if he settles for an amount greater than the defendant's proportionate fault. *See* notes 27, 59 & 62 *supra*. One of the primary goals of the securities laws is deterrence. *See* note 19 *supra* and accompanying text. Thus, a nonsettling defendant who violates the securities laws should never get the benefit of a bargain over an injured plaintiff, the very person the securities laws were designed to protect.

77. For example, suppose A brought a suit against B and C for \$100 total in damages, A and B each being liable for \$50 of the damages. If A settled with B for only \$25, he would receive only \$75 in total damages: \$25 from B, plus a \$50 judgment from C because the judgment against C would have been reduced by B's share of the damages.

78. *See* notes 38 & 57 *supra* and accompanying text. For example, suppose A sues B and C for \$100,000. If the award were merely reduced by the settlement amount, A could settle with B for \$1,000. This would reduce the judgment against C by only \$1,000 and make him liable for \$99,000.

79. A could threaten to settle with B for \$1,000 and thereby subject C to a potential liability

Denying contribution from the settling defendants while reducing the judgment by the settling defendant's proportionate share of the damages properly balances the two competing objectives that arise in contribution cases. This approach promotes settlements because the settling party is absolved from the time, expense, and liability of future litigation. Each defendant is required to pay a share of the damages, thereby promoting the deterrence policies of the Securities Acts. Good faith settlements result because the plaintiff is compelled to settle for an amount equal to the settling party's share of the damages. Finally, reducing the award by the settling party's proportionate share of the damages limits the nonsettling party's liability to his proportionate share of the damages. The result under this approach, for the nonsettling party, is the same as if contribution were allowed.

III. METHODS OF ALLOCATING JUDGMENT AWARDS

The equitable allocation of the judgment award⁸⁰ among the several defendants is an important aspect of contribution analysis.⁸¹ There are three primary methods used in apportioning the judgment award: pro rata, benefits-derived, and comparative fault.⁸²

A. *Pro Rata*

The traditional method for apportioning damages among joint

of \$99,000 even though he only caused \$50,000 of the damages. Thus, there would be great pressure on C to settle even if the settlement was unfavorable and the case against him weak. See note 59 *supra* and accompanying text.

80. To determine the defendant's proportionate share, the court must first begin with a computation of the actual damages. Damages are traditionally calculated on the basis of out-of-pocket costs measured by the difference between the stock's value and the amount actually paid. *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972). A wrongdoer is generally liable for all damages that result from his wrong. *Zeller v. Bogue Elec. Mfg. Corp.*, 476 F.2d 795, 802 (2d Cir.), *cert. denied*, 414 U.S. 908 (1973). See generally Mullaney, *supra* note 23; Ruder, *Measuring Buyers' Damages in 10b-5 Cases*, 31 BUS. LAW. 1839 (1976).

81. In order to determine each party's proportionate share of the damages, a court must first determine the number of parties from whom contribution to a judgment will be required. For a discussion of this issue, see Adamski, *supra* note 8, at 554-62; Fischer, *supra* note 2, at 1836-40.

82. It is important to note here that whether contribution is based upon findings of comparative fault, a pro rata formula, or on the basis of benefits received, the plaintiff's right to proceed against any one of the defendants for satisfaction in full remains undisturbed. Rather, these methods are used only to determine the amount the paying party may recover from the other parties. *Lentz v. Freeman Assoc. Caribbean*, 441 F. Supp. 892, 895 (D.V.I. 1977). See RESTATEMENT OF RESTITUTION § 81, comment b (1937); RESTATEMENT (SECOND) OF TORTS § 886A (1977).

tortfeasors is to require each tortfeasor to pay a pro rata share.⁸³ This share is determined simply by dividing the total judgment award by the number of liable parties. Each of these parties thus pays an equal share.⁸⁴

Early commentators generally accepted the pro rata rule as "the only workable rule to apply."⁸⁵ These commentators preferred the pro rata approach for three main reasons.⁸⁶ First, early legal scholars adhered to the traditional notion that "equality is equity."⁸⁷ Second, because the rule is reasonably clear and definite, it fosters administrative ease and convenience.⁸⁸ Finally, courts and authors construed the phrase "as in cases of contract," which is found in the express provisions of the Securities Acts governing contribution,⁸⁹ to imply a preference for the pro rata method as used in pre-Securities Acts contract cases.⁹⁰

83. See *Herzfeld v. Laventhol, Krekstein, Horwath & Horwath*, 540 F.2d 27, 38-39 (2d Cir. 1976); *Wassel v. Eglowsky*, 399 F. Supp. 1330, 1370-71 (D. Md. 1975), *aff'd*, 542 F.2d 1235 (4th Cir. 1976); W. PROSSER, *supra* note 1, § 50, at 310; Fischer, *supra* note 2, at 1829; Ruder, *supra* note 3, at 650; Note, *supra* note 8, at 1304.

84. See W. PROSSER, *supra* note 1, § 50, at 310; RESTATEMENT OF RESTITUTION §§ 81, 85 (1937).

85. Douglas & Bates, *The Federal Securities Act of 1933*, 43 YALE L.J. 171, 179-80 (1933) state:

The only workable rule to apply to this residual group is the one of pro rata contribution according to the rules of law and equity. . . . On the whole, 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.

See 3 L. Loss, *supra* note 4, at 1738 (citing Douglas & Bates with approval); Ruder, *supra* note 3, at 650 n.239 (pro rata method is easier to administer).

86. See Fischer, *supra* note 2, at 1829.

87. W. PROSSER, *supra* note 1, § 50, at 310. See Bohlen, *supra* note 22, at 557-69; Gregory, *Contribution Among Tortfeasors: A Uniform Practice*, 1938 WIS. L. REV. 365, 372; Leflar, *supra* note 2, at 136; Turck, *supra* note 2, at 20.

88. See *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179, 1182 n.4 (8th Cir. 1979); *Wassel v. Eglowsky*, 399 F. Supp. 1330, 1370-71 (D. Md. 1975), *aff'd*, 542 F.2d 1235 (4th Cir. 1976). See generally W. PROSSER, *supra* note 1, § 50, at 310; Fischer, *supra* note 2, at 1829.

89. See note 12 *supra* and accompanying text.

90. See Ruder, *supra* note 3, at 650-51. In determining which method is appropriate, Dean Ruder states:

The phrase "as in cases of contract" also aids in answering the question: "According to what method is the contribution to be allowed?" Theoretically contribution could be required either on a pro-rata basis or on some basis involving a degree of fault analysis. Since the Securities Acts incorporate the contract standard for contribution between tortfeasors, the pro-rata method used in common law contract cases should apply.

Id.

The legislative history of the act provides no assistance in this determination. See S. REP. NO. 47, 73d Cong., 1st Sess. (1933); H.R. REP. NO. 85, 73d Cong., 1st Sess. (1933); H.R. REP. NO. 152,

The pro rata method originated in the context of business contract cases.⁹¹ This approach led to an equitable result in these cases because normally all the parties who signed, or were a party to, the contract were equally at fault.⁹² In contrast to these early business contract cases, however, the federal securities laws subject a much broader and more diverse group of parties to liability.⁹³ As a result of this diverse exposure, the degree of fault among various securities violators is not necessarily equal.⁹⁴ The pro rata method thus has begun to lose its longstanding preferred status.⁹⁵

73d Cong., 1st Sess. (1933); S. REP. NO. 792, 73d Cong., 2d Sess. (1934); S. DOC. NO. 185, 73d Cong., 2d Sess. (1934); H.R. REP. NO. 1383, 73d Cong., 2d Sess. (1934); H.R. REP. NO. 1838, 73d Cong., 2d Sess. (1934).

91. See W. PROSSER, *supra* note 1, § 50, at 310; Ruder, *supra* note 3, at 650; Note, *supra* note 5, at 1304.

92. The three major situations in which the business contract cases arose were all suited for equal contribution shares: (1) a director presumably acted with the consent of all the other directors when signing a contract later held to be ultra vires and therefore equal liability was appropriate; (2) normally each party in surety cases was equally culpable and therefore equal shares of contribution produced an equitable result; and (3) when the contract in a joint undertaking was for the benefit of all the parties, equal contribution was proper. Note, *supra* note 5, at 1304 n.272.

93. See, e.g., Securities Act of 1933 § 11(a), 15 U.S.C. § 77k(a) (1976), which subjects any of the following persons to liability if a registration statement is misleading:

- (1) every person who signed the registration statement;
- (2) every person who was a director of (or person performing similar functions) or partner in the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;
- (3) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions, or partner;
- (4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him;
- (5) every underwriter with respect to such security.

See also Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b) (1976) (imposes liability on any person who employs any manipulation or deceptive device in connection with the purchase or sale of any security).

94. In addition, the courts have construed these acts as imposing different standards of liability for different classes of defendants. See, e.g., *Feit v. Leasco Data Processing Equip. Corp.*, 332 F. Supp. 544 (E.D.N.Y. 1971), and *Escott v. Barchris Constr. Corp.*, 283 F. Supp. 643 (S.D.N.Y. 1968), which impose different standards of due diligence under § 11 of the Act.

95. Starting in the early 1970s, the federal courts began recognizing the existence of other methods of apportionment. The court in *Feit v. Leasco Data Processing Equip. Corp.*, 332 F. Supp. 544 (E.D.N.Y. 1971), without discussing the concept of comparative fault, allowed the less culpable parties to pay significantly lesser amounts. Then in *Herzfeld v. Laventhol, Krekstein, Horwath & Horwath*, 378 F. Supp. 112, 136 (S.D.N.Y. 1974), *aff'd in part and rev'd in part*, 540 F.2d 27 (2d Cir. 1976), the court first considered comparative fault before adopting a pro rata

B. *Benefits-Derived*

The first decision to depart expressly from the pro rata method was *Gould v. American-Hawaiian Steamship Co.*⁹⁶ In *Gould* the nonsettling defendants,⁹⁷ held liable under Section 14(a) of the Securities Exchange Act, were forced to disgorge twenty-five percent of the premiums they received in a merger.⁹⁸ These nonsettling defendants then sought contribution on a pro rata basis from the settling defendants.⁹⁹

The *Gould* court rejected the contention that the phrase "as in cases of contract" in the Securities Acts means that the pro rata method is required in contribution cases arising under the securities laws.¹⁰⁰ Although the legislative history is silent concerning this issue, the court stated that Congress inserted this phrase only to avoid the common-law restriction against contribution.¹⁰¹ The *Gould* court reasoned that when a party seeking contribution is held liable on a disgorgement principle, that party may seek contribution from the other parties only on a benefits-derived theory.¹⁰² Allowing contribution on a pro rata basis may allow the nonsettling defendants to retain some of the bene-

approach. The court justified its use of the pro rata method not only on administrative ease and convenience grounds, but also because the parties were equally culpable and comparative fault would have led to the same result. *Id.* at 136.

Although the court in *Herzfeld* cited *Globus* as support for the principle that the pro rata method is applicable for use in securities actions, it should be noted that the parties in *Globus* were also found equally culpable, and thus a comparative fault allocation would have led to the same result. *See Globus, Inc. v. Law Research Serv. Inc.*, 318 F. Supp. 955, 958 (S.D.N.Y. 1970), *aff'd*, 442 F.2d 1346 (2d Cir.), *cert. denied*, 404 U.S. 941 (1971).

96. 387 F. Supp. 163 (D. Del. 1974), *vacated on other grounds*, 535 F.2d 761 (3d Cir. 1976). In *Gould*, the federal court was presented with three classes of defendants arguing for three different methods of contribution: pro rata, benefits-derived, and comparative negligence. *Id.* at 169-70.

97. Although the original defendants include two companies, ten directors, and five shareholders, *Gould v. American-Hawaiian S.S. Co.*, 331 F. Supp. 981, 984 (D. Del. 1971), after settlements, only the liability of two shareholders remained at issue. *Gould v. American-Hawaiian S.S. Co.*, 362 F. Supp. 771, 773 (D. Del. 1973), *vacated on other grounds*, 535 F.2d 761 (3d Cir. 1976).

98. 362 F. Supp. at 778. The court held that the proxies solicited by the defendants for shareholder approval of a proposed merger were materially misleading in violation of Securities Exchange Act of 1934 § 14(a), 15 U.S.C. § 78n(a) (1976). 362 F. Supp. at 774-75. Therefore, the court forced the nonsettling shareholders to disgorge that portion of the share price which was in excess of the actual market value. *Id.* at 775-76.

99. 387 F. Supp. at 169-70.

100. *Id.* at 170. *See also* notes 90-94 *supra* and accompanying text.

101. 387 F. Supp. at 170.

102. *Id.* at 171. The court noted that even if the pro rata method was generally used in securities cases, under these circumstances it would lead to an inequitable result. It would be inequitable to force the settling defendants to reimburse the nonsettling defendants for their disgorgement of benefits they illegally received. *Id.* at 170-71.

fits of their violation and thus would not adequately deter future violations.¹⁰³

The court refused, however, to endorse fully the benefits-derived theory. The court denied contribution claims from the settling defendants who had received no economic benefits from their violations.¹⁰⁴ Allowing such a claim would have amounted to the full indemnification of a securities laws violator.¹⁰⁵ This result would conflict with one rationale of contribution that requires all defendants to share the financial burdens caused by their actions in order to deter future violations.¹⁰⁶ Thus, subsequent courts have refused to use a benefits-derived allocation when the party seeking contribution received no economic benefits from the violation. Basing contribution on a benefits-derived theory would completely indemnify any defendant who derived no economic gain from an illegal act.¹⁰⁷

C. Comparative Fault

Courts may also allocate damages among joint tortfeasors on a comparative fault basis. This method apportions damages based on each party's relative culpability or responsibility for the illegal act.¹⁰⁸

The trend in areas of law other than securities is to adopt comparative fault contribution.¹⁰⁹ *United States v. Reliable Transfer Co.*,¹¹⁰ a

103. *Id.* at 171. A pro rata allocation would lead to an inequitable result when a party's pro rata share was less than the benefits he derived from the violation. Such a result would reward a party for violating the securities laws and thus defeat the deterrence policies of the Acts. *See id. Cf. Olson Farms, Inc. v. Safeway Stores, Inc.*, [1979-2] Trade Cas. (CCH) ¶ 62,995, at 79,704 (10th Cir.) (antitrust case in which court in dictum proposed a comparative benefit analysis whereby the defendant is required to accept that share of the judgment that reflects the profits he received as a result of the violation); ABA MAJORITY REPORT, *supra* note 36, at 3 (recognizes market share as a viable alternative).

104. 387 F. Supp. at 171.

105. *Id.* Using the benefits derived from the violation as the measure of liability is improper because any party who received no economic benefits would be absolved from contribution.

106. *Id.* *See also* notes 7-8 *supra* and accompanying text.

107. *See Marrero v. Abraham*, 473 F. Supp. 1271, 1278 (E.D. La. 1979); *McLean v. Alexander*, 449 F. Supp. 1251, 1266-67 (D. Del. 1978), *rev'd on other grounds*, 599 F.2d 1190 (3d Cir. 1979); *Alexander & Baldwin, Inc. v. Peat, Marwick, Mitchell & Co.*, 385 F. Supp. 230, 238 (S.D.N.Y. 1974).

108. *See McLean v. Alexander*, 449 F. Supp. 1251, 1274 (D. Del. 1978), *rev'd on other grounds*, 599 F.2d 1190 (3d Cir. 1979); ALI FED. SEC. CODE § 1724(f)(2) (Proposed Official Draft 1978); *Adamski, supra* note 8, at 555; *Fischer, supra* note 2, at 1829; *Freund & Hacker, supra* note 4, at 472; *Note, supra* note 4, at 98-100; *Note, supra* note 5, at 1308.

109. *See United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975) (comparative fault recognized in admiralty collision cases); UNIFORM COMPARATIVE FAULT ACT (proposes comparative

recent United States Supreme Court admiralty decision, provides valuable insight regarding the Court's view on apportioning damages. The Court refused to use the traditional pro rata approach, noting that the United States was virtually alone among the world's maritime nations in using this formula in applying damages.¹¹¹ Such a lack of uniformity was certain to cause forum shopping.¹¹² In repudiating the pro rata method, the Court stated that this rule produces a satisfactory result only when each party is nearly equal in fault and thus would assume a share of the damage in true proportion to their degree of fault.¹¹³ The Court dismissed the argument that the ease and expediency of the pro rata rule would serve to promote judicial economy¹¹⁴ and settlements,¹¹⁵ declaring that convenience in application could never justify

fault in state tort area); ABA MAJORITY REPORT, *supra* note 36, (proposes comparative fault in antitrust area).

110. 421 U.S. 397 (1975). In this case, a ship owner sought contribution from the United States for the damages that resulted when his ship ran aground. *Id.* at 398-99. The lower court found that the grounding was caused 25% by the failure of the Coast Guard to maintain a breakwater light and 75% by the fault of the ship's crew. *Id.* at 399. The lower court refused to depart from the traditional pro rata method, however, and required the parties to share the damages equally. *Id.* at 400.

111. *Id.* at 403-04.

112. *Id.* Likewise, a lack of uniformity in the federal securities area will promote forum shopping. If the original defendant is smaller and less culpable than the other joint violators, he may maintain a separate action for contribution in a district where the judge favors comparative fault; whereas if he is more culpable than the other parties, he will try to sue in a district that favors pro rata. Compare *McLean v. Alexander*, 449 F. Supp. 1251 (D. Del. 1978) (Delaware federal court stated preference for comparative fault), *rev'd on other grounds*, 599 F.2d 1190 (3d Cir. 1979) with *Herzfeld v. Laventhol, Krekstein, Horwath & Horwath*, 378 F. Supp. 112 (S.D.N.Y. 1974) (Southern District of New York has favored pro rata method), *aff'd in part and rev'd in part*, 540 F.2d 27 (2d Cir. 1976) and *Globus, Inc. v. Law Research Serv., Inc.*, 318 F. Supp. 955 (S.D.N.Y. 1970) (same), *aff'd*, 442 F.2d 1346 (2d Cir.), *cert. denied*, 404 U.S. 941 (1971).

113. 421 U.S. at 405.

114. 421 U.S. at 407. Although the Court realized that the argument favoring a pro rata allocation because of its ease and certainty had merit, the Court stated that it has no force in those cases in which the degree of culpability can be determined without difficulty. *Id.* If it is impossible or too problematic to allocate degrees of fault among the parties in a particular case, then the pro rata rule is an appropriate and equitable remedy. *Id.* But "potential problems of proof in some cases hardly requires adherence to an unfair and archaic rule in all cases." *Id.*

115. *Id.* at 408. The Court noted that settlements according to perceived relative fault will still benefit both parties by avoiding the time and expense of litigation. *Id.* Furthermore, the Court stated that "experience with comparative fault in the personal injury area teaches us that a rule of fairness in the court will produce fair out-of-court settlements." *Id.* Even if the argument had more merit, the Supreme Court would have rejected it because "congestion in the courts cannot justify a legal rule that produces unjust results in litigation simply to encourage out-of-court considerations." *Id.*

inequitable results.¹¹⁶ Finally, the Court stated that a method that imposes greater liability on the more culpable party would serve as a greater deterrent.¹¹⁷

Comparative fault has also received some consideration in the legislative area. The proposed Federal Securities Code¹¹⁸ provides that contribution should be determined by considering the relative responsibility of each of the parties for the loss incurred.¹¹⁹ In addition, two bills recently proposed in Congress favor a federal right to contribution in the antitrust area and also advocate a comparative fault approach.¹²⁰

116. *Id.*

117. *Id.* at 405 n.11. The Court stated:

It is difficult to imagine any manner in which the divided damages rule would be more likely to "induce care and vigilance" than a comparative negligence rule that also penalizes wrongdoing, but in proportion to measure of fault. A rule that divides damages by degree of fault would seem better designed to induce care than the rule of equally divided damages, because it imposes the strongest deterrent upon the wrongful behavior that is most likely to harm others.

Id.

118. ALI FED. SEC. CODE (Proposed Official Draft 1978).

119. *Id.* § 1724(f)(2). The Code provides that

to the extent that there is no such contract, and on consideration of the relative responsibility of each party 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 for contribution, but no such person may be ordered to pay more under section 1724(f) than his maximum liability if he had been a defendant in the action giving rise to an action for contribution.

Id.

120. A bill by Senator Bayh would allocate damages in an antitrust contribution case according to the damages which are attributable to each party's actions. S. 1468, 96th Cong., 1st Sess. (1979). See note 62 *supra*.

In reaction to the Bayh bill, the ABA proposed an approach that measured contribution according to the relative responsibility of each party. See ABA MAJORITY REPORT, *supra* note 36, at 11. The ABA proposal is more flexible because it looks to impact as well as culpability. Whereas the Bayh bill looks only to the damages directly attributable to a sale or purchase, the ABA method looks further to the extent of the violation, the transactions affected, and the relative culpabilities of the parties. *Id.* at 15.

The ABA approach is preferable in the securities area in which damages are seldom attributable to distinct parties. Instead, in a securities violation, a number of parties will jointly participate in one activity that violates the securities laws. See, e.g., Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b) (1976) (imposes liability on every person involved in any manipulative or deceptive device or contrivance to injure the investing public); Securities Act of 1933 § 11, 15 U.S.C. § 77(k) (1976) (imposes liability on every person who signed or was in any way connected with a registration statement that contained an untrue statement).

An allocation based solely on "responsibility" for the violation would result in the imposition of great burdens on the issuer and insiders to the benefit of underwriters and other outsiders because the insider would be closer to the facts and the one responsible for initiating the fraud. See Note,

This trend toward comparative fault analysis is beginning to influence federal securities litigation at the district court level.¹²¹ In *Feit v. Leasco Data Processing Equipment Corp.*,¹²² the court, without discussing the concept of comparative fault, forced the more culpable parties to pay significantly greater amounts of damages than their pro rata share.¹²³ Then, the courts in both *Gould v. American-Hawaiian Steamship Co.*¹²⁴ and *Herzfeld v. Laventhol, Krekstein, Horwath & Horwath*¹²⁵ identified comparative fault as one equitable method of apportioning damages, but declined to apply it. Finally, in 1978, the court in *McLean v. Alexander*¹²⁶ adopted a comparative fault approach to apportion damages in a securities case.

In *McLean*, an accounting firm was sued by investors who detrimen-

supra note 4, at 100. Therefore, factors such as culpability, motive, and the extent and duration of the violation should be considered to produce an amount that will serve to deter future securities violations.

121. See *McLean v. Alexander*, 449 F. Supp. 1251 (D. Del. 1978) (adopting comparative fault), *rev'd on other grounds*, 599 F.2d 1190 (3d Cir. 1979). Compare ALI FED. SEC. CODE § 1724(f) (Proposed Official Draft 1978) (Loss now advocates comparative fault) with L. LOSS, *supra* note 4, at 1738 ("only workable rule to apply is pro rata").

122. 332 F. Supp. 544 (E.D.N.Y. 1971).

123. Note, *supra* note 4, at 90. Following judgment against the corporation and three of its directors for violating § 11 of the 1933 Act, the company sought approval to pay the entire judgment without contribution from its directors. *Id.* at 89. The SEC intervened on the grounds that such a payment would amount to indemnification of the directors and would thus violate public policy. *Id.* (citing Brief for SEC as Intervenor, *Feit v. Leasco Data Processing Equip. Corp.*, 332 F. Supp. 544 (E.D.N.Y. 1971)). See also note 4 *supra* and accompanying text. The court, without discussion, approved the payment of only \$5,000 by each of the three directors, leaving the corporation to pay more than \$300,000. Note, *supra* note 4, at 89. Whether the court was attempting to apportion damages according to financial ability to pay or comparative fault is not certain. It is clear, however, that the court refused to apply a pro rata allocation under these circumstances.

By requiring the directors to contribute nominal sums to the corporation, this case also seems to stand for the proposition that the Securities Acts not only grant a right to contribution, but also impose a duty on corporations to seek contribution from their directors and employees when it is necessary to avoid their complete indemnification. See 17 C.F.R. § 430.460 (1980) (it is the opinion of the Securities and Exchange Commission that indemnification contracts between directors and issuers are against public policy).

124. *Gould v. American-Hawaiian S.S. Co.*, 387 F. Supp. 163, 170-71 (D. Del. 1974), *vacated on other grounds*, 535 F.2d 761 (3d Cir. 1976).

125. 378 F. Supp. 112 (S.D.N.Y. 1974), *aff'd in part and rev'd in part*, 540 F.2d 27 (2d Cir. 1976). After being held liable in a § 10(b) action, an accounting firm sought contribution from an underwriter who had knowledge of the misleading nature of the financial report. *Id.* at 134. The underwriter was held liable for contribution because one of its officers had knowledge of the misleading nature of the financial report. *Id.* The court found that the underwriter had a duty along with the auditors to reveal all the material facts needed by the investors to make a knowledgeable decision. *Id.*

126. 449 F. Supp. 1251 (D. Del. 1978), *rev'd on other grounds*, 599 F.2d 1190 (3d Cir. 1979).

tally relied upon a misleading financial report.¹²⁷ Seeking contribution from four selling shareholders, the accounting firm argued that the court should evenly apportion the damages among the five parties.¹²⁸ The court was troubled, however, because a pro rata approach would not take into consideration the vast differences in culpability between the accounting firm and the prior shareholders.¹²⁹

The court focused its attention on devising an allocation method that would reflect this difference in culpability. Although the *McLean* court realized that no prior court had used a comparative fault approach in a securities action,¹³⁰ it noted that a few recent commentators had suggested this alternative approach in the securities area.¹³¹ Impressed

127. *Id.* at 1255. The plaintiff alleged that these misleading financial reports caused him to buy the stock of Technidyne, Inc. at an inflated price. *Id.*

128. *Id.* at 1272. Because the selling shareholders had both promoted the selling of the stock to the plaintiff and had intentionally given the accountant misleading information, the court held that all five parties were jointly and severally liable. *Id.* at 1267. The accounting firm argued that damages should be awarded on a "head count" basis whereby the four selling shareholders and the accountant in the firm would each pay 20%. *See Herzfeld v. Laventhol, Krekstein, Horwath & Horwath*, 540 F.2d 27, 38 (2d Cir. 1976) (adopted head count approach, simply dividing the amount of damages by the number of culpable parties). The court acknowledged that the "entity theory" had been well received in the federal courts, and grouped the prior shareholders as one "entity" due to their collective efforts in fraudulently promoting the sale of stock. 449 F. Supp. at 1272. The court expressed concern, however, about the vast difference in culpability between the shareholders and the accounting firm. *Id.* Therefore, in order to avoid the inequity that would have resulted if the damages would have been equally divided between the "entity" and the accounting firm, the court used a comparative fault apportionment. This case demonstrates the need for a comparative fault allocation to prevent the inequities that may result when a pro rata allocation is used simultaneously with the "entity" approach. Culpable parties often work collectively in order to defraud the investing public. If these parties rely on another party's negligence or recklessness to further their fraudulent scheme, it would be unjust to force that one negligent party to bear the same amount of damages as the entity bears in its entirety. Indeed, such a result would encourage culpable parties to act collectively. Thus, a comparative fault approach, which would deter such collective action in the future, should be adopted in those cases which impose a sufficiently large burden on the more culpable parties.

129. 449 F. Supp. at 1272. The accountant was found guilty of merely performing a negligent audit. The prior shareholders, however, had intentionally created and concealed the fraud from the accountant in order to defraud its investors. *Id.* A pro rata apportionment between the entity would have required each of these shareholders to pay only 12.5% of the damages, while the accountant would have been liable for 50% of the damages. Thus, even though the accountant was less culpable than any of the prior shareholders, he would have had to pay four times as much.

130. *Id.* at 1274. *But see* notes 121-25 *supra* and accompanying text.

131. 449 F. Supp. at 1274. *See* ALI FED. SEC. CODE § 1724(f) (Proposed Official Draft 1978); Adamski, *supra* note 8, at 557-62; Fischer, *supra* note 2, at 1829-30; Freund & Hacker, *supra* note 4, at 472; Note, *supra* note 4, at 98-100; Note, *supra* note 8, at 1308.

with the recent state trend toward adopting comparative fault¹³² and a recent United States Supreme Court admiralty decision that adopted this method,¹³³ the *McLean* court stated that it could find no reason not to adopt a comparative fault allocation.¹³⁴

132. This trend is reflected by the changes in position of the Uniform Commission on State Laws. In 1939, the Commission proposed the UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 2 (1939), which adopted a relative fault measure in those situations in which an equal distribution of damages would otherwise lead to an inequitable result. In 1955, the Commission rejected this position and proposed that contribution be applied strictly on a pro rata basis. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 2 (1955).

The Commission rejected comparative fault in the 1955 Act because the Act already excluded intentional, willful, and wanton actions from the right to seek contribution. *See id.* § 1(c). The Commission believed that this exclusion eliminated the need for a relative degree of fault rule since only negligent parties could seek contribution. *Id.* § 2, Commissioner's Comment. What the Commission failed to realize is that a negligent tortfeasor could still seek contribution from an intentional tortfeasor, and consequently there could still be a vast difference in culpability between parties involved in a contribution suit.

State courts and legislatures gradually started to depart from the pro rata approach, however, and comparative fault gradually found acceptance in many jurisdictions. The leading case is *Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972). *See Fischer, supra* note 2, at 1830.

In 1977, the Commission recognized and supported this trend by adopting the UNIFORM COMPARATIVE FAULT ACT. This act allocates damages by degree of fault. *Id.* § 2. To aid in determining the degree of fault that should be allocated to each party, the Commission provided five factors:

- (1) whether the conduct was mere inadvertence or engaged in with an awareness of the danger involved,
- (2) the magnitude of the risk created by the conduct, including the number of persons endangered and the potential seriousness of the injury,
- (3) the significance of what the actor was seeking to attain by his conduct,
- (4) the actor's superior or inferior capacities, and
- (5) the particular circumstances, such as the existence of an emergency requiring a hasty decision.

Id. § 2, Commissioner's Comment.

133. *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975). *See* notes 109-17 *supra* and accompanying text.

134. 449 F. Supp. at 1276. The court also looked to Delaware state law, which apportioned damages according to degree of fault. *Id.* The court stated that because Delaware state law followed a comparative fault allocation of damages rule, and because this rule provided an equitable result in the case at hand, the court should adopt it. *Id.*

It should be pointed out, however, that contribution is governed by federal common law. *See* note 19 *supra* and accompanying text. Therefore, although the court in *McLean* could look to state law for guidance, it was not obligated to follow or apply that rule. *See Fischer, supra* note 2, at 1827-28.

The court in *McLean* also rejected the shareholder's contention that varying degrees of fault were absent in the intentional behavior required to violate § 10(b) and therefore a comparative fault method was not practicable. 449 F. Supp. at 1275. The court, instead, acknowledged the existence of a "wide spectrum of prohibited behavior" that constituted violations of § 10(b). 449 F. Supp. at 1275. This argument has been reinforced by recent circuit court rulings that various

McLean rejected the argument that a comparative fault apportionment would undermine the principle of deterrence.¹³⁵ The court reasoned that a system which holds all wrongdoers liable in proportion to their wrongdoing is likely to further the deterrence policies of the securities laws¹³⁶ because each party will realize that greater culpability will lead to greater liability.¹³⁷ Accordingly, the court apportioned ninety percent of the judgment to the shareholders and ten percent to the accountant.¹³⁸

D. *Analysis*

In evaluating the methods of measuring proportional shares for use in contribution cases, courts must choose the method that is most equitable and best serves the deterrence policies of the securities laws. Thus, courts should require all parties to contribute a portion of the total liability so as to deter similarly situated parties from engaging in similar illegal acts in the future.¹³⁹

degrees of recklessness also satisfy the requirement of intentional behavior under § 10(b). Some courts have defined recklessness as an extreme departure from the standards of ordinary care that presents a danger of misleading buyers and sellers. *See, e.g.,* *McLean v. Alexander*, 599 F.2d 1190 (3d Cir. 1979); *Cook v. Avien, Inc.*, 573 F.2d 685 (1st Cir. 1978); *Rolf v. Blyth, Eastman, Dillon & Co.*, 570 F.2d 38 (2d Cir.), *cert. denied*, 439 U.S. 1039 (1978); *Wright v. Heizer Corp.*, 560 F.2d 236 (7th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978); *Sundstrand Corp. v. Sun Chem. Corp.*, 553 F.2d 1033 (7th Cir.), *cert. denied*, 434 U.S. 875 (1977). Other courts have defined recklessness as conduct closely approaching conscious deception. *See, e.g.,* *Coleco Indus., Inc. v. Berman*, 567 F.2d 569 (3d Cir. 1977), *cert. denied*, 439 U.S. 830 (1978); *Felts v. National Account Sys. Assoc.*, 446 F. Supp. 357 (N.D. Miss. 1977). One court has recognized a definition of recklessness as carelessness approaching indifference. *Hoffman v. Estabrook & Co.*, 587 F.2d 509 (1st Cir. 1978).

135. 449 F. Supp. at 1275. A comparative fault allocation arguably does not deter the smaller, less culpable defendant. Such a defendant would pay only a small fraction of the ultimate judgment award.

136. *Id.*

137. *Id.* The court further pointed out that one will not embark on an unlawful course with the hope that someone more culpable will pay the damages. *Id.*

138. *Id.* at 1276. The court applied the comparative fault test in the following manner:

Applying principles of relative fault to the instant case, the Court concludes that Schiavi, by issuance of a recklessly prepared audit which misstated the existence of receivables and consequently gave substance to the fiction of current sales of Technidyne, is responsible for 10% of *McLean's* loss. The remaining 90% of *McLean's* damages are laid at the feet of the culpable shareholders who in face to face meetings and through reports, actively misrepresented the assets of the company and knowingly deceived *McLean* as to the facts surrounding both *Amvit* and the current sales. As a consequence of their actions, they must bear a greater responsibility for the resultant losses.

Id.

139. *See* Note, *supra* note 4, at 99, which states:

The pro rata rule is clear and reasonably easy to apply.¹⁴⁰ This approach, however, produces a satisfactory result only when each party's fault is nearly equal because only then does each party assume a share of the damages in proportion to its share of the blame.¹⁴¹ Because the pro rata method does not take into account the degree of culpability, the responsibility, or the benefits derived from the violations, a material difference in any one of these factors among the parties may produce arbitrary and irrational results.¹⁴²

Another factor to consider when establishing the proper allocation of damages in a securities contribution case is the benefits derived from the violation.¹⁴³ The benefits-derived method is particularly relevant in those cases in which the benefits derived from a violation are greater than the defendant's pro rata share of the damages.¹⁴⁴ Leaving such proceeds in the hands of the violator would unjustly enrich the party responsible for the wrong and would tend to cancel the deterrent effect of liability.¹⁴⁵ A benefits-derived method would force each of the violators to give up his share of the illegal gains in addition to incurring the added time and expense of litigation.¹⁴⁶ This result would further the deterrence policies of the securities laws.

The benefits-derived method, however, has limited usefulness. It should be used only in those cases in which the party seeking contribu-

The calculation of "adequate deterrence" must necessarily be imprecise. The court's task in the calculation should be to require all parties found liable to contribute a portion of the total liability that would adequately deter future misconduct by parties similarly situated. At the same time, adjustment could be made for differences in the situations of the parties. Different levels of liability suffice to deter the misconduct of individuals and organizations, for example. In determining minimum acceptable liability, a court could perform a function akin to criminal sentencing—within the damages assessed, it may match punishment and wrongdoing.

Id.

140. See notes 83-90 *supra* and accompanying text.

141. See note 113 *supra* and accompanying text. Therefore, the results reached in both *Herzfeld* and *Globus* were correct. See *Herzfeld v. Laventhol, Krekstein, Horwath & Horwath*, 378 F. Supp. 112, 136 (S.D.N.Y. 1974) (used pro rata but stated that both parties were equally culpable and comparative would have led to the same result), *aff'd in part and rev'd in part*, 540 F.2d 27 (2d Cir. 1976); *Globus, Inc. v. Law Research Serv., Inc.*, 318 F. Supp. 955, 958 (S.D.N.Y.) (same), *aff'd*, 442 F.2d 1346 (2d Cir.), *cert. denied*, 397 U.S. 913 (1970). See note 95 *supra* and accompanying text.

142. See notes 113 & 129 *supra* and accompanying text.

143. See notes 96-103 *supra* and accompanying text.

144. See *id.*

145. See note 103 *supra*.

146. See notes 102-03 *supra*.

tion was unjustly enriched.¹⁴⁷ Courts routinely have refused to extend this method to cases in which the party seeking contribution received no benefit from the violation and in which the effect would be to indemnify completely that defendant.¹⁴⁸

Because the court's main task in contribution suits under the securities laws is to deter future violations,¹⁴⁹ apportioning contribution according to the relative degree of fault of each of the parties is the method most closely related to the goal of deterrence. This method imposes the greatest burden on the most culpable parties, thereby deterring those actions most likely to cause the greatest harm.¹⁵⁰ The potential violator, recognizing this increase in possible liability, will be more hesitant to act and much more likely to consider the "degree, nature, and scope" of future actions.¹⁵¹

The argument that comparative fault will not adequately deter the smaller, less culpable party is unpersuasive.¹⁵² Awards granted under the securities laws are often substantial, and even a small portion of a large award, particularly when added to the time and expense of litigation, should serve as a sufficient deterrent. In addition, a method that deters larger and more culpable parties is more beneficial than a method that concentrates on the smaller, less culpable parties.¹⁵³

Courts should also reject the argument that a comparative fault method would deter settlements. Plaintiffs and defendants would still be better off to settle in accordance with their perceived relative fault in

147. See notes 104-07 *supra*.

148. See note 107 *supra* and accompanying text.

Such a result is justified when the party seeking contribution is an intentional violator because it is uniformly accepted that an intentional violator should never be indemnified by another securities violator. See note 4 *supra*. A more difficult question arises, however, when a negligent defendant seeks contribution from an intentional wrongdoer. Presumably, if the intentional wrongdoer received all the benefits of the violation, those jurisdictions that permit the complete indemnification of a negligent defendant by an intentional wrongdoer could reasonably allow contribution on a benefits-derived theory even if it were to amount to full indemnification. *Id.*

149. See generally notes 7-8, 106 & 139 *supra* and accompanying text.

150. See notes 117 & 135-38 *supra* and accompanying text.

151. See Schwartz, Simpson & Arnold, *supra* note 25.

This argument assumes that charging a more culpable violator with a greater portion of the liability is more prohibitive than equal apportionment among the several defendants. *Id.* The counter argument, favoring pro rata apportionment, is that it deters conduct at the very inception of the violation because the smaller and less culpable defendant who is faced with a share of liability greatly in excess of his culpability will be discouraged from participating in the violation. *Id.*

152. See notes 117 & 135-38 *supra* and accompanying text.

153. See generally notes 117 & 136-38 *supra* and accompanying text.

order to avoid the time and expense of litigation as well as the risk of an ultimate recovery.¹⁵⁴ Even if settlements were deterred, however, “[c]ongestion in the courts cannot justify a legal rule that produces unjust results in litigation simply to encourage speedy out-of-court accommodations.”¹⁵⁵

Although the argument that pro rata contribution is easy and expedient to apply has merit, it has no force in those situations in which the court can determine the relative fault of the parties with relative certainty and ease.¹⁵⁶ If impossible or too difficult to allocate fairly the degrees of fault among the parties in a particular case, the pro rata method produces an appropriate result.¹⁵⁷ But “[p]otential problems of proof in some cases hardly require adherence to an archaic and unfair rule in all cases.”¹⁵⁸

IV. CONCLUSION

Increased hostility toward indemnification contracts between joint violators of the securities laws has forced courts to recognize the importance of contribution in the securities field.¹⁵⁹ The courts, however, have not yet adopted a uniform approach in this area.¹⁶⁰ This lack of clear precedent frees courts to develop an approach that furthers the deterrence policies of the securities laws and promotes justice and fairness between the parties.

In securities cases involving settlements, the courts should deny contribution from the settling parties and reduce the judgment by the settling party's proportionate share of the damages.¹⁶¹ This approach

154. See note 115 *supra* and accompanying text.

Even under a pro rata rule, there is still a wide range of damages for which each defendant could be held liable. The fact and measure of the ultimate damages award is not certain. Neither will the settling party be sure whether or not he is to be regarded as part of an entity. See note 128 *supra* and accompanying text. For example, suppose there are five parties jointly liable for \$1,000,000 in damages. Further, suppose that party A is one of four parties that may be grouped as an entity. Under this example, A would not know if his share would be \$200,000 (\$1,000,000 split among five parties) or \$125,000 (four parties liable for \$500,000 in total, while fifth party liable for the remaining \$500,000).

155. *United States v. Reliable Transfer Co.*, 421 U.S. 397, 408 (1975).

156. See note 114 *supra* and accompanying text.

157. See *id.*

158. *United States v. Reliable Transfer Co.*, 421 U.S. 397, 407 (1975).

159. See note 4 *supra* and accompanying text.

160. See note 22 *supra* and accompanying text.

161. See notes 72-79 *supra* and accompanying text.

would promote settlements because the settling defendants would be absolved from future litigation. Reducing the judgment award by the settling party's share of the damages will ensure that the nonsettling parties pay only their proportionate shares of the damages.

Courts should apply the pro rata rule when there is no substantial difference in the degree of fault among the parties. Courts should also apply the rule when it would be too difficult or impossible to measure each party's comparative fault.¹⁶² In these cases, the judge should balance administrative ease and convenience against potential injustice to any one of the parties that would result by the use of the rule.

Courts should treat the benefits-derived method as a limited exception. Its application produces rational results only in disgorgement cases in which the party seeking contribution received material economic benefit from the violation.¹⁶³ Because the securities laws seek to require all parties to share in the financial burdens caused by their actions, this method should not be used when it results in the indemnification of an intentional violator.¹⁶⁴

The comparative fault method is especially appropriate in those cases in which each defendant's wrongful acts are distinct and capable of accurate measurement such that the court can determine the relative fault of each defendant.¹⁶⁵ A comparative fault method, while slightly

162. The pro rata rule is most appropriate in those § 10(b) cases in which all the parties participated in a scheme to defraud the investing public. Because § 10(b) liability requires scienter, any attempt to differentiate culpability between the parties could be arbitrary and capricious. *See, e.g., Herzfeld v. Laventhol, Krekstein, Horwath & Horwath*, 540 F.2d 27, 38 (2d Cir. 1976) (court unable to detect difference in culpability between selling shareholders and accountant); *Globus, Inc. v. Law Research Serv., Inc.*, 318 F. Supp. 955, 957 (S.D.N.Y. 1970) (court unable to detect difference in culpability between selling shareholders and underwriter), *aff'd*, 442 F.2d 1346 (2d Cir.), *cert. denied*, 404 U.S. 941 (1971). Caution must still be exercised in these cases, however, because the scienter requirement for imposing liability may include varying degrees of recklessness and, therefore, material differences of culpability may occasionally exist. *See* note 134 *supra* and accompanying text.

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

164. *See generally* note 4 *supra* and accompanying text. It would seem, however, that in those jurisdictions where a negligent violator would be allowed indemnification from an intentional violator, a benefits-derived method could be permitted in a disgorgement if the negligent party was seeking contribution on this theory from an intentional violator. *See id.* This result would serve to take away all the illegal profits from the intentional violator that would remain if a pro rata rule had been applied. The best approach in these cases may be to require each of the parties to disgorge the illegal profits and then apportion the remaining liability among the parties, using either a comparative fault or pro rata allocation.

165. This fact pattern will occur mostly in § 10(b) or § 17(a) actions in which the investor is

more difficult to administer than a pro rata method, imposes a greater liability on the more culpable party.¹⁶⁶ This approach is thus consistent with the fault structure inherent in the securities laws.¹⁶⁷

In conclusion, courts should adopt a general rule favoring a comparative fault allocation of contribution shares among multiple defendants in securities violations. In applying such a rule, however, courts should employ a rebuttable presumption that the parties are equally at fault. Such a case-by-case approach would promote uniformity while granting the court enough freedom to fashion an equitable allocation based on the facts and circumstances of each case. The benefits-derived

fraudulently induced to purchase stock by a few private parties. *See, e.g.*, *Marrero v. Abraham*, 473 F. Supp. 1271 (E.D. La. 1979); *Wassel v. Eglowsky*, 399 F. Supp. 1330 (D. Md. 1975), *aff'd*, 542 F.2d 1235 (4th Cir. 1976).

166. Thus, the comparative fault method should be used in securities cases arising under § 11 or § 10(b) for material misstatements in financial statements or SEC registration statements. In these cases, the injured investors often sue only the underwriters or accountant for aiding and abetting the management fraud perpetrated by those false and misleading statements. The accountant or underwriter will then seek contribution from the directors and officers responsible for the fraud. Here, the accountant may be merely negligent or reckless in not uncovering the fraud, while the directors and officers of the corporation conceived and deliberately concealed the fraud. *See, e.g.*, *McLean v. Alexander*, 449 F. Supp. 1251 (D. Del. 1978) (accountant sued for misleading financial statement sought contribution from selling shareholders), *rev'd on other grounds*, 599 F.2d 1190 (3d Cir. 1979); *Alexander & Baldwin, Inc. v. Peat, Marwick, Mitchell & Co.*, 385 F. Supp. 230 (S.D.N.Y. 1974) (accountant sued for misleading financial statements sought contribution from shareholders and certain other directors and officers); *Globus, Inc. v. Law Research Serv., Inc.*, 318 F. Supp. 955 (S.D.N.Y. 1970) (underwriter sued for circulating misleading advertisement of a stock sale sought contribution from issuer and its president), *aff'd*, 442 F.2d 1346 (2d Cir.), *cert. denied*, 404 U.S. 941 (1971); *State Mut. Life Assurance Co. v. Peat, Marwick, Mitchell & Co.*, 49 F.R.D. 202 (S.D.N.Y. 1969) (accountant sued for false and misleading financial statement sought contribution from selling shareholders and directors and officers of corporation). In these cases comparative fault should be used to impose the greater burden on those directors and officers directly responsible for the injury in order to deter similar actions in the future. The accountant and underwriter, however, should still be responsible for a sufficient share of the judgment award to encourage care and vigilance in the future. The fear that the directors and officers may turn out to be insolvent and thus not able to contribute their fair share will also promote diligence by accountants and underwriters.

167. Use of a comparative fault approach would further the deterrence policies of § 11(f), which prohibits an intentional violator from seeking contribution from a negligent violator. 15 U.S.C. § 77k(f) (1976). Because the culpable party may not recover contribution, this section already imposes a risk on that party that he will bear a greater portion of the damages. The intentional violator, however, only bears this extra burden if he is the party forced to pay the judgment award and then subsequently seeks contribution. If a negligent party pays the judgment and seeks contribution, the intentional violator is forced to pay only his pro rata share. Use of a comparative fault method would further the deterrence policies of § 11, however, by requiring the more culpable party to pay a greater share of the damages in all cases.

method and the pro rata method should be employed only when they will produce more equitable and desirable results.

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